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CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE
AMERICAN LAW

AS DEVELOPED BY
ALL REPORTED CASES

By
The Editorial Staffs
of
THE AMERICAN LAW BOOK CO.
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been two-fold. First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of *Corpus Juris*. When the searcher may wish to consult earlier authorities, a specific reference to *Corpus Juris* makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A	A	Am L Reg.	American Law Register
Abb.	Atlantic Reporter	Am L Reg N.S.	American Law Register New Series
Abb Adm.	Abbott (U.S.)	Am Law Reg (O. S.)	American Law Register Old Series
Abb App. Dec.	Abbott's Admiralty (U.S.)	Am L Rev.	American Law Review
Abb Dec.	Abbott's Appeals Decisions (N.Y.)	Am L T Bankr.	American Law Times Bankruptcy Reports
Abb N. Cas.	Abbott's Decisions (N.Y.)	Am. Law Inst.	American Law Institute, Restatement of the Law
Abb Pr	Abbott's New Cases (N.Y.)	Am Negl Cas.	American Negligence Cases
Abb Pr. N.S.	Abbott's Practice (N.Y.)	Am Negl R.	American Negligence Reports
A'Beck Res. Judgm.	Abbott's Practice New Series (N.Y.)	A M & O	Armstrong, Macartney & Ogle (Ir.)
[1917] A.C.	A'Beckett's Reserved Judgments (Vict.)	Am Prob.	American Probate
[1918] A.C.	[1917] Appeal Cases (Can.)	Am Prob. N.S.	American Probate New Series
Acton	Law Reports [1918] Appeal Cases (Eng.)	Am Pr.	American Practice
Adams	Acton (Eng.)	Am R	American Reports
Add	Adams Reports (N.H.)	Am R & Corp.	American Railroad & Corporation
Add Eccl.	Addison (Pa.)	Am R Rep.	American Railway Reports
A & E.	Addams' Ecclesiastical (Eng.)	Am. S R	American State Reports
A & E. Enc. L.	Adolphus & Ellis (Eng.)	Am St R. D.	American Street Railway Decisions
A & E. Enc. L. & Pr.	American & English Encyclopedia of Law	And.	Anderson (Eng.)
Alk.	American & English Encyclopedia of Law & Practice	Andr.	Andrews (Eng.)
A K. Marsh.	Aikens (Vt.)	Ann Cas.	American & English Annotated Cases
Ala.	A. K. Marshall (Ky.)	Ann Cas 1912A	American Annotated Cases 1912A, et seq.
Ala App.	Alabama	Anstr.	Anstruther (Eng.)
Alaska	Alabama Appellate Court	Anth N P.	Anthon's Nisi Prius (N.Y.)
Alb L. J.	Alaska	App D C.	Appeal Cases (D.C.)
A L O.	Albany Law Journal	App. Cas.	Law Reports Appeal Cases (Eng.)
Alc & N.	American Leading Cases	App Div.	Appellate Division (N.Y.)
Alc Reg Cas.	Alcott & Napier (Eng.)	Ariz.	Arizona
Aleyn	Alcock's Registry Cases (Eng.)	Ark.	Arkansas
Alison Pr.	Aleyn (Eng.)	Ark Just.	Aikley's Justiciary (Sc.)
Allen	Alison's Practice (Sc.)	Arn	Arnold (Eng.)
Allen (N.B.)	Allen (Mass.)	Arn & H.	Arnold & Hodges (Eng.)
Alta L.	Allen, New Brunswick	Ashm.	Ashmead (Pa.)
A L R.	Alberta Law	Aspin.	Aspinall's Maritime Cases (Eng.)
Am Bankr.	American Law Reports	Atk.	Atkyn (Eng.)
Ambl.	American Bankruptcy (U.S.)	Austr. O. L. R.	Commonwealth Law Reports, Australia
A M O.	Ambler (Eng.)	Austr Jur.	Australian Jurist
Am Corp Cas.	American Maritime Cases	Austr. L. T.	Australian Law Times
Am Cr.	American Corporation Cases		
Am D.	American Criminal		
Am & E Corp. Cas.	American Decisions		
Am & E. Corp. Cas. N.S.	American & English Corporation Cases		
Am & Eng. Ency. Law	American & English Corporation Cases New Series		
Am & E. Eq. D.	American and English Encyclopedia of Law		
Am. & Eng. Pat. Cas.	American & English Decisions in Equity		
Am & Eng. R. R. Cas.	American and English Patent Cases		
Am. Electr. Cas.	American and English Railroad Cases		
Am & E R Cas.	American Electrical Cases		
Am & E. R. Cas. N. S.	American & English Railroad Cases		
Am. J. Int. L.	American & English Railroad Cases New Series		
Am. L. J.	American Journal of International Law		
Am L J. N. S.	American Law Journal (Pa.)		
Am. L. Rec.	American Law Journal New Series (Pa.)		
C. J. S.	American Law Record (Ohio)		

B.&C.
B.&Macn.
B.D.&O.
Beatty
Beav.
Beav.&Wal.Ry.
Cas.
Beav.R.&C.Cas.
Beaw.Lex.Mer.
Bee
Bell
Bell App.Cas.
Bell Cas.
Bell C.C.
Bell Comm.
Bell Sc.Cas.
Ben.
Benl.
Benl.&D.
B.&H.Cr.Cas.

Bibb
Bing.
Bing N.Cas.
Binn.
Biss.
Bitt.W.&P.
Black
Blackf.
Blackstone Comm
Blah.H.

Blair Co.
Bland
Bland's Ch.
Blatchf.
Blatchf.&H.
Blatchf PrizeCas.
Bligh
Bligh N.S.
B.Mon.
Bond
Bouvier
Boyce
B.&P.
B.&P.N.R.

Bract.

Bradf Surr.
Brayt
B.R.C.
Brev.
Brewst.
Brightly
Brightly El.Cas.
Bro Ch.
Brock
Brock.Cas.
Brod.&B.
Brod.&Fr.

Brodix Am.&E.
Pat Cas.
Bro.Just.
Brook Abr.
Brook N.Cas.
Brooke N.C.
Bro P.C.
Brown Adm.
Brown, Ch.
Brown Ecc.
Brown NP
Brown,Parl Cas.
Browne
Brown.&L.
Brownl.&G.
Bruce
Brunn.Coll.Cas.
B.&S.
B.T.A.
Buck
Buller N.P.
Bulstr.

Barneball & Cresswell (Eng.)
Browne & Macnamara (Eng.)
Blackham, Dundas & Osborne (Ir.)
Beatty (Ir.)
Beavan (Eng.)
Beavan & Walford's Railway and Canal Cases (Eng.)
English Railway and Canal Cases
Beawes Lex Mercatoria (Eng.)
Bee (U.S.)
Bellewa (Eng.)
Bell's Appeal Cases (Sc.)
Bell's Cases (Sc.)
Bell's Crown Cases (Eng.)
Bell's Commentaries (Eng.)
Bell's Scotch Court of Session Cases
Benedict (U.S.)
Benloe (Eng.)
Benloe & Dallison (Eng.)
Bennett & Heard Leading Criminal Cases (Eng.)
Bibb (Ky.)
Bingham (Eng.)
Bingham's New Cases (Eng.)
Binney (Pa.)
Bissell (U.S.)
Bittleston, Wise & Parnell (Eng.)
Black (U.S.)
Blackford (Ind.)
Blackstone Commentaries
Henry Blackstone's English Common Pleas (Eng.)
Blair County (Pa.)
Bland (Md.)
Bland Chancery (Md.)
Blatchford (U.S.)
Blatchford & Howland (U.S.)
Blatchford's Prize Cases (U.S.)
Bligh (Eng.)
Bligh New Series (Eng.)
B. Monroe (Ky.)
Bond (U.S.)
Bouvier's Law Dictionary
Boyce (Del.)
Bosanquet & Puller (Eng.)
Bosanquet & Puller's New Reports (Eng.)
Bracton de Legibus et Consuetudinibus Anglæ
Bradford's Surrogate (N.Y.)
Brayton (Vt.)
British Ruling Cases
Brievard (S.C.)
Brewster (Pa.)
Brightly (Pa.)
Brightly's Election Cases (Pa.)
Brown's Chancery (Eng.)
Brockenbrough (U.S.)
Brockenbrough's Virginia Cases
Brodenip & Bingham (Eng.)
Bioderick & Fremantle's Ecclesiastical Cases
Brodix's American & English Patent Cases
Broun's Justiciary (Sc.)
Brook's Abridgments (Eng.)
Brook's New Cases (Eng.)
Brooke's New Cases
Brown's Parliament Cases (Eng.)
Brown's Admiralty (U.S.)
Brown's Chancery Cases (Eng.)
Brown Ecclesiastical (Eng.)
Brown's Michigan Nisi Prius
Brown Parliamentary Cases (Eng.)
Browne (Pa.)
Browning & Lushington (Eng.)
Brownlow & Goldesborough (Eng.)
Bruce (Sc.)
Brunner's Collective Cases (U.S.)
Best & Smith (Eng.)
Board of Tax Appeals (U.S.)
Buck (Eng.)
Buller's Nisi Prius (Eng.)
Bulstrode (Eng.)

Bumb.
Burn.
Burr.
Burr S.Cas.
Busb.
Busb.Eq.
Bush
B.W.C.C.

Bunbury (Eng.)
Burnett (Wis.)
Burrows (Eng.)
Burrows' Settlement Cas. (Eng.)
Busbee (N.O.)
Busbee Equity (N.C.)
Bush (Ky.)
Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab.&El.
Cal.
Cal Cas.
Cal.
Cal (2d)
Cal App
Cal App (2d)

Cald.
Call
Call (Va.)
Calthr.
Cal Unrep Cas.
Cam Cas
Campb
Canal Zone
Can App Cas.
Can Cr Cas.
Can Exch.
Can.L.J.
Can L.J.N.S.
Can L.T.Occ.
Notes
Can R.Cas.
Can S.C.
Cane&L.

Car.&K.
Car.&M.
Car.&P.
Car H.&A.
Carp P.C.
Carter
Caith.
Cartwr.Cas.
Cary
Cas.
Cas t Hardw.
Cas t Holt
Cas t King
Cas t Talb.
C.B.

C.B.N.S.
C.C.A.
C.O.P.A.
Centr L.J.
[1891] Ch
Chamb.Rep.
(handl.
(harl R M
(harl.T.U.P.
(hase
Ch Cas.
(h Chamb.
(h Col.Op.
Ch.D.

Chest.Co.
Chev.
Chit.
(hoyce Cas Ch.
Ch Rep.
Ch Sent.
Cinc.L.Bul.
Cinc.Super.

Cababe & Ellis (Eng.)
Cames (N.Y.)
Cames' Cases (N.Y.)
California
California Reports, Second Series
California Appellate Court
California Appellate Reports, Second Series
Caldecott (Eng.)
Call (Va.)
Calthrop (Eng.)
California Unreported Cases
Cameron's Cases (Can.)
Campbell (Eng.)
Canal Zone Supreme Court
Canadian Appeal Cases
Canadian Criminal Cases
Canadian Exchequer
Canada Law Journal
Canada Law Journal New Series
Canadian Law Times Occasional Notes
Canadian Railway Cases
Canada Supreme Court
Cane & Leigh Crown Cases Reserved (Eng.)
Carrington & Kirwan (Eng.)
Carrington & Marshman (Eng.)
Carrington & Payne (Eng.)
Carrow, Hamerton & Allen (Eng.)
Carpmaal Patent Cases (Eng.)
Carter (Eng.)
Cathew (Eng.)
Cartwright's Cases (Can.)
Cary (Eng.)
Casey (Pa.)
Cases temp. Hardwicke (Eng.)
Cases temp. Holt (Eng.)
Cases temp. King (Eng.)
Cases temp. Talbot (Eng.)
Common Bench (Manning, Granger & Scott) (Eng.)
Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
Circuit Court of Appeals (U.S.)
Court of Customs and Patent Appeals
Central Law Journal
Law Reports [1891] Chancery (Eng.)
Chamber (Ont.)
Chandler (Wis.)
R M Charlton (Ga.)
T U. P. Charlton (Ga.)
Chase (U.S.)
Cases in Chancery (Eng.)
Chancery Chambers (U.C.)
Chalmers' Colonial Opinions
Law Reports Chancery Division (Eng.)
Chester County (Pa.)
Cheves (S.C.)
Chitty (Eng.)
Choyce Cases in Chancery (Eng.)
Chancery Reports (Eng.)
Chancery Sentinel (N.Y.)
Weekly Law Bulletin (Oh.)
Cincinnati Superior Court Reporter (Oh.)
City Court Reports (N.Y.)
City Hall Recorder (N.Y.)

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)	Crabbe	Crabbe (U.S.)
C.J.	Corpus Juris	Cranch	Cranch (U.S.)
C.J. Ann.	Corpus Juris Annotations	Cranch C.O.	Cranch's Circuit Court (U.S.)
C.J.S.	Corpus Juris Secundum	Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
C & K.	Carrington & Kirwan (Eng.)	Cr App	Criminal Appeals (Eng.)
C & L.	Connor & Lawson (Ir.)	Crawf & D.	Crawford & Dix (Ir.)
Cl App.	Clark's Appeal Cases (Eng.)	Crawf & D. Abr.	Crawford & Dix's Abridged Cases (Ir.)
Cl Oh.	Clarke's Chancery (N.Y.)	Cas	Cripp's Church and Clergy Cases
Clark & F.	Clark & Finnely (Eng.)	Cripp's Ch.Cas.	Criminal Law Magazine
Clark & Fin N.S.	Clark's House of Lords Cases (Eng.)	Cr L Mag.	Craig & Phillips (Eng.)
Clarke	Clarke's Chancery (N.Y.)	Cr & Ph.	Christopher Robinson's Admiralty (Eng.)
Clarke & S Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)	Cro Car.	Croke Charles (Eng.)
Clarke Oh.	Clarke's Chancery (N.Y.)	Cro Eliz.	Croke Elizabeth (Eng.)
Clayt.	Clayton's Reports, York Assizes (Eng.)	Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
C L Chamb.	Chamber's Common Law (U.O.)	Crompt.&J	Crompton & Jervis (Eng.)
Clev L Rec.	Cleveland Law Record (Oh.)	Crompt & M.	Crompton & Meeson (Eng.)
Clev L Rep.	Cleveland Law Reporter (Oh.)	Crosw Pat.Cas.	Croswell's Collection of Patent Cases (U.S.)
Cl & F.	Clark & Finnely (Eng.)	Cr & Ph.	Craig & Phillips (Eng.)
Chf El.Cas.	Clifford's Southwick Election Cases	Ct Cl.	Court of Claims (U.S.)
Chff	Clifford (U.S.)	Ct Cust & Pat.	Court of Customs and Patent Appeals
C L R.	Common Law Reports (Eng.)	App.	Cunningham (Eng.)
C & M.	Carrington & Marshman (Eng.)	Cunn.	Curtis (U.S.)
C M & R.	Crompton, Meeson & Roscoe (Eng.)	Curt	Curtis Ecclesiastical (Eng.)
Cock.&Rowe	Cockburn & Rowe's Election Cases	Curt.Eccl.	Cushing (Mass.)
Code Rep.	Code Reporter (N.Y.)	Cush.	United States Customs Appeals
Code Rep N.S.	Code Reports New Series (N.Y.)	Cust.A.	Cyclopedia of Law & Procedure
Coff Prob.	Coffey's Probate (Cal.)	Cyc.	Cyclopedia of Law & Procedure Annotations
Co Inst.	Coke's Institutes	Cyc. Ann.	
Coke	Coke (Eng.)		
Col Cas.	Coleman's Cases (N.Y.)		
Col & C Cas.	Coleman & Caines' Cases (N.Y.)		
Col C O.	Collyer's Chancery Cases (Eng.)		
Coldw.	Coldwell (Tenn.)		
Coll	Collyer (Eng.)		
Col L Rep.	Colorado Law Reporter		
Col Law Review	Columbia Law Review		
Coll & E Bank.	Collier and Eaton's American Bankruptcy Reports		
	Colles' Cases in Parliament (Eng.)	Dak.	Dakota
Colles	Colorado	Dal.C.P.	Dalison's Common Pleas (Eng.)
Colo.	Colorado Appeals	Dall.	Dallaman's Decisions (Tex.)
Colo.App.	Colquit	Dallas	Dallas (Pa.)
Colq.	Coltman (Eng.)	Dall.	Dallas (U.S.)
Coltm.	Comberbach (Eng.)	Dair Dea.	Dalrymple's Decisions (Sc.)
Comb.	Commercial Cases (Eng.)	Daly	Daly (N.Y.)
Com Cas.	Commercial Law (Can.)	Dan.	Daniell (Eng.)
Com L.		Dana	Dana (Ky.)
Comptr.Treas.	Comptroller Treasury Decisions	Dane Abr.	Dane's Abridgment
Dec.	Comstock (N.Y.)	Dans.&L.	Danson & Lloyd (Eng.)
Comst.	Comyns (Eng.)	D'Anv Abr.	D'Anver's Abridgment (Eng.)
Comyns	Comyns Digest (Eng.)	Dauph Co.	Dauphin County (Pa.)
Comyns Dig.	Connor & Lawson (Ir.)	Day & M.	Davison & Mervale (Eng.)
Con.&Law.	Conference Reports (N.C.)	Davys	Davys (Ir.)
Conf.	Connecticut	Day	Day (Conn.)
Conn.	Connolly's Surrogate (N.Y.)	D B & M.	Dunlop, Bell & Murray (Sc.)
Conn Surr.	Constitutional Reports (N.O.)	D C.	District of Columbia
Const.	Cooke (Eng.)	D.Chipm.	D Chipman (Vt.)
Cooke	Cooke (Tenn.)	Deac.	Deacon (Eng.)
Cooke	Cooke & Alcock (Ir.)	Deac.&C.	Deacon & Chitty (Eng.)
Cooke & A.	Cook's Vice-Admiralty (L.O.)	Deady	Deady (U.S.)
Cook Vice-Adm.	Cooper's Chancery (Eng.)	Dears.&B.	Dearsley & Bell (Eng.)
Coop.	Cooper's Practice Cases (Eng.)	Dears.C.O.	Dearsley's Crown Cases (Eng.)
Coop.Pr Cas.	Cooper's Cases temp. Brougham (Eng.)	Deas & A.	Deas & Anderson (Eng.)
Coop.t Brough.	Cooper's Cases temp. Cottenham (Eng.)	De Gex	De Gex (Eng.)
Coop.t.Cott.	Cooper's Cases tempore Eldon (Eng.)	De G F & J.	De Gex, Fisher & Jones (Eng.)
Coop.t Eld.	Coke's Reports (Eng.)	De G J & S.	De Gex, Jones & Smith (Eng.)
Co P C.	Corbett & Daniell's Election Cases (Eng.)	De G & J.	De Gex & Jones (Eng.)
Corb.&D.	Courtney & Maclean (Sc.)	De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
	Cowen (N.Y.)	De G.&Sm.	De Gex & Smale (Eng.)
Court.&MacL.	Cowen's Criminal (N.Y.)	Del.	Delaware
Cow.	Cowper (Eng.)	Del.Ch.	Delaware Chancery
Cow Cr.Rep.	Cox's American Trade-Mark Cases	Del Co.	Delaware County (Pa.)
Cowp.	Cox's Criminal Cases (Eng.)	Dem Surr.	Demarest's Surrogate (N.Y.)
Cox.Am T.M.Cas.	Cox's Chancery (Eng.)	Den.	Denio (N.Y.)
Cox C.O.	Cox & Atkinson (Eng.)	Den C O.	Denison's Crown Cases (Eng.)
Cox Oh.	Carrington & Payne (Eng.)	Desausure	Desausure (S.C.)
Cox & Atk.	O. P. Cooper's Chancery Practice Cases (Eng.)	Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
C & P.		Dev.L.	Devereux (N.O.)
C P.C.		Dev.&Bat.	Devereux & Battle (N.O.)
		Dick.	Dickens (Sc.)
C.P.D.	Law Reports Common Pleas Division (Eng.)	Dill	Dillon (U.S.)
		Dirl.Dec.	Dirlerton's Decisions (Sc.)
		Disn.	Disney (Oh.)

D.&L. Dowling & Lowndes (Eng.)
 Dods. Dodson's Admiralty (Eng.)
 Dom L.R. Dominion Law Reports (Can.)
 Donnelly Donnelly (Eng.)
 Dorion Dorion (L.C.)
 Dougl. Douglas (Eng.)
 Dougl. Douglass (Mich.)
 Dougl. EL.Cas. Douglas' Election Cases (Eng.)
 Dow Dow (Eng.)
 Dow & Cl. Dow & Clark (Eng.)
 Dow & L. Dowling & Lowndes (Eng.)
 Dow.N.S. Dowling, New Series (Eng.)
 Dowl. Dowling's English Bail Court (Practice) Cases
 Dowl.P.C. Dowling's Practice Cases (Eng.)
 Dowl.P.C.N.S. Dowling's Practice Cases New Series (Eng.)
 D.&R. Dowling & Ryland (Eng.)
 Draper Draper (U.C.)
 Drew. Drewry (Eng.)
 Drinkw. Drinkwater (Eng.)
 D.&R.Mag.Cas. Dowling & Ryland's Magistrate Cases (Eng.)
 D.&R.N.P. Dowling & Ryland's Nisi Prius (Eng.)
 Dr & Sm. Drewry & Smale (Eng.)
 Drury Drury (Ir.)
 Dr.&Wal. Drury & Walsh (Ir.)
 Dr & War. Drury & Warren (Ir.)
 D.&Sw. Deane & Swabey (Eng.)
 Dud Eq. Dudley (S.C.)
 Dudl. Dudley (Ga.)
 Duer Duer's Superior Court (N.Y.)
 Duni B.&M. Dunlop, Bell & Murray (Sc.)
 Dunlop Dunlop (Sc.)
 Dunn. Dunning (Eng.)
 Durie Durie (Sc.)
 Durn.&E. Durnford & East (Eng.)
 Duv. Duvall (Ky.)
 Dyer Dyer (Eng.)

E

East East (Eng.)
 East L.R. Eastern Law Reporter (Can.)
 East P.C. East's Pleas of the Crown (Eng.)
 East T. Eastern Term (Eng.)
 E.&B. Ellis & Blackburn (Eng.)
 E.B.&E. Ellis, Blackburn & Ellis (Eng.)
 E.B.&S. Ellis, Best & Smith (Eng.)
 E.C.L. English Common Law
 Eden Eden (Eng.)
 Edgar Edgar (Sc.)
 Edm Sel.Cas. Edmond's Select Cases (N.Y.)
 E. D. Smith E. D. Smith (N.Y.)
 Edw. Edwards (Eng.)
 Edw. Edwards' Chancery (N.Y.)
 Edw Abr. Edwards' Abridgment of Prerogative Court Cases
 Edw Adm. Edwards' Admiralty (Eng.)
 E.&E. Ellis & Ellis (Eng.)
 Enc Pl.&Pr. Encyclopedia of Pleading & Practice
 Ency.Law. American and English Encyclopedia of Law
 Eng.Ad. English Admiralty
 Eng C.O. English Crown Cases
 Eng Ch. English Chancery
 Eng Eccl. English Ecclesiastical Reports
 Eng Ecc R. English Ecclesiastical Reports
 Eng Exch. English Exchequer Reports
 Eng L.&Eq. English Law & Equity
 Eng.Rep R. English Reports, Full Reprint
 Eng Ry.&C.Cas. English Railway and Canal Cases
 Eng.&Ir.App. Law Reports, English and Irish Appeal Cases
 Eq Cas.Abr. Equity Cases Abridged (Eng.)
 Eq.Rep. Equity Reports (Eng.)
 E.R.O. English Rules Cases
 Esp. Espinasse's Nisi Prius (Eng.)
 Euer Euer (Eng.)
 Exch. Exchequer (Eng.)
 Exch Cas. Exchequer Cases (Sc.)

Ex D. Law Reports Exchequer Division (Eng.)
 Eyre Eyre's Reports (Eng.)

F

Falc. Falconer's Court of Sessions (Sc.)
 Falc.&F. Falconer & Fitzherbert (Eng.)
 Far Farreley (Eng.)
 F.Cas.No. Federal Cases (U.S.)
 F.(Ct.Sess.) Fraser's Court of Sessions Cases (Sc.)
 F. Federal Reporter (U.S.)
 F (2d) Federal Reporter Second Series
 F.R.D. Federal Rules Decisions
 F Supp. Federal Supplement
 Ferg Cons. Ferguson's Consistory (Eng.)
 F.&F. Foster & Finlason (Eng.)
 Fish.Pat.Cas. Fisher's Patent Cases (U.S.)
 Fish Pat.R. Fisher's Patent Reports (U.S.)
 Fish PrizeCas. Fisher's Prize Cases (U.S.)
 Fitzg. Fitzgibbon (Eng.)
 Fitzh. Fitzherbert's Abridgment (Eng.)
 Fitzh.N.Br. Fitzherbert's Natura Brevium (Eng.)
 Fla. Florida
 Flipp. Flippin (U.S.)
 Fl & K. Flanagan & Kelly (Ir.)
 Fonb Eq. Fonblanque's Equity (Eng.)
 Fonbl. Fonblanque (Eng.)
 Fonbl R. Fonblanque's English Cases
 Forbes Forbes (Eng.)
 Forr. Forrest (Eng.)
 Forrester Forrester's Cases (Eng.)
 Fortesc. Fortescue (Eng.)
 Forst. Foster (Eng.)
 Forst. Foster (N.H.)
 Forst & Fin. Foster & Finlason (Eng.)
 Fount Dec. Fountainhall's Decisions (Sc.)
 Fox Fox Reports (Eng.)
 Fox & S. Fox & Smith (Ir.)
 Freem. Freeman's Chancery (Eng.)
 Freem. Freeman's Chancery (Miss.)
 Freem.K.B. Freeman's King's Bench (Eng.)

G

Ga. Georgia
 Ga.App. Georgia Appeals
 Ga Dec. Georgia Decisions
 Gale Gale (Eng.)
 Gall. Gallison (U.S.)
 G Coop. G. Cooper (Eng.)
 G & D. Gale & Davidson (Eng.)
 Geld & M. Geldart & Maddock (Eng.)
 Gibb Surr. Gibbon's Surrogate (N.Y.)
 Giffard Giffard (Eng.)
 Giff & H. Giffard and Hemming (Eng.)
 Gil Gilfillan's Edition (Minn.)
 Gilb. Gilbert's (Eng.)
 Gilb.Cas. Gilbert's Cases (Eng.)
 Gilb C.P. Gilbert's Common Pleas (Eng.)
 Gilb Exch. Gilbert's Exchequer (Eng.)
 Gill (Md.) Gill (Md.)
 Gill & J. Gill & Johnson (Md.)
 Gilm. Gilmer (Va.)
 Gilm.&Falc. Gilmour & Falconer (Sc.)
 Gilm. Gilpin (U.S.)
 Glasc. Glascock (Ir.)
 Glyn & J. Glyn & Jameson (Eng.)
 Godb. Godbolt (Eng.)
 Godo. Godolphin's Abridgment of Ecclesiastical Law
 Goeb. Goebel's Probate Court Cases
 Gosf. Gosford (Eng.)
 Gouldsb. Gouldsbrough (Eng.)
 Gow Gow (Eng.)
 Gow N.P. Gow's English Nisi Prius Cases
 Grant Grant's Cases (Pa.)
 Grant Ch. Grant's Chancery (U.C.)
 Grant Err.&App. Grant's Error & Appeal (U.C.)
 Gratt. Grattan (Va.)
 Gray Gray (Mass.)

Green Cr.
Greene
Gwillt.Cas.

Green's Criminal Law (Eng.)
Greene (Iowa)
Gwillm's Tithe Cases (Eng.)

H

Hadd.
Hagg Adm.
Hagg.Cons.
Hagg Eccl.
Hailes Dec.
Hale
Hale Eccl.
Hale P.O.
Hall
Hall&T.
Halsbury L.Eng.
Handy
Han.(N.B.)
Hard.
Hardres
Hare
Harp.Eq.
Harr.
Harr.(Del.)
Harr.(Mich.).
Harr.&G.
Harr.Oh.
Harr.&H.
Harr.&J.
Harr.&M.
Harr.&R.
Harr.&W.
Hask.
Havil.
Hawai.
Hawaii.Fed.
Hawanan Rep.
Hawk P.O.
Hay Exch.
Hayes
Hayes&J.
Hay&M.
Hayw.
Hayw.
Hayw.&H.
Haz Reg.
H.B.
H.&C.
Head
Heisk.
Hem.&M.
Hempst.
Hen.&M.
Het.
Het O.P.
H.&H.
Hill
Hill S.C.
Hill & Den.
Hill & Den. Supp.
Hilt.
Hilt.
H.L.Cas.
H.&N.
Hob.
Hodg.Ecl.
Hodges
Hoffm.
Hoffm.Land Cas.
Hog.
Holmes
Holt Adm.Cas.
Holt Eq.
Holt K.B.
Holt N.P.
Homs
Hope Dec.
Hopk.
Hopk.Dec.

Haddington (Eng.)
Haggard's Admiralty (Eng.)
Haggard's Consistory (Eng.)
Haggard's Ecclesiastical (Eng.)
Hailes' Decisions (Sc.)
Hale's Common Law (Eng.)
Hale's Ecclesiastical (Eng.)
Hale's Pleas of the Crown (Eng.)
Hall's Superior Court (N.Y.)
Hall & Twells (Eng.)
Halsbury's Law of England
Handy (Oh.)
Hannay's Reports, New Brunswick
Hardun (Ky.)
Hardres (Eng.)
Hare (Eng.)
Harper (S.C.)
Harrison's Chancery (Mich.)
Harrington (Del.)
Harrington's Michigan Chancery Reports
Harris & Gill (Md.)
Harrison's Chancery (Eng.)
Harrison & Hodgins (U.O.)
Harris & Johnson (Md.)
Harris & McHenry (Md.)
Harrison & Rutherford (Eng.)
Harrison & Wollaston (Eng.)
Haskell (U.S.)
Haviland (Pr.Edw.Is.)
Hawaiian
Hawaiian Federal
Hawan Reports
Hawkins' Pleas of the Crown (Eng.)
Hayes Exchequer (Ir.)
Hayes (Ir.)
Hayes & Jones (Ir.)
Hay & Marriott (Eng.)
Haywood (N.O.)
Haywood (Tenn.)
Haywood & Hazelton (U.S.)
Hazard's Register (Pa.)
Henry Blackstone (Eng.)
Hurlstone & Coltman (Eng.)
Head (Tenn.)
Heiskell (Tenn.)
Hemming & Miller (Eng.)
Hempstead (U.S.)
Henning & Munford (Va.)
Hetley (Eng.)
Hetley's Common Pleas (Eng.)
Horn & Hurlstone (Eng.)
Hill (N.Y.)
Hill (S.C.)
Hill & Denio (N.Y.)
Lalor's Supplement to Hill & Denio's (N.Y.)
Hilton (N.Y.)
Hilary Term (Eng.)
House of Lords Cases (Eng.)
Hurlstone & Norman (Eng.)
Hobart (Eng.)
Hodgins' Election (U.O.)
Hodges (Eng.)
Hoffman's Chancery (N.Y.)
Hoffman's Land Cases (U.S.)
Hogan (Ir.)
Holmes (U.S.)
Holt's English Admiralty Cases
Holt's Equity (Eng.)
Holt's King's Bench (Eng.)
Holt's Nisi Prius (Eng.)
Holt (Sc.)
Hope's Decisions (Sc.)
Hopkins' Chancery (N.Y.)
Hopkins' Decisions (Pa.)

Hopw.&C.
Hopw.&P.
Hosea
Houst.
Houst.Or.
How.
How.(Miss.)
How.A.Cas.
How.N.P.
How Fr.
How Pr N.S.
How St Tr.
Hud & B.
Hughes
Hughes
Hume
Humphr.
Hun.
Hurl & Gord.
Hurl & W.
Hutt.
Hopwood & Coltman (Eng.)
Hopwood & Philbrick (Eng.)
Hosea (Ohio)
Houston (Del.)
Houston's Criminal Cases (Del.)
Howard (U.S.)
Howard (Miss.)
Howard's Appeal Cases (N.Y.)
Howell's Nisi Prius (Mich.)
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Howard's Practice New Series (N.Y.)
Howell's State Trials (Eng.)
Hudson & Brooke (Ir.)
Hughes (Ky.)
Hughes (U.S.)
Hume's Decisions (Sc.)
Humphreys (Tenn.)
Hun (N.Y.)
Hurlstone & Gordon (Eng.)
Hurlstone & Walsley (Eng.)
Hutton (Eng.)

I

Idaho
Iddings D.R.D.
Ill.
Ill App.
Ill.Cir.
Ind.
Ind.App.
Ind.T.
Ins L.J.
Int.Com.Comm.
Int Com Rep.
Int Rev Rec.
Iowa
[1891] Ir.
Ir.Oh.
Ir O.L.
Ir.Eccl.
Ired.
Ir.Eq.
Ir.Law Rep.
Ir.Law & Eq.
Ir.R 1894.
Ir R.C.L.
Ir.R.Eq.
Irv.Just.
Idaho
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J

Jac.
Jac & W.
J.Bridgm.
J & C.
Jebb & B.
Jebb O.O.
Jebb & S.
Jeff.
Jenk.
J.J. Marsh.
J.&L.
Johns.
Johns.
Johns Cas.
Johns.Ch.
Johns.V.C.
Johns & H.
Jones Exch.
Jones T.
Jones W.
Jones & Spen.
Journ Jur.
J.P.
Jur.
Jur.N.S.
Just L.R.
Jacob (Eng.)
Jacob & Walker (Eng.)
John Bridgman (Eng.)
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Jebb & Bourke (Ir.)
Jebb's Crown Cases (Ir.)
Jebb & Symes (Ir.)
Jefferson (Va.)
Jenkins (Eng.)
J. J. Marshall (Ky.)
Jones & La Touche (Eng.)
Johnson (Eng.)
Johnson (N.Y.)
Johnson's Cases (N.Y.)
Johnson's Chancery (N.Y.)
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K

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Kames Elucid.
Kames Rein. Dec.
Kames Sel. Dec.
Kan.
Kan. App.
Kay
Kay & J.
[1917] K.B.

Keane & Gr.
Keb.
Keen
Keilw.
Kel. C.O.
Kelly
Kelyng, J.
Kelynge, W.
Keyes
Keyl.
K & G.
Kilk.
Kirby
Knapp
Knapp & O.
Kn & Moo.
Knox
Knox & F.
Kulp
Ky
Ky. Dec.
Ky. L.
Ky Op.

Kames' Decisions (Sc.)
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Kansas
Kansas Appeals
Kay (Eng.)
Kay & Johnson (Eng.)
Law Reports [1917] King's Bench (Eng.)
Keane & Grant (Eng.)
Kebble (Eng.)
Keen (Eng.)
Keilway (Eng.)
Kelyng's Crown Cases (Eng.)
Kelly (Ga.)
Kelyng's English Crown Cases
Kelynge's Chancery (Eng.)
Keyes (N.Y.)
Keilway (Eng.)
Keane & Grant (Eng.)
Kilkerran's Decisions (Sc.)
Kirby (Conn.)
Knapp (Eng.)
Knapp & Ombler (Eng.)
Knapp & Moore (Eng.)
Knox (N.S. Wales)
Knox & Fitzhardinge (N.S. Wales)
Kulp (Pa.)
Kentucky
Kentucky Decisions
Kentucky Law Reporter
Kentucky Opinions

L

La.
La. App.
La. A. (Orleans)
La Ann.
Lab.
Lack. Jur.
Lack Leg N.
Lack Leg Rec.
Lalor

Lanc Bar
Lanc. L. Rev.
Land Dec.
Lane
Lans.
Lans. Ch.
Latch
Law Rep. N.S.
L.O.
L & C.
L O Jur.
L O L J.
L O Rep S. Qu.

L.D.
Ld Ken.
Ld Raym.
Lea
Leach C.O.
L Ed.

Lee Eccl.
Lee t. Hardw.
Lef. Dec.

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Leg & Ins R.
Leg Int.
Leg Op.
Leg Rec.
Lehigh Co. L. J.
Lehigh Val. L. R.
Leigh

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Leigh & C.
Leon.
Lev.
Lew. O.C.
Ley
L.G.
Liberian L.
Litt.
Litt.
Litt Sel. Cas.
L.J. Adm.

L.J. Bankr.
L.J. Ch.
L.J. Ch. O.S.
L.J. C.P.
L.J. C.P. O.S.
L.J. Eccl.
L.J. Exch.
L.J. Exch O.S.
L.J. K.B.
L.J. K.B. O.S.
L.J. M.C.
L.J. M.C. O.S.
L.J. P.C.
L.J. P.D. & Adm.
L.J. P. & M.
L.J. Q.B.

L.J. Rep.
L & G t. Pl.
L & G t. S.
L & W.
L & M.
L.M. & P.
Loc Gov.
Lofft
Long & T.
Low. Can Seign.
Lowell
L.R.
L.R.A.
L.R.A. 1915A.
L.R. App. Cas.

L.R.A. & E.
L.R.A.N.S.
L.R.C.C.
L.R. Ch.
L.R.O.P.
L.R. Eq.
L.R. Exch.
L.R.H.L.
L.R.H.L. Sc.
L.R. Indian App.
L.R. Ir.
L.R.P.C.
L.R.P. & D.
L.R.Q.B.

L.T.
L.T.N.S.
L.T.O.S.

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Leonard (Eng.)
Levinz (Eng.)
Lewin's Crown Cases (Eng.)
Ley (Eng.)
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Littell (Ky.)
Littleton (Eng.)
Littall's Select Cases (Ky.)
Law Journal Admiralty New Series (Eng.)
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Law Journal Exchequer Old Series (Eng.)
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Lloyd & Gould temp. Sugden (Ir.)
Lloyd & Welsby (Eng.)
Lowndes & Maxwell (Eng.)
Lowndes, Maxwell & Pollack (Eng.)
Local Government (Eng.)
Lofft (Eng.)
Longfield & Townsend (Ir.)
Lower Canada Seigniorial Reports
Lowell (U.S.)
Law Reports (U.S.)
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Lawyers' Reports Annotated New Series
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Law Reports Chancery Appeal Cases (Eng.)
Law Reports Common Pleas Cases (Eng.)
Law Reports Equity Cases (Eng.)
Law Reports Exchequer Cases (Eng.)
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Law Reports House of Lords (Scotch Appeal Cases)
Law Reports Indian Appeals (Eng.)
Law Reports Irish
Law Reports Privy Council (Eng.)
Law Reports Probate & Divorce (Eng.)
Law Reports Queen's Bench Cases (Eng.)
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Law Times New Series (Pa.)
Law Times, Old Series (Eng.)

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Lush.
Lutw.
Lutw Reg Cas
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Lynd.Prov.

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Lushington's Admiralty (Eng.)
Lutwyche (Eng.)
Lutwyche's Registration Cases (Eng.)
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Lyndwood's Provinciales

M

MacA Pat.Cas.
MacArth.
MacAr & M.
Maccl.
MacFarl.
Mackey
MacL & R.
Macn & G.
Macph.
Macph S.&L.
Macq
Madd
Madd Ch.Pr.
Malloy
Man.
Man El Cas.
Man Exch Pr.
Man G. & S.
Man.L.J.
Man & Ry
Man & Ry.Mag.
Cas
Man.&S.
Mann Unrep Cas.
Manson
Man t Wood
March
Mar Prov.
Mars Adm.
Marsh.
Marsh J.J.
Mart.
Mart.(N.S.)
Mart.
Mart.
Mart N.S.
Mart & Y.
Mason
Mass.
Maule & S.
Mayn.
McAll.
McC.
McClell.
McClell & Y.
McCord.
McOrary
McG
McLean
McMull.
Md.
Md.Ch.
Me.
Mees.&Ros.
Mees.&W.
Meg.
Meigs
Menzies Cape of Good Hope
Merv.
Metc.
Metc.
M.&G.
M.&H.
Mich.
Mich.N.P.
Mich.T.
Miles
Mill Const.

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MacArthur's District of Columbia Reports
MacArthur & Mackey's District of Columbia Reports
Macclesfield (Eng.)
MacFarlane (Sc.)
Mackey's Reports, District of Columbia
Maclean & Robinson (Eng.)
Macnaghten & Gordon (Eng.)
Macpherson (Sc.)
Macpherson, Shurreff & Lee (Sc.)
Macqueen's Scotch Appeal Cases
Maddock (Eng.)
Maddock's Chancery Practice (Eng.)
Malloy (Ir.)
Mamtoha Law
Manning's Election Cases (Eng.)
Manning's Exchequer Practice (Eng.)
Manning, Granger, & Scott (Eng.)
Mamtoha Law Journal
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Manning & Scott (Eng.)
Manning's Unreported Cases (La.)
Manson (Eng.)
Mamtoha temp. Wood
March (Eng.)
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Marsden's Admiralty (Eng.)
Marshall (Eng.)
J. J. Marshall (Ky.)
Martin Old Series (La.)
Martin, New Series (La.)
Martin (N.C.)
Marvel (Del.)
Martin New Series (La.)
Martin & Yerger (Tenn.)
Mason (U.S.)
Massachusetts
Maule & Selwyn (Eng.)
Maynard (Eng.)
McAllister (U.S.)
McCahon (Kan.)
McClelland (Eng.)
McClelland & Younge (Eng.)
McCord (S.C.)
McOrary (U.S.)
McGloin (La.)
McLean (U.S.)
McMullan (S.C.)
Maryland
Maryland Chancery
Maine
Meeson & Roscoe (Eng.)
Meeson & Welsby (Eng.)
Megone (Eng.)
Meigs (Tenn.)
Menzies Cape of Good Hope
Merrivale (Eng.)
Metcalf (Mass.)
Metcalf (Ky.)
Manning & Ganger (Eng.)
Murphy & Hurlstone (Eng.)
Michigan
Michigan Nisi Prius
Michaelmas Term (Eng.)
Miles (Pa.)
Mill's Constitutional (S.C.)

Mill Dec.
Mills
Milw.
Minn.
Minor
Misc.
Miss.
Miss.Dec
Miss St Cas.
M & M.
Mo
Mo App.
Moak
Mo A.R.
Mod
Mod.Cas L & Eq.
Molloy
Mon.
Mont.
Mont.
Mont Bank Rep.
Mont L.R.
Mont.&A.
Mont & B
Mont & C.
Mont D & DeG.
Montg.Co
Mont & M.
Montr.Cond.Rep.
Monti Leg N.
Montr.Q.B
Montr.Super.
Moody C.C
Moore C.P.
Moore Indian App.
Moore K.B.
Moore P.C.
Moore P.C.N.S.
Moore & S.
Moore & W.
Mor Min Rep.
Morr.
Morr Bank Cas.
Morr St Cas.
Mosely
M & P.
M & R.
M & Rob.
M & S.
Mun.Corp.Cas.
Munf.
Murph.
Murray
M & W.
Myl & C.
Myl & K.
Myr.Prob.
Nat.Bank Reg
Nat Corp.Rep.
Nat L.Rep.
N.B.
N Benl.
N.B.Eq.
N.C.
N.Chipm.
N C Conf
N C.T.Rep.
N.D.
N.E.
N E (2d)
Neb.
Neb.(Unoff.)
Nels.
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Miller's Decisions (U.S.)
Mills (N.Y.)
Milward (Ir.)
Minnesota
Minor (Ala.)
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Mississippi
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Missouri
Missouri Appeals
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Monaghan (Pa.)
Montana
Montagu (Eng.)
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Mosely (Eng.)
Moore & Payne (Eng.)
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Moody & Robinson (Eng.)
Maule & Selwyn (Eng.)
Municipal Corporation Cases
Munford (Va.)
Murphey (N.C.)
Murray (Sc.)
Meeson & Welsby (Eng.)
Mylne & Craig (Eng.)
Mylne & Keen (Eng.)
Myrick's Probate (Cal.)
N
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New Brunswick
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N Chipman (Vt.)
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 Notes of Cas. Notes of Cases (Eng.)
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 Noy Noy (Eng.)
 N.&P. Nevile & Perry (Eng.)
 N.S. Nova Scotia
 N.S. Dec. Nova Scotia Decisions
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 Okl. Oklahoma
 Okl. Cr. Oklahoma Criminal
 Olcott Olcott (U.S.)
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 O'M & H. O'Malley & Hardcastle (Ir.)
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 Ont. El. Cas. Ontario Election Cases
 Ont. L. Ontario Law
 Ont. L.J. Ontario Law Journal
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Or. Oregon
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 Overt. Overton (Tenn.)
 Owen Owen (Eng.)

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 Pa Dist. Pennsylvania District
 Pa Dist. & Co. Pennsylvania District and County
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 Paine Paine (U.S.)
 Pa. L.J. Pennsylvania Law Journal
 Pa. L. Rec. Pennsylvania Law Record
 Pa. L.J.B. Clark's Pennsylvania Law Journal Reports
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 Park. Parker (Eng.)
 Park Cr. Parker's Criminal (N.Y.)
 Park Exch. Parker's Exchequer (Eng.)
 Park Ins. Parker's Insurance (Eng.)
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 Paton App Cas. Paton's Appeal Cases (Sc.)
 Patrick El. Cas. Patrick's Election Cases (Can.)
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 P. & D. Perry & Davison (Eng.)
 Peake N.P. Peake's Nisi Prius (Eng.)
 Pearce O.O. Pearce's Reports in Dearly's (Eng.)
 Pearson Pearson (Pa.)
 Peck Peck (Tenn.)
 Peck El. Cas. Peckwell's Election Cases (Eng.)
 Pennew. Pennewill (Del.)
 Pennyp. Pennypacker (Pa.)
 Penr. & W. Penrose & Watts (Pa.)
 Perry & Kn. Perry & Knapp Election Cases (Eng.)
 Pet. Peters (U.S.)
 Pet Adm. Peters' Admiralty (U.S.)
 Pet. C.O. Peters' Circuit Court (U.S.)
 Phil. Phillips (Eng.)
 Phil. Phillip (N.C.)
 Phila. Philadelphia (Pa.)
 Philippine Philippine
 Philm. Philmore Ecclesiastical (Eng.)
 Pick. Pickering (Mass.)
 Pig & R. Pigott & Rodwell (Eng.)
 Pig Rec. Pigott's Recoveries (Eng.)
 Pinn. Pinney (Wis.)
 Pittsb. Pittsburgh (Pa.)
 Pittsb. Leg. J. Pittsburgh Legal Journal (Pa.)
 Pittsb. Leg. J. N.S. Pittsburgh Legal Journal New Series (Pa.)
 P. & K. Perry & Knapp (Eng.)
 Plowd. Plowden (Eng.)
 Pollexf. Pollexfen (Eng.)
 Poph. Popham (Eng.)
 Port. Porter (Ala.)
 Posey Posey's Unreported Cases (Tex.)
 Puerto Rico Puerto Rico
 Puerto Rico Fed. Puerto Rico Federal
 Pow. Surr. Powers' Surrogate (N.Y.)
 P.R. & D. El. Cas. Power, Rodwell & Dew's Election Cases (Eng.)
 Prec Ch. Precedents in Chancery (Eng.)
 Pr. Edw. Isl. Prince Edward Island
 Price Price (Eng.)
 Price Pr. Cas. Price's Practice Cases (Eng.)
 Prid & C. Prideaux & Cole (Eng.)
 Prob. [1917] Law Reports, Probate Division (Eng.)

Prob Rep.	Probate Reports (Eng.)	Rose	Rose (Eng.)
Pr Rep.	Practice Reports (Eng.)	Ross' Lead Cas	Ross' Leading Cases (Eng.)
P.Wms.	Peere-Williams (Eng.)	R & R.	Russell & Ryan Crown Cases (Eng.)
P.U.R.	Public Utilities Reports	Russ.	Russell (Eng.)
Pyke	Pyke (Can.)	Russ.&C Eq Cas.	Russell's & Chesley's Equity Cases (N.S.)
Q		Russ.Eq Cas	Russell's Equity Cases (N.S.)
Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)	Russ & Geld.	Russell & Geldett Nova Scotia
[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)	Russ & M.	Russell & Mylne (Eng.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)	Ry & M.	Ryan & Moody (Eng.)
Queensl J P.	Queensland Justice of the Peace	S	
Queensl L.	Queensland Law	Salk.	Salkeld (Eng.)
Queensl L.J.	Queensland Law Journal	Sandf	Sandford's Superior Court (N.Y.)
Que L.	Quebec Law	Sandf Ch.	Sandford's Chancery (N.Y.)
Que Pr.	Quebec Practice	Sask L.	Saskatchewan Law
Que.Q.B.	Quebec Official Reports Queen's Bench	Saund.	Saunders (Eng.)
Que Rev Jud.	Quebec Revised Judicial	Saund & C.	Saunders & Cole (Eng.)
Que Super.	Quebec Official Reports Superior Court	Sau & Sc.	Sausse & Scully (Ir.)
Quincy	Quincy (Mass.)	S Austr L.	South Australia Law
R		Sav	Savile (Eng.)
Rand.	Randolph (Va.)	Sawyer.	Sawyer (U.S.)
Rap Jud.Q C.S.	Rapport's Judiciares de Quebec Cour Supérieure	Saxt.	Saxton (N.J.)
Rawle	Rawle (Pa.)	Say.	Sayer (Eng.)
R O L.	Ruling Case Law	S C.	South Carolina
R & Can Cas.	Railway & Canal Cases (Eng.)	[1907]S.C.	Court of Session Cases (Sc.)
R & Can Tr.Cas.	Railway & Canal Traffic Cases (Eng.)	Scam	Scammon (Ill.)
Redf	Redfield's Surrogate (N.Y.)	S O Eq	South Carolina Equity
Redf & B.	Redfield & Bigelow's Leading Cases (Eng.)	Sch & Lef.	Schoales & Lefroy (Ir.)
Redf R Cas.	Redfield's Railway Cases (Eng.)	[1907]S C (J)	Court of Justiciary Cases (Sc.)
Redf Surr.	Redfield's Surrogate (N.Y.)	Sc Jur.	Scottish Jurist
Reeve Eng.L.	Reeve's English Law	S C L	South Carolina Law
Reports	Reports (Eng.)	Sc.L Rep	Scottish Law Reporter
Reprint	English Reprint	Scot L.T.	Scott Law Times
Rept t Finch	Cases temp Finch (Eng.)	Scott	Scott (Eng.)
Rept t Hard.	Lee's Reports <i>tempore</i> Hardwicke (Eng.)	Scott N R	Scott's New Reports (Eng.)
Rept.t.Holt	Reports <i>tempore</i> Holt (English Cases of Settlement)	Scr L T	Scranton Law Times (Pa.)
Res.&Eq Judgm	Reserved & Equity Judgments (N.S. Wales)	Sc Sess Cas.	Scotch Court of Session Cases
Rev Crit.	Revue Critique (Can.)	S Ct.	Supreme Court Reporter (U.S.)
Rev.de Jur.	Revue de Jurisprudence (Can.)	S D.	South Dakota
Rev de Legis.	Revue de Legislation (Can.)	S E.	South Eastern Reporter
Rev Leg	Revue Legale (Can.)	Searle & Sm	Searle & Smith (Eng.)
Rev.Leg N.S.	Revue Legale New Series (Can.)	Sel Cas.Ch	Select Cases in Chancery (Eng.)
Rev.Rep.	Revised Reports (Eng.)	Seld.	Selden's Notes (N.Y.)
R I.	Rhode Island	Selden	Selden (N.Y.)
Rice	Rice (S.C.)	Selw	Selwyn's Nisi Prius (Eng.)
Rich.	Richardson (S C)	Seig & R.	Sergeant & Rawle (Pa.)
Rich.O.P.	Richardson's Practice Common Pleas (Eng.)	Sess.Cas.	Court of Session Cases (Eng.)
Ridg.	Ridgeway's Reports <i>tempore</i> Hardwicke (Eng.)	Shan	Shannon (Tenn.)
Ridg Ap.	Ridgeway's Appeal (Ir.)	Shaw	Shaw (Sc.)
Ridg L & S.	Ridgeway, Lapp & Schoale (Ir.)	Shaw & D.	Shaw & Dunlop (Sc.)
Ridg P O	Ridgeway's Parliament Cases (Ir.)	Shaw, Dunl & B.	Shaw, Dunlop & Be'l (Sc.)
Ridg t Hardw.	Ridgeway temp. Hardwicke (Eng.)	Shaw & M.	Shaw & MacLean (Sc.)
Riley	Riley (S.C.)	Sheld.	Sheldon (N.Y.)
R & M.	Ryan & Moody (Eng.)	Shep Abr	Sheppard's Abridgment
R. M. Charl't.	R. M. Charlton (Ga.)	Sheph.Sel.Cas.	Shepherd's Select Cases (Ala.)
Rob.	Robinson (La.)	Show.	Shower (Eng.)
Rob.	Robinson (Va.)	Show P.O.	Shower's Parliament Cases (Eng.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)	Sid.	Siderfin (Eng.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)	Silv A.	Silvernail's Appeals (N.Y.)
Rob Eccl	Robertson's Ecclesiastical (Eng.)	Silv.Sup.	Silvernail's Supreme (N.Y.)
Robin App Cas.	Robinson's Appeal Cases (Sc.)	Sim.	Simons (Eng.)
Rob Wm Adm.	William Robinson's Admiralty (Eng.)	Sim N.S.	Simons New Series (Eng.)
Rolle	Rolle (Eng.)	Sim & St.	Simons & Stuart (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)	Skinner	Skinner (Eng.)
Rolle Ct.Rep.	Rolle's Court Reports	Smale & G.	Smale & Giffard (Eng.)
Rom Cas.	Romilly's Notes of Cases (Eng.)	Smith	Smith (Ind.)
Root	Root (Conn.)	Smith	Smith (N.H.)
		Smith & B.	Smith & Batty (Ir.)
		Smith K B	Smith's King's Bench (Eng.)
		Smith Lead Cas	Smith's Leading Cases (Eng.)
		Smith Reg.	Smith's Registration (Eng.)
		Sm & M	Smedes & Marshall (Miss.)
		Sm & M.Ch.	Smedes & Marshall Chancery (Miss.)
		Smythe	Smythe (Ir.)
		Sneed	Sneed (Tenn.)
		So.	Southern Reporter
		Sol J.	Solicitor's Journal (Eng.)
		Sp.	Speers (S C)
		Spunks	Spinks Admiralty (Eng.)
		Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)

Spinks, P.C.
 Spottsw.
 Spottsw Eq.
 Sprague
 Stair
 Stark
 Stat. at L.
 Stew.
 Stew.
 Stew & P.
 Stockt Vice-Adm.
 Story
 Str.
 Strob.
 Stuart Vice-Adm.
 Stu. M. & P.
 Style
 Sumn
 Susq. Leg. Chron.
 S W.
 S W. (2d)
 Swab.
 Swab. & Tr.
 Swan
 Swanst.

Spinks' Prize Cases (Eng.)
 Spottswode (Sc.)
 Spottswode's Equity (Sc.)
 Sprague (U.S.)
 Stair (Sc.)
 Starkie Nisi Prius (Eng.)
 United States Statutes at Large
 Stewart (Ala.)
 Stewart's Reports (N.S.)
 Stewart & Porter (Ala.)
 Stockton's Vice-Admiralty (N.B.)
 Story (U.S.)
 Strange (Eng.)
 Strobbart (S.O.)
 Stuart's Vice-Admiralty (L.C.)
 Stuart, Milne & Peddie (Sc.)
 Style (Eng.)
 Sumner (U.S.)
 Susquehanna Legal Chronicle (Pa.)
 South Western Reporter
 South Western Reporter Second Series
 Swabey's Admiralty (Eng.)
 Swabey & Triatram (Eng.)
 Swan (Tenn.)
 Swanston (Eng.)

T

Taml.
 Taney
 Tapp.
 Taunt.
 Taylor
 T B. Mon.
 Tenn.
 Tenn App.
 Tenn Cas.
 Tenn. Ch.
 Tenn. Ch. A.
 Tenn. Civ. A.
 Terr. L.
 Tex.
 Tex. App.
 Tex. A. Civ. Cas.
 Tex. Civ. App.
 Tex. Cr.
 Tex. Suppl.
 Tex. Unrep. Cas.
 Thach. Cr.
 Thomps & O.
 Thomps. Cas.
 Tinw.
 T. Jones
 T. L. R.
 T. M. R.
 T & M.
 Toth.
 T. R.
 Transcr. A.
 T. Raym.
 Tread Const.
 Treas. Dec.
 Tr. & H. Pr.
 Trint. T.
 Trueman. Eq. Cas.
 Tuck. Sel. Cas.
 Tuck. Surr.
 T. U. P. Charit.
 Turn. & R.
 Tyler
 Tyrw.
 Tyrw. & G.

Tamlyn (Eng.)
 Taney (U.S.)
 Tappan (Oh.)
 Taunton (Eng.)
 Taylor (N.C.)
 T. B. Monroe (Ky.)
 Tennessee
 Tennessee Appeals
 Unreported Tennessee Cases
 Tennessee Chancery
 Tennessee Chancery Appeals
 Tennessee Civil Appeals
 Territories Law (Northwest Territories)
 Texas
 Texas Court of Appeals
 White & Wilson's Civil Cases (Tex.)
 Texas Civil Appeals
 Texas Criminal
 Texas Supplement
 Posey's Unreported Cases (Tex.)
 Thacher's Criminal Cases (Mass.)
 Thompson & Cook (N.Y.)
 Thompson's Cases (Tenn.)
 Tinwald (Sc.)
 Thomas Jones (Eng.)
 Times Law Reports (Eng.)
 Trade Mark Reports
 Temple & Mew (Eng.)
 Tothill (Eng.)
 Term Reports (Durnford & East) (Eng.)
 Transcript Appeals (N.Y.)
 Thomas Raymond (Eng.)
 Treadway Constitutional (S.C.)
 Treasury Decisions (U.S.)
 Troubat & Haly's Practice (Pa.)
 Trinity Term (Eng.)
 Trueman's Equity Cases (N.B.)
 Tucker's Select Cases (Newfoundland)
 Tucker's Surrogate (N.Y.)
 T. U. P. Charlton (Ga.)
 Turner & Russell (Eng.)
 Tyler (Vt.)
 Tyrwhitt (Eng.)
 Tyrwhitt & Granger (Eng.)

U

U.C.
 U.C. Ch.
 U.C. Cham.
 U.C.C.P.
 U.C.E. & A.
 U.C.K.B.

Upper Canada
 Upper Canada Chancery
 Upper Canada Chamber
 Upper Canada Common Pleas
 Upper Canada Error and Appeal
 Upper Canada King's Bench Reports

U.C.Q.B.
 U.C.Q.E.O.S.
 U.S.
 U.S. Aviation Rep.
 U.S.C.A.
 Utah

Upper Canada Queen's Bench
 Upper Canada Queen's Bench Old Series
 United States
 Aviation Reports (U.S.)
 United States Code Annotated
 Utah

V

Va.
 Va. Cas.
 Va. Ch. Dec.
 Va. Dec.
 Van Ness Prize
 Cas.
 Vaugh.
 Vaux.
 Vent.
 Vern.
 Vern. Ch.
 Vern. & S.
 Ves.
 Ves & B.
 Ves Jr.
 Ves Jr. Suppl.
 Ves Suppl.
 Vict.
 Vict. L.
 Vict. L. T.
 Vict. Rep.
 Vict. St. Tr.
 Vin. Abr.
 Virgin Islands
 Vt.

Virginia
 Virginia Cases
 Chancery Decisions (Va.)
 Virginia Decisions
 Van Ness Prize Cases (U.S.)
 Vaughan (Eng.)
 Vaux's Decisions (Pa.)
 Ventris (Eng.)
 Vernon's Cases (Eng.)
 Vernon's Chancery (Eng.)
 Vernon & Scriven (Ir.)
 Vesey Senior (Eng.)
 Vesey & Beames (Eng.)
 Vesey Junior (Eng.)
 Vesey Junior Supplement (Eng.)
 Vesey Senior Supplement (Eng.)
 Victorian
 Victorian Law
 Victorian Law Times
 Victorian Reports
 Victorian State Trials
 Viner's Abridgment (Eng.)
 Virgin Islands
 Vermont

W

Walk.
 Walk.
 Wall.
 Wall C.C.
 Wall Jr.
 Wall Sr.
 Wallis
 Ware
 Wash.
 Wash.
 Wash. St.
 Wash. C.C.
 Wash. T.
 Watts
 Watts & S.
 W. Bl.
 W. C. O.

Walker (Pa.)
 Walker's Chancery (Mich.)
 Wallace (U.S.)
 Wallace (U.S.)
 Wallace Junior (U.S.)
 Wallace Senior (U.S.)
 Wallis (Ir.)
 Ware (U.S.)
 Washington
 Washington (Va.)
 Washington State
 Washington Circuit Court (U.S.)
 Washington Territory
 Watts (Pa.)
 Watts & Sergeant (Pa.)
 William Blackstone (Eng.)
 Minton-Senhouse's Workmen's Compensation Cases (Eng.)

Webb, A. B. & W. L.
 P & M.

Webb, A. Beckett, & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)

Web. Pat. Cas.
 Welsh
 Wend.
 West
 West L. J.
 West L. Month.
 West L. R.
 West L. T.
 West R.
 West & Hardw.
 West Wkly.
 [1917] West Wkly.
 Whart.
 Wheat.
 Wheel. Cr.
 White & T. Lead.
 Cas. Eq.

Webster's Patent Cases (Eng.)
 Welsh Registry Cases (Ir.)
 Wendell (N.Y.)
 West (Eng.)
 Western Law Journal (Oh.)
 Western Law Monthly (Oh.)
 Western Law Reporter (Can.)
 Western Law Times (Can.)
 Western Reporter
 West temp. Hardwicke (Eng.)
 Western Weekly (Can.)
 [1917] Western Weekly (Can.)
 Wharton (Pa.)
 Wheaton (U.S.)
 Wheeler's Criminal (N.Y.)

Whitm. Pat. Cas.
 Wight.
 Wilcox
 Willes
 Wilm.
 Wils.

White & Tudor's Leading Cases in Equity (Eng.)
 Whitman's Patent Cases (U.S.)
 Wightwicke (Eng.)
 Wilcox (Pa.)
 Willes (Eng.)
 Wilmot's Notes (Eng.)
 Wilson (Ind.)

Wils Ch.	Wilson's Chancery (Eng.)	W Rob.	William Robinson's Admiralty (Eng.)
Wils C.P.	Wilson's Common Pleas (Eng.)	Wi Pa	Wright (Pa.)
Wils Exch.	Wilson's Exchequer (Eng.)	W Va	West Virginia
Wils P.C.	Wilson's Privy Council (Eng.)	W W Harr.	W W. Harrington
Wils & S.	Wilson & Shaw (Sc.)	W W & D.	Willmore, Wollaston & Davidson (Eng.)
Winch	Winch (Eng.)		Willmore, Wollaston & Hodges (Eng.)
Winst.	Winston (N.C.)	W.W.&H.	Wyoming
Wis.	Wisconsin	Wyo.	Wythe's Chancery (Va.)
W Jones	William Jones (Eng.)	Wythe	Wyatt & Webb (Vict.)
W Kel.	William Kelynge (Eng.)	Wy & W.	Wyatt, Webb & A'Beckett (Vict.)
Wkly L Gaz.	Weekly Law Gazette (Oh.)	Wy W.&A'Beck.	
Wkly N.C.	Weekly Notes of Cases (Pa.)		
Wkly Rep.	Weekly Reporter (Eng.)		
Wms Saund.	Williams Notes to Saunders' Reports		
W N.	Weekly Notes (Eng.)		
Wolf & B.	Wolferstan & Bristow's Election Cases (Eng.)		
Wolf & D.	Wolfeistan & Daw's Election Cases (Eng.)		
Woll.	Wollaston (Eng.)		
Woodb. & M.	Woodbury & Minot (U.S.)		
Woods	Woods (U.S.)		
Woodw.	Woodward's Decisions (Pa.)		
Woolw.	Woolworth (U.S.)		
Words & Phrases	Words & Phrases		
Wright	Wright (Oh.)		

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y B	Year Book (Eng.)
Y & C Exch.	Younge & Collyer's Exchequer (Eng.)
Y & Coll	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y. & J.	Younge & Jervis (Eng.)
York Leg Rec.	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A B A Jour.	American Bar Association Journal	Lincoln L.Rev.	Lincoln Law Review
Am.J.Int Law	American Journal of International Law	Marq L.Rev.	Marquette Law Review
Am Law S.Rev.	American Law School Review	Mass.L.Q.	Massachusetts Law Quarterly
B U.L.Rev.	Boston University Law Review	Mercer, Beasley L.Rev	Mercer, Beasley Law Review
Brooklyn L.Rev.	Brooklyn Law Review	Mich L.Rev.	Michigan Law Review
Calif L.Rev.	California Law Review	Minn L.Rev.	Minnesota Law Review
Camb.L.J.	Cambridge Law Journal	Miss.L.J.	Mississippi Law Journal
Chi-Kent Rev.	Chicago-Kent Review	Neb L.B.	Nebraska Law Bulletin
Colum L.Rev.	Columbia Law Review	N.J.L.J.	New Jersey Law Journal
Com L.J.	Commercial Law Journal	N.J.L.Rev.	New Jersey Law Review
Cornell L.Q.	Cornell Law Quarterly	N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Detroit L.Rev.	Detroit Law Review		
Dick.L.Rev.	Dickinson Law Review	Notre Dame Law.	Notre Dame Lawyer
Fed B.A.J.	Federal Bar Association Journal	N O L.Rev.	North Carolina Law Review
Fla.L.J.	Florida Law Journal	Okl.S.B.J.	Oklahoma State Bar Journal
Fordham L.Rev.	Fordham Law Review	Oreg L.Rev.	Oregon Law Review
Geo Wash.L.Rev.	George Washington Law Review	Phil.L.J.	Philippine Law Journal
Geo L.J.	Georgetown Law Journal	Rocky Mt.L.Rev.	Rocky Mountain Law Review
Harv.L.Rev.	Harvard Law Review	St. John's L.Rev.	St. John's Law Review
Ia L.Rev.	Iowa Law Review	St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
Idaho L.J.	Idaho Law Journal		
Ill L.Rev.	Illinois Law Review	So Calif.L.Rev.	Southern California Law Review
Ind L.J.	Indiana Law Journal	Temp L.Q.	Temple Law Quarterly
J Am.Jud.Soc.	Journal of the American Judicature Society	Tenn L.Rev.	Tennessee Law Review
J.Comp.Leg.	Journal of the Society of Comparative Legislation	Tex L.Rev.	Texas Law Review
J N A Referees Bank.	Journal of the National Association of Referees in Bankruptcy	Tul L.Rev.	Tulane Law Review
J Soc Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law	U.Ch.L.Rev.	University of Chicago Law Review
John Marshall L. Q.	The John Marshall Law Quarterly	U Cin L.Rev.	University of Cincinnati Law Review
Kan.City L.Rev.	Kansas City Law Review	U Detroit L.J.	University of Detroit Law Journal
Kan.St.L.J.	Kansas State Law Journal	U.Pa.L.Rev.	University of Pennsylvania Law Review
Ky L.J.	Kentucky Law Journal		
L.J.	Law Journal	U. of Pitts L.Rev.	University of Pittsburgh Law Review
L Lib.J.	Law Library Journal	U Toronto L.J.	University of Toronto Law Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series	Va.L.Rev.	Virginia Law Review
Law Soc.J.	Law Society Journal	Wash.L.Rev.	Washington Law Review
		Wash U.L.Q.	Washington University Law Quarterly
		W.Va.L.Q.	West Virginia Law Quarterly and The Bar
			Wisconsin Law Review
		Wis.L.Rev.	Yale Law Journal
		Yale L.J.	

LIST OF TITLES

IN

CORPUS JURIS SECUNDUM

Abandonment	Associations	Colleges and Universities
Abatement and Revival	Assumpsit, Action of	Collision
Abduction	Asylums	Commerce
Abortion	Attachment	Common Lands
Absentees	Attorney and Client	Common Law
Abstracts of Title	Attorney General	Common Scold
Accession	Auctions and Auctioneers	Compositions with Creditors
Accord and Satisfaction	Audita Querela	Compounding Offenses
Account, Action on	Bail	Compromise and Settlement
Accounting	Bailments	Concealment of Birth or Death
Account Stated	Bankruptcy	Conflict of Laws
Acknowledgments	Banks and Banking	Confusion of Goods
Actions	Barratry	Conspiracy
Adjoining Landowners	Bastards	Constitutional Law
Admiralty	Beneficial Associations	Contempt
Adoption of Children	Bigamy	Continuances
Adulteration	Bills and Notes	Contracts
Adultery	Blasphemy	Contratos
Adverse Possession	Bonds	Contribution
Aerial Navigation	Boundaries	Conversion
Affidavits	Bounties	Convicts
Affray	Breach of Marriage Promise	Copyright and Literary
Agency	Breach of the Peace	Property
Agriculture	Bribery	Coroners
Aliens	Bridges	Corporations
Alteration of Instruments	Brokers	Costs
Ambassadors and Consuls	Building and Loan Associations	Counterfeiting
Amicus Curiae	Burglary	Counties
Animals	Business Trusts	Court Commissioners
Annuities	Canals	Courts
Appeal and Error	Cancellation of Instruments	Covenant, Action of
Appearances	Carriers	Covenants
Apprentices	Case, Action on	Creditors' Suits
Arbitration and Award	Cemeteries	Criminal Law
Architects	Census	Crops
Army and Navy	Certiorari	Culpa
Arrest	Champerty and Maintenance	Curtsey
Arson	Charities	Customs and Usages
Assault and Battery	Chattel Mortgages	Customs Duties
Assignments	Citizens	Damages
Assignments for Benefit of	Civil Rights	Dead Bodies
Creditors	Clerks of Courts	Death
Assistance, Writ of	Clubs	Debt, Action of

Dedication	Ferries	Joint Adventures
Deeds	Finding Lost Goods	Joint Stock Companies
Dependencies, Colonies, and British Possessions	Fines	Joint Tenancy
Depositories	Fires	Judges
Depositions	Fish	Judgments
Deposits in Court	Fixtures	Judicial Sales
Descent and Distribution	Flags	Juries
Detectives	Food	Justices of the Peace
Detinue	Forcible Entry and Detainer	Kidnapping
Discovery	Forfeitures	Landlord and Tenant
Dismissal and Nonsuit	Forgery	Larceny
Disorderly Conduct	Fornication	Levees and Flood Control
Disorderly Houses	Franchises	Lewdness
District and Prosecuting Attorneys	Fraud	Libel and Slander
District of Columbia	Frauds, Statute of	Licenses
Disturbance of Public Meetings	Fraudulent Conveyances	Liens
Divorce	Game	Limitations of Actions
Domicile	Gaming	Lis Pendens
Dower	Garnishment	Livery Stable Keepers
Drains	Gas	Logs and Logging
Druggists	Gifts	Lost Instruments
Drunkards	Good Will	Lotteries
Dueling	Grand Juries	Malicious Mischief
Easements	Ground Rents	Malicious Prosecution
Ejectment	Guaranty	Mandamus
Election of Remedies	Guardian and Ward	Manufactures
Elections	Habeas Corpus	Maritime Liens
Electricity	Hawkers and Peddlers	Marriage
Embezzlement	Health	Marshaling Assets and Securities
Embracery	Highways	Master and Servant
Eminent Domain	Holidays	Masters' and Employers' Associations
Entry, Writ of	Homesteads	Mayhem
Equity	Homicide	Mechanics' Liens
Escape	Hospitals	Mercantile Agencies
Escheat	Husband and Wife	Militia
Escrows	Improvements	Mills
Estates	Incest	Mines and Minerals
Estoppel	Indemnity	Miscegenation
Evidence	Indians	Modern Civil Law
Exchange of Property	Indictments and Informations	Money Lenders
Exchanges	Industrial Co-operative Societies	Money Lent
Executions	Infants	Money Paid
Executors and Administrators	Injunctions	Money Received
Exemptions	Innkeepers	Monopolies
Explosives	Insane Persons	Mortgages
Extortion	Insolvency	Motions and Orders
Extradition	Inspection	Motor Vehicles
Factors	Insurance	Municipal Corporations
False Imprisonment	Insurrection and Sedition	Names
False Personation	Interest	Navigable Waters
False Pretenses	Internal Revenue	Ne Exeat
Federal Courts	International Law	Negligence
Fences	Interpleader	Neutrality Laws
	Intoxicating Liquors	

Newspapers	Railroads	Suicide
New Trial	Rape	Summary Proceedings
Notaries	Real Actions	Sunday
Notice	Receivers	Supersedeas
Novation	Receiving Stolen Goods	Taxation
Nuisances	Recognizances	Telegraphs and Telephones
Oaths and Affirmations	Records	Tenancy in Common
Obscenity	References	Tender
Obstructing Justice	Reformation of Instruments	Territories
Officers	Reformatories	Theaters and Shows
Pardons	Registers of Deeds	Threats and Unlawful Communication
Parent and Child	Registration of Land Titles	Time
Parliamentary Law	Release	Torts
Parties	Religious Societies	Towage
Partition	Removal of Causes	Towns
Partnership	Replevin	Trade-Marks, Trade-Names, and Unfair Competition
Party Walls	Reports	Trade Unions
Patents	Rescue	Trading Stamps and Coupons
Paupers	Review	Treason
Pawnbrokers	Rewards	Treaties
Payment	Right of Privacy	Trespass
Penalties	Riot	Trespass to Try Title
Pensions	Robbery	Trial
Pent Roads	Sales	Trover and Conversion
Peonage	Salvage	Trusts
Perjury	Schools and School Districts	Turnpikes and Toll Roads
Perpetuities	Scire Facias	Undertakings
Physicians and Surgeons	Seals	United States
Pilots	Seamen	United States Commissioners
Piracy	Searches and Seizures	United States Marshals
Pleading	Seduction	Unlawful Assembly
Pledges	Sequestration	Use and Occupation
Poisons	Set-Off and Counterclaim	Usury
Possessory Warrant	Sheriffs and Constables	Vagrancy
Post Office	Shipping	Vendor and Purchaser
Powers	Signatures	Venue
Principal and Surety	Slaves	War
Prisons	Social Security and Public Welfare	Warehousemen and Safe Depositories
Private Roads	Sodomy	Waste
Prize Fighting	Specific Performance	Waters
Process	Spendthrifts	Weapons
Profanity	States	Weights and Measures
Prohibition	Statutes	Wharves
Property	Steam	Wills
Prostitution	Stenographers	Witnesses
Public Administrative Bodies and Procedure	Stipulations	Woods and Forests
Public Lands	Street Railroads	Work and Labor
Public Utilities	Submission of Controversy	Workmen's Compensation
Quieting Title	Subrogation	
Quo Warranto	Subscriptions	

TITLES IN THIS VOLUME

	Page
Master and Servant §§ 482—end - - - - -	1
Masters' and Employers' Associations - - - - -	444
Mayhem - - - - -	461
Mechanics' Liens - - - - -	482
Mercantile Agencies - - - - -	1052
Militia - - - - -	1081

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CORPUS JURIS SECUNDUM

VOLUME FIFTY-SEVEN

MASTER AND SERVANT

This Title includes the relation created by contracts of employment, express or implied; rights, powers, duties, and liabilities of the parties, as between themselves and as to others, incident to the relation; interference of others with the relation; and legal proceedings relating thereto.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

Divisions I to IV G in Volume 56

I. THE RELATION, §§ 1-59

- A. DEFINITIONS, AND CREATION AND EXISTENCE OF RELATION, §§ 1-13
- B. STATUTORY REGULATIONS IN GENERAL, §§ 14-27
- C. EMPLOYEE ORGANIZATIONS; DISCRIMINATORY PRACTICES; DETERMINATION OF DISPUTES, §§ 28(1)-28(144)
 - 1. *In General*, §§ 28(1)-28(19)
 - 2. *Collective Bargaining*, §§ 28(20)-28(42)
 - 3. *Unfair Labor Practices*, §§ 28(43)-28(64)
 - 4. *Labor Relations Boards*, §§ 28(65)-28(68)
 - 5. *Procedure for Settlement of Disputes*, §§ 28(69)-28(121)
 - a. IN GENERAL, §§ 28(69)-28(81)
 - b. PARTIES, PROCESS, PLEADING, AND EVIDENCE, §§ 28(82)-28(101)
 - c. HEARINGS, FINDINGS, DETERMINATIONS, AND ORDERS, §§ 28(102)-28(121)
 - 6. *Judicial Enforcement or Review of Orders or Awards*, §§ 28(122)-28(144)
- D. TERMINATION OF RELATION, §§ 29-59

II. SERVICES AND COMPENSATION, §§ 60-160(13)

- A. PERFORMANCE AND BREACH OF EMPLOYMENT CONTRACT, §§ 60-80
- B. WAGES AND OTHER REMUNERATION, §§ 81-160(13)
 - 1. *Right to Compensation*, §§ 81-108
 - 2. *Amount*, §§ 109-118
 - 3. *Time When Compensation Due and Payment*, §§ 119-121

See also descriptive word index in the back of this Volume

II. SERVICES AND COMPENSATION—Continued

B. WAGES AND OTHER REMUNERATION—Continued

4. *Actions*, §§ 122-137
5. *Arbitration and Mediation*, § 138
6. *Liens and Preferences*, §§ 139-150
7. *Constitutional or Statutory Regulations and Penalties*, §§ 151(1)-160(13)
 - a. *MINIMUM WAGES AND OVERTIME PAY*, §§ 151(1)-153
 - b. *OTHER REGULATIONS*, §§ 154-159
 - c. *ACTIONS AND CRIMINAL PROSECUTIONS*, §§ 160(1)-160(13)

III. MEDICAL, SURGICAL, AND HOSPITAL ATTENTION; RELIEF FUNDS, §§ 161-170

IV. MASTER'S LIABILITY FOR INJURIES TO SERVANT, §§ 171-554

- A. *NATURE AND EXTENT IN GENERAL*, §§ 171-200
- B. *TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK*, §§ 201-259
 1. *In General*, §§ 201-212
 2. *Particular Appliances and Places*, §§ 213-230
 3. *Covering or Guarding Dangerous Machinery or Places*, §§ 231-234
 4. *Inspection and Repair*, §§ 235-243
 5. *Knowledge by Master of Defect or Danger*, §§ 244-248
 6. *Dangerous Operations and Improper or Unusual Use or Test*, §§ 249-251
 7. *Proximate Cause of Injury*, §§ 252-259
- C. *METHODS OF WORK; RULES AND ORDERS*, §§ 260-283
- D. *WARNING AND INSTRUCTING SERVANT*, §§ 284-306
- E. *FELLOW SERVANTS*, §§ 307-356
 1. *Number, Competency, and Supervision*, §§ 307-320
 2. *Common-Law Liability of Master for Injuries by Fellow Servant*, §§ 321-333
 3. *Constitutional or Statutory Provisions as to Master's Liability for Injuries by Fellow Servant*, §§ 334-355
 4. *Concurrent Negligence of Master and Fellow Servant*, § 356
- F. *ASSUMPTION OF RISK*, §§ 357-420
 1. *In General*, §§ 357-360
 2. *Nature of Risks*, §§ 361-378
 3. *Knowledge as Affecting Assumption of Risk in General*, §§ 379-392
 4. *Continuing Work after Knowledge of Danger*, §§ 393-397
 5. *Compliance with Commands or Threats*, §§ 398-403
 6. *Assurances or Representations of Master*, §§ 404-406
 7. *Risks outside Scope of Employment*, §§ 407-409
 8. *Disobedience of Rules, Orders, Instructions, or Statutes, and Use of Appliances for Purposes Not Intended*, §§ 410-411
 9. *Inexperienced or Youthful Servant*, §§ 412-420
- G. *CONTRIBUTORY NEGLIGENCE*, §§ 421-481
 1. *In General*, §§ 421-445
 2. *Particular Applications of Doctrine*, §§ 446-470
 3. *Inexperienced or Youthful Servants*, §§ 471-481
- H. *ACTIONS*, §§ 482-554
 1. *In General*, §§ 482-488
 2. *Pleading*, §§ 489-500
 3. *Evidence*, §§ 501-527
 4. *Trial*, §§ 528-550
 5. *New Trial, Judgment, Review, and Damages*, §§ 551-554

See also descriptive word index in the back of this Volume

V. LIABILITY FOR INJURIES TO THIRD PERSONS, §§ 555-621

- A. ACTS OR OMISSIONS OF SERVANT, §§ 555-579
- B. WORK OF INDEPENDENT CONTRACTOR, §§ 580-610
- C. ACTIONS, §§ 611-621

VI. LIABILITY OF THIRD PERSON FOR INJURIES TO SERVANT, §§ 622-623**VII. INTERFERENCE WITH THE RELATION BY THIRD PERSONS, §§ 624-639**

- A. CIVIL LIABILITY, §§ 624-632
- B. CRIMINAL LIABILITY, §§ 633-639

Sub-Analysis

For Sub-Analysis of §§ 1 to 481 see Vol. 56

IV. MASTER'S LIABILITY FOR INJURIES TO SERVANT—Continued**H. ACTIONS—p 7****1. In general—p 7**

- § 482. In general—p 7
- 483. Conditions precedent—p 8
- 484. — Return of money received after injury—p 8
- 485. — Notice of injury—p 8
- 486. Jurisdiction and venue—p 10
- 487. Time to sue and limitations—p 11
- 488. Parties—p 13

2. Pleading—p 14

- § 489. Declaration, petition, or complaint—p 14
- 490. — Negligence of master—p 17
- 491. — Negligence of fellow servants—p 31
- 492. — Negating assumption of risk—p 32
- 493. — Negating contributory negligence—p 35
- 494. Plea or answer—p 36
- 495. Replication or reply—p 41
- 496. Amendment of pleadings—p 41
- 497. Issues, proof, and variance—p 43
- 498. — Matters to be proved—p 43
- 499. — Issues raised by, and evidence admissible under, pleadings—p 45
- 500. — Variance—p 50

3. Evidence—p 52

- § 501. Presumptions and burden of proof—p 52
- 502. — Effect of constitutional and statutory provisions—p 84
- 503. Admissibility—p 86
- 504. — Employment or relation of master and servant—p 87
- 505. — Nature, cause, and extent of injury—p 88
- 506. — Negligence of employer in general—p 89
- 507. — Care of inexperienced or youthful employee—p 89
- 508. — Violations of statutes or ordinances—p 89
- 509. — Conditions before or after injury—p 90
- 510. — Precautions against recurrence of injury—p 92

IV. MASTER'S LIABILITY FOR INJURIES TO SERVANT—Continued

H. ACTIONS—Continued

3. Evidence—Continued

- § 511. — Similar facts and occurrences—p 94
- 512. — Defective or dangerous machinery, appliances, and places—p 96
- 513. — Methods of work, rules, and orders—p 100
- 514. — Warning and instructing employee—p 103
- 515. — Insufficient force for work—p 103
- 516. — Employment or retention of incompetent employees—p 104
- 517. — Negligence of fellow servant—p 106
- 518. — Assumption of risk—p 107
- 519. — Contributory negligence—p 108
- 520. Weight and sufficiency—p 113
- 521. — Existence of relation of master and servant—p 115
- 522. — Cause of injury—p 116
- 523. — Action of servant within scope of employment—p 121
- 524. — Negligence of master—p 121
- 525. — Negligence of fellow servant—p 139
- 526. — Assumption of risk—p 141
- 527. — Contributory negligence—p 143

4. Trial—p 146

- § 528. Conduct of trial—p 146
- 529. Questions of law and fact—p 146
- 530. — Relation of parties—p 148
- 531. — Scope of employment—p 150
- 532. — Presumptions—p 152
- 533. — Nature and cause of injury—p 152
- 534. — Negligence on part of master—p 164
- 535. — Fellow servants and coemployees—p 205
- 536. — Assumption of risk—p 211
- 537. — Contributory negligence—p 222
- 538. Instructions—p 237
- 539. — Conformity to pleadings and evidence; theory of case—p 240
- 540. — Presumptions and burden of proof—p 241
- 541. — What law governs—p 242
- 542. — Relation of parties; codefendants—p 242
- 543. — Scope of employment—p 243
- 544. — Cause of injury—p 243
- 545. — Accidental or improbable injury—p 244
- 546. — Negligence of master—p 245
- 547. — Contracts affecting liability—p 252
- 548. — Negligence of fellow servants—p 252
- 549. — Assumption of risk and contributory negligence—p 253
- 550. Verdict and findings—p 262

5. New Trial, Judgment, Review, and Damages—p 264

- § 551. New Trial—p 264
- 552. Judgment—p 265
- 553. Appeal and error—p 265
- 554. Damages—p 265

V. LIABILITY FOR INJURIES TO THIRD PERSONS—p 266**A. ACTS OR OMISSIONS OF SERVANT—p 266**

- § 555. In general—p 266
- 556. Liability of master based on his contribution or participation—p 268
- 557. — Acts done by express command or assent—p 268
- 558. — Ratification by master—p 269
- 559. — Negligence in selecting or retaining servants—p 270
- 560. — Failure to instruct servant or to enforce obedience to instructions—p 272
- 561. Liability of master based on doctrine of respondeat superior—p 272
- 562. — Necessity for relation of master and servant—p 273
- 563. — When relation exists in general—p 275
- 564. — Assistants employed by servant—p 280
- 565. — Special police officers—p 283
- 566. — Servants hired or lent to or under control of third person—p 284
- 567. — Joint employment—p 292
- 568. — Termination of relation—p 292
- 569. — Persons to whom master liable—p 293
- 570. — Acts or omissions imposing liability in general—p 294
- 571. — Negligence—p 315
- 572. — Willful or malicious acts—p 320
- 573. — Criminal acts—p 322
- 574. — Acts of servant in his own behalf—p 323
- 575. — Particular application of respondeat superior doctrine—p 331
- 576. Personal liability of servant—p 345
- 577. — To third persons generally—p 345
- 578. — To fellow servants—p 348
- 579. Joint and several liability of master and servant—p 350

B. WORK OF INDEPENDENT CONTRACTOR—p 352

- § 580. In general—p 352
- 581. Test of relationship—p 353
- 582. Subcontractors—p 353
- 583. Dual capacity of servant and contractor—p 353
- 584. General rule as to nonliability of contractee for acts or omissions of contractor or his servants—p 353
- 585. Circumstances under which contractee liable—p 357
- 586. — Negligence of contractee—p 357
- 587. — Injury necessarily resulting from work—p 357
- 588. — Injuries caused by unlawful work—p 358
- 589. — Injuries caused by defective plans or specifications—p 358
- 590. — Work dangerous unless precautions observed—p 359
- 591. — Nondelegable duties of contractee—p 365
- 592. — Employment of incompetent contractor—p 368
- 593. — Active interference with work—p 369
- 594. — Ratification of contractor's acts—p 370
- 595. — Abandonment, completion, or acceptance of work—p 370
- 596. — Failure to remedy nuisance—p 371
- 597. — Joint wrongful act of contractor and contractee—p 371
- 598. — Subterfuge and identity of interest—p 371
- 599. Stipulations as exempting contractee from liability—p 371
- 600. Liability of contractee to servants of contractor or subcontractor—p 371
- 601. — Negligence of contractee or his servants—p 373

V. LIABILITY FOR INJURIES TO THIRD PERSONS—Continued

B. WORK OF INDEPENDENT CONTRACTOR—Continued

- § 602. — Retention or assumption of control of work—p 374
- 603. — Safety of place to work—p 374
- 604. — Safety of appliances for work—p 376
- 605. — Materials furnished by contractee—p 377
- 606. — Latent or potential dangers; warnings and instructions—p 377
- 607. Liability of contractee for injuries to contractor—p 379
- 608. Liability of contractors—p 380
- 609. — For acts or omissions of subcontractors—p 380
- 610. — For injuries to each other's servants—p 381

C. ACTIONS—p 383

- § 611. Nature and form—p 383
- 612. Grounds of action, conditions precedent, and defenses—p 384
- 613. Parties—p 384
- 614. Pleading—p 384
- 615. Evidence—p 391
- 616. Trial and judgment—p 407
- 617. — Questions of law and fact—p 408
- 618. — Instructions—p 418
- 619. — Verdict, findings, and judgment—p 421
- 620. Appeal and error—p 424
- 621. Costs—p 424

VI. LIABILITY OF THIRD PERSON FOR INJURIES TO SERVANT—p 424

- § 622. Rights of master—p 424
- 623. Rights of servant—p 426

VII. INTERFERENCE WITH THE RELATION BY THIRD PERSONS—p 427

A. CIVIL LIABILITY—p 427

- § 624. In general—p 427
- 625. Enticing servant to leave employment—p 428
- 626. — Under special statutory provisions—p 431
- 627. — Actions—p 432
- 628. — Damages—p 433
- 629. Intimidation, coercion, or violence to prevent service—p 434
- 630. Malicious procurement of discharge—p 434
- 631. — Actions—p 437
- 632. — Damages—p 439

B. CRIMINAL LIABILITY—p 439

- § 633. Enticing servant—p 439
- 634. — Nature and elements of offense—p 440
- 635. — Indictment, complaint, or affidavit—p 441
- 636. — Evidence—p 442
- 637. — Trial—p 442
- 638. Intimidation or coercion of servant—p 442
- 639. Bribing servant with intent to influence his relation with master—p 443

H. ACTIONS

1. IN GENERAL

§ 482. In General

At common law a servant's action against his master for a personal injury generally is an action based on negligence. The enactment of an employers' liability act usually does not abolish the servant's right of action against the master whether the right is one previously enforceable at common law or by virtue of another statute.

Generally at common law a servant's action against his master for a personal injury is for negligence,⁹⁸ and, in the absence of any controlling statutory provision, the servant's right of action, if any, is one at common law.⁹⁹ The enactment of an employers' liability act does not ordinarily abolish a right of action by a servant against his master for negligence, whether the right is one previously enforceable at common law,¹ or by virtue of some other statute.² The servant may enforce a liability created by statute, even though the injury was sustained under such circumstances that he could have maintained his action at common law,³ or under another subdivision of the same statute;⁴ but a cause of action under one provision of a statute cannot also be set out as a separate cause under another and distinct provision.⁵ Plaintiff may

rest his suit on one of several statutes, or on both, if either or both support the action.⁶

The statutory remedy, however, supersedes the common-law remedy as to all matters particularly mentioned in the statute or exclusively governed thereby,⁷ and no other notice that the action is brought under the statute is necessary than to allege facts bringing the case within it.⁸ If the statute is unconstitutional, an action, in so far as it seeks to recover thereunder, is not, of course, maintainable.⁹ An action may be maintained under a statute in force at the time of the injury, even though the statute, as subsequently revised, does not preserve a remedy for injuries occurring under the former act.¹⁰ A statutory right of action is not taken away or in any way affected by a provision imposing a penalty for the violation of the statute.¹¹

Where the pleadings are applicable to a recovery either, under the Federal Employers' Liability Act or at common law, plaintiff is not necessarily required to elect at the beginning of the trial to seek recovery either under such act or at common law.¹² Plaintiff's election at the trial, however, to base his cause of action on a common-law duty of defend-

98. NY—Schmidt v Merchants Despatch Transp Co., 280 N.Y.S. 836, 244 App Div. 606, motion granted Labieko v American Piano Co., 198 N.E. 534, 268 N.Y. 639, modified on other grounds Schmidt v Merchants Despatch Transp Co., 200 N.E. 824, 270 N.Y. 287, reargument denied 2 N.E.2d 680, 271 N.Y. 531.

Action as one in contract or in tort see Actions § 49 c (8).

Breach of duty

In the case of trespass actions for disease or injury from exposure due to the employer's negligence or violation of a statutory duty, it is the breach of the employer's duty which constitutes the "cause of action" and the disease is but the consequential damage—McIntyre v E J Lavino & Co., 25 A.2d 168, 344 Pa. 163.

99. Kan—Thoman v. Farmers & Bankers Life Ins Co., 130 P.2d 551, 155 Kan. 806.

Air-conditioned office

An action against an employer for injuries sustained by woman employee for impairment of health due to working in an air-conditioned office was not maintainable under a single isolated section of the Industrial Welfare Act, Gen St 1935, 44-639 et seq, which created an official state

board and clothed it with authority to prescribe standard conditions of labor for women in industries to which employers must conform, since neither the statute nor the state board created by the statute had prescribed standard conditions of labor for women in industry to which particular employer must conform—Thoman v. Farmers & Bankers Life Ins Co., supra.

Injury in another state

NC—Johnson v Carolina, C. & O. Ry. Co., 131 S.E. 390, 191 N.C. 75.

1. Mass—Ryalls v. Mechanics' Mills, 22 N.E. 766, 150 Mass. 190, 5 L.R.A. 687.
39 C.J. p 907 note 83.

2. U.S.—Arzuaga v. Ortiz, C.C.A. Puerto Rico, 266 F. 449.
39 C.J. p 907 note 84.

3. N.Y.—Finley v Conlan, 136 N.Y.S. 565, 152 App Div. 202.
39 C.J. p 907 note 85.

4. Ala.—Jackson Lumber Co. v. Courcy, 63 So. 749, 9 Ala.App. 488.

5. Ala.—Bridges v. Tennessee Coal, Iron & Railroad Co., 19 So. 495, 109 Ala. 287.

6. Kan.—Flanigan v. Hines, 198 P. 1077, 108 Kan. 123.

Ohio—Milburn Wagon Co. v. Gaw-

ronski, 33 Ohio Cir Ct. 1, affirmed 91 N.E. 1124, 81 Ohio St. 565.

39 C.J. p 908 note 88.

7. Iowa—Edgren v. Scandia Coal Co., 151 N.W. 519, 171 Iowa 459.
39 C.J. p 908 note 89.

Occupational injury

Common-law action for carbon bisulphide poisoning due to employee's work in glue room not ventilated as provided by Factory Act was not maintainable but recovery could be had only under the Factory Act—Calhoun v. Washington Veneer Co., 15 P.2d 943, 170 Wash. 152.

8. Or—Schulte v. Pacific Paper Co., 135 P. 527, 67 Or. 334, rehearing denied 136 P. 5, 67 Or. 334.

9. Miss—Yazoo & M. V. R. Co. v. Schraag, 36 So. 193, 84 Miss. 125.
39 C.J. p 908 note 91.

10. Ill.—Schultz v. Burnwell Coal Co., 180 Ill. App. 693.
39 C.J. p 908 note 2.

11. Ind.—D. H. Davis Coal Co. v. Pollard, 62 N.E. 492, 158 Ind. 607, 32 Am. S.R. 219.

Pa.—McEhane v. Philadelphia Quartermaster Club, 53 Pa. Super. 262.

12. Wash.—Prink v. Longview, P. & N. Ry. Co., 279 P. 1115, 153 Wash. 300.

ant may prevent plaintiff's subsequent reliance on an employers' liability act.¹³ The nature and form of proceedings under workmen's compensation acts are discussed in the C.J.S. title Workmen's Compensation Acts § 415, also 71 C.J. p 952 note 96-p 959 note 82.

§ 483. Conditions Precedent

Notice of injury and return of money received after injury as conditions precedent are discussed *infra* §§ 484, 485.

Examine Pocket Parts for later cases.

§ 484. — Return of Money Received after Injury

The injured employee is not bound under all circumstances to return payments received from the employer after the injury was sustained, as a condition precedent to the maintenance of an action.

Unless accepted in compromise of his claim, a servant is not bound, as a condition precedent to his right of action, to return money received for wages and medical attention after the accident.¹⁴

§ 485. — Notice of Injury

- a. General considerations
- b. Waiver or estoppel
- c. Form and sufficiency
- d. Service
- e. Variance

a. General Considerations

Some statutes require the giving of a notice of injury within a prescribed time as a condition precedent to a right of action under the statutes.

Some employers' liability acts require a notice of

injury to be given within a prescribed time after the injury as a condition precedent to a right of action under the statute,¹⁵ but such a statutory provision has no application to injuries occurring before it took effect.¹⁶ The requirements of the employers' liability acts apply only to those cases which lie outside the common law and within the statute, or to a case in which a servant, although he has a remedy at common law, relies on the statute alone;¹⁷ but under a general statute providing that no action for injury to a person shall be maintained unless notice of the injury is given, such notice is a condition precedent to a common-law action by an employee against his employer for injuries caused by the latter's negligence.¹⁸

Under a statutory provision excusing failure to give notice within the prescribed time if from physical or mental incapacity it is impossible to do so, mere physical incapacity to give the notice personally is not sufficient excuse if the injured employee is able to give notice through another and is mentally capable of so doing.¹⁹ Failure formally to offer in evidence a notice properly served will not defeat recovery.²⁰

Contract requirement of notice. A provision in the contract of employment requiring notice of injury to be given within a specified time will be enforced,²¹ but such a provision is ineffective and unenforceable if it is in conflict with some constitutional or statutory provision.²² The validity of such a provision is governed by the law of the place where the injury occurs.²³ If the contract provides that it may terminate at the option of either party, the adoption of a constitutional provision making any such contract void abrogates a contract previ-

13. N.Y.—Di Tommaso v. East Coast Coaling Co., 209 N.Y.S. 422, 212 App.Div. 592.

14. Ky.—Houston, Stanwood & Gamble Co. v. Bain, 163 S.W. 765, 157 Ky. 623—Continental Tobacco Co. v. Knoop, 71 S.W. 2, 24 Ky.L. 1268.

Repayment or tender of consideration as condition precedent to contesting validity of release generally see the C.J.S. title Release § 87, also 53 C.J. p 1282 note 60-p 1238 note 35.

15. Wash.—Nelson v. Young-Cole Lumber Co., 107 P. 873, 58 Wash. 58.

39 C.J. p 908 note 8.

Commencement of action as constituting notice see *infra* subdivision c of this section.

16. Wash.—Miller v. Union Mill Co., 88 P. 130, 45 Wash. 199.

17. Mass.—Dumas v. Meyer, 5 NE 2d 14, 296 Mass. 57.

39 C.J. p 909 note 10.

18. Wis.—Brunette v. Brunette, 177 N.W. 593, 171 Wis. 366.

39 C.J. p 909 note 12

Construction and operation of particular statute

(1) In an action by an employee against his employer, it has been held that a loading platform maintained by the employer constituted "premises" within meaning of statute requiring a person injured because of a defect in premises consisting in part of snow or ice thereon to notify owner of premises of such injury prior to bringing action and within a specified time after injury.—Whalen v. Railway Exp Agency, Mass., 73 NE2d 740.

(2) Such statute is not limited to snow or ice appearing at place of injury through natural causes and applies where employee stepped on a

piece of ice which was present on a loading platform as the result of loading operation.—Whalen v. Railway Exp Agency, *supra*.

19. Mass.—Cogan v. Burnham, 56 N. E. 585, 175 Mass. 391.

39 C.J. p 909 note 14.

20. N.Y.—Coleman v. Ruggles-Robinson Co., 144 N.Y.S. 272, 159 App. Div. 268, affirmed 107 NE 1076, 213 NY 683—Mullins v. Bradley Contracting Co., 150 N.Y.S. 633.

21. Kan.—Smith v. Chicago, R. I. & P. R. Co., 107 P. 635, 82 Kan. 136, 28 L.R.A., NS, 1255.

39 C.J. p 909 note 16.

22. Okl.—Brakebill v. Chicago, R. I. & P. R. Co., 131 P. 540, 37 Okl. 140.

39 C.J. p 909 note 17.

23. Tex.—Chicago, R. I. & P. R. Co. v. Thompson, 97 S.W. 459, 100 Tex. 185, 123 Am.S.R. 798, 7 L.R.A., N.S., 191.

ously made where the injury occurs after the adoption of the constitution.²⁴

b. Waiver or Estoppel

The right to notice of injury may be lost by estoppel or waiver.

The right to the statutory notice may be lost by estoppel or waiver,²⁵ and failure to make timely objection constitutes a waiver of the notice.²⁶ A contract provision for notice may also be waived,²⁷ and no consideration is necessary to support a waiver.²⁸

c. Form and Sufficiency

The notice of injury must state the particulars required with reasonable definiteness and completeness, and usually the notice must be in writing.

The notice of injury must state all the particulars required by the statute, such as the time, place, and cause of the injury, with reasonable definiteness and completeness,²⁹ although technical precision is not required.³⁰ A notice which states merely a common-law liability does not enlarge plaintiff's rights or extend defendant's liability beyond that imposed by the common law.³¹ Usually the notice of injury must be in writing.³²

Commencement of action as notice. The view has been taken that the commencement of an action under an employers' liability act within the period prescribed, and the filing of a complaint setting out the required facts, constitute a sufficient compliance with the requirement of notice,³³ and a like rule has been applied with respect to a contract provision for notice.³⁴ According to some cases, however, the giving of the statutory notice must pre-

cede the writ or commencement of the action, as shown *infra* subdivision d of this section. A complaint in a common-law action discontinued by plaintiff is not a sufficient notice to entitle him to recover in a subsequent action under the statute.³⁵

Signature. The notice must be signed by plaintiff or by some one in his behalf duly authorized by him,³⁶ but it is not necessary that the notice should state expressly that it is signed in behalf of plaintiff if such intent can reasonably be inferred from its language.³⁷

Effect of defects. Under some statutes a defect or inaccuracy in a notice of injury which does not prejudice defendant, and which is not for the purpose of misleading him, will not vitiate the notice.³⁸ Thus, a notice which is merely inaccurate in giving some detail will not defeat the action where defendant is not misled,³⁹ as where he or his representative had actual knowledge of the facts;⁴⁰ but the statute does not excuse an entire omission to state some substantial fact,⁴¹ even though defendant had knowledge of such fact apart from the notice.⁴² If the complaint is broad enough to embrace a common-law as well as a statutory liability, the court may treat the case as at common law, and defects in the notice sufficient to defeat an action under the statute will be no defense.⁴³

Waiver of defects. Defects and irregularities in the notice of injury may be waived.⁴⁴ By the express terms of some statutes, if the notice is insufficient, failure to demand further notice within a specified time after service of the original notice waives all defects therein.⁴⁵ Under a statute pro-

24. Okl.—*Brakebill v. Chicago, R I & P. R. Co.*, 131 P 540, 37 Okl 140

25. Wis.—*Maurer v. Northwestern Iron Co.*, 138 N.W. 636, 151 Wis 172

39 C.J. p 910 note 20.

Waiver of defect in notice see *infra* subdivision c of this section.

26. U.S.—*Welsh v. Barber Asphalt Pav. Co.*, Or., 167 F. 465, 93 C.C.A. 101.

27. Cal.—*Smith v. Atchison, T. & S. F. R. Co.*, 178 P 501, 179 Cal. 611. 39 C.J. p 910 note 23

28. Kan.—*Smith v. Chicago, R. I & P R Co.*, 107 P 635, 82 Kan. 136, 28 L.R.A.N.S. 1255.

29. N.Y.—*Logerto v. Central Bldg Co.*, 91 N.E. 782, 198 N.Y. 390.

39 C.J. p 910 note 25.

30. Mass.—*De Marco v. Pease*, 149 N.E. 208, 253 Mass. 499.

39 C.J. p 911 note 26.

31. N.Y.—*Lewis v. Gehlen*, 122 N Y.S. 89, 136 App.Div. 855.

39 C.J. p 911 note 27.

32. Mass.—*Greibenstein v. Stone & Webster Engineering Co.*, 95 N.E. 503, 209 Mass. 198.

39 C.J. p 910 note 24.

33. U.S.—*Welsh v. Barber Asphalt Pav. Co.*, Or., 167 F. 465, 93 C.C.A. 101.

39 C.J. p 911 note 28.

34. Tex.—*Missouri, etc., R Co v. Hawley*, 123 S.W. 726, 58 Tex.Civ. App. 143

35. N.Y.—*Chisholm v. Manhattan R. Co.*, 101 N.Y.S. 623, 116 App.Div. 320.

36. N.Y.—*Rodzboraki v. American Sugar Refining Co.*, 104 N.E. 616, 210 N.Y. 262.

39 C.J. p 911 note 30.

37. Mass.—*Menis v. Quissett Mill*, 104 N.E. 286, 216 Mass. 552.

38. Mass.—*Whalen v. New England Telephone & Telegraph Co.*, 117 N E 620, 228 Mass. 361

39 C.J. p 911 note 32.

39. N.Y.—*Finnigan v. New York*

Contracting Co., 87 N.E. 424, 194 N. Y. 244, 21 L.R.A.N.S., 238.

39 C.J. p 912 note 33.

40. Mass.—*De Marco v. Pease*, 149 N.E. 208, 253 Mass. 499

39 C.J. p 912 note 34.

41. N.Y.—*Finnigan v. New York Contracting Co.*, 87 N.E. 424, 194 N. Y. 244, 21 L.R.A.N.S., 238.

39 C.J. p 912 note 35.

42. N.Y.—*Finnigan v. New York Contracting Co.*, *supra*.

39 C.J. p 912 note 36

43. N.Y.—*Mosier v. Weil-Haskell Co.*, 121 N.Y.S. 946, 137 App.Div. 547.

39 C.J. p 912 note 37.

44. N.Y.—*Heffron v. Lackawanna Steel Co.*, 105 N.Y.S. 429, 121 App. Div. 35, affirmed 88 N.E. 1121, 194 N.Y. 598.

39 C.J. p 912 note 39.

Waiver of want of notice see *supra* subdivision b of this section.

45. N.Y.—*Spaguis v. American Locomotive Co.*, 148 N.Y.S. 377.

viding that, where a notice is defective defendant may, within a specified time after service thereof, demand a further or amended notice, an amended notice supersedes the original notice⁴⁶ as far as it is inconsistent therewith.⁴⁷ Plaintiff may begin his action as soon as the original notice is served,⁴⁸ and need not discontinue and commence a new action after the service of the amended notice.⁴⁹

d. Service

Generally the notice of injury must be served in the manner and within the time prescribed.

The notice of injury must be served in the manner⁵⁰ and within the time⁵¹ prescribed, unless reasonable excuse is shown for delay.⁵² According to some cases the giving of the statutory notice must precede the writ or commencement of the action.⁵³ The notice must be given by plaintiff or his agent⁵⁴ to defendant or his duly authorized agent.⁵⁵

An admission of service of notice is insufficient proof of service where there is no proof of the contents of the notice or of the date of service.⁵⁶

e. Variance

The evidence at the trial must conform to the facts stated in the notice of injury where the action is based solely on an employers' liability act.

Where the action is brought solely under the employers' liability act, the evidence on the trial must

conform to the facts stated in the notice of injury,⁵⁷ and a substantial variance between the notice and proof will defeat recovery.⁵⁸ Where a notice was addressed to defendant and alleged that on the date of plaintiff's injury he was in defendant's employ as a street car conductor, he could not claim on the trial that the evidence showed that he was employed by a certain railway company other than defendant, and that there was no evidence that such company and defendant were identical.⁵⁹

§ 486. Jurisdiction and Venue

Generally a state court may acquire jurisdiction of an action for an injury to an employee which occurred in another state. Various state courts have jurisdiction of actions under the Federal Employers' Liability Act, and the state practice determines the venue of such an action in a state court.

While an action for injury to an employee is transitory, and a state court has generally jurisdiction of such an action, notwithstanding the injury occurred in another state, if jurisdiction of defendant is duly obtained,⁶⁰ questions of jurisdiction and venue in actions by servants against their masters for personal injuries are sometimes governed by special statutory provisions.⁶¹ Under the Federal Employers' Liability Act, 45 U.S.C.A. § 56, plaintiff has a choice with respect to certain courts in which an action under the act may be brought.⁶² Under such act certain state courts have jurisdiction,⁶³ in-

46. N.Y.—Spagnis v. American Locomotive Co., *supra*.

47. N.Y.—Fitzgerald v. Brooklyn Inst. of Arts & Sciences, 162 N.Y.S. 625, 175 App.Div. 554—Oswald v. Underpinning & Foundation Co., 144 N.Y.S. 843, 159 App.Div. 684.

48. N.Y.—Oswald v. Underpinning & Foundation Co., *supra*—Spagnis v. American Locomotive Co., 148 N.Y.S. 377.

49. N.Y.—Oswald v. Underpinning & Foundation Co., 144 N.Y.S. 843, 159 App.Div. 684—Spagnis v. American Locomotive Co., 148 N.Y.S. 377.

50. N.Y.—Nielsen v. George A. Just Co., 155 N.Y.S. 442, 169 App.Div. 577.

39 C.J. p 912 note 46.

51. N.Y.—Connors v. Gross, 144 N.Y.S. 18.

39 C.J. p 912 note 47.

52. N.Y.—Wolven v. Gabler, 116 N.Y.S. 359, 132 App.Div. 45.

39 C.J. p 912 note 48.

53. Mass.—Finneran v. Graham, 84 N.E. 473, 198 Mass. 385, 15 Ann. Cas. 291.

39 C.J. p 912 note 47 [a].

Pleading as sufficient to satisfy requirement of notice see *supra* subdivision c of this section.

54. Mass.—Healey v. Geo. F. Blake Mfg. Co., 62 N.E. 270, 180 Mass. 270.

Mo.—Husted v. Missouri Pac. R. Co., 128 S.W. 282, 143 Mo.App. 623.

55. Mass.—Healey v. Geo. F. Blake Mfg. Co., 62 N.E. 270, 180 Mass. 270.

39 C.J. p 912 note 50.

Service on railroad

Leaving notice with person in charge of railroad depot or station was sufficient to charge railroad.—Dowell v. Chicago, R. I. & P. Ry. Co., 112 P. 136, 83 Kan. 562, affirmed Chicago, R. I. & P. Ry. v. Dowell, 33 S.Ct. 684, 229 U.S. 102, 57 L.Ed. 1090—St. Louis & S.F. R. Co. v. Burgess, 83 P. 991, 72 Kan. 454.

56. N.Y.—Inglese v. New York, N. H. & N.H.R. Co., 117 N.Y.S. 392, 13 App.Div. 198.

57. N.Y.—Finnigan v. New York Contracting Co., 87 N.E. 424, 194 N.Y. 244, 21 L.R.A.N.S. 235.

39 C.J. p 912 note 52.

58. N.Y.—Beadle v. Holbrook, Cabot & Rollins Corp., 150 N.Y.S. 203, 164 App.Div. 464.

39 C.J. p 912 note 53.

59. N.Y.—McLaughlin v. Interurban

St. R. Co., 91 N.Y.S. 883, 101 App. Div. 134.

60. U.S.—Tennessee Coal, Iron & R. Co. v. George, Ga., 34 S.Ct. 587, 233 U.S. 354, 58 L.Ed. 997, L.R.A. 1916D 685.

15 C.J. p 740 note 50 [b].

61. Ga.—Thomas v. Georgia R. & Banking Co., 38 Ga. 232.

39 C.J. p 912 notes 55, 56.

62. Utah—Petersen v. Ogden Union Ry. & Depot Co., 175 P.2d 744.

The purpose of such provisions is not only to promote employee's convenience and to enable him to choose a court in which the expense of litigation would not be prohibitive, but also to confer on him the right to select a court in which he considers it would be most advantageous for him to bring his action.—Petersen v. Ogden Union Ry. & Depot Co., *supra*.

Protection of rights

The beneficial effects of the statute should not be whittled away by courts by distinguishing between adjective and substantive rights, and adjective and substantive duties.—Petersen v. Ogden Union Ry. & Depot Co., *supra*.

63. Va.—Chesapeake & O. R. Co. v.

Meadows, 89 S.E. 244, 119 Va. 33.

39 C.J. p 914 note 57 [a] (1), (3).

cluding a competent court of the state in which defendant resides,⁶⁴ in which the action arose,⁶⁵ or in which defendant is doing business.⁶⁶ While the act does not give an absolute right to sue in the courts of any state where jurisdiction over defendant may be obtained,⁶⁷ generally a state court which has jurisdiction may not refuse to exercise it.⁶⁸ The act does not enlarge the jurisdiction of the state court over the person of defendant carrier to an extent greater than that conferred by the state.⁶⁹ The venue of actions in state courts under the act is left to the practice of the forum.⁷⁰

Concurrent jurisdiction of state and federal courts of actions under the Federal Employers' Liability Act is discussed generally in Courts § 526.

§ 487. Time to Sue and Limitations

a. General considerations

b. Computation of statutory period

a. General Considerations

An action based on an employers' liability act must be commenced within the time prescribed by such act. Generally the limitation in such acts relates not merely to the remedy but is a condition of liability created by the statute.

Where an employers' liability act prescribes the time for commencing actions arising thereunder, an action based on such act must be brought within the time so limited.⁷¹ The limitation in such acts relates not merely to the remedy, but operates as a condition of liability.⁷² There have been broad

64. Cal—Leet v. Union Pac R Co., 155 P.2d 42, 25 Cal.2d 605, 158 A.L.R. 1008, certiorari denied 65 S.Ct. 1403, two cases, 325 U.S. 866, 89 L.Ed. 1986.

65. Cal—Leet v. Union Pac R Co., supra.

66. Cal—Leet v. Union Pacific R Co., supra—In re Waits' Estate, 146 P.2d 5, 23 Cal.2d 676.

39 C.J. p. 914 note 57 [a] (2).

Defendant operating railroad under state charter

Action for injuries to an employee resulting from defendant employer's negligence in failing to comply with Federal Safety Appliance Acts could be maintained in a state court in Texas notwithstanding the injury occurred in another state, where defendant operated a railroad in Texas by virtue of a charter under the laws of Texas—St. Louis Southwestern Ry. Co. of Texas v. Smitha, 232 S.W. 494, 111 Tex. 285.

67. Ind.—Kern v. Cleveland, C. C. & St. L. Ry. Co., 185 N.E. 446, 204 Ind. 595.

68. Cal—Leet v. Union Pac. R Co., 155 P.2d 42, 25 Cal.2d 605, 158 A.L.R. 1008, certiorari denied 65 S.Ct. 1403, two cases, 325 U.S. 866, 89 L.Ed. 1986.

The doctrine of forum non conveniens does not justify refusal of a state court to exercise jurisdiction—Leet v. Union Pac. R Co., supra.

69. Ohio—Casebalt v. Kanawha & Michigan R Co., 26 Ohio Cir.Ct. N.S., 161.

70. U.S.—Miles v. Illinois Central R Co., Tenn., 62 S.Ct. 827, 315 U.S. 698, 86 L.Ed. 1129.

Minn—Doll v. Chicago Great Western R Co., 198 N.W. 1006, 159 Minn. 323.

N.Y.—Barton v. Delaware, L. & W R Co., 218 N.Y.S. 171, 218 App Div. 748.

Provisions as to place of trial in federal courts not applicable

Provisions of the act, 45 U.S.C.A. § 56, as to place of trial in actions in federal courts do not apply to an action under the act brought in a state court—Barton v. Delaware, L. & W. R Co., supra.

71. U.S.—Carpenter v. Erie R Co., CCANJ, 132 F.2d 362, certiorari denied 63 S.Ct. 983, 318 U.S. 788, 87 L.Ed. 1155—Bell v. Wabash Ry Co., CCA Mo., 58 F.2d 569.

Ark—Field v. Gazette Pub. Co., 59 S.W.2d 19, 187 Ark. 253.

Mo—Urie v. Thompson, 176 S.W.2d 471, 352 Mo. 211.

Wash.—Bennor v. Oregon-Washington R. & Nav. Co., 27 P.2d 1082, 175 Wash. 559.

39 C.J. p. 914 note 59.

Federal Employers' Liability Act construed

(1) The provision of such act, 45 U.S.C.A. § 55, that any contract, rule, regulation, or device, intended to enable a common carrier to exempt itself from liability under the act shall to that extent be void did not operate to restore the injured employee's rights which had been lost by failure to bring action within the statutory period, in a case in which the employee and the employer railroad company had entered into compensation agreement under a state workmen's compensation act—Damiano v. Pennsylvania R Co., CCA Pa., 161 F.2d 534.

(2) A street railroad company in the District of Columbia was not a common carrier by railroad within the meaning of the Federal Employers' Liability Act of 1908, 45 U.S.C.A. §§ 51-60, and, therefore, the limitation of two years fixed by such act did not apply, and the statutory period of limitations applicable in such case was the period of one year fixed by the Federal Employers' Liability Act of 1906—Mangum v. Capital Traction Co., 39 F.2d 286, 59 App D.C. 241.

State statute referring to Federal Employers' Liability Act

Section foreman's action for injuries sustained on interstate railroad which occurred while he was not engaged in interstate transportation, and hence which was not within the Federal Employers' Liability Act and which injuries occurred more than two years prior to bringing of action, was barred by limitations under state statute providing remedy for railroad employees and fixing limitation period as provided in Federal Employers' Liability Act—Schoback v. Chicago, M. & St. P. & P. R. Co., 63 P.2d 477, 188 Wash. 672, modified on other grounds 71 P.2d 548, 181 Wash. 425.

72. U.S.—Damiano v. Pennsylvania R Co., CCA Pa., 161 F.2d 534—Carpenter v. Erie R Co., CCANJ, 132 F.2d 362, certiorari denied 63 S.Ct. 983, 318 U.S. 788, 87 L.Ed. 1155—Wabash Ry. Co. v. Bridal, CCA Mo., 54 F.2d 117, certiorari denied 59 S.Ct. 63, 305 U.S. 602, 83 L.Ed. 382—Bell v. Wabash Ry. Co., CCA Mo., 58 F.2d 569—Rademaker v. E. D. Flynn Export Co., CCA Ala., 17 F.2d 15—Taylor v. Southern Ry Co., DC Ill., 6 F.Supp. 259.

Ill—Herb v. Pitcairn, 51 NE.2d 277, 384 Ill. 237, reversed on other grounds 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L.Ed. 2005.

N.Y.—Corico v. Smith, 161 N.Y.S. 293, 97 Misc. 447.

N.C.—Belch v. Seaboard Air Line Ry. Co., 96 S.E. 640, 176 N.C. 22.

Ohio—Wade v. Franklin, 200 N.E. 644, 51 Ohio App. 318—Shinn v. New York, C. & St. L. Ry. Co., 156 N.E. 280, 24 Ohio App. 113.

Okla.—Moore v. Atchison, T. & S. F. R Co., 104 P.2d 286, 187 Okl. 534.

Tex.—Wichita Falls & S. R. Co. v. Durham, 120 S.W.2d 808, 132 Tex. 143, 130 A.L.R. 1497.

statements to the effect that there cannot be a waiver of such a statute,⁷³ and verbal promises and acts by the employer which might ordinarily constitute an estoppel do not prevent the operation of the statute.⁷⁴ Thus a failure to commence the action within the statutory period cannot be excused by showing a breach of an agreement by the employer to provide employment and care for the injured employee in consideration of his not bringing suit,⁷⁵ especially where such excuse is not seasonably presented.⁷⁶

The limitation prescribed by the statute will not bar the action if the action is one at common law,⁷⁷ or plaintiff's pleading shows that the statute containing the limitations is not applicable.⁷⁸ Such statutes are not retroactive,⁷⁹ and an amendment extending the period of limitation will not affect actions pending at the time of the amendment, and which were already barred under the original act.⁸⁰

b. Computation of Statutory Period

Subject to certain qualifications the period of limitations commences to run under some employers' liability acts from the date of injury, and is not tolled by fraud or by personal disability of the injured employee. Under some acts an amendment of plaintiff's original pleading which does not state a new cause of action may relate back to the time of the commencement of the action without regard to the intervening lapse of time.

In an action by an injured employee under the Federal Employers' Liability Act, generally the cause of action accrues and the statutory limitation commences to run on the date of the injury,⁸¹

and not on the date when the result of the injury becomes apparent,⁸² but in an action under such act for disability caused by an occupational disease resulting from the employer's violation of the Federal Boiler Inspection Act, 45 U.S.C.A. § 23, the period of limitation commences to run when the employee becomes disabled or incapacitated as a result of the disease,⁸³ although it has also been held that the date when the period of limitation commences to run is not necessarily postponed until the date on which the employee or his physician ascertains the particular disease with which the employee is afflicted.⁸⁴

The limitation provision of the Federal Employers' Liability Act is not tolled or extended by fraud or concealment which prevents plaintiff from bringing the action within the statutory period,⁸⁵ nor is such provision tolled by the fact that the injured employee entered into a compensation agreement with the employer under a state workmen's compensation act.⁸⁶ Also, it is not tolled by reason of a personal disability⁸⁷ as, for example, in the case of disability of infancy⁸⁸ or insanity.⁸⁹

Commencement of action. There is a sufficient commencement of an action to satisfy the limitation provision of the Federal Employers' Liability Act where process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without the issuance of new initial process,⁹⁰ as, for example, where an action is instituted by service of process issued out of a state court which is

Utah—Peterson v. Union Pac. R. Co., 8 P.2d 627, 79 Utah 213.
39 C.J. p 914 note 62

73. U.S.—Bell v. Wabash Ry. Co., CCA Mo., 58 F.2d 569—Taylor v. Southern Ry. Co., DC Ill., 6 F. Supp. 259.

74. Wis.—Gauthier v. Atchison, T. & S. F. R. Co., 186 N.W. 619, 176 Wis 245

75. Ohio—Omin v. Baltimore & O. S. W. R. Co., 8 Ohio App 161, 27 Ohio Cir Ct. N.S. 142

Wis—Gauthier v. Atchison, T. & S. F. R. Co., 186 N.W. 619, 176 Wis 245.

76. DC—Morrison v. Baltimore & O. R. Co., 40 App D.C. 391, Ann. Cas. 1914C 1026.
39 C.J. p 914 note 66.

77. Mo—Yost v. Union Pac. R. Co., 149 S.W. 577, 245 Mo 219.
39 C.J. p 914 note 69.

78. S.C.—Hardin v. Southern R. Co., 122 S.E. 582, 128 S.C. 216.
39 C.J. p 914 note 70

79. D.C.—Morrison v. Baltimore &

O R Co., 40 App D.C. 391, Ann. Cas. 1914C 1026.

80. Ark—Louis Werner Sawmill Co. v. Dyer, 200 S.W. 281, 132 Ark 78.

81. Okl—Moore v. Atchison, T. & S. F. R. Co., 104 P.2d 236, 187 Okl. 534.

37 C.J. p 897 note 50 [b].

Computation of statutory period of limitations

Generally see Limitations of Actions §§ 108-301

In action for Death see Death § 54

Federal or state law as governing actions brought in state courts under the act see supra § 173.

82. Okl—Moore v. Atchison, T. & S. F. R. Co., supra.

83. Mo—Urie v. Thompson, 176 S.W. 2d 471, 352 Mo 211

84. Ark—Field v. Gazette Pub. Co., 59 S.W. 2d 19, 187 Ark 253.

85. U.S.—Damiano v. Pennsylvania R. Co., CCA Pa., 161 F.2d 534—Bell v. Wabash Ry. Co., CCA Mo., 58 F.2d 569.

Ohio—Wade v. Franklin, 200 N.E. 844, 51 Ohio App 318—Shinn v. New York, C. & St. L. Ry. Co., 156 N.E. 230, 24 Ohio App. 118.

Fraud not shown

Ohio—Shinn v. New York, C. & St. L. Ry. Co., 156 N.E. 230, 24 Ohio App 118

86. U.S.—Damiano v. Pennsylvania R. Co., CCA Pa., 161 F.2d 534

87. N.C.—Link v. Carolina & N. W. Ry. Co., 150 S.E. 672, 198 N.C. 78

88. N.C.—Link v. Carolina & N. W. Ry. Co., supra.

39 C.J. p 914 note 61 [a]

89. Tex.—Alvarado v. Southern Pac. Co., Civ. App., 193 S.W. 1108.

37 C.J. p 1024 note 68 [a].

90. U.S.—Herb v. Pitcairn, III, 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L.Ed. 2005—Belcher v. Louisville & N. R. Co., III, 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L.Ed. 2005.

without power to proceed to final judgment, if the state law or practice directs or permits the transfer of the cause by change of venue or otherwise to a court which has jurisdiction to hear, try, and otherwise determine the cause.⁹¹ However, the fact that the injured employee and the employer have entered into a compensation agreement under a state workmen's compensation act does not constitute commencement of the action.⁹²

Where the allegations of plaintiff's original pleading state facts authorizing recovery under the Federal Employers' Liability Act, an amendment of such pleading after the elapse of the period of limitations prescribed by such act, which does not state a new cause of action, is permissible and relates back to the commencement of the action without regard to the intervening lapse of time,⁹³ as, for example, where the amendment merely expands or amplifies what has been alleged in the original pleading.⁹⁴ The rule is otherwise, however, as to an attempted amendment introducing a new cause of action which was not set up in the original pleading, after the period of limitation prescribed by such act has elapsed.⁹⁵

The Federal Transportation Act of February 28, 1920, § 206 (f) declaring that the period of federal control of the railroads should not be computed as a part of the period of limitations in actions against carriers, did not revive an action brought under the Federal Employers' Liability Act, and which had become extinguished before the passage of the Transportation Act by expiration of the statutory period.⁹⁶

§ 488. Parties

The general rule that, in case of a joint tort, plaintiff may join as defendants the joint tort-feasors applies in an action by a servant for personal injuries.

A person not included in the class to be benefited by a statute generally does not have the right to sue for a violation of such statute.⁹⁷ The general rule that in case of a joint tort plaintiff may join all of the joint tort-feasors applies to an action by a servant to recover for personal injuries,⁹⁸ and the rule may apply even where the master's liability is statutory, while that of the servants is imposed by common law.⁹⁹

If there is no joint liability, a joinder of the parties is erroneous.¹

It has been held that, in an action against a railroad company under a state employers' liability act, another railroad company whose concurrent negligence is alleged to have contributed to the injury is improperly joined,² and that in an action by a servant, who was in the employment of two railroad companies at a point where they used a common track, and who was injured while performing a duty for one of the companies only, disconnected from any service performed for the other, the latter is not a proper party defendant.³ However, a railroad company which has purchased the road of another company, and which has assumed the payment of all claims against the vendor company, is properly joined as a codefendant with the vendor in an action for personal injuries sustained by a

91. *US—Herb v. Pitcairn*, Ill., 65 S Ct 954, 325 US 77, 89 L Ed 1483, rehearing denied 65 S Ct 1188, 325 U.S. 873, 89 L Ed 2005—*Belcher v. Louisville & N R Co.*, Ill., 65 S Ct 954, 325 US 77, 89 L Ed 1483, rehearing denied 65 S Ct 1188, 325 U.S. 893, 89 L Ed 2005

92. *US—Damiano v Pennsylvania R. Co.*, CCA Pa., 161 F 2d 534

93. *Mont—Gillespie v. Great Northern Ry. Co.*, 208 P 1059, 63 Mont 598.

39 C.J. p 958 note 60.

Amendments of pleadings affecting computation of period of limitations generally see *Limitations of Actions* §§ 279-284.

94. *US—New York Cent. & H. R. Co. v. Kinney*, N. Y., 43 S Ct 122, 260 U.S. 340, 67 L Ed 294—*Wabash Ry. Co. v. Bridal*, CCA Mo., 94 F 2d 117, certiorari denied 59 S Ct. 63, 305 U.S. 602, 83 L Ed 382.

Utah—Peterson v Union Pac R Co., 8 P 2d 627, 79 Utah 213
39 C.J. p 958 note 61.

Application of liberal rule

In this connection it has been stated that, when defendant had notice from the beginning that plaintiff was attempting to enforce a claim for specific conduct, a liberal rule should be applied to prevent the application of the statutory period of limitation—*New York Cent & H R R Co v. Kinney*, N. Y., 43 S Ct 122, 260 U.S. 340, 67 L Ed 294—*Wabash Ry. Co v. Bridal*, CCA Mo., 94 F 2d 117, certiorari denied 59 S Ct 63, 305 U.S. 602, 83 L Ed 382

95. *US—Baltimore & Ohio S W. R Co. v. Carroll*, Ind., 50 S Ct 182, 280 US 491, 74 L Ed 566—*Walker v Iowa Cent. R. Co.*, D C Iowa, 241 F 395

Mass—Hughes v. Gaston, 183 NE 752, 281 Mass. 292, certiorari denied 63 S Ct 656, 289 US 737, 77 L Ed 1485—*Renaldi v New York*

Cent. R Co., 152 NE 373, 56 Mass 337.

96. *Minn.—Kannelos v. Great Northern R. Co.*, 186 N.W. 389, 151 Minn 157

97. *NY—Stern v. Great Island Corporation*, 293 N.Y.S. 608, 250 App. Div. 115.

98. *Ill.—Republic Iron & Steel Co v Lee*, 81 NE 411, 227 Ill 246
Wyo—Stanolind Oil & Gas Co v. Bunce, 62 P 2d 1297, 51 Wyo 1.
39 C.J. p 915 note 83.

Joint liability of master and others generally see *supra* § 195.

99. *SC—Powell v. Southern R. Co.*, 96 SE 292, 110 S.C. 70

Joint liability of master and servant for injury to another servant see *infra* § 579

1. *Ill—Wendensaki v Madison Coal Corp.*, 118 NE 435, 282 Ill. 82.

2. *Ga—Western & A. R. Co. v. Smith*, 87 SE 1082, 144 Ga. 737.

3. *Iowa—Vary v. Burlington, C. R. & M R Co.*, 42 Iowa 246.

servant while in the employ of the latter.⁴ Where it appears from the evidence that a lessee is but an agent of the owner, a recovery for an injury to a servant employed in or about the property may be had of the owner.⁵

Effect of misjoinder or action against wrong

party. The presence of a superfluous defendant will not prevent a servant from obtaining such relief as he is entitled to against the proper defendant.⁶ Knowledge on the part of the actual employer that the injured employee has sued the wrong person as employer is not of itself sufficient to substitute the actual employer as a party to the action.⁷

2. PLEADING

§ 489. Declaration, Petition, or Complaint

- a. General principles
- b. Statement of cause of action generally
- c. Performance of conditions precedent
- d. Negating applicability of, and recovery under, Workmen's Compensation Act

a. General Principles

The declaration or complaint in an action by a servant for injuries should plead facts, and not conclusions, and the allegations must be consistent with one another and not duplicitous.

The general rules relating to the pleadings in civil actions are applicable to the declaration, petition, or complaint in an action by a servant against his master to recover for personal injuries.⁸ The allegations in the declaration or complaint must be consistent with one another,⁹ but in order to render the pleading bad the repugnancy must be such that proof of one state of facts as the basis for recovery will necessarily disprove another state of facts as such basis.¹⁰ Evidentiary facts need not be set out.¹¹ A complaint will be bad for duplicity,¹² but

different statements of the cause of injury¹³ and different acts of negligence¹⁴ may be alleged.

Facts, and not conclusions, should be pleaded;¹⁵ but, if the fact is one concerning which the court takes judicial notice and which need not, therefore, be specially pleaded, it may, if pleaded, be stated as a legal conclusion.¹⁶ So, a conclusion in the pleading will be subject to special demurrer only where no facts are alleged to support it, or the specific facts alleged will not warrant the inference drawn.¹⁷ Mere surplusage will not vitiate the pleading.¹⁸

Demurrer to complaint. Questions which are peculiarly for the jury will not be determined on demurrer to the declaration or complaint,¹⁹ except in plain and undisputable cases.²⁰ Where it is doubtful, under the wording of the complaint, as to whether, when the proofs are in, a cause of action will have been made out, the court may, in its discretion, overrule a demurrer to the complaint, reserving its right to sustain a demurrer to the evidence at the trial.²¹

4. Iowa—Knott v Dubuque & S. C. R. Co., 51 N.W. 57, 84 Iowa 462.

5. Ill.—Consolidated Coal Co. v. Seniger, 58 N.E. 733, 179 Ill. 370.

6. Ind.—Acme Bedford Stone Co. v. McPhetridge, 78 N.E. 833, 35 Ind. App. 79.

39 C.J. p 916 note 99.

7. Tex.—Gillette Motor Transport Co. v. Whitfield, Civ.App., 160 S.W. 2d 290.

Duty of person made party to give information of error

A railway company against which an action was erroneously brought as employer was not under a duty to inform plaintiff employee and cross-complainant that they had sued the wrong company.—Gillette Motor Transport Co. v. Whitfield, supra.

8. R.I.—Huling v. Finn, 24 A.2d 620, 67 R.I. 369.

39 C.J. p 916 notes 5-14.

9. Mo.—Rinard v. Omaha, K. C. & E. R. Co., 64 S.W. 124, 164 Mo. 270.

39 C.J. p 916 note 5.

10. Mo.—Rinard v. Omaha, K. C. & E. R. Co., supra.

39 C.J. p 916 note 6.

11. Ind.—Tippecanoe L. & T. Co. v. Cleveland, C. C. & St. L. R. Co., 104 N.E. 866, 57 Ind. App. 644, rehearing denied 106 N.E. 739, 57 Ind. App. 644.

39 C.J. p 916 note 7.

12. R.I.—Leporte v. Cook, 33 A. 700, 20 R.I. 261.

39 C.J. p 916 note 8.

13. Ala.—Louisville & N. R. Co. v. Motherhead, 12 So. 714, 97 Ala. 261.

39 C.J. p 916 note 9.

14. Wis.—Landry v. Great Northern R. Co., 140 N.W. 75, 152 Wis. 379.

39 C.J. p 916 note 10.

Allegations under statute and at common law see *infra* subdivision b of this section.

15. Ga.—Cedartown Cotton & Export Co. v. Miles, 58 S.E. 289, 2 Ga. App. 79.

16. Ga.—Cedartown Cotton & Export Co. v. Miles, supra.

17. Ga.—Tufts v. Threlkeld, 121 S.E. 120, 31 Ga. App. 452.

39 C.J. p 916 note 13.

18. Ariz.—Calumet & Arizona Mining Co. v. Chambers, 176 P. 339, 20 Ariz. 54.

Ill.—Fromm v. New Staunton Coal Co., 211 Ill. App. 3, affirmed New Staunton Coal Co. v. Fromm, 131 N.E. 594, 286 Ill. 254—Davidson v. Peoria & P. U. Ry. Co., 203 Ill. App. 498.

Ky.—McHenry Coal Co. v. Robinson, 183 S.W. 489, 169 Ky. 121.

Mo.—Hensley v. Dorr, App., 202 S.W. 3d 553.

39 C.J. p 916 note 14.

19. Ga.—American Agr. Chemical Co. v. Ryan, 103 S.E. 432, 25 Ga. App. 128—Bush v. West Yellow Pine Co., 58 S.E. 529, 2 Ga. App. 295.

20. Ga.—Western Union Telegraph Co. v. Spencer, 101 S.E. 198, 24 Ga. App. 471.

21. Puerto Rico—Gutierrez v. New

b. Statement of Cause of Action Generally

Although no express form of words is necessary, the declaration or complaint must set out with certainty and definiteness all the facts necessary to constitute a cause of action for injuries to a servant.

While no express form of words is necessary, the declaration or complaint must set out with certainty and definiteness all the facts necessary to constitute a cause of action²² sufficient to apprise a person of ordinary understanding of what he will be required to meet,²³ although the same degree of certainty is not required as to facts peculiarly within defendant's knowledge²⁴. The allegations must clearly show the existence of the relation of mas-

ter and servant at the time of the injury,²⁵ and a pleading which alleges that plaintiff was employed by defendant's agent, instead of alleging that he was employed by defendant, is demurrable²⁶. On the other hand, it has been held that it is not necessary to state whether plaintiff was an employee or a trespasser.²⁷ It is not necessary, of course, to allege the relationship of the parties where the action is brought under a statute creating a liability irrespective of such relationship.²⁸

Plaintiff must also allege the nature and circumstances of the injury²⁹ in so far as they are material features of the negligence complained of,³⁰ the right of plaintiff to be where he was when in-

York & Puerto Rico S S Co, 4 Puerto Rico Fed 510

22. Ala.—Southern R Co v Bunt, 32 So 507, 131 Ala 591

SC—Hubbard v Rowe, 5 SE 2d 187, 192 SC 12

W Va.—Payne v Wright Bros Co, 109 SE 779, 89 W. Va. 564.

39 C J p 916 note 15

Continuing injury

Where the nature of the action is such that it embraces a substantial period of time, and the act complained of and the employment are continuous, plaintiff may allege facts material thereto regardless of how long before the statutory period of limitations they occurred—Hughes v Eureka Flint & Spar Co., 26 A 2d 567, 20 N J Misc 314

"Humanitarian" rule

Fact that amended petition in action arising out of intersectional automobile collision injuring servant used the words "in and approaching a place of danger," instead of "in and approaching a place of peril," was immaterial in determining whether humanitarian rule was applicable, since "danger" and "peril" meant the same thing, and the petition stated a cause of action under the rule—Hensley v. Dorr, Mo. App., 202 SW 2d 553

Several defendants

Where the writ, in an action for injuries to an employee, made two corporations parties defendant, and the declaration charged "the said defendant" with the ownership and operation of the railroad causing the injury, the declaration was demurrable by one of the corporations on the refusal of the court to dismiss the action as to the other.—Johnson v Bennington & N A. St. Ry. Co., 90 A. 507, 87 Vt 519.

Allegations held sufficient

Ga.—Moore v. Ross, 153 S.E. 575, 41 Ga. App. 509.

Mo.—Choate v. City of Springfield, App. 74 SW 2d 889—Lugar v Missouri Pac R. Co., 283 S.W. 738, 221

Mo App 678—Woosley v Wabash Ry Co, App. 274 SW 871

NY—Scheerens v E W Edwards & Son, 232 NYS 557, 133 Misc 616

NC—Spake v Pearlman, 21 SE 2d 881, 222 NC 62

Pa.—Simon v Allegheny-Pittsburgh Coal Co, 34 Pa Dist & Co. 643, 87 Pittsb Leg J 41

RI—Huling v Finn, 24 A.2d 630, 67 RI 369

W Va.—Holton v. Clayco Gas Co, 145 SE 637, 106 W Va 394.

39 C J p 916 note 15 [a]

Allegations held insufficient

(1) Generally—Stith Coal Co. v Sanford, 68 So 990, 192 Ala. 601, 15 A L R. 1423—39 C.J. p 916 note 15 [b]

(2) Against demurrer—Panhandle & S F Ry. Co v Sledge, Tex Civ App. 31 SW 2d 146, affirmed Sledge v Panhandle & S F. Ry. Co, Com App. 45 SW 2d 1112

23. Ind.—Domestic Block Coal Co v. De Arme, 100 NE 675, 179 Ind 592, rehearing denied 102 NE 99, 179 Ind 592—Knickerbocker Ice Co v Smith, 91 NE 28, 45 Ind App 445.

Pa.—Kashuba v. Glen Alden Coal Co, Com Pl. 87 Luz Leg Reg 425

24. Tenn.—Lowry v Southern R Co, 179 SW 125, 132 Tenn 630

Tex.—Missouri, K. & T R Co v Hawley, 123 SW. 726, 58 Tex Civ App 143

25. Fla.—Peery v. Mershon, 5 So 2d 694, 149 Fla 351.

39 C J p 917 note 18

Relation held sufficiently alleged

(1) Generally—Marsh v Williams, Tex Civ App. 154 SW 2d 201, error refused—39 C J p 917 note 18 [e].

(2) In action for injuries sustained by plaintiff while riding in automobile, complaint alleging that plaintiff was employed by defendants as nurse and governess for their children and that plaintiff, while acting within scope of her employment, was seated in the automobile as directed by defendant wife when

accident occurred sufficiently alleged that plaintiff was employed jointly by husband and wife—Peery v. Mershon, 5 So 2d 694, 149 Fla 351.

Relation held insufficiently alleged

Fla.—Kasanof v Embury-Riddle Co., 26 So 2d 889, 157 Fla 677

39 C J p 917 note 18 [f]

26. RI—Whalan v. Whipple, 13 A. 107.

SD—Phillips v International Harvester Co, 117 NW. 146, 22 S.D. 272

27. Mo.—Reardon v Missouri Pac. R Co, 21 SW 731, 114 Mo 384.

Va.—Jones v Old Dominion Cotton Mills, 82 Va 140, 3 Am SR 92.

28. Ala.—Empire Coal Co. v Bowen, 70 So. 283, 195 Ala 348.

39 C J p 918 note 21

Sufficiency of allegations in actions for breach of statutory duty see infra § 490 j.

29. Mo.—Bennett v. Myres, App., 21 SW 2d. 943

39 C J p 918 note 22.

Allegations held sufficient

Mo.—Bennett v Myres, supra, 19 C J. p 918 note 22 [a]

Allegations held insufficient

Ga.—Southern Ry Co v Jenkins, 147 SE 800, 39 Ga App. 585.

39 C J p 918 note 22 [b]

30. NC—Dark v. Johnson, 36 SE 2d 237, 225 NC 651

39 C J p 918 note 23

Facts held not material

(1) Generally—Central of Georgia Ry Co v Summers, 129 SE 659, 34 Ga App 340—39 C J p 918 note 23 [a].

(2) Where plaintiff alleged that intestate was employed by defendant to install electrical equipment on truck, and as part of intestate's duty was riding on the truck when its driver negligently ran the truck off the road, failure to show with exactness for what purpose or in what capacity intestate was on truck at time of injury did not defeat right of action for death since gravamen

jured,³¹ and that he was in the performance of the duties of his service.³²

Statutory or common-law action. The complaint may be so framed as to enable plaintiff to recover either under the federal or state statute, or at common law,³³ but the allegation should be sufficient to enable the court to determine what statute is relied on.³⁴ A complaint, although insufficient under the federal statute, may be sufficient under the state statute or at common law,³⁵ and, if the facts alleged do not make out a cause of action either under the state or federal employers' liability act it will be regarded as declaring on a breach of common-law duty, if the allegations are sufficient in that respect.³⁶

c. Performance of Conditions Precedent

The declaration or complaint must allege the performance of conditions precedent to the right of action for injuries to a servant.

of cause of action was defendant's alleged breach of duty—*Dark v. Johnson*, 36 S.E.2d 237, 225 N.C. 651.

31. Fla.—*Bryant v. Moss Packing Co.*, 158 So. 713, 118 Fla. 176.
39 C.J. p 918 note 24
Negating contributory negligence generally see infra § 493

32. Ala.—*Seaboard Air Line Ry. Co. v. Hackney*, 115 So. 869, 217 Ala. 332.
39 C.J. p 919 note 25.

Use of automobile

Without allegation that automobile furnished employee was being used in employer's business, accident must be assumed to have occurred when automobile was used in employee's private affairs—*Lutz's Adm'r v. W. J. Hughes & Sons Co.*, 24 S.W.2d 578, 232 Ky. 675.

Allegations held sufficient

U.S.—*Geneva Mill Co. v. Andrews*, CCA Fla., 11 F.2d 924.

Ala.—*Seaboard Air Line Ry. Co. v. Hackney*, 115 So. 869, 217 Ala. 332.
Fla.—*Peery v. Merahon*, 5 So.2d 694, 149 Fla. 351.

Mo.—*Cushulas v. Schroeder & Treymayne*, 22 S.W.2d 872, 225 Mo. App. 567, certiorari quashed State ex rel *Schroeder & Treymayne v. Haid*, 41 S.W.2d 789, 328 Mo. 807.
39 C.J. p 919 note 25 [a]

33. Ala.—*Atlantic Coast Line R. Co. v. Jones*, 63 So. 693, 9 Ala.App. 499, reversed on other grounds Ex parte *Atlantic Coast Line R. Co.*, 67 So. 256, 190 Ala. 132.

SC.—*Jenkins v. Southern Ry.—Carolina Division*, 150 S.E. 123, 152 S.C. 386, 66 L.R.A. 416.

W.Va.—*Shaffer v. Western Maryland*

Ry. Co., 116 S.E. 747, 93 W.Va. 300.

39 C.J. p 919 note 27

Allegations as to violation of statutory duty see infra § 490 j

34. Ala.—Ex parte *Atlantic Coast Line R. Co.*, 67 So. 256, 190 Ala. 132.

35. Mass.—*Dewing v. New York Cent. R. Co.*, 133 N.E. 754, 251 Mass. 351.

Tex.—*Texas & N. O. R. Co. v. Churchill*, Civ App., 74 S.W.2d 1030, error dismissed—*Chicago, R. I. & G. Ry. Co. v. Bernard*, Civ App., 275 S.W. 505.

Wash.—*Baird v. Northern Pac. Ry. Co.*, 133 P. 325, 78 Wash. 67.

39 C.J. p 919 note 29.

36. Tex.—*Chicago, R. I. & G. Ry. Co. v. Bernard*, Civ App., 275 S.W. 505.

39 C.J. p 920 note 30

37. Mass.—*Whalen v. Railway Exp. Agency*, 73 N.E.2d 740.

39 C.J. p 920 notes 33–39.

38. Mass.—*Whalen v. Railway Exp. Agency*, supra.

39 C.J. p 920 note 33

Necessity and sufficiency of notice see supra § 485.

39. Puerto Rico.—*Dinkins v. Prescott & Mehrhoff Co.*, 7 Puerto Rico Fed. 271.

39 C.J. p 920 note 34

40. N.Y.—*Gmaehle v. Rosenberg*, 70 N.E. 411, 178 N.Y. 147.

39 C.J. p 920 note 35

41. N.Y.—*Uss v. Crane Co.*, 123 N.Y.S. 94, 138 App.Div. 266.

42. Mass.—*Steffe v. Old Colony R. Co.*, 80 N.E. 1137, 156 Mass. 262.

43. U.S.—*Carpenter v. Erie R. Co.*, C.C.A.N.J., 132 F.2d 362, certiorari

The declaration or complaint must allege the performance of any condition precedent to the right of action,³⁷ such as the giving of notice of injury,³⁸ in writing,³⁹ where such notice is a prerequisite.⁴⁰ It has been held that plaintiff's pleading must also state the date of service of notice,⁴¹ although some authorities have held that the date need not be alleged.⁴² Where the statute makes the bringing of the action within a specified time a condition of liability, plaintiff's pleading must allege that the action was brought within such time.⁴³ Where the limitation provision operates as a condition of liability, the defense of limitations may be raised by demurrer⁴⁴ and need not be specially pleaded.⁴⁵

d. Negating Applicability of, and Recovery under, Workmen's Compensation Act

In some jurisdictions, but not in others, it is necessary to allege that the employer had elected not to accept the provision of the Workmen's Compensation Act.

denied 63 S.Ct. 933, 318 U.S. 788, 37 L.Ed. 1155—*American R. Co. v. Coronas*, Puerto Rico, 230 F. 545, 144 CCA 599, L.R.A. 1916E 1095.
N.Y.—*Corico v. Smith*, 161 N.Y.S. 293, 97 Misc. 447.

44. D.C.—*Morrison v. Baltimore & O. R. Co.*, 40 App.D.C. 391, Ann Cas. 1914C 1026.

39 C.J. p 915 note 79.

Action under Federal Employers' Liability Act

In an action under the Federal Employers' Liability Act, a complaint or petition which shows on its face that the statutory period of limitations has run is subject to demurrer.

Okl.—*Moore v. Atchison, T. & S. F. R. Co.*, 104 P.2d 236, 187 Okl. 534.
Utah—*Peterson v. Union Pac. R. Co.*, 8 P.2d 627, 79 Utah 213.

45. U.S.—*Atlantic Coast Line R. Co. v. Burnette*, N.C., 36 S.Ct. 75, 239 U.S. 199, 60 L.Ed. 226.

Fla.—*Seaboard Air Line R. Co. v. Hess*, 74 So. 500, 73 Fla. 494.

Action under Federal Employers' Liability Act

(1) Generally.

Ala.—*Louisville & N. R. Co. v. Echols*, 34 So. 827, 203 Ala. 627.

Utah—*Peterson v. Union Pac. R. Co.*, 8 P.2d 627, 79 Utah 213.
39 C.J. p 915 note 80

(2) More specifically it has been stated that in an action under the act it is unnecessary to plead as a defense provision precluding maintenance of action more than specified time subsequent to accrual of cause of action provided sufficient facts appear to raise defense—*Wichita Falls & S. R. Co. v. Durham*, 120 S.W.2d 803, 132 Tex. 143, 120 A.L.R. 1497.

In some jurisdictions the complaint in an action by an employee for personal injuries need not allege that the employer had elected not to accept the provisions of the Workmen's Compensation Act⁴⁶ In other jurisdictions such fact must be alleged⁴⁷ in a case which would otherwise come within the act;⁴⁸ but it need not be alleged that the employee had or had not accepted the act, since the rejection by the employer precluded the former from the right of election.⁴⁹ The fact, however, that the employer's rejection of the provisions of the act is pleaded does not show a right of recovery by action, unless negligence on the part of defendant is also pleaded.⁵⁰ Where the injury was sustained in another state under circumstances which would have limited the employee to compensation provided by the Workmen's Compensation Act if the injury had occurred in the state of the forum, the complaint must show that the action could be maintained under the laws of the state where the accident occurred.⁵¹

Negating recovery under workmen's compensation act. In a common-law action for injuries to a servant the declaration or complaint need not allege that plaintiff has not recovered benefits under the Workmen's Compensation Act, that being a matter of defense for defendant to allege and prove.⁵²

§ 490. — Negligence of Master

- a. Duty owed to servant
- b. Acts constituting negligence or breach of duty in general
- c. Defective or dangerous machinery, appliances, or places for work
- d. Methods of work, rules, and orders
- e. Failure to warn or instruct servant
- f. Negligence in employment or retention of servants

- g. Negligence in employment of insufficient force
- h. Acts or omissions through agents or representatives
- i. Connection between negligence charged and injury sustained
- j. Liability imposed by statute, and violation of statutory duty
- k. Willful or wanton injury

a. Duty Owed to Servant

The declaration or complaint in an action for injuries must show the existence of a particular legal duty owed by the master to the servant.

In an action by a servant to recover for personal injuries, the declaration or complaint must show the existence of a particular legal duty owed by the master to the servant,⁵³ and a mere allegation of duty without stating the facts on which it rests is insufficient.⁵⁴ The duty violated may be expressly pleaded⁵⁵ or may be implied from the facts directly averred,⁵⁶ but it cannot be implied from a mere allegation that an act or omission was negligent.⁵⁷ Where facts are alleged from which the law implies a duty on the part of the master, the complaint need not allege why such duty arises.⁵⁸

Degree of care required. It has been held that a demurrer will lie to a declaration or complaint which charges a higher degree of care than the law imposes.⁵⁹ On the other hand, it has been held that, where the law will imply a legal duty from the facts stated, the statement of too high a duty is mere surplusage which will not render the pleading demurrable.⁶⁰

b. Acts Constituting Negligence or Breach of Duty in General

The declaration, petition, or complaint must contain, in an action by a servant for personal injury, an ex-

46. Mass.—Tardiff v Lynn Sand & Stone Co, 193 N.E. 56, 288 Mass. 472.

39 C.J. p 920 note 40.

47. Ill.—Beveridge v Illinois Fuel Co, 119 N.E. 46, 283 Ill. 81.

39 C.J. p 920 note 41.

48. N.Y.—Nilsen v American Bridge Co, 116 N.E. 383, 221 N.Y. 12.

39 C.J. p 920 note 42.

49. Ill.—Favro v. Superior Coal Co, 188 Ill. App. 203.

39 C.J. p 920 note 43.

50. Ky.—Woodrow v High Splint Coal Co, 238 S.W. 184, 194 Ky. 30.

39 C.J. p 920 note 44.

51. Wash.—Freyman v. Day, 182 P. 940, 108 Wash. 71.

52. Nev.—Day v. Cloke, 215 P. 386, 47 Nev. 75.

53. Fla.—Bryant v Moss Packing Co, 153 So. 713, 118 Fla. 176.

Okl.—Traders Compress Co v Steigler, 169 P.2d 205, 197 Okl. 204—Kansas City, M. & O Ry Co v Bishop, 282 P. 1091, 140 Okl. 277—Chicago, R. I. & P. Ry Co v McIntire, 119 P. 1008, 29 Okl. 797.

Pa.—Kashuba v Glen Alden Coal Co, Com Pl., 37 Lux. Leg. Reg. 425.

W. Va.—Hudson v Norfolk & W. Ry Co, 146 S.E. 525, 106 W. Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 806, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79.

39 C.J. p 920 note 48.

Allegations held sufficient

N.M.—Maestas v. Alameda Cattle Co, 14 P.2d 733, 36 N.M. 223.

39 C.J. p 920 note 48 [a].

54. Cal.—Colen v Gladding, McBean & Co, 136 P. 289, 168 Cal. 364.

39 C.J. p 921 note 49.

55. Me.—Glidden v Bath Iron

Works Corp, 54 A.2d 528.

56. Me.—Glidden v Bath Iron

Works Corp, supra.

39 C.J. p 921 note 50.

57. Ala.—Southern Cotton Oil Co v Woods, 78 So. 907, 201 Ala. 553.

39 C.J. p 921 note 51.

58. Ind.—Jackson Hill Coal Co v. Van Hantenryck, 120 N.E. 664,

69 Ind. App. 142.

59. U.S.—Canter v Colorado United Min. Co, C.C. Colo., 35 F. 41,

39 C.J. p 921 note 53.

60. W. Va.—Jaeger v City Ry Co., 78 S.E. 69, 72 W. Va. 307.

39 C.J. p 922 note 54.

press averment of negligence or breach of duty by defendant, or such fact must appear by legal intendment from the facts alleged.

The general rules governing the sufficiency of the declaration, petition, or complaint in actions for injuries caused by negligence are applicable in an action by a servant for personal injuries sustained through the negligence of the master.⁶¹ The declaration, petition, or complaint must contain an express averment of negligence or breach of duty on the part of defendant, or such fact must appear by legal intendment from the facts alleged.⁶² However, while it is not sufficient to charge negligence in general terms as a conclusion of law, and while it must be shown in what the negligence complained of consisted,⁶³ the particular acts or omissions which constitute and go to prove the negligence need not be averred, it being generally sufficient merely to state such facts as will make it appear to the court what the act of negligence alleged to have caused the injury was,⁶⁴ and it is only when the acts and things alleged are such that they cannot constitute negligence under any possible state of facts or circumstances which could be proved under the

averments in the declaration or complaint that the court will, after verdict and judgment, say, as a matter of law, that negligence was not sufficiently pleaded.⁶⁵ Specifications of negligence may be pleaded sufficient to meet any probable condition which might have caused the injury.⁶⁶

c. Defective or Dangerous Machinery, Appliances, or Places for Work

- (1) In general
- (2) Knowledge of master
- (3) Ownership, possession, or control of instrumentalities or places

(1) In General

In an action for injury resulting from defective or dangerous machinery, appliances, or places for work, the declaration, petition, or complaint must allege with a reasonable degree of particularity facts showing the existence and nature of the defect and the master's negligence with respect thereto.

A servant suing for injury resulting from defective or dangerous machinery, appliances, or places for work, must allege with a reasonable degree of

61. Ariz.—*Bowers v. J. D. Halstead Lumber Co.*, 236 P. 124, 28 Ariz. 122.

39 C.J. p. 922 notes 58-60, p. 923 notes 61, 62.

62. Ariz.—*Bowers v. J. D. Halstead Lumber Co.*, *supra*.

Ky.—*Southern Mining Co. v. Saylor*, 95 S.W.2d 236, 264 Ky. 655—*Mannington Fuel Co. v. Ray's Adm'x.*, 68 S.W.2d 933, 250 Ky. 736.

Me.—*Glidden v. Bath Iron Works Corp.*, 54 A.2d 528.

Md.—*William B. Tilghman Co. v. Conway*, 133 A. 593, 150 Md. 525.

Mo.—*Hamilton v. Standard Oil Co. of Indiana*, 19 S.W.2d 679, 323 Mo. 331—*Barnes v. Commercial Auto Body Co.*, App., 13 S.W.2d 553.

N.M.—*Maestas v. Alameda Cattle Co.*, 14 P.2d 733, 36 N.M. 323.

Okla.—*Traders Compress Co. v. Steigler*, 169 P.2d 205, 197 Okl. 204—*Kansas City, M. & O. Ry. Co. v. Bishop*, 282 P. 1091, 140 Okl. 277.

—*Chicago, R. I. & P. Ry. Co. v. McIntire*, 119 P. 1008, 29 Okl. 797.

Tex.—*Cate v. Orific Gasoline Production Co.*, Civ. App., 78 S.W.2d 635, error refused.

W.Va.—*Hudson v. Norfolk & W. Ry. Co.*, 146 S.E. 525, 106 W.Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 78—*Payne v. Wright Bros. Co.*, 109 S.E. 779, 39 W.Va. 564.

39 C.J. p. 922 note 58.

Complaint held not demurrable.

Complaint alleging that decedent was discharging duties as employee

of defendant railroad company when injured was not demurrable as showing no breach of duty to decedent, whom defendant owed duty not to injure negligently—*Alabama Great Southern Ry. Co. v. Norrell*, 143 So. 904, 225 Ala. 503.

63. U.S.—*Self v. Sinclair Refining Co.*, C.C.A. Fla., 69 F.2d 948.

Pa.—*Wascavage v. Susquehanna Collieries Co.*, Comp. Pl., 15 Northumb. Leg. J. 59.

39 C.J. p. 922 note 59.

Allegations held insufficient

(1) Generally.—*Stucker v. American Stores Co.*, 159 A. 848, 5 W.W. Harr., Del., 586, affirmed *Stucker v. American Stores Corporation*, 171 A. 230, 5 W.W. Harr. 594—39 C.J. p. 59 note 59 [a].

(2) Count of declaration for death of employee overcome by gasoline fumes when descending stairway to floating roof of gasoline tank was demurrable in not alleging negligence because of employer's failure to have at hand the means of rescue and not alleging that helper, if present, could have saved employee's life—*Self v. Sinclair Refining Co.*, C.C.A. Fla., 69 F.2d 948.

64. Ala.—*Louisville & N. R. Co. v. Holland*, 51 So. 365, 164 Ala. 73, 137 Am. S.R. 25.

Ind.—*Baltimore & O. S. W. R. Co. v. Berdon*, 145 N.E. 2, 195 Ind. 265, rehearing denied 150 N.E. 407, 195 Ind. 265, and certiorari denied 45 S.Ct. 225, 266 U.S. 633, 69 L.Ed. 479.

Tex.—*Wilson Hydraulic Casing Pulling Mach. Co. v. James*, Civ. App., 271 S.W. 424.

W.Va.—*Hudson v. Norfolk & W. Ry. Co.*, 146 S.E. 525, 106 W.Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79.

39 C.J. p. 922 note 60.

Allegations held sufficient

U.S.—*Kane v. Federal Match Corporation*, D.C. Pa., 5 F.Supp. 507.

Ala.—*Birmingham Belt R. Co. v. Hendrix*, 110 So. 312, 215 Ala. 285, certiorari denied 47 S.Ct. 472, 273 U.S. 758, 71 L.Ed. 877.

Ky.—*Patton v. Stagall*, 295 S.W. 379, 220 Ky. 674.

Mo.—*State ex rel. Schroeder & Tremayne v. Haid*, 41 S.W.2d 789, 328 Mo. 807—*Horn v. Kansas City Power & Light Co.*, 274 S.W. 673—

Kenyon v. St. Joseph Ry. Light, Heat & Power Co., 298 S.W. 246, 221 Mo. App. 1014—*Barber v. Missouri Boiler Works Co.*, App., 297 S.W. 124—*Miller v. Walsh Fire Clay Products Co.*, 282 S.W. 141, 219 Mo. App. 590.

S.C.—*Piner v. Standard Oil Co. of New Jersey*, 161 S.E. 504, 163 S.C. 302.

39 C.J. p. 922 note 60 [a].

65. Utah.—*Mangum v. Bullion Beck & Champion Min. Co.*, 60 P. 334, 15 Utah 534.

39 C.J. p. 922 note 61.

66. Conn.—*Schnare v. Ryan-Unionmack Co.*, 90 A. 933, 28 Conn. 225.

particularity, although not necessarily in detail, facts showing the existence and nature of the defect and the master's negligence with respect thereto,⁶⁷ but, if the allegations of the declaration or complaint show with reasonable certainty the existence and nature of the defect and that the mas-

ter was negligent, there need be no express allegation of negligence.⁶⁸

A complaint alleging negligent failure to furnish proper appliances need not specify the character or kind of appliances which should have been furnished,⁶⁹ and, where a pleading alleges the defective

67. Fla.—American Box & Lumber Co v Chandler, 138 So 29, 102 Fla. 907

Ky.—Mannington Fuel Co v Ray's Adm'x, 63 SW 2d 933, 250 Ky 736 —Kelly & Shields v. Miller, 33 S W 2d 662, 236 Ky 693—S K Jones Const. Co v Hendley, 5 SW 2d 482, 224 Ky 83—Louisville & N R Co v Lewis, 278 SW. 143, 211 Ky 830

39 C.J. p 923 note 64.

Allegation as to causal connection between defect and injury see infra subdivision 1 of this section.

Inconsistent causes of action

A count for defective machinery is not inconsistent with one for failure to notify an employee of the danger of using it, if he was ignorant of its condition—Ruddy v George F Blake Mfg. Co., 91 NE 310, 205 Mass 172

Existence of emergency

In action by saleswoman against employer for injuries sustained when her hand was crushed in door of women's toilet allegedly because employer negligently failed to equip door with knob on inside, spring, or other contrivance so that it might be closed in safety, allegations of declaration must be taken in connection with existence of emergency incident to use of facilities—Cook v. Lewis K Liggett Co., 178 So 359, 127 Fla. 369

Violent animal

An employee seeking to recover from employer for injuries sustained by act of an animal was required to allege that animal was vicious and liable to inflict injury on others—Schnell v. Howitt, 76 P 2d 1130, 158 Or 586—39 C.J. p 923 note 64 [a].

General allegations limited by specific allegations

S.C.—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 192 S.C. 156.

Allegations held sufficient

U.S.—Self v. Sinclair Refining Co., C.C.A.Fla., 69 F 2d 948

Ala.—Gentry v Swann Chemical Co., 174 So 530, 234 Ala 313—Smith v Kennedy, 108 So 564, 214 Ala 427

Fla.—Peery v Marshon, 5 So 2d 694, 149 Fla 351—Putnam Lumber Co v Berry, 2 So 2d 133, 146 Fla 595

City of Hollywood v. Blair, 186 So 813, 136 Fla. 100—Cook v Lewis K. Liggett Co., 178 So. 159, 127 Fla. 369—American Box & Lumber

Co v Chandler, 165 So 382, 122 Fla 169

Ga.—Alford v Zeigler, 16 S.E.2d 69, 65 Ga App 294—Atlanta, B & C R Co v King, 189 S.E. 580, 55 Ga App 1—Southern R. Co v. Cowan, 183 S.E. 331, 52 Ga App 360

Ky.—Morris v High Splint Coal Co., 103 S.W.2d 696, 268 Ky 49—Mannington Fuel Co v Ray's Adm'x, 63 S.W.2d 933, 250 Ky 736

Mass.—Dumas v Meyer, 5 N.E.2d 14, 296 Mass 57.

Minn.—Gow Co v Hunter, 163 So 264, 175 Miss 896

Mo.—Gray v Doe Run Lead Co., 53 S.W.2d 877, 331 Mo 481—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448—Eaton v Wallace, 287 S.W. 614, 48 A.L.R. 1291—Kramer v Kansas City Power & Light Co., 279 S.W. 43, 311 Mo 369—Smith v American Car & Foundry Co., App., 288 S.W. 932

—Harrison v. American Car & Foundry Co., App., 280 S.W. 60, quashed State ex rel American Car & Foundry Co v Daus, 288 S.W. 13, 315 Mo 1229 and reheard Harrison v American Car & Foundry Co., App., 296 S.W. 814

Mont.—Morelli v. Great Northern Ry Co., 300 P 210, 89 Mont 603

—Titus v Anaconda Copper Mining Co., 133 P 677, 47 Mont 583

N.Y.—Speziale v. National Brass Mfg. Co., 294 N.Y.S. 678, 162 Misc. 261.

Ohio.—Triff v. National Bronze & Aluminum Foundry Co., 20 N.E.2d 232, 135 Ohio St 191, 121 A.L.R. 1181

Okl.—Southwest Stone Co v. Hughes, 177 P 2d 489, 193 Okl 257—Weatherman v. Victor Gasoline Co., 130 P 2d 527, 191 Okl 423—Jamison v Independent Oil & Gas Co., 12 P 2d 697, 158 Okl. 123—Spruce v Chicago, R I & P Ry Co., 281 P. 586, 139 Okl 123

Pa.—Wascavage v. Susquehanna Collieries Co., Com Pl., 15 Northumb Leg.J. 59

S.C.—Montgomery v. Conway Lumber Co., 172 S.E. 620, 171 S.C. 433

—Gowns v. Watts Mill, 133 S.E. 550, 135 S.C. 163

Tex.—Murdoch v. Llewellyn, Civ.App., 8 S.W.2d 818

Va.—Roberts v. Southern Ry Co., 144 S.E. 863, 151 Va 815, rehearing denied 145 S.E. 255, 151 Va 815

39 C.J. p 923 note 64 [e].

Allegations held insufficient

(1) Generally

Ariz.—Wylie v. Moore, 84 P 2d 450, 52 Ariz. 537

Ga.—Davis v Georgia Coating Clay Co., 11 S.E.2d 60, 63 Ga App 265

—Powell v. Shurling, 179 S.E. 653, 51 Ga App. 67—Newman v. Griffin Foundry & Machine Co., 144 S.E. 386, 38 Ga App 518

Ill.—Caldon v National Malleable Castings Co., 182 Ill App 458

Kan.—Fishburn v. International Harvester Co., 138 P 2d 471, 157 Kan. 43—Dodd v Wilson & Co of Kansas, 88 P 2d 1116, 149 Kan 605

Ky.—Ray v United Elkhorn Coal Co., 51 S.W.2d 248, 244 Ky 417—Lutz's Adm'r v W. J. Hughes & Sons Co., 24 S.W.2d 578, 232 Ky 675

Mich.—Newell v Detroit, T & I R. Co., 205 N.W. 579, 232 Mich 538.

Miss.—Mitchell v. Brooks, 147 So. 680, 165 Miss 826

Mo.—Missouri Dist Telegraph Co v. Southwestern Bell Telephone Co., 93 S.W.2d 19, 338 Mo 692—Hopkins v American Car & Foundry Co., App., 295 S.W. 841, opinion quashed State ex rel. Hopkins v Daus, 6 S.W.2d 893, 319 Mo 733.

N.C.—Key v. Home Chair Co., 156 S.E. 135, 199 N.C. 794.

Pa.—Kashuba v. Glen Alden Coal Co., Com Pl., 37 Luz Leg Reg 425.

S.C.—Steinmeyer v Marine Hotel Corporation, 140 S.E. 695, 143 S.C. 358.

39 C.J. p 923 note 64 [f].

(2) A petition alleging that servant was injured as result of a defect in a claw hammer furnished to servant as a tool by master and showing that servant had equal opportunity with master for ascertaining safety and suitability of hammer did not state a cause of action—Leiserer v. Thompson, 122 P 2d 387, 190 Okl. 233

(3) Vice-principal, suing, cannot allege as negligence defects or omissions which it was his duty, as vice-principal, to remedy—Sible v. Wells Bros Co., 148 Ill App 109.

62. Cal.—Perry v. Angelus Hospital Ass'n, 156 P 449, 172 Cal. 311.

Fla.—Logan Coal & Supply Co. v. Hasty, 67 So 72, 68 Fla 589.

69. R.I.—Devaney v. American Electrical Works, 90 A. 417.

39 C.J. p 926 note 66.

loading of a car, it need not state the manner in which it should have been loaded in the exercise of reasonable care.⁷⁰ It has been held, however, that a petition which fails to allege the existence of a safety device capable of preventing the injury is demurrable.⁷¹ A complaint alleging failure to furnish a safe place for work need not charge that the master contracted to do so.⁷² Plaintiff is not required to negative every fact which would tend to establish defendant's freedom from negligence.⁷³

Employment of minor. The declaration or complaint in an action by an immature employee having little or no experience in the work is not defective because it appears from the allegations that the injury resulted from a simple tool.⁷⁴ However, where the action is based on the employment of a minor in a dangerous occupation without the consent of the parent, a petition which fails to allege that the employment was without the parent's consent or against her will or that the minor was put at a dangerous employment without the parent's

consent, or that defendant knew of the servant's minority, is insufficient.⁷⁵

(2) Knowledge of Master

Generally, the declaration or complaint must allege that the master knew, or ought to have known, of the alleged defect or danger, and that such actual or constructive knowledge existed a sufficient length of time to permit a removal in the use of reasonable care.

In an action by a servant against his master to recover for injuries caused by defective or dangerous appliances or places, it must, as a general rule, be alleged that the master knew, or ought to have known, of the alleged defect or danger,⁷⁶ although some authorities have held that this allegation is unnecessary, since want of knowledge is a matter of defense.⁷⁷ However, a direct averment of actual or constructive knowledge is unnecessary, where it is necessarily implied from the facts alleged,⁷⁸ as where it is alleged that the defect was in the construction of the appliance or place, or existed when the appliance was furnished,⁷⁹ or where the defect

70. Tex.—Southern Pac. Co v Godfrey, 107 S.W. 1185, 48 Tex.Civ. App. 616

71. Ohio—Winkler v Knox, 143 N.E. 24, 109 Ohio St. 603—Klots v Balmat, 171 N.E. 409, 34 Ohio App. 490.

72. U.S.—Beyer v Hamburg-American SS Co, C.C.N.Y., 171 F. 582

73. Mich.—Cristanelli v Saginaw Min. Co., 117 N.W. 910, 154 Mich. 423.

74. Miss.—Middleton v. Faulkner, 178 So. 583, 180 Miss. 737
Duty to warn or instruct see *infra* subdivision e of this section.

Allegations held sufficient

A declaration against master for injuries to servant caused by use of worn wedge stated a cause of action, where declaration alleged that servant was only seventeen years of age and wholly without experience, that master knew thereof, that foreman assured servant that wedge was safe, declining to furnish another, and that servant relied on foreman's assurance.—Middleton v. Faulkner, *supra*.

75. Ga.—Bartow County Fair Ass'n v. Gilreath, 87 S.E. 1033, 144 Ga. 773

76. Ga.—Lawrenceville Oil Mill v. Walton, 84 S.E. 584, 143 Ga. 359—Kidd v. Williamson, 8 S.E.2d 590, 61 Ga.App. 890—Louisville & N. R. Co. v. Dobbs, 143 S.E. 601, 38 Ga.App. 293.

Ky.—Brooks v. Arnett, 69 S.W.2d 1029, 253 Ky. 491—Mannington Fuel Co. v. Ray's Adm'x, 63 S.W.2d 933, 250 Ky. 736.

Ohio—McKee v. New Idea, App., 44 N.E.2d 697
39 C.J. p. 926 note 73.

Violent animal

Ga.—Hays v. Anchors, 30 S.E.2d 646, 71 Ga.App. 280
Or.—Schnell v. Howitt, 76 P.2d 1130, 158 Or. 586

Allegations held sufficient

Ga.—Spivey v. Lovett & Brinson, 172 S.E. 658, 48 Ga.App. 335
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.

Ky.—Christopher's Adm'r v. Blanton Stone Co., 80 S.W.2d 590, 258 Ky. 587

Pa.—Kittila v. Standard Stoker Co., Com.Pl., 21 Erie Co. 266
39 C.J. p. 926 note 73 [d]

Allegations held insufficient

(1) Generally

Ga.—Williamson v. Kidd, 15 S.E.2d 801, 65 Ga.App. 285—Daugherty v. Summerall, 13 S.E.2d 705, 64 Ga.App. 638—McClain v. Seaboard Air Line Ry. Co., 129 S.E. 876, 34 Ga.App. 86

Ky.—Watkins v. Louisville & N. R. Co., 291 S.W. 728, 218 Ky. 526—Gibraltar Coal Mining Co. v. Nalley, 238 S.W. 416, 214 Ky. 431
Minn.—Woodring v. Pastoret, 21 N.W.2d 97, 221 Minn. 50

S.D.—Koenekamp v. Picasso, 249 N.W. 749, 61 S.D. 456
39 C.J. p. 926 note 73 [e]

(2) A petition, in employee's action against employer to recover damages for employer's alleged negligence in failing to furnish a healthy place to work, alleging that servant contracted typhus fever

when bitten by a flea which came from a dead rat which employer failed to immediately remove from premises, that the fleas were too small to be seen by the human eye and employee did not know of their presence, was subject to general demurrer as failing to show that employer knew or should have known that employees would thereby contract the fever.—Blair v. Fulton Bakery, 24 S.E.2d 593, 68 Ga.App. 879.

77. S.C.—Branch v. Port Royal & W. C. R. Co., 14 S.E. 808, 35 S.C. 405

W.Va.—Hoffman v. Dickinson, 6 S.E. 53, 31 W.Va. 142.

78. Ga.—Lawrenceville Oil Co. v. Walton, 84 S.E. 584, 143 Ga. 259—Louisville & N. R. Co. v. Dobbs, 143 S.E. 601, 38 Ga.App. 239.
39 C.J. p. 927 note 75

Allegations held sufficient

Mo.—Mooney v. Monark Gasoline & Oil Co., 298 S.W. 69, 317 Mo. 1255
39 C.J. p. 927 note 75 [c].

Allegations held insufficient

Ga.—Fraser v. Smith & Kelly Co., 70 S.E. 792, 136 Ga. 18.
Mo.—Lawson v. Higgins, 169 S.W.2d 881, 350 Mo. 1066.

79. Ky.—Louisville & N. R. Co. v. Lewis, 278 S.W. 143, 211 Ky. 830.
Mo.—Aeby v. Missouri Pac. R. Co., 285 S.W. 965, 313 Mo. 492, reversed on other grounds 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to, *Aeby v. Missouri Pac. R. Co.*, Sup., 6 S.W.2d 1115.
39 C.J. p. 928 note 76.

resulted from the master's failure to comply with a duty imposed by statute;⁸⁰ and a general allegation of knowledge by defendant of the defect is sufficient to include constructive as well as actual knowledge.⁸¹ Where the complaint is based on the master's negligence in failing to inspect and to use ordinary care to make the place of work reasonably safe, it need not allege that the master knew that plaintiff was ignorant either of the defects or of the failure to inspect.⁸²

Time of acquiring knowledge. It has been held that defendant's actual or constructive knowledge of a defect should be alleged to have existed a sufficient length of time to permit a removal in the use of reasonable care,⁸³ and that a complaint charging merely that plaintiff was injured by a defect arising from defendant's negligence is insufficient, where it does not allege the time defendant actually learned of the defect.⁸⁴ On the other hand, it has been held that the exact time when knowledge of the defect was acquired need not be alleged where the complaint charges that defendant had long known of the defect,⁸⁵ or had knowledge thereof when he ordered plaintiff to work at the place of injury,⁸⁶ or that the defect had existed for a stated time before the accident, and was known or should have been known by defendant.⁸⁷

It need not be alleged that the master had a reasonable time in which to remove the defect after he had received notice thereof.⁸⁸ Where, however, the complaint alleges a defect which arose by use and wear, and does not show that the master had knowledge of the defect before the appliance was placed in plaintiff's charge, it is insufficient, although there is a general averment of knowledge, unless it also shows that defendant had such knowl-

edge a sufficient length of time to have enabled him to repair the defect.⁸⁹ An averment that a defect had not been discovered or remedied owing to defendant's negligence imports that it had existed long enough to have been discovered and remedied had defendant used due care.⁹⁰

(3) Ownership, Possession, or Control of Instrumentalities or Places

Ordinarily the declaration or complaint must allege that the instrumentality or place, whose defective or dangerous condition occasioned the injury, was owned or controlled by the master.

The declaration or complaint in an action by a servant against the master for personal injuries must allege that the instrumentality or place, whose defective or dangerous condition occasioned the injury, was owned or controlled by the master,⁹¹ or that he jointly owned or controlled it.⁹² However, where the injury occurred in a building owned by a third person, in which defendant was installing machinery, it is sufficient to allege that defendant was plaintiff's master in the performance of the work, without stating what relation the master sustained to the building.⁹³

d. Methods of Work, Rules, and Orders

Where a servant's right of recovery for injury is based on negligent methods of work, rules, or orders, or on negligent failure to adopt and enforce proper rules, the declaration or complaint must allege facts from which a legal inference of negligence may be drawn.

Where the declaration or complaint bases a right of recovery on negligent methods of work, rules, or orders, or on negligent failure to adopt and enforce proper rules, it must allege facts from which a legal inference of negligence may be drawn.⁹⁴ So, it has

80. Puerto Rico—*Diaz v Arkadia Sugar Co*, 27 Puerto Rico 537

81. Ind—*Louisville, E & St L Cons R Co v Miller*, 40 NE 116, 140 Ind 685
39 C J p 928 note 78

82. Idaho—*Hennes v Pend d'Oreille Min. & Reduction Co*, 178 P 886, 32 Idaho 121

83. Ky—*Gibraltar Coal Mining Co v Nalley*, 283 SW 416, 214 Ky 431

Mo—*Shumlin v. C. & S. Min. Co.*, App, 187 S.W. 76.

84. Mont—*Fallon v Chicago, M & St P R Co*, 200 P 453, 61 Mont. 130

85. Ind—*Wabash, etc., R Co v Morgan*, 31 NE 661, 133 Ind 430, rehearing denied 32 NE 85, 133 Ind 430.

86. Ind—*Oolitic Stone Co v Ridge*, 91 NE 944, 174 Ind 558

39 C J p 928 note 83

87. Mont—*Davis v Freisheimer*, 219 P 236, 68 Mont 322

39 C J p 928 note 84

88. Ala—*Woodward Iron Co v Jones*, 30 Ala 123

89. Ind—*Kentucky & I. Bridge & Co v Moran*, 80 NE 536, 169 Ind 18, transferred, see 79 NE 213, 39 Ind App. 24

90. Ala—*Louisville & N R Co v Hawkins*, 9 So 271, 92 Ala. 241.

Ind—*Kentucky & I Bridge & Co. v Moran*, 80 NE 536, 169 Ind 18, transferred, see 79 N.E. 213, 39 Ind App 24

91. Mo—*Troth v Norcross*, 20 SW 297, 111 Mo 630.

39 C J p 928 note 89.

Loosen premises

A petition which alleged that

plaintiff was employed by defendant as domestic servant, that, while hanging out clothes to dry, she sustained injuries as result of foot and leg breaking through defective plank in walkway, and that walkway was provided for and intended to be used by her in carrying on work for which she was employed, was sufficient, notwithstanding walkway was part of premises which was not owned by employer, but merely leased by him—*Fontenot v Raftery*, La.App. 193 So 396

92. U.S.—*Todahl v Sudden & Christenson*, C.C.A. Cal., 5 F 2d 462
39 C J p 929 note 90.

93. Tex—*Dawson v King*, Civ App, 121 S.W. 917

94. Ga—*Louisville & N. R. Co v Maffett*, 137 S.E. 404, 36 Ga.App 513.

been held that it must be alleged that the master knew, or by the exercise of ordinary care could have known, that plaintiff was in a position of danger,⁹⁵ and that injury would result,⁹⁶ except where the master is chargeable with such knowledge.⁹⁷ Where it is alleged that the servant was directed by some officer or agent of defendant to pursue a certain method of work which resulted in the injury, the pleading should show the authority of such officer or agent.⁹⁸ Plaintiff must allege the giving of a direct and specific order,⁹⁹ that such order was acted on under compulsion or in an emergency,¹ and that the person giving the command knew, or by the exercise of ordinary care, could have known,

of the danger which resulted in the injury.²

Where the negligence charged is the violation of rules, it is not necessary to allege the master's knowledge of the existence of such rules.³ The rules violated need not be set out verbatim,⁴ although their substance should be alleged.⁵ However, if the acts of negligence relied on, and which are alleged to be in violation of rules, are specifically set out, it is not necessary to set out either the rules or their substance.⁶ Exceptions contained in a rule prescribed by defendant need not be negated in the declaration.⁷

Where violation of a custom is alleged, the complaint should show what such custom was,⁸ and

Va.—Southern Ry. Co. v. Simmons, 55 SE 459, 106 Va 651
39 C.J. p 929 note 93.

Allegations held sufficient

(1) Generally
Ala.—Lowe v. Poole, 179 So. 536, 235 Ala 441.

Ariz.—Swansea Lease, Inc. v. Williams, 238 P. 389, 28 Ariz. 581.

Ga.—Pollard v. Weeks, 4 SE 2d 722, 60 Ga App 664—Padgett v. Southern Ry. Co., 172 S.W. 597, 48 Ga App. 214—Central of Georgia Ry. Co. v. Jackson, 162 SE 873, 44 Ga App 724—Rabon v. Atlantic Coast Line R. Co., 138 SE 858, 37 Ga App 6.

Ill.—McKirchy v. Van Sweringen, 63 NE 2d 132, 326 Ill App. 583.

Ind.—Baltimore & O S W. R. Co. v. Beach, 168 NE 204, 99 Ind App 672.

Ky.—Patrick's Adm'r v. Louisville & N R Co., 132 SW 2d 758, 280 Ky 181—Gathitt Coal Co. v. Hill's Adm'r, 92 SW 2d 56, 263 Ky 309
Miss.—Gow Co. v. Hunter, 168 So 264, 175 Miss 896.

Mo.—Evans v. Southern Wheel Co., App. 273 SW 749.

R.I.—Huling v. Finn, 24 A.2d 620, 67 RI 369.

SC.—Mullikin v. Southern Bleachery & Print Works, 192 SE 665, 184 SC 449—Gowns v. Watts Mill, 133 SE 550, 185 SC 163.

Tex.—Murdock v. Llewellyn, Civ App, 8 SW 2d 318—Louisiana Ry. & Nav Co. of Texas v. Disheroon, Civ App, 295 SW 250.

Wis.—Hoebnerman v. Feldman, 206 N W 580, 220 Wis 557.

39 C.J. p 929 note 93 [a].

(3) Where an employee alleged that a fellow employee negligently struck chisel on grating, held by plaintiff, with such force as to cause a piece of metal to fly off and strike his eye, it was not necessary further to plead that the fellow employee used unusual and unnecessary force, since this would confine negligence to unusualness of the blow rather

than the question of ordinary care—Galveston, H. & S. A. Ry. Co. v. Condois, Tex Civ App, 279 SW 929, affirmed Com App, 288 SW 154, certiorari denied 47 S Ct 669, 274 US 747, 71 L Ed 1328.

Allegations held insufficient

Ga.—McKay v. Atlanta, B. & C. R. Co., 3 SE 2d 458, 60 Ga App 212.

Ill.—Caldon v. National Malleable Castings Co., 182 Ill App 458.

Kan.—Dodd v. Wilson & Co. of Kansas, 88 P 2d 1116, 149 Kan 605.

Minn.—Woodring v. Pastoret, 21 NW 2d 97, 221 Minn 50.

Miss.—Newell Contracting Co. v. Flynt, 161 So 298, 172 Miss 719, motion overruled 161 So 743, 172 Miss 719—Mitchell v. Brooks, 147 So. 660, 165 Miss 826.

39 C.J. p 929 note 93 [b].

95. Del.—Derrickson v. Commissioners of Town of Harrington, 138 A 645, 3 W.W. Harr 412.

Allegations held sufficient

Ga.—Mount v. Southern Ry. Co., 156 SE 701, 42 Ga App 546.

Allegations held insufficient

NC.—Baton v. Atlantic Coast Line R. Co., 188 SE 383, 210 NC 756.

96. Ky.—Ray v. United Elkhorn Coal Co., 61 S.W. 2d 248, 244 Ky 417.

97. Ala.—Birmingham Belt R. Co. v. Hendrix, 110 So 812, 215 Ala 285, certiorari denied 47 S Ct 472, 273 US 758, 71 L Ed. 377.

Allegations held sufficient

Ala.—Birmingham Belt R. Co. v. Hendrix, supra.

98. Ind.—Jourdan v. Lagrange, 104 NE 104, 55 Ind App 502.

Petition was construable as showing that section foreman acted without scope of authority in ordering section hand to help in moving piano—Taylor v. Atlantic Coast Line R. Co., 138 SE 286, 35 Ga App 418.

99. Mo.—Missouri Dist. Telegraph Co. v. Southwestern Bell Telephone Co., 93 SW 2d 19, 338 Mo 692.

1. Ill.—Chestnut v. Chicago, B. & Q. R. Co., 1 NE 2d 811, 284 Ill. App 317.

Obedience to instructions

Count of declaration for death of employee who inhaled deadly gasoline fumes emanating from gasoline tank when he was directed to go to tank roof was demurrable for failure to allege that employee went on tank or roof in obedience to instructions, although alleging failure to supply watchman to remain nearby.—Self v. Sinclair Refining Co., C.C. A Fla., 69 F 2d 948.

2. Ind.—Conway v. Park, 31 NE 2d 79, 108 Ind App 562.

Allegations held sufficient

Mo.—Hamilton v. Standard Oil Co. of Indiana, 19 SW 2d 679, 323 Mo. 531.

3. Ky.—Madison Coal Corporation v. Altmire, 284 SW. 1068, 215 Ky. 283.

4. Ga.—Edwards v. Southern Ry. Co., 184 SE 370, 52 Ga App. 557.

Va.—Southern Ry. Co. v. Simmons, 55 SE 459, 105 Va 651.

39 C.J. p 930 note 95.

5. Ind.—Wabash R. Co. v. Hassett, 83 NE 705, 170 Ind 370—Chicago, I. & L. R. Co. v. Cobler, 80 NE 162, 39 Ind App 506.

6. Tex.—Houston & T. C. R. Co. v. Barlett, Civ. App., 162 SW 1039.

7. Va.—Culp v. Virginia R. Co., 87 SE 187, 77 W Va 125.

8. Ind.—Chicago, I. & L. R. Co. v. Cobler, 80 NE 162, 39 Ind App. 506.

Mo.—Allen v. Larabee Flour Mills Corporation, 40 SW 2d 597, 323 Mo 226.

Customary methods

Common use of Fresno scraper raises presumption of reasonable safety and imposes on person claiming that it is unsafe or unsuitable to a particular use to allege that the general use does not extend to particular use in question, together

should allege plaintiff's knowledge thereof,⁹ and his reliance thereon.¹⁰ It has been held not necessary, however, to allege the master's knowledge of the custom.¹¹ It has been held proper to allege a general custom among others in the same business,¹² but, where the complaint does not rely on a violation of custom, it need not allege the custom or practice of others than the employer in relation to the acts of negligence complained of.¹³

Where failure to promulgate rules is charged as negligence, the complaint must allege facts showing the master's duty to plaintiff.¹⁴ Plaintiff, however, need not specify what the rules should be,¹⁵ although the contrary has been held where the particular rule which should have been adopted does not otherwise appear from the allegations in the pleading.¹⁶

e. Failure to Warn or Instruct Servant

Where a servant seeks to recover for injury on the theory that they were caused by the master's failure to warn or instruct him, the declaration or complaint must allege facts which show a negligent failure to perform such duty.

Where a servant seeks to recover for injuries on the theory that they were caused by the master's failure to warn or instruct him, the declaration or complaint must allege facts showing the danger,¹⁷ the duty to warn or instruct,¹⁸ a negligent failure to perform that duty,¹⁹ and, as discussed infra subdivision i of this section, a causal connection be-

tween such failure and the injury complained of.

It is not sufficient to allege defendant's duty to warn as a conclusion of law,²⁰ and a mere allegation of defendant's duty to warn is insufficient without a statement of facts showing the existence of such duty.²¹ However, if the facts alleged show a duty to warn and that the injury resulted from failure to perform such duty, a specific averment of the existence of the duty and the negligent failure to discharge it is unnecessary.²² So, if the facts alleged show that the servant, owing to his youth and inexperience, was not capable of following instructions and that the master had knowledge of this fact, a cause of action is stated, although the petition does not allege a failure to warn or instruct.²³ Plaintiff need not allege the particular warning required, or the particular damage to be apprehended, in the absence of special demurrer for uncertainty.²⁴

Master's knowledge of danger. In order to show a breach of duty to warn or instruct, the declaration or complaint must allege, or state facts showing, that the master had actual or constructive knowledge of the danger.²⁵ However, a general averment of negligence in failing to warn has been held sufficient in this respect.²⁶

Servant's lack of knowledge or experience. It must be alleged that the servant was ignorant of the danger or was inexperienced and in need of warning or instruction.²⁷ However, it has been

with the factual reasons therefor. or that, if it does, then the facts must be so fully disclosed in detail that it may be said therefrom that the means or method is so extrahazardous that impartial persons could not well be in disagreement on it.—*Newell Contracting Co v Flynt*, 161 So 288, 172 Miss 719, motion overruled 161 So 743, 172 Miss 719. Petition held to base cause of action on violation of custom.

Tex—Tyrrell Rice Milling Co v. Baskin, Civ App., 264 SW 1039 39 C.J. p 930 note 98

9. *Mo—Kirkland v. Bixby*, 222 SW 462, 282 Mo 462.

10. *Mo—Brock v Mobile & O R Co*, 51 SW 2d 100, 380 Mo 918, certiorari denied *Mobile & O R Co v Brock*, 53 S Ct 87, 287 US 638, 77 L Ed 553

11. *Ky—Madison Coal Corporation v. Altmore*, 284 SW 1068, 215 Ky 283

12. *Okl—Missouri, O. & G R. Co v Overmyre*, 160 P. 933, 58 Okl. 723.

13. *Cal—Haskins v. Southern Pac Co.*, 39 P.2d 896, 3 Cal App 2d 177

14. *Ala—Reed v. Ridout's Ambulance*, 102 So 906, 212 Ala 428

15. *US—Southern R. Co v Cook*, Va., 226 F 1, 141 CCA 115, error dismissed 38 S Ct 62, 245 US 677, 62 L Ed 543.

Tex—Texas & P R Co v Cumpston, 40 SW 546, 15 Tex.Civ.App. 493

16. *W Va—Kirk v Webb*, 124 S.E. 501

17. *Mo—Barnes v Commercial Auto Body Co.*, App., 13 SW 2d 553

18. *Ariz—Wyllie v. Moore*, 84 P.2d 450, 52 Ariz 537 39 C.J. p 930 note 8.

Allegations held insufficient *Ariz—Wyllie v Moore*, supra. 39 C.J. p 930 note 8 [c]

19. *Ga—Louisville & N R Co v Dobbs*, 143 S.E. 601, 38 Ga.App 293

39 C.J. p 931 note 9

Allegations held sufficient *Ga—Western & A R R v Michael*, 157 S.E. 226, 42 Ga.App 603

Mo—Poynter v Fogel Const Co, 289 SW 20, 221 Mo App 530

Ohio—Triff v National Bronze & Aluminum Foundry Co, 20 N.E.2d

232, 195 Ohio St 191, 121 A.L.R. 1131

39 C.J. p 931 note 9 [a]

Allegations held insufficient

Mo—Barnes v. Commercial Auto Body Co., App., 13 SW 2d 553.

39 C.J. p 931 note 9 [b]

20. *Mo—Nivert v Wabash R Co*,

135 SW 33, 232 Mo. 626

21. *US—Fortin v. Manville, C.C.R* I, 128 F 642

22. *Ala—Postal Tel Cable Co v Hulsey*, 81 So 527, 132 Ala. 444

23. *Okl—New v. Stout*, 224 P. 519, 98 Okl 177.

24. *Mont—Forquer v North*, 112 P 439, 42 Mont 272

25. *Minn—Woodring v Pastoret*, 21 NW 2d 97, 221 Minn 50

Mo—Barnes v Commercial Auto Body Co., App., 13 SW 2d 553

39 C.J. p 931 note 15

26. *Ala—Robinson Min Co v. Tolbert*, 31 So 519, 132 Ala 462—

Sloss-Sheffield Steel & Iron Co v. Pilgrim, 70 So. 301, 14 Ala.App. 346

27. *Tex—Magnolia Petroleum Co v Ray*, Civ App., 187 S.W. 1085 39 C.J. p 931 note 13.

held that an allegation that defendant wrongfully and negligently failed to warn or instruct implies that the servant was without the necessary knowledge or experience, without a direct averment of that fact.²⁸

Master's knowledge of servant's lack of knowledge or experience. The declaration or complaint must allege, or state facts showing, that the master knew or should have known that the servant was inexperienced or ignorant of the danger.²⁹ However, where the complaint alleges the master's knowledge of the danger and the servant's ignorance thereof, a general averment of negligence in failing to warn sufficiently alleges that the master knew or should have known that the servant should be warned.³⁰

f. Negligence in Employment or Retention of Servants

In an action based on the negligence of the master in selecting or retaining in his service an incompetent servant, the incompetency of the fellow servant, and the negligence in employing or retaining him with knowledge, actual or constructive, of such incompetency, should be alleged.

In an action against a master for injuries caused by the negligence of a fellow servant, based on the theory of the negligence of the master in selecting

or retaining in his service an incompetent servant, the declaration or complaint should show the existence of the relation of master and servant at the time of the injury,³¹ that the fellow servant was incompetent, that the master negligently employed or retained him with knowledge, actual or constructive, of his incompetency,³² and, in some jurisdictions,³³ but not in others,³⁴ that plaintiff was ignorant of such incompetency. It must also be alleged or shown that the injury was caused by the incompetency of the servant charged with negligence, as discussed *infra* subdivision 1 of this section.

The servant's ignorance of the fellow servant's incompetency,³⁵ as well as the master's knowledge thereof,³⁶ may be inferred from the facts alleged; and an allegation that the act of employing a servant was done in a negligent manner, and that in consequence thereof an incompetent servant was taken into defendant's service, has been held a sufficient specification of negligence in employing an incompetent servant, without alleging that defendant knew, or could have known, of his incompetency.³⁷ A general allegation of knowledge is sufficient to include either actual or constructive knowledge.³⁸

The particulars of the servant's incompetency need not be set out;³⁹ nor need the exact time when

28. W.Va.—Trump v Tidewater Coal & Coke Co., 32 S.E. 1085, 46 W.Va. 238.

29. Mo.—Zimmerman v. Pryor, App. 190 S.W. 26.

30 C.J. p. 931 note 20

Knowledge of servant's physical condition

Declaration alleging that defendant employer required plaintiff employee to submit to physical examination which disclosed that employee was suffering from serious heart disease, that employer knew or should have known that hard manual labor would endanger employee's life, that employee in exercise of due care did not know of his heart condition, that employer owed employee duty of informing him of condition and of not requiring him to perform hard manual labor or undergo physical exertion, and that such duties were breached to employee's damage was defective in absence of allegation that employer knew or should have known that employee did not know of his own condition.—Glidden v Bath Iron Works Corp., Me., 54 A.2d 528.

30. Ala.—Jones v Tennessee Coal & Iron Co., 50 So. 1017, 163 Ala. 268.

Cal.—Pigeon v. Fuller, 105 P. 976, 156 Cal. 691.

31. Ala.—McDuff v Kurn, 172 So. 886, 233 Ala. 619.

32. Fla.—Cummer Lumber Co. v. Silas, 125 So. 372, 98 Fla. 1158.

Ga.—Blanchard v Gallahar, 38 S.E. 2d 379, 72 Ga.App. 132.—Strickland v Foughner, 12 S.E.2d 371, 63 Ga.App. 805.

Okl.—Singer Sewing Mach. Co. v. Odom, 45 P.2d 473, 172 Okl. 411.

39 C.J. p. 932 note 23

Allegations held sufficient

Fla.—Putnam Lumber Co. v. Tompkins, 150 So. 712, 112 Fla. 635.

Mo.—Munoz v. American Car & Foundry Co., 298 S.W. 228, 220 Mo.App. 902.

Okl.—Weatherman v Victor Gasoline Co., 130 P.2d 527, 191 Okl. 423.

39 C.J. p. 932 note 23 [b]

Allegations held insufficient

Ga.—Van Dyke v. Melno Fruit Co., 59 S.E. 215, 129 Ga. 632.—Davis v Georgia Coating Clay Co., 11 S.E.2d 60, 62 Ga.App. 265.

39 C.J. p. 932 note 23 [c]

33. Ga.—Story v Crouch Lumber Co., 6 S.E.2d 86, 61 Ga.App. 210.—Atlantic Coast Line R. Co. v Cox, 156 S.E. 733, 42 Ga.App. 439.

Okl.—Singer Sewing Machine Co. v. Odom, 45 P.2d 473, 172 Okl. 411.

39 C.J. p. 932 note 24.

Care in discovering incompetency in action by plumber's helper

against an employer for injuries sustained as result of negligence of a fellow servant, based on alleged negligence of the employer in employing the fellow servant and failing to comply with city ordinance requiring the hiring of an employee who has passed examination required by ordinance, complaint which failed to show that the helper did not know of alleged incompetency of fellow servant, and could not have discovered such incompetency by exercise of ordinary care, or did not have equal means with employer of knowing of such incompetency, was fatally defective.—Strickland v Foughner, 12 S.E.2d 371, 63 Ga.App. 805.

34. W.Va.—Leach v Martin, 71 S.E. 170, 69 W.Va. 219.

39 C.J. p. 932 note 25

35. Vt.—Mahoney v Rutland R. Co., 69 A. 652, 81 Vt. 210.

36. Ala.—Alabama Fuel & Iron Co. v Denson, 94 So. 311, 208 Ala. 337.

37. Tex.—Galveston Rope & Twine Co. v. Buikett, 21 S.W. 958, 3 Tex. Civ.App. 308.

39 C.J. p. 932 note 29.

38. Ky.—South Covington & C. St. R. Co. v Brown, 104 S.W. 703, 31 Ky.L. 1072.

39. U.S.—Johnston v. Canadian Pac. R. Co., C.C.Vt., 50 F. 886, affirmed

the master acquired knowledge of the incompetency be alleged.⁴⁰ An averment of "negligence and carelessness" is not equivalent to an allegation that the servant was incompetent.⁴¹

g. Negligence in Employment of Insufficient Force

In an action based on the negligence of the master in failing to employ a sufficient number of men for the work, a general allegation of negligence in failing to provide a sufficient force, in consequence of which plaintiff was injured, is sufficient.

Where the theory of the action is that the master was negligent in failing to employ a sufficient number of men for the work, a general allegation that the master negligently failed to provide a sufficient force, in consequence of which the injury complained of was sustained, is sufficient.⁴² The master's negligence must be distinctly alleged,⁴³ but the declaration or complaint need not specify how many servants should have been engaged in the work,⁴⁴ or how the assistance of additional help would have prevented the injury,⁴⁵ nor need it set out in detail other facts on which the servant relies as showing how the injury occurred,⁴⁶ at least in the absence of a motion for a more definite statement.⁴⁷

h. Acts or Omissions through Agents or Representatives

Acts or omissions of a master through agents or representatives may be charged as negligence of the master, or, under some circumstances, as negligence of the servant, or they may be charged as negligence of the master acting by or through his servants, or as the negligence of both master and servant.

In an action by a servant to recover for personal

injuries, an allegation that the negligence relied on was that of defendant is good, as against a demurrer, although in point of fact the negligence was that of a servant for whom defendant, as master, was responsible.⁴⁸ The negligence may, however, be charged as that of the servant where the servant acts in a supervisory capacity,⁴⁹ or where the facts alleged show that it consists of a breach of a nonassignable duty,⁵⁰ or it may be charged as the negligence of the master acting by or through his servants or agents,⁵¹ or as the negligence of both master and a servant performing an act for which the master is liable.⁵²

It is not sufficient to show a state of facts which merely suggests that a coservant may have owed a duty which he neglected,⁵³ but a complaint defective in this respect may be cured by the answer.⁵⁴ The averments of the pleading must show that the servant inflicting the injury was an employee of defendant,⁵⁵ and that the act of the negligent servant was within the scope of his employment,⁵⁶ or that, at the time such act was committed, he was under the control of the master.⁵⁷ However, it is not necessary for plaintiff to set out the contract between the negligent servant and the master, or state his conclusion as to the scope of such servant's employment.⁵⁸

i. Connection between Negligence Charged and Injury Sustained

It must be alleged that the act of negligence charged was the proximate cause of the injury sustained, or facts must be stated from which such causal connection may be legally implied.

61 F. 738, 9 C.C.A. 587, 25 L.R.A. 470.

40. Ind.—Wabash W R Co v Morgan, 31 NE 661, 132 Ind 430, rehearing denied 32 NE 85, 132 Ind 430.

41. Mont.—Kelly v. Cable Co., 34 P 611, 13 Mont. 411.

42. Mont.—Boyd v Great Northern Ry Co., 274 P 293, 84 Mont 84 39 C.J. p 933 note 35

Causal connection between negligence charged and injury sustained see *infra* subdivision i of this section

43. Puerto Rico—Glaudio v Cortinez, 9 Puerto Rico 97.

Allegations held sufficient

Miss—Gow Co v. Hunter, 163 So 264, 175 Miss 896

Allegations held insufficient

Ky—Ray v United Elkhorn Coal Co., 51 S.W.2d 248, 244 Ky 417

La.—Devore v Louisiana & Arkansas Ry. Co., App., 178 So. 706.

44. Del.—Valente v American Bridge Co., 78 A. 395, 22 Del 558.

45. Mo—Bowman v Kansas City Electric Light Co., App., 213 S.W. 161.

46. Mo—Bowman v Kansas City Electric Light Co., *supra* Tex.—Galveston, Houston & S A R Co v Bonn, 99 S.W. 413, 44 Tex Civ App 631

47. Mo—Bowman v Kansas City Electric Light Co., App., 213 S.W. 161

48. S.D.—Murphy v. Chicago, M & P S R Co., 141 N.W. 380, 81 S D 475.

39 C.J. p 933 note 42.

Negating negligence of fellow servants see *infra* § 491.

49. Ala.—Gentry v Swann Chemical Co., 174 So. 530, 234 Ala 318

50. Mich.—Eberts v. Mt. Clemens Sugar Co., 148 N.W. 810, 182 Mich 449.

39 C.J. p 933 note 43.

51. Cal.—McGuire v Miller & Lux, 174 P. 898, 170 Cal 644.

39 C.J. p 933 note 44.

52. Ga.—Postal Tel-Cable Co. v.

Puckett, 101 S.E. 397, 24 Ga.App 458

39 C.J. p 933 note 45.

53. Ark.—Roberts & Shafer Co v. Jones, 101 S.W. 165, 82 Ark 188. Ind.—Pittsburgh, etc., R. Co. v Lighthouse, 71 NE 218, 660, 163 Ind 247

54. Ark.—Roberts & Shafer Co v Jones, 101 S.W. 165, 82 Ark 188

55. Ky.—Bishop v Walker, 172 S.W. 2d 224, 294 Ky 590

56. Ind.—New York, C. & St L R Co v Connaughton, 5 NE 2d 904, 211 Ind 419.

Ky.—Maxwell's Adm'r v. Louisville & N R. Co., 47 S.W.2d 1023, 243 Ky 190

39 C.J. p 933 note 48

57. Ga.—Frazier v. Southern Ry Co., 37 S.E.2d 774, 200 Ga 590, conformed to 38 S.E.2d 183, 73 Ga. App 815

39 C.J. p 933 note 49.

58. Ill.—American Car & Foundry Co v Hill, 80 N.E. 784, 226 Ill 227

In consequence of the rule that the master's liability for injury to a servant depends on whether or not his negligence was the proximate cause of the injury, as discussed *supra* § 187, the declaration or complaint must allege that the act of negligence or the breach of duty charged was the proximate cause of the injury sustained, or state facts from which such causal connection may be legally implied.⁵⁹ Thus, where an act constituting a violation of a statute is relied on, it must be alleged that it

was the proximate cause of the injury.⁶⁰ A general allegation is sufficient,⁶¹ unless the specific allegations are so inconsistent therewith as to show that the general averment is not true.⁶²

j. Liability Imposed by Statute, and Violation of Statutory Duty

(1) In general

(2) Federal statutes

59. Fla.—Cummer Lumber Co. v. Silas, 125 So 372, 98 Fla 1158.
 Ky—Hobson v Turner, 185 SW 2d 550, 299 Ky. 342—Davidson v Perkins-Bowling Coal Co, 74 SW 2d 1, 255 Ky 649.
 Mo—Barnes v Commercial Auto Body Co., App. 13 SW 2d 553.
 NJ—Huels v. General Elec Co, 46 A 2d 454, 134 NJLaw 165.
 Okl.—Traders Compress Co v Steigler, 169 P 2d 206, 197 Okl 204—Singer Sewing Mach Co v Odom, 46 P 2d 473, 172 Okl 411—Kansas City, M & O. Ry. Co v Bishop, 282 P. 1091, 140 Okl 277—Chicago, R I & P Ry Co v McIntire, 119 P 1008, 29 Okl 797.
 Pa—Kashuba v Glen Alden Coal Co, Comp Pl, 37 LuzLeg Reg. 425 39 C J p 934 note 53.
Defective condition of machinery
 Tex.—Hutton v. Burkett, Civ App, 18 SW 2d 740, error refused.
Causal connection sufficiently shown
 U.S.—Self v Sinclair Refining Co, C. C.A. Fla., 69 F 2d 948—Southwest Metals Co v. Gomez, C.C.A. Ariz., 4 F 2d 215, 39 ALR 1416.
 Ga—Atlanta & W P R Co v Robinson, 176 SE 550, 49 Ga App 712.
 Mo—Rose v. Missouri Dist. Telegraph Co, 43 SW 2d 562, 328 Mo 1009, 81 ALR 400—Fischer v M-K Express Co, App, 158 SW 2d 458—Hankins v St Louis-San Francisco Ry Co, App, 31 SW 2d 596, certiorari quashed State ex rel St. Louis-San Francisco Ry. Co v. Cox, 46 SW 2d 849, 329 Mo 292—Cushulas v Schroeder & Treymayne, 22 SW 2d 872, 235 Mo App 567, certiorari quashed State ex rel Schroeder & Treymayne v Haid, 41 SW 2d 789, 328 Mo 807.
 Mont—Chancellor v. Hines Motor Supply Co, 69 P 2d 764, 104 Mont. 603.
 N.M.—Maestas v Alameda Cattle Co, 14 P 2d 783 36 NM 323 39 C J p 934 note 53 [b].
Causal connection not sufficiently shown
 U.S.—Feaster v. Southern Ry. Co, C.C.A.S.C., 15 F 2d 540.
 Cal—McCamish v. Groff, 257 P. 78, 83 Cal App 776.
 Ga.—Daugherty v Summerall, 13 S E 2d 705, 64 Ga App 638—Lumpkin v Western & Atlantic R R, 9 S E 2d 188, 62 Ga App 597.
 Mo—Grindstaff v J Goldberg & Sons Structural Steel Co, 40 S W 2d 702, 328 Mo 72—Coble v. St Louis-San Francisco Ry. Co, 38 SW 2d 1031.
 S.D.—Koenekamp v. Picasso, 249 N. W. 749, 61 SD 456 39 C J. p 934 note 53 [c].
 60. U.S.—Sheaf v Minneapolis, St P. & S S M R Co, CC AND, 162 F 2d 110.
 Ala.—Louisville & N R. Co v Hall, 135 So 466, 228 Ala. 338, certiorari denied 52 S Ct. 37, 284 US 661, 76 L Ed 560.
 Fla.—Powell v Edwards, 157 So. 427, 117 Fla 114.
 Ga—Pollard v Weeks, 4 SE 2d 722, 60 Ga App 664.
 Minn—Schendel v Chicago, M & St P Ry Co, 206 NW 436, 165 Minn 223.
 Neb—Hick v Chicago & N W Ry Co, 261 NW. 692, 129 Neb 336—Diller v Chicago, B & Q R Co, 229 NW. 888, 119 Neb 494.
 ND—Johnson v Minneapolis, St P & S S M Ry Co, 209 NW 786, 54 ND 351.
 Wis—Baker v Janesville Traction Co, 234 NW 912, 204 Wis. 452 39 C J p 937 note 60.
Negligence
 (1) Count of flagman's declaration against railroad under Federal Employers' Liability Act for injuries flagman sustained when struck by express truck, engaged in allegedly dangerous maneuvers customarily pursued to speed unloading of express cars, stated cause of action, where alleging that injury resulted from dangerous unloading methods pursued by railroad and express company together, as against contention that action of express company and its truck was independent intervening cause, since declaration showed case of concurrent negligence, as to which each of concurring tortfeasors is liable—Ross v. Louisville & N. R Co, 172 So 752, 178 Miss. 69.
 (2) In employee's suit under Federal Employers' Liability Act, employee could allege in one count that accident was proximately caused by two negligent acts, liability under either of which called for application of same measure of relief—King v Schumacher, 89 P 2d 466, 32 Cal App 2d 172, certiorari denied Schumaker v King, 60 S Ct. 123, 308 US 593, 84 L Ed 496.
 (3) In laborer's action against railroad for injuries under Federal Employers' Liability Act, complaint is sufficient if it shows that injuries resulted in part from railroad's negligence—Leonidas v Great Northern Ry Co, 72 P 2d 1007, 105 Mont. 302, affirmed 59 S Ct 51, 305 US 1, 83 L Ed 3.
Allegations held sufficient
 Ala—Alabama Great Southern R. Co v Baum, 31 So. 2d 366, 249 Ala. 442.
 Ga—Edwards v. Southern Ry. Co, 184 SE. 370, 52 Ga App. 557—Southern Ry. Co v Lunsford, 179 SE 571, 50 Ga App 829, reversed on other grounds, 56 S Ct 504, 297 US 398, 80 L Ed 740, rehearing denied 56 S Ct 667, 297 US 729, 80 L Ed. 1011.
 Ind—Jeffersonville Mfg Co v Holden, 102 NE 21, 180 Ind 301.
 Mont—Leonidas v Great Northern Ry Co, 72 P 2d 1007, 105 Mont. 302, affirmed 59 S Ct 51, 305 US 1, 83 L Ed. 3.
 Tex—Renegar v. Fort Worth Transit Co, Civ App, 143 SW 2d 443 39 C J p 937 note 60 [a].
Allegations held insufficient
 U.S.—Tishar v Nicodemus, D.C. Ill., 49 F Supp. 145.
 Ga—Tankersley v Southern Ry. Co, 35 SE 3d 522, 73 Ga App 88.
 Wis—Baker v Janesville Traction Co, 234 NW. 912, 204 Wis 452.
 61. Ind—Cleveland, C. C. & St. L. R Co v. Quinn, 101 N.E. 406, 54 Ind App. 11. 39 C J. p 935 note 54.
 62. Ind—Dodge Mfg Co. v. Krone-witter, 104 NE 99, 57 Ind App. 190. 39 C J. p 935 note 55.

(1) In General

Where the liability sought to be enforced is imposed by statute, or the negligence alleged to have caused the injury consists of a breach of statutory duty, facts must be alleged which clearly bring the case within the statute.

Where the liability sought to be enforced is imposed by statute, or the negligence alleged to have caused the injury consists of a breach of statutory duty, the declaration or complaint in an action by a servant to recover for personal injuries must allege facts which clearly bring the case within the statute,⁶³ and, in addition to this, must allege in terms that the act constituting a violation of the statute

was the proximate cause of the injury or must state facts from which such causal connection can be legally implied, as discussed *supra* subdivision i of this section. While it is not sufficient to charge a violation of the statute in general terms as a conclusion of law, and it must be shown in what the violation complained of consisted,⁶⁴ technical accuracy is not required⁶⁵ and the precise language of the statute or ordinance need not be followed.⁶⁶ Plaintiff need not plead in detail facts which are peculiarly within the knowledge of defendant.⁶⁷ Resort cannot be had to inferences in order to supply omissions of material facts,⁶⁸ but the averment

63. Ga.—Haynesworth v Hall Const Co, 163 S.E. 273, 44 Ga App 807.

Minn.—Harvey v. Ruff, 204 N.W. 634, 164 Minn. 21.

39 C.J. p 935 note 59.

Statutory provisions as to master's liability for injuries to his servants see *supra* § 173.

Scope of employment

In action for injuries to employee brought under the employers' liability act it must be alleged that the employee was, when injured, acting within the scope of his employment.

U.S.—Union Oil Co of California v. Hunt, CCA Or, 111 F.2d 269.

Or.—Walters v Dock Commission, 266 P. 634—Brady v Oregon Lumber Co, 245 P. 732, 118 Or. 15, 45 A.L.R. 813.

Fraud and unauthorized conduct

Where a minor employee attempts to recover damages for personal injuries and the employer defends on the ground of fraud and unauthorized conduct, the pleadings are framed under the same rules and regulations as in any other case—Kilgore v Hudson, 4 So.2d 865, 148 Fla. 580.

Terms used in complaint construed

Ala.—Vida Lumber Co v Courson, 112 So. 737, 216 Ala. 248.

Allegations held sufficient

(1) Under statutes relating to employment of minor

U.S.—Swift & Co v. Daly, CCA Mont, 44 F.2d 40.

Fla.—Tampa Shipbuilding & Engineering v. Adams, 181 So. 403, 132 Fla. 419, rehearing denied Tampa Shipbuilding & Engineering Co v. Adams, 181 So. 893, 132 Fla. 419—J. Ray Arnold Lumber Corporation of Olustee v Richardson, 141 So. 133, 105 Fla. 204.

Kan.—Kronvall v. Garvey, 84 P.2d 858, 148 Kan. 802.

Mich.—Brandt v C. F. Smith & Co, 218 N.W. 803, 242 Mich. 217.

W.Va.—Dale v. Wheeling Steel Cor-

poration, 164 S.E. 245, 112 W.Va. 138.

39 C.J. p 935 note 59 [c].

(2) Under statutes imposing liability for defects in condition of ways, works, machinery, etc

Mo.—Whiteley v. Eagle-Picher Lead Co., 115 S.W.2d 536, 232 Mo App 178.

N.Y.—Lanick v. American Laundry Mach Co, 280 N.Y.S. 858, 244 App. Div. 891.

Ohio—Triff v National Bronze & Aluminum Foundry Co, 20 N.E.2d 232, 135 Ohio St. 191, 121 A.L.R. 1131.

39 C.J. p 935 note 59 [e] (1).

(3) Under statutes relating to factories and their operation.

Ind.—Dean v Dalton Foundries, 34 N.E.2d 145, 109 Ind App 377.

N.Y.—Weydig v Cole Electric Products, 25 N.Y.S.2d 863.

39 C.J. p 935 note 59 [e] (2).

(4) Under statutes relating to mines and their operation

Ariz.—Moreno v Moore, 57 P.2d 316, 47 Ariz. 529.

Ark.—New Union Coal Co. v. Walker, 31 S.W.2d 753, 132 Ark. 460.

Pa.—Ham v Hudson Coal Co, 28 Pa. Dist & Co. 528, 38 Lack Jur 89—Ham v Hudson Coal Co, Com Pl, 40 Lack Jur 61.

39 C.J. p 935 note 59 [e] (3).

(5) Under statutes relating to trains and their operation—Renegar v Fort Worth Transit Co, Tex Civ. App, 143 S.W.2d 443—39 C.J. p 935 note 59 [e] (4).

(6) Under statutes requiring dangerous machinery to be guarded.

Ind.—Jeffersonville Mfg Co. v Holden, 102 N.E. 21, 180 Ind 301.

Mo.—Pavlo v. Forum Lunch Co, 19 S.W.2d 510, 225 Mo App 167.

39 C.J. p 935 note 59 [e] (5).

(7) Under statutes imposing liability for failure to provide safety devices

N.Y.—Butterly v. The Westover, Inc, 67 N.Y.S.2d 634.

Ohio—Triff v National Bronze & Aluminum Foundry Co., 20 N.E.2d

232, 135 Ohio St. 191, 121 A.L.R. 1131.

(8) Under miscellaneous statutes.—Ford Motor Co v. Brady, C.C.A. Mo, 73 F.2d 248—39 C.J. p 935 note 59 [e] (6), (7).

Allegations held insufficient

(1) Under statutes relating to employment of minors.

Ga.—Haynesworth v. Hall Const Co, 163 S.E. 273, 44 Ga App 807.

Minn.—Harvey v. Ruff, 204 N.W. 634, 164 Minn. 21.

39 C.J. p 935 note 59 [c].

(2) Under statutes imposing liability for defects in condition of ways, works, machinery, etc.—Riley v Chancey Bros, 112 So. 830, 216 Ala. 176—39 C.J. p 935 note 59 [f] (1).

(3) Under miscellaneous statutes.

Kan.—Birmingham v. M. & W. Min. Co, 180 P.2d 615, 163 Kan. 66.

Neb.—Russo v. Swift & Co., 286 N.W. 291, 136 Neb. 406.

N.Y.—Teller v. Prospect Heights Hospital, 21 N.E.2d 504, 280 N.Y. 456—Feola v. National Brass Mfg Co, 284 N.Y.S. 242, 248 App.Div. 678—Daurizio v. Merchants' Despatch Transp Co, 274 N.Y.S. 174, 153 Misc. 716.

Pa.—Kashuba v. Glen Alden Coal Co, Com Pl, 37 Luz Leg Reg 425.

Wis.—Redman v Hobart, 22 N.W.2d 532, 248 Wis 508—Baker v Janesville Traction Co, 234 N.W. 912, 204 Wis 452.

39 C.J. p 935 note 59 [f] (2).

64. Wis.—Baker v. Janesville Traction Co, *supra*.

65. Ill.—Thomas v. Chicago Embossing Co, 133 N.E. 285, 307 Ill. 134.

39 C.J. p 937 note 61.

66. Ind.—Chicago, I. & L. R. Co. v. Cobler, 80 N.E. 162, 39 Ind App. 506.

39 C.J. p 937 note 62.

67. Ind.—Domestic Block Coal Co. v Holder, 103 N.E. 73, 56 Ind App 634.

68. Ind.—Morgantown Mfg Co v Hicks, 92 N.E. 199, 46 Ind App 623.

of a particular fact carries with it into the pleading all facts that are necessarily to be inferred from the fact alleged.⁶⁹

Where the statute imposes a mandatory duty, negligence⁷⁰ or actual or constructive notice of the dangerous condition⁷¹ need not be charged. As a general rule it is sufficient to allege that the injury resulted from a breach of the statutory duty⁷² without alleging in what manner the failure to comply with the statute caused the injury,⁷³ or that plaintiff had no knowledge of the defect or danger, as discussed *infra* §§ 492, 493, or, where the negligence consists in the failure to guard a machine, that the machine was dangerous.⁷⁴

Exceptions in the statute are matters of defense and need not be negatived,⁷⁵ especially where they do not apply to the particular duty for the breach of which the action is brought⁷⁶ or are contained in a separate clause⁷⁷

Reference to statute. Where the allegations

bring the case within the statute, it will be construed as a statutory, not a common-law, action,⁷⁸ unless the statutory remedy is merely cumulative and a common-law cause of action is also stated,⁷⁹ and it is not necessary to recite or make specific reference to the statute⁸⁰ or expressly to allege that the action is based thereon.⁸¹

(2) Federal Statutes

In actions under federal statutes by a servant to recover for personal injuries, the declaration, petition, or complaint must allege facts which clearly bring the case within the statute.

In actions under various federal statutes by a servant to recover for personal injuries, the declaration, petition, or complaint must allege facts which clearly bring the case within the statute⁸² or must set out facts from which a violation of the statute may be inferred.⁸³ Where the allegations are otherwise sufficient, however, it is not necessary to plead the statute or expressly to invoke its terms.⁸⁴ An allegation that defendant was engaged

69. Ind.—Holcomb v Norman, 91 N E 625, 47 Ind App 87

70. N.Y.—Johnson v. Johnson, 292 N.Y.S. 921, 249 App Div. 859.

39 C.J. p 937 note 66

71. Kan.—Little v. Norton Coal Co., 109 P 768, 83 Kan 232

Mo.—Mauris v. Western Coal & Mining Co., 11 S.W.2d 268, 331 Mo 378

Want of knowledge as defense

Where there was evidence tending to show that employee had died of silicosis caused by unsafe conditions in employer's plant, it was not necessary, in action for employee's death, to plead knowledge or concealment of unsafe condition by defendant or lack of knowledge thereof by plaintiff's decedent, want of knowledge on part of defendant, if it existed, being a matter of defense within prescribed statutory limits—McKee v. New Idea, Ohio App., 44 N E 2d 697

72. Ind.—Baltimore & O. S. W. R. Co. v. Peterson, 59 N.E. 1044, 156 Ind. 364.

39 C.J. p 937 note 67.

73. Ala.—Mobile, J. & K. C. R. Co. v. Bromberg, 87 So. 395, 141 Ala. 258.

39 C.J. p 937 note 68.

74. Ind.—King v Inland Steel Co., 96 N.E. 337, 177 Ind. 201, rehearing denied 97 N.E. 529, 177 Ind. 201—La Porte Carriage Co. v. Sullender, App., 71 N.E. 922, reversed on other grounds 75 N.E. 277, 165 Ind. 290.

75. Ariz.—Red Rover Copper Co. v. Ellis, 185 P. 641, 21 Ariz. 87.

39 C.J. p 937 note 71.

76. Ind.—Chamberlain v Waymire, 68 N.E. 306, 32 Ind App 442, rehearing denied 70 N.E. 81, 22 Ind App. 442.

77. W.Va.—Blankenship v Ethel Coal Co., 70 S.E. 863, 69 W.Va. 74

78. Tex.—Corpus Juris quoted in Texas & N. O. R. Co. v Churchill, Civ App., 74 S.W.2d 1030, 1032, error dismissed

39 C.J. p 937 note 75

Actions under federal Employers' Liability Act see *infra* subdivision 1 (2) of this section

79. Ill.—Hayes v. Wabash R. Co., 180 Ill.App. 511, error dismissed 34 S.Ct. 729, 234 U.S. 86, 58 L.Ed. 1226

Tex.—Corpus Juris quoted in Texas & N. O. R. Co. v Churchill, Civ App., 74 S.W.2d 1030, 1032, error dismissed

39 C.J. p 937 note 77.

81. U.S.—McChesney v. Illinois Cent R. Co., D.C.Ky., 197 F. 85

Tex.—Corpus Juris quoted in Texas & N. O. R. Co. v Churchill, Civ App., 74 S.W.2d 1030, 1032, error dismissed.

82. Mo.—Harlan v. Wabash Ry Co., 73 S.W.2d 749, 335 Mo. 414

Allegation as to proximate cause see *supra* subdivision 1 of this section

Exceptions of statute need not be negatived in the complaint in an action based on the statute for personal injuries or to recover a penalty—Schlemmer v. Buffalo, R. & P. R. Co., Pa., 27 S.Ct. 407, 205 U.S. 1, 51 L.Ed. 681.

Cause of defect

Complaint for injuries to switchman because of negligence in maintaining defective brake on car need not aver why brake was defective—Pennsylvania R. Co. v Hough, 161 N.E. 705, 88 Ind.App. 601.

Allegations held sufficient

(1) Under Boiler Inspection Act—Urie v. Thompson, 176 S.W.2d 471, 353 Mo. 211—Harlan v. Wabash Ry Co., 73 S.W.2d 749, 335 Mo. 414.

(2) Under Safety Appliance Act—US—Vigor v Chesapeake & O Ry Co., C.C.A.Ind., 101 F.2d 865, certiorari denied Chesapeake & O R. Co. v. Vigor, 59 S.Ct. 1031, 307 U.S. 635, 83 L.Ed. 1517—Chesapeake & O Ry Co. v. Moore, C.C.A.Ind., 64 F.2d 473, reversed on other grounds 54 S.Ct. 403, 291 U.S. 205, 78 L.Ed. 755

Mo.—Wild v. Pitcairn, 149 S.W.2d 800, 347 Mo. 915, certiorari denied Pitcairn v. Wild, 63 S.Ct. 72, 314 U.S. 638, 88 L.Ed. 512—Harlan v. Wabash Ry Co., 73 S.W.2d 749, 335 Mo. 414

Tex.—San Antonio & A. P. R. Co. v. Wagner, Civ App., 166 S.W. 21, affirmed 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110

Allegations held insufficient

Ga.—Watson v. Georgia Southern & F. Ry. Co., 136 S.E. 921, 36 Ga. App. 452, affirmed 146 S.E. 843, 167 Ga. 841, certiorari denied 49 S.Ct. 352, 279 U.S. 857, 73 L.Ed. 998.

83. N.J.—Oelfke v. Hudson & M. R. Co., 135 A. 659, 5 N.J. Misc. 3

Tenn.—Mitchell v. Southern Ry. Co., 12 Tenn App 523.

84. U.S.—Wyatt v. New York, O. &

in interstate commerce has been held not necessary where the court takes judicial notice of such fact.⁸⁵ Where the statute imposes a mandatory duty, negligence need not be alleged.⁸⁶

Federal Employers' Liability Act. A declaration, petition, or complaint under the Federal Employers' Liability Act must allege facts which bring the case

within the statute.⁸⁷ The pleading must allege the relation existing between plaintiff and defendant,⁸⁸ that defendant is an interstate carrier, and that, at the time of his injury, plaintiff was engaged in interstate commerce or in work so closely related to it as to be practically a part of it.⁸⁹ In some instances, however, the absence of allegations that

W R Co, CCANY, 45 F2d 705, certiorari denied New York, O & W R Co v. Wyatt, 51 S Ct 558, 283 US 829, 75 L Ed 1442

Ala.—Atlantic Coast Line R Co v Wetherington, 16 So 2d 720, 245 Ala 313

Ga.—Western & A R R v Meister, 140 SE 908, 37 Ga App 570

NJ.—Oelke v Hudson & M R Co, 135 A 659, 5 NJ Misc 2

W Va.—Staton v Virginian Ry. Co., 195 SE 601, 119 W Va 658

Different defenses available

In an action for injuries where the Federal Employers' Liability Act and the Safety Appliance Act and the State Hazardous Occupation Act are relied on, declaration should contain allegations to put defendant on notice of such fact, since defenses and proof under the different acts will be materially different—Atlantic Coast Line R Co v Moore, 181 So 374, 135 Fla 485, modified on other grounds 186 So 210, 135 Fla 485

85. Fla.—Atlantic Coast Line R Co v Moore, 186 So 210, 135 Fla 485

Switching tracks and yards

In switchman's action against railroad for injuries sustained in switching yards when grabiron on a car came loose, it was unnecessary, under Federal Safety Appliance Act, to allege that tracks in switching yards constituted part of the line of railroads engaged in interstate commerce, since such switching yards, sidetracks, Ys, etc., constitute a part of the highway used in interstate commerce, as a matter of law—Atlantic Coast Line R Co v Moore, supra

86. US—Zumwalt v. Gardner, CC A Mo, 160 F2d 298

Ala.—Atlantic Coast Line R Co v Wetherington, 16 So 2d 720, 245 Ala 313

Mo.—Cason v. Kansas City Terminal Ry. Co, 123 SW 2d 133

87. Fla.—Atlantic Coast Line R Co v. Moore, 186 So 210, 135 Fla 485

Miss.—Goss v. Kurn, 193 So 783, 187 Miss 679.

39 CJ p 937 note 79.

Negating assumption of risk see infra § 492.

Reasonable certainty required

Petition based on negligence of railroad in matters relating to structural condition of track, locomotive,

or appliances thereon need not allege minute details as to condition and structure, but need only clearly describe matters in question and state cause of action with sufficient definiteness and completeness to enable railroad to ascertain nature of acts of negligence alleged, since reasonable certainty in pleadings is all that is required—Southern Ry. Co. v Lunsford, 179 SE 571, 50 Ga App 829, reversed on other grounds 56 S Ct 504, 297 US 398, 80 L Ed 740, rehearing denied 56 S Ct 667, 297 US 729, 80 L Ed 1011

Allegations held sufficient

(1) Generally

Ala.—Mobile & O R Co v Williams, 129 So 60, 221 Ala 402

Ga.—Southern Ry. Co v Lunsford, 179 SE 571, 50 Ga App 829, reversed on other grounds, 56 S Ct 504, 297 US 398, 80 L Ed 740, rehearing denied 56 S Ct 667, 297 US 729, 80 L Ed 1011—Gay v Hurst, 155 SE 346, 42 Ga App 148

Ind.—Southern Ry Co v Wilkins, 178 NE 454, 95 Ind App 180, certiorari denied 53 S Ct 85, 287 US 635, 77 L Ed 550—Pennsylvania R Co v Ribke, 174 NE 427, 92 Ind App 611—Pennsylvania R Co v Hough, 161 NE 705, 88 Ind App 601

Miss.—Ross v Louisville & N R Co, 172 So 752, 178 Miss 69

Mo.—Jenkins v Wabash Ry Co, 73 SW 2d 1002, 335 Mo 748—Taylor v. Cleveland, C, C & St L Ry Co, 63 SW 2d 69, 333 Mo 650, certiorari denied Cleveland, C, C & St. L Ry Co v Taylor, 54 S Ct 121, 290 US 685, 78 L Ed 590

Pa.—Lombardo v Pittsburgh & L. E R R Co, 91 Pa Super 307.

SC—Covington v Atlantic Coast Line R Co, 155 SE 438, 158 SC 194, certiorari denied Atlantic Coast Line R. Co v Covington, 51 S Ct. 33, 282 US 858, 75 L Ed 759 39 CJ p 937 note 79 [c].

(2) Against demurrer

Fla.—Powell v Edwards, 157 So 427, 117 Fla 114

Ga.—Southern Ry. Co v Bradshaw, 37 SE 2d 150, 73 Ga App 438

Ind.—Baltimore & O S W R Co v Hill, 148 NE 489, 84 Ind App 354, motion granted 47 S Ct. 96, 71 L Ed 1313, certiorari denied 47 S Ct 246, 273 US 738, 71 L Ed. 367

Kan.—Wiggins v Missouri, K & T R. Co, 251 P. 1095, 122 Kan. 414

Mont.—Kakos v. Bryam, 292 P 909, 88 Mont 309

Tenn.—Nashville, C & St. L Ry v Hines, 94 SW 2d 397, 20 Tenn App. 1

Allegations held insufficient

(1) Generally.

US—Sabatino v. Reading Co, DC NJ, 16 F Supp 215

Ala.—Mobile & O R Co v Williams, 129 So. 60, 221 Ala 402.

Ga.—Harris v. Southern Ry. Co, 187 SE 405, 53 Ga App 668—McClain v Seaboard Air Line Ry Co, 129 SE 876, 34 Ga App 86

Ky.—York v. Rockcastle River Ry Co, 284 SW 79, 215 Ky 11.

La.—Devore v Louisiana & Arkansas Ry Co, App, 178 So 706

Mo.—Urie v Thompson, 176 SW 2d 471, 352 Mo 211

39 CJ p 937 note 79 [d]

(2) Against demurrer—Edwards v Southern Ry Co, 184 SE 370, 52 Ga App. 557.

88. Fla.—Powell v Edwards, 157 So 427, 117 Fla 114

Plaintiff's employment by defendant US—Pearce v. Pennsylvania R Co, DCPa, 7 FRD 420, affirmed 162 F 2d 524

89. US—Farmers' Bank & Trust Co of Hardinsburg, Ky, v Atchison, T & S F Ry. Co, DCMo, 11 F 2d 993, reversed on other grounds, CCA, 25 F 2d 23—Pearce v Pennsylvania R. Co, DCPa, 7 FRD. 420, affirmed 162 F.2d 524.

Ill.—Northern Trust Co v Grand Trunk Western Ry Co, 118 NE 986, 282 Ill 565—Gensel v New York, C & St. L. R Co, 249 Ill. App 164

Md.—Boyer v. Pennsylvania R. Co, 159 A 909, 162 Md 328

Mo.—Davis v Chicago & E I Ry. Co, 94 SW 2d 870, 338 Mo 1348

Pa.—Smith v Philadelphia & R. Ry. Co, 135 A 648, 288 Pa 250

Tenn.—Louisville & N R Co. v Jackson, 3 Tenn App 463

Tex.—Chicago, R I & G Ry. Co v. Bernhard, Civ App, 275 SW. 505

39 CJ. p 938 note 80

Express allegation not required

Ala.—Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 217 Ala. 323.

Mich.—Jorgensen v Railway Co, 155 NW 535, 189 Mich. 537.

Allegations held sufficient

Ala.—Southern Ry Co v. Melton, 193 So. 588, 240 Ala. 244—Mobile & O.

defendant was engaged, and plaintiff was employed, in interstate commerce has been held not fatal,⁹⁰ as where the court will take judicial notice of such facts⁹¹ or where the evidence requires a finding that the employee was engaged in interstate commerce.⁹²

The complaint must also allege the existence of some duty on the part of defendant toward plaintiff,⁹³ defendant's negligence or breach of duty,⁹⁴ injury to plaintiff,⁹⁵ and that the act of negligence charged was, in whole or in part, the proximate cause of the injury sustained, as discussed supra subdivision i of this section.

If the allegations are otherwise sufficient, the statute need not be specifically declared on or referred to.⁹⁶ It has been held that, even where the complaint does not state facts sufficient to make the

statute applicable, it will be treated as applicable if the evidence shows the necessary facts.⁹⁷ Where the pleading alleges facts which establish the right to recovery under the federal statute, it has been held immaterial that plaintiff alleges that his right to recover is determinable under a state statute.⁹⁸ The sufficiency of the pleading is not affected by an allegation that the master's common-law liability was in force at the time and place of the injury.⁹⁹

k. Willful or Wanton Injury

In an action for willful or wanton injury plaintiff must allege that the act complained of was willfully done with intent willfully to inflict the particular injury.

A declaration or complaint by a servant against the master for willful or wanton injury must allege that the act complained of was willfully done with intent willfully to inflict the particular injury.¹

R. Co. v. Williams, 121 So 722, 219 Ala. 238.

Ga.—Southern Ry Co v Highsmith, 1 SE2d 211, 59 Ga App 659.

Mo.—Sibert v. Litchfield & M Ry Co, 159 SW2d 612—Walls v. Thompson, App., 119 SW2d 48.

39 C.J. p 938 note 80 [a].

Allegations held insufficient

(1) Generally

U.S.—Farmers' Bank & Trust Co. of Hardinsburg, Ky., v. Atchison, T. & S F Ry. Co., Ky., 11 F2d 993, reversed on other grounds, CCA, 25 F2d 23.

Ala.—Seaboard Air Line Ry Co v Hackney, 115 So 869, 217 Ala 382.

—Kasulka v. Louisville & N. R. Co., 105 So 187, 213 Ala 463.

Pa.—Smith v Philadelphia & R. Ry Co, 135 A 648, 288 Pa 250.

Tex.—Chicago, R I & G Ry Co v Bernhard, Civ App., 275 SW. 505.

39 C.J. p 938 note 80 [b].

(2) Count against master for servant's death, which was based on master's negligence in retaining incompetent fellow servant and made no mention of employment of servant or fellow servant in interstate commerce, did not state cause of action under Federal Employers' Liability Act.—McDuff v. Kurn, 172 So 886, 233 Ala 619.

90. Mich.—Kruk v Minneapolis, St P & S. S M. Ry Co, 229 N.W. 479, 249 Mich 685—Fernet v Railroad Co., 144 N.W. 884, 175 Mich 653.

91. Fla.—Atlantic Coast Line R. Co v. Moore, 186 So 210, 135 Fla 485.

Mo.—State v. Railroad, 111 SW 500, 219 Mo 658—McIntosh v. St. Louis & S F. R. Co., 168 SW. 821, 182 Mo App. 238.

92. Tex.—Geer v St. Louis, S F. & T R. Co., 194 S.W. 939, 109 Tex. 38.

93. ND.—Johnson v. Minneapolis, St P & S. S M Ry Co, 209 N W 786, 54 ND 351.

94. Fla.—Powell v. Edwards, 157 So. 427, 117 Fla 114.

Ill.—Speiring v Chicago & E I R Co, 60 NE2d 267, 325 Ill App 576.

Miss.—Clark v Gulf, M. & N. R. Co., 97 So 185, 132 Miss 627.

Neb.—Bernhardt v. Chicago, B & Q. R Co, 272 NW 209, 132 Neb 346. certiorari denied 58 S.Ct. 24, 302 US 685, 82 LEd 529.

ND.—Johnson v Minneapolis, St. P & S S M Ry. Co., 209 N.W. 786, 54 ND. 351.

Okl.—Fisher v Kansas City, M & O Ry Co., 36 P2d 744, 169 Okl 282.

Or.—Campbell v. Southern Pac Co., 250 P. 622, 120 Or. 123.

Tenn.—Louisville & N. R. Co v Jackson, 3 Tenn App. 463.

Notice of injury

In action against railroad under Federal Employers' Liability Act for death of employee allegedly resulting from injuries sustained when aggravated by failure to receive medical attention for several hours, where no facts were pleaded to show that railroad knew or should have known of the injury, complaint did not state a cause of action.—Tishar v Nicodemus, DC Ill., 49 F Supp. 145.

Allegations held sufficient

Ga.—Southern Ry. Co v. Blanton, 192 SE 437, 56 Ga App 232.

Mo.—Jenkins v. Wabash Ry Co, 73 SW2d 1002, 335 Mo 748—Harlan v Wabash Ry. Co., 73 SW2d 749, 335 Mo. 414.

Allegations held insufficient

US.—Sabatino v. Reading Co., D.C. N.J., 16 F Supp 215—Klug v. Palmer, DC NY, 2 FRD 273.

Mo.—Urie v Thompson, 176 S.W.2d 471, 352 Mo. 211.

95. US.—Burwell v Railway Express Agency, Inc., DC Mass., 26 F Supp 26.

96. US.—Carpenter v Baltimore & O R Co, CCA Ohio, 109 F2d 375.

Ga.—Mattox v. Southern Ry. Co., 187 SE 29, 182 Ga 779.

Mo.—Harlan v Wabash Ry. Co., 73 SW2d 749, 335 Mo 414.

Utah.—Ehalt v McCarthy, 138 P2d 839, 104 Utah 100.

97. Ark.—St. Louis, I M & S R. Co v Coke, 175 SW 1177, 118 Ark. 49.

98. Ga.—Southern Ry Co v Heat-on, 6 SE2d 339, 61 Ga App 386—Atlantic Coast Line R. Co. v. Frierson, 4 SE2d 131, 60 Ga App 465.

99. Mo.—Carpenter v. Kansas City Southern R Co., 175 SW. 234, 189 Mo App. 164.

1. Ala.—Gentry v. Swann Chemical Co., 174 So. 530, 234 Ala 313.

39 C.J. p 939 note 86.

Allegations held insufficient

(1) In action for injuries to employee from working in unventilated room filled with fumes, dust, and small particles of a chemical mixture, count charging that defendant's servants and agents wantonly, willfully, and intentionally caused plaintiff to work in such room instead of alleging that his injury was so caused, was subject to demurrer.—Gentry v. Swann Chemical Co., supra.

(2) Other allegations see 39 C.J. p 939 note 86 [a].

Alternative allegations

Okl.—Chicago, R. I & P Ry Co. v. McIntire, 119 P 1008, 29 Okl. 797.

39 C.J. p 939 note 86 [b].

§ 491. — Negligence of Fellow Servants

- a. In general
- b. Under statutes modifying fellow-servant rule

a. In General

Where the pleading in a common-law action for injury to a servant charges negligence on the part of the master, it need not affirmatively aver that the injury was not caused by the negligence of a fellow servant; but, where it appears that the act or omission causing the injury was that of a fellow servant, plaintiff must allege, or state facts showing that he and such servant were not fellow servants.

Where the declaration, petition, or complaint in a common-law action for injury to a servant charges negligence on the part of the master, it need not affirmatively aver that the injury was not caused by the negligence of a fellow servant;² and, where a servant alleges injuries caused by the negligence of the master and sets forth the acts of omission constituting the negligence, the fact that the petition shows that the negligence of a fellow servant contributed to the injury does not render it demurrable.³ So, where the negligence is charged directly against the master, although a corporation incapable of acting otherwise than through agents, it will not be assumed on demurrer that the act or omission was, in its nature, that of a fellow servant.⁴

Where, on the other hand, the negligence is charged as that of a servant, or it appears affirmatively on the face of the pleading that the act or omission causing the injury was that of a fellow servant,⁵ or where, under the facts stated, the injury might have resulted from the negligence of a fellow servant,⁶ plaintiff must allege, or state facts showing, that he and such servant were not fellow servants, or, as discussed supra § 490 f, that defendant was negligent in employing such servant or retained him after he knew, or ought to have known, that he was incompetent. In some jurisdictions it has been held insufficient to allege as a legal conclusion that the negligent servant was a vice principal of defendant.⁷ Where an action is brought for injury occurring in another state, if, by the common law of the state, plaintiff and those whose negligence caused the injury were not fellow servants, plaintiff must plead such law as a fact.⁸

The name of the negligent servant need not be stated⁹ if the pleading alleges what duties the servant performed¹⁰ or otherwise shows that he was acting as vice principal in respect of plaintiff.¹¹

b. Under Statutes Modifying Fellow-Servant Rule

Where the fellow-servant rule has been modified or abrogated, the declaration or complaint must allege facts which show negligence on the part of the servant causing the injury.

2. Ga.—Hec Mfg Co. v. Heaven, 144 S.E. 686, 38 Ga.App. 460 39 C.J. p 939 note 88

Acts or omissions through agents or representatives see supra § 490 h

3. Ind.—McMillen v. Hall, 109 N.E. 424, 59 Ind.App. 545

Mo.—Young v. Shickle, Harrison & Howard Iron Co., 15 S.W. 771, 103 Mo. 324

4. Ind.—Bedford Belt R. Co. v. Brown, 42 N.E. 359, 142 Ind. 659. 39 C.J. p 939 note 90

5. Ga.—Blanchard v. Gallahar, 83 S.E. 3d 379, 72 Ga.App. 182—McKerley v. Georgia School of Technology, 139 S.E. 361, 37 Ga.App. 72 39 C.J. p 939 note 91

Matter not raised by demurrer

A demurrer to a declaration in an action for injuries to an employee, which states that the declaration as a whole does not allege facts constituting a legal cause of action, does not raise the question whether a co-employee, whose acts were complained of as negligent, was a fellow servant of the employee—Johnson v. Bennington & N. A. St. Ry Co., 90 A. 507, 87 Vt. 519.

Allegations held sufficient to negative fellow service

(1) Generally
Ga.—Spaulding Oil Mill v. Mayes, 173 S.E. 734, 48 Ga.App. 613
Tex.—People's Ice Co. v. Nowling, Civ.App., 16 S.W.2d 976 39 C.J. p 939 note 91 [b]

(2) Against demurrer
Fla.—Ball v. I. C. Helmly Furniture Co., 182 So. 435, 132 Fla. 882—Bryant v. Moss Packing Co., 158 So. 713, 118 Fla. 176
Kan.—Burroughs v. Michel, 52 P.2d 633, 142 Kan. 814.

Allegations held insufficient to negative fellow service

(1) Generally
Ala.—McDuff v. Kurn, 172 So. 886, 233 Ala. 619
Fla.—Hawkins v. Ideal Holding Co., 188 So. 781, 137 Fla. 599
Ga.—Wildor v. Steel Products Co., 195 S.E. 226, 57 Ga.App. 255 39 C.J. p 939 note 91 [c].

(2) Against demurrer
Fla.—Kendrick v. Ideal Holding Co., 188 So. 778, 137 Fla. 600
Ga.—Salter v. Nugent, 177 S.E. 513, 50 Ga.App. 187.

6. Ill.—Sutherland v. Rockford & Interurban R. Co., 165 Ill.App. 80 39 C.J. p 940 note 92

Relationship not assumed

It has been held, however, that petition alleging merely that plaintiff, when employed by highway department in loading gravel, was negligently hit with a shovel by another employee of department, did not warrant assumption that they were fellow servants, and was not vulnerable to exception of no cause or right of action because of fellow-servant doctrine—Crain v. State, La. App., 28 So.2d 336.

7. Mo.—Higgins v. Missouri Pac. R. Co., 16 S.W. 409, 104 Mo. 413, 418 39 C.J. p 940 note 94

8. Ind.—Wabash R. Co. v. Hassett, 83 N.E. 705, 170 Ind. 370.

9. Ga.—Pierce v. Seaboard Air Line R. Co., 50 S.E. 468, 122 Ga. 664 39 C.J. p 940 note 96

Under statutes modifying fellow servant rule see infra subdivision b of this section.

10. Ga.—General Supply & Const. Co. v. Lawton, 62 S.E. 293, 181 Ga. 375 39 C.J. p 940 note 97.

11. Tex.—Suderman v. Krizan, 109 S.W. 373, 50 Tex.Civ.App. 29. 39 C.J. p 940 note 98.

Where the fellow-servant rule has been modified or abrogated,¹² as by an employers' liability act,¹³ the declaration or complaint must allege facts which show negligence on the part of the servant causing the injury and otherwise bring the case clearly within the terms of the statute. If the facts alleged are sufficient for this purpose the precise words of the statute need not be used,¹⁴ and the particular acts or omissions which constitute and go to prove the negligence need not be averred¹⁵ in the absence of a demand for a bill of particulars or a motion to make the complaint more definite and certain.¹⁶ Also, if the facts alleged bring the case within the statute, the complaint need not allege that defendant is liable under its provisions.¹⁷

An allegation that the negligent servant had knowledge of the danger has been held unnecessary;¹⁸ but there is also authority to the contrary.¹⁹ The pleading must show to which servant or servants negligence is imputed,²⁰ although where the negligence is charged as that of one exercising superintendence it is sufficient without alleging the nature of the superintendence;²¹ and the fact that the fellow servant was acting within the scope of his employment must be averred or be necessarily implied from the facts alleged.²² The complaint

cannot be made to piece out a common-law action with the aid of such provisions of a state employers' liability act as constitute under the common law negligence of a fellow servant.²³

Name of negligent servant. Under some statutes a complaint for injury to a servant caused by the negligence of a coemployee intrusted with superintendence, or to whose order plaintiff was bound to conform, must state the name of the negligent coemployee or allege that his name is unknown to plaintiff;²⁴ but, where the action is brought under that section of the statute making the master liable for injuries caused by defects in the condition of the ways, works, machinery, or plant, the name of the servant intrusted with the duty of seeing that such ways, etc., were in proper condition need not be stated.²⁵ In at least one jurisdiction it is not necessary to state the name of the employee intrusted with superintendence.²⁶

§ 492. — Negating Assumption of Risk

- a. In general
- b. Notice or complaint, and promise of remedy
- c. Inexperienced or youthful servants

12. Fla.—Tampa Electric Co v Jandreau, 112 So 558, 93 Fla 520 Constitutional or statutory provisions as to master's liability for injuries by fellow servant see supra §§ 334-355

Hazardous occupations

(1) Under statute modifying fellow-servant rule in respect of hazardous occupations, employee injured by fellow employees in hazardous occupation must allege in declaration that injury was result of employer's negligence in operating machinery or in carrying on hazardous occupation—Porter v Sprague, 126 So. 759, 99 Fla. 371.

(2) Injured employee need not deny in declaration that the negligent act was being jointly performed by himself and fellow servants—Geneva Mill Co v. Andrews, C.C.A.Fla., 11 F.2d 924.

(3) Count of declaration, alleging that defendant corporation was engaged in business of transportation for hire on public highways and parked trailer truck on public street for purpose of delivering glass to plaintiff's employer, that its servants negligently failed to fasten truck door securely, and that plaintiff was struck and injured thereby when it flew open while he was assisting such servants in moving crate of glass off sidewalk into employer's place of business, stated no cause of action under extrahazardous occu-

pation statute for injuries to employee because of fellow servants' negligence, in absence of allegation that defendant was engaged in business of operating automobiles for public use—Hartquist v Tamiami Trail Tours, 190 So 533, 139 Fla. 328.

Allegations held sufficient

Fla.—Atlanta & St Andrews Bay Ry Co v Pittman, 178 So 297, 130 Fla 634—Tampa Electric Co v Jandreau, 112 So 558, 93 Fla 520

13. Ga.—McClam v Seaboard Air Line Ry Co, 129 S.E. 876, 34 Ga. App 86.

39 C.J. p 940 note 99.

Allegations held sufficient

Ga.—Southern Ry Co v Heaton, 6 S.E.2d 339, 61 Ga.App 386

39 C.J. p 940 note 99 [d].

Allegations held insufficient

Ga.—Fisher v Georgia Northern Ry Co, 134 S.E. 827, 35 Ga.App. 733.

39 C.J. p 940 note 99 [e]

14. Ind.—Southern Indiana R Co v. Martin, 66 N.E. 886, 160 Ind 280.

15. Ala.—Alabama Great Southern R Co v. Flynn, 74 So. 246, 199 Ala. 177.

39 C.J. p 943 note 2.

16. N.Y.—Schradin v. New York Cent. & H. R. R. Co, 109 N.Y.S. 428, 124 App Div 705, affirmed 87 N.E. 1126, 194 N.Y. 534

17. N.Y.—Ingless v. New York, N.

H. & H. R. Co, 117 N.Y.S. 392, 133 App Div 193, reargument denied 118 N.Y.S. 1115, 134 App Div 932—Schradin v. New York Cent. & H. R. R. Co, 109 N.Y.S. 428, 124 App Div 705, affirmed 87 N.E. 1126, 194 N.Y. 534.

18. Ala.—Robinson Min. Co v. Tolbert, 31 So 519, 133 Ala. 462

39 C.J. p 943 note 5

19. Ind.—Chicago & E. R. Co. v.

Lain, 83 N.E. 632, 170 Ind 84.

20. Tex.—Texas & Pacific Coal Co. v. Sherbley, Civ App, 212 S.W. 758.

21. Ala.—Western Steel Car & Foundry Co. v. Cunningham, 48 So 109, 158 Ala 369—Louisville & N. R. Co. v. Orr, 10 So 167, 94 Ala. 602

22. Ala.—Naugher v. Louisville & N. R. Co, 91 So 254, 206 Ala. 515

39 C.J. p 943 note 9

23. N.Y.—Donnelly v. Staten Island Shipbuilding Co, 200 N.Y.S. 836, 206 App Div. 765

24. Ala.—Naugher v. Louisville & N. R. Co, 91 So. 254, 206 Ala. 515.

39 C.J. p 943 note 12.

In common-law action see supra § subdivision a of this section.

25. Ala.—Louisville & N. R. Co. v. Lile, 45 So. 699, 154 Ala. 556

39 C.J. p 943 note 13.

26. Mass.—Woodbury v. Post, 33 N. E. 86, 158 Mass. 140.

a. In General

In some jurisdictions where assumption of risk is regarded as an affirmative defense, plaintiff ordinarily need not negative such defense, in other jurisdictions it is generally necessary for the declaration, petition, or complaint to negative assumption of risk.

In an action to enforce the master's common-law liability, assumption of risk by the injured servant is regarded in some jurisdictions as an affirmative defense, the burden of proving and establishing which is on defendant, as discussed *infra* § 501, and plaintiff need not negative such defense by alleging his want of knowledge of the defect or danger²⁷ unless the case made by his own pleading raises an inference of knowledge²⁸ This rule, however, has been held not to apply where the injury occurred in the execution of an express command by the master, and in such case want of knowledge must be averred²⁹ unless it is charged that the servant was coerced to undertake a dangerous work which he did not possess the capacity or

experience to perform with safety.³⁰ In other jurisdictions it is necessary, as a rule, for the declaration, petition, or complaint to negative assumption of risk³¹ unless the risk was an extraordinary one³² or the danger instantaneous.³³

Irrespective of what rule prevails as to the necessity of negating assumption of risk, a declaration or complaint is demurrable where it affirmatively shows that the risk was assumed³⁴ On the other hand, where it does not clearly appear from the declaration or complaint, or by inference from the facts alleged, that the servant assumed the risk, the pleading may be sufficient³⁵

Alleging want of knowledge of defect or danger. Where assumption of risk is required to be negated, the declaration or complaint should allege that the servant had no knowledge of the defect or danger,³⁶ or, if he had knowledge, it should state an excuse for continuing work³⁷ An allegation that plaintiff was without fault has been held not to

27. Okl.—Missouri-Kansas-Texas R Co v Highfill, 293 P 182, 146 Okl 84, certiorari denied 51 S Ct 483, 283 U.S. 834, 75 L Ed 1446.
Tenn.—Louisville & N. R. Co v. Jackson, 3 Tenn App. 463.
39 C J p 943 note 17

In action under Federal Employers' Liability Act, generally employee is not required to anticipate and negative defense of assumption of risk—Matthews v Southern Pac Co, 59 P 2d 220, 15 Cal App 2d 36

28. S C—Steinmeyer v. Marine Hotel Corporation, 140 S E 695, 142 S C 358
39 C J p 943 note 18

29. W Va.—McClary v. Knight, 80 S E 866, 73 W Va 355.
39 C J p 943 note 19

30. W Va.—Kinder v Boomer Coal & Coke Co, 95 S E 580, 82 W Va 32.

31. Ga.—Lumpkin v Western & Atlantic R R, 9 S E 2d 188, 62 Ga App 597
39 C J p 944 note 21

Specific allegation not required
Ky—Christopher's Adm'r v Blanton Stone Co, 80 S W 2d 590, 258 Ky 587—Louisville & N R Co. v Stewart, 173 S W 757, 163 Ky 164

32. Conn.—Worden v Gore-Meenan Co, 78 A 422, 83 Conn. 642
39 C J p 944 note 22

33. Ky.—Payne v Cooper, 245 S W 855, 197 Ky. 76
39 C J p 945 note 23

34. US—Grosscup v Chicago & N W Ry Co, DC Wyo, 14 F Supp 276

Fla—Swanson v Miami Home Milk Producers' Ass'n, 157 So 415, 117 Fla 110

Ga.—Atlantic Coast Line R Co v Cox, 156 S E 733, 42 Ga App 439
Minn—Kommerstad v. Great Northern Ry Co, 139 N W 713, 120 Minn 376

S C—Steinmeyer v Marine Hotel Corporation, 140 S E 695, 142 S C 358

Va—Chesapeake & O. Ry. Co v Swartz, 80 S E 568, 115 Va. 723.
39 C J p 945 note 24

Assumption of risk as defense see *supra* §§ 358–360

Pleadings held to show assumption of risk

Fla.—Gordon v Gandy Bridge Co, 7 So 2d 850, 150 Fla 28

Ga.—Moses v Johnson, 22 S E 2d 328, 68 Ga App. 131—Davis v Georgia Coating Clay Co, 11 S E 2d 60, 63 Ga App 265—Gartrell v Russell, 180 S E 860, 51 Ga App 519—Horne v. Atlanta, B & C. R Co., 169 S E 760, 47 Ga App 116—Brady v Bugg, 142 S E 804, 38 Ga App 48

39 C J p 945 note 24 [a]

35. Ga.—Simowits v Register, 3 S E 2d 231, 60 Ga App 180

Pa.—Ham v. Hudson Coal Co, Com Pl, 40 Lack Jur 61

Pleadings held not to show assumption of risk

US—Self v Sinclair Refining Co, CCA Fla, 69 F 2d 948

Ga.—Southern Ry. Co v. Blanton, 192 S E 437, 56 Ga App. 232.

Ind.—Baltimore & O S W. R Co v Beach, 168 N E 204, 99 Ind App. 672.

Kan.—Wiggins v Missouri, K & T R Co, 251 P 1095, 122 Kan 414—Tartar v Missouri, K & T R Co, 241 P 246, 119 Kan 738, certiorari denied Missouri-Kansas-Texas R

Co v Tarter, 46 S Ct. 355, 270 US 659, 70 L Ed 785

NY—O'Donnell v Elmira Foundry Co, 233 N Y S 9, 133 Misc 629
39 C J p 945 note 25 [b]

36. Ga.—Lawrenceville Oil Co v Walton, 84 S E 584, 143 Ga 259

Ky—Brooks v Arnett, 69 S W 2d 1029, 253 Ky 491—Gibraltar Coal Mining Co v Nalley, 383 S W 416, 214 Ky 431—Louisville & N. R Co v Lewis, 278 S W. 143, 211 Ky 830.

Ohio—McKee v New Idea, App, 44 N E 2d 697.

39 C J p 945 note 27

Necessity of alleging want of knowledge where action is based on negligence in

Employment of incompetent servants see *supra* § 490 f

Failure to warn or instruct servant see *supra* § 490 e

Allegations held sufficient

Ky—Christopher's Adm'r v Blanton Stone Co, 80 S W 2d 590, 258 Ky 587

39 C J p 945 note 27 [d]

Allegations held insufficient

Ga.—Kidd v Williamson, 8 S E 2d 590, 61 Ga App 890—Newman v Griffin Foundry & Machine Co, 144 S E 886, 58 Ga App 518

Ky—Louisville & N R Co. v. Lewis, 278 S W 143, 211 Ky 830.

39 C J p 945 note 27 [e]

37. Ind.—Western Const Co. v. Smith, 122 N E 429, 69 Ind. App 591

39 C J p 945 note 27

Allegations of notice or complaint and promise of remedy see *infra* subdivision b of this section.

take the place of an averment of want of knowledge,³⁸ although there is also authority to the contrary.³⁹ While it has been held that express allegations are not required,⁴⁰ allegations of want of knowledge by the servant must be direct and not by way of recital,⁴¹ and should be as broad as those averring knowledge by the master.⁴² However, a general allegation of want of knowledge, where plaintiff relies on his ignorance of the defect or danger to show nonassumption of risk, has been held sufficient⁴³ unless overcome by the facts specifically stated,⁴⁴ and such an allegation negatives both actual and constructive knowledge.⁴⁵ On the other hand, it has been held that an allegation that plaintiff did not know of the defect or danger is not sufficient to negative constructive knowledge.⁴⁶

Statutory liability. The declaration or complaint need not negative assumption of risk where the action is based on neglect of a duty imposed by statute⁴⁷ or is brought under a statute which excludes such defense in the particular case.⁴⁸

b. Notice or Complaint, and Promise of Remedy

Where the servant had knowledge of the condition which caused his injuries, but bases his action on the master's promise to remedy such condition, he should allege notice or complaint to the master, the promise of remedy, reliance on the promise, and lapse of a reasonable time for repairing after the promise was made.

Where the servant had knowledge of the defect or danger which caused his injuries, but bases his right of recovery on a promise by the master to

remedy the defect or remove the danger, he should allege notice or complaint to the master, the promise of remedy, his reliance on the promise, and the lapse of a reasonable time for repairing after the promise was made,⁴⁹ although a complaint failing to allege reliance on the promise or that a reasonable time for repair had elapsed has been held sufficient after verdict.⁵⁰ It has also been held that plaintiff should allege that he believed he would be discharged if he did not continue the dangerous work.⁵¹

On the other hand, it has been held that, where plaintiff is not required to negative assumption of risk, a fortiori he is not bound to show why he did not assume the risk; and if defendant sets up assumption of risk as a defense plaintiff may prove a promise to repair, although he did not plead such promise.⁵² If the complaint shows that an unreasonable time had elapsed between the promise and the injury, the servant will be held to have waived the promise and assumed the risk,⁵³ although this, being a matter of defense, need not be negated.⁵⁴

Violation of statute Where the action is based on the violation of a statutory duty, plaintiff need not plead such statute in order to avail himself of its provisions relieving him from the assumption of risk in continuing in the service after knowledge of the danger.⁵⁵

c. Inexperienced or Youthful Servants

Assumption of risk is sufficiently negated where it is alleged that the servant was inexperienced or

38. Vt.—Pette v Old English Slate Quarry, 96 A 596, 90 Vt 87

39 C.J. p 946 note 29

39. Mich.—Cristanelli v Saginaw Min Co., 117 N.W. 910, 154 Mich. 423.

40. Ga.—Lawrenceville Oil Mill v. Dobbs, 84 S.E. 584, 143 Ga. 259—Nashville, C & St L Ry v Hilderbrand, 173 S.E. 87, 48 Ga.App. 140—Louisville & N R Co. v Dobbs, 143 S.E. 601, 38 Ga.App. 289

41. Ind.—Cleveland, C C & St L R Co v Morrey, 88 N.E. 932, 173 Ind 513.

39 C.J. p 946 note 31

42. Ind.—Indianapolis Traction & Terminal Co v Mathews, 97 N.E. 320, 177 Ind 88.

39 C.J. p 946 note 32

43. Vt.—Blaisdell v Blake, 11 A 2d 215, 111 Vt 123

39 C.J. p 946 note 34

If plaintiff relies on other facts to show nonassumption of risk he must plead them.—Ellie v. Cowles, 73 A 258, 82 Conn 236.

44. Fla.—Swanson v Miami Home Milk Producers' Ass'n, 157 So 415, 117 Fla. 110

39 C.J. p 946 note 35

45. Ky.—Christopher's Adm'r v Blanton Stone Co., 80 S.W.2d 590, 258 Ky. 587

39 C.J. p 946 note 36

46. Ill.—Gould v Aurora, Elgin & Chicago R Co., 141 Ill.App. 344

47. Ind.—Cleveland, C C & St L R Co v Powers, 88 N.E. 1073, 89 N.E. 485, 173 Ind 105

39 C.J. p 946 note 38

48. Ohio—McKee v New Idea, App., 44 N.E.2d 697

39 C.J. p 947 note 39

Effect of statutes on defense of assumption of risk see supra §§ 358-360.

49. Miss.—Ross v Louisville & N R Co., 172 So. 752, 178 Miss 69

39 C.J. p 947 note 40

Allegations held sufficient

Ga.—Baker v Augusta Veneer Co., 161 S.E. 676, 44 Ga.App. 383—

Evans v Central of Georgia R Co., 135 S.E. 780, 36 Ga.App. 58

39 C.J. p 947 note 40 [c]

Allegations held insufficient

Ga.—Brady v Bugg, 142 S.E. 304, 38 Ga.App. 48

39 C.J. p 947 note 40 [d]

50. Ill.—St Louis Cons Coal Co v Dokamp, 54 N.E. 567, 181 Ill 9

51. Ohio—Memphis & Cincinnati Packet Co v Britton, 25 Ohio Cir Ct 153

52. US—Pennsylvania R Co. v Forstall, N.Y., 159 F 893, 87 CC A 73

Issues, proof, and variance see infra §§ 497-500.

53. Wis.—Stephenson v Duncan, 41 N.W. 337, 73 Wis 404, 9 Am St R 806

39 C.J. p 947 note 44.

54. Ind.—Daugherty v. Midland Steel Co., 53 N.E. 844, 23 Ind.App. 78.

55. Mich.—Wallin v Arcadia & B R. R Co., 138 N.W. 270, 173 Mich 466.

39 C.J. p 947 note 46.

youthful, that he did not know or appreciate the dangers to which he was exposed, and that the master, knowing these facts, failed to warn or instruct him as to the dangers of his employment.

Assumption of risk is sufficiently negatived where it is alleged that the servant was inexperienced or youthful, that he did not know or appreciate the dangers to which he was exposed, and that the master, knowing these facts, failed to warn or instruct him as to the dangers of his employment.⁵⁶ These facts, however, must be definitely pleaded.⁵⁷

§ 493. — Negating Contributory Negligence

In some jurisdictions, but not in others, the declaration or petition must contain allegations negating negligence on the part of plaintiff, but under either view if the facts alleged show contributory negligence the declaration or complaint is bad.

In some jurisdictions contributory negligence is regarded as an affirmative defense, which must be alleged and proved by defendant in a common law action by a servant for injury, and consequently need not be negatived by plaintiff⁵⁸ unless the declaration or complaint raises an inference of contributory negligence.⁵⁹ In other jurisdictions it is held that the absence of contributory negligence is essential to the servant's cause of action, and that therefore the declaration or complaint must contain allegations negating negligence on the part of

plaintiff,⁶⁰ in the absence of a statutory provision to the contrary.⁶¹

Under either view if the facts alleged show contributory negligence the declaration or complaint is bad,⁶² even though there is a specific allegation that plaintiff was in the exercise of due care or that he had no knowledge of the defect or danger.⁶³ However, although the pleading states facts from which it might be inferred that plaintiff was guilty of contributory negligence, yet, when such an inference does not necessarily follow from the averments of the declaration, petition, or complaint, taken as a whole, an allegation directly negating such negligence renders it good as against a general demurrer.⁶⁴

Where it is necessary to negative contributory negligence, a general allegation of due care on the servant's part, or his freedom from contributory negligence,⁶⁵ as by the use of the phrase "without fault" on his part,⁶⁶ is generally sufficient unless overcome by the other facts alleged. Where several grounds of negligence are alleged, plaintiff must plead facts showing that he was free from fault as to each ground.⁶⁷

Alleging want of knowledge of defect or danger. While the question of negating the servant's want of knowledge of the defect or danger is generally considered as relating to the doctrine of assumption

56. Ind.—Evansville & R R Co v Maddux, 38 NE 345, 34 NE 511, 134 Ind. 571.
39 C.J. p 947 note 47.

57. Ga.—Cedartown Cotton & Export Co v Miles, 58 SE 289, 2 Ga.App. 79.
Tex.—Magnolia Petroleum Co v Ray, Civ App., 187 SW 1085

58. Mo.—Hamilton v. Standard Oil Co. of Indiana, 19 SW 2d 679, 328 Mo 631.
Tenn.—Louisville & N R Co. v Jackson, 8 Tenn App 463
39 C.J. p 948 note 50

Employee need not negative possible effect of contributory negligence.—Smith v. American Car & Foundry Co., Mo App., 288 SW. 982

59. Mo.—Eaton v Wallace, 287 SW 514, 48 ALR 1291.
Mont.—Armstrong v Billings, 283 P 226, 86 Mont 228
39 C.J. p 948 note 51.

Allegations held not to raise inference

Fla.—Cook v. Lewis K Liggett Co., 173 So 159, 127 Fla 369
39 C.J. p 948 note 51 [c]

60. Ga.—Lumpkin v. Western & At-

lantic R R., 9 SE 2d 188, 62 Ga App 597.—Newman v Griffin Foundry & Machine Co., 144 SE 286, 38 Ga.App 518.

39 C.J. p 948 note 52

Allegations held sufficient

Ga.—Pollard v Weeks, 4 SE 2d 723, 60 Ga.App 664.
39 C.J. p 948 note 52 [d]

61. Iowa.—Band v Reinke, 298 N W 865, 230 Iowa 515
39 C.J. p 949 note 53

62. Del.—Potter v. Richardson & Robbins Co., 99 A 540, 6 Boyce 314

Fla.—Gordon v Gandy Bridge Co., 7 So 2d 350, 150 Fla 28

Ga.—Tankersley v Southern Ry Co., 35 SE 2d 522, 73 Ga.App 88.—Hopkins v Barron, 6 SE 2d 96, 61 Ga. App 168

Mo.—Eaton v. Wallace, 287 SW 614, 48 ALR 1291

Mont.—Armstrong v. Billings, 283 P 226, 86 Mont 228

SC.—Steinmeyer v. Marine Hotel Corporation, 140 SE 695, 142 SC. 353

Va.—Chesapeake & O Ry Co v Swartz, 80 SE 568, 115 Va. 723.
39 C.J. p 949 note 54

Allegations held not to show contributory negligence

Fla.—Cook v Lewis K Liggett Co., 173 So 159, 127 Fla 369

Ga.—Dessau v Achord, 178 SE 296, 50 Ga App 426.—Fulton Bakery v Williams, 134 SE 621, 35 Ga App 681.

Kan.—Wiggins v. Missouri, K & T R Co., 261 P 1095, 122 Kan 414

Tex.—Robison v. City of Wichita Falls, Civ App., 27 SW 2d 281, reversed on other grounds City of Wichita Falls v Robison, 46 SW 2d 985, 121 Tex 133

39 C.J. p 949 note 54 [b]

63. Ga.—Elder v. City of Quitman, 193 SE 82, 56 Ga.App 460
39 C.J. p 949 note 55.

64. R.I.—Huling v. Finn, 34 A.2d 620, 67 R.I 369

39 C.J. p 950 note 56

65. Ky.—Christopher's Adm'r v. Blanton Stone Co., 80 SW 2d 590, 258 Ky 687.—Louisville & N. R. Co v Stewart, 173 SW 757, 163 Ky 164.

39 C.J. p 950 note 57

66. Ind.—Rogers v Overton, 87 Ind 410

39 C.J. p 950 note 58

67. Ga.—Central of Georgia R Co v Ruff, 56 SE 290, 127 Ga. 200.

of risk, discussed supra § 492, it has been treated in some cases as equally applicable to the doctrine of contributory negligence; and, where it is necessary to negative the latter defense, the declaration or complaint must show want of knowledge on the part of the servant,⁶⁸ although in some jurisdictions an allegation of want of knowledge has been held to be unnecessary where it is averred that the servant was in the exercise of due care.⁶⁹ Where knowledge of the defect or danger is required to be negated, a general allegation of want of knowledge is sufficient unless the specific facts stated contradict it,⁷⁰ and such allegation will cover both actual and constructive knowledge.⁷¹ On the other hand, it has been held that freedom from implied knowledge can be alleged in the form of a legal conclusion only when the facts set forth show such a state of circumstances as relieves plaintiff of such an imputation; otherwise the court will disregard the legal conclusion and give judgment on the facts actually stated.⁷²

An allegation that plaintiff had no opportunity to examine the appliance causing the injury is not equivalent to an allegation that he did not know that it was defective.⁷³ Even in those jurisdictions where contributory negligence is required to be negated, an allegation of want of knowledge has been held unnecessary where the servant was under no duty to examine the place alleged to be defective⁷⁴ or had a right to rely on the master's judgment as to the kind of tool to be used,⁷⁵ or where the complaint shows that he was ordered to work outside

the scope of his employment or away from the place of his usual work.⁷⁶ Where contributory negligence need not be negated, it has been held that, where knowledge by the person injured of his own physical condition is immaterial to a statement of his cause of action, plaintiff need not allege want of such knowledge.⁷⁷

Alleging youth and inexperience of servant. Contributory negligence may be negated by averring that, owing to the servant's youth and inexperience, he did not appreciate the danger and was not warned thereof.⁷⁸ Where it is not necessary to negative contributory negligence, plaintiff need not allege that he was inexperienced and did not appreciate the character of the work or the danger involved.⁷⁹

Statutory liability. Plaintiff need not negative contributory negligence where his action is based on neglect of a duty imposed by statute⁸⁰ or is brought under a statute abolishing that defense in the particular case.⁸¹ On the other hand, it has been held, in an action under a statute providing that injury to a railroad employee by reason of a defective car shall be prima facie evidence of negligence on the part of the railroad company, that the statute does not affect the rule requiring the petition to negative knowledge of the defect on the part of the employee.⁸²

§ 494. Plea or Answer

a. In general

68. Ga.—Holman v American Auto Ins Co, 39 S.E2d 850, 201 Ga 454 —Atlanta, B & C R Co v Mullis, 159 S.E 893, 43 Ga App 692.

Pa.—Kittila v Standard Stoker Co, Com Pl, 21 Erie Co. 266. 39 C.J. p 950 note 63

69. Ill.—Consolidated Coal Co v Wombacher, 24 N.E 627, 134 Ill 57

39 C.J. p 950 note 64.

70. Ind.—Lavene v. Friedrichs, 115 N.E 324, 186 Ind 333, rehearing denied 116 N.E 421, 186 Ind. 333 39 C.J p 950 note 65

Facts stated held to overcome general allegation

U.S.—Sapp v Brooks-Scanlon Corp, D.C.Fla., 285 F 578

Ga.—Ray v Western & Atlantic R. R., 9 S.E2d 92, 62 Ga.App 609

Facts stated held not to overcome general allegation

Ind.—Lavene v Friedrichs, supra. 39 C.J p 950 note 65 [a]

71. Ind.—Lavene v. Friedrichs, 115 N.E. 324, 186 Ind 333, rehearing denied 116 N.E 421, 186 Ind. 333.

Ky.—Christopher's Adm'r v Blanton Stone Co, 80 S.W2d 590, 258 Ky 587

39 C.J p 950 note 66.

72. Ga.—Taylor v. Virginia-Carolina Chemical Co, 63 S.E 470, 4 Ga App. 705—Cedartown Cotton & Export Co v Miles, 58 S.E. 289, 2 Ga.App 79

73. Ga.—Central of Georgia R Co v Ruff, 56 S.E 290, 127 Ga 200 39 C.J p 950 note 68

74. Ky.—Chesapeake & N R. Co v Venable, 63 S.W 35, 111 Ky 41, 23 Ky L 427 39 C.J p 950 note 69.

75. Ky.—Louisville & N. R. Co v Richardson, 46 S.W 631, 23 Ky L 2090

76. Ind.—Clark County Cement Co v Wright, 45 N.E. 817, 16 Ind App 630

77. Mo.—Hamilton v Standard Oil Co of Indiana, 19 S.W2d 679, 323 Mo 581

Mental incapacity
Employee, suing for injuries, need

not allege he was mentally incapable of appreciating his physical condition—Hamilton v Standard Oil Co of Indiana, supra

78. Ga.—Jordan v Datayias, 186 S.E 451, 53 Ga App 538 39 C.J p 951 note 73

Pleading failure to warn or instruct generally see supra § 490 e.

79. Mo.—Hamilton v Standard Oil Co of Indiana, 19 S.W.2d 679, 323 Mo 531

80. Ala.—Broslin v. Kansas City, M & B. R. Co., 21 So. 475, 114 Ala 398

39 C.J p 951 note 74.

81. Vt.—Carpenter v. Central Vermont R. Co, 107 A. 569, 93 Vt 357

39 C.J p 951 note 75
Defense of contributory negligence as affected by statutory provisions see supra § 123

82. Ohio—Hesse v. Columbus, S & H R Co, 50 N.E 354, 58 Ohio St 167.

- b Assumption of risk
- c Contributory negligence

a. In General

The allegations of the plea or answer must be definite and certain and responsive to the allegations of the declaration or complaint. Generally affirmative defenses must be specially pleaded.

The general rules of pleading govern as to the form and sufficiency of the plea or answer in an action by a servant to recover from his master for personal injuries⁸³ The allegations of the plea or answer must be definite and certain⁸⁴ and responsive to the allegations of the declaration or complaint⁸⁵ Affirmative defenses are not generally available to defendant unless they are specially pleaded⁸⁶ However, in an action based on a statute defendant is not required specially to plead an exception contained in the statute,⁸⁷ nor is it necessary for defendant to plead facts showing that the injury to the servant arose from a cause different from that alleged by plaintiff⁸⁸ Matters avoiding a defense pleaded should be set up by replication, and need not be negatived in the plea⁸⁹

Inconsistent defenses; duplicity Pleas of as-

sumed risk and contributory negligence are not destroyed because coupled with a denial of negligence.⁹⁰ On the other hand, it has been held that a claim of contributory negligence implies some negligence by defendant and is inconsistent with a general and qualified denial of negligence⁹¹ A plea setting up both assumption of risk and contributory negligence has been held bad for duplicity.⁹²

Admissions A plea or answer may by its form, nature, or substance operate as an admission of some facts alleged in the declaration, complaint, or petition⁹³ An allegation that the accident was caused by the negligence of the employee, or by the negligence of a fellow servant "in the service" of the employer "with" plaintiff, is an admission of the employment⁹⁴ On the other hand, an answer does not admit the dangerous condition of an appliance where it alleges that plaintiff "could well have known of its location and construction, and the dangers thereto, if any such dangers existed"⁹⁵ A plea which admits the killing of the servant, but does not admit that he was free from fault or that the other employees were at fault, is not a plea of justification⁹⁶

83. Kan—Giltner v. Stephens, 180

P 2d 288, 163 Kan 37.

39 C.J. p 951 note 79

Pleadings held sufficient

(1) Generally—Smith's Adm'rs v Louisville & N. R. Co., 32 SW 2d 1003, 236 Ky. 174—39 C.J. p 951 note 79 [b]

(2) In action by one employed to take charge of construction of barn for personal injuries allegedly caused by negligence of defendant, an answer showing that rope which plaintiff had tied became untied, as result of which girder fell on and injured plaintiff, showed that plaintiff's negligence was proximate cause of the accident and stated a good defense—Giltner v Stephens, 180 P 2d 288, 163 Kan 37

(3) In action to recover for injuries, allegations of answer that plaintiff's father had contracted as an independent contractor to cut logs for defendant and that plaintiff succeeded to contract on father's abandoning it were sufficient to raise issue as to plaintiff's status as independent contractor—Esthay v Sherman, Tex Civ App., 135 SW 2d 174, error dismissed, judgment correct.

Pleadings held insufficient

(1) Generally—Louisville & N. R. Co v Parker, 138 So 231, 223 Ala 626, certiorari granted 52 S Ct 496, 236 US 535, 76 L Ed 1375, certiorari dismissed 53 S Ct 94, 237 US 569, 77 L Ed 501—39 C.J. p 951 note 79 [c].

(2) Railroad's plea of codefendant's negligence was held to allege indemnity contract not available to defeat liability for injuries to employee—Jackson v Houston E & W T Ry Co., Tex Civ App., 293 SW 865, reversed on other grounds Houston E & W T Ry. Co v Jackson, Com App., 299 SW 885

84. Colo—Chicago, B & Q R Co v McGraw, 45 P 383, 22 Colo 363 39 C.J. p 951 note 80

85. Ala—Sloss-Sheffield Steel & Iron Co. v. Smith, 64 So. 337, 185 Ala 607 39 C.J. p 951 note 81

86. Cal—Qualls v Atchison, T & S F Ry Co., 296 P 645, 112 Cal App 7 SC—Youngblood v Southern Ry Co., 134 SE 660, 137 SC 47. 39 C.J. p 951 note 82

Applicability of Federal Employers' Liability Act must be pleaded in order to entitle defendant to claim any right or immunity thereunder Okl—Chicago, R I & P R Co v McBee, 145 P 331, 45 Okl 193 Tex—Wichita Falls & S R. Co v Holbrook, 78 SW 2d 938, 125 Tex 184, certiorari denied 56 S Ct 139, 296 US 618, 80 L Ed 439

87. Ill—Wajer v U S Brewing Co., 184 Ill App 545

88. Minn—Peterson v Chicago, B & Q R Co., 154 NW 1093, 131 Minn 266

89. Ala—Woodward Iron Co v. Lewis, 54 So 566, 171 Ala 288 39 C.J. p 951 note 85.

90. US—Owl Creek Coal Co v Goble, Wyo., 210 F 209, 127 C.C.A. 27.

91. Ohio—Bakas v. Casparis Stone Co., 14 Ohio NP NS, 677

92. Ala—Kansas City, M & B R. Co v. Thornhill, 37 So 413, 141 Ala 215

93. Mo—Ebert v A. J. Kasper Co., 71 SW 2d 859, 228 Mo App. 589 Wash—Easterly v Eatonville Lumber Co., 111 P 876, 60 Wash 647.

Plea held not to constitute admission

In suit for damages under employers' liability act, interveners claiming under an assignment of part of cause of action were not excused from pleading and proving that plaintiff had a cause of action by the fact that defendant pleaded a settlement with plaintiff, such plea not amounting to an admission—Phoenix Const Co. v. Witt & Saunders, Tex Civ App., 190 SW. 780.

94. N.Y.—Dobler v. Conron Bros. Co., 152 N.Y.S. 266, 166 App Div. 785

95. Iowa—Coates v Burlington, C R & N. R. Co., 17 N.W. 760, 62 Iowa 486

96. Ga.—Central R. Co v Crosby, 74 Ga 737, 58 Am R. 463

Pleading Workmen's Compensation Act. Where the master claims that the action is within the Workmen's Compensation Act, and not cognizable in the courts, he must plead his compliance with the act.⁹⁷ However, he need not negative exceptions in the act.⁹⁸

Negligence of fellow servants. The defense that the injury was caused by the negligence of a fellow servant must be set up, in some jurisdictions, by plea or answer in order to be available,⁹⁹ unless such negligence affirmatively appears from plaintiff's own pleadings or proofs,¹ but it is not necessary to specify the fellow servant whose negligence caused the injury or state in what the negligence consisted.² In other jurisdictions, however, defendant may show that the injury was caused by the negligence of a fellow servant without pleading the fact specially.³ Where plaintiff alleges negligence of the master in selecting an incompetent fellow servant whose negligent act caused the injury, defendant's denial both of the incompetency and the negligent act does not estop him to set up the defense of nonliability for the negligence of the fel-

low servant, if the evidence involves such negligence and either fails to establish the alleged incompetency or leaves the matter in issue.⁴

b. Assumption of Risk

Ordinarily assumption of risk by an employee is an affirmative defense which must be specially pleaded, but it has been held that the defendant need not plead a contractual assumption of risk, and, where it appears from the plaintiff's pleadings or proof that the risk was assumed, the defendant may avail himself of the defense without pleading it.

It has been generally held that assumption of risk by an employee is an affirmative defense which must be specially pleaded,⁵ since in its nature it is a plea in confession and avoidance.⁶ This is usually the rule where the risk is an extraordinary one created or enhanced by the master's negligence, and which the servant voluntarily assumes by continuing in the employment with actual or constructive knowledge of the defect and danger.⁷

It has been held, on the other hand, that defendant need not plead a contractual assumption of risk, that is, a risk ordinarily and necessarily incident to the employment,⁸ since, as discussed *infra* § 499,

97. Wash.—Norman v Alaska Coast Co, 142 P. 434, 81 Wash 64—Acres v Frederick, 140 P 270, 79 Wash 402.

98. Mo.—Mitchell v St. Louis Smelting & Refining Co, 215 S.W. 506, 202 Mo App 251.

99. Tex.—Smith v Great Atlantic & Pacific Tea Co, Civ App, 100 S.W.2d 1041, error dismissed.

39 C.J. p 952 note 99.

Evidence admissible under pleading see *infra* § 499.

1. Mont.—Mosher v Sutton's New Theater Co, 187 P. 584, 48 Mont 137.

39 C.J. p 952 note 1.

2. Ky.—Cincinnati, N. O. & T. P. R. Co. v Lewallen, 32 S.W. 958, 17 Ky L. 863.

3. Ga.—Vinson v. Morning News, 45 S.E. 481, 113 Ga. 655.

39 C.J. p 952 note 2.

4. Ga.—Babcock Bros Lumber Co. v Hughes, 113 S.E. 816, 29 Ga. App 20.

5. Cal.—Thomas v Southern Pac. Co, 2 P.2d 644, 116 Cal App 126, certiorari denied Southern Pac Co v Thomas, 52 S.Ct 265, 284 U.S. 689, 76 L.Ed 582.

Conn.—French v W. W. Mertz Co, 163 A. 457, 116 Conn 18.

Fla.—Great Atlantic & Pacific Tea Co v Dallas, 192 So 867, 141 Fla. 206—Swanson v Miami Home Milk Producers' Ass'n, 157 So 415, 117 Fla. 110—Corpus Juris cited in Smith v Coleman, 132 So 198, 204, 100 Fla. 1707.

Minn.—Foley v Bennett, 17 N.W.2d 509, 219 Minn 249.

Okl.—Shunkamolah v Delco, 288 P. 270, 131 Okl 272.

SC—Medlin v Vanderbilt, 130 S.E. 893, 133 SC 266.

Tex.—Smith v. Great Atlantic & Pacific Tea Co, Civ App, 100 S.W.2d 1041, error dismissed.

39 C.J. p 952 note 5.

Assumption of risk as defense see *supra* §§ 352-360.

Under Federal Employers' Liability Act

(1) It is generally held that the defense of assumption of risk must be pleaded in order to be available.

Ala.—Louisville & N. R. Co v Parker, 138 So 231, 223 Ala 626, certiorari granted 52 S.Ct 496, 286 U.S. 535, 76 L.Ed 1276, certiorari dismissed 53 S.Ct 94, 287 U.S. 569, 77 L.Ed 501.

Cal.—Matthews v Southern Pac Co, 69 P.2d 220, 15 Cal App 2d 36.

Mo.—Grosvenor v New York Cent. R. Co, 123 S.W.2d 173, 178, 343 Mo 611—Vaughan v St. Louis Merchants' Bridge Terminal Ry Co, 18 S.W.2d 62, 323 Mo 980—Clift v St. Louis-San Francisco Ry Co, 9 S.W.2d 972, 320 Mo 791—Halt v Railroad, 279 S.W. 148.

N.C.—Hubbard v Southern Ry Co, 166 S.E. 803, 203 N.C. 675.

39 C.J. p 952 note 8 [b] (3).

(2) It has been stated, however, that whether or not the defense of assumption of risk must be pleaded by the employer depends on the local rules of practice—Southern Ry

Co v Wessinger, 124 S.E. 100, 32 Ga. App 551.

6. Conn.—French v. W. W. Mertz Co, 163 A. 457, 116 Conn 18.

7. Cal.—Thomas v Southern Pac Co, 2 P.2d 644, 116 Cal App 126, certiorari denied Southern Pac Co v Thomas, 52 S.Ct 265, 284 U.S. 689, 76 L.Ed 582.

Iowa.—Laws v. Richards, 231 N.W. 321, 210 Iowa 608—McClary v Great Northern Ry Co., 227 N.W. 646, 209 Iowa 67.

Ky.—Corpus Juris quoted in Louisville & N. R. Co v Carter, 10 S.W.2d 1064, 226 Ky. 561.

39 C.J. p 952 note 5, p 953 note 6.

8. Ill.—Huff v Illinois Cent. R. Co., 279 Ill App 323, affirmed 199 N.E. 116, 362 Ill 95.

Iowa.—Laws v. Richards, 231 N.W. 321, 210 Iowa 608—McClary v. Great Northern Ry Co., 227 N.W. 646, 209 Iowa 67.

Ky.—Louisville & N. R. Co v Carter, 10 S.W.2d 1064, 226 Ky 561.

Mass.—Sylvain v Boston & M. R. R., 182 N.E. 835, 280 Mass 503.

Mo.—Corpus Juris cited in Grosvenor v New York Cent. R. Co, 123 S.W.2d 173, 178, 343 Mo 611—Clift v St. Louis-San Francisco Ry Co, 9 S.W.2d 972, 320 Mo. 791.

39 C.J. p 952 note 8.

Ordinary and extraordinary risks distinguished

Mass.—Ashton v Boston & M. R. R. Co, 109 N.E. 820, 222 Mass 65, 69, L.R.A. 1816B 1281.

39 C.J. p 952 note 8 [a].

such defense is available under a plea of the general issue or under a general denial; and an allegation setting up assumption of a risk incident to the employment is mere surplusage, presenting no affirmative defense.⁹ In some jurisdictions, however, the assumption of an ordinary risk must be pleaded by defendant.¹⁰ In a jurisdiction which follows the rule that the servant does not assume the risk of injury from the master's negligence, but that contributory negligence of the servant may constitute a defense, discussed supra § 362, it has been held that assumption of risk is not a proper plea to an action founded on the master's negligence,¹¹ although where the plea of assumption of risk is tantamount to the defense of contributory negligence it must be affirmatively pleaded.¹²

In any event, where it appears from plaintiff's own pleadings or proof that the risk was assumed, defendant may avail himself of the defense without pleading it.¹³ Also, where the complaint alleges that the servant did not assume the risk, a denial of the allegation is sufficient to raise the issue.¹⁴

Sufficiency of plea. Where assumption of risk is an affirmative defense, the facts supporting such defense must be specially pleaded in a succinct

statement showing that the specific risk was assumed,¹⁵ and ordinarily the pleading must also show that the risk was normally incident to, and to be expected of, the employment, and was not merely created by the employer's negligence.¹⁶ If the averment is of an extraordinary risk of the employment, defendant must allege, or state facts showing, that the servant had knowledge of the defect, or that it was obvious, and that he knew or should have known of the attendant danger.¹⁷

Where the answer sets out facts constituting assumed risk, it is not necessary to designate the defense in specific terms as that of assumed risk.¹⁸ In those jurisdictions where it is necessary for defendant to plead assumption of the risk of the master's negligence, a plea of assumption of a risk incident to the employment is insufficient.¹⁹

c. Contributory Negligence

Generally the defense of contributory negligence is not available unless specially pleaded, and the plea must state the facts constituting the negligence.

Although it has been held that contributory negligence need not be specially pleaded,²⁰ the general rule is that such defense is not available unless pleaded.²¹ However, the general rule does not ap-

9. Iowa—*McClary v. Great Northern Ry. Co.*, 227 NW 646, 209 Iowa 67—*Woodworth v. Iowa Cent. R. Co.*, 149 NW 522, 170 Iowa 697 39 C.J. p 954 note 13

10. Cal.—*Boin v. Spreckles Sugar Co.*, 103 P. 937, 155 Cal 612—*Thomas v. Southern Pac. Co.*, 2 P 2d 544, 116 Cal App 126, certiorari denied *Southern Pac. Co. v. Thomas*, 52 S Ct 265, 284 US 689, 76 L Ed 582 39 C.J. p 952 note 5.

11. Mo.—*Kleth v. American Car & Foundry Co.*, App, 9 SW 2d 644. 39 C.J. p 953 note 8 [b] (1)

12. Mo.—*Grosvenor v. New York Cent. R. Co.*, 123 SW 2d 173, 343 Mo 611—*Clift v. St. Louis-San Francisco Ry. Co.*, 9 SW 2d 972, 320 Mo 791.

13. Ill.—*Huff v. Illinois Cent. R. Co.*, 279 Ill App 323, affirmed 199 NE 116, 383 Ill 95

Tex.—*Corpus Juris* cited in *Pisano v. Texas & N. O. R. Co.*, Civ App, 112 SW 2d 316, 317, error dismissed 39 C.J. p 954 note 11

14. SC.—*Shirley v. Abbeville Furniture Co.*, 57 SE 178, 76 S.C. 452, 121 Am S.R. 952

15. Ala.—*Louisville & N. R. Co. v. Parker*, 138 So 231, 223 Ala 626, certiorari granted 52 S Ct 496, 286 US 635, 76 L Ed 1275, certiorari dismissed 53 S Ct 94, 287 US 589, 77 L Ed 501.

16. Ala.—*Louisville & N. R. Co. v. Parker*, supra

17. Ala.—*Louisville & N. R. Co. v. Parker*, supra 39 C.J. p 954 note 13

Averment of knowledge or notice in the alternative is no stronger than an averment of notice, and is subject to demurrer—*Lockhart v. Sloss-Sheffield Steel & Iron Co.*, 51 So 627, 165 Ala 516—*Osborne v. Alabama Steel & Wire Co.*, 33 So 687, 135 Ala 571

Pleas held sufficient

Iowa—*McClary v. Great Northern Ry. Co.*, 227 NW 646, 209 Iowa 67

39 C.J. p 954 note 13 [g]

Pleas held insufficient

(1) Generally—*Louisville & N. R. Co. v. Parker*, 138 So 231, 223 Ala 626, certiorari dismissed 52 S Ct 94, 287 US 589, 77 L Ed 501—*Lockhart v. Sloss-Sheffield Steel & Iron Co.*, 51 So 627, 165 Ala 516—39 C.J. p 954 note 13 [h]

(2) Pleas held to allege contributory negligence and not assumption of risk

Ala.—*Davis v. Sorrell*, 104 So 397, 213 Ala 191

SC.—*Ogilvie v. Conway Lumber Co.*, 81 SE 200, 80 SC 7

18. Ala.—*Louisville & N. R. Co. v. Parker*, 138 So 231, 223 Ala 626, certiorari granted 52 S Ct 496, 286 US 535, 76 L Ed 1275, certiorari

dismissed 53 S Ct 94, 287 US 589, 77 L Ed 501

Ark.—*Herron v. Mama Coal Co.*, 220 SW 470, 143 Ark 353

19. Iowa—*Flick v. Globe Mfg. Co.*, 154 NW 828, 172 Iowa 561 39 C.J. p 954 note 15

20. Ind.—*Pittsburgh, C. C. & St. L. R. Co. v. Collins*, 80 NE 415, 168 Ind. 467

Wis.—*Andrews v. Chicago, M. & St. P. R. Co.*, 71 NW 372, 96 Wis 348

21. Iowa—*Hunter v. Colfax Consol. Coal Co.*, 154 NW 1037, 175 Iowa 245, L.R.A. 1917D 15, Ann Cas 1917E 803, rehearing denied 57 NW 145, 175 Iowa 245, L.R.A. 1917D 15, Ann Cas 1917E 803

Minn.—*Foley v. Bennett*, 17 NW 2d 509, 219 Minn 248

Mo.—*Corpus Juris* cited in *Grosvenor v. New York Central R. Co.*, 123 S W 2d 173, 178, 343 Mo. 611—*Neal v. Curtis & Co. Mfg. Co.*, 41 SW 2d 543, 328 Mo 389—*Eaton v. Wallace*, 287 SW 614, 48 ALR 1291

Okla.—*Shunkamolah v. Delco*, 268 P 270, 131 Okl 272

Tex.—*Smith v. Great Atlantic & Pacific Tea Co.*, Civ App, 100 SW 2d 1041, error dismissed.

39 C.J. p 954 note 18.

Right to plead contributory negligence

An employer can plead contributory negligence as a defense whether or not the action is governed by em-

ply where plaintiff's own case discloses contributory negligence or necessarily puts in issue all the facts relied on by defendant to show it;²² and, where the declaration or complaint alleges that plaintiff was without fault, a denial by defendant raises the issue of contributory negligence.²³ Where a complaint is not based on negligence of the master, but on the employment of a minor at dangerous work without the consent of the parent, a plea of contributory negligence is inapt.²⁴

Where contributory negligence operates merely to diminish damages, as discussed in the CJS title Negligence §§ 170-172, also 39 C.J. p 822 note 79-p 824 note 19, and 45 C.J. p 1037 note 97-p 1043 note 62, a plea setting up contributory negligence in bar of the cause of action is demurrable.²⁵ The necessity of pleading contributory negligence as a pro tanto defense to an action brought under the Federal Employer's Liability Act generally depends on the laws of the state in which the action is instituted.²⁶ In some jurisdictions the defense of contributory negligence need not be specially pleaded in mitigation of damages,²⁷ and evidence of contributory negligence may be shown in reduction of damages under the general issue, as discussed *infra* § 499. In other jurisdictions, sometimes by virtue of express statutory requirement, contributory negligence as a partial defense in mitigation of damages must be specifically set up in the answer in order to be available.²⁸

Sufficiency of plea. The general rules of pleading, particularly those applicable to negligence cases, govern as to the sufficiency of the plea or answer to raise the issue of contributory negligence in an action by an employee for personal injuries.²⁹ A plea of contributory negligence is in its nature a plea of confession and avoidance,³⁰ and it is the general rule that the facts constituting such negligence must be stated,³¹ although it has been held that an allegation of contributory negligence in general terms is sufficient,³² at least after verdict and judgment³³ or in the absence of a motion to make more specific.³⁴ However, it is not necessary that the allegations of the plea should be as specific as the proof in order to support it³⁵ or that matters of evidence should be stated.³⁶

Allegations of contributory negligence should not be in the alternative,³⁷ and, if they are, the sufficiency of the pleading must be tested by its weakest averment.³⁸ Where plaintiff's nonperformance of a duty imposed by statute is relied on as constituting contributory negligence, the answer should show that he was within the class of persons contemplated by the statute.³⁹ In an action under the Employers' Liability Act, if contributory negligence must be pleaded, a plea following the language of the statute is sufficient.⁴⁰

Proximate cause of injury. It has been held that the contributory negligence charged must be pleaded as the proximate cause of the injury,⁴¹ although

employers' liability act—Hodges v Swastika Oil Co., Tex Civ App. 185 S.W. 349, error dismissed

22. Mo—Eaton v Wallace, 287 S.W. 614, 48 A.L.R. 1291
39 C.J. p 955 note 19

23. Minn—Lee v H N Leighton Co., 129 N.W. 767, 113 Minn 373
S.C.—Hutchings v. Mills Mfg Co., 47 S.E. 710, 68 S.C. 512

24. Ala—Huntsville Knitting Mill Co v Butner, 69 So 960, 194 Ala 317.

25. Ala—Davis v. Sorrell, 104 So 397, 213 Ala 191.

Mo—O'Donnell v Baltimore & O R Co., 26 S.W.2d 929, 324 Mo. 1097
39 C.J. p 955 note 23

26. Ky—Chesapeake & O Ry Co v Shirley's Adm'x, 291 S.W. 395, 218 Ky 337.

27. Ala—Southern Ry Co v Smith, 137 So 398, 223 Ala 583—Mobile & O R Co v. Williams, 129 So 60, 321 Ala 402.
39 C.J. p 955 note 22

28. Ill—Sprickerhoff v. Baltimore & O. R. Co., 55 N.E.2d 632, 338 Ill.App 340

Ky—Chesapeake & O. Ry Co v

Shirley's Adm'x, 291 S.W. 395, 218 Ky 337

Mo—Sheehan v Terminal R Ass'n of St Louis, 127 S.W.2d 657, 344 Mo 586—Corpus Juris cited in Grosvenor v New York Central R. Co., 123 S.W.2d 173, 178, 343 Mo 611

N.C.—Fleming v Norfolk Southern R Co., 76 S.E. 212, 160 N.C. 196

29. Mo—O'Donnell v Baltimore & O R Co., 26 S.W.2d 929, 324 Mo 1097

30. Ariz—Consolidated Arizona Smelting Co. v Gonzales, 193 P 304, 21 Ariz 628

39 C.J. p 955 note 25

31. Ala—Creola Lumber Co v Mills, 42 So. 1019, 149 Ala 474
39 C.J. p 955 note 29

Pleas held sufficient

N.C.—Johnson v Carolina, C. & O Ry Co., 131 S.E. 390, 191 N.C. 75
Tex—St Louis, S. F. & T Ry Co v Wilson, Com App, 279 S.W. 808
39 C.J. p 955 note 29 [f]

Pleas held insufficient

Mo—O'Donnell v Baltimore & O R Co., 26 S.W.2d 929, 324 Mo 1097
39 C.J. p 955 note 29 [g]

32. N.Y.—Robinson v. Ocean SS

Co., 147 N.Y.S. 310, 162 App Div 169

39 C.J. p 955 note 26

33. Mo—Bollmeyer v Eagle Mill & Elevator Co., App. 206 S.W. 917
39 C.J. p 955 note 27

34. Neb—Chicago, B. & Q. R. Co v Oyster, 78 N.W. 359, 58 Neb 1
39 C.J. p 955 note 28

35. Ala—St. Louis & S. F. R. Co v Brantley, 53 So 305, 168 Ala 579

36. Mo—Alcorn v Chicago & A. R. Co., 13 S.W. 182, 108 Mo 81

37. Ala—Lockhart v Sloss-Sheffield Steel & Iron Co., 51 So 2d 627, 165 Ala 516

39 C.J. p 955 note 32

38. Ala—Alabama Great Southern R. Co v Flinn, 74 So 246, 190 Ala 177

39 C.J. p 957 note 33.

39. Okl—Sandals v. Mizpah Min Co., 168 P 808, 66 Okl. 233

40. Ala—Sloss-Sheffield Steel & Iron Co. v Stapp, 70 So 267, 195 Ala 340

41. Ky—Harris v Rex Coal Co., 197 S.W. 1075, 177 Ky 630.

39 C.J. p 957 note 36.

a direct allegation is not necessary if the plea, when considered with the complaint, shows the causal connection.⁴²

Designation of plea immaterial A plea setting up the facts constituting contributory negligence is good, although it is designated as a plea of assumed risk.⁴³

§ 495. Replication or Reply

Matters in avoidance of a defense of assumed risk or contributory negligence must sometimes be pleaded by way of replication or reply.

The general rules of pleading, particularly those applicable to negligence cases, govern as to the necessity⁴⁴ and sufficiency⁴⁵ of a replication or reply in an action by a servant for personal injuries. Where the servant seeks to avoid the defense of assumed risk by the master's promise to remedy conditions, he must specially plead such promise,⁴⁶ and the replication is insufficient if it fails to allege that a reasonable time for making the repairs had not expired at the time of the injury.⁴⁷

A replication asserting that the servant continued in the employment after a knowledge of the danger, on the master's promise to remedy the defect, is inappropriate to a plea of contributory negligence.⁴⁸ If defendant alleges the servant's violation of a rule,

special matter excusing or justifying such violation must be set up by replication.⁴⁹ Where defendant pleads contributory negligence in an action based on a statute which provides that such negligence, when slight, shall not bar the action, but shall reduce plaintiff's damages, a special replication alleging the slight character of plaintiff's negligence is not necessary.⁵⁰

A general denial has been held in some jurisdictions a good reply to averments in an answer setting up contributory negligence and assumption of risk.⁵¹

§ 496. Amendment of Pleadings

- a In general
- b To conform to proof

a. In General

The allowance or refusal of amendments of pleadings rests largely in the discretion of the trial court.

As in civil actions generally, the allowance or refusal of amendments of pleadings in an action by a servant for injury caused by the master's negligence rests largely in the discretion of the trial court.⁵² However, an amendment should not be allowed which sets up a new cause of action⁵³ or renders

42. Ala.—Reid v. Sloss-Sheffield Steel & Iron Co., 58 So 301, 177 Ala 262

43. Ala.—King v Woodward Iron Co., 59 So 264, 177 Ala. 487

44. Ky.—Louisville & N R Co v McIntosh, 210 S.W. 181, 183 Ky 571

39 C J p 957 note 41

45. Ala.—Clinton Min Co. v Bradford, 76 So 74, 200 Ala 308

39 C J p 957 note 42

Replication held sufficient

Tex.—San Antonio, U & G R Co v Dawson, Civ App, 301 S.W. 247

39 C J p 957 note 42 [a]

Replication held insufficient

Ala.—Southern Cotton Oil Co v Walker, 51 So 169, 164 Ala 33

39 C J p 957 note 42 [b].

46. Tex.—Schaff v Hendrich, Civ App, 207 S.W. 543.

47. Ala.—Southern Cotton Oil Co v Walker, 51 So 169, 164 Ala 33

48. Ala.—Merriweather v. Sayre Min & Mfg. Co., 49 So 216, 161 Ala. 441

49. Ala.—Red Feather Coal Co. v Murchison, 80 So 354, 202 Ala. 289

39 C J p 957 note 46

50. US—Erie R Co v White, Ohio, 187 F 556, 109 CCA 323, rehearing denied 187 F. 944, 109 CCA 326.

51. US—American Smelting & Refining Co v Karapa, Colo., 173 F 607, 97 CCA 517

52. Tex.—St Louis, B & M R Co v Vick, Civ App, 210 S.W. 247

39 C J p 957 note 50

Amendment held proper or allowable

(1) Generally—Davis v. Starratt Bros., 147 S.E. 530, 39 Ga.App. 422

—39 C J p 957 note 50 [L]

(2) In an action to recover for injuries to an employee, an amendment of the statement of claim more than two years after the accident, which merely sets forth more accurately the negligence charged, is properly allowed—Coll v Westinghouse Electric & Mfg Co., 79 A 163, 230 Pa. 86

(3) Where, in an action for death of a servant in a mine, the complaint alleged that defendant permitted the roof to be dangerous, and negligently failed to timber it or in any manner support the roof or provide against its dangerous condition, by reason of which a large mass of rock fell and killed deceased, the court did not err in permitting a trial amendment by inserting the words "and because the pillars of the mine had been and were being withdrawn therefrom," objected to on the theory that such language interposed a new issue, defendant not having claimed surprise,

or that it was unprepared, and not having asked for a continuance or postponement—Sargent v Union Fuel Co., 108 P 928, 37 Utah 392

Amendment held improper or not allowable

Where petition failed to state even an imperfect cause of action which could be aided by amendment, allowance of amendment was error—McKay v Atlanta, B. & C R Co., 3 S.E. 2d 456, 60 Ga.App. 212

53. Pa.—Coll v Westinghouse Elec & Mfg Co., 79 A. 163, 230 Pa. 86.

39 C J p 958 note 51

Amendments held not to set up new cause of action

(1) Generally

Ark.—Western Coal & Mining Co v Corkille, 131 S.W. 963, 96 Ark 387

Ga.—Atlantic Paper & Pulp Corporation v Bowen, 102 S.E. 36, 24 Ga.App. 569, followed in Atlantic Paper & Pulp Corp v Johnson,

102 S.E. 37, 24 Ga.App. 672 and Atlantic Paper & Pulp Corp v Owens, 102 S.E. 37, 24 Ga.App. 672

Ky.—Elkhorn Coal Corporation v Guttadora, 228 S.W. 420, 190 Ky. 770

RI—Atlantic Mills v. Superior Court, 79 A 577, 32 R.I. 285.

Tex.—Galveston, H. & S. A Ry Co v Brewster, Civ App, 4 S.W.2d 330, error refused

the pleading uncertain and duplicitous,⁵⁴ or which does not state any valid ground of recovery⁵⁵ An amendment of the petition may be allowed for the purpose of setting out more fully the facts relied on for recovery⁵⁶ where the allegations are too general to withstand a special demurrer⁵⁷ Where the pleading sets out the material elements of the servant's cause of action, plaintiff cannot be compelled to amend by setting out the details of the probative matters or particulars of evidence by which these elements are to be established.⁵⁸

b. To Conform to Proof

Ordinarily it is within the discretion of the trial court to permit an amendment to conform to the proof

where evidence has been introduced without objection as to facts not presented, or insufficiently presented, by the pleadings.

In accordance with the general rules of pleading, the court may permit an amendment to conform to the proof where evidence has been introduced without objection as to facts not presented, or insufficiently presented, by the pleadings⁵⁹ The discretion of the court to permit the amendment should be exercised liberally⁶⁰ and in such a manner as to avoid prejudice or injury to the adverse party⁶¹

Change of cause of action. A usually recognized limitation on the propriety of amendments to conform to the proof is that they must not change the cause of action,⁶² although an amendment setting

(2) A servant's action for injury being based on the master's failure to maintain a safe place for the servant, an amendment of the petition, merely changing the specification of the act by which defendant failed in the performance of that duty, did not constitute a departure—Mullery v. Missouri & Kansas Telephone Co., 163 S.W. 213, 180 Mo App 123

54. Ga.—Garvin v. Georgia Veneer & Package Co., 85 S.E. 922, 143 Ga. 762.

55. Ky.—Johnson v. Cincinnati Ice Co., 173 S.W. 142, 163 Ky. 46. 39 C.J. p 958 note 53

56. Ark.—Western Coal & Mining Co v Corkille, 131 S.W. 963, 96 Ark 387

Ga.—Blackwell v. Ramsey-Brisben Stone Co., 55 S.E. 968, 126 Ga. 812
Pa.—Coll v. Westinghouse Elec. & Mfg Co., 79 A. 163, 280 Pa. 36
RI.—Atlantic Mills v. Superior Court, 79 A. 577, 32 R.I. 285

Tex.—Galveston, H. & S. A. Ry. Co v Brewer, Civ App., 4 S.W.3d 320, error refused.

57. Ga.—Blackstone v. Central of Georgia R. Co., 31 S.E. 90, 105 Ga. 380.

58. S.C.—Moore v. Catawba Power Co., 46 S.E. 1004, 68 S.C. 201. 39 C.J. p 958 note 55

59. U.S.—O'Dell v. Southern Ry Co., S.C., 243 F. 343—Waters v. Guile, Mich., 234 F. 532, 148 C.C.A. 298—Armour & Co v Arbuckle, Neb., 205 F. 273, 123 C.C.A. 435—Long Pole Lumber Co v Gross, Va., 180 F. 5, 103 C.C.A. 359—Pennsylvania Co v Whitney, Ohio, 169 F. 572, 95 C.C.A. 70.

Cal.—Bruce v. Western Pipe & Steel Co., 169 P. 980, 177 Cal. 26—Scott v. McPherson, 145 P. 529, 168 Cal. 783

Mo.—Walk v. St. Louis Can Co., App., 28 S.W.2d 391—Bright v. Sammons, App., 214 S.W. 425

Mont—Gillespie v. Great Northern Ry Co., 208 P. 1059, 63 Mont. 598
Okl.—Chas. T. Derr Const. Co v Gelruth, 120 P. 253, 29 Okl. 538

Tex.—Schaff v. Lyon, Civ. App., 251 S.W. 592, error refused
39 C.J. p 957 note 50, p 958 note 57
Amendments of pleadings to conform to proof generally see the C.J.S. title Pleading § 285, also 49 C.J. p 490 note 4—p 498 note 27

Action based on common law or statute

(1) Plaintiff failing to make case under Federal Employers' Liability Act must amend petition declaring thereon to conform to proof, to warrant submission of case to jury under common law—Chesapeake & O Ry Co v. Rucker, 64 S.W.2d 642, 246 Ky. 161.

(2) Where employee brought common-law action for injuries, and it appeared on trial that defendant and plaintiff were engaged in interstate commerce, court should have sustained defendant's motion for directed verdict, but plaintiff should be given opportunity to amend petition to state cause of action under Federal Employers' Liability Act—Louisville & N. R. Co. v Brandenburg, 270 S.W. 1, 207 Ky. 689.

Action based on federal law or state law

(1) Plaintiff, suing under Federal Employers' Liability Act, on being found not within act, may be entitled to amend petition to raise issues under state law

U.S.—O'Dell v. Southern Ry. Co., D.C.S.C., 243 F. 343

Mo.—Sullivan v. St. Louis-San Francisco Ry. Co., 12 S.W.2d 735, 321 Mo. 697.

Ohio—Detroit & T. Shore Line R. Co. v. Seigel, App., 153 N.E. 870

(2) A declaration which does not rely on the Federal Employers' Liability Act may be amended to conform to the proof so as to authorize a recovery under the federal act—

Fernette v. Pere Marquette R. Co., 144 N.W. 834, 175 Mich. 653—39 C.J. p 958 note 57 [a]

60. Mont—Gillespie v. Great Northern Ry Co., 208 P. 1059, 63 Mont. 598

Discretion held not abused

U.S.—Waters v. Guile, Mich., 234 F. 532, 148 C.C.A. 298—Long Pole Lumber Co. v. Gross, Va., 180 F. 5, 103 C.C.A. 359

Ind.—New Castle Bridge Co v Doty, 79 N.E. 485, 168 Ind. 259

Minn.—Ardell v. Great Northern Ry Co., 189 N.W. 939, 163 Minn. 191
Mont—Gillespie v. Great Northern Ry Co., 208 P. 1059, 63 Mont. 598

61. U.S.—O'Dell v. Southern Ry Co., D.C.S.C., 243 F. 343—Waters v. Guile, Mich., 234 F. 532, 148 C.C.A. 298

Ind.—New Castle Bridge Co v. Doty, 79 N.E. 485, 168 Ind. 259

Tex.—Schaff v. Lyon, Civ. App., 251 S.W. 592, error refused

62. Mont—Gillespie v. Great Northern Ry Co., 208 P. 1059, 63 Mont. 598

Amendments held not to change cause of action

(1) Generally

Cal.—Bruce v. Western Pipe & Steel Co., 169 P. 980, 177 Cal. 26—Scott v. McPherson, 145 P. 529, 168 Cal. 783

Ind.—New Castle Bridge Co. v. Doty, 79 N.E. 485, 168 Ind. 259

Mo.—Bright v. Sammons, App., 214 S.W. 425

N.C.—Patterson v. Champion Lumber Co., 94 S.E. 692, 175 N.C. 90.

(2) In action for injury to employee under Federal Employers' Liability Act, amendment permitting plaintiff to strike out averments of interstate employment, so that complaint without such averments stated a good cause of action under the state law, was not error, since striking out such averments did not change claim substantially.—Sulli-

up an entirely new cause of action has been allowed.⁶³

To prevent variance. Where the introduction of evidence is objected to as not justified by the pleadings, it is ordinarily regarded as within the discretion of the trial court to permit the party to amend his pleadings to render the evidence admissible.⁶⁴

§ 497. Issues, Proof, and Variance

The issues, proof and variance in an action by a servant against the master for personal injuries are discussed *infra* §§ 498-500.

Examine Pocket Parts for later cases.

§ 498. — Matters to Be Proved

In an action by a servant against his master for personal injuries, the plaintiff must prove every material allegation of his declaration or complaint, and the defendant must establish every material averment of a substantive defense pleaded by him.

In an action by a servant against his master for personal injuries, plaintiff must prove every material allegation of his declaration or complaint,⁶⁵ such as an allegation that the relationship of master and servant existed,⁶⁶ that the servant was acting within the scope of his employment,⁶⁷ or that the action was brought within the time limited by an employers' liability act.⁶⁸ So too plaintiff must prove the negligence or breach of duty as charged in his complaint or declaration⁶⁹ and that such negligence or

van v St Louis-San Francisco Ry Co, 12 SW2d 735, 321 Mo 697

(3) In action by servant for injuries from an allegedly defective and dangerous machine, an amendment, alleging the absence of a proper guard, does not set up a new cause of action but merely a further specification of negligence.—Flynn v McLoughlin, 159 N.Y.S 442, 173 App. Div 368

63. Minn—Ardell v Great Northern Ry Co, 189 NW 939, 153 Minn 191, applying Wisconsin law.

64. N.Y.—Flynn v McLoughlin, 159 N.Y.S 442, 173 App. Div. 368

Okl—Chas T Derr Const Co v Gelruth, 120 P. 253, 29 Okl 538
S.C.—Taylor v Winnsboro Mills, 143 S.E 474, 146 S.C 28

65. U.S.—Carpenter v Erie R Co, CCANJ, 132 F.2d 362, certiorari denied 63 S.Ct 933, 318 US 788, 87 L.Ed 1156.

Fla—Great Atlantic & Pacific Tea Co v Dallas, 192 So. 867, 141 Fla 206.

Ill.—Rost v F H Noble & Co, 147 N.E. 258, 316 Ill 357

Ky.—Brooks v Arnett, 69 S.W.2d 1029, 253 Ky 491—Brooks v Louisville & N R Co, 26 S.W.2d 523, 233 Ky 666

Mass.—Whalen v Railway Express Agency, 78 N.E.2d 740

Mich.—Hughes v Michoff, 284 N.W. 718, 288 Mich 259

Miss.—Newell Contracting Co v Flynt, 161 So. 298, 172 Miss 719, motion overruled 161 So. 743, 172 Miss 719

N.H.—Kenney v Boston & Maine R R, 33 A.2d 557, 92 N.H. 495—Dowling v L. H. Shattuck, Inc, 47 A.2d 529, 91 N.H. 234

N.D.—Johnson v Minneapolis, St P & S S M Ry Co, 209 N.W. 786, 54 N.D. 351

Pa.—Hartz v Schafer, 154 A. 713, 303 Pa. 449—Wiggins v Granelli, Com Pl, 1 Monroe L.R. 116

Tenn.—Armstrong v Bowman, 115 S.W.2d 329, 21 Tenn.App. 673

Tex.—Texas & N. O R Co. v Sturgeon, 177 S.W.2d 340, reversed on other grounds 177 S.W.2d 264, 143 Tex 222

39 C.J. p 958 note 65.

Interstate commerce

In an action brought under the Federal Employers' Liability Act, plaintiff must prove that at the time of injury the employer and employee were engaged in interstate commerce.

U.S.—Emch v. Pennsylvania R Co, CCA Ohio, 37 F.2d 828

Ill.—Genzel v New York, C & St L R Co, 249 Ill App 164

Mo.—Davis v. Chicago & E I Ry Co, 94 S.W.2d 370, 338 Mo 1248

Tex.—Chicago, R I. & G. Ry Co v. Bernhard, Civ App, 275 S.W. 505.

Local custom

Employee relying on local custom must plead and prove such custom—Allen v. Larabee Flour Mills Corporation, 40 S.W.2d 597, 328 Mo 226

66. Mont.—De Sandro v. Missoula Light & Water Co, 136 P. 711, 48 Mont 226.

39 C.J. p 958 note 65 [b]

67. U.S.—Union Oil Co of California v. Hunt, CCA Or, 111 F.2d 269

39 C.J. p 958 note 65 [a].

68. U.S.—Carpenter v Erie R Co, CCANJ, 132 F.2d 362, certiorari denied 63 S.Ct. 933, 318 US 788, 87 L.Ed 1155—American R Co. v Coronas, Puerto Rico, 230 F. 545, 144 CCA 599, L.R.A.1916E 1095.

69. U.S.—Sheaf v Minneapolis, St P. & S S M R Co, CCAND, 162 F.2d 110—Healey v New York, O & W R Co, CCAN.Y., 79 F.2d 542

Ark.—Heard v. Arkansas Power & Light Co, 147 S.W.2d 362, 201 Ark 915

Fla.—Great Atlantic & Pacific Tea

Co v Dallas, 192 So. 867, 141 Fla 206

Ind.—Piepho v Gesse, 18 N.E.2d 468, 106 Ind App 450

Ky.—Hooks v Cornett Lewis Coal Co, 86 S.W.2d 697, 260 Ky 778
Mo.—Williams v St Louis-San Francisco Ry Co, 85 S.W.2d 624, 337 Mo 667

Neb.—Bernhardt v Chicago, B & Q R Co, 272 N.W. 209, 132 Neb 346, certiorari denied 58 S.Ct 34, 302 US 685, 82 L.Ed 529—Diller v. Chicago, B & O R Co, 229 N.W. 888, 119 Neb 494

N.H.—Kenney v Boston & Maine R R, 33 A.2d 557, 92 N.H. 495

N.C.—Weatherman v. R J Reynolds Tobacco Co, 152 S.E. 796, 193 N.C. 603

Okl.—Traders Compress Co v Steigler, 169 P.2d 205, 197 Okl 204—Fisher v Kansas City, M & O Ry Co, 86 P.2d 744, 169 Okl 282

Or.—Campbell v Southern Pac. Co, 250 P. 622, 120 Or 122

S.C.—Temple v Atlantic Coast Lane R Co, 163 S.E. 644, 165 S.C. 201, reversed on other grounds 52 S.Ct. 334, 285 US 143, 76 L.Ed. 670.

Tex.—Cate v Orlic Gasoline Production Co, Civ App, 78 S.W.2d 685, error refused

W.Va.—Hudson v. Norfolk & W Ry Co, 146 S.E. 525, 106 W.Va. 437, certiorari denied 49 S.Ct 481, 279 US 866, 73 L.Ed 1004, rehearing denied 60 S.Ct 79

Failure to operate under workmen's compensation act

Fact that employer not operating under the workmen's compensation act was not entitled to the defenses of contributory negligence, assumed risk, and negligence of fellow servant, did not relieve employee in suit for injuries of burden of proving negligence of employer.—Southern Mining Co v Saylor, 95 S.W.2d 286, 264 Ky. 655—Mannington Fuel Co. v. Ray's Adm'r, 63 S.W.2d 933, 250 Ky. 736.

breach of duty was the proximate cause of the injury sustained⁷⁰ The defendant must establish every material averment of a substantive defense pleaded by him,⁷¹ such as the defense of assump-

tion of risk by the employee⁷² or contributory negligence.⁷³

Immaterial allegations and matters not in issue need not be proved,⁷⁴ although proof of an essential

Fellow servants

(1) Master's negligence in not properly selecting fellow servants must be proved as alleged—*Cummar Lumber Co. v. Silas*, 125 So 372, 98 Fla. 1158

(2) Plaintiff must allege and prove that fellow servant was incompetent for, or unskilled in, work in which engaged, that master negligently employed or retained him with knowledge of his incompetency, that plaintiff was ignorant thereof, and that the injury was caused by the fellow servant's negligence—*Singer Sewing Mach Co v. Odom*, 45 P2d 478, 173 Okl. 411

(3) In an action under the Federal Employers' Liability Act a charge that defendant was negligent in failing to furnish plaintiff sufficient help must be sustained by showing in what way further help would have prevented the accident—*Huff v Illinois Cent R Co*, 279 Ill App 323, affirmed 189 N.E 116, 363 Ill 95.

Knowledge or notice

(1) Employee suing railroad for injuries sustained by fall from car due to sudden jerk was required to prove that engineer knew, or was negligent in not knowing, such jerk would be likely to cause injury—*Southern Ry Co v Smith*, 128 So 228, 221 Ala 278.

(2) A servant, in order to recover for injury arising from master's negligence in failing to furnish proper machinery or appliances or safe place of work, must show, as alleged, that he did not have equal means with master to know of danger—*Abercrombie v. Ivey*, 200 S.E 551, 59 Ga.App 296—*Barrow County Cotton Mills v. Farr*, 127 S.E 788, 33 Ga. App 730.

(3) Employee was required to allege and prove that animal was vicious and liable to inflict injuries on others, and that that fact was known to employer, or by the exercise of reasonable diligence should have been known to him—*Schnell v Howitt*, 76 P.2d 1130, 158 Or 586

70. US—*Healey v New York, O. & W R Co*, CCANY, 79 F2d 543 Ill—*Randall v Crescent Coal Co*, 117 NE 773, 280 Ill 517

Ind—*Piepho v Gasse*, 18 NE 3d 468, 106 Ind App 450.

Ky—*Hobson v Turner*, 185 SW 3d 550, 299 Ky. 342—*Southern Mining Co v Saylor*, 96 SW 2d 236, 264 Ky 655.

Minn—*Schendel v Chicago, M & St P Ry Co*, 206 NW. 436, 165 Minn 223.

Mo—*Steinkamp v. F. B Chamberlain Co*, App, 294 SW. 762

Neb—*Hick v Chicago & N W Ry Co*, 261 NW 693, 129 Neb 336—*Diller v Chicago B & O R Co*, 229 NW 888, 119 Neb 494.

NH—*Kenney v Boston & Maine R R*, 38 A 2d 557, 92 NH 495

Okla—*Kansas City, M & O Ry Co v Bishop*, 282 P 1091, 140 Okl 277

71. Cal—*Qualls v Atchison, T & S F Ry Co*, 296 P 645, 113 Cal App 7

SC—*Youngblood v. Southern Ry Co*, 134 SE 660, 137 SC 47

39 C.J p 959 note 66

To bring action within the Federal Employers' Liability Act, in an action by an employee not brought under the act, defendant must plead and prove the necessary facts—*Wichita Falls & S R Co v Holbrook*, 78 SW 2d 938, 125 Tex 184, certiorari denied 56 S Ct 139, 296 US 618, 80 L Ed 439

72. US—*Anzolotti v McAdoo*, DC NY, 262 F 568, reversed on other grounds 271 F 268

Fla—*Great Atlantic & Pacific Tea Co v Dallas*, 192 So 867, 141 Fla 206—*Smith v Coleman*, 132 So 198, 100 Fla 1707

Iowa—*Laws v Richards*, 231 NW 321, 210 Iowa 608

73. Ala—*Alabama Great Southern R Co v Flinn*, 74 So 246, 199 Ala 177

Mo—*Eaton v Wallace*, 287 SW 614, 48 A L R. 1291

74. Ala—*Southern Ry. Co v. Smith*, 128 So 228, 221 Ala 273.

Cal—*Haskins v. Southern Pac Co*, 39 P 2d 895, 3 Cal App 2d 177

Ill—*Rost v F H Noble & Co*, 147 NE 258, 316 Ill 357

Mass—*Eckstein v Scoff*, 13 NE 2d 436, 299 Mass 578

Mo—*Maurix v Western Coal & Mining Co*, 11 SW 2d 268, 321 Mo 878—*Spinnell v. Goldberg*, 275 S. W 775, 219 Mo App. 471.

39 C.J p 959 note 67.

Employment by one of several defendants

In employee's action for injuries, where in pretrial report defendants conceded that plaintiff was employed by one of defendants and plaintiff claimed that he was employed by both defendants, it was not necessary that plaintiff prove liability of both defendants, since, where two or more are liable for the same cause of action, they are liable severally as well as jointly, and, if one is sued alone, entire damage may be recovered against him—*Eckstein v Scoff*, 13 NE 2d 436, 299 Mass 578

ered against him—*Eckstein v Scoff*, 13 NE 2d 436, 299 Mass 578

Assumption of risk equivalent to contributory negligence is not element of plaintiff's case—*Clift v St Louis-San Francisco Ry. Co*, 9 S W 2d 973, 320 Mo 791.

Allegation as to interstate commerce
Petition permitted recovery under common law, where proof failed to sustain allegation of injury in interstate commerce and such allegation was eliminated—*Hilderbrand v St. Louis-San Francisco Ry Co*, 298 S. W 1069, 220 Mo App 1229

Matters not necessary to prove

(1) Generally

Ark—*Scott-Burr Stores Corporation v Foster*, 122 SW 2d 165, 197 Ark 232

Mo—*Alexander v. Barnes Grocery Co*, 7 SW 2d 370, 223 Mo App 1

Tex—*Galveston, H & S A Ry Co. v Contois*, Civ App, 279 SW 929, affirmed, Com App, 288 SW. 154, certiorari denied 47 S Ct 659, 274 US 747, 71 L Ed 1338—*Wilson Hydraulic Casing Pulling Mach. Co v. James*, Civ App, 271 SW 424

39 C.J. p 959 note 67 [b].

(2) Injured workman need not prove due care on his part in action under Federal Employers' Liability Act—*Beck v Baltimore & O. R Co*, 244 Ill App 441.

(3) In an action for personal injuries governed by the Federal Safety Appliance Act it has been held unnecessary to plead or prove negligence

US—*Zumwalt v Gardner*, CCA Mo, 160 F 2d 298.

Ill—*Herb v Pitcairn*, 28 NE 2d 543, 306 Ill App 582, reversed on other grounds 36 NE 555, 377 Ill 405.

Mo—*Cason v Kansas City Terminal Ry. Co*, 123 SW 2d 133.

(4) Under statute requiring employers using dust-generating machines to provide each machine with hood connected with suction fan to carry off dust and prevent its inhalation by employees, employee injured by dust because of employer's failure to comply with statute could recover without proving that injury was an occupational disease.—*Smith v Harbison-Walker Refractories Co*, 100 S W 2d 909, 340 Mo 389.

(5) Where there was evidence tending to show that injury and death were caused by unsafe conditions in employer's plant, it has been held unnecessary to plead or prove knowledge or concealment of unsafe condition by employer or lack of

fact not alleged by plaintiff is required where the defective declaration is cured by verdict.⁷⁵ Where general allegations of negligence are followed by an averment of the specific act of negligence alleged to have caused the injury, there can be no recovery, as a general rule, unless the specific act is proved,⁷⁶ but, where defendant is charged with negligence in several particulars, plaintiff need not prove every branch of the case but may recover on proof of a cause of action on any one or more of such acts of negligence,⁷⁷ even though the several acts of negligence are alleged conjunctively or as concurring to produce the injury.⁷⁸ On the other hand, it has been held that, where several defects or acts are averred conjunctively, or pleaded as interdependent or concurring causes of the injury, all must be proved.⁷⁹ Where an action against a corporation employer is in case, and not in trespass, plaintiff need not show that defendant's president or board of directors actually participated in the alleged negligent act.⁸⁰

Facts admitted by the adverse party need not be proved;⁸¹ but a plea of the general issue does not

admit the relationship of master and servant so as to dispense with proof thereof.⁸²

Violation of ordinance Nothing can be predicated on the master's violation of a municipal ordinance where the ordinance is not introduced in evidence.⁸³

§ 499. — Issues Raised by, and Evidence Admissible under, Pleadings

- a. In general
- b. Under general issue or general denial
- c. Under allegations as to incompetency of fellow servants
- d. Under allegations as to contributory negligence

a. In General

The evidence in an action by a servant for personal injuries must be confined to the issues made by the pleadings.

As in other civil actions, the evidence in an action by a servant for personal injuries must be confined to the issues made by the pleadings.⁸⁴ On the

knowledge thereof by employee, want of knowledge on part of employer, if it existed, being a matter of defense within prescribed statutory limits—*McKee v New Idea, Ohio App, 44 NE 2d 697*

75. Ill—*Wiggins Ferry Co. v. Hill, 112 Ill App 475*

76. Mo—*Sanders v Armour & Co of Delaware, 292 SW 443—Pogue v Crunden-Martin Mfg Co, App, 273 SW 782*

39 C.J. p 959 note 69

77. Fla—*Holstun v Embry, 169 So 400, 124 Fla 554*

Ill—*Adamatis v. Gardner, 63 NE 2d 135, 326 Ill App 594*

Mo—*Hankins v. St Louis-San Francisco Ry Co, App, 31 SW 2d 596, certiorari quashed State ex rel St Louis-San Francisco Ry. Co v Cox, 46 SW 2d 849, 329 Mo 292—Steinkamp v F B Chamberlain Co, App, 294 SW 762*

Tex—*St Louis Southwestern Ry Co of Texas v Neely, Civ App, 396 SW 948.*

39 C.J. p 959 note 70

78. Kan—*Benelli v Atchison, T. & S. F. Ry. Co, 243 P 1004, 120 Kan 237*

39 C.J. p 960 note 71

79. Mich—*Hughes v Michoff, 284 NW 718, 288 Mich 359*

Mo—*Bonnarens v Lead Belt Ry. Co., 273 SW 1043, 309 Mo 65*

Tenn—*Nashville, C & St L Ry v Whitt, 5 Tenn App. 463.*

39 C.J. p 960 note 72

80. Ala—*Chamberlain v Southern R. Co, 48 So 703, 159 Ala. 171*

81. Mo—*Butz v Murch Bros Constr Co, 97 SW. 895, 199 Mo 279*

39 C.J. p 960 note 77.

82. Ill—*Carr v. U S Silica Co, 158 Ill App 511*

83. Mich—*Barnhart v. Pere Marquette R Co, 155 NW 355, 158 Mich. 537*

84. US—*Miller v. American Cyanamid Co, C.C.A.N.J., 61 F 2d 389—Summers v Louisville & N R Co, D.C.Ky, 4 F Supp 410*

Ala—*Alabama Great Southern R Co v. Baum, 81 So 2d 366—Mobile & O R Co v Williams, 121 So 722, 219 Ala 238*

Ark—*Bruner Ivory Handle Co v West, 86 S.W 2d 919, 191 Ark 479—Presley v. Actus Coal Co., 289 S W 474, 172 Ark 498*

Fla—*Kilgore v Hudson, 4 So 3d 865, 148 Fla 580*

Ill—*Chicago & E I R Co v Walker, 137 Ill App 428*

Ind—*Romona Oolitic Stone Co v Shields, 88 NE 595, 173 Ind. 68*

Kan—*Johnson v. Olson, 67 P 2d 422, 145 Kan 779.*

Ky—*Louisville & N R Co v Yell, 168 SW 2d 556, 293 Ky 71—Gibraltar Coal Mining Co v Nalley, 283 SW 416, 214 Ky 431*

La—*Devore v Louisiana & Arkansas Ry Co, App, 178 So 706*

Mass—*Pagano v. Worcester Consol St. Ry Co, 163 NE 764, 265 Mass. 89*

Minn—*Harvey v. Ruff, 204 N.W. 634, 164 Minn 21.*

Mo—*Karlun v Kansas City Public Service Co, App, 30 SW 2d 1032*

Mont—*Kakos v Bryam, 292 P 909, 88 Mont 309—Allen v Bear Creek Coal Co, 115 P 673, 43 Mont. 289*

Pa—*Wiggins v Granelli, Com Pl, 1 Monroe LR 116*

SC—*Singleton v McLeod, 8 SE 2d 908, 193 SC 378*

Tex—*Texas & N O Ry Co. v. Tilley, Com App, 6 SW 2d 86, certiorari denied 49 S Ct 36, 278 U.S. 642, 73 L Ed 556—Jackson v. Houston E & W. T. Ry Co, Civ App, 293 SW 865, reversed on other grounds Houston E & W. T. Ry. Co v Jackson, Com App, 299 SW. 885—Gulf, C & S F Ry Co v Young, Civ App, 284 SW. 664—Ft Worth & R G Ry Co v Finley, 110 SW. 531, 50 Tex Civ App. 291*

39 C.J. p 960 note 82

Issues raised by, and evidence admissible under, pleadings in negligence actions generally see the C.J.S. title Negligence § 201, also 45 C.J. page 1180 note 29—page 1143 note 7

Under Federal Employers' Liability Act

Allegation that plaintiff was engaged in interstate commerce when injured distinguishes cause of action from one at common law and may preclude defendant from asserting certain defenses thereto otherwise available under common or statutory law of state governing plaintiff's cause of action, such as defense of contributory negligence.—*Davis v.*

other hand, any evidence otherwise admissible may be received if the matters to which it relates are expressly or by clear inference substantially embraced within the scope of the allegations of the party offering it⁸⁵ or tend to explain the circumstances surrounding the accident⁸⁶ It has been held that

Chicago & N. I. Ry. Co., 94 SW 2d 370, 388 Mo. 1248.

Interstate commerce

In a switchman's action for injuries, where there was nothing in declaration to indicate that plaintiff relied on the Federal Safety Appliance Act or the Federal Employers' Liability Act, evidence with reference to interstate commerce was irrelevant and should have been excluded—Atlantic Coast Line R. Co. v. Moore, 181 So. 374, 135 Fla. 485, modified on other grounds 186 So. 210, 135 Fla. 485.

Conflicting pleadings

In action against railroad for death of employee, exclusion of testimony to effect that employee was warned against act which proved fatal was not error where railroad's pleadings were conflicting as to whether employee was performing duties assigned to him at time of his death—Snow v. Texas & P. Ry. Co., La. App. 166 So. 200.

Negligence of fellow servant

(1) In servant's action for personal injuries, declaration alleging substantially no more than that foreman negligently performed act causing injury was not sufficient to perform predicate for proof showing that in performing such act the foreman had joined with fellow servants in manual work and that master had not exercised reasonable care in establishing and maintaining reasonably safe method of work.—Federal Compress Co. v. Craig, 7 So. 2d 532, 192 Miss. 689.

(2) Defendant employer could not invoke doctrine of negligence of fellow-servant as defense where it did not in its pleading urge that defense nor request a submission of that issue to jury—City of Wichita Falls v. Phillips, Tex. Civ. App., 87 SW 2d 544, error dismissed.

85. Ark.—Burden v. Hughes, 55 S. W. 2d 502, 186 Ark. 707—Pearl City Packet Co. v. Towery, 43 S. W. 2d 1088, 184 Ark. 966—Fair Oaks State Co. v. Cross, 9 S. W. 2d 580, 177 Ark. 1146.

Fla.—Atlantic Coast Line R. Co. v. Fogelman, 158 So. 108, 117 Fla. 334.

Ill.—Powers v. Michigan Cent. R. Co., 268 Ill. App. 493.

Ind.—Central Indiana Ry. Co. v. Mitchell, 199 N. E. 439, 102 Ind. App. 121.

Ky.—Louisville & N. R. Co. v. Stephens, 182 S. W. 2d 447, 298 Ky. 328.—Armour & Co. v. Young, 35 S. W. 2d 906, 237 Ky. 444.

La.—Smith v. New Orleans Great

Northern R. Co., 44 So. 805, 119 La. 975.

Miss.—Aponaug Mfg. Co. v. Carroll, 184 So. 62, 183 Miss. 793.

Mo.—Brackett v. James Black Masonry & Contracting Co., 32 SW 2d 288, 326 Mo. 587—Doody v. California Woolen Mills Co., 274 S. W. 492—Pavlo v. Forum Lunch Co., 19 S. W. 2d 510, 285 Mo. App. 167—Sanders v. Armour & Co. of Delaware, App., 292 S. W. 443—Naughton v. Laclede Gaslight Co., 100 S. W. 1104, 123 Mo. App. 192.

N. J.—Hughes v. Eureka Flint & Spar Co., 26 A. 2d 587, 20 N. J. Misc. 314—Hendershot v. New York, S. & W. R. Co., 138 A. 206, 5 N. J. Misc. 727, affirmed 140 A. 919, 104 N. J. Law. 486, certiorari denied New York, S. & W. R. Co. v. Hendershot, 48 S. Ct. 562, 277 U. S. 602, 72 L. Ed. 1009.

N. M.—Maestas v. Alameda Cattle Co., 14 P. 2d 733, 36 N. M. 323.

Okl.—Williamson v. City of Fairview, 11 P. 2d 453, 157 Okl. 239—Missouri-Kansas-Texas R. Co. v. Highfill, 293 P. 182, 146 Okl. 84, certiorari denied 51 S. Ct. 483, 233 U. S. 834, 75 L. Ed. 1446.

S. C.—Hubbard v. Rowe, 5 S. E. 2d 187, 192 S. C. 12—Langston v. Fiske-Carter Const. Co., 185 S. E. 62, 180 S. C. 113.

Tex.—Chicago, R. I. & G. R. Co. v. Trout, Civ. App., 153 S. W. 1137, reversed on other grounds, Com. App., 206 S. W. 829, rehearing overruled 208 S. W. 658—Southwestern Telegraph & Telephone Co. v. Luckie, Civ. App., 153 S. W. 1158, error refused.

Utah.—Miller v. Southern Pac. Co., 21 P. 2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S. Ct. 207, 290 U. S. 697, 78 L. Ed. 600.

Wis.—Callahan v. Chicago & N. W. Ry. Co., 154 N. W. 449, 161 Wis. 288.

39 C. J. p. 962 note 86.

Particular evidence held admissible

(1) Generally

Miss.—Hardaway Contracting Co. v. Rivers, 180 So. 800, 181 Miss. 727. Mo.—Mooney v. Monark Gasoline & Oil Co., 298 S. W. 69, 317 Mo. 1255. 39 C. J. p. 962 note 86 [a]-[j].

(2) Evidence of fellow servant's negligence in raising end of trestle was admissible under allegation that he negligently knocked it against plaintiff—Louisville & N. R. Co. v. Clarke, 288 S. W. 1022, 217 Ky. 11.

(3) Where negligence charged was failure of employer to furnish reasonably safe tools, objection to question as to whether saw guide was in

suitable condition to be used in operation of a sawmill in view of worn condition of threads on ground that condition of threads was not shown to be cause of plaintiff's injury should have been overruled—Carlisle v. Tilghmon, Mo., 174 S. W. 2d 798.

(4) Petition for injuries by master's failure to furnish safe tools authorized issues on furnishing defective hammer, and failure to supply another after report of defect—Castevens v. Texas & P. Ry. Co., Civ. App., 28 S. W. 2d 288, reversed on other grounds 32 S. W. 2d 637, 119 Tex. 456, 73 A. L. R. 89.

(5) Where petition of railroad employee for injuries sustained when assaulted while serving as night watchman guarding railroad bridge used in interstate commerce did not contain allegation that there was any defect in any appliance or any violation of a safety act, the doctrine of assumption of risk was applicable as a defense—Devore v. Louisiana & Arkansas Ry. Co., La. App., 178 So. 706.

Interstate commerce

(1) In actions to which Federal Employers' Liability Act is applicable, it has been held not necessary to plead that parties were engaged in interstate commerce in order to introduce proof to that effect—Pisano v. Texas & N. O. R. Co., Tex. Civ. App., 112 S. W. 2d 316, error dismissed.

(2) In action against railroad company for injuries to employee parties' stipulation that defendant was engaged in interstate commerce and evidence that plaintiff was engaged in performance of duties incident thereto when injured were sufficient to bring action within provisions of Federal Employers' Liability Act, though not referred to in pleadings—Davis v. Midland Valley R. Co., 153 P. 2d 823, 194 Okl. 619.

86. Ark.—McEachin & McEachin v. Hill, 97 S. W. 2d 70, 192 Ark. 1139. Ind.—Thomas Madden, Son & Co. v. Wilcox, 91 N. E. 933, 174 Ind. 657. Mo.—Brackett v. James Black Masonry & Contracting Co., 32 S. W. 2d 288, 326 Mo. 587—Walser v. Kuhlmann, App., 176 S. W. 2d 658. Tex.—Gulf, C. & S. F. Ry. Co. v. Young, Civ. App., 284 S. W. 664. 39 C. J. p. 963 note 87.

Evidence of condition of passageway, although not alleged, was admissible in explanation of the cause of piece of freight falling from truck and pinning plaintiff against box car, or for the purpose of accounting for breaking of truck, although it was not admissible as a basis for

evidence of the employer's promise to repair is admissible even though not alleged in the declaration, where proof of such promise is not a substantive part of plaintiff's case, but is in the nature of rebuttal to the defense of assumption of risk claimed by the master.⁸⁷

General or specific allegations of negligence. Ordinarily, under a general allegation of negligence, evidence may be introduced of any acts or omissions which tend to show actionable negligence on the part of defendant, as charged in the complaint.⁸⁸ So defendant's knowledge, being an ingredient of negligence, may be proved under a general allegation of negligence,⁸⁹ and under such a general allegation evidence of willful or gross negligence is admissible.⁹⁰ It has been stated, however, that a general allegation of negligence is limited in scope and confines the issues to a definite field without specifying a definite act,⁹¹ and plaintiff is not permitted to prove any particular act or acts of negligence which he may see fit to show.⁹² The proof must be of negligence within the general scope of the allegations of the complaint.⁹³ Thus it has been held that evidence of negligence by failure to furnish a safe place or safe instrumentalities is not competent under a general charge of negligence.⁹⁴

Where specific acts of negligence⁹⁵ or particular defects in the machinery, appliances, or place for work furnished by the master⁹⁶ are alleged, plaintiff's proof must also be specific and evidence of other defects or negligent acts ordinarily is inadmissible. It has also been held that evidence of acts of negligence not alleged is admissible solely for the purpose of determining whether the specific negligence charged has been established, and will not in itself warrant recovery.⁹⁷ In some jurisdictions it has been held that, where general allegations of negligence are followed by an enumeration of specific acts, plaintiff will not be limited to proof of such acts unless the complaint fairly indicates his intention so to limit it.⁹⁸

Rules and customs. Evidence as to rules of the master and customs as to the mode of performing the work is admissible, although not specially pleaded, if the matters sought to be shown thereby are within the issues raised by the pleadings.⁹⁹ So evidence of a custom or usage is admissible, although not specially pleaded, where such custom or usage is merely incidental and is relied on only as evidence of some other fact in issue¹ or where it is not relied on to take the case out of a general rule of law.² However, evidence of a custom or usage is inadmis-

recovery—Gulf, C. & S. F. Ry. Co. v Young, *supra*.

87. N.Y.—Carron v. Standard Refrigerator Co., 123 N.Y.S. 682, 138 App Div. 723.

88. Fla.—Atlantic Coast Line R. Co. v. Fogleman, 158 So. 108, 117 Fla. 334.

Mo.—Barber v. Missouri Boiler Works Co., App., 297 S.W. 124. 39 C.J. p 964 note 89.

89. U.S.—Knareborough v. Belcher Silver Min. Co., C.C.Nev., 14 F.Cas. No. 7,874, 3 Sawy. 446.

Tex.—St. Louis Southwestern Ry. Co. of Texas v. Lawrence, Civ. App., 91 S.W.2d 434.

90. U.S.—Shumacher v. St. Louis & F. R. Co., C.C.Ark., 39 F. 174, reversed on other grounds 14 S.Ct. 479, 152 U.S. 77, 38 L.Ed. 361.

Ky.—Borderland Coal Co. v. Edwards, 199 S.W. 792, 178 Ky. 659.

91. Mo.—Barber v. Missouri Boiler Works Co., App., 297 S.W. 124.

92. Mo.—Barber v. Missouri Boiler Works Co., *supra*.

93. Ky.—Monroe v. Standard Sanitary Mfg. Co., 133 S.W. 214, 141 Ky. 549.

Mo.—Barber v. Missouri Boiler Works Co., App., 297 S.W. 124.

94. Ky.—Lutz's Adm'r v. W. J. Hughes & Sons Co., 24 S.W.2d 578, 232 Ky. 675—S. K. Jones Const. Co. v. Hendley, 5 S.W.2d 482, 224

Ky. 83—Patton v. Stegall, 295 S.W. 979, 220 Ky. 674—Louisville & NR Co. v. Lewis, 278 S.W. 143, 211 Ky. 330.

95. U.S.—Zumwalt v. Gardner, C.C. A.Mo., 160 F.2d 298.

Ind.—New York, C. & St. L. R. Co. v. King, 154 N.E. 508, 85 Ind. App. 510.

Ky.—Mannington Fuel Co. v. Ray's Adm'r, 68 S.W.2d 933, 250 Ky. 738—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91.

Mont.—White v. Chicago, M. & P. S. R. Co., 143 P. 561, 49 Mont. 419.

Okl.—Railway Express Agency v. Britton, 43 P.2d 119, 117 Okl. 580.

S.C.—Singleton v. McLeod, 8 S.E.2d 908, 193 S.C. 378.

Tenn.—Cincinnati N. O. & T. P. Ry. Co. v. Steelman, 7 Tenn. App. 657.

Tex.—Cassstevens v. Texas & P. Ry. Co., Civ. App., 28 S.W.2d 288, reversed on other grounds 32 S.W.2d 637, 119 Tex. 456, 73 A.L.R. 89. 39 C.J. p 961 note 83.

Failure to furnish safe machine

Where negligence relied on is employer's failure to furnish reasonably safe machine, employee cannot show that injury was caused by negligent operation—Knuckles v. Asher, 46 S.W.2d 774, 242 Ky. 427.

96. W.Va.—Laas v. Lubric, 133 S.E. 142, 101 W.Va. 546.

39 C.J. p 962 note 84.

97. Ind.—Thomas Madden, Son &

Co. v. Wilcox, 91 N.E. 933, 174 Ind. 657.

Mo.—Brackett v. James Black Masonry & Contracting Co., 32 S.W.2d 288, 326 Mo. 587—Walser v. Kuhlmann, App., 176 S.W.2d 658. 39 C.J. p 964 note 88.

98. U.S.—U. S. Express Co. v. Wahl, Ohio, 168 F. 848, 94 C.C.A. 260. 39 C.J. p 962 note 85.

99. U.S.—Wyatt v. New York, O. & W. R. Co., C.C.A.N.Y., 45 F.2d 705, certiorari denied New York, O. & W. R. Co. v. Wyatt, 51 S.Ct. 853, 283 U.S. 329, 75 L.Ed. 1442.

Ky.—Nelson's Adm'r v. Southern Ry. Co., 194 S.W.2d 518, 302 Ky. 243.

Mo.—Rose v. St. Louis-San Francisco Ry. Co., 289 S.W. 913, 315 Mo. 1181.

Utah.—Peterson v. Union Pac. R. Co., 8 P.2d 627, 79 Utah 213. 39 C.J. p 964 note 92.

1. U.S.—Terminal R. Ass'n of St. Louis v. Schorb, C.C.A.Mo., 151 F.2d 261, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Mo.—Norton v. Wheelock, 23 S.W.2d 142, 323 Mo. 913, certiorari denied Wheelock v. Norton, 50 S.Ct. 355, 281 U.S. 752, 74 L.Ed. 1162—Woodward v. Missouri Pac. R. Co., 295 S.W. 98, 316 Mo. 1196, certiorari denied Missouri Pac. R. Co. v. Woodward, 48 S.Ct. 115, 275 U.S. 552, 73 L.Ed. 422.

2. Mo.—Carbaugh v. St. Louis-San

sible unless specially pleaded where the custom or usage is a substantive matter and is not merely evidentiary of other facts in issue,³ or is relied on to take the case out of a general rule of law.⁴

Ordinances. As a general rule plaintiff cannot claim the benefit of a municipal ordinance imposing a duty on defendant unless he pleads it.⁵ However it has been held that, where an ordinance is offered merely to show the negligence alleged, and the action is not based on its violation, it may be received in evidence, although not pleaded.⁶

Effect of elimination of count. The admission of evidence authorized under a count of the complaint is not rendered erroneous because such count is subsequently eliminated from the case.⁷

Waiver of objections Where defendant goes to trial on a pleading charging general negligence in failing to furnish a safe place in which to work, after receiving a bill of particulars showing where in the place was not safe, it cannot prevent plaintiff from proving the facts showing such unsafety by objecting to the proof as not being within the issues.⁸

b. Under General Issue or General Denial

Under the general issue or general denial only defenses which are not required to be specially pleaded are available.

Under the general issue or general denial any defense is available which is not required to be specially pleaded.⁹ Under such a pleading defendant may show anything which tends to prove that the cause of action never existed,¹⁰ such as that the act of plaintiff was the sole proximate cause of the injury,¹¹ or that the injury was caused by the negligence of a third person for whom the master was not responsible,¹² or that the injury was the result of an unavoidable accident.¹³ So too defendant may show that plaintiff was not his employee,¹⁴ or, where the negligence of a fellow servant is a defense, that the servant's injury was caused by such negligence,¹⁵ or, where the negligence of a fellow servant is not a defense, that such negligence was not the proximate cause of the injury,¹⁶ or that the alleged fellow servant was not acting on behalf of the employer and did not commit the tortious act in the course of the employment.¹⁷ Also it has been held that the defenses of assumption of risk¹⁸ and contributory negligence¹⁹ are

- Francisco Ry. Co., App., 2 S.W.2d 195
3. Fla.—Atlantic Coast Line R. Co. v. Fogleman, 158 So. 108, 117 Fla. 384
- Iowa.—Chilcote v. Chicago & N. W. R. Co., 221 N.W. 771, 206 Iowa 1093
- Mo.—Martin v. Wabash, 30 S.W.2d 735, 325 Mo. 1107
- 39 C.J. p. 965 note 93
4. Mo.—Allen v. Larabee Flour Mills Corporation, 40 S.W.2d 597, 328 Mo. 226—Martin v. Wabash Ry. Co., 30 S.W.2d 735, 325 Mo. 1107
5. Mo.—Hardwick v. Wabash R. Co., 168 S.W. 328, 181 Mo. App. 156
6. Cal.—Cragg v. Los Angeles Trust Co., 98 P. 1063, 154 Cal. 663
- 39 C.J. p. 965 note 95
7. Ala.—Louisville & N. R. Co. v. Morris, 60 So. 933, 179 Ala. 239.
8. N.Y.—Devine v. Alphons Custodis Chimney Constr. Co., 110 N.Y. S. 119, 126 App. Div. 7
9. Ill.—Powers v. Michigan Cent. R. Co., 268 Ill. App. 493
- Tex.—Fort Worth & D. C. Ry. Co. v. Rowe, Civ. App., 69 S.W.2d 189.
- 39 C.J. p. 965 note 98.
- Facts stated in inducement**
- In action by employee against employer for injuries, plea of not guilty does not make an issue of facts stated in the inducement.—Great Atlantic & Pacific Tea Co. v. Dallas, 192 So. 867, 141 Fla. 206.
10. Mo.—Sheehan v. Prosser, 55 Mo. App. 569
- 39 C.J. p. 965 note 98 [a.] 3
11. Mo.—Lehnerts v. Otis El. Co., 256 S.W. 819—Forbes v. Dunnavant, 95 S.W. 934, 198 Mo. 193—Pecher v. Howd, 273 S.W. 752, 317 Mo. App. 113
12. Tex.—Fort Worth & D. C. Ry. Co. v. Rowe, Civ. App., 69 S.W.2d 169
- 39 C.J. p. 965 note 98 [d.]
13. Tex.—Colorado & S. Ry. Co. v. Rowe, Com. App., 238 S.W. 908—Smith v. Great Atlantic & Pacific Tea Co., Civ. App., 100 S.W.2d 1041, error dismissed—Castevens v. Texas & P. Ry. Co., Civ. App., 28 S.W.2d 288, reversed on other grounds 32 S.W.2d 637, 119 Tex. 456, 78 A.L.R. 89
14. Miss.—Long-Bell Lumber Sales Corporation v. Perritt, 172 So. 747, 178 Miss. 194
- Tenn.—Copeland v. Cherry, 95 S.W.2d 1275, 30 Tenn. App. 122.
- Independent contractor**
- (1) General denial to petition for damages alleging deceased was employed by defendant entitled defendant to show that decedent was independent contractor.—Stein v. Battenfeld Oil & Grease Co., 39 S.W.2d 345, 327 Mo. 804
- (2) Defense that plaintiff was employed by an independent contractor is available under a general denial.—Baker v. Scott County Milling Co., 20 S.W.2d 494, 323 Mo. 1089.
15. Mo.—Reynolds v. Al. G. Barnes Amusement Co., 300 S.W. 1062, 221 Mo. App. 1169
- 39 C.J. p. 952 note 2.
16. Mo.—Johnson v. Terminal R. Ass'n of St. Louis, 8 S.W.2d 891, 320 Mo. 884, certiorari denied 49 S. Ct. 80, 278 U.S. 644, 73 L.Ed. 558, 61 A.L.R. 572
17. Okl.—Massman Const. Co. v. Chisholm, 145 P.2d 207, 193 Okl. 473, followed in Massman Const. Co. v. Chisholm, 145 P.2d 211, 193 Okl. 477.
18. Mo.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Kieth v. American Car & Foundry Co., 9 S.W.2d 644, 320 Mo. 791—Guthrie v. Gillespie, 6 S.W.2d 886, 319 Mo. 1137.
- 39 C.J. p. 953 note 8
19. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Collins, 80 N.E. 415, 168 Ind. 467
- Wis.—Andrews v. Chicago, M. & St. P. Ry. Co., 71 N.W. 372, 96 Wis. 343
- Under Federal Employers' Liability Act**
- Contributory negligence, in action under Federal Employers' Liability Act, is provable under general issue.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari granted 52 S.Ct. 496, 286 U.S. 535, 76 L.Ed. 1275, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501—39 C.J. p. 955 note 22.

provable under a general denial or plea of the general issue.

Under the rule that matters of affirmative defense must be specially pleaded, discussed *supra* § 494, an affirmative defense cannot be shown under a general denial or plea of the general issue.²⁰ Thus in those jurisdictions where such defenses must be specially pleaded, assumption of risk,²¹ and contributory negligence,²² and negligence of a fellow servant,²³ are not provable under a plea of the general issue or a general denial.

c. Under Allegations as to Incompetency of Fellow Servants

In order to warrant the admission of evidence that a fellow servant through whose negligence plaintiff was injured was incompetent, the declaration or complaint must allege his incompetency.

In order to warrant the admission of evidence that a fellow servant through whose negligence plaintiff was injured was incompetent, the declaration or complaint must allege his incompetency²⁴ and aver that the master knew or should have known of such incompetency.²⁵ On the other hand, it has been held that, in an action for injuries resulting from the negligence or incompetency of a vice principal, it need not be alleged that such person was vice principal, or that his incompetency was known to defendant, to admit proof that the injury was caused by his negligence or incompetency.²⁶

An allegation of gross negligence involves the

competency of the fellow servant and renders admissible evidence as to his experience.²⁷ Generally any facts are admissible in evidence, under an allegation of incompetency or lack of skill, if they tend to establish or disprove the allegation;²⁸ otherwise they are not.²⁹

d. Under Allegations as to Contributory Negligence

On an issue of contributory negligence defendant may introduce evidence of any facts tending to establish his defense and plaintiff may avail himself of any facts which tend to disprove such negligence.

On an issue of contributory negligence defendant may introduce evidence of any facts tending to establish his defense.³⁰ However, a plea of contributory negligence is not sufficient to let in the defense that the injury was caused by the negligence of fellow servants,³¹ nor will an allegation of contributory negligence in general terms admit of the defense of disobedience of orders;³² and, where defendant alleges a specific act of contributory negligence, he cannot rely on any other act of negligence.³³ Since a plea of contributory negligence filed with a general denial admits that there is an issue of negligence between the parties, defendant cannot show that plaintiff was employed by a third person who is the proper party to be sued.³⁴

On an issue of contributory negligence, plaintiff may avail himself of any facts which tend to disprove such negligence,³⁵ even though not alleged

20. Cal.—Crabbe v. Mammoth Channel Gold Min Co., 143 P. 714, 168 Cal 500.

39 C.J. p 951 note 82, p 965 note 98 [h]

21. Ala.—Alabama Great Southern R Co v Skotsky, 71 So 335, 196 Ala 25—Mobile Electric Co v Sanges, 53 So 176, 169 Ala 341, Ann Cas 1912B 461

39 C.J. p 952 note 5

Under Federal Employers' Liability Act assumption of risk is an affirmative defense which must be pleaded and if not pleaded is not available—Adams v. Quincy, O & K. C. R. Co., 229 S.W. 790, 287 Mo. 535

22. Ala.—Alabama Great Southern R Co v. Skotsky, 71 So 335, 196 Ala 25—Mobile Electric Co v Sanges, 53 So 176, 169 Ala 341, Ann Cas 1912B 461

Cal.—Crabbe v. Mammoth Channel Gold Min Co., 143 P. 714, 168 Cal 500

39 C.J. p 954 note 18

Under Federal Employers' Liability Act

When an action is brought in the state court under the Federal Em-

ployers' Liability Act, the procedure should conform as nearly as may be to that of the state law, therefore, in order to establish contributory negligence under the federal statute, it should be considered and treated as a partial defense, coming within the terms of the local law and must be pleaded to make it available—Fleming v Norfolk Southern R Co., 76 SE 212, 160 NC 196.

23. Or.—Duff v. Willamette Steel Works, 78 P 363, 668, 45 Or 479. 39 C.J. p 952 note 99.

24. Tenn.—East Tennessee & W N C R Co v Collins, 1 SW 833, 85 Tenn 227 39 C.J. p 966 note 2

25. Tex.—Texas & Pacific Coal Co v Sherbley, Civ App, 212 SW 758

26. N.C.—Harris v Balfour Quarry Co., 49 SE 95, 137 NC 204

27. Md.—Wood v Heiges, 34 A 372, 83 Md 257.

28. N.Y.—Probst v Delamater, 3 N E 184, 100 N.Y. 266 39 C.J. p 966 note 6

29. Minn.—Ransier v. Minneapolis

& St L. R. Co., 14 N.W. 883, 30 Minn 215.

39 C.J. p 966 note 7

30. Mass.—MacLean v Neipria, 23 NE 2d 85, 304 Mass. 237.

39 C.J. p 966 note 8

31. Mo.—Higgins v. Missouri Pac. R Co., 43 Mo App 547.

32. Tex.—Texas & P. R Co v Magrill, 40 SW 188, 15 Tex Civ.App 353

33. US—American Car & Foundry Co v. Uss, Mo., 211 F. 862, 128 C A 240

39 C.J. p 966 note 15

34. Ark.—St Louis, I M & S R Co v Wiggam, 135 SW 889, 98 Ark 259

La.—Bomar v. Louisiana, N. & S. R Co., 8 So. 478, 42 La Ann 983, rehearing denied 9 So. 244, 42 La Ann 1206

35. Tex.—International - Great Northern R. R. v. Lowry, Civ App, 98 SW 3d 382, reversed on other grounds International - Great Northern R. Co v Lowry, 121 S W 2d 585, 132 Tex 272.

39 C.J. p 966 note 9.

in his declaration or complaint³⁶ On the other hand, it has been held that the mental weakness of an adult servant is not admissible to negative contributory negligence unless it is pleaded³⁷ It has also been held that contributory negligence cannot be disproved by evidence that the servant carefully discharged his duties, since the issue is whether he used due care under the circumstances existing at the time of the injury, and not as to his habits³⁸

Rules and customs. Defendant may introduce its rules for the purpose of showing contributory negligence without alleging that plaintiff had violated a rule,³⁹ but there is also authority to the contrary⁴⁰

Effect of elimination of issue of negligence Where an employee charged the excessive speed of a train as negligence, and also alleged, in anticipation of the defense of contributory negligence which defendant subsequently pleaded, that because of such speed he was unable to avoid injury, evidence

as to the speed of the train was admissible on the issue of contributory negligence, although the issue of negligence based on excessive speed had become immaterial.⁴¹

§ 500. — Variance

In an action by a servant against his master for personal injuries the plaintiff can recover only on the case made by the declaration or complaint and a material variance between the allegations and the proof is fatal.

In an action by a servant against his master for personal injuries plaintiff can recover only on the case made by the declaration or complaint,⁴² and a material variance between the allegations and proof is fatal⁴³ There is a material variance under this rule where specific acts of negligence are alleged and negligent acts not alleged are proved.⁴⁴ Where the proof substantially supports the pleading, the fact that it varies therefrom on some immaterial matter is not a fatal variance.⁴⁵ In some jurisdictions it has been held, sometimes under express

36. SC—Glasgow v Pacific Mills, 96 SE 137, 109 SC 385
39 CJ p 966 note 10

37. Mich—Hill v. Smith, 142 NW 585, 176 Mich 151, LRA 1917D 556, Ann Cas.1915B 452

38. Mass—Luxotte v. New York Cent & H. R. R Co, 83 NE 362, 196 Mass 519.

39. Ky—Nelson's Adm'r v Southern Ry Co., 194 S.W.2d 513, 302 Ky 243

Mo—Alcorn v Chicago & A. R. Co., 18 S.W. 188, 108 Mo 81

40. Iowa—Strong v Iowa Cent. R. Co., 62 NW 799, 94 Iowa 380

41. Tex—Southern Kansas R Co v. Shinn, Civ.App., 153 S.W. 636

42. U.S.—Ramsouer v Midland Valley R Co., D.C. Ark., 44 F.Supp 523, reversed on other grounds, C.C.A., 135 F.2d 101.

Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 WW Harr 564

Fla.—Powell v. Edwards, 157 So. 427, 117 Fla. 114.

Ind—Republic Creosoting Co v Hlatt, 8 NE 2d 981, 212 Ind. 432—New York, C. & St. L. R Co v King, 154 NE 508, 85 Ind App 510

Ky.—Stephens v Kitchen Lumber Co., 2 S.W.2d 874, 222 Ky 736

Mo—Nagy v St Louis Car Co, 87 S.W.2d 813—Newcomb v Payne, 250 S.W. 553

Mont—Kakos v. Bryam, 292 P 909, 88 Mont. 309

N.J.—Gurzo v. American Smelting & Refining Co., 41 A.2d 6, 132 N.J. Law 485

Tenn—Nashville, C & St L. Ry. v. Whitt, 5 Tenn App. 463.
39 CJ p 967 note 21

43. Ark—Vincennes Steel Corporation v. Derryberry, 106 S.W.2d 571, 194 Ark 37—Sisk v Poinsett Lumber & Mfg. Co., 54 S.W.2d 706, 186 Ark 588

Ky—Louisville & N R Co v Parsons, 281 S.W 519, 213 Ky 432

Mass—Shea v Crompton & Knowles Loom Works, 25 NE 2d 725, 305 Mass 327

39 CJ p 967 note 22

Variance held material

(1) In action under Employers' Liability Act, proof that scaffold fell with employee was at fatal variance with allegation that ladder gave way or caused employee to fall, and justified general charge for defendants—Kidd v. Roberts, 191 So. 243, 238 Ala. 446.

(2) Where employee's complaint against employer charged that tuberculosis was contracted by reason of conditions under which employee worked but proof did not show contraction but tended to show aggravation of tuberculosis infection which occurred from cause not connected with employment, there was a variance—Gurzo v American Smelting & Refining Co., 41 A.2d 6, 132 N.J. Law 485.

(3) In employee's suit for injuries, variance between allegation that named person was employer and evidence that such person was member of copartnership was fatal—Merrick v Street, Tex.Civ.App., 91 S.W.2d 851, error refused

(4) Other variances—Mannington Fuel Co. v. Ray's Adm'r, 63 S.W.2d

933, 250 Ky. 736—39 C.J. p 967 note 22 [c]

44. US—Reynolds v. New York, O. & W Ry Co., C.C.A.N.Y., 42 F.2d 164

Ala.—Jenkins v Mann, 127 So. 230, 220 Ala. 661

Ky—Knuckles v. Asher, 46 S.W.2d 774, 242 Ky. 427

Mo—Norwood v. St Louis-San Francisco Ry. Co., App., 277 S.W. 936.

Okl—Railway Express Agency v Britton, 43 P.2d 119, 117 Okl 580.

Tenn—Nashville, C & St. L. Ry. v. Whitt, 5 Tenn App 463.

39 CJ p 968 note 23.

45. Ky—Chesapeake & O Ry Co v Carroll's Adm'r, 61 S.W.2d 41, 249 Ky 703—West Kentucky Coal Co v Myers, 287 S.W. 572, 216 Ky. 207.

Mo—Cason v. Kansas City Terminal Ry Co., 128 S.W.2d 133—Morris v. Atlas Portland Cement Co., 19 S.W.2d 865, 323 Mo. 307—Westover v Wabash Ry Co., 6 S.W.2d 843, certiorari denied Wabash Ry. Co v Westover, 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed 550—Funk v Fulton Iron Works Co., 277 S.W 566, 311 Mo 77—Creighton v. Missouri Pac R. Co., 66 S.W.2d 980, 229 Mo App 325, certiorari denied Missouri Pac R Co v Creighton, 55 S.Ct 70, 293 U.S 558, 79 L.Ed 659—Goodwin v. American Car & Foundry Co., App., 285 S.W. 529—Zein v Pickel Stone Co., App., 273 S.W. 165—Alvarez v. Traffic Motor Truck Corporation, App., 271 S.W. 531

Mont—Kakos v. Bryam, 292 P. 909, 88 Mont. 309.

statutory provision, that no variance will be deemed material unless it actually surprises or misleads the opposite party to his prejudice⁴⁶ and that no judgment will be reversed for anything which might have been amended below.⁴⁷

Proof of part of matters alleged Where the proofs sustain a portion of the allegations of the pleading, there is no variance if such portion amounts to a cause of action⁴⁸ Thus, where such defects or acts of negligence are pleaded and established by proof as will render defendant liable, it is not a material variance that other defects or negligent acts were alleged but not proved,⁴⁹ if such allegations could not have misled defendant⁵⁰

Excess of proof. Recovery cannot be defeated by proof of negligent acts not relied on, where the negligence relied on and proved was the proximate cause of the injury.⁵¹

Proof of a lesser degree of negligence than alleged. Where ordinary negligence of a servant in a different department is sufficient to render the master liable, the fact that gross negligence is al-

leged and ordinary negligence proved does not constitute a variance⁵²

Actions at common law or under state or federal employers' liability acts The fact that allegations of a violation of an act of congress, such as the Federal Employer's Liability Act, are not sustained by the proof will not prevent recovery under allegations in the same petition which state a cause of action at common law and are proved,⁵³ nor will failure to sustain a cause of action under the federal law prevent recovery under a state employers' liability act, where both causes of action are pleaded and the cause based on the state act is supported by proof⁵⁴ So, where a cause is pleaded under the Federal Employers' Liability Act and the proof shows that plaintiff was not engaged in interstate commerce, but establishes a case under the state law, there is no material variance if the complaint is broad enough to cover both statutes;⁵⁵ and where the allegations of the complaint are broad enough to cover both a cause of action at common law and a cause of action under the Federal Employers' Liability Act, and the proof sustains a case under the

N.M.—Tillian v Atchison, T & S F Ry Co, 55 P 2d 34, 40 N M 80

Tenn.—Alabama Great Southern Ry. Co v Hale, 15 Tenn App 369

Tex.—Wilson Hydraulic Casing Pulling Mach. Co. v. James, Civ App, 271 S W 424.

39 C J p 968 note 29

Variance held immaterial

(1) Variance between allegations that plank was unsound and evidence that it broke under combined weight of two employees was immaterial and not misleading—Eppinger & Russell Co. v. Sheely, C.C.A. Fla., 24 F 2d 153.

(2) Description in complaint of car, fully identified by evidence, by incorrect number, was not material variance.—Detroit United Ry. Co. v. Craven, C.C.A. Mich., 13 F 2d 352, certiorari denied 47 S Ct 107, 273 US 713, 71 L Ed 854.

(3) Allegation that obstruction of passageway formed by piles of boxes proximately caused plaintiff's injury was not variance from proof that narrowness of passageway proximately caused injury—Bariess v St Louis Independent Packing Co, Mo App, 46 S W 2d 952

(4) Other variances
Ark.—Scott-Burr Stores Corporation v. Foster, 122 S W 2d 165, 197 Ark. 232

Ky.—Louisville & N R Co. v Stephens, 182 S W 2d 447, 298 Ky. 328 39 C J p 968 note 29 [d]

Time

Variance between allegation in petition that burn occurred on or about

Feb 1, 1939, and proof that burn occurred some time during January, 1939, was not material variance, and petition would be considered amended to conform with proof—Marsanick v. Luechtefeld, Mo App, 157 S W 2d 537

Place

(1) Where a petition, in action for death of husband, alleged that deceased, in the exercise of his duties, was required to walk a two-inch pipe for eighteen feet to a certain stopcock, plaintiff was permitted to show that accident happened anywhere on the pipe, and evidence that he fell at or near stopcock was sufficient—Berkbigher v Scott County Milling Co, Mo App, 275 S W 599

(2) Allegation in petition that minor was injured while attempting to place bottle of water on stand, supported by proof that bottle was dropped forty feet distant from stand, was held not to be a material variance—Dougherty v. Robb, 5 S W 2d 582, Tex Civ App, error dismissed

46. US—Waters v. Guile, Mich, 234 F 532, 148 CCA 298

Ky.—Clover Splint Coal Co. v Lorenz, 110 S W 2d 457, 270 Ky 676—Chesapeake & O Ry. Co v Carroll's Adm'r, 61 S W 2d 41, 249 Ky 703

N.M.—Tillian v. Atchison, T & S F Ry Co, 55 P 2d 34, 40 N M 80.

Tex.—Dougherty v. Robb, Civ App, 5 S W 2d 582, error dismissed. 39 C J p 968 notes 25, 28.

47. Ind.—Consumers' Paper Co v Eyer, 66 N.E. 994, 160 Ind 424 39 C J p 968 note 28

Amendment to conform pleading to proof see supra § 496

48. Ill.—Taylor v. Chicago, etc, R Co, 164 Ill App 348

Mo.—Richardson v St. Louis & H R Co, 123 S W. 22, 223 Mo 325

49. Mo.—Lewis v. Wabash R Co, 121 S W 1090, 142 Mo App 585

39 C J p 970 note 31

Necessity of proving immaterial matters see supra § 498

50. Kan.—Truman v. Kansas City, M. & O R Co, 161 P. 587, 98 Kan 761.

51. Mo.—Bridges v. St Louis-San Francisco R Co., 199 S W 573, 198 Mo App 576

39 C J. p 970 note 34.

52. Ky.—Louisville, H & St L R Co v Armes, 166 S W 190, 158 Ky 676

53. Mo.—Hilderbrand v. St Louis-San Francisco Ry. Co, 298 S W 1069, 220 Mo App. 1229

Pa.—Stoker v. Philadelphia & R. R Co, 99 A. 28, 254 Pa 494

54. S D.—Polluck v. Minneapolis & St L R Co, 183 NW 859, 44 S D. 249

55. Wash.—Archibald v Northern Pac R R Co., 183 P. 95, 108 Wash 97.

federal act, there is no material variance.⁵⁶

It has been held, on the other hand, that where a cause is pleaded solely under the Federal Employers' Liability Act and the proof establishes that plaintiff was not engaged in interstate commerce, but establishes a case under the common law, there is a material variance.⁵⁷ Also a material variance arises where only a common-law right of action is alleged and the proof discloses a liability created by an employers' liability act, state or federal,⁵⁸ and this is also true where the action is brought under the state act and the evidence shows that the case is controlled by the federal act⁵⁹ or by the workmen's compensation act,⁶⁰ but it has been held that the fact that the pleadings state a case under the common law and make no mention of the federal law does not preclude a recovery based on ap-

plication of the Federal Employer's Liability Act.⁶¹

Where the evidence shows that a case brought under the state law is in fact controlled by the federal statute, defendant may interpose the objection that no recovery can be had on the case proved, although he did not plead the federal act,⁶² and where an action against a common carrier is brought under the common law defendant may, in defense, rely on the federal statute, without pleading it, if he can show or the testimony of plaintiff shows that defendant was engaged in interstate commerce at the time of the injury.⁶³ On the other hand, it has been held that defendant cannot show affirmatively as a defense, without pleading it, that an action brought under the state law is in fact governed by the federal act.⁶⁴

3. EVIDENCE

§ 501. Presumptions and Burden of Proof

- a. Presumptions
- b. Burden of proof

a. Presumptions

- (1) In general
- (2) As to negligence or fault of master generally
- (3) As to cause of injury
- (4) As to equipment or place of work
- (5) As to methods of work, rules, and orders

- (6) As to competency, selection, and retention of servants
- (7) As to assumption of risk
- (8) As to contributory negligence

(1) In General

Certain presumptions are available to the parties in an action against a master to recover for injuries to a servant, but a presumption will not be indulged in unless the facts necessary to support it are present.

In actions against masters to recover for injuries to servants, various presumptions may be available to the parties.⁶⁵ Of course, a presumption will not

56. Ind.—Grand Trunk Western Ry. Co. v. Thrift Trust Co., 115 N.E. 685, 116 NE 756, 68 Ind App 198

57. Mo.—Davis v Chicago & E I Ry Co, 94 SW 2d 370, 338 Mo 1248

58. Pa.—Hogarty v Philadelphia & R. R. Co., 99 A. 741, 255 Pa. 236 39 C.J. p 970 note 40.

59. U.S.—Chicago, Rock Island & Pacific Ry. v Wright, Neb., 36 S. Ct. 185, 239 US 548, 60 L Ed 431. Ala.—McDuff v. Kurn, 172 So. 886, 223 Ala. 619

39 C.J. p 970 note 41.

60. Ala.—McDuff v. Kurn, *supra*

61. U.S.—Norfolk & W Ry Co v. Hall, CCA W Va., 49 F.2d 692.

62. U.S.—Toledo, St L & W. R. Co. v. Slavin, Ohio, 36 S.Ct. 306, 236 US 454, 59 L Ed 651

39 C.J. p 970 note 42

63. Pa.—Hogarty v Philadelphia & R. R. Co., 99 A. 741, 255 Pa. 236.

64. Iowa.—Breen v Iowa Cent R. Co., 168 NW. 901, 184 Iowa 1200—Bradbury v. Chicago, R. I. & P.

R Co, 128 NW 1, 149 Iowa 51, 40 L.R.A.N.S., 684

65. U.S.—Aqua System v Kodakokki, CCA Canal Zone, 38 F.2d 395 SC—Singleton v McLeod, 8 SE 2d 908, 193 SC 378.

Presumptions held available

(1) Where there is no allegation to the contrary in action against employer, presumption is that ten-year-old male employee was normal.—Stucker v. American Stores Corporation, 171 A. 230, 5 WW Harr., Del., 594

(2) Presumption is that experienced switchman knew how work was ordinarily performed, and that he was competent to perform it—Wheelock v. Freiwald, CCA Mo., 66 F.2d 694

(3) Vice-principal of master while discharging duties relating solely to ordinary functions of a servant will be presumed to have assumed status of a servant, and master will not be liable for vice-principal's acts of negligence resulting in injury to another servant—Haynie v Foremost Dairies, 187 SE 907, 54 Ga.App 369.

(4) As respects duty to warn, employee is presumed to see and understand all dangers that prudent and intelligent person of same age and experience and with same capacity for estimating their significance would understand—Ward v. Maine Cent R Co., 166 A. 826, 132 Me. 88

(5) Car inspector, struck by train, must be assumed, in absence of evidence to contrary, to have possessed normal hearing and sight—Kansas City Southern Ry. Co. v Jones, Tex Civ App., 282 SW. 309, affirmed 287 SW 304, reversed on other grounds Jones v Kansas City Southern Ry Co., Com App., 291 SW 528, reversed on other grounds 48 S.Ct. 308, 276 U. S 303, 72 L Ed 583

Employer's knowledge of risks

(1) What an employer ought reasonably to know is dangerous to his employees it is his duty to know, and therefore he is presumed to know it—Martin v. Atlantic Transport Co., 85 A. 29, 237 Pa. 15

(2) An employer is conclusively presumed to know dangers and risks to which he subjects employees—

be indulged in or a fact assumed unless the facts necessary to support such a presumption or assumption are present,⁶⁶ and a presumption cannot be built on another presumption.⁶⁷ The fact that one is found doing service for another may raise a presumption that the relation of master and servant exists between them,⁶⁸ and not that of contractor and contractee,⁶⁹ although there is authority to the contrary,⁷⁰ and, where plaintiff proves that he was employed by defendant even at a considerable time prior to the accident, it will be presumed that the contractual relation existed at the time of the injury.⁷¹ Where a railroad servant is injured while riding on defendant railroad company's pass in going back and forth from his work, it may be presumed that he was employed as a servant at the time.⁷² In an action under the Federal Employers' Liability Act it is said there is no presumption that the relation of master and servant existed at the time the alleged injury was received.⁷³

As to injury in performance of master's work
A servant injured by operation of a machine on

which he was working is presumed to have been in the performance of his duties.⁷⁴ The same presumption obtains where the cause of a fatal accident is unknown and deceased servant was at his designated place of employment at the time.⁷⁵ However, there is no presumption that a servant is in the line of his duty after it is shown that he has left his place of work,⁷⁶ and the presumption that a servant was doing his duty when injured creates no implication that the master was negligent.⁷⁷

As to employment in interstate or intra-state commerce Ordinarily, in the absence of proof to the contrary, it will be presumed that the employer, while in the use and operation of its railway within a state, was engaged in intra-state commerce,⁷⁸ at least where plaintiff does not allege that he was injured while engaged in interstate commerce,⁷⁹ but no such presumption arises where there is proof to the contrary.⁸⁰ The mere fact that a man is employed by a railroad raises no presumption that he was engaged in interstate commerce at the time of the injury;⁸¹ neither does the fact that one of

Self v Sinclair Refining Co., CCA Fla., 69 F2d 948.

66. US—Atchison, T & S F. Ry Co v Toops, Kan., 50 S Ct 281, 281 US 351, 74 L Ed 896—Davis v Crane, CCA Mo., 12 F2d 855

Ky—Louisville & N. R Co v Bryant, 252 SW. 145, 200 Ky 177

NC—Laughter v Powell, 14 SE2d 826, 219 NC 689, 136 ALR 1116, certiorari denied Powell v. Laughter, 62 S Ct 666, 86 L Ed 533

Tex—Harris v. Missouri-Kansas-Texas R Co, Civ.App., 283 SW. 895

Malice

In action by employee injured by falling bolt, it will not be presumed that act was malicious, where there is no such evidence—Stubbs v. American Car & Foundry Co., Mo App., 270 SW 145

Decent

In action under Federal Employers' Liability Act for death of railroad telegraph lineman who was killed when struck by train while riding a speeder, where train was on schedule it could not be assumed that deceased had been informed by agent that train was running behind time and that deceased would have adequate time to reach next station ahead of the train, in the absence of evidence that such information had been sought and that agent made false report—Cunningham v Great Northern Ry. Co., 14 NW2d 753, 73 ND 315

67. Tex—Harris v. Missouri-Kansas-Texas R. Co., Civ App., 283 SW 895.

68. Tex—Esthay v Sherman, Civ App., 135 SW2d 174, error dismissed, judgment correct—Corpus Juris cited in Liberty Mut Ins Co v Boggs, Civ App., 66 SW2d 787, 791

89 CJ p 970 note 48

69. Tex—Esthay v Sherman, Civ App., 135 SW2d 174, error dismissed, judgment correct

89 CJ p 970 note 49

70. Ala—Warrior-Pratt Coal Co v Shereda, 62 So. 721, 183 Ala 118

89 CJ p 970 note 50

71. Tex—Southern Pac Co v Wellington, Civ.App., 36 SW 1114

89 CJ p 970 note 51

72. NY—Vroom v. New York Cent & H R Co., 115 NYS 1063, 129 App Div 858, affirmed 91 NE 1121, 197 NY 588

73. Ala—Illinois Cent R Co v Johnston, 87 So 866, 205 Ala 1, certiorari denied 41 S Ct 218, 255 US 564, 65 L Ed 788 and error dismissed 41 S Ct 375, 254 US 654, 65 L Ed 459.

74. Mo—Perryman v Missouri Pac R Co., 31 SW2d 4, 326 Mo 176

89 CJ p 971 note 56.

75. Colo—Velotta v Yampa Valley Coal Co., 167 P 971, 63 Colo 489, LRA 1918B 917.

76. Mo—Elliott v. Payne, 239 SW 851, 293 Mo 581, 23 ALR 706

77. Okl—Smith v Chicago, R. I & P R Co., 142 P 398, 42 Okl 577

78. Cal—Johnson v Southern Pac Co., 248 P 501, 199 Cal 126, 49 A.

L R 1323—Reif v Schumacker, App., 102 P2d 375—McCoy v Southern Pac Co., 83 P2d 970, 29 Cal App2d 16, certiorari denied 59 S Ct 827, 307 US 626, 83 L Ed 1510

Ill—Mitchell v Louisville & N R Co., 27 NE2d 861, 305 Ill App 636, reversed on other grounds 31 NE2d 965, 375 Ill 545, mandate conformed to 35 NE2d 81, 310 Ill App 563, reversed 42 NE2d 86, 379 Ill 532

Iowa—Bradbury v Chicago, R I & P Ry Co., 128 NW 1, 149 Iowa 51, 40 LRA NS, 684

Miss—Goss v Kurn, 193 So 783, 187 Miss 679

Car moving within state

Where car is bound from one point within state to another within it, presumption that car is employed in intra-state commerce must be overcome by positive testimony—Cato v Atlanta & C A L Ry Co., 162 S. E 239, 164 S C. 123, certiorari denied Atlanta & C A L Ry Co. v Cato, 52 S Ct 200, 284 US 684, 76 L Ed 577

79. Miss—Goss v Kurn, 193 So. 783, 187 Miss 679

89 CJ p 971 note 68.

80. Cal—Newkirk v. Los Angeles Junction Ry. Co., 181 P2d 535, 21 Cal 2d 308.

Miss—Goss v Kurn, 193 So 783, 187 Miss. 679

81. Ill—Deman v. Illinois Cent R. Co., 13 NE2d 840, 294 Ill App 294. Pa—Colangelo v Pittsburgh & L E R. Co., 9 A.2d 391, 336 Pa 490.

the cars involved in the collision resulting in the injuries contained "perishables" raise a presumption that it was used in interstate commerce.⁸² As a general rule railroad employees such as members of switching or yard or station crews, whose duties may involve both interstate and intra-state commerce, are not so exclusively identified with either type of activity that they may be presumed to be engaged in the one rather than in the other.⁸³ Subject to the usual rules governing presumptions in civil actions generally, various other presumptions may be available in actions under the Federal Employers' Liability Act on the question of whether defendant and the injured employee were at the time and place of the injury engaged in interstate or intra-state commerce.⁸⁴

As to existence of remedy in foreign jurisdiction. It has been held that, where plaintiff brings suit to recover for injuries received in another jurisdiction, it will be presumed that there is a law in force in such jurisdiction furnishing a remedy for the injury.⁸⁵ However, although there is authority to the contrary,⁸⁶ it has also been held that the fellow-servant rule will be presumed to obtain in such ju-

risdiction.⁸⁷

As to what law controls. It has been held that, in the absence of proof that a servant is engaged in interstate commerce, the presumption obtains that the law of the forum controls the rights of the parties to the litigation.⁸⁸

(2) As to Negligence or Fault of Master Generally

In the absence of evidence to the contrary, there is ordinarily no presumption that the master was negligent, but there is rather a presumption that the master exercised due care.

In an action by a servant against his master for personal injuries there is a prima facie presumption that the master was free from negligence;⁸⁹ at least there is no presumption that he was negligent.⁹⁰ As affecting the question of the master's negligence, there is a presumption that the physician employed by him for an injured servant is reasonably skillful and competent.⁹¹ In an action under the Federal Employers' Liability Act there is a presumption that defendant performed its duty⁹² and exercised due care,⁹³ which offsets and counteracts the presumption of due care on the part of plain-

82. Ill—*Mitchell v Louisville & N R Co*, 27 NE2d 861, 305 Ill App 635, reversed on other grounds 31 NE2d 965, 375 Ill. 545, mandate conformed to 35 NE2d 81, 310 Ill App 563, reversed 42 NE2d 86, 379 Ill 522

83. Pa—*Painter v Baltimore & O R Co*, 13 A2d 396, 339 Pa 271, certiorari denied 61 S Ct 62, 311 US 633, 85 LEd 441—*Colangelo v Pittsburgh & L E R Co*, 9 A2d 391, 336 Pa 490—*Konsoute v Pennsylvania R Co*, 135 A 209, 287 Pa 302, certiorari denied 47 S Ct 448, 273 US 747, 71 LEd 871

84. Ill—*Wagner v Chicago, Rock Island & Pacific R Co*, 200 Ill App 305, affirmed 115 NE 201, 277 Ill 114.

39 C.J. p 971 note 67

Presumptions held available

(1) Presumption is that sidings appurtenant to trunk line railroad track are needed in interstate commerce—*Hamilton v Louisiana Ry & Nav Co*, 111 So 184, 162 La 841

(2) In action under Federal Employers' Liability Act where plaintiff fails to show that particular cars being moved were not interstate cars, they must be regarded as intra-state cars—*McNatt v Wabash Ry Co*, 74 SW2d 625, 336 Mo 999

Presumption not available

Presumption did not obtain, from fact that local freight train left point within state with interstate load, that its consist was in whole or

in part interstate at time railroad brakeman was injured at another point so as to authorize brakeman to maintain action under Federal Employers' Liability Act, since the consist of a train is not continuous in its nature—*Russell v St Louis-San Francisco Ry. Co*, 81 SW2d 631, 336 Mo 845.

85. Kan—*Speer v Missouri, K & T R Co*, 23 Kan 571

86. NC—*Williams v Southern R Co*, 38 SE 893, 128 NC 286

87. Ind—*Baltimore & O. S W R Co v Read*, 62 NE 488, 158 Ind 25, 92 AmSR 292

88. Ohio—*Moglosky v. Pennsylvania R Co*, 11 Ohio App. 437.

89. US—*Southern R Co v Stewart*, CCA Mo, 115 F2d 817, modified on other grounds 119 F2d 85, reversed on other grounds *Stewart v Southern Ry Co*, 62 S Ct 616, 315 US 263, 86 LEd 849—*Erickson v Pacific States Lumber Co*, CCA Or, 18 F2d 513

Ala—*Alabama Great Southern R Co*, 18 So2d 737, 248 Ala 64, certiorari denied 65 S Ct 676, 324 US 846, 89 LEd 1407

Ark—*Kroger Grocery & Baking Co v Kennedy*, 136 SW2d 470, 199 Ark 914—*J E Parham Const Co v Parker*, 37 SW2d 879, 182 Ark 673—*Wheeler v Ellis*, 35 SW2d 64, 183 Ark 138

Mo—*Sabol v St Louis Cooperage Co*, 282 SW 425, 313 Mo 527

39 C.J. p 971 note 73

Masters other than railroads

It has been held that all presumptions are in the master's favor except where the master is a railroad—*J S Betts Co v Hancock*, 77 SE 77, 139 Ga 198—*Whately v Block*, 21 SE 985, 95 Ga 15—*Gartrell v Russell*, 180 SE 860, 51 Ga App 519—*Wing v Savannah Guano Co*, 87 SE 827, 17 Ga App 534

Fellow servant

Presumption that master was not negligent applies to servant alleged to have caused injuries to fellow servant—*Miller v Southern Pac Co*, 21 P2d 865, 82 Utah 46, certiorari denied *Southern Pac Co v Miller*, 54 S Ct 207, 290 US 697, 78 LEd 600

90. US—*Geneva Mill Co v Andrews*, CCA Fla, 11 F2d 924. Del—*Valeri v Breakwater Co*, 82 A 507, 3 Boyce 215

Ky—*Linard v Interstate Coal Co*, 169 SW 1006, 160 Ky. 598

91. SC—*Hurdin v Southern R. Co*, 132 SE 582, 128 SC 216.

92. Va—*Davis v Souder*, 114 SE 605, 134 Va 356.

39 C.J. p 972 note 77.

93. US—*McGivern v. Northern Pac Ry Co*, CCA Minn, 132 F 2d 213

Or—*Ebell v Oregon-Washington R. & Nav Co*, 231 P 1062, 110 Or. 665

Defendant's deceased servants

In the absence of evidence to the contrary, it may be presumed that servants of defendant killed in the

tiff⁹⁴ There is no available statutory or common-law presumption of negligence of defendant.⁹⁵

(3) As to Cause of Injury

(a) In general

(b) Existence of defect or happening of event

(c) Res ipsa loquitur

(a) In General

The evidence may be such as to raise a presumption as to the cause or manner of the injury.

In an action against a master to recover for injuries to a servant as a result of negligence, the evidence may be such as to raise a presumption as to the cause or manner of the injury.⁹⁶ However, the circumstances relied on to prove defendant's negligence will not ordinarily be presumed;⁹⁷ and there can be no presumption that the injury was caused in one way when there is positive and undis-

puted evidence that it was caused in another way.⁹⁸ There is no presumption that the master's neglect to instruct plaintiff as to the hazards of the employment was the cause of the injury suffered by plaintiff.⁹⁹

(b) Existence of Defect or Happening of Event

No presumption of negligence on the part of the master ordinarily arises from the mere existence of a defect or from the occurrence of the accident through which the servant was injured; and this rule obtains in actions under the Federal Employers' Liability Act.

In the absence of statutory provision to the contrary, or circumstances making applicable the doctrine of res ipsa loquitur, as discussed infra subdivision a (3) (c) of this section, the general rule is that no presumption of negligence on the part of the master arises from the mere existence of a defect or the happening of the accident through which the servant was injured,¹ and, where the evidence

same accident as that on which the action is based used due care—*Bowser v Baltimore & O R. Co.*, CCA Pa., 152 F2d 436.

94. *Or—Ebell v Oregon-Washington R. & Nav. Co.*, 221 P 1062, 110 Or 665

Presumption as to contributory negligence see infra subdivision a (8) of this section

95. *US—Philadelphia & R Ry Co v. Throun*, CCANJ, 9 F2d 856, followed in *Szczepanski v Pennsylvania R Co.*, 86 F2d 1022

Ala—*Alabama Great Southern R Co v Davis*, 18 So 2d 737, 246 Ala 64, certiorari denied 65 SCt 876, 324 US 846, 89 LEd 1407—*Louisville & N R Co v. Grizzard*, 189 So 303, 233 Ala 49, certiorari denied 60 SCt 140, 308 US 603, 84 LEd 504.

NJ—*Di Bernardo v Delaware, L. & W. R. Co.*, 33 A 2d 823, 130 N.J.Law 479.

39 CJ p 972 note 80

96. *Tex—Texas & P. Ry Co. v. Perkins*, Civ App, 29 SW2d 835, reversed on other grounds Com App, 48 SW2d 249.

97. *La—Burmaster v Texas & P M. P. Terminal R. of New Orleans*, 6 La.App 778.

98. *Tex—Thomas v. Missouri-Kansas-Texas R Co of Texas*, Civ App, 178 SW2d 881, error refused

99. *Ohio—Hawkins v. Lake Shore & Michigan Southern R Co.*, 16 Ohio Cir Ct. N.S., 551, affirmed 78 NE 1137, 74 Ohio St 424

L. *US—Ramsouer v Midland Valley R. Co.*, CCA Ark, 135 F2d 101—*Southern R Co v Stewart*, CCA Mo, 115 F2d 817, modified on other grounds, 119 F2d 85, re-

versed on other grounds *Stewart v Southern Ry Co.*, 62 SCt 618, 315 US 263, 86 LEd 849—*Madison v Phillips Petroleum Co.*, CCA Tex, 88 F2d 515, certiorari denied 57 SCt 946, 301 US 703, 81 LEd 1358—*Aqua System v Kodakowski*, CCA Canal Zone, 88 F2d 395—*Luckenbach S S Co v Busynski*, CCA Tex, 19 F2d 871, reversed on other grounds 48 SCt 440, 277 US 226, 72 LEd 860, conformed to CCA, *Luckenbach S S Co v Busynski*, 31 F2d 1015, certiorari denied *Busynski v Luckenbach S S Co.*, 49 SCt 483, 279 US 867, 73 LEd. 1004—*Erickson v Pacific States Lumber Co.*, CCA Or, 18 F2d 513

Ark—*Bayse v. Odom*, 168 SW2d 1092, 205 Ark 423—*Harmon v Morrison*, 147 SW2d 35, 301 Ark 820—*Lee v Pate*, 131 SW2d 8, 198 Ark 723—*Pekin Wood Products Co v Burkhardt*, 96 SW2d 776, 192 Ark 1025—*Rice & Holman v Henderson*, 35 SW2d 1016, 183 Ark 355—*Wheeler v. Ellis*, 35 SW2d 64, 183 Ark 133—*Texas Co. v. Jones*, 298 SW 342, 174 Ark 905

Colo—*Denver & S L Ry Co v. Mullen*, 279 P 49, 86 Colo 159

Ga—*Louisville & N R Co v. Ruder*, 147 SE 795, 39 Ga App 513

Ill—*Toledo, W & W R Co v. Moore*, 77 Ill. 217—*Illinois Cent. R Co v. Houck*, 72 Ill. 285

Iowa—*Duree v Chicago, M & St. P R. Co.*, 92 NW. 890, 118 Iowa 640

Ky—*High Splint Coal Co v Bailey's Adm'r.*, 37 SW2d 22, 238 Ky 217—*Highsplint Coal Co v Palmer's Adm'r.*, 20 SW2d 1020, 231 Ky 24

Me—*Loring v. Maine Cent. R Co.*, 152 A 527, 129 Me 369.

Mass—*Lynch v New York, N. H. &*

H R R., 200 NE 877, 294 Mass. 152.

Mich—*Voigt v Michigan Peninsular Car Co.*, 70 NW 1103, 112 Mich. 504

Mo—*Schmeer v Anchor Cold Storage Co.*, 12 SW2d 433—*Compton v Louis Rich Const. Co.*, 287 SW 474, 315 Mo 1068—*Sabot v St Louis Cooperage Co.*, 282 SW 425, 313 Mo 527—*Emrick v. City of Springfield*, App, 110 SW2d 840—*Pronnecke v Westliche Post Pub Co.*, 291 SW. 139, 220 Mo App 640—*Tashman v Republic Metal & Rubber Co.*, App, 285 SW 109

Neb—*Laf Ferry v Chicago, B. & Q R Co.*, 208 NW. 737, 114 Neb 219.

Okla—*Tunstall v. Mead-Phillips Drilling Co.*, 86 P 2d 727, 169 Okl 238—*St Louis & S F. Ry Co v. Hartless*, 241 P. 482, 115 Okl 88

SC—*Jackson v. Brock*, 159 SE 22, 160 SC 471—*Taylor v. Winnsboro Mills*, 143 SE 474, 146 SC 28—*Wilson v Atlantic Coast Line R. Co.*, 131 SE 777, 134 SC. 31

Tex—*Emmons v Texas & P Ry Co.*, Civ App, 149 SW2d 167, error dismissed, judgment correct—*Lancaster v. Taylor*, Civ.App, 281 SW 654.

39 CJ p 972 notes 87, 88

Rule as to passenger distinguished

Presumption of negligence of carrier arising on proof of occurrence causing injury to passenger does not apply to injury to servant

Ala—*Louisville & N. R Co v. Allen's Adm'r.*, 78 Ala 494

Mo—*Kenyon v St Joseph Ry., Light, Heat & Power Co.*, 298 S.W. 246, 221 Mo App. 1014

39 CJ p 972 note 88 [b].

leaves the cause of an injury unproved, it cannot be attributed to defendant's negligence.² This has been held true even where a highly dangerous agency, such as electricity, is employed by the master and the servant is injured thereby,³ even though the accident is of an unusual character,⁴ or even though the injury was directly caused by reason of a failure of a machine or appliance furnished by the employer.⁵ The rule, however, has been held inapplicable where the peculiar characteristics of the injury may be linked in the chain of circumstances tending to prove negligence.⁶ Where it is shown that the servant was injured while the master was acting in violation of a statute, the injuries will be attributed to negligence, in the absence of anything to show the contrary.⁷

In an action under the Federal Employers' Liability Act the fact of an accident whereby plaintiff was injured carries no presumption of defendant's negligence sufficient to warrant recovery,⁸ at least

where plaintiff's injury was not due to defendant's violation of the Federal Safety Appliance Act.⁹

(c) Res Ipsa Loquitur

Although there is authority to the contrary, it is quite generally held, both in ordinary actions by a servant against the master for injuries and in actions under the Federal Employers' Liability Act, that the doctrine of *res ipsa loquitur* is applicable in a proper case.

The question of the applicability of the doctrine of *res ipsa loquitur* in an action against a master to recover for injuries to a servant has given rise to considerable discussion and conflict and a certain amount of confusion among the decisions.¹⁰ Some authorities expressly and categorically deny the applicability of the doctrine in master and servant cases,¹¹ while others hold that it should be applied only rarely and in certain isolated cases,¹² and even then only with great caution.¹³ However, the majority of the decisions are in agreement that the doctrine is applicable in a proper case in an action

Not conclusively

Fact that elevator cable broke, permitting elevator to fall, injuring employee, did not conclusively establish employer's fault—*Bridges v. Great Falls Mfg. Co.*, 156 A 697, 85 NH 220.

2. Wash—*Gardner v. Seymour*, 180 P 2d 564, 27 Wash 2d 274
39 C J p 994 note 46

3. Ala—*Williams v. Anniston Electric & Gas Co.*, 51 So 385, 164 Ala 84

4. NY—*Schlappendorff v. American R Traffic Co.*, 137 NYS 44, 142 App Div. 554
39 C J p 974 note 90

Presumption of care by master

Mere fact of servant's injury, due to abnormally unsafe conditions, is not sufficient to overcome presumption that master exercised proper care—*Sabol v. St. Louis Cooperage Co.*, 282 SW 425, 313 Mo 527

5. Fla—*Florida East Coast Ry Co v. Daughetee*, 124 So 757, 98 Fla 1021.

Md—*McVey v. Gerrald*, 193 A 789, 172 Md 595

Mo—*Grindstaff v. J. Goldberg & Sons Structural Steel Co.*, 40 SW 2d 702, 328 Mo 72

Okl—*McCracken v. Franco-Dominion Development Corporation*, 117 P 2d 135, 189 Okl 354

S.C—*Langston v. Fiske-Carter Const. Co.*, 185 S.E. 62, 180 SC 113—*Jackson v. Brock*, 159 S.E. 22, 160 SC 471.

39 C J p 995 note 61 [e] (1)

"When an accident happens by the breaking of a machine in ordinary use, and there is neither proof of defects in the machine nor of error in its use by the servant, the law will

not draw first the inference that the machine was defective, and then from that inference infer the lack of care of the master"—*Brazeale v. Piedmont Mfg. Co.*, 193 SE 39, 41, 184 SC 471

6. Mo—*Nicholson v. Franciscus*, 40 SW 2d 623, 328 Mo 96

7. Mo—*Bluedorn v. Missouri Pac R Co.*, 25 SW 943, 121 Mo 258
39 C J p 994 note 50

8. U.S.—*Edwards v. Baltimore & O R Co.*, CCA II, 131 F 2d 366—*Lukon v. Pennsylvania R Co.*, CCA Pa., 131 F 2d 327—*Wheelock v. Freiwald*, CCA Mo., 66 F 2d 694—*Ramsouer v. Midland Valley R Co.*, DCArk., 44 F Supp. 523, reversed on other grounds, CCA., 135 F 2d 101

Ark—*Missouri Pac R Co v. Boyd*, 106 SW 2d 165, 194 Ark 131

Kan—*Schaefer v. Lowden*, 78 P 2d 48, 147 Kan 530

Ky.—*Louisville & N R Co. v. Stewart*, 143 SW 2d 110, 283 Ky 585

Me—*Morey v. Maine Cent R Co.*, 133 A 92, 125 Me 272

NJ—*Loffler v. Delaware, L & W R Co.*, 173 A 497, 113 NJ Law 113

NC—*Austin v. Southern Ry. Co.*, 148 SE 446, 197 NC 319

Okl—*Wright v. Atchison, T & S F Ry Co.*, 38 P 2d 517, 170 Okl 48—*Fisher v. Kansas City, M & O Ry Co.*, 36 P 2d 744, 169 Okl 282

Or—*Waller v. Northern Pac Terminal Co. of Or.*, 166 P 2d 488, certiorari denied 67 S Ct. 45, 329 US 742, 91 L Ed 640, rehearing denied 67 S Ct. 181, 329 US 825, 91 L Ed. 701—*McPherson v. Oregon Trunk Ry.*, 102 P 2d 726, 165 Or 1

Pa—*Guerriero v. Reading Co.*, 29 A 2d 510, 346 Pa 187.

Vt—*Bailey v. Central Vermont Ry.*, 28 A 2d 639, 113 Vt 8, reversed on other grounds 63 S Ct 1063, 319 U S 350, 87 L Ed 1444, conformed to 35 A 2d 365, 113 Vt 432.

Wis—*Schiefelbein v. Chicago, M, St P & P R Co.*, 265 NW 386, 221 Wis 35, certiorari denied Chicago, M, St P & P R Co v Schiefelbein, 57 S Ct 20, 299 U.S. 558, 81 L Ed 411

39 C J p 974 note 92, p 994 note 40

9. Ga—*Southern R. Co. v. Blackwell*, 93 SE 321, 20 Ga.App 630. Minn—*Reeves v. Chicago, St. P. M & O R Co.*, 179 NW. 689, 147 Minn 114

10. U.S.—*Cochran v. Pittsburgh & L E R Co.*, DCOhio, 31 F 2d 769

Mo—*Corpus Juris* quoted in *Noce v. St. Louis-San Francisco Ry Co.*, 85 SW 2d 637, 640, 337 Mo. 689
39 C J p 975 notes 96, 99

11. Mo—*Corpus Juris* cited in *Williams v. St. Louis-San Francisco Ry Co.*, 85 SW 2d 624, 634, 337 Mo 667.
39 C J p 975 note 98.

12. Mo—*Sabol v. St. Louis Cooperage Co.*, 282 SW 425, 313 Mo 527

Tex—*Brigman v. Holt & Bowers*, Civ App., 32 S.W.2d 220, error refused—*Hanson v. Ponder*, Civ App., 293 SW 219, affirmed in part and reversed in part on other grounds Com App., 300 SW 2d 35, rehearing denied 3 SW.2d 136 and motion granted, Com App., 5 SW.2d 767.

39 C J. p 975 note 97

13. Mo—*Sabol v. St. Louis Cooperage Co.*, 282 SW 425, 313 Mo 527

by a servant for injuries,¹⁴ especially where a statute has abolished the fellow-servant rule,¹⁵ although it has been pointed out that the application of the doctrine in such cases is somewhat restricted by the subsidiary rules governing the relationship between the parties¹⁶

Even where the doctrine is applicable the usual limitations obtain, that is to say, the presumption

or inference of negligence is, in the absence of a statute to the contrary, deducible not from the mere happening of the event, but from the attendant circumstances¹⁷ Thus, the doctrine is applied or the inference is drawn where and only where the thing or condition causing the injury is under the exclusive¹⁸ control and management¹⁹ of the master, and where in ordinary experience the accident does not

14. Cal—Metz v Southern Pac Co, 124 P2d 670, 51 Cal App 2d 260

Ga—Gable v Central of Georgia Ry Co, 147 S E 135, 39 Ga App. 350

Ill—Thompson v Elgin, J & E Ry Co, 69 NE 2d 705, 329 Ill App 645

Schulk v Joliet & Southern Traction Co, 154 Ill App 108

Minn—Ryan v St Paul Union Depot Co, 210 NW 32, 168 Minn 287

Mo—Whitaker v Pitcairn, 174 SW 2d 163, 351 Mo 848—Charlton v Lovelace, 173 SW 2d 13, 351 Mo 364—Miller v Terminal R Ass'n

of St Louis, 163 SW 2d 1034, 349 Mo 944, certiorari denied Terminal Railroad Ass'n v Miller, 68 S Ct 160, 317 US 678, 87 L Ed 544, rehearing denied 68 S Ct 356, 317 US 710, 87 L Ed 586—Corpus Juris quoted in Noce v St Louis-San Francisco Ry Co, 85 SW 2d 637, 640, 337 Mo 689—Corpus Juris quoted in Gordon v Muehling Packing Co, 40 SW 2d 693, 696, 328 Mo. 123—Jenkins v Kansas City, 91 SW 2d 98, 230 Mo App 337—Hauck v American Car & Foundry Co, App, 14 SW 2d 497

Or—Erickson v Meier & Frank Co, 18 P 2d 207, 142 Or 76

Tex—Texas & Pac Ry Co v Casaday, Civ App, 148 SW 2d 471, error dismissed, judgment correct—Galveston, H. & S A Ry Co v Brewer, Civ App, 4 SW 2d 320, error refused

39 CJ p 975 notes 1, 98 [b]

In federal courts

(1) It has been held that the doctrine is inapplicable in cases between master and servant—Phillips Petroleum Co v. Manning, CCA Ark, 81 F 2d 849—39 CJ p 975 note 98 [a]

(2) In a number of cases, however, the doctrine has been applied—F W Martin & Co v. Cobb, CCA Ark, 110 F 2d 169—Lowery v Hocking Valley Ry Co, CCA Ohio, 60 F 2d 78—Altman v Atlantic Coast Line R. Co, CCA Fla, 18 F 2d 405—Cochran v Pittsburgh & L E R Co, D C Ohio, 31 F 2d 769—39 CJ p 975 note 98 [a]

(3) Also, in a number of cases it has been held that, where an employee is injured by an instrumentality under the control and management of the employer, and there is evidence negating fault on the part of the employee, and such an acci-

dent does not ordinarily happen if due care is exercised, such circumstances constitute evidence or permit an inference of negligence on the part of the employer—American Glycerin Co v Brown, CCA Tex, 30 F 2d 316—39 CJ p 977 note 10

In Kentucky

(1) It has been held that, while it is the rule that the doctrine of res ipsa loquitur applies to a case of master and servant, it does not apply with the same fullness and weight as in cases where the relation of master and servant does not exist—West Kentucky Coal Co v Key, 198 SW 724, 178 Ky 220—Hartung v Ten Broeck Tyre Co, 190 SW 677, 173 Ky. 155—Baltimore & O. R Co v Smith, 184 SW. 1108, 169 Ky 593, L R A 1918F 1205

(2) Also, it has been said that the doctrine is applied as between master and servant only in extreme cases—Louisville & N R Co v Grant, 2 SW 2d 1063, 223 Ky 39

(3) However, it has also been said that, as a general rule, the doctrine of res ipsa loquitur does not apply where relationship of master and servant exists—Magness' Adm'x v. Hutchinson, 117 SW 2d 1041, 274 Ky 226—Fee's Adm'x v. Mahan-Ellison Coal Corporation, 43 SW 2d 681, 241 Ky 231.

15. US—Cochran v Pittsburgh & L E R Co, D C Ohio, 31 F 2d 769

Ind—Baltimore & O. S W R Co v Hill, 148 NE 489, 84 Ind App 354, certiorari granted 47 S Ct 96, 71 L Ed 1313, and certiorari denied 47 S Ct 246, 273 US 738, 71 L Ed 867

Mo—Corpus Juris quoted in Noce v. St Louis-San Francisco Ry Co, 85 SW 2d 637, 640, 337 Mo 689—Corpus Juris quoted in Gordon v Muehling Packing Co, 40 SW 2d 693, 696, 328 Mo 123

39 CJ p 976 note 2

16. Or—Erickson v Meier & Frank Co, 18 P 2d 207, 142 Or 76

Fellow servant's negligence

Where the fellow-servant rule obtains, the res ipsa loquitur doctrine is inapplicable in a suit against an employer for injury through a fellow servant's negligence—Kirkpatrick v American Ry. Express Co, 6 SW 2d 524, 177 Ark 334.

17. US—Cochran v Pittsburgh & L E R Co, D C Ohio, 31 F 2d 769

Mo—Noce v St Louis-San Francisco Ry Co, 85 SW 2d 637, 337 Mo 689—Corpus Juris quoted in Gordon v Muehling Packing Co, 40 SW 2d 693, 696, 328 Mo 123

39 CJ p 976 notes 4, 6

Presumptions arising from mere existence of defect or happening of event see supra subdivision a (3) (b) of this section

18. US—Ramsouer v Midland Valley R Co, D C Ark, 44 F Supp 523, reversed on other grounds, CCA, 135 F 2d 101.

Ark—Missouri Pac R Co v Shores, 191 SW 2d 580, 209 Ark 539

Ohio—Hilleary v Bromley, 61 NE 2d 781, reversed on other grounds 64 NE 2d 832, 146 Ohio St 213

Pa—Killfeather v. Pollock, Com Pl, 58 Montg Co 419

Wash—Gardner v Seymour, 180 P. 2d 564, 27 Wash 2d 802.

39 CJ p 976 note 7

19. US—Ramsouer v Midland Valley R Co, CCA Ark, 135 F 2d 101

Cochran v Pittsburgh & L E R Co, D C Ohio, 31 F 2d 769

Ariz—Roples v. Preciado, 79 P 2d 504, 52 Ariz 113

Cal—Dryden v. Western Pac R Co, 36 P 2d 394, 1 Cal App 2d 49

Ky—Louisville & N R Co v Grant, 2 SW 2d 1063, 223 Ky 39

Me—Sylvia v. Bitacovits, 189 A 419, 135 Me 80

Md—McVey v Gerrald, 192 A 789, 173 Md 595

Mo—Whitaker v Pitcairn, 174 SW. 2d 163, 351 Mo 848—Gordon v Muehling Packing Co, 40 SW 2d 693, 328 Mo 123—Foster v. Kansas City, C C & S. J Ry. Co, 26 SW 2d 770, 325 Mo 18

39 CJ p 976 note 8

Control by employee

Where the servant has charge of the instrumentality causing the accident with the duty to inspect, the doctrine of res ipsa loquitur does not apply.

Ark—Pekin Wood Products Co v Burkhardt, 96 SW 2d 776, 192 Ark. 1025

Ky—Stephens v Kitchen Lumber Co, 2 SW 2d 374, 223 Ky. 736

Operation or use by employee

(1) It has been held that the fact that injured employee was operating or working with the instrumentality

of the accident does not preclude recovery where the instrumentality was under the control and management of the master.

20. US—Cochran v Pittsburgh & L E R Co, D C Ohio, 31 F 2d 769

Mo—Noce v St Louis-San Francisco Ry Co, 85 SW 2d 637, 337 Mo 689—Corpus Juris quoted in Gordon v Muehling Packing Co, 40 SW 2d 693, 696, 328 Mo 123

39 CJ p 976 notes 4, 6

Presumptions arising from mere existence of defect or happening of event see supra subdivision a (3) (b) of this section

21. US—Ramsouer v Midland Valley R Co, D C Ark, 44 F Supp 523, reversed on other grounds, CCA, 135 F 2d 101.

Ark—Missouri Pac R Co v Shores, 191 SW 2d 580, 209 Ark 539

Ohio—Hilleary v Bromley, 61 NE 2d 781, reversed on other grounds 64 NE 2d 832, 146 Ohio St 213

Pa—Killfeather v. Pollock, Com Pl, 58 Montg Co 419

Wash—Gardner v Seymour, 180 P. 2d 564, 27 Wash 2d 802.

39 CJ p 976 note 7

22. US—Ramsouer v Midland Valley R Co, CCA Ark, 135 F 2d 101

Cochran v Pittsburgh & L E R Co, D C Ohio, 31 F 2d 769

Ariz—Roples v. Preciado, 79 P 2d 504, 52 Ariz 113

Cal—Dryden v. Western Pac R Co, 36 P 2d 394, 1 Cal App 2d 49

Ky—Louisville & N R Co v Grant, 2 SW 2d 1063, 223 Ky 39

Me—Sylvia v. Bitacovits, 189 A 419, 135 Me 80

Md—McVey v Gerrald, 192 A 789, 173 Md 595

Mo—Whitaker v Pitcairn, 174 SW. 2d 163, 351 Mo 848—Gordon v Muehling Packing Co, 40 SW 2d 693, 328 Mo 123—Foster v. Kansas City, C C & S. J Ry. Co, 26 SW 2d 770, 325 Mo 18

39 CJ p 976 note 8

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Where the servant has charge of the instrumentality causing the accident with the duty to inspect, the doctrine of res ipsa loquitur does not apply.

Ark—Pekin Wood Products Co v Burkhardt, 96 SW 2d 776, 192 Ark. 1025

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Operation or use by employee

(1) It has been held that the fact that injured employee was operating or working with the instrumentality

of the accident does not preclude recovery where the instrumentality was under the control and management of the master.

23. US—Cochran v Pittsburgh & L E R Co, D C Ohio, 31 F 2d 769

Mo—Noce v St Louis-San Francisco Ry Co, 85 SW 2d 637, 337 Mo 689—Corpus Juris quoted in Gordon v Muehling Packing Co, 40 SW 2d 693, 696, 328 Mo 123

39 CJ p 976 notes 4, 6

Presumptions arising from mere existence of defect or happening of event see supra subdivision a (3) (b) of this section

24. US—Ramsouer v Midland Valley R Co, D C Ark, 44 F Supp 523, reversed on other grounds, CCA, 135 F 2d 101.

Ark—Missouri Pac R Co v Shores, 191 SW 2d 580, 209 Ark 539

Ohio—Hilleary v Bromley, 61 NE 2d 781, reversed on other grounds 64 NE 2d 832, 146 Ohio St 213

Pa—Killfeather v. Pollock, Com Pl, 58 Montg Co 419

Wash—Gardner v Seymour, 180 P. 2d 564, 27 Wash 2d 802.

39 CJ p 976 note 7

25. US—Ramsouer v Midland Valley R Co, CCA Ark, 135 F 2d 101

Cochran v Pittsburgh & L E R Co, D C Ohio, 31 F 2d 769

Ariz—Roples v. Preciado, 79 P 2d 504, 52 Ariz 113

Cal—Dryden v. Western Pac R Co, 36 P 2d 394, 1 Cal App 2d 49

Ky—Louisville & N R Co v Grant, 2 SW 2d 1063, 223 Ky 39

Me—Sylvia v. Bitacovits, 189 A 419, 135 Me 80

Md—McVey v Gerrald, 192 A 789, 173 Md 595

Mo—Whitaker v Pitcairn, 174 SW. 2d 163, 351 Mo 848—Gordon v Muehling Packing Co, 40 SW 2d 693, 328 Mo 123—Foster v. Kansas City, C C & S. J Ry. Co, 26 SW 2d 770, 325 Mo 18

39 CJ p 976 note 8

Control by employee

Where the servant has charge of the instrumentality causing the accident with the duty to inspect, the doctrine of res ipsa loquitur does not apply.

Ark—Pekin Wood Products Co v Burkhardt, 96 SW 2d 776, 192 Ark. 1025

Ky—Stephens v Kitchen Lumber Co, 2 SW 2d 374, 223 Ky. 736

Operation or use by employee

(1) It has been held that the fact that injured employee was operating or working with the instrumentality

usually happen without negligence on the master's part²⁰ It is often difficult to determine what inference can reasonably be drawn from the facts;²¹ and the propriety of applying the doctrine in a particular case must be determined in the light of the special facts of the case and the teachings of ex-

perience with regard to them,²² for common experience is the basis of presumptions of fact.²³ At all events, the doctrine will not be applied if the evidence does not show that the accident was of such a character as to justify the inference or presumption of negligence on the part of defendant²⁴

causing the injury does not of itself necessarily forbid the application of the doctrine of "res ipsa loquitur"—Whitaker v Pitcairn, 174 S.W.2d 163, 351 Mo. 848

(2) However, it has also been held that the res ipsa loquitur rule was not applicable in action by gas employee against employer and superintendent for injuries sustained when gas heater in basement of dormitory maintained by company for benefit of employees exploded when employee attempted to light heater, since employee, and not company, was making "use" of heater, and since explosion did not occur without any voluntary action on part of employee within the rule—Stanolind Oil & Gas Co v Bunce, 62 P.2d 1297, 51 Wyo. 1.

20. US—Ramsouer v Midland Valley R. Co., CCA Ark., 135 F.2d 101—F. W. Martin & Co v Cobb, CCA Ark., 110 F.2d 159—Cochran v Pittsburgh & L. E. R. Co., D. C. Ohio, 31 F.2d 769.

Ariz—Robles v Preciado, 79 P.2d 504, 52 Ariz. 113

Cal—Weddle v. Loges, 125 P.2d 914, 52 Cal App 2d 115.

Ky—Stephens v Kitchen Lumber Co., 2 S.W.2d 374, 222 Ky 736

Me—Sylvia v. Biscovitz, 189 A. 419, 135 Me. 80.

Minn—Ryan v St. Paul Union Depot Co., 210 N.W. 32, 168 Minn. 287

Miss—Gulfport Creosoting Co v. White, 157 So. 86, 171 Miss. 127.

Mo—Whitaker v. Pitcairn, 174 S.W.2d 163, 351 Mo. 848—Corpus Juris quoted in Gordon v. Muehling Packing Co., 40 S.W.2d 693, 697, 323 Mo. 123—Meade v. Missouri Water & Steam Supply Co., 300 S.W. 515, 318 Mo. 350—Hauck v American Car & Foundry Co., App., 14 S.W.2d 497—Uhl v Century Electric Co., App., 295 S.W. 127—Miller v Walsh Fire Clay Products Co., 292 S.W. 141, 219 Mo App 590—Lowe v. Fox Laundry, Cleaning & Dyeing Co., App., 274 S.W. 857

N.Y.—Gustavson v Thomas, 237 N.Y. S. 479, 227 App Div 303

N.C.—Eaker v. International Shoe Co., 154 S.E. 667, 199 N.C. 379

N.D.—Bakken v State, 234 N.W. 513, 60 N.D. 344

Pa.—Killfeather v Pollock, Com Pl., 58 Montg. Co 419

Wash—Thornton v. Van De Kamp's

Holland Dutch Bakers, 42 P.2d 799, 181 Wash. 213

39 C.J. p 977 notes 9, 10

Complex character of machine

Fact that machine, through a defect in the mechanism of which employee was injured, was a complicated one did not prevent application of doctrine of res ipsa loquitur—Jenkins v Kansas City, 91 S.W.2d 98, 230 Mo App 337

Doctrine held applicable in cases of injuries resulting from

(1) Falling of elevator—Meade v. Missouri Water & Steam Supply Co., 300 S.W. 515, 318 Mo. 350

(2) Automatic or abnormal starting of machine or appliance—Corpus Juris cited in Gordon v Muehling Packing Co., 40 S.W.2d 693, 697, 323 Mo. 123—Jenkins v Kansas City, 91 S.W.2d 98, 230 Mo App 337—Stroud v Booth Cold Storage Co., Mo App., 285 S.W. 165—39 C.J. p 977 note 10 [b]

(3) Defective electrical appliance—Corpus Juris cited in Gordon v Muehling Packing Co., 40 S.W.2d 693, 697, 323 Mo. 123—39 C.J. p 977 note 10 [d]

(4) Explosion of tear gas system—Koehler v Thensville State Bank, 14 N.W.2d 15, 245 Wis. 281

(5) Collapse of building—Moody v. Hardeman, 162 S.E. 653, 44 Ga. App. 676—39 C.J. p 977 note 10 [b]

(6) Electric shock—Mo—Foster v Kansas City, C. C. & S. J. Ry. Co., 26 S.W.2d 770, 325 Mo. 18

N.C.—O'Brien v Parks Cramer Co., 145 S.E. 684, 196 N.C. 359

Tex—Morton Salt Co v Wells, Civ. App., 35 S.W.2d 454, affirmed 70 S.W.2d 409, 123 Tex. 151

39 C.J. p 977 note 10 [d]

(7) Sagging or falling scaffold—Baughner v Gamble Const. Co., 26 S.W.2d 946, 324 Mo. 1233—39 C.J. p 977 note 10 [e]

(8) Explosion of gasoline tank on motorcar—Errie R. Co. v. Murphy, C.C.A. N.Y., 9 F.2d 525

(9) Explosion or bursting of boiler—Grimsley v Hankins, D.C. Ala., 48 F. 400—39 C.J. p 977 note 10 [f]

21. Mo—Corpus Juris quoted in Gordon v Muehling Packing Co., 40 S.W.2d 693, 697, 323 Mo. 123

N.C.—McGraw v Southern Ry. Co., 175 S.E. 288, 206 N.C. 873.

39 C.J. p 980 note 13

22. US—Errie R. Co v Murphy, C.C.A. N.Y., 9 F.2d 525

39 C.J. p 980 note 11

23. Tex—Missouri, K. & T. R. Co v Jones, 125 S.W. 309, 103 Tex. 187

24. US—Norfolk & W. Ry. Co v Hall, C.C.A. W. Va., 49 F.2d 692.

Ariz—Robles v Preciado, 79 P.2d 504, 52 Ariz. 113

Ark—Lewis v Chitwood Motor Co., 115 S.W.2d 1072, 196 Ark. 86—Eureka Oil Co v Mooney, 271 S.W. 321, 168 Ark. 479

Cal—Dryden v Western Pac. R. Co., 36 P.2d 394, 1 Cal App 2d 49

Fla—M. F. Comer Bridge & Foundation Co v Sheeran, 161 So. 60, 119 Fla. 543

Ga—Alford v Zeigler, 23 S.E.2d 474, 68 Ga. App. 627

Ky—Hobson v Turner, 185 S.W.2d 550, 299 Ky. 342—Magness' Adm'r v Hutchinson, 117 S.W.2d 1041, 274 Ky. 226

La—Buttitta v J. C. Penny Co., App., 164 So. 469

Mass—Shea v Frangioso, 183 N.E. 745, 281 Mass. 412—O'Brien v. Boston & M. R. R., 164 N.E. 446, 265 Mass. 527.

Mo—Charlton v. Lovelace, 173 S.W.2d 13, 351 Mo. 364—Corpus Juris quoted in Gordon v. Muehling Packing Co., 40 S.W.2d 693, 697, 323 Mo. 123—Stewart v St. Louis-San Francisco Ry. Co., 30 S.W.2d 1000, 326 Mo. 293

N.Y.—Menaged v Emigrant Industrial Sav. Bank, 21 N.Y.S.2d 238

N.C.—Armstrong v Acme Spinning Co., 172 S.E. 313, 205 N.C. 553

Ohio—Realty Bond & Mortgage Co v. High, 175 N.E. 747, 38 Ohio App. 289

Pa.—Persing v Citizens' Traction Co., 114 A. 97, 294 Pa. 230

Wash—Gardner v Seymour, 180 P.2d 564, 27 Wash.2d 802—Bremer v Shoultes, 110 P.2d 641, 7 Wash.2d 604—Grant v Libby, McNeill & Libby, 295 P. 139, 160 Wash. 138

39 C.J. p 980 note 14

Doctrine held inapplicable in cases of injuries resulting from.

(1) Falling of elevator

Miss—Von Scoter v Megginson, 110 So. 247, 144 Miss. 510

Tenn—Mebane v Baptist Memorial Hospital, 166 S.W.2d 622, 179 Tenn. 381

(2) Starting of machine or appliance—Leffler v. Anheuser-Busch Brewing Ass'n, 106 S.W. 105, 137 Mo. App. 488—39 C.J. p 977 note 10 [b].

Likewise, where the accident may have happened as a result of one of two or more causes, and it is not more reasonably probable that it was due to the negligence of the master than to any other cause, the doctrine is inapplicable²⁵

The prima facie case of negligence arising from application of the doctrine is rebuttable,²⁶ and although, in order to make the doctrine of *res ipsa loquitur* applicable in the first instance, plaintiff need only show facts raising a reasonable inference of negligence without excluding every other reasonable hypothesis of negligence,²⁷ nevertheless, where evidence is adduced to explain the happening of the occurrence on any other theory than that of the negligence claimed, the jury should disregard the inference arising from the fact of the injury²⁸ It is sometimes said that the inference of negligence is allowed from necessity when the causes of an injury cannot be clearly shown by the injured party and ought to be known to the employer,²⁹ and that the inference is not otherwise drawn,³⁰ and, although there is authority to the contrary,³¹ it has been held that the doctrine of *res ipsa loquitur* may be invoked only where there is a general allegation of negligence unaccompanied by specific allegations.³²

So it is held that the doctrine is inapplicable where the servant knows or has an opportunity of knowing the defect which caused the accident,³³ or where direct evidence explaining the accident is introduced³⁴ or is available to plaintiff³⁵ The doctrine does not dispense with the rule that the party who alleges negligence must prove it;³⁶ on the contrary, it only determines the method of proving it, or what shall be prima facie evidence of negligence in a certain class of cases.³⁷

In an action under the Federal Employers' Liability Act negligence of defendant is not to be inferred from the mere fact that plaintiff was injured, as discussed supra subdivision a (3) (b) of this section, and the doctrine of *res ipsa loquitur* has been held inapplicable,³⁸ or at least not usually applicable,³⁹ and under this rule a state statute creating a presumption of negligence of defendant on proof of an injury occurring in the operation or running of trains cannot be applied.⁴⁰ However, it has been pointed out that many of the cases frequently relied on to support the contention that the doctrine is inapplicable in such actions do not so hold, but hold only that the mere fact of an accident raises no presumption of negligence,⁴¹ and there is considerable authority for the view that the doctrine is ap-

(3) *Falling of rock—Hoffman v. Peerless White Lume Co.*, 296 SW 764, 317 Mo. 86—39 C.J. p 980 note 14 [c] (1).

25. *Md—McVey v. Gerrald*, 192 A 789, 172 Md 595

Minn—Mathews v Chicago & N W Ry. Co., 202 NW. 896, 162 Minn 313.

Mo—Grindstaff v J Goldberg & Sons Structural Steel Co., 40 SW 2d 702, 328 Mo 72.

Tex—Emmons v Texas & P Ry Co., Civ App, 149 SW 2d 167, error dismissed, judgment correct *Wyo—Stanolind Oil & Gas Co v. Bunce*, 62 P 2d 1297, 51 Wyo 1

26. *Miss—Alabama Great Southern R. Co v Hunnicutt*, 58 So. 617, 98 Miss. 272.

39 C.J. p 981 note 20.

27. *Mo—Gordon v. Muehling Packing Co.*, 40 SW 2d 693, 328 Mo 123

28. *Ark—Heard v Arkansas Power & Light Co.*, 147 SW 2d 362, 201 Ark 915.

39 C.J. p 981 note 21.

29. *US—Pitcairn v Perry, CCA Mo.*, 122 F 2d 881, certiorari denied 62 S Ct. 414, 314 US 697, 36 L Ed 557.

Mo—Whitaker v Pitcairn, 174 SW 2d 163, 351 Mo 848—*Corpus Juris* quoted in *Gordon v. Muehling Packing Co.*, 40 SW 2d 693, 697, 328 Mo. 123—*Miller v. Walsh Fire*

Clay Products Co., 282 SW 141, 219 Mo App 590

39 C.J. p 980 note 15

30. *Mo—Corpus Juris* quoted in *Gordon v Muehling Packing Co.*, 40 SW 2d 693, 697, 328 Mo 123.

Wyo—Stanolind Oil & Gas Co. v Bunce, 62 P 2d 1297, 51 Wyo 1.

39 C.J. p 981 note 16.

31. *Cal—Lippert v. Pacific Sugar Corp.*, 164 P 810, 33 Cal App. 198

39 C.J. p 960 note 75.

32. *US—Arnall Mills v Smallwood*, CCA Ga., 68 F 2d 57

Mo—Compton v Louis Rich Const Co., 287 SW. 474, 315 Mo 1068—*Sabot v St Louis Cooperage Co.*, 282 SW 425, 313 Mo 527

39 C.J. p 960 note 76, p 980 note 17

33. *Mo—Sabol v. St Louis Cooperage Co.*, supra.

34. *Vt—Blaisdell v Blake*, 11 A 2d 215, 111 Vt. 123

Attempt to show negligence

Employee, injured by inhaling gas in gas producer was entitled to invoke *res ipsa loquitur* rule, although he undertook to show some specific negligence, where he did not show exactly why gas escaped—*Miller v Walsh Fire Clay Products Co.*, 282 SW. 141, 219 Mo App 590

35. *Mo—Sabol v St Louis Cooperage Co.*, 282 SW 425, 313 Mo. 527

36. *US—Carpenter v Baltimore & O. R. Co.*, CCA Ohio, 109 F 2d 375.

Miss—Gulfport Creosoting Co. v. White, 157 So 86, 171 Miss 127

Mo—Corpus Juris quoted in *Gordon v Muehling Packing Co.*, 40 SW 2d 693, 697, 328 Mo. 123

Vt—Houston v. Brush, 29 A. 380, 66 Vt 331.

37. *Miss—Gulfport Creosoting Co v White*, 157 So 86, 171 Miss 127.

Mo—Corpus Juris quoted in *Gordon v Muehling Packing Co.*, 40 SW 2d 693, 697, 328 Mo 123—*Meade v. Missouri Water & Steam Supply Co.*, 300 SW. 515, 318 Mo. 350.

Vt—Houston v. Brush, 29 A. 380, 66 Vt 331.

38. *Ky—Louisville & N R Co v. Grant*, 2 SW 2d 1063, 223 Ky. 39

Wis—Schiefelbein v Chicago, M, St P. & P. R. Co., 265 NW. 386, 221 Wis 35, certiorari denied *Chicago, M, St. P. & P. R. Co v Schiefelbein*, 57 S Ct. 20, 299 US. 558, 81 L Ed 411.

39 C.J. p 981 note 26.

39. *Ky—Louisville & N. R. Co v Campbell*, 217 S.W. 687, 186 Ky 628

39 C.J. p 981 note 27

40. *Ark—St Louis, I. M & S R. Co. v. Steel*, 197 SW. 288, 129 Ark 520

39 C.J. p 981 note 29

41. *Mo—Noce v. St Louis-San Francisco Ry. Co.*, 85 SW.2d 637, 337 Mo 689—*Williams v. St. Louis*

plicable,⁴² at least where the injury results from a defective instrumentality,⁴³ where,⁴⁴ and only where,⁴⁵ the instrumentality causing the injury was under the exclusive management and control of de-

fendant, and where the accident was such as in the ordinary course of things does not happen without negligence on the part of the one in exclusive possession and control.⁴⁶ In accordance with the gen-

San Francisco Ry Co, 85 SW 2d 624, 337 Mo 667

42. US—Union Pac R Co v De Vaney, CCA Cal, 162 F 2d 24—Ekker v Pettibone, CCA Ind, 110 F 2d 451—Carpenter v Baltimore & O R Co, CCA Ohio, 109 F 2d 375—Lowery v Hocking Valley Ry. Co, CCA Ohio, 60 F 2d 78—Chesapeake & O Ry Co v Smith, CCA Ohio, 42 F 2d 111, certiorari denied 51 S Ct 32, 282 US 856, 75 L Ed 758—Ramsouer v Midland Valley R Co, DCArk, 44 F Supp 528, reversed on other grounds, CCA, 135 F 2d 101—Cochran v Pittsburgh & L E R. Co, DC Ohio, 31 F 2d 769

Cal—Hackley v Southern Pac Co, 45 P 2d 447, 6 Cal App 2d 611, certiorari denied Southern Pac Co v Hackley, 56 S Ct 153, 296 US 630, 80 L Ed 447

Ind—Southern Ry Co v Wilkins, 178 NE 454, 95 Ind App 130, certiorari denied 53 S Ct 85, 287 US 635, 77 L Ed 550—Pennsylvania R Co. v. Hough, 161 NE 705, 88 Ind App 601—Baltimore & O S. W R Co v Hill, 148 NE 489, 84 Ind App 354, certiorari denied 47 S Ct 246, 273 US 738, 71 L Ed 867.

Mo—Cantley v. Missouri-Kansas-Texas R Co, 183 SW 2d 123, 353 Mo 606—Whitaker v Pitcairn, 174 SW 2d 163, 351 Mo 848—Sibert v Litchfield & M Ry Co, 159 S. W 2d 612—Nocce v St. Louis-San Francisco Ry. Co, 85 SW 2d 637, 337 Mo 689—Williams v St. Louis-San Francisco Ry Co, 85 SW 2d 624, 337 Mo 667

NJ—Deputia v. Pennsylvania R Co, 166 A 87, 110 NJ Law 515, certiorari denied Pennsylvania R Co. v Deputia, 54 S Ct 62, 290 US 643, 78 L Ed 559.

NC—Lamb v Atlantic Coast Line R Co, 103 SE 440, 179 NC 619

Ohio—Howard v Pennsylvania R Co, 182 NE 663, 43 Ohio App 96

43. US—Southern Ry Co v Bennett, S C, 34 S Ct 566, 233 US 80, 58 L Ed 860—Pitcairn v. Perry, CCA Mo., 122 F 2d 881, certiorari denied 63 S Ct 414, 314 US 697, 86 L Ed 557—Terminal R. Ass'n of St Louis v Staengel, CCA Mo., 123 F 2d 271, 136 ALR 789, certiorari denied 62 S Ct 181, 314 US 680, 86 L Ed 544

Ky.—Louisville & N R Co v Stephens, 182 SW 2d 447, 298 Ky 338.

Mo—Benner v. Terminal R. R Ass'n of St. Louis, 156 SW 2d 657, 348 Mo 928, certiorari denied Terminal

R Ass'n of St Louis v. Benner, 62 S Ct 798, 315 US 813, 86 L Ed 1211

In action under Federal Safety Appliance Act, the principle of *res ipsa loquitur* has been held applicable, even though negligence is immaterial in such an action

US—Didinger v. Pennsylvania R Co, CCA Ohio, 39 F 2d 798
Minn—Ross v Duluth, Missabe & Iron Range Ry Co, 281 NW 76, 203 Minn 312

Mo—Colwell v. St. Louis-San Francisco Ry. Co, 73 SW 2d 222, 335 Mo 494.

44. US—Jesionowski v. Boston & M R. R., Mass, 67 S Ct 401, 329 US 452, 91 L Ed 416, 169 ALR 947—Lukon v Pennsylvania R Co, CCA Pa., 131 F 2d 546—Pitcairn v Perry, CCA Mo., 122 F 2d 881, certiorari denied 62 S Ct 414, 314 US 697, 86 L Ed 557—Terminal R Ass'n of St Louis v Staengel, CCA Mo., 122 F 2d 271, 136 ALR 789, certiorari denied 62 S Ct 181, 314 US 680, 86 L Ed 544—Lowery v. Hocking Valley Ry Co, CCA Ohio, 60 F 2d 78—Chesapeake & O Ry Co v Smith, CCA Ohio, 42 F 2d 111, certiorari denied 51 S Ct 32, 282 US 856, 75 L Ed 758—Cochran v Pittsburgh & L E R Co, DCA Ohio, 31 F 2d 769

Cal—Hackley v Southern Pac Co, 45 P 2d 447, 6 Cal App 2d 611, certiorari denied Southern Pac Co v Hackley, 56 S Ct 153, 296 US 630, 80 L Ed 447.

Mo—Maxie v Gulf, M & O R Co, 202 SW 2d 904—Whitaker v Pitcairn, 174 SW 2d 163, 351 Mo 848—Benner v Terminal R R Ass'n of St Louis, 156 SW 2d 657, 348 Mo 928, certiorari denied Terminal R Ass'n of St Louis v Benner, 62 S Ct 798, 315 US 813, 86 L Ed 1211.

Operation by employee

In action under Federal Safety Appliance Act and Federal Employers' Liability Act for death of engineer when locomotive was derailed because pony truck jumped the tracks, *res ipsa loquitur* doctrine was not inapplicable because engineer was in control of locomotive, since engineer had no more control of, and was no more responsible for, proper functioning of pony truck which caused accident, than was the fireman, brakeman, or conductor—Ekker v Pettibone, CCA Ind, 110 F 2d 451

45. US—O'Mara v. Pennsylvania R. Co, CCA Ohio, 95 F.2d 762

Cal—Dryden v Western Pac R Co, 36 P 2d 394, 1 Cal App 2d 49

Mass—Lynch v New York, N H & H. R. R., 200 NE 877, 294 Mass 152

Miss—Gulf M & N R Co v Madden, 200 So 119, 190 Miss 374

Or—Waller v Northern Pac Terminal Co of Or, 166 P 2d 483, 178 Or 274, certiorari denied 67 S Ct 45, 329 US 742, 91 L Ed 640, rehearing denied 67 S Ct 181, 329 US 825, 91 L Ed 701

Improper handling by employee

In action under act for death of section hand resulting from injuries sustained in fall from dry bridge to crossing below while opening car hopper loaded with cinders, *res ipsa loquitur* doctrine was not applicable, where it appeared that accident may have been due to improper handling by deceased of wrench used to start shaft spinning so as to unwind chain and open hopper—Bailey v Central Vermont Ry, 28 A 2d 639, 113 Vt 3, reversed on other grounds 63 S Ct 1062, 319 US 350, 87 L Ed 1444, conformed to 35 A 2d 365, 113 Vt 433

46. US—Jesionowski v Boston & M R. R., Mass, 67 S Ct 401, 329 US 452, 91 L Ed 416, 169 ALR 947—Lukon v Pennsylvania R Co, CCA Pa., 131 F 2d 546—Pitcairn v Perry, CCA Mo., 122 F 2d 881, certiorari denied 62 S Ct 414, 314 US 697, 86 L Ed 557—Terminal R Ass'n of St Louis v Staengel, CCA Mo., 122 F 2d 271, 136 ALR 789, certiorari denied 62 S Ct 181, 314 US 680, 86 L Ed 544—Ekker v Pettibone, CCA Ind, 110 F 2d 451—Carpenter v Baltimore & O R Co, CCA Ohio, 109 F 2d 375—Chesapeake & O Ry Co v Smith, CCA Ohio, 42 F 2d 111, certiorari denied 51 S Ct 32, 282 US 856, 75 L Ed 758—Cochran v Pittsburgh & L E R Co, DCA Ohio, 31 F 2d 769.

Ala.—Seaboard Air Line Ry Co v Hackney, 115 So 869, 217 Ala 382.

Cal—Hackley v Southern Pac Co, 45 P 2d 447, 6 Cal App 2d 611, certiorari denied Southern Pac Co v Hackley, 56 S Ct 153, 296 US 630, 80 L Ed 447

Mass—Shipp v Boston & M R. R., 186 NE 653, 283 Mass. 366.

Mo—Maxie v Gulf, M & O R Co, 202 SW 2d 904—Whitaker v Pitcairn, 174 SW 2d 163, 351 Mo 848—Sibert v Litchfield & M Ry. Co, 159 SW 2d 612—Nocce v St. Louis-San Francisco Ry. Co, 85 SW 2d 637, 337 Mo 689

Or—McPherson v Oregon Trunk Ry 102 P 2d 726, 165 Or. L.

eral rule, *res ipsa loquitur* cannot be invoked where plaintiff pleads⁴⁷ and proves⁴⁸ specific acts of negligence proximately causing the injury.

Whether or not the doctrine is applicable so as to raise a presumption of negligence, it is agreed that an inference of negligence may be drawn from the circumstances attending an accident,⁴⁹ as, for example, where an injury is caused by a defect in an instrumentality exclusively in the control of defendant⁵⁰ and where the accident is one that does not usually occur without negligence of the master⁵¹. On the other hand, such an inference is not drawn where the facts surrounding the accident do not create even a reasonable probability that it was the result of defendant's negligence,⁵² or where the facts were not so unusual and of such a nature that the injury could not well have been incurred without defendant's negligence,⁵³ or where the injury was not caused by something connected with the equipment or operation of the road over which defendant had entire control⁵⁴.

An inference or presumption of negligence merely requires defendant to produce evidence in explanation or rebuttal, and the inference or presumption is to be weighed against defendant's evidence, observing the rule that the burden of proof is upon plaintiff, and, if the probative force of the circumstances and facts in evidence do not preponderate in favor of the presumption and against defendant's proofs, plaintiff fails to make out his case⁵⁵.

(4) As to Equipment or Place of Work

Although the facts in a given case may raise a contrary presumption, there is ordinarily a rebuttable presumption that the master used due care with respect to the equipment and place of work provided for its servants.

The law presumes, in the absence of evidence to the contrary, that the master has performed his duty with reference to furnishing his servants with reasonably safe and suitable tools, machinery, appliances, and places for work,⁵⁶ and had no notice of

W. Va.—Crotty v Virginian Ry Co, 177 SE 609, 115 W Va 558 39 C J p 287 note 33 [a]

47. Mo.—Maxie v Gulf, M & O R Co, 202 S.W.2d 904—Benner v Terminal R R Ass'n of St Louis, 156 S.W.2d 657, 348 Mo 928, certiorari denied Terminal R R Ass'n of St Louis v Benner, 62 S.Ct 798, 315 US 813, 86 L.Ed 1211.

NC—Brady v Southern Ry Co, 23 SE2d 334, 222 NC 367, certiorari denied 63 S.Ct 995, 318 US 792, 87 L.Ed 1158, affirmed 64 S.Ct 332, 320 US 476, 88 L.Ed 339

Doctrine held not abandoned

In action under act for damages sustained by head brakeman in derailment of train, brakeman by offering evidence as to amount of rainfall and negligent failure of railroad to inspect track, and by stating in his brief that railroad's evidence showed gross negligence supporting brakeman's prima facie case under *res ipsa loquitur* doctrine, did not abandon reliance on *res ipsa loquitur* doctrine, so as to bind himself to submit case on theory of specific negligence, where true cause of accident was in doubt—Whitaker v Pitcairn, 174 S.W.2d 163, 351 Mo 848

Reliance on rule to prove specific acts

In action by switchman against railroad for personal injuries, plaintiff having made specific allegations of negligence must rely for his recovery on the specific acts or causes alleged and cannot recover for any other, but fact that plaintiff made specific allegations of negligence does not deprive him of the benefit of the doctrine of *res ipsa loquitur*

to establish such specific acts of negligence—Zumwalt v Gardner, CCA Mo, 160 F.2d 298

48. Cal.—Matthews v Southern Pac Co, 59 P.2d 220, 15 Cal.App.2d 36 Va.—Bly v Southern Ry Co, 31 S.E.2d 564, 183 Va 162, opinion adhered to 33 S.E.2d 659, 183 Va 406

Doctrine held not barred

In action under act for injuries sustained by train auditor in wreck, auditor's evidence that a large per cent of ties near scene of wreck were rotten and that rails near scene of wreck were joined with angle bars secured with only two bolts, whereas there were holes for four bolts, did not clearly show cause of wreck, so as to make *res ipsa loquitur* doctrine inapplicable—Williams v. St. Louis-San Francisco Ry Co, 85 S.W.2d 624, 337 Mo 687.

49. US—Zumwalt v Gardner, CCA Mo, 160 F.2d 298

Ill.—Anderson v Chesapeake & O Ry Co, 186 NE 185, 352 Ill 561 Ind.—New York, C & St L R Co v Connaughton, 5 NE.2d 904, 211 Ind 419

Ky.—Illinois Cent R Co v Halterman, 271 SW 1103, 208 Ky 811 39 C J p 981 note 30

50. Mont.—Callahan v Chicago, B & Q R Co, 133 P 687, 47 Mont 401, 47 L.R.A.N.S. 587

51. US—Zumwalt v Gardner, CCA Mo, 160 F.2d 298 39 C J p 982 note 32

52. La.—Davis v Hines, 97 So 794, 154 La 511 39 C J p 982 note 33

53. Ark.—St. Louis, I M & S R

Co v Steel, 197 SW 288, 129 Ark 520

54. Tex.—Davis v. Castile, Com. App, 257 SW 870 39 C J p 982 note 35.

55. US—Sweeney v Erving, App DC, 33 S.Ct 416, 228 US 233, 57 L.Ed 815, Ann.Cas.1914D 905 Fla.—Louisville, etc., R Co v Rhoda, 74 So 19, 73 Fla 12

Showing of due care

Where evidence showed that derailed cars struck caboose which overturned on brakeman, railroad was not obliged to explain cause of derailment, but only to go forward with proof that it exercised due care to furnish safe equipment—Schroble v Lehigh Valley R Co, CCA N.Y., 62 F.2d 993

56. Ark.—Tucker Duck & Rubber Co v Harvey, 154 SW 2d 838, 202 Ark 1033—Harmon v Morrison, 147 S.W.2d 35, 201 Ark 820—Safeway Stores v Phelps, 145 SW.2d 337, 201 Ark 495—Kemp v Hunter Transfer Co, 41 S.W.2d 981, 184 Ark 13—Long v. Ellis, 35 S.W.2d 66, 183 Ark 137—Wheeler v Ellis, 35 S.W.2d 64, 183 Ark 133 39 C J p 982 note 38

Presumption held not overcome

Inference, if any, arising from fact of injury to truck driver from defect in tire rim and explosion of tire did not overcome presumption that master performed duty in exercising ordinary care in furnishing of such appliance and in having repairs made thereon—Kemp v Hunter Transfer Co, 41 S.W.2d 981, 184 Ark 13

Common use of machine

Common use of Fresno scraper

any defects therein,⁵⁷ and even a statutory provision has been held not necessarily to destroy the presumption;⁵⁸ but, where the defect through which the injury occurred is in the original construction of the appliance or instrumentality, knowledge of the defect by the master will be presumed.⁵⁹ However, the facts in a given case may raise a presumption of the master's negligence with respect to equipment furnished,⁶⁰ and a railroad company is conclusively presumed to have knowledge of the unsafe condition of its tracks over which its trains run.⁶¹ The presumption in favor of the master is rebuttable,⁶² but it will not be presumed that a railroad company inspected a particular car for defects by which an employee was injured, on a showing that it was the custom to inspect all cars,⁶³ and it has been held that there is no presumption in the master's favor but simply an absence of presumption against him.⁶⁴ A statute providing that proof of an injury caused by a defect in certain tools or appliances raises a presumption of knowledge and constitutes prima facie evidence of negligence on the part of the master is not applicable where the injury was not caused by such a defect.⁶⁵

In action under Federal Employers' Liability Act the presumption prevails that the master was not aware of the existence of a defect in machinery, appliances, or equipment, even after proof of such defect.⁶⁶ Where plaintiff's injuries are alleged to have been caused by defendant's violation of the Ash Pan Act, it will be presumed that the ash pan placed on the locomotive complied with the requirements of the statute.⁶⁷ There is no presumption that the place where plaintiff was injured was unsafe as the result of a negligent failure of defendant,⁶⁸ neither does a presumption arise from the mere occurrence of the accident that the tools furnished by the employer were insufficient;⁶⁹ and, although it has been held that the circumstances may create an inference that the master violated a statutory duty with respect to machinery or appliances,⁷⁰ it has also been held that a violation of the Federal Boiler Inspection Act cannot be inferred from the mere fact that injury resulted from some condition of the locomotive, without evidence of an existing defect which could have caused the accident.⁷¹

raises presumption of reasonable safety.—*Newell Contracting Co v Flynt*, 161 So 298, 172 Miss 719, motion overruled 161 So. 743, 172 Miss 719

57. Ark.—*Kemp v Hunt Transfer Co*, 41 SW2d 981, 184 Ark 12—*Long v Ellis*, 35 SW2d 66, 183 Ark 137—*Wheeler v Ellis*, 35 SW2d 64, 183 Ark 133.

39 C.J. p 982 note 39

58. N.Y.—*Larson v Nassau Electric R Co*, 151 NYS 694, 165 App Div. 887

39 C.J. p 982 note 40

59. Kan.—*Brinkmeier v Missouri Pac R Co*, 77 P 586, 69 Kan 738

39 C.J. p 983 note 41

60. Me.—*Guthrie v Maine Cent R Co*, 18 A. 295, 81 Me 572

39 C.J. p 983 note 43

61. N.C.—*Leggett v Atlantic Coast Line R Co*, 67 SE 249, 153 N.C. 110

39 C.J. p 983 note 42

62. Mo.—*Cabanne v St Louis Car Co*, 161 SW 597, 178 Mo App 718

39 C.J. p 983 note 44.

63. Tex.—*Eddy v Prentice*, 27 SW. 1063, 8 Tex Civ.App. 58

64. Vt.—*Kiley v Rutland R Co*, 68 A 713, 80 Vt 536, 13 Ann Cas 269

39 C.J. p 983 note 46

65. U.S.—*Ristucci v Norfolk & W Ry. Co*, CCA Ohio, 60 F2d 28.

66. Ga.—*Southern Ry. Co v Bradshaw*, 37 SE2d 150, 73 Ga.App 438.

67. Tex.—*Smithers v Fort Worth & D C Ry Co*, Com App, 272 SW 764—*Ft Worth & D C R Co v Smithers*, Civ App, 228 SW 637

68. Miss.—*New Orleans & N E R Co v Penton*, 100 So 521, 135 Miss 571.

N.C.—*Fore v Geary*, 131 SE 387, 191 NC 90

69. Ga.—*Southern Ry Co v Bradshaw*, 37 SE2d 150, 73 Ga.App 438

Mo.—*Tashman v Republic Metal & Rubber Co*, App, 285 SW 109

N.Y.—*Lyman v Delaware & H Co*, 170 NYS 412, 183 App Div. 289.

70. U.S.—*Eker v Pettibone, CCA Ind*, 110 F2d 451.

Ala.—*Atlantic Coast Line R Co v Wetherington*, 16 So2d 720, 245 Ala. 313

Failure to function

(1) Mere fact that coupler failed to perform function authorizes inference that carrier violated absolute duty to properly equip cars.—*Saxton v Delaware & H Co*, 176 NE 425, 256 N.Y. 863.

(2) Failure of a hand brake to meet the requirements of the Federal Safety Appliance Act, thereby rendering absolute the carrier's liability under the Federal Employers' Liability Act for injuries proximately resulting therefrom, may be inferred from a failure of the brake to function when operated with due care in the normal, natural, and usual manner

U.S.—*Spotts v. Baltimore & O R Co*, CCA Ind, 102 F.2d 160, cer-

tiorari denied *Baltimore & O R Co v Spotts*, 59 SCt 1039, 307 U S. 641, 83 LEd 1522—*Didinger v Pennsylvania R Co*, CCA Ohio, 39 F2d 798

Cal.—*Newkirk v Los Angeles Junction Ry Co*, 131 P2d 535, 21 Cal 2d 308

Ill.—*Anderson v Chesapeake & O Ry Co*, 186 NE 185, 352 Ill 561, certiorari denied *Chesapeake & O Ry Co v Anderson*, 54 SCt 93, 290 US 675, 78 LEd. 583—*Herb v Pitcairn*, 29 NE2d 543, 306 Ill App 583, reversed on other grounds 36 NE2d 555, 377 Ill 405

Minn.—*McDonald v Great Northern Ry Co*, 207 NW 194, 166 Minn 87

Mo.—*Wild v Pitcairn*, 149 SW 2d 800, 347 Mo 915, certiorari denied *Pitcairn v Wild*, 62 SCt 721, 314 U.S. 638, 86 LEd 512

Res ipsa loquitur

(1) Principle of *res ipsa loquitur* is applicable in cases involving defective railroad equipment, although negligence is immaterial

U.S.—*Didinger v. Pennsylvania R. Co*, CCA Ohio, 39 F2d 798

Minn.—*Ross v Duluth, Missabe & Iron Range Ry Co*, 281 NW. 76, 203 Minn 312

Mo.—*Colwell v St. Louis-San Francisco Ry Co*, 73 SW2d 222, 335 Mo 494

(2) Applicability of doctrine in master and servant cases generally see supra subdivision a (3) (c) of this section

71. Mo.—*Fryer v. St. Louis-San*

(5) As to Methods of Work, Rules, and Orders

In the absence of evidence to the contrary, it may be presumed that the methods of work and rules prescribed by a master were proper and sufficient and were enforced, that the injured employee had knowledge of an existing rule, and that he did not disobey orders.

In the absence of evidence to the contrary,⁷² it will be presumed that the methods of work adopted by a master, and the rules and regulations promulgated by him for the government of his employees, were proper and sufficient⁷³ and were enforced,⁷⁴ and, where the existence of a rule or custom is shown, it will be further presumed that it was known to an employee at the time of his injury,⁷⁵ and the master will be presumed to have knowledge of a custom existing for a long time regarding his work,⁷⁶ There is a presumption also that a servant did not disobey orders,⁷⁷ and that he complied with defendant's rules.⁷⁸

Where a switch was thrown, causing a collision of trains, it will be presumed that the switch was thrown in pursuance of orders from some one in authority who was superior to the engineer and whose orders those in charge of the train were bound to obey.⁷⁹ A servant's failure to obey positive orders as to the manner of doing his work is prima facie evidence of his negligence.⁸⁰ Where an employee is ordered to do certain work, it may be

presumed that the employer has superior knowledge of the perils attending the performance thereof,⁸¹ and in case of doubt such presumption must prevail in behalf of the employee.⁸²

In an action under the Federal Employers' Liability Act, the presumption obtains that defendant's rules were known by its servants.⁸³ Where a custom to give warning to employees under certain circumstances is proved, the injured servant is presumed to have known of it⁸⁴ and to have relied on it.⁸⁵ Where injury to an employee occurs by reason of another employee's violation of a rule adopted to protect employees, there is a strong, and in some cases decisive, presumption of negligence.⁸⁶ Of course, an assumption that a particular rule was in force will not be indulged in where there is substantial evidence to the contrary.⁸⁷

(6) As to Competency, Selection, and Retention of Servants

Coemployees of the injured employee are ordinarily presumed competent; and the master is presumed to have exercised due care in the selection and retention of his servants, although he will also be presumed to have known what was generally known regarding the incompetency of one of them.

In the absence of evidence to the contrary, employees of defendant other than the one injured are presumed competent.⁸⁸ While a master is presumed

Francisco Ry Co, 63 SW 2d 47, 333 Mo 740

72. NH—Dervin v Amoskeag Co, 122 A 353, 81 NH 108
39 C.J. p 983 note 52.

73. Ark—Arkansas Mining Co v Eaton, 288 SW 399, 172 Ark 323
NH—Hook v Consolidation Coal Co, 129 A 490, 82 NH 75
39 C.J. p 983 note 53

74. Ark—Arkansas Mining Co v Eaton, 288 SW 399, 172 Ark 323
NY—Murrman v New York, N H & H R Co, 258 NYS 545, 236 App Div 734, affirmed 184 NE 105, 260 NY 589, certiorari denied New York, N H & H R Co v Murrman, 53 S Ct 320, 288 US 601, 77 L Ed 977.

75. NJ—Healy v Erie R Co, 102 A 629, 91 NJ Law 325
39 C.J. p 983 note 54

Presumption as to reading notice
Neb—Ahrens v American Smelting & Refining Co, 272 NW. 235, 132 Neb 460

76. Ill—Sturm v Consolidated Coal Co, 93 NE 345, 248 Ill 20, 21 Ann Cas. 99
39 C.J. p 983 note 55

77. Conn—Messinger v. New York, N H & H R Co, 83 A 631, 85 Conn. 467.

Mich—Snow v Escanaba Power Co, 127 NW 677, 162 Mich 579

78. Mo—Harris v St Louis & S F R Co, App, 200 SW 111

The nonobservance of a proper rule will not be assumed in the absence of proof for the purpose of charging the master with negligence—Hodges v Kimball, Va, 104 F 745, 44 CCA 193

79. Ohio—Cincinnati, H & D R v Woulfe, 34 Ohio Cir Ct 123, 15 Ohio Cir Ct, NS, 147

80. Me—Erickson v Monson Cons Slate Co, 60 A 708, 100 Me 107

81. Tenn—Nashville Bridge Co v Hudgins, 137 SW 2d 327, 28 Tenn App 677

82. Tenn—Nashville Bridge Co v. Hudgins, supra

83. NC—Saunders v Southern R Co, 83 SE 573, 167 NC 375.
39 C.J. p 984 note 61

84. US—Director Gen of Railroads v Templin, CCA Pa, 268 F 483, certiorari denied 41 S Ct 218, 254 US 656, 65 L Ed 460

Mo—Armstrong v Mobile & O R Co, 55 SW 2d 460, 331 Mo 1224, certiorari denied Mobile & O R Co v. Armstrong, 53 S Ct 689, 289

US 743, 77 L Ed 1490—O'Donnell v Baltimore & O R Co, 26 SW 2d 929, 324 Mo. 1097—Koonse v Missouri Pac R Co, 18 SW 2d 467, 322 Mo 813, certiorari denied Missouri Pac R Co v Koonse, 50 S Ct 34, 280 US 582, 74 L Ed 632

85. Mo—Armstrong v. Mobile & O R Co, 55 SW 2d 460, 331 Mo 1224, certiorari denied Mobile & O R Co v Armstrong, 53 S Ct 689, 289 US 743, 77 L Ed 1490—Koonse v Missouri Pac R Co, 18 SW 2d 467, 322 Mo 813, certiorari denied Missouri Pac R Co v Koonse, 50 S Ct 34, 280 US 582, 74 L Ed 632

86. Minn—Jacobson v Chicago & N W Ry Co, 22 NW 2d 455, 231 Minn 454

Need for showing unusual danger

Railroad policeman suing for injuries showing departure from custom respecting lights on cars need not show any other unusual danger—Delaware, L & W R Co v Berry, CCA NJ, 48 F 2d 1052, certiorari denied 52 S Ct 7, 284 US 617, 76 L Ed 527

87. Mo—Reed v Terminal R Ass'n of St Louis, 62 SW 2d 747.

88. US—Aqua System v Kodakowski, CCA Canal Zone, 88 F 2d 395

to have known in regard to the incompetency of a fellow servant what was generally known to those among whom such servant worked and lived, and what he might have known by the exercise of due care and diligence,⁸⁹ he will be presumed, in the absence of affirmative proof to the contrary, to have exercised proper care in the selection and retention of his servants⁹⁰ The presumption may be rebutted,⁹¹ as by evidence of the servant's general reputation for unfitness without proof that such reputation was known to the master's representatives.⁹²

(7) As to Assumption of Risk

It is generally held that a servant is ordinarily presumed to have known and assumed the ordinary risks and obvious dangers of his employment, but the rule does not apply to a servant whose youth or lack of experience or mental capacity is such as to repel the presumption.

As a general rule a servant will be presumed to know the risks ordinarily incident to his employment,⁹³ as well as defects and dangers so obvious

as to charge him with knowledge thereof,⁹⁴ and he will be presumed to have assumed the ordinary risks of his employment,⁹⁵ at least where it may be inferred from the allegations in plaintiff's complaint that he was of full age and possessed of all his faculties,⁹⁶ and also to have assumed the risks arising from defects and dangers of which he has, or ought to have, knowledge⁹⁷ In some jurisdictions, however, knowledge of defects and dangers being a matter of defense, no presumption of knowledge arises, in the absence of evidence that the servant did have knowledge,⁹⁸ nor is he presumed to have assumed the risk of special dangers, arising from a peculiar condition of affairs,⁹⁹ or the risk of the master's own negligence¹ occurring after the servant enters the employment.²

If a servant is a minor,³ or is by reason of lack of experience or mental capacity unable to comprehend the dangers incident to the employment,⁴ or is known to the master to be immature and inexperienced so as to be unfit to perform the duty assigned to him,⁵ he will not ordinarily be presumed to

89. Del.—Warren v. Harlan Holdingsworth Corp, 84 A 215, 26 Del 182—Giordano v Brandywine Granite Co, 52 A 332, 19 Del 423

90. NC—Pleasants v. Barnes, 19 SE 2d 627, 221 NC 173
39 C J p 984 note 65

91. Cal.—Camosi v Colusa Sandstone Co, 147 P 107, 26 Cal.App 74.

39 C J p 984 note 66

92. Mich.—Davis v. Detroit & M R Co, 20 Mich 105, 4 Am R 364

93. U.S.—Burnett v Amalgamated Phosphate Co, CCA Fla, 96 F 2d 974, certiorari denied 59 S Ct 153, 305 US 647, 83 L Ed 418—Kane v Federal Match Corporation, DCPa, 5 F Supp 507

Ga.—Brady v Bugg, 142 SE 304, 38 Ga App 48.

Ind.—Baltimore & O S W. R Co v Carroll, 163 NE 99, 200 Ind 589, set aside 171 NE 923, 203 Ind 37, reversed on other grounds 50 S Ct 182, 280 US 491, 74 L Ed 566

Or.—Schnell v Howitt, 76 P 2d 1180, 153 Or 586

39 C J p 984 note 71

Conclusively presumed

Ark.—Chicago, R I & P. Ry Co v. Allison, 287 SW 197, 171 Ark 983

NC—Hubbard v Southern Ry Co, 166 SE 802, 203 NC 675

Pa.—Guerrero v. Reading Co, 29 A 2d 510, 348 Pa. 187

Tenn.—Peters v. Tennessee Cent Ry, 167 SW 2d 973, 179 Tenn 509

Natural laws
Servant of ordinary intelligence is conclusively presumed to know or take notice of ordinary, well-under-

stood laws of nature, and govern himself accordingly—Louisville & N R Co v Gross, 272 SW 57, 209 Ky 1—39 C J p 984 note 71 [c].

Knowledge equal to master's

As matter of law, employee's knowledge of simple tools is presumed equal to master's

US—Middleton v National Box Co, DCMiss, 38 F 2d 89.

Ind.—Baltimore & O S W R Co v Carroll, 163 NE 99, 200 Ind 589, set aside 171 NE 923, 203 Ind 37, reversed on other grounds 50 S Ct 182, 280 US 491, 74 L Ed 566

94. Md.—Le Vonas v Acme Paper Bd Co, 40 A 2d 43, 184 Md 16
39 C J p 737 note 60, p 985 note 74.

95. Ga.—Hulsey v Southeastern Greyhound Lines, 20 SE 2d 449, 69 Ga App 401

NC—Hubbard v Southern Ry Co, 166 SE 802, 203 NC 675

Or.—Hamilton v Redeman, 97 P 2d 194, 163 Or 324—Schnell v. Howitt, 76 P 2d 1180, 153 Or 586—Freeman v Wentworth & Irwin, 7 P 2d 796, 139 Or 1

39 C J p 985 note 72

96. U.S.—Victor American Fuel Co v Edson, NM, 237 F 999, 150 C A 649

Ga.—Curry v. Atlantic Coast Line R Co, 16 SE 2d 609, 65 Ga App 845

97. US—Consolidated Textile Corporation v Shipp, CCANC, 41 F 3d 479

39 C J p 985 note 74.

98. Ind.—Louisville, E & St L

Cons R Co v Miller, 40 NE 116, 140 Ind 635

39 C J p 985 note 76.

99. Or.—Hamilton v Redeman, 97 P 2d 194, 163 Or 324.

39 C J p 985 note 77.

Scientific knowledge

(1) An employee is not presumed to have knowledge of hidden dangers which require a scientific knowledge to appreciate fully; nor does he assume the risk thereof, and unless he is warned or undertakes work with knowledge of the hidden dangers, he is not as a matter of law chargeable with the risk—Middlebrooks v Atlanta Metallic Casket Co, 11 SE 2d 682, 63 Ga App 620

(2) An employee is not presumed to have scientific knowledge of the causes of occupational diseases—Steiner v Spencer, 145 SW 2d 547, 24 Tenn App 889

1. Or.—Freeman v. Wentworth & Irwin, 7 P 2d 796, 139 Or 1
39 C J p 985 note 78.

2. Ark.—Choctaw, O & G. R Co v Jones, 92 SW 244, 77 Ark 367, 4 LRA, NS, 337, 7 Ann Cas 430
39 C J p 985 note 79.

3. Tex.—Tucker v. National Loan, etc. Co, 80 S.W. 879, 35 Tex Civ App 474
39 C J p 984 note 69.

4. Ark.—Everton Silica Sand Co v Hicks, 125 SW 2d 793, 197 Ark 980.

5. Ark.—Perkins Oil Co of Delaware v Fitzgerald, 121 S.W.2d 877, 197 Ark 14.

have assumed the ordinary risks of his employment, although under some circumstances even a minor may be presumed to have assumed such risks.⁶ Where a servant continues to work because of a promise by the employer to repair a defect, there is no presumption that he assumes the risk incidental to the defect,⁷ unless the time for the performance of the promise has gone by, and he knows that the repairs have not been made.⁸

In an action under the Federal Employers' Liability Act, it has been held that a servant will not be presumed to have assumed a risk which was not conspicuous,⁹ but he is conclusively¹⁰ presumed¹¹ to have known and assumed such risks as are ordinarily incidental to his employment, provided they are not due to the master's negligence or violation of law.¹²

(8) As to Contributory Negligence

In some jurisdictions, and in actions under the Federal Employers' Liability Act, the injured servant will be presumed to have been free from fault; and as a general rule plaintiff will be given the benefit of the presumption arising from the instinct of self-preservation.

In some jurisdictions the injured servant will be

presumed to have been free from fault,¹³ where there is an absence of direct testimony on the subject,¹⁴ and, as discussed *infra* subdivision b (11) of this section, the burden of proof to the contrary rests on defendant. In these jurisdictions, as well as in jurisdictions where no such presumption prevails, the rebuttable presumption arising from the instinct of self-preservation is indulged in,¹⁵ although it has also been held that no such presumption may be relied on to establish plaintiff's freedom from contributory negligence.¹⁶ In the case of minors, whether or not contributory negligence can be presumed may depend on their age and capacity and the obviousness of the danger.¹⁷ In any case a presumption of care on the part of plaintiff does not justify a presumption of negligence of defendant,¹⁸ and cannot prevail¹⁹ or even be indulged in²⁰ against evidence showing that the accident resulted from contributory negligence.

In an action under the Federal Employers' Liability Act, there is no presumption that the employee was negligent or knowingly incurred the risk which caused the injury.²¹ On the contrary, there is a presumption that plaintiff was exercising ordinary

6. Ala.—King v Woodstock Iron Co, 42 So 27, 143 Ala 632 39 C.J. p 984 note 70

7. Ill.—Chicago & G W R Co. v Travis, 44 Ill App 466

8. Mass.—Counsell v Hall, 14 NE 530, 145 Mass 468

9. US.—Tennant v Peoria & P U Ry Co, Ill, 64 S Ct 409, 321 US 29, 88 L Ed 520, rehearing denied 64 S Ct 610, 321 US 802, 88 L Ed 1089

Cal.—Gray v Southern Pac Co, 145 P 2d 561, 23 Cal 2d 632—Crabtree v Western Pac R Co, 90 P 2d 835, 33 Cal App 2d 35

Tex.—Southern Pac Co v Clayton, Civ App, 81 SW 2d 788, error refused Certiorari denied 58 S Ct 155, 296 US 631, 80 L Ed 448 39 C.J. p 985 note 83

10. Ill.—Huff v Illinois Cent. R Co, 199 NE 116, 362 Ill 95

La.—Snow v Texas & P Ry. Co, App, 166 So 200

Pa.—Casseday v Baltimore & O. R Co, 22 A 2d 668, 343 Pa 342

11. Mo.—Williams v Pryor, App, 46 SW 2d 241, affirmed 200 SW 53, 272 Mo 613, reversed on other grounds Pryor v. Williams, 41 S Ct 86, 254 US 43, 65 L Ed 130

Utah.—Morgan v Ogden Union Ry & Depot Co, 294 P 641, 77 Utah 325

12. Ill.—Huff v. Illinois Cent R Co, 199 NE 116, 362 Ill 95

13. Ala.—Alabama Great Southern

R Co v Davis, 18 So 2d 737, 246 Ala 64, certiorari denied 65 S Ct 676, 324 US 848, 89 L Ed 1407.

Cal.—Pitt v Southern Pac Co, 9 P 2d 273, 121 Cal App 228

NC.—McGraw v Southern Ry Co, 175 SE 286, 206 NC 873

RI.—Kemplin v H W. Golden & Son, 157 A 872, 52 RI 89

Tex.—Saxon v Atchison, T & S F Ry Co, Com App, 38 SW 3d 775, reversed on other grounds 53 S Ct 229, 284 US 458, 76 L Ed 397, conformed to Saxon v Atchison, T & S F Ry Co, Com App, 50 SW 2d 1095

Wash.—Gardner v Seymour, 180 P 2d 564—Miller v. National Furniture Co, 269 P. 1038, 148 Wash 694

39 C.J. p 985 note 85

In Georgia

(1) If plaintiff suing a railroad company shows that defendant was to blame, the law then presumes until the contrary appears that he was not to blame.—Central R & Banking Co v Kenney, 58 Ga 485

(2) So, too, proof that a coemployee was negligent may raise a presumption of law against the employer that the injured employee, who was engaged in same action as such coemployee was without fault.—Southern Ry Co v Perdue, 154 SE 793, 171 Ga 184

14. U.S.—Worthington v Elmer, Ohio, 207 F 806, 125 CCA 60.

15. Ill.—George B Swift Co v Gaylord, 32 NE 299, 239 Ill 330 39 C.J. p 986 note 91

16. N.Y.—Riordan v Ocean S S Co, 26 NE 1027, 124 NY 655 39 C.J. p 986 note 92

17. Pa.—Rice v Kring, 165 A 833, 310 Pa 550 39 C.J. p 986 note 93

18. US.—Southern R Co v Stewart, CCA Mo, 115 F 2d 317, modified on other grounds 119 F 2d 85, certiorari granted Stewart v Southern Ry Co, 62 S Ct 71, 314 US 591, 86 L Ed 477.

Wash.—Gardner v Seymour, 180 P. 2d 564 39 C.J. p 987 note 94.

19. Wash.—Miller v National Furniture Co, 269 P. 1038, 148 Wash 694

20. Neb.—Britton v Samuelson, 23 NW 2d 267, 147 Neb 318.

21. US.—Tennant v. Peoria & P U Ry Co, Ill, 64 S Ct 409, 321 US 29, 88 L Ed 520, rehearing denied 64 S Ct 610, 321 US 802, 88 L Ed 1089

Cal.—Gray v Southern Pac Co, 145 P 2d 561, 23 Cal 2d 632—Mappin v. Atchison, T & S F Ry. Co, 247 P. 911, 198 Cal 733, 49 ALR 1330, certiorari denied Atchison, T & S F R Co v. Mappin, 47 S Ct. 339, 273 US 729, 71 L Ed 862—Hackley v Southern Pac Co, 45 P 2d 417, 6 Cal App 2d 611, certiorari denied Southern Pac. Co v

care at the time of the accident,²² but it has been held that this presumption is offset by a like presumption, as discussed *supra* subdivision a (2) of this section, that defendant was in the exercise of due care.²³

b. Burden of Proof

- (1) In general
- (2) Relationship of master and servant
- (3) Negligence or fault of master generally
- (4) Cause of injury
- (5) Condition of equipment or place of work
- (6) Methods of work, rules, and orders
- (7) Incompetency or negligence of fellow servants
- (8) Plaintiff's knowledge or understanding of danger
- (9) Warning of danger
- (10) Assumption of risk
- (11) Contributory negligence

(1) In General

In an action against a master to recover for a servant's injuries the burden is on the plaintiff to establish his cause of action by a preponderance of the evidence; and the same rule applies in an action under the Federal Employers' Liability Act.

As in other actions, so in an action by a servant to recover from the master for personal injuries, the burden is on plaintiff to establish his cause of action²⁴ and on defendant to establish an affirmative defense.²⁵ Thus, plaintiff must prove the injury for which recovery is sought,²⁶ and must show that the accident was caused solely in the manner claimed.²⁷ Where the Federal Employers' Liability Act is set up in defense of a common-law action, it has been held that the burden is on plaintiff to establish a right of action at common law which has not been superseded by the federal statute,²⁸ that is to say, he must show that the federal statute is inapplicable.²⁹ On the other hand, however, there is authority holding that defendant must establish the applicability of the federal statute,³⁰ as for example, by showing that the injured employee was engaged in interstate commerce, where the cause of

Hackley, 56 S Ct. 153, 296 US 680, 80 L Ed. 447.

22. US—Atchison, T & S F. Ry Co v. Toops, Kan., 50 S Ct 281, 281 US 351, 74 L Ed 896—Chicago & N. W. R. Co v. Grauel, CCA Minn., 180 F 2d 820—Bowser v. Baltimore & O R Co, CCA Pa., 152 F 2d 436—Sheehan v. New York, N H & H R Co, CCA N Y, 93 F 2d 442, certiorari denied 68 S Ct 942, 304 US 580, 82 L Ed 1527—Erie R Co v. Lindquist, CCA Pa., 27 F 2d 98—Pitt v. Pennsylvania R Co, DCPa., 66 F Supp 443.

Ala—Alabama Great Southern R Co v. Davis, 18 So 2d 737, 246 Ala 64, certiorari denied 65 S Ct 878, 324 US 846, 89 L Ed 1407—Atlantic Coast Line R Co v. Wetherington, 16 So 2d 720, 245 Ala 313.

Ark—St. Louis-San Francisco Ry. Co v. Bishop, 33 SW 2d 383, 182 Ark 763, certiorari denied 51 S Ct 647, 283 US 854, 75 L Ed 1161.

Cal—Woodward v. Southern Pac Co, 94 P 2d 1028, 35 Cal App 2d 130, certiorari denied Southern Pac Co v. Woodward, 60 S Ct 614, 309 US 670, 84 L Ed. 1016.

Tex—Saxon v. Atchison, T & S F Ry Co, Com App, 38 SW 2d 775, reversed on other grounds 53 S Ct 229, 284 US 458, 76 L Ed. 397, conformed to Saxon v. Atchison, T & S F Ry Co, Com App, 50 SW 2d 1095—Hudgins v. Kansas City, M & O R Co, Civ App, 2 SW 3d 958, error refused.

39 C J. p 987 note 96.

23. Or—Ebell v. Oregon-Washington R & Nav Co, 221 P 1082, 110 Or. 686.

24. Cal—Lockhart v. Southern Pac Co, 267 P 591, 91 Cal App 770. Ky—Vincennes Bridge Co v. Quinn's Guardian, 22 SW 2d 300, 281 Ky 773.

Mass—Tanona v. New York, N H & H R R, 18 NE 2d 163, 301 Mass 589.

Mich—Fuzerski v. Buhl Stamping Co, 218 NW 655, 242 Mich 336.

Miss—Goss v. Kurn, 193 So 783, 187 Miss. 679.

Mo—Hunt v. Armour & Co, 136 S W 2d 312, 345 Mo 677—Stein v. Battenfeld Oil & Grease Co, 39 S W 2d 315, 327 Mo 804.

Or—Barker v. Portland Traction Co, 173 P 2d 288—Fitzgerald v. Oregon-Washington R & Nav. Co, 16 P 2d 27, 141 Or 1.

Pa—Killfeather v. Pollock, Com Pl., 58 Montg Co 419. 39 C J. p 987 note 2.

25. US—Schlemmer v. Buffalo, R & P R Co, Pa, 27 S Ct 407, 305 US 1, 51 L Ed 681.

La—Lewis v. A. Moresi Co, App., 198 So 70.

39 C J. p 987 note 3.

Accident caused by third party

In suit against railway for death of switchman killed when automobile collided with engine, railway need not have shown that administratrix had tenable cause of action against motorist to establish defense that motorist's act was sole cause

of switchman's death—Fort Worth & D C. Ry Co v. Rowe, Tex Civ App, 69 SW 2d 169.

Act of God

Where defendants relied for a defense on the act of God, it was incumbent on them to show that there was no joinder to that of their own negligent act—Sloan v. J G White Engineering Co, 89 S E. 564, 105 S C 236.

26. US—Galeota v. U S Gypsum Co, CCA N Y, 123 F 2d 947, certiorari denied U S Gypsum Co v. Galeota, 62 S Ct 798, 315 US 813, 86 L Ed 1211.

Okla—Williamson v. City of Fairview, 11 P 2d 453, 157 Okl 239.

27. NY—Lucas v. International Paper Co, 115 N Y S 814, 131 App Div 368.

39 C J. p 987 note 4.

28. Mass—Picanzo v. Trustees of New York, N H & H R Co, 70 NE 2d 310, 320 Mass. 760—Tanona v. New York, N H & H R R, 18 NE 2d 163, 301 Mass 589.

29. La—Bordelon v. New Orleans Terminal Co, 129 So 452, 14 La. App 60.

Mass—Tanona v. New York, N H & H R R, 18 NE 2d 163, 301 Mass 589.

30. Tex—Missouri, K. & T R Co v. Blalock, 147 S.W. 559, 105 Tex 296.

39 C J. p 988 note 3.

action is predicated on the theory that he was engaged in intra-state commerce.³¹

In case of a conflict of laws, the law of the state where the contract of employment is made governs as to the burden of proof in an action for personal injuries against a master by a servant.³²

In an action under the Federal Employers' Liability Act and related statutes, the burden is on plaintiff to make out a prima facie case.³³ Thus, plaintiff has the burden of proving that he is en-

titled to the benefit of the provisions of the statute,³⁴ he must prove the relationship of master and servant, as discussed infra subdivision b (2) of this section, and that defendant owned and operated a common carrier railroad and was engaged in interstate or foreign commerce,³⁵ and that both plaintiff and the instrumentality causing the injury were at the time of the injury engaged in interstate commerce³⁶ or in work so closely related thereto as to be part thereof.³⁷ However, where the facts show that the case may have been within the statute, the

31. *Mo—Trout v Chicago, R I & P Ry Co*, App, 39 SW2d 424, certiorari denied *Chicago, R I & P Ry Co v Trout*, 51 S Ct 649, 233 US 858, 75 L Ed 1463

Tex—Texas & N O Ry Co v Tiley, Com App, 6 SW2d 86, certiorari denied 49 S Ct 36, 278 US 642, 73 L Ed 556
39 CJ p 988 note 8.

32. *Ill—Wojciech Stolarek v Interstate Iron & Steel Co*, 207 Ill App 7

33. *Mo—Clevinger v St Louis-San Francisco Ry Co*, 109 SW2d 369, 341 Mo 797, certiorari denied 58 S Ct 366, 302 US 760, 32 L Ed 588

Boiler Inspection Act

US—Chesapeake & O Ry Co v Wells, CCA Ohio, 49 F2d 251, certiorari denied *Wells v Chesapeake & O Ry Co*, 52 S Ct 23, 284 US 641, 76 L Ed 545

34. *US—Southern Pac Co v Middleton*, CCA Tex, 54 F2d 833

Mo—Gieseking v Litchfield & M Ry Co, 94 SW2d 375, 339 Mo 1—*Montgomery v Terminal R Ass'n of St Louis*, 73 SW2d 236, 335 Mo 348, certiorari denied 55 S Ct 118, 293 US 602, 79 L Ed 694

NY—Carey v New York Cent R Co, 165 NE 805, 250 NY 345
Okl—Oklahoma Ry Co v Dalton, 50 P2d 302, 174 Okl 170

Pa—Colangelo v Pittsburgh & L E R Co, 9 A2d 391, 336 Pa 490
39 CJ p 988 note 11.

35. *Cal—Newkirk v Los Angeles Junction Ry Co*, 131 P2d 535, 21 Cal2d 308—*Johnson v Southern Pac Co*, 248 P. 501, 199 Cal 136, 49 ALR 1323—*McCoy v Southern Pac Co*, 83 P2d 970, 29 Cal App2d 16, certiorari denied 59 S Ct 827, 307 US 626, 33 L Ed 1510
39 CJ p 988 note 13.

36. *U S—Onley v Lehigh Valley R Co*, CCANY, 36 F2d 705, certiorari denied 50 S Ct 349, 281 US 742, 74 L Ed 1156.

Cal—Reif v Schumacker, App, 103 P2d 375

Ill—Avance v Thompson, 55 NE2d 57, 387 Ill 77, certiorari denied 65 S Ct 82, 323 US 753, 39 L Ed 603

—*Day v Chicago & N W Ry Co*, 188 NE 540, 354 Ill 469—*Mitchell v Louisville & N R Co*, 27 NE3d 861, 305 Ill App 635, reversed on other grounds 31 NE2d 965, 375 Ill 545, mandate conformed to 35 NE2d 81, 310 Ill App 563, reversed 42 NE2d 86, 379 Ill 622—*Benson v Chicago, R I & P Ry Co*, 267 Ill App 11, affirmed *Chicago, R I & P Ry Co v Benson*, 185 NE 244, 352 Ill 195, certiorari denied 54 S Ct 53, 290 US 636, 78 L Ed 553—*Foreman Trust & Savings Bank v Grand Trunk Western Ry Co*, 213 Ill App 428, certiorari denied 49 S Ct 252, 279 US 839, 73 L Ed 985

Mo—Gieseking v Litchfield & M Ry Co, 94 SW2d 375, 339 Mo 1—*Russell v St Louis-San Francisco Ry Co*, 81 SW2d 621, 336 Mo 845—*Cox v Missouri-Kansas-Texas R Co*, 76 SW2d 411, 335 Mo 1226—*Shidloski v New York, C & St L R Co*, 64 SW2d 259, 333 Mo 1134—*Jarvis v Chicago, B & Q R Co*, 37 SW2d 602, 325 Mo 428, certiorari denied 52 S Ct 19, 284 US 635, 76 L Ed 540—*Kepner v Cleveland, C, C & St L Ry Co*, 15 SW2d 825, 322 Mo 299, certiorari denied *Cleveland, C, C & St L Ry Co v Kepner*, 50 S Ct 24, 280 US 564, 74 L Ed 618—*Creighton v Missouri Pac R Co*, 66 SW2d 980, 329 Mo App 325, certiorari denied *Missouri Pac R Co v Creighton*, 55 S Ct 70, 293 US 558, 79 L Ed 659

Neb—McDermott v Chicago & N W Ry Co, 248 NW 59, 134 Neb 727—*Lindley v Wabash Ry Co*, 231 NW 812, 120 Neb 195, modified on other grounds 233 NW 450, 120 Neb 195, certiorari denied *Wabash R Co v Lindley*, 51 S Ct 655, 283 US 863, 75 L Ed 1468

NJ—Berger v New York Cent R Co, 155 A 444, 108 NJ Law 61

NY—Clark v Delaware & H R Corporation, 283 NYS 739, 245 App Div 447.

Pa—Konsoute v Pennsylvania R Co, 135 A 209, 287 Pa 302, certiorari denied 47 S Ct 448, 273 US 687, 71 L Ed 841

Wash—Kidder v Marysville & A

Ry Co, 295 P 162, 160 Wash 471, affirmed 300 P 170, 160 Wash 471
39 CJ p 988 note 14

Movement over particular track

Plaintiff in action against railroad for freight conductor's death while engaged in switching operations in yard at consignee's plant, in which interstate commerce occasionally moved, was not required to prove movement of such commerce over specific track on which accident occurred—*Geraghty v Lehigh Valley R Co*, CCANY, 70 F2d 800.

Interstate shipment

(1) The burden of proving intention to move shipment in interstate commerce at time of injury to railroad employee assisting in such shipment is on him in his suit to recover damages under the act—*Young v Chicago & I M Ry Co*, 20 NE2d 320, 299 Ill App 693.

(2) Railroad yard brakeman had burden of showing that foreign destination of cars being handled was fixed in mind of shipper from moment they left mill track, even though cars had not been weighed or billed—*Baldassarre v Pennsylvania R Co*, CCA Ohio, 24 F2d 201.

(3) Employee, injured in moving empty cars after they had finished interstate run, had burden of showing that cars had commenced predetermined interstate movement to show injury in interstate commerce.—*Rogers v Canadian Nat Ry Co*, 224 NW 429, 246 Mich 899, certiorari denied 50 S Ct. 15, 280 US 554, 74 L Ed 610

Under Boiler Inspection Act

Mo—Aly v Terminal R. R. Ass'n of St Louis, 78 S.W.2d 851, 336 Mo 340

37. *Ill—Young v Chicago & I M Ry Co*, 20 NE2d 320, 299 Ill App 393

Mo—Shidloski v New York, C & St L R Co, 64 SW2d 259, 333 Mo 1134—*Kepner v Cleveland, C, C & St L Ry Co*, 15 SW2d 825, 322 Mo 299, certiorari denied *Cleveland, C, C & St L Ry Co v Kepner*, 50 S Ct. 24, 280 US 564, 74 L Ed 618.

initial burden on plaintiff is satisfied, and it is for defendant to show the contrary.³⁸ It is not defendant's duty to show how the accident occurred or what the injured employee was doing at the time thereof.³⁹

(2) Relationship of Master and Servant

Plaintiff has the burden of proving the relationship of master and servant, and that he was engaged in the master's business when he was injured.

The burden is on plaintiff to show such a state of facts as under the law of negligence constitutes the relation of master and servant,⁴⁰ and that he was engaged in the master's business when he was injured,⁴¹ but, where the act of a servant causing his injury was within the apparent scope of his authority, the master is charged with the burden of proving want of authority.⁴² Where plaintiff makes a prima facie showing that the relationship exists, the burden falls on defendant to establish his alle-

gation that plaintiff was the employee of an independent contractor.⁴³

In an action under the Federal Employers' Liability Act, plaintiff has the burden of proving the relation of master and servant,⁴⁴ that when he was injured he was about the business of defendant,⁴⁵ that he was acting within the line of his employment,⁴⁶ and in the performance of some duty owing to defendant;⁴⁷ but, plaintiff having made a prima facie case in his favor, it is incumbent on defendant to prove facts in support of its defense that he was employed as an independent contractor.⁴⁸

(3) Negligence or Fault of Master Generally

The servant generally has the burden of proving the negligence of the master in an action for injuries.

In an action for personal injuries it is essential that the servant should prove the negligence of the master⁴⁹ in failing properly to perform a duty or

38. U.S.—Erie R Co v. Krysienski, N.Y., 238 F. 142, 145, 151 C.C.A. 218.

Tex.—Southern Pac Co. v. Stephens, Civ App, 201 S.W. 1076.

39. Ala.—Alabama Great Southern R Co v. Davis, 18 So.2d 737, 246 Ala. 64, certiorari denied 65 S.Ct. 676, 324 U.S. 846, 89 L.Ed. 1407.

Interstate commerce

Defendant is under no duty to bring out facts in addition to those adduced by plaintiff bearing on question whether section hand had been engaged in interstate transportation within meaning of the act—Clevinger v. St. Louis-San Francisco Ry Co., 109 S.W.2d 369, 341 Mo. 797, certiorari denied 58 S.Ct. 266, 302 U.S. 760, 82 L.Ed. 588.

40. Mass.—Parker v. Taylor, 3 N.E.2d 25, 295 Mass. 51.

Miss.—Long-Bell Lumber Sales Corporation v. Perritt, 172 So. 747, 178 Miss. 194.

Okla.—Incorporated Town of Locust Grove v. Faull, 50 P.2d 1122, 174 Okl. 466.

Va.—Lough v. Lyon, Inc., 190 S.E. 290, 168 Va. 136.

39 C.J. p. 988 note 17.

Bystander seeking to recover for injury received while assisting employee of defendant must show latter's authority to ask assistance to recover for injuries—Henry Quells Lumber & Mfg. Co. v. Hays, 291 S.W. 982, 173 Ark. 43.

Holder

In action for injuries sustained by plaintiff when defendants' milk truck, on which plaintiff was riding at driver's request to help driver distribute milk, ran into tree, burden was on plaintiff to show express or implied authority from some responsible rep-

resentative of defendants, other than the driver, to engage plaintiff to go on the route with the driver—Reus v. Mosebach, 12 A.2d 37, 387 Pa. 413.

Action for breach of warranty

One seeking to recover for workman's death on ground of defendant's breach of warranty of safety of materials furnished for building oil derrick was required to prove that deceased was defendant's servant—Clements v. Luby Oil Co., 180 So. 851, 15 La.App. 384.

41. Miss.—Yazoo & M. V. R. Co. v. Slaughter, 45 So. 873, 92 Miss. 289, 39 C.J. p. 988 note 19.

42. Colo.—Rapson Coal Min. Co. v. Michell, 164 P. 311, 62 Colo. 330.

43. N.C.—Lilley v. Interstate Cooperation Co., 139 S.E. 369, 194 N.C. 250.

44. Ala.—Central of Georgia Ry Co. v. Garner, 122 So. 429, 219 Ala. 441.

Neb.—Bocian v. Union Pac. R. Co., 289 N.W. 372, 137 Neb. 318.

39 C.J. p. 989 note 22.

45. Mo.—Elliott v. Payne, 239 S.W. 551, 293 Mo. 581, 23 A.L.R. 706.

46. Mo.—Elliott v. Payne, 239 S.W. 551, 293 Mo. 581, 23 A.L.R. 706, 39 C.J. p. 989 note 24.

47. Wash.—Hobbs v. Great Northern R. Co., 142 P. 20, 80 Wash. 678, L.R.A. 1915D 503.

39 C.J. p. 989 note 25.

48. Tex.—Esthay v. Sherman, Civ. App., 135 S.W.2d 174, error dismissed, judgment correct—Gulf, C. & S.F.R. Co. v. Clement, Civ. App., 220 S.W. 407.

49. U.S.—Proctor & Gamble Do-

fense Corp. v. Bean, C.C.A. Miss., 146 F.2d 598—Mescall v. W. T. Grant Co., C.C.A. Ind., 138 F.2d 209, certiorari denied 63 S.Ct. 1176, 319 U.S. 759, 87 L.Ed. 1711, reh'g denied 63 S.Ct. 1445, 320 U.S. 214, 87 L.Ed. 1851—Aqua System v. Kodakowski, C.C.A. Canal Zone, 88 F.2d 395—Thomson v. Pennsylvania R. Co., C.C.A. Ohio, 88 F.2d 148—Geneva Mill Co. v. Andrews, C.C.A. Fla., 11 F.2d 924—Chicago & N.W. Ry. Co. v. Payne, C.C.A. Neb., 8 F.2d 332.

Ariz.—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.

Ark.—Baay v. Odom, 168 S.W.2d 1092, 205 Ark. 423—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495—Kroger Grocery & Baking Co. v. Kennedy, 136 S.W.2d 470, 199 Ark. 914—Kum v. Teague, 94 S.W.2d 1037, 192 Ark. 687—Southern Lumber Co. v. Downey, 64 S.W.2d 552, 188 Ark. 1167—Williams Bros. v. Witt, 41 S.W.2d 237, 184 Ark. 606—J. E. Parham Const. Co. v. Parker, 37 S.W.2d 879, 183 Ark. 873—Mosley v. Raines, 37 S.W.2d 78, 183 Ark. 569—Rice & Holman v. Henderson, 35 S.W.2d 1016, 183 Ark. 355—Wheeler v. Ellis, 35 S.W.2d 64, 183 Ark. 133—Cleaver v. Bert Johnson Orchards, 298 S.W. 1016, 175 Ark. 223—Texas Co. v. Jones, 298 S.W. 342, 174 Ark. 905.

Ga.—Holman v. American Automobile Ins. Co., 39 S.E.2d 850, 201 Ga. 454—Western & A. R. R. v. Michael, 157 S.E. 226, 42 Ga.App. 603—Clark v. Western & A. R. R., 152 S.E. 847, 41 Ga.App. 317—Flippin v. Central of Georgia Ry. Co., 132 S.E. 918, 35 Ga.App. 243.

an act imposed on him as master by law or by the express or implied requirements of the employment.⁶⁰ This burden rests on plaintiff, even though it involves the proving of a negative,⁶¹ and, except in so far as the rule is changed by the application of the doctrine of *res ipsa loquitur* or statutory provisions to the contrary, the burden is not discharged by merely showing the existence of a defect or the occurrence of the accident or injury.⁶²

With respect to medical attention. Where plain-

tiff seeks to hold the master liable for the negligence of its physician in treating the injured servant, such negligence must be established,⁶³ but, where plaintiff makes out a *prima facie* case of the incompetency of the physician employed by defendant to attend him after his injury, the burden is on defendant to prove his competency.⁶⁴ Plaintiff has the burden of proving his allegation that defendant was negligent in failing to equip its hospital properly.⁶⁵

Iowa—*Degner v Anderson*, 239 N W 790, 213 Iowa 588

Ky—*Hobson v Turner*, 185 SW 2d 550, 299 Ky 342—*Elcomb Coal Co v Gray's Adm'r*, 115 SW 2d 1056, 273 Ky 230—*Grigsby v Louisville & N R Co*, 114 SW 2d 775, 272 Ky 709—*Southern Mining Co v Saylor*, 95 SW 2d 236, 264 Ky 656—*Brooks v Arnett*, 69 SW 2d 1029, 253 Ky 491—*Codell Const Co v White*, 65 SW 2d 690, 251 Ky 574—*High Splint Coal Co v Baker*, 57 SW 2d 60, 247 Ky 428—*Fee's Adm'r v Mahan-Ellison Coal Corporation*, 43 SW 2d 681, 241 Ky 231—*Crouch v Noland*, 88 SW 2d 471, 238 Ky 575—*Gibralter Coal Mining Co v Collins*, 86 SW 2d 373, 237 Ky 765—*Nugent Sand Co v Howard*, 11 SW 2d 885, 227 Ky 91

Me—*Loring v Maine Cent R. Co*, 152 A 527, 129 Me 369

Mich—*Rule v Guglio*, 7 NW 2d 227, 304 Mich 78, 145 ALR 537—*Koetsier v Cargill Co*, 217 NW 51, 241 Mich 370

Miss—*Masonite Corp v Scruggs*, 29 So 2d 262

Mo—*Cain v Humes-Deal Co*, 49 SW 2d 90, 339 Mo 1107—*Grindstaff v J Goldberg & Sons Structural Steel Co*, 40 SW 2d 702, 328 Mo 72—*Sabot v St Louis Cooperage Co*, 282 SW 435, 313 Mo 527—*Wagner v St Louis-San Francisco Ry Co*, 19 SW 2d 518, 233 Mo App 864—*Thompson v St Louis-San Francisco Ry Co*, App, 274 SW 531

NJ—*Huels v General Elec. Co*, 46 A 2d 654, 134 NJ Law 165

NC—*Chinard v Chinard Electric Co*, 136 SE 1, 192 NC 736.

Okla—*Bell v McDonnell*, 9 P 2d 735, 156 Okl 68

Tex—*Fort Worth & D C Ry Co v Rowe*, Civ App, 69 SW 2d 169—*Hunt v Robinson*, Civ App, 55 SW 2d 166—*Davis v W T Carter & Bro*, Civ App, 19 SW 2d 386, error refused

Wash—*Kantonen v Braley Motor Co*, 30 P 2d 245, 176 Wash 577, 39 CJ p 989 note 29.

Difficulty of obtaining evidence

Difficulties encountered by employee in obtaining evidence afford no ground for putting on employer

onus of showing freedom from negligence—*Grindstaff v J Goldberg & Sons Structural Steel Co*, 40 SW 2d 702, 328 Mo 72

30. US—*St Louis-San Francisco Ry. Co v Mills, Ala.*, 46 S Ct 520, 271 US 344, 70 L Ed 979—*Thomson v Pennsylvania R Co*, CCA Ohio, 88 F 2d 148—*Chicago & N W Ry Co v Payne*, CCA Neb, 8 F 2d 332

Ark—*J. E Parham Const Co v Parker*, 37 SW 2d 879, 183 Ark 678

Ky—*Johnson's Adm'r v. Harlan Ridgeway Crown Mining Co*, 145 SW 2d 89, 284 Ky. 463—*Magness' Adm'r v Hutchinson*, 117 SW 2d 1041, 274 Ky 226—*Elcomb Coal Co v Gray's Adm'r*, 115 SW 2d 1056, 273 Ky 230—*High Splint Coal Co v Baker*, 57 SW 2d 60, 247 Ky 426—*Fee's Adm'r v Mahan-Ellison Coal Corporation*, 43 SW 2d 681, 241 Ky 231

Mo—*Emrick v City of Springfield*, App, 110 SW 2d 840

Okla—*William v. City of Fairview*, 11 P 2d 453, 157 Okl 239.

Vt—*Anderson v Howe Scale Co*, 97 A 992, 90 Vt 244, 39 CJ p 991 note 30.

Knowledge of danger

(1) A servant, working in safe place with safe tools at time of injuries to his hands by contact with trichlorethylene in tank used for degreasing electric appliances manufactured by employer, could not recover damages from employer, in absence of proof that employer knew or should have known that trichlorethylene was dangerous and injurious to plaintiff's hands, as alleged in complaint—*Huels v General Elec Co*, 46 A 2d 654, 134 NJ Law 165

(2) An employee gored by employer's bull to recover from employer for injuries was required to show that the bull was an animal possessing a vicious propensity of which the employer had actual or constructive knowledge and that injury was brought about by breach of some duty owed by the employer to the employee—*Hill v Moseley*, 17 SE 2d 876, 220 NC 485

Gross negligence

Tex—*San Jacinto Bldg v Washing-*

ton, Civ App, 122 SW 2d 289, error refused

Reasonableness of precautions

In action against employer for death of employee caused by explosion of dynamite, plaintiff was required only to present the pertinent facts and place the situation before the jury, not to prove what constituted reasonable means to locate unexploded charges and to warn employee—*L. E Whitham Const Co v Remer*, CCA Okl, 105 F.2d 371

Duty to give warning

An employee suing employer for injuries allegedly resulting from employer's negligence in failing to warn employee of the danger must prove existence of danger, employer's actual or constructive knowledge of existence of risk, employee's lack of knowledge of danger, and employer's actual or constructive knowledge of employee's lack of appreciation of danger—*Marranick v. Luechtefeld*, Mo App, 157 SW 2d 537

51. Minn—*Uggen v Bazilla*, 143 N. W 112, 123 Minn 97

39 CJ p 991 note 31

52. U.S.—*Aqua System v. Kodak-ski*, CCA Canal Zone, 88 F 2d 395

Mo—*Guthrie v Gillespie*, 6 SW 2d 886, 319 Mo 1137—*Emrick v City of Springfield*, App, 110 SW 2d 840.

Wash—*Gardner v. Seymour*, 180 P. 2d 564

39 CJ p 992 note 34

Effect of statutory and constitutional provisions on burden of proof see *infra* § 502

Presumption from existence of defect or mere happening of event see *supra* subdivision a (3) (b) of this section

Res ipsa loquitur see *supra* subdivision a (3) (c) of this section

53. Cal—*Rannard v Lockheed Aircraft Corp*, 157 P 2d 1, 26 Cal 2d 149

54. La—*Nations v Ludington, Wells & Van Schaick Lumber Co*, 63 So 257, 133 La 657, 48 L.R.A., NS, 531, Ann Cas 1916B 471

39 CJ p 999 note 11

55. Miss—*James v Yazoo & M. V. R Co*, 131 So 819, 153 Miss 776.

Under Federal Employers' Liability Act and related statutes. In an action under the Federal Employers' Liability Act plaintiff has the burden of proving defendant's negligence,⁵⁶ even though the injured employee has been absolved of contributory negligence.⁵⁷ In other words, plaintiff must show that defendant was guilty of some breach of duty owed in respect of the matter charged as negli-

86. US—Tennant v Peoria & P U Ry Co, 64 S Ct 409, 321 US 29, 88 L Ed 520, rehearing denied 64 S Ct 610, 321 US 802, 88 L Ed 1089—Atchison, T & S F Ry Co v Saxon, Tex, 62 S Ct 229, 284 U S 458, 76 L Ed 518—Wolfe v Henwood, CCA Ark, 162 F 2d 988—Boston & M R R v Cabana, CCA Mass, 148 F 2d 150, certiorari denied 65 S Ct 1414, 325 US 873, 89 L Ed 1991—Fantini v Reading Co, CCA NJ, 147 F 2d 543, certiorari denied 65 S Ct 1185, 325 US 856, 89 L Ed 1976—Barry v Reading Co, CCA NJ, 147 F 2d 129, certiorari denied 65 S Ct 912, 324 US 867, 89 L Ed 1422, rehearing denied 65 S Ct 1023, 324 US 891, 89 L Ed 1488—Atlantic Coast Line R Co v Tiller, CCA Va, 142 F 2d 718, reversed on other grounds 65 S Ct 421, 323 US 574, 89 L Ed 466—Mastrandrea v Pennsylvania R Co, CCA Pa, 132 F 2d 318—Lukon v Pennsylvania R Co, CCA Pa, 131 F 2d 327—Deere v Southern Pac Co, CCA Or, 123 F 2d 438, certiorari denied 62 S Ct 916, 315 US 819, 86 L Ed 1217—Detroit, G H & M Ry Co v Maldonado, CCA Mich, 59 F 2d 911—Holl v Southern Pac Co, DCCal, 71 F Supp 21—Raudenbush v Baltimore & O R R, DCPa, 83 F Supp 329—Ramsouer v Midland Valley R Co, DC Ark, 44 F Supp 528, reversed on other grounds 135 F 2d 101—King v U S, DC NY, 22 F Supp 993
Ala—Southern Ry Co v Melton, 198 So 588, 240 Ala 244—Louisville & N R Co v Gizzard, 189 So 203, 238 Ala 49, certiorari denied 60 S Ct 140, 308 US 603, 84 L Ed 504.
Ariz—Southern Pac Co v Gastelum, 283 P 719, 36 Ariz 106
Ark—Missouri Pac R Co v Davis, 186 SW 2d 20, 208 Ark 86—Missouri Pac R Co v Montgomery, 55 SW 2d 68, 186 Ark 637, certiorari denied 53 S Ct 690, 289 US 747, 77 L Ed 1493—St Louis-San Francisco Ry Co v Smith, 19 SW 2d 1102, 179 Ark 1015—St Louis-San Francisco Ry Co v Pearson, 281 SW 910, 170 Ark 842, certiorari denied 47 S Ct 101, 273 US 711, 71 L Ed 858.
Cal—Gray v Southern Pac Co, 145 P 2d 561—Showalter v Western Pac R Co, 106 P 2d 895, 16 Cal 2d 460—Matthews v Atchison, T & S F Ry Co, 129 P 2d 435, 54 Cal App 2d 547—Matthews v Southern Pac Co, 59 P 2d 330, 15 Cal App 2d 36.

Conn—Onofrio v Palmer, 43 A 2d 454, 132 Conn 257
Ga—Southern Ry Co v Bradshaw, 37 SE 2d 150, 78 Ga App 438—Louisville & N R Co v Rudder, 147 SE 795, 39 Ga App 513
Ill—Advance v Thompson, 55 NE 2d 57, 387 Ill 77, certiorari denied 65 S Ct 82, 323 US 753, 89 L Ed 603—O'Brien v Chicago & N W Ry Co, 68 NE 2d 638, 329 Ill App 382—Halleran v Chicago & N W Ry Co, 63 NE 2d 670, 327 Ill App 217
Iowa—Hamilton v Chicago, B & Q R Co, 234 NW 810, 211 Iowa 924
Ky—Louisville & N R Co v Stewart, 142 SW 2d 119, 283 Ky 585
La—Harris v Yasoo & M V R Co, App, 183 So 108
Me—Loring v Maine Cent R Co, 152 A 527, 129 Me 389
Mass—Hietala v Boston & A R R, 3 NE 2d 377, 295 Mass 186, certiorari denied Boston & Albany R Co v Hietala, 57 S Ct 116, 299 US 589, 81 L Ed 434—Shipp v Boston & M R R, 186 NE 653, 282 Mass 266—Slamin v New York, N H & H R Co, 185 NE 353, 282 Mass 590—Griffin v New York, N H & H R Co, 181 NE 889, 279 Mass 511
Miss—New Orleans Great Northern R Co v Branton, 146 So 870, 167 Miss 52, certiorari denied 54 S Ct 88, 290 US 687, 78 L Ed 577—Mobile & O R Co v Clay, 135 So 819, 156 Miss 463, certiorari denied Clay v Mobile & O R Co, 51 S Ct 24, 282 US 844, 75 L Ed 749.
Mo—Joice v Missouri-Kansas-Texas R Co, 189 SW 2d 568, 354 Mo 439, 161 ALR 383—Godsey v Thompson, 179 SW 2d 44, 352 Mo 681, certiorari denied 65 S Ct 48, 323 US 719, 89 L Ed 578—Barrett v St Louis Southwestern Ry Co, 143 SW 2d 60—Carnahan v Missouri-Kansas-Texas R Co, 88 SW 2d 1027, 338 Mo 23, certiorari denied 56 S Ct 748, 298 US 664, 80 L Ed 1388—Carpenter v Wabash Ry Co, 71 SW 2d 1071, 335 Mo 130—Brainard v Missouri Pac R Co, 5 SW 2d 15, 319 Mo 890—Sweeney v Wabash Ry Co, 80 SW 2d 216, 229 Mo App 398—Creighton v Missouri Pac R Co, 66 SW 2d 980, 229 Mo App 325, certiorari denied Missouri Pac R Co v Creighton, 55 S Ct 70, 293 US 558, 79 L Ed 659—Parker v St Louis-San Francisco Ry Co, App, 297 SW 146.
Neb—Ellis v Union Pac R Co, 22 NW 2d 805, 147 Neb 18
NJ—Cowdrick v Pennsylvania R

Co, 39 A 2d 98, 132 NJ Law 131, certiorari denied 65 S Ct 555, 328 US 799, 89 L Ed 637
NY—Sadowski v Long Island R Co, 55 NE 2d 497, 392 NY 448—Clark v Delaware & H R Corporation, 283 NYS 739, 245 App Div 447—Henry v Norton, 66 NY S 2d 317
NC—Bue v Powell, 1 SE 2d 103, 215 NC 67—Cole v Seaboard Air Line Ry Co, 154 SE 682, 199 NC 389, certiorari denied Seaboard Air Line Ry Co v Cole, 51 S Ct 182, 282 US 898, 75 L Ed 791—Austin v Southern Ry Co, 148 SE 446, 197 NC 319
Okla—Wright v Atchison, T & S F Ry Co, 38 P 2d 517, 170 Okl 48
Pa—Dawson v Reading Co, 142 A 295, 293 Pa 301, certiorari denied 49 S Ct 28, 278 US 628, 78 L Ed 547—Rafferty v Pittsburgh & W V Ry Co, 131 A 470, 284 Pa 555.
SC—Temple v Atlantic Coast Line R Co, 168 SE 644, 165 SC 201, reversed on other grounds 53 S Ct 334, 285 US 143, 76 L Ed 670
Tex—Texas & N O R Co v Warden, 78 SW 2d 164, 125 Tex. 193—Kansas City Southern Ry Co v Chandler, Civ App, 192 SW 2d 304, ref n r e—Tye v Henwood, Civ App, 153 SW 2d 184, error refused—Paris & G N R Co v Stafford, Civ App, 36 SW 2d 321, reversed on other grounds 53 SW 2d 1019
Utah—Pauly v McCarthy, 166 P 2d 501, 109 Utah 398, reversed on other grounds 67 S Ct 963, 330 US 802, 91 L Ed 1261.
Vt—Bailey v Central Vermont Ry, 28 A 2d 639, 113 Vt 8, reversed on other grounds 63 S Ct 1062, 319 US 350, 87 L Ed 1444, conformed to 35 A 2d 365, 113 Vt 433
Va—Beamer v Virginian Ry Co, 26 SE 2d 42, 181 Va 650, certiorari denied 64 S Ct 486, 321 US 763, 88 L Ed 1060—Seaboard Air Line Ry Co v De Loatch, 141 SE 121, 149 Va 338
Wis—Schiefelbein v Chicago, M, St P & P R Co, 265 NW 386, 231 Wis 35, certiorari denied Chicago, M St P & P R Co v Schiefelbein, 57 S Ct 20, 299 US 558, 81 L Ed 411—Rupert v Chicago, M, St P & P R Co, 233 NW 550, 202 Wis 563, certiorari denied 51 S Ct 488, 283 US 840, 75 L Ed 1451
39 CJ p 998 note 38
57. US—Bowser v Baltimore & O R Co, DCPa, 55 F Supp 48, reversed on other grounds, CCA, 152 F 2d 436.

gence.⁵⁸ Since, as discussed supra subdivision a (2) of this section, no presumption of negligence ordinarily exists, negligence of the master must be affirmatively proved.⁵⁹ Where the action is predicated on a violation of the Federal Safety Appliance Act, proof of negligence on the part of the master is unnecessary,⁶⁰ since a violation of the statute constitutes negligence per se.⁶¹ In an action under the Boiler Inspection Act plaintiff is not required to prove negligence in the sense of lack of care,⁶² but merely the failure of the appliance causing the injury to function properly.⁶³

(4) Cause of Injury

The plaintiff has the burden of proving the manner and immediate cause of the injury, and must also prove that the defendant's negligence was the proximate cause thereof; and the same burden rests on him in an action under the Federal Employers' Liability Act.

In an action against a master for injuries to a servant, plaintiff has the burden of proving the manner in which the injury occurred and the immediate cause which produced it,⁶⁴ and, having proved defendant's negligence, he has the further burden of proving that such negligence was the proximate cause of the injury⁶⁵ in whole or in

58. U.S.—Baltimore & O R Co v Berry, Mo, 52 S Ct 510, 286 US 272, 76 L Ed 1098—Edwards v Baltimore & O R Co, CCA Ill, 131 F 2d 366

Ark—St Louis-San Francisco Ry Co v Rogers, 290 SW 74, 172 Ark 508—St Louis-San Francisco Ry Co v. Miller, 292 SW 986, 173 Ark 597

Cal—MacDonnell v. Southern Pac Co, 62 P 2d 201, 17 Cal App 2d 432, certiorari denied Southern Pac Co v MacDonnell, 57 S Ct 790, 301 US 688, 81 L Ed 1345

Iowa—Chicote v. Chicago & N W R Co, 221 NW. 771, 206 Iowa 1093

Ky—Louisville & N R Co v Stewart, 143 SW 2d 119, 283 Ky 585

Mo—Martin v. Wabash Ry Co, 30 SW 2d 735—Sweeney v Wabash Ry Co, 80 SW 2d 216, 229 Mo App 393

NC—Potter v Atlantic Coast Line R Co, 147 SE 698, 197 NC 17

Wis—Lind v Chicago, M, St P. & P Ry Co, 256 NW 705, 216 Wis 405.

59. U.S.—Philadelphia & R Ry Co v Thirouin, CCA N.J., 9 F 2d 856, followed in Sacsepanski v Pennsylvania R Co, 36 F 2d 1022

Cal—Matthews v Southern Pac Co, 59 P 2d 220, 15 Cal App 2d 36

N.J.—Di Bernardo v. Delaware, L & W R Co, 33 A.2d 823, 130 NJ Law 479

NC—McGraw v Southern Ry. Co, 175 SE 286, 206 NC 873.

60. Cal—Leet v. Union Pac R Co, 142 P 2d 37, 60 Cal App 2d 814

Mo—Wild v Pitcairn, 149 SW 2d 800, 347 Mo 915, certiorari denied Pitcairn v. Wild, 62 S Ct 72, 314 US 638, 86 L Ed 512

61. U.S.—Chicago, St P, M & O Ry Co v Muldowney, CCA Minn, 130 F 2d 971, certiorari denied 63 S Ct 526, 317 US 700, 87 L Ed 560.

62. U.S.—Fredericks v Erie R Co, CCANY, 36 F 2d 716

Mo—Arnold v Alton R Co, 134 S W 2d 1093, 343 Mo 1049.

63. Mo—Arnold v. Alton R Co, supra

64. U.S.—Wisconsin & Arkansas Lumber Co v Ward, CCA Ark, 32 F 2d 974—Murray v Carleton, D C Me, 33 F 2d 966

Ark—Basye v Odom, 168 SW 2d 1092, 205 Ark 423

Ky—Hobson v Turner, 185 SW 2d 550, 299 Ky 342—Fee's Adm'x v Mahan-Ellison Coal Corporation, 43 SW 2d 681, 241 Ky 231—Royal Collieries Co v Wells, 276 SW 515, 210 Ky 600

Miss—Masonite Corp v Scruggs, 29 So 2d 262—Dr Pepper Bottling Co v Gordy, 164 So 236, 174 Miss 392

Mo—Smith v Harbison-Walker Refractories Co, 100 SW 2d 909, 340 Mo 889—Bennett v. Myres, App. 31 SW 2d 943

NJ—Huels v General Elec Co, 46 A 2d 654, 134 N.J. Law 165

Pa—Keough v Markus, 173 A. 768, 114 Pa Super 80

39 C.J. p 994 note 45

65. U.S.—Mescall v W. T. Grant Co, CCA Ind, 133 F 2d 209, certiorari denied 63 S Ct 1176, 319 US 759, 87 L Ed 1711, rehearing denied 63 S Ct 1445, 320 US 314, 87 L Ed 1851—Boal v Electric Storage Battery Co, CCA Pa, 98 F 2d 815—Hecimovich v Winston-Dear Const Co, CCA Mo, 29 F 2d 382—Chicago & N W Ry Co v Payne, CCA Neb, 8 F 2d 332

Ark—Basye v Odom, 168 SW 2d 1092, 205 Ark 423—Tucker Duck & Rubber Co v Harvey, 154 S W 2d 828, 202 Ark 1033—Safeway Stores v Phelps, 145 SW 2d 337, 201 Ark 495—Kroger Grocery & Baking Co v Kennedy, 136 SW 2d 470, 199 Ark 914—Southern Lumber Co v Downey, 64 SW 2d 552, 188 Ark 1167—Williams Bros. v Witt, 43 SW 2d 237, 184 Ark 606—J E Parham Const Co v Parker, 37 S W 2d 879, 183 Ark 673—Mosley v Raines, 37 SW 2d 78, 183 Ark 569

—Rice & Holiman v Henderson, 35 SW 2d 1016, 183 Ark 355—Wheeler v Ellis, 35 SW 2d 64, 183 Ark 183—Booth & Flinn Co v Pearsall, 33 SW 2d 404, 182 Ark. 854—

Cleaver v Bert Johnson Orchards, 298 SW 1016, 175 Ark 323

Colo—Denver & S. L Ry. Co v Mullen, 279 P 49, 86 Colo 159

Ky—Johnson's Adm'r v Harlan Ridgeway Crown Mining Co, 145 SW 2d 89, 384 Ky 403—Magness' Adm'x v Hutchinson, 117 SW 2d 1041, 374 Ky 326—Elcomb Coal Co. v Gray's Adm'x, 115 SW 2d 1056, 273 Ky 230—Southern Mining Co v Saylor, 95 SW 2d 286, 264 Ky. 655—Codell Const Co. v White, 65 SW 2d 690, 251 Ky 574—High Splint Coal Co v Baker, 57 SW 2d 60, 247 Ky 426—Fee's Adm'x v Mahan-Ellison Coal Corporation, 43 SW 2d 681, 241 Ky. 231—Crouch v Noland, 38 S.W.2d 471, 238 Ky. 575—High Splint Coal Co v Bailey's Adm'r, 37 S.W.2d 22, 238 Ky 217—Kelly & Shields v Miller, 38 SW 2d 662, 236 Ky 698—Brooks v Louisville & N R Co, 26 SW 2d 523, 233 Ky 656—Faulkner v Gatliff Coal Co., 15 SW 2d 236, 228 Ky 379—Nugent Sand Co v Howard, 11 SW 2d 985, 227 Ky 91

Me—Loring v. Maine Cent R Co., 152 A 527, 129 Me 309

Miss—Masonite Corp. v Scruggs, 29 So 2d 262—Crosby v Burge, 1 So. 2d 504, 190 Miss 739

Mo—Cain v Humes-Deal Co, 49 S. W 2d 90, 329 Mo 1107—Grindstaff v J Goldberg & Sons Structural Steel Co, 40 SW 2d 702, 328 Mo 72—Sabot v. St. Louis Cooperage Co, 282 S.W. 425, 313 Mo 527—Head v M E Leming Lumber Co, 281 SW 441—State ex rel Bowling v. Cox, 276 SW 869, 310 Mo 367

—Emrick v City of Springfield, App. 110 SW 2d 840

NY—Schein v Feder, 278 NYS 653, 154 Misc 830.

Ohio—Hilleary v Bromley, 61 NE 2d 731, reversed on other grounds 64 NE 2d 832, 146 Ohio St 212.

Okl—Oklahoma Gas & Electric Co. v Oliphant, 45 P 2d 1077, 172 Okl 635—Willaman v City of Fairview, 11 P 2d 453, 157 Okl 289.

Pa—Keough v. Markus, 173 A. 768, 114 Pa. Super 80

Tex—Railway Express Agency v Robinson, Civ App., 162 S.W.2d 984,

part.⁶⁶ Plaintiff is not required, however, to point out the precise ultimate act or omission which caused the accident⁶⁷ or to negative every other possible cause other than defendant's negligence,⁶⁸ but if it appears that the injury complained of may with equal likelihood have resulted from one of two or more causes, for one of which, and not the other, defendant is liable, plaintiff must show with reasonable certainty that the cause for which defendant is liable produced the result.⁶⁹

If plaintiff's evidence of cause establishes a prima facie case of negligence, the burden shifts to defendant to offer a reasonable explanation of the cause of the accident.⁷⁰ Thus where, by application of the doctrine of *res ipsa loquitur*, discussed supra subdivision a (3) (c) of this section, plaintiff shows

prima facie that the injuries were caused by defendant's negligence, the burden is cast on defendant to show some other explanation of how the accident was caused at least equally conceivable and consistent with the proved and admitted facts,⁷¹ and this burden is not satisfied by mere proof of other probable causes and of the good condition of the instrumentality causing the injury.⁷² Where the action is brought under a state employers' liability act, plaintiff must show that the proximate cause of the injury was within the statute.⁷³

In an action under the *Federal Employers' Liability Act* the burden is on plaintiff to show that defendants' negligence was, in whole or in part,⁷⁴ the proximate cause of the injury;⁷⁵ or, as it is sometimes stated, plaintiff must show the causal

error refused—*Fort Worth & D C Ry. Co. v. Rowe*, Civ App., 69 S.W. 2d 169

Wash.—*Kantonen v Braley Motor Co.*, 30 P 2d 245, 176 Wash 577. 39 C.J. p 991 note 33

"The establishment of a juridical connection between the master's negligence and the injury being one of the essential prerequisites to the maintenance of the action, the burden of proving that there was such a connection rests on the plaintiff"—*Gardner v. Seymour*, 180 P 2d 564, 570, 27 Wash 2d 802.

Actionable negligence

In servant's personal injury action against master, servant had burden of proving actionable negligence, which involves not only failure to exercise due care but the causative relation of such failure to the injury—*Thomson v Pennsylvania R. Co.*, CCA Ohio, 88 F.2d 148.

66. Ky.—*Wilder's Adm'r v Southern Mining Co.*, 96 S.W.2d 436, 265 Ky 219.

Concurrence with other cause

In order to justify recovery, it must be shown that employer's negligence concurred with lightning, which passed over employer's wires and caused employee's death—*Grant v. Libby, McNeill & Libby*, 295 P. 139, 160 Wash. 138

67. Mass.—*Ridge v. Boston El. R. Co.*, 100 NE 687, 213 Mass 460 39 C.J. p 994 notes 47, 48 [a]

Disease peculiar to employment

In employee's action against employer for damages resulting from an occupational disease, in absence of evidence that disease was acquired in the employment, it must be shown that disease is peculiar or incident to the work in which employee was engaged—*Wommack v Orr*, 176 S.W.2d 477, 352 Mo. 113—*Wolf v. Mallinckrodt Chemical Works*, 81 S.W.2d 323, 336 Mo 746.

68. Wash.—*Kantonen v Braley Motor Co.*, 30 P 2d 245, 176 Wash 577 —*St. Germain v. Potlach Lumber Co.*, 135 P 804, 76 Wash. 102

69. Mo.—*Hamilton v St. Louis-San Francisco Ry. Co.*, App., 279 S.W. 177—*Pronnecke v Westliche Post Pub. Co.*, 291 S.W. 139, 220 Mo App. 640. 39 C.J. p 993 note 35

70. Wash.—*Rosellini v Salsich Lumber Co.*, 128 P. 213, 71 Wash. 208

71. Iowa.—*Paulson v Bettendorf Axle Co.*, 125 N.W. 174, 146 Iowa 399

72. Mo.—*Stroud v. Booth Cold Storage Co.*, App., 285 S.W. 165

73. Or.—*Barker v Portland Traction Co.*, 173 P 2d 288, rehearing denied 178 P 2d 706—*Fitzgerald v Oregon-Washington R. & Nav. Co.*, 16 P 2d 27, 141 Or. 1.

74. US.—*Tennant v Peoria & P U Ry. Co.*, Ill., 64 S.Ct. 409, 321 US 29, 88 L.Ed. 520, rehearing denied 64 S.Ct. 610, 321 US 802, 88 L.Ed. 1089—*Wolfe v Henwood*, CCA Ark., 162 F.2d 998—*Chicago, St. P. M. & O R Co v Arnold*, CCA Minn., 160 F.2d 1002—*Boston & M R R v Cabana*, CCA Mass., 148 F.2d 150, certiorari denied 65 S.Ct. 1414, 325 US. 878, 89 L.Ed. 1991—*Atlantic Coast Line R. Co v Tiller*, CCA Va., 142 F.2d 718, reversed on other grounds 65 S.Ct. 421, 323 US 574, 89 L.Ed. 465—*Edwards v Baltimore & O R Co.*, CCA Ill., 131 F.2d 366.

Ark.—*Missouri Pac R. Co v. Remel*, 48 S.W.2d 548, 185 Ark 598, certiorari denied 53 S.Ct. 85, 287 US 634, 77 L.Ed. 550

Cal.—*Gray v. Southern Pac Co.*, 145 P 2d 561, 23 Cal 2d 632

Ill.—*O'Brien v Chicago & N. W Ry. Co.*, 68 NE 2d 638, 329 Ill App 382 —*Halloran v. Chicago & N W Ry*

Co., 68 NE 2d 670, 327 Ill App 217

Mass.—*Hietala v Boston & A R. R.*, 3 NE 2d 377, 295 Mass 186, certiorari denied *Boston & Albany R. Co v Hietala*, 57 S.Ct. 116, 299 U. S. 589, 81 L.Ed. 434

Mo.—*Joice v Missouri-Kansas-Texas R. Co.*, 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383—*Godsey v. Thompson*, 179 S.W.2d 44, 352 Mo. 681, certiorari denied 65 S.Ct. 48, 323 US 719, 89 L.Ed. 578—*Bartlett v St. Louis Southwestern Ry. Co.*, 143 S.W.2d 60—*Young v Wheelock*, 64 S.W.2d 950, 333 Mo. 992, certiorari denied *Wheelock v Young*, 54 S.Ct. 527, 291 US. 676, 78 L.Ed. 1064

Tex.—*Kansas City Southern Ry. Co. v Chandler*, Civ App., 192 S.W.2d 304, refused no reversible error—*Paris & G N R Co v Stafford*, Civ.App., 36 S.W.2d 331, reversed on other grounds, Com App. 53 S.W.2d 1019.

75. US.—*New York Cent R. Co v Ambrose*, N.J., 50 S.Ct. 198, 280 US 486, 74 L.Ed. 563—*Delaware, L. & W. R. Co v Koske*, N.J., 49 S.Ct. 202, 279 US 7, 73 L.Ed. 578 —*Wolfe v Henwood*, CCA Ark., 162 F.2d 998—*Chicago, St. P. M. & O R Co v. Arnold*, CCA Minn., 160 F.2d 1002—*Fantini v. Reading Co.*, CCA N.J., 147 F.2d 548, certiorari denied 65 S.Ct. 1185, 325 U. S. 856, 89 L.Ed. 1976—*Mastrandrea v Pennsylvania R. Co.*, CCA Pa., 132 F.2d 318—*Deere v Southern Pac. Co.*, CCA Or., 123 F.2d 438, certiorari denied 63 S.Ct. 916, 315 US 819, 86 L.Ed. 1217—*Detroit, G. H. & M Ry. Co v. Maldonado*, CCA Mich., 59 F.2d 911—*Raudenbush v. Baltimore & O. R. R.*, D.C. Pa., 63 F.Supp. 329

Ala.—*Atlantic Coast Line R. Co v Wetherington*, 16 So.2d 720, 245 Ala. 213.

Ark.—*Missouri Pac R. Co v. Montgomery*, 55 S.W.2d 68, 186 Ark. 537,

connection between defendant's negligence and the injury.⁷⁶ Where the accident may have resulted from one of two or more possible causes, for one of which, and not the other, defendant is liable, plaintiff must show that the cause for which defendant is liable produced the result.⁷⁷ Plaintiff also has the burden of proving the manner and the proximate physical cause of the injury,⁷⁸ although, apart from the necessity of showing defendant's negligence, he is not required to prove the precise ultimate cause thereof.⁷⁹ If, under the doctrine of *res ipsa loquitur*, the evidence establishes *prima facie* that the injury was caused by defendant's negligence, the burden rests on defendant to show that some other agency was the proximate cause of the injury.⁸⁰

In an action under the Boiler Inspection Act the

burden is on plaintiff to prove that defendant's wrongful act or omission was the proximate cause of the injury.⁸¹

(5) Condition of Equipment or Place of Work

Generally the plaintiff has the burden of proving the defective or dangerous condition of equipment or place of work alleged to have caused the injury, that the defendant was negligent in causing or permitting such condition to exist, and that such negligence was the proximate cause of the injury; and in an action predicated on a violation of the Federal Safety Appliance Act the plaintiff must prove the violation.

Where the action is to recover for an injury or death caused by reason of a defective machine or appliance, or an unsafe place of work, the burden is on plaintiff to prove that such defect or danger existed.⁸² He must further prove defendant's neg-

certiorari denied 53 S.Ct. 690, 289 U.S. 747, 77 L.Ed. 1493—Mosley v. Raines, 37 S.W.2d 78, 183 Ark. 569—St. Louis-San Francisco Ry. Co. v. Smith, 19 S.W.2d 1102, 179 Ark. 1015

Ga.—Southern Ry. Co. v. Bradshaw, 37 S.E.2d 150, 73 Ga.App. 432—Louisville & N. R. Co. v. Rudder, 147 S.E. 795, 39 Ga.App. 513

Ill.—Avance v. Thompson, 55 N.E.2d 57, 387 Ill. 77, certiorari denied 65 S.Ct. 82, 323 U.S. 753, 89 L.Ed. 603

—Robertson v. Louisville & N. R. Co., 63 N.E.2d 608, 327 Ill.App. 44.

Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924

La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108—Burmester v. Texas & P. M. P. Terminal R. of New Orleans, 6 La.App. 778

Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369

Miss.—New Orleans Great Northern R. Co. v. Branton, 146 So. 870, 187 Miss. 52, certiorari denied 54 S.Ct. 88, 290 U.S. 667, 78 L.Ed. 577

Mo.—Carnahan v. Missouri-Kansas-Texas R. Co., 88 S.W.2d 1027, 338 Mo. 23, certiorari denied 56 S.Ct. 748, 298 U.S. 664, 80 L.Ed. 1388—Carpenter v. Wabash Ry. Co., 71 S.W.2d 1071, 335 Mo. 130—Martin v. Wabash Ry. Co., 30 S.W.2d 735—Brainard v. Missouri Pac. R. Co., 5 S.W.2d 15, 319 Mo. 890—Sweany v. Wabash Ry. Co., 80 S.W.2d 216, 229 Mo.App. 393—Creighton v. Missouri Pac. R. Co., 66 S.W.2d 980, 229 Mo.App. 825, certiorari denied Missouri Pac. R. Co. v. Creighton, 55 S.Ct. 70, 293 U.S. 558, 79 L.Ed. 659.

N.J.—Cowdrick v. Pennsylvania R. Co., 39 A.2d 98, 132 N.J.Law 131, certiorari denied 65 S.Ct. 555, 323 U.S. 799, 89 L.Ed. 637.

N.Y.—Sadowaki v. Long Island R.

Co., 55 N.E.2d 497, 392 N.Y. 448—Henry v. Norton, 66 N.Y.S.2d 317. N.C.—McGraw v. Southern Ry. Co., 175 S.E. 286, 206 N.C. 878

N.D.—Cunningham v. Great Northern Ry. Co., 14 N.W.2d 753, 73 N.D. 315

Okl.—Wright v. Atchison, T. & S. F. Ry. Co., 38 P.2d 517, 170 Okl. 48

Pa.—Dawson v. Reading Co., 142 A. 295, 293 Pa. 301, certiorari denied 49 S.Ct. 28, 278 U.S. 628, 73 L.Ed. 547.

Tex.—Texas & N. O. R. Co. v. Warden, 78 S.W.2d 164, 125 Tex. 193

—Tye v. Henwood, Civ.App., 153 S.W.2d 184, error refused.

Wis.—Rupert v. Chicago, M., St. P. & P. R. Co., 232 N.W. 550, 202 Wis. 563, certiorari denied 51 S.Ct. 488, 283 U.S. 840, 75 L.Ed. 1451
39 C.J. p. 994 note 39

Although contributory negligence is no defense under the statute, but operates only to reduce damages, plaintiff is nevertheless bound to prove defendant's negligence as the proximate cause of the injury

Conn.—Onofrio v. Palmer, 43 A.2d 454, 132 Conn. 257

Ga.—Louisville & N. R. Co. v. Kemp, 79 S.E. 558, 140 Ga. 657.

Ill.—Huff v. Illinois Cent. R. Co., 199 N.E. 116, 362 Ill. 95

Mo.—Godsey v. Thompson, 179 S.W.2d 44, 352 Mo. 681, certiorari denied 65 S.Ct. 48, 233 U.S. 719, 89 L.Ed. 578

76. U.S.—Atchison, T. & S. F. Ry. Co. v. Saxon, Tex., 52 S.Ct. 229, 284 U.S. 458, 76 L.Ed. 297.

Mo.—Carnahan v. Missouri-Kansas-Texas R. Co., 88 S.W.2d 1027, 338 Mo. 23, certiorari denied 56 S.Ct. 748, 298 U.S. 664, 80 L.Ed. 1388

Neb.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18, reversed on other grounds 67 S.Ct. 598, 329 U.S. 649, 91 L.Ed. 572.

N.Y.—Healy v. Erie R. Co., 180 N.E.

888, 259 N.Y. 40, certiorari denied Erie R. Co. v. Healy, 53 S.Ct. 81, 287 U.S. 628, 77 L.Ed. 545

77. Ala.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313

78. Cal.—Prichard v. Southern Pac. Co., 51 P.2d 428, 9 Cal.App.2d 701

Iowa.—McClary v. Great Northern Ry. Co., 227 N.W. 646, 209 Iowa 67.

Ky.—Hobson v. Turner, 185 S.W.2d 550, 299 Ky. 342.

79. Pa.—Carmont v. Erie R. Co., 114 A. 521, 271 Pa. 122.

39 C.J. p. 994 note 53

80. Mo.—Whitaker v. Pitcairn, 174 S.W.2d 163, 351 Mo. 848.

Cause of coal falling

In action against railroad company under act for injuries to night watchman on damaged bridge when struck by piece of coal falling from tender of freight train engine, burden was not on plaintiff to explain with minute detail particular motion or jolt of train which caused such piece to fall—Missouri Pac. R. Co. v. Wiley, 140 S.W.2d 676, 200 Ark. 574, dissenting opinion, 142 S.W.2d 944, 200 Ark. 574, certiorari denied Thompson v. Wiley, 61 S.Ct. 66, 311 U.S. 684, 85 L.Ed. 442, rehearing denied 61 S.Ct. 170, 311 U.S. 728, 85 L.Ed. 474

81. Mo.—Arnold v. Alton R. Co., 124 S.W.2d 1092, 343 Mo. 1049

Failure to obey law

Railroad's liability for injury to engineer in explosion of locomotive boiler required proof that failure to obey law was proximate cause of injury—Chesapeake & O. Ry. Co. v. Wells, C.C.A. Ohio, 49 F.2d 251, certiorari denied Wells v. Chesapeake & O. Ry. Co., 52 S.Ct. 22, 284 U.S. 641, 76 L.Ed. 545

82. U.S.—Southern R. Co. v. Stewart, C.C.A. Mo., 115 F.2d 317, modi-

ligence in so furnishing, or permitting or requiring the use of, a defective or unsafe tool or appliance⁸³ or machine,⁸⁴ or in failing to keep a tool or appliance in a reasonably safe condition,⁸⁵ or in providing plaintiff with a dangerous place to work or failing to provide him with a reasonably safe one⁸⁶ It has been held that if an injury is shown to have resulted from an unsafe place a prima facie case of negligence is made out against the master,⁸⁷ requir-

ing the master to exculpate himself;⁸⁸ but proof of the mere happening of the accident and the resulting injury does not establish a breach of the master's duty to provide reasonably safe appliances or place of work⁸⁹

It has generally been held that plaintiff has the burden of proving actual or constructive knowledge of the master of a defect in a tool, appliance, or machine by which the servant was injured,⁹⁰ or that

fled on other grounds 119 F 2d 85, reversed on other grounds Stewart v Southern Ry Co, 62 S Ct 616, 315 US 283, 86 L Ed 849
Ark—Pekin Wood Products Co v Burkhardt, 96 SW 2d 776, 192 Ark 1025—Rice & Holman v Henderson, 35 SW 2d 1016, 183 Ark. 355
La—Fontenot v Raftery, App, 14 So 2d 77.
Miss—Dr Pepper Bottling Co v Gordy, 164 So 236, 174 Miss 392
—Gulfport Creosoting Co v White, 157 So 86, 171 Miss 127
Mo—Emrick v City of Springfield, App., 110 SW 2d 840
Ohio—Corpus Juris cited in Hilleary v Bromley, App, 61 NE 2d 731, 738, reversed on other grounds 64 NE 2d 832, 146 Ohio St 212
Va—Stevens v Mirakian, 12 SE 2d 780, 177 Va. 123
39 C.J. p 995 note 59 [a], p 996 note 62 [a].

Particulars of defect

In order to support the burden of proving the nature of the defect, plaintiff must show the particulars in point of fact which rendered the instrumentality defective—J W Sanders Cotton Mill v Moody, 195 So 688, 189 Miss 284

Defect in independent unit

When the defect allegedly causing the injury to an employee is an independent unit in a machine and when the injurious unit acted independently of other units of the machine and of all other machines thereabout, the defect must be proved to have existed in that unit, and not that there were defects in other units either of the same machine or in other machines, although of like kind—J. W Sanders Cotton Mill v Moody, supra

Change of condition

In a suit for the wrongful death of a street car company employee while repairing a trolley wire leading from the roof of a street car, plaintiff was not required to show whether anything had happened which was likely to change the condition of the roof between the time it was repaired by the employee and the time of the accident, since the conditions to which the car was exposed in the interval were in the exclusive knowledge of defendant—

Faubion v Kansas City Public Service Co, Mo App., 22 SW 2d 897
83. US—Southern R Co v Stewart, CCA Mo, 115 F 2d 317, modified on other grounds 119 F 2d 85, reversed on other grounds Stewart v Southern Ry. Co, 62 S Ct 616, 315 US 283, 86 L Ed 849
Ark—Pekin Wood Products Co v Burkhardt, 96 SW 2d 776, 192 Ark 1025—Chapman v. Henderson, 67 SW 2d 570, 188 Ark 714
Mass—Mucha v Northeastern Crushed Stone Co., 30 NE 2d 870, 307 Mass 592
Miss—Masonite Corp v Scruggs, 28 So 2d 262.
Mo—Emrick v City of Springfield, App, 110 SW 2d 840—Tashman v Republic Metal & Rubber Co., App, 285 SW. 109
Okl—McCracken v Franco-Dominion Development Corporation, 117 P 2d 135, 189 Okl 354
Pa—Hartz v Schafer, 154 A. 713, 303 Pa 449
Tenn—Louisville & N R Co v Jackson, 3 Tenn App 463
39 C.J. p 995 note 59, 60.
84. Pa—Hartz v Schafer, 154 A. 713, 303 Pa. 449
39 C.J. p 995 note 61.
85. Mont—Masich v. American Smelting & Refining Co, 118 P. 764, 44 Mont. 36
Tenn—Louisville & N R Co. v. Jackson, 3 Tenn App 463
86. US—Mescall v W T Grant Co, CCA Ind, 133 F 2d 209, certiorari denied 63 S Ct 1176, 319 US. 759, 87 L Ed 1711, rehearing denied 63 S Ct 1445, 320 US. 214, 87 L Ed 1851.
Ark—Basye v. Odom, 168 SW 2d 1093, 205 Ark 423—Tucker Duck & Rubber Co v Harvey, 154 SW 2d 828, 202 Ark 1033—Chapman v Henderson, 67 SW 2d 570, 188 Ark 714
Ky—Burk Hollow Coal Co v McCulley's Adm'r, 161 SW 2d 632, 290 Ky 435
La—Fontenot v. Raftery, App, 14 So 2d 77
Mass—Deignan v Lubarsky, 63 NE 2d 576, 318 Mass 661
Mo—Tashman v Republic Metal & Rubber Co., App, 285 SW 109
NY—Johnson v Johnson, 292 NY S 921, 249 App Div 859
Ohio—Shoemaker v Electric Auto-

Lite Co, 41 NE 2d 433, 69 Ohio App 169

Va—Lough v Lyon, Inc, 190 SE 290, 168 Va 136
39 C.J. p 996 note 63

Sufficiency of precautions

(1) In action against employer for death of employee caused by explosion of dynamite, plaintiff was required only to present the pertinent facts and place the situation before the jury, not to prove what constituted reasonable means to locate unexploded charges and to warn employee—L E Whitman Const Co v Remer, CCA Okl, 105 F 2d 371.

(2) On the other hand, it has been held, in a common-law action by employee against employer for injuries to lungs caused by chromic acid fumes sustained as result of employer's alleged negligence in not maintaining a safe place to work that in absence of evidence indicating the usual safeguards of the industry employee could not recover—Shoemaker v Electric Auto-Lite Co, 41 NE 2d 433, 69 Ohio App 169

Defective material

In carpenter's common-law action against employer for negligence resulting in carpenter being injured when defective plank in floor of staging on which carpenter was working broke, where employer had furnished material with which staging was constructed by carpenter, carpenter had burden of showing a breach of duty on employer's part with respect to furnishing a sufficient and suitable supply of planks for erection of staging—Ireland v E J Pinney, Inc, 13 A 2d 750, 91 NH 323

87. SC—Bunch v. American Cigar Co., 119 SE 828, 126 SC 324
39 C.J. p 996 note 64

88. SC—Davis v. Atlantic Coast Line R Co., 147 SE 834, 150 SC 130, reversed on other grounds Atlantic Coast Line R Co v. Davis, 49 S Ct 210, 279 US 34, 73 L Ed 601.

89. Mich—Muchler v. Johnson, 273 N.W. 794, 280 Mich 527.

90. US—Southern R Co. v. Stewart, CCA Mo, 115 F 2d 317, modified on other grounds 119 F 2d 85, reversed on other grounds Stewart

it was not carefully prepared and manufactured,⁹¹ or that the place of work was unsafe,⁹² but in at least one jurisdiction it has been held that the burden is on defendant to show that he did not know, and could not have known by the exercise of due diligence, that the instrumentality was defective.⁹³ Where the employer seeks to avoid liability on the ground that the employee had accepted a delegation of the duty to construct a safety appliance, the employer has the burden of showing such delegation,⁹⁴ he must show that negotiations with respect to such delegation had passed the permissive stage and that the employee had actually contracted to construct such appliance.⁹⁵ On the other hand, it has been held that the burden is on the servant, suing for injuries caused by his defective construction of temporary appliances for particular work, to adduce

evidence from which the master's obligation to furnish such instrumentality in a completed state is reasonably inferable.⁹⁶

Plaintiff also has the burden of proving that such negligence on defendant's part was the proximate cause of the injury alleged, whether arising from defects in appliances,⁹⁷ or machinery,⁹⁸ or the place of work.⁹⁹

Under Federal Employers' Liability Act and related statutes. In an action under the Federal Employers' Liability Act to recover for injuries on the theory that the place of work was unsafe, the burden is on plaintiff to show that the place of work was unsafe as a result of the negligent failure of defendant to do its duty with respect thereto¹ and that such negligence was in whole or in part the

v Southern Ry. Co., 62 S Ct 616, 315 US 283, 86 L Ed 849

Ark—Pekin Wood Products Co v Burkhardt, 96 S W 2d 776, 192 Ark 1025—Rice & Holman v Henderson, 35 S W 2d 1016, 183 Ark 355—International Harvester Co of America v Hawkins, 24 S W 2d 340, 180 Ark 1056

Iowa—Degner v. Anderson, 239 N W 790, 213 Iowa 588

La—Fontenot v Raftery, App., 14 So 2d 77.

Miss—Gulfport Creosoting Co v White, 157 So 86, 171 Miss 127

Ohio—Corpus Juris cited in Hilleary v Bromley, App., 61 NE 2d 731, 736, reversed on other grounds 64 NE 2d 832, 146 Ohio St. 212

Va—Stevens v Mirakian, 12 SE 2d 780, 177 Va 123

30 C J p 995 notes 56, 60 [a].

Ability to ascertain

Where plaintiff does not claim that defendant had actual knowledge of the defect, he must prove that the defect could have been ascertained by defendant by a reasonably careful inspection

US—Chicago, M, St P & P R Co v Gilbert, CCA Mont., 87 F 2d 282

Md—McVey v Gerrald, 192 A. 789, 172 Md 595

Miss—J W Sanders Cotton Mill v Moody, 195 So 683, 189 Miss 284—Dr Pepper Bottling Co v Gordy, 164 So 236, 174 Miss 392

Mo—Schneider v Pevely Dairy Co., 40 S W 2d 647, 328 Mo 301

91. NH—Sanborn v Boston & M R Co., 86 A 157, 76 NH 523

39 C J p 995 note 57

92. Ark—International Harvester Co of America, v Hawkins, 24 S W 2d 340, 180 Ark. 1056.

39 C J p 996 note 63 [b]

Where defendant violated statute

Employer was bound to know of statutory duty to provide exhaust

fans to carry off dust from dust-creating machinery, and that failure to perform such duty would constitute negligence per se for which it was bound to respond in damages if employee was injured thereby, hence employer could not urge a failure of proof that it had knowledge that employee was being exposed to silicosis in course of his employment, and that without such knowledge there could be no negligence in so exposing employee—Dalton Foundries v Jefferies, 51 NE 2d 13, 114 Ind App 271, followed in Dalton Foundries v Dean, 51 NE 2d 397, 114 Ind App 289

93. SC—Leslie v Southern Paving Const Co., 169 SE 139, 169 SC 414

39 C J p 995 note 61 [e] (2)

Proof of injury by reason of failure of machinery or appliance as not raising presumption of negligence see supra subdivision a (3) (b) of this section

94. US—Kunschman v. U. S., CC A NY, 54 F 2d 987

Miss—E L Bruce Co v Brogan, 166 So 350, 175 Miss 208

95. Miss—E L Bruce Co v. Brogan, supra.

96. NH—McIntyre v McIntyre, 171 A 329, 86 NH 479

97. Miss—Dr Pepper Bottling Co. v Gordy, 164 So 336, 174 Miss 392

Mo—Fischer v. City of Cape Girardeau, 131 S W 2d 521, 345 Mo 122

NY—Schein v Feder, 278 NYS 653, 154 Misc 830

39 C J p 997 note 66

Burden of proving negligence as proximate cause generally see supra subdivision b (4) of this section

98. US—Carnegie Steel Co. v. Byers, Ohio, 149 F. 667, 82 CCA 115, 8 L R A. N S., 677.

Ala—Caldwell-Watson Fdy & Machine Co v Watson, 62 So 859, 183 Ala 326—Louisville & N R Co v Lowe, 48 So 99, 158 Ala 391.

Iowa—Degner v Anderson, 239 N. W 790, 213 Iowa 588

Miss—J W Sanders Cotton Mill v. Moody, 195 So 683, 189 Miss 284

W Va—Vance v Virginia Pocahontas Coal Co., 82 SE 1081, 74 W. Va. 728

99. US—Mescall v W T Grant Co., CCA Ind., 133 F 2d 209, certiorari denied 63 S Ct 1176, 319 U. S 759, 87 L Ed 1711, rehearing denied 63 S Ct. 1445, 320 US 214, 87 L Ed 1851—Galeota v U S Gypsum Co., CCA NY, 123 F 2d 947, certiorari denied U S Gypsum Co v Galeota, 62 S Ct 798, 315 U. S. 813, 86 L Ed 1211

Ark—Tucker Duck & Rubber Co v. Harvey, 154 S W 2d 828, 202 Ark. 1033—Chapman v Henderson, 87 S W 2d 570, 188 Ark 714

Ky—Burk Hollow Coal Co v McCulley's Adm'r, 161 S W 2d 622, 290 Ky 435—Gunn Coal Mining Co v Wilson, 125 S W 2d 774, 277 Ky 3

Mo—Grindstaff v J Goldberg & Sons Structural Steel Co., 40 S W. 2d 702, 328 Mo 72

Ohio—Corpus Juris cited in Hilleary v Bromley, App., 61 NE 2d 731, 736, reversed on other grounds 64 NE 2d 832, 146 Ohio St 212.

39 C J p 997 note 68

1. US—Delaware, L. & W. R. Co. v. Koske, N J., 49 S Ct 203, 279 U. S 7, 73 L Ed 578—Edwards v. Baltimore & O R Co., CCA Ill., 131 F 2d 366

Miss—New Orleans & N E R Co. v. Fenton, 100 So 521, 135 Miss. 571

Notice of condition

(1) It has been held that, where an otherwise safe place to work has been rendered dangerous to railroad

proximate cause of the injury.³ Likewise, where it is claimed that the injury resulted from a defective tool or appliance, the burden is on plaintiff to prove that such defect existed,³ that defendant was negligent in furnishing him with, or permitting the use of, such unsafe equipment,⁴ that plaintiff used the equipment in the manner intended,⁵ and that the defect was the proximate cause of the injury.⁶ In an action for injury to plaintiff caused by a defective car, the burden of proof that the car was a foreign car was on defendant.⁷ Where plaintiff's right to recover is based on alleged failure of defendant to comply with the Federal Ash Pan Act he has the burden of proof of such failure.⁸

In a suit to recover for an injury caused by a violation of the Federal Safety Appliance Act, plaintiff

has the burden of proving the violation,⁹ as by showing that the coupler¹⁰ or other appliance¹¹ in question failed to comply with the statutory requirements, and that its failure to operate was not due to plaintiff's fault.¹² However, although there is authority to the contrary,¹³ it has been held that, having proved the violation of the statute, plaintiff is not required to prove defendant's negligence¹⁴ or that the appliance or equipment was in other respects out of order or defective.¹⁵ It has been held that mere proof of the opening of an automatic coupler whereby plaintiff was injured is sufficient to permit the inference that defendant was negligent in failing to provide a coupler complying with the statutory requirements, and casts the burden on defendant to rebut such inference.¹⁶

employee by an object falling on track, or a hole or depression existing along tracks, employee must prove actual or constructive notice of condition to employer before employee can recover damages for injury sustained through existence of such condition—*Matthews v Southern Pac Co*, 59 P.2d 220, 15 Cal App. 2d 36.

(2) So too it has been held that in an action by a switching crew foreman against a carrier operating a railroad yard for injuries sustained when foreman allegedly stepped on a stick and fell while boarding a moving train during switching operation, the foreman must prove that the alleged condition of the yard had existed for a sufficient period of time to charge the carrier with constructive notice thereof or that the system of inspection throughout the yard was insufficient—*Waller v Northern Pac. Terminal Co of Or*, Or., 166 P.2d 488, certiorari denied 67 S.Ct. 45, 329 U.S. 742, 91 L.Ed. 640, reh'g denied 67 S.Ct. 181, 329 U.S. 825, 91 L.Ed. 701.

(3) However, where the place of work was made dangerous by a concealed instrumentality, plaintiff's knowledge thereof was a matter of defense and no part of his cause of action—*McDowell v Southern R Co*, 102 S.W. 639, 113 S.C. 399.

2. US—*Edwards v. Baltimore & O R. Co*, CCA Ill., 131 F.2d 366

3. US—*Myers v Reading Co*, CCA Pa., 155 F.2d 533, reversed on other grounds 67 S.Ct. 1334, 331 U.S. 477, 91 L.Ed. 1615

Ala.—*Alabama Great Southern R Co v. Davis*, 18 So.2d 737, 246 Ala. 64, certiorari denied 65 S.Ct. 676, 324 U.S. 846, 89 L.Ed. 1407

Ill.—*Huff v Illinois Cent R Co*, 199 N.E. 116, 362 Ill. 95—*Robertson v Louisville & N. R. Co*, 63 N.E.2d 608, 327 Ill. App. 44.

Tex.—*Chicago, R I & G Ry Co v Hammond*, Civ App., 286 S.W. 433 39 C.J. p. 997 note 84.

4. US—*Eker v. Pettibone, CCA Ind*, 110 F.2d 451

Ill.—*Huff v Illinois Cent. R Co*, 199 N.E. 116, 362 Ill. 95

Va.—*Chesapeake & O Ry Co. v Butler*, 177 S.E. 195, 163 Va. 626.

Knowledge

In a suit predicated on defendant's negligence with respect to tools, appliances, or equipment, plaintiff must show that defendant had actual or constructive knowledge of the defect in question

US—*Schilling v Delaware & H. R Corporation*, CCA N.Y., 114 F.2d 69

Ill.—*Lilly v Grand Trunk Western R Co*, 37 N.E.2d 838, 312 Ill. App. 73, reversed on other grounds 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411. 39 C.J. p. 997 note 84

A state statute creating a prima facie presumption of negligence of defendant in such a case has no application

Ark.—*St Louis, L M & S R Co. v Ingram*, 187 S.W. 452, 124 Ark. 298. N.Y.—*Kent v. Erie R. Co*, 126 N.E. 646, 228 N.Y. 94

5. Ill.—*Robertson v. Louisville & N. R. Co*, 63 N.E.2d 608, 327 Ill. App. 44

6. Ill.—*Huff v Illinois Cent R Co*, 199 N.E. 116, 362 Ill. 95—*Robertson v Louisville & N. R. Co*, 63 N.E.2d 608, 327 Ill. App. 44

7. Tex.—*Colorado & S R. Co. v Rowe*, Com App., 338 S.W. 908

8. Tex.—*Et Worth & D C. R. Co v. Smithers*, Civ App., 249 S.W. 286.

9. Me.—*Thomas v. Maine Cent R Co*, 144 A. 213, 127 Me. 466, certiorari denied 49 S.Ct. 254, 279 U.S. 835, 73 L.Ed. 933.

10. US.—*Southern Ry Co v Stewart*, CCA Mo., 119 F.2d 85, reversed on other grounds *Stewart v*

Southern Ry. Co, 62 S.Ct. 616, 315 U.S. 233, 86 L.Ed. 349

Mo.—*Kimberling v Wabash Ry Co*, 85 S.W.2d 736, 337 Mo. 703 39 C.J. p. 997 note 83.

After showing of original compliance

In action against railroad for death of brakeman whose death was alleged to have been caused by failure of couplers on freight cars to couple automatically on impact in violation of Federal Safety Appliance Act, wherein evidence showed that railroad had equipped cars with type of couplers required by Federal Safety Appliance Act, burden to prove that couplers were defective at time of accident was on plaintiff—*Western & Atlantic R R v Gentle*, 198 S.E. 257, 53 Ga.App. 282, certiorari denied *Gentle v Western & A R R*, 59 S.Ct. 252, 305 U.S. 654, 83 L.Ed. 424.

11. Ill.—*Carter v. Peoria & P. U. Ry Co*, 3 N.E.2d 955, 286 Ill. App. 532

12. Mo.—*Kimberling v Wabash Ry Co*, 85 S.W.2d 736, 337 Mo. 702.

13. Wis.—*Rupert v Chicago, M., St P & P R Co*, 232 N.W. 530, 202 Wis. 563, certiorari denied 51 S.Ct. 488, 283 U.S. 340, 75 L.Ed. 1451

14. US—*San Antonio & P R Co v. Wagner*, Tex., 36 S.Ct. 636, 241 U.S. 476, 60 L.Ed. 1110

Ill.—*Stott v Thompson*, 14 N.E.2d 246, 294 Ill. App. 450, certiorari denied *Thompson v Stott*, 59 S.Ct. 106, 305 U.S. 639, 83 L.Ed. 411.

N.H.—*Grew v Boston & M. R. R*, 142 A. 707, 83 N.H. 383.

15. US—*Terminal R. Ass'n of St Louis v Kimbrel*, CCA Mo., 105 F.2d 262

16. US—*Minneapolis & St. L. R Co v Gotschall*, Minn., 37 S.Ct. 598, 344 U.S. 66, 87, 61 L.Ed. 995 39 C.J. p. 997 note 82.

Partial coupling

In action against railway company

In an action under the Federal Automatic Coupler Act of 1893, now part of the Federal Safety Appliance Act, 45 U.S.C.A. §§ 1-7, defendant has the burden of proving that it is within the exception in favor of four-wheeled cars which is made by a proviso in the act,¹⁷ and failure of defendant to provide grab irons or hand holds as required by the act is *prima facie* negligence.¹⁸ Plaintiff, however, has the burden of proving that at the time of the accident he was engaged in moving cars then used in interstate traffic¹⁹ and that they were not equipped with automatic couplers as required by the statute.²⁰

In an action under the Federal Boiler Inspection Act for damages because of failure to keep a locomotive and appurtenances thereof in proper condition as required by the statute, the burden of proof rests on plaintiff to prove a violation of the statute²¹ and that such violation was the proximate cause of the injury.²² Having shown a violation of the statute, defendant is not required to prove defendant's negligence,²³ but it has also been held that, when a railroad company turns over to the engineer a locomotive in proper condition, plaintiff has the burden of showing that a defect developing in the course of its run was caused by the railroad company's negligence.²⁴

for death of brakeman as result of uncoupling of first car in moving freight train from engine tender, the burden was not on defendant to establish partial coupling which enabled train to run for considerable distance without separating—*Vigor v Chesapeake & O R. Co.*, CCA Ind., 101 F.2d 865, certiorari denied *Chesapeake & O R. Co. v. Vigor*, 59 S.Ct. 1031, 307 U.S. 635, 83 L.Ed. 1617.

17. U.S.—*Schlemmer v. Buffalo, R. & P. R. Co.*, Pa., 27 S.Ct. 407, 205 U.S. 1, 51 L.Ed. 681.

18. Ill.—*Malott v. Hood*, 99 Ill.App. 360, affirmed 66 N.E. 247, 201 Ill. 202.

19. Del.—*Winkler v. Philadelphia & R. R. Co.*, 53 A. 90, 20 Del. 80.

20. Del.—*Winkler v. Philadelphia & R. R. Co.*, *supra*.

21. Mo.—*Arnold v. Alton R. Co.*, 124 S.W.2d 1092, 343 Mo. 1049—*Fryer v. St. Louis-San Francisco Ry. Co.*, 63 S.W.2d 47, 333 Mo. 740.

N.Y.—*Luce v. New York, C. & St. L. R. Co.*, 205 N.Y.S. 273, 209 App.Div. 728.

Va.—*Crosswhite v. Southern Ry. Co.*, 33 S.E.2d 777, 181 Va. 40.

Violation of general standard of safety.

In action for death of brakeman under Federal Boiler Inspection Act,

plaintiff was not required to prove violation of specific order or rule of Interstate Commerce Commission respecting safety appliances, or that some appliance in use was defective or insecure, but might show violation of standard of safety required by act, although orders and rules prescribed by Interstate Commerce Commission when applicable are paramount—*Satterlee v. St. Louis-San Francisco Ry. Co.*, 82 S.W.2d 69, 336 Mo. 943.

22. Mo.—*Arnold v. Alton R. Co.*, 124 S.W.2d 1092, 343 Mo. 1049.

Okl.—*Pryor v. Chicago, R. I. & P. Ry. Co.*, 39 P.2d 563, 170 Okl. 158.

S.D.—*Nauman v. Payne*, 189 N.W. 112, 45 S.D. 484.

23. Mo.—*Arnold v. Alton R. Co.*, 124 S.W.2d 1092, 343 Mo. 1049—*Fryer v. St. Louis-San Francisco Ry. Co.*, 63 S.W.2d 47, 333 Mo. 740.

24. Va.—*Virginian R. Co. v. Andrews*, 87 S.E. 577, 118 Va. 482.

25. N.H.—*Jutras v. Amoskeng Mfg. Co.*, 147 A. 753, 84 N.H. 171—*Hook v. Consolidation Coal Co.*, 129 A. 490, 82 N.H. 75.

Communication of instructions

Where the master had furnished printed and written instructions for the guidance of plaintiff's fellow servants, by whose negligence he was injured, plaintiff had the burden of showing that the instructions had

(6) Methods of Work, Rules, and Orders

The plaintiff has the burden of proving his contention that the defendant was derelict in its duty to provide and enforce proper rules and instructions for the conduct of its work, or that the injured servant had a lawful reason for disobeying the orders of his superior; but the defendant must prove its defense that the injury was caused by the servant's violation of a company rule, and this is also true in an action under the Federal Employers' Liability Act.

Plaintiff has the burden of proving his contention that defendant was derelict in its duty to provide requisite rules and instructions for the conduct of its work²⁵ or to enforce rules adopted for the safety of employees.²⁶ So too he has the burden of proving his contention that the method of work prescribed by defendant was not reasonably safe²⁷ and that his injury was the result of a method which exposed him to an extraordinary risk.²⁸ Where the evidence shows that plaintiff was injured because of the negligent manner in which a particular operation was performed, he need not show that the manner in which it was done was different from the customary manner, since if the customary manner was negligent its observance would not excuse defendant.²⁹ A servant suing for injuries arising from an alleged negligent order by an authorized agent of the master has the burden of proving a duty and the breach thereof by such

not been communicated to them—*Kennedy v. Wanamaker*, 129 N.Y.S. 1053, 145 App.Div. 423, affirmed 101 N.E. 1107, 207 N.Y. 724.

26. Ark.—*Arkansas Mining Co. v. Eaton*, 288 S.W. 399, 172 Ark. 323.

27. U.S.—*Pulaski Min. Co. v. Hagan*, Va., 196 F. 724, 116 C.C.A. 852.

Ark.—*Arkansas Mining Co. v. Eaton*, 288 S.W. 399, 172 Ark. 323.

Me.—*Millett v. Maine Cent. R. Co.*, 146 A. 903, 128 Me. 314.

Tex.—*Chisos Mining Co. v. Hernandez*, Civ. App., 96 S.W.2d 292, error dismissed.

Inadequacy of force

In action by foreman for injuries due to employer's alleged failure to supply sufficient workmen to do work in safety, burden was on foreman to prove inadequacy of force to do work with such plans and precautions as were open to foreman—*Seymour v. Holman*, 158 So. 525, 229 Ala. 634.

28. Pa.—*Miller v. Republic Chemical Co.*, 97 A. 73, 251 Pa. 593.

Failure to furnish helper

Burden was on employee to show that employer's failure to furnish helper caused or contributed to injury—*Missouri Pac. R. Co. v. Hornor*, 15 S.W.2d 994, 179 Ark. 321.

29. Ark.—*Humphries v. Kendall*, 111 S.W.2d 492, 195 Ark. 45.

agent.³⁰ Where plaintiff was injured by reason of defendant's violation of its alleged custom, the burden was on defendant to prove that for some legal and satisfactory reason the custom was not in force at the time of the accident.³¹

A servant who disobeys the orders of his superior takes on himself the burden of showing a lawful reason for such disobedience.³² So, where the evidence shows injury to plaintiff to have occurred through his violation of an established rule of the master, the burden is on plaintiff to show that he had no actual knowledge of the rule and that its existence had been so concealed or ineffectively published that he could not by the exercise of ordinary care on his part have acquired such knowledge.³³ Likewise, where a servant injured by reason of his disobedience of a rule promulgated by defendant contends that the rule had been so habitually disregarded with defendant's acquiescence as to amount to its suspension, he has the burden of proving that contention.³⁴ Nevertheless, if defendant relies for defense on plaintiff's violation of a rule, it has the burden of proving such rule,³⁵ and, where the rule is expressly subject to exception under stated circumstances, defendant has the burden of proving that such exception did not apply to plaintiff's case.³⁶

In an action under the Federal Employers' Liability Act, defendant has the burden of proof with respect to the defense that the injury to the employee was caused by his violation of a company rule³⁷ and that plaintiff's violation of the rule was the proximate cause of the injury.³⁸ Plaintiff, however, has the burden of proving that such rule was waived.³⁹ Where plaintiff depends for recovery on the violation of a custom or rule he must show such violation⁴⁰ and that he came within such custom or rule.⁴¹ In order to avoid the defense of assumption of risk, plaintiff must prove defendant's knowledge of the defect and promise to remedy it,⁴² or, if he contends that he was acting under his superior's direct orders, he must prove that such orders were given and that he was injured as a result of his efforts to carry them out substantially as given.⁴³ Where plaintiff relies on a local custom conflicting with a general rule of defendant, he must show that the alleged custom was actually known to all employees dealing with it.⁴⁴

(7) Incompetency or Negligence of Fellow Servants

Generally, where an action is predicated on the liability of the master for the negligence of another servant or employee, the plaintiff has the burden of proving such negligence and the scope of such servant's duty and authority; and, where it is claimed that the master was negligent in employing an incompetent serv-

30. Ala.—General Supply & Const Co v. Shelton, 47 So 593, 157 Ala. 635

Mo.—Herrick v City of Springfield, App., 110 SW 2d 840

Making repairs in rain

Railroad employee alleging negligence in being required to repair bridge in rain was required to show that work could have been performed at another time without endangering passengers on trains—Wichita Falls & S R Co v Burton, Tex Civ App., 35 SW 2d 476

Proof of authority

Under state Employers' Liability Act, burden of proof as to allegation that instruction, by reason of having obeyed which plaintiff was injured, was given by person delegated with master's authority in that behalf was on plaintiff—Seagle v Stith Coal Co., 79 So. 301, 202 Ala. 3

31. Ga.—Neary v. Georgia Public Serv Co., 107 SE 893, 27 Ga.App. 238

32. Or.—Adams v Corvallis & E R Co., 152 P. 504, 78 Or 117

33. Tex.—Texas & P R Co v Moore, 27 SW 962, 8 Tex Civ App 289

34. Va.—Norfolk & W R. Co v Cofer, 76 SE 909, 114 Va. 431—

Southern R Co v Johnson, 69 SE 323, 111 Va. 499, Ann Cas 1912A 81

35. US—Miller v Central R. Co of New Jersey, CCAN Y, 58 F2d 635, certiorari denied Central R. Co of New Jersey v. Miller, 53 S Ct 18, 227 US 617, 77 L Ed 536.

36. Cal.—Fogarty v Southern Pac Co., 91 P 650, 151 Cal 785

37. US—Halges v Central R Co of New Jersey, CCAN Y, 58 F2d 169, certiorari denied Central R. Co of New Jersey v Halges, 53 S. Ct 11, 227 US 607, 77 L Ed 528

Cal.—Myers v Southern Pac Co., 58 P 2d 387, 14 Cal App 2d 287, hearing denied 59 P 2d 1001, 14 Cal App 2d 287

Riding in cab

In an action under the act for injuries sustained by a railroad laborer while riding to his work in the cab of defendant's locomotive, it was held that if there was any rule or order of the company prohibiting plaintiff from riding there the burden was on defendant to prove it—Robert v Cleveland, C C & St L R Co., 203 Ill App 480, affirmed 117 NE 97, 279 Ill 493

38. US—Kierce v Central Vermont Ry, CCA Vt., 79 F2d 198, certiorari denied Central Vermont Ry

v. Kierce, 56 S Ct. 152, 296 US 629, 80 L Ed 447 and Central Vermont Ry v. Pearson, 56 S Ct 152, 296 US 629, 80 L Ed. 447.

39. Proof required

Railroad's waiver of employee's safety rule can be established only by showing habitual violations to knowledge of railroad, with no action to enforce observance—Hudson v. Norfolk & W. Ry Co., 146 SE 525, 108 W Va 437, certiorari denied 49 S Ct. 481, 279 US 366, 73 L Ed. 1004, rehearing denied 50 S Ct 79

40. Mo.—Shane v Lowden, 106 S. W 2d 956, 232 Mo App. 360

41. Ill.—Rogers v. New York, C & St L. R Co., 65 NE 2d 243, 328 Ill App 123.

42. Mo.—Lane v. St. Louis-San Francisco R Co., App., 10 SW 2d 963

Burden of proof as to assumption of risk generally see infra subdivision b (10) of this section

43. W Va.—Reynolds v. Virginian Ry Co., 180 SE 271, 116 W Va. 331

44. Pa.—Carlo v. Bessemer & L E R Co., 143 A 5, 293 Pa. 343, certiorari denied 49 S Ct. 25, 278 US 623, 73 L Ed 543.

ant, the plaintiff has the burden of proving such servant's incompetency and the defendant's negligence in employing him.

Where an action is predicated on the liability of the master for the negligence of another servant or employee, the burden is on plaintiff to show such servant's negligence⁴⁵ and to show the scope of his duties and authority⁴⁶. Where an action to recover for injuries caused by the wrongful act of an incompetent servant is based on the liability of the master for his own negligence in employing such a servant, plaintiff has the burden of proving the fact of incompetency⁴⁷ unless the fellow servant is an infant of tender years⁴⁸ or unless it appears that the employer failed to inquire into such fellow servant's fitness when his services were engaged,⁴⁹ and plaintiff must further prove that he did not know and in the exercise of ordinary care could not have known that the fellow servant was incompetent,⁵⁰ that the master was negligent in selecting such servant or in retaining him in the service after actual or constructive notice of his incompetency,⁵¹ and that the injury suffered by plaintiff was the proximate result of such incompetency.⁵²

Although there is considerable authority to the contrary,⁵³ it has frequently been held that the bur-

den of establishing the relation of fellow servants between the injured servant and the servant whose negligence caused the injury, so as to relieve defendant from liability, is on defendant⁵⁴. Where plaintiff shows prima facie that the injury was caused by the act of an employee who was not a fellow servant, the burden is on defendant to prove that the injury was caused by the negligence of a fellow servant⁵⁵. In a jurisdiction in which it is held that the fellow-servant rule will not be presumed to obtain in another state, as discussed supra subdivision a (1) of this section, plaintiff is not required to prove that the rule has been abrogated in such state by statute⁵⁶.

In an action under the Federal Employers' Liability Act to recover for an injury caused by the negligence of one alleged to be a servant of defendant, the burden is on plaintiff to prove that such person was a servant of defendant,⁵⁷ that he was negligent,⁵⁸ and that his acts were within the scope of his employment.⁵⁹ Where the negligence charged is that of the master in employing an incompetent servant whose act caused the injury, plaintiff has the burden of proving such incompetency⁶⁰ and that such incompetency was known to

45. Ark—Williams Bros v Witt, 43 SW 2d 237, 184 Ark 606

Ky—High Splint Coal Co v Baker, 57 SW 2d 60, 247 Ky 426

Mo—Elmrick v City of Springfield, App, 110 SW 2d 840

Statutory modification or abrogation of fellow-servant rule see supra §§ 334-355.

46. Ala—DeBerry v Goodyear Tire & Rubber Co of Alabama, 186 So 547, 237 Ala. 223

Okl—Massman Const Co v Chisholm, 145 P 2d 207, 193 Okl 473—Massman Const Co v Chisholm, 145 P 2d 211, 193 Okl. 477

47. Ga—Strickland v. Foughner, 12 SE 2d 371, 63 Ga.App 805

Ind—Noblesville Milling Co v Witham, 156 NE 522, 86 Ind App. 309

39 CJ p 998 note 95

48. Wis—Molaske v Ohio Coal Co, 56 NW 475, 86 Wis. 220

39 CJ p 998 note 96.

49. US—Gallagher v. California Brick Co, CCA Fla., 5 F 2d 461

50. Ga—Strickland v Foughner, 12 SE 2d 371, 63 Ga.App 805

Ill—Quann v Blair, 187 Ill App. 465

51. Ga—Strickland v. Foughner, 12 SE 2d 371, 63 Ga.App 805

Ind—Noblesville Milling Co v Witham, 156 NE 522, 86 Ind App 309

NC—Pleasants v Barnes, 19 SE 3d 627, 221 NC. 173—Shorter v

Mooresville Cotton Mills, 150 SE 499, 193 NC 27

39 CJ p 998 note 98

52. Ga—Strickland v Foughner, 12 SE 2d 371, 63 Ga.App 805

NC—Pleasants v Barnes, 19 SE 2d 627, 221 NC 173

39 CJ p 998 note 1

53. Ill—Chicago City R. Co v Leach, 70 NE 222, 208 Ill 198, 100 Am SR 216

Mo—Guthrie v Gillespie, 6 SW 2d 886, 319 Mo 1137

39 CJ p 998 note 3

54. Kan—Consolidated Kansas City Smelting & Refining Co v Osborne, 71 P. 828, 66 Kan 393

39 CJ p 998 note 2

55. Wash.—Haverty v International Stevedoring Co, 235 P 360, 134 Wash 235, reheard 238 P 581, 134 Wash 235, affirmed International Stevedoring Co v Haverty, 47 S Ct 19, 272 US 50, 71 L Ed 157

56. NC—Williams v Southern R Co, 38 SE. 893, 128 NC 286

57. Ala—Central of Georgia Ry Co v Garner, 122 So 429, 219 Ala 441

58. US—Sandri v Byram, CCA Mich, 30 F 2d 784

Identifying particular employee

In laborer's action for injuries sustained when he fell from running board of locomotive because of alleged negligence on part of some co-employee in leaving lump of grease on running board, it was not neces-

sary for laborer to prove just who dropped grease on running board—Crabtree v Western Pac R Co, 90 P 2d 835, 33 Cal App 2d 35

Notice of danger

(1) Where locomotive fireman's complaint in personal injury action under the act alleged that engineer was negligent in failing to apply brakes after fireman had given notice of train ahead, fireman was required to prove that he acted promptly and reasonably to awaken engineer to danger ahead and that notice was communicated to engineer, but to establish fact of communication fireman had only to prove that engineer should have comprehended warning under circumstances disclosed, and he was not obligated to go further and produce evidence of subjective reactions in engineer's mind—Jenkins v Kurn, Mo, 61 S Ct 934, 313 US 256, 85 L Ed 1216

(2) Where it is claimed that a servant of defendant was negligent in failing to give a timely signal or warning of danger, plaintiff must prove that such servant knew or should have known of the danger—Rogers v New York, C & St L R Co, 65 NE 2d 243, 328 Ill App 123

59. Neb—Bocian v. Union Pac R Co, 289 N.W 373, 137 Neb 318

60. Ark—Ft Smith, S & R I. R. Co v Moore, 266 SW. 971, 166 Ark. 459

defendant or should, by the exercise of reasonable care, have been known.⁶¹

(8) Plaintiff's Knowledge or Understanding of Danger

In some jurisdictions it is held that defendant has the burden of proving the injured servant's knowledge of the defect which caused the injury, but in other jurisdictions plaintiff is held to have the burden of proving that he did not know of the defect or danger and could not have known thereof by the exercise of ordinary care.

In respect of the burden of proof as to knowledge by plaintiff of the defect causing his injury there is some conflict of authority,⁶² possibly arising, it has been intimated, from the conflicting rules respecting the burden of proof as to assumption of risk and contributory negligence,⁶³ although the servant's knowledge of the defect has by some authorities been regarded as an independent factor of plaintiff's case.⁶⁴ At any rate in some jurisdictions the burden of proof of such knowledge is on defendant.⁶⁵ In other jurisdictions plaintiff has the burden of proving that he did not know of the defect or danger and had not equal means of knowing with the master,⁶⁶ and by the exercise of ordinary care could not have known thereof.⁶⁷ In at least one jurisdiction where the rule placing the burden on plaintiff is recognized it is held that the rule has no application in actions for the death of a servant.⁶⁸ Where a servant's want of knowledge of defects in appliances is not susceptible of direct

proof, it may be inferred from circumstances, and he may be aided by the presumption that a person does not voluntarily incur danger.⁶⁹

It has been held that the burden of proof is on plaintiff to show that he did not know of the danger incident to his work,⁷⁰ but it has also been held that in respect of a nonobvious and an extraordinary risk the burden is on defendant to prove that plaintiff knew of it and appreciated the danger from it.⁷¹

Under Federal Employers' Liability Act. In an action under the Federal Employers' Liability Act the burden of proving that plaintiff had actual or constructive knowledge of unsafe conditions surrounding his place of work was on defendant pleading assumption of risk.⁷² Where plaintiff is a minor, the burden of establishing his actual comprehension of the particular risk rests on defendant.⁷³ It has, however, been held that where plaintiff placed himself in a dangerous position he has the burden of proving that in the exercise of reasonable care he did not and could not have known of his danger.⁷⁴

Infant or incompetent servant. A minor plaintiff must prove his lack of experience or intelligence where his age is such as to repel a presumption in his favor.⁷⁵ So, if an infant servant, fourteen years of age or over, relies on his want of capacity to comprehend and avoid danger, the burden of proving it is on him, but, if under that age, the burden of proving capacity is on the master.⁷⁶ As ex-

61. Ark.—*Et Smith, S & R. I. R. Co v Moore*, *supra*.

62. Ill.—*George B Swift Co. v. Gaylord*, 82 N.E. 299, 229 Ill. 330. 39 C.J. p 1001 note 41.

63. Ill.—*George B Swift Co v. Gaylord*, *supra*.

64. Ind.—*Lynch v Chicago, St L & P R. Co.*, 36 N.E. 44, 8 Ind.App. 518.

39 C.J. p 1001 note 45.

65. Colo.—*Williams v Sleepy Hollow Min. Co.*, 86 P. 337, 37 Colo. 62, 7 L.R.A.N.S., 1170, 11 Ann.Cas. 111.

39 C.J. p 1001 note 46.

66. Ga.—*Holman v American Automobile Ins. Co.*, 39 S.E.2d 850, 201 Ga. 454—*Western & A R R. v. Michael*, 157 S.E. 226, 42 Ga.App. 603—*Clark v Western & A R R.*, 152 S.E. 847, 41 Ga.App. 317.

Va.—*Stevens v Mirakian*, 12 S.E.2d 780, 177 Va. 123.

39 C.J. p 1001 note 47.

Appreciation of danger

In action by employee against employer for injury sustained when he was gored by employer's bull, burden was on employee to show

that risk to which he was exposed and which resulted in his injury was one which he did not appreciate, and would not have appreciated in exercise of reasonable care—*Quimby v. Shattuck*, 187 A. 479, 88 N.H. 262.

67. Ga.—*Holman v American Automobile Ins. Co.*, 39 S.E.2d 850, 201 Ga. 454.

68. Ky.—*Moseley v. Black Diamond Coal & Mining Co.*, 109 S.W. 306, 33 Ky.L. 110.

39 C.J. p 1001 note 50.

69. Ill.—*See Huback v Wabash R. Co.*, 189 Ill.App. 345.

70. N.S.—*McPherson v. Vail*, 40 N. S. 517.

71. Idaho.—*Kangas v National Copper Min. Co.*, 187 P. 792, 32 Idaho 602.

Work beyond scope of employment

In action by a boy employed to aid in harvesting corn against owner of farm and owner's husband, who was allegedly vice principal in charge of farm operations, for injuries sustained when boy's hand was caught in corn picker, where evidence showed that plaintiff was a

minor wholly inexperienced, engaged in performance of duties outside scope of his employment, and that another servant was engaged in cleaning the opposite side of picker at time plaintiff received his injury, negating notice on part of plaintiff, either actual or constructive, with respect to danger encountered, was not a requisite to plaintiff's right to recover—*McKinnon v. Parrill*, 38 N.E.2d 1008, 111 Ind.App. 343.

72. Nev.—*Ames v Western Pac R. Co.*, 227 P. 1009, 48 Nev. 78.

Burden of proof as to assumption of risk see *infra* subdivision b (10) of this section.

73. W.Va.—*Mills v Virginian R. Co.*, 102 S.E. 604, 85 W.Va. 729, certiorari denied 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447.

74. Neb.—*Ellis v. Union Pac R. Co.*, 19 N.W.2d 641, 146 Neb. 397, opinion adhered to 22 N.W.2d 305, 147 Neb. 18.

75. Ala.—*Bedgood v. T. R. Miller Mill Co.*, 80 So. 364, 202 Ala. 299.

76. Pa.—*Rice v. Kring*, 165 A. 833, 310 Pa. 550.

W.Va.—*Ewing v. Lanark Fuel Co.*

pressed in one case, the burden of proving that a minor servant had more than the usual capacity of minors of the same age rests on the employer, and the burden of proving that he had less than the usual capacity rests on the person seeking to recover damages for his death.⁷⁷ In an action for the wrongful death of an employee by reason of his having been employed in a dangerous occupation despite his known mental incapacity, plaintiff has the burden of proof.⁷⁸

(9) Warning of Danger

As a general rule the plaintiff is held to have the burden of proving his contention that the defendant wrongfully failed to give him a warning of dangers attending his work, but in some instances the burden of proving that sufficient warning was given is held to rest on the defendant.

Where the gist of an action by a servant against the master is the alleged wrongful omission to give him a warning of dangers attending his work, the burden is on plaintiff to show that such warning was not given,⁷⁹ but it has been held that the burden is on defendant to prove that plaintiff was warned of the danger arising from a nonobvious and an extraordinary risk.⁸⁰ Even in the case of an infant servant it has been held that the burden is on plaintiff to prove his allegation that he was not

warned of the dangers incident to the operation of a machine,⁸¹ although there is also authority to the contrary.⁸² Where a youthful and inexperienced servant was placed in charge of dangerous machinery and was injured thereby, the burden is on defendant master to show that those in authority warned him in such a manner that he fully appreciated the danger.⁸³ In a jurisdiction where the burden of proof of nonassumption of risk is on plaintiff, as discussed *infra* subdivision b (10) of this section, plaintiff must prove that he was not warned of a danger to which he was subjected that was wholly unnecessary to the operation of the master's business.⁸⁴ On the other hand, where the burden of proving assumption of risk is on defendant, defendant also has the burden of proving warning as a foundation for the defense of assumption of risk.⁸⁵

(10) Assumption of Risk

In some jurisdictions the burden is on the plaintiff to show that he did not assume the risk, while in other jurisdictions the burden of showing assumption of risk is on the defendant; and the latter rule applies in an action under the Federal Employers' Liability Act.

In a number of jurisdictions the burden of showing assumption of risk is on defendant,⁸⁶ at least

65 S.E. 200, 65 W.Va. 726, 29 L.R.A., N.S., 487

77. W.Va.—Bare v Crane Creek Coal & Coke Co., 55 S.E. 907, 61 W.Va. 38, 123 Am.S.R. 966, 8 L.R.A.N.S., 284

78. W.Va.—Sowers v Virginian Ry Co., 133 S.E. 325, 101 W.Va. 582

79. U.S.—Madison v Phillips Petroleum Co., CCA Tex., 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358

Miss.—Masonite Corp. v. Scruggs, 29 So.2d 262

N.Y.—Cook v Erie R. Co., 1 N.Y.S.2d 846, affirmed 12 N.Y.S.2d 1010, 257 App.Div. 909.

39 C.J. p 1004 note 76.

Concealment of danger

Employee, in order to recover for injuries in working with chemicals, because of employer's deceit as to character of instrumentalities used, was required to prove fraud, defendant's knowledge of danger, and that deceit or concealment caused injury.—Hendrickson v Continental Fibre Co., 140 A. 659, 3 W.W.Harr., Del., 564

80. Idaho—Kangas v. National Copper Min. Co., 187 P. 792, 32 Idaho 602

81. Wis.—Schumacher v. Tuttle Press Co., 126 NW 46, 142 Wis 631

39 C.J. p 1005 note 79.

Infant servant's knowledge or understanding of danger generally; see *supra* subdivision b (8) of this section

82. Tex.—Lawson v. Hamilton Compress Co., Civ App., 162 S.W. 1023 39 C.J. p 1005 note 80

83. Cal.—Clark v Tulare Lake Dredging Co., 112 P. 564, 14 Cal App 414

39 C.J. p 1005 note 81

84. Ill.—Devine v Delano, 111 N.E. 742, 272 Ill. 166, Ann.Cas. 1918A 689 39 C.J. p 1005 note 83

85. N.J.—De Rose v. Delaware, L. & W. R. Co., 153 A. 351, 9 N.J.Misc. 183, appeal dismissed 160 A. 423, 109 N.J.Law 135

86. U.S.—Piecsonka v Pullman Co., CCA N.Y., 102 F.2d 432—Bradford Electric Light Co v Clapper, CCA N.H., 51 F.2d 992, reversed on other grounds 52 S.Ct. 571, 286 U.S. 145, 76 L.Ed. 1026, 82 A.L.R. 696—United Iron Works, Inc., v Woolsey, CCA Ark., 39 F.2d 385.

Ark.—Covington v Little Fay Oil Co., 13 S.W.2d 306, 178 Ark. 1046—Sun Oil Co v Hedge, 293 S.W. 9, 173 Ark. 729

Cal.—Mappin v Atchison, T & S F Ry Co., 347 P. 911, 198 Cal. 733, 49 A.L.R. 1330, certiorari denied Atchison, T & S F Ry Co v. Mappin, 47 S.Ct. 239, 273 U.S. 729, 71

L.Ed. 862—Pitt v. Southern Pac. Co., 9 P.2d 273, 121 Cal App 238

Iowa—Price v McNeill, 24 N.W.2d 464, 237 Iowa 1120

Mass.—Kavagian v Lonero, 45 N.E.2d 823, 312 Mass. 603

N.Y.—Buckley v. Cunard S. S. Co., 253 N.Y.S. 254, 233 App.Div. 361

N.C.—Batten v Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batten, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Hubbard v Southern Ry. Co., 166 S.E. 802, 203 N.C. 675—Young v. E. A. Wood & Co., 146 S.E. 70, 196 N.C. 435

Pa.—Guerriero v. Reading Co., 29 A.2d 510, 346 Pa. 187—Fox v Lehigh Valley R. Co., 141 A. 157, 292 Pa. 321

Tex.—International-Great Northern R. R. v. Lowry, Civ App., 98 S.W.2d 888, reversed on other grounds International-Great Northern R. Co v Lowry, 121 S.W.2d 585, 132 Tex. 272.

Va.—Knowles v Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88—Roberts v. Southern Ry. Co., 145 S.E. 255, 151 Va. 815

39 C.J. p 999 note 24.

Contractual assumption of risk need not be proved by defendant since it relates only to the issue of defendant's negligence.—Sylvain v.

where this issue is an affirmative defense,⁸⁷ while in others the burden is on plaintiff to show that he did not assume the risk.⁸⁸ Regardless of which of these two conflicting views, when taken without qualification, is adhered to, it is generally agreed that where the evidence shows that the danger was one which ought not to have attended the servant's employment, but was caused by the negligence of the master, the burden of proving that the servant assumed it as a risk of his employment is on the master.⁸⁹ Defendant is relieved of the burden of proving assumption of risk where such assumption is shown by plaintiff's own evidence⁹⁰

Where a servant has continued in the service

notwithstanding knowledge of a defect or danger, the burden is on him to prove a promise by the master to repair the defect or remove the danger⁹¹ and that in continuing his work he relied on that promise.⁹² A servant suing in tort for injury resulting from the negligent breach of a promise to protect him against an accident need show no consideration for the promise.⁹³

Capacity of infant servant to assume risks. The burden is on him who asserts the capacity of an infant servant to assume risks to prove it.⁹⁴

In an action under the Federal Employers' Liability Act the burden of proof of plaintiff's assumption of risk is on defendant,⁹⁵ at least where the

Boston & M. R. R., 182 NE 835, 280 Mass 503

Availability of safer method

Where store owner, in employee's action for injuries sustained when falling in attempt to secure merchandise located on shelf which could not be reached from the floor, claimed that employee selected hazardous way of reaching shelf when another safe way by use of box was available, burden was on defendant to show that such a box was readily accessible to employee—*F. W. Woolworth Co. v. Freeman*, 11 So 2d 447, 193 Miss 838

Appreciation of risk

Defendant must prove not only that plaintiff had knowledge of the fact situation which caused his injury but that he understood and appreciated, or ought to have understood and appreciated, the danger inherent in such situation

Mo—*Smith v. Thompson*, 182 SW 2d 83

SC—*Tucker v. Holly Hill Lumber Co.*, 20 SE 2d 704, 200 SC 259—*Singleton v. McLeod*, 8 SE 2d 908, 193 SC 378—*McKinney v. Woodside Cotton Mills*, 166 SE 499, 167 SC 438.

87. US—*Great Northern Ry. Co. v. Nelson*, CCA Minn., 90 F 2d 84—*Davis v. Crane*, CCA Mo., 13 F 2d 355—*Hutts v. Brown*, CCA Conn., 180 F 1019, reversed on other grounds 192 F 528, 113 CCA 84

Iowa—*Johnson v. Kinney*, 7 NW 2d 188, 233 Iowa 1016, 144 ALR 997
Ohio—*Hodnicki v. Pere Marquette Ry. Co.*, 158 N.E. 496, 25 Ohio App 134.

SC—*McKinney v. Woodside Cotton Mills*, 166 SE 499, 167 SC 438

88. NH—*Fortier v. Concord Electric Co.*, 33 A 2d 801, 92 NH 492—*Stone v. Howe*, 33 A 2d 484, 92 NH 425—*Sweeney v. Winebaum*, 149 A 77, 84 NH 217—*Shurkus v. Gate City Foundry Co.*, 138 A 302, 83 NH 43—*Owen v. Elliot Hospital*, 136 A 133, 82 NH 497—*Upton*

v. *Conway Lumber Co.*, 128 A 802, 81 NH 489

Vt—*Landing v. Town of Fairlee*, 23 A 2d 179, 112 Vt 127
39 CJ p 1000 note 28

Extraordinary risk

Vt—*Blaisdell v. Blake*, 11 A 2d 215, 111 Vt 123

Ignorance of danger

In action for death of employee, plaintiff in proving nonassumption of risk is not required to negative all possible sources of information from which employee could have learned of danger, and while plaintiff must show, inferentially at least, that the employee's ignorance was justifiable under the circumstances, he need not elucidate in advance every conceivable circumstance which might tend to endow him with knowledge—*Upton v. Conway Lumber Co.*, 128 A 802, 81 NH 489

89. Conn—*Vickery v. New London Northern R. Co.*, 89 A 277, 87 Conn 634

39 CJ p 1000 note 27.

Knowledge of danger

Master seeking to avoid liability for injuries brought about by unusual dangers must show that employee actually knew of danger or that it was so plainly observable that he will be charged with notice thereof—*Hawthorne v. International Great Northern R. Co.*, Tex Civ App., 63 SW 3d 243, error refused

90. Ark—*Covington v. Little Fay Oil Co.*, 13 SW 2d 306, 178 Ark 1046—*Sun Oil Co. v. Hedge*, 298 S W 9, 173 Ark 729

Fla—*Duncan v. Growers Equipment Co.*, 1 So.2d 458, 146 Fla 518.

NC—*Holeman v. Pensacola Shipbuilding Co.*, 134 SE 647, 192 NC 238

Pa—*Guerriero v. Reading Co.*, 29 A 2d 510, 346 Pa 187.

91. Ky—*Tucker's Adm'r v. Louisville & N. R. Co.*, 127 SW 2d 842, 277 Ky 774.

39 CJ p 1000 note 28.

92. Ky—*Tucker's Adm'r v. Louisville & N. R. Co.*, supra

NH—*Coughlin v. Arms Textile Co.*, 46 A 2d 130, 94 NH 57
39 CJ p 1000 note 29.

93. Vt—*Blanchard v. Vermont Shade Roller Co.*, 79 A 911, 84 Vt 442

94. SC—*Goodwin v. Columbia Mills Co.*, 61 SE 390, 80 SC 349

Presumptions as to minor servant's assumption of risk see supra subdivision a (7) of this section

Ordinary risks deemed extraordinary

In case of minor employees, ordinary risks are for evidential purposes treated at the outset of the inquiry regarding assumption of risk as extraordinary and the burden of establishing the minor's comprehension of the particular risk is cast on the employer—*Crenshaw Bros. Produce Co. v. Harper*, 194 So 353, 142 Fla 27.

95. US—*Northern Pac. R. Co. v. Berven*, CCA Wash., 73 F 2d 687—*Halges v. Central R. Co. of New Jersey*, CCA N.Y., 58 F 2d 169, certiorari denied Central R. Co. of New Jersey v. Halges, 53 S Ct 11, 287 US 607, 77 L Ed 538—*Northwestern Pac. R. Co. v. Friedler*, CCA Cal., 52 F 2d 400—*New York, N. H. & H. R. Co. v. Pascucci*, CCA Mass., 46 F 2d 969, certiorari denied 51 S Ct 650, 283 US 858, 75 L Ed 1464—*Chesapeake & O. Ry. Co. v. Winder*, CCA Va., 23 F. 2d 794—*Pacheco v. New York, N. H. & H. R. Co.*, CCA N.Y., 15 F 2d 467—*Davis v. Gray*, CCA NH., 8 F 2d 843, reversed on other grounds *Mellon v. Gray*, 47 S Ct 585, 374 US 715, 71 L Ed 1318

Cal—*Matthews v. Atchison, T. & S. F. Ry. Co.*, 129 P 2d 435, 54 Cal App 2d 549—*King v. Schumacher*, 89 P 2d 466, 32 Cal App 2d 173, certiorari denied *Schumacher v. King*, 80 S Ct 123, 308 US 593, 84 L Ed 496—*Myers v. Southern Pac. Co.*, 58 P.2d 387, 14 Cal App.2d

risk is extraordinary,⁹⁶ notwithstanding a contrary rule in the state in a court of which the action is brought⁹⁷ and notwithstanding decisions to the contrary in actions not under the federal statute.⁹⁸ However, defendant is not compelled to establish the defense by his own evidence,⁹⁹ it is incumbent on plaintiff to present a case free from facts showing that the risk was one which had been assumed by him.¹

(11) Contributory Negligence

In some jurisdictions the plaintiff has the burden of proving freedom from contributory negligence, but in a majority of jurisdictions the burden of proving con-

tributory negligence is on the defendant. The burden is on the defendant in actions under the Federal Employers' Liability Act.

In some jurisdictions, in the absence of a statute requiring a different rule, the burden is on plaintiff to show by a preponderance of evidence that he was free from contributory negligence,² although it is not necessary that he should introduce evidence distinctly directed to that matter,³ and he is aided by the presumption arising from the instinct of self-preservation.⁴ In the majority of jurisdictions, however, in some instances by reason of statutes applicable to negligence actions generally, contributory negligence is regarded as an affirmative de-

287, hearing denied 59 P 2d 1001, 14 Cal App 2d 287

Ga.—Western & A R R v Lochridge, 153 SE 474, 170 Ga 308, certiorari denied 50 S Ct 481, 281 US 762, 74 L Ed 1171—Southern R Co v Cowan, 183 SE 331, 52 Ga App 360

Idaho—Clariss v Oregon Short Line R Co, 33 P 2d 348, 54 Idaho 568

Ill.—Kiefer v Elgin, J & E Ry Co, 184 NE 870, 351 Ill 634—Pipal v Grand Trunk Western Ry Co, 173 NE 372, 341 Ill 320, certiorari denied Grand Trunk Western Ry Co v Pipal, 51 S Ct 486, 283 US 338, 75 L Ed 1449—Weiner v Illinois Cent R Co, 33 NE 2d 121, 309 Ill App 292, reversed on other grounds 42 NE 2d 82, 379 Ill 559

—Grosse v Terminal R Ass'n of St Louis, 29 NE 2d 1018, 307 Ill App 414—Maher v New York, C & St L R Co, 280 Ill App 222—Huff v Illinois Cent R Co, 379 Ill App 323, affirmed 199 NE 116, 362 Ill 95—Wetterer v Atchison, T & S F Ry Co, 277 Ill App 375, certiorari denied Atchison, T & S F Ry Co v Wetterer, 55 S Ct 835, 295 US 754, 79 L Ed 1698—Worthey v Cleveland, C, C & St L Ry Co, 251 Ill App 585—Beck v Baltimore & O. R. Co., 244 Ill App 441

Me.—McLaughlin v Bangor & A R Co, 140 A 827, 127 Me. 24—Morey v. Maine Cent. R. Co., 183 A 92, 125 Me. 272.

Mass.—Hanley v Boston & M R R, 190 NE 501, 286 Mass 390, certiorari denied Boston & M R R v Hanley, 55 S Ct 112, 293 US 597, 79 L Ed 690—Murphy v Boston & M. R. R., 190 NE 501, 286 Mass 390, certiorari denied Boston & M. R. R v Murphy, 55 S Ct 112, 293 US 597, 79 L Ed 690—Manning v Prouty, 157 NE 864, 260 Mass 399

Minn.—Reams v Chicago, M, St P & P. R. Co., 231 NW 236, 180 Minn 534

Mo.—Owen v Kurn, 148 SW 2d 519, 347 Mo. 516—Kamer v Missouri-Kansas-Texas R Co, 32 SW 2d 1075, 326 Mo 793, certiorari denied Missouri-Kansas-Texas R Co v Kamer, 51 S Ct 216, 282 US 903, 75 L Ed 795—Berry v. St Louis-San Francisco Ry Co, 26 SW 2d 988, 324 Mo 775, certiorari denied St Louis-San Francisco Ry Co. v Berry, 50 S Ct 464, 281 US 765, 74 L Ed 1173—Oglesby v St Louis-San Francisco Ry Co, 1 SW 2d 172, certiorari denied St Louis-San Francisco R Co v Oglesby, 48 S Ct 434, 277 US 587, 72 L Ed 1001—Sweeney v Terminal R Ass'n of St Louis, App, 110 SW 2d 852—Weber v Terminal Railroad Ass'n of St Louis, App, 20 SW 2d 601

Nev.—Southern Pac Co v Huyck, 128 P 2d 849, 61 Nev 365

NH.—Ingalls v Maine Cent R R, 142 A 695, 83 NH 397.

NC.—Batton v Atlantic Coast Line R Co, 193 SE 674, 212 NC 256, certiorari denied Atlantic Coast Line R Co v. Batton, 58 S Ct 750, 303 US 651, 82 L Ed 1112—Hubbard v Southern Ry Co, 166 SE 802, 203 NC. 675—Candler v Southern Ry Co, 149 SE 393, 197 NC 399

1075, 326 Mo 793, certiorari denied Missouri-Kansas-Texas R Co v Kamer, 51 S Ct 216, 282 US 903, 75 L Ed 795—Berry v. St Louis-San Francisco Ry Co, 26 SW 2d 988, 324 Mo 775, certiorari denied St Louis-San Francisco Ry Co. v Berry, 50 S Ct 464, 281 US 765, 74 L Ed 1173—Oglesby v St Louis-San Francisco Ry Co, 1 SW 2d 172, certiorari denied St Louis-San Francisco R Co v Oglesby, 48 S Ct 434, 277 US 587, 72 L Ed 1001—Sweeney v Terminal R Ass'n of St Louis, App, 110 SW 2d 852—Weber v Terminal Railroad Ass'n of St Louis, App, 20 SW 2d 601

Nev.—Southern Pac Co v Huyck, 128 P 2d 849, 61 Nev 365

NH.—Ingalls v Maine Cent R R, 142 A 695, 83 NH 397.

NC.—Batton v Atlantic Coast Line R Co, 193 SE 674, 212 NC 256, certiorari denied Atlantic Coast Line R Co v. Batton, 58 S Ct 750, 303 US 651, 82 L Ed 1112—Hubbard v Southern Ry Co, 166 SE 802, 203 NC. 675—Candler v Southern Ry Co, 149 SE 393, 197 NC 399

N.D.—DeMoss v Great Northern Ry Co, 273 NW 506, 67 ND 412

Pa.—Moseley v Reading Co, 145 A 293, 295 Pa 342

Tex.—Wichita Falls & S R Co v Holbrook, Civ App, 50 SW 2d 428, affirmed 78 SW 2d 938, 125 Tex 184, certiorari denied 58 S Ct 139, 296 US 618, 80 L Ed 439—Texas & N O R Co v Tilley, Civ App, 297 SW 1063, affirmed, Com App, 6 SW 2d 86, certiorari denied 59 S Ct 36, 278 US 642, 73 L Ed 556—Lancaster v Bradford, Civ App, 279 SW 607

39 CJ p 1000 note 34

Appreciation of danger

In order to show assumption of risk, master must show that danger was so obvious that servant knew and appreciated, or must be charged with knowledge and appreciation of, hazard

Cal.—Thomas v Southern Pac Co, 2 P 2d 544, 116 Cal App 128, certiorari denied Southern Pac Co v Thomas, 53 S Ct 265, 284 US 689, 76 L Ed 582

Mo.—O'Connell v Baltimore & O R Co, 26 SW 2d 929, 324 Mo 1097

96. Mo.—Gately v St Louis-San Francisco Ry Co, 56 SW 2d 54, 332 Mo 1—State ex rel St Louis-San Francisco Ry Co v Cox, 46 SW 2d 849, 329 Mo 292

Tex.—Missouri-Kansas-Texas R. Co of Texas v. Barnaby, Civ App, 187 SW 2d 235, error refused

97. Vt.—Robey v Boston & M R Co, 100 A 925, 91 Vt 386

98. Ind.—Cleveland, C, C & St L R Co v Belange, 135 NE 367, 78 Ind App 36

39 CJ p 1001 note 37.

99. Iowa—Taylor v. Chicago, R I & P R Co, 170 NW 388, 186 Iowa 508

1. US.—Southern Pac. Co v Berkshire, Tex., 41 S Ct 162, 254 US 415, 65 L Ed 385

Pa.—Sullivan v Baltimore & O. R Co, 116 A 369, 272 Pa. 439.

2. Ga.—Holman v American Automobile Ins Co, 39 SE 2d 850, 201 Ga 454—Gartrell v Russell, 180 SE 860, 51 Ga App 519—Western & A R R. v Michael, 157 SE 226, 42 Ga App 603—Clark v Western & A R R, 152 SE 847, 41 Ga App 317—Flippin v Central of Georgia Ry Co, 132 SE 918, 35 Ga App 243

2 P 2d 544, 116 Cal App 128, certiorari denied Southern Pac Co v Thomas, 53 S Ct 265, 284 US 689, 76 L Ed 582

Mo.—O'Connell v Baltimore & O R Co, 26 SW 2d 929, 324 Mo 1097

96. Mo.—Gately v St Louis-San Francisco Ry Co, 56 SW 2d 54, 332 Mo 1—State ex rel St Louis-San Francisco Ry Co v Cox, 46 SW 2d 849, 329 Mo 292

Tex.—Missouri-Kansas-Texas R. Co of Texas v. Barnaby, Civ App, 187 SW 2d 235, error refused

97. Vt.—Robey v Boston & M R Co, 100 A 925, 91 Vt 386

98. Ind.—Cleveland, C, C & St L R Co v Belange, 135 NE 367, 78 Ind App 36

39 CJ p 1001 note 37.

99. Iowa—Taylor v. Chicago, R I & P R Co, 170 NW 388, 186 Iowa 508

1. US.—Southern Pac. Co v Berkshire, Tex., 41 S Ct 162, 254 US 415, 65 L Ed 385

Pa.—Sullivan v Baltimore & O. R Co, 116 A 369, 272 Pa. 439.

2. Ga.—Holman v American Automobile Ins Co, 39 SE 2d 850, 201 Ga 454—Gartrell v Russell, 180 SE 860, 51 Ga App 519—Western & A R R. v Michael, 157 SE 226, 42 Ga App 603—Clark v Western & A R R, 152 SE 847, 41 Ga App 317—Flippin v Central of Georgia Ry Co, 132 SE 918, 35 Ga App 243

Ill.—Lamar v. Collins, 252 Ill App 238

Mass.—Smith v New England Cotton Yarn Co, 114 NE 359, 225 Mass 287.

Mich.—Puzerski v. Buhl Stamping Co, 218 NW 655, 242 Mich 386

Vt.—Blaisdell v Blake, 11 A 2d 215, 111 Vt 123

39 CJ p 1001 note 59.

Effect of statutes in actions by servant generally see *infra* § 502

3. Vt.—Blaisdell v. Blake, *supra*. 39 CJ p 1002 note 60

4. Ill.—George B Swift Co v Gaylord, 82 NE 299, 229 Ill 230, 340

fense which must be proved by defendant;⁵ and this rule has been held not changed by a statute adopting the doctrine of comparative negligence⁶ or by a statute abolishing the fellow-servant rule.⁷ Defendant is not required to attach any blame to plaintiff until he himself has been shown to have been in fault;⁸ and he may be relieved of the burden of proving contributory negligence where it may be legitimately inferred from plaintiff's own showing.⁹ In some instances the burden of proof has been made to depend on the state of the pleadings.¹⁰

A rule requiring plaintiff to show that he was free from fault has been held to be a rule of substantive law and hence without applicability where an employee sues for an injury received in another state where no such doctrine prevails.¹¹ Where willful negligence of plaintiff is by statute made a complete defense, it must be proved by defendant.¹²

In actions under the Federal Employers' Liability

5. *US—Piecsonka v Pullman Co.*, CCANY, 102 F2d 432—Bradford Electric Light Co v Clapper, C CANH, 51 F2d 903, reversed on other grounds 52 S Ct 571, 286 US 145, 78 L Ed 1026, 82 ALR 696—Sheehan v New York, N. H. & H R Co, DCNY, 18 F Supp 636, reversed on other grounds, C CA, 93 F2d 442, certiorari denied 58 S Ct 942, 304 US 560, 82 L Ed 1527
- Ark—Chapman v Henderson, 67 S W2d 570, 188 Ark 714—Covington v Little Fay Oil Co, 13 S W2d 306, 178 Ark. 1046
- Ind—McKinnon v Parrill, 38 NE2d 1008, 111 Ind App 343
- Ky—Big Sandy & C R Co v Measell's Adm'r, 42 S W2d 747, 240 Ky. 571
- La—Watkins v Jahncke Dry Docks, 125 So 469, 12 La App. 350
- Mass—Kavigan v Lonerio, 45 NE 2d 823, 312 Mass. 603.
- Miss—Mengel Co v. Parker, 7 So 2d 521, 192 Miss. 634.
- Mo.—Craven v Halpin-Boyle Const Co, App, 15 S W2d 852—Struckel v Busch Sulzer Bros Diesel Engine Co, App, 300 S W. 993
- NH—Bilodeau v Gale Bros., 140 A 172, 83 NH 196
- NC—Young v E A Wood & Co, 146 S E 70, 196 NC. 435—Clnard v. Clnard Electric Co, 136 S E 1, 192 NC 736.
- Tex—Dougherty v. Robb, Civ App., 5 S W2d 582, error dismissed
- Wis—Dugenske v. Wyse, 215 N W 839, 194 Wis. 159
- 39 C J p 1002 notes 62, 63, p 1005 note 92.

6. *Cal—West v Lanney*, 164 P 608, 33 Cal App 164
39 C J. p 1004 note 65
7. *Ark—Soard v Western Anthracite Coal & Mining Co*, 123 S W 759, 92 Ark 502.
39 C J p 1004 note 66
8. *La—Larkin v Union Sulphur Co*, 68 So 491, 133 La. 986
9. *Ark—Covington v Little Fay Oil Co*, 13 S W2d 306, 178 Ark 1046
- NC—Holeman v Pensacola Shipbuilding Co, 134 SE 647, 192 NC 236.
39 C J. p 1003 note 64.
10. *Del—Kemp v McNeill Cooper-age Co*, 104 A. 639, 30 Del 146.
39 C J. p 1004 note 67.
11. *Ga—Southern R Co v. Robert-son*, 66 SE 535, 7 Ga App 154
12. *Mich—Kangas v Champion Iron Co*, 199 N.W 616, 228 Mich 237.
13. *US—Sheehan v New York, N H & H R Co*, CCANY, 93 F2d 442, certiorari denied 58 S Ct 942, 304 US. 560, 82 L Ed 1527—Sear-foss v. Lehigh Valley R. Co., C CANY, 76 F2d 762.
- Ga—Southern R Co. v. Cowan, 183 SE 331, 52 Ga App 360
- Ill—Pipal v Grand Trunk Western Ry. Co, 178 NE 373, 341 Ill 320, certiorari denied Grand Trunk Western Ry Co v. Pipal, 51 S Ct 486, 263 US 838, 75 L Ed. 1449—Holloran v Chicago & N W. Ry Co, 63 NE2d 670, 327 Ill App 217
- Ind—Chicago & Erie R Co v Pat-terson, 34 NE2d 960, 110 Ind App 94
- Mo—Kamer v Missouri-Kansas-Texas R. Co, 32 S.W.2d 1075, 326

Mo 792, certiorari denied Missouri-Kansas-Texas R Co v. Kamer, 51 S Ct 216, 282 US 903, 75 L Ed 795—Wilson v Chicago, B & Q R Co, 296 S W 1017, 317 Mo 645

Humanitarian doctrine. The burden is on plaintiff to show facts justifying application in his favor of the humanitarian doctrine or, as it is sometimes called, the doctrine of last clear chance.¹⁶

§ 502. — Effect of Constitutional and Statutory Provisions

The ordinary rules controlling presumptions and burden of proof in actions between master and servant have to some extent been affected in the various jurisdictions by constitutional and statutory provisions especially applicable thereto.

The ordinary rules relating to presumptions and burden of proof, discussed supra § 501, have been varied in a number of jurisdictions by constitutional or statutory provisions relating especially to mas-

- NH—Grew v Boston & M R F., 142 A 707, 83 NH 383
 - W Va.—Salmons v Norfolk & W Ry Co, 129 SE 760, 100 W Va 49.
39 C J p 1004 note 72
 14. *Iowa—Corpus Juris cited in McCall v Pitcairn*, 6 NW 2d 415, 420, 232 Iowa 887.
39 C J p 1004 note 73.
 15. *Iowa—Corpus Juris cited in McCall v Pitcairn*, 6 NW 2d 415, 420, 232 Iowa 887.
39 C J p 1004 note 74.
 16. *US—Brennan v. Baltimore & O R Co*, CCANY, 115 F2d 555, certiorari denied 61 S Ct. 614, 312 US 685, 85 L Ed. 1123.
 - Ala—Southern Ry Co v. Melton, 198 So 588, 240 Ala. 244
39 C J p 997 note 93
- Injury avoidable by master notwithstanding contributory negligence see supra § 423
- Impossibility of escape**
- A plaintiff seeking recovery under Federal Employers' Liability Act from railroad for death of signalman who was injured when train collided with inspection car which signalman was attempting to remove from track, on ground that engineer in charge of train had last clear chance to avoid collision, had burden of showing that signalman could not have escaped injury by exercise of ordinary care—Deere v. Southern Pac Co, CCA Or, 133 F2d 438, certiorari denied 62 S Ct. 916, 315 US 819, 86 L Ed 1217.

ter and servant cases¹⁷ Thus, under some statutes, plaintiff has the burden of affirmatively proving the servant's freedom from negligence,¹⁸ but under others the burden of proof of contributory negligence in an action against an employer for injuries to an employee rests on defendant¹⁹ Under some statutes, in an action for the death of a servant of a railroad company, on proof that the servant was killed by the running of locomotives or cars or other machinery of such company, or from an act done by some person in the employ and service of the company, a rebuttable²⁰ presumption²¹ arises that defendant was negligent; and, similarly, certain proof may by statute be made prima facie evidence of defendant's negligence.²² On the other hand, some statutory provisions expressly confirm the common-law rule that there is no presumption of the employer's negligence on proof of injury, but that the burden of proving negligence is on plaintiff²³

The subject of presumptions and burden of proof in an action under the Federal Employers' Liability Act, as well as the effect of statutes relating to presumptions and burden of proof in negligence actions generally, are discussed supra § 501.

Under statutes requiring a master to guard dangerous machinery a servant suing for an injury caused by an unguarded machine has the burden of proving in the first instance that the machine was not guarded, as complained of in his pleading,²⁴ and that the injury was caused by such failure to comply with the statute,²⁵ and, if a protection of some sort is provided which plaintiff contends is not a proper or sufficient compliance with the statute, the burden is on him of proving that fact²⁶ However, proof that machinery is of the kind mentioned in the statute and is unguarded makes out a prima facie case of negligence.²⁷

According to some authorities plaintiff is under no burden to prove the availability or practicability of more sufficient devices or safeguards,²⁸ the burden being rather on defendant to prove that no guard was practicable which would have been reasonably calculated to prevent the accident²⁹ In other cases, however, it has been held that the burden is on plaintiff to show that it was practicable to guard the machine,³⁰ and it has been held that, where there is no question about the practicability

17. US—Nash v Pennsylvania R Co, CCA Ohio, 60 F2d 26.

Ohio—McKee v New Idea, App, 44 NE2d 697

Minn—Connolly v Davidson, 15 Minn 519, 2 Am R 154—McMahon v Davidson, 12 Minn 357.

39 CJ p 1005 note 92

18. Ariz—Inspiration Consol Copper Co v Bryan, 252 P 1012, 31 Ariz 303

39 CJ p 1005 note 92 [b] (1)

19. Iowa—Band v Reinke, 298 N W 865, 230 Iowa 515—Teller v Davenport, 213 N W 565, 203 Iowa 1012

NY—Kennealy v State, 238 NYS 719, 135 Misc 437

39 CJ p 1005 note 92 [g] (1), [h], [i], [k] (1), [c], [p] (13)–(16), [q] (2)

20. US—Walker v Charleston & W C Ry. Co, CCA Ga, 8 F2d 725

21. US—Walker v Charleston & W C Ry Co, supra
39 CJ p 1005 note 92 [e]

22. US—Nash v Pennsylvania R Co, CCA Ohio, 60 F2d 26

Miss—Mississippi Cent R Co v Knight, 103 So 377, 138 Miss 621, certiorari denied 46 S Ct. 20, 269 US 559, 70 L Ed 411

Mo—Shuler v Omaha, K C & E R Co, 87 Mo App 618.

Ohio—McKee v New Idea, App, 44 NE2d 697

39 CJ p 1005 note 92 [c] (2), [m], [p] (2)–(4), (7), (10), [r] (1).

Statute held inapplicable

The statute making prima facie case for plaintiff on showing injury and that motor vehicle at time of accident was operated contrary to provisions of Motor Vehicle Law is inapplicable in an action by a servant against his master—Dr Pepper Bottling Co v Gordy, 164 So 286, 174 Miss 392

Prima facie case not shown

Absence of barrier guard at small opening for ladder in sand house of railroad is not "defect or unsafe condition" within statutes creating prima facie case, or presumptive evidence, of negligence—Nash v Pennsylvania R Co, CCA Ohio, 60 F2d 26

23. US—Geneva Mill Co v Andrews, CCA Fla, 11 F2d 924
Fla—Atlantic Coast Line R Co v Gardner, 81 So 473, 77 Fla 305.

Shifting of burden

(1) In an action under a hazardous occupation statute, where plaintiff furnishes prima facie evidence of negligence, the burden shifts to the employer to show that it has exercised all ordinary and reasonable care and diligence in the premises
US—Altman v Atlantic Coast Line R Co, CCA Fla, 18 F2d 405
Fla—Peninsular Telephone Co v Dority, 174 So 446, 128 Fla 106

(2) However, when it is shown that the employer did exercise such care, the burden shifts back to plaintiff to prove the negligence alleged by a preponderance of the

evidence—Florida East Coast Ry. Co. v. Daughetee, 124 So 757, 98 Fla. 1021—39 CJ p 1005 note 92 [d] (1).

24. Mo—Smith v. Harbison-Walker Refractories Co, 100 SW 2d 909, 340 Mo 389

39 CJ p 1009 note 94

25. Mo—Smith v. Harbison-Walker Refractories Co, supra—Blittschau v American Car & Foundry Co, App, 144 SW 2d 196

26. Pa—Rebel v Standard Sanitary Mfg Co, 16 A 2d 534, 710 Pa 313—Gross v. Eagle Wheel Mfg Co., 97 A 457, 252 Pa 361.

27. Iowa—Steburg v Vincent Clay Products Co, 155 NW 337, 173 Iowa 248
39 CJ p 1009 note 96.

28. Pa—Rebel v Standard Sanitary Mfg Co, 16 A 2d 534, 340 Pa 313

29. US—Grant Storage Battery Co v De Lay, CCA Neb, 87 F2d 726
39 CJ p 1009 note 97

30. Or—Cox v Samaritan Co, 184 P 2d 386

39 CJ p 1009 note 98.

Dependent on whether duty absolute

(1) Where the statute makes it the absolute duty of the employer to provide the prescribed safeguards, plaintiff is not under the burden of proving availability or practicality—Boll v Condie-Bray Glass & Paint Co, 11 SW 2d 48, 321 Mo 92—Blittschau v American Car & Foundry Co, Mo App, 144 SW 2d 196

(2) Where, however, the statute requires safeguards when possible,

of applying a guard, the omission to guard constitutes negligence per se,³¹ but that, where the practicability is in dispute, the burden is on plaintiff to show that it is feasible.³²

§ 503. Admissibility

The general rules governing the competency, relevancy, and materiality of evidence in civil actions apply in an action to recover from a master for personal injuries to a servant.

The general rules governing the competency, relevancy, and materiality of evidence in civil actions apply in an action to recover from a master for personal injuries to a servant,³³ as, for example, with respect to the determination of the admissibility of evidence offered for the purpose of establishing matters relating to the time³⁴ and location³⁵ of the accident and the surrounding circumstances³⁶. The written report of an accident made by one who did not witness it is generally inadmissible.³⁷ While it has been held that reports required by statute to be made are admissible to establish

the facts required to be reported,³⁸ the contrary has also been held.³⁹ The fact that no official report of the accident was made is not admissible.⁴⁰

Liability insurance. The fact that an employer is insured against loss from injuries to his employees is in itself inadmissible on the issue of his negligence.⁴¹ However, a conversation between the parties on the subject may be admissible as tending to prove defendant's admission of liability,⁴² and other facts connected therewith may be admissible to affect the credibility,⁴³ or to show the bias,⁴⁴ of a witness.

Interstate character of employee's work at time of injury. In suits brought against an employer for injuries suffered by his employee in the course of his employment, under the Federal Employers' Liability Act and other federal statutes, any evidence, otherwise competent, is admissible which tends to prove the fact that the employee was engaged in interstate commerce at the time he sustained the injury.⁴⁵

and if not possible requires posting of notice of such fact, plaintiff must prove that the required safeguards were possible—*Boll v Condie-Bray Glass & Paint Co*, 11 S W 2d 48, 321 Mo 92—*Hummel v American Mfg Co*, Mo App, 279 S W 202—*Pildner v Shaw Marble & Tile Co*, Mo App, 239 S W. 1095

31. *Minn—Glockner v Hardwood Mfg Co*, 122 N W 465, 109 Minn 30, 18 Ann Cas 130, rehearing denied 123 N W. 807, 109 Minn 30 18 Ann Cas 130

32. *Minn—Glockner v. Hardwood Mfg Co*, supra.

33. *Mass—Coulombe v Horne Coal Co*, 175 N E 631, 275 Mass 226 39 C J p 1009 note 4

Evidence held admissible

(1) In general

Md—General Automobile Owners' Ass'n v. State, 140 A 48, 154 Md. 204

Mo—Gately v. St. Louis-San Francisco Ry Co, 56 S W 2d 54, 332 Mo 1—*Willgues v. Pennsylvania R Co*, 298 S W 817, 318 Mo 28

NC—Hamilton v Southern Ry Co, 158 S E 75, 200 NC. 543, certiorari denied *Southern Ry Co v Hamilton*, 52 S Ct 19, 284 US 686, 76 L Ed 541

39 C J p 1009 note 4 [a], [b]

(2) Evidence tending to show why plaintiff filed the action—*Mahan-Jellico Coal Co v. Scalf*, 177 S W 2d 384, 796 Ky 404.

(3) Evidence of statements of an employer tending to show that he recognized his liability for the injuries suffered by his employee—

Lochmann v Brown, Mo App, 20 S W 2d 561.

Evidence held inadmissible

(1) In general.

Ga—Western & A. R R v Roberson, 162 S L 842, 44 Ga App 736

Kan—Foley v. Crawford, 264 P 59, 125 Kan 252

Ky—Louisville & N R Co v Davis' Adm'x, 51 S W 2d 942, 245 Ky 79

Md—General Automobile Owners' Ass'n v State, 140 A 48, 154 Md 204

Mass—Coulombe v Horne Coal Co, 175 N E 631, 275 Mass 226

39 C J p 1009 note 4 [c]

(2) Evidence that an employer's claim agent discharged the employee because he would not settle for the injuries suffered by him—*Dierks Lumber & Coal Co v. Tollerson*, 54 S W 2d 61, 186 Ark 429

(3) Evidence that an alleged participant in an assault on an employee by fellow employees was thereafter promoted by the employer—*DeBerry v Goodyear Tire & Rubber Co of Alabama*, 186 So 547, 287 Ala 223

(4) Evidence of a claimed settlement with an employer under a workmen's compensation act in an action brought by the injured employee under the Federal Employers' Liability Act—*Wetterer v Atchison, T & S F Ry Co*, 377 Ill App 275, certiorari denied *Atchison, T & S F Ry Co v Wetterer*, 55 S Ct 835, 293 US 764, 79 L Ed 1698

(5) Evidence of the reputation of an animal belonging to an employer

to show directly its vicious propensity—*Hill v Moseley*, 17 S E 2d 676, 320 NC 485

34. *Cal—Richman v San Francisco, N & C R Co*, 181 P 789, 180 Cal 454

35. *Ky—Stewart v Louisville & N R Co*, 125 S W 154, 136 Ky 717
Tex—St Louis, B & M Ry Co v Knight, Civ App, 295 S W 945

36. *Cal—Poor v Fuller*, 159 P 233, 30 Cal App 650

39 C J p 1011 note 7

37. *Ill—Wabash R Co. v. Farrell*,

79 Ill App 508

38. *Ill—Aetitus v Spring Valley Coal Co*, 93 N E 579, 246 Ill 32, 133 Am S R 221

39 C J p 1011 note 9.

39. *Ohio—Cleveland, C, C & St L R Co v Ullom*, 20 Ohio Cir Ct 512, 11 Ohio Cir Dec 321

40. *Ill—Haywood v Dering Coal Co*, 145 Ill App 508

41. *Ill—McCarthy v Spring Valley Coal Co*, 93 N E 957, 232 Ill 473

39 C J p 1011 note 12

42. *Neb—Egner v Curtis, Towle & Paine Co*, 148 N W. 1032, 96 Neb. 18, L R A 1915A 153

43. *Idaho—Steve v Bonners Ferry Lumber Co*, 92 P. 363, 13 Idaho 384

39 C J p 1011 note 14

44. *Pa—Lenahan v Pittston Coal Min Co*, 70 A 884, 231 Pa. 626

39 C J p 1011 note 15

45. *US—Lehigh Valley R Co v. Huben*, CCANY, 10 F 2d 78, certiorari denied 46 S Ct 305, 270 US 641, 70 L Ed 775

§ 504. — Employment or Relation of Master and Servant

Any evidence, otherwise competent, is admissible in an action by a servant against his master to recover for personal injuries which tends to prove or disprove the fact of employment.

In an action by a servant against his master to recover for personal injuries, any evidence, otherwise competent, is admissible which tends to prove⁴⁶ or disprove⁴⁷ the fact of employment. Thus it has been held permissible to prove the con-

tract of employment,⁴⁸ the authority of the person hiring,⁴⁹ the instruction of the servant,⁵⁰ the authority to direct of the person giving directions,⁵¹ and the payment of wages⁵² or hospital dues⁵³. Also evidence of indemnity⁵⁴ or liability⁵⁵ insurance taken by defendant, has been held admissible. Facts tending to show defendant's control over the business,⁵⁶ his liability for the wages of other employees⁵⁷ or whether he was reimbursed for monies paid to employees,⁵⁸ and who supplied material for work to a fellow employee⁵⁹ have been held ad-

Evidence held admissible

(1) In general.

US—Lehigh Valley R. Co. v. Hubcn supra

Cal—Mappin v. Atchison, T. & S. F. Ry. Co., 247 P. 911, 198 Cal. 733, 49 A.L.R. 1330, certiorari denied Atchison, T. & S. F. Ry. Co. v. Mappin, 47 S.Ct. 239, 273 U.S. 729, 71 L.Ed. 862

N.J.—Steinert v. Pennsylvania R. Co., 153 A. 533, 107 N.J. Law 505

(2) To show that plaintiff's work was necessary to safe interstate transportation—Louisville & N. R. Co. v. Blankenship, 74 So. 960, 199 Ala. 531

(3) To show the interstate destination of a car or train and its contents

Ill.—Herb v. Pitcairn, 29 N.E. 2d 543, 306 Ill. App. 583, reversed on other grounds 36 N.E. 2d 555, 377 Ill. 405

N.Y.—Larkin v. New York Cent. R. Co., 232 N.Y.S. 363, 225 App. Div. 109

(4) To show that the work was part of one entire interrelated transaction—Sibert v. Litchfield & M. Ry. Co., Mo., 159 S.W. 2d 612—Gieseking v. Litchfield & Madison Ry. Co., 137 S.W. 2d 700, 344 Mo. 672, certiorari denied Litchfield & M. Ry. Co. v. Gieseking, 60 S.Ct. 104, 308 U.S. 583, 84 L.Ed. 488

Evidence held inadmissible

(1) In general

Ill.—Wetterer v. Atchison, T. & S. F. Ry. Co., 277 Ill. App. 275, certiorari denied Atchison, T. & S. F. Ry. Co. v. Wetterer, 55 S.Ct. 835, 295 U.S. 754, 79 L.Ed. 1698

Mo.—Howard v. Mobile & O. R. Co., 78 S.W. 2d 272, 335 Mo. 295

Pa.—Colangelo v. Pittsburgh & L. E. R. Co., 9 A.2d 391, 336 Pa. 490

Wash.—Schosboeck v. Chicago, M., St. P. & P. R. Co., 63 P.2d 477, 188 Wash. 672, modified on other grounds 71 P.2d 548, 191 Wash. 425

(2) Statement of person in charge that car or cars on which plaintiff was working when injured had an interstate destination

US—Mirkowicz v. Reading Co., C.C.A.N.J., 84 F.2d 537, certiorari de-

nied 57 S.Ct. 43, 299 U.S. 579, 81 L.Ed. 426

Cal.—McCoy v. Southern Pac. Co., 83 P.2d 970, 29 Cal. App. 2d 16, certiorari denied 59 S.Ct. 837, 307 U.S. 826, 83 L.Ed. 1510

Pa.—Colangelo v. Pittsburgh & L. E. R. Co., 9 A.2d 391, 336 Pa. 490

46. Miss.—Gulf, M. & N. R. Co. v. Graham, 117 So. 881, 153 Miss. 72, 39 C.J. p. 1011 note 17

Evidence of employment generally see supra § 12.

Evidence held admissible

(1) Evidence that defendant refused to recognize liability on a ground other than that plaintiff was not his employee—Gasco v. Tracas, 155 N.E. 179, 85 Ind. App. 591

(2) Evidence tending to show that the injured employee was jointly employed by defendant and others—Willgues v. Pennsylvania R. Co., 298 S.W. 817, 318 Mo. 28

(3) Other evidence—Whittington v. Westport Hotel Operating Co., 33 S.W. 2d 963, 326 Mo. 1117—39 C.J. p. 1011 note 17 [a]

Evidence held not admissible

Ga.—Howard v. Georgia Power Co., 176 S.E. 69, 49 Ga. App. 420, 39 C.J. p. 1011 note 17 [b]

Violation of rule

In an action in which defendant claims that plaintiff was not a bona fide employee because of his violation of a rule against outside work, competent evidence tending to excuse plaintiff's violation of such rule has been held admissible—Godsey v. Thompson, 179 S.W. 2d 44, 352 Mo. 681, certiorari denied 55 S.Ct. 43, 323 U.S. 719, 89 L.Ed. 578

47. Miss.—Gulf, M. & N. R. Co. v. Graham, 117 So. 881, 153 Miss. 72, 39 C.J. p. 1011 note 18 [a].

48. Ala.—Warrior-Pratt Coal Co. v. Sherada, 62 So. 721, 183 Ala. 118

49. Mich.—Brandt v. C. F. Smith & Co., 218 N.W. 808, 242 Mich. 217

Tex.—San Antonio Waterworks Co. v. White, Civ. App., 44 S.W. 181

Evidence of a custom permitting employees to hire helpers has been held admissible in an action against an employer for injuries to a helper.

—Thomas' Adm'r v. Ashland Fire Brick Co., 4 S.W. 2d 757, 223 Ky. 821

Knowledge of rules against hiring

Where the injured person is employed by defendant's servant against the rules of defendant, evidence offered to prove that the injured person knew of such rules has been held admissible—Cloverdale Dairy Co. v. Briggs, 2 N.E. 2d 592, 131 Ohio St. 261

50. Ga.—Mayfield v. Savannah, G. & N. A. R. Co., 13 S.E. 459, 87 Ga. 374

39 C.J. p. 1011 note 21

51. Ala.—Lowe v. Poole, 179 So. 536, 235 Ala. 441

39 C.J. p. 1011 note 22

52. Or.—Dibert v. Giebach, 144 P. 1184, 74 Or. 64

39 C.J. p. 1011 note 23

53. Or.—Dibert v. Giebach, supra. Tex.—Missouri, K. & T. R. Co. v. Reasor, 68 S.W. 332, 28 Tex. Civ. App. 302

54. N.C.—Davis v. North Carolina Shipbuilding Co., 104 S.E. 82, 180 N.C. 74

39 C.J. p. 1011 note 25.

55. Mo.—Lochmann v. Brown, App., 20 S.W. 2d 561

Evidence of an admission by defendant that he carried liability insurance covering the work in which the injured person was engaged at the time of the injury and tending to show that such person was in his employ at such time has been held admissible—Lochmann v. Brown, supra

56. Mass.—Beauregard v. Benjamin F. Smith Co., 100 N.E. 637, 213 Mass. 259, 45 L.R.A., N.S., 200, Ann. Cas. 1914A 473

39 C.J. p. 1012 note 26.

57. Mo.—Powell v. Rawson Land Co., App., 221 S.W. 765

39 C.J. p. 1012 note 27

Who paid fellow employee

Ariz.—Inspiration Consol. Copper Co. v. Bryan, 252 P. 1012, 31 Ariz. 802

58. Ariz.—Inspiration Consol. Copper Co. v. Bryan, supra

59. Ariz.—Inspiration Consol. Copper Co. v. Bryan, supra

missible Evidence of a statement by defendant's agent that he is the employer⁶⁰ or will be responsible for injuries⁶¹ has likewise been held admissible Evidence that a customary furlough was not given by a general employer to the injured employee while working for a special employer has been held admissible to determine whether such employee knew of the change of employers.⁶²

Competent evidence tending to show whether the injured person was employed by defendant, or by an independent contractor, or was himself an independent contractor, at the time of the injury is admissible⁶³ Thus evidence that defendant carried sickness and accident insurance on its servants and made deductions from their wages to pay the premiums thereon has been held admissible as to whether plaintiff was an employee or an independent contractor at the time of the injury⁶⁴ Also a compensation policy, maintained by one who defendant claims acted as an independent contractor solely responsible for plaintiff's injuries, has been held admissible to show that such person acted as defendant's agent and not as an independent contractor.⁶⁵

§ 505. — Nature, Cause, and Extent of Injury

Relevant, competent, and material evidence as to the nature, cause, and extent of the servant's injury is admissible.

Evidence having some bearing on the cause of the accident,⁶⁶ tending to show that it was due⁶⁷ or not due⁶⁸ to defendant's negligent act, or was attributable to some cause other than defendant's negligence,⁶⁹ has been held admissible or inadmissible depending on its relevancy or irrelevancy to those issues. Evidence tending to show the cause of the accident will not be excluded on the ground that the negligence testified to has not been charged in the complaint⁷⁰

Competent evidence bearing on the nature⁷¹ and extent⁷² of the accident, or on the nature⁷³ and extent⁷⁴ of plaintiff's injuries resulting therefrom, is admissible.

Relation of employer to cause of injury Evidence bearing on the relation of the employer to the cause of the injury is admissible, as, for example, any evidence tending to prove that the negligent person was in his employ at the time,⁷⁵ and that

60. Mich—Hannula v Cleveland Cliffs Iron Co, 155 NW 499, 188 Mich 648

61. Ill—Consolidated Coal Co v Seniger, 53 NE 733, 179 Ill 370

62. NY—Lisanti v William F. Kenny Co, 232 NYS 103, 225 App Div 129, affirmed 166 NE 347, 350 NY. 621.

63. Mass—Trepannier v. Cote, 93 N. E 796, 207 Mass 484

Miss—Long-Bell Lumber Sales Corporation v. Perritt, 172 So 747, 178 Miss. 194.

Testimony of other employees has been held admissible on the question whether plaintiff was employed by an independent contractor or by defendant, notwithstanding the vagueness of the testimony as to the time of work with reference to the time of plaintiff's injury—Chapman & Dewey Lumber Co v Andrews, 91 SW 2d 1026, 192 Ark. 291

64. Miss—Long-Bell Lumber Sales Corporation v. Perritt, 172 So 747, 178 Miss 194.

65. Ohio—Kraemer v. Bates Motor Transport Lines, 11 NE 2d 105, 56 Ohio App 427.

66. Ark—Eureka Oil Co v Mooney, 392 SW. 681, 173 Ark 335. 39 C.J. p 1012 note 31.

Evidence held admissible

(1) An employee suing his employer for injuries resulting from an occupational disease is not restricted to evidence that other employees contracted the disease under similar working conditions—Wolf v Malinckrodt Chemical Works, 81 SW 2d 323, 336 Mo 748—Cleveland v. Laclede-Christy Clay Products Co, Mo App, 113 SW 2d 1065

(2) Other evidence held admissible see 39 C.J. p 1012 note 31 [a].

Evidence held not admissible

Cal—Dryden v. Western Pac R Co, 36 P 2d 394, 1 Cal App 2d 49
Mo—Lavender v Kurn, 195 SW 2d 480, 355 Mo 168, certiorari denied 87 SCt 111, 329 US 674, 91 LEd 596—Young v. Wheelock, 64 SW 2d 950, 333 Mo. 992, certiorari denied Wheelock v Young, 54 SCt 527, 291 US 676, 78 LEd 1084

39 C.J. p 1012 note 31 [b]

67. Kan—Griffith v. Midland Valley R Co, 166 P 467, 100 Kan 500, certiorari denied 38 SCt 12, 245 US 653, 62 LEd 532, and error dismissed 38 SCt 133, 245 US 633, 62 LEd 522. 39 C.J. p 1012 note 32

Evidence held admissible

(1) Circumstantial evidence has been held admissible to show the causal connection between defendant's alleged negligence and the

servant's injury—Lunde v. Cudahy Packing Co, 117 NW 1063, 139 Iowa 688

(2) Other evidence held admissible see 39 C.J. p 1012 note 32 [a]

68. Ill—Lolli v Spring Valley Coal Co, 193 Ill App 234
39 C.J. p 1012 note 33

69. Ark—American Bauxite Co v. Dunn, 178 SW 934, 120 Ark 1, Ann Cas 1917C 625
39 C.J. p 1012 note 34

70. Mont—Domitrovich v Stone & Webster Engineering Corp, 118 P 760, 44 Mont 7.
39 C.J. p 1012 note 37

Admissibility dependent on pleadings—generally see supra § 499

71. Mo—Potter v Metropolitan St R Co, 126 S.W. 209, 142 Mo App 220

72. Ind—Southern Indiana R Co v. Osborn, 78 NE 248, 39 Ind App 333, rehearing denied 79 NE 1067, 39 Ind App 333

73. US—Chicago, M & St P R Co v Heil, Minn, 154 F 626, 83 CCA 400

74. NC—Wacksmuth v Atlantic Coast Line R. Co, 72 SE 813, 157 NC 34
39 C.J. p 1012 note 41

75. Mo—Williams v Schaff, 232 S. W 412, 282 Mo 497
39 C.J. p 1012 note 43.

it was⁷⁶ or was not⁷⁷ his act which resulted in plaintiff's injury

§ 506. — Negligence of Employer in General

Any evidence, otherwise competent, relevant to the issues as to the negligence of the employer is ordinarily admissible.

Any evidence, otherwise competent, relevant to the issues as to the negligence involved is ordinarily admissible to establish or disprove the negligence complained of⁷⁸

§ 507. — Care of Inexperienced or Youthful Employee

In an action against a master to recover for injuries to an inexperienced or youthful servant, any competent evidence is admissible which tends to prove or disprove the servant's inexperience, youth, and mental capacity, and evidence bearing on the employer's duty and failure to protect the employee is admissible.

In an action to recover for injuries to an inexperienced or youthful servant, any competent evidence is admissible which tends to show or disprove the servant's inexperience⁷⁹ or youth,⁸⁰ his mental capacity,⁸¹ or his knowledge or ignorance of the danger.⁸² Evidence may also be admissible

to show the employer's knowledge of his employee's youth or inexperience,⁸³ and evidence bearing on his duty and failure to protect the employee, as, for example, facts relating to the existence and nature of the danger and the consequent duty to warn,⁸⁴ the custom of defendant⁸⁵ or of others in the same kind of business⁸⁶ to take or not to take precautions, the taking or failing to take precautions at the time of the accident,⁸⁷ and the giving or failing to give the proper warnings or instructions.⁸⁸ Evidence of experience or inexperience is immaterial where there is no evidence in the case of the employee's due care and of the employer's negligence.⁸⁹

§ 508. — Violations of Statutes or Ordinances

The employment of a servant by a master in violation of a statute is competent evidence of the negligence of the master.

The employment of a servant by a master in violation of a statute is competent evidence of the negligence of the master.⁹⁰ Thus, in an action for injuries suffered by an infant employee of defendant, evidence as to whether defendant employed the infant in violation of a statute governing the employment of minors ordinarily is admissible,⁹¹ and it has been held that the violation of such a statute

76. *US—American Mfg Co v Bigelow*, NY, 188 F 84, 110 CC A 77

NY—*Pedersen v. Leonhard Michel Brewing Co*, 141 NY S. 399, 156 App Div 383

77. *Mich—Downs v Fowler*, 187 N W 855, 201 Mich 659

78. *Miss—New Orleans Great Northern R Co v Branton*, 146 So 870, 167 Miss 52, certiorari denied 54 S Ct 88, 290 US 667, 78 L Ed 577

39 CJ p 1013 note 47.

Violation of statutes or ordinances as evidence of negligence see *infra* § 508

Evidence held admissible

(1) In general—*Louisville & N R Co v Bradford*, 69 SE 870, 135 Ga 522—39 CJ p 1013 note 47 [a]

(2) Testimony that train, judging by "blistered" places on rails, was stopped in shorter distance than that between it and person struck thereby when engineer applied emergency brakes by his own admission has been held competent on question of his negligence—*New Orleans Great Northern R Co v Branton*, 146 So 870, 167 Miss 52, certiorari denied 54 S Ct 88, 290 US 667, 78 L Ed 577

79. *NC—Dunn v John L Roper*

Lumber Co, 90 SE 18, 172 NC 129

39 CJ p 1013 note 49

Care required of master as to inexperienced or youthful servants see *supra* § 185

80. *NH—Bilodeau v Gale Bros*, 140 A 172, 83 NH 196

39 CJ p 1013 note 50

Representation on applying for work Whether plaintiff stated that he was older than he actually was when he applied for work has been held not material—*Harlow v Western Cartridge Co*, 179 Ill App 515

81. *NH—Bilodeau v Gale Bros*, 140 A 172, 83 NH 196

39 CJ p 1013 note 51

82. *Mass—Gettins v Kelley*, 98 N E 684, 213 Mass 171

NC—*Dunn v John L Roper Lumber Co*, 90 SE 18, 172 NC 129

83. *Tex—Texas P R Co v Brick*, 20 SW 511, 83 Tex 598.

39 CJ p 1013 note 53

84. *NH—Bilodeau v Gale Bros*, 140 A 172, 83 NH 196

39 CJ p 1013 note 55

85. *Va—Virginia Iron, Coal & Coke Co v Tomlinson*, 51 SE 362, 104 Va 249.

39 CJ p 1013 note 56.

86. *Utah—Pence v California Min Co*, 75 P 934, 27 Utah 578

39 CJ p 1014 note 57

87. *Ga—J S Betts Co. v Hancock*, 77 SE 77, 139 Ga 198.

39 CJ p 1014 note 58

88. *Wash—Arneson v. Smith*, 206 P 980, 130 Wash 98.

39 CJ p 1014 note 59

Admissibility of evidence as to warning and instructing employee generally see *infra* § 514

89. *Ga—Kendrick v. Central R & Banking Co*, 15 SE 685, 89 Ga 782

90. *Pa—Stehle v Jaeger Automatic Mach Co*, 69 A 1116, 230 Pa 617, 14 Ann Cas 122

39 CJ p 532 note 77

Master's liability for injuries to servant arising out of violations of statutes generally see *supra* § 191

91. *RI—Ross v. Ronci*, 195 A 401, 59 RI 807.

39 CJ p 533 note 77 [a], p 1014 note 63

Master's liability for injuries to minors employed in violation of statutory prohibition or regulation generally see *supra* § 194

Evidence held admissible

(1) A minor employee who is injured while being employed in violation of a statute limiting the number of hours per week for which he can legally be employed is entitled to have such fact considered by jury in determining the employer's liability

is evidence, or evidence per se, of negligence⁹³

The rule has also been applied to the admissibility of evidence showing whether an employer violated a statute or ordinance providing for the guarding of dangerous machinery⁹⁴ and places,⁹⁴ or for the regulation of dangerous occupations,⁹⁵ such as mining,⁹⁶ railroading,⁹⁷ and blasting⁹⁸

§ 509. — Conditions before or after Injury

In an action against a master for personal injuries

—*Rossi v. Ronci*, 195 A 401, 59 RI 307

(2) Under some statutory provisions evidence of employer's failure to secure employment certificate is material only to sustain minor employee's right to bring action at common law for injuries—*Benner v. Evans Laundry Co.*, 222 N.W. 630, 117 Neb. 701, 60 A.L.R. 830

(3) Other evidence held admissible see 39 C.J. p 1014 note 63 [a]

Evidence held inadmissible

(1) In an action for injury to a minor employed in violation of a statute prohibiting the employment of children under a stated age in certain places without an employment certificate, evidence that the child's parents knew of, and consented to, his employment in violation of the statute has been held inadmissible—*Tampa Shipbuilding & Engineering v. Adams*, 181 So 403, 132 Fla. 419, rehearing denied *Tampa Shipbuilding & Engineering Co. v. Adams*, 181 So 893, 132 Fla. 419

(3) In an action for injury to a minor employee, where the injury to such employee did not result from the danger against which the child labor statute was directed, evidence of the violation of such statute by the employer has been held inadmissible—*Hooven & Allison Co. v. Cor's Adm'r.*, 104 SW2d 969, 268 Ky 266

(3) Other evidence held inadmissible see 39 C.J. p 1014 note 63 [b]

92. NY—*Warney v. Board of Education of School Dist. No 5 of Town of Irondequoit*, 49 NE2d 466, 290 NY 329—*Murphy v. Elmwood Country Club*, 50 NYS2d 331.

39 C.J. p 298 note 16.

Only when employment of child is unlawful because in violation of a child labor statute is the violation of such statute in itself evidence of actionable negligence—*Williamson v. Old Dominion Box Co.*, 171 SE 335, 205 NC 350

93. Kan—*Slater v. Atchison, T & S F R. Co.*, 137 P 943, 91 Kan 236, LRA 1916F 949.
39 C.J. p 1014 note 64.

Evidence held inadmissible

(1) Under a statute making it an imperative requirement that a machine be equipped with a suction fan, evidence that equipping such machine with a fan as required by the statute is impractical and impossible has been held inadmissible—*Reaves v. Kramer*, 97 SW2d 136, 231 Mo App 368

(2) Where the issue is the violation of a safety appliance act, evidence that the appliance in question is commonly used has been held inadmissible—*Western & A R R v. Meister*, 140 SE 905, 37 Ga App 570

(3) Other evidence held inadmissible see 39 C.J. p 1014 note 64 [b]

94. Mo—*Wack v. F E Schoenberg Mfg Co.*, 53 SW2d 28, 331 Mo 197

39 C.J. p 1015 note 65

Provisions of building code

In action against an employer for injuries sustained by employee in falling into unguarded cellarway on another's premises, permitting jury to consider provisions of building code as bearing on negligence of employer has been held error where no defect in the employer's premises was legal cause of accident—*Bryan v. Hines*, 281 NYS 420, 245 App. Div 322

Elevators, shafts, and hoistways

(1) In action for injuries sustained by employee crashing through gate into elevator shaft, ordinance requiring interlocking device for gates has been held admissible where device would strengthen gate—*Wack v. F E Schoenberg Mfg Co.*, 53 SW2d 28, 331 Mo 197

(2) Other decisions with respect to the admissibility of such evidence see 39 C.J. p 1014 note 65 [a]

95. Wash—*Grant v. Fisher Flouring Mills Co.*, 68 P2d 310, 190 Wash 356

Official reports

In action for injuries received by employee as result of employer's violation of factory act by failing to provide proper ventilation of rooms wherein dangerous gases were used,

to his servant, competent evidence may be admitted to show the condition of the master's machinery, appliances, or places for work before and after the injury, where such condition is shown, or may be presumed, to have existed at the time of the accident.

In an action against a master for personal injuries to his servant, competent evidence may be admitted to show the condition of the master's machinery, appliances, or places for work before and after the injury, where such condition is shown, or may be presumed, to have existed at the time of the accident⁹⁹ However, it has been held that un-

reports of department of labor and industries inspectors stating that ventilation in factory was good were relevant as laying foundation for inference that employer did not violate factory act as alleged—*Grant v. Fisher Flouring Mills Co.*, supra

Rule of state industrial bulletin

US—*Galeota v. U S Gypsum Co.*, CCANY, 123 F2d 947, certiorari denied *U S Gypsum Co. v. Galeota*, 62 S Ct 798, 315 US 813, 86 L Ed 1211

96. Ala—*Stith Coal Co. v. Sanford*, 68 So 990, 192 Ala 601, 15 A.L.R. 1433

39 C.J. p 1015 note 66

Failure to report accidents

Evidence of mine owner's failure to report accidents as required by statute, has been held inadmissible where that fact is not in issue—*Haywood v. Dering Coal Co.*, 145 Ill App 506

97. SC—*Moore v. Southern Ry Co.*, 161 SE 526, 163 SC 343, reversed on other grounds *Southern Ry. Co. v. Moore*, 52 S Ct. 38, 284 US 581, 76 L Ed 503

39 C.J. p 1015 note 67

Ordinance regulating speed

In an action brought under the Federal Employers' Liability Act, an ordinance prohibiting the operation of a train in excess of a stated speed has been held admissible an indicating the negligent operation of the train on which the employee was injured—*Moore v. Southern Ry Co.*, 161 SE 526, 163 SC 343, reversed on other grounds *Southern Ry Co. v. Moore*, 52 S Ct 38, 284 US 581, 76 L Ed 503

98. NY—*Burke v. City & County Contract Co.*, 117 NYS 400, 133 App Div 113

99. Mo—*Busby v. Southwestern Bell Telephone Co.*, 287 S.W. 434.

Continuing negligence

Evidence as to the condition, before and after the injury of the employee, of an entry to a place of work, at which entry the employee was injured, has been held competent as showing continuing negligence on the part of the employer—

less there is proof that conditions were the same at the time of the inspection as at the time of the accident to the employee,¹ or unless the inspection and discovery occurred so shortly before or subsequent to the accident that a reasonable presumption would arise that the conditions had not been changed,² evidence of such conditions is not admissible. In the case of a suit against an employer based on injuries caused by an occupational disease of his employee, it has been held that evidence of conditions existing at the place of work may take a wide range in time,³ especially where the conditions giving rise to the claimed injuries and the nature thereof are obscure.⁴

Before injury. In an action against a master for personal injuries to his servant, competent evidence may be admitted to show the condition of the master's machinery, appliances, or places for work previous to the injury, where such condition is shown, or may be presumed, to have continued up to the time of the accident,⁵ or where there is evidence to show what changes, if any, have been made in the meantime.⁶ Where, however, the conditions are constantly changing the evidence is not admissi-

ble.⁷ On issues other than defendant's negligence, evidence of the conditions prior to the accident, unless too remote,⁸ may be admissible, as, for example, in rebuttal of the claims of either plaintiff⁹ or defendant,¹⁰ to explain the nature of repairs to a machine before the accident, where their nature and sufficiency are in issue,¹¹ or to show the dangerous character of the appliance or place,¹² or the employer's knowledge of the defect or danger,¹³ or his willfulness in continuing it.¹⁴

After injury. Where, in an action against a master for personal injuries to his servant, the condition of the master's machinery, appliances, or places of work, as it appeared after the accident occurred, may be presumed to have existed at the time of the accident,¹⁵ or where such subsequent condition is shown to be the same, or substantially the same, as the condition existing at the time of the accident,¹⁶ evidence of such condition usually is admissible. Ordinarily, however, in order to be admissible, the evidence should deal with conditions as they appeared within a reasonable time after the accident,¹⁷ and the machinery, appliances, or places of work concerning which the evidence is offered

Western Coal & Mining Co v. Dane, 273 S.W. 657, 168 Ark. 961

Where there has been no change of condition, evidence as to the condition of the place where the employee was injured, before and after the accident occurred, has been held admissible—**Busby v. Southwestern Bell Telephone Co., Mo.** 287 S.W. 434

Where the necessary similarity of conditions is shown, evidence relating to the condition of a track and roadbed where the employee was injured, at a time other than when the accident occurred, has been held admissible—**Ellis v. Union Pac. R. Co.** 27 N.W. 2d 921, 148 Neb. 515

1. Ala.—**St. Louis-San Francisco Ry. Co. v. Curtis**, 113 So. 54, 216 Ala. 296.

2. Ala.—**St. Louis-San Francisco Ry. Co. v. Curtis**, *supra*.

3. Ky.—**Coburn v. North American Refractories Co.**, 174 S.W. 2d 757, 295 Ky. 566

4. Ky.—**Coburn v. North American Refractories Co.**, *supra*.

5. Ala.—**St. Louis-San Francisco Ry. Co. v. Curtis**, 113 So. 54, 216 Ala. 296

39 C.J. p 1015 note 71.

Prior conditions as bearing on the plaintiff's assumption of risk see *infra* § 518.

Evidence held admissible as to:

(1) Defective condition of automobile.—**Casualty Reciprocal Exchange v. Sutfin**, 166 P.2d 434, 196 Okl. 524

(2) Insufficient ventilation in place of work—**Clark v. Banner Grain Co.** 261 N.W. 596, 195 Minn. 44

(3) Only condition of place of work—**Henwood v. Chaney**, C.C.A. Mo., 156 F.2d 892, certiorari denied 87 S.Ct. 112, 329 U.S. 760, 91 L.Ed. 655

(4) Other matters—**Dixie Baukite Co. v. Webb**, 63 S.W. 2d 634, 187 Ark. 1024—39 C.J. p 1015 note 71 [a]

Evidence held not admissible as to condition of:

(1) Light on switch stand—**Wallingford v. Terminal R. R. Ass'n of St. Louis**, 88 S.W. 2d 361, 337 Mo. 1147

(2) Other matters see 39 C.J. p 1015 note 71 [b]

6. Ky.—**Stewart v. Louisville & N. R. Co.**, 125 S.W. 154, 186 Ky. 717.

7. Iowa.—**Keatley v. Illinois Cent. R. Co.**, 63 N.W. 560, 94 Iowa 685 39 C.J. p 1016 note 73.

8. Vt.—**Johnson v. Doubleday**, 102 A. 1038, 92 Vt. 267

9. Vt.—**Niles v. Central Vermont R. Co.**, 89 A. 629, 87 Vt. 356

10. Vt.—**White v. Central Vermont R. Co.**, 89 A. 618, 87 Vt. 330, affirmed 35 S.Ct. 865, 238 U.S. 507, 59 L.Ed. 1433, Ann. Cas. 1916B 252 39 C.J. p 1016 note 77

11. Wash.—**Towle v. Stimson Mill Co.**, 74 P. 471, 33 Wash. 805

12. Ill.—**McCarthy v. Spring Valley Coal Co.**, 149 Ill. App. 275, affirmed 89 N.E. 872, 243 Ill. 135.

13. N.C.—**Kelly v. Raleigh Granite Co.**, 156 S.E. 517, 200 N.C. 326 39 C.J. p 1016 note 80.

Evidence held admissible as to condition of:

(1) Cars—**Kelly v. Raleigh Granite Co.**, 156 S.E. 517, 200 N.C. 326

(2) Other things see 39 C.J. p 1016 note 80 [a]

14. Ill.—**Emerling v. Spring Valley Coal Co.**, 149 Ill. App. 97

15. U.S.—**Scott v. Baltimore & O. R. Co.**, C.C.A. Pa., 151 F.2d 61

Ark.—**Missouri Pac. R. Co. v. Zollicoffer**, 191 S.W. 2d 587, 209 Ark. 559

Mo.—**Aly v. Terminal R. Ass'n of St. Louis**, 119 S.W. 2d 363, 342 Mo. 1116, certiorari denied Terminal R. Ass'n of St. Louis v. Aly, 59 S.Ct. 251, 306 U.S. 655, 83 L.Ed. 424—**Harrison v. St. Louis-San Francisco Ry. Co.**, 99 S.W. 2d 841, 339 Mo. 321.

39 C.J. p 1016 note 84

16. U.S.—**Reading Co. v. Geary**, C. C.A. Md., 47 F.2d 142, 79 A.L.R. 226, certiorari denied 51 S.Ct. 492, 283 U.S. 844, 75 L.Ed. 1454

Ga.—**Louisville & N. R. Co. v. Edwards**, 158 S.E. 361, 43 Ga. App. 167

Ky.—**Coburn v. North American Refractories Co.**, 174 S.W. 2d 757, 295 Ky. 566.

17. Ga.—**Western & A. R. R. v. Hetzel**, 149 S.E. 876, conformed to 150 S.E. 112, 40 Ga. App. 447.

Tex.—**Brigman v. Holt & Bowers**,

should be sufficiently identified as the cause of the accident.¹⁸

Evidence of conditions as they appeared subsequent to the accident is not admissible where it is shown that conditions are not the same,¹⁹ or that they are constantly changing,²⁰ or where there is no presumption or proof or offer of proof of unchanged conditions.²¹ If the nature and extent of the intervening changes²² or the fact of their immateriality²³ is shown, evidence of the later condition is admissible. A change in conditions taking place at the time of the accident and caused thereby is not admissible, in the absence of evidence showing that the described condition was due to the causes alleged.²⁴ Evidence as to what was done with the machinery after the accident in question has been held inadmissible.²⁵

Evidence of conditions after the injury is admissible to contradict or control evidence as to such condition already introduced by the other party²⁶ or to explain inconsistencies in the testimony of witnesses of the party offering it.²⁷ The practicability of guarding a machine may be shown by evidence that it was guarded while being operated for several months after the injury, without injury to other employees.²⁸

§ 510. — Precautions against Recurrence of Injury

As a general rule evidence that after the accident the employer took precautions against its recurrence is not admissible to show his negligence.

Evidence that after the accident the employer took precautions against its recurrence is generally held not to be admissible to show his negligence.²⁹

Civ App, 32 S.W.2d 220, error refused

39 C.J. p 1016 note 83

Conflicting reports

Inspection reports made one day after the accident showing a defect in an appliance on a train causing the injury are admissible, although similar reports made on the day of the accident showed no such defect, and although a trip intervened between the two sets of reports, in view of the fact that the first set of reports was made without a special inspection.—*Scott v Baltimore & O. R. Co.*, C.C.A. Pa., 151 F.2d 61.

Time held not too remote

(1) Immediately after—*Aly v Terminal R. Ass'n of St. Louis*, 119 S.W.2d 383, 342 Mo. 1116, certiorari denied *Terminal R. Ass'n of St. Louis v Aly*, 59 S.Ct. 261, 805 U.S. 655, 83 L.Ed. 424—39 C.J. p 1016 note 84 [a] (1)

(2) Within an hour after—*Missouri Pac. R. Co. v Zollmeier*, 191 S.W.2d 587, 209 Ark. 559

(3) Morning after—*Central of Georgia Ry. Co. v White*, 175 S.E. 407, 49 Ga.App. 290

(4) Day after.—*Scott v Baltimore & O. R. Co.*, C.C.A. Pa., 151 F.2d 61—39 C.J. p 1016 note 84 [a] (6).

(5) Day or two after—*Harrison v St. Louis-San Francisco Ry. Co.*, 99 S.W.2d 841, 339 Mo. 821—39 C.J. p 1016 note 84 [a] (7)

(6) About two and one half years after.—*Reading Co. v Geary*, C.C.A. Md., 47 F.2d 142, 79 A.L.R. 226, certiorari denied 51 S.Ct. 492, 283 U.S. 844, 75 L.Ed. 1454

(7) Other times see 39 C.J. p 1016 note 84 [a] (2)-(5), (8)-(25)

18. Ky.—*Wright v. Elkhorn Cons*

Coal & Coke Co., 206 S.W. 634, 183 Ky. 423

39 C.J. p 1016 note 82

19. Pa.—*Johns v Pennsylvania R. Co.*, 75 A. 408, 226 Pa. 319, 28 L.R.A.N.S. 591

Wis.—*Odegard v North Wisconsin Lumber Co.*, 110 N.W. 809, 180 Wis. 859

20. Ky.—*Edwards v Lam*, 116 S.W. 283, 132 Ky. 32, rehearing denied 119 S.W. 175, 132 Ky. 32, and 131 S.W. 795, 132 Ky. 32

21. Mo.—*Totten v Smith Bros.*, App. 3 S.W.2d 740
39 C.J. p 1017 note 87.

22. Wash.—*Christiansen v McLeilan*, 133 P. 434, 74 Wash. 318.

39 C.J. p 1018 note 88

Repairs or changes made after the accident see *infra* § 510

23. Mich.—*Clemens v Gem Fibre Package Co.*, 117 N.W. 187, 153 Mich. 495

Wash.—*Barrett v Banner Shingle Co.*, 87 P. 919, 45 Wash. 12

24. Iowa.—*Kirby v Chicago, R. I. & P. R. Co.*, 155 N.W. 343, 173 Iowa. 144

39 C.J. p 1018 note 90

Evidence of defects which might have resulted from the accident has been held incompetent unless there were circumstances authorizing a reasonable inference that such defects existed before the accident.—*McEachin & McEachin Const. Co. v Burks*, 75 S.W.2d 794, 189 Ark. 947

25. Ohio.—*Shank v Hamilton Foundry & Machine Co.*, 155 N.E. 564, 23 Ohio App. 323

26. Ark.—*St. Louis, I. M. & S. R. Co. v Coke*, 175 S.W. 1177, 118 Ark. 49

39 C.J. p 1018 note 91

27. Ind.—*Brazil Block Coal Co. v*

Gibson, 66 N.E. 883, 160 Ind. 319, 98 Am.S.R. 281.

39 C.J. p 1018 note 92.

28. Wash.—*Lindblom v Hazel Mill Co.*, 157 P. 998, 91 Wash. 333

29. U.S.—*General Motors Corp. v Holler*, C.C.A. Mo., 150 F.2d 297
Ga.—*Evans v Central of Georgia Ry. Co.*, 143 S.E. 909, 38 Ga.App. 146
Mo.—*Wallingford v Terminal R. R. Ass'n of St. Louis*, 88 S.W.2d 361, 337 Mo. 1147

N.H.—*Blais v Flanders Hardware Co.*, 42 A.2d 332, 93 N.H. 370

S.C.—*Green v Atlantic Coast Line R. Co.*, 134 S.E. 385, 136 S.C. 337.

Wash.—*Hatcher v Globe Union Mfg. Co.*, 16 P.2d 824, 170 Wash. 494

39 C.J. p 1018 note 95

Failure to repair as evidence of negligence see *infra* § 512

Evidence of repairs, alterations, and replacements held inadmissible

(1) In general—*Louisville & N. R. Co. v McCoy*, 87 S.W.2d 921, 261 Ky. 435—39 C.J. p 1018 note 93 [c]

(2) Removing vegetation along railroad tracks—*Chicago, B. & Q. R. Co. v Kelley*, C.C.A. Neb., 74 F.2d 80

(3) Repairing depot platform—*Lindley v Wabash Ry. Co.*, 233 N.W. 450, 120 Neb. 195, certiorari denied *Wabash R. Co. v Lindley*, 51 S.Ct. 655, 283 U.S. 863, 75 L.Ed. 1468

(4) Repairing switch or lock on elevator.—*Kay v Balentine Packing Co.*, 184 S.E. 846, 179 S.C. 485.

Evidence of guarding appliances or places held inadmissible

(1) Furnishing more adequate light at entrance to elevator—*Kay v Balentine Packing Co.*, 184 S.E. 846, 179 S.C. 485.

(2) Placing guard on wood-turning lathe—*Stanton v Morrison Mills*, 47 A.2d 112, 94 N.H. 92—*Blais v*

but there is also some authority to the contrary³⁰

On other issues or for other purposes, depending on the circumstances, such evidence has been held admissible,³¹ as, for example, in rebuttal of the claims or evidence of the other party,³² or to test the credibility of a witness³³ or the accuracy of a map³⁴. Such evidence has also been held admissible to show the possibility of producing certain parts of a machine in court,³⁵ to fix the time of an examination of the premises,³⁶ to reconcile the condition of a place or appliance in question at the time of the trial with that at the time of the accident,³⁷ to show changed conditions after the accident,³⁸ or to show the conditions³⁹ or the methods of work used⁴⁰ at the time of the accident, if not too remote.⁴¹

It has been held that such evidence is admissible to corroborate other evidence of a defective condition⁴² and to show the possibility of correcting it,⁴³ to prove the cause of the accident,⁴⁴ or to show whose duty it was to make the repairs,⁴⁵ or to show the possibility⁴⁶ or practicability⁴⁷ of guarding ap-

pliances or places, where the statute requires guards in such contingency, although there is authority for the position that the evidence is not admissible for this purpose.⁴⁸ If the guard was installed without defendant's authority, the evidence is not admissible.⁴⁹ Where any of these issues or purposes are obviously used as a mere pretext for the admission of such evidence, and the real purpose is to show the negligence of defendant before or at the time of the accident, the evidence will be excluded.⁵⁰

Repairs not constituting admission by defendant. Where the subsequent repairs or changes have no relation whatever to the defect alleged to have caused plaintiff's injuries,⁵¹ or where they are made for some other reason than to protect the employees,⁵² or where they are merely a temporary expedient and not permanent construction,⁵³ the evidence is admissible.

Absence of repairs or changes. Evidence offered by defendant that no repairs or changes of any consequence were made after the accident is not admissible.⁵⁴

Flanders Hardware Co., 42 A 2d 332, 93 NH 370.

(3) Placing light on target indicating position of derailer—Brady v Southern Ry Co., 23 SE 2d 334, 222 NC 367, certiorari denied 63 S Ct. 995, 318 U.S. 793, 87 L Ed 1158, affirmed 64 S Ct 232, 320 US 475, 88 L Ed 339.

(4) Other safeguards—Love v Chambers Lumber Co., 139 P 492, 64 Or 129—39 CJ p 1019 note 95 [d]

Evidence of changing methods of work held inadmissible

(1) Adopting different method of handling railroad cars—Chicago, B & Q R Co v Kelley, CCA Neb, 74 F 2d 80

(2) Other changes see 39 C.J. p 1019 note 95 [e]

30. Kan—White v Berkson Bros Cloak & Suit Co., 187 P 670, 106 Kan 239.

39 CJ p 1019 note 96

31. Mo—Wallingford v. Terminal R. R. Ass'n of St. Louis, 88 SW 2d 361, 337 Mo. 1147

Concealment of conditions at time of accident

Evidence tending to show that after the accident occurred the employer sought to conceal conditions as they then existed has been held admissible—Wallingford v. Terminal R. R. Ass'n of St. Louis, supra

32. Mo—Miller v Walsh Fire Clay Products Co., 282 SW 141, 219 Mo App 590

39 CJ p 1020 note 97

Evidence held admissible

(1) That after employee was in-

jured, other employees, who finished the job, were provided with a fan to keep out gas, to rebut defense that no gas entered place of work—Miller v Walsh Fire Clay Products Co., supra

(2) Other evidence see 39 C.J. p 1020 note 97 [a]

33. Ohio—Massillon Iron & Steel Co v Wiegand, 34 Ohio Cir Ct 556, 15 Ohio Cir Ct NS, 417

39 CJ p 1020 note 98

34. Or—Ferrari v. Beaver Hill Coal Co., 102 P 1016, 54 Or 210

35. Tex—Waggoner v Porterfield, 118 SW 1094, 55 Tex Civ App 169

36. Ark—Bodcaw Lumber Co. v Ford, 102 SW 896, 82 Ark 555
Idaho—Erickson v Edward Rutledge Timber Co., 203 P. 1078, 34 Idaho 754

37. SC—Green v. Atlantic Coast Line R Co., 134 SE 385, 136 SC 337.

38. SC—Kay v Balentine Packing Co., 184 SE 346, 179 SC 485.

39. Okl—Tway v Hartman, 75 P. 2d 893, 181 Okl 608.

39 CJ p 1020 note 3

40. Mass—Bartley v. Boston & N St R Co., 83 NE 1093, 198 Mass 163

41. Mo—Hearon v. Himmelberger-Harrison Lumber Co., App, 224 SW 67

39 CJ p 1020 note 5.

42. Cal—Brunker v Pioneer Roll Paper Co., 92 P 1043, 6 Cal App 691.

NC—West v. Atlantic Coast Line R Co., 93 SE 479, 174 NC 135

43. Mass—Willey v. Boston Electric Light Co., 46 NE 395, 168 Mass 40, 37 LRA 723.

44. Vt—Place v Grand Trunk R Co., 71 A. 336, 82 Vt. 42

45. NC—Boggs v Cullowhee Min Co., 78 SE 274, 162 NC 393

46. Mo—Phillips v Hamilton Brown Shoe Co., 165 SW. 1183, 178 Mo App 196

47. Wis—West v Bayfield Mill Co., 128 NW 993, 144 Wis. 106, 45 L. R.A. NS, 124

39 CJ p 406 note 49, p 1020 note 11.

48. Ind—Cincinnati, H & D R Co v Armuth, 103 NE 738, 180 Ind 673

39 CJ p 1020 note 12.

49. Mo—Cobb v Richmond Cotton Oil Co., App, 181 SW 1196

50. US—Antietam Paper Co. v. Womble, 294 F 795.

39 CJ p 1021 note 14.

51. Mass—Albright v Sherer, 111 NE 711, 223 Mass 39.

39 CJ p 1021 note 15

52. US—Du Pont de Nemours v. Smith, Va., 252 F. 491, 164 CCA 407

39 CJ p 1021 note 16

53. Ark—St. Louis, I M & S R Co v Coke, 175 SW. 1177, 118 Ark 49

39 CJ p 1021 note 17

54. Ill—Lee v Toledo, St. Louis & Western R Co., 190 Ill.App. 383

§ 511. — Similar Facts and Occurrences

a. In general

b. Evidence of injuries, or accidents resulting in injuries, to others

a. In General

Evidence of facts, occurrences, or accidents happening at another time are admissible if relevant to the issue and if a substantial similarity in the essential conditions exists, but, where the necessary prerequisites are not shown, and the relevancy and the similarity of essential conditions are not proved, such evidence is not admissible.

Evidence of facts, occurrences, or accidents happening at another time are admissible if relevant to the issue and if a substantial similarity in the essential conditions exists.⁵⁵ Such evidence has been held admissible to show the cause of plaintiff's injuries,⁵⁶ or the authority⁵⁷ or incompetency⁵⁸ of the negligent workman. Likewise, evidence of similar facts and occurrences has also been held admissible to show the existence or the extent of the defective or dangerous condition causing the injury,⁵⁹

the employer's knowledge or his duty to know of the defect or danger, or of the existing perils,⁶⁰ or the duty of the employer to make repairs.⁶¹

Evidence of facts, occurrences, or accidents happening at another time has also been held admissible to show the adequacy of the appliance for the work,⁶² the necessity of taking precautions by the employer,⁶³ the practicability of guarding appliances or places,⁶⁴ or the possibility of guarding them more effectively.⁶⁵ Such evidence has likewise been held admissible to show the customary⁶⁶ or prior⁶⁷ methods of work, and the employer's willfulness in the violation of a statute.⁶⁸ Where such evidence tends to rebut the claims or evidence of the other party, it is admissible for that purpose.⁶⁹

It has been held that evidence as to specific instances of other and similar acts of alleged negligence is not, as a general rule, competent,⁷⁰ so that where the necessary prerequisites are not shown, and the relevancy and the similarity of essential

55. Ark.—Missouri Pac R Co v Beard, 39 SW 2d 292, 183 Ark 377
Cal.—Hicks v. Ocean Shore R R, 117 P 2d 850, 18 Cal 2d 773

Fla.—Holstun v Embry, 169 So 400, 124 Fla 554

Kan.—Wiggins v Missouri-Kansas-Texas R. Co., 276 P. 63, 123 Kan 32.

Mo.—Bird v. St. Louis-San Francisco Ry. Co., 78 SW 2d 389, 396 Mo 316—Moran v Atchison, T & S F Ry Co., 48 SW 2d 881, 330 Mo 278, certiorari denied Atchison, T & S F R Co v Moran, 53 S Ct 21, 287 US 621, 77 LEd 539—Sweany v Wabash Ry Co., 80 S W 2d 216, 229 Mo App 393

NH.—Dowling v L H Shattuck, Inc., 17 A.2d 629, 91 NH 234

NC.—Almond v. Ocoala Mills, 161 SE 731, 202 NC 97

SC.—Barton v. Southern Ry Co., 171 SE 5, 171 SC 46, certiorari denied Southern Ry. Co v Barton, 54 S Ct 51, 290 US 632, 78 LEd 550—Hopkins v. Southern Cotton Oil Co., 142 SE 615, 144 SC 395
39 CJ p 1021 note 20

Evidence of:

Existence of devices on other machines as bearing on plaintiff's assumption of risk see *infra* § 618

Other acts of plaintiff to show contributory negligence see *infra* § 619.

56. Mich.—Van Doorn v Heap, 125 NW 11, 160 Mich 199
39 CJ p 1031 note 21

57. Ala.—Louisville & N R Co v Chamberlee, 54 So 681, 171 Ala. 183, Ann.Cas.1913A 977.

58. Ariz.—Hobson v New Mexico & A R Co., 11 P 546, 2 Ariz 171
39 CJ p 1031 note 23

59. SC.—Hopkins v Southern Cotton Oil Co., 142 SE 615, 144 SC 395

39 CJ p 1021 note 24

Evidence of previous occurrences held admissible

(1) In general

Ark.—Fair Oaks Stave Co v Cross, 9 SW 2d 580, 177 Ark 1146

Cal.—Hicks v Ocean Shore R R, 117 P 2d 850, 18 Cal 2d 773
39 CJ p 1031 note 24 [a]

(2) To show defective condition of cotton oil press—Hopkins v Southern Cotton Oil Co., 142 SE 615, 144 SC 395

60. Fla.—Holstun v. Embry, 169 So 400, 124 Fla 554

39 CJ p 1022 note 26

Evidence held admissible

(1) In general

Cal.—Hicks v Ocean Shore R R, 117 P 2d 850, 18 Cal 2d 773

Fla.—Holstun v. Embry, 169 So 400, 124 Fla 554
39 CJ p 1022 note 26 [a]

(3) That a cotton oil press causing the injury complained of had a previous breakdown when operated by another employee—Hopkins v Southern Cotton Oil Co., 142 SE 615, 144 SC 395

61. SC.—Hopkins v Southern Cotton Oil Co., 142 SE 615, 144 SC 395

62. NY.—Hammond v Union Bag & Paper Co., 136 N.Y.S. 1024, 151 App Div 776

39 CJ p 1022 note 25.

63. Cal.—Ingalls v Monte Cristo Oil & Development Co., 167 P. 857, 176 Cal 123

39 CJ p 1022 note 27.

64. W Va.—Tarr v Keller Lumber & Construction Co., 144 SE 881, 106 W Va. 99, 60 A.L.R. 570
39 CJ p 1022 note 28.

65. Minn.—Poczerwinski v C A Smith Lumber Co., 117 NW 186, 105 Minn 306

39 CJ p 1022 note 29.

66. Ga.—Southern R. Co v Blanton, 200 SE 471, 59 Ga App 352

Ill.—Chicago, etc., R Co. v. Rathneau, 134 Ill App 427, affirmed 80 NE 119, 225 Ill 278.

Utah.—Ward v Denver & R G W. R Co., 85 P 2d 837, 96 Utah 564

67. Mo.—Clark v Widmer Engineering Co., App., 283 SW 500

68. Ill.—Robertson v. Donk Bros Coal & Coke Co., 87 NE 373, 238 Ill 344

69. Cal.—Polkinghorn v. Riverside Portland Cement Co., 142 P. 140, 24 Cal App 615

39 CJ p 1022 note 33

70. Mo.—Mills v. F W Steadley & Co., App., 279 SW 160

Evidence as to defects in other machines for the purpose of recovering for injuries to an employee on the basis of a defect in a particular machine should never be admitted to such an extent as to raise a doubt whether the case was decided on the real issue or on the collaterals—J W Sanders Cotton Mill v. Moody, 195 So 683, 189 Miss. 384.

conditions are not proved, the evidence is not admissible.⁷¹

Evidence showing that no other similar accident ever happened where the injury sued for occurred, or because of the appliance allegedly causing the injury, has been held inadmissible.⁷² It has further been held that defendant may not show that no similar accident has happened within a period of time testified to at the place where the injury occurred or because of the appliance used at the time of the injury,⁷³ but the contrary has also been held.⁷⁴ Evidence that others had performed the task at which plaintiff was injured without injury has been held inadmissible to excuse the employer's failure to furnish a safe place of work.⁷⁵ Also evidence tending to show that no one other than plaintiff had ever been injured by other appliances of the same kind has been held inadmissible.⁷⁶ However, in an action to recover for disability caused by an occupational disease, evidence has been held admissible to show that employees other than plaintiff working under the same conditions have not been so injured to support other evidence by defendant that plaintiff is not affected as claimed.⁷⁷

b. Evidence of Injuries, or Accidents Resulting in Injuries, to Others

Evidence of injuries to others in defendant's employ, or other accidents resulting in such injuries, is admissible if it has any tendency to prove the issue and if there is a substantial similarity in the essential conditions.

Evidence of injuries to others in defendant's employ, or other accidents resulting in such injuries, is admissible if it has a tendency to prove the issue and if there is a substantial similarity in the essential conditions.⁷⁸ Such evidence has been held admissible to prove the cause of the accident or injury,⁷⁹ the defective or dangerous condition,⁸⁰ and defendant's knowledge of or duty to know such condition,⁸¹ and his failure to use the care required under the circumstances.⁸²

Evidence of injuries to others in defendant's employ, or other accidents resulting in such injuries, is not admissible where the relevancy of the evidence, or similarity of conditions, or the proximity of time, is not shown,⁸³ and evidence of accidents or injuries subsequent to the accident or injury complained of is not admissible to prove knowledge on the part of the employer of the defect or condition on which his negligence is predicated.⁸⁴ However, testimony elicited on cross-examination of a

71. Ga.—Southern R Co v Cowan, 183 SE 331, 52 Ga.App 360.
Ky.—Louisville & N R Co v McCoy, 87 SW2d 921, 261 Ky 435.
Miss.—Texas Co v Mills, 158 So 866, 171 Miss 231.
39 CJ p 1023 note 34.

Similar but unconnected occurrence

Evidence of a similar but unconnected negligent occurrence is incompetent to prove carelessness, so that, in action to recover for injuries sustained because of employer's negligent failure to instruct employee on safe method of work, testimony by employee who took plaintiff's place at machine that he was not given such instructions has been held incompetent to prove carelessness—Blais v Flanders Hardware Co, 42 A2d 332, 93 NH 370.

72. US—Bowman-Hicks Lumber Co v Robinson, CCA Or, 16 F2d 340, certiorari denied 47 S Ct. 574, 274 US 736, 71 L Ed 1316.

Mo.—Walker v Mitchell Clay Mfg Co, App, 291 SW 180.

73. Tenn.—Jones v. Noel, App, 204 SW2d 336.
39 CJ p 1023 note 36.

74. Or.—Evensen v Grande Ronde Lumber Co, 149 P 1035, 77 Or 1.
39 CJ p 1023 note 35.

75. Fla.—Southern States Power Co v. Clark, 159 So. 881, 118 Fla 521.

76. SC—Vollington v Southern Paving Const Co, 165 SE 184, 166 SC 448.

77. Tenn.—Banks v Southern Potteries, App, 204 SW2d 382.

78. US—Henwood v Chaney, CCA Mo, 156 F2d 393, certiorari denied 67 S Ct 113, 329 US 760, 91 L Ed 655—Cropper v Titanium Pigment Co, CCA Mo, 47 F2d 1038, 78 ALR 737—E I Du Pont de Nemours & Co v White, CCA NJ, 8 F2d 5.

Mo—Benner v Terminal R Ass'n of St Louis, 156 SW2d 657, 348 Mo 928, certiorari denied Terminal R Ass'n of St Louis v Benner, 62 S Ct 798, 315 US 813, 86 L Ed 1211—Ingram v Prairie Block Coal Co, 5 SW2d 413, 319 Mo 644.

NC—McCord v Harrison-Wright Co, 153 SE 406, 198 NC 742—Corpus Juris quoted in O'Brien v Parks Cramer Co, 145 SE 684, 688, 196 NC 359.

79. US—Chesapeake & O Ry Co v Smith, CCA Ohio, 42 F2d 111, certiorari denied 51 S Ct 33, 282 US 856, 75 L Ed 758.

NC—McCord v Harrison Wright Co, 153 SE 406, 198 NC 742—Corpus Juris quoted in O'Brien v Parks Cramer Co, 145 SE 684, 688, 196 NC 359.

39 CJ p 1023 note 39.

80. Mo—Benner v Terminal R Ass'n of St Louis, 156 SW2d 657,

348 Mo 928, certiorari denied Terminal R Ass'n of St Louis v Benner, 62 S Ct 798, 315 US 813, 86 L Ed 1211.

NC—Corpus Juris quoted in O'Brien v Parks Cramer Co, 145 SE 684, 688, 196 NC 359.
39 CJ p 1023 note 40.

81. NC—Corpus Juris quoted in O'Brien v Parks Cramer Co, 145 SE 684, 688, 196 NC 359.
39 CJ p 1023 note 41.

82. US—Northern Cent. Coal Co v Barrowman, Mo, 246 F 906, 159 CCA 178.

NC—Corpus Juris quoted in O'Brien v Parks Cramer Co, 145 SE 684, 688, 196 NC 359.

83. US—Cropper v. Titanium Pigment Co, CCA Mo, 47 F2d 1038, 78 ALR 737.

NC—Watson v. City of Durham, 178 SE 218, 207 NC 624—Etheridge v Atlantic Coast Line R Co, 175 SE 124, 208 NC 657—Corpus Juris quoted in O'Brien v Parks Cramer Co, 145 SE 684, 688, 196 NC 359.
39 CJ p 1023 note 43.

84. Ind—Holliday, etc, Co v O'Donnell, 101 NE 642, 54 Ind App 95.

Me—Spence v. Bath Iron Works Corporation, 37 A2d 174, 140 Me. 287.

witness of the employer will not be excluded because it tends to establish a previous accident at the same place.⁸⁵

§ 512. — Defective or Dangerous Machinery, Appliances, and Places

- a. In general
- b. General practice or custom
- c. Inspections, repairs, and tests
- d. Knowledge by employer of defect or danger

a. In General

Evidence, otherwise competent, of any facts tending to establish or disprove negligence on the part of an employer in failing to provide reasonably safe and suitable machinery, appliances, and places for work may be admitted.

Evidence, otherwise competent, of any facts tending to establish or disprove negligence on the part of an employer in failing to provide reasonably safe and suitable machinery, appliances, and places for work may be admitted,⁸⁶ as, for example, evidence tending to show where plaintiff was working

when injured,⁸⁷ the authority of a foreman,⁸⁸ or the existence, nature, extent, and performance, generally, of defendant's duty to plaintiff.⁸⁹ So too competent evidence may be admitted as to the actual conditions existing at the time of the accident,⁹⁰ the surrounding circumstances,⁹¹ and the causal connection of the existing conditions with the injuries received by plaintiff,⁹² the proper methods or appliances under the existing conditions,⁹³ or the possibility or practicability of using better methods or appliances than those employed at the time of the accident.⁹⁴

Only competent, relevant, and material evidence may be admitted,⁹⁵ and evidence is not admissible where it has no relation to the conditions existing at the time⁹⁶ or place⁹⁷ of the accident or injury to plaintiff or defendant's duty thereunder.⁹⁸ Likewise evidence having no relation to the facts relied on by plaintiff as constituting negligence is not admissible,⁹⁹ and where plaintiff's own explanation of how the accident occurred renders such evidence immaterial it is not admissible.¹ Similarly, evidence is not admissible which has no relation to

85. Kan—Schwarzschild v. Drysdale, 76 P. 441, 69 Kan. 119

86. Wis—Paine v. Eastern R. Co. of Minnesota, 64 NW 1005, 91 Wis 340

89 C.J. p 1023 note 46.

Equipment required by statute

In an action brought under a statute requiring defendant to use certain equipment, plaintiff may show that such equipment was available without showing that it was in general use at the time plaintiff was injured—Reaves v. Kramer, 97 SW 2d 136, 231 Mo App 368.

87. Or—Ranawamy v. Hammond Lumber Co., 152 P 223, 78 Or 407

88. US—Boland v. Great Northern R. Co., Wash., 203 F 485, 120 CC A. 624

89. Mo—Dudacs v. Hotel Statler Co., App., 295 SW 826

Tex—Foster v. Carle, Civ App., 160 SW 2d 999, error refused

90. US—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737

89 C.J. p 1024 note 50

Purpose for which admitted

Evidence of conditions existing at the time and place of the accident has been held admissible only to show the degree of care required of an employer to keep the place of work safe for his employees—Scott Burr Stores Corporation v. Morrow, 180 So. 741, 182 Miss 743.

Evidence held admissible

- (1) Generally.

Ill—Holloran v. Chicago & N. W. Ry. Co., 63 NE 2d 870, 327 Ill App 217

Ky—Royal Collieries Co. v. Wells, 50 SW 2d 948, 244 Ky 303

Mo—Aly v. Terminal R. Ass'n of St. Louis, 119 SW 2d 363, 342 Mo 1116, certiorari denied Terminal R. Ass'n of St. Louis v. Aly, 59 SCt 251, 305 US 655, 83 LEd 424.

89 C.J. p 1024 note 50 [a]

(2) The extent to which a furnace was heated—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737.

91. SC—James v. Atlantic Coast Line R. Co., 18 SE 2d 616, 199 S. C 45

92. Mo—Gordon v. Kansas City Southern R. Co., 121 SW 80, 222 Mo 516

89 C.J. p 1024 note 51

93. Mass—Lamberti v. Neal, 148 N. E 463, 253 Mass 99

89 C.J. p 1024 note 52

Evidence held admissible

(1) The use of safety ground wire and transformer to reduce voltage of a motor—Lamberti v. Neal, *supra*

(2) Other evidence held admissible see 39 C.J. p 1024 note 53 [a].

94. NH—Hussey v. Boston & M. R. R., 133 A. 9, 82 NH 236.

89 C.J. p 1024 note 53

Evidence held admissible

(1) Practicability of guarding opening in floor through which employee fell—Fisher v. Laclede Gas Light Co., Mo., 31 SW 2d 770.

(2) Excessive cost of different construction of wires, to justify employer's conduct—Hussey v. Boston & M. R. R., 133 A. 9, 82 NH 236

(3) Other evidence held admissible see 39 C.J. p 1024 note 53 [a]—[d].

95. NH—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 NH 516

NC—Mahaffey v. Forsyth Furniture Lines, 145 SE 237, 196 NC. 810

96. Del—Bowling v. Delaware Rayon Co., 192 A. 598, 8 W.V. Harr 339

89 C.J. p 1025 note 54.

97. Ark—Jones v. Kansas City Southern Ry. Co., 145 SW 2d 969, 201 Ark 533.

Del—Bowling v. Delaware Rayon Co., 192 A. 598, 8 W.V. Harr 339.

98. Tenn—Jones v. Noel, App., 204 SW 2d 336.

89 C.J. p 1025 note 55

An employee's belief as to danger has been held immaterial on question of employer's negligence in compelling employee to work in an unsafe place, except in so far as it is some evidence as to whether a reasonable man would have done no more than employer did—Lynch v. Oregon Lumber Co., C.C.A.Or., 108 F.2d 283.

99. Ill—U. S. Wind Engine & Pump Co. v. Butcher, 79 N.E. 304, 223 Ill 638.

89 C.J. p 1025 note 56.

1. Miss—Wilson & Co. v. Holmes, 177 So. 24, 180 Miss 361.

the form of action brought by plaintiff,³ or to the cause of the accident,³ or to a cause for which defendant is liable.⁴ Evidence tending to prove an admitted or established fact is not admissible.⁵

b. General Practice or Custom

Competent evidence of a general practice or custom of others in the same business as the defendant, or of the defendant himself, under similar conditions or circumstances, has been held admissible on the question of his exercise of due care in providing reasonably safe and suitable instrumentalities or places for work.

Evidence, otherwise admissible, of a general practice or custom of others in the same business as defendant, under substantially similar conditions or circumstances, has been held admissible on the question of his exercise of due care in providing reasonably safe instrumentalities or places for work.⁶ Thus evidence has been held admissible to show what safeguards or safety devices are customarily used by others in the same business as defendant,⁷ as well as to show the practicability⁸ or impracticability⁹ of such guards, or the suitability of equipment for the purpose for which it was used.¹⁰ The inquiry should be limited to the custom of well regulated and prudently managed businesses,¹¹ and to competent evidence showing a general practice

or custom,¹² or a custom of which defendant had knowledge.¹³ Evidence of customary methods of other establishments may be admissible in rebuttal.¹⁴

There is authority holding that evidence of customary methods pursued in other similar establishments may be offered by defendant to disprove negligence,¹⁵ but not, as a rule, to make out plaintiff's case,¹⁶ and such proof has been held to be admissible on behalf of an injured plaintiff only when it tends to show that the customary method pursued in the employer's establishment is not only unusual but more dangerous in itself than the ordinary one,¹⁷ or that the adoption of the safer method was practicable in defendant's business,¹⁸ or that defendant promised to change his method.¹⁹ It has also been held that the admission of such evidence is discretionary with the court.²⁰ There is some authority for the proposition that evidence that the type of device used by defendant is the usual type used by other well-regulated establishments in the same business is inadmissible.²¹

Evidence of the character under consideration is not admissible in the absence of a showing of similar conditions as a basis for an inference of de-

2. N.Y.—*McGovern v. Fitzpatrick*, 181 N.Y.S. 1048, 148 App Div. 84, 89 C.J. p 1025 note 57

3. Ark.—*A. J. Neimeyer Lumber Co. v. Brame*, 207 S.W. 35, 136 Ark 564.

39 C.J. p 1025 note 58

4. Mass.—*Ridge v. Boston El. R. Co.*, 100 N.E. 687, 213 Mass. 460, 39 C.J. p 1025 note 59

5. Colo.—*Stewart v. Driscoll*, 139 P. 18, 56 Colo. 816

Iowa.—*Hartshorn v. J. C. Mardis Co.*, 146 N.W. 70, 165 Iowa 454, 39 C.J. p 1025 note 60.

6. U.S.—*Piesonka v. Pullman Co.*, C.C.A.N.Y., 89 F.2d 358

Cal.—*Haskins v. Southern Pac. Co.*, 39 P.2d 895, 3 Cal.App.2d 177

Iowa.—*Casey v. Hansen*, 26 N.W.2d 50.

Ky.—*Duvin Coal Co. v. Fike*, 38 S.W.2d 201, 288 Ky. 376

Mo.—*Satterlee v. St. Louis-San Francisco Ry. Co.*, 82 S.W.2d 69, 336 Mo. 943—*Shay v. Central Coal & Coke Co.*, 21 S.W.2d 772, 323 Mo. 1058—*Ingram v. Prairie Block Coal Co.*, 5 S.W.2d 413, 319 Mo. 644.

N.C.—*Mahaffey v. Forsyth Furniture Lines*, 145 S.E. 237, 196 N.C. 810

R.I.—*Faltinal v. Great Atlantic & Pacific Tea Co.*, 182 A. 605, 55 R.I. 438

39 C.J. p 331 note 62, p 1026 note 61

7. Ark.—*Sandusky v. Warren*, 6 S.W.2d 15, 177 Ark. 271

Okla.—*Champlin Refining Co. of New Mexico v. Huntington*, 69 P.2d 81, 180 Okla. 280

Tex.—*Galveston, H. & S. A. Ry. Co. v. Contois*, Civ.App., 279 S.W. 929, affirmed, Com.App., 288 S.W. 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1828.

Wis.—*Tiemann v. May*, 292 N.W. 612, 235 Wis. 100.

8. Or.—*Garvin v. Western Cooperative Co.*, 184 P. 555, 94 Or. 437

Wash.—*Thomson v. Issaquah Shingle Co.*, 86 P. 58, 43 Wash. 253

9. Mich.—*Slack v. Curry*, 143 N.W. 602, 177 Mich. 437

Wash.—*Shaw v. Woodland Shingle Co.*, 111 P. 1070, 61 Wash. 56.

10. N.Y.—*Hammond v. Union Bag & Paper Co.*, 186 N.Y.S. 1024, 151 App Div. 776.

Instrumentality causing unsafe condition

Where the instrumentality used caused an unsafe condition resulting in the injury complained of, expert opinion that the failure to use the customary instrument made no difference has been held not to render evidence of such failure inadmissible, and under such circumstances the expert opinion may be disregarded—*Dowling v. L. H. Shattuck, Inc.*, 17 A.2d 529, 91 N.H. 234.

11. Ill.—*Illinois Cent. R. Co. v. Prickett*, 71 N.E. 435, 210 Ill. 140.

12. N.C.—*Grubbs v. Lewis*, 145 S.E. 769, 196 N.C. 391, 39 C.J. p 1026 note 66

Practice held sufficiently general
Wyo.—*Chicago, B. & Q. R. Co. v. Murray*, 277 P. 708, 40 Wyo. 324

13. N.Y.—*Miele v. Rosenblatt*, 150 N.Y.S. 323, 164 App Div. 604, affirmed 116 N.E. 1062, 221 N.Y. 567.

14. Ark.—*St. Louis & S. F. R. Co. v. Keathley*, 187 S.W. 319, 124 Ark. 410

39 C.J. p 1027 note 74.

15. Pa.—*Chambers v. Mesta Mach. Co.*, 97 A. 101, 251 Pa. 618.

16. Pa.—*Clark v. Butler Junction Coal Co.*, 102 A. 952, 259 Pa. 262, 39 C.J. p 1026 note 69.

17. Pa.—*McFadden v. Philadelphia*, 98 A. 827, 248 Pa. 83, 39 C.J. p 1026 note 70

18. Pa.—*Wagner v. Standard Sanitary Mfg. Co.*, 91 A. 853, 244 Pa. 310.

19. Pa.—*Hollis v. Widener*, 70 A. 287, 221 Pa. 72.

20. Mass.—*Reidy v. Crompton & Knowles Loom Works*, 60 N.E.2d 589, 318 Mass. 135, 39 C.J. p 1027 note 73

21. S.C.—*Hopkins v. Southern Cotton Oil Co.*, 142 S.E. 615, 144 S.C. 395.

defendant's negligence,²² or where it is not related to the issue,²³ or where the custom offered in evidence is obviously no excuse for the negligent conduct of defendant²⁴

Custom in employer's business. Evidence as to the custom followed in defendant's business may be admitted if material and relevant to the issue,²⁵ otherwise it is not admissible.²⁶

c. Inspections, Repairs, and Tests

Competent evidence which is relevant to issues with respect to inspections, repairs, and tests is admissible.

Competent evidence which is relevant to an issue with respect to inspections of appliances and places of work is admissible²⁷ Accordingly, evidence is admissible to establish the employer's duty to inspect,²⁸ the proper methods of inspection,²⁹ and

what a proper inspection would disclose³⁰ Such evidence has also been held admissible to show the general custom as to inspection in other similar establishments³¹ or rules providing therefor in the employer's business³² Similarly evidence of this nature may be admitted to show the making of,³³ or the failure to make,³⁴ an inspection, as well as the sufficiency of inspections made,³⁵ and the making of,³⁶ or the failure to make,³⁷ a report, and the effect of a report³⁸ Evidence has also been held admissible to show the necessity of an inspection as the basis for expert testimony.³⁹

Inspection by government agents. The admissibility of evidence as to inspections by government agents depends on its competency and relevancy to the issues involved, as, for example, evidence as to the making⁴⁰ and sufficiency⁴¹ of such inspections,

22. Ky—Big Sandy & C R Co v Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571
39 C.J. p 1027 note 75.

Proof of "common usage" offered to show employer's negligence assumes use of instrumentality under similar circumstances in same line of work—Schmidt v Union Electric Light & Power Co., 3 S.W.2d 384, 319 Mo. 102.

Only as far as conditions are similar may evidence of a customary usage be admissible—Watkins v Boston & M R R., 138 A. 815, 83 N H 10.

23. Mo—Dodd v Independent Stove & Furnace Co., 51 S.W.2d 114, 380 Mo. 662.
39 C.J. p 1027 note 76.

Evidence held inadmissible

(1) Generally
Mo—Dodd v. Independent Stove & Furnace Co., supra
N.Y.—Martin v. Walker & Williams Mfg. Co., 106 N.Y.S. 708, 122 App Div 280
39 C.J. p 1027 note 76 [a], [c]

(2) Where recovery is sought under a statute imposing a higher degree of care than that required under the rules of common law, evidence of a general practice or custom of others in the same occupation and under like circumstances has been held inadmissible.—Fromme v. Lang & Co., 281 P. 120, 131 Or 501.

(3) Evidence that instrument used is of the same type and standard as that generally used by others in the same business has been held inadmissible where such instrument was being used in a new function at the time of the injury—Kaumans v White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.

24. Or—Shields v. Grace, 179 P 265, 91 Or 187.
39 C.J. p 1027 note 77

25. U.S.—Dudley v Scandrett, CC A Wash., 115 F.2d 728
Me.—Nugent v Boston, C & M R Co., 12 A. 797, 80 Me 62, 6 Am S.R. 151.

Mo—Mills v F W Steadley & Co., App., 279 S.W. 160
39 C.J. p 1027 note 78

26. Cal—Robinet v Hawk, 252 P 1045, 200 Cal. 265

N.Y.—Martin v Walker & Williams Mfg Co., 106 N.Y.S. 708, 122 App Div 280
39 C.J. p 1027 note 79.

27. Mo—Tallman v Nelson, 125 S W 1181, 141 Mo App 478
39 C.J. p 1033 note 79

28. Utah—Valiotis v Utah-Apex Min Co., 184 P 802, 55 Utah 151
39 C.J. p 1027 note 81.

29. Cal—Bowen v Sierra Lumber Co., 84 P 1010, 3 Cal App 312
Mich—Ammer v. Postal, 184 N.W. 453, 168 Mich 405

30. Mich—Ammer v. Postal, supra
To rebut claim of following prescribed practice

Evidence that the injury complained of resulted from a defective condition which the employer could have discovered by an inspection has been held admissible to rebut a claim that there had been a compliance with the practice prescribed by an underwriters' code—Nemet v Friedland, 263 N.W. 889, 273 Mich 692.

31. N.Y.—Scott v Nauss Bros Co., 126 N.Y.S. 17, 141 App Div. 255.
39 C.J. p 1028 note 84.

32. Ky—Kentucky Cent R. Co v Carr, 43 S.W. 193, 19 Ky L. 1172
39 C.J. p 1028 note 85

33. U.S.—Schroble v. Lehigh Valley R Co, CCA N.Y., 62 F.2d 993.
39 C.J. p 1028 note 86.

Evidence of a recent inspection has been held relevant to rebut an imputation of negligence on the part of defendant in not maintaining equipment in proper condition, although there is no claim that failure to inspect constitutes negligence—Schroble v Lehigh Valley R Co., C C A N.Y., 62 F.2d 993

34. Mass—McMahon v McHale, 54 NE 854, 174 Mass 320
39 C.J. p 1028 note 87

35. Ky—Trosper Coal Co v Crawford, 153 S.W. 211, 152 Ky 214
39 C.J. p 1028 note 88

36. Vt—Niles v Central Vermont R Co., 89 A. 629, 87 Vt 356.
39 C.J. p 1028 note 89

37. Ala—Alabama Great Southern R Co v. Yount, 51 So 737, 165 Ala 537.
39 C.J. p 1028 note 90

38. Kan—Atchison, T. & S F. R Co v Burks, 96 P 950, 78 Kan 515, 18 L.R.A.N.S. 231.
39 C.J. p 1028 note 91.

Irrelevant report

Reports of defendant's employees, which are not shown to be evidence of any specific charge of negligence on the part of defendant, and where there is nothing to show that the conditions referred to therein are relevant to the question of defendant's negligence, are inadmissible—Fowler v Western & A R R., Ga. App., 42 SE2d 499

39. Ill—Walker v Co-Operative Coal & Mining Co., 165 Ill App 374.
39 C.J. p 1028 note 92.

40. Okl—Burk v Hobart Mill & Elevator Co., 150 P. 458, 48 Okl. 470
39 C.J. p 1028 note 94

41. Ill—Eichhorn v St Louis & O'Fallon Coal Co., 123 NE 603, - 288 Ill. 351
39 C.J. p 1028 note 95.

their frequency,⁴² the agents' recommendations based on such inspections,⁴³ or the absence of such recommendations⁴⁴ So also the admissibility of evidence as to their reports⁴⁵ and certificates,⁴⁶ notices of existing defective conditions,⁴⁷ the public records of such inspections,⁴⁸ and their testimony at the trial based on such inspections,⁴⁹ depends on its competency and relevancy to the issues involved.

Repairs and tests. Competent evidence which is relevant to an issue with respect to repairs is admissible,⁵⁰ such as evidence involving such matters as the necessity of frequent repairs,⁵¹ and the making of,⁵² or failure to make,⁵³ repairs. The same rule applies to evidence involving such matters as the making of,⁵⁴ or failure to make,⁵⁵ a test, what a proper test would disclose,⁵⁶ and the employer's custom with reference thereto⁵⁷ Evidence as to the place where repairs are made, when that is material,⁵⁸ their sufficiency,⁵⁹ and the possibility of remedying defects thereby⁶⁰ has also been held admissible.

d. Knowledge by Employer of Defect or Danger

Competent and relevant evidence is admissible to prove that the defendant knew or ought to have known of the defect or danger causing the injury of which complaint is made.

Competent evidence tending to prove that defendant knew or ought to have known of the defect or danger is admissible,⁶¹ as, for example, that a warning or complaint was made to the employer⁶² or to his representative,⁶³ or that his representative's attention was drawn to the danger⁶⁴ Evidence that a report to defendant employer or his representative of the conditions disclosing the danger had been made,⁶⁵ that defendant was notified of the defect by others before the injury,⁶⁶ or that defendant's representative had been informed by another that he had trouble with the appliance causing the injury⁶⁷ has been held admissible.

Evidence that the dangerous condition causing the injury had been the subject of a conversation before the time of the accident between the employer's representative and another⁶⁸ or between

42. Ala.—Williams v Alabama Fuel & Iron Co, 102 So 136, 212 Ala 153

39 C.J. p 1028 note 96

43. Ala.—Burnwell Coal Co v Setzer, 67 So 604, 191 Ala 398

39 C.J. p 1028 note 97

44. Iowa.—Butkovitch v Centerville Block Coal Co, 177 NW 479, 188 Iowa 1176

39 C.J. p 1028 note 98.

45. Ky.—Mt Morgan Coal Co. v Shumate, 163 S.W. 1099, 157 Ky 654

39 C.J. p 1029 note 99

46. Or.—Kuntz v Emerson Harwood Co, 184 P 253, 93 Or 565

39 C.J. p 1029 note 1.

47. Mo.—Wack v F. E. Schoenberg Mfg. Co, 53 S.W.2d 28, 331 Mo 197

Where it is shown that conditions remained defective, evidence of a city inspector's notification of defendant of the defective condition some time prior to the accident caused thereby has been held admissible—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 331 Mo 197

48. N.Y.—Havholm v. Whale Creek Iron Works, 144 N.Y.S. 836, reversed on other grounds 147 N.Y.S. 856, 162 App.Div. 354

39 C.J. p 1029 note 2

49. Ala.—Williams v. Alabama Fuel & Iron Co., 102 So. 136, 212 Ala. 153

39 C.J. p 1029 note 3

50. Kan.—Root v. Cudahy Packing Co, 147 P. 69, 94 Kan. 339.

39 C.J. p 1028 notes 81, 82.

51. Kan.—Root v Cudahy Packing Co, supra.

39 C.J. p 1029 note 5

52. Ala.—Adams v Crimm, 58 So 443, 177 Ala 279

39 C.J. p 1029 note 6.

53. Mich.—Lukovski v Michigan Cent. R. Co, 129 N.W. 707, 164 Mich 361

39 C.J. p 1029 note 7

54. N.Y.—Rollings v. Levering, 45 N.Y.S. 942, 18 App.Div. 223

39 C.J. p 1029 note 8

55. Or.—Duntley v. Inman, 70 P. 529, 42 Or 334, 59 L.R.A. 785

39 C.J. p 1029 note 9

56. Ill.—Brossman v Drake Standard Mach Works, 83 N.E. 936, 232 Ill 412

39 C.J. p 1029 note 10.

57. Wash.—Hemmingson v. Carbon Hill Coal Co, 112 P. 1111, 63 Wash 28

39 C.J. p 1029 note 11

58. Iowa.—Knapp v Sioux City & P. R. Co., 32 N.W. 18, 71 Iowa 41.

39 C.J. p 1029 note 12

59. Mich.—Huber v. Twin City Gen Electric Co, 134 N.W. 980, 168 Mich 531

39 C.J. p 1029 note 13

60. Ky.—Belle of Nelson Distilling Co v Riggs, 45 S.W. 99, 104 Ky. 1, 20 Ky L. 499

39 C.J. p 1029 note 14

61. Ark.—New Union Coal Co v Walker, 31 S.W.2d 753, 182 Ark 460

Evidence held admissible

(1) In general.

Ala.—Belcher v Chapman, 7 So.2d 859, 242 Ala. 653.

Ark.—Jim Fork Coal Co v. Rhotenberry, 35 S.W.2d 590, 183 Ark 319

—New Union Coal Co v Walker, 31 S.W.2d 753, 182 Ark. 460

Mo.—Aly v Terminal R. Ass'n of St. Louis, 119 S.W.2d 363, 342 Mo. 1116, certiorari denied Terminal R. Ass'n of St. Louis v Aly, 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424—Hoffman v Peerless White Lime Co, 296 S.W. 764, 317 Mo 86

(2) Fact that an animal has a reputation for viciousness, to show knowledge by the employer of its vicious propensity—Hill v Moseley, 17 S.E.2d 676, 220 N.C. 485

62. Ark.—Bauschka v Western Coal & Mining Co., 129 S.W. 1095, 95 Ark 477

39 C.J. p 1030 note 17.

63. U.S.—Chapman & Dewey Lumber Co v. Hanks, C.C.A. Tenn., 106 F.2d 482.

N.H.—Stanton v Morrison Mills, 47 A.2d 112, 94 N.H. 92—Dowling v L. H. Shattuck, Inc., 17 A.2d 529, 91 N.H. 234

39 C.J. p 1030 note 18

64. N.C.—Mahaffey v Forsyth Furniture Lanes, 145 S.E. 237, 196 N.C. 810.

65. Mo.—Winkle v George B. Peck Dry Goods Co, 112 S.W. 1026, 132 Mo App 656

39 C.J. p 1030 note 19

66. N.C.—O'Brien v. Parks Cramer Co, 145 S.E. 684, 196 N.C. 359.

67. Ark.—Haynes Drilling Corporation v Smith, 143 S.W.2d 27, 200 Ark. 1098.

68. Neb.—Cudahy Packing Co. v.

outsiders in the presence of the employer's representative,⁶⁹ or that the employer made an admission of such knowledge either by his own words⁷⁰ or conduct⁷¹ or through the admission by words⁷² or conduct⁷³ of his representative, has been held admissible. So too evidence that the defect or danger was obvious⁷⁴ or its existence generally understood among the employees⁷⁵ or others,⁷⁶ or that there were other circumstances in the case clearly indicating a duty on the part of the employer to know the conditions,⁷⁷ has been held admissible.

Evidence is not admissible which has no tendency to show defendant's knowledge of the particular defect⁷⁸ or dangerous condition,⁷⁹ or the existence of facts relieving him of his obligation to know,⁸⁰ or where the uncontroverted evidence shows that defendant's representative is not chargeable with knowledge of the particular danger to which the offered evidence relates.⁸¹ Where the evidence offered indicates that knowledge of the danger first came to defendant after the accident it is not admissible.⁸²

§ 513. — Methods of Work, Rules, and Orders

Competent evidence of any facts tending to prove

or disprove the defendant's negligence as to methods of work, rules, and orders in his business may be admitted.

Competent evidence of any facts which tend to show negligence or the absence thereof on the part of defendant with respect to methods of work, rules, and orders in his business may be admitted, as, for example, evidence of facts relative to the duties of particular employees,⁸³ or evidence explanatory of the methods used,⁸⁴ as well as evidence of facts tending to show the insufficiency of such methods,⁸⁵ or of facts tending to prove defendant's responsibility therefor.⁸⁶ Also, evidence of facts bearing on defendant's duty to promulgate rules,⁸⁷ as well as evidence of the rules themselves, where relevant to the issues,⁸⁸ and of facts showing their construction,⁸⁹ may be admitted. So, too, evidence of any orders given by defendant which are relevant to the issue,⁹⁰ and of facts bearing on the question whether the orders given were authorized,⁹¹ may be admitted.

Evidence as to methods of work is not admissible where not relevant to the issue,⁹² or where it does not tend to show that such methods had any causal connection with plaintiff's injuries,⁹³ or where its relevancy is dependent on other evidence not offered in proof,⁹⁴ or where the rejected testimony has al-

Wesolowski, 106 N.W. 1007, 75 Neb. 788

89 C.J. p 1030 note 20.

69. Iowa.—Dale v. Colfax Cons Coal Co., 107 N.W. 1096, 131 Iowa 67.

70. Mass.—Wilson v Daniels, 145 N. E. 469, 250 Mass. 359

71. Iowa.—Stoutenburgh v. Dow, Gilman, Hancock Co., 47 N.W. 1039, 82 Iowa 179.

39 C.J. p 1030 note 23

72. Mo.—Todd v. American Ry Express Co., 271 S.W. 880, 219 Mo App 405

39 C.J. p 1030 note 24

73. Iowa.—Christopherson v. Chicago, M. & St P R Co., 109 N.W. 1077, 135 Iowa 409, 124 Am.S.R. 284.

39 C.J. p 1030 note 25.

74. Fla.—Jacksonville v. Glover, 69 So. 20, 69 Fla. 701

39 C.J. p 1030 note 26.

75. Ark.—Burdette Cooperage Co v Bunting, 167 S.W. 77, 113 Ark. 45

Ill.—Toledo, St L & K C R Co v Bailey, 33 N.E. 1089, 145 Ill. 159

76. Ala.—Louisville & N R. Co. v Hall, 3 So. 371, 91 Ala. 112, 24 Am.S.R. 863.

Mass.—Palmer v. Coyle, 72 N.E. 844, 187 Mass. 126.

77. Kan.—Brady v. Cherokee &

Pittsburgh Coal & Mining Co., 122 P. 869, 86 Kan. 818

Vt.—McKane v. Marr, 68 A. 944, 79 Vt. 13.

78. RI.—Wilson v New York, etc., R Co., 69 A. 364, 29 R.I. 146, 163 39 C.J. p 1030 note 30.

79. Ky.—Louisville & N. R. Co. v Cox, 141 S.W. 59, 145 Ky. 716

39 C.J. p 1030 note 31.

80. Ala.—Birmingham Fuel Co v Stocks, 68 So. 568, 14 Ala.App. 136.

39 C.J. p 1030 note 32.

81. Ala.—Pennsylvania Coal Co v Bowen, 49 So. 305, 159 Ala. 165.

39 C.J. p 1030 note 33

82. Md.—State v. Flanigan, 74 A. 818, 111 Md. 481.

83. Mont.—Kinsel v North Butte Min. Co., 130 P. 797, 44 Mont. 445

Employees' duties just prior to accident in question may be shown as evidence of their duties at the time of the accident, where it may be presumed that their general duties remained the same.—Inspiration Consol. Copper Co. v Bryan, 252 P. 1012, 31 Ariz. 302.

84. US.—Federal Min. & Smelting Co. v. Hodge, Idaho, 213 F. 605, 130 C.C.A. 197.

N.H.—Darwin v. Amoskeag Co., 122 A. 353, 81 N.H. 108.

85. Mont.—Stewart v Stone & Web-

ster Engineering Corp., 119 P. 568, 44 Mont. 160

39 C.J. p 1031 note 39.

86. N.Y.—Mengle v. McClintic-Marshall Constr. Co., 85 N.Y.S. 1012, 89 App.Div. 334

87. Wis.—McHolm v Philadelphia & Reading Coal & Iron Co., 132 N.W. 585, 147 Wis. 381

39 C.J. p 1031 note 42

88. Ala.—Birmingham R. Light & Power Co v. Mosely, 51 So. 424, 164 Ala. 111

39 C.J. p 1031 note 43.

89. Ohio.—Lake Shore & Michigan Southern R Co v Andrews, 14 Ohio Cir.Ct. 564, 8 Ohio Cir.Dec. 78.

Tex.—Gulf, C & S F. R. Co. v Pierce, 25 S.W. 1052, 7 Tex.Civ. App. 597

90. Mo.—Swearingen v Consolidated Troup Min. Co., 111 S.W. 545, 212 Mo. 524

N.C.—Hollifield v. Southern Bell Tel. & Tel. Co., 90 S.E. 996, 172 N.C. 714.

91. Mo.—Collins v Star Paper Mill Co., 127 S.W. 641, 143 Mo.App. 333

92. Ala.—Jackson Lumber Co. v Courcay, 63 So. 749, 9 Ala.App. 488

39 C.J. p 1031 note 47.

93. Ala.—Pennsylvania Coal Co v. Bowen, 49 So. 305, 159 Ala. 165.

94. Mass.—McTiernan v. American

ready been admitted in another form.⁹⁵ Thus, evidence of facts relative to the duties of particular employees, where not relevant to the issue, is inadmissible.⁹⁶ So, too, evidence of rules where not relevant to the issues,⁹⁷ or not sufficiently proved,⁹⁸ or not shown to be in force,⁹⁹ or void,¹ or not posted when the statute requires it,² or when posted after the injury,³ is not admissible. Also, evidence as to oral rules has been held not admissible.⁴ In like manner, evidence of orders given by defendant in his business, which are not relevant to the issue, is not admissible.⁵

Customary methods. Evidence, otherwise admissible, of what is the usual method of work, either with defendant or others in the same business, under similar conditions, where such evidence has a tendency to show or disprove defendant's negligence,⁶ or to contradict the contentions of the other

party,⁷ may be admitted. Competent evidence of the customary disregard of a rule is admissible to show its abrogation.⁸ While the fact that a master used a method of work customarily adopted by others in the same business has been held not to render inadmissible evidence of better methods,⁹ ordinarily, evidence of a method of work not shown to be customary,¹⁰ or evidence of a custom irrelevant to the issue,¹¹ or tending to prove an established fact,¹² or of a custom instituted after the accident,¹³ or in contravention of a rule of law,¹⁴ is not admissible.

Operation of railroads These rules frequently have been applied with respect to the admission or the exclusion of evidence as to the operation of railroads,¹⁵ as, for example, with respect to the admissibility of evidence as to the ordinary practice or custom relative thereto,¹⁶ as well as to the admissibility of evidence as to the rules of a railroad

Woolen Co., 83 NE 678, 197 Mass 238
 NY—Ianne v U. S. Gypsum Co., 86 NE 809, 194 NY 88
 95. Mass—MacLellan v Boston El R Co., 108 NE 767, 221 Mass 20
 39 C.J. p 1031 note 50
 96. NC—Mahaffey v Forsyth Furniture Lines, 145 SE 287, 196 NC 810.
 97. Mich—Hawitt v. Flint & P M R Co., 34 N.W. 659, 67 Mich. 61
 39 C.J. p 1031 note 51
 98. Ala—Sloss-Sheffield Steel & Iron Co v Bearden, 80 So 42, 202 Ala 220.
 99. Ky—Pouillon v Louisville R Co., 131 SW 996, 140 Ky. 707
 39 C.J. p 1031 note 53.
 1. Ill—Brack v B F. Berry Coal Co., 196 Ill App 192
 39 C.J. p 1031 note 54
 2. Ky—Stearns Coal & Lumber Co v Spradlin, 195 S.W. 781, 176 Ky 405
 3. Nev.—Zelavin v Tonopah Belmont Dev Co., 149 P. 188, 39 Nev 1.
 4. Mass—Gerry v Worcester Cons. St R Co., 143 NE 694, 248 Mass. 559.
 39 C.J. p 1031 note 57
 5. Va—Powhatan Lume Co. v Whetzel, 86 SE 898, 118 Va 161
 39 C.J. p 1031 note 58.
 6. U.S.—Scroggs v American Stove Co., CCA Ind., 142 F.2d 297—Chapman & Dewey Lumber Co v Hanks, CCA Tenn., 106 F.2d 482—Missouri Valley Bridge & Iron Co v Blake, Va., 231 F. 417, 145 C.C.A 411.
 Ala—Johnson v. Johns Service Funeral Parlor, 198 So. 357, 240 Ala 231.
 Mass—Cronan v Armitage, 190 NE 12, 285 Mass. 520.

Mo—Corpus Juris cited in Whittington v Westport Hotel Operating Co., 33 SW.2d 963, 967, 326 Mo 1117
 39 C.J. p 381 note 62, p 1032 note 60.
 7. Ark—Arkadelphia Lumber Co v Henderson, 105 SW. 882, 84 Ark 382
 39 C.J. p 1032 note 61.
 8. SC—Bussey v. Charleston & Western Carolina R Co., 58 SE 1015, 78 SC 532
 Utah—Wright v Southern Pac. Co., 46 P 374, 14 Utah 383
 9. Okl—Beasley v. Bond, 48 P.2d 299, 173 Okl 355.
 10. Mo—Orth v. General Const. Co. App., 272 SW 1076
 39 C.J. p 1032 note 63.
 11. Mo—Bender v Kroger Grocery & Baking Co., App., 294 SW 732
 39 C.J. p 1032 note 64
 12. Ind—Lambert v Wasnitsky, 133 NE 128, 191 Ind. 419.
 39 C.J. p 1032 note 65.
 13. Md.—State v. Flanagan, 74 A 818, 111 Md 481.
 14. Mont—Allen v Bear Creek Coal Co., 115 P. 673, 43 Mont 269
 39 C.J. p 1032 note 67
 15. Mo—Holman v St. Louis-San Francisco Ry. Co., 278 SW 1000, 312 Mo 342.
 39 C.J. p 1032 note 69.
 Railroad methods of work as related to contributory negligence see infra § 519
Evidence held admissible
 (1) In general.
 Ala—Southern Ry Co v. Smith, 137 So. 398, 223 Ala 583
 Ind—Central Indiana Ry. Co. v Mitchell, 199 NE 439, 102 Ind. App 121.
 Mo—Cantley v. Missouri-Kansas-Texas R Co., 133 SW 2d 123, 353 Mo. 605—Holman v. St. Louis-San

Francisco Ry. Co., 278 SW. 1000, 312 Mo. 342
 39 C.J. p 1032 note 69 [a]

(2) As to the circumstances surrounding the accident—Holloran v. Chicago & N. W. Ry Co., 63 NE 2d 670, 327 Ill App. 217

(3) That train was northbound on southbound track—Louisville & N. R Co v Parker, 138 So 231, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 US 569, 77 L Ed 501.

(4) That there was a sudden, unusual, and unnecessary coupling of trains—Hamilton v Southern Ry. Co., 158 SE 75, 200 NC. 543, certiorari denied Southern Ry Co v. Hamilton, 52 S.Ct. 19, 284 US 636, 76 L Ed. 541

(5) As to other methods of doing work as affecting the question of ordinary care in using a particular method—Galveston, H & S. A. Ry. Co v Contois, Tex Civ.App., 279 S. W 929, affirmed, Com App., 288 S.W. 2d 154, certiorari denied 47 S.Ct. 659, 274 US 747, 71 L Ed 1328.

Evidence held inadmissible

NJ—Nestico v. Delaware, L & W. R Co., 133 A. 83, 4 NJ Misc 418
 Utah—Ayres v. Union Pac R Co., 176 P 2d 161.

39 C.J. p 1032 note 69 [b].

16. Ala—Southern Ry. Co v. Smith, 137 So 398, 223 Ala 583.
 39 C.J. p 1032 note 70.

Evidence held admissible

(1) In general.

Ky—Chesapeake & O Ry. Co v. Kennard, 3 S.W.2d 649, 223 Ky. 262

NJ—Hendershot v. New York, S & W. R. Co., 138 A. 206, 5 N.J.Misc. 727, affirmed 140 A. 919, 104 N.J. Law 436, certiorari denied New York, S & W. R Co v Hendershot, 48 S.Ct. 562, 277 U.S. 602, 72 L Ed. 1009.

generally.¹⁷ These rules have been applied with respect to the admissibility of evidence as to rules, practice, or custom relative to warnings,¹⁸ signals, and the rules, practice, or custom relative thereto,¹⁹

N.C.—*Hamilton v. Southern Ry. Co.*, 158 S.E. 75, 200 N.C. 543, certiorari denied *Southern Ry. Co. v. Hamilton*, 52 S.Ct. 19, 284 U.S. 636, 76 L.Ed. 541.

S.C.—*Mann v. Seaboard Air Line Ry. Co.*, 136 S.E. 234, 138 S.C. 241.

Va.—*Chesapeake & O Ry. Co. v. Golladay*, 180 S.E. 400, 164 Va. 292, 39 C.J. p. 1032 note 70 [a].

(2) As to customary practice of a railway telegrapher giving out information concerning the location of trains, notwithstanding rules—*Southern Ry. Co. v. Smith*, 137 So. 398, 223 Ala. 583.

(3) As to custom that a locomotive should not be used while a fireman is on the running board—*New Orleans & N.E. Ry. Co. v. James*, 128 So. 766, 157 Miss. 607.

Evidence held inadmissible

(1) In general—*James v. Atlantic Coast Line R. Co.*, 18 S.E.2d 616, 199 S.C. 45—39 C.J. p. 1032 note 70 [b].

(2) As to meaning that expression had acquired by usage—*Pullen v. Chicago, M., St. P. & P. Ry. Co.*, 227 N.W. 352, 178 Minn. 347.

(3) As to a practice or custom too remote in time to justify any inference as of the time of the accident—*Minn.—Ross v. Duluth, Missabe & Iron Range Ry. Co.*, 281 N.W. 76, 203 Minn. 312.

N.J.—*Donohue v. Delaware, L. & W. R. Co.*, 156 A. 313, 9 N.J.Misc. 339.

(4) As to the practice of a single yard of another railroad, on the issue whether defendant's practice was negligent—*Willis v. Pennsylvania R. Co.*, CCANY, 122 F.2d 248, certiorari denied 62 S.Ct. 187, 314 U.S. 684, 86 L.Ed. 547.

17. N.Y.—*Reed v. Davis*, 162 N.E. 576, 249 N.Y. 35, 39 C.J. p. 1032 note 72.

Evidence held admissible

(1) In general

U.S.—*Kierce v. Central Vermont Ry.*, 79 F.2d 198, CCA Vt., certiorari denied *Central Vermont Ry. v. Kierce*, 56 S.Ct. 152, 296 U.S. 629, 80 L.Ed. 447, and *Central Vermont Ry. v. Pearson*, 56 S.Ct. 152, 296 U.S. 629, 80 L.Ed. 447—*Chicago, St. P., M. & O. Ry. Co. v. Henkel*, CCA Minn., 52 F.2d 313, certiorari denied 52 S.Ct. 200, 284 U.S. 683, 76 L.Ed. 576, and certified questions answered *Henkel v. Chicago, St. P., M. & O. Ry. Co.*, 52 S.Ct. 223, 284 U.S. 444, 76 L.Ed. 386—*Montgomery v. Baltimore & O. R. Co.*, C.C.A. Ohio, 22 F.2d 359.

Iowa.—*Chilcote v. Chicago & N. W. R. Co.*, 221 N.W. 771, 206 Iowa 1093.

39 C.J. p. 1032 note 72 [a].

(2) As to rules which railroad had to safeguard its employees

Ind.—*New York Cent. R. Co. v. Verpleatse*, 59 N.E.2d 916, 161 Ind. App. 1, rehearing denied 60 N.E.2d 784, 161 Ind. App. 1.

N.Y.—*Reed v. Davis*, 162 N.E. 576, 249 N.Y. 35.

(3) As to rules which railroad should have had to safeguard its employees—*Reed v. Davis*, supra.

Evidence held inadmissible

(1) In general—*Atlantic Coast Line R. Co. v. Hardwick*, 193 So. 730, 239 Ala. 58—39 C.J. p. 1032 note 72 [b].

(2) As to an inapplicable rule

Ala.—*Mobile & O. R. Co. v. Williams*, 147 So. 819, 226 Ala. 541, certiorari denied 54 S.Ct. 71, 290 U.S. 655, 78 L.Ed. 568.

Ky.—*Louisville & N. R. Co. v. Reverman's Adm'x*, 15 S.W.2d 300, 228 Ky. 590.

(3) As to rule not promulgated for the protection of the injured person—*U.S.—Thomson v. Downey*, CCA Ill., 78 F.2d 487, certiorari denied *Downey v. Thomson*, 56 S.Ct. 154, 296 U.S. 680, 80 L.Ed. 448.

Ill.—*Speiring v. Chicago & E. I. R. Co.*, 60 N.E.2d 267, 325 Ill.App. 576.

(4) As to rules of a railroad other than defendant—*Genzel v. New York, C. & St. L. R. Co.*, 249 Ill.App. 164.

Evidence as to violation of rules

(1) In general

Ill.—*Adams v. Chicago & E. R. Co.*, 41 N.E.2d 991, 314 Ill.App. 404.

S.C.—*Dutton v. Atlantic Coast Line R. Co.*, 88 S.E. 263, 104 S.C. 16, affirmed *Atlantic Coast Line R. Co. v. Dutton*, 38 S.Ct. 191, 245 U.S. 637, 62 L.Ed. 525.

39 C.J. p. 1032 note 72 [f].

(2) As to habitual violation—*Preble v. Wabash R. Co.*, 149 Ill.App. 584, affirmed 90 N.E. 716, 243 Ill. 340.

Evidence of interpretation of rules

(1) Where railroad rules are free from ambiguity, evidence of usage to show how they are interpreted has been held inadmissible—*Adams v. Wabash R. Co.*, Mo., 199 S.W. 969.

(2) Other decisions with respect to interpretation of rules see 39 C.J. p. 1032 note 72 [d].

18. Mass.—*Hanley v. Boston & M. R. R.*, 190 N.E. 501, 286 Mass. 390, certiorari denied *Boston & M. R. R. v. Hanley*, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—*Murphy v. Boston & M. R. R.*, 190 N.E. 501, 286 Mass. 390, certiorari denied *Boston & M. R. R. v. Murphy*, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690.

39 C.J. p. 1032 note 75.

Evidence held admissible

(1) In general.

Ark.—*Kansas City Southern Ry. Co. v. Brock*, 98 S.W.2d 949, 198 Ark. 210.

Mo.—*Goodwin v. Missouri Pac. R. Co.*, 72 S.W.2d 988, 335 Mo. 398—*Armstrong v. Mobile & O. R. Co.*, 55 S.W.2d 460, 331 Mo. 1224, certiorari denied *Mobile & O. R. Co. v. Armstrong*, 53 S.Ct. 689, 289 U.S. 743, 77 L.Ed. 1490.

S.C.—*Mann v. Seaboard Air Line Ry. Co.*, 136 S.E. 234, 138 S.C. 241.

Tex.—*Missouri Pac. R. Co. v. Steen*, Civ.App., 288 S.W. 532, certiorari denied 47 S.Ct. 765, 274 U.S. 753, 71 L.Ed. 1333.

(2) As to the custom of engineers to warn employees of a railroad on seeing them in a position of danger, on the issue of the railroad's negligence, notwithstanding the absence of any rule requiring the giving of such warning—*Hanley v. Boston & M. R. R.*, 190 N.E. 501, 286 Mass. 390, certiorari denied *Boston & M. R. R. v. Hanley*, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—*Murphy v. Boston & M. R. R.*, 190 N.E. 501, 286 Mass. 390, certiorari denied *Boston & M. R. R. v. Murphy*, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690.

Evidence held inadmissible

Mass.—*Pagano v. Worcester Consol. St. Ry. Co.*, 163 N.E. 764, 265 Mass. 89.

Pa.—*Magyar v. Pennsylvania R. Co.*, 144 A. 765, 294 Pa. 585.

19. Ala.—*Southern Ry. Co. v. Smith*, 137 So. 398, 223 Ala. 583, 39 C.J. p. 1032 note 76.

Evidence held admissible

(1) In general

Ala.—*Louisville & N. R. Co. v. Parker*, 138 So. 231, 223 Ala. 636, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501—*Southern Ry. Co. v. Smith*, 137 So. 398, 223 Ala. 583.

Ill.—*Halloran v. Chicago & N. W. Ry. Co.*, 63 N.E.2d 670, 327 Ill.App. 217.

39 C.J. p. 1032 notes 72 [a], (7), (8), 76 [a].

(2) That rule, in existence for a long time prior to accident, required all trains to whistle for curves and that engineers whistled for curves after rule no longer existed, since the rule had probative value to establish a custom—*Owen v. Kurn*, 148 S.W.2d 519, 347 Mo. 516.

(3) Of rule book showing that three short blasts of whistle meant to back up standing train—*Hanley v. Boston & M. R. R.*, 190 N.E. 501, 286 Mass. 390, certiorari denied *Boston & M. R. R. v. Hanley*, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—

as well as flags, and the rules, practice, or custom relative thereto²⁰ Further, these rules have been applied with respect to the admissibility of evidence as to the duties of particular employees,²¹ schedules,²² orders,²³ signs,²⁴ and track construction²⁵

§ 514. — Warning and Instructing Employee

Competent and relevant evidence of any facts tending to establish or negative defendant's negligence in failing to give reasonable and proper warning and instruction to the injured employee with regard to the dangers of the employment is admissible.

Competent and relevant evidence may be admitted of any facts which tend to establish or negative defendant's negligence in failing to give reasonable and proper warning and instruction to the injured employee with regard to the dangers of the employment,²⁶ as, for example, facts bearing on defendant's duty to warn,²⁷ the giving,²⁸ or failure to give,²⁹ a warning, and the nature³⁰ and the adequacy³¹ of the warning. While it has been held that evidence of defendant's custom with respect to warnings is admissible,³² it has also been held

that evidence of a custom to warn is not admissible.³³

It has been held not permissible to show that other employees had been warned or instructed,³⁴ or that plaintiff had been warned on other occasions,³⁵ or that he had not been warned on the present occasion if it appears that he knew the danger.³⁶ In the absence of evidence that defendant knew or should have known of the danger, evidence of his failure to warn the injured employee has been held not admissible to charge him with negligence.³⁷ Evidence as to what an employee's instructions were with respect to a given duty is inadmissible where the injury complained of did not occur while he was performing such duty.³⁸ Likewise, it is not permissible to show whether plaintiff would have conducted himself at the time of the accident as he did, if he had known or had been warned of the danger.³⁹

§ 515. — Insufficient Force for Work

Where the employee's injury is alleged to have resulted from his master's failure to provide a sufficient

Murphy v Boston & M R R, 190 NE 501, 286 Mass 390, certiorari denied Boston & M R R v Murphy, 55 S Ct 112, 293 US 597, 79 L Ed 690

(4) That a rule required the ringing of a bell before the movement of an engine—Dundon v New York Cent. R Co, CCANY, 145 F 2d 711

(5) That a rule requiring the ringing of an engine bell had not been applied for many years—Union Pac R Co v Owens, CCA Wash, 142 F 2d 145, certiorari denied 65 S Ct 57, 323 US 740, 89 L Ed 593

Evidence held inadmissible

(1) In general—Going v. Norfolk & W. R. Co, 89 S E 914, 119 Va. 543—39 C J. p 1033 note 76 [b]

(2) That a rule required engineers to sound whistles at highway crossings, where such rule was for the benefit of others than the injured person—Sperring v Chicago & E I R. Co, 60 NE 2d 267, 325 Ill App 576.

20. Ky.—Chesapeake & O Ry. Co v Kennard, 3 S W 2d 649, 223 Ky 262.

39 C J. p 1033 note 77

Evidence held inadmissible

Evidence of custom and usage of brotherhood members to protect themselves by a flag while working about cars was held incompetent because contrary to unambiguous contractual obligation of railroad company so to protect them—Cato v Atlanta & C. A. L. Ry Co, 162 S E 239, 184 S C. 123, certiorari denied

Atlanta & C A L Ry. Co v Cato, 52 S Ct 200, 284 US 684, 76 L Ed 577.

21. Cal.—Gray v Southern Pac Co, 145 P 2d 561, 23 Cal 2d 632.

39 C J. p 1033 note 71.

22. NC—Stewart v Raleigh & A Air Line R Co, 53 S E 877, 141 NC 253

39 C J. p 1033 note 73

23. SC—Webster v Atlantic Coast Line R Co, 61 S E 1080, 81 S C 46

39 C J. p 1033 note 74

24. Ga.—Atlantic Coast Line R Co v Jones, 63 S E 834, 132 Ga 189

25. Ky.—Chesapeake & O R Co v Wiley, 121 S W 402, 134 Ky 461

26. Ill.—Mitchell v Louisville & N R Co, 31 NE 2d 965, 375 Ill 545, mandate conformed to 35 NE 2d 81, 310 Ill App 563, reversed on other grounds, 42 NE 2d 86, 379 Ill 523

NC—Mahaffey v Forsyth Furniture Lines, 145 S E 237, 196 NC 810—Fowler v Champion Fibre Co, 181 S E 380, 181 NC 42

39 C J. p 1033 note 84

As to warning and instructing inexperienced or youthful employee see supra § 507

27. Wis.—Forseth v Iron River Lumber Co, 124 NW. 1036, 142 Wis 87

39 C J. p 1033 note 85

28. Wash.—Allard v Northwestern Contract Co, 116 P. 457, 64 Wash. 14.

39 C J. p 1033 note 86.

29. Ill.—Eblin v American Car & Foundry Co, 87 NE 385, 288 Ill. 176

39 C J. p 1034 note 87.

30. Ind.—Grand Trunk Western R Co v. Poole, 93 NE 26, 175 Ind. 567

31. US—Monadnock Mills v. Fushy, NH, 224 F 386, 140 CCA. 72, certiorari denied 36 S Ct 551, 241 US 666, 50 L Ed 1228

Pa.—Rosenna v Howard Gas Coal Co, 96 A 716, 251 Pa. 298

32. Mo.—Bequette v Pittsburgh Plate Glass Co, 207 S W. 852, 200 Mo App 506

39 C J. p 1035 note 88

33. Ala.—Birmingham Fuel Co v. Taylor, 81 So 630, 202 Ala. 674.

39 C J. p 1035 note 91

34. Minn.—Murphy v. Gross, 136 N W 868, 118 Minn. 311

39 C J. p 1035 note 92

35. Del.—Rex v Pullman's Palace Car Co, 43 A 246, 16 Del 337

39 C J. p 1035 note 93

36. Del.—McMahon v. Bangs, 62 A 1098, 21 Del 178

37. US—Delano Mill Co v. Osgood, Me., 246 F 273, 159 CCA 3

Ill.—Kahnaki v Williamson County Coal Co, 183 Ill App 541, reversed on other grounds 104 NE 1097, 263 Ill 257

38. Pa.—New York, L E & W. R Co. v. Lyons, 13 A. 205, 119 Pa 324

39 C J. p 1035 note 96.

39. S C.—Roberts v Virginia-Carolina Chemical Co., 66 S D 258, 84 S C. 282.

number of men for the work, evidence may be admitted to show the insufficiency of the force, and that the defendant had notice of the fact.

Where the employee's injury is alleged to have resulted from his master's failure to provide a sufficient number of men for the work, evidence may be admitted to show the insufficiency of the force, and that defendant had notice of the fact⁴⁰ The number of men customarily used by defendant on the particular work has been held admissible,⁴¹ but the custom of other establishments is not admissible in the absence of evidence of similarity of conditions.⁴²

§ 516. — Employment or Retention of Incompetent Employees

- a. In general
- b. Employer's knowledge of incompetency
- c. Other acts of negligence
- d. Habits and reputation

a. In General

Evidence tending to show incompetency on the part of another workman resulting in the employee's injuries, and the employer's knowledge of, or duty to know of, such incompetency is admissible; but the mere fact that a servant is retained in, or discharged from, the service after the accident is not admissible on the question of his competency.

Evidence tending to show incompetency on the part of another workman resulting in the employee's injuries, and the employer's knowledge of, or duty to know of, such incompetency is admissible.

ble,⁴³ as, for example, evidence relating to the requirements of the position,⁴⁴ complaints made about the workman,⁴⁵ or conduct equivalent to a complaint,⁴⁶ as well as the result of investigations following the complaint.⁴⁷ So, too, competent evidence relating to the conduct of the workman at the time,⁴⁸ or any peculiarities or unusualness in his previous appearance or conduct,⁴⁹ his mental capacity,⁵⁰ and his experience,⁵¹ and defendant's records of his work,⁵² has been held admissible.

The evidence must be relevant,⁵³ and is inadmissible where it has no tendency to show the competency⁵⁴ or incompetency⁵⁵ of the particular workman whose acts caused plaintiff's injuries, or, as discussed infra subdivision b of this section, defendant's knowledge of his incompetency, or the negligent act of employing such a workman at the time and place of the injury.⁵⁶ Evidence of incompetency is not admissible where plaintiff's injuries were due to causes other than the workman's incompetency.⁵⁷

Retention or discharge after accident. The mere fact that a servant is retained in, or discharged from, the service after an accident is not admissible on the question of his competency,⁵⁸ but may be admitted to contradict the evidence of the other party.⁵⁹ As discussed infra § 517, competent evidence showing that he is not discharged, suspended, or reprimanded is admissible to disprove the defense that plaintiff's injuries were due to the negligence of a fellow servant, or as characterizing the

40. Miss—Everett Hardware Co v Shaw, 172 So. 337, 178 Miss 476, suggestion of error denied 173 So 411, 178 Miss 476

39 C.J. p 1035 notes 99, 1.

Complaint to defendant's representative

Miss—Everett Hardware Co. v. Shaw, supra

39 C.J. p 1035 note 1 [b]

41. Ala.—Alabama Great Southern R Co v. Vail, 46 So 587, 155 Ala. 382.

42. Del.—Creswell v. Wilmington & N R Co, 43 A. 629, 18 Del. 210
39 C.J. p 1035 note 3.

43. Ark.—D H Dalton Const. Co v. Huskey, 56 SW2d 1018, 186 Ark. 934

Cal.—Weddle v Loges, 125 P.2d 914, 52 Cal App 2d 115

39 C.J. p 1034 note 5

Knowledge of employee's reputation

Evidence of an employer's knowledge of an employee's reputation for recklessness, where competent and relevant, is admissible—Weddle v Loges, supra.

44. Cal.—Peters v Southern Pac Co, 116 P 400, 160 Cal 48

Ill.—Devine v Boston Store of Chicago, 167 Ill App 443

45. Ga.—Camilla Cotton Oil & Fertilizer Co v Walker, 94 S.E. 855, 21 Ga App 603

46. Del.—Giordano v Brandywine Granite Co, 52 A 332, 19 Del 423

39 C.J. p 1036 note 8

47. Ill.—Lamb v. Kerrens-Donnewald Coal Co, 140 Ill App. 195.

48. Iowa.—Hunt v Waterloo, C F & N R Co, 141 N.W 334, 160 Iowa 722

49. Mass.—Leary v Williams G Webber Co, 96 NE 136, 210 Mass 68.

50. Ala.—Montgomery First Nat Bank v Chandler, 39 So. 322, 144 Ala 286, 113 Am SR 39

39 C.J. p 1036 note 12

51. Mo.—Allen v Quercus Lumber Co, 157 SW 661, 171 Mo App 492

Tex.—Texas & Pacific Coal Co v. Sherbley, Civ App, 212 SW 758

52. Mich.—Trend v. Detroit United R Co, 112 N.W. 977, 149 Mich 338.

53. Mo.—Munoz v. American Car & Foundry Co, 296 SW 228, 220 Mo App 902

NC—Taylor v J. A Jones Const Co, 138 SE 129, 193 NC 775

39 C.J. p 1036 note 15

54. Vt.—Latremouille v. Bennington & R R Co, 23 A 656, 63 Vt 386.

39 C.J. p 1036 note 16

55. NC—McMahan v. Carolina Spruce Co, 105 SE 439, 180 NC 636.

39 C.J. p 1036 note 17.

56. NC—McMahan v. Carolina Spruce Co, supra

39 C.J. p 1036 note 18.

57. NY—Smith v New York Cent & H R. Co, 58 NE 655, 164 NY. 491

39 C.J. p 1036 note 20.

58. Iowa.—Couch v. Watson Coal Co, 46 Iowa 17.

NY—Winters v. Naughton, 86 NY. S 439, 91 App Div 80

59. NH.—Race v Graves & Ramadell Co, 105 A. 744, 79 NH. 144.

39 C.J. p 1036 note 22.

animus of those controlling defendant corporation, and as an ingredient in the measure of damages where the fact was known to the officer or agent of the company having power to discharge him.⁶⁰

b. Employer's Knowledge of Incompetency

Evidence, otherwise admissible, may be admitted to show the defendant's knowledge of a servant's incompetency.

As tending to show defendant's knowledge of an employee's incompetency, it is permissible to show prior acts of insubordination and wilful disobedience of orders,⁶¹ knowledge on the part of defendant's foreman of such conduct,⁶² also declarations of defendant's foreman, provided there is independent evidence of the workman's incompetency.⁶³ Since the exact issue is not whether the employer believed his employee competent, but whether he was justified in so believing, it has been held that a question asked of the employer whether he had any knowledge or belief that the workman was not competent is inadmissible.⁶⁴ The fact that the workman had been given derogatory nicknames is not admissible to show the employer's knowledge of his incompetency.⁶⁵

c. Other Acts of Negligence

Evidence of prior specific acts of a fellow servant is generally held to be admissible on the question of his competency, provided it is also shown that the defendant knew or ought to have known of such prior acts.

Although there is some authority to the contrary,⁶⁶ it has generally been held that evidence of prior specific acts of a fellow servant is admissible

on the question of his competency,⁶⁷ even though such negligent acts differ somewhat from the negligent act which caused the injury, provided they are of similar character,⁶⁸ where it is shown that such acts were known, or ought to have been known, to the employer,⁶⁹ and proof of actual notice to the employer⁷⁰ or to his foreman⁷¹ is not required. In the absence of evidence that defendant knew or ought to have known of the prior acts, the evidence is not admissible.⁷² Where prior negligent acts are admitted to show incompetency, it follows that defendant may introduce evidence to rebut the inferences to be drawn therefrom.⁷³

d. Habits and Reputation

Competent and relevant evidence of an employee's habits and reputation indicating his unsuitability for the work to which he was assigned may be admitted to show the defendant's negligence in employing him for that purpose.

Competent and relevant evidence of an employee's habits, rendering him unsuitable for the work to which he was assigned, may be admitted to show negligence of the master in employing him for that purpose, as, for example, evidence that the employee was habitually careless,⁷⁴ or forgetful,⁷⁵ or intoxicated.⁷⁶ As a general rule, evidence of an employee's general reputation for competency in the particular line of work in which he was employed may be admitted, when the negligence of the employer in hiring him or retaining him in his employment is in issue,⁷⁷ as is true also of evidence as to his reputation for particular traits entering into the question of his fitness for the work, as, for

60. Ill.—Peck v Cooper, 112 Ill 192, 54 Am R 281

61. Me.—Robbins v Lewiston, A & W St R Co, 77 A 537, 107 Me 42, 30 L.R.A.N.S., 109, Ann Cas 1912C 92

Prior suit

Competent and relevant evidence of a prior suit against defendant showing that a physician employed by him was lacking in skill is admissible to show that defendant had notice of the fact that the physician was considered unskillful.—McMahon v Carolina Spruce Co, 105 S.E. 439, 180 N.C. 636

62. Ala.—Montgomery First Nat Bank v Chandler, 39 So 322, 144 Ala 286, 113 Am S.R. 39

63. Md.—McCall's Ferry Power Co v Price, 69 A 832, 108 Md. 96 39 C.J. p 1036 note 28

64. Minn.—Pfundl v Romer, 120 N.W. 302, 107 Minn 553.

65. Ill.—St Louis, A & T H R Co v Corgan, 49 Ill App 229 39 C.J. p 1035 note 30

66. Mass.—Cooney v Commonwealth Ave St. R. Co, 81 NE 905, 196 Mass 11

39 C.J. p 1036 note 39
Other acts of negligence to show negligence in doing or omitting act complained of see supra § 511

67. Me.—Robbins v Lewiston, A & W St R Co, 77 A 537, 107 Me 42, 30 L.R.A.N.S., 109, Ann Cas 1912C 92

Or—Corpus Juris cited in Guedon v Rooney, 87 P 2d 209, 217, 160 Or 621

39 C.J. p 1035 note 32.

68. Mo.—Burns v R L McDonald Mfg Co, 252 SW 984, 213 Mo App 640

39 C.J. p 1036 note 33

69. Wash.—Conover v. Neher-Ross Co, 80 P 281, 38 Wash. 172, 107 Am S.R. 841

39 C.J. p 1036 note 34.

70. Tex.—Galveston, H & S A R Co v Davis, Civ App, 45 SW. 956.

71. Md.—McCall's Ferry Power Co. v. Price, 69 A 832, 108 Md. 96. 39 C.J. p 1036 note 36

72. U.S.—Southern Pac Co v Hester, Utah, 135 F 272, 68 CCA. 26, 1 L.R.A.N.S., 288

39 C.J. p 1036 note 37.

73. Vt.—Griffin v Boston & M. R. Co, 89 A 220, 87 Vt 278

39 C.J. p 1036 note 38

74. Tex.—Houston & T. C. R. Co. v. Patton, 9 SW 175

75. Mass.—Ledwidge v Hathaway, 49 NE 656, 170 Mass 348.

39 C.J. p 1036 note 43

76. Mich.—Laysell v J H Somers Coal Co, 117 NW. 179, 156 Mich 268, adhered to 120 NW. 996, 156 Mich 268

39 C.J. p 1036 note 44

77. Mo.—Grube v Missouri Pac. R. Co, 11 SW 786, 98 Mo. 830, 14 Am. S.R. 645, 4 L.R.A. 776.

39 C.J. p 1036 note 45.

example, inattention,⁷⁸ carelessness,⁷⁹ recklessness,⁸⁰ malicious conduct,⁸¹ or intoxication⁸²

It has been held that evidence of his reputation is not admissible to prove the workman's incompetency, but only defendant's knowledge of such incompetency, after the incompetency has been established by other evidence of specific acts⁸³ The general character of the workman, as distinguished from his reputation for traits which have a bearing on the case,⁸⁴ and his reputation for traits which have no relation whatever to the cause of the accident,⁸⁵ or to the issues of the case,⁸⁶ are not admissible. In showing the general reputation of a servant among those who worked with him, evidence of their actions and what they gave as their reasons when they refused to work with him is admissible.⁸⁷

§ 517. — Negligence of Fellow Servant

Competent and relevant evidence as to the negligence of a fellow servant may be admitted.

Subject to the general rules as to competency and relevancy, evidence as to the relationship between plaintiff and the coemployee whose negligent act is alleged to have caused the injury is admissi-

ble,⁸⁸ as is evidence to show to whom the negligent act is attributable,⁸⁹ or to show that the act of a coemployee is to be regarded as the act of defendant,⁹⁰ or to disprove the negligence of the fellow servant.⁹¹ Likewise, competent and relevant evidence tending to bring the case within the operation of statutes abrogating the fellow-servant rule,⁹² or within exceptions to such statutes,⁹³ may be admitted. In an action brought under some statutory provisions, evidence tending to show that defendant's superintendent was negligent in failing to discover or correct a defect in the instrumentalities used resulting in plaintiff's injury has been held admissible.⁹⁴ In an action brought under the Federal Employers' Liability Act § 1 et seq, 45 U.S.C.A. § 51 et seq, a railroad's rule intended for the safety of its employees has been held relevant on the issue of the negligence of a fellow employee.⁹⁵ Evidence having no tendency to prove that the injuries were caused by the negligence of the fellow servant,⁹⁶ or that the negligent workman was,⁹⁷ or was not,⁹⁸ a vice-principal, or to bring defendant within the terms of a statute exempting him from injuries caused by a vice-principal in certain cases,⁹⁹ is not admissible.

78. Miss—Yasoo & M V R Co. v Hare, 61 So. 648, 104 Miss. 564
NC—Walters v Durham Lumber Co, 80 S.E. 49, 183 NC 536.

79. NC—Walters v Durham Lumber Co, supra
Wash—Johansen v Pioneer Min. Co., 137 P. 1019, 77 Wash. 421

Evidence of wages paid employees is not admissible to show an employer's negligence in not employing competent workmen, since the compensation paid a workman, or the fact that he is paid according to the regular scale, or any other scale, is not any evidence of his reputation for carelessness in performing his work—Taylor v J. A. Jones Const. Co., 138 S.E. 129, 193 NC. 775

80. Pa.—Rosenstiel v. Pittsburgh R. Co., 79 A. 556, 230 Pa. 273, 33 L.R.A.N.S., 751
Wis—Serdan v Falk Co., 140 N.W. 1035, 153 Wis. 169.

81. Miss—Yasoo & M V R Co. v. Hare, 61 So. 648, 104 Miss. 564.

82. Ill—Taylor v Chicago & Alton R. Co., 164 Ill. App. 348
NY—Haskins v New York Cent. & Hudson River R. Co., 65 Barb. 129, affirmed 56 NY 608

83. Cal—Gier v Los Angeles Cons. Electric R. Co., 41 P. 22, 108 Cal. 139
39 C.J. p. 1037 note 52.

84. NC—Walters v Durham Lumber Co., 81 S.E. 453, 165 NC 388

85. Okl—Adamson v Allende, 38 P.2d 917, 170 Okl. 154
39 C.J. p. 1037 note 54.

Drunkenness

(1) Evidence that an employee has a reputation for intemperance is inadmissible in the absence of evidence that he was incompetent by reason of drunkenness at the time of the accident in question, or that his drinking contributed to the injury—Adamson v Allende, supra.

(2) Other evidence as to drunkenness see 39 C.J. p. 1037 note 54 [a]
86. Ga—Louisville & N. R. Co. v. Hudson, 73 S.E. 80, 10 Ga. App. 169
39 C.J. p. 1037 note 55.

87. Del—Giordano v Brandywine Granite Co., 52 A. 332, 19 Del. 423

88. Idaho—Walsh v Winston Bros. Co., 111 P. 1090, 18 Idaho 768
39 C.J. p. 1037 note 58

Incompetency of fellow servant

Where a master seeks to escape liability to an injured employee on the ground that the coemployee and the injured employee were fellow servants, evidence that the coemployee was incompetent has been held admissible—Aronovitch v Ayres, 193 S.E. 524, 169 Va. 308

Only competent and relevant evidence is admissible to show the status of employees so as to render the

fellow-servant doctrine applicable.—J. M. High Co v Hague, 185 S.E. 141, 53 Ga. App. 165.

89. Vt—Lassasso v Jones Bros. Co., 93 A. 266, 88 Vt. 526

90. Mo—McCall v B. Nugent Bros. Dry Goods Co., 236 S.W. 324

91. US—Atchison, T. & S. F. R. Co. v. Parker, Ind. T., 55 F. 595, 5 C.C.A. 220.

92. Ala—Southern R. Co. v. Peters, 69 So. 611, 194 Ala. 94.
39 C.J. p. 1037 note 62

93. Colo—Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson, 89 P. 63, 44 Colo. 236
39 C.J. p. 1037 note 63.

94. Ala—Belcher v Chapman, 7 So. 2d 859, 242 Ala. 653.

95. US—Katila v. Baltimore & O. R. Co., C.C.A. Ohio, 104 F.2d 842

96. Mo—Totten v. Smith Bros., App., 3 S.W.2d 740.
39 C.J. p. 1037 note 64.

97. Tex—Texas Mexican R. Co. v. Douglass, 7 S.W. 77, 69 Tex. 894.
39 C.J. p. 1038 note 65.

98. Mont—Wallace v. Chicago, M. & P. S. R. Co., 157 P. 955, 52 Mont. 345

99. W. Va.—Gartin v. Draper Coal & Coke Co., 73 S.E. 873, 72 W. Va. 405
39 C.J. p. 1038 note 67.

§ 518. — Assumption of Risk

- a. In general
- b. Notice or complaint, and promise to repair

a. In General

Any facts tending to show the plaintiff's assumption or nonassumption of risk ordinarily may be given in evidence, but such evidence is not admissible where it has no tendency to prove plaintiff's knowledge of the danger, or his assumption of risk.

On an issue of assumption of risk by plaintiff, ordinarily any facts may be given in evidence which tend to show his assumption or nonassumption of the risk,¹ as, for example, facts tending to show his knowledge or ignorance of the defect or danger.² However, such evidence is not admissible where it has no tendency to prove plaintiff's knowledge of the danger,³ or his assumption of risk.⁴

Evidence of plaintiff's knowledge or ignorance of the danger or his assumption of risk is not admissible where the injuries are caused by defects not reasonably to be regarded as incidental to the work,⁵ where it appears that the injuries were not the result of the inherent dangers of the employment,⁶ where the defects testified to are not the defects causing the injuries,⁷ where a statute requires a guard as a protection from the defect or danger,⁸ where, under a statute, assumption of risk is not a defense,⁹ or where plaintiff's offered asser-

tion of ignorance can have no legal effect in view of the obviousness of the danger.¹⁰ Evidence that plaintiff, when injured, was unaware of the fact that he was about to do something which would surely result in injury or death is immaterial on the issue of his assumption of risk, when he had knowledge of conditions for many years prior to the injury.¹¹ Conditions existing before plaintiff entered the employment are immaterial, where there is evidence as to what the conditions were at the time he entered the employment and later at the time of the accident.¹²

b. Notice or Complaint, and Promise to Repair

In order to show nonassumption of risk, the plaintiff may show notice or complaint by himself to the employer, and a promise by the employer to remedy the defect or to remove the danger, but he may not show complaints made by someone else or those made by himself with respect to defects other than the defect causing the injury.

In order to show nonassumption of risk, plaintiff may show notice or complaint made by himself to the employer, and a promise by the employer to remedy the defect or to remove the danger,¹³ or that, after protesting because of the danger, he only worked under a threat of discharge.¹⁴ As bearing on the question whether plaintiff had a right to rely on defendant's promise to repair, other instances of complaints by plaintiff as to unsafe con-

L. Mo—Goodwin v Missouri Pac R Co, 72 S.W.2d 988, 335 Mo 398 39 C.J. p 1038 note 69

Under Federal Employers' Liability Act

(1) In an action brought under the Federal Employers' Liability Act, at least prior to the amendment of Aug 11, 1939, c 685 § 1, 45 U.S.C.A. § 54, ordinarily competent and relevant evidence as to the injured employee's assumption of risk may be admitted

Mass—Hanley v Boston & M R R, 190 N.E. 501, 286 Mass 390, certiorari denied Boston & M R R v. Hanley, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—Murphy v Boston & M R R, 190 N.E. 501, 286 Mass 390, certiorari denied Boston & M R R v. Murphy, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690

Mo—Weaver v Mobile & O R Co, 120 S.W.2d 1105, 343 Mo 223—Jenkins v Wabash Ry Co, 73 S.W.2d 1002, 335 Mo 748—Jenkins v. Wabash Ry Co, 107 S.W.2d 204, 232 Mo App 438, certiorari denied Wabash R. Co v. Jenkins, 58 S.Ct. 139, 302 U.S. 737, 32 L.Ed. 570.

(2) However, in an action brought under the act, where defendant's violation of a statute enacted for the

safety of its employees contributed to plaintiff's injury, or where such injury resulted in whole, or in part, from the negligence of any officer, agent, or employee of defendant, evidence relating to plaintiff's assumption of risk is not admissible—Leet v Union Pac R Co., 142 P.2d 37, 60 Cal.App.2d 814.

2. N.H.—Nichols v. Moulton, 130 A.28, 82 N.H. 110. 39 C.J. p 1038 note 70

3. N.H.—Dubuc v Amoskeag Industries, 15 A.2d 887, 91 N.H. 173 39 C.J. p 1038 note 71

4. Utah—Miller v Western Pac R Co, 274 P. 945, 73 Utah 442 Wash—Prink v Longview, P. & N. Ry Co, 279 P. 1115, 153 Wash. 300. 39 C.J. p 1038 note 72.

Application for employment

(1) An application for employment, offered for the purpose of showing that the employee assumed ordinary risks, is inadmissible where it is immaterial and confusing—Thompson v. Missouri Pac R Co, CCA Mo, 15 F.2d 28.

(2) Other applications see 39 C.J. p 1038 note 72 [a].

5. Mass—Cook v. Newhall, 101 N.E. 72, 213 Mass 392

6. Mo—Bowman v Marceline Coal & Mining Co, 154 S.W. 891, 168 Mo App 703

7. S.C.—Kirkland v. Southern R. Co, 121 S.E. 594, 128 S.C. 47.

8. Mo—Shoemaker v Adair County Coal Co, App, 255 S.W. 350 39 C.J. p 1039 note 76

9. Mo—Church v Central Coal, etc., Co., App, 195 S.W. 573

10. Ill.—Barrett v Chicago Bridge & Iron Co, 181 Ill. App 204.

11. Utah—Miller v. Western Pac R. Co, 274 P. 945, 73 Utah 442

12. Mass—Simoneau v Rice, 88 N.E. 433, 202 Mass 82—McCafferty v. Lewando's French Dyeing & Cleansing Co, 80 N.E. 460, 194 Mass 412, 120 Am.S.R. 562.

13. Iowa—Steburg v Vincent Clay Products Co, 155 N.W. 337, 173 Iowa 248. 39 C.J. p 1039 note 81.

14. Mo—Doyle v Missouri, K & T. Trust Co., 41 S.W. 255, 140 Mo 1

ditions and their having been remedied may be shown.¹⁵

Plaintiff may not show complaints made by some one else,¹⁶ or complaints made by himself with respect to defects other than the defect causing the injury.¹⁷ Defendant may not show a custom not to make such promises to corroborate his denial of a promise to repair,¹⁸ nor may he be heard to qualify a promise given by himself by an attempted explanation inconsistent with his own testimony and that of defendant as to what he had said.¹⁹ The fact that plaintiff had never made any complaint may not be shown where there is a statute requiring a guard to be placed on the dangerous machine,²⁰ or where defendant's failure to provide a safe place for work or safe appliances did not or could not have caused or contributed to plaintiff's injury.²¹

§ 519. — Contributory Negligence

- a In general
- b Habits and reputation of injured employee
- c Employee's knowledge of defect or danger and precautions taken
- d Employee's duty to discover or remedy defect
- e Employee's obedience or disregard of rules
- f Methods of work

a. In General

In the absence of a statute otherwise providing, competent and relevant evidence as to whether or not the injured employee was contributorily negligent may be admitted.

Evidence, otherwise admissible, ordinarily may be admitted to show whether or not the injured employee was contributorily negligent.²² Under comparative negligence statutes, such as the Federal Employers' Liability Act, competent and relevant evidence tending to show whether or not the injured employee was contributorily negligent ordinarily may be admitted,²³ but not for the purpose of establishing a defense.²⁴ Evidence of contributory negligence may be excluded under a statute barring contributory negligence as a defense.²⁵

It has been held that evidence as to the exercise of due care by the injured employee,²⁶ or as to the surrounding conditions,²⁷ may be admitted. So, too, such evidence as to facts explanatory of the injured employee's conduct,²⁸ its necessity²⁹ and reasonableness,³⁰ has been held admissible. Also, competent and relevant evidence as to the dangerous condition of the place for work has been held admissible to rebut a charge of contributory negligence.³¹ Evidence may be admissible to show that the accident to the injured employee might have been caused in ways other than by the employee's negligence to rebut the defense that the balance of probabilities excludes every cause but that, without proof that any one of such ways was the cause.³²

Facts offered for the purpose of showing whether or not the injured employee was contributorily negligent must be relevant and material.³³ Where the relevancy of evidence depends on conditions not shown,³⁴ or on a similarity of conditions not proved,³⁵ or on issues not raised,³⁶ it is not admissible.

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| <p>15. Wis.—Driscoll v. Albs-Chalmers Co., 129 NW 401, 144 Wis 451.</p> <p>16. Iowa.—Ford v. Chicago, R. I. & P. R. Co., 59 N.W. 5, 91 Iowa 179, 24 L.R.A. 657.</p> <p>17. Mich.—Lukovski v. Michigan Cent. R. Co., 129 NW. 707, 164 Mich 361</p> <p>18. Tex.—Missouri, K. & T. R. Co. v. Nordell, 50 SW. 601, 20 Tex Civ App 382</p> <p>19. Ill.—Porkorney v. Binner-Wells Co., 178 Ill App 546.
39 C.J. p 1039 note 88.</p> <p>20. Mo.—Shoemaker v. Adair County Coal Co., App., 255 SW. 350</p> <p>21. Mont.—Wallace v. Chicago, M. & P. S. R. Co., 157 P 955, 52 Mont 345</p> <p>22. R.I.—Jones v. New York, N. H. & H. R. Co., 37 A 1033, 20 R.I. 210
39 C.J. p 1039 note 93</p> <p>23. Ala.—Alabama Great Southern</p> | <p>R. Co. v. Baum, 81 So 2d 866, 249 Ala 442</p> <p>Tex.—Whitehead v. Texas & P. Ry. Co., Civ App., 84 SW 2d 779, error dismissed</p> <p>24. La.—Jones v. Kansas City Southern R. Co., 68 So 401, 137 La 178.</p> <p>25. Mo.—Church v. Central Coal & Coke Co., App., 195 SW 573
Defense of contributory negligence as affected by special statutory provisions see supra § 425</p> <p>26. Iowa.—Norris v. Cudahy Packing Co., 100 NW. 853, 124 Iowa 748
39 C.J. p 1039 note 95</p> <p>27. Mo.—George v. St. Louis & S. F. R. Co., 125 SW. 196, 225 Mo 364.
39 C.J. p 1040 note 96.</p> <p>28. Mich.—Van Driel v. Stevens, 166 NW 974, 200 Mich. 291,
39 C.J. p 1040 note 97.</p> | <p>29. Md.—Jones Hollow Ware Co. v. Hawkins, 97 A 365, 128 Md 160
39 C.J. p 1040 note 98</p> <p>30. Ala.—Alabama Cons. Coal & Iron Co. v. Heald, 53 So 162, 168 Ala 626
39 C.J. p 1040 note 99</p> <p>31. Mo.—Grott v. Johnson, Stephens & Shinkle Shoe Co., 2 SW 2d 785</p> <p>32. N.H.—Hussey v. Boston & M. R. R., 183 A 9, 82 N.H. 236</p> <p>33. Mo.—Denkman v. Prudential Fixture Co., 289 SW 591.
39 C.J. p 1039 note 92.</p> <p>34. Or.—Burroughs v. Curtiss Lumber Co., 114 P 103, 58 Or 270
39 C.J. p 1040 note 1.</p> <p>35. Ala.—Badgood v. T. R. Miller Mill Co., 80 So 364, 203 Ala 299.
N.Y.—Harrison v. New York Cent. & H. R. R. Co., 87 N.E 802, 195 N.Y. 36</p> <p>36. Ky.—Chesapeake & O. R. Co. v.</p> |
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Other occurrences or acts of injured employee
Other disconnected occurrences,³⁷ or acts of plaintiff,³⁸ are not admissible to show that he was in the exercise of due care or was guilty of contributory negligence at the time of the accident, but may be admitted to show his knowledge of, or experience in, the work in which he was engaged.³⁹ Where the risk is not patently obvious to one unaccustomed thereto, evidence that others had performed the same task as the injured servant, without injury to themselves, has been held inadmissible to show contributory negligence on the part of the servant where he was injured in his first attempt to perform the task.⁴⁰

Scope of employment. On an issue of contributory negligence, evidence may be admitted to show whether or not the injured servant was acting in the line of his duty at the time of his injury.⁴¹ Thus, it has been held that competent and relevant evidence may be admitted to show what the duties of his position were,⁴² and his acts in performance of them.⁴³ However, evidence as to the duties of a position he is not employed to fill may not be admitted.⁴⁴

b. Habits and Reputation of Injured Employee

While it has been held that evidence of the habits and general reputation for care and prudence of the injured employee may be admitted for or against him, the contrary has also been held.

On the question whether or not evidence of the

habits and general reputation for care and prudence of the injured employee is admissible for or against him, there is a conflict of authority, some jurisdictions holding that such evidence may be admitted,⁴⁵ others that it may not.⁴⁶ In jurisdictions allowing the evidence, its admission is based, in some of the cases expressly or impliedly, on the fact that no direct proof was obtained on the issue of due care.⁴⁷ Where the relevancy of the evidence depends on other evidence not shown, it is not admissible.⁴⁸

c. Employee's Knowledge of Defect or Danger and Precautions Taken

Evidence tending to show plaintiff's knowledge or ignorance of the defect or danger and the precautions taken by him may be admitted as bearing on the issue of his due care or lack of it at the time of the accident.

Evidence which tends to show plaintiff's knowledge or ignorance of the defect or danger may be admitted as bearing on the issue of his due care or lack of it at the time of the accident.⁴⁹ Thus, it has been held that competent and relevant evidence as to the nature of the danger,⁵⁰ conditions making knowledge difficult,⁵¹ and facts as to plaintiff's experience,⁵² mental capacity,⁵³ or physical defect affecting his ability to perceive the danger,⁵⁴ may be admitted. It has further been held permissible to show plaintiff's familiarity with the general conditions,⁵⁵ his knowledge of special conditions at the time constituting the danger,⁵⁶ as well as his knowl-

Satterfield, 100 S W 844, 30 Ky L 1168

Wis—Dixon v Russell, 145 NW 761, 156 Wis 161

37. Ala—Louisville & N R Co v Butler, 55 So 262, 1 Ala App 279
Tex—Galveston, H & S A R Co v Gillespie, 106 S W 707, 48 Tex Civ App 56.

38. Ark—Miller v Harris, 281 S W 907, 170 Ark 1193
39 C J p 1040 note 13

39. Ala—Bice v Stevenson, 38 So 753, 205 Ala 576

40. Fla—Southern States Power Co v Clark, 159 So 881, 118 Fla 521

41. Del—Chielinsky v Hoopes & Townsend Co, 40 A 1127, 1 Marv 273
39 C J p 1040 note 15

42. Iowa—Thornton v Minneapolis & St L R Co, 175 NW 71, 187 Iowa 1158
39 C J p 1040 note 16

43. Va—Chesapeake & O R Co v Arrington, 101 SE 415, 126 Va 194
39 C J p 1041 note 17.

44. Wash—Bush v. Independent Mill Co, 103 P. 45, 54 Wash 212.
39 C J p 1041 note 18.

45. NH—Hussey v Boston & M R R, 133 A. 9, 82 NH 236

39 C J p 1040 note 7.

Under Federal Employers' Liability Act

Ill—Armstrong v Chicago & W I R Co, 263 Ill App 126, affirmed 183 NE 478, 350 Ill. 426, certiorari denied Chicago & W I R Co v Armstrong, 58 S.Ct. 523, 289 US 724, 77 L Ed 1475

46. Okl—Great Western Coal & Coke Co v McMahan, 143 P. 23, 43 Okl 429
39 C J p 1040 note 8.

47. Ill—Armstrong v Chicago & W I R Co, 263 Ill App 126, affirmed 183 NE 478, 350 Ill. 426, certiorari denied Chicago & W I R Co v Armstrong, 58 S.Ct. 523, 289 US 724, 77 L Ed 1475

NH—Hussey v Boston & M R R, 133 A. 9, 82 NH 236
39 C J p 1040 note 9.

48. Tex—De Walt v Houston, H & W. T. R. Co, 55 S.W. 534, 22 Tex Civ App 403
39 C J p 1040 note 11.

49. Mo—High v Quincy, O & K C R. Co, 300 S.W. 1102, 318 Mo. 444

NH—Nichols v. Moulton, 130 A. 28, 83 NH 110

39 C J p 1041 note 20

50. Md—Dettering v. Levy, 79 A. 476, 114 Md 273

39 C J p 1041 note 21

51. RI—Chobanian v. Washburn Wire Co, 80 A. 394, 33 RI 289, Ann.Cas 1913D 780
39 C J p 1041 note 22

52. Iowa—Gregory v Chicago, R I & P R Co, 124 NW 797, 147 Iowa 715, Ann Cas 1912B 723.
39 C J p 1041 note 23.

53. Mass—Doolan v Pocasset Mfg. Co, 85 NE 1055, 200 Mass 200.

W Va—Swope v Keystone Coal & Coke Co, 89 SE 284, 78 W Va 517, L.R.A.1917A 1128.

54. NM—Maestas v Alameda Cattle Co, 14 P2d 732, 36 NM 323.

Defective vision

NM—Maestas v Alameda Cattle Co., supra

55. Cal—Neidlein v Southern Pac. Co, 179 P. 191, 180 Cal 63.
39 C J p 1041 note 25.

56. Mo—High v Quincy, O & K C R. Co, 300 S.W. 1102, 318 Mo. 444.

39 C J p 1041 note 26.

edge of existing devices to eliminate or minimize the danger.⁵⁷ Similarly, competent and relevant evidence as to statements by plaintiff indicating his knowledge of the danger,⁵⁸ as well as statements⁵⁹ or warnings⁶⁰ of defendant and plaintiff's knowledge of the meaning of signals designed to warn him of the danger,⁶¹ may be admitted. Evidence which has no bearing on the issues is not admissible.⁶² Evidence as to the knowledge of others than plaintiff, in the absence of similarity of conditions,⁶³ or in the absence of evidence indicating that such knowledge was substantially equal to that of plaintiff,⁶⁴ or in the absence of evidence showing that such persons communicated their knowledge to plaintiff,⁶⁵ may not be admitted. So, too, evidence of a conversation as to the danger between others, in the absence of evidence that plaintiff heard it, may not be admitted.⁶⁶ Evidence as to plaintiff's knowledge⁶⁷ or ignorance⁶⁸ of the danger from certain stated defective conditions is not admissible where the danger resulted from other causes. Where the work engaged in is recognized by everyone to be dangerous, it has been held that no good purpose would be served by admitting the injured employee's application for employment made several years prior to the trial to show that he had knowledge of the danger.⁶⁹

Precautions against known dangers. Evidence as to the precautions taken by the injured employee against the dangers of a particular place,⁷⁰ or arising under certain circumstances,⁷¹ after his discovery or knowledge of them,⁷² usually may be admit-

ted, as well as facts offered as justification for his not taking such precautions.⁷³

d. Employee's Duty to Discover or Remedy Defect

Evidence bearing on the employee's duty to discover the defect which resulted in his injury may be admitted.

Evidence, otherwise admissible, bearing on the employee's duty to discover or remedy the defect which resulted in his injury may be admitted.⁷⁴ Thus, it has been held that evidence of instructions by defendant to his employees,⁷⁵ of a practice to show the construction put on a rule requiring inspection,⁷⁶ of the probable result of an inspection by plaintiff,⁷⁷ and of plaintiff's rights after reporting a defect to his employer,⁷⁸ may be admitted. Evidence of a rule requiring an inspection by plaintiff is not admissible where it is obvious from the uncontradicted evidence that an inspection would not have disclosed the defect.⁷⁹ So, too, evidence having no bearing on plaintiff's duties,⁸⁰ or the relevancy of which depends on other evidence not shown,⁸¹ is not admissible.

e. Employee's Obedience or Disregard of Rules

In the absence of statutes providing otherwise, evidence tending to show the injured employee's obedience or disregard of his employer's rules, orders, or warnings, of which he has had notice, and which results in his injuries, may be admitted.

Ordinarily, evidence tending to show the injured employee's obedience or disregard of his employer's rules, orders, or warnings, of which he has had no-

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| <p>57. Md.—Baltimore & O. R. Co v Branson, 98 A 225, 128 Md 878 39 C.J. p 1041 note 27</p> <p>58. Iowa—Steburg v Vincent Clay Products Co, 155 NW 327, 173 Iowa 348</p> <p>Vt.—Spinney v Hooker, 102 A 53, 93 Vt 146</p> <p>59. Wis.—Smith v. Milwaukee Electric R & Light Co, 106 NW. 829, 127 Wis 253 39 C.J. p 1041 note 29</p> <p>60. Mo.—Runyan v Marceline Coal & Mining Co, 172 S.W. 1165, 186 Mo App 707 39 C.J. p 1041 note 30</p> <p>61. Ala.—Louisville & N. R. Co v Anderson, 43 So 566, 150 Ala 350</p> <p>Tex.—Modern Order of Praetorians v Nelson, Civ App, 162 S.W. 17</p> <p>62. Ind.—Indianapolis Tract. & Terminal Co v Holtclaw, 82 NE 986, 41 Ind App 520</p> <p>63. Tex.—Yellow Pine Oil Co v Noble, Civ App, 97 S.W. 332</p> <p>64. N.H.—Dubuc v Amoskeag Industries, 15 A 2d 867, 91 N.H. 173</p> | <p>65. N.H.—Dubuc v. Amoskeag Industries, supra</p> <p>66. Ariz.—Gila Valley, G & N R Co v Hall, 112 P 845, 13 Ariz 270, affirmed 34 S.Ct. 229, 232 US 94, 58 L.Ed. 521</p> <p>67. Tex.—National R Co v Luggage, Civ App, 172 S.W. 1140</p> <p>68. Mass.—Cook v Newhall, 101 N.E. 72, 218 Mass 392</p> <p>69. Ill.—Chicago, R I & P Ry Co v Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied Chicago, R I & P Ry Co v Benson, 54 S.Ct. 52, 290 US 636, 78 L.Ed. 553</p> <p>70. Ky.—Kington Coal Co v. Aaron, 144 S.W. 371, 147 Ky 480 39 C.J. p 1042 note 45</p> <p>71. Ind.—Chicago & E. R. Co v Mitchell, 110 N.E. 215, 184 Ind 383</p> <p>N.C.—Clements v Elizabeth City Light, etc., Co, 100 S.E. 189, 178 N.C. 52</p> <p>72. Conn.—Quinn v. New York, N.H. & H. R. Co, 18 A. 97, 56 Conn. 44, 7 Am.S.R. 284</p> | <p>73. N.D.—Davy v Great Northern R Co, 128 NW 311, 21 N.D. 43. 39 C.J. p 1042 note 48</p> <p>74. Wis.—Revolinski v Adams Coal Co, 95 NW 133, 118 Wis 334 39 C.J. p 1041 note 37.</p> <p>75. Tex.—Van Geem v. Cisco Oil Mill, Civ App, 162 S.W. 1108</p> <p>76. Utah.—Shepard v Payne, 206 P. 1098, 60 Utah 140</p> <p>77. Ky.—Western Union Tel Co v Holtby, 93 S.W. 552, 29 Ky L. 523</p> <p>78. Wis.—Beach v Bird & Wells Lumber Co, 116 NW 215, 135 Wis 550</p> <p>79. Ky.—Cincinnati, N O & T. P. R Co v Nolan, 170 S.W. 650, 161 Ky 205.</p> <p>80. Ill.—North Chicago Rolling-Mill Co v Johnson, 29 N.E. 186, 114 Ill. 57 39 C.J. p 1041 note 43</p> <p>81. Ill.—Walsh v West Baden Springs Co, 125 N.E. 727, 291 Ill. 24.</p> |
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tice, resulting in his injuries, may be admitted.⁸² However, in actions brought under statutes such as the Federal Employers' Liability Act, where a statute enacted for the protection and safety of employees has been violated by the employer, such evidence may not be admitted,⁸³ unless such disobedience on the part of the injured employee was the sole proximate cause of the injury,⁸⁴ but, where no violation of any safety act on the part of the employer is shown, it has been held that such evidence may be admitted, under these statutes.⁸⁵

Under the general rule that competent evidence tending to show the injured employee's obedience or disregard of his employer's rules, orders, or warnings may be admitted, it has been held that evidence of facts bearing on the question whether or not such a rule existed,⁸⁶ its provisions,⁸⁷ impracticability,⁸⁸ or terms making its application discretionary with the employee⁸⁹ or contingent on circumstances,⁹⁰ may be admitted. It has also been held permissible to show the employee's knowledge and understanding of such a rule,⁹¹ the habitual disregard by the employees of the rule with the employer's knowledge and implied consent,⁹² and as bearing on the right of the employee to rely on an observance of rules.⁹³ Competent evidence as to

facts relating to orders for the employee's work,⁹⁴ and their authenticity,⁹⁵ and warnings by the employer,⁹⁶ and the employee's right to rely on their completeness and sufficiency,⁹⁷ may also be admitted. Where defendant claims that the injured employee violated his instructions regarding the use of safety appliances, evidence as to the inapplicability of the instructions to the work in which the injured employee was engaged may be admitted.⁹⁸

It is not permissible to show orders not applicable to the injured employee;⁹⁹ nor is it permissible to show orders in the absence of evidence that the injured employee heard or could have heard them.¹ A rule is properly excluded where it is not shown that the injured employee violated it,² as is evidence of a violation of rules by other employees not brought to the knowledge of the master.³ A rule which merely urges employees to be careful in their work is not admissible,⁴ but it has been held that a rule requiring the utmost care in an extraordinarily dangerous part of the work is admissible.⁵

f. Methods of Work

- (1) In general
- (2) Customary methods

82. Mass.—Robichaud v New York, N H & H R Co, 107 NE 975, 230 Mass 250

39 C.J. p 1042 note 50

83. Cal.—Leet v Union Pac R Co, 142 P 2d 37, 60 Cal App 2d 814

Ill.—Howard v Baltimore & O C T R Co, 63 NE 2d 774, 327 Ill App 33

Mo.—Aly v Terminal R Ass'n of St Louis, 119 SW 2d 863, 342 Mo 1116, certiorari denied Terminal R Ass'n of St Louis v Aly, 59 S Ct 251, 305 US 655, 83 L Ed 424—Jordan v East St Louis Connecting Ry Co, 271 SW 997, 308 Mo 81

84. US.—Boghich v Louisville & N R Co, CCA Fla, 26 F 2d 861

Ill.—Howard v Baltimore & O C T R Co, 63 NE 2d 774, 327 Ill App 33

85. US.—Katila v Baltimore & O R Co, CCA Ohio, 104 F 2d 842—Ross v New York, C & St. L. R Co, CCA Ohio, 73 F 2d 187

Mo.—Jenkins v Wabash Ry Co, 73 SW 2d 1002, 335 Mo 743—Jenkins v Wabash Ry Co, 107 SW 2d 304, 232 Mo App 438, certiorari denied Wabash R Co v Jenkins, 58 S Ct 139, 302 US 737, 82 L Ed 570.

Evidence of waiver of rules

Evidence showing the customary and practical construction given to the rules of the employer and that such rules were waived by those

in authority has been held admissible—Wiggins v Powell, CCA Fla, 119 F 2d 751, certiorari denied Powell v Wiggins, 62 S Ct 94, 314 US 649, 86 L Ed 520

86. Ala.—Southern R Co v McGowan, 43 So 378, 149 Ala 440. 39 C.J. p 1042 note 51

87. Ind.—Balzer v Warring, 95 NE 257, 176 Ind 585, 48 L R A, N S, 834

39 C.J. p 1042 note 52

88. NC.—Haynes v North Carolina R Co, 55 SE 516, 143 NC 154, 9 L R A, N S, 972

39 C.J. p 1042 note 53

89. Tex.—Galveston, H & S A R Co v Still, 100 SW 176, 45 Tex Civ App 169

90. Va.—Chesapeake & O R Co v Meadows, 89 SE 244, 119 Va 33

91. Iowa.—Sedgwick v Illinois Cent. R. Co, 34 NW 790, 72 Iowa 158

39 C.J. p 1042 note 56

92. NC.—Byers v. Boice Hardwood Co, 159 SE 3, 201 NC 75

39 C.J. p 1042 note 57.

93. Fla.—Jacksonville v. Glover, 69 So 20, 69 Fla 701

Tex.—Paris & G N. R Co v Boston, Civ App, 142 SW 944

94. Ala.—Thomas Furnace Co v Carroll, 85 So. 455, 204 Ala. 263.

39 C.J. p 1042 note 59.

95. Ill.—Kutlik v. Chicago, Rock Island & Pacific R Co., 206 Ill App. 624.

96. Or.—Kunts v Emerson Hardwood Co, 184 P. 253, 93 Or. 565.

97. Mass.—Santore v. New York Cent & H R R Co, 89 NE 619, 203 Mass. 437.

Mo.—George v St Louis, etc., R Co, 125 SW. 196, 225 Mo 364

98. Mo.—Horn v. Kansas City Power & Light Co, 274 SW. 673

99. Va.—Powhatan Lime Co v. Whetsel, 86 SE 898, 118 Va 161

L Ala.—Illinois Cent R Co v Lowery, 63 So 952, 184 Ala. 443, 49 L R A, N S, 1149

2. Ind.—Lake Erie & W R Co v. Mugg, 31 NE 564, 132 Ind 168 39 C.J. p 1042 note 65

3. Ga.—Binion v Georgia Southern & F. R. Co, 45 SE 276, 118 Ga. 282

Or.—Burroughs v. Curtiss Lumber Co, 114 P 103, 58 Or. 270.

4. Ind.—Chicago & E R Co. v. Lawrence, 79 NE 863, 82 NE 788, 169 Ind. 319.

5. Ohio.—Sherman v. Toledo & Ohio Cent. R. Co, 1 Ohio A. 279, 20 Ohio Cir Ct. N.S. 464.

39 C.J. p 1042 note 63.

(1) In General

On an issue of contributory negligence, competent and relevant evidence may be admitted which tends to establish or negative negligence on the part of the injured employee in the method of work adopted by him.

On an issue of contributory negligence, evidence may be admitted which tends to establish or negative negligence on the part of the injured employee in the method of work adopted by him.⁶ Thus, evidence showing the possible methods available,⁷ or that no other method was available,⁸ may be admitted. So, too, evidence showing the reasonableness or propriety of the method used,⁹ the difficulty of using,¹⁰ or the impracticability¹¹ or impropriety¹² of using other methods, may be admitted.

Evidence as to the method of work used must be competent, relevant, and material to be admissible.¹³ It is not permissible to show other methods available in the absence of evidence that plaintiff knew of them,¹⁴ or to show the necessity of the method used, where such necessity on the facts in evidence is a matter of common knowledge.¹⁵ Similarly, it is not permissible to show methods used prior to the accident in the absence of evidence that they were in use at the time of the accident.¹⁶

(2) Customary Methods

Where a servant is charged with contributory negligence in the method adopted by him in doing his work, competent and relevant evidence showing his usual method of work, or the customary method of others for doing similar work, may be admitted.

Where a servant is charged with contributory negligence in the method adopted by him in doing his work, it is competent to show his usual method of work,¹⁷ and also the customary method of others for doing similar work.¹⁸ This rule has been applied in numerous cases, such as, for example, in cases involving construction work,¹⁹ mining,²⁰ railroads,²¹ shipping,²² mills and grain elevators,²³ saw and planing mills,²⁴ lumber yards,²⁵ electric companies,²⁶ foundries,²⁷ and other industries or establishments.²⁸

Evidence of customary methods is not admissible where immaterial to the issue,²⁹ or where the custom is not sufficiently proved by competent evidence,³⁰ or where the customary method of others was in itself negligent.³¹ So, too, such evidence is not admissible in the absence of evidence that plaintiff,³² or defendant,³³ knew of the custom, or that an alleged custom was being followed at the time

6. Ky.—Ohio Valley Coal & Mining Co. v. Heine, 167 SW 878, 159 Ky 586

Mich.—Greene v. Miller, 204 N.W. 722, 232 Mich 19

Mo.—Bell v. Terminal Railroad Ass'n of St. Louis, 18 SW 2d 40, 322 Mo 886

39 CJ p 1043 note 70

Under Federal Employers' Liability Act

Ala.—Southern Ry Co v Smith, 137 So 398, 228 Ala 583

Reliance on foreman's judgment

Mo.—Ingram v. Prairie Block Coal Co, 5 SW 2d 418, 319 Mo 644

7. Ala.—Southern Cotton Oil Co v Woods, 78 So 907, 201 Ala 558.

39 CJ p 1043 note 71

8. Wash.—Cook v. Pittock & Leadbetter Lumber Co, 98 P. 1130, 51 Wash 316

39 CJ p 1043 note 72

9. Cal.—Price v. Northern Electric R Co, 142 P 81, 168 Cal 173

39 CJ p 1043 note 73

10. Ill.—U S Wind Engine & Pump Co v. Butcher, 79 NE 304, 223 Ill 638

11. Ky.—Kington Coal Co v Aaron, 144 SW 371, 147 Ky 480

12. U.S.—Central Iron & Coal Co v. Massey, CCA Ala, 268 F 300

13. U.S.—Bowman - Hicks Lumber Co v. Robinson, CCA Or, 18 F 2d 240, certiorari denied 47 S Ct 574, 274 U.S. 736, 71 L Ed 1816.

Mo.—Bender v. Kroger Grocery & Baking Co, App., 294 SW 732

14. Mo.—Turner v. Tyler Land & Timber Co, 174 SW 184, 188 Mo App 481, transferred, see, 167 SW 973, 259 Mo 15

15. Mass.—McNulty v. Power, 89 NE 557, 203 Mass 320.

16. Ga.—Central R Co v De Bray, 71 Ga. 406

17. Iowa.—Gibson v Burlington, C R & N R Co, 78 NW 190, 107 Iowa 596

39 CJ p 1043 note 81.

18. Iowa.—Gorman v. Minneapolis & St L R Co, 43 N.W. 303, 78 Iowa 509

39 CJ p 1043 note 82.

Under Federal Employers' Liability Act

Minn.—Wolf v. Chicago, M, St P. & P. R. Co, 230 NW 826, 180 Minn 310

19. U.S.—Alfred E Norton Co v Byers, NY, 223 F. 765, 139 CCA 295

Me.—Elliot v Sawyer, 77 A 782, 107 Me. 195

20. Mo.—Overby v Mears Min Co, 128 SW. 813, 144 Mo App. 362.

39 CJ p 1043 note 84.

21. Mo.—Goodwin v Missouri Pac R. Co, 72 SW 2d 988, 335 Mo 308

39 CJ p 1043 note 85.

Under Federal Employers' Liability Act

Minn.—Wolf v. Chicago, M, St. P. &

P R. Co., 230 NW 826, 180 Minn 310

22. Wash.—Anderson v Globe Nav Co, 107 P 376, 57 Wash 502

39 CJ p 1043 note 86

23. Kan.—Bailod v Nelson Grain Co, 145 P 895, 93 Kan 775

Ky.—White v Kentucky Public El Co, 216 SW 837, 186 Ky 91

24. Mich.—Molyneux v Bradley, 123 NW 1013, 167 Mich 278

39 CJ p 1043 note 88

25. Or.—Richardson v Klamath SS Co, 126 P. 24, 62 Or 490

26. Md.—Chesapeake & Potomac Tel Co. v. State, 93 A. 11, 124 Md 527

27. Wis.—Buchman v. Jeffery, 115 NW. 372, 135 Wis 448

28. Wis.—Monaghan v Northwestern Fuel Co, 122 NW 1066, 140 Wis 457

39 CJ p 1043 note 92

29. Me.—Swasey v Maine Cent. R Co, 92 A 325, 112 Me 399.

30. Ill.—Muenter v Moline Plow Co, 182 Ill App. 578

Nev.—König v. Nevada-California-Oregon R Co., 135 P 141, 36 Nev 181

31. Kan.—Carrier v. Union Pac. R Co, 59 P 1075, 61 Kan 447

39 CJ p 1043 note 95.

32. Wash.—Barrett v Banner Shingle Co, 87 P 919, 45 Wash 12

33. U.S.—Powell v Wisconsin Cent.

of the accident,³⁴ or where, under a statute, contributory negligence is not a defense.³⁵

§ 520. Weight and Sufficiency

In an action by a servant against his master to recover for personal injuries, the plaintiff must support his cause of action by a preponderance of the evidence, but the evidence may be either direct or circumstantial.

In an action by a servant against his master to recover for personal injuries, plaintiff need only establish his cause of action by a preponderance of evidence,³⁶ which may be circumstantial as well as direct.³⁷ Plaintiff must support his cause of action by evidence sufficient to prove his claim to some legal certainty,³⁸ or by evidence substantial enough

to support a verdict,³⁹ and, when it appears from plaintiff's own evidence that he cannot recover in any event, the court may not ignore the facts so presented.⁴⁰ Evidence which does no more than produce speculation or conjecture as the basis for a verdict is not sufficient,⁴¹ and an inference which authorizes recovery has no probative force where it is no more reasonable than an inference from the same evidence which does not authorize recovery, and it may not be arbitrarily chosen in preference to the other,⁴² but, if plaintiff proves sufficient facts to justify a verdict for him on one theory, the existence of other rational theories favoring defendant from the same evidence does not preclude recovery by plaintiff.⁴³

R Co, Minn, 159 F 864, 87 CCA 44

Mass—Papandrianos v New York Cent & H R R Co, 138 NE 547, 244 Mass 216

34. Iowa—Contri v Hollingsworth Coal Co, 121 NW 506, 143 Iowa 115

39 CJ p 1048 note 98

35. Ill—Lucas v Peoria & Eastern R Co, 171 Ill App 1.

36. Wash—Cockerline v Anderson, 52 P 2d 321, 184 Wash 701.

39 CJ p 987 note 2

"Clear" preponderance

It is sufficient if plaintiff establishes his case by a preponderance of the evidence and a "clear" preponderance of the evidence is not necessary—Davis v Illinois Collieries Co, 83 NE 836, 232 Ill 284

Violation of child labor statute

In action against employer for death of minor under sixteen years of age employed in violation of child labor act making such employment crime, plaintiff may establish his case by a preponderance of evidence and he need not prove his case beyond a reasonable doubt—Rost v. F. H Noble & Co, 147 NE 258, 316 Ill 357

Evidence held to support verdict for employer

US—Chapman v Alton R Co, CC A Ill, 117 F.2d 669

Ala—DeBerry v Goodyear Tire & Rubber Co of Alabama, 186 So 547, 237 Ala 228

Ky—Wallis v Illinois Cent R Co, 171 S W 2d 225, 294 Ky 177

La—Buttitta v J C Penny Co, App, 164 So 469—Dates v Morgan's Louisiana & T. R. & S S. Co, 133 So 899, 16 La.App 371

Miss—Ross v Louisville & N R Co, 181 So 133, 181 Miss 795

NY—Paradiso v. U S Gypsum Co, 23 N.Y.S.2d 483, 260 App Div 885, reargument denied 25 N.Y.S.2d 1019, 261 App Div. 884.

Or—Broad v Kelly's Olympian Co, 66 P 2d 485, 156 Or 216

Tex—Tye v Henwood, Civ App, 153 S W 2d 184, error refused

Evidence held sufficient to support verdict for employee

US—Wagner Electric Corporation v Snowden, CCA Mo, 38 F.2d 599

Ark—McCormack-Reedy Lumber Co v Savage, 273 S W 1028, 169 Ark 192—Missouri Pac R Co v Kinslow, 270 S W 603, 168 Ark 487

Cal—Newkirk v Los Angeles Junction Ry Co, 131 P 2d 535, 21 Cal 2d 308

Ill—Adams v Cleveland, C C & St L Ry. Co, 90 NE 882, 243 Ill 191

Ky—Illinois Cent R Co v Wallis, 152 S W 2d 288, 287 Ky 88

Minn—Eichler v Equity Farms, 259 NW 545, 194 Minn 8

Okl—Marrs v Richardson, 87 P 2d 131, 184 Okl 342

RI—Rossi v Ronci, 7 A 2d 773, 63 RI 250

Tex—Railway Express Agency v Bannister, Civ App, 46 S W 2d 372

—Chicago, R I & G Ry Co v Harris, Civ App, 28 S W 2d 611, error dismissed—St Louis Southwestern Ry Co of Texas v Lewis, Civ App, 277 S W 727

Va—Chesapeake & O Ry. Co. v Steele's Adm'r, 135 SE 677, 146 Va. 22

39 CJ p 1044 note 4 [a]

37. Ill—Norkevich v Atchison, T & S. F. R. Co, 263 Ill App 1, certiorari denied Atchison, T & S F R Co v Norkevich, 52 S Ct 497, 286 U.S. 544, 76 L Ed. 1282

Nev—Southern Pac Co v Huyck, 128 P 2d 849, 61 Nev. 365

39 CJ p 1044 note 5

38. La—Powell v Louisiana & A Ry Co, App, 152 So. 871

Evidence held sufficient to show time of injury

Tex—Kansas City Southern Ry. Co v Chandler, Civ.App., 192 S.W.2d 304, ref. n. r. e.

39. US—Southern Ry Co. v Stewart, CCA Mo, 119 F.2d 85, certiorari granted Stewart v Southern Ry Co, 62 S Ct 71, 314 US 263, 86 L Ed 849—Colonna v Merchants & Miners Transp. Co, CC A Va, 112 F.2d 612

39 CJ p 1044 note 6

Scintilla of evidence

In an action under the Federal Employers' Liability Act, 45 USC A § 151 et seq., plaintiff must support his cause of action by more than a scintilla of evidence

Ark—Missouri Pac R Co v Remel, 48 S W 2d 548, 185 Ark 598, certiorari denied 53 S Ct 85, 287 US 634, 77 L Ed 550

Cal—Showalter v Western Pac R. Co, 106 P 2d 895, 16 Cal 2d 460

NC—Bue v Powell, 1 SE 2d 102, 215 NC 67

Or—Christie v Great Northern Ry Co, 20 P 2d 377, 142 Or 321

Engagement in commerce

Evidence that railroad car repairs at time of injury to one of them were carrying a trestle to be placed under a loaded car is sufficient to show that they were engaged in commerce so as to come within a state employers' liability act—Louisville & N R Co v Clark, 277 S W 272, 211 Ky 315

40. Or—Leavitt v. Stamp, 298 P. 414, 134 Or 191

39 CJ p 1044 note 7.

41. US—Colonna v Merchants & Miners Transp Co, CCA Va, 112 F.2d 612—Lynch v Delaware, L. & W R Co, CCAN.Y., 58 F.2d 177

Okl—Atchison, T & S. F. Ry Co. v Myers, 69 P 2d 62, 179 Okl 637, appeal dismissed Myers v Atchison, T & S F R Co, 58 S Ct. 29, 302 US 636, 82 L Ed 495.

42. Wyo—Hartung v Union Pac R. Co, 247 P 1071, 35 Wyo 188

43. Cal—Newkirk v. Los Angeles Junction Ry Co, 181 P.2d 535, 21 Cal 2d 308—Weiland v Southern Pac. Co., 93 P.2d 1023, 84 Cal.App.

Conflicting and confusing statements of plaintiff while testifying may corroborate medical testimony concerning plaintiff's defective mentality ⁴⁴

Interstate character of employment Where plaintiff seeks to establish his case under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq, or other federal statutes relating to liability of employers to employees injured in interstate commerce, he must show by substantial evidence that

the work in which he was engaged at the time of the accident was of an interstate character ⁴⁵ Evidence to show plaintiff to have been engaged in interstate commerce at the time of the injury must develop more than conjecture or speculation, ⁴⁶ and a scintilla of proof is not sufficient ⁴⁷ In accordance with the facts and circumstances of the particular case, evidence has been held to be sufficient ⁴⁸ or insufficient ⁴⁹ to show that plaintiff was engaged in interstate commerce when injured or

2d 500, certiorari denied Southern Pac Co v Weiland, 60 S Ct 613, 309 US 670, 84 L Ed 1016

44. N.H.—Stanton v Morrison Mills, 47 A 2d 112, 94 NH 92

45. Mo.—Jonas v Missouri Pac R Co, App, 48 S.W.2d 123, certiorari denied Missouri Pac R Co v Jonas, 53 S Ct 13, 287 US 610, 77 L Ed 530

39 C.J. p 1044 note 3

Applicability of state statute

In employee's suit against his employer for injuries sustained, the state employers' liability act would govern and not the Federal Employers' Liability Act if the evidence was insufficient to show that employee was engaged in interstate commerce when injured

Ga.—Gay v Osteen, 192 S.E. 539, 56 Ga App 224

ND.—Oster v Great Northern Ry Co, 219 NW 788, 56 ND 891

46. Mo.—Berry v. St. Louis-San Francisco Ry Co, 26 SW 2d 988, 324 Mo 775, certiorari denied St. Louis-San Francisco Ry Co v Berry, 50 S Ct 464, 281 US 765, 74 L Ed 1173

Interstate billing

Where interstate billing of shipment before injury to railroad employee, suing under Federal Employers' Liability Act for injuries sustained while assisting in such shipment, is important in fixing interstate character thereof, plaintiff must prove such fact by evidence, not conjecture, although foreign destination of shipment was fixed in shipper's or employer's mind at time of accident.—Young v Chicago & I M Ry Co, 20 NE 2d 320, 299 Ill App. 893.

47. Mo.—Shidloski v. New York, C & St. L. R. Co., 64 S.W.2d 259, 333 Mo 1184—Berry v St. Louis-San Francisco Ry Co, 26 SW 2d 988, 324 Mo. 775, certiorari denied St. Louis-San Francisco Ry Co v Berry, 50 S Ct. 464, 281 U.S. 765, 74 L Ed 1173

48. US.—Lehigh Valley R Co v Huben, C.C.A.N.Y., 10 F.2d 78, certiorari denied 46 S Ct 305, 270 US 641, 70 L Ed 775—Geraghty v Lehigh Valley R. Co., D.C.N.Y., 3 F.Supp. 376.

Ala.—McDuff v Kurn, 172 So. 886, 283 Ala. 619

Ark.—Missouri Pac Ry Co v Barry, 290 SW 942, 173 Ark 729, certiorari denied 48 S Ct 21, 275 US 529, 72 L Ed 409

Cal.—Mappin v Atchison, T & S F Ry Co, 247 P 911, 198 Cal 783, 49 A L R 1330, certiorari denied Atchison, T & S F R Co v Mappin, 47 S Ct 289, 273 US 729, 71 L Ed 862—Ballard v Sacramento Northern Ry Co, 14 P 2d 1045, 126 Cal App 486, rehearing denied 15 P 2d 793, 126 Cal App 486

Ill.—Chicago, R I & P Ry Co v Benson, 185 NE 244, 352 Ill 195, certiorari denied Chicago, R I. & P Ry Co v Benson, 54 S Ct. 53, 290 US 636, 78 L Ed 553—Mitchell v Louisville & N R Co, 35 NE 2d 81, 310 Ill App 563, reversed on other grounds 42 NE 2d 86, 379 Ill 532—Worthey v Cleveland, C, C & St. L Ry Co., 251 Ill App 585

Minn.—Witort v Chicago & N W Ry. Co., 226 NW 934, 178 Minn 261

Mo.—Sibert v Litchfield & M Ry. Co., 159 SW 2d 612—Koonse v Missouri Pac R Co, 18 SW 2d 467, 322 Mo 813, certiorari denied Missouri Pac R Co v Koonse, 50 S Ct. 34, 280 US 582, 74 L Ed 632—Potterfield v Terminal R Ass'n of St Louis, 5 SW 2d 447, 319 Mo 619, certiorari denied Terminal R Ass'n of St Louis v Potterfield, 49 S Ct 20, 278 US 616, 78 L Ed 539

Tenn.—Tennessee Cent Ry Co v Scarbrough, 9 Tenn App 295.

Tex.—Texas & N O R Co v Neill, Civ App, 97 SW 2d 279, error refused 100 SW 2d 348, 128 Tex 580, certiorari dismissed 58 S Ct 118, 302 US 645, 82 L Ed 501, rehearing denied 58 S Ct 268, 302 US 778, 82 L Ed 602—Dawson v Texas & P Ry Co, Civ App, 45 SW 2d 367, reversed on other grounds 70 SW.2d 392, 133 Tex 191, certiorari denied Texas & P Ry Co v Dawson, 55 S Ct 110, 293 US 580, 79 L Ed. 877.

39 C.J. p 1044 note 2.

"Train movement"

In action by employee of terminal railroad for injuries sustained while

engaged in moving a string of forty-five cars drawn by a locomotive across several city streets from one switching yard of terminal railroad to another to be delivered to transcontinental railroad line, evidence was sufficient to sustain trial court's finding that such movement of cars was a regular "train movement" rather than a switching operation, within meaning of the Safety Appliance Act requiring train to be equipped with certain per cent of power brakes under engineer's control—Maurice v State, 110 P 2d 708, 43 Cal App 2d 270

49. US.—Wise v Lehigh Valley R Co, C.C.A.N.Y., 43 F.2d 602—Baldassarre v Pennsylvania R Co, C C A Ohio, 24 F.2d 201—Shoenfelt v Pennsylvania R Co, D.C.N.Y., 69 F.Supp. 728

Cal.—Reif v Schumacker, App, 102 P 2d 375—Walton v Southern Pac. Co., 48 P 2d 108, 8 Cal App 2d 290, certiorari denied Southern Pac Co. v Walton, 56 S Ct 308, 296 US 647, 80 L Ed 461, rehearing denied 56 S Ct 380, 296 US 665, 80 L Ed 474—Lockhart v Southern Pac Co., 267 P 591, 91 Cal App 770

Ga.—Gay v Osteen, 192 S.E. 539, 56 Ga App 224—Mitchell v Southern Ry Co, 98 SE 184, 23 Ga App 195

Ill.—Gidley v. Chicago Short Line Ry Co, 178 NE 399, 346 Ill 123, certiorari denied 53 S Ct 411, 285 US 554, 76 L Ed 943—Day v Chicago & N W Ry Co, 269 Ill App 435, affirmed 188 NE 540, 354 Ill 469.

Md.—Raxroad v Western Maryland Ry. Co., 160 A 730, 162 Md 566

Miss.—Goss v Kurn, 193 So 783, 187 Miss. 679

Mo.—Clevinger v St. Louis-San Francisco Ry Co, 109 SW 2d 369, 341 Mo 797, certiorari denied 58 S Ct 366, 302 US 760, 82 L Ed 588—Russell v St. Louis-San Francisco Ry Co, 81 SW 2d 621, 236 Mo 845—Phillips v Union Terminal Ry Co., 40 SW 2d 1046, 338 Mo 240, certiorari denied 52 S Ct 38, 284 US 660, 76 L Ed 559—Sailor v. Missouri Pac R Co, 18 SW 2d 82, 322 Mo 396—Poin-dexter v Cleveland, C. C. & St. L Ry Co, 4 SW 2d 1065, 319 Mo 285, certiorari denied 49 S Ct 25, 278 US 622, 78 L Ed 543.

that the accident arose in interstate transportation.

Where a railroad seeks to defeat recovery under the state employers' liability act after a prima facie case of intra-state commerce is made by plaintiff, the railroad must affirmatively show that the employee was engaged in interstate commerce.⁵⁰

§ 521. — Existence of Relation of Master and Servant

In a personal injury action based on allegations of neglect of a duty owed by a master to his servant, the plaintiff must show the existence of the relation of master and servant by a preponderance of the evidence or by substantial evidence.

Plaintiff in a personal injury action based on allegations of neglect of a duty owed by a master to

his servant must show by a preponderance of the evidence⁵¹ or by substantial evidence⁵² that the relation of master and servant existed between defendant and himself or the injured person, and this is also true where it becomes necessary to prove the existence of the relation between defendant and a third person.⁵³ The relation may be established not only by evidence of an express contract but also by a presentation of facts and circumstances which will authorize the conclusion that the relation of master and servant actually existed at the time of the injury.⁵⁴

In accordance with the facts and circumstances of the particular case, evidence has been held to be sufficient⁵⁵ or insufficient⁵⁶ to show that the relation

NJ—Berger v New York Cent R Co, 155 A 444, 108 NJLaw 61
Pa—Colangelo v Pittsburgh & L E R Co, 9 A 2d 391, 336 Pa 490

Tex—Wichita Falls & S R Co v Holbrook, 78 SW 2d 938, 125 Tex 184, certiorari denied 56 S Ct 139, 298 US 618, 80 LEd 439—Texas & N O R Co v Tilley, Civ App, 297 SW 1063, affirmed, Com App, 6 SW 2d 86, certiorari denied 59 S Ct 86, 278 US 642, 73 LEd 556—Galveston, H & S A Ry Co v Contois, Civ App, 279 SW 929, affirmed, Com App, 288 SW 154, certiorari denied 47 S Ct 659, 274 US 747, 71 LEd 1328

Wash—Kiddler v Marysville & A Ry Co, 395 P 162, 160 Wash 471, affirmed 300 P 170, 160 Wash 471 39 CJ p 1044 note 8 [a]

Car marked for interstate transfer

Proof that freight cars are marked for eventual transfer to another state does not of itself establish that every movement of the cars is a movement in interstate commerce—Colangelo v Pittsburgh & L E R Co, 9 A 2d 391, 336 Pa 490

50. SC—Cato v Atlanta & C A L Ry Co, 162 SE 239, 164 SC 123, certiorari denied Atlanta & C A L Ry Co v Cato, 52 S Ct 200, 284 US 684, 76 LEd 577

51. Ark—Missouri Pac R Co v Davis, 122 SW 2d 546, 197 Ark 396.

39 CJ p 1045 note 10

Emergency requiring assistance to employee

Plaintiff, suing for injuries sustained when assisting employee of defendant must show by a preponderance of the evidence that such an emergency had arisen as would call for assistance in the matter—Missouri Pac R Co v Davis, supra.

52. Ky—Nelson's Adm'x v Kitchen Lumber Co, 122 S.W.2d 1087, 276 Ky 3

Presumptions and burden of proof see supra §§ 501, 502.

53. Ark—St Louis, I. M & S R Co v De Lambert, 166 SW 544, 112 Ark 446
39 CJ p 1046 note 11

54. Ark—Booth & Flynn v. Price, 39 SW 2d 717, 183 Ark 975, 76 ALR 957

Mass—Lawson v. Royal Riding Stables, 26 NE 2d 343, 305 Mass 494

Mo—Klaber v Fidelity Bldg. Co, App, 19 SW 2d 758
39 CJ p 1046 note 12

Designation by parties

(1) Evidence of a contract stating that plaintiff is an independent contractor is not conclusive that no master-servant relationship existed where other evidence shows that defendant directed the work—Meyer v Moore, 115 SW 2d 1087, 195 Ark 1114

(2) A fortiori, such a contract is not conclusive where it has been signed after the injury and ante-dated—Coddington v. Berry Dry Goods Co, 137 S.W.2d 249, 199 Ark. 1110

55. Ala.—Central of Georgia Ry. Co v. Garner, 122 So 429, 219 Ala 441
Ark—Bates Coal & Mining Co v Mannon, 168 SW 2d 408, 205 Ark 215—Kennedy v. Griffin, 112 SW 2d 644, 195 Ark 379—Missouri Pac Transp Co v Baxter, 76 S W 2d 958, 189 Ark 1147—Central Coal & Coke Co v Porter, 280 SW 12, 170 Ark 498.

Cal—Daniels v. Johnson, 101 P 2d 707, 38 Cal App 2d 619.

Conn—Knybel v Cramer, 29 A 2d 576, 129 Conn 439

Ill—Wheeler v Chicago & W L R Co., 108 NE 380, 267 Ill 306

Ind—Pinnell-Dulin Lumber Co v Day, 13 NE 2d 351, 105 Ind App 62

Kan—Palmer v Julian, 170 P 2d 813, 161 Kan 619.

Ky.—U S Fidelity & Guaranty Co v. Antle, 42 S.W.2d 1, 240 Ky. 243

Mass—Enga v Sparks, 51 NE 2d 984, 315 Mass 120—Eckstein v Scoff, 13 NE 2d 426, 299 Mass. 573—Devlin v Newfellow, 175 NE 647, 275 Mass 279

Mich—Rule v Guglio, 7 NW 2d 227, 304 Mich 73, 145 ALR 537—Buskirk v Ide, 4 NW 2d 504, 302 Mich 154

Minn—Borum v Minneapolis, St P. & S M Ry Co, 233 NW 4, 184 Minn 126, affirmed 52 S Ct 612, 286 US 447, 76 LEd 1218

Mo—Klaber v Fidelity Bldg Co, App, 19 SW 2d 758

NY—Keller v Equitable Life Assur Soc of U S, 283 NYS 841, 246 AppDiv 565, affirmed 2 NE 2d 670, 271 N.Y 511—Otway v Snare & Triest Co, 153 NYS 845, 167 AppDiv. 128, appeal denied 153 NYS 1131, 168 AppDiv 956

Okl—Miller v Tennis, 282 P 345, 140 Okl 185

Tenn—Copeland v. Cherry, 95 SW. 2d 1275, 20 Tenn App 122

Tex—Marsh v Williams, Civ App, 154 SW 2d 201, error refused—Neyland v Adams, Civ App, 140 SW 2d 233, error dismissed, judgment correct

Va—Ross v Schneider, 27 SE 2d 154, 181 Va 931—Brinkley v Pennsylvania R Co, 184 SE 227, 166 Va. 84

39 CJ p 1045 note 10 [a]

Employment of son by father

Mass—Allen v Allen, 11 NE 2d 922, 299 Mass 89

Knowledge of work by plaintiff

Evidence of knowledge of defendant's foreman that plaintiff was working as a helper and his approval thereof has been held to be sufficient prima facie to show consent of defendant and to establish the relation of master and servant—Thomas' Adm'x v Ashland Fire Brick Co, 4 SW 2d 757, 223 Ky. 321.

56. Ala—Bugg v Sanders, 121 So. 410, 219 Ala. 129.

Ariz—Lane v. Greer, 143 P 2d 332.

of master and servant existed between defendant and plaintiff at the time of the injury; sufficient⁵⁷ or insufficient⁵⁸ to show that the person causing the injury was a servant of defendant; or sufficient⁵⁹ or insufficient⁶⁰ to show authority of an employee of defendant to hire plaintiff; or the evidence has been held to show that two defendants were acting in concert in employing plaintiff,⁶¹ or to show that plaintiff's employment was not casual employment⁶²

§ 522. — Cause of Injury

In a servant's personal injury action against the master, the plaintiff must show by a preponderance of the evidence that the injury was caused by an act or omission for which the employer would be responsible; but it is not necessary that the plaintiff show this with absolute certainty.

In a servant's personal injury action against the master, plaintiff must show by a preponderance of the evidence,⁶³ or by substantial evidence,⁶⁴ or with

- 61 Ariz 1—Bristol v Moser, 99 P 2d 708, 55 Ariz 185.
- Ark—Armour & Co v Rice, 134 S W 2d 539, 199 Ark 89
- Ill.—Davis v John R Thompson Co, 239 Ill App 469
- Ind—Standard Oil Co of Indiana v Allen, 128 NE 674, 189 Ind 398
- Ky—Nelson's Adm'x v Kitchen Lumber Co, 122 SW 2d 1037, 276 Ky 3—McLellan v Brown, 120 S W 2d 743, 275 Ky 80
- La—Gray v Elgutter, 5 La App 315
- Me—Michaud v Taylor, 27 A 2d 820, 139 Me 124
- Mass—Devlin v Newfell, 175 NE 647, 275 Mass 279
- Minn—Gonyea v Duluth, M & I R Ry Co, 19 NW 2d 384, 220 Minn 225.
- Miss—Masonite Corp v Stevens, 30 So 2d 77—Columbus & G Ry Co v Robinson, 198 So 749, 189 Miss 675—Alabama Great Southern R Co v Halford, 128 So 505, 157 Miss 585
- Okl—Beasley v Bond, 48 P 2d 299, 173 Okl 355—White v. McGee, 11 P 2d 924, 187 Okl 204
- Tenn—Copeland v Cherry, 95 SW 2d 1275, 20 Tenn App. 122
- Tex—El Paso Laundry Co v Gonzales, Civ App, 36 S W 2d 793, error dismissed—Huggins v Texas & N O R Co, Civ App, 17 S W 2d 848—Kirk v. Tucker, Civ App, 7 SW 2d 118
- 39 CJ p 1045 note 10 [b].
57. US—Pittsburgh Valve Foundry & Construction Co v Gallagher, CCA Ohio, 32 F 2d 436.
- Tex—Houston & T C. R. Co v Hanks, 124 SW. 136, 58 Tex Civ App 298, error refused
58. Ark—St Louis, I M & S R Co v De Lambert, 168 SW. 544, 112 Ark 446
- 39 C.J. p 1046 note 11 [a].
59. Mo—Gruenewald v Kaywing Iron Works, App, 5 SW 2d 709
- Utah—Looney v Furgis, 2 P 2d 112, 78 Utah 172
60. NY—Mandala v Wells, 209 N. Y.S. 85, 212 App Div. 370.
- Emergency not shown
- Ark—Missouri Pac R Co v Davis, 123 SW 2d 546, 197 Ark. 398
- Mass—Coulombe v Horne Coal Co, 175 NE 681, 275 Mass 226
61. Mo—Whittington v. Westport

- Hotel Operating Co, 83 SW 2d 963, 326 Mo 1117
62. Cal—Daniels v Johnson, 101 P 2d 707, 38 Cal App 2d 619
63. US—Deere v Southern Pac Co, CCA Or, 123 F 2d 438, certiorari denied 62 S Ct. 916, 315 US 819, 86 L Ed 1217
- Ark—Harmon v Morrison, 147 SW 2d 35, 201 Ark 820—Texas Co v Jones, 298 SW 342, 174 Ark 905—Ft Smith Light & Traction Co v Cooper, 280 SW 990, 170 Ark 286
- Cal—Myers v. Southern Pac Co, 58 P 2d 387, 14 Cal App 3d 287, hearing denied 59 P 2d 1001, 14 Cal App 2d 287—Casson v. Atchison, T & S F Ry Co, 6 P 2d 336, 119 Cal App 222
- Ill—Collins v. Kurth, 153 NE 355, 322 Ill 250
- Ky—Magness' Adm'x v Hutchinson, 117 SW 2d 1041, 274 Ky 226—Fee's Adm'x v. Mahan-Elliott Coal Corporation, 43 SW 2d 681, 241 Ky 231
- Mass—Mucha v. Northeastern Crushed Stone Co, 30 NE 2d 870, 307 Mass 592
- Mo—Satterlee v St Louis-San Francisco Ry Co, 82 SW 2d 69, 336 Mo 948—Bello v. Stuever, 44 SW 2d 619—Watkins v Bird-Sykes-Bunker Co, 16 SW 2d 38, 322 Mo 830
- Neb—Ellis v. Union Pac R. Co, 22 NW 2d 805, 147 Neb 18
- NY—Healy v Erie R Co, 180 N E 888, 259 NY 40, certiorari denied 53 S Ct. 81, 287 US 628, 77 L Ed 545—Betzag v Gulf Oil Corp, 72 N Y S 2d 41, 272 App Div 935.
- NC—Ridge v Norfolk Southern R Co, 83 SE 762, 167 N.C 510, L.R.A. 1917E 215
- Tex—Saxon v Atchison, T. & S. F Ry Co, Civ App, 72 SW 2d 327, certiorari denied 55 S Ct 651, 295 US 735, 79 L Ed 1683
64. US—Atchison, T. & S F R Co v. Saxon, 52 S Ct 229, 284 U S 458, 76 L Ed 897, conformed to Saxon v. Atchison, T & S F Ry Co, Tex Com App, 50 SW 2d 1095
- Ark—St Louis-San Francisco Ry Co. v Wacaster, 199 SW 2d 948, 210 Ark 1080—St. Louis-San Francisco Ry. Co. v. Bishop, 33 SW 2d 383, 182 Ark. 768, certiorari de-

- nied 51 S Ct 647, 288 US 854, 75 L Ed 1461
- Cal—Weiland v Southern Pac Co, 93 P 2d 1023, 34 Cal App 2d 500, certiorari denied Southern Pac Co v Weiland, 60 S Ct 613, 309 US 670, 84 L Ed 1016.
- Ky—Nelson's Adm'x v Kitchen Lumber Co, 122 SW 2d 1037, 276 Ky 3
- Mo—Barrett v St Louis Southwestern Ry Co, 143 SW 2d 60—Rowe v Missouri-Kansas-Texas R Co, 100 SW 2d 480, 339 Mo 1145, certiorari denied Missouri-Kansas-Texas R Co v Rowe, 57 S Ct 671, 300 US 680, 81 L Ed 881—Zachritz v St Louis-San Francisco Ry Co, 81 SW 2d 608, 336 Mo 801, certiorari denied 56 S Ct 95, 296 US 584, 80 L Ed 413
- ND—Kutcher v Minneapolis, St P & S S M Ry Co, 212 NW 51, 54 ND 897
- Okl—Osborn v Chickasha Gas & Electric Co, 251 P. 480, 123 Okl 198,

Problem of sufficiency under statutes

In action against railroad for death of employee because of the alleged negligence of the railroad, the decision of the problem of the sufficiency of evidence to show proximate cause would be the same, whether the case arose under the federal or under the state railroad liability act—McDermott v Minneapolis, N & S Ry. Co, 283 NW 116, 204 Minn 215.

Violation of statutory duty

(1) The Federal Employers' Liability Act and Federal Safety Appliance Act contemplate proof of causal relation between injury and violation of statutory duty substantially equivalent in kind and amount to proof required to establish proximate cause in negligence cases at common law—Staton v Virginian Ry Co, 195 SE 601, 119 W Va. 658

(2) Proof that railroad's violation of Federal Safety Appliance Act was proximate cause of employee's death is sufficient without proof of other negligence

- Fla—Atlantic Coast Line R. Co v Moore, 181 So. 374, 135 Fla 485, modified on other grounds 186 So. 210, 135 Fla. 485
- Tex—Chicago, R. I & G Ry Co v Harris, Civ App, 28 SW 2d 611, error dismissed

reasonable certainty⁶⁵ that the injury was caused by an act or omission for which the employer would be responsible; but it is not necessary that plaintiff show this with absolute certainty.⁶⁶

The causal connection need not be shown by direct evidence, but may be reasonably inferable from the circumstances of the case,⁶⁷ although in such case the evidence must be something more than merely consistent with plaintiff's theory as to how the accident occurred.⁶⁸ The inference drawn from circumstantial evidence must be a reasonable one,⁶⁹ and, where the evidence is such that the injury may as reasonably be attributed to a cause which will

excuse defendant as to one which will subject it to liability, plaintiff has failed to establish his case⁷⁰ for the reason that recovery cannot be based on mere conjecture or surmise.⁷¹ On the other hand, plaintiff need not negative every other conceivable hypothesis than the one relied on,⁷² and, where the evidence justifies the inference that the accident was due to one of a number of conditions for each of which defendant is responsible, it is sufficient to warrant a recovery.⁷³

If there is sufficient evidence that the alleged negligence caused the injury, a showing that there was another contributing cause does not exonerate de-

65. Cal—Bobo v Northwestern Pac R Co, 19 P 2d 10, 129 Cal App 273, reversed on other grounds 54 S Ct 263, 290 U.S. 499, 78 L Ed 462

Me—Loring v Maine Cent R Co, 152 A 527, 129 Me 369

Miss—Gulf, M & N R Co v Collins, 117 So 593, 151 Miss 240

Mo—Karlín v Kansas City Public Service Co, App, 30 SW 2d 1032
—Lutgen v Standard Oil Co, 287 SW 885, 221 Mo App 773—Gehbauer v J Hahn Bakery Co, App, 285 SW 170

Utah—Buhler v Maddison, 140 P 2d 933, 105 Utah 89

39 C J p 1047 note 14

Conclusion of reasonable minds

Plaintiff's proof must be such that reasonable minds may conclude that defendant's negligence proximately caused the injury—Cain v Fort Worth & D C Ry Co, CCA Tex, 75 F 2d 103

66. Mo—Hasenjaeger v Missouri-Kansas-Texas R Co, 53 SW 2d 1083, 227 Mo App 413—Berkbigler v. Scott County Milling Co, App, 275 SW 599

NH—Upton v Conway Lumber Co, 128 A 802, 81 NH 489

Greater likelihood

In action against employer for injuries, employee is required to show only a greater likelihood that his injuries came from an act for which the employer was responsible than from a cause for which it was not responsible—Roberts v Frank's Inc., 49 NE 2d 427, 314 Mass 42.

67. Ark—St Louis-San Francisco Ry Co v Bishop, 33 SW 2d 383, 182 Ark 763, certiorari denied 51 S Ct 647, 283 US 854, 75 L Ed 1461

Cal—Showalter v Western Pac R Co, 106 P 2d 895, 16 Cal 2d 460

Ill—O'Brien v Chicago & N W Ry Co, 68 NE 2d 638, 329 Ill App 382
—Norkevich v. Atchison, T & S F R Co, 263 Ill App 1, certiorari denied Atchison, T. & S. F. R. Co

v Norkevich, 52 S Ct 497, 286 US

544, 76 L Ed 1282

Ky—Wilders' Adm'r v Southern Mining Co, 96 SW 2d 436, 265 Ky 219—Fees' Adm'r v Mahan-Elliason Coal Corporation, 43 SW 2d 681, 241 Ky 281

Mo—Brainard v Missouri Pac R Co, 5 SW 2d 15, 319 Mo 890

Neb—Riley v Cudahy Packing Co., 117 NW 765, 82 Neb 319

Nev—Southern Pac Co v Huyck, 128 P 2d 849, 61 Nev 365

Okl—Oklahoma Gas & Electric Co v Oliphant, 45 P 2d 1077, 172 Okl 635

Pa—Keough v Markus, 173 A 768, 114 Pa Super 80

Va—Atlantic Coast Line R Co v Newton, 87 SE 618, 118 Va 222

Wash—Thomas v Inland Motor Freight, 68 P 2d 603, 190 Wash 428

39 C J p 994 note 48, p 1044 note 5 [a], p 1049 note 15

68. Minn—Schendel v. Chicago, M & St P Ry Co., 206 NW 436, 165 Minn 223

39 C J p 1050 note 16

69. Cal—Sherman v. Southern Pac Co, 93 P 2d 812, 34 Cal App 2d 490, certiorari denied Southern Pac Co v Sherman, 60 S Ct 610, 309 US 669, 84 L Ed 1015

70. US—Bonner v Texas Co, C CA Tex, 89 F 2d 291—Reading Co v Boyer, CCA Pa, 6 F 2d 185

ND—Kutchera v Minneapolis, St P & S M Ry Co, 212 NW 51, 54 ND 897

Tenn—Louisville & N R Co. v. Jackson, 3 Tenn App 463

Tex—Tye v. Henwood, Civ App, 153 SW 2d 184, error refused—Emmons v. Texas & P Ry Co, Civ App, 149 SW 2d 167, error dismissed, judgment correct—Texas & N O R Co v Warden, Civ App, 107 SW 2d 451, error dismissed

Wash—Gardner v Seymour, 180 P 2d 564, 27 Wash 2d 802

39 C J p 1051 note 17

71. Cal—Showalter v Western Pac R Co, 106 P 2d 895, 16 Cal 2d 460

—Weiland v. Southern Pac Co, 93 P 2d 1023, 34 Cal App 2d 500, certiorari denied Southern Pac Co. v

Weiland, 60 S Ct 613, 309 US 670, 84 L Ed 1016

Ill—Nardoni v Chicago & E I Ry Co, 261 Ill App 339

Ky—Johnson's Adm'r v. Harlan Ridgeway Crown Mining Co., 145 S. W 2d 89, 284 Ky 463

Minn—Fredrickson v Arrowhead Co-op Creamery Ass'n, 277 NW 345, 202 Minn 12—O'Connor v Pillsbury Flour Mills Co., 267 NW 507, 197 Minn 534

Mo—David v Missouri Pac R Co, 41 SW 2d 179, 328 Mo 437, reversed on other grounds 52 S Ct 242, 284 US 460, 76 L Ed 399—

Brainard v Missouri Pac R Co, 5 SW 2d 15, 319 Mo 890—Karlín v Kansas City Public Service Co, App, 30 SW 2d 1032

Wash—Gardner v Seymour, 180 P. 2d 564, 27 Wash 2d 802

W Va—Staton v. Virginian Ry Co, 195 SE 601, 119 W Va 658

39 C J p 1051 note 18.

72. Mass—Mucha v. Northeastern Crushed Stone Co, 80 NE 2d 870, 307 Mass 592.

Mo—Kenyon v St Joseph Ry, Light, Heat & Power Co, 298 SW 246, 221 Mo App 1014

NH—Upton v Conway Lumber Co., 128 A 802, 81 NH 489

39 C J. p 1052 note 19

73. NH—Hussey v Boston & M R. R., 133 A 9, 82 NH 236

39 C J p 994 note 48, p 1052 note 20

Failure of defective appliance

Where there was a failure of one or the other of two appliances, and one of them was known to be defective, it was held that there was ground for the jury to draw an inference that it was probably the defective appliance that failed, and caused the accident.

SC—Keys v. Winnsboro Granite Co, 51 SE 549, 72 S.C. 97

Tex—Yellow Pine Paper Mill Co. v. Lyons, Civ.App., 159 SW 909.

fendant from liability;⁷⁴ but where it appears that an independent responsible agency intervened, and was the sole cause of the injury, plaintiff is not entitled to a recovery,⁷⁵ and likewise, where the employee by his independent conduct between the time of the employer's negligence and the injury places himself in a place of danger, defendant is not liable for the ensuing injury⁷⁶ unless the intervening conduct is the normal response to the stimulus of a

situation created by the employer's negligence.⁷⁷

In accordance with the facts and circumstances of the particular case, evidence has been held to be sufficient to show that the injury to the employee resulted from the negligent act or omission of the employer or from a cause for which the employer would be liable,⁷⁸ such as from defective or dangerous appliances in general,⁷⁹ an unsafe or unhealthy place of employment in general,⁸⁰ negligent op-

74. Ind.—Central Indiana Ry Co. v. Mitchell, 199 N.E. 439, 102 Ind App 121.

39 C.J. p 1053 note 21

75. Mich.—Kurtz v Detroit, T & I R Co., 213 NW 169, 188 Mich. 289, certiorari denied 48 S Ct. 31, 275 U.S. 535, 72 L Ed 412.

Minn.—Kesich v Oliver Iron Mining Co., 246 NW 672, 188 Minn 173.

Or.—Leavitt v Stamp, 293 P. 414, 134 Or. 191.

SC.—Johnston v Atlantic Coast Line R Co., 190 SE 459, 183 SC 126—Lewis v Seaboard Air Line Ry Co., 166 SE 134, 167 SC 204. 39 C.J. p 1053 note 22

76. Wis.—Central Wisconsin Trust Co. v Chicago & N. W. R. Co., 287 NW 699, 232 Wis 536.

Contributory negligence see *infra* § 527

77. Wis.—Central Wisconsin Trust Co. v. Chicago & N. W. R. Co., *supra*.

78. US.—Union Pac. R Co. v De Vaney, CCA Cal., 162 F.2d 24—Murphy v Lehigh Val R Co., C C.A.N.Y., 158 F.2d 481—Boston & M R R v. Cabana, CCA Mass., 148 F.2d 150, certiorari denied 65 S Ct. 1414, 325 US 873, 89 L Ed 1991—Thunberg v Panama R. Co., CCA N.Y., 189 F.2d 587

Ark.—Missouri Pac R Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—Ward Furniture Mfg Co. v Mounce, 31 S.W.2d 531, 182 Ark 380—Natural Gas & Fuel Corporation v. Alotto, 11 S.W.2d 769, 178 Ark 461—Sinclair Oil & Gas Co. v Langley, 293 S.W. 1015, 173 Ark. 956

Ga.—Southern Ry. Co. v. Heaton, 6 SE2d 339, 61 Ga App 386—Western & A R R v. Roberson, 162 SE 842, 44 Ga App 736

Ill.—Rost v F H Noble & Co., 147 NE 258, 316 Ill 357

Mass.—Wood v Canadian Imperial Dry, 5 NE2d 8, 296 Mass 80—McPhail v Boston & M R R., 181 NE 739, 280 Mass 118

Minn.—Ross v Duluth, M & I R Ry Co., 290 NW 566, 207 Minn 157, followed in 291 NW. 610, 207 Minn 648, certiorari denied Duluth, M & I R Co. v Ross, 61 S Ct 9, 311 U.S. 656, 85 L Ed. 420—Jack-

son v Chicago Great Western Ry Co., 205 NW 689, 165 Minn 58

Miss.—McLemore & McArthur v Rogers, 152 So 883, 169 Miss 650

Mo.—Cech v Mallinckrodt Chemical Co., 20 S.W.2d 509, 323 Mo 601—Hasenjaeger v. Missouri-Kansas-Texas R Co., 53 S.W.2d 1083, 227 Mo App 413—Coy v Dean, 4 S.W.2d 835, 222 Mo App 67—Tabor v Kansas City Bolt & Nut Co., App., 274 S.W. 911—McNairy v Pulitzer Pub Co., App., 274 S.W. 849—Stubbs v American Car & Foundry Co., App., 270 S.W. 145

Neb.—Thornton v Davis, 204 NW 69, 113 Neb 539

Nev.—Southern Pac Co v Huyck, 128 P.2d 849, 61 Nev 365

N.J.—Duffy v Bates, 103 A 243, 91 N.J. Law 243

Okl.—Chicago, R I & P Ry Co. v. Hurst, 263 P. 113, 129 Okl 1—Schaff v Daugherty, 239 P. 922, 112 Okl 124, certiorari denied 46 S Ct 208, 270 US 642, 70 L Ed 776

Tex.—McMillan v Gage, Civ App., 165 S.W.2d 764, error refused—Missouri-Kansas-Texas R Co of Texas v McKinney, Civ App., 126 S.W.2d 789, affirmed Missouri, K & T R Co of Texas v McKinney, 145 S.W.2d 1081, 136 Tex 75—City of Wichita Falls v Lewis, Civ App., 68 S.W.2d 388, error dismissed—Morton Salt Co v Wells, Civ App., 35 S.W.2d 454, affirmed 70 S.W.2d 409, 128 Tex 151—St Louis Southwestern Ry Co v. Gillenwater, Civ App., 284 S.W. 268, affirmed St Louis Southwestern Ry Co of Texas v Gillenwater, Com App., 294 S.W. 193—Galveston, H & S. A. Ry Co v Ford, Civ App., 275 S.W. 463—Fort Worth & D. C. Ry. Co v Stovall, Civ App., 272 S.W. 594, certiorari denied 46 S Ct 356, 270 US 660, 70 L Ed 786

Wash.—Kelly v. The Vogue, 153 P.2d 277, 21 Wash.2d 785

39 C.J. p 1049 note 15 [b]

Misrepresentation when applying for employment

Evidence that switchman was examined by railroad's physician before commencing work, had been working four years for railroad when injured, and was an experienced, agile man who did his work without complaint, warranted finding that there was no

causal connection between switchman's injury and his false representation as to age when applying for employment which would preclude recovery under Employers' Liability Act for injuries—Newkirk v Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal 2d 303

Injury held not result of unavoidable accident

Tex.—Cisco & N. E Ry Co v Villaneuva, Civ App., 270 S.W. 576.

79. Ark.—Missouri Pac R Co v. Bryant, 128 S.W.2d 268, 198 Ark 193—Kennedy v Giffin, 112 S.W.2d 644, 195 Ark 379—McEachin & McEachin Const Co v Burks, 75 S.W.2d 794, 189 Ark 947—Missouri Pac R Co v Hendrix, 277 S.W. 337, 169 Ark 825, certiorari denied 46 S Ct 351, 270 US 651, 70 L Ed 781

Ky.—R. B. Tyler Co v Cantrell, 137 S.W.2d 401, 281 Ky 718.

La.—Melton v Fraering Brokerage Co., App., 31 So 3d 884

Mo.—Shey v Central Coal & Coke Co., 21 S.W.2d 772, 323 Mo. 1058

—Lally v Morris, App., 26 S.W.2d 52—Jaycrest v St Louis Screw Co., App., 6 S.W.2d 1015

N.H.—Stanton v Morrison Mills, 47 A.2d 112, 94 N.H. 92—Bill v New England Cities Ice Co., 10 A.2d 662, 90 N.H. 453—Norton v Atlantic Gypsum Products Co., 143 A. 469, 83 N.H. 407

Tex.—Henwood v. Neal, Civ App., 198 S.W.2d 125.

Va.—Aronovitch v Ayres, 193 S.E. 524, 169 Va. 308

Wash.—Thomas v Inland Motor Freight, 68 P.2d 603, 190 Wash 428

Wis.—Koehler v Thiensville State Bank, 14 NW2d 15, 245 Wis 281.

80. US.—Boal v Electric Storage Battery Co., CCA Pa., 98 F.2d 815

—Parnell v Southern Kraft Corporation, D.C. Miss., 5 F Supp 189, affirmed, CCA, Southern Kraft Co. v Parnell, 65 F.2d 785

Ariz.—Atchison, T & S F Ry Co v Gutierrez, 249 P. 66, 30 Ariz 491

Ark.—Safeway Stores v Phelps, 143 S.W.2d 337, 201 Ark 495

Fla.—Tampa Electric Co v Hardy, 190 So 473, 239 Fla 142

Ill.—O'Brien v Chicago & N. W. Ry Co., 68 NE2d 638, 329 Ill App 332

eration or maintenance of machinery,⁸¹ defects in railroad cars or locomotives,⁸² defects in, or obstructions on or near, railroad tracks or roadbeds,⁸³ or from improper rules, orders, methods of work or operations for which the employer would be liable⁸⁴

On the other hand, where the circumstances show

- McGehee v Geo S Mepharm & Co, 279 Ill App 115—Montagne v Belleville Enameling & Stamping Co, 249 Ill App 567—Jannusch v Weber Bros Metal Works, 249 Ill App 1
- Me—Kimball v Clark, 177 A 188, 133 Me 263
- Mass—Reidy v Crompton & Knowles Loom Works, 60 NE 2d 589, 318 Mass 135
- Mich—Oichefsky v Mercier, Bryant, Larkins Brick Co, 215 NW 317, 340 Mich 536
- Miss—Yazoo & M V R Co v Smith, 117 So 339, 150 Miss 882
- Mo—Koehler v Wells, 20 SW 2d 31, 323 Mo 892—Klaber v Fidelity Bldg Co, App, 19 SW 2d 758
- Nev—Pershing Quicksilver Co v Thiers, 152 P 2d 432, 62 Nev 382
- NH—Kruger v Exeter Mfg Co, 149 A 872, 84 NH 290
- NY—Cornell v J. J. Newberry Co, 299 NYS 30, 352 App Div 817, affirmed 13 NE 2d 477, 277 NY 565
- NC—Hill v Moseley, 17 SE 2d 676, 220 NC 485
- Pa.—Baumgartner v Pennsylvania R. Co, 140 A 623, 292 Pa 106
- Tex—El Paso Electric Co v Gregston, Civ App, 170 SW 2d 515—Wichita Falls & S R Co v Wade, Civ App, 57 SW 2d 332, error refused
31. Cal—Lewis v Curran, 62 P 2d 800, 17 Cal App 689
- NH—Boucher v Namasket Co, 17 A 2d 98, 91 NH 215—Chatman v Maine Cent R R, 167 A 559, 86 NH 317
- Tex—Beaumont, S L & W Ry Co v Schmidt, 72 SW 2d 899, 123 Tex 580
32. US—Eglsaer v Scandrett, CC A Wis, 151 F 2d 562—Pitcairn v. Perry, CCA Mo, 122 F 2d 881, certiorari denied 62 S Ct 414, 314 U. S 697, 86 L Ed 557—Fort Street Union Depot Co. v Hillen, CCA Mich, 119 F 2d 807, certiorari denied 62 S Ct 82, 314 U. S 642, 86 L Ed 515—Sullivan v Aliquippa & S R Co, DCPa, 57 F Supp 363
- Ala.—Atlantic Coast Line R Co v Wetherington, 16 So 2d 720, 245 Ala 313
- Ark—St Louis-San Francisco Ry Co v Bishop, 33 SW 2d 383, 183 Ark 783, certiorari denied 51 S Ct 647, 283 US 854, 75 L Ed 1461
- Ill—O'Brien v Chicago & N W Ry Co, 68 NE 2d 638, 329 Ill App 382
- Ind—Chicago, I & L Ry Co v Stierwalt, 153 NE 807, 87 Ind App 478, certiorari denied 49 S Ct 32, 278 US 638, 78 L Ed 551
- Mo—Colwell v. St. Louis-San Fran-
- cisco Ry Co, 73 SW 2d 232, 335 Mo 494
- NH—Watkins v Boston & M R R, 138 A 315, 83 NH 10
- Tex—Chicago, R. I & G Ry Co v Harris, Civ App, 38 SW 2d 611, error dismissed—Texas & P Ry Co v Baldwin, Civ App, 25 SW 2d 969, affirmed, Com App, 44 SW 2d 909, certiorari denied 53 S Ct 11, 287 US 606, 77 L Ed 527—International & G N R Co v Finger, Civ App, 16 SW 2d 132, error dismissed
33. US—Chicago Great Western Ry Co v Peeler, CCA Minn, 140 F 2d 865—Thomson v Boles, CCA Minn, 123 F 2d 487, certiorari denied 62 S Ct 632, 315 US 804, 86 L Ed 1204—Chicago, St P, M & O Ry Co v Kulp, CCA Minn, 103 F 2d 352, 133 ALR 1445, certiorari denied 59 S Ct 1032, 307 U. S 636, 83 L Ed 1513—Chicago, St P, M & O Ry Co v Henkel, CC A Minn, 52 F 2d 313, certiorari denied 52 S Ct 200, 284 US 683, 76 L Ed 576, and certified questions answered Henkel v Chicago, St P, M & O Ry Co, 52 S Ct 233, 284 US 444, 76 L Ed 386
- NC—Barton v Atlantic Coast Line R Co, 193 SE 674, 212 NC 356, certiorari denied Atlantic Coast Line R Co v Barton, 58 S Ct 750, 303 US 651, 82 L Ed 1112
- SC—Tyner v Atlantic Coast Line R Co, 146 SE 668, 149 SC 89
- Tex—Davis v Preston, 16 SW 2d 117, 118 Tex 308, certiorari dismissed 50 S Ct 171, 280 US 406, 74 L Ed 514, corrected, Com App, 35 SW 2d 403—Missouri-Kansas-Texas R Co of Texas v Barnaby, Civ App, 167 SW 2d 235, error refused
34. US—Thompson v. Camp, CCA Tenn, 163 F 2d 396—Edwards v Baltimore & O R Co, CCA Ill, 131 F 2d 366—Lukon v Pennsylvania R Co, 131 F 2d 327
- Ark—Hill v Hardy, 157 SW 2d 494, 203 Ark. 79—Chicago, R I & P. Ry Co v Manus, 100 SW 2d 258, 193 Ark 397—Newark Gravel Co v Barber, 18 SW 2d 331, 179 Ark. 799
- Cal—Gray v Southern Pac Co, 145 P 2d 551, 23 Cal 2d 632—Showalter v Western Pac R Co, 106 P 2d 895, 16 Cal 2d 460—Raif v. Schumacker, 99 P 2d 593, reheard 102 P 2d 375—Weiland v Southern Pac Co, 93 P 2d 1023, 34 Cal App 2d 500, certiorari denied Southern Pac Co. v Weiland, 60 S Ct 613, 309 US 670, 84 L Ed 1016
- Ga—Southern Ry Co v Blanton, 10 SE 2d 430, 63 Ga App 93—Atlantic Coast Line R Co v McDonald, 179 SE 185, 50 Ga App 856, certiorari denied 56 S Ct 143, 296 US 621, 80 L Ed 441
- Ill—Halloran v Chicago & N W Ry Co, 63 NE 2d 670, 327 Ill App 217
- Ind—Southern Ry Co v Wilkins, 178 NE 154, 95 Ind App 130, certiorari denied 53 S Ct 85, 287 U S 635, 77 L Ed 550
- Mo—Dodd v Missouri-Kansas-Texas R Co, 193 SW 2d 905, 354 Mo 1205—Smith v Thompson, 161 S W 2d 232, 349 Mo 396—Brainard v Missouri Pac R Co, 5 SW 2d 16, 319 Mo 890—Vaccaro v City of St Louis, App, 123 SW 2d 230
- NJ—Jurczyk v Lehigh Valley R Co, 156 A 778, 9 NJ Misc 1028
- NY—Rizzo v Murray, 10 NYS 2d 93, 256 App Div 956, affirmed 26 NE 2d 806, 282 NY 670
- NC—Barton v Atlantic Coast Line R Co, 193 SE 674, 212 NC 356, certiorari denied Atlantic Coast Line R Co v Barton, 58 S Ct 750, 303 US 651, 82 L Ed 1112—Winfree v Seaboard Air Line Ry Co, 155 SE 259, 199 NC 590
- Ohio—Tamplin v Pennsylvania R Co, App, 51 NE 2d 736
- Or—Peluck v Pacific Machine & Blacksmith Co, 298 P 417, 134 Or 171
- SC—Gillis v Atlantic Coast Line R Co, 179 SE 62, 175 SC 223, certiorari denied Atlantic Coast Line R Co v Gillis, 55 S Ct 545, 294 U S 718, 79 L Ed 1251
- Tenn—Kurn v Weaver, 161 SW 2d 1005, 25 Tenn App 556—Nashville, C & St L Ry v Hines, 94 SW. 2d 397, 20 Tenn App 1
- Tex—McMillan v Gage, Civ App, 165 SW 2d 754, error refused—Texas & N O R Co v Neill, Civ App, 97 SW 2d 279, error refused 100 SW 2d 348, 128 Tex 580, certiorari dismissed 58 S Ct 118, 302 US 645, 82 L Ed 501, rehearing denied 58 S Ct 268, 302 US 778, 82 L Ed 603—Southern Pac Co v Clayton, Civ App, 81 S.W 2d 788, error refused Certiorari denied 56 S.Ct. 155, 296 US 631, 80 L Ed 448—Southern Pac Co v McKinley, Civ App, 80 SW 2d 1009, error dismissed Certiorari denied 56 S Ct. 154, 296 US 631, 80 L Ed 448—Texas & P. Ry Co v Baldwin, Civ App, 25 SW 2d 969, affirmed, Com App, 44 S.W 2d 909, certiorari denied 53 S.Ct 11, 287 U. S. 606, 77 L Ed 527—St Louis Southwestern Ry Co of Texas v Smithhart, Civ App, 9 SW 2d 146—Texas & N O R Co. v Tilley, Civ App, 297 SW. 1063, affirmed, Com App, 6

nothing as to the real cause of the injury, there is a failure of proof,⁸⁵ and under the facts and circumstances evidence has been held to be insufficient to show that the injury to the employee resulted from the negligent act or omission of the employer or from a cause for which the employer would be

liable,⁸⁶ such as from defective or dangerous appliances in general,⁸⁷ an unsafe or unhealthful place of employment in general,⁸⁸ defects in railroad cars or locomotives,⁸⁹ defects in, or obstructions on or near, railroad tracks or roadbeds,⁹⁰ or from improper rules, orders, methods of work or operations

SW 2d 86, certiorari denied 49 S Ct 86, 278 US 642, 73 L Ed 556—Fort Worth & D C Ry Co v Westrup, Civ App, 278 SW 490, affirmed 285 SW 1053
Wis—Lehner v. Chicago, M., St P & P R Co., 236 NW 572, 204 Wis 558

85. Ky—Royal Collieries Co v. Wells, 276 SW 515, 210 Ky 600.
39 C.J. p 1047 note 18

86. US—Bobo v. Northwestern Pac R Co., Cal., 54 S Ct 283, 290 US 499, 78 L Ed 462—Aqua System v Kodakowski, CCA Canal Zone, 88 F2d 395

Ark—Texas Co v Jones, 298 SW 342, 174 Ark 905.

Ill—Collins v Kurth, 153 NE 355, 322 Ill 250

Ky—Dean Branch Coal Co v. Collins, 132 SW 2d 310, 280 Ky 1—Gunn Coal Mining Co v Wilson, 125 SW 2d 774, 277 Ky 3

La—Powell v Louisiana & A Ry Co., App, 152 So 371

Mass—Keller v New York N H. & H R. R., 152 NE 835, 255 Mass 528.

Mo—Watkins v Bird-Sykes-Bunker Co., 16 SW 2d 38, 322 Mo 830—Karlín v Kansas City Public Service Co., App, 30 SW 2d 1033

Okl—Abdo v Mullen, 44 P 2d 102, 173 Okl 144—Osborn v Chickasha Gas & Electric Co., 251 P. 480, 123 Okl 198

Or—Leavitt v Stamp, 293 P. 414, 134 Or 191.

Pa—Dawson v Reading Co., 142 A 295, 293 Pa. 301, certiorari denied 49 S Ct 28, 278 US 628, 73 L Ed 547.

Tenn—Banks v Southern Potteries, App, 204 SW 2d 382—Louisville & N R Co v. Jackson, 3 Tenn App 463.

Tex—Texas & N O. R Co. v Warden, 78 SW 2d 164, 125 Tex 193—Cate v Orlic Gasoline Production Co., Civ App, 78 SW 2d 635, error refused—Hudgins v Kansas City, M & O R Co., Civ App, 2 SW 2d 958, error refused—Texas & N O. R Co v. Smith, Civ App, 285 SW 913

Utah—Cotelini v Kearns, 11 P 2d 317, 79 Utah 470

Va—Norfolk Southern R Co v. Mabe, 132 SE 692, 146 Va 813

Wash—Gardner v Seymour, 180 P 2d 564, 27 Wash 2d 802

39 C.J. p 1047 notes 13 [a], 14 [a], p 1051 notes 17 [a], 18 [a].

Recovery barred by limitations

In common-law action by employee against employer for injuries to lungs resulting from exposure to fumes of chromic acid solution, where employee suffered injuries from the fumes, recovery for which was barred by the statute of limitations, evidence failed to show any subsequent injury independent of previous injury approximately causing hemorrhages in lungs so as to authorize recovery—Shoemaker v Electric Auto-Lite Co., 41 NE 2d 433, 69 Ohio App 169

87. US—Dobbyn v Boat Repairing Corporation, CCA NJ, 25 F2d 283

Ark—Harmon v Morrison, 147 SW 2d 35, 201 Ark 820—Marathon Oil Co v Sowell, 88 SW 2d 82, 191 Ark 865

Ga—Alford v Zeigler, 23 SE 2d 474, 68 Ga App. 627

Ky—Nixon v Raymond City Coal & Transportation Co., 134 SW 2d 633, 280 Ky 743—Hooks v. Cornett Lewis Coal Co., 86 SW 2d 697, 260 Ky 778

Mont—Morelli v Great Northern Ry. Co., 300 P. 210, 89 Mont 603

NY—De Gaetano v Merritt & Chapman Derrick & Wrecking Co., 219 NYS 689, 219 App Div 243, affirmed 161 NE 188, 247 NY 574

Or—Abbott v Portland Trust & Savings Bank, 86 P 2d 962, 160 Or. 699

Tex—Railway Express Agency v. Robinson, Civ App, 162 SW 2d 984, error refused—Page v Schlott, Civ App., 89 SW 2d 249

Injury apart from use of appliance

Fact that decedent was compelled because of defective appliance to do something he would not have otherwise done, and while so doing was injured by something apart from use of appliance, does not of itself establish such causal connection—Schendel v Chicago, M & St P. Ry Co., 206 NW 436, 165 Minn 223

88. US—Holliday v. Fulton Band Mill, CCA Miss, 142 F2d 1006—Murray v Carleton, D C Me., 33 F 2d 966

Minn—Larson v. Great Northern Ry Co., 303 NW 57, 162 Minn 419

Nev—Provenzano v. Long, 183 P 2d 639

NH—Ducas v International Cotton Mills, 130 A. 158, 81 N.H. 543

NY—Bennett v Village of Wolcott, 29 NYS 2d 365, 177 Misc. 768, af-

firmed 33 NYS 2d 392, 263 App. Div 932

NC—Gibson v Steele's Mills, 130 S. E 617, 190 NC 760

39 C.J. p 1053 note 24 [a].

Prima facie showing

Ky—Southern Mining Co v Lawson, 131 SW 2d 831, 278 Ky 659—Auto Livery Co v Stone, 36 SW 2d 849, 287 Ky 686—Furnace Coal Mining Co v Perry, 287 SW 918, 216 Ky 362—Steele Coal Co v Vanover, 272 SW 418, 209 Ky. 148

La—Clark v Southern Kraft Corporation, App, 11 So 2d 17

Minn—O'Connor v Pillsbury Flour Mills Co., 267 NW 507, 197 Minn. 584

Mo—Swab v Smith Bros., 6 S.W. 2d 56, 222 Mo App 873

Neb—Smith v Morton Motor Co., 16 NW 2d 843, 145 Neb 396

NY—Cornell v J J Newberry Co., 294 NYS 164, 250 App Div 816

ND—Olson v. Great Northern Ry Co., 219 NW 209, 56 ND 690

Okl—Highway Const Co v. Shue, 49 P 2d 203, 173 Okl 456

Tenn—Brown v. Tennessee Consol Coal Co., 83 SW 2d 568, 19 Tenn App 123

Tex—Railway Express Agency v Robinson, Civ App, 162 SW 2d 984, error refused

89. US—Chicago Great Western R Co. v Rambo, Minn., 56 S Ct 693, 298 US 99, 80 L Ed 1066, rehearing denied 56 S Ct 945, 298 US 692, 80 L Ed 1409, conformed to Rambo v Chicago, Great Western R Co., 268 NW 199, 197 Minn 652—Central Vermont Ry Co v Perry, CCA N.H., 10 F2d 132

Minn—Robertson v Chicago, R I & P. Ry Co., 235 NW 160, 177 Minn 303—Larsen v. Northern Pac Ry. Co., 220 NW. 159, 175 Minn 1

Miss—Gulf M & N R Co v Mad-den, 200 So 119, 190 Miss 374

NY—Buschalewski v. New York Cent. R Co., 173 NYS 506, 105 Misc 541

Okl—Pryor v Chicago, R I & P. Ry. Co., 39 P 2d 563, 170 Okl 158.

Pa—Casseday v Baltimore & O R Co., 22 A 2d 663, 343 Pa. 342

W Va—Staton v Virginian Ry Co., 195 SE 601, 119 W Va. 658

90. US—Atchison, T & S F Ry. Co. v. Saxon, Tex., 52 S Ct 229, 284 US 458, 76 L Ed 397, conformed to Saxon v Atchison, T & S F. Ry. Co., Com.App, 50 S.W 2d 1095

for which the employer would be liable.⁹¹

§ 523. — Action of Servant within Scope of Employment

In an action by a servant against his master to recover for personal injuries, the plaintiff must show by a preponderance of evidence that at the time of the accident he was acting within the scope of his employment, but this he may do by adducing evidence from which such fact may be inferred.

In order that plaintiff may recover for injury sustained by reason of defendant's negligence, he must show by a preponderance of evidence that at the time of the accident he was acting within the scope of his employment,⁹² but this he may do by adducing evidence from which such fact may be inferred.⁹³

§ 524. — Negligence of Master

a. In general

—Chicago, M & St P Ry Co v Coogan, Minn., 46 S Ct 564, 271 U S 473, 70 L Ed 1041—New York Cent R Co v Devine, C C A N Y, 23 F 2d 588

Ind—Pennsylvania R Co v Johnson, 169 N E 358, 91 Ind App 412

Ky—Louisville & N R Co v Chapman's Adm'x, 190 SW 2d 542, 300 Ky 835

Mo—Hamilton v St Louis-San Francisco Ry. Co., 300 SW 787, 313 Mo 123

Pa—Casseday v. Baltimore & O R Co., 22 A 2d 663, 343 Pa 342

SC—Governor v Atlantic Coast Line R Co., 151 SE 229, 154 SC 113.

Tex—Texas & N O R Co v Warden, Civ App., 107 SW 2d 451, error dismissed

91. US—Atchison, T. & S F Ry Co v Toops, Tex., 50 S Ct 231, 281 US 351, 74 L Ed 896.

Ala—Mobile & O R Co v Williams, 129 So. 60, 221 Ala 402

Ark—St Louis-San Francisco Ry Co v Ward, 124 S.W.2d 975, 197 Ark 520—St. Louis-San Francisco Ry Co v Smith, 19 SW 2d 1102, 179 Ark 1015.

Ga—Southern Ry. Co v. Blanton, 192 SE, 437, 56 Ga App 232.

Mo—Byrd v. Missouri Pac R Co, 46 SW 2d 221, 226 Mo App 708

Okl—Atchison, T & S F Ry Co v. Myers, 69 P 2d 62, 179 Okl 637, appeal dismissed Myers v Atchison, T. & S F. R. Co., 58 S Ct. 29, 302 US. 636, 82 L Ed 495.

Pa—Carlo v. Bessemer & L. E R Co., 143 A 5, 293 Pa 343, certiorari denied 49 S.Ct 25, 278 US 622, 73 L Ed 543

Tex—Texas & P Ry Co v. Rampy, Civ.App., 71 SW 2d 387, error dismissed—St. Louis Southwestern

Ry. Co of Texas v. Bounds, Civ. App., 283 SW. 278.

92. Iowa—Casey v. Hansen, 26 N W 2d 50

Fellow servant acting within scope of employment see infra § 525

Evidence held insufficient

US—Rea v Hearty, C C A Or., 62 F 2d 461

Tex—Rio Bravo Oil Co v Matthews, Civ App., 20 SW 2d 342.

Va—Raven Red Ash Coal Co. v Griffith, 27 SE 2d 360, 181 Va. 911 39 C J p 1053 note 23 [a]

93. Cal—Gray v Southern Pac. Co., 145 P 2d 561, 23 Cal 2d 682.

Custom of employees

In action for personal injuries sustained in closing door which covered gears, finding that employer was charged with knowledge of custom of employees to close such doors was warranted, in view of the evidence as to continued practice of employees to so close doors—Ducas v International Cotton Mills, 130 A. 156, 81 N. H. 543.

Evidence held sufficient

US—Shoaf v. Fitzpatrick, C C A. Tenn., 104 F 2d 290, certiorari denied 60 S Ct. 295, 308 US. 620, 84 L Ed. 518

Ark—Luten Bridge Co. v. Etherton, 70 SW 2d 46, 188 Ark. 1167.

Cal—Weiland v. Southern Pac. Co., 93 P 2d 1023, 34 Cal App 2d 500, certiorari denied Southern Pac Co v Weiland, 60 S Ct. 613, 309 US 670, 84 L Ed 1016

Kan—Palmer v. Julian, 170 P 2d 818, 161 Kan 619

Mass—Watkins v New York, N H & H R Co., 195 N E. 888, 290 Mass 448.

94. US—Deere v. Southern Pac Co., C C A Or., 123 F 2d 438, cer-

b Knowledge by master of defect or danger

c Appliances or places of work

d Rules, orders, and acts or omissions in method of work

e. Employment of incompetent or vicious servant

f. Insufficiency of force for work

g. Failure to instruct or warn servant

a. In General

In an action by a servant against the master to recover for personal injuries, the plaintiff must show negligence of the master by a preponderance of evidence; but he need not prove negligence beyond a reasonable doubt.

In an action by a servant against the master to recover for personal injuries, plaintiff must show negligence of the master by a preponderance of evidence,⁹⁴ or, according to other decisions on

tiolari denied 62 S Ct 916, 315 US 819, 86 L Ed 1217—Brown v Good-year Yellow Pine Co., C C A Miss., 102 F 2d 726—Schroble v. Lahigh Valley R Co., C C A N Y, 62 F 2d 993—Brennan v Baltimore & O R Co., D C N Y, 33 F Supp. 158, reversed on other grounds, C C A, 115 F 2d 555, certiorari denied 61 S Ct. 614, 312 US 685, 85 L Ed 1123

Ark—Missouri Pac R. Co. v Boyd, 106 SW 2d 165, 194 Ark. 121.

Cal—MacDonnell v Southern Pac. Co., 63 P 2d 201, 17 Cal App 2d 432, certiorari denied Southern Pac Co. v MacDonnell, 57 S.Ct 790, 301 US 688, 81 L Ed. 1345

Fla—Kirkland v City of Gainesville 166 So 460, 122 Fla. 765.

Ky—Smith's Adm'x v Honaker, 197 SW 2d 780, 303 Ky 348

Mich—Williams v. Sealander, 286 N. W. 101, 288 Mich 617

Mo—Bello v. Stuever, 44 SW 2d 619

—Baker v Chicago, B & Q R Co., 39 SW 2d 585, 327 Mo 986—Compton v Louis Rich Const. Co., 287 S W. 474, 315 Mo. 1068

Neb—Ellis v Union Pac. R. Co., 22 N.W 2d 305, 147 Neb 18

N.D—Cunningham v. Great Northern Ry. Co., 14 NW 2d 753, 73 N. D. 315.

Okl—Atchison, T. & S. F. Ry. Co v. Myers, 69 P 2d 62, 179 Okl 637, appeal dismissed Myers v. Atchison, T. & S F. R. Co., 58 S.Ct. 29, 302 US. 636, 82 L Ed. 495.

Utah—Buhler v. Maddison, 140 P.2d 933, 105 Utah 39.

39 C J p 989 note 28, p 1054 note 26.

Negligence shown

(1) In general.

US—Thunberg v. Panama R. Co., C C A N Y., 139 F.2d 567.

the question, by substantial evidence,⁹⁵ and he may | the proof of the claim of negligence uncertain, not recover if the evidence does no more than leave | speculative, or conjectural,⁹⁶ but he need not prove

Ark—Ozan Grayson Lumber Co. v. Ward, 66 S W 2d 1074, 188 Ark 557
Ill—Faulkner v. New York Cent R Co, 332 Ill App 346.

Ky—Cincinnati, N O & T P Ry. Co v Wheelodon, 270 S W 762, 208 Ky 201

NY—Skidmore v Rosenblatt, 28 N Y S 2d 255, 260 App Div 947, motion denied 33 N E 2d 543, 285 N Y 617, affirmed 35 N E 2d 196, 285 N Y 809

NC—Hamilton v Southern Ry Co, 158 S E 75, 300 NC 543, certiorari denied Southern Ry Co v Hamilton, 53 S Ct 19, 284 US 636, 76 L Ed 541

Pa—Blair v. Baltimore & O R Co, 65 S Ct 545, 323 US 600, 89 L Ed 490

Tex—Louisiana Ry & Nav Co. of Texas v Disheroon, Civ App, 295 S W 250—Texarkana & Ft Smith Ry Co v Smith, Civ App, 270 S W 867

39 C J p 1055 note 27 [a].

(2) Youthful or inexperienced employee—Kirst v Spears, La.App. 192 So. 884—39 C J p 1055 note 27 [b].

Negligence not shown

(1) In general.

US—New York Cent R. Co v. Ambrose, N.J., 50 S Ct 198, 280 US 486, 74 L Ed 562—Southwell v Atlantic Coast Line R Co, NC, 48 S.Ct 25, 275 US 64, 73 L Ed 157
Ala.—Belcher v. Chapman, 7 So.2d 859, 242 Ala. 653

Ark—Chicago, R I & Pac. Ry. Co v Dixon, 156 S W 2d 209, 203 Ark 210
—Williams Bros v Witt, 43 S W 2d 237, 184 Ark 606—Turk v Sweeten, 27 S W 2d 1000, 181 Ark 759

Cal.—Casson v Atchison, T & S. F. Ry Co, 6 P 2d 336, 119 Cal App 222.

Kan—Roberts v. St Louis & S. F. Ry Co, 18 P 2d 167, 186 Kan 749

Ky—Smith's Adm'x v. Honaker, 197 S W.2d 780, 303 Ky 348.

Mass—Manning v Smith, 12 N E 2d 845, 299 Mass 818—Shea v Frangioso, 188 N.E. 745, 281 Mass. 412

Minn—Brennan v. Butler Bros, 120 N.W. 540, 107 Minn 430.

Miss—Masonite Corp v Stevens, 80 So 2d 77—Wunderlich v Walker, 189 So 523, 186 Miss. 149—Walters v. Thompson, 128 So 81, 157 Miss. 851

Mo—Pietraschke v. Pollnow, App, 147 S W.2d 167.

Neb—Laf Ferry v Chicago, B. & Q. R Co, 206 N W 737, 114 Neb 219

N.Y.—Powell v Danoff, 51 N.Y.S 2d 200, 268 App Div 922.

NC—Ivey v Eastern Cotton Oil Co, 154 S E 740, 199 NC 452.

N.D.—Wingen v. Minneapolis, St. P.

& S S M R Co., 173 N W 832, 42 ND 517

Okl—Tunstall v Mead - Phillips Drilling Co, 36 P 2d 727, 169 Okl 336

Or—Barker v Portland Traction Co, 173 P 2d 288

SD—Marinko v. Chicago, M, St P & P Ry Co, 257 N W 639, 63 S D 256

Tex—Gulf, C & S F Ry Co v Bell, Civ App, 101 S W 2d 363, error dismissed—Huggins v Texas & N O R Co, Civ App, 17 S W 2d 848—Atchison, T & S F Ry. Co v Hix, Civ App, 291 S W 281

Va—Seaboard Air Line Ry Co v De Loatch, 141 S E 121, 149 Va. 338.

W Va—Linville v Chesapeake & O. Ry Co, 177 S E 538, 115 W Va 610.

39 C J p 1054 note 26 [a]. p 1056 note 32 [b]

(2) Youthful or inexperienced employee—Meyer Dairy Products Co v Gill, 196 N.E. 428, 129 Ohio St. 633.

95. US—Atchison, T & S F. R Co v. Saxon, Tex, 52 S Ct 229, 284 U S. 458, 76 L Ed 397, conformed to Saxon v Atchison, T. & S F Ry Co, Com App, 50 S W 2d 1095—Brennan v. Baltimore & O. R Co, C.C.A.N.Y., 115 F 2d 555, certiorari denied 61 S Ct. 614, 312 U.S. 685, 85 L Ed. 1123

Ark.—St. Louis-San Francisco Ry. Co v Wacaster, 199 S W 2d 948, 210 Ark 1080—St Louis-San Francisco Ry Co v Bishop, 33 S W 2d 383, 182 Ark 763, certiorari denied 51 S Ct 647, 283 US 854, 75 L Ed 1461.

Ga.—Southern Ry Co v. Bradshaw, 37 S E 2d 150, 73 Ga App 438

Ky—Nelson's Adm'x v. Kitchen Lumber Co, 122 S.W 2d 1037, 276 Ky 3

Minn—Noesen v. Minneapolis, St. P & S S. M Ry. Co, 283 N W 246, 204 Minn 233

Mo—Barrett v. St Louis Southwestern Ry Co, 143 S W 2d 60—Sabot v St Louis Coopera Co, 282 S W 425, 313 Mo. 527

NJ—Cowdrick v. Pennsylvania R Co, 39 A 2d 98, 132 N.J.Law 131, certiorari denied 65 S Ct. 555, 323 US 799, 89 L Ed 637.

Okl—Chicago, R I. & P. Ry. Co v. Smith, 16 P 2d 226, 160 Okl. 287

Tex—Saxon v Atchison, T & S. F. Ry. Co, Civ App., 72 S.W 2d 327, certiorari denied 55 S.Ct. 651, 295 US 785, 79 L Ed 1683

Wis—Schiefelbein v Chicago, M, St. P. & P R Co, 265 N.W. 386, 221 W 35, certiorari denied Chicago, M, St. P. & P. R Co v Schiefelbein, 57 S Ct. 20, 299 U.S. 558, 81 L Ed 411.

Scintilla of evidence is not sufficient under the Federal Employers' Liability Act—Alabama Great Southern R Co v Davis, 18 So 2d 737, 246 Ala 64, certiorari denied 65 S Ct. 676, 324 US 846, 89 L Ed. 1407

Willful or gross negligence shown
S C—Piner v. Standard Oil Co of New Jersey, 161 S E 504, 183 S C. 302

Active or willful negligence not shown

Ky—Collins v Cincinnati, N O & T P. R. Co., 18 S.W. 11, 13 Ky L 670

NY—Powell v Danoff, 51 N.Y.S 2d 200, 268 App Div. 922

96. US—Brennon v Baltimore & O R Co., C.C.A.N.Y., 115 F 2d 555, certiorari denied 61 S Ct 614, 312 US 685, 85 L Ed 1123—Carpenter v Baltimore & O R Co, C.C.A. Ohio, 109 F 2d 375.

Ga.—Southern Ry Co v. Newman, 199 S E 753, 187 Ga. 182, followed in Southern Ry Co v Newman, 199 S E 755, 187 Ga. 136

Iowa—Hamilton v Chicago, B & Q R Co, 234 N.W. 810, 211 Iowa 924
Mass—Lamberti v Neal, 148 N E 463, 258 Mass 99

Neb—Bernhardt v. Chicago, B & Q. R. Co, 272 N.W. 209, 132 Neb. 346, certiorari denied 58 S Ct 34, 302 U. S 685, 82 L Ed 529

NJ—Cowdrick v. Pennsylvania R. Co, 39 A 2d 98, 132 N.J.Law 131, certiorari denied 65 S Ct 555, 323 US 799, 89 L Ed. 637

Or—Waller v. Northern Pac Terminal Co. of Or, 166 P 2d 438, 178 Or 274, certiorari denied 67 S Ct 45, 329 US, 742, 91 L Ed 640, rehearing denied 329 US 825, 67 S Ct 181, 91 L Ed 701

Pa—Killfeather v Pollock, Com.Pl., 58 Montg Co 419

SC—Weston v Hillyer, 159 S E 390, 160 S C 541

Wash.—Gardner v Seymour, 180 P. 2d 564, 27 Wash 2d 302.

Res ipsa loquitur

Question of negligence, in application of doctrine of res ipsa loquitur to injury to employee, must not be based on mere speculation—Gordon v Muehling Packing Co, 40 S.W 2d 693, 328 Mo. 123.

Inference from absence of employee's negligence

No inference of the employer's negligence arises from absence of a fair inference that employee was himself negligent.—Alabama Great Southern R Co v Davis, 18 So 2d 737, 246 Ala. 64, certiorari denied 65 S Ct 676, 324 U.S 846, 89 L Ed. 1407.

the master's negligence beyond a reasonable doubt⁹⁷ Proof may be made by circumstantial as well as by direct evidence⁹⁸ Under the Federal Employers' Liability Act proof that the proximate cause of plaintiff's injury was the negligence of the employer is sufficient to warrant recovery⁹⁹

Violation of statute. Proof of the violation by the master of a statutory or valid municipal regulation is evidence of negligence on the part of the master, which may be sufficient to establish his liability to the servant,¹ at least where such violation may not be excused by a showing that under the special circumstances the failure to observe the statute or ordinance was justifiable² In any event it must appear that the violation was the proximate cause of the injury.³

Compliance with a statutory regulation is not conclusive evidence of due care⁴

b. Knowledge by Master of Defect or Danger

As a general rule, in order to show the master's negligence, the plaintiff must make an affirmative showing of actual knowledge on his part of the defect or danger or else prove facts which show that, in the exercise of ordinary care, he should have known it.

As a general rule, in order to show the master's negligence, plaintiff must make an affirmative showing of actual knowledge on his part of the defect or danger or else prove facts which show that, in the exercise of ordinary care, he should have known it⁵ Thus proof of the existence of a dangerous condition without a showing that it existed for a sufficient length of time to afford defendant opportunity to discover it is insufficient to charge him with liability therefor,⁶ and if it appears that the defect was latent and not discoverable on ordinary inspection⁷ or that no duty rested on defendant to make such inspection⁸ recovery may not be had.

97. Wash—Cockerline v. Anderson, 52 P 2d 321, 184 Wash. 701

98. Ark—St. Louis-San Francisco Ry. Co. v. Bishop, 33 SW 2d 383, 182 Ark 763, certiorari denied 51 S Ct 647, 283 US 854, 75 L Ed 1461

Cal—Hackley v. Southern Pac. Co., 45 P 2d 447, 6 Cal App 2d 611, certiorari denied Southern Pac. Co. v. Hackley, 56 S Ct 153, 296 US 630, 80 L Ed 447

Ga.—Louisville & N. R. Co. v. Ruder, 147 SE 795, 39 Ga App 513

Mo—Grindstaff v. J. Goldberg & Sons Structural Steel Co., 40 SW 2d 702, 328 Mo 72—Sabol v. St. Louis Cooperage Co., 282 SW 425, 313 Mo 527

Okla—Oklahoma Gas & Electric Co. v. Oliphant, 45 P 2d 1077, 172 Okl 635

Tex—Eisenberg v. Great Atlantic & Pacific Tea Co., Civ App, 169 SW 2d 221

39 C J p 994 note 48, p 1055 note 27

99. US—Tiller v. Atlantic Coast Line R. Co., Va., 63 S Ct 444, 318 US 54, 87 L Ed 610, 143 A L R. 967—Murphy v. Lehigh Val R. Co., CCAN Y., 158 F 2d 481.

1. Ala—Vida Lumber Co. v. Courson, 113 So 787, 316 Ala 248

Minn—Weber v. J. B. Barr Packing Corporation, 284 N.W 682, 182 Minn 486

39 C J p 1056 note 29

Violation of statute pertaining to appliances and places of work see infra subdivision c of this section

Prima facie evidence

In an action for injury to a minor employed in violation of statute, evidence of such injury proximately caused by such violation is prima facie evidence of defendant's liability and entitles plaintiff to recover

unless rebutted by evidence of greater weight in defendant's favor

Miss—Anderson Mfg. Co. v. Wade, 119 So 313, 151 Miss 830

Mo—Buffum v. F. W. Woolworth Co., 273 SW 176, 221 Mo App 345

RI—Rossi v. Ronci, 7 A 2d 773, 63 RI 250

W Va.—Dale v. Wheeling Steel Corporation, 164 SE 245, 112 W Va. 138.

2. Cal—Cragg v. Los Angeles Trust Co., 98 P 1063, 154 Cal 663, 16 Ann Cas 1061

39 C J p 1056 note 30

Knowledge of minor's age

Evidence consisting of testimony of employee that infant employed in a stone quarry was under age was insufficient to show that employer had employed infant in willful and known violation of provision of child labor law prohibiting employment of infants under sixteen years of age in such an occupation without a written certification of his age—Caldwell v. Jarvis, 185 SW 2d 552, 299 Ky 439

3. N.Y.—Schmidt v. Bruen, 106 NY S 443, 66 Misc 130, 131

39 C J p 1056 note 31.

4. S.C.—Tyner v. Atlantic Coast Line R. Co., 146 SE 663, 149 SC 89.

5. US—Southern R. Co. v. Stewart, CCA Mo., 115 F 2d 317, reheard 119 F 2d 85, reversed on other grounds Stewart v. Southern Ry. Co., 62 S Ct 616, 315 US 263, 86 L Ed 849—F. W. Martin & Co. v. Cobb, CCA Ark., 110 F 2d 159—Puleo v. H. E. Moss & Co., D.C. N. Y., 66 F Supp. 78

Ark—Kroger Grocery & Baking Co. v. Kennedy, 136 SW 2d 470, 199 Ark 914

La—Fontenot v. Raftery, App., 14 So 2d 77.

Minn—Dally v. Ward, 26 N.W 2d 217, 223 Minn 265

Miss—Eagle Cotton Oil Co. v. Solle, 187 So 506, 185 Miss 475

Mo—Small v. Ralston-Purina Co., App., 202 SW 2d 533

NY—Menaged v. Emigrant Industrial Sav. Bank, 21 NYS 2d 238

Ohio—Bevan v. New York, C & St. L. R. Co., 6 NE 3d 932, 132 Ohio St 245, certiorari denied 57 S Ct 924, 301 US 695, 81 L Ed. 1351—Tobin v. Detroit, T & I R Co., 13 NE 2d 739, 57 Ohio App 806

Or—Schnell v. Howitt, 76 P 2d 1130, 158 Or 586

Wash—Saunders v. Longview, P & N. R. Co., 296 P 835, 161 Wash 280

39 C J p 1079 note 8.

6. Ark—Kroger Grocery & Baking Co. v. Kennedy, 136 SW 2d 470, 199 Ark 914

Mass—Manning v. Smith, 13 NE 2d 845, 299 Mass. 318

Mo—Small v. Ralston-Purina Co., App., 202 SW 2d 533—Byrd v. Missouri Pac. R. Co., 46 SW 2d 221, 226 Mo App 708

Tenn—Mebane v. Baptist Memorial Hospital, 166 SW 2d 622, 179 Tenn 381.

Tex—Texas & N. O. R. Co. v. Smith, Civ App, 285 SW 913.

39 C J p 1079 note 9

7. US—Chicago, M., St. P. & P. R. Co. v. Gilbert, CCA Mont., 87 F 2d 282

Vass—Sheridan v. Boston & A. R. R., 149 NE 150, 253 Mass. 448.

39 C J p 1080 note 10.

8. Mich—Siegel v. Detroit, etc., R. Co., 125 NW 6, 160 Mich 270, 19 Ann Cas 1095

39 C J p 1080 note 11.

Circumstantial evidence may be sufficient to show negligence of the master in failing to discover the defect or danger,⁹ and plaintiff may prove the actual¹⁰ or constructive¹¹ knowledge on the part of defendant by proof of facts from which such knowledge may reasonably be inferred, as, for example, that the master was informed of the dangerous condition,¹² that a similar condition had manifested itself before,¹³ or that the danger or defect was discoverable on a due inspection and that such inspection was not made.¹⁴ However, the fact that an inspection was made is not conclusive evidence of the absence of negligence on the part of the master.¹⁵

In accordance with the facts and circumstances of the particular case, the evidence has been held to show that the master had actual or constructive

notice of the defect or danger¹⁶ or that the defect or danger could have been discovered or anticipated in the exercise of due care.¹⁷ In like manner the evidence has been held insufficient to show that the master knew or ought to have known of the defect or danger,¹⁸ that the defect or danger could have been discovered or anticipated in the exercise of due care,¹⁹ or that the master was guilty of negligence by a failure to make a proper inspection.²⁰

c. Appliances or Places of Work

As a general rule in order for the servant to recover for an injury allegedly caused by the failure of the master to furnish safe appliances or a safe place to work, the plaintiff must adduce substantial evidence of the alleged defect or danger in the condition of the appliances or place of work and of the negligence of the master in connection therewith to create a preponderance in his favor.

2. Mo—Norton v Wheelock, 28 S W2d 142, 323 Mo 913, certiorari denied Wheelock v Norton, 50 S Ct 355, 281 US 752, 74 L Ed 1162 NH—Bridges v Great Falls Mfg Co, 156 A 697, 85 NH 220 Wash—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash. 1

10. Iowa—Bell v Brown, 239 N.W. 785, 214 Iowa 370 39 C.J. p 1080 note 12.

Intention to injure

In action for injuries inflicted on employee by discharge of spring gun, proof that employer, who had set guns with intention of inflicting injury, had intended to injure plaintiff, and no one else, was not necessary to prove deliberate intention to injure plaintiff—Weis v. Allen, 85 P 2d 478, 147 Or. 670

11. Mass—Lamberti v. Neal, 148 N E 463, 253 Mass 99

Mo—Doyle v St Louis Merchants' Bridge Terminal Ry. Co., 81 S W 2d 1010, 336 Mo. 425, certiorari denied St. Louis Merchants' Bridge Terminal R. R. v. Doyle, 51 S Ct 345, 283 US 820, 75 L Ed 1435 39 C.J. p 1080 note 13.

12. N.Y.—Henry v. Norton, 66 N.Y. S 2d 817 39 C.J. p 1081 note 14.

13. Mass—Wood v. Canadian Imperial Dry, 5 NE 2d 8, 296 Mass 80 39 C.J. p 1081 note 15.

14. U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 848.

Ill—Winans v Baltimore & O. R. Co., 25 NE 2d 85, 303 Ill App 231 Mo—Meierotto v Thompson, 201 S W 2d 161—Genta v. Ross, 37 S W 2d 969, 225 Mo App 673 Tex—St. Louis Southwestern Ry

Co of Texas v Lawrence, Civ App, 91 S W 2d 434 39 C.J. p 1081 note 16.

15. Ky—Big Sandy & C. R. Co. v Measell's Adm'r, 42 S W 2d 747, 240 Ky 571

NH—Bridges v Great Falls Mfg Co., 156 A 697, 85 N.H. 220.

16. Ga.—Southern R. Co v Cowan, 183 SE 331, 52 Ga.App 360

N.Y.—Henry v Norton, 66 N.Y.S 2d 317

N.C.—Hill v Moseley, 17 SE 2d 676, 220 N.C. 485

39 C.J. p 1080 notes 12 [a], 13 [c], p 1081 notes 14 [a], 15 [a]

Gun set by employer

In action for injuries inflicted on employee by discharge of spring gun, evidence was held to sustain finding that employer had himself set gun—Weis v. Allen, 85 P 2d 478, 147 Or 670

17. Ark—Safeway Stores v. Phelps, 145 S W 2d 337, 201 Ark 495

Ky.—Chesapeake & O. Ry. Co. v Carroll's Adm'r, 61 S W 2d 41, 249 Ky 703

Mo—Mooney v Monark Gasoline & Oil Co., 298 S W 69, 317 Mo. 1255 39 C.J. p 1081 note 16 [a].

18. Ind.—Paxton v McCartney, 6 N. E 2d 719, 103 Ind App 697

Ky—Bauman's Adm'r v Brown & Williamson Tobacco Corp., 204 S W 2d 327.

Mass—Sheridan v Boston & A. R. R., 149 NE 150, 253 Mass. 446

Miss—Eagle Cotton Oil Co v Sollie, 187 So 506, 185 Miss 475

Mo.—Shay v Central Coal & Coke Co., 21 S W 2d 772, 323 Mo 1058—Fessler v Hunter, App., 35 S.W 2d 641—Winslow v. Missouri, K. & T R Co., App., 192 S W 121

N.J.—Davis v. New York Shipbuilding Corp., 42 A 2d 301, 133 N.J. Law 18.

N.Y.—Barbare v Auditors Contracting Co., 214 N.Y.S. 221, 215 App Div. 595

39 C.J. p 1079 notes 8 [a], 9 [a].

Illness of employee

In wrongful death action based on employer's alleged failure to furnish proper care to servant, evidence was held insufficient to establish that employer or its agents or servants had knowledge of employee's fatal illness until he was beyond human aid—Wilke v. Chicago Great Western Ry Co., 251 NW. 11, 190 Minn 89.

19. Ark—Hall v Patterson, 166 S W 2d 667, 205 Ark 10

Mass—Griffin v New York, N. H. & H. R. Co., 181 NE 839, 279 Mass 511.

Miss—Dr Pepper Bottling Co v. Gordy, 164 So 236, 174 Miss. 392.

39 C.J. p 1080 note 10 [a]

Suicide by mentally deranged employee

In administrator's action for death of section hand who committed suicide by throwing himself in front of train, evidence that prior to day of his death deceased had shown no evidence of mental derangement, that certain incidents occurred on that day which indicated abnormality, but that deceased's conduct manifested a natural fear of trains and an ability to take reasonable precaution to avoid them, was insufficient to impose liability on railroad employer on theory that railroad was negligent because it had knowledge that deceased was mentally deranged and yet permitted him to participate in hazardous work—Southern Ry Co v. Bell, C.C.A.Va., 114 F 2d 341.

20. Ark—Pekin Wood Products Co v. Burkhardt, 96 S.W.2d 776, 192 Ark 1025

Va.—Chesapeake & O. Ry Co v. Butler, 177 SE 195, 163 Va. 626. 39 C.J. p 1080 note 11 [a].

As a general rule, in order for the servant to create a preponderance of evidence in his favor in an action to recover for an injury allegedly caused by the failure of the master to furnish safe appliances or a safe place to work, plaintiff must adduce substantial evidence of the alleged defect or danger in the condition of the appliances or place of work²¹ and of the negligence of the master in connection therewith²² Proof may be made by circumstantial,

as well as by direct, evidence,²³ but recovery may not be based on mere conjecture or surmise.²⁴ Plaintiff need not point out the precise nature of the defect in the appliance or place of work,²⁵ but he must show the existence of the alleged defective condition at the time of the accident²⁶ although he need not establish this by direct evidence.²⁷

As a general rule, unless a positive statutory re-

21. *US—Southern R Co v Stewart*, CCA Mo., 115 F.2d 817, modified on other grounds 119 F.2d 85, reversed on other grounds *Stewart v Southern Ry Co*, 62 S.Ct. 616, 315 U.S. 283, 86 L.Ed. 849

Cal.—*Sherman v Southern Pac Co*, 93 P.2d 812, 34 Cal.App.2d 490, certiorari denied *Southern Pac Co. v Sherman*, 60 S.Ct. 610, 309 U.S. 669, 84 L.Ed. 1015

La.—*Buttitta v J. C. Penny Co*, App., 164 So. 469

Mass.—*Mucha v Northeastern Crushed Stone Co*, 80 N.E.2d 370, 307 Mass. 592

Mich.—*Nichols v Bush*, 289 N.W. 219, 291 Mich. 473

Mo.—*Zachritz v St Louis-San Francisco Ry Co*, 81 S.W.2d 608, 386 Mo. 801, certiorari denied 56 S.Ct. 95, 296 U.S. 584, 80 L.Ed. 413—*Riley v Wabash Ry Co*, 44 S.W.2d 136, 328 Mo. 910—*Tashman v Republic Metal & Rubber Co*, App., 285 S.W. 109

39 C.J. p. 1061 note 40

Vicious propensity of bull

In employee's action against employer for injuries sustained when gored by employer's bull, evidence of vicious propensity of bull was required to be unequivocal, a propensity being vicious if it tends to harm, whether manifested in play or in anger, or in some outbreak of untrained nature—*Hill v Moseley*, 17 S.E.2d 676, 220 N.C. 485

22. *Ark—Harmon v Morrison*, 147 S.W.2d 35, 201 Ark. 830—*Kroger Grocery & Baking Co v Kennedy*, 136 S.W.2d 470, 199 Ark. 914—*Mosley v Raines*, 37 S.W.2d 78, 183 Ark. 569—*Long v Ellis*, 35 S.W.2d 66, 183 Ark. 137—*Wheeler v Ellis*, 35 S.W.2d 64, 183 Ark. 133.

Ga.—*Southern Ry Co v Lunsford*, 194 S.E. 602, 67 Ga.App. 53, certiorari denied 59 S.Ct. 73, 305 U.S. 619, 83 L.Ed. 395.

Ind.—*Paxton v McCartney*, 6 N.E.2d 719, 103 Ind.App. 697

Mass.—*Beggelman v Romanow*, 192 N.E. 159, 288 Mass. 14

Pa.—*Prattico v Hudson Coal Co*, 32 A.2d 733, 347 Pa. 490.

Frost on running board

There is no common-law liability on part of railroad for damages resulting from accumulation of frost on running board of tank car unless

there is proof of some negligent act or omission on the part of the railroad—*Tobin v Detroit, T & I R Co*, 13 N.E.2d 739, 57 Ohio App. 306

23. *Mo—Noce v St Louis-San Francisco Ry Co*, 85 S.W.2d 637, 237 Mo. 689—*Cole v St Louis-San Francisco Ry Co*, 61 S.W.2d 344, 333 Mo. 999—*King v City of St Louis*, App., 155 S.W.2d 557

Okl.—*Dixon v Gasco Pump & Burner Mfg. Co*, 80 P.2d 678, 183 Okl. 249

Wash.—*McGinn v North Coast Stevedoring Co*, 270 P. 113, 149 Wash. 1

39 C.J. p. 1058 note 39

Changes made by master after accident

In action for death of a conductor, when he lost his balance while alighting from a moving engine as it reached the station platform, evidence that after the accident the depth of the trench formed by platform and rail was lessened and the rail was raised, justified an inference by the jury that the platform did not, at the time of the accident, conform to the standard type of curb platforms, as bearing on the issue of defendant's negligence in maintaining it—*Southern Pac Co v Huyck*, 128 P.2d 849, 61 Nev. 365

Changes made by master before accident

Where, in an action for the death of a servant by the involuntary operation of a lever connected with a locomotive frame slot cutting machine, defendant introduced evidence that after prior similar accidents it had substituted a wheel for the lever, which was claimed to be safer, such evidence could not be ignored as bearing on the question of negligence in a subsequent change back to the lever—*Deninger v American Locomotive Co*, Pa., 185 F. 22, 107 C. C.A. 126

Defect in coupler

Alleged fact that at time of accident resulting in death of railroad switchman couplers were in such condition that they would not couple automatically on impact as required by federal statutes could be proved by circumstantial evidence—*Chicago, St. P. M & O Ry. Co v Muldowney*, CCA Minn., 130 F.2d 971, certiorari denied 63 S.Ct. 536, 317 U.S. 700, 87 L.Ed. 560

24. *US—Erickson v Pacific States Lumber Co*, CCA Or., 18 F.2d 513

Reasonable conclusion

Evidence must render conclusion of defective appliance more reasonable than any other conclusion which would be consistent with fact appliance was adequate—*McDonald v Great Northern Ry Co*, 207 N.W. 194, 166 Minn. 87

25. *Cal—O'Connor v Mennie*, 146 P. 674, 169 Cal. 217

39 C.J. p. 1063 note 41

26. *Ala—Atlantic Coast Line R Co v. Wetherington*, 16 So.2d 720, 246 Ala. 313

Considerable period of time after accident

(1) Proof that a shaft of a grain elevator was in a bent condition forty days after the happening of the accident was held insufficient to establish the master's negligence with respect thereto, in the absence of other evidence—*Stoeckle v Great Western Cereal Co*, 130 N.W. 157, 150 Iowa 383

(2) Condition of step of engine at time of trial was held no evidence of condition at time of accident nine months previous—*Seaboard Air Line Ry Co v De Loatch*, 141 S.E. 121, 149 Va. 338.

27. *Ark—Chicago Mill & Lumber Co. v. Cooper*, 119 S.W. 673, 90 Ark. 326

39 C.J. p. 1063 note 42

Appearance after accident

In laborer's suit against master for injuries sustained in pushing wheelbarrow, testimony that after accident wheelbarrow appeared "pretty shakley" and that wire had been substituted for missing bolts to hold frame together authorized inference that defects in wheelbarrow existed before accident—*McBachin & McBachin Const Co v. Burks*, 75 S.W.2d 784, 189 Ark. 947

Rusted and corroded bolts

In an action for death of a locomotive fireman, due to a boiler explosion, testimony that the broken ends of a large number of stay bolts were rusted and corroded, indicating that they were broken some time before the explosion, was held to be evidence tending to prove negligence—*Findley v Coal & Coke Ry. Co*, 73 S.E. 396, 72 W.Va. 268.

quirement to furnish a safe appliance or place of work is involved, mere proof of the existence of a defect in the appliance or place of work or the happening of the accident or injury at the place the servant was required or permitted to be in performing the duties of his employment is not, without more, sufficient to establish the master's negligence;²⁸ but under the doctrine of *res ipsa loquitur* the very nature of the accident, in the light of the surrounding circumstances, may in itself be sufficient to warrant the inference that the injury was occasioned by the master's negligence.²⁹ Evidence of the failure of the master to provide a reasonably safe instrumentality with which to work or place

wherein to work makes out a *prima facie* case of negligence,³⁰ particularly where a statute expressly so provides,³¹ but ordinarily, where the evidence shows that the selection or construction of an appliance, or the creation of a safe place to work, was a detail of the work left to the employees, the master will not be held liable for an improper selection or construction of an appliance³² or for the danger arising in the progress of the work.³³ Failure of the master to furnish the newest type of appliance is not evidence of negligence if the appliance furnished is reasonably safe.³⁴

Violation of statute. Proof of the violation by the master of a statutory or municipal regulation

28. U.S.—*Southern R. Co. v. Stewart*, C.C.A. Mo., 115 F.2d 817, modified on other grounds 119 F.2d 85, reversed on other grounds *Stewart v. Southern Ry. Co.*, 62 S.Ct. 618, 315 U.S. 283, 86 L.Ed. 849—*Brown v. Goodyear Yellow Pine Co.*, C.C.A. Miss., 102 F.2d 726.

Ark.—*Kroger Grocery & Baking Co. v. Kennedy*, 136 S.W.2d 470, 199 Ark. 914—*Safeway Stores v. Mosely*, 95 S.W.2d 1136, 192 Ark. 1059—*Long v. Ellis*, 35 S.W.2d 66, 183 Ark. 137—*Wheeler v. Ellis*, 35 S.W.2d 64, 183 Ark. 133.

Ga.—*Southern Ry. Co. v. Bradshaw*, 37 S.E.2d 150, 73 Ga.App. 438.

Minn.—*Hedicks v. Highland Springs Co.*, 339 N.W. 896, 185 Minn. 79.

Mo.—*Pietraschke v. Pollnow*, App., 147 S.W.2d 167—*Thompson v. St. Louis-San Francisco Ry. Co.*, App., 274 S.W. 531.

Neb.—*Hick v. Chicago & N.W. Ry. Co.*, 261 N.W. 693, 129 Neb. 838.

N.Y.—*Menaged v. Emigrant Industrial Sav. Bank*, 21 N.Y.S.2d 238.

Wash.—*McGinn v. North Coast Stevedoring Co.*, 270 P. 113, 149 Wash. 1.

33 C.J. p. 1056 note 32.

Existence of dust

Proof of much dust at particular place, without proof that employer could and should have provided efficient means to overcome it, is not controlling on question of negligence. U.S.—*Pennsylvania Pulverizing Co. v. Butler*, C.C.A. N.J., 61 F.2d 311. N.J.—*Cichocki v. Geigy Co.*, 183 A. 463, 14 N.J. Misc. 232.

Failure of team to stop

Proof that mule team furnished by employer did not promptly stop when employee called "whoa" was held not to establish that mules were unsafe.—*Walters v. Thompson*, 128 So. 81, 157 Miss. 351.

29. N.Y.—*Leonard v. Queen Mountain Country Club*, 53 N.Y.S.2d 209, 269 App. Div. 669.
39 C.J. p. 1056 note 28.

Wet wax on floor

In chauffeur's action for injuries sustained when he fell on floor of dining room in employer's home, proof that wax one quarter of an inch thick was applied to floor and was not dry at time of the accident established *prima facie* case for chauffeur on ground of employer's negligence.—*Ecker v. Monae-Lesser*, 15 N.Y.S.2d 972, 258 App. Div. 812.

30. S.C.—*Tucker v. Holly Hill Lumber Co.*, 20 S.E.2d 704, 200 S.C. 259.

Break during proper use

Where the servant eliminates any fault on his part by showing that the injury was caused by the breaking of the instrumentality furnished by the master while it was being properly used, he shows *prima facie* that the fault was in the instrumentality.—*McGinn v. North Coast Stevedoring Co.*, 270 P. 113, 149 Wash. 1.

Fall of scaffold

Evidence that the scaffold on which the servant was directed to work fell makes a *prima facie* case for the servant against the master. Mo.—*Curtis v. Koch*, App., 282 S.W. 1045.

N.Y.—*Stewart v. Ferguson*, 58 N.E. 662, 164 N.Y. 553—*Johnson v. Johnson*, 292 N.Y.S. 921, 249 App. Div. 859.

Shock from electric wire

Proof that employee received shock from electric wire was *prima facie* evidence of negligence and conclusive evidence of defective insulation.—*Gilday v. Smith Bros.*, App., 32 S.W.2d 118, record quashed on other grounds *State ex rel Gilday v. Trimble*, 44 S.W.2d 57, 329 Mo. 198, conformed to *Gilday v. Smith Bros.*, 50 S.W.2d 191, 226 Mo. App. 1246.

31. Phrase "defect or unsafe condition" within statutes creating *prima facie* case, or presumptive evidence, of negligence relates to some defect or unsafety inherent in machine or plant.—*Nash v. Pennsylvania R. Co.*, C.C.A. Ohio, 80 F.2d 26.

Retroactive operation of statute

A statute providing that the proof of injury from the running of engines or cars shall be *prima facie* evidence of the want of reasonable skill and care has been held to provide only a rule of evidence, and not to deal with substantive rights and to be applicable in the trial of all cases after its enactment, even though the injury occurred before.—*Myers v. Lamb-Fish Lumber Co.*, 64 So. 727, 106 Miss. 766.

32. Ark.—*Missouri Pac. R. Co. v. Davis*, 186 S.W.2d 20, 208 Ark. 86. N.Y.—*Ebbitt v. Milliken*, 92 N.Y.S. 1033, 103 App. Div. 211.

Acceptance of duty to construct

(1) Where employer seeks to avoid liability to employee for injury on ground that employee accepted delegation of duty to construct safety appliance, acceptance of duty by employee should be proved by express agreement.—*E. L. Bruce Co. v. Brogan*, 166 So. 350, 175 Miss. 208.

(2) In action for injury sustained by employee when kicked by employer's mule which employee was shoeing, the fact that employee was offered enough lumber to build special stall for mule was held insufficient to show that employee accepted delegation of duty to construct stall.—*E. L. Bruce Co. v. Brogan*, *supra*.

Miner engaged in making place safe

Rule which requires master to furnish servant with reasonably safe place to work was held not to apply where evidence disclosed that miner was injured by falling slate when engaged in blasting and removing dangerous slate overhanging place of work in order that place might be made safe, since miner was engaged in making dangerous place safe and created danger in progress of his work.—*Baker v. High Splint Coal Co.*, 81 S.W.2d 577, 258 Ky. 786.

34. N.Y.—*Schein v. Feder*, 278 N.Y.S. 653, 154 Misc. 330.

pertaining to appliances or places of work which has been enacted for the safety of employees may be sufficient to establish liability of the master to the servant without other proof of negligence.³⁵ Under such statutes evidence of the failure of an appliance to function has been held sufficient proof of its defective character and of the violation of the statute by the master,³⁶ regardless of how it functioned before or after such failure,³⁷ and the par-

ticular defect which caused the injury need not be pointed out.³⁸ The evidence must show that the statute on which liability is sought to be predicated was actually violated,³⁹ and, where the accident is due to a defective appliance which is not covered by the statute, the same rules as to the weight and sufficiency of evidence apply as in a common-law action for negligence.⁴⁰

35. *US—Myers v Reading Co., Pa.*, 67 S Ct 1334, 331 US 477, 91 L Ed 1615—*Vigor v Chesapeake & O Ry Co., CCA Ind.*, 101 F 2d 865, certiorari denied *Chesapeake & O R Co v Vigor*, 59 S Ct 1031, 307 US 635, 83 L Ed 1517—*Michalek v U S Gypsum Co., CCAN Y.*, 76 F 2d 115, reversed on other grounds 56 S Ct 679, 298 US 639, 80 L Ed 1372

Ky—Hooven & Allison Co v Cor' Adm'r., 104 SW 2d 969, 268 Ky 266

Mo—Bieser v. Goran, 100 SW 2d 397, 340 Mo 354

NY—Saxton v Delaware & H Co., 176 NE 425, 256 NY 363—*Weisthal v Arena Bldg Corporation*, 247 NYS 576, 232 App Div 694, affirmed 178 NE 785, 257 NY 537

Ohio—McKee v New Idea, App., 44 NE 2d 697

39 C J p 1056 note 29, p 1058 notes 33-35

36. *US—Myers v Reading Co., Pa.*, 67 S Ct 1334, 331 US 477, 91 L Ed 1615

Brake

(1) Under the Federal Safety Appliance Act the inefficiency of a hand brake may be shown by proof of some particular defect or by proof that it failed to function when attempted to be operated with due care in the usual manner

US—Myers v Reading Co., supra—Didinger v Pennsylvania R. Co., CCA Ohio, 39 F 2d 798

Mo—Gieseking v. Litchfield & Madison Ry Co., 127 SW 2d 700, 344 Mo 672, certiorari denied *Litchfield & M R Co v. Gieseking*, 60 S Ct 104, 308 US 533, 84 L Ed 458—*Cason v Kansas City Terminal Ry Co.*, 123 SW 3d 133—*Colwell v St. Louis-San Francisco Ry Co.*, 73 S.W.2d 222, 335 Mo. 494

NC—Spencer v Seaboard Air Line Ry. Co., 160 SE 763, 201 N.C. 537, certiorari denied *Seaboard Air Line Ry. Co. v Spencer*, 52 S Ct. 312, 285 US 639, 76 L Ed. 932

(2) In order to prove inefficiency of hand brake of railroad car because of failure in performance, proof must establish that brake was operated with due care and that when operated with due care the brake failed to function in normal,

natural, and usual manner—*Myers v Reading Co., CCA Pa.*, 155 F 2d 533, reversed on other grounds 67 S Ct 1334, 331 US 477, 91 L Ed 1615

(3) In switchman's action for injuries resulting from alleged inefficient hand brake on interstate railroad car, fact that hand brake operated efficiently after accident at time when railroad's witnesses undertook to test it did not destroy effect of proof that it operated inefficiently as shown by plaintiff—*Herb v Pitcairn*, 29 NE 3d 543, 306 Ill App 583, reversed on other grounds 36 NE 2d 555, 377 Ill 405

Coupler

(1) Generally a violation of Federal Safety Appliance Act provisions prohibiting a common carrier from using or hauling any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between ends of cars is shown by proof that cars on a fair trial failed to couple automatically by impact

US—Southern Ry Co v Stewart, CCA Mo., 119 F 2d 85, reversed on other grounds *Stewart v Southern Ry Co.*, 62 S Ct 616, 315 US 283, 86 L Ed 849—*Philadelphia & R Ry Co v Auchenbach, CCAN J.*, 16 F 2d 550, certiorari denied 47 S Ct 476, 373 US 761, 71 L Ed. 878

Ala—Alabama Great Southern R Co v. Cornett, 106 So 242, 214 Ala 23

Mo—Kimberling v Wabash Ry Co., 85 SW 2d 736, 337 Mo. 702

39 C J p 1072 note 64 [c]

(2) A single failure of coupling to couple automatically is some evidence of failure of railroad to perform duty to furnish proper coupler, although evidence of such single failure is not conclusive on such issue—*Ross v Duluth, Missabe & Iron Range Ry Co.*, 281 NW 76, 208 Minn 312

(3) While Federal Safety Appliance Act does not require carrier to use only cars which will remain coupled until uncoupling device is operated, proof that cars became uncoupled while in use, without human intervention, is evidence from which

jury may infer that coupler was not in condition to perform function required of it by statute—*Vigor v. Chesapeake & O Ry Co., CCA Ind.*, 101 F 2d 865, certiorari denied *Chesapeake & O R Co v Vigor*, 59 S Ct 1031, 307 US 635, 83 L Ed 1517

Proof that footboard slipped

In action under Federal Boiler Inspection Act for injuries sustained by switch foreman who fell when he stepped on footboard of engine, evidence that footboard slipped created inference that there was something out of order which permitted the footboard to slip—*Aly v Terminal R Ass'n of St. Louis*, 119 SW 2d 363, 342 Mo 1116, certiorari denied *Terminal R Ass'n of St. Louis v. Aly*, 59 S Ct 251, 305 US 655, 83 L Ed. 424.

37. *US—Myers v Reading Co., Pa.*, 67 S Ct 1334, 331 US 477, 91 L Ed 1615—*Vigor v Chesapeake & O Ry Co.*, 101 F 2d 865, certiorari denied *Chesapeake & O R Co v Vigor*, 59 S Ct 1031, 307 US 635, 83 L Ed 1517

38. *US—Myers v Reading Co., Pa.*, 67 S Ct. 1334, 331 US 477, 91 L Ed 1615

Cal—Burch v. Atchison, T & S F Ry Co., 142 P 2d 955, 61 Cal App. 2d 286

39. *Mo—Satterlee v St. Louis-San Francisco Ry Co.*, 82 SW.2d 69, 336 Mo 943

Violation of statute shown

Ill—McGehee v Geo S Mapham & Co., 279 Ill App 115

Minn—Fredrickson v Arrowhead Co-op Creamery Ass'n., 277 NW. 345, 202 Minn 12.

Ohio—McKee v New Idea, App., 44 NE 2d 697

Tenn—Sterner v Spencer, 145 SW. 2d 547, 24 Tenn App 389

Violation of statute not shown

Mo—Hunt v Armour & Co., 136 S. W 2d 312, 345 Mo 677—*Zachritz v St. Louis-San Francisco Ry Co.*, 81 S.W.2d 608, 336 Mo 601, certiorari denied 56 S Ct. 95, 296 US. 584, 80 L Ed. 413

Wash—Gardner v. Seymour, 180 P. 2d 564, 27 Wash.2d 802

39 C J. p 1056 note 29 [a].

40. *Or.—Campbell v Southern Pac. Co.*, 250 P. 622, 120 Or. 122.

Use of customary appliance. Proof that an appliance is one customarily used for the purpose, while not conclusive,⁴¹ tends to show due care on the part of the master in furnishing it,⁴² but the use of a customary appliance does not tend to show due care where the evidence shows that it was used for a new function.⁴³ Evidence of the failure of other employers in the same industry to furnish protective appliances does not establish that defendant was free from negligence in not furnishing them;⁴⁴ but, on the other hand, the failure of the master to furnish a device in customary use for the protection of his servant is some evidence of the master's negligence.⁴⁵ A master may show due

care by proof that he has used the same appliance or similar appliances or materials for a length of time without accident,⁴⁶ but this does not constitute conclusive evidence that the appliances or materials are reasonably safe.⁴⁷

Evidence held sufficient to show negligence. In accordance with the facts and circumstances of the particular case, the evidence has been held to be sufficient to show negligence of the master in furnishing defective appliances⁴⁸ or in providing an unsafe place for the servant to perform his work.⁴⁹ More specifically, the evidence has been held to be sufficient to show negligence of the master in failing to furnish his servant with a reasonably safe

41. Cal.—Perrett v Southern Pac Co, 185 P.2d 761, 73 Cal App 2d 30.

Iowa.—Casey v Hansen, 26 NW 3d 50.

39 C.J. p 331 note 63, p 1063, note 44, p 1128 note 25

Use of customary method for doing work see *infra* subdivision d of this section

42. U.S.—Stedley v Atlantic Coast Line R Co, CCA Ga., 107 F.2d 754

Mo.—Shey v Central Coal & Coke Co, 21 S.W.2d 772, 323 Mo. 1058

39 C.J. p 1063 note 45.

43. Utah.—Kaumans v White Star Gas & Oil Co, 63 P.2d 231, 92 Utah 24.

44. N.Y.—Sadowski v Long Island R Co, 55 NE 2d 497, 292 N.Y. 448

45. U.S.—Maty v Grasselli Chemical Co, CCA N.J., 98 F.2d 877.

39 C.J. p 1064 note 47

46. Ga.—Southern Ry Co v Bradshaw, 27 SE 2d 150, 73 Ga App 438

39 C.J. p 1064 note 46

Door stop

Undisputed testimony that door stop had existed as a part of fire station for some twenty-five years during which time a large number of persons had passed through the doorway without sustaining an injury was strong, if not conclusive, evidence, that maintenance of such door stop was not negligence.—City of Drumright v. Moore, 170 P.2d 230, 197 Okl. 306.

Use after repair

Where employee was killed when steel derrick upon which he was working collapsed, any imputation to employer of negligence in continuing to use derrick after it was damaged in storm and repaired was refuted by two years' subsequent continuous use without any indication that derrick was defective or inadequate.—Phillips Petroleum Co. v. Manning, C.C.A. Ark., 81 F.2d 849.

47. Vt.—Bailey v. Central Vermont Ry., 35 A.2d 365, 113 Vt 438

48. U.S.—J. R. Hanify Co v Westberg, CCA Or., 16 F.2d 552

Ark.—Eudora Motor Co v Womack, 111 S.W.2d 530, 195 Ark 74—McEachin & McEachin v Hill, 97 S.W.2d 70, 192 Ark. 1139

Cal.—Robinet v. Hawk, 252 P. 1045, 200 Cal 265

Fla.—Holstun v Embry, 169 So 400, 124 Fla. 554—Galleppie v. Thornton, 117 So 714, 95 Fla. 5.

Ky.—Louisville & N R Co v Goodman, 273 S.W. 526, 210 Ky 13

La.—Malton v Fraering Brokerage Co, App, 31 So 2d 884

Mass.—Demaris v. Van Leeuwen, 186 NE 69, 283 Mass. 169

Miss.—Hercules Powder Co v Thompson, 29 So 2d 323—E. L. Bruce Co v Brogan, 166 So 350, 175 Miss 208.

Mo.—Anderson v Asphalt Distributing Co, 55 S.W.2d 688, 86 A.L.R. 1032—Mooney v. Monark Gasoline & Oil Co, 293 S.W. 69, 317 Mo 1255—Whitehead v Fogelman, App, 44 S.W.2d 261—Goodwin v American Car & Foundry Co, App, 285 S.W. 529

Okl.—S. H. Kress & Co. v Nash, 83 P.2d 536, 183 Okl 544

Or.—Donaghy v Oregon-Washington R. & Nav Co, 288 P. 1003, 133 Or 663, rehearing denied 291 P. 1017, 133 Or 663

Tex.—McMillan v Gage, Civ.App., 165 S.W.2d 764, error refused—Lawson v. Hutcherson, Civ.App., 138 S.W.2d 181, error dismissed, judgment correct—Houston, E & W. T. Ry. Co. v Chambers, Civ App, 279 S.W. 290

Va.—Stevens v Mirakian, 12 SE 2d 780, 177 Va. 123—Aronovitch v Ayres, 193 SE 524, 169 Va 308

Wash.—Reynolds v. International Stevedoring Co., 245 P. 1, 138 Wash 690

39 C.J. p 1058 note 39 [a].

49. U.S.—Rowe v. Gatke Corporation, CCA Ind., 126 F.2d 61, peti-

tion dismissed Gatke Corporation v Rowe, 63 S.Ct 81, 317 US 702, 87 L Ed. 561—Chapman & Dewey Lumber Co v Hanks, CCA Tenn., 106 F.2d 482—O'Hern v T Smith & Son, D.C. La., 8 F.2d 299

Ark.—Safeway Stores v Phelps, 145 S.W.2d 337, 201 Ark 495—Horton & Coleman, Inc. v Houser, 139 S.W.2d 53, 200 Ark 291—Clark v Patterson, 77 S.W.2d 978, 190 Ark 148—Fair Oaks State Co v Cross, 9 S.W.2d 580, 177 Ark 1146—Chicago Mill & Lumber Co v. Lamb, 295 S.W. 27, 174 Ark 258

Fla.—Southern States Power Co v Clark, 159 So 881, 118 Fla 521

Ill.—McGehee v Geo S Mephram & Co, 279 Ill App 115

La.—Tillman v Cook, App, 3 So 2d 230

Mass.—Keough v E. M. Loew's, 21 NE 2d 971, 303 Mass 364

Minn.—Ryan v Twin City Wholesale Grocer Co., 297 NW 705, 210 Minn 21.

Miss.—Adams v. Hicks, 178 So. 484, 181 Miss 165

Mo.—Tabor v Kansas City Bolt & Nut Co, App, 274 S.W. 911

N.H.—Kruger v Exeter Mfg Co., 149 A. 872, 84 N.H. 290.

N.J.—Dailey v Mutual Chemical Co. of America, 16 A.2d 557, 125 N.J. Law 465, affirmed 19 A.2d 778, 126 N.J. Law 426

N.D.—Bakken v State, 234 N.W. 513, 60 N.D. 844.

Okl.—S. H. Kress & Co v. Nash, 83 P.2d 536, 183 Okl 544.

Tex.—Neyland v Adams, Civ App., 140 S.W.2d 233, error dismissed, judgment correct—St. Louis Southwestern Ry Co. v. Gillenwater, Civ.App., 284 S.W. 263, affirmed St. Louis Southwestern Ry Co. of Texas v. Gillenwater, Com App, 294 S.W. 193.

Wash.—Pellerin v. Washington Veneer Co, 2 P.2d 658, 163 Wash. 555.

39 C.J. p 1058 note 39 [b].

tool or instrument for the performance of his work,⁵⁰ in failing to furnish reasonably safe machinery,⁵¹ in failing to furnish a reasonably safe electrical appliance or apparatus,⁵² or sufficient to show negligence of the master in failing to furnish a reasonably safe platform,⁵³ scaffold,⁵⁴ ladder,⁵⁵ stairway,⁵⁶ gangway,⁵⁷ or other support.⁵⁸ Also the evidence has been held sufficient to show negligence

of the master in the construction or maintenance of an unsafe derrick, elevator, or other hoisting device.⁵⁹

In like manner, evidence has been held to be sufficient to show negligence of a railroad in an action by a servant of the railroad for injury due to the unsafe condition of a locomotive⁶⁰ or of a railroad car,⁶¹ such as where there was a failure to furnish

50. Ark.—Warren & O V Ry Co v. Ederington, 28 S W 2d 1073, 181 Ark 1037

Ky.—Reed v Nelson Creek Coal Co, 6 S W 2d 252, 234 Ky 322

Mass.—Eckstein v Scoff, 13 N E 2d 436, 299 Mass 673—Walsh v Boston & M. R. R., 187 N E 554, 284 Mass 250—McPhail v Boston & M. R. R., 181 N E 739, 280 Mass 113

Minn.—Thompson v Chicago Great Western R Co, 205 N W 439, 164 Minn 494

Miss.—Faulkner v Middleton, 190 So 910, 186 Miss 355

Mo.—Gately v St Louis-San Francisco Ry Co, 56 S W 2d 54, 332 Mo 1

NH.—Kruger v Exeter Mfg Co., 149 A 872, 84 N H 390

Tex.—Henwood v Neal, Civ App, 198 S W 2d 125

39 C. J. p 1064 note 48 [a]

51. U.S.—Natural Gas & Fuel Corporation v Sallee, CCA Ark, 80 F 2d 908

Ark.—Roach v Haynes, 72 S W 2d 533, 189 Ark 393—W H Moore Lumber Co v Ragland, 279 S W 362, 170 Ark 1194—Breece-White Mfg Co v Journey, 278 S W. 642, 170 Ark 365—Hogue v Bundy, 271 S W 979, 168 Ark 879

Ga.—Quarterman v Godwin, 129 S E 14, 34 Ga App 201

Ill.—Montagne v Belleville Enameling & Stamping Co, 249 Ill App 567

Ky.—Croley v Huddleston, 192 S W. 2d 717, 301 Ky 580—R B Tyler Co v Cantrell, 137 S W 2d 401, 281 Ky 718

Me.—Poirier v Venus Shoe Mfg Co, 3 A 2d 116, 136 Me 100

Miss.—National Box Co v. Bradley, 154 So 724, 171 Miss 15, suggestion of error overruled 157 So 91, 171 Miss. 15.

Mo.—Scott v American Mfg Co, App, 20 S W 2d 592—Frummer v American Car & Foundry Co, App, 20 S W 2d 587—Edwards v Smith, App, 288 S W 428

Neb.—Bosteder v Duling, 219 N W 896, 117 Neb 154

NH.—Pickett v Norwood Cafe & Co, 195 A 627, 89 N H. 244.

39 C. J. p 1064 note 49

52. Kan.—Howard v Jones Store Co., 256 P 1019, 123 Kan. 620, 53 A L R 139

Miss.—Masonite Corporation v. Lochridge, 141 So 758, 163 Miss 364

NC.—Gibson v Steele's Mills, 180 S E 617, 190 NC 760

Tex.—El Paso Electric Co v Gregston, Civ App, 170 S W 2d 515

Utah.—Kaumans v White Star Gas & Oil Co, 63 P 2d 231, 93 Utah 24 Va.—Colonna Shipyard v Dunn, 145 S E 342, 151 Va 740, certiorari denied 49 S Ct 253, 279 U S 840, 73 L Ed 986

39 C. J. p 1067 note 51.

53. Nev.—Southern Pac Co v Huyck, 128 P 2d 849, 61 Nev 365

Okl.—Tindall Motor Co v Mankin, 86 P 2d 625, 184 Okl 231

Or.—Hovedsgaard v Grand Rapids Store Equipment Corporation, 5 P 2d 86, 138 Or 39

39 C. J. p 1069 note 56 [a].

54. U.S.—Ingalls Shipbuilding Corp v Trehern, CCA Miss, 155 F 2d 203

Ala.—Pound v Gaulding, 187 So 468, 237 Ala 387

N.H.—Lucas v Pietkevich, 175 A 234, 87 N H 148

NY.—Laurin v. Patrick Const Corporation, 32 N Y S 2d 928, 263 App Div 1012, appeal denied 43 N E 2d 841, 289 N Y 625

Vt.—Travelers' Ins Co v Evans, 143 A 290, 101 Vt 250

39 C. J. p 1069 note 57 [a]

55. U.S.—Thunberg v Panama R Co, CCA NY, 139 F 2d 567

Fla.—C F Hamblen, Inc, v Owens, 172 So 694, 137 Fla 91

Kan.—Palmer v Julian, 170 P 2d 813, 161 Kan 619.

Ky.—Nugent Sand Co v. Howard, 11 S W 2d 985, 227 Ky 91.

Pa.—Lemon v Lonker, 97 Pa Super 240

Wash.—Etel v. Grubb, 388 P 931, 157 Wash 311

39 C. J. p 1069 note 58 [a]

56. Miss.—S. H. Kress & Co. v Sharp, 126 So. 650, 156 Miss. 692, 68 A L R. 167.

Mo.—Busby v. Southwestern Bell Telephone Co, 237 S.W. 434

NC.—Batson v City Laundry Co, 170 S E. 136, 205 N C. 93.

Or.—Hovedsgaard v Grand Rapids Store Equipment Corporation, 5 P 2d 86, 138 Or. 39.

Wash.—Kelly v. The Vogue, 153 P 2d 277, 21 Wash 2d 785

39 C. J. p 1070 note 59 [a]

57. Ark.—Royal v. White Oil Corp., 254 S W 819, 160 Ark 467—Fayetteville Mercantile Co v. Rogers, 147 S W 456, 103 Ark 434

39 C. J. p 1070 note 60 [a]

58. Cal.—Grady v Canfield, 49 P 2d 902, 9 Cal App 2d 841

Ohio.—Baltimore & O R Co v McTeer, 9 N E 2d 627, 55 Ohio App 217

SC.—Whisenhunt v Atlantic Coast Line R Co, 10 S E 2d 305, 195 S C 218

39 C. J. p 1070 note 61 [a]

59. Fla.—Putnam Lumber Co v Berry, 3 So 2d 133, 146 Fla 595

Mo.—McNairy v Pulitzer Pub Co, App, 274 S W 349

Okl.—Campbell v Breece, 274 P 1085, 134 Okl 266

Or.—Chatfield v Zeller, 147 P 2d 222, 174 Or 69

39 C. J. p 1067 note 53 [a], p 1068 notes 54 [a], 55 [a]

60. Ala.—Atlantic Coast Line R Co v. Wetherington, 18 So 2d 720, 245 Ala 313—Atlantic Coast Line R Co v Hardwick, 193 So 730, 239 Ala 58

Ark.—Missouri Pac R Co v. Ha-gler, 158 S W 2d 703, 203 Ark 304

—Missouri Pac. R Co v Hendrix, 277 S W 337, 169 Ark 325, certiorari denied 46 S Ct 351, 270 U.S. 651, 70 L Ed 781

Ill.—O'Brien v Chicago & N. W Ry Co, 68 N E 2d 638, 329 Ill App 382

—Hayes v. New York Cent R Co, 67 N E 2d 215, 328 Ill App. 631—Parthun v Elgin, J & E Ry Co, 60 N E 2d 464, 325 Ill App 408

Mo.—Meierotto v. Thompson, 201 S W 2d 161—Satterlee v. St Louis-San Francisco Ry. Co, 32 S W 2d 69, 336 Mo. 943—Crain v Illinois Cent. R Co, 73 S W 2d 786, 335 Mo 658, certiorari denied Illinois Cent. R Co v Crain, 55 S Ct 123, 293 U.S. 607, 79 L Ed. 698—Harlan v Wabash Ry. Co., 73 S W 2d 749, 335 Mo 414

Tex.—Galveston, H. & S. A. Ry Co. v Ford, Civ App., 275 S W. 463.

39 C. J. p 1070 note 62 [a].

61. U.S.—Union Pac R. Co. v De Vane, CCA Cal., 162 F.2d 24

Ark.—Missouri Pac R. Co v Beard, 89 S.W.2d 292, 183 Ark 877.

a suitable coupler,⁶² brake,⁶³ or hand hold;⁶⁴ or sufficient to show that defendant railroad was negligent in the construction or maintenance of its track,⁶⁵ roadbed,⁶⁶ yards,⁶⁷ bridge,⁶⁸ or bridge guard;⁶⁹ or that it was negligent in permitting a dangerous obstruction to remain on,⁷⁰ beside,⁷¹ or over⁷² the track or roadbed.

Evidence has also been held to be sufficient to show negligence of the master in failing to furnish a reasonably safe place of work where the place of work was a mine,⁷³ quarry,⁷⁴ or other excavation,⁷⁵ including cases where the servant has been injured by reason of an accumulation of explosive or poisonous gases⁷⁶ or dust⁷⁷ due to a failure to ventil-

Cal—Burch v Atchison, T. & S F Ry Co, 142 P 2d 955, 61 Cal App 2d 286

Ill—Armstrong v Chicago & W I R Co, 183 NE 478, 350 Ill 426, certiorari denied Chicago & W I R Co v. Armstrong, 53 S Ct 523, 289 US 724, 77 L Ed 1475

Ind—Chesapeake & O Ry Co v Fultz, 161 NE 835, 191 Ind App 639, certiorari denied 51 S Ct 31, 282 US 855, 75 L Ed 757

Neb—Ellis v Union Pac R Co., 27 NW 2d 921, 143 Neb 515
39 C J p 1071 note 63 [a].

62. US—Vigor v Chesapeake & O Ry Co, CCA Ind, 101 F 2d 865, certiorari denied Chesapeake & O Ry Co v Vigor, 59 S Ct 1031, 307 US 635, 83 L Ed 1517—Hampton v Des Moines & C I R Co, CCA Iowa, 65 F 2d 899

Ill—Howard v. Baltimore & O C T R Co, 63 NE 2d 774, 327 Ill App 83

Ind—Chicago, I. & L Ry Co v Stierwalt, 153 NE 807, 87 Ind App 478, certiorari denied 49 S Ct 32, 278 US 633, 78 L Ed 551

Minn—Holz v Chicago, M, St P. & P. R. Co., 224 NW. 241, 176 Minn 575

Mo—Wilson v. Thompson, 133 SW 2d 331, 345 Mo. 319

Tex—Fort Worth & D C Ry Co. v Williams, Civ App, 275 SW 415, certiorari denied 46 S Ct 356, 270 US 661, 70 L Ed 786
39 C J. p 1072 note 64 [a].

63. US—Myers v Reading Co, Pa., 67 S Ct 1334, 331 US 477, 91 L Ed 1616—Cusson v Canadian Pac Ry Co, CCA Vt, 115 F 2d 430—Sullivan v. Aliquippa & S R Co., DCPa., 57 F Supp 353

Cal—Newkirk v Los Angeles Junction Ry Co, 131 P 2d 535, 21 Cal 2d 308—Hosman v. Southern Pac. Co., 83 P 2d 88, 28 Cal App 2d 621, certiorari denied Southern Pac Co v Hosman, 59 S Ct 645, 306 US 656, 83 L Ed 1054—Karberg v Southern Pac. Co., 52 P 2d 285, 10 Cal App 2d 234—Ballard v Sacramento Northern Ry Co, 14 P 2d 1045, 126 Cal App 486, rehearing denied 15 P 2d 798, 126 Cal App 486—Qualls v. Atchison, T. & S. F Ry Co, 296 P. 645, 112 Cal App 7

Ga.—Louisville & N R. Co v Crapps, 8 SE 2d 413, 62 Ga App 437—Louisville & N R Co v Edwards, 158 SE 361, 43 Ga App

167—Western & A R R v Meister, 140 SE 905, 37 Ga App 570

Ill—Anderson v Chesapeake & O R Co, 263 Ill App 601, affirmed 186 NE 185, 352 Ill 561, certiorari denied Chesapeake & O Ry Co v Anderson, 54 S Ct. 93, 290 US 675, 78 L Ed 583

Ind—Pennsylvania R Co v. Hough, 161 NE 705, 88 Ind App 601.

Mo—Wild v. Pitcairn, 149 SW 2d 800, 347 Mo. 915, certiorari denied Pitcairn v Wild, 62 S Ct 72, 314 US 638, 86 L Ed 512

Okl—Missouri-Kansas-Texas R Co v Highfill, 293 P 182, 146 Okl 84, certiorari denied 51 S Ct 433, 283 US 834, 75 L Ed 1446.

Tex—International & G N R Co v Finger, Civ App, 16 SW 2d 132, error dismissed—International-Great Northern R Co v Hailey, Civ App, 9 SW 2d 182, certiorari denied 50 S Ct 17, 280 US 558, 74 L Ed 613
39 C J p 1072 note 65 [a]

64. US—Fort Street Union Depot Co v Hillen, CCA Mich, 119 F 2d 307, certiorari denied 62 S Ct 82, 314 US 642, 86 L Ed 515
39 C J p 1072 note 66 [a]

65. Ga—Southern Ry Co v Goree, 187 SE 297, 54 Ga App 134—Western & A R R v Hughes, 143 SE 185, 37 Ga App 771, affirmed 49 S Ct. 231, 278 US 496, 73 L Ed 473

Ind—Chesapeake & O Ry Co v Fultz, 161 NE 835, 91 Ind App 639, certiorari denied 51 S Ct 31, 282 US 855, 75 L Ed 757

Kan—Pipkin v Midland Valley R Co, 19 P 2d 701, 137 Kan 150
39 C J. p 1073 note 67 [a]

66. Ga—Southern Ry Co v. Goree, 187 SE 297, 54 Ga App 134
39 C J. p 1073 note 68 [a]

Crossing

Evidence warranted finding that protruding end of plank at railroad crossing was a defect in railroad's works, within meaning of Federal Employers' Liability Act, and that such defect was due to railroad's negligence and the proximate cause of injury to switchman who tripped over plank in attempting to alight from locomotive—Chicago Great Western Ry Co v Peeler, CCA Minn., 140 F 2d 865

67. US—Thompson v Camp, CCA Tenn, 163 F 2d 396

68. Ala—Illinois Cent R Co v Posey, 101 So 644, 212 Ala 10
39 C J p 1074 note 69 [a]

69. Ill—Brant v Chicago & A R Co, 128 NE 732, 294 Ill 606
39 C J. p 1074 note 70 [a]

70. Cal—Smith v Schumacker, 85 P 2d 967, 30 Cal App 2d 251, certiorari denied Schumacher v Smith, 59 S Ct 1046, 307 US 646, 83 L Ed 1526

Mo—Doyle v St Louis Merchants' Bridge Terminal Ry Co, 31 SW 2d 1010, 336 Mo 425, certiorari denied St Louis Merchants' Bridge Terminal R R v Doyle, 51 S Ct 345, 283 US 820, 75 L Ed 1435
39 C J p 1074 note 71 [a]

71. US—Ellis v Union Pac R Co, Neb, 67 S Ct. 598, 329 US 649, 91 L Ed 572

Cal—Haskins v Southern Pac Co, 39 P 2d 895, 3 Cal App 3d 177
39 C J p 1074 note 72 [a]

72. Conn—Shirowski v New York, N H & H R Co, 108 A. 805, 94 Conn 303

39 C J p 1074 note 73 [a].

73. US—Splint Coal Corporation v Anderson, CCA Ky, 109 F 2d 896, certiorari denied 61 S Ct 18, 311 US 661, 85 L Ed 424

Okl—Quapaw Mining Co v Cogburn, 190 P 416, 78 Okl 227
39 C J p 1075 note 74 [a]

Safe place along haulway

Evidence was held sufficient to show negligence where the master failed to provide safe places of refuge along the haulway—Ford v Lehigh & Wilkes-Barre Coal Co, 101 A 958, 258 Pa. 24—39 C J. p 1076 note 88 [a]

74. Mass—Kendrick v Lynn Sand & Stone Co, 59 NE 2d 702, 317 Mass 737
39 C J p 1075 note 75 [a]

75. Pa—Dohl v Clement, 107 A. 334, 263 Pa 581
39 C J p 1075 note 76 [a]

76. Ark—Bates Coal & Mining Co v Mannon, 168 SW 2d 408, 205 Ark 215

Cal—Humphrey v Star Petroleum Co, 293 P. 692, 110 Cal App 15.
Mo—Totten v Smith Bros, App, 3 SW 2d 740
39 C J. p 1076 note 85 [a]

77. Okl—McAlester-Edwards Coal Co v. Stephenson, 260 P. 78, 126 Okl. 219.

ate⁷⁸ or to sprinkle⁷⁹ the place of work, or where the master has failed to timber or otherwise shore up an unsafe place⁸⁰ or to furnish suitable material for such timbering,⁸¹ and the servant has been injured by reason of falling or slipping material in a mine,⁸² quarry,⁸³ tunnel,⁸⁴ pit,⁸⁵ trench,⁸⁶ or other excavation.⁸⁷

Also the evidence has been held sufficient to show negligence in failing to guard the dangerous part of a running machine or hoisting device,⁸⁸ or to cover or rail a dangerous aperture,⁸⁹ or to maintain a proper railing along a dangerous passage-

way⁹⁰ or support,⁹¹ or to furnish adequate safety equipment or other safeguards to protect the servant from a known dangerous condition of appliance or place.⁹²

Evidence held insufficient to show negligence. In accordance with the facts and circumstances of the particular case, the evidence has been held to be insufficient to warrant recovery by plaintiff for alleged negligence of the master in furnishing defective appliances⁹³ or in providing an unsafe place for the servant to perform his work.⁹⁴ More specifically, the evidence has been held insufficient to

78. Ark.—Central Coal & Coke Co v Barnes, 233 S.W. 683, 149 Ark. 533 39 C.J. p 1076 note 86 [a].

79. Ill.—Davis v Illinois Collieries Co, 88 N.E. 836, 232 Ill. 284 39 C.J. p 1076 note 87 [a].

80. U.S.—Splint Coal Corporation v Anderson, CCA Ky, 109 F.2d 896, certiorari denied 61 S.Ct. 18, 311 U.S. 661, 85 L.Ed. 424.

Ky.—Breslin v Blair, 60 S.W.2d 337, 249 Ky. 178.

39 C.J. p 1076 note 88 [a].

81. Kan.—Ricci v Cherokee & Pittsburgh Coal & Mining Co, 140 P. 884, 92 Kan. 349.

39 C.J. p 1076 note 84 [a].

82. U.S.—Splint Coal Corporation v Anderson, CCA Ky, 109 F.2d 896, certiorari denied 61 S.Ct. 18, 311 U.S. 661, 85 L.Ed. 424.

Ark.—New Union Coal Co v Sult, 290 S.W. 580, 172 Ark. 753.

Ky.—Southern Mining Co v Saylor, 95 S.W.2d 236, 264 Ky. 655.

Mo.—Biondi v Central Coal & Coke Co, App, 297 S.W. 171, affirmed 9 S.W.2d 596, 320 Mo. 1180.

Okl.—Adamson v Allende, 62 P.2d 1229, 178 Okl. 464.

39 C.J. p 1076 note 77 [a].

83. Okl.—Southwest Stone Co v Hughes, 177 P.2d 489, 198 Okl. 257 39 C.J. p 1076 note 78 [a].

84. Ark.—Trumann Cooperage Co v Crye, 209 S.W. 278, 137 Ark. 293. 39 C.J. p 1076 note 79 [a].

85. Vt.—Johnson v Doubleday, 102 A. 1038, 92 Vt. 267.

39 C.J. p 1076 note 80 [a].

86. Ky.—Breslin v Blair, 60 S.W.2d 337, 249 Ky. 178.

Mass.—De Marco v Pease, 149 N.E. 208, 253 Mass. 499.

39 C.J. p 1076 note 81 [a].

87. Pa.—Lombardo v Pittsburgh & L. E. R. Co, 91 Pa. Super. 307 39 C.J. p 1076 note 82 [a].

88. Mo.—Ebert v. A. J. Kasper Co, 71 S.W.2d 859, 228 Mo. App. 589—Scott v American Mfg Co, App, 20 S.W.2d 592—Ranfrow v. Loose Leaf Metals Co, App, 5 S.W.2d 665.

NH.—Wemyss v Wyoming Valley Paper Co, 172 A. 438, 86 N.H. 587 Wis.—Tiemann v May, 292 N.W. 612, 235 Wis. 100.

39 C.J. p 1077 notes 89 [a], 90 [a].

Belt

NH.—Boucher v Namasket Co, 17 A.2d 98, 91 N.H. 215.

39 C.J. p 1078 note 95 [a].

Bolt or set screw

Kan.—Bollinger v Hill City, 227 P. 265, 116 Kan. 604.

39 C.J. p 1078 note 98 [a].

Cogwheel

Pa.—Maurer v. Rogers, 95 A. 593, 250 Pa. 447.

39 C.J. p 1077 note 93 [a].

Knife

Min.—Puls v. Chicago, B. & Q. R. Co, 150 N.W. 175, 127 Minn. 507.

39 C.J. p 1077 note 91 [a].

Pulley

Iowa.—Steburg v Vincent Clay Products Co, 155 N.W. 337, 173 Iowa 248.

39 C.J. p 1078 note 97 [a].

Roller

Pa.—Schwartz v Caplan, 100 A. 800, 256 Pa. 239.

39 C.J. p 1078 note 94 [a].

Saw

Va.—Atlantic Coast Line R. Co v. Bell, 141 S.E. 838, 149 Va. 720.

39 C.J. p 1077 note 92 [a].

Shaft

Mo.—Tatum v. Crescent Laundry Co, 208 S.W. 139, 201 Mo. App. 97.

39 C.J. p 1078 note 96 [a].

89. Iowa.—Iunde v. Cudahy Packing Co, 117 N.W. 1063, 139 Iowa 688.

39 C.J. p 1078 note 99 [a].

Elevator shaft

RI.—Wojtyna v Bazar Bros & Co, 142 A. 541.

39 C.J. p 1078 note 2 [a].

Hatchway

Pa.—James v Snellenburg, 90 A. 629, 244 Pa. 365.

39 C.J. p 1078 note 1 [a].

Reservoir or vat

NH.—Osman v W. H. McElwain Co, 99 A. 287, 78 N.H. 597.

39 C.J. p 1078 note 3 [a].

90. U.S.—Thomson v Boles, CCA Minn, 123 F.2d 487, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1204.

39 C.J. p 1078 note 4 [a].

91. Minn.—Security Trust Co v St. Paul Bldg. Co, 133 N.W. 861, 116 Minn. 295.

39 C.J. p 1078 note 5 [a].

92. U.S.—Pieczenka v Pullman Co, CCA N.Y., 102 F.2d 432.

NH.—Dubuc v. Amoskeag Industries, 15 A.2d 867, 91 N.H. 173.

Tex.—Neyland v Adams, Civ. App., 140 S.W.2d 238, error dismissed, judgment correct.

39 C.J. p 1078 note 6 [a], p 1079 note 7 [a].

Goggles

Ark.—Berry Asphalt Co v Kidd, 143 S.W.2d 42, 200 Ark. 1121.

Respirator or mask

U.S.—Rowe v Gatke Corporation, CCA Ind, 126 F.2d 61, petition dismissed Gatke Corporation v Rowe, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.

Cal.—Neugebauer v Gladding, 169 P. 714, 35 Cal. App. 276.

Ventilation or exhaust fans

U.S.—Rowe v Gatke Corporation, CCA Ind, 126 F.2d 61, petition dismissed Gatke Corporation v Rowe, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.

Ind.—Dean v. Dalton Foundries, 34 N.E.2d 145, 109 Ind. App. 377.

93. Iowa.—Anderson v Sheurman, 6 N.W.2d 125, 233 Iowa 705.

Ky.—Hobson v Turner, 185 S.W.2d 550, 299 Ky. 342.

La.—Buttitta v. J. C. Penny Co., App, 164 So. 469.

Mass.—Mucha v. Northeastern Crushed Stone Co, 30 N.E.2d 870, 307 Mass. 592.

Minn.—Johnson v. Anderson, 236 N.W. 628, 183 Minn. 366.

Mo.—Emrick v. City of Springfield, App, 110 S.W.2d 840.

N.Y.—Sherry v. Pennsylvania R. Co, 290 N.Y.S. 17, 248 App. Div. 439—Murray v. O'Brien Bros., 236 N.Y.S. 648, 227 App. Div. 43.

39 C.J. p 1081 note 40 [a].

94. U.S.—Bray v. Gulf Stevedoring

entitle plaintiff to recover for the alleged failure of the master to furnish his servant with a reasonably safe tool or instrument for the performance of his work,⁹⁵ in failing to furnish reasonably safe machinery,⁹⁶ in failing to furnish a reasonably safe electrical appliance or apparatus,⁹⁷ or in failing to furnish a reasonably safe platform,⁹⁸ scaffold,⁹⁹ ladder,¹ stairway,² gangway,³ or other support.⁴ Also the evidence has been held insufficient

to show negligence of the master in the construction or maintenance of an unsafe derrick, elevator, or other hoisting device.⁵

In like manner, evidence has been held insufficient to show negligence of a railroad in an action by a servant of the railroad for injury alleged to be due to the unsafe condition of a locomotive⁶ or of a railroad car,⁷ such as where the negligence alleged was failure to furnish a suitable coupler,⁸

- Co, CCA La, 18 F 2d 411—Young v New Orleans Coal & Bisso Towboat Co, DCLa, 8 F 2d 310
- Ala—Bankers' Mortg Bond Co v Sproull, 124 So 907, 220 Ala. 245
- Ark—Roe v St Louis Southwestern Ry Co, 168 S.W.2d 1112, 205 Ark. 416—Basye v. Odom, 168 S.W.2d 1092, 205 Ark. 423—Chicago, R I & P Ry Co v Sampson, 142 S.W.2d 221, 200 Ark. 906—Sparkman Hardwood Lumber Co v McCann, 80 S.W.2d 53, 190 Ark. 552
- Cal—Daly v Wight, 277 P. 882, 99 Cal App 127
- Ind—Widmer v Hufnagel, 26 N.E.2d 557, 108 Ind.App. 267
- Iowa—Anderson v Sheuerman, 6 N.W.2d 125, 232 Iowa 705
- Kan—Gifford v Wheeler, 106 P.2d 684, 153 Kan. 544
- Ky—Bishop v Walker, 172 S.W.2d 234, 294 Ky. 590
- Me—Charpentier v Great Atlantic & Pacific Tea Co, 157 A. 237, 130 Me. 423
- Mich—Sherman v Barthwell, 17 N.W.2d 727, 310 Mich. 494—Budzen v Michigan Cent R Co., 239 N.W. 889, 256 Mich. 454
- Miss—Masonite Corp v Stevens, 30 So.2d 77—Supreme Instruments Corporation v. Lehr, 1 So.2d 242, 190 Miss. 600—Aponaug Mfg Co. v Hammond, 137 So. 227, 185 Miss. 198
- Mo—Sabot v. St. Louis Cooperage Co, 282 S.W. 425, 313 Mo. 527
- Neb—Brannan v Chicago & N. W. Ry Co, 225 N.W. 474, 118 Neb. 503
- N.C—Craver v. Franklin Cotton Mills, 145 S.E. 570, 196 N.C. 330
- Okl—Kansas City, M. & O Ry. Co v. Bishop, 282 P. 1091, 140 Okl. 277
- Or—Cox v Sanitarium Co, 184 P.2d 386
- Tenn—Crane Enamelware Co. v. Bowen, 15 Tenn App 217
- Tex—Railway Express Agency v. Robinson, Civ App, 162 S.W.2d 984, error refused.
- 39 C.J. p 1061 note 40 [b]
95. Ark.—Roe v. St. Louis Southwestern Ry. Co, 168 S.W.2d 1112, 205 Ark. 416—Cleaver v. Bert Johnson Orchards, 298 S.W. 1016, 175 Ark. 223.
- Ga.—Southern Ry. Co. v Bradshaw, 37 S.E.2d 150, 78 Ga.App. 438.
- Mass—Shipp v. Boston & M. R. R., 136 N.E. 658, 283 Mass. 286.
- Miss—Masonite Corp v. Stevens, 30 So.2d 77.
- N.Y.—Hendrickson v Rice, 217 N.Y. S 35, 217 App.Div. 433
- 39 C.J. p 1064 note 48 [b].
96. U.S.—Erickson v. Pacific States Lumber Co, CCA Or, 18 F.2d 513
- Ark—Pekin Wood Products Co v Burkhardt, 96 S.W.2d 776, 192 Ark. 1025—Rice & Holiman v. Henderson, 35 S.W.2d 1016, 183 Ark. 355
- Ill—Kay v Rothschild, 2 N.E.2d 589, 285 Ill App 581.
- Mich—Muehler v Johnson, 273 N.W. 794, 280 Mich. 527
- Miss—J W Sanders Cotton Mill v Moody, 195 So. 683, 189 Miss. 284
- Mo—Williams v St Joseph Artesian Ice & Cold Storage Co, 214 S.W. 385.
- N.H.—Lafontaine v. St John, 80 A.2d 476, 92 N.H. 319.
- Wash—Bremer v Shoultes, 110 P.2d 641, 7 Wash.2d 804—Wehtje v Porter, 48 P.2d 212, 183 Wash. 177.
- 39 C.J. p 1066 note 50
97. U.S.—Federal Electric Co v. Taylor, CCA Mo, 19 F.2d 122
- Ark—Ft Smith Light & Traction Co v Cooper, 280 S.W. 990, 170 Ark. 286
- Ky—Deboe's Adm'r v West Kentucky Coal Co, 287 S.W. 568, 216 Ky. 198
- Mo—Kramer v Kansas City Power & Light Co, 279 S.W. 43, 311 Mo. 369.
- 39 C.J. p 1067 note 52
- Primary negligence not shown
- Mo—Missouri Dist Telegraph Co. v. Southwestern Bell Telephone Co, 93 S.W.2d 19, 338 Mo. 692
98. U.S.—O'Mara v. Pennsylvania R Co, CCA Ohio, 95 F.2d 762.
- 39 C.J. p 1069 note 56 [b]
99. Ark.—Missouri Pac R Co. v. Davis, 186 S.W.2d 20, 208 Ark. 86
- Mo—Guthrie v Gillespie, 6 S.W.2d 885, 319 Mo. 1137
- 39 C.J. p 1069 note 57 [b].
1. U.S.—McNeal v. Otto, CCA N.M., 91 F.2d 289.
- Ark—Harmon v Morrison, 147 S.W.2d 35, 201 Ark. 820
- Miss—Eagle Cotton Oil Co v Sollie, 187 So. 506, 185 Miss. 475.
- 39 C.J. p 1069 note 58 [b]
2. Mass—Manning v Smith, 12 N.E.2d 845, 299 Mass. 318.
- N.C—Craver v. Franklin Cotton Mills, 145 S.E. 570, 196 N.C. 330
3. S.C—Culbreth v. Taylor-Colquitt Co, 167 S.E. 148, 188 S.C. 153
- 39 C.J. p 1070 note 60 [b]
4. Mich—Morris v. Timmer, 220 N.W. 794, 243 Mich. 512
- 39 C.J. p 1070 note 61 [b].
5. U.S.—Luckenbach S S Co v. Buzynski, CCA Tex, 19 F.2d 871, reversed on other grounds 48 S.Ct. 440, 277 U.S. 226, 72 L.Ed. 860, conformed to, CCA, Luckenbach S S Co v. Buzynski, 31 F.2d 1015, certiorari denied Buzynski v. Luckenbach S S Co, 49 S.Ct. 482, 279 U.S. 867, 73 L.Ed. 1004.
- N.J—Matchett v F C Reinhardt Holding Co, 166 A. 116, 110 N.J. Law 501
- Tenn—Mebane v. Baptist Memorial Hospital, 166 S.W.2d 622, 179 Tenn. 381
- 39 C.J. p 1087 note 53 [b], p 1088 notes 54 [b], 55 [b]
- Gross negligence not shown
- Tex—San Jacinto Bldg v Washington, Civ App, 122 S.W.2d 289 Error refused
6. U.S.—Chicago Great Western R Co v. Rambo, Minn., 56 S.Ct. 698, 298 U.S. 99, 80 L.Ed. 1066, rehearing denied 56 S.Ct. 945, 298 U.S. 692, 80 L.Ed. 1409, conformed to Rambo v Chicago Great Western R Co, 268 N.W. 199, 197 Minn. 652
- Fredericks v Erie R. Co., CCA N.Y., 36 F.2d 716
- Mo—Fryer v St. Louis-San Francisco Ry Co, 63 S.W.2d 47, 333 Mo. 740—Riley v Wabash Ry Co., 44 S.W.2d 136, 328 Mo. 910—Bonnarens v Lead Belt Ry. Co, 273 S.W. 1043, 309 Mo. 65.
- Okl—Pryor v. Chicago, R I & P. Ry Co, 39 P.2d 563, 170 Okl. 158
- Va—Crosswhite v Southern Ry Co, 28 S.E.2d 777, 181 Va. 40.
- 39 C.J. p 1070 note 62 [b].
7. U.S.—Norfolk & W. Ry Co. v Hall, CCA W.Va., 49 F.2d 692
- Me—Morey v Maine Cent R. Co., 133 A. 92, 125 Me. 272.
- 39 C.J. p 1071 note 63 [b].
8. Me—Morrisette v Grand Trunk R. Co, 104 A. 633, 117 Me. 573.
- 39 C.J. p 1072 note 64 [b].

brake,⁹ or hand hold,¹⁰ or insufficient to show that defendant railroad was negligent in the construction or maintenance of its track,¹¹ roadbed,¹² yards,¹³ or bridge,¹⁴ or that it negligently permitted a dangerous obstruction to remain on,¹⁵ beside,¹⁶ or over,¹⁷ the track or roadbed.

Evidence has also been held to be insufficient to warrant a recovery by the servant for the master's alleged negligence in failing to furnish a reasonably safe place of work where the place of work was a mine¹⁸ or other excavation,¹⁹ such as where the servant was alleged to have been injured by reason

of an accumulation of explosive or poisonous gases²⁰ due to a failure to ventilate the place of work,²¹ or where the master was alleged to have failed to timber or otherwise shore up an unsafe place²² or to furnish suitable material for such timbering,²³ and the servant has been injured by reason of falling or slipping material in a mine,²⁴ quarry,²⁵ tunnel,²⁶ trench,²⁷ or other excavation,²⁸ or insufficient to show negligence in failing to guard the dangerous part of a running machine or hoisting device,²⁹ or to cover or maintain a barrier along a dangerous aperture,³⁰ or to maintain a proper rail-

9. Ill.—Carter v Peoria & P. U. Ry Co., 3 N.E.2d 955, 286 Ill. App. 532. Minn.—Collins v Great Northern Ry Co., 231 N.W. 797, 181 Minn. 125—Stemper v. Chicago, M. & St. P. Ry Co., 209 N.W. 265, 167 Minn. 379—McDonald v Great Northern Ry Co., 207 N.W. 194, 166 Minn. 87.

Wis.—Rupert v. Chicago, M. & St. P. & P. R. Co., 232 N.W. 550, 202 Wis. 563, certiorari denied 51 S.Ct. 488, 283 U.S. 840, 75 L.Ed. 1451. 39 C.J. p. 1072 note 65 [b].

10. Mo.—Zachritz v. St. Louis-San Francisco Ry Co., 81 S.W.2d 608, 336 Mo. 801, certiorari denied 58 S.Ct. 95, 296 U.S. 584, 30 L.Ed. 413—Bonnarens v. Lead Belt Ry Co., 273 S.W. 1043, 309 Mo. 65. 39 C.J. p. 1072 note 66 [b].

11. Ky.—Louisville & N. R. Co. v. Chapman's Adm'x, 190 S.W.2d 542, 300 Ky. 835. 39 C.J. p. 1072 note 67 [b].

12. U.S.—Healy v. Central R. Co. of New Jersey, D.C.N.Y., 35 F.Supp. 591.

Ark.—Roe v. St. Louis Southwestern Ry Co., 188 S.W.2d 1112, 205 Ark. 416—Caddo River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724.

Va.—Chesapeake & O. Ry Co. v. Butler, 177 S.E. 195, 163 Va. 626. 39 C.J. p. 1072 note 68 [b].

Trestle

Ark.—Missouri Pac. R. Co. v. Hathcock, 139 S.W.2d 35, 200 Ark. 294.

13. U.S.—Delaware, L. & W. R. Co. v. Koske, N.J., 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578.

Mo.—Wickham v. St. Louis-San Francisco Ry Co., 31 S.W.2d 1007. Ohio.—Bevan v. New York, C. & St. L. R. Co., 8 N.E.2d 982, 132 Ohio St. 245, certiorari denied 57 S.Ct. 924, 301 U.S. 695, 81 L.Ed. 1851.

Or.—Waller v. Northern Pac. Terminal Co. of Or., 166 P.2d 488, 178 Or. 274, certiorari denied 87 S.Ct. 45, 329 U.S. 742, 91 L.Ed. 640, rehearing denied 67 S.Ct. 181, 329 U.S. 825, 91 L.Ed. 701.

14. Okl.—Wyman v. Chicago, R. I. & P. R. Co., 184 P. 758, 76 Okl. 172.

Tex.—Fort Worth & Denver City Ry Co. v. Burton, Civ. App., 158 S.W.2d 601.

15. Ga.—Gay v. Osteen, 192 S.E. 539, 56 Ga. App. 224. 39 C.J. p. 1074 note 71 [b].

16. Ill.—Halloran v. Chicago & N. W. Ry Co., 63 N.E.2d 670, 327 Ill. App. 217. 39 C.J. p. 1074 note 72 [b].

17. Vt.—Johnson v. Boston & M. R. Co., 62 A. 1021, 78 Vt. 844, 4 L.R.A.N.S., 856. 39 C.J. p. 1074 note 73 [b].

18. Ky.—Southern Mining Co. v. Lawson, 131 S.W.2d 831, 279 Ky. 659—Hooks v. Cornett Lewis Coal Co., 88 S.W.2d 697, 260 Ky. 778. Tenn.—Moore Coal Co. v. Brown, 64 S.W.2d 3, 166 Tenn. 516. 39 C.J. p. 1075 note 74 [b].

19. Iowa.—Johnson v. J. W. Turner Impr. Co., 161 N.W. 663, 179 Iowa 547. 39 C.J. p. 1075 note 76 [b].

20. W.Va.—Dickinson v. Stuart Colliery Co., 76 S.E. 654, 71 W.Va. 325, 43 L.R.A.N.S., 335. 39 C.J. p. 1076 note 85 [b].

21. Pa.—Prattico v. Hudson Coal Co., 32 A.2d 733, 347 Pa. 490.

22. Ala.—Clark v. Choctaw Min. Co., 78 So. 372, 201 Ala. 466. 39 C.J. p. 1076 note 83 [b].

23. Ky.—Collins v. Gatloff Coal Co., 244 S.W. 887, 196 Ky. 517. 39 C.J. p. 1076 note 84 [b].

24. Va.—Edwards v. Laurel Branch Coal Co., 114 S.E. 108, 138 Va. 584. 39 C.J. p. 1075 note 77 [b].

25. Va.—Bowles v. Virginia Soapstone Co., 80 S.E. 799, 115 Va. 690. 39 C.J. p. 1076 note 78 [b].

26. N.J.—Mikula v. Delaware, L. & W. R. Co., 73 A. 507, 77 N.J.Law 744. 39 C.J. p. 1076 note 79 [b].

27. Ky.—McCarty v. Louisville & N. R. Co., 260 S.W. 6, 202 Ky. 460. 39 C.J. p. 1076 note 81 [b].

28. Ark.—Mosley v. Raines, 37 S.W.2d 78, 183 Ark. 569. 39 C.J. p. 1076 note 82 [b].

29. Ohio.—Winzeler v. Knox, 143 N.E. 24, 109 Ohio St. 503. 39 C.J. p. 1077 notes 89 [b], 90 [b].

Bolt or set screw
Cal.—Albert v. McKay, 163 P. 666, 174 Cal. 451.

Cogwheel

Ky.—Webb v. Elkhorn Min. Corp., 248 S.W. 844, 198 Ky. 270. 39 C.J. p. 1077 note 93 [b].

Knife

Me.—Cote v. Jay Mfg. Co., 98 A. 817, 115 Me. 300. 39 C.J. p. 1077 note 91 [b].

Fuller

N.Y.—Fitzgerald v. Newton Falls Paper Co., 97 N.E. 457, 204 N.Y. 184.

Tex.—Mitchell v. Comanche Cotton Oil Co., 113 S.W. 158, 51 Tex. Civ. App. 506.

Roller

Neb.—Johnson v. Model Steam Laundry Co., 128 N.W. 653, 88 Neb. 12. 39 C.J. p. 1078 note 94 [b].

Saw

N.H.—Lafontaine v. St. John, 30 A.2d 476, 92 N.H. 319. 39 C.J. p. 1077 note 92 [b].

Shaft

Cal.—Reynolds v. E. Clemens Horst Co., 170 P. 1082, 35 Cal. App. 711. 39 C.J. p. 1078 note 96 [b].

30. U.S.—Nash v. Pennsylvania R. Co., C.C.A. Ohio, 60 F.2d 26. 39 C.J. p. 1078 note 99 [b].

Elevator shaft

N.Y.—Sabatino v. Roebbling Constr. Co., 120 N.Y.S. 956, 136 App. Div. 217.

Pa.—Beach v. Hyman, 98 A. 982, 254 Pa. 131.

Hatchway

US.—Wood v. Davis, C.C.A. Fla., 290 F. 1. 39 C.J. p. 1078 note 1 [b].

Reservoir or vat

Tex.—Missouri, K. & T. R. Co. v. Graham, Com. App., 209 S.W. 399. 39 C.J. p. 1078 note 2 [b].

ing along a dangerous passageway³¹ or support,³² or to furnish adequate safety equipment or other safeguards to protect the servant from a known dangerous condition of an appliance or place.³³

d. Rules, Orders, and Acts or Omissions in Method of Work

Where relied on as a basis for recovery from a master for injury to his servant, the plaintiff must prove by a preponderance of the evidence failure of the master to have and promulgate safety rules or orders or the violation by the master or his agent of rules which have been formulated for the safety of the servant.

Where relied on as a basis for recovery from a master for injury to his servant, plaintiff must prove by a preponderance of the evidence failure of the master to have and promulgate safety rules or orders or the violation by the master or his agent of rules which have been formulated for the safety of the servant,³⁴ or of the lack of due care by the master in giving orders or directions which were confusing or which unreasonably exposed the servant to danger,³⁵ or of any negligent act or omission by the master or his agent in the methods of work or in the carrying on of operations.³⁶ On an issue

31. SC—Squire v Southern R Co, 96 SE 152, 109 SC 400.

32. Iowa—Kancevich v Cudahy Packing Co, 189 NW 186, 184 Iowa 799.

39 CJ p 1078 note 5 [b]

33. US—Nash v Pennsylvania R Co, CCA Ohio, 60 F2d 26.

Ohio—Standard Accident Ins Co v National Fire Proofing Co, 176 NE 591, 39 Ohio App 1.

39 CJ p 1078 note 6 [b], p 1079 note 7 [b]

Goggles

Mo—Brooks v Kansas City Gas Co, 127 SW2d 427, 343 Mo 1226.

34. US—Kurn v Stanfield, CCA Mo, 111 F2d 469—Southern R Co v Cook, Va., 226 F 1, 141 CCA 115, error dismissed 38 SCt 62, 245 US 677, 82 LEd 543.

Evidence held sufficient

NC—Nichols v Champion Fibre Co, 128 SE 471, 190 NC 1.

Or—Jodoin v Luckenbach S S Co, 268 P. 51, 125 Or 634.

39 CJ p 1084 note 18 [a].

Evidence held insufficient

Ark—Arkansas Mining Co v Eaton, 288 SW 399, 172 Ark 323.

Miss—Masonite Corp. v Stevens, 80 So 2d 77.

Mo—Shane v Lowden, 106 SW2d 956, 232 Mo App 360.

Neb—Ahrens v American Smelting & Refining Co, 273 NW 235, 182 Neb. 460.

Gross negligence not shown

Tex.—San Jacinto Bldg. v Washington, Civ App, 122 S.W.2d 289. Error refused.

35. Ill.—Holloran v Chicago & N W Ry Co, 63 NE2d 670, 327 Ill App 217.

Evidence held sufficient

Ala.—Louisville & N. R. Co. v Grizzard, 189 So 203, 238 Ala. 49, certiorari denied 60 SCt 140, 308 US 603, 84 LEd 504.

Ark—St. Louis-San Francisco Ry Co. v McCommon, 62 SW2d 954, 187 Ark 824, certiorari denied 54 SCt 438, 291 US 661, 78 LEd. 1053—Pine Bluff Heading Co v McMorris, 31 S.W.2d 962, 182 Ark 445.

Ind—Pinnell-Dulin Lumber Co v Day, 13 NE2d 351, 105 Ind App 62.

Ky—West Kentucky Coal Co v Myers, 287 SW 573, 216 Ky 207.

La—Tillman v. Cook, App., 3 So 2d 230.

Mo—Mooney v Monark Gasoline & Oil Co., 298 SW 69, 317 Mo 1255.

—Gallus v Pauly Jail Bldg Co, App, 282 SW 125.

NH—Kruger v Exeter Mfg Co, 149 A 872, 84 NH 290.

39 CJ p 1084 note 19 [a]

Evidence held insufficient

Ark—Batson v Smith, 117 SW2d 731, 196 Ark 386.

La—Crain v State, App., 29 So 2d 406.

Mo—Missouri Dist Telegraph Co v Southwestern Bell Telephone Co, 93 SW2d 19, 338 Mo 692.

Tex—Wichita Falls & S R Co v Burton, Civ App, 35 SW2d 476.

Rio Bravo Oil Co v Daniel, Civ App, 20 SW2d 389—St. Louis Southwestern Ry Co of Texas v Weatherly, Civ App, 2 SW2d 555.

39 CJ p 1084 note 19 [b].

Scope of employment or authority

(1) Evidence was held to authorize finding that railroad shop foreman, giving directions to mechanic's helper to wash helper's overalls and providing cleansing material, was acting within scope of his employment, with respect to railroad's liability for injury to helper's eyes from cleansing compound—Watkins v New York, N H & H R Co, 195 NE 888, 290 Mass 448.

(2) Evidence of an order by a foreman, directing a lineman to paint a telephone pole carrying heavily charged electric wires, with the assurance that they were dead, was held to warrant a finding that it was within the scope of the foreman's authority—Whalen v. New England Telephone & Telegraph Co., 117 NE 620, 238 Mass 361.

Statement equivalent to order

Statement by injured workman's superior that it was "all right to go up" smokestack authorized finding that statement was equivalent to order to ascend—Smith v Acme Boiler

& Tank Co, 32 SW2d 576, 326 Mo 784.

36. Tex.—Galveston, H & S A Ry Co v Contois, Civ App, 279 SW 929, affirmed, Com.App, 288 SW2d 154, certiorari denied 47 SCt 659, 274 US 747, 71 LEd 1323.

Weight and sufficiency of evidence as to failure to warn or instruct servant see *infra* subdivision g of this section.

Evidence held sufficient

US—Edwards v. Baltimore & O. R Co, CCA Ill, 131 F2d 366.

Ark—Hartman-Clark Bros Co v Melton, 32 SW2d 267, 190 Ark 1001—Mississippi River Fuel Corporation v Senn, 43 SW2d 255,

184 Ark. 554—Shultz Const Co v Lovett, 24 SW2d 330, 180 Ark 1104—Standard Pipe Line Co v Dillon, 296 SW 52, 174 Ark 708.

Cal—Weddie v. Loges, 125 P.2d 914, 52 Cal App 2d 115.

Colo—Beatty v Stir, 115 P2d 644, 108 Colo 253.

Fla.—Putnam Lumber Co v. Berry, 2 So 2d 133, 146 Fla 595.

Ill—Lamar v. Collins, 252 Ill App 238.

Ky—U S Fidelity & Guaranty Co v Antle, 42 SW2d 1, 240 Ky. 243—Cincinnati, N & C Ry Co v Rairden, 21 SW2d 236, 231 Ky 141.

Me—Hoskins v Bangor & A. R Co, 195 A 363, 135 Me 285.

Mass.—Allen v Allen, 11 NE2d 922, 299 Mass 89.

Minn—Angelos v Chicago, M, St P & P. R Co, 231 N.W. 922, 181 Minn. 187.

Miss—Neely v. Young, 192 So 292, 186 Miss 879.

Mo—Mrasek v Terminal R Ass'n of St. Louis, 111 SW2d 26, 341 Mo 1054, certiorari denied Terminal R. Ass'n of St. Louis v Mrasek, 68 SCt 760, 308 US 656, 82 LEd 1116.

—Nelson v Heine Boiler Co, 20 S W2d 906, 323 Mo 326.

Nev—Provensano v Long, 183 P.2d 639.

NH—Clairmont v. Cilley, 153 A. 465, 85 NH 1.

NY—Waller v. Feiss, 35 NE2d 919, 286 NY 563.

SC—Mullikin v. Southern Bleachery

as to whether a master has provided a reasonably safe method for doing the work, evidence of the customary use of the same method by other persons engaged in the same business is of some weight to show reasonable care³⁷ but it is not conclusive³⁸ On the other hand, failure of the master to employ the customary methods of doing the work or to take

the customary precautions is some evidence of the master's negligence³⁹

Cases in which the evidence was held sufficient or insufficient to show negligence are separately grouped in the footnotes where the negligence charged was in the operation of a railroad train or car,⁴⁰ as, for example, driving at excessive

& Print Works, 192 S.E. 665, 184 S.C. 449

Tex.—McMillan v. Gage, Civ App, 165 S.W.2d 754, error refused—
Eastern Iron & Metal Co v. McMorrough, Civ App, 135 S.W.2d 750—
City of Wichita Falls v. Phillips, Civ App, 87 S.W.2d 544, error dismissed—
Railway Express Agency v. Bannister, Civ App, 46 S.W.2d 372—
Rio Bravo Oil Co. v. Matthews, Civ App, 20 S.W.2d 342—
Galveston, H. & S. A. Ry. Co. v. Contois, Civ App, 279 S.W. 929, affirmed, Com App, 288 S.W.2d 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328

Wash.—Young v. International Stevedoring Co, 245 P. 9, 138 Wash. 665, affirmed 250 P. 469

Wis.—Lehner v. Chicago, M. St. P. & P. R. Co., 236 N.W. 572, 204 Wis. 558

39 C.J. p. 1082 note 17 [a], p. 1084 note 20 [a], p. 1086 note 21 [a]

Evidence held insufficient

US.—King v. U.S., D.C.N.Y., 22 F. Supp. 992

Ala.—Belcher v. Chapman, 7 So.2d 859, 242 Ala. 658

Ariz.—Southern Pac. Co. v. Gastelum, 288 P. 719, 36 Ariz. 106

Ark.—Booth & Firm Co. v. Pearsall, 33 S.W.2d 404, 182 Ark. 854—
Carnahan-Alport Lumber Co. v. Puckett, 176 S.W. 320, 118 Ark. 601

Fla.—Watson v. Watson, 163 So. 476, 121 Fla. 173

Ga.—Western & A. R. R. v. Michael, 157 S.E. 226, 42 Ga. App. 608.

Ky.—Louisville & N. R. Co. v. Yett, 168 S.W.2d 556, 293 Ky. 71—
Stegall v. Patton, 21 S.W.2d 488, 231 Ky. 365

La.—Crain v. State, App, 29 So.2d 406—
Evans v. Campbell, App., 9 So.2d 91.

Neb.—Anderson v. Svehla, 253 N.W. 863, 126 Neb. 584

N.H.—Clairmont v. Cilley, 153 A. 465, 85 N.H. 1

Okl.—Abdo v. Mullen, 44 P.2d 102, 173 Okl. 144—
White v. McGee, 11 P.2d 924, 157 Okl. 204

Tex.—Lancaster v. Taylor, Civ App, 281 S.W. 554

Wis.—Bohlmann v. Penn. Electric Corporation, 286 N.W. 552, 232 Wis. 232

39 C.J. p. 1082 note 17 [b], p. 1084 note 20 [b], p. 1086 note 21 [b]

Scope of employment of agent

Evidence has been held sufficient to show that the person whose neg-

ligence caused the injury was acting within the scope of his employment.
—Abilene Steam Laundry Co. v. Carter, Tex. Civ App, 210 S.W. 571, error refused

37. US.—Scroggs v. American Stove Co., CCA Ind., 143 F.2d 297
R.I.—Faltinal v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438

Tex.—Gordon Jones Const. Co. v. Lopez, Civ App, 172 S.W. 987, error dismissed

Use of customary appliance see supra subdivision c of this section

38. US.—Scroggs v. American Stove Co., CCA Ind., 143 F.2d 297
R.I.—Faltinal v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438

Tex.—Gordon Jones Const. Co. v. Lopez, Civ App, 172 S.W. 987, error dismissed

39 C.J. p. 331 note 63, p. 1128 note 25.

39. US.—Shoaf v. Fitzpatrick, CCA Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518—
Boal v. Electric Storage Battery Co., CCA Pa., 98 F.2d 815

Manner of loading truck

In action against employer for injuries sustained by employee while assisting in loading of truck with iron pipes, when one of pipes rolled off truck and struck employee, evidence that it was common practice to insert side boards on truck when it was being loaded with pipes, and that there were none on the truck in question, supported jury's finding that employer was negligent—
Spear v. Chelsea Bldg. Wrecking Co., 32 N.E.2d 241, 308 Mass. 416.

40. Negligence held shown

US.—Ellis v. Union Pac. R. Co., Neb., 87 S.Ct. 598, 329 U.S. 649, 91 L.Ed. 572—
Mostyn v. Delaware, L. & W. R. Co., CCA N.Y., 160 F.2d 15—
Boston & M. R. R. v. Meech, CCA Mass., 156 F.2d 109, certiorari denied 67 S.Ct. 124, 329 U.S. 763, 91 L.Ed. 658—
Reading Co. v. Geary, CCA Md., 47 F.2d 142, 79 A.L.R. 226, certiorari denied 51 S.Ct. 492, 283 U.S. 844, 75 L.Ed. 1454—
Craft v. Northern Pac. R. Co., C.Or., 62 F. 785, affirmed 69 F. 124, 16 CCA. 175—
Arnold v. Chicago, St. P., M. & O. Ry. Co., D.C. Minn., 63 F.Supp. 986—
Leuthe v. Erie R. Co., D.C.N.Y., 12 F.Supp. 161.

Ala.—Louisville & N. R. Co. v. Grizard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504—
Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384

Ark.—Chicago, R. I. & P. Ry. Co. v. Adams, 62 S.W.2d 947, 187 Ark. 816, 89 A.L.R. 688

Cal.—Matthews v. Atchison, T. & S. F. Ry. Co., 129 P.2d 435, 54 Cal. App.2d 549—
Woodward v. Southern Pac. Co., 94 P.2d 1028, 35 Cal. App.2d 130, certiorari denied Southern Pac. Co. v. Woodward, 60 S.Ct. 614, 309 U.S. 670, 84 L.Ed. 1016—
Weiland v. Southern Pac. Co., 93 P.2d 1023, 34 Cal. App.2d 500, certiorari denied Southern Pac. Co. v. Weiland, 60 S.Ct. 613, 309 U.S. 670, 84 L.Ed. 1016

Fla.—Atlantic Coast Line R. Co. v. Fogleman, 158 So. 108, 117 Fla. 334

Ga.—Pollard v. Gammon, 12 S.E.2d 624, 63 Ga. App. 852—
Louisville & N. R. Co. v. Crapps, 8 S.E.2d 413, 62 Ga. App. 437—
Southern Ry. Co. v. Woodward, 146 S.E. 561, 39 Ga. App. 173

Ill.—Halloran v. Chicago & N. W. Ry. Co., 63 N.E.2d 670, 327 Ill. App. 217—
Gensel v. New York, C. & St. L. R. Co., 261 Ill. App. 176

Ind.—Central Indiana Ry. Co. v. Mitchell, 199 N.E. 439, 102 Ind. App. 121—
Pennsylvania R. Co. v. Ribkes, 174 N.E. 437, 92 Ind. App. 611

Ky.—Illinois Cent. R. Co. v. Halterman, 271 S.W. 1103, 208 Ky. 811

Mich.—Kruk v. Minneapolis, St. P. & S. M. Ry. Co., 241 N.W. 162, 257 Mich. 152

Mo.—Derrington v. Southern Ry. Co., 40 S.W.2d 1069, 328 Mo. 283, certiorari denied Southern Ry. Co. v. Derrington, 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561—
Potterfield v. Terminal R. Ass'n of St. Louis, 5 S.W.2d 447, 319 Mo. 619, certiorari denied Terminal R. Ass'n of St. Louis v. Potterfield, 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—
Beal v. Chicago, B. & Q. R. Co., 285 S.W. 482

N.C.—Nichols v. Champion Fibre Co., 128 S.E. 471, 190 N.C. 1.

N.J.—Mullen v. Central R. Co. of New Jersey, 156 A. 318, 9 N.J. Misc. 1083, affirmed 162 A. 424, 109 N.J. Law 414.

Pa.—Coleman v. Reading Co., 29 A. 2d 499, 346 Pa. 289.

speed,⁴¹ disregarding signals,⁴² failing to maintain a proper lookout,⁴³ failing to stop in time to avert the accident,⁴⁴ sending unattended cars down the track,⁴⁵ starting without awaiting the customary signal,⁴⁶ causing an extraordinarily violent jerk,⁴⁷

Tenn.—Kurn v Weaver, 161 S W 2d 1005, 25 Tenn App 556

Tex.—Texas & P Ry Co. v. Riley, Civ App, 183 S W 2d 991, error refused, certiorari denied 65 S Ct 1414, 326 US 873, 89 L Ed 1991—Missouri-Kansas-Texas R. Co. of Texas v McKinney, Civ App, 136 S W 2d 789, affirmed Missouri, K & T R. Co. of Texas v McKinney, 145 S W 2d 1081, 136 Tex 75—Texas & N O R Co v Warden, Civ App, 107 S W 2d 451, error dismissed—Texas & Pac Ry Co v. Kelly, Civ App, 35 S W 2d 749, reversed on other grounds, Com App, 51 S W 2d 299, certiorari denied Kelly v Texas & P R Co, 53 S Ct 90, 287 US 644, 71 L Ed 557—Texas & N O R Co v Stevens, Civ App, 15 S W 2d 200, affirmed, Com App, 24 S W 2d 9—St Louis Southwestern Ry Co of Texas v Smithhart, Civ App, 9 S W 2d 146—Houston & T C R Co v Shepherd, Civ App, 6 S W 2d 410—St Louis, B & M Ry Co v Knight, Civ App, 395 S W 945

Utah—Morgan v Ogden Union Ry & Depot Co, 294 P 541, 77 Utah 325. 39 C J p 1087 note 23 [a].

Negligence held not shown

US—Atchison, T. & S F Ry. Co. v. Toops, Kan, 50 S Ct 281, 281 US 351, 74 L Ed 896—Mastrandrea v Pennsylvania R. Co., CCA Pa, 132 F 2d 318—Norfolk & W Ry Co. v Collingsworth, CCA Ohio, 83 F 2d 561—Michigan Cent R Co v Zimmerman, CCA Ohio, 34 F 2d 23—Brown v Norfolk & W Ry. Co. CCA Va., 20 F 2d 138, certiorari denied Brown v Norfolk & W Ry. Co, 48 S Ct 36, 275 US 540, 72 L Ed 414—Eckenrode v Pennsylvania R. Co., D.C.Pa., 71 F Supp 764—Willis v Pennsylvania R. Co., DCNY, 85 F Supp 941, affirmed, CCA, 122 F 2d 248, certiorari denied 62 S Ct 187, 314 US 684, 86 L Ed 647.

Ill—Union Bank of Chicago v Chicago & N. W. Ry. Co., 267 Ill App 554—Hines v Pennsylvania R. Co., 255 Ill App. 541.

Kan—Caples v. Atchison, T. & S. F. R. Co., 283 P 53, 129 Kan. 341.

Ky—Smith's Adm'rs v. Louisville & N R. Co., 32 S.W.2d 1008, 236 Ky 174.

Me—Ward v. Maine Cent. R. Co., 163 A. 273, 131 Me. 396.

Mass—McNamara v. Boston & M. R. R., 192 N.E. 519, 288 Mass. 232.

Mo—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S W 2d 791, 324 Mo. 1005.

Neb—Bernhardt v. Chicago, B & Q R. Co., 273 N.W. 209, 132 Neb. 346,

certiorari denied 58 S Ct 34, 302 U S 685, 82 L Ed 529

NH—Kenney v Boston & Maine R R, 33 A 2d 557, 92 N.H. 495

NJ—Noon v Delaware, L & W R Co., 150 A 344, 106 N.J.Law 526, certiorari denied Whitson v Delaware, L & W R Co., 51 S Ct 348, 283 US 818, 75 L Ed 1434

NY—Colby v Woodruff, 29 NYS 2d 396, 262 App Div. 945—Salisbury v New York Cent R Co., 222 NYS 38, 220 App Div 491

ND—Cunningham v Great Northern Ry. Co., 14 NW 2d 753, 73 ND 315

Okl—Atchison, T. & S F Ry. Co. v. Myers, 69 P 2d 62, 179 Okl 637, appeal dismissed Myers v Atchison, T. & S F R Co., 58 S Ct 29, 302 US 636, 82 L Ed 495

SC—Shiver v. Atlantic Coast Line R. Co., 152 SE 717, 155 SC 531

Tex.—St Louis Southwestern Ry Co. of Texas v Weatherly, Civ App, 2 S W 2d 555

Va—Norfolk & W Ry Co v. Smith, 146 SE 268, 152 Va 165.

41. Negligence held shown

Ark—Missouri Pac R Co v Wiley, 140 S W 2d 676, 200 Ark 574—Missouri Pac R Co v Wiley, 142 S W 2d 944, 200 Ark. 574, certiorari denied Thompson v. Wiley, rehearing denied 61 S Ct 170, 311 US 728, 85 L Ed 474

Ill—Holloran v. Chicago & N W. Ry. Co., 63 NE 2d 670, 327 Ill App 217

Mo—Berry v. St. Louis-San Francisco Ry Co., 26 S W 2d 983, 324 Mo 775, certiorari denied St Louis-San Francisco Ry Co. v Berry, 50 S Ct 464, 281 US 765, 74 L Ed 1173

Ohio—Tampam v. Pennsylvania R. Co., App, 51 NE 2d 736

Tex—Southern Pac Co v McKinley, Civ App, 80 S W 2d 1009, error dismissed Certiorari denied 56 S Ct 154, 296 US 631, 80 L Ed 448.

39 C J p 1088 note 24 [a].

Negligence held not shown

La.—Miller v Missouri Pac. R. Co., 121 So. 241, 9 La App 477.

ND—Cunningham v. Great Northern Ry Co., 14 NW 2d 753, 73 ND 315

39 C J. p 1088 note 24 [b].

42. Negligence held shown

Minn—Koccolos v. Chicago Great Western Ry Co., 210 N.W. 62, 167 Minn. 502.

39 C.J. p 1088 note 25 [a].

Negligence held not shown

US—Kierce v. Central Vermont Ry, CCA Vt., 79 F.2d 198, certiorari denied Central Vermont Ry. v. Kierce, 56 S Ct 152, 296 US 629, 80 L Ed. 447, and Central Vermont

Ry v Pearson, 56 S Ct. 152, 296 US 629, 80 L Ed 447.

NY—Salisbury v New York Cent R Co., 222 NYS 38, 220 App Div 491.

39 C J p 1088 note 25 [b].

43. Negligence held shown

Ark—Jonesboro, Lake City & E R Co. v Wright, 281 S W 374, 170 Ark 815

Ill—Carpenter v Grand Trunk Western R Co., 263 Ill App 462

Tenn—Kurn v Weaver, 161 S W 2d 1005, 25 Tenn App 556

39 C J p 1088 note 26 [a]

Negligence held not shown

Va—Davis v Saville, 120 SE 160, 187 Va. 562

39 C J. p 1088 note 26 [b]

44. Negligence held shown

Ga—Southern Ry Co v Blanton, 10 SE 2d 430, 63 Ga App 93

Minn—Lindberg v Great Northern Ry Co., 241 NW 49, 185 Minn 331

39 C J p 1088 note 27 [a].

Negligence held not shown

US—Central Vermont Ry v Sullivan, CCA Mass., 86 F 2d 171

Ga—Southern Ry Co v Blanton, 192 SE 437, 58 Ga App 232

39 C.J. p 1088 note 27 [b]

45. Negligence held shown

Ark—St Louis Southwestern R Co v Martin, 262 SW 982, 165 Ark 30

Ill—Lake Shore & M S R Co v Hundt, 30 NE 458, 140 Ill 535

39 C J. p 1089 note 28 [a].

Negligence held not shown

Tex—Southern Pac Co v. Evans, Civ App, 183 S W 117

46. Negligence held shown

US—Kurn v Stanfield, CCA Mo., 111 F 2d 469.

Mo—Case v. St Louis-San Francisco Ry Co., 30 S W 2d 1069, certiorari denied St Louis-San Francisco Ry Co v Case, 51 S Ct 107, 282 US 893, 75 L Ed 787

39 C.J. p 1089 note 29 [a]

Negligence held not shown

US—Missouri Pac R Co v. Mette, CCA Mo., 281 F 755.

39 C.J. p 1089 note 29 [b].

Negligence shown in accelerating speed before signal

US—Jacobs v Reading Co., CCA N.J., 130 F 2d 612.

47. Negligence held shown

Ala—Southern Ry Co v. Smith, 128 So 228, 221 Ala. 273

Cal—Gray v Southern Pac Co, 145 P 2d 561, 23 Cal 2d 632

Ky—Louisville & N R Co v Goodman, 273 S.W. 526, 210 Ky 13

Tex.—Texas & P. Ry Co. v. Hester-

or moving⁴⁸ or striking⁴⁹ of the car or locomotive at which plaintiff was engaged in work.

e. Employment of Incompetent or Vicious Servant

Negligence of the master may be sufficiently established where the servant adduces substantial evidence of the master's absence of due care in the employment or retention of an incompetent, reckless, or vicious servant.

Negligence of the master may be sufficiently established where the servant adduces substantial evidence, either direct or circumstantial, of the master's absence of due care in the employment or retention of an incompetent, reckless, or vicious servant⁵⁰. In order to establish such negligence it is essential that plaintiff show by a preponderance of evidence the fact of the servant's incompetency or vicious temperament⁵¹ and that the master knew, or in the exercise of ordinary care should have known of it.⁵² Proof alone of the happening of the accident or of a single previous act of negligence or viciousness on the part of the servant is not sufficient to show that he was generally incompetent or vicious,⁵³ but, where the previous act or omission was of an especially flagrant character, slight

evidence aliunde may be sufficient to warrant the inference of such incompetency or viciousness⁵⁴ and of the master's constructive knowledge thereof.⁵⁵

Causal connection In order to entitle a servant to recover on the ground that his injuries resulted from the negligence of an incompetent fellow servant for whose employment or retention in the service defendant was chargeable with negligence, it must be definitely shown that it was in fact the negligence of such person which caused the injury.⁵⁶

f. Insufficiency of Force for Work

Where recovery is sought by a servant on the theory that his injury was caused by the master's negligence in failing to employ a sufficient number of men to perform the work safely, the plaintiff must adduce enough evidence to show that the force was actually insufficient and that the master failed to exercise due care in this respect.

Where recovery is sought by a servant on the theory that his injury was caused by the master's negligence in failing to employ a sufficient number of men to perform the work safely, plaintiff must adduce enough evidence to show that the force was actually insufficient and that the master failed to

ly. Civ App, 79 SW 2d 909, error dismissed

39 C.J. p 1089 note 30 [a]

Negligence held not shown

Ark—Missouri Pac R Co v Guy, 157 SW 2d 11, 293 Ark. 166, certiorari granted Guy v Missouri Pac R Co, 62 S.Ct. 1046, 316 US 655, 86 L.Ed. 1735, certiorari dismissed 63 S.Ct. 23, 317 US 702, 87 L.Ed. 561

39 C.J. p 1089 note 30 [b]

48. Negligence held shown

Cal—Dick v Atchison, T & S F Ry Co, 287 P 538, 105 Cal App 363.

Mo—Demaray v Missouri-Kansas-Texas R Co, 50 SW 2d 127, 330 Mo. 589, certiorari denied Missouri-Kansas-Texas R Co v Demaray, 53 S.Ct. 20, 287 US 620, 77 L.Ed. 538

Okl—Chicago R L & P Ry. Co v Calloway, 291 P. 111, certiorari denied 51 S.Ct. 179, 282 US 894, 75 L.Ed. 788

Utah—Coray v Ogden Union Ry & Depot Co, 180 P.2d 542.

39 C.J. p 1090 note 31 [a]

Negligence held not shown

Ill—Cady v Grand Trunk Western Ry Co, 251 Ill App 513

Minn—Graham v Minneapolis, St P & S S M Ry Co, 232 NW 341, 181 Minn 314.

49. Negligence held shown

US—Chicago & N. W. R Co v Grauel, CCA Minn, 160 F.2d 820—Halges v Central R Co. of New Jersey, CCA N.Y., 58 F.2d 169, cer-

tiorari denied Central R. Co of New Jersey v Halges, 58 S.Ct. 11, 287 US 607, 77 L.Ed. 528

Ark—Missouri Pac Ry Co v Barry, 290 SW 942, 172 Ark 729, certiorari denied 48 S.Ct. 21, 275 US 529, 72 L.Ed. 409.

Cal—Showalter v Western Pac R Co, 106 P.2d 895, 16 Cal.2d 460—Qualls v Atchison, T & S F Ry Co, 296 P 645, 112 Cal App 7—McComb v Atchison, T & S F Ry Co, 294 P 81, 110 Cal App 303, certiorari denied Atchison, T & S F Ry. Co v McComb, 51 S.Ct. 486, 283 US 838, 75 L.Ed. 1449

Ill—Lake Shore & M S R Co v Hundt, 30 N.E. 458, 140 Ill 525—Patzsky v Lowden, 47 N.E.2d 338, 317 Ill App 613

Kan—Holliday v Pullman Co, 250 P 323, 121 Kan 739

Miss—Illinois Cent R Co v Ray, 148 So 283, 165 Miss 885

Tex—Southern Pac Co v Clayton, Civ App, 81 SW 2d 788, error refused Certiorari denied 56 S.Ct. 155, 286 US. 631, 80 L.Ed. 448—Texas & P Ry Co. v Aaron, Civ App, 19 SW 2d 930, certiorari denied 50 S.Ct. 409, 281 US 756, 74 L.Ed. 1166.

Utah—Coray v Ogden Union Ry. & Depot Co, 180 P.2d 542

39 C.J. p 1090 note 32 [a].

50. NH—Coughlin v. Arms Textile

Co, 46 A.2d 130, 94 N.H. 57

Tex—Fort Worth Elevator Co. v Russell, 28 SW 2d 320, reversed

on other grounds Fort Worth Elevators Co v Russell, 70 SW.2d 397, 123 Tex. 128

39 C.J. p 1090 note 33

51. Del—Warren v Harlan & Hollingsworth Corp, 84 A 215, 26 Del 182

39 C.J. p 1090 note 34.

Negligence held not shown

Ohio—Kansas City, M. & O Ry. Co. v Bishop, 282 P. 1091, 140 Okl. 277.

39 C.J. p 1090 note 34 [a]

52. Miss—Country Club of Jackson

v Turner, 4 So.2d 718, 192 Miss. 510

39 C.J. p 1091 note 35.

Knowledge held shown

Iowa—James v. Winifred Coal Co., 169 NW 121, 184 Iowa 619

39 C.J. p 1091 note 35 [a]

53. Neb—Bocian v Union Pac. R Co, 289 NW. 372, 137 Neb. 318.

39 C.J. p 1091 note 36.

54. Ill—Smith v. Chicago, P. & St. L R Co, 143 Ill App 128, affirmed

86 NE 150, 226 Ill. 369.

39 C.J. p 1091 note 37

55. Cal—Still v. San Francisco & N W R Co, 98 P 672, 154 Cal 559, 129 Am SR. 177, 20 L.R.A.N.S., 322

39 C.J. p 1091 note 38.

56. US—Brady v. Western Union Tel. Co, Mich., 113 F. 909, 51 C.C. A 539

Pa.—Brunner v. Blaisdell, 32 A. 607, 170 Pa. 25.

exercise due care in this respect.⁵⁷ Proof may be made by direct or circumstantial evidence.⁵⁸

g. Failure to Instruct or Warn Servant

Negligence of the master may be sufficiently established where the servant adduces substantial evidence which shows that the master was guilty of a failure to warn or instruct the servant as to a danger actually or constructively known to the master, but of which the servant was unaware.

The master's failure adequately to instruct or warn the servant may be proved by either direct or circumstantial evidence,⁵⁹ and negligence of the master may be sufficiently established where the servant adduces substantial evidence which shows that the master was guilty of a failure to warn or

instruct the servant as to a danger actually or constructively known to the master, but of which the servant was unaware,⁶⁰ or at any rate unappreciative, whether his ignorance or lack of appreciation may have been due to his youth or inexperience⁶¹ or to a physical or mental deficiency.⁶² On the other hand, where the evidence shows that the danger was known to the servant,⁶³ or was obvious,⁶⁴ or was one that could not reasonably have been apprehended by the master,⁶⁵ plaintiff has failed to establish negligence of the master in failing to warn or instruct the servant.

Warning signals. Substantial evidence of the failure of the master or his agent to give a warn-

57. Ala.—Seymour v Holman, 158 So 525, 229 Ala 634.
Miss—Graham v Goodwin, 156 So 513, 170 Miss 896
39 C.J. p 1092 note 42.

Weight of load

In order to sustain judgment against employer for overloading employee, there must be competent factual evidence as to actual or apparent weight of load, or such other proof as is factual equivalent of direct proof—Harris v Pounds, 187 So 891, 185 Miss 688

Combination of several factors

Where employers were not liable, either because of order given by foreman or because of alleged inadequacy of help provided to remove section of culvert, for injuries sustained by employee while assisting in removing culvert, the order and the alleged inadequacy of force, taken together, did not entitle employee to recover from employers for injuries—Bateson v Smith, 117 S.W.2d 731, 196 Ark 386

Negligence held not shown

Ark—Perkins v Pogue, 137 S.W.2d 927, 200 Ark 81—Kansas City Southern Ry Co v Holder, 127 S.W.2d 807, 198 Ark 127—Missouri Pac R Co v Horner, 15 S.W.2d 994, 179 Ark 321

Minn—Hetager v Moran, 210 N.W. 390, 168 Minn 491, rehearing denied 210 N.W. 864, 168 Minn 491.
Miss—Harris v Pounds, 187 So 891, 185 Miss 688.

Va.—Lloyd v Norfolk & W Ry Co, 145 S.E. 373, 151 Va 409.
39 C.J. p 1092 note 42 [a].

58. Mo—Hulse v Tower Grove Quarry & Construction Co, 30 S.W.2d 1018, 326 Mo 194
39 C.J. p 1092 note 40

Negligence held shown

US—Great Atlantic & Pacific Tea Co. v. Roberts, C.C.A.N.C. 161 F. 2d 929

N.Y.—Skidmore v Rosenblatt, 16 N.Y.S.2d 319, 258 App Div 919.

Tex.—St. Louis Southwestern Ry

Co v Gillenwater, Civ App, 284 S.W.2d 288, affirmed St Louis Southwestern Ry Co of Texas v Gillenwater, Com App, 294 S.W. 193
39 C.J. p 1092 note 40 [a]

59. N.H.—Stanton v Morrison Mills, 47 A.2d 112, 94 N.H. 92

60. U.S.—Ellis v Union Pac R Co, Neb, 67 S.Ct. 598, 329 US 649, 91 L.Ed 572.

Ark—Harmon v Ward, 149 S.W.2d 575, 202 Ark 54—Harmon v Harrison, 147 S.W.2d 739, 201 Ark 988
Cal—Matthews v Atchison, T & S F Ry Co, 129 P.2d 435, 54 Cal App 2d 549—Metz v Southern Pac Co, 124 P.2d 670, 51 Cal App 2d 260

Ill—Halloran v Chicago & N W Ry. Co., 63 N.E.2d 670, 327 Ill App 217

Ky—Southern Mining Co v Saylor, 95 S.W.2d 286, 264 Ky 655

Mass—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass 135—Kendrick v Lynn Sand & Stone Co, 59 N.E.2d 702, 317 Mass 737—Watkins v New York, N.H. & H.R. Co., 195 N.E. 888, 290 Mass 448

Mo—Mooney v Monark Gasoline & Oil Co, 293 S.W. 69, 317 Mo 1255—Genta v Ross, 37 S.W.2d 969, 225 Mo App. 673

N.H.—Stanton v. Morrison Mills, 47 A.2d 112, 94 N.H. 92—Roberts v Hillsborough Mills, 161 A. 29, 85 N.H. 517—Kruger v. Exeter Mfg Co, 149 A. 872, 84 N.H. 290

Okla.—Henry Chevrolet Co v Taylor, 108 P.2d 1024, 188 Okl 380

S.C.—Whisenhunt v Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213

Tex.—Beaumont, S. L. & W. Ry Co v. Schmidt, Civ App, 45 S.W.2d 734, affirmed, Com App, 72 S.W.2d 899, 123 Tex 580
39 C.J. p 1092 note 43

Negligence held not shown

Ky.—Phillips v. Keltner's Adm'r, 124 S.W.2d 71, 276 Ky. 254.

Minn—Johnson v. Anderson, 236 N.W. 628, 183 Mich 368

Mo—Shane v Lowden, 106 S.W.2d 956, 292 Mo App 360

N.H.—Sweeney v Boston & M. R. R., 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct 638, 294 U.S. 728, 79 L.Ed 1258

Okla.—Kansas City, M. & O Ry Co v Bishop, 282 P. 1091, 140 Okl 277

61. Ark—Ward Furniture Mfg Co v Mounce, 31 S.W.2d 531, 182 Ark 380—Humble Oil & Refining Co v Bearden, 271 S.W. 12, 168 Ark. 1167

Kan—Fritchman v Chitwood Battery Co, 8 P.2d 368, 134 Kan 727
Mass—Cotoia v Seale, 27 N.E.2d 706, 306 Mass 101—Lawson v Royal Riding Stables, 26 N.E.2d 348, 305 Mass 494—Wood v Canadian Imperial Dry, 5 N.E.2d 8, 296 Mass 80.

Minn—Jenkins v. Jenkins, 19 N.W. 2d 389, 220 Minn 216

Tex.—Beaumont, S. L. & W. Ry Co v Schmidt, Civ App, 45 S.W.2d 734, affirmed 72 S.W.2d 899, 123 Tex 580

39 C.J. p 1092 notes 44, 45.

Evidence held to show sufficient warning

Ind.—Ping v Indianapolis Soap Co, 184 N.E. 908, 206 Ind 287.

62. Ark—Warren Vehicle Stock Co v Sigs, 120 S.W. 412, 91 Ark. 102.
39 C.J. p 1094 notes 46, 47.

63. Mo—Brooks v Kansas City Gas Co, 127 S.W.2d 427, 343 Mo 1226
Ohio—Shoemaker v Electric Auto-Lite Co, 41 N.E.2d 433, 68 Ohio App. 189
39 C.J. p 1094 note 48.

64. Ark—Turk v Sweeten, 27 S.W. 2d 1000, 181 Ark 759

Me—Loring v Maine Cent. R. Co., 152 A. 527, 129 Me. 369.
39 C.J. p 1094 note 49

65. Va.—Yellow Poplar Lumber Co. v Goble, 79 S.E. 1036, 115 Va. 682.
39 C.J. p 1094 note 50.

ing signal where he had reason to believe that the servant was in a position of imminent peril may be sufficient to establish negligence which will subject the master to liability for ensuing injuries to the servant.⁶⁶ The cases are separately grouped in the footnotes in which the negligence charged was the failure to give the customary warning as to the movements of trains or cars in the conduct of railroad operations,⁶⁷ as, for example, omitting to give the usual starting⁶⁸ or stopping⁶⁹ signal; failing to signal the presence of a stalled train or car obstructing the track,⁷⁰ failing to give warning of the approach of a train or car;⁷¹ or failing to give notice of the intention to conduct kicking or switching operations over the servant's place of work.⁷²

Custom to give warning A custom to warn a servant of danger need not be proved with such

fullness as would make it a rule of common law,⁷³ but the evidence must show numerous repetitions of the act extending over a considerable period of time.⁷⁴

§ 525. — Negligence of Fellow Servant

- a. In general
- b. Fact of negligence

a. In General

Whether the servants occupy the relation of fellow servants or whether one occupies such a position toward the other as to render the master liable for his negligence depends on the facts and circumstances of the particular case.

Whether the servants occupy the relation of fellow servants or whether one occupies such a position toward the other as to render the master liable for his negligence depends on the facts and cir-

66. Ark—Newark Gravel Co v Barber, 18 SW 2d 331, 179 Ark 799—Sakaba Oil Corporation v Parish, 299 SW 1016, 176 Ark 618

Okl—Kansas, O & G Ry Co v Hawkins, 64 P 2d 266, 178 Okl 639
Tex—Missouri-Kansas-Texas R Co of Tex v Waddles, Civ App, 203 SW 2d 350.

39 CJ p 1094 note 51

Negligence held not shown

Ark—Arkansas Mining Co v Eaton, 288 SW 399, 172 Ark 323.
39 CJ p 1094 note 51 [b].

67. Negligence held shown

Cal—McComb v Atchison, T. & S F Ry Co, 294 P. 81, 110 Cal App 303, certiorari denied Atchison, T. & S. F. Ry. Co v McComb, 51 S Ct 486, 283 US 838, 75 L Ed 1449
NJ—De Rose v Delaware, L & W R Co, 153 A 251, 9 NJ Misc 183, appeal dismissed 160 A 423, 109 NJ Law 135

Pa—De Lellis v Pittsburgh & L E R. Co, Com Pl, 92 Pittsb Leg J 295, affirmed 39 A 2d 588, 350 Pa 436

39 CJ p 1094 note 52 [a]

Negligence held not shown

Mass—Shepard v Boston & M. R. Co, 33 NE 508, 158 Mass 174.
Mo—Crosno v Terminal R Ass'n of St Louis, 41 SW 2d 796, 328 Mo 826—Martin v Wabash Ry. Co., 30 SW 2d 735

39 CJ p 1094 note 52 [b]

68. Negligence held shown

Ark—Ozan Grayson Lumber Co v Ward, 66 SW 2d 1074, 188 Ark 557
Mo—O'Donnell v Baltimore & O R. Co, 26 SW 2d 929, 324 Mo. 1097.
39 CJ p 1094 note 53 [a]

Negligence held not shown

La—Winbush v Texas & P. R. Co, 78 So. 557, 148 La. 275.
39 CJ p 1094 note 53 [b].

69. Negligence held shown

Minn—Thompson v Minneapolis & St L R Co, 158 N.W. 42, 133 Minn 203
39 CJ p 1095 note 54 [a].

70. Negligence held shown

Minn—Parker v Chicago Great Western R Co, 195 NW 892, 157 Minn 184
39 CJ p 1095 note 55 [a]

Negligence held not shown

NY—Tuell v Lehigh Valley R Co, 196 NYS 883, 203 App Div 254
Tex—International & G N R Co v Brice, Civ App, 111 SW. 1094

71. Negligence held shown

US—Boston & M R R v Meech, CCA Mass, 156 F 2d 109, certiorari denied 67 S Ct 124, 329 US 763, 91 L Ed 658

Ohio—Tamplin v Pennsylvania R Co, App, 51 NE 2d 736

Pa—De Lellis v Pittsburgh & L E R Co, Com Pl, 92 Pittsb Leg J 295, affirmed 39 A 2d 588, 350 Pa 436

Tenn—Kurn v Weaver, 161 SW 2d 1005, 25 Tenn App 556

39 CJ p 1095 note 56 [a]

Negligence held not shown

US—Willis v Pennsylvania R R Co, DCNY, 35 F Supp 941, affirmed, CCA, 122 F 2d 248, certiorari denied 62 S Ct 187, 314 US 684, 86 L Ed 547

NH—Sweeney v Boston & M R R, 175 A 243, 87 NH 90, certiorari denied 55 S Ct 632, 294 US 728, 79 L Ed 1268

NY—Cook v Erie R Co, 1 NYS 2d 846, affirmed 12 NYS 2d 1010, 257 App Div. 909

Or—Elmer v Oregon Short Line R Co, 94 P 2d 302, 162 Or 616.

39 CJ p 1095 note 56 [b]

72. Negligence held shown

Tex—Texas & P Ry. Co. v Bald-

win, Civ App, 25 SW 2d 969, affirmed, Com App, 44 SW 2d 909, certiorari denied 53 S.Ct 11, 287 U. S 606, 77 L Ed 527

39 CJ p 1095 note 57 [a]

Negligence held not shown

Mo—Ingram v Mobile & O R Co, 30 SW 2d 989, 326 Mo 163

Pa—Carlo v Bessemer & L E R Co, 143 A 5, 293 Pa 343, certiorari denied 49 S Ct 25, 278 U.S. 623, 73 L Ed 543

39 CJ p 1095 note 57 [b]

73. US—St Louis & S F Ry Co v Jeffries, CCA Mo, 276 F 73

Mo—Young v Terminal R R Ass'n of St Louis, 193 SW 2d 402—Wellinger v Terminal R Ass'n of St Louis, 183 SW 2d 908, 353 Mo. 670—Armstrong v Mobile & O R. Co, 55 SW 2d 460, 331 Mo 1224, certiorari denied Mobile & O R. Co v Armstrong, 53 S Ct 689, 389 US 743, 77 L Ed 1490—O'Donnell v Baltimore & O R Co, 26 SW. 2d 929, 324 Mo 1097

74. Pa—Carlo v. Bessemer & L. E. R. Co, 143 A 5, 293 Pa 343, certiorari denied 49 S Ct 25, 278 US 623, 73 L Ed 543

Custom to give warning not shown

Mo—Shane v. Lowden, 106 SW 2d 956, 232 Mo.App. 380

NJ—Matarani v Reading Co, 194 A. 246, 119 NJ Law 43, certiorari denied Matarani v Reading Co, 58 S Ct 481, 802 US 766, 32 L Ed 595

Violation of custom shown

Cal—Matthews v Atchison, T & S F Ry Co, 129 P 2d 435, 54 Cal App 2d 549

Tex—Missouri-Kansas-Texas R. Co of Tex v Waddles, Civ App, 203 SW 2d 350.

cumstances of the particular case⁷⁵ Evidence that plaintiff worked under the same roof with the person who caused the injury and was paid by the same employer is not conclusive as a showing that they were fellow servants.⁷⁶ In accordance with the facts and circumstances of the particular case, evidence has been held to be sufficient⁷⁷ or not sufficient⁷⁸ to show that the person whose act caused or contributed to the injury was a vice principal or superior servant.

Where an employee is injured by the act of another employee, proof that the other employee was acting within the scope of his employment is essential to establish the employer's liability under

the doctrine of respondeat superior.⁷⁹

b. Fact of Negligence

Evidence of the fellow servant's negligence must be substantial, but circumstantial evidence may be sufficient.

In order to establish the negligence of a fellow servant as the proximate cause of the injury, plaintiff must show that the act was not that of a person of ordinary prudence under the circumstances⁸⁰ Evidence of the fellow servant's negligence must be substantial,⁸¹ and the matter must not be left to conjecture,⁸² but circumstantial evidence may be sufficient.⁸³ In accordance with the facts and circumstances of the particular case, evidence has been held to be sufficient⁸⁴ or in particular

76. Evidence held to show fellow-servant relation

Ky—Grubb v Coleman Fuel Co, 114 SW 2d 477, 272 Ky 847.

Mo—Chappee v Gus V Brecht Butchers' Supply Co, 30 SW 2d 85

Ohio—Pollock v Reitz, 176 NE 478, 38 Ohio App 487.

RI—Tanguay v Warwick Chemical Co, 173 A. 640, 54 RI 445.

39 C J p 1095 note 59 [a]

Evidence held not to show fellow-servant relation

Ala—Sloss-Sheffield Steel & Iron Co v Weir, 60 So. 851, 179 Ala 227. 39 C J p 1095 note 59 [b].

76. NH—Moore v Morse & Malloy Shoe Co, 197 A. 707, 39 NH 332

77. Ark—Jolly v Smith, 65 SW 2d 908, 188 Ark 446

Colo—Cohen v Schaetzel, 103 P 2d 1060, 106 Colo 266

Ind—McKinnon v Parrill, 38 NE 2d 1008, 111 Ind App 343

Mo—Grunevald v Kaysing Iron Works, 5 SW 2d 709—Houston v American Car & Foundry Co, App, 282 SW. 170.

78. US—Bellamy v Eagle Picher Lead Co, CCA Mo, 31 F 2d 662

Ark—Koss Const Co v Vanderburg, 47 SW 2d 41, 185 Ark 316.

Mo—Guthrie v Gillespie, 6 SW 2d 886, 319 Mo 1187.

79. Ala—Taylor v Atlantic Coast Line R. Co, 168 So 181, 232 Ala. 378

Okl—Massman Const Co v Chisholm, 145 P 2d 207, 193 Okl 473—Massman Const. Co v Chisholm, 145 P 2d 211, 193 Okl 477

Assault

Where servant committing assault induced superior servant to accompany him to certain place on employer's premises with definite intention of there assaulting superior servant and evidence did not show why assault was committed, superior servant could not recover from employer

for injuries—McCarty v. Mitchell, 151 So 567, 169 Miss 82

Employer's ratification of acts

Under the particular facts and circumstances of the case, evidence was held not to show the employer's participation in, or ratification of, an employee's willful act outside the scope of his employment

Ala—DeBerry v Goodyear Tire & Rubber Co of Alabama, 186 So 547, 237 Ala 223

Mo—Gens v Wagner Electric Mfg Co., 31 SW 2d 785, 326 Mo 603

80. US—Duncan v Montgomery Ward & Co, CCA Ark, 108 F 2d 848, modified on other grounds 61 S Ct 189, 311 US 243, 85 L Ed 147

Ark—St Louis-San Francisco Ry Co v Childers, 134 SW 2d 964, 197 Ark 527

Ga—Southern Ry Co v Perdue, 154 SE 793, 171 Ga 134

81. Ark—Missouri Pac R. Co v Davis, 122 SW 2d 546, 197 Ark 396

Minn—Noesen v Minneapolis, St P & S S M Ry Co, 283 NW 246, 204 Minn 233

Scintilla of evidence is insufficient to show negligence of a fellow servant—Gulf, M & O R Co v Joiner, Miss, 39 So 2d 255.

82. US—Duncan v Montgomery Ward & Co, CCA Ark, 108 F 2d 848, modified on other grounds 61 S Ct 189, 311 US 243, 85 L Ed 147.

83. Ark—Missouri Pac R. Co v Sullivan, 122 SW 2d 947, 197 Ark 360

84. US—Pitcairn v Devlin, CCA Ohio, 111 F 2d 785—Duncan v Montgomery Ward & Co, CCA Ark, 108 F 2d 848, modified on other grounds 61 S Ct 189, 311 US 243, 85 L Ed 147—Aqua System v Kodakoski, CCA Canal Zone, 88 F 2d 395—Norfolk & W. Ry Co v Hall, CCA Va., 49 F 2d 692—Decoss v. Turner & Blanchard, C.

CANY, 15 F 2d 258—Pallerin v. International Cotton Mills, CCA NH, 248 F 242, 160 CCA 320

Ark—Standard Oil Co of Louisiana v Chandler, 165 SW 2d 595, 204 Ark 895—Fort Smith Couch & Bedding Co v Rosell, 155 SW 2d 707, 203 Ark 35—Arkansas Power & Light Co v Dutton, 140 SW 2d 689, 200 Ark 761—Southwestern Gas & Electric Co v Halter, 138 S W 2d 793, 200 Ark 244—C W Lewis Lumber Co v. Rogers, 135 S W 2d 674, 199 Ark 678—Missouri Pac R Co v Sullivan, 122 SW 2d 947, 197 Ark 860—Rodgers v Crumpton, 118 SW 2d 480, 186 Ark 1179—Missouri Pac Transp Co v Baxter, 76 SW 2d 958, 189 Ark 1147—St Louis-San Francisco Ry Co v Norman, 277 SW 524, 169 Ark 1062

Cal—Crabtree v Western Pac R Co, 90 P 2d 835, 33 Cal App 2d 35 Ky—Chesapeake & O. Ry Co v McCracken, 61 SW 2d 618, 249 Ky 767

Mass—Messina v. Trustees of New York, N H & H R Co, 51 NE 2d 312, 314 Mass 757—Cunningham v Boston & M R R., 34 NE 2d 697, 309 Mass 215, certiorari denied Boston & M R R v Cunningham, 62 S Ct 185, 314 US 682, 86 L Ed 546—Demaris v. Van Leeuwen, 186 NE 69, 283 Mass 169—Baldwin v Sommer, 180 NE 133, 278 Mass 346

Minn—Ross v Duluth, M & I R Ry Co, 290 NW 568, 207 Minn 157, followed in 291 NW 610, 207 Minn 548, certiorari denied Duluth, M. & I R R Co v Ross, 61 S Ct 9, 311 US 656, 85 L Ed 420—Christmann v. Great Northern Ry Co, 231 NW. 710, 181 Minn 97—Kline v Byram, 314 N. W 890, 172 Minn 284

Miss—Hercules Powder Co v Hammack, 110 So 676, 145 Miss 304

Mo—Riley v Wabash Ry Co, 44 S W 2d 136, 328 Mo 910—Thompson v. Kansas City, App, 153 S.W. 2d

cases the evidence has been held insufficient⁸⁵ to show negligence of plaintiff's fellow servant; sufficient⁸⁶ or insufficient⁸⁷ to show negligence of a vice principal or superior servant; or sufficient⁸⁸ or insufficient⁸⁹ to show willful or gross negligence of a fellow servant or superior servant.

§ 526. — Assumption of Risk

Assumption of risk may be held to be established where the evidence shows that the servant knew and appreciated, or should have known and appreciated, the dangers incident to his employment.

Assumption of risk may be held to be established where the evidence shows that the servant knew and appreciated, or should have known and appreciated, the dangers incident to his employment.⁹⁰

such as those arising from a known defect in the appliance or place of work furnished by the master,⁹¹ or where it shows that the servant voluntarily adopted an unsafe method of performing the work,⁹² or, fully cognizant of the danger, failed to take ordinary precautions for his own safety,⁹³ or knowingly violated a rule promulgated by the master,⁹⁴ in the absence of special extenuating circumstances.⁹⁵ Proof that the employee knowingly assumed the extraordinary risk caused by the employer's negligence may be made by circumstantial evidence.⁹⁶

Ordinarily assumption of risk is not established where the injury is not shown by the evidence to be the result of a risk or danger usually incident to the

127—Walls v. Thompson, App. 119 S W 2d 43.

NH—Weare v Rochester Lodge No 1293, B P O of Elks, 32 A 2d 815, 92 NH 525.

NY—Laginsky v Shapiro, 283 NY S 1023, 248 App Div 218—Healy v Carter & Weeks Stevedoring Co, 210 NYS 75, 213 App Div 122 NC—Armstrong v Acme Spinning Co., 173 SE 313, 205 NC 553 Okl—Mid-Continent Petroleum Corp v Fleming, 167 P 2d 366

Pa—Toth v Reading Co., 94 Pa. Super 360.

SC—Grier v Winyah Lumber Co, 141 SE 685, 144 SC 10

Tex—St. Louis Southwestern Ry Co of Texas v Gillenwater, Com App, 294 SW 193

39 C J p 1096 note 60 [a]

85. Ark—Owosso Mfg Co v Ramsey, 138 SW 2d 790, 200 Ark 1190 —Missouri Pac. R Co v Davis, 123 S.W.2d 546, 197 Ark 896

Iowa—Baird v Ft Dodge, D M. & S R Co, 329 NW 759, 209 Iowa 1026

Mass—O'Brien v Boston & M R R., 164 NE 446, 265 Mass 527

Minn—Nadeau v Minneapolis, St P & S S M Ry Co, 283 NW 808, 182 Minn 111

Miss—Gulf, M & N R Co. v. Collins, 117 So 593, 151 Miss 240—Gulf & S I R Co v. Hales, 105 So 458, 140 Miss 829

Mo—Brooks v Kansas City Gas Co, 127 S.W.2d 497, 343 Mo 1226—McNairy v Pultizer Pub Co, App, 274 SW 349

Okl—Kansas City, M & O Ry Co v Bishop, 283 P 1091, 140 Okl 277

Tex—Carnley v Kelley, Civ App, 180 SW 2d 910—Cisco & N. El Ry Co v Villeneuve, Civ App, 270 S W 576.

86. Colo—Cohen v Schastzel, 103 P. 2d 1080, 106 Colo 266

Fla—Crenshaw Bros Produce Co v Harper, 194 So 553, 142 Fla 37

Ill—Norkevich v Atchison, T. & S

F R Co, 263 Ill App 1, certiorari denied Atchison, T & S. F. R Co v Norkevich, 52 S Ct 497, 286 US 544, 76 L Ed 1282

Mo—Thomas v. American Sash & Door Co, 14 SW 2d 1, 321 Mo. 1024

Tenn—Walton & Co v Burchel, 121 SW. 391, 121 Tenn 715, 130 Am SR 788

Improper direction or order

Mo—Morris v Atlas Portland Cement Co, 19 SW 3d 865, 323 Mo 307—Vaccaro v City of St Louis, App, 123 SW 2d 230

NY—Kostka v Staack, 43 NYS 2d 62, 266 App Div 383, affirmed 53 NE 2d 573, 291 NY 808

87. US—Wheelock v. Freiwald, C CA Mo, 66 F 2d 694.

Ark—Kansas City Southern Ry Co v Diggs, 167 SW 3d 879, 205 Ark 150

Mass—O'Brien v Boston & M R R., 164 NE 446, 265 Mass 527

88. Tex—Fort Worth Elevator Co v Russell, Civ App, 28 SW 2d 820, reversed on other grounds Fort Worth Elevators Co v Russell, 70 SW 2d 397, 123 Tex. 128

89. Va—Lloyd v Norfolk & W Ry Co, 145 SE 372, 151 Va 409

39 C J p 1096 note 60 [b]

90. Ga—Curry v Atlantic Coast Line R Co, 16 SE 2d 609, 65 Ga. App 845—Parker v Brooks, 146 SE 916, 39 Ga. App 302

Neb—Christenson v Union Pac R Co., 290 NW. 246, 137 Neb 538, certiorari granted 61 S Ct. 232, 113 US 678, 85 L Ed 1114, certiorari dismissed 61 S Ct 825, 312 U.S. 710, 85 L Ed 1142

NH—Clairmont v. Cilley, 163 A 466, 85 NH 1.

NY—Cornell v J. J. Newberry Co, 294 NYS 164, 250 App Div 816

Va—Knowles v. Southern Ry. Co., 12 SE 2d 821, 177 Va. 88.

39 C J p 1097 note 65

91. Mass—Beggelman v Romanow, 192 NE 159, 288 Mass 14

Tenn—Draper v Louisville & N R. Co, 66 SW 2d 1003, 17 Tenn App 213—Tennessee Cent. Ry. Co. v. Williams, 9 Tenn. App 529.

39 C J p 1097 note 66

Permission to replace a defective appliance which is not communicated to the employee before injury has been held to be immaterial on the question of assumed risk in using the defective appliance—Farmers' Adm'x v Chesapeake & O Ry. Co, 181 SE 334, 144 Va 65.

92. Ark—Luten Bridge Co v. Cook, 32 SW 2d 438, 182 Ark 578

NC—Brady v. Southern Ry Co, 23 SE 2d 384, 222 NC 367, certiorari denied 63 S Ct 995, 318 US 792, 37 L Ed 1158, affirmed 64 S Ct 232, 320 US 476, 88 L Ed 339

Va—Chesapeake & O Ry Co v Mizelle, 118 SE 241, 136 Va 237

39 C J p 1101 note 80

93. Mo—Wagner v. St Louis-San Francisco Ry. Co, 19 SW 2d 518, 223 Mo App 864

Utah—Buhler v Maddison, 140 P 2d 938, 105 Utah 39.

94. Ill—Jenco v Illinois Steel Co, 84 NE. 273, 233 Ill 301

39 C J p 1101 note 81

Neglect of duty

NC—Brady v Southern Ry Co, 23 SE 2d 334, 222 NC. 367, certiorari denied 63 S Ct 995, 318 US 792, 87 L Ed 1158, affirmed 64 S Ct 232, 320 US 476, 88 L Ed 339.

95. Customary disregard of rule

A showing that the rule was habitually violated, and that the master acquiesced in its violation, is sufficient to exonerate the servant who acted in reliance on such facts of the charge of assumption of risk.—Selden-Breck Constr. Co v Linnett, 134 P 556, 38 Okl. 704—39 C J. p 1101 note 82 [a].

96. Mo—Jenkins v Wabash Ry. Co, 78 S.W.2d 1002, 335 Mo. 748

employment,⁹⁷ such as where the evidence shows that the injury was due to a negligent act or omission of the master or his agent⁹⁸ Likewise, assumption of risk is not ordinarily established where the evidence shows that the defect was latent or the dangerous condition was not open or obvious,⁹⁹ or that the danger was not realized, understood, or appreciated by the servant,¹ or that the servant continued in the work only on the master's assurance

of safety² or promise to repair.³ Evidence that the employee placed himself in a position of peril in a sudden emergency in order to save human life or protect his employer's property does not show an assumption of risk by the employee.⁴

In accordance with the facts and circumstances of the particular case, evidence has been held to be sufficient to establish the servant's assumption of risk⁵ where the injury resulted from dangerous

97. *Mo—Mrzek v Terminal R Ass'n of St Louis*, 111 S.W.2d 26, 341 Mo 1054, certiorari denied Terminal R Ass'n of St Louis v Mrzek, 58 S.Ct. 760, 303 U.S. 656, 82 L.Ed. 1116.

S.C.—*Brasale v Piedmont Mfg Co*, 193 S.E. 39, 184 S.C. 471

Tenn.—*Kurn v Weaver*, 161 S.W.2d 1005, 25 Tenn.App. 556

Duty of servant to protect himself

Testimony that plaintiff was supposed to look out for his own safety does not establish that plaintiff assumed risks other than those which he was bound to assume under the law.—*Southern Ry Co v Woodward*, 146 S.E. 561, 39 Ga.App. 173

98. *Ark—St Louis-San Francisco Ry Co v Norman*, 277 S.W. 524, 169 Ark. 1062

Colo.—*Cohen v Schaetzle*, 103 P.2d 1060, 106 Colo. 266

Fla.—*Crenshaw Bros Produce Co v Harper*, 194 So. 353, 142 Fla. 27

Ill.—*Faulkner v New York Cent R Co*, 232 Ill.App. 346

Mass.—*Messina v Trustees of New York, N.H. & H.R. Co*, 51 N.E.2d 312, 314 Mass. 757

Miss.—*Blue Bell Globe Mfg Co v Lewis*, 27 So.2d 900

Mo.—*Owen v Kurn*, 148 S.W.2d 519, 347 Mo. 516

N.H.—*Dubuc v Amoskeag Industries*, 15 A.2d 867, 91 N.H. 173—*Lamarche v Lamarche*, 182 A. 549, 87 N.H. 454—*Tondreau v Boston & M.R.R.*, 157 A. 76, 85 N.H. 235—*Fears v Noel*, 145 A. 664, 83 N.H. 575

N.C.—*Batton v Atlantic Coast Line R Co*, 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R Co v Batton, 68 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112

Tex.—*Texas & P Ry Co v Aaron*, Civ.App., 19 S.W.2d 930, certiorari denied 50 S.Ct. 409, 281 U.S. 756, 74 L.Ed. 1166

39 C.J. p. 1100 note 79

Negligence of master or agent not shown

Iowa.—*Kampe v Illinois Cent R Co*, 232 N.W. 657, 211 Iowa 312, 74 A.L.R. 148

99. *U.S.—Overland Const Co v Sydnor*, C.C.A. Ohio, 70 F.2d 838—*New York C & St L R Co v Boulden*, C.C.A. Ind., 63 F.2d 917,

certiorari denied 58 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498

Ark.—*Fort Smith Couch & Bedding Co v Rozell*, 155 S.W.2d 707, 203 Ark. 35

N.H.—*Glidden v Public Service Co of New Hampshire*, 183 A. 865, 88 N.H. 4

S.C.—*Langston v Fiske-Carter Const Co*, 185 S.E. 62, 180 S.C. 113.

39 C.J. p. 1098 note 67

1. *Ala.—Louisville & N.R. Co v Hall*, 185 So. 466, 233 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560

Kan.—*Fritchman v Chitwood Battery Co*, 8 P.2d 368, 134 Kan. 727

Mass.—*Reidy v Crompton & Knowles Loom Works*, 60 N.E.2d 589, 318 Mass. 135—*Kendrick v Lynn Sand & Stone Co*, 69 N.E.2d 702, 317 Mass. 737

Mo.—*State ex rel St Louis-San Francisco Ry Co v Cox*, 46 S.W.2d 849, 329 Mo. 292

N.H.—*Boucher v Namaasket Co*, 17 A.2d 98, 91 N.H. 315—*Moore v Morse & Malloy Shoe Co*, 197 A. 707, 89 N.H. 332—*Pickett v Norwood Calf & Co*, 196 A. 627, 89 N.H. 244

Ohio.—*Flynn v Sharon Steel Corporation*, 50 N.E.2d 319, 142 Ohio St. 145

Okla.—*Mid-Continent Petroleum Corp v Jamison*, 171 P.2d 976, 197 Okl. 387

S.C.—*Langston v Fiske-Carter Const Co*, 185 S.E. 62, 180 S.C. 113

39 C.J. p. 1098 note 68, p. 1100 note 77

Compliance with negligent order

(1) Assumption of risk is not established where the evidence shows that the servant did not appreciate the dangers incident to his compliance with a negligent order given by the master

Ark.—*Standard Pipe Line Co v Gwaltney*, 53 S.W.2d 597, 186 Ark. 230

N.H.—*Clairmont v. Cilley*, 153 A. 465, 85 N.H. 1

Ohio.—*New York Cent R Co v Lukanc*, 167 N.E. 403, 32 Ohio App. 232

39 C.J. p. 1100 note 78

(2) To disprove assumption of risk the servant must show by a preponderance of evidence that he

actually complied with the order.—*Reynolds v Virginian Ry. Co*, 180 S.E. 271, 116 W.Va. 331

(3) The servant must also show that the person giving the order had authority from the master to do so.—*Koss Const Co v Vanderburg*, 47 S.W.2d 41, 185 Ark. 316

Knowledge of master's negligence

The mere fact that a servant, exposed to extraordinary peril by master's negligence, knew of master's negligence and continued his work without objection does not establish that servant assumed the increased risk, it must be shown, not only that servant was aware of negligence, but that he also realized the danger to which he was exposed.—*Federal Compress & Warehouse Co v Harmon*, 118 S.W.2d 239, 196 Ark. 417—*Choctaw, O. & G. R. Co v. Jones*, 92 S.W. 244, 77 Ark. 367

Minor employees

In case of minor employees, ordinary risks are for evidential purposes treated at the outset of the inquiry regarding assumption of risk as extraordinary.—*Crenshaw Bros Produce Co v Harper*, 194 So. 353, 142 Fla. 27

2. *Ark—Pine Bluff Heading Co v McMorris*, 31 S.W.2d 962, 182 Ark. 445

39 C.J. p. 1098 note 69

Statement that repairs were made

Wash.—*Thornton v Van De Kamp's Holland Dutch Bakers*, 42 P.2d 799, 181 Wash. 213

3. *Ark—Roach v Haynes*, 72 S.W.2d 522, 169 Ark. 399

Okla.—*Chicago, R. I. & P. Ry Co v Murphy*, 86 P.2d 629, 184 Okl. 240

39 C.J. p. 1098 note 70

4. *Ala.—Atlantic Coast Line R Co v Russell*, 111 So. 753, 215 Ala. 600

Ark.—*Central Coal & Coke Co. v Porter*, 280 S.W. 12, 170 Ark. 498

Emergency not shown

Ark.—*Koss Const Co v Vanderburg*, 47 S.W.2d 41, 185 Ark. 316

5. *Iowa.—Laws v Richards*, 231 N.W. 321, 210 Iowa 608

N.C.—*Winfree v Seaboard Air Line Ry. Co*, 155 S.E. 259, 199 N.C. 590

Okla.—*Gulf, C. & S. F. Ry Co v.*

or defective machinery,⁶ where the injury arose while plaintiff was in the service of a railroad company,⁷ or where the injury arose from the dangers incident to mining or excavating,⁸ and in like manner, under the facts and circumstances of the particular case, evidence has been held not to be sufficient to establish the servant's assumption of risk⁹ where the injury resulted from dangerous or defective machinery,¹⁰ where the injury arose while plaintiff was in the service of a railroad company,¹¹ or where the injury arose from the dangers incident to mining or excavating.¹²

§ 527. — Contributory Negligence

Where the master interposes a plea of contributory negligence on the part of the servant, he must show such contributory negligence by a preponderance of the evidence, either direct or circumstantial.

Where the master interposes a plea of contributory negligence on the part of the servant, he must

show such contributory negligence by a preponderance of the evidence,¹³ but he need not prove it beyond every theoretical possibility¹⁴ Contributory negligence,¹⁵ or its antithesis, due care,¹⁶ may be proved by circumstantial evidence. The fact that the servant failed to take every possible precaution does not conclusively establish his negligence if he has acted as the average person would have acted under the circumstances,¹⁷ and the fact that the evidence shows that plaintiff placed himself in a dangerous position because of an emergency created by the negligence of the master does not relieve the master from liability¹⁸ Evidence that the employee performed the work in the manner directed may eliminate the contention that the work was performed in a negligent manner so as to preclude recovery,¹⁹ at least where the evidence does not show that the danger in obeying the directions of the master was so absolute and imminent that injury would almost necessarily result²⁰ So, where the

Scroggins, 18 P 2d 878, 161 Okl 294

W Va.—Reynolds v Virginian Ry Co, 180 SE 271, 116 W Va. 331 39 C J p 1096 note 62

6. Neb.—Groat v Clausen, 298 NW 563, 139 Neb 689

NH.—Levesque v American Box & Lumber Co, 153 A 10, 84 NH 543

Tex.—Knight v Texas & N O R Co, Civ App, 26 SW 2d 672 39 C J p 1098 note 71.

7. US—Delaware, L & W R Co v. Koske, N J, 49 S Ct 202, 379 U S 7, 73 L Ed 578

Ark.—Missouri Pac R Co v Guy, 157 SW 2d 11, 203 Ark 166, certiorari granted Guy v Missouri Pac R Co, 62 S Ct 1046, 316 U S 655, 86 L Ed 1738, certiorari dismissed 63 S Ct 22, 317 US 702, 87 L Ed 561.

Kan.—Barlovich v Union Pac R Co, 58 P 2d 1061, 144 Kan 186

La.—Powell v Louisiana & A Ry Co, App, 152 So 371

Me.—Morey v Maine Cent R Co, 133 A 92, 135 Me 272

Mo.—Jones v St Louis-San Francisco Ry Co, 30 SW 2d 481, 335 Mo 1163

Ohio.—Tobin v Detroit, T & I R Co, 13 NE 2d 739, 57 Ohio App 306.

39 C J, p 1099 note 73

8. Tenn.—Wind Rock Coal & Coke Co v Robbins, 1 Tenn App 734 39 C J p 1100 note 75

9. US—Missouri Pac R Co v Stratt, CCA Ark, 78 F 2d 253—Steele v Erie R Co, DC NY, 54 F 2d 688, affirmed, CCA, 54 F 2d 690, certiorari denied Erie R Co v Steele, 52 S Ct 395, 285 US 545, 76 L Ed 937

Kan.—Walker v. Colgate-Palmolive-

Peet Co, 139 P 2d 157, 157 Kan 170

NH.—Ducas v International Cotton Mills, 130 A 156, 81 NH 543 39 C J p 1096 note 63

10. Fla.—H & C Operating Co v Fossum, 176 So 865, 129 Fla 480 39 C J p 1099 note 72

11. US—Owens v Union Pac R Co, Wash, 63 S Ct 1271, 319 US 715, 87 L Ed 1683, conformed to 142 F 2d 145, certiorari denied 65 S Ct 57, 323 US 740, 89 L Ed 593

Ark.—Missouri Pac R Co v Sullivan, 122 SW 2d 947, 197 Ark 360

Cal.—Matthews v Atchison, T & S F Ry Co, 129 P 2d 435, 54 Cal App 2d 549—Metz v Southern Pac Co, 124 P 2d 670, 51 Cal App 2d 260—Maurice v State, 110 P 2d 706, 43 Cal App 2d 270—King v Schumacher, 89 P 2d 466, 32 Cal App 2d 173, certiorari denied Schumacher v King, 60 S Ct 123, 308 US 593, 84 L Ed 496—MacDonnell v Southern Pac Co, 62 P 2d 201, 17 Cal App 2d 432, certiorari denied Southern Pac Co v Macdonnell, 57 S Ct 790, 301 US 688, 81 L Ed 1345

Ga.—Louisville & N R Co v Crapps, 8 SE 2d 413, 62 Ga App 437

Ill.—Patsensky v Lowden, 47 NE 2d 338, 317 Ill App 613.

Mo.—Bird v St Louis-San Francisco Ry Co, 78 SW 2d 389, 336 Mo 316

NY.—Healy v Erie R Co, 180 NE 888, 259 N.Y 40, certiorari denied 53 S Ct. 81, 287 US 628, 77 L Ed 545

Tex.—Wichita Falls & S R Co v Holbrook, Civ App, 50 SW 2d 428, affirmed 78 SW 2d 938, 125 Tex

184, certiorari denied 56 S Ct 139, 286 US 618, 80 L Ed 439 39 C J p 1100 note 74

12. Ky.—Breslin v Blair, 60 SW 2d 337, 249 Ky 178 39 C J p 1100 note 76

13. Fla.—Great Atlantic & Pacific Tea Co v. Dallas, 192 So. 887, 141 Fla 206

La.—Watkins v Jahncke Dry Docks, 125 So 469, 12 La App 350

NH.—Bridges v Great Falls Mfg. Co, 156 A 697, 85 NH 220

14. US—Hardie v New York Harbor Dock Corporation, CCA NY, 9 F 2d 545

15. NC—Ellis v Durham Herald Co, 145 SE 283, 196 NC 262 39 C J p 1101 note 84

16. Vt.—Blaisdell v Blake, 11 A 2d 155, 111 Vt 123 39 C J p 1102 note 85.

17. NH—Racette v Sunlight Baking Co, 165 A 354, 85 NH 171.

18. Miss.—Legan & McClure Lumber Co v Fairchild, 134 So. 336, 155 Miss 271.

Wis.—Central Wisconsin Trust Co v. Chicago & N W R Co, 287 NW. 699, 232 Wis 536

19. Mo.—Hankins v St. Louis-San Francisco Ry Co, App, 31 SW 2d 596, certiorari quashed State ex rel St Louis-San Francisco Ry Co v Cox, 46 SW 2d 849, 329 Mo 292

Utah.—Kaumans v White Star Gas & Oil Co, 63 P 2d 231, 92 Utah 24.

20. Loading gasoline

Evidence was held insufficient to show that loading of gasoline directly from tank car into truck storage tank as ordered by employer was so dangerous as to render contributory-

184, certiorari denied 56 S Ct 139, 286 US 618, 80 L Ed 439

39 C J p 1100 note 74

12. Ky.—Breslin v Blair, 60 SW 2d 337, 249 Ky 178

39 C J p 1100 note 76

13. Fla.—Great Atlantic & Pacific Tea Co v. Dallas, 192 So. 887, 141 Fla 206

La.—Watkins v Jahncke Dry Docks, 125 So 469, 12 La App 350

NH.—Bridges v Great Falls Mfg. Co, 156 A 697, 85 NH 220

14. US—Hardie v New York Harbor Dock Corporation, CCA NY, 9 F 2d 545

15. NC—Ellis v Durham Herald Co, 145 SE 283, 196 NC 262

39 C J p 1101 note 84

16. Vt.—Blaisdell v Blake, 11 A 2d 155, 111 Vt 123

39 C J p 1102 note 85.

17. NH—Racette v Sunlight Baking Co, 165 A 354, 85 NH 171.

18. Miss.—Legan & McClure Lumber Co v Fairchild, 134 So. 336, 155 Miss 271.

Wis.—Central Wisconsin Trust Co v. Chicago & N W R Co, 287 NW. 699, 232 Wis 536

19. Mo.—Hankins v St. Louis-San Francisco Ry Co, App, 31 SW 2d 596, certiorari quashed State ex rel St Louis-San Francisco Ry Co v Cox, 46 SW 2d 849, 329 Mo 292

Utah.—Kaumans v White Star Gas & Oil Co, 63 P 2d 231, 92 Utah 24.

20. Loading gasoline

Evidence was held insufficient to show that loading of gasoline directly from tank car into truck storage

tank as ordered by employer was so dangerous as to render contributory-

evidence shows compliance with the directions of the master on his assurance of safety, it may be sufficient to warrant recovery against the master.²¹

Where the doctrine of last clear chance is sought to be applied to impose liability on the master after negligence of the servant has been shown, the evidence must show that the master or his agent had an opportunity to avoid the accident.²²

In particular cases the evidence has been held

sufficient to show contributory negligence on the part of the servant²³ where the injury was alleged to have resulted from the dangerous or defective condition of an appliance or place of work,²⁴ such as from dangerous or defective machinery,²⁵ where the servant was injured in the course of his employment on or near an elevator or other hoisting device,²⁶ where the servant was injured while employed on a railroad,²⁷ or where the servant was

ly negligent as matter of law an employee who was burned when spark from electric pump used in such loading operation ignited the gasoline—*Kaumanns v. White Star Gas & Oil Co.*, 63 P.2d 231, 92 Utah 24

21. *Ga.*—*Louisville & N. R. Co. v. Crapps*, 8 SE2d 413, 62 Ga. App 437.

Injury from vicious dogs

The fact that servant refused to enter employers' dining room where dogs were until she received assurances from her employer that the dogs would not harm her, and also a command to enter the dining room, established that the servant was not guilty of contributory negligence, and authorized recovery by servant for injuries caused by vicious dogs harbored by her employers—*Tillman v. Cook*, La. App., 3 So 2d 280

22. *Iowa*—*Hamilton v. Chicago, B & Q R Co.*, 234 NW 810, 211 Iowa 924.

Mo.—*Owen v. Kurn*, 148 SW2d 519, 347 Mo 516

Evidence held insufficient to warrant recovery under last clear chance doctrine

U.S.—*St. Louis Southwestern Ry Co. v. Simpson*, Ark., 63 S Ct 520, 286 U.S. 346, 76 L Ed 1152—*Southern Ry Co. v. Verelle*, CCA N.C., 57 F.2d 1008.

La.—*Miller v. Missouri Pac. R. Co.*, 121 So 241, 9 La App 477

Mo.—*Barracough v. Union Pac. R. Co.*, 52 SW.2d 998, 331 Mo 157

Neb.—*Ellis v. Union Pac. R. Co.*, 19 N.W.2d 641, 146 Neb 397, opinion adhered to 22 NW 2d 305, 147 Neb. 18.

23. *Ark.*—*Turk v. Sweeten*, 27 SW.2d 1000, 181 Ark 759

Miss.—*Goodyear Yellow Pine Co. v. Clark*, 142 So 443, 163 Miss. 661

Mont.—*Burnett v. Northern Pac. Ry. Co.*, 124 P.2d 307, 113 Mont 263

N.Y.—*Alfano v. Manufacturers Trust Co.*, 45 N.Y.S.2d 843, 267 App Div 827, affirmed 60 N.E.2d 128, 293 NY 817.

N.C.—*Williamson v. Old Dominion Box Co.*, 171 SE 835, 205 NC 350

Or.—*Parrott v. Hanson*, 175 P.2d 169

—*Fitzgerald v. Oregon-Washington R & Nav. Co.*, 16 P.2d 37, 141 Or 1

Utah—*Buhler v. Maddison*, 140 P.2d 933, 105 Utah 39

39 CJ p 1101 note 84 [a], p 1106 note 98 [a]

Servant's negligence held sole cause of injury

Mo.—*Wagner v. St. Louis-San Francisco Ry Co.*, 19 SW2d 518, 223 Mo App 864.

N.C.—*Gardner v. Black Mountain Ry Co.*, 178 SE 844, 208 NC 822

Servant's negligence held proximate cause of injury

U.S.—*Slayton v. Noonan*, CCA Ala., 133 F.2d 793.

Ky.—*Howard v. Southern Harlan Coal Co.*, 162 SW2d 613, 287 Ky 228.

24. *Cal.*—*Daly v. Wight*, 277 P 882, 99 Cal App 127

N.C.—*Batson v. City Laundry Co.*, 170 SE 136, 205 NC 98

Ohio—*Baltimore & O R Co. v. McTeer*, 9 NE2d 627, 55 Ohio App 217

39 CJ p 1102 note 89 [a]

Servant's negligence held sole cause of injury

Mont.—*Morelli v. Great Northern Ry Co.*, 300 P 210, 89 Mont 603

Or.—*Abbott v. Portland Trust & Savings Bank*, 86 P.2d 962, 160 Or 699

Wash.—*Bremer v. Shoultes*, 110 P.2d 641, 7 Wash 2d 804

25. *Mich.*—*Puzerski v. Buhl Stamping Co.*, 218 NW 655, 242 Mich 336

Neb.—*Groat v. Clausen*, 298 NW. 563, 139 Neb 689.

N.H.—*Lafontaine v. St John*, 30 A. 2d 476, 92 NH 319

39 CJ p 1103 note 90 [a].

26. *U.S.*—*Davis v. F. W. Woolworth Co.*, CCA Okl., 80 F.2d 344

N.C.—*Williamson v. Old Dominion Box Co.*, 171 SE 835, 205 NC 350

S.C.—*McGuire v. Steinberg*, 193 SE 205, 185 SC 97

39 CJ p 1104 note 92 [a].

27. *U.S.*—*Sheehan v. New York, N. H & H R Co.*, CCANY, 93 F. 2d 442, certiorari denied 58 S Ct 942, 304 US 560, 82 L Ed 1527

Ark.—*Missouri Pac. R. Co. v. Haigler*, 158 SW2d 703, 203 Ark. 804

—*St. Louis-San Francisco Ry Co. v. Tidmore*, 47 SW2d 16, 185 Ark 177

Iowa—*Hamilton v. Chicago, B & Q R Co.*, 234 NW 810, 211 Iowa 924

Miss.—*Favre v. Louisville & N R Co.*, 178 So 327, 180 Miss 843

Mo.—*Ingram v. Mobile & O R Co.*, 30 SW2d 989, 326 Mo 163

N.Y.—*Kawacs v. Delaware, L & W R Co.*, 181 NE 87, 259 NY 166,

reargument denied 191 NE 513, 264 NY 459, certiorari denied 53 S Ct. 121, 287 US 659, 77 L Ed 569

39 CJ p 1104 note 94 [a]

Occupying place of danger

That steam fitter's helper was standing upon footboard of locomotive at time of collision or was seated on the water tank was held immaterial as respects liability of railroad for his death, where either place was a position of known and obvious danger—*Buckner v. Southern Ry Co.*, 96 SW.2d 600, 20 Tenn App 212

Servant's negligence held sole cause of injury

U.S.—*Baltimore & O R Co. v. Berry*, Mo., 62 S Ct 510, 286 US 273, 76 L Ed 1098—*Pitcairn v. Hayes*, C

CA Ohio, 107 F.2d 936

Ill.—*Helton v. Thomson*, 36 NE2d 267, 311 Ill App 354, certiorari denied 62 S Ct 1280, 316 US 638, 86 L Ed 1760, rehearing denied 63 S

Ct 24, 317 US 704, 87 L Ed 562

N.C.—*Brady v. Southern Ry Co.*, 23 SE2d 334, 222 NC 367, certiorari denied 63 S Ct 995, 318 US 782, 87 L Ed 1168, affirmed 64 S Ct 232, 320 US 476, 88 L Ed 339

Pa.—*Carlo v. Bessemer & L E R Co.*, 143 A. 5, 293 Pa. 343, certiorari denied 49 S Ct 25, 278 US 622, 73 L Ed 548.

Violation of rule or order shown

Ill.—*Helton v. Thomson*, 36 NE2d 267, 311 Ill App 354, certiorari denied 62 S Ct 1280, 316 US 638, 86 L Ed 1760, rehearing denied 63 S

Ct 24, 317 US 704, 87 L Ed 562

Waiver of rule

In action for injuries sustained by railroad car inspector when run over in process of inspecting a car, evidence did not establish that railroad had waived safety rule requiring workmen to place a blue flag at both ends of cars when working about or

injured in the course of mining or excavating operations.²⁸

The facts and circumstances have also been held to show due care, or not to show contributory negligence, on the part of the servant²⁹ where the injury was alleged to have resulted from the danger-

ous or defective condition of an appliance or place of work,³⁰ such as from dangerous or defective machinery,³¹ where the servant was injured in the course of his employment on or near an elevator or other hoisting device,³² where the servant was injured while employed on a railroad,³³ or where

under cars so as to relieve inspector from the binding effect of the rule—*Lasagna v. McCarthy*, Utah, 177 P.2d 784.

28. Ga.—*Western & A. R. R. v. Michael*, 157 S.E. 226, 42 Ga. App. 603

39 C.J. p. 1106 note 96 [a]

Violation of rule or order shown

Ky.—*Carbon Mining Co. v. Ward's Adm'x*, 178 S.W.2d 955, 297 Ky. 47

29. U.S.—*Pellerin v. International Cotton Mills, NH*, 248 F. 242, 180 CCA 320

Ark.—*Fort Smith Couch & Bedding Co. v. Rosell*, 155 S.W.2d 707, 208 Ark. 35—*Bradley Lumber Co. of Arkansas v. Clanton*, 147 S.W.2d 14, 201 Ark. 657—*Miller v. Harris*, 381 S.W. 907, 170 Ark. 1193—*Humble Oil & Refining Co. v. Bearden*, 271 S.W. 12, 158 Ark. 1167

Cal.—*Bryant v. Market St. Ry. Co.*, App., 158 P.2d 18—*Weddle v. Loges*, 125 P.2d 914, 52 Cal. App. 2d 115.

Colo.—*Cohen v. Schaetsel*, 103 P.2d 1080, 108 Colo. 266

Ga.—*Central of Georgia Ry. Co. v. Summers*, 129 S.E. 659, 34 Ga. App. 340

Miss.—*Legan & McClure Lumber Co. v. Fairchild*, 124 So. 336, 155 Miss. 271

NH.—*Bill v. New England Cities Ice Co.*, 10 A.2d 862, 90 NH 453

NY.—*Waller v. Feiss*, 85 N.E.2d 919, 288 N.Y. 563.

39 C.J. p. 1101 note 84 [b], p. 1102 note 85 [a], p. 1106 note 99 [a]

Speed statute held not violated

NH.—*Racette v. Sunlight Baking Co.*, 155 A. 254, 85 NH 171.

Servant's negligence held not sole cause of injury

U.S.—*Herrin Motor Lines v. Jarvis*, CCA Miss., 156 F.2d 276.

Violation of rule or order not shown

NH.—*Pickett v. Norwood Cafe & Co.*, 195 A. 627, 89 NH 244

30. U.S.—*Rowe v. Gatke Corporation*, CCA Ind., 126 F.2d 61, petition dismissed *Gatke Corporation v. Rowe*, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561

Fla.—*Putnam Lumber Co. v. Berry*, 2 So. 2d 132, 146 Fla. 595

Kan.—*Walker v. Colgate-Palmolive-Peet Co.*, 139 P.2d 157, 157 Kan. 170.

Minn.—*Fredrickson v. Arrowhead*

Co-op Creamery Ass'n, 277 NW 345, 202 Minn. 12

Miss.—*Odum v. Walker*, 11 So. 2d 452, 193 Miss. 862.

NH.—*Dubuc v. Amoskeag Industries*, 15 A.2d 867, 91 NH 173

Wash.—*Etel v. Grubb*, 288 P. 931, 157 Wash. 311

39 C.J. p. 1102 note 89 [b]

Duty to report or remedy defect not shown

Mo.—*Fischer v. M-K Express Co.*, App., 158 S.W.2d 458

31. Fla.—*H & C Operating Co. v. Fossum*, 176 So. 865, 129 Fla. 480

39 C.J. p. 1104 note 91 [a]

32. Mass.—*Bowie v. Coffin Valve Co.*, 86 NE 914, 200 Mass. 571

Mo.—*Cech v. Mallinckrodt Chemical Co.*, 20 S.W.2d 509, 323 Mo. 601.

39 C.J. p. 1104 note 93 [a]

33. U.S.—*Guest v. Wabash R. Co.*, CCA Ill., 147 F.2d 578—*Edwards v. Baltimore & O R Co.*, CCA Ill., 131 F.2d 366—*Baltimore & O R Co. v. Brandenberger*, CCA Ohio, 74 F.2d 593

Cal.—*Weiland v. Southern Pac. Co.*, 93 P.2d 1033, 34 Cal. App. 2d 500, certiorari denied *Southern Pac. Co. v. Weiland*, 60 S.Ct. 613, 309 U.S. 670, 84 L.Ed. 1016—*Ballard v. Sacramento Northern Ry. Co.*, 15 P.2d 793, 126 Cal. App. 486, rehearing denied 14 P.2d 1045, 126 Cal. App. 486

Ga.—*Louisville & N R Co. v. Crapps*, 8 S.E.2d 413, 62 Ga. App. 437—*Southern Ry. Co. v. Heaton*, 6 S.E.2d 339, 61 Ga. App. 386.

Ill.—*Anderson v. Chesapeake & O Ry. Co.*, 186 NE 185, 352 Ill. 561, certiorari denied *Chesapeake & O Ry. Co. v. Anderson*, 54 S.Ct. 93, 290 U.S. 675, 78 L.Ed. 583—*Brant v. Chicago & A R Co.*, 128 NE 733, 294 Ill. 606—*Halloran v. Chicago & N W Ry. Co.*, 63 N.E.2d 670, 327 Ill. App. 217

Ky.—*Southern Mining Co. v. Hensley*, 58 S.W.2d 985, 247 Ky. 276.

Mo.—*McCurry v. Thompson*, 181 S.W.2d 529, 352 Mo. 1199—*Demaray v. Missouri-Kansas-Texas R. Co.*, 50 S.W.2d 127, 330 Mo. 539, certiorari denied *Missouri-Kansas-Texas R. Co. v. Demaray*, 53 S.Ct. 20, 237 U.S. 620, 77 L.Ed. 538—*Derrington v. Southern Ry. Co.*, 40 S.W.2d 1069, 328 Mo. 383, certiorari denied *Southern Ry. Co. v. Derrington*, 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561

—*Berry v. St. Louis-San Francisco Ry. Co.*, 26 S.W.2d 988, 324 Mo. 775,

certiorari denied *St. Louis-San Francisco Ry. Co. v. Berry*, 50 S.Ct. 464, 231 U.S. 765, 74 L.Ed. 1173

—*Nibler v. Kansas City Southern Ry. Co.*, 193 S.W. 598, 197 Mo. App. 696

Ohio.—*Tamplin v. Pennsylvania R. Co.*, App., 61 NE 2d 736

Pa.—*Fox v. Lehigh Valley R. Co.*, 141 A. 157, 292 Pa. 321

SC.—*Tyner v. Atlantic Coast Line R. Co.*, 146 SE 663, 149 SC 39

Tex.—*Wichita Falls & S R Co. v. Holbrook*, Civ. App., 50 S.W.2d 428, affirmed 78 S.W.2d 938, 125 Tex. 184, certiorari denied 58 S.Ct. 139, 296 U.S. 618, 80 L.Ed. 439—*Beaumont, S L & W Ry. Co. v. Schmidt*, Civ. App., 45 S.W.2d 784, affirmed 72 S.W.2d 899, 123 Tex. 580—*St. Louis, B & M Ry. Co. v. Knight*, Civ. App., 295 S.W. 945

Wis.—*Schiefelbein v. Chicago, M. St. P & P R Co.*, 265 NW 386, 221 Wis. 35, certiorari denied *Chicago, M. St. P & P R Co. v. Schiefelbein*, 57 S.Ct. 20, 299 U.S. 558, 81 L.Ed. 411—*Nellis v. Chicago, M. St. P & P R Co.*, 236 NW 668, 205 Wis. 397, certiorari denied *Chicago, M. St. P & P R Co. v. Nellis*, 52 S.Ct. 393, 285 U.S. 543, 76 L.Ed. 935.

39 C.J. p. 1105 note 95 [a].

Employee's negligence held not sole cause of injury

Ark.—*Missouri Pac. R. Co. v. Haigler*, 158 S.W.2d 703, 203 Ark. 804

Ill.—*Adams v. Chicago & E R Co.*, 41 NE 2d 991, 314 Ill. App. 404

NY.—*Wolf v. Baltimore & O R Co.*, 189 N.E. 780, 264 N.Y. 57.

Rules and orders of railroad

(1) In order to sustain plea of railway employee's violation of order, prohibiting line-up in operating motorcar, but enjoining use of rule book, providing for written line-up when possible, evidence must show violation of both order and rule—*Southern Ry. Co. v. Smith*, 137 So. 398, 223 Ala. 533.

(2) Evidence that brakemen while employed in switching operation rode on side of freight cars all the time in violation of railroad rule authorized finding that railroad had knowledge of such practice and did not insist on strict compliance with rule, hence brakeman who was crushed against box car while riding one side of combination passenger car was not barred from recovering for injuries sustained on ground he had vio-

the servant, according to the judicial decisions in the course of mining or excavating operations on the subject in various states, was injured tions³⁴

4 TRIAL

§ 528. Conduct of Trial

The general rules governing the conduct of trials in civil actions apply in personal injury actions by a servant against his master.

The general rules governing the conduct of trials in civil actions, discussed in the C.J.S. title Trial §§ 36-156, also 64 C.J. p 65 note 20-p 232 note 84, are applicable to an action by a servant against his master for personal injuries.¹ Thus it is improper for plaintiff's counsel to place before the jury the fact that the master carries indemnity insurance.²

§ 529. Questions of Law and Fact

a. In general

b. Effect of law requiring submission of issues

c. Actions under Federal Employers' Liability Act

a. In General

In an action by a servant for personal injuries all questions of fact or mixed questions of law and fact are for the jury, under proper instructions from the court, while questions of law are for the court.

As in other cases, in an action by a servant for personal injuries all questions of fact or mixed questions of law and fact are for the jury, under proper instructions from the court,³ while questions of law are for the court.⁴ The case should be submitted to the jury where the evidence tends to support the allegations of the complaint⁵ or makes out a prima facie case;⁶ and where there is sufficient evidence to support a verdict for plaintiff it is error to direct a verdict for defendant,⁷ sustain a demurrer to the evidence,⁸ or grant a nonsuit.⁹ So, where the evidence on a material fact is conflicting,¹⁰ or involves a question of credibility,¹¹ or is such that

lated rule—*McAllister v Suncook*
Val R R, 42 A 2d 733, 93 NH 400

(8) Violation of rule or order not shown

US—*Lowden v. Burke*, CCA Minn., 129 F 2d 767.

Ala.—*Alabama Great Southern Ry Co v Norrell*, 143 So 904, 225 Ala 508

Tex.—*Missouri Pac. R Co v Jones*, Civ App, 38 SW 2d 836, affirmed 76 SW 2d 1044, 124 Tex 234, certiorari denied 55 S Ct 638, 294 US 729, 79 L Ed 1259

34. Ky.—*Breslin v. Blair*, 60 SW 2d 337, 249 Ky 178.

39 C.J. p 1106 note 97 [a]

Servant's negligence held not sole cause of injury

Ky.—*Southern Mining Co. v. Saylor*, 95 SW 2d 336, 264 Ky. 655.

1. NH—*Little v. Head & Dawst Co*, 43 A 619, 69 NH 494

N.Y.—*Murphy v. Hopper*, 78 N.Y.S 657, 75 App Div 606

39 C.J. p 1107 note 2.

General rules governing the reception of evidence have been applied
Kan.—*Johnson v. Olson*, 67 P 2d 422, 146 Kan 779.

Pa.—*Pursglove v. Monongahela Ry. Co*, 131 A 477, 285 Pa. 27, certiorari denied 46 S Ct 352, 270 US 654, 70 L Ed. 783.

39 C.J. p 1107 note 2 [a].

Failure to construe railroad rules when introduced

Although the trial court at the time railroad rules for protection of employees were admitted in evidence did not construe them, it was sufficient if in its written instructions

the court fully and completely explained and construed the rules—*Louisville & N R Co v. Mitchell*, 191 SW 465, 173 Ky 622

2. Tex.—*Wichita Falls Motor Co v. Meade*, Civ App, 203 SW 71

Wash.—*Iverson v McDonnell*, 78 P 202, 36 Wash 73

3. Mass.—*De Marco v Pease*, 149 N E 208, 253 Mass 499

N.Y.—*Gambon v City of New York*, 271 N.Y.S 244, 151 Misc 201

Wash.—*Pellerin v Washington Veneer Co*, 2 P 2d 658, 163 Wash. 555

39 C.J. p 1107 note 7

4. Ark.—*Pine Bluff, S & S Ry Co v Leatherwood*, 175 SW. 1184, 117 Ark 524

39 C.J. p 1107 note 12

5. Ill.—*Hogan v Crane Co*, 102 N E 215, 259 Ill. 47.

39 C.J. p 1107 note 9.

6. Ga.—*Louisville & N. R Co v. Barrett*, 85 SE 923, 143 Ga 742

7. US—*Chesapeake & O. Ry Co v Gowen*, CCA Ohio, 65 F 2d 260

—*Baldassarre v. Pennsylvania R Co*, CCA Ohio, 24 F 2d 201.

Fla.—*Gunn v. Jacksonville*, 64 So 485, 67 Fla 40.

Tex.—*Payne v. Harris*, Civ.App., 228 SW. 350, reversed on other grounds, Com App, 241 SW. 1008—*Missouri, K. & T. Ry Co of Texas v Maples*, Civ App, 162 S.W. 428, error refused

8. Mo.—*Kimmie v Terminal R. R. Ass'n of St Louis*, 66 SW.2d 561, 334 Mo 596

9. N.H.—*Claywood v Norwood Calf Co*, 173 A 794, 87 N.H. 482

10. US—*Mexican Cent. R Co v. Conway*, Tex., 108 F 932, 48 CCA. 147

Ala.—*St Louis & S F R. Co v Phillips*, 51 So 638, 165 Ala 504

Fla.—*Florida East Coast Ry Co v Lassiter*, 52 So 975, 59 Fla 246.

Ill.—*Jasper v Griffin Wheel Co*, 194 Ill App 517.

Ky.—*Louisville & N. R Co v Gilliland*, 295 SW. 422, 230 Ky 431, 53 ALR 386—*West Kentucky Coal Co v. Smithers*, 221 SW 558, 188 Ky. 224

Miss.—*Mississippi Utilities Co v Smith*, 145 So 896, 166 Miss 105

Mo.—*Cason v Kansas City Terminal Ry Co*, 128 SW 2d 133—*Granneman v Commercial Auto Body Co*, App, 296 SW. 437

Pa.—*Crothers v Philadelphia Electric Co*, 67 A 206, 218 Pa 214

Tex.—*Western Union Tel Co v Coker*, 204 SW 2d 977

W Va.—*Moll v Bayha*, 150 S.E. 515, 108 W Va. 173

Wis.—*Jeffers v. Green Bay & W Ry Co*, 134 NW 900, 148 Wis. 315

39 C.J. p 1107 note 8

Whether room was "enclosed room" within statute held mixed question of law and fact for jury where testimony of witnesses was in conflict and jury viewed premises—*Pellerin v Washington Veneer Co*, 2 P 2d 658, 163 Wash 555

11. Ark.—*Altman-Rodgers Co v. Rogers*, 48 SW.2d 239, 185 Ark 561

Ky.—*Dailey v Lexington & E. Ry. Co*, 203 SW 569, 180 Ky. 668.

Mo.—*Perryman v Missouri Pac. R. Co*, 31 SW.2d 4, 326 Mo. 176.

fair-minded men may reasonably draw different inferences or conclusions therefrom,¹² a jury question is presented. Conversely, where the evidence is not in conflict,¹³ and is such that fair-minded men in the exercise of reason and judgment can reach only one conclusion,¹⁴ or is insufficient to support a verdict for plaintiff,¹⁵ a question of law for the court is presented, and the court should determine the proceeding by nonsuit, directed verdict, or otherwise, in accordance with the local practice.

Right to maintain action. Whether plaintiff has a sufficient interest in the subject matter to maintain the action¹⁶ or whether the conditions precedent to the bringing of the action have been complied with¹⁷ are questions for the jury where there is a conflict of evidence.

Whether the right to recover is governed by statute or the principles of the common law ordinarily is a question for the court.¹⁸ It is also a question for the court whether in a particular case a statute is applicable,¹⁹ unless the applicability of the statute depends on the determination of a question of fact.²⁰

Dangerous work. Ordinarily, whether the work in which an employee is engaged involves risk or danger within the meaning of a statute governing such work is a question of fact for the jury,²¹ but where the facts are such that reasonable men can reach but one conclusion the question then becomes

one of law for the court to determine.²²

b. Effect of Law Requiring Submission of Issues

Constitutional and statutory provisions requiring certain questions to be submitted to the jury have been held not to require that in every case the evidence must go to the jury, regardless of its legal effect.

Sometimes by express constitutional and statutory provisions the questions of the employer's negligence, and the assumption of risk by the servant, and his contributory negligence, as discussed *infra* §§ 534, 536, 537, are required to be submitted to the jury, but it has been held that such provisions do not require that in every case the evidence must go to the jury, regardless of its legal effect,²³ and under provisions of this nature no jury question arises in the absence of evidence tending to raise the different issues, it being a question for the court whether the issues are raised.²⁴

c. Actions under Federal Employers' Liability Act

In an action under the Federal Employers' Liability Act the credibility of witnesses, the weight of evidence, and the inferences to be drawn from the facts are questions of fact for the jury; but submission to the jury of contested issues of fact is not required if there is only a scintilla of evidence or where the evidence is such that there can be but one reasonable conclusion as to the verdict or finding.

In an action under the Federal Employers' Liability Act the credibility of witnesses,²⁵ the weight and

NH—*Maltans v. City of Concord*, 166 A 267, 86 NH 211.

Tex—*Western Union Tel Co v Coker*, 204 SW2d 977—*City of Waco v Thralls*, Civ App, 172 SW2d 142, error refused.

12. ND—*Cunningham v Great Northern Ry. Co.*, 14 NW2d 753, 73 ND 815.

SC—*Wilson v. Atlantic Coast Line R. Co.*, 131 SE 777, 134 SC 31.

13. Ill—*Wicks v. Cuneo-Henneberry Co.*, 234 Ill App 502, affirmed 150 NE 276, 319 Ill 344.

Construction of unambiguous written release held question for court—*Pine Bluff, S. & S Ry Co v Leatherwood*, 175 SW. 1184, 117 Ark. 524.

14. Ky—*Louisville & N. R. Co v. Lewis*, 278 SW 143, 211 Ky 830.

ND—*Cunningham v Great Northern Ry. Co.*, 14 NW2d 753, 73 N. D. 815.

SC—*Mann v Seaboard Air Line Ry. Co.*, 136 SE 234, 138 SC 241.

Where verdict must rest solely on speculation, submitting the case to the jury is not authorized—*Fee's Adm'x v Mahan-Ellison Coal Corporation*, 43 SW2d 681, 241 Ky 231.

15. US—*New Cornelia Copper Co v. Espinoza*, CCA Ariz, 268 F 742.

16. US—*Minneapolis & St Louis R Co v. Gotchall*, Minn., 37 S Ct 598, 244 US 66, 61 L Ed 995.

39 CJ p 1112 note 44.

17. NY—*Trotto v. Bellevue & Merritt Co.*, 111 NYS 533, 127 App Div 400.

39 CJ p 1112 note 45.

18. Or—*Schulte v Pacific Paper Co.*, 135 P 527, 67 Or 334, rehearing denied 136 P. 5, 67 Or. 334.

19. US—*Continental Public Works Co v. Stein*, NY, 232 F. 559, 146 CCA 517.

39 CJ p 1107 note 17.

20. Fla—*J. Ray Arnold Lumber Corporation of Olustee v. Richardson*, 141 So. 133, 105 Fla. 204.

Wash—*Pellerin v Washington Veneer Co.*, 2 P2d 658, 163 Wash 555.

39 CJ p 1107 note 18.

21. Mich—*Fontana v Ford Motor Co.*, 270 NW 266, 278 Mich 199.

Neb—*Benner v Evans Laundry Co.*, 223 NW. 630, 117 Neb. 701, 60 A L.R. 830.

Or—*Ferretti v Southern Pac Co.*, 57

P2d 1280, 154 Or 97—*McCauley v The Willamette*, 215 P. 892, 109 Or 131.

SD—*Koenekamp v Picasso*, 269 N. W 74, 64 SD 567.

39 CJ p 1107 note 18 [a] (4).

22. Or—*Hoffman v Broadway Hazelwood*, 10 P2d 349, 139 Or 519, 83 ALR. 1008, rehearing denied 11 P 2d 814, 139 Or 519, 83 ALR 1008.

23. Neb—*Disher v Chicago, R I & P R Co.*, 140 NW 135, 93 Neb 224.

24. Neb—*Disher v Chicago, R I & P R Co.*, *supra*.

39 CJ p 1107 note 15.

25. US—*Ellis v Union Pac R Co.*, Neb, 67 S Ct 598, 329 US 649, 91 L Ed 572—*Fitzgerald v Pennsylvania R. Co.*, CCANY., 164 F2d 323—*Jacobs v. Reading Co.*, CCA NJ, 130 F.2d 612.

Cal—*Gray v Southern Pac. Co.*, 145 P 2d 561, 23 Cal 2d 632.

Mass—*Shipp v Boston & M. R R.*, 186 NE 653, 283 Mass 266.

Mo—*Crain v. Illinois Cent. R. Co.*, 73 SW2d 786, 331 Mo. 658, certiorari denied Illinois Cent R Co. v Crain, 55 S Ct 123, 293 US. 607, 79 L Ed. 698—*Mitchell v. Wabash*

probative value of evidence,²⁶ and the inferences to be drawn from uncontroverted as well as controverted facts²⁷ are questions of fact. If there is any substantial evidence to support the cause of action pleaded, it must be submitted to the jury,²⁸ and it is not the function of the court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.²⁹ A jury question is not necessarily presented, however, in every case under the act.³⁰ Submission of contested issues of fact is not required if there is only a scintilla of evidence;³¹ and the court should determine the proceeding by nonsuit, directed verdict, or otherwise, in accordance with the local practice, without sub-

mission to the jury where the evidence is such that, without weighing the credibility of witnesses,³² there can be but one reasonable conclusion as to the verdict or finding,³³ or where the evidence and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict or finding for the other party.³⁴

§ 530. — Relation of Parties

Where evidence as to the existence of the relation of master and servant at the time of the injury is conflicting or is reasonably susceptible of more than one inference, the question ordinarily should be submitted to the jury.

Where there is a conflict of evidence as to whether the relation of master and servant existed be-

Ry. Co., 69 SW2d 286, 334 Mo. 928.

Wash.—Blessing v Camas Prairie R Co., 100 P2d 416, 3 Wash 2d 268

Interested witness

US—Anderson v Baltimore & O R Co., CCA NY, 96 F2d 796

26. Cal.—Gray v Southern Pac Co., 145 P2d 561, 23 Cal 2d 632—Crabtree v Western Pac R Co., 90 P2d 835, 33 Cal App 2d 85.

Mass.—Shipp v Boston & M R R., 186 NE 653, 283 Mass 266

Mo.—Crain v Illinois Cent R Co., 73 SW2d 786, 331 Mo 658, certiorari denied Illinois Cent R Co. v Crain, 55 S Ct 123, 293 US 607, 79 L Ed 698—Mech v Terminal Railroad Ass'n of St Louis, 18 S W2d 510, 322 Mo. 937

NY—Sadowski v Long Island R Co., 37 NYS2d 457, reversed on other grounds 41 NYS2d 611, 266 App Div 782, reversed on other grounds 55 NE3d 497, 292 NY 448, affirmed 50 NYS2d 171, 268 App Div 777, conformed to 55 NE2d 497, 292 NY 448

Wash.—Blessing v Camas Prairie R Co., 100 P2d 416, 3 Wash 2d 268.

27. US—Ellis v. Union Pac. R Co., Neb., 67 S Ct 598, 329 US 649, 91 L Ed. 572—Tennant v Peoria & Pekin Union Railway Co., Ill., 64 S Ct 409, 321 US 29, 88 L Ed 520—Highfill v. Louisville & N. R Co., CCA Tenn., 154 F2d 874

Cal.—Gray v. Southern Pac Co., 145 P2d 561, 23 Cal 2d 632

28. Ga.—Louisville & N R Co v Rudder, 147 SE 795, 39 Ga App 513

Ky.—Louisville & N R Co v Stewart's Adm'r, 174 SW 744, 163 Ky. 823, affirmed Louisville & N R Co. v Stewart, 86 S Ct 586, 241 US 261, 60 L Ed 989.

Mo.—Lloyd v Alton R Co., 159 SW. 2d 267, 348 Mo 1232.

Evidence held sufficient for jury

Ala.—Louisville & N. R. Co v. Park-

er, 138 So 231, 223 Ala 626, certiorari granted 53 S Ct 496, 286 U S. 535, 76 L Ed. 1275, certiorari dismissed 53 S Ct. 94, 287 US 569, 77 L Ed 501

Cal.—Crabtree v Western Pac R Co., 90 P2d 835, 33 Cal App 2d 35—Pitt v Southern Pac Co., 9 P2d 273, 121 Cal App 238

Mo.—Godsy v Thompson, 179 SW 2d 44, 352 Mo 681, certiorari denied 65 S Ct 48, 323 US 719, 89 L Ed 578—Young v. Wheelock, 64 SW 2d 950, 333 Mo 993, certiorari denied Wheelock v Young, 54 S Ct. 527, 291 US 676, 78 L Ed 1064—Reed v. Terminal R Ass'n of St Louis, App., 62 SW2d 747

NY—Love v Baltimore & O. R. Co., 6 NE3d 405, 273 NY 464

Or.—Chatfield v Zeller, 147 P2d 222, 174 Or 59

29. US—Tennant v Peoria & Pekin Union Railway Co., Ill., 64 S Ct 409, 321 US. 29, 88 L Ed. 520—Chicago & N. W Ry Co v Green, CCA Minn., 164 F2d 55—Highfill v. Louisville & N R Co., CCA Tenn., 154 F2d 874

30. US—Wolfe v Henwood, CCA Ark., 162 F2d 998

31. US—Brady v Southern Ry Co, NC, 64 S Ct 232, 320 US 476, 88 L Ed 239—Raudenbush v. Baltimore & O R R., DCPa., 63 F Supp 329

Ala.—Southern Ry Co v Melton, 188 So 588, 240 Ala. 244—Southern Ry. Co. v Smith, 128 So. 223, 221 Ala 273

Ky.—Louisville & N R Co. v. McCoy, 110 SW2d 433, 270 Ky. 608.

Miss.—Gulf, M & O R Co v. Joiner, 29 So 2d 255.

NC—Hubbard v Southern Ry. Co., 166 SE 802, 203 NC. 675—Potter v. Atlantic Coast Line R. Co., 147 SE 698, 197 NC 17.

Or.—Hopkins v Spokane, P. & S. Ry Co., 298 P. 914, 137 Or. 287, re-

hearing denied 2 P2d 1105, 137 Or 287.

SC—Williamson v Southern Ry. Co., 191 SE 79, 188 SC 312

What law governs in actions brought under Federal Employers' Liability Act in state courts see supra § 178

32. US—Brady v Southern Ry Co, NC, 64 S Ct. 232, 320 US 476, 88 L Ed 239

Miss.—Gulf, M & O R Co. v. Joiner, 29 So 2d 255

Neb.—Ellis v Union Pac R. Co., 22 NW 2d 805, 147 Neb 18.

33. US—Brady v Southern Ry Co, NC, 64 S Ct 232, 320 US 476, 88 L Ed 239—New York, C & St L R Co v Kelly, CCA Ind., 70 F2d 548, certiorari denied Kelly v New York, C & St L R Co, 55 S Ct. 110, 293 US 595, 79 L Ed 689

Mass.—Shipp v Boston & M R R., 186 NE 653, 283 Mass 266

Miss.—Gulf, M & O R Co v. Joiner, 29 So 2d 255

Neb.—Ellis v Union Pac R. Co., 22 NW 2d 805, 147 Neb 18

ND—Cunningham v Great Northern Ry Co, 14 NW 2d 753, 73 N.D 315

Or.—Annereau v Ewauna Box Co, 159 P2d 215, 176 Or 509.

Where no recovery can be had under any interpretation which can be properly taken of the facts which the evidence tends to establish the case may be taken from the jury—Voelker v. Delaware, L & W. R. Co. DCNY, 31 F Supp. 387.

34. Ky.—Louisville & N R Co v McCoy, 110 S.W.2d 433, 270 Ky 603

Mo.—Parrent v. Mobile & O R Co., 70 SW2d 1068, 334 Mo. 1202.

N.C.—Potter v Atlantic Coast Line R. Co., 147 SE 698, 197 NC 17

SC—Williamson v Southern Ry. Co., 191 SE 79, 188 SC 312.

tween the parties at the time of the injury, or the evidence thereon is reasonably susceptible of more than one inference, the question ordinarily should be submitted to the jury.³⁵ Conversely, where the evidence is not conflicting, and is reasonably susceptible of but one inference, the question as to the existence of the relation is one of law for the court to determine.³⁶ Where the contract of employment is in writing, the question ordinarily is for the court.³⁷

Thus, where the evidence is susceptible of more than one inference, or there is a conflict of evidence on matters entering into the formation of the contract and which affect the liability of the master thereunder,³⁸ or as to employment in violation of a statute,³⁹ or as to the beginning of the employment,⁴⁰ suspension,⁴¹ or termination of the relationship,⁴² or as to the identity of the employer,⁴³ or as to the authority of the person employing,⁴⁴ the question is one for the jury. Similarly, wheth-

35. US—Mostyn v Delaware, L & W R Co, CCANY, 160 F2d 15—Madison v. Phillips Petroleum Co, CCA Tex, 88 F2d 515, certiorari denied 57 S Ct 946, 301 US 703, 81 LEd 1358
Ala—Lowe v Poole, 179 So 536, 235 Ala 441—Nichols v Smith's Bakery, 119 So 638, 218 Ala 607
Ark—Wright v McDaniel, 159 S.W. 2d 737, 203 Ark 992—Chapman & Dewey Lumber Co v Andrews, 91 S.W.2d 1026, 192 Ark 291—Natural Gas & Fuel Corporation v Alotto, 11 S.W.2d 769, 178 Ark 461
Cal.—Umsted v Scofield Engineering Const Co, 263 P 799, 203 Cal 224
Ga—Howard v Georgia Power Co, 176 S.E. 69, 49 Ga.App 420—Southern Ry Co v Rylee, 156 S.E. 705, 42 Ga.App. 431.
Ill—Armster v. American Steel Foundries, 40 N.E.2d 575, 313 Ill App 378
Ind—Gasco v. Tracas, 155 N.E. 179, 85 Ind App 591
Iowa—Ganzhorn v Reep, 12 N.W.2d 154, 234 Iowa 495.
Ky—Wathen v Mackey, 187 S.W.2d 1000, 300 Ky 115—Simpson v Green Silvers Coal Corporation, 176 S.W.2d 261, 298 Ky 108—Grubb v. Coleman Fuel Co, 114 S.W.2d 477, 372 Ky 847—Jones v Hicks, 103 S.W.2d 702, 268 Ky 38—U S Fidelity & Guaranty Co v Antle, 42 S.W.2d 1, 240 Ky 243—Auto Livery Co. v Stone, 36 S.W.2d 349, 237 Ky 686
Me—Moore v. Isenman, 143 A. 462, 127 Me 370
Mass—Enga v. Sparks, 51 N.E.2d 984, 315 Mass. 120—Labatte v. Lavallee, 155 N.E. 433, 258 Mass 527—Lessard v Kneeland, 154 N. E. 94, 257 Mass 455
Mich—Brandt v C F Smith & Co, 218 N.W. 803, 242 Mich. 217.
Miss—Mississippi Power Co v Stribling, 3 So.2d 807, 191 Miss 832—Edward Hines Lumber Co v Harriel, 158 So 146, 171 Miss 670—Hamilton Bros Co v Weeks, 124 So. 793, 155 Miss. 754—Gulf, M & N R Co. v. Graham, 117 So 881, 153 Miss 72.
Mo—Milburn v Chicago, M., St P & P R Co, 56 S.W.2d 80, 331 Mo 1171—Whittington v. Westport Hotel Operating Co, 33 S.W.2d 963, 326 Mo 1117—Clayton v Wells, 26

S.W.2d 969, 324 Mo 1176—Daniels v Luechtefeld, App, 155 S.W.2d 307.
NJ—Sharabba v McGuire, 144 A 327, 7 N.J. Misc 128
NY—La Rose v Donnelly, 219 N.Y. S 148, 219 App Div 181—Greenberg v Sommer, 315 N.Y.S. 383, 216 App Div 416
NC—Dark v. Johnson, 36 S.E.2d 237, 225 N.C. 651
Okl—Palmer v Skelly Oil Co, 263 P 440, 129 Okl 32
SC—Hyman v Carolma Veneer & Lumber Co, 9 S.E.2d 27, 194 S.C. 67—Hubbard v Rowe, 5 S.E.2d 187, 192 S.C. 12—Cross v Siddall, 193 S.E. 124, 184 S.C. 508—Bagwell v Liberty Land & Securities Co, 161 S.E. 417, 163 S.C. 188
Tex—Manning v Beaumont, S L & W Ry Co, 181 S.W. 687, 107 Tex 546—Elsthay v Sherman, Civ App, 135 S.W.2d 174, error dismissed, judgment correct—El Paso Laundry Co v Gonzales, Civ App, 36 S.W.2d 793, error dismissed
Wash—Nichols v Pacific County, 68 P.2d 412, 190 Wash 408.
39 C.J. p 1108 note 22.
36. US—Stevenson v. Lake Terminal R Co, CCA Ohio, 42 F.2d 857—Postal Telegraph-Cable Co v Darrow, Pa, 260 F. 581, 162 CCA. 597, certiorari denied 39 S.Ct. 8, 248 U.S. 563, 63 L.Ed. 423, and 41 S.Ct. 448, 255 U.S. 577, 65 L.Ed. 794
Ark—Missouri Pac R Co v Davis, 122 S.W.2d 546, 197 Ark. 386—Pine Woods Lumber Co v. Cheatham, 57 S.W.2d 813, 186 Ark 1060
Ga—Mathis v Western & A. R. R., 134 S.E. 793, 35 Ga.App 672.
Ill—Armster v. American Steel Foundries, 40 N.E.2d 575, 313 Ill. App 378
Ky—Grubb v. Coleman Fuel Co, 114 S.W.2d 477, 272 Ky 847.
Mass—Coulombe v Horne Coal Co, 175 N.E. 631, 275 Mass 226
Mich—Brown v Standard Oil Co, 14 N.W.2d 797, 309 Mich 101
Minn—Gonyea v Duluth, M. & I R Ry Co, 19 N.W.2d 384, 220 Minn 225.
NC—Miller v Roberts, 193 S.E. 286, 212 N.C. 126—Connor v. Saprolites, Inc, 182 S.E. 108, 308 N.C. 346.

Okl—White v McGee, 11 P.2d 924, 157 Okl. 304
Tex—Evans v Sabine & E. T. R. Co., 18 S.W. 493—Lone Star Gas Co. v. Kelly, Com App, 46 S.W.2d 656
W Va—Rawson v Jones-Winifrede Coal Co, 130 S.E. 492, 100 W Va. 263, 43 A.L.R. 330.
39 C.J. p 1108 note 33
37. Mont—De Sandro v. Missoula Light & Water Co, 136 P. 711, 48 Mont 226
39 C.J. p 1108 note 24
38. Fla—Kilgore v Hudson, 4 So.2d 865, 148 Fla. 580
Ga—Howard v Georgia Power Co., 176 S.E. 69, 49 Ga.App 420
Ill—Carter v Peoria & P U Ry Co, 275 Ill App 298.
Minn—Blanton v Northern Pac Ry Co, 10 N.W.2d 382, 215 Minn 442
Tex—Texas & N O R Co v Webster, Civ App, 53 S.W.2d 656, affirmed 70 S.W.2d 394, 123 Tex 197, certiorari denied 55 S.Ct. 93, 293 U.S. 580, 79 L.Ed. 677, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 70 L.Ed. 716
39 C.J. p 1108 note 25
39. S.D.—Koenekamp v. Picasso, 269 N.W. 74, 64 S.D. 567
39 C.J. p 1108 note 26
40. Mo—Williams v Schaff, 222 S.W. 412, 282 Mo. 497
39 C.J. p 1108 note 27.
41. Mass—Watkins v New York, N H & H. R Co, 195 N.E. 888, 290 Mass 448
39 C.J. p 1108 note 28
42. US—National Biscuit Co. v Litzky, CCA Mich., 22 F.2d 939, 56 A.L.R. 853.
Ill—Porter v Terminal R Ass'n of St. Louis, 65 N.E.2d 31, 327 Ill App 645.
39 C.J. p 1109 note 29
43. Mass—Eckstein v Scoff, 13 N.E.2d 436, 299 Mass. 573.
N.Y.—Christianson v. Breen, 48 N.E.2d 478, 288 N.Y. 435.
SC—Hyman v. Carolina Veneer & Lumber Co, 9 S.E.2d 27, 194 S.C. 67—Heidt v. State Highway Department, 1 S.E.2d 188, 189 S.C. 310—Cross v. Siddall, 193 S.E. 124, 184 S.C. 508
39 C.J. p 1109 note 30.
44. Mich—Breger v. Feigenson

er a servant injured while working for a municipality was employed with the assent of the proper authorities,⁴⁵ or whether the person injured was a servant or an independent contractor,⁴⁶ whether a person temporarily assisting another became a servant,⁴⁷ or whether plaintiff when injured was in the service of defendant or of an independent contractor⁴⁸ or other person sustaining a contractual relation to defendant,⁴⁹ or whether plaintiff was engaged in the service of both,⁵⁰ is a question for the jury.

§ 531. — Scope of Employment

Where the evidence as to whether the servant was acting within the scope of his employment at the time of the injury is not conflicting or susceptible of more than one inference, the question is one for the court to determine, otherwise the question should be submitted to the jury.

Where the evidence as to whether the servant was acting within the scope of his employment at the time of the injury is not conflicting or susceptible of more than one inference, the question is one for the court to determine;⁵¹ otherwise the question should be submitted to the jury,⁵² as should the

Bros. Co., 249 N.W. 493, 264 Mich 37

Tenn—Armstrong v Bowman, 115 S W 2d 229, 21 Tenn App 673
39 C.J. p 1109 note 31

Whether circumstances constitute emergency impliedly authorizing employee to procure temporary assistance is generally a question for jury.

Ark—Bryant Truck Line v. Nance, 118 S.W.2d 1047, 196 Ark 1177—Henry Quellmaiss Lumber & Mfg Co v Hays, 291 S.W. 982, 173 Ark 43

Mich—Marshall v Glaeser, 282 N. W. 832, 284 Mich 56

NC—Reaves v Catawba Mfg & Electric Power Co, 174 S.E. 413, 206 NC 533

45. Iowa—Winn v. Anthom, 181 N. W. 642, 179 Iowa 630.
39 C.J. p 1109 note 32

46. U.S.—Madison v Phillips Petroleum Co, CCA Tex, 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358

Ark—Fordyce Lumber Co v Wardlaw, 178 S.W.2d 241, 206 Ark 35—Wright v. McDaniel, 159 S.W.2d 737, 739, 203 Ark 992—Chapman & Dewey Lumber Co. v Andrews, 91 S.W.2d 1026, 192 Ark 291

Mo—Aubuchon v Security Const Co, App, 291 S.W. 187

Ohio—Gillum v Industrial Commission, 48 N.E.2d 234, 235, 141 Ohio St 378.

Tenn—Copeland v Cherry, 95 S.W.2d 1276, 1278, 20 Tenn App 122

Tex—Panama Refining Co. v Crouch, Civ App, 98 S.W.2d 271, affirmed 124 S.W.2d 988, 132 Tex 608—J. W. Zempter Const Co v. Rodgers, Civ App, 45 S.W.2d 763.
39 C.J. p 1109 note 33

47. Ark—Bryant Truck Line v. Nance, 118 S.W.2d 1047, 196 Ark 1177

NY—La Rose v. Donnelly, 219 N.Y. S. 148, 219 App Div 181
39 C.J. p 1109 note 34.

48. Ark—Standard Oil Co of Louisiana v Chandler, 165 S.W.2d 595, 204 Ark 897—Wright v McDaniel, 159 S.W.2d 737, 203 Ark. 992—Caddo River Lumber Co v. Holmes,

183 S.W.2d 884, 199 Ark 417—Long Bell Lumber Co v Tarver, 118 S.W.2d 282, 196 Ark 275

Miss—Edward Hines Lumber Co v Dickinson, 125 So. 93, 155 Miss 674

Mo—Baker v Scott County Milling Co, 20 S.W.2d 494, 323 Mo 1089—Timmermann v St. Louis Architectural Iron Co, 1 S.W.2d 791, 318 Mo 421—Baker v. Scott County Milling Co, App, 43 S.W.2d 441—Clayton v Hydraulic Press Brick Co, App, 27 S.W.2d 52—Howard v Lewin Metals Corporation, App, 22 S.W.2d 84, certiorari quashed State ex rel. St. Louis Bridge & Terminal Rys Co v. Haid, 29 S.W.2d 714, 325 Mo 532—Oney v Dierks Lumber & Coal Co, App, 296 S.W. 470.

NY—Lisanti v William F. Kenny Co, 232 N.Y.S. 103, 225 App Div 129, affirmed 166 N.E. 347, 250 N.Y. 621—La Rose v Donnelly, 219 N.Y.S. 148, 219 App Div 181

NC—Hawkins v Rowland Lumber Co, 152 S.E. 169, 198 NC 475—Lilley v Interstate Cooperation Co., 139 S.E. 869, 194 NC 250

Tex—Tanner v Drake, 78 S.W.2d 162, 124 Tex 395
39 C.J. p 1109 note 35

49. Ohio—Cloverdale Dairy Co v. Briggs, 2 N.E.2d 592, 131 Ohio St 261

Pa.—Dougherty v Proctor & Schwartz, 176 A. 439, 317 Pa 363
Va—Brinkley v Pennsylvania R. Co, 184 S.E. 227, 166 Va. 84.

39 C.J. p 1110 note 36

50. NC—Hamilton v Southern Ry Co, 158 S.E. 75, 200 NC 543, certiorari denied Southern Ry Co v. Hamilton, 52 S.Ct. 19, 284 U.S. 636, 76 L.Ed. 541

39 C.J. p 1110 note 37

51. U.S.—Young v New York, N.H. & H.R. Co, CCA N.Y., 74 F.2d 261.

Mich—Holden v. Meehan, 214 N.W. 206, 239 Mich 266.

Okl—Graney v Midland Valley Ry Co, 238 P. 838, 111 Okl 128

39 C.J. p 1110 note 38

Slight or large deviations
Employee's deviations from em-

ployment may be so slight that they can be said as a matter of law not to constitute a departure from employment, or so large that they can be said as a matter of law to amount to such a departure—Labbe v American Brass Co, 46 A.2d 339, 132 Conn 606

52. U.S.—Tombigbee Mill & Lumber Co v Hollingsworth, CCA Miss, 162 F.2d 783—Zeidman v Gutterston & Gould, CCA N.H., 139 F.2d 160—Halderman v Pennsylvania R. Co, CCA N.Y., 53 F.2d 365—Bangor & A.R. Co v Jones, CCA Me, 36 F.2d 886—Perry v Western Union Telegraph Co, CCA Tenn, 27 F.2d 197

Ark—Altman-Rodgers Co v Rogers, 48 S.W.2d 289, 185 Ark 561—Ward Furniture Mfg Co v Pickle, 295 S.W. 727, 174 Ark 463—Harrison Electric Co v Bumgardner, 272 S.W. 688, 168 Ark 1074

Cal—Gray v Southern Pac Co, 145 P.2d 561, 23 Cal.2d 632—Myers v Southern Pac Co, 58 P.2d 387, 14 Cal App 2d 287, hearing denied 59 P.2d 1001, 14 Cal App 2d 387—Miller v Cookson, 265 P. 374, 89 Cal. App 602

Del.—Elliott v Camper, 194 A. 130, 8 W.W. Harr 504

Iowa—Casey v. Hansen, 26 N.W.2d 50—Bell v. Brown, 239 N.W. 785, 214 Iowa 370—Oesterreich v Leslie, 234 N.W. 229, 212 Iowa 105.

Ky—Auto Livery Co v Stone, 36 S.W.2d 349, 237 Ky 686

Md—General Automobile Owners' Ass'n v State, 140 A. 48, 154 Md. 304.

Mass—Rollins v Boston & M.R.R., 74 N.E.2d 664—Ryan v Gray, 55 N.E.2d 700, 316 Mass 259—Enga v Sparks, 51 N.E.2d 984, 315 Mass. 120

Minn—Jenkins v. Jenkins, 19 N.W.2d 389, 220 Minn 216—Symons v. Great Northern Ry. Co, 293 N.W. 303, 208 Minn 240.

Miss—Legan & McClure Lumber Co. v Fairchild, 124 So 336, 155 Miss. 271—McKinnon v Braddock, 104 So 154, 139 Miss 424

Mo—Arkell v Baltimore & O.R. Co, 131 S.W.2d 590—Meek v New York, C. & St. L. R. Co, 88 S.W.2d

question whether a servant other than the one injured was acting within the scope of his employment.⁵³

Interstate or intra-state employment. Where the facts are undisputed and lead to but one conclusion, whether the employment of the injured servant was in interstate or intra-state commerce, so as to be

subject to the Federal Employers' Liability and Safety Appliance Acts or the state law, is for the court,⁵⁴ but where the question as to which law is applicable depends on the determination of a disputed issue of fact on which the evidence is conflicting or subject to more than one inference, then the question should be submitted to the jury.⁵⁵

833, 337 Mo 1188, certiorari denied New York, C & St L R Co v Meek, 56 S Ct 688, 297 US 722, 80 L Ed 1006—Koonse v Missouri Pac R Co, 18 SW 2d 467, 322 Mo 813, certiorari denied Missouri Pac R Co v Koonse, 50 S Ct 34, 280 US 582, 74 L Ed 632—Weed v American Car & Foundry Co, 14 SW 2d 652, 322 Mo 137—Head v M E Leming Lumber Co, 281 S W 441

NH—Hussay v Boston & M R R, 133 A 9, 82 NH 236

NY—Barry v Boston & M R R, 229 NYS 378, 223 App Div 568

NC—Kennedy v Western Union Telegraph Co, 161 SE 398, 201 N C 756

Ohio—Zeis v Kaechele, 163 NE 42, 29 Ohio App 54

SC—Davis v Atlantic Coast Line R Co, 147 SE 834, 150 SC 130, reversed Atlantic Coast Line R Co v Davis, 49 S Ct 210, 279 US 34, 73 L Ed 601—Gowns v Watts Mill, 133 SE 550, 135 SC 163

SD—Koenekamp v Picasso, 269 N W 74, 64 SD 567

Tex—Foster v Carle, Civ App, 160 SW 2d 999, error refused—United East & West Oil Co v Dyer, Civ App, 144 SW 3d 989, affirmed 163 SW 2d 680, 139 Tex 318.

Va—Chesapeake & O Ry Co v Golladay, 180 SE 400, 164 Va 292 39 CJ p 1110 note 39

Province of court and jury in determining whether servant acted within scope of employment where there is evidence tending to show contributory negligence on part of servant see *infra* § 537.

Ordinarily it is a question of fact for the jury to determine whether the servant acted within the scope of his employment

Ark—Lundell v Walker, 165 S.W. 2d 600, 204 Ark 871.

Conn—Labbe v American Brass Co, 46 A 2d 339, 132 Conn. 606 39 CJ p 1110 note 39 [a].

53. Ark—Humphries v Kendall, 111 SW 2d 492, 195 Ark 45

Mo—Cheney v Terminal R R Ass'n of St Louis, App, 70 SW 2d 66

Okl—Breene v Crawford, 53 P 2d 244, 175 Okl 186.

SC—Jester v Southern Ry Co, 29 SE 2d 768, 204 SC 395, 156 A L R 832, certiorari denied 65 S Ct 44, 323 US 716, 89 L Ed 576

Tex—Texas & N O R Co v Webster, Civ.App., 53 S.W.2d 656, af-

firmed 70 SW 2d 394, 123 Tex 197, certiorari denied 55 S Ct 93, 293 US 580, 79 L Ed 677, rehearing denied 55 S Ct 138, 293 US 630, 70 L Ed 716

39 CJ p 1111 note 40

54. US—Minkowicz v Reading Co, CCANJ, 84 F 2d 537, certiorari denied 57 S Ct 43, 299 US 579, 81 L Ed 426—Middleton v Southern Pac Co, CCA Tex, 61 F 2d 929, certiorari denied 53 S Ct 658, 289 US 736, 77 L Ed 1484—Voelker v Delaware, L & W R Co, DCNY, 31 F Supp. 387

Ala—Louisville & N R Co v Carter, 70 So 655, 195 Ala 382, Ann Cas 1917E 292

Cal—Newkirk v Los Angeles Junction Ry Co, 131 P 2d 535, 21 Cal 2d 308

Ill—Young v Chicago & I M Ry Co, 20 NE 2d 320, 299 Ill App 393 —Lavigne v Chicago, M, St P. & P R Co, 4 NE 2d 785, 287 Ill App 253, 268, certiorari denied 58 S Ct 32, 302 US 688, 82 L Ed 532—Lewis v Cleveland, C, C & St. L Ry Co, 240 Ill App 332

Kan—Skanks v Union Pac R Co, 127 P 2d 431, 155 Kan 584

Me—Delong v Maine Cent. R. Co, 6 A 2d 431, 136 Me 194

Mo—Maxie v Gulf, M & O R Co, 202 SW 2d 904—Cox v Missouri-Kansas-Texas R Co, 76 SW 2d 411, 335 Mo. 1226—Shidloski v New York, C & St. L R Co, 64 SW 2d 259, 333 Mo 1134—Jarvis v Chicago, B & Q R Co, 37 SW 2d 602, 325 Mo 428, certiorari denied 52 S Ct 19, 284 US 635, 76 L Ed 540

Or—Hoffman v Broadway Hazelwood, 10 P 2d 349, 139 Or. 519, 83 A L R 1008, rehearing denied 11 P.2d 814, 139 Or. 519, 83 A L R 1008

Tex—Texas & Pac Ry Co. v Kelly, Civ App, 35 SW 2d 749, reversed on other grounds, Com App, 51 S W 2d 299, certiorari denied Kelly v. Texas & P. R Co, 53 S Ct 90, 287 US 644, 71 L Ed 557

W.Va—Towns v Monongahela Ry. Co., 144 SE 289, 105 W.Va 572.

39 CJ p 1111 note 42.

55. US—Reading Co v Larkin, C. C.A.Pa., 114 F 2d 416, certiorari denied Reading Co v Larkin, 61 S Ct 175, 311 US 707, 85 L Ed 459 —Keys v Pennsylvania R Co, C.A.N.Y., 104 F 2d 663, reversed on

other grounds 60 S Ct 385, 308 US 529, 84 L Ed 447—Flack v Delaware, L & W R Co, CCANJ, 45 F 2d 683—McKay v Monongahela Ry Co, CCA Pa., 44 F 2d 150 —Voelker v Delaware, L & W R Co, DCNY, 31 F Supp 387—Larkin v. Reading Co, DCPa, 28 F Supp. 292, affirmed, CCA, Reading Co v Larkin, 114 F 2d 416, certiorari denied 61 S Ct. 175, 311 US 707, 85 L Ed. 459—Geraghty v Lehigh Valley R Co, DCNY, 3 F Supp 376

Ala—Southern Ry Co. v Melton, 198 So 588, 240 Ala. 244—Mobile & O R Co. v Williams, 121 So. 722, 219 Ala 238

Ark—Baldwin v Hunnicut, 93 SW 2d 131, 192 Ark 441

Cal—Mappin v. Atchison, T & S F Ry Co, 247 P 911, 198 Cal 733, 49 A L R 1830, certiorari denied Atchison, T & S F R Co v Mappin, 47 S Ct 239, 273 US 729, 71 L Ed 862

Fla—Atlantic Coast Line R Co v Moore, 181 So 374, 135 Fla. 485, modified on other grounds 186 So 210, 135 Fla 485

Ill—Avance v Thompson, 55 NE 2d 57, 387 Ill 77, certiorari denied 65 S Ct 82, 328 US 753, 89 L Ed 603 —Kiefer v. Elgin, J & E Ry Co, 184 NE 870, 351 Ill 634—Bolle v Chicago & N. W. Ry Co, 155 NE 287, 324 Ill. 479—Brown v Illinois Terminal Co, 150 NE 242, 319 Ill 326, 151 A L R 1—Bryant v Illinois Cent R Co, 252 Ill App 428—Brundage v Chicago, B & Q R Co, 245 Ill App 440—Foreman Trust & Savings Bank v Grand Trunk Western Ry. Co, 242 Ill App 428, certiorari denied 49 S Ct 252, 279 US 839, 73 L Ed 985 —Pennsylvania R Co v. Gavin, 234 Ill App 28

Mass—Griffin v. New York, N. H & H R Co, 181 NE 839, 279 Mass 511.

Mich—Wilken v New York Cent R Co., 266 N.W. 306, 275 Mich 159—Britton v Wabash Ry Co, 203 N W 484, 230 Mich 628, certiorari denied Wabash Ry. Co v. Britton, 46 S Ct 102, 269 US 575, 70 L Ed 420.

Minn—Blanton v. Northern Pac. Ry. Co., 10 NW 2d 382, 215 Minn 442 —Holz v Chicago, M., St P. & P R. Co, 224 NW 241, 176 Minn. 575—Witort v Chicago & N W Ry. Co, 213 N.W. 944, 170 Minn

§ 532. — Presumptions

Ordinarily it is for the jury to say whether or not the evidence is sufficient to overcome the presumptions raised by law.

Ordinarily, it is for the jury to say whether or not the evidence is sufficient to overcome the presumptions raised by law in an action for injury to a servant⁵⁶

§ 533. — Nature and Cause of Injury

- a In general
- b Matters of conjecture
- c. Happening of accident
- d. Accidental or improbable injury
- e. Defective or dangerous appliances or places

482—Schendel v Chicago, R I. & P. Ry. Co., 204 NW 553, 163 Minn 460, reversed on other grounds 46 S Ct 420, 270 US 611, 70 L Ed 757.

Mo—Lloyd v. Alton R Co., 175 SW 2d 819, 351 Mo 1156—Gray v Kurn, 137 SW 2d 558, 345 Mo 1027—Gieseking v Litchfield & Madison Ry Co., 127 SW 2d 700, 344 Mo. 672, certiorari denied Litchfield & M. R. Co v Gieseking, 60 S Ct 104, 308 US 583, 84 L Ed 488—McNatt v Wabash Ry Co., 108 S W 2d 33, 341 Mo 516—Gieseking v Litchfield & M. Ry Co., 94 SW 2d 375, 339 Mo 1—Brum v Wabash Ry Co., 74 SW 2d 566, 335 Mo 876—Howard v Mobile & O. R. Co., 78 SW 2d 272, 335 Mo 295—Berry v St Louis-San Francisco Ry Co., 26 SW 2d 988, 324 Mo 775, certiorari denied St Louis-San Francisco Ry Co v Berry, 50 S Ct 464, 281 US 765, 74 L Ed 1173—Mech v Terminal Railroad Ass'n of St. Louis, 18 SW 2d 510, 322 Mo 937—Stottle v Chicago, R I. & P Ry Co., 18 SW 2d 423, certiorari denied Chicago, R I. & P Ry Co v Stottle, 50 S Ct 38, 280 US 589, 74 L Ed 638—La Lone v. St. Louis Merchants' Bridge Terminal Ry Co., 293 SW 379, 316 Mo 835, certiorari denied St Louis Merchants Bridge Terminal Ry. Co v La Lone, 48 S Ct 18, 275 US 524, 72 L Ed 406—Soderstrom v Missouri Pac R Co., App. 141 SW 2d 73—Trout v. Chicago, R I. & P Ry Co., App. 39 SW 2d 424, certiorari denied Chicago, R I. & P Ry Co v Trout, 51 S Ct. 649, 283 US 856, 75 L Ed 1463—Seidel v St. Louis-San Francisco Ry. Co., App. 18 SW 2d 126, error quashed State ex rel St Louis-San Francisco Ry Co v Haid, 37 SW 2d 437, 327 Mo 217.

N.C.—Hamilton v. Southern Ry Co., 158 SE 75, 200 NC 543, certiorari denied Southern Ry Co v Hamil-

ton, 52 S Ct 19, 284 US 636, 76 L Ed 541

Ohio—Mellon v Weber, 152 NE 753, 115 Ohio St 91—Detroit & T Shore Line R Co. v Seigel, App. 153 N. E 870

SC—Cato v Atlanta & C A L Ry Co., 162 SE 239, 164 SC 123, certiorari denied Atlanta & C A L Ry Co v Cato, 52 S Ct 200, 284 US 684, 76 L Ed 577.

Utah—Smith v Salt Lake & Utah Railroad Corporation, 105 P 2d 338, 99 Utah 393—Roach v Los Angeles & S L R Co., 280 P 1053, 74 Utah 545, certiorari denied 50 S Ct 162, 280 US 613, 74 L Ed 655—Roach v. Los Angeles & S L R Co., 256 P 1061, 69 Utah 530.

39 CJ p 1111 note 43

State statutes cannot alter the rule La—Higginbotham v Public Belt Railroad Commission, App. 181 So 65, rehearing denied 181 So 221, affirmed 188 So 395, 192 La 526.

Fact that one of cars in group being moved at time of accident contained an interstate shipment was sufficient to take to jury issue whether employee involved in movement of the cars was then engaged in interstate commerce—Mitchell v Louisville & N R Co., 31 NE 2d 965, 375 Ill 545, mandate conformed to 35 NE 2d 81, 310 Ill App 563, reversed on other grounds 42 NE 2d 86, 379 Ill 522

56. US—Anderson v. Baltimore & O. R. Co., C.C.A.N.Y., 96 F 2d 796 Mo—Baughner v Gamble Const. Co., 26 SW 2d 946, 324 Mo 1233

SC—Cato v Atlanta & C A L Ry Co., 162 SE 239, 164 SC 123, certiorari denied Atlanta & C A L Ry Co v Cato, 52 S Ct 200, 284 U. S 684, 76 L Ed 577

39 CJ p 1112 note 46

57. US—Blair v Baltimore & O R Co., Pa., 65 S Ct 645, 223 US 600, 89 L Ed 490—Pearce v. Lehigh Valley R Co., C.C.A.N.J., 157 F.2d

- f. Methods of work, rules, and orders
- g. Warning and instructing servant
- h. Insufficient force for work
- i. Concurrent negligence of employer and third person

a. In General

Ordinarily the question as to the nature and cause of the injury suffered by an employee is one of fact for the jury, but where the evidence is not conflicting and is not such that reasonable minds can differ as to its verity and inference the question should not be submitted to the jury.

Ordinarily the question as to the nature and cause of the injury suffered by an employee is one of fact.⁵⁷ Generally speaking, this is true where the evidence as to the nature and cause of the injury is

252—Bowser v Baltimore & O R. Co., C.C.A. Pa., 152 F 2d 436—General Motors Corp v Holler, C.C.A. Mo., 150 F 2d 297—Barry v Reading Co., C.C.A.N.J., 147 F 2d 129, certiorari denied 55 S Ct 912, 324 US 867, 89 L Ed 1422, rehearing denied 55 S Ct 1022, 324 US 891, 89 L Ed 1438—Galeota v U S Gypsum Co., C.C.A.N.Y., 123 F 2d 947, certiorari denied U S Gypsum Co v Galeota, 62 S Ct 798, 315 U S 813, 88 L Ed 1211—Dudley v Scandrett, C.C.A. Wash., 115 F 2d 728—Ford Motor Co v Brady, C. C.A. Mo., 73 F 2d 248—Jacque v. Locke Insulator Corporation, C.C.A.N.Y., 70 F 2d 680, certiorari denied Locke Insulator Corporation v. Jacque, 55 S Ct 99, 293 US 585, 79 L Ed 681.

Ala—Nichols v Smith's Bakery, 119 So 638, 218 Ala 607

Ark—Standard Oil Co. of Louisiana v Richerson, 67 SW 2d 1003, 188 Ark 882—Gilliam v. Bradley Lumber Co of Arkansas, 67 SW 2d 595, 188 Ark 615—Simms Oil Co v. Seago, 63 SW 2d 834, 187 Ark 1089—Booth & Flynn v. Price, 39 SW 2d 717, 188 Ark 975, 76 A.L.R. 957—Standard Pipe Line Co v Dillon, 295 SW 52, 174 Ark 708 Cal—Hosman v Southern Pac Co., 83 P.2d 88, 28 Cal App 2d 621, certiorari denied Southern Pac Co v Hosman, 59 S Ct 645, 306 US 656, 83 L Ed 1054

Ga.—Louisville & N R Co v. Maffett, 137 SE 404, 36 Ga App 513 Ill—Bryant v Illinois Cent R. Co., 252 Ill App. 428

Ky—Louisville & N R Co. v Gilliland, 295 S.W. 422, 220 Ky. 431, 53 A.L.R. 386—Pacific Coal Mining Co. v. Horn, 277 S.W. 511, 211 Ky. 444

Miss—McLamore & McArthur v. Rogers, 152 So 882, 169 Miss. 650 Mo—Jenkins v Wabash Ry Co., 73 S.W. 2d 1003, 335 Mo. 748—Hardin v. Illinois Cent R. Co., 70 S.W. 2d

conflicting⁵⁸ or is such that reasonable men might reach different conclusions therefrom⁵⁹ Where, however, the evidence is not conflicting and is not such that reasonable minds can differ as to its verity and inference,⁶⁰ or where there is no evidence fairly tending to show that the injuries were the proximate result of the master's negligence, or of persons for whose negligence the master is responsible,⁶¹ the question should not be submitted to the

jury. While it has been held that substantial evidence is necessary in order to warrant or require submission of the question to the jury,⁶² and that a mere scintilla of evidence is insufficient,⁶³ it is not necessary that the evidence exclude the possibility that the injury resulted from a cause for which the employer is not liable,⁶⁴ and generally any evidence⁶⁵ reasonably⁶⁶ tending to show the nature and cause of the injury, or from which the nature and

1075, 334 Mo 1169, certiorari denied Illinois Cent R Co v Hardin, 55 S Ct 86, 293 US 574, 79 L Ed 672—Kimmie v Terminal R R Ass'n of St Louis, 66 SW 2d 561, 334 Mo 596—Pulliam v Wheelock, 3 SW 2d 374, 319 Mo 139—Willgues v Pennsylvania R Co, 298 SW 817, 318 Mo 28—Langeneckert v St Louis Sulphur & Chemical Co, App, 65 SW 2d 648—Bailey v St Louis-San Francisco Ry Co, App, 20 SW 2d 952—Atkins v Torson, App, 12 SW 2d 930

Mont—Chancellor v Hines Motor Supply Co, 69 P 2d 764, 104 Mont 603

NJ—Downing v. Oxweld Acetylene Co, 169 A 709, 112 NJ Law 25, affirmed 174 A 900, 113 NJ Law 399—Cichocki v. Geigy Co, 183 A 463, 14 NJ Misc 232

NC—McGraw v Southern Ry Co, 175 SE 286, 206 NC 873

Pa—Krng v Darlington Brick & Mining Co, 131 A 241, 284 Pa 277 SC—Gillis v Atlantic Coast Line R Co, 179 SE 62, 175 SC 223, certiorari denied Atlantic Coast Line R Co v Gillis, 55 S Ct 545, 294 US 718, 79 L Ed 1251—Busby v W M Ritter Lumber Co, 174 SE 4, 172 SC 372

Tenn—McGinniss v. Brown, App, 204 SW 2d 334

Tex—Langston v. Degala, Civ App, 186 SW 2d 738—Foster v Carle, Civ App, 180 SW 2d 999, error refused

Wash—White v Consolidated Freight Lines, 73 P 2d 358, 192 Wash 146—Depre v Pacific Coast Forge Co, 276 P. 89, 151 Wash 430

39 C J p 1113 note 49 [a]

In actions under Federal Employers' Liability Act, authority of trial courts to withdraw from consideration of jury matter bearing on proximate relation of the master's negligence to the injury is very restricted—Keith v Wheeling & L E Ry Co, CCA Ohio, 160 F 2d 654

58. U.S.—F W Woolworth Co v Davis, CCA Okl., 41 F 2d 842, certiorari denied 51 S Ct. 33, 282 US 859, 75 L Ed 760—Eppinger & Russell Co v. Sheely, CCA Fla., 24 F 2d 153.

Ark.—Missouri Pac. R. Co. v. Pip-

kin, 75 SW 2d 801, 189 Ark. 890, certiorari denied 55 S Ct 637, 294 US 728, 79 L Ed 1258

Fla.—Atlantic Coast Line R Co v Holliday, 74 So 479, 73 Fla 269

Ill.—Wilmington & Springfield Coal Co v Sloan, 80 NE 265, 225 Ill 467.

Ky—Pacific Coal Mining Co v. Horn, 277 SW 511, 211 Ky 444

Mo—Benner v Terminal R R Ass'n of St Louis, 156 SW 2d 657, 348 Mo 928, certiorari denied Terminal R Ass'n of St Louis v. Benner, 62 S Ct 798, 315 US 813, 86 L Ed 1211—Gately v. St Louis-San Francisco Ry Co, 56 SW 2d 54, 332 Mo 1—Ryan v. Sheffield Car & Equipment Co, App, 24 SW 2d 166

W Va.—Holton v Clayco Gas Co., 145 SE 637, 106 W Va. 394

59. U.S.—Southern Pac Co v Ralston, CCA Utah, 67 F 2d 958

Ariz—Gazette Printing & Publishing Co. v Suits, 226 P 542, 26 Ariz 464, reversed on other grounds 233 P. 595, 27 Ariz 371

Tex—Rio Bravo Oil Co v Matthews, Civ App, 20 SW 2d 342
39 C J p 1113 note 49 [d], [e]

60. Ky—Kelly & Shields v. Miller, 33 SW 2d 662, 236 Ky. 698.

Miss.—Ozen v. Spier, 117 So 117, 150 Miss 458

Mo—Peters v Wabash Ry. Co, 42 SW 2d 588, 328 Mo 924, certiorari denied 52 S Ct 209, 284 US. 686, 76 L Ed 580.

Pa.—Fitzgerald v. Pennsylvania R R, 184 A 299, 121 Pa Super 461

Tex—Thomas v Missouri-Kansas-Texas R Co of Texas, Civ App, 178 SW 2d 881 Error refused.
39 C J. p 1113 note 47

Whether disease was "occupational disease" within meaning of statute held question of law for court—Wolf v Mallinckrodt Chemical Works, 81 SW 2d 323, 336 Mo. 746.

Evidence held insufficient to constitute issue for jury as to cause of injury.

U.S.—Southern Pac Co v Ralston, CCA Utah, 62 F.2d 1026, adhered to, CCA, 67 F 2d 958—Welsh v. Erie R. Co., CCA Ohio, 39 F 2d 869

Ky—Highsplit Coal Co. v Palmer's Adm'r, 20 S.W 2d 1020, 231 Ky 24.

Minn—Clark v Banner Grain Co, 261 NW 596, 195 Minn 44

NJ—Gurzo v American Smelting & Refining Co, 41 A 2d 6, 132 NJ Law 485—Cichocki v Geigy Co, 183 A 463, 14 NJ Misc 232
39 C J p 1112 note 48 [b]

61. Ark—Kroger Grocery & Baking Co v Kennedy, 136 SW 2d 470, 199 Ark 914

Ky—Kelly & Shields v Miller, 33 S W 2d 662, 236 Ky 698

Me—Dambrosia v Edwards, 148 A. 673, 123 Me 458

Okf—Wright v. Atchison, T & S F Ry Co, 38 P 2d 517, 170 Okl 48

Tex—Ft Worth Belt Ry Co. v Jones, 166 SW. 1130, 106 Tex 345
39 C J p 1112 note 48

62. Mo—Weaver v Mobile & O R Co, 120 SW 2d 1105, 343 Mo 223

Or—Waller v Northern Pac Terminal Co of Or, 166 P 2d 488, 178 Or 274, certiorari denied 67 S Ct 45, 329 US 742, 91 L Ed 640

63. Mo—Weaver v Mobile & O. R Co, 120 SW 2d 1105, 343 Mo 223

Neb—Ellis v. Union Pac R Co, 23 NW.2d 305, 147 Neb 18

Tex—Emmons v. Texas & P Ry Co, Civ App, 149 SW 2d 167 Error dismissed, judgment correct

64. Mo.—Wurst v. American Car & Foundry Co, App, 103 S.W 2d 6
39 C J p 1113 note 49 [b].

65. Ky—Billiter & Shurtleff Coal Co v Luster, 190 SW 2d 633, 301 Ky. 17—Helton v Gunn Coal Mining Co, 79 SW 2d 695, 258 Ky 168

SC—Whisenhunt v Atlantic Coast Line R Co, 10 S.E.2d 805, 195 S C 213

39 C J p 1113 note 49.

66. Okl—Marrs v Richardson, 87 P 2d 131, 184 Okl 342—Beasley v. Bond, 48 P 2d 299, 173 Okl 355
39 C J p 1113 note 49.

Evidence held sufficient to go to jury
US—Grammer v Mid-Continent Petroleum Corporation, CCA Okl., 71 F 2d 38, certiorari denied 55 S Ct. 82, 293 US 571, 79 L Ed 670—United S S Co v Barber, CCA. Ohio, 4 F 2d 625.

Ariz—Watson v. Southern Pac. Co, 152 P 2d 665

Ark—Eureka Oil Co. v. Mooney, 271 S.W. 321, 168 Ark. 479.

cause of the injury may reasonably be inferred,⁶⁷ is sufficient to warrant or require submission of the question to the jury. Evidence which is otherwise sufficient to warrant or require submission of the question to the jury will not be withdrawn from the jury merely because it is contradicted or otherwise weakened or impaired by other evidence in the case.⁶⁸

Time and place of injury Where there is any evidence on the subject, questions as to the time⁶⁹ and place⁷⁰ of the injury are for the jury to determine.

b. Matters of Conjecture

Where the cause of the injury is left by the evidence to mere conjecture the case should not be submitted to the jury, but where the evidence is sufficient to warrant a reasonable inference that the injury resulted from an act for which the master is liable the question should be submitted to the jury.

Where the cause of the injury is left by the evidence to mere conjecture⁷¹ or is shown as a mere possibility or probability⁷² the case should not be submitted to the jury. This does not mean, however, that a case should not be submitted to the jury because the cause of the injury is not shown by direct evidence but rests on inference from evidence

Mass—Rollins v. Boston & M R R, 74 N.E.2d 664.

Mich—Britton v. Wabash Ry. Co., 203 N.W. 484, 230 Mich. 628, certiorari denied Wabash Ry. Co. v. Britton, 46 S.Ct. 102, 269 U.S. 575, 70 L.Ed. 420.

Miss—Brush v. Laurendine, 150 So. 818, 168 Miss. 7.

Mo—Wommack v. Orr, 176 S.W.2d 477, 352 Mo. 113—Pevesdorf v. Union Electric Light & Power Co., 64 S.W.2d 939, 333 Mo. 1155—Plank v. R. J. Brown Petroleum Co., 61 S.W.2d 828, 332 Mo. 1150—Senter v. Hammond Packing Co., App., 274 S.W. 493—McGowan v. American Mfg. Co., App., 270 S.W. 423—Pelster v. Shamrod Boiler Co., App., 268 S.W. 890—Reynolds v. Al G. Barnes Amusement Co., 253 S.W. 140, 214 Mo. App. 391.

NH—Claywood v. Norwood Calaf Co., 173 A. 794, 87 N.H. 482.

NC—Lewis v. Babcock Lumber & Land Co., 151 S.E. 97, 198 N.C. 816.

Tex—Kansas City Southern Ry. Co. v. Chandler, Civ.App., 192 S.W.2d 804, refused no reversible error—Texas & N. O. Ry. Co. v. Churchill, Civ.App., 74 S.W.2d 1030, error dismissed.

39 C.J. p. 1118 note 49 [H. [J].

67. US—Tennant v. Peoria & P. U. Ry. Co., Ill., 64 S.Ct. 409, 321 U.S. 29, 88 L.Ed. 520, rehearing denied 64 S.Ct. 610, 321 U.S. 802, 88 L.Ed. 1089—Northwestern Pac. Ry. Co. v. Bobo, Cal., 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 463.

Ala—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504.

Cal—Gray v. Southern Pac. Co., 145 P.2d 561, 23 Cal.2d 632.

Minn—Turner v. Northern Pac. Ry. Co., 290 N.W. 568, 207 Minn. 187.

Mo—Wurst v. American Car & Foundry Co., App., 103 S.W.2d 6.

Neb—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.

Okl—Atchison, T. & S. F. Ry. Co. v. Myers, 69 P.2d 62, 179 Okl. 637, appeal dismissed Myers v. Atchison,

T & S. F. R. Co., 58 S.Ct. 29, 302 U.S. 636, 82 L.Ed. 495—Wright v. Atchison, T. & S. F. Ry. Co., 88 P.2d 517, 170 Okl. 48.

68. Kan—Merrick v. Missouri-Kansas-Texas R. Co., 42 P.2d 950, 141 Kan. 591—Davis v. Atchison, T. & S. F. Ry. Co., 180 P. 195, 104 Kan. 604.

Mo—Weaver v. Mobile & O. R. Co., 120 S.W.2d 1105, 343 Mo. 223—King v. City of St. Louis, App., 155 S.W.2d 557.

Tex—W. U. Tel. Co. v. Coker, Civ. App., 202 S.W.2d 710.

39 C.J. p. 1118 note 49 [g].

Reconciling servant's testimony as to how he received injury and extrajudicial statements held for jury—Kelso v. St. Louis San Francisco Ry. Co., Mo. App., 39 S.W.2d 456.

69. Mo—Smith v. Stanolind Pipe Line Co., 189 S.W.2d 244, 354 Mo. 250.

NH—Watkins v. Boston & M R R, 146 A. 865, 84 N.H. 124, certiorari denied Boston & M R R v. Watkins, 50 S.Ct. 35, 280 U.S. 584, 74 L.Ed. 683.

39 C.J. p. 1114 note 50.

70. Mo—Birdsong v. Jones, 30 S.W.2d 1094, 235 Mo. App. 242.

39 C.J. p. 1114 note 51.

71. US—Northwestern Pac. Ry. Co. v. Bobo, Cal., 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 462—Atchison, T. & S. F. Ry. Co. v. Toops, Kan., 50 S.Ct. 281, 281 U.S. 361, 74 L.Ed. 896—Atlanta & C. A. L. Ry. Co. v. Green, S.C., 49 S.Ct. 350, 279 U.S. 821, 73 L.Ed. 976—St. Louis-San Francisco Ry. Co. v. Mills, Ala., 46 S.Ct. 520, 271 U.S. 344, 70 L.Ed. 979—Southern Ry. Co. v. Stewart, C.C.A.Mo., 115 F.2d 317, modified on other grounds 119 F.2d 85, reversed on other grounds 62 S.Ct. 616, 315 U.S. 283, 86 L.Ed. 849—Spain v. Powell, C.C.A.Va., 90 F.2d 580—Swaner v. Utah, Idaho Cent. R. Co., C.C.A.Utah, 54 F.2d 868, certiorari denied Utah, Idaho Cent. R. Co. v. Swaner, 53 S.Ct. 6, 287 U.S. 600, 77 L.Ed. 522—Bean v. In-

dependent Torpedo Co., C.C.A.Okl., 4 F.2d 504—Tishar v. Nicodemus, D.C.Ill., 49 F.Supp. 145.

Ala—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504.

Ind—Werling v. New York, C. & St. L. R. Co., 168 N.E. 42, 90 Ind. App. 26.

Kan—Salisbury v. Atchison, T. & S. F. Ry. Co., 263 P. 791, 125 Kan. 181, certiorari denied 49 S.Ct. 12, 278 U.S. 607, 78 L.Ed. 534.

Mass—Breskin v. Boston & M R R, 157 N.E. 581, 260 Mass. 414.

Minn—Phillips v. Chicago, M. & St. P. & P. R. Co., 234 N.W. 307, 182 Minn. 307.

Miss—Illinois Cent. R. Co. v. Humphries, 155 So. 421, 170 Miss. 840.

Mo—Robison v. Chicago & E. I. Ry. Co., 64 S.W.2d 660, 334 Mo. 81, certiorari denied 54 S.Ct. 558, 291 U.S. 682, 78 L.Ed. 1069—Sabot v. St. Louis Cooperaage Co., 282 S.W. 425, 213 Mo. 527—Fronnecke v. Westliche Post Pub. Co., 291 S.W. 139, 220 Mo. App. 640.

NH—Davis v. Nox-All Shoe Co., 159 A. 126, 85 N.H. 327.

NC—Planters Nat. Bank & Trust Co. of Rocky Mount v. Atlantic Coast Line R. Co., 181 S.E. 635, 208 N.C. 574.

Okl—Atchison, T. & S. F. Ry. Co. v. Myers, 69 P.2d 62, 179 Okl. 637, appeal dismissed Myers v. Atchison, T. & S. F. R. Co., 58 S.Ct. 29, 302 U.S. 636, 82 L.Ed. 495.

Or—Annereau v. Ewauna Box Co., 159 P.2d 215, 176 Or. 509.

Tex—Emmons v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 167, error dismissed, judgment correct.

Va—Norfolk & P. Belt Line R. Co. v. White, 129 S.E. 339, 143 Va. 875.

Wis—Central Wisconsin Trust Co. v. Chicago & N. W. Ry. Co., 287 S.W. 699, 232 Wis. 536.

39 C.J. p. 1114 note 52.

72. NH—Dade v. Boston & M R. R., 30 A.2d 485, 92 N.H. 294.

39 C.J. p. 1115 note 53.

of the surrounding circumstances,⁷³ and it has frequently been held that, where the evidence is sufficient to warrant a reasonable inference, that is, not a matter of conjecture merely, that the injury resulted from an act for which the master is liable, the question should be submitted to the jury although it might be found that the injury was caused in other ways.⁷⁴ Where it is no more inferable from the evidence that the injury was caused by some act for which the employer is liable than that it arose from some cause for which the employer is not liable, it has been held that the case should not be submitted to the jury.⁷⁵ Where, however, the inference arises that the negligence was caused by one of several causes, each of which would make the employer liable,⁷⁶ or where the injuries are attributable to several defects which have sprung from the same negligence and have combined and co-operated in the production of a dangerous condition that becomes the proximate cause of the injury,⁷⁷ the case should not be taken from the jury.

c. Happening of Accident

Ordinarily, where there is no evidence beyond the mere existence of the defect or the happening of the accident or injury, the case should not be submitted to the jury; but, where the thing which caused the injury is shown to be under the control of the defendant and the accident is such as usually does not happen if those in control use proper care, the question as to the cause of the accident becomes one for the jury.

Ordinarily, where there is no evidence beyond the mere existence of the defect or the happening of the accident or injury, the case should not be submitted to the jury.⁷⁸ As a general rule, however, even as between master and servant, where the thing which caused the injury is shown to be under the management or control of defendant or its servants, other than the one injured, and the accident is such as, in the ordinary course of things, does not happen if those who have the management or control use proper care, the happening of the accident gives rise to a presumption that it occurred because of the master's failure to use proper care, discussed *supra* § 501, and in such case the question as to the cause of the accident becomes one for the jury to determine.⁷⁹

73. Ala.—Mobile & O R Co. v. Hedgecoth, 110 So 44, 215 Ala. 291 39 C.J. p 1115 note 54.

74. US—Lavender v Kurn, Mo, 66 S Ct 740, 327 US 645, 90 L Ed. 916—Scrimeo v. Central R. R. of New Jersey, CCA N.Y., 138 F 2d 761—Southern Ry. Co v. Stewart, CCA Mo, 115 F 2d 317, modified on other grounds 119 F 2d 85—Swaner v Utah Idaho Cent R Co, CCA Utah, 54 F 2d 863, certiorari denied Utah Idaho Cent R. Co v Swaner, 58 S Ct 6, 287 US 600, 77 L Ed 522

Ala.—Mobile & O R. Co v Hedgecoth, 110 So 44, 215 Ala. 291.

Mass—Murphy v. Boston & Maine R R, 65 NE 2d 923, 319 Mass 413 Mich—Scott v Boyne City, G & A R. Co, 148 NW 719, 182 Mich 514 N Y—Healy v Erie R Co, 180 NE 888, 259 NY 40, certiorari denied Erie R Co v Healy, 58 S Ct 81, 287 US 628, 77 L Ed. 545.

Okl—Atchison, T & S F Ry Co v. Myers, 69 P 2d 62, 179 Okl 637, appeal dismissed Myers v Atchison, T. & S F R. Co, 58 S Ct 29, 302 US 636, 82 L Ed 495

Or—Hartman v. Oregon Electric R. Co, 149 P 893, 77 Or 810, rehearing denied 151 P 472, 77 Or 810. 39 C.J. p 1115 note 55

Cause of injury held not speculative Va.—Southern Ry Co v. Wilmoth, 153 SE 874, 154 Va. 582, certiorari denied Wilmoth v Southern Ry Corporation, 51 S Ct 81, 282 US 878, 75 L Ed 775

75. US—Burnett v Pennsylvania R. Co, CCA Ohio, 38 F 2d 579,

followed in Kuhnheim v. Pennsylvania R Co, 88 F 2d 1015

Ky—Everman's Adm'r v Louisville & N. R Co, 293 SW 977, 219 Ky 478

Mo—Robison v Chicago & E I Ry Co, 64 SW 2d 660, 334 Mo 81, certiorari denied 54 S Ct 558, 291 US 682, 78 L Ed. 1069

Okl—Lawson v Anderson & Kerr Drilling Co, 84 P 2d 1104, 184 Okl 107

Or—Annerseau v. Ewauna Box Co, 159 P 2d 215, 176 Or 509

Va—Norfolk & P Belt Line R Co v. White, 129 SE 339, 143 Va 875. 39 C.J. p 1115 note 56

76. Ky—Elkhorn Coal Corp v Watkins, 265 SW. 814, 205 Ky 357.

39 C.J. p 1116 note 58

77. Mo—Dunphy v St Joseph Stock Yards Co, 95 SW 301, 118 Mo App. 506

39 C.J. p 1116 note 59

78. US—Northwestern Pac. R Co v. Bobo, Cal, 54 S Ct. 263, 290 US 499, 78 L Ed 462.

Ala.—Southern Ry. Co v. Hargrove, 155 So 316, 26 Ala App 165

Ark—International Harvester Co of America v. Hawkins, 24 SW.3d 340, 180 Ark 1056

Kan—Salisbury v Atchison, T. & S F Ry. Co, 263 P 791, 125 Kan 131, certiorari denied 49 S Ct 12, 278 US 607, 73 L Ed. 534

Ky—Stephens v. Kitchen Lumber Co, 2 SW 2d 374, 222 Ky 736.

Mo—Pronnecke v. Westliche Post Pub. Co, 291 SW. 139, 220 Mo App. 640.

NH—Dade v. Boston & M. R R., 30 A 2d 485, 92 NH 294.

Or—Voshall v Northern Pacific Terminal Co, 240 P 891, 116 Or 237 Pa—Prattico v. Hudson Coal Co, 32 A 2d 732, 347 Pa 490—Ludy v. Union Spring & Manufacturing Co, Com Pl, 22 West Co L J, 170

SC—Watson v Charleston Stevedoring Co, 139 SE 778, 141 SC 355. 39 C.J. p 1116 note 60.

79. US—Jesionowski v. Boston & M. R. R., Mass, 67 S Ct 401, 329 US 452, 169 A.L.R. 947, 91 L Ed. 416—Zumwalt v Gardner, CCA Mo, 160 F 2d 298—Atchison, T & S F Ry Co v Simmons, CCA N. M., 153 F.2d 206—Sweeting v. Pennsylvania R. Co, CCA Pa., 142 F 2d 611—Lukon v Pennsylvania R Co, CCA Pa., 181 F 2d 327—Nashville, C & St L Ry Co v. York, CCA Tenn., 127 F 2d 606—Terminal R Ass'n of St. Louis v. Staengel, CCA Mo., 122 F 2d 271, 136 ALR 789, certiorari denied 62 S Ct 181, 314 US. 680, 86 L Ed 544—Eker v. Pettibone, CCA Ind., 110 F 2d 451.

Ark—International Harvester Co of America v Hawkins, 24 SW 2d 340, 180 Ark 1056

Ga.—Parrish v. Central of Georgia Ry Co, 135 SE 782, 36 Ga.App. 133.

Mo—Maxie v. Gulf, M & O. R. Co., 202 SW 2d 904—Sibert v. Litchfield and M. Ry. Co., 159 SW.2d 612—State ex rel Fulton Iron Works v Allen, 289 SW. 583—Bartlett v Pontiac Realty Co, 31 SW 2d 279, 224 Mo App. 1234—Kenyon v. St. Joseph Ry, Light,

unless it is shown⁸⁰ without dispute⁸¹ that the injury was due to a cause not chargeable to the master's failure to use proper care. So, where in addition to the evidence furnished by the presumption there is other evidence pointing toward the master's failure to use proper care,⁸² even though such additional proof may be slight,⁸³ a jury question is presented.

d. Accidental or Improbable Injury

Whether an employee's injury was the result of a mere accident or could have been reasonably anticipated by the master ordinarily is a question for the jury unless there is no evidence as to the cause of the accident or showing that a man of ordinary care would have foreseen the danger.

Whether the injury to an employee was the result of a mere accident or could have been reasonably anticipated by the master ordinarily is a question for the jury⁸⁴ unless there is no evidence as to the cause of the accident⁸⁵ or there is no evidence showing that the accident proximately resulted from any act for which the master is liable⁸⁶ or that a

man of ordinary care would have foreseen the danger.⁸⁷ Whether or not an injury is an accident, once the facts have been ascertained, is a question of law.⁸⁸ On a contention that it is improbable or impossible that the injury to a servant was caused in the manner claimed the case should not be withdrawn from the jury⁸⁹ unless the facts clearly disclose that the injury could not have occurred in the manner claimed.⁹⁰

e. Defective or Dangerous Appliances or Places

- (1) In general
- (2) Railroad tracks, roadbed, equipment, and appliances
- (3) Mines, quarries, and excavations

(1) In General

Whether an injury to an employee proximately resulted from the employer's failure to perform the duty resting on him to furnish safe and suitable appliances and places for work ordinarily is a question for the jury unless the evidence does not tend to show that the injuries sustained by the employee were the proximate result of the employer's breach of duty.

Heat & Power Co., 298 SW 246, 221 Mo App. 1014—Kneemiller v American Car & Foundry Co., App., 291 SW 506

Neb.—Johnson v Weborg, 7 NW 2d 65, 142 Neb 516
39 C.J. p 1116 note 61.

Evidence held insufficient for jury Ala.—Southern Ry Co. v Hargrove, 155 So 316, 28 Ala App 165.

Mo.—Pronnecke v Westliche Post Pub Co., 291 SW 139, 230 Mo App 640.

80. US—Nashville, C & St L Ry Co v. York, CCA Tenn., 127 F 2d 606

Neb.—Johnson v Weborg, 7 NW 2d 65, 142 Neb 516.

81. US—Walker v. Charleston & W. C Ry Co., CCA Ga., 8 F 2d 725.

Sufficiency of explanation held for jury

Ill.—Thompson v Elgin, J & E Ry Co., 69 NE 2d 705, 329 Ill App 645

Mo.—State ex rel Fulton Iron Works v Allen, 289 SW 683

82. Ky.—Stephens v Kitchen Lumber Co., 2 SW 2d 374, 223 Ky 736

83. Ky.—Stephens v Kitchen Lumber Co., supra.

39 C.J. p 1116 note 61

84. US—King Cotton Mills v Wilson, CCA NC, 61 F 2d 1004—Chicago, St P., M. & O. Ry Co v Henkel, CCA Minn., 52 F 2d 313, certiorari denied 52 S Ct 200, 234 US 683, 76 L Ed 576, certified questions answered Henkel v. Chicago, St P., M. & O Ry Co., 52 S.Ct. 223, 234 U.S. 444, 76 L Ed 386.

Ala.—Hardy v City of Dothan, 176 So 419, 234 Ala 664

Ark.—Sloan v Hathcoat, 134 SW 2d 873, 199 Ark 530, reversed on other grounds 136 SW 2d 1020, 199 Ark 530—Warren & O V Ry Co v Elderington, 28 SW 2d 1073, 181 Ark 1037—W H Moore Lumber Co v Ragland, 279 SW 362, 170 Ark 1194

Miss.—Veney v Samuels, 107 So 517, 142 Miss 476

Mo.—Smith v Stanolind Pipe Line Co., 189 SW 2d 244, 354 Mo 250—Bennet v Terminal R Ry Ass'n of St Louis, 156 SW 2d 657, 348 Mo. 928, certiorari denied Terminal R Ass'n of St Louis v Bennet, 62 S Ct 798, 315 US 812, 86 L Ed 1211—Barrett v St Louis Southwestern Ry Co., 143 SW 2d 60—Gray v Kurn, 137 SW 2d 658, 346 Mo. 1027—Baker v Chicago, B & Q R Co., 39 SW 2d 535, 327 Mo 986—Stewart v American Ry Express Co., App., 18 SW 2d 520—Ballard v Kansas City Power & Light Co., 298 SW. 131, 221 Mo App 1116—Smith v American Car & Foundry Co., App., 288 SW. 982—Gehbauer v. J Hahn Bakery Co., App., 285 SW. 170

N.H.—Churchiolo v New England Wholesale Tailors, 150 A. 540, 84 NH 329

Or.—Voshall v Northern Pacific Terminal Co., 240 P 891, 116 Or 237
Tex.—Texas & P Ry Co v. Perkins, Civ App., 29 SW 2d 885, reversed on other grounds, Com.App., 48 S.W 2d 249—Texas & P. Ry Co v. Baldwin, Civ App., 25 SW 2d 969, affirmed, Com.App., 44 S.W 2d 909, certiorari denied 53 S.Ct. 11,

237 US 606, 77 L Ed 537—Amarillo Traction Co v. Russell, Civ App., 290 SW 905
39 C.J. p 1117 note 62.

Whether the employment of a minor was the proximate cause of the injuries received by the minor has been held to be a jury question—Langston v Degelia, Tex Civ App., 186 SW 2d 738

A reasonable attempt by an employee to save his employer's property which the latter's negligence has endangered is not as a matter of law, such a remote consequence of employer's negligence as to relieve employer from liability to employee for injuries sustained during the attempt—Rollins v Boston & M R R, Mass., 74 NE 2d 664

85. Pa.—Byrnelson v. Turner-Forman Concrete Steel Co., 86 A. 924, 239 Pa 346

39 C.J. p 1117 note 63.

86. N.Y.—Egan v Thompson-Starrrett Co., 102 NE 536, 209 N.Y. 110.
39 C.J. p 1117 note 64

87. N.C.—Caves v. Erwin Cotton Mills Co., 142 SE 220, 195 NC 404

39 C.J. p 1117 note 65.

88. Ariz.—Calumet & Arizona Min Co v Winters, 219 P. 585, 25 Ariz 483

89. Mo.—Wilday v. Missouri-Kansas-Texas R Co., 147 SW 2d 431, 347 Mo 275

39 C.J. p 1117 note 67.

90. Ind.—Inland Steel Co v Gillespie, 104 NE 76, 181 Ind 633

N.H.—Barber v. George R Jones Shoe Co., 108 A. 690, 79 N.H. 311

Whether an injury to an employee proximately resulted from the employer's failure to perform the duty resting on him to furnish safe and suitable tools, machinery, appliances, and places for work ordinarily is a question for the jury⁹¹ unless the evidence does not tend to show that the injuries

91. **US**—Tombigbee Mill & Lumber Co v Hollingsworth, CCA Miss, 162 F2d 763—Smith v Shevlin-Hixon Co, CCA Or, 157 F2d 51—Boston & M R R v Meech, CCA Mass, 156 F2d 109, certiorari denied 67 S Ct 124, 329 US 763, 91 L Ed 658—Breece-White Mfg Co v Baker, CCA Ark, 106 F2d 815—Somogyi v Cincinnati, N O & T P Ry Co, CCA Ky, 101 F2d 480
Ala—Belcher v Chapman, 7 So 2d 859, 242 Ala 653
Ark—Sloan v Hathcoat, 134 SW 2d 873, 199 Ark 530, reversed on other grounds 136 SW 2d 1020, 199 Ark 530—Norton & Wheeler Stave Co v Wright, 106 SW 2d 178, 194 Ark 115—E L Bruce Co v Corbett, 69 SW 2d 270, 188 Ark 962—Standard Pipe Line Co v Burnett, 66 SW 2d 637, 188 Ark 491, certiorari denied 54 S Ct 857, 292 US 649, 78 L Ed 1499—Eureka Oil Co v Mooney, 292 SW 681, 173 Ark 335
Calo—Huddleston v Ingersoll Co, 123 P2d 1016, 199 Colo 134
Iowa—Price v McNeill, 24 NW 2d 464, 237 Iowa 1120
Mass—Neiss v Burwen, 191 NE 654, 287 Mass 82
Mo—Dodd v Independence Stove & Furnace Co, 51 SW 2d 114, 330 Mo 662—Stegemann v Heil Packing Co, App, 2 SW 2d 169—Wair v American Car & Foundry Co, App, 300 SW 1048—Ballard v Kansas City Power & Light Co, 298 SW 131, 221 Mo App 1116—Green v Kurtz, App, 293 SW 1073—Mabe v Gille Mfg Co, 271 SW 1033, 219 Mo App 234—Brown v American Car & Foundry Co, App, 271 SW 540
NH—Perreault v Allen Oil Co, 179 A 365, 87 NH 306
NY—Adlam v Konvalinka, 50 NE 2d 535, 291 NY 40
Okla—Buxton v Hicks, 131 P2d 1015, 191 Okl 573
Or—Beckman v Doernbecher Mfg Co, 59 P2d 688, 154 Or 408—Freeman v Wentworth & Irwin, 7 P2d 796, 139 Or 1—Voshall v Northern Pacific Terminal Co, 240 P 891, 116 Or 237
SC—Nance v Swift & Co, 186 SE 389, 180 SC 470—Bohing v Woodside Cotton Mills, 171 SE 9, 171 SC 84—Taylor v Winnsboro Mills, 143 SE 474, 146 SC 28
Tenn—McGinniss v Brown, App, 204 SW 2d 334
Tex—Sonken-Galamba Corporation v Hillman, Civ App, 111 SW 2d 853, error dismissed—Smith v Great Atlantic & Pacific Tea Co,

Civ App, 100 SW 2d 1041, error dismissed—Chicago, R & G Ry Co v Hammond, Civ App, 286 SW 483—St Louis Southwestern Ry Co v Gillenwater, Civ App, 284 SW 268, affirmed St Louis Southwestern Ry Co of Texas v Gillenwater, Com App, 294 SW 193
Wash—Christansen v Puget Sound Nav Co, 244 P 569, 138 Wash 239—Wickman v Twin Harbor Stevedoring & Tug Co, 244 P 268, 138 Wash 153
 39 CJ p 446 note 36, p 1117 note 69.
Violation of statute
NY—Ploch v Thames Trading Co, 7 NYS 2d 515, 355 App Div 832
Okla—Cities Service Oil Co v Jamison, 117 P2d 776, 189 Okl 445
 39 CJ p 1117 note 69 [b]

The causal connection between a disease or illness contracted by an employee and the employer's failure to perform the duty resting on him to furnish safe and suitable appliances and places for work has been held to be a question for the jury to determine under the evidence

US—Wagner Electric Corporation v Snowden, CCA Mo, 38 F2d 599
Mass—Reidy v Crompton & Knowles Loom Works, 60 NE 2d 589, 318 Mass 135
Minn—Fredrickson v Arrowhead Co-op Creamery Ass'n, 277 NW 345, 202 Minn 12—Clark v Banner Grain Co, 261 NW 596, 195 Minn 44
Miss—Benjamin v Davidson-Gulfport Fertilizer Co, 152 So 839, 169 Miss 162
Mo—Smith v Stanolind Pipe Line Co, 189 SW 2d 244, 354 Mo 250—Wommack v Orr, 176 SW 2d 477, 352 Mo 113—Wurst v American Car & Foundry Co, App, 103 SW 2d 6
NJ—Cichocki v Geigy Co, 183 A 463, 14 NJ Misc 232
NY—Sadowski v Long Island R Co, 55 NE 2d 497, 292 NY 448
Tenn—Tennessee Eastman Corporation v Newman, 121 SW 2d 130, 22 Tenn App 270

Particular tools

Evidence has been held sufficient to go to the jury on the question whether injuries proximately resulted from the defective condition of

(1) Clamp—McGowan v. American Mfg Co, Mo App, 270 SW, 423.
 (2) Claw bar—Russell v Missouri Pac R Co, 295 SW 102, 318 Mo 1308, certiorari denied Missouri Pac R Co v Russell, 48 S Ct 114, 275 US 551, 72 L Ed 431

(3) Compressed air wrench—Ax-

tell v Erie R Co, 291 NYS 308, 249 App Div 694

(4) Maul—Natalino v St Paul Bridge & Terminal Ry Co, 251 NW 9, 190 Minn 118

(5) Pick—Arkansas Quicksilver Co v McGhee, 68 SW 2d 280, 187 Ark 883—39 CJ p 1117 note 69 [c] (12)

(6) Shovel—Bevin v. Oregon-Washington R. & Nav Co, 298 P 204, 136 Or 18, certiorari denied Oregon-Washington R. & Nav Co v Bevin, 52 S Ct 21, 284 US 639, 76 L Ed 543

(7) Wrench

Mo—Gehbauer v. J Hahn Bakery Co, App, 285 SW 170

NC—Cole v Seaboard Air Line Ry Co, 154 SE 682, 199 NC 389, certiorari denied Seaboard Air Line Ry Co v Cole, 51 S Ct 182, 282 US 898, 75 L Ed 791

39 CJ p 1117 note 69 [c] (21)

(8) Other tools—Chesapeake & O Ry Co v Holbrook, 271 SW 583, 308 Ky 488—39 CJ p 1117 note 69 [c]

Particular machinery or appliances

Evidence has been held sufficient to go to the jury on the question whether injuries proximately resulted from

(1) Defect in belt

Ark—Dixie Bauxite Co v Webb, 63 SW 2d 634, 187 Ark 1024

Miss—Mississippi Power & Light Co v Smith, 153 So 376, 169 Miss. 447.

(2) Defect in bolt—Peters v Hoooven & Allison Co, Mo App, 281 SW. 71

(3) Defect in brakes

Mo—Anderson v Asphalt Distributing Co, 55 SW.2d 688, 86 ALR 1033

NC—Lowe v. Taylor, 145 SE. 611, 196 NC 275

Wash—Kantonen v Braley Motor Co, 30 P2d 245, 176 Wash 577

(4) Defect in cable—Randolph Lumber Co v Shaw, 164 So 587, 174 Miss 297

(5) Defect in clutch—Oesterreich v Leslie, 234 NW 229, 212 Iowa 105

(6) Defect in electrical wiring

Ark—Hope Basket Co v Thomasson, 82 SW 2d 241, 190 Ark 956
 Mich—Nemet v Friedland, 270 N. W 779, 278 Mich 541

Mo—Brashears v Rogers Foundry & Mfg. Co., App, 11 SW 2d 1060.

(7) Defect in ladder

US—Missouri Pac R Co. v. Spangler, CCA Ark., 140 F.2d 917.

sustained by the employee which are complained of were the proximate result of the employer's breach of duty,⁹² or does not tend to show that the cause of the accident was due to the particular negligence or defective or dangerous condition alleged,⁹³ or leaves it to mere surmise or conjecture whether the

injuries resulted from such condition, as discussed supra subdivision b of this section.

(2) Railroad Tracks, Roadbed, Equipment, and Appliances

In an action for injuries to the servant of a rail-

Mo—Braden v Friederichsen Floor & Wall Tile Co, 15 SW2d 923, 223 Mo App 700

39 C.J. p 1117 note 69 [c] (7).

(8) Defect in motor vehicle
Mo—Fischer v M-K Express Co., App, 158 SW2d 458
Okla—Stockett v Steele, 169 P.2d 195, 197 Okl 134

(9) Defect in oil-drilling machinery—Hutton v Burkett, Tex Civ App, 18 SW2d 740, error refused

(10) Defect in scaffold
Ark—Chicago, R I & P Ry Co v Garrett, 18 SW2d 321, 179 Ark 690, certiorari denied 50 S Ct 39, 280 US 591, 74 L Ed 639

Mo—Dyer v W M Sutherland Building & Contracting Co, 13 SW2d 1056, 321 Mo. 1015—Klaber v Fidelity Bldg Co, App, 19 SW. 2d 758

(11) Defect in tractor—Bell v. Brown, 239 NW 785, 214 Iowa 370

(12) Defect in waste container—Hoffman v Broadway Hazelwood, 10 P.2d 349, 139 Or 519, 83 ALR 1008, rehearing denied 11 P.2d 814, 139 Or 519, 83 ALR 1008

(13) Defect in winch—McDuff v. McFarlin, 95 P.2d 636, 185 Okl 569

(14) Failure to cover or guard dangerous machinery
US—Tombigbee Mill & Lumber Co v Hollingsworth, CCA Miss, 162 F.2d 768.

N.H.—Upton v Conway Lumber Co, 128 A. 802, 81 NH 489

N.C.—Boswell v Whitehead Hosiery Mills, 132 SE 598, 191 NC 549

Or.—Ludwig v Zidell, 118 P.2d 1073, 167 Or 488.

Wis.—Dugenske v Wyse, 215 N.W. 829, 194 Wis. 159

39 C.J. p 1117 note 69 [c] (29).

(15) Failure to equip elevator properly—Cech v. Mallinckrodt Chemical Co, 20 SW2d 509, 323 Mo 601.

(16) Failure to furnish appliance for carrying rails—Jefferson v Denkmann Lumber Co, 148 So 237, 167 Miss. 246

(17) Failure to have contactor on welding machine—Oglesby v St Louis-San Francisco Ry Co, 1 SW. 2d 172, 318 Mo. 79, certiorari denied St. Louis-San Francisco R Co v Oglesby, 48 S.Ct. 434, 277 U.S. 587, 72 L.Ed. 1001.

(18) Failure to mark gasoline container.—Atkins v. Torsion, Mo App, 12 SW.2d 930.

(19) Other defects

Conn.—Donovan v Connecticut Co, 84 A 288, 86 Conn 82

Mo—Smith v Harbison-Walker Refractories Co, 100 SW2d 909, 340 Mo 389

Tex—Beaumont, S L & W Ry Co v Schmidt, Civ App, 45 SW2d 734, affirmed 72 SW2d 899, 123 Tex 580

39 C.J. p 1117 note 69 [c]

Failure to provide safe place to work

(1) In general

Mont—Chancellor v Hines Motor Supply Co, 69 P.2d 764, 104 Mont 603

N.C.—Frady v. Harris Granite Quarries Co, 151 SE 246, 198 NC 207

Okla—Champlin Refining Co. of New Mexico v. Huntington, 69 P.2d 31, 180 Okl 280

39 C.J. p 1117 note 69 [d]

(2) Employee falling into elevator shaft—Kay v Balentine Packing Co, 184 SE 846, 179 SC 485

(3) Employee working near bricklayers tossing bricks—Thomas v Lawrence, 127 SE 585, 189 NC 621

(4) Failure to provide proper lighting

Miss—S H Kress & Co v Sharp, 126 So 650, 156 Miss 693, 68 ALR 167

Or—Fitzgerald v Oregon-Washington R & Nav Co., 16 P.2d 27, 141 Or 1

S.C.—Kay v Balentine Packing Co, 184 NE 846, 179 SC 485

(5) Failure to remove obstructions in passageway—Messing v Judge & Dolph Drug Co, 18 SW2d 408, 322 Mo. 901

92. US—Northwestern Pac. R Co v Bobo, Cal, 54 S Ct 283, 290 US 499, 78 L Ed 462—Atlantic Coast Line R Co v Davis, SC, 49 S Ct 210, 279 US 84, 73 L Ed 601—Scroggs v American Stove Co, CCA Ind, 142 F.2d 297—Mecall v. W T Grant Co., CCA Ind, 133 F.2d 209, certiorari denied 68 S Ct. 1176, 319 US 759, 87 L Ed. 1711, rehearing denied 68 S Ct 1445, 320 US 214, 87 L Ed 1851—Van Norden v. Chas R McCormick Lumber Co of Delaware, C. C.A. Or., 17 F.2d 668, certiorari denied 47 S Ct 768, 274 US 768, 71 L Ed. 1337

Fla—M F Comer Bridge & Foundation Co v. Sheeran, 161 So 60, 119 Fla 543

Ill—Huff v Illinois Cent R. Co, 279 Ill App 223, affirmed 199 NE 116, 362 Ill 95

Ky—Elcomb Coal Co v. Gray's Adm'r, 115 SW2d 1056, 273 Ky 330—Everman's Adm'r v Louisville & N R. Co, 293 SW. 977, 219 Ky. 478

Mass—Fraioi v. New York, N H & H R Co, 190 NE 605, 286 Mass 450

Miss—Masonite Corp v Scruggs, 29 So 2d 262—Crosby v Burge, 1 So 2d 604, 190 Miss 739—F W Woolworth Co v Haynie, 170 So 150, 176 Miss 703

Mo—Bieser v Goran, 100 SW2d 897, 340 Mo 354—Komor v Liberty Foundry Co, App, 300 SW 1028

N.H.—Davis v Nox-All Shoe Co, 159 A 126, 85 NH 327

N.C.—Murray v Atlantic Coast Line R Co, 11 SE2d 326, 218 NC 392

Or—Jackson v Oregon Lumber Co, 52 P.2d 189, 152 Or 200

Tex—D-Bar Ranch v Maxwell, Civ App, 170 SW2d 308, error refused—Wichita Falls & S R. Co v Wade, Civ App, 57 SW2d 332, error refused—Guess v Texas & N O R Co, Civ App, 55 SW2d 642.

39 C.J. p 1119 note 70.

Independent cause

Where, in an action against employer, plaintiff's evidence clearly showed that condition brought about by employer's negligence was rendered injurious entirely by act of a third person sufficient of itself to constitute an independent, efficient intervening cause of the injury, there was no question for the jury—Janow v. Lewis, 172 P.2d 315, 197 Okl 415

93. US—Chicago, M., St P & P R Co v Gilbert, CCA Mont, 87 F.2d 382

Ariz—Wylie v. Moore, 84 P.2d 450, 52 Ariz 537.

Ky—White's Adm'r v Kentucky Public Elevator Co, 216 SW. 837, 186 Ky. 91

39 C.J. p 1119 note 71.

Absence of saw guard

In servant's action for injuries when struck by a board while operating an edger in a sawmill, plaintiff was held not to have made a case for the jury under a statute requiring all power driven circular saws to be provided with safety guards, where board which struck him had gone through the edger and had been discharged from it, and thereafter came back and came in contact with the saw, and finally struck plaintiff—Isaacs v. Smith, Mo App, 275 S.W. 555.

road, the question whether the injuries proximately resulted from the negligence of the railroad company regarding its tracks, roadbeds, equipment, and appliances or from its violation of a statute with respect thereto, is for the jury where there is sufficient evidence

In an action for injuries to the servant of a railroad company the question whether the injuries

proximately resulted from the negligence of the railroad company regarding its tracks, roadbeds, locomotives, cars, and appliances, or from its violation of a statute with respect thereto, becomes one for the jury where there is sufficient evidence.⁹⁴ Where there is no evidence tending to show that

94. US—Lavender v Kurn, Mo, 66 S Ct 740, 327 US 645, 90 L Ed 916—Fleming v Husted, CCA Iowa, 164 F 2d 65—Chicago & N W Ry Co v Green, CCA Minn, 164 F 2d 65—Atlantic Coast Line R Co v Simms, CCA Pa, 157 F 2d 874—Thompson v Missouri Pac R Co, CCA Mo, 15 F 2d 28—Handy v Reading Co, DCPa, 66 F Supp 346

Minn—Blanton v Northern Pac Ry Co, 10 NW 2d 882, 215 Minn 442 Mo—Arnold v Alton R Co, 154 S W 2d 58, 848 Mo 516—Howard v Mobile & O R Co, 78 SW 2d 272, 335 Mo 295—Siberell v St Louis-San Francisco Ry Co, 9 SW 2d 912, 320 Mo 916—Lovett v Kansas City Terminal Ry Co, 295 SW 89, 316 Mo 1346

SC—Tyner v Atlantic Coast Line R Co, 146 SE 663, 149 SC 89 Tex—Kansas City Southern Ry Co v Chandler, Civ App, 192 SW 2d 304, refused no reversible error—Gulf, C & S F Ry Co v Houston, Civ App, 45 SW 2d 771

39 CJ p 1120 notes 74, 76

Operation of railroads see *infra* subdivision f of this section

Particular omissions, defects, or dangers

Evidence has been held sufficient to go to the jury on the question whether the injury proximately resulted from:

(1) Absence of lights on locomotive—Tiller v Atlantic Coast Line R Co, Va, 65 S Ct 421, 323 US 574, 39 L Ed 465—Raudenbush v Baltimore & O R Co, CCA Pa, 160 F 2d 363

(2) Defective bell ringer—Eglsaer v Scandrett, CCA Wis, 151 F 2d 562

(3) Defective brakes

US—Schroble v Lehigh Valley R Co, CCANY, 62 F 2d 993—Detroit, T & I R Co v Hahn, CCA Ohio, 47 F 2d 59, certiorari denied 51 S Ct 489, 388 US 842, 75 L Ed 1452—Chesapeake & O Ry Co v Smith, CCA Ohio, 43 F 2d 111, certiorari denied 51 S Ct 32, 282 US 856, 75 L Ed 752—Payne v Connor, CCA Me, 274 F 497

Cal—Newkirk v Los Angeles Junction Ry Co, 131 P 2d 535, 21 Cal 2d 308—Qualls v Atchison, T & S F Ry Co, 296 P 645, 112 Cal App 7.

Ill—West v Cincinnati, I & W R Co, 240 Ill App 512

Miss—Gulf, M. & N. R. Co. v. Wood,

146 So 298, 164 Miss 765, motion sustained for stay of execution 147 So 652, certiorari denied 53 S Ct 791, 289 US 759, 77 L Ed 1502 Mo—Radler v St Louis-San Francisco Ry Co, 51 SW 2d 1011, 330 Mo 968—Siberell v St Louis-San Francisco Ry Co, 9 SW 2d 912, 320 Mo 916

NJ—Hendershot v New York, S. & W R Co, 138 A 208, 5 NJ Misc 727, affirmed 140 A 919, 104 NJ Law 436, certiorari denied New York, S & W R Co v Hendershot, 48 S Ct 662, 277 US 603, 72 L Ed 1009

Okl—Missouri-Kansas-Texas R Co v Herron, 55 P 2d 95, 176 Okl 162 Tenn—Southern Ry Co v Woods, 86 SW 2d 803, 19 Tenn App 314 Tex—Texas & P Ry Co v Baldwin, Civ App, 25 SW 2d 989, affirmed, Com App, 44 SW 2d 909, certiorari denied 53 S Ct 11, 387 US 606, 77 L Ed 527

39 CJ p 1120 note 74 [a] (2), (3), (5), (7)

(4) Defective couplers

US—Southern Ry Co v Stewart, CCA Mo, 115 F 2d 317, reheard 119 F 2d 85, reversed on other grounds Stewart v Southern Ry Co, 62 S Ct 616, 315 US 263, 86 L Ed 849—Chicago, M, St P & P R Co v Goldhammer, CCA Minn, 79 F 2d 272, certiorari denied 56 S Ct 382, 296 US 655, 80 L Ed 467—Geraghty v Lehigh Valley R Co, CCANY, 70 F 2d 300—Chicago, M, St P & P R Co v Linehan, CCA Minn, 66 F 2d 373—New York Cent R Co v Brown, CCA Mich, 63 F 2d 657, certiorari denied New York Cent R Co v Brown, 54 S Ct 52, 290 US 634, 78 L Ed 551—Brown v. New York Cent R Co, DCMich, 53 F 2d 490, affirmed, CCA, New York Cent R Co v Brown, 63 F 2d 657, certiorari denied 54 S Ct 52, 290 US 634, 78 L Ed 551—Baltimore & O R Co v Tittle, CCA Ohio, 4 F 2d 818, certiorari denied 46 S Ct 20, 269 US 558, 70 L Ed 410.

Ala—Alabama Great Southern R Co v Cornett, 106 So 242, 214 Ala 23.

Cal—Devaney v Atchison, T & S F Ry Co, 27 P 2d 635, 219 Cal 487.

Mo—Meek v New York, C & St L R Co, 88 SW 2d 333, 337 Mo 1188, certiorari denied New York, C & St L R Co v Meek, 56 S Ct 668, 297 US 722, 81 L Ed 1006—Truesdale v Wheelock, 74 SW 2d 585,

335 Mo 924—Alcorn v Missouri Pac R Co, 63 SW 2d 55, 333 Mo 828, certiorari denied Missouri Pac Ry Co v Alcorn, 54 S Ct 238, 290 US 701, 78 L Ed 802—McAllister v St Louis Merchants' Bridge Terminal Ry Co, 25 SW 2d 791, 324 Mo 1005

39 CJ p 1120 notes 74 [a] (11), 75 [a] (3)

(5) Defective draw bars

US—Chicago, St P, M & O Ry Co v Muldowney, CCA Minn, 130 F 2d 971, certiorari denied 63 S Ct 526, 317 US 700, 87 L Ed 560.

Mo—Williamson v St. Louis-San Francisco Ry Co, 74 SW 2d 583, 335 Mo 917—Carter v St Louis, T & E R Co, 271 SW. 358, 307 Mo 595

(6) Defective grab iron

US—Davis v Wolfe, Mo, 44 S Ct 64, 263 US 239, 68 L Ed 284—Fort Street Union Depot Co v Hillan, CCA Mich, 119 F 2d 307, certiorari denied 62 S Ct 82, 314 US 642, 86 L Ed 515

Ark—St Louis-San Francisco Ry Co v Bishop, 33 SW 2d 383, 182 Ark 763, certiorari denied 51 S Ct 647, 282 US 854, 75 L Ed 1461

(7) Defective guard rail—Thomson v Boles, CCA Minn, 123 F 2d 487, certiorari denied 62 S Ct 632, 315 US 804, 86 L Ed 1204.

(8) Defective hand hold

Miss—Yazoo & M V R Co v Decker, 116 So 287, 150 Miss 621

Tex—McAdoo v Campbell, Civ App, 224 SW 784, error dismissed.

Wash—Riggs v Northern Pac. R Co, 111 P 162, 60 Wash 292.

(9) Defective hopper doors—St Louis-San Francisco Ry Co. v. Starkweather, 297 P 616, 148 Okl 94

(10) Defective locomotive—Crain v Illinois Cent R Co, 73 SW 2d 786, 335 Mo 658, certiorari denied Illinois Cent R Co v Crain, 55 S Ct 123, 293 US 607, 79 L Ed 698—Kidd v Chicago, R I & P Ry Co, 274 SW 1079, 310 Mo 1, certiorari denied Chicago, R I & P Ry Co v Kidd, 46 S Ct 119, 269 US 582, 70 L Ed 424

(11) Defective roadbed—McClellan v Charleston & W. C. Ry. Co., 4 S. Ed 280, 191 SC 332

(12) Defective running board or footboard

US—Clarke v Chicago & N W Ry Co., DCMinn, 63 F Supp 579

Mo—Aly v Terminal R. Ass'n of St.

the injury resulted from the negligence of the railroad company or from its violation of a statute,⁹⁵ or if the facts are such that all reasonable men must draw the same conclusion from them,⁹⁶ the question of proximate cause is one of law.

(3) Mines, Quarries, and Excavations

The question of the proximate cause of injuries to a servant working in a mine, excavation, quarry, or the like ordinarily is one for the jury unless there is no evidence tending to establish the proximate cause of the injury.

Louis, 119 SW 2d 862, 342 Mo 1116, certiorari denied Terminal R. Ass'n of St. Louis v. Aly, 59 S Ct 251, 305 US 655, 82 L Ed 424—Aly v. Terminal R. R. Ass'n of St. Louis, 78 SW 2d 851, 386 Mo 840

(13) Defective sanding apparatus—Anderson v. Baltimore & O R Co., CCA NY, 89 F 2d 629, certiorari denied Baltimore & O R Co. v. Anderson, 58 S Ct 14, 302 US 696, 32 L Ed 538.

(14) Defective spark arrester—Hardin v. Illinois Cent R Co, 70 S W 2d 1075, 334 Mo 1169, certiorari denied Illinois Cent R Co. v. Hardin, 55 S Ct 86, 293 US 574, 79 L Ed 672

(15) Defective step—Minn—White v. Great Northern R Co, 170 NW 849, 142 Minn. 50—Mo—Kimmie v. Terminal R R Ass'n of St. Louis, 66 SW 2d 561, 334 Mo. 596

(16) Defective tracks—US—Pitcairn v. Landis, CCA Ind, 82 F 2d 578

Ark—Missouri Pac R Co v. Bush-ey, 20 SW 2d 614, 180 Ark 19, certiorari denied 50 S Ct 245, 281 US 728, 74 L Ed 1145

Mo—Young v. Wheelock, 64 SW 2d 950, 338 Mo 992, certiorari denied Wheelock v. Young, 54 S Ct 537, 291 US 676, 78 L Ed 1064

Tex—Mosey v. Texas & P Ry Co, Civ App, 191 SW 2d 65

(17) Defective motor car.—Colo—McCarthy v. Eddings, 127 P 2d 883, 109 Colo 526

Ga—Atlantic Coast Line R Co. v. Frierson, 4 SE 2d 131, 60 Ga.App 465.

Mo—Joice v. Missouri-Kansas-Texas R Co, 189 SW 2d 568, 354 Mo 439, 161 ALR 383.

(18) Improper or inadequate lights or lighting

US—Chesapeake & O Ry. Co. v. Wood, CCA Ohio, 59 F 2d 1017, certiorari denied 53 S Ct 92, 297 US 646, 77 L Ed 559.

Minn—Gonyea v. Duluth, M. & L R Ry Co., 19 NW 2d 384, 220 Minn. 235.

(19) Negligent maintenance of catwalk.

Mass—Murphy v. Boston & Maine R. R., 65 NE 2d 923, 219 Mass 418

Va—Bly v. Southern Ry. Co., 31 SE 2d 564, 183 Va 162, opinion adhered to 32 SE 2d 659, 183 Va 406

(20) Negligent maintenance of ditch—Blessing v. Camas Prairie R Co., 100 P 2d 416, 3 Wash 2d 266.

(21) Other omissions, defects or dangers

US—Highfill v. Louisville & N R Co, CCA Tenn, 154 F 2d 874

Cal—Sherman v. Southern Pac Co, 93 P 2d 812, 34 Cal App 2d 490, certiorari denied Southern Pac Co v. Sherman, 60 S Ct 610, 309 US 669, 84 L Ed 1015

Mo—Smith v. Thompson, 183 SW 2d 63—Hankins v. St. Louis-San Francisco Ry Co, App, 14 SW 2d 674—Clark v. St. Louis-San Francisco Ry Co, App, 6 SW 2d 1004

Okl—Carter v. Chicago, R I & P Ry Co, 86 P 2d 469, 179 Okl 292

Tex—Beaumont, S. L. & W. Ry Co v. Schmidt, Civ App, 45 SW 2d 734, affirmed 72 S.W.2d 899, 123 Tex 580

39 C.J. p 1120 notes 74 [a], 75 [a]

Obstructions on, over, or near tracks

Evidence has been held sufficient to go to the jury on the question whether an injury proximately resulted from:

(1) Negligent piling of cinders near track—Illinois Cent R Co v. Humphries, 155 So 431, 170 Miss 840

(2) Obstructions placed on track by third person

Ga—Southern Ry. Co v. Lunsford, 194 SE 602, 57 Ga App 53, certiorari denied 59 S Ct 78, 305 US 619, 82 L Ed 395.

Mo—Young v. Wheelock, 64 SW 2d 950, 338 Mo 992, certiorari denied Wheelock v. Young, 54 S Ct 527, 291 US 676, 78 L Ed 1064.

(3) Roof of shed over track—Louisville & N R Co v. Lewis, 278 SW 143, 211 Ky. 830

(4) Semaphore near track—Powe v. Atlantic Coast Line R Co, 159 SE 473, 161 SC 122, reversed on other grounds Atlantic Coast Line R Co. v. Powe, 51 S Ct 498, 283 US 401, 75 L Ed 1142

(5) Other obstructions on, over, or near tracks

US—Chicago & N W. Ry Co. v. Struthers, CCA Minn, 52 F 2d 88, certiorari denied 52 S Ct 38, 284 US 662, 79 L Ed 561

Mo—Smith v. Southern Illinois & Missouri Bridge Co, 30 S.W.2d 1077, 326 Mo 109.

39 C.J. p 1120 note 74 [c].

95. US—Thomson v. Pennsylvania R. Co, CCA Ohio, 88 F 2d 148

Cal—King v. Schumacher, 81 P 2d 999, reheard 89 P 2d 466, 32 Cal. App 2d 172, certiorari denied Schu-

macher v. King, 60 S.Ct. 128, 308 US 593, 84 L Ed. 496

NJ—Cowdrick v. Pennsylvania R Co, 39 A 2d 98, 132 NJ Law 131, certiorari denied 65 S Ct 555, 323 US 799, 89 L Ed 637

Utah—Coray v. Southern Pac Co, 185 P 2d 963—Tremelling v. Southern Pac Co, 257 P 1066, 70 Utah 72.

39 C.J. p 1121 note 76

Evidence has been held insufficient to go to the jury on the question whether the injury proximately resulted from

(1) Defective boiler—Robison v. Chicago & E I Ry Co, 64 SW 2d 660, 334 Mo 81, certiorari denied 54 S Ct 558, 291 US 682, 78 L Ed 1069

(2) Defective brakes—Burnett v. Pennsylvania R Co, CCA Ohio, 33 F 2d 579, followed in Kuhnheim v. Pennsylvania R Co, 38 F 2d 1015—39 C.J. p 1121 note 76 [a] (6)

(3) Defective couplers—Weekly v. Baltimore & O R Co, CCA Ohio, 4 F 2d 812—39 C.J. p 1121 note 76 [a] (4).

(4) Defective cross-tie—Elliot v. G M & N. R. Co, 111 So 146, 145 Miss 763

(5) Improper loading—Missouri Pac R Co v. Shores, 191 SW 2d 580, 209 Ark 539

(6) Obstruction or erection on, over, or near track.—Wright v. Atchison, T & S F. Ry Co, 38 P 2d 517, 170 Okl 48.

(7) Violation of safety appliance statutes—Schroble v. Lehigh Valley R Co, CCA NY, 62 F 2d 993

(8) Other matters.

Cal—Prichard v. Southern Pac Co, 51 P 2d 426, 9 Cal App 2d 701

Me—Thomas v. Maine Cent R Co, 144 A 212, 127 Me. 466, certiorari denied 49 S Ct 254, 279 US 835, 73 L Ed 983

Mich—Howe v. Michigan Cent R Co, 211 NW. 111, 236 Mich 577, certiorari denied 47 S Ct 578, 274 US 738, 71 L Ed 1317

Mo—Carnahan v. Missouri-Kansas-Texas R Co, 88 SW 2d 1027, 338 Mo. 23, certiorari denied 56 S Ct 748, 298 US 664, 80 L Ed. 1388

Okl—Lowden v. Bowen, 183 P 2d 980

39 C.J. p 1121 note 76 [a].

96. Utah—Coray v. Southern Pac Co, 185 P 2d 963.

39 C.J. p 1121 note 77.

As in other cases, the question of the proximate cause of the injuries to a servant working in a mine, excavation, quarry, or the like ordinarily is one for the jury to determine⁹⁷ unless there is no evidence tending to establish the proximate cause of the injury⁹⁸

Under the Illinois Mines and Miners' Act, imposing liability on a mine owner for injuries resulting from a willful violation of the provisions of the act, the question whether the violation of the act was the proximate cause of the injury is usually one of fact for the jury⁹⁹. Where, however, the proof is such that all reasonable minds must agree that the violation of the statute had nothing to do with the injury complained of, the question of prox-

imate cause is one of law for the court.¹

f. Methods of Work, Rules, and Orders

Where there is any substantial evidence tending to show that negligence on the part of the master with respect to methods of work, rules, or orders was the proximate cause of injuries received by the servant, the case should be submitted to the jury.

Where there is any substantial evidence tending to show that the negligence on the part of the master, or of those for whose acts he is responsible, with respect to the methods of work, rules, or orders, was the proximate cause of injuries received by the servant, then the case becomes one for determination by the jury.² This rule is frequently applied in actions by railroad employees.³ Where,

97. *US—Stornelli v U S Gypsum Co*, C.C.A.N.Y., 134 F.2d 461, certiorari denied *United States Gypsum Co v Stornelli*, 63 S.Ct. 1317, 319 U.S. 760, 87 L.Ed. 1712, rehearing denied 63 S.Ct. 1445, 320 U.S. 214, 87 L.Ed. 1851

Mo—Maurin v Western Coal & Mining Co, 11 S.W.2d 268, 321 Mo. 378

39 C.J. p. 1121 note 78

Where the causal relation is reasonably inferable from the evidence, the question is one for the jury—*Southern Mining Co v Saylor*, 95 S.W.2d 238, 264 Ky. 655.

Evidence has been held sufficient to go to the jury on the question whether the injury proximately resulted from

(1) Contact with poorly insulated electric wires—*Gaither Coal Co v Le Clerch*, 31 S.W.2d 750, 182 Ark. 466

(2) Failure to provide safe place to work—*Dockery v Woodsmall*, 11 S.W.2d 1057, 222 Mo. App. 1089

(3) Failure to keep mine boss on job—*McGinniss v Brown*, Tenn. App., 204 S.W.2d 334

(4) Inhaling carbon monoxide gas—*Knaup v Western Coal & Mining Co*, 114 S.W.2d 969, 343 Mo. 210

(5) Other defects and dangers
Ky—*Payne v High Splint Coal Co*, 40 S.W.2d 299, 239 Ky. 634
Tenn—*McGinniss v Brown*, App., 204 S.W.2d 334
39 C.J. p. 1121 note 78 [a] [c]

Pneumoconiosis or silicosis

Evidence has been held sufficient for jury on issue whether miner contracted pneumoconiosis or silicosis in defendant's mines

Minn—Applequist v. Oliver Iron Mining Co, 296 N.W. 13, 209 Minn. 230

Pa—Harvey v Dunbar Corporation, Com Pl., 5 Fay L.J. 79

98. *Ky—Fee's Adm'x v. Mahan-El-*
57 C.J.S.—11

lison Coal Corporation, 48 S.W.2d 681, 241 Ky. 231.

39 C.J. p. 1121 note 79

Evidence has been held insufficient to go to the jury on the question whether the injury proximately resulted from

(1) Bad air or carbon monoxide poisoning—*Dean Branch Coal Co v Collins*, 132 S.W.2d 310, 280 Ky. 1—*Keyser Coal Co v Helvy*, 371 S.W. 1088, 208 Ky. 772.

(2) Electrocution due to defective machinery—*Mitchell's Adm'x v Harlan Central Coal Co.*, 98 S.W.2d 347, 263 Ky. 702

(3) Explosion of gas—*Johnson's Adm'r v Harlan Ridgeway Crown Mining Co*, 145 S.W.2d 89, 284 Ky. 463

99. *Ill—Shomdie v Brewerton*, 234 Ill. App. 173.

39 C.J. p. 1121 note 80

1. *Ill—Brunnworth v Kerens-Donnewald Coal Co*, 103 N.E. 178, 260 Ill. 202—*Odorizzi v Southern Coal & Mining Co*, 151 Ill. App. 393

2. *US—Tombigbee Mill & Lumber Co v Hollingsworth*, C.C.A. Mass. 162 F.2d 763—*American Glycerin Co v Brown*, C.C.A. Tex., 30 F.2d 316

Ala—Hardy v City of Dothan, 176 So. 419, 234 Ala. 664

Ark—Phillips Petroleum Co v Jenkins, 82 S.W.2d 264, 190 Ark. 964, affirmed 56 S.Ct. 611, 297 U.S. 629, 80 L.Ed. 942, rehearing denied 56 S.Ct. 745, 298 U.S. 691, 80 L.Ed. 1409—*W. P. Brown & Sons Lumber Co v Oatles*, 72 S.W.2d 218, 189 Ark. 338

Cal—Weddle v Loges, 125 P.2d 914, 52 Cal. App. 2d 115

Ga—Padgett v Southern Ry Co, 172 S.E. 597, 48 Ga. App. 214

Ky—Evans v. Crusott, 97 S.W.2d 569, 265 Ky. 693

Miss—Kennedy v Little, 2 So. 2d 163, 191 Miss. 78

Mo—Hensley v Dorr, App., 202 S.

W.2d 553—Wilson v Spicuzza, App., 135 S.W.2d 53

NC—Satchell v McNair, 127 S.E. 417, 189 N.C. 472.

Okla—Ice v Gardner, 33 P.2d 378, 183 Okl. 496

SC—Piner v Standard Oil Co of New Jersey, 161 S.E. 504, 163 S.C. 302

39 C.J. p. 1122 note 83, p. 1168 note 73

Particular methods, rules, and orders

Evidence has been held sufficient to go to the jury as to whether injuries proximately resulted from

(1) Employer's negligence in permitting elevator shaft to be used as a means of communication without establishing a reasonable system of rules to minimize inherent dangers—*Tremblay v J. Rudnick & Sons*, 13 A.2d 153, 91 N.H. 34

(2) Failure to furnish assistance—*Sonken-Galamba Corporation v. Hillman*, Tex. Civ. App., 111 S.W.2d 853, error dismissed

(3) Master's violation of traffic rules—*Hensley v Dorr*, Mo. App., 202 S.W.2d 553

(4) Obedience to order as to manner of ingress to place of work—*Smith v Sheylin-Hixon Co*, C.C.A. Or., 157 F.2d 51

(5) Obedience to order directing use of unsafe tool or appliance—*Warren & O. V. Ry Co v. Ederington*, 28 S.W.3d 1073, 181 Ark. 1037.

(6) Obedience to order to do work requiring swinging heavy hammer—*Hamilton v. Standard Oil Co of Indiana*, 19 S.W.2d 679, 323 Mo. 531

(7) Rule of lumber company requiring sawyers to continue to saw after tree "pitched to fall"—*Long-Bell Lumber Sales Corporation v. Perritt*, 172 So. 747, 178 Miss. 194

(8) Other methods, rules, and orders—*Bell v. Brown*, 239 N.W. 785, 214 Iowa 370—39 C.J. p. 1122 note 83 [b]

3. *US—Tennant v Peoria & P. U*

however, the evidence does not tend to show that | the negligence of the master in this respect prox-

Ry Co, Ill, 64 S Ct 409, 321 US 29, 88 L Ed 520, rehearing denied 64 S Ct 610, 321 US 803, 88 L Ed 1089—Chicago & N W Ry Co v. Green, CCA Minn, 164 F 2d 55—Chicago, St P, M & O R Co v. Arnold, CCA Minn, 160 F 3d 1002—Boston & M R R v. Kyle, CCA Mass, 156 F 2d 112—Boston & M R R v. Meech, CCA Mass, 156 F 2d 109, certiorari denied 67 S Ct. 124, 329 US 763, 91 L Ed 658—Cooley v New York Cent R Co, CCAN Y, 80 F 2d 816, certiorari denied New York Cent R Co v. Cooley, 56 S Ct 599, 297 US 721, 80 L Ed 1005—Norfolk & W Ry Co v. Fraley, CCA Ohio, 69 F 2d 775.

Ala—Louisville & N. R Co v Hall, 135 So 466, 223 Ala. 338, certiorari denied 52 S Ct 37, 284 US 661, 76 L Ed 560—Mobile & O R Co v. Hedgecoth, 110 So 44, 215 Ala. 291 Ark—American Refrigerator Transit Co v. Stroope, 88 S.W.2d 840, 191 Ark. 955—Barnes v. Hope Basket Co, 56 S.W.2d 1014, 186 Ark 942—Newark Gravel Co v. Barber, 18 S.W.2d 331, 179 Ark 799.

Cal—Gray v. Southern Pac Co, 145 P 2d 561, 63 Cal 2d 682—Foxe v. Southern Pac Co, 9 P 2d 514, 121 Cal App 633.

Ga—Gainesville Midland R Co. v Floyd, 40 S.E.2d 134, 74 Ga.App 575.

Ill—Walaite v. Chicago, R I & P Ry. Co, 28 N.E.2d 149, 306 Ill.App 5, reversed on other grounds 33 N.E.2d 119, 376 Ill. 59—Carpenter v Grand Trunk W R Co, 263 Ill App 462.

Mass—Cunningham v. Boston & M. R R, 34 N.E.2d 697, 309 Mass 215, certiorari denied Boston & M R R v. Cunningham, 62 S Ct 185, 314 US 682, 86 L Ed 546.

Mo—McCurry v Thompson, 181 S W 2d 529, 352 Mo 1199—Goday v Thompson, 179 S W 2d 44, 352 Mo 681, certiorari denied 65 S Ct. 48, 323 US 719, 89 L Ed 578—Mrasek v Terminal R Ass'n of St Louis, 111 S W 2d 26, 341 Mo 1054, certiorari denied Terminal R Ass'n of St. Louis v Mrasek, 58 S Ct. 760, 303 US 656, 82 L Ed 1116—McNatt v. Wabash Ry Co, 108 S W 2d 33, 341 Mo. 516—Baker v Chicago, B. & Q R Co, 39 S W 2d 535, 327 Mo 986—Bequette v National Lead Co, App., 31 S W 2d 575.

N.J.—Steinert v Pennsylvania R Co, 153 A. 533, 107 N.J.Law 505 N.M.—Tillian v. Atchison, T & S F. Ry. Co, 55 P 2d 34, 40 N M 80 N.C.—Ford v. Atlantic Coast Line R Co, 132 S E 717, 209 NC 108.

Okl—Missouri-Kansas-Texas R Co. v Herron, 55 P 2d 95, 176 Okl 162 Tenn.—Southern Ry. Co v. Woods,

86 S.W.2d 903, 19 Tenn App 314—Mitchell v Southern Ry Co, 12 Tenn App. 523

Tex—Missouri, K & T. Ry. Co. of Texas v Riddle, Civ.App., 277 S W 164

39 C J p 1122 note 84.

Failure to give warning or signal

Evidence has been held sufficient to carry to the jury the question whether the injuries proximately resulted from failure to give a warning or signal as to the movement of a car or locomotive where.

(1) Servant was injured while inspecting train—Pitcairn v. Landis, CCA Ind, 82 F 2d 578—39 C J. p 1122 note 84 [a] (7)

(2) Servant was caught between cars

US—Midland Valley R. Co v Bradley, CCA Okl, 37 F 2d 666.

Ill—Sevier v Thomson, 41 N.E.2d 210, 314 Ill App. 382, certiorari denied Thomson v Sevier, 63 S.Ct 442, 317 US 698, 87 L Ed 558

(3) Servant was injured in other ways

US—Chicago, M, St P. & P R Co v Kane, CCA Mont, 33 F.2d 866, certiorari denied 50 S Ct 37, 280 US 588, 74 L Ed 637

Ark—Ozan Graysona Lumber Co v Ward, 66 S.W.3d 1074, 188 Ark 557

Ind—New York Cent. R Co v. Verpleatse, 60 N.E.2d 784, 116 Ind App. 1.

Mich—Musgrove v Manistique & L S Ry., 244 N W 132, 259 Mich 469, certiorari denied Manistique & L S R Co v Musgrove, 53 S Ct 313, 387 US 669, 77 L Ed 577 Mo—Freeman v Terminal R Ass'n of St Louis, 107 S.W.2d 36, 341 Mo 288

39 C J p 1122 note 84 [a]

Other particular methods, rules, or orders

Evidence has been held sufficient to go to the jury on the question whether injuries proximately resulted from

(1) Backing at excessive speed—McDaniel v Chicago, R I & P Ry. Co, 92 S.W.2d 118, 338 Mo. 481

(2) Departure from custom respecting lights on moving cars—Delaware, L & W R Co v Berry, CCANJ., 48 F 2d 1052, certiorari denied 52 S Ct 7, 284 US 617, 76 L Ed 527.

(3) Driving motor car into open switch—Jenkins v Wabash Ry Co, 107 S W 2d 204, 232 Mo App 438, certiorari denied Wabash R Co v Jenkins, 58 S Ct. 139, 302 US 737, 82 L Ed 570.

(4) Employee's being startled by whistle—Panhandle & S F Ry Co v. Ocean, Tex Civ App, 271 S W 205

(5) Excessive speed

US—Terminal R Ass'n of St Louis v Schorb, CCA Mo, 151 F 2d 361, certiorari denied 66 S Ct 470, 326 US 786, 90 L Ed. 477

Mo—Cantley v Missouri-Kansas-Texas R Co, 183 S W 2d 123, 353 Mo 605—Copeland v Terminal R Ass'n of St Louis, 182 S W 2d 600, 353 Mo 433, certiorari denied 65 S Ct 554, 323 US 799, 89 L Ed 637—Kidd v Chicago, R I & P. Ry Co, 274 S W 1079, 310 Mo 1, certiorari denied Chicago, R I & P Ry. Co v Kidd, 46 S Ct 119, 269 US 582, 70 L Ed 424

39 C J p 1122 note 84 [b] (3), (3)

(6) Method of moving piling—Spencer v Quincy, O. & K. C. R. Co, 297 S W. 353, 317 Mo 492.

(7) Moving without signal—Murphy v Lehigh Valley R Co, CCAN Y, 158 F 2d 431—Underwood v Louisville & N R Co, CCA Ill, 131 F 2d 306, certiorari denied 63 S Ct 559, 318 US 760, 87 L Ed. 1132—39 C J p 1122 note 84 [b] (9).

(8) Negligence in backing—Louisiana Ry & Nav Co v. McGlory, C. C.A La., 20 F 2d 545, certiorari denied 48 S Ct 157, 275 US 570, 72 L Ed 432

(9) Negligence in causing train to jerk

US—Fitzgerald v Pennsylvania R. Co, CCAN Y., 164 F 2d 323—Norfolk & W. Ry Co v Fraley, CCA Ohio, 69 F 2d 775—Slocum v. Erie R Co, CCAN Y., 47 F 2d 216 Ga.—Western & A. R Co v Gardner, 40 S E 2d 672, 74 Ga App 575 Ky—Cincinnati, N O & T P Ry Co. v. Jacobs, 294 S.W. 1050, 220 Ky 217

Miss—St Louis & S. F Ry Co v. Bridges, 125 So 423, 156 Miss 206 NC—McGraw v Southern Ry Co, 184 S E 31, 209 NC 432, certiorari denied Southern Ry. Co. v. McGraw, 57 S Ct. 117, 299 US 591, 81 L Ed 435

Okl—St Louis-San Francisco Ry Co v. Stuart, 47 P 2d 177, 173 Okl 221.

(10) Negligence in ordering laborer to carry heavy load—Leonidas v Great Northern Ry Co, 72 P 2d 1007, 105 Mont 302, affirmed 59 S.Ct. 51, 305 US 1, 83 L Ed. 3

(11) Negligence of conductor in switching movement.

N Y—Healy v Erie R. Co, 180 N.E 888, 259 N.Y. 40, certiorari denied Erie R Co v. Healy, 53 S Ct. 81, 287 US 628, 77 L Ed 545

Va.—Froman v Chesapeake & O Ry Co, 138 S.E. 658, 148 Va 148

(12) Pushing a string of cars.—Griswold v. Gardner, CCA Ill, 155 F 2d 383, certiorari denied Gardner

mately caused the injuries complained of, or the evidence is without substantial conflict and only one reasonable conclusion can be drawn therefrom, the question presented is one of law for the court to determine and should not be submitted to the jury.⁴

g. Warning and Instructing Servant

Where no causal relation is shown between an injury to a servant and the employer's failure to warn and instruct, the question should not be submitted to the jury; but where there is evidence of such causal relation the question becomes one for the jury.

Where no causal relation is shown between an accident involving injury to a servant and the employer's failure to warn and instruct, the question

should not be submitted to the jury;⁵ but where there is evidence of such causal relation the question becomes one for the jury.⁶

h. Insufficient Force for Work

Whether an employee's injury proximately resulted from the master's failure to furnish a sufficient force for the work undertaken is ordinarily a question for the jury to determine unless there is no evidence of the causal relation.

Whether an employee's injury proximately resulted from the master's failure to furnish sufficient force for the work undertaken ordinarily is a question for the jury to determine.⁷ This is so where there is evidence of good health prior to perform-

v. Griswold, 67 S Ct 74, 329 US 725, 91 L Ed 628.

(13) Shunting cars.—Pratt v Louisiana & A Ry. Co, CCA La., 135 F 2d 692—39 C.J. p 1122 note 84 [b] (11), (17).

(14) Sudden stop or slowing down Me.—Richards v Maine Cent R Co, 133 A 911, 125 Me 347.

Mo.—Good v. Missouri-Kansas-Texas R Co, 97 SW 2d 612, 339 Mo 330, certiorari denied Missouri-Kansas-Texas R Co. v Good, 57 S Ct 231, 299 US 605, 81 L Ed 446.

Utah.—Ward v Denver & R G W R Co, 85 P 2d 837, 96 Utah 564

(15) Switching with one brakeman.—Murphy v Lehigh Valley R Co, CCA N.Y., 158 F 2d 481

(16) Use of wrecker of insufficient capacity.—Atlantic Coast Line R Co v Simms, CCA Fla., 157 F 2d 874

(17) Other methods, rules, or orders.

US.—Underwood v. Louisville & N. R Co, CCA Ill., 131 F 2d 306, certiorari denied 63 S Ct 559, 318 US 760, 87 L Ed 1133—Kulp v Chicago, St. P., M & O Ry. Co, CCA Minn., 88 F 2d 466, certiorari denied Chicago, St. P., M. & O R Co v Kulp, 57 S Ct 930, 301 US 700, 81 L Ed 1355—Fernald v Boston & M. R. R., CCA N.Y., 62 F 2d 782.

Ark.—Missouri & N A R Co v Robinson, 65 S.W.2d 546, 188 Ark 334.

Ky.—McDonald v. Louisville & N. R. Co, 24 SW 2d 585, 232 Ky 734.

Mo.—Smith v Thompson, 161 SW 2d 232, 349 Mo 336—Finley v St Louis-San Francisco Ry. Co, 160 SW 2d 735, 349 Mo 330

Tenn.—Southern Ry. Co v Woods, 86 SW 2d 903, 19 Tenn App. 314 39 C.J. p 1122 note 84 [b]

4. US.—Atlantic Coast Line R. Co v. Temple, S.C., 52 S Ct 334, 285 U.S. 143, 76 L Ed 670—Atlantic Coast Line R. Co. v. Driggers, S.C., 49 S Ct. 490, 279 U.S. 787, 73 L Ed. 957—Brennan v. Baltimore &

O R Co, CCA N.Y., 115 F 2d 555, certiorari denied 61 S Ct 614, 312 US 685, 85 L Ed 1123—Hecovich v Winston-Deer Const Co, CCA Mo., 29 F 2d 382

Ark.—Western Union Telegraph Co v Ponder, 128 SW 2d 246, 198 Ark 207—Missouri Pac R Co v Medlock, 39 SW 2d 518, 183 Ark 955.

Ky.—Gatliff Coal Co v. Broyles' Adm'r, 180 SW 2d 406, 297 Ky 516—U S Fidelity & Guaranty Co v Antle, 42 SW 2d 1, 240 Ky. 243—Louisville & N R Co v Wingo's Adm'r, 281 SW. 170, 213 Ky 336

Minn.—Meyers v Minneapolis, St P & S S M Ry. Co, 209 NW 892, 168 Minn 122

Miss.—Cobb Bros Const. Co v Campbell, 170 So. 283, 176 Miss 695

Mo.—Coble v. St. Louis-San Francisco Ry Co, 38 SW 2d 1031

NH.—Kenney v Boston & Maine R R, 38 A 2d 557, 92 NH 495

NC.—Howell v Atlantic Coast Line R Co, 189 SE 764, 211 NC 297.

Okla.—Guthrie v City of Henryetta, 57 P 2d 1165, 177 Okl 122

Tex.—Turnbow v Panhandle & S F Ry Co, Civ App, 127 SW 2d 982, error refused—Chisos Mining Co v Hernandez, Civ App, 96 SW 2d 292, error dismissed

Wis.—Central Wisconsin Trust Co v Chicago & N W Ry. Co, 287 N. W 699, 232 Wis 536

39 C.J. p 1122 note 85

Particular matters in operation of railroad

Evidence has been held insufficient to take the case to the jury as to whether injuries to a railroad employee proximately resulted from

(1) Action of trainmaster in ordering plaintiff to jump a rolling car and apply brakes—Game v Atlantic Coast Line R Co, 30 SE 2d 33, 204 SC 452

(2) Backing without proper warning.—Williamson v Southern Ry Co, 191 SE 79, 183 SC 312

(3) Failure to stop train—Mullen

v. Lowden, 124 SW 2d 1152, 344 Mo 40

(4) Jerking of train Ala.—Seaboard Air Line Ry Co v Hackney, 115 So 869, 217 Ala 382 Mo.—Mullen v Lowden, 124 S.W.2d 1152, 344 Mo 40.

(5) Leaving car on track near another track diverging therefrom.—Texas & N O. R Co v Warden, 78 SW 2d 164, 135 Tex 193.

(6) Violation of rule designed for protection of persons other than employee injured.—Healey v. New York, O & W. R. Co, CCA N.Y., 79 F 2d 542

(7) Other particular matters—Detroit, G H & M. Ry. Co. v Maldonado, CCA Mich., 59 F 2d 911—39 C.J. p 1122 note 85 [b].

5. Me.—Robash v Maine Cent. R. Co, 103 A 363, 117 Me 558

6. US.—Dudley v Scandrett, CCA Wash., 115 F 2d 728

Ark.—Harmon v Harrison, 147 S.W. 2d 794 201 Ark 938.

Ill.—Grosse v. Terminal R. Ass'n of St Louis, 29 NE 2d 1018, 307 Ill App 414

Kan.—Darba v Crystal Ice & Fuel Co, 296 P 705, 132 Kan. 640

Ky.—Southern Mining Co v Saylor, 95 SW 2d 236, 264 Ky 655

Mass.—Dahlgren v. Coe, 40 NE 2d 5, 311 Mass 18.

Minn.—Jenkins v. Jenkins, 19 NW 2d 389, 220 Minn. 216

Mo.—Stubbs v American Car & Foundry Co, 270 SW. 145.

N.J.—Chojinski v New York Cent. R Co, 151 A. 123, 8 N.J. Misc 576

Pa.—DeLellis v. Pittsburgh & Lake Erie R Co., 39 A 2d 583, 350 Pa. 436

SC.—Pmer v. Standard Oil Co. of New Jersey, 161 S.E. 504, 163 SC. 302

Va.—Atlantic Coast Line R Co. v. Wheeler, 132 SE 517, 147 Va. 1, affirmed 136 SE 570, 147 Va. 1.

39 C.J. p 1122 note 88.

7. US.—Murphy v Lehigh Valley R. Co., CCA N.Y., 158 F 2d 481

ing a task with insufficient help and of suffering or ailments immediately or shortly thereafter.⁸ Where, however, there is no evidence of the causal connection between the injury and the master's failure to furnish sufficient help, the question is one of law for the court to determine.⁹

1. Concurrent Negligence of Employer and Third Person

Whether a servant's injuries were caused by the concurrent negligence of his employer and a third person is a jury question where there is evidence of the causal relation.

On a contention that the injuries to a servant were caused by the concurrent negligence of his employer and a third person, whether they were so caused is a question for the jury where there is any evidence tending to show the causal connection.¹⁰ So it is a question for the jury whether the injuries were the proximate result alone of the employer's negligence¹¹ or that of the third person.¹² Where, however, the evidence does not tend to show that the injuries resulted from the negligence of the employer¹³ or of the third person,¹⁴ then the question should not be submitted to the jury.

§ 534. — Negligence on Part of Master

a. In general

- Miss—Jefferson v. Denkmann Lumber Co., 148 So 237, 187 Miss 248
Mo.—Duvall v. Brooklyn Cooperage Co., App., 275 S.W. 586
NC—Cinard v. Cinard Electric Co., 136 S.E. 1, 192 NC 736
89 C.J. p 1172 note 90.
2. Mont—Boyd v. Great Northern Ry. Co., 274 P 293, 84 Mont 84
3. Va.—Norfolk & P Belt Line R Co v. White, 129 S.E 339, 143 Va 875
10. Ariz—Verde Tunnel & Smelter R Co v. Stevenson, 196 P 164, 22 Ariz 188
89 C.J. p 1123 note 89.
Negligence of fellow servant as question of fact see infra § 535
11. Ind—Moss Tie Co v. Hite, 128 N.E 752, 190 Ind 198
89 C.J. p 1123 note 90.
12. US—Burris v. American Chicle Co., D.C.N.Y., 33 F.Supp 104, affirmed, CCA., 120 F.2d 218
89 C.J. p 1123 note 91.
13. Ariz—Verde Tunnel & Smelter R Co v. Stevenson, 196 P 164, 22 Ariz 188
Miss—Ozen v. Sperier, 117 So 117, 150 Miss 458
14. Ariz—Green v. Jennings, 222 P 1039, 26 Ariz, 132—Verde Tunnel & Smelter R Co v. Stevenson, 196 P 164, 22 Ariz. 188.

15. US—New York, C. & St. L. R Co v. Boulden, CCA Ind., 63 F.2d 917, certiorari denied 53 S.Ct 785, 289 US 753, 77 L.Ed 1498—King Cotton Mills v. Wilson, CCA NC., 61 F.2d 1004—United S S Co v. Barber, CCA Ohio, 4 F.2d 625
Ala.—Pound v. Gaulding, 187 So 468, 237 Ala 387—Louisville & N. R Co v. Parker, 188 So 331, 223 Ala 626, certiorari dismissed 53 S.Ct 94, 287 US 569, 77 L.Ed 501.
Ark—Missouri Pac R Co v. McKamev, 171 S.W.2d 932, 205 Ark 907—Mosley v. Raines, 37 S.W.2d 78, 183 Ark 569—Rice & Holman v. Henderson, 35 S.W.2d 1016, 183 Ark 355
Cal—Still v. San Francisco & N.W. Ry Co., 98 P 672, 154 Cal 559, 20 L.R.A.N.S., 322, 129 Am.S.R. 177
Colo.—Denver & S. L. Ry Co v. Mullen, 279 P 49, 86 Colo 159
Ga.—Howard v. Georgia Power Co., 176 S.E 69, 49 Ga.App 420—Cope-land v. McElroy, 176 S.E 67, 49 Ga.App 490
Ill.—Werner v. Illinois Cent R Co., 83 N.E.3d 121, 300 Ill.App 292, reversed on other grounds 42 N.E.2d 82, 379 Ill 559—Beck v. Baltimore & O R Co., 244 Ill.App 441
Ky—Billiter & Shurtleff Coal Co v. Luster, 190 S.W.2d 682, 301 Ky 17
Me—Sylvia v. Etscovitz, 189 A 419, 135 Me 80

- b Constitutional and statutory provisions
c Care of inexperienced or youthful servant
d. Medical attention
e Customary methods and appliances
f. Tools, machinery, appliances, or places for work
g. Latent or obvious dangers
h Knowledge by master of defect or danger
i Methods of work
j Rules
k Orders
l. Warning and instructing servant

a. In General

The question of the master's negligence is ordinarily a question of fact for the jury or is one for the court where the case is tried without a jury; but whether or not there is any evidence tending to show negligence on the part of the master is a question for the court, and the case should not be submitted to the jury where the evidence does not tend to sustain the negligence alleged or where only one inference can reasonably be drawn from the evidence.

The question of the master's negligence is ordinarily a question of fact for the jury,¹⁵ or is one for the court to determine as a question of fact on

- Mass—Dahlgren v. Coe, 40 N.E.2d 5, 311 Mass 18
Mich—Olechafsky v. Mercier, Bryant, Larkins Brick Co., 215 N.W 317, 240 Mich 536—Thiel v. Verschoor, 209 N.W 53, 235 Mich 373
Minn—Narjes v. Litzau, 7 N.W.2d 312, 214 Minn 21
Miss—Hercules Powder Co v. Williamson, 110 So 244, 145 Miss 172
Mo—Smith v. Harrison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo 389—Kelso v. W. A. Ross Const Co., 85 S.W.2d 527, 337 Mo 202—Phares v. Century Electric Co., 82 S.W.2d 91, 338 Mo 961—Pavesdorf v. Union Electric Light & Power Co., 64 S.W.2d 929, 332 Mo 1155—Martin v. St. Louis-San Francisco Ry Co., 46 S.W.2d 149, 329 Mo 729, certiorari denied St. Louis-San Francisco Ry Co v. Martin, 52 S.Ct 644, 236 US 562, 76 L.Ed 1294—Kitchen v. Schlusser Mfg Co., 20 S.W.2d 676, 323 Mo 1179—Compton v. Louis Rich Const Co., 237 S.W. 474, 315 Mo 1068—Funk v. Fulton Iron Works Co., 277 S.W 566, 311 Mo 77—Hensley v. Dorr, App., 202 S.W.2d 553—Faubion v. Kansas City Public Service Co., App., 23 S.W.2d 897—Todd v. American Ry Express Co., 271 S.W 880, 319 Mo.App 405—Goode v. Central Coal & Coke Co., 186 S.W. 844, 179 Mo.App. 207.

a consideration of the weight and sufficiency of the evidence where the case is tried without a jury.¹⁶ The question whether or not there is any evidence tending to show negligence on the part of the master, however, is one for the court,¹⁷ and the case should not be submitted to the jury where the evidence does not tend to sustain the negligence alleged,¹⁸ or where the facts are undisputed,¹⁹ al-

though it has been held that, even if there is no conflict on any material issue, whether the employer's negligence is to be inferred from the evidence is a question of fact for the jury, and not of law for the court, unless the evidence admits of no rational inference of negligence.²⁰ Where only one inference can reasonably be drawn from the evidence, the question as to the master's negligence is one of

Mont—Chancellor v. Hines Moto Supply Co., 69 P.2d 784, 104 Mont 603

NH—Hussey v. Boston & M. R. R., 133 A. 9, 82 NH 286—Tullgren v. Amoskeag Mfg. Co., 133 A. 4, 82 NH 268, 46 A.L.R. 380

NJ—Cowdrick v. Pennsylvania R. Co., 39 A.2d 98, 132 N.J.Law 131, certiorari denied 65 S.Ct. 555, 323 U.S. 799, 89 L.Ed. 637

NY—Sadowski v. Long Island R. Co., 55 N.E.2d 497, 292 N.Y. 448—Lovell v. Haas, 27 N.Y.S.2d 886, 262 App.Div. 49

NC—Rogers v. American Tobacco Co., 178 S.E. 94, 207 NC 865—Smith v. Raleigh Granite Co., 162 S.E. 731, 202 NC 305—Lewis v. Babcock Lumber & Land Co., 151 S.E. 97, 198 NC 816

Ohio—McKee v. New Idea, App. 44 N.E.2d 697

Okl—Tidal Oil Co. v. Forcum, 116 P.2d 572, 189 Okl. 268—Cook v. Hunt, 63 P.2d 693, 178 Okl. 477

Or—Beckman v. Doernbecher Mfg. Co., 59 P.2d 688, 154 Or. 408

SC—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 SC 213—Brazee v. Piedmont Mfg. Co., 193 S.E. 39, 181 SC 471—Carter v. A. C. Tuxbury Lumber Co., 174 S.E. 754, 173 SC 58

Tenn—Jones v. Noel, App. 204 S.W.2d 336—Morgan Lumber Co. v. James, 14 Tenn App. 305

Tex—Texas & N. O. R. Co. v. Sturgeon, Civ App., 177 S.W.2d 340, reversed on other grounds 177 S.W.2d 264, 142 Tex. 222—Galveston, H. & S. A. Ry. Co. v. Brewer, Civ App., 4 S.W.2d 820, error refused—Missouri, O. & G. Ry. Co. v. Boring, Civ App., 166 S.W. 76, error refused

Utah—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24 Wash—Buss v. Wachsmith, 70 P.2d 417, 190 Wash. 673, adhered to 74 P.2d 999, 193 Wash. 600—Stubbs v. Baker, 273 P. 732, 150 Wash. 514, 39 C.J. p. 1056 note 28, p. 1087 note 22, p. 1124 note 99

Effect of testimony

In action against railroad and co-employee, the effect of coemployee's testimony as to his negligence was for jury, although uncontradicted—Missouri Pac. R. Co. v. Hampton, 112 S.W.2d 428, 195 Ark. 335.

Evidence held to make master's negligence question for jury Ark—Wisconsin & Arkansas Lumber Co. v. Hall, 280 S.W. 363, 170 Ark. 576

Mo—Nelson v. Heine Boiler Co., 20 S.W.2d 908, 323 Mo. 826

NY—Kraushofer v. Miller, 263 N.Y.S. 294, 237 App.Div. 518, reargument denied 362 N.Y.S. 939, 238 App.Div. 825

Tex—Gulf, C. & S. F. Ry. Co. v. Young, Civ App., 284 S.W. 664

Duty of master

(1) Where the standard of the master's duty is not fixed, but variable with the circumstances and incapable of being determined as a matter of law, the question whether such duty has been complied with must, if authorized by the evidence, be submitted to the jury—Stephan v. Apartment Hotels, 77 P.2d 539, 182 Okl. 274—Interstate Compress Co. v. Arthur, 155 P. 861, 53 Okl. 212

(2) But, where employee's evidence shows that employer's standard of duty toward employee is fixed by law, custom, or usage, and that such duty has been performed, a demurrer to evidence may properly be sustained—Stephan v. Apartment Hotels, supra.

(3) Where the standard of the master's duty is fixed and the same under all circumstances, its omission is negligence as a matter of law—Interstate Compress Co. v. Arthur, supra.

(4) Other decisions with respect to duty of master see 39 C.J. p. 1124 note 99 [d]

16. Wash—Jim v. Chicago, M. & St. P. R. Co., 160 P. 295, 93 Wash. 179

17. US—Eckenrode v. Pennsylvania R. Co., D.C.Pa., 71 F.Supp. 764

Okl—Stephan v. Apartment Hotels, 77 P.2d 539, 182 Okl. 274, 39 C.J. p. 1123 note 94.

Due care

Motion for peremptory instructions based on failure of evidence to sustain verdict for servant against master raised question as to whether master exercised due care—Thomson v. Pennsylvania R. Co., C.A. Ohio, 88 F.2d 148

18. US—Kansas City Southern Ry. Co. v. Jones, Tex., 48 S.Ct. 308, 276 U.S. 308, 72 L.Ed. 583—Ristucca v.

Norfolk & W. Ry. Co., C.C.A. Ohio, 60 F.2d 28—Eckenrode v. Pennsylvania R. Co., D.C.Pa., 71 F.Supp. 764.

Ark—National Refining Co. v. Wrexford, 74 S.W.2d 633, 189 Ark. 598

Ky—Brooks v. Arnett, 69 S.W.2d 1029, 253 Ky. 491—Codell Const. Co. v. White, 65 S.W.2d 690, 251 Ky. 574—Hollifield's Adm'x v. Louisville & N. R. Co., 16 S.W.2d 472, 229 Ky. 16

Mass—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266

Miss—Harvey v. Smith, 198 So. 739, 190 Miss. 130—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876

Mo—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876

Neb—Britton v. Samuelson, 23 N.W.2d 267, 147 Neb. 318—Diller v. Chicago, B. & Q. R. Co., 229 N.W. 888, 119 Neb. 494—Phillips v. Chicago, B. & Q. R. Co., 227 N.W. 931, 119 Neb. 182

NH—Kenney v. Boston & Maine R. R., 32 A.2d 557, 92 NH. 495.

NC—Banks v. Maxwell, 171 S.E. 70, 205 NC 233

Okl—Earl v. Oklahoma City-Ada-Artok Ry. Co., 101 P.2d 249, 187 Okl. 100—Kill v. Summitt Drilling Co., 5 P.2d 346, 153 Okl. 197—Woodruff v. Phillips, 280 P. 449, 138 Okl. 77

Pa.—Killfeather v. Pollock, Com Pl., 58 Montg. Co. 419

Tex—Magnolia Petroleum Co. v. Booth, Civ App., 105 S.W.2d 358, error refused

Wash—McGinnis v. Globe-Union Mfg. Co., 60 P.2d 900, 184 Wash. 260

39 C.J. p. 1124 note 95

Incompetent workman

Verdict was held properly directed for employer on issue of employment of mentally incompetent workman—Sowers v. Virginian Ry. Co., 133 S.E. 325, 101 W.Va. 563

19. Neb—Brown v. Swift & Co., 136 N.W. 736, 91 Neb. 532

20. US—Cincinnati, N. O. & T. P. R. Co. v. Davis, C.C.A. Tenn., 293 F. 481.

law.²¹ The question of the employer's liability should not be submitted to the jury where the only evidence of negligence is as to admissions made by him with respect to his negligence,²² and donations and promises of future assistance by him.²³

The question of willful and wanton negligence is one for the jury where the evidence tends to show it.²⁴

b. Constitutional and Statutory Provisions

Where constitutional or statutory provisions expressly provide for the submission to the jury of the question of the employer's negligence, the question must be submitted if there is any competent evidence of negligence; and in an action brought under an employers' liability act or other statute relating to the safety of employees, the question of the employer's negligence is ordinarily one for the jury.

Where constitutional or statutory provisions expressly provide for the submission to the jury of the question of the employer's negligence, the question must be submitted if there is any competent evidence

tending to show the negligence of the master,²⁵ but, in the absence of such evidence, the court may direct a verdict.²⁶ In an action brought under one of the various employers' liability acts or other statutes relating to the safety of employees, to recover for injuries to a servant, the question of the employer's negligence is ordinarily one for the jury,²⁷ as is the question whether the employment was a dangerous one within the terms of the statute.²⁸ Whether there is any evidence of the master's negligence is a question for the court,²⁹ and, where the evidence shows the applicability of a factory act, that question should not be submitted to the jury.³⁰

Where there is a conflict in the evidence, an employer is entitled to have the question of his negligence submitted to the jury notwithstanding a statutory presumption arising from the injury.³¹ In order to warrant submission of the issue of negligence under the Federal Employer's Liability Act, there

21. Ky.—Louisville & N R Co v Wingo's Adm'r, 281 S.W. 170, 213 Ky. 336

Okl.—Stephan v Apartment Hotels, 77 P 2d 539, 182 Okl 274
39 C.J. p 1124 note 86

22. Minn.—Binewicz v Haglin, 115 N.W. 271, 103 Minn 297, 15 L.R.A. N.S., 1096, 14 Ann Cas 225.

23. Minn.—Binewicz v Haglin, supra.

N.Y.—Ainsworth v. New York Cent. & H. R. R. Co., 135 N.Y.S. 474, 151 App Div 822.

24. S.C.—Muckenfuss v. Atlantic Coast Line R. Co., 76 S.E. 610, 93 S.C. 263
39 C.J. p 1126 note 2.

25. N.D.—Peterson v. Fargo-Moorhead St. R. Co., 164 N.W. 42, 87 N.D. 440
39 C.J. p 1126 note 11

26. Neb.—Disher v Chicago, R. I. & P. R. Co., 140 N.W. 135, 93 Neb. 224

Okl.—Phoenix Printing Co. v Durham, 122 P. 708, 32 Okl. 575, 38 L.R.A.N.S., 1191.

27. U.S.—Ellis v. Union Pac. R. Co., Neb., 67 S.Ct. 598, 239 U.S. 649, 91 L.Ed. 573—Tennant v. Peoria & P. U. Ry. Co., Ill., 64 S.Ct. 409, 321 U.S. 29, 88 L.Ed. 520, rehearing denied 64 S.Ct. 610, 321 U.S. 802, 88 L.Ed. 1089—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 987—Buchanan v. Chicago & N. W. Ry. Co., C.C.A.III., 159 F.2d 576—Edwards v. Baltimore & O. R. Co., C.C.A.III., 131 F.2d 366—Dudley v. Scandrett, C.C.A.Wash., 115 F.2d 728—Northern

Pac. R. Co. v. Berven, C.C.A.Wash., 73 F.2d 687

Ark.—Missouri Pac. R. Co. v. Remel, 48 S.W.2d 548, 185 Ark. 598, certiorari denied 53 S.Ct. 85, 287 U.S. 634, 77 L.Ed. 550

Cal.—Gray v. Southern Pac. Co., 145 P.2d 661, 23 Cal.2d 632—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal.2d 308—Bobo v. Northwestern Pac. R. Co., 19 P.2d 10, 129 Cal.App. 273, reversed on other grounds 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 462

Mass.—Rollins v. Boston & M. R. R., 74 N.E.2d 664

Minn.—Jacobson v. Chicago & N. W. Ry. Co., 22 N.W.2d 455, 231 Minn. 454

N.Y.—Mnich v. American Radiator Co., 67 N.Y.S.2d 733, 269 App Div 928, appeal denied 64 N.E.2d 658, 295 N.Y. 636, affirmed 68 N.E.2d 608, 396 N.Y. 536

N.C.—Southwell v. Atlantic Coast Line R. Co., 131 S.E. 670, 191 N.C. 153, reversed on other grounds 48 S.Ct. 25, 275 U.S. 64, 73 L.Ed. 157
Pa.—Blair v. Baltimore & O. R. Co., 37 A.2d 736, 349 Pa. 436, reversed on other grounds 65 S.Ct. 545, 323 U.S. 600, 89 L.Ed. 490
39 C.J. p 1126 note 5

Employment of minors in violation of statute see *infra* subdivision c of this section

Statutes requiring guards for dangerous places see *infra* subdivision f (6) of this section

Authority of court restricted

In actions under Federal Employers' Liability Act, authority of trial courts, by direction of a verdict, to withdraw from consideration of jury

matter bearing on question of defendant's negligence is very restricted—Keith v. Wheeling & L. E. Ry. Co., C.C.A. Ohio, 160 F.2d 654.

Restatement of prior law

Provision of state employers' liability act that all questions of negligence shall be question of fact for jury is a restatement of the law in relation to trials by jury as it existed prior to the enactment of the act—Lang v. U. S. Reduction Co., C.C.A. Ind., 110 F.2d 441

Evidence held to raise jury question as to:

(1) Violation of federal safety appliance acts—Stottle v. Chicago, R. I. & P. Ry. Co., 18 S.W.2d 433, 321 Mo. 1190, certiorari denied Chicago, R. I. & P. Ry. Co. v. Stottle, 60 S.Ct. 38, 280 U.S. 589, 74 L.Ed. 638

(2) Whether employer violated statutes requiring laundry toilets to be in proper condition—Christopherson v. Custom Laundry Co., 229 N.W. 136, 179 Minn. 325

28. Or.—Fitzgerald v. Oregon-Washington R. & Nav. Co., 16 P.2d 27, 141 Or. 1—Freeman v. Wentworth & Irwin, 7 P.2d 796, 139 Or. 1—Jodoin v. Luckenbach S. S. Co., 268 P. 51, 125 Or. 634.
39 C.J. p 1126 note 6

29. Ga.—Thompson v. Marsh Cypress Co., 73 S.E. 352, 10 Ga.App. 303

NH.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326

30. Ill.—Peterson v. Sahlin Co., 138 Ill.App. 622

31. Ark.—St. Louis, I. M. & S. R. Co. v. Ingram, 176 S.W. 692, 113 Ark. 377.

must be some substantial proof of negligence,³² and a verdict may properly be directed for defendant if plaintiff fails to present such evidence³³ or to make out a prima facie case,³⁴ and a mere scintilla of evidence,³⁵ or evidence leaving the matter in the realm of speculation and conjecture,³⁶ is insufficient to take the case to the jury on the question of defendant's negligence. The question whether the violation by a master of a city ordinance enacted for protection of persons and property from injury may be such proof of negligence as will support an action by an injured servant against the master is for the jury.³⁷ Under a statute providing that a motion to direct a verdict shall be denied where the adverse party objects thereto, the court cannot hold that the employer was negligent as a matter of law, but the issue must be submitted to the jury.³⁸

c. Care of Inexperienced or Youthful Servant

Negligence of the master with respect to the protection of inexperienced or youthful servants against injury or in employing a minor servant in violation of statute is a question for the jury, unless the facts are not in dispute.

The question whether or not defendant has exercised due care to protect an inexperienced or youthful servant against injury is one of fact for the jury,³⁹ unless there is no evidence on which to base a verdict.⁴⁰

The negligence of a master in employing a minor servant in violation of the terms of a statute is ordinarily a question for the jury;⁴¹ but, where the facts are not in dispute, the question is one for the courts.⁴²

d. Medical Attention

Negligence of the employer in securing or failing to secure medical attention for an injured servant, and negligence of a doctor furnished by the employer, are questions for the jury where the evidence tends to show negligence of the master.

The question whether an employer was negligent in securing medical attention for an injured servant,⁴³ or whether the master failed to employ a competent physician,⁴⁴ is a question for the jury where the evidence tends to show negligence of the master in regard thereto. The duty of a doctor employed by a company for its employees, as to at-

32. Okl.—Wright v Atchison, T & S F Ry Co, 88 P2d 517, 170 Okl 48—Fisher v Kansas City, M & O Ry Co, 36 P2d 744, 169 Okl 282
Tenn—Mitchell v Southern Ry. Co., 12 Tenn App 523

33. Or—Waller v Northern Pac Terminal Co of Or, 166 P2d 488, 178 Or 274, certiorari denied 67 S Ct 45, 329 US 742, 91 L Ed 640, rehearing denied 67 S Ct. 181, 329 US 825, 91 L Ed 701

34. Ill—Union Bank of Chicago v Chicago & N W Ry. Co., 367 Ill App 554

Okl—Fisher v Kansas City, M & O Ry Co, 36 P2d 744, 169 Okl 282

Vt—Bailey v Central Vermont Ry, 28 A2d 639, 113 Vt 8, reversed on other grounds 63 S Ct 1062, 319 US 350, 87 L Ed 1444, conformed to 35 A2d 865, 113 Vt 433

35. Mo—Weaver v Mobile & O R Co, 120 SW2d 1105, 343 Mo 233—Poe v Illinois Cent R Co, 73 S W2d 779, 335 Mo. 507

Neb—Ellis v Union Pac R Co, 22 NW3d 305, 147 Neb. 18, reversed on other grounds 67 S Ct 598, 329 U.S. 649, 91 L Ed 572

36. Mo—Poe v Illinois Cent R Co, 73 S W2d 779, 335 Mo 507.

Neb—Ellis v Union Pac R Co, 22 NW2d 305, 147 Neb. 18, reversed on other grounds 67 S Ct. 598, 329 U.S. 649, 91 L Ed. 572

Ohio—Bevan v New York, C & St L R Co., 6 N.E2d 982, 132 Ohio St 245, certiorari denied 57 S Ct 924, 301 U.S. 695, 81 L Ed 1351.

37. Neb—Olson v Nebraska Tel Co, 137 NW 916, 87 Neb 593

38. Minn—Jones v St Paul, 153 N W 516, 130 Minn 260

39. US—Philyaw v Arundel Corporation, CCA SC, 51 F2d 183

Ark—Ashcraft v Jerome Hardwood Lumber Co, 292 SW 386, 173 Ark 135

Ga—Thompson v Hanes, 132 SE 250, 35 Ga App 136

Kan—Foley v Crawford, 264 P 59, 125 Kan 252

Mass—Wilson v Daniels, 153 N.E 561, 257 Mass 294

Mich—La Pointe v Chevette, 250 NW 272, 261 Mich 482—Britton v Wabash Ry Co, 208 NW 484,

230 Mich 628, certiorari denied Wabash Ry. Co v Britton, 46 S Ct 103, 269 US 575, 70 L Ed 420

Mo—Evans v Southern Wheel Co, App, 273 SW 749—Buffum v F W Woolworth Co, 273 SW 176, 221 Mo App 345

NC—McLaughlin v Black, 1 SE2d 130, 215 NC 85—Highill v Washington Mills Co, 174 SE 457, 206 NC 582—Dalton v Stoneville Cabinet Co., 142 SE 480, 195 NC 870

SC—Davis v Spartan Mills, 137 S E 198, 139 SC 19

39 C J p 1126 note 16

Supervision of father

Question whether employer permitted deceased to work in coal mine only under direct supervision of father was for jury on conflicting evidence—Rex Red Ash Coal Co v Barley's Adm'r, 6 SW2d 724, 224 Ky. 485.

40. Ark—Ft. Smith Rim & Bow Co v Baker, 271 SW 945, 168 Ark. 798

Ky—Stober v Embury, 47 SW2d 921, 243 Ky 117
39 C J p 1127 note 17.

41. Ill—Kowalczyk v Swift & Co, 160 NE 588, 329 Ill 308

Mo—Walk v St Louis Can Co, App, 28 SW2d 391
39 C J. p 1127 note 18

Question whether minor was unlawfully employed in, about, or in connection with, processes wherein dangerous gases were used or made was mixed question of law and fact—Miller v American Cyanamid Co, CCA N J, 81 F2d 359

42. SC—Newsom v F. W. Poe Mfg Co, 98 SE 142, 111 SC 424
39 C J p 1127 note 19

43. SC—Crawford v Davis, 134 S E 247, 136 SC 95

Tex—Atchison, T & S F. Ry Co v Hix, Civ App, 291 SW 281
39 C J p 1128 note 20.

Contractual duty

Question whether employer owed employee duty under contract to furnish medical service was held for jury—Busby v. W. M. Rutter Lumber Co, 174 SE 4, 172 SC. 372

44. NC—Angel v Carolina Spruce Co, 101 SE 384, 173 NC 621—Woody v Carolina Spruce Co, 97 S.E 610, 176 NC. 643.

tending a particular servant, depends largely on the surrounding circumstances,⁴⁵ and the question to be left to the jury is whether the physician acted in good faith in forming his judgment.⁴⁶

e. Customary Methods and Appliances

It is for the jury to determine disputed questions of fact as to customary methods and appliances and as to whether an employer was negligent in failing to adopt customary methods and appliances, but, where the only inference that can reasonably be drawn from the evidence is that the master conformed to the general usage among prudent employers, he may be declared as a matter of law to have been in the exercise of due care.

The question whether an appliance or method of construction is in general or customary use is a question of fact,⁴⁷ and the same is true as to the question whether a usage exists, and if so, what such usage is.⁴⁸ Evidence that an employer has used customary methods and appliances, as discussed supra § 524, is not conclusive of the question as to his freedom from negligence, but such evidence goes to the jury with other evidence for determination of the ultimate fact whether the particular appliance or method was reasonably safe.⁴⁹ It is likewise a question for the jury whether an employer is negligent in failing to adopt customary methods and appliances,⁵⁰ and he will not be held negligent as a matter of law for failing to do so.⁵¹ On evidence showing that the employer was negligent in failing to furnish certain devices for the use of his employees, the case should not be withheld from the jury by reason of the fact that there is no evidence that such devices were customary or demanded by good practice.⁵² Where the

only inference that can reasonably be drawn from the evidence is that the master conformed to the general usage among prudent and skillful employers in well regulated concerns in respect of the adoption or use of an appliance, he may be declared, as a matter of law, to have been in the exercise of due care.⁵³

f. Tools, Machinery, Appliances, or Places for Work

- (1) General rule
- (2) Ways and places for work
- (3) Tools and appliances
- (4) Instrumentalities belonging to, or provided by, third persons
- (5) Particular places and instrumentalities
- (6) Covering or guarding dangerous machinery or places
- (7) Inspection and test
- (8) Repairs

(1) General Rule

Negligence on the part of the master with respect to his tools, machinery, appliances, or places for work is a question of fact for the jury, unless there is no evidence tending to show the master's negligence, or unless the evidence adduced is conclusive one way or the other.

Where, in an action by a servant to recover for personal injuries, there is evidence tending to show negligence on the part of the master with respect to his tools, machinery, appliances, or places for work, the question as to his negligence should be submitted to the jury,⁵⁴ but, where there is no evidence

45. Va.—Virginia Iron, Coal & Coke Co v. Odle, 105 SE 107, 128 Va 280.

46. Va.—Virginia Iron, Coal & Coke Co v. Odle, supra.

47. Mo.—Birdsong v Jones, 30 S.W. 2d 1094, 225 Mo App 242
39 C.J. p 1128 note 34

48. Va.—Atlantic Coast Lane R. Co v. Dell, 141 SE 838, 149 Va. 720

49. U.S.—Piecsonka v Pullman Co., C.C.A.N.Y., 89 F.2d 353.

Iowa.—Kibby v Chicago, R. I. & P. R. Co., 129 N.W. 983, 150 Iowa 587
NH.—Bill v. New England Cities Ice Co., 10 A.3d 662, 90 NH 453
N.Y.—Sadowski v Long Island R. Co., 55 NE2d 497, 292 NY 448—
Schein v. Feder, 278 NYS 653, 154 Misc 830
39 C.J. p 1128 note 25

50. Mo.—Birdsong v Jones, 30 S.W. 2d 1094, 225 Mo App 242
39 C.J. p 1128 note 26.

51. Iowa.—Donnelly v Ft. Dodge Portland Cement Corp., 148 NW 983, 168 Iowa 393

Minn.—Witta v. Interstate Iron Co., 115 NW 169, 103 Minn 803, 16 L.R.A.N.S., 128

52. U.S.—Standard Oil Co v. De Vries, C.C.A.N.J., 3 F.2d 852

53. Okl.—Powell v Durant Milling Co., 136 P.2d 904, 192 Okl 402
Pa.—Prattico v Hudson Coal Co., 32 A.2d 733, 347 Pa 490
39 C.J. p 1129 note 29

Evidence held not to make issue of fact on usage and custom—Vehicle Woodstock Co. v. Bowles, 128 So 98, 158 Miss 346

54. U.S.—Myers v Reading Co., Pa., 67 S.Ct 1334, 231 US 477, 91 L.Ed 1615—St Joseph Lead Co v Jones, C.C.A.Mo., 70 F.2d 475—Reynolds-West Lumber Co. v Taylor, C.C.A. Miss., 23 F.2d 36

Ark.—Berry Asphalt Co v Kidd, 143 S.W.2d 42, 200 Ark 1121—Norton & Wheeler Stave Co v Wright, 106 S.W.2d 178, 194 Ark 115—Arkansas Quicksilver Co v McGhee, 63 S.W.2d 280, 187 Ark 883—International Harvester Co of Amer-

ica v. Hawkins, 24 S.W.2d 340, 180 Ark 1056

Cal.—Burch v. Atchison, T. & S.F. Ry Co., 142 P.2d 955, 61 Cal App 2d 286—Thomas v Southern Pac Co., 3 P.2d 544, 116 Cal App 128, certiorari denied Southern Pac Co v Thomas, 52 S.Ct 265, 284 US 689, 78 L.Ed 582

Colo.—Huddleston v Ingersoll Co., 133 P.2d 1016, 109 Colo 134

Ill.—Adamaitis v Gardner, 63 NE 2d 135, 326 Ill App. 594

Ind.—Illinois Steel Co v Fuller, 23 NE2d 359, 216 Ind 180

Kan.—Walker v Colgate-Palmolive-Pest Co., 139 P.2d 157, 157 Kan 170

Ky.—Peerless Mfg Corporation v Mackey, 171 S.W.2d 258, 294 Ky. 221.

Mass.—McPhail v Boston & M.R.R., 181 NE 739, 280 Mass. 113

Miss.—F.W. Woolworth Co v Freeman, 11 So 2d 447, 193 Miss 838—Stricklin v Harvey, 179 So 345, 181 Miss 606—Gaines v Strickland, 170 So. 695, 178 Miss 308—

tending to show the master's negligence in this respect, or where the evidence which has been adduced on the question of his default is conclusive one way or the other, the question should not be submitted to the jury, and it is for the court to determine whether there is any evidence which has a tendency to show negligence, or whether the evidence conclusively shows it, or its absence⁵⁵

(2) Ways and Places for Work

The question whether an employer has been negli-

gent in respect of furnishing a reasonably safe place for work is a question for the jury where the issue is raised by the evidence; but the question should not be submitted to the jury where the evidence does not tend to show a lack of proper care by the employer or where the evidence is such that it permits of only one conclusion.

The question whether an employer has been negligent in respect of furnishing a reasonably safe place for work is a question for the jury where the issue is raised by the evidence⁵⁶ So, where the evidence is sufficient to raise the issue, it is for the

Benjamin v Davidson-Gulfport Fertilizer Co, 152 So 839, 166 Miss 162—Jefferson v Denkmann Lumber Co., 148 So 237, 167 Miss 246

Mo—Milburn v Chicago, M, St P & P R Co, 56 SW 2d 80, 381 Mo 1171—Gray v Doe Run Lead Co, 53 SW 2d 877, 381 Mo 481—Smith v Acme Boiler & Tank Co, 32 SW 2d 576, 326 Mo 734—High v Quincy, O & K C R Co, 300 SW 1103, 318 Mo 444—Eaton v Wallace, 287 SW 614, 48 A L R 1291—Walser v Kuhlmann, App, 176 SW 2d 658—Barney v St. Louis Independent Packing Co, App, 46 SW 2d 952—Wainwright v Westborough Country Club, App, 45 SW 2d 86—Gruenewald v Kaysing Iron Works, App, 5 SW 2d 709—Phillips v American Car & Foundry Co, App, 287 SW 810

NJ—Cichocki v Geigy Co, 183 A 463, 14 NJ Misc. 232

NC—Lee v Roberson, 16 SE 2d 459, 230 NC 61—Cole v Seaboard Air Line Ry Co, 154 SE 682, 199 NC 389, certiorari denied Seaboard Air Line Ry Co v Cole, 51 S Ct 182, 282 US 898, 75 L Ed 791—Perkins v Spray Wood & Coal Co, 127 SE 677, 189 NC 602

Okla—Luper Transp Co v Campbell, 138 P 2d 197, 182 Okl 45

Pa—Price v New Castle Refractories Co, 3 A 2d 418, 332 Pa 607—Texas & P Ry Co v Presley, 152 SW 2d 1105, 137 Tex 232—Beaumont, S L & W Ry Co v Schmidt, Civ App, 45 SW 2d 734, affirmed 72 SW 2d 899, 128 Tex 580

Utah—Kaumans v White Star Gas & Oil Co, 63 P 2d 231, 92 Utah 24—Thacker v Klotz, 7 SE 2d 883, 175 Va 267

Wash—Thornton v Van De Kamp's Holland Dutch Bakers, 42 P 2d 799, 181 Wash 213

39 C J p 1129 note 31

Concurrent negligence of master and fellow servants see infra § 535
Methods of work, rules, and orders see infra subdivisions 1-4 of this section

55. U.S.—Wolfe v Henwood, CCA Ark, 163 F 2d 998—Grant Stoeger Battery Co v De Lay, CCA Neb.,

87 F 2d 726—Pennsylvania Pulverizing Co v Butler, CCA NJ, 61 F 2d 311

Fla.—Duncan v Growers Equipment Co, 1 So 3d 458, 146 Fla 516

Mass—Shipp v Boston & M R R, 186 NE 653, 233 Mass 236

Mich—Greene v Miller, 204 NW 723, 232 Mich 19

Mo—Williams v Terminal R Ass'n of St. Louis, 98 SW 2d 651, 339 Mo 594, certiorari denied 57 S Ct 511, 300 US 689, 81 L Ed 876—Maupin v American Cigar Co, 84 SW 2d 218, 229 Mo App 782

Mont—Burnett v Northern Pac Ry Co, 124 P 2d 807, 113 Mont 253

Tex—Johnson v Pulliam, Civ App, 161 SW 2d 589, error refused. 39 C J p 1182 note 34

Duty of master

Where employee's evidence shows that employer's standard of duty toward employee with reference to safe place to work, safe tools, and safe appliances is fixed by law, custom, or usage, and that such duty has been performed, a demurrer to evidence may properly be sustained—Stephan v Apartment Hotels, 77 P 2d 539, 182 Okl 274

56. U.S.—Lavender v Kurn, Mo, 66 S Ct 740, 327 US 645, 90 L Ed 916—Bailey v. Central Vermont Ry, Vt, 68 S Ct. 1062, 319 US 350, 87 L Ed 1444, conformed to 35 A 2d 365, 113 Vt 433—Atlantic Coast Line R Co v Driggers, S C, 49 S Ct 490, 279 US 787, 73 L Ed 957—Atlanta & C A L Ry Co v Green, S C, 49 S Ct. 350, 279 US 821, 73 L Ed 976—Atlantic Coast Line R Co v Davis, S C, 49 S Ct 210, 279 US 34, 73 L Ed 601—Missouri Pac R Co v Aebly, Mo, 48 S Ct 177, 275 US 426, 72 L Ed 351, mandate conformed to Aebly v Missouri Pac R Co, 6 SW 2d 1115—Fleming v. Husted, CCA Iowa, 164 F 2d 65—Tombigbee Mill & Lumber Co v Hollingsworth, CCA Miss, 163 F 2d 763—Smith v Shevlin-Hixon Co, CCA Or, 157 F 2d 51—Boston & M R R v Meech, CCA Mass, 156 F 2d 109, certiorari denied 67 S Ct 124, 339 US 763, 91 L Ed 858—Southern Package Corporation v Mitchell, CCA Miss.,

109 F 2d 609—Harrison Engineering & Construction Corporation v Rollison, CCA Miss, 109 F 2d 602—Chapman & Dewey Lumber Co v. Hanks, CCA Tenn, 106 F 2d 482—Virginian Ry. Co v Staton, CCA W Va, 84 F 2d 133—Nelson v Jadrijevic, CCA Canal Zone, 68 F. 2d 631, certiorari denied 54 S Ct. 862, 292 US 652, 78 L Ed 1501—Southern Kraft Corporation v Parnall, CCA Miss, 66 F 2d 785—James Baird Co. v Boyd, CCA NC, 41 F 2d 578—Port Angeles Western R Co v Tomas, CCA Wash, 36 F 2d 210—Louisville & N. R Co v Mount, CCA Ohio, 35 F 2d 634—Reynolds-West Lumber Co v Taylor, CCA Miss, 23 F 2d 36—Chapman v Louisville & N R Co, DCKy, 72 F Supp 793

Ark—Safeway Stores v Phelps, 145 SW 2d 337, 201 Ark 495—Haynes Drilling Corporation v Smith, 143 SW 2d 27, 200 Ark 1098—L C Burr & Co v Greenlee, 103 SW 2d 77, 193 Ark 705—Wohlfeld v Henley, 98 SW 2d 1247, 192 Ark 650—Burden v Hughes, 55 SW 2d 502, 186 Ark 707—Federal Compress & Warehouse Co. v Parrott, 28 SW. 2d 728, 181 Ark 946—Ashcraft v. Jerome Hardwood Lumber Co, 292 SW 386, 173 Ark 135—Wisconsin & Arkansas Lumber Co v McCloud, 270 SW. 599, 168 Ark 352.

Cal—Bobo v. Northwestern Pac R Co, 19 P.2d 10, 129 Cal App 273, reversed on other grounds 54 S. Ct 263, 290 U.S. 499, 78 L Ed 462

Ga.—Chenall v Palmer Brick Co, 43 SE 443, 117 Ga 106

Ill.—McGehee v. Geo. S Mephram & Co., 279 Ill App 116—Wicks v Cuneo-Henneberry Co, 231 Ill App. 502, affirmed 150 NE 276, 319 Ill 344

Ind.—Wood v Chicago & E. R. Co., 178 NE 394, 93 Ind App. 309.

Kan.—Walker v. Colgate-Palmolive-Peet Co., 189 P.2d 157, 157 Kan 170.

Ky.—Premier Motors v. Smith's Adm'x, 178 S.W.2d 205, 296 Ky. 642—Coburn v. North American Refractories Co., 174 S.W.2d 757, 296 Ky 566—Kelly & Shields v. Miller, 33 S.W.2d 662, 236 Ky. 698.

jury to determine whether the employer extended | an implied invitation to servants to use a particu-

Mich—Holden v Meehan, 214 NW 208, 289 Mich 266

Minn—McDermott v Minneapolis, N & S Ry Co, 288 NW 116, 204 Minn 315—Reams v Chicago, M, St P & P R Co, 231 NW 286, 180 Minn 534

Miss—Mengel Co v Parker, 7 So 2d 521, 192 Miss 634—Stricklin v Harvey, 179 So 345, 181 Miss 806—Gulfport Fertilizer Co v Bilbo, 174 So 65, 178 Miss 791—Eagle Cotton Oil Co v. Pickett, 166 So 764, 175 Miss 677—Morgan Hill Paving Co. v Morris 133 So 229, 160 Miss 79—Poplarville Lumber Co v Kirkland, 115 So 191, 149 Miss 116.

Mo—Francis v. Terminal R Ass'n of St Louis, 193 SW 2d 909, 354 Mo 1232—Goslin v Kurn, 173 S W 2d 79, 351 Mo 395—Baker v Federal Garage Co, 88 SW 2d 473—Snyder v American Car & Foundry Co, 14 SW 2d 603, 322 Mo 147—Vordermark v Hill-Behan Lumber Co, 12 SW 2d 498—Dixon v Frauer-Davis Const Co, 393 SW 827, 318 Mo 50—Eaton v Wallace, 287 SW 614, 48 A.L.R. 1291—Doody v California Woolen Mills Co, 274 SW 692—Greer v McCrory, App, 192 SW 2d 431, affirmed in part and reversed in part, on other grounds State ex rel. McCrory v Bland, 197 SW 2d 669, 355 Mo 706—Baries v St Louis Independent Packing Co, App, 46 SW 2d 952—Wainwright v. Westborough Country Club, App, 45 SW 2d 86—Baker v Scott County Milling Co, App, 43 SW 2d 441—Alexander v. Forum Cafeteria, 37 SW 2d 670, 225 Mo App 679—Komer v. Liberty Foundry Co, App, 300 SW 1028—Koonse v Standard Steel Works Co, 300 SW 531, 221 Mo App. 1231—Ballard v Kansas City Power & Light Co, 298 SW 131, 221 Mo App 1116—De Bastiani v. Lesser-Goldman Cotton Co, App, 297 SW 174—Oney v Dierks Lumber & Coal Co, App, 296 SW 470—Hutson v Missouri Stair Co, App, 296 SW 216—Glenn v. American Car & Foundry Co, App, 294 SW 1021—Steinkamp v. F. B. Chamberlain Co., App, 294 S.W. 762—Davis v National Refining Co, App, 294 S W 114—Guldner v. International Shoe Co, App, 293 SW 428—Smith v. American Car & Foundry Co, App, 288 SW 982—Brann v Hydraulic Press Brick Co, App, 288 S.W. 941—Phillips v. American Car & Foundry Co, App, 287 S.W. 810—Markley v Kansas City, 286 SW 125, 221 Mo App 887—Courtois v American Car & Foundry Co, App, 282 SW 484—Schulte v Carmichael-Cryder Co., App, 282

SW 181—Ray v Marquette Cement Mfg Co, App, 273 SW 1078—Bushong v Barrett Co, App, 273 SW 761—Arnold v Graham, 272 SW 90, 219 Mo App 249—Brown v American Car & Foundry Co, App, 271 SW 540—Stubbs v American Car & Foundry Co, App, 270 SW 145

NH—Stone v Howe, 32 A 2d 484, 92 NH 425—Perkins v Nashua Mfg Co, 16 A 2d 700, 91 NH 211—Wentworth v Boston & M R R, 166 A 265, 86 NH 251—Harvey v Welch, 163 A 417, 86 NH 72—Hussey v Boston & M R R, 138 A 9, 82 NH 236

NJ—Clayton v. Ainsworth, 4 A 2d 274, 122 NJ Law 160—Downing v. Oxwell Acetylene Co, 169 A 709, 112 NJ Law 25, affirmed 174 A 900, 113 NJ Law 399—Mauthe v B & G Service Station, 139 A 245, 5 NJ Misc 981

NY—Sadowski v Long Island R Co, 55 NE 2d 497, 292 NY 448—Bellows v Merchants Despatch Transp Co, 12 NYS 2d 655, 267 App Div 15, affirmed 27 NE 2d 440, 282 NY 581

NC—Loflin v High Point, T & D R Co, 194 SE 104, 212 NC 595—Falls v Monarch Cotton Mills Co, 151 SE 191, 198 NC 227—Southwell v Atlantic Coast Line R. Co, 131 SE 670, 191 NC 153, reversed on other grounds 48 S Ct 25, 275 US 64, 72 L Ed 157.

Okl—Britt v Doty, 161 P 2d 521, 195 Okl 620—Champlin Refining Co of New Mexico v Huntington, 69 P 2d 31, 180 Okl 280—Herrian v Union Equity Co-op Exchange, 45 P 2d 151, 172 Okl 393—Crabb v Oklahoma Gas & Electric Co, 250 P 926, 120 Okl 182

Or—Beckman v Doernbecher Mfg. Co, 59 P 2d 688, 154 Or 408.

Pa—Rebel v Standard Sanitary Mfg. Co, 16 A 2d 534, 340 Pa 313—Keough v Markus, 173 A 768, 114 Pa.Super. 80.

SC—Boling v. Woodside Cotton Mills, 171 SE 9, 171 SC 34—Bailey v. Union-Buffalo Mills Co, 148 SE 703, 151 SC 83

SD—Pearson v Anderson, 224 N.W 185, 54 S.D. 639.

Tex—Great Atlantic & Pacific Tea Co v. Garner, Civ App, 170 SW 2d 502, error refused—United East & West Oil Co v. Dyer, Civ App, 144 SW 2d 989, affirmed 162 SW 2d 680, 139 Tex 313—Sonken-Galamba Corporation v Hillman, Civ App, 111 SW 2d 553, error dismissed—San Antonio & A. P. Ry. Co. v Mason, Civ App, 289 SW 1027—St Louis Southwestern Ry Co v Gillenwater, Civ App, 284 SW 268, affirmed, Com App, St Louis Southwestern Ry. Co of Texas v.

Gillenwater, 294 SW 193—Texarkana & Ft Smith Ry Co v Smith, Civ App, 270 SW 887

Va—Ross v Schnelder, 27 SE 2d 154, 181 Va 931

W Va—Moll v Bayha, 150 SE 515, 108 W Va 173—Holton v Clayco Gas Co, 145 SE 637, 106 W Va 394—Barr v Knotts, 133 SE 114, 101 W Va 440

39 C.J p 1132 note 35

Covering or guarding dangerous machinery or places see *infra* subdivision f (6) of this section

Particular questions held for jury

(1) Whether employer used ordinary care in determining safety of place—Davidson v. Riley, C.C.A. Miss, 17 F 2d 345

(2) Whether silica in form and quantity to cause silicosis was present in employee's place of work—Smith v. Harbison-Walker Refractories Co, 100 SW 2d 900, 340 Mo 389.

(3) Whether railroad failed in performance of legal duty to protect decedent from a sudden assault, which through its vice principal should have been foreseen and prevented—Southwell v Atlantic Coast Line R Co, 127 SE 361, 189 NC 417.

(4) Whether harmful quantities of hydrogen sulphide gas existed in oil being transported by defendant, whether gas was present in gate-houses in quantities sufficient to be harmful, and whether employee came in contact with harmful quantities of gas under harmful conditions—Smith v Stanolind Pipe Line Co, 189 SW 2d 244, 354 Mo. 250.

(5) Whether employer had used required degree of care to prevent damage from escaping of gas—Margay Oil Corporation v. Jamison, 59 P 2d 790, 177 Okl 433

(6) Whether unexploded charge of dynamite in rock existed, where employee was instructed to drill—L E Whitham Const Co v. Remar, C.C.A. Okl, 93 F 2d 736

(7) Whether master furnished safe place to servant removing brick from wall beneath roof which fell—Morris v. Clements, 293 S.W. 742, 173 Ark 1182

(8) Whether it was "practicable" to move truck from the roadway, within terms of statute, governing parking on the highway—Bohlmann v Penn Electric Corporation, 286 N W. 552, 232 Wis 232.

(9) Whether employer should have provided guard rail along side of embankment where road was under its exclusive control—Highway Const. Co. v. Shue, 49 P 2d 203, 173 Okl 456.

lar part of the premises in the performance of their duties,⁵⁷ or whether he was negligent in respect of furnishing light for dangerous places,⁵⁸ or providing proper ventilation,⁵⁹ or in having articles stand on end or edge so that they are likely to top-

ple over and injure a servant⁶⁰

The question whether a master was negligent in respect of furnishing a safe place to work should not be submitted to the jury where the evidence does not tend to show a lack of proper care by him,⁶¹ or

Use of unsafe way

Fact that one safe and one unsafe way were provided was held not, as matter of law, to determine owner's nonliability for injuries sustained while using unsafe way—*Creamer v Levy*, 155 A 446, 108 NJ Law 26

Making unsafe place safe

Mo—*Johnson v Ingram*, 178 S W 2d 821, 238 Mo App 241

57. NJ—*Creamer v Levy*, 155 A 446, 108 NJ Law 26
39 C.J. p 1133 note 36.

58. US—*Pearce v Lehigh Val R Co*, CCA NJ, 157 F 2d 252—*Johns-Manville v Pocker*, CCA Mo, 26 F 2d 204

Ill—*Miller v Russell*, 23 NE 2d 775, 302 Ill App 165

Minn—*Gonyea v Duluth, M & I R Ry Co*, 19 NW 2d 384, 220 Minn 225

Miss—*Davidson v McIntyre*, 32 So 2d 150—*Scott Burr Stores Corporation v Morrow*, 180 So 741, 182 Miss 748

Mo—*Derrington v Southern Ry Co*, 40 S W 2d 1069, 328 Mo 283, certiorari denied *Southern Ry Co v Derrington*, 52 S Ct 37, 284 US 682, 76 L Ed 561—*Eaton v Wallace*, 287 SW 614, 48 ALR 1291—*Busby v Southwestern Bell Telephone Co*, 287 SW 434—*Reynolds v Al G Barnes Amusement Co*, 300 SW 1062, 221 Mo App 1169—*Ryon v American Car & Foundry Co*, 297 SW 430, 220 Mo App 1142
39 C.J. p 1133 note 37.

59. US—*Goodall Co v. Sartin*, C CA Tenn, 141 F 2d 427, certiorari denied 65 S Ct 34, two cases, 323 US 709, 89 L Ed 571—*Michalek v. U. S Gypsum Co*, DC NY, 16 F Supp 708

Ind—*Illinois Steel Co v. Fuller*, 23 NE 2d 259, 216 Ind 180

Ky—*Coburn v. North American Refractories Co*, 174 SW 2d 757, 295 Ky 566

Minn—*Golden v. Lerch Bros*, 281 N W 249, 203 Minn. 211

NJ—*Rosacci v. United States Pipe & Foundry Co*, 8 A 2d 707, 123 N J Law 357

NY—*Schmidt v Merchants Despatch Transp Co*, 280 NYS 836, 244 App Div 606, modified on other grounds *Schmidt v. Merchants Despatch Transp Co*, 200 NE 824, 270 NY 287, reargument denied 3 NE 2d 680, 271 NY. 531

Pa.—*Price v New Castle Refractories Co*, 3 A 2d 418, 332 Pa 507
Tenn—*Holliston Mills of Tennessee*

v McGuffin, 145 SW 2d 1, 177 Tenn 1, rehearing denied 146 S W 2d 357, 177 Tenn 1—*Nashville Bridge Co v Hudgins*, 137 SW 2d 327, 23 Tenn App 677

Wash—*McGinnis v. Globe-Union Mfg Co*, 50 P 2d 900, 184 Wash 260

Practicability

Question whether it was practicable to install in factory exhaust system to carry away dust so that workman would not breathe it into respiratory tract and lungs was held for jury—*Jacques v. Locke Insulator Corporation*, CCA NY, 70 F 2d 680, certiorari denied *Locke Insulator Corporation v Jacques*, 55 S Ct. 99, 293 US 585, 79 L Ed 681

Sufficiency of natural means

Question whether natural means were insufficient to ventilate garage in which plaintiff was employed was held, under evidence, at least a jury question—*Pevesdorf v Union Electric Light & Power Co*, 64 SW 2d 939, 333 Mo. 1155.

60. Neb—*Riley v. Cudahy Packing Co*, 117 NW. 765, 82 Neb. 319
39 C.J. p 1134 note 38.

61. US—*Raudenbush v. Baltimore & O R. R.*, DCPa, 63 F Supp 329

Ark—*Kroger Grocery & Baking Co v Kennedy*, 136 SW 2d 470, 199 Ark 914

Miss—*Waterford Lumber Co v Jacobs*, 97 So 187, 132 Miss 638
39 C.J. p 1134 note 39

Evidence held insufficient to raise jury question as to negligence
(1) In providing a safe place for work generally.

US—*Wolfe v Henwood*, CCA Ark, 162 F 2d 998—*Hutchins v. Akron, C & Y R Co*, CCA Ohio, 162 F 2d 189—*Pennsylvania Pulverizing Co v. Butler*, CCA NJ, 61 F 2d 311

Ark—*Kroger Grocery & Baking Co v. Taylor*, 157 SW 2d 5, 203 Ark 154—*A. A. Electric Co v Ray*, 149 SW 2d 38, 202 Ark 85—*Southwestern Bell Telephone Co. v. Casson*, 138 SW 2d 406, 199 Ark 1140—*Baldwin v Dickinson*, 100 SW 2d 968, 193 Ark 1179—*Hickman v Weidman*, 54 SW 2d 291, 186 Ark 489—*Williamson & Williams v Cates*, 37 SW 2d 88, 183 Ark 579
Cal—*Rosetti v. Casazza*, 269 P. 637, 205 Cal 44

Kan—*Allen v Shell Petroleum Corporation*, 68 P 2d 651, 146 Kan. 67—*Hunter v. Barnsdall Refining Co*, 268 P. 86, 136 Kan 277.

Ky—*Louisville & N R Co v Morgan's Adm'r*, 9 SW 2d 212, 225 Ky. 447

Miss—*Wilson & Co v. Holmes*, 177 So 24, 180 Miss 361—*Meridian Grain & Elevator Co v Jones*, 169 So 771, 176 Miss 764.

Mo—*Wommack v Orr*, 176 SW 2d 477, 352 Mo 113—*Williams v Terminal R Ass'n of St Louis*, 98 S W 2d 651, 339 Mo. 594, certiorari denied 57 S Ct 511, 300 US 669, 81 L Ed 376—*Stone v Missouri Pac Ry. Co*, 293 SW. 367—*Crawford v Kansas City Bolt & Nut Co*, 278 SW 373—*Koenen v Terminal Railroad Ass'n*, App, 280 S. W 73, certiorari quashed *State ex rel Koenen v Daus*, Sup, 288 S W 14—*Jones v Laggett & Myers Tobacco Co*, App, 284 SW 513

Mont.—*Burnett v Northern Pac Ry. Co*, 124 P 2d 307, 113 Mont 253.

NH—*Balcus v Lexington Shoe Co*, 43 A 2d 155, 93 NH 428.

NY—*Schmidt v Carper*, 61 NYS 2d 185, 270 App Div 411.

NC—*Brady v Southern Ry Co*, 23 SE 2d 334, 222 NC 867, certiorari denied 63 S Ct. 995, 318 US 792, 87 L Ed 1158, affirmed 64 S Ct 232, 320 US 476, 88 L Ed 339—*Thomas v. Carolina Power & Light Co*, 173 SE 344, 206 NC. 332—*Potter v Atlantic Coast Line R Co*, 147 SE 698, 197 NC. 17—*Harris v. R G Lassiter & Co*, 142 SE 325, 195 NC 866.

Okl—*Powell v Durant Milling Co*, 136 P 2d 904, 192 Okl 402—*Atchison, T & S F Ry Co v Ford*, 48 P 2d 459, 171 Okl 516—*Bell v McDonnell*, 9 P 2d 735, 156 Okl 68—*Woodruff v. Phillips*, 280 P. 449, 138 Okl 77

Pa.—*Ludy v. Union Spring & Manufacturing Co*, Com Pl., 22 West Co. 170

SC—*Weston v Hillyer*, 159 SE 390, 160 SC 541

Tex—*Wichita Falls & S. R. Co v. Wade*, Civ App, 57 SW 2d 332, error refused

Utah—*Wilkerson v. McCarthy*, 187 P 2d 188

Wyo—*Galich v Oregon Short Line R. Co*, 87 P. 2d 27, 54 Wyo 133
39 C.J. p 1134 note 39 [d]

(2) In respect of failure to use reasonable care to provide proper ventilating system—*Pennsylvania Pulverizing Co v. Butler*, CCA N. J., 61 F 2d 311.

(3) In respect of furnishing light for dangerous places.

where the evidence is such that it permits of only one conclusion⁶²

It has been held that the question whether a master is under duty to furnish the servant a safe place to work is for the court,⁶³ but, where the facts are in dispute, the issue becomes one for the jury⁶⁴

(3) Tools and Appliances

It is generally a question for the jury whether an

employer is negligent in failing to provide suitable tools and appliances or whether appliances furnished are reasonably safe; but the question should not be submitted to the jury where there is no evidence tending to show negligence or where the evidence is uncontroverted.

It is generally a question for the jury whether an employer is negligent in failing to provide suitable tools and appliances⁶⁵ Whether or not the appliances furnished are reasonably safe is a question of fact to be determined by the jury.⁶⁶ This rule is

Ky—Brooks v Arnett, 69 SW 3d 1029, 253 Ky. 491

Miss—Supreme Instruments Corporation v. Lehr, 1 So 2d 242, 190 Miss 600

Mo—Wallingford v Terminal R. R. Ass'n of St Louis, 88 SW 2d 361, 837 Mo 1147.

NH—Shurkus v Gate City Foundry Co, 188 A 302, 83 NH 43.

NC—Craver v. Franklin Cotton Mills, 145 S.E. 570, 196 NC 330 39 C.J. p 1133 note 37 [b]

Failure to guard employees during strike

Fact that railroad provided guard during strike was held not to warrant submitting to jury question of negligence in failing to provide more than one guard—St Louis-San Francisco Ry Co v. Mills, Ala. 46 S.Ct. 520, 271 US 344, 70 L.Ed 979

62. US—Atchison v Martin Veneer Corporation, CCA Miss, 96 F 2d 46

Okl—Stephan v. Apartment Hotels, 77 P 2d 539, 182 Okl 274 39 C.J. p 1134 note 40

63. Utah—Andrews v Free, 146 P 555, 45 Utah 505.

Evidence held insufficient to warrant submission to jury of question of employers' duty to furnish safe place to work—Gaines v Strickland, 170 So 695, 178 Miss 308

64. Ky.—Duvin Coal Co v. Fike, 38 SW 2d 201, 238 Ky. 376

Duty to provide equipment

Question whether employer had duty to provide equipment for elimination of dust which contained silica was for jury—Reidy v. Crompton & Knowles Loom Works, 60 NE 2d 589, 318 Mass 135

65. US—Zeldman v. Gutterson & Gould, Inc., CCA N.H., 139 F 2d 160.

Ark—Capital City Casket Co. v. Ssurgot, 54 SW 2d 285, 186 Ark 421

Cal—Miller v Cookson, 265 P 374, 89 Cal App 603

Fla—Tampa Shipbuilding & Engineering Co v. Thomas, 179 So. 705, 181 Fla 660

Ga—Atlanta, B & C R Co. v King, 189 SE 580, 55 Ga App 1

Kan—Johnson v St Joseph & G. I. Ry. Co, 262 P. 494, 125 Kan. 88—

Crouch v Missouri Pac R. Co, 259 P 799, 124 Kan 305

Me—Boober v Bicknell, 191 A 275, 135 Me 153

Mass—Roberts v Frank's Inc, 49 NE 2d 427, 314 Mass 42—Cronan v Armitage, 190 NE 12, 285 Mass 520

Miss—Cotton Mill Products Co v. Oliver, 121 So 111, 158 Miss 362.

Mo—Gately v St Louis-San Francisco Ry Co, 56 SW 2d 54, 332 Mo 1—Boll v Condie-Bray Glass & Paint Co, 11 SW 2d 48, 321 Mo 92—Stahl v St. Louis-San Francisco Ry Co, 287 SW 628—Reaves v Kramer, 87 SW 2d 136, 231 Mo App 368—Crowley v St Louis-San Francisco Ry Co, App, 18 SW 2d 541—Wair v American Car & Foundry Co, App, 300 S W 1048—Darber v Missouri Boiler Works Co, App, 297 SW. 124—Wair v American Car & Foundry Co, App, 285 SW 155—Marlow v American Car & Foundry Co, App, 282 SW 522—Spinnell v Goldberg, 275 SW 775, 219 Mo App 471—McGowan v American Mfg. Co., App, 270 SW 423

NH—Brouillette v. J F McElwain Co, 51 A 2d 41—Perkins v Nashua Mfg Co, 16 A 2d 700, 91 NH 211

NJ—James v Pennsylvania R Co, 146 A 52, 105 NJ Law 504

NY—Adlam v. Konvalinka, 50 NE 2d 535, 291 NY 40—Miller v Erie R Co, 54 NYS. 606, 34 App Div 217

NC—McCord v Harrison-Wright Co, 153 SE 406, 198 NC 742—Smith v Kitchen Lumber Co, 153 SE 324, 198 NC 736—McKinish v Norwood Lumber Co, 133 SE 163, 191 NC 836

Okl—Anthony v Colvin, 180 P 2d 819, 181 Okl 476, rehearing denied Anthony v Colvin, 145 P 2d 384, 191 Okl 476—Beasley v. Bond, 48 P 2d 299, 173 Okl 355

SC—Tucker v Holly Hill Lumber Co, 20 SE 2d 704, 200 SC 259—Gowns v Watts Mill, 133 S.E. 550, 135 SC 163.

Tex—Texas & N. O. R Co v Kveton, Civ App, 75 SW 2d 118, error dismissed—Chicago, R I & G Ry Co v Hammond, Civ App, 286 S W. 483—Texarkana & Ft Smith Ry Co v Smith, Civ App, 270 S W 887

W Va—Hammack v Hope Natural Gas Co, 140 SE 1, 104 W Va. 344 39 C.J. p 1134 note 42

Particular questions held for jury

(1) Whether safety appliances would minimize danger from lighting which caused employee's death—Grant v Lubby, McNeill & Lubby, 295 P 139, 160 Wash 133

(2) Whether there was danger of contracting fibrosis of lungs and enlargement of heart as incident to plaintiff's work so as to require defendant employer to use approved and effective devices to protect plaintiff—Smith v. Stanolind Pipe Lane Co, 189 SW 2d 244, 354 Mo 250

Masks or respirators

US—Harrison Engineering & Construction Corporation v Rollison, CCA Miss, 109 F 2d 602—Pieczonka v Pullman Co., CCA N.Y., 102 F 2d 432

Miss—Allen Gravel Co v. Curtis, 161 So 670, 173 Miss 416

Mo—Blitschau v American Car & Foundry Co, App, 144 SW 2d 196

Ohio—McKee v New Idea, App, 44 NE 2d 697.

Goggles

US—Harrison Engineering & Construction Corporation v Rollison, CCA Miss, 109 F 2d 602.

39 C.J. p 1134 note 42 [a]

Violation of rule of industrial board relating to safety devices is not negligence as a matter of law but constitutes merely some evidence of negligence of person failing to provide those devices, to be considered with other evidence on question of negligence—Teller v Prospect Heights Hospital, 21 NE 2d 504, 280 N.Y. 456

66. US—Chickasha Cotton Oil Co v Roden, CCA Okl, 66 F 2d 127

Ga—Copeland v. McElroy, 176 SE 67, 49 Ga App 490

Idaho—Clariss v Oregon Short Line R Co, 33 P 2d 348, 54 Idaho 568

Ind—Chicago, I & L Ry. Co v Younger, 175 NE 290, 93 Ind App 278.

Iowa—Bell v Brown, 239 N.W. 785, 214 Iowa 370

Minn—Foley v Bennett, 17 NW 2d 509, 219 Minn 249

Miss—J. W Sanders Cotton Mill Co v Bryan, 179 So 741, 181 Miss 573—Mississippi Power & Light

frequently applied where the servant is injured by a splinter or chip of metal breaking from a defective appliance or instrumentality.⁶⁷ It cannot be said as a matter of law, without reference to the use made of it, that because an article is a simple appliance a master, when furnishing it to his servant, does not owe to him the duty to use ordinary care to see that it is reasonably suitable and safe to use in the work to be done, but the question is one for the jury,⁶⁸ the contrary view, however, is not unsupported.⁶⁹ A master cannot, as a matter of

law, be said to fail to exercise reasonable care solely because he fails to adopt the latest and most approved devices known,⁷⁰ or because he experiments with new and untried devices,⁷¹ and the question of negligence in such case is for the jury.⁷²

The question should not be submitted to the jury, however, where there is no evidence tending to show the negligence of the master in providing and maintaining suitable tools and appliances for the servant,⁷³ or where the evidence is uncontrovert-

Co v Smith, 153 So 376, 169 Miss 447

Mo—Huhn v Ruprecht, 2 SW 2d 780—Allen v Missouri Pac Ry Co, 294 SW 80—Crowley v St Louis-San Francisco Ry Co, App, 18 SW 2d 541—Neely v Chicago Great Western R Co, App, 14 SW 2d 972 certiorari quashed State ex rel Chicago Great Western R Co v Trimble, 14 SW 2d 978

NH—Brouillette v J F McElwain Co, 51 A 2d 41.

NY—Adlam v Konvalinka, 50 NE 2d 535, 291 NY 40—Bellows v Merchants Despatch Transp Co, 12 NYS 2d 655, 257 App Div 15, affirmed 27 NE 2d 440, 288 NY 581.

Okla—Corpus Juris quoted in Rudco Oil & Gas Co v Lofland, 135 P 2d 494, 496, 192 Okl 256—Joy v Pope, 53 P 2d 683, 175 Okl 540

Pa—Raymer v Standard Steel Works, 64 A 903, 216 Pa 101.

Wash—Schmidt v Pelz, 87 P 2d 278, 198 Wash 80

Wis—Dugenske v Wyse, 215 NW 829, 194 Wis 159.

39 CJ p 1134 note 43

Standard of reasonable care

(1) Where workmen's exposure during sandblasting operations was certain and grave and best mask available cost only a small sum, measuring the cost against the risk, jury could pitch the standard of reasonable care of employer higher than in other situations—Pieczonka v Pullman Co, CCAN.Y., 102 F 2d 432

(2) Question whether masks were sufficient protection as art stood when masks were issued was held for jury—Pieczonka v Pullman Co, CCAN.Y., 89 F 2d 353

67. Ark—Smith v McEachin, 57 S W 2d 1043, 186 Ark 1132

Mass—Jellow v Fore River Ship Bldg Co, 87 NE 906, 201 Mass 464

Mich—Newell v Detroit, T. & I R. Co, 205 NW 579, 232 Mich 528

Minn—Natalino v St. Paul Bridge & Terminal Ry Co, 251 NW 9, 190 Minn 118

Miss—Faulkner v Middleton, 188 So. 565, 186 Miss. 355, suggestions of

error overruled 190 So 910, 186 Miss 355.

Mo—Loduca v St Louis-San Francisco Ry Co, 289 SW 908, 315 Mo 331—Struckel v. Busch Sulzer Bros Diesel Engine Co, App, 300 SW 993

Tex—Texas Mexican Ry Co v Trujerina, 111 SW 239, 51 Tex Civ App 100, error refused 39 CJ p 1135 note 44

Evidence held insufficient for jury Mo—Williams v Terminal R Ass'n of St Louis, 98 SW 2d 651, 339 Mo 594, certiorari denied 57 S Ct 511, 300 US 669, 81 L Ed 876 39 CJ p 1135 note 44

68. US—Quannah, A & P Ry Co v Gray, CCA Tex., 63 F 2d 410, certiorari denied 54 S Ct 54, 290 US 636, 78 L Ed 553 39 CJ p 1136 note 45

Evidence held to raise jury questions as to

(1) Whether soft metal hammer was ordinary hand tool and whether presence of such tool would have made work safer—Freeman v Wentworth & Irwin, 7 P 2d 796, 139 Or 1

(2) Whether boat used by employer in transporting employees across river was a simple tool or a dangerous instrumentality—Tucker v Holly Hill Lumber Co, 20 SE 2d 704, 200 SC 259

Evidence held not to establish as matter of law that a wire-mesh soap pad furnished to a domestic servant by her mistress was such a simple household article in common use as to absolve mistress from liability for negligence in directing servant to use the article which was in a defective condition—Adlam v Konvalinka, 50 NE 2d 535, 291 NY 40

69. Miss—Allen Gravel Co v Yarbrough, 98 So 117, 133 Miss 652 39 CJ p 1136 note 46

70. NY—Adlam v Konvalinka, 50 NE 2d 535, 291 NY 40. 39 CJ p 1136 note 47

71. DC—U. S Express Co v Ball, 36 App DC 269, Ann Cas 1912C 331

72. DC—U. S Express Co. v Ball, supra.

73. Ark—Kemp v Hunter Transfer Co, 41 SW 2d 981, 184 Ark 18

Ill—Geiken v Chicago Great Western R Co, 6 NE 2d 690, 289 Ill. App 45

Neb—Rzeszotarski v. American Smelting & Refining Co, 277 NW. 334, 133 Neb 825

NC—Taylor v Atlantic Coast Line R Co, 165 SE 357, 208 NC 218

Okla—Stephan v Apartment Hotels, 77 P 2d 539, 182 Okl 274

Wash—Magnuson v Johnson, 107 P. 1043, 58 Wash 141.

39 CJ p 1136 note 49.

Statutory safeguards

In action against employer for breach of statutory duty resulting in injury to plaintiff's lungs, employer's liability should not have been submitted to jury, in absence of proof that employer had failed to provide safeguards specifically required by statute—Torelli v Eastman Kodak Co, 23 NYS 2d 895, 260 App Div 558.

Evidence held insufficient for jury

US—Stapleton v Reading Co, C.C. ANJ., 26 F 2d 242, certiorari denied 49 S Ct 28, 278 U.S. 627, 73 L Ed 546

Ill—Huff v Illinois Cent. R. Co, 199 NE 116, 362 Ill 95

Ky—Brooks v Arnett, 69 SW 2d 1029, 253 Ky 491—Louisville & N R Co v Morgan's Adm'r, 9 SW. 2d 212, 225 Ky 447—Green v. Pennsylvania R Co, 8 SW 2d 418, 235 Ky 243

Miss—Morgan Hill Paving Co v. Morris, 133 So. 229, 160 Miss 79

Mo—Poynter v Fogel Const. Co., 289 SW 80, 231 Mo App 530—Harville v Harrison Engineering & Construction Co, App, 281 SW. 113

NJ—Coyne v. Erie R Co., 150 A. 333, 106 NJ Law 453

NC—King v. Lee, 150 SE. 711, 198 NC 86—Clement v. Cannon Mills Co, 150 SE 630, 198 NC 43—

Potter v Atlantic Coast Lane R. Co, 147 SE. 698, 197 NC. 17—

Richardson v Southern Surety Co., 139 SE 839, 194 NC 469

Okla—Oklahoma Pipe Line Co v Perrymore, 126 P 2d 518, 190 Okl 687—Bell v. McDonnell, 9 P 2d 735,

ed.⁷⁴ Reasonable scientific judgment has been held not to be subject to review by a jury.⁷⁵

(4) Instrumentalities Belonging to, or Provided by, Third Persons

Where an employer could have discovered, by use of ordinary care, the dangerous condition of an instrumentality not belonging to him, but by which his servant was injured in the performance of his duties, the question of the employer's negligence is for the jury.

Where an employer is in a position to have discovered, by the use of ordinary care, the dangerous condition of an instrumentality not belonging to him but by which his servant was injured in the performance of his duties, the question of the employer's negligence is for the jury,⁷⁶ but not where it does not appear that there was any defect known to him or in existence under such circumstances as to imply that he was negligent in not knowing it.⁷⁷ It has been held that the purchase of an appliance from a reputable manufacturer does not establish the exercise of ordinary care by the master as a matter of law, and, where defects are discoverable by the exercise of ordinary care, the question of negligence is for the jury.⁷⁸ Whether or not an article was made by a reputable dealer is a question for the jury.⁷⁹

(5) Particular Places and Instrumentalities

- (a) Machinery
- (b) Horses and vehicles
- (c) Locomotives
- (d) Railroad cars
- (e) Railroad tracks and roadbeds
- (f) Buildings
- (g) Platforms, scaffolds, ladders, and supports
- (h) Elevators, derricks, cranes, hoisting apparatus, and shafts
- (i) Mines, oil wells, quarries, tunnels, and excavations
- (j) Electrical apparatus and structures
- (k) Shipping

(a) Machinery

In an action for injuries to a servant resulting from defective or dangerous machinery, the question of the master's negligence is one for the jury unless there is no evidence tending to show any negligence or unless only one conclusion is deducible from the facts.

In an action for injuries to a servant resulting from defective or dangerous machinery, the question of the master's negligence is generally one for the jury.⁸⁰ Thus the master's negligence is a question for the jury where he fails to provide or maintain

186 Okl 68—Woodruff v. Phillips, 380 P 449, 138 Okl 77.

Tex—D-Bar Ranch v Maxwell, Civ App, 170 S.W.2d 303, error refused.

Va.—Farmers' Adm'x v. Chesapeake & O Ry Co., 131 S.E. 334, 144 Va. 65.

74. Ark—Kemp v Hunter Transfer Co., 41 S.W.2d 981, 184 Ark 13
N.C.—Isley v. Virginia Bridge & Iron Co., 53 S.E. 841, 141 N.C. 220

Okl.—Powell v Durant Milling Co., 136 P.2d 904, 192 Okl 403

75. U.S.—Thomson v. Pennsylvania R. Co., C.C.A. Ohio, 88 F.2d 148.

76. N.Y.—Stroud v. Bramson, 58 N.Y.S.2d 82, 269 App Div 666.
39 C.J. p 1136 note 52

Particular questions held for jury

(1) Ownership—Rose v Missouri Dist Telegraph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400

(2) Whether third person was agent of employer or was independent contractor—Riggs v Meeker Co, Mo App, 8 S.W.2d 1085.

Joint negligence

In an action by an injured employee against the person supplying the defective instrumentality, in which the employer is made a third-party defendant on defendant's motion, the issue of joint negligence need not be submitted to the jury where plaintiff has not amended his complaint.—Wujnovich v. Equipment

Corporation of America, D.C. Pa., 54 F.Supp 465

77. Mass—Russell v Spaulding, 130 N.E. 195, 238 Mass 206
Pa—Moran v. General Fire Extinguisher Co., 102 A. 501, 259 Pa. 168

78. Tex.—St. Louis Southwestern R. Co. v. Ewing, Com App, 222 S.W. 198.
39 C.J. p 1136 note 55.

79. Mass—Murphy v Huber-Hodgman Printing Press Co., 89 N.E. 1044, 203 Mass. 549.

80. U.S.—Somogyi v. Cincinnati, N. O. & T. P. Ry. Co., C.C.A. Ky, 101 F.2d 180—Chickasha, Cotton Oil Co. v Roden, C.C.A. Okl., 66 F.2d 127—Natural Gas & Fuel Corporation v Salles, C.C.A. Ark., 80 F.2d 908—Farmers' Mfg. Co v Burton, C.C.A. N.C., 20 F.2d 339—Oregon-American Lumber Co v. Simpson, C.C.A. Wash., 8 F.2d 946.

Ariz—Bristol v Moser, 99 P.2d 706, 55 Ariz. 185.

Ark—Manhattan Const. Co. v. Atkinson, 88 S.W.2d 819, 191 Ark 920—Breece-White Mfg Co v Green, 287 S.W. 173, 171 Ark 968—Nowlin-Carr Co. v Cook, 283 S.W. 7, 171 Ark 51—W H Moore Lumber Co v Ragland, 279 S.W. 362, 170 Ark 1194

Fla—McGee v. C. Ed De Brauwere & Co., 162 So. 510, 117 Fla. 859.

Kan—Peters v. Cavanah, 295 P. 693, 132 Kan 244.

Minn—Foley v Bennett, 17 N.W.2d 509, 219 Minn 249

Miss—J. W. Sanders Cotton Mill Co. v. Bryan, 179 So 741, 181 Miss 573.

Mo—Tatum v. Torson, 38 S.W.2d 939, 327 Mo 275—Kitchen v Schluster Mfg Co., 20 S.W.2d 676, 323 Mo 1179—Huhn v Ruprecht, 2 S.W.2d 760—Owens v St. Louis-San Francisco Ry Co., 46 S.W.2d 930, 226 Mo App 226—Webster v International Shoe Co., App. 18 S.W.2d 131—Uhl v Century Electric Co., App. 295 S.W. 127—Peters v Hooen & Allison Co., App. 281 S.W. 71—Lowe v. Fox Laundry, Cleaning & Dyeing Co., App. 274 S.W. 857—Imboden v. St. Louis-San Francisco Ry. Co., App., 272 S.W. 1092

Neb—Bosteder v. Duling, 213 N.W. 809, 115 Neb 557.

N.H.—Isabelle v. Crystal Laundry, 41 A.2d 241, 93 N.H. 264—Connell v State Oil Co., 40 A.2d 743, 93 N.H. 244—Nason v. Lord-Morrow Excelsior Co., 29 A.2d 464, 92 N.H. 251

N.C.—Boswell v. Whitehead Hosiery Mills, 132 S.E. 598, 191 N.C. 549—Perkins v Spray Wood & Coal Co., 127 S.E. 677, 189 N.C. 603

Okl—Corpus Juris quoted in Rudco Oil & Gas. Co. v Lofland, 135 P.2d 494, 496, 192 Okl 256—McDuff v McFarlin, 95 P.2d 636, 185 Okl. 569

proper safety devices,⁸¹ such as belt shifters,⁸² or operates machinery without safety devices with which it has been equipped,⁸³ or maintains revolving projecting bolts,⁸⁴ or set screws in such position that they are dangerous to the servant,⁸⁵ or furnishes a defective or dangerous belt,⁸⁶ or maintains unsafe conditions around dangerous machinery.⁸⁷

Where, however, in an action for injuries from the operation of machinery there is no evidence tending to show any negligence on the part of the master, the question of negligence should not be submitted to the jury since it is one of law,⁸⁸ it is also a question of law where only one conclusion is deducible from the facts.⁸⁹

Where the servant is injured by the automatic starting of machinery when it should have remained at rest, the question of the master's negligence is ordinarily one for the jury,⁹⁰ although it has been held that evidence of the mere starting of

a machine where it had not occurred before,⁹¹ or in the absence of any other evidence of negligence,⁹² is insufficient to raise a jury question as to the negligence of the master.

(b) Horses and Vehicles

Where there is some evidence of negligence on the part of the master, the question of his negligence is ordinarily one for the jury where a servant's injuries result from the acts of horses or mules furnished by the master or are caused by a defective and dangerous condition of a wagon or other vehicle.

The question of the master's negligence is one for the jury where a servant's injuries result from the acts of horses or mules furnished by the master, and the evidence tends to show that the animals had vicious propensities,⁹³ or that their actions resulted from some negligent act of the master, or of some person for whose acts he is responsible.⁹⁴ Likewise, negligence of the master ordinarily is a question for the jury where the injuries to a serv-

—Joy v. Pope, 53 P.2d 683, 175 Okl. 540—Herrian v. Union Equity Co-op Exchange, 45 P.2d 151, 172 Okl. 393

SC—Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 184 S.C. 471—Leslie v. Southern Paving Const. Co., 169 S.E. 139, 169 S.C. 414—Hopkins v. Southern Cotton Oil Co., 142 S.E. 615, 144 S.C. 335.

Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580.

39 C.J. p. 1136 note 56.

81. US—Motor Wheel Corporation v. Dodson, C.C.A. Miss., 23 F.2d 282 39 C.J. p. 1137 note 57

82. NC—Tate v. Standard Mirror Co., 81 S.E. 328, 165 N.C. 273 39 C.J. p. 1137 note 58

83. US—Deninger v. American Locomotive Co., Pa., 185 F. 22, 107 C.C.A. 126

84. Mich—MacDonald v. Freeman Mfg. Co., 125 N.W. 352, 160 Mich. 380

85. US—Tombigbee Mill & Lumber Co. v. Hollingsworth, C.C.A. Miss., 162 F.2d 763 39 C.J. p. 1137 note 61.

86. US—Chicago Mill & Lumber Co. v. Jett, C.C.A. Ark., 32 F.2d 976. Ark—Dixie Bauxite Co. v. Webb, 63 S.W.2d 634, 187 Ark. 1024 Miss—Mississippi Power & Light Co. v. Smith, 153 So. 376, 169 Miss. 447—Legan & McClure Lumber Co. v. Fairchild, 124 So. 336, 155 Miss. 271.

39 C.J. p. 1137 note 62.

87. US—Tombigbee Mill & Lumber Co. v. Hollingsworth, C.C.A. Miss., 162 F.2d 763

Ark—McDonald v. Hailbron-Palmer

Tank Line Co., 292 S.W. 115, 173 Ark. 77

Minn—Foley v. Bennett, 17 N.W.2d 509, 219 Minn. 249

Wis—Fries v. Lallier, 263 N.W. 178, 219 Wis. 388.

39 C.J. p. 1137 note 64.

Failure to cover or guard dangerous places see *infra* subdivision f (6) of this section

88. Ark—Ft. Smith Rim & Bow Co. v. Baker, 271 S.W. 945, 168 Ark. 798

NC—Blanton v. Lawing, 4 S.E.2d 438, 216 N.C. 794

Pa.—Badara v. Goeringer, Com.Pl., 36 Luz. Leg. Reg. 11.

39 C.J. p. 1138 note 65.

Duty of employee to remedy dangerous condition

Where employee, who was injured while operating machine, was supposed to change knives when dull, it was error to submit question whether knives were dull and dullness contributed to injury—Garrison Co. v. Lawson, 287 S.W. 396, 171 Ark. 1122

Evidence held insufficient to raise jury question

US—Thomson v. Pennsylvania R. Co., C.C.A. Ohio, 88 F.2d 148—Arnall Mills v. Smallwood, C.C.A. Ga., 63 F.2d 57.

Iowa—Degner v. Anderson, 239 N.W. 790, 213 Iowa 588

Ky—Robinson v. Lytle, 124 S.W.2d 78, 276 Ky. 397—Highsplit Coal Co. v. Palmer's Adm'r, 20 S.W.2d 1020, 231 Ky. 24.

NC—Almond v. Ocoola Mills, 161 S.E. 781, 202 NC 97

Okl—Phillips v. Tackett, 32 P.2d 29, 168 Okl. 143.

Tex—Magnolia Petroleum Co. v. Ford, Civ. App., 14 S.W.2d 97, er-

ror denied Ford v. Magnolia Petroleum Co., 17 S.W.2d 86, 118 Tex. 461

Wis—Davis v. Wendlandt, 246 N.W. 320, 210 Wis. 322

89. Idaho—Maw v. Coast Lumber Co., 114 P. 9, 19 Idaho 393.

90. Mo—Jenkins v. Kansas City, 91 S.W.2d 98, 230 Mo. App. 337.

39 C.J. p. 1138 note 68

Negligence in failing to give proper warning when machinery is about to be started as question for jury see *infra* subdivision i (1) of this section.

91. SC—Holmes v. Davis, 119 S.E. 249, 126 S.C. 231.

92. Pa—Hemscher v. Dobson, 69 A. 669, 220 Pa. 222, 123 Am. S.R. 690

93. Evidence held to take case to jury

Mo—Warner v. Oriol Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448—Williams v. Pevely Dairy Co., App., 285 S.W. 149, certiorari quashed State ex rel. Pevely Dairy Co. v. Daves, 289 S.W. 835, 316 Mo. 418

39 C.J. p. 1138 note 71 [a].

Evidence held insufficient for jury

Iowa—Hansen v. Jensen, 216 N.W. 677, 204 Iowa 1063

Miss—Crosby v. Burge, 1 So. 2d 504, 190 Miss. 739

39 C.J. p. 1138 note 71 [b].

94. Mo—Todd v. American Ry. Express Co., 271 S.W. 880, 219 Mo. App. 405.

Neb.—Large v. Johnson, 248 N.W. 400, 124 Neb. 821.

N.Y.—James v. Metropolitan Jockey Club, 26 N.Y.S.2d 980, 261 App. Div. 1089

39 C.J. p. 1138 note 72.

ant are caused by a defective and dangerous condition of a wagon or similar vehicle,⁹⁵ such as a baggage or mail truck,⁹⁶ or by a tractor⁹⁷ or a motor vehicle,⁹⁸ or by an improper method of loading such vehicles.⁹⁹

(c) Locomotives

The question of the master's negligence should be submitted to the jury where there is evidence tending to show that a servant's injuries resulted from a de-

fective or dangerous condition of a locomotive or its equipment and appliances, but engineering questions relating to the choice of mechanical means by which locomotive boilers are to be kept in proper condition should not be left to the jury.

Evidence tending to show that a servant's injuries resulted from a defective or dangerous condition of a locomotive, or its equipment and appliances, is generally held to raise a question for the jury as to the master's negligence,¹ but, where there

95. Mo—Rogers v Gaines Bros Co, 295 SW 493, 220 Mo App 876
Okla—Buxton v Hicks, 131 P 2d 1015, 191 Okl 573

Wash—Cockerline v Anderson, 53 P 2d 321, 184 Wash 701
39 C.J. p 1138 note 73

Stave buggy

Ark—Norton & Wheeler Stave Co v Wright, 106 SW 2d 178, 194 Ark 115

96. Mo—Wellinger v Terminal R Ass'n of St Louis, 183 SW 2d 908, 353 Mo 670

Evidence held insufficient for submission to jury

NJ—Randion v Central R Co of New Jersey, 142 A 935, 7 NJ Misc 81

97. Ark—Gaster v. Hicks, 25 SW 2d 760, 181 Ark 299
Iowa—Oesterreich v Leslie, 234 N W 239, 212 Iowa 105

Evidence held to raise question for jury

Mo—Compton v. Louis Rich Const Co., 287 SW. 474, 315 Mo 1068

98. US—Heisson v Dickinson, C.C. A Ark., 85 F 2d 370

Ark—Producers Gravel & Sand Co v. Jones, 136 SW 2d 99, 197 Ark 767—Haraway v Mance, 56 SW 2d 1023, 186 Ark 971

Conn—Kruy v Smith, 144 A. 304, 108 Conn 628.

Mass—Kavigan v Lonerio, 45 N.E. 2d 823, 313 Mass 603

Miss—Crosby Lumber & Manufacturing Co v Durham, 179 So 285, 181 Miss 559, suggestion of error overruled 179 So 854, 181 Miss 559—Texas Co. v. Jackson, 165 So 546, 174 Miss 737

Mo—Alexander v Barnes Grocery Co., 7 SW 2d 370, 223 Mo App. 1—Lutgen v Standard Oil Co, 287 SW 885, 221 Mo App 773—Watson v Energy Const Co, 388 SW 715, 220 Mo App 363—Mots v Watson, App, 284 SW 837.

NH—Racette v Sunlight Baking Co, 155 A. 254, 85 NH 171

NC—Miles v McIver, 162 SE 551, 202 NC 285—Williams v Atlantic Coast Line R Co, 129 SE 816, 190 NC 366

Okla—Stockett v Steele, 169 P 2d 195, 197 Okl 134—Shoemaker v Gilstrap, 18 P 2d 1051, 162 Okl 399

Or—Erickson v Meier & Frank Co. 18 P 2d 207, 142 Or 76

SC—Googe v Speaks, 9 SE 2d 439, 194 SC 208

Wash—White v Consolidated Freight Lines, 72 P 2d 358, 193 Wash 146—Thomas v Inland Motor Freight, 68 P 2d 603, 190 Wash 428

39 C.J. p 1138 note 74

Evidence held for jury as to

(1) Whether steering wheel was reasonably safe—Luckett v Louisiana Oil Corporation, 158 So 199, 171 Miss 570

(2) Whether vehicle was illegally parked on highway—American Co of Arkansas v Baker, 60 SW 2d 572, 187 Ark 492

(3) Whether employee sustaining injuries while riding to work on employer's truck was being gratuitously conveyed—Anderson v Balenger, 164 SE 313, 166 SC 44

Evidence held insufficient to raise jury question

Ark—Magnolia Petroleum Co v Saunders, 104 SW 2d 1062, 193 Ark 1080—Wheeler v Ellis, 85 S W. 2d 64, 183 Ark 133

Ky—Magness' Adm'x v Hutchinson, 117 SW 2d 1041, 274 Ky 326

Mass—Cary v Streeter & Sons Co, 169 NE 782, 270 Mass 175.

Miss.—Dr. Pepper Bottling Co v Gordy, 164 So 286, 174 Miss 392

Tex—Railway Express Agency v Robinson, Civ App, 162 SW 2d 984, error refused.

39 C.J. p 1138 note 74 [b]

99. Mo—Wainwright v Missouri Lumber & Mining Co, 137 S.W. 53, 156 Mo App 512.

NJ—Fagan v New Jersey Cent R Co, 111 A. 32, 93 NJ Law 454
39 C.J. p 1138 note 75

1. US—Lilly v. Grand Trunk Western R Co, Ill, 63 S Ct 347, 317 U.S. 481, 87 L Ed 411—Chicago, St P, M & O Ry. Co v Muldowney, CCA Minn, 180 F.2d 971, certiorari denied 63 S Ct 526, 317 U.S. 700, 87 L Ed 560—Anderson v Baltimore & O R Co, CCA NY, 89 F 2d 629, certiorari denied Baltimore & O R Co v Anderson, 58 S Ct 14, 302 US 696, 82 L Ed 538—Chesapeake & O Ry Co v Wood, CCA Ohio, 59 F 2d 1017, certiorari denied 53 S Ct 92,

287 US 646, 77 L Ed 559—Chesapeake & O Ry Co v Wells, CCA Ohio, 49 F 2d 251, certiorari denied Wells v Chesapeake & O Ry Co, 52 S Ct 23, 284 US 641, 76 L Ed 545—Lehigh & N E R Co v Smale, CCA NJ, 19 F 2d 67

Ark—Chicago, R I & P. Ry Co v Matthews, 49 SW 2d 392, 185 Ark 724, certiorari denied 53 S Ct 88, 287 US 640, 77 L Ed 564

Ill—Lilly v Grand Trunk Western R Co, 37 NE 2d 888, 312 Ill App 78, reversed on other grounds 63 S Ct 347, 317 US 481, 87 L Ed 411
Ind—New York, C & St L R Co v Connaughton, 5 NE 2d 904, 211 Ind 419

Mo—Aly v Terminal R Ass'n of St Louis, 119 SW 2d 363, 342 Mo 1116, certiorari denied Terminal R Ass'n of St. Louis v Aly, 59 S Ct 251, 305 US 655, 83 L Ed 424—High v Quincy, O & K C R Co, 300 SW 1102, 318 Mo 444—Hilderbrand v St Louis-San Francisco Ry Co, 298 SW. 1069, 220 Mo App 1229.

Okla—Corpus Juris quoted in Rudco Oil & Gas Co v Lofland, 185 P 2d 494, 496, 192 Okl 256—Atchison, T & S F Ry. Co v Washington, 56 P 2d 1190, 176 Okl. 521

SC—Gordon v Atlantic Coast Line R Co, 174 SE 904, 173 S.C. 72.

Tenn—Nashville, C & St L Ry v. Pollard, 14 Tenn App 388
39 C.J. p 1138 note 76

Credibility of witnesses

In action under Federal Employers' Liability Act, fact that testimony of plaintiff's only witness who testified to improper condition of engine wheel was contradicted by several witnesses of defendant, including two inspectors from Interstate Commerce Commission, and that plaintiff's witness had been discharged by defendant, did not render testimony insufficient to go to jury—Crain v. Illinois Cent R Co, 73 SW 2d 786, 385 Mo 658, certiorari denied Illinois Cent R. Co v Crain, 55 S.Ct. 123, 298 U.S. 607, 79 L Ed 698.

Evidence held sufficient to go to jury on question

(1) Whether locomotive boiler is in condition required by Boiler Inspection Act § 2, 45 U.S.C.A. § 23.—

is no evidence tending to show any negligence of the master regarding the condition of a locomotive and its appurtenances, the case should not be submitted to the jury.² Whether or not an order of the Interstate Commerce Commission relating to handholds on "cars" applies to tenders which are parts of locomotives is a question of law and should not be left to the jury to determine.³

Engineering question Under the Federal Boiler Inspection Act § 2, 45 U.S.C.A. § 23, requiring locomotive boilers and their appurtenances to be in such condition as to permit their use without unnecessary danger, it has been held that it is not for the courts to lay down rules which will restrict carriers in their choice of mechanical means by which the locomotive boilers are to be kept in the proper condition, nor are such matters to be left to the varying and uncertain opinions or verdicts of juries, since the matters are engineering questions.⁴

(d) Railroad Cars

The question of the master's negligence in respect of railroad cars and their appliances is a question for the court in the absence of a conflict of evidence or where the evidence so clearly preponderates that a verdict to the contrary should be set aside, but where the evidence is substantially conflicting the question is one for the jury.

The question of the master's negligence in respect of railroad cars and their appliances is a question for the court in the absence of a conflict of evidence⁵ or where the evidence so clearly preponderates that, in the exercise of sound discretion, a verdict to the contrary should be set aside,⁶ but where the evidence is substantially in conflict the question of the master's negligence is ordinarily one for the jury where a servant is injured by reason of a defect in, or want of, a hand hold and the like,⁷ step,³ or brake⁹ of a railroad car, or by other defective or dangerous conditions of a car

Watkins v Boston & M R R, 138 A 315, 83 NH 10

(2) Whether pony wheel of locomotive was defective, in violation of Interstate Commerce Commission's rule, so as to render railroad negligent, regardless of whether railroad had notice of defect—**Crain v Illinois Cent R Co**, 73 SW 2d 786, 335 Mo 658, certiorari denied Illinois Cent R Co v Crain, 55 S Ct 123, 293 US 607, 79 L Ed 698

Substantial evidence

Switching foreman suing for injury under Federal Boiler Inspection Act was entitled to go to jury on substantial evidence that footboard on rear of engine tender did not function properly, irrespective of whether railroad was negligent—**Aly v Terminal R R Ass'n of St Louis**, 78 SW 2d 851, 336 Mo 340

2. Pa—Pursglove v Monongahela Ry Co, 131 A 477, 285 Pa 27, certiorari denied 46 S Ct 352, 270 US 654, 70 L Ed 783
39 CJ p 1139 note 77

Evidence held insufficient to raise jury question

US—Lynch v Delaware, L & W R Co, CCANY, 58 F 2d 177
Kan—Barlovich v Union Pac R Co, 58 P 2d 1061, 144 Kan 186
Tex—Emmons v Texas & P. Ry Co, Civ App, 149 SW 2d 167, error dismissed, judgment correct.

3. Mo—Satterlee v. St Louis-San Francisco Ry. Co., 32 SW 2d 69, 336 Mo 943

4. US—Baltimore & Ohio R Co v Groeger, Ohio, 45 S Ct 163, 266 US 521, 69 L Ed 419

Ill—Auschwitz v Wabash Ry Co, 178 NE 403, 346 Ill 190

NH—Watkins v Boston & M R R, 138 A 315, 83 NH 10
39 CJ p 1139 note 79

Held not engineering question

In action for death of fireman, who either fell or was knocked from tender by a low viaduct while attempting to return to engine cab over coal bin while returning from "doghouse" on tender where he had gone for shelter after a drenching received while taking on water in subzero weather, issue of whether facilities furnished constituted negligence was not an engineering question solely within jurisdiction of Interstate Commerce Commission but was a question for jury—**O'Brien v Chicago & N W Ry Co**, 68 NE 3d 638, 329 Ill App 382

5. SC—Game v Atlantic Coast Line R Co, 30 S.E.2d 32, 204 SC 452

39 CJ p 1140 note 91

Evidence held insufficient for jury

US—Atchison, T & S F Ry. Co. v Scarlett, Cal, 57 S Ct 541, 300 US 471, 81 L Ed 748, rehearing denied 57 S Ct 787, 301 US 712, 81 L Ed 1365—**Raudenbush v Baltimore & O R R**, DCPa, 63 F Supp 329

Ark—Kurn v Teague, 94 SW 2d 1037, 192 Ark 687

Ky—Louisville & N. R Co v Smith, 155 SW 2d 28, 287 Ky. 671—**Louisville & N R Co v Grant**, 27 S W 2d 980, 234 Ky 276

NC—Brewer v Southern Ry Co, 20 S.E.2d 370, 221 NC 453

Okl—Lowden v Bowen, 183 P 2d 980

39 CJ p 1140 note 91 [a].

6. US—Benefield v Woods Bros Const Co, CCA Miss, 17 F 2d 371

7. US—Swinson v Chicago, St. P.

M & O Ry Co, Minn, 55 S Ct 517, 291 US 529, 79 L Ed 1041, 96 ALR 1136, rehearing denied 55 S Ct 642, 295 US 787, 79 L Ed 1708—**Fort Street Union Depot Co v Hillen**, CCA Mich, 119 F 2d 307, certiorari denied 62 S. Ct 82, 314 US 642, 86 L Ed 516—**Chicago & N W Ry Co v Kelly**, CCA Minn, 84 F 2d 569—**Chicago & N W Ry Co v Kelly**, CCA Minn, 74 F.2d 31

Mo—Gordon v Kansas City Southern Ry Co, 131 SW 80, 222 Mo. 516

39 CJ p 1139 note 30.

8. Mich—Leary v Houghton County Tract Co, 137 NW 225, 171 Mich 365, 45 L.R.A.N.S., 359.

39 CJ p 1139 note 81

9. US—Myers v Reading Co, Pa., 67 S Ct 1334, 331 US 477, 91 L Ed 1615—**Altman v Atlantic Coast Line R Co**, CCA Fla, 18 F 2d 405
Cal—Phillips v Southern Pac Co, 58 P 2d 688, 14 Cal App 2d 454—**Karberg v Southern Pac Co**, 52 P. 2d 285, 10 Cal App 2d 234

Ill.—Carter v. Peoria & P U Ry. Co., 3 NE 2d 955, 286 Ill App 532
—**West v Cincinnati, I & W R Co**, 240 Ill.App 512

Mo—Wild v Pitcairn, 149 S.W.2d 800, 347 Mo 915, certiorari denied Pitcairn v Wild, 62 S Ct 72, 314 US. 638, 86 L Ed 512—**Cason v Kansas City Terminal Ry Co**, 133 SW 2d 133—**Henry v. Cleveland, C. C & St. L. Ry. Co**, 61 SW 2d 340, 332 Mo 1072, certiorari denied Cleveland, C. C & St. L. R Co v Henry, 64 S Ct. 70, 290 US 627, 78 L Ed 546—**Roan v Wells**, App., 14 SW 2d 488

NJ—Hendershot v New York, S & W R Co, 132 A. 206, 5 NJ Misc 737, affirmed 140 A. 919, 104 NJ

and its appliances.¹⁰ The question has been held one for the jury where the injuries resulted from the defective or dangerous condition of a foreign car,¹¹ tank car,¹² dump car,¹³ wrecker,¹⁴ or hand

car or tool car and the like.¹⁵ Where a servant is injured by reason of defects in a coupling apparatus, the question of the master's negligence may be one for the jury,¹⁶ but the direction of a verdict

Law 436, certiorari denied New York, S & W. R Co v. Hendershot, 48 S Ct 562, 277 U.S. 602, 72 L Ed 1009

NC—Brittain v. Atlantic & Y Ry Co., 9 SE2d 416, 217 NC 737—Bateman v. Brooks, 167 SE 627, 204 NC 176

SC—Link v. Seaboard Air Line Ry Co., 156 SE 481, 159 SC 538, certiorari denied Seaboard Air Line Ry Co. v. Link, 51 S Ct 212, 283 US 800, 75 L Ed 792

39 CJ p 1139 note 82

Questions as to particular defects held for jury

(1) Whether brake was defective or inefficient

US—Spotts v. Baltimore & O R Co., CCA Ind., 102 F2d 160, certiorari denied Baltimore & O R Co. v. Spotts, 59 S Ct 1039, 307 US 641, 83 L Ed 1522—Chesapeake & O Ry Co. v. Gowen, CCA Ohio, 65 F2d 260—Ernie R Co. v. Irona, CCA N.J., 48 F2d 60, certiorari denied 51 S Ct 649, 283 US 857, 75 L Ed 1463—Detroit, T. & I R Co. v. Hahn, CCA Ohio, 47 F2d 59, certiorari denied 51 S Ct 489, 283 US 842, 75 L Ed 1452

Cal—Newkirk v. Los Angeles Junction Ry Co., 131 P2d 535, 21 Cal 2d 308—Karberg v. Southern Pac Co., 52 P2d 285, 10 Cal App 2d 234

Ill—Anderson v. Chesapeake & O Ry Co., 186 NE 185, 352 Ill 561, certiorari denied Chesapeake & O Ry Co. v. Anderson, 54 S Ct. 93, 290 US 675, 78 L Ed. 583.

Minn—Duryea v. Chicago, St P, M & O Ry Co., 260 N.W. 528, 194 Minn 431.

NC—Spencer v. Seaboard Air Line Ry Co., 160 SE 763, 201 NC 537, certiorari denied Seaboard Air Line Ry Co. v. Spencer, 52 S Ct 313, 285 US 639, 76 L Ed. 932

Tex—Texas & P Ry Co. v. Baldwin, Civ App., 25 SW2d 969, affirmed, Com App., 44 SW2d 909, certiorari denied 53 S Ct. 11, 287 U.S. 606, 77 L Ed 527.

(2) Whether railroad complied with the Safety Appliance Act requiring an efficient hand brake

US—Spotts v. Baltimore & O R Co., CCA Ind., 102 F2d 160, certiorari denied Baltimore & O R Co. v. Spotts, 59 S Ct. 1039, 307 US 641, 83 L Ed 1522—Chesapeake & O Ry Co. v. Gowen, CCA Ohio, 65 F2d 260.

Ill—Anderson v. Chesapeake & O Ry Co., 186 NE 185, 352 Ill 561, certiorari denied Chesapeake & O Ry Co. v. Anderson, 54 S Ct. 93, 290 U.S. 675, 78 L Ed. 583.

US—Spotts v. Baltimore & O R Co., CCA Ind., 102 F2d 160, certiorari denied Baltimore & O R Co. v. Spotts, 59 S Ct. 1039, 307 US 641, 83 L Ed 1522—Chesapeake & O Ry Co. v. Gowen, CCA Ohio, 65 F2d 260.

Ill—Anderson v. Chesapeake & O Ry Co., 186 NE 185, 352 Ill 561, certiorari denied Chesapeake & O Ry Co. v. Anderson, 54 S Ct. 93, 290 U.S. 675, 78 L Ed. 583.

Ill—Anderson v. Chesapeake & O Ry Co., 186 NE 185, 352 Ill 561, certiorari denied Chesapeake & O Ry Co. v. Anderson, 54 S Ct. 93, 290 U.S. 675, 78 L Ed. 583.

(3) Whether equipment furnished by railroad complied with minimum requirements prescribed by interstate commerce regulations and whether equipment was efficient—Barry v. Reading Co., CCA N.J., 147 F2d 129, certiorari denied 65 S Ct 913, 324 US 867, 89 L Ed 1422, rehearing denied 65 S Ct 1022, 324 US 891, 89 L Ed 1438

(4) Whether motor car would have been stopped before open switch was reached, and derailment avoided if brakes on car had been in good condition—Chicago, R I & G Ry Co. v. Bernhard, Tex Civ App., 275 SW 505.

Evidence held insufficient for jury US—Grand Trunk Western R Co v. Holstein, CCA Mich., 67 F2d 780

NC—Brewer v. Southern Ry. Co., 20 SE2d 370, 221 NC 453.

Okl—Earl v. Oklahoma City-Atoka Ry. Co., 101 P2d 249, 187 Okl 100

SC—Game v. Atlantic Coast Line R Co., 30 SE2d 33, 204 SC 452

W Va.—Staton v. Virginian Ry Co., 195 SE 601, 119 W Va. 658

Mechanical question

Efficiency of railroad hand brakes, requiring two and a half turns of brake wheel to set, was held mechanical question for court, not jury, to determine from testimony of engineers and officers of companies building cars—De Queen & E R Co. v. Dye, 58 S.W.2d 955, 187 Ark 219

Weight to be given testimony of witnesses is a question for the jury—Karberg v. Southern Pac Co., 52 P2d 285, 10 Cal App 2d 234.

10. US—Guest v. Wabash R Co., CCA Ill., 147 F2d 579—Fort Street Union Depot Co. v. Hillen, CCA Mich., 119 F2d 307. Certiorari denied 62 S Ct 82, 314 US 642, 86 L Ed. 516.

Ill—Speiring v. Chicago & El. I. R Co., 60 NE2d 267, 225 Ill App 576 Minn—Wolf v. Chicago, M, St P. & P. R Co., 280 NW. 826, 180 Minn 310.

Mo—Cole v. St. Louis-San Francisco Ry Co., 61 SW2d 344, 332 Mo 999.

Okl—Kansas, O & G Ry Co. v. Ballew, 61 P2d 181, 177 Okl 500.

SC—Tyner v. Atlantic Coast Line R Co., 146 SE 663, 149 SC 89

Tex—Roberts v. Texas & P. Ry Co., 180 SW2d 330, 142 Tex 550—Kirby Lumber Co. v. Cunningham, Civ App., 164 SW 288

Wyo—Chicago & N. W. Ry Co. v. Ott, 237 P. 238, 33 Wyo. 200, re-

hearing denied 238 P 287, 33 Wyo 200, certiorari denied 46 S Ct 201, 269 US 585, 70 L Ed. 425

39 CJ p 1139 note 83

Evidence held to raise jury question

(1) Whether movement of cars from one yard to another was switching movement as affecting applicability of Safety Appliance Acts—Philadelphia & R Ry Co. v. Bartsch, CCA N.J., 9 F2d 858

(2) Whether railroad violated Safety Appliance Acts

US—Thompson v. Missouri Pac. R Co., CCA Mo., 15 F2d 28—Clarke v. Chicago & N W Ry Co., DC Minn., 63 F Supp 579

Cal—Burch v. Atchison, T & S. F Ry Co., 142 P2d 955, 61 Cal App 2d 286

(3) Whether running board was secure—Burch v. Atchison, T & S F Ry Co., supra.

11. SC—Rhodes v. Southern Ry. Co., 198 SE 382, 188 S.C. 238 39 CJ p 1140 note 84

12. Cal—Newkirk v. Los Angeles Junction Ry. Co., 131 P2d 535, 21 Cal 2d 308

Tex—Magnolia Petroleum Co. v. Ray, Civ App., 187 SW 1085

13. Wis—York v. Chicago, M & St. P. R. Co., 198 N.W. 377, 184 Wis 110

39 CJ p 1140 note 86.

14. US—Atlantic Coast Line R Co. v. Simms, CCA Fla., 157 F2d 874.

15. Ill—Beck v. Baltimore & O. R Co., 244 Ill App. 441

Kan—Palmer v. Midland Valley R. Co., 235 P 853, 118 Kan 507

Mo—Joice v. Missouri-Kansas-Texas R Co., 189 SW2d 568, 354 Mo 439, 161 A.L.R. 383.

NH—Dade v. Boston & M. R. R., 30 A2d 485, 92 NH 294

NC—Brittain v. Atlantic & Y. Ry. Co., 9 SE2d 416, 217 N.C. 737

39 CJ p 1140 note 87

Evidence held insufficient for jury Ky—Cincinnati, N O & T P. Ry Co. v. Owens, 11 SW2d 181, 226 Ky 472.

16. US—Chicago, St. P, M. & O Ry. Co. v. Muldowney, CCA Minn., 130 F2d 971, certiorari denied 63 S Ct 526, 317 U.S. 700, 87 L Ed 560

Ariz—Apache Ry. Co. v. Shumway, 158 P2d 142, 62 Ariz. 359, 159 A L.R. 857.

Minn—Ross v. Duluth, M. & I. R Ry. Co., 290 NW. 566, 207 Minn 157, followed in 219 NW 610, 207 Minn 648, certiorari denied Duluth,

against an employer for failure to provide automatic couplers as required by statute has been held proper.¹⁷

(e) Railroad Tracks and Roadbeds

Whether a railroad company has been negligent in maintaining a railroad track or roadbed, or obstructions or erections on, over, or near railroad tracks, whereby an employee is injured, ordinarily is a question for the jury, although the case should not be submitted to the jury in the absence of evidence of negligence. It has been held that purely engineering questions should not be submitted to the jury.

Whether a railroad company has been negligent in maintaining a railroad track or roadbed ordinarily is a question for the jury,¹⁸ although the case should not be submitted to the jury where there is no evidence of negligence of a railroad company in respect of its track or roadbed.¹⁹ Among the various defects and dangers in tracks and roadbeds which have resulted in injuries to employees and have been held to raise questions for the jury are holes, ditches, etc.,²⁰ or obstructions, debris, and the like, between or along the tracks,²¹ low joints

M & I R. R. Co v Ross, 61 S Ct. 9, 311 US 656, 85 LEd 420.

Mo—Truesdale v Wheelock, 74 SW 2d 585, 335 Mo. 924—*Williamson v St Louis-San Francisco Ry Co*, 74 SW 2d 583, 335 Mo. 917—*Jordan v. East St Louis Connecting Ry Co*, 271 SW. 997, 308 Mo. 81—*Carter v St Louis, T & E R Co*, 271 SW. 358, 307 Mo. 595—*Soderstrom v Missouri Pac R Co*, App. 141 S.W.2d 73—*Hankins v St. Louis-San Francisco Ry Co*, App. 14 SW 2d 674
39 C.J. p 1140 note 88

Evidence held to raise question for jury

(1) Whether couplers of cars were defective.

US—Geraghty v Lehigh Valley R Co, DCNY, 3 FSupp 376

Mo—McAllister v. St Louis Merchants' Bridge Terminal Ry Co, 25 SW 2d 791, 324 Mo. 1005—*Talbert v Chicago, R I & P Ry Co*, 15 SW 2d 762, 321 Mo. 1080, certiorari denied *Chicago, R I & P Ry Co v Talbert*, 50 S Ct. 26, 280 US 567, 74 LEd. 621.

(2) Whether coupler was lawful within Federal Safety Appliance Acts—*St Louis Southwestern Ry. Co. of Texas v. Bounds*, Tex Civ App., 283 S.W. 273—*St Louis Southwestern Ry. Co of Texas v. Pyron*, Tex Civ App., 278 S.W. 270.

(3) Whether railroad was liable for violation of Federal Safety Appliance Acts.

NJ—Oelfke v. Hudson & M. R Co, 135 A 659, 5 NJ Misc 2

N.Y.—Lierness v. Long Island R Co, 216 N.Y.S. 656, 217 App.Div. 301.

Evidence held insufficient for jury

(1) Whether couplers were defective at time of accident so as to impose liability on railroad.

US—Penn v. Chicago & N W Ry. Co, CCA Ill., 168 F.2d 995

Ga.—Western & Atlantic R R v. Gentle, 198 SE 257, 58 Ga App 282, certiorari denied *Gentle v Western & A. R. R.*, 59 S Ct. 252, 305 US 654, 83 LEd 424

(2) Whether coupler pin was defective—*Meisenhelder v Byram*, 283 N.W. 449, 182 Minn. 615, affirmed on

reargument 336 NW 195, 182 Minn 615, and certiorari denied 52 S Ct 30, 284 US 638, 76 LEd 543

17. *NY—Pless v New York Cent R Co*, 179 NYS 578, 189 App. Div 261, affirmed 134 NE 555, 232 NY 522, certiorari denied 43 S Ct 272, 258 US 620, 66 LEd 794

18. *US—Lavender v Kurn*, Mo., 66 S Ct 740, 327 US 645, 90 LEd 916—*Chicago & N W Ry Co v Green*, CCA Minn., 164 F.2d 55—*Eker v Pettibone*, CCA Ind., 110 F.2d 451—*Pitcairn v Hunault*, CCA Ind., 86 F.2d 664—*Virginian Ry Co v Staton*, CCA W Va., 84 F.2d 138—*National Box Co v Wroten*, CCA Miss., 66 F.2d 86—*Chicago, St P, M & O Ry Co v. Henkel*, CCA Minn., 52 F.2d 313, certiorari denied 53 S Ct 200, 284 US 683, 76 LEd 576, and certified questions answered *Henkel v Chicago, St P, M & O. Ry Co*, 52 S Ct 223, 284 US 444, 76 LEd. 386.

Ga.—Southern Ry. Co. v. Lunsford, 194 SE 602, 57 Ga.App. 53, certiorari denied 69 S Ct 78, 305 US 619, 83 LEd 395

Ill—*Porter v. Terminal R Ass'n of St Louis*, 65 NE 2d 31, 327 Ill App 645—*Popp v Terminal R Ass'n of St Louis*, 45 NE 2d 298, 316 Ill App 670

Mass—Murphy v Boston & Maine R. R., 65 NE 2d 923, 319 Mass 413.

Mo—Williams v. St Louis-San Francisco Ry Co, 35 SW 2d 624, 337 Mo 667—*Schluster v East St Louis Connecting Ry. Co*, 296 S W. 105, 316 Mo 1268—*Woolley v Wabash Ry. Co.*, App. 274 SW 871

NY—Walls v. Lehigh Valley R Co, 27 NYS 2d 174, 261 App Div 1116, appeal denied 30 N.Y.S. 695, 262 App Div. 977

Okla.—Oklahoma City-Ada-Atoka Ry Co. v. Kirkbride, 65 P 2d 1021, 179 Okl 428—*Schaff v Daugherty*, 339 P. 922, 112 Okl 134, certiorari denied 46 S Ct 208, 270 US 642, 70 LEd 776

Or—Adaskin v Oregon-Washington R & Nav Co., 294 P. 605, 184 Or 574

Tex—Kansas City Southern Ry Co v. Chandler, Civ App., 192 SW 2d 304, refused no reversible error—*Mosey v. Texas & P Ry Co*, Civ App., 191 SW 2d 55.

39 C.J. p 1141 note 92

19. *US—Delaware, L. & W R Co v Koska*, NJ., 49 S Ct 202, 279 US 7, 73 LEd. 578
39 C.J. p 1141 note 1.

Striking derailler from wrong direction

US—Brady v Southern Ry Co, N C., 64 S Ct. 232, 320 US 476, 83 LEd 239

Evidence held insufficient for jury

US—Atlantic Coast Line R. Co v. Temple, SC., 52 S Ct 334, 285 US 143, 76 LEd 670—*Toledo, St L. & W R Co v Allen*, Mo., 48 S Ct 215, 276 US 165, 72 LEd 613, conformed to *Allen v Toledo, St Louis & Western Ry. Co*, Sup., 12 S. W.2d 1116.

Mass—Slamin v. New York, N. H. & H R Co, 185 NE 353, 282 Mass. 590

Mo—Mattingly v. Broderick, 36 SW 2d 415, 225 Mo App 377

Ohio—Bevan v New York, C. & St L. R Co, 6 NE 2d 982, 132 Ohio St 245, certiorari denied 57 S Ct 924, 301 US 695, 81 LEd. 1351

Okla.—Wright v. Atchison, T. & S. F. Ry Co., 38 P.2d 617, 170 Okl 48.

Tex—Paris & G. N R. Co v. Stafford, Com App., 53 SW 2d 1019—*Ochoa v Fort Worth & D. C. Ry. Co*, Civ App., 293 SW 879.

20. *US—Handy v. Reading Co*, D C Pa., 68 FSupp 246

Ill—*Spearing v Chicago & E. I R Co*, 60 NE 2d 267, 325 Ill App 676

Mo—Goslin v Kurn, 173 SW 2d 79, 351 Mo 395—*Odell v. St Louis-San Francisco Ry. Co*, App. 281 S W. 456

NJ—Shortway v Erie R Co., 148 A 173, 8 NJ Misc 29, affirmed 153 A 907, 107 N.J. Law 385.

S.C.—McClain v. Charleston & W C. Ry Co, 4 S E 2d 280, 191 SC 332

39 C.J. p 1141 note 93

21. *US—Waddell v Chicago & E I R Co*, CCA Ill., 142 F.2d 209,

or places on the tracks,²² or dangerous conditions at a curve,²³ bridge,²⁴ or switch,²⁵ or conditions resulting in the setting or collapse of the roadbed²⁶ or bridge.²⁷ Whether a railroad has furnished a reasonably safe place in respect of a trestle required to be used by the servant ordinarily is a question for the jury,²⁸ although it has been held that it is not evidence of negligence for a railroad to maintain an uncovered underground farm crossing without regard to its use or location.²⁹

Obstruction or erection on, over, or near railroad tracks. The proximity of a structure to the track may, as a matter of law, be negligent or careful, or the negligence in its erection may be a question of fact, according to the circumstances of each particular case;³⁰ but where a servant is injured by reason of obstructions or erections placed on, over, or near railroad tracks the question of negligence is usually held to be one for the jury³¹ unless the evidence fails to show any negligence on the part

certiorari denied 65 S Ct 69, 333 US 732, 89 L Ed 587—Christian v Boston & M R R, CCANY, 109 F 2d 103—Pitcairn v Hunault, CCA Ind, 86 F 2d 664—Chicago, B & Q R Co v Kelley, CCA Neb, 74 F 2d 80—Terminal R Ass'n of St Louis v Harris, CC Mo, 69 F 2d 779—Chicago & N W Ry Co v Struthers, CCA Minn, 52 F 2d 88 certiorari denied 53 S Ct 38, 284 US 662, 79 L Ed 561—Youngstown & O R R Co v Halverstadt, CCA Ohio, 13 F 2d 995.

Ark—Missouri Pac R Co v Zolliecoffer, 191 SW 2d 687, 309 Ark 559
Cal—Smith v Schumacher, 85 P 2d 967, 30 Cal App 2d 251, certiorari denied Schumacher v Smith, 59 S Ct 1046, 307 US 446, 83 L Ed 1526—Haskins v Southern Pac Co, 39 P 2d 895, 3 Cal App 2d 177
Miss—Illinois Cent R Co v Humphries, 155 So 421, 170 Miss 840

Mo—Tash v St Louis-San Francisco Ry Co, 76 SW 2d 690, 335 Mo 1148—Smith v Southern Illinois & Missouri Bridge Co, 30 SW 2d 1077, 336 Mo 109—Sweeney v Terminal R Ass'n of St Louis, App, 110 SW 2d 852—Hicks v Missouri Pac R Co, 40 SW 2d 512, 225 Mo App 1053, 236 Mo App 362

Ohio—Howard v Pennsylvania R Co, 182 NE 663, 43 Ohio App 96
Or—Adskim v Oregon-Washington R & Nav Co, 294 P. 605, 134 Or 574—Adskim v Oregon-Washington R & Nav Co, 276 P 1094, 129 Or 169.

Tenn.—Tennessee Cent Ry Co v Shacklett, 147 S.W.2d 1054, 24 Tenn App 563
39 C.J. p 1141 note 94

Evidence held insufficient for jury
U.S.—Chicago & N W Ry Co v Payne, CCA Neb, 8 F 2d 332
Ark—White v St Louis Southwestern Ry Co, 183 SW 2d 781, 207 Ark 1005

Cal—Matthews v Southern Pac Co, 59 P 2d 220, 15 Cal App 2d 36
NH—Dade v Boston & M R R, 30 A 2d 485, 92 NH 294.

22. Mo—Harrison v St Louis-San Francisco Ry Co, 99 SW 2d 841, 389 Mo 821
39 C.J. p 1141 note 95.

23. US—Florida East Coast Ry Co v Clark, CCA Fla, 42 F 2d 216, certiorari denied 51 S Ct 76, 382 US, 870, 75 L Ed 769
39 C.J. p 1141 note 96

24. US—Pauly v. McCarthy, Utah, 67 S Ct 962, 330 US 802, 91 L Ed 1261—Bailey v Central Vermont Ry, Vt, 63 S Ct 1062, 319 US 350, 87 L Ed 1444, conformed to 35 A 2d 355, 113 Vt 433—Rashaw v Central Vermont Ry, CCA Vt, 133 F 2d 353

Minn—Bumberg v Northern Pac Ry Co, 14 NW 2d 410, 217 Minn 187, followed in 14 NW 2d 419, 217 Minn 187, certiorari denied 65 S Ct 87, 323 US 752, 89 L Ed 602

Vt—Bailey v Central Vermont Ry, 35 A 2d 355, 113 Vt 433, conforming to 63 S Ct 1062, 319 US 350, 87 L Ed 1444

Va—Bly v Southern Ry Co, 31 S E 2d 564, 183 Va 162, opinion adhered to 32 S E 2d 659, 183 Va 406.

25. US—Stewart v Baltimore & O R Co, CCANY, 137 F 2d 527
Ark—St. Louis-San Francisco Ry Co v Pearson, 281 SW 910, 170 Ark 842, certiorari denied 47 S Ct 101, 273 US 711, 71 L Ed 853

Cal—Thomas v Southern Pac Co, 2 P 2d 544, 116 Cal App 126, certiorari denied Southern Pac Co v Thomas, 52 S Ct 265, 284 US 689, 76 L Ed 582

Ill—Adamaitis v. Gardner, 63 NE 2d 135, 326 Ill App 594.

Iowa—McCall v. Pitcairn, 6 NW 2d 415, 232 Iowa 867.
39 C.J. p 1141 note 97

Evidence held insufficient for jury
Mo—Benton v St. Louis-San Francisco R Co, 182 S.W.2d 61, certiorari denied 65 S Ct 676, 324 US 843, 89 L Ed 1405

26. NH—Burke v Boston & M. R. R, 134 A 574, 82 NH 350
39 C.J. p 1141 note 98

27. Va.—Roberts v Southern Ry Co, 145 S.E. 255, 151 Va. 815.
39 C.J. p 1141 note 99.

28. US—Cawman v Pennsylvania-Reading Seashore Lines, CCAN J., 110 F 2d 832, certiorari denied

Pennsylvania Reading Seashore Lines v. Cawman, 61 S Ct 24, 311 US 668, 85 L Ed 427

NY—Hendricks v New York, N H & H R Co, 167 NE 449, 251 N Y 297, reargument denied 168 N. E 439, 251 NY 591, certiorari denied New York, N H & H R Co v Hendricks, 50 S Ct 82, 280 US 601, 74 L Ed 646.

NC—Barton v Atlantic Coast Line R Co, 193 SE 674, 213 NC 256, certiorari denied Atlantic Coast Line R Co v Barton, 58 S Ct 750, 308 US 651, 82 L Ed 1112.
39 C.J. p 1141 note 2

Evidence held insufficient for jury
Ark—Missouri Pac R Co v Hathcock, 139 SW 2d 35, 200 Ark 294

29. NY—Maue v Erie R Co, 91 NE 639, 198 NY 221.

30. Minn—Cay v Chicago, M & St P R Co, 115 NW. 949, 104 Minn 1.

NY—Long v Payne, 190 NYS 803, 198 App Div 667
39 C.J. p 1142 note 4.

31. US—Ellis v Union Pac R Co, Neb, 67 S Ct 598, 329 US 649, 91 L Ed 572—New York, C & St. L. R Co v Boulden, CCA Ind, 63 F 2d 917, certiorari denied 53 S Ct 785, 289 US 753, 77 L Ed 1498—Emch v Pennsylvania R Co, C CA Ohio, 37 F 2d 828

Ill—Sprickerhoff v Baltimore & O. R Co, 55 NE 2d 532, 333 Ill App 340—Werner v Illinois Cent. R. Co, 33 NE 2d 121, 309 Ill App 292, reversed on other grounds 42 NE 2d 82, 379 Ill 559

Mo—Wallingford v. Terminal R. R. Ass'n of St Louis, 88 SW 2d 361, 387 Mo 1147—Westover v. Wabash Ry Co, 6 SW 3d 843, certiorari denied Wabash Ry Co v Westover, 49 S Ct 31, 278 US 632, 73 L Ed 550—Howser v. Chicago Great Western R. Co, 5 SW 2d 59, 319 Mo 1015

S.C.—James v Atlantic Coast Line R Co, 18 SE 2d 616, 199 SC 45—Tyner v Atlantic Coast Line R Co, 146 SE 663, 149 SC 89—Green v Atlantic Coast Line R Co, 134 SE 385, 136 SC 337.

39 C.J. p 1142 note 5.

of the railroad company³² The want of a telltale or a defect therein resulting in injury to a servant by reason of being struck by an overhead bridge or other structure may raise a question of negligence for the jury³³ Where cars are left on an adjoining track so close to the passing track that they cannot be passed safely and a servant is injured thereby, the question of negligence may be one for the jury under the evidence,³⁴ but the mere placing of tracks so close together that cars moving thereon have barely enough room to pass, where such condition results from the necessity of using a public street, is not enough to support an inference of negligence³⁵ As to injuries received by a servant by reason of being crushed between a locomotive or car and a door jamb of a roundhouse or similar structure, whether a railroad company is negligent in failing to provide a reasonably safe place to work has been held to raise³⁶ or not to raise³⁷ a question for the jury, the rule in the latter instance being based on the principle that entry into or exit from a closed building, through a doorway, is a very different matter from the proximity of water tanks, mail cranes, signal

posts, and the like which may result in injuries to an employee³⁸ Where a mail crane is maintained at the same distance from a railroad track as other mail cranes, the question as to negligence in maintaining may not be submitted to the jury,³⁹ although the question may be submitted where it appears that the crane could have been located at a greater distance from the track and still operate efficiently⁴⁰

Engineering questions. The broad rule has been laid down that it is against public policy for courts to lay down rules as to the manner of the construction of railroads or to submit to a jury for decision purely engineering questions of railroad construction, in an action by a servant to recover damages for injuries sustained by him,⁴¹ and the rule has been held applicable specifically to curves in a railroad track⁴² There is authority opposed to this general rule,⁴³ and there is also authority which does not deny the rule in its entirety, but holds that it should not be extended beyond its specific application⁴⁴ Furthermore, neither the general doctrine nor its specific application prevents a submission to the jury of the negligence of a railroad in the method of using the track.⁴⁵

32. US—Atlantic Coast Line R Co v Powe, 51 S Ct 498, 288 US 401, 75 L Ed 1142

Evidence held insufficient for jury

US—Philadelphia & R Ry Co v Throun, CCANJ, 9 F2d 856, followed in Szczepanski v Pennsylvania R Co, 36 F2d 1023.

Me—Birmingham v Bangor & A R Co, 147 A 149, 128 Me 264

Minn—Stone v Chicago & N W Ry Co, 222 NW 641, 176 Minn 104

Mo—Hamilton v St Louis-San Francisco Ry Co, 300 SW 787, 318 Mo 123

39 CJ p 1142 note 6 [a]

33. US—Reading Co v Geary, CC A Md, 47 F2d 142, 79 ALR 226, certiorari denied 51 S Ct 492, 283 US 844, 75 L Ed 1454

39 CJ p 1142 note 7.

Evidence held insufficient for jury
Ala—Southern Ry Co v Crawley, 155 So 568, 229 Ala 162

34. Mo—Vaughan v St Louis Merchants' Bridge Terminal Ry Co, 18 SW2d 62, 322 Mo 980.

NJ—Reardon v Delaware, L & W R Co, 147 A 544, 106 NJ Law, 172, certiorari denied Delaware, L & W R Co v Reardon, 50 S Ct 239, 281 US 724, 74 L Ed 1142
39 CJ p 1142 note 8

Evidence held insufficient for jury
Ky—Brooks v Louisville & N R Co, 26 SW2d 523, 233 Ky 656

35. US—Reese v Philadelphia & R R Co, Pa, 36 S Ct 134, 239 US 463, 60 L Ed 384.

36. US—Harvey v Texas & P R Co, Tex, 166 F 385, 92 CCA 237
39 CJ p 1143 note 10

37. NY—Hogan v New York Cent & H R R Co, 102 NE 556, 209 NY 20.

39 CJ p 1142 note 11

38. NY—Hogan v New York Cent & H R R Co, supra

39. US—Southern Pac Co v Berkshire, Tex, 41 S Ct 162, 254 US 415, 65 L Ed 335

NY—Sisco v Lehigh & H R R Co, 39 NE 958, 145 NY 296

40. Colo—Denver & R. G R Co v Burchard, 86 P 749, 35 Colo 539, 9 Ann Cas 994

39 CJ p 1143 note 14.

41. Pa—McGuire v. Lehigh Valley R. Co, 64 A 825, 215 Pa. 618.

39 CJ p 1143 note 15

Space between tracks

Court, in determining whether railroad provided car checker safe working place, will not prescribe space between tracks or leave question to jury—Toledo, St L & W R Co v Allen, Mo, 48 S Ct 215, 276 US 165, 73 L Ed 513, conformed to Allen v Toledo, St Louis & Western Ry Co, 12 SW2d 1116

42. US—Tuttle v Detroit, G H & M R Co, Mich, 7 S Ct 1166, 122 US 189, 194, 80 L Ed 1114.

Va—Potomac, F & P R Co v Chichester, 68 SE 404, 111 Va. 152.
39 CJ p 1143 note 16

43. Iowa—Gordon v Chicago, R L & R R Co, 106 NW 177, 129 Iowa 747
39 CJ p 1143 note 17.

Adequacy of curve of tracks as contributing cause to throwing fireman from engine was held for jury
—Watkins v Boston & M R R, 146 A 865, 84 NH 124, certiorari denied Boston & M R R v Watkins, 50 S Ct 35, 280 US 584, 74 L Ed 633.

44. Mo—Schultheis v. United R Co, 236 SW 54
39 CJ p 1143 note 18

Structure deviating from standard

While it is true that ordinarily the location of apparatus or structures in proximity to railroad tracks is a matter in which a jury is not allowed to review the judgment of the locating engineers, and the jury should not be allowed to infer negligence where there was ample need or propriety of the location of a structure deviating from the standard location of such a structure, where it is unexplained, and was apparently unnecessarily dangerous, it has a substantial tendency to show negligence as against a servant ignorant and unwarned, and a question for determination of the jury is presented—Emch v Pennsylvania R Co, CCA Ohio, 87 F2d 828

45. US—Norfolk & W. R. Co v Gillespie, Va, 224 F. 316, 139 C.C. A. 552.

(f) Buildings

The question of the master's negligence ordinarily is for the jury where the evidence shows that a servant was injured by reason of the defective or dangerous condition of a building.

The question of the master's negligence ordinarily is for the jury where the evidence shows that a servant was injured by reason of the defective or dangerous condition of a building,⁴⁶ and this rule has been applied where the injury is attributable to a floor that is defective⁴⁷ or slippery⁴⁸ or that has uncovered or unguarded holes or openings therein,⁴⁹ or to the want of a proper exit or escape in case of a fire,⁵⁰ or to the dangerous condition of a trap-door.⁵¹

(g) Platforms, Scaffolds, Ladders, and Supports

On conflicting evidence, the question of the master's negligence ordinarily is one for the jury where a servant is injured by reason of want, or defective condition, of a scaffold, ladder, platform, support, or the like.

On conflicting evidence, the question of negligence of the master ordinarily is one for the jury where a servant is injured by reason of the master's failure to furnish a scaffold in a proper case,⁵² or where the injury results from the defective or dangerous condition of a scaffold or staging furnished by him,⁵³ or the condition of a skid, runway, walk,

46. Ill.—Miller v. Russell, 23 N.E.2d 775, 302 Ill.App. 165

Mo.—Busby v. Southwestern Bell Telephone Co., 287 S.W. 434—Pearce v. Boyd-Welsh Shoe Co., App. 6 S.W.2d 888.

N.Y.—Caminiti v. Matthews Const. Co., 372 N.Y.S. 245, 241 App.Div. 879.

N.D.—Olson v. Great Northern Ry. Co., 219 N.W. 209, 56 N.D. 690.

Ohio.—New York Cent. R. Co. v. Lukanc, 167 N.E. 403, 32 Ohio App. 232

R.I.—Boettger v. Mauran, 12 A.2d 285, 64 R.I. 340.

Wash.—Kelly v. The Vogue, 153 P.2d 277, 21 Wash.2d 785.

39 C.J. p 1143 note 20

Negligence of master in respect of furnishing light for dangerous places or providing proper ventilation as question for jury see *supra* subdivision f (3) of this section

Evidence held insufficient for jury
U.S.—Allison v. Great Atlantic & Pacific Tea Co., C.C.A.N.C., 99 F.2d 507

Mass.—Rasimas v. Swan, 67 N.E.2d 662, 320 Mass. 60.

Miss.—Supreme Instruments Corporation v. Lehr, 1 So.2d 242, 190 Miss. 600.

Mo.—Bello v. Stuever, 44 S.W.2d 619—Layton v. Chinberg, 282 S.W. 434

47. Mass.—Wood v. National Theatre Co., 42 N.E.2d 536, 311 Mass. 550

Mo.—Killon v. King Lumber Co., App. 16 S.W.2d 730.

39 C.J. p 1143 note 21

48. Kan.—Phillips v. Commercial Nat. Bank, 289 P. 984, 119 Kan. 339.

Mass.—Novash v. Crompton & Knowles Loom Works, 23 N.E.2d 89, 304 Mass. 244.

Mo.—Capstick v. T. M. Sayman Products Co., 84 S.W.2d 480, 327 Mo. 1—Garnett v. S. S. Kresge Co., App. 85 S.W.2d 157—Harris v. Chouteau

Shoe Mfg. Co., App. 16 S.W.2d 633

—Barnes v. National Biscuit Co., App. 3 S.W.2d 254—Spina v. Union Biscuit Co., App. 299 S.W. 136

—Dudacs v. Hotel Statler Co., App. 295 S.W. 826—Sanders v. Armour & Co. of Delaware, App. 292 S.W. 443—Simmer v. May Department Stores, App. 282 S.W. 117

Or.—Henning v. Carstens Packing Co., 297 P. 1055, 136 Or. 267

R.I.—Faltmali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438

Tex.—Great Atlantic & Pacific Tea Co. v. Garner, Civ. App. 170 S.W.2d 502, error refused.

39 C.J. p 1143 note 22

Evidence held insufficient for jury

Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033

Mo.—Hoover v. Baldwin, App., 111 S.W.2d 1011.

Or.—De Mars v. Heathman, 286 P. 144, 132 Or. 609

49. Mo.—Fisher v. Laclede Gas Light Co., 31 S.W.2d 770

N.C.—Pearson v. Standard Garage & Sales Co., 161 S.E. 536, 202 N.C. 14.

W.Va.—Thorn v. Addison Bros. & Smith, 194 S.E. 771, 119 W.Va. 479.

39 C.J. p 1143 note 23.

Covering or guarding dangerous machinery or places generally see *infra* subdivision f (6) of this section

Evidence held insufficient for jury

Kan.—Gifford v. Wheeler, 106 P.2d 684, 152 Kan. 544.

50. Ala.—Birmingham R. Light & Power Co. v. Milbrat, 78 So. 224, 201 Ala. 368

N.Y.—Sembler v. Cowperthwait, 103 N.Y.S. 979, 53 Misc. 28

51. W.Va.—Thorn v. Addison Bros. & Smith, 194 S.E. 771, 119 W.Va. 479

39 C.J. p 1144 note 25

52. Ky.—E. J. O'Brien & Co. v. Shel-

ton's Adm'r., 55 S.W.2d 352, 246 Ky. 537

Mo.—Meyers v. Atlas Portland Cement Co., App. 260 S.W. 778.

Evidence held insufficient for jury
Mass.—Deignan v. Lubarsky, 63 N.E.2d 575, 318 Mass. 661

Mo.—Stone v. Missouri Pac. Ry. Co., 293 S.W. 367.

53. U.S.—Ingalls Shipbuilding Corp. v. Trehern, C.C.A.Miss., 155 F.2d 202

Ark.—Arkadelphia Sand & Gravel Co. v. Knight, 79 S.W.2d 71, 190 Ark. 386—Chicago, R. I. & P. Ry. Co. v. Garrett, 18 S.W.2d 321, 179 Ark. 690, certiorari denied 50 S.Ct. 39, 280 U.S. 591, 74 L.Ed. 639

Iowa.—Casey v. Hansen, 26 N.W.2d 50

Mo.—Brackett v. James Black Masonry & Contracting Co., 32 S.W.2d 288, 326 Mo. 387—Sloan v. Polar Wave Ice & Fuel Co., 19 S.W.2d 476, 323 Mo. 362—Dyer v. W. M. Sutherland Building & Contracting Co., 13 S.W.2d 1056, 321 Mo. 1015—Howard v. Fred Schmitt Realty & Investment Co., App. 7 S.W.2d 448

N.H.—West v. Boston & M. R. R., 129 A. 768, 81 N.H. 522, 42 A.L.R. 176

N.C.—Drake v. City of Asheville, 138 S.E. 343, 194 N.C. 6.
39 C.J. p 1144 note 27.

Route of descent

In servant's action for injuries sustained when plank of scaffold from which servant was attempting to descend slipped and permitted servant to fall, whether route used by servant was customarily used by other employees under the immediate supervision of the general superintendent and was therefore adopted by master was for jury—Graham v. Brummett, 181 So. 721, 182 Miss. 580.

Employer's negligence in furnishing defective timber to laborers for scaffolding:

or the like,⁵⁴ or a ladder,⁵⁵ or a platform,⁵⁶ or a jack,⁵⁷ or supports of various kinds.⁵⁸ On conflicting evidence, the question whether a master has undertaken to furnish a completed scaffold or staging, or only suitable material therefor, leaving the matter of construction or erection to the servants, is one for the jury.⁵⁹

(h) Elevators, Derricks, Cranes, Hoisting Apparatus, and Shafts

Unless there is no evidence tending to show neg-

ligence, the negligence of the master ordinarily is a question for the jury where the servant is injured by reason of a defective or dangerous condition of an elevator, derrick, crane, hoisting apparatus, or shaft.

The negligence of the master ordinarily is a question for the jury where the servant is injured by reason of a defective or dangerous condition of an elevator,⁶⁰ or of a derrick⁶¹ or crane,⁶² hoisting ap-

(1) Held for jury—*Miller v. Collins*, 40 S.W.2d 1062, 328 Mo. 313

(3) Held not raised by evidence sufficient for jury—*La. Coe v. Kinsey*, 169 A. 901, 106 Vt. 109

Who placed board on scaffold, or ordered it placed, was held for jury—*Watkins v. Jahncke Dry Docks*, 125 So. 469, 12 La.App. 350.

Height of scaffold

A question as to the height of a scaffold, on which the evidence is conflicting, is for the jury—*Gillis v. Graeber*, 221 P. 235, 26 Ariz. 34

Evidence held insufficient to raise jury question

Mo—*Meyer v. Wells Realty & Investment Co.*, 292 S.W. 17
39 C.J. p. 1144 note 27 [e].

54. Miss—*Mississippi Cottonseed Products Co. v. Harris*, 132 So. 439, 187 Miss. 138

Mo—*Whittington v. Westport Hotel Operating Co.*, 33 S.W.2d 963, 326 Mo. 1117.

Or—*Moen v. Aitken*, 271 P. 730, 127 Or. 246

S.C.—*Whisenhunt v. Atlantic Coast Line R. Co.*, 10 S.E.2d 305, 195 S.C. 213

39 C.J. p. 1144 note 28

Purpose

Question whether board which broke with weight of plaintiff farmer, hired to take care of water tank, was solely ladder brace or was intended to be walked on, and whether defendant railroad owed plaintiff legal duty to maintain board in condition to be stepped on, was held for jury on conflicting evidence—*Texas & N. O. R. Co. v. Rittmann*, Tex. Civ. App., 87 S.W.2d 745, error dismissed.

55. Fla.—*Kenan v. Walker*, 173 So. 836, 127 Fla. 275

Mass.—*McCarthy v. New York, N. H. & H. R. R.*, 189 N.E. 30, 285 Mass. 211

Mo.—*Braden v. Friedrichsen Floor & Wall Tile Co.*, 15 S.W.2d 923, 223 Mo. App. 700.

N.H.—*Pike v. Gagne*, 11 A.2d 809, 90 N.H. 516

N.Y.—*Koenig v. Patrick Const. Corp.*, 58 N.Y.S.2d 275, 269 App. Div. 989

N.C.—*Jones v. Atlantic Coast Line R. Co.*, 139 S.E. 242, 194 N.C. 227.

S.C.—*Langston v. Fiske - Carter Const. Co.*, 185 S.E. 62, 180 S.C. 113

39 C.J. p. 1144 note 29

Particular questions held for jury

(1) Whether ladder was part of place of employment and as such subject to general duty of a master to provide servants with reasonably safe place to work—*Missouri Pac. R. Co. v. Spangler*, CCA Ark., 140 F.2d 917.

(2) Negligence in failing to keep stationary ladder in pit of pump house in safe condition—*Missouri Pac. R. Co. v. Spangler*, supra.

Evidence held insufficient to raise jury question

U.S.—*Nash v. Pennsylvania R. Co.*, CCA Ohio, 60 F.2d 26

Md.—*McVey v. Gerrald*, 192 A. 789, 172 Md. 595

Mich.—*Rule v. Giuglio*, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537—*Nichols v. Bush*, 289 N.W. 219, 291 Mich. 473—*Kelley v. Brown*, 247 N.W. 900, 262 Mich. 356

N.Y.—*Smith v. Green Fuel Econimizer Co.*, 108 N.Y.S. 45, 123 App. Div. 672

55. U.S.—*Northern Pac. R. Co. v. Berven*, CCA Wash., 73 F.2d 687—*Davidson v. Riley*, CCA Miss., 17 F.2d 345

Ark.—*Wohlfield v. Henley*, 93 S.W.2d 1247, 192 Ark. 650—*Chapman v. Henderson*, 67 S.W.2d 570, 188 Ark. 714

Nev.—*Southern Pac. Co. v. Huyck*, 128 P.2d 849, 61 Nev. 365

39 C.J. p. 1145 note 30

Evidence held insufficient to raise jury question

Ark.—*Kroger Grocery & Baking Co. v. Taylor*, 157 S.W.2d 5, 203 Ark. 154.

Neb.—*Sullivan v. Chicago & N.W. Ry. Co.*, 258 N.W. 38, 128 Neb. 92, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694

Pa.—*Iams v. Hazel-Atlas Glass Co.*, 96 A. 1034, 251 Pa. 439

57. Pa.—*Luschko v. Pottenger*, 108 A. 830, 260 Pa. 439

58. U.S.—*Davidson v. Riley*, CCA Miss., 17 F.2d 345

39 C.J. p. 1145 note 32.

59. Kan.—*Maib v. Maib's Mill & Elevator Co.*, 109 P. 688, 82 Kan. 660
39 C.J. p. 1145 note 33

Whether servants were expected and given opportunity to select materials used in staging was properly submitted to jury—*Hamre v. Rothchild & Co.*, 240 P. 909, 136 Wash. 522

63. U.S.—*T. A. Pittman, Inc. v. La Fontaine*, CCA Miss., 68 F.2d 469
NH.—*Bridges v. Great Falls Mfg. Co.*, 156 A. 697, 85 N.H. 220.

N.Y.—*Spandurra v. 230 Estates*, 56 N.Y.S.2d 684, 185 Misc. 283, affirmed 61 N.Y.S.2d 910, 270 App. Div. 834 appeal denied 61 N.Y.S.2d 920, 270 App. Div. 884

Okla.—*McCracken v. Franco-Dominion Development Corporation*, 117 P.2d 135, 189 Okl. 354—*Wright v. Clark*, 61 P.2d 192, 177 Okl. 628—*Griffin Grocery Co. v. Scroggins*, 293 P. 235, 145 Okl. 9.

39 C.J. p. 1145 note 34

Violation of statute or ordinance

(1) Whether a defendant violated section of labor law requiring elevators and elevator openings and machinery connected therewith and hoistways, hatchways, and wellholes in factories to be so constructed and maintained as to be safe, for all persons, was for jury—*Ploch v. Thames Trading Co.*, 7 N.Y.S.2d 515, 255 App. Div. 332.

(2) Whether hotel violated ordinances requiring closing of door and sliding door of passenger elevators before starting elevator as alleged by minor hotel employee injured by alleged negligent operation of elevator was for jury under conflicting evidence as to whether the elevator in question was ever used by guests—*Jones v. Noel*, Tenn.App., 204 S.W.2d 336

61. U.S.—*F. W. Martin & Co. v. Cobb*, CCA Ark., 110 F.2d 159.

Okla.—*Nelson v. Wasteka Oil Co.*, 165 P.2d 637, 106 Okl. 439—*Southern Drilling Co. v. McKee*, 42 P.2d 265, 171 Okl. 409.

39 C.J. p. 1145 note 35.

62. Colo.—*Fresman v. Frasher*, 268 P. 538, 84 Colo. 67, certiorari denied 49 S.Ct. 33, 278 U.S. 637, 78 L.Ed. 553.

Tex.—*Galveston, H. & S. A. Ry. Co.*

paratus,⁶³ dumb-waiter,⁶⁴ chute,⁶⁵ conveyor and the like,⁶⁶ or an unguarded or other dangerous condition of an elevator or similar shaft.⁶⁷ The case should not be submitted to the jury, however, where there is no evidence tending to show any negligence on the part of the master in respect of an elevator,⁶⁸ shaft,⁶⁹ crane,⁷⁰ or derrick, and other hoisting apparatus,⁷¹ or where the evidence does not show the negligence alleged.⁷²

(1) Mines, Oil Wells, Quarries, Tunnels, and Excavations

The case should be submitted to the jury on con-

flicting evidence tending to show the negligence of the master whereby injuries resulted to a servant working in a mine, quarry, excavation or tunnel, or at an oil well or gravel plant

The case should be submitted to the jury on conflicting evidence tending to show the negligence of the master whereby injuries resulted to a servant working in a mine;⁷³ and more specifically where the injuries resulted from the fall of rock or material from the roof of the mine,⁷⁴ or from the operation of a mine car upon the underground

v. Brewer, Civ.App., 4 SW 2d 320, error refused
39 C.J. p 1146 note 36.

Steam shovel

Where the evidence showed that defendant was attempting to move a car with a steam shovel and that a part of the dipper swung free and struck deceased, killing him, it was held that there was sufficient evidence to go to the jury—Dawson Bros & Beaver, Inc. v. Peterson, 11 Tenn App 167.

63. Mo—Schmidt v. Union Electric Light & Power Co., 3 SW 2d 384, 819 Mo 102

Wash—Labee v. Sultan Logging Co., 109 P 1023, 59 Wash. 341.
39 C.J. p 1146 note 37

64. N.Y.—Grimm v. Maurocordato, 181 N.Y.S 609, 191 App Div 550
39 C.J. p 1146 note 38

65. Minn—Denchfield v. Minneapolis, St P. & S S M R Co., 130 N W. 551, 114 Minn 58
Mo—Edwards v. Morehouse Stave, etc., Co., App., 221 SW 744

66. Md.—Security Cement & Lime Co v Bowers, 91 A. 834, 124 Md 11.

N.Y.—Lynch v. American Linseed Co., 88 N.E. 1124, 194 NY 574.

67. Miss—Scott Burr Stores Corporation v. Morrow, 180 So 741, 182 Miss 743

Mo—Wack v. F. E. Schoenberg Mfg Co., 53 SW 2d 28, 331 Mo 197—McNairy v. Pulitzer Pub. Co., App., 274 S.W. 849

Or.—Moen v. Autken, 271 P. 730, 137 Or. 246

R.I.—Wojtyna v. Bazar Bros & Co., 132 A 384, 47 R.I. 221

S.C.—Kay v. Balentine Packing Co., 184 S.E. 846, 179 S.C. 485.

Wash—Gardner v. Seymour, 180 P. 3d 564, 27 Wash 2d 802

39 C.J. p 1146 note 41

Covering or guarding dangerous machinery or places generally see infra subdivision f (6) of this section

Servant entering door of shaft by mistake

N.Y.—Christianson v. Breen, 43 NE 2d 478, 288 NY 435

39 C.J. p 1146 note 41 [a]

68. D.C.—Ferreiros v. Fox Theatres Corporation, 68 F.2d 575, 63 App DC 3

Okl.—Stephan v. Apartment Hotels, 77 P.2d 539, 182 Okl. 274

Pa.—Slakoff v. Foulke, 186 A. 79, 323 Pa 352.

39 C.J. p 1146 note 42

69. N.Y.—Egan v. Thompson-Stairrett Co., 102 NE 536, 209 NY 110—Wendell v. Leo, 87 NE 790, 195 NY. 76

Gross negligence

In action against corporate owner of building for exemplary damages for death of janitor who fell down elevator shaft while cleaning elevators, evidence was held insufficient to raise issue whether owner was guilty of gross negligence—San Jacinto Bldg v. Washington, Tex Civ App, 122 SW 2d 289, error refused

70. N.Y.—Sisco v. Lehig & H. R. Co., 39 NE 958, 145 NY 296.

71. U.S.—Phillips Petroleum Co v Manning, CCA Ark, 81 F.2d 849.

Ark—Livingston Oil Corporation v Granger, 295 SW 969, 174 Ark 1180

Iowa—Rehard v. Miles, 290 N.W. 702, 237 Iowa 1290

Mo—Grindstaff v. J. Goldberg & Sons Structural Steel Co., 40 SW 2d 702, 328 Mo 72—Schmidt v. Union Electric Light & Power Co., 3 SW 2d 384, 319 Mo. 102
39 C.J. p 1146 note 45

72. Ala.—Sloss-Sheffield Steel & Iron Co. v. Pilgrim, 70 So 301, 14 Ala App 346

Mo—Popejoy v. Hydraulic Press Brick Co., 186 SW. 1132, 193 Mo App 612

73. Ark—Midland Coal Mining Co v Rodden, 41 SW 2d 777, 184 Ark 157—Jewel Coal & Mining Co v. Whitner, 279 SW 1081, 170 Ark 393—Western Coal & Mining Co. v. Dane, 272 SW 657, 168 Ark 961

Ky—Ridgeway-Darby Coal Co v. Penley, 174 SW 2d 513, 295 Ky 350

—Cloversplint Coal Co v Blair, 151 SW 2d 1052, 287 Ky 158—W. A. Wickliffe Coal Co v Ryan, 44 SW 2d 525, 241 Ky 537—Payne v. High Splint Coal Co., 40 SW 2d 299, 239 Ky 634—West Kentucky Coal Co v Shoulders' Adm'r, 28 SW 2d 479, 234 Ky 427—Gatliff Coal Co v Powers' Adm'r, 294 S W 472, 219 Ky. 839—Furnace Coal Mining Co v Perry, 287 SW 918, 216 Ky 362

Mo—Yeager v. St Joseph Lead Co., 12 SW 2d 520, 228 Mo App 245—Mintner v. St Joseph Lead Co., App., 272 SW 1043

NC—West v. Fontana Mining Corporation, 150 SE 834, 198 NC 150—Christopher v. North Carolina Talc & Mining Co., 146 S.E. 144, 196 NC 531

Tenn—McGinniss v. Brown, App., 204 SW 2d 334

39 C.J. p 1146 note 47

Cave-in of shaft at bottom

Ark—Mercury Mining Co. v Chambers, 102 SW 2d 543, 193 Ark 771

74. Ky—Billiter & Shurtleff Coal Co v Luster, 190 SW 2d 682, 301 Ky 17—Helton v. Gunn Coal Mining Co., 79 SW 2d 695, 258 Ky 168

—High Splint Coal Co. v. Payne, 49 SW 2d 539, 243 Ky 677—Hall v. Proctor Coal Co., 34 SW 2d 425, 286 Ky. 818—Gibraltar Coal Mining Co. v. Miller, 25 SW 2d 38, 233 Ky 129—Rex Red Ash Coal Co v. Barley's Adm'r, 6 SW 2d 724, 224 Ky 485—Thomas' Adm'r v. Ashland Fire Brick Co., 4 SW 2d 757, 223 Ky. 821.

Mo—Reed v. Blue Jay Coal & Mining Co., App., 287 SW 853

N.C.—Street v. Erakune-Ramsey Coal Co., 145 SE 11, 196 NC 178.

Tenn—McGinniss v. Brown, App., 204 SW 2d 334

Tex—Hernandez v. Malakoff Fuel Co., Civ App, 109 SW 2d 358, error dismissed—Chisos Mining Co v. Hernandez, Civ App, 96 SW 2d 292, error dismissed

W.Va.—Stanton v. Ruthbell Coal Co., 34 SE 2d 257, 127 W.Va. 685, certiorari denied 66 S.Ct 53, 326 U.S. 740, 90 L.Ed 442

39 C.J. p 1147 note 48.

tracks or ways of a mine,⁷⁵ or the operation of a cage or hoist therein.⁷⁶ In case of conflicting evidence it is for the jury to determine whether the master furnished suitable props or timbers for use,⁷⁷ and whether they were demanded,⁷⁸ or whether it was the master's duty or that of the servant to make the place safe,⁷⁹ and the necessity and sufficiency of inspection by the master,⁸⁰ and his negligence in failing to mark dangerous places.⁸¹ The question of the master's negligence should not be submitted to the jury where there is no evidence tending to support the allegations thereof⁸² or where the facts are undisputed.⁸³

The case should be submitted to the jury on evi-

dence raising the question of the master's negligence as to injuries sustained by a servant working in a quarry,⁸⁴ excavation,⁸⁵ or tunnel,⁸⁶ or at an oil well⁸⁷ or gravel plant,⁸⁸ otherwise the case is one for determination by the court.⁸⁹

(j) Electrical Apparatus and Structures

Where evidence tends to show negligence of the master in respect of a servant's injury by electrical apparatus and structures, the case should be submitted to the jury, but there is no question for the jury in the absence of such evidence.

Where a servant is injured by electrical apparatus and structures in respect of which the evidence tends to show that the master has been negligent, the case should be submitted to the jury,⁹⁰ but in

75. Ky—Elcomb Coal Co v Brock, 189 S W 2d 397, 300 Ky 399—High Splint Coal Co v Cowans, 155 S W 3d 488, 288 Ky 66—Elcomb Coal Co v Coffman, 113 S W 2d 847, 272 Ky 93—Morris v High Splint Coal Co, 103 S W 2d 696, 268 Ky 49 Mo—Morgan v Doe Run Lead Co, App, 273 S W 244 Okl—Covington Coal Products Co v Stogner, 72 P 2d 491, 181 Okl 35—Folsom-Morris Coal Mining Co v Superior, 237 P 89, 110 Okl 134 39 C J p 1147 note 49

Particular questions held for jury as bearing on negligence

(1) Distance of wall from track—Western Coal & Mining Co v Burns, 372 S W 357, 188 Ark 976

(2) Whether defendant operators laid a track, which was used for coal cars, so close to a support in mine that cars could not pass over the tracks—McGinniss v. Brown, Tenn App, 204 S W 2d 334

76. Mo—Oberdan v Evens & Howard Fire Brick Co, App, 396 S W 161.

Tex—Chisos Mining Co v Llanes, Civ App, 298 S W 642 39 C J p 1148 note 50.

77. Ark—New Union Coal Co v Walker, 31 S W 2d 753, 182 Ark 460

39 C J p 1148 note 51

78. Ark—Southern Anthracite Coal Min Co v Rice, 245 S W 805, 156 Ark 94

39 C J p 1148 note 52

79. Mo—Schillings v Big Creek Coal Co, App, 277 S W. 964. 39 C J p 1148 note 53

80. Ind—Deep Vein Coal Co v Rainey, 112 N E 392, 62 Ind App 608

39 C J p 1148 note 54.

Failure to make proper inspection and test generally see infra subdivision f (7) of this section

Examination after blast

Where second shot was necessary because first blast in coal mine

missed fire, examination by injured miner's boss who did not look for unexploded dynamite was held not as a matter of law compliance with statute requiring examination to ascertain safety—Andriusius v Philadelphia & R Iron Co, 156 N Y S 260, 172 App Div 350

81. Ark—Central Coal & Coke Co v Barnes, 233 S W 683, 149 Ark 533

39 C J p 1148 note 55

82. Ark—Mid-Continent Quicksilver Co v Ashbrook, 109 S W 2d 448, 194 Ark 744

Ky—Willis v Barber, 133 S W 2d 551, 280 Ky 417—Perkins-Harlan Coal Co v Creech's Adm'r, 103 S W 2d 943, 268 Ky 174

39 C J p 1149 note 56

Evidence held insufficient for jury

Ky—Carbon Mining Co v Ward's Adm'r, 178 S W 2d 955, 297 Ky 47—Johnson's Adm'r v Harlan Ridgeway Crown Mining Co, 145 S W 2d 89, 284 Ky 463—Perkins-Harlan Coal Co v Creech's Adm'r, 103 S W 2d 943, 268 Ky 174—Yeary's Adm'r v Hignite Coal Co, 102 S W 2d 19, 267 Ky 265—Butte's Adm'r v High Splint Coal Co, 93 S W 2d 356, 263 Ky 638—High Splint Coal Co v Baker, 57 S W 2d 60, 247 Ky 426—Southern Mining Co v Cox, 50 S W 2d 80, 243 Ky 802—Gibraltar Coal Mining Co v Collins, 36 S W 2d 372, 237 Ky 765—Ford v Perkins-Bowling Coal Corporation, 32 S W 2d 544, 236 Ky 36

W Va—Leas v Lubie, 144 S E 225, 105 W Va 513

39 C J p 1149 note 56 [b]

83. Ky—High Splint Coal Co v Baker, 57 S W 2d 60, 247 Ky 426

84. Mo—Goucan v Atlas Portland Cement Co, 298 S W. 789, 317 Mo 919—Clark v Rock Hill Quarry & Construction Co, App, 7 S W 2d 716—Mills v F W. Steadley & Co., App, 279 S W. 160.

N.C—Killian v. Wilson Creek Quarry Co, 135 S.E. 927, 192 N.C. 672 39 C J p 1149 note 57

85. Ark—Ault v McGaughey, 292 S W 359, 173 Ark 323

Ky—Carl Const Co v Bain, 32 S W 2d 414, 235 Ky 833

NH—Dowling v L H Shattuck, Inc, 17 A 2d 539, 91 NH 234

NC—Darden v Robert G Lassiter & Co, 152 S E 32, 198 NC 427

39 C J p 1149 note 58

Excavation for cistern

Wash—Stubbe v Baker, 273 P 732, 150 Wash 514

86. US—Northwestern Pac. R Co v Fredler, CCA Cal, 52 F 2d 400

Mo—Swab v Smith Bros, 6 S W 2d 56, 222 Mo App 873

39 C J p 1149 note 59.

87. Tex—Illinois Torpedo Co. v. H'lis, Civ App, 233 S W 336

39 C J p 1149 note 60

88. Ark—Producers' Sand & Gravel Co v Patterson, 64 S W 2d 320, 188 Ark 50.

89. Ky—McCarty v Louisville & N R Co, 260 S W 6, 202 Ky. 460

39 C J p 1149 note 61

90. US—Bradford Electric Light Co v Clapper, CCA NH, 51 F 2d 992, appeal dismissed and certiorari granted 52 S Ct 118, 284 US 221, 76 L Ed. 254, reversed on other grounds 52 S Ct 571, 286 US 146, 76 L Ed 1036, 82 ALR 696—Western Union Telegraph Co. v. Williamson, C.C.A. Mass, 15 F 2d 972.

Ala—Hardy v. City of Dothan, 176 So 449, 234 Ala. 664.

Ark—Hope Basket Co v. Thomasson, 82 S W 2d 241, 190 Ark 956—Presley v Actus Coal Co., 289 S. W 474, 172 Ark. 498.

Fla—Winter Park Telephone Co v. Strong, 179 So. 289, 130 Fla. 755, rehearing denied 182 So 927.

Mass—Neuss v. Burwen, 191 N.E. 654, 287 Mass 82—Cronan v Armistage, 190 N.E. 12, 285 Mass. 520.

the absence of evidence tending to show negligence on the part of the master there is no question for the jury.⁸¹

(k) Shipping

The question of negligence of the master in respect of the condition or operation of a vessel or of appliances used in loading the vessel whereby a servant is injured is for the jury where evidence tends to show such negligence, but not in the absence of evidence of negligence.

Where evidence tends to show negligence whereby a servant is injured, it is for the jury to determine the question of negligence on the part of a master in respect of the condition or operation of a vessel⁸² or of appliances used in loading the vessel,⁸³ but not where the evidence fails to show any negligence on the part of the master.⁸⁴

(6) Covering or Guarding Dangerous Machinery or Places

On conflicting evidence, whether a master is negligent in failing to cover or guard dangerous places or machinery and whether he has complied with statutes providing for guards ordinarily is for the jury to determine.

On conflicting evidence, whether a master is negligent in failing to cover or guard dangerous places ordinarily is a question for the jury.⁸⁵ As discussed supra §§ 231-234, numerous statutes provide for the guarding of machinery, or specified parts thereof, and other places, and ordinarily it is for the jury to determine, under proper instructions, whether in a particular case it is practicable to provide guards⁸⁶ or necessary to do so,⁸⁷ or whether there has been a compliance with the statute.⁸⁸

The question of the master's negligence ordinarily is for the jury in respect of covering or guarding machinery in general,⁸⁹ or specifically such machin-

Mich—Anderson v Jersey Creamery Co., 270 N.W. 725, 278 Mich 396
Mo—Foster v. Kansas City, C. C. & S. J. Ry. Co., 28 S.W.2d 770, 325 Mo. 18—Koehler v Wells, 20 S.W.2d 31, 323 Mo 892—Horn v Kansas City Power & Light Co., 274 S.W. 673.

N.H.—Hussey v Boston & M. R. R., 133 A. 9, 82 NH 286.

Pa.—Vescio v Pennsylvania Electric Co., 9 A.2d 546, 336 Pa. 502

Tex.—Gulf States Utilities Co. v. Moore, Civ. App., 73 S.W.2d 941, reversed on other grounds 106 S.W.2d 256, 129 Tex. 604

Wash.—Stanke v. Spokane, C. D. & P. Ry. Co., 43 P.2d 961, 181 Wash 472—Grant v. Libby, McNeill & Libby, 295 P. 139, 160 Wash 138.

39 C.J. p 1149 note 62

Particular questions held for jury as bearing on negligence

(1) Whether saw machine run by electricity was dangerous to employees when table was not grounded.—Masonite Corporation v Lochridge, 140 So. 223, 163 Miss 364, suggestion of error overruled 141 So. 758, 163 Miss. 364

(2) Whether there was any defect in defendant's telephone system and instrument which could have caused shock.—Benner v. Terminal R. R. Ass'n of St. Louis, 156 S.W.2d 657, 348 Mo. 928, certiorari denied Terminal R. R. Ass'n of St. Louis v Benner, 62 S.Ct. 798, 315 U.S. 813, 86 L. Ed. 1311.

(3) Whether street car used under all conditions could get out of repair in eleven days.—Faubion v Kansas City Public Service Co., Mo. App., 22 S.W.2d 897.

81. Mass.—Murphy v. Old Colony

St. R. Co., 120 N.E. 361, 230 Mass 333

39 C.J. p 1150 note 63 [a]

92. US—Chesapeake & O. Ry. Co. v. Winder, C.C.A. Va., 23 F.2d 794
N.J.—Dwyer v. Lehigh Valley R. Co., 37 A.2d 88, 131 N.J. Law 485.

N.Y.—Robert v. U.S. Shipping Board Emergency Fleet Corporation, 148 N.E. 650, 240 N.Y. 474.

Wash.—Christensen v. Puget Sound Nav. Co., 244 P. 569, 138 Wash 239

39 C.J. p 1150 note 64.

93. N.Y.—Brancoleone v. Northern Stevedoring Co., 231 N.Y.S. 489, 224 App. Div. 562

Wash.—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash 1—Reynolds v International Stevedoring Co., 245 P. 1, 138 Wash 690.

39 C.J. p 1150 note 65

94. US—O'Brien v. Calmar S. S. Corporation, D.C. Pa., 25 F. Supp. 752, affirmed, C.C.A., 104 F.2d 148, certiorari denied 60 S.Ct. 111, 308 U.S. 555, 84 L. Ed. 467

39 C.J. p 1150 note 66

95. N.J.—Koske v. Delaware, L. & W. R. Co., 142 A. 43, 104 N.J. Law 627, affirmed 49 S.Ct. 202, 279 U.S. 7, 73 L. Ed. 578

N.Y.—Jones v. Baltimore Insular Line, 286 N.Y.S. 688, 247 App. Div. 185

Okl.—Highway Const. Co. v. Shue, 49 P.2d 203, 178 Okl. 456

39 C.J. p 1151 note 67

Guarding elevators, shafts, etc., see supra subdivision f (5) (h) of this section

Chutes in hay loft

Whether absence of guard or covering on chutes located in hay loft rendered place unsafe for work by

employee who had no knowledge of chutes, and if so whether lack of safety was due to negligence of employer, were questions for jury—Stone v. Howe, 32 A.2d 484, 92 N.H. 425.

Walkway on bridge
In brakeman's action under Federal Employers' Liability Act against railroad for injuries sustained by falling from a wooden walkway on railroad bridge, the manner in which brakeman was standing or leaning against guardrail on walkway and whether it was on the new or old guardrail were questions for jury.—Thomson v. Boles, C.C.A. Minn., 123 F.2d 487, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L. Ed. 1204

96. Mo.—Birdsong v. Jones, 30 S.W.2d 1094, 225 Mo. App. 242—Goodson v. Luce, App., 24 S.W.2d 682—Maier v. American Car & Foundry Co., App., 296 S.W. 212—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo. App. 234

Or.—Ludwig v. Zidell, 118 P.2d 1073, 167 Or. 488.

39 C.J. p 1151 note 69.

97. Mo.—Lumats v. American Car & Foundry Co., 273 S.W. 1089, 217 Mo. App. 94

39 C.J. p 1151 note 70.

98. Mo.—Lumats v. American Car & Foundry Co., supra

Wash.—Gardner v. Seymour, 180 P.2d 564, 37 Wash.2d 802

39 C.J. p 1151 note 71.

99. Colo.—Huddleston v. Ingersoll Co., 123 P.2d 1016, 109 Colo. 134

Mo.—Temple v. Samuel Cupples Envelope Co., 300 S.W. 265, 318 Mo. 280—Denkman v. Prudential Fixture Co., 289 S.W. 591—Ebert v. A. J. Kasper Co., 71 S.W.2d 859, 238 Mo. App. 589—Primmer v. Ameri-

39 C.J. p 1151 note 69.

97. Mo.—Lumats v. American Car & Foundry Co., 273 S.W. 1089, 217 Mo. App. 94

39 C.J. p 1151 note 70.

98. Mo.—Lumats v. American Car & Foundry Co., supra

Wash.—Gardner v. Seymour, 180 P.2d 564, 37 Wash.2d 802

39 C.J. p 1151 note 71.

99. Colo.—Huddleston v. Ingersoll Co., 123 P.2d 1016, 109 Colo. 134

Mo.—Temple v. Samuel Cupples Envelope Co., 300 S.W. 265, 318 Mo. 280—Denkman v. Prudential Fixture Co., 289 S.W. 591—Ebert v. A. J. Kasper Co., 71 S.W.2d 859, 238 Mo. App. 589—Primmer v. Ameri-

39 C.J. p 1151 note 69.

97. Mo.—Lumats v. American Car & Foundry Co., 273 S.W. 1089, 217 Mo. App. 94

39 C.J. p 1151 note 70.

98. Mo.—Lumats v. American Car & Foundry Co., supra

Wash.—Gardner v. Seymour, 180 P.2d 564, 37 Wash.2d 802

39 C.J. p 1151 note 71.

99. Colo.—Huddleston v. Ingersoll Co., 123 P.2d 1016, 109 Colo. 134

Mo.—Temple v. Samuel Cupples Envelope Co., 300 S.W. 265, 318 Mo. 280—Denkman v. Prudential Fixture Co., 289 S.W. 591—Ebert v. A. J. Kasper Co., 71 S.W.2d 859, 238 Mo. App. 589—Primmer v. Ameri-

ery as saws,¹ or such parts of machinery as belts,² gearing or cogs,³ pulleys,⁴ revolving shafting,⁵ rollers,⁶ or revolving set screws and the like,⁷ or covering or guarding openings in hatches,⁸ vats,⁹ or third rails,¹⁰ or in providing banisters for a stairway,¹¹ or in providing covers or guards to keep servants from being injured by falling objects¹² or by flying particles of metal or other substances.¹³ A dangerous piece of machinery is not as a matter of law sufficiently guarded by reason of its distance from the floor where a servant's duties more or less frequently require him to get into close proximity to it.¹⁴

The question of the master's negligence should not be submitted to the jury, but should be determined by the court, where there is no conflict of evidence as to the practicability of guarding machinery or dangerous places,¹⁵ or the necessity therefor,¹⁶ or as to the maintenance of a proper guard.¹⁷ It has been held that the failure to guard machinery as required by statute is evidence only

of negligence to be submitted to the jury on the question of negligence.¹⁸ On the other hand, it has been held that the failure to guard machinery belonging to certain specified classes required by statute to be guarded constitutes negligence per se.¹⁹ Whether certain parts of machinery as to the character of which there is no dispute belong to a certain specified class required to be guarded is a question of law for the court.²⁰

(7) Inspection and Test

Evidence of the master's failure to make a proper inspection and test at reasonable times generally raises a question for the jury in an action for injuries to a servant, and ordinarily it is for the jury to determine whether the defect causing the injury was discoverable by reasonable inspection; but the question of negligence should not be submitted to the jury where the evidence is insufficient to raise the issue.

Evidence of the master's failure to make a proper inspection and test at reasonable times generally raises a question for the jury in an action for injuries to a servant,²¹ and ordinarily it is a question

can Car & Foundry Co., App., 20 S W 2d 587—Pavlo v Forum Lunch Co., 19 S W 2d 510, 225 Mo App 167—Adams v Thayer, 6 S W 2d 630, 222 Mo App 907—Bishop v Musick Plating Works, 3 S W 2d 256, 222 Mo App 370—Shepherd v Century Electric Co., 299 S W 90, 220 Mo App. 1152—Engle v American Car & Foundry Co., App., 287 S W 801—Mabe v Gille Mfg Co., 271 S W 1023, 219 Mo App 234 ND—Oster v Great Northern Ry Co., 219 N W 788, 56 ND 891 39 C J p 1151 note 72

1. US—Wisconsin & Arkansas Lumber Co v Ward, CCA Ark., 32 F 2d 974—Kokesch v Excelsior Powder Mfg. Co., CCA Mo., 16 F 2d 574 Ark—Sandusky v. Warren, 6 S W 2d 15, 177 Ark 271—Missouri Pac R Co v Kinslow, 270 S W 603, 168 Ark 487. Ky—Bringardner Lumber Co v Middleton, 124 S W 2d 52, 276 Ky 247—Leger v A. Rollyson & Co., 47 S W 2d 708, 242 Ky. 802 Miss—Wilbs Lumber Co v Calhoun, 140 So. 680, 163 Miss 80 Mo—Adams v Thayer, 6 S W 2d 630, 222 Mo App 907 NC—McLaughlin v. Black, 1 S E 2d 180, 215 NC 85—Robbins v American Upholstery Co., 150 S E 699, 198 NC 75 Va—Atlantic Coast Line R Co v Bell, 141 S E 838, 149 Va 720 39 C J p 1151 note 73.

2. Minn—Rase v Minneapolis, St P & S S M R. Co., 120 N W. 360, 107 Minn 260, 21 L.R.A., N.S., 138 39 C J p 1152 note 74.

3. Tex—Dial v. Wilke, Civ App., 127 S W 2d 379, error refused 39 C J p 1152 note 75

4. Minn—Rase v. Minneapolis, St P & S S M R. Co., 120 N W 360, 107 Minn 260, 21 L.R.A., N.S., 138 39 C J p 1152 note 76.

5. Iowa—Johnson v Kinney, 7 N W 2d 188, 232 Iowa 1016, 144 A L R 997.

Mo—Grott v Johnson, Stephens & Shinkle Shoe Co., 2 S W 2d 785 39 C J p 1152 note 77.

6. Mich—Garfield v Lapham, 139 N W 2, 173 Mich 217. 39 C J p 1152 note 78

7. US—Tombigbee Mill & Lumber Co v. Hollingsworth, CCA Miss., 162 F 2d 763 39 C J p 1152 note 79.

8. NY—Seyford v. Southern Pac Co., 111 N E 248, 216 N.Y. 613 39 C J p 1152 note 81

Floors see supra subdivision f (5) (f) of this section

9. Wis—Lind v Uniform Stave & Package Co., 120 N W. 839, 140 Wis 183 39 C J p 1152 note 82

10. Mich—Paperno v. Michigan R Engineering Co., 168 N W. 503, 202 Mich 257.

11. Tex—Consumers' Lignite Co v Hubner, Civ App., 154 S W. 249

12. SC—Squire v Southern R Co., 96 S.E. 152, 109 SC 400. 39 C J p 1152 note 85

13. Ark—Pekin Stave & Mfg Co v Ramey, 147 S W 83, 104 Ark 1 39 C J p 1152 note 86

14. Mich—Smith v. Mt. Clemens

Sugar Co., 146 N W. 262, 179 Mich 97

39 C J p 1152 note 87

15. Mo—Hummel v. American Mfg. Co., App., 279 S W 202. 39 C J p 1152 note 88

16. Ark—Missouri Pac. R Co. v. Hathcock, 139 S W 2d 35, 200 Ark. 294

39 C J p 1152 note 89.

17. Pa—Matlack v. Fayette R. Plumb, Inc., 91 A. 250, 245 Pa. 150 39 C J p 1152 note 90.

18. NY—Gelder v. International Ore Treating Co., 134 N Y S 782, 150 App Div 184

W Va—Parfitt v. Sterling Veneer & Basket Co., 69 S.E. 985, 68 W.Va. 438

19. Ind—U. S. Cement Co v. Cooper. 88 N E 69, 172 Ind 599

Iowa—Lamb v. Wagner Mfg. Co., 136 N W. 203, 155 Iowa 400.

20. Ohio—National Coal Co v. Potts, 2 Ohio App 338, 19 Ohio Cir Ct. N.S., 379, 34 Ohio Cir Ct 655

21. US—Shelton v Thompson, C C A Ill., 157 F 2d 709—Virginian Ry Co v Staton, CCA W Va., 84 F 2d 138—Chicago, St P., M & O. Ry Co. v. Henkel, CCA Minn., 52 F 2d 313, certiorari denied 52 S Ct 200, 284 U S 683, 76 L Ed 576, and certified questions answered Henkel v Chicago, St P., M & O Ry Co., 52 S Ct 223, 284 U S 444, 76 L Ed 388 —Los Angeles & S L R. Co. v Shields, CCA Utah, 33 F 2d 23. Ark—Seaman Store Co v Bonner, 113 S W. 2d 1106, 195 Ark 563—Dixie Bauxite Co v. Webb, 63 S W 2d 634, 187 Ark 1024—Hunt v Hurst, 280 S.W. 652, 170 Ark. 644

for the jury on conflicting evidence to determine whether the defect causing the injury was discoverable by reasonable inspection²². It seems that a master will not be held free from negligence as a matter of law by showing merely that he has complied with the customary methods of inspection²³ or that he purchased the appliance or machinery

from a reputable manufacturer,²⁴ nor will an inspection by government officials²⁵ or other persons²⁶ necessarily and as a matter of law release the master from his duty to make such examinations and inspections as are required of him by the rule which demands that he exercise ordinary and reasonable care for the safety of his servant, wheth-

Colo.—McCarthy v Eddings, 137 P 3d 883, 109 Colo 528

Ky.—Johnson's Adm'r v. Harlan Ridgeway Crown Mining Co., 145 SW 2d 89, 284 Ky 463—Southern Mining Co v Saylor, 95 SW 2d 336, 264 Ky 655—Big Sandy & C R Co v Measell's Adm'r, 43 SW 2d 747, 240 Ky 571

Mich.—Clingenpeel v Hill, 213 NW 703, 238 Mich 493

Miss.—Alabama & V R Co v Fountain, 111 So 153, 145 Miss 515, certiorari denied 47 S Ct 769, 274 U S 759, 71 L Ed 1338

Mo.—Cole v St Louis-San Francisco Ry Co, 61 SW 2d 344, 332 Mo 999—Siberell v St Louis-San Francisco Ry Co, 9 SW 2d 912, 320 Mo 916—Biondi v. Central Coal & Coke Co, 9 SW 2d 596, 320 Mo 1130—Becker v Federal Garage Co, 38 SW 2d 473—Hoffman v. Peerless White Lume Co, 296 S W 764, 317 Mo 86—Alexander v Barnes Grocery Co, 7 SW 2d 370, 223 Mo App 1—Crowley v American Car & Foundry Co, App, 279 SW 212

NH.—Stone v. Howe, 32 A 2d 484, 92 NH 425—Bridges v Great Falls Mfg Co, 156 A 697, 85 NH 220

N.J.—Chojinski v. New York Cent R Co, 151 A 122, 8 NJ Misc 576

N.Y.—Adlam v Konvalinka, 50 NE 2d 535, 291 NY 40

NC.—O'Brien v Parks Cramer Co, 145 SE 684, 196 NC 359

Or.—Moen v. Aitken, 271 P. 730, 127 Or 246

SC.—Rhodes v Southern Ry Co, 198 SE 382, 188 S.C. 228—Brazeale v Piedmont Mfg Co, 193 SE 89, 184 S.C. 471—Tuttle v Hanckel, 183 SE 484, 179 SC 60

Tenn.—Memphis Power & Light Co v Telghman, 11 Tenn App 395

Tex.—Gulf, C. & S F Ry Co v Houston, Civ App, 45 SW 2d 771

Wash.—White v Consolidated Freight Lines, 78 P 2d 358, 192 Wash 146—Cockerline v Anderson, 52 P 2d 321, 184 Wash 701. 39 CJ p 1153 note 95

Inspecting and marking dangerous places in mine see supra subdivision f (5) (i) of this section

Passageway and "narrow work"

It was for the jury to determine whether room in coal mine from which all coal has been removed had become a mere passageway which it was the employer's duty to inspect,

and whether an entryway was "narrow work" thereby placing on the employer the duty to inspect it—Biondi v. Central Coal & Coke Co, App, 297 SW 171, affirmed 9 SW 2d 596, 320 Mo 1130

Simple tools

(1) Fact that tool injuring employee is simple does not as matter of law relieve employer of all duty of inspection—Quannah, A & P Ry Co v Gray, CCA Tex, 63 F 2d 410, certiorari denied 54 S Ct 54, 290 US 636, 78 L Ed 553—39 CJ p 1153 note 95 [a]

(2) Ordinarily simplicity of a tool is but a circumstance to be considered by jury in determining duty resting on employer in furnishing it—Norton & Wheeler Stave Co. v Wright, 106 SW 2d 178, 194 Ark 115

(3) Whether twelve-foot stationary ladder in pit of pump house was subject to general duty of a master to make reasonable inspections to see that it was kept in safe condition was for jury—Missouri Pac R Co v Spangler, CCA Ark, 140 F 2d 917

(4) Question whether particular tools were simple tools which would require no ordinary care or inspection was held for jury—Norton & Wheeler Stave Co v Wright, supra—Missouri Pac R. Co v Herdrix, 277 SW 337, 169 Ark 835, certiorari denied 46 S Ct 351, 270 US 651, 70 L Ed 781.

Frequency of test or inspection

How frequently a test or inspection should be made in the exercise of due care is a question of fact—H E Jackson Lumber Co v Cunningham, 37 So 445, 141 Ala 306—39 CJ p 1153 note 95 [b].

Roadbed made by predecessor

Whether railroad should have inspected roadbed made by predecessor was held question of fact—Burke v Boston & M R R, 134 A 574, 82 NH 350

Previous condition

Question whether scaffold was in safe condition on evening preceding accident, with respect to duty of employer's superintendent to inspect, was for jury—Pound v. Gaulding, 187 So 468, 237 Ala. 387.

22. US.—Whitehurst v Standard Oil Co, CCA Ga, 8 F 2d 728

Ark.—Warren & O. V. Ry Co v Ed- 1037

Mich.—Nemet v Friedland, 270 N W 779, 273 Mich 541

Mo.—Gray v Kurn, 137 SW 2d 558, 345 Mo 1027—Cole v St Louis-San Francisco Ry Co, 61 SW 2d 344, 332 Mo 999—Hoffman v Peerless White Lume Co, 296 SW 764, 317 Mo 86—Siebert v Liggett & Myers Tobacco Co, 273 SW 153, 217 Mo App 163—Schleef v Schoen, 270 SW. 410, 216 Mo App 499

NH.—Perkins v. Nashua Mfg Co, 16 A 2d 700, 91 NH 211

Wash.—Pierce v Spokane International Ry Co, 131 P 2d 139, 15 Wash 2d 431—Thomas v. Inland Motor Freight, 81 P 2d 218, 195 Wash 633

Latent or obvious dangers generally see infra subdivision g of this section

cursory examination

Where a brakeman was injured by a brake staff twisting off under his hand while setting the brake, as the result of a crack which showed on the outside, the question was for jury to decide whether such defect should have been discovered on "cur-sory examination," by which is meant an inspection for defects visible or ascertainable by ordinary examination—Coll v Lehigh Valley R. Co, 130 A 225, 8 NJ Misc 869, affirmed 132 A 922, 102 NJ Law 713

Evidence held insufficient for jury

On question whether employer could have discovered by reasonably careful inspection that aluminum alloy vanes of fan might break because of centrifugal force—Chicago, M., St P & P R Co v Gilbert, CC A Mont, 87 F 2d 282.

23. Ala.—Clark-Pratt Cotton Mills Co. v Bailey, 77 So 995, 201 Ala. 333

Tex.—Gulf, C. & S F. R Co v McGinnis, Civ App, 147 SW. 1188, reversed on other grounds 33 S Ct 426, 228 US. 173, 57 L Ed 785 39 CJ p 1154 note 96

24. US.—Petroleum Iron Works Co v Boyle, Ohio, 179 F 433, 102 CC A 579. 39 CJ p 1154 note 97.

25. Ill.—McGregor v Reid, 53 NE 323, 178 Ill 464, 69 Am SR 332 39 CJ p 1154 note 98

26. Ill.—McGregor v. Reid, supra. Tex.—Southern Pac. Co. v. Green, Civ.App. 269 S.W. 877.

er it was the master's duty to make an inspection, or the servant's, is a question for the jury on conflicting evidence.²⁷ The reasonableness²⁸ and sufficiency²⁹ of an inspection, where made, is also a question of fact for the jury.

The question of his negligence should not be submitted to the jury where there is no evidence tending to show that the master failed to make a proper inspection,³⁰ where the evidence that he made a reasonable inspection is uncontradicted,³¹ or where the evidence supports no facts which would suggest to the employer a condition which would excite suspicion of defects or danger and thus require an inspection to be made.³²

(8) Repairs

On conflicting evidence it is for the jury to determine questions relating to the master's negligence based on failure to make proper repairs.

On conflicting evidence, it is for the jury to determine the question of the master's negligence in respect of failing to make repairs,³³ or as to the manner of making repairs,³⁴ or as to taking proper precautions to prevent the use of the appliance being repaired,³⁵ as well as what would be a rea-

sonable time for making repairs³⁶ and whether a reasonable time had elapsed after a promise to repair.³⁷ The repair of a machine by a reputable maker has been held not sufficient to relieve an employer from negligence for defects therein as a matter of law,³⁸ although there appears to be authority to the contrary.³⁹

g. Latent or Obvious Dangers

On sufficient evidence the questions whether a danger was latent or obvious, and was discoverable by due care, and the liability of the master for injuries from a latent defect are questions for the jury.

On sufficient evidence it is for the jury to determine the questions whether a danger was latent or obvious,⁴⁰ and was discoverable by the exercise of due care,⁴¹ and the liability of the master for injuries from a latent defect.⁴² The questions should not be submitted, however, where the testimony is undisputed⁴³ or insufficient to raise the issues.⁴⁴

h. Knowledge by Master of Defect or Danger

The question of the master's negligence should be submitted to the jury where injuries to a servant were caused by a defect or danger which the evidence tends to show was known, or in the exercise of reasonable care should have been known, to the master.

27. Ky.—Eagle Coal Co v Patrick's Adm'r, 170 SW 960, 161 Ky. 333

39 C.J. p 1155 note 1

28. NC.—Burgess v North Carolina Electrical Power Co, 136 SE 711, 193 NC 223

39 C.J. p 427 note 69.

29. NC.—Burgess v North Carolina Electrical Power Co, supra.

39 C.J. p 427 note 69

30. Kan.—Pilgrim v Verdigris Valley Brick & Tile Co, 107 P. 554, 82 Kan 114.

Evidence held insufficient for jury

US.—Grammer v. Mid-Continent Petroleum Corporation, CCA Okl., 71 F.2d 38, certiorari denied 55 S.Ct. 82, 293 US 571, 79 L.Ed 670

Ark.—Tucker Duck & Rubber Co v Harvey, 154 SW 2d 328, 202 Ark 1033

31. US.—Canadian Northern R Co v Senake, Minn., 201 F. 637, 120 CCA 65

39 C.J. p 1155 note 2.

32. Wash.—Miller v Western Stevedore Co, 268 P. 177, 148 Wash 155, rehearing denied 270 P. 810, 149 Wash 698.

33. US.—Missouri Pac R Co v Spangler, CCA Ark., 140 F.2d 917—Chicago, M., St P & P R Co v. Busby, CCA Mont., 41 F.2d 617
Mass.—Roberts v. Frank's Inc., 49 NE 2d 427, 314 Mass 42

Mo.—Alexander v. Barnes Grocery Co, 7 SW 2d 370, 223 Mo App 1.

SC.—Tuttle v Hancikel, 183 SE 484, 179 S.C. 60—Gordon v. Atlantic

Coast Line R Co, 174 SE 904 173 SC 72

39 C.J. p 1155 note 4

Knowledge by master of defect or danger as question of fact generally see infra subdivision h of this section

34. Wash.—Kantonen v Braley Motor Co, 30 P.2d 245, 176 Wash 577

39 C.J. p 1155 note 5

35. Mass.—Pope v Heywood Bros & Wakefield Co, 108 NE 1058, 221 Mass 143

SC.—Cannon v Lockhart Mills, 85 SE 323, 101 SC 59

36. Miss.—Aponaug Mfg Co v Carroll, 184 So 63, 183 Miss. 798

Reasonable time after knowledge to remedy defects is question for jury.—Larkin v Washington Mills Co, 61 N.Y.S. 93, 45 App Div 6

37. Ark.—Western Coal & Mining Co v. Harrison, 192 SW 190, 127 Ark 81

39 C.J. p 1155 note 7

38. Mass.—Phillips v J H Lockey Piano Case Co, 90 NE 981, 205 Mass 59

39 C.J. p 1155 note 8.

39. US.—Richmond & D. R Co. v Elliott, Ga., 13 S.Ct 837, 149 US 266, 37 L.Ed 728—McClaren v Weber Bros Shoe Co, Mass., 166 F.714, 92 CCA. 386

39 C.J. p 1155 note 9

40. US.—Breece-White Mfg Co v Baker, CCA Ark., 106 F.2d 815.

Mo.—Kramer v Kansas City Power & Light Co, 279 SW. 43, 311 Mo 369

39 C.J. p 1155 note 10.

Negligence with respect to warning of latent or obvious dangers as question of law or fact see infra subdivision i of this section

41. Mo.—Kramer v Kansas City Power & Light Co, 279 SW 43, 311 Mo 369

N.J.—Maher v Ferracuta Machine Co, 83 A 909, 83 N.J. Law 575

39 C.J. p 1155 note 11

Whether defect was discoverable by reasonable inspection as question for jury generally see supra subdivision f (7) of this section.

Latent and concealed dangers

Whether, in any particular case, employer has discharged duty to employee to discover existence of latent and concealed dangers, is ordinarily question for jury's determination.—Batton v Atlantic Coast Line R Co, 193 SE 674, 212 NC 258, certiorari denied Atlantic Coast Line R Co v Batton, 58 S.Ct. 750, 303 US 651, 82 L.Ed 1112.

42. Iowa.—Warner v Spalding, 172 NW 263, 186 Iowa 137

39 C.J. p 1155 note 12

43. N.Y.—Gardner v Westinghouse Electric & Mfg Co, 125 N.Y.S. 693, 141 App Div 5.

39 C.J. p 1155 note 13.

44. Miss.—Masonite Corp. v. Scruggs, 29 So 2d 262

The question of the master's negligence should be submitted to the jury where injuries to a servant were caused by a defect or danger which the evidence tends to show was known, or in the exercise of reasonable care should have been known, to the master⁴⁵. Thus it is ordinarily for the jury to determine whether the defect or danger was known

to the master⁴⁶ or by the exercise of due care should have been known to him,⁴⁷ and whether he took reasonable precautions to remedy the defects or obviate the danger,⁴⁸ whether the danger was so remote that the master could not by chance have had knowledge of it,⁴⁹ and whether the master could or should have anticipated the accident or injury.⁵⁰

45. Ark.—Safeway Stores v Phelps, 145 S.W.2d 327, 201 Ark 495—Carson v Dierks Lumber & Coal Co, 117 S.W.2d 39, 196 Ark 163

Mo—Bird v St Louis-San Francisco Ry Co, 78 S.W.2d 389, 336 Mo 316—Gordon v Muehling Packing Co, 40 S.W.2d 693, 328 Mo 123—Walser v Kuhlmann, App, 176 S.W.2d 658—Cleveland v Laclede-Christy Clay Products Co., App, 113 S.W.2d 1065—Williams v Terminal Railroad Ass'n of St. Louis, App, 20 S.W.2d 584—Whitehead v. Koberman, App, 299 S.W. 121—Hutchcraft v Laclede Gaslight Co., App, 282 S.W. 38.

NH—Musgrave v. Great Falls Mfg Co, 169 A. 583, 86 NH 375—Chiuchiole v. New England Wholesale Tailors, 150 A. 540, 84 NH 329.

NY—Wawrzonek v. Central Hudson Gas & Electric Corp, 12 NE2d 535, 276 NY 412

NC—O'Brien v. Parks Cramer Co, 145 SE 684, 196 NC 359.

39 C.J. p 1155 note 14.
Negligence of employer knowing of defects in instrumentalities belonging to, or provided by, third person as question for jury see supra subdivision f (4) of this section.

46. US—F W Martin & Co v Cobb, CCA Ark., 110 F.2d 159—L E Whitham Const Co v. Remer, CCA Okl., 93 F.2d 736

Ariz—Bristol v Moser, 99 P.2d 706, 55 Ariz 185.

Ark—Endora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark 74

Cal—Notthoff v. Los Angeles Gas & Electric Co, 118 P. 436, 161 Cal 93.

Ill—Beck v. Baltimore & O. R. Co, 244 Ill App 441

Ind—Baltimore & O S. W. R Co v Carroll, 163 NE 99, 200 Ind 589, set aside on other grounds 171 NE 923, 202 Ind. 37, reversed on other grounds 50 S.Ct 132, 280 US 491, 74 L.Ed. 568

Ky—Premier Motors v. Smith's Adm'x, 178 S.W.2d 205, 296 Ky 642

Mass—Dahlgren v. Coe, 40 NE2d 5, 311 Mass 18

Mich—Massengile v Piper, 293 N.W. 897, 294 Mich. 653—Anderson v Jersey Creamery Co, 270 N.W. 725, 278 Mich. 396

Miss—New Orleans & N E R. Co v Benson, 183 So. 505, 183 Miss 171.

Mo—Schlueter v. East St Louis Connecting Ry. Co, 296 S.W. 105, 316 Mo 1266—Marsanick v Luechtefeld, App, 157 S.W.2d 537—Magee v Hayden, App, 111 S.W.2d 239—Koonse v Standard Steel Works Co, 300 S.W. 531, 221 Mo App 1231—Peters v. Hooven & Allison Co., App, 281 S.W. 71—Farley v. Lehrack, App, 272 S.W. 987.

N.C—O'Brien v Parks Cramer Co, 145 SE 684, 196 NC 359

Okla—Tidal Oil Co v Forcum, 116 P.2d 572, 189 Okl 268

Or—Voshall v Northern Pacific Terminal Co, 240 P 891, 116 Or 237. 39 C.J. p 1155 note 14.

Physical condition of employee
(1) Employer's knowledge of employee's physical condition and inability to do work without probable injury at time they ordered him to do it was for jury—Hamilton v. Standard Oil Co of Indiana, 19 S.W.2d 679, 323 Mo 581

(2) Whether master's knowledge of physical condition of servant was superior to that of servant was question for triers of facts—Hamilton v Standard Oil Co of Indiana, supra

47. US—F W Martin & Co. v Cobb, CCA Ark., 110 F.2d 159

Ark—Endora Motor Co v Womack, 111 S.W.2d 530, 195 Ark 74.

Ill.—Beck v Baltimore & O. R. Co, 244 Ill App 441

Ky—Premier Motors v Smith's Adm'x, 178 S.W.2d 205, 296 Ky 642

Miss—New Orleans & N E R Co v Benson, 183 So. 505, 183 Miss 171.

Mo—Schlueter v. East St Louis Connecting Ry Co., 296 S.W. 105, 316 Mo 1266—Allen v Missouri Pac Ry. Co, 294 S.W. 80—Marsanick v Luechtefeld, App, 157 S.W.2d 537—Peters v Hooven & Allison Co., App, 281 S.W. 71—Farley v Lehrack, App, 272 S.W. 987

NH—Stone v. Howe, 32 A.2d 484, 92 NH 425.

NC—O'Brien v. Parks Cramer Co, 145 SE 684, 196 NC 359

Or—Voshall v Northern Pacific Terminal Co, 240 P 891, 116 Or 237. 39 C.J. p 1155 note 14

Actual or implied knowledge

Ind—Illinois Steel Co v Fuller, 23 NE2d 259, 216 Ind. 180

Constructive notice

(1) Whether employer had constructive notice of dangerous condi-

tion of warehouse floor allegedly resulting in injury to employee is for jury—Faltmali v Great Atlantic & Pacific Tea Co., 182 A 605, 55 RI 438

(2) Thus whether the dangerous condition had existed for a sufficient length of time to charge the employer with constructive notice thereof ordinarily is a question for the jury.

US—Schilling v Delaware & H. R. Corporation, CCAN.Y., 114 F.2d 69.

Mo—Goslin v Kurn, 173 S.W.2d 79, 351 Mo 395—Vordermark v Hill-Behan Lumber Co, 12 S.W.2d 498—Magee v Hayden, App, 111 S.W.2d 239—Creighton v. Missouri Pac. R. Co, 66 S.W.2d 980, 229 Mo App 325, certiorari denied Missouri Pac. R. Co v Creighton, 55 S.Ct 70, 293 US 558, 79 L.Ed. 659

Whether anything suggested un-soundness in defective tool or appliance was held for jury, where shaver entered employee's thumb.—Warren & O V Ry. Co. v Ederington, 28 S.W.2d 1073, 181 Ark. 1037.

48. Ark—Endora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74

NJ—Davis v. New Jersey Zinc Co., 182 A. 850, 116 NJ Law 103

Or—Beckman v. Doernbecher Mfg. Co, 59 P.2d 688, 154 Or 408.

Negligence based on failure to make repairs as question of fact generally see supra subdivision f (8) of this section

49. Kan—Fishburn v. International Harvester Co, 138 P.2d 471, 157 Kan. 43.

50. Miss—Federal Compress Co. v. Craig, 7 So.2d 532, 192 Miss. 689—Allen Gravel Co. v Curtis, 161 So. 670, 173 Miss 416—Hamilton Bros Co. v Narcuse, 158 So. 467, 173 Miss. 24

Mo—Marsanick v. Luechtefeld, App, 157 S.W.2d 537—Sweany v Wabash Ry Co, 80 S.W.2d 216, 229 Mo. App 393—Andybur v National Pigments & Chemical Co., App, 24 S.W.2d 1069—Farley v. Lehrack, App, 272 S.W. 987.

NH—Stanton v. Morrison Mills, 47 A.2d 112, 94 NH 92—Wemyss v. Wyoming Valley Paper Co, 172 A. 438, 86 NH 587—Chiuchiole v New England Wholesale Tailors, 150 A. 540, 84 N.H. 329.

The issue is properly withdrawn from the jury where there is no evidence showing that the master knew, or in the exercise of reasonable care should have known, of the defect or danger⁵¹ or where the fact of knowledge is undisputed⁵² The question whether the authority of an agent to receive notice was within the scope of the duties of the agency is, on ascertained facts, a question of law, and should not be referred to the jury⁵³

1. Methods of Work

(1) In general

(2) Operation of railroads

(1) In General

It is a question for the court to determine whether there is any evidence tending to show negligence on the part of the master with respect to his methods of work, or in the methods adopted by those for whose negligence he is responsible, and for the jury to say whether the evidence submitted is sufficient to show negligence.

It is a question for the court to determine whether there is any evidence tending to show negligence on the part of the master with respect to his methods of work, or in the methods adopted by those for whose negligence he is responsible,⁵⁴ while it is for the jury to say whether the evidence submitted is sufficient to show negligence.⁵⁵ The test, as is

Or—Voshall v Northern Pacific Terminal Co, 240 P 891, 116 Or 237 39 C J p 1155 note 14 [d]

51. U S—Allison v. Great Atlantic & Pacific Tea Co, C C A N C, 99 F 2d 507

Ark—Kroger Grocery & Baking Co v Kennedy, 136 S W 2d 470, 199 Ark 914—Kurn v Faubus, 84 S W 2d 602, 191 Ark 232—Long v Ellis, 35 S W 2d 66, 183 Ark 137

Ill—Huff v Illinois Cent. R. Co, 199 N E 116, 362 Ill 95

Miss—Meridian Grain & Elevator Co. v Jones, 169 So 771, 176 Miss 764—Dr Pepper Bottling Co v. Gordy, 164 So 236, 174 Miss 392

Mo—Poe v Illinois Cent R Co, 73 S W 2d 779, 335 Mo. 507—Schneider v Pevelly Dairy Co, 40 S W 2d 647, 328 Mo 301—Hoover v Baldwin, App, 111 S W 2d 1011—Fessler v Hunter, App., 35 S W 2d 641—Sharp v Stuebner Cleaning & Mercantile Co, App, 300 S W 559

N C—Rector v Southern Coal Co, 136 S E 113, 193 N C 804

Ok—Thurlow v. Failing, 272 P. 368, 133 Okl 277.

Or—De Mars v Heathman, 286 P 144, 133 Or. 609.

39 C J p 1157 note 15

Evidence held insufficient for jury

Employer's superior knowledge of the dangerous condition in view of evidence that employee had equal knowledge of the dangerous condition—Schmidt v Carper, 61 N Y S 2d 185, 270 App Div 411

52. Utah—Elegant v. Standard Coal Co, 168 P 266, 50 Utah 585.

53. Ala—Mobile & Ohio R. Co v. Thomas, 42 Ala 672

54. Ark—Barnes v Hope Basket Co., 56 S W 2d 1014, 186 Ark 942 39 C J p 1157 note 17.

Negligence of fellow servants see infra § 535

Operation of car or hoist in mine see supra subdivision f (5) (1) of this section

Employee acting in disregard of direction

Employer was held as matter of

law not negligent as to injuries sustained by employee setting up bridge stringers in disregard of foreman's direction—Orr v Johnson, 9 S W 2d 563, 177 Ark 1165

Evidence held insufficient for jury

U S—Aqua System v Kodakowski C C A Canal Zone, 88 F 2d 395—Phillips Petroleum Co v Manning, C C A Ark, 81 F 2d 849—Van Norden v Chas R McCormick Lumber Co of Delaware, C C A Or, 17 F 2d 568, certiorari denied 47 S Ct 768, 274 U S 758, 71 L Ed 1387—C B Foster Packing Co v Lamey, C C A Miss, 5 F 2d 23

Ark—J L Williams & Sons v Tompkins, 114 S W 2d 845, 195 Ark 1146—Union Saw Mill Co v Hayes, 90 S W 2d 209, 193 Ark 17

Fla—Duncan v Growers Equipment Co, 1 So 2d 458, 146 Fla 516

Ky—Perkins-Harlan Coal Co v Creech's Adm'r, 103 S W 2d 943, 268 Ky 174—Hanor v West Kentucky Coal Co, 43 S W 2d 689, 241 Ky 163—Louisville & N R Co v Morgan's Adm'r, 9 S W 2d 213, 235 Ky 447

Me—Loring v Maine Cent R Co, 153 A 527, 129 Me 389—Millett v Maine Cent R Co, 146 A 903, 123 Me 314

Miss—Anderson-Tully Co v Goodin, 163 So 536, 174 Miss 162

Mo—Williams v Terminal R Ass'n of St Louis, 98 S W 2d 651, 339 Mo. 594, certiorari denied 57 S Ct 611, 300 U S 689, 81 L Ed 876—Lewis v American Car & Foundry Co, App, 8 S W 2d 283—Harrison v American Car & Foundry Co, App, 296 S W 214

Neb—Britton v Samuelson, 23 N W 2d 267, 147 Neb 318

N C—Callahan v Roberts, 193 S E 265, 212 N C 328—Shipes v Poag, 163 S E 746, 302 N C 844—Poole v Norfolk Southern R Co, 162 S E 905, 202 N C 839—Byrum v. Houts, 156 S E 134, 199 N C 818

Ok—Singer Sewing Mach Co v Odom, 45 P 2d 473, 172 Okl. 411—Chicago, R I & P. Ry Co v Spillane, 265 P. 130, 130 Okl 46

Or—Jackson v. Oregon Lumber Co, 53 P 2d 189, 152 Or. 200—Freeman v Wentworth & Irwin, 7 P 2d 796, 139 Or 1.

Tex—Lloyd v Pierce, Civ App, 89 S W 2d 1035, reversed on other grounds Pierce v Lloyd, 114 S W 2d 867, 131 Tex 401.

Reasonable engineering and scientific judgment

(1) With respect to negligence in using crane instead of hand tools in particular operation, reasonable engineering and scientific judgment used by master is not subject to review by a jury—Louisville & N R Co v Davis, C C A Tenn, 75 F 2d 849, certiorari denied Davis v Louisville & N R Co, 56 S Ct 119, 296 U S 603, 80 L Ed. 427

(2) In action by employee injured when pile fell from crane, used by railroad to remove braces from bridge piling, use of crane instead of hand tools to remove braces was held not negligence as a matter of law, in absence of evidence that crane was not suitable for purpose or that it was defective or negligently operated—Louisville & N R Co. v. Davis, supra.

55. U S—Blair v Baltimore & O R Co, 65 S Ct 645, 323 U S 600, 89 L Ed 490—Boston & M. R R v Kyle, C C A Mass, 156 F 2d 112—Norfolk & W Ry Co v Brumfield, C C A Ohio, 64 F 2d 961—American Glycerin Co v. Brown, 30 F 2d 316—Eppinger & Russell Co v. Sheely, C C A Fla., 24 F 2d 153.

Ala—Louisville & N R Co. v Hall, 135 So 466, 233 Ala 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L Ed 560.

Ariz—Southern Pac. Co v. Gastelum, 297 P 875, 38 Ariz 127

Ark—Hill v Hardy, 157 S W 2d 494, 203 Ark 79—Missouri Pac R. Co v. Sanders, 117 S W 2d 720, 196 Ark 369—Missouri Pac R. Co v. Brown, 115 S W 2d 1083, 195 Ark 1080—Consolidated Const. Co. of Oklahoma v. Hatchett, 114 S W 2d 31, 195 Ark 556—West Bauxite

the case in other civil actions, is that the question should not be submitted to the jury if the court would be bound to set aside a verdict for plaintiff⁵⁶ Illustrative of the rule, the question as to the exercise of proper care after the discovery of the servant's peril has been held a question for the ju-

ry,⁵⁷ and so have the questions as to the negligent operation of machinery⁵⁸ or elevators,⁵⁹ the failure to stop machinery during the performance of acts which would otherwise be dangerous,⁶⁰ the failure to provide for a proper system of signals,⁶¹ the failure to give proper signals or warning when ma-

Mining Co v Harvey, 110 S W 2d 1068, 194 Ark 1156—Baldwin v Hunnicut, 93 S W 2d 131, 193 Ark 441—Barnes v Hope Basket Co, 56 S W 2d 1014, 196 Ark 942—Mississippi River Fuel Corporation v Small, 32 S W 2d 422, 182 Ark 1186—Arkansas Drilling Co v Gross, 17 S W 2d 889, 179 Ark 631.

Ga—Copeland v McElroy, 176 S E 67, 49 Ga App 490

Ill—Mueller v Elm Park Hotel Co, 75 N E 2d 314, 398 Ill 60

Ind—Chicago, I & L Ry Co v Younger, 175 N E 290, 93 Ind App 278

Ky—Wilder's Adm'r v Southern Mining Co, 96 S W 2d 436, 265 Ky 219—Gathuff Coal Co v Hill's Adm'r, 92 S W 2d 56, 263 Ky 809—E J O'Brien & Co v Shelton's Adm'r, 55 S W 2d 352, 246 Ky 537
Me—Le Blanc v Sturgis, 147 A 701, 128 Me 374.

Miss—Hercules Powder Co v Palmer, 30 So 2d 804—F W Woolworth Co v Freeman, 11 So 2d 447, 193 Miss 838—Mississippi Power Co v Stribling, 3 So 2d 807, 191 Miss 832—Eagle Cotton Oil Co v Pickett, 166 So 764, 175 Miss 677—Hercules Powder Co v Williamson, 110 So 244, 145 Miss 172

Mo—Kelso v W A Ross Const Co, 85 S W 2d 627, 337 Mo 202—Paiker v Nelson Grain & Milling Co, 43 S W 2d 906, 330 Mo 95—Jacob v Peerless White Lime Co, 40 S W 2d 558, 327 Mo 868—Baker v Scott County Milling Co, 20 S W 2d 494, 323 Mo 1089—Koehler v Wells, 20 S W 2d 31, 323 Mo 892—Hamilton v Standard Oil Co of Indiana, 19 S W 2d 679, 323 Mo 531—Grandstaff v Wabash Ry Co, App, 71 S W 2d 174—Wuest v Dorman, 54 S W 2d 1000, 227 Mo App 405—Hogue v St. Louis-San Francisco Ry Co, App, 20 S W 2d 301—Beuc v Mesker Bros. Iron Co, App, 7 S W 2d 438—Lewis v American Car & Foundry Co, App, 3 S W 2d 283—Gebhardt v American Car & Foundry Co, App, 298 S W 446—Gailus v Pauly Jail Bldg. Co, App, 282 S W 135.

NY—Wawrzonek v Central Hudson Gas & Electric Corporation, 12 N E 2d 535, 276 NY 412

NC—O'Neal v Jones, 155 S E 448, 199 NC 652—Pyatt v Southern Ry Co, 154 S E 847, 199 NC 397—Young v E. A. Wood & Co, 146 S E 70, 196 NC 435—Wade v McLean Contracting Co, 62 S E 919, 149 N.C. 177.

Okl—Casualty Reciprocal Exchange v Sutfin, 166 P 2d 434, 196 Okl 567—Anthony v Colvin, 130 P 2d 819, 191 Okl 476, dissenting opinion 145 P 2d 384, 191 Okl 476—Jov v Pope, 53 P 2d 683, 175 Okl 540—Tankersley v Ferrin, 238 P 853, 113 Okl 68

SC—Piner v Standard Oil Co of New Jersey, 161 S E 504, 163 SC 303

Tex—Galveston, H & S A Ry. Co v Contois, Civ App, 279 S W 929, affirmed, Com App, 288 S W 2d 154, certiorari denied 47 S Ct. 659, 274 US 747, 71 L Ed 1338—Sonken-Galamba Corporation v Hillman, Civ App, 111 S W 2d 853, error dismissed—Texas & Pac Ry Co v Kelly, Civ App, 35 S W 2d 749, reversed on other grounds, Com App, 51 S W 2d 299, certiorari denied Kelly v Texas & P. R. Co, 53 S Ct 90, 287 US 644, 71 L Ed 557
Wash—Ranstrom v International Stevedoring Co, 277 P 992, 153 Wash 332—Kahlstrom v International Stevedoring Co, 250 P 287, 141 Wash 874, affirmed 256 P. 503, 141 Wash 642, certiorari denied 48 S Ct 119, 275 US. 560, 72 L Ed 426

39 C J p 1087 note 22, p 1157 note 18.

Particular questions held for jury

(1) Employer's negligence in withdrawing hold from defective ladder while employee was working thereon—Isaman v Hayes, 46 S W 2d 110, 242 Ky 302, 85 A L R 996

(2) Existence of custom for apprentices to take job directly to operator of machine in another department, and to assist operator if requested—Chesapeake & O Ry Co v Golladay, 180 S E 400, 164 Va 292.

(3) Existence of custom of employer to look out for employee's safety—Young v Terminal R R Ass'n of St. Louis, Mo, 192 S W 2d 402

(4) Negligence in method of handling gasoline and kerosene

US—Maine Cent R Co v Loring, CCA Me, 56 F 2d 371

Miss—Curry & Turner Const Co v Bryan, 185 So 256, 184 Miss 44.

(5) Whether employee used, and was required to use, formalin, a poisonous, harmful, substance in fumigating railroad cars.—Louisville & N R Co v Gilliland, 296 S W 423, 220 Ky 481, 53 A L R 386.

(6) Whether so-called safe method of oiling machinery was, in fact, obvious and safe—Tombigbee Mill & Lumber Co v Hollingsworth, CCA Miss, 162 F 2d 763.

56. Ill—Cummings v. Chicago & N W R Co, 89 Ill App 199, affirmed 60 N E 51, 189 Ill 608

57. Ark—Dixie Bauxite Co v Webb, 63 S W 2d 634, 187 Ark 1024

N.H.—Tondreau v. Boston & M. R R, 157 A 76, 85 N H 235

N.J.—Davis v New Jersey Zinc Co, 182 A 850, 116 N J Law 103
39 C J p 1159 note 20.

Bad seamanship

Evidence as to bad seamanship of captain in backing tug to rescue deckhand falling overboard was held for jury—Radoslovic v New York Cent R Co, 156 N E 625, 245 N.Y. 91

53. U.S.—New York, C. & St L R. Co v Slater, CCA Ind, 23 F.2d 777, certiorari denied 48 S Ct. 601, 275 US 605, 72 L Ed 1011

Ark—Temple Cotton Oil Co v Holiday, 47 S W 2d 4, 185 Ark 1190—Pekin Wood Products Co v Mason, 46 S W 2d 798, 185 Ark 166

Mo—Daggett v American Car & Foundry Co, App, 284 S W 855.

Wash—Tennessee v. Kadiak Fisheries Co, 2 P 2d 745, 164 Wash 380.
39 C J p 1159 note 21.

59. Cal—Morgan v J W Robinson Co, 107 P 695, 157 Cal 348
39 C J p 1159 note 22.

60. Ark—Chapman & Dewey Lumber Co v Bryan, 35 S W 2d 80, 183 Ark 119

Mo—Baker v Atlas Portland Cement Co, App, 299 S W 70.

NC—Lane v Paschall, 154 S E 626, 199 NC 364—Mills v Marion Mfg Co, 151 S E 92, 198 NC 145

SD—Koenekamp v Picasso, 269 N W. 74, 64 S D 567

39 C J p 1159 note 23.

Failure to throw binder out of gear Iowa—Bell v Brown, 239 N.W. 785, 214 Iowa 370.

61. US—Hutchins v. Akron, C & Y R Co, CCA Ohio, 162 F 2d 189
39 C J p 1159 note 24

Evidence held insufficient for jury US—Hutchins v. Akron, C. & Y R Co, supra.

chinery is about to be started,⁶² or when some act dangerous to a servant is about to be performed,⁶³ or on the approach of some instrumentality dangerous to the servant,⁶⁴ negligence in the manner of loading a car or other vehicle⁶⁵ or unloading it,⁶⁶ the negligent manner of piling various objects,⁶⁷ and negligence in the conduct of logging operations.⁶⁸

(2) Operation of Railroads

The case should be submitted to the jury when the

evidence tends to establish the negligence of the master in the operation of a locomotive, train, or car; but it is for the court to determine pure legal questions, and in the absence of evidence tending to show negligence, or where negligence is conclusively shown, the question is not for the jury

The case should be submitted to the jury where the evidence tends to establish the negligence of the master in respect of the operation of a locomotive, train, or car,⁶⁹ or the failure to use proper

62. Mo—Mitchell v Wabash Ry Co, 69 SW 2d 286, 334 Mo 926
39 C.J. p 1159 note 25
Negligence

Of master where machinery which should have remained at rest automatically starts as question for jury see *supra* subdivision f (5) (a) of this section

With respect to warning and instructing servant as question of law or fact generally see *infra* subdivision i of this section

63. US—L. E. Whitham Const Co v Remer, CCA Okl., 105 F.2d 371
Ark—Newark Gravel Co v Barber, 18 SW 2d 331, 179 Ark 799—Texas Pipe Line Co v Johnson, 275 SW 329, 169 Ark 235

Miss—Albert v Doullut & Edwin, 178 So 312, 180 Miss 626
39 C.J. p 1159 note 26

Violation of custom without warning

Mo—McCurry v Thompson, 181 S W 2d 529, 352 Mo 1199—Courtois v American Car & Foundry Co, App., 282 SW 484

64. NY—Dzkowski v Reynoldsville Carting Co, 110 N.E. 442, 216 NY 173

39 C.J. p 1159 note 27

65. US—Ekblom v G. O. Reed, Inc., CCA Fla., 71 F.2d 399.

Mo—Manuel v American Car & Foundry Co, App., 23 SW 2d 1073
NC—Langford v Kitchen Lumber Co, 148 SE 457, 197 NC 396—Arrington v Suncrest Lumber Co, 146 SE 87, 196 NC 821—Sutton v Suncrest Lumber Co, 146 SE 87, 196 NC 820

Okl—Ice v Gardner, 83 P.2d 378, 183 Okl. 496

39 C.J. p 1159 note 28

66. Iowa—Farwark v. Chicago, M. & St. P. Ry Co., 211 NW 875, 202 Iowa 1229

Mo—Carpenter v. Wabash Ry Co., 71 SW 2d 1071, 335 Mo. 180—Macklin v Fogel Const Co, 31 S.W. 2d 14, 326 Mo 38—Dietderick v Missouri Iron & Metal Co, 9 SW 2d 824, 222 Mo App. 740.

NC—Lynch v Carolina, C. & O. Ry Co., 80 SE 173, 164 NC 249

Tex—Texas & P. Ry Co. v Rley, Civ App., 183 SW 2d 991, error re-

fused, certiorari denied 65 S.Ct. 1414, 326 US 873, 89 L.Ed. 1991—St. Louis Southwestern Ry Co of Texas v Neely, Civ App., 296 SW 948

39 C.J. p 1159 note 29

67. Mo—Granneman v Commercial Auto Body Co, App., 296 SW 437
SC—Mullikin v Southern Bleachery & Print Works, 192 SE 665, 184 SC 449

39 C.J. p 1159 note 30

68. NC—Collins v Hyde County Land & Lumber Co., 141 SE 580, 195 NC 849—Bradford v English, 130 SE 705, 190 NC 742

39 C.J. p 1160 note 31

69. US—Keeton v. Thompson, Ark., 66 S.Ct. 135, 326 US 689, 90 L.Ed. 405—Rocco v Lehigh Valley R. Co., N.Y., 63 S.Ct. 343, 288 US 275, 77 L.Ed. 743—Chicago & N.W. Ry Co v Green, CCA Minn., 164 F.2d 55—Boston & M.R.R. v Meech, CCA Mass., 156 F.2d 109, certiorari denied 67 S.Ct. 124, 329 US 763, 91 L.Ed. 658—Keys v Pennsylvania R. Co., CCA N.Y., 104 F.2d 683, certiorari granted 60 S.Ct. 103, 308 US 535, 84 L.Ed. 450, reversed on other grounds 60 S.Ct. 355, 308 US 529, 84 L.Ed. 447—Chicago, B. & Q. R. Co v Kelley, CCA Neb., 74 F.2d 80—Chesapeake & O. Ry Co v Meers, CCA Va., 64 F.2d 291—McClellan v Pennsylvania R. Co., CCA N.Y., 63 F.2d 61—Swaner v Utah Idaho Cent. R. Co., CCA Utah, 54 F.2d 863, certiorari denied Utah Idaho Cent. R. Co v Swaner, 53 S.Ct. 6, 287 US 600, 77 L.Ed. 522—Grand Trunk Western Ry Co v Heathie, CCA Mich., 48 F.2d 759, certiorari denied 53 S.Ct. 10, 284 US 625, 76 L.Ed. 533—Erie R. Co v Irons, CCA N.J., 48 F.2d 60, certiorari denied 51 S.Ct. 649, 283 US 857, 75 L.Ed. 1463—Chesapeake & O. Ry Co v Smith, CCA Ohio, 42 F.2d 111, certiorari denied 51 S.Ct. 32, 282 US 856, 75 L.Ed. 758—Sandri v Byram, CCA Mich., 30 F.2d 784

Ala.—Louisville & N. R. Co. v Parker, 138 So 231, 223 Ala. 636, certiorari granted 52 S.Ct. 496, 286 US 535, 76 L.Ed. 1375, certiorari

dismissed 53 S.Ct. 94, 287 US 569, 77 L.Ed. 501

Ark—Dierks Lumber & Coal Co v Tollerson, 54 SW 2d 61, 186 Ark 439—Missouri Pac. R. Co v Harville, 46 SW 2d 17, 185 Ark 47, certiorari denied 53 S.Ct. 13, 287 US 610, 77 L.Ed. 530

Cal—Weiland v Southern Pac. Co., 93 P.2d 1023, 34 Cal App.2d 500, certiorari denied Southern Pac. Co v Weiland, 60 S.Ct. 618, 309 US 670, 84 L.Ed. 1016

Colo—Denver & S. L. Ry Co v Mullen, 279 P. 49, 86 Colo 159

Ill—Goodman v Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill App 320, certiorari denied Chicago, B. & Q. R. Co v Goodman, 58 S.Ct. 610, 303 US 640, 82 L.Ed. 1100

Kan—Wiggins v Missouri-Kansas-Texas R. Co., 276 P. 63, 138 Kan 32

Miss—Graves v Gulf & S. I. R. Co., 110 So 234, 146 Miss 130

Mo—Owen v Kurn, 148 SW 2d 519, 347 Mo 516—McNatt v Wabash Ry Co., 108 SW 2d 33, 341 Mo 516

—Rowe v Missouri-Kansas-Texas R. Co., 100 SW 2d 480, 339 Mo 1145, certiorari denied Missouri-Kansas-Texas R. Co v Rowe, 57 S.Ct. 671, 300 US 680, 81 L.Ed. 884—Good v Missouri-Kansas-Texas R. Co., 97 SW 2d 612, 339 Mo 330, certiorari denied Missouri-Kansas-Texas R. Co v Good, 57 S.Ct. 231, 299 US 605, 81 L.Ed. 446—Martin v St. Louis-San Francisco Ry Co., 46 SW 2d 149, 339 Mo 739, certiorari denied St. Louis-San Francisco Ry Co v Martin, 52 S.Ct. 644, 286 US 563, 76 L.Ed. 1294—Clift v St. Louis-San Francisco Ry Co., 9 SW 2d 972, 320 Mo 791—Siberell v St. Louis-San Francisco Ry Co., 9 SW 2d 912, 320 Mo 816—Jenkins v Wabash Ry Co., 107 SW 2d 204, 232 Mo App 438, certiorari denied Wabash R. Co v Jenkins, 58 S.Ct. 139, 303 US 737, 82 L.Ed. 570.

N.J.—Erickson v. Lehigh Valley R. Co., 134 A. 892, 4 N.J. Misc. 905

NC—Rigsbee v Atlantic Coast Line R. Co., 129 S.E. 580, 190 N.C. 231

SC—Dantaler v Southern Ry. Co., 164 SE 434, 166 SC 148, reversed on other grounds Southern Ry. Co.

care as to a servant riding thereon,⁷⁰ or while on,⁷² a standing car or locomotive, or while en-boarding⁷¹ or alighting from,⁷³ or while working

v. Dantsler, 53 S Ct 520, 286 US 318, 78 L Ed 1127—Youngblood v Southern Ry Co, 164 S E 431, 166 SC 140, reversed on other grounds Southern Ry Co v Youngblood, 52 S Ct 518, 286 US 313, 78 L Ed 1124—Wilson v Atlantic Coast Line R Co, 131 S E 777, 134 S C 81

Tenn—Tennessee Cent Ry Co v. Williams, 9 Tenn App 529
39 C J p 1160 note 32

Particular questions held for jury under evidence

(1) Whether freight train was started by conductor pursuant to rules, or by direction of deceased—Murmman v New York, N H & H R Co, 258 NYS 545, 236 App Div 784, affirmed 184 NE 105, 260 N.Y. 589, certiorari denied New York, N H & H R Co v Murmann, 53 S.Ct. 320, 288 US 601, 77 L Ed 977.

(2) Whether railroad interlocking signal system worked so that signal, passed by train before entering tunnel, must have indicated "caution" when signal beyond opposite portal showed "stop"—Miller v Southern Pac Co, 21 P 2d 865, 32 Utah 46, certiorari denied Southern Pac Co v. Miller, 54 S.Ct. 207, 290 US 697, 78 L Ed. 600

70. US—Keeton v Thompson, Ark., 66 S Ct. 185, 326 US 589, 90 L Ed 405—Hutchins v Akron, C & Y R Co, CCA Ohio, 162 F 2d 189—Atlantic Coast Line R Co v Simms, CCA Fla., 157 F 2d 874—Philadelphia & R Ry Co v. Bartsch, CCA N.J., 9 F 2d 858
Ala—Birmingham Belt R Co v Hendrix, 110 So. 312, 215 Ala 285, certiorari denied 47 S Ct 472, 273 US 768, 71 L Ed. 877.

Ark—Missouri Pac R. Co v. Boyd, 106 SW 2d 165, 194 Ark 121—Missouri Pac R Co v Montgomery, 55 SW 2d 88, 186 Ark 537, certiorari denied 53 S Ct. 690, 289 U. S 747, 77 L Ed. 1493

Cal—Tuller v Atchison, T & S F. Ry. Co, 145 P.2d 321, 63 Cal App.2d 852.

Ill—Popp v Terminal R. Ass'n of St Louis, 45 NE 2d 298, 316 Ill. App 670

Ind—Central Indiana Ry. Co. v. Mitchell, 199 NE 439, 102 Ind.App 121

Kan—Blevins v Union Pac R Co, 293 P 519, 181 Kan 682, reversed on other grounds 299 P 593, 133 Kan 185.

Mich—Kruk v Minneapolis, St. P & S S M Ry Co, 241 N.W. 162, 257 Mich. 152.

Minn—Thom v. Northern Pac Ry Co, 262 NW 660, 190 Minn 622—Moquin v Minneapolis, St. P. &

S S M Ry Co, 231 N.W. 329, 181 Minn 56, reversed on other grounds 51 S Ct 501, 283 US 520, 75 L Ed 1343, and followed in 331 NW 930, 181 Minn 626—Larson v Great Northern Ry. Co, 203 N W 57, 162 Minn 419

Mo—Pashea v Terminal R Ass'n of St Louis, 165 SW 3d 691, 360 Mo 132, certiorari denied Terminal Railroad Ass'n of St Louis v Pashea, 63 S Ct 664, 318 US 768, 37 L Ed 1135—Mann v St Louis-San Francisco Ry Co, 72 SW 2d 977—Young v Wheelock, 64 SW 2d 950, 333 Mo 992, certiorari denied Wheelock v. Young, 54 S Ct 537, 291 US 676, 78 L Ed 1064—Hutchinson v Missouri Pac Ry Co, App, 288 SW 91

NC—Wimberley v Atlantic Coast Line R Co, 130 S E 116, 190 NC 444, reversed Atlantic Coast Line R Co v Wimberley, 47 S Ct 475, 273 US 673, 71 L Ed 833

ND—Sullivan v Minneapolis, St. P & S S M. Ry Co, 213 NW 841, 55 ND 853

Okl—Kansas, O. & G Ry Co v Dillon, 135 P 2d 498, 191 Okl 671—Missouri-Kansas-Texas R Co v Embrey, 33 P 2d 481, 168 Okl 433, certiorari denied 55 S Ct 119, 293 US 603, 79 L Ed 695

SC—Neal v Southern Ry, Carolina Division, 160 S E 837, 162 SC 288, certiorari denied Southern Ry-Carolina Division v Neal, 52 S Ct 9, 284 US 621, 76 L Ed. 530

Tex—Lynch v Texas & P. Ry Co, 132 SW 523, 63 Tex Civ App 280—International-Great Northern R R v Lowry, Civ App, 98 SW 2d 383, reversed on other grounds International-Great Northern R Co v Lowry, 121 SW 2d 585, 182 Tex 273

Va—Southern Ry Co v May, 137 S E 493, 147 Va 542.

Wash—Jorgensen v Oregon-Washington R & Nav Co, 29 P 2d 744, 176 Wash. 399, affirmed 33 P 2d 898, 176 Wash 399, certiorari denied Oregon-Washington R & Nav Co v Jorgenson, 55 S Ct 215, 293 US 620, 79 L Ed 708

39 C J p 1160 note 33

Reconciliation of conflict between testimony of conductor and his prior statements was held for jury—Kulp v Chicago, St. P. M & O. Ry Co, CCA Minn., 88 F 2d 466, certiorari denied Chicago, St P M & O R Co v Kulp, 67 S Ct 930, 301 US 700, 81 L Ed 1355.

71. Utah—Ayres v Union Pac R Co, 178 P 2d 161.
39 C J p 1160 note 34

72. US—Jacobs v Reading Co, C C A N J, 130 F 2d 612

Mo—Ford v Louisville & N R Co, 198 SW 2d 163, 355 Mo 362—Cannell v Missouri Pac R Co, App, 277 SW 583

39 C J p 1160 note 35

73. US—Fitzgerald v Pennsylvania R Co, CCA Pa., 164 F 2d 328—Sweeting v Pennsylvania R Co, CCA Pa., 142 F 2d 611—Line v Erie R Co, CCA Ohio, 62 F 2d 657, certiorari denied Erie R Co v Line, 52 S Ct 526, 289 US 729, 77 L Ed 1478—Bangor & A R Co v Jones, CCA Me., 36 F 2d 886

Ark—Kansas City Southern Ry Co v Larsen, 114 SW 2d 1081, 195 Ark 808, certiorari denied 59 S Ct 82, 305 US 621, 83 L Ed 397—Chicago, R I & P Ry Co v Man- us, 100 SW 2d 258, 193 Ark 397

Cal—King v Schumacher, 89 P 2d 466, 32 Cal App 173, certiorari denied Schumacher v King, 60 S Ct 123, 308 US 593, 84 L Ed 496

Ill—Walate v Chicago, R I & P Ry Co, 28 NE 2d 149, 306 Ill App 5, reversed on other grounds 33 NE 2d 119, 376 Ill 59

Ind—Southern Ry Co v Wilkins, 178 NE 454, 95 Ind App 130, certiorari denied 53 S Ct 85, 287 U S 685, 77 L Ed. 550

Miss—Newton v Homochitto Lum- ber Co, 138 So 564, 163 Miss 20

Mo—Smith v Thompson, 182 SW 2d 62—Goodwin v. Missouri Pac R Co, 72 SW 2d 988, 335 Mo 398—Grange v Chicago & E I Ry Co, 69 SW 2d 955, 334 Mo 1040—Perryman v Missouri Pac R Co, 31 SW 2d 4, 328 Mo 176—Norton v Wheelock, 23 SW 2d 142, 333 Mo. 913, certiorari denied Wheelock v Norton, 50 S Ct 353, 281 US 753, 74 L Ed 1162—Martin v St Louis-San Francisco Ry. Co, 19 SW 2d 470, 323 Mo 450—Sullivan v St Louis-San Francisco Ry Co, 12 S W 2d 735, 321 Mo 697—Holman v St Louis-San Francisco Ry. Co., 278 SW 1000, 312 Mo 343—McIntire v Missouri Pac R Co, App, 38 SW 3d 373

NJ—Marcone v New York Cent R. Co, 144 A 635, 105 N J Law 466, affirmed 50 S Ct 294, 281 US. 345, 74 L Ed 892

NC—Batton v Atlantic Coast Line R Co, 193 S E 674, 212 NC 236, certiorari denied Atlantic Coast Line R Co v Batton, 58 S Ct. 750, 303 US 651, 82 L Ed 1112—Ritchie v High Point, T & D R Co., 135 S E 770, 192 NC 666

Ohio—Davis v. Hussey, 153 NE 875. 22 Ohio App 181, certiorari denied Mellon v Hussey, 48 S Ct. 355, 270 US 659, 70 L Ed 736

SC—Mann v Seaboard Air Line Ry. Co., 136 S.E. 234, 188 SC. 241

gaged in coupling or switching cars,⁷⁴ or as to a | servant on or near tracks,⁷⁵ and the rule applies

Tex—Texas & P Ry Co v Riley, Civ App, 183 S W 2d 991, error refused, certiorari denied 65 S Ct 1414, 325 US 873, 89 L Ed 1991—Texas & N O R Co v Neill, Civ App, 97 S W 2d 279, error refused 100 S W 2d 348, 128 Tex 580, certiorari dismissed 58 S Ct 118, 30 US 645, 82 L Ed 501, rehearing denied 58 S Ct 268, 302 US 778, 82 L Ed 402—Texas & P Ry Co v Aaron, Civ App, 19 S W 2d 930, certiorari denied 50 S Ct 409, 281 US 766, 74 L Ed 1166
39 C J p 1160 note 36

74. US—Ellis v. Union Pac R Co, Neb, 67 S Ct 698, 329 US 649, 91 L Ed 572—Hutchins v Akron, C & Y. R. Co, CCA Ohio, 162 F 2d 189—Murphy v Lehigh Valley R Co, CCA NY, 158 F 2d 481—Griswold v Gardner, CCA Ill, 155 F 2d 338, certiorari denied Gardner v Griswold, 67 S Ct 74, 329 US 725, 91 L Ed 638—Pratt v Louisiana & A Ry Co, CCA La, 135 F 2d 692—Atchison, T & S F Ry Co v Keddly, CCA Cal, 28 F 2d 952, certiorari denied 49 S Ct 351, 279 US 556, 73 L Ed 997—Louisville & N R Co v Summerlin, CCA Fla, 18 F 2d 950
Ala—Birmingham Belt R Co v Bennett, 146 So 265, 226 Ala 185, certiorari denied 54 S Ct 52, 290 US 634, 78 L Ed 652—Gulf, M & N R Co v Williams, 119 So 212, 218 Ala 481, certiorari dismissed 50 S Ct 86, 280 US 526, 74 L Ed 593—Seaboard Air Line Ry Co v Johnson, 115 So 168, 217 Ala 251, certiorari granted 48 S Ct 436, 277 US 579, 72 L Ed 997, and certiorari dismissed 49 S Ct 95, 278 US 576, 73 L Ed 515—Davis v Sorrell, 104 So 397, 313 Ala 191

Ark—W. P. Brown & Sons Lumber Co v Oaties, 72 S W 2d 213, 189 Ark 338—Missouri & N A R Co v Robinson, 65 S W 2d 546, 188 Ark 344

Cal—Phillips v Southern Pac Co, 58 P 2d 688, 14 Cal App 2d 454—Pitt v Southern Pac Co, 9 P 2d 278, 121 Cal App 228

Ga—Gainesville Midland R Co v Floyd, 40 SE 2d 434, 74 Ga App 575

Idaho—Roy v. Oregon Short Line R. Co, 42 P 2d 476, 55 Idaho 404, certiorari denied Oregon Short Line R Co v Roy, 56 S Ct 89, 296 US 579, 80 L Ed 409

Ill—Kiefer v Elgin, J. & E Ry Co, 184 NE 870, 351 Ill 634—Adams v Chicago & E R Co, 41 NE 2d 991, 314 Ill App 404—Benson v Chicago, R I & P Ry Co, 267 Ill App. 11, affirmed Chicago, R L & P Ry Co v Benson, 185 NE 244, 352 Ill 195, certiorari de-

med 54 S Ct 58, 290 US 636, 78 L Ed 553

Ind—Harris v Chicago & E I Ry Co, 158 NE 636, 87 Ind App 11 Ky—Louisville & N R Co v Pearcy, 121 S W 1037

Mich—Musgrove v. Manistique & L S Ry, 244 NW 132, 259 Mich 469, certiorari denied Manistique & L S R Co v Musgrove, 53 S Ct 313, 287 US 669, 77 L Ed 577
Minn—Thompson v Byram, 228 N W 546, 179 Minn 67

Miss—Hackler v Natchez & S Ry Co, 128 So 325, 157 Miss 432

Mo—Hold v Terminal R R Ass'n of St Louis, 201 S W 2d 958—Cope-land v Terminal R Ass'n of St Louis, 182 S W 2d 600, 353 Mo 433, certiorari denied 65 S Ct 551, 323 US 799, 89 L Ed 637—Godsey v Thompson, 179 S W 2d 44, 352 Mo 681, certiorari denied 65 S Ct 48, 323 US 719, 89 L Ed 578—Mooney v Terminal R Ass'n of St Louis, 176 S W 2d 605, 352 Mo 245—West v Kurn, 148 S W 2d 752—Freeman v Terminal R Ass'n of St Louis, 107 S W 2d 36, 341 Mo 288—Will-gues v Pennsylvania R Co, 298 S W 817, 318 Mo. 28—Halt v Cleve-land, C. C & St. L Ry Co, 279 S W. 148, certiorari denied Cleve-land, C. C & St L Ry Co v Halt, 46 S Ct 483, 271 US 668, 70 L Ed 1142—Carbaugh v St Lou- is-San Francisco Ry Co., App. 2 S W 2d 195

NY—Healy v. Erie R Co, 180 NE 888, 259 NY. 40, certiorari denied Erie R Co v Healy, 53 S Ct 61, 287 US 628, 77 L Ed 545

NC—Laughter v Powell, 14 SE 3d 826, 219 NC 689, 136 ALR 1116, certiorari denied Powell v Laugh- ter, 62 S Ct 128, 314 US. 666, 86 L Ed 533

Ohio—Moran v. Hines, 152 NE 664, 115 Ohio St 226

Tex—Roberts v Texas & Pac Ry. Co, 180 S W 2d 330, 142 Tex 550—Texas & P. Ry. Co v Baldwin, Civ App, 25 S W 2d 969, affirmed, Com App, 44 S W 2d 909, certiorari denied 53 S Ct 11, 287 US 606, 77 L Ed 527—Galveston, H & S A Ry Co v Andrews, Civ App, 291 S W 590.

Va—Chesapeake & O Ry. Co v Steele's Adm'r, 135 SE 677, 146 Va 23

Wis—Schiefelbein v Chicago, M, St P & P R Co, 365 NW 386, 221 Wis 35, certiorari denied Chicago, M, St P & P. R Co v Schiefel- bein, 57 S Ct. 20, 299 US 558, 81 L Ed 411

39 C J p 1161 note 37

Particular questions held for jury under evidence

(1) Agreement of yardmaster to look out for plaintiff's safety when

directing him to work on cars where he was injured—Reed v Terminal R. Ass'n of St Louis, Mo, 62 S W 2d 747

(2) Custom as to dimming head- lights on trains moving in yard—Goslin v Kurn, 173 S W 2d 79, 351 Mo 395

(3) Custom or practice of a switch crew to give an airman advance ad- vice of switching movements—Young v Terminal R R Ass'n of St. Louis, Mo., 192 S W 2d 402.

(4) Duty of conductor of yard train under circumstances shown to close switch, and right of plaintiff to rely on his doing so—Lehigh Val- ley R Co v McGranahan, CCA N. Y, 6 F 2d 431

(5) Negligence in moving cars without first ascertaining whether interstate was in safe place—Mobile & O R Co v Williams, 139 So 337, 224 Ala 125—Mobile & O R Co. v. Williams, 129 So. 60, 221 Ala 403

(6) Whether other employees knew or should have known of switchman's whereabouts and wheth- er he might attempt to mount the footboard—Texas & N O. R Co v. Sturgeon, 177 S W 2d 264, 142 Tex. 222.

75. US—Tiller v. Atlantic Coast Line R Co, Va, 65 S Ct. 421, 323 US 574, 89 L Ed. 465—Tiller v Atlantic Coast Line R Co, Va, 63 S Ct 444, 318 US 54, 87 L Ed 610, 143 ALR 967—Seago v New York Cent R Co, Mo, 62 S Ct 806, 315 US 781, 86 L Ed 1188—Boston & M R R v Cabana, CCA Mass, 148 F 2d 150, certiorari denied 65 S Ct 1414, 325 US. 873, 89 L Ed 1991—Chicago, M, St P & P R Co. v Kane, CCA Mont, 33 F 2d 866, certiorari denied 50 S Ct 37, 280 US 588, 74 L Ed 637—Voor- hees v Central R Co of New Jer- sey, CCA NJ, 14 F 2d 899—Ore- gon Short Line R Co v Gubler, CCA Utah, 9 F 2d 494, certiorari denied 47 S Ct 100, 273 US. 709, 71 L Ed 851

Ala—Louisville & N. R Co v Park- er, 138 So. 231, 223 Ala 626, cer- tiorari dismissed 53 S Ct 94, 287 US 569, 77 L Ed. 501

Ark—Missouri Pac R Co v Hamp- ton, 112 S W 2d 428, 195 Ark 335—Missouri Pac R Co v Simmons, 81 S W 2d 924, 190 Ark 876—Mis- souri Pac R. Co. v. Beard, 29 S.W. 2d 292, 183 Ark 877

DC—Washington & O. D. Ry. Co. v. McPherson, 26 F 2d 989, 58 App. DC 211, certiorari denied 49 S.Ct 13, 278 US 610, 73 L Ed 535.

Ga—Newman v Southern Ry. Co, 194 SE 287, 57 Ga App. 70, af- firmed Southern Ry. Co. v. New- man, 199 SE 2d 753, 187 Ga. 132

where the evidence tends to show the failure to use proper care whereby a collision results⁷⁶ or the

and 199 SE 755, 187 Ga 136—Louisville & N R Co v Maffett, 137 SE 404, 36 Ga App 513

Ill—Rogers v New York, C & St L R Co, 65 NE2d 243, 338 Ill App 123—Collins v Elgin, J & E Ry Co, 60 NE2d 279, 325 Ill App 573—Worthey v Cleveland, C. C & St L Ry Co, 351 Ill App 585—Brundage v Chicago, B & Q R Co, 315 Ill App 440

Kan—Toops v Atchison, T & S F Ry Co, 277 P 57, 128 Kan 189, reversed on other grounds 50 S Ct 281, 281 US 351, 74 L Ed 896

Ky—Chesapeake & O Ry Co v Howard's Adm'r, 51 SW2d 461, 244 Ky 838, certiorari denied Chesapeake & O Ry Co v Howard, 58 S Ct 315, 287 US 670, 77 L Ed 578

Minn—Genova v St Paul Bridge & Terminal Ry Co, 250 NW 190, 189 Minn 555, 559, certiorari denied St Paul Bridge & Terminal R Co v Genova, 54 S Ct 642, 292 US 630, 78 L Ed 1484

Miss—New Orleans & N E R Co v Benson, 183 So 505, 183 Miss 171

Mo—Francis v Terminal R Ass'n of St Louis, 193 SW2d 909, 351 Mo 1232—Owen v Kurn, 118 SW2d 519, 347 Mo 516—Tash v St Louis-San Francisco Ry Co, 76 S W2d 890, 335 Mo 1148—Moran v Atchison, T. & S F Ry Co, 48 S W2d 881, 330 Mo 378, certiorari denied Atchison, T & S F R Co v Moran, 53 S Ct 21, 287 US 631, 77 L Ed 539

NJ—Kelly v Central R Co of New Jersey, 180 A 767, 13 NJ Misc 719, affirmed 185 A 46, 116 NJ Law 410

NC—Loflin v High Point, T & D R Co, 194 SE 104, 212 NC 595—Ford v Atlantic Coast Line R Co, 182 SE 717, 209 NC 108—Candler v Southern Ry Co, 149 SE 893, 197 NC 898—Stamev v Suncrest Lumber Co, 148 SE 436, 197 NC 891.

Pa—Moseley v Reading Co, 145 A 293, 295 Pa 342—Mimoni v Pennsylvania R. Co, 93 Pa Super. 512

SC—Primus v Atlantic Coast Line R Co, 171 SE 1, 171 SC 199, certiorari denied Atlantic Coast Line R Co v Primus, 54 S Ct 56, 290 US 639, 78 L Ed 555—Bell v. Atlantic Coast Line R Co, 155 SE 397, 158 SC 168, certiorari denied Atlantic Coast Line R Co v Bell, 51 S Ct 30, 282 US 853, 75 L Ed 755

Tex—Texas & P Ry Co v Gibson, Com App, 288 SW 833, certiorari denied 47 S Ct 763, 274 US 748, 71 L Ed 1830—Texas & P Ry Co v Mix, Civ App, 193 SW2d 542—Lancaster v Bradford, Civ App, 279 SW 607.

Utah—Winegar v Oregon Short Line R Co, 298 P. 948, 77 Utah 594

39 C J p 1161 note 38

Particular questions held for jury under evidence

(1) Existence of custom in switchyard not to shunt cars on track adjacent to one on which train was moving—Fernald v Boston & M R. R, CCAN Y, 62 F2d 782

(2) Existence of custom of having lights on leading ends of cars running through yards at night—Delaware, L & W R Co v Berry, CCAN J, 48 F2d 1052, certiorari denied 52 S Ct 7, 284 US 617, 76 L Ed 527

(3) Existence of custom to block or crotch car—Louisville & N R Co v Reverman, 49 SW2d 558, 243 Ky 703, certiorari denied 53 S Ct 84, 287 US 633, 77 L Ed 519

(4) Existence of custom to have brakeman with light on front end of leading car of switch trains—Norfolk & W Ry Co v Collingsworth, CCA Ohio, 52 F2d 827

(5) Whether deceased could have heard whistle above noise of escaping steam—Brown v Chicago, R I & P Ry Co, 286 SW 45, 315 Mo 409

(6) Whether deceased had alighted from train and walked down track before being struck by train starting without signal—Koonse v. Missouri Pac R Co, 18 SW2d 467, 322 Mo 813, certiorari denied Missouri Pac R Co v Koonse, 50 S Ct 34, 280 US 582, 74 L Ed 632

(7) Whether departure from custom respecting lights on moving cars was negligent omission—Delaware, L & W R Co, v Berry, CCAN J, 48 F2d 1052, certiorari denied 52 S Ct 7, 284 US 617, 76 L Ed 527.

(8) Whether sounding whistle at time and under circumstances was negligence—Panhandle & S F Ry Co v Ocan, Tex Civ App, 271 SW 205

(9) Where alignment of track prevented engineer from seeing track laborer, whether railroad should have provided another method of protection—Nestico v. Delaware, L. & W. R. Co, 133 A. 88, 4 NJ Misc. 418.

76. US—Rocco v. Lehigh Valley R Co, NY, 53 S Ct 343, 288 US 275, 77 L Ed 743—Rader v Baltimore & O R Co, CCA Ill, 108 F2d 980, certiorari denied Baltimore & O R Co v Rader, 60 S Ct 723, 309 US 682, 84 L Ed 1026—Ballard v. Atchison, T & S F R Co, CCA Tex, 100 F2d 182—Erie R Co v Randall, CCA Ohio, 65 F2d 128—Miller v. Central R Co of New Jersey, CCAN Y, 58 F2d

615, certiorari denied Central R Co of New Jersey v Miller, 53 S Ct 18, 287 US 617, 77 L Ed 533—Grand Trunk Western Ry Co v Heatlie, CCA Mich, 48 F2d 759, certiorari denied 52 S Ct 10, 284 US 625, 76 L Ed 533

Ala—Atlantic Coast Line R Co v Russell, 111 So 753, 215 Ala 600—Birmingham Belt R Co v Hendrix, 110 So 312, 215 Ala 285, certiorari denied 47 S Ct 472, 273 US 758, 71 L Ed 877

Ark—Kansas City Southern Ry Co v Taylor, 190 SW2d 968, 209 Ark 488

Ga—Atlantic Coast Line R Co v Anderson, 36 SE2d 475, 73 Ga App 343—Central of Georgia Ry Co v White, 175 SE 407, 49 Ga App 290

Idaho—Girany v Oregon Short Line R Co, 53 P2d 841, 56 Idaho 740

Ill—Taylor v Atchison, T & S F Ry Co, 11 NE2d 610, 293 Ill App 457, certiorari denied Atchison, T & S F R Co v Taylor, 58 S Ct 942, 301 US 580, 82 L Ed 1538—Armstrong v Chicago & W I R Co, 263 Ill App 126, affirmed 183 NE 478, 350 Ill 426, certiorari denied Chicago & W I. R Co v Armstrong, 53 S Ct 523, 289 US 724, 77 L Ed 1475

Mo—Dodd v Missouri-Kansas-Texas R Co, 184 SW2d 454, 353 Mo 799—Mech v Terminal Railroad Ass'n of St Louis, 18 SW2d 510, 322 Mo 937—Wilson v Chicago, B & Q R Co, 296 SW 1017, 317 Mo 645—Roan v Wells, App, 14 SW. 2d 483

NC—Brittain v Atlantic & Y Ry Co, 9 SE2d 416, 217 NC 737

Okla—Schaft v Richardson, 289 P 343, 143 Okl 249—Schaft v Richardson, 254 P 496, 120 Okl 70

SC—Covington v. Atlantic Coast Line R Co, 155 SE 438, 158 SC 194, certiorari denied Atlantic Coast Line R Co v Covington, 51 S Ct 33, 282 US 858, 75 L Ed 759

Wash—Tate v Chicago, M., St P & P R Co, 19 P2d 137, 172 Wash 33, certiorari denied Chicago, M., St P & P R Co v Tate, 54 S Ct 50, 290 US 631, 78 L Ed 549

39 C J p 1162 note 39

Scientilla doctrine held inapplicable in action under Federal Employers' Liability Act against railroad for death of engineer in head-on collision between trains—Louisville & N R Co v Grizzard, 189 So. 203, 238 Ala 49, certiorari denied 60 S Ct 140, 308 US 603, 84 L Ed 504

Whether fuses were put out by overtaken train was held jury question under evidence—Grand Trunk Western Ry Co v Heatlie, CCA Mich, 48 F2d 759, certiorari denied 52 S Ct 10, 284 US 625, 76 L Ed 533

failure to use proper care after the discovery of the servant's peril⁷⁷

Among specific acts of negligence which have been submitted to the jury on evidence held to raise the question are the failure to keep a proper lookout⁷⁸ or to give proper signals or warnings,⁷⁹ or

77. Ga.—Southern Ry Co v Newman, 199 SE 753, 187 Ga 132, followed in Southern Ry Co v Newman, 199 SE 755, 187 Ga 136
NY—Kawacz v Delaware, L & W R Co, 254 NYS 270, 233 App Div 422, reversed on other grounds 181 NE 87, 259 NY 166, reargument denied 191 NE 513, 264 NY 459, certiorari denied 53 S Ct 121, 287 US 659, 77 L Ed 589
39 C J p 1162 note 40

Whether brakes were defective or were not applied when danger was discovered was held for jury under evidence—Barton v Southern Ry Co, 171 SE 5, 171 SC 46, certiorari denied Southern Ry Co v Barton, 54 S Ct 51, 280 US 632, 78 L Ed 550

78. US—Rocco v Lehigh Valley R Co, NY, 53 S Ct 343, 238 US 275, 77 L Ed 743—Erie R Co v Randall, CCA Ohio, 65 F 2d 128
Ala.—Louisville & N R Co v Parker, 138 So 231, 223 Ala 626, certiorari dismissed 53 S Ct 94, 287 US 569, 77 L Ed 501

Ill.—Carpenter v Grand Trunk W R Co, 263 Ill App 462

Ind.—Harris v Chicago & E I Ry Co, 158 NE 636, 87 Ind App 11
Minn.—Genova v St Paul Bridge & Terminal Ry Co, 250 NW 190, 189 Minn 555, 559, certiorari denied St Paul Bridge & Terminal R Co v Genova, 54 S Ct 642, 292 US 630, 78 L Ed 1484

Mo.—Kidd v Chicago, R I & P Ry Co, 274 SW 1079, 310 Mo 1, certiorari denied Chicago R I & P Ry Co v Kidd, 46 S Ct 119, 289 US 552, 70 L Ed 424

NC—Brittain v Atlantic & Y Ry Co, 9 SE 2d 416, 217 NC 737

Tex.—Texas & N O R Co v Neill, Civ App, 97 SW 2d 279, error refused 100 SW 2d 348, 128 Tex 580, certiorari dismissed 58 S Ct 118, 30 US 645, 82 L Ed 501, rehearing denied 58 S Ct 268, 302 US 778, 82 L Ed 602—Texas & P Ry Co v Gibson, Civ App, 281 SW 652, affirmed, Com App, 288 SW 823, certiorari granted 47 S Ct 659, 274 US 731, 71 L Ed 1326, certiorari denied 47 S Ct 763, 274 US 748, 71 L Ed 1330

39 C J p 1163 note 41.

Particular questions held for jury under evidence

(1) Whether car inspector could rely on switching crew fieldman keeping lookout while car inspector went between cars—Perry v Missouri-Kansas-Texas R. Co, 104 SW 2d 332, 340 Mo 1052

(2) Whether accident occurred within yard limits, with respect to

duty to display light and maintain lookout—Primus v Atlantic Coast Line R Co, 171 SE 1, 171 SC 199, certiorari denied Atlantic Coast Line R Co v Primus, 54 S Ct 56, 290 US 639, 78 L Ed 555

79. US—Tennant v Peoria & P U Ry Co, Ill, 64 S Ct 400, 321 US 29, 88 L Ed 520, rehearing denied 64 S Ct 610, 321 US 802, 88 L Ed 1089—Rocco v Lehigh Valley R Co, NY, 53 S Ct 343, 238 US 275, 77 L Ed 743—New York Cent R Co v Marcone, N J, 50 S Ct 294, 281 US 345, 74 L Ed 892—Eiseman v Pennsylvania R Co, CCA Pa, 151 F 2d 232—Kulp v Chicago, St P, M & O Ry Co, CCA Minn, 88 F 2d 466, certiorari denied Chicago, St P, M & O R Co v Kulp, 57 S Ct 930, 301 US 700 81 L Ed 1355—Lane v Erie R Co, CCA Ohio, 62 F 2d 657, certiorari denied Erie R Co v Lane, 53 S Ct 526, 289 US 729, 77 L Ed 1478—New York, N H & H R Co v Pascucci, C C A Mass, 46 F 2d 969, certiorari denied 51 S Ct 650, 288 US 858, 75 L Ed 1464—Montgomery v Baltimore & O R Co, CCA Ohio, 23 F 2d 859

Ala.—Louisville & N R Co v Parker, 138 So 231, 223 Ala 626, certiorari dismissed 53 S Ct 94, 287 US 569, 77 L Ed 501

Ark.—St Louis-San Francisco Ry Co v Pine, 44 SW 2d 340, 184 Ark 940, certiorari denied 52 S Ct 502, 286 US 552, 76 L Ed 1287

Ga.—Louisville & N R Co v Maffett, 137 SE 404, 35 Ga App 513

Ill.—Rogers v New York, C & St L R Co, 65 NE 2d 243, 328 Ill App 123

Ind.—Harris v Chicago & E I Ry Co, 158 NE 636, 87 Ind App 11

Ky.—Louisville & N R Co v Carter, 10 SW 2d 1084, 226 Ky 561—Louisville & N R Co v Bryant's Adm'r, 285 SW 245, 215 Ky 401.

Minn.—Genova v St Paul Bridge & Terminal Ry Co, 250 NW 190, 189 Minn 555, 559, certiorari denied St Paul Bridge & Terminal R Co v Genova, 54 S Ct 642, 292 US 630, 78 L Ed 1484

Mo.—Owen v Kurn, 148 SW 2d 519, 347 Mo 516—Freeman v Terminal R Ass'n of St. Louis, 107 SW 2d 38, 341 Mo 288—Mann v. St Louis-San Francisco Ry Co, 72 SW 2d 977—Grange v Chicago & E I Ry Co, 69 SW 2d 955, 324 Mo 1040—Lepchenski v. Mobile & O R Co, 59 SW 2d 610, 332 Mo 194

—Willgues v Pennsylvania R Co, 298 SW 817, 318 Mo 28—Kidd v Chicago, R I & P Ry Co, 274

SW 1079, 310 Mo 1, certiorari denied Chicago, R I & P Ry Co v Kidd, 46 S Ct 119, 289 US 552, 70 L Ed 424—Cannell v Missouri Pac R Co, App, 277 SW 593

NJ—Kelly v Central R Co of New Jersey, 185 A 46, 116 NJ Law 410—Ilionardo v Erie R Co, 135 A 77, 103 NJ Law 4, affirmed 137 A 917, 103 NJ Law 698

NC—Rigsbee v Atlantic Coast Line R Co, 129 SE 580, 190 NC 231
Pa.—Krall v Pennsylvania R Co, 135 A 203, 287 Pa 332

SC—Youngblood v Southern Ry. Co, 134 SE 660, 137 SC 47.

Tex.—Texas & N O R Co v Neill, Civ App, 97 SW 2d 279, error refused 100 SW 2d 348, 128 Tex 580, certiorari dismissed 58 S Ct 118, 30 US 645, 82 L Ed 501, rehearing denied 58 S Ct 268, 302 US 778, 82 L Ed 602—Texas & P Ry Co v Gibson, Civ App, 281 SW 652, affirmed, Com App, 288 SW 823, certiorari denied 47 S Ct 763, 274 US 748, 71 L Ed 1330—Paris & G N R Co v Lackey, Civ App, 171 SW 540

Va.—Southern Ry Co v. May, 137 SE 493, 147 Va 542

39 C J p 1163 note 42

Negligence with respect to warning and instructing servant as question for court or jury generally see infra subdivision 1 of this section

Particular questions held for jury under evidence

(1) Existence of custom to sound whistle when train traveled around long curve through deep cut

Mo.—Armstrong v Mobile & O. R Co, 55 SW 2d 460, 331 Mo. 1224, certiorari denied Mobile & O R Co v Armstrong, 53 S Ct 689, 289 US 743, 77 L Ed 1490—Brock v. Mobile & O R Co, 51 SW 2d 100, 330 Mo 918, certiorari denied Mobile & O R Co v. Brock, 53 S Ct 87, 287 US 638, 77 L Ed 552—Koonse v Missouri Pac R Co, 18 SW 2d 467, 323 Mo 813, certiorari denied Missouri Pac R Co v. Koonse, 50 S Ct 34, 280 US 582, 74 L Ed 632—Detmering v. St. Louis-San Francisco Ry Co, 36 S. W 2d 112, 225 Mo App. 980

Utah—Winegar v Oregon Short Line R Co, 298 P 948, 77 Utah 594

39 C J p 1163 note 42 [c].

(2) Existence of custom to warn employees in certain situations

US—McClellan v. Pennsylvania R. Co, CCA N.Y., 62 F 2d 61

Mo—Evans v. Atchison, T & S F. Ry Co, 131 S.W.2d 604, 345 Mo. 147

the operation of trains, cars, etc., at an excessive rate of speed⁸⁰ or with unusual jars or jolts⁸¹ Where there is a question of negligence for the jury, defendant is not entitled to the general

charge.⁸²

The question is not one for the jury, but is determined by the court in the absence of evidence tending to show negligence⁸³ or where negligence is

(3) Sufficiency of warning—*Evans v. Atchison, T & S F. Ry Co*, supra—39 C.J. p 1163 note 42 [g].

(4) Whether bell was ringing on locomotive moving cars which struck deceased—*Primus v Atlantic Coast Line R Co*, 171 S.E. 1, 171 S.C. 199, certiorari denied *Atlantic Coast Line R Co v Primus*, 54 S.Ct. 56, 290 U.S. 639, 78 L.Ed. 555

(5) Whether deceased would have gone into place of danger if whistle had been sounded as required by rule—*Smith v. Chicago, B & Q. R Co.*, 15 S.W.2d 794, 321 Mo. 960

(6) Whether rule and custom of railroad requiring ringing of bell when starting engine was observed—*Koonse v. Missouri Pac R Co*, 18 S.W.2d 467, 322 Mo. 813, certiorari denied *Missouri Pac R Co v Koonse*, 50 S.Ct. 34, 280 U.S. 582, 74 L.Ed. 632

(7) Whether section men were entitled to protection of existing custom requiring trains to sound whistle while traveling around long curve through deep cut—*Brock v. Mobile & O R Co*, 51 S.W.2d 100, 330 Mo. 918, certiorari denied *Mobile & O R Co v Brock*, 53 S.Ct. 87, 287 U.S. 638, 77 L.Ed. 552

80. *US—Terminal R. Ass'n of St Louis v. Schorb*, C.C.A. Mo., 151 F.2d 361, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

Cal.—*Leet v Atchison, T & S F Ry Co*, 152 P.2d 351, 66 Cal.App.2d 413

Ill.—*Brundage v Chicago, B & Q. R Co*, 245 Ill.App. 440

Mo.—*Ford v Louisville & N R Co*, 196 S.W.2d 163, 355 Mo. 362—*Lloyd v Alton R Co*, 175 S.W.2d 819, 351 Mo. 1156—*Lloyd v Alton R Co*, 159 S.W.2d 287, 348 Mo. 1222—*Young v Wheelock*, 64 S.W.2d 950, 333 Mo. 992, certiorari denied *Wheelock v. Young*, 54 S.Ct. 537, 291 U.S. 676, 78 L.Ed. 1064—*Kidd v Chicago, R I & P Ry Co*, 274 S.W. 1079, 310 Mo. 1, certiorari denied *Chicago, R I & P Ry Co v Kidd*, 46 S.Ct. 119, 289 U.S. 582, 70 L.Ed. 434

NC.—*Brittain v. Atlantic & Y Ry Co*, 9 S.E.2d 416, 217 NC 787.

SC.—*Tyner v. Atlantic Coast Line R Co*, 146 S.E. 663, 149 S.C. 89.

Tex.—*Louisiana Ry & Nav Co v Foster*, Civ App, 5 S.W.2d 183, error dismissed

39 C.J. p 1164 note 43

Particular questions held for jury under evidence

(1) Whether ordinarily prudent person would have operated caboose

with defective brakes at eight miles per hour—*Texas & P Ry Co v Baldwin*, Tex Civ App, 25 S.W.2d 969, affirmed, Com App, 44 S.W.2d 909, certiorari denied 53 S.Ct. 11, 287 U.S. 606, 77 L.Ed. 527.

(2) Whether twelve miles per hour was rapid speed for train approaching crossing—*Birmingham Belt R Co v Hendrix*, 110 So. 312, 215 Ala. 285, certiorari denied 47 S.Ct. 472, 273 U.S. 758, 71 L.Ed. 877

31. *US—Keeton v Thompson*, Ark., 66 S.Ct. 135, 326 U.S. 689, 90 L.Ed. 405—*Fitzgerald v Pennsylvania R Co*, C.C.A.N.Y., 164 F.2d 323

Ala.—*Southern Ry. Co v Smith*, 128 So. 228, 221 Ala. 273

Ark.—*Missouri Pac R Co v Pipkin*, 75 S.W.2d 801, 189 Ark. 390, certiorari denied 55 S.Ct. 637, 294 U.S. 728, 79 L.Ed. 1258—*Missouri Pac R Co v Remel*, 48 S.W.2d 548, 185 Ark. 598, certiorari denied 53 S.Ct. 85, 287 U.S. 634, 77 L.Ed. 550.

Ga.—*Western & A R Co v Gardner*, 40 S.E.2d 672, 74 Ga.App. 599

Mo.—*Pashea v Terminal R Ass'n of St Louis*, 165 S.W.2d 691, 350 Mo. 132, certiorari dismissed *Terminal Railroad Ass'n of St Louis v Pashea*, 63 S.Ct. 664, 318 U.S. 763, 87 L.Ed. 1135—*Mann v St Louis-San Francisco Ry Co*, 72 S.W.2d 977

NC.—*McGraw v Southern Ry Co*, 175 S.E. 286, 206 NC 873

Ohio.—*Beam v Baltimore & O R Co*, 68 N.E.2d 159, 77 Ohio App. 419.

Tex.—*Texas & N O R Co v Cammack*, Civ App, 280 S.W. 864, certiorari denied 47 S.Ct. 111, 273 U.S. 720, 71 L.Ed. 858

Utah.—*Ayres v Union Pac R Co*, 176 P.2d 161

39 C.J. p 1164 note 44

Particular questions held for jury under evidence

(1) Whether method used by engineer to stop or slow down train was negligence—*Missouri Pac R Co v Montgomery*, 55 S.W.2d 68, 186 Ark. 537, certiorari denied 53 S.Ct. 690, 289 U.S. 747, 77 L.Ed. 1493

(2) Whether sudden slowing of cars was negligence and whether sudden slowing jerked decedent off the train—*Ward v Denver & R G W R Co*, 85 P.2d 837, 96 Utah 564.

Ordinary vibration likely to occur in railroading is not evidence of negligence sufficient for jury.—*Slocum v Erie R Co*, C.C.A.N.Y., 37 F.2d 42.

32. *Ala—Mobile & O R Co v Williams*, 139 So. 337, 224 Ala. 125

33. *US—Atlantic Coast Line R Co v Davis*, S.C., 49 S.Ct. 210, 279 U.S. 34, 73 L.Ed. 601—*Wolfe v Henwood*, C.C.A. Ark., 162 F.2d 998—*Cogswell v Chicago & E I. R Co*, C.C.A. Ill., 153 F.2d 94, reversed on other grounds 65 S.Ct. 1122, 328 U.S. 820, 90 L.Ed. 1601—*Fantini v. Reading Co*, C.C.A.N.J., 147 F.2d 543, certiorari denied 65 S.Ct. 1185, 325 U.S. 856, 89 L.Ed. 1976

Ala.—*Alabama Great Southern R Co v Williams*, 104 So. 632, 20 Ala. App. 635

Ky.—*Louisville & N R Co v Chapman's Adm'r*, 190 S.W.2d 542, 300 Ky. 835—*Louisville & N R Co v Noble's Adm'r*, 54 S.W.2d 636, 246 Ky. 86.

Minn.—*Meyers v Minneapolis, St P. & S M Ry. Co*, 209 N.W. 892, 168 Minn. 122

N.J.—*Loffler v Delaware, L & W R Co*, 173 A. 497, 113 N.J.Law 113

N.Y.—*Clark v. Delaware & H. R Corporation*, 287 N.Y.S. 1, 246 App Div 347, reargument denied 285 N.Y.S. 1045, 246 App Div 861, affirmed 3 N.E.2d 847, 273 N.Y. 413, certiorari denied 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436.

ND.—*Cunningham v Great Northern Ry. Co*, 14 N.W.2d 753, 73 ND 315

Ohio.—*Creech v New York, C & St L Ry Co*, 153 N.E. 299, 22 Ohio App. 216

Tex.—*J Lee Vilbig & Co v Lucas*, Civ App, 23 S.W.2d 516, error dismissed.

39 C.J. p 1164 note 45

Evidence of negligence held insufficient for jury as to:

(1) Collision.

US—Atchison, T. & S. F. Ry Co v Ballard, C.C.A. Tex., 108 F.2d 768, rehearing denied 109 F.2d 1012, certiorari denied *Ballard v. Atchison, T & S F R Co*, 60 S.Ct. 1096, 310 U.S. 646, 84 L.Ed. 1413

N.Y.—*Keppeler v New York Cent R Co*, 32 N.Y.S.2d 673, 263 App Div 199.

Okl.—*Lancaster v St Louis & S F Ry Co*, 261 P. 960, 128 Okl. 176

(2) Custom of ringing bell before engine backed into standing cars for coupling—*McClellan v Pennsylvania R Co*, C.C.A.N.Y., 62 F.2d 61.

(3) Custom to warn of switching movements—*Jones v. St Louis-San Francisco Ry. Co*, 30 S.W.2d 481, 325 Mo. 1152.

conclusively shown,⁸⁴ and it is for the court to de- | termine pure legal questions⁸⁵

(4) Excessive speed

U.S.—Southern Ry Co. v Moore, S C, 53 S Ct. 38, 284 U S 581, 76 L Ed 503—Atlantic Coast Line R Co v Driggers, S C, 49 S Ct 490, 279 U S 787, 73 L Ed 957—Carfelo v Delaware, L & W. R Co, CCA NY, 54 F 2d 475

Mo—Karr v Chicago, R I. & P Ry Co, 108 SW 2d 44, 341 Mo 536
NY—Keppler v New York Cent R Co, 32 NYS 2d 673, 268 App Div 189

(5) Failing to avoid injuring plaintiff after knowledge of peril

U.S.—Toledo, St Louis & Western R Co v Allen, Mo, 48 S Ct 215, 276 U S 165, 72 L Ed 518, conformed to Allen v. Toledo, St. Louis & Western Ry Co., 12 S W 2d 1116

Mo—Voorhees v Chicago, R I & P Ry Co, 30 SW 2d 22, 325 Mo 835, 70 ALR 1106.

NY—Keppler v New York Cent R Co, supra

Okla—Roy v St Louis-San Francisco Ry. Co, 4 P 2d 1038, 153 Okl 270
39 C.J. p 1164 note 45 [b] (1)

(6) Failure to give proper signals or warnings

U.S.—Atlantic Coast Line R Co v Driggers, S C, 49 S Ct. 490, 279 U S 787, 73 L Ed 957—Cain v Fort Worth & D C Ry Co, CCA Tex, 75 F 2d 103—Bernola v Pennsylvania R Co, CCA Pa, 68 F 2d 172—Jacobson v Chicago, M, St P & P R Co, CCA Minn, 66 F 2d 688—Norfolk & W Ry Co v Kratzer, CCA Ohio, 37 F 2d 522

Ill—Prihodski v Atchison, T & S F Ry Co, 10 NE 2d 895, 291 Ill App 617

Mo—Parker v. St. Louis-San Francisco Ry. Co, App, 297 SW 146

NY—Keppler v New York Cent R Co, 32 NYS 2d 673, 263 App Div 199

NC—Sampson v Jackson Bros. Co, 166 SE 181, 203 NC 413
39 C.J. p 1164 note 45 [b]

(7) Failure to keep lookout

U.S.—Atlantic Coast Line R Co v Driggers, S C, 49 S Ct 490, 279 U S 787, 73 L Ed 957

Mo—Crossno v Terminal R Ass'n of St Louis, 62 SW 2d 1092, 333 Mo 783

(8) Operation of locomotive, car, or train generally.

U.S.—Atlantic Coast Line R Co v Driggers, supra—Christian v Boston & M R R, CCA NY, 109 F 2d 103—Philadelphia & R Ry Co v Throum, CCA NJ, 9 F 2d 856, followed in Saccepanaki v Pennsylvania R Co, 86 F 2d 1022—Philadelphia & R Ry. Co. v Allen, CCA NJ, 9 F 2d 854.

Tex—Harris v. Missouri-Kansas-

Texas R Co, Civ App, 283 SW 895.

39 C.J. p 1164 note 45 [b].

(9) Servant engaged in coupling or switching cars

U.S.—Atlantic Coast Line R Co v Driggers, S C, 49 S Ct 490, 279 U S 787, 73 L Ed 957—Hutchins v Akron, C & Y R Co, CCA Ohio, 162 F 2d 189—Van Derveer v Delaware, L & W R Co, CCA NY, 84 F 2d 979, certiorari denied 57 S Ct 120, 299 US 595, 81 L Ed 438—Slocum v Erie R Co, CCA NY, 37 F 2d 42

Ala—Southern Ry Co v Glenn, 154 So 792, 228 Ala 563

Ky—Webber's Adm'r v Louisville & N. R. Co, 87 S.W 2d 348, 261 Ky 257—Caudill v Louisville & N R Co, 32 SW 2d 23, 235 Ky 687

Minn—Keegan v Chicago Great Western Ry Co, 243 NW 60, 186 Minn 179—Meisenholder v Byram, 331 NW 849, 182 Minn 615, affirmed on reargument 236 NW 195, 183 Minn 615, certiorari denied 52 S Ct 20, 284 US 638, 76 L Ed 543—Pullen v Chicago, M, St P & P Ry Co, 227 NW 352, 178 Minn 347

NH—Kenney v Boston & Maine R R, 33 A 2d 557, 92 NH 495

NJ—Noon v Delaware, L & W R Co, 144 A 590, 105 N.J.Law 431

NY—Love v Baltimore & O R Co, 278 NYS 289, 244 App Div 72

SC—Williamson v Southern Ry Co, 191 SE 79, 183 SC 312

Tenn—Tennessee Cent Ry Co v Shacklett, 147 SW 2d 1054, 24 Tenn App 563

39 C.J. p 1164 note 45 [b] (2)

(10) Servant on or near tracks

U.S.—Kansas City Southern Ry Co v Jones, Tex, 48 S Ct 308, 276 U S 303, 72 L Ed 583—Kansas City Southern Ry Co v Williford, C CA La, 65 F 2d 223, certiorari denied Williford v Kansas City Southern Ry Co, 54 S Ct 87, 290 US 666, 78 L Ed 576—Southern Ry Co v Verelle, CCA NC, 57 F 2d 1008

Ark—Missouri Pac R Co v Shores, 191 SW 2d 580, 209 Ark 539—St Louis-San Francisco Ry Co v Hall, 32 SW 2d 440, 182 Ark 476

Iowa—Disalvo v Chicago, R I & P Ry Co, 213 NW 569, 208 Iowa 974

Ky—Smith's Adm'r's v Louisville & N R Co, 32 SW 2d 1003, 236 Ky 174.

Neb—Lens v Union Pac. R Co, 258 N.W 33, 128 Neb 99

NJ—Pellington v Erie R Co., 181 A 39, 115 N.J.Law 589

NC—Vest v. Atlantic Coast Line R Co, 179 SE 607, 208 NC 80—Sampson v Jackson Bros Co, 166 SE 181, 203 NC 413—Austin v

Southern Ry Co, 148 SE 446, 197 NC 319—Taylor v Rowland Lumbar Co, 139 SE 611, 194 NC 354
Okla—Chicago, R I & P Ry Co v Smith, 16 P 2d 226, 160 Okl 237—Shuck v Davis, 237 P 95, 110 Okl 196

Tex—Brittain v Fort Worth & D C Ry Co, Civ App, 128 SW 3d 874, error dismissed, judgment correct

39 C.J. p 1164 note 45 [b] (13)

(11) Servant riding on locomotive, train, or car

Miss—Mobile & O R Co v Clay, 125 So 819, 156 Miss 463, certiorari denied Clay v Mobile & O R Co, 51 S Ct 24, 282 US 841, 75 L Ed 749.

Mo—Allen v Terminal R R Ass'n of St Louis, 68 SW 2d 709.

SC—Johnston v. Atlantic Coast Line R Co, 190 SE 459, 183 S.C 126

Tex—Texas & N O R Co v Warden, 78 SW 2d 164, 125 Tex 193—Emmons v Texas & P Ry Co, Civ App, 149 SW 2d 167, error dismissed, judgment correct

(12) Servant working on standing car or locomotive

US—Brill v Reading Co, CCA Pa, 16 F 2d 461

Ky—Louisville & N. R. Co v Mannin, 289 SW. 1089, 217 Ky 460

Minn—Beaton v Great Northern Ry Co, 143 NW. 324, 123 Minn 178

SC—Owens v Atlantic Coast Line R Co, 139 SE 779, 141 SC 359.

(13) Unusual jars or jerks

US—Ft Smith, S & R I R Co v Moore, Ark, 48 S Ct 300, 276 US 593, 72 L Ed 723—Gulf, M & N. R Co v Wells, Miss, 48 S Ct 151, 275 US 455, 72 L Ed 370—Chesapeake & O Ry Co v Thomason, C CA Ky, 70 F.2d 880—Kensey v. Central R Co of New Jersey, C. CANJ, 68 F 2d 562, certiorari denied 54 S Ct. 561, 291 US 684, 78 L Ed 1071.

Ark—Defries v. Batesville White Lume Co., 132 SW 2d 169, 198 Ark 986

NC—Hill v. Atlantic Coast Line R. Co, 11 SE 2d 552, 218 NC 563

39 C.J. p 1164 note 45 [b] (14), (20)

84. Mich—Salabrin v Ann Arbor R Co, 160 NW. 552, 194 Mich 458

Tex—Wight v Calicut, Civ App, 225 SW. 389

39 C.J. p 1165 note 46

85. Mo—Hughes v. Mississippi River & B. T. Ry., 274 SW. 703, 309 Mo. 560.

Duty of sending man forward

Court was required to determine the pure legal question whether defendant owed plaintiff duty of sending a man forward for protection of section crew—Hughes v. Mississippi River & B T. Ry., supra.

Negligence of joint user of track Where an employer permits the joint use of its tracks by another railroad company and the servant is injured by the joint user's negligent manner of using the track as to which the employer has no knowledge, the question of the employer's negligence should not be submitted to the jury.⁸⁶

j. Rules

- (1) Construction
- (2) Duty to promulgate and enforce
- (3) Existence and applicability
- (4) Reasonableness and sufficiency
- (5) Waiver

(1) Construction

The construction of rules promulgated by a master ordinarily is a question of law for the court; but, where they are uncertain and ambiguous, on conflicting evidence their construction becomes a question for the jury.

The construction of rules promulgated by a master is a question of law for the court.⁸⁷ Rules are within statutes requiring courts to declare the terms and substance of instruments.⁸⁸ Where, however,

they are uncertain and ambiguous, on conflicting evidence their construction becomes a question for the jury.⁸⁹

(2) Duty to Promulgate and Enforce

Whether a master was negligent in making and promulgating rules for the protection of his servants, or in failing to use due care and diligence, after the promulgation of a necessary rule, to have it enforced, is, on conflicting evidence, a question for the jury, but the question is for the court in the absence of any evidence showing the necessity, practicability, and utility of such rules or where the evidence shows that the injury complained of was caused by a needless violation of a valid and reasonable rule.

Whether a master was negligent in making and promulgating rules for the protection of his servants, or in failing to use due care and diligence, after the promulgation of a necessary rule, to have it enforced, is, under evidence from which reasonable men might differ as to whether the duty has been performed, a question for the jury,⁹⁰ and this rule has been applied where the question arose as to the promulgation and enforcement of a rule for giving of warnings and signals in carrying on dangerous operations.⁹¹ The question whether the

Duty to obey signals

In an action by a brakeman injured while opening the knuckle on a car so that a coupling might be made, where the uncontroverted evidence showed that the engine was operated exclusively by signals, the question as to the duty of the engineer to obey signals was one of law for the court.—*St. Louis & S. F. R. Co. v. Matlock*, Tex. Civ. App., 141 S.W. 1067, error refused.

Engineering problem

Judgment of railroad company's engineers in omitting requirement of turning retainer valve handles up on down grades, reached after survey of railroad's grade and brake system, cannot be reviewed by jury with view of finding actionable negligence.—*Hylton v. Southern Ry. Co.*, CCA Tenn., 87 F.2d 393, certiorari denied 57 S.Ct. 929, 301 U.S. 699, 81 L.Ed. 1854.

88. Ky.—*Hunsaker v. Chesapeake & O R. Co.*, 215 S.W. 552, 185 Ky. 686, 28 A.L.R. 117.

87. US.—*Norfolk & W. Ry. Co. v. Collingsworth*, CCA Ohio, 53 F.2d 827.

Ala.—*Corpus Juris* cited in *Louisville & N. R. Co. v. Grizzard*, 189 So. 203, 207, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504.

Ind.—*Louisville & N. R. & Lighting Co. v. Beck*, 145 N.E. 886, 196 Ind. 238, rehearing denied 147 N.E. 776, 196 Ind. 238.—*New York Cent. R. Co. v. Verpleatse*, 59 N.E.2d 916, 116 Ind. App. 1, rehearing denied 60 N.E.2d 784, 116 Ind. App. 1.

Md.—*Baltimore & O R. Co. v. Whitacre*, 92 A. 1060, 124 Md. 411, affirmed 37 S.Ct. 33, 242 U.S. 169, 61 L.Ed. 228.

Nev.—*Musser v. Los Angeles & S. L. R. Co.*, 299 P. 1020, 53 Nev. 304.

W. Va.—*Hudson v. Norfolk & W. Ry. Co.*, 146 S.E. 525, 106 W. Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 78 L.Ed. 1004, rehearing denied 50 S.Ct. 79.

39 C.J. p. 1165 note 48.

88. Mont.—*Lynes v. Northern Pac. R. Co.*, 117 P. 81, 43 Mont. 317, Ann. Cas. 1912C 183.

89. US.—*Paster v. Pennsylvania R. R. Co.*, 48 F.2d 908.

Ala.—*Corpus Juris* cited in *Louisville & N. R. Co. v. Grizzard*, 189 So. 203, 207, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504.—*Southern Ry. Co. v. Smith*, 187 So. 398, 238 Ala. 588.

Nev.—*Musser v. Los Angeles & S. L. R. Co.*, 299 P. 1020, 53 Nev. 304. 39 C.J. p. 1165 note 50.

90. Ill.—*Adams v. Chicago & E. R. Co.*, 41 N.E.2d 991, 314 Ill. App. 404.

Minn.—*Jacobson v. Chicago & N. W. Ry. Co.*, 32 N.W.2d 455, 221 Minn. 454.

Miss.—*Illinois Cent. R. Co. v. Ray*, 148 So. 233, 165 Miss. 885.

Mo.—*Smith v. Thompson*, 182 S.W.2d 69.—*Jacob v. Peerless White Lume Co.*, 40 S.W.2d 556, 327 Mo. 868.—*Weed v. American Car & Foundry Co.*, 14 S.W.2d 652, 322 Mo. 137.

NH.—*Isabelle v. Crystal Laundry*, 41 A.2d 341, 93 N.H. 264.

NY.—*Reed v. Davis*, 162 N.E. 576, 249 N.Y. 35.—*Blosky v. Overseas Shipping Co.*, 220 N.Y.S. 95, 219 App. Div. 438.

NC.—*McCrowell v. Southern Ry. Co.*, 20 S.E.2d 352, 221 N.C. 366.

Tenn.—*Nashville, C. & St. L. Ry. v. Hines*, 94 S.W.2d 397, 20 Tenn. App. 1.

39 C.J. p. 1087 note 22, p. 1165 note 51.

Claim of existence as evidence of necessity

Master's claim that it had rule was held admission justifying finding by jury that rule was reasonably required, making case for submission to jury.—*Wilson v. George H. Taylor & Co.*, 136 A. 260, 83 N.H. 488.

Particular questions held for jury under evidence

(1) Whether by exercise of reasonable care place of work could have been made reasonably safe by establishment and observance of safety rules.—*Tombigbee Mill & Lumber Co. v. Hollingsworth*, CCA Miss., 162 F.2d 763.

(2) Whether road construction company prescribed reasonably safe rules and methods for storage and handling of gasoline and kerosene used in work of constructing highway.—*Curry & Turner Const. Co. v. Bryan*, 186 So. 256, 184 Miss. 44.

91. Ind.—*Harris v. Chicago & E. I. Ry. Co.*, 158 N.E. 636, 87 Ind. App. 11.

master was negligent is for the court, however, in the absence of any evidence showing the necessity, practicability, and utility of such rules,⁹² or where the evidence clearly shows that the injury complained of was caused by a needless violation of a valid and reasonable rule.⁹³ The danger may be so obvious as to suggest of itself the necessity of regulations to an ordinarily prudent master, so that their absence might be considered negligence as a matter of law,⁹⁴ or that the court may submit the question of negligence to the jury although there is no evidence showing that other employers in the same business had made rules for similar situations.⁹⁵

(3) Existence and Applicability

The questions as to the existence of rules, or notice thereof to the servant, or their applicability to the case are for the jury on conflicting evidence, and for the court where the evidence is not conflicting or in the absence of evidence as to their applicability.

On conflicting evidence it is for the jury to determine questions as to the existence of rules,⁹⁶ or notice thereof to the servant,⁹⁷ or their applica-

bility to the case.⁹⁸ The question is one for the court, however, where the evidence is not conflicting⁹⁹ or in the absence of evidence as to their applicability.¹

(4) Reasonableness and Sufficiency

Questions as to the reasonableness and sufficiency of rules ordinarily are held to be for the jury where there is evidence on which to base a submission of the question.

There appears to be a conflict of authority as to whether the reasonableness of any rule for the government of servants in the course of their employment presents a question for the court or for the jury, some decisions holding that it is a question of law for the court² and other decisions laying down the doctrine that whether the question is to be decided by the court or submitted to the jury depends on the raising of fact by the evidence,³ the jury to be properly instructed in the premises if the evidence requires submission of the question.⁴ The adequacy and sufficiency of a rule present a question for the jury,⁵ provided there is any evidence on which to base a submission of the question.⁶

Minn—Jacobson v Chicago & N W Ry Co, 22 N.W.2d 455, 221 Minn 454

39 C J p 1165 note 52.

92. N.H.—Fortier v. Concord Electric Co, 33 A.2d 801, 92 N.H. 492

39 C J p 1166 note 53

Evidence held insufficient for jury

(1) Failure to adopt and promulgate reasonable rules—Louisville & N R Co v Morgan's Adm'r, 9 SW 2d 212, 225 Ky 447

(2) Failure to comply with any rule or safety suggestion of defendant—Clark v Delaware & H R Corporation, 287 N.Y.S. 1, 246 App Div 347, reargument denied 285 N.Y.S. 1045, 246 App Div 861, affirmed 3 N.E.2d 847, 273 N.Y. 413, certiorari denied 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436

93. Ark.—Keneffick-Hammond Co. v Rohr, 91 SW 179, 77 Ark 290

Ind—Cleveland, C, C & St L R Co v Gossett, 87 N.E. 723, 172 Ind 525

94. Wis.—Polaski v. Pittsburgh Coal Dock Co, 114 NW 437, 134 Wis 259, 14 L.R.A.N.S., 952

95. N.Y.—Banchetti v. Goraline and Swan Constr Co, 136 N.Y.S. 539, 152 App Div 275

39 C J p 1166 note 56

96. Miss.—Long-Bell Lumber Sales Corporation v. Perritt, 172 So 747, 178 Miss 194

N.C.—McCrowell v Southern Ry Co, 20 S.E.2d 852, 221 N.C. 366

39 C.J. p 1166 note 57

97. Ky.—Cincinnati, N O & T P R

Co v Lovell, 132 SW 569, 141 Ky 249, 47 L.R.A.N.S., 909, rehearing denied 133 SW 788, 143 Ky 1

Wash—Kluksa v Yeomans, 103 P 819, 54 Wash 465, 132 Am.S.R. 1121

Question of negligence

Where there was evidence of non-communication of rule forbidding workmen to stand on railing and of practice of other workmen, including foreman, of using railing on which plaintiff was injured, and rule was admitted, question of negligence was for jury.—Wilson v George H Taylor & Co, 136 A. 360, 83 N.H. 483

98. US—Dundom v New York Cent R Co, C.C.A.N.Y., 145 F.2d 711

Ala.—Southern Ry Co v. Smith, 137 So 398, 223 Ala 583

Nev.—Musser v. Los Angeles & S L R Co., 299 P 1020, 53 Nev 304.

39 C J p 1166 note 59

Whistling at curves

With respect to application of railroad rule requiring whistling at curves where view is obscured, maximum view of five hundred feet is not sufficient as matter of law to protect railroad trackmen.—Smith v Chicago, B & Q R Co, 16 SW 2d 794, 221 Mo 960.

99. Ind.—Jackson v Rutledge, 122 N.E. 579, 188 Ind 415

Evidence held insufficient for jury

Failure to establish proper rules

US—Hutchins v Akron, C & Y. R. Co, C.C.A. Ohio, 162 F.2d 189.

NH—Pike v Gagne, 11 A.2d 809, 90 NH 516

1. Me.—Cunningham v Bath Iron Works, 43 A 106, 92 Me 501

2. Minn.—Le Duc v Northern Pac R Co, 100 NW 108, 92 Minn 287

39 C J p 1166 note 62

3. Miss.—Long-Bell Lumber Sales Corporation v Perritt, 172 So. 747, 178 Miss 194

39 C J p 1166 note 63

Storage of gasoline and kerosene

Whether road construction company prescribed reasonably safe rules and methods for storage and handling of gasoline and kerosene, used in work of constructing highway, and reasonable care required that separate places of storage be provided for each or that different and more pronounced methods of distinguishing them than tying of tops of gasoline can and its spout with string on upper part of can be prescribed, was held for jury under evidence.—Curry & Turner Const. Co. v Bryan, 185 So. 256, 184 Miss 44

4. Neb.—Wright v Chicago, R. I & P R Co, 146 NW 1024, 98 Neb. 87, affirmed 36 S.Ct. 185, 239 U.S. 548, 60 L.Ed. 431

Wash.—Sipes v Puget Sound Electric R Co, 102 P 1057, 54 Wash 47

5. Utah.—Stone v. Union Pac. R Co, 100 P 362, 35 Utah 305, 100 P 390, 35 Utah 378

39 C J p 1167 note 65

6. N.H.—Pike v. Gagne, 11 A.2d 809, 90 NH 516.

39 C J p 1167 note 66.

The rule obtains in the federal courts that, when a railroad has adopted a system of rules which have been made familiar to its employees, and its railroad is operated under them with success, that question is not to be submitted to the varying determination of juries as a question of fact, but must be determined as a question of law⁷ in the absence of any conflict of expert testimony on the question of their reasonableness and sufficiency.⁸

(5) Waiver

The question whether an employer's rule has been waived or abandoned is for the jury to determine unless the evidence is insufficient to charge the master with notice of the acts relied on to establish a waiver or abandonment.

The question whether a rule of an employer respecting the conduct of his business has been waived or abandoned by him is for the jury⁹ unless the evi-

dence is insufficient to charge the master with notice of the acts relied on to establish a waiver or abandonment.¹⁰

k. Orders

Where there is evidence on which to base its submission, the questions whether an order was given and whether it was negligently given are for the jury; but the construction of an order may be for the court or jury, depending on the circumstances.

Where there is evidence on which to base its submission, it is for the jury to determine whether an order was or was not in fact given,¹¹ and, if so, whether it was negligently given.¹² The construction of an order usually is a question for the jury,¹³ but there is some authority holding that the construction is for the court,¹⁴ at least where the order is not ambiguous on its face and no facts raise a latent ambiguity in its meaning,¹⁵ and, when

7. *US—New Jersey Cent. R Co v Young, Pa.*, 200 F 359, 118 CCA 485, LRA 1916E 927, modified on other grounds 34 S Ct 451, 232 U S 602, 58 L Ed 750
39 C.J. p 1167 note 67
8. *US—New Jersey Cent. R Co v Young, supra*
39 C.J. p 1167 note 68
9. *Okl—Covington Coal Products Co. v Stogner*, 72 P 2d 491, 181 Okl 85
S C—*Taylor v Winnsboro Mills*, 143 SE 474, 146 S C. 28—*Dutton v Atlantic Coast Line R Co*, 88 S E 263, 101 S C 16, affirmed Atlantic Coast Line R Co v Dutton, 38 S Ct 191, 245 U S. 637, 62 L Ed 535
39 C.J. p 1167 note 69.
10. *Mich—Jones v Pere Marquette R Co*, 133 NW 993, 168 Mich 1
Tex—Texas & Pac Ry Co v Elliott, Civ App, 189 SW 737
11. *Ark—Pekin Wood Products Co v Mason*, 46 S.W 2d 798, 185 Ark 166.
Ky—Clover Splint Coal Co v Lorenz, 110 SW 2d 457, 270 Ky. 676
Miss—Odom v Walker, 11 So 2d 452, 193 Miss 862—*Russell v Williams*, 150 So 628, 168 Miss 181, suggestion of error overruled 151 So 372, 168 Miss 181.
Mo—Mitchell v Wabash Ry Co, 69 SW 2d 286, 334 Mo 926—*Hamilton v Standard Oil Co of Indiana*, 19 SW 2d 679, 333 Mo 531—*Green v Baum*, App, 132 SW 2d 865—*Beuc v Mesker Bros Iron Co*, App, 7 SW 2d 438—*Baker v Atlas Portland Cement Co*, App, 299 SW 70
NY—Schwartz v Onward Const Co, 115 NYS 380, 180 App Div 588.
Or—Peluck v. Pacific Machine & Blacksmith Co, 293 P 417, 134 Or 171
39 C.J. p 1167 note 71
12. *US—Smith v Shevlin-Hixon Co*, CCA Or, 187 F 2d 51—*Pittman v Schultz*, CCA Miss, 125 F 2d 83
Colo—Chicago, R I & P Ry Co v Chne, 14 P 2d 495, 91 Colo 255
Ga—Rabon v Atlantic Coast Line R Co, 138 SE 858, 87 Ga App 6
Miss—Jefferson v. Virginia-Carolina Chemical Co, 185 So 230, 184 Miss 23—*Aponaug Mfg Co v Carroll*, 184 So 63, 183 Miss 793—*Gow Co v Hunter*, 168 So 264, 175 Miss 896
Mo—Phares v Century Electric Co, 83 SW 2d 91, 336 Mo 961—*Berry v Baltimore & O R Co*, 48 SW 2d 782, reversed on other grounds 52 S Ct 510, 286 US 272, 76 L Ed 1098—*Hamilton v Standard Oil Co of Indiana*, 19 SW 2d 679, 323 Mo 531—*Sullivan v St Louis-San Francisco Ry Co*, 12 SW 2d 735, 321 Mo 697—*Horn v Kansas City Power & Light Co*, 374 SW 673—*Wilson v Spicuzza*, App, 135 S W 2d 53—*Bentley v American Car & Foundry Co*, App, 13 SW 2d 562—*Dietderick v Missouri Iron & Metal Co*, 9 SW 2d 824, 222 Mo. App 740—*Alexander v Barnes Grocery Co*, 7 SW 2d 370, 228 Mo App 1—*Rodgers v Gaines Bros Co*, 295 SW 492, 220 Mo App 876—*Dobromilsky v American Car & Foundry Co*, App, 293 SW 451—*Guldner v International Shoe Co*, App, 293 SW 428—*Roberson v Loose-Wiles Biscuit Co*, App, 285 SW 127
Mont—Leonidas v Great Northern Ry Co, 72 P 2d 1007, 105 Mont 303, affirmed 59 S Ct 61, 306 US 1, 83 L Ed 3
NY—Wawrzonek v Central Hudson Gas & Electric Corporation, 12 N E 2d 626, 276 NY 413
NC—Tate v Parker-Graham-Sexton, 146 SE 85, 196 NC 499—*Ogle v Black Mountain Ry Co*, 143 SE 833, 195 NC 795—*Robinson v J B Ivey & Co*, 138 SE 173, 193 NC 805—*Wade v McLean Contracting Co*, 62 SE 919, 149 NC 177
Tex—West Lumber Co v Smith, Com App, 292 SW 1108—*Dougherty v Robb*, Civ App, 5 SW 2d 582, error dismissed
39 C.J. p 1087 note 22, p 1167 note 72
- Evidence held insufficient for jury**
Ark—Western Union Telegraph Co v Ponder, 128 SW 2d 246, 198 Ark 207
Fla—Duncan v Growers Equipment Co, 1 So 2d 458, 146 Fla 516
Mo—Harrison v American Car & Foundry Co, App, 296 SW 214
Neb—Britton v Samuelson, 23 NW 2d 387, 147 Neb 318
NC—Jackson v Royal & Borden Mfg Co, 141 SE 282, 195 NC 18
Or—Ferretti v Southern Pac Co, 57 P 2d 1380, 154 Or 97
Tex—Turnbow v Panhandle & S F. Ry Co, Civ App, 127 SW 2d 982, error refused—*Chisos Mining Co v Hernandez*, Civ App, 96 S W 2d 292, error dismissed
39 C.J. p 1167 note 72 [d], p 1168 note 74
13. *Ky—Leger v A Rollyson & Co*, 47 S.W 2d 708, 242 Ky. 802
39 C.J. p 1168 note 75
14. *Colo—Denver & S L Ry Co v Bedard*, 86 P 2d 770, 95 Colo 364.
15. *Ind—Louisville & N R & Lighting Co v Beck*, 146 NE 886, 196 Ind 238, rehearing denied 147 NE 776, 196 Ind 288.

written, its construction is for the court under a statute declaring that all questions of law, including the construction of writings, are for the court.¹⁶

1. Warning and Instructing Servant

Whether the master was guilty of negligence with respect to warning and instructing the injured servant, and the sufficiency of warnings and instructions given, are questions of fact for the jury if there is evidence

warranting the submission of the questions, but in the absence of such evidence the questions should not be submitted to the jury.

In accordance with well-settled general principles, whether the master was guilty of negligence with respect to warning and instructing the injured servant is a question of fact for the jury if there is any evidence tending to show such negligence.¹⁷ Ordinarily it is for the jury to determine whether

16. Or—Chadwick v Oregon-Washington R & Nav Co, 144 P 1165, 74 Or 19

17. US—Dudley v Scandrett, CC A Wash, 115 F2d 728—Breece-White Mfg Co v Baker, CCA Ark, 106 F2d 815—L E Whitham Const Co v Remer, CCA Okl, 105 F2d 371—E I Du Pont De Nemours & Co v Brown, CCA N.J., 102 F2d 786—L E Whitham Const Co v Remer, CCA Okl, 93 F2d 736—Bradford Electric Light Co v Clapper, CCA N.H., 51 F2d 993, reversed on other grounds 52 S Ct 571, 286 US 145, 76 L Ed 1026, 83 ALR 696—Southern Ry Co v Hobbs, CCA NC, 35 F2d 298—Geneva Mill Co v Andrews, CCA Fla, 11 F2d 924
Ala.—Seaboard Air Line Ry Co v Latham, 127 So. 679, 23 Ala App 490

Ark.—St Louis-San Francisco Ry Co v Wacoater, 199 SW 2d 948, 210 Ark 1080—Pekin Wood Products Co v Mason, 46 SW 2d 798, 185 Ark 166—Sandusky v Warren, 6 SW 2d 15, 177 Ark. 371—Wilson & Co. v Smith, 278 SW. 31, 169 Ark 1054

Colo.—Denver & Salt Lake Ry Co v Granler, 89 P 2d 245, 104 Colo 131—Denver & S L Ry Co v Lombardi, 287 P 648, 87 Colo 311, certiorari denied 51 S Ct 37, 282 US 865, 75 L Ed 765

Ill.—Mueller v Elm Park Hotel Co., 75 NE 2d 314, 398 Ill 60

Kan.—Darbe v Crystal Ice & Fuel Co, 296 P 705, 132 Kan 640.

Ky.—Coburn v North American Refractories Co, 174 S.W. 2d 757, 295 Ky 566—Southern Mining Co v Saylor, 95 SW 2d 236, 264 Ky. 655

Mass.—Reidy v Crompton & Knowles Loom Works, 60 NE 2d 589, 318 Mass 135—Ryan v Gray, 55 NE 2d 700, 316 Mass 359—Wood v National Theatre Co, 42 NE 2d 536, 311 Mass 550—Dahlgren v Coe, 40 NE 2d 5, 311 Mass 18—Manning v Prouty, 157 NE 364, 260 Mass 399

Miss.—Federal Compress Co v Craig, 7 So 2d 532, 192 Miss 689—Mississippi Power Co v Stribling, 3 So 2d 807, 191 Miss 832—Norton v Standard Oil Co, 171 So 691, 177 Miss 758—Evans v Brown, 106 So 281, 141 Miss 346

Mo.—Milburn v. Chicago, M, St P

& P. R Co, 56 SW 2d 80, 331 Mo 1171—Neal v Curtis & Co. Mfg Co, 41 SW 2d 543, 328 Mo 369—Nagy v St Louis Car Co, 37 SW 2d 513—Gettys v American Car & Foundry Co, 16 SW 2d 85, 323 Mo 787—Sullivan v St. Louis-San Francisco Ry Co, 12 SW 2d 735, 321 Mo 697—Willgues v Pennsylvania R Co, 298 SW 817, 318 Mo 28—State ex rel Boeving v. Cox, 276 SW 869, 310 Mo 367—McMillan v Isreal, App, 30 SW 2d 626—Bentley v American Car & Foundry Co, App, 13 SW 2d 563—Clark v Rock Hill Quarry & Construction Co, App, 7 SW 2d 716—Beuc v Meaker Bros Iron Co, App, 7 SW 2d 488—Alexander v Barnes Grocery Co, 7 SW 2d 370, 223 Mo App 1—Simmons v Kroger Grocery & Baking Co, App, 6 SW 2d 1023, quashed on other grounds State ex rel Kroger Grocery & Baking Co v Haid, 18 SW 2d 478, 323 Mo 9—Shepherd v. Century Electric Co, 299 SW 90, 230 Mo App 1152—Henley v United Farmers' Gin Co, App, 293 SW 481—Poynter v. Fogel Const Co, 289 SW 30, 231 Mo App 530—Biskup v Hoffman, 287 SW 865, 220 Mo App 543—Phillips v American Car & Foundry Co, App, 287 SW 810—Cannell v Missouri Pac R Co, App, 277 SW 583—McNairy v Pulitzer Pub Co, App, 274 SW 849—Mintner v St Joseph Lead Co, App, 272 SW 1042.

NH.—Brouillette v J F McElwain Co, 51 A 2d 41—Pike v Gagne, 11 A 2d 809, 90 NH 516—Musgrave v. Great Falls Mfg Co, 169 A. 583, 86 NH 375—Harvey v. Welch, 163 A. 417, 86 NH 72.

NJ.—Davis v New Jersey Zinc Co, 182 A 860, 116 NJ Law 103

NY.—Donovan v Moore-McCormack Lines, 42 NYS 2d 441, 266 App Div 406—Smith v. Delaware & H Co., 237 NYS. 297, 227 App Div 269

Ohio.—Flynn v. Sharon Steel Corporation, 50 NE 2d 319, 142 Ohio St 145—Hale v Kohler, App, 85 NE 3d 967

Okl.—Britt v Doty, 161 P 2d 521, 195 Okl 620—Griffin Grocery Co v. Scroggins, 293 P. 235, 145 Okl. 9.

Pa.—De Lellis v Pittsburgh & Lake Erie R Co, 39 A 2d 588, 350 Pa. 486.

RI.—Boettger v Mauran, 13 A 2d 285, 64 RI 340

SC.—Piner v Standard Oil Co of New Jersey, 161 SE 504, 163 SC 302

Tex.—International-Great Northern R Co v Sifuentes, Civ.App, 6 S. W 2d 192

Wash.—Lander v Shannon, 268 P. 145, 148 Wash 93

Wis.—Miller v Paine Lumber Co, 227 NW. 933, 202 Wis 77, reheard 230 NW 702, 203 Wis 77
39 CJ p 1168 note 78

Obvious or latent dangers

(1) It is a question for the jury as to whether or not a situation or thing is so obvious that there is a duty to give warning thereof

US—Breece-White Mfg Co. v Baker, CCA Ark, 106 F2d 815
Mo—Kirkpatrick v American Crocketing Co, 37 SW 2d 996, 225 Mo. App 774.

(2) Whether, in any particular case, employer has discharged duty to give employee warning of latent and concealed dangers ordinarily is question for jury—Barton v Atlantic Coast Line R Co, 193 SE 674, 212 NC 256, certiorari denied Atlantic Coast Line R Co v Barton, 58 S Ct 750, 303 US 651, 82 L Ed. 1113

(3) Whether danger was latent or obvious as question of law or fact generally see supra subdivision g of this section

Particular questions held for jury under evidence

(1) Foreman's negligence in leaving place, from which he could observe danger, without notifying men or designating another employee to watch and warn—Peterson v Union Pac R Co, 8 P 2d 627, 79 Utah 213

(2) Whether employee was one of class to whom duty to warn existed under custom—McCurry v Thompson, 181 SW 2d 529, 352 Mo 1199.

(3) Whether employer ought to have anticipated that employee might act as he did and by so doing subject himself to injury—Stanton v Morrison Mills, 47 A 2d 112, 94 N H. 92

(4) Whether work required of employee was simple, necessitating no special instructions.—Williams v.

it was incumbent on the master to warn and instruct a minor or inexperienced servant, and whether the master has discharged his duty in this respect;¹⁸ and the question frequently arises where a servant has been injured by dangerous or complicated machinery.¹⁹ It is also a question for the jury whether the duty to warn was properly delegated.²⁰

The question should not be submitted to the jury where only one inference can be drawn from the testimony²¹ or in the absence of evidence of negligence on the part of the master with respect to warning and instructing the servant.²²

Sufficiency. The sufficiency of warnings or instructions given is also a question for the jury²³ un-

Seaboard Air Line Ry Co, 155 S.E. 861, 199 NC 767

18. US—Zeidman v Gutterson & Gould, C.C.A.N.H., 139 F.2d 160
Ark—Kansas City Southern Ry Co v Hopson, 186 S.W.2d 946, 208 Ark 548—Ideal Cement Co v Hardwick, 185 S.W.2d 266, 208 Ark 163—Harmon v Harrison, 147 S.W.2d 739, 201 Ark 988—Barber v Parker, 76 S.W.2d 973, 190 Ark 34—Ward Furniture Mfg. Co v Mounce, 31 S.W.2d 531, 182 Ark 380—Ward Furniture Mfg Co v Pickle, 295 S.W.2d 737, 174 Ark 463—Morris v Clements, 293 S.W.2d 742, 173 Ark 1182

Ky—Robins v Norfolk & W Ry Co, 60 S.W.2d 344, 249 Ky 83
Mass—Cotoia v Seale, 27 N.E.2d 706, 806 Mass 101

Mo—Downing v Loose-Wiles Biscuit Co, 8 S.W.2d 884, 230 Mo 819—Wainwright v Westborough Country Club, App, 45 S.W.2d 86—Smiley v Jessup, App, 283 S.W. 110

N.H.—Stone v Howe, 32 A.2d 484, 92 N.H. 425

Wash—Hatcher v Globe Union Mfg Co, 16 P.2d 324, 170 Wash 494

39 C.J. p 517 note 47, p 1170 note 79

Negligence with respect to protection of inexperienced or youthful servants against injury as question of law or fact generally see supra subdivision c of this section

Servant's knowledge and appreciation of danger

(1) Question of minor servant's knowledge and appreciation of danger is generally for jury

Ga—Thompson v Hanes, 132 S.E. 250, 35 Ga App. 136

Mo—Benjamin v C Hager & Sons Hinge Mfg. Co, App, 273 S.W. 754

NC—McLaughlin v. Black, 1 S.E.2d 130, 215 NC 85

(2) Whether inexperienced boy helping operator of machine so well knew and so fully appreciated danger as to relieve master of duty to warn him was held for jury—Benjamin v C Hager & Sons Hinge Mfg Co, supra.

19. Ark—Berry Asphalt Co. v Kidd, 143 S.W.2d 42, 200 Ark 1131—Nowlin-Carr Co v Cook, 283 S.W. 7, 171 Ark 51.

Ga—Thompson v Hanes, 132 S.E. 250, 35 Ga App 136

Minn—Jenkins v Jenkins, 19 N.W. 2d 389, 220 Minn 216

Miss—J W Sanders Cotton Mill Co v Bryan, 179 So. 741, 181 Miss 573

Mo—Green v Baum, App, 132 S.W. 2d 665

N.H.—Brock v Ireland-Grafton Co, 141 A 912, 83 N.H. 290—Bilodeau v Gale Bros, 140 A. 173, 83 N.H. 196

NC—McLaughlin v Black, 1 S.E.2d 130, 215 NC 85—Gibson v Leaksville Cotton Mills, 151 S.E. 251, 198 NC 267

Okl—Chicago, R I & P Ry Co v Hurst, 263 P 113, 199 Okl 1

S.C.—Dawson v Gluck Mills, 157 S.E. 143, 159 S.C. 382

Tex—Beaumont, S L & W Ry Co v Schmidt, 72 S.W.2d 899, 133 Tex 580—Dial v Wilke, Civ App, 127 S.W.2d 379, error refused—Gamer Co v Gamage, Civ App, 147 S.W. 721

39 C.J. p 1170 note 80.

20. Pa—Clark v Best Mfg Co, 90 A 186, 243 Pa 353

39 C.J. p 1171 note 81

21. N.H.—Fortier v Concord Electric Co, 33 A.2d 801, 92 N.H. 492
39 C.J. p 1171 note 82

Obvious danger

Me—McBurnie v Northrup, 27 A.2d 823, 139 Me 149.

Employee's understanding of danger

(1) Question of employer's liability for not giving warning should not be submitted to the jury where the warning was unnecessary because of employee's understanding of danger—Poplarville Lumber Co v Kirkland, 115 So. 191, 149 Miss 116

(2) So, where employee admitted on examination that he knew of unsafe condition of appliance, question whether employers were guilty of negligence in not warning employee of such condition was not required to be submitted to jury—McGuire v Steinberg, 193 S.E. 205, 185 S.C. 97

22. US—Schilling v Delaware & H R Corporation, C.C.A.N.Y., 114 F.2d 69—Grant Storage Battery Co v De Lay, C.C.A.Neb., 87 F.2d 726

Ky—Willis v Barber, 183 S.W.2d 651, 280 Ky 417

Okl—Thurlow v. Failing, 272 P 868, 133 Okl 877

39 C.J. p 1171 note 83

Evidence held insufficient for jury

US—Jacobson v. Chicago, M., St. P & P R Co, C.C.A.Minn., 66 F.2d 688—Kansas City Southern Ry Co v Williford, C.C.A.La., 65 F.2d 223, certiorari denied Williford v Kansas City Southern Ry Co, 54 S.Ct. 87, 290 U.S. 666, 78 L.Ed 576—Pennsylvania Pulverizing Co v Butler, C.C.A.N.J., 61 F.2d 311.

Ark—Tucker Duck & Rubber Co v Harvey, 154 S.W.2d 828, 202 Ark 1033—Missouri Pac R Co v Hathcock, 139 S.W.2d 85, 200 Ark 294

Iowa—Chilcote v Chicago & N.W. R Co, 221 N.W. 771, 206 Iowa 1093

Ky—Crouch v Noland, 38 S.W.2d 471, 238 Ky 575

Mass—Pagano v Worcester Consol St Ry Co, 168 N.E. 764, 265 Mass 89

Neb—Campbell v Chicago, R I & P R Co, 234 N.W. 395, 120 Neb 499

N.H.—Trombly v H P. Hood & Sons, 146 A 815, 84 N.H. 119

N.J.—Matarani v Reading Co, 194 A 246, 119 N.J.Law 43, certiorari denied Matarani v Reading Co, 53 S.Ct. 481, 302 U.S. 766, 82 L.Ed 595

Okl—Earl v. Oklahoma City-Ada-Atoka Ry Co, 101 P.2d 249, 187 Okl. 100

Or—Hopkins v. Spokane, P & S Ry Co, 298 P 914, 137 Or. 287, rehearing denied 2 P.2d 1106, 137 Or 287
39 C.J. p 1171 note 88 [a]

23. Ark—Harrison Electric Co v Bumgardner, 272 S.W. 688, 168 Ark 1074

Ky—Helton v Cincinnati, N O & T P Ry Co, 283 S.W. 895, 214 Ky. 392

Mo—Neal v Curtis & Co Mfg Co, 41 S.W.2d 543, 228 Mo 389—Dobson v Otis Elevator Co, 26 S.W.2d 942, 324 Mo 1147

NC—Harper v Murray Const Co, 156 S.E. 187, 200 NC 47.

Tex—Dial v Wilke, Civ App, 127 S.W.2d 379, error refused

39 C.J. p 522 note 90 [b], p 1171 note 84

Matters to be considered by jury

In determining whether boy was sufficiently instructed by employer

less the evidence that the employee was properly instructed is not contradicted²⁴

§ 535. — Fellow Servants and Coemployees

- a. Adequacy and competency of working force
- b. Liability of master for negligence of fellow servant

a. Adequacy and Competency of Working Force

Provided the evidence is sufficient therefor, it is for the jury to determine whether an employer has furnished an adequate and competent working force or has been negligent in that respect.

In an action by an employee for injuries alleged to have been suffered as a result of the employer's violation of his duty to furnish an adequate and

competent working force, which duty is considered supra §§ 307-319, it is ordinarily for the jury to determine whether a sufficient number of servants has been furnished for the particular work²⁵ or assigned to a particular task;²⁶ or whether there has been negligence as to furnishing a sufficient number of employees,²⁷ or assigning them to the particular work²⁸ However, it is otherwise where the evidence is insufficient to warrant submission of the issues to the jury²⁹

Likewise it is ordinarily for the jury to determine whether coemployees were competent;³⁰ whether the master was negligent in employing or retaining an incompetent employee,³¹ and whether the incompetency of the employee was the proximate cause of the injury,³² but, similarly, such questions should not be submitted to the jury when not presented by the evidence.³³

as to danger inherent in his work, a jury could take into consideration not only the warnings given by the employer but also the fact that danger was or should have been obvious to the boy—*Shaw v Kendall*, 136 P 2d 748, 114 Mont 323

24. Md.—*McGee v Cuyler*, 75 A 970, 112 Md 314

39 CJ p 1171 note 85.

25. US—*Murphy v Lehigh Valley R Co*, CCANY, 158 F 2d 481—*Montgomery Ward & Co v Lindsey*, CCA Miss, 104 F 2d 882

39 CJ p 1171 note 86

As proximate cause of injury see supra § 533 h

26. Mo—*Hamilton v St Louis-San Francisco Ry Co*, App, 279 SW 177—*Stroud v Doe Run Lead Co*, App, 272 SW. 1080.

39 CJ p 1171 note 87

27. US—*Chesapeake & O Ry Co v Winder*, CCA Va, 23 F 2d 794
Mo—*Dietderick v Missouri Iron & Metal Co*, 9 SW 2d 824, 222 Mo App 740—*Lewis v American Car & Foundry Co*, App, 3 SW 2d 282
NC—*Johnson v Carolina, C & O Ry Co*, 131 SE 390, 191 NC 75

39 CJ p 1171 note 88

Evidence held sufficient for jury
US—*Great Atlantic & Pacific Tea Co v Robards*, CCA NC, 161 F 2d 829

NC—*Smith v Kitchen Lumber Co*, 153 SE 324, 198 NC 736—*Bradford v English*, 130 SE 705, 190 NC 742

28. US—*Murphy v Lehigh Val R Co*, CCANY, 158 F 2d 481—*Pittman v. Schultz*, CCA Miss, 135 F 2d 82

Miss—*Hardaway Contracting Co v Rivers*, 180 So 800, 181 Miss 737—*Gaines v Strickland*, 170 So. 695, 173 Miss. 308—*Jefferson v Denk-*

mann Lumber Co, 148 So 237, 167 Miss 246

Mo—*Hulsev v Tower Grove Quarry & Construction Co*, 30 SW 2d 1018, 326 Mo 194

Mont—*Boyd v Great Northern Ry Co*, 274 P 293, 84 Mont 84

NC—*Hawkins v Rowland Lumber Co*, 152 SE 169, 198 NC 475—*Barrett v Seaboard Air Line Ry Co*, 138 SE 5, 192 NC 728

Okl—*Beasley v Bond*, 48 P 2d 299, 173 Okl 355

Or—*Christie v Great Northern Ry Co*, 20 P 2d 377, 142 Or 321

SC—*Boyleston v Southern Ry. Co*, 44 SE 2d 537

Tex—*Great West Mill & Elevator Co v Hess*, Civ App, 281 SW. 234

39 CJ p 1172 note 89

Evidence held sufficient for jury
US—*Albright v Pennsylvania R Co*, DCPa, 16 F Supp 281

Ark—*Griffin v St Louis, I M & S R Co*, 181 SW 278, 121 Ark 433

Mo—*Lewis v American Car & Foundry Co*, App, 3 SW 2d 282

Tex—*W U Tel Co v Coker*, Civ App, 202 SW 2d 710—*St Louis Southwestern Ry Co v Gillenwater*, Civ App, 284 SW 268, affirmed
St Louis Southwestern Ry Co of Texas v Gillenwater, Com App, 294 SW 193

29. Wash—*Brown v Chicago, M & St P R. Co*, 217 P. 16, 125 Wash 463

39 CJ p 1172 note 91

Number of employees

US—*Deere v Southern Pac Co*, C CA Or, 123 F 2d 438, certiorari denied 62 S Ct 916, 315 US 819, 86 L Ed 1217

Negligence as to number of employees

Ky—*Cravens v Poston*, 71 SW 2d 1044, 254 Ky 542.

NC—*Jarvis v Erwin Cotton Mills Co*, 140 SE 602, 194 NC 687—

Tvier v Atlantic Coast Line R Co, 139 SE 773, 194 NC 800

Okl—*Lowden v Bowen*, 183 P 2d 980

30. Miss—*Hamilton Bros Co v Weeks*, 134 So 798, 155 Miss 754

Mo—*Baker v Scott County Milling Co*, App, 43 SW 2d 441

39 CJ p 1172 note 92

31. US—*Gallagher v California Brick Co*, CCA Fla, 5 F 2d 464.

Ark—*J E Parham Const Co v Parker*, 37 SW 2d 879, 183 Ark 678.

Miss—*Country Club of Jackson v Turner*, 4 So 2d 718, 192 Miss 510.

Mo—*Reed v Koch*, 282 SW 515, 230 Mo App. 175—*Isaacs v Smith*, App 275 SW 555

NC—*Shorter v Mooresville Cotton Mills*, 150 SE 499, 198 NC 27

Okl—*Lowden v Larson*, 103 P 2d 144, 187 Okl 226

Wash—*Roswall v Grays Harbor Stevedore Co*, 244 P 723, 138 Wash 390, 50 ALR 445.

39 CJ p 1172 note 93.

32. Mich—*Torpey v Davis*, 190 N. W 710, 221 Mich 45

39 CJ p 1172 note 94

33. Pa—*McVey v. Hughes*, 90 A. 436, 344 Pa. 113.

39 CJ p 1173 note 95

Evidence of incompetency held insufficient to go to jury—*J E Parham Const Co v Parker*, 37 SW 2d 879, 183 Ark 678—39 CJ p 1173 note 95 [a]

Evidence of negligence of master held insufficient to go to jury

Ark—*Ft Smith Ram & Bow Co v Baker*, 271 SW 945, 168 Ark 798.

NH—*Pike v Gagne*, 11 A 2d 809, 90 NH 516

Okl—*Singer Sewing Mach Co. v. Odum*, 45 P 2d 473, 172 Okl 411.

39 CJ. p 1173 note 95 [b].

b. Liability of Master for Negligence of Fellow Servant

- (1) In general
- (2) Existence of relationship of fellow servant
- (3) Negligence of coemployee or fellow servant
- (4) Failure in nondelegable duty
- (5) Proximate cause

(1) In General

In general, questions relating to a master's liability for injuries to a servant caused by the negligence of a fellow servant are to be determined by the jury, unless the evidence is undisputed or permits of but one inference.

In general, questions relating to the liability of an employer or master for injuries suffered by an employee or servant resulting from the negligence of a coemployee or fellow servant, which liability is considered *supra* §§ 321-356, are to be determined by the jury where the evidence on the question is conflicting or permits of more than one inference;³⁴ but, where the facts are undisputed or permit of but one inference, the question is one for the court.³⁵

Applicability of statutes. Where the evidence is in conflict, it is for the jury to determine whether

particular facts exist rendering applicable statutes affecting the liability of the master for injuries occasioned by the act of a coemployee,³⁶ as, for example, whether the character of employment is within the statute,³⁷ whether servants are in the same grade of employment,³⁸ whether a particular employee is intrusted with the duty of superintendence,³⁹ or is in control,⁴⁰ or whether an act is one of superintendence,⁴¹ or is the proximate cause of injury.⁴²

(2) Existence of Relationship of Fellow Servant

Except where the evidence is such as to warrant but one reasonable conclusion, it is for the jury to determine questions relating to whether particular employees were fellow servants, such as whether a servant was acting as a representative of the master.

Where the facts are undisputed or but one reasonable conclusion may be drawn from the evidence, the question whether servants of a common master stand in the relation of fellow servants may be a question of law for the court.⁴³ It is, however, ordinarily a question of fact or of mixed law and fact to be determined by the jury under proper instructions.⁴⁴ Similarly, where servants of different masters are employed in the same work, it is ordinarily for the jury to determine under proper

34. US—Hossack v Metzger, C.C. ASD, 156 F.2d 501.

Procurement of assault

In action for assault and battery on minor employee by fellow employees, evidence was insufficient to take to jury question whether plaintiff was assaulted at instance, procurement, or command of defendant or whether act was ratified by defendant.—Smith v Colonial Stores, 33 S.E.2d 360, 72 Ga.App. 186.

35. Ark.—Hill v. Hardy, 157 S.W. 2d 494, 203 Ark. 79.

36. Minn.—Cherpeshki v. Great Northern R. Co., 150 N.W. 1091, 128 Minn. 360.

39 C.J. p. 1175 note 15.

Evidence held insufficient for jury

U.S.—Van Norden v Chas. R. McCormick Lumber Co. of Delaware, CCA Or., 17 F.2d 568, certiorari denied 47 S.Ct. 768, 274 U.S. 758, 71 L.Ed. 1337.

Mich.—Safranski v Detroit, G.H. & M. Ry. Co., 206 N.W. 485, 233 Mich. 318, modified on other grounds 209 N.W. 588, 233 Mich. 515.

39 C.J. p. 1175 note 15 [a].

37. Minn.—Pylacanski v Great Northern R. Co., 139 N.W. 147, 120 Minn. 74.

39 C.J. p. 1175 note 16.

38. Tex.—Galveston, H. & S.A. R. Co. v Mohrmann, 93 S.W. 1090, 42 Tex.Civ.App. 374.

39. Mass.—Whalen v Hugh Nawn Contracting Co., 104 N.E. 959, 217 Mass. 400.

39 C.J. p. 1175 note 18.

40. Mont.—Johnson v Butte & Superior Copper Co., 108 P. 1057, 41 Mont. 158, 48 L.R.A.N.S. 938.

39 C.J. p. 1175 note 19.

41. US—Flickwir & Bush v Walkonen, N.J., 238 F. 307, 151 CCA 323.

39 C.J. p. 1175 note 20.

42. Ala.—Alabama Fuel & Iron Co. v Ward, 69 So. 621, 194 Ala. 242.

39 C.J. p. 1175 note 21.

43. Ill.—Kaminsky v Chicago Rys. Co., 121 N.E. 596, 286 Ill. 271—Craig v Boudouris, 241 Ill.App. 392.

Ky.—North East Coal Co. v Setzer, 183 S.W. 553, 169 Ky. 245.

Mo.—Rosenblum v Rosenblum, 96 S.W.2d 1082, 231 Mo.App. 276.

N.Y.—Riley v Carlton, 39 N.Y.S.2d 687, 265 App.Div. 1032, affirmed 50 N.E.2d 302, 290 N.Y. 913.

Okl.—Mid-Continent Petroleum Corp. v Fleming, 167 P.2d 866, 196 Okl. 605—Singer Sewing Mach. Co. v Odom, 45 P.2d 478, 172 Okl. 411.

RI.—Ryan v Unsworth, 157 A. 869, 52 R.I. 86.

SC.—Hill v Broad River Power Co., 148 S.E. 870, 151 S.C. 280.

Tex.—Corpus Juris cited in Horne

Motors v. Latimer, Civ.App., 148 S.W.2d 1000, 1003, 1006.

Utah—Shepherd v. Denver & R.G. R. Co., 126 P. 692, 41 Utah 469.

39 C.J. p. 1173 note 96.

44. US—Hossack v Metzger, C.C. ASD, 156 F.2d 501.

Ark.—Jolly v Smith, 65 S.W.2d 908, 188 Ark. 446.

Fla.—Electrical Equipment Co. v Cook, 151 So. 483, 113 Fla. 312—Sutton v Hancock, 141 So. 532, 105 Fla. 497.

Ill.—Kaminsky v Chicago Rys. Co., 121 N.E. 596, 286 Ill. 271—Lamar v. Collins, 252 Ill.App. 238.

Ky.—E. Smith & Son v Garrison, 108 S.W. 293, 32 Ky.L. 1278.

Mo.—Beuc v Mesker Bros. Iron Co., App. 7 S.W.2d 438—Coy v Dean, 4 S.W.2d 835, 222 Mo.App. 67—Dillard v Justus, 3 S.W.2d 392, 222 Mo.App. 362.

N.Y.—Rice v Isbell, 67 N.Y.S.2d 860, 188 Misc. 758.

SC.—Wesley v Holly Hill Lumber Co., 43 S.E.2d 619, 211 S.C. 40—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213—Price v American Agr. Chemical Co., 182 S.E. 637, 178 S.C. 217—Boling v Woodside Cotton Mills, 171 S.E. 9, 171 S.C. 34.

Utah—Shepherd v. Denver & R.G. R. Co., 126 P. 692, 41 Utah 469.

39 C.J. p. 1173 note 97.

instructions from the court whether the facts are established making them fellow servants⁴⁵

Further, when involved in the determination of whether particular employees are fellow servants, it is for the jury to determine, in case of a conflict in the evidence as to the facts, whether the relationship of master and servant has been established,⁴⁶ whether the injured servant was acting within the scope of his employment,⁴⁷ whether the employee to whom the injury was attributed was acting within his employment⁴⁸ or authority,⁴⁹ although what acts are within the scope of the employment is a question of law,⁵⁰ whether servants are employed in the same department;⁵¹ or whether direct co-operation or habitual association is established.⁵²

Servant as representative of master It is also

for the jury to determine, on conflicting evidence, whether a particular act is performed as representative of the master⁵³ or is in the performance of a primary or nondelegable duty of the master,⁵⁴ such as the furnishing of a safe place to work,⁵⁵ furnishing safe tools and appliances,⁵⁶ superintendence,⁵⁷ inspection,⁵⁸ or repair.⁵⁹ So, where the doctrine of dual capacity is recognized, it is, on conflicting evidence, a question of fact for the jury whether the servant was acting as a vice principal or as a fellow servant,⁶⁰ but, where the facts are undisputed, the question is for the court.⁶¹

(3) Negligence of Coemployee or Fellow Servant

Provided there is evidence tending to show it, whether a fellow servant or coemployee has been guilty of negligence is a question for the jury.

Provided there is evidence tending to show it,⁶²

45. Mass.—Mahoney v. New York, N H & H R Co, 132 N E 384, 240 Mass. 8

39 C J p 1174 note 98

46. US—Hossack v Metzger, CC ASD, 156 F 2d 501

Ala—Belcher v Chapman, 7 So 2d 859, 242 Ala. 653—Lowe v Poole, 179 So 536, 235 Ala. 441

Ark—Jolly v Smith, 65 S W 2d 908, 188 Ark 446—Altman-Rodgers Co v Rogers, 48 S W 2d 239, 185 Ark 561

Cal—Srimsher v. Reliance Rock Co, 2 P 2d 862, 116 Cal App 500

Mo—Dillard v Justus, 3 S W 2d 392, 222 Mo App 362.

39 C J p 1174 note 99

47. Tex—St Louis Southwestern R Co v Blevins, 173 S W. 281

39 C J p 1174 note 1.

48. Ala—Taylor v. Atlantic Coast Line R. Co., 168 So 181, 232 Ala. 378

Ark—Standard Coffee Co v Watson, 129 S W 2d 948, 198 Ark 592

Mo—Boston v Kroger Grocery & Baking Co, 7 S W.2d 1006, 320 Mo 408

39 C J p 1174 note 2

Evidence held insufficient for jury
US—Martin v. Memphis Stone & Gravel Co., C.C.A.Miss, 46 F.2d 989

Ga.—Odum v Edgar Bros Co, 103 S E, 183, 25 Ga.App 144

49. Mo—Stahl v St Louis-San Francisco Ry Co., 287 S W. 628—Gray v Phillips Bldg Co, App, 51 S W 2d 181.

39 C J p 1174 note 3.

50. Cal.—Adams v American President Lines, 146 P 2d 1, 23 Cal 2d 681, prior opinion 140 P 2d 47.

51. Cal—Judd v. Letts, 111 P 12, 158 Cal 359, 41 L.R.A.N.S., 156

Ill—Montegard v Donk Bros Coal & Coke Co, 199 Ill App 178

52. Ill—Kaminsky v Chicago R Co, 121 N E 596, 288 Ill. 271
39 C J p 1175 note 6

53. Ariz—Central Copper Co v Klefsch, 370 P 629, 34 Ariz 230
Minn—Eichler v Equity Farms, 259 N.W 545, 194 Minn 8

Miss—Russell v Williams, 150 So 528, 168 Miss 181, suggestion of error overruled 151 So 372, 168 Miss 181.

Mo—Wall v Philip A. Rohan Boat, Boiler & Tank Co., 62 S W 2d 764, 333 Mo 619—Carter v. Wolff, App, 296 S W 187—Evans v Southern Wheel Co, App, 273 S W 749—Todd v American Ry. Express Co, 271 S W 880, 219 Mo App 405—House v St. Louis Car Co, App, 270 S W 135.

NY—Weisman v Camp Beecher, 55 N Y S 2d 454, 269 App Div 278, affirmed 64 N E 2d 654, 295 N Y 626
Or—Fitzgerald v Oregon-Washington R & Nav Co, 16 P 2d 27, 141 Or. 1

SC—Price v. American Agr Chemical Co, 176 S E 352, 173 SC 518—Brewer v Brooklyn Cooperage Co, 166 S E 85, 167 S C. 152
39 C J p 1175 note 7

Evidence held insufficient for jury
Ga—Smith v Colonial Stores, 33 S E 2d 360, 72 Ga.App. 186

54. Ind—Patterson v Southern R Co, 99 N E 491, 52 Ind App 618
Mo—Wuellner v Crescent Planning Mill Co, 259 S W. 764, 303 Mo 38

55. Mass.—Metayer v. Grant, 110 N E 310, 222 Mass. 254.
39 C J p 1175 note 9.

56. Ind.—Patterson v. Southern R Co, 99 N E 491, 52 Ind App 618

Wash—Mattson v Carlisle Packing Co, 213 P 179, 123 Wash 243.

57. NY—Smith v Milliken, 93 N.E 184, 200 N Y 21.

39 C J p 1175 note 11

58. Tex—Liquid Carbonic Co v Dilley, 203 S W. 316, 109 Tex 140.
Wyo—Engen v Rambler Copper & Platinum Co, 121 P. 867, 20 Wyo 95, rehearing denied 123 P. 413, 20 Wyo 95

59. Minn—Mortenson v Hotel Nicolet Co, 136 N W. 306, 118 Minn. 29.

60. Ark—May v Sharp, 39 S.W 2d 735, 191 Ark 1142

Fla.—Tampa Shipbuilding & Engineering Co v Thomas, 179 So 705, 131 Fla 650.

Ga.—Howard v Georgia Power Co, 176 S E 69, 49 Ga.App 430

Idaho—Clariss v. Oregon Short Line R Co, 33 P 2d 348, 54 Idaho 588
Miss—Russell v Williams, 151 So 372, 168 Miss 181

Mo—Dreessen v National Bldg Material Co, 5 S W 2d 1, 319 Mo 1010—Beuc v Mesker Bros Iron Co, App, 7 S W 2d 438—Bennett v Hood, App, 296 S W 1028—Guldner v International Shoes Co, App, 298 S W 428

N.C.—Southwell v Atlantic Coast Line R Co, 127 S E 361, 189 N C 417

39 C J. p 1175 note 14

61. Ark—Hill v Hardy, 157 S W.2d 494, 203 Ark 79—Haraway v Mance, 56 S W 2d 1023, 186 Ark 971.

Okla.—Singer Sewing Mach. Co v. Odom, 45 P 2d 473, 172 Okl. 411.
39 C J. p 1173 note 96

62. Iowa—Allen v. Chicago, M. & St P R. Co, 101 N W. 863, 126 Iowa 213

Sufficiency of evidence

(1) Plaintiff was entitled to go to jury, if there was any evidence of

the question whether a fellow servant or co-employee,⁶³ or vice-principal,⁶⁴ has been guilty of negligence is one of fact for the jury. This rule has been applied in determining whether a fellow servant has been negligent in relation to directions or

orders as to the conduct of the work,⁶⁵ or in regard to furnishing tools and appliances,⁶⁶ inspection,⁶⁷ or repairs.⁶⁸ It has also been applied in determining negligence with regard to signals,⁶⁹ warnings,⁷⁰ or other means of protection from dan-

negligence of defendant's employee—*Hutchinson v Sovrensky*, 165 NE 698, 267 Mass 5

(2) Conflicting evidence is sufficient to warrant submission of the case to the jury—*Jacobson v Chicago & N W Ry Co*, 22 N.W.2d 455, 231 Minn 454

(3) Circumstantial evidence has been held sufficient to warrant submission of the case to the jury—*Johnson v Southern Ry Co*, 175 S.W.2d 802, 351 Mo 1110

(4) In action under Federal Employers' Liability Act for injuries suffered in lifting heavy rod, where plaintiff-employee testified that a fellow employee suddenly released his hold thereby casting additional weight on plaintiff and causing injuries, employer was not entitled to a directed verdict on theory that deliberate and intentional dropping of rod was not in furtherance of the employer's business—*Steeley v Kurn*, 157 S.W.2d 212, 348 Mo 1142

(5) Other evidence held sufficient—*Enga v Sparks*, 51 NE.2d 984, 315 Mass 120—39 C.J. p 1176 note 22 [a]

(6) Evidence held insufficient for jury

US—*Van Norden v Chas R McCormick Lumber Co of Delaware*, C.C.A.Or., 17 F.2d 568, certiorari denied 47 S.Ct 768, 274 U.S 758, 71 L.Ed 1837.

Ark—*Missouri Pac. R Co v Shores*, 191 S.W.2d 580, 200 Ark 539—*J M Farrin & Co v Brown*, 62 S.W.2d 944, 187 Ark 1163—*St. Louis-San Francisco Ry Co v Burns*, 56 S.W.2d 1027, 186 Ark. 921.

Iowa—*Rehard v Miles*, 290 N.W. 702, 227 Iowa 1290

Mass—*Hughes v Gaston*, 183 NE 752, 281 Mass 292, certiorari denied 53 S.Ct 656, 289 U.S 737, 77 L.Ed 1485—*Pagano v Worcester Consol St Ry Co*, 168 NE 764, 265 Mass 89.

Miss—*Harvey v Smith*, 198 So 739, 190 Miss. 130—*Buckeye Cotton Oil Co v McMorris*, 158 So. 799, 172 Miss. 99.

Mo—*Harville v Harrison Engineering & Construction Co*, App. 7 S.W.2d 1032

N.J.—*Di Bernardo v Delaware, L & W R Co*, 33 A.2d 823, 130 N.J. Law 479—*Noon v Delaware, L & W R Co*, 150 A. 344, 106 N.J. Law 526, certiorari denied *Whitson v Delaware, L & W R Co*, 51 S.Ct 348, 283 U.S 818, 75 L.Ed 1434.

Okla.—*Chicago, R I & P Ry Co v West*, 254 P 91, 124 Okl 147 39 C.J. p 1176 note 22 [b]

63. US—*Blair v Baltimore & O R Co*, Pa., 65 S.Ct 545, 323 US 600, 89 L.Ed 490—*Hossack v Metzger*, C.C.A.S.D., 156 F.2d 501—*Norfolk & W Ry Co v Trautwein*, C.C.A. Ohio, 111 F.2d 923—*Duncan v Montgomery Ward & Co*, C.C.A. Ark, 108 F.2d 848, certiorari denied *Montgomery Ward & Co v Duncan*, 60 S.Ct 809, 309 US 650, 84 L.Ed 1001, motion denied 60 S.Ct 1073, 310 US 612, 84 L.Ed 1389, modified on other grounds 61 S.Ct 189, 311 US 243, 85 L.Ed 147—*Great Northern Ry Co v Nelson*, C.C.A.Minn., 90 F.2d 84—*Erie R Co v Vajo*, C.C.A. Ohio, 41 F.2d 738

Ala.—*Birmingham Belt R Co v Hendrix*, 110 So 312, 215 Ala 285, certiorari denied 47 S.Ct 472, 273 US 758, 71 L.Ed 877

Ark—*Kansas City Southern Ry Co v Diggs*, 167 S.W.2d 879, 205 Ark 150—*Standard Oil Co of Louisiana v Chandler*, 165 S.W.2d 595, 204 Ark 895—*Sanders v Missouri Pac R Co*, 106 S.W.2d 177, 197 Ark 451—*May v Sharp*, 89 S.W.2d 735, 191 Ark. 1142—*Chicago, R I & P. Ry Co v Britt*, 74 S.W.2d 398, 189 Ark 571—*Temple Cotton Oil Co v Holliday*, 47 S.W.2d 4, 185 Ark. 1190—*Mississippi River Fuel Corporation v Morris*, 35 S.W.2d 607, 183 Ark. 207—*Seaman-Dunning Corporation v Haralson*, 39 S.W.2d 1085, 182 Ark 92—*Sinclair Oil & Gas Co v Langley*, 298 S.W. 1015, 178 Ark 956—*St. Louis-San Francisco Ry Co v Miller*, 292 S.W. 986, 173 Ark 597

Ga.—*Southern Ry Co v Blanton*, 10 S.E.2d 430, 63 Ga.App 93

Ill.—*Mueller v Elm Park Hotel Co*, 75 NE.2d 314, 398 Ill. 60—*Williams v. Southern Ry Co*, 258 Ill App 84.

Md.—*F. Jarka Co v Gancel*, 181 A. 754, 149 Md 425.

Mass—*Hutchinson v. Sovrensky*, 165 NE 698, 267 Mass 5

Mich—*Oliver v Ford Motor Co*, 255 N.W. 287, 287 Mich 289—*Thrall v Pere Marquette Ry Co*, 229 N.W. 488, 249 Mich 440.

Miss.—*Alden Mills v. Pendergraft*, 115 So 713, 149 Miss 595

Mo—*Pritchard v Thompson*, 156 S.W.2d 652, 348 Mo 832—*Barrett v St. Louis Southwestern Ry Co*, 143 S.W.2d 60—*Crane v Liberty Foundry Co*, 17 S.W.2d 945, 322 Mo 592—*Cheney v Terminal R R*

Ass'n of St Louis, App., 70 S.W.2d 66

N.J.—*Deputula v Pennsylvania R Co*, 166 A. 87, 110 N.J. Law, 515, certiorari denied *Pennsylvania R Co v Deputula*, 54 S.Ct 62, 290 US 643, 78 L.Ed 559

Or—*Johnson v. Oregon-Washington R & Nav Co*, 268 P 985, 128 Or 85

S.D.—*Finger v. Northwest Properties*, 257 N.W. 121, 63 S.D. 176

Tex.—*Texas & P Ry Co v Perkins* Civ App. 29 S.W.2d 835, reversed on other grounds, Com App. 48 S.W.2d 249

39 C.J. p 1176 note 23

64. Mo—*Morris v Atlas Portland Cement Co*, 19 S.W.2d 865, 323 Mo. 307—*Dreesen v National Bldg Material Co*, 5 S.W.2d 1, 319 Mo 1010—*Vaccaro v City of St. Louis*, App. 128 S.W.2d 230

65. Ark—*Louis B Siegel & Co. v. Moore*, 161 S.W.2d 387, 204 Ark 50—*Smith v. Stuart C Irby Co*, 151 S.W.2d 996, 202 Ark. 736.

Ill.—*Hogan v Crane Co*, 102 NE 215, 259 Ill 47.

Mo—*Pritchard v. Thompson*, 156 S.W.2d 652, 348 Mo 832—*Crane v Liberty Foundry Co*, 17 S.W.2d 945, 322 Mo. 592—*Vaccaro v City of St. Louis*, App. 128 S.W.2d 230

N.Y.—*Blosky v. Overseas Shipping Co*, 220 N.Y.S. 95, 219 App Div. 438

39 C.J. p 1176 note 24.

66. Wash—*Hamra v. Rothschild & Co*, 240 P 909, 186 Wash 522 39 C.J. p 1176 note 25.

67. Mass—*Tardiff v Lynn Sand & Stone Co*, 193 NE. 55, 288 Mass. 472

39 C.J. p 1176 note 26.

68. Mass—*Igo v. Boston El R Co*, 90 NE 574, 204 Mass 197.

N.Y.—*Guirizinski v. American Radiator Co*, 118 N.E. 215, 222 N.Y. 85

69. N.C.—*Hawkins v Rowland Lumber Co*, 152 S.E. 169, 198 N.C. 475

39 C.J. p 1176 note 28.

70. Mass.—*Igo v. Boston El R. Co*, 90 NE 574, 204 Mass 197

39 C.J. p 1176 note 29.

Evidence held insufficient for jury
Mass—*Pagano v. Worcester Consol. St Ry Co*, 168 N.E. 764, 265 Mass. 89.

gers.⁷¹

Particular operations. It is ordinarily a question of fact for the jury whether a fellow servant has been negligent with regard to particular methods of work, such as are involved in blasting,⁷² hoisting,⁷³ logging,⁷⁴ mining,⁷⁵ quarrying,⁷⁶ handling explosives,⁷⁷ loading or unloading heavy objects,⁷⁸ carrying or moving a heavy object,⁷⁹ piling material,⁸⁰ selecting materials,⁸¹ starting or operating eleva-

tors⁸² or machinery,⁸³ operating motor vehicles,⁸⁴ or in the performance of electrical work.⁸⁵

Railroad operations It is ordinarily a question of fact for the jury whether a fellow servant has been negligent in connection with railroad operations,⁸⁶ as in the giving of incorrect train orders,⁸⁷ or in starting,⁸⁸ stopping,⁸⁹ or failing to stop,⁹⁰ backing,⁹¹ coupling,⁹² switching,⁹³ traveling at an excessive rate of speed,⁹⁴ or in the operation of a

71. Or—Fitzgerald v Oregon-Washington R & Nav Co, 16 P 2d 27, 141 Or 1

39 C J p 1177 note 30

72. Minn—Carlson v James Forrestal Co, 112 NW. 626, 101 Minn 446

Vt—Barclay v Wetmore & Morse Granite Co, 102 A 493, 92 Vt 195

73. N Y—Borckmann v Terry Constr Co, 110 NE 172, 216 NY 139

39 C J p 1177 note 32

74. Ark—Black Springs Lumber Co v Palmer, 96 SW 2d 469, 192 Ark 1032

Tex—Kirby Lumber Co v Bratcher, Civ App, 191 SW 700

75. Ark—American Bauxite Co v Tudor, 230 SW 558, 148 Ark 500

39 C J p 1177 note 34.

76. N.H.—Tierney v. New England Granite Works, 106 A 481, 79 NH 166

77. Pa.—Simmons v Lehigh Valley Coal Co, 87 A. 562, 240 Pa 354

39 C J p 1177 note 35

78. U.S.—Pennsylvania R Co v Roth, CCA Ohio, 163 F 2d 161—Duncan v. Montgomery Ward & Co, CCA Ark, 108 F 2d 848, certiorari denied Montgomery Ward & Co v. Duncan, 60 S Ct 809, 309 US 650, 84 L Ed 1001, motion denied 60 S Ct 1073, 310 US 612, 84 L Ed 1389, modified on other grounds 61 S Ct 189, 311 US 243, 85 L Ed 147.

Ark—Southern Compress Co v. Elston, 161 SW 2d 202, 204 Ark 180—Southern Lumber Co v. Downey, 64 SW 2d 552, 188 Ark. 1167—Power Mfg Co v. Saunders, 276 SW 599, 169 Ark 748, reversed on other grounds 47 S Ct 878, 274 US 490, 71 L Ed 1165

Minn—Stritske v. Chicago Great Western Ry. Co, 251 N.W. 532, 190 Minn 323.

Mont—Kakos v Bryam, 292 P 909, 88 Mont 309

Or—Christie v. Great Northern Ry Co, 20 P 2d 377, 142 Or 321

39 C J p 1177 note 37.

79. Ark—Standard Oil Co of Louisiana v Chandler, 165 S.W.2d 595, 204 Ark 895—Phillips Petroleum Co v. Jenkins, 82 SW 2d 264, 190 Ark. 964, affirmed 56 S Ct 611, 297

US 629, 80 L Ed 943, rehearing denied 56 S Ct 745, 298 US 691, 80 L Ed 1409—Border Queen Kitchen Cabinet Co v Gray, 76 SW 2d 305 159 Ark 1137

Ky—Louisville & N R Co v Clark, 277 SW 272, 211 Ky 315

Mo—Wheeler v Missouri Pac R Co, 18 SW 2d 494, 322 Mo 371, certiorari denied Missouri Pac R Co v Wheeler, 50 S Ct 27, 280 US 568, 74 L Ed 621

Tex—Missouri-Kansas-Texas R Co of Texas v Hemphkins Civ App, 30 SW 2d 661, certiorari denied 51 S Ct 560, 283 US 851, 75 L Ed 1459

39 C J p 1177 note 38

80. Ark—Missouri Pac R Co v Brown, 115 SW 2d 1083, 195 Ark 1080.

39 C J p 1177 note 39

81. Or—Moen v Aitken, 371 P 730, 127 Or 246

39 C J p 1177 note 40

82. Mo—Bennett v Hood, App, 296 SW 1028

39 C J p 1177 note 41

83. Mo—Beuc v. Mesker Bros Iron Co, App, 7 SW 2d 438

SC—Price v. American Agr Chemical Co, 182 SE 637, 178 SC 317—Price v. American Agr Chemical Co, 176 SE 353, 173 SC 518

39 C J p 1177 note 42.

84. U.S.—Garrett Const Co. v. Aldridge, CCA Ark, 73 F 2d 814.

Ark—American Co of Arkansas v Baker, 60 SW 2d 573, 187 Ark 493—Gilliland Oil Co v Wilburn, 3 SW 2d 41, 176 Ark 1204

Mo—Boston v. Kroger Grocery & Baking Co, 7 SW 2d 1006, 320 Mo 408

85. Ark—Southwest Power Co v Price, 22 SW 2d 373, 180 Ark 567, certiorari denied 50 S Ct 353, 281 US 753, 74 L Ed 1163, and appeal dismissed 50 S Ct 407, 281 U.S. 703, 74 L Ed 1128

Ky—Reed v Nelson Creek Coal Co, 6 SW 2d 262, 224 Ky 322

Mo—Freese v Wells, 40 SW 2d 652

86. U.S.—Jenkins v Kurn, Mo, 61 S Ct 934, 313 US 256, 85 L Ed 1116

Ark—Kansas City Southern Ry Co v. Brock, 98 SW 2d 949, 193 Ark 210

Evidence held insufficient to go to jury

US—Toledo, St L & W. R Co v Allen, Mo, 18 S Ct 215, 276 US 165, 72 L Ed 513, conformed to Allen v Toledo, St Louis & Western Ry Co, Sup, 12 SW 2d 1116

87. Mass—Doe v Boston & W St. R Co, 80 NE 814, 195 Mass 168

88. Mich—Habitz v Wabash R Co, 135 NW 827, 170 Mich 71

Tex—Galveston H & S A R Co v Mitchell, 107 SW 374, 48 Tex Civ App 381

89. Minn—La Mere v Minneapolis Railway Transfer Co, 145 NW 1068, 125 Minn 169, Ann Cas 1915C 667

90. U.S.—Jenkins v Kurn, Mo, 61 S Ct 934, 313 US 256, 85 L Ed 1116—Bowser v Baltimore & O R Co, CCA Pa, 152 F 2d 436—Atchison, T & S F Ry Co v Ballard, CCA Tex, 108 F 2d 768, rehearing denied 109 F 2d 1012, certiorari denied Ballard v Atchison, T & S. F R Co, 60 S Ct 1096, 310 US 646, 84 L Ed 1413

Mass—Hanley v Boston & M R R., 190 NE 501, 286 Mass 390, certiorari denied Boston & M R R v. Hanley, 55 S Ct 112, 293 US 597, 79 L Ed 690—Murphy v Boston & M R R., 190 NE 501, 286 Mass 390, certiorari denied Boston & M R R v Murphy, 55 S Ct 112, 293 US 597, 79 L Ed 690.

39 C J p 1177 note 47

91. U.S.—Chicago Great Western R Co v Egan, Iowa, 159 F. 40, 86 C CA 230

Colo—Brady v Florence & C C R Co, 98 P 321, 44 Colo 283.

92. U.S.—Mahoning Ore & Steel Co. v. Blomfelt, Minn, 163 F 827, 91 CCA 390

Mo—Delano v Roberts, App, 182 S W 771

93. Ala.—Mobile & O. R Co. v Williams, 121 So. 722, 219 Ala 288.

Ind—New York Cent R. Co. v Verpleatse, 59 NE 2d 916, 116 Ind. App 1, rehearing denied 60 NE 2d 784, 116 Ind.App. 1.

Mo—Johnson v. Chicago & E I Ry. Co, 64 SW 2d 674, 334 Mo. 22

39 C J p 1177 note 50.

94. NC—Moore v. Atlantic Coast

handcar or motorcar⁹⁵

Gross negligence and wantonness. The question whether a servant has been guilty of gross negligence is, on conflicting evidence, one of fact for the jury⁹⁶ Whether or not one employee was guilty of wantonness in injuring another has also been held to be a question for the jury.⁹⁷

(4) Failure in Nondelegable Duty

It is ordinarily for the jury to determine, on conflicting evidence, whether or not the negligence of a fellow servant constitutes a failure in the performance of a nondelegable duty of the master

Provided the evidence with regard thereto is conflicting,⁹⁸ it is ordinarily for the jury to determine whether or not the negligence of a coemployee or fellow-servant constitutes a failure in the performance of a primary or nondelegable duty of the master,⁹⁹ such as the furnishing of a safe place to work,¹ the furnishing of safe appliances,² inspec-

tion,³ the keeping of appliances safe,⁴ the providing of a safe method of work,⁵ the adoption of necessary rules and regulations⁶ or signal systems,⁷ and the giving of warning and instruction.⁸

(5) Proximate Cause

In cases involving the defense of negligence of fellow servants, proximate cause of the injury is, on conflicting evidence, a question for the jury.

As in cases involving the question of the proximate cause of an employee's injuries generally, as considered supra § 533, in cases involving the defense of negligence of fellow servants, the question of the proximate cause of the injury is on conflicting evidence one of fact for the jury.⁹ However, the question should not be submitted to the jury where there is no substantial conflict in the evidence.¹⁰ Moreover, under the rules authorizing the direction of a verdict generally, the court may, in cases in which the negligence of fellow servants

Line R. Co., 116 SE 409, 185 NC 189

39 CJ p 1177 note 48

95. Ky.—McDonald v Louisville & N R Co., 24 SW2d 535, 232 Ky 784

Mo.—Jenkins v Wabash Ry Co., 73 SW2d 1002, 335 Mo 748—Jones v St Louis-San Francisco Ry Co., 63 SW2d 94, 333 Mo 802—McPherson v. Thompson, App., 164 SW2d 80, certiorari denied Thompson v McPherson, 63 SCt 769, 318 US 773. 87 LEd 1143.

SC—Scott v International Agr Corporation, 184 SE 133, 180 SC 1.

Wash.—Papoutsakis v Spokane, P. & S. R. Co., 153 P 1053, 89 Wash 1

96. Ky.—Chesapeake & O R Co v Marcum, 124 SW 293, 136 Ky 245

97. Ala.—Naugher v. Louisville & N R Co., 91 So. 254, 206 Ala 515—Louisville & N. R. Co v Preston, 40 So 337, 146 Ala. 635

98. Mich.—McBroom v B Siegel Co., 141 NW. 551, 175 Mich 186

39 CJ. p 1177 note 54

Evidence held insufficient

Mo.—Kemmler v City of Richmond Heights, 114 SW2d 994.

39 CJ. p 1177 note 54 [b].

99. Vt.—Barclay v. Wetmore & Morse Granite Co., 102 A. 493, 92 Vt. 195.

1. Ark.—Moline Timber Co. v. McClure, 266 SW 301, 166 Ark. 364 39 CJ. p 1177 note 56

2. Mass.—Sprague v General Electric Co., 100 NE 628, 213 Mass 375

39 CJ p 1177 note 57.

3. Ala.—Tennessee Coal, Iron & R. Co v. Spicer, 89 So. 293, 206 Ala. 141.

Mass.—Sprague v General Electric Co., 100 NE 628, 213 Mass 375

4. Wis.—Massy v Milwaukee Electric R & Light Co., 126 NW 544, 143 Wis 220, 139 AmSR 1096, 40 L.R.A.N.S., 814

5. Okl.—Pure Transp. Co v. Newman, 155 P2d 977, 195 Okl 173. 39 CJ p 1177 note 60

6. N.Y.—Sutherland v Troy & B R Co., 26 NE 609, 125 NY 737

Wyo.—Engen v Rambler Copper, Platinum Co., 121 P 867, 20 Wyo 95, rehearing denied 123 P 413, 20 Wyo. 95.

7. Iowa.—Donnelly v Ft Dodge Portland Cement Corp., 148 NW 982, 168 Iowa 393

Wash.—Johansen v Pioneer Min Co., 137 P 1019, 77 Wash 421.

8. Minn.—Francoeur v Gribben Lumber Co., 132 NW. 199, 115 Minn 200

39 CJ p 1178 note 63.

9. U.S.—Great Atlantic & Pacific Tea Co v. Robards, CCA NC, 161 F2d 929—Hossack v Metzger, C. C.A.S.D., 156 F2d 501—Duncan v Montgomery Ward & Co, C.C.A. Ark., 108 F2d 848, reversing 27 F Supp. 4, certiorari denied Montgomery Ward & Co v Duncan, 60 SCt 809, 309 US 650, 84 LEd 1001, motion denied 60 SCt 1073, 310 US 612, 84 LEd. 1389—Atchison, T. & S. F Ry Co v Ballard, CCA Tex., 108 F2d 768, rehearing denied 109 F2d 1012, certiorari denied Ballard v Atchison, T. & S. F. R. Co., 60 SCt 1096, 310 US 646, 84 LEd 1413—Southern Pac Co v. Ralston, CCA Utah, 67 F.2d 958

Ark.—Dierks Lumber & Coal Co v. Noles, 148 SW2d 650, 201 Ark

1088—May v. Sharp, 89 SW2d 735, 191 Ark 1143

Ill.—Surinak v Elgin, J. & E Ry. Co., 235 Ill App 431

Mass.—Knight v Overman Wheel Co., 54 NE 890, 174 Mass 455

Mo.—Weaver v Mobile & O R Co., 120 S.W.2d 1105, 343 Mo 223—Jones v St Louis-San Francisco Ry Co., 63 SW2d 94, 333 Mo 802

—Boston v Kroger Grocery & Baking Co., 7 SW2d 1006, 320 Mo 408—Wair v. American Car & Foundry Co., App., 300 SW 1048

—Barber v. Missouri Boiler Works Co., App., 297 SW 124—Bennett v Hood, App., 296 SW 1028—Hopkins v. American Car & Foundry Co., App., 295 SW 841, opinion quashed on other grounds State ex rel Hopkins v Daves, 6 SW2d 893, 319 Mo. 733—Courtois v. American Car & Foundry Co., App., 282 SW 484

Mont.—Corpus Juris cited in Ernst v City of Helena, 65 P2d 1167, 1169, 104 Mont 249—Carlson v Northern Pac. Ry Co., 268 P. 549, 82 Mont 559, 58 ALR 1304

SC—Nance v. Swift & Co., 186 SE 389, 180 SC. 470

39 CJ p 1178 note 65.

10. U.S.—Pennsylvania R. Co. v. Chamberlain, NY, 53 SCt 391, 288 US 333, 77 LEd 819.

Inference contradicted by direct testimony

Plaintiff's case, based on inference of collision, from single witness' testimony, and contradicted by direct testimony of other witnesses, was held insufficient for jury's consideration in action against railroad for brakeman's death—Pennsylvania R. Co. v. Chamberlain, supra.

constitutes a defense, as considered supra § 321, direct a verdict for defendant where the evidence shows that the injury was caused by such negligence.¹¹

Concurring negligence. Whether the negligence of the master or vice-principal concurs with the negligence of a fellow servant in occasioning the injury is on conflicting evidence a question of fact for the jury.¹²

§ 536. — Assumption of Risk

a. General principles

b. Risks arising from defective or dangerous appliances or places

c. Risks arising from dangerous operations and methods of work

d. Knowledge and appreciation of danger

e. Continuance at work with knowledge of danger

f. Compliance with negligent order, command

g. Negligence of fellow servant

a. General Principles

In the absence of a statute to the contrary, the question of assumption of risk by an injured servant is for the jury to determine unless the evidence thereon is harmonious and consistent and permits of but one conclusion.

Where, on an issue of assumption of risk by a servant who has sustained injuries, the facts are controverted, or such that different inferences may be drawn therefrom, the question as to assumption of risk should be submitted to the jury under proper instructions from the court.¹³ On the other hand, where the evidence is harmonious and con-

11. Pa.—Larsen v. John T. Bailey Co., 94 A 1057, 249 Pa. 247 39 C.J. p 1178 note 68.

12. Mo.—State ex rel Greer v Cox, 274 S.W. 373.

Okl.—Producers' & Refiners' Corporation v. Castle, 246 P 615, 118 Okl. 42.

39 C.J. p 1178 note 69.

13. U.S.—Northern Pac. R. Co. v. Berven, CCA.Wash., 78 F.2d 687—New York, C & St. L. R. Co. v. Boulden, CCA.Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498—Davis v. Hynde, CCA.Miss., 4 F.2d 656—Kolenko v. Certain-Teed Products Corporation, D.C.N.Y., 20 F.Supp. 920.

Ala.—Gulf, M. & N. R. Co. v. Williams, 119 So. 212, 218 Ala. 481, certiorari dismissed 50 S.Ct. 86, 280 U.S. 526, 74 L.Ed. 593.

Ark.—Haynes Drilling Corporation v. Smith, 143 S.W.2d 27, 200 Ark. 1098—Standard Oil Co. of Louisiana v. Webb, 108 S.W.2d 1086, 194 Ark. 569—E. L. Bruce Co. v. Corbett, 69 S.W.2d 270, 188 Ark. 962—Burden v. Hughes, 55 S.W.2d 502, 186 Ark. 707.

Cal.—Mappin v. Atchison, T. & S. F. Ry. Co., 247 P. 911, 198 Cal. 733, 49 A.L.R. 1330, certiorari denied Atchison, T. & S. F. R. Co. v. Mappin, 47 S.Ct. 239, 278 U.S. 729, 71 L.Ed. 862—King v. Schumacher, 89 P.2d 466, 82 Cal.App.2d 172, certiorari denied Schumacher v. King, 60 S.Ct. 133, 308 U.S. 593, 84 L.Ed. 496—Miller v. Cookson, 265 P. 374, 89 Cal.App. 603.

Fla.—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.

Ga.—Western & A. R. R. v. Lochridge, 152 S.E. 474, 170 Ga. 208, certiorari denied 50 S.Ct. 461, 281 U.S. 762, 74 L.Ed. 1171—Southern Ry.

Co. v. Heaton, 6 S.E.2d 339, 61 Ga. App. 886.

Idaho—Clariss v. Oregon Short Line R. Co., 33 P.2d 348, 54 Idaho 568.

Ill.—Worthey v. Cleveland, C. C. & St. L. Ry. Co., 251 Ill.App. 585—Brundage v. Chicago, B. & Q. R. Co., 245 Ill.App. 440.

Ind.—Baltimore & O. S. W. R. Co. v. Carroll, 163 N.E. 99, 200 Ind. 589, set aside 171 N.E. 933, 202 Ind. 37, reversed on other grounds 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566.

Ky.—Wallis v. Illinois Cent. R. Co., 124 S.W.2d 461, 276 Ky. 436—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410.

Me.—Bubar v. Bernardo, 27 A.2d 593, 139 Me. 82.

Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 285 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434—Manning v. Prouty, 157 N.E. 364, 280 Mass. 399.

Mich.—Kruk v. Minneapolis, St. P. & S. M. Ry. Co., 241 N.W. 162, 257 Mich. 152—Safranski v. Detroit, G. H. & M. Ry. Co., 206 N.W. 485, 233 Mich. 318, modified on other grounds 209 N.W. 588, 233 Mich. 515.

Minn.—Christmann v. Great Northern Ry. Co., 231 N.W. 710, 181 Minn. 97.

Mo.—Gruenewald v. Kaysing Iron Works, App., 5 S.W.2d 709.

Mont.—Cotton v. Osterberg, 293 P. 908, 88 Mont. 383—Boyd v. Great Northern Ry. Co., 274 P. 293, 84 Mont. 84.

N.H.—Morin v. Champlin, 43 A.2d 772, 93 N.H. 422.

N.M.—Maestas v. Alameda Cattle Co., 14 P.2d 733, 36 N.M. 323.

N.C.—Barton v. Atlantic Coast Line R. Co., 193 S.E. 674, 213 N.C. 256,

certiorari denied Atlantic Coast Line R. Co. v. Barton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Maulden v. High Point Bending & Chair Co., 144 S.E. 557, 196 N.C. 122.

Okl.—Pure Transp. Co. v. Newman, 155 P.2d 977, 195 Okl. 173.

Or.—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.

Pa.—Moseley v. Reading Co., 145 A. 293, 295 Pa. 342—Verna v. Lopresti, 42 A.2d 170, 157 Pa.Super. 163.

S.C.—Meyer v. Gulf Refining Co., 184 S.E. 796, 179 S.C. 324—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1—Carter v. A. C. Tuxbury Lumber Co., 174 S.E. 754, 173 S.C. 58—McKinney v. Woodside Cotton Mills, 166 S.E. 499, 167 S.C. 438—Rogers v. Pacific Mills, 165 S.E. 183, 166 S.C. 519—Bagwell v. Liberty Land & Securities Co., 161 S.E. 417, 163 S.C. 138—Dawson v. Gluck Mills, 157 S.E. 143, 159 S.C. 382—Green v. Atlanta & C. A. L. Ry. Co., 148 S.E. 633, 151 S.C. 1, reversed on other grounds 49 S.Ct. 350, 279 U.S. 821, 73 L.Ed. 976—Maddox v. Steel Heddle Mfg. Co., 147 S.E. 327, 149 S.C. 384—Taylor v. Winstonsboro Mills, 148 S.E. 474, 146 S.C. 28—Davis v. Spartan Mills, 137 S.E. 198, 139 S.C. 19—Gowns v. Watts Mill, 133 S.E. 550, 135 S.C. 163.

Tenn.—Sternberg v. Lanier, 8 Tenn. App. 383.

Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Barnaby, Civ.App., 167 S.W.2d 235, error refused—Wichita Falls & S. R. Co. v. Lindley, Civ. App., 143 S.W.2d 428, error dismissed, judgment correct—Williams v. City of Galveston, Civ. App., 297 S.W. 1101—Galveston, H.

sistent, and the circumstances permit of but one conclusion, the question whether plaintiff assumed the risk becomes one of law for the determination of the court, and a submission of such question by the court for the determination of the jury is erroneous¹⁴ Whether an employee assumed a risk created by the negligence of his master is a question for the jury, unless reasonable minds are not likely to differ on the evidence¹⁵ Of course, the question should not be submitted where it is not in the case,¹⁶ as, in some jurisdictions, where the master has been negligent.¹⁷

Violation of rule. The fact that a servant acted in violation of a rule promulgated by the master is not of itself sufficient to charge him with assumption of risk,¹⁸ but it is otherwise where it is clear that the servant fully appreciated the danger which such violation involved.¹⁹

Constitutional and statutory provisions. In some

jurisdictions by express constitutional or statutory provisions the question of assumption of risk by the servant must be submitted to the jury.²⁰ Statutory provisions of this nature are valid.²¹ In some of these jurisdictions it has been held that the provision is merely a restatement of the law in relation to trials by jury as it existed prior to the enactment of the provision,²² so that, where the evidence on assumption of risk is uncontradicted, the court must decide the question as a matter of law.²³ In others it has been held that, while such provisions are not merely declaratory of the common law,²⁴ they do not require a submission of the question of assumption of risk where there is no evidence showing any negligence on the part of the employer.²⁵

Where, for some reason, the provisions are inapplicable,²⁶ as, for instance, where a servant must rely on the common-law cause of action by reason of his failure to give the statutory notice,²⁷ the general rule applies, and the question of assumption

- & S. A. Ry Co v Contois, Civ App, 279 SW 929, affirmed, Com App, 288 SW 154, certiorari denied 47 S Ct, 659, 274 US 747, 71 L Ed 1323
- Vt—Robie v Boston & M R R, 100 A 925, 91 Vt 386
- Va—Knowles v Southern Ry Co, 12 SE 2d 821, 177 Va 88—Norfolk & W Ry Co v Lumpkins, 144 S E, 485, 151 Va 173
- Wash—Peterson v Tacoma-Ashford Transit Co, 17 P 2d 35, 170 Wash 594
- 39 CJ p 1179 note 75.
14. US—Northern Pac. R. Co v Berven, CCA Wash, 73 F 2d 687—New York, C & St L R Co v Boulden, CCA Ind, 63 F 2d 917, certiorari denied 53 S Ct 785, 289 US 753, 77 L Ed 1498—Wagner Electric Corporation v Snowden, CCA Mo, 38 F 2d 599
- Ala—Southern Ry Co v Smith, 187 So 398, 223 Ala 583
- Ark—Haynes Drilling Corporation v Smith, 143 SW 2d 27, 200 Ark 1098
- Ill—Stahl v. Dow, 74 N.E 2d 907, 332 Ill App 233—Lilly v Grand Trunk Western R Co, 37 N.E 2d 888, 312 Ill App 73, reversed on other grounds 68 S Ct 347, 317 US 481, 87 L Ed 411—Huff v Illinois Cent R Co, 279 Ill App 823, affirmed 199 NE 116, 362 Ill 95
- Ky—Nashville, C & St L. Ry Co v Cleaver, 118 S.W 2d 748, 274 Ky 410
- Mo—Braden v Friedrichsen Floor & Wall Tile Co, 15 SW 2d 923, 223 Mo App. 700.
- Mont—Cotton v Osterberg, 292 P 908, 83 Mont 383—Boyd v Great Northern Ry. Co, 274 P. 293, 84 Mont 84.
- NC—Batton v Atlantic Coast Line R Co, 193 SE 674, 212 NC 256, certiorari denied Atlantic Coast Line R Co v Batton, 58 S Ct 750, 303 US 651, 82 L Ed 1113—Gibson v Steele's Mills, 130 SE 617, 190 NC 760
- Pa—Moseley v Reading Co, 145 A. 293, 295 Pa 342—Verna v Lopresti, 42 A 2d 170, 157 Pa Super 163
- SC—Hice v Dobson Lumber Co, 135 SE 742, 180 SC 259—Meyer v Gulf Refining Co, 184 SE 796, 179 SC 324.
- Tex—Missouri-Kansas-Texas R Co of Texas v Barnaby, Civ App, 167 SW 2d 235, error refused
- 39 CJ p 1182 note 76
15. Ark—Long Bell Lumber Co v Tarver, 118 SW 2d 282, 196 Ark 275
- Cal—Foxe v. Southern Pac Co, 9 P 2d 514, 121 Cal App 633
- Iowa—Lang v Hedrick, 295 NW 107, 239 Iowa 766
- Mass—Kavigan v Lonero, 45 NE 2d 823, 312 Mass 603
- Mo—Berry v St Louis-San Francisco Ry Co, 36 SW 2d 988, 324 Mo 775, certiorari denied St Louis-San Francisco Ry Co v Berry, 50 S Ct 464, 281 US 765, 74 L Ed 1173
- SC—Tuttle v Hanckel, 183 SE 484, 179 SC 60
- Vt—Blaisdell v Blake, 11 A 2d 215, 111 Vt 123
- Evidence held insufficient to go to jury**
- As regards assumed risk, switchman's risk in boarding moving car was held as matter of law not created by defendant's negligence, so that question was not for jury—Roach v Los Angeles & S. L R Co, 280 P. 1053, 74 Utah 545, certiorari denied 50 S Ct 162, 230 US 613, 74 L Ed 655
16. US—Carpenter v Baltimore & O. R Co, CCA Ohio, 109 F 2d 375
- 39 CJ p 1182 note 77
17. Miss—J J Newman Lumber Co v Cameron, 174 So 571, 179 Miss 217
- 39 CJ p 1182 note 77 [b]
18. NH—Wilson v George H Taylor & Co, 136 A 260, 82 NH 488.
- 39 CJ p 1193 note 27
19. Ky—Webb v Elkhorn Min Corp, 248 SW 844, 198 Ky 270
20. US—Lang v. U S. Reduction Co, CCA Ind, 110 F 2d 441.
- 39 CJ p 1182 note 78
21. NY—Clark v New York Cent & H R R Co, 84 NE 397, 191 N Y 416
22. US—Lang v U S Reduction Co, CCA Ind, 110 F 2d 441
23. US—Lang v U S Reduction Co, supra.
24. Okl—Dickinson v. Cole, 177 P. 570, 74 Okl 79
25. Ariz—Bowers v. J. D Halstead Lumber Co, 236 P 124, 28 Ariz 122
- Okl—St Louis & S F Ry. Co v Hartless, 241 P 432, 115 Okl 38
- 39 CJ p 1183 note 81
26. NY—Jackson v Greene, 93 N E 1107, 201 N.Y. 76—Matrusciello v. Milliken, 126 N.Y.S 739, 141 App Div. 769, affirmed 101 NE 1110, 207 NY 699.
27. NY—Jackson v. Greene, 93 N E 1107, 201 N.Y. 76—Bushtis v Catskill Cement Co, 112 N.Y.S 294, 128 App Div 780, affirmed 92 NE 1079, 198 N.Y. 548.

of risk becomes one for the court where the evidence is uncontroverted, or is such that reasonable men might not draw different conclusions therefrom²⁸

Federal Employers' Liability Act. Under an amendment to the Federal Employers' Liability Act, as discussed supra § 359, it has been held that no case is to be withdrawn from a jury on any theory of assumption of risk²⁹ In cases arising prior to this amendment the courts held that the question of assumption of risk was for the jury unless the evi-

dence was uncontroverted or could lead to but one inference³⁰

b. Risks Arising from Defective or Dangerous Appliances or Places

The assumption of risk arising from defective or dangerous appliances or places is a question for the jury unless the evidence warrants but one inference.

Whether a servant has assumed the risk arising from defective or dangerous appliances and places is usually a question for the jury,³¹ unless the evidence warrants but a single reasonable inference

28. NY—Courtney v Niagara Falls Hydraulic Power & Mfg Co, 122 NYS 721, 138 AppDiv 383, affirmed 95 NE 1126, 201 NY 584
Okl—Frisco Lumber Co v Thomas, 142 P 310, 42 Okl 670

29. US—Tiller v Atlantic Coast Line R Co, Va, 63 S Ct 444, 318 US 54, 87 L Ed 610, 143 ALR 967

30. US—Owens v Union Pac R Co, Wash, 63 S Ct 1271, 319 US 715, 87 L Ed 1683, conformed to, CCA, 142 F 2d 145, certiorari denied 65 S Ct 57, 223 US 740, 59 L Ed 593—Chesapeake & O Ry Co v Kuhn, Ohio, 52 S Ct 45, 284 US 44, 76 L Ed 157—Northwestern Pac R Co v Fiedler, CCA Cal, 52 F 2d 400—New York, N H & H R Co v Pascucci, CCA Mass, 46 F 2d 969, certiorari denied 51 S Ct 650, 283 US 858, 75 L Ed 1464—Chesapeake & O Ry Co v Winder, CCA Va, 23 F 2d 794

Ill—Lilly v. Grand Trunk Western R Co, 37 NE 2d 888, 312 Ill App 73, reversed on other grounds 63 S Ct 347, 317 US 481, 87 L Ed 411—Werner v. Illinois Cent. R Co, 33 NE 2d 121, 309 Ill App 392, reversed on other grounds 42 NE 2d 82, 379 Ill 559

Mo—Sweeney v Terminal R Ass'n of St Louis, App, 110 S.W. 2d 852
ND—DeMoss v Great Northern Ry Co, 372 NW 506, 67 ND 412
Okl—Missouri-Kansas-Texas R Co v Herron, 55 P 2d 95, 176 Okl 162
Or—Makino v Spokane, P & S Ry Co, 63 P 2d 1082, 155 Or 317.

Evidence held to warrant submission of question to jury

Ill—Powers v Michigan Cent R Co, 268 Ill App 493

Ind—Harris v Chicago & E I Ry Co, 158 NE 636, 87 Ind App 11
NY—Sadowski v Long Island R Co, 55 NE 2d 497, 292 NY 448

Wash—Jorgensen v Oregon-Washington R & Nav Co, 29 P.2d 744, 176 Wash 399, affirmed 33 P 2d 898, 176 Wash 399, certiorari denied Oregon-Washington R & Nav

Co v Jorgenson, 55 S Ct 215, 293 US 620, 79 L Ed 718
39 CJ p 1183 note 86 [a]

Evidence held not to warrant submission of question to jury

US—Chesapeake & O Ry Co v Kuhn, Ohio, 52 S Ct 45, 284 US 44, 76 L Ed 157—Kansas City Southern Ry Co v Williford, CCA La, 65 F 2d 223, certiorari denied Williford v Kansas City Southern Ry Co, 54 S Ct 87, 390 US 663, 78 L Ed 576—Thompson v Tennessee R Co, CCA Tenn, 38 F 2d 18

Okl—Davis v Midland Valley R Co, 153 P 2d 828, 194 Okl 619—Guilf, C & S F Ry Co v Scroggins, 18 P 2d 873, 161 Okl 294
Va—Seaboard Air Line Ry Co v De Loatch, 141 SE 131, 149 Va 338
39 CJ p 1183 note 85 [a]

31. US—Dudley v Scandrett, CCA Wash, 115 F 2d 728—Emch v Pennsylvania R Co, CCA Ohio, 37 F 2d 828—Chesapeake & O Ry Co v Winder, CCA Va, 23 F 2d 794—Spurgeon v Mahony, CCA Cal, 10 F 2d 144

Ga—Copeland v McElroy, 176 SE 67, 49 Ga App 490
Iowa—Bell v Brown, 339 NW 785, 314 Iowa 370

Mo—Gately v St Louis-San Francisco Ry Co, 56 SW 2d 54, 332 Mo 1—Dixon v Frazier-Davis Const Co, 398 SW 827, 318 Mo 50

NJ—Downing v Oxweld Acetylene Co, 169 A 709, 112 NJ Law 25, affirmed 174 A 900, 113 NJ Law 399

NY—Adlam v Konvalinka, 50 NE 2d 535, 291 NY 40

Okl—Luper Transp Co v Campbell, 133 P 2d 197, 192 Okl 45

SC—Link v Seaboard Air Line Ry Co, 156 SE 481, 159 SC 538, certiorari denied Seaboard Air Line Ry Co v Link, 51 S Ct 212, 282 US 900, 75 L Ed 792

Tex—City of Panhandle v. Byrd, 106 SW 2d 660, 130 Tex 96
39 CJ p 1183 note 87

Manner of injury

(1) Brush fire—Keys v Pennsylvania R Co, N.Y., 60 S Ct 385, 308 US 529, 84 L Ed 447

(2) Falling sacks of meal—Temple Cotton Oil Co v Skinner, 2 SW 2d 676, 176 Ark 17

(3) Sliver in eye—Chesapeake & O Ry Co v Holbrook, 271 SW 588, 208 Ky 488

(4) Shipping of ferry plank—Christiansen v Puget Sound Nav. Co, 244 P 569, 138 Wash 239

(5) Other instances
US—Northwestern Pac R Co v. Fiedler, CCA Cal, 52 F 2d 400
Mo—Stegemann v Heil Packing Co., App, 2 SW 2d 169
39 CJ p 1183 note 87 [b]

Particular appliances

(1) Boat—Tucker v. Holly Hill Lumber Co, 20 SE 2d 704, 200 SC 259

(2) Shovel—Bevin v. Oregon-Washington R. & Nav Co, 398 P 204, 136 Or 18, certiorari denied Oregon-Washington R. & Nav Co v Bevin, 52 S Ct 31, 284 US 639, 76 L Ed 543

(3) Other appliances—Smith v McEachin, 57 SW 2d 1043, 186 Ark. 1132—39 CJ p 1183 note 87 [c]

Particular places

(1) Lumber pile
US—Chapman & Dewey Lumber Co v Hanks, CCA Tenn, 106 F 2d 482

Mo—Schulte v Carmichael-Cryder Co, App, 282 SW. 181

(2) Ditch
NH—Maltais v City of Concord, 166 A 267, 86 NH 211.

NC—Darden v Robert G Lassiter & Co, 152 SE 32, 198 NC 427

(3) Roof—Schmidt v Pels, 87 P. 2d 278, 198 Wash. 80.

(4) Overhanging tree—Reader R v Sanders, 90 SW 2d 762, 192 Ark 28

(5) Other places—Chambers v. Chicago, B & Q R Co, 293 NW 388, 138 Neb 490—39 C.J. p 1183 note 87 [d]

from the facts³² More specifically, the rule has been applied where the injuries have resulted from defective or dangerous machinery,³³ hoisting apparatus,³⁴ electrical apparatus,³⁵ or poles,³⁶ floors or stairways,³⁷ platforms, runways, or the like,³⁸ ladders,³⁹ scaffolds or staging,⁴⁰ motor vehicles,⁴¹ or tractors⁴²

Mines and other excavations. The rule has been applied where the injuries resulted from dangerous conditions in an excavation,⁴³ as where the servant

is injured by a fall of rock in a mine or quarry,⁴⁴ or in some other way by reason of dangerous conditions existing therein⁴⁵

Railroads. Whether a servant assumed the risk arising from defective or dangerous appliances or places ordinarily is a question for the jury where the injury resulted from defective or dangerous conditions with respect to railway cars,⁴⁶ locomotives and tenders,⁴⁷ handcars or motorcars,⁴⁸ the defective or dangerous condition of a railway track or

32. US—Davis v. Gray, 8 F.2d 843, certiorari granted Mellon v. Gray, C.C.A.N.H., 46 S.Ct. 349, 270 US 638, 70 L.Ed. 774, reversed on other grounds 47 S.Ct. 585, 274 US 715, 71 L.Ed. 1318
 Ala—Barger v. Oswalt, 194 So. 884, 239 Ala. 289
 Kan—Monteith v. Litchenburger, 58 P.2d 57, 144 Kan. 70
 Me—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.
 Minn—Clark v. Banner Grain Co., 261 N.W. 596, 195 Minn. 44.
 S.C.—McKinney v. Woodside Cotton Mills, 166 S.E. 499, 167 S.C. 438.
 33. US—Somogyi v. Cincinnati, N.O. & T. P. Ry. Co., C.C.A.Ky., 101 F.2d 480—King Cotton Mills v. Wilson, C.C.A.N.C., 61 F.2d 1004
 Ark—Seaman-Dunning Corporation v. Haralson, 29 S.W.2d 1085, 182 Ark. 92—Garrison Co. v. Lawson, 287 S.W. 396, 171 Ark. 1122
 Iowa—Lang v. Hedrick, 295 N.W. 107, 229 Iowa 766
 N.H.—Stanton v. Morrison Mills, 47 A.2d 112, 94 N.H. 92—Kruger v. Hxeter Mfg. Co., 149 A. 872, 84 N.H. 290.
 N.C.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 US 898, 75 L.Ed. 791.
 Okl.—St. Louis-San Francisco Ry. Co. v. Henson, 247 P. 92, 118 Okl. 124
 S.C.—Gowns v. Watts Mill, 133 S.E. 550, 135 S.C. 163
 39 C.J. p. 1184 note 88.
 34. ND—Oster v. Great Northern Ry. Co., 219 N.W. 788, 56 N.D. 391. 39 C.J. p. 1184 note 89.
 35. Ark—Presley v. Actus Coal Co., 289 S.W. 474, 172 Ark. 498
 39 C.J. p. 1185 note 90
 36. N.C.—Burgess v. North Carolina Electrical Power Co., 136 S.E. 711, 193 N.C. 223
 39 C.J. p. 1185 note 91.
 37. US—Jersey City Stockyards Co. v. Grobner, C.C.A.N.J., 5 F.2d 963.
 Ark—Wallace v. Long, 197 S.W.2d 20, 210 Ark. 588—L. C. Burr & Co. v. Greenlee, 102 S.W.2d 77, 193 Ark. 705.
 Ill—Miller v. Russell, 23 N.E.2d 775, 202 Ill. App. 165.
 Kan—Phillips v. Commercial Nat. Bank, 239 P. 984, 119 Kan. 339
 Mass—Novash v. Crompton & Knowles Loom Works, 23 N.E.2d 89, 304 Mass. 244
 S.C.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60
 38. S.C.—Nichols v. Congaree Fertilizer Co., 149 S.E. 162, 151 S.C. 417.
 Wash—Pierce v. Spokane International Ry. Co., 131 P.2d 139, 15 Wash.2d 431
 39 C.J. p. 1185 note 93
 39. US—Missouri Pac. R. Co. v. Spangler, C.C.A.Ark., 140 F.2d 917
 N.H.—Pike v. Gagne, 11 A.3d 809, 90 N.H. 516
 N.Y.—Brancaleone v. Northern Stevedoring Co., 231 N.Y.S. 489, 234 App. Div. 562
 S.C.—Boling v. Woodside Cotton Mills, 171 S.E. 9, 171 S.C. 34—Rogers v. Pacific Mills, 165 S.E. 183, 166 S.C. 519
 39 C.J. p. 1185 note 92
 40. Mo—Weber v. Terminal Railroad Ass'n of St. Louis, App., 20 S.W.2d 601
 39 C.J. p. 1185 note 94
 41. N.H.—Racette v. Sunlight Baking Co., 155 A. 254, 85 N.H. 171
 Tex—Gulf, C. & S. F. Ry. Co. v. Young, Civ. App., 284 S.W. 664
 Wash—Thomas v. Inland Motor Freight, 68 P.2d 603, 190 Wash. 423.
 42. US—Breece-White Mfg. Co. v. Baker, C.C.A.Ark., 106 F.2d 815
 Iowa—Price v. McNeill, 24 N.W.2d 464, 237 Iowa 1120—Bell v. Brown, 239 N.W. 785, 214 Iowa 370—Oestereich v. Leslie, 234 N.W. 229, 212 Iowa 105.
 43. Nev—Zelavin v. Tonopah Belmont Dev. Co., 149 P. 188, 39 Nev. 1
 39 C.J. p. 1186 note 2
 44. Ark—Goodin v. Boyd-Sicard Coal Co., 122 S.W.2d 548, 197 Ark. 175
 Mo—Hoffman v. Peerless White Lime Co., 296 S.W. 764, 317 Mo. 86
 39 C.J. p. 1186 note 3.
 45. Ark—Jewel Coal & Mining Co. v. Whitner, 279 S.W. 1031, 170 Ark. 393
 Ky—Powers v. Gatloff Coal Co., 14 S.W.2d 216, 228 Ky. 5
 Mo—Walthall v. Childress, App., 4 S.W.2d 1100
 39 C.J. p. 1186 note 4.
 46. US—Pitcairn v. Perry, C.C.A. Mo., 122 F.2d 881, certiorari denied 62 S.Ct. 414, 314 US 697, 86 L.Ed. 557—Baltimore & O. R. Co. v. Brandenberger, C.C.A. Ohio, 74 F.2d 593
 Ill—Thompson v. Elgin, J. & E. Ry. Co., 69 N.E.2d 705, 329 Ill. App. 645
 Minn—Ross v. Duluth, Missabe & Iron Range Ry. Co., 281 N.W. 76, 203 Minn. 312—Wolf v. Chicago, M., St. P. & P. R. Co., 230 N.W. 826, 180 Minn. 310
 Va—Norfolk Southern R. Co. v. Lewis, 141 S.E. 228, 149 Va. 318.
 39 C.J. p. 1185 note 95
 47. Ark—Missouri Pac. R. Co. v. Boyd, 106 S.W.2d 165, 194 Ark. 121
 —Chicago, R. I. & P. Ry. Co. v. Matthews, 49 S.W.2d 392, 185 Ark. 724, certiorari denied 53 S.Ct. 88, 287 US 640, 77 L.Ed. 554—Missouri Pac. R. Co. v. Hendrix, 277 S.W. 337, 169 Ark. 825, certiorari denied 46 S.Ct. 351, 270 U.S. 651, 70 L.Ed. 781.
 Mo—Kelso v. St. Louis San Francisco Ry. Co., App., 39 S.W.2d 456.
 Okl—Chicago, R. I. & P. Ry. Co. v. King, 25 P.2d 304, 165 Okl. 169.
 39 C.J. p. 1185 note 96
 48. US—Chicago, M., St. P. & P. R. Co. v. Busby, C.C.A. Mont., 41 F.2d 617.
 Ga—Southern Ry. Co. v. Heaton, 6 S.E.2d 339, 61 Ga. App. 386.
 Mich—Thrall v. Pere Marquette Ry. Co., 229 N.W. 488, 249 Mich. 440.
 Miss—Watkins v. Jackson & E. R. Co., 115 So. 897, 149 Miss. 766
 Tex—Louisiana Ry. & Nav. Co. v. Foster, Civ. App., 5 S.W.2d 183, error dismissed—Chicago, R. I. & G. Ry. Co. v. Bernhard, Civ. App., 275 S.W. 505
 Wis—Nellis v. Chicago, M., St. P. & R. Co., 236 N.W. 688, 205 Wis. 397, certiorari denied Chicago, M., St. P. & P. R. Co. v. Nellis, 52 S.Ct. 398, 285 US 543, 76 L.Ed. 935.
 39 C.J. p. 1185 note 97.

roadbed,⁴⁹ or dangerous obstructions along,⁵⁰ or over,⁵¹ a track, or in or around a railroad yard.⁵²

c. Risks Arising from Dangerous Operations and Methods of Work

Whether a servant assumed the risk of injury resulting from a dangerous operation is a question for the jury where reasonable minds may draw different conclusions from the evidence.

Whether the servant who was injured as a result of a dangerous operation assumed the risk of in-

jury therefrom is a question for the jury, where reasonable minds may draw different conclusions from the evidence.⁵³ However, the question is one of law for the court where the circumstances permit of but one conclusion.⁵⁴ This rule has been applied in a number of cases where the servant was injured in the course of excavating,⁵⁵ blasting,⁵⁶ or founding operations,⁵⁷ or while engaged in the construction or demolition of a building;⁵⁸ or while employed in loading or unloading material,⁵⁹ in moving a heavy object,⁶⁰ or in the operation of rail-

49. Ill.—Maher v. New York, C. & St. L. R. Co., 280 Ill. App. 222

Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Schlueter v. East St. Louis Connecting Ry. Co., 296 S.W. 105, 316 Mo. 1266—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852

N.Y.—Fitzpatrick v. International Ry. Co., 169 N.E. 112, 252 N.Y. 127, 68 A.L.R. 801.

Or.—Adskim v. Oregon-Washington R. & Nav. Co., 276 P. 1094, 129 Or. 169

S.C.—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 181 S.C. 332, 39 C.J. p. 1186 note 98

50. U.S.—New York, C. & St. L. R. Co. v. Boulden, C.C.A. Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498—Youngstown & O. R. R. Co. v. Halverstadt, C.C.A. Ohio, 12 F.2d 995

Cal.—Haskins v. Southern Pac. Co., 39 P.2d 895, 3 Cal. App. 2d 177.

Ill.—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill. App. 292, reversed on other grounds 42 N.E.2d 82, 379 Ill. 559

Miss.—Illinois Cent. R. Co. v. Humphries, 155 So. 421, 170 Miss. 840

N.J.—Reardon v. Delaware, L. & W. R. Co., 147 A. 544, 106 N.J. Law 172, certiorari denied Delaware, L. & W. R. Co. v. Reardon, 50 S.Ct. 339, 281 U.S. 724, 74 L.Ed. 1142

S.C.—Powe v. Atlantic Coast Line R. Co., 159 S.E. 473, 161 S.C. 122, reversed on other grounds Atlantic Coast Line R. Co. v. Powe, 51 S.Ct. 498, 283 U.S. 401, 75 L.Ed. 1142

Tex.—Durham v. Wichita Falls & S. R. Co., Civ. App., 92 S.W.2d 282, reversed on other grounds Wichita Falls & S. R. Co. v. Durham, 120 S.W.2d 803, 132 Tex. 143, 130 A.L.R. 1497

39 C.J. p. 1186 note 99

51. S.C.—Tyner v. Atlantic Coast Line R. Co., 146 S.E. 663, 149 S.C. 89

Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Barnaby, Civ. App., 167 S.W.2d 235, error refused, 39 C.J. p. 1186 note 1

52. Mo.—Creighton v. Missouri Pac. R. Co., 66 S.W.2d 930, 329 Mo. App. 325, certiorari denied Missouri Pac. R. Co. v. Creighton, 55 S.Ct. 70, 293 U.S. 558, 79 L.Ed. 659

N.D.—Olson v. Great Northern Ry. Co., 219 N.W. 209, 56 N.D. 690

53. U.S.—Keys v. Pennsylvania R. Co., N.Y., 60 S.Ct. 385, 308 U.S. 529, 84 L.Ed. 447

Ark.—Hill v. Hardy, 157 S.W.2d 494, 203 Ark. 79

Cal.—Thomas v. Southern Pac. Co., 2 P.2d 544, 116 Cal. App. 126, certiorari denied Southern Pac. Co. v. Thomas, 52 S.Ct. 265, 284 U.S. 689, 76 L.Ed. 582

Ill.—Grosse v. Terminal R. Ass'n of St. Louis, 29 N.E.2d 1018, 307 Ill. App. 414

Miss.—F. W. Woolworth Co. v. Freeman, 11 So.2d 447, 193 Miss. 888

N.H.—Isabelle v. Crystal Laundry, 41 A.2d 241, 93 N.H. 264

S.C.—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759, 39 C.J. p. 1186 note 5

Particular operations

(1) Placing poles for power lines—Arkansas Power & Light Co. v. Dutton, 140 S.W.2d 689, 200 Ark. 761

(2) Cutting stumps—Houston Oil Co. of Texas v. Phillips, 39 S.W.2d 702, 183 Ark. 1004

(3) Replacing machine belt—Ark.—Chapman & Dewey Lumber Co. v. Bryan, 35 S.W.2d 80, 183 Ark. 119

N.C.—Maulden v. High Point Bending & Chair Co., 144 S.E. 557, 186 N.C. 122

S.C.—Taylor v. Winnsboro Mills, 143 S.E. 474, 146 S.C. 28.

(4) Working without goggles—Ethridge v. Atlantic Coast Line R. Co., 183 S.E. 539, 209 N.C. 326

54. Ark.—Sheets v. Planters Gin Co., 82 S.W.2d 855, 190 Ark. 1067

Fla.—Duncan v. Growers Equipment Co., 1 So.2d 458, 146 Fla. 516

Ky.—Louisville & N. R. Co. v. Davis' Adm'r, 51 S.W.2d 942, 245 Ky. 79

Miss.—Everett Hardware Co. v. Shaw, 172 So. 337, 178 Miss. 476,

suggestion of error denied 173 So. 411, 178 Miss. 476

Utah.—Roach v. Los Angeles & S. L. R. Co., 280 P. 1033, 74 Utah 545, certiorari denied 60 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655

55. Minn.—Hanson v. Red Wing Sewer Pipe Co., 142 S.W. 804, 122 Minn. 415

39 C.J. p. 1187 note 6

56. Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560

39 C.J. p. 1187 note 7.

57. Ark.—Athletic Min. & Smelting Co. v. Sharp, 205 S.W. 695, 135 Ark. 330

Ill.—McCulloch v. Illinois Steel Co., 90 N.E. 664, 243 Ill. 464.

58. Iowa.—Collier v. McClintic-Marshall Constr. Co., 138 N.W. 522, 157 Iowa 244

39 C.J. p. 1187 note 9

59. U.S.—New York, C. & St. L. R. Co. v. Slater, C.C.A. Ind., 23 F.2d 777, certiorari denied 48 S.Ct. 601, 277 U.S. 605, 72 L.Ed. 1011.

Ark.—Bryant Truck Line v. Nance, 118 S.W.2d 1047, 196 Ark. 1177—Meyer v. Moore, 115 S.W.2d 1087, 195 Ark. 1114—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1080.

N.M.—Tillman v. Atchison, T. & S. F. Ry. Co., 55 P.2d 34, 40 N.M. 80.

N.Y.—McFadden v. New York, N. H. & H. R. Co., 218 N.Y.S. 315, 218 App. Div. 442.

Okl.—Midland Valley R. Co. v. Watie, 54 P.2d 177, 175 Okl. 402, 39 C.J. p. 1187 note 12.

60. Ark.—James B. Berry's Sons Co. v. Presnall, 35 S.W.2d 83, 183 Ark. 135—Mississippi River Fuel Corporation v. Small, 32 S.W.2d 422, 182 Ark. 1186—Texas Pipe Line Co. v. Johnson, 275 S.W. 329, 169 Ark. 235

N.Y.—Wawrzonek v. Central Hudson Gas & Electric Corporation, 13 N.E.2d 525, 276 N.Y. 412

S.C.—Weatherford v. Fiske-Carter Const. Co., 189 S.E. 224, 182 S.C. 294

Wash.—Roalsen v. Oregon Stevedoring Co., 267 P. 423, 147 Wash. 672, 39 C.J. p. 1187 note 13.

road trains or cars,⁶¹ or in the repair of railroad | tracks or cars or other equipment.⁶²

61. US—Pitcairn v Landis, CCA Ind, 82 F 2d 578—Chesapeake & O Ry Co v Mearns, CCA Va, 64 F 2d 291—Erie R Co v Irons, CC ANJ, 48 F 2d 60, certiorari denied 51 S Ct 649, 253 US 857, 75 L Ed 1463—New York, N H & H R Co v Pascucci, CCA Mass, 46 F 2d 969, certiorari denied 51 S Ct 650, 283 US 858, 75 L Ed 1464
- Ark—Missouri Pac R Co. v. Harville, 46 SW 2d 17, 165 Ark 47, certiorari denied 53 S Ct 13, 287 US 610, 77 L Ed 530—Missouri Pac R Co v Beard, 39 SW 2d 293, 183 Ark 877—Ft Smith, S & R I R Co v Moore, 289 SW 6, 172 Ark 353, reversed on other grounds 48 S Ct 300, 276 US 593, 72 L Ed 723
- Cal—Woodward v Southern Pac Co, 94 P 2d 1028, 35 Cal App 2d 130, certiorari denied Southern Pac Co v Woodward, 60 S Ct 614, 309 US 670, 84 L Ed 1016—McComb v Atchison, T & S F Ry Co, 294 P 81, 110 Cal App 303, certiorari denied Atchison, T & S F Ry Co v McComb, 51 S Ct 486, 283 US 838, 75 L Ed 1449—Dick v Atchison, T & S F Ry Co, 287 P 538, 105 Cal App 363
- Ill—Mitchell v Louisville & N R Co, 35 NE 2d 81, 310 Ill App 563, reversed on other grounds 42 NE 2d 86, 379 Ill 522—Faulkner v. New York Cent R Co, 232 Ill App. 846
- Ind—New York, C & St L R Co v Connaughton, 5 NE 2d 904, 211 Ind 419.
- Kan—Whetstone v Atchison, T & S F Ry Co, 7 P 2d 501, 134 Kan 509—Tschreppel v Missouri-Kansas-Texas R. Co., 5 P 2d 845, 134 Kan 251, certiorari denied Missouri-Kansas-Texas R Co v Tschreppel, 52 S Ct 501, 286 US 549, 76 L Ed 1285—Wiggins v Missouri-Kansas-Texas R Co, 276 P. 63, 128 Kan 32
- Ky—Patrick's Adm'x v Louisville & N R Co, 132 SW 2d 758, 280 Ky 181—Chesapeake & O Ry Co v Howard's Adm'x, 51 SW 2d 461, 244 Ky 838, certiorari denied Chesapeake & O Ry Co v Howard, 53 S Ct 315, 287 US 670, 77 L Ed 578—Chesapeake & O Ry Co v Dixon, 380 SW. 93, 212 Ky 738—Glacken v. Cincinnati, N O & T P Ry Co, 272 SW 23, 209 Ky. 28
- Minn—Westover v Chicago, M, St P & P Ry Co, 266 NW 741, 197 Minn 194, opinion supplemented on other grounds 287 N.W. 427, 197 Minn 194—Moquin v. Minneapolis, St P & S S M Ry Co, 281 NW 829, 181 Minn 56, reversed on other grounds 51 S Ct 501, 283 US 530, 75 L Ed 1243, followed in 281 NW. 930, 181 Minn 626
- Mo—Mooney v. Terminal R. Ass'n of St Louis, 176 SW 2d 605, 353 Mo 245—Smith v Thompson, 161 SW 2d 232, 349 Mo 396—Evans v Atchison, T & S F Ry Co 131 SW 2d 604, 345 Mo 147—McNatt v. Wabash Ry Co, 108 SW 2d 33, 341 Mo 516—Hough v Chicago, R I & P Ry Co, 100 SW 2d 499, 339 Mo 1169—Good v Missouri-Kansas-Texas R Co, 97 SW 2d 612, 339 Mo 330, certiorari denied Missouri-Kansas-Texas R Co v Good, 57 S Ct 231, 299 US 605, 81 L Ed 446—Lepchenski v Mobile & O R Co, 59 SW 2d 610, 332 Mo 194—Brock v Mobile & O R Co, 51 SW 2d 100, 330 Mo 918, certiorari denied Mobile & O R Co v Brock, 53 S Ct 87, 287 US 638, 77 L Ed 552—Moran v Atchison, T & S F Ry Co, 48 SW 2d 881, 330 Mo 378, certiorari denied Atchison, T & S F R Co v Moran, 53 S Ct 21, 287 US 621, 77 L Ed 539—Kamer v Missouri-Kansas-Texas R Co, 83 SW 2d 1075, 326 Mo 792, certiorari denied Missouri-Kansas-Texas R Co v Kamer, 51 S Ct 216, 282 US 903, 75 L Ed 795—Jenkins v Wabash Ry Co, 107 SW 2d 204, 233 Mo App 438, certiorari denied Wabash R Co v Jenkins, 58 S Ct 139, 302 US 737, 82 L Ed 570
- N.Y—Salisbury v New York Cent R Co, 223 NYS 38, 220 App Div. 491
- NC—Kelly v Raleigh Granite Co, 156 SE 517, 200 NC 326
- Okl—Kansas, O & G Ry Co v Dullon, 185 P 2d 498, 191 Okl 671—St Louis-San Francisco Ry Co v Stuart, 47 P 2d 177, 173 Okl 221—St Louis-San Francisco Ry Co v Landers, 243 P 959, 116 Okl 142, certiorari denied 47 S Ct 92, 273 US 695, 71 L Ed 844
- Pa—Krall v. Pennsylvania R Co, 135 A. 303, 287 Pa. 332
- SC—Scott v International Agr Corporation, 184 SE. 133, 180 SC 1—Primus v Atlantic Coast Line R Co, 171 SE 1, 171 SC 199, certiorari denied Atlantic Coast Line R Co v Primus, 54 S Ct 56, 290 US 639, 73 L Ed 555—Neal v. Southern Ry, Carolina Division, 160 SE 837, 162 SC. 288, certiorari denied Southern Ry-Carolina Division v Neal, 53 S Ct 9, 284 US. 621, 76 L Ed 530—Driggers v Atlantic Coast Line R Co, 148 S E 889, 151 SC 164, reversed on other grounds Atlantic Coast Line R Co v Driggers, 49 S Ct 490, 279 US. 787, 78 L Ed. 957, certiorari granted 49 S Ct 17, 278 US 587, 73 L Ed 521
- Tenn—Kurn v Weaver, 161 SW 2d 1005, 35 Tenn App 556.
- Tex—Missouri Pac R Co v Jones, Com App, 24 SW 2d 32—Fort Worth & R G Ry Co v Pickens, Civ App, 153 SW 2d 252, reversed on other grounds 162 SW 2d 691, 139 Tex 181—International-Great Northern R R v Lowry, Civ App, 98 SW 2d 383, reversed on other grounds International-Great Northern R Co v Lowry, 121 S W 2d 585, 132 Tex 272—International-Great Northern R Co v Hawthorne, Civ App, 90 SW 2d 895, affirmed 116 SW 2d 1056, 131 Tex 623, certiorari denied 59 S Ct 487, 306 US 639, 83 L Ed 1040—Southern Pac Co v McKinley, Civ App, 80 SW 2d 1009, error dismissed, certiorari denied 56 S Ct 154, 296 US 631, 80 L Ed 448—Texas & N O R Co v Bell, Civ App, 28 SW 2d 853, error refused—Texas & P Ry Co v Baldwin, Civ App, 25 SW 2d 969, affirmed, Com App, 44 SW 2d 909, certiorari denied 53 S Ct 11, 287 US 606, 77 L Ed 527
- Utah—Morgan v Ogden Union Ry & Depot Co, 294 P. 541, 77 Utah 325. Va.—Davis v Ellis' Adm'r, 131 SE. 815, 146 Va 366
- W Va—Thomas v Chesapeake & O Ry Co, 162 SE. 169, 111 W.Va 389, certiorari denied Chesapeake & O Ry Co v Thomas, 52 S Ct 645, 286 US 564, 76 L Ed 1296—Kirk v Virginian Ry Co, 142 SE. 434, 105 W Va 335, certiorari dismissed 49 S Ct 185, 278 US 582, 73 L Ed 518.
- 89 CJ p 1187 note 10.
- Evidence held insufficient for jury
- Tenn—Cincinnati N O & T P Ry Co v Steelman, 7 Tenn App 657
- Utah—Roach v Los Angeles & S L R Co, 280 P 1053, 74 Utah 546, certiorari denied 50 S Ct. 162, 380 U.S. 613, 74 L Ed. 655.
62. US—Bangor & A. R Co. v. Jones, CCA Mo, 36 F 2d 886
- Ga—Southern Ry Co v Woodward, 146 SE 561, 39 Ga App 173
- Mass—Pagano v Worcester Consol. St. Ry Co., 163 N.E. 764, 265 Mass. 89
- Mich—Kruk v. Minneapolis, St P & S S M Ry. Co, 241 NW 162, 257 Mich. 152
- Minn—Larson v Great Northern Ry Co, 203 N.W. 57, 162 Minn 419
- Miss—Pearl River Valley R. Co v. Moody, 171 So 769, 178 Miss 1
- Mo—Perry v Missouri-Kansas-Texas R Co, 104 SW 2d 332, 340 Mo 1053—Doyle v St Louis Merchants' Bridge Terminal Ry. Co, 81 SW 2d 1010, 326 Mo 425, certiorari denied St Louis Merchants' Bridge Terminal R R v. Doyle, 51 S Ct 345, 283 US. 820, 75 L Ed 1435—O'Donnell v Baltimore & O R Co, 26 SW 2d 929, 324 Mo 1097
- NH—Ingalls v Maine Cent R R, 143 A 695, 83 NH 397
- NC—Loflin v. High Point, T. & D

d. Knowledge and Appreciation of Danger

Whether the servant knew and appreciated, or ought to have known, the danger so as to be chargeable with assumption of the risk is a question for the jury unless the evidence warrants but a single inference.

Whether the servant knew and appreciated the danger, or, in the exercise of ordinary care, ought to have known of it so as to be chargeable with the

assumption of the risk thereof, is a question for the jury,⁶³ unless the evidence warrants but a single reasonable inference as to such fact,⁶⁴ as where the uncontroverted evidence shows the danger apparent to an ordinarily prudent person and the rendition of services thereafter without complaint.⁶⁵ On conflicting evidence it is for the jury to determine whether the danger was obvious or latent,⁶⁶ and

R Co., 194 SE 104, 212 NC 595—Pyatt v Southern Ry Co., 154 SE 447, 199 NC 397

Tenn—Nashville, C & St L Ry v Hines, 94 SW2d 397, 20 Tenn App 1

Tex—Wichita Falls & S R Co v. Lindley, Civ App., 143 SW2d 428, error dismissed, judgment correct—Texas & Pac Ry Co v Kelly, Civ App., 85 SW2d 749, reversed on other grounds, Com App., 51 SW2d 299, certiorari denied Kelly v Texas & P R Co., 53 S Ct 90, 287 US 644, 71 L Ed 557

Wash—Imbler v Spokane, P & S Ry Co., 2 P2d 895, 184 Wash 299, 39 CJ p 1187 note 11

63. US—Owens v Union Pac R Co., Wash., 68 S Ct 1271, 319 US 715, 87 L Ed 1683, conformed to, CCA., 142 F2d 145, certiorari denied 65 S Ct 57, 323 US 740, 89 L Ed 693—Baltimore & O R Co v Brandenberger, CCA Ohio, 74 F2d 593—Natural Gas & Fuel Corporation v Sallee, CCA Ark., 30 F. 2d 903

Ark—Federal Compress & Warehouse Co v. Harmon, 118 SW2d 239, 196 Ark 417—Missouri Pac R Co v Hunnicutt, 104 SW2d 1070, 193 Ark 1128—Western Coal & Mining Co v Dana, 272 SW. 667, 168 Ark 961

Fla—Gordon v Gandy Bridge Co., 7 So 2d 350, 150 Fla. 28

Ga—Middlebrooks v Atlanta Metallic Casket Co., 11 SE2d 682, 63 Ga App 620—Atlantic Coast Line R Co v Frierson, 4 SE2d 131, 60 Ga App 465—Simowitz v Register, 3 SE2d 281, 60 Ga App 180—Gray v Garrison, 176 SE 412, 49 Ga App 472.

Ill—Carpenter v. Grand Trunk W R Co., 268 Ill App 462

Ind—Baltimore & O S W R Co v Carroll, 163 NE 99, 200 Ind 589, set aside on other grounds 171 NE 923, 202 Ind 27, reversed on other grounds 50 S Ct 182, 280 US 491, 74 L Ed 566

Me—Hatch v Portland Terminal Co., 131 A 5, 125 Me 96

Mass—Godon v McClure, 75 NE2d 656—Reidy v Crompton & Knowles Loom Works, 60 NE2d 559, 318 Mass 135—Ryan v Gray, 55 NE 2d 700, 316 Mass 259.

Mo—Clift v. St. Louis-San Francisco Ry Co., 9 SW2d 972, 320 Mo. 791—Kidd v. Chicago, R I &

P Ry Co., 274 SW 1079, 310 Mo 1, certiorari denied Chicago, R I & P Ry Co v Kidd, 46 S Ct 119, 269 US 582, 70 L Ed 424

NH—Lamarche v Lamarche, 182 A 549, 87 NH 454—Musgrave v Great Falls Mfg Co., 169 A 533, 86 NH 375

Ohio—New York, C & St. L R Co v Biermacher, 151 NE 665, 114 Ohio St 654

Okl—Britt v Doty, 161 P2d 521, 195 Okl 620—Kansas, O & G Ry Co v Dillon, 135 P2d 498, 191 Okl 671—Knox v Schomaker, 139 P2d 841, 191 Okl 337

Or—Johnson v Oregon-Washington R & Nav Co., 268 P 995, 128 Or 85

Pa—Verna v Lopresti, 42 A2d 170, 157 Pa Super 163

SC—Stogner v Great Atlantic & Pacific Tea Co., 192 SE 406, 184 SC 406

Tex—Chicago, R I & G Ry Co v Frederick, Civ App., 74 SW2d 275, error refused, certiorari denied 55 S Ct 915, 295 US 753, 79 L Ed 1701—Missouri Pac R Co v Steen, Civ App., 288 SW 532, certiorari denied 47 S Ct 765, 274 US 753, 71 L Ed 1338

Wash—McPherson v Twin Harbor Stevedoring & Tug Co., 245 P 747, 139 Wash 61.

W Va—Kirk v Virginian Ry Co., 142 SE 434, 105 W Va 335, certiorari dismissed 49 S Ct 185, 278 US 582, 73 L Ed 518

Wyo—Chicago & N W Ry Co v Ott, 237 P 288, 33 Wyo. 300, rehearing denied 238 P 287, 33 Wyo 200, certiorari denied 46 S Ct 301, 269 US 585, 70 L Ed 425

39 CJ p 1188 note 14

Both knowledge and appreciation essential

Proof that the employee knew of the condition is not sufficient alone to charge him, as a matter of law, with assuming the risk of injury, and it must appear further that the danger was or should have been appreciated—Lander v Shannon, 368 P 145, 148 Wash 93—39 CJ p 1188 note 14 [a]

64. US—Delaware, L & W R Co v Koske, N J., 49 S Ct 202, 279 US 7, 73 L Ed 578—Keys v Pennsylvania R Co., CCANY, 104 F. 2d 683, reversed on other grounds 60 S Ct 385, 308 US 529, 84 L Ed 447—Baltimore & O. R. Co. v

Brandenberger, CCA Ohio, 74 F2d 593—Kansas City Southern Ry Co v Williford, CCA La., 65 F2d 223, certiorari denied Williford v Kansas City Southern Ry Co., 64 S Ct 87, 290 US 666, 73 L Ed 576

Ark—Federal Compress & Warehouse Co v Harmon, 118 SW2d 239, 196 Ark 417—Southern Lumber Co v Green, 53 SW2d 229, 186 Ark 309

Fla—Gordon v Gandy Bridge Co., 7 So 2d 350, 150 Fla 28

Ga—Parckerson v Brooks, 146 SE 916, 39 Ga App 303

Iowa—Laws v Richards, 231 NW 321, 210 Iowa 808—Loving v Atlantic Southern R Co., 168 NW 910, 184 Iowa 435

Pa—McCully v Monongahela Ry Co., 137 A. 623, 289 Pa 393, certiorari denied 48 S Ct 37, 275 US 542, 72 L Ed 416

SC—Veronee v Charleston Consol Ry & Lighting Co., 149 SE 753, 152 SC 178

Vt—Landing v Town of Fairlee, 22 A2d 179, 113 Vt 127.

Va—Lloyd v Norfolk & W Ry Co., 145 SE 372, 151 Va 409

39 CJ p 1188 note 15

Evidence held to show assumption of risk as matter of law

DC—Payne v McDonald & Langstroth Co., 26 F2d 527, 68 App DC 155

Ky—Bell v Louisville & N R Co., 287 SW 219, 216 Ky 42.

39 CJ p 1188 note 15 [a]

Evidence held insufficient to warrant submission of issue to jury

Iowa—Johnson v Kinney, 7 NW2d 188, 232 Iowa 1016, 144 ALR 997

39 CJ p 1188 note 15 [b]

65. Ark—Wisconsin & Arkansas Lumber Co v Otta, 10 SW2d 364, 178 Ark 283

Ind—Baltimore & O S. W R Co v Carroll, 163 NE 99, 200 Ind 589, set aside on other grounds 171 NE 923, 202 Ind 27, reversed on other grounds 50 S Ct 182, 280 US 491, 74 L Ed 566

66. US—Yates v. Atlantic Ice & Coal Co., CCA Fla., 76 F2d 86—Quannah, A. & P Ry. Co v Gray, CCA Tex., 63 F2d 410, certiorari denied 54 S Ct 54, 290 US 636, 78 L Ed 553—United Iron Works v Woolsey, CCA Ark., 39 F2d 385—Davis v Crane, CCA Mo., 12 F. 2d 355.

whether the servant had sufficient opportunity to discover it.⁶⁷

Youth, inexperience, or mental deficiency It is ordinarily for the jury to determine whether the

servant, in view of his youth,⁶⁸ inexperience,⁶⁹ or mental deficiency,⁷⁰ may be said to have fully appreciated the hazard of the employment, although the mere fact of the servant's immaturity will not prevent the court from inferring assumption of risk,

Ark—Horton & Coleman v Houser, 139 S.W.2d 53, 200 Ark 291—Norton & Wheeler Stave Co v Wright, 106 S.W.2d 178, 194 Ark 115—Missouri Pac R Co v Hunnicutt, 104 S.W.2d 1070, 193 Ark 1128—Booth & Flynn v Price, 39 S.W.2d 717, 183 Ark 975, 76 A.L.R. 957—Seaman-Dunning Corporation v Haralson, 29 S.W.2d 1085, 183 Ark 93—Ault v McGaughey, 293 S.W. 359, 173 Ark 322—McDonald v Heilbron-Palmer Tank Line Co, 393 S.W. 115, 173 Ark 77—W H Moore Lumber Co v Ragland, 379 S.W. 362, 170 Ark 1194—Western Coal & Mining Co v Burns, 373 S.W. 357, 168 Ark 976

Fla—Gordon v Gandy Bridge Co, 7 So 2d 350, 150 Fla. 28

Ind.—Baltimore & O S W R Co v Carroll, 163 N.E. 99, 200 Ind 589, set aside on other grounds 171 N.E. 923, 202 Ind 37, reversed on other grounds 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566

Kan—Fishburn v International Harvester Co, 138 P.2d 471, 157 Kan 43

Mass—Ryan v Gray, 55 N.E.3d 700, 318 Mass 259—Wood v National Theatre Co, 42 N.E.3d 536, 311 Mass 550—Keough v E M Loew's, 21 N.E.3d 971, 303 Mass 364

Minn—Reams v Chicago, M, St P & P R Co., 231 NW 236, 180 Minn 584

Mo—Smith v Thompson, 161 S.W. 2d 232, 349 Mo. 396—Pritchard v Thompson, 156 S.W.2d 652, 348 Mo 882—Barrett v St Louis Southwestern Ry Co, 143 S.W.2d 60—Moran v Atchison, T & S F Ry Co, 48 S.W.2d 881, 380 Mo 278, certiorari denied Atchison, T & S F R Co v. Moran, 53 S.Ct. 21, 287 US 621, 77 L.Ed. 589—Westover v Wabash Ry. Co, 6 S.W.2d 848, certiorari denied Wabash Ry Co v Westover, 49 S.Ct. 31, 278 US 632, 73 L.Ed. 550—Schlueter v East St Louis Connecting Ry. Co, 298 S.W. 105, 316 Mo 1366—Kidd v Chicago, R I & P Ry Co, 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I & P. Ry Co v. Kidd, 46 S.Ct. 119, 269 U.S. 522, 70 L.Ed. 424—Sweeney v Terminal R Ass'n of St. Louis, App, 110 S.W.2d 852—Cornelius v Terminal R. Ass'n of St. Louis, App., 284 S.W. 813.

N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425.

N.J.—Koske v. Delaware, L & W. R. Co, 142 A. 43, 104 N.J.Law 627,

affirmed 49 S.Ct. 202, 279 US 7, 73 L.Ed. 578

N.C.—Mills v Marion Mfg Co, 151 S.E. 92, 198 NC 145

Or—Adskim v Oregon-Washington R & Nav Co, 276 P. 1094, 129 Or 169

Pa.—Moseley v Reading Co, 145 A. 293, 295 Pa. 342

Tex.—Missouri-Kansas-Texas R Co of Texas v Barnaby, Civ App, 167 S.W.2d 235, error refused—Texas & N O R Co v Warden, Civ App, 49 S.W.2d 486, reversed on other grounds 78 S.W.2d 164, 125 Tex 193

Wash—McGinn v North Coast Stevedoring Co, 270 P. 113, 149 Wash 1—Lander v Shannon, 268 P 145, 148 Wash 93

39 C.J. p 1189 note 16.

Particular dangers within rule

(1) Risk from falling objects in building being repaired was held not so obvious as to require instructed verdict on assumption of risk—James Baird Co v Boyd, C.C.A.N.C., 41 F.2d 578.

(2) Whether danger from claw bar falling off railroad motorcar was so apparent as to charge injured employee with knowledge was held jury question—Clift v St Louis-San Francisco Ry. Co, 9 S.W.2d 972, 320 Mo. 791

(3) Question whether danger from driving truck with badly bent radius rod over rough road was so obvious that prudent man would have declined to use truck, was held for jury—Holeman v Pensacola Shipbuilding Co, 134 S.E. 647, 192 NC 286

67 U.S.—Power Mfg Co v Saunders, 276 S.W. 599, 169 Ark 748, reversed on other grounds 47 S.Ct. 678, 274 US 490, 71 L.Ed. 1165 39 C.J. p 1190 note 17

Failure to inspect place of work

Evidence was held not to show assumption of risk as matter of law by failure to inspect place of work—Dixon v Frazier-Davis Const Co, 298 S.W. 827, 318 Mo 50

68. U.S.—Zeidman v Gutterson & Gould, C.C.A.N.H., 139 F.2d 160

Ark—Wisconsin & Arkansas Lumber Co v Otts, 10 S.W.2d 364, 178 Ark 283—Fair Oaks Stave Co v Cross, 9 S.W.2d 580, 177 Ark 1146 Mich—La Pointe v Chevette, 250 N.W. 272, 284 Mich 482

Minn—Jenkins v Jenkins, 19 N.W. 2d 389, 220 Minn 216

Mont—Shaw v Kendall, 136 P.2d 748, 114 Mont 328.

N.H.—Tremblay v. J Rudnick & Sons, 13 A.2d 153, 91 N.H. 24—Bilodeau v Gale Bros, 140 A. 172, 83 N.H. 186.

Or—Hamilton v Redeman, 97 P.2d 194, 163 Or 324

Pa.—Royer v Tinkler, 16 Pa.Super 457—Sheetram v Trexler Stave & Lumber Co, 13 Pa.Super 219

S.C.—Maddox v Steel Heddle Mfg Co, 147 S.E. 327, 149 S.C. 284—Dawson v Gluck Mills, 157 S.E. 143, 159 S.C. 382

Tex.—Dougherty v Robb, Civ App, 5 S.W.2d 582, error dismissed 39 C.J. p 1190 note 18

69. U.S.—Zeidman v Gutterson & Gould, C.C.A.N.H., 139 F.2d 160—Philyaw v Arundel Corporation, C.C.A.S.C., 51 F.2d 183

Ark—Southern Lumber Co v Green, 63 S.W.2d 229, 186 Ark 209—Gaster v Hicks, 25 S.W.2d 760, 181 Ark 299—Ward Furniture Mfg Co v Pickle, 295 S.W. 727, 174 Ark 463

Fla.—Tampa Shipbuilding & Engineering Co v Thomas, 179 So 705, 131 Fla 650

Mass—Wilson v Daniels, 158 N.E. 561, 257 Mass 234

Mich—Britton v Wabash Ry Co, 203 NW 484, 230 Mich 638, certiorari denied Wabash Ry Co v. Britton, 46 S.Ct. 102, 269 US 575, 70 L.Ed. 420

Minn—Jenkins v. Jenkins, 19 N.W. 2d 389, 220 Minn 216

Mo—Marsanick v Luechtefeld, App, 157 S.W.2d 537

Mont—Boyd v Great Northern Ry. Co, 274 P. 293, 84 Mont. 84

N.H.—Stone v Howe, 32 A.2d 484, 92 N.H. 425—Norton v Atlantic Gypsum Products Co, 143 A. 469, 83 N.H. 407

N.Y.—Healy v. Erie R Co, 180 N.E. 888, 359 N.Y. 40, certiorari denied Erie R Co v Healy, 53 S.Ct. 81, 287 US 628, 77 L.Ed. 545

Okla—Chicago, R I & P. Ry Co v. Hurst, 263 P. 113, 129 Okl 1

Pa.—Verna v Lopresti, 42 A.2d 170, 157 Pa.Super 163.

Tex.—Beaumont, S L & W. Ry Co v Schmidt, Civ App, 45 S.W.2d 734, affirmed 72 S.W.2d 899, 123 Tex 580.

Va.—Roberts v. Southern Ry Co, 145 S.E. 255, 151 Va. 615.

39 C.J. p 1190 note 19

70. N.H.—Dmedne v. New Market Mfg Co, 129 A. 271, 81 N.H. 516

where such inference must be clear to all reasonable persons.⁷¹

Particular dangers. It is usually for the jury to determine whether the servant knew and appreciated the danger of particular defective or dangerous appliances or places,⁷² such as machinery,⁷³ floors,

platforms, and stairways,⁷⁴ locomotives, trains, cars, and equipment relating thereto,⁷⁵ and railroad yards and rights of way,⁷⁶ or whether the employee knew and appreciated the danger of particular operations and methods of work⁷⁷ used in the operation of trains,⁷⁸ or of particular methods of work used

71. Ark—Fair Oaks Stave Co v Cross, 9 SW 2d 580, 177 Ark 1146
Tex—Clayton v Chicago, R I & G Ry Co, Civ App, 129 SW 2d 693, affirmed 154 SW 2d 453, 137 Tex 441
39 C J p 1191 note 20.

72. Ark—Federal Compress & Warehouse Co v Harmon, 118 S W 2d 239, 196 Ark 417
Cal—Mappin v Atchison, T & S F. Ry Co, 247 P. 911, 198 Cal 783, 49 A L R 1380, certiorari denied Atchison, T & S F R Co v. Mappin, 47 S Ct 239, 273 US 729, 71 L Ed 862

Ga—Middlebrooks v. Atlanta Metallic Casket Co, 11 SE 2d 682, 63 Ga App 620

Kan—Tartar v Missouri, K & T R Co, 241 P 246, 119 Kan 738, certiorari denied Missouri-Kansas-Texas R Co v Tartar, 46 S Ct 355, 270 US 659, 70 L Ed 785

Mass—Ryan v Gray, 55 NE 2d 700, 316 Mass 259.

Minn—Natalino v St Paul Bridge & Terminal Ry Co, 251 NW 9, 190 Minn 118—Liberty Mut. Ins Co v Great Northern Ry Co, 219 NW 755, 174 Minn 466

Mo—Cunningham v Doe Run Lead Co, 285 SW 757, 220 Mo App 38
NH—Stone v Howe, 32 A 2d 484, 92 NH 435—Perreault v Allen Oil Co, 179 A 365, 87 NH 306—

Turner v Globe Automatic Sprinkler Co, 128 A 529, 81 NH 443
NY—Brown v Friedman, 383 NYS 269, 246 App Div 653

SC—Green v Atlanta & C A L Ry Co, 148 SE 633, 151 SC 1, reversed on other grounds 49 S Ct 350, 279 US 821, 73 L Ed. 976

Tex—Pure Oil Co v Pope, Civ App., 75 SW 2d 175, reversed without opinion—Texarkana & Ft Smith Ry Co v Smith, Civ App, 270 SW 867

Va—Norfolk & W. Ry Co v Lumpkins, 144 SE 485, 151 Va. 173

Particular appliance or place

(1) High tension wires—City of Timpon v Powers, Tex. Civ App, 119 SW 2d 145.

(2) Line poles—Glidden v Public Service Co of New Hampshire, 183 A 865, 88 NH 4

(3) Mines—Mercury Mining Co v Chambers, 102 SW 2d 543, 193 Ark 771.

(4) Motor vehicles

Ark—Producers Gravel & Sand Co

v Jones, 126 SW 2d 99, 197 Ark 767

NH—Bill v New England Cities Ice Co, 10 A 2d 662, 90 NH 453
Wash—Peterson v Tacoma-Ashford Transit Co, 17 P 2d 35, 170 Wash 594

(5) Plow—Fox v Beall, 41 NE 2d 126, 314 Ill App 144

73. US—Chicago Mill & Lumber Co v Jett, CCA Ark, 32 F 2d 976—Wisconsin & Arkansas Lumber Co v Ward, CCA Ark, 32 F 2d 974.

Ark—W H Moore Lumber Co v Ragland, 279 SW 382, 170 Ark 1194

Mo—Oglesby v St Louis-San Francisco Ry Co, 1 SW 2d 172, 318 Mo 79, certiorari denied St Louis-San Francisco Ry Co v Oglesby, 48 S Ct 434, 277 US 587, 72 L Ed 1001.

NH—Blais v Flanders Hardware Co, 43 A 2d 382, 93 NH 370—Connell v State Oil Co, 40 A 2d 743, 93 NH 244—Upton v Conway Lumber Co, 128 A. 802, 81 NH 489

SC—Brazeale v Piedmont Mfg Co, 193 SE 39, 184 SC 471—Turbeville v Avery Lumber Co, 152 SE 439, 155 SC 202

74. Ark—Bruner Ivory Handle Co v West, 86 SW 2d 919, 191 Ark 479

NH—Jacques v. Cote, 14 A 2d 649, 91 NH 107

Wash—Kelly v The Vogue, 153 P 2d 277, 21 Wash 2d 785

75. Ill—Benson v Chicago, R I & P Ry Co, 267 Ill App. 11, affirmed Chicago, R I & P Ry Co v Benson, 185 NE 244, 352 Ill 195, certiorari denied 54 S Ct 53, 290 US 636, 78 L Ed 553

Ind—Chicago, I & L Ry Co v Younger, 175 NE 290, 93 Ind App 276.

Kan—Crouch v Missouri Pac R Co, 259 P 799, 124 Kan 305

Minn—Jackson v. Chicago Great Western Ry. Co., 205 NW 689, 165 Minn 58

Mo—Harlan v Wabash Ry Co, 73 SW 2d 749, 335 Mo 414

76. US—Blackley v Powell, C.C. A NC, 68 F 2d 457—Birmingham Belt R Co v Dunlap, CCA Ala., 58 F 2d 951.

Mo—Berry v Baltimore & O R Co, 43 SW 2d 782, reversed on other grounds 52 S Ct. 510, 286 US 372, 78 L Ed. 1098—Doyle v St Louis

Merchants' Bridge Terminal Ry Co, 31 SW 2d 1010, 326 Mo 425, certiorari denied St Louis Merchants' Bridge Terminal R R v. Doyle, 51 S Ct 345, 283 US 820, 75 L Ed 1435

Okl—Missouri-Kansas-Texas R. Co v Herron, 55 P 2d 95, 176 Okl. 162

Or—Adakim v. Oregon-Washington R & Nav Co, 276 P. 1094, 129 Or. 169

Va—Roberts v. Southern Ry Co, 144 SE 883, 151 Va 815, rehearing denied 145 SE 255, 151 Va 815

Obstructions along or over track
US—Reading Co v. Geary, CCA Md., 47 F 2d 142, 79 A L R 226, certiorari denied 51 S Ct. 492, 383 US 844, 75 L Ed. 1454—Davis v. Crane, CCA Mo., 12 F 2d 355—Central of Georgia Ry. Co v Davis, CCA Ala., 7 F 2d 269, certiorari denied 46 S Ct. 104, 269 US. 578, 70 L Ed 422.

Ark—E L Bruce Co v Leake, 3 S. W 2d 988, 176 Ark 705

Ind—New York, C. & St L R Co v Peele, 164 NE 705, 88 Ind App 532, certiorari denied 49 S Ct 263, 279 US 842, 73 L Ed 988

Tex—Durham v Wichita Falls & S. R Co, Civ App, 92 SW 2d 382, reversed on other grounds Wichita Falls & S R Co v. Durham, 120 SW 2d 803, 132 Tex 143, 120 A L R 1497—Houston & T C R Co v Robins, Civ App, 23 SW 2d 461, error refused

77. Tenn—Nashville Bridge Co v. Hudgins, 137 SW.2d 327, 23 Tenn App 677

Particular operations and methods

(1) Operation of elevator with door open—Bridges v Great Falls Mfg Co, 156 A. 697, 85 NH 220

(2) Painting in airtight compartment—Nashville Bridge Co. v Hudgins, 137 SW.2d 327, 23 Tenn App 677.

78. US—Southern Ry. Co. v. Hobbs, CCA NC, 35 F 2d 298

Ark—Missouri Pac R Co v Pipkin, 75 SW 2d 801, 189 Ark 390, certiorari denied 55 S Ct 637, 294 US 738, 79 L Ed. 1358

Mo—Smith v Thompson, 161 SW 2d 232, 349 Mo. 396—Finley v St Louis-San Francisco Ry. Co, 160 SW 2d 735, 349 Mo 330

N.C—Candler v Southern Ry. Co, 149 SE 393, 197 N C 399

Tex—Chicago, R I & G Ry Co. v. Frederick, Civ App, 74 S.W.2d 275,

in the repair of tracks or trains,⁷⁹ or in moving, loading, or unloading heavy objects⁸⁰

e. Continuance at Work with Knowledge of Danger

Whether continuance at work after knowledge of the danger constitutes assumption of risk is a question for the jury on conflicting evidence. Whether the servant's reliance on the master's assurance of safety or promise to repair affects assumption of risk is similarly a question for the jury on conflicting evidence.

Whether the servant in continuing at the work after knowledge of the danger must be said to have assumed the risk of injury therefrom is a question for the jury, where the evidence is conflicting.⁸¹ Whether the employee failed to complain to the employer of the defective or dangerous condition is also generally a question for the jury in de-

termining whether the employee assumed the risk by continuing at work.⁸²

Reliance on promise to repair. It is for the jury to determine whether the servant was relieved of assuming the risk of injury from a known or obvious danger by reason of a reliance on the master's promise that the dangerous condition would be remedied,⁸³ unless the facts are such that all reasonable persons must draw the same conclusion therefrom.⁸⁴

Reliance on assurance of safety. Whether the servant, knowing of the danger, was justified in undertaking the work in reliance on the master's assurance of safety is a question for the jury, where reasonable minds may draw different conclusions from the evidence.⁸⁵

error refused, certiorari denied 5 S Ct. 915, 295 US 758, 79 L Ed 1701—Hawthorne v International Great Northern R Co, Civ App, 6 SW 2d 313, error refused

Va—Froman v Chesapeake & O Ry Co, 138 SE 658, 148 Va 148—Davis v. Ellis Adm'r, 131 SE 815, 146 Va 366

79. Mo—Barrett v St Louis Southwestern Ry. Co, 143 SW 2d 60

80. Mo—Spencer v Quincy, O & K C R. Co, 297 SW 353, 317 Mo 492

Or—Makino v Spokane, P & S Ry Co, 63 P 2d 1082, 155 Or 317

S.C.—Weatherford v Fiske-Carter Const. Co, 189 SE 234, 182 SC 294

SL Ark—Norton & Wheeler Stave Co v Wright, 106 SW 3d 178, 194 Ark 115

Ill—Cash v Cleveland, C. C & St L Ry. Co, 244 Ill App 1

N.C.—McCord v Harrison-Wright Co, 153 SE 406, 198 NC 742

W Va.—Looney v Norfolk & W Ry Co, 135 SE 262, 102 W Va 40, 48 ALR 806, rehearing denied 137 SE 756, 102 W Va 40, 48 ALR 806

39 CJ p 1191 note 21

Opportunity to leave service

What constitutes reasonable opportunity to choose between leaving service and assuming risk of action in emergency is fact question.—Clairmont v. Cilley, 158 A. 465, 65 NH 1.

82. Mo—Wilson v. Marland Refining Co., App, 7 SW 2d 442 39 CJ p 1192 note 23 [c].

Authority of person notified

Ark—Roach v Haynes, 73 SW 2d 532, 189 Ark 399.

Evidence held insufficient to go to jury

Mich—Thrall v. Pere Marquette Ry Co., 229 N.W. 488, 249 Mich 440

32. US—McCarthy v Palmer, CC AN Y, 113 F 2d 721, certiorari denied Palmer v McCarthy, 61 S Ct 50, 311 US 680, 85 L Ed 438

Ark—Carson v Dierks Lumber & Coal Co, 117 SW 2d 39, 196 Ark 163—Roach v Haynes, 73 SW 2d 532, 189 Ark 399

Cal—Hooghruin v Atchison, T & S F Ry Co, 2 P 2d 992, 218 Cal 582

Kan—Johnson v St Joseph & G I Ry Co, 263 P 494, 125 Kan 38

NH—Coughlin v Arms Textile Co, 46 A 2d 130, 94 NH 57

ND—DeMoss v Great Northern Ry Co, 273 NW. 506, 87 ND 412

Okl—St Louis & S F Ry Co v Sears, 49 P 2d 489, 173 Okl 483

Or—Bevin v Oregon-Washington R & Nav Co, 298 P 204, 186 Or 18, certiorari denied Oregon-Washington R & Nav Co v Bevin, 52 S Ct 21, 284 US 639, 76 L Ed 543

SC—Googe v Speaks, 9 SE 2d 439, 194 SC 206

Tex—Crews v Texas & P Ry Co, Civ App, 149 SW 2d 1079, error dismissed, judgment correct

Va.—Riverside & Dan River Cotton Mills Co v Carter, 74 SE 183, 118 Va 346

Wash—Wickman v Twin Harbor Stevedoring & Tug Co, 244 P 268, 138 Wash 153

39 CJ p 1192 note 23.

Reasonableness of interval between promise and injury

The question whether the servant remained in his master's employ for more than a reasonable time after he had complained of a defect and been promised that it would be obviated is, on conflicting evidence, for the jury

Ark—Faulkner v. Big Rock Stone & Material Co, 143 SW 2d 883, 201 Ark 124

Iowa—Price v McNeill, 24 NW 2d 464, 237 Iowa 1120—Oesterich v

Leslie, 234 NW. 229, 212 Iowa 105

Mo—Kepner v Cleveland, C. C & St L Ry Co, 15 SW 2d 825, 322 Mo 299, certiorari denied Cleveland, C. C & St L Ry Co v Kepner, 50 S Ct 24, 280 US 564, 74 L Ed 618

NH—Nason v Lord-Merrow Excelsior Co, 29 A 2d 464, 92 NH 251 39 CJ p 1192 note 23 [a]

84. Mo—Odell v St Louis-San Francisco Ry. Co, App, 281 SW 456

39 CJ p 1192 note 24.

85. US—Port Angeles Western R Co v Tomas, CCA Wash, 36 F 2d 210

Ala—Smith v Kennedy, 108 So 564, 214 Ala 427.

Ark—Missouri Pac R Co v Treece, 64 SW 2d 561, 188 Ark 68, certiorari denied 54 S Ct 630, 293 U. S 626, 78 L Ed 1481

Iowa—Corpus Juris quoted in Wittrock v Newcom, 277 NW 286, 290, 224 Iowa 926

Me—Bubar v. Bernardo, 27 A 2d 593, 193 Me 82

Mo—Sullivan v St Louis-San Francisco Ry Co, 12 SW 2d 735, 321 Mo 697

NH—Morin v Champlin, 43 A 2d 772, 93 NH 422

SC—Green v Atlanta & C A L Ry Co, 148 SE 633, 151 SC 1, reversed on other grounds 49 S Ct 350, 279 US 821, 73 L Ed 976

Tenn—Nashville Bridge Co v Hudgins, 137 SW 2d 327, 23 Tenn App 877

39 CJ p 1191 note 22

Evidence held insufficient for jury

Ark—Mid-Continent Quicksilver Co v Ashbrook, 109 SW 2d 448, 194 Ark 744

Mo—Culver v Menden Coal Co, App, 286 SW 745.

f. Compliance with Negligent Order; Command

Whether the servant who was injured while executing an order of the master fully appreciated the hazard of the undertaking so as to be chargeable with assuming the risk of injury ordinarily is a question for the jury.

Whether the servant who was injured while executing an order of the master or a representative of the master, fully appreciated the hazard of the undertaking so as to be chargeable with assuming the risk of injury therefrom ordinarily is a question for the jury,⁸⁶ but, where it must be evident to all reasonable minds that the danger was one which no prudent person would have encountered,

the servant will be precluded from a recovery as a matter of law.⁸⁷ Where an employee is acting under the threat or command of his master or a vice-principal, whether the danger is so obvious or imminent that a prudent man would not have been willing to encounter it even under such orders is usually a question for the jury.⁸⁸

g. Negligence of Fellow Servant

Whether an employee has assumed the risk of injury due to the negligence of his coemployees or their incompetency or insufficiency in number is a question for the jury to determine, where the evidence is such that reasonable minds may differ on such question.

Whether an employee has assumed the risk of injury due to the negligence of his coemployees,⁸⁹ or

86. US—Pittman v Schultz, CC A Miss., 125 F2d 82—Great Northern Ry Co v Wojtala, CCA Mont., 112 F2d 609—Albright v Pennsylvania R Co, DCPa., 16 F Supp 281

Ark—Haynes Drilling Corporation v Smith, 143 SW2d 27, 200 Ark 1098—Standard Oil Co of Louisiana v Webb, 108 SW2d 1086, 194 Ark 569—Arkadelphia Sand & Gravel Co v Knight, 79 SW2d 71, 190 Ark 386—McEachin & McEachin Const Co v Durks, 75 SW2d 794, 189 Ark 947—Southern Lumber Co v Green, 53 SW2d 229, 186 Ark 209—Owosso Mfg Co v Drennan, 81 SW2d 763, 182 Ark 389—Gilliland Oil Co v Wilburn, 8 SW2d 41, 176 Ark 1204—Woodley Petroleum Co v Willis, 290 SW 958, 172 Ark 671

Colo—Chicago, R I & P Ry Co v Clune, 14 P2d 496, 91 Colo 205

Ind—McKinnon v Parrill, 88 NE2d 1008, 111 Ind App 343

Minn—Angelos v Chicago, M, St P & P R Co., 231 NW 922, 181 Minn 187

Mo—Grandstaff v Wabash Ry Co, App, 71 SW2d 174

Mont—Kvia v Feddersen, 122 P2d 207, 113 Mont 97—Leonidas v Great Northern Ry Co, 72 P2d 1007, 105 Mont 302, affirmed 59 S Ct 51, 805 US 1, 83 L Ed 3

NH—Morin v Champlin, 48 A2d 773, 93 NH 432

SC—Cross v Siddall, 193 SE 124, 184 SC 508

Tex—Howard v Bennett, Civ App, 165 SW2d 919, reversed on other grounds 170 SW2d 709, 141 Tex 101

Wash—Prink v Longview, P. & N Ry Co, 279 P 1115, 153 Wash 300

39 CJ p 1193 note 25

87. Ark—Southern Lumber Co v Green, 53 SW2d 229, 186 Ark 209

Iowa—Rehaid v Miles, 290 NW 702, 227 Iowa 1290.

39 CJ. p 1193 note 26.

88. US—Blair v Baltimore & O R Co, Pa., 65 S Ct 545, 221 US 600, 89 L Ed 470—Steel v Erie R Co, DCNY, 54 F2d 685, affirmed, CCA, 54 F2d 690, certiorari denied Erie R Co v Steele, 52 S Ct 395, 285 US 546, 76 L Ed 937

Ky—Nashville, C & St L Ry Co v Cleaver, 118 SW2d 748, 274 Ky 410

Ohio—Maslek v Pennsylvania R Co, 160 NE 523, 26 Ohio App 520, affirmed Pennsylvania R Co v Maslek, 163 NE 302, 118 Ohio St 644

Reasonableness of fear of discharge
In railroad bridge workers' action for injuries sustained in attempting to lift water soaked sill from mud, whether worker as reasonable man had reasonable grounds to believe he would be discharged if he did not attempt to remove sill and therefore did not assume risk, was held question for jury—Pearl River Valley R Co v Moody, 171 So 769, 178 Miss 1

Waiver of defense of assumption of risk

Whether there was waiver by employer of defense of assumption of risk by employee peremptorily ordered to use appliance was held question for jury—Maslek v Pennsylvania R Co, 160 NE 523, 26 Ohio App 520, affirmed Pennsylvania R Co v Maslek, 163 NE 302, 118 Ohio St 644

89. US—Chesapeake & O Ry Co v Richardson, CCA Ohio, 116 F2d 860, certiorari denied 81 S Ct 961, 213 US 574, 85 L Ed 1531—Norfolk & W. Ry Co v Trautwein, CCA Ohio, 111 F2d 923—Great Northern Ry Co v Nalson, CCA Minn., 90 F2d 84—Chicago, B & Q R Co v Kelley, CCA Neb., 74 F2d 80—Southern Pac Co v Ralston, CCA Utah, 87 F2d 958.

Ala—Birmingham Belt R Co v Bennett, 146 So 265, 226 Ala 185, certiorari denied 54 S Ct 52, 290

US 634, 78 L Ed 552—Gulf, M & N R Co v Williams, 119 So 212, 218 Ala 481, certiorari dismissed 50 S Ct 26, 280 US 526, 74 L Ed 573

Ark—Kansas City Southern Ry Co v Diggs, 167 SW2d 879, 205 Ark 150—Long Bell Lumber Co v Tarver, 118 SW2d 282, 196 Ark 275—Missouri Pac R Co v Brown, 115 SW2d 1082, 195 Ark 1060—Black Springs Lumber Co v Palmer, 96 SW2d 469, 192 Ark 1032—Missouri Pac R Co v Remel, 48 SW2d 518, 185 Ark 598, certiorari denied 53 S Ct 85, 287 US 634, 77 L Ed 550—Louisiana & A Ry. Co v Muldrow, 27 SW2d 516, 181 Ark 674—Chicago, R I & P Ry Co v Allison, 287 SW 197, 171 Ark 983—Chicago, R I & P Ry. Co v Daniel, 273 SW 15, 169 Ark 23

Ga—Western & A R R v Lochridge, 152 SE 474, 170 Ga 208, certiorari denied 50 S Ct 461, 281 US 762, 74 L Ed 1171.

Ill—Taylor v Atchison, T & S F Ry Co, 11 NE2d 610, 292 Ill App 457, certiorari denied Atchison, T & S F R Co v Taylor, 58 S Ct 942, 304 US 560, 82 L Ed 1528

Mass—Hanley v Boston & M R R., 190 NE 501, 286 Mass 390, certiorari denied Boston & M R R v Hanley, 55 S Ct 112, 293 US 597, 79 L Ed 690—Murphy v Boston & M R R., 190 NE 501, 286 Mass 390, certiorari denied Boston & M R R v Murphy, 55 S Ct 112, 293 US 597, 79 L Ed 690

Minn—Thom v Northern Pac Ry. Co, 253 NW 660, 190 Minn 622—Genova v St. Paul Bridge & Terminal Ry Co, 250 NW 190, 189 Minn 555, 559, certiorari denied St. Paul Bridge & Terminal R Co v Genova, 54 S Ct 643, 292 US 680, 78 L Ed 1484—Kline v Byram, 214 NW 890, 172 Minn 284.

Mo—Jenkins v Wabash Ry. Co, 107 SW2d 204, 232 Mo App 438, certiorari denied Wabash R Co. v

their incompetency,⁹⁰ or insufficiency in number,⁹¹ is a question for the jury to determine, where the evidence is such that reasonable minds may differ on such question. However, the question may become one of law for the court where the evidence is insufficient to warrant submission of the question to the jury,⁹² or where the facts are conceded and permit of but one conclusion,⁹³ or where, by statute, a servant does not assume the risk of injury occasioned by the negligence of a fellow servant, it is error, in an action based on such negligence, to submit to the jury the question as to assumption of risk.⁹⁴

§ 537. — Contributory Negligence

a. General principles

- Jenkins, 58 S Ct 139, 302 US 737, 32 L Ed 570
 N.C.—McCrowell v Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366—Shorter v Mooreville Cotton Mills, 150 S.E. 499, 198 N.C. 27—Inge v. Seaboard Air Line Ry Co., 135 S.E. 522, 192 N.C. 522, certiorari denied Seaboard Air Line R Co v Inge, 47 S Ct 456, 273 U.S. 753, 71 L Ed 874.
 Okl.—Kansas, O & G Ry. Co v Hawkins, 64 P.2d 266, 178 Okl 639
 Or.—Christie v. Great Northern Ry Co., 20 P.2d 377, 142 Or 321
 S.C.—Leslie v Southern Paving Const. Co., 169 S.E. 139, 169 S.C. 414—Hill v Broad River Power Co., 148 S.E. 870, 151 S.C. 280—Owens v Laurens Cotton Mills, 64 S.E. 915, 83 S.C. 19
 Tex.—Texas & P Ry Co. v Gibson, Com App, 288 S.W. 823, certiorari denied 47 S Ct 763, 274 US 745, 71 L Ed 1330—St. Louis Southwestern Ry Co of Texas v Smithhart, Civ App, 9 S.W.2d 146—Missouri, K & T R Co. of Texas v O'Connor, Civ App, 298 S.W. 921, certiorari denied Missouri-Kansas-Texas Ry Co of Texas v. O'Connor, 48 S Ct 602, 277 US 607, 72 L Ed 1013.
 Wash.—Tenneson v Kadiak Fisheries Co., 2 P.2d 745, 174 Wash 380.
 39 C.J. p 1178 note 70, p 1193 note 39

Failure to give warning

(1) Whether freight trucker allegedly sideswiped against wall of freight car, into which pipe was being loaded, through negligence of co-employee in making unusual and unexpected pull without warning assumed risk of injury was held question for jury.—Stritske v Chicago Great Western Ry. Co., 251 N.W. 532, 190 Minn 823.

(2) Foreman loading ship was held not to have assumed, as matter

of law, risk of hatch tender's failure to warn of danger—Rasmussen v Twin Harbor Stevedoring & Tug Co., 265 P. 1085, 147 Wash 260.

(3) Switchman boarding car did not, as matter of law, assume risk of injury from coemployee's failure to warn him of intended sudden movement of car, contrary to long-established custom—Demaray v. Missouri-Kansas-Texas R. Co., 50 S.W. 2d 127, 330 Mo 589, certiorari denied Missouri-Kansas-Texas R Co v. Demaray, 53 S Ct 20, 287 U.S. 620, 77 L Ed 538

90. Or.—Christie v Great Northern Ry Co., 20 P.2d 377, 142 Or. 321. 39 C.J. p 1178 note 71

91. S.C.—Kell v Rock Hill Fertilizer Co., 116 S.E. 97, 123 S.C. 199. 39 C.J. p 1179 note 72

92. Tex.—Texas & P Ry Co v Perkins, Com App, 48 S.W.2d 249

93. Tex.—Buchanan & Gilder v Murayda, 124 S.W. 973, 58 Tex Civ App. 473, error refused. 39 C.J. p 1179 note 73

94. Mich.—Boesler v Copper Range R Co., 151 N.W. 560, 184 Mich. 430

95. U.S.—Buchanan v. Chicago & N W Ry Co, C.C.A. III, 159 F.2d 576 —Mid-Continent Petroleum Corporation v. Hane, C.C.A. Okl., 56 F.2d 989.

Ala.—Atlantic Coast Line R Co v. Russell, 111 So 753, 215 Ala 600

Ark.—Missouri Pac R Co. v McKamey, 171 S.W.2d 932, 205 Ark 907—Coddington v. Berry Dry Goods Co., 137 S.W.2d 249, 199 Ark 110—Reader R R v Sanders, 90 S.W.2d 762, 192 Ark 28—Wisconsin & Arkansas Lumber Co v Hall, 280 S.W. 363, 170 Ark 576.

Cal.—Woodward v Southern Pac Co., 94 P.2d 1028, 35 Cal App 2d 130, certiorari denied Southern Pac Co. v Woodward, 60 S Ct 614, 309 U.S. 670, 84 L Ed. 1016.

b. Specific rules

c. Application to particular dangers

a. General Principles

In general, contributory negligence is a mixed question of law and fact to be submitted to the jury whenever the evidence is inconclusive or permits of different inferences.

Based on well settled principles governing the procedure in the trial of all civil actions, contributory negligence, like assumption of risk, is a mixed question of law and fact, and should be submitted to the jury, under proper instructions, whenever the evidence is inconclusive or where it is such that different inferences may legitimately be drawn therefrom.⁹⁵ However, where the evidence is conclusive

Colo.—Cohen v. Schaetzle, 103 P.2d 1060, 106 Colo 266.

Ill.—Fahl v. Dow, 74 N.E.2d 907, 332 Ill App 233—Armster v. American Steel Foundries, 40 N.E.2d 575, 313 Ill App 378—Mitchell v Louisville & N. R Co., 27 N.E.2d 861, 305 Ill App 635, reversed on other grounds 31 N.E.2d 965, 375 Ill 545, mandate conformed to 35 N.E.2d 81, 310 Ill App 563, reversed on other grounds 43 N.E.2d 86, 379 Ill 522

Ind.—McKinnon v. Parrill, 38 N.E. 2d 1008, 111 Ind App 343

Me.—Bubar v. Bernardo, 27 A.2d 598, 139 Me 82.

Minn.—Narjes v. Litzau, 7 N.W.2d 312, 214 Minn. 21

Mo.—Clayton v. Wells, 26 S.W.2d 969, 324 Mo 1176—Mooney v. Monark Gasoline & Oil Co., 298 S.W. 69, 317 Mo 1255—Funk v. Fulton Iron Works Co., 277 S.W. 566, 311 Mo 77—Carter v. Wolff, App, 296 S.W. 187—Davis v. National Refining Co., App, 294 S.W. 114—Markley v. Kansas City, 286 S.W. 125, 221 Mo App. 837—Reed v. Koch, 282 S.W. 515, 220 Mo App 175—Vaughn v. Mountain Grove Creamery, Ice & Electric Co., App, 275 S.W. 592, judgment and opinion quashed in part on other grounds State ex rel Mountain Grove Creamery, Ice & Electric Co. v. Cox, 286 S.W. 368, 315 Mo 619—Sackewitz v. American Biscuit Mfg Co., 78 Mo App 144

NH.—Hussey v. Boston & M. R R., 133 A. 9, 82 N.H. 236

NM.—Maestas v. Alameda Cattle Co., 14 P.2d 733, 36 N.M. 323

NY.—Adlam v. Konvalinka, 50 N.E. 2d 535, 291 N.Y. 40

NC.—Rogers v. American Tobacco Co., 178 S.E. 94, 207 N.C. 865

Okl.—Pure Transp Co v Newman, 155 P.2d 977, 195 Okl. 173

Pa.—Keough v. Markus, 173 A. 768, 114 Pa Super 80

S.C.—Whisenhunt v. Atlantic Coast

one way or the other, or is of such a character that but one inference can be drawn from it by all reasonable minds, the question whether plaintiff has been guilty of contributory negligence becomes one of law for the determination of the court, and it is error for the court to submit it to the jury.⁸⁶ Where there is no evidence of the master's negligence, there is no necessity for a submission to the jury of the issue of contributory negligence,⁹⁷ and the same is true where it appears that the risk was one assumed by the servant.⁹⁸ Similarly, where no issue of contributory negligence is raised by defendant, such issue should not be submitted to the jury.⁹⁹

Willful negligence. In a jurisdiction where, under the statute, only willful negligence on the part of the servant is sufficient to defeat recovery, the question whether the conduct of the servant constituted such negligence is for the jury, the evidence being conflicting.¹

Constitutional and statutory provisions. In some constitutions and statutes, provision is made that the question of contributory negligence shall be one for the jury,² but, unless a contrary intention clearly appears,³ such provisions are construed as being

merely declaratory of the existing law.⁴ Under the Federal Employers' Liability Act, providing that the employee's contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee, it has been held that the question of the employee's contributory negligence must be submitted to the jury,⁵ but, where there is no evidence tending to show negligence on the part of the employer, there is no issue of contributory negligence which should go to a jury.⁶ A statutory change in the burden of proof on the issue of contributory negligence has been held not to affect the question of law presented by a motion for a directed verdict provided the facts surrounding the accident are fully disclosed.⁷

b. Specific Rules

- (1) In general
- (2) Proximate cause
- (3) Inadvertent acts; acts in emergency
- (4) Choice of unsafe appliance, passageway, place, or method of work
- (5) Knowledge and appreciation of danger or defect
- (6) Continuance at work with knowledge of danger

Line R Co, 10 SE2d 305, 195 SC 213—Tuttle v Hancok, 183 SE 484, 179 SC 60—Gillis v Atlantic Coast Line R Co, 179 SE 62, 175 SC 323, certiorari denied Atlantic Coast Line R Co v Gillis, 55 SCt 545, 294 US 718, 79 L Ed 1251—Rogers v Pacific Mills, 165 SE 183, 166 SC 519—Davis v Spartan Mills, 137 SE 198, 139 SC 19

Tex—Williams v City of Galveston, Civ App, 297 SW 1101—Chicago, R I & G Ry Co v Bernnard, Civ App, 275 SW. 505

39 CJ p 1102 note 86, p 1194 note 35

Intoxication

In action against oil company for oil pumper's injuries received in gas explosion in a two-room bunk house, whether pumper was intoxicated at time of explosion so as to preclude recovery was question for jury—United East & West Oil Co v Dyer, Civ App, 144 SW2d 989, affirmed, 162 SW3d 680, 139 Tex. 318.

98. Ill—Stahl v Dow, App, 74 NE 2d 907, 332 Ill App 233.

Iowa—Rork v Klein, 221 NW 460, 206 Iowa 809, 60 ALR 469

Me—Moore v Isenman, 143 A 462, 127 Me 370.

Mo—Hamilton v Standard Oil Co of Indiana, 19 SW2d 679, 323 Mo 581—Ward v. American Car & Foundry Co, App, 293 SW 492.

NH—Hussey v Boston & M R R. 133 A 9, 82 NH 236.

NY—Wenzel v Patrick Ryan Const Corporation, 154 NYS 809, 189 App Div 357, affirmed 119 NE 1085, 323 NY 610

39 CJ p 1198 note 36

97. Miss—Buckeye Cotton Oil Co v McMorris, 158 So 799, 172 Miss 99

NY—Van Buren v Town of Richmondville, 16 NE2d 126, 378 NY 619, reargument denied 17 NE2d 139, 378 NY. 719

NC—Bennett v Powers, 135 SE 535, 193 NC 599

39 CJ p 1198 note 37

96. Tex—St Louis & S F. R Co v Mathis, 107 SW. 530, 101 Tex 342

39 CJ p 1198 note 38

99. US—Carpenter v Baltimore & O R Co, CCA Ohio, 109 F.2d 375

1. Mich—Frost v Clement, 196 NW 324, 225 Mich 267

39 CJ p 1205 note 80

2. US—Lang v U S Reduction Co, CCA Ind, 110 F2d 441

Okl—St Louis & S F. Ry Co v. Hartless, 241 P 482, 115 Okl 38

39 CJ p 1198 note 40

Employers' liability acts as affecting contributory negligence see supra § 425

3. Okl—Goodrich v Tulsa, 227 P. 91, 102 Okl 90

39 CJ p 1199 note 41.

4. US—Lang v. U. S Reduction Co, CCA Ind, 110 F2d 441.

39 CJ p 1199 note 42

Question for court

In employee's action under Federal Employers' Liability Act for personal injuries, court has power to declare conduct of employee contributorily negligent as a matter of law when that inference only can be drawn from the evidence by reasonable minds—McCrowell v Southern Ry Co, 20 SE2d 352, 221 NC 366

5. US—Tiller v Atlantic Coast Line R Co, Va., 63 SCt 444, 318 US 54, 87 L Ed 610, 143 ALR 967.

Directed verdict held error

US—Keith v Wheeling & L E Ry. Co, CCA Ohio, 160 F2d 654

6. Ark—Missouri Pac R. Co v Hathcock, 139 SW2d 35, 200 Ark 394

Okl—St Louis & S F. Ry Co v Hartless, 241 P 482, 115 Okl 38

7. NH—Hussey v Boston & M R R, 133 A 9, 82 NH 236

Uncertainty in employee's evidence

Where happenings preceding accident depended on inference, uncertainty of employee's evidence on contributory negligence is not ground for taking case from jury, in view of statute changing burden of proof—Hussey v Boston & M. R. R, supra

- (7) Compliance with, or disobedience of, rule or order
 (8) Injury avoidable by final effort of master

(1) In General

Ordinarily, it is for the jury to determine whether at the time of the injury the servant was acting within the scope of his authority or employment or whether he was negligent in disregarding a warning of danger

Where there is evidence tending to show negligence on the part of the servant, it is for the jury to determine whether at the time of the injury the servant was acting within the scope of his authority or employment,⁸ unless the facts are such that all reasonable persons must draw the same inference

therefrom⁹

Disregard of warning. Where the evidence is conflicting on the issue of the servant's negligence in disregarding a warning of danger, the question should be submitted to the jury under proper instructions.¹⁰

(2) Proximate Cause

Whether the servant's negligence was a proximate cause, or the sole proximate cause, of the injury is a question for the jury where the facts are in dispute.

Whether the alleged negligence of the servant was a proximate cause of the injury complained of is a question for the determination of the jury, where the facts are in dispute,¹¹ but it is otherwise

8. N.J.—*Cremer v Levy*, 155 A. 446, 108 N.J.Law 26
 S.C.—*Tyner v Atlantic Coast Line R Co*, 148 S.E. 663, 149 S.C. 89
 39 C.J. p. 1199 note 46
 Province of court and jury generally in determining whether servant acted within scope of his employment see *supra* § 531
9. Colo.—*Colorado Fuel & Iron Co v. Hawkins*, 130 P. 70, 23 Colo. App. 420.
 N.Y.—*Greco v Long Island R Co*, 159 N.Y.S. 819, 174 App. Div. 876
10. Wash.—*McPherson v Twin Harbor Stevedoring & Tug Co*, 245 P. 747, 139 Wash. 61
 39 C.J. p. 1200 note 56
 Failure to read warning
 Tex.—*Chicago, R I & G Ry Co v Frederick*, Civ. App., 74 S.W.2d 275, error refused, certiorari denied 55 S.Ct. 815, 285 U.S. 758, 79 L.Ed. 1701
- Passing block signal
 Ind.—*Wabash Ry Co. v Whitcomb*, 151 N.E. 885, 94 Ind. App. 190, certiorari denied 52 S.Ct. 395, 385 U.S. 546, 76 L.Ed. 937
11. U.S.—*Chicago, St P, M & O. R Co v Arnold*, CCA Minn., 160 F.2d 1002—*Boston & M R R v Cabana*, CCA Mass., 148 F.2d 150, certiorari denied 65 S.Ct. 1414, 325 U.S. 873, 89 L.Ed. 1991—*Missouri Pac R Co. v Spangler*, CCA Ark., 140 F.2d 917—*Chesapeake & O Ry Co v Richardson*, CCA Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 813 U.S. 574, 85 L.Ed. 1531—*Southern Pac Co v. Ralston*, CCA Utah, 67 F.2d 958—*Sandri v Byram*, CCA Mich., 30 F.2d 784
- Ala.—*Barger v. Oswalt*, 194 So. 884, 239 Ala. 289—*Louisville & N R Co v. Grizzard*, 189 So. 208, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504—*Southern Ry. Co. v. Smith*, 137 So. 398, 223 Ala. 583—*Southern Ry Co v. Smith*, 128 So. 228, 221 Ala. 273
 Ark.—*Ozan Grayson Lumber Co v Ward*, 86 S.W.2d 1074, 188 Ark. 557
 —*Rice & Holman v Henderson*, 35 S.W.2d 1016, 183 Ark. 355—*Warren & O V Ry Co v Edgington*, 28 S.W.2d 1073, 181 Ark. 1037
 Cal.—*Gray v Southern Pac Co*, 145 P.2d 561, 23 Cal.2d 632—*Qualls v Atchison, T & S F Ry Co*, 296 P. 615, 113 Cal. App. 7
 Ga.—*Atlantic Coast Line R R v Anderson*, 38 S.E.2d 610, 200 Ga. 801—*Atlantic Coast Line R Co v Frierson*, 4 S.E.2d 131, 60 Ga. App. 465—*Southern Ry Co v Rylee*, 156 S.E. 705, 42 Ga. App. 431
 Ill.—*Sevier v Thomson*, 41 N.E.2d 210, 314 Ill. App. 382, certiorari denied *Thomson v Sevier*, 62 S.Ct. 442, 317 U.S. 698, 87 L.Ed. 558—*Faulkner v New York Cent R Co*, 233 Ill. App. 346
 Ind.—*Chicago & Erie R Co v Patterson*, 34 N.E.2d 960, 110 Ind. App. 94
 Ky.—*Chesapeake & O Ry Co v. Howard's Adm'r*, 51 S.W.2d 461, 244 Ky. 338, certiorari denied *Chesapeake & O Ry Co v Howard*, 53 S.Ct. 315, 287 U.S. 670, 77 L.Ed. 578—*Hall v Proctor Coal Co*, 34 S.W.2d 425, 236 Ky. 813
 Mich.—*Gwitt v. Foss*, 203 N.W. 151, 230 Mich. 8.
 Minn.—*Jacobson v. Chicago & N W Ry Co*, 23 N.W.2d 455, 221 Minn. 454—*Stritzke v Chicago Great Western Ry Co*, 251 N.W. 532, 190 Minn. 323—*Kline v. Byram*, 214 N.W. 890, 172 Minn. 284
 Miss.—*Mississippi Power & Light Co v. Merritt*, 12 So.2d 527, 194 Miss. 794—*J W Sanders Cotton Mill Co v. Bryan*, 179 So. 741, 181 Miss. 573
 Mo.—*Young v Terminal R R Ass'n of St Louis*, 192 S.W.2d 403—*Copeland v Terminal R Ass'n of St Louis*, 182 S.W.2d 600, 353 Mo. 432, certiorari denied 65 S.Ct. 554, 323 U.S. 799, 89 L.Ed. 637—*Perry v Missouri-Kansas-Texas R Co*, 104 S.W.2d 332, 340 Mo. 1052—*Good v Missouri-Kansas-Texas R Co*, 97 S.W.2d 612, 339 Mo. 330, certiorari denied *Missouri-Kansas-Texas R Co v. Good*, 57 S.Ct. 231, 299 U.S. 605, 81 L.Ed. 446—*Armstrong v Mobile & O R Co*, 55 S.W.2d 460, 331 Mo. 1224, certiorari denied *Mobile & O R Co v Armstrong*, 53 S.Ct. 689, 289 U.S. 743, 77 L.Ed. 1490—*Kamer v Missouri-Kansas-Texas R Co*, 32 S.W.2d 1075, 326 Mo. 792, certiorari denied *Missouri-Kansas-Texas R Co v Kamer*, 51 S.Ct. 216, 282 U.S. 903, 75 L.Ed. 795—*Mech v Terminal Railroad Ass'n of St Louis*, 18 S.W.2d 510, 322 Mo. 937—*Brown v Chicago, R I & P Ry Co*, 236 S.W. 45, 215 Mo. 409—*Kidd v Chicago, R I & P Ry Co*, 274 S.W. 1079, 310 Mo. 1, certiorari denied *Chicago, R I & P Ry Co v Kidd*, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424
 N.C.—*Inge v. Seaboard Air Line Ry Co*, 135 S.E. 522, 192 N.C. 522, certiorari denied *Seaboard Air Line R Co v. Inge*, 47 S.Ct. 456, 273 U.S. 753, 71 L.Ed. 874
 Okl.—*Southwest Stone Co v Hughes*, 177 P.2d 489, 198 Okl. 257.
 Tex.—*City of Panhandle v. Byrd*, 108 S.W.2d 660, 130 Tex. 96—*Missouri Pac R Co v Jones*, 76 S.W.2d 1044, 124 Tex. 234, certiorari denied 55 S.Ct. 638, 294 U.S. 729, 79 L.Ed. 1259—*Missouri Pac R Co v Jones*, Com. App., 24 S.W.2d 32—*International-Great Northern R Co v Hawthorne*, Civ. App., 90 S.W.2d 805, affirmed 116 S.W.2d 1056, 181 Tex. 622, certiorari denied 59 S.Ct. 487, 306 U.S. 639, 83 L.Ed. 1040—*City of Wichita Falls v Lewis*, Civ. App., 68 S.W.2d 388, error dismissed—*Texas & P Ry Co v Short*, Civ. App., 62 S.W.2d 995, error refused
 Vt.—*Blaisdell v Blake*, 11 A.2d 215, 111 Vt. 123.
 Va.—*Davis v Ellis' Adm'r*, 131 S.E. 815, 146 Va. 366.
 39 C.J. p. 1199 note 42.

where from the entire evidence it appears that no other reasonable conclusion could be reached than that the injury resulted proximately from the servant's negligent act or omission¹²

(3) Inadvertent Acts, Acts in Emergency

Whether a servant is guilty of contributory negligence because of his conduct in an emergency or because he was momentarily inattentive or acted under a mistake of judgment is a question for the jury.

The fact that a servant was momentarily inattentive to the task in hand,¹³ or acted under an ordinary mistake of judgment,¹⁴ does not, as a matter of law, warrant the conclusion that he was guilty of contributory negligence. Mere temporary forgetfulness of a known danger does not constitute

contributory negligence as a matter of law.¹⁵ Whether the conduct of the servant, confronted by a sudden and imminent peril, conformed to the legal standard of ordinary care is generally a question for the jury, the evidence being in conflict¹⁶

(4) Choice of Unsafe Appliance, Passage-way, Place, or Method of Work

Generally, an employee's choice of an unsafe appliance, route, or passageway, place or position of work, or method of work is not contributory negligence as a matter of law, but raises a question for the jury.

Generally, the mere choice by a servant of an unsafe appliance,¹⁷ of an unsafe route or passageway,¹⁸ or of an unsafe method of performing the

In what proportion section hand's negligence, if any, in not looking for obstructions in front of motor car on which he was riding, contributed to accident was held for jury—*Thorn v. Northern Pac Ry Co*, 352 N.W. 660, 190 Minn 622

Speed of motor vehicle

Whether truck driver's violation of statute, by driving at night at a speed of thirty-five miles per hour with lights providing vision for only seventy-five feet, was a proximately concurring cause of collision with unlighted road roller parked on traveled portion of highway was question for jury in absence of evidence as to distance within which automobile traveling at a given speed may be safely stopped by sudden application of brakes—*Olguin v Thygesen*, 143 P 2d 585, 47 NM 377

12. US—*Slayton v Noonan*, CCA Ala, 133 F 2d 793—*Willis v Pennsylvania R Co*, CCA NY, 132 F 2d 248, certiorari denied 62 S Ct. 187, 314 US 684, 86 L Ed 547—*Harrison v L E Myers Const Co*, CCA Ark, 42 F 2d 950, certiorari denied 51 S Ct. 103, 282 US 887, 75 L Ed 782

39 CJ p 1199 note 44

Foreseeability of generally dangerous situation

In action to recover for injuries sustained by employee, where evidence disclosed that employee's negligence was sole proximate cause of injury, failure to direct verdict for employer was held error, notwithstanding employer was also negligent, and employee could not reasonably have anticipated the precise manner in which injury would occur, since generally dangerous situation was foreseeable—*Louisville & N R Co v Davis*, CCA Tenn, 75 F 2d 849, certiorari denied Davis v Louisville & N R Co, 56 S Ct. 119, 296 US 608, 80 L Ed 427.

13. Ill—*Wicks v Cuneo-Henneber-*

ry Co, 234 Ill App 503, affirmed 150 NE 276, 319 Ill 344

Mich—*Kucinski v City Laundry & Cleaning Works*, 218 NW 773, 242 Mich 352

NY—*Kennealy v State*, 238 NYS 719, 135 Misc 467

39 CJ p 1199 note 48

14. Mass—*Dahlgren v Coe*, 40 NE 2d 5, 311 Mass 18

39 CJ p 1199 note 49

15. US—*Kane v Northern Cent R Co*, Pa, 9 S Ct 18, 128 US 91, 32 L Ed 339

39 CJ p 839 note 82.

16. US—*Kurn v Stanfield*, CCA Mo, 111 F 2d 469

Ala—*Atlantic Coast Line R Co v Jeffcoat*, 107 So 456, 214 Ala 317, certiorari denied 46 S Ct 639, 271 US 688, 70 L Ed 1152

Ark—*Booth & Flynn v Price*, 39 S W 2d 717, 183 Ark 975, 76 ALR 957

Colo—*Freeman v Frasher*, 268 P 538, 84 Colo 67, certiorari denied 49 S Ct. 33, 278 US 637, 73 L Ed 553

Ga—*Southern Ry Co v Blanton*, 10 SE 2d 430, 63 Ga App 93

Mass—*Rollins v Boston & M R R*, 74 NE 2d 664

Mo—*Miller v Collins*, 40 S W 3d 1062, 328 Mo 313—*Bushong v Barrett Co*, App, 273 SW 761

39 CJ p 1200 note 50

Failure to exercise best judgment

Where master's negligence creates sudden emergency making choice of action by servant imperative, servant's failure to exercise best judgment will not necessarily constitute contributory negligence—*Gray v Garrison*, 176 SE 412, 49 Ga App 472

Attempt to stop moving car

Ala—*Seaboard Air Line Ry Co v Johnson*, 115 So 168, 217 Ala 251, certiorari dismissed 49 S Ct. 95, 278 US 576, 73 L Ed 515

Ill—*Mitchell v Louisville & N R Co*, 85 NE 2d 81, 310 Ill App. 563,

reversed on other grounds 42 NE 2d 86, 379 Ill 522—*Anderson v Chesapeake & O R Co*, 263 Ill App 601, affirmed 186 NE 185, 353 Ill 561, certiorari denied Chesapeake & O Ry Co v Anderson, 54 S Ct 93, 290 US 675, 78 L Ed 583

Jumping from train to avoid injury Cal—*Qualls v Atchison, T & S F Ry Co*, 296 P 645, 113 Cal App 7

17. US—*Gallagher v California Brick Co*, CCA Fla, 5 F 2d 464

Cal—*Robinet v Hawk*, 253 P 1045, 200 Cal 265

Mass—*Shipp v Boston & M R R*, 186 NE 653, 283 Mass 266

39 CJ p 1201 note 63

18. Miss—*Graham v Brummett*, 181 So 721, 182 Miss 380—*Legan & McClure Lumber Co v Fairchild*, 124 So 336, 155 Miss 271

Mo—*Craven v Halpin-Bovle Const Co*, App, 15 SW 2d 553—*Arnold v Graham*, 272 SW 90, 319 Mo App 249

NY—*Christianson v Breen*, 43 NE 2d 478, 288 NY 435

Tex—*Thompson & Ford Lumber Co v Thomas*, Civ App, 147 SW 296, error refused

39 CJ p 1201 note 63

Both paths obstructed

Where there was evidence that both of the paths which an employee could use in going from one point in the employer's shop to another were somewhat obstructed, it could not be ruled as a matter of law that he was negligent in selecting one path rather than the other—*Perry v Davis & Sargent Lumber Co*, 102 NE 320, 215 Mass 338

Darker of two stairways

A cleaning woman in a municipal auditorium, injured by falling on darkened stairway while going from one floor to another, was not contributorily negligent as matter of law in choosing the darker of two stairways, where only portion of the other stairway was lighted, risk of

task in hand,¹⁹ is not of itself sufficient to charge him with contributory negligence as a matter of law. Similarly, it is generally held that whether an employee's choice of an unsafe place, or his assumption of an unsafe position, for the performance of his work constitutes negligence is a question for the jury, and that such choice is not contributory negligence as a matter of law.²⁰ However, where the evidence undisputably shows that the choice was one that no prudent man would have made, the question of the servant's negligence is

properly withheld from the jury.²¹

(5) Knowledge and Appreciation of Danger or Defect

Whether a servant, particularly a youthful or inexperienced one, knew and appreciated the danger, or ought to have known of it in the exercise of reasonable care, is a question for the jury on disputed facts.

Whether the servant knew and appreciated the danger, or ought to have known of it, in the exercise of reasonable care, is a question for the jury, the facts being in dispute.²² Thus it is for the jury

injury not being so obvious that court could say as matter of law that no ordinarily prudent person would expose himself to it—*King v City of St Louis*, Mo App, 155 S W 2d 557

19. U.S.—*Mid-Continent Petroleum Corporation v Hane*, CCA Okl, 56 F 2d 989

Ariz.—*Arizona Cotton Oil Co v Thompson*, 245 P 673, 30 Ariz 204—*Salt River Valley Water Users' Ass'n v Wheeler*, 236 P 1108, 28 Ariz 350

Ark.—*McCormack-Reedy Lumber Co v Savage*, 273 S W 1028, 169 Ark 193

Miss.—*Pearl River Valley R Co v Moody*, 171 So 769, 178 Miss 1

Mo.—*Frese v Wells*, 40 S W 2d 652—*Doddy v California Woolen Mills Co*, 274 S W 692—*Baker v Wagner Electric Mfg Co*, 270 S W 302

—*Marsanick v Luechtefeld*, App, 157 S W 3d 537—*Storey v Williams Bros*, App, 50 S W 2d 698—*Baker v Atlas Portland Cement Co*, App, 299 S W 70—*McMahon v Chicago, B & Q. R Co*, App, 277 S W 356—*Brown v American Car & Foundry Co*, App, 271 S W 540

NH.—*Hussey v Boston & M R R*, 133 A 9, 82 NH 286.

39 C.J. p 1203 note 65

20. Ala.—*Barger v Oswalt*, 194 So 884, 239 Ala 289.

Ark.—*Roach v Haynes*, 72 S W 2d 532, 189 Ark 399

Miss.—*New Orleans Great Northern R Co v Branton*, 146 So 870, 167 Miss 52, certiorari denied 54 S Ct 88, 290 US 667, 78 L Ed 577

Mo.—*Dixon v Frazier-Davis Const Co*, 298 S W 827, 318 Mo 50—*Mooney v Monark Gasoline & Oil Co*, 298 S W 69, 317 Mo 1255—*Allen v Missouri Pac Ry Co*, 294 S W 80—*Junker v Keisel*, App, 16 S W 2d 690—*Stegemann v Heil Packing Co*, App, 2 S W 2d 169—*Landcaster v National Enameling & Stamping Co*, App, 1 S W 2d 238—*Schulte v Carmichael-Cryder Co*, App, 282 S W 181—*McNairy v Pulitzer Pub Co*, App, 274 S W 849

N.H.—*Wemyss v Wyoming Valley Paper Co*, 173 A 438, 86 NH 587

S.C.—*Leslie v Southern Paving Const Co*, 169 S E 139, 169 S C 414

Tex.—*Missouri, K & T Ry Co of Texas v Riddle*, Civ App, 277 S W 164

Wash.—*Blair v Kinema Theatres of Washington*, 277 P 398, 153 Wash 122

Wis.—*Nellis v Chicago, M, St P & P R Co*, 236 NW 668, 305 Wis 397, certiorari denied Chicago, M, St P & P R Co v Nellis, 52 S Ct 393, 285 US 543, 76 L Ed 935

39 C.J. p 1201 note 64, p 1202 note 67

Sitting on edge of truck

Whether cotton picker transported from plantation in employer's overcrowded truck, sitting on left edge of truck with legs hanging down, and injured in passing of approaching truck, was negligent, was held question for jury—*Haraway v Mance*, 56 S W 2d 1023, 186 Ark 971

Leaning against guard rail

U.S.—*Thomson v Boles*, CCA Minn, 123 F 2d 487, certiorari denied 62 S Ct 632, 315 US 804, 86 L Ed 1204

21. Iowa.—*Hedberg v Lester*, 270 NW 447, 222 Iowa 1025

Mo.—*Storey v Williams Bros*, App, 50 S W 2d 698

39 C.J. p 1203 note 66

Combination of dangerous circumstances

Evidence that defendant's farm employee who was directed by foreman to gather coal along railroad tracks walked on top of underpass wall, eight or nine feet high, knowing that cap of wall was broken in places, and evidence that it was a drizzly day, that employee had but one eye, that he was carrying a seventy or seventy-five pound sack of coal on his shoulder, and that there was gravel on top of wall, showed that employee was guilty of "contributory negligence" as a matter of law barring recovery for injuries sustained in fall from wall—*Russell v Johnson*, 160 S W 2d 701, 349 Mo 267

22. U.S.—*Rocco v Lehigh Valley R Co*, N.Y, 53 S Ct 343, 288 US 375, 77 L Ed 743—*Pitcairn v Hunault*,

CCA Ind, 86 F 2d 664—*New York, C & St L R Co v Boulden*, CCA Ind, 63 F 2d 917, certiorari denied 53 S Ct 785, 289 US 753, 77 L Ed 1498

Ala.—*Gulf, M & N R Co v Williams*, 119 So 212, 218 Ala 481, certiorari dismissed 50 S Ct 86, 280 US 526, 74 L Ed 593

Ark.—*Barber v Parker*, 76 S W 2d 973, 190 Ark 34

Cal.—*Miller v Cookson*, 265 P 374, 89 Cal App 603

Conn.—*Rescigno v Rosner*, 198 A 751, 124 Conn 253

Fla.—*Winter Park Telephone Co v Strong*, 179 So 289, 130 Fla 755, rehearing denied 182 So 927

La.—*Watkins v Jahncke Dry Docks*, 125 So 469, 12 La App 350

Me.—*Boober v Bicknell*, 191 A 275, 135 Me 153

Miss.—*Odum v Walker*, 11 So 2d 453, 193 Miss 862

Mo.—*Morris v Atlas Portland Cement Co*, 19 S W 2d 865, 323 Mo 307—*Vordermark v Hill-Behan Lumber Co*, 12 S W 2d 498—*Kidd v Chicago, R I & P Ry Co*, 274 S W 1079, 310 Mo 1, certiorari denied Chicago, R I & P Ry Co v Kidd, 46 S Ct 119, 269 US 582, 70 L Ed 424—*Crull v Massman*, App, 189 S W 2d 1009, opinion quashed on other grounds State ex rel Massman v Bland, 194 S W 2d 42, 356 Mo 17—*Johnson v Ingram*, 178 S W 2d 621, 238 Mo App 241

—*Marsanick v Luechtefeld*, App, 157 S W 2d 537—*Landcaster v National Enameling & Stamping Co*, App, 1 S W 2d 238—*Koonse v Standard Steel Works Co*, 300 S W 581, 221 Mo App 1231—*Cornelius v Terminal R Ass'n of St Louis*, App, 284 S W 813—*Schillings v Big Creek Coal Co*, App, 277 S W 964

Mont.—*Kvia v Peddersson*, 122 P 2d 207, 118 Mont 97.

Neb.—*Large v Johnson*, 248 NW 400, 124 Neb 821

N.H.—*Perkins v Nashua Mfg Co*, 16 A 2d 700, 91 NH 211—*Jacques v. Cote*, 14 A 2d 649, 91 NH 107

—*Bill v. New England Cities Ice Co*, 10 A 2d 662, 90 NH 453—*Pickett v Norwood Calf & Co*, 186 A 627, 89 NH 244—*Lucas v*

to say whether the danger was obvious or latent,²³ and whether the servant had sufficient opportunity to discover it,²⁴ or was in duty bound to make an inspection,²⁵ or to take other steps which would have revealed or eliminated the danger.²⁶ However, where the evidence shows that the danger is so

Pietkevich, 175 A 234, 87 NH 148
—Wentworth v Boston & M R R, 166 A 265, 86 NH 251—Bridges v Great Falls Mfg Co, 156 A 697, 85 NH 220—Hussey v Boston & M R R, 133 A 9, 82 NH 236—Turner v Globe Automatic Sprinkler Co, 128 A 529, 81 NH 443

N M—Olguin v Thygesen, 143 P 2d 585, 47 NM 377

N Y—Healy v Erie R Co, 180 NE 888, 259 NY 40, certiorari denied Erie R Co v Healy, 53 S Ct 81, 287 US 428, 77 L Ed 545—Lovell v Haas, 27 NYS 2d 886, 262 App Div 49

Okl—Knox v Schomaker, 129 P 2d 841, 191 Okl 337

Or—Adskim v Oregon-Washington R & Nav Co, 294 P 605, 134 Or 574

Pa—Bailey v Alexander Realty Co, 20 A 2d 754, 342 Pa 362

Tex—City of Panhandle v Byrd, Civ App, 77 SW 2d 904, reversed on other grounds 106 SW 2d 680, 130 Tex 96

Va—Roberts v Southern Ry Co, 144 SE 883, 151 Va 815, rehearing denied 145 SE 255, 151 Va 815

Wash—Thornton v Van De Kamp's Holland Dutch Bakers, 43 P 2d 799, 181 Wash 213—Lander v Shannon, 268 P 145, 148 Wash 93

Wis—Nellis v Chicago, M, St P & P R Co, 236 NW 668, 205 Wis 397, certiorari denied Chicago, M, St P & P R Co v Nellis, 62 S Ct 393, 285 US 548, 76 L Ed 935

39 C J p 1202 note 68

More knowledge of defect or danger
Where the evidence establishes that an employee had knowledge of a danger or defect, but did not appreciate the danger arising therefrom, such knowledge is not sufficient to charge him with contributory negligence as a matter of law, and the question should be submitted to the jury.

Ill—Fox v Beall, 41 NE 2d 126, 314 Ill App 144

Mich—Kucinski v City Laundry & Cleaning Works, 218 NW 778, 242 Mich 362

Habitually careless driver

Employee was held not contributorily negligent as matter of law in riding with fellow employee with knowledge of habitual negligence in operation of automobile—Cento v American Fruit Growers, Mo App, 7 SW 2d 804

23. Ark—Roach v Haynes, 72 SW 2d 522, 189 Ark 399—McDonald v

Heilbron-Palmer Tank Line Co, 292 SW 115, 173 Ark 77

Ga—Atlantic Coast Line R Co v Frierson, 4 SE 2d 131, 60 Ga App 465

Miss—Legan & McClure Lumber Co v Fairchild, 124 So 336, 155 Miss 371

Mo—Phares v Century Electric Co, 82 SW 2d 91, 336 Mo 961—Roe v Missouri Dist Telegraph Co, 43 SW 2d 563, 328 Mo 1009, 81 ALR 400—Hoffman v Peerless White Lime Co, 296 SW 764, 317 Mo 86—Fischer v M-K Express Co, App, 158 SW 2d 458—Johnson v Boaz-Kiel Const Co, App, 23 SW 2d 881—Hankins v St Louis-San Francisco Ry Co, App, 14 SW 2d 674—De Bastian v Lesser-Goldman Cotton Co, App, 297 SW 174—Phillips v American Car & Foundry Co, App, 287 SW 510—McNairy v Pulitzer Pub Co, App, 274 SW 849—McGowan v American Mfg Co, App, 270 SW 423

Or—Hennig v Carstens Packing Co, 297 P 1055, 136 Or 287

SC—Whisenhunt v Atlantic Coast Line R Co, 10 SE 2d 305, 195 SC 213—Stogner v Great Atlantic & Pacific Tea Co, 193 SE 406, 184 SC 406

Wash—Wickman v Twin Harbor Stevedoring & Tug Co, 244 P 368, 138 Wash 153

39 C J p 1203 note 69

Effect of "simple tool doctrine"

(1) Fact that tool injuring employee is simple does not as matter of law establish affirmative defense of contributory negligence—Quannah, A & P Ry Co v Gray, CCA Tex, 63 F 2d 410, certiorari denied 54 S Ct 54, 290 US 838, 78 L Ed 553

(2) Simple-tool doctrine generally see supra § 390

After employer's repair of defect

Hod carrier injured by collapse of building was held not negligent, as matter of law, where building was braced after he noticed condition—Whitehead v Koberman, Mo App, 399 SW 121

24. Mass—Ryan v Gray, 55 NE 2d 700, 316 Mass 259—Wood v National Theatre Co, 42 NE 2d 536, 311 Mass 550

Utah—Miller v Southern Pac Co, 21 P 2d 865, 82 Utah 46, certiorari denied Southern Pac Co v Miller, 54 S Ct 207, 290 US 697, 78 L Ed 600.

39 C J p 1203 note 70.

25. US—Missouri Pac R Co v Spangler, CCA Ark, 140 F 2d 917. Ark—Norton & Wheeler Stave Co v

Wright, 106 SW 2d 178, 194 Ark 115—McCormack-Reedy Lumber Co v Savage, 273 SW 1028, 169 Ark 193

Mo—Good v Missouri-Kansas-Texas R Co, 97 SW 2d 612, 339 Mo 330, certiorari denied Missouri-Kansas-Texas R Co v Good, 57 S Ct 231, 299 US 605, 81 L Ed 446—Ensler v Missouri Pac R Co, 23 SW 2d 1034, 324 Mo 530—Cunningham v Doe Run Lead Co, 4 SW 2d 803—Dixon v Frazier-Davis Const Co, 298 SW 827, 318 Mo 50—Stahl v St Louis-San Francisco Ry Co, 287 SW 628—Kramer v Kansas City Power & Light Co, 279 SW 43, 311 Mo 369—Arnold v Graham, 272 SW 90, 219 Mo App 249
NH—Pike v Gagne, 11 A 2d 809, 90 NH 516—Lucas v Pietkevich, 175 A 234, 87 NH 148

NC—Kennedy v Western Union Telegraph Co, 161 SE 396, 201 NC 756—Burgess v North Carolina Electrical Power Co, 136 SE 711, 193 NC 223

SC—Whisenhunt v Atlantic Coast Line R Co, 10 SE 2d 305, 195 SC 213

SD—Breen v Kreen, 235 NW 223, 55 SD 150

Tex—St Louis, S F & T Ry Co v Green, Civ App, 22 SW 2d 550, reversed on other grounds, Com App, 37 SW 2d 123

39 C J p 1203 note 71

26. Minn—Thom v Northern Pac Ry Co, 252 NW 660, 190 Minn 622

Mo—Harms v Emerson Electric Mfg Co, 41 SW 2d 375.

NH—Maltais v City of Concord, 166 A 267, 86 NH 211

NM—Olguin v Thygesen, 143 P 2d 585, 47 NM 377

Or—Hovedsgaard v Grand Rapids Store Equipment Corporation, 5 P. 2d 86, 138 Or 39

Failure to turn on light

Or—Whisler v U S Nat Bank of Portland, 82 P 2d 1079, 160 Or 10.

Failure to test scaffold

Contributory negligence of painter, injured on falling of scaffold, in failing to test scaffold after moving it, was held for jury—Sloan v Polar Wave Ice & Fuel Co., 19 SW 2d 476, 323 Mo 363

Failure to repair

(1) In action for injuries to railroad employee operating motorcar on track, fault in failing to keep car in proper repair was held for jury.—Chicago, M, St P. & P. R Co v Busby, CCA Mont, 41 F 2d 617.

(2) Servant's negligence in not repairing ladder, where not furnished

glaring and obvious that reasonable men could not differ, the court must declare the conduct contributory negligence as a matter of law.²⁷

Youthful or inexperienced servant Whether a youthful servant²⁸ or one who is inexperienced²⁹ appreciated the danger, and acted with the degree of care commensurate with his age or experience, are questions for the jury, the evidence being in conflict.

(6) Continuance at Work with Knowledge of Danger

Whether a servant was negligent in continuing at work after he became aware of the danger is generally

a question for the jury, especially where he relied on the master's assurance of safety or promise to repair. Whether the failure of the servant to adopt precautions against known danger constituted negligence is a question for the jury on disputed evidence.

Whether a servant was wanting in common prudence in continuing at the work after he became aware of the danger is for the jury to determine, where reasonable minds may differ on the question.³⁰ Whether a servant is guilty of contributory negligence in continuing at work after notice or complaint to the master of defects or dangers is similarly generally a question of fact for the jury.³¹

Reliance on assurance of safety. Where there is

with tools or nails, was held for jury—*Braden v. Friederichsen Floor & Wall Tile Co.*, 15 S.W.2d 923, 233 Mo App 700

27. Ark—*Roach v. Haynes*, 72 S.W.2d 512, 189 Ark 399

Mo—*Mosely v. Sum*, 120 S.W.2d 485, 344 Mo 969—*Hoffman v. Peerless White Lume Co.*, 296 S.W.764, 317 Mo 88

NC—*Hemphill v. Standard Oil Co.*, 148 S.E.443, 197 NC 339

28. US—*Zeidman v. Gutterson & Gould*, CCAN.H, 139 F.2d 160

Fla.—*Crenshaw Bros. Produce Co. v. Harper*, 194 So.353, 143 Fla.37

Kan—*Lee v. Kansas City Public Service Co.*, 22 P.2d 942, 137 Kan.759

Mich—*Fontana v. Ford Motor Co.*, 270 N.W.266, 278 Mich.199—*La Pointe v. Chevrolet*, 250 N.W.272, 264 Mich.482—*Sundstrom v. Fruit Growers' Package Co.*, 219 N.W.617, 242 Mich.442—*Branchau v. Monroe Binder Board Co.*, 203 N.W.149, 229 Mich.681

Minn—*Jenkins v. Jenkins*, 19 N.W.2d 389, 220 Minn.216

Mo—*Birdsong v. Jones*, 80 S.W.2d 1094, 235 Mo App 242—*Clayton v. Hydraulic Press Brick Co.*, App. 27 S.W.2d 52—*Smiley v. Jessup*, App. 282 S.W.110—*Benjamin v. C. Hager & Sons Hinge Mfg. Co.*, App. 273 S.W.754—*Buffum v. F. W. Woolworth Co.*, 273 S.W.176, 221 Mo App 345

Mont—*Shaw v. Kendall*, 136 P.2d 748, 114 Mont.323

NH—*Bilodeau v. Gale Bros.*, 140 A.172, 83 NH.196

NC—*Highfill v. Washington Mills Co.*, 174 S.E.457, 306 NC.582—*Dalton v. Stoneville Cabinet Co.*, 142 S.E.480, 195 NC.870—*Boswell v. Whitehead Hosiery Mills*, 132 S.E.598, 191 NC.549

SD—*Koenekamp v. Picasso*, 269 N.W.74, 64 SD.587

Tenn—*Schilly v. Baker*, 202 S.W.2d 348, 134 Tenn.654

Tex—*Dougherty v. Robb*, Civ App. 5 S.W.2d 582, error dismissed 39 C.J. p.1203 note 72.

29. US—*Zeidman v. Gutterson & Gould*, CCAN.H, 139 F.2d 160
Ala.—*City of Dothan v. Hardy*, 188 So.264, 237 Ala.603, 122 A.L.R.637

Ark—*Barber v. Parker*, 76 S.W.2d 973, 190 Ark.34—*Midland Coal Mining Co. v. Rodden*, 41 S.W.2d 777, 184 Ark.157—*Gaster v. Hicks*, 25 S.W.2d 760, 181 Ark.299

Colo—*Huddleston v. Ingersoll Co.*, 123 P.2d 1016, 109 Colo.134

Mass—*Wilson v. Daniels*, 153 N.E.661, 257 Mass.234

Minn—*Jenkins v. Jenkins*, 19 N.W.2d 389, 220 Minn.216

Mo—*Platt v. Cape Girardeau Bell Telephone Co.*, App. 12 S.W.2d 933—*Smiley v. Jessup*, App. 282 S.W.110

Mont—*Boyd v. Great Northern Ry. Co.*, 274 P.298, 84 Mont.84

NH—*Norton v. Atlantic Gypsum Products Co.*, 143 A.469, 83 NH.407

NY—*Healy v. Erie R. Co.*, 180 N.E.888, 259 NY.40, certiorari denied *Erie R. Co. v. Healy*, 53 S.Ct.81, 287 U.S.628, 77 L.Ed.545

NC—*Robbins v. American Upholstery Co.*, 150 S.E.699, 198 NC.75

Okla—*Chicago, R. I. & P. Ry. Co. v. Hurst*, 268 P.113, 129 Okl.1

Pa—*Verna v. Lopresti*, 42 A.2d 170, 157 Pa.Super.163

SC—*Dawson v. Gluck Mills*, 157 S.E.143, 169 SC.382

39 C.J. p.1204 note 73

Whether employee was inexperienced

In action by employee for injury sustained in sliding log down mountain side, plaintiff's evidence was held sufficient, as against motion of nonsuit, to justify jury in finding that he was without actual experience in such work prior to day of injury.—*Bradford v. English*, 130 S.E.705, 190 NC.742

30. US—*Galeota v. U. S. Gypsum Co.*, CCAN.Y, 123 F.2d 947, certiorari denied *U. S. Gypsum Co. v.*

Galeota, 63 S.Ct.798, 315 U.S.813, 86 L.Ed.1211

Ark—*Norton & Wheeler Stave Co. v. Wright*, 106 S.W.2d 178, 194 Ark.115

Mo—*Messing v. Judge & Dolph Drug Co.*, 18 S.W.3d 408, 323 Mo.901—*Nolen v. Halpin-Dwyer Const. Co.*, 29 S.W.2d 215, 225 Mo App.224—*Braden v. Friederichsen Floor & Wall Tile Co.*, 15 S.W.2d 923, 223 Mo App.700—*Struckel v. Busch Sulzer Bros. Diesel Engine Co.*, App. 300 S.W.993—*Crowell v. St. Louis Screw Co.*, 293 S.W.521, 220 Mo App.728—*Adkins v. Chicago, R. I. & P. Ry. Co.*, 292 S.W.1075, 222 Mo App.578—*Sanders v. Armour & Co. of Delaware*, App. 292 S.W.443—*Walker v. Mitchell Clay Mfg. Co.*, App. 391 S.W.180—*Culver v. Minden Coal Co.*, App. 286 S.W.745—*Plannett v. McFall*, App. 284 S.W.850—*Reed v. Koch*, 282 S.W.515, 230 Mo App.175

NC—*Mills v. Marion Mfg. Co.*, 151 S.E.93, 198 NC.145

SC—*Whisenhunt v. Atlantic Coast Lume R. Co.*, 10 S.E.2d 305, 195 SC.213—*Tuttle v. Hanckel*, 183 S.E.484, 179 SC.60
39 C.J. p.1204 note 76

No knowledge of serious danger

The fact that employee, suing employer for first degree burns allegedly caused by muriatic acid solution used in cleaning outside brick walls of building, continued to work after receiving surface burns which were produced by the acid and which resulted in reddening of skin and itching, did not constitute contributory negligence as a matter of law, where employee did not know or have reason to believe that acid would do him serious injury.—*Marsanick v. Luechtefeld*, Mo.App., 157 S.W.2d 537

31. SC—*Googe v. Speaks*, 9 S.E.2d 489, 194 SC.206

Tex—*International & G. N. R. Co. v. Williams*, 18 S.W.700, 83 Tex.342.

any evidence tending to show that the servant, in undertaking the work on the master's assurance of safety, acted as a reasonably prudent person would have acted under the circumstances, the question of contributory negligence is for the jury.³²

Reliance on promise to repair Whether the servant undertook the work in reliance on the master's promise to remedy the dangerous condition, and whether he was justified in such undertaking, are questions for the jury, where the facts are in dispute.³³

Precautions against known dangers It is for the jury to determine whether, knowing of the danger,

the servant was negligent in failing to adopt the precautionary measures that a prudent person in like case would have adopted,³⁴ unless the facts are such that but one reasonable inference may be drawn therefrom.³⁵

(7) Compliance with, or Disobedience of, Rule or Order

Whether a servant was guilty of negligence in violating a rule or disobeying or complying with an order is usually a question for the jury.

The question as to whether the servant was guilty of negligence in violating a rule,³⁶ or disobeying

32. Ala.—Smith v Kennedy, 108 So 564, 214 Ala 427
Ark.—Mercury Mining Co v Chambers, 102 SW 2d 543, 193 Ark 771
Ga.—Atlanta, B & C R Co v King, 189 SE 580, 55 Ga App 1—Padgett v Southern Ry Co, 172 SE 597, 48 Ga App 214
Kan.—Johnson v St Joseph & G I Ry Co, 262 P 494, 125 Kan 38
Mass.—Klein v Keresey, 29 NE 2d 703, 307 Mass 51
Mo.—Whittington v Westport Hotel Operating Co, 33 SW 2d 963, 326 Mo 1117—Ingram v Prairie Block Coal Co, 5 SW 2d 413, 319 Mo 644—Mooney v Monark Gasoline & Oil Co, 298 SW 69, 317 Mo 1255—Marsanick v Luechtefeld, App, 157 SW 2d 537—Manuel v American Car & Foundry Co, App, 23 SW 2d 1073—Lutgen v Standard Oil Co, 287 SW 885, 221 Mo App 773—Spinnell v Goldberg, 275 SW 775, 219 Mo App 471
39 CJ p 1204 note 77

33. Conn.—Rescigno v Rosner, 198 A 751, 124 Conn 253
Ga.—Evans v Central of Georgia Ry Co, 135 SE 760, 36 Ga App 58
Mo.—Johnson v Ingram, 178 SW 2d 821, 238 Mo App 341—Glaves v Old Gem Catering Co, App, 18 SW 2d 564—Culver v Minden Coal Co, App, 286 SW 745
NH.—Nason v Lord-Merrow Excelsior Co, 29 A 2d 464, 92 NH 251
SC.—Gooze v Speaks, 9 SE 2d 439, 194 SC 206
39 CJ p 1205 note 78

34. Ark.—Goodin v Boyd-Sicard Coal Co, 122 SW 2d 543, 197 Ark 175—Missouri Pac R Co v Shipper, 298 SW 849, 174 Ark 1083, certiorari denied 48 S Ct 322, 276 US 629, 72 L Ed 740—Miller v Harris, 281 SW 907, 170 Ark 1193
Miss.—Wade-Stevens Lumber Co v Addy, 194 So 303, 187 Miss 851.
Mo.—Mooney v Monark Gasoline & Oil Co, 298 SW 69, 317 Mo 1255—Compton v Louis Rich Const

Co, 287 SW 474, 315 Mo 1068—Smith v St Joseph Ry, Light Heat & Power Co, 276 SW 607
310 Mo 469—Barnes v National Biscuit Co, App, 3 SW 2d 254—Baiber v Missouri Boiler Works Co, App, 297 SW 124—Drew v St Louis-San Francisco Ry Co, 293 SW 468, 220 Mo App 720
Neb.—Large v Johnson, 248 NW 400, 124 Neb 821
NH.—Morin v Champlin, 43 A 2d 772, 93 NH 422
NY.—Sgandurra v 220 Estates, 56 NY 2d 684, 155 Misc 283, affirmed 61 NYS 2d 910, 270 App Div 834, appeal denied 61 NYS 2d 920, 270 App Div 884
NC.—Rigsbee v Atlantic Coast Line R Co, 129 SE 580, 190 NC 231
Okl.—McCracken v Franco-Dominion Development Corporation, 117 P 2d 185, 189 Okl 354
Or.—Robbins v Irwin, 178 P 2d 935
SD.—Finger v Northwest Properties, 257 NW 121, 68 SD 176
39 CJ p 1204 note 74

Failure to wear mask
US.—Piecsonka v Pullman Co, C CANY, 103 F 2d 432
Ky.—Peerless Mfg Corporation v Mackey, 171 SW 2d 253, 294 Ky 221
Pa.—Price v New Castle Refractories Co, 3 A 2d 418, 333 Pa 507
Failure to wear safety belt
Ark.—Chapman v Henderson, 67 SW 2d 570, 188 Ark 714
Fla.—Winter Park Telephone Co v Strong, 179 So 289, 130 Fla 755, rehearing denied 183 So 937
35. Ark.—Plassance v Chicago, R I & P R Co, 186 SW 175, 98 Ark 462
39 CJ p 1204 note 75

36. US.—Rocco v Lehigh Valley R Co, NY, 53 S Ct 343, 288 US 275, 77 L Ed 743—Mumma v Reading Co, CCA Pa, 146 F 2d 215—Missouri Pac R Co v Spangler, CCA Ark, 140 F 2d 917—Atchison, T & S F Ry Co v Ballard, CCA Tex, 108 F 2d 768, rehearing denied 109 F 2d 1012,

certiorari denied Ballard v Atchison, T & S F R Co, 60 S Ct 1096, 310 US 646, 84 L Ed 1413
Ala.—Southern Ry Co v Smith, 187 So 395, 223 Ala 583
Ark.—Kansas City Southern Ry Co v Larsen, 114 SW 2d 1081, 195 Ark 503, certiorari denied 59 S Ct 82, 305 US 621, 33 L Ed 897
Cal.—Myers v Southern Pac Co, 58 P 2d 387, 14 Cal App 2d 287, hearing denied 59 P 2d 1001, 14 Cal App 2d 287.
Ind.—Chicago & E I Ry Co v Schraeder, 168 NE 468, 90 Ind App 151.
Ky.—Patrick's Adm'x v Louisville & N R Co, 132 SV 3d 758, 280 Ky 181.
Mo.—Mech v Terminal Railroad Ass'n of St Louis, 18 SW 2d 510, 322 Mo 937.
Tex.—Texas & P Ry Co v Short, Civ App, 62 SW 2d 995, error refused
Utah.—Allison v McCarthy, 147 P 2d 870, 106 Utah 278.
39 CJ p 1200 note 57

Purpose of rule as factor

Evidence that servant injured while operating replaner was "supposed" to use only one-inch lumber on replaner when set for certain thickness, and that lumber used was of various thicknesses, was insufficient to require finding of contributory negligence as matter of law, in absence of evidence that supposed rule was a safety regulation established for servant's protection—Morin v Champlin, 43 A 2d 772, 93 NH 422

Customary or habitual violation of rule

(1) Whether employer's rule respecting employee's riding on motor was habitually disregarded with knowledge or acquiescence of employer's agents and servants, superior in authority to injured employee, was held question for jury—Southern Mining Co v Hensley, 56 SW 2d 965, 247 Ky 276

(2) Where evidence showing ha-

an order,³⁷ of the master, is one of fact for the determination of the jury, unless the evidence is such that there is no reasonable ground for a difference of opinion as to such fact.³⁸

Compliance with negligent order It is for the jury to determine whether the servant, in complying with an order of the master involving extraordinary and unnecessary hazard, acted as a reasonably careful person would have acted under the circumstances,³⁹ unless the act directed was fraught with such imminent and apparent danger that no reasonable man would have attempted it.⁴⁰

(8) Injury Avoidable by Final Effort of Master

Although the servant's negligence placed him in a position of peril, whether his subsequent conduct precludes or affects his recovery, or whether the negligence of the master intervened, is a question for the jury, unless the evidence permits of one inference.

Although the servant was initially negligent in placing himself in a position of peril, whether his subsequent conduct was such as to preclude a recovery or warrant a diminution of the damages, or whether the negligence of the master intervened, is a question for the jury,⁴¹ unless the facts are

bitual nonobservance of rule forbidding switchmen to board front of approaching engines was couched in substantially same language as rule, question whether it was custom to board approaching engine from between rails was for jury—Johnson v Chicago & E I Ry Co, 64 SW 2d 674, 834 Mo 22

Posting of blue flag or light

(1) Whether railroad employee did or did not post a blue flag or blue light or other warning device in accordance with railroad's rules is ordinarily a question of fact for the jury.

Mo—Perry v. Missouri-Kansas-Texas R Co, 104 SW 2d 332, 340 Mo 1052.

Ohio—Davis v Hussey, 153 NE 875, 22 Ohio App 191, certiorari denied Mellon v Hussey, 46 S Ct 355, 370 US 659, 70 L Ed 785

(3) Whether manner in which deceased employee displayed blue flag to indicate that work was being done on box car complied with railroad rule was a jury question—Lowden v Burke, CCA Minn, 129 F 2d 767

37. Ky—Evans v Crusott, 97 SW 2d 569, 265 Ky 693

Mo—Wilson v. Chicago, B & Q R Co, 296 SW. 1017, 317 Mo 645—Shubert v Fleming, App, 1 SW. 2d 852—Koonse v Standard Steel Works Co., 300 SW. 531, 231 Mo App 1231—McNairy v Pulitzer Pub Co, App, 274 SW 649

Wash—Schmidt v. Pelz, 87 P 2d 278, 198 Wash 80.

39 C J p 1201 note 58

Employer's acquiescence in violation of order

Contributory negligence of bleachery employee suffering illness from tasting acid solution for testing strength instead of using hydrometer, as overseer instructed, under evidence showing employers acquiesced in employees' disregard of instructions, was held for jury—Mungrave v Great Falls Mfg Co., 169 A 583, 86 NH 375

38. US—Lowden v Burke, CCA Minn, 129 F 2d 767.

Ky—Rex Red Ash Coal Co. v. Bar-

ley's Adm'r, 6 SW 2d 724, 234 Ky 485

Mo—McNairy v Pulitzer Pub Co, App, 274 SW 849

Utah—Allison v McCarthy, 147 P 2d 870, 106 Utah 278

Wash—Schmidt v Pelz, 87 P 2d 278, 198 Wash 80

39 C J p 1201 note 59

Excessive rate of speed

US—Atchison, T & S F Ry Co v Ballard, CCA Tex, 108 F 2d 768, rehearing denied 109 F 2d 1012, certiorari denied Ballard v Atchison, T & S F R Co, 60 S Ct 1096, 310 US 646, 84 L Ed 1413

39. US—Miller v Central R Co of New Jersey, CCA NY, 58 F 2d 635, certiorari denied Central R Co of New Jersey v Miller, 53 S Ct 18, 287 US 617, 77 L Ed 536 Ark—Gilliland Oil Co v Wilburn, 3 SW 2d 41, 176 Ark 1204—Ault v McGaughey, 292 SW 359, 173 Ark 322

Colo—Chicago, R I & P Ry Co v Cline, 14 P 2d 495, 91 Colo 255

Conn—Schneider v Raymond, 186 A 874, 106 Conn 72

Ga—Howard v Georgia Power Co, 176 SE 68, 49 Ga App 430—Padgett v Southern Ry Co, 172 SE 597, 48 Ga App 214

Ind—McKinnon v Parrill, 88 NE 2d 1008, 111 Ind App 343

Kan—Rush v Brown, 109 P 2d 84, 153 Kan 59

Miss—Odom v Walker, 11 So 2d 452, 193 Miss 862—Mississippi Power & Light Co v Smith, 153 So 376, 169 Miss 447

Mo—Phares v Century Electric Co, 111 SW 2d 11, 341 Mo 990—Phares v Century Electric Co, 82 SW 2d 91, 336 Mo 961—Berry v Baltimore & O R Co, 43 SW 2d 783, reversed on other grounds 52 S Ct 510, 286 US 272, 76 L Ed 1098—Crane v Liberty Foundry Co, 17 SW 2d 945, 322 Mo 592—Loduca v St Louis-San Francisco Ry Co, 289 SW 908, 315 Mo 331—Phares v Century Electric Co, App, 131 SW.2d 879—Jenkins v Kansas City, 91 SW 2d 98, 230 Mo

App 837—Nolen v Halpin-Dwyer Const Co, 29 SW 2d 215, 225 Mo App 224—Goodson v Luce, App, 24 SW 2d 683—Johnson v Boaz-Kiel Const Co, App, 23 SW 2d 881—Braden v Friederichsen Floor & Wall Tile Co, 15 SW 2d 923, 223 Mo App 700—Clayton v Metalcrafts Corporation, App, 12 SW 2d 938—Sexton v Garrison, App, 295 SW 484—Roberson v Loose-Wiles Biscuit Co, App, 285 SW 127

NH—Tremblay v J Rudnick & Sons, 13 A 2d 153, 91 NH 24—Perreault v Allen Oil Co, 179 A 365, 87 NH 306

NC—Bateman v Brooks, 167 SE 627, 204 NC 176

Ohio—Tuck v Chapple, 152 NE 660, 115 Ohio St 177

Okl—Baker v J H Hudson Drilling Co, 300 P 336, 149 Okl 180 Tex—Howard v Bennett, Civ App, 165 SW 2d 919, reversed on other grounds 170 SW 2d 709, 141 Tex 101

Vt—Blaisdell v Blake, 11 A 2d 215, 111 Vt 133

39 C J p 1201 note 60

Operation of defective elevator

If employer directed superintendent to continue operation of elevator, after he suggested discontinuance of use until defect, the nature of which he was unable to determine, had been remedied, it was then a question of fact for jury whether superintendent was negligent in continuing its operation, and in taking passage thereon at time of accident—O'Quinn v Alston, 104 So 653, 213 Ala 346, 39 ALR 1263

40. Mo—Braden v. Friederichsen Floor & Wall Tile Co, 15 SW 2d 923, 223 Mo App 700

39 C J p 1201 note 61

41. US—Chicago, M, St P & P. R Co v Kane, CCA Mont, 33 F. 2d 866, certiorari denied 50 S Ct 37, 280 US 588, 74 L Ed 637

Ark—Missouri Pac R Co v Skipper, 298 SW 849, 174 Ark 1083, certiorari denied 48 S Ct 322, 276 US 629, 72 L Ed 740.

Mo—Woodward v Missouri Pac. R.

such that but one conclusion can reasonably be drawn therefrom⁴² However, it has been held that, where the original negligence amounted to a reckless disregard of safety, the question as to the exercise of care in the emergency may not be submitted to the jury⁴³

c. Application to Particular Dangers

(1) Dangerous or defective appliances or places

(2) Dangerous operations

(1) Dangerous or Defective Appliances or Places

(a) Machinery

(b) Railroads

(c) Other appliances or places

(a) Machinery

Whether the servant was negligent in the operation of dangerous or defective machinery, or in coming in contact with unguarded machinery, or in oiling or adjusting machinery while in motion is a question for the jury on conflicting evidence

In accordance with the rule that contributory negligence and issues relating thereto are questions for the jury unless the evidence is conclusive or is of such character that only one inference can be drawn from it by all reasonable minds, discussed supra subdivision a of this section, the question whether the servant was negligent in the operation of a dangerous or defective machine⁴⁴ or in coming into contact with unguarded machinery while thereabout employed⁴⁵ has been held, where the evidence is conflicting, to be left to the determination of a jury Thus, in such case, it is for the jury to say whether the servant was negligent in attempting to oil⁴⁶ or to clean or adjust⁴⁷ machinery without stop-

Co., 295 SW 98, 316 Mo 1196, certiorari denied Missouri Pac R Co v Woodward, 48 S Ct 115, 275 US 552, 72 L Ed 422—Rose v St Louis-San Francisco Ry Co, 289 SW 913, 315 Mo 1181—Beal v Chicago, B & Q R Co, 285 SW 482—Hensley v Dorr, App, 203 SW 2d 553—Voorhees v Chicago, R I & P Ry Co, App, 7 SW 2d 740

39 CJ p 1200 notes 51, 52

Last clear chance theory see supra § 423

42. US—St Louis Southwestern Ry Co v Simpson, Ark, 53 S Ct 520, 286 US 346, 76 L Ed 1152—Brennan v Baltimore & O R Co, CCANY, 115 F 2d 555, certiorari denied 61 S Ct 614, 312 US 685, 85 L Ed 1123

Ark—Missouri Pac R Co v Beard, 39 SW 2d 292, 183 Ark 877—St Louis-San Francisco Ry Co v Smith, 31 SW 2d 407, 182 Ark 299 Mo—George v Missouri Pac R Co, 251 SW 729, 213 Mo App 688

Tex—Brittan v Fort Worth & D C Ry Co, Civ App, 128 SW 2d 874, error dismissed, judgment correct—Panhandle & S F Ry Co. v Ocan, Civ App, 271 SW 205.

Servant's obliviousness of danger is not alone sufficient to make master's negligence issue for jury—Parker v St Louis-San Francisco Ry Co, Mo App, 297 SW 146

Delay in removal to hospital

Evidence of negligence of other train employees under the "humanitarian doctrine" in failing to transport a seriously injured trainman by motor ambulance to a city hospital twenty-eight miles away and in attempting to transport the injured brakeman by freight train to a hospital fifty-nine miles away, the

brakeman dying before arrival, was insufficient for jury, where the fault, if any, of the trainmen was an error of judgment for which the railroad would not be liable—Kurn v Denison, 10 So 2d 198, 193 Miss 763

Failure to blow whistle

Where evidence established that engineer had blown three signals within fifteen to thirty seconds before observing automobile which approached the crossing on a road in open country, failure of engineer to blow whistle again after discovering the automobile did not authorize submission of question of railroad's negligence under "last clear chance" doctrine—Southern Ry Co v Melton, 198 So 588, 240 Ala 244

Failure to reverse engine

Engineer's undisputed testimony that it would not have been helpful to stop train any quicker if engineer had reversed engine instead of merely applying brakes, shutting off steam, and opening sandbox, precluded submission to jury under "last clear chance" doctrine of question of engineer's negligence in failing to reverse the engine—Southern Ry Co v Melton, supra.

43. Ala—Alabama Co v. Sanders, 80 So. 860, 202 Ala. 295. 39 CJ p 1200 note 55

44. US—King Cotton Mills v Wilson, CCANC, 61 F 2d 1004. Ark—Hill v Hardy, 157 SW 2d 494, 203 Ark 79—Mississippi River Fuel Corporation v Morris, 35 S W.2d 607, 183 Ark 207

NC—Maulden v. High Point Bending & Chair Co, 144 S E. 557, 196 N.C. 122

Wis—Dugenske v. Wyse, 215 NW 829, 194 Wis 159 39 CJ p 1205 note 84.

Particular machines

(1) Laundry press machine—Isabelle v Crystal Laundry, 41 A 2d 241, 93 NH 264

(2) Punch press—Kitchen v. Schluster Mfg Co, 20 SW 2d 676, 328 Mo 1179—Uhl v. Century Electric Co, Mo App, 295 SW. 127—Mabe v Gille Mfg Co, 271 SW 1023, 219 Mo App 234

(3) Shearing machine—Beuc v. Mesker Bros Iron Co, Mo App, 7 SW 2d 438

(4) Tractor. Mo—Compton v Louis Rich Const Co, 287 SW 474, 315 Mo 1068 Tex—Lawson v. Hutchinson, Civ App, 138 SW 2d 181, error dismissed, judgment correct

(5) Washing machine—Foley v. Bennett, 17 NW 2d 509, 219 Minn. 249—39 CJ p 1205 note 84 [§§]

(6) Wood-boring machine—Maier v American Car & Foundry Co, Mo. App, 296 SW 212

(7) Wood - working machine—Stanton v Morrison Mills, 47 A 2d 112, 94 NH 92

45. Mo—Andybur v. National Pigments & Chemical Co., App, 24 S. W 2d 1069 39 CJ p 1206 note 85.

Belt

NH—Boucher v Namasket Co, 17 A 2d 98, 91 NH 215. 39 CJ p 1206 note 85 [a].

Saw

Ark—E L Bruce Co v Corbett, 69 SW 2d 270, 188 Ark 962.

Mo—Carlisle v. Tilghmon, 159 SW. 2d 663 39 CJ p 1206 note 85 [k].

46. US—Woolfe v. Ohio Oil Co, CCA Ohio, 286 F. 829 39 CJ. p 1207 note 86.

47. Ark—Ft. Smith Rim & Bow

ping its motion; and whether the servant who was injured by reason of the unexpected starting of the machinery was guilty of negligence in assuming an unsafe position, or in failing to take precautionary measures against such starting, is likewise a question for the jury where the facts are in dispute.⁴⁸ However, where the evidence on the question as to the negligence of the servant, injured in the course of his employment at or about dangerous or defective machinery, permits of but one inference it is one of law for the determination of the court.⁴⁹

(b) Railroads

Whether a servant injured in the course of his employment in connection with a railroad was guilty of

contributory negligence is a question for the jury where the evidence is conflicting.

Whether the servant injured in the course of his employment in connection with a railroad was guilty of contributory negligence is a question for the jury where the evidence is conflicting.⁵⁰ Thus, in such case, it is for the jury to determine whether the servant was negligent in failing to avoid injury from a known or discoverable defect or danger in a locomotive,⁵¹ car,⁵² track,⁵³ or roadbed,⁵⁴ or whether he was negligent in operating a train, locomotive, or car in such manner as to cause a collision⁵⁵ or derailment,⁵⁶ or whether he was negligent with reference to adopting an unsafe method of adjusting a coupling between cars.⁵⁷

- Co v Baker, 271 S.W. 945, 168 Ark 798
- Mo—Nagy v St Louis Car Co, 37 S.W.2d 513—Baker v Atlas Portland Cement Co, App., 299 S.W. 70—Zain v Pickel Stone Co., App., 273 S.W. 165
- 39 C.J. p 1207 note 87
- Replacing belt**
- Ark—Chapman & Dewey Lumber Co v. Bryan, 35 S.W.2d 80, 183 Ark 119
- SC—Taylor v Wimborsboro Mills, 143 SE 474, 146 SC 28
- 39 C.J. p 1207 note 87 [c]
42. Ark—Athletic Mining & Smelting Co v Sharp, 205 S.W. 695, 185 Ark 330
- 39 C.J. p 1207 note 88
49. Mass—Carroll v Augustus Hubbard, 106 NE 1031, 219 Mass 289
- 39 C.J. p 1208 note 59
50. US—Bucanan v Chicago & N.W. Ry Co, CCA Ill., 159 F.2d 576
51. Ala.—Alabama Great Southern R. Co v Baum, 31 So.2d 366, 249 Ala. 442
- Miss—Gulf, M. & N. R. Co v Wood, 146 So. 298, 164 Miss 765, motion sustained 147 So. 652, certiorari denied 53 S.Ct. 791, 289 US 759, 77 L.Ed. 1502
- Mo—Harlan v. Wabash Ry Co, 73 S.W.2d 749, 335 Mo. 414.
- 39 C.J. p 1211 note 19
- Heat and gases in firebox**
- US—Albright v Pennsylvania R. Co, DCPa., 16 F.Supp. 281
52. US—Guest v Wabash R. Co., CCA Ill., 147 F.2d 579
- Minn—Wolf v Chicago, M., St. P. & P. R. Co., 230 NW 826, 180 Minn 310
- Mo—Riley v Wabash Ry Co, 44 S.W.2d 136, 328 Mo. 810—Lane v. St. Louis-San Francisco R. Co., App., 10 S.W.2d 962
- Okl—Chicago, R. I. & P. Ry Co v King, 25 P.2d 304, 165 Okl. 169.
- Tex—Roberts v Texas & P. Ry Co., 180 S.W.2d 330, 142 Tex 550
- 39 C.J. p 1211 note 20
- Defective automatic couplings**
- Minn—Ross v Duluth, Missabe & Iron Range Ry Co., 281 NW 76, 203 Minn 312
53. US—Erie R. Co v. White, Ohio, 187 F. 556, 109 CCA 323, rehearing denied 187 F. 944, 109 CCA 326
- 39 C.J. p 1211 note 21
54. US—Handy v Reading Co, DCPa., 68 F.Supp. 246
- NJ—Koske v Delaware, L. & W. R. Co., 142 A. 43, 104 NJLaw 627, affirmed Delaware, L. & W. R. Co v. Koske, 49 S.Ct. 202, 279 US 7, 73 L.Ed. 578
- 39 C.J. p 1211 note 22
- Defective bridge**
- Okl—Chicago, R. I. & P. Ry Co v Brooks, 11 P.2d 142, 155 Okl. 53, certiorari denied Chicago, R. I. & P. R. Co v. Squire, 52 S.Ct. 502, 286 US 552, 76 L.Ed. 1287
55. US—Ballard v Atchison, T. & S. F. R. Co., CCA Tex., 100 F.2d 162—Detroit, T. & I. R. Co v Hahn, CCA Ohio, 47 F.2d 59, certiorari denied 51 S.Ct. 489, 283 US 842, 75 L.Ed. 1452
- Ala.—Louisville & N. R. Co v Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 US 603, 84 L.Ed. 504
- Ark—Kansas City Southern Ry Co v Taylor, 190 S.W.2d 968, 209 Ark 488
- Colo—Auslander v Boettcher, 242 P. 672, 78 Colo. 427
- Ill—Armstrong v. Chicago & W. I. R. Co., 263 Ill.App. 126, affirmed 183 NE 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co v Armstrong, 53 S.Ct. 523, 289 US 724, 77 L.Ed. 1476
- Ky—Louisville & N. R. Co v Jolly's Adm'x, 28 S.W.2d 564, 282 Ky 702, certiorari denied Louisville & N. R. Co v Jolly, 51 S.Ct. 26, 282 US 847, 75 L.Ed. 751.
- Mo—Brock v Mobile & O. R. Co., 51 S.W.2d 100, 330 Mo. 918, certiorari denied Mobile & O. R. Co v Brock, 53 S.Ct. 87, 287 US. 638, 77 L.Ed. 552—Mech v Terminal Railroad Ass'n of St. Louis, 18 S.W.2d 510, 322 Mo. 937—Jenkins v Wabash Ry Co, 107 S.W.2d 204, 232 Mo. App. 438, certiorari denied Wabash Ry Co v Jenkins, 58 S.Ct. 139, 302 US 737, 82 L.Ed. 570—Roan v. Wells, App., 14 S.W.2d 488
- NH—Sweeney v Boston & M. R. R., 175 A. 243, 87 NH 90, certiorari denied 55 S.Ct. 638, 294 US. 728, 79 L.Ed. 1258
- NY—Wolf v Baltimore & O. R. Co., 139 NE 780, 264 NY 57.
- ND—Sullivan v Minneapolis, St. P. & S. M. Ry Co., 213 NW. 841, 55 ND 253
- Tex—International-Great Northern R. Co v Hawthorne, 116 S.W.2d 1056, 131 Tex 622, certiorari denied 59 S.Ct. 487, 306 US. 639, 83 L.Ed. 1040—Hawthorne v International-Great Northern R. Co, Civ. App., 63 S.W.2d 242, error refused
- 39 C.J. p 1211 note 23
- Disregarding signals**
- Ind—Chicago & Erie R. Co. v Patterson, 34 NE.2d 960, 110 Ind App 94
- 39 C.J. p 1211 note 23 [b]
56. Minn—Moquin v Minneapolis, St. P. & S. M. Ry Co., 231 NW 829, 181 Minn 56, reversed on other grounds Minneapolis, St. P. & S. M. R. Co v Moquin, 51 S.Ct. 501, 283 US 530, 75 L.Ed. 1243. Followed in 231 NW 920, 181 Minn 626
- Utah—Miller v Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co v Miller, 54 S.Ct. 207, 290 US 697, 78 L.Ed. 600.
- 39 C.J. p 1212 note 24
57. US—Hampton v Des Moines & C. I. R. Co., CCA Iowa, 65 F.2d 899
- Mich—Musgrove v Manistique & L. S. Ry., 244 N.W. 132, 259 Mich.

Where the facts are in dispute, it is for the jury to say whether there was negligence on the part of the servant who, while on a track, was struck by a car or locomotive,⁵⁸ or was crushed while passing between standing cars,⁵⁹ or was injured in the attempt to board,⁶⁰ or alight from,⁶¹ a moving car or locomotive; and whether the servant, who, while riding on a car or locomotive, was thrown from his support,⁶² or was brought into contact with an obstruction beside or over the track,⁶³ or was injured

in a collision⁶⁴ or derailment of trains or cars,⁶⁵ was guilty of contributory negligence in occupying an unsafe place or assuming an unsafe position, is for the jury, where reasonable persons may draw different conclusions as to such fact. It is for the jury to determine, on conflicting evidence, whether the servant, who was injured by reason of the unexpected movement of the train, car, or locomotive at which he was working, was guilty of negligence in assuming a dangerous position or in failing to take

469, certiorari denied *Manistique & L S R Co v Musgrove*, 53 S Ct 313, 287 US 669, 77 L Ed 577

Mo—*Copeland v Terminal R Ass'n of St Louis*, 182 SW 2d 600, 353 Mo 433, certiorari denied 65 S Ct 554, 323 US 799, 89 L Ed 637—*Lovett v Kansas City Terminal Ry Co*, 205 SW 89, 318 Mo 1246 39 CJ p 1212 note 25

58. US—*Tiller v. Atlantic Coast Line R Co, Va.*, 63 S Ct 444, 318 US 54, 87 L Ed 610, 148 ALR 967—*Kurn v Stanfield, CCA Mo*, 111 F 2d 469

Ala—*Birmingham Belt R Co v Bennett*, 146 So 265, 226 Ala. 185, certiorari denied 54 S Ct 52, 290 US 634, 78 L Ed 552

Ark—*Missouri Pac R Co v Skipper*, 298 SW 849, 174 Ark 1083, certiorari denied 48 S Ct 322, 276 US 829, 72 L Ed 740

Ga—*Newman v Southern Ry Co*, 194 SE 237, 57 Ga App 70, affirmed *Southern Ry Co v Newman*, 199 SE 753, 187 Ga 132, and 199 SE 755, 187 Ga 136

Ill—*Carpenter v Grand Trunk W R Co*, 263 Ill App 462

Ind—*New York Cent R Co v Verpleats*, 59 NE 2d 916, 116 Ind. App. 1, rehearing denied 60 NE 2d 784, 116 Ind App 1

Mo—*Hold v Terminal R R Ass'n of St Louis*, 201 SW 2d 958—*Armstrong v Mobile & O R Co*, 55 SW 2d 460, 331 Mo. 1234, certiorari denied *Mobile & O R Co v Armstrong*, 53 S Ct 689, 289 US 743, 77 L Ed 1490—*Moran v Atchison, T & S F Ry Co*, 48 SW 2d 881, 330 Mo 278, certiorari denied *Atchison, T & S F R Co v Moran*, 53 S Ct 21, 287 US 621, 77 L Ed 539—*Busch v Louisville & N R Co*, 17 SW 2d 337, 323 Mo. 469, certiorari denied *Louisville & N R Co v Busch*, 50 S Ct 27, 280 US 569, 74 L Ed 622—*Carbaugh v St Louis-San Francisco Ry. Co*, App. 2 SW 2d 195

NY—*Smith v Delaware & H Co*, 237 NYS 297, 227 App Div 269

NC—*Rigsbee v Atlantic Coast Line R Co*, 129 SE 580, 190 NC 231

Pa—*DeLellis v. Pittsburgh & L E R Co*, 39 A 2d 588, 350 Pa 436

SC—*Gillis v Atlantic Coast Line R Co*, 179 SE 62, 175 S C 223, cer-

tiorari denied *Atlantic Coast Line R Co v Gillis*, 55 S Ct 545, 294 US 718, 79 L Ed 1251

Tex—*Jones v Kansas City Southern Ry Co*, Com App, 291 SW. 528, reversed on other grounds 48 S Ct 808, 276 US 303, 72 L Ed 583—*Texas & P Ry Co v Mix*, Civ App, 193 SW 2d 542—*Thompson & Ford Lumber Co v Thomas*, Civ App, 147 SW 296, error refused

Va—*Norfolk Southern R Co v Lewis*, 141 SE 238, 149 Va 318—*Froman v Chesapeake & O Ry Co*, 138 SE 658, 148 Va 148 39 CJ p 1213 note 26

59. Mo—*High v Quincy, O & K C R Co*, 300 SW. 1102, 318 Mo 444 39 CJ p 1214 note 27

60. Ind—*Chicago & E I Ry Co v Schraeder*, 188 NE 468, 90 Ind App 151

Mo—*Johnson v Chicago & E I Ry Co*, 64 SW 674, 334 Mo 22 39 CJ p 1214 note 28

61. US—*Mumma v Reading Co, C A Pa.*, 146 F 2d 215—*New York, C & St L R Co v Boulden, C C A Ind*, 63 F 2d 917, certiorari denied 53 S Ct 785, 289 US 753, 77 L Ed 1498

Ga—*Southern Ry Co v Williamson*, 188 SE 902, 53 Ga App 856

Mo—*Bell v Terminal Railroad Ass'n of St Louis*, 18 SW 2d 40, 322 Mo 886

NC—*Inge v Seaboard Air Line Ry Co*, 135 SE 522, 192 NC 522, certiorari denied *Seaboard Air Line R Co v Inge*, 47 S Ct 456, 273 US 753, 71 L Ed 874

Tex—*International-Great Northern R R v Lowry*, Civ App, 98 SW 2d 383, reversed on other grounds *International-Great Northern R Co v Lowry*, 121 S.W.2d 585, 132 Tex 272

39 CJ p 1214 note 29

62. Ill—*Mitchell v Louisville & N R Co*, 35 NE 2d 81, 310 Ill App. 563, reversed on other grounds 42 NE 2d 86, 379 Ill 522

NY—*Salisbury v New York Cent. R Co*, 222 NYS 38, 220 App Div. 491

SC—*Tyner v. Atlantic Coast Line R Co*, 146 SE 663, 149 S.C. 89.

39 CJ p 1214 note 30.

63. US—*Reading Co v Geary, C C A Md*, 47 F 2d 143, 79 ALR 226, certiorari denied 51 S Ct 492, 283 US 844, 75 L Ed 1454.

Minn—*Jacobson v Chicago & N W Ry Co*, 23 NW 2d 455, 221 Minn. 454

Tex—*Houston & T C R Co v Robins*, Civ App, 23 SW 2d 481, error refused 39 CJ p 1215 note 31

Passing train; knowledge of custom

Where railroad employee killed when custom of leaving track open was violated was presumed to know custom relied on, demurrer to evidence could not be sustained for failure to show employee knew of custom—*Derrington v. Southern Ry Co*, 40 SW 2d 1069, 328 Mo 383, certiorari denied *Southern Ry Co v Derrington*, 52 S Ct. 37, 284 US 662, 76 L Ed 561

64. Ala—*Atlantic Coast Line R Co. v Russell*, 111 So 753, 215 Ala. 600

Ark—*Missouri Pac Ry Co v Barry*, 290 SW 942, 172 Ark 729, certiorari denied 48 S Ct 21, 275 US 529, 72 L Ed 409

Cal—*Matthews v Atchison, T & S. F Ry Co*, 129 P 2d 435, 54 Cal. App 2d 549

Ill—*Taylor v. Atchison, T & S F Ry Co*, 11 NE 2d 610, 292 Ill App. 457, certiorari denied *Atchison, T & S F R Co v Taylor*, 58 S Ct. 942, 304 US 560, 82 L Ed 1528

Mo—*Shubert v Fleming*, App, 1 S. W 2d 853

39 CJ p 1215 note 32

Jumping to avoid collision

Mo—*Lepchenaki v Mobile & O R. Co*, 59 SW.2d 610, 382 Mo 194

65. Ill—*Thompson v Elgin, J & E Ry Co*, 69 NE 2d 705, 329 Ill App 645.

Mich—*Thrall v Pere Marquette Ry Co*, 229 NW 488, 249 Mich. 440

Mo—*McNatt v Wabash Ry. Co.*, 108 SW 2d 33, 341 Mo 516—*Good v Missouri-Kansas-Texas R Co*, 97 SW 2d 612, 339 Mo. 380, certiorari denied *Missouri-Kansas-Texas R. Co v Good*, 57 S Ct. 221, 299 US. 605, 81 L Ed 446

39 CJ p 1216 note 33.

precautionary measures against such movement.⁶⁶

Under the evidence in some cases, the question as to the contributory negligence of the servant who was injured in the course of his employment on a railroad was held to be one for the court.⁶⁷

(c) Other Appliances or Places

The rule that questions of contributory negligence usually are for the jury has been applied to questions of contributory negligence in connection with various dangerous or defective appliances or places.

The rule that questions of contributory negligence are for the jury unless the evidence permits of but one inference has been applied in determining whether an employee, injured in connection with other dangerous or defective appliances or places, was chargeable with contributory negligence.⁶⁸ Thus the question of contributory negligence has

been held to be one for the jury where the servant was charged with failing to exercise due care in the selection or use of a defective or dangerous implement.⁶⁹ Also it is a question for the jury on conflicting evidence whether the employee was contributorily negligent in the course of his employment in connection with motor vehicles.⁷⁰

Electrical apparatus Whether a servant, injured by contact with an electrically charged wire or conductor⁷¹ or other appliance,⁷² or by the fall of a supporting pole,⁷³ was guilty of contributory negligence ordinarily is a question for the jury unless the evidence warrants but a single reasonable inference as to such fact.⁷⁴

Hatchways, elevator shafts, and other apertures. Whether the servant was negligent in falling into an unguarded hatchway,⁷⁵ elevator shaft,⁷⁶ or other

66. *US—Lowden v Burke, CCA Minn.*, 129 F2d 767

Cal—Woodward v Southern Pac Co., 94 P2d 1038, 35 Cal App 2d 130, certiorari denied *Southern Pac Co v Woodward* 80 S Ct 614, 309 U S 670, 84 L Ed 1016

Ill—Walate v Chicago, R I & P Ry Co., 28 NE2d 149, 306 Ill App 5, reversed on other grounds 33 NE2d 119, 376 Ill 59

39 C.J. p 1216 note 34

67. *NC—Buse v Powell*, 1 SE2d 103, 215 NC 67

39 C.J. p 1216 note 35

Disregarding signals

US—Sheehan v New York, N H & H R Co, CCANY., 93 F2d 442, certiorari denied 58 S Ct 942, 304 U S 560, 82 L Ed 1527

39 C.J. p 1216 note 35 [c]

Assuming unsafe position

US—Reid v Grand Trunk Western R Co, CCA Mich., 73 F2d 405

Tenn—Buckner v Southern Ry Co., 96 SW2d 600, 20 Tenn App. 212

39 C.J. p 1216 note 35 [b]

Failing to heed approach of locomotive or car

NH—Sweeney v Boston & M R R., 174 A 676, 37 NH 90, reheard 175 A 243, 37 NH 90, certiorari denied 55 S Ct 638, 294 U S 728, 79 L Ed 1258

39 C.J. p 1216 note 35 [e]

68. *Minn—Golden v Lerch Bros.*, 281 NW. 249, 203 Minn 211.

NY—Sadowski v Long Island R Co., 37 NYS2d 457, reversed on other grounds 41 NYS2d 611, 266 App Div 782, reversed on other grounds 55 NE2d 497, 292 NY 448, conformed to 50 NYS2d 171, 268 App Div 777

Question for court

Minn—Clark v Banner Grain Co., 261 NW. 596, 195 Minn 44

69. *US—Quannah, A & P. Ry Co. v.*

Gray, CCA Tex., 63 F2d 410, certiorari denied 54 S Ct 54, 290 US 636, 78 L Ed 553—*Sporgeon v Mahony, CCA Cal.*, 10 F2d 144

Ark—Norton & Wheeler Stave Co v Wright, 106 SW2d 178, 194 Ark 115—*Missouri Pac R Co v Hendrix*, 277 SW 337, 169 Ark 825, certiorari denied 46 S Ct 351, 270 US 651, 70 L Ed 781—*Smith v McEhachin*, 57 SW2d 1043, 186 Ark 1132

Mo—Allen v Missouri Pac Ry Co., 294 SW 80

39 C.J. p 1205 note 82

Particular implements

(1) Gasoline pump hose nozzle—*Mooney v Monark Gasoline & Oil Co.*, 298 SW. 69, 317 Mo. 1255

(2) Hammer—*Gray v Doe Run Lead Co.*, 53 SW2d 877, 331 Mo 481—39 C.J. p 1205 note 82 [g]

(3) Steam hammer—*Texas & N O R Co v Kveton, Tex Civ App.*, 75 SW2d 118, error dismissed.

70. *Ky—Evans v Cruscott*, 97 SW 2d 569, 265 Ky 693

Mass—Kavagian v. Lonero, 45 NE2d 823, 312 Mass 603

Miss—Texas Co v Jackson, 165 So 546, 174 Miss 737.

Mo—Kelso v W A Ross Const. Co., 85 SW2d 527, 337 Mo 202—*Very v Willh, App.*, 293 SW 500.

NH—Racette v Sunlight Baking Co., 155 A 254, 85 NH 171

NC—Holeman v Pensacola Shipbuilding Co., 134 SE 647, 192 NC 236

Lighting

Conn—Kruy v. Smith, 144 A. 304, 108 Conn 628

Cranking vehicle

Miss—Mississippi Utilities Co. v. Smith, 145 So 896, 166 Miss 105.

Excessive speed

Wash—Thomas v. Inland Motor

Freight, 68 P2d 603, 190 Wash 428

Working in unsafe position

Ky—Cincinnati, N & C Ry Co v Rairden, 21 SW2d 236, 231 Ky 141

Towing vehicle

Mo—Watson v Energy Const Co., 286 SW 715, 220 Mo App 362

71. *Ala—City of Dothan v Hardy*, 188 So 264, 237 Ala 603, 122 ALR 637

Ark—Presley v Actus Coal Co., 289 SW 474, 172 Ark 498

NH—Hussey v Boston & M. R R., 133 A 9, 82 NH 286

NC—Ellis v Durham Herald Co., 145 SE 283, 196 NC 262

39 C.J. p 1209 note 96

72. *Mo—Phares v Century Electric Co., App.*, 131 SW2d 879

39 C.J. p 1209 note 97

73. *Ark—Arkansas Power & Light Co v Dutton*, 140 SW2d 689, 200 Ark 761

Mo—Rose v Missouri Dist Telegraph Co., 43 SW2d 562, 328 Mo. 1009, 81 ALR 400

39 C.J. p 1209 note 98

74. *Kan—Sebaugh v City of Norcatur*, 287 P 238, 130 Kan 494

NC—Gibson v Steele's Mills, 130 SE 617, 190 NC 760

Pa—Commonwealth Trust Co v Carnegie-Illinois Steel Corp, Com Pl., 94 Pittsb Leg J 1, affirmed 44 A2d 594, 353 Pa 150

39 C.J. p 1209 note 99.

75. *Mass—Simpson v Phillipsdale Paper Mill Co.*, 116 NE. 828, 227 Mass 430

39 C.J. p 1210 note 13.

76. *Ala—Johnson v Johns Service Funeral Parlor*, 198 So 357, 240 Ala 231.

Mo—Cech v Mallinckrodt Chemical Co., 20 SW2d 509, 328 Mo. 601.

39 C.J. p 1211 note 14.

aperture⁷⁷ usually is a question for the jury unless the evidence is such that but one inference can be drawn from it by all reasonable minds⁷⁸

Hoisting appliances. Whether a servant, injured by a derrick,⁷⁹ elevator,⁸⁰ or other hoisting device,⁸¹ was guilty of contributory negligence ordinarily is a question for the jury unless the facts are such that all reasonable minds must draw the same inference therefrom.⁸²

Mines and other excavations. Whether a servant who was injured in the course of his employment in a mine⁸³ or other excavation, such as a quarry,⁸⁴ was guilty of contributory negligence usually is one for the determination of the jury unless the evidence is such that but one conclusion may

reasonably be drawn therefrom⁸⁵ Under the evidence the question of contributory negligence has been held to be one for the jury where the injury resulted from the fall of material from the wall or roof of a mine,⁸⁶ quarry,⁸⁷ tunnel,⁸⁸ pit,⁸⁹ trench,⁹⁰ or manhole⁹¹

Passageways. Whether the servant who was injured by reason of the defective or dangerous condition of a passageway was negligent in the selection or use thereof is a question for the jury⁹² unless the facts are such that all reasonable persons must draw the same conclusion therefrom⁹³

Supports. Whether the servant was negligent in the selection or use of a scaffold,⁹⁴ platform,⁹⁵ lad-

77. U S—Barber Asphalt Pav Co v Austin, Iowa, 186 F 443, 108 C A 365

39 C J p 1211 note 15.

78. Ill—Darrow v The Fair, 118 Ill App 665

39 C J p 1211 note 16

Elevator shaft

(1) Whether an employee who walks into an open elevator shaft is negligent as a matter of law does not depend on degree of darkness prevailing at the opening and there is no requirement that question of his negligence be submitted to the jury if he walks into an open elevator shaft in semi-darkness—Bailey v Alexander Realty Co, 20 A 2d 764, 342 Pa 363

(2) Employee's uncorroborated testimony, contradicting his testimony at former trial of action for injuries from fall down elevator shaft, that he looked and thought he saw elevator, was held insufficient to take case to jury—Davis v F W Woolworth Co, CCA Okl, 60 F 2d 344

79. Ind—Indiana Bridge Co v Shepp, 108 NE 107, 182 Ind 610

39 C J p 1208 note 91

80. Mo—Ebert v A J Kasper Co, 71 SW 2d 859, 228 Mo App 589

39 C J p 1208 note 92

Manner of placing trucks on elevator

Whether injured employee improperly placed trucks on elevator, thereby causing cable to break, and whether such act constituted contributory negligence were held for jury—Bridges v Great Falls Mfg Co, 156 A. 697, 85 NH 220

81. Mo—Greenan v Emerson Elec Mfg Co, 191 SW 2d 646, 354 Mo 781.

39 C J p 1208 note 93.

Dumb-waiter

NY—Kraushofer v Miller, 262 NY S. 294, 237 App Div. 518, reargu-

ment denied 262 NY S. 939, 238 App Div 825

82. Minn—Beier v Aberdeen Hotel Co, 136 NW 757, 118 Minn 237

39 C J p 1209 note 94

83. Ky—Elcomb Coal Co v Brock, 189 SW 2d 387, 300 Ky 399

Mo—Jacob v Peerless White Lime Co, 40 SW 2d 556, 327 Mo 888—Biondi v Central Coal & Coke Co, 9 SW 2d 596, 320 Mo 1130—Ingram v Prairie Block Coal Co, 5 SW 2d 413, 319 Mo 644—Oberdan v Evens & Howard Fire Brick Co, App, 296 SW 161—Cunningham v Doe Run Lead Co, 285 SW 757, 220 Mo App 38

39 C J p 1216 note 37.

84. Iowa—Herr v Green, 136 NW 511, 156 Iowa 532, rehearing denied 137 NW 917, 156 Iowa 532

39 C J p 1217 note 38

85. Ky—Willis v Barber, 133 SW 2d 551, 280 Ky 417

Tenn—Wind Rock Coal & Coke Co v Robbins, 1 Tenn App 784

39 C J p 1217 note 40

86. Ark—Mercury Mining Co v Chambers, 102 SW 2d 543, 193 Ark 771

Mo—Walthall v Childress, App, 4 SW 2d 1100

Tenn—Cain v Sisk, 72 SW 2d 1061, 18 Tenn App 84

39 C J p 1217 note 41

87. Mo—Hoffman v Peerless White Lime Co, 296 SW 764, 317 Mo 86—Genta v Ross, 37 SW 2d 969, 225 Mo App 673.

39 C J p 1217 note 43

88. Ark—Trumann Cooperage Co v Crye, 209 SW 278, 137 Ark 293

39 C J p 1217 note 43

89. Conn—Jenkins v Reichert, 5 A. 2d 6, 125 Conn 258.

39 C J p 1217 note 44

90. NC—Darden v Robert G. Laster & Co, 152 SE 32, 198 NC 427.

39 C J p 1217 note 45.

91. Ky—Nicholas v E H Abadie Co, 124 SW 325

92. Ill—Miller v Russell, 23 NE 2d 775, 303 Ill App 165

Mo—Busby v Southwestern Bell Telephone Co, 387 SW 434—Koonse v Standard Steel Works Co, 300 SW 531, 221 Mo App 1231

Ohio—Hale v Kohler, App, 35 NE 2d 967

39 C J p 1210 note 10

Falling on slippery floor

NY—Ecker v Monae-Lesser, 15 N. Y S 2d 972, 258 App Div 812

SC—Tuttle v Hanckel, 183 SE 484, 179 SC 60—Nichols v Congaree Fertilizer Co, 149 SE 162, 151 S. C 417

39 C J p 1210 note 10 [d], [e].

Stepping into hole or ditch

Mo—Jamison v Flour City Ornamental Iron Co, 80 SW 2d 984—Farley v Lehrack, App, 372 SW. 987—Arnold v Graham, 273 SW. 90, 219 Mo App. 249

39 C J p 1210 note 10 [b].

93. NY—Heilback v Consumers' Brewery, 100 NE 599, 207 NY. 133

39 C J p 1210 note 11.

94. Mo—Howard v Fred Schmitt Realty & Investment Co, App, 7 SW 2d 448

NC—Butler v Armour & Co, 137 SE 818, 193 NC 632.

39 C J p 1209 note 2

95. US—Northern Pac R. Co v. Berven, CCA Wash, 73 F 2d 687.

Mo—Lalley v Eberhardt, 37 SW 2d 599—Crull v Massman, App, 189 SW 2d 1009, opinion quashed on other grounds State ex rel. Massman v. Bland, 194 SW 2d 42, 355 Mo 17

39 C J p 1209 note 3.

der,⁹⁶ stairway,⁹⁷ gangway,⁹⁸ or other support⁹⁹ usually is a question for the jury unless the evidence is such that reasonable minds must draw the same conclusion therefrom.¹

(2) Dangerous Operations

Ordinarily it is a question for the jury whether the servant was guilty of contributory negligence when he was injured while participating in a dangerous operation.

Ordinarily it is a question for the jury whether a

servant was guilty of contributory negligence when he was injured while participating in logging,² founding,³ or blasting⁴ operations, or while engaged in the construction⁵ or demolition⁶ of a building or structure, or in the repair of a railroad car or track,⁷ or in loading, unloading, or stacking material,⁸ or in moving or conveying a heavy object,⁹ or while engaged in some other dangerous operation,¹⁰ unless the evidence is such that reasonable minds must invariably draw the same conclusion

96. NH—Pike v. Gagne, 11 A.2d 809, 90 NH 516

NY—Brancoleone v Northern Stevedoring Co, 231 NYS 489, 224 App Div 562

SC—Langston v Fiske-Carter Const Co, 185 SE 62, 180 SC 113—Rogers v Pacific Mills, 165 SE 183, 166 SC 519
39 CJ p 1210 note 4

97. Mo—Capstick v T M Sayman Products Co, 34 SW2d 480, 327 Mo 1—Fisher v Laclede Gas Light Co, 31 SW2d 770—Eaton v Wallace, 287 SW 814, 48 ALR 1291—Green v Kurtz, App, 292 SW 1073

RI—Boettger v Mauran, 12 A.2d 285, 64 RI 340

Wash—Kelly v The Vogue, 153 P.2d 277, 21 Wash 2d 785
39 CJ p 1210 note 5

98. US—Gold Hunter Mining & Smelting Co v Johnson, Idaho, 233 F 849, 147 CCA 523
39 CJ p 1210 note 6

99. US—Thomson v Boles, CCA Minn, 123 F.2d 487, certiorari denied 62 S.Ct 632, 315 US 804, 86 L.Ed. 1204

Wash—Hamre v Rothschild & Co, 240 P 909, 136 Wash 522

39 CJ p 1210 note 7

Flak
Wash—Christensen v Puget Sound Nav Co, 244 P. 569, 138 Wash 289

Roof
Ky—Anderson v Republic Iron & Steel Co, 107 SW 220, 32 Ky L 783

Wash—Schmidt v. Pelz, 87 P.2d 278, 198 Wash 80

1. US—Chicago, B & Q. R. Co. v Shalstrom, Neb, 195 F 725, 115 CCA 515, 45 L.R.A.N.S. 387
39 CJ p 1210 note 8

Scaffold with defective support

Where janitor who had been employed at apartment building for more than twenty-five years, in constructing a scaffold to clean wall paper, used as a support a stepladder which he knew was weak and had rusty braces and had been repaired with straps and rope, janitor was contributorily negligent as a matter of law, and could not recover

er from alleged owners and operators of building for injuries sustained when scaffold collapsed—Mosely v Sum, 130 SW2d 465, 344 Mo 969

2. Ark—Black Springs Lumber Co v Palmer, 96 SW2d 469, 192 Ark 1032—Houston Oil Co of Texas v Phillips, 39 SW2d 702, 183 Ark 1004

NC—Hawkins v Rowland Lumber Co, 152 SE 169, 198 NC 475—Collins v Hyde County Land & Lumber Co, 141 SE 580, 195 NC 849

SC—Wesley v Holly Hill Lumber Co, 43 SE2d 619, 211 SC 40

Wash—Hall v Northwest Lumber Co, 112 P. 369, 61 Wash 351

39 CJ p 1218 note 48

3. Mich—Borkowski v American Radiator Co., 130 NW 640, 165 Mich 266

39 CJ p 1218 note 49

4. Mo—Shey v Central Coal & Coke Co, 21 SW2d 772, 323 Mo 1058

39 CJ p 1218 note 50

5. Ark—Jones v Scott, 172 SW 840, 116 Ark 108

39 CJ p 1218 note 51

6. Ark—Burden v Hughes, 55 SW 2d 502, 186 Ark 707

NC—O'Neal v. Jones, 155 SE 448, 199 NC 652.

Okl—Beasley v Bond, 48 P.2d 299, 173 Okl. 355

39 CJ p 1218 note 53

7. Minn—Gonyea v Duluth, M & I R Ry. Co, 19 NW2d 384, 220 Minn 325

Mo—Gebhardt v American Car & Foundry Co, App, 296 SW 446

NC—Lofin v High Point, T & D R Co, 184 SE 104, 212 NC 595

—Hamilton v Southern Ry Co, 158 SE 75, 200 NC 543, certiorari denied Southern Ry Co v Hamilton, 52 S.Ct 19, 284 US 636, 76 L.Ed 541—Pyatt v Southern Ry Co, 154 SE 847, 199 NC 397

Tenn—Southern Ry Co v McCarroll, 7 Tenn App 297—Elmert v Wilkerson, 7 Tenn App 269

39 CJ p 1218 note 53

8. Ark—Meyer v Moore, 115 SW 2d 1087, 195 Ark 1114—Missouri Pac R. Co v Brown, 115 S.W.2d 1082, 195 Ark 1080.

Md—F Jarka Co v Gancel, 131 A 754, 149 Md 425

Minn—Stritske v Chicago Great Western Ry Co, 251 NW 532, 190 Minn 323

Mo—Craven v Halpin-Boyle Const Co, App, 15 SW2d 853—Gruenewald v Kaysing Iron Works, App, 5 SW2d 709—Oney v Dierks Lumber & Coal Co, App, 296 SW 470—Hutson v Missouri Star Co, App, 296 SW 316—Brann v Hydraulic Press Brick Co, App, 288 SW 941—Duvall v. Brooklyn Cooperage Co, App, 275 SW 586

NC—Langford v Kitchen Lumber Co, 148 SE 457, 197 NC 396

Okl—Luper Transp Co v Campbell, 133 P.2d 197, 192 Okl 45—Midland Valley R Co v Watie, 54 P.2d 177, 175 Okl 402

Tex—San Antonio & A P Ry Co v. Mason, Civ App, 289 SW 1027

Va—Andrews v Chesapeake & O Ry Co, 37 SE2d 29, 184 Va 951

39 CJ p 1218 note 54

9. Ark—Dierks Lumber & Coal Co v Noles, 148 SW2d 650, 201 Ark 1088—Mississippi River Fuel Corporation v Small, 32 SW2d 422, 182 Ark 1186

Mo—McCurry v Thompson, 181 SW 2d 529, 352 Mo 1199—Compton v Louis Rich Const Co, 287 SW 474, 315 Mo 1068—Neely v Chicago, Great Western R Co, App, 14 SW2d 972, certiorari quashed State ex rel Chicago Great Western R Co v Trimble, Sup, 14 SW 2d 978—Stroud v. Doe Run Lead Co, App, 272 SW 1080

NY—Wawrzonek v Central Hudson Gas & Electric Corporation, 12 N. E.2d 525, 276 NY 412

39 CJ p 1218 note 55

10. Ga—Howard v. Georgia Power Co, 176 SE 69, 49 Ga.App. 420

Mo—Walser v Kuhlmann, App, 176 SW2d 658—Kirkpatrick v American Creosoting Co, 37 SW2d 996, 225 Mo App 774—Miller v Walsh Fire Clay Products Co, 282 SW 141, 219 Mo App. 590—Gailus v. Pauly Jail Bldg Co, App, 282 SW 125—Scott v American Mfg. Co, App, 20 SW2d 592

Utah—Kaumans v White Star Gas & Oil Co, 63 P.2d 231, 92 Utah 24.

therefrom¹¹

§ 538. Instructions

- a In general
- b Requests for instructions
- c Submission of issues, invading province of jury

a. In General

In an action against an employer for injuries to his servant, the instructions should fully and clearly state the law applicable to the case.

As in civil actions generally, in an action against

an employer for injuries to his servant the instructions should fully and clearly state the law applicable to the case,¹² defining, limiting, and explaining, when necessary, the different terms or expressions used¹³ The instructions must be certain and definite,¹⁴ and pertinent,¹⁵ and not argumentative,¹⁶ speculative,¹⁷ or confusing, misleading, or contradictory¹⁸ In order to be sufficient, an instruction should be complete in itself¹⁹ The instructions should be considered as a whole, and if, taken together, they fairly and fully present the law, they are not objectionable,²⁰ but where the different paragraphs of the charge are not properly connect-

Climbing pile of ingots to unhook others from crane

Mo—Tabor v Kansas City Bolt & Nut Co, App, 274 SW 911

Repairing valve in refinery vapor line

Tex—Pure Oil Co v Pope, Civ App, 75 SW 2d 175, reversed without opinion

Refilling kerosene stoves

Mo—Atkins v Torson, App, 13 SW 2d 930

Working with dangerous chemicals

Minn—Symons v Great Northern Ry Co, 293 NW 303, 208 Minn 240

11. Ark—Boyle-Farrell Land Co v. Carleton, 266 SW 87, 166 Ark 315

89 CJ p 1219 note 56

Explosion in gasoline refinery

Where there was no evidence showing any causal relation between owner's allegedly negligent act or omission and accident resulting in death, and vapors causing explosion, if any, did not arise from gasoline drawn into building but from gasoline caused and permitted by decedent to remain exposed to air in the building, there could be no recovery against owner—*Jessie's Adm'x v Gulf Refining Co*, 121 SW 2d 909, 375 Ky 583

Moving heavy object

Mo—Boll v Condie-Bray Glass & Paint Co, 11 SW 2d 48, 321 Mo 92

N.C—Hemphill v Standard Oil Co, 148 SE 443, 197 NC 339

Repairing tank

Okl—Champlin Refining Co of New Mexico v. Huntington, 69 P 2d 31, 180 Okl 280

12. **Instructions held sufficient or not erroneous**

US—Brownell Impr Co v Sweeney, Ohio, 223 F 510, 139 CCA 58
39 CJ p 1219 note 60 [a]

Instructions held insufficient or erroneous

SC—Grant v Director-Gen of Railroads, 102 SE 854, 114 SC 89
39 CJ p 1219 note 60 [b].

13. Ill—Momen Stone Co v Turrell, 68 NE 1078, 305 Ill 515
39 CJ p 1219 note 61

Noxious dust

In employee's suit for damages for tuberculosis allegedly contracted from inhalation of dust from sand blasting, defendant's requested instruction defining words, "noxious dust" within statute requiring employer to furnish respirator was held erroneous—*Dodd v Independence Stove & Furnace Co*, 51 SW 2d 114, 330 Mo 662

14. Mo—Duerat v St Louis Stamping Co, 63 SW 827, 163 Mo 607—*Hegberg v St Louis & S F R Co*, 147 SW 192, 164 Mo App 514

15. NY—Vogel v American Bridge Co, 84 NYS 799, 88 App Div 68, reversed on other grounds 73 NE 1, 180 NY 373

16. Ala—Louisville & N R Co v Campbell, 12 So 574, 97 Ala 147
39 CJ p 1219 note 64

Instructions held argumentative

Ala—Mobile & O R Co v Williams, 139 So 337, 224 Ala 125
39 CJ p 1219 note 64 [a]

17. Cal—Jones v Southern Pac Co, 239 P 429, 74 Cal App 10

18. Ala—Mobile & O R Co v Williams, 139 So 337, 224 Ala 125

Miss—Federal Compress Co v. Craig, 7 So 2d 532, 193 Miss 689
39 CJ p 1219 note 65

Instructions held confusing, misleading, or contradictory

US—Delaware, L & W R Co v Berry, CCA N.J., 48 F 2d 1052, certiorari denied 52 SCt 7, 284 US 617, 76 L Ed 527

Ala—Mobile & O R Co v Williams, 139 So 337, 224 Ala 125—*Louisville & N R Co v Parker*, 138 So 231, 223 Ala 626, certiorari dismissed 53 SCt 94, 287 US 569, 77 L Ed 501—*Southern Ry Co v Smith*, 137 So 398, 223 Ala 583

Ga—Western & A R R v Hetzel, 144 SE 506, 88 Ga App 556, reversed on other grounds 149 SE 876, 189 Ga 246, conformed to 150 SE 112, 40 Ga App 447, and vacated 150 SE 112, 40 Ga App 447.

Idaho—Burklund v. Oregon Short Line R Co, 58 P 2d 773, 56 Idaho 703

Mo—Brum v Wabash Ry Co, 74 SW 2d 566, 335 Mo 876—*Gettys v American Car & Foundry Co*, 16 SW 2d 85, 322 Mo 787—*Howser v Chicago Great Western R Co*, 5 SW 2d 59, 319 Mo 1015

Tex—Galveston, H & S A Ry Co v Andrews, Civ App, 291 SW 590
39 CJ p 1219 note 65 [a]

Instructions held not confusing, misleading, or contradictory

Ala—Mobile & O R Co v Williams, 147 So 819, 226 Ala 541, certiorari denied 54 SCt 71, 290 US 655, 78 L Ed 568

Miss—Long-Bell Lumber Sales Corporation v Ferritt, 172 So 747, 178 Miss 194

Mo—Hampton v Wabash R Co, 304 SW 2d 708—*Wall v Philip A Rohan Boat, Boiler & Tank Co*, 62 SW 2d 764, 338 Mo 619—*Hulsev v Tower Grove Quarry & Construction Co*, 30 SW 2d 1018, 326 Mo 194—*Hamilton v Standard Oil Co of Indiana*, 19 SW 2d 679, 323 Mo 531—*Messing v Judge & Dolph Drug Co*, 18 SW 2d 408, 322 Mo 901—*Schlueter v East St Louis Connecting Ry Co*, 296 SW 105, 318 Mo 1366—*Bartlett v Pontiac Realty Co*, 31 SW 2d 279, 221 Mo App 1234—*Denkman v Prudential Fixture Co*, App, 289 SW 591—*Duval v Brooklyn Cooperage Co*, App, 375 SW 586—*Tabor v Kansas City Bolt & Nut Co*, App, 274 SW 911

Tex—Texas & P Ry Co v Aaron, Civ App, 19 SW 2d 930, certiorari denied 50 SCt 409, 281 US 756, 74 L Ed 1166

39 CJ p 1219 note 65 [b]

19. Ill—Pittsburgh, C & St L R Co v McGrath, 15 Ill App 85.
39 CJ p 1220 note 66

20. Fla—Great Atlantic & Pacific Tea Co v Dallas, 192 So 867, 141 Fla 306

Mo—Moran v Atchison, T & S F. Ry Co, 48 SW 2d 881, 330 Mo 278, certiorari denied Atchison, T.

ed, and they may be construed to be contradictory in their terms, such charge is error²¹ Mere errors of form or phraseology which could not possibly have misled the jury are immaterial.²²

b. Requests for Instructions

Except where the court is required to instruct regardless of whether any request is made, the master or servant desiring instructions to be given must request them, and the court will give or refuse to give them according to the rules applicable in civil actions generally

In accordance with the rules applicable to trials of civil actions generally, as discussed in the CJS title Trial § 390, also 64 C.J. p 819 note 35 et seq,

in some jurisdictions in an action against a master to recover for injuries to a servant the court must instruct the jury as to the law of the case regardless of whether any request is made²³ In other jurisdictions, however, the party desiring instructions to be given to the jury on submission of a case must make a request therefor before it becomes the duty of the court to do so,²⁴ and, if a case is submitted on a certain ground of negligence only, other grounds are deemed abandoned when no instructions on them are requested²⁵ If an instruction, as given, is not sufficiently full and clear, it is the duty of counsel to ask for a further explanatory charge²⁶ If a requested instruction is correct, and there is

& S F R Co v Moran, 58 S Ct 21, 287 US 621, 77 L Ed 539
39 C.J. p 1220 note 67

21. Tex—Paris, M & S P R Co v Stokes, Civ App, 41 SW 484
39 C.J. p 1220 note 68

22. Ind—Cincinnati Gas, Coke, Coal & Mining Co v Underwood, 107 NE 28, 60 Ind App 351

Miss—Long-Bell Lumber Sales Corporation v Perritt, 172 So 747, 178 Miss 194

39 C.J. p 1220 note 69

23. Ga.—Babcock Bros Lumber Co v Hughes, 113 SE 816, 29 Ga App 20—Southern Cotton Oil Co v Shields, 93 SE 169, 20 Ga App 549

Under Federal Employers' Liability Act the trial judge must instruct as to present value of damages representing loss of future benefits, whether or not requested—Youngblood v Southern Ry Co, 149 SE 742, 153 SC 265, 77 ALR 1419

Failure to charge without request held not improper

(1) A failure to charge on the fellow-servant doctrine, when not requested so to do, has been held not improper where the testimony apparently excluded the defense of negligence of a fellow servant—Turrentine v Wellington, 48 SE 739, 136 NC 308

(2) In the absence of an appropriate request the court is not required to charge the jury what is not the law—Charleston & W. C. R Co v Brown, 79 SE 932, 13 Ga App 744

24. Minn—Campbell v Canadian Northern Ry Co, 144 NW 772, 124 Minn 245

Mo—Moran v Atchison, T. & S F Ry Co, 48 SW2d 881, 330 Mo 278 certiorari denied Atchison, T. & S F Ry Co v Moran, 58 S Ct 21, 287 US 621, 77 L Ed 539—Brown v. Forrester & Nace Box Co, 243 SW 330—Smith v Fordyce, 88 SW 879, 190 Mo 1—Huber v Ehlen, App, 253 SW 184—Lafaver v Pryor, App, 218 SW 970—Carpenter v. Kansas City

Southern Ry Co, 175 SW 234, 189 Mo App 164

NC—Buchanan v Ritter Lumber Co, 84 SE 50, 188 NC 40

Tex—Strawn Coal Co v Trojan, Civ App, 195 SW 256—Texas Power & Light Co v Bird, Civ App, 165 SW 8, error refused—International & G N R Co v Beasley, 29 SW 1121, 9 Tex Civ App 569

W Va.—Jaeger v City Ry Co, 78 SE 59, 72 W Va 307

Wis—Lind v Uniform Stave & Package Co, 120 NW 839, 140 Wis 183

25. Mo—Harlan v Wabash Ry Co, 73 SW2d 749, 335 Mo 414—Hughes v Mississippi River & B T Ry, 274 SW 703, 309 Mo 560

26. US—Illinois Cent R Co v Skaggs, Minn, 36 S Ct 249, 240 US 66, 60 L Ed 528—Odell Mfg Co v Tibbets, CCA NH, 212 F 652, 129 CCA 188—Erie R Co v Schomer, CCA Ohio, 171 F. 798, 96 CCA 458

Ala.—Sloss-Sheffield Co v Ross, 77 So 686, 201 Ala 160—Pace v Louisville & N R Co, 52 So 52, 166 Ala 519

Ga.—Temples v Central of Georgia Ry Co, 91 SE 502, 19 Ga App 307

Idaho—Barter v. Stewart Mining Co, 135 P 68, 24 Idaho 540

Ind—Vandalia Coal Co v Yemm, 94 NE 881, 175 Ind 524

Minn—Gillespie v Great Northern Ry Co, 144 NW 466, 124 Minn 1.

Mont—Wallace v Chicago, M & P S Ry Co, 157 P 955, 52 Mont 345

SC—Youngblood v Southern Ry Co, 149 SE 742, 152 SC 265, 77 ALR 1419

Tex—Gulf, C & S F Ry Co v Hall, Civ App, 196 SW 613, error refused—St Louis Southwestern Ry Co. of Texas v Bishop, Civ App, 291 SW 843, error dismissed—Missouri, K & T Ry Co of Texas v Maples, Civ App, 162 SW 426, error refused—Missouri, K & T. Ry. Co. of Texas v Perryman,

Civ App, 160 SW 406, dismissed

in accordance with agreement on file—Missouri, K & T Ry Co of Texas v Bunkley, Civ App, 153 SW 937, error granted—Abilene Light & Water Co v Robinson, Civ App, 146 SW 1052, error refused—Louisiana & Texas Lumber Co v Meyers, Civ App, 94 SW 140

Wis—Mueller v Northwestern Iron Co, 104 NW 87, 125 Wis 326—Lounsbury v Davis, 102 NW 941, 124 Wis 432

39 C.J. p 1223 note 99

Instructions held sufficient in absence of request

US—Baltimore & O R Co v Tittle, CCA Ohio, 4 F2d 818, certiorari denied 46 S Ct 20, 369 US 558, 70 L Ed 410

Conn—Roma v Climax Co of Lowell, 92 A 427, 88 Conn 642

Ga.—Bibb Mfg Co v Snow, 106 SE 612, 26 Ga App 504

Ill.—Yeates v Illinois Cent R Co, 89 NE 338, 241 Ill 205

Ind—Cincinnati, I & W R Co v Little, 131 NE 762, 190 Ind 662

Iowa—Bradbury v Chicago, R I & P Ry Co, 128 NW 1, 149 Iowa 51, 40 LRA NS, 684, error dismissed 32 S Ct 520, 223 US 711, 56 L Ed 624

Minn—Mortenson v Hotel Nicollet Co, 136 NW 306, 118 Minn 29

NC—Lalley v Interstate Cooperation Co, 139 SE 869, 194 NC 250

Okl—St. Louis-San Francisco Ry. Co v Stitt, 233 P 1073, 108 Okl 42, certiorari denied 45 S Ct 636, 268 US 700, 69 L Ed 1164.

Or—McClagherty v Rogue River Electric Co, 140 P. 64, 73 Or 135, affirmed 144 P 569, 73 Or 135

SC—Newsom v. F W. Poe Mfg. Co., 98 SE 142, 111 SC 424

Tex—Southwestern Portland Cement Co v Presbitero, Civ App, 190 SW 776, error dismissed—Kirby Lumber Co. v Williams, Civ App, 159 SW 309, error dismissed—Ft. Worth & D C Ry Co v Keeran, Civ App, 149 SW 355, error refused—Galveston, H & S A. Ry.

some evidence on which to base it, it should be given if not covered by instructions already given²⁷ If the substance of a requested instruction is covered by the general charge or by other instructions already given, it may properly be refused²⁸ Where a requested instruction is incorrect, the court may and should modify it so as to make it conform to the facts of the case and the law applicable thereto²⁹

c. Submission of Issues; Invading Province of Jury

In an action against an employer to recover for injuries to an employee, the instructions must not ignore or exclude issues material to the cause or invade the province of the jury.

In accordance with the rules relating to ignoring or excluding issues, theories, or defenses generally, the instructions must not ignore a material matter in issue or withdraw or exclude it from the jury,³⁰ nor must they ignore material evidence³¹ or assume, as a matter of law, the existence or nonexistence of

a fact in dispute³² Failure to instruct on matters not pleaded and not in issue is not error³³ An instruction must be supported by some evidence³⁴ In charging the jury, the court should not assume the existence of facts to prove which there is no evidence³⁵ or which the evidence shows not to exist³⁶ An instruction should not single out and give undue prominence to any portion of the evidence, or direct the attention of the jury from the main issue and cause it to decide the whole case on a mere subordinate issue³⁷ An instruction which is a mere statement of fact is erroneous³⁸ and properly refused³⁹ It is not error to assume the existence of a fact which is admitted or established⁴⁰ or to fail to instruct as to undisputed or immaterial matters⁴¹ It is proper for the court, in charging the jury, to require it to find whether the evidence establishes the existence of the specified group of facts which, if true, would in law establish plaintiff's cause of action or defendant's defense,⁴² and to instruct the jury that, if they find such group of

Co v Grenig, Civ App, 142 S W 135, error refused—Missouri, K & T Ry Co of Texas v Hampton, Civ App, 142 S W 89, error refused—Sanders v St Louis Southwestern Ry Co of Texas, Civ. App, 135 S W 718—Galveston, H & S A Ry Co v Senn, Civ App, 125 S W. 322, 59 Tex Civ App. 15, error refused

27. Iowa—Morbey v Chicago & N W. R Co, 74 N W 751, 105 Iowa 46

39 C J p 1223 note 1.

28. Ark—Arkansas Lumber Co v Wallace, 139 S W 534, 99 Ark. 537 Mo—Dodd v Independence Stove & Furnace Co, 51 S W 2d 114, 330 Mo 662

Tex—Texas & P Ry Co v Aaron, Civ App, 19 S W 2d 930, certiorari denied 50 S Ct 409, 281 U S 756, 74 L Ed 1166

39 C J p 1223 note 2—64 C J p 903 note 67

29. Mo—Lepchenaki v Mobile & O R Co, 59 S W 2d 610, 332 Mo 194—Ryan v Sheffield Car & Equipment Co, App, 24 S W 2d 166 39 C J p 1223 note 3

Modification held proper

(1) In servant's action for injuries, modification of defendant's instruction that master was not liable, merely because plaintiff was injured by act of fellow servant, by adding the qualification "unless such fellow servant was negligent, and such negligence was the proximate cause of the injury," was not erroneous—Texas Pipe Line Co v Johnson, 275 S W 329, 169 Ark 235

(2) Instruction denying recovery

if employee was at liberty to choose method was properly modified by explaining effect of employer's direction of method—Welly v S H Kress & Co, 295 S W. 501, 231 Mo App 1089

Instructions held improper as given Charges on common-law negligence, without explanation that they applied only in case employment of minor was found to be legal, was erroneous—Norris v American Steam Pump Co, 237 N W 382, 255 Mich 144

30. U S—Philadelphia & R Ry Co v Bartsch, C.C.A.N.J., 9 F 2d 858 Mo—Clayton v Wells, 26 S W 2d 969, 324 Mo 1176

39 C J p 1222 note 85

Instructions held proper or not erroneous

Ala—Taylor v Atlantic Coast Line R Co, 168 So 181, 233 Ala 378

Mo—Kamer v Missouri-Kansas-Texas R Co, 32 S W 2d 1075, 326 Mo 793, certiorari denied Missouri-Kansas-Texas R Co v Kamer, 51 S Ct 216, 282 U S 903, 75 L Ed 795—Potterfield v Terminal R Ass'n of St Louis, 5 S W 2d 447, 319 Mo 619, certiorari denied Terminal R Ass'n of St Louis v Potterfield, 49 S Ct. 20, 278 U S 616, 73 L Ed 539

NC—Malcolm v Mooresville Cotton Mills, 133 S E 7, 191 NC 727

31. NJ—Tuccillo v John T Clark & Son, 139 A 58, 104 N J Law 122 39 C J p 1223 note 86

32. Ind—Cincinnati, I. & W. R Co v Little, 131 N E 762, 190 Ind. 662 39 C J p 1222 note 87

33. Minn—Ryan v. St Paul Union

Depot Co, 210 N W 32, 168 Minn 237

64 C J p 756 note 26, p 757 note 36

34. Mo—Gately v St Louis-San Francisco Ry Co, 56 S W 2d 54, 332 Mo 1

39 C J p 1222 note 88

Evidence held sufficient to warrant instruction

Mo—Gately v St Louis-San Francisco Ry. Co, 56 S W 2d 54, 332 Mo 1

39 C J p 1222 note 88 [a]

35. Fla—South Florida R Co. v. Weese, 13 So 436, 32 Fla. 212

39 C J p 1222 note 89

36. Iowa—Brady v Burlington, C R & N R Co, 33 N W 360, 72 Iowa 53

39 C J p 1222 note 90.

37. Ga—Southern Cotton Oil Co v Caleb, 85 S E 707, 143 Ga. 585 39 C J p 1223 note 91.

38. S C—Lowrimore v Palmer Mfg Co, 38 S E 430, 60 S C 153

39. S C—Lowrimore v Palmer Mfg. Co, supra.

40. Mo—Stratton v. Nafsiger Baking Co, App, 237 S W 538

Tex—Bryson v Moore, Civ App, 157 S W 233—Ft Worth & D C R Co v Lynch, Civ App, 136 S W 530

41. Mo—Brasel v W T Letts Box & Cooperage Co, App, 220 S W 984

Tex—Southern Pac Co v Godfrey, 106 S W 1135, 48 Tex Civ App 616

42. Tex—Galveston, H & S A. R Co v Buch, 65 S W. 681, 27 Tex. Civ App 283

facts to be established by the evidence, they should find in favor of plaintiff or defendant, as the case may be.⁴³

§ 539. — Conformity to Pleadings and Evidence; Theory of Case

In an action against an employer to recover for injuries to an employee, the instructions must conform and be confined to the issues raised by the pleadings and evidence.

In an action against an employer to recover for injuries to an employee, the instructions must conform and be confined to the issues raised by the pleadings and evidence.⁴⁴ Where the pleadings warrant it and evidence on which to base an instruction has been introduced, either party is entitled to an instruction on his theory of the case,⁴⁵ and such instruction need not embrace the theory of the other party,⁴⁶ since the latter can submit the

theory in an instruction of his own.⁴⁷ The right of recovery should be confined to the specific cause of action alleged in the declaration.⁴⁸ Instructions are properly limited by the court to the count of the declaration or complaint to which they are applicable.⁴⁹

Common-law and statutory liability. Where the extent of the liability is governed by statute, the court should instruct the jury by construing the statute in its application to the case at bar.⁵⁰ Where the issues warrant recovery either at common law or under a statute, it has been held that it is not erroneous to instruct as to defendant's liability both at common law and under the statute,⁵¹ and in such cases it has been held erroneous to disregard the issue arising from the common-law liability.⁵²

Limiting purpose for which evidence may be considered. Where evidence competent for one purpose merely or as to one issue is admitted, the court

43. Tex.—Galveston, H & S. A. R Co v Buch, *supra*.

44. Ill.—Armstrong v Chicago & W I R Co, 283 Ill App 126, affirmed 183 NE 478, 350 Ill 426, certiorari denied Chicago & W I R Co v Armstrong, 53 S Ct 523, 289 US 724, 77 L Ed 1475.

Ky.—Long Fork Ry Co v Ferrell, 293 SW 953, 219 Ky 458.

39 C J p 1220 note 71—64 C J p 773 note 96, p 773 note 6.

Instructions held proper or erroneously refused

Ill.—Jannusch v Weber Bros Metal Works, 249 Ill App 1.

Mo.—Young v Terminal R R Ass'n of St. Louis, 192 SW 2d 403—Joice v. Missouri-Kansas-Texas R Co, 189 SW 2d 568, 354 Mo 439, 161 ALR 383—Gieseking v Litchfield & Madison Ry Co, 127 SW 2d 700, 344 Mo 672, certiorari denied Litchfield & M R Co v Gieseking, 60 S Ct 104, 308 US 583, 84 L Ed 488—Gately v St Louis-San Francisco Ry Co, 56 SW 2d 54, 332 Mo 1—Kamer v. Missouri-Kansas-Texas R Co, 32 SW 2d 1075, 326 Mo 792, certiorari denied Missouri-Kansas-Texas R Co v Kamer, 51 S Ct 216, 282 US 903, 75 L Ed 795—Hamilton v Standard Oil Co of Indiana, 19 SW 2d 679, 333 Mo 531—Westover v. Wabash Ry Co, 6 SW 2d 843, certiorari denied Wabash Ry Co v Westover, 49 S Ct 31, 278 US 632, 73 L Ed 550—Compton v Louis Rich Const Co, 287 SW 474, 215 Mo 1068—Wilson v. Spicuzza, App, 135 SW 2d 53—Walls v Thompson, App, 119 SW 2d 43—Wainwright v Westborough Country Club, App, 45 SW 2d 86—Genta v Ross, 37 SW 2d 969, 225 Mo App 673—Whitehead v. Koberman, App, 299 SW 121—

Goodwin v American Car & Foundry Co, App, 285 SW 529
39 C J p 1220 note 71 [a]—64 C J p 743 notes 78, 84, p 751 note 1

Instructions held erroneous or properly refused

US—Carpenter v Baltimore & O R Co, CCA Ohio, 109 F 2d 375—Union Pac R Co v. Garner, CCA Neb, 24 F 2d 53

Ill.—Stott v. Thompson, 14 NE 2d 246, 294 Ill App 450, certiorari denied Thompson v Stott, 59 S Ct 106, 305 US 639, 83 L Ed 411—Wetterer v. Atchison, T & S F Ry. Co, 277 Ill App 275, certiorari denied Atchison, T & S F Ry Co v Wetterer, 55 S Ct 835, 295 US 754, 79 L Ed 1698

Ind.—Dalton Foundries v Jefferies, 51 NE 3d 13, 114 Ind App 271, followed in Dalton Foundries v Dean, 51 NE 2d 397, 114 Ind App 389

Ky.—Horse Creek Mining Co v Frazier's Adm'x, 5 SW 2d 1064, 234 Ky. 211—Cincinnati, N O & T P R Co v Heinz, 288 SW 1020, 217 Ky. 43

Mass.—Reidy v Crompton & Knowles Loom Works, 60 NE 2d 589, 318 Mass 135

Miss.—Eagle Cotton Oil Co v Pickett, 166 So 764, 175 Miss 577

Mo.—Riley v Wabash Ry. Co, 44 SW 2d 136, 328 Mo 910—Scheibe v Fruin-Colnon Contracting Co, 23 SW 2d 44, 334 Mo 375—Phillips v American Car & Foundry Co, App, 274 SW 963

Or.—Hollopeter v Palm, 291 P 380, 134 Or 546, modified on other grounds 294 P 1056, 134 Or 546, appeal dismissed 53 S Ct 15, 284 US 572, 76 L Ed 497.

SC.—Youngblood v Southern Ry.

Co, 149 SE 742, 152 SC 265, 77 ALR 1419

Vt.—Blaisdell v Blake, 11 A 2d 215, 111 Vt 123

Wis.—Fries v Lallier, 263 NW 178, 219 Wis 388

39 C J p 1220 note 71 [b]—64 C J p 743 notes 1, 11, p 744 notes 37, 41, p 753 notes 30, 43, p 755 note 82, p 756 note 92, p 774 notes 36, 40

Instructions held unnecessary but not prejudicial

Ark.—Bruner Ivory Handle Co v West, 86 SW 2d 919, 191 Ark 479

45. Okl.—Casualty Reciprocal Exchange v Sutfin, 166 P 2d 434, 196 Okl 567—Evlo Refining & Marketing Co v Moore, 137 P 2d 911, 192 Okl 576

39 C J p 1221 note 72

Instructions held not improper

Mo.—Lovett v Kansas City Terminal Ry Co, 295 SW 89, 316 Mo 1246.

43. Mo.—Shaw v Chicago & A R Co, 282 SW 416, 314 Mo 123
39 C J p 1221 note 73

47. Mo.—Hester v Jacob Dold Packing Co, 81 Mo App 451

48. Iowa.—Flisk v Chicago, M & St P R Co, 38 NW. 132, 74 Iowa 424

39 C J p 1221 note 75

49. Ill.—Cobb Chocolate Co v. Knudson, 69 NE 816, 207 Ill 452

50. Iowa.—Pelton v Illinois Cent R Co, 150 NW 236, 171 Iowa 91

51. Or.—Hoag v. Washington-Oregon Corp, 144 P 574, 75 Or 588, reheard 147 P 756, 75 Or 588
39 C J p 1222 note 78

52. Kan.—Warfield v. Morgan, 121 P 489, 86 Kan 524.

should charge the jury that it should not be considered for purposes other than those for which it was admitted,⁵³ and it is error to refuse a request for an instruction to that effect.⁵⁴ However, an instruction is properly refused which restricts the evidence unduly.⁵⁵

§ 540. — Presumptions and Burden of Proof

In an action against an employer for injuries to his employee, the jury must be properly instructed as to

the presumptions of law applicable to the issues and on whom the burden of proof devolves.

The instructions must correctly state the presumptions of law applicable to the issues raised, and on whom the burden of proof devolves,⁵⁶ for instance, as to the existence of the relation of master and servant,⁵⁷ the cause of the injury,⁵⁸ the negligence of the master,⁵⁹ the assumption of risk by the servant,⁶⁰ the contributory negligence of the servant injured,⁶¹ and the incompetency or negligence of fellow servants.⁶² It is not necessary that a specific

53. Ga.—Brush Electric Light & Power Co v Wells, 80 SE 533, 103 Ga 512

Mich.—Catlin v Michigan Cent. R. Co., 38 NW 515, 66 Mich 358

54. Ga.—Brush Electric Light & Power Co v Wells, 80 SE 533, 103 Ga 512

Mich.—Catlin v Michigan Cent. R. Co., 38 NW 515, 66 Mich 358

55. Tex.—Missouri, etc., R. Co. v Kellerman, Civ App., 87 SW 401

56. Fla.—Great Atlantic & Pacific Tea Co v Dallas, 192 So 867, 141 Fla 206

Ga.—Western & A. R. R. v Lochridge, 152 SE 474, 170 Ga 208, certiorari denied 50 S Ct 461, 281 US 762, 74 L Ed 1171

39 CJ p 1224 note 5

Instructions held sufficient or not erroneous

Ga.—Southern Ry Co v Perdue, 154 SE 793, 171 Ga 134—Western & A. R. R. v Lochridge, 152 SE 474, 170 Ga 208, certiorari denied 50 S Ct 461, 281 US 762, 74 L Ed 1171

Or.—Weiss v Allen, 35 P 2d 478, 147 Or 670

S C.—Mann v Seaboard Air Line Ry. Co., 136 SE 234, 188 SC 241.

39 CJ p 1224 note 5 [a]

Instructions held insufficient or erroneous

Mo.—Hough v Chicago, R. I. & P. Ry Co., 100 SW 2d 499, 339 Mo 1169

39 CJ p 1224 note 5 [b]

Instructions held properly refused

Ga.—Western & A. R. R. v Hetzel, 144 SE 506, 38 Ga App 556, reversed 149 SE 876, 169 Ga 246, conformed to 150 SE 112, 40 Ga App 447, and vacated 150 SE 112, 40 Ga App 447

Ill.—Wetterer v Atchison, T. & S. F. v Co., 277 Ill App 275, certiorari denied Atchison, T. & S. F. Ry Co v Wetterer, 55 S Ct 835, 295 US 754, 79 L Ed 1698—Norkevich v Atchison, T. & S. F. R. Co., 263 Ill App 1, certiorari denied Atchison, T. & S. F. R. Co. v Norkevich, 52 S Ct 497, 286 US 514, 76 L Ed 1282

39 CJ p 1224 note 5 [c]

57. Wash.—Stubbe v Baker, 273 P. 733, 150 Wash 514.

58. Instructions held sufficient, not erroneous, or improperly refused

Ark.—St. Louis Southwestern R. Co. v Burd, 134 SW 239, 93 Ark 88

39 CJ p 1224 note 6 [a]

Instructions held insufficient, erroneous, or properly refused

US.—McCarthy v Pennsylvania R. Co., CCA Ind., 156 F 2d 877

Ill.—Rost v F. H. Noble & Co., 147 NE 258, 316 Ill 357

39 CJ p 1224 note 6 [b]

59. Instructions held sufficient, not erroneous, or improperly refused

US.—Nashville, C. & St. L. Ry. Co. v. York, CCA Tenn., 127 F 2d 606

—F. W. Martin & Co. v Cobb, CCA Ark., 110 F 2d 159—Lowery v. Hocking Valley Ry. Co., CCA Ohio, 60 F 2d 78

Ind.—New York, C. & St. L. R. Co. v Connaughton, 5 NE 2d 904, 211 Ind 419

Mo.—Tash v St. Louis-San Francisco Ry Co., 76 SW 2d 690, 335 Mo 1148—Barradough v Union Pac. R. Co., 52 SW 2d 998, 331 Mo 157

—Nicholson v Franciscus, 40 S W 2d 623, 328 Mo 96—Uhl v Century Electric Co., App., 295 SW 127—Stroud v Booth Cold Storage Co., App., 285 SW. 165—Ware v Northwestern Mach. Co., App., 273 SW 237

NC.—Bryant v Burns-Hammond Const. Co., 150 SE 122, 197 NC 639

Ohio.—Baltimore & O. R. Co. v. Shober, 176 NE 88, 38 Ohio App. 316

39 CJ p 1224 note 7 [a]

Instructions held insufficient, erroneous, or properly refused

US.—Carpenter v Baltimore & O. R. Co., CCA Ohio, 109 F 2d 375

Cal.—Perrett v. Southern Pac. Co., 165 P 2d 751, 78 Cal App 2d 30

Miss.—Stokes v Adams-Newell Lumber Co., 118 So 441, 151 Miss. 711—Mobile & O. R. Co. v Brewer, 107 So 199, 142 Miss 60

Mo.—Cantley v Missouri-Kansas-Texas R. Co., 183 SW 2d 128, 353 Mo 605—Grosvenor v New York Cent. R. Co., 123 SW 2d 178, 343 Mo 611—Tash v St. Louis-San Francisco Ry Co., 76 SW 2d 690, 335 Mo 1148—Temple v Samuel Cupples Envelope Co., 300 SW. 265,

318 Mo 280—Hauck v American Car & Foundry Co., App., 14 SW. 2d 497

NY.—Gustavson v Thomas, 237 N. Y S 479, 227 App Div 303

39 CJ p 1224 note 7 [b], [c].

60. Instructions held sufficient, not erroneous, or improperly refused

Pa.—Fox v. Lehigh Valley R. Co., 141 A. 157, 293 Pa 821

39 CJ p 1224 note 8 [a]

Instructions held insufficient, erroneous, or properly refused

NC.—Hubbard v Southern Ry. Co., 166 SE 802, 203 NC 675

39 CJ p 1224 note 8 [b]

61. Instructions held sufficient, not erroneous, or improperly refused

US.—Chicago & N. W. R. Co. v. Grauel, CCA Minn., 160 F 2d 820.

Ill.—O'Brien v Chicago & N. W. Ry. Co., App., 68 NE 2d 638

Iowa.—Oestereich v Leslie, 284 N. W 220, 212 Iowa 105

Tex.—St. Louis Southwestern Ry. Co. v Gillenwater, Civ App., 284 S W 268, affirmed St. Louis Southwestern Ry. Co. of Texas v. Gillenwater, Com App., 294 S W 193

Utah.—Miller v. Southern Pac. Co., 21 P 2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v Miller, 54 S Ct 207, 290 US 697, 78 L Ed. 600

Va.—Southern Ry Co v May, 137 S. E 493, 147 Va 542

39 CJ p 1224 note 9 [a]

Instructions held insufficient, erroneous, or properly refused

Mo.—Derrington v. Southern Ry Co., 40 SW 2d 1069, 328 Mo 283, certiorari denied Southern Ry Co. v. Derrington, 52 S Ct. 37, 284 US. 662, 76 L Ed 561

NY.—Sadowski v Long Island R. Co., 55 NE 2d 497, 292 N. Y. 448

39 CJ p 1224 note 9 [b]

62. Instructions held sufficient, not erroneous, or improperly refused

Ala.—Taylor v Atlantic Coast Line R. Co., 168 So 181, 232 Ala 378

Cal.—Vedde v Loges, 125 P 2d 914, 52 Cal App 2d 115.

Ga.—Western & A. R. R. v Lochridge, 152 SE 474, 170 Ga. 208, certiorari denied 50 S Ct. 461, 281 US. 762, 74 L Ed 1171

39 CJ p 1225 note 10 [a].

instruction on the question be given, where it has already been fully covered in other instructions⁶³ It is not, however, error to refuse to charge on the burden of proof where there is no defect in plaintiff's proof and the issues are clearly submitted on the facts,⁶⁴ and, when the circumstances and facts of a case are proved by direct testimony, it is error to instruct the jury that it should consider and give proper weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives, in determining whether, at the time he was injured, plaintiff was in the exercise of ordinary care⁶⁵ Where plaintiff has pleaded negligence both generally and specially, he has been held to be entitled to an instruction on the res ipsa loquitur doctrine notwithstanding he proves specific acts of negligence,⁶⁶ but where the complaint alleges only specific acts of negligence such an instruction is improper⁶⁷ Where plaintiff's action is based on the theory that the injury was due to violation by the employer of statutes imposing an absolute duty on him, an instruction requiring plaintiff to prove the employer's negligence is not proper⁶⁸

§ 541. — What Law Governs

The jury must be instructed fully and properly as to the law relative to the liability of the master for injury to the servant where the injury occurred outside the state of the forum or where the applicability of federal or state laws is involved.

It is the duty of the court of the state in which an action has been brought for personal injuries, al-

leged to have occurred in another state, to instruct the jury fully as to any conflict in the laws of the two states relative to the liability of the master to his servant⁶⁹ So, where the doctrine of the fellow-servant rule is in issue and the law of the forum with respect thereto differs from the law of the *lex loci delicti*, it is error to fail to instruct with respect to the difference between the rules in the two jurisdictions⁷⁰ In such case the court should instruct the jury as to who is a fellow servant under the law of the state governing the case⁷¹

Federal or state law. In a proper case the court should instruct the jury with respect to the federal or state laws, depending on which is applicable⁷² If the federal statute is applicable it is sufficient to instruct in the language of the statute itself⁷³ Where the case is submitted on the issue of common-law liability for negligence, it is not erroneous to fail to define terms dealing with liability under federal statutes⁷⁴ Where there is an issue of fact as to whether the injury occurred while working under interstate or intra-state commerce, the court shall instruct the jury on the law as to both⁷⁵ If the liability of the master is the same under the state and federal statutes, it has been held not to be erroneous to fail to distinguish between the commerce in which the master is engaged as being either interstate or intra-state commerce⁷⁶

§ 542. — Relation of Parties; Codefendants

In an action against a master to recover for inju-

Instructions held insufficient, erroneous, or properly refused

Tex.—Atchison, T & S F. R Co v Mills, 116 SW 852, 53 Tex Civ App 359

63. Ind.—Chicago, St L & P R Co v Champion, 86 NE 221, 9 Ind App 510, 53 Am SR 357, rehearing denied 37 NE 21, 53 Am SR 357 39 CJ p 1225 note 11

64. Tex.—Taylor, B & H R Co v Taylor, 14 SW 918, 79 Tex 104, 23 Am SR 316

65. Iowa.—Whitsett v Chicago, R I & P R Co, 25 NW 104, 67 Iowa 150—Dunlavy v Chicago, R I & P R Co, 23 NW 911, 66 Iowa 435 [both dist Way v Illinois Cent R Co, 40 Iowa 341]

66. Cal.—Leet v Union Pac R Co, 155 P 2d 42, 25 Cal 2d 805, 158 A LR 1008, certiorari denied 65 S Ct 1403, two cases, 325 US 866, 89 LEd 1986

67. Ind.—New York, C. & St L. R Co v King, 154 NE 508, 85 Ind App 510

68. Ill.—Stott v. Thompson, 14 NE

2d 346, 294 Ill App 450, certiorari denied Thompson v Stott, 59 S Ct 106, 305 US 639, 83 LEd 411

69. Kan.—Atchison, T & S F. R Co v Moore, 29 Kan 632 39 CJ p 1225 note 15

70. Kan.—Atchison, T & S F. R Co v Moore, *supra*

71. Mo.—Ham v. St Louis & S F. R Co, 117 SW 108, 186 Mo App 17

72. W Va.—Towns v. Monongahela Ry Co, 144 SE 289, 105 W Va 572

39 CJ. p 1225 note 18

Instructions held proper

US.—Chicago, St. P. M. & O R Co v. Arnold, CCA Minn, 160 F2d 1002

Ga.—Southern Ry Co v Heaton, 6 SE 2d 339, 61 Ga App 386

Ind.—Chicago & E I Ry. Co. v. Schraeder, 163 NE 534, 89 Ind App 100

Miss.—Illinois Cent R Co v Ray, 148 So 232, 165 Miss. 885.

Instructions held erroneous

Ind.—Propst v Spitznagle, 19 NE

2d 263, 215 Ind 402

39 CJ p 1225 note 18 [a]

73. Mo.—Gill v Baltimore & O R Co, 259 SW 93

39 CJ p 1225 note 19

74. Tex.—Paris & G N R Co. v Boston, Civ App, 142 SW 944

39 CJ p 1225 note 20

75. SC.—Cato v Atlanta & C A L Ry Co, 152 SE 522, 155 SC 304 —Camp v Atlanta & C A L R Co, 84 SE 825, 100 SC 294

Instructions held proper

Mo.—Gieseking v Litchfield & Madison Ry Co, 127 S.W 2d 700, 344 Mo 672, certiorari denied Litchfield & M R Co v Gieseking, 68 S Ct 104, 308 US 583, 84 LEd 488 —McNatt v Wabash Ry Co, 108 S.W 2d 33, 341 Mo 516—Brum v. Wabash Ry Co, 74 SW 2d 566, 335 Mo 876

76. Tex.—St Louis Southwestern R. Co v Bryant, Civ.App, 252 S.W. 322

39 CJ. p 1225 note 22.

ries to the servant, where the relation of the parties is in issue the court should properly instruct the jury thereon; and, when the liability of more than one defendant is in issue, the court should properly instruct the jury on the law relating thereto.

Where the relation of the parties is in issue, the court should properly instruct the jury thereon⁷⁷ and it is error to refuse a proper request.⁷⁸ The instructions must not ignore the elements of the relation of master and servant⁷⁹ and must be supported by the evidence and the pleadings⁸⁰ Likewise, the instructions should not assume as a matter of law the existence of the relation when such fact is in controversy⁸¹

Codefendants. When the liability of more than one defendant is in issue, the court should properly instruct the jury on the law relating thereto⁸²

§ 543. — Scope of Employment

Where the issue is whether the injury occurred with in the scope of the servant's employment, the court should properly instruct the jury on the law relating to such issue

Where the issue is properly raised that the injury

occurred outside the scope of the servant's employment,⁸³ the court should properly instruct the jury on the law relating to such issue,⁸⁴ as, for instance, where the application of the doctrine of assumption of risks depends on whether such doctrine applies to risks outside the scope of the employment.⁸⁵ It is proper to instruct the jury that the servant cannot recover, if the injury occurred while he was in the performance of an act outside of his duties, and that the scope of duty within which a servant is entitled to protection is to be defined by what he was employed to perform, and what, with the knowledge and approval of the employer, he did perform, rather than by the verbal designation of his position.⁸⁶

§ 544. — Cause of Injury

The jury should be given appropriate instructions relative to the cause of the injury, in conformity with the issues raised under the pleadings and evidence

Instructions should be given relating to the cause of the injury complained of⁸⁷ in conformity with the issues raising the question under the pleadings and evidence⁸⁸ The jury should be instructed as to

77. Ariz.—Inspiration Consol Copper Co v Bryan, 253 P 1012, 31 Ariz 302

Tenn.—Morgan Lumber Co v James, 14 Tenn App 305
39 C J p 1225 note 24

Instructions held proper

SC—Davis v Atlantic Coast Line R Co, 147 SE 834, 150 SC 130, reversed on other grounds Atlantic Coast Line R Co v Davis, 49 S Ct 210, 279 US 34, 78 L Ed 601
Tenn.—Morgan Lumber Co v James, 14 Tenn App 305

Independent contractor

In personal injury action, wherein defendant's defense was that plaintiff was an independent contractor rather than an employee, court had duty to define relationship of employer and independent contractor and to instruct jury as to exceptions to general rule that an employer is not liable for injuries to an independent contractor or the servants of an independent contractor—Meyer v Moore, 115 SW 2d 1087, 195 Ark 1114

78. Ala.—Merryweather v Sayre Min & Mfg Co, 49 So 916, 161 Ala 441
39 C J p 1225 note 25

79. Cal.—Fay v German Gen Benev Soc, 124 P. 844, 183 Cal 118
39 C J. p 1226 note 26.

Instructions held sufficient, not erroneous, or improperly refused
Ky.—Rex Red Ash Coal Co v Bar-

ley's Adm'r, 6 SW 2d 724, 224 Ky 485

39 C J p 1226 note 26 [a]

80. Instructions held proper or improperly refused

Mo—Linton v St Louis Transfer R Co, 130 SW 381, 149 Mo App 231
39 C J p 1226 note 27 [a]

Instructions held improper or properly refused

Cal.—Fay v German Gen Benev Soc, 124 P 844, 183 Cal 118
Va—Brinklev v Pennsylvania R Co, 184 SE 237, 166 Va 84

81. Mo—Lawhon v St Joseph Veterinary Laboratories, 252 SW 44
39 C J p 1226 note 28

82. Instructions held sufficient or not erroneous

Conn—Jenkins v Reichert, 5 A 3d 6, 125 Conn 258
Ind—Dunbar v Demaree, 2 NE 2d 1003, 102 Ind App 585
Minn—Miller v Chicago, M & St P R Co, 115 NW 269, 103 Minn 443

Instructions held erroneous or properly refused

Mo—Clayton v Hydraulic Press Brick Co, 27 SW 2d 52

83. Instructions held warranted by pleadings or evidence, or both

Ark—F Keich Mfg Co v Wallace, 286 SW 815, 171 Ark 647
Iowa—Johnson v Kinney, 7 NW 2d 188, 232 Iowa 1016, 144 ALR 997
Mass—Enga v Sparks, 51 NE 2d 984, 315 Mass 180

Wash—Blair v Kinema Theatres of

Washington, 377 P 398, 152 Wash 123

39 C J p 1226 note 31 [a]

84. Mo—Soltesz v J H Belz Provision Co, 260 SW 990

39 C J p 1226 note 32

Instructions held sufficient or not erroneous

Mo—Cunningham v Doe Run Lead Co, 26 SW 2d 957
39 C J p 1226 note 33 [a]

85. NC—Hamrick v Balfour Quarry Co, 43 SE 820, 132 NC 282
39 C J p 1226 note 33

86. Pa.—Rummel v Dilworth, 19 A 345, 346, 131 Pa 509, 17 Am SR 827

87. Mo—Baldwin v Hanley & Kinsella Coffee Co, 216 SW 998, 303 Mo App 650

39 C J p 1226 note 36

Instructions held sufficient or not erroneous

Mo—Hankins v St Louis-San Francisco Ry Co, 14 SW 2d 674—Stegemann v Heil Packing Co. App, 2 SW 2d 169
39 C J p 1226 note 36 [a]

88. Instructions held warranted by pleadings or evidence, or both, or improperly refused

Cal—Weddle v Loges, 125 P.2d 914, 52 Cal App 3d 115

Mo—Clark v Chicago, R I & P Ry Co, 300 SW 758, 318 Mo 453
—Wallis v Thompson, App, 119 S. W 2d 43

NH—Watkins v Boston & M R R, 146 A 865, 84 NH 134, certiorari denied Boston & M R R v Wat-

proximate and remote cause⁸⁹ and as to the necessity of finding that the negligence charged did in fact contribute to cause the injury⁹⁰ Where negligence is charged in two or more particulars, an instruction which requires the jury to find that the injury was caused by negligence in each particular is erroneous,⁹¹ but an instruction authorizing recovery if plaintiff establishes one or more of the alleged acts of negligence is proper⁹² An instruction need not embrace negligence which was an incident to, and not the proximate cause of, the injury.⁹³ An instruction on causation must be supported by evidence tending to show that the injury was caused by the negligence with respect to which the instruction

is requested⁹⁴ and should not be given where the evidence is purely speculative.⁹⁵ Also such instruction must be considered in connection with other instructions given, and if, taken together, they fairly and fully present the law, they are not objectionable⁹⁶

§ 545. — Accidental or Improbable Injury

Where the issue of accidental or improbable injury has been properly raised, the jury should be given proper instructions thereon.

Where the issue that the injury was of an accidental or improbable character is properly raised,⁹⁷ the court should instruct the jury in a proper man-

kins, 50 S Ct 35, 280 US 584, 74 L Ed 638

NC—Hamilton v Southern Ry Co 158 SE 75, 200 NC 543, certiorari denied Southern Ry Co v Hamilton, 52 S Ct 19, 284 US 636, 76 L Ed 541

39 C.J. p 1237 note 37 [a]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Miss—Columbus & G R Co v Coleman, 160 So 277, 173 Miss 514—Goodyear Yellow Pine Co v Sumrall, 120 So 734, 153 Miss 350—McKinnon v Braddock, 104 So 154, 139 Miss 424

Vt—Bailey v Central Vermont Ry, 35 A 2d 365, 113 Vt 433, conforming to 62 S Ct 1062, 319 US 350, 87 L Ed 1444

39 C.J. p 1237 note 37 [b]

89. Okl—St Louis & S F R Co v Bateman, 340 P 110, 113 Okl 86 39 C.J. p 1237 note 38

Instructions held sufficient, not erroneous, or improperly refused
US—Terminal R Ass'n of St. Louis v Kimbrel, CCA Mo, 105 F 2d 283

Ala—Mobile & O R Co v Williams, 121 So 722, 319 Ala 288

Ga—Southern Ry Co v Blanton, 10 SE 2d 430, 63 Ga App 93

Ill—Grimm v Chicago & N W Ry Co, 78 NE 2d 920, 331 Ill App 601
Mich—Clingenpeel v Hill, 213 NW 703, 238 Mich 493

Mo—Clark v Chicago, R I & P Ry Co, 300 SW 753, 318 Mo 453—Snelling v Triplett, App, 171 SW 2d 739

Tenn—Kurn v Weaver, 161 SW 2d 1005, 25 Tenn App 556

Tex—St Louis, S F & T Ry Co v Barr, Civ App, 67 SW 2d 1063—Gulf States Utilities Co. v Moore, Civ App, 47 SW 2d 488 39 C.J. p 1237 note 38 [a]

Instructions held insufficient, erroneous, or properly refused

Ga—Southern Ry Co v Blanton 200 SE 471, 59 Ga App 252

Idaho—Burklund v Oregon Short Line R Co, 58 P 2d 773, 56 Idaho 703

Ky—Mannington Fuel Co v Ray's Adm'x, 63 SW 2d 933, 250 Ky 736
Okl—Buxton v Hicks, 131 P 2d 1015, 191 Okl 573

RI—Rossi v Ronci, 195 A 401, 59 RI 307

Tex—St Louis, S F & T Ry Co v Mullins, Civ App, 23 SW 2d 489 39 C.J. p 1237 note 38 [b]

90. Mo—McCombs v Bowen, 73 S W 2d 300, 238 Mo App. 754 39 C.J. p 1237 note 39

Instructions held sufficient, not erroneous, or improperly refused

Ark—Presley v Actus Coal Co, 289 SW 474, 172 Ark 498

Ga—Fulton Bakery v Williams, 141 SE 922, 37 Ga App 780

Ind—Altman v Indianapolis Union Ry Co, 178 NE 491, 95 Ind App 199

Mo—Brackett v James Black Masonry & Contracting Co, 33 SW 2d 288, 326 Mo 387—Messing v Judge & Dolph Drug Co, 18 SW 2d 408, 322 Mo 901—Cento v American Fruit Growers, App, 7 SW 2d 304—Reed v Blue Jay Coal & Mining Co, App, 287 SW 853—Alvarez v Traffic Motor Truck Corporation, App, 371 SW 531

Tex—Fort Worth & R G Ry Co v Pickens, Civ App, 153 SW 2d 252, reversed on other grounds 162 SW 2d 691, 139 Tex 181

Utah—Ward v Denver & R G W R Co, 85 P 2d 837, 96 Utah 564

Wash—Grant v Libby, McNeill & Libby, 295 P 139, 160 Wash 138 39 C.J. p 1237 note 39 [a]

Instructions held insufficient, erroneous, or properly refused

Ill—Wetterer v Atchison, T & S F Ry Co, 277 Ill App 275, certiorari denied Atchison, T & S F Ry Co v Wetterer, 55 S Ct 835, 295 US 754, 79 L Ed 1698.

39 C.J. p 1237 note 39 [b].

91. Md—National Enameling & Stamping Co v Cornell, 52 A 588, 95 Md 524

SC—Chase v Spartanburg R, Gas & Electric Co, 41 SE 899, 64 SC 212

92. Mont—Chancellor v Hines Motor Supply Co, 69 P 2d 764, 104 Mont 603

93. Iowa—Trott v Chicago, R I & P R Co, 86 NW 33, 115 Iowa 80, rehearing denied 87 NW 722, 115 Iowa 80

94. Tex—Gulf, C & S F R Co v Harriett, 15 SW 556, 80 Tex 73—Missouri Pac R Co v Lamothé, 13 SW 194, 76 Tex 319

95. Mo—Bolino v Illinois Terminal R Co, 200 SW 2d 353, 355 Mo 1236

96. **Instructions held cured**

Minn—Jacobson v Great Northern R Co, 139 NW 142, 120 Minn 53
Mo—Clark v Long, App, 196 SW 409

97. **Instructions held improper or properly refused**

Mo—Noce v St Louis-San Francisco Ry Co, 85 SW 2d 637, 337 Mo 689—Tash v St Louis-San Francisco Ry Co, 76 SW 2d 690, 335 Mo 1148—Goodwin v Missouri Pac R Co, 72 SW 2d 988, 335 Mo 398—Sloan v Polar Wave Ice & Fuel Co, 19 SW 2d 476, 323 Mo 363—Totten v Smith Bros, App, 3 SW 2d 740—Crowell v St Louis Screw Co, 293 SW 521, 320 Mo App 738—Schulte v Carmichael-Cryder Co, App, 282 SW 181—House v St Louis Car Co, App, 270 SW 135.

39 C.J. p 1237 note 45 [a]

Instructions held proper or erroneously refused

Mo—Nelson v C Heinz Stove Co, 8 SW 2d 918, 320 Mo 655—Spencer v Quincy, O & K C R. Co, 297 SW 353, 317 Mo 492

39 C.J. p 1237 note 45 [b].

ner as to the law with respect to such an issue,⁹⁸ applying the principle, in a proper case, to the specific defense relied on,⁹⁹ and it should instruct the jury as to the meaning of "accident."¹ Such instructions must be considered in connection with the charge as a whole, and if, taken together, they fairly and fully present the law, they are not objectionable.² Where the jury has been charged as to the burden of proof, and as to what facts will raise a presumption of liability against the master, it is not error to omit to charge, in the same connection, the law applicable to defendant's theory that the injury was a mere accident, since it is sufficient if the law bearing on such theory is elsewhere charged.³

§ 546. — Negligence of Master

a. In general

- b. Restricting right of recovery, submitting various hypotheses on negligence
- c. Statutory liability

a. In General

Where negligence of the master is in issue, proper instructions thereon should be given which do not invade the province of the jury or impose a higher degree of care on the employer than is imposed on him by law.

When the issue of the master's negligence and degree of care required of him is properly raised by the pleadings and evidence⁴ the court should instruct the jury on the law of such issue,⁵ doing so in a proper manner⁶ and so framing the instructions that they are not open to objection as infringing on or invading the province of the jury as triers of the facts.⁷ An instruction which imposes on the master a higher duty or degree of care than is imposed by law is erroneous.⁸ Such instruction must be con-

98. Mo—House v St Louis Car Co., App., 270 SW 135
39 C.J. p 1227 note 46

99. Ga—East Tennessee, V & G R Co v Smith, 17 SE 104, 91 Ga 176

1. Ill—Barnett & Record Co v Schlapka, 70 NE 343, 208 Ill 426
39 C.J. p 1228 note 48

Instructions held proper

Tex—Missouri-Kansas-Texas R Co of Texas v McKinney, Civ App., 126 SW 2d 789, affirmed Missouri, K & T R Co of Texas v McKinney, 145 SW 2d 1081, 136 Tex 75—Joy v Craig, Civ App., 94 SW 2d 524, error dismissed

2. Ga—Raleigh & G R Co v Allen, 32 SE 623, 106 Ga 572

3. Ga—Raleigh & G R Co v Allen, supra

4. Mo—Kitchen v Schlueter Mfg Co, 20 SW 3d 876, 323 Mo 1179
39 C.J. p 1228 note 51

Instructions held warranted by pleadings or evidence, or both

Ark—F Keich Mfg Co v Wallace, 288 SW 815, 171 Ark 647

Mo—Kitchen v Schlueter Mfg Co, 20 SW 2d 676, 323 Mo 1179—Stewart v. American Ry Express Co., App., 18 SW 2d 520

39 C.J. p 1228 note 51 [a]—64 C.J. p 743 note 84

Instructions held not warranted by pleadings or evidence, or properly refused

Ala—Louisville & N. R Co v Butler, 55 So 262, 1 Ala App 379

39 C.J. p 1228 note 51 [b]—64 C.J. p 743 note 11, p 775 note 51, p 779 note 28

5. Pa—Rafferty v Pittsburgh & W

V Ry Co, 131 A 470, 284 Pa 555

39 C.J. p 1228 note 52

6. Mo—Gordon v Muehling Packing Co, 40 SW 2d 693, 328 Mo 123

39 C.J. p 1228 note 53

Instructions held sufficient or not erroneous

US—Pullman Co v Montimore, C CA Tex., 17 F 2d 2, certiorari denied 47 S Ct 659, 274 US 746, 71 L Ed 1328

Ark—Everton Silica Sand Co v Hicks, 125 SW 2d 793, 197 Ark 980

Ind—New York, C & St L R Co v Connaughton, 5 NE 2d 904, 211 Ind 419

Mo—O'Donnell v Baltimore & O R Co, 26 SW 2d 939, 324 Mo 1097—Morris v Atlas Portland Cement Co, 19 SW 3d 865, 323 Mo 307

—Coy v Dean, 4 SW 2d 835, 223 Mo App 67—Alvarez v Traffic Motor Truck Corporation, App., 271 SW 531

NY—Bellow's v Merchants Dispatch Transp Co, 12 NYS 2d 656, 357 App Div 15, affirmed 27 NE 3d 440, 283 NY 581

Or—Pickett v Gray, McLean & Percy, 31 P 2d 652, 147 Or 380

39 C.J. p 1228 note 53 [a]—64 C.J. p 771 note 56

Instructions held insufficient or erroneous

Ark—Wisconsin & Arkansas Lumber Co v McCloud, 270 SW 599, 168 Ark 353

Mo—Houghtaling v Banfield, App., 8 SW 2d 1023

SC—Levesque v. Clearwater Mfg. Co., 41 SE 2d 92, 209 SC 494

39 C.J. p 1228 note 53 [b].

Instructions properly refused

Ark—McEachin & McEachin Const Co v Burks, 75 SW 2d 794, 189 Ark 947

SC—Watson v Coxe Bros Lumber Co, 28 SE 2d 401, 203 SC 125

39 C.J. p 1228 note 53 [c]—64 C.J. p 744 note 41

Instructions improperly refused

US—Atchison, T & S F R Co v Hines, 211 F 264 127 CCA 632
39 C.J. p 1228 note 53 [d]

7. Instructions held proper or improperly refused

Ark—Jones v Kansas City Southern Ry Co, 145 SW 2d 969, 201 Ark 523

Tex—Texarkana & Ft Smith Ry Co v Smith, Civ App., 270 SW. 867

39 C.J. p 1229 note 54 [a]

Instructions held improper or properly refused

Mo—Gordon v Muehling Packing Co, 40 SW 2d 693, 328 Mo 123

39 C.J. p 1229 note 54 [b]

8. US—L E Whitham Const Co v Remer, CCA Okl., 93 F 2d 736

Ark—Ft Smith-Spadra Mining Co v Shirley, 13 SW 2d 14, 178 Ark 1007—Natural Gas & Fuel Co v Lyles, 294 SW 395, 174 Ark 146

Ky—Peerless Mfg Corporation v Mackey, 171 SW 2d 258, 394 Ky 221

Minn—Witort v Chicago & N W Ry. Co, 226 NW 934, 178 Minn. 361

Miss—Gulfport Fertilizer Co v Bilbo, 174 So 65, 178 Miss 791

Mo—Shepherd v Century Electric Co, 299 SW. 90, 220 Mo App 1152

Ohio—Detroit & T Shore Lane R. Co v Seigel, App., 153 NE 870.

39 C.J. p 1230 note 55

sidered in connection with the charge as a whole, and if all the instructions taken together fairly and fully present the law they are not objectionable.⁹

An instruction advising the jury as to the duty owing plaintiff as to his safety is properly directed to the duty to him in particular, without regard to the safety of defendant's servants in general,¹⁰ and, while it is the better practice to state the qualifications of a master's liability to the employee in connection with a statement of the liability, the failure to do so, where such qualifications are referred to in connection with a statement of the liability, will

not render the charge misleading.¹¹ In a proper case the court should instruct on the duty imposed by law on an employer of minor employees.¹² It is not error for the court to refuse a charge explaining the difference in the degree of care to be exercised by a common carrier toward a passenger and an employee.¹³

Particular instructions Courts have passed on the correctness or sufficiency of instructions dealing with negligence on the part of the master with respect to places of work,¹⁴ tools, machinery, or appliances;¹⁵ the construction and condition of plat-

Instructions held proper or not erroneous

Ark—Safeway Stores v Phelps, 146 S W 2d 337, 201 Ark 495—Kansas City Southern Ry Co v Brock, 98 S W 2d 949, 193 Ark 210—Natural Gas & Fuel Co v Lyles, 294 S W 395, 174 Ark 146

Ill—Howard v Baltimore & O C T R Co, 63 N E 2d 774, 327 Ill App 83

Minn—Moquin v Minneapolis, St P & S M Ry Co, 231 N W 839, 181 Minn 56, reversed on other grounds Minneapolis, St P & S M Ry Co v Moquin, 51 S Ct 501, 383 US 520, 75 L Ed 1343, followed in 331 N W 920, 181 Minn 626, reversed on other grounds Minneapolis, St P & S M Ry Co v Moquin, 51 S Ct 501, 283 US 520, 75 L Ed 1343

Mo—Smith v Stanolind Pipe Line Co, 189 S W 2d 244, 354 Mo 250—Stotler v Blanton-Sims Co, App, 273 S W 137

NH—Nason v. Lord-Morrow Excelsior Co, 29 A 2d 464, 92 NH 251.

NJ—Tucillo v John T Clark & Son, 139 A 58, 104 N J Law 123
SC—Prisco v International Agr Corporation, 144 S E 579, 147 S C 58

Tex—Galveston, H & S A Ry Co v Ford, Civ App, 275 S W 463

Va—Chesapeake & O Ry Co v Steele's Adm'r, 135 S E 677, 146 Va 32

Wyo—Chicago & N W Ry Co v Ott, 237 P 238, 33 Wyo 200, rehearing denied 238 P 237, 33 Wyo 200, certiorari denied 46 S Ct 201, 269 US 585, 70 L Ed 425

39 C J p 1230 note 55 [a], p 1232 note 73 [i]

Instructions held improper or erroneous

Ky—Croley v Huddleston, 192 S W 2d 717, 301 Ky 580

Miss—Eagle Cotton Oil Co v Pickett, 166 So 764, 175 Miss 577

Mo—Isaacs v Smith, App, 275 S W 555

Tex—Sullivan & Davis v Gauna, Civ App, 5 S W 2d 242.

Wis—Miller v. Paine Lumber Co, 280 N W 702, 203 Wis 77

9. Mo—Stotler v Blanton-Sims Co, App, 273 S W 137
39 C J p 1230 note 56

10. Ill—Barnett & Record Co v Schlapka, 70 N E 343, 208 Ill 426
39 C J p 1231 note 57

11. Tex—International & G N R Co v Jackson, 62 S W 91, 25 Tex. Civ App 619

12. NC—Satchell v McNair, 127 S E 417, 189 NC 472

13. Iowa—Cooper v Iowa Cent R Co, 44 Iowa 134

14. Ky—Trooper Coal Co v Crawford, 153 S W 211, 152 Ky 214
39 C J p 1232 note 73

Instructions held sufficient, not erroneous, or improperly refused

US—Tombigbee Mill & Lumber Co v Hollingsworth, CCA Miss, 162 F 2d 763

Ark—Berry Asphalt Co v Kidd, 143 S W 2d 42, 200 Ark 1131—Burden v Hughes, 55 S W 2d 502, 186 Ark 707—Covington v Little Fay Oil Co, 13 S W 2d 306, 178 Ark 1046

Ky—Bishop v Walker, 172 S W 2d 224, 294 Ky 590—Kelly & Shields v Miller, 33 S W 2d 862, 236 Ky 698—General Const Co v Ford, 277 S W 313, 211 Ky 158

Minn—Jacobson v Chicago & N W Ry Co, 22 N W 2d 455, 231 Minn 454

Mo—State ex rel McCrory v. Bland, 197 S W 2d 669—Busen v Chevrolet Motor Co of St Louis, 100 S W 2d 277, 339 Mo 1098—Capstick v T M Sayman Products Co, 34 S W 2d 480, 327 Mo 1—Smith v Southern Illinois & Missouri Bridge Co, 80 S W 2d 1077, 326 Mo 109—Arnold v Graham, 273 S W 90, 219 Mo App 349—Alvarez v Traffic Motor Truck Corporation, App, 271 S W. 581

NJ—Clayton v Ainsworth, 4 A 2d 274, 122 N J Law 160

NC—Pearson v Standard Garage & Sales Co, 161 S E 536, 202 N C 14

SC—Langston v Fiske-Carter Const Co, 185 S E 62, 180 S C 113

15. Davis v Atlantic Coast Line R Co, 147 S E 834, 150 S C 130, reversed on other grounds Atlantic Coast Line R Co v Davis, 49 S Ct 210, 279 US 34, 73 L Ed 601

39 C J p 1232 note 73 [a], [e], [g], [h]

Instructions held insufficient, erroneous, or properly refused

Ga—Seaboard Air Line Railway Co v D'Avignon, 153 S E 96, 41 Ga App 263, certiorari denied 51 S Ct 351, 283 US 827, 75 L Ed 1441

NH—Chiuchiole v New England Wholesale Tailors, 150 A 540, 84 NH 339

39 C J p 1232 note 73 [b]

Instructions held insufficient, erroneous, or properly refused

Ga—Seaboard Air Line Railway Co v D'Avignon, 153 S E 96, 41 Ga App 263, certiorari denied 51 S Ct 351, 283 US 827, 75 L Ed 1441
NH—Chiuchiole v New England Wholesale Tailors, 150 A 540, 84 NH 339

39 C J p 1232 note 73 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Ky—W A Wickliffe Coal Co v Ryan, 44 S W 2d 525, 241 Ky 637

Mo—Doody v California Woolen Mills Co, 274 S W 692—Killion v King Lumber Co, App, 16 S W 2d 730—Stegemann v Hail Packing Co, App, 2 S W 2d 169—Whitehead v Koberman, App, 299 S W 121—Sanders v Armour & Co of Delaware, App, 292 S W 443

Okla—Slater v Mafford, 111 P 2d 159, 188 Okl 535

39 C J p 1232 note 73 [c]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

US—Zumwalt v Gardner, CCA. Mo, 160 F 2d 398

Ark—McEachin & McEachin Const Co v Burks, 75 S W 2d 794, 189 Ark 947—Standard Pipe Line Co. v Gwaltney, 58 S W 2d 597, 186 Ark 230—Missouri Pac R Co v. Horner, 15 S W 2d 994, 179 Ark. 321

Ky—Croley v Huddleston, 192 S W. 2d 717, 301 Ky 580

Miss—Wilson & Co v. Holmes, 177 So 24, 180 Miss 361

NH—Lamarche v Lamarche, 182 A. 549, 87 NH 454

39 C J p 1232 note 73 [d].

15. Instructions held sufficient, not erroneous, or improperly refused

US—Tombigbee Mill & Lumber Co

forms, scaffolds, stages, and their supports,¹⁶ ladders,¹⁷ electric wires or other electric appliances,¹⁸ explosives,¹⁹ the duty to cover or guard dangerous machinery or places,²⁰ inspections and repairs,²¹ the knowledge by the master of the defect or dan-

v Hollingsworth, CCA Miss, 183 F2d 763

Ark—Berry Asphalt Co v Kidd, 143 SW2d 43, 200 Ark 1121—Dixie Bauxite Co v Webb, 63 SW2d 634, 187 Ark 1034—Bradley Lumber Co v Tarvin, 37 SW2d 620, 181 Ark 1146—Hunt v Hurst, 380 SW 652, 170 Ark 644

Ga—Southern R Co v Cowan, 183 SE 331, 52 Ga App 360

Miss—Gulf, M & N R Co v Kelly, 171 So 883, 178 Miss 531, certiorari denied 57 S Ct 938, 301 US 705, 81 L Ed 1359

Mo—Stegemann v Heil Packing Co, App, 2 SW2d 169—Hoffman v Philip A Rohan Boat, Boiler & Tank Co, App, 294 SW 758—Spinnell v Goldberg, 275 SW 775, 219 Mo App 471

NH—Churchill v New England Wholesale Tailors, 150 A 540, 84 NH 829

NC—Eaker v International Shoe Co, 154 SE 667, 199 NC 379

SC—Moore v Southern Ry Co, 161 SE 525, 163 SC 342, reversed on other grounds Southern Ry Co v Moore, 52 S Ct 38, 284 US 581, 76 L Ed 503

39 CJ p 1233 note 74 [a], [e]

Instructions held insufficient, erroneous, or properly refused

Ga—Southern Co-op Foundry Co. v Elliott, 131 SE 180, 34 Ga App 746

Miss—Gulfport Creosoting Co v White, 157 So 86, 171 Miss 127—Jefferson v Denkmann Lumber Co, 148 So 237, 167 Miss 346

Mo—Dobson v Otis Elevator Co, 26 SW2d 942, 324 Mo 1147—Kitchen v Schluster Mfg Co, 20 SW2d 676, 323 Mo 1179

39 CJ p 1233 note 74 [b].

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—Gray v Doe Run Lead Co, 53 SW2d 877, 331 Mo 481—Primmer v American Car & Foundry Co, App, 20 SW2d 587—Peters v Hooven & Allison Co, App, 381 SW 71—Halley v Federal Truck Co, App, 274 SW 507—Zein v Pickel Stone Co, App, 278 SW 165

39 CJ p 1233 note 74 [c]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

US—Fredericks v Erie R Co, CC ANY, 36 F2d 716

Ga—Southern R Co. v Cowan, 183 SE 331, 52 Ga App 360

Mo—Gordon v Mushling Packing Co, 40 SW2d 693, 328 Mo. 123—

Schneider v Pevely Dairy Co, 40 SW2d 647, 328 Mo 301—Hankins

v St Louis-San Francisco Ry Co, App, 14 SW2d 674

39 CJ p 1233 note 74 [d]

18 Ark—Murch Bros Constr Co v Hays, 114 SW 697, 88 Ark 292

NY—Brabson v Fav Hunt Erecting Co, 136 NYS 602, 152 App Div 213

39 CJ p 1233 note 75

Instructions held sufficient, not erroneous, or improperly refused

US—Stone-Ordean-Wellis Co v Hansford, Mont, 213 F 618, 130 CCA 310

39 CJ p 1233 note 75 [a]

Instructions held insufficient, erroneous, or properly refused

Mo—Sloan v Polar Wave Ice & Fuel Co, 19 SW2d 476, 323 Mo 363

39 CJ p 1233 note 75 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—Wall v Philip A Rohan Boat, Boiler & Tank Co, 62 SW2d 764, 323 Mo 619

39 CJ p 1233 note 75 [c], [e]

17. Iowa—Wilder v Great Western Cereal Co, 109 NW 789, 134 Iowa 451

39 CJ p 1234 note 76

18. Vt—Drown v New England Tel & Telegraph Co, 70 A 599, 81 Vt 358

39 CJ p 1234 note 77

Instructions held sufficient, not erroneous, or improperly refused

Ky—West Kentucky Coal Co v Hazel's Adm'r, 139 SW2d 1000, 279 Ky 5

Mo—Oglesby v St Louis-San Francisco Ry Co, 1 SW2d 172, 318 Mo 79, certiorari denied St Louis-San Francisco R Co v Oglesby,

48 S Ct 434, 277 US 587, 72 L Ed 1001—Totten v Smith Bros, App,

3 SW2d 740

39 CJ p 1234 note 77 [a], [e]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Mass—Lamberti v Neal, 148 NE 463, 253 Mass 99

Mo—Hollis v Kansas City Light & Power Co, 224 SW 158, 204 Mo. App 297

19. **Instructions held sufficient, not erroneous, or improperly refused**

US—L E Whitham Const Co v Remer, CCA Okl, 105 F2d 371

Ky—Gatliff Coal Co v Hill's Adm'r, 92 SW2d 56, 263 Ky 309

39 CJ p 1234 note 78 [a].

Instructions held insufficient, erroneous, or properly refused

US—L E Whitham Const Co v Remer, CCA Okl, 93 F2d 736

Miss—Federal Compress Co v Craig, 7 So2d 532, 192 Miss 689

39 CJ p 1234 note 78 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

US—L E Whitham Const Co v Remer, CCA Okl, 105 F2d 371

20. **Instructions held sufficient, not erroneous, or improperly refused**

Miss—Anderson v McGrew, 132 So 492, 154 Miss 291

Mo—Denkman v Prudential Fixture Co, 289 SW 591—Renfrow v

Loose Leaf Metals Co, App, 5 S. W2d 665

Ohio—Shank v Hamilton Foundry & Machine Co, 155 NE 564, 23 Ohio App 823

39 CJ p 1234 note 79 [a], [e], [f]

Instructions held insufficient, erroneous, or properly refused

Mo—Pavlo v Forum Lunch Co, 19 SW2d 510, 225 Mo App 167

39 CJ p 1234 note 79 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—Andybur v National Pigments & Chemical Co, App, 24 SW2d 1069

39 CJ p 1234 note 79 [c]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Mo—Kitchen v Schluster Mfg Co, 20 SW2d 676, 323 Mo 1179—Higgins v Medart Patent Pulley Co,

App, 240 SW 252

21. Ind—Peacock Coal & Mining Co v Crawford, 117 NE 504, 85 Ind App 401

39 CJ p 1234 note 80

Instructions held sufficient, not erroneous, or improperly refused

Ark—Warren & O V. Ry Co v Ederington, 28 SW2d 1073, 181 Ark 1037

Ga—Southern R Co v Cowan, 183 SE 331, 52 Ga App 360

39 CJ p 1234 note 80 [a]

Instructions held insufficient, erroneous, or properly refused

Mo—Powers v S & S. Mining Co., App, 8 SW2d 940

39 CJ p 1234 note 80 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—Crowley v American Car & Foundry Co, App, 279 SW. 212.

39 CJ p 1234 note 80 [c].

ger;²³ the methods of work,²³ the promulgation of lookouts and warn and instruct the servant²⁵ rules and orders,²⁴ and the duty to have proper Courts have also passed on the correctness or

22. *Mo—Stubbs v American Press, App. 254 SW 105*
39 C.J. p 1235 note 81

Instructions held sufficient, not erroneous, or improperly refused

Ga—Bryan v Moncrief Furnace Co., 142 SE 700, 38 Ga App 107, reversed on other grounds 149 SD 193, 168 Ga 825, conformed to 149 SE 424, 40 Ga App 280

Mo—Kamer v Missouri-Kansas-Texas R. Co., 32 SW 2d 1075, 328 Mo 792, certiorari denied Missouri-Kansas-Texas R. Co. v Kamer, 51 S Ct 216, 282 US 903, 75 L Ed 795—Hamilton v Standard Oil Co of Indiana, 19 SW 2d 679, 323 Mo 521—Messing v Judge & Dolph Drug Co., 18 SW 2d 408, 323 Mo 901—Daniels v Luechtefeld, App. 155 SW 2d 307—Scott v American Mfg Co., App. 20 SW 2d 592—Peters v Hooven & Allison Co., App. 281 SW 71—Spinnell v Goldberg, 275 SW 775, 219 Mo App 471—Stuba v American Car & Foundry Co., App. 270 SW 145

Or—Hovedsgaard v Grand Rapids Store Equipment Corporation, 5 P 2d 86, 138 Or 39

Va—Stevens v Mirakian, 12 SE 2d 780, 177 Va 123

39 C.J. p 1235 note 81 [a]

Instructions held insufficient, erroneous, or properly refused

US—Lynch v Oregon Lumber Co., CCA Or., 108 F 2d 283

Ind—Dalton Foundries v Jefferies, 51 NE 2d 13, 114 Ind App 271, followed in Dalton Foundries v Dean, 51 NE 2d 397, 114 Ind App 289

Mo—Wolf v Mallinckrodt Chemical Works, 81 SW 2d 333, 336 Mo 746—Anderson v Asphalt Distributing Co., 55 SW 2d 688, 86 ALR 1033—Siberell v St Louis-San Francisco Ry Co., 9 SW 2d 912, 320 Mo 916

Ohio—Realty Bond & Mortgage Co v High, 175 NE 747, 38 Ohio App 289—Detroit & T Shore Line R. Co v Seigel, App. 153 NE 870

Va—Stevens v Mirakian, 12 SE 2d 780, 177 Va 123

39 C.J. p 1235 note 81 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—Nelson v Heine Boiler Co., 20 SW 2d 906, 333 Mo 826—Marsanick v Luechtefeld, App. 157 SW 2d 537—Dillard v Justus, 3 SW 2d 392, 322 Mo App 362

39 C.J. p 1235 note 81 [c], [e]

23. *Mo—Robinson v St. Louis & S F R Co., 112 SW 730, 133 Mo App 101*

39 C.J. p 1235 note 82.

Instructions held sufficient, not erroneous, or improperly refused

US—Chesapeake & O Ry Co v Richardson, CCA Ohio, 116 F 2d 860, certiorari denied 61 S Ct 961, 313 US 574, 85 L Ed 1531

Mo—Grandstaff v Wabash Ry Co., App. 71 SW 2d 174—Williams v Hyman-Michaels Co., App. 277 SW 593

Tex—Galveston, H & S A Ry Co v Contois, Civ App., 279 SW 929, affirmed, Com App., 288 SW 2d 154, certiorari denied 47 S Ct 659, 274 US 747, 71 L Ed 1328

39 C.J. p 1235 note 82 [a]

Instructions held insufficient, erroneous, or properly refused

Miss—Hercules Powder Co v Williamson, 110 So 244, 145 Miss 172

Mo—Baker v Scott County Milling Co., 20 SW 2d 494, 323 Mo 1089

—Meyer v Johnson, 30 SW 2d 641, 224 Mo App 565—Jones v Gilliox, App. 9 SW 2d 89, quashal of opinion denied State ex rel Jones v Cox, Sup., 23 SW 2d 112

NH—Perreault v Allen Oil Co., 179 A 365, 87 NH 306

39 C.J. p 1235 note 82 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—Armstrong v Mobile & O R Co., 55 SW 2d 460, 331 Mo 1234, certiorari denied Mobile & O R Co v Armstrong, 53 S Ct 689, 289 US 743, 77 L Ed 1490

39 C.J. p 1235 note 82 [c]

24. *Mass—Gerry v Worcester Cons St R Co., 143 NE 694, 248 Mass 559*

39 C.J. p 1235 note 83

Instructions held sufficient, not erroneous, or improperly refused

Miss—Long-Bell Lumber Sales Corporation v Perritt, 173 So 747, 178 Miss 194

Nev—Musser v Los Angeles & S L R Co., 299 P 1030, 53 Nev 304

NY—Reed v Davis, 251 NYS 704, 141 Misc. 86, affirmed 249 NYS 929, 232 App Div 868, certiorari denied Davis v Reed, 52 S Ct 314, 285 US 542, 76 L Ed 934

39 C.J. p 1235 note 83 [a]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Ark—Standard Oil Co of Louisiana v Milner, 88 SW 2d 424, 191 Ark 973

Mass—Tardiff v Lynn Sand & Stone Co., 193 NE 55, 288 Mass 472

Miss—Everett Hardware Co v. Shaw, 172 So 387, 178 Miss 476, suggestion of error denied 173 So 411, 178 Miss 476

Mo—Doody v. California Woolen Mills Co., 274 SW. 692—Ray v

Marquette Cement Mfg Co., App. 273 SW 1078—Grandstaff v Wabash Ry Co., App. 71 SW 2d 174
39 C.J. p 1235 note 83 [c]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Ky—Louisville & N R Co v Rev-erman, 49 SW 2d 558, 243 Ky 702, certiorari denied 53 S Ct 84, 287 US 683, 77 L Ed 549

Miss—Eagle Cotton Oil Co v Pick-ett, 166 So 764, 175 Miss 577

Mo—Doody v California Woolen Mills Co., 274 SW 692
39 C.J. p 1235 note 83 [d]

25. **Instructions held sufficient, not erroneous, or improperly refused**

Ark—Manhattan Const Co v At-kisson, 88 SW 2d 819, 191 Ark 920—Burden v. Hughes, 55 SW 2d 502, 186 Ark 707—Sandusky v Warren, 6 SW 2d 15, 177 Ark 271

Mass—Reidy v Crompton & Knowles Loom Works, 60 NE 2d 589, 318 Mass 135—Wood v Canadian Imperial Dry, 5 NE 2d 8, 296 Mass 80

Mo—Holman v St Louis-San Francisco Ry Co., 278 SW 1000, 312 Mo 342—Bentley v American Car & Foundry Co., App. 13 SW 2d 562—Arnold v Graham, 272 SW 90, 219 Mo App 249—Stuba v American Car & Foundry Co., App. 270 SW 145

NJ—Clayton v Ainsworth, 4 A 2d 274, 122 N.J. Law 160

Okl—Slater v Mafford, 111 P 2d 159, 188 Okl 525.

Or—Parker v Norton, 21 P 2d 790, 143 Or 165

SC—Brewer v Brooklyn Cooperage Co., 166 SE 85, 167 SC 152—

Prisock v International Agr Corporation, 144 SE 579, 147 SC 58.
39 C.J. p 1235 note 84 [a]

Instructions held insufficient, erroneous, or properly refused

NH—Perreault v Allen Oil Co., 179 A. 865, 87 NH 306

Or—Parker v Norton, 21 P 2d 790, 143 Or 165

39 C.J. p 1235 note 84 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Ark—Harmon v Ward, 149 SW 2d 575, 202 Ark 54

Mo—Freese v Rogers-Schmitt Wire & Iron Co., 274 SW. 778—Wurst v American Car & Foundry Co., App. 103 SW 2d 6—Landcaster v National Enameling & Stamping Co., App. 1 SW 2d 238—Daggett v American Car & Foundry Co., App. 284 SW 855—McNairy v. Pulitzer Pub. Co., App., 274 S.W. 849.

sufficiency of instructions dealing with negligence on the part of the master with respect to acts or omissions through agents or employees,²⁶ duties delegated to, or imposed on, the servant injured,²⁷ the employment and care of inexperienced or youthful employees,²⁸ obvious or latent defects,²⁹ horses, mules, and vehicles,³⁰ and medical attendance on an injured servant³¹

The courts have likewise passed on the correctness or sufficiency of instructions dealing with tools, appliances, and places of work, methods of work, rules and orders, etc., in or about mills, factories, or manufacturing,³² building construction work,³³ mining, quarrying, and excavation,³⁴ and elevators and derricks³⁵

Railroads. The courts have also passed on the

Okl—Slater v Mefford, 111 P 2d 159, 188 Okl 525

39 C J p 1235 note 84 [c]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Minn—Hols v Chicago, M, St P & P R Co, 224 N W 241, 176 Minn 575

Mo—Stuba v American Car & Foundry Co, App, 370 S W 145

NH—Glidden v Public Service Co of New Hampshire, 183 A 865, 88 NH 4—Perreault v Allen Oil Co, 179 A 365, 87 NH 308

39 C J p 1235 note 84 [d]

26. Mass—Burke v Hodge, 87 N E 920, 211 Mass 156, Ann Cas 1915B 381

39 C J p 1236 note 85

Instructions held sufficient, not erroneous, or improperly refused

Ala—Louisville & N R Co v Hall, 135 So 466, 223 Ala 338, certiorari denied 52 S Ct 37, 284 US 661, 76 L Ed 560

39 C J p 1236 note 85 [a]

Instructions held insufficient, erroneous, or properly refused

Mo—Bender v Kroger Grocery & Baking Co, App, 294 S W 732

Ohio—McKee v New Idea, App, 44 NE 2d 697

39 C J p 1236 note 85 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—Jablonowski v Modern Cap Mfg Co, 279 S W 49, 312 Mo 173—McIntire v Missouri Pac R Co, App, 28 S W 2d 372

39 C J p 1236 note 85 [c]

27. Ind—Marietta Glass Mfg Co v Bennett, 106 NE 419, 60 Ind App 485

39 C J p 1236 note 86

Instructions held insufficient, erroneous, or properly refused

Miss—Edward Hines Lumber Co. v Dickinson, 125 So 93, 155 Miss 674

39 C J p 1236 note 86 [b]

28. Ala—Louisville & N R Co v Wilson, 60 So 188, 162 Ala 588

39 C J p 1236 note 87.

Instructions held sufficient, not erroneous, or improperly refused

Ark—Everton Silica Sand Co. v

Hicks, 125 S W 2d 793, 197 Ark 980

39 C J p 1236 note 87 [a]

29. Cal—Bruce v Western Pipe & Steel Co, 169 P 680, 177 Cal 25

39 C J p 1236 note 88

30. **Instructions held sufficient, not erroneous, or improperly refused**

US—Redmond v American Ry Express Co, CCA Mass, 17 F 2d 753

Fla—Holston v Embury, 169 So 400, 124 Fla 554

Mo—Kelso v W A Ross Const Co, 85 S W 2d 527, 337 Mo 202—Anderson v Asphalt Distributing Co, 55 S W 2d 688, 86 A L R 1033—State ex rel Pevely Dairy Co v Dunes, 289 S W 835, 316 Mo 418

39 C J p 1236 note 89 [a]

Instructions held insufficient, erroneous, or properly refused

Mass—Klein v Keresey, 29 NE 2d 703, 307 Mass 51

Mo—Anderson v Asphalt Distributing Co, 55 S W 2d 688, 86 A L R 1033

39 C J p 1236 note 89 [b]

31. Tex—Missouri, K & T R Co v Graves, 123 S W 458, 57 Tex Civ App 395

39 C J p 1236 note 90

Instructions held insufficient, erroneous, or properly refused

Mo—Bailey v St Louis-San Francisco Ry. Co, App, 20 S W 2d 952

32. Ark—Chickasaw Cooperage Co v McGraw, 221 S W 1057, 144 Ark 188

39 C J p 1236 note 91

33. Mo—Seitz v Pelligreen Construction & Inv Co, 208 S W 603, 199 Mo App 388

39 C J p 1237 note 92

Instructions held insufficient, erroneous, or properly refused

Mo—Pritchard v Thompson, 156 S W 2d 652, 348 Mo 832

39 C J p 1237 note 92 [b]

34. Ala—Little Cahaba Coal Co v Arnold, 91 So. 536, 206 Ala 598

39 C J p 1237 note 93

Instructions held sufficient, not erroneous, or improperly refused

Ark—New Union Coal Co v Walker, 81 S W 2d 753, 182 Ark 460—Ault v McLaughy, 292 S W 859, 178 Ark 322

Ky—Southern Mining Co v Saylor, 95 S W 2d 236, 264 Ky 655—Hall v Proctor Coal Co., 34 S W 2d 425,

236 Ky 815—Rex Red Ash Coal Co v Barley's Adm'r, 6 S W 2d 724, 221 Ky 485

39 C J p 1237 note 93 [a]

Instructions held insufficient, erroneous, or properly refused

Ky—Gibraltar Coal Mining Co v Miller, 25 S W 2d 38, 233 Ky 129—Rockport Coal Co v Barnard, 273 S W 533, 310 Ky 5

Tex—Chisos Mining Co. v Hernandez, Civ App, 96 S W 2d 292, error dismissed

39 C J p 1237 note 93 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Ark—Bates Coal & Mining Co v Mannon, 168 S W 2d 408, 205 Ark 215

Ky—West Kentucky Coal Co v Harel's Adm'r, 129 S W 2d 1000, 279 Ky 5—Duvon Coal Co v Fike, 38 S W 2d 201, 238 Ky 376

Mo—Knaup v Western Coal & Mining Co, 114 S W 2d 969, 312 Mo 210—Ruggeri v Mitchell Clay Mfg Co, 15 S W 2d 775, 322 Mo 737—Hoffman v Peerless White Lime Co, 296 S W 764, 317 Mo 86

39 C J p 1237 note 93 [c]

35. Ind—Romona Oolitic Stone Co v Shields, 88 NE 595, 173 Ind 68

39 C J p 1237 note 94

Instructions held sufficient, not erroneous, or improperly refused

US—James Baird Co v Boyd, CCA NC, 41 F 2d 578

NY—Gustavson v Thomas, 287 N Y S 479, 227 App Div 803

Tenn—Jones v Noel, App, 204 S W 2d 336

39 C J p 1237 note 94 [a]

Instructions held insufficient, erroneous, or properly refused

NY—Ploch v Thames Trading Co, 7 N Y S 2d 515, 255 App Div 832

Okl—Campbell v Breese, 374 P 1085, 134 Okl 266

Tenn—Jones v Noel, App, 204 S W 2d 336

39 C J p 1237 note 94 [b]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—Cech v Mallinckrodt Chemical Co., 20 S W 2d 509, 323 Mo 601

Or—Chatfield v Zeller, 147 P 2d 223, 174 Or 59

Tex—Houston & T C R Co v Johnson, Civ App, 118 S W 1150,

correctness or sufficiency of instructions dealing with negligence in the operation of railroads,³⁶ and on the correctness or sufficiency of instructions as to places of work in, machinery and appliances used around, railroads,³⁷ and with respect to railroad

36. Instructions held sufficient, not erroneous, or improperly refused

- US—Tiller v Atlantic Coast Line R Co, Va., 65 S Ct 421, 323 US 574, 89 L Ed 465—Chicago & N W R Co v Grauel, CCA Minn., 160 F 2d 820—Kierce v Central Vermont Ry, CCA Vt., 79 F 2d 198, certiorari denied Central Vermont Ry v Kierce, 56 S Ct 152, 296 US 639, 80 L Ed 447, and Central Vermont Ry v Pearson, 56 S Ct 153, 296 US 639, 80 L Ed 447
- Ga—Atlantic Coast Line R Co v Anderson, 36 S E 2d 435, 73 Ga App 343—Southern Ry Co v Blanton, 10 S E 2d 430, 63 Ga App 93—Gay v Hurst, 155 S E 346, 42 Ga App 148
- Ky—Louisville & N R Co v Rev-erman, 49 S W 2d 558, 243 Ky 703, certiorari denied 53 S Ct 64, 287 US 633, 77 L Ed 549
- Mo.—Jenkins v Kurn, 156 S W 2d 668, 348 Mo 942—West v Kurn, 148 S W 2d 752—Owen v Kurn, 148 S W 2d 519, 347 Mo 516—Freeman v Terminal R Ass'n of St Louis, 107 S W 2d 36, 341 Mo 288—Perry v Missouri-Kansas-Texas R Co, 104 S W 2d 333, 340 Mo 1052—Grange v Chicago & E I Ry Co, 69 S W 2d 955, 334 Mo 1040
- Nev—Musser v. Los Angeles & S L R Co, 299 P 1020, 53 Nev 304
- Ohio—Ross v Hocking Valley Ry Co, 178 N E 852, 40 Ohio App 447
- Or.—Nordlund v Lewis & C R Co., 15 P 2d 980, 141 Or 83
- Tenn—Kurn v Weaver, 161 S W 2d 1005, 25 Tenn App 556
- Utah—Ward v Denver & R G W R Co, 85 P 2d 337, 96 Utah 564
- 39 C J p 1237 note 95 [a]—84 C J p 771 note 42.

Instructions held insufficient, erroneous, or properly refused

- Ala—Louisville & N R Co v Parker, 138 So 231, 223 Ala 626, certiorari dismissed 53 S Ct. 94, 287 US 569, 77 L Ed 501
- Cal—Pitt v. Southern Pac Co., 9 P 2d 273, 121 Cal App 228
- Idaho—Burklund v. Oregon Short Line R. Co., 58 P 2d 773, 56 Idaho 703
- Ind—Pennsylvania R Co v Ribkee, 174 N E 427, 92 Ind App 611.
- Miss—New Orleans & N. E. R. Co. v James, 128 So. 746, 157 Miss. 607.
- Mo—Grosvenor v New York Cent R Co, 123 S W 2d 173, 343 Mo 611—Kamer v. Missouri-Kansas-Texas R Co, 33 S W 2d 1075, 326 Mo 792, certiorari denied Missouri-Kansas-Texas R Co. v Kamer, 51

S Ct 216, 282 US 903, 75 L Ed 795

39 C J p 1237 note 95 [b]—64 C J p 744 note 37

Instructions held warranted by pleadings or evidence, or both, or improperly refused

- Ark—Kansas City Southern Ry Co v Taylor, 190 S W 2d 968, 209 Ark 488
- Ga—Atlantic Coast Line R Co v Anderson, App., 44 S E 2d 576—Southern Ry Co v Blanton, 10 S E 2d 430, 63 Ga App 93
- Ill—Auschwitz v Wabash Ry Co., 178 N E 403, 346 Ill 190
- Mo—Jenkins v Kurn, 156 S W 2d 668, 348 Mo 942—Satterlee v St Louis-San Francisco Ry Co, 82 S W 2d 69, 336 Mo 943—Armstrong v Mohle & O R Co, 55 S W 2d 460, 331 Mo. 1224, certiorari denied Mobile & O R Co v Armstrong, 53 S Ct 689, 289 US 743, 77 L Ed 1490—Wilson v Chicago, B & Q R Co, 296 S W 1017, 317 Mo 645—Brown v Chicago, R I & P Ry Co, 286 S W 45, 315 Mo 409—Jenkins v Wabash Ry Co, 107 S W 2d 204, 282 Mo App 438, certiorari denied Wabash R Co v Jenkins, 58 S Ct 139, 302 US 737, 82 L Ed 570
- NJ—Coll v Lehigh Valley R Co., 130 A 225, 3 N J Misc 869, affirmed 132 A 922, 102 N J Law 713
- NC—Hamilton v Southern Ry Co., 158 S E 75, 200 NC 543, certiorari denied Southern Ry Co v Hamilton, 52 S Ct 19, 284 US 636, 76 L Ed 541
- Tenn—Kurn v Weaver, 161 S W 2d 1005, 25 Tenn App 556
- Utah—Miller v Southern Pac Co., 21 P 2d 865, 82 Utah 46, certiorari denied Southern Pac Co v. Miller, 54 S Ct 207, 290 US 697, 78 L Ed 600
- 39 C J p 1237 note 95 [c]—64 C J p 743 note 78
- Instructions held not warranted by pleadings or evidence, or both, or properly refused**
- Fla—Powell v. Edwards, 157 So 427, 117 Fla. 114
- Ga—Southern Ry. Co. v Blanton, 10 S E 2d 430, 63 Ga App 93
- Ky—Louisville & N R Co v Stewart, 142 S W 2d 119, 283 Ky 585
- Mo—Kamer v Missouri-Kansas-Texas R Co, 32 S W 2d 1075, 326 Mo 792, certiorari denied Missouri-Kansas-Texas R Co v Kamer, 51 S Ct 216, 282 US 903, 75 L Ed 795—Siberell v St Louis-San Francisco Ry Co, 9 S W 2d 912, 320 Mo 916
- Wis—Dretzka v Chicago & N W.

Ry Co, 256 NW 703, 216 Wis 111

39 C J p 1237 note 95 [d]—64 C J p 743 note 1, p 774 notes 36, 40, p 775 note 48, p 778 notes 9, 15

37. Instructions held sufficient, not erroneous, or improperly refused

- US—Lilly v Grand Trunk Western R Co, Ill., 63 S Ct 347, 317 US 481, 87 L Ed 411—Chicago & N W Ry Co v Green, CCA Minn., 164 F 2d 55—Terminal R Ass'n of St Louis v Kimbrel, CCA Mo., 105 F 2d 262—Spotts v Baltimore & O R Co, CCA Ind., 103 F 2d 160, certiorari denied Baltimore & O R Co v Spotts, 59 S Ct 1039, 307 US 641, 83 L Ed 1522—Atchison, T & S F Ry Co v Keddy, CCA Cal., 28 F 2d 953, certiorari denied 49 S Ct 351, 279 US 856, 73 L Ed 997—Lehigh Valley R Co v Passanier, CCA N J., 4 F 2d 46
- Ga—Grant v Atlantic Coast Line R Co, 147 S E 919, 39 Ga App 596
- Ill—Howard v Baltimore & O C T R Co, 63 N E 2d 774, 327 Ill App 83—Spearing v Chicago & E I R Co, 40 N E 2d 267, 335 Ill App 576
- Ky—Louisville & N R Co v Stephens, 182 S W 2d 447, 298 Ky. 328
- Miss—Hercules Powder Co v Tyronne, 124 So 74, 155 Miss 75, suggestion of error overruled 134 So. 475, 155 Miss. 75.
- Mo—Kimberling v Wabash Ry Co., 85 S W 2d 786, 337 Mo 702—Allen v Ross, 293 S W 732, reversed on other grounds 48 S Ct 215, 276 U S 165, 72 L Ed 513, conformed to Allen v. Toledo, St Louis & Western Ry Co, 12 S W 2d 1116
- NH—Watkins v. Boston & M R R., 146 A. 865, 84 NH 124, certiorari denied Boston & M R R v Watkins, 50 S Ct 35, 280 US 684, 74 L Ed 633.
- NC—Hamilton v Southern Ry Co., 158 S E. 75, 200 NC. 543, certiorari denied Southern Ry Co. v Hamilton, 52 S Ct 19, 284 US 636, 76 L Ed 541
- 39 C J p 1238 note 96 [a]
- Instructions held insufficient, erroneous, or properly refused**
- US—Southern Ry Co v Lunsford, Ga., 56 S Ct 504, 297 US 398, 80 L Ed 740, rehearing denied 56 S Ct 667, 297 US 739, 80 L Ed 1011—Toledo, St. L. & W. R Co v Allen, Mo., 48 S Ct 215, 276 US 165, 72 L Ed 513, conformed to Allen v. Toledo, St Louis & Western Ry Co, 12 S W 2d 1116—McCarthy v Pennsylvania R Co, CCA Ind., 156 F 2d 877—Spotts v. Baltimore

beds or tracks³⁸

b. Restricting Right of Recovery; Submitting Various Hypotheses on Negligence

The instructions must be limited to the particular act or acts of negligence of the master relied on for recovery. In a proper case separate hypotheses of negligence may be submitted.

The instructions must be limited to the specified act or acts of negligence alleged, and restrict the right of recovery thereto³⁹ In a proper case the court may properly submit the case to the jury under two separate hypotheses of negligence⁴⁰ Under an allegation of general negligence the court may properly submit to the jury the particular act of negligence proved, since such action does not constitute submission of an issue not included within the complaint or petition,⁴¹ but under a general allegation of negligence it has been held improper to instruct on a breach of duty of the employer not connected with the doing of the act resulting in the injury⁴² Where separate grounds of negligence

are charged, it is proper to submit them separately,⁴³ but the court should, by proper instructions, withdraw from the consideration of the jury a question of negligence on which the evidence is insufficient to go to the jury⁴⁴ Where the negligence of the master in having a defective place for work concurs with his negligence in furnishing incompetent fellow servants, both being separately alleged in the complaint or petition, the issue of negligence in having the defective place for work may be submitted without reference to the negligence in furnishing incompetent fellow servants⁴⁵ It is error to require judgment for defendant unless all the enumerated acts of negligence are found in favor of plaintiff⁴⁶

c. Statutory Liability

Where the liability of the master under statutory provisions is in issue, the jury should be properly instructed thereon.

Where issues, properly raised, involve a liability of the master under statutory provisions, the court

& O R Co, CCA Ind, 103 F 2d 160, certiorari denied Baltimore & O R Co v Spotts, 59 S Ct 1039, 307 US 841, 83 L Ed 1522—Pennsylvania R Co v Hammond, CC A NY, 7 F 2d 1010

Ala—Alabama Great Southern R Co v Cornett, 106 So 243, 214 Ala 23

Cal—Devaney v Atchison, T & S F Ry Co, 27 P 2d 635, 219 Cal 487—Karberg v Southern Pac Co, 53 P 2d 385, 10 Cal App 2d 234

Ga—Southern Ry Co v Goree, 187 SE 297, 54 Ga App 134

Miss—Columbus & G R Co v Coleman, 160 So 277, 172 Miss 514

Nev—Musser v Los Angeles & S L R Co, 299 P 1020, 53 Nev 304

Or—Adskim v Oregon-Washington R & Nav. Co, 276 P 1094, 129 Or 169

SC—Youngblood v Southern Ry Co, 149 SE 743, 152 SC 265, 77 ALR 1419

Tex—Southern Pac Co v Hart, 116 SW 415, 53 Tex Civ App 536, error refused

Wyo—Chicago, B & Q R Co v Murray, 377 P 703, 40 Wyo 324 39 CJ p 1238 note 96 [b]

Instructions held warranted by pleadings or evidence, or both

Ky—Louisville & N R Co v Goodman, 273 SW 526, 210 Ky 13

Mo—Goslin v Kurn, 173 SW 2d 79, 351 Mo 395—Wild v Pitcairn, 149 SW 2d 800, 347 Mo 915, certiorari denied Pitcairn v Wild, 62 S Ct 72, 314 US 438, 86 L Ed 512—

Sweeney v Terminal R Ass'n of St Louis, App, 110 SW 2d 853

Neb—Ellis v Union Pac R Co, 27 NW 2d 921, 148 Neb 515

NC—Gerow v Seaboard Air Line Ry, 128 SE 345, 189 NC 613, certiorari denied Seaboard Air

Line Ry Co v Gerow, 46 S Ct 121, 369 US 584, 70 L Ed 435

39 CJ p 1238 note 96 [c]

Instructions held not warranted by pleadings or evidence or both, or properly refused

Ala—Alabama Great Southern R Co v Baum, 31 So 2d 366

Mo—Lloyd v Alton R Co, 159 S W 2d 267, 348 Mo 1323

39 CJ p 1238 note 96 [d]

38. Ga—Central of Georgia R Co v Bell, 65 SE 155, 133 Ga 93

39 CJ p 1238 note 97

Instructions held sufficient, not erroneous, or improperly refused

Ga—Western & A R R v Hughes, 142 SE 185, 37 Ga App 771, affirmed 49 S Ct 231, 278 US 496, 73 L Ed 473

39 CJ p 1238 note 97 [a]

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Ark—Missouri Pac R Co v Bush-ey, 30 S W 2d 614, 180 Ark 19, certiorari denied 50 S Ct 245, 281 US 728, 74 L Ed 1145

Mo—Bird v St Louis-San Francisco Ry Co, 78 SW 2d 389, 336 Mo 816—Schlueter v East St Louis Connecting Ry Co, 296 SW 105, 316 Mo 1266

39. Mo—Snelling v Triplett, App, 171 SW 2d 789—Wilborn v Des-loge Consol Lead Co, App, 268 S W 655

39 CJ p 1231 note 60.

Instructions held not erroneous

Ala—Louisville & N R Co v Hall,

135 So 466, 223 Ala 338, certiorari denied 52 S Ct 37, 284 US 661, 76 L Ed 560

Mo—Scott v American Mfg Co. App, 20 S W 2d 592—Halley v Federal Truck Co, App, 274 SW 507—Morgan v Doe Run Lead Co, App, 278 SW 244

Instructions held erroneous

Miss—J W Sanders Cotton Mill v. Moody, 195 So 683, 189 Miss 284

—Graham v Brummett, 181 So 731, 182 Miss 580

Mo—Allen v Missouri Pac Ry Co, 294 SW 80—Bonnarens v Lead Belt Ry Co, 273 SW 1043, 309 Mo 65

40. Mo—Hild v St Louis Car Co, App, 259 SW 838

39 CJ p 1231 note 61.

41. Mo—Lafever v. Pryor, App, 218 SW 970—Hall v Wabash R Co, 145 SW 1169, 165 Mo App 114

42. Ky—Patton v Stegall, 295 SW 979, 220 Ky 674

43. Mo—State v Ellison, 223 S W 671

Tex—Galveston, H & S A R Co v McAdams, Civ App, 84 SW 1076

39 CJ p 1231 note 64.

44. Colo—Denver & S L Ry. Co v. Mullen, 279 P. 49, 86 Colo 159.

45. Tex—Freeman v. Graabel, Civ. App, 145 SW 695

46. Tex—Texas & N O. R Co v Mortensen, 66 SW. 99, 27 Tex Civ. App 106

39 CJ p 1231 note 66.

should instruct the jury on such issues in a proper manner with reference to such statutory liability.⁴⁷ If, under the statute, negligence need not be shown, an instruction predicated liability on negligence is properly refused.⁴⁸ Any ground of negligence properly presented by the pleadings and evidence, whether under the common law or the statute law, should be submitted to the jury under proper instructions.⁴⁹ So, if the action is based on both statute and common-law negligence, the court should properly instruct the jury on both grounds.⁵⁰ Where the issues only raise the question of the master's liability at common law, it is erroneous to submit the case as one within the statute.⁵¹ Where a master is subject to the same liability at common law and under statute, a charge which refers to the statute is not erroneous and does not affect plaintiff's right of recovery on the common-law liability.⁵²

§ 547. — Contracts Affecting Liability

Where issues of fact with respect to the master's

liability as affected by a contract between the parties are properly raised, the court should instruct the jury on the law relating thereto.

Where issues of fact with respect to the master's liability as affected by a contract between the parties are properly raised, the court should instruct the jury on the law relating thereto.⁵³ Where a statute prohibits waiver of its benefits by employees, an instruction susceptible of meaning that a proper settlement after injury cannot be made has been held to be erroneous.⁵⁴

§ 548. — Negligence of Fellow Servants

The jury should be instructed on the law relating to the fellow-servant doctrine where such doctrine is involved in the issues raised.

When the fellow-servant doctrine is involved in the issues raised,⁵⁵ it is the duty of the court to instruct the jury on the law relating thereto, doing so in a proper manner.⁵⁶ Such instructions should be construed in connection with other instructions

47. Ga.—Southern R Co v Hurst, 87 SE 1020, 144 Ga 699
39 CJ p 1231 notes 67, 68

Instructions held sufficient, not erroneous, or improperly refused

US—Wagner Electric Corporation v Snowden, CCA Mo., 38 F2d 699
Cal—Edgington v Southern Pac Co, 55 P2d 553, 12 Cal App 2d 300

Mo—Smith v Harbison-Walker Refractories Co, 100 SW 2d 969, 340 Mo 389—Lovett v Kansas City Terminal Ry Co, 295 SW 89, 316 Mo 1246—Reaves v Kramer, 97 SW 2d 136, 331 Mo App 368

39 CJ p 1231 note 68 [a], [d]

Instructions held insufficient, erroneous, or properly refused

US—Philadelphia & R Ry Co v Bartsch, CCANJ, 9 F2d 858
Ark—Missouri Pac R Co v Sanders, 117 SW 2d 730, 196 Ark 269

Mo—Smith v Harbison-Walker Refractories Co, 100 SW 2d 969, 340 Mo 889

Ohio—McKee v New Idea, App, 44 NE 2d 697

Or—Donaghy v Oregon-Washington R & Nav Co, 288 P 1003, 133 Or 663, rehearing denied 291 P 1017, 133 Or 663—Stanfield v Fletcher, 236 P 258, 114 Or 581

SC—Mann v Seaboard Air Line Ry Co, 136 SE 234, 138 SC 241

Wash—Hatcher v Globe Union Mfg Co, 16 P2d 824, 170 Wash 494
39 CJ p 1231 note 68 [b]

Orders

In action for death of molder as result of silicosis allegedly resulting from unsafe conditions in violation of statute for safety of employees, court should have instructed jury that the different rules pre-

scribed by the state industrial commission were "orders" within meaning of statutory provision that certain orders should be obeyed by employer—McKee v New Idea, Ohio App, 44 NE 2d 697

48. Va.—Brinkley v Pennsylvania R Co, 184 SE 227, 166 Va 81.

49. NY—Marion v B G Coon Construction Co, 141 NYS 647, 157 App Div 95, affirmed 110 NE 444, 216 NY 178

50. NY—Marion v B G Coon Construction Co, supra

51. NY—Simpson v Foundation Co, 95 NE 10, 201 NY 479, Ann Cas 1912B 321

52. NY—Rosasco v Ideal Opening Die Co, 141 NYS 23, 79 Misc 507

53. Ky—Edwards v Lam, 116 SW 283, 133 Ky 22, rehearing denied 119 SW 175, 132 Ky 23 and 131 SW 795, 132 Ky 32

39 CJ p 1238 note 1

54. NC—Fleming v Southern R Co, 42 SE 905, 181 NC 476, rehearing granted 44 SE 551, 132 NC 714

55. Tenn.—Coal Creek Min Co v Davis, 18 SW 387, 90 Tenn 711

39 CJ p 1238 note 4

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Ark—Kansas City Southern Ry Co v Diggs, 167 SW 2d 679, 205 Ark 150

Colo—Cohen v Schaezel, 103 P2d 1060, 106 Colo 266

Mo—Morris v Atlas Portland Ce-

ment Co, 19 SW 2d 865, 323 Mo 307

39 CJ p 1238 note 4 [b]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Ark—Gaster v Hicks, 25 SW 2d 760, 181 Ark 299

Ga.—Southern Ry Co v Heaton, 6 SE 2d 339, 61 Ga App 336

Ky—Croley v Huddleston, 192 SW 2d 717, 301 Ky 580

Mo—Anderson v Asphalt Distributing Co, 55 SW 2d 688, 86 ALR 1033—Nelson v Heine Boiler Co, 20 SW 3d 906, 333 Mo 836

NH—Wemyss v Wyoming Valley Paper Co, 173 A 438, 86 NH 587.
39 CJ p 1238 note 4 [a]

58. Ky—Louisville & N R Co v. Percy, 121 SW 1037

Tex—Armour v Morgan, 191 SW. 942, 108 Tex 417

Instructions held sufficient, not erroneous, or improperly refused

Ark—Kansas City Southern Ry Co v Diggs, 167 SW 2d 679, 205 Ark 150

Ga.—Western & A R R v Lochridge, 146 SE 776, 39 Ga App. 246, affirmed 152 SE 474, 170 Ga 208, certiorari denied 50 SCt 461, 281 US 762, 74 LEd 1171.

Mich—Sumner v Ann Arbor R Co, 209 NW 184, 235 Mich 293

Mo—McPherson v Thompson, App 164 SW 2d 80, certiorari denied Thompson v McPherson, 63 SCt 769, 318 US 773, 87 LEd 1143—Houston v American Car & Foundry Co, App, 282 SW 170

Wash.—Roswall v. Grays Harbor

given, and if, taken together, they fairly and fully present the law, they are not objectionable.⁵⁷

More particularly, it is the duty of the court to lay down rules in its instructions defining the relation of fellow servants with substantial accuracy,⁵⁸ and to instruct the jury as to the liability of the master for the acts of a vice-principal or superior servant,⁵⁹ as to the distinction between a fellow servant's personal negligence and his negligence in a matter in which he stands in the place of the master,⁶⁰ and as to the liability or nonliability of the master for injuries proximately caused by the negligence of a fellow servant.⁶¹ Where applicable, the jury should also be instructed as to the effect of concurrent negligence on the part of the master and a fellow servant,⁶² and, in some jurisdictions, as to the duty of the master to exercise reasonable supervision over his servants.⁶³ In a case so requiring, the distinction between the negligence of a competent fellow servant and the unskillfulness of an incompetent fellow servant should be clearly pointed out to the jury.⁶⁴

§ 549. — Assumption of Risk and Contributory Negligence

- a Distinction between assumption of risk and contributory negligence
- b Assumption of risk
- c Contributory negligence

a. Distinction between Assumption of Risk and Contributory Negligence

Where the issues raised by the pleadings and evidence so require, the jury should be instructed as to the distinction between assumption of risk and contributory negligence, particularly where one or the other defense has been abrogated or restricted by statute.

Although, as discussed supra § 357, the defenses of contributory negligence and assumed risks are separate and distinct, it frequently happens that they are both available in the same case and under the same state of facts, and at common law, where under the evidence the defenses of contributory negligence and assumption of risk approximate each other so closely as to become indistinguishable, it would not be error for the court to fail to draw the distinction between the two defenses.⁶⁵ However, ordinarily an instruction is erroneous which confounds the distinction between assumption of risk and con-

Stevedore Co., 244 P 723, 138 Wash 390, 60 A.L.R. 445

39 C.J. p 1238 note 5 [a], [d]

Instructions held insufficient, erroneous, or properly refused

US—Montgomery Ward & Co. v Lindsey, CCA Miss., 104 F.2d 882

Ariz.—Southern Pac. Co. v Gastelum, 283 P 719, 36 Ariz 106

Ga.—Atlantic Coast Line R. Co. v Anderson, App., 44 S.E.2d 576

Mo.—Rogers v Mobile & O. R. Co., 85 S.W.2d 581, 337 Mo 140, certiorari denied Mobile & O. R. Co. v Rogers, 56 S.Ct 178, 296 U.S. 642, 80 L.Ed 456—Lewis v American Car & Foundry Co., App., 20 S.W.2d 600

39 C.J. p 1238 note 5 [b], [c]

57. Ga.—Tallulah Falls R. Co. v Taylor, 93 S.E. 533, 20 Ga.App 786.

58. Ark.—Fordyce v Key, 84 S.W. 797, 74 Ark 19

39 C.J. p 1239 note 7

59. Mo.—Smith v St. Louis & S. F. R. Co., 52 S.W. 378, 151 Mo 391, 48 L.R.A. 368

39 C.J. p 1239 note 8

Instructions held sufficient, not erroneous, or improperly refused

Ark.—Kansas City Southern Ry. Co. v Duggs, 167 S.W.2d 879, 205 Ark 150.

Ga.—Seaboard Air Line Ry. Co. v D'Avignon, 146 S.E. 618, 39 Ga. App 111.

Ind.—New York Cent. R. Co. v Ver-

pleise, 59 N.E.2d 916, 116 Ind. App. 1, rehearing denied 60 N.E.2d 784, 116 Ind. App. 1

Miss.—Gwin v Carter, 129 So 597, 158 Miss 196

NC—Farr v Tallahassee Power Co., 151 S.E. 242, 198 N.C. 347

SC—Pisacock v International Agr. Corporation, 144 S.E. 579, 147 S.C. 58

39 C.J. p 1239 note 8 [a], [d]

Instructions held insufficient, erroneous, or properly refused

Ark.—Louis B. Siegel & Co. v Moore, 161 S.W.2d 387, 304 Ark 50

Fla.—Tampa Shipbuilding & Engineering Co. v Thomas, 179 So 705, 131 Fla 650

Minn.—Novotny v Bouley, 27 N.W.2d 813, 223 Minn 592

NH.—Dubuc v Amoskeag Industries, 15 A.2d 867, 91 N.H. 173—Perreault v Allen Oil Co., 179 A. 865, 87 N.H. 306

39 C.J. p 1239 note 8 [b], [c]

60. Mo.—Sheppard v. Robinson, App., 299 S.W. 842

39 C.J. p 1239 note 9

61. Ala.—Northern Alabama R. Co. v Mansell, 36 So 459, 138 Ala 548.

39 C.J. p 1239 note 10

Instructions held sufficient, not erroneous, or improperly refused

US—C. B. Foster Packing Co. v Lamey, CCA Miss., 5 F.2d 23

Ark.—Hope Basket Co. v Hartsfield, 69 S.W.2d 1076, 189 Ark 1

Ga.—Southern Ry. Co. v Heaton, 6 S.E.2d 339, 61 Ga.App 386

Mo.—Rogers v Mobile & O. R. Co., 85 S.W.2d 581, 337 Mo 140, certiorari denied Mobile & O. R. Co. v Rogers, 56 S.Ct 178, 296 U.S. 642, 80 L.Ed 456

39 C.J. p 1239 note 10 [a]

Instructions held insufficient, erroneous, or properly refused

Mo.—Greenan v Emerson Elec. Mfg. Co., 191 S.W.2d 646, 354 Mo. 781.

39 C.J. p 1239 note 10 [b].

62. Ariz.—Gila Valley, G. & N. R. Co. v Lyon, 71 P. 957, 8 Ariz 118, affirmed 27 S.Ct 145, 203 U.S. 465, 51 L.Ed 276

39 C.J. p 1240 note 11

Instructions held sufficient, not erroneous, or improperly refused

Fla.—Tampa Shipbuilding & Engineering Co. v Thomas, 179 So 705, 131 Fla 650

39 C.J. p 1240 note 11 [a], [d]

63. Mass.—Rogers v Ludlow Mfg. Co., 11 N.E. 77, 144 Mass 193, 59 Am.S.R. 68

39 C.J. p 1240 note 12

64. Ga.—Ingram v Hilton & Dodge Lumber Co., 33 S.E. 861, 108 Ga 194

39 C.J. p 1240 note 13

65. Ark.—E. L. Bruce Co. v. Yax, 199 S.W. 525, 135 Ark 480.

39 C.J. p 1240 note 16.

tributory negligence,⁶⁶ and, where by force of statute one of these defenses has been abrogated or restricted and the other retains its character as a complete defense, it is important for the court, in its instructions, to draw the distinction which is made by the statute,⁶⁷ and so to frame its instructions, where the evidence warrants it, as to allow defendant the benefit of the defense available,⁶⁸ although the same evidence may justify an instruction on the defense not available under the statute.⁶⁹ A charge may be defective in attempting to couple contributory negligence and assumed risk together in such a way as to confuse the issue.⁷⁰ A correct charge on contributory negligence is not rendered bad because it fails to charge on assumption of risk.⁷¹

b. Assumption of Risk

- (1) In general
- (2) Statutory modification of doctrine
- (3) Knowledge by servant of defect or danger

(1) In General

Where the assumption by the servant of the risks incident to his employment is properly in issue, the jury should be given appropriate instructions on the law relating thereto.

Where an assumption by the servant of risks incident to his employment is involved in the issues properly raised by the pleadings and evidence,⁷² the court should instruct the jury on the law relating thereto,⁷³ doing so in a proper manner,⁷⁴ without

66. U.S.—Nelson v Jadrijevic, C. A. Canal Zone, 59 F.2d 25.
39 C.J. p 1240 note 17

67. Ark.—E. L. Bruce Co v Yax, 199 S.W. 535, 135 Ark. 480.
39 C.J. p 1240 note 20

Instructions held sufficient or not erroneous

Ark.—St. Louis, I. M. & S. R. Co v Howard, 188 S.W. 14, 124 Ark. 588

Mo.—Schlueter v East St. Louis Connecting Ry Co, 296 S.W. 105, 316 Mo. 1366

68. Ark.—E. L. Bruce Co v Yax, 199 S.W. 535, 135 Ark. 480

Instructions held not erroneous
Ga.—Louisville & N. R. Co v Maffett, 137 S.E. 404, 36 Ga. App. 513

69. Ark.—E. L. Bruce Co v Yax, 199 S.W. 535, 135 Ark. 480

70. Tex.—Pecos & N. T. R. Co v Winkler, Civ. App., 179 S.W. 691

71. Ga.—Western & A. R. R. v Hughes, 142 S.E. 185, 37 Ga. App. 771, affirmed 49 S.Ct. 231, 278 U.S. 496, 78 L.Ed. 473

72. Ark.—Henry Wrape Co v Barrentine, 211 S.W. 366, 138 Ark. 267.
39 C.J. p 1240 note 24

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Ark.—Arkansas Power & Light Co v Richenback, 119 S.W.2d 515, 196 Ark. 630—Missouri Pac. R. Co v Skipper, 398 S.W. 849, 174 Ark. 1083, certiorari denied 48 S.Ct. 322, 276 U.S. 629, 72 L.Ed. 740—St. Louis-San Francisco Ry Co v Miller, 292 S.W. 986, 173 Ark. 597—Woodley Petroleum Co v Willis, 290 S.W. 953, 172 Ark. 671

Kan.—Johnson v Olson, 67 P.2d 432, 145 Kan. 779.

Mass.—Ready v Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 185—Kavigian v Lonero, 45 N.E.2d 828, 312 Mass. 603.

Miss.—Martin v Beck, 171 So. 14, 177 Miss. 303

Mo.—Grosvenor v New York Cent. R. Co, 123 S.W.2d 173, 343 Mo. 611—Nelson v C. Heinz Stove Co, 8 S.W.2d 918, 320 Mo. 655

Wash.—Blair v Kinema Theatres of Washington, 277 P. 398, 152 Wash. 122

39 C.J. p 1240 note 24 [a]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Ill.—Thompson v Elgin, J. & E. Ry Co, 69 N.E.2d 705, 329 Ill. App. 645—Gensel v New York, C. & St. L. R. Co, 261 Ill. App. 176

Ind.—Central Indiana Ry Co v Mitchell, 199 N.E. 439, 102 Ind. App. 121

Ky.—Louisville & N. R. Co v Morgan's Adm'r, 9 S.W.2d 212, 235 Ky. 447

Minn.—Kline v Byram, 214 N.W. 890, 173 Minn. 284

Mo.—Culver v Minden Coal Co, App., 286 S.W. 745

Tenn.—Cincinnati, N. O. & T. P. Ry Co v Steelman, 7 Tenn. App. 657

Tex.—Galveston, H. & S. A. Ry Co v Andrews, Civ. App., 291 S.W. 590.
39 C.J. p 1240 note 24 [b]

73. Ark.—Arkansas Shortleaf Lumber Co v Wilkinson, 282 S.W. 8, 149 Ark. 270

39 C.J. p 1241 note 25

74. Vt.—Barney v Quaker Oats Co, 82 A. 113, 85 Vt. 372
39 C.J. p 1241 note 26

Instructions held sufficient, not erroneous, or improperly refused

U.S.—Kurn v Stanfield, C.C.A. Mo., 111 F.2d 469

Ark.—Standard Oil Co of Louisiana v Webb, 108 S.W.2d 1086, 194 Ark. 569—H. L. Hunt, Inc. v Frisby, 51 S.W.2d 516, 185 Ark. 1188—Chicago, R. I. & P. Ry Co v Garrett, 18 S.W.2d 821, 179 Ark. 690, certiorari denied 50 S.Ct. 39, 280 U.S. 591, 74 L.Ed. 639

Fla.—Tampa Shipbuilding & Engineering Co v Thomas, 179 So. 705, 131 Fla. 650

Ill.—Thompson v Elgin, J. & E. Ry Co, 69 N.E.2d 705, 329 Ill. App. 645

Mo.—Clift v St. Louis-San Francisco Ry Co, 9 S.W.2d 972, 320 Mo. 791—Nelson v C. Heinz Stove Co, 8 S.W.2d 918, 320 Mo. 655

Neb.—Grover v. Aaron Ferer & Sons, 241 N.W. 539, 122 Neb. 755

Nev.—Musser v Los Angeles & S. L. R. Co, 299 P. 1020, 53 Nev. 304

N.C.—Batton v Atlantic Coast Line R. Co, 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co v Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1113

S.C.—Moore v Southern Ry Co, 161 S.E. 525, 163 S.C. 312, reversed on other grounds Southern Ry Co v Moore, 52 S.Ct. 38, 284 U.S. 581, 76 L.Ed. 503

W. Va.—Looney v Norfolk & W. Ry Co, 135 S.E. 262, 103 W. Va. 40, 48 A.L.R. 806, rehearing denied 137 S.E. 756, 102 W. Va. 40, 48 A.L.R. 806

Wyo.—Chicago & N. W. Ry Co v Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200, certiorari denied 46 S.Ct. 201, 269 U.S. 585, 70 L.Ed. 425

39 C.J. p 1241 note 26 [a], [d], [f]

Instructions held insufficient, erroneous, or properly refused

Ga.—Southern Ry Co v Heaton, 6 S.E.2d 339, 61 Ga. App. 386

Idaho.—Roy v Oregon Short Line R. Co, 42 P.2d 476, 55 Idaho 404, certiorari denied Oregon Short Line R. Co v Roy, 56 S.Ct. 49, 296 U.S. 579, 80 L.Ed. 409

Miss.—Graves v Gulf & S. I. R. Co, 110 So. 234, 146 Miss. 130

Mo.—Grosvenor v New York Cent. R. Co, 123 S.W.2d 173, 343 Mo. 611—Hough v Chicago, R. I. & P. Ry Co, 100 S.W.2d 499, 389 Mo. 1169—Derrington v. Southern Ry. Co, 40 S.W.2d 1069, 228 Mo. 283, certiorari denied Southern Ry Co v Derrington, 52 S.Ct. 37, 284 U.S. 662, 76

invading the province of the jury⁷⁵ Such instructions should be construed in connection with other instructions given, and, if all the instructions taken together properly state the law, they are not objectionable⁷⁶ The court should give proper instructions as to the servant's right to rely on the master's exercise of due care for his protection⁷⁷ It is not essential, in order to avoid misconception by the jury of the rule by which they are to be guided in determining the issue of assumed risk, that the charge be confined to a consideration of the specific act of negligence alleged⁷⁸

Concurrent negligence of master. An instruction on assumption of risk by a servant which ignores the question of concurrent negligence on the part of the master or of some one for whose negligence the master is responsible is erroneous.⁷⁹ Where the jury are instructed as to assumption of risk, an instruction on the master's duties is not erroneous for failure to mention the question of the servant's assumption of risk⁸⁰ Where there is no assumption of risk of injury from the master's negligence, an instruction on assumption of risk is properly refused where there is proof of negligence of the master⁸¹ An instruction that the servant does not assume risk if the master is negligent has been held to be improper where the evidence shows that the master's negligence was due to the servant's own negligence⁸²

Dangerous operations and methods. When the ap-

plication of the doctrine of assumption of risk depends on the dangerous character of the operations and methods of work, the court should instruct the jury on the law relating thereto.⁸³ An instruction as to the effect of the choice by plaintiff of a dangerous method of doing his work, when other safer methods were open to him, is insufficient if it omits the essential element of his knowledge of such safer methods,⁸⁴ and it is proper to refuse to charge that if, among different modes of performing his duty, some of which were safe, plaintiff chose one which was less safe, he took the risk of his choice, since this is but a circumstance which the jury should consider with the other facts in determining whether or not plaintiff was at fault⁸⁵

Inexperienced or youthful servants. If an issue, properly raised, may call for the application of the doctrine of assumption of risk, invoked as against an inexperienced or youthful servant, the court should instruct the jury on the law relating thereto,⁸⁶ it is erroneous not to do so,⁸⁷ and requested instructions ignoring the doctrine are properly refused⁸⁸ The court, in giving such an instruction, should do so in a proper manner⁸⁹

Risks as to places of work, machinery, appliances, etc. The courts have considered and passed on the correctness or sufficiency of instructions relating to the assumption of risks as to places of work,⁹⁰ tools, machinery, and appliances,⁹¹ platforms, scaffolds,

1. Ed 561—Macklin v. Fogel Const Co., 31 S W 2d 14, 326 Mo 38—Walls v Thompson, App., 119 S W. 2d 43—Bagby v Culbertson, App., 273 S W 209
Ohio—Pittsburg, C, C & St L Ry Co v Lucas, 17 Ohio App 408
39 C J p 1241 note 26 [b], [c]

75. Tex.—Texas & P R Co v Tuck, Civ App., 116 S W 620, affirmed 123 S W 406, 103 Tex 72
39 C J p 1242 note 27.

76. US—Anderson Lumber Corp v Lehto, C C A S C, 282 F. 485
39 C J. p 1242 note 28

77. Ga.—Southern Cotton Oil Co v Horton, 85 S E 765, 22 Ga. App 155.
39 C J p 1242 note 30

Instructions held insufficient, erroneous, or properly refused
Mo.—Webster v International Shoe Co, App., 18 S W 2d 181
39 C J p 1242 note 30 [b].

78. Tex.—Missouri, K & T. R Co. v Neaves, 127 S W. 1090, 60 Tex. Civ App 305.

79. Ill.—Cobb Chocolate Co v Knudson, 69 N E 616, 207 Ill. 452.
39 C J. p 1244 note 57.

Instructions held sufficient or not erroneous

Ark.—Louis B Siegel & Co v. Moore, 161 S W 2d 337, 204 Ark 50

Mo.—Denkman v Prudential Fixture Co., 289 S W 591

NC—Batton v Atlantic Coast Line R Co., 193 S E 674, 213 NC 256, certiorari denied Atlantic Coast Line R Co v Batton, 58 S Ct 750, 303 US 651, 82 L Ed 1112
39 C J p 1244 note 57 [a]

80. Iowa—Ford v Chicago, R I & P R Co., 71 NW 332

RI—McGar v National & Providence Worsted Mills, 47 A. 1092, 23 R.I. 347

81. Mo.—Bishop v. Musick Plating Works, 3 S W 2d 256, 222 Mo App 370

82. Miss.—Edward Hines Lumber Co v Dickinson, 125 So 93, 155 Miss 674.

83. Ark.—Clark Lumber Co v. Northcutt, 129 S W 88, 95 Ark 291
39 C J. p 1245 note 60

84. Vt.—Kilpatrick v. Grand Trunk R Co., 52 A. 631, 74 Vt. 286, 93 Am S R 687.

85. Ga.—Central R Co v De Bray, 71 Ga. 406

86. Tex.—Allen v Shook, Civ. App., 160 S W 1091

39 C J p 1243 note 42

87. Ala.—Tutwiler Coal, Coke & Iron Co v Enalen, 30 So 600, 139 Ala. 336

88. Ala.—Tutwiler Coal, Coke & Iron Co v Enalen, supra

Tex.—Chicago, etc., R Co v Easley, Civ App., 149 S W 785—Producers' Oil Co v Barnes, Civ App., 120 S W 1023

89. Ala.—Birmingham Candy Co v Sheppard, 70 So. 193, 14 Ala. App 312
39 C J p 1243 note 45

Instructions held sufficient, not erroneous, or improperly refused

Ark.—Bureka Oil Co v Mooney, 292 S W. 681, 173 Ark 335

Mont.—Shaw v Kendall, 136 P 2d 742, 114 Mont 323

Wash.—Stubbe v Baker, 273 P. 732, 150 Wash. 514.

39 C J p 1243 note 45 [a].

90. Ark.—Trumann Cooperage Co v Crye, 209 S W 273, 137 Ark 293
39 C J p 1245 note 64

91. US—Missouri Valley Bridge &

and supports,⁹² elevators and hoists,⁹³ and electrical apparatus;⁹⁴ and also more particularly as to places of work, machinery and appliances, etc., in the operation of railroads⁹⁵ and mines and quarries⁹⁶

(2) Statutory Modification of Doctrine

If the defense of assumption of risk has been modified by statute, the court should instruct the jury accordingly; and, if the defense has been abolished, no charge thereon need be given.

If the defense of assumption of risk has been modified by statute, the court should instruct accordingly,⁹⁷ and in such case an instruction under the common law may properly be refused.⁹⁸ A charge synonymous with, or substantially in, the language of the statute is sufficient.⁹⁹ If by force of statute assumption of risk is no defense, there is no necessity to charge thereon;¹ and an instruction injecting the doctrine into the case is erroneous,² but, if defendant pleads it, it has been held not to be erroneous to charge that assumption of risk is no defense³ without defining the term,⁴ and such an instruction has been held proper, although assumption of risk was not pleaded, where, under the evidence, the jury might find that the servant assumed the risk unless

they were otherwise instructed.⁵ As discussed supra § 536, under some statutes assumption of risk is always a question of fact, while at common law it may be either a question of law or of fact, but, if on the evidence assumption of risk is a question of fact at common law, it is proper, whether the action is regarded as one at common law or under statute, to charge that assumption of risk is a question of fact.⁶

(3) Knowledge by Servant of Defect or Danger

Where the doctrine of assumption of risk is involved, the court should instruct the jury as to the effect of the servant's knowledge, actual or constructive, of the dangers incident to his employment.

Since the doctrine of assumption of risk is ordinarily dependent on the servant's knowledge, actual or constructive, of the dangers incident to his employment, the court should instruct the jury as to the assumption of the risk of any defect or danger of which the servant knows, or should, in the exercise of ordinary care, know,⁷ and must do so in a proper manner.⁸ Such an instruction must be sup-

Iron Co v Nunnemaker, Mo, 209 F 33, 136 CCA 174
39 C J p 1245 note 65.

Instructions held properly refused
Ark—Rice & Holman v Henderson, 35 SW 3d 1016, 183 Ark 355

92. Instructions held sufficient, not erroneous, or improperly refused
US—Norfolk & W Ry Co v Trautwein, CCA Ohio, 111 F 2d 923.

NY—Quell v Moylan, 44 NYS 2d 663, 286 App Div 1053
39 C J p 1245 note 66 [a].

Instructions held insufficient, erroneous, or properly refused

Or—Hollopeter v Palm, 291 P. 380, 134 Or 546, modified on other grounds 294 P 1056, 134 Or 546, appeal dismissed 53 S Ct 15, 284 US 572, 76 L Ed 497
39 C J p 1245 note 66 [b]

93. Instructions held insufficient, erroneous, or properly refused
Okla—Campbell v Breece, 274 P 1085, 134 Okl 266

94. Ky—Cumberland Tel & Tel Co v Ware, 74 SW 289, 115 Ky. 531, 24 Ky L 2519.

95. Mo—Adams v Quincy, O. & K C R Co, 229 SW. 790, 287 Mo. 535

39 C J p 1245 note 68

Instructions held sufficient, not erroneous, or improperly refused
US—Baltimore & O R Co v Brandenberger, CCA Ohio, 74 F 2d 593

Cal—Dick v Atchison, T & S F Ry. Co, 287 P. 538, 105 Cal App 363.

Mo—Westover v Wabash Ry Co, 6 SW 2d 843, certiorari denied Wabash Ry. Co v Westover, 49 S Ct 31, 278 US 632, 73 L Ed 550
Tex—Texas & P Ry Co v Aaron, Civ App, 19 SW 2d 930, certiorari denied 50 S Ct 409, 281 US 756, 74 L Ed 1166
39 C J p 1245 note 68 [a]

Instructions held insufficient, erroneous, or properly refused

Ala.—Louisville & N R Co v Parker, 136 So 231, 223 Ala. 626, certiorari dismissed 53 S Ct 94, 287 US 569, 77 L Ed 501—Southern Ry. Co v Smith, 137 So 398, 223 Ala 633

Mich—Thrall v Pere Marquette Ry Co, 286 NW 280, 254 Mich 197

Tex—Texas & P Ry Co v Bradley, Civ App, 298 SW 149, reversed on other grounds Bradley v Texas & P Ry Co, Com App, 1 SW 2d 861

39 C J p 1245 note 68 [b]

96. Ky—Main Jellico Mountain Coal Co v Parker, 124 SW 871
39 C J p 1245 note 69

97. Instructions held sufficient, not erroneous, or improperly refused
Miss—Gulf, M & N R Co v Walters, 184 So. 831, 161 Miss 313

Wash—Ranstrom v International Stevedoring Co, 277 P. 992, 152 Wash 332

39 C J p 1242 note 33 [a], [d].

Instructions held insufficient, erroneous or properly refused

Ark—St. Louis-San Francisco Ry

Co v Norman, 277 SW 524, 169 Ark 1063

39 C J p 1242 note 33 [b], [c]

98. Or—Poole v. Tilford, 195 P 1114, 99 Or 585

99. Tex—Texas & P R Co v Johnson, 106 SW 773, 18 Tex Civ App 135

1. US—Scrimo v Central R R of New Jersey, CCANY, 138 F 3d 761

Ark—Baldwin v Sears, 31 SW 2d 266, 193 Ark 357

Fla.—Atlantic Coast Line R Co v Whitney, 61 So 179, 45 Fla 72

Miss—Crosby Lumber & Manufacturing Co v Durham, 179 So 285, 181 Miss 559, suggestion of error overruled 179 So 854, 181 Miss 559

Mo—Young v Terminal R R Ass'n of St Louis, 193 SW 2d 403—Truesdale v Wheelock, 74 S.W 2d 585, 335 Mo 924

2. Cal—Perrett v Southern Pac Co, 165 P 2d 751, 73 Cal App 2d 30

3. Mo—Page v Payne, 240 SW 156, 293 Mo 600.

4. Mo—Page v. Payne, supra.

5. Mo—Meierotto v. Thompson, 201 SW 2d 161.

6. N.Y.—Rosasco v. Ideal Opening Die Co., 141 NYS 23, 79 Misc 507

7. Ill—Chicago & E I R Co v Heerey, 68 NE 74, 203 Ill. 492.
39 C J p 1242 note 47.

8. Instructions held sufficient, not erroneous, or improperly refused
Ark.—International Harvester Co. of

ported by the pleadings and evidence.⁹ Where the facts of the case show a risk or danger of which the servant has no knowledge, an instruction that the servant did not assume the risk is proper,¹⁰ and an instruction relating to contractual assumption of risk is properly refused where the defect causing injury arose after the employment had begun.¹¹

Obvious or latent defects When the doctrine of assumption of risk as affected by obvious or latent dangers or defects is involved in the issues, the court should properly instruct on the law relating thereto.¹² Such an instruction must be supported by the evidence,¹³ it must be considered in connection with other instructions given and, if the charge, read as a whole, properly states the law, they are not objectionable.¹⁴

After notice or complaint to master Where the effect of notice or complaint by the servant to the master of the defect or danger, known to the serv-

ant, is pertinent to an issue properly raised, the court should instruct on the law applicable in such case,¹⁵ and do so in a proper manner,¹⁶ without ignoring any elements of the law.¹⁷ Such an instruction must be supported by the pleadings and evidence.¹⁸

c. Contributory Negligence

- (1) In general
- (2) Statutory modification of doctrine
- (3) Inexperienced or youthful servants
- (4) Duty to discover or remedy defect
- (5) Disobedience of rules and orders

(1) In General

The jury must be given proper instructions on the law of contributory negligence where such issue has been properly raised.

When the issue of contributory negligence has been properly raised, the court should instruct the jury on the law applicable thereto,¹⁹ and do so in a

America v. Hawkins, 24 SW 3d 340, 180 Ark 1056

Mo—Kamer v Missouri-Kansas-Texas R Co, 32 SW 2d 1075, 328 Mo 792, certiorari denied Missouri-Kansas-Texas R Co v Kamer, 51 S Ct. 216, 282 US 903, 75 L Ed 795

NC—Barton v Atlantic Coast Line R Co, 193 SE 674, 212 NC 256, certiorari denied Atlantic Coast Line R Co v Barton, 58 S Ct 750, 303 US 651, 82 L Ed 1112

Ohio—Baltimore & O R Co v. Shober, 176 NE 88, 38 Ohio App 216 Wash—Hamre v Rothschild & Co, 240 P 909, 136 Wash 522 39 CJ p 1243 note 48 [a]

Instructions held insufficient, erroneous, or properly refused

Ark—Cruce v Missouri Pac R Co, 287 SW 583, 171 Ark 1074

NH—Lamarche v Lamarche, 132 A 549, 87 NH 454.

39 CJ p 1243 note 48 [b]

9. Ill—Chicago & A R Co v. Howell, 109 Ill App 546, affirmed 70 NE 15, 208 Ill 155 39 CJ p 1244 note 49

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Fla—Tampa Shipbuilding & Engineering Co v Thomas, 179 So 705, 131 Fla. 650

39 CJ p 1244 note 49 [a]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Ark—Covington v Little Fay Oil Co, 13 SW 2d 306, 178 Ark 1046. 39 CJ p 1244 note 49 [b].

10. Miss—Blue Bell Globe Mfg Co v. Lewis, 27 So.2d 900

11. Mass—Enga v Sparks, 51 NE 2d 984, 315 Mass 120

12. Instructions held sufficient, not erroneous, or improperly refused

Ill—Werner v Illinois Cent R Co, 33 NE 2d 121, 309 Ill App 292, reversed on other grounds 42 NE 2d 82, 379 Ill 559

Kan—Schaefer v Lowden, 78 P.2d 48, 147 Kan 520 39 CJ p 1244 note 50 [a]

Instructions held insufficient, erroneous, or properly refused

Ark—Eureka Oil Co v Mooney, 271 SW 321, 168 Ark 479.

39 CJ p 1244 note 50 [b]

13. US—Louisville & N R Co v Mount, CCA Ohio, 35 F 2d 634

Tex—Freeman v Fuller, 127 SW 1194, 60 Tex Civ App 242

14. Ky—Owensboro Stave & Barrel Co v Daugherty, 110 SW 319, 38 Ky L. 828

Tex—Guitar v Randel, Civ App, 147 SW 642

15. Ky—Louisville Fire Brick Works v Tackett, 262 S.W. 299, 203 Ky 367

39 CJ p 1244 note 53

16. Ga—Mitchell v J S Schofield's Sons Co., 85 SE 978, 16 Ga App 636

39 CJ p 1244 note 54

Instructions held sufficient, not erroneous, or improperly refused

Ark—Louis B Siegel & Co v Moore, 161 SW 2d 387, 204 Ark 50.

NC—Barton v Atlantic Coast Line R Co, 193 SE 674, 212 NC 256, certiorari denied Atlantic Coast Line R Co v Barton, 58 S Ct 750, 303 US 651, 82 L Ed 1112.

39 CJ p 1244 note 54 [a], [d].

17. WV Va—McKelvey v Chesapeake & O R Co, 14 SE 261, 35 WV Va 500

39 CJ p 1244 note 55

18. Ky—Thayer v Kitchen, 140 S W 1052, 145 Ky 554

39 CJ p 1244 note 56

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Miss—Blue Bell Globe Mfg Co v. Lewis, 27 So 2d 900

39 CJ p 1244 note 56 [a], [c].

19. US—Broadley v. Union Ry. Co, CCA Tenn, 132 F 2d 419 39 CJ p 1245 note 71

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Ga—Atlantic Coast Line R Co v. Anderson, 133 SE 63, 35 Ga App 292

Mo—Denkman v Prudential Fixture Co, 289 SW 591—Malone v. Franke, 274 SW 369—Clayton v Hydraulic Press Brick Co, App, 27 SW 2d 52

Va—Chesapeake & O R Co v Christian's Adm'n, 67 SE 345, 110 Va 728

39 CJ p 1245 note 71 [a]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Ga—Southern Ry. Co v Heaton, 6 SE 2d 339, 61 Ga App. 386

Ky—Illinois Cent. R Co v Wallis, 152 SW 2d 288, 287 Ky 38—Southern Mining Co. v Childers, 142 S. W 2d 996, 283 Ky 637, 131 A L R. 315—Louisville & N R Co v. Lewis, 281 S.W. 401, 218 Ky 197.

Mass—McPhail v. Boston & M. R. R., 181 N.E 739, 280 Mass. 118.

proper manner²⁰ without invading the province of the jury as triers of the facts if the evidence is conflicting.²¹ Instructions on contributory negligence must be supported or justified by the pleadings²² and the evidence.²³ Such instructions should be construed in connection with other instructions given and, if the charge, as a whole, properly states the law, they are not objectionable.²⁴

More particularly, the court should correctly instruct the jury as to what constitutes, and the ef-

fect of, contributory negligence,²⁵ as to the degree of care required of a servant in the prosecution of his work,²⁶ and as to his right to rely on the exercise of due care by the master or those for whom the master is responsible.²⁷ Plaintiff has the right to have the jury's attention drawn to circumstances, if any, from which inferences might be drawn tending to rebut any inference of contributory negligence.²⁸ An instruction which omits the essential element of plaintiff's knowledge, actual or constructive, of the defect or danger, is erroneous,²⁹ as is one which

Minn.—Kline v Byram, 214 N.W. 890, 172 Minn 284

Mo—Gimmarro v Kansas City, 116 S.W.2d 11, 342 Mo 428—Huhn v. Ruprecht, 2 S.W.2d 760

Tex—Missouri, K & T Ry Co of Texas v Maples, Civ App, 162 S.W. 426, error refused

Utah—Allison v McCarthy, 147 P.2d 870, 106 Utah 278

39 C.J. p 1245 note 71 [b]

20. U.S.—Burgess Sulphite Fibre Co v Gagne, N.H., 255 F. 873, 87 CCA 193

39 C.J. p 1246 note 72

Instructions held insufficient or erroneous

Cal—Weddle v Heath, 295 P. 832, 211 Cal 445

Mo—Carlisle v Tilghmon, 159 S.W.2d 663

Wash—Hatcher v Globe Union Mfg Co, 16 P.2d 824, 170 Wash 494

39 C.J. p 1246 note 72 [b]

Instructions held properly refused

Ga—Western & A R R v Robertson, 162 S.E. 842, 44 Ga.App 736

Mo—Wainwright v Westborough Country Club, App, 45 S.W.2d 86—Neely v Chicago Great Western R Co, App, 14 S.W.2d 972, certiorari quashed, Sup, State ex rel Chicago Great Western R Co v Trumble, 14 S.W.2d 978

S.C.—Chesser v Tyger River Pine Co, 152 S.E. 646, 155 S.C. 356

39 C.J. p 1246 note 72 [c]

Instructions held improperly refused

Ky—Harlan-Central Coal Co v Gross, 133 S.W.2d 550, 298 Ky 540

Tex—Missouri, K & T R Co v Jordan, Civ App, 2 S.W.2d 312

39 C.J. p 1246 note 72 [d]

21. Ala.—Clinton Min Co v Bradford, 49 So. 4, 193 Ala 576

39 C.J. p 1247 note 78

Instructions held proper

S.C.—Medlin v Vanderbilt, 130 S.E. 893, 133 S.C. 256

39 C.J. p 1247 note 78 [a].

Instructions held proper or improperly refused

Ark—St. Louis-San Francisco Ry Co v Miller, 392 S.W. 988, 173 Ark 597

39 C.J. p 1247 note 74 [a].

Instructions held improper or properly refused

Mo—Derrington v Southern Ry Co, 40 S.W.2d 1069, 328 Mo 283, certiorari denied Southern Ry Co v Derrington, 52 S.Ct. 87, 284 U.S. 662, 76 L.Ed. 561—Schuler v St. Louis Can Co, 18 S.W.2d 42, 322 Mo 765

Tex—Colorado & S R Co v Rowe, Civ App, 224 S.W. 928

39 C.J. p 1247 note 74 [b]

23. U.S.—Atchison, T & S F R Co v Howard, Colo, 49 F. 206, 1 C.C.A. 229

S.D.—Iverson v Look, 143 N.W. 332, 33 S.D. 321

39 C.J. p 1247 note 75

Instructions held proper

Miss—Legan & McClure Lumber Co v Fairchild, 124 So. 386, 155 Miss 271

Mo—Schmeer v Anchor Cold Storage Co, 12 S.W.2d 433

39 C.J. p 1247 note 75 [a]

Instructions held properly refused

Mo—Ingram v Prairie Block Coal Co, 5 S.W.2d 413, 319 Mo 644.

Okl.—St. Louis & S F Ry Co v. Sears, 49 P.2d 489, 173 Okl 483

24. Miss—Wilbe Lumber Co v Calhoun, 140 So. 680, 163 Miss 60

Mo—Barracough v Union Pac R Co, 53 S.W.2d 998, 331 Mo 157

39 C.J. p 1247 note 76

25. Tenn.—Steiner v Spencer, 145 S.W.2d 547, 24 Tenn App 389

39 C.J. p 1247 note 77

26. N.C.—Malcolm v Mooresville Cotton Mills, 138 S.E. 7, 191 N.C. 727

39 C.J. p 1247 note 78

Instructions held sufficient, not erroneous, or improperly refused

Ga.—Southern Ry Co v Blanton, 10 S.E.2d 430, 63 Ga.App 93

Kan.—Moon v O'Leary, 249 P. 582, 121 Kan 663

Mo—Anderson v Asphalt Distributing Co, 55 S.W.2d 688, 86 A.L.R. 1033—Hoffman v Peerless White Lums Co, 296 S.W. 784, 317 Mo 86

N.C.—Malcolm v Mooresville Cotton Mills, 138 S.E. 7, 191 N.C. 727

Ohio—Ross v Hocking Valley Ry Co., 178 N.E. 853, 40 Ohio App 447

Or.—Robbins v Irwin, 173 P.2d 935

Utah—Miller v Southern Pac Co, 21 P.2d 865, 82 Utah, 46, certiorari denied Southern Pac Co v Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600

39 C.J. p 1247 note 78 [a]

Instructions held insufficient, erroneous, or properly refused

Ala.—Louisville & N R Co v Parker, 198 So. 231, 223 Ala 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501

Ky.—Rockport Coal Co v Barnard, 273 S.W. 538, 210 Ky 5

Miss—Mengel Co v Parker, 7 So. 2d 521, 192 Miss 634

Mo—Mues v Century Electric Co, 280 S.W. 412

39 C.J. p 1247 note 78 [b]

27. Ill.—Illinois Steel Co v McFadden, 63 N.E. 671, 196 Ill. 344, 89 Am.S.R. 319

39 C.J. p 1248 note 79

Instructions held sufficient, not erroneous, or improperly refused

Mo—Clift v St. Louis-San Francisco Ry Co, 9 S.W.2d 972, 320 Mo 791—Carbaugh v St. Louis-San Francisco Ry Co, App, 2 S.W.2d 195

39 C.J. p 1248 note 79 [a]

Instructions held insufficient, erroneous, or properly refused

Mo—Carbaugh v St. Louis-San Francisco Ry Co, supra

39 C.J. p 1248 note 79 [b]

28. U.S.—Broadley v Union Ry Co., CCA Tenn., 132 F.2d 419—Pitcairn v Devlin, CCA Ohio, 111 F.2d 785

Instruction held erroneous or properly refused

U.S.—Broadley v Union Ry. Co., CCA Tenn., 132 F.2d 419

29. Ala.—Reynolds v Woodward Iron Co, 74 So. 360, 199 Ala. 231

39 C.J. p 1248 note 80

Instructions held sufficient, not erroneous, or improperly refused

Mo—Berry v St. Louis-San Francisco Ry Co, 26 S.W.2d 988, 324 Mo 775, certiorari denied St. Louis-San Francisco Ry Co v Berry, 50 S.Ct. 464, 281 U.S. 765, 74 L.Ed. 1173—Hamilton v Standard Oil Co of Indiana, 19 S.W.2d 679, 323

fails to hypothesize negligence on his part³⁰ as the contributing cause of injury³¹ In order to entitle defendant to an instruction grouping the evidence on an issue of contributory negligence, the facts must have been specifically pleaded.³² One may be entitled to have a charge given, grouping the facts relied on as contributory negligence, although the plea may not have been as specific as the testimony³³

Acts in emergencies. Where the pleadings and evidence justify an instruction on the doctrine of emergency or sudden danger,³⁴ the court should instruct the jury on the law relating to such doctrine³⁵ It is proper to instruct the jury that a man under sudden excitement of peril is required to exercise only such care for his safety as an ordinarily prudent man would have exercised under the circumstances, and, if he exercised such degree of care, in that case he is not guilty of contributory negligence.³⁶ Such an instruction should, however,

refer to the question as to whether the servant had time, after knowing his danger, to protect himself³⁷

Compliance with commands Where the issue is properly raised as to whether or not the servant was injured while acting in obedience to the order or command of his master or of one for whose negligence the master is responsible,³⁸ the court should correctly instruct the jury on the law relating thereto³⁹

Injury avoidable by care of master. Where there is evidence to justify an instruction on the doctrine of discovered peril,⁴⁰ the court should properly instruct the jury on the law relating thereto⁴¹ An instruction which in effect withdraws the issue of discovered peril raised by the evidence from the jury may properly be refused⁴²

Methods of work Where the issues properly raise the question whether or not plaintiff's injuries were caused by the method of work adopted by him,⁴³ the court should properly instruct the jury

Mo 531—Walker v Mitchell Clay Mfg Co, App, 291 SW 180
39 C.J. p 1248 note 80 [a]

Instructions held insufficient, erroneous, or properly refused

Ga—Southern Co-op Foundry Co v Elliott, 131 SE 180, 34 Ga App 746

Mo—Bell v. Terminal Railroad Ass'n of St Louis, 18 SW 2d 40, 322 Mo 886

59 C.J. p 1248 note 80 [b]

30. Ala.—Louisville & N R Co v Parker, 138 So 231, 223 Ala 626, certiorari dismissed 53 S Ct 94, 287 US 569, 77 L Ed 501
39 C.J. p 1249 note 81

Instructions held insufficient, erroneous, or properly refused

Ala.—Louisville & N R Co v Parker, supra

39 C.J. p 1249 note 81 [b]

31. S C—Youngblood v South Carolina & G R Co, 38 SE 232, 60 S C 9, 85 Am S R 824
39 C.J. p 1249 note 82

Instructions held sufficient, not erroneous, or improperly refused

Ky—Coburn v. North American Refractories Co, 174 SW 2d 757, 295 Ky 566

39 C.J. p 1249 note 82 [a]

32. Tex—Missouri, K & T R Co v. Parker, Civ App, 49 SW 717

Instructions held improperly refused

Tex—Strawn Coal Co v Trojan, Civ App, 195 SW. 266

33. Tex—Galveston, H. & S. A. R Co v. Worth, Civ App, 107 SW 958.

34. Cal—Martin v California Cent R Co, 29 P 645, 94 Cal 326
39 C.J. p 1252 note 19

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Tex—Panhandle & S F Ry Co v Ocan, Civ App, 271 SW 205
39 C.J. p 1251 note 19 [a]

Instructions held not warranted by pleadings or evidence, or both, or properly refused

NH—Glidden v Public Service Co of New Hampshire, 183 A 865, 88 NH 4.

35. **Instructions held sufficient, not erroneous, or improperly refused**

Ky—Louisville & N R Co v Stephens, 182 SW 2d 447, 298 Ky 328
Mo—Detmering v St Louis-San Francisco Ry Co, 36 SW 2d 112, 225 Mo App 980

39 C.J. p 1252 note 20 [a]

Instructions held insufficient, erroneous, or properly refused

Mo—Owen v Kurn, 148 SW 2d 519, 347 Mo 516

39 C.J. p 1252 note 20 [b], [c].

36. Ala.—Richmond & D R Co v. Farmer, 12 So 86, 97 Ala 141

37. Iowa—Jeffrey v Keokuk & D M R Co, 9 NW. 884, 56 Iowa 546

38. Ga—Louisville, etc, R Co v Culpepper, 82 SE 659, 142 Ga. 275
39 C.J. p 1251 note 17.

39. Ala—Alabama Cons. Coal & Iron Co v. Heald, 55 So. 181, 171 Ala 263

39 C.J. p 1251 note 18.

Instructions held insufficient, erroneous, or properly refused

Miss—Walley v Williams, 28 So 2d 579

39 C.J. p 1251 note 18 [b]

40. Iowa—Aurandt v Chicago, M & St P R. Co, 57 NW 442, 90 Iowa 617

Ky—Chesapeake & O. R Co v Johnson, 140 SW 687, 145 Ky. 481
39 C.J. p 1252 note 23

Instructions held warranted by pleadings or evidence, or both

Mo—Rose v St Louis-San Francisco Ry Co, 289 SW 913, 315 Mo 1181

39 C.J. p 1252 note 23 [a]

41. NC—Boney v Atlantic Coast Line R. Co, 71 SE 87, 155 NC 95.

Instructions held sufficient, not erroneous, or improperly refused

NH—Small v. Boston & M. R R., 173 A. 381, 87 N.H. 25
39 C.J. p 1252 note 24 [a].

Instructions held insufficient, erroneous, or properly refused

Ala.—Louisville & N R Co v Parker, 138 So. 231, 223 Ala 626, certiorari dismissed 53 S Ct 94, 287 US 569, 77 L Ed 501.

Mo—Grosvenor v New York Cent. R Co, 123 SW 2d 173, 343 Mo 611.

Ohio—Ross v Hocking Valley Ry Co, 178 N.E. 852, 40 Ohio App. 447
39 C.J. p 1252 note 24 [b]

42. Tex.—Chicago, R. I & T. R Co v Williams, Civ App, 83 SW. 248
39 C.J. p 1252 note 25.

43. Ga.—Southern Marble Co v. Newberry, 86 S.E. 1083, 144 Ga. 253

39 C.J. p 1251 note 8.

in the law relating thereto⁴⁴ In order to warrant an instruction that an employee selecting a dangerous method rather than a safe one apparent to him cannot recover, there must be a showing that the way chosen was dangerous and that a safer way was presently available.⁴⁵ The submission of the issue whether plaintiff selected a dangerous method in performing his work one way rather than another is not warranted where either way is safe in the absence of negligence⁴⁶

(2) Statutory Modification of Doctrine

Instructions on contributory negligence should recognize any statutory limitation on the doctrine of contributory negligence, and, where the defense has been abolished, requests for instructions submitting contributory negligence to the consideration of the jury are properly refused.

If by force of statute the doctrine of contributory negligence is limited, in a proper case it is necessary to instruct the jury accordingly, doing so in a proper manner,⁴⁷ and it has been held to be improper to instruct that an employee was contributorily negligent as a matter of law, where contributory negligence is not an absolute defense⁴⁸ If by force of statute contributory negligence is no defense, an in-

struction permitting recovery irrespective of the employee's negligence is proper,⁴⁹ and instructions on contributory negligence, requested by defendant, are properly refused,⁵⁰ and it has been held not to be erroneous to charge that contributory negligence is no defense⁵¹ without defining the term.⁵² On the other hand, under such circumstances, an instruction allowing the jury to find against plaintiff because of his contributory negligence is improper⁵³ Where the answer pleads that the servant's negligence was the direct and proximate cause of his injury, it has been held to be proper to admonish the jury that the defense is valid only if they find that the negligence of plaintiff was the sole cause⁵⁴

Defendant is entitled to complete instructions as to plaintiff's contributory negligence, where such negligence may be considered in mitigation of damages⁵⁵ In a number of cases the courts have passed on the correctness or sufficiency of instructions relating to the diminution of damages by reason of contributory negligence⁵⁶

Where in an action for injuries two counts are joined, one based on statutory liability, and the other on the common law, failure to give instructions as

44. Ala.—Montevallo Min Co v Underwood, 79 So 453, 202 Ala 59. 39 C.J p 1251 note 9

Instructions held insufficient, erroneous, or properly refused

Miss.—Stokes v Adams-Newell Lumber Co, 118 So 441, 151 Miss 711

Mo.—Morgan v Doe Run Lead Co, App, 273 S.W. 244—Mintner v St Joseph Lead Co, App, 272 S.W. 1042

39 C.J p 1251 note 9 [b]

45. Ariz.—Swansea Lease, Inc. v Willson, 238 P 389, 28 Ariz 581

46. Tex.—Galveston, H & S A Ry Co v Andrews, Civ App, 291 S.W. 590

47. U.S.—Grand Trunk Western R Co v Lindsay, 111, 201 F 836, 120 C.C.A. 166, affirmed 34 S.Ct 581, 233 U.S. 42, 58 L.Ed. 338, Ann Cas 1914C 168

39 C.J p 1249 note 86.

Instructions held sufficient, not erroneous, or improperly refused

Ind.—Chicago & Erie R Co v Patterson, 34 N.E.2d 960, 110 Ind App 94

39 C.J p 1249 note 86 [a]

48. Ark.—Stuart C. Irby Co. v. Smith, 168 S.W.2d 618, 205 Ark 183.

49. Miss.—Crosby Lumber & Manufacturing Co v Durham, 179 So 285, 181 Miss 559, suggestion of error overruled 179 So. 854, 181 Miss 559.

Mo.—Soderstrom v Missouri Pac R Co, App, 141 S.W.2d 73.

50. U.S.—Scrimo v Central R R of New Jersey, C.C.A.N.Y., 138 F.2d 761

Ala.—Alabama Great Southern R Co v Baum, 31 So 2d 366, 249 Ala. 442 —Alabama Great Southern R Co v Cornett, 106 So 242, 214 Ala. 23

Ark.—Baldwin v Sears, 91 S.W.2d 266, 192 Ark 257

Cal.—Frinner v C J Kubach Co, 171 P 952, 177 Cal 723

Ind.—Chicago & E I Ry Co v Schraeder, 163 N.E. 534, 89 Ind App 100

Mo.—Kumberling v Wabash Ry Co, 85 S.W.2d 736, 337 Mo 702—Truesdale v Wheelock, 74 S.W.2d 585, 335 Mo 924—Soderstrom v Missouri Pac R Co, App, 141 S.W.2d 73—Grandstaff v Wabash Ry Co, App, 71 S.W.2d 174—Green v St Louis-San Francisco Ry Co, 30 S.W.2d 784, 224 Mo App 517

51. Ill.—Cyrulik v Ritchey Coal Co, 215 Ill App 254—Layher v Chicago-Sandoval Coal Co., 179 Ill App 476

Mo.—Page v Payne, 240 S.W. 156, 293 Mo 600

52. Mo.—Page v Payne, supra.

53. U.S.—McCarthy v Pennsylvania R Co, C.C.A.Ind, 156 F.2d 877

Ark.—Jones v. Kansas City Southern Ry Co, 145 S.W.2d 969, 201 Ark 523

Ind.—New York, C. & St L. R Co

v Peele, 164 N.E. 705, 88 Ind App 532, certiorari denied 49 S.Ct 263, 279 U.S. 842, 73 L.Ed. 988

Mo.—Imboden v St Louis-San Francisco Ry Co, App, 272 S.W. 1092

54. Mo.—O'Donnell v Baltimore & O R Co, 26 S.W.2d 929, 324 Mo 1097

55. U.S.—Illinois Cent R Co v Nelson, Iowa, 203 F 956, 122 C.C.A. 258

56. Instructions held sufficient, not erroneous, or improperly refused
Fla.—Atlantic Coast Line R Co v McIntosh, 198 So 92, 144 Fla 356

Ga.—Southern Ry Co v Heaton, 6 S.E.2d 339, 61 Ga.App 386—Western & A R R v Hetzel, 144 S.E. 506, 38 Ga.App 556, reversed on other grounds 149 S.E. 876, 169 Ga. 246, conformed to 150 S.E. 112, 40 Ga.App 447

Ky.—Louisville & N R. Co v. Stephens, 182 S.W.2d 447, 298 Ky 328.

Mo.—Grosvenor v New York Cent. R Co, 123 S.W.2d 173, 343 Mo 611 —Hough v Chicago, R. I & P. Ry. Co, 100 S.W.2d 499, 339 Mo 1169 —Wilson v. Chicago, B & Q R. Co, 296 S.W. 1017, 317 Mo. 645.

39 C.J p 1249 note 92 [a].

Instructions held insufficient, erroneous, or properly refused
Mo.—Jenkins v. Kurn, 156 S.W.2d 668, 348 Mo 942

39 C.J p 1249 note 92 [b].

to contributory negligence at common law is proper, where the count based on the common law is abandoned and is not submitted to the jury.⁵⁷

(3) Inexperienced or Youthful Servants

Where the question is in issue, the jury should be instructed on the effect of youth or inexperience of the servant as affecting contributory negligence.

When the issues properly raise the question,⁵⁸ the court should instruct the jury on the question of contributory negligence by inexperienced or youthful servants, doing so in a proper manner.⁵⁹ The court should instruct the jury as to the degree of care required of such a servant.⁶⁰ The jury should be charged to consider the servant's experience, age, capacity, and appearance on the question of contributory negligence,⁶¹ and on the question of how much instruction and care he was entitled to,⁶² and it is not sufficient to charge generally on his duty to exercise reasonable care.⁶³ The court should instruct that plaintiff's minority did not relieve him from the duty of using the care to prevent injury to himself which one of his age and intelligence would use under similar circumstances.⁶⁴

(4) Duty to Discover or Remedy Defect

Where the issues properly raise the question, the jury should be instructed on the law relative to the duty of the servant to discover or remedy the defect or danger.

When the issues properly raise the question,⁶⁵ the court should properly instruct the jury as to the law relating to the duty of the servant to discover or remedy the defect or danger.⁶⁶ An instruction, which ignores the duty of the servant to inform himself of the surroundings and perils attendant on the nature of the service in which he was engaged at the time of his injury, and which were open to his observation in the exercise of reasonable care on his part, is erroneous,⁶⁷ and, where there is a distinct issue made as to whether it was the duty of plaintiff to inspect the machinery, appliances, or place of work, the court should charge that, if such duty rested on him, he cannot recover for any defects which he might have discovered by inspection.⁶⁸ Also, where there is evidence to show that it was the servant's duty to see that the appliances or place of work were kept in a reasonably safe condition, the court should give a proper instruction presenting the subject of his duty to the jury.⁶⁹

(5) Disobedience of Rules and Orders

The jury should, in a proper case, be instructed as to the effect of the servant's violation of rules or orders, and as to the effect of the employer's acquiescence in such violation.

Where there is evidence to justify an instruction thereon,⁷⁰ the court should instruct the jury as to the effect of a servant's violation of a rule or order or warning,⁷¹ and as to the effect of acquiescence

57. Mo—*Miller v. Schaff*, 228 S.W. 488.

58. Ga.—*Paulk v. Lee*, 121 S.E. 845, 31 Ga.App. 629.

39 C.J. p. 1250 note 94.

59. S.C.—*Stanton v. Interstate Chemical Corp.*, 81 S.E. 660, 97 S.C. 403.

Instructions held sufficient, not erroneous, or improperly refused.

Mont.—*Shaw v. Kendall*, 186 P.2d 748, 114 Mont. 323.

39 C.J. p. 1250 note 96 [a].

Instructions held insufficient, erroneous, or properly refused.

S.C.—*Chitwood v. Chitwood*, 156 S.E. 179, 159 S.C. 109.

39 C.J. p. 1250 note 96 [b].

60. Tex.—*Chicago, R.I. & G.R. Co. v. Connors*, Civ.App., 101 S.W. 480, 39 C.J. p. 1250 note 97.

61. Mo.—*Birdsong v. Jones*, 30 S.W.2d 1094, 225 Mo.App. 242.

N.Y.—*Keating v. Coon*, 92 N.Y.S. 474, 102 App.Div. 112.

62. N.Y.—*Keating v. Coon*, *supra*.

63. N.Y.—*Keating v. Coon*, *supra*.

64. Tex.—*Bering Mfg. Co. v. Femel-at*, 79 S.W. 869, 35 Tex.Civ.App. 86.

65. Tex.—*Bonner v. Whitcomb*, 15 S.W. 899, 80 Tex. 178—*Houston & T.*

C.R.Co. v. *Rodican*, 40 S.W. 535, 15 Tex.Civ.App. 556.

39 C.J. p. 1250 note 3.

66. Instructions held sufficient, not erroneous, or improperly refused.

U.S.—*Flack v. Delaware, L. & W.R. Co.*, C.C.A.N.Y., 45 F.2d 683.

Ala.—*Davis v. Sorrell*, 104 So. 397, 213 Ala. 191.

Ind.—*Chicago & Erie R. Co. v. Patterson*, 84 N.E.2d 980, 110 Ind.App. 94.

39 C.J. p. 1250 note 4 [a], [e].

Instructions held insufficient, erroneous, or properly refused.

Ala.—*Davis v. Sorrell*, 104 So. 397, 213 Ala. 191.

Ky.—*Connelly v. Cincinnati, N.O. & T.P.R. Co.*, 224 S.W. 670, 189 Ky. 128.

Mo.—*Jenkins v. Wabash Ry. Co.*, 107 S.W.2d 204, 232 Mo.App. 438, certiorari denied *Wabash R. Co. v. Jenkins*, 58 S.Ct. 139, 302 U.S. 787.

82 L.Ed. 570—*Dixon v. Fraser-Davis Const. Co.*, 298 S.W. 827, 818 Mo. 50.

39 C.J. p. 1250 note 4 [b], [c].

67. Ark.—*Fordyce v. Edwards*, 80 S.W. 758, 80 Ark. 438.

39 C.J. p. 1250 note 5.

68. U.S.—*Mexican Cent. R. Co. v.*

Henderson, Tex., 114 F. 892, 52 C.C.A. 512.

39 C.J. p. 1250 note 6.

69. Iowa.—*Stroble v. Chicago, M. & St.P.R. Co.*, 31 N.W. 63, 70 Iowa 555, 59 Am.R. 456.

70. Ga.—*Western & N.R. Co. v. Bussey*, 28 S.E. 207, 95 Ga. 584.

39 C.J. p. 1251 note 10.

Willful violation.

Where miner at time of his death was riding in a bank car, which company furnished to carry miners to their places of work, an instruction on willful misconduct was properly denied, but even if he violated company's rule such violation is contributory negligence and not willful misconduct.—*Rockport Coal Co. v. Barnard*, 278 S.W. 533, 210 Ky. 5.

In action under the Federal Employers' Liability Act, court properly refused instruction that employee was guilty of negligence contributing to his injury, which instruction was predicated on alleged violation of rule by employee, where rule, when properly construed, disclosed no violation.—*Williamson v. Wabash R. Co.*, 196 S.W.2d 129, 355 Mo. 248.

71. U.S.—*Atchison, T. & S.F. Ry. Co. v. Ballard*, C.C.A.Tex., 108 F.2d 768, rehearing denied 109 F.2d

in such violation on the part of the master or his representative.⁷² An instruction which ignores the element of the servant's knowledge of a rule,⁷³ which excludes the effect of contributory negligence in defeating a recovery,⁷⁴ or which ignores precautions shown to have been taken by the servant to comply with the rule he is charged with having violated,⁷⁵ or which ignores testimony relative to a general disregard of the rules by the employees,⁷⁶ is erroneous. Where the evidence warrants it, it is proper to instruct that, if plaintiff violated a rule of defendant, and his injuries were the result thereof, he will not be debarred from recovery, if under the circumstances a reasonably prudent person would have done as he did.⁷⁷ Instructions as to participation by plaintiff in the violation of a rule have been held properly refused where the evidence shows that plaintiff was a subordinate employee and did not participate in such violation.⁷⁸

§ 550. Verdict and Findings

- a In general
- b Sufficiency of findings
- c Consistency of findings

a. In General

The rules relative to verdicts and findings in civil actions generally apply in actions by a servant against his master for personal injuries.

The rules as to the verdict or findings in civil actions generally discussed in the C.J.S. title Trial §§ 485-573, also 64 C.J. p 1053 note 52 et seq, apply in actions by a servant against his master for personal injuries,⁷⁹ including those relating to special verdicts,⁸⁰ requests for special findings,⁸¹ and preparation and form of interrogatories.⁸² A verdict by less than the total number of jurors in a jurisdiction where such a verdict is permitted in an action by a servant against his master for an injury caused by the master's negligence⁸³ is not invalid because the action is brought under the Federal Employers' Liability Act.⁸⁴ Where by statute the court on request must direct the jury to return a special verdict on any or all of the issues, a failure by the jury to make the proper findings on the issues submitted requires a reversal.⁸⁵

It has been held preferable that the jury return special verdicts relative to reduction of damages by contributory negligence in actions under the Federal Employers' Liability Act.⁸⁶

Construction and operation. The general rules governing the construction and operation of verdicts and findings in civil actions apply to actions by a servant against his master to recover for personal injuries.⁸⁷ A general verdict, if it is supported by

1012, certiorari denied *Ballard v Atchison, T & S F R Co*, 60 S Ct 1096, 310 US 646, 84 L Ed. 1413 39 C.J. p 1251 note 11

Instructions held sufficient, not erroneous, or improperly refused
US—Chicago, St P, M & O R Co v Arnold, CCA Minn., 160 F 2d 1002—*Atchison, T & S F Ry. Co v Ballard*, CCA Tex., 108 F 2d 768, rehearing denied 109 F 2d 1012, certiorari denied *Ballard v Atchison, T & S F R Co*, 60 S Ct 1096, 310 US 646, 84 L Ed. 1413—*Boghigh v Louisville & N R Co*, CCA Fla., 26 F 2d 361
Ind—Chicago & Erie R Co. v. Paterson, 34 NE 2d 960, 110 Ind App 94
Ky—Rex Red Ash Coal Co v. Barley's Adm'r, 6 SW 2d 724, 224 Ky 485
Ohio—Pollock v Reitz, 176 NE 478, 38 Ohio App. 487
 39 C.J. p 1251 note 11 [a], [d]

Instructions held insufficient, erroneous, or properly refused
Ala—Louisville & N R Co v Jacobson, 118 So 565, 218 Ala 334
Ind—Chicago & Erie R Co v Paterson, 34 NE 2d 960, 110 Ind App 94
Mo—Grosvenor v New York Cent R Co, 123 SW 2d 173, 343 Mo 611 39 C.J. p 1251 note 11 [b], [c]

72. Ark—*St Louis, I M & S R Co v Stewart*, 187 SW 920, 124 Ark 437
 39 C.J. p 1251 note 12

Instructions held sufficient, not erroneous, or improperly refused
Ky—Southern Mining Co. v Childers, 142 SW 2d 995, 283 Ky 687, 131 ALR 315
 39 C.J. p 1251 note 12 [a]

73. Iowa—*Connors v Burlington, C R & N R Co*, 53 NW. 1092, 87 Iowa 147
 39 C.J. p 1251 note 13

74. Iowa—*Deeds v Chicago, R I & P R Co*, 28 NW. 488, 69 Iowa 164

75. Tex—*Texas & P. R Co v Lester*, 13 SW 955, 75 Tex 56

76. Mo—*Dobson v Otis Elevator Co*, 26 SW 2d 942, 324 Mo 1147

77. Tex—*Texas & N O R Co v Mortensen*, 66 SW. 99, 27 Tex. Civ App 106

78. Ill—*Taylor v Atchison, T & S F Ry Co*, 11 NE 2d 610, 292 Ill App 457, certiorari denied *Atchison, T & S F R Co v Taylor*, 58 S Ct 942, 304 US 580, 82 L Ed 1528

79. Consistency

In an action against the master and a third person for injuries to the servant, where negligence of code-

pendants was not interdependent, and neither charged other with negligence, verdict against one was not inconsistent with verdict for other—*Southern Ry Co v Hobbs*, CCA N C, 35 F 2d 298

80. Tex—*Missouri, etc, R Co v Pace*, Civ App, 184 SW 1051.
 39 C.J. p 1252 note 28

81. Ind—*Citizens' Tel. Co v Prickett*, 126 NE 193, 189 Ind 141
 39 C.J. p 1252 note 29

82. Wis—*Beach v Bird & Wells Lumber Co*, 116 NW. 245, 135 Wis 550
 39 C.J. p 1253 note 30

83. Okl—*St Louis & S F R Co v Brown*, 144 P 1075, 45 Okl 143

84. US—*Louisville & N R Co. v Stewart*, Ky, 36 S Ct. 586, 241 U. S 261, 60 L Ed 989
 39 C.J. p 1253 note 35

85. Cal—*Larsen v. Leonardt*, 96 P. 395, 8 Cal 226

86. NY—*Fried v. New York, N H & H R Co*, 170 NYS 697, 183 App Div 115, dismissal of appeal denied 127 NE 913, 228 NY 611, and affirmed 130 NE 917, 230 N. Y 619—*McAuliffe v New York Cent & H R R Co*, 158 NYS 922, 172 App Div 597

87. **Particular findings construed**
Mo—Hulsey v. Tower Grove Quarry

the evidence,⁸⁸ must be construed as establishing every material fact in issue⁸⁹ necessary to support it,⁹⁰ except such facts as are eliminated by instructions⁹¹ or special findings⁹²

Where a general verdict is accompanied by special findings, all parts of the verdict⁹³ are to be reconciled in support thereof if it can reasonably be done⁹⁴ No presumptions will be indulged in favor of special findings as against a general verdict,⁹⁵ but, on the other hand, every reasonable intendment in favor of the general verdict should be made⁹⁶ In determining the force of the answers to interrogatories, nothing but the pleadings, the verdict, and answers can be considered.⁹⁷ It is the duty of the court to reconcile special findings one with another if it can reasonably be done⁹⁸ A finding of no evidence on a matter essential to recovery⁹⁹ requires no construction¹ and is fatal to a recovery.² Where the jury in answer to special questions finds that the

negligence on which they base their verdict is a single act, the finding acquits defendant of all other charges of negligence alleged in the petition or mentioned in the evidence³

b. Sufficiency of Findings

In an action against a master to recover for injuries to his servant, findings must be definite and certain and supported by the evidence, and must be responsive to the issues and instructions.

In an action against a master to recover for personal injuries to his servant the findings to be sufficient must be definite and certain,⁴ and supported by the evidence⁵ A special verdict should be sufficiently certain to stand as a final decision of the special matters with which it deals⁶ Special findings must find ultimate,⁷ and not evidentiary,⁸ facts or conclusions of law⁹

Responsiveness to issues and instructions. Findings must be responsive to the issues¹⁰ and instruc-

& Construction Co., 80 SW 2d 1018, 326 Mo 194—Morris v. Atlas Portland Cement Co., 19 SW 2d 865, 323 Mo 307—Hicks v. Missouri Pac R Co., 40 SW 2d 512, 225 Mo App 1053, 226 Mo App. 362

Tex—St Louis, B & M. Ry Co v Huff, Civ App, 66 SW 2d 373—Texas & N O R Co v Kveton, Civ App, 48 SW 2d 523

88. US—Spokane & I E R Co v Campbell, Wash., 86 S Ct 683, 241 US 497, 60 L Ed 1126
39 CJ p 1253 note 40

89. Mass—MacLean v. Neipris, 23 NE 2d 85, 304 Mass 237.
39 CJ p 1253 note 41

90. Tex—Texas & P Ry Co v Aaron, Civ App, 19 SW 2d 980, certiorari denied 50 S Ct 409, 281 US 756, 74 L Ed 1166
39 CJ p 1253 note 42

91. US—Spokane & I E R Co v Campbell, Wash., 86 S Ct 683, 241 US 497, 60 L Ed 1126.

92. US—Spokane & I E R Co v Campbell, supra.
ND—Schantz v Northern Pac R Co., 180 NW 517, 47 ND 1

93. Ind—Ittenbach v Thomas, 96 NE 21, 48 Ind App 420.
39 CJ p 1254 note 45

94. Ind—Standard Oil Co v Allen, 126 NE 674, 189 Ind 398.
39 CJ p 1254 note 46

95. Ind—Standard Oil Co v. Allen, supra.
39 CJ p 1254 note 47

96. Ind—Standard Oil Co v. Allen, supra.
39 CJ p 1254 note 48

97. Ind—Citizens' Tel Co v. Prickett, 125 NE 192, 189 Ind 141.
39 CJ p 1254 note 49.

88. Cal—Petersen v California Cotton Mills Co., 130 P 169, 20 Cal App, 751
39 CJ p 1254 note 50

99. Kan—Jolliff v Kansas City Western R Co., 129 P 1178, 88 Kan 758

1. Kan—Jolliff v Kansas City Western R Co., supra.

2. Kan—Jolliff v Kansas City Western R Co., supra

3. Kan—Morlan v Atchison, T & S F Ry Co., 236 P 821, 118 Kan 713—Roberts v Missouri, K & T Ry Co., 161 P 590, 98 Kan 705

4. Tex—Kansas City M & O Ry Co of Texas v Foster, Civ App, 38 SW 2d 391
39 CJ p 1255 note 58

Findings held sufficient

Ill—Parthun v Elgin, J & E Ry Co., 60 NE 2d 464, 325 Ill App 408

5. Kan—Holliday v Pullman Co., 250 P 323, 121 Kan 739
NY—Hayes v Hudson River Tel Co., 168 NYS. 324, 181 App Div 217

Tex—St Louis Southwestern Ry. Co of Texas v Weatherly, Civ. App., 2 SW 2d 555
39 CJ p 1255 note 61

In determining whether evidence justifies verdict in action under the Federal Employers' Liability Act, it is necessary to consider character and extent of plaintiff's injuries, evidence as to defendant's negligence, and evidence as to plaintiff's contributory negligence, and to determine from consideration of evidence tending most to support verdict on all three subjects, whether verdict is ar-

roneous—Wood v Chicago & E R Co., 18 NE 2d 772, 215 Ind. 467, rehearing denied 20 NE 2d 642, 315 Ind 467

Conflicting evidence

Where the evidence as to contributory negligence is such that reasonable minds might honestly differ, a finding either way cannot be said to be insufficiently supported by the evidence—New Omaha Thompson-Houston Electric Light Co v Dent, 94 NW 819, 68 Neb 668, reheard 108 NW. 1091, 68 Neb 668.

6. Tex—Missouri, K & T R Co v Pace, Civ App, 184 SW 1051
39 CJ p 1255 note 62

7. Ind—Dodge Mfg Co v Kronewitter, 104 NE 99, 57 Ind App. 190
39 CJ p 1256 note 68

8. Ill—Offner v Chicago & E R Co., 174 Ill App 82
Ind—Dodge Mfg Co v. Kronewitter, 104 NE 99, 57 Ind App 190.

Wis—Novitski v Waite Grass Carpet Co., 140 NW 1064, 153 Wis 266

9. Ind—Lagler v. Roch, 104 NE 111, 57 Ind App. 79
39 CJ p 1256 note 70.

10. Kan—Schaefer v. Lowden, 78 P. 2d 48, 147 Kan 520—Tschreppel v Missouri-Kansas-Texas R Co., 5 P 2d 845, 134 Kan 251, certiorari denied Missouri-Kansas-Texas R Co v. Tschreppel, 52 S Ct. 501, 286 US 549, 76 L Ed 1285

Mo—Good v Missouri-Kansas-Texas R Co., 97 SW 2d 612, 339 Mo. 330, certiorari denied Missouri-Kansas-Texas R Co. v Good, 57 S Ct 231, 239 US. 605, 81 L Ed. 446.
39 CJ p 1256 note 72.

tions¹¹ A finding on an immaterial issue may be disregarded¹²

c. Consistency of Findings

In an action against a master to recover for injuries to his servant, special findings on a material issue which are absolutely irreconcilable with the general verdict will control the general verdict

In accordance with the rules applicable to civil actions generally with relation to the consistency of findings, whether findings are inconsistent will depend on the issues raised by the pleadings and the findings thereon.¹³ Special findings are inconsistent with the general verdict when they, as matter of

law, authorize a judgment different from that authorized by the verdict.¹⁴ Special findings on a material issue¹⁵ that are so inconsistent with the general verdict as to be absolutely irreconcilable with it,¹⁶ beyond the possibility of such conflict being removed by any supposable or conceivable evidence legitimately admissible under the issues,¹⁷ will control the general verdict¹⁸ Special findings which are inconsistent one with another¹⁹ neutralize each other²⁰ and cannot control a general verdict²¹ if the other special findings are not in conflict with it.²² Special findings are not inconsistent where one is necessarily included as an element of the other.²³

5. NEW TRIAL, JUDGMENT, REVIEW, AND DAMAGES

§ 551. New Trial

In actions against a master to recover for personal injuries to his servant, a new trial may be granted or refused in accordance with the general rules governing new trials in civil actions.

The usual rules are applicable to questions relat-

ing to a new trial of an action against a master for personal injuries to his servant²⁴ Under these rules a new trial should be granted where the verdict is manifestly contrary to, or against the weight of, the evidence,²⁵ and this rule has been expressly enacted by some statutes²⁶ Where the essential

11. N.Y.—Goodman v Robinson, 175 N.Y.S. 867, 187 App.Div. 683

39 C.J. p 1256 note 73

12. Tex.—Panhandle & S F Ry Co v Ocan, Civ App, 271 S.W. 205

39 C.J. p 1256 note 74

13. N.C.—Hamilton v Hines Bros Lumber Co, 75 S.E. 1087, 160 N.C. 47.

Tex.—Fink v. Brown, Civ App, 183 S.W. 46

14. Kan.—Seeds v American Bridge Co, 75 P. 480, 68 Kan. 522

39 C.J. p 1256 note 78.

15. Kan.—Pyles v Atchison, T & S F R Co, 155 P. 788, 97 Kan. 455

39 C.J. p 1256 note 79.

16. Ind.—Republic Creosoting Co v Hiatt, 8 N.E.2d 981, 212 Ind. 432

39 C.J. p 1256 note 80

Findings not irreconcilable with general verdict

U.S.—Pratt v Louisiana & A Ry Co, CCA La., 135 F.2d 692—Bernola v. Pennsylvania R Co, CCA Pa., 68 F.2d 172

Ill.—Wicks v Cuneo-Henneberry Co, 150 N.E. 276, 819 Ill. 344

Ind.—Baltimore & O R Co v Faust, 148 N.E. 433, 85 Ind.App. 435, rehearing denied 150 N.E. 239, 85 Ind.App. 435

Kan.—Walker v Colgate-Palmolive-Peet Co, 139 P.2d 157, 157 Kan. 170

—Haney v Canfield, 106 P.2d 662, 152 Kan. 597—Tschreppel v Missouri-Kansas-Texas R Co, 5 P.2d 845, 134 Kan. 251, certiorari denied Missouri-Kansas-Texas R Co v Tschreppel, 52 S.Ct. 501, 286 U.S. 549, 76 L.Ed. 1285—Darbe v Crystal Ice & Fuel Co, 296 P. 705, 132

Kan. 640—Tartar v. Missouri, K & T R Co, 241 P. 246, 119 Kan. 738, certiorari denied Missouri-Kansas-Texas R Co v Tarter, 46 S.Ct. 355, 270 U.S. 659, 70 L.Ed. 785—Palmer v Midland Valley R Co, 235 P. 853, 118 Kan. 507

Mich.—La Pointe v Chavrette, 250 N.W. 272, 264 Mich. 482

Okl.—Oklahoma Gas & Electric Co v Busha, 66 P.2d 64, 179 Okl. 505

Tex.—Benson v Missouri, K & T R Co, Civ App, 200 S.W.2d 233, error refused, no reversible error—International-Great Northern R R v. Lowry, Civ App, 98 S.W.2d 383, reversed on other grounds International-Great Northern R Co v Lowry, 121 S.W.2d 585, 132 Tex. 272—Kansas City M & O Ry Co of Texas v Foster, Civ App, 38 S.W.2d 391

39 C.J. p 1256 note 80 [d]

17. Ind.—Standard Oil Co v. Allen, 126 N.E. 674, 189 Ind. 398

39 C.J. p 1256 note 81

18. Ind.—Republic Creosoting Co v Hiatt, 8 N.E.2d 981, 212 Ind. 432

Kan.—Schaefer v Lowden, 78 P.2d 48, 147 Kan. 520

Tex.—Benson v Missouri, K & T R Co, Civ App, 200 S.W.2d 233, error refused, no reversible error

39 C.J. p 1256 note 82

19. Ind.—Baltimore & O. R Co v Kaiser, 94 N.E. 330, 51 Ind.App. 58

Findings not inconsistent

Kan.—Holliday v. Pullman Co, 250 P. 323, 121 Kan. 739

Tex.—Gulf, C & S F Ry Co v Canty, 285 S.W. 296, 115 Tex. 537—

Woodard v Wilkinson, Civ App, 173 S.W.2d 223—Missouri-Kansas-Texas R Co of Texas v McKinney, Civ App, 136 S.W.2d 789, affirmed Missouri, K. & T R Co of Texas v McKinney, 145 S.W.2d 1081, 136 Tex. 75—Gulf States Utilities Co v Moore, Civ.App, 73 S.W.2d 941, reversed on other grounds 108 S.W.2d 356, 129 Tex. 604—Amarillo Traction Co v Russell, Civ App, 290 S.W. 905—Panhandle & S F Ry Co v. Ocan, Civ App, 271 S.W. 205

39 C.J. p 1258 note 83 [a]

20. Ind.—Inland Steel Co v Kiesling, 108 N.E. 232, 183 Ind. 117

39 C.J. p 1258 note 84

21. Ind.—Chicago & Erie R Co v Patterson, 34 N.E.2d 960, 110 Ind. App. 94

39 C.J. p 1258 note 85

22. Ind.—Nordyke & Marmon Co v Whitehead, 106 N.E. 867, 183 Ind. 7

39 C.J. p 1258 note 86

23. Tex.—Kansas City, M & O R Co v. Estes, Com App, 238 S.W. 1087

39 C.J. p 1258 note 87.

24. La.—Joyce v Nona Mills Co, 77 So. 854, 142 La. 934.

39 C.J. p 1259 note 92

25. Ga.—Seaboard Air-Line R Co v Rock, 65 S.E. 288, 133 Ga. 120

39 C.J. p 1259 note 94

26. N.Y.—Bodette v Foster-Armstrong Co, 116 N.Y.S. 504, 63 Misc. 389, affirmed 123 N.Y.S. 1197, 137 App. Div. 931

39 C.J. p 1259 note 95.

findings required for the court to enter judgment are in such conflict that one destroys the other, the court should order a new trial.²⁷

§ 552. Judgment

In actions against an employer for injuries to his servant, the judgment must conform to the pleadings and proof and be consistent with, and supported by, the verdict or findings.

In actions against an employer for injuries to his servant the judgment, as in civil actions generally, must be in conformity to the pleadings and the proof,²⁸ and be in accordance with, and sustained by, the verdict or findings.²⁹ Where the jury finds the facts on controlling issues, and there is no contradictory finding, the court should enter judgment in conformity with the findings,³⁰ and, where under the findings the servant is not entitled to any recovery, a finding that if he were entitled to recover his damages would be in a certain amount does not warrant a judgment in his favor for that amount.³¹

In jurisdictions where a special verdict must find on all of the facts in issue which are essential to a judgment, a judgment for plaintiff cannot be sustained by findings which do not determine, if the fact is in issue, whether there is actionable negligence,³² in what it consisted,³³ whether it was the proximate cause of the injury,³⁴ and whether the servant was guilty of contributory negligence.³⁵

Special findings which are irreconcilably inconsistent³⁶ in matters material to the issues involved³⁷ will not afford a sufficient basis for a judgment.

§ 553. Appeal and Error

The rules as to appeal and error in civil actions are discussed in Appeal and Error.

§ 554. Damages

- a. In general
- b. Exemplary damages

a. In General

Except as modified by statute, in actions against a master to recover for injuries to his servant, the recovery of compensatory damages is controlled by the general rules governing the elements and measure of damages in personal injury cases.

The general rules governing the elements and measure of compensatory damages are applicable to actions against the master for injury to, or death of, a servant in the absence of special statutory regulation.³⁸ In some jurisdictions, and under some employers' liability acts, where the master is only concurrently negligent the negligence of the servant³⁹ or of a fellow servant⁴⁰ will be considered in mitigation of damages. Thus under Federal Employers' Liability Act § 3, 45 U.S.C.A. § 53, contributory negligence of the servant will reduce the amount of damages in proportion to the amount of negligence attributable to him,⁴¹ and if contributory negligence has been shown, but the jury makes no deduction, the court may order such remittitur as seems proper.⁴² Ordinarily the fellow-servant rule operates to defeat the right of recovery rather than to limit the amount of damages recoverable.⁴³

27. N.C.—Porter v. Western North Carolina R. Co., 2 S.E. 581, 97 N.C. 66, 2 Am.S.R. 272.

Tex.—Perez v. Houston & T. C. R. Co., Civ.App., 5 S.W.2d 782—Mayo v. Fort Worth & D. C. R. Co., Civ.App., 234 S.W. 937.

Wis.—Van Dinter v. Worden-Allen Co., 142 N.W. 122, 153 Wis. 533—Murray v. Abbot, 20 N.W. 910, 61 Wis. 198.

Findings held not so conflicting as to warrant new trial.

Tex.—Perez v. Houston & T. C. R. Co., Civ.App., 5 S.W.2d 782.

28. Ind.—Vandalia Coal Co. v. Yemm, 94 N.E. 881, 175 Ind. 524. Mo.—Newcomb v. Payne, 250 S.W. 553.

Theory of case.

Where an action is tried and a verdict rendered for plaintiff on the theory of a common-law liability, and the evidence does not warrant such a finding, a judgment cannot be sustained under the provisions of an employers' liability act—Impellizzeri v. Cranford, 126 N.Y.S. 644, 141 App.Div. 755.

29. Tex.—Gulf States Utilities Co. v. Moore, Civ.App., 73 S.W.2d 941, reversed on other grounds 106 S.W.2d 258, 139 Tex. 604—Houston & T. C. R. Co. v. Smallwood, Civ.App., 171 S.W. 292.

Wis.—Halwas v. American Granite Co., 123 N.W. 789, 141 Wis. 127.

30. Tex.—Perez v. Houston & T. C. R. Co., Civ.App., 5 S.W.2d 782.

31. Tex.—Perez v. Houston & T. C. R. Co., supra.

32. Wis.—Covell v. Cooper Underwear Co., 128 N.W. 40, 151 Wis. 13. 39 C.J. p. 1255 note 64.

33. Wis.—Kucera v. Merrill Lumber Co., 65 N.W. 374, 91 Wis. 637.

34. Wis.—Kruick v. Wilbur Lumber Co., 123 N.W. 1117, 148 Wis. 76. 39 C.J. p. 1256 note 66.

35. Wis.—Yanike v. Chicago & N. W. R. Co., 126 N.W. 329, 149 Wis. 554.

36. Tex.—Fort Worth & Denver City Ry. Co. v. Burton, Civ.App., 158 S.W.2d 601, error dismissed—Marshall v. Hall, Civ.App., 151 S.

W.2d 919, error dismissed—Perez v. Houston & T. C. R. Co., Civ.App., 5 S.W.2d 782.

39 C.J. p. 1258 notes 88, 90.

37. Tex.—Marshall v. Hall, Civ.App., 151 S.W.2d 919, error dismissed.

39 C.J. p. 1258 note 89.

38. S.C.—Keels v. Atlantic Coast Line R. Co., 89 S.E. 383, 104 S.C. 497.

39 C.J. p. 1263 note 33.

39. Or.—Sonnixsen v. Hood River Gas & Electric Co., 146 P. 980, 78 Or. 25.

39 C.J. p. 1264 note 34.

40. U.S.—The Phoenix, D.C.S.C., 34 F. 760.

41. Okl.—Kansas City, M. & O. R. Co. v. Costa, 170 P. 892, 69 Okl. 132. 39 C.J. p. 1264 note 36.

42. Neb.—Hadley v. Union Pac. R. Co., 156 N.W. 765, 99 Neb. 243.

43. Mont.—Mosher v. Sutton's New Theater Co., 137 P. 534, 48 Mont. 137.

Minors. Under some statutes the fact that a minor servant unlawfully employed misrepresented his age may not be considered in mitigation of damages.⁴⁴ Where double damages are recoverable if the servant was employed in violation of a child labor law, employment in violation of such law must be established before such damages may be recovered⁴⁵

b. Exemplary Damages

The right of a servant to recover exemplary damages generally depends on whether his injury was the result of willful, wanton, or gross negligence of the master or one for whose acts the master is liable

As a general rule, exemplary or punitive damages

may not be awarded for injuries to a servant unless the master's negligence was willful, wanton, or gross,⁴⁶ although gross or wanton negligence may authorize recovery of such damages⁴⁷ In some jurisdictions the master is not liable in exemplary damages for gross negligence of its employees unless such employee was a vice principal rather than a fellow servant⁴⁸ or unless he was engaged in a nondelegable or absolute duty of the master⁴⁹

Ratification of servant's acts Retention in service of an employee with knowledge of his assault on plaintiff employee has been held not to be such a ratification of the assault as to render the employer liable in exemplary damages⁵⁰

V. LIABILITY FOR INJURIES TO THIRD PERSONS

A. ACTS OR OMISSIONS OF SERVANT

§ 555. In General

a. General rules

b. Employers' liability act

a. General Rules

The liability of the master for his servant's wrongful acts has been based on the ground that, where one of two innocent persons must suffer for the wrong of a third, the loss must fall on him who has enabled the third person to do the wrong, or on the doctrine of agency, or, more specifically, on the maxim, *Qui facit per alium facit per se*, or on the doctrine of respondent superior.

It has been broadly stated that when the relation of master and servant exists the master is liable in damages to any third person suffering injuries from the tortious or negligent act of his servant⁵¹ The liability of the master for his servant's wrongful acts has been based on the ground that, where one of two innocent persons must suffer for the wrong of a third, the loss must fall on him who has enabled the third person to do the wrong,⁵² or on the doctrine of agency,⁵³ or, more specifically on the maxi-

44. Tenn.—Knoxville News Co v Spitzer, 279 SW 1043, 152 Tenn 814

45. Mich.—Sotonyi v. Detroit City Gas Co, 232 NW 201, 251 Mich 393

46. Del.—Hendrickson v Continental Fibre Co, 140 A 659, 3 W.W. Harr 564

39 C.J. p 1264 note 42

Gross or wanton negligence held not shown

Tex.—H. B. Zachry Co v Fullilove, Civ App., 177 SW 2d 980, error refused

47. Ala.—Clinton Mining Co v. Bradford, 76 So 74, 200 Ala 808

Tex.—Fort Worth Elevator Co v Russell, Civ App., 28 SW 2d 320, reversed on other grounds Fort Worth Elevators Co. v. Russell, 70 SW 2d 397, 123 Tex. 128
39 C.J. p 1264 note 43

48. Tex.—Magnolia Petroleum Co v Studdard, Civ App., 83 SW 2d 1047.

Employee held not vice principal

(1) Employee whose duties were confined to operation of particular concrete mixer and repair thereof under another employee's supervision.—H. B. Zachry Co. v. Fullilove,

Civ App., 177 SW 2d 980, error refused

(2) Stillman in charge of only three stills for only one six-hour period of day, and having no general supervision of still department or authority to hire or discharge any workman of crew of cleaners—Magnolia Petroleum Co v Booth, Civ App., 105 SW 2d 356, error refused

(3) Head driller who was not corporate officer, did not have authority to hire and discharge employees, and was not intrusted with management of business—Magnolia Petroleum Co v Studdard, Civ App., 83 SW 2d 1047, error dismissed.

49. Tex.—Magnolia Petroleum Co v Studdard, supra

50. Tex.—Baker Hotel of Dallas v Rogers, Civ App., 157 SW 2d 940, error refused 180 SW 2d 522, 138 Tex 398

51. Mo.—O'Brien v Rundakopf, 70 SW 2d 1085, 334 Mo 1233
Negligence see *infra* § 571

Failure to perform duty

Where an employee omits to enter on the performance of a duty which the master owes another, the master may be liable to such other for the omission—Southeastern Greyhound

Lines v Callahan, 13 So 2d 660, 244 Ala 449

Statutory Liability

A statute prohibiting infected domestic animals capable of communicating Bang's disease from leaving the quarantine premises and making any person, common carrier, or corporation failing to comply with statute liable for resulting damages was passed to prevent spread of Bang's disease and must be interpreted in light of that purpose which cannot be avoided by permitting owner of an infected herd to place them in charge of an irresponsible herdsman, and no showing of negligence on part of owner of the infected herd is necessary—Schrack v. Philbeck, Wis., 80 NW 2d 233

52. Md.—Baltimore & O. R. Co v. Strube, 78 A 697, 111 Md 119

53. Ala.—Hampton v. Bracklin's Jewelry & Optical Co, 186 So 173, 237 Ala 212—Hardeman v Williams, 43 So 726, 150 Ala 415, 10 L.R.A.N.S. 653.

Ky.—Slusher v Hubble, 72 SW 2d 39, 254 Ky 595—Corbin Fruit Co v Decker, 68 SW 2d 434, 252 Ky. 766—Bray-Robinson Clothing Co.

im, Qui facit per alium facit per se,⁵⁴ or on the doctrine of respondeat superior, discussed infra § 561 et seq. It has been said that one is responsible for another's acts only when the relation of master and servant,⁵⁵ or the relation of master and servant or principal and agent,⁵⁶ exists between them

In general the master is not liable where the employee himself would not be liable if he had acted in his own behalf instead of as a servant,⁵⁷ or as discussed infra § 570, where the master would not have been liable if he himself, instead of the servant, had committed the act, or where the act of the employee does not proximately cause the injury complained of.⁵⁸ When it appears that an employee was not acting in the course of his employment, a reasonable connection at least must be shown between the employer and the act of his employee which caused damage, before any liability therefor attaches to the employer.⁵⁹

The fact that an employee's wages are paid by one other than his employer does not exempt the latter from liability for his employee's acts,⁶⁰ nor is an employer relieved from liability for such acts by the fact that the injured person may be aided in the enforcement of a judgment by an execution against the person.⁶¹ The statutory liability of a servant does not preclude the common-law liability of his master.⁶² An employer cannot claim immunity from liability for damages done to a third person by his employee because the law with respect to the employment has not been complied with.⁶³

"Servant" not restricted to domestic servant The word "servant," as used in a statute making every person liable for torts committed by his servant by his command or in the prosecution and within the scope of his business, means an employee, and is not limited to domestic servants.⁶⁴

v Higgins, 276 S.W. 129, 210 Ky 432

Mo—Lajoie v Rossi, 37 S.W.2d 684, 225 Mo App 651

Or—Olds v Von der Hellen, 263 P 907, 127 Or 276, modified on other grounds 270 P 497, 127 Or 276

What law governs

Where a person authorizes another to act for him in any state and the other does so act, whether he is liable for the tort of the other is determined by the law of the place of the wrong—Muraszki v William L Clifford, Inc., 26 A.2d 578, 129 Conn 128

54. Ala.—Hampton v Bracklin's Jewelry & Optical Co., 186 So 173, 237 Ala 213—Hardeman v Williams, 43 So 726, 150 Ala 415, 10 L.R.A.N.S., 653

Ky—Bray-Robinson Clothing Co v Higgins, 276 S.W. 129, 210 Ky 432
Mo—O'Brien v Rundskopf, 70 S.W. 2d 1085, 334 Mo 1233

55. Ind.—Scott Const Co v. Cobb, 159 N.E. 763, 86 Ind App 699

NJ—Manswinkle v Penn Jersey Auto Supply Co., 2 A.2d 593, 121 N.J. Law 349

Compulsion to serve another

One compelled by law or duress to render services to another has power to subject the other to liability as though there were a master and servant relationship—Fournier v Churchill Downs-Latonia, 166 S.W.2d 38, 292 Ky 215

A property owner must exercise care that his property is so used and managed by his servants that the mode of conducting his work will not cause injury to others—Le Vonas v Acme Paper Bd Co., 40 A.2d 43, 134 Md. 16—Deford v. State, 30 Md. 179.

56. Ill.—Darnier v Colby, 31 N.E.3d 950, 375 Ill 558, mandate conformed to 35 N.E.2d 952, 311 Ill App 352

Ky—Cole v Back, 205 S.W.2d 303, 305 Ky 668—Slusher v Hubble, 72 S.W.2d 39, 254 Ky 595—Corbin Fruit Co v Decker, 68 S.W.2d 434, 252 Ky 766—Bickel Coal Co v Louisville Tire Co., 14 S.W.2d 775, 238 Ky 239

N.C.—Robinson v McAlheney, 198 S.E. 647, 214 N.C. 180

Okl.—Fairmont Creamery Co of Lawton v Carsten, 55 P.2d 757, 175 Okl 592—Whitehorn v Mosier, 245 P. 553, 119 Okl 155

Pa.—Fuller v Palazzolo, 197 A. 225, 329 Pa. 93—Silvens v Grossman, 161 A. 362, 307 Pa. 272—Allen v Willard, 57 Pa. 374

Utah—McFarlane v Winters, 155 P. 437, 47 Utah 598, L.R.A.1916D 618

Strict master and servant relation not essential

The liability for the acts of another is not dependent on the strict relationship of master and servant, but on relationship of a similar nature, where one acts for another, at his request, express or implied, for his benefit and under his direction—Nalli v Peters, 149 N.E. 343, 241 N.Y. 177, motion for reargument or to amend remittitur denied 150 N.E. 566, 241 N.Y. 587.

Agent as servant

There are some situations at least in which an employer is not liable for faults in the physical conduct of his agent's duties unless the agent is his "servant"—Still v. Union Circulation Co., C.C.A.N.Y., 101 F.2d 11, certiorari denied 60 S.Ct. 78, 308 U.S. 565, 84 L.Ed. 474.

57. U.S.—New Orleans & N. E. R.

Co v Jopes, Miss., 12 S.Ct. 109, 142 U.S. 18, 35 L.Ed. 919

Fla.—Webster v Snyder, 138 So 755, 103 Fla. 1131.

Ill.—Meece v Holland Furnace Co., 269 Ill App 164

Iowa—Maine v. James Maine & Sons Co., 201 N.W. 30, 198 Iowa 1278, 37 A.L.R. 161

Md.—Riegger v Bruton Brewing Co., 16 A.2d 99, 178 Md 518, 131 A.L.R. 307

Mo—State ex rel Shell Petroleum Corporation v Hostetter, 156 S.W. 2d 673, 348 Mo 841

Tenn.—Graham v Miller, 187 S.W. 2d 622, 182 Tenn 434, 163 A.L.R. 571

Inability to sue servant as not affecting respondeat superior doctrine see infra § 561

Tort required

In order to cause master to be civilly responsible for conduct of servant, act must constitute a tort—Barone v Winebrenner, Md., 55 A.2d 505

58. N.C.—Hudson v Gulf Oil Co., 2 S.E.2d 26, 215 N.C. 422

59. La.—Tinker v Hirst, 110 So. 324, 163 La 209

Acts of servant within scope of employment see infra § 570

60. N.J.—Ross v Pennsylvania R. Co., 138 A. 383, 5 N.J.Misc 809 (second case).

61. N.Y.—Levy v Ely, 62 N.Y.S. 855, 48 App Div 554

62. Mass.—Reynolds v. Hanrahan, 100 Mass 313

63. Cal.—King v. Emerson, 288 P. 1099, 110 Cal App 414, adopted 294 P. 768, 110 Cal.App. 414

64. Ga.—Andrews v. Norvell, 15 S.E. 2d 808, 65 Ga.App. 241—Cohn v.

b. Employers' Liability Act

Under the provisions of an employers' liability act liability is imposed on an employer for injury to another's employee acting within the scope of his employment.

The provisions of an employers' liability act have been held designed to protect employees⁶⁵ and to impose liability on an employer for injury to another's employee⁶⁶. An action will lie thereunder for damages only at the instance of one who is an employee carrying on his work at the place where he is injured⁶⁷ and who was acting within the scope of his employment,⁶⁸ the purpose was not to give a mere member of the public, as such, a right of action,⁶⁹ the word "public," as used in the act, relating only to criminal liability thereunder⁷⁰.

§ 556. Liability of Master Based on His Contribution or Participation

A master may become liable to a third person for

failure to exercise ordinary care in furnishing a reasonably safe tool or appliance.

Since a master has the right to choose the instrumentalities or agencies for the performance of the work or duties required of employees,⁷¹ he may become liable to a third person for his failure to exercise ordinary care in choosing and furnishing a reasonably safe tool or appliance.⁷² An employer's duty to guard the public from the danger flowing from the use of his property by employees acting outside the scope of their employment is limited to the exercise of skill and care commensurate with the danger which may reasonably be anticipated⁷³.

§ 557. — Acts Done by Express Command or Assent

A master is liable for torts committed by his servant in obedience to his express orders, or committed in his presence with his assent or acquiescence.

W. E. Cody Sales Stable Co., 80 S E 661, 14 Ga App 284.
39 C.J. p 83 note 9 [a.]

65. U.S.—Pacific States Lumber Co v Bargar, CCA Or, 10 F 2d 335
Or—Saylor v Enterprise Electric Co, 212 P. 477, 106 Or 421

66. U.S.—Pacific States Lumber Co v Bargar, CCA Or, 10 F 2d 335
Or—Clayton v Enterprise Electric Co, 161 P 411, 82 Or 149—Cauldwell v Bingham & Shelley Co, 84 Or 257, 155 P 190

"The . . . Act . . . does extend its protection to employees of the particular person owning or operating dangerous machinery or engaged in hazardous employments, and to other persons or employees of other corporations whose lawful duties require them to be or work about such machinery, or expose themselves to the hazards of the machinery or appliances in use by the owner thereof"—Rorvik v. North Pac Lumber Co, 190 P. 331, 334, 99 Or 58, reheard 195 P 163, 99 Or 58

An employee of a customer of defendant, on the latter's premises and using its appliances while lawfully engaged in his occupation, is within the protection of the act—Coomer v Supple Investment Co, 274 P. 302, 128 Or 224

Contractor's employee

The act requires a company which furnished and delivered concrete to a construction contractor to take the required precautions for the protection of the contractor's employees—McKay v Pacific Bldg Materials Co, 68 P 2d 127, 156 Or. 578

Milling company employee, pushing freight car from roadway on

dock commission's property, was held protected by high degree of care prescribed by statute—Walters v Dock Commission of City of Portland, 266 P 634, 126 Or 487, motion denied 270 P 778, 126 Or 487

Statute held not applicable

Or—McCauley v Steamship "Williamette," 215 P 892, 109 Or 181

67. U.S.—Pacific States Lumber Co v Bargar, CCA Or, 10 F 2d 335
Or—Saylor v Enterprise Electric Co, 212 P 477, 106 Or 421

Complaint alleging milling company employees' custom of removing cars from tracks on dock commission's property held to warrant evidence that commission knew of such employment—Walters v Dock Commission of City of Portland, 266 P. 634, 126 Or 487, motion denied 270 P 778, 126 Or 487.

Evidence held to warrant finding that dock commission knew that milling company employees often shoved cars from tracks on commission's property, and testimony that commission was informed of dangerous railway crossing, and had rule requiring its employees to observe conditions thereat before car was moved from milling company's shed, was held admissible in action for death of milling company's employee—Walters v. Dock Commission of City of Portland, supra

Instruction

Dock commission's subjection to statute was held properly submitted by instruction to find whether commission's work involved danger to milling company's employees—Walters v Dock Commission of City of Portland, supra.

68. Or—Walters v. Dock Commission of City of Portland, supra

What determines scope

Scope of servant's duties depends on what he was employed to, and did, with employer's knowledge and approval, perform—Walters v Dock Commission of City of Portland, supra

Evidence held to support finding that milling company employee acted within scope of employment in pushing freight car from roadway on dock commission's property—Walters v Dock Commission of City of Portland, supra.

69. Or—Drefts v Holman Transfer Co, 280 P 506, 130 Or 453—Saylor v Enterprise Electric Co, 212 P 477, 106 Or 421—Rorvik v North Pac Lumber Co, 190 P 331, 99 Or 58, reheard 195 P 163, 99 Or 58—Turnidge v. Thompson, 175 P 281, 89 Or 637.

70. Or—Turnidge v Thompson, 175 P 281, 89 Or. 637

71. Ark—Western Union Telegraph Co v Hinson, 87 SW 2d 66, 191 Ark 617

72. Ark—Western Union Telegraph Co v Hinson, supra

73. NY—Ford v Grand Union Co, 197 NE 266, 268 NY 243, reargument denied 198 NE 546, 268 NY 664.

Opportunity to guard

While such duty cannot be delegated, it is measured by opportunity afforded, under particular conditions, to prevent injury after knowledge or notice of danger is brought home to employer, and where danger cannot reasonably be anticipated, there is no duty to guard against it, and after knowledge or notice of danger is present, there must be reasonable opportunity to guard against it.—Ford v. Grand Union Co, supra.

A master is liable for the tort of his servant where the tortious act is done in obedience to his express orders or directions,⁷⁴ even though the service is not within the line of the servant's usual duties,⁷⁵ and provided the injury to the third person occurs as the natural, direct, and proximate result of the directed or authorized act.⁷⁶ So also the master is liable for a tortious act of his servant committed in his presence with his assent or acquiescence,⁷⁷ or where the unauthorized act of a servant is performed with the knowledge and apparent approval of those authorized to represent the master⁷⁸ by reason of the master's knowledge of, and acquiescence in, previous acts of the servant of a similar character, although the acts were not within the scope of the servant's employment.⁷⁹ Nevertheless,

in order to charge the master with liability for unauthorized acts of the servant, it must be shown that he had either actual notice of such acts or that they were committed so frequently and under such circumstances as to justify the presumption of notice.⁸⁰

§ 558. — Ratification by Master

A master not otherwise liable for his servant's wrongful act may so ratify it as to become liable therefor; but ratification can be inferred only from acts unequivocally evincing the intention to ratify.

A wrongful act committed by a servant, resulting in injury to a third person, for which the master ordinarily would not be liable, may be so ratified by him as to fix liability on him for the injury,⁸¹ in which circumstances the wrong may be fairly said to be that of the master himself.⁸² There can, of

74. Cal—Benson v Southern Pac Co, 171 P 948, 177 Cal 777—Davison v Diamond Match Co, 51 P 2d 452, 10 Cal App 2d 218
Conn—Stone v Hills, 45 Conn 44, 29 Am R 635
Fla—Reece v Ebersbach, 9 So 2d 805, 152 Fla 763, certiorari denied 63 S Ct 855, 318 US 784, 87 L Ed 1151, rehearing denied 63 S Ct 1155, 319 US 781, 87 L Ed 1725
Ga—Massachusetts Cotton Mills v Hawkins, 139 SE 52, 164 Ga 594, answers conformed to 139 SE 429, 37 Ga App 198
Ill—Mock v Polley, 66 NE 2d 78, 116 Ill App 580—Meece v. Holland Furnace Co, 269 Ill App 164
Ky—J J Newberry Co v Faulconer, 58 SW 2d 217, 248 Ky 59
Neb—Frazier v Anderson, 11 NW 2d 784, 143 Neb 905—Van Auker v Steckley's Hybrid Seed Corn Co, 8 NW 2d 451, 143 Neb 24—La Fleur v Poesch, 252 NW 902, 126 Neb 263
Tex—Nolte v Olmos Dinner Club, Civ.App, 118 SW 2d 841, error dismissed
W Va—Porter v South Penn Oil Co., 24 SE 2d 330, 125 W.Va 361, 39 CJ p 1265 note 10

Assault; intention

Employer, to be liable for assault by employee, must have intended by statements to employee to cause him to commit assault—Krudwig v Koepke, 270 NW 79, 223 Wis. 244.

Joint participants

Where an employee acts under the direction of his employer, the employer is liable for employee's negligence, not merely under the rule of respondeat superior, but also as a joint participant in the acts complained of

- Cal—McInerney v United Railroads, 195 P. 958, 50 Cal App. 538
Neb—Fonda v Northwestern Public

- Service Co, 292 NW 712, 138 Neb 262

75. Cal—Chamberlain v Southern California Edison Co, 140 P. 25, 187 Cal 500
39 CJ p 1265 note 11

76. Or—Olds v Von der Hellen, 283 P. 907, 127 Or 276, modified on other grounds 270 P 497, 127 Or 276

77. Mass—Elder v Bemis, 2 Metc 599
39 CJ p 1265 note 12

The real test as to liability to third persons is whether the act, however trivial, is done by one for another, with knowledge of the person sought to be charged as master, and with his assent, express or implied, even though there was no request on his part to the other to do the act in question—Mainswinkle v Penn Jersey Auto Supply Co, 2 A 2d 593, 121 N J Law 349

Statutory responsibility

Under statutes making one responsible for damage occasioned by persons for whom one is answerable, but providing that responsibility attaches only when master might have prevented act, but did not, defendant was held liable for negligence of employees in connection with street obstruction, causing injury, since he could have made obstruction safe—Rogge v Cañero, 131 So 207, 15 La App 585, appeal dismissed 134 So 909, 15 La App. 565

78. Pa—Farneth v Commercial Credit Co, 169 A. 89, 313 Pa. 433.

Master's silence held not consent to servant's helping in garage outside scope of employment, so as to make him liable for injuries from servant's act—Mallory v Day Carpet & Furniture Co, 245 Ill App 465.

79. U.S.—Fletcher v Baltimore & P R Co, D.C., 18 S Ct. 35, 168 US 185, 42 L Ed 411

80. Neb—Corpus Juris cited in

- Triplett v Western Public Service Co, 260 NW. 387, 392, 128 Neb. 835.

- NY—Ford v Grand Union Co, 197 NE 266, 268 NY 243, reargument denied 198 NE 646, 268 NY 664, 39 CJ p 1266 note 14

81. Cal—Jameson v Gavett, 71 P. 2d 937, 22 Cal App 2d 646—Davison v Diamond Match Co, 51 P 2d 452, 10 Cal App 2d 218.

- Fla—Reece v Ebersbach, 9 So.2d 805, 152 Fla 763, certiorari denied 63 S Ct 855, 318 US 784, 87 L Ed 1151, rehearing denied 63 S Ct. 1155, 319 US 781, 87 L Ed. 1725

- Ind—Polk Sanitary Milk Co. v Berry, 17 NE 2d 860, 106 Ind App 29

- Kan—Kastrup v Yellow Cab & Baggage Co, 282 P 742, 129 Kan 398

- Ky—J. J Newberry Co v Faulconer, 58 SW 2d 217, 248 Ky 59

- Miss—Wells v Robinson Bros. Motor Co, 121 So 141, 153 Miss 451

- NY—Corpus Juris cited in Denton v. Buffalo Pipe Line Corporation, 39 NYS 2d 83, 86, leave to appeal denied 16 NYS 2d 698, 258 App Div. 860

- NC—Robinson v McIlheny, 198 S E. 647, 214 NC 180

- Okl—Mason v Nibel, 263 P 121, 129 Okl 7

- 39 CJ p 1266 note 16

A crime, such as assault, committed by a servant may be ratified by the master, so as to render him liable in tort to a third person, under a statute recognizing ratification by a principal of wrongs committed by his agent—Sullivan v. People's Ice Corporation, 268 P. 934, 92 Cal App. 740

82. Minn—Penas v Chicago, M & St P R Co, 127 NW. 926, 112 Minn 203, 140 Am S.R. 470, 38 L.R.A., N.S., 627.

Liability for exemplary damages see Damages § 125 d.

course, be no ratification unless the act was done for the master⁸³ or at least purported to be done for him.⁸⁴

The ratification must be with full knowledge of the act or fact to be ratified,⁸⁵ of the tortious character of the act,⁸⁶ or of the surrounding circumstances.⁸⁷ Ratification is a question of intention⁸⁸ and can be inferred only from acts which evince clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving such intention.⁸⁹ The mere retention in employment of the servant who has been guilty of the wrongful act complained of does not amount to a ratification of his act so as to impose liability on the master⁹⁰ even though the master has knowledge of the servant's wrongful act,⁹¹ but it has been held that retention in em-

ployment amounts to some evidence of ratification or may be considered as bearing thereon.⁹²

On the other hand, if the master with knowledge of the wrongful act accepts the benefits thereof, there is a ratification which renders him liable.⁹³

§ 559. — Negligence in Selecting or Retaining Servants

A master may be liable for injuries to a third person proximately resulting from the incompetence or unfitness of his servant, where he was negligent in selecting or retaining an incompetent or unfit servant.

A master may be liable for injuries inflicted on a third person by his servant where he was guilty of negligence in selecting a servant incompetent or otherwise unfit to perform the services for which he was employed,⁹⁴ and this is especially true where

83. Ga.—*Corpus Juris* quoted in *Reddy v Waldhauer-Maffett Co v Spivey*, 185 SE 147, 149, 53 Ga App 117.

39 C.J. p 1266 note 19

84. Ga.—*Corpus Juris* quoted in *Reddy-Waldhauer-Maffett Co. v Spivey*, 185 SE 147, 149, 53 Ga App 117.

39 C.J. p 1266 note 20

85. Ky.—*Edwards v Kentucky Utilities Co*, 158 SW2d 935, 289 Ky 375, 139 A LR 1063.

Or.—*Tauscher v Doernbecher Mfg Co*, 56 P 2d 318, 153 Or 152.

86. Or.—*Tauscher v Doernbecher Mfg Co*, supra.

39 C.J. p 1266 note 21

87. Cal.—*Jameson v Gavett*, 71 P 2d 937, 22 Cal App 2d 646.

Okl.—*Mason v Nibel*, 263 P. 121, 129 Okl 7.

88. Ga.—*Estridge v Hanna*, 139 S E 364, 54 Ga App 817.

Ky.—*Edwards v Kentucky Utilities Co*, 158 SW2d 935, 289 Ky 375, 139 A LR 1063.

Or.—*Tauscher v Doernbecher Mfg Co*, 56 P 2d 318, 153 Or 152.

89. Tex.—*Home Telephone & Electric Co. v. Branton*, Civ App, 7 S.W.2d 627, affirmed, Com App, 23 S.W.2d 294.

39 C.J. p 1266 note 22

Nonintervention is not ratification—*Edwards v Kentucky Utilities Co*, 158 SW2d 935, 289 Ky. 375, 139 A LR 1063.

Increase in pay does not tend to prove ratification—*J C Penney Co v. Gravelle*, 155 P 2d 477, 62 Nev 434.

90. U.S.—*Chaney v Frigidaire Corporation*, C.C.A.La., 31 F 2d 977.

Cal.—*Sullivan v People's Ice Corporation*, 268 P 934, 92 Cal App 740.

Ill.—*See Neville v Chicago & A R Co*, 210 Ill App 168.

Nev.—*J C Penney Co v Gravelle*, 155 P 2d 477, 62 Nev 434.

Or.—*Tauscher v Doernbecher Mfg Co*, 56 P 2d 318, 153 Or 152.

S.C.—*Gantt v Belk-Simpson Co*, 174 SE 1, 172 SC 174.

Wis.—*Mandel v Byram*, 211 NW 145, 191 Wis 446.

39 C.J. p 1266 note 23

After assault

Miss.—*Wells v Robinson Bros Motor Co*, 121 So 141, 153 Miss 451.

Tex.—*Home Telephone & Electric Co v Branton*, Civ App, 7 SW 2d 627, affirmed, Com App, 23 SW 2d 294.

After slander

Ky.—*J J Newberry Co v Faulconer*, 58 SW2d 217, 248 Ky 59.

Miss.—*Craft v Magnolia Stores Co*, 138 So 405, 161 Miss 756.

Lack of knowledge

Or.—*Tauscher v Doernbecher Mfg Co*, 56 P 2d 318, 153 Or 152.

S.C.—*Mann v Life & Casualty Ins Co of Tennessee*, 129 SE 79, 132 SC 193.

91. U.S.—*Chaney v Frigidaire Corporation*, C.C.A.La., 31 F 2d 977.

Miss.—*Craft v Magnolia Stores Co*, 138 So 405, 161 Miss 756.

S.C.—*Gantt v Belk-Simpson Co*, 174 SE 1, 172 SC 174.

39 C.J. p 1267 note 24

92. Cal.—*McChristian v Popkin*, 171 P 2d 85, 75 Cal App 2d 249—*Rosenberg v J C Penney Co*, 86 P 2d 696, 30 Cal App 2d 609.

Ga.—*Sullivan v People's Ice Corporation*, 268 P. 934, 92 Cal App 740.

Miss.—*Wells v Robinson Bros Motor Co*, 121 So 141, 153 Miss 451.

S.C.—*Gantt v Belk-Simpson Co*, 174 SE 1, 172 SC 174.

39 C.J. p 1267 note 25

93. Okl.—*Mason v Nibel*, 263 P 121, 129 Okl 7.

39 C.J. p 1267 note 26.

Excess of authority

Master is liable to third person when servant's wrong arises from excess of authority, in furthering master's interest, and master receives benefit of act—*Anderson v Schust Co*, 247 N.W 167, 262 Mich 236.

Tort-feasor not originally servant

The rule stated in the text has been applied even where the tort-feasor was not a servant when he committed the tort, the ratification by accepting the benefits goes to the relation and establishes it ab initio—*Dempsey v Chambers*, 28 NE 279, 154 Miss 380, 26 AmSR 249, 13 L.R.A. 219.

94. Mo.—*Priest v F W Woolworth Five and Ten Cent Store*, 62 SW 2d 926, 228 Mo App 23.

Tenn.—*Wishone v Yellow Cab Co*, 97 SW 2d 452, 20 Tenn App 229.

39 C.J. p 1267 note 28.

Basin of liability

It has been held that the master's liability to third persons negligently injured by servant in course of employment is based on imputation to master of specific negligent acts of servant, and not on master's original negligence in employing careless and incompetent servant—*Krausnick v Haegg Roofing Co*, 20 N.W.2d 432, 236 Iowa 985.

Knowledge not shown

Mo.—*Porter v Thompson*, 306 S.W. 2d 509.

Servant under legal age

One employing child under fourteen years old in violation of labor law is liable per se to person injured as proximate result of such employment—*Spear v Koshelle*, 269 NYS 391, 150 Misc 305.

Investigation and references

(1) Owner of leased premises must exercise reasonable care to employ honest servants to work in tenant's

skill and capacity are required for the performance of the services⁹⁵ or where the services require the use of instrumentalities which are very dangerous if not skillfully handled.⁹⁶ The servant's incapacity must relate to the duties required of him,⁹⁷ but it is not essential that the precise injury or accident which did occur could have been anticipated or foreseen, and it will be sufficient that the injury resulting therefrom is such as is usual and therefore might have been expected⁹⁸

The master, in selecting an employee, must exercise a degree of care commensurate with the nature and danger of the business in which he is engaged and the nature and grade of service for which the servant is intended,⁹⁹ but is required to hire employees possessing only such skill as is ordinarily and reasonably commensurate with the work to be

performed by them¹

Retaining in employment a servant who is, or should be, known to be incompetent, habitually negligent, or otherwise unfit, is such negligence on the part of the master as will render him liable for injuries to third persons resulting from the acts of the incompetent servant,² whether the master's knowledge of the servant's incompetency was actual, or direct,³ or constructive,⁴ the master is chargeable with knowledge of the incompetency of the servant if by the exercise of due or reasonable care or diligence he could have ascertained such incompetence⁵

Proximate cause of injury No liability attaches to the master by reason of hiring incompetent or otherwise unfit servants unless their incompetency or unfitness was the proximate cause of the injury⁶

apartment—Zerder v Friman Holding Co, 274 NYS 588, 153 Misc 225

(2) Employer held negligent in hiring, without investigating qualifications, messenger stealing goods, especially where casual investigation would have disclosed that messenger was not proper person to be entrusted with goods—F & L Mfg Co v Jomark, Inc, 235 NYS 551, 134 Misc 349

(3) Failure of apartment house owner to make inquiry of employee's references did not show negligence rendering it liable for employee's theft—Argonne Apartment House v Garrison, 42 F 2d 605, 59 App DC 370

Prior conviction of employee

Fact that investigation after theft by apartment house employee showed that he had previously been convicted of intoxication was held not to establish negligence in employing him—Argonne Apartment House v Garrison, supra

Violent nature of strike guard

As against contention that strike guard was dangerous and violent man and employer was guilty of negligence in retaining him, violent nature of guard would be no basis for employer's liability for homicide resulting from guard's personal wantonness beyond scope of his employment—St Louis Southwestern Ry Co of Texas v Hudson, Tex Civ App, 286 SW 766, affirmed in part and reversed on other grounds in part, Com App, Hudson v St Louis Southwestern Ry. Co of Texas, Com App, 293 SW 811, rehearing denied 295 SW 577

Limitation of rule to fellow servants

The rule as to the liability of a master on the ground of want of care in the selection of competent servants is a part of the fellow serv-

ant rule, and has no application in cases where the injuries are inflicted by a servant on a third person—Central Truckaway System v Moore, 201 SW 2d 735, 304 Ky 533

95. US—Holladay v Kennard, N Y, 13 Wall 254, 20 L Ed 390

96. Ala—McGowin v Howard, 421 So 2d 683, 246 Ala 533—Alabama City, G & A R Co v Bessiere, 66 So 805, 190 Ala 59

Negligence in selecting barber held not shown—Vann v Ionta, 284 N Y S 278, 157 Misc 461

97. Ky—Creamer v Kroger Grocery & Baking Co, 86 SW 2d 288, 260 Ky 544

98. Ind—Broadstreet v Hall, 80 N E 145, 168 Ind 192, 120 Am SR 356, 10 L R A, NS, 938

99. Tenn—Wishone v Yellow Cab Co, 97 SW 2d 452, 20 Tenn App 229

Right to assume proper appointment of ranger

In absence of knowledge of bad reputation or other disqualifications of watchman holding commission as special ranger, corporation employing him was held entitled to assume that those charged with appointing state rangers had performed their duties and that ranger so appointed was competent, with respect to corporation's liability to third person negligently shot by watchman—Texas Breeders & Racing Ass'n v Blanchard, CCA Tex, 81 F 2d 382, motion dismissed 85 F 2d 1019.

1. Mo—Kuhlman v Water, Light & Transit Co, 271 SW 788, 307 Mo 607

2. Kan—Corpus Juris cited in Kiser v Skelly Oil Co, 18 P 2d 181, 183, 186 Kan 812

Miss—Hamilton Bros Co v Weeks, 124 So 798, 155 Miss 754

Mo—Priest v F W Woolworth Five & Ten Cent Store, 62 SW 2d 926, 238 Mo App 23

Neb—Corpus Juris cited in Triplett v Western Public Service Co, 260 NW 387, 392, 128 Neb 835

N Y—Hall v Smathers, 148 N E 654, 240 N Y 486

Pa—Jackson v Port Pitt Hotel Co, 95 Pittsb Leg J 327

39 CJ p 1267 note 34
Notice to employer from act sued on
The very act relied on for recovery cannot be regarded as giving the employer notice of the servant's dangerous character so as to render him liable for failure to discharge him in advance of such act—Phillips' Adm' v Tway, 108 SW 2d 525, 269 Ky 583

3. Miss—Hamilton Bros Co v Weeks, 124 So 798, 155 Miss 754
Neb—Corpus Juris cited in Triplett v Western Public Service Co, 260 NW 387, 392, 128 Neb 835
39 CJ p 1268 note 35

4. Miss—Hamilton Bros Co v Weeks, 124 So 798, 155 Miss 754
Neb—Corpus Juris cited in Triplett v Western Public Service Co, 260 NW 387, 392, 128 Neb 835
Tenn—Wishone v Yellow Cab Co, 97 SW 2d 452, 20 Tenn App 229
39 CJ p 1268 note 36.

5. Miss—Hamilton Bros Co v Weeks, 124 So 798, 155 Miss 754.
Pa—Jackson v Fort Pitt Hotel Co, 95 Pittsb Leg J 327
39 CJ p 1268 note 36

6. N Y—Spear v Koshella, 269 N Y S 391, 150 Misc 305.
Wis—Lunden v City Car Co, 300 N W 925, 239 Wis 236.
39 CJ p 1268 note 37.

§ 560. — Failure to Instruct Servant or to Enforce Obedience to Instructions

A master is liable for injuries resulting to third persons from his failure to instruct his servants as to the method of performing their work or to see that they obey his instructions.

Negligence of the master in failing properly to instruct his servants as to the method of performance of the work which they are employed to do renders him liable for injuries to third persons resulting therefrom,⁷ as does his failure to see that his instructions are obeyed.⁸ He is responsible for injuries caused by a negligent failure to inform his servant of dangers incident to the business to which third persons are exposed, which are known to him

and unknown to the servant.⁹ Negligence of the master, however, cannot be predicated on his failure to instruct his servant in the law of the land.¹⁰

§ 561. Liability of Master Based on Doctrine of Respondeat Superior

The doctrine of respondeat superior usually is relied on as the basis of liability of a master for injuries to third persons caused by the acts or omissions of his servants

The doctrine of respondeat superior usually is relied on as the basis of liability of a master for injuries to third persons caused by the acts or omissions of his servants.¹¹ The doctrine has been said to apply to one who is having a service rendered in

7. Ala.—Sloss-Sheffield Steel & Iron Co v Bibb, 51 So 345, 164 Ala 62 39 C.J. p 1268 note 38

Smoking

Company which acquiesced in servant's smoking while delivering gasoline was not liable for servant's setting fire to plaintiff's clothes while smoking, where servant was not doing act in connection with company's business that would make smoking unsafe—*Kelly v Louisiana Oil Refining Co*, 66 SW 2d 997, 167 Tenn 101

8. Pa.—Allen v Posternock, 163 A 386, 107 Pa Super 332

9. NH.—Mitchell v Boston & M R R Co, 34 A 674, 68 NH 98

10. Tex.—Kasch v Anton, Civ App, 81 SW 2d 1097

11. US.—Union Pac R Co v Artist, Wyo, 60 F 365, 9 CCA 14, 23 LRA 581

Ala.—Hampton v Brackin's Jewelry & Optical Co, 186 So 173, 237 Ala 212—*Mi-Lady Cleaners v McDaniel*, 179 So 908, 235 Ala 469, 116 ALR 639—*Hardeman v Williams*, 43 So. 726, 160 Ala 415, 10 LRA, NS, 653

Cal.—Bourn v. Hart, 28 P 951, 93 Cal 321, 27 AmSR 203, 15 LRA 481.

Conn.—Chase v New Haven Waste Material Corporation, 150 A 107, 111 Conn 377, 68 ALR 1497—*Hearns v Waterbury Hospital*, 33 A 595, 66 Conn 98, 31 LRA 224—*Ginswold v New York & N E R Co*, 4 A 261, 53 Conn 371, 55 AmR 115—*Weed v Borough of Greenwich*, 45 Conn 170—*Young v New Haven*, 39 Conn 435—*Jewett v New Haven*, 38 Conn 368, 9 AmR 382—*Judge v Meriden*, 38 Conn 90

Fla.—Lynch v. Walker, 31 So 2d 268 Ga.—*Southern R Co v Morrison*, 31 SE 564, 105 Ga 543

Ill.—*McNulta v Lockridge*, 27 NE 453, 137 Ill 270, 31 AmSR 362—*Van Meter v Gurney*, 240 Ill App 165.

Ind.—*Bryan v Pommert*, 37 NE 2d 720, 110 Ind App 61

Iowa.—*Anderson v Abramson*, 13 N W 2d 315, 234 Iowa 792—*Montanick v McMillin*, 280 NW 608, 225 Iowa 442—*Maine v James Maine & Sons Co*, 201 NW 20, 198 Iowa 1278, 37 ALR 161

Kan.—*St. Louis Ft S & N R Co v Willis*, 16 P 728, 38 Kan 330—*Kansas Cent R Co v Fitzsimmons*, 18 Kan 34

Ky.—*Bray-Robinson Clothing Co v Higgins*, 278 SW 129, 210 Ky 432

Me.—*Welch v Maine Cent R Co*, 30 A 116, 86 Me 552, 25 LRA 658—*Bulger v Bden*, 19 A 829, 82 Me 353, 9 LRA 205—*Smart v White*, 73 Me 332, 40 AmR 356—*Woodcock v City of Calais*, 68 Me 244—*State v Consolidated European & N A R Co*, 67 Me 479—*Woodcock v City of Calais*, 66 Me 234—*Somes v White*, 65 Me 542, 20 AmR 718—*Brown v Vinalhaven*, 65 Me 402, 20 AmR 709—*Campbell v Portland Sugar Co*, 62 Me 552, 16 AmR 503—*Morgan v Hallowell*, 57 Me 375

Md.—*Barone v Winebrenner*, 55 A 2d 505—*Western Maryland R Co v Franklin Bank*, 60 Md 36.

Mass.—*Rogers v Ludlow Mfg Co*, 11 NE 77, 144 Mass. 198, 59 AmR 68—*Johnson v Boston Tow-Boat Co*, 135 Mass. 209, 46 AmR 458—*Stone v Codman*, 15 Pick 297—*Sprout v Hemmingway*, 14 Pick 1, 25 AmD 350—*Richards v Farnham*, 13 Pick 451—*Lawrence v Rice*, 12 Metc 527—*Farwell v Boston & W R Corp*, 4 Metc 49, 38 AmD 339—*Earle v Hall*, 2 Metc 353

Mich.—*Boyd v Rice*, 38 Mich 599—*Bath v Caton*, 37 Mich 199—*City of Detroit v Corey*, 9 Mich. 165, 80 AmD 78

Minn.—*Slater v Advance Thresher Co*, 107 NW 133, 97 Minn 305, 5 LRA, NS, 598—*Marrier v St Paul, M. & M R Co*, 17 NW. 952, 31 Minn 351, 47 AmR. 793

Mo.—*O'Brien v Rindakopf*, 70 SW.

2d 1085, 334 Mo 1233—*Chicago Herald Co v Bryan*, 92 SW 902, 195 Mo 574—*Haehl v Wabash R Co*, 24 SW 737, 119 Mo 325—*Douglas v National Life & Accident Ins Co of Nashville, Tenn*, 155 SW 2d 267, 236 Mo App 467—*Blasimay v Albert Wenzlick Real Estate Co*, 138 SW 2d 721, 235 Mo App 526—*Lajoie v Rossi*, 37 S W 2d 684, 225 Mo App 651—*McMahon v Chicago, B & I R Co*, App, 277 SW 356.

Mont.—*Kornec v Mike Horse Mining & Milling Co*, 180 P 2d 252

Neb.—*Gillespie v City of Lincoln*, 52 NW 811, 35 Neb 34, 16 LRA 349

NH.—*Porter v Consolidation Coal Co*, 142 A 483, 83 NH 374—*Carter v Berlin Mills Co*, 58 NH 53, 42 AmR 572—*Wilson v Peverly*, 2 NH 548

NJ.—*Little v Dusenbury*, 46 NJ Law 614, 50 AmR 445—*Condict v Jersey City*, 46 NJ Law 157—*McDermott v Evening Journal Ass'n*, 43 NJ Law 488, 39 AmR 606—*Cuff v Newark & N Y R Co*, 35 NJ Law 17, 10 AmR 205—*Ayres's Exrs v New York & E R Co*, 30 NJ Law 460—*Muller v Bayonne*, 19 A 614, 45 NJ Eq 237

NM.—*Atchison, T & S F R Co v Martin*, 34 P 536, 7 NM 153, affirmed 17 SCt 603, 166 U.S. 399, 41 LEd. 1051

NY.—*Ramsey v New York Cent. R. Co*, 199 NE 65, 269 NY. 219, 102 ALR 511—*Murray v Usher*, 23 NE 564, 117 NY 542—*Hexamer v Webb*, 4 NE 755, 101 NY 377, 54 AmR 703—*Maximilian v New York*, 62 NY 160, 20 AmR 463—*Higgins v Watervliet Turnpike & R. Co*, 46 NY. 23, 7 AmR. 293—*Blake v Ferris*, 5 NY 48, 1 Seld 48, 55 AmD 304—*McNulty v Ludwig*, 109 NY S 703, 125 App Div 291—*Woodhull v New York*, 28 NY S. 120, 76 Hun 390, reversed on other grounds 44 NE 1033, 150 NY. 450—*Burns v Pethcal*, 27 NY S. 499, 75 Hun 437—*Mutual Life*

his behalf only when the service is in itself unlawful or the manner of the execution of the service is unlawful and is within the control of the master.¹² The doctrine is not affected by the injured person's inability to sue the servant,¹³ nor does it depend on the master's right to sue the servant.¹⁴

§ 562. — Necessity for Relation of Master and Servant

Ordinarily, in order to render a person liable for injuries under the doctrine of respondeat superior, the relation of master and servant must be shown to have

existed, between the wrongdoer and the person sought to be charged with the result of the wrong, at the time of the injury, and in respect of the very transaction out of which the injury arose.

Apart from statutory regulations, in order to render a person liable for injuries under the doctrine of respondeat superior, the relation of master and servant must be shown to have existed, between the wrongdoer and the person sought to be charged with the result of the wrong, at the time of the injury, and in respect of the very transaction out of which the injury arose.¹⁵ However, if this relation is

Ins Co v Forty-Second Street & Grand Street Ferry, 26 NYS 545, 74 Hun 506—Phillips v Northern R Co of New Jersey, 16 NYS 909, 62 Hun 233, error dismissed 35 NE 207, 139 NY, 650—Walsh v New York, 2 NY St 384, 41 Hun 299, affirmed 13 NE 911, 107 NY 230—Piercy v Averill, 37 Hun 360—People v Dwyer, 27 Hun 548, 63 How Pr 115, affirmed 90 NY 402, 2 NY Civ Proc 379—Perry v Lansing, 17 Hun 34—Peck v New York Cent & H R R Co, 8 Hun 286, affirmed 70 NY 537—Potter v Seymour, 17 NY Super 140—Worthington v Parker, 11 Daly 545—McMullen v Hoyt, 2 Daly 271—Gourdiar v Cormack, 2 ED Smith 254—Hauser v Metropolitan St R Co, 58 NYS 286, 27 Misc 538—McKnight v Brooklyn Heights R Co, 51 NYS 783, 33 Misc 527—Higgins v Western Union Tel Co, 28 NYS 676, 8 Misc 433—Haas v Most Holy Redeemer Missionary Soc, 26 NYS 868, 6 Misc 281—Buffalo v Clement, 19 NYS 846, 46 NY St 676—O'Brien v New York, 15 NYS 520, affirmed 19 NYS 793, 65 Hun 112, affirmed 39 NE 333, 139 NY 543, reargument denied 37 NE 465, 142 NY, 671—Hurly v Brooklyn, 8 NYS 98, 28 NY St 142—Ex parte Reed, 4 Hill 572—Bailey v New York, 3 Hill 531, 38 AmD 669, 1 NY Leg Obs 163, affirmed 2 Denio 433

NC—Hudson v Gulf Oil Co, 2 SE 2d 26, 215 NC 422—Morrow v Southern R Co, 195 SE 883, 213 NC 127—North Carolina Lumber Co v Spear Motor Co, 135 SE 115, 192 NC 377—Clodfelter v. State, 86 NC 51, 41 AmR 440—Ohio—Metropolitan Life Ins Co v Huff, 194 NE 429, 48 Ohio App 412

Pa.—Joseph v United Workers Ass'n, 23 A 2d 470, 343 Pa 836—Eckert v Merchants' Shipbuilding Corp, 124 A 477, 280 Pa 340—Gates v Pennsylvania R Co, 24 A 638, 150 Pa 50, 16 LRA 554, 30 Wkly NC 329, 40 Pittsb Leg J 30—Fire Ins. Patrol v Boyd, 15 A 553, 120 Pa 624, 6 AmSR 745, 1

LRA 417, 23 Wkly NC 248—Boyd v Philadelphia Ins Patrol, 6 A 536, 113 Pa. 269, 18 Wkly NC 209, 43 Leg Int 427, 34 Pittsb Leg J 136—New York L E & W R Co v Bell, 4 A 50, 112 Pa 400, 17 Wkly NC 457—McCullough v Shoneman, 105 Pa 169, 51 AmR 194, 41 Leg Int 439—Federal St & P V Pass R Co v Gibson, 96 Pa 83—Wray v Evans, 30 Pa 102 23 Pittsb Leg J 189—Alcorn v Philadelphia, 44 Pa. 348, 20 Leg Int 85, 5 Leg Ins Rep 50—Meany v Abbott, 6 Phila 256, 24 Leg Int 389

Tenn—Raines v Mercer, 55 SW 2d 263, 165 Tenn 415

Tex—Le Sage v Pryor, 154 SW 2d 446, 137 Tex 455—Corpus Juris cited in Fort Worth Elevators Co v Russell, 70 SW 2d 397, 406, 123 Tex 128—Corpus Juris cited in Shell Petroleum Corporation v Magnolia Pipe Line Co, Civ App, 85 SW 2d 829, 832

Utah—Corpus Juris cited in Gleason v Salt Lake City, 74 P 2d 1225, 1231, 94 Utah 1

Va—Fry v Albemarle County, 9 SE 1004, 86 Va 195, 19 AmSR 879—Wash—Doremus v Root, 63 P. 572, 23 Wash 710, 54 LRA 649.

W Va—Smith v Smith, 179 SE 812, 116 W Va 230—Corpus Juris cited in Greaser v Appaline Oil Co, 155 SE 170, 172, 109 W Va 396

Wis—Underwood v Paine Lumber Co, 48 NW 673, 79 Wis 592—King v. City of Oshkosh, 44 NW 745, 75 Wis. 517—Bass v. Chicago & N W R Co, 42 Wis 654, 24 AmR 437—Hayes v City of Oshkosh, 33 Wis 814, 14 AmR 760—Wilson v Noonan, 27 Wis. 598

Other grounds of liability see supra § 555

To authorize recovery under doctrine of respondeat superior, it must be shown that plaintiff was injured by alleged wrongdoer's negligence, that relation of master and servant or principal and agent existed between wrongdoer and one sought to be charged, that wrong was done in course of wrongdoer's employment, or scope of his authority, and that he was engaged in work of his em-

ployer, or principal, and was about the business of his superior at time of injury—Mason v Texas Co, 175 SE 291, 206 NC 805.

Conspiracy to commit trespass, or being present, aiding and abetting therein, renders all liable as direct trespassers, and not under doctrine of respondeat superior—Gray v. Williams, 160 So. 715, 230 Ala. 14

12. Mo—Lajoie v Rossi, 37 SW 2d 684, 225 Mo App 651

13. Vt—Poulin v Graham, 147 A 698, 102 Vt 307

Liability of master or servant as primary or secondary see infra § 570

14. Ill—Star Brewery Co v Hauck, 78 NE 837, 222 Ill 348, 113 Am SR 420

Vt—Poulin v Graham, 147 A 698, 102 Vt 307

Liability of servant to master for damages paid to third persons see Indemnity §§ 21, 24

15. U.S.—Lamb v Interstate S S Co, CCA Ohio, 149 F 2d 914—Mid-Continent Pipe Line Co v. Whiteley, CCA Okl, 116 F 2d 871—Baker Tow Boat Co v Langner, CC A Ala, 37 F 2d 714—Labbee v Travenot S S Co, CCANY, 37 F 2d 52, certiorari denied Labbee v Travenot S S Co, 50 S Ct 408, 281 US 754, 74 L Ed 1164—Southern R Co v. Power Fuel Co, SC, 152 F 917, 82 CCA. 65, 12 LRA, NS, 472

Ala—Corpus Juris quoted in Perfection Mattress & Spring Co v Windham, 182 So. 6, 8, 286 Ala. 239—Corpus Juris cited in Mi-Lady Cleaners v McDaniel, 179 So 908, 911, 235 Ala 469, 116 ALR 639

Ariz—Lee Moore Contracting Co v. Blanton, 65 P 2d 35, 49 Ariz 130

Cal—Kish v. California State Automobile Association, 212 P 27, 190 Cal 246—Wilson v Droege, 294 P. 726, 110 Cal App. 578—Pree v. Roed, 278 P 928, 99 Cal App. 372—Filger v. City of Paris Dry Goods Co, 261 P 328, 86 Cal App 277—Tiburne v Burton, 261 P. 334, 86 Cal App. 627.

D C—Western Marine & Salvage Co. v. Ball, 37 F.2d 1004, 59 App DC.

shown to exist at the time of the injury, and in re- | spect of the transaction out of which the injury

- 208, certiorari denied *Ball v Western Marine & Salvage Co.*, 50 S Ct 353, 281 U.S. 749, 74 L Ed 1161—*Western Union Telegraph Co v Scrivener*, 18 F.2d 162, 57 App DC 120
- Ill.—*Palmer v Miller*, 43 NE 2d 978, 380 Ill 256—*Darner v Colby*, 31 NE 2d 950, 375 Ill 558, mandate conformed to 35 NE 2d 952, 411 Ill App 352—*Metzler v Layton*, 25 NE 2d 60, 373 Ill 88—*Mosby v Kimball*, 178 NE 66, 345 Ill 420—*Shannessy v Walgreen Co.*, 59 NE 2d 380, 324 Ill App 590—*Hogan v City of Chicago*, 49 NE 2d 861, 319 Ill App 531—*Creek v Naylor*, 38 NE 2d 740, 309 Ill App 601—*Jones v Standerfer*, 15 NE 2d 924, 296 Ill App 145—*Thuel v. Material Service Corporation*, 283 Ill App 46, affirmed 5 NE 2d 88, 364 Ill 539—*Trust v Chicago Motor Club*, 276 Ill App 289—*Bird v Louer*, 272 Ill App 532—*Craig v Tucker*, 264 Ill App 521—*Borgmier v. Wood*, 252 Ill App 194—*Black v. Texas Co.*, 247 Ill App 801—*Shein v John R. Thompson Co.*, 225 Ill App 490
- Ind.—*Standard Oil Co v Soderling*, 42 NE 2d 373, 112 Ind App 437.
- Iowa—*Anderson v Abramson*, 13 NW 2d 315, 284 Iowa 782—*In re Ammond's Estate*, 310 NW 923, 203 Iowa 306
- Ky.—*Johnson v Brewer*, 98 SW 2d 889, 266 Ky 314—*Leachman v Belknap Hardware & Mfg Co.*, 84 SW 2d 46, 260 Ky 123—*Slusher v Hubble*, 72 SW 3d 39, 254 Ky 595—*Corbin Fruit Co v Decker*, 68 SW 2d 434, 252 Ky 766—*American Sav Life Ins Co v Riplinger*, 60 SW 2d 115, 249 Ky 8
- La.—*Todaro v City of Shreveport*, 174 So 111, 187 La 68—*James v J S Williams & Son*, 150 So 9, 177 La 1033—*Carson v De George*, App 18 So 2d 356
- Mass.—*Khoury v. Edison Electric Illuminating Co.*, 164 NE 77, 265 Mass 286, 60 A.L.R. 1159
- Mich.—*Marshall v Glaesser*, 278 NW 763, 284 Mich 56, reversed on other grounds 282 NW 832, 284 Mich 56—*Rockwell v Grand Trunk Western Ry Co.*, 284 NW 159, 253 Mich 144
- Miss.—*Parker v. Film Transit Co.*, 13 So 2d 159, 194 Miss 542—*Sellers v Powell*, 152 So. 492, 168 Miss 682—*Louis Werner Sawmill Co v Northcutt*, 184 So 156, 161 Miss 441
- Mo.—*Oganaso v. Mellow*, 201 S.W. 2d 365—*Corder v Morgan Roofing Co.*, 166 SW 2d 455, 350 Mo 382—*Corpus Juris* quoted in *Vert v Metropolitan Life Ins Co.*, 117 S.W. 2d 253, 255, 343 Mo 629, 116 A.L.R. 1381—*Riggs v Higgins*, 106 SW 2d 1, 341 Mo 1—*Corpus Juris* quoted in *Brunk v. Hamilton-Brown Shoe Co.*, 66 SW 2d 903, 907, 334 Mo 517—*Corpus Juris* cited in *Acker v Koopman*, 50 S.W. 2d 100, 102—*Hiladorf v City of St Louis*, 45 Mo 94, 100 Am D 353—*Lajoie v Rossi*, 37 SW 2d 684, 225 Mo App 651
- NH.—*Porter v Consolidation Coal Co.*, 142 A 483, 83 NH 334
- NJ.—*Wirth v. Gabry*, 4 A.2d 281, 122 NJ Law 95—*Conklin v Brighton Mills*, 144 A 815, 105 NJ Law 386—*Pederson v Edward Shoe Corporation*, 142 A 13, 104 NJ Law 566—*Doran v Thomsen*, 71 A 296, 298, 76 NJ Law 754, 19 L.R.A., N.S. 335, 131 Am SR 877
- NY.—*Currie v International Magazine Co.*, 175 NE 530, 256 NY 106—*Cronin v MacAffer*, 45 NYS 2d 732, 267 App Div 852—*Howitt v Hopkins*, 220 NYS 462, 219 App Div 653, affirmed 159 NE 669, 246 NY 604—*Thomas v. Springer*, 119 NYS 463, 134 App Div 982—*Thomas v Springer*, 119 NYS 460, 134 App Div 640, rehearing denied 120 NYS 1148, 136 App Div 923—*Bernstein v Western Union Telegraph Co.*, 18 NYS 2d 856, 174 Misc 74—*Bindert v. Elmhurst Taxi Corporation*, 6 NYS 2d 666, 168 Misc 892—*Dunne v Contenti*, 4 NYS 2d 148, 167 Misc 925, affirmed 9 NYS 2d 248, 256 App Div 833
- NC.—*Carter v Thurston Motor Lines*, 41 SE 2d 586, 237 NC 193—*Tomlinson v Sharpe*, 37 SE 2d 498, 226 NC 177—*Walker v Manson*, 23 SE 2d 839, 222 NC 527—*Hairston v Atlantic Greyhound Corporation*, 18 SE 2d 166, 220 NC 642—*Smith v Moore*, 16 SE 2d 701, 220 NC 165—*Smith v Duke University*, 14 SE 2d 643, 219 NC 628—*Creech v National Lunen Service Corporation*, 14 SE 2d 408, 219 NC 457—*Ross v Western Union Telegraph Co.*, 13 SE 2d 571, 219 NC 324—*McLamb v Beasley*, 11 SE 2d 288, 218 NC 808—*Parrott v Kantor*, 6 SE 2d 40, 218 NC 584—*Robinson v Sears, Roebuck & Co.*, 4 SE 2d 889, 216 NC 322—*Bright v Western Union Telegraph Co.*, 195 SE 391, 213 NC 208—*Liverman v Cline*, 192 SE 849, 212 NC 43—*Van Landingham v Singer Sewing Mach Co.*, 177 SE 126, 207 NC 355—*Martin v. Greensboro-Fayetteville Bus Line*, 150 SE 501, 197 NC 720—*Wilkie v Stancil*, 147 SE 296, 196 NC 794—*Linville v Nissen*, 77 SE 1096, 162 NC 95
- Ohio.—*Biddle v New York Cent R Co.*, 182 NE 601, 43 Ohio App 6
- Okla.—*World Pub Co. v Smith*, 161 P 2d 861, 195 Okl 691—*Massman Const Co v Chisholm*, 145 P 2d 211, 193 Okl 477—*Massman Const Co v Chisholm*, 145 P.2d 207, 193 Okl 473—*Rabinovitz v Taylor*, 106 P 2d 827, 188 Okl 84—*Fairmont Creamery Co of Lawton v Carsten*, 55 P 2d 757, 175 Okl 592—*Whitehorn v Mosier*, 245 P 553, 119 Okl 155—*Schmitt v Kier*, 238 P 410, 111 Okl 23
- Or.—*Fogelsong v Jarman*, 121 P 2d 924, 168 Or 177—*Hantke v Harris Ice Mach Works*, 54 P 2d 293, 152 Or 564—*Olds v Von der Helten*, 263 P 907, 127 Or 276, modified on other grounds 270 P 497, 127 Or 376
- Pa.—*McGrath v Edward G Budd Mfg Co.*, 36 A 2d 303, 348 Pa 619—*Milwaukee Locomotive Mfg Co v Point Marion Coal Co.*, 144 A 100, 294 Pa 238—*Bojarski v M F Howlett, Inc.*, 140 A 544, 291 Pa 485—*Kirkpatrick v Alan Wood Steel Co.*, Com Pl., 55 Montg Co 123, affirmed 12 A 2d 22, 338 Pa 126
- SC.—*Holder v Haynes*, 7 SE 2d 833, 193 SC 176
- SD.—*Morman v Wagner*, 262 NW 78, 63 SD 547
- Tenn.—*East Tennessee & Western North Carolina Motor Transp Co v Brooks*, 121 SW 2d 559, 173 Tenn 542—*Goodman v Wilson*, 166 SW 752, 129 Tenn 464, 51 L.R.A., N.S. 1116
- Tex.—*Corpus Juris* cited in *Hilgenberg v Elam*, 193 SW 2d 94, 95, 145 Tex 437—*American Nat Ins Co v Denke*, 95 SW 2d 370, 128 Tex 229, 107 A.L.R. 409—*National Cash Register Co v Rider*, Com App, 24 SW 2d 28—*Hudson v St Louis Southwestern Ry Co of Texas*, Com App, 293 SW 811, rehearing denied 295 SW 577—*Anderson-Berney Bldg Co v Lowry*, Civ App, 143 S.W. 2d 401, reversed on other grounds *Lowry v Anderson-Berney Bldg Co*, 161 SW 2d 459, 139 Tex 29—*Texas Mut Reserve Life Ins. Co v Ormand*, Civ App, 115 SW 2d 776—*American Nat Ins Co v Kennedy*, Civ App, 101 SW 2d 825, modified on other grounds *Kennedy v American Nat. Ins Co*, 107 SW 2d 864, 180 Tex. 155, 112 A.L.R. 918—*City of Wichita Falls v Phillips*, Civ App, 87 S.W. 2d 544, error dismissed—*Corpus Juris* quoted in *Texas Electric Service Co. v Kinkadee*, Civ App, 86 SW 2d 1052, 1056
- Utah.—*Gleason v. Salt Lake City*, 74 P 2d 1225, 94 Utah 1—*McFarlane v Winters*, 155 P 437, 47 Utah 598, L.R.A. 1916D 618
- 39 C.J. p 1268 note 45
- Necessity that act causing injury be within scope of employment see infra § 570
- Here fact that employee is on call does not render employer liable for employee's negligence under doctrine of respondeat superior—*Hantke v.*

arose, the mere fact that the act of a third person not in the employ of the master contributed to the injury will not exempt him from liability.¹⁶

§ 563. — When Relation Exists in General

- a In general
- b Right to select, control, or discharge servant
- c Contract of employment
- d Payment for services

a. In General

Whether the relation of master and servant, as fixing liability on one person for the acts of another under the doctrine of respondeat superior, exists in a particular case depends on the facts and circumstances of that case.

Harris Ice Mach. Works, 54 P 2d 293, 152 Or 564

Police officer

(1) Railroad held not liable to injured striker for acts of city police chief in removing striking mill workers from mill siding, although acts were requested or demanded by railroad's agent, police chief not being employee of railroad—Kent v Southern Ry. Co., 184 S E 638, 52 Ga App 781.

(2) Where defendant's theater had been robbed and defendant had requested special police protection and at the policeman's request, had given him a key that he might enter the premises, defendant was not liable for the policeman's actions in killing a person found on the premises, there being no relation of master and servant—Lawrence v Crescent Amusement Co., 8 Tenn App 216.

A volunteer cannot bind a master by assuming to help the servant, without the latter's knowledge or consent—McLain v Armour & Co., 218 N W 69, 205 Iowa 343

Estoppel to deny existence of relationship

Nev—Montgomery Ward & Co v Stevens, 109 P 2d 895, 60 Nev 358
 N Y—Thomas v Springer, 119 N Y S 463, 134 App Div 982—Thomas v Springer, 119 N Y S 460, 134 App Div 640, rehearing denied 120 N Y S 1148, 136 App Div 923
 Ohio—Morgan v American Meat Co., App, 46 N E 2d 669

16. N Y—Corpus Juris cited in Ford v Grand Union Co., 270 N Y S 162, 240 App Div 294
 39 C.J. p 1269 note 46

17. Ill—Darner v Colby, 31 N E 2d 950, 375 Ill 558, mandate conformed to 35 N E 2d 952, 311 Ill App 352

Ind—Superior Meat Products v Holloway, 48 N E 2d 83, 113 Ind App 320.

Mo—Barnes v Real Silk Hosiery Mills, 108 S W 2d 58, 341 Mo 563

Circumstances showing existence of relation

(1) Generally

Ga—Upshaw v Upshaw, 6 S E 2d 394, 61 Ga App 272

Mo—Givens v Spalding Cloak Co., 63 S W 2d 819, 238 Mo App 169

Wis—Sprecher v Roberts, 248 N W 795, 212 Wis 69

(2) Agency contract held to create relationship of master and servant between employer and agent and agent's employees—Magnolia Petroleum Co v Pierce, 269 P 1076, 132 Okl 167, 61 A L R 218.

(3) General contractor's hoistman operating hoist, which injured subcontractor's employee, under agreement whereby subcontractor paid for hoisting, held employee of general contractor, and under its control—Brumhall v Sutherland, 293 P. 672, 110 Cal App 10

Circumstances showing absence of relation

(1) Generally

La—Tocaro v City of Shreveport, 174 So 111, 187 La 68—Carson v De George, App, 18 So 2d 356

N Y—Cronin v MacAffer, 45 N Y S 2d 732, 267 App Div 852—Howitt v. Hopkins, 220 N Y S 462, 219 App Div 653, affirmed 159 N E 669, 246 N Y 604

N.C.—Inman v Gulf Refining Co., 140 S E 289, 194 N C 566.

(2) The facts that operator of filling station paid rent to oil company, bought and paid for merchandise, and bore all expenses of operating station, employed and controlled employees in discharge of their work, stood losses and appropriated the profits, were inconsistent with relation of master and servant—Texas Co v Wheat, 168 S W 2d 632, 140 Tex 468

Whether the relation of master and servant exists in a particular case must depend on its own surrounding facts and circumstances,¹⁷ including the contract between the parties,¹⁸ and no one feature of the relation between them is determinative, but all must be considered together.¹⁹ The relation of master and servant, as fixing liability on one person for the acts of another under the doctrine of respondeat superior, is usually understood to arise when one person subordinately serves another, both consenting thereto,²⁰ and the relation may exist outside of actual working time.²¹ However, the existence of definite hours of labor has been declared a requisite of the existence of the relation.²²

The relation does not depend on whether the serv-

Recommendation of appointment

The fact that Sea Scout Committee recommended appointment of scoutmaster did not make him employee of committee for whose acts of negligence committee would be liable—Nelles v Ramsdell, 59 N Y S 2d 671, appeal dismissed Hansen v. Ramsdell, 63 N Y S 2d 216

18. Ill—Darner v Colby, 31 N E 2d 950, 375 Ill 558, mandate conformed to 35 N E 2d 952, 311 Ill App 352

Effect of indemnity agreement or bond

The fact that a salesman agrees to indemnify his employer for any claim which may be asserted against the latter by reason of the former's conduct in effecting sales, or his agreement to furnish a bond for the faithful performance of his contract, does not affect the question whether there is a master and servant relationship between them—Griffith v. Electrolux Corporation, 11 S E 2d 644, 176 Va 378

19. Ill—Darner v Colby, 31 N E 2d 950, 375 Ill 558, mandate conformed to 35 N E 2d 952, 311 Ill App 352

20. W Va—O'Dell v Universal Credit Co., 191 S E 568, 118 W Va. 678

Essentials of relation generally see supra § 2

Marked characteristic

With respect to master's liability to third person, personal service is marked characteristic of relation of master and servant—Coul v. George B Peck Dry Goods Co., 32 S W 2d 758, 326 Mo 870

21. W Va—O'Dell v Universal Credit Co., 191 S E 568, 118 W Va. 678

22. Mo—Coul v George B Peck Dry Goods Co., 32 S.W.2d 758, 326 Mo 870.

ice is temporary or permanent²³ or on who owns the appliances that are being used;²⁴ and the relation may exist even though the law requires the selection of persons for the particular work to be made from a limited class.²⁵ Actual presence of one person with another is not necessary for the creation or maintenance between them of the relationship of master and servant²⁶

Unlawfulness of employment. While it has been held that, in order to render an employer liable under the doctrine of respondeat superior, the employment must have for its object the prosecution of a lawful business, and that if the business is unlawful or criminal, the relation of master and servant cannot exist,²⁷ this rule must be distinguished from the master's liability for the criminal acts of his servant committed within the scope of his employment where the relation of master and servant can and

does exist, as discussed infra § 573.

b. Right to Select, Control, or Discharge Servant

In order that the relation of master and servant may exist for the purpose of fixing liability under the doctrine of respondeat superior, the alleged master must have the right to select, direct, control, and discharge the alleged servant.

In order to constitute the relation of master and servant for the purpose of fixing liability on the former for acts of the latter under the doctrine of respondeat superior, it is indispensable that the right to select the person claimed to be a servant should exist²⁸ Furthermore, something more than the mere right of selection is essential to the relation,²⁹ this right must be accompanied by the power or right to direct and control the alleged servant while in the alleged master's employ,³⁰ with respect to the

23. W Va.—O'Dell v Universal Credit Co, 191 S E 568, 118 W Va 678

24. Ky—Greene v Pennington, 108 S W 2d 1013, 270 Ky 28

Bicycle used for delivery

Ky—Greene v Pennington, *supra*

25. Wis—Tetting v Hotel Pfister, 266 N W 249, 221 Wis 141

26. Pa—Rosen v Diesinger, 158 A 561, 308 Pa 13.

27. Colo—Sagers v Nuckolls, 32 P 187, 3 Colo App 95

39 C.J. p 1271 note 69.

28. U.S.—Young v. Wilky Carrier Corporation, D C Pa., 54 F Supp 912, affirmed, CCA, 150 F 2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L Ed 477.

Ala.—Moore-Handley Hardware Co v. Williams, 189 So 757, 238 Ala. 189—Corpus Juris cited in Motor Terminal & Transportation Co v Simmons, 180 So 597, 599, 28 Ala. App 190

Ill.—Merlo v Public Service Co. of Northern Illinois, 45 NE 2d 665, 381 Ill 300, followed in 45 NE 2d 677, 381 Ill 336.

Ky—Broadway Motors v Bass, 67 S W 2d 955, 252 Ky 628

La.—Corpus Juris quoted in Todaro v. City of Shreveport, App, 170 So 356, 360, modified on other grounds 174 So 111, 187 La 68

Md.—Hood v Asrael, 175 A 666, 187 Md. 641—Corpus Juris quoted in Vacek v State, 142 A 491, 494, 155 Md. 400—Bell v State, 138 A 227, 153 Md 333, 58 A.L.R. 1051.

Miss—Parker v Film Transit Co., 13 So 2d 159, 194 Miss 542.

Nev.—Wells, Inc v Shoemake, 177 P 2d 451

N.J.—Kosick v. Standard Properties, 177 A 428, 13 N.J. Misc 219

Ohio.—Corpus Juris quoted in Pan-

tell v Shriver-Allison Co, 22 NE 2d 497, 501, 61 Ohio App 119

Okl.—Corpus Juris quoted in Vogler v Jones, 186 P 2d 315, 317

Pa.—Joseph v. United Workers Ass'n, 23 A 2d 470, 343 Pa 636

Tex.—Corpus Juris quoted in Dempster Mill Mfg Co v Lester, Civ App, 131 S W 2d 254, 256—Corpus Juris quoted in Texas Electric Service Co v. Kinkead, Civ App, 36 S W 2d 1052, 1055

W Va.—Corpus Juris cited in Greaser v Appaline Coal Co, 155 S E 170, 172, 109 W Va 230

39 C.J. p 1209 notes 47, 50

29. Ala.—Corpus Juris cited in Motor Terminal & Transportation Co v Simmons, 180 So 597, 28 Ala. App 190

La.—Todaro v City of Shreveport, App, 170 So 356, modified on other grounds 174 So 111, 187 La 68

Md.—Corpus Juris quoted in Vacek v State, 142 A 491, 494, 155 Md 400

Nev.—Wells, Inc, v Shoemake, 177 P 2d 451

Ohio.—Corpus Juris quoted in Pantell v. Shriver-Allison Co, 22 NE 2d 497, 501, 61 Ohio App 119

Tex.—Corpus Juris quoted in Dempster Mill Mfg. Co v Lester, Civ App, 131 S W 2d 254, 256—Corpus Juris quoted in Texas Electric Service Co v Kinkead, Civ App, 36 S W 2d 1052, 1055

39 C.J. p 1269 notes 51, 52

30. U.S.—Maloney Tank Mfg. Co v Mid-Continent Petroleum Corporation, CCA Okl, 49 F 2d 146—Labbe v Travenot S S Co, CCA N Y, 37 F 2d 52, certiorari denied Labbe v Travenot S. S Co, 50 S Ct 408, 281 US 754, 74 L Ed 1164—Young v Wilky Carrier Corporation, D C Pa., 54 F Supp 912, affirmed, CCA, 150 F 2d 764, cer-

tiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L Ed 477.

Ala.—Moore-Handley Hardware Co v Williams, 189 So 757, 238 Ala. 189—Corpus Juris cited in Motor

Terminal & Transportation Co v. Simmons, 180 So 597, 28 Ala App. 190

Ark.—Corpus Juris cited in Gray v McLaughlin, 179 S W 2d 686, 687, 307 Ark 191—Mississippi River Fuel Corporation v. Morris, 35 S. W 2d 607, 182 Ark 207

Cal.—Moss v Chronicle Pub Co, 258 P 88, 201 Cal 610, 55 A.L.R. 1258—Chinnis v Pomona Pump Co, 98 P 2d 560, 36 Cal App 2d 623—Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P 2d 546, 121 Cal App 719—Brumhall v. Sutherland, 293 P 672, 110 Cal App 10—Pulger v. City of Paris Dry Goods Co, 261 P 328, 86 Cal App 727.

Conn.—Oleksinski v Filip, 80 A 2d 912, 129 Conn 701—Krowka v Colt Patent Fire Arm Mfg Co, 8 A 2d 5, 125 Conn 705

Ga.—Bibb Mfg Co v Souther, 184 S. E 421, 52 Ga.App 722

Idaho—Whalen v Zinn, 96 P 2d 434, 60 Idaho 722.

Ill.—Merlo v Public Service Co of Northern Illinois, 45 NE 2d 665, 381 Ill 300, followed in 45 NE 2d 677, 381 Ill 336—Thiel v. Material Service Corporation, 283 Ill App 46, affirmed 5 NE 2d 88, 364 Ill 539—Black v. Texas Co, 247 Ill App 301.

Iowa—Anderson v. Abramson, 13 N W 2d 315, 234 Iowa 792

Ky.—Leachman v Belknap Hardware & Mfg Co, 84 S W 2d 46, 260 Ky. 122—Slusher v Hubble, 72 S W 2d 39, 254 Ky 595—Corbin Fruit Co v. Decker, 68 S W 2d 424, 252 Ky. 766—Broadway Motors v. Bass, 67 S.W.2d 955, 252 Ky. 628—

transaction out of which the injury arose,³¹ and such right has been said to be the principal³² or decisive³³ test.³⁴ In determining whether the alleged master exercises control, all the circumstances surrounding the contract are to be considered³⁵

If workmen do not stand in such relation to the person sought to be charged as to make it his duty to control them, they are not his servants and he is in no sense responsible for their acts under the doctrine of respondeat superior³⁶ Where the person

American Sav Life Ins Co v Rip-
linger, 60 SW 2d 115, 249 Ky 8
La—James v J S Williams & Son,
150 So 9, 177 La 1033—Corpus
Juris quoted in Todaro v City of
Shreveport, App, 170 So 356, 360,
modified on other grounds 174 So
111, 187 La 68

Md—Hood v Azrael, 175 A 666, 187
Md 641—Corpus Juris quoted in
Vacek v State, 142 A 491, 494, 155
Md 400—Bell v State, 138 A 227,
153 Md 333, 58 A L R 1051—Hooper
v Brawner, 129 A 672, 148 Md
417, 42 A L R 1437

Miss—Corpus Juris cited in Louis
Werner Sawmill Co v Northcutt,
134 So 156, 158 161 Miss 441

Mo—Corder v Morgan Roofing Co,
166 S W 2d 455, 350 Mo 382—Riggs
v Higgins, 108 SW 2d 1, 341 Mo
1—Hilsdorf v City of St Louis,
45 Mo 94, 100 Am D. 352—Gorman
v A R Jackson Kansas City
Showcase Works Co, App, 19 S
W 2d 559.

Mont—Devaney v Lawler Corpora-
tion, 56 P 2d 746, 101 Mont 579

Nev—Wells v Shoemaker, 177 P 2d
451.

N.J.—Vreeland v Wilkinson Gaddis
& Co, 29 A 2d 387, 129 N J Law
283

N.Y.—Osborn v Hoffman, 300 N Y
S 690, 252 App Div 587, affirmed
19 NE 2d 924, 280 N Y 523—How-
itt v Hopkins, 220 N Y S 462 219
App Div 653, affirmed 159 NE 669,
246 N Y 604

NC—Wood v Miller, 39 SE 2d 608,
226 NC 567

Ohio—Johnson v Wagner Provision
Co, 49 NE 2d 925, 141 Ohio St 584
—Corpus Juris quoted in Pantell
v Shriver-Allison Co, 22 NE 2d
497, 501, 61 Ohio App 119—Hudson
v Ohio Bus Line Co, 11 NE 2d
113, 56 Ohio App 483.

Okl—World Pub Co v Smith, 161
P 2d 861, 195 Okl 691—Magnolia
Petroleum Co v Pierce, 269 P
1076, 132 Okl 167, 61 A L R 218

Pa.—Joseph v. United Workers
Ass'n, 28 A 2d 470, 343 Pa 636—
Eckert v Merchants' Shipbuilding
Corp, 124 A 477, 280 Pa 340

Tex—Rankin v Nash-Texas Co, 105
S W 2d 195, 129 Tex 396—Corpus
Juris quoted in Dempster Mill
Mfg Co v Lester, Civ App, 131 S
W 2d 254, 256—Corpus Juris cited
in Christopher v City of El Paso,
Civ App, 98 S W 2d 394, 400, error
dismissed—Corpus Juris quoted in
Texas Electric Service Co v Kin-
kead, Civ App, 36 S W 2d 1052,
1055

Va—Barber v Textile Machine
Works, 17 SE 2d 359, 178 Va 435
Wash—McHugh v King County, 128
P 2d 504, 14 Wash 2d 441

W Va—Corpus Juris cited in O'Dell
v Universal Credit Co, 191 SE
568 570 118 W Va 678—Corpus
Juris cited in Greaser v Appaline
Coal Co, 155 SE 170, 172, 109 W
Va 396

39 C J p 1269 note 52

Obedience to instructions

One means of ascertaining whether
employer's right to control exists so
as to give rise to relationship of em-
ployer and employee is to determine
whether, if instructions were given,
they would have to be obeyed, fact
that alleged employee chooses his
own time to go out and return and
is not directed where to go or to
whom to sell, is not conclusive of
relationship with employer and is
not inconsistent with relationship of
employer and employee—Burling-
ham v Gray, 137 P 2d 9, 22 Cal 2d 87

Requiring standards of cleanliness

Fact that oil company required op-
erator of filling station to maintain
certain standards of cleanliness in
operation of station did not create
relation of master and servant as
long as company did not undertake to
direct the details by which the re-
sults were to be accomplished—Tex-
as Co v Wheat, 168 S W 2d 632, 140
Tex 468

Physicians

(1) The doctrine of respondeat su-
perior does not apply to a physician
who acts on his own initiative and
in the exercise of his own judgment
and skill without direction or con-
trol of an employer—Smith v. Duke
University, 14 SE 2d 643, 219 NC
628—48 C J p 1137 note 39 [b]

(2) The relation of master and
servant cannot exist between physi-
cians and surgeons who are not
X-ray specialists themselves and the
X-ray specialist or roentgenologist
whom they employ to assist them in
the treatment and diagnosis of dis-
eases where they have no control
over the method of his work—Gray
v McLaughlin, 179 S W 2d 686, 207
Ark 191—Runyan v Goodrum, 228
SW 397, 147 Ark 481, 13 A L R
1403

(3) However, such relation existed
between X-ray specialist and tech-
nician employed by him to operate
X-ray machine in a part of office
separated from specialist's private
office by partition in such a way that
specialist could see technician while

she was operating machine, so as to
render specialist liable for injury
caused by negligent operation of ma-
chine by technician—Gray v Mc-
Laughlin, supra

31. US—P F Collier & Son Dis-
tributing Corporation v Drinkwa-
ter, C C A NC, 81 F 2d 200—Stand-
ard Oil Co v Parkinson, Neb, 152
F 681, 32 C C A 29.

Ind—Lieber v Messick, 173 NE 238,
93 Ind App 264

Md—Vacek v State, 142 A 491, 155
Md 400

NJ—Easbee Amusement Corpora-
tion v Greenhaus, 177 A 562, 114
N J Law 492

32. Ala—Corpus Juris cited in
Motor Terminal & Transportation
Co v Simmons, 180 So 597, 28 Ala
App 190

La—Corpus Juris quoted in Todaro
v City of Shreveport, App, 170 So
356, 360, modified on other grounds
174 So 111, 187 La 68

Md—Corpus Juris quoted in Vacek
v State, 142 A 491, 494, 155 Md
400.

Mo—De Vall v Mrs Stover's Bunga-
low Candies Co, App, 172 SW 2d
958—Gorman v. A R Jackson
Kansas City Showcase Works Co,
App 19 SW 2d 559

NJ—Younkers v Ocean County, 33
A 2d 898, 130 N J Law 607

Ohio—Corpus Juris quoted in Pan-
tell v Shriver-Allison Co, 22 NE
2d 497, 501, 61 Ohio App 119

Pa.—Joseph v. United Workers
Ass'n, 28 A 2d 470, 343 Pa 636

Tex—Corpus Juris quoted in Demp-
ster Mill Mfg Co v Lester, App,
131 SW 2d 254, 256—Corpus Juris
quoted in Texas Electric Service
Co v Kinkead, App, 36 SW 2d
1052, 1055

W Va—Corpus Juris cited in O'Dell
v Universal Credit Co, 191 SE
568, 570, 118 W Va 678

39 C J. p 1269 note 52, p 1270 note
53

33. Mo—Barnes v Real Silk Hos-
iery Mills, 108 SW 2d 58, 341 Mo
563.

34. Ga—Bibb Mfg Co v Souther,
181 SE 421, 53 Ga App 722.

Ind—Van Drake v Thomas, 38 NE
2d 878, 110 Ind App 586

Ky—Tackett v. Inland Steel Co, 136
SW 2d 25, 281 Ky 313.

35. Kan—Houdek v Gloyd, 107 P
2d 761, 152 Kan 789

36. Ala—Corpus Juris cited in Mo-
tor Terminal & Transportation Co
v Simmons, 180 So 597, 28 Ala
App 190.

employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the acts of the former.³⁷

The control essential to the relation is authoritative control, as distinguished from mere suggestion or coöperation as to detail,³⁸ it is complete and un-

qualified control, or right to control,³⁹ and must extend not only to the ordering of the work to be done, or the result to be accomplished, but also to the mode, manner, and details of performance,⁴⁰ and must include the power to stop the work or to continue it.⁴¹ However, the actual exercise of control is not essential to the relation as long as the right to exercise control is present.⁴²

La.—Corpus Juris quoted in *Todaro v City of Shreveport*, App, 170 So 356, 360, modified on other grounds 174 So 111, 187 La 68

Tex.—Corpus Juris quoted in *Dempster Mill Mfg Co v Lester*, Civ App, 131 S W 2d 254, 256—**Corpus Juris** quoted in *Texas Electric Service Co v Kinkead*, Civ App, 36 S W 2d 1052, 1055

39 C.J p 1269 note 52, p 1270 note 54.

37. **La.—Corpus Juris** quoted in *Todaro v City of Shreveport*, App, 170 So 356, 360, modified on other grounds 174 So 111, 187 La 68

Tex.—Corpus Juris quoted in *Texas Electric Service Co v Kinkead*, Civ App, 36 S W 2d 1052, 1055

39 C.J p 1270 note 55

Agent with initiative distinguished

A distinction exists between "agent" employed and authorized to bring about only contractual relations between his principal and others, on agent's own initiative, or by his own methods, and servant or employee employed to perform physical service within time and in manner directed by employer, with respect to principal's or employer's liability for agent's or servant's wrongful acts—*Snowwhite v Metropolitan Life Ins Co*, 127 S W 2d 713, 344 Mo 705—*Vert v Metropolitan Life Ins Co*, 117 S W 2d 253, 342 Mo 629, 116 A L R 1381

38. **Cal.—Burlingham v Gray**, 137 P 2d 9, 22 Cal 2d 87

Iowa.—Lind v Eddy, 6 N.W 2d 427, 232 Iowa 1328, 146 A L R 695—*McDonald v Dodge*, 1 N.W 2d 280, 231 Iowa 325

39. **Cal.—Burlingham v Gray**, 137 P 2d 9, 22 Cal 2d 87—*Chinnis v Pomona Pump Co*, 98 P 2d 560, 36 Cal App 2d 633

40. **U.S.—Singer Manufacturing Co v Rohn**, Minn, 10 S Ct 175, 132 U.S. 513, 33 L Ed 440—*Great American Indemnity Co v Henken*, C.C.A.La., 134 F.2d 208, certiorari denied *Henken v Great American Indemnity Co*, 63 S Ct 1167, 319 U.S. 753, 87 L Ed 1706, rehearing denied 63 S Ct 1434, 319 U.S. 785, 87 L Ed 1728—*P. F. Collier & Son Co v Hartzell*, C.C.A. Minn, 72 F 2d 625—*Young v Wilky Carrier Corporation*, D.C.Pa., 54 F.Supp 912, affirmed C.C.A., 150

F 2d 764, certiorari denied 66 S Ct 470, 326 U.S. 786, 90 L Ed 477—*Hoffman v Lamb Knit Goods Co*, D.C.Mich., 37 F.Supp 188

Ala.—Moore-Handley Hardware Co v Williams, 189 So 757, 238 Ala 189

Cal.—Burlingham v Gray, 137 P 2d 9, 22 Cal 2d 87—*Chinnis v Pomona Pump Co*, 98 P 2d 560, 36 Cal App 2d 633—*Pilger v City of Paris Dry Goods Co*, 261 P 328, 88 Cal App 277

Colo.—Landis v McGowan, 165 P 2d 180, 114 Colo 355

Conn.—Oleksinski v Filip, 30 A 2d 912, 129 Conn 701—*Kiowka v Colt Patent Fire Arm Mfg Co*, 8 A 2d 5, 125 Conn 705

Idaho.—Whalen v Zinn, 96 P 2d 434, 60 Idaho 722

Ill.—Hartley v Red Ball Transit Co, 176 NE 751, 344 Ill 534

Iowa.—Kampe v Grundy County Rural Electric Co-op, 300 N.W 662, 231 Iowa 187—*Hough v Central States Freight Service*, 269 N W 1, 222 Iowa 548—*In re Amond's Estate*, 210 N.W 923, 203 Iowa 306

Kan.—Houdek v Gloyd, 107 P 2d 751, 152 Kan 789

Ky.—Broadway Motors v Bass, 67 S W 2d 955, 252 Ky 628—*American Sav Life Ins Co v Riplinger*, 80 S W 2d 115, 249 Ky 8

La.—Corpus Juris quoted in *Todaro v City of Shreveport*, App, 170 So 356, 360

Md.—Hood v Asrael, 175 A 666, 167 Md 641—*Bell v State*, 138 A 227, 153 Md 333, 68 A L R 1051

Miss.—Louis Werner Sawmill Co v Northcutt, 134 So 156, 161 Miss. 441

Mo.—Douglas v. National Life & Accident Ins Co of Nashville, Tenn, 155 S W 2d 267, 236 Mo App 467—*Reiling v Missouri Ins Co*, 153 S W 2d 79, 236 Mo App 164

Mont.—Devaney v Lawler Corporation, 56 P 2d 746, 101 Mont 579

N.J.—Vreeland v Wilkinson Gaddis & Co, 29 A 2d 367, 129 N.J.Law 383

N.Y.—Gutov v Krasne, 42 N.Y.S 2d 20, 266 App Div. 302, affirmed 55 N.E 2d 872, 292 N.Y. 603, stating New Jersey law—*Osborn v Hoffman*, 300 N.Y.S 690, 252 App Div 587, affirmed 19 N.E 2d 924, 280 N.Y. 523

N.C.—Wood v Miller, 39 S.E 2d 608, 226 N.C. 567

Ohio.—Johnson v Wagner Provision Co, 49 N.E 3d 925, 141 Ohio St 584—**Corpus Juris** quoted in *Pantell v Shriver-Allison Co*, 22 N.E 2d 497, 501, 61 Ohio App 119

Okl.—Wylie-Stewart Machinery Co v Thomas, 137 P 2d 556, 192 Okl 605

Pa.—Joseph v United Workers Ass'n, 23 A 2d 470, 343 Pa 636

Tex.—Texas Co v Wheat, 163 S W 2d 632, 140 Tex. 468—*Conner v Angelina County Lumber Co*, Civ App, 146 S W 2d 1093—**Corpus Juris** quoted in *Dempster Mill Mfg Co v Lester*, Civ App, 131 S W 2d 254, 256—**Corpus Juris** cited in *Christopher v City of El Paso*, Civ App, 98 S W 2d 394, 400, error dismissed—**Corpus Juris** quoted in *Texas Electric Service Co v Kinkead*, Civ App, 36 S W 2d 1052, 1055

Va.—Barber v Textile Machine Works, 17 S.E 2d 359, 178 Va 435

Amount of work; alteration in plans
The employer's control over amount of work to be done or reservation of power to make alterations in plans does not necessarily create relation of master and servant—*Barnes v Real Silk Hosiery Mills*, 108 S W 2d 58, 341 Mo 563

Leading case

Tex.—Shannon v Western Indemnity Co, Com App, 257 S W 522

41. **Mont.—Devaney v Lawler Corporation**, 56 P 2d 746, 101 Mont. 579.

42. **Ill.—Hartley v Red Ball Transit Co**, 176 NE 751, 344 Ill 534

Ind.—Van Drake v Thomas, 38 N.E 2d 478, 110 Ind App 586

Iowa.—Kampe v Grundy County Rural Electric Co-op, 300 N.W. 662, 231 Iowa 187

N.Y.—Witaszek v Drees, 280 N.Y.S. 592, 155 Misc 828, reverse in part on other grounds *Haykl v Drees*, 286 N.Y.S 38, 247 App Div 90, motion granted 4 N.E 2d 745, 276 N.Y. 577 and *Witaszek v Drees*, 4 N.E 2d 745, 272 N.Y. 576

Tex.—National Cash Register Co v Rider, Com App, 24 S W 2d 28.

Va.—Barber v. Textile Machine Works, 17 S.E 2d 359, 178 Va 435

Failure to supervise does not change the relationship of employer and employee where the work is not

Right to discharge or cease work. It is also essential to the relation of master and servant that the right to discharge or remove for unskillfulness, neglect of duty, or other cause should exist,⁴³ the presence or absence of such right is of much importance,⁴⁴ and perhaps the most conclusive single circumstance⁴⁵ in determining whether the relation exists.

c. Contract of Employment

With respect to the liability of a master for the acts of a servant, the relation of master and servant may arise by implication as well as expressly; there need be no express contract of employment.

While the relation of master and servant arises out of contract,⁴⁶ and the assent of both parties is essential,⁴⁷ in order to constitute the relationship of master and servant, in so far as the liability of the former for the acts of the latter is concerned, there need be no express contract of employment,⁴⁸ the relation may arise by implication as well as expressly,⁴⁹ and the relation of the parties does not depend solely on the written contract.⁵⁰ If one knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his service, he is liable as a master for the acts of the latter as his servant,⁵¹

even though the servant was, at the time of the negligence complained of, in the general employment of another,⁵² but it is not to be understood that a person can be rendered liable for injuries caused by the negligent act of a mere volunteer who, without the knowledge or assent of the former, undertook to perform services in his behalf.⁵³

Nature of contract of service. If one is injured by the servant of another, and the injury is in any manner connected with the fact of service, the particulars of the arrangement, or the terms of the agreement, are immaterial.⁵⁴ Thus it is immaterial to the injured party what the contract of service was, how long it was to continue, what compensation was to be paid for it, or what mutual covenants the parties had for their own protection.⁵⁵

d. Payment for Services

In determining the existence of the relation of master and servant, as rendering one person liable for another's acts, the fact or absence of payment by one to the other for services is not conclusive.

While the fact that men employed were paid by a certain person for their services might, in the absence of evidence negating the relation of master and servant, be accepted as some evidence of em-

of a character requiring a great deal of supervision

Ill—Thiel v Material Service Corporation, 283 Ill App 46, affirmed 5 NE2d 88, 364 Ill 539
Ind—Van Drake v Thomas, 38 NE 2d 878, 110 Ind App 586.

43. US—Young v. Wilky Carrier Corporation, DCPa., 64 F Supp 912, affirmed 150 F2d 764, certiorari denied 66 S Ct. 470, 326 US 786, 90 L Ed 477

Ga—Bibb Mfg Co v Souther, 184 SE 421, 52 Ga App 722

Ill—Merlo v Public Service Co of Northern Illinois, 45 NE2d 665, 381 Ill 300, followed in 45 NE2d 677, 381 Ill 386—Borgmiller v Wood, 252 Ill App 194

Ind—Van Drake v Thomas, 38 NE 2d 878, 110 Ind App 586

Kan—Houdek v Gloyd, 107 P 2d 761, 152 Kan 789

Ky—Broadway Motors v Bass, 67 SW 2d 955, 252 Ky 628

Md—Hood v Asrael, 175 A 666, 167 Md 641—Bell v State, 133 A 227, 153 Md 333, 58 A L R 1051

Miss—Louis Werner Sawmill Co v Northcutt, 134 So 156, 161 Miss 441

Okl—Magnolia Petroleum Co. v Pierce, 269 P 1076, 132 Okl. 167, 61 A L R 218

Pa—Joseph v. United Workers Ass'n, 23 A 2d 470, 843 Pa 636

Tex—Corpus Juris quoted in Demp-

ster Mill Mfg Co v Lester, Civ App, 131 SW 2d 254, 256

Utah—Chatelain v Thackeray, 100 P 2d 191, 98 Utah 525

Va.—Texas Co v Zeigler, 14 SE 2d 704, 177 Va. 557
39 C J p 1270 note 56

Right to discharge held shown

Tex—Hudson v St Louis Southwestern R Co, Com App, 293 SW 811, rehearing denied 295 SW 577

44. Ind—Van Drake v Thomas, 38 NE 2d 878, 110 Ind App 586

Tenn—Knight v Hawkins, 173 SW 2d 163, 26 Tenn App 448

45. Cal—Burlingham v Gray, 137 P 3d 9, 32 Cal 2d 87, prior opinion Burlingham v Stockholders Pub Co, 129 P 2d 757

46. Miss—Louis Werner Sawmill Co v. Northcutt, 134 So 156, 161 Miss 441

47. Ga—Coward v Jordan, App, 44 SE 2d 804

Miss—Louis Werner Sawmill Co v Northcutt, 134 So 156, 161 Miss 441.

Assent of both parties as essential generally see supra § 3

48. Mich—Janik v Ford Motor Co, 147 NW 510, 180 Mich. 557, 53 L R A., N S., 294, Ann Cas 1916A 669

39 C J p 1270 note 57.

49. Ga—Lacey v Forehand, 108 S E 247, 27 Ga App 344

39 C J p 1270 note 58

50. Okl—World Pub Co v Smith, 161 P 2d 861, 195 Okl 691

51. Tex—Corpus Juris quoted in City of Grandview v Ingle, Civ App, 90 SW 2d 855, 870
39 C J p 1270 note 59

Where volunteer renders a beneficial service for alleged master, in his presents or with his knowledge, and is suffered to proceed without dissent, an assent may be implied, and relation of master and servant established, to extent necessary to render master liable to third persons for tortious acts of the volunteer done in the course of such service—Lemieux v Leonard Const. Co, R.I., 56 A 2d 189

52. Tex—Corpus Juris quoted in City of Grandview v. Ingle, Civ App, 90 SW 2d 855, 870.
39 C J p 1270 note 60.

53. NY—Edwards v. Jones, 12 Daly 415, 67 How Pr. 177

54. Okl—World Pub Co v. Smith, 161 P 2d 861, 195 Okl 691.
W Va—Corpus Juris cited in O'Dell v Universal Credit Co, 191 SE 568, 570, 118 W Va 678

55. Ark—Ward v. Young, 42 Ark. 512

39 C J p 1270 note 62.

ployment by him, it is not the determining test⁵⁶ and does not necessarily establish the existence of the relation.⁵⁷ On the other hand, in order to constitute the relation of master and servant, it is not essential that the person employed should receive a stated wage⁵⁸ or that the services should be paid for at all by the employer.⁵⁹

It is generally of no importance in what payment is made, and hence it is not essential that the services should be paid for in money.⁶⁰ It has been held, however, that whether work is paid for by the day or by the job is a matter that may be considered in determining whether the relation is that of master and servant or of employer and employee.⁶¹

§ 564. — Assistants Employed by Servant

a. In general

56. N.Y.—*Osborn v Hoffman*, 300 N.Y.S. 690, 252 App. Div. 587, affirmed 19 N.E.2d 924, 280 N.Y. 523.—*Beatty v Thulemann*, 8 N.Y.S. 645, 16 Daly 20.

Tex.—*Corpus Juris* cited in *City of Grandview v Ingle*, Civ. App., 90 S.W.2d 855, 857.

Compensation as element of relation generally see *supra* § 2.

Reimbursement of wages paid

The fact that one person is obligated to reimburse another for wages paid by the latter to an employee is of no importance in determining in whose employment the employee is.—*Labbee v Travenot S S Co.*, C.C.A.N.Y., 37 F.2d 52, certiorari denied *Labbee v Travenot S S Co.*, 50 S.Ct. 408, 281 U.S. 754, 74 L.Ed. 1164.

57. Tex.—*St. Louis Southwestern R. Co. of Texas v Hudson*, Civ. App., 286 S.W. 766, affirmed in part and reversed on other grounds in part *Hudson v St. Louis Southwestern R. Co. of Texas*, Com. App., 293 S.W. 811, rehearing denied 295 S.W. 577.

58. U.S.—*Riggs v Standard Oil Co.*, C.C.Minn., 130 F. 199.
39 C.J. p. 1270 note 64.

59. W.Va.—*Corpus Juris* cited in *O'Dell v Universal Credit Co.*, 191 S.E. 568, 570, 118 W.Va. 678.
39 C.J. p. 1270 note 65.

60. Miss.—*Millsaps v Louisville, N. O. & T. R. Co.*, 13 So. 696, 69 Miss. 428.
39 C.J. p. 1271 note 66.

61. Conn.—*Corbin v American Mills*, 27 Conn. 374, 71 Am.D. 63.

62. Del.—*Biddle v Haldas Bros.*, 190 A. 588, 8 W.W.Harr. 210.
Ga.—*Cowart v Jordan*, App., 44 S.E. 2d 804.

Pa.—*Saldukas v McKerna*, 16 A.2d 30, 340 Pa. 113.—*Weimer v West-*

moreland Water Co., 193 A. 685, 137 Pa. Super. 201.

63. Ala.—*Emison v Wylam Ice Cream Co.*, 111 So. 216, 215 Ala. 504.

64. U.S.—*Waggaman v General Finance Co. of Philadelphia*, C.C.A. Pa., 116 F.2d 254.—*Alabama Great Southern R. Co. v Alsop*, C.C.A. Miss., 101 F.2d 175.—*Gulf Refining Co. v Brown*, C.C.A. Va., 93 F.2d 870, 116 A.L.R. 449.

Ala.—*Corpus Juris* quoted in *Harris v Bell*, 176 So. 469, 471, 234 Ala. 679.

Ark.—*Corpus Juris* quoted in *Pullen v Faulkner*, 117 S.W.2d 28, 30, 196 Ark. 231.—*Ice Service Co. v Forbes*, 31 S.W.2d 411, 180 Ark. 253.

Del.—*Biddle v Haldas Bros.*, 190 A. 588, 8 W.W.Harr. 210.

Ga.—*Cowart v Jordan*, App., 44 S.E. 2d 804.

Ill.—*Corpus Juris* cited in *Trust v Chicago Motor Club*, 276 Ill. App. 289, 300.

Ind.—*Standard Oil Co. v Soderling*, 42 N.E.2d 373, 112 Ind. App. 437.

Kan.—*Corpus Juris* quoted in *Dobson v Baxter Chat Co.*, 85 P.2d 1, 4, 148 Kan. 750.

La.—*Corpus Juris* quoted in *Monetti v. Standard Oil Co.*, 195 So. 89, 98.
Me.—*Copp v. Paradis*, 157 A. 228, 130 Me. 464.

Ohio.—*Great Atlantic & Pacific Tea Co. v. Davis*, 167 N.E. 618, 32 Ohio App. 100.

Okl.—*Corpus Juris* cited in *Magnolia Petroleum Co. v. Pierce*, 269 P. 1076, 1078, 132 Okl. 167, 61 A.L.R. 218.

Tex.—*Corpus Juris* cited in *Gibson v. Texas Co.*, Civ. App., 20 S.W.2d 349, 351, error dismissed.

W.Va.—*O'Dell v. Universal Credit Co.*, 191 S.E. 568, 118 W.Va. 678.—

b. Absence of authorization or ratification by master

a. In General

A master is liable for acts done, by one whom the servant employs, with express or implied authority from the master, or with the master's acquiescence or ratification, to assist the servant in the master's work.

While ordinarily a subordinate servant has no power to employ or discharge assistants, so as to render the master liable for their acts,⁶² and, likewise, a servant cannot, without authority, abandon the master's service and substitute another person in his place so as to make the master responsible for the acts of the substituted servant,⁶³ a master is liable for the acts of one whom the servant employs, under authority given him by the master, to assist in the performance of the master's work.⁶⁴ The authority to employ assistants may be either express⁶⁵

Corpus Juris cited in *Brightwell v Simpson*, 146 S.E. 383, 385, 106 W.Va. 471.

39 C.J. p. 1271 note 73.

Scope of employment

(1) The employing servant must be engaged in something that is within the scope of his own employment.—*O. C. Whitaker Co. v. Hall*, Civ. App., 180 S.W.2d 177, affirmed 185 S.W.2d 720, 148 Tex. 397.

(2) Scope of employment as affecting master's liability generally see *infra* § 570.

Employment of prohibited person

Master was liable for negligence of person employed by servant with authority to employ labor, although forbidden to employ that particular person.—*Brightwell v Simpson*, 146 S.E. 383, 106 W.Va. 471.

65. Ala.—*Corpus Juris* quoted in *Harris v Bell*, 176 So. 469, 470, 234 Ala. 679.

Ark.—*Corpus Juris* quoted in *Pullen v Faulkner*, 117 S.W.2d 28, 30, 196 Ark. 231.

Ga.—*Cowart v. Jordan*, App., 44 S.E. 2d 804.—*Cooper v. Lowery*, 60 S.E. 1015, 4 Ga. App. 120.

Kan.—*Corpus Juris* quoted in *Dobson v. Baxter Chat Co.*, 85 P.2d 1, 4, 148 Kan. 750.

Me.—*Copp v. Paradis*, 157 A. 228, 130 Me. 464.

Md.—*Corpus Juris* cited in *Great Atlantic & Pacific Tea Co. v. Noppenberger*, 189 A. 434, 171 Md. 378.
N.J.—*Kosick v. Standard Properties*, 177 A. 428, 13 N.J. Misc. 219.

Pa.—*Corpus Juris* quoted in *Jacami no v. Harrison Motor Freight Co.*, 5 A.2d 393, 396, 135 Pa. Super. 856.

Tex.—*Corpus Juris* cited in *Gibson v. Texas Co.*, Civ. App., 20 S.W.2d 349, 351, error dismissed.

W.Va.—*Corpus Juris* cited in *Bright-*

or implied,⁶⁶ it may be implied from the nature or extent of the work to be performed,⁶⁷ from the circumstances of the particular case,⁶⁸ from the general course of conducting the business of the master by the servant,⁶⁹ as where it is such as necessarily requires the help of others,⁷⁰ or from the fact that an emergency arises necessitating assistance.⁷¹ but

a servant cannot bind the master by employing assistants in an emergency where he can do the work himself,⁷² or where there are fellow servants available to assist,⁷³ or where a higher authority is available to act.⁷⁴

Acquiescence in hiring Authority to hire other servants to do the work of the master may be im-

well v Simpson, 146 S E 383, 385, 106 W Va. 471
39 C J p 1271 note 74

66. U S—Waggaman v General Finance Co of Philadelphia, C C A Pa., 116 F 2d 254

Ala—Corpus Juris quoted in Harris v Bell, 176 So 469, 470, 234 Ala 679

Ark—Corpus Juris quoted in Pullen v Faulkner, 117 S W 2d 28, 30, 196 Ark 231

Del—Biddle v Haldas Bros., 190 A 538, 8 W W Harr. 210

Ga—Coward v Jordan, App., 44 S E 2d 804—Cooper v Lowery, 60 S E 1015, 4 Ga App 120

Kan—Corpus Juris quoted in Dobson v Baxter Chat Co., 85 P 2d 1, 4, 148 Kan 750

La—Corpus Juris quoted in Monetti v Standard Oil Co., App., 195 So 89, 93

Me—Copp v Paradis, 157 A 228, 130 Me 464

Md—Corpus Juris cited in Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

Mo—Corpus Juris cited in Fuqua v Lumbermen's Supply Co., 76 S W 2d 715, 720, 229 Mo App 210

N J—Kosick v Standard Properties, 177 A 428, 13 N J Misc 219

Pa—Corpus Juris quoted in Jocamino v Harrison Motor Freight Co., Super., 5 A 2d 393, 396

Tex—Corpus Juris cited in Gibson v Texas Co., Civ App., 20 S W 2d 349, 351, error dismissed

W Va—Corpus Juris cited in Brightwell v Simpson, 146 S E 383, 385, 106 W Va. 471

39 C J p 1271 note 75

Implied authority held shown

Tex—Gibson v Texas Co., 20 S W 2d 349, Civ App., error dismissed.

W Va—Brightwell v Simpson, 146 S E 383, 106 W Va. 471

Implied authority held not shown

Ind—Standard Oil Co v Soderling, 42 N E 2d 373, 112 Ind App. 437.

Ohio—Ford v Commercial Motor Freight, 14 N E 2d 354, 57 Ohio App 384

67. U S—Waggaman v General Finance Co of Philadelphia, C C A Pa., 116 F 2d 254

Ala—Corpus Juris quoted in Harris v Bell, 176 So 469, 470, 234 Ala 679

Ark—Corpus Juris quoted in Pullen v Faulkner, 117 S W 2d 28, 30, 196 Ark 231.

Del—Biddle v Haldas Bros., 190 A 538, 8 W W Harr. 210

Kan—Corpus Juris quoted in Dobson v Baxter Chat Co., 85 P 2d 1, 4, 148 Kan 750

La—Corpus Juris quoted in Monetti v Standard Oil Co., App., 195 So 89, 93

Me—Copp v Paradis, 157 A 228, 130 Me 464

Md—Corpus Juris cited in Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

N J—Kosick v Standard Properties, 177 A 428, 13 N J Misc 219

Pa—Corpus Juris quoted in Jocamino v Harrison Motor Freight Co., 5 A 2d 393, 396, 135 Pa Super 356
39 C J p 1271 note 75

Authority held not implied

Tex—O C Whitaker Co v Hall, 180 S W 2d 177, Civ App., affirmed
185 S W 2d 720, 143 Tex 397

68. Ala—Corpus Juris quoted in Harris v Bell, 176 So 469, 470, 234 Ala 679

Ark—Corpus Juris quoted in Pullen v Faulkner, 117 S W 2d 28, 30, 196 Ark 231.

Kan—Corpus Juris quoted in Dobson v Baxter Chat Co., 85 P 2d 1, 4, 148 Kan 750

La—Corpus Juris quoted in Monetti v Standard Oil Co., App., 195 So. 89, 93

Pa—Corpus Juris quoted in Jocamino v Harrison Motor Freight Co., 5 A 2d 393, 396, 135 Pa Super. 356
39 C J. p 1271 note 75

69. Ala—Corpus Juris quoted in Harris v Bell, 176 So 469, 470, 234 Ala 679

Ark—Corpus Juris quoted in Pullen v Faulkner, 117 S W 2d 28, 30, 196 Ark 231

Kan—Corpus Juris quoted in Dobson v Baxter Chat Co., 85 P 2d 1, 4, 148 Kan 750

La—Corpus Juris quoted in Monetti v Standard Oil Co., App., 195 So 89, 93

Me—Copp v Paradis, 157 A. 228, 130 Me 464

Md—Corpus Juris cited in Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

Pa—Corpus Juris quoted in Jocamino v Harrison Motor Freight Co., 5 A 2d 393, 396, 135 Pa Super 356
39 C J p 1271 note 77.

Authority held not implied

Tex—O C Whitaker Co v Hall,

180 S W 2d 177, Civ App., affirmed
185 S W 2d 720, 143 Tex. 397

70. Del—Biddle v Haldas Bros., 190 A 538, 8 W W Harr. 210

Mo—Corpus Juris cited in Fuqua v Lumbermen's Supply Co., 76 S W 2d 715, 720, 229 Mo App 210

N J—Kosick v Standard Properties, 177 A 428, 13 N J Misc. 219

39 C J p 1271 note 76 [a]

Removal of snow held not to call for assistance—Kosick v Standard Properties, supra

71. Del—Biddle v Haldas Bros., 190 A 538, 8 W W Harr. 210

Me—Copp v Paradis, 157 A 223, 130 Me 464

Mich—Marschall v Glaeser, 278 N W 763, 284 Mich 56, reversed on other grounds 282 N W. 882, 284 Mich 56

Pa—Saldukas v McKerna, 16 A 2d 30, 340 Pa 113—White v Consumers Finance Service, 15 A 2d 142, 339 Pa 417—Corbin v George, 182 A 459, 308 Pa 201

Requirements for application of doctrine

The emergency-employment doctrine cannot be invoked merely to avoid an inconvenience, it is based on a sudden and unexpected incident which renders it necessary to obtain assistance, and without which the emergency condition cannot be overcome by the servant or any coemployees in the regular service of the master—Hall v O C Whitaker Co., 185 S W 2d 720, 143 Tex. 397

Emergency held not shown

Store manager's wife could not be considered store owner's employee on theory that manager's illness created emergency giving him implied authority to substitute wife, where wife had been managing store for four days when acts involved occurred—Great Atlantic & Pacific Tea Co v Compton, 145 So. 105, 164 Miss 553

72. Mich—Marschall v Glaeser, 278 N W 763, 284 Mich 56, reversed on other grounds 282 N W 883, 284 Mich 56.

73. Pa—Saldukas v McKerna, 16 A 2d 30, 340 Pa 113.

74. Tex—O C. Whitaker Co. v Hall, Civ App., 180 S W 2d 177, affirmed 185 S W 2d 720, 143 Tex 397.

plied when he knows of such hiring and acquiesces in it.⁷⁵

Ratification. A master may also become liable for the acts of an assistant employed by the servant where he ratifies such employment.⁷⁶

Liability of servant. If the employment was authorized, the employing servant is not liable for the acts of the servant so employed.⁷⁷

b. Absence of Authorization or Ratification by Master

Since a person employed by a servant to assist him, without authorization from, or ratification by, the master, is not the latter's servant, the master is not liable for that person's acts under the doctrine of respondeat superior, but the master may be liable on other grounds and theories.

Where there is neither express nor implied authority given a servant to employ another to per-

form or to assist him in the performance of his work, or a subsequent ratification by his employer of such employment, the relation of master and servant between the employer and one so employed by his servant does not exist and he is not liable for the negligent acts of the latter under the doctrine of respondeat superior.⁷⁸

Liability of master on other grounds. While some decisions hold, apparently without qualification, that no liability attaches to the master on any ground by reason of acts of one employed by a servant where such employment was neither authorized nor ratified,⁷⁹ the weight of authority holds that the fact that the master cannot be held liable under the doctrine of respondeat superior does not necessarily absolve him from liability on other grounds,⁸⁰ although the decisions are not in accord as to the circumstances which will impose liability,⁸¹ or as to the juridical theory on which that liability should

75. Ark—*Corpus Juris* quoted in Pullen v Faulkner, 117 S.W.2d 28, 30, 196 Ark 231—Ice Service Co v Forbess, 21 S.W.2d 411, 180 Ark 353

Kan—*Corpus Juris* quoted in Dobson v. Baxter Chat Co., 85 P.2d 1, 4, 148 Kan 750

Mo—*Corpus Juris* cited in Fuqua v Lumbermen's Supply Co., 78 S.W.3d 715, 720, 229 Mo App 210.

Utah—*Corpus Juris* cited in Looney v Furgis, 2 P.2d 112, 114, 78 Utah 172

39 C.J. p 1271 note 79

76. Ark—*Corpus Juris* quoted in Pullen v Faulkner, 117 S.W.2d 28, 30, 196 Ark 231—Ice Service Co. v. Forbess, 21 S.W.2d 411, 180 Ark. 253

Ga—Coward v Jordan, App., 44 S.E.2d 804—Cooper v Lowery, 60 S.E. 1015, 4 Ga App 130

Kan—*Corpus Juris* quoted in Dobson v Baxter Chat Co., 85 P.2d 1, 4, 148 Kan 750

Ratification held not shown

Miss—Great Atlantic & Pacific Tea Co. v Compton, 145 So 105, 164 Miss 553

77. Kan—*Corpus Juris* quoted in Dobson v Baxter Chat Co., 85 P.2d 1, 4, 148 Kan 750

S.C.—Ellis v Southern R. Co., 52 S.E. 328, 72 S.C. 465, 2 L.R.A.N.S., 378

Liability of servant generally see infra §§ 576-578

78. Ala—*Corpus Juris* quoted in Emison v Wylam Ice Cream Co., 111 So 216, 217, 215 Ala 504—Motor Terminal & Transportation Co v Simmons, 180 So 597, 28 Ala.App 190

Ark—Southern Kansas Stage Lines Co v Carlisle, 121 S.W.2d 77, 196 Ark. 1066—*Corpus Juris* quoted in

Pullen v Faulkner, 117 S.W.2d 28, 30, 196 Ark 231—*Corpus Juris* quoted in Interurban Transp Co v Reeves, 108 S.W.2d 594, 598, 194 Ark 321

Cal—*Corpus Juris* cited in Gibbons v Naritoka, 283 P 845, 847, 102 Cal App 669

Del—Biddle v Haldas Bros., 190 A 583, 8 W.W.Harr 210

Ga—Coward v Jordan, App., 44 S.E.2d 804

Ind—Standard Oil Co v Soderling, 42 N.E.2d 373, 112 Ind App 487

La—*Corpus Juris* cited in Buissan v Potts, 156 So 406, 409, 180 La 380

Me—*Corpus Juris* cited in Copp v Paradis, 157 A 228, 230, 130 Me 464

Miss—Parker v. Film Transit Co., 18 So 2d 159, 194 Miss 542—*Corpus Juris* cited in Great Atlantic & Pacific Tea Co v. Compton, 145 So 105, 106, 164 Miss 553

N.J.—*Corpus Juris* quoted in Kosick v Standard Properties, 177 A 428, 429, 13 N.J. Misc 219

N.C.—*Corpus Juris* cited in Reaves v Catawba Mfg & Electric Power Co., 174 S.E. 413, 415, 206 N.C. 528

Ohio—*Corpus Juris* cited in Sandlin v Hamilton Auto Sales Co., 197 N.E. 233, 49 Ohio App 313

Pa—*Corpus Juris* cited in Corbin v George, 162 A 459, 460, 308 Pa 201.

Tenn—*Corpus Juris* quoted in Potter v Golden Rule Grocery Co., 84 S.W.2d 364, 365, 169 Tenn 240

Tex—O C Whitaker Co v Hall, Civ App., 180 S.W.2d 177, affirmed 185 S.W.2d 720, 143 Tex. 397

Va—Moncier v Green, 27 S.E.2d 921, 182 Va 127

Wash—*Corpus Juris* quoted in

Bradley v S L Savidge, Inc., 123 P.2d 780, 782, 784, 13 Wash.2d 28 39 C.J. p 1273 note 83

Assistance contrary to instructions
When the assistance is secured contrary to the direct instructions of the master, he is not liable—Gibbons v Naritoka, 283 P 845, 102 Cal App 669

79. Neb—Levin v Omaha, 167 N.W. 214, 102 Neb 328 39 C.J. p 1273 note 84

80. Ala—*Corpus Juris* cited in Emison v Wylam Ice Cream Co., 111 So 216, 218, 215 Ala 504

Ark—*Corpus Juris* quoted in Malco Theatres v McLain, 117 S.W.2d 45, 49, 196 Ark 188—*Corpus Juris* quoted in Interurban Transp Co v Reeves, 108 S.W.2d 594, 598, 194 Ark 321

Inherently dangerous work

In action against transfer company for injuries sustained by pedestrian struck by a coil of wire being rolled down a plank by truck driver, where employment of driver by company was disputed, work was not of an inherently dangerous character so as to be within the rule under which an employer is liable for injuries caused even when work is delegated to one other than an employee—Ford v Commercial Motor Freight, 14 N.E.2d 854, 57 Ohio App 384.

81. Ala—*Corpus Juris* cited in Emison v Wylam Ice Cream Co., 111 So 216, 218, 215 Ala 504.

Ark—*Corpus Juris* quoted in Malco Theatres v McLain, 117 S.W.2d 45, 49, 196 Ark. 188—*Corpus Juris* quoted in Interurban Transp. Co. v Reeves, 108 S.W.2d 594, 598, 194 Ark 321.

be explained.⁸² Some decisions hold the master liable where the act causing the injury was done in his presence and by his direction or with his assent and acquiescence, on the ground that the act is in effect that of the master himself,⁸³ and, according to some decisions, the master is not liable for the acts of a stranger where the servant, without authority so to do, delegates a particular duty to such stranger, and is not present and does not in any manner co-operate with the latter in the performance thereof.⁸⁴ Other decisions have formulated an even broader rule and have held that the negligence of a third person employed by a servant to do the work which the master employed the servant to do is the negligence of the servant and that the master is liable for resulting injuries,⁸⁵ or have affirmed the liability of the master on the ground that the injury was caused by an instrumentality used by the servant in the prosecution of the master's business, thereby making the act complained of the act of the servant himself, without reference to whether the act causing the injury was or was not done in the presence of the servant.⁸⁶

Participation in wrongful act by servant. Where the facts show combined or commingled acts of negligence on the part of the servant and one whom, without authority, he has employed to assist him in performing the master's work,⁸⁷ or where the facts are such that the servant can be said to be a party to, or to have participated in, the negligent act of the one so employed by him,⁸⁸ the master is liable for an injury resulting from the negligent act, and his responsibility is based on the negligence of his servant.⁸⁹

§ 565. — Special Police Officers

Apart from statute, where a special police officer is appointed by public authority, but is employed and paid by a private person, the latter is not responsible for an act of such officer performed in carrying out his duty as a public officer.

Unless it is otherwise provided by statute,⁹⁰ a private person or corporation is not responsible for the acts of a special police officer, appointed by public authority, but employed and paid by the private person or corporation, when the act complained of was

82. Ala.—*Emison v Wylam Ice Cream Co.*, 111 So 216, 215 Ala. 504

Basis of Liability

Where a servant charged with the performance of certain duties delegates them to a stranger, to be performed in the servant's presence, the latter is deemed to be co-operating with the stranger, and his negligence in law is that of the servant—*Interurban Transp Co v Reeves*, 108 S.W.2d 594, 598, 194 Ark 321

83. Cal.—*Gibbons v Naritoka*, 283 P 345, 102 Cal App 669

Minn.—*Guild v Miller*, 271 N.W. 332, 199 Minn 141

Miss.—*Corpus Juris* cited in *Slaughter v Holseback*, 147 So 318, 323

Mo.—*Samper v American Press*, 273 S.W. 186, 217 Mo App 55.

N.Y.—*Ricciardi v McMahon*, 299 N.Y.S. 440, 163 Misc 659

39 C.J. p 1272 note 87

Where the servant is present, but asleep, it cannot be said that the stranger is acting under his direction and the master cannot be held for the acts of the stranger under such circumstances—*Elkin Motor Co v Ragland*, 6 Tenn App 166.

84. Cal.—*Corpus Juris* cited in *Gibbons v Naritoka*, 283 P. 345, 347, 102 Cal App 669.

39 C.J. p 1272 note 88.

85. Ark.—*Malco Theatres v. McLean*, 117 S.W.2d 45, 196 Ark 188—*Interurban Transp Co v Reeves*, 108 S.W.2d 594, 194 Ark 321

86. Ala.—*Corpus Juris* cited in *Har-*

ris v Bell, 176 So 469, 470, 234 Ala 879—*Corpus Juris* quoted in *Emison v Wylam Ice Cream Co.*, 111 So 216, 218, 215 Ala 504

39 C.J. p 1272 note 89

"In such a case we can recognize no valid distinction between a case where the servant was present with his assistant at the time and place of the accident and a case where the servant was elsewhere. In each case the servant uses the instrumentality for the purpose intended and authorized and in each case the directed act of the assistant is equally the act of the servant"—*Emison v Wylam Ice Cream Co.*, 111 So 216, 218, 215 Ala 504

Servant's knowledge of risk

Master who intrusts servant with an instrumentality is subject to liability for harm caused by its negligent management by one to whom servant intrusts its custody to serve purposes of master, if servant should realize there is undue risk that such person will harm others by its management—*Potter v Golden Rule Grocery Co.*, 84 S.W.2d 364, 169 Tenn 240

87. Mo.—*Blumenfeld v Meyer-Schmid Grocer Co.*, 230 S.W. 183, 206 Mo App 509—*Weatherman v Handy*, App, 198 S.W. 459

Negligence in engaging or failing to supervise assistant

If negligence of employee in engaging incompetent assistant or in failing to supervise assistant is proximate cause of damage, employer is liable, although employment of assistant was unauthorized where

assistant's negligence in presence of employee and in combination with his negligence contributed proximately to accident—*Copp v Paradis*, 157 A 228, 180 Me 464

88. Mo.—*Blumenfeld v. Meyer-Schmid Grocer Co.*, 230 S.W. 183, 206 Mo App 509—*Weatherman v. Handy*, App, 198 S.W. 459

89. Mo.—*Weatherman v. Handy*, supra.

39 C.J. p 1272 note 92.

90. Cal.—*Corpus Juris* quoted in *Maggi v Pompa*, 287 P. 982, 983, 105 Cal App 496.

Ga.—*Kent v Southern Ry Co.*, 184 S.E. 638, 62 Ga.App 731.

Idaho.—*Corpus Juris* quoted in *MacDonald v Ogan*, 129 P.2d 654, 655, 64 Idaho 168

Va.—*Corpus Juris* cited in *Norfolk & W Ry Co v Haun*, 187 S.E. 481, 482, 167 Va. 157

39 C.J. p 1272 note 93

Special police for railroads

The statute providing for the appointment of special policemen for railroads, and authorizing such policemen to exercise in the counties, etc., in which the railroads are situated all the authority and powers held by constables, etc., does not make the corporation applying for the appointment liable for everything such policemen may do, regardless of whether it be for the protection of its property or the preservation of peace and good order on its premises—*Philadelphia, B & W. R. Co. v. Stumpo*, 77 A. 266, 112 Md 571.

performed in carrying out his duty as a public officer,⁹¹ or was committed in furtherance of some personal purpose to the special officer.⁹³ However, where such officer is acting in performance of the duties for which he is employed, such as the protection of property, the employer may be liable for his acts,⁹³ although the act resulting in the injury is a misjudged and wrongful act,⁹⁴ or in excess of his authority.⁹⁵ The employer will be liable where the movements of the special officer are directed by him.⁹⁶

Whether the acts complained of are inflicted by one in his capacity as a servant or as an officer is to be determined by all the circumstances in evidence.⁹⁷ Any irregularity in the original appointment of the officer is unimportant in determining whether or not there is liability on the ground that

he is an employee.⁹⁸

§ 566. — Servants Hired or Lent to or under Control of Third Person

- a. In general
- b. Payment and right to discharge
- c. Driver and team hired to third person

a. In General

Where a servant is loaned by the employer to another, the question whether the general or the special employer is liable for his acts while in the special employment generally depends on which one retains the right of direction and control over him and in whose business the servant was engaged while performing the act complained of; in some circumstances both masters may be liable.

The Corpus Juris statement, which has been characterized as clear and concise, is that a servant may

91. *US—Red River Lumber Co v Cardenas*, CCA Cal, 95 F2d 157 Cal.—*Corpus Juris* quoted in *Maggi v. Pompa*, 387 P 982, 983, 105 Cal App 496

Conn.—*Corpus Juris* cited in *Krowka v Colt Patent Fire Arm Mfg. Co*, 8 A 2d 5, 9, 125 Conn 705

Ga.—*Kent v. Southern Ry. Co*, 184 SE 638, 53 Ga App 731

Idaho.—*Corpus Juris* quoted in *MacDonald v Ogan*, 129 P 2d 654, 655, 64 Idaho 168

Me.—*Neallus v Hutchinson Amusement Co*, 139 A 671, 126 Me 469, 55 A L R 1191

N.Y.—*Biniewski v City of New York*, 44 N Y S 2d 543, 287 App Div 108

Ohio.—*New York, C & St Louis Ry Co v Fieback*, 100 NE 889, 87 Ohio St 254, 43 L R A. N S, 1164

Pa.—*Kirkpatrick v Alan Wood Steel Co*, 12 A 2d 23, 338 Pa 126

Tex.—*Hudson v St Louis Southwestern Ry Co of Texas*, Com App, 298 S W 811, rehearing denied *Hudson v St Louis Southwestern Ry. Co of Texas*, 295 S W 577—*Brady v Gulf, C & S F Ry Co*, Civ App., 71 S.W.2d 303, error refused

Va.—*Corpus Juris* cited in *Norfolk & W. Ry Co v Haun*, 187 SE 481, 482, 167 Va 157

W Va.—*Thompson v Norfolk & W. Ry Co*, 182 SE 880, 116 W.Va 705

39 C J p 1273 note 94

Execution of warrant

Corporation employing public officer was held not liable for homicide committed by him in executing warrant for misdemeanor not involving company's interests, although warrant was procured by company's agent who knew that it was void—*Massachusetts Cotton Mills v Hawkins*, 139 SE 52, 164 Ga 594, answers conformed to 189 SE 429, 37 Ga App 198.

Acting as messenger's guard

Cal.—*St John v Reid*, 61 P 2d 363, 17 Cal App 2d 5

Striking arrested person

Where a special railroad policeman, after having made a wrongful arrest at the instigation of an employee of the railroad, wantonly, and without excuse or provocation, strikes the person arrested, the company will not be liable for such act, if it appears that it was not instigated by the company's employee—*Finrock v. Northern Cent Ry Co*, 58 Pa Super. 52

92. Idaho.—*Corpus Juris* quoted in *MacDonald v Ogan*, 129 P 2d 654, 655, 64 Idaho 168

39 C J. p 1273 note 95

93. Ga.—*Massachusetts Cotton Mills v. Hawkins*, 139 SE 52, 164 Ga 594, answers conformed to 189 SE 429, 37 Ga App 198

Md.—*Baltimore & O R Co v. Strube*, 78 A 697, 111 Md 119.

Me.—*Neallus v. Hutchinson Amusement Co*, 139 A. 671, 126 Me 469, 55 A L R 1191

Okl.—*Empire Oil & Refining Co v Fie'ds*, 73 P 2d 164, 181 Okl. 231

Tex.—*Hudson v St Louis Southwestern Ry Co of Texas*, Com. App, 298 S W 811, rehearing denied *Hudson v. St Louis Southwestern Ry Co of Texas*, 295 S W 577

39 C J p 1273 note 96

Employment in theater

Where special police officer was employed by theater owner to protect property, to check ticket stubs, and to maintain order, theater owner could not avoid liability to patron assaulted by special officer on ground that officer was acting only in discharge of his police duties.—*McChristian v. Popkin*, 171 P 2d 85, 75 Cal App 2d 249.

Railroad police

Fact that railroad police are commissioned as police officers does not absolve railroad from liability for their unlawful acts committed within scope of railroad's business

Ind.—*Matthews v New York, C & St L R Co*, 161 NE 653, 98 Ind App 618.

Ohio.—*New York, C & St Louis Ry Co v Fieback*, 100 NE 889, 87 Ohio St 254, 43 L R A. N S, 1164

Tex.—*Brady v Gulf, C & S F Ry Co*, Civ App., 71 S.W.2d 303, error refused

39 C J p 1273 note 96 [c].

94. Tenn.—*Terry v Burford*, 175 S W 538, 131 Tenn 451, L R A 1815F 714

95. Mont.—*Rand v. Butte Electric R Co*, 107 P 37, 40 Mont 398

Railroad guards

Mo.—*Adams v. St Louis-San Francisco Ry Co*, App, 261 S W 124.

Tex.—*Hudson v St Louis Southwestern R Co*, Com App, 298 S W 811, rehearing denied *Hudson v St Louis Southwestern R Co. of Texas*, 295 S.W 577

96. Mass.—*Zygmuntowicz v. American Steel & Wire Co*, 134 NE 885, 240 Mass 421

W Va.—*Layne v Chesapeake & O. R. Co*, 67 SE 1103, 66 W Va 807.

97. Tex.—*Texas & N O R Co v. Parsons*, 113 S W 914, 103 Tex. 157, 132 Am S R 857

Presumptions as to capacity as servant or as officer see *infra* § 615

98. Tex.—*St Louis Southwestern R Co of Texas v. Hudson*, Civ App, 286 S W 786, affirmed in part and reversed on other grounds in part *Hudson v. St Louis Southwestern R Co of Texas*, Com App, 293 S W 811, rehearing denied 295 S.W. 577.

be loaned or hired by his master for some special purpose so as to become, as to that service, the servant of the person to whom he is loaned or hired, and to impose on the latter the usual liabilities of a master, the general or original master being correspondingly relieved.⁹⁹ While it has been said that a de-

99. US—Denton v Yazoo & M V R Co, Miss, 52 S Ct 141, 284 U S 305, 76 L Ed 310—Malinski v Indemnity Ins Co of North America, CCA Md, 135 F 2d 910—Blair v Durham, CCA Tenn, 134 F 2d 729, rehearing denied 139 F 2d 260—Jones v George F Getty Oil Co, CCANM, 92 F 2d 255, certiorari denied Associated Indemnity Corporation v George F Getty Oil Co, 58 S Ct 644, 303 U S 644, 82 L Ed 1106—Harlan v Bryant, CCA Ill, 87 F 2d 170—Norfolk & W Ry Co v Hall, CCA W Va, 57 F 2d 1004—American Fidelity & Cas Co of Richmond, Va, v Zurich General Acc & Liability Ins Co, DCSC, 70 F Supp 613—The H C Jefferson, DCPa, 69 F Supp 650
- Ark—Rarton—Mansfield Co v Bogey, 147 S W 2d 977, 201 Ark 860
- Cal—Moss v Chronicle Pub. Co, 253 P 88, 201 Cal 610, 55 ALR 1258—Lowell v Harris, 74 P 2d 551, 24 Cal App 2d 70—Corpus Juris cited in Nichols v Hitchcock Motor Co, 70 P 2d 654, 659, 22 Cal App 2d 151—Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P 2d 546, 121 Cal App 719—Valdick v Le Clair, 289 P 673, 106 Cal App 489—Peters v United Studios, 277 P 156, 98 Cal App 373
- Colo—Corpus Juris quoted in Landis v McGowan, 165 P 2d 180, 187, 114 Colo 355
- DC—Balinovic v Evening Star Newspaper Co, 118 F 2d 505, 72 App DC 176, certiorari denied 61 S Ct 42, 311 U S 675, 85 L Ed 484
- Fla—Postal Telegraph & Cable Co v Doyle, 167 So 358, 123 Fla 695, affirmed 175 So 515, 128 Fla 707
- Ga—Corpus Juris quoted in Bibb Mfg Co v Souther, 184 SE 421, 24, 52 Ga App 722
- Ill—Merlo v. Public Service Co of Northern Illinois, 45 NE 2d 665, 381 Ill 300, followed in 45 NE 2d 677, 381 Ill 336—Creek v Naylor, 33 NE 2d 740, 309 Ill App 601—Bird v Louer, 273 Ill App 522—Meyer v All-Electric Bakery, Inc, 271 Ill App 522
- Ind—Standard Oil Co. v Soderling, 43 NE 2d 873, 112 Ind App 437—Lieber v Messick, 173 NE 238, 92 Ind App 264
- Iowa—Anderson v Abramson, 13 N W 2d 315, 234 Iowa 792
- Kan—Corpus Juris quoted in Moseman v L M Penwell Undertaking Co, 100 P 2d 669, 673, 151 Kan 610
- Ky—Corpus Juris cited in Bowen v. Gradison Const. Co, 32 S.W.2d 1914, 1916, 286 Ky. 270.
- Me—Fronyea v Maine Steel Products Co, 170 A 515, 132 Me 271
- Mich—Rockwell v Grand Trunk Western Ry Co, 234 NW 159, 253 Mich 144
- Minn—Wicklund v North Star Timber Co, 287 NW 7, 205 Minn 595
- Mo—Kourik v English, 100 SW 2d 901, 340 Mo 367—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW 2d 1085, 1088, 334 Mo 1233—Corpus Juris quoted in Roman v Hendricks, App, 80 SW 2d 907, 908—Gorman v A R Jackson Kansas City Showcase Works Co, App, 19 SW 2d 559
- Mont—Devaney v Lawler Corporation, 56 P 2d 746, 101 Mont 579
- Neb—Mansfield v Andrew Murphy & Son, 298 NW 749, 139 Neb 793
- NJ—Younkers v Ocean County, 38 A 2d 898, 130 NJ Law 607
- NY—Ramsey v New York Cent R Co, 199 NE 65, 269 NY 219, 102 ALR 511—Irwin v Klein, 276 NYS 41, 243 App Div. 23—Van Deusen v Ruhtz-Pike Engineering & Construction Corporation, 264 NYS 395, 238 App Div 178, appeal dismissed 188 NE 100, 262 NY 639—Irolla v City of New York, 280 NYS 873, 155 Misc 908—Robins Dry Dock & Repair Co v Navigazione Libera Triestina S A, 279 NYS 257, 154 Misc 788, affirmed 185 NE 698, 261 NY 455, reargument denied 188 NE 47, 262 NY 521, certiorari denied Moran Towing & Transp Co v Robins Dry Dock & Repair Co, 54 S Ct 72, 290 US 556, 78 L Ed 568 and 54 S Ct 72, 290 US 557, 78 L Ed 569
- NC—Leonard v Tatum & Dalton Transfer Co, 12 SE 2d 729, 218 NC 867
- Ohio—Halkias v Wilkoff Co, 47 N. E 2d 199, 141 Ohio St 189
- Okl—Wylie-Stewart Machinery Co v Thomas, 137 P 2d 556, 193 Okl 505
- Pa—McGrath v Edward G Budd Mfg Co, 36 A 2d 803, 348 Pa 619—Rau v Wilkes-Barre & E R Co, 167 A 230, 311 Pa 510—Milwaukee Locomotive Mfg Co v Point Marion Coal Co, 144 A 100, 294 Pa 238
- Tex—Magnolia Petroleum Co v Francis, Civ App, 169 SW 2d 286, error refused—Corpus Juris cited in Steele v Wells, Civ App, 134 SW 2d 377, 378, error refused—Corpus Juris quoted in City of Grandview v. Ingle, Civ App, 90 SW 2d 855, 857—Independent-Eastern Torpedo Co v Herrington, Civ App, 69 SW 2d 232, 1108, reversed on other grounds 95 SW 2d 377, 128 Tex 17
- Wash—McHugh v King County, 128 P 2d 541, 14 Wash 2d 441—B & B Building Material Co v Winston Bros Co, 290 P 839, 158 Wash 130
- Wis—De Forest Dairy Co v Friedrich, 232 NW 543, 203 Wis 251
- 39 CJ p 1274 note 4
- Liability for acts of bailee's servant in general see Bailments § 40 b
- Motor vehicle and driver hired or loaned to third person see the CJS title Motor Vehicles § 426, also 42 CJ p 1097 note 60—p 1099 note 71
- Status of servant loaned or hired to another see supra § 2.
- Leading case**
- US—Standard Oil Co v Anderson, NY, 212 U.S. 215, 29 S Ct 252, 53 L Ed 480
- General employer's interest in work**
- The rule applies, even though the general employer may have an interest in the work
- NY—Osberg v Hoffman, 300 NYS 690, 252 App Div 587, affirmed 19 NE 2d 924, 280 NY 533
- Pa—Bojarski v. M F Howlett, Inc, 140 A 544, 281 Pa 485
- The implied or express consent of the servant to the transfer must appear in order to establish a transfer of the servant for a special service**
- Younkers v Ocean County, 38 A 2d 898, 130 NJ Law 607—Pederson v Edward Shoe Corporation, 142 A. 13, 104 NJ Law 586
- Special servant as to some acts**
- The fact that a person is one employer's general servant does not, as a matter of law, prevent him from becoming the special servant of another, who may become liable for his acts, and he may become such other's servant as to some acts and not as to others
- Ariz—Lee Moor Contracting Co v. Blanton, 65 P 2d 35, 49 Ariz 130
- Tex—Hilgenberg v Elam, 198 SW 2d 94, 145 Tex 437
- The ex parte acts of a master cannot make his servant the servant of another or shift responsibility therefor to another**—Younger Bros v Moore, Tex Civ App, 135 S.W.2d 780, error dismissed, judgment correct
- Agreement to become master**
- Buyer, having voluntarily agreed to assume risk of damage resulting from seller's employees' services in using dynamite, was bound by agreement—Hercules Powder Co v Harry T Campbell Sons Co, 144 A. 510, 156 Md. 346, 62 ALR 1497.

termination of this matter calls for the consideration of many different factors,¹ and that every case presents facts peculiar to itself,² the usual test of liability for the acts of the servant is whether in the particular service in which the servant is engaged or which he is requested to perform he con-

tinues liable to the direction and control of his original master or becomes subject to the direction and control of the person to whom he is loaned or hired, or who requests his services,³ but it has been said that in the application of this test the authorities cannot be reconciled,⁴ and that it is difficult to de-

1. Mont—Devaney v Lawler Corporation, 56 P 2d 746, 101 Mont 579
Vt—Pappillo's Adm'x v Prairie, 164 A 537, 105 Vt 193

2. Mont—Devaney v Lawler Corporation, 56 P 2d 746, 749, 101 Mont 579

3. US—Harlan v Bryant, CCA Ill, 87 F 2d 170—Bertino v. Marion Steam Shovel Co, CCA Mo, 64 F 2d 409—Yellowway, Inc, v Hawkins, CCA Mo, 38 F 2d 731—The Commandant, DCMd, 23 F 2d 100

Ala—Williams v Central of Georgia Ry. Co, 124 So 878, 220 Ala 298

Ariz—Lee Moor Contracting Co v Blanton, 65 P 2d 35, 49 Ariz 130

Ark—Barton-Mansfield Co v. Boge, 147 SW 2d 977, 201 Ark 860

Cal—McComas v. Al G Barnes Shows Co, 12 P 2d 630, 215 Cal 685—Lowell v Harris, 74 P 2d 551, 24 Cal App 2d 70—Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P 3d 546, 121 Cal App 719

Colo—Corpus Juris quoted in Landis v McGowan, 165 P 2d 180, 187, 114 Colo 355—Gallagher Transfer & Storage Co v Public Service Co of Colorado, 138 P 2d 926, 111 Colo 162—Thayer v Kirchhof, 266 P. 225, 83 Colo 480

DC—Western Marine & Salvage Co v. Ball, 37 F 2d 1004, 59 App DC 208, certiorari denied Ball v Western Marine & Salvage Co, 50 S Ct 363, 281 US 749, 74 L Ed 1161

Ga—Corpus Juris quoted in Bibb Mfg Co v Souther, 184 S.E 421, 424, 52 Ga App 722

Ill—Merlo v Public Service Co of Northern Illinois, 45 NE 2d 665, 381 Ill 300, followed in 45 NE 2d 677, 381 Ill 386—Bird v Louer, 272 Ill App 522—Meyer v. All-Electric Bakery, Inc, 271 Ill App. 522—Warput v. Reading Coal Co, 250 Ill App 450.

Ind—Standard Oil Co v. Soderling, 42 NE 2d 373, 112 Ind App 437

Iowa—Anderson v Abramson, 13 NW 2d 315, 234 Iowa 792

Kan—Corpus Juris quoted in Moseman v L M Penwell Undertaking Co, 100 P 2d 669, 673, 151 Kan 610

Ky—C L & L Motor Express Co v Achenbach, 82 SW 2d 335, 341, 359 Ky 228—Bowen v Gradison Const Co, 32 SW 2d 1014, 236 Ky 270

Me—Frenyea v Maine Steel Products Co, 170 A 515, 132 Me 271

Md—Baltimore Transit Co v State, to Use of Schriefer, 40 A 2d 678,

184 Md 250—Dippel v Juliano, 137 A 514, 152 Md 694—Hooper v Brawner, 129 A 672, 148 Md 417, 42 A L R 1437

Mich—Rockwell v. Grand Trunk Western Ry Co, 234 NW 159, 253 Mich 144

Minn—St Paul-Mercury Indemnity Co v St Joseph's Hospital, 4 NW 2d 637, 212 Minn 558

Miss—Yasoo & M V R Co v Denton, 133 So 656, 160 Miss 850, affirmed 52 S Ct 141, 284 US 305, 76 L Ed 310

Mo—McFarland v. Dixie Machinery & Equipment Co, 153 SW 2d 67, 348 Mo 341, 136 A L R 516—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW 2d 1085, 1088, 334 Mo 1232—Corpus Juris quoted in Roman v Hendricks, App, 80 SW 2d 907, 908

Mont—Devaney v Lawler Corporation, 56 P 2d 746, 101 Mont 579

Neb—Mansfield v Andrew Murphy & Son, 298 NW 749, 139 Neb 793

NJ—Younkers v Ocean County, 33 A 2d 898, 130 NJ Law 607

NY—Irwin v Klein, 3 NE 2d 601, 271 NY 477—Ramsey v New York Cent R Co, 199 NE 65, 269 NY 219, 102 A L R 511—Currie v International Magazine Co, 175 NE 530, 256 NY 106—Bartolomeo v Charles Bennett Contracting Co, 156 NE 98, 245 NY 66—Van Deusen v Ruhtz-Pike Engineering & Construction Corporation, 264 NYS 395, 238 App Div 178, appeal dismissed 188 N E 100, 262 NY 639—Irolia v City of New York, 280 NYS 873, 155 Misc 908—Robins Dry Dock & Repair Co. v Navigazione Libera Triestina S A, 279 NYS 257, 154 Misc 788, affirmed 185 N E 698, 261 NY 455, reargument denied 188 NE 47, 262 NY 521, certiorari denied Moran Towing and Transp Co v Robins Dry Dock & Repair Co, 54 S Ct 72, 290 US 656, 78 L Ed 568 and 54 S Ct 72, 290 US 657, 78 L Ed 569

Ohio—Halkias v. Wilkoff Co, 47 NE 2d 199, 141 Ohio St 139

Okl—Corpus Juris quoted in City of Tulsa v. Randall, 52 P 2d 33, 34, 174 Okl 630

Pa—Sudekum v Animal Rescue League of Pittsburgh, 45 A 2d 59, 353 Pa 408—Kimbly v Wilson, 42 A 2d 526, 353 Pa 275—Dunmire v. Fitzgerald, 37 A 2d 596, 349 Pa 511—McGrath v. Edward G Budd Mfg Co, 36 A 2d 303, 348 Pa 619—Rau v Wilkes-Barre & E R

Co, 167 A 280, 311 Pa 510—Gordon v S M Byers Motor Car Co, 164 A 334, 309 Pa 453—Stephanelli v Yuhas, 7 A 2d 124, 135 Pa Super 573—Kissell v Motor Age Transit Lines, Inc, Comp Pl, 30 Erie Co 151, affirmed 53 A 2d 593, 357 Pa 204

Tenn—Gaston v Sharpe, 168 SW 2d 784, 179 Tenn 609

Tex—Hilgenberg v Elam, 198 SW 2d 94, 145 Tex 437—Steele v. Wells, Civ App, 184 SW 2d 377, error refused—Corpus Juris cited in Haden Co. v Riggs, Civ App, 84 SW 2d 789, 794—Corpus Juris cited in Krausse v Decker, Civ App, 57 SW 2d 1124, 1125

Vt—Pappillo's Adm'x v Prairie, 164 A 537, 105 Vt 193

Wash—B & B Building Material Co. v Winston Bros Co, 290 P 839, 158 Wash 130

39 CJ p 1274 note 5

Selection or retention of employee

(1) Master having no voice in selection or retention of employee loaned to him by another has no power of control over such employee—Moss v Chronicle Pub Co, 288 P. 88, 201 Cal 610, 55 A L R 1258—Bullig v Southern Pacific Co, 209 P 241, 189 Cal 477—Lowell v Harris, 74 P 2d 551, 24 Cal App 2d 70—Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P 2d 546, 121 Cal App 719—Valdick v LeClair, 289 P 673, 106 Cal App 489

(2) In the absence of any express agreement, the law puts the liability for the acts of a servant on the person responsible for the servant's selection and retention—Lowell v. Harris, *supra*

Work of handling mails, done by men furnished by railroads under postal regulation, was held governmental work relieving railroads from liability for injury to railway postal clerk, direction exercised by postal clerk over men furnished by railroads comprehends power to supervise and control movement, and has force of command—Denton v Yasoo & M V R. Co, Miss, 52 S Ct 141, 284 US 305, 78 L Ed 310.

Direction of elevator operator by persons other than owner and manager of building held not shown—Conover v. Hecker, 26 N.W 2d 774, 317 Mich 285

4. Ill—Warput v Reading Coal Co, 250 Ill App 450.

termine what is meant by "control."⁵

It is not so much the actual exercise of control which is decisive as the right to exercise such control.⁶ In order to escape liability, the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person;⁷ and

it is necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary co-operation where the work furnished is part of a larger operation.⁸ A servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out to the servant the work to be done,⁹ or supervises the performance there-

5. Md—Dippel v Juliano, 187 A 514, 152 Md 694

6. Cal—Lowell v Harris, 74 P 2d 551, 24 Cal App 2d 70—Corpus Juris cited in Peters v United Studios, 277 P 156, 98 Cal App 373

Colo—Corpus Juris quoted in Landis v. McGowan, 165 P 2d 180, 187, 114 Colo 355

Ga—Corpus Juris quoted in Bibb Mfg Co v Souther, 184 SE 421, 424, 52 Ga App 722

Ill—Warput v Reading Coal Co, 250 Ill App 450

Kan—Corpus Juris quoted in Moseman v L M Penwell Undertaking Co, 100 P 2d 669, 673, 151 Kan 610

Me—Corpus Juris cited in Frenyes v Maine Steel Products Co, 170 A 515, 132 Me 271

Mo—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW 2d 1085, 1088, 334 Mo 1233—Corpus Juris quoted in Roman v Hendricks, App, 80 SW 2d 907, 908

Okl—Corpus Juris quoted in City of Tulsa v Randall, 52 P 2d 33, 34, 174 Okl 630.

Pa—Sudekum v Animal Rescue League of Pittsburgh, 45 A 2d 59, 353 Pa 408—Kimble v Wilson, 42 A 2d 526, 352 Pa 275—Dunnire v Fitzgerald, 37 A 2d 596, 349 Pa. 511—Gordon v S M Byers Motor Car Co, 164 A 334, 309 Pa 453—Kissell v Motor Age Transit Lines Inc, Com Pl, 30 Erie Co, 151, affirmed 53 A 2d 593, 357 Pa. 204

39 CJ p 1275 note 6

7. U.S.—Malisfaki v Indemnity Ins Co of North America, CCA Md., 135 F 2d 910

Cal—Corpus Juris quoted in Moss v Chronicle Pub Co, 258 P 88, 90, 201 Cal 610, 55 A L R 1258—Lowell v Harris, 74 P 2d 551, 24 Cal App 2d 70—Corpus Juris quoted in Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P 2d 546, 549, 121 Cal App 719—Corpus Juris quoted in Guild v Brown, App, 1 P 2d 528, 529—Corpus Juris quoted in Valdick v Le Clair, 289 P 673, 677, 106 Cal App 489—Peters v. United Studios, 277 P. 156, 98 Cal App 373

Colo—Corpus Juris quoted in Landis v McGowan, 165 P 2d 180, 187, 114 Colo 355

Ga—Corpus Juris quoted in Bibb Mfg Co v Souther, 184 SE 421, 424, 52 Ga App 722.

Iowa—Corpus Juris cited in Kanipe v Grundy County Rural Electric Co-op, 300 NW 662, 663, 231 Iowa 187

Mich—Rockwell v Grand Trunk Western Ry Co, 234 NW 159, 253 Mich 144

Mo—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW 2d 1085, 1088, 334 Mo 1233—Corpus Juris quoted in Roman v Hendricks, App, 80 SW 2d 907, 908

NY—Smith v Styne & Lachman, 25 NYS 2d 638

NC—Leonard v Tatum & Dalton Transfer Co, 12 SE 2d 729, 218 NC 667

Ohio—Halkias v Wilkoff Co, 47 N. E 2d 199, 141 Ohio App 139

Okl—Corpus Juris quoted in City of Tulsa v Randall, 52 P 2d 33, 34, 174 Okl 630

Tenn—Corpus Juris quoted in Hot Blast Coal Co v Willhax, 10 Tenn App 226, 233

Tex—Independent-Eastern Torpedo Co v Herrington, Civ App, 59 S W 2d 223, 1108, reversed on other grounds, 95 SW 2d 377, 128 Tex 17.

Wash—Clarke v Bohemian Breweries, 110 P 2d 197, 7 Wash 2d 487—Walter v Everett School Dist No 24, 79 P 2d 689, 195 Wash 45 39 CJ p 1275 note 7

Control as to details and manner of work

The test in determining whether an employee is to be deemed employee of the person for whom the work is done, or of person from whom wages and orders and other matters incident to general employment are received, is that one is the employee of the person who has the right to control both the result of the work and the progress and details of the work and the manner in which it is to be performed

Colo—Landis v. McGowan, 165 P 2d 180, 114 Colo 355
Pa—Dunnire v Fitzgerald, 37 A 2d 596, 349 Pa. 511.

Full control

It has been held that in order to render the borrower responsible, full dominion and control are evidently not necessary, since that would imply the right to hire and discharge, and that is nowhere regarded as essential—Dippel v Juliano, 187 A. 514, 152 Md 694

8. Cal—Corpus Juris quoted in Moss v Chronicle Pub Co, 258 P 88, 90, 201 Cal 610, 55 A L R 1258—Corpus Juris quoted in Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P 2d 546 549, 121 Cal App 719—Corpus Juris quoted in Guild v Brown, 1 P 2d 528, 529, 115 Cal App 374—Corpus Juris quoted in Valdick v Le Clair, 289 P 673, 677, 106 Cal App 489—Peters v United Studios, 277 P. 156, 98 Cal App 373

Colo—Corpus Juris quoted in Landis v McGowan, 165 P 2d 180, 187, 114 Colo 355—Thayer v Kirchhof, 266 P 225, 83 Colo 480

Mo—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW 2d 1085, 1089, 334 Mo 1233—Corpus Juris cited in Roman v Hendricks, App, 80 SW 2d 907, 908

Okl—Corpus Juris quoted in City of Tulsa v Randall, 52 P 2d 33, 34, 174 Okl 630

Tenn—Corpus Juris quoted in Hot Blast Coal Co. v Willhax, 10 Tenn App 226, 233

39 CJ p 1275 note 8

9. U.S.—Yelloway, Inc, v Hawkins, CCA Mo, 38 F 2d 731

Cal—Corpus Juris quoted in Entre-mont v Whitsell, 89 P 2d 392, 395, 13 Cal 2d 290—Corpus Juris quoted in Moss v Chronicle Pub Co, 258 P 88, 90, 201 Cal 610, 55 A L R 1258—Corpus Juris quoted in Valdick v Le Clair, 289 P 673, 677, 106 Cal App 489

Colo—Corpus Juris quoted in Landis v McGowan, 165 P 2d 180, 187, 114 Colo 355

Iowa—Anderson v. Abramson, 13 N W 2d 315, 234 Iowa 793

Kan—Corpus Juris quoted in Redfield v Chelsea Coal Co, 16 P 2d 475, 477, 136 Kan 588

Me—Frenyes v Maine Steel Products Co, 170 A 515, 132 Me 271

Mo—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW 2d 1085, 1089, 334 Mo 1233—Corpus Juris cited in Roman v Hendricks, App, 80 SW 2d 907, 908

NY—Smith v Styne & Lachman, 25 NYS 2d 628

Okl—Corpus Juris quoted in City of Tulsa v Randall, 52 P 2d 33, 34, 174 Okl 630

Tenn—Corpus Juris quoted in Hot Blast Coal Co v. Willhax, 10 Tenn. App 226, 233

39 CJ p 1275 note 9.

of,¹⁰ or designates the place and time for such performance,¹¹ or gives the servant signals calling him into activity,¹² or gives him directions as to the details of the work and the manner of doing it,¹³ or because the servants of the person for whom the work is being performed assist in the work¹⁴

Keeping in view these principles, it is very gen-

erally held that the original or general master is not liable for injuries resulting from acts of the servant while under the control of a third person, the latter being liable,¹⁵ on the other hand, the original master is liable, and the third person is not liable, where the control of the servant is retained by the original master¹⁶

10. Me—Frenyea v Maine Steel Products Co, 170 A 515, 132 Me 271

11. NY—Bartolomeo v Charles Bennett Contracting Co, 156 N.E. 98, 245 NY 66—Chapin-Owen Co v Yeoman, 250 N.Y.S. 95, 233 App Div 580, motion denied 253 N.Y.S. 568, 233 App Div 492—McHugh v McCormick, 238 N.Y.S. 208, 228 App Div 659

12. Cal—Corpus Juris quoted in Entremont v Whitsell, 89 P.2d 392, 395, 13 Cal.3d 290—Corpus Juris quoted in Moss v Chronicle Pub Co, 258 P.2d 88, 90, 201 Cal.610, 55 A.L.R. 1252—Corpus Juris quoted in Valdict v Le Clair, 289 P.673, 677, 106 Cal.App. 489

Colo—Corpus Juris quoted in Landis v McGowan, 165 P.2d 180, 187, 114 Colo. 355

D.C.—Sonnemann v Philadelphia, B. & W. R. Co, 35 App DC 279

Kan—Corpus Juris quoted in Redfield v Chelsea Coal Co, 16 P.2d 475, 477, 136 Kan. 588

Mich—Rockwell v Grand Trunk Western Ry. Co, 234 N.W. 159, 253 Mich. 144

Mo—Corpus Juris quoted in O'Brien v Rindskopf, 70 S.W.2d 1085, 1089, 334 Mo. 1233—Corpus Juris cited in Roman v Hendricks, App. 80 S.W.2d 907, 908

Okl—Corpus Juris quoted in City of Tulsa v Randall, 52 P.2d 33, 34, 174 Okl. 630

Tenn—Corpus Juris quoted in Hot Blast Coal Co v Willhax, 10 Tenn. App. 226, 233

39 C.J. p. 1275 note 10

13. Cal—Corpus Juris quoted in Entremont v Whitsell, 89 P.2d 392, 395, 13 Cal.3d 290—Corpus Juris quoted in Moss v Chronicle Pub Co, 258 P.2d 88, 90, 201 Cal.610, 55 A.L.R. 1252—Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P.2d 546, 121 Cal.App. 719—Corpus Juris quoted in Valdict v Le Clair, 289 P.673, 677, 106 Cal.App. 489

Colo—Corpus Juris quoted in Landis v McGowan, 165 P.2d 180, 187, 114 Colo. 355

Kan—Corpus Juris quoted in Redfield v Chelsea Coal Co, 16 P.2d 475, 477, 136 Kan. 588

Me—Frenyea v Maine Steel Products Co, 170 A.515, 132 Me.271
Md—Dippel v Juliano, 137 A.514, 152 Md.694

Mo—Corpus Juris quoted in O'Brien

v Rindskopf, 70 S.W.2d 1085, 1089, 334 Mo. 1233—Corpus Juris cited in Roman v Hendricks, App. 80 S.W.2d 907, 908

NY—Ramsey v New York Cent. R. Co, 199 N.E. 65, 289 N.Y. 219, 102 A.L.R. 511—Smith v Styne & Lachman, 25 N.Y.S.2d 628

Okl—Corpus Juris quoted in City of Tulsa v Randall, 52 P.2d 33, 34, 174 Okl. 630

Tenn—Corpus Juris quoted in Hot Blast Coal Co v Willhax, 10 Tenn. App. 226, 233

Tex—Corpus Juris cited in Krausse v Decker, Civ. App., 57 S.W.2d 1124, 1125

39 C.J. p. 1275 note 11

Authority to direct course or route of a third person's servant does not prevent his remaining servant of the third person—Goldwyn v Coast Cities Coaches, 30 A.2d 295, 129 N.J. Law 501

14. NY—Ramsey v New York Cent. R. Co, 199 N.E. 65, 289 N.Y. 219, 102 A.L.R. 511

15. US—Mahafski v Indemnity Ins. Co of North America, C.C.A. Md., 135 F.2d 910—Harlan v Bryant, C.C.A. Ill., 87 F.2d 170

Cal—Lowell v Harris, 74 P.2d 551, 24 Cal.App.2d 70

Colo—Corpus Juris quoted in Landis v McGowan, 165 P.2d 180, 187, 114 Colo. 355—Gallagher Transfer & Storage Co v Public Service Co of Colorado, 138 P.2d 926, 111 Colo. 162

Fla—Postal Telegraph & Cable Co v Doyle, 167 So. 358, 123 Fla. 695, affirmed 175 So. 515, 128 Fla. 707.

Ga—Carstarphen v Ivey, 19 S.E.2d 341, 66 Ga.App. 865

Ill—Meyer v All-Electric Bakery, Inc., 271 Ill.App. 522

Iowa—Anderson v Abramson, 13 N.W.2d 315, 234 Iowa 792—Swartzwelter v Iowa Southern Utilities Corporation, 250 N.W. 121, 216 Iowa 1060

Ky—Corpus Juris cited in C. L. & L. Motor Express Co v Achenbach, 82 S.W.2d 835, 341, 259 Ky. 228—Corpus Juris cited in Bowen v Gradison Const. Co, 22 S.W.2d 1014, 1016, 236 Ky. 270

Md—Baltimore Transit Co. v State, to Use of Schriefer, 40 A.2d 678, 184 Md. 250—Dippel v Juliano, 137 A.514, 152 Md.694—Hooper v Brawner, 129 A.672, 148 Md.417, 42 A.L.R. 1437.

Minn—St. Paul-Mercury Indemnity Co v St. Joseph's Hospital, 4 N.W.2d 637, 212 Minn. 558

Mo—McFarland v Dixie Machinery & Equipment Co, 153 S.W.2d 67, 348 Mo. 341, 136 A.L.R. 516—Corpus Juris cited in Roman v Hendricks, App. 80 S.W.2d 907, 908

NJ—Hudson v Fay, 4 A.2d 408, 125 N.J. Eq. 62

NY—Van Deusen v Ruhtz-Pike Engineering & Construction Corporation, 264 N.Y.S. 395, 238 App. Div. 178, appeal dismissed 188 N.E. 100, 262 N.Y. 639—Irolla v City of New York, 280 N.Y.S. 873, 155 Misc. 908

Ohio—Halkas v Wilkoff Co, 47 N.E.2d 199, 141 Ohio St. 139

Okl—Aderhold v Bishop, 221 P.752, 94 Okl. 303

Pa—Bojarski v M. F. Howlett, Inc., 140 A.544, 291 Pa. 485

Tenn—Gaston v Sharpe, 168 S.W.2d 784, 109 Tenn. 609—Evans v Raney, 14 Tenn. App. 668

39 C.J. p. 1275 note 13

16. US—Radich v U.S. C.C.A. Cal., 160 F.2d 616—Chicago, M. & St. P. Ry. Co v City of Tacoma, C.C.A. Wash., 7 F.2d 586, certiorari denied 46 S.Ct. 119, 269 U.S. 583, 70 L. Ed. 424

Cal—McComas v Al G. Barnes Shows Co, 12 P.2d 630, 215 Cal. 685—Lowell v Harris, 74 P.2d 551, 24 Cal.App.2d 70—Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P.2d 546, 121 Cal.App. 719

Colo—Corpus Juris quoted in Landis v McGowan, 165 P.2d 180, 187, 114 Colo. 355

D.C.—Sonnemann v Philadelphia, B. & W. R. Co, 35 App DC 279

Fla—Postal Telegraph & Cable Co v Doyle, 167 So. 358, 123 Fla. 695, affirmed 175 So. 515, 128 Fla. 707

Ga—Corpus Juris cited in Atlanta Coach Co v Curtis, 157 S.E. 344, 345, 42 Ga.App. 639

Ill—Warput v Reading Coal Co, 250 Ill.App. 450.

Iowa—Kanipe v Grundy County Rural Electric Co-op, 300 N.W. 662, 231 Iowa 187

Me—Frenyea v Maine Steel Products Co, 170 A.515, 132 Me.271
Mass—Quinby Co v Estey, 108 N.E. 908, 221 Mass. 57.

Mich—Rockwell v Grand Trunk Western Ry. Co, 234 N.W. 159, 253 Mich. 144

NY—Bartolomeo v Charles Bennett Contracting Co., 156 N.E. 98, 245

Another test in determining who the master is in such cases is the question as to whose business the servant was engaged in while performing the act complained of,¹⁷ and this question is usually determined by ascertaining under whose authority and command the work was being done,¹⁸ and, where the servant is at the time of the injury actually engaged in performing services for the original master, the latter is liable.¹⁹ It has been held that neither this test nor the control test furnishes an infallible rule,²⁰ that each case must be determined in the light of the existing facts and circumstances,²¹ that they should be considered as factors in reaching a conclusion as to where the responsibility lies, rather than as tests,²² and that frequently it is necessary to consider both rules in determining on whom the liability

shall rest where there is a special, as well as a general, employer.²³ A further test in determining who is the master is whether the act of the borrowed servant which caused the damage was within the normal scope of the business of the borrower.²⁴ The fact that the borrowing employer carries no workmen's compensation insurance on the borrowed employee does not relieve him of liability for the latter's acts.²⁵ Likewise, the character of the service to be rendered²⁶ and the duration of the special employment²⁷ are to be considered as aids in determining the relation, although they do not necessarily determine it.

Use of machine or appliance. The fact that an employee is using the general employer's machine or appliance has been held to indicate a continuation

NY 66—Chapir-Owen Co v Yeoman 259 NYS 95, 232 App Div 560, motion denied 253 NYS 568, 238 App Div 492—Smith v Styne & Lachman, 25 NYS 2d 638
Okla—City of Tulsa v Randall, 52 P 2d 33, 174 Okl 630

Pa—Stephanelli v Yuhas, 7 A 2d 124, 135 Pa Super 573—Madigan v H B Sproul Const Co, Comp Pl, 44 Lack Jur 73, 4 Monroe LR 123

Tenn—Corpus Jams cited in Summers v Bond-Chadwell Co, 145 S W 2d 7, 23, 24 Tenn App 357

Tex—Independent-Eastern Torpedo Co v Herrington, 59 SW 2d 222, 1108, Civ App, reversed on other grounds 95 SW 2d 377, 128 Tex 17—Tanner v Drake, Civ App, 47 SW 2d 453, affirmed 78 SW 2d 163, 124 Tex 395

39 CJ p 1276 note 16

Effect of Interstate Commerce Commission provision

Crane operator employed by railroad, who was alleged to have negligently injured shipper's employee while unloading shipment, remained servant of railroad, as respects liability for injury, notwithstanding tariff provision of Interstate Commerce Commission which made it illegal for railroad to unload car, since it was immaterial, as respects legality, whether railroad, which retained control, was unloading car or loaned crane and operator to shipper—Ramsey v New York Cent R Co, 199 NE 65, 269 NY 219, 103 ALR 611

17. US—Denton v Yazoo & M V R Co, Miss, 52 S Ct 141, 284 U S 305, 76 L Ed 310—Standard Oil Co v Anderson, NY, 39 S Ct 252, 212 US 215, 53 L Ed 480—Bertino v Marion Steam Shovel Co, C C A Mo, 64 F 2d 409—Yelloway, Inc v Hawkins, C C A Mo, 38 F 2d 731.

Ala—Williams v Central of Georgia Ry Co, 124 So 878, 220 Ala 298
Ariz—Lee Moor Contracting Co v Blanton, 65 P 2d 35, 49 Ariz 130
Colo—Landis v McGowan, 165 P 2d 180, 114 Colo 355

D C—Balinovic v Evening Star Newspaper Co, 113 F 2d 505, 72 App DC 176, certiorari denied 61 S Ct 42, 311 US 675, 85 L Ed 434—Western Marine & Salvage Co v Ball, 37 F 2d 1004, 59 App DC 208, certiorari denied Ball v Western Marine & Salvage Co, 50 S Ct 353, 281 US 749, 74 L Ed 1161

Kan—Moseman v. L. M Penwell Undertaking Co, 100 P 2d 669, 673, 151 Kan 610

Md—Baltimore Transit Co v State, to Use of Schrieffer, 40 A 2d 678, 184 Md 260—Dippel v Juliano, 137 A 514, 152 Md 694

Mont—Devaney v Lawler Corporation, 56 P 2d 746, 101 Mont 579
NY—Robins Dry Dock & Repair Co v Navigazione Libera Triestina S A, 279 NYS 257, 154 Misc 788, affirmed 185 NE 698, 261 NY 455, reargument denied 188 NE 47, 262 NY 521, certiorari denied Moran Towing & Transp Co. v. Robins Dry Dock & Repair Co, 54 S Ct 72, 290 US 656, 78 L Ed 568 and 54 S Ct 72, 290 US 657, 78 L Ed 569.

Ohio—Halkias v. Wilkoff Co, 47 N E 2d 199, 141 Ohio St 139

Tenn—Gaston v. Sharpe, 168 SW 2d 784, 179 Tenn 609

Tex—Hilgenberg v Elam, 198 SW 2d 94, 145 Tex 437.

Proprietary interest

For general servant of one employer to become particular servant of another, latter must have proprietary interest in work in which servant is used—Independent-Eastern Torpedo Co v Herrington, Civ App, 59 SW 2d 222, 1108, reversed on oth-

er grounds 95 SW 2d 377, 128 Tex. 17

18. US—Denton v Yazoo & M V R Co, Miss, 52 S Ct 141, 284 US 305, 76 L Ed 310

D C—Balinovic v Evening Star Newspaper Co, 113 F 2d 505, 72 App DC 176, certiorari denied 61 S Ct 42, 311 US 675, 85 L Ed 434

19. Iowa—Ferinac v. Italian Importing Co, 168 NW. 31, 183 Iowa 991

In the absence of a lending of employees, the loaned servant doctrine has no application—Blair v Durham, CCA Tenn, 134 F 2d 729, rehearing denied 139 F 2d 260

20. Colo—Landis v McGowan, 165 P 2d 180, 114 Colo. 355

Furthering business of both

The test of whose business is being done by the borrowed servant is not entirely satisfactory, for, in a sense, the servant's work might be furthering the business of both employers—Anderson v Abramson, 13 NW 2d 815, 234 Iowa 792

21. Colo—Landis v McGowan, 165 P 2d 180, 114 Colo 355.

22. Tenn—Gaston v Sharpe, 168 SW 2d 784, 179 Tenn 609

23. Colo—Landis v McGowan, 165 P.2d 180, 114 Colo 355.

24. Mo—McFarland v. Dixie Machinery & Equipment Co, 153 S W 2d 87, 348 Mo. 341, 136 ALR 516

25. Colo—Gallagher Transfer & Storage Co v Public Service Co. of Colorado, 138 P 2d 926, 111 Colo. 162

26. Pa—McGrath v. Edward G. Budd Mfg. Co., 36 A.2d 303, 348 Pa. 619.

27. Pa—McGrath v. Edward G. Budd Mfg Co., supra.

of the general employment,²⁸ particularly if the machine or appliance is of considerable value,²⁹ but the test of liability is the possession of control over the operator,³⁰ and, where the hirer of a machine or appliance and operator has complete control, the hirer is liable for the operator's negligence, notwithstanding he remains a general servant of the owner of the machine or appliance.³¹

Lender and borrower both liable. Under some circumstances both the lender and the borrower may have control over the servant so as to render each of them liable for his conduct,³² for he may have been transferred to carry on work which is of mutual interest to them and to effect their common purpose, so that his service to the one does not involve abandonment of his service to the other.³³

Work primarily beneficial to another. One of the essentials to be considered in determining whether the general employment of one doing work primarily beneficial to another continues is the agreement or understanding between the general employer and the person primarily benefited.³⁴ Evidence that a person committing a tort is an employee of another, in his pay, employed by and subject to re-

moval by him, and working under his control and supervision, negatives the relation of master and servant between the tort-feasor and the person for whose ultimate benefit the work is being done.³⁵

Direction by governmental borrower. Where a servant acts under the directions of municipal officers, the master is not liable,³⁶ the governmental immunity of the borrower of a servant does not subject the lender to liability.³⁷

Negligence in furnishing incompetent servant. The doctrine of loaned servant relieves the general master from liability for the servant's negligence only, and does not relieve the general master from liability for his own negligence in knowingly furnishing an incompetent servant.³⁸

b. Payment and Right to Discharge

The authorities differ as to whether, as between the general and the special employer, the one who pays a loaned servant or has the right to discharge him is necessarily the one liable for his acts.

Where control is surrendered by the general employer to the special employer, the latter is liable, under some authorities, even though the servant is paid by the original employer³⁹ and remains subject

28. Cal—Lowell v. Harris, 74 P 2d 551, 24 Cal App 2d 70—Scrimsher v. Reliance Rock Co., 2 P 2d 862, 116 Cal App 500

Iowa—Anderson v. Abramson, 13 N W 2d 315, 284 Iowa 792

Results expected; manner of use. If the servant is expected to give only the results called for by the temporary employer and to use the instrumentality as his general employer would desire, the original service continues—Lowell v. Harris, 74 P 2d 551, 24 Cal App 2d 70

29. Cal—Lowell v. Harris, supra

30. N.Y.—Bartolomeo v. Charles Bennett Contracting Co., 156 N E 98, 245 N Y 66

31. Cal—Peters v. United Studios, 277 P 156, 98 Cal App 373

Colo—Gallagher Transfer & Storage Co v. Public Service Co of Colorado, 138 P.2d 926, 111 Colo 162

D C—Western Marine & Salvage Co v. Ball, 37 F 2d 1004, 59 App D C 208, certiorari denied Ball v. Western Marine & Salvage Co, 50 S Ct 353, 281 US 749, 74 L Ed 1161

Ky—Board of Common Council of Frankfort v. Hall, 18 SW 2d 755, 227 Ky 599

N Y—Van Deusen v. Ruhtz-Pike Engineering & Construction Corporation, 264 N Y S 295, 238 App Div 178, appeal dismissed 188 NE 100, 262 N Y 639

Pa—Rau v. Wilkes-Barre & E R Co., 167 A. 230, 311 Pa 510—Bojar-

ski v. M F Howlett, Inc., 140 A 544, 291 Pa 486

Wash—McHugh v. King County, 128 P 2d 504, 14 Wash 2d 441

Steam shovel

(1) Lessee of steam shovel, having no control over shovel except to indicate when and where to work, was held not engineer's master ad hoc—McHugh v. McCormick, 238 N Y S 206, 238 App Div 659

(2) Owner of steam shovel, who rented machine to third persons, and furnished an operator, was not liable for damages occurring while machine was so rented, where owner had no control whatever over machine's operation—Hudson v. Fay, 4 A 2d 408, 125 N J Eq 63

Seller of locomotive was held not liable for negligence of employee sent to instruct buyer's employee in operating locomotive.—Milwaukee Locomotive Mfg Co. v. Point Marion Coal Co., 144 A 100, 294 Pa 238

32. Mo—Kourik v. English, 100 S W.2d 901, 340 Mo 367

Pa—Kissell v. Motor Age Transit Lines, 53 A 2d 593, 357 Pa 204—Sudekum v. Animal Rescue League of Pittsburgh, 45 A 2d 59, 353 Pa 408—Kimble v. Wilson, 42 A 2d 528, 352 Pa 275—Gordon v. S M Byers Motor Car Co., 164 A 334, 309 Pa 453

Tenn—Gaston v. Sharpe, 168 SW 2d 784, 179 Tenn 609

Joint employment see *infra* § 567.

33. Pa—Kissell v. Motor Age Transit Lines, 53 A 2d 593, 357 Pa. 204—Sudekum v. Animal Rescue League of Pittsburgh, 45 A 2d 59, 353 Pa. 408

34. N Y—Delisa v. Arthur F Schmidt, Inc., 34 N E 2d 336, 285 N Y 814

35. Ala—Alabama Power Co v. Key, 140 So 233, 224 Ala 286, followed in 140 So 922, 224 Ala 702

36. Neb—New Omaha Thomson-Houston Electric Co v. Anderson, 102 NW 89, 73 Neb 84.

39 C.J. p 1276 note 18

37. D C—Balinovic v. Evening Star Newspaper Co., 113 F 2d 505, 72 App D C 176, certiorari denied 61 S Ct 42, 311 US 675, 85 L Ed 434

38. Tenn—Evans v. Raney, 14 Tenn App 668

39 C.J. p 1277 note 19

Negligence of master in selecting or retaining servants generally see *supra* § 559.

39. Colo—Corpus Juris quoted in Landis v. McGowan, 165 P 2d 180, 187, 114 Colo 355

Fla—Postal Telegraph & Cable Co. v. Doyle, 167 So 358, 123 Fla 695, affirmed 175 So. 515, 128 Fla 707

Ill—Meyer v. All-Electric Bakery, Inc., 271 Ill App 522

Ky—Corpus Juris cited in C. L. & L. Motor Express Co v. Achenbach, 82 SW 2d 336, 341, 259 Ky 228—Corpus Juris cited in Bowen

to discharge by him,⁴⁰ but it has been held that the right of the general employer to discharge the servant or substitute another for him indicates a continuation of the general employment,⁴¹ and that one who hires the servant of another cannot be said to have control over him so as to be responsible for his acts unless he has the right to discharge him and employ others in his place in case of his misconduct or incapacity.⁴² Other authority holds that neither the circumstance of who pays the servant for his service⁴³ nor the power to select and discharge the employee⁴⁴ is necessarily a controlling or determinative factor in all cases, although each is an element to be considered along with other factors in determining the relation or in deciding who had the right and power of control over the employee.⁴⁵

c. Driver and Team Hired to Third Person

Where an employer furnishes a driver and team to another, liability for the driver's acts, as between the general employer and the hirer, depends on which one has control of the driver's movements.

One who furnishes a driver and team to another for the latter's use for a particular purpose is nevertheless liable for injuries from the acts of the servant while performing such services for the third person, provided exclusive control of the driver is not vested in the hirer.⁴⁶ The test of liability turns on the question whether the employer or the hirer controls the movements of the driver.⁴⁷ Liability of the general employer for the acts of the driver furnished with the team is not affected by the fact that directions are given the driver by the hirer as to when and where to go,⁴⁸ that directions are given as to what shall be carried,⁴⁹ or

v Gradison Const Co, 32 SW 2d 1014, 1016, 236 Ky 270
Minn—Wicklund v North Star Timber Co, 287 NW 7, 205 Minn 595
Mo—Corpus Juris cited in Roman v Hendricks, App, 80 SW 2d 907, 909
NY—Irolla v City of New York, 280 NYS 873, 155 Misc 908
Ohio—Halkias v Wilkoff Co, 47 N. E.2d 199, 141 Ohio St. 139
Pa—McGrath v. Edward G Budd Mfg Co, 86 A.2d 303, 348 Pa. 619
Tex—Magnolia Petroleum Co v Francis, Civ App, 169 SW.2d 286, error refused
39 C.J. p 1276 note 15.

40. Colo—Corpus Juris quoted in Landis v McGowan, 165 P.2d 180, 187, 114 Colo 355
DC—Otis Elev Co v George A Fuller Co, 44 App DC 287
Ky—Corpus Juris cited in C L & L Motor Express Co v Achenbach, 82 SW 2d 335, 341, 259 Ky 228—Bowen v Gradison Const Co, 32 SW 2d 1014, 236 Ky 270
Md—Dippel v Juliano, 137 A 514, 152 Md 694
Mo—Corpus Juris cited in Roman v Hendricks, App, 80 SW 2d 907, 909

41. Iowa—Anderson v Abramson, 13 NW 2d 315, 234 Iowa 792

42. Cal—Lowell v Harris, 74 P.2d 551, 24 Cal App 2d 70

43. U.S.—The Commandant, D.C. Md., 23 F.2d 100

Cal—McCormas v Al G Barnes Shows Co, 12 P.2d 630, 215 Cal 685.

Colo—Thayer v Kirchhof, 266 P. 225, 83 Colo 480

DC—Western Marine & Salvage Co. v Ball, 37 F.2d 1004, 59 App D.C. 203, certiorari denied Ball

v Western Marine & Salvage Co., 50 S.Ct 353, 281 US 749, 74 L Ed 1161

Mo—Gorman & A R Jackson Kansas City Showcase Works Co, App, 19 SW 2d 559

Mont—Devaney v Lawler Corporation, 56 P.2d 746, 101 Mont 579

NY—Irolla v. City of New York, 280 NYS 873, 155 Misc 908

Okl—Wylie-Stewart Machinery Co v Thomas, 137 P.2d 556, 192 Okl 505

Pa—McGrath v Edward G Budd Mfg Co, 86 A.2d 303, 348 Pa. 619

Deduction of money advanced from rental

Fact that contractor who rented gasoline shovel which rental included gasoline, oil, repairs and services of operator, advanced money to operator which was deducted from the rental, did not make the operator the servant of the contractor—Kunan v De Matteo, 32 NE 2d 613, 308 Mass 427.

44. Cal—McCormas v Al G Barnes Shows Co, 12 P.2d 630, 215 Cal 685

Colo—Thayer v Kirchhof, 266 P. 225, 83 Colo 480.

Mont—Devaney v. Lawler Corporation, 56 P.2d 746, 101 Mont 579

Okl—Wylie-Stewart Machinery Co v Thomas, 137 P.2d 556, 192 Okl 505

45. Cal—McCormas v Al G Barnes Shows Co, 12 P.2d 630, 215 Cal 685.

Mo—Gorman v A R Jackson Kansas City Showcase Works Co, App, 19 SW 2d 559

Mont—Devaney v. Lawler Corporation, 56 P.2d 746, 101 Mont 579.

Pa—McGrath v. Edward G Budd Mfg Co, 86 A.2d 303, 348 Pa. 619

46. Cal—Corpus Juris quoted in

Lowell v. Harris, 74 P.2d 551, 556, 24 Cal App 2d 70—Peters v United Studios, 277 P. 156, 98 Cal App 373

Colo—Thayer v Kirchhof, 266 P. 225, 83 Colo 480

Ga—Corpus Juris cited in Atlanta Coach Co v Curtis, 157 SE 344, 345, 42 Ga App 639

Mo—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW 2d 1085, 1089, 334 Mo 1233

N.Y.—Chapin-Owen Co v Yeoman, 250 NYS 95, 232 App Div 560, motion denied 253 N.Y.S 568, 233 App Div 492.

39 C.J. p 1277 note 21.

47. Ark—Dubisson v McMullin, 259 SW 400, 163 Ark 186

Cal—Corpus Juris quoted in Lowell v Harris, 74 P.2d 551, 556, 24 Cal App 2d 70

Colo—Thayer v Kirchhof, 266 P. 225, 83 Colo 480

Mo—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW 2d 1085, 1089, 334 Mo 1233

Tex—Corpus Juris cited in Hilgenberg v Elam, Civ App, 192 SW 2d 799, 803

48. Cal—Corpus Juris quoted in Lowell v Harris, 74 P.2d 551, 556, 24 Cal App 2d 70

Colo—Thayer v Kirchhof, 266 P. 225, 83 Colo 480

Mo—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW 2d 1085, 1089, 334 Mo 1233

39 C.J. p 1277 note 23.

49. Cal—Corpus Juris quoted in Lowell v Harris, 74 P.2d 551, 556, 24 Cal App 2d 70

Mo—Corpus Juris quoted in O'Brien v Rindskopf, 70 SW.2d 1085, 1089, 334 Mo. 1233.

39 C.J. p 1277 note 24.

that directions are given to the driver to hurry or to take his time,⁵⁰ or that the driver also assisted in the work that the hirer was doing for which the team was used,⁵¹ or that the hirer furnished a uniform for the driver.⁵² Also, liability of the general employer is not affected by the fact that the person doing the hiring expressly asked for the services of the particular driver whose act caused the injury,⁵³ or that the general employer furnishes the services of the driver and team without charge.⁵⁴

The hiring or lending of a motor vehicle and driver to a third person is discussed in the C.J.S. title Motor Vehicles § 436, also 42 C.J. p 1097 note 60—p 1099 note 71.

Care in choosing servant. The fact that due care was used in order to employ a careful and competent servant does not affect the liability of the general employer.⁵⁵

Driver under exclusive control of hirer. Where the driver is actually placed under the exclusive control of the hirer, the master is not liable, but the hirer is liable, for injuries resulting from the acts of the driver.⁵⁶

Use by hirer for unauthorized purpose. If a hired vehicle is used for a purpose different from that stipulated in the contract, the driver is not the

agent of the owner in using it at the direction of the hirer.⁵⁷

§ 567. — Joint Employment

Several masters jointly employing a servant are jointly and severally liable for wrongful acts committed by him while acting within the scope of his employment and in behalf of all.

Where a servant is jointly employed by several masters, they are jointly and severally liable for his wrongful act toward third parties committed while acting within the scope of his employment and in behalf of all.⁵⁸ So, also, while there is some authority to the contrary,⁵⁹ it has generally been held that a joint and several liability attaches for the wrongful act of the joint servant, although at the time of the injury complained of he was engaged in performing a service for one of the masters only.⁶⁰ It has been held that the liability of a joint employer is not affected by the fact that the servant is paid by another of the employers.⁶¹

§ 568. — Termination of Relation

A master is not liable for acts committed by his former servant after termination of the employment.

A master is not liable for any acts committed by his former servant after the termination of the serv-

50. Cal.—Corpus Juris quoted in *Lowell v Harris*, 74 P.2d 551, 556, 24 Cal App 2d 70.

Mass.—*Driscoll v Towle*, 83 N.E. 922, 181 Mass 416.

Mo.—Corpus Juris quoted in *O'Brien v Rundskopf*, 70 S.W.2d 1085, 1089, 334 Mo 1233.

51. Cal.—Corpus Juris quoted in *Lowell v Harris*, 74 P.2d 551, 556, 24 Cal App 2d 70.

Mo.—Corpus Juris quoted in *O'Brien v Rundskopf*, 70 S.W.2d 1085, 1089, 334 Mo 1233.

52. Cal.—Corpus Juris cited in *Peters v. United Studios*, 277 P. 156, 159. 98 Cal App 373.

53. Mich.—*Joslin v Grand Rapids Ice Co.*, 15 N.W. 837, 50 Mich. 516, 45 Am R 54.

54. Md.—*Sacker v Waddell*, 56 A. 399, 98 Md 43, 103 Am SR 374.

Va.—*Muse v Stern*, 82 Va. 32, 3 Am SR 77.

55. Cal.—*Gornstein v. Priver*, 231 P 396, 64 Cal App 249.

56. U.S.—*Philadelphia & R Coal & Iron Co. v Barrie*, Minn., 179 F 50, 102 CCA 618.

39 C.J. p 1278 note 32.

57. Ariz.—*Blue Bar Taxicab & Transfer Co v. Kudspeth*, 216 P 246, 25 Ariz 287.

39 C.J. p 1278 note 33.

58. Fla.—Corpus Juris cited in *Seaboard Air Line Ry Co v Ebert*, 188 So 4, 10, 102 Fla 641.

Mo.—*Beal v Chicago, B & Q R Co.*, 285 S.W. 482.

Pa.—*Gordon v S M Byers Motor Car Co.*, 164 A. 334, 309 Pa. 453.

39 C.J. p 1278 note 34.

Joint control and directions

Where employee injuring third person was under joint control and directions of broker and landowner, they were jointly liable for injuries.—*King v. Emerson*, 288 P 1099, 110 CC App 414, adopted 294 P 768, 110 Cal App 414.

A traveling salesman may represent several independent employers at the same time, soliciting orders from the same prospective purchasers on the same occasion for the sales of different commodities which in no way conflict with the highest duty which he may owe to a particular employer, and under such circumstances his negligence in the course of employment may render each of his independent employers liable.—*Hiser v Olson*, 72 P 2d 890, 23 Cal App 2d 227, rehearing denied 73 P 2d 945, 23 Cal App 2d 227.

Masters not joint employers

(1) A servant of two masters may be acting within the scope of his employment by each at the same instant and in the performance of the

same act, and may thereby make both liable, where both have a right of control over the servant, even though the masters are not joint employers and their purposes do not coincide.—*Koontz v. Messer*, 181 A 792, 320 Pa 487.—*Stephanelli v Yuhas*, 7 A 2d 134, 135 Pa Super 73.—*McDonald v Ferrebee*, Pa Com Pl., 42 Sch Leg Rec 30.

(2) A man cannot serve two masters at the same time, and although there may be joint employment and also acts for which more than one employer may be liable, nevertheless there is no several liability of two persons, not acting jointly, as separate masters of a single servant for the same act.—*McFarland v Dixie Machinery & Equipment Co.*, 153 S.W.2d 47, 348 Mo 341, 136 A.L.R 516.

59. Pa.—*Gordon v S M. Byers Motor Car Co.*, 164 A. 334, 309 Pa. 453.

39 C.J. p 1278 note 35.

60. Tex.—Corpus Juris cited in *Moreman v Armour & Co.*, Civ App., 65 S.W.2d 334, 338, error refused.

39 C.J. p 1278 note 36.

61. Mo.—*Beal v Chicago, B & Q R Co.*, 285 S.W. 482.

NC.—*Moore v. Southern R. Co.* 81 S.E. 603, 165 NC. 439, 51 L.R.A. N.S., 866.

ant's employment,⁶² whether such termination is permanent⁶³ or consists of a temporary termination, suspension, or abandonment of the employment⁶⁴ Where these conditions exist, the relation of master and servant ceases for the time being,⁶⁵ but the relation reattaches on resumption of the master's business,⁶⁶ and the master again becomes liable for the wrongful acts of the servant if they are committed in the course of his employment⁶⁷

§ 569. — Persons to Whom Master Liable

A master may be liable for injuries inflicted by his servant on a licensee or invitee. Authorities differ as to whether an employee's wife or child, injured by his act, may assert the liability of his employer for such act.

A master has been held liable for injuries negligently inflicted by his servant on one who is neither a trespasser nor volunteer, but engaged in work, or otherwise acting, in such manner as to constitute him a licensee or invitee with an interest

entitling him to the exercise of ordinary care from the servants of the master;⁶⁸ and it has been held that, where a person has been invited to submit his person, comfort, and safety to the keeping of a master and his servants, the master has a special duty to protect the invitee.⁶⁹

A master's liability to a fellow servant of the one whose act was the cause of the injury, or to volunteers or others assisting the servant, is discussed supra §§ 321-355, his liability for injuries to the servant of an independent contractor in his employ caused by the negligence of himself or his servants, infra §§ 600-606

Wife or child of employee On the ground that a master is not liable where the servant himself would not be liable if he had acted in his own behalf instead of as a servant,⁷⁰ a wife⁷¹ or child⁷² of the employee causing the injury has been held unable to assert the tort liability of the employer, but other authority upholds the wife's⁷³ or the

62. N.J.—Conklin v Brighton Mills, 144 A 816, 105 N.J.Law 386
89 C.J. p 1279 note 38

Intoxication

The fact that employee appeared for work in an intoxicated condition did not terminate relationship of employer and employee—Ingle v Bay Cities Transit Co., 164 P 2d 508, 72 Cal App 2d 283

63. Md.—Brown v. Purviance, 2 Harr & G 816

Mass.—Flint v Gloucester Gaslight Co., 9 Allen 552

64. N.J.—Conklin v Brighton Mills, 144 A 816, 105 N.J.Law 386
89 C.J. p 1279 note 39

Acts of servant in his own behalf see infra § 574

65. N.J.—Conklin v Brighton Mills, supra

N.Y.—Dockweiler v American Piano Co., 160 N.Y.S 270, 94 Misc 712, affirmed 163 N.Y.S 1115, 177 App Div 913

66. N.Y.—Dockweiler v American Piano Co., supra

67. N.Y.—Riley v. Standard Oil Co., 132 N.E 97, 231 N.Y. 801, 32 A.L.R 1382

68. Cal.—Demmon v. Smith, App., 136 P 2d 660

Kan.—Lee v Kansas City Public Service Co., 22 P 2d 942, 137 Kan 759

N.Y.—Meek v Corbisello, 44 N.Y.S 2d 529, 266 App Div. 1044

N.D.—Krueger v North Am Creameries, 27 N.W.2d 240

Pa.—Sorrentino v. Gramano, 17 A 2d 373, 841 Pa 113,
39 C.J. p 1279 note 46

Duty toward trespassers, licensees, and invitees generally see the C.J.

S title Negligence §§ 23-53, also 45 C.J. p 740 note 88-p 838 note 52

Injury to consignee or servant of consignee

Me.—Welch v Maine Cent R Co., 80 A 116, 86 Me 552, 25 L.R.A 658

Accepting benefit of labor

Employer knowing that employee's son assisted employee, acquiescing in son's presence, and accepting benefit of his labor, could not claim that son was mere volunteer on premises—El Paso Laundry Co v Gonzales, Tex Civ App., 36 S.W.2d 798, error dismissed

Aiding employees to enhance own interest

Where a person, in aiding another's employees, is enhancing his own interest, he is entitled to protection against the negligence of the other's agents or employees, but the principle does not apply to one who is forbidden by contract to assist another's employees, and does so only as an accommodation and as a mere volunteer—Stallcup v United Gas Public Service Co., Tex Civ App., 119 S.W.2d 574, error dismissed

Railroad employees

(1) A track repairer going on the right of way after work hours with the foreman and other members of the gang to take a train to the next working place is not a trespasser, but an employee—Swadley v Missouri Pac. R Co., 24 S.W. 140, 118 Mo. 268, 40 Am S.R. 368

(2) Employee returning home along track after working on installation of signals is not a trespasser—Grow v Oregon Short Line R Co., 138 P 398, 44 Utah 160, Ann Cas 1915B 481.

69. Ky.—Fournier v. Churchill Downs-Latonia, 166 S.W.2d 38, 292 Ky 215

70. Iowa—Maine v James Maine & Sons Co., 201 N.W. 30, 198 Iowa 1278, 37 A.L.R 161

71. Iowa—Maine v James Maine & Sons Co., supra

Me.—Sacknoff v Sacknoff, 161 A 869, 131 Me 280

Md.—Riegger v Bruton Brewing Co., 16 A 2d 99, 178 Md 518, 131 A.L.R 307

Mich.—Riser v Riser, 215 N.W. 290, 240 Mich 402

Neb.—Emerson v. Western Seed & Irrigation Co., 216 N.W. 297, 116 Neb 180, 56 A.L.R 327.

Rule criticized

Miss.—McLaurin v McLaurin Furniture Co., 146 So. 877, 166 Miss 180

72. Cal.—Myers v Tranquility Irr. Dist., 79 P 2d 419, 36 Cal App 2d 885

Tenn.—Graham v Miller, 187 S.W.2d 622, 182 Tenn 434, 163 A.L.R 571

73. Fla.—Webster v Snyder, 138 So 755, 103 Fla 1131

Mass.—Pittsley v David, 11 N.E.2d 461, 298 Mass 552

N.H.—Miltimore v. Milford Motor Co., 197 A 330, 89 N.H. 272, stating Massachusetts law

N.Y.—Wadsworth v Webster, 257 N.Y.S 386, 143 Misc 806, affirmed 261 N.Y.S 670, 237 App Div 819.

Pa.—Fisher v Diehl, Com Pl., 17 Northumb Leg J. 77, 59 York Leg Rec 31, affirmed 40 A.2d 912, 156 Pa Super 476

Vt.—Poulin v. Graham, 147 A. 698, 103 Vt 307

Wis.—Hensel v Hensel Yellow Cab Co., 245 N.W. 159, 209 Wis. 489.

child's⁷⁴ right to assert such liability.

§ 570. — Acts or Omissions Imposing Liability in General

- a. Statement of general rule
- b. "Scope of employment" and similar terms
- c. Nature and basis of liability
- d. Tests of liability under doctrine of respondeat superior
- e. Exceptions to rule

a. Statement of General Rule

Under the doctrine of respondeat superior, a master is liable for injury to person or property resulting from the acts of his servant where, and only where, they are performed within the scope of his employment

Under the doctrine of respondeat superior, a master is liable for injury to the person or property of another proximately resulting from the acts of his servant done within the scope of his employment in the master's service⁷⁵ On the other hand, the

Great weight of authority

Ky.—Broadbuss v Wilkenson, 186 S W.2d 1052, 281 Ky 601.

Reasons for rule

(1) A trespass, negligent or willful, on the person of a wife does not cease to be an unlawful act, although the law exempts the husband from liability for the damage, and others may not hide behind the skirts of his immunity

Minn.—Miller v J A Tyrholm & Co, 265 NW 324, 196 Minn 438
Miss.—McLaurin v McLaurin Furniture Co, 146 So 877, 186 Miss 180

Mo.—Mullally v Langenberg Bros Grain Co, 98 SW2d 645, 389 Mo 582

N.Y.—Schubert v August Schubert Wagon Co, 184 NE 42, 249 NY 253, 64 ALR 293.

Pa.—Koonz v. Messer, 181 A 792, 320 Pa 487

(2) Although his wife may be injured thereby, the negligent act of the servant is nonetheless wrongful, and the personal immunity which protects him is based simply on the policy of preserving domestic peace and felicity, that immunity ought not to extend to the master—Koonz v. Messer, 181 A 792, 320 Pa 487

(3) If in law the act of the employee is the act of the employer, then the latter's responsibility for his act ought not to be abrogated simply because the injured party is denied the right to sue the employee—Metropolitan Life Ins Co. v. Huff, 194 NE 429, 48 Ohio App 413

74. Ala.—Mi-Lady Cleaners v McDaniel, 179 So 908, 235 Ala 489, 116 ALR 689

Conn.—Chase v New Haven Waste Material Corporation, 150 A 107, 111 Conn 377, 68 ALR 197

Reason for rule

The recovery for the wrong done the child by the employer does not belong to the father, but to the child—Chase v New Haven Waste Material Corporation, *supra*.

75. US.—Babcock v Tam, CCA Ariz, 156 F2d 116—Lamb v Interstate S S Co, CCA Ohio, 149 F2d 914—Mid-Continent Pipe Line

Co v Whiteley, CCA Okl, 116 F 2d 871—Waggaman v General Finance Co of Philadelphia, CC APa, 116 F2d 254—Department of Water and Power of City of Los Angeles v Anderson, CCA Nev, 95 F2d 577, certiorari denied 59 S Ct 577, 805 US 607, 83 L Ed 336—Marion Steam Shovel Co v Bertino, CCA Mo, 82 F2d 945, certiorari denied 57 S Ct 17, 299 US 557, 81 L Ed 409—Angco v Standard Oil Co of California, CCA Hawaii, 66 F2d 929—Saucer v Willys-Overland, DCFia, 49 F 2d 385—Corpus Jans cited in Silverado S S Co v Prendergast, C CA Wash, 31 F2d 225, 226, certiorari denied Prendergast v Silverado S S Co, 50 S Ct 17, 280 US 557, 74 L Ed 612—Price v U S, DCLa, 11 F2d 283—Futterman v Western Union Tel Co, DC La, 43 F Supp 729

Ala.—Perfection Mattress & Spring Co v Windham, 182 So 6, 236 Ala 239—Mi-Lady Cleaners v McDaniel, 179 So 908, 235 Ala 489, 116 ALR 689—Donaldson v Foreman, 104 So 406, 213 Ala 232

Ariz.—Consolidated Motors v Ketcham, 66 P2d 246, 49 Ariz 295

Ark.—C J Horner Co v Holland, 180 SW2d 524, 207 Ark 345—Gray v McLaughlin, 179 SW2d 686, 207 Ark 191—Pullen v Faulkner, 117 SW2d 28, 198 Ark 281—Carter Truck Line v Gibson, 115 SW2d 270, 195 Ark 994—Federal Compress & Warehouse Co v Jones, 21 SW2d 857, 180 Ark 478

Cal.—Fernelius v Pierce, 138 P2d 12, 22 Cal2d 226—Haworth v Elliott, 153 P2d 804, 67 Cal App2d 77—Stansell v Safeway Stores, 113 P2d 264, 44 Cal App2d 823—Yates v Taft Lodge No 1527, B P O E of U S of America, 44 P2d 409, 6 Cal App2d 389—Smith v Pickwick Stages System, 297 P 940, 113 Cal App 118—Wilson v Droega, 294 P. 726, 110 Cal App 578—Barty v Collins, 293 P 979, 109 Cal App 94—King v Emerson, 288 P. 1099, 110 Cal App 414, adopted 294 P 768, 110 Cal App. 414—Pree v Roed, 278 P 928, 99 Cal App 373—Tiburne v. Burton, 281 P. 334, 86 Cal App 627.

Conn.—Haliburton v General Hospital Soc of Conn, 48 A 2d 261, 133 Conn 61—Bradlow v American Dist Telegraph Co, 38 A 2d 879, 131 Conn 192—Shiembob v Ringling, 160 A 429, 115 Conn 62—Chese v New Haven Waste Material Corporation, 150 A 107, 111 Conn 377, 68 ALR 1497—Ackerson v Erwin M Jennings Co, 140 A 760, 107 Conn 393, 56 ALR 1127

Del.—Biddle v Haldas Bros, 190 A 588, 8 WW Harr 210

DC—Western Union Telegraph Co v Scrivener, 18 F2d 162, 57 App DC 120

Fla.—Reece v Ebersbach, 9 So 2d 805, 152 Fla 763, certiorari denied 63 S Ct 855, 318 US 784, 87 L Ed 1151, rehearing denied 63 S Ct 1155, 319 US 781, 87 L Ed 1725—International Shoe Co. v Hewitt, 167 So 7, 123 Fla 587—Western Union Telegraph Co v Michel, 163 So 86, 120 Fla 511

Ga.—Atlanta Hub Co v Jones, 171 SE 470, 47 Ga App 778—Selman v Wallace, 165 SE 851, 45 Ga App 688

Idaho—Scrivner v. Boise Payette Lumber Co, 268 P 19, 46 Idaho 334

Ill.—Darnier v Colby, 31 NE2d 950, 375 Ill 558, mandate conformed to 35 NE2d 952, 311 Ill App 352—Metzler v Layton, 25 NE2d 60, 373 Ill 88—Mosby v Kimball, 178 NE 66, 345 Ill 420—Hogan v City of Chicago, 49 NE2d 861, 319 Ill App 581—Flood v Bitzer, 40 NE 2d 557, 313 Ill App 369—Creek v Naylor, 33 NE2d 740, 309 Ill App 601—Metzler v Layton, 19 NE2d 130, 298 Ill App. 629, affirmed 25 NE2d 60, 373 Ill. 68—Jones v Standerfer, 15 NE2d 924, 296 Ill. App 145—Trust v Chicago Motor Club, 276 Ill App 289—Craig v Tucker, 264 Ill App. 521—Skala v Lehon, 258 Ill App 252, affirmed 175 NE 832, 343 Ill 602—Borgmiller v. Wood, 252 Ill App. 194—Black v Texas Co, 247 Ill App 301—Zbinden v De Moulin Bros & Co, 245 Ill App 248

Ind.—Junior Toy Corporation v Novak, 21 NE2d 445, 107 Ind App. 427—Commercial Credit Co. v.

mere existence of the relation of master and servant is not enough to impose on the master liability

- Macht**, 165 N.E. 766, 89 Ind App 59—**Lewis v Guthrie**, App., 111 N.E. 455, reheard 113 N.E. 769, 63 Ind App 8
- Iowa**—**Hughes v Western Union Telegraph Corporation**, 236 N.W. 3, 211 Iowa 1391
- Kan**—**Redfield v Chelsea Coal Co.**, 16 P.2d 475, 136 Kan 588
- Ky**—**Wood v Southeastern Greyhound Lines**, 194 S.W.2d 81, 303 Ky 110—**John v Lococo**, 76 S.W.2d 897, 256 Ky 607—**Warfield Natural Gas Co v Ward**, 72 S.W.2d 464, 254 Ky 754—**Slusher v Hubble**, 72 S.W.2d 39, 254 Ky 595—**Ben Humpich Sand Co v Moore**, 69 S.W.2d 996, 253 Ky 667—**Corbin Fruit Co v Decker**, 68 S.W.2d 434, 252 Ky 766—**American Sav Life Ins Co v Riplinger**, 60 S.W.2d 115, 249 Ky 8—**General Refractories Co v Mozier**, 30 S.W.2d 952, 235 Ky 252—**Brooks v Cray-Yon Allmen Sanitary Milk Co**, 277 S.W. 816, 211 Ky 462, 46 A.L.R. 1207
- La**—**Oliphant v Town of Lake Providence**, App., 192 So 95, 193 La 675, answers to certified questions conformed to 193 So 516—**James v J S Williams & Son**, 150 So 9, 177 La 1033—**Dudley v Surles**, App., 11 So 2d 70—**Brand v Vinet**, App., 5 So 2d 300—**Whittington v Western Union Tel Co**, App., 1 So 2d 327—**Comfort v Monteleone**, App., 168 So 670—**Buisson v Potts**, App., 151 So 97, affirmed 156 So 408, 180 La 330—**Carriel v Federal Compress & Warehouse Co**, App., 147 So. 120—**Davis v Lindsay Furniture Co**, 188 So 439, 19 La App 169—**Griffin v Motor Transit Co**, 127 So 438, 13 La App 151—**Rousseau v Texas & P Ry Co.**, 4 La App 691
- Me**—**Leek v Cohen**, 38 A.2d 460, 141 Me 18
- Md**—**Great Atlantic & Pacific Tea Co v Noppenberger**, 189 A 434, 171 Md 378—**Eyerly v Baker**, 178 A 691, 168 Md 699—**Fletcher v Meredith**, 129 A 795, 148 Md 580, 45 A.L.R. 474—**McCrory Stores Corporation v Satchell**, 129 A 348, 148 Md 379
- Mass**—**Kees v William Filene's Sons Co**, 8 N.E.2d 8, 297 Mass 142—**Charmatoro v Adams**, 176 N.E. 610, 275 Mass 521, 75 A.L.R. 1171—**Guinan v Famous Players-Lasky Corporation**, 167 N.E. 285, 267 Mass 501.
- Mich**—**Murphy v Kuhartz**, 221 N.W. 143, 344 Mich 54
- Miss**—**Singer Sewing Mach Co v Stockton**, 157 So 366, 171 Miss 209—**Alden Mills v Pendergraft**, 115 So 713, 149 Miss 595—**Natchez, C & M R Co v Boyd**, 107 So 1, 141 Miss 593—**Yazoo & M. V. R Co v Cornelius**, 95 So 90, 131 Miss 37
- Mo**—**Porter v Thompson**, 206 S.W.2d 509—**Oganaso v Mellow**, 201 S.W.2d 365—**Stumpf v Panhandle Eastern Pipeline Co**, 189 S.W.2d 223, 354 Mo 208—**Bass v Kansas City Journal Post Co**, 148 S.W.2d 648, 347 Mo 681—**Vert v Metropolitan Life Ins Co**, 117 S.W.2d 252, 342 Mo 629, 116 A.L.R. 1381—**Simmons v Kroger Grocery & Baking Co**, 104 S.W.2d 857, 340 Mo 1118—**Brunk v Hamilton-Brown Shoe Co**, 66 S.W.2d 903, 334 Mo 517—**Acker v Koopman**, 50 S.W.2d 100—**Wolfsberger v Miller**, 39 S.W.2d 758, 327 Mo 1150—**Punk v Fulton Iron Works Co**, 277 S.W. 566, 311 Mo 77—**Daugherty v Spuck Iron & Foundry Co.**, App., 175 S.W.2d 45—**Salmons v Dun & Bradstreet**, App., 153 S.W.2d 556—**Blasimay v Albert Wenzelick Real Estate Co**, 138 S.W.2d 721, 235 Mo App 528—**Dovino v General American Life Ins Co**, App., 127 S.W.2d 732—**Rohrmoser v Household Finance Corporation**, 86 S.W.2d 103, 231 Mo App 1188—**Daniel v Phillips Petroleum Co**, 73 S.W.2d 356, 220 Mo App 150—**Gosselin v Yellow Cab Co**, App., 29 S.W.2d 186, certiorari quashed State ex rel Gosselin v Trimble, 41 S.W.2d 801, 328 Mo 760—**Uptegrove v Walker**, 7 S.W.3d 734, 222 Mo App 758—**Mollman v Union Electric Light & Power Co**, 227 S.W. 264, 306 Mo App 353
- Mont**—**Kornec v Mike Horse Mining & Milling Co**, 180 P.2d 253
- Neb**—**Dafoe v Grantski**, 9 N.W.2d 488, 143 Neb 344—**La Fleur v Poesch**, 252 N.W. 902, 136 Neb 263.
- NH**—**Sauriolle v O'Gorman**, 163 A.717, 86 N.H. 39
- NJ**—**Muckin v Hubbs**, 26 A.2d 286, 128 N.J.Law 395—**Blackman v Atlantic City & S R Co**, 19 A.2d 807, 126 N.J.Law 458—**Hudson v Gas Consumers' Ass'n**, 8 A.2d 337, 123 N.J.Law 252—**Wirth v Gabry**, 4 A.2d 281, 122 N.J.Law 95—**Palowonsky v Joffe**, 129 A 143, 101 N.J.Law 521, 40 A.L.R. 1335—**Doran v Thomsen**, 71 A. 296, 76 N.J.Law 754, 19 L.R.A.N.S. 335, 131 Am.S.R. 677
- NY**—**Castorina v Rosen**, 49 N.E.2d 521, 290 N.Y. 445—**Irwin v Klein**, 3 N.E.2d 601, 271 N.Y. 477—**Ford v Grand Union Co**, 197 N.E. 266, 268 N.Y. 243, reargument denied 198 N.E. 546, 268 N.Y. 661—**McLoughlin v New York Edison Co**, 169 N.E. 277, 252 N.Y. 202—**Ford v Grand Union Co**, 270 N.Y.S. 162, 240 App.Div. 284—**Clark v Harnischfeger Sales Corporation**, 264 N.Y.S. 873, 238 App.Div. 493—**Bernstein v. Western Union Telegraph Co**, 18 N.Y.S.2d 856, 174 Misc. 74—**Bindert v Elmhurst Taxi Corporation**, 6 N.Y.S.2d 666, 168 Misc. 892—**Dunne v Contenti**, 4 N.Y.S.2d 148, 167 Misc. 935, affirmed 9 N.Y.S.2d 248, 256 App.Div. 833—**Witaszek v Drees**, 280 N.Y.S. 592, 155 Misc. 838, reversed in part on other grounds Haykl v Drees, 288 N.Y.S. 38, 247 App.Div. 90, motion granted 4 N.E.2d 715, 275 N.Y. 577, and Witaszek v Drees, 4 N.E.2d 745, 272 N.Y. 576—**New York Cent. R Co v City of New York**, 223 N.Y.S. 757, 129 Misc. 917—**Goschar v. Bauer**, 13 N.Y.S.2d 328
- NC**—**Unemployment Compensation Commission v Nissen**, 41 S.E.2d 734, 327 N.C. 216—**Carter v Thurston Motor Lines**, 41 S.E.2d 586, 327 N.C. 198—**Tomlinson v Sharpe**, 37 S.E.2d 493, 226 N.C. 177—**Rogers v Town of Black Mountain**, 29 S.E.2d 203, 224 N.C. 119—**Gillis v. Great Atlantic & Pacific Tea Co**, 27 S.E.2d 283, 223 N.C. 470, 150 A.L.R. 1330—**Walker v Manson**, 23 S.E.2d 839, 222 N.C. 527—**Hairston v Atlantic Greyhound Corporation**, 18 S.E.2d 166, 220 N.C. 642—**Hammond v Eckerd's of Asheville**, 18 S.E.2d 151, 220 N.C. 596—**Smith v Moore**, 16 S.E.2d 701, 220 N.C. 165—**Smith v. Duke University**, 14 S.E.2d 643, 219 N.C. 628—**Creech v National Linen Service Corporation**, 14 S.E.2d 408, 219 N.C. 457—**Ross v Western Union Telegraph Co**, 13 S.E.2d 571, 219 N.C. 324—**McLamb v Beasley**, 11 S.E.2d 233, 218 N.C. 308—**Parrott v Kantor**, 6 S.E.2d 40, 216 N.C. 584—**Robinson v Sears, Roebuck & Co**, 4 S.E.2d 889, 216 N.C. 322—**West v F W Woolworth Co**, 1 S.E.2d 546, 215 N.C. 211—**Robinson v. McAlhanev**, 198 S.E. 647, 214 N.C. 180—**Barrow v Keel**, 196 S.E. 866, 213 N.C. 873—**Bright v Western Union Telegraph Co**, 195 S.E. 391, 213 N.C. 208—**Snow v De Butts**, 193 S.E. 324, 212 N.C. 120—**Liverman v. Cline**, 192 S.E. 849, 212 N.C. 48—**Parrish v Boysell Mfg Co**, 188 S.E. 817, 211 N.C. 7—**Waller v. Hupp**, 179 S.E. 428, 208 N.C. 117—**Van Landingham v Singer Sewing Mach Co**, 177 S.E. 126, 207 N.C. 355—**Robertson v. Virginia Electric & Power Co**, 168 S.E. 415, 204 N.C. 359, cause remanded 170 S.E. 139, 205 N.C. 111—**Brown v. Southern Ry Co**, 162 S.E. 613, 202 N.C. 256—**Dickerson v Atlantic Refining Co**, 159 S.E. 446, 201 N.C. 90—**Martin v. Greensboro-Fayetteville Bus Line**, 150 S.E. 501, 197 N.C. 720—**Wilkie v. Stancil**, 147 S.E. 296, 196 N.C. 794—**Lynville v Nissen**, 77 S.E. 1096, 163 N.C. 95.
- Ohio**—**Miller v. Metropolitan Life**

for whatever torts the servant may commit.⁷⁶ Beyond the scope of his employment, the servant is as much a stranger to the master as any third person,⁷⁷ and an act of the servant not done in the

execution of the service for which he was engaged cannot be regarded as an act of the master, and no liability attaches to him by reason of such act under the doctrine of respondeat superior.⁷⁸ In or-

Ins Co, 16 NE2d 447, 134 Ohio St 289—Biddle v New York Central Railroad Co, 182 NE 601, 43 Ohio App 6—Zarn v Dominique, 177 NE 850, 89 Ohio App 412—Nagy v Kangasser, 168 NE 517, 32 Ohio App 527

Okl—World Pub Co v Smith, 161 P 3d 861, 195 Okl 611—Massman Const Co v Chisholm, 145 P 2d 211, 193 Okl 477—Massman Const Co v Chisholm, 145 P 2d 207, 193 Okl 473—Claxton v Page, 124 P 2d 977, 190 Okl 432—Small v Shull, 134 P 2d 381, 190 Okl 418—Corn v City of Sapula, 110 P 2d 290, 188 Okl 418—Robinovitz v Taylor, 106 P 2d 827, 188 Okl 84—Fairmont Creamery Co of Lawton v Carsten, 55 P 2d 757, 175 Okl 592—Russell-Locke Super-Service v Vaughn, 40 P 2d 1090, 170 Okl 377—Ada-Konawa Bridge Co v Cargo, 21 P 2d 1, 163 Okl 122—Whitehorn v Mosier, 215 P. 553, 119 Okl. 155

Or—Fogelsong v Jarman, 121 P 2d 924, 168 Or 177—Knapp v Standard Oil Co. of California, 68 P 2d 1052, 156 Or 564—Tauscher v Doernbecher Mfg Co, 56 P 2d 318, 153 Or 152

Pa—Zavodnick v A. Rose & Son, 146 A 455, 397 Pa 86—Corpus Juris cited in Milwaukee Locomotive Mfg Co v Point Marion Coal Co, 144 A 100, 103, 294 Pa 288—Bojaraki v M F Howlett, Inc., 140 A 544, 291 Pa 485—Laubach v Colley, 139 A 88, 283 Pa 366—Cooper v American Stores Co, 97 Pa.Super 474—Skvorc v Hager, 93 Pa Super 527—Sebastianelli v Cleland-Simpson Co, Com Pl, 85 Berks Co L J 458, affirmed 31 A 2d 570, 152 Pa Super 203—Gregoria v Wolfe, Com Pl, 55 Dauph Co 273

RI—Hanning v. Turner Centre System, 149 A 376, 50 RI 481

SC—Adams v South Carolina Power Co, 21 SE2d 17, 200 SC 428—Hyde v. Southern Grocery Stores, 16 SE2d 353, 197 SC 263—Holder v Haynes, 7 SE2d 823, 198 SC 176

SD—Morman v Wagner, 262 N.W. 78, 63 SD 547—Hache v Wagner, 227 N.W 66, 55 SD 595

Tenn—National Life & Accident Ins Co v. Morrison, 163 S.W.2d 501, 179 Tenn 29—Terrett v. Wray, 105 S.W.2d 98, 171 Tenn 448—Goodman v Wilson, 166 S.W 752, 139 Tenn 464, 51 L.R.A.N.S., 1116—Hoover Motor Express Co v Thomas, 65 S.W.2d 621, 16 Tenn App 664

Tex—Broaddus v. Long, 188 S.W.2d

1057, 135 Tex 353—American Nat Ins Co v Shepherd, 95 S.W.2d 370, 128 Tex 229, 107 A.L.R. 409—Texas Power & Light Co v Denison, 81 S.W.2d 36, 125 Tex 383—Hudson v St Louis Southwestern Ry Co of Texas, Com App, 293 S.W. 811, rehearing denied 295 S.W. 577—Felder v Houston Transit Ry Co, Civ App, 203 S.W.2d 831—Westheimer Transfer & Storage Co v Houston Bldg Co, Civ App, 198 S.W.2d 465, refused no reversible error—Heldenfels v Montgomery, Civ App, 157 S.W.2d 998, error dismissed—Anderson-Berney Bldg Co v Lowry, Civ App, 143 S.W.2d 401, reversed on other grounds Lowry v Anderson-Berney Bldg Co, 161 S.W.2d 459, 139 Tex 29—National Life & Accident Ins Co v Ringo, Civ App, 137 S.W.2d 828, error refused—Sullivan v Trammell, Civ App, 130 S.W.2d 810, error dismissed, judgment correct—Texas Mut Reserve Life Ins Co v Ormond, Civ App, 115 S.W.2d 776—American Nat Ins Co v Kennedy, Civ App, 101 S.W.2d 825, modified on other grounds Kennedy v American Nat Ins Co, 107 S.W.2d 364, 130 Tex 155, 112 A.L.R. 916—Central Motor Co v Gallo, Civ App, 94 S.W.2d 821—Texas Electric Service Co v Kinkead, Civ App, 36 S.W.2d 1052—McCoy v Beach-Wittman Co, Civ App, 23 S.W.2d 714, error dismissed—Bower Auto Rent Co v Young, Civ App, 274 S.W. 295

Vt—Jewett v Pudlo, 172 A 423, 106 Vt 249, followed in 172 A 428, 106 Vt 258—Ronan v J G Turnbull Co, 131 A 788, 99 Vt 280

Va—Kavanaugh v. Wheeling, 7 S.E.2d 125, 175 Va 105—Western Union Telegraph Co v Phelps, 169 S.E. 574, 160 Va 674—Thalhumer Bros v Shaw, 159 S.E. 87, 156 Va 863—Crowell v Duncam, 134 S.E. 576, 145 Va. 489

Wash—Westerland v. Argonaut Grill, 55 P.2d 819, 185 Wash 411—Nolan v Fisher Co, 19 P.2d 937, 172 Wash. 267—Miller v Alaska S. S. Co., 246 P. 296, 139 Wash. 207.

Wis—Tetting v Hotel Pfister, 266 N.W. 249, 221 Wis 141—Krusse v Weigand, 285 N.W. 426, 204 Wis 195, followed in 285 N.W. 431, 204 Wis 206, Smith v Weigand, 285 N.W. 431, 204 Wis 207, Smith v Weigand, 285 N.W. 431, 204 Wis 208 (two cases), and Woodard v Weigand, 285 N.W. 432, 204 Wis 209—Eckel v. Richter, 211 N.W. 158, 191 Wis 409

Wyo—Stockwell v Morris, 22 P.2d 189, 46 Wyo 1.

39 C.J p 1279 note 47.

Express authorization or ratification

(1) Liability of master in case of wrongful act of employee in course of, or in connection with, employment places liability on master, irrespective of express authorization or ratification—Daniel v. Phillips Petroleum Co., 73 S.W.2d 355, 230 Mo App 150

(2) Liability of master based on express command, assent, or ratification see *supra* §§ 557, 558

It is not necessary that servant's conduct be sole cause of the injury complained of in order to impose liability on the master; it is sufficient if it constitutes a contributing or concurrent cause of the injury—Yashar v Yakovac, 48 N.Y.S.2d 128

76. Ala—Alabama Great Southern R. Co v Pouncey, 61 So 601, 7 Ala App 548

Ark—White v Sims, 201 S.W.2d 21 Ga.—Falls v. Jacobs Pharmacy Co, 31 SE2d 426, 71 Ga App 547

Mo—Green v Western Union Telegraph Co, App, 58 S.W.2d 772—Gray v Phillips Bldg Co, App, 51 S.W.2d 181

NJ—Muckin v. Hubbs, 26 A.2d 286, 128 N.J.Law 395

NC—Walker v Manson, 23 SE2d 889, 222 NC 527—Smith v Moore, 16 SE2d 701, 220 NC 165—Smith v Duke University, 14 SE2d 643, 219 NC 628

Wis—Linden v City Car Co, 300 N. W 935, 239 Wis 236

77. Ky—Wood v Southeastern Greyhound Lines, 194 S.W.2d 81, 302 Ky 110

NY—Dunne v. Contenti, 4 N.Y.S.2d 148, 167 Misc 925, affirmed 9 N.Y.S.2d 248, 256 App Div 833

Tex—Guitar v Wheeler, Civ App, 86 S.W.2d 825, error dismissed. 39 C.J. p 1280 note 49

78. US—Brailas v Shepard S S Co, CCAN.Y., 153 F.2d 849, certiorari denied 66 S.Ct 970, 327 U. S. 807, 90 L.Ed 1033—White v Firestone Tire & Rubber Co, CC A.S.C., 90 F.2d 637—Angco v Standard Oil Co of California, CC A.Hawaii, 66 F.2d 929—Saucer v Willlys-Overland, D.C.Fla., 49 F.2d 385—In re Southern Pac Co, D.C.N.Y., 30 F.2d 723, affirmed 30 F.2d 725—Price v U.S., D.C.La., 11 F.2d 283—Davis v Carolina Cotton & Woolen Mills Co, CCAN.C., 5 F.2d 575—Edwards v Gisi, D.C.Neb., 45 F.Supp 17—Dumbrow v Ettlinger, D.C.N.Y., 44 F.Supp. 763.

der to render the master liable for an act of this | character, it must have been expressly authorized or

- Ala.—Perfection Mattress & Spring Co v Windham, 182 So 6, 286 Ala. 239—Donaldson v Foreman, 104 So 406, 218 Ala 232
- Ariz.—Consolidated Motors v Ketcham, 66 P 2d 246, 49 Ariz 295
- Ark.—C J Horner Co v Holland, 180 SW 2d 524, 207 Ark 345—Carter Truck Line v Gibson, 115 S W 2d 270, 195 Ark 994—Mullins v Ritchie Grocer Co, 35 SW 2d 1010, 183 Ark 218
- Cal.—Stansell v Safeway Stores, 113 P 2d 264, 44 Cal App 2d 822—Lane v Safeway Stores, 91 P 2d 160, 33 Cal App 2d 169—Yates v Taft Lodge No 1527, B P O E of U S of America, 44 P 2d 409, 6 Cal App 2d 389—Wilson v Droege, 294 P. 726, 110 Cal App 578—Barty v Collins, 292 P 979, 109 Cal App 94—Preo v Roed, 278 P 928, 99 Cal App 372
- Conn.—Bradlow v American Dist Telegraph Co, 88 A 2d 679, 131 Conn 192
- DC—Lucas v Friedman, 24 F 2d 271, 58 App DC 5—Western Union Telegraph Co v Scrivener, 18 F 2d 162, 57 App DC 120
- Fla.—Crowder v Wolary, 198 So 9, 144 Fla 149
- Ga.—Falls v Jacobs Pharmacy Co, 31 SE 2d 426, 71 Ga App 547—Great Atlantic & Pacific Tea Co v Cox, 181 SE 788, 51 Ga App 880—Atlanta Hub Co v Jones, 171 SE 470, 47 Ga App 778—Atlanta Coca Cola Bottling Co v Brown, 167 SE 776, 46 Ga App 451—Selman v Wallace, 165 SE 851, 45 Ga App 688—Palmer Phinizy & Connell v Heinserling, 130 SE 537, 34 Ga App 544
- Idaho—Scrivner v Boise Payette Lumber Co, 268 P 19, 46 Idaho 334
- Ill.—Haynes v Holman, 49 NE 2d 324, 319 Ill App 896—Metzler v Layton, 19 NE 2d 180, 298 Ill App. 529, affirmed 25 NE 2d 60, 378 Ill 88—Trust v. Chicago Motor Club, 276 Ill App 289—Craig v. Tucker, 264 Ill App. 521—Black v Texas Co, 247 Ill App 301—Mallory v Day Carpet & Furniture Co, 245 Ill App 465.
- Ind.—Mock v. Polley, 66 NE 2d 78, 116 Ind App 580—Polk Sanitary Milk Co v Berry, 17 NE 2d 860, 106 Ind App 29
- Iowa—Dolan v Hubinger, 80 NW 514, 109 Iowa 408
- Kan.—Redfield v. Chelsea Coal Co, 16 P 2d 475, 186 Kan. 588
- Ky.—Brock v. Bennett, 200 S.W. 2d 745, 304 Ky 338—Wood v Southeastern Greyhound Lines, 194 SW 2d 81, 302 Ky 110—Koch's Adm'r v Koch Bros, 119 SW 2d 1116, 274 Ky 640—Johnson v. Brewer, 98 S W 2d 889, 266 Ky. 314—John v Lococo, 76 SW 2d 897, 266 Ky. 607
- Clark's Ex'x v Weir, 67 SW 2d 962, 252 Ky 560—General Refractories Co v Mowbray, 30 SW 2d 952, 235 Ky 252—Brooks v Gray-Von Allmen Sanitary Milk Co, 277 S W 816, 211 Ky 462, 46 ALR 1207.
- La.—Oliphant v Town of Lake Providence, 192 So 95, 193 La 675, answers to certified questions conformed to, App. 193 So. 516—James v J S Williams & Son, 150 So 9, 177 La 1033—Tinker v Hirst, 110 So 324, 162 La 209—Dudley v. Surles, App. 11 So 2d 70—Braud v Vinet, App. 5 So 3d 200—Buisson v Potts, App. 151 So 97, affirmed 156 So 408, 180 La 380—Cariel v Federal Compress & Warehouse Co, App. 147 So 130—Jefferson v King, 124 So 589, 12 La App 248—Moore v Day Builders' Supply Co, 3 La App 575
- Me.—Leek v. Cohen, 38 A 2d 460, 141 Me 18
- Md.—Eyerly v Baker, 178 A 691, 168 Md 599—Carroll v Hillendale Golf Club, 144 A 693, 156 Md 542—Fletcher v Meredith, 129 A 795, 148 Md 580, 45 ALR 474—McCorry Stores Corporation v Satchell, 129 A 348, 148 Md 279
- Mass.—Bruce v Hanks, 178 NE 728, 277 Mass 268—Ciarmataro v Adams, 176 NE 610, 275 Mass 521, 75 ALR 1171
- Minn.—Loucks v R J. Reynolds Tobacco Co, 246 NW. 898, 188 Minn 182
- Miss.—Tarver v J W Sanders Cotton Mill, 192 So 17, 187 Miss 111—Natches, C & M R Co v Boyd, 107 So 1, 141 Miss 593—Louisville & N R Co v. Corlander, 91 So 699, 129 Miss 24
- Mo.—Oganoso v Mellow, 201 SW 2d 365—Simmons v Kroger Grocery & Baking Co, 104 SW 2d 357, 340 Mo. 1118—Excelsior Products Mfg Co v Kansas City Southern Ry Co, 172 SW 359, 288 Mo 142, Ann Cas. 1817B 1047—Gosselin v. Yellow Cab Co, App., 29 SW 2d 186, certiorari quashed State ex rel Gosselin v Trumble, 41 SW 2d 801, 328 Mo 760—Corpus Juris ext'd in Clark v. Wheelock, App., 293 SW 456, 459
- Neb.—Dafoe v Grantski, 9 NW 2d 488, 143 Neb 344.
- NH.—Morin v People's Wet Wash Laundry Co., 156 A. 499, 85 NH 233
- NJ.—Demarest v. Guild, 176 A 558, 114 NJ Law 472.
- N.Y.—Castorina v. Rosen, 49 NE 2d 521, 290 NY 445—Ospifoff v. City of New York, 86 NE 2d 646, 286 NY. 422, 136 ALR. 1354—Ford v. Grand Union Co, 197 NE 266, 268 NY. 243, and reargument denied 198 NE 546, 268 NY. 664—Clark v. Harnischfeger Sales Corporation, 264 NYS 873, 238 App Div.
- 493—Anderson v. International Mercantile Marine Co, 264 NYS 175, 238 App Div 509, motion denied 188 NE 124, 263 NY 693, affirmed 191 NE 497, 264 NY 425—Curran v Buckpitt, 233 NYS 249, 235 App Div 880—Schell v Vergo, 4 NYS 3d 644, 166 Misc 839—Dunne v Contenti, 4 NYS 3d 148, 167 Misc 925, affirmed 9 NYS 2d 248, 256 App Div 833—Bram v Lusat Realty Corporation, 8 N.Y. S 2d 176
- NC.—Rogers v Town of Black Mountain, 29 SE 2d 203, 224 NC 119—Walker v Manson, 28 SE 2d 839, 223 NC 527—Hammond v Eckerd's of Asheville, 18 SE 2d 151, 220 NC 596—Creech v National Linen Service Corporation, 14 SE 2d 408, 219 NC 457—McLamb v Beasley, 11 SE 2d 288, 218 NC 308—Parrott v Kantor, 6 SE 2d 40, 216 NC 584—Robinson v McAlhane, 198 SE 647, 214 NC 180—Snow v. De Butts, 193 SE 234, 212 NC 120—Cotton v Carolina Truck Transp Co., 150 SE 505, 197 NC 709
- ND.—McIntee v Baker, 268 NW. 661, 66 ND 869—Bodie v Wenner, 266 NW 894, 66 ND 502
- Ohio—Lombardi v Silver, App. 82 NE 2d 558—Biddle v New York Central Railroad Co, 182 NE 601, 48 Ohio App 6—Zarn v Dominique, 177 NE 850, 89 Ohio App 442—Nagy v Kangasser, 168 NE 517, 32 Ohio App 527
- Okl.—Massman Const Co v. Chisholm, 145 P 2d 211, 193 Okl 477—Massman Const Co v Chisholm, 145 P 2d 207, 193 Okl 477—Claxton v Page, 124 P 2d 277, 190 Okl 422—Small v Shull, 124 P 2d 381, 190 Okl 418—Corn v City of Sapulpa, 110 P 2d 290, 188 Okl 418—Phillips Petroleum Co. v Ward, 74 P 2d 614, 181 Okl 462—Chicago, R I & P. R Co v. Sawyer, 56 P 2d 418, 176 Okl 446—Fairmont Creamery Co of Lawton v Carsten, 55 P 2d 757, 175 Okl 592—Whitehorn v. Mosler, 245 P 553, 119 Okl 155.
- Or.—Akerson v. D C. Bates & Sons, 174 P 2d 953—Larkins v Utah Copper Co, 127 P 2d 354, 169 Or 499—Fogelsong v Jarman, 121 P. 2d 924, 168 Or. 177.
- Pa.—Roberts v. Scott Bros., 172 A. 681, 315 Pa 841—Bylock v Colonial Ice Cream Co, 148 A. 862, 300 Pa 144—Zavodnick v A Rose & Son, 146 A 455, 297 Pa. 86—D'Allesandro v. Bentivoglio, 131 A 592, 285 Pa. 72—Gregoris v. Wolfe, Com Pl., 55 Dauph Co. 273.
- R.I.—Haining v Turner Centre System, 149 A. 376, 50 R.I. 481.
- SC.—Powers v Wheelless, 9 SE 2d 129, 198 S.C. 364—Holder v. Haynes, 7 SE 2d 833, 193 S.C. 176—Davenport v. Charleston & W. C

subsequently ratified.⁷⁹

b. "Scope of Employment" and Similar Terms

The terms "scope of employment," "scope of authority," "course of employment," and similar terms are often used indiscriminately and interchangeably, and, while these terms have been said to have no fixed legal meaning, they are to be accepted in their ordinary sense.

The terms "scope of employment," "scope of authority," and "course of employment" are often used indiscriminately and interchangeably,⁸⁰ although technically there is a distinction.⁸¹ While these terms may have no fixed legal or technical meaning,⁸² and indeed have been said not to be susceptible

of accurate definition,⁸³ they are to be accepted in their ordinary sense.⁸⁴ These terms, when used relative to the acts of a servant, are not synonymous with "during the period covered by his employment,"⁸⁵ but meanwhile engaged in the service of the master or while about his business,⁸⁶ and nothing more.⁸⁷

Other expressions said to be equivalent to "scope of employment" are "line of duty,"⁸⁸ although it has also been stated that there is a clear distinction between the two expressions,⁸⁹ "course of service,"⁹⁰ "employer's service,"⁹¹ "furtherance of employer's business,"⁹² "prosecution of the master's

R Co, 51 SE 677, 72 SC 205, 110 Am SR 598

S.D.—Morman v Wagner, 262 NW 78, 63 S.D. 547

Tenn.—Cole v. Standard Oil Co of New Jersey, App, 197 SW 2d 13—Hoover Motor Express Co. v. Thomas, 85 SW 2d 821, 16 Tenn. App 664—Woody v. Ball, 5 Tenn. App 800.

Tex.—Guitar v. Wheeler, Civ App, 86 SW 2d 325, error dismissed—Horwitz v. Dickerson, Civ App, 25 SW 2d 966—Newton v. Rhoads Bros, Civ App, 11 SW 2d 377, reversed on other grounds, Com App, 24 SW 2d 378—Corpus Juris quoted in Gulf, C. & S. F. Ry Co v. Boss, Civ App, 285 SW 939, 940—Bower Auto Rent Co v. Young, Civ App, 274 SW 295—Mellody v. Missouri, K. & T. Ry Co of Texas, 124 S.W. 702, 58 Tex Civ App 461, error refused

Utah.—Carter v. Bessey, 93 P 2d 490, 97 Utah 427—Looney v. Furgis, 2 P 2d 112, 78 Utah 172—Looney v. Bingham Dairy, 282 P. 1030, 75 Utah 58, 73 A.L.R. 427.

Vt.—Ronan v. J. G. Turnbull Co., 181 A. 788, 99 Vt 280

Va.—Kavanaugh v. Wheeling, 7 SE 2d 125, 175 Va. 105—Western Union Telegraph Co. v. Phelps, 169 S. E. 574, 160 Va. 674—Thalhimer Bros. v. Shaw, 159 SE 87, 156 Va. 863.

Wash.—Van Court v. Lodge Cab Co, 89 P.2d 206, 198 Wash 530—Estes v. Brewster Cigar Co., 287 P. 36, 156 Wash. 465.

Wis.—Lunden v. City Car Co., 300 N. W. 925, 239 Wis 236—Mittleman v. Lindsay-McMillan Co., 232 NW. 527, 202 Wis 577—Johnson v. Holmen Canning Co., 211 NW. 157, 191 Wis 457.

89 C.J. p 1280 note 49

This rule is not affected by a statute which provides that, for damage done by any person in the employment and service of the master, the latter shall be liable, this language must be understood to mean such torts only as are committed by an

employee while engaged about the business of his employer—Columbus & R. R. Co v. Christian, 25 SE 411, 97 Ga. 56

79. Fla.—Reece v. Ebersbach, 9 So 2d 805, 153 Fla. 763, certiorari denied 63 SCt 855, 318 US 784, 87 LEd 1151, rehearing denied 63 SCt 1155, 319 US 781, 87 LEd 1725

Ind.—Polk Sanitary Milk Co v. Berry, 17 NE 2d 860, 106 Ind App 29 Md.—McCrorry Stores Corporation v. Satchell, 129 A. 348, 148 Md 279.

N.C.—Rogers v. Town of Black Mountain, 29 SE 2d 203, 224 NC 119—Hammond v. Ecker's of Asheville, 18 SE 2d 151, 220 NC 596—Robinson v. McAlhaney, 198 SE 647, 214 NC 180

39 C.J. p 1281 note 50

80. S.C.—Adams v. South Carolina Power Co., 21 SE 2d 17, 200 SC 438.

Tex.—Corpus Juris cited in Gulf, C. & S. F. Ry Co v. Cobb, Civ App, 45 SW 2d 323, 328

W.Va.—Porter v. South Penn Oil Co., 24 SE 2d 330, 125 W Va. 361

39 C.J. p 1282 note 52—15 C.J. p 679 note 89 [a] (1).

81. W.Va.—Porter v. South Penn Oil Co, supra.

Difference affecting master's liability

The mere fact that an act was committed in the course of employment is not sufficient to warrant a holding that it was committed within the scope of the employment—Comfort v. Monteleone, La App, 163 So. 670.

82. Miss.—Corpus Juris quoted in Loper v. Yazoo & M. V. R. Co., 145 So. 743, 745, 168 Miss. 79

Mo.—Nichols v. Chicago, R. I. & P. R. Co., App, 232 SW. 275

N.C.—Robertson v. Virginia Electric & Power Co., 168 SE 415, 204 NC 359, cause remanded 170 SE 139, 205 NC 111

83. N.Y.—Ford v. Grand Union Co., 270 N.Y.S. 162, 240 App Div. 294.

SC—Adams v. South Carolina Power Co., 21 SE 2d 17, 200 S.C. 438. 39 C.J. p 1282 note 59—15 C.J. p 679 note 89 [a] (2).

84. Mo.—Nichols v. Chicago, R. I. & P. R. Co., App, 232 S.W. 275.

85. Ark.—Hunter v. First State Bank of Morrilton, 28 SW 2d 712, 181 Ark 907

39 C.J. p 1282 note 61—15 C.J. p 679 note 89 [c]

86. Ark.—Mullins v. Ritchie Grocer Co., 35 S.W. 2d 1010, 183 Ark. 218 39 C.J. p 1282 note 62.

87. Minn.—Slater v. Advance Thresher Co., 107 N.W. 138, 97 Minn 205, 5 L.R.A.N.S. 598 Neb.—Neff v. Brandeis, 135 NW 232, 91 Neb 11, 39 L.R.A.N.S. 933.

88. Cal.—Hiroshima v. Pacific Gas & Electric Co., 63 P.2d 340, 18 Cal App 2d 24.

Mo.—Sturgis v. Kansas City Rys. Co., App, 228 SW 861

N.Y.—Issacs v. Third Ave. R. Co., 47 N.Y. 122, 7 Am R. 418

Tex.—Corpus Juris cited in Gulf, C. & S. F. Ry Co v. Cobb, Civ App, 45 SW 2d 323, 328

89. Mo.—La Bella v. Southwestern Bell Telephone Co., 24 S.W.2d 1072, 224 Mo App. 708

90. Cal.—Hiroshima v. Pacific Gas & Electric Co., 63 P.2d 340, 18 Cal. App 2d 24

Mo.—Ephland v. Missouri Pac. R. Co., 37 SW 820, 137 Mo 187, 59 Am SR 498, 35 L.R.A. 107, rehearing denied 38 SW 926, 137 Mo 187—Sturgis v. Kansas City Rys Co., App, 228 SW. 861.

91. Cal.—Hiroshima v. Pacific Gas & Electric Co., 63 P.2d 340, 18 Cal. App 2d 24

Md.—Adams v. Cost, 62 Md. 264, 50 Am.R. 211.

92. Mo.—Sturgis v. Kansas City Rys Co., App, 228 SW 861

R.I.—Faulton v. Keith, 49 A. 635, 23 R.I. 164, 91 Am S.R. 624, 54 L.R.A. 670.

business,"⁹³ "protection of the employer's property,"⁹⁴ and the like.⁹⁵

c. Nature and Basis of Liability

The liability of a master to a third person for injuries inflicted by a servant in the course of his employment has been stated to be derivative and secondary. The master's liability under the doctrine of respondeat superior has been said to rest on the ground that every man who prefers to manage his affairs through others remains bound so to manage them that third persons are not injured by any breach of legal duty on the part of such others while acting within the scope of their employment.

It has been stated that the liability of a master to a third person for injuries inflicted by a servant in the course of his employment and within the scope of his authority is derivative and secondary,⁹⁶ while that of the servant is primary,⁹⁷ and ordinarily, if there is no liability on the part of the servant, there is none on the part of the master.⁹⁸ On the

other hand, it has also been held that the right to sue the employer is not a dependent, but a primary, right,⁹⁹ and that the employer may be held liable even though no recovery against the servant can be had,¹ as where the servant has a personal immunity from suit.²

The master's liability under the doctrine of respondeat superior in part, at least, is founded on the power of control and superintendence over the servant which the master has the right to exercise,³ and it is the master's correlative obligation to see to it that the servant does not commit any torts in the course of his employment,⁴ although it has been stated that theoretically, as well as practically, the master's responsibility extends far beyond his actual or possible control over the conduct of the servant,⁵ and rests on the broader ground that every man who prefers to manage his affairs through oth-

93. Wis.—Cobb v. Simon, 97 N.W. 276, 119 Wis 597, 100 Am S.R. 909

94. Cal.—Hiroshima v. Pacific Gas & Electric Co., 63 P.2d 340, 18 Cal. App.2d 24

Mo.—Sturgis v. Kansas City Rys Co., App., 228 S.W. 861

95. Cal.—Hiroshima v. Pacific Gas & Electric Co., 63 P.2d 340, 18 Cal. App.2d 24.

Mo.—Sturgis v. Kansas City Rys Co., App., 228 S.W. 861.

96. Conn.—Stulginski v. Cizauskas, 5 A.2d 10, 125 Conn 293

Mo.—State ex rel Shell Petroleum Corporation v. Hostetter, 156 S.W.2d 673, 348 Mo 841

N.Y.—Pangburn v. Buick Motor Co., 105 N.E. 428, 211 N.Y. 228

Pa.—Corpus Juris quoted in Allen v. Posternock, 163 A. 336, 337, 107 Pa. Super 332

Meaning of statement

"The statement sometimes made that [the master's liability] is derivative and secondary . . . means this, and nothing more. That at times the fault of the actor will fix the quality of the act."—Schubert v. August Schubert Wagon Co., 164 N.E. 42, 43, 249 N.Y. 253, 64 A.L.R. 293

97. Mo.—State ex rel Shell Petroleum Corporation v. Hostetter, 156 S.W.2d 673, 348 Mo 841.

98. Ala.—Ashworth v. Alabama Great Southern R. Co., 99 So. 191, 211 Ala. 20.

Mo.—State ex rel Shell Petroleum Corporation v. Hostetter, 156 S.W.2d 673, 348 Mo 841—Brunk v. Hamilton-Brown Shoe Co., 66 S.W.2d 908, 334 Mo 517

Personal liability of servant to third persons generally see infra § 577.

Verdict acquitting servant as barring recovery against master see infra § 619.

Privileged act of servant

Master is not liable for acts of servant which the servant is privileged to do, although the master himself would not be so privileged—Rosenblum v. Rosenblum, 96 S.W.2d 1082, 231 Mo App 276

Liability and not culpability is the true basis for the respondeat superior doctrine—Riegger v. Bruton Brewing Co., 16 A.2d 99, 178 Md 518, 131 A.L.R. 307.

99. Ohio—Metropolitan Life Ins Co v. Huff, 194 N.E. 429, 48 Ohio App 412

Breach of duty to injured party

It has been stated that the master is not responsible for servant's acts unless there has been breach of duty which master owed injured party—U-Run-It Co v. Merryman, 153 S.E. 664, 154 Va. 467.

1. N.Y.—Schubert v. August Schubert Wagon Co., 164 N.E. 42, 249 N.Y. 253, 64 A.L.R. 293

Ohio—Metropolitan Life Ins. Co v. Huff, 194 N.E. 429, 48 Ohio App. 412

Vt.—Poulin v. Graham, 147 A. 698, 102 Vt. 307

2. Ala.—Mi-Lady Cleaners v. McDaniel, 179 So. 908, 285 Ala. 469, 116 A.L.R. 639

Mo.—Rosenblum v. Rosenblum, 96 S.W.2d 1082, 231 Mo App 276

Ohio—Metropolitan Life Ins Co v. Huff, 194 N.E. 429, 48 Ohio App 412

Vt.—Poulin v. Graham, 147 A. 698, 102 Vt. 307.

Liability of master for injury to servant's wife or child see supra § 569.

3. Ark.—Mullins v. Ritchie Grocer Co., 35 S.W.2d 1010, 183 Ark 218

Del.—McGrady v. National Starch Products, 28 A.2d 108, 2 Terry 892

D.C.—Phelps v. Boone, 67 F.2d 574, 63 App.D.C. 308, certiorari denied Boone v. Phelps, 54 S.Ct. 528, 291 U.S. 677, 78 L.Ed. 1065

Miss.—White's Lumber & Supply Co v. Collins, 191 So. 105, 186 Miss. 659, suggestion of error overruled 192 So. 312, 186 Miss. 659

Mo.—Bass v. Kansas City Journal Post Co., 148 S.W.2d 548, 347 Mo. 681—Riggs v. Higgins, 106 S.W.2d 1, 341 Mo 1

N.Y.—Irwin v. Klein, 3 N.E.2d 601, 271 N.Y. 477—Witaszek v. Drees, 280 N.Y.S. 592, 155 Misc. 838, reversed in part on other grounds Haykl v. Drees, 286 N.Y.S. 38, 247 App.Div. 90, motion granted 4 N.E.2d 745, 275 N.Y. 577, and Witaszek v. Drees, 4 N.E.2d 745, 272 N.Y. 576.

Pa.—Corpus Juris quoted in Allen v. Posternock, 163 A. 336, 337, 107 Pa. Super. 332

Tex.—Clark v. Lynch, Civ. App., 139 S.W.2d 294—Corpus Juris cited in Shell Petroleum Corporation v. Magnolia Pipe Line Co., Civ. App., 85 S.W.2d 829, 832, error dismissed. Va.—Griffith v. Electrolux Corporation, 11 S.E.2d 644, 176 Va. 378. 39 C.J. p. 1282 note 65

A master having no right or power to command or forbid the act or omission that resulted in injury by servant is not liable under doctrine of respondeat superior—Railway Express Agency v. Bonnell, 33 N.E.2d 980, rehearing denied 34 N.E.2d 927, 218 Ind. 607—Bryan v. Pommert, 37 N.E.2d 720, 110 Ind.App. 61

4. Miss.—White's Lumber & Supply Co v. Collins, 191 So. 105, 186 Miss. 659, suggestion of error overruled 192 So. 312, 186 Miss. 659.

5. Cal.—Carr v. Wm C. Crowell Co., 171 P.2d 5, 28 Cal.2d 652.

ers remains bound so to manage them that third persons are not injured by any breach of legal duty on the part of such others while acting within the scope of their employment,⁶ and is dictated by considerations of public policy and the necessity for holding a responsible person liable for the acts done by others in the prosecution of his business, as well as for placing on employers an incentive to hire only careful employees.⁷ It necessarily follows that the act of the servant within the scope of his employment must be considered the act of the master, for which he is liable to the same extent as though he had performed the act in person.⁸

The master's liability is not based on the master's fault,⁹ or on the act of the servant in the master's name¹⁰ or under the color of his employment,¹¹ and exists irrespective of contract.¹²

Conn—Chase v New Haven Waste Material Corporation, 150 A 107, 111 Conn 377, 88 A.L.R. 1497—Wolf v. Sulik, 106 A 443, 93 Conn 431, 4 A.L.R. 356

The fact that the employer has elected not to retain the means or power, as a practical matter, of superintendence over the performance of the work of the servant does not alter the rule as to the master's ultimate liability—White's Lumber & Supply Co v. Collins, 191 So. 105, 186 Miss 659, suggestion of error overruled 192 So 312, 186 Miss 659

8. Cal—Carr v Wm C. Crowell Co., 171 P 2d 5, 28 Cal 2d 652

Conn—Chase v New Haven Waste Material Corporation, 150 A 107, 111 Conn 377, 88 A.L.R. 1497

Or—Hantke v. Harris Ice Mach Works, 54 P 2d 293, 152 Or 564.

Pa—Corpus Juris quoted in Allen v Posternock, 183 A 336, 337, 107 Pa.Super. 332.

Tex—Corpus Juris cited in Shell Petroleum Corporation v Magnolia Pipe Line Co, Civ App, 85 S.W.2d 839, 832, error dismissed.

39 C.J. p 1282 note 66.

Doctrine of agency

Doctrine of master's liability for servant's wrongful acts rests on doctrine of agency.—American Sav Life Ins Co v Ripplinger, 60 S.W.2d 115, 249 Ky 8.

Maintenance of social interest in security

"Vicarious liability to third persons is imposed upon the master for his servant's torts because the servant is conducting the master's business, and because the social interest in the general security is best maintained by holding those who conduct enterprises in which others are employed to an absolute liability for what their servants do in the course of the enterprise."

d. Tests of Liability under Doctrine of Respondeat Superior

- (1) In general
- (2) Conduct within scope of authority or employment generally
- (3) Time of service
- (4) Area of service
- (5) Intent or motive of servant
- (6) Knowledge or assent of master
- (7) Acts unnecessary to performance of duty
- (8) Acts in excess or abuse of authority
- (9) Disobedience of orders or instructions

(1) In General

The test to determine the master's liability for the

Porter v. Grennan Bakeries, 16 N W 2d 906, 910, 219 Minn 14

Because the servant is engaged in the master's affairs, for the proper conduct of which the master is responsible, the master is held liable U.S.—Yellowway, Inc. v Hawkins, C C A Mo, 38 F 2d 731

Mo—Milazzo v Kansas City Gas Co., 180 S.W.2d 1—Haehl v Wabash R Co, 24 S.W. 737, 119 Mo. 325—Daniel v Phillips Petroleum Co, 73 S.W.2d 355, 220 Mo App 150—Gosselin v Yellow Cab Co, App., 29 S.W.2d 186

7. Ky—Johnson v Brewer, 98 S.W. 2d 889, 266 Ky 314

S.C.—Sams v Arthur, 133 S.E. 205, 135 S.C. 123.

8. Ala—Mi-Lady Cleaners v. McDaniel, 179 So 908, 235 Ala 469, 116 A.L.R. 639

Ark—Vaughan Hardware Co v. McAdoo, 118 S.W.2d 280, 196 Ark. 471

Mo—Blasina v. Albert Wenzlick Real Estate Co, 138 S.W.2d 721, 235 Mo App 526

N.H.—Morin v People's Wet Wash Laundry Co, 156 A 499, 85 N.H. 233

N.J.—Hudson v. Gas Consumers' Ass'n, 8 A 2d 337, 123 N.J. Law 252

N.C.—Robertson v Virginia Electric & Power Co, 168 S.E. 415, 204 N.C. 359, cause remanded 170 S.E. 139, 205 N.C. 111.

Tex—Le Sage v Pryor, 154 S.W.2d 446, 137 Tex 455—Corpus Juris cited in Shell Petroleum Corporation v. Magnolia Pipe Line Co, Civ App, 85 S.W.2d 829, 832, error dismissed

Vt—Jewett v. Pudlo, 172 A 423, 106 Vt. 249, followed in 172 A. 423, 106 Vt. 253.

39 C.J. p 1282 note 67.

Master's order

Every act done by servant in course of his duty is regarded as

done by his master's orders and hence same as though it were master's own act—Knapp v Standard Oil Co of California, 68 P 2d 1052, 156 Or 564

9. Minn—Porter v Grennan Bakeries, 16 N.W.2d 906, 219 Minn 14

10. Mo—Milazzo v. Kansas City Gas Co, 180 S.W.2d 1—Haehl v Wabash R Co, 24 S.W. 737, 119 Mo 325—Daniel v. Phillips Petroleum Co, 73 S.W.2d 355, 220 Mo App 150—Gosselin v Yellow Cab Co, App, 29 S.W.2d 186.

11. Mo—Milazzo v Kansas City Gas Co, 180 S.W.2d 1—Haehl v Wabash R Co, 24 S.W. 737, 119 Mo 325—Daniel v Phillips Petroleum Co, 73 S.W.2d 355, 220 Mo App 150—Gosselin v Yellow Cab Co, App, 29 S.W.2d 186

12. Utah—Carter v Bessey, 93 P 2d 490, 97 Utah 427.

Master cannot by contract with servant exempt himself from liability to third persons for injuries sustained through servant's negligence.—Hartley v Red Ball Transit Co, 176 N.E. 751, 344 Ill 534

Terms of contract of employment do not determine the master's liability, since, if that were the case, care in phraseology would enable the master to avoid all liability—Milton v. Missouri Pacific R Co, 91 S.W. 949, 193 Mo 46—Ledbetter v St Louis Southwestern Ry. Co., Mo App, 293 S.W. 791

The master may limit the scope of action of his servant, however, giving to him only such powers to do such acts as he may deem appropriate or proper—Tarver v J. W. Sanders Cotton Mill, 192 So. 17, 187 Miss 111.

act of his servant is whether the act was within the scope of his employment and whether the injury complained of was committed by authority of the master.

The primary test to determine the master's liability for the act of his servant under the doctrine of

respondent superior is whether the act was within the scope of his employment.¹³ The test is also whether the injury complained of was committed by the authority of the master¹⁴ and whether it is just

13. *U.S.*—Waggaman v General Finance Co of Philadelphia, CCA Pa., 116 F 2d 254—Angco v Standard Oil Co of California, CCA Hawaii, 86 F 2d 929—Saucer v Willys-Overland, D C Fla., 49 F 2d 385—Price v U S, D C La., 11 F 2d 283

Ala.—Corpus Juris cited in Birmingham News Co v Browne, 153 So 889, 891, 228 Ala 414

Ark.—Lindley v McKay, 146 SW 2d 545, 201 Ark 675—Vaughan Hardware Co v McAdoo, 118 SW 2d 280, 186 Ark 471—Mullins v Ritchie Grocer Co, 35 SW 2d 1010, 183 Ark 218—Hunter v First State Bank of Morrilton, 28 SW 2d 712, 181 Ark 907

Cal.—McChristian v Popkin, 171 P 2d 85, 75 Cal App 3d 249—Haworth v Elliott, 153 P 2d 804, 67 Cal App 2d 77—Tighe v Ad Cheng, 112 P 2d 20, 44 Cal App 2d 164—Yates v Taft Lodge No 1527, BPOE of U S of America, 44 P 2d 409, 6 Cal App 2d 389—Wilson v Droegge, 294 P 726, 110 Cal App 578—Barty v Collins, 292 P 979, 109 Cal App 94—Preo v Roed, 278 P. 928, 99 Cal App 372

Ga.—Frazier v Southern Ry Co, 37 SE 2d 774, 200 Ga 590, conformed to 38 SE 2d 183—Stanger v Mitchell, 28 SE 2d 885, 70 Ga App 563—Nichols v G L Hight Motor Co, 15 SE 2d 805, 65 Ga App 397—Jump v Anderson, 197 SE 644, 58 Ga App 126—McGhee v Kingman & Everett, 176 SE 55, 49 Ga App 767—Gomez v Great Atlantic & Pacific Tea Co, 172 SE 750, 48 Ga App 398—Atlanta Hub Co v Jones, 171 SE 470, 47 Ga App 778—Selman v Wallace, 165 SE 851, 45 Ga App 688

Idaho.—Scrivner v Boise Payette Lumber Co, 268 P. 19, 46 Idaho 834

Ill.—Palmer v Miller, 43 NE 2d 973, 380 Ill 256—Darnier v Colby, 31 NE 2d 950, 375 Ill 558, mandate conformed to 35 NE 2d 952, 311 Ill App 352—Becker v Brummel, 48 NE 2d 419, 319 Ill App 499—Trust v Chicago Motor Club, 376 Ill App 289—Black v Texas Co, 247 Ill App 301

Ind.—Mock v Polley, 66 NE 2d 78, 116 Ind App 580—Annis v Postal Telegraph Co., 52 NE 2d 373, 114 Ind App 543—Bryan v Pommert, 37 NE 2d 720, 110 Ind App 61

Kan.—Ruff v Farley Machine Works Co, 99 P 2d 789, 151 Kan 349

Ky.—Wood v Southeastern Greyhound Lines, 194 SW 2d 81, 302 Ky 110—John v Lococo, 76 SW 2d

897, 256 Ky 607—General Refractories Co v Mozier, 30 SW 2d 952, 235 Ky 252

La.—Comfort v Monteleone, App, 163 So 670

Md.—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378—Eyerly v Baker, 178 A 691, 168 Md 599

Mass.—Fancullo v B G & S Theatre Corporation, 8 NE 2d 174, 297 Mass 44

Miss.—Corpus Juris quoted in Brown v Bond, 1 So 2d 794, 798, 190 Miss 774—Natchez, C & M R Co v Boyd, 107 So 1, 141 Miss 593

Mo.—Oganoso v Mellow, 301 SW 2d 365—Corpus Juris cited in Milazzo v Kansas City Gas Co, 180 SW 2d 1, 4—Simmons v Kroger Grocery & Baking Co, 104 SW 2d 357, 340 Mo 1118—Young v Sinclair Refining Co, App, 92 SW 2d 995—Chiles v Metropolitan Life Ins Co, 91 SW 2d 164, 230 Mo App 350—Green v Western Union Telegraph Co, App, 58 SW 2d 773—Gray v Phillips Bldg Co, App, 51 SW 2d 181—La Bella v Southwestern Bell Telephone Co, 24 SW 2d 1072, 224 Mo App 708

Mont.—Harrington v H D Lee Mercantile Co, 33 P 2d 553, 97 Mont 40

Neb.—La Fleur v Poesch, 252 NW 902, 126 Neb 263

N.J.—Muckin v Hubbs, 26 A 2d 286, 128 NJ Law 395—Blackman v Atlantic City & S R Co, 19 A 2d 807, 126 NJ Law 458—Smith v Bosco, 19 A 2d 637, 126 NJ Law 453

N.Y.—Ford v Grand Union Co, 197 NE 266, 268 NY 243, reargument denied 198 NE 546, 268 NY 664—Ford v Grand Union Co, 270 NY S 162, 240 App Div 294—Clark v Harnischfeger Sales Corporation, 264 NY S. 878, 238 App Div 493—Curran v Buckpitt, 233 NY S. 249, 225 App Div 380

N.C.—Hammond v Eckerd's of Asheville, 18 SE 2d 151, 220 NC 596—Smith v Moore, 16 SE 2d 701, 220 NC 165—Riddle v Whisnant, 16 SE 2d 698, 220 NC 131—Robinson v McAlhane, 198 SE 647, 214 NC 130—Snow v De Butts, 193 SE 224, 212 NC 120—Dickerson v Atlantic Refining Co, 159 SE 446, 201 NC 90—Grier v Grier, 135 S. E 852, 192 NC 760

Ohio.—Miller v Metropolitan Life Ins Co, 16 NE 2d 447, 184 Ohio St. 289—House v Stark Iron & Metal Co, App, 46 NE 2d 419—Metropolitan Concrete Co v Vitale, 188 NE 10, 46 Ohio App. 140

Okl.—Massman Const Co v Chisholm, 145 P 2d 211, 193 Okl 477—Massman Const Co v Chisholm, 145 P 2d 207, 193 Okl 473—Claxton v Page, 124 P 2d 977, 190 Okl. 423—Small v Shull, 124 P 2d 381, 190 Okl 418—Fairmont Creamery Co. of Lawton v Carsten, 55 P 2d 757, 175 Okl 592—Corpus Juris quoted in Wilson & Co v Shaw, 10 P.2d 448, 449, 157 Okl 34

Or.—Larkins v Utah Copper Co., 127 P 2d 354, 169 Or 499—Fogelson v Jarman, 121 P 2d 924, 168 Or 177

Pa.—Zavodnick v A Rose & Son, 146 A 455, 297 Pa 86—Corpus Juris cited in Milwaukee Locomotive Mfg Co v Point Marion Coal Co, 144 A 100, 102, 294 Pa 238

R.I.—Haining v Turner Centre System, 149 A 376, 50 RI 481

S.C.—Hyde v Southern Grocery Stores, 15 SE 2d 353, 197 SC 263.

S.D.—Norman v Wagner, 262 NW. 78, 63 SD 547.

Tenn.—National Life & Accident Ins. Co v Morrison, 162 SW 2d 501, 179 Tenn 23—Hoover Motor Express Company v Thomas, 65 S. W 2d 621, 16 Tenn. App 664—Woody v Ball, 5 Tenn App 300

Tex.—Broadus v Long, 138 SW 2d 1057, 135 Tex 353—Texas Power & Light Co v Denson, 81 SW 2d 36, 125 Tex 383—National Life & Accident Ins Co v. Ringo, Civ. App, 137 SW 2d 828, error refused—Central Motor Co v Gallo, Civ. App, 94 SW 2d 821—McCoy v Beach-Wittman Co, Civ App, 22 SW 2d 714, error dismissed—Newton v Rhoads Bros, Civ App, 11 SW 2d 377, reversed on other grounds Com App, 24 SW 2d 378.

Vt.—Ronan v J G Turnbull Co., 131 A 788, 99 Vt. 280

Va.—Western Union Telegraph Co v. Phelps, 169 SE 574, 160 Va 874

Wash.—Corpus Juris quoted in Carlson v P F Collier & Son Corporation, 67 P.2d 842, 848, 190 Wash. 301.

W.Va.—Corpus Juris cited in Cochran v Michaels, 157 SE. 173, 175, 110 W.Va. 127.

89 C.J. p 1282 note 69.

14. *Ala.*—Alabama Fuel & Iron Co. v Powaski, 166 So 782, 232 Ala. 66

Ky.—Leachman v. Belknap Hardware & Mfg. Co, 84 SW 2d 46, 260

that the loss resulting from the servant's acts should be considered one of the normal risks of the business in which the servant is employed, which that business should bear.¹⁵ The test is not the character or quality of the act,¹⁶ or the rank of the employee,¹⁷ or whether the act was done during the existence of the servant's employment,¹⁸ nor is it necessarily predicated on the instrumentality used¹⁹ or by whom it is furnished.²⁰ The master will be liable for the

acts of the servant within the scope of the employment whether the acts are expressly or impliedly authorized²¹ and whether his authority is real or merely apparent.²² Ordinarily, however, where there is nothing to induce the third person to alter his position in reliance on the servant's authority, there is no basis for holding the master liable on the ground that the servant's act is within the scope of his apparent authority.²³

Ky 123—John v Lococo, 76 SW 2d 897, 256 Ky 607—Slusher v Hubble, 72 SW 2d 39, 254 Ky 595—Corbin Fruit Co v Decker, 68 SW 2d 434, 252 Ky 766—American Sav. Life Ins Co v Riplinger, 60 SW 2d 115, 249 Ky 8—Reynolds' Adm'r v Black Mountain Corporation, 42 SW 2d 916, 240 Ky. 673 Md—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

Mass—Bruce v. Hanks, 178 NE 728, 277 Mass 268—Charmatoro v Adams, 176 NE 610, 275 Mass 521, 75 A L R 1171

Miss—Tarver v J W Sanders Cotton Mill, 192 So 17, 187 Miss 111 Neb—La Fleur v Poesch, 252 NW 902, 126 Neb 263

NJ—Blackman v Atlantic City & S R. Co., 19 A 2d 807, 126 NJ Law 458—Smith v Bosco, 19 A 2d 637, 126 NJ Law 452—Pederson v Edward Shoe Corporation, 142 A 13, 104 NJ Law 566

N.C.—Hammond v Eckerd's of Asheville, 18 SE 2d 151, 220 NC 596—Riddle v Whisanant, 16 SE 2d 698, 220 NC 131—Dickerson v. Atlantic Refining Co., 159 SE 446, 201 NC 90—Grier v Grier, 135 SE 852, 192 NC 760

Ohio—Miller v Metropolitan Life Ins. Co., 16 NE 2d 447, 134 Ohio St 289

Tenn—Hoover Motor Express Company v Thomas, 65 SW 2d 621, 16 Tenn App 664.

Tex—Anderson-Berney Bldg Co v Lowry, Civ App, 143 S.W. 2d 401, reversed on other grounds Lowry v Anderson-Berney Bldg Co., 161 SW 2d 459, 139 Tex 29

Wash—Van Court v Lodge Cab Co., 89 P 2d 206, 198 Wash 530—Poundstone v. Whitney, 65 P 2d 1261, 189 Wash 494 39 C.J. p 1283 note 72

15. Miss—Hahn v Owens, 168 So. 632, 176 Miss 396—Laper v Yawoo & M V R. Co., 145 So. 742, 166 Miss 79

16. N.C.—Snow v De Butts, 193 SE 224, 212 NC. 120 39 C.J. p 1283 note 70

Nature of act with relation to duty
In determining whether employee was acting within scope of employment when he committed a tort, test

was nature of tortious act and its relation or nonrelation to that which the employee was employed to do—Rappaport v Rosen Film Delivery System, 18 A 2d 362, 127 Conn 524

17. NY—De Ryas v New York Cent R Co., 291 NYS 379, 249 App Div. 644, affirmed in part and reversed in part on other grounds 9 NE 2d 788, 275 N.Y. 85

The size of the servant's job does not determine the employer's liability—Lamm v Charles Stores Co., 159 SE 444, 201 NC 134, 77 A L R 933

18. US—Brallas v Shepard S S Co., CCAN Y., 153 F 2d 849, certiorari denied 68 S Ct 970, 327 U S 807, 90 L Ed 1082

Ark—C J Horner Co v Holland, 180 SW 2d 524, 207 Ark 345—Lindley v McKay, 146 SW 2d 545, 201 Ark 675—Carter Truck Line v Gibson, 115 SW 2d 270, 195 Ark 994—Hunter v First State Bank of Morrilton, 28 SW 2d 712, 181 Ark 907

Conn—Shiembob v Ringling, 160 A 429, 115 Conn 62

Ga—Georgia Power Co v Shipp, 24 SE 2d 764, 195 Ga 446, conformed to 25 SE 2d 524, 69 Ga App 356—Frazier v Southern Ry Co., 35 SE 2d 525, 73 Ga App 58, reversed on other grounds 37 SE 2d 774, 200 Ga 590, conformed to 38 SE 2d 183, 73 Ga App 815—Nichols v G L Hight Motor Co., 15 SE 2d 805, 65 Ga App 397—Jump v Anderson, 197 SE 644, 58 Ga App 126

La—Comfort v Monteleone, App., 163 So 670.

Mo—Chiles v Metropolitan Life Ins Co., 91 SW 2d 164, 230 Mo App 350—Gray v Phillips Bldg Co, App., 51 SW 2d 181

N.C.—Hammond v Eckerd's of Asheville, 18 SE 2d 151, 220 NC 596—Riddle v Whisanant, 16 SE 2d 698, 220 NC 131

Ohio—Homlar v Great Lakes Towing Co., 57 NE 2d 792, 74 Ohio App 110—Biddle v New York Cent R Co., 182 NE 601, 43 Ohio App 6.

Tenn—Hoover Motor Express Co v Thomas, 65 SW 2d 621, 16 Tenn App 664

Wis—Linden v City Car Co., 300 N W 925, 239 Wis 236 39 C.J. p 1283 note 71

19. Ind—Annis v Postal Telegraph Co., 52 NE 2d 373, 114 Ind App 543

20. Ind—Annis v Postal Telegraph Co., supra

21. US—The H S, Inc., No 72, C CAN J., 130 F 2d 341

Ala—Alabama Fuel & Iron Co v Powaski, 166 So 782, 232 Ala 66

Cal—Jameson v Gavett, 71 P 2d 937, 22 Cal App 2d 646

Ky—John v Lococo, 76 SW 2d 897, 256 Ky 607—Warfield Natural Gas Co v Ward, 72 SW 2d 464, 254 Ky 754—Slusher v Hubble, 72 SW 2d 39, 254 Ky 595—Corbin Fruit Co v Decker, 68 SW 2d 434, 252 Ky 766—Reynolds' Adm'r v Black Mountain Corporation, 42 SW 2d 916, 240 Ky 673

Wash—Poundstone v Whitney, 65 P. 2d 1261, 189 Wash 494

39 C.J. p 1283 notes 72, 73

22. Mass—Denny v Riverbank Court Hotel Co., 184 NE 452, 282 Mass 176

Mich—Anderson v Schust Co., 247 NW 167, 262 Mich 286

Miss—Tarver v J W Sanders Cotton Mill, 192 So 17, 187 Miss 111.

N.J.—Pederson v Edward Shoe Corporation, 142 A 13, 104 NJ Law 566

Pa—Clark v Glosser Bros. Department Stores, 39 A 2d 732, 156 Pa Super 193—Christman v Segal, 17 A 2d 676, 143 Pa Super 87

Appearances less important than in agency

In determining liability of master for acts of servant, appearances are of less importance than in case of principal-agent relationship, since generally third person injured by acts of servant is not misled by master's misrepresentations of servant's authority—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

23. Minn—Schlick v Berg, 286 NW. 356, 205 Minn 465

Master not estopped to dispute servant's authority—Goble v American R Express Co., 115 SE 900, 124 S C 19.

(2) Conduct within Scope of Authority or Employment Generally

While the determination of what conduct is within the scope of a servant's employment or authority is necessarily largely dependent on the facts and circumstances of the particular case, generally whatever is done by the employee in virtue of his employment and in furtherance of its ends is deemed to be within the scope of his employment.

The determination of what conduct of a servant is within the scope of his employment or authority is necessarily largely dependent on the facts and circumstances involved in the particular case in which the question arises,²⁴ and no general rule can be formulated which will determine in each case whether the servant was acting within the scope of

his employment.²⁵ Nevertheless, it may be laid down as a general rule that whatever is done by the employee in virtue of his employment and in furtherance of its ends is deemed by the law to be an act done within the scope of his employment,²⁶ and that, in determining whether the servant's conduct was within the scope of his employment, it is proper to inquire whether he was at the time engaged in serving his master.²⁷

It is clear that conduct which the master has specifically directed is within the scope of the servant's employment,²⁸ but it is not essential that the conduct be specially authorized by the master.²⁹ It is enough that it is impliedly directed or authorized by

24. *US—Hubbard v Lock Joint Pipe Co*, D.C. Mo., 70 F.Supp. 589
Cal—O'Shea v Pacific Gas & Electric Co, 62 P.2d 1066, 18 Cal.App.2d 320

Conn—Branchini v Florio, 175 A. 670, 119 Conn. 212—*Garriepy v Ballou & Nagle*, 157 A. 535, 114 Conn. 46

Ind—Vincennes Packing Corporation v Trosper, 28 N.E.2d 624, 108 Ind. App. 7—*Estes v Anderson Oil Co*, 176 N.E. 560, 93 Ind.App. 365

Mo—Mason v. Down Town Garage Co, 52 S.W.2d 409, 227 Mo.App. 297

Neb—Dafos v. Grantski, 9 N.W.2d 488, 143 Neb. 344—*Vanderlippe v. Midwest Studios*, 289 N.W. 841, 137 Neb. 289

N.Y.—Bindert v Elmhurst Taxi Corporation, 6 N.Y.S.2d 666, 168 Misc. 892

Pa—Orr v William J Burns International Detective Agency, 12 A.2d 25, 337 Pa. 587

SC—Adams v South Carolina Power Co, 21 S.E.2d 17, 200 S.C. 438—*Hancock v Aiken Mills*, 185 S.E. 188, 180 S.C. 93

Tex—Corpus Juris cited in Guitart v. Wheeler, Civ.App., 36 S.W.2d 325, 328, error dismissed
 39 C.J. p. 1283 note 77.

Determination as question of law or fact see *infra* § 617

Whether employee has implied or apparent authority to act in a particular transaction depends on the inference to be drawn from a variety of circumstances relating to the conduct of the employee, and on whether the circumstances are such as to warrant persons dealing with him in the exercise of reasonable prudence and discretion to believe he has authority to represent the employer—*Lord v. Lowell Institution for Savings*, 23 N.H.2d 101, 304 Mass. 212

25. *Cal—Cragun v. Krossoff*, 114 P.2d 431, 45 Cal.App.2d 480
Mo—La Bella v. Southwestern Bell

Telephone Co, 24 S.W.2d 1072, 224 Mo.App. 708

Pa—Orr v William J Burns International Detective Agency, 12 A.2d 25, 337 Pa. 587

Tex—Corpus Juris cited in Guitart v. Wheeler, Civ.App., 36 S.W.2d 325, 328

38 C.J. p. 1283 note 76

26. *US—In re Southern Pac. Co*, D.C.N.Y., 30 F.2d 723, affirmed C.C.A., 80 F.2d 725

Ala—Alabama Fuel & Iron Co v Powaski, 166 So. 782, 232 Ala. 66—*Gulf Refining Co v McNeel*, 153 So. 231, 228 Ala. 302—*Rochester-Hall Drug Co v Bowden*, 118 So. 674, 218 Ala. 242

Cal—Dohnar v Pedone, 146 P.2d 237, 63 Cal.App.2d 169—*Stansell v Safeway Stores*, 113 P.2d 264, 44 Cal.App.2d 822—*Stewart v Reutler*, 89 P.2d 402, 32 Cal.App.2d 195

—*Jameson v Gavett*, 71 P.2d 937, 22 Cal.App.2d 646

Mo—Porter v. Thompson, 208 S.W.2d 509—*Hinkle v Chicago, B. & Q. R. Co*, 199 S.W. 227

NC—Crech v National Linen Service Corporation, 14 S.E.2d 408, 219 N.C. 457—*Parrott v Kantor*, 6 S.E.2d 40, 216 N.C. 584—*Robertson v Virginia Electric & Power Co*, 168 S.E. 415, 204 N.C. 359, cause remanded 170 S.E. 139, 205 N.C. 111—*Dickerson v Atlantic Refining Co*, 159 S.E. 446, 201 N.C. 90

Wash—Brazier v Betts, 113 P.2d 84, 8 Wash.2d 549—*Rice v Gari*, 98 P.2d 301, 2 Wash.2d 403

Relation which act bears to employment determines whether an act by a servant is within the scope of his employment—*Porter v. South Penn Oil Co*, 24 S.E.2d 330, 125 W.Va. 361—*Cochran v Michaels*, 157 S.E. 173, 110 W.Va. 127

27. *Ga—Georgia Power Co v. Shupp*, 24 S.E.2d 764, 195 Ga. 446, conformed to 25 S.E.2d 524, 69 Ga. App. 356—*Frazier v Southern Ry. Co*, 35 S.E.2d 525, 73 Ga.App. 58, reversed on other grounds 37 S.E.

2d 774, 200 Ga. 590, conformed to 38 S.E.2d 183, 73 Ga.App. 815—*Jordan v Thompson*, 193 S.E. 302, 58 Ga.App. 199

Mont—Ellinghouse v Ajax Livestock Co, 152 P. 481, 51 Mont. 275, L.R.A. 1916D 886

NC—Smith v Duke University, 14 S.E.2d 643, 219 N.C. 628

Ohio—Homlar v Great Lakes Towing Co, 57 N.E.2d 792, 74 Ohio App. 110

Va—Western Union Telegraph Co v Phelps, 169 S.E. 574, 160 Va. 674

Direct or indirect benefit

If act was for benefit of employer, either directly or incidentally, act was within scope of servant's employment

Cal—Curcio v Nelson Display Co, 64 P.2d 1153, 19 Cal.App.2d 46

SD—Morman v Wagner, 262 N.W. 78, 63 S.D. 547.

Scope of general employment is not determinative, but test of master's liability for injuries caused by servant is whether he was on employer's business at time—*Meldram v Curtis & Bro*, D.C.Pa., 29 F.2d 582

An act is done in the "prosecution of the employer's business," within the meaning of a statute imposing liability on the employer for acts so committed, if employee at time of commission of wrongful act is engaged in serving his employer—*Andrews v Norvell*, 15 S.E.2d 808, 65 Ga.App. 241

28. *Pa—Corpus Juris quoted in Kelly v. Yount*, 12 A.2d 579, 581, 338 Pa. 190

Tex—Acme Laundry v Weinstein, Civ.App., 182 S.W. 408

Wash—Poundstone v. Whitney, 65 P.2d 1261, 189 Wash. 494.

W.Va—Porter v South Penn Oil Co, 24 S.E.2d 330, 125 W.Va. 361—*Cochran v Michaels*, 157 S.E. 173, 110 W.Va. 127

29. *Ark—Federal Compress & Warehouse Co v. Jones*, 21 S.W.2d 857, 180 Ark. 476.

the master,³⁰ or is of the same general nature as that authorized,³¹ or is incidental to the conduct authorized.³² In determining whether or not a servant's conduct, although not specifically directed or authorized, is impliedly authorized or incidental

to the conduct authorized, the surrounding facts and circumstances, together with the nature of the employment and the conduct of the employee, will be considered.³³ A servant has implied authority to do what is usual, customary, and necessary to fulfill

Cal.—McChristian v Popkin, 171 P 2d 85, 75 Cal App 2d 249—Jameson v Gavett, 71 P 2d 937, 22 Cal App 2d 646—Corpus Juris cited in O'Shea v Pacific Gas & Electric Co., 63 P 2d 1066, 1069, 18 Cal App 2d 32

Conn.—Kuharski v Somers Motor Lines, 43 A 2d 777, 132 Conn 269

Ga.—Atlanta Hub Co v Jones, 171 SE 470, 47 Ga App 778

Ind.—Mock v Polley, 66 NE 2d 78, 116 Ind App 580

Ky.—Ben Humpich Sand Co v Moore, 69 SW 2d 986, 253 Ky 667

Md.—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

Mo.—Bass v Kansas City Journal Post Co, 148 SW 2d 548, 347 Mo 681—Philbert v Benjamin Ansehl Co, 119 SW 2d 797, 342 Mo. 1239—Salmons v Dun & Bradstreet, App, 153 SW 2d 556—Bouillon v. Laclede Gas Light Co, 129 SW 401, 148 Mo App 462.

Mont.—Kornec v. Mike Horse Mining & Milling Co, 180 P 2d 252

N.C.—West v F W Woolworth Co, 1 SE 2d 546, 215 NC 211

Pa.—Corpus Juris quoted in Kelly v Yount, 12 A 2d 579, 581, 338 Pa 190.

30. Me.—Stevens v. Frost, 32 A 2d 164, 140 Me 1

SC.—Hancock v Aiken Mills, 185 SE 188, 180 SC 93

Wash.—Poundstone v Whitney, 65 P 2d 1361, 189 Wash 494

W Va.—Porter v South Penn Oil Co, 24 SE 2d 330, 125 W Va. 361—Cochran v Michaels, 157 SE 173, 110 W Va 127

Existence of express or implied authority as test of master's liability see supra subdivision d (1) of this section

31. US.—Hubbard v. Lock Joint Pipe Co, DCMo, 70 F Supp 589

Cal.—Stewart v Reutler, 89 P 2d 402, 32 Cal App 2d 195—Jameson v. Gavett, 71 P 2d 937, 22 Cal App 2d 646

Ind.—Vincennes Packing Corporation v Trosper, 23 NE 2d 624, 108 Ind App 7

Ky.—Wood v Southeastern Greyhound Lines, 194 SW 2d 81, 302 Ky 110—Fournier v. Churchill Downs-Latonia, 166 SW 2d 38, 292 Ky. 215

Md.—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

Miss.—Hahn v Owens, 168 So 622, 176 Miss 296.

Or.—Jasper v Wells, 144 P 2d 505, 173 Or 114

Tenn.—Terrett v Wray, 105 SW 2d 93, 171 Tenn 448—Sandlin v Komisar, 93 SW 2d 645, 19 Tenn App 625

32. Ark.—White v Sims, 201 SW 2d 21

Cal.—Tarasco v Moyers, 185 P 2d 86—Jameson v. Gavett, 71 P 2d 937, 22 Cal App 2d 646—Curcio v Nelson Display Co, 64 P 2d 1153, 19 Cal App 2d 46

Ind.—Vincennes Packing Corporation v Trosper, 23 NE 2d 624, 108 Ind App 7

Ky.—Wood v Southeastern Greyhound Lines, 194 SW 2d 81, 302 Ky 110

Md.—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

Miss.—Sears, Roebuck & Co v Creekmore, 23 So 2d 250—Corpus Juris cited in Scott-Burr Stores Corporation v Edgar, 177 So 766, 768, 181 Miss 486—Southern Bell Telephone & Telegraph Co v Quick, 149 So 107, 167 Miss 438—Loper v Yazoo & M V R Co, 145 So 743, 166 Miss. 79

Mo.—Daugherty v Spuck Iron & Foundry Co, App, 175 SW 2d 45—Salmons v Dun & Bradstreet, App, 153 SW 2d 556, modified on other grounds 162 SW 2d 245, 349 Mo 498, 141 ALR 674

Neb.—Rich v Dugan, 280 NW 225, 135 Neb 63.

Nev.—Corpus Juris cited in Nevada Transfer & Warehouse Co v Peterson, 99 P 2d 638, 637, 60 Nev 87

NY.—Delisa v Arthur F Schmidt, Inc, 34 NE 2d 336, 285 NY. 314, appeal denied 22 NYS 2d 927, 260 App Div. 807

NC.—Riddle v. Whisnant, 16 SE 2d 698, 220 NC 131—Lamm v Charles Stores Co, 159 SE 444, 201 NC 134, 77 ALR 923—Grier v Grier, 185 SE 852, 192 NC 760.

Okl.—Brayton v. Carter, 163 P 2d 960, 196 Okl 125—Retail Merchants Ass'n and Associated Retail Credit Men of Tulsa v. Peterman, 99 P 2d 130, 186 Okl 560—Russell-Locke Super-Service v Vaughn, 40 P 2d 1090, 170 Okl 377—Ada-Konawa Bridge Co v. Cargo, 21 P 2d 1, 163 Okl. 122

Or.—Jasper v Wells, 144 P 2d 505, 173 Or. 114.

Pa.—Corpus Juris quoted in Kelly v Yount, 12 A 2d 579, 581, 338 Pa 190

Tenn.—Terrett v Wray, 105 SW 2d

93, 171 Tenn 448—Sandlin v Komisar, 93 SW 2d 645, 19 Tenn App 625

Tex.—Baker Hotel of Dallas v Rogers, Civ App, 157 SW 2d 940, error refused 160 SW 2d 522, 138 Tex. 398

Wash.—Poundstone v Whitney, 65 P 2d 1361, 189 Wash 494

W Va.—Porter v South Penn Oil Co, 24 SE 2d 330, 125 W Va. 361—O'Dell v Universal Credit Co, 191 SE 568, 118 W Va. 678—Cochran v. Michaels, 157 SE 173, 110 W Va 127

39 CJ p 1283 note 79—15 CJ p 679 note 89

Servant need not be engaged in direct performance of thing which is ultimate object of employment in order to hold the master liable, since also included within its scope are those acts which incidentally or indirectly contribute to the service—May v Farrell, 271 P. 789, 94 Cal App 703

An act is incidental to an authorized act, although different, if subordinate and pertinent thereto, provided it is something within ultimate objective of master—Loper v Yazoo & M V R Co, 145 So 743, 166 Miss 79

33. Neb.—Rich v. Dugan, 280 NW 225, 135 Neb 63

Specific matters considered

Court must consider whether act is commonly done by such servant, whether it is outside the master's enterprise, and, if not, whether it has been entrusted to any servant, whether master has reason to expect act will be done, whether instrumentality used to accomplish act is furnished by master, whether act is criminal, time, place, and purpose of act, previous relation between master and servant, extent to which business is apportioned between servants, similarity of act done to that authorized, and extent of departure from normal method of accomplishing an authorized result.—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md. 378.

The implied powers of one acting as general manager are particularly broad with respect to question whether tort of such employee is within scope of employment.

Conn.—Ackerson v Erwin M. Jennings Co, 140 A 760, 107 Conn 393, 56 ALR 1127

Tex.—Wilhoit v Iverson Tool Co, Civ App, 119 SW 2d 709, error dismissed by agreement.

the duty intrusted to him by the master,³⁴ and accordingly an act is within the scope of a servant's employment where it is reasonably necessary or appropriate to accomplish the purpose of his employment,³⁵ and intended for that purpose,³⁶ although in excess of the powers actually conferred on the servant by the master.³⁷

A servant's failure to perform his duty in the exact manner contemplated by the master does not relieve the latter from liability for the servant's acts.³⁸ So also the act may be within the scope of the employment, although it is not necessary for the proper performance of the servant's duty to his master,³⁹ or although it is not in the interest of the master,

or in furtherance of his business,⁴⁰ or although it even may be an obstruction and hindrance to the master's business⁴¹ or is prohibited by statute.⁴² On the other hand, the fact that the act in question was advantageous to, or convenient for, the master, or even effectual in transacting the business in which the master was engaged, is not in itself sufficient to bring the act within the servant's scope of employment.⁴³ A fortiori, an act will not necessarily be considered as within the scope of the servant's employment merely because the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master,⁴⁴ or merely because the act was committed during the

34. Me—Stevens v Frost, 32 A 2d 184, 140 Me 1

Md—McCrary Stores Corporation v Satchell, 129 A 348, 148 Md 279

Mo—Daugherty v Spuck Iron & Foundry Co, App, 175 S W 2d 45—Salmons v Dun & Bradstreet, App, 153 S W 2d 556, modified on other grounds 162 S W 2d 245, 349 Mo 498, 141 A L R 674

Usual and suitable means

Where master directs servant to accomplish result and does not specify means to be used, servant is authorized to employ any usual or suitable means

Md—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378.

Neb—Rankin v W U Tel Co., 28 N W 2d 676, 147 Neb 411

35. Cal—Bleser v Thomas Haverly Co, 88 P 2d 873, 3 Cal App 2d 199
Miss—Sears, Roebuck & Co. v Creekmore, 23 So 2d 250

Mo—Mason v Down Town Garage Co, 53 S W 2d 409, 227 Mo App 297

N Y—Katz v Wolff & Reinheimer, 221 N Y S 476, 129 Misc 384

Pa—Corpus Juris quoted in Kelly v Yount, 12 A 2d 579, 581, 338 Pa 190—Corpus Juris cited in Christman v Segal, 17 A 2d 676, 679, 143 Pa Super 87—Fletcher v. Central Wrecking Corporation, 188 A 613, 124 Pa Super 271.

S C—Adams v South Carolina Power Co, 21 S E 2d 17, 200 S C 438—Hyde v Southern Grocery Stores, 15 S E 2d 353, 197 S C 263—Hancock v Aiken Mills, 185 S E 188, 180 S C 93

Tex—Broadbuss v. Long, 138 S W 2d 1057, 135 Tex 353—Le Sage v. Smith, Civ App, 145 S W 2d 308, error dismissed, judgment correct—Davis v. Clark, Civ App, 78 S W 2d 1008, reversed on other grounds 105 S W 2d 190, 129 Tex 550

39 C J p 1283 note 81.

36. Ky—Wood v. Southeastern

Grayhound Lines, 194 S W 2d 81, 302 Ky 110

Mo—Salmons v Dun & Bradstreet, App, 153 S W 2d 556, modified on other grounds 162 S W 2d 245, 349 Mo 498, 141 A L R 674—La Bella v Southwestern Bell Telephone Co, 24 S W 2d 1072, 224 Mo App 708

N Y—Meshel v Crotona Park Sanitarium, 276 N Y S 989, 154 Misc 221

N C—Grier v Grier, 135 S E 853, 192 N C 760

Pa—Corpus Juris quoted in Kelly v Yount, 12 A 2d 579, 581, 338 Pa 190

Tenn—Terrett v Wray, 105 S W 2d 93, 171 Tenn 448—Sandlin v Komisar, 98 S W 2d 645, 19 Tenn App 625

39 C J p 1283 note 81

Act expected to contribute even indirectly to service servant is ultimately to perform may be within scope of employment—O'Dell v Universal Credit Co, 191 S E 568, 118 W Va 678.

37. Ky—Wood v Southeastern Grayhound Lines, 194 S W 2d 81, 302 Ky 110

Mo—Salmons v Dun & Bradstreet, App, 153 S W 2d 556, modified on other grounds 162 S W 2d 245, 349 Mo 498, 141 A L R 674

Pa—Corpus Juris quoted in Kelly v Yount, 12 A 2d 579, 581, 338 Pa 190—Corpus Juris cited in Christman v Segal, 17 A 2d 676, 679, 143 Pa Super 87

S C—Corpus Juris cited in Hyde v. Southern Grocery Stores, 15 S E 2d 353, 357, 197 S C 263

39 C J p 1283 note 82

Acts in excess or abuse of authority generally see infra subdivision d (8) of this section

38. US—Pacific Telephone & Telegraph Co v White, C C A Or, 104 F 2d 923

Ariz—Brooks v Neer, 47 P 2d 452, 46 Ariz. 144.

Mo—Salmons v Dun & Bradstreet, App, 153 S W 2d 556

Tenn—Woody v Ball, 5 Tenn App 300

Tex—Broadbuss v Long, Civ App, 125 S W 2d 340, affirmed 138 S W 2d 1057, 135 Tex 353—Nations v Koch, Civ App, 265 S W 1105

39. N Y—Corpus Juris cited in Ford v. Grand Union Co, 370 N Y S 162, 167, 340 App Div 294

39 C J p 1283 note 84

40. La—Yours v New Orleans Linen Supply Co, App, 185 So 525

N Y—Corpus Juris cited in Ford v Grand Union Co, 270 N Y S 162, 167, 240 App Div 294

39 C J p 1283 note 85

Responsibility is not limited to acts which promote the objects of the employment

Cal—Lane v Safeway Stores, 91 P 2d 160, 33 Cal App 2d 169—Hiroshima v Pacific Gas & Electric Co., 63 P 2d 340, 18 Cal App 2d 24
Ill—Metzler v Lavton, 19 N E 2d 130, 398 Ill App. 529, affirmed 25 N E 2d 60, 373 Ill 88

41. Mo—Noland v Morris, 248 S W. 627, 212 Mo App 1

N Y—Corpus Juris cited in Ford v Grand Union Co, 370 N Y S 162, 167, 240 App Div 294

42. US—Donaldson v. Tucson Gas, Electric Light & Power Co. DC Ariz, 14 F Supp 248

Miss—White's Lumber & Supply Co v Collins, 191 So 105, 186 Miss 659, suggestion of error overruled 192 So 312, 186 Miss 659

43. Ill—Nelson v Stutz Chicago Factory Branch, 178 N E 394, 341 Ill 887

Me—Stevens v. Frost, 32 A 2d 184, 140 Me 1

Mo—Oganaso v Mellow, 201 S W 2d 365.

44. Minn—Corpus Juris cited in Loucks v. R J Reynolds Tobacco Co, 246 N W. 893, 896, 188 Minn 182

Mo—Garretsen v Duenckel, 50 Mo. 104, 11 Am R 405.

period covered by the servant's employment,⁴⁵ or merely because the servant supposed that he possessed authority to do the act in question⁴⁶ or conceived his conduct to be in the interest of the master.⁴⁷

Absence of authority to do particular act In order to hold the master liable, it is not necessary that the servant should have authority to do the particular act which resulted in the injury complained of,⁴⁸ all that is necessary is that the act be within the scope of the servant's employment.⁴⁹

Contractual relation with person injured In order to render a master liable for injuries inflicted by a servant acting within the scope of his employment, it is not essential that there should be any contractual relation between the master and the person injured⁵⁰

Implied authority to do unlawful act. In some decisions it has been held or said, in effect, that there can be no implied authority to do an act which it would not be lawful under any circumstances for the master himself to do,⁵¹ but this rule does not

prevent holding the master liable for the wrongful or excessive exercise of the servant's discretion in a case where the act done would have been lawful if the supposed circumstances had been real⁵²

Infliction of unnecessary injury The master is responsible for a servant's wrongful act if he had authority to do the business in which he was engaged when the act was committed and it was done in the course of his employment, although the servant inflicted unnecessary injury in performing the master's work.⁵³

Insanity or intoxication of servant. Where an act inflicting an injury on a third person is committed by a servant acting within the scope of his authority, the fact that the servant is insane⁵⁴ or that he was intoxicated at the time of inflicting the injury complained of⁵⁵ does not exonerate the master from liability.

Power to prevent act. If the act causing the injury is within the scope of the servant's employment the master is liable although he could not have prevented the act causing the damage⁵⁶

45. La.—*Comfort v. Monteleone*, 163 So. 670

Mo.—*Gray v. Phillips Bldg Co.*, App., 51 S.W.2d 181

Pa.—*Blaker v. Philadelphia Electric Co.*, 60 Pa. Super. 56.

46. Mo.—*Noland v. Morris*, 248 S.W. 627, 212 Mo. App. 1
39 C.J. p. 1284 note 92

47. Ala.—*Birmingham News Co. v. Browne*, 153 So. 889, 228 Ala. 414

48. U.S.—*Marion Steam Shovel Co. v. Bertino*, C.C.A. Mo., 82 F.2d 945, certiorari denied 57 S.Ct. 17, 299 U.S. 557, 81 L.Ed. 409

Ark.—*Interurban Transp. Co. v. Reeves*, 108 S.W.2d 594, 194 Ark. 321—*Vincennes Steel Corporation v. Gibson*, 106 S.W.2d 178, 194 Ark. 58.

Cal.—*Fields v. Sanders*, 180 P.2d 684, 29 Cal.2d 834—*Haworth v. Elliott*, 153 P.2d 804, 67 Cal.App.2d 77

Conn.—*Kuharski v. Somers Motor Lines*, 43 A.2d 777, 132 Conn. 269.

Ky.—*Ben Humpich Sand Co. v. Moore*, 69 S.W.2d 996, 253 Ky. 667
Me.—*Corpus Juris* cited in *Frenyes v. Maine Steel Products Co.*, 170 A. 515, 517, 132 Me. 271

Miss.—*Southern Bell Telephone & Telegraph Co. v. Quick*, 149 So. 107, 167 Miss. 438—*Loper v. Yazoo & M.V.R. Co.*, 145 So. 743, 166 Miss. 79.

Mo.—*Bass v. Kansas City Journal Post Co.*, 148 S.W.2d 543, 347 Mo. 681

N.C.—*West v. F. W. Woolworth Co.*, 1 S.E.2d 546, 215 N.C. 211

Okl.—*Claxton v. Page*, 124 P.2d 977, 190 Okl. 422.

S.D.—*Hasche v. Wagner*, 227 N.W. 66, 55 S.D. 595

Tex.—*Hudson v. St. Louis Southwestern Ry. Co. of Texas*, Com. App., 293 S.W. 811, rehearing denied *Hudson v. St. Louis Southwestern Ry. Co. of Texas*, 295 S.W. 577—*Baker Hotel of Dallas v. Rogers*, Civ. App., 157 S.W.2d 940, error refused 160 S.W.2d 522, 138 Tex. 398—*National Life & Accident Ins. Co. v. Ringo*, Civ. App., 137 S.W.2d 828, error refused—*McCoy v. Beach-Wittman Co.*, Civ. App., 22 S.W.2d 714, error dismissed
Wash.—*Fordney v. King County*, 115 P.2d 667, 9 Wash.2d 546
39 C.J. p. 1287 note 22.

49. Ky.—*Ben Humpich Sand Co. v. Moore*, 69 S.W.2d 996, 253 Ky. 667
Miss.—*Southern Bell Telephone & Telegraph Co. v. Quick*, 149 So. 107, 167 Miss. 438—*Loper v. Yazoo & M.V.R. Co.*, 145 So. 743, 166 Miss. 79.

Okl.—*Claxton v. Page*, 124 P.2d 977, 190 Okl. 422

Tex.—*Baker Hotel of Dallas v. Rogers*, 157 S.W.2d 940, error refused 160 S.W.2d 522, 138 Tex. 398.

39 C.J. p. 1287 note 28.

50. Tenn.—*Louisville & N. R. Co. v. Marlin*, 186 S.W. 595, 135 Tenn. 435, L.R.A. 1917A 417—*Memphis St. R. Co. v. Stratton*, 176 S.W. 105, 181 Tenn. 620, L.R.A. 1915E 704

51. W.Va.—*Pruitt v. Watson*, 138 S.E. 331, 103 W.Va. 627.

39 C.J. p. 1283 note 88.

Master's civil liability for criminal acts of servant within scope of employment see *infra* § 573.

52. R.I.—*Staples v. Schmid*, 26 A. 193, 18 R.I. 224, 19 L.R.A. 824.

39 C.J. p. 1284 note 89

53. Ky.—*Commonwealth v. Hoover's Adm'r.*, 118 S.W.2d 741, 274 Ky. 472—*John v. Lococo*, 76 S.W.2d 897, 256 Ky. 607—*Ben Humpich Sand Co. v. Moore*, 69 S.W.2d 996, 253 Ky. 667

Pa.—*Orr v. William J. Burns International Detective Agency*, 12 A.2d 25, 337 Pa. 587—*Sebastianelli v. Cleland-Simpson Co.*, Com. Pl., 35 Berks Co. L.J. 453, affirmed 31 A.2d 570, 152 Pa. Super. 203.
39 C.J. p. 1287 note 24

54. Tex.—*Corpus Juris* quoted in *American Nat. Ins. Co. v. Shepherd*, Civ. App., 91 S.W.2d 439, 440, reversed on other grounds, 95 S.W.2d 370, 128 Tex. 229, 107 A.L.R. 409

39 C.J. p. 1289 note 49.

55. U.S.—*Cleveland Nehi Bottling Co. v. Schenk*, C.C.A. Ohio, 56 F.2d 941

Ky.—*Central Truckaway System v. Moore*, 201 S.W.2d 725, 304 Ky. 533

Md.—*Erdman v. Henry S. Horkheimer & Co.*, to Use of *World Fire & Marine Ins. Co.*, 181 A. 221, 169 Md. 204.

N.Y.—*Chapman v. New York Cent. R. Co.*, 33 N.Y. 369, 88 Am.D. 392

Tex.—*Corpus Juris* quoted in *American Nat. Ins. Co. v. Shepherd*, Civ. App., 91 S.W.2d 439, 440, reversed on other grounds 95 S.W.2d 370, 128 Tex. 229, 107 A.L.R. 409.

56. La.—*Ragas v. Douglas*, 71 So. 242, 139 La. 773.

Where it is doubtful whether a servant in injuring a third person was acting within the scope of his authority, it has been said that the doubt will be resolved against the master because he set the servant in motion,⁵⁷ at least to the extent of requiring the question to be submitted to a jury for determination, as discussed *infra* § 617.

Use of instrumentality The servant may act within the scope of his employment in using an instrumentality not expressly authorized to effect a result which he has been ordered by the master to accomplish where the means to be used are not specified and no other means of obeying the order are available.⁵⁸ The master is not liable, however, where the servant, even in the execution of his general duty, uses an instrumentality not expressly or impliedly authorized by the master,⁵⁹ or which is of a kind substantially different from that authorized,⁶⁰ or over the use of which it is understood the master is to have no right of control.⁶¹ While the master may be held liable for the wrongful act of a servant in the use of an instrumentality which the master has authorized the servant to use even

though the master does not own such instrumentality,⁶² the fact that the instrumentality used by the servant is not owned by the master is a fact which may indicate that the use of the instrumentality is not authorized, or, if authorized, that its use is not within the scope of employment,⁶³ and the fact that the master does not own it or has not rented it on such terms that he can direct the manner in which it may be used indicates that the servant is to have a free hand in its use.⁶⁴ In determining whether or not the use of an unauthorized instrumentality is within the scope of the employment, the additional risk from the use is an important fact to be considered.⁶⁵

Surrender of instrumentality to third person. If a servant without authority intrusts an instrumentality to one whom, because of his age, inexperience, or recklessness, he has reason to believe is likely to harm others, it has been held that the master is liable for the resulting harm,⁶⁶ and that the liability of the master may exist not only when the person to whom the instrumentality is intrusted is known to be incompetent or reckless, but, in the case of an

57. Ky—John v. Lococo, 78 SW 2d 897, 256 Ky 607—Ashland Coca Cola Bottling Co v Ellison, 66 SW 2d 52, 252 Ky. 172

NC—Corpus Juris quoted in Pinnix v. Griffin, 12 SE 2d 667, 668, 219 NC 35—Long v. Eagle, 5, 10 and 254 Store Co, 198 SE 573, 214 NC 146—Corpus Juris quoted in Cole v Atlantic Coast Line R Co, 191 SE 353, 356, 211 NC 591—Corpus Juris quoted in Colvin v Kitchen Lumber Co, 153 SE 394, 395, 198 NC 776

SC—Corpus Juris quoted in Carroll v Beard-Laney, Inc, 35 SE 2d 425, 427, 207 SC 339—Corpus Juris cited in Hyde v Southern Grocery Stores, 15 SE 2d 353, 357, 197 SC 263—Corpus Juris quoted in Matheson v American Telephone & Telegraph Company, 135 SE 306, 310, 137 SC 237

Va—Corpus Juris quoted in Crowell v Duncan, 134 SE 576, 579, 145 Va 489, 50 ALR 1425.

39 CJ p 1284 note 94.

"Where the actual employment is admitted, courts should be slow to assume that there has been any deviation from the course of employment upon speculative hypotheses"—Pinnix v Griffin, 12 SE 2d 667, 668, 219 NC 35

58. Md—Great Atlantic & Pacific Tea Co. v. Noppenberger, 189 A 484, 171 Md. 378.

59. Ind—Railway Express Agency v Bonnell, 33 NE 2d 980, rehearing denied 34 NE 2d 927, 218 Ind 607.

NJ—Blackman v Atlantic City & S R Co, 19 A 2d 807, 136 NJ Law 458

Instrumentality not belonging to master

La—Dunn v Campo, App. 179 So 103

Tenn—Kennedy v Union Charcoal & Chemical Co, 4 SW 2d 354, 156 Tenn 666, 57 ALR 733

60. Mo—Corder v Morgan Roofing Co, 166 SW 2d 455, 350 Mo 382

Neb—Rankin v. W. U Tel Co, 23 NW 2d 676, 147 Neb 411

Different instrumentality of same sort

A servant's use of instrumentality different from, but of same sort as, that authorized by master, is within scope of employment, and the master is not relieved of liability because his servant used a racing bicycle, instead of an ordinary bicycle, in performing his duties—Rankin v. W U Tel Co, *supra*.

61. Mo—Corder v Morgan Roofing Co, 166 SW 2d 455, 350 Mo 382.

Liability dependent on actual or potential control

In order to hold a master legally responsible for the act of a servant who is engaged in furthering his master's business and who, while doing so, negligently uses some instrumentality, it must either be proved that the master exercised actual or potential control over that instrumentality or that the use of the instrumentality at the time and place of the act complained of was of such vital importance in furthering the

business of the master that the latter's actual or potential control of it may reasonably be inferred—Holdsworth v Pennsylvania Power & Light Co, 10 A 2d 412, 337 Pa 235—Wesolowski v John Hancock Mut Life Ins Co, 162 A 166, 308 Pa 117, 87 ALR 783, followed in 162 A 168, 308 Pa 123—Koscelek v. Lucas, 43 A 2d 550, 157 Pa Super 548—Sinclair v Perma-Maid Co, 24 A 2d 169, 147 Pa Super 226, affirmed 26 A 2d 924, 345 Pa 280

Employee using public conveyance

If, in the course of his work, an employee travels as a passenger in a train, trolley car, taxicab, or other public conveyance, he does not expose his employer to the risk of financial responsibility for injuries to third persons—Gittelman v Hoover Co, 10 A 2d 411, 337 Pa 242

62. Md—Regal Laundry Co. v. A S Abell Co, 163 A 845, 163 Md 525

NY—Lando v Murray's Trucking Corporation, 17 N.Y.S 2d 528, 258 App Div 616

63. Pa—Holdsworth v. Pennsylvania Power & Light Co., 10 A 2d 412, 337 Pa 235.

64. Pa—Holdsworth v. Pennsylvania Power & Light Co., *supra*

65. Neb—Rankin v W. U. Tel Co, 23 N.W 2d 676, 147 Neb 411.

66. Tenn—Tennessee Coach Co. v. Reese, 156 S.W 2d 404, 178 Tenn 126—Potter v Golden Rule Grocery Co, 84 SW 2d 364, 169 Tenn 240.

instrumentality likely to do harm if not carefully managed, the master is liable when the servant intrusts the instrumentality to a person whose qualifications the servant does not know.⁶⁷ Moreover, it has been held that a servant, while remaining with an instrumentality belonging to his master, may surrender its immediate control to another, and although such surrender is not negligent, the master remains subject to liability for any negligence of his servant in supervising the third person's conduct.⁶⁸

(3) Time of Service

Conduct of a servant is within the scope of his employment only when it occurs substantially within authorized time limits or during a period not unreasonably disconnected from the authorized period.

Conduct of a servant is within the scope of his employment only when it occurs substantially within authorized time limits or during a period which is

not unreasonably disconnected from the authorized period.⁶⁹ Ordinarily the master will not be liable if the act resulting in the injury is committed by the servant at a time when he is off duty,⁷⁰ as, for instance, after the day's work is completed,⁷¹ or at a free hour,⁷² or while taking time away from his work for meals,⁷³ or where the servant has been given a holiday,⁷⁴ and it has been held that this is true although the act is one which, if done by the servant while on duty and at a time when actually engaged in the master's service, would be within the course and scope of his usual and ordinary duties.⁷⁵ It has been held, however, that cessation of work for eating, drinking, and similar necessities is a necessary incident of employment, and that an employee so engaged does not necessarily sever his relation from his work so as to relieve his master of liability for his acts,⁷⁶ and that the master's liability is not limited to acts occurring during actual working time.⁷⁷ The mere fact that an act, which is

67. Tenn.—Tennessee Coach Co. v. Reece, 156 S.W.2d 404, 178 Tenn 126—Potter v. Golden Rule Grocery Co., 84 S.W.2d 364, 169 Tenn 240

68. Tenn.—Tennessee Coach Co. v. Reece, 156 S.W.2d 404, 178 Tenn 126—Potter v. Golden Rule Grocery Co., 84 S.W.2d 364, 169 Tenn 240

69. U.S.—Hubbard v. Lock Joint Pipe Co., D.C.Mo., 70 F.Supp 589 Ind.—Vincennes Packing Corporation v. Trospier, 23 N.E.2d 624, 108 Ind App. 7.

Ky.—Fournier v. Churchill Downs-Latonia, 166 S.W.2d 38, 292 Ky 215

Md.—Great Atlantic & Pacific Tea Co. v. Noppenberger, 189 A 434, 171 Md 378.

Miss.—White's Lumber & Supply Co. v. Collins, 191 So. 105, 186 Miss 659, suggestion of error overruled 192 So 312, 186 Miss. 659—Primos v. Gulfport Laundry & Cleaning Co., 128 So. 507, 157 Miss. 770

Or.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114.

Wash.—Brazier v. Betts, 113 P.2d 34, 8 Wash.2d 549

Wis.—Fultz v. Lange, 298 N.W. 60, 288 Wis. 342.

Subject to master's control

A servant's act is within scope of his employment, only if it occurs at time when he is subject to master's control under employment contract—Rice v. Garl, 98 P.2d 301, 2 Wash. 2d 403

70. U.S.—Dumbrow v. Ettlinger, D C.N.Y., 44 F.Supp 763

Idaho.—Normington v. Neely, 70 P. 2d 396, 58 Idaho 134.

La.—Sedberry, for Use and Benefit

of Holloway v. Western Union Telegraph Co., App. 9 So.2d 73 Me.—Easler v. Downie Amusement Co., 133 A 905, 125 Me 334, 53 A L.R. 847

Mo.—Corpus Juris quoted in Green v. Western Union Telegraph Co., App. 58 S.W.2d 772, 774

Ohio.—Biddle v. New York Cent. R. Co., 182 N.E. 601, 43 Ohio App 6

Okl.—Corpus Juris quoted in Wilson & Co. v. Shaw, 10 P.2d 448, 450, 157 Okl 34

Wash.—Corpus Juris quoted in Brazier v. Betts, 113 P.2d 34, 40, 8 Wash.2d 549.

W.Va.—Coates v. Auto Sales Co., 145 S.E. 644, 106 W.Va 380.

89 C.J. p 1296 note 96

71. U.S.—Futterman v. Western Union Tel. Co., D.C.La., 43 F.Supp 729

Kan.—Kyle v. Postal Telegraph-Cable Co., 235 P. 116, 118 Kan 300

Okl.—Corpus Juris quoted in Wilson & Co. v. Shaw, 10 P.2d 448, 450, 157 Okl 34

Wash.—Corpus Juris quoted in Brazier v. Betts, 113 P.2d 34, 40, 8 Wash.2d 549.

39 C.J. p 1296 note 97.

72. Mo.—Corpus Juris quoted in Green v. Western Union Telegraph Co., App. 58 S.W.2d 772, 774.

Wash.—Corpus Juris quoted in Brazier v. Betts, 113 P.2d 34, 40, 8 Wash.2d 549.

39 C.J. p 1296 note 98.

Repairs to cycle used in business

Telegraph company, which gave messenger one hour off duty daily during which time employee was not paid and was at complete liberty and which required employee to furnish his own transportation and maintained no supervision over type of

transportation furnished, was not liable for injuries sustained by third person when struck by motorcycle operated by employee during employee's free hour when employee was returning to work after repairing a tire—Sedberry, for Use and Benefit of Holloway v. Western Union Telegraph Co., La.App. 9 So.2d 73

73. Cal.—Peccolo v. City of Los Angeles, 66 P.2d 651, 8 Cal.2d 532—Carnes v. Pacific Gas & Electric Co., 69 P.2d 998, 21 Cal.App.2d 568, rehearing denied 76 P.2d 717, 21 Cal.App.2d 568—Helm v. Bagley, 298 P. 826, 113 Cal.App 602

D.C.—Tipton v. Western Union Tel. Co., D.C., 68 F.Supp 854

La.—Cado v. Many, App. 180 So. 185.

Va.—Appalachian Power Co. v. Robertson, 129 S.E. 224, 142 Va. 454

74. Iowa.—Reynolds v. Buck, 103 N. W. 946, 127 Iowa 601

75. Ohio.—Lima R. Co. v. Little, 65 N.E. 861, 67 Ohio St. 91.

Wash.—Corpus Juris quoted in Brazier v. Betts, 113 P.2d 34, 40, 8 Wash.2d 549.

76. Mo.—Brunk v. Hamilton-Brown Shoe Co., 66 S.W.2d 903, 334 Mo. 517

Traveling salesman

A salesman employed to sell a product over a large territory whose hours of going and returning from his headquarters were fixed by his own convenience and the exigencies of business would not be deviating from his employment in stopping to eat—Brunk v. Hamilton-Brown Shoe Co., supra.

77. W.Va.—O'Dell v. Universal Credit Co., 181 S.E. 568, 118 W.Va. 678.

otherwise within a servant's scope of employment, is performed at a time before the servant ordinarily goes to work will not exonerate the master of liability therefor.⁷⁸

(4) Area of Service

Conduct of a servant is within the scope of his employment only when it occurs in a locality not unreasonably distant from the area in which he is authorized to perform his duties, and ordinarily the employer is not responsible for the acts of his employees while going to, or returning from, their place of employment.

Conduct of a servant is within the scope of his employment only when it occurs substantially within authorized space limits, that is, in a locality not unreasonably distant from the area in which he is authorized to perform his duties.⁷⁹ Generally an employee going to and from his place of employment is not acting within the scope of his employment.⁸⁰ This rule is, however, subject to exceptions,⁸¹ and an employee may be regarded as acting within the scope of his employment while going to, or returning from, his place of work where the em-

ployee's compensation covers the time involved in going or returning,⁸² or the employer furnishes the transportation,⁸³ or an allowance is made for the cost of transportation,⁸⁴ or there are circumstances disclosing that the interests of the master are being served,⁸⁵ or that the master controls, or has the right to control, the conduct of the servant.⁸⁶ Where the employment itself is one in which an employee is required to travel from place to place at the employer's will, the risks of such travel are directly incident to the employment, and the employer may be held liable therefor.⁸⁷ An employee going on a mission or errand for his employer does not cease to act in the course or scope of his employment when starting on the return trip.⁸⁸

(5) Intent or Motive of Servant

While it has been held that the liability of the master for the servant's acts is not affected by the intention or motive with which the servant committed the act, it has also been recognized that the intention with which an act is performed is material in determining whether it is within the scope of his employment.

78. Ind.—Vincennes Packing Corporation v. Trosper, 28 NE2d 634, 108 Ind App 7

Ky—Standard Blkhorn Coal Co v Davis, 2 SW2d 670, 222 Ky 773

79. US—Hubbard v. Lock Joint Pipe Co, DCMo, 70 F Supp 589.

Ky—Fournier v Churchill Downs-Latonia, 166 SW2d 38, 292 Ky 215

Md—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

Minn—Loucks v R. J. Reynolds Tobacco Co, 246 NW 893, 188 Minn 182

Or—Jasper v Wells, 144 P2d 505, 173 Or 114.

Wash—Brasier v Betts, 113 P2d 34, 8 Wash2d 549

Area where servant will probably go

There is an area beyond the authorized area into which common knowledge of human nature suggests that the servant will probably go, and liability for an injury to a third person by a servant while within such area must ordinarily be borne by the employer—Master Auto Service Corporation v Bowden, 19 SE2d 679, 179 Va. 507

Subject to master's control

Conduct is within the scope of employment only in a place where the servant is subject to the master's control under the employment contract—Rice v Garl, 98 P2d 301, 2 Wash2d 403.

80. Ala—Knight Iron & Metal Co v Ardis, 199 So 712, 29 Ala App 600, reversed on other grounds 199 So 716, 240 Ala. 305

Cal—Robinson v. George, 105 P.2d

914, 16 Cal2d 238—Breland v. Traylor Engineering & Manufacturing Co, 126 P2d 455, 52 Cal App2d 415

La—Boyes v Greer, App, 15 So2d 404—Whittington v. Western Union Tel Co, App, 1 So2d 327—Gallaher v Ricketts, App., 191 So 713

NC—McLamb v Beasley, 11 SE2d 283, 218 NC 303

Okl—Wilson & Co v Shaw, 10 P2d 448, 157 Okl. 34

Or—Larkins v Utah Copper Co, 127 P2d 354, 169 Or 499—Hantke v Harris Ice Mach Works, 54 P2d 293, 152 Or 564

Use of particular means of travel not required

An employee who was not required by employer to use any particular means of travel in coming to his place of employment or returning therefrom was not engaged in the furtherance of his master's business so as to render master responsible for the acts of such employee while so engaged—American Nat Ins Co v O'Neal, Tex Civ App, 107 SW2d 927

81. Cal—Breland v Traylor Engineering & Manufacturing Co, 126 P2d 455, 52 Cal App2d 415

Or—Hantke v Harris Ice Mach Works, 54 P2d 293, 152 Or 564.

Among the exceptions to this rule are cases where employee travels over way authorized by employer, or is upon employer's premises, or is coming from place maintained by employer for use of employee as incident of employment—Hantke v Harris Ice Mach Works, supra.

82. Cal—Breland v Traylor Engineering & Manufacturing Co, 126 P2d 455, 52 Cal App2d 415

83. Or—Hantke v Harris Ice Mach Works, 54 P2d 293, 152 Or 564

84. Cal—Breland v Traylor Engineering & Manufacturing Co, 126 P2d 455, 52 Cal App2d 145

85. La—Whittington v Western Union Tel Co, App, 1 So2d 327

Or—Hantke v Harris Ice Mach Works, 54 P2d 293, 152 Or 564

Frequent changes in place of employment

The transportation of a workman, whose place of employment is subject to frequent and variable changes of substantial distance, may be of such importance to him and his employer as to make it part of his employment—Rice v. Garl, 98 P2d 301, 2 Wash2d 403

86. Or—Hantke v Harris Ice Mach Works, 54 P.2d 293, 152 Or 564.

87. Cal—Robinson v George, 105 P2d 914, 16 Cal2d 238

Tex—Le Sage v Smith, Civ App, 145 SW2d 308, error dismissed, judgment correct.

88. Cal—Ryan v Farrell, 280 P. 945, 208 Cal. 200—Barton v McDermott, 291 P. 591, 108 Cal App 372—May v. Farrell, 271 P 789, 94 Cal App 708.

Ga—Marsh v Postal Telegraph-Cable Co, 189 S.E. 550, 55 Ga.App. 57.

Mo—Brunk v Hamilton-Brown Shoe Co, 66 S.W.2d 903, 334 Mo. 517.

In a number of decisions it has been held or stated that, where a third person sustains injury from the act of a servant done in the course of his employment, the intention or motive with which the servant committed the act does not in any way affect the master's liability,⁸⁹ although it may have some effect in determining the amount of damages.⁹⁰ Conversely, it has been held that, if the act was outside of the scope of the servant's employment, the fact that the act was intended to promote the interest of the master will not render him liable.⁹¹ Nevertheless it has also been recognized that the intention with which an act was done by a servant is material in determining whether the act was within the scope of his employment,⁹² or for some purpose of his own having no relation to his employment,⁹³ and this is true even though the act

of the servant was in disobedience of orders and instructions.⁹⁴ Thus an act of a servant has been held not to be within the scope of his employment if it is done with no intention to perform it as a part of, or incident to, a service he is employed to perform,⁹⁵ and that, in order to be considered within the scope of employment, the servant's act must be actuated at least in part by a purpose to serve the master.⁹⁶ An act may be within the scope of the servant's employment even though the predominant motive is to benefit himself, as discussed *infra* § 574, or a third person.⁹⁷ On the other hand, the mere fact that the act is done by the servant with the intention of serving the master is not of itself sufficient to bring the act within the scope of his employment.⁹⁸

89. U.S.—Crockett v. U. S., CCA W Va., 116 F2d 646.

Ga.—Frazier v. Southern Ry Co., 37 SE2d 774, 200 Ga 590, conformed to 38 SE2d 183, 78 Ga App 815.

Ind.—Mock v. Polley, 66 NE2d 78, 118 Ind App 580—Junior Toy Corporation v. Novak, 21 NE2d 445, 107 Ind App 427.

Mo.—Uptegrove v. Walker, 7 SW2d 784, 222 Mo App 758.

NC.—Hammond v. Eckerd's of Asheville, 18 SE2d 151, 220 NC 596—Snow v. De Butts, 193 SE 224, 212 NC 120—Dickerson v. Atlantic Refining Co., 159 SE 446, 201 NC 90.

Va.—Thalhimer Bros v. Shaw, 159 SE 87, 156 Va 863.

W Va.—Corpus Juris cited in Cochran v. Michaels, 157 SE 173, 175, 110 W Va 127.

39 C.J. p 1284 note 1.

The servant's motive is not conclusive of the master's liability.—Hoover Motor Express Co v. Thomas, 65 SW2d 821, 16 Tenn App 664.

The cause which made the employee do what he did does not determine the master's liability.—Metzler v. Layton, 19 NE2d 130, 298 Ill App 529, affirmed 25 NE2d 60, 373 Ill 88.

90. Ark.—St. Louis, I M & S R Co v. Hackett, 24 SW 881, 58 Ark 381, 41 Am SR 105.

NY.—Cleghorn v. New York Cent & H R R Co., 56 NY 44, 15 Am R 375.

91. NC.—Snow v. De Butts, 193 SE 224, 212 NC 120.

RI.—Haining v. Turner Centre System, 149 A 376, 50 RI 481.

Tex.—St. Louis Southwestern Ry Co of Texas v. Hudson, Civ App, 286 SW 766, affirmed in part and reversed in part on other grounds Hudson v. St. Louis Southwestern Ry. Co. of Texas, Com App, 293 S

W 811, rehearing denied 295 S W 577.

39 C.J. p 1284 note 3.

92. U.S.—Nelson v. American-West African Line, CCANY, 86 F2d 730, certiorari denied American-West African Line v. Nelson, 57 S Ct 509, 300 US 665, 81 L Ed 878.

Ind.—Wells v. Northern Indiana Public Service Co., 40 NE2d 1012, 111 Ind App 166.

Ky.—Fournier v. Churchill Downs-Latonia, 166 SW2d 38, 292 Ky 215.

Md.—Great Atlantic & Pacific Tea Co v. Noppenberger, 189 A 434, 171 Md 378.

NH.—Lemariar v. A. Towle Co., 51 A 2d 42.

NC.—Tomlinson v. Sharpe, 37 SE2d 498, 226 NC 177.

Okl.—Brayton v. Carter, 163 P2d 960, 196 Okl 125—Retail Merchants Ass'n and Associated Retail Credit Men of Tulsa v. Peterman, 99 P2d 130, 186 Okl 560.

Pa.—Herr v. Simplex Paper Box Corporation, 198 A 309, 330 Pa 129.

Tex.—Gulf, C & S F. Ry Co. v. Cobb, Civ App., 45 SW2d 323, error dismissed.

Wis.—Linden v. City Car Co., 300 N W 925, 239 Wis 236.

39 C.J. p 1285 note 7.

Test is intent, not method.

The test of the scope of employment is the intent or purpose of the act, and not its method.—Gibson v. Dupree, 144 P 1133, 26 Colo App. 324 39 C.J. p 1284 note 4.

Whose business was being done is more important than the motive of the act in ascertaining the master's liability.—La Bella v. Southwestern Bell Telephone Co., 24 SW2d 1072, 224 Mo App 708.

Purpose of act in which servant was engaged at time tort was committed determines the liability of the

master.—Walker v. Manson, 23 SE 2d 839, 222 NC 527—Smith v. Moore, 16 SE2d 701, 220 NC 165.

93. Okl.—Retail Merchants Ass'n and Associated Retail Credit Men of Tulsa v. Peterman, 99 P2d 130, 186 Okl 560.

Pa.—Herr v. Simplex Paper Box Corporation, 198 A 309, 330 Pa 129.

Wis.—Linden v. City Car Co., 300 N W 925, 239 Wis 236.

39 C.J. p 1285 note 8.

94. Conn.—Butler v. Hyperion Theater Co., 124 A 220, 100 Conn 551.

95. Ind.—Wells v. Northern Indiana Public Service Co., 40 NE2d 1012, 111 Ind App 166.

NH.—Lemariar v. A. Towle Co., 51 A 2d 42.

NC.—Tomlinson v. Sharpe, 37 SE2d 498, 226 NC 177.

Pa.—Herr v. Simplex Paper Box Corporation, 198 A 309, 330 Pa 129.

Tenn.—Kelly v. Louisiana Oil Refining Co., 66 SW2d 997, 167 Tenn 101.

96. U.S.—Hubbard v. Lock Joint Pipe Co., D.C.Mo., 70 F Supp 589.

Ky.—Fournier v. Churchill Downs-Latonia, 166 SW2d 38, 292 Ky 215.

Md.—Great Atlantic & Pacific Tea Co v. Noppenberger, 189 A 434, 171 Md 378.

Mo.—Milazzo v. Kansas City Gas Co., 180 SW2d 1.

Wash.—Brazier v. Betts, 113 P2d 84, 8 Wash 2d 549.

97. Mo.—Foster v. Campbell, 196 S W 2d 147.

98. NC.—Snow v. De Butts, 193 SE 224, 212 NC 120.

RI.—Haining v. Turner Centre System, 149 A 376, 50 RI 481.

Tenn.—Hall Grocery Co v. Wall, 13 Tenn App 208.

Tex.—St. Louis Southwestern Ry Co of Texas v. Hudson, Civ App, 286 SW 766, affirmed in part and re-

(6) Knowledge or Assent of Master

If an act or omission occurs in the course of a servant's employment and within its scope, the master is liable therefor although he had no knowledge thereof.

The master's liability is not limited to cases where he is present and remains passive.⁹⁹ If an act or omission, resulting in the injury complained of, occurs in the course of a servant's employment and within its scope, the master is liable therefor although he has no knowledge thereof¹ or although the manner of doing the act was without his knowledge or assent.²

A servant's scope of employment, as it affects the master's liability for the servant's acts, is determined not only by what the servant is employed to perform, as discussed supra subdivision d (2) of this section, but also by what the servant does actually perform with the knowledge and approval of his master.³

Imputation of servant's knowledge to master. A master is affected with constructive knowledge, regardless of his actual knowledge, of all material facts of which his servant receives notice or acquires knowledge while acting in the course of his employment and within its scope, although the servant does not in fact inform his master thereof.⁴

On the other hand, a servant's knowledge of a matter which is outside the scope of his employment or not related to its purpose is not imputed to the master.⁵

(7) Acts Unnecessary to Performance of Duty

The master is responsible for acts within the scope of a servant's employment although not necessary for the proper performance of his duty.

Where the act complained of was done within the scope of the servant's employment, the master will be responsible although the servant's act was not necessary for the proper performance of his duty.⁶ The liability of the master is not limited to the result of acts done by the servant in the proper performance of his duties.⁷

(8) Acts in Excess or Abuse of Authority

If the act complained of was within the scope of the servant's authority, the master will be liable although it constituted an abuse or excess of the authority conferred.

If the act complained of was within the scope of the servant's authority, the master will be liable although it constituted an abuse or excess of the authority conferred,⁸ especially where the master

versed in part on other grounds
Hudson v St Louis Southwestern
Ry Co of Texas, Com App, 293 S
W. 811, rehearing denied 295 SW
577

39 C.J. p 1285 note 6

99. Mo—Calkins v Engle, 300 SW
997, 221 Mo App. 1173
39 C.J. p 1284 note 96

Liability of master for acts done by
express command or assent gen-
erally see supra § 557

1. U.S.—Department of Water and
Power of City of Los Angeles v
Anderson, CCA Nev., 95 F.2d 577,
certiorari denied 59 S.Ct. 67, 305
US 607, 83 L.Ed. 386—Marion
Steam Shovel Co v Bertino, CCA
Mo., 82 F.2d 945, certiorari denied
57 S.Ct. 17, 299 US 557, 81 L.Ed.
409—Southern Counties Ice Co v
RKO Radio Pictures, DCCal., 39
F.Supp. 157.

2. Ga.—Evans v. Caldwell, 184 SE 440,
52 Ga App 475, affirmed 190 SE
582, 184 Ga 203

Ill.—Darnier v Colby, 31 NE2d 950,
375 Ill 558, mandate conformed to
35 NE2d 952, 311 Ill App 352—
Corpus Juris cited in Flood v. Bit-
zer, 40 NE2d 557, 560, 313 Ill App
359

La.—Yours v New Orleans Linen
Supply Co., App, 135 So 525

Mo.—Davis v Buck's Stove & Range
Co., 49 S.W.2d 47, 229 Mo 1177.

N.Y.—Ford v Grand Union Co, 270
NYS 162, 240 App Div. 294

NC—West v F W Woolworth Co,
1 SE2d 546, 215 NC 311

SD—Hasche v Wagner, 227 NW.
86, 55 SD 595

Tex.—Baker Hotel of Dallas v Rog-
ers, Civ App, 157 SW2d 940, error
refused 160 SW2d 522, 138 Tex
398

39 C.J. p 1284 note 97

2. U.S.—Marion Steam Shovel Co v
Bertino, CCA Mo., 82 F.2d 945,
certiorari denied 57 S.Ct. 17, 299
US 557, 81 L.Ed 409

39 C.J. p 1284 note 98

3. U.S.—In re Southern Pac. Co., D
C.N.Y., 30 F.2d 723

Open and habitual violation of rule
forbidding act outside class of
service as affecting master's liabil-
ity see infra subdivision d (9) of
this section.

4. N.Y.—De Ryss v New York Cent
R Co., 9 NE2d 788, 275 NY. 85

5. Mo.—Excelsior Products Mfg Co
v Kansas City Southern Ry Co,
172 SW 359, 268 Mo. 337, Ann Cas
1917B 1047.

N.Y.—De Ryss v New York Cent R.
Co., 9 NE2d 788, 275 NY 85

Pa.—Osborne v. Philadelphia & R
Ry Co., 106 A. 732, 263 Pa 472

Knowledge of ministerial servant
ordinarily is not imputed to master
—Varas v James Stewart & Co., 17
SW2d 651, 223 Mo App 385

Knowledge of trespass

When employee engaged to protect
property departs from his duty, be-
trays his trust, or acquiesces and
encourages a trespass, his knowledge
of trespass and of acts of trespasser
cannot constitute notice—De Ryss
v New York Cent R. Co., 9 NE2d
788, 275 NY 85.

6. Ill.—Flood v Bitzer, 40 NE2d
557, 313 Ill App. 359

Ind.—Junior Toy Corporation v No-
vak, 21 NE2d 445, 107 Ind App
427

Mo.—Young v Sinclair Refining Co.,
App, 92 SW2d 995

SC—Carroll v Beard-Laney, Inc.,
35 SE2d 425, 207 SC 339

Tex.—Baker Hotel of Dallas v. Rog-
ers, Civ App, 157 SW2d 940, error
refused 160 S.W.2d 522, 138 Tex
398

39 C.J. p 1284 note 99

Acts within servant's discretion

A master cannot escape liability
for acts of his servant when he has
given servant authority to act and
the discretion when to act, and the
servant negligently acts at a time
when such action was not necessary.
—McBee's Adm'r v Indian Head
Mining Co., 132 SW.2d 515, 280 Ky
82

7. U.S.—Shadoan v Cincinnati, N.
O & T P R R Co., Ky, 220 F.
68, 135 CCA 636.

8. U.S.—Marion Steam Shovel Co v

knows or should know that such act is likely to be performed and that damage to others is likely to result.⁹ The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury on a third person.¹⁰ The master is not liable, however, if authority to perform the act complained of is totally lacking.¹¹

(9) Disobedience of Orders or Instructions

If the act resulting in the injury was within the scope of the servant's employment, the master will be liable therefor, although the act was in violation of his instructions or orders, but if a forbidden act is outside the class of service which the servant is employed to perform the act is outside the scope of employment and ordinarily no liability attaches to the master.

If the act resulting in the injury was within the scope of the servant's employment, the master will be liable therefor, without regard to the servant's motive,¹² although the act was in violation of the master's orders or instructions as to the method of performing the work or was expressly forbidden by him,¹³ especially where the master knows or should

- Bertino, CCA Mo, 82 F2d 945, certiorari denied 57 S Ct 17, 299 US 556, 81 L Ed 400
- Ala.—Gulf Refining Co v McNeel 153 So 231, 228 Ala 302
- Ky.—Commonwealth v Hoover's Adm'r, 118 SW2d 741, 274 Ky 472—Warfield Natural Gas Co v Ward, 72 SW2d 464, 254 Ky 754—Ben Humphich Sand Co v Moore, 69 SW2d 996, 253 Ky 667
- La.—Comfort v Monteleone, App. 163 So 670
- Miss.—Gill v L N Dantsler Lumber Co, 121 So 153, 153 Miss 559—Alden Mills v Pendergraft, 116 So 713, 149 Miss 595—Yazoo & M V R Co v Cornelius, 95 So 90, 131 Miss 37
- Mo.—Simmons v Kroger Grocery & Baking Co, 104 SW2d 357, 340 Mo 1113
- NY.—Ospoff v City of New York, 36 NE2d 646, 286 NY 422, 136 ALR 1354
- Okl.—Patsy Oil & Gas Co v Odom, 98 P2d 302, 186 Okl 116—Ada-Konawa Bridge Co v Cargo, 21 P2d 1, 163 Okl 122
- Pa.—Orr v William J Burns International Detective Agency, 12 A2d 25, 337 Pa 587—Sebastianelli v Cleland Simpson Co, 31 A2d 570, 152 Pa Super 208—Christman v Segal, 17 A2d 676, 142 Pa Super 87
- Tex.—Corpus Juris quoted in Felder v. Houston Transit Co, Civ App, 203 SW2d 831, 834—Corpus Juris quoted in Central Motor Co v Gallo, Civ App, 94 SW2d 821, 822—Corpus Juris cited in Texas Power & Light Co v Denson, Civ App, 45 SW2d 1001, 1002—Gulf, C. & S F. Ry. Co v Cobb, Civ App, 45 SW2d 823, error dismissed—W R Pickering Lumber Co v Bussey, Civ App, 294 SW 666—Friend-Rowe Motor Co v Ricci, Civ App, 293 SW 851
- W Va.—Corpus Juris cited in Cochran v Michaels, 157 SE 173, 175, 110 W Va 127
- 39 C J p 1285 note 10
- U.S.—U. S. Lighterage Corpora-
- tion v. Petterson Lighterage & Towing Corporation, CCA NY, 142 F2d 197
10. Ill.—Metzler v Layton, 25 NE 2d 60, 373 Ill 88
- Ky.—J J Newberry Co v Judd, 82 SW2d 359, 259 Ky 309
- Pa.—Orr v William J Burns International Detective Agency, 12 A 2d 25, 337 Pa 587
- Tex.—Corpus Juris quoted in Felder v. Houston Transit Co, Civ App, 203 SW2d 831, 834—Corpus Juris quoted in Central Motor Co v Gallo, Civ App, 94 SW2d 821, 822
- 39 C J p 1285 note 11
11. Ala.—Gulf Refining Co v McNeel, 153 So 231, 228 Ala 302
12. Tex.—Panhandle & S F R Co v Daldorf, Civ App, 266 SW 208
13. U.S.—Pacific Telephone & Telegraph Co v White, CCA Or, 104 F2d 922—Department of Water and Power of City of Los Angeles v Anderson, CCA Nev, 95 F2d 577, certiorari denied 59 S Ct 67, 305 US 607, 83 L Ed 388—Cleveland Nelu Bottling Co v Schenk, CCA Ohio, 68 F2d 941
- Ala.—Gulf Refining Co v. McNeel, 153 So 231, 228 Ala 302
- Ark.—Interurban Transp Co v. Reeves, 108 SW2d 594, 194 Ark 321—Vincennes Steel Corporation v Gibson, 106 SW2d 173, 194 Ark 58—Pickens v Westbrook, 83 SW2d 830, 191 Ark 156—Missouri Pac R Co v Rodden, 59 SW2d 599, 137 Ark 321—Pratt v Martin, 35 SW2d 1004, 183 Ark 365—Federal Compress & Warehouse Co v Jones, 21 SW2d 857, 180 Ark 476
- Cal.—Fields v Sanders, 180 P2d 654, 29 Cal 2d 834—Transcontinental & Western Air v Bank of America N. T. & S. A., 116 P2d 791, 46 Cal App 2d 708—Barton v McDermott, 291 P 591, 108 Cal App 372
- Conn.—Kuharski v Somers Motor Lines, 43 A2d 777, 132 Conn 269—Stuliginski v Ciszaukas, 5 A2d 10, 125 Conn 293—Branchini v Florio, 175 A 670, 119 Conn 212
- Shiembob v Ringling, 160 A 439, 115 Conn 62
- DC.—Baltimore & O R Co v Papa, 133 F2d 413, 77 US App DC 202
- Ga.—Corpus Juris quoted in Evans v Caldwell, 184 SE 440, 443, 53 Ga App 475, affirmed 190 SE 582, 184 Ga 203
- Ill.—Darnier v Colby, 31 NE2d 950, 376 Ill 558, mandate conformed to 35 NE2d 952, 311 Ill App 352—Bandoz v A. Daigger & Co, 255 Ill App 494
- Iowa.—Haintz v Iowa Packing Co, 268 NW 607, 222 Iowa 517—Herring Motor Co v Myerly, 222 NW 1, 207 Iowa 990
- La.—Starnes v. Monsour's No 4, App, 30 So 2d 135—Dunn v Cam-po, App, 179 So 102—Ellzey v Booth Furniture & Carpet Co., 2 La App 431
- Md.—Corpus Juris cited in Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 442, 171 Md 378
- Mass.—Denny v. Riverbank Court Hotel Co, 184 NE 452, 282 Mass 176—Guinan v Famous Players-Lasky Corporation, 167 NE 235, 287 Mass 501—Stone v Commonwealth Coal Co, 156 NE 737, 259 Mass 360
- Mich.—Anderson v Schust Co, 247 NW 167, 262 Mich 236—Cumming v. Automobile Crank Shaft Corporation, 205 NW 183, 232 Mich 158
- Miss.—Loper v. Yazoo & M. V R Co, 145 So 743, 166 Miss 79
- Mo.—Riggs v. Higgins, 106 SW2d 1, 341 Mo 1—Simmons v Kroger Grocery & Baking Co, 104 SW2d 357, 340 Mo 1113—Humphreys v St Louis-San Francisco Ry Co, App, 286 SW 738
- Mont.—Kornec v Mike Horse Mining & Milling Co, 180 P2d 252
- Neb.—Rose v. Glat, 298 NW 333, 139 Neb 593
- N.J.—Corpus Juris cited in Axford v. Purity Bakeries Corporation, 178 A 723, 115 NJ Law 166—Pederson v. Edward Shoe Corporation, 142 A 13, 104 NJ Law 566—Corpus

know that such act is likely to be performed and that damage to others is likely to result.¹⁴ The test of the master's responsibility for the acts of his servants is not whether such act was done in accordance with the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed to do,¹⁵ and an act is regarded as "authorized" in the legal sense if it is incidental to the performance of the duties intrusted to the servant even though it is in disobedience of the master's express orders and instructions.¹⁶ If the master undertakes to determine for himself the manner in which his servant shall perform his prescribed duties, the obligation is on him to see that such instructions are carried out and that the servant does not substitute his own methods for those of his master.¹⁷ Any other rule,

it has been said, would in a measure nullify the doctrine of respondeat superior.¹⁸ The rule, of course, does not apply where the injury was the result of arrangements made by the person injured with the servant, with knowledge that they were in contravention of prior orders from the master.¹⁹

As determinative of scope of employment. The fact that a servant disobeys the orders or instructions of his master in doing the act complained of is not determinative of whether he acted within the scope of his employment,²⁰ it is well settled that such act may be within the scope of the servant's employment although in violation of the express instructions or orders of the master.²¹ If, however, the act forbidden is outside the class of service which the servant is employed to perform, the doing of the act is outside the scope of employment

Juris quoted in *Warner v Davis*, 159 A 817, 10 NJ Misc 539, affirmed 166 A 164, 110 NJ Law 458
 NY—*Corpus Juris* cited in *Ford v Grand Union Co*, 270 NYS 162, 167, 240 App Div 294
 NC—*Gillis v Great Atlantic & Pacific Tea Co*, 27 SE2d 283, 223 NC 470, 150 ALR 1830—*Hammond v Eckerd's of Asheville*, 18 SE2d 151, 220 NC 596—*Riddle v Whisnant*, 16 SE2d 698, 220 NC 131—*West v F W Woolworth Co*, 1 SE2d 546, 215 NC 211
 Or—*Thompson v Union Fishermen's Co-op Packing Co*, 273 P 953, 128 Or 173—*Newkirk v Oregon-Washington R & Nav Co*, 273 P 707, 128 Or 28, 72 ALR 530
 Pa—*Mantino v Piercedale Supply Co*, 13 A2d 51, 338 Pa 435—*Orr v. William J Burns International Detective Agency*, 12 A2d 25, 337 Pa 587—*Griffith v Atlantic Refining Co*, 157 A 791, 305 Pa 386—*Schroeder v Gulf Refining Co of Port Arthur, Tex*, 150 A 663, 300 Pa 397—*Petrowski v Philadelphia & R Ry Co*, 107 A 381, 263 Pa 531—*Allen v Posternock*, 163 A 386, 107 Pa Super 332
 SC—*Carroll v Beard-Laney, Inc*, 35 SE2d 426, 307 SC 339—*Hyde v Southern Grocery Stores*, 15 SE2d 353, 197 SC 263—*Hancock v Aiken Mills*, 185 SE 188, 180 SC 93
 Tenn—*Pratt v Duck*, 191 SW2d 562, 28 Tenn App 602
 Tex—*Sid Katz, Inc v Walsh & Burney Co*, 177 SW2d 49, 142 Tex 232—*Hudson v St. Louis Southwestern Ry Co of Texas, Com App*, 293 SW 811, rehearing denied *Hudson v St. Louis Southwestern Ry Co of Texas*, 295 SW 577—*Gammill v Mullins*, Civ App, 188 SW2d 986, error dismissed—*Baker Hotel of Dallas v Rogers*, Civ App, 157 SW2d 940,

error refused 160 SW2d 522, 138 Tex 398—*National Life & Accident Ins Co v Ringo*, Civ App, 137 SW2d 828, error refused—*Central Motor Co v Gallo*, Civ App, 94 SW2d 821—*Corpus Juris* cited in *Texas Power & Light Co v Denison*, Civ App, 45 SW2d 1001, 1002—*Gulf, C & S F Ry Co v Cobb*, Civ App, 45 SW2d 323, error dismissed—*W R Pickering Lumber Co v Bussey*, Civ App, 294 SW 665—*Friend-Rowe Motor Co v Ricci*, Civ App, 293 SW 851
 Utah—*Carter v Bessey*, 93 P2d 490, 97 Utah 427
 W Va—*O'Dell v Universal Credit Co*, 191 SE 568, 118 W Va 678, 39 CJ p 1285 note 12
 14. US—U S Lighterage Corporation v Peterson Lighterage & Towing Corporation, CC.ANY, 142 F2d 197
 Md—*Great Atlantic & Pacific Tea Co v Noppenberger*, 189 A 434, 171 Md 378
 Common knowledge of disobedience
 Servants' disobedience of instructions relating to manner of discharging duties is matter of common knowledge of which employers must take notice—*Loper v Yazoo & M V R Co*, 145 So 743, 166 Miss 79
 15. Ga—*Corpus Juris* quoted in *Evans v Caldwell*, 184 SE 440, 443, 52 Ga App 475, affirmed 190 SE 582, 184 Ga 203
 NJ—*Corpus Juris* quoted in *Warner v Davis*, 159 A 817, 10 NJ Misc 539, affirmed 166 A 164, 110 NJ Law 458
 SC—*Hyde v Southern Grocery Stores*, 15 SE2d 353, 197 SC 263, 39 CJ p 1286 note 14
 16. NC—*Hammond v Eckerd's of Asheville*, 18 SE2d 151, 220 NC 596—*Riddle v Whisnant*, 16 SE2d 698, 220 NC 131

17. La—*Corpus Juris* quoted in *Dunn v Campo*, App, 179 So 102, 104
 NJ—*Corpus Juris* quoted in *Warner v Davis*, 159 A 817, 10 NJ Misc 539, affirmed 166 A 164, 110 NJ Law 458
 Pa—*McDermott v Consolidated Ice Co*, 44 Pa Super 445
 18. US—*Philadelphia & R R Co v Derby*, Pa, 14 How 468, 14 L Ed 502
 La—*Corpus Juris* quoted in *Dunn v Campo*, App, 179 So 102, 104
 NJ—*Corpus Juris* quoted in *Warner v Davis*, 159 A 817, 10 NJ Misc 539, affirmed 166 A 164, 110 NJ Law 458
 19. Mo—*Snider v Crawford*, 47 Mo App 8
 20. Cal—*Barton v McDermott*, 391 P 591, 108 Cal App 373
 NY—*Bush v Sinclair-Rooney*, 201 NYS 804, 207 App Div 699
 Tex—*Corpus Juris* cited in *Sid Katz, Inc v Walsh & Burney Co*, 177 SW2d 49, 51, 142 Tex 232
 21. Ala—*Gulf Refining Co v McNeel*, 153 So 231, 228 Ala 303
 Ark—*Federal Compress & Warehouse Co v Jones*, 21 SW2d 857, 180 Ark 476
 Cal—*Barton v McDermott*, 291 P 591, 108 Cal App 373
 Md—*Corpus Juris* cited in *Great Atlantic & Pacific Tea Co v Noppenberger*, 189 A 434, 442, 171 Md 378
 Mich—*Anderson v Schust Co*, 247 NW 187, 262 Mich 336
 Neb—*Rose v Gisi*, 298 NW 333, 139 Neb 593
 Tex—*Sid Katz, Inc v Walsh & Burney Co*, 177 SW2d 49, 142 Tex 232—*Lowry v Anderson-Berney Bldg Co*, 161 SW2d 459, 139 Tex 29
 39 CJ, p 1287 note 19.

and no liability attaches to the master²² unless the rule forbidding the act has been openly, constantly, and habitually violated for such a length of time that the master in the exercise of ordinary care should have been apprised and informed of its non-observance²³. The fact that a servant is at a place where he should not be, if he had obeyed his master's orders, is immaterial except as it tends to show a permanent or temporary abandonment of his master's service.²⁴

e. Exceptions to Rule

- (1) In general
- (2) Dangerous instrumentalities or agencies

(1) In General

The rule that the master is liable only for acts committed by his servant within the scope of employment is subject to some apparent exceptions.

There are some apparent exceptions to the general rule, discussed supra subdivisions a-d of this section, that the master is liable for torts of the servant if, and only if, they are committed by him while acting within the scope of his employment.²⁵ They grow out of the duty owing by the master to the person injured,²⁶ and the master is liable for acts of his servant which he has contracted against even though such acts are outside the scope of the servant's employment.²⁷

Servant of storekeeper. It has been held that a shopkeeper or storekeeper, who invites the public to enter his premises and to subject themselves to the custody and control of his employees, is liable for injuries inflicted by them, even though not within the scope of their employment,²⁸ but other decisions do not recognize this exception²⁹.

Acts for which master not liable if done by himself. It has been held that the master is not liable for any act of his servant for which he would not have been liable if he had done it himself³⁰.

(2) Dangerous Instrumentalities or Agencies

In some jurisdictions it has been held that a master who intrusts the custody, control, and use of any dangerous instrumentality or agency to a servant will not be permitted to avoid liability for injuries inflicted thereby on the ground that the servant in doing the particular act complained of was acting outside the scope of his employment.

In some jurisdictions, it has been held that a master who intrusts the custody, control, and use of any dangerous instrumentality or agency to a servant will not be permitted to avoid responsibility for injuries inflicted thereby through the act of the servant on the ground that the servant in doing the particular act complained of was acting outside of the scope of his employment³¹. This is on the theory that persons using dangerous instrumentalities in the prosecution of their business must observe the greatest care in the custody and use thereof,³² that this duty cannot be shifted by the master from him-

22. Neb.—Rose v Gisl, 298 NW 283, 189 Neb 593

N.C.—Hayes v Pine State Creamery, 141 SE 340, 195 NC 118

Disobedience of the order forbidding the act cannot annul the order unless the master knows of the violation and ratifies it—Texas & P Ry. Co v Black, 27 SW 118, 87 Tex 160—South Plains Coaches v. Box, Tex Civ App, 111 SW 3d 1151, error dismissed

23. N.C.—Hayes v Pine State Creamery, 141 SE 340, 195 NC 118.

24. N.Y.—Riley v Standard Oil Co., 132 NE 97, 231 NY 301, 23 ALR 1382.

25. Ky.—Gladdish v Southeastern Greyhound Lines, 169 SW 3d 297, 293 Ky 498

N.Y.—Schell v Vergo, 4 NYS 3d 644, 186 Misc 839

Liability of carrier to passengers for negligence and wrongs of employees outside scope of employment see Carriers § 689.

26. N.Y.—Schell v. Vergo, supra.

The proprietor of a saloon, under a statute in effect so providing, has

the duty to protect guests from torts of his servants, and those who accept his invitation become his "guests" when they partake of what he offers and hence should be entitled to protection from the willful trespass of those he employs to serve them—Schell v Vergo, supra

27. Ky.—Illinois Cent R Co v Fontaine, 289 SW 263, 217 Ky 211, 52 ALR 1064

Miss.—Todd v Natchez-Eola Hotels Co., 157 So 703, 171 Miss 577

Liability of bailee of property for unauthorized use by servant see Bailments § 27 a (2)

Where the master is under a contractual obligation to care for property of another, and such property is damaged by the act of his servant, he is liable therefor even though the act of the servant was outside the scope of his employment—Pratt v Martin, 35 SW 2d 1004, 183 Ark 365

28. N.Y.—Mallach v Ridley, 9 NY S 922, 24 Abb NCas 172

39 CJ p 1288 note 36

29. Mo.—Smothers v Welch & Co House Furnishing, 274 SW. 678, 310 Mo. 144, 40 ALR 1209—Priest

v. F W. Woolworth Five & Ten Cent Store, 62 SW 2d 926, 228 Mo App 23

39 CJ p 1288 note 36

Liability of storekeeper to customers for acts of servants generally see infra § 575.

30. Ala.—Russell v Irby, 18 Ala. 181.

31. Fla.—Crenshaw Bros Produce Co v Harper, 194 So 353, 142 Fla. 27—Western Union Telegraph Co. v Michel, 163 So 86, 120 Fla. 511.

Mich.—Wiley v Pere Marquette Ry. Co., 209 NW 59, 235 Mich 279

Tex.—Lloyd v Herrington, Civ App, 178 SW 2d 694, reversed on other grounds 182 SW 2d 1003, 143 Tex 125—Corpus Jams cited in ATEX Const Co v Farrow, Civ App, 71 SW 2d 323, 325, error refused

39 CJ p 1288 note 39

32. Ohio—Pittsburgh, C & St L. R. Co v Shields, 24 NE 652, 47 Ohio St 387, 21 Am SR. 840, 8 LRA 464

Tex.—Atex Const Co v. Farrow, Civ App, 71 SW.2d 323, error refused.

self to his servants so as to exonerate him from liability for their negligence in the custody and use thereof,³³ and that, when these instrumentalities are so intrusted to a servant by the master, the proper custody and use thereof becomes a part of the servant's employment,³⁴ and he must use the same degree of care and attention as the law requires of the master.³⁵

Extent and limits of rule. This doctrine, it has been said, applies not to those instrumentalities alone which are dangerous per se or which are operated or propelled by the power of steam, electricity, powder, dynamite, or kindred forces, but to all instrumentalities employed by the master which, by reason of the method of their operation, are capable of inflicting, and likely to inflict, serious injury on others.³⁶ Some authorities have limited the application of the doctrine to cases where the injury results from the servant's failure to guard a dangerous instrumentality and have refused to apply the rule so as to impose liability on the master where the injury results from the positive personal wrong of the servant.³⁷

Torpedoes The rule has been applied where a servant in charge of torpedoes used by the master in his business inflicts injury on another by his negligent use thereof³⁸ or where injuries are inflicted on another when the torpedoes are being used by the servant for his own amusement or to play a joke.³⁹ However, it has been held that the doctrine has no application where the servant inflicting the injuries by the use of torpedoes was not intrusted with the custody and use thereof and at the time of the injury was not acting in furtherance of the master's interest.⁴⁰

§ 571. — Negligence

Under the doctrine of respondeat superior the master is liable for the negligent acts or omissions of his servant while acting as such within the scope of his authority

Under the doctrine of respondeat superior⁴¹ the master is liable for the negligent acts or omissions of his servant while acting as such and within the scope of his employment,⁴² which proximately re-

33. Fla.—Crenshaw Bros Produce Co v. Harper, 194 So 353, 142 Fla 27.

39 C.J. p 1288 note 41

34. Ohio—Pittsburgh, C & St L R Co v Shields, 24 NE 658, 47 Ohio St 387, 394, 21 Am SR 840, 8 LRA 464

39 C.J. p 1288 note 42

35. Fla.—Southern Cotton Oil Co v Anderson, 86 So. 629, 80 Fla 441, 16 ALR 255

Tex.—Corpus Juris cited in Atex Const Co v Farrow, Civ App, 71 SW 2d 323, 325, error refused

36. Fla.—Crenshaw Bros Produce Co v Harper, 194 So 353, 142 Fla 27

39 C.J. p 1288 note 44

An automobile has been held not to constitute a dangerous instrumentality within the meaning of the rule—Terrett v Wray, 105 S.W.2d 93, 171 Tenn 448

37. Idaho—Scrivner v Boise Pallette Lumber Co, 268 P. 19, 46 Idaho 384

Tex.—Galveston, Harrisburg & S A Ry. Co v Currie, 98 SW. 1073, 100 Tex 136, 10 LRA, NS, 367

38. Wis.—Euting v Chicago & N. W. R. Co., 92 NW. 358, 116 Wis 13, 96 Am SR 936, 60 LRA 168

39 C.J. p 1288 note 45

39. Ohio—Pittsburgh, C. & St L R Co v. Shields, 24 NE 658, 47 Ohio St 387, 21 Am SR. 840, 8 LRA 464.

39 C.J. p 1289 note 46

40. Mass.—Obertoni v. Boston & M

R R Co, 71 NE 980, 186 Mass 481, 67 LRA 423

39 C.J. p 1289 note 47

41. Ill.—Lasko v. Meier, 67 NE 2d 162, 394 Ill 71

N.Y.—Ramsey v New York Cent R Co, 199 NE. 65, 269 N.Y. 219, 102 ALR 511.

42. US.—Pittsburgh S S Co v. Scott, CCA Ohio, 159 F2d 378—Sugg v Hendrix, CCA Miss, 153 F2d 240—Western Union Telegraph Co v Bromberg, CCA Or, 143 F2d 288—Joy v Winder, CC A Okl, 78 F2d 283—P F Collier & Son Co v Hartfield, CCA Minn, 73 F2d 835—Eagle Star Ins Co v Bean, DC Wash, 34 F Supp 300, affirmed, CCA, 134 F2d 755

Ala.—Southeastern Greyhound Lines v Callahan, 13 So 2d 660, 244 Ala 449—Mi-Lady Cleaners v McDaniel, 179 So 908, 235 Ala 469, 116 ALR 639—Jewel Tea Co. v Skhvis, 165 So 824, 231 Ala 590—St Louis-San Francisco Ry Co v Robbins, 123 So 12, 219 Ala 627

Ark.—White v Sims, 201 SW 2d 21—C J Horner Co. v Holland, 180 SW 2d 524, 207 Ark. 345—Malco Theatres v McLain, 117 SW 2d 45, 196 Ark. 188—Interurban Transp Co v Reeves, 108 SW 2d 594, 194 Ark 321—Rex Oil Corporation v Crank, 38 SW 2d 1093, 183 Ark 819—Pratt v Martin, 35 SW 2d 1004, 183 Ark 365—Southwestern Bell Telephone Co. v Roberts, 31 SW 2d 302, 182 Ark. 211—Hunter v First State Bank of Morrilton, 28 S.W.2d 712, 181 Ark 907—Federal Compress & Warehouse Co. v

Jones, 21 SW 2d 857, 180 Ark 476

Cal.—Taylor v Oakland Scavenger Co, 110 P 2d 1044, 17 Cal 3d 594—Dyer v McCorkle, 280 P 965, 208 Cal 216—Wills v J J Newberry Co, 111 P 2d 846, 43 Cal App 2d 595—Cain v Marques, 88 P 2d 200, 31 Cal App 2d 430—Jameson v. Gavett, 71 P 2d 937, 22 Cal App 2d 646—O'Shea v Pacific Gas & Electric Co, 62 P 2d 1086, 18 Cal App 2d 32—Woodman v Hemet Union High School Dist of Riverside County, 29 P 2d 257, 136 Cal App 544—Clough v. Allen, 1 P 2d 545, 115 Cal App 330—Schwediwy v. McDermott, 298 P. 107, 118 Cal. App 218—Mand v Rose, 274 P 392, 96 Cal App 564

Conn.—Bagre v Daggett Chocolate Co, 13 A 2d 757, 126 Conn 659—Wells v New York, N. H & H R Co, 128 A. 700, 102 Conn 361.

D.C.—Schweinhaut v. Flaherty, 49 F2d 533, 60 App DC 151, certiorari denied 51 S Ct 656, 283 US 864, 75 L Ed 1468

Fla.—J C. Penny Co v McLaughlin, 188 So 785, 137 Fla 694—Orr v. Avon Florida Citrus Corporation, 177 So 612, 130 Fla 306—Florida Dairies Co v. Rogers, 181 So 85, 119 Fla 451

Ga.—Coward v. Jordan, App, 44 S.E. 2d 804—Lake v. Cameron, 13 S.E. 2d 858, 64 Ga.App. 501—Brown v Union Bus Co, 6 S.E.2d 888, 61 Ga App 496—Jones v. Hall, 195 S.E. 879, 57 Ga.App 477—Personal Finance Co. of Macon v Whiting, 173 S.E. 111, 48 Ga.App. 164

Idaho.—Baldwin v. Singer Sewing

- Mach Co, 287 P 944, 49 Idaho 231
- Ill.—Lasko v Meier, 67 NE2d 162, 234 Ill 71—Danner v Colby, 31 N E2d 950, 375 Ill 558, mandate conformed to 35 NE2d 952, 311 Ill App 353—Metzler v Layton, 25 N E2d 60, 373 Ill 86—Mosby v Kimball, 178 NE 66, 345 Ill 420—Hartley v Red Ball Transit Co, 176 NE 761, 344 Ill 634—Nelson v Stutz Chicago Factory Branch, 178 NE 394, 311 Ill 357—Dean v Ketter, 65 NE2d 575, 325 Ill App 206—Flood v Bitzer, 40 NE2d 537, 313 Ill App 359—Richardson v Moore, 254 Ill App 511—Freehill v Consumers' Co, 243 Ill App 1—Van Meter v Gurney, 240 Ill App 165
- Ind.—Annis v Postal Telegraph Co, 52 NE2d 378, 114 Ind App 543—Standard Oil Co v Soderling, 42 NE2d 378, 112 Ind App 437—Bailey v Washington Theatre Co, 41 NE2d 819, 112 Ind App 336—Holland Furnace Co v Nauracaj, 14 NE2d 339, 105 Ind App 574.
- Iowa.—Krausniek v Haegg Roofing Co, 20 NW2d 432, 236 Iowa 985
- Ky.—Central Truckaway System v Moore, 201 SW2d 725, 301 Ky 533
- La.—Woodall v Dickson Ice Cream Co, App, 180 So 193—Mason v Harrin Transfer & Warehouse Co, App, 168 So 331—Comfort v Monteleone, App, 163 So 670—Walton v Louisiana Power & Light Co, App, 152 So 760—Norton v Louisiana Ice & Utilities, 135 So 717, 18 La App. 664—Goldman v Yellow Cab Co, 134 So 351, 17 La App 450—Finney v Banner Cleaners & Dyers, 126 So 573, 13 La App 101—Serrere v Dennis Sheen Transfer, 7 La App 684—Rousseau v Texas & P Ry Co, 4 La App 691—Bedsole v Hill, Harris & Co, 2 La App 366
- Me.—Anthony v. Arpin, 41 A 2d 4, 141 Me 165—Stevens v Frost, 32 A 2d 164, 140 Me 1—Copp v Paradise, 157 A 228, 130 Me 464
- Md.—Erdman v. Henry S Horkheimer & Co, to Use of World Fire & Marine Ins Co, 181 A 221, 169 Md 204—Corpus Juris cited in Eyerly v Baker, 178 A 691, 696, 168 Md 599.
- Mass.—Fanciullo v. B G. & S Theatre Corporation, 8 NE2d 174, 397 Mass. 44—Ciarmataro v Adams, 176 NE 610, 275 Mass. 521, 75 A L R 1171
- Mich.—Conover v Hecker, 26 NW2d 774, 317 Mich 285
- Minn.—Gilbert v Megears, 357 NW 73, 193 Minn 495
- Miss.—Sears, Roebuck & Co v Creekmore, 23 So 2d 250, 199 Miss 48
- Mo.—Porter v Thompson, 206 SW 2d 509—Atterbury v Temple Stephens Co., 181 SW2d 659, 352 Mo 5—Devine v Kroger Grocery & Baking Co, 162 SW2d 813, 349 Mo 621—Simmons v Kroger Grocery & Baking Co, 104 SW2d 357, 340 Mo 1118—O'Brien v Rindskopf, 70 SW2d 1085, 334 Mo 1333—Davis v Buck's Stove & Range Co, 49 SW2d 47, 329 Mo 1177—Funk v Fulton Iron Works Co, 277 SW 566, 311 Mo 77—Presley v Central Terminal Co, App, 143 SW2d 799—Rohrmoser v Household Finance Corporation, 86 SW 2d 103, 331 Mo App 1188—Givens v Spalding Cloak Co, 63 SW2d 819, 228 Mo App 169—Corpus Juris cited in Lajoie v Rossi, 37 SW2d 684, 687, 325 Mo App 651—McMahon v Chicago, B & Q R Co, App, 277 SW 356
- Neb.—Frazier v Anderson, 11 NW 2d 764, 143 Neb 905—Van Auker v Steckley's Hybrid Seed Corn Co, 8 NW2d 451, 143 Neb. 24—Snyder v Russell, 1 NW2d 126, 140 Neb 616
- NH.—Sauriolle v O'Gorman, 163 A 717, 86 NH 39—Doyle v. Lacroix, 157 A 75, 85 NH 247
- NJ.—Dwyer v Lehigh Valley R Co, 37 A 2d 88, 181 NJ Law 485—Donaldson v Ludlow & Squier, 110 A 690, 91 NJ Law 306
- NY.—Osnoff v City of New York, 36 NE2d 646, 286 NY 422, 136 A L R 1354—Delisa v Arthur F Schmidt, Inc, 34 NE2d 326, 285 NY 314—Ramsey v New York Cent R Co, 199 NE 65, 269 NY 219, 102 A L R 511—De Haen v Rockwood Sprinkler Co of Massachusetts, 179 NE 764, 258 NY 350—Pettis v New York State Electric & Gas Corporation, 293 NYS 91, 249 App Div 487, affirmed 11 NE2d 318, 275 NY 607—Antun v Eskay Beverage Co, 283 NYS 488, 246 App Div 631—Smith v. Brady, 121 NYS 474, 136 App Div 665—Bindert v Elmhurst Taxi Corporation, 6 NYS 2d 666, 168 Misc 892—Coggins v Clinton Trust Co, 52 NYS 2d 827—Benal Dress Co v Bagold Corporation, 48 NYS 2d 766—Yashar v Yakovac, 48 NYS 2d 128—Bram v Lustat Realty Corporation, 8 NYS 2d 176
- NC.—Gillis v Great Atlantic & Pacific Tea Co, 27 SE2d 283, 223 N C 470, 150 A L R 1330—Hammond v. Eckerd's of Asheville, 18 SE 2d 151, 220 NC 596—Creech v National Linen Service Corporation, 14 SE2d 408, 219 NC 457—D'Armour v Beeson Hardware Co, 9 SE2d 12, 217 NC 568—West v F W Woolworth Co, 1 SE 2d 546, 215 NC 211—Robinson v McAlhane, 198 SE 647, 214 NC 180—Snow v. De Butts, 193 SE. 224, 212 NC 120—Robertson v Virginia Electric & Power Co, 168 SE 415, 204 NC 359, cause remanded 170 SE 189, 205 NC 111—Dickerson v Atlantic Refining Co, 159 SE 446, 201 NC 90—Wilkie v Stancil, 147 SE 296, 196 NC 794—Fry v Southern Public Utilities Co, 111 SE 354, 183 NC 281
- Ohio.—Metropolitan Concrete Co. v Vitale, 188 NE 10, 46 Ohio App 140—Manfroy v Craig-Curtiss Co, 176 NE 230, 39 Ohio App 91—J G McCrory Co v Hanley, 175 NE 232, 37 Ohio App 461—National Refining Co v Clancy, 166 NE 305, 31 Ohio App 99—Lytle v Union Gas & Electric Co, 157 NE 804, 24 Ohio App 314
- Okla.—Folsom-Morris Coal Mining Co v De Vork, 160 P 64, 61 Okl 75, L R A 1917A 1290
- Or.—Olds v Von der Hellen, 263 P. 907, 127 Or 276, modified on other grounds 270 P. 497, 137 Or 276
- Pa.—Morris v Lipkin, 176 A 434, 317 Pa 423—Loper v P G Publishing Co, 169 A 374, 312 Pa 580—Martin v Lipschitz, 149 A 168, 299 Pa 211—Markman v Fred P Bell Stores Co, 132 A 178, 285 Pa 378, 43 A L R 862—Clark v Glosser Bros Department Stores, 39 A 2d 733, 156 Pa Super 192—Parker to Use of Bunting v Rodgers, 189 A 693, 125 Pa Super 48—Bahan v Pittsburgh Rys Co, 179 A 803, 118 Pa Super 569—Festi v Proctor & Schwartz, 163 A 354, 107 Pa Super 349—Bittner v Glowatsky, Com Pl, 20 Lehigh LJ 260—Henry v Beck, Com Pl, 66 York Leg Rec 209, affirmed 36 A 2d 734, 154 Pa Super 535—Muldowney v Carote, Com Pl, 8 Sch Reg 44
- RI.—Schiano v McCarthy Freight System, 53 A 2d 527—Kimatian v New England Telephone & Telegraph Co, 141 A 331, 49 RI 186
- SC.—Nuckolls v Great Atlantic & Pacific Tea Co, 5 SE2d 862, 193 SC 156—Corpus Juris cited in Hancock v Aiken Mills, 185 SE 182, 190, 180 SC 93—Johnson v Atlantic Coast Line R. Co, 140 SE 443, 142 SC 125
- SD.—Corpus Juris cited in Anderson v. Chicago & N W Ry Co, 241 NW. 516, 618, 59 SD 543
- Tenn.—Tennessee Coach Co v. Reese, 156 SW2d 404, 178 Tenn 126—Colsher v. Tennessee Electric Power Co, 84 SW2d 117, 19 Tenn App 166—Hoover Motor Express Company v. Thomas, 65 SW2d 621, 16 Tenn App 664
- Tex.—McAfee v Travis Gas Corporation, 153 SW2d 442, 137 Tex 314—Southwest Dairy Products Co v De Frates, 125 SW2d 282, 132 Tex 556, 122 A L R 854—Texas Light & Power Co. v. Denson, 81 SW2d 36, 125 Tex 383—Texas Farm Products Co v Johnson, Civ App, 190 SW2d 178—Lloyd v Herrington, Civ App, 178 SW2d 694, reversed on other

sult in the injury complained of,⁴³ the negligence of a servant in the course of his employment being imputed to his master who is liable therefor,⁴⁴ without the necessity of ratification,⁴⁵ and it is immaterial whether the injurious act or omission consti-

tutes negligence at common law or is made such by statute.⁴⁶ The mere fact that a servant is not employed to be negligent does not mean that such tortious acts are outside the scope or course of his employment,⁴⁷ on the contrary, negligent acts may be

grounds 182 S.W.2d 1003, 143 Tex 135—Baker Hotel of Dallas v Rogers, Civ App, 157 S.W.2d 940, error refused 160 S.W.2d 522, 138 Tex 398—Sullivan v Trammell, Civ App, 130 S.W.2d 310, error dismissed, judgment correct—American Nat Ins Co v Shepherd, Civ App, 91 S.W.2d 439, reversed on other grounds 95 S.W.2d 370, 128 Tex 229, 107 A.L.R. 409—Shell Petroleum Corporation v Magnolia Pipe Line Co, Civ App, 35 S.W.2d 829, error dismissed—El Paso Laundry Co v Gonzales, Civ App, 36 S.W.2d 793, error dismissed

Va—Barber v Textile Machine Works, 17 S.E.2d 359, 178 Va 435—Beasley v Whitehurst, 147 S.E. 194, 152 Va 305

Wash—Leuthold v Goodman, 157 P. 2d 326, 22 Wash.2d 583—Hobbs v Postal Telegraph-Cable Co, 141 P.2d 648, 19 Wash.2d 103—Miller v Alaska S. S. Co, 246 P. 296, 139 Wash 207—Crabb v Wilkins, 109 P. 807, 59 Wash 302

W Va—O'Dell v Universal Credit Co, 191 S.E. 568, 118 W Va 678—Corpus Juris cited in Wellman v Fordson Coal Co, 143 S.E. 160, 161, 105 W Va 463

Wis—De Forest Dairy Co v Friedrich, 232 N.W. 548, 202 Wis 251—Mittleman v Lindsay-McMillan Co, 232 N.W. 527, 202 Wis 577

39 C.J. p 1289 note 64

Ground of liability

(1) It has been stated that the liability of the master for his servant's negligence is predicated on the fact that the employee during the performance of his duties is presumably acting under the control of his employer—McCready v National Starch Products, 23 A.2d 108, 2 Terry, Del., 392.

(2) It has also been stated that it is based on the ground that one who does a thing by and through another does it himself and is responsible for manner in which it is done—Stith v J. J. Newberry Co, 79 S.W.2d 447, 388 Mo 487.

(3) On the other hand, it has been stated that the master's liability is not that servant represents master in the negligent act, but that he is conducting affairs of master who must see that they are conducted without injury to others—P. F. Collier & Son Distributing Corporation v Drinkwater, C.C.A.N.C., 81 F.2d 300

(4) Other statements see 39 C.J. p 1289 note 54 [a].

Ways and means of performing act

When servant is engaged in work of master, doing that which servant is employed or directed to do, and an actionable wrong is negligently done to another, master is liable, not only for what servant does, but also for ways and means employed by servant in performing act in question—Long v Eagle 5, 10 and 25; Store Co, 198 S.E. 573, 314 N.C. 146—Robertson v Virginia Electric & Power Co, 168 S.E. 415, 204 N.C. 359, cause remanded 170 S.E. 139, 205 N.C. 111—Dickerson v Atlantic Refining Co, 159 S.E. 446, 201 N.C. 90

When relation is created between parent and child, parent is responsible to third persons for child's negligence while acting in course of employment—Miller v Semler, 3 P.2d 937, 137 Or 410

43. Idaho—Scrivner v Boise Payette Lumber Co, 268 P. 19, 46 Idaho 334

Ind—Standard Oil Co v Soderling, 42 N.E.2d 373, 112 Ind App 437

La—Mason v Herrin Transfer & Warehouse Co, App, 163 So 331—Davis v Harry B. Loeb Piano Co, 119 So 746, 10 La App 106

N.C.—Hudson v Gulf Oil Co., 2 S.E. 2d 26, 215 N.C. 432

R.I.—Schiano v McCarthy Freight System, 53 A.2d 527

Tenn—Colsher v Tennessee Electric Power Co, 84 S.W.2d 117, 19 Tenn. App 166

Tex—El Paso Laundry Co v Gonzales, Civ App, 36 S.W.2d 793, error dismissed

Utah—Looney v Bingham Dairy, 282 P. 1080, 75 Utah 53, 73 A.L.R. 427

Damages reasonably anticipated

The employer is liable for any damage that he might reasonably have anticipated would result from the employee's negligence—Ritz v Cousins Lumber Co, 59 S.W.2d 1072, 227 Mo App 1167.

Concurrent negligence of third person

The fact that the negligence of a third person other than that of the person injured cooperated with that of the servant in inflicting the injury will not exonerate the master from liability where the act was within the scope of the servant's employment—Yashar v Yakovac, 48 N.Y.S.2d 128

39 C.J. p 1292 note 67.

An intervening cause will not relieve the master of liability where

such intervening cause was set in motion by the servant's negligence—Folsom-Morris Coal Mining Co v. De Vork, 160 P. 64, 61 Okl. 75, L.R.A. 1917A 1290

44. U.S.—Sugg v Hendrix, C.C.A. Miss, 153 F.2d 240

Conn—Bagre v Daggett Chocolate Co, 13 A.2d 757, 128 Conn 659

Ill—Darnier v Colby, 31 N.E.2d 950, 376 Ill 558, mandate conformed to 35 N.E.2d 952, 311 Ill App 352—Metzler v Layton, 25 N.E.2d 60, 373 Ill 88—Mosby v Kimball, 178 N.E. 66, 345 Ill 420—Nelson v Stutz Chicago Factory Branch, 173 N.E. 894, 341 Ill 387—Dean v Ketter, 65 N.E.2d 572, 328 Ill App 206

—Flood v Bitzer, 40 N.E.2d 557, 313 Ill App 359—Van Meter v Gurney, 240 Ill App 165

Ind—Holland Furnace Co v Nauracas, 14 N.E.2d 339, 105 Ind App. 574

Iowa—Krausnick v Haegg Roofing Co, 20 N.W.2d 432, 236 Iowa 985

Mich—Conover v Hecker, 26 N.W.2d 774, 317 Mich 285

Neb—Frazier v Anderson, 11 N.W. 2d 764, 143 Neb 905—Van Auker v Steckley's Hybrid Seed Corn Co, 8 N.W.2d 451, 143 Neb 24.

N.C.—Dickerson v Atlantic Refining Co, 159 S.E. 446, 201 N.C. 90

Okla—Folsom-Morris Coal Mining Co v De Vork, 160 P. 64, 61 Okl. 75, L.R.A. 1917A 1290

Pa—Parker, to Use of Bunting, v Rodgers, 189 A. 693, 125 Pa Super 48

Tex—McAfee v Travis Gas Corporation, 153 S.W.2d 442, 137 Tex. 314—Texas Farm Products Co. v Johnson, Civ App, 190 S.W.2d 178

—Lloyd v Herrington, Civ App, 178 S.W.2d 694, reversed on other grounds 182 S.W.2d 1003, 143 Tex 135

Wash—Crabb v Wilkins, 109 P. 807, 59 Wash 302

W Va—Corpus Juris cited in Wellman v Fordson Coal Co., 143 S.E. 160, 161, 105 W Va 463.

39 C.J. p 1290 note 65.

45. Wis—Haswell v. Reuter, 177 N.W. 8, 171 Wis. 228

46. Ariz—Davis v. Boggs, 199 P. 116, 22 Ariz 497.

Miss—Osborne v McMasters, 41 N.W. 543, 40 Minn 103, 12 Am S.R. 698

47. Miss—Sears, Roebuck & Co v. Creekmore, 23 So.2d 250, 199 Miss. 43.

considered within the scope or course of a servant's employment⁴⁸ On the other hand, it is not sufficient to render the master liable for his servant's negligent acts that the acts were performed during the period of employment,⁴⁹ and the master cannot be held liable under the doctrine of respondeat su-

perior for the negligent acts of omission or commission of the servant when not acting within the scope of his employment⁵⁰

The test as to liability of the master is whether the servant was guilty of negligence in the doing of his master's work⁵¹ and whether the master had

48. *Miss*—Sears, Roebuck & Co v Creekmore, *supra*.

49. *Wis*—Mittleman v Lindsay-McMillan Co, 282 NW 537, 202 Wis 577

50. *US*—Pittsburgh S S Co v Scott, CCA Ohio, 159 F2d 378—White v Firestone Tire & Rubber Co, CCA SC, 90 F2d 637

Ala—St Louis-San Francisco Ry Co v Robbins, 123 So 12, 219 Ala 627

Ark—White v Sims, 201 SW 2d 21—Pratt v Martin, 85 SW 2d 1004, 183 Ark 365—Southwestern Bell Telephone Co v Roberts, 31 SW 2d 802, 182 Ark 211

Cal—Woodman v Hemet Union High School Dist of Riverside County, 29 P 2d 257, 186 Cal App 544—Clough v Allen, 1 P 2d 545, 115 Cal App 330

Conn—Wells v New York, N. H. & H R Co, 138 A 700, 102 Conn 361

Ill—Kavale v Morton Salt Co, 242 Ill App 205, affirmed 160 NE 752, 329 Ill 445

Ind—Wells v Northern Indiana Public Service Co, 40 NE 2d 1012, 111 Ind App 186

Kan—Kyle v Postal Telegraph-Cable Co, 225 P 116, 118 Kan 300

Ky—Hensley v Golden, 186 SW 2d 739, 303 Ky 856

La—Goldman v Yellow Cab Co, 134 So 351, 17 La App 450

Mich—Chajack v Dougherty, 236 NW 789, 254 Mich 296

N.H.—Sauriolle v O'Gorman, 163 A 717, 86 NH 39

N.J.—Shefts v. Free, 146 A 185, 105 NJ Law 577

N.Y.—Bernstein v. East 167th Street Corporation, 293 NYS. 109, 141 Misc 836

N.C.—Tomlinson v Sharpe, 37 SE 2d 498, 226 NC 177—Smith v Duke University, 14 SE 2d 643, 219 NC 628—Creesh v. National Linen Service Corporation, 14 SE 2d 408, 219 NC 457—Snow v. De Butts, 193 SE 224, 212 NC 120—Martin v Greensboro-Fayetteville Bus Line, 150 SE 501, 197 NC 720—Wilkie v. Stencil, 147 SE 296, 196 NC 794

Ohio—Edwards v Benedict, 70 NE 2d 471, 79 Ohio App 134—Metropolitan Concrete Co v Vitale, 183 NE 10, 46 Ohio App 140—Lytle v Union Gas & Electric Co, 157 NE 804, 24 Ohio App 314

Pa.—Martin v Lipschitz, 149 A 168, 299 Pa. 211—Henry v. Beck, Com.

P1, 56 York Leg Rec 209, affirmed 36 A 2d 734, 154 Pa Super 585

SD—Norman v Wagner, 262 NW 78, 63 SD 547

Tenn—Cunningham v Union Chevrolet Co., 147 SW 2d 746, 177 Tenn 214, rehearing denied 148 SW 2d 638, 177 Tenn 214

Tex—Southwest Dairy Products Co v De Frates, 125 SW 2d 282, 132 Tex 556, 122 ALR 854—Shell Petroleum Corporation v Magnolia Pipe Line Co, Civ App, 85 SW 2d 829, error dismissed—King v Nacogdoches & S E Ry Co, Civ App, 146 SW 300.

Va—Barber v Textile Machine Works, 17 SE 2d 359, 178 Va 435—Beasley v Whitehurst, 147 SE 194, 152 Va 305—Appalachian Power Co v Robertson, 129 SE 224, 142 Va 454

Wis—De Forest Dairy Co v Friedrich, 332 NW 543, 202 Wis 251—Mittleman v Lindsay-McMillan Co, 282 NW 537, 202 Wis 577 39 C.J. p 1291 note 58.

Work of third person

If servant is doing work of some other person, master is not answerable for his negligence in performance thereof—White v Firestone Tire & Rubber Co, CCA SC, 90 F 2d 637—Elkhorn Piney Coal Mining Co v. Hazelett, CCA Ky, 62 F 2d 137

Last clear chance

Where employer is not liable for employee's negligence because employee was acting outside the scope of his employment, employer cannot be held liable for any failure of his employee to take advantage of a last clear chance—Dempsey v. Test, 184 NE 909, 98 Ind App 533

51. *U S*—Joy v. Winder, CCA Okl, 78 F 2d 283

Ga—Wisham v. McNeely, 199 SE 542, 58 Ga App 587

La—Woodall v Dickson Ice Cream Co, App, 180 So. 193—Mason v Herrin Transfer & Warehouse Co, App, 168 So. 331—Norton v Louisiana Ice & Utilities, 185 So. 717, 18 La App 564—Finney v Banner Cleaners & Dyers, 136 So 573, 13 La App 101—Serrano v. Dennis Sheen Transfer, 7 La.App 684—Bedsale v. Hill, Harris & Co, 2 La App 866

Mo—Devine v. Kroger Grocery & Baking Co, 162 SW 2d 813, 349 Mo 621

N Y—De Haen v. Rockwood Sprink-

ler Co of Massachusetts, 179 NE 764, 258 NY 350—Delisa v Arthur F Schmidt Inc, 34 NE 2d 836, 285 NY 314, appeal denied 22 NYS 2d 927, 260 App Div 607—Benal Dress Co v Bagold Corporation, 43 NYS 2d 766

Ohio—Metropolitan Concrete Co v Vitale, 183 NE 10, 46 Ohio App 140—National Refining Co v. Clancy, 166 NE 205, 31 Ohio App 99

Pa—Morris v. Lipkin, 176 A 434, 317 Pa 422

SC—Hancock v Aiken Mills, 185 S E 188, 180 SC 93

Tex—*Corpus Juris* quoted in Texas Power & Light Co v Denson, 81 SW 2d 36, 39, 125 Tex 383—El Paso Laundry Co v. Gonzales, Civ App, 86 SW 2d 793, error dismissed

W Va—*Corpus Juris* quoted in Wellman v Fordson Coal Co, 143 SE 160, 161, 105 W.Va. 468 39 C.J. p 1291 note 60.

Facts of particular case

Whether or not a servant's negligent act is within the scope of his employment necessarily depends on the facts of each case

Ala—St Louis-San Francisco Ry Co v. Robbins, 123 So 12, 219 Ala. 627.

Ark—Rex Oil Corporation v Crank, 38 SW 2d 1093, 183 Ark 619

If the act of the employee is not negligent, the master is not liable

Conn—Haliburton v General Hospital Soc of Conn, 48 A 2d 261, 133 Conn 61

Mo—Wright v Hannan & Everitt, Inc, 81 SW 2d 303, 336 Mo 732—Brunk v Hamilton-Brown Shoe Co, 66 SW 2d 903, 334 Mo 517

N.C.—Hudson v. Gulf Oil Co, 2 SE 2d 26, 215 NC 422

Tex—Houston & T C R Co v Keeling, 112 SW 308, 61 Tex Civ App 386, certified questions answered 120 SW 847, 102 Tex 521, rehearing denied, Civ App, 121 S. W. 597

Incidental acts

The mere fact that the injury complained of was caused by the negligence of the servant in the performance of an act which, taken per se, was within the scope of his employment, it has been held will not impose liability on the master, if the act was merely incidental to the servant's attempt to perform an act entirely beyond the scope of his au-

the right or power to control the servant in the performance of the act which caused the injury⁵² Whether or not a certain course of conduct by a servant is negligent, or the exercise of reasonable care, must be determined by the standards fixed by law, without regard to any private rules of the master regulating the conduct of his servant⁵³ The master may be held liable even though he has taken every precaution in selecting and instructing the servant,⁵⁴ and it is immaterial, as affecting the master's liability, what the motive of the servant was⁵⁵ It is not essential to the master's liability that the negligent act or omission complained of should have been expressly authorized by him,⁵⁶ or that he should have been present when the act or omission complained of was committed,⁵⁷ or that he should

have had knowledge of the act or omission which caused the injury⁵⁸ Indeed, as long as the act is within the scope of the servant's employment, the master may be held liable even though he disapproved or forbade it⁵⁹ The fact that he had delegated to a third person the power to give the servant instructions as to his work will not exonerate the master from liability.⁶⁰

Limitation of rule; charitable work It has been held that, while an employee engaged in doing charitable work for the master may be regarded as acting in the furtherance of his master's business and to further his purposes, the rule of respondeat superior does not extend to his negligence in so doing, resulting in injury to one who is a recipient of the master's charity.⁶¹

thority—*Cunningham v Union Chevrolet Co*, 147 S W 2d 746, 177 Tenn 214, rehearing denied 148 S W 2d 683, 177 Tenn 214

Law stricter than in compensation cases

The law is applied more strictly in negligence cases, where it is sought to hold master liable for servant's act, than in workmen's compensation cases—*Cunningham v Union Chevrolet Co*, supra.

Knowledge of presence of injured person

In determining whether an employer is liable for the negligence of his employee, the test is not only whether the employee knew of the presence of the injured person, but whether he had reason to expect the presence of that person within the range of his negligent acts—*Dunlavy v Nead*, 99 P 2d 1044, 36 Cal. App 2d 478.

52. Cal.—*King v Emerson*, 288 P 1099, 110 Cal App 414, adopted 294 P. 768, 110 Cal App 414

DC—*Phelps v Boone*, 67 F 2d 574, 62 App DC 808, certiorari denied *Boone v Phelps*, 54 S Ct 528, 291 US 677, 78 L Ed 1065

53. Ala.—*Harrison v Mobile Light & Railroad Co*, 171 So 743, 233 Ala 393—*Alabama G S R Co. v. Clark*, 84 So. 917, 136 Ala. 450

Minn.—*Fonda v St Paul City Ry Co*, 74 N W. 166, 71 Minn 438, 70 Am SR 341

N.Y.—*Taddeo v Tilton*, 289 N.Y.S. 427, 248 App Div 290

Rules beyond legal standards or for different purpose

Private rules governing conduct of employees in dangerous and unusual situations are not definitive of standard of care on which liability for negligence is to be predicated where rules go beyond legal standards or where they are formulated for an entirely different purpose.—*Anstine*

v. Pennsylvania R Co, 20 A 2d 774, 343 Pa 423

54. Ala.—*Jewel Tea Co v Sklavis*, 165 So 324, 231 Ala 590

Exercise of reasonable care in the selection of competent servants, is not a defense where liability to a third person is predicated on negligence of a servant under the doctrine of respondeat superior—*Central Truckway System v Moore*, 201 S W 2d 725, 304 Ky 533

Liability is not based on negligence in employing a careless and incompetent servant—*Krausnick v Haegg Roofing Co*, 20 N W 2d 432, 236 Iowa 985

55. Tex.—*Corpus Juris* quoted in *Texas Power & Light Co v Denson*, 81 S W 2d 36, 39, 125 Tex 383 —*Grubb v Galveston, H & S A R Co*, Civ App, 153 S W 694

56. US—*P F Collier & Son Co v Hartfeil*, CCA Minn, 72 F 2d 625 Ala.—*St Louis-San Francisco Ry Co v Robbins*, 123 So 12, 219 Ala. 427

Ark.—*Interurban Transp Co v Reeves*, 108 S W 2d 594, 194 Ark 321—*Rex Oil Corporation v Crank*, 38 S W 2d 1092, 183 Ark 819

Cal.—*O'Shea v Pacific Gas & Electric Co*, 62 P 2d 1066, 18 Cal App 2d 32

Tex.—*Corpus Juris* quoted in *Texas Power & Light Co v Denson*, 81 S W 2d 36, 39, 125 Tex 383

W Va.—*Corpus Juris* quoted in *Wellman v Fordson Coal Co*, 143 S E 160, 161, 105 W Va. 463 39 C J. p 1291 note 61

57. Tex.—*Corpus Juris* quoted in *Texas Light & Power Co. v Denson*, 81 S W 2d 36, 39, 125 Tex 383

W Va.—*Corpus Juris* quoted in *Wellman v Fordson Coal Co*, 143 S E 160, 161, 105 W Va. 463 39 C J. p 1291 note 62.

58. US.—*P F Collier & Son Co v Hartfeil*, CCA Minn, 72 F 2d 625 NC—*West v F W Woolworth Co*, 1 S E 2d 546, 215 NC 211

Tex.—*Corpus Juris* quoted in *Texas Power & Light Co v Denson*, 81 S W 2d 36, 39, 125 Tex 383

W Va.—*Corpus Juris* quoted in *Wellman v Fordson Coal Co*, 143 S E 160, 161, 105 W Va. 463

39 C J. p 1291 note 63

Servant's knowledge of dangerous condition is imputed to master and it is not necessary for plaintiff, suing for injuries sustained, to show that condition had existed a sufficient length of time to charge master with constructive knowledge thereof.—*The Vogue, Inc, v Cox*, 190 S W 2d 307, 28 Tenn App 344.

59. US—*P F Collier & Son Co v Hartfeil*, CCA Minn, 72 F 2d 625 Ala.—*St Louis-San Francisco Ry Co. v Robbins*, 123 So 12, 219 Ala. 427

Ark.—*Interurban Transp Co v Reeves*, 108 S W 2d 594, 194 Ark 321

DC—*Schweinhaut v Flaherty*, 49 F 2d 533, 60 App DC 151, certiorari denied 51 S Ct 656, 283 US 864, 75 L Ed 1468

Fla.—*Florida Dairies Co v. Rogers*, 161 So 455, 119 Fla 451

Mass.—*O'Brien v. Freeman*, 11 NE 2d 582, 299 Mass 20

Telling servant to act carefully will not enable the master to avoid responsibility—*Mautino v Piercedale Supply Co*, 13 A 2d 51, 338 Pa. 435.

60. US.—*Clark v Geer*, Kan, 86 F. 447, 32 C.C.A. 295

61. N.Y.—*Wallace v. John A. Casey Co*, 116 N.Y.S 394, 133 App.Div. 85

39 C J. p 1292 note 66.

Liability of charitable institution for torts see Charities § 76.

Contributory negligence. Plaintiff cannot recover, although defendant's servant was negligent in the scope of his employment, if plaintiff himself was guilty of contributory negligence⁶² and the doctrine of "last clear chance" is not involved⁶³. Consent of plaintiff to the absence of the servant, where he failed to return as he had promised, which failure was the cause of the injury, has been held not to relieve the master of liability.⁶⁴

§ 572. — Willful or Malicious Acts

As a general rule a master may be held liable for the willful or malicious acts of his servant done in the course of employment and within its scope.

Although there is some early authority to the contrary,⁶⁵ it is well settled that the master may be held liable for the willful or malicious acts of the servant done in the course of his employment and within its scope,⁶⁶ although the acts were not con-

62. U.S.—Knecht v Castleman River R Co, DCPa., 25 F Supp 652, affirmed CCA, 104 F 2d 677

Cal—Wallace v King, 80 P 2d 523, 27 Cal App 2d 174

Ind—Annis v Postal Telegraph Co, 52 N.E 2d 373, 114 Ind App 543 39 C J p 1292 note 68

What constitutes contributory negligence

The determination of whether plaintiff is barred by contributory negligence from recovering depends on whether a reasonably prudent man, situated as was plaintiff, seeing what he saw and knowing what he knew, would have acted as he acted, and whether such conduct constituted care in proportion to the danger—Wallace v King, 80 P 2d 523, 27 Cal App 2d 174

Plaintiff held not guilty of contributory negligence

La—Woodall v Dickson Ice Cream Co, App, 180 So 193—Mason v Herrin Transfer & Warehouse Co, App, 168 So 331

63. Cal—Wallace v King, 80 P 2d 523, 27 Cal App 2d 174

64. Ark.—Gaines v Bard, 22 SW 570, 57 Ark 615, 38 Am SR 366

65. Iowa.—Cooke v Illinois Cent R Co, 30 Iowa 202 39 C J p 1292 note 70

In Michigan

(1) There is early authority supporting the text rule—Cleveland v Newsom, 7 NW 222, 45 Mich 62—Moore v Sanborne, 2 Mich 519, 59 Am D 209

(2) It has been declared that, "In this State our court has never departed from the rule laid down in Cleveland v. Newsom, 7 NW 222, 45 Mich 62, and has not adopted the modern rule, so called, which is invoked, and which goes to an extreme which this court is not willing to follow"—Ducre v Sparrow-Kroll Lumber Co, 133 NW. 928, 940, 168 Mich 49, 47 L.R.A.N.S., 959

(3) It has been recognized, however, that the master may be held liable for an assault committed by his servant while acting within the scope of his employment—Moffit v White Sewing Mach. Co, 183 N.W. 198, 214 Mich 496

66. U.S.—Thompson-Starrett Co v Heindol, C.C.Pa., 60 F 2d 360—

Phillips v Interstate Motor Freight System, D.C.Ill., 45 F Supp 1—The H S Inc No 72, D C N J, 39 F Supp 855, reversed on other grounds, CCA, 130 F 2d 341

Ala.—W. E Belcher Lumber Co v York, 17 So 2d 281, 245 Ala. 286—Lehigh Portland Cement Co v Sharit, 173 So 386, 234 Ala 40—Birmingham News Co v Browne, 153 So 773, 228 Ala 395—Alabama Power Co v Bodine, 105 So 869, 213 Ala 627—Seaboard Air Line Ry Co v Glenn, 104 So 548, 213 Ala 284—Corpus Juris cited in Anderson v Tadlock, 175 So 412, 414, 27 Ala App 513

Cal—Fields v Sanders, 180 P 2d 684, 29 Cal 2d 834—Deevy v Tassi, 130 P 2d 389, 21 Cal 2d 109—Stansell v Safeway Stores, 113 P 2d 264, 44 Cal App 2d 832

Conn—Antinozzi v A Vincent Pepe Co, 166 A 392, 117 Conn 11—Son v Hartford Ice Cream Co, 129 A 778, 102 Conn 696

Fla—C I T Corporation v Brewer, 200 So 910, 146 Fla 247.

Ga.—Frazier v Southern Ry Co, 37 SE 2d 774, 200 Ga 590, conformed to 38 SE 2d 183, 73 Ga App 815—Andrews v Norvell, 15 SE 2d 603, 65 Ga App 241—Brown v Union Bus Co, 6 SE 2d 388, 61 Ga App 496—Broome v Primrose Tapestry Mills, 200 SE 506, 69 Ga App 70—Ford v Mitchell, 179 SE 216, 50 Ga App 617—American Sec Co v Cook, 176 SE 798, 49 Ga App 723—Corpus Juris cited in Gomez v. Great Atlantic & Pacific Tea Co., 172 SE 750, 752, 48 Ga App 398—Personal Finance Co of Macon v Whiting, 172 SE 111, 48 Ga App 154—Atlanta Hub Co v Jones, 171 SE 470, 47 Ga App 778

Ind—Pittsburgh, C. C & St. L Ry Co. v Farmers' Trust & Savings Co, 108 NE 108, 183 Ind 287—Mock v. Polley, 66 NE 2d 78, 116 Ind App 580.

Ky—McBee's Adm'r v Indian Head Mining Co, 132 SW 2d 515, 280 Ky 82—Brooks v. Gray-Von Allen Sanitary Milk Co, 277 SW 816, 211 Ky 462, 46 A.L.R. 1207

La.—Bearman v Southern Bell Telephone & Telegraph Co, 184 So 787, 17 La App 89

Md.—Great Atlantic & Pacific Tea

Co v Noppenberger, 189 A 434, 171 Md 378—Great Atlantic & Pacific Tea Co v. Roch, 153 A 22, 160 Md 189—McCrorry Stores Corporation v Satchell, 129 A 348, 148 Md 279

Mass—Fanciullo v B G & S Theatre Corporation, 8 NE 2d 174, 297 Mass 44—Carmataro v Adams, 176 NE 610, 275 Mass 521, 75 A.L.R. 1171.

Miss—Hahn v Owens, 168 So 622, 176 Miss 296—Trico Coffee Co v Clemens, 151 So 175, 168 Miss 748

Mo—Porter v. Thompson, 206 SW 2d 509—Simmons v Kroger Grocery & Baking Co, 104 SW 2d 357, 340 Mo 1118—Corpus Juris quoted in Ragsdale v Riverside Jockey Club, App, 106 SW 2d 948, 951—Uptegrove v Walker, App. 7 SW 2d 784—Calkins v Engle, 300 SW 997, 221 Mo App 1178

Mont—Kornec v. Mike Horse Mining & Milling Co, 180 P 2d 262

N.J.—Heenan v Horre Coal Co, 174 A 551, 113 NJ Law, 388

N.Y.—Oaspoiff v. City of New York, 36 NE 2d 646, 286 NY 422, 136 A.L.R. 1354—Oneta v. Paul Tocci Co, 67 N.Y.S.2d 795, 271 App Div 681—Bram v. Lusat Realty Corporation, 8 N.Y.S.2d 176

N.C.—Hammond v Eckerd's of Asheville, 18 SE 2d 151, 220 NC 696—D'Armour v Beeson Hardware Co, 9 SE 2d 12, 217 NC 568—West v. F. W. Woolworth Co, 1 SE 2d 546, 215 NC 211—Robinson v McAlhane, 198 SE 647, 214 NC 180—Snow v De Butts, 193 SE 224, 212 NC 120—Robertson v Virginia Electric & Power Co, 168 SE 415, 204 NC 359, cause remanded 170 SE 139, 205 NC. 111—Dickerson v. Atlantic Refining Co, 159 SE 446, 201 NC 90—Fry v. Southern Public Utilities Co, 111 SE 354, 183 NC 281

Ohio—J. G. McCrorry Co v. Hanley, 175 NE 232, 37 Ohio App 461

Okl.—Corpus Juris cited in Ada-Konawa Bridge Co v. Cargo, 21 P 2d 1, 7, 163 Okl 122

Pa.—Orr v William J Burns International Detective Agency, 12 A 2d 25, 337 Pa. 587.

S.C.—Johnson v Atlantic Coast Line R Co, 140 SE 443, 142 SC 125.

S.D.—Hasche v. Wagner, 227 N.W. 46, 55 S.D. 595.

sent to, or expressly ratified or authorized by, the master.⁶⁷ Such acts are imputable to the master under the doctrine of respondeat superior.⁶⁸

It has been stated that the decisions holding that the willful or malicious tort of the servant may be imputed to the master fall into three classes.⁶⁹ (1) Where the master is under contract, express or implied, with the person wronged, or under a law-imposed duty, requiring the master to refrain from mistreatment of him.⁷⁰ (2) Where the nature of the employment or the duty imposed on the servant is such that the master must contemplate the use of

force by the servant in performance as a natural or legitimate sequence.⁷¹ (3) Where a dangerous instrumentality is intrusted by the master to the servant, which has capability of harm to the public.⁷² While it has been recognized that other cases may arise which would call for a distinct classification,⁷³ it has been held that ordinarily the master is not liable if the case does not fall within one of these three classes.⁷⁴

The master may be held liable for a willful or malicious act of his servant even though he had no knowledge that the act was to be done,⁷⁵ and, in

Tenn.—Hoover Motor Express Co. v. Thomas, 65 S.W.2d 531, 16 Tenn App 654

Vt.—Jewett v. Pudlo, 172 A. 423, 106 Vt. 249, followed in 172 A. 428, 106 Vt. 258

Wis.—Linden v. City Car Co., 300 N.W. 925, 239 Wis. 236—Bryan v. Adler, 72 N.W. 368, 97 Wis. 124, 65 Am.S.R. 99, 41 L.R.A. 658

39 C.J. p. 1292 note 72

Liability of:

Corporation for willful or malicious acts of its agents or servants see Corporations § 1283

Master for conversion, trespass, or assault see infra § 575

Principal or master for fires willfully set by agent or servant see Fires § 11

Ways and means employed in performance of act

"When the servant is engaged in the work of the master, doing that which he is employed or directed to do, and an actionable wrong is done to another . . . maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question."—Long v. Eagle 5, 10 and 35; Store Co., 198 S.E. 578, 576, 214 N.C. 146—Robertson v. Virginia Electric & Power Co., 168 S.E. 415, 416, 204 N.C. 359, cause remanded 170 S.E. 139, 205 N.C. 111—Dickerson v. Atlantic Refining Co., 159 S.E. 446, 452, 201 N.C. 90

In Texas

(1) The rule stated in the text has been announced or applied in a number of cases—Commonwealth of Massachusetts v. Davis, 168 S.W.2d 216, 140 Tex. 398, certiorari denied 63 S.Ct. 1447, 320 U.S. 210, 37 L.Ed. 1848, rehearing denied 64 S.Ct. 31, 320 U.S. 811, 38 L.Ed. 490—Baker Hotel of Dallas v. Rogers, Civ App., 157 S.W.2d 940, error refused 160 S.W.2d 522, 138 Tex. 398—Michels v. Crouch, Civ App., 150 S.W.2d 111, error dismissed, judgment correct—National Life & Accident Ins. Co. v. Ringo, Civ App., 137 S.W.2d 828, error refused—Corpus Juris cited in Pratley v. Sherwin-Williams Co. of

Texas, Civ App., 56 S.W.2d 510, 511—Corpus Juris cited in Gulf, C. & S.F. Ry. Co. v. Cobb, Civ App., 45 S.W.2d 323, 325, error dismissed—St. Louis Southwestern Ry. Co. of Texas v. Hudson, Civ App., 286 S.W. 766, affirmed in part and reversed in part on other grounds Hudson v. St. Louis Southwestern Ry. Co. of Texas, Com App., 293 S.W. 811, rehearing denied 295 S.W. 577—Chicago, R. I. & G. Ry. Co. v. Carter, Civ App., 250 S.W. 192, certified questions answered 245 S.W. 228, 113 Tex. 260, affirmed, Com App., 261 S.W. 185

(2) It has been stated, however, that a master's liability for the malicious intent of his servant "only arises where the master has either authorized or ratified the act or has been guilty of some breach of duty in the selection of the servant"—Brown v. Calhoun, Tex. Civ App., 22 S.W.2d 757, 758

67. Ala.—W. E. Belcher Lumber Co. v. York, 17 So.2d 281, 245 Ala. 286—Corpus Juris cited in Anderson v. Tadlock, 175 So. 412, 414, 27 Ala. App. 513

Cal.—Deevy v. Tassi, 130 P.2d 389, 21 Cal.2d 109—Stansell v. Safeway Stores, 118 P.2d 264, 44 Cal.App.2d 822

Ga.—Andrews v. Norvell, 15 S.E.2d 808, 65 Ga.App. 241—Brown v. Union Bus Co., 6 S.E.2d 388, 61 Ga.App. 496—Ford v. Mitchell, 179 S.E. 215, 50 Ga.App. 617

Ind.—Mock v. Polley, 66 N.E.2d 78, 116 Ind.App. 580

Mo.—Corpus Juris quoted in Ragsdale v. Riverside Jockey Club, App., 106 S.W.2d 948, 951

Tex.—Corpus Juris cited in Pratley v. Sherwin-Williams Co. of Texas, Civ App., 56 S.W.2d 510, 511

Wis.—Bryan v. Adler, 72 N.W. 368, 97 Wis. 124, 65 Am.S.R. 99, 41 L.R.A. 658.

39 C.J. p. 1292 note 72.

68. Ala.—Lehigh Portland Cement Co. v. Sharit, 173 So. 386, 234 Ala. 40—Anderson v. Tadlock, 175 So. 412, 27 Ala.App. 513

Miss.—Trico Coffee Co. v. Clemens, 151 So. 175, 168 Miss. 748.

N.Y.—Marx v. Ontario Beach Hotel & Amusement Co., 105 N.E. 97, 211 N.Y. 33

N.C.—Dickerson v. Atlantic Refining Co., 159 S.E. 446, 201 N.C. 90

Tex.—Michels v. Crouch, Civ App., 150 S.W.2d 111, error dismissed, judgment correct—Corpus Juris cited in Gulf, C. & S.F. Ry. Co. v. Cobb, Civ App., 45 S.W.2d 323, 325, error dismissed

69. Tenn.—Fugate v. Cincinnati, New Orleans & Texas Pac. Ry. Co., 183 S.W.2d 867, 181 Tenn. 608—Life & Casualty Ins. Co. v. Russell, 51 S.W.2d 491, 164 Tenn. 586—Hunt-Berlin Coal Co. v. Paton, 202 S.W. 935, 139 Tenn. 611.

70. Tenn.—Fugate v. Cincinnati, New Orleans & Texas Pac. Ry. Co., 183 S.W.2d 867, 181 Tenn. 608—Life & Casualty Ins. Co. v. Russell, 51 S.W.2d 491, 164 Tenn. 586—Hunt-Berlin Coal Co. v. Paton, 202 S.W. 935, 139 Tenn. 611—Roths Central Garage v. Holmes, 10 Tenn. App. 500

71. Tenn.—Fugate v. Cincinnati, New Orleans & Texas Pac. Ry. Co., 183 S.W.2d 867, 181 Tenn. 608—Life & Casualty Ins. Co. v. Russell, 51 S.W.2d 491, 164 Tenn. 586—Hunt-Berlin Coal Co. v. Paton, 202 S.W. 935, 139 Tenn. 611.

72. Tenn.—Fugate v. Cincinnati, New Orleans & Texas Pac. Ry. Co., 183 S.W.2d 867, 181 Tenn. 608—Life & Casualty Ins. Co. v. Russell, 51 S.W.2d 491, 164 Tenn. 586—Hunt-Berlin Coal Co. v. Paton, 202 S.W. 935, 139 Tenn. 611

73. Tenn.—Hunt-Berlin Coal Co. v. Paton, 202 S.W. 935, 139 Tenn. 611.

74. Tenn.—Fugate v. Cincinnati, New Orleans & Texas Pac. Ry. Co., 183 S.W.2d 867, 181 Tenn. 608—Life & Casualty Ins. Co. v. Russell, 51 S.W.2d 491, 164 Tenn. 586—Hunt-Berlin Coal Co. v. Paton, 202 S.W. 935, 139 Tenn. 611

75. N.C.—West v. F. W. Woolworth Co., 1 S.E.2d 546, 215 N.C. 211.

Tex.—Baker Hotel of Dallas v. Rogers, Civ App., 157 S.W.2d 940, er-

accordance with general principles heretofore discussed, the master will be liable, although the acts were in disobedience of express orders or instructions given by him,⁷⁶ or although the particular act complained of may have been in excess of the servant's authority,⁷⁷ and regardless of the motive or intention of the servant.⁷⁸ It has been held, however, that, if the nature of the act is such as to render it doubtful if the act comes within the scope of the servant's employment, the intention with which the act is done may be considered in determining its character.⁷⁹

Not within scope of employment In accordance with general principles considered supra § 570, the master is not liable for the willful and malicious acts of the servant committed outside the scope of his employment.⁸⁰ This is true even though the acts in question are committed in the course of the employment⁸¹ or the employment furnishes the opportuni-

ty for the wrongdoing.⁸² Nevertheless, it has been held that the general rule that a master is not liable for a malicious act of his servant, not done within the scope of his employment, does not relieve the master from his own neglect to use reasonable means to prevent a dangerous practice carried on by workmen under his control and on his premises.⁸³

§ 573. — Criminal Acts

It has generally been held that a master may be liable in damages because of the criminal acts of his servant where such acts can be said to be within the scope of the servant's employment.

It has generally been held that where the relation of master and servant actually exists, under the respondeat superior doctrine a master may be liable in damages because of the criminal acts of his servant, where such acts can be said to be within the scope of the servant's employment.⁸⁴ On the other

refused 160 S W 2d 522, 138 Tex 398

76. Ala.—W E Belcher Lumber Co v York, 17 So 2d 281, 245 Ala 286—Seaboard Air Line Ry Co v Glenn, 104 So 548, 213 Ala 284

Tex.—Baker Hotel of Dallas v Rogers, Civ App, 157 S W 2d 940, error refused 160 S W 2d 522, 138 Tex 398—Corpus Juris cited in Gulf, C & S F Ry Co v Cobb, Civ App, 45 S W 2d 323, 326, error dismissed.

Wis.—Bryan v Adler, 72 N W 368, 97 Wis 124, 65 Am SR 99, 41 L R A 658

39 C J p 1293 note 75

Effect of disobedience generally see supra § 570

77. Minn.—Barrett v Minneapolis, P & S S M R Co, 117 N W 1047, 106 Minn 51, 130 Am SR 585, 18 L R A NS, 418

Tex.—Corpus Juris cited in Gulf, C & S F Ry Co v Cobb, Civ App, 45 S W 2d 323, 326, error dismissed. Excess or abuse of authority generally see supra § 570.

78. Mo.—Corpus Juris quoted in Ragadale v Riverside Jockey Club, App, 106 S W 2d 948, 951

Tex.—Corpus Juris cited in Gulf, C & S F Ry Co v Cobb, Civ App, 45 S W 2d 323, 326, error dismissed 39 C J p 1293 note 77

Effect of motive or intent generally see supra § 570.

The fact that the employee demonstrates hatred of the victim of his wrongful act does not make the employer any the less liable—The H S Inc No 72, C C A N J, 130 F 2d 341

79. Ohio.—Passenger R Co. v Young, 21 Ohio St 518, 8 Am R 78

Tex.—Corpus Juris cited in Gulf, C

& S F Ry Co v Cobb, Civ App, 45 S W 2d 323, 326, error dismissed

80. U S—Nelson v American-West African Line, C C A N Y, 86 F 2d 730, certiorari denied American-West African Line v Nelson, 57 S Ct 509, 300 U S 665, 81 L Ed 873—The H S Inc No 72, D C N J, 39 F Supp 355, reversed on other grounds, C C A, 130 F 2d 341

Ala.—W E Belcher Lumber Co v York, 17 So 2d 281, 245 Ala 286—Corpus Juris cited in Birmingham News Co v Browne, 153 So 773, 774, 228 Ala 395—Seaboard Air Line Ry Co v Glenn, 104 So 548, 213 Ala 284—Great Atlantic & Pacific Tea Co v Lantrip, 153 So 290, 36 Ala App 79

Conn.—Bradlow v. American Dist Telegraph Co, 38 A 2d 679, 131 Conn 193

Ga.—Gomez v. Great Atlantic & Pacific Tea Co, 172 SE 750, 48 Ga App 398

Idaho—Scrivner v Boise Payette Lumber Co, 268 P 19, 46 Idaho 334

Ill.—Zbinden v De Moulins Bros & Co, 245 Ill App 248

Ky.—McBee's Adm'x v Indian Head Mining Co, 132 S W 2d 515, 280 Ky 82

Md.—Corpus Juris cited in Eyerly v Baker, 178 A 691, 696, 168 Md 599

Mass.—Fancullo v B G & S Theatre Corporation, 8 NE 2d 174, 297 Mass 44

Mich.—Anderson v Schust Co, 247 N W 167, 262 Mich 236

N Y—Oneta v Paul Tocci Co, 87 N Y S 2d 795, 271 App Div 681

N C—Smith v Cathey, 191 S E 505, 211 N C 747—Jackson v Scheiber, 184 S E 17, 209 N C 441.

Pa.—MacPhail v. Pinkerton's Nat

Detective Agency, 3 A 2d 968, 134 Pa Super 351

Tenn.—Hoover Motor Express Co v Thomas, 65 S W 2d 621, 16 Tenn App 684—Woody v Ball, 5 Tenn App 300

Tex.—St Louis Southwestern Ry Co of Texas v Hudson, Civ App, 286 S W 766, affirmed in part and reversed in part on other grounds Com App, Hudson v St Louis Southwestern Ry Co of Texas, Com App, 293 S W 811, rehearing denied 295 S W 577

39 C J p 1293 note 80

Willful tort in public interest

Master is not liable for his servant's willful torts, done in supposed public interest and not for master's benefit—Birmingham News Co v Browne, 153 So 773, 228 Ala 395

81. Pa.—MacPhail v. Pinkerton's Nat Detective Agency, 3 A 2d 968, 134 Pa Super 351

82. Cal.—Copelin v Berlin Dye Works & Laundry Co, 144 P 961, 168 Cal 715, L R A 1915C 712

83. N Y—Hogle v H H Franklin Mfg Co, 113 N Y S 881, 128 App Div 403, affirmed 92 NE 794, 199 N Y 388, 32 L R A NS, 1038

39 C J p 1294 note 82

84. U S—Donaldson v Tucson Gas, Electric Light & Power Co, D C Ariz, 14 F Supp 246

Ariz.—Davis v Boggs, 199 P 116, 22 Ariz 497

Cal.—Transcontinental & Western Air v Bank of America N T & S A, 116 P 2d 791, 46 Cal App 2d 708

Ga.—Coleman v Nail, 174 S E 178, 49 Ga App 51

Ky.—Bray-Robinson Clothing Co v Higgins, 276 S W 129, 210 Ky 432

La.—Yours v New Orleans Linen Supply Co, App, 185 So 525—

hand, it is well settled that the master is not liable in damages for criminal acts of the servant not within the scope of his employment, and not authorized or sanctioned by him,⁸⁵ unless the criminal act is subsequently ratified by the master,⁸⁶ and this rule has been applied to such crimes as larceny,⁸⁷ forgery,⁸⁸ attempted rape,⁸⁹ and murder⁹⁰

Where a servant is employed to guard the property of a third person, and he steals some of the property, the master has been held liable, although the act was outside the scope of his employment⁹¹

§ 574. — Acts of Servant in His Own Behalf

a. In general

Bearman v Southern Bell Telephone & Telegraph Co, 134 So 787, 17 La App 89

Mid—Corpus Juris cited in Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 424, 440, 171 Md 378

Miss—Corpus Juris cited in White's Lumber & Supply Co v Collins, 191 So 105, 107, 186 Miss 659, suggestion of error overruled 192 So 812, 186 Miss 659—*Hahn v Owens*, 168 So 622, 176 Miss 296
Mo—Porter v Thompson, 206 SW 2d 509—*Simmons v Kroger Grocery & Baking Co*, 104 SW 2d 357, 340 Mo 1118—*Smother's v House Furnishing Co*, 374 SW 678, 310 Mo 144, 40 ALR 1209

NJ—Driesse v Verblaauw, 153 A 388, 9 NJ Misc 173

39 CJ p 1294 note 85

Criminal liability of master for acts of employee see Criminal Law § 84

Employer is liable for unlawful killing which employee knowingly aided and abetted during arrest authorized by employer—*Great Southern Lumber Co v Williams*, CCA La, 17 F 2d 468, certiorari denied 48 S Ct 19, 275 US 511, 72 L Ed 399, affirmed 48 S Ct 417, 277 US 19, 72 L Ed 761

Where dealer's clerk unlawfully sold cartridges to minor and accidental discharge of cartridges from pistol killed plaintiff's intestate, store owner would be liable—*Driesse v Verblaauw*, 153 A 388, 9 NJ Misc 173.

Liability to employer's principal for felony

Fact that unfaithfulness of employee in committing a wrong may amount to a felony does not alter obligation of employer to employer's principal as long as the employee is acting within the scope of his employment—*Transcontinental & Western Air v Bank of America N. T. & S. A.*, 116 F.2d 791, 46 Cal App.2d 708

In Texas

(1) It has been broadly stated that "A trespass committed by a servant while acting in the course of his employment is imputable to the master in the law of negligence, regardless of whether the wrongful act of the servant may or may not also amount to a criminal offense"—*Texas Farm Products Co v Johnson*, Tex Civ App, 190 SW 2d 178, 180

(2) A fuller statement of the master's liability for the criminal acts of his servant is that "if in performing any duty within the line of his employment the servant uses unnecessary force in doing an act lawful within itself, and thereby commits a trespass or a crime, then the act may be deemed one for which the master is civilly responsible, but if the act be in itself illegal, however performed, or by whomsoever done, then the master ought not be held liable, unless he advised, or in some way participated in, the unlawful act"—*Dillingham v Russell*, 11 SW 139, 142, 78 Tex 47, 15 Am SR 753, 3 LRA 634

(3) It has been held that the liability of the master cannot be based on a criminal act, such as violation of a statute requiring lighting of a motor vehicle when in operation at night, unless the master was a party to the crime or offense either as an accomplice or otherwise—*Brown v Calhoun*, Tex Civ App, 22 SW 2d 757
85. Ky—Brooks v Gray-Von Allen Sanitary Milk Co, 277 SW 816, 211 Ky 462, 46 ALR 1207—*Bray-Robinson Clothing Co v Huggins*, 276 SW 129, 210 Ky 432
39 CJ p 1294 note 86

Manager of business held without implied authority to give directions or permission to subordinate employees to perform criminal acts, with respect to question whether criminal acts fell within scope of employment of subordinate em-

- b Use of facilities supplied by master
- c Mischievous acts for amusement
- d Deviation or departure from service

a. In General

As a general rule the act of a servant done to effect some independent purpose of his own is not within the scope of his employment so as to render the master liable therefor.

As a general rule the act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor.⁹² In these circumstances, the servant alone

employees so as to impose liability on the owner of the business—*Morin v People's Wet Wash Laundry Co*, 156 A 499, 85 NH 233

86. NM—Bruton v Sakariason, 155 P 725, 21 NM 438

87. DC—Argonne Apartment House v Garrison, 42 F 2d 605, 59 App DC 370

NY—Liggett v Glen Oaks Club, 28 NYS 2d 84, affirmed 30 NYS 2d 855, 263 App Div 702

39 CJ p 1294 note 87

If bailed goods are stolen by employee of bailee, there is no liability on bailee if the theft occurs without his connivance or negligence—*Barclay, Inc. v Maxfield*, DC Mun App, 45 A 2d 768

88. NY—Ehrich v New York Guaranty Trust Co, 186 NYS 103, 194 App Div 658, affirmed 135 NE 950, 233 NY 637

89. Mo—Smother's v Welch & Co House Furnishing Co, 274 SW 678, 310 Mo 144, 40 ALR 1209

90. Tenn—Hoover Motor Express Co v Thomas, 65 SW 2d 621, 16 Tenn App 664

39 CJ p 1295 note 89

91. NY—Williams v Brooklyn Dist Tel Co, 33 NYS 849, 12 Misc 565

39 CJ p 1288 note 87

92. US—Standard Coffee Co v Trippet, CCA Tex, 108 F 2d 161—*White v Firestone Tire & Rubber Co*, CCA SC, 90 F 2d 637—*Texas Breeders & Racing Ass'n v Blanchard*, CCA Tex, 81 F 2d 382, motion dismissed 85 F 2d 1019—*Thomas v Slavens*, CCA Mo, 78 F 2d 144—*Elkhorn Piney Coal Mining Co v Hazelett*, CCA Ky, 62 F 2d 137—*Corpus Juris cited in Silverado S S Co v Prendergast*, CCA Wash, 31 F 2d 226, 228, certiorari denied *Prendergast v Silverado S S Co*, 50 S Ct 17, 280 US 557, 74 L Ed 612—*Tipton v Western Union Tel Co*, D.C.D.C.

- 68 FSupp 554—Dumbrow v Ettinger, DCNY, 44 FSupp 763—Futterman v Western Union Tel Co, DCLa, 43 FSupp 729.
- Ala—Koonce v Craft, 174 So 478, 234 Ala 278
- Ariz—Cox v Enloe, 70 P 2d 331, 50 Ariz 201
- Ark—Lindley v McKay, 146 S W 2d 545, 201 Ark 875—Carter Truck Line v Gibson, 115 S W 2d 270, 195 Ark 994—Pickens v Westbrook, 53 S W 2d 830, 191 Ark 156—Southwestern Bell Telephone Co v. Roberts, 81 S W 2d 302, 182 Ark 211—Hunter v First State Bank of Morrilton, 28 S W 2d 712, 181 Ark 907
- Cal—Robinson v George, 105 P 2d 914, 16 Cal 2d 238—Stansell v Safeway Stores, 113 P 2d 264, 44 Cal App 2d 822—Wierama v City of Long Beach, 106 P 2d 45, 41 Cal App 2d 8—Lane v Safeway Stores, 91 P 2d 180, 33 Cal App 2d 169—Curcio v. Nelson Display Co, 64 P 2d 1153, 19 Cal App 2d 46—Hiroshima v Pacific Gas & Electric Co, 83 P 2d 340, 18 Cal App 2d 24—Yore v Pacific Gas & Electric Co, 277 P 878, 99 Cal App 81
- D C—Corpus Juris quoted in Grimes v B F Saul Co, 47 F 2d 409, 410, 60 App DC 47
- Fla—Jacksonville Paper Co. v Carlisle, 15 So 2d 443, 153 Fla 661—Ball v I C Helmly Furniture Co, 182 So 435, 132 Fla 882
- Ga—Georgia Power Co v Shipp, 24 S E 2d 764, 195 Ga 446, mandate conformed to 25 S E 2d 524, 69 Ga App 356—Frazier v Southern Ry Co, 35 S E 2d 525, 73 Ga App 58, reversed on other grounds 37 S E 2d 774, conformed to 38 S E 2d 183, 73 Ga App 815—Parker v Smith, 18 S E 2d 559, 66 Ga App 567—Broome v Primrose Tapestry Mills, 200 S E 506, 59 Ga App 70—Mulkey v Griffin Const Co, 200 S E 163, 58 Ga App 808—Stafford v Postal Telegraph & Cable Co, 198 S E 117, 58 Ga App 213, followed in 198 S E 130, 58 Ga App 219—Jump v. Anderson, 197 S E 644, 58 Ga App 136—Gomez v. Great Atlantic & Pacific Tea Co, 173 S E 750, 48 Ga App 398—Dawson Chevrolet Co v. Ford, 170 S E 806, 47 Ga App 312—Selman v Wallace, 165 S E 851, 45 Ga App 688—Palmer Phinney & Connell v Heinzerling, 130 S E 537, 34 Ga App 544.
- Ill—Boehmer v Norton, 65 N E 2d 212, 328 Ill App 17—Stix, Baer & Fuller Co v Woesthaus Motor Co, 1 N.E.2d 796, 284 Ill App. 301—Craig v Tucker, 264 Ill App 531
- Ind.—Mock v Polley, 66 N E 2d 78, 116 Ind App. 580—Wells v Northern Indiana Public Service Co, 40 N E 2d 1012, 111 Ind App 166.
- Ky—Wood v. Southeastern Greyhound Lines, 194 S W 2d 81, 302 Ky. 110—Wells v. Combs, 65 S W 2d 468, 251 Ky 479—Corpus Juris cited in Roselle v Bingham, 46 S W 2d 764, 765, 242 Ky 496—Armstrong's Adm'r v Sumne & Ratterman Co, 278 S W 111, 211 Ky 750—Brooks v Gray-Von Allmen Sanitary Milk Co, 277 S W. 816, 211 Ky 462, 46 A L R 1207
- La—Williamson v. De Soto Wholesale Grocery Co, App, 16 So 2d 739—Braud v Vinet, App, 5 So 2d 200—Corpus Juris quoted in Petrich v New Orleans City Park Improvement Ass'n, App, 188 So 199, 201—Matheny v U S Fidelity & Guaranty Co, App, 181 So 647—Kissgen v Continental Casualty Co of Indiana, App, 148 So 732—Schaumburg v Nash-Mississippi Valley Motor Co, 129 So 390, 14 La App 77
- Mass—Walton v New York Cent Sleeping Car Co, 2 N E 101, 139 Mass 556
- Mich—Foote v Huelster, 261 N W 296, 272 Mich 194
- Miss—Stovall v Jepsen, 13 So 2d 229, 195 Miss. 115—Jefferson v Yazoo & M V. R R Co, 11 So 2d 442, 194 Miss 729—Thomas-Kin-cannon-Hilkin Drug Co v Hendrix, 168 So 287, 175 Miss 767—Western Union Telegraph Co v Stacy, 139 So 604, 162 Miss 288.
- Mo—Porter v Thompson, 206 S W 2d 509—Vert v Metropolitan Life Ins Co, 117 S W 2d 252, 342 Mo 629, 116 A L R 1381—State ex rel Mountain Grove Creamery, Ice & Electric Co v Cox, 286 S W 368, 315 Mo 619—Smothers v Welch & Co House Furnishing Co, 274 S W 678, 310 Mo 144, 40 A L R 1209—Priest v F W Woolworth Five & Ten Cent Store, 62 S W 2d 926, 238 Mo App 23—Mason v Down Town Garage Co, 53 S W 2d 409, 227 Mo App 297—Humphreys v St Louis-San Francisco Ry Co, App, 286 S.W. 728.
- Mont—Kornec v Mike Horse Mining & Milling Co, 180 P 2d 252—Webster v Mountain States Telephone & Telegraph Co, 89 P 2d 602, 108 Mont 188
- Neb—Sutton v Inland Const Co, 14 N.W 2d 887, 144 Neb 721.
- N Y—Oneta v. Paul Todd Co, 67 N Y S 2d 795, 271 App Div 681—Fabisiak v Empire Steel Partition Co., 238 N Y S 298, 228 App Div 665, followed in 238 N Y S 828, 228 App Div 666, affirmed 175 N E 327, 255 N Y 593—Bernstein v East 167th Street Corporation, 293 N Y S. 109, 161 Misc 836
- N C—Rogers v Town of Black Mountain, 29 S E 2d 203, 224 N C 119—Gillis v Great Atlantic & Pacific Tea Co, 27 S E 2d 288, 223 N C 470, 150 A L R 1330—Smith v Duke University, 14 S E 2d 643, 219 N C 628—Crech v National Linen Service Corporation, 14 S E 2d 408, 219 N C 457—McLamb v Beasley, 11 S E 2d 283, 218 N C 308—Parrott v Kantor, 6 S E 2d 40, 216 N C 584—Robinson v. Sears, Roebuck & Co, 4 S E 2d 889, 216 N C 322—Robinson v. McAlhaney, 198 S E 647, 214 N C. 180—Parrish v Boyseil Mfg Co, 188 S E 817, 211 N C 7—Robertson v Virginia Electric & Power Co, 168 S E 415, 204 N C 359, cause remanded 170 S E 139, 205 N C 111—Dickerson v. Atlantic Refining Co, 159 S E 446, 201 N C 90—Martin v Greensboro-Fayetteville Bus Line, 150 S E 501, 197 N C 720
- Ohio—Edwards v Benedict, 70 N. E 2d 471, 79 Ohio App 134—Lombardi v Silver, App, 32 N E 2d 558
- Okl—Brayton v Carter, 163 P 2d 960, 196 Okl 125—Corn v City of Sapulpa, 110 P 2d 290, 188 Okl 418—Retail Merchants Ass'n and Associated Retail Credit Men of Tulsa v Peterman, 99 P 2d 130, 186 Okl 560—Patsy Oil & Gas Co v Odom, 96 P 2d 302, 186 Okl 116—Phillips Petroleum Co v Ward, 74 P 2d 614, 181 Okl 463—Corpus Juris quoted in Wilson & Co v Shaw, 10 P 2d 448, 450, 157 Okl 34
- Pa—MacPhail v Pinkerton's Nat Detective Agency, 3 A 2d 968, 134 Pa Super 357
- S C—Hyde v Southern Grocery Stores, 15 S E 2d 353, 197 S C 263—Holder v Haynes, 7 S E 2d 833, 193 S C 176—Corpus Juris cited in Hancock v Aiken Mills, 135 S E 188, 191, 180 S C 93—Dudley v Atlantic Coast Line Ry. Co, 96 S E 478, 110 S C 73
- S D—Morman v Wagner, 262 N W 78, 63 S D 547
- Tenn—Goff v St Bernard Coal Co, 129 S W 2d 205, 174 Tenn 558—Standard Tire & Battery Co v. Sherrill, 95 S W 2d 915, 170 Tenn 418—Kelly v Louisiana Oil Refining Co, 66 S W 2d 997, 167 Tenn 101—Cole v Standard Oil Co of N J, App, 197 S W 2d 13—Pratt v Duck, 191 S W 2d 562, 28 Tenn App 502—Hoover Motor Express Co v Thomas, 65 S W 2d 621, 16 Tenn App 664
- Tex—Anderson-Berney Bldg Co v Lowry, 143 S W 2d 401, 139 Tex 29—Southwest Dairy Products Co v De Frates, 125 S W 2d 282, 132 Tex 556, 122 A L R 864—Hitt v East Texas Theatres, Civ App, 203 S W. 968—Gammill v Mullins, Civ App, 188 S W 2d 986, error dismissed—Smith v. Turner, Civ App, 150 S W 2d 304, error dismissed, judgment correct—Jax Beer Co v. Tucker, Civ App, 146 S W 2d 436, error dismissed, judgment correct—National Life & Accident Ins Co v Ringo, Civ App, 137 S W 2d 828, error refused—Bishop v Farm & Home Savings & Loan Ass'n, Civ App, 75 S W 2d 285—Bresnan v. Republic Supply Co, Civ App, 68 S W 2d 1105, error refused—Horwitz v. Dickerson, Civ.

may be held liable for the injury inflicted.⁹³ If the servant steps aside from the master's business for some purpose wholly disconnected from his employment, the relation of master and servant is temporarily suspended,⁹⁴ and the master is not liable for his acts during such time.⁹⁵ This is true no matter

App, 25 SW 2d 966—Home Telephone & Electric Co v Branton Civ App, 7 SW 2d 627, affirmed, Com App, 23 SW 2d 294

Utah—Carter v Bessey, 93 P 2d 490, 97 Utah 427.

Va—Master Auto Service Corporation v Bowden, 19 SE 2d 879, 179 Va 507—Kavanaugh v Wheeling, 7 SE 2d 125, 175 Va 105—Virginia Ice & Freezing Corporation v Coffin, 184 SE 214, 166 Va 154

Wash—Estes v Brewster Cigar Co, 287 P 36, 156 Wash 465

Wis—Linden v City Car Co, 300 N W 925, 239 Wis 236—Mittleman v Lindsay-McMillan Co, 232 NW 527, 202 Wis 577.

39 C J p 1295 note 91

Acts committed by servant while off duty see supra § 570 d (3)

Fraud on employer

When an employee abandons the object of his employment and acts for himself by committing a fraud on his employer for his own exclusive benefit, he ceases to act within the scope of his employment and to that extent ceases to act as employee—Home Indemnity Co of New York v. State Bank of Fort Dodge, 8 NW 2d 757, 233 Iowa 103.

"Independent business," within statute providing that employer is not responsible for employee's torts in exercising independent business, means business or employment separate and independent from employer's business—Yearwood v Peabody, 164 SE 901, 45 Ga App 451

93. Ark—Pickens v Westbrook, 83 SW 2d 830, 191 Ark 156

D C—Corpus Juris quoted in Grimes v B F Saul Co, 47 F 2d 409, 410, 60 App DC 47

Fla—Ball v I C Helmly Furniture Co, 182 So 435, 182 Fla 882

Ga—Frazier v Southern Ry Co, 35 SE 2d 525, 73 Ga App 58, reversed on other grounds 37 SE 2d 774, conformed to 38 SE 2d 183, 73 Ga App 815—Parker v Smith, 18 SE 2d 559, 66 Ga App 567—Mulkey v Griffin Const Co, 200 SE 163, 58 Ga App 808—Jump v Anderson, 197 SE 644, 58 Ga App 126

La—Corpus Juris quoted in Petrich v New Orleans City Park Improvement Ass'n, App, 188 So 199, 201.

SC—Hyde v Southern Grocery Stores, 15 SE 2d 353, 197 SC 263—Corpus Juris cited in Hancock v Aiken Mills, 185 SE 188, 191, 180 SC 93

Tenn—Hoover Motor Express Co v Thomas, 85 SW 2d 621, 16 Tenn App 664

Wis—Fireman's Fund Ins Co v

Schreiber, 135 NW 507, 150 Wis 42, 45 L.R.A.N.S., 314, Ann Cas 1913E 823

Personal liability of servant to third persons generally see infra § 577

94. US—Thomas v Slavens, CCA Mo, 78 F 2d 144—Cleveland Nehi Bottling Co v Schenk, CCA Ohio, 56 F 2d 941

Ala—Bell v Martin, 1 So 2d 906, 241 Ala 183

Ark—Lindley v McKay, 146 SW 2d 545, 201 Ark 675—Carter Truck Line v Gibson, 115 SW 2d 270, 195 Ark 994—Southwestern Bell Telephone Co v Roberts, 31 SW 2d 302, 182 Ark 211

Fla—Ball v I C Helmly Furniture Co, 182 So 435, 182 Fla 882

Ga—Georgia Power Co v Shipp, 24 SE 2d 764, 195 Ga 446, mandate conformed to 25 SE 2d 524, 69 Ga App 356—Frazier v Southern Ry Co, 35 SE 2d 525, 73 Ga App 58, reversed on other grounds 37 SE 2d 774, conformed to 38 SE 2d 183, 73 Ga App 815—Parker v Smith, 18 SE 2d 559, 66 Ga App 567—Broome v Primrose Tapestry Mills, 200 SE 506, 59 Ga App 70—Mulkey v Griffin Const Co, 200 SE 163, 58 Ga App 808—Plumer v Southern Bell Telephone & Telegraph Co, 199 SE 353, 58 Ga App 632—Stafford v Postal Telegraph & Cable Co, 198 SE 117, 58 Ga App 213, followed in 198 SE 130, 58 Ga App 219—Jump v Anderson, 197 SE 644, 58 Ga App 126—Dawson Chevrolet Co v Ford, 170 SE 306, 47 Ga App 312—Selman v Wallace, 165 SE 851, 45 Ga App 688

Ill—Stix, Baer & Fuller Co v Woesthaus Motor Co, 1 NE 2d 796, 284 Ill App 301

Ind—Wells v Northern Indiana Public Service Co, 40 NE 2d 1012, 111 Ind App 166

Ky—Wood v Southeastern Greyhound Lines, 194 SW 2d 81, 302 Ky 110—Corpus Juris cited in Creamer v Kroger Grocery & Baking Co, 86 SW 2d 288, 290, 280 Ky 544—Brooks v Gray-Von Allmen Sanitary Milk Co, 277 SW 816, 211 Ky 462, 46 ALR 1207

La—Oliphant v Town of Lake Providence, 192 So 95, 193 La 675, answers to certified questions conformed to App, 193 So 516—Matheny v U. S. Fidelity & Guaranty Co, App, 181 So 647.

Miss—Stovall v Jepsen, 13 So 2d 229, 195 Miss 115.

NC—Rogers v Town of Black Mountain, 29 SE 2d 203, 224 NC 119

Pa—MacPhail v Pinkerton's Nat

Detective Agency, 3 A 2d 968, 134 Pa Super. 357

SC—Hyde v Southern Grocery Stores, 15 SE 2d 353, 197 SC 263—Holder v Haynes, 7 SE 2d 833, 193 SC 176—Corpus Juris cited in Hancock v Aiken Mills, 185 SE 188, 191, 180 SC 93

Tex—Anderson-Berney Bldg Co v Lowry, 143 SW 2d 401, 139 Tex. 29—Southwest Dairy Products Co v De Frates, 125 SW 2d 282, 133 Tex 556, 122 ALR 854—Hitt v East Texas Theatres, Civ App, 203 SW 2d 983—Gammill v Mullins, Civ App, 188 SW 2d 986, error dismissed—American Dist Telegraph Co of Texas v Walsh & Burney Co, Civ App, 171 SW 2d 503, reversed on other grounds Sid Katz, Inc v Walsh & Burney Co, 177 SW 2d 49, 142 Tex 233—Smith v Turner, Civ App, 150 SW 2d 304, error dismissed, judgment correct—Bishop v Farm & Home Savings & Loan Ass'n, Civ App, 75 SW 2d 285—Corpus Juris quoted in Bresnan v Republic Supply Co, Civ App, 63 SW 2d 1105, 1106, error refused—Corpus Juris quoted in Bragg v Hughes, Civ App, 53 SW 2d 151, 154

Wis—Mittleman v Lindsay-McMillan Co, 232 NW. 527, 202 Wis 577

39 C J p 1295 note 93.

95. US—Standard Coffee Co v. Trippett, CCA Tex, 108 F 2d 161—Thomas v Slavens, CCA Mo, 78 F 2d 144—Cleveland Nehi Bottling Co v Schenk, CCA Ohio, 56 F 2d 941

Ala—Bell v Martin, 1 So 2d 906, 241 Ala 183.

Ark—Carter Truck Line v Gibson, 115 SW 2d 270, 195 Ark 994

Fla—Ball v I C Helmly Furniture Co, 182 So 435, 182 Fla 882

Ga—Georgia Power Co v Shipp, 24 SE 2d 764, 195 Ga 446, mandate conformed to 25 SE 2d 524, 69 Ga App 356—Frazier v Southern Ry Co, 35 SE 2d 525, 73 Ga App 58, reversed on other grounds 37 SE 2d 774, 200 Ga. 590, conformed to 38 SE 2d 183, 73 Ga App 815—Parker v Smith, 18 SE 2d 559, 66 Ga App 567—Broome v Primrose Tapestry Mills, 200 SE 506, 59 Ga App 70—Mulkey v Griffin Const Co, 200 SE 163, 58 Ga App 808—Stafford v. Postal Telegraph & Cable Co, 198 SE 117, 58 Ga App 213, followed in 198 SE 130, 58 Ga App 219—Jump v Anderson, 197 SE 644, 58 Ga App 126—Gomez v Great Atlantic & Pacific Tea Co, 172 SE 750, 48 Ga App.

how short the time⁹⁶ and even though the servant does not literally, and physically step aside from the locus in quo.⁹⁷ Where, however, the act complained of is not so separated by time and logical sequence from the business of the master as to make it a separate and independent transaction, the master is not relieved of liability,⁹⁸ and it has been held that an employee while at work for his employer may do those things which are necessary to his own health and comfort, even though they are personal to himself, and such acts will be considered incidental to his employment⁹⁹

b. Use of Facilities Supplied by Master

The facts that in perpetrating the injury complained of the servant, while acting for some purpose of his own, used facilities supplied by the master and that the injury could not have been inflicted without such facilities impose no liability on the master.

The facts that in perpetrating the injury complained of the servant, while acting for some purpose of his own, used facilities or instrumentalities supplied by the master and that the injury could not have been inflicted without such facilities or instrumentalities impose no liability on the master.¹ The master is liable only when his facilities or instru-

398—Dawson Chevrolet Co v Ford, 170 S E 306, 47 Ga App 312—Selman v Wallace, 165 S E 851, 45 Ga App 688

Ill—Stix, Baer & Fuller Co v Woesthaus Motor Co, 1 N E 2d 796, 284 Ill App 301

Ind—Wells v Northern Indiana Public Service Co, 40 N E 2d 1012, 111 Ind App 166

Ky—Brooks v Gray-Von Allmen Sanitary Milk Co, 277 S W 816, 211 Ky 462, 46 A L R 1207

La—Braud v Vinet, App, 5 So 2d 300—Schaumburg v Nash-Mississippi Valley Motor Co, 129 So 390, 14 La App 77

Miss—Stovall v Jepsen, 13 So 2d 229, 195 Miss 115

NC—Rogers v. Town of Black Mountain, 29 S E 2d 203, 224 NC 119

SC—Hyde v Southern Grocery Stores, 15 S E 2d 353, 197 SC 263—Holder v Haynes, 7 S E 2d 833, 193 SC 176—Corpus Juris cited in Hancock v Aiken Mills, 185 S E 188, 191, 180 SC 93

Tenn—Hoover Motor Express Co v Thomas, 65 S W 2d 621, 16 Tenn App 864

Tex—Southwest Dairy Products Co v De Frates, 125 S W 2d 282, 132 Tex 556, 122 A L R 854—Hitt v East Texas Theatres, Civ App, 303 S W 2d 983—Gammill v Mullins, Civ App, 188 S W 2d 986, error dismissed—Smith v Turner, Civ App, 150 S W 2d 304, error dismissed, judgment correct—Bishop v Farm & Home Savings & Loan Ass'n, Civ App, 75 S W 2d 385—Corpus Juris quoted in Bresnan v. Republic Supply Co, Civ App, 63 S W 2d 1105, 1106, error refused—Corpus Juris quoted in Bragg v Hughes, Civ App, 53 S W 2d 151, 154.

39 C J p 1296 note 95

Termination of relation as terminating master's liability generally see supra § 568.

96. Ark.—Carter Truck Line v Gibson, 115 S W 2d 270, 195 Ark 994 Ga.—Georgia Power Co v Shipp, 24 S E 2d 764, 195 Ga. 446, mandate conformed to 25 S E 2d 624, 69

Ga App 356—Frazier v Southern Ry Co, 35 S E 2d 525, 73 Ga App 58, reversed on other grounds 37 S E 2d 774, 200 Ga 509, conformed to 38 S E 2d 153, 73 Ga App 815—Parker v Smith, 18 S E 2d 559, 66 Ga App 567—Broome v Primrose Tapestry Mills, 200 S E 506, 69 Ga App 70—Mulkey v Griffin Const Co, 200 S E 168, 58 Ga App 808—Plumer v Southern Bell Telephone & Telegraph Co, 199 S E 353, 58 Ga App 622—Stafford v Postal Telegraph & Cable Co, 193 S E 117, 58 Ga App 213, followed in 198 S E 120, 58 Ga App 219—Jump v Anderson, 197 S E 644, 58 Ga App 126—Gomez v Great Atlantic & Pacific Tea Co, 173 S E 750, 48 Ga App 898—Dawson Chevrolet Co v Ford, 170 S E 306, 47 Ga App 312—Selman v Wallace, 165 S E 851, 45 Ga App 688

Ind—Wells v Northern Indiana Public Service Co, 40 N E 2d 1012, 111 Ind App 166

Ky—Wood v Southeastern Greyhound Lines, 194 S W 3d 81, 302 Ky. 110—Corpus Juris cited in Creamer v Kroger Grocery & Baking Co, 86 S W 2d 388, 290, 260 Ky 544—Brooks v Gray-Von Allmen Sanitary Milk Co, 277 S W 816, 211 Ky 462, 46 A L R 1207

La—Oliphant v Town of Lake Providence, 192 So 95, 193 La 675, answers to certified questions conformed to App, 193 So 516—Braud v Vinet, App, 5 So 2d 200

Pa—MacPhail v Pinkerton's Nat Detective Agency, 3 A 2d 968, 134 Pa Super 357

SC—Corpus Juris cited in Hancock v Aiken Mills, 185 S E 188, 191, 180 SC 93

Tex—Hitt v East Texas Theatres, Civ App, 203 S W 2d 983—Corpus Juris quoted in Bresnan v. Republic Supply Co, Civ App, 63 S W 2d 1105, 1106, error refused—Corpus Juris quoted in Bragg v Hughes, Civ App, 53 S W 2d 151, 154

Wis—Mittleman v Lindsay-McMillan Co., 232 N.W 527, 202 Wis 677

39 C J p 1296 note 94

97. Tenn—Hoover Motor Express Co v Thomas, 65 S W 2d 621, 16 Tenn App 864

Change of mental attitude

Element of stepping aside essential to break relationship of master and servant need only be change of mental attitude—Mittleman v Lindsay-McMillan Co, 232 N W 527, 202 Wis 677

98. Miss—Interstate Co v McDaniel, 178 So 165, 178 Miss. 276

Where whole transaction consumes only a few moments and has all the features constituting one continuous and unbroken occurrence, master is not relieved of liability because servant steps outside his authority—Interstate Co v McDaniel, supra

99. Cal—Adams v American President Lines, 146 P 2d 1, 23 Cal 2d 681

Ill—Freehill v. Consumers' Co, 243 Ill App 1

Mo—Brunk v Hamilton-Brown Shoe Co, 66 S W 2d 903, 334 Mo 517

1. US—Crawford v. Rice, CCA Tex, 36 F 2d 199

Ark—White v Sims, 201 S W 2d 21—Rex Oil Corporation v Crank, 38 S W 2d 1093, 183 Ark 819

Ill—Craig v Tucker, 264 Ill App 521

La—Oliphant v Town of Lake Providence, 192 So 95, 193 La 675, answers to certified questions conformed to App, 193 So 516—Cado v Many, App, 180 So 185

Miss—Corpus Juris cited in Thomas-Kincannon-Elkun Drug Co v Hendrix, 168 So 237, 238, 175 Miss 767

SD—Morman v Wagner, 262 N W 78, 63 SD 647

Tex—Corpus Juris quoted in Bragg v Hughes, Civ App, 53 S W 2d 151, 154

Va—Master Auto Service Corporation v. Bowden, 19 S E 2d 479, 179 Va 607

39 C.J. p 1296 note 2.

mentalities are being used by the servant for the purpose of advancing the employer's business or interests.² This is true even though the facilities or instrumentalities causing the injury were used with the consent of the master³ or were maintained by the master entirely for the use of the servant,⁴ and it has been held that the fact that the facilities furnished were dangerous by reason of defects therein is immaterial.⁵

c. Mischievous Acts for Amusement

If the servant does an act merely to frighten a third person or an animal or to perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of the employment, the master is generally not liable therefor.

If the servant does an act merely to frighten a third person or an animal⁶ or to perpetrate a joke on a third person,⁷ and the act is entirely disconnected from the purpose of the employment, the master generally is not liable therefor. The master may be held liable, however, if the act of the servant in perpetrating a joke is not entirely disconnected from the purposes of his employment,⁸ and it has been held that the act of a servant in charge of an engine in blowing off steam or hot water or whis-

ting, even where purely mischievous or malicious, is within the scope of his employment.⁹

d. Deviation or Departure from Service

- (1) In general
- (2) While engaged in master's business notwithstanding deviation
- (3) Resumption of master's work after deviation

(1) In General

In order to relieve a master from liability for his servant's acts, on the ground that the servant had deviated from his service, the deviation must be so substantial as to amount to an entire departure therefrom and be for purposes entirely personal to the servant.

The mere deviation or departure by a servant from the strict course of duty, although for a purpose of his own, does not in and of itself constitute such a departure from the master's business as to release him from liability for injuries inflicted by the act of the servant.¹⁰ The liability of the master depends on the degree of deviation and all the attendant circumstances.¹¹ A slight deviation by the servant will not release the master from liability.¹²

2. La.—*Oliphant v. Town of Lake Providence*, 192 So 95, 193 La 875, answers to certified questions conformed to App, 193 So 516.

3. La.—*Oliphant v. Town of Lake Providence*, supra, 39 C J p 1296 note 4.

4. La.—*Oliphant v. Town of Lake Providence*, supra.

5. Ark.—*American R. Express Co. v. Davis*, 238 SW 50, 152 Ark 258, dissenting opinion 238 SW 1063, 152 Ark 258.

6. Tex.—*Lowry v. Anderson-Berney Bldg. Co.*, 161 SW 2d 459, 139 Tex 29, 39 C J p 1296 note 6.

7. Ill.—*Zbinden v. De Moulin Bros. & Co.*, 245 Ill App 248.

Miss.—*Thomas-Kincannon-Ellkin Drug Co. v. Hendrix*, 168 So 287, 175 Miss 767.

Tenn.—*Terrett v. Wray*, 105 SW 2d 92, 171 Tenn 448, 39 C J p 1296 note 7.

Hot Foot

Where bartender in charge of defendant's tavern during defendant's absence placed papers under foot of patron dining at table and started fire which seriously injured patron, defendant was not liable to patron for bartender's act—*Sullivan v. Crowley*, 29 NE 2d 769, 307 Mass 139.

8. Ga.—*Andrews v. Norvell*, 15 SE 2d 803, 65 Ga App 241.

9. Iowa.—*Alsever v. Minneapolis &*

St. L. R. Co., 88 NW 841, 115 Iowa 338, 56 LRA 748, 39 C J p 1296 note 9.

10. U.S.—*Babcock v. Tam*, CCA Ariz, 156 F 2d 116—*Thomas v. Slavons*, CCA Mo, 78 F 2d 141.

Cal.—*Westberg v. Wilde*, 94 P 2d 590, 14 Cal 2d 360—*Wassack v. Maxwell Hardware Co.*, 293 P. 986, 210 Cal 636—*Dolinar v. Pedone*, 146 P 2d 237, 68 Cal App 2d 169—*Cann v. Marquez*, 88 P 2d 200, 31 Cal App 2d 430—*Hiroshima v. Pacific Gas & Electric Co.*, 63 P 2d 340, 18 Cal App 2d 24—*Corpus Juris* cited in *Gayton v. Pacific Fruit Express Co.*, 15 P 2d 217, 219, 127 Cal App 50—*Corpus Juris* cited in *Kiuse v. White Bros.*, 253 P 178, 181, 81 Cal App 86.

Conn.—*Neville v. Adorno*, 195 A 613, 123 Conn 395—*Branchini v. Florio*, 175 A 670, 119 Conn 212.

Fla.—*Western Union Telegraph Co. v. Michel*, 163 So 86, 120 Fla 511. NC—*Gillis v. Great Atlantic & Pacific Tea Co.*, 27 SE 2d 283, 223 NC 470, 150 ALR 1330—*Parrott v. Kantor*, 6 SE 2d 40, 216 NC 584—*Robertson v. Virginia Electric & Power Co.*, 168 SE 415, 204 NC 359, cause remanded 170 SE 139, 205 NC 111—*Dickerson v. Atlantic Refining Co.*, 159 SE 448, 201 NC 90.

Ohio.—*Amstutz v. Prudential Ins. Co. of America*, 26 NE 2d 454, 186 Ohio St 404—*Edwards v. Benedict*, 70 NE 2d 471, 79 Ohio App. 134.

Pa.—*Orr v. William J. Burns Inter-*

national Detective Agency, 12 A 2d 25, 337 Pa 587—*Rice v. Gibson*, 94 Pa Super 541.

Utah.—*Carter v. Bessey*, 63 P 2d 490, 97 Utah 427, 39 C J p 1297 note 10.

A servant's unfulfilled intention to depart from his employment does not effect a departure so as to relieve master from liability for torts—*Carroll v. Beard-Laney, Inc.*, 35 SE 2d 425, 307 SC 339.

11. Ala.—*Bell v. Martin*, 1 So 2d 906, 241 Ala 182.

Conn.—*Neville v. Adorno*, 195 A 613, 123 Conn 395—*Branchini v. Florio*, 175 A 670, 119 Conn 212.

Ohio.—*Metropolitan Concrete Co. v. Vitale*, 188 NE 10, 46 Ohio App 140.

39 C J p 1297 note 11.

Permanent or temporary abandonment

Whether deviation from master's directions absolves him from consequences of his servant's acts depends on whether the deviation constitutes a permanent or but a temporary abandonment of the employment—*Goschar v. Bauer*, 13 N.Y.S. 2d 328.

12. Ariz.—*Peters v. Pima Mercantile Co.*, 27 P 2d 143, 42 Ariz 454. Cal.—*Westberg v. Wilde*, 94 P.2d 590, 14 Cal 2d 360—*Cann v. Marquez*, 88 P.2d 200, 31 Cal.App.2d 430.

Conn.—*Neville v. Adorno*, 195 A 613, 123 Conn 395—*Branchini v. Florio*,

In order to relieve a master from liability for the servant's acts on the ground that the servant had deviated from his service, the deviation must be so substantial as to amount to an entire departure therefrom and be for purposes entirely personal to the servant.¹³ Nevertheless, if the servant totally departs from the master's business for a purpose exclusively his own, the master is not liable for his acts.¹⁴

(2) While Engaged in Master's Business
notwithstanding Deviation

Where the servant is, notwithstanding a deviation,

engaged in the master's business within the scope of his employment, it is immaterial, with respect to the master's liability, that he joined with this some private purpose of his own

Since in order to exonerate the master from liability it is essential that the deviation or departure should be for purposes entirely personal to the servant, as discussed supra subdivision d (1) of this section, where the servant is, notwithstanding the deviation, engaged in the master's business within the scope of his employment it is immaterial that he joined with this some private business or purpose of his own.¹⁵ The fact that the servant's predominant

175 A, 670, 119 Conn 212—*Garipey v Balloa & Nagle*, 157 A 535, 114 Conn 46—*Hickson v W W Walker Co*, 149 A 400, 110 Conn 604, 65 A.L.R. 1044

Fla—*Orr v Avon Florida Citrus Corporation*, 177 So 612, 130 Fla 306—*Western Union Telegraph Co v Michel*, 163 So 86, 130 Fla 511
Ga—*Parker v Smith*, 18 S.E.2d 559, 66 Ga App 557

Ky—*Dennes v Jefferson Meat Market*, 14 S.W.2d 408, 228 Ky 164

Mich—*Foots v Huelster*, 261 N.W. 296, 272 Mich 194

Mo—*Burgess v Garvin*, 272 S.W. 108, 219 Mo.App 162

Ohio—*Edwards v Benedict*, 70 N.E. 2d 471, 79 Ohio App 184

Utah—*Carter v Bessey*, 93 P.2d 490, 97 Utah 427

39 C.J. p 1297 note 12

In terms of time and space

It has been held, however, that if the act performed by the servant is in furtherance of his own purposes and outside the scope of his employment, the master is not liable even though the deviation, measured in terms of time and space, is slight—*Eckel v Richter*, 211 N.W. 158, 191 Wis 409

13. US—*National Battery Co. v Levy*, C.C.A.Mo., 126 F.2d 33, certiorari denied *Levy v National Battery Co*, 62 S.Ct 1294, 316 U.S. 697, 86 L.Ed 1767—*Thomas v Slavens*, C.C.A.Mo., 78 F.2d 144—*Cleveland Nehi Bottling Co. v Schenk*, C.C.A.Ohio, 56 F.2d 941—*Hubbard v Lock Joint Pipe Co*, D.C.Mo., 70 F.Supp 589

Cal—*Westberg v Wilde*, 94 P.2d 590, 14 Cal.2d 380—*Dohnar v Pedone*, 146 P.2d 237, 68 Cal.App.2d 169—*Cain v Marquez*, 88 P.2d 200, 31 Cal.App.2d 430—*Corpus Juris* cited in *Gayton v Pacific Fruit Express Co*, 15 P.2d 217, 219, 127 Cal.App. 50—*Corpus Juris* cited in *Kruse v White Bros.*, 253 P. 178, 181, 81 Cal.App 86

Conn—*Hickson v. W W Walker Co*, 149 A 400, 110 Conn. 604, 68 A.L.R. 1044.

La—*Pearce v U. S. Fidelity &*

Guaranty Co, App. 8 So.2d 743—*Gilbert v Trotter*, App. 160 So 855

N.J.—*Calidonio v A. Z. Motors Co*, 2 A.2d 877, 121 N.J.Law 377—*Efstathopoulos v Federal Tea Co*, 196 A 470, 119 N.J.Law 408—*Demerest v Guild*, 176 A 558, 114 N.J.Law 472—*Bedell v Mandel*, 155 A 383, 108 N.J.Law 22

N.C.—*Robertson v Virginia Electric & Power Co*, 168 S.E. 415, 204 N.C. 359, cause remanded 170 S.E. 139, 205 N.C. 111

Ohio—*Edwards v Benedict*, 70 N.E. 2d 471, 79 Ohio App 184

Okl—*Brayton v Carter*, 163 P.2d 960, 196 Okl 125

Tenn—*Pratt v Duck*, 191 S.W.2d 562, 28 Tenn App 502—*Goff v St Bernard Coal Co*, 129 S.W.2d 205, 174 Tenn 558

Utah—*Carter v Bessey*, 93 P.2d 490, 97 Utah 427

Va—*Master Auto Service Corporation v Bowden*, 19 S.E.2d 679, 179 Va 507

39 C.J. p 1297 note 13

Deviation severing relationship

A deviation by a servant will not be deemed to be an abandonment of employment, so as to relieve master of liability for servant's negligence unless such deviation is so divergent from the regular duty that its very character severs the relationship of master and servant—*Amstutz v Prudential Ins Co of America*, 26 N.E.2d 454, 136 Ohio St 404—*Edwards v Benedict*, 70 N.E.2d 471, 79 Ohio App 184

14. US—*National Battery Co v Levy*, C.C.A.Minn., 126 F.2d 33, certiorari denied *Levy v National Battery Co*, 62 S.Ct 1294, 316 U.S. 697, 86 L.Ed 1767

Ariz—*Peters v Pima Mercantile Co*, 27 P.2d 143, 42 Ariz 454

Conn—*Hickson v. W. W. Walker Co*, 149 A. 400, 110 Conn 604, 68 A.L.R. 1044.

D.C.—*Corpus Juris* cited in *Lucas v. Friedman*, 24 F.2d 271, 272, 58 App D.C. 5.

Md—*Carroll v. Hillendale Golf Club*, 144 A. 693, 156 Md 542

Mich—*Foots v Huelster*, 261 N.W. 296, 272 Mich 194

N.C.—*Parrott v Kantor*, 6 S.E.2d 40, 216 N.C. 584—*Snow v De Butts*, 193 S.E. 224, 212 N.C. 120—*Robertson v Virginia Electric & Power Co*, 168 S.E. 415, 204 N.C. 359, cause remanded 170 S.E. 139, 205 N.C. 111—*Dickerson v Atlantic Refining Co*, 159 S.E. 446, 201 N.C. 90

Okl—*Patsy Oil & Gas Co v Odom*, 96 P.2d 302, 186 Okl 116

Tenn—*Goff v St Bernard Coal Co*, 129 S.W.2d 205, 174 Tenn 558—*Pratt v Duck*, 191 S.W.2d 562, 28 Tenn App 502

Va—*Kavanaugh v Wheeling*, 7 S.E. 2d 126, 175 Va 105

39 C.J. p 1297 note 14

Acts not immediately connected with business

A substantial deviation from the duties imposed on the employee will relieve the employer of liability for those acts not immediately connected with his employer's business—*Gillis v Great Atlantic & Pacific Tea Co*, 27 S.E.2d 283, 228 N.C. 470, 150 A.L.R. 1380

Marked deviation justifies determination that servant was on own business—*Dennes v Jefferson Meat Market*, 14 S.W.2d 408, 228 Ky. 164

15. US—*Hoper-Holmes Bureau v. Bunn*, C.C.A.Fla., 161 F.2d 102—*Corpus Juris* quoted in *National Battery Co v Levy*, C.C.A.Minn., 126 F.2d 33, 34, certiorari denied *Levy v National Battery Co*, 62 S.Ct 1294, 316 U.S. 697, 86 L.Ed 1767—*Thomas v Slavens*, C.C.A.Mo., 78 F.2d 144—*Cleveland Nehi Bottling Co. v. Schenk*, C.C.A.Ohio, 56 F.2d 941—*Hubbard v. Lock Joint Pipe Co*, D.C.Mo., 70 F.Supp 589.

Ark—*Vincennes Steel Corporation v Gibson*, 106 S.W.2d 173, 194 Ark 58—*Southwestern Bell Telephone Co. v. Roberts*, 31 S.W.2d 302, 132 Ark 211.

Cal—*Westberg v Wilde*, 94 P.2d 590, 14 Cal.2d 380—*Ryan v Farrell*, 280 P. 945, 208 Cal. 200—

motive is to benefit himself does not necessarily prevent the act from being within the scope of his employment,¹⁶ and, if the purpose of serving the master's business actuates the servant to any appreciable degree, the master is subject to liability if the act is otherwise within the service.¹⁷ So it has been held that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to the business in which the servant was actually engaged when a third person was injured,¹⁸ but the master will be held responsible unless it clearly appears that the servant could

not have been directly or indirectly serving his master.¹⁹

(3) Resumption of Master's Work after Deviation

If at the time of the act of which complaint is made the servant had fulfilled his purpose and resumed the prosecution of the master's business, the master will be liable for his act.

Notwithstanding the servant's deviation or departure from his employment for purposes of his own, if at the time of the act of which complaint is made the servant had fulfilled his purpose and resumed the prosecution of the master's business the master will be liable for his act,²⁰ provided the con-

Stansell v Safeway Stores, 113 P 2d 264, 44 Cal App 2d 822—Cain v Marquez, 88 P 2d 200, 81 Cal App 2d 430—Sullivan v Thompson, 87 P 2d 62, 30 Cal App 2d 475—Naudack v Canini, 95 P 2d 510, 29 Cal App 2d 687—Jameson v Gavett, 71 P 2d 937, 22 Cal App 2d 648—Broecker v Moxley, 28 P 2d 409, 136 Cal App 2d 448—Gayton v Pacific Fruit Express Co., 15 P 3d 217, 127 Cal App 50—Barty v Collins, 292 P 979, 109 Cal App 94—King v Emerson, 288 P 1099, 110 Cal App 414, adopted 294 P 768, 110 Cal App 414—Aubel v Sossio, 236 P 319, 72 Cal App 57
Ga—Parker v Smith, 18 SE 2d 559, 66 Ga App 567—Corpus Juris cited in Andrews v Norvell, 15 SE 2d 808, 811, 65 Ga App 241
Idaho—Manion v Waybright, 86 P 2d 181, 59 Idaho 643
Ill—Flood v Bitzer, 40 NE 2d 557, 313 Ill App 359
Ind—Great American Tea Co v Van Buren, 33 NE 2d 580, 218 Ind 462
La—Pearce v U S Fidelity & Guaranty Co., App., 8 So 2d 743
Me—Stevens v Frost, 32 A 2d 164, 140 Me 1
Miss—S & W Const Co v Bugge, 13 So 2d 645, 194 Miss 822, 146 A L R 1190—Singer Sewing Mach Co v. Stockton, 157 So 366, 171 Miss 209—Primos v Gulfport Laundry & Cleaning Co., 128 So 507, 157 Miss 770
Mo—Foster v Campbell, 196 SW 2d 147, 355 Mo 349—Corpus Juris cited in Cotton v Ship-By-Truck Co., 85 SW 2d 80, 84, 337 Mo 270—Whimster v Homes, 164 SW 236, 177 Mo App 130—Tutue v Kennedy, App., 272 SW 117
N J—Efsthathopoulos v Federal Tea Co., 196 A. 470, 119 N J Law 408.
Tex—Corpus Juris quoted in Maryland Casualty Co v Stewart, Civ App., 164 SW 2d 800, 803—Wilhoit v Iverson Tool Co., Civ App., 119 SW 2d 709, error dismissed by agreement—Corpus Juris cited in Liberty Mut. Ins. Co v. Boggs,

Civ App., 66 SW 2d 787, 795—Guitar v Wheeler, Civ App., 36 SW 2d 325, error dismissed
Utah—Carter v Bessey, 93 P 2d 490, 97 Utah 427
Wash—Leuthold v Goodman, 157 P 2d 326, 22 Wash 2d 583
Wis—Le Sage v Le Sage, 271 NW 369, 224 Wis 57—Eckel v Richter, 211 NW 158, 191 Wis 409
39 C J p 1298 note 16

Work necessitating travel

(1) If his work creates a necessity for travel, the employee is in the course of his employment while traveling although he is serving, at the same time, some purpose of his own
Mont—Webster v Mountain States Telephone & Telegraph Co., 99 P 2d 602, 108 Mont 188
Wis—Bohnsack v Huson-Ziegler Co., 248 NW 764, 212 Wis 65

(3) However, where employee's work has no part in creating necessity for travel, and journey would have gone forward even though business errand had been dropped and would have been canceled on failure of private purpose, even though the business errand was undone, both travel and risk are personal—Bohnsack v Huson-Ziegler Co., supra

16. US—Hubbard v Lock Joint Pipe Co., D C Mo., 70 F Supp 589.
Ind—Great American Tea Co v Van Buren, 33 NE 2d 580, 218 Ind 462—Vincennes Packing Corporation v Trosper, 23 NE 2d 624, 108 Ind App 7
Miss—S & W Const Co v Bugge, 13 So 2d 645, 194 Miss 822, 146 A L R 1190
Mo—Foster v Campbell, 196 SW 2d 147, 355 Mo 349.
SC—Carroll v Beard-Laney, Inc., 35 SE 2d 425, 207 SC 339
Wash—Leuthold v Goodman, 157 P 2d 326, 22 Wash 2d 583—Forsberg v Tevis, 71 P 2d 358, 191 Wash 355

17. US—Hubbard v Lock Joint Pipe Co., D C Mo., 70 F Supp. 589
Ind—Great American Tea Co v Van Buren, 33 NE 2d 580, 218 Ind.

462—Vincennes Packing Corporation v Trosper, 23 NE 2d 624, 108 Ind App 1

Miss—S & W. Const Co v Bugge, 13 So 2d 645, 194 Miss 822, 146 A L R 1190

SC—Carroll v Beard-Laney, Inc., 35 SE 2d 425, 207 SC 339

Wash—Leuthold v Goodman, 157 P 2d 326, 22 Wash 2d 583—Forsberg v Tevis, 71 P 2d 358, 191 Wash 355

In order to be appreciable, actuation of servant by purpose of serving master's business must be more than merely technical, suppositional, or argumentative, and must amount to more than a scintilla—S & W Const Co v Bugge, 13 So 2d 645, 194 Miss 822, 146 A L R 1190

18. Cal—Ryan v Farrell, 280 P. 945, 208 Cal 300—Sullivan v Thompson, 87 P 2d 62, 30 Cal App 2d 675—Naudack v Canini, 85 P 2d 510, 29 Cal App 2d 687—Broecker v Moxley, 28 P 2d 409, 136 Cal App 248.

Tex—Wilhoit v. Iverson Tool Co., 119 SW 2d 709, error dismissed by agreement

Va.—Drake v Norfolk Steam Laundry Corp., 116 SE 668, 135 Va 354

19. Cal—Ryan v. Farrell, 280 P. 945, 208 Cal 300—Naudack v. Canini, 85 P 2d 510, 29 Cal App 2d 687—Broecker v Moxley, 28 P 2d 409, 136 Cal App 248.

Va.—Drake v Norfolk Steam Laundry Corp., 116 SE 668, 135 Va 354

20. Cal—Cain v. Marquez, 88 P 2d 200, 81 Cal App 2d 430—Hiroshima v Pacific Gas & Electric Co., 68 P 2d 340, 18 Cal App 2d 24
Conn—Neville v Adorno, 195 A 613, 128 Conn 395

Ga—Corpus Juris cited in Atlanta Furniture Co v Walker, 181 SE 498, 499, 51 Ga App. 781—Corpus Juris cited in Davies v. Hearn, 164 SE 273, 276, 45 Ga App 276—Palmer Phinney & Connell v Heinzerling, 130 SE 537, 34 Ga App. 544.
Idaho—Baldwin v. Singer Sewing

ditions which then existed have not been altered by the act of the servant so that some new negligent cause has intervened for which the master was not originally liable.²¹ There is some conflict in the authorities as to when a servant will be deemed to have returned to his employment after a deviation therefrom for a purpose of his own.²² According to some authorities the servant will be considered to have resumed the prosecution of the master's business where, after the fulfillment of his own purpose, he is returning to resume his duties.²³ It has been held, however, that the mere fact that a servant has completed the purpose for which he departed from his master's business and is returning to resume the duties of his employment will not operate to restore the relationship of master and servant so as to impose liability on the master²⁴ and that a servant cannot reenter the scope of his employment until he is within the flexible limits of his employment.²⁵ While it has been held that it is not necessary for him to have reached the zone of his employment or the territory in which he was employed to work,²⁶ or the point from which he diverged when beginning to act for a purpose of his own,²⁷ or his des-

tinuation,²⁸ it has also been held that a servant ordinarily will not be deemed to have returned to his master's service until he at least has reached a point in a zone within which his labors would have been consistent with an act of deviation merely,²⁹ and other authorities have held that the relation of master and servant is not restored until the servant has returned to the place where the deviation occurred or to a corresponding place, some place where, in the performance of his duty, he should be.³⁰ In any case, it has been said to be clearly impossible to formulate a general rule governing all cases, and whether there has been a resumption of the master's business must of necessity depend largely on the facts of the particular case.³¹

Such resumption of the master's business cannot be effected merely by the mental attitude of the servant.³² There must be that attitude coupled with a reasonable connection in time and space with the work in which he should be engaged,³³ and it has been held that there can be no resumption of the relation which has been suspended while the servant is still primarily bent on the accomplishment of his personal undertaking.³⁴

Mach. Co., 287 P 944, 49 Idaho 231.

III—Boehmer v Norton, 65 NE 2d 212, 328 Ill App 17

La—Corpus Juris cited in James v J S Williams & Son, 150 So 9, 13, 177 La 1033—Braud v Vinet, App, 5 So 2d 200—Matheny v U S Fidelity & Guaranty Co., App, 181 So 647—Gilbert v Trotter, App, 160 So. 855

Mo—Cable v. Johnson, App, 63 S W 2d 433

Neb—Corpus Juris quoted in Sutton v. Inland Const Co., 14 NW 2d 387, 391, 144 Neb 721—Corpus Juris quoted in Keebler v Harris, 235 NW 328, 329.

Tex—Placencia v Western Union Telegraph Co., 172 S W 2d 86, 141 Tex 247—Chisos Mining Co v Huerta, 171 S W 2d 867, 141 Tex 289—Corpus Juris quoted in Bresnan v Republic Supply Co., Civ App, 63 S W 2d 1105, 1107, error refused

39 C.J. p 1298 note 17.

21. N.Y.—Geraty v. National Ice Co., 44 N.Y.S 659, 16 App Div 174.

22. Mo—Humphrey v Hogan, App, 104 S.W 2d 767

23. La—Matheny v. U S Fidelity & Guaranty Co., App, 181 So. 647—Gilbert v. Trotter, App, 160 So. 855

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Trip unauthorized from its inception
The master is not responsible for acts committed by his servant while returning from a mission of his own

where the entire trip is unauthorized from its inception—James v J S Williams & Son, 150 So 9, 177 La 1033

24. Ala—Bell v Martin, 1 So 3d 906, 241 Ala. 182

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25. Ky—Central Truckaway System v Moore, 201 S W 2d 725, 304 Ky 533

26. La—Matheny v U S Fidelity & Guaranty Co., App, 181 So 647 39 C.J p 1298 note 20

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28. N.Y.—Geraty v National Ice Co., 44 N.Y.S 659, 16 App Div 174

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N.Y.—Dockweiler v American Piano Co., 160 N.Y.S 270, 94 Misc 713, affirmed 163 N.Y.S. 1115, 177 App. Div. 912

30. Ala—Bell v Martin, 1 So.2d 906, 241 Ala 182.

Mo—Humphrey v Hogan, App, 104 S.W 2d 767

N.C—Parrott v Kantor, 6 S E 2d 40, 216 N.C. 584

Tex—Chisos Mining Co v. Huerta, 171 S W 2d 867, 141 Tex. 289

31. La—Matheny v. U S Fidelity & Guaranty Co., App, 181 So 647

Matters considered

In determining whether servant resumed employment after unauthorized deviation therefrom, purpose of servant, coupled with reasonable connection with period and place of alleged resumption as related to character of employment, time elapsed between departure and claimed resumption and place of resumption should be considered—Neville v Adorno, 195 A. 613, 123 Conn. 395.

32. Cal—Cain v. Marquez, 88 P 2d 200, 31 Cal App 2d 430

III—Boehmer v Norton, 65 NE 2d 212, 328 Ill App 17

N.Y.—Riley v. Standard Oil Co. of New York, 132 NE 97, 231 N.Y. 301, 22 A L R 1883

Tex—Placencia v Western Union Telegraph Co., 172 S W 2d 86, 141 Tex 247—Southwest Dairy Products Co v De Frates, 125 S W 2d 282, 132 Tex 556, 122 A L R 854

33. Cal—Cain v Marquez, 88 P 2d 200, 31 Cal App 2d 430

III—Boehmer v Norton, 65 NE 2d 212, 328 Ill App 17

N.Y.—Riley v Standard Oil Co of New York, 132 NE 97, 231 N.Y. 301, 22 A L R. 1882

34. N.H—Sauriolle v O'Gorman, 163 A. 717, 66 N.H 39.

§ 575. — Particular Application of Respondeat Superior Doctrine

- a. In general
- b. Fires started by servant
- c. Injuries to invitees, licensees, and trespassers
- d. Negligent or willful use of master's horses or vehicles
- e. Obstruction of highways and streams
- f. Trespass

a. In General

The doctrine of respondeat superior should be liberally and practically applied, but it should not be applied in such a manner as to destroy the rights of the master.

It has been declared that the rule imposing liability on the master for the acts of his servant is to be liberally and practically applied, especially where

the business of the master, intrusted to the servant, involves a duty owed by him to the public or to third persons.³⁵ In addition to other particular applications, hereinafter considered, a wide variety of acts or omissions has been held to fall within the scope of employment of particular servants so as to impose liability therefor on the master,³⁶ including the servant's deceit or fraud,³⁷ negligence in the maintenance of the floors and stairways on the master's premises,³⁸ in leaving an inherently dangerous instrument where it could injure others,³⁹ in leaving open trap doors, coalholes, or like contrivances,⁴⁰ in discharging firearms,⁴¹ or in substituting another to perform his duties;⁴² mistake in filling a prescription,⁴³ pollution of milk delivered to a customer,⁴⁴ setting up machinery in a defective manner⁴⁵ or failing to test it properly after setting it up,⁴⁶ violation of the Civil Rights Law,⁴⁷ creation

35. NC—Robertson v Virginia Electric & Power Co., 168 SE 415, 304 NC 359, cause remanded 170 SE 139, 205 NC 111.

Liability of master for particular torts:

Arrest and false imprisonment see False Imprisonment § 40

Label or slander see Label and Slander § 150

Malicious prosecution see Malicious Prosecution § 63

Resolution of doubts as to whether act within scope of employment against master see supra § 570d (2)

36. Particular conduct held within scope of employment

(1) In general

US—Cole v American Bridge Co., CCA Ind., 152 F.2d 157

Ala.—Western Union Telegraph Co v. Gorman, 185 So 748, 237 Ala. 146

Cal.—O'Shea v Pacific Gas & Electric Co., 62 P.2d 1066, 18 Cal App 2d 32

Mo.—Stumpf v Panhandle Eastern Pipeline Co., 189 SW 2d 223, 354 Mo 208—Thompson v St Louis-San Francisco Ry Co., App., 3 SW 2d 1033

Tex.—Heldenfels v Montgomery, Civ App., 157 SW 2d 998, error dismissed

(2) Act of attendant in restroom negligently pushing door against customer J. C. Penny Co. v. McLaughlin, 188 So 785, 137 Fla. 594.

(3) Slamming door, causing glass panel to break and injure customer Kiser v. Skelly Oil Co., 18 P.2d 181, 136 Kan 812.

(4) Negligence of a medical examiner of an insurance company in failing to replace a plaster cast on the foot of one insured under an ac-

cident policy resulting in injury to insured—Tompkins v Pacific Mut Life Ins Co., 44 SE 439, 53 W Va 479, 97 Am SR 1006, 63 LRA 489

(5) X-ray technician requesting third person to assist during making of X-ray—Kelly v Yount, 12 A 2d 579, 338 Pa 190

(6) Removal of rocks from the master's road and negligently allowing them to roll down hills, causing injuries to a child—Lytle v Harlan Town Coal Co., 180 SW 519, 167 Ky 345

(7) Attendant's failure properly to replace plug in crank case, causing damage to automobile from lack of oil—National Refining Co v Clancy, 166 NE 205, 31 Ohio App 99.

(8) Failure to remove all of sulphur dioxide from cylinder of evaporator of refrigerator being dismantled—Pettis v New York State Electric & Gas Corporation, 293 NY S 91, 249 App Div 487, affirmed 11 NE 2d 818, 275 NY 507.

(9) Usher, in pointing out to policemen plaintiffs as being in theater without tickets Kennington-Saenger, Inc. v. Wicks, 151 So 549, 168 Miss 566

(10) The untying of the sloop of an intruder or trespasser from the master's wharf, during a storm in consequence of which it was lost—Ploof v. Putnam, 75 A 277, 83 Vt. 252, 138 Am SR 1085, 26 LRA NS, 251—39 C.J. p 1298 note 34

Careful tests and inspection cannot relieve ship builder from liability for negligence of employee who performed defective welding and thereby rendered vessel unseaworthy with result that a longshoreman was

injured—The Samovar, D C Cal., 72 F Supp 574

37. La.—Yours v New Orleans Linen Supply Co., App., 185 So 535 39 CJ p 1298 note 23

38. Mo.—Van Brock v First Nat. Bank in St. Louis, 161 SW 2d 258, 349 Mo 425—Savona v May Department Stores Co., App., 71 SW 2d 157

N.Y.—Coggins v Clinton Trust Co., 52 NY S 2d 627

39. N.Y.—Delisa v Arthur F. Schmidt, Inc., 34 NE 2d 336, 285 NY 314

40. RI.—Kimatian v New England Telephone & Telegraph Co., 141 A. 331, 49 RI 166 39 CJ p 1298 note 24

41. Mass.—Colvin v Peabody, 29 NE 59, 155 Mass 104

42. Ark.—Federal Compress & Warehouse Co v Jones, 21 SW 2d 857, 180 Ark 476

43. Or.—Goodwin v Rowe, 135 P. 171, 67 Or 1, Ann Cas. 1915C 416

44. Ohio.—Stranahan Bros. Catering Co v Coit, 45 NE 634, 55 Ohio St 398, 4 LRA NS, 591 39 CJ p 1298 note 30

45. US.—Wrought-Iron Range Co. v Graham, NC, 80 F 474, 25 C. CA 570 Minn.—Crandall v Boutell, 103 N.W. 890, 95 Minn 114, 5 Ann. Cas. 122.

46. N.Y.—Wright Steam Engine Works v Lawrence Cement Co., 60 NE 739, 167 NY 440

47. N.Y.—Springer v. McDermott, 173 NY S 413 11 CJ p 813 note 47—39 C.J. p 1298 note 35.

ditions which then existed have not been altered by the act of the servant so that some new negligent cause has intervened for which the master was not originally liable.²¹ There is some conflict in the authorities as to when a servant will be deemed to have returned to his employment after a deviation therefrom for a purpose of his own.²² According to some authorities the servant will be considered to have resumed the prosecution of the master's business where, after the fulfillment of his own purpose, he is returning to resume his duties.²³ It has been held, however, that the mere fact that a servant has completed the purpose for which he departed from his master's business and is returning to resume the duties of his employment will not operate to restore the relationship of master and servant so as to impose liability on the master.²⁴ and that a servant cannot reenter the scope of his employment until he is within the flexible limits of his employment.²⁵ While it has been held that it is not necessary for him to have reached the zone of his employment or the territory in which he was employed to work,²⁶ or the point from which he diverged when beginning to act for a purpose of his own,²⁷ or his des-

tinuation,²⁸ it has also been held that a servant ordinarily will not be deemed to have returned to his master's service until he at least has reached a point in a zone within which his labors would have been consistent with an act of deviation merely,²⁹ and other authorities have held that the relation of master and servant is not restored until the servant has returned to the place where the deviation occurred or to a corresponding place, some place where, in the performance of his duty, he should be.³⁰ In any case, it has been said to be clearly impossible to formulate a general rule governing all cases, and whether there has been a resumption of the master's business must of necessity depend largely on the facts of the particular case.³¹

Such resumption of the master's business cannot be effected merely by the mental attitude of the servant.³² There must be that attitude coupled with a reasonable connection in time and space with the work in which he should be engaged,³³ and it has been held that there can be no resumption of the relation which has been suspended while the servant is still primarily bent on the accomplishment of his personal undertaking.³⁴

Mach. Co., 287 P. 944, 49 Idaho 231

III—Boehmer v Norton, 65 NE 2d 212, 328 Ill App 17

La.—Corpus Juris cited in James v J S Williams & Son, 150 So 9, 12, 177 La 1083—Braud v Vinet, App, 5 So 2d 300—Matheny v U S Fidelity & Guaranty Co, App, 181 So 647—Gilbert v Trotter, App, 160 So 855

Mo—Cable v Johnson, App, 63 S W 2d 433.

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21. NY—Geraty v National Ice Co, 44 NYS 659, 16 App Div. 174

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23. La—Matheny v U S Fidelity & Guaranty Co, App, 181 So. 647—Gilbert v Trotter, App, 160 So 855

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Trip unauthorized from its inception. The master is not responsible for acts committed by his servant while returning from a mission of his own

where the entire trip is unauthorized from its inception—James v J S Williams & Son, 150 So 9, 177 La 1033

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NY—Dockweiler v American Piano Co, 150 NYS 270, 94 Misc 712, affirmed 163 NYS. 1115, 177 App Div 912

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Mo—Humphrey v Hogan, App, 104 SW 2d 767

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31. La.—Matheny v. U S Fidelity & Guaranty Co, App, 181 So 647

Matters considered

In determining whether servant resumed employment after unauthorized deviation therefrom, purpose of servant, coupled with reasonable connection with period and place of alleged resumption as related to character of employment, time elapsed between departure and claimed resumption and place of resumption should be considered—Neville v Adorno, 195 A 613, 123 Conn. 395

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33. Cal—Cain v Marquez, 88 P 2d 200, 31 Cal App 2d 430

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34. NH—Sauriolle v. O'Gorman, 168 A. 717, 86 NH. 39.

§ 575. — Particular Application of Respondent Superior Doctrine

- a. In general
- b. Fires started by servant
- c. Injuries to invitees, licensees, and trespassers
- d. Negligent or willful use of master's horses or vehicles
- e. Obstruction of highways and streams
- f. Trespass

a. In General

The doctrine of respondent superior should be liberally and practically applied, but it should not be applied in such a manner as to destroy the rights of the master.

It has been declared that the rule imposing liability on the master for the acts of his servant is to be liberally and practically applied, especially where

the business of the master, intrusted to the servant, involves a duty owed by him to the public or to third persons³⁵ In addition to other particular applications, hereinafter considered, a wide variety of acts or omissions has been held to fall within the scope of employment of particular servants so as to impose liability therefor on the master,³⁶ including the servant's deceit or fraud,³⁷ negligence in the maintenance of the floors and stairways on the master's premises,³⁸ in leaving an inherently dangerous instrument where it could injure others,³⁹ in leaving open trap doors, coalholes, or like contrivances,⁴⁰ in discharging firearms,⁴¹ or in substituting another to perform his duties,⁴² mistake in filling a prescription,⁴³ pollution of milk delivered to a customer,⁴⁴ setting up machinery in a defective manner⁴⁵ or failing to test it properly after setting it up,⁴⁶ violation of the Civil Rights Law,⁴⁷ creation

35. NC—Robertson v Virginia Electric & Power Co, 168 SE 415, 304 NC 359, cause remanded 170 SE 139, 205 NC 111

Liability of master for particular torts:

Arrest and false imprisonment see False Imprisonment § 40

Label or slander see Label and Slander § 150

Malicious prosecution see Malicious Prosecution § 63

Resolution of doubts as to whether act within scope of employment against master see supra § 570d (2)

36. Particular conduct held within scope of employment

(1) In general

US—Cole v American Bridge Co, CCA Ind, 152 F2d 157

Ala.—Western Union Telegraph Co v Gorman, 185 So 743, 237 Ala. 146

Cal.—O'Shea v Pacific Gas & Electric Co, 62 P2d 1066, 18 Cal App 2d 32

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(2) Act of attendant in restroom negligently pushing door against customer J C. Penny Co. v. McLaughlin, 188 So 785, 137 Fla. 594.

(3) Slamming door, causing glass panel to break and injure customer. Kiser v Skelly Oil Co., 18 P2d 181, 136 Kan. 812

(4) Negligence of a medical examiner of an insurance company in failing to replace a plaster cast on the foot of one insured under an ac-

cident policy resulting in injury to insured—Tompkins v Pacific Mut Life Ins Co, 44 SE 439, 53 W Va 479, 97 Am SR 1006, 62 LRA 489

(5) X-ray technician requesting third person to assist during making of X-ray—Kelly v Yount, 12 A2d 579, 338 Pa 190

(6) Removal of rocks from the master's road and negligently allowing them to roll down hills, causing injuries to a child—Lytle v Harlan Town Coal Co, 180 SW 519, 167 Ky 345

(7) Attendant's failure properly to replace plug in crank case, causing damage to automobile from lack of oil—National Refining Co v Clancy, 166 NE 205, 31 Ohio App 99

(8) Failure to remove all of sulphur dioxide from cylinder of evaporator of refrigerator being dismantled—Pettis v New York State Electric & Gas Corporation, 293 NY S 91, 249 App Div 487, affirmed 11 NE 2d 318, 275 NY. 507.

(9) Usher, in pointing out to policemen plaintiffs as being in theater without tickets Kennington-Saenger, Inc. v Wicks, 151 So 549, 168 Miss 566

(10) The untying of the sloop of an intruder or trespasser from the master's wharf, during a storm in consequence of which it was lost—Ploof v. Putnam, 75 A. 277, 83 Vt 252, 138 Am SR 1085, 26 LRA NS, 251—39 CJ p 1298 note 84.

Careful tests and inspection cannot relieve ship builder from liability for negligence of employee who performed defective welding and thereby rendered vessel unseaworthy with result that a longshoreman was

injured—The Samovar, DCCal., 72 F Supp 574

37. La.—Yours v. New Orleans Linen Supply Co, App, 185 So 525. 39 CJ p 1298 note 28

38. Mo.—Van Brock v First Nat. Bank in St Louis, 161 SW2d 258, 349 Mo 425—Savona v May Department Stores Co, App, 71 SW. 2d 157

NY—Coggins v Clinton Trust Co, 52 NY S2d 637

39. NY—Delisa v Arthur F. Schmidt, Inc, 34 NE2d 336, 285 NY 314

40. RI—Kimatian v New England Telephone & Telegraph Co, 141 A. 331, 49 RI 186
39 CJ p 1298 note 24

41. Mass.—Colvin v Peabody, 29 NE 59, 155 Mass 104

42. Ark.—Federal Compress & Warehouse Co v Jones, 21 SW2d 557, 180 Ark 476

43. Or.—Goodwin v Rowe, 135 P. 171, 67 Or 1, Ann Cas 1915C 416

44. Ohio—Stranahan Bros. Catering Co v Coit, 45 NE 634, 55 Ohio St 398, 4 LRA NS, 591.
39 CJ p 1298 note 30

45. US—Wrought-Iron Range Co. v Graham, NC, 80 F 474, 25 C. CA 570

Minn.—Crandall v Boutell, 103 NW. 890, 95 Minn 114, 5 Ann Cas 132.

46. NY—Wright Steam Engine Works v. Lawrence Cement Co, 60 NE 789, 167 NY 440

47. N.Y.—Springer v. McDermott, 173 NY S 413

11 CJ p 813 note 47—39 CJ p 1298 note 25.

of a nuisance,⁴⁸ or waste⁴⁹

On the other hand, the doctrine of respondeat superior should not be applied so as to destroy the rights of the master,⁵⁰ and a variety of conduct has been held to be outside the scope of employment of particular servants so as to relieve the master of liability to third persons for injuries resulting therefrom.⁵¹ Thus, the master was held not liable where his employees, instead of putting wire used for repair in a safe place, connected it with a wire charged with electricity with the avowed intention of injuring thieves,⁵² where servants engaged in running a steamboat used to carry persons to a railway, both steamboat and railway being owned by the same person, mismanaged the railway so as to cause injuries to third persons, nothing being shown as to any authority or right on their part to operate the railway,⁵³ or where the servant, while not acting within the real or apparent scope of his authority, used abusive and insulting language to one on the master's premises.⁵⁴

Barbering and beauty culture The owner of a beauty or barber shop is liable to a customer for injuries received due to the negligence of his servants while acting within the scope of their employment.⁵⁵

Conversion. If a servant, while acting within the scope of his employment and in the discharge of his duty, wrongfully converts the property of a third person, the master is liable therefor.⁵⁶ On the other hand, the master is not liable for the conversion by his servant of another's property where he was acting outside of the scope of his employment.⁵⁷

Injuries to, or killing of, animals. The master is ordinarily liable for the killing of, or injury to, an animal by a servant, in the ordinary prosecution and scope of his employment,⁵⁸ but a master is not liable for the act of his servant outside the scope of his employment,⁵⁹ unless such servant has acted under the command or direction of his master.⁶⁰

48. N.Y.—Sullivan v McManus, 45 N.Y.S. 1079, 19 App.Div. 167
46 C.J. p. 747 note 5

49. Ky.—Campbell v W. M. Ritter Lumber Co., 131 S.W. 30, 140 Ky. 312, 140 Am.S.R. 385

50. Tex.—Grubb v Galveston, H. & S. A. Ry. Co., Civ.App., 153 S.W. 694, error refused

Criminal acts as being outside scope of employment see supra § 573

51. Particular conduct held outside scope of employment

(1) Aiding third person

N.Y.—Anderson v International Mercantile Marine Co., 264 N.Y.S. 175, 238 App.Div. 509, motion denied 188 N.E. 124, 232 N.Y. 693, affirmed 191 N.E. 497, 264 N.Y. 426—Murray v O'Brien Bros., 238 N.Y.S. 648, 227 App.Div. 43

Tenn.—Cole v Standard Oil Co. of New Jersey, App., 197 S.W.2d 13
Va.—Appalachian Power Co. v Robertson, 129 S.E. 224, 142 Va. 454
Wis.—Mittleman v Lindsay-McMillan Co., 232 N.W. 527, 202 Wis. 577

(2) Using equipment to lift load more than twice the lifting capacity of the equipment—Koepeke v Matthews Bros. Const. Co., 47 N.E.2d 334, 317 Ill.App. 651

(3) Removal of fire placed one foot from curb in front of defendant's premises by superintendent—Granatelli v Kalmanowitz, 48 N.Y.S.2d 600, 368 App.Div. 90

(4) Giving of advice and counsel generally.

Okla.—Chicago, R. I. & P. R. Co. v Sawyer, 56 P.2d 418, 176 Okla. 446
S.D.—Anderson v Chicago & N.W. Ry. Co., 241 N.W. 516, 59 S.D. 543

(5) Clay miners burying their own powder to prevent theft during absence—General Refractories Co. v Mosier, 30 S.W.2d 953, 235 Ky. 252

(6) Leaving doors of cellar stairway open—Eagan v Prudential Ins. Co. of America, 45 A.2d 622, 133 N.J. Law 603

(7) Other conduct

Mo.—Oganaso v Mellow, 201 S.W.2d 365—Berling v S. S. Kresge Co., 116 S.W.2d 522, 232 Mo.App. 1195

N.Y.—Bernstein v East 167th Street Corporation, 293 N.Y.S. 109, 161 Misc. 836

N.C.—Norman v. Porter, 148 S.E. 41, 197 N.C. 232

52. Ky.—Craig v Kentucky Utilities Co., 209 S.W. 33, 183 Ky. 274.
39 C.J. p. 1299 note 38

53. Ill.—Biederman v Brown, 49 Ill. App. 483

54. Miss.—American R. Express Co. v. Wright, 91 So. 342, 128 Miss. 593, 23 A.L.R. 127

55. Ill.—Higgins v Byrnes, 274 Ill. App. 440

Iowa.—Pearson v Butts, 276 N.W. 65, 224 Iowa 376.

La.—Mixon v Brechtel, App., 174 So. 283—Cassidy v. Beauty Studio, App., 144 So. 517.

Mo.—Givens v. Spalding Cloak Co., 63 S.W.2d 519, 228 Mo.App. 169.

Assumption of risk

(1) Where operators in defendant beauty parlor failed to warn plaintiff of the possible dangers of giving a permanent wave, plaintiff could not be held to have assumed the risk

incident to the operation of being given a permanent wave—Lenza v Metcalf, La.App., 25 So.2d 453—Mixon v Brechtel, La.App., 174 So. 283

(2) Customer, burned while getting hair curled was held not to have assumed risk—Cassidy v Beauty Studio, La.App., 144 So. 517.

Unavoidable accident

Injuries sustained by barber's customer when, due to customer's easily excitable ticklishness, he instinctively jumped up and caught hold of razor when back of it struck his chest as barber in process of shaving him was about to wipe razor on tissue paper resting on customer's chest, were held result of unavoidable accident, precluding recovery against master, notwithstanding employee had been provoking laughter from customer—Vann v Ionta, 284 N.Y.S. 278, 157 Misc. 461

56. SC.—Corpus Juris cited in Powell v A. K. Brown Motor Co., 20 S.E.2d 636, 637, 200 S.C. 75.
39 C.J. p. 1299 note 42

57. N.Y.—Vandeymark v. Corbett, 115 N.Y.S. 911, 131 App.Div. 391
39 C.J. p. 1299 note 43

58. Mo.—Schmidt v. Adams, 18 Mo. App. 432

3 C.J. p. 159 note 31

Liability of master for injuries caused by servant's dog kept on master's premises see Animals § 165 b

59. Ga.—Lee v Nelms, 57 Ga. 253.
3 C.J. p. 159 note 32.

60. N.Y.—Steele v. Smith, 3 Ed. Smith 321
3 C.J. p. 159 note 33.

Negligent pedestrianism. It has been held that the master is liable for an injury to the person or property of another caused by the negligent pedestrianism of his servant who is otherwise acting within the scope of his employment⁶¹

Selling explosives to infant. As discussed in Explosives § 6 c, if one sells gunpowder or other explosives to children, or to others whom he knows to be incapable of taking proper care of them, he is liable for injuries resulting from their improper use by such persons. Such liability extends to sales made by a servant acting within the scope of his employment,⁶² and the master is not exonerated from liability by reason of the fact that the sale was made in violation of the master's instructions⁶³

b. Fires Started by Servant

Where, in doing the master's work, the use of fire is necessary or greatly facilitates the performance of the work, the use thereof will be considered as being within the scope of the servant's employment so as to

render the master liable for injuries to third persons by reason of the servant's negligence in the use thereof, but, generally, the master is not liable for injuries resulting from fires started by a servant merely to serve his own purposes.

Where, in doing the master's work, the use of fire is necessary or greatly facilitates the performance of the work, the use thereof will be considered as being within the scope of the servant's employment so as to render the master liable if a third person is injured or his property is destroyed by reason of the negligence of the servant in the use thereof,⁶⁴ and this is true, although the servant may have violated the master's instructions as to how to use it,⁶⁵ or may have acted in disobedience of the master's orders to use it at all,⁶⁶ but there is authority apparently to the contrary of this last proposition.⁶⁷ If the master has directed the servant to start a fire, he cannot exonerate himself from responsibility by showing that his instructions were not strictly followed by the servant.⁶⁸

61. U S—Western Union Telegraph Co v Bromberg, CCA Or, 148 F 2d 288

Cal—Tighe v Ad Chong, 112 P 2d 20, 44 Cal App 2d 164—Schediwy v McDermott, 298 P 107, 113 Cal App 318

Ind—Annis v Postal Telegraph Co, 52 NE 2d 373, 114 Ind App 543
Wash—Hobbs v Postal Telegraph-Cable Co, 141 P 3d 648, 19 Wash 2d 102.

Collision on public highway held within rule—Annis v Postal Telegraph Co, 52 NE 2d 373, 114 Ind App 543

In Missouri

(1) Where a messenger, while delivering a message for his master or otherwise acting within the scope of his employment, negligently collides with a pedestrian on a public street, it has been held that the master cannot be held liable for the pedestrian's injuries under the doctrine of respondeat superior, since the messenger was not traveling on the street by permission of the master but was merely exercising a public right valuable to himself as a facility for gaining a livelihood—Phillips v Western Union Telegraph Company, 195 SW 711, 270 Mo 678—Ritchey v Western Union Telegraph Co, 41 SW 2d 623, 227 Mo App 754

(2) In a later case, however, it was held that a master distributing material to customers by route boys, one of whom negligently pushed revolving door constituting only entrance to customer's business office against person attempting to leave such office as he entered it to make delivery, would be liable for such person's injuries in absence of contributory negligence, the court dis-

tinguishing Phillips v Western Union Telegraph Company, supra, from the case at bar in that in the case at bar the accident did not occur on the public street, the route boy was not using merely his health and strength, and had not in any way departed from the scope of his employment—Salmons v Dun & Bradstreet, 163 SW 2d 245, 349 Mo 498, 141 A L R 674

62. Pa—Mautino v Piercedale Supply Co, 13 A 2d 51, 338 Pa 435

63. Pa—Mautino v Piercedale Supply Co, supra.

64. SC—Hancock v. Aiken Mills, 185 SE 188, 180 SC 98.

Wash—Netherlands American Mortg Bank v Eastern Ry & Lumber Co, 268 P 604, 148 Wash 249

Wis—Spaulding v Chicago & N. W. R Co, 33 Wis 582
39 C J p 1299 note 46

Employee's mistaken judgment as to effect of fire, started in course of employment, would not relieve employer from liability—Netherlands American Mortg Bank v Eastern Ry & Lumber Co, 268 P 604, 148 Wash. 249.

Burning off right of way

Where servants of a railroad company started a fire on its right of way for the purpose of clearing it and through their negligence the fire spread to property of an adjoining owner resulting in injuries thereto, the company was liable—Leffomer v Detroit & M R Co, 128 NW 766, 163 Mich 635—Fitzsimmons v Milwaukee, L S & W R Co, 57 NW 127, 98 Mich 257—39 C J p 1299 note 46 [a].

Keeping warm

Test whether employees were acting in scope of their employment in building fire to keep themselves warm while working, was whether building of fire was reasonably implied from character of work, nature of employment, and duties incident to employment—Hancock v Aiken Mills, 185 SE 188, 180 SC 98

Killing yellow jackets

Employer was liable for damages by fire started by servants to kill yellow jackets molesting them while they were working—Robertson v Virginia Electric & Power Co, 168 SE 415, 204 NC 359, cause remanded 170 SE 139, 205 NC 111.

Failure to protect child

Where twelve-year-old child was burned while standing by fire which had been built by workmen acting within the scope of their employment, failure of workmen to keep child away from fire was held not actionable negligence, since a fire is ipso facto dangerous—Hancock v Aiken Mills, 185 SE 188, 180 SC 98.

65. Pa—McDermott v Consolidated Ice Co, 44 Pa Super 445
39 C J p 1300 note 47

66. Mich—Leffomer v. Detroit & M. R R Co, 128 NW 766, 163 Mich 635—Fitzsimmons v Milwaukee, L S. & W. R Co, 57 NW 127, 98 Mich 257.

67. NH—Andrews v Green, 82 N. H. 436.

68. Ill—Armstrong v Cooley, 10 Ill 505
39 C J p 1300 note 50.

On the other hand, as a general rule, the master is not liable for injuries from fires started by the servant merely to serve his own purposes and having no connection with the master's work.⁶⁹ Such is not the rule, however, where it is one of the duties pertaining to the servant's employment to extinguish fires found on the master's premises irrespective of how they were started so that they would not extend to and injure the property of others.⁷⁰

Fires started by smoking. The courts have generally refused recovery in an action against an employer where the person or property of a third person is injured by a servant smoking,⁷¹ especially where the injury occurs at a time when the servant is not otherwise acting within the scope of his employment or serving the interests of his master,⁷² or the smoking takes place in surroundings where it could not reasonably be anticipated that damage would result.⁷³ The master has been held liable, however, where the servant at the time the injury occurred was combining smoking and his master's business,⁷⁴ and, although there is authority to the contrary,⁷⁵ it has been held that, where the master sends out servants to do work, the nature of which

is such that the master knows that damage is likely to occur if his servants smoke, the duty devolves on the master to see that his servants exercise due care under the existing circumstances and he is liable for the damages caused by their smoking.⁷⁶

c. Injuries to Invitees, Licensees, and Trespassers

It has been held that an employer is not liable for an injury, caused by his employee's conduct, or otherwise, to one accepting or soliciting from the employee an invitation, not known to, or binding on, the employer, to enter or remain on the employer's premises, even though the conduct which immediately causes the harm is within the scope of the servant's employment, although there is also authority to the contrary.

The owner, occupant, or person in charge of property owes to an invitee the duty of exercising reasonable or ordinary care for his safety, and is liable for injury resulting from a breach of such duty, as discussed in the C.J.S. title Negligence § 45, also 45 C.J. p 824 note 50, p 825 note 51. This rule includes within its protection persons invited on the premises by the owner's or occupant's servant where the invitation is within the scope of his employment,⁷⁷ and it operates to protect invitees of

69. Cal—Corpus Juris cited in Yore v Pacific Gas & Electric Co., 277 P 878, 880, 99 Cal App 81

Mo.—Excelsior Products Mfg Co. v Kansas City Southern R Co, 173 SW 359, 363 Mo 143, Ann Cas 1817B, 1047

Pa.—Herr v. Simplex Paper Box Corporation, 198 A 309, 330 Pa 129

Tenn.—Kelly v Louisiana Oil Refining Co, 66 SW2d 997, 167 Tenn 101

39 C.J. p 1300 note 51.

70. Miss.—Baldwin v. Alabama & V R Co, 53 So 358, 96 Miss 52
39 C.J. p 1300 note 52

71. Cal.—Yore v Pacific Gas & Electric Co, 277 P 878, 99 Cal App. 81

N.C.—Tomlinson v Sharpe, 37 SE2d 498, 236 NC 177

Pa.—Herr v. Simplex Paper Box Corporation, 198 A 309, 330 Pa 129

Tenn.—Shuck v Carney, 118 SW2d 896, 22 Tenn App 125

39 C.J. p 1300 note 51 [b]

Unanticipated ignition of gasoline

It has been held that the negligence of a garage foreman in dropping a burning match, after lighting a cigarette, on ground saturated with gasoline from the tank of an overturned automobile was not related to supervision of efforts to get automobile out of ditch which garage owner had requested him to do, and hence garage owner was not liable for burning of automobile, regardless of whether owner knew foreman smoked while working, where owner could not anticipate spilled gasoline

or its manner of ignition—Shuck v Carney, 118 SW2d 896, 22 Tenn App 125

Fact that servant was telephoning employer from place where he was making delivery when he lit cigarette and set fire to plaintiff's clothes by throwing away lighted match did not render master liable, since lighting cigarette was outside scope of employment—Kelly v Louisiana Oil Refining Co, 66 SW2d 997, 167 Tenn 101.

72. Ark.—Lindley v McKay, 146 SW2d 545, 201 Ark 675

73. U.S.—Maloney Tank Mfg Co v Mid-Continent Petroleum Corporation, CCA Okl, 49 F2d 146

74. Ark.—Vincennes Steel Corporation v Gibson, 106 SW2d 173, 194 Ark 58

75. Cal.—Yore v Pacific Gas & Electric Co, 277 P. 878, 99 Cal App. 81

76. U.S.—Maloney Tank Mfg Co v Mid-Continent Petroleum Corporation, CCA Okl, 49 F2d 146

Okl.—McKinney v. Bland, 112 P2d 798, 188 Okl 661

Throwing cigarette across gas tank

A filling station proprietor has been held liable for employee's act in throwing lighted cigarette across a gasoline tank which he was filling, causing explosion—Wood v Saunders, 238 NYS 571, 228 App Div 69, followed in Davidson v Gorlich, 256 N.Y.S. 1015, 235 App Div. 849.

Where a foreman laying an explosive floor mixture carelessly lit his pipe and set fire to the building, the master was liable for the negligence of the servant on the theory that the foreman was the master's alter ego—Mack v Hugger Bros Const Co, 10 Tenn App 403

Knowledge that men were likely to smoke

Where defendant had men setting out trees in a field in which the grass was very parched and dry, and they smoked while they worked, and one of them dropped a lighted match, defendant was held liable for the damage which followed, because the court found that it knew or should have known that its men were likely to smoke while on the job—Palmer v. Keene Forestry Assoc, 112 A 798, 80 NH 68, 13 ALR 995

77. U.S.—King v Yancey, D.C. Nev. 53 F Supp 510, reversed on other grounds, CCA, 147 F2d 379

Conn.—Deacy v McDonnell, 88 A2d 181, 131 Conn 101

Nev.—Nevada Transfer & Warehouse Co v Peterson, 99 P2d 633, 60 Nev 87

N.Y.—Ferro v Leopold Sinsheimer Estate, 176 NE 817, 256 NY 398

Pa.—Devlin, to Use of U S Fidelity & Guaranty Co v School Dist of Philadelphia, 10 A2d 408, 337 Pa 309

Acquiescence in use of fire escape

The mere fact that authority of landlord's servant was limited to operation and maintenance of building,

the master against injuries by his servants acting within the scope of their employment.⁷⁸ On the other hand, it has been held that the employer is not liable for an injury, caused by his employee's conduct, or otherwise, to one accepting or soliciting from the employee an invitation, not known to, or binding on, the employer, to enter or remain on the employer's premises,⁷⁹ although the conduct which immediately causes the harm is within the scope of the servant's employment.⁸⁰ It has also been held, however, that, if the conduct which immediately causes the harm is within the scope of the servant's employment, the master may be held liable therefor, even though the invitation was outside the servant's scope of employment.⁸¹

Licensees. It has been held that a master is not liable for an injury to a licensee caused by the mere negligence of his servant,⁸² but is liable only for an injury willfully or wantonly inflicted by the servant

while acting within the scope of his employment.⁸³ **Trespassers** It has been stated that the rights of a trespasser are limited when his presence in a place which proves to be one of danger is the result of an invitation extended by a servant contrary to the master's instructions and the injury results from the acts of the servant.⁸⁴ It has been held, however, that a trespasser may recover against the master whose servant, knowing of the trespasser's peril, negligently injures him.⁸⁵

Injuries to children invited on premises. Except where the servant is an alter ego of the master,⁸⁶ or has been placed in exclusive management or control of the master's premises,⁸⁷ he has no implied authority to invite or permit children to be on the master's premises, and the master is not liable for injuries which they may sustain through conditions on the premises or the servant's negligence.⁸⁸

Customers in store. The proprietor of a store has

and that he had no power to create tenancies or grant rights and privileges to tenants, did not authorize contention that his knowledge of use of fire escape stairway as a common passageway did not constitute acquiescence binding on landlord—*Darlington v Railway Exchange Bldg*, 188 S W 2d 101, 353 Mo 569

Superintendent in charge of plant had authority to invite into plant, for purpose of advising him respecting operating problems confronting owner, superintendent of another plant, who was injured, with respect to owner's liability for injury—*Henry W Cross Co. v. Burns*, C C A Ark, 81 F 2d 856

Wife of employee held "invitee," with respect to master's liability for her injuries—*King v. Yancey*, C C A Nev, 147 F 2d 379

78. Cal—*Dyer v McCorkle*, 280 P 965, 208 Cal 316

Minn—*Gilbert v Megears*, 257 N.W. 73, 192 Minn 495

Mo—*Daugherty v Spuck Iron & Foundry Co*, 175 S W 2d 45

Nev—*Nevada Transfer & Warehouse Co v. Peterson*, 99 P 2d 633, 60 Nev 87.

Tex—*El Paso Laundry Co v. Gonzales*, Civ App, 36 S W 2d 793, error dismissed

Guest of house servant

Where master was absent when guest of house servant visited premises, servants represented master, their knowledge of guest's presence was in effect master's knowledge, and servants were obligated to take such precautions to prevent injury to guest as master should have taken had he been present—*Deacy v McDonnell*, 38 A 2d 181, 131 Conn 101

79. U.S.—*Silverado S. S. Co v*

Prendergast, C C A Wash, 31 F 3d 226, certiorari denied *Prendergast v Silverado S S Co*, 50 S Ct 17, 280 US 557, 74 L Ed 612

Ill.—*Mallory v Day Carpet & Furniture Co*, 245 Ill App 465

Kan—*Dye v Rule*, 28 P 2d 758, 138 Kan 808

Minn—*Holmgren v Red Lake Falls Milling Co*, 210 NW 1000, 169 Minn 268

Or—*Akerson v D C Bates & Sons*, 174 P 2d 953

Utah—*Looney v. Bingham Dairy*, 282 P 1030, 75 Utah 53, 78 A L R 427.

Explosion

Where deceased, looting in filling station in violation of owner's known rule, was fatally injured by explosion caused by alcohol spilled on floor when employee struck match, owner was not liable, even if employee permitted deceased to loaf on premises—*Dye v Rule*, 28 P 2d 758, 138 Kan 808

Knowledge not imputed to master

Where defendant's employee was not acting within scope of his authority in inviting plaintiff into building, knowledge of plaintiff's presence on the premises and likelihood of her being injured could not be imputed to defendant—*Akerson v. D. C. Bates & Sons, Or*, 174 P 2d 953

Where a servant directs a stranger to use a passageway not usually used, it is not within the scope of his employment where the person injured is a stranger who has gone on the premises merely to accommodate the servant—*Lackat v Lutz*, 22 S W 218, 94 Ky 287, 15 Ky L 75

80. Kan—*Dye v. Rule*, 28 P.2d 758, 138 Kan 808.

81. Conn—*Kuharski v. Somers Mo*

tor Lines, 43 A 2d 777, 133 Conn. 269

82. US—*Jones v. George F Getty Oil Co.* C C A N M, 92 F 2d 255, certiorari denied *Associated Indemnity Corporation v George F Getty Oil Co*, 58 S Ct 644, 303 U S 644, 82 L Ed 1106

83. US—*Jones v George F Getty Oil Co.* C C A N M, 92 F 2d 255, certiorari denied *Associated Indemnity Corporation v George F Getty Oil Co*, 58 S Ct 644, 303 U S 644, 82 L Ed 1106

84. Conn—*Kuharski v Somers Motor Lines*, 43 A 2d 777, 132 Conn 269

85. Mo—*Daniel v Artesian Ice & Cold Storage Co.* App, 45 S W 2d 548

86. Mich—*Formall v Standard Oil Co*, 86 N W 946, 127 Mich 496

Tex—*Poteet v Blossom Oil & Cotton Co*, 115 S W 289, 53 Tex.Civ App 187.

87. Tex—*Houston & T C R Co v Bulger*, 80 S W 557, 35 Tex Civ App, 478

39 C J p 1301 note 57

88. U.S.—*Corpus Juris cited in Martin v Latex Const Co*, D.C. La., 50 F Supp 424, 426

Ill—*Corpus Juris cited in Mallory v Day Carpet & Furniture Co*, 245 Ill App 465, 468.

N Y—*Horowitz v Home Title Ins Co*, 16 N.Y.S 2d 410, 258 App Div 901

39 C J. p 1301 note 53.

Riding elevator

Elevator operator, permitting outside children to ride merely for sake of riding, was as matter of law, not acting within the scope of his em-

been held to be liable for injury to a customer resulting from an unsafe condition in such store caused by the negligence of his employees.⁸⁹ It is within the apparent authority of a clerk to invite a customer into that part of the store where the material the customer desires to purchase is kept,⁹⁰ or to use a lavatory or toilet in the store.⁹¹ On the other hand, a merchant is not an insurer of his customers' personal safety so as to be liable for the torts of his servants done outside the scope of their employment.⁹²

d. Negligent or Willful Use of Master's Horses or Vehicles

- (1) In general
- (2) What acts are within scope of employment
- (3) Injuries sustained by persons invited to ride
- (4) Consent of master to use his vehicle or team for necessary errands of servant

(1) In General

A master is liable for injuries negligently or willfully inflicted on a third person by a servant in the driving or handling of his horses, teams, or vehicles, if, and only if, at the time of the injury the servant was acting within the scope of his employment.

A master is not liable for injuries negligently or willfully inflicted on a third person by a servant in the driving or handling of his horses, teams, or vehicles, when at the time of the injury the servant was not acting within the scope of his employment, but for some purpose of his own.⁹³ On the other hand, the master will be liable if at the time of an injury negligently inflicted the servant was acting

within the scope of his employment,⁹⁴ and provided the person injured is not guilty of contributory negligence.⁹⁵

Willful or wanton acts within scope of authority
The master will be liable for injuries to third persons willfully and wantonly inflicted by a servant while using his horse, teams, or vehicles, and acting within the scope of his employment.⁹⁶

Failure to observe law of road; servant's statutory liability. The fact that the servant is made liable by statute for injuries resulting from his negligence in failing to observe the rule of the road in driving does not exempt the master from his common-law liability for the servant's negligence while acting within the scope of his employment.⁹⁷ An action against the master based on such statute will not lie, however, where the statute imposes liability on "every person offending against the provisions thereof," since such a statute imposes liability solely on the party who is guilty of its violation.⁹⁸

(2) What Acts Are within Scope of Employment

A mere deviation by the servant from the direct or usual route in driving his master's horses or vehicle for some purpose of his own as a general rule will not absolve the master from liability for injuries inflicted by the servant, and, in order to exonerate the master, it is essential that the deviation should be for purposes entirely personal to the servant.

It is very generally held that a mere deviation by the servant from the direct or usual route in driving his master's horses or vehicle in order to accomplish some purpose of his own does not constitute such a turning aside from the master's business as to absolve the master from liability for negligent injuries

employment—*Crawford v Rice*, CCA Tex., 36 F.2d 199.

89. Mich—*Carpenter v Herpolsheimer's Co.*, 271 NW 575, 278 Mich 697.

Lost property

Where a customer is invited into a store to make purchases, and leaves or loses property that is finally turned over to an employee of the store, and not returned to its owner, the employer is liable for the loss of the property.—*J. G. McCrory Co v Hanley*, 175 NE 282, 37 Ohio App 461.

90. Mo—*Clack v Southern Electrical Supply Co.*, 72 Mo App. 506.

91. Fla.—*J. C. Penny Co v McLaughlin*, 188 So 785, 137 Fla 594.

Apparent scope of employment
Pa.—*Christman v. Segal*, 17 A.2d 676, 143 Pa Super. 87.

General laborer held without authority

Tex.—*M. N. Bleich & Co v Emmett*, Civ App., 295 S.W. 233.

92. Mo—*Smothers v Welch & Co House Furnishing Co.*, 274 SW 678, 310 Mo 144, 40 A.L.R. 1209—*Priest v F. W. Woolworth Five & Ten Cent Store*, 62 SW2d 926, 238 Mo App 23.

93. D.C.—*Lucas v Friedman*, 24 F.2d 371, 58 App.D.C. 5.

Mich—*Foot v Huelster*, 361 NW 396, 272 Mich 194.

Okl—*Spartan Aircraft Co v Jamison*, 75 P.2d 1036, 181 Okl 645.

39 C.J. p 1301 note 63.

Liability of master where team or vehicle and driver are hired or loaned to third person see supra § 566.

Liability of master or principal of operator of motor vehicle for injuries caused by servant see the C

J.S. title Motor Vehicles §§ 435-437, 450-454, also 43 C.J. p 1094 note 31-p 1114 note 88, p 1125 note 65-p 1129 note 2.

94. Ill.—*Freehill v Consumers' Co.*, 243 Ill App 1.

La.—*Pearce v United States Fidelity & Guaranty Co.*, App., 8 So 2d 743 39 C.J. p 1301 note 64.

95. Md.—*Mattingley v Montgomery*, 68 A. 205, 106 Md 461.

39 C.J. p 1302 note 65.

96. Ohio—*Higbee Co v Jackson*, 128 NE 61, 101 Ohio St 75, 14 A.L.R. 131.

39 C.J. p 1302 note 67.

Liability of master for willful and malicious acts of servant generally see supra § 572.

97. Mass.—*Reynolds v. Hanrahan*, 100 Mass 313.

98. Mass.—*Goodhue v Dix*, 2 Gray 181.

inflicted by the servant,⁹⁹ and it is not material that the act occurred at some place to which the servant's duty did not necessarily call him.¹ If the servant in going extra viam is really engaged in the execution of the master's business within the scope of his employment, it is immaterial that he joined with this some private business or purpose of his own.² In order to exonerate the master from liability, it is essential that the deviation or departure should be for purposes entirely personal to the servant.³ Nevertheless, where a servant steps aside from the master's business and goes on a journey or does some act wholly independent of, and foreign to, his employment for a purpose exclusively his own, the master is not liable for his acts during such time.⁴

If the master is liable where the servant has deviated, it has been held that it must be where the deviation occurs on a journey on which the servant had originally started on his master's business, in other words, he must be in the employ of his master at the time of committing the grievance.⁵ This principle has been applied in cases where the servant was directed to put up the vehicle and, instead of doing so, used it for some purpose of his own during which time the injury occurred,⁶ or where he

used the vehicle for his own exclusive purpose after the completion of his services for the day.⁷

Resumption of master's business. Notwithstanding the servant's deviation or departure from the usual or direct route for his own purposes, if he has fulfilled that purpose and resumed prosecution of the master's work, the master will be liable for his acts in prosecuting the work.⁸

(3) Injuries Sustained by Persons Invited to Ride

It is generally held that a servant has no implied authority to invite or permit a third person to ride on a horse or vehicle in his charge and, if he does so, and such person sustains injuries through the negligence of the servant, the master will not be liable.

Although there is some authority to the contrary,⁹ it is very generally held that a servant has no implied authority to invite or permit a third person to ride on a horse or vehicle in his charge and, if he does so, and such person sustains injuries through the negligence of the servant, the master will not be liable,¹⁰ and especially is this true where the servant is acting in disobedience of express orders not to invite anyone to ride on the vehicle.¹¹ In these circumstances, the master owes no duty to the

99. Ill.—Freehill v Consumers' Co., 243 Ill App 1

La.—Pearce v United States Fidelity & Guaranty Co., App., 8 So 2d 743

Mich.—Foote v Huelster, 261 NW 296, 272 Mich 194

Tex.—J C Penney Co v Oberpriller, Civ App, 163 SW 2d 1067, reversed on other grounds 170 SW 2d 607, 141 Tex 138

Va.—Virginia Ice & Freezing Corporation v Coffin, 184 SE 214, 166 Va 154

39 C.J. p 1302 note 70

Deviation or departure from service generally as affecting master's liability see supra § 574 d

Circumstances of each case

The question whether or not the servant is acting within the scope of his employment depends largely on the particular facts of each case in which the question arises—Cado v Many, La App., 180 So 185

1. Miss.—Barmore v Vicksburg, S. & P. R. Co., 38 So 310, 85 Miss 426, 70 L.R.A. 627, 3 Ann Cas 594 39 C.J. p 1303 note 71

2. Ill.—Freehill v. Consumers' Co., 243 Ill.App 1

La.—Corpus Juris quoted in Pearce v United States Fidelity & Guaranty Co., App., 8 So 2d 743, 748. 39 C.J. p 1303 note 72

3. La.—Corpus Juris quoted in Pearce v United States Fidelity &

Guaranty Co., App., 8 So 2d 743, 748

Tenn.—Corpus Juris quoted in Goff v St Bernard Coal Co., 139 SW 2d 205, 206, 174 Tenn 558

39 C.J. p 1303 note 73

4. DC.—Lucas v Friedman, 24 F 2d 271, 58 App DC 5

Mich.—Foote v Huelster, 261 NW 296, 272 Mich 194

Tenn.—Corpus Juris quoted in Goff v St Bernard Coal Co., 139 SW 2d 205, 206, 174 Tenn 558

39 C.J. p 1303 note 74

Violation of express directions

Where the servant has express directions as to where to deliver merchandise and the route to be taken in returning home, and the servant at the request of the person to whom the merchandise was to be delivered carried it to a place several miles further, at which place the team when unattended ran away, injuring the property of a third person, it has been held that the master was not liable—Stone v Hills, 45 Conn 44, 29 Am R 635—39 C.J. p 1304 note 78

5. La.—Corpus Juris quoted in Goldman v Yellow Cab Co., App., 134 So 351, 353 39 C.J. p 1303 note 75

6. Mass.—McCarthy v Timmins, 59 NE 1088, 178 Mass 278, 86 Am S R 490 39 C.J. p 1303 note 76

7. Utah.—Cannon v Goodyear Tire

& Rubber Co., 208 P 519, 60 Utah 348

39 C.J. p 1303 note 77

8. Miss.—Barmore v Vicksburg, S. & P. R. Co., 38 So 210 85 Miss. 426, 70 L.R.A. 627, 3 Ann Cas 594. 39 C.J. p 1304 note 79

Resumption of master's work after deviation generally see supra § 574 d (8)

9. Conn.—Kuharski v Somers Motor Lines, 43 A 2d 777, 133 Conn 269—Kalmich v White, 111 A. 845, 95 Conn 568

10. Cal.—Corpus Juris quoted in Malcolm v Tevis, 293 P 640, 641, 110 Cal App 76

Ky.—Corpus Juris cited in Koch's Adm'r v Koch Bros, Inc., 119 S W 2d 1116, 1117, 274 Ky 640—Corpus Juris quoted in Slusher v Hubble, 72 SW 2d 39, 42, 254 Ky 595—Corpus Juris cited in Electric Bakeries v Stacy's Adm'r, 66 S W 2d 70, 71, 252 Ky 20

Wis.—Corpus Juris quoted in Hartman v Badger Tobacco Co., 246 N W 577, 579, 210 Wis 519 39 C.J. p 1304 note 81

11. US.—Delaware & H. R. Corporation v Bonzik, CCA Pa., 105 F 2d 341

Cal.—Corpus Juris quoted in Malcolm v Tevis, 293 P 640, 641, 110 Cal App 76

Ky.—Corpus Juris cited in Electric Bakeries v Stacy's Adm'r, 66 S.W. 2d 70, 71, 252 Ky. 20—Williams'

person invited, who is a trespasser, except to see that he is not wilfully or wantonly injured¹² Nevertheless, the master will be liable for injuries inflicted on him by the wilful, wanton, or reckless conduct of the servant.¹³ These principles have been applied notwithstanding the person invited to ride was an infant,¹⁴ even though, it has been held, the invitee was an infant of tender years,¹⁵ and for that reason released from any charge of contributory negligence¹⁶ It has been held, however, that, when an employee operates a vehicle in the employer's business in the face of a known peril to a child, and the child is injured as a result of the employee's negligence, the employer cannot deny liability on the ground that the employee was not acting within the scope of his employment when he placed the child in a position of peril.¹⁷

(4) Consent of Master to Use His Vehicle or Team for Necessary Errands of Servant

If within the course of his employment a servant is permitted to use the master's vehicle or team to facilitate the performance of necessary errands of his own, the doctrine of respondeat superior applies.

If within the course of his employment a servant is permitted to use the master's vehicle or team to facilitate the performance of necessary errands of his own, he is still an employee while so doing, and the doctrine of respondeat superior applies.¹⁸ Where, however, a servant uses the master's vehicle for the purpose of going to, and returning from,

his meals without the master's knowledge or consent, and the contract of employment does not authorize such use, the master is not liable for injuries sustained through the servant's negligent acts in the use of the vehicle.¹⁹

e. Obstruction of Highways and Streams

A master is liable for injuries caused by the negligent acts of his servants acting within the scope of their employment in placing obstructions in highways and streams.

A master is liable for injuries caused by the negligent acts of his servants acting within the scope of their employment in placing obstructions in highways and streams,²⁰ and, on the other hand, where the act of the servant is not within the scope of his employment, no liability attaches to the master for injuries resulting therefrom.²¹

f. Trespass

- (1) In general
- (2) Trespass vi et armis

(1) In General

The master is liable for a trespass of his servant if, and only if, it was committed while the servant was acting within the scope of his employment.

The duties of a servant may be such that the commission of a trespass on the land of another may be within the scope of his employment, rendering the master liable for his acts,²² even though the servant disobeyed the master's orders,²³ and this principle has been applied in case of a search for

Adm'r v Portsmouth By-Product Coke Co., 280 S.W. 479, 213 Ky 96
NC—Hayes v Pine State Creamery, 141 S.E. 840, 195 NC 113
39 C.J. p 1304 note 83

Waiver or abrogation of order

If the order forbidding the servant to invite persons to ride has been expressly waived or abrogated, or has been openly, constantly, and habitually violated for such length of time that the master in the exercise of ordinary care and diligence knew or should have known of such habitual nonobservance, then the order is deemed by law to have been waived, and the master becomes liable for the negligence of his servant—Hayes v Pine State Creamery, 141 S.E. 840, 195 NC 113

12. US—Delaware & H. R. Corporation v. Bonzak, CCA Pa., 105 F. 2d 341.

Ala—Jewel Tea Co. v. Sklivis, 165 So. 824, 281 Ala. 590

Ky—Corpus Juris quoted in Slusher v. Hubble, 72 S.W. 2d 39, 42, 254 Ky 595.

Wis.—Corpus Juris quoted in Hart-

man v Badger Tobacco Co., 246 N.W. 577, 579, 210 Wis. 519
39 C.J. p 1304 note 86

13. Pa—Lafferty v Armour, 116 A. 515, 272 Pa. 588
39 C.J. p 1304 note 87

14. Ky—Corpus Juris cited in Koch's Adm'r v Koch Bros., Inc., 119 S.W. 2d 1116, 1117, 274 Ky 640
—Corpus Juris cited in Electric Bakeries v. Stacy's Adm'r, 66 S.W. 2d 70, 71, 252 Ky 20—Williams' Adm'r v Portsmouth By-Product Coke Co., 280 S.W. 479, 213 Ky 96.
NC—Hayes v Pine State Creamery, 141 S.E. 840, 195 NC 113

Wis—Corpus Juris quoted in Hartman v Badger Tobacco Co., 246 N.W. 577, 579, 210 Wis. 519
39 C.J. p 1304 note 88

15. Wis—Corpus Juris quoted in Hartman v Badger Tobacco Co., 246 N.W. 577, 579, 210 Wis. 519
39 C.J. p 1304 note 84

16. Pa—Perrin v. Glassport Lumber Co., 119 A. 719, 276 Pa. 8
39 C.J. p 1304 note 85.

17. Ala—Jewel Tea Co. v. Sklivis, 165 So. 824, 281 Ala. 590.

18. La—Cado v. Many, App., 180 So. 185

39 C.J. p 1305 note 88

Use to speed return

A master, who furnishes vehicle so that servant by using it may return to work sooner than would otherwise be possible, is responsible for injuries caused by the servant while so using vehicle, since use of vehicle is in the furtherance of master's business—Cado v. Many, La App., 180 So. 185

19. Wis—Steffen v. McNaughton, 124 N.W. 1016, 142 Wis. 49, 26 L.R.A.N.S., 382, 19 Ann. Cas. 1227.
39 C.J. p 1305 note 89

20. Iowa—Baxter v. Chicago, R. I. & P. R. Co., 54 N.W. 350, 87 Iowa 488.

39 C.J. p 1305 note 91.

21. Mass—Smith v. Spitz, 31 N.E. 5, 156 Mass. 319.
39 C.J. p 1305 note 92

22. Minn—Helppie v. Northwestern Drain. Co., 149 N.W. 461, 127 Minn. 360.

39 C.J. p 1305 note 95.

23. Or—French v. Cresswell, 11 P. 62, 13 Or. 418.

property by the servant on another's premises,²⁴ or a wrongful cutting of timber by the servant on the land of another person,²⁵ especially where the master neglected to superintend the work or instruct the servant so that he could distinguish the boundaries of the master's land.²⁶ On the other hand, the master is not liable for a trespass of his servant done outside the scope of his authority,²⁷ unless he directed the act²⁸ or ratified it.²⁹ Likewise, the master is not liable for a trespass committed by the servant while acting under the orders of a third person.³⁰

Statutory penalty for cutting trees It has been held that an employer is not liable for a statutory penalty for the trespass of his servants in cutting trees of another, committed without his knowledge or consent,³¹ and that, when an employer gives definite instructions to his servants engaged in cutting trees to go only to a well-marked and clearly defined line, such as a fence or a stream, one so distinct and obtrusive that it could not reasonably be anticipated that they would go beyond it, their unauthorized act of cutting trees beyond such line on the property of another will not render the employer liable for the statutory penalty.³²

(2) Trespass Vi et Armis

- (a) In general
- (b) Assaults by watchmen, detectives, and similar servants
- (c) Assaults for purpose of retaking master's property
- (d) Assaults to enforce payment of money
- (e) Shooting

(a) In General

A master is liable to a third person on whom an assault and battery is wrongfully made by his servants while acting within the scope of their employment, that is, whenever the nature of the employment authorizes the servant to use force, and he improperly exercises such authority against a person not in fault, or uses more force than necessary.

A master is liable to a third person on whom an assault and battery is wrongfully made by his servants while acting within the scope of their employment, that is, whenever the nature of the employment authorizes the servant to use force, and he improperly exercises such authority against a person who is not in fault, or uses more force than the circumstances of the case require.³³ Stated dif-

24. Minn—Lesch v Great Northern R. Co., 101 NW 965, 98 Minn 435 39 C J p 1806 note 99

25. Miss—Bates v Brevard-Woods Stave Co., 76 So 553, 115 Miss 588 39 C J p 1805 note 97.

26. N.Y.—Carman v New York, 14 Abb Fr 801

27. Okl.—Corpus Juris cited in Mid-Continent Petroleum Corporation v Donelson, 116 P 2d 721, 723, 189 Okl 273 39 C J p 1806 note 2.

28. Okl.—Corpus Juris cited in Mid-Continent Petroleum Corporation v Donelson, 116 P 2d 721, 723, 189 Okl 273 39 C J p 1806 note 3

29. Okl.—Corpus Juris cited in Mid-Continent Petroleum Corporation v Donelson, 116 P 2d 721, 723, 189 Okl 273 39 C J p 1806 note 4

30. Or.—Swackhamer v Johnson, 65 P 91, 39 Or 383, 54 L R A 625

31. Miss—Richardson v Flowers, 11 So 2d 808, 194 Miss 105

32. Miss.—Planters' Package Co v Parsons, 120 So 200, 153 Miss. 9

33. U.S.—The H S. Inc., No 72, C C A N J., 130 F 2d 341—Pacific Telephone & Telegraph Co v White, C C A Or., 104 F 2d 923—Western Union Telegraph Co v Hill, C C A Ala., 67 F 2d 487—Great Southern Lumber Co. v. Williams, C C A La.,

17 F 2d 468, affirmed 48 S Ct 417, 277 US 19, 72 L Ed 761—Hodson v Great Atlantic & Pacific Tea Co., D C Mo., 66 F Supp 514

Ala.—Great Atlantic & Pacific Tea Co v Smalley, 156 So 639, 26 Ala App 176, certiorari denied 156 So 641, 239 Ala 289

Ark.—Haughton v Pierce Petroleum Corporation, 13 S W 2d 26, 178 Ark 917

Cal.—Fields v Sanders, App. 170 P 2d 690—Haworth v Elliott, 153 P 2d 804, 67 Cal App 2d 77—Stansell v Safeway Stores, 113 P 2d 264, 44 Cal App 2d 822—Raben v Hamilton Diamond Co., 65 P 2d 98, 19 Cal App 2d 383—Hiroshima v Pacific Gas & Electric Co., 63 P 2d 340, 18 Cal App 2d 24—Montbalano v Rainbow Gardens, 50 P 2d 972, 9 Cal App 2d 661

Conn.—Rappaport v Rosen Film Delivery System, 18 A 2d 362, 127 Conn 524—Son v Hartford Ice Cream Co., 129 A 778, 102 Conn 696

D C—Dill v Johnson, 107 F 2d 669, 71 App D C 139

Ga.—Corpus Juris quoted in Georgia Power Co v Shupp, 24 S E 2d 764, 768, 195 Ga 446, conformed to 25 S E 2d 524, 69 Ga App 356—Schwartz v Nunnally Co., 5 S E 2d 91, 60 Ga App 858—Broome v Primrose Tapestry Mills, 200 S E 506, 59 Ga App 70—Gomez v Great Atlantic & Pacific Tea Co., 173 S E 750, 48 Ga App 398—J. M. High

Co v Holler, 157 S E 209, 42 Ga App 657

Idaho—Normington v Neely, 70 P 2d 396, 58 Idaho 134

Ky.—McBee's Adm'r v Indian Head Mining Co., 132 S W 2d 515, 280 Ky 82—Moore v Ford Motor Co., 97 S W 2d 400, 265 Ky 575—John v Lococo, 76 S W 2d 897, 256 Ky 607

La.—Healey v Playland Amusements, App. 199 So 682—Womack v Hotel Frances, App. 151 So 128 Md.—McCrorry Stores Corporation v Satchell, 129 A 348, 148 Md 279—Baltimore & O R Co v. Strube, 73 A 697, 111 Md 119

Mass.—Zernig v H P Hood & Sons Co., 152 N E 50, 255 Mass 603—Genga v New York, N H. & H R Co., 137 N E 637, 243 Mass. 101.

Minn.—Plotkin v Northland Transp. Co., 283 NW 758, 204 Minn 422

Miss—Gill v L N Dantzler Lumber Co., 121 So 153, 153 Miss 559

Mo.—Simmons v Kroger Grocery & Baking Co., 104 S W 2d 357, 340 Mo 1118—Young v Sinclair Refining Co., App. 92 S W 2d 995—Calkins v Engle, 300 S W. 997, 221 Mo App 1178

Mont.—Korneo v. Mike Horse Mining & Milling Co., 180 P 2d 252.

Neb.—Rich v Dugan, 280 NW. 225, 185 Neb 63

N.J.—Heenan v Horre Coal Company, 174 A. 551, 113 N.J.Law 388.

N.Y.—Ospoff v City of New York, 36 N E 2d 646, 286 N.Y 422, 136 A

ferently, a master who authorizes his servant to perform acts which involve the use of force against persons, or which are of such nature that they are not uncommonly accompanied by the use of force, is subject to liability for an assault and battery to such persons caused by the servant's unprivileged use of force exerted for the purpose of accomplishing a result within the scope of the employment.⁸⁴ The question whether or not an employment involves, or is likely to lead to, the use of force against the person of another is a question to be decided on the facts of the individual case.⁸⁵

If the act is within the scope of the servant's em-

ployment, the motive or intent with which the act was committed is immaterial.⁸⁶ In order to render the master liable, the authority need not be express but may be implied from the nature of the employment,⁸⁷ and it is not necessary that the assault should have been made for the purpose of performing a task specifically assigned.⁸⁸ It does not matter whether the act of the servant is due to a lack of judgment, infirmity of temper, or the influence of passion, or that the servant goes beyond his strict line of duty and authority in inflicting such injury,³⁹ or even that he acted wantonly or willfully,⁴⁰ and contrary to his master's interests⁴¹ or instruc-

L.R. 1854—Langguth v. Bickford's, Inc., 71 N.Y.S.2d 278, 272 App.Div. 907—Oneta v. Paul Tocci Co., 67 N.Y.S.2d 795, 271 App.Div. 681—Schell v. Vergo, 4 N.Y.S.2d 644, 186 Misc. 839—Bram v. Lusat Realty Corporation, 8 N.Y.S.2d 176

N.C.—Snow v. De Butts, 198 S.E. 224, 312 N.C. 120

Pa.—Pilpovich v. Pittsburgh Coal Co., 172 A. 136, 314 Pa. 585—Sebastianelli v. Cleland Simpson Co., 31 A.2d 570, 152 Pa. Super. 203—Cooper v. American Stores Co., 97 Pa. Super. 474.

S.C.—Lazar v. Great Atlantic & Pacific Tea Co., 14 S.E.2d 560, 197 S.C. 74

Tex.—Baker Hotel of Dallas v. Rogers, Civ. App., 157 S.W.2d 940, error refused 160 S.W.2d 533, 138 Tex. 398—Nolte v. Olmos Dinner Club, Civ. App., 118 S.W.2d 841, error dismissed—A. B. C. Stores v. Brown, Civ. App., 105 S.W.2d 725—Central Motor Co. v. Gallo, Civ. App., 94 S.W.2d 821—Corpus Juris quoted in Pratley v. Sherwin-Williams Co., Civ. App., 56 S.W.2d 510, 513—Gulf, C. & S. F. Ry. Co. v. Cobb, Civ. App., 45 S.W.2d 323, error dismissed—Taylor v. Heparza, Civ. App., 8 S.W.2d 288, error dismissed—Corpus Juris cited in Home Telephone & Electric Co. v. Branton, Civ. App., 7 S.W.2d 627, 629, affirmed, Com. App., 28 S.W.2d 294—Cameron Compress Co. v. Kubecka, Civ. App., 283 S.W. 285—Baker v. Ives, Civ. App., 188 S.W. 950—Texas & N. O. R. Co. v. Taylor, 73 S.W. 1081, 31 Tex. Civ. App. 617

Va.—Baskett v. Banks, 45 S.E.2d 173, 186 Va. 1022

Wash.—Westerland v. Argonaut Grill, 55 P.2d 819, 185 Wash. 411—Nolan v. Fisher Co., 19 P.2d 937, 172 Wash. 267.

W.Va.—Porter v. South Penn. Oil Co., 24 S.E.2d 320, 125 W.Va. 361—Pruitt v. Watson, 138 S.E. 331, 108 W.Va. 627

39 C.J. p. 1306 note 10.

As long as assault occurs in course of employment, it has been held that the master is liable—Haworth v.

Elliot, 153 P.2d 804, 67 Cal. App. 2d 77—Stansell v. Safeway Stores, 113 P.2d 284, 44 Cal. App. 2d 822—Hiroshima v. Pacific Gas & Electric Co., 63 P.2d 840, 18 Cal. App. 2d 24.

Dispute between drivers

(1) The master cannot avoid liability under doctrine of respondeat superior for assault by driver on motorist following alleged collision, on the ground that driver's employment did not contemplate that he should enter into relations with third persons in course of which he might become annoyed, lose his temper, and commit an assault—Fields v. Sanders, 180 P.2d 684, 29 Cal. 2d 834

(2) The driver of bus struck by automobile who became angered and assaulted motorist on refusal of motorist to give his name etc., did not thereby deviate from the course of his employment—Felder v. Houston Transit Co., Tex. Civ. App., 303 S.W.2d 881

Ejection of trespasser

It is within the scope of the employment of a servant to eject from the premises of his master a trespasser who interferes with the servant in the performance of his duties—Chai v. Murata, 34 Hawaii 85

34. Ind.—Moskins Stores v. De Hart, 29 N.E.2d 948, 217 Ind. 622
Mass.—Fanciullo v. B. G. & S. Theatre Corporation, 8 N.E.2d 174, 297 Mass. 44

35. Ind.—Moskins v. De Hart, 29 N.E.2d 948, 217 Ind. 622

Circumstances of assault must afford reasonable inference that it was done in furtherance of master's business or interest and there was an implied consent thereto—Moore v. Ford Motor Co., 97 S.W.2d 400, 265 Ky. 575

36. Mo.—Young v. Sinclair Refining Co., App., 92 S.W.2d 995

Tex.—Texas, etc., R. Co. v. Parsons, Civ. App., 109 S.W. 240, affirmed 113 S.W. 914, 102 Tex. 157, 182 Am. S. R. 857.

37. U.S.—Pacific Telephone & Telegraph Co. v. White, C.C.A. Or., 104 F.2d 923

39 C.J. p. 1307 note 12

38. Cal.—Haworth v. Elliott, 153 P.2d 804, 67 Cal. App. 2d 77.

39. Cal.—Stansell v. Safeway Stores, 113 P.2d 284, 44 Cal. App. 2d 822—Hiroshima v. Pacific Gas & Electric Co., 63 P.2d 840, 18 Cal. App. 2d 24

D.C.—Dilli v. Johnson, 107 F.2d 669, 71 App. D.C. 139

Miss.—Gill v. L. N. Dantzer Lumber Co., 121 So. 153, 153 Miss. 559

N.Y.—Ospoff v. City of New York, 36 N.E.2d 646, 286 N.Y. 422, 136 A.L.R. 1354

Pa.—Pilpovich v. Pittsburgh Coal Co., 172 A. 136, 314 Pa. 585—Sebastianelli v. Cleland Simpson Co., 31 A.2d 570, 152 Pa. Super. 203

Tex.—Gulf, C. & S. F. Ry. Co. v. Cobb, Civ. App., 45 S.W.2d 323, error dismissed—Texas & N. O. R. Co. v. Taylor, 73 S.W. 1081, 31 Tex. Civ. App. 617

Wash.—Westerland v. Argonaut Grill, 55 P.2d 819, 185 Wash. 411
39 C.J. p. 1307 note 12.

Provocation

If servant commits assault in discharge of his duties because of provoking language or conduct of another, master is nevertheless liable—Gulf, C. & S. F. Ry. Co. v. Cobb, Tex. Civ. App., 45 S.W.2d 323, error dismissed—39 C.J. p. 1351 note 12.

Use of wrench as club

The master cannot avoid liability for assault by its driver on motorist following alleged collision on ground that master could not expect that wrench would be used by driver as a club to beat motorist—Fields v. Sanders, 180 P.2d 684, 29 Cal. 2d 834.

40. D.C.—Dilli v. Johnson, 107 F.2d 669, 71 App. D.C. 139.

Ky.—McBee's Adm'x v. Indian Head Mining Co., 132 S.W.2d 515, 280 Ky. 82.

41. D.C.—Dilli v. Johnson, 107 F.2d 669, 71 App. D.C. 139.

tions.⁴² On the other hand, the master is not liable for an assault by his servant merely because it was committed during the existence of the employment,⁴³ or would not have occurred except for the employment.⁴⁴

It is not ordinarily within the scope of a servant's authority to commit an assault on a third person,⁴⁵

and, in the absence of a nondelegable duty, such as that imposed by the relationship of carrier and passenger, or hotel and guest,⁴⁶ if the assault committed by the servant was outside the scope of his employment and was made in a spirit of vindictiveness or to gratify personal animosity, or to carry out an independent purpose of his own, the master is not liable,⁴⁷ unless the servant's conduct is ratified by

42. Pa.—McClung v Dearborne, 19 A 698, 134 Pa 396, 19 Am S R 708, 8 L R A 204.

39 C J p 1307 note 14.

43. Ga.—Plumer v. Southern Bell Telephone & Telegraph Co, 199 S E 353, 58 Ga App 622.

Ky.—Southeastern Greyhound Lines v Harden's Adm'x, 136 S W 2d 42, 281 Ky 345—Moore v Ford Motor Co, 97 S W 2d 400, 265 Ky 575.

NY—Oneta v Paul Tocci Co, 67 N Y S 2d 795, 271 App Div 681.

44. Minn.—Plotkin v Northland Transp Co, 283 N W. 758, 204 Minn 422.

Tenn.—Hoover Motor Express Co v Thomas, 65 S W 2d 621, 16 Tenn App 664.

45. Ky.—Southeastern Greyhound Lines v Harden's Adm'x, 136 S W 2d 42, 281 Ky 345—John v Lococo, 76 S W 2d 897, 256 Ky 607.

Minn.—Plotkin v Northland Transp Co, 283 N W 758, 204 Minn 422.

46. Minn.—Plotkin v. Northland Transp Co, supra.

47. US—Western Union Telegraph Co v Hill, C C A Ala, 67 F 2d 487—Hodson v Great Atlantic & Pacific Tea Co, D C Mo, 66 F Supp 514.

Ala.—Seaboard Air Line Ry Co v Glenn, 104 So 548, 213 Ala 284—Great Atlantic & Pacific Tea Co v Lantrip, 153 So. 290, 26 Ala App 79—Western Union Telegraph Co v Hill, 150 So 709, 25 Ala App 540, certiorari denied 150 So 711, 227 Ala 469.

Cal.—Fields v Sanders, App, 170 P 2d 690—Wiersma v City of Long Beach, 106 P 2d 45, 41 Cal App 2d 8—Raben v Hamilton Diamond Co, 65 P.2d 98, 19 Cal App 2d 283—Yates v Taft Lodge No 1527, B P. O E of U S of America, 44 P 2d 409, 6 Cal App 2d 389.

DC—Park Transfer Co v Lumbermens Mut Casualty Co, 142 F 2d 100, 79 US App DC 48—Grimes v B F. Saul Co, 47 F 2d 409, 60 App DC 47.

Ga.—Georgia Power Co v Shipp, 24 S E 2d 764, 195 Ga 446, vacated 25 S E 2d 524, 69 Ga App 356—Broome v. Primrose Tapestry Mills, 200 S E 506, 59 Ga App 70—Corpus Juris quoted in Plumer v Southern Bell Telephone & Telegraph Co, 199 S E 353, 58 Ga App 622—Atlanta Coca Cola Bot-

tling Co v Brown, 167 S E 776, 46 Ga App 451—Dugger v Central of Georgia Ry Co, 138 S E 266, 36 Ga App 782—Smith v Seaboard Air Line Ry, 89 S E 490, 18 Ga App 399.

Idaho—Normington v Neely, 70 P 2d 398, 58 Idaho 134.

Ill.—Shannessy v Walgreen Co, 59 N E 2d 330, 324 Ill App. 590—Ne-ville v Chicago & A. R Co, 210 Ill App 163.

Ind.—Moskins Stores v De Hart, 29 N E 2d 948, 217 Ind 622—Polk Sanitary Milk Co v Berry, 17 N. E 2d 860, 106 Ind App 29.

Kan.—Kastrup v Yellow Cab & Baggage Co, 282 P 742, 139 Kan 398.

Ky.—Southeastern Greyhound Lines v Harden's Adm'x, 136 S W 2d 42, 281 Ky 345—McBee's Adm'x v Indian Head Mining Co, 132 S W 2d 515, 280 Ky 82—Moore v Ford Motor Co, 97 S W 2d 400, 265 Ky 575—Meredith v Fehr, 90 S W 2d 1021, 263 Ky 648—John v Lococo, 76 S W 2d 897, 256 Ky 607.

La.—Godechaux v Texas & P Ry Co, 81 So 706, 144 La 1041—Corpus Juris quoted in Comfort v Monteleone, App, 163 So 670, 672.

Minn.—Porter v Grennan Bakeries, 16 N W 2d 906, 219 Minn 14.

Miss.—Hahn v Owens, 168 So 622, 176 Miss 296—Wells v Robinson Bros Motor Co, 121 So 141, 153 Miss 451.

Mo.—Corpus Juris cited in Milazzo v Kansas City Gas Co, 280 S W 2d 1, 6—Corpus Juris cited in State ex rel Gosselin v Trimble, 41 S W 2d 801, 803, 828 Mo. 760—Rohrmoser v Household Finance Corporation, 86 S W 2d 103, 231 Mo App 1188—Priest v F W Woolworth Five & Ten Cent Store, 62 S W 2d 926, 228 Mo App 23—Gosselin v Yellow Cab Co, App, 29 S W 2d 186, certiorari quashed State ex rel Gosselin v Trimble, 41 S W 2d 801, 328 Mo 760.

Nev.—J C Penney Co v Gravelle, 155 P 2d 477, 62 Nev 434.

NY—Oneta v Paul Tocci Co, 67 N Y S 2d 795, 271 App Div 681—Trebitsch v Goelet Leasing Co, 285 N Y S 426, 226 App Div 567, affirmed 170 N E 140, 252 N Y 554—Anderson v Metropolitan Life Ins Co, 218 N Y S 494, 138 Misc 144, affirmed 222 N Y S 763, 764, 220 App Div 779.

NC—Robinson v Sears, Roebuck &

Co, 4 S E 2d 889, 216 NC 322—Corpus Juris cited in Robinson v McAlhaney, 198 S E 647, 650, 214 NC 180—Snow v. De Butts, 193 S E 224, 212 NC 120—Smith v Cathey, 191 S E 505, 211 NC 747—Pa.—Pilpovich v Pittsburgh Coal Co, 173 A 136, 314 Pa 585—Tahudy v Hubbs Stores Corpora-tion, 165 A 238, 310 Pa 285—By-lock v Colonial Ice Cream Co, 148 A 862, 300 Pa 144—Dalsey v Cseiner, 85 A 2d 523, 154 Pa Super 194—MacPhail v. Pinkerton's Nat Detective Agency, 3 A 2d 968, 134 Pa Super 351—Cooper v American Stores Co, 97 Pa Super 474—Skvorc v Hager, 93 Pa Super 527—Bylock v Colonial Ice Cream Co, 13 Pa Dist & Co 489, affirmed 148 A 862, 300 Pa 144.

Tenn.—Hoover Motor Express Co v Thomas, 65 S W 2d 621, 16 Tenn App 664.

Tex.—Jax Beer Co v Tucker, Civ App, 146 S W 2d 436, error dis-mitted, judgment correct—National Life & Accident Ins Co v Rin-go, Civ App, 137 S W 2d 828, error refused—A B C Stores v Brown, Civ App, 105 S W 2d 725—Pratley v Sherwin-Williams Co of Texas, Civ App, 56 S W 2d 510—Corpus Juris cited in Home Telephone & Electric Co v Branton, Civ App, 7 S W 2d 627, 629, affirmed, Com. App, 23 S W 2d 294—Payne v Tis-dale, Civ App, 232 S W 881.

Utah—Barney v Jewel Tea Co, 139 P 2d 878, 104 Utah 292.

Wash.—Westerland v Argonaut Grill, 55 P 2d 819, 185 Wash 411—W Va.—Porter v South Penn Oil Co, 24 S E 2d 330, 125 W Va 861—Pruitt v Watson, 138 S E 331, 103 W Va 627.

Wis.—Linden v City Car Co, 300 N W. 925, 239 Wis 236—Mandel v. Byram, 211 N W 145, 191 Wis 446.

39 C J p 1307 note 15.

Assault arising out of business com-petition

NH—Morin v People's Wet Wash Laundry Co, 156 A 499, 85 N H. 233.

Assault in rough play

Where store employee kicked child who had been consummating pur-chase, in rough play rather than because of any controversy concern-ing the purchase, master-servant re-

the master.⁴⁸

The mere fact that something occurs during the course of a servant's employment, or while he is in the discharge of his duty, which arouses his ire or displeasure, has been held not to afford a ground for holding the master liable for an assault and battery the servant may subsequently commit,⁴⁹ especially where the assault is committed after the employment is completed or the servant has gone off duty.⁵⁰ It has been held, however, that, where a servant begins a quarrel while acting within the scope of his employment, and immediately follows it up with a violent assault, the master is liable, as the law under the circumstances will not undertake to say when in the course of the assault he ceased to act as a servant and acted on his own responsibility.⁵¹

Acting under orders of officer. If the servant at the time of committing the assault is acting under the orders of an officer of the law serving a writ of replevin for the master, he is not liable since the

act is the act of the officer.⁵²

Self-defense justifying an assault by the servant will justify the master.⁵³

(b) Assaults by Watchmen, Detectives, and Similar Servants

If a watchman, detective, or other servant to whom is committed the duty of guarding the master's property or maintaining order on his premises uses force unnecessarily, the master will be liable therefor.

A familiar instance in which the employment necessarily involves the right of the servant to use force is in the case of watchmen, doormen, detectives, and others to whom is committed the duty of guarding the master's property or keeping order on his premises, and, if he uses force unnecessarily, or uses a greater degree of force than the occasion warrants, the master will be liable therefor.⁵⁴ On the other hand, the master will not be liable if the assault is made not for the purpose of guarding the master's property or preserving order,⁵⁵ or if the servant was actuated by personal ill will, jealousy,

lotion did not exist as respects such conduct, and employer was not liable for resulting injuries—*Lane v Safeway Stores*, 91 P 2d 160, 88 Cal App 2d 169.

Assault on spectator by baseball player during game for fancied insult was not committed within scope of employment as respects master's liability—*Atlanta Baseball Co v Lawrence*, 144 S.E. 351, 88 Ga App 497.

Dispute between drivers

A driver who entered into a dispute with a motorist has been held not acting within the scope of his employment in striking the motorist during the dispute where he stopped the vehicle he was driving and left it to pursue the motorist.

Ky—Wood v Southeastern Grayhound Lines, 194 SW 2d 81, 302 Ky 110.

Minn—Plotkin v. Northland Transp Co., 283 NW 758, 304 Minn 422.

Theater manager assaulting pickets advertising other theaters as being fair to organized labor was not acting within scope of authority—*Horwitz v Dickerson*, Tex Civ App, 25 SW 2d 986.

48. *Miss—Wells v Robinson Bros Motor Co*, 121 So. 141, 153 Miss 451.

NC—Snow v De Butts, 193 S.E. 224, 212 NC 120.
39 C.J. p 1307 note 15 [h].

49. *Minn—Plotkin v Northland Transp Co.*, 283 NW 758, 304 Minn 422.

Tex—A B C Stores v Brown, Civ App., 105 SW 2d 725.

Wis—Lunden v City Car Co., 300 NW 925, 239 Wis 236.

50. *Idaho—Normington v Neely*, 70 P 2d 398, 58 Idaho 134.

51. *Cal—Fields v Sanders*, 180 P 2d 684, 29 Cal 2d 834.

Ky—New Ellerslie Fishing Club v. Stewart, 93 SW 598, 138 Ky 8.

Tex—Chicago, R I & G Ry Co v Carter, Com App., 261 SW 135.
—*Felder v Houston Transit Co.*, Civ App., 203 SW 2d 831.

39 C.J. p 1309 note 21.

Continuous occurrence

Employer of vendor on train was liable for injuries inflicted by vendor on passenger whom vendor struck, even if vendor stepped outside of his authority, where transaction consumed only a few moments and had all the features constituting one continuous and unbroken occurrence—*Interstate Co v McDaniel*, 173 So 165, 178 Miss 276.

If second assault grew out of and was proximate result of the first attack, which was within scope of employment, second assault was also within scope of employment—*Baskett v Banks*, 45 S.E. 2d 173, 186 Va. 1022.

52. *Ind—Kohl v. H P. Lenhart Furniture Co.*, 106 NE 399, 58 Ind App 7.

Mo—Healy v Wrought Iron Range Co., 143 SW 549, 161 Mo App 483.

53. *Tex—Cameron Compress Co v Kubecka*, Civ App., 283 SW 285.

54. *US—The H S, Inc.*, No. 72, C C.A.N.J., 130 F 2d 341.

Cal—Montalbano v. Rainbow Gar-

dens, 50 P 2d 972, 9 Cal App 3d 661.

La—Womack v Hotel Frances, App., 151 So 128—*Bearman v Southern Bell Telephone & Telegraph Co.*, 134 So 787, 17 La App 89.

Mass—Fancullo v B G & S Theatre Corporation, 8 NE 2d 174, 297 Mass 44.

Miss—Jefferson v Yazoo & M V R R Co., 11 So 2d 442, 194 Miss 729.

NJ—Heenan v Horre Coal Co., 174 A 551, 113 NJ Law 388.

NY—Bram v Lusat Realty Corporation, 8 NYS 2d 176.

Pa—Pilpovich v Pittsburgh Coal Co., 172 A 138, 314 Pa. 585.

Tex—Baker Hotel of Dallas v Rogers, Civ App., 157 SW 2d 940, error refused 160 SW 2d 523, 138 Tex. 398—*McMurrey Corporation v. Yawn*, Civ App., 143 SW 2d 664, error refused—*Baker v Ives*, Civ App., 188 SW 950.

39 C.J. p 1308 note 17.

Bartenders

Cal—Haworth v Elliott, 153 P 2d 804, 67 Cal App 2d 77.

Disobedience of order to call police

A defense that saloon owner's employee, in ejecting patron, acted in direct disobedience of employer's orders to call policeman to eject obstreperous patrons, is inadequate to absolve employer from liability for resulting injuries to such patron—*Starnes v Monsour's No 4*, La App., 30 So 2d 135.

55. *Conn—Bradlow v. American Dist Telegraph Co.*, 38 A 2d 679, 131 Conn 192.

Ill—Ewald v. Plelet Scrap Iron &

hatred, or other ill feelings independent of his duty as servant,⁵⁶ or if the assault is made following an appreciable interval after a trespasser has been sent away from the premises.⁵⁷ The master will be liable, however, if an assault after ejecting an intruder from the master's premises is merely a continuation of an assault commenced while the intruder was being ejected.⁵⁸ If the assault is committed by a servant having no authority to eject trespassers, the master has been held not to be liable.⁵⁹

(c) Assaults for Purpose of Retaking Master's property.

Servants whose duty it is to retake from third persons property claimed by the master have implied authority to use force in the performance of their duty, and an assault and battery committed in the discharge of such duty is within the scope of their employment.

Servants whose duty it is to retake from third persons property claimed by the master have implied authority to use force in the performance of their duty, and an assault and battery committed in the discharge of such duty is within the scope of their employment,⁶⁰ even though the servants may

have disobeyed instructions.⁶¹ Where, however, a servant is without authority to retake goods, the master is not liable for an assault committed by such servant in retaking such goods,⁶² and it has been held that the master is not liable for an assault committed by a store clerk outside the store on a person suspected of having stolen goods in the clerk's custody.⁶³

(d) Assaults to Enforce Payment of Money

According to some authorities, but not others, where a servant is entrusted with the duty of collecting money due the master, an assault made by the servant to enforce payment is within the scope of his authority, and the master is liable.

According to some authorities, where a servant is entrusted with the duty of collecting money due the master, an assault made by the servant to enforce payment is within the scope of his authority, and the master is liable,⁶⁴ even though the servant was instructed not to use force.⁶⁵ Other authorities hold the contrary,⁶⁶ taking the view that an unlawful assault is not a necessary or usual method of collecting money,⁶⁷ and that the master cannot be held liable unless there is something indicating that the use

Metal Co., 33 NE2d 930, 310 Ill App 218

ND—Galehouse v Minneapolis, St P & S S M R Co, 135 NW 189, 22 ND 615, 47 L.R.A., NS, 965

Assault off premises

Employer was not liable for act of employee in assaulting plaintiff on street, such act being outside authority of employee, notwithstanding instruction to keep trespassers off employer's premises—Skvorc v Hager, 93 Pa Super 527

58. Ga.—Plümer v Southern Bell Telephone & Telegraph Co., 199 S E 353, 58 Ga App 632

La.—Comfort v Monteleone, App., 183 So 670

39 CJ p 1309 note 19.

57. ND—Kinnonen v Great Northern R Co, 158 NW 1058, 34 ND 556

58. Md.—Wilson Amusement Co v. Spangler, 121 A 851, 148 Md 98 39 CJ p 1309 note 21

59. NY—Connor v Benenson Realty Co, 152 NYS 700

60. Fla.—C I T Corporation v Brewer, 200 So 910, 146 Fla 247

La.—Davis v Lindsay Furniture Co, 138 So 439, 19 La App 169

Neb.—Rich v Dugan, 280 NW 225, 135 Neb 63

Okla.—Russell-Locke Super-Service v Vaughn, 40 P2d 1090, 170 Okl 377 39 CJ p 1309 note 23

Store manager, to whom owner entrusted goods for sale and safe-keeping, acted within implied authority

in attempting to recover goods which he thought had been stolen, and owner was liable for manager's assault on person erroneously suspected, in so doing, although not expressly authorized nor subsequently ratified Md—McCrorry Stores Corporation v Satchell, 139 A 348, 148 Md 279 Miss—Morgan v Loyacomo, 1 So 2d 510, 190 Miss 656

61. US—Shear v Singer Sewing Mach Co, CCPa, 171 F 678

62. NY—Murphy v Buckley-Newhall Co, 136 NYS 309, 151 App Div 520

39 CJ p 1309 note 25

Servant attending to identify

Master was not liable for assault and battery by employee, while attending with marshal to identify goods replevied—Guzzo v Kosches, 229 NYS 530, 224 App Div 741

63. NC—Hammond v Eckerd's of Asheville, 18 SE2d 151, 220 NC 596

64. Conn—Son v Hartford Ice Cream Co, 129 A 778, 102 Conn 696

39 CJ p 1309 note 26

If collector acts within scope of his employment in making an assault, the master is liable therefor Ga.—Atlanta Hub Co v Jones, 171 SE 470, 47 Ga App 778.

Tex—Taylor v. Baparra, Civ App, 8 SW2d 288, error dismissed

Assault after receiving payment

Assault on customer by collector was held to have occurred in collec-

tor's scope of employment, so as to impose liability on master, where collector called at customer's place of business to collect a bill, and, after receiving a check therefor, assault occurred over collector's alleged failure to notify customer of his delinquency, and after assault collector in performance of his duty gave to customer a receipt for the amount of the bill covered by the check—Hiroshima v Pacific Gas & Electric Co, 63 P2d 340, 18 Cal App 2d 34

65. Conn—Son v Hartford Ice Cream Co, 129 A 778, 102 Conn 696

66. Fla.—Reece v Ebersbach, 9 So 2d 805, 152 Fla 763, certiorari denied 63 S Ct 855, 318 US 784, 87 L Ed 1151, rehearing denied 63 S Ct 1155, 319 US 781, 87 L Ed 1725

Ind—Moskins Stores v De Hart, 29 NE2d 948, 217 Ind 622

NY—Zucker v Lannin Realty Co, 217 NYS 65, 217 App Div 487

Utah—Barney v Jewel Tea Co, 139 P2d 878, 104 Utah 292

Assault with intent to establish sexual relations

Mo—Rohrmoser v Household Finance Corporation, 88 SW2d 103, 231 Mo App 1188

NY—Anderson v Metropolitan Life Ins Co, 218 NYS 494, 128 Misc 144, affirmed 223 NYS 763, 764, 220 App Div 779

67. Fla.—Reece v. Ebersbach, 9 So 2d 805, 152 Fla 763, certiorari de-

of force was contemplated or usual, or that the employer knew, or had reason to know, that the collector was the type of person who was likely to resort to force.⁶⁸ A fortiori, the master is not liable for an assault made by the servant where the servant is himself accountable to the master for the price of goods delivered without collecting the charge, and the assault is made by the servant after delivery of the goods without collecting the amount due, to enforce payment thereof.⁶⁹ So, if the servant while attempting to collect a debt commits an assault resulting from a personal quarrel, the master is not liable.⁷⁰

(e) Shooting

A master may be held liable for the shooting of a third person by his servant, if, and only if, the shooting can be said to be within the scope of the servant's employment.

The shooting of a third person by a servant, not done within the scope of his employment or in the line of his duty to the master, imposes no liability on the latter,⁷¹ unless the master participated in, authorized, or ratified the shooting,⁷² and this is true, although it was by reason of his employment that the servant acquired the facilities to commit the act.⁷³

The rule is otherwise, however, where the shooting can be said to be within the scope of the servant's employment,⁷⁴ as where the servant has authority to eject trespassers from the master's premises,⁷⁵ or to make arrests,⁷⁶ and the shooting is done while ejecting trespassers or making the arrests; and the employer is not relieved because the servant exceeded his authority in the details of performance, or even violated express instructions, or that in committing the act he lost his temper,⁷⁷ or although the use of any but reasonable and necessary force was expressly prohibited.⁷⁸ However, there is authority to the effect that the mere employment of a watchman to guard property and keep away trespassers does not involve authority to shoot trespassers;⁷⁹ and it has been held that, if the watchman shoots a trespasser after he has left the premises, such act is not within the scope of his authority,⁸⁰ although there is authority to the effect that, where the servant is authorized to carry firearms to protect the master's property from injury and directed to use them when considered necessary, it cannot be said as a matter of law that the servant is not acting within the scope of his employment in shooting a third person not on the premises but near them.⁸¹ If the watchman

med 63 S Ct 855, 318 US 784, 87 L Ed 1151, rehearing denied 63 S Ct 1155, 319 US 781, 87 L Ed 1725

Ind.—Moskins Stores v De Hart, 29 NE 2d 948, 217 Ind 632
39 CJ p 1309 note 27 [a]

62. Ind.—Moskins Stores v De Hart, 29 NE 2d 948, 217 Ind 632
Liability of master based on negligence in retaining servant see supra § 559

69. Tex.—Corpus Jails quoted in Magnolia Petroleum Co v Guffey, Civ App, 59 SW 3d 174, 175
39 CJ p 1309 note 28

70. Mich.—Moffit v White Sewing Mach Co., 183 NW 198, 314 Mich 496

71. Ala.—Knight Iron & Metal Co v. Ardis, 199 So 716, 240 Ala 305
Ark.—Hough v Leech, 62 SW 3d 14, 187 Ark 719

Ill.—Metzler v Layton, 25 NE 2d 60, 373 Ill 88

Ky.—McBee's Adm'r v Indian Head Mining Co, 132 SW 2d 515, 280 Ky 82—Creamer v. Kroger Grocery & Baking Co, 86 SW 2d 288, 260 Ky 544—Maggard v. Kentucky King Coal Co, 273 SW 451, 309 Ky 809

Mass.—Charmaturo v Adams, 176 NE 610, 275 Mass 521, 75 ALR 1171

Mich.—Martin v. Jones, 4 NW 2d 686, 303 Mich 355.

Miss.—Natchez, C & M R Co v Boyd, 107 So 1, 141 Miss 593
Mo.—Porter v Thompson, 306 SW 2d 509

NY.—Ford v Grand Union Co, 197 NE 266, 268 NY 243, reargument denied 198 NE 546, 268 NY 664
Tex.—Burns v Texas Midland R R, Civ App, 167 SW 264—Grubb v Galveston, H & S A R Co, Civ App, 153 SW 694, error refused

Wash.—Brazier v Betts, 113 P 2d 34, 2 Wash 3d 549
39 CJ p 1309 note 31

72. Wash.—Brazier v Betts, supra

73. Tex.—Grubb v Galveston, H & S A R Co, Civ App, 153 SW 694, error refused
39 CJ p 1310 note 32

74. Ala.—Mount Vernon-Woodberry Mills v Little, 183 So 710, 222 Ala 605

Ill.—Metzler v Layton, 19 NE 2d 180, 298 Ill App 539, affirmed 25 NE 2d 60, 373 Ill 88

Kan.—Wilson v Fowler Packing Co, 255 P 1109, 123 Kan 470

Ky.—Louisville & N R Co v Moore's Adm'r, 166 SW 2d 68, 292 Ky 223

Miss.—Jefferson v Yasow & M V R Co, 11 So 2d 442, 194 Miss 729

Pa.—Pulovich v Pittsburgh Coal Co, 172 A 136, 314 Pa 585

Tex.—Hudson v St Louis Southwestern R Co, Com App, 293 SW 811, rehearing denied 295 SW 577—Gulf, C & S F. Ry Co v Cobb,

Civ App, 45 SW 3d 323, error dismissed—Chicago, R I & G Ry Co v Carter, Civ App, 250 SW 192, affirmed, Com App, 261 SW 135

39 CJ p 1310 note 33

75. Kan.—Wilson v Fowler Packing Co, 255 P 1109, 123 Kan 470
39 CJ p 1310 note 34

76. Ky.—Louisville & N R Co v Moore's Adm'r, 166 SW 2d 68, 292 Ky 223

39 CJ p 1310 note 35

77. Tex.—Hudson v St Louis Southwestern R Co, Com App, 293 SW 811, rehearing denied 295 S. W 577—Campbell v Lancaster, Civ App, 209 SW 269

78. NJ.—Letts v Hoboken R. Warehouse & Steamship Connecting Co, 57 A 392, 70 NJ Law 358

79. Okl.—Rawley v Commonwealth Cotton Oil Co, 211 P 74, 88 Okl 29

39 CJ p 1310 note 38

Shooting by trap gun

Owner of premises was not liable for death of trespasser killed by shot from concealed spring or trap gun set up by caretaker without knowledge of owner—Charmaturo v. Adams, 176 NE 610, 275 Mass 521, 75 ALR 1171

80. Iowa.—Golden v Newbrand, 2 N W 537, 52 Iowa 59, 35 Am R 257
39 CJ p 1310 note 39

81. Ky.—Robards v. P. Bannon

shoots at a person who is not on the master's premises and is making no attempt to trespass thereon, the master is not liable.⁸²

Injuries negligently inflicted While it has been held that, where the master intrusts an unsafe firearm to a servant and a third person is injured thereby as a result of the servant's careless carrying of the firearm, the master is liable irrespective of whether the servant was acting within the scope of his employment at the time the injury occurred,⁸³ it is generally held that the master is not liable for injuries negligently inflicted on a third person by a servant in the handling of firearms while not acting within the scope of his employment.⁸⁴ On the other hand, if the negligent shooting resulting in the injury complained of may be said to be within the scope of the servant's authority, the master will be liable therefor.⁸⁵

Contributory fault of plaintiff. It has been held that a person detected in the commission of a crime, and shot by a servant while attempting to escape arrest, is barred from recovering civil damages against the master by his own contributory fault.⁸⁶

Where the employee himself is not liable, the employer is not liable.⁸⁷

If a servant is hired to guard the master's personal property on the land of another, the servant is not acting within the scope of his employment in shooting a trespasser on such land merely because he refuses to leave the premises, where it does not appear that the trespasser had taken or attempted to take any of the personal property.⁸⁸

§ 576. Personal Liability of Servant

Liability of a servant to third persons generally is discussed *infra* § 577, and to fellow servants *infra* § 578

Examine Pocket Parts for later cases.

§ 577. — To Third Persons Generally

A servant may be liable for an injury to a third person, notwithstanding the servant was acting in his capacity of servant at the time of the injury and notwithstanding the master may be liable for the tort of the servant under the doctrine of respondeat superior.

The fact that a person is acting in his capacity as servant of another at the time of an injury to a third person does not of itself relieve the servant of liability for such injury,⁸⁹ and the fact that the master may be held liable for the tort of the servant un-

Sewer Pipe Co., 113 S.W. 429, 130 Ky 380, 132 Am.S.R. 394, 18 L.R.A., N.S., 923
Miss—Jefferson v. Yazoo & M. V. R. R. Co., 11 So.2d 442, 194 Miss 729

82. N.J.—Ward v. Erie R. Co., 100 A. 1029, 89 N.J. Law 525
N.Y.—Grimes v. Young, 64 N.Y.S. 859, 51 App. Div. 239

83. Mich.—Wiley v. Pere Marquette Ry. Co., 209 N.W. 59, 235 Mich. 279

84. U.S.—Texas Breeders & Racing Ass'n v. Blanchard, CCA Tex., 81 F.2d 382, motion dismissed 85 F.2d 1019

Idaho—Scrivner v. Boise Payette Lumber Co., 268 P. 19, 46 Idaho 334

N.Y.—Ford v. Grand Union Co., 197 N.E. 266, 268 N.Y. 243, reargument denied 198 N.E. 546, 268 N.Y. 664
Tex.—Burns v. Texas Midland R. R., Civ. App., 167 S.W. 264, 39 C.J. p. 1310 note 42

85. Idaho—Scrivner v. Boise Payette Lumber Co., 268 P. 19, 46 Idaho 334

Ill.—Metzler v. Layton, 25 N.E.2d 60, 373 Ill. 88

Ky.—Creamer v. Kroger Grocery & Baking Co., 86 S.W.2d 288, 260 Ky 544

Pa.—Fletcher v. Central Wrecking Corporation, 188 A. 612, 124 Pa. Super 271—Dunn v. Philadelphia

& R. R. Co., 25 Pa. Dist. 156, affirmed 85 Pa. Super 406

Tex.—Chicago, R. I. & G. Ry. Co. v. Carter, Civ. App., 250 S.W. 192, affirmed, Com. App., 261 S.W. 135, 39 C.J. p. 1311 note 43

Shooting at destructive animals

Where a watchman is employed, among other things, to protect the employer's property against animals, such as rabbits or rats, with a propensity to destroy the master's property, and the watchman in shooting at an animal injures a third person, he is acting within the scope of his employment, and the employer is liable for the injuries sustained—Joy v. Winder, CCA Okl., 78 F.2d 283—39 C.J. p. 1311 note 43 [a]

Pursuing bandit outside premises

Fact that office manager was outside office when he shot plaintiff while in pursuit of bandits did not excuse master from responsibility to plaintiff or from application of doctrine of respondeat superior—Metzler v. Layton, 19 N.E.3d 130, 298 Ill. App. 529, affirmed 25 N.E.2d 60, 373 Ill. 88

86. La.—Candiff v. Louisville, N. O. & T. R. Co., 7 So. 601, 42 La. Ann. 477

39 C.J. p. 1351 note 11

87. Ala.—Ashworth v. Alabama Great Southern R. Co., 99 So. 191, 211 Ala. 20

Self-defense

In action against master for death of deceased who was shot by servant, self-defense as a justification was not only available to servant had he been sued, but also to his master—McMurrey Corporation v. Yawn, Tex. Civ. App., 143 S.W.2d 664, error refused

88. N.J.—Holler v. Ross, 53 A. 472, 88 N.J. Law 324, 96 Am.S.R. 546, 59 L.R.A. 943

89. U.S.—La. Flower v. Merrill, D.C. Cal., 28 F.2d 784—Lanham v. Cline, D.C. Idaho, 44 F. Supp. 897

Ala.—Carter v. Franklin, 173 So. 861, 234 Ala. 116.

Iowa—Hough v. Illinois Cent. R. Co., 149 N.W. 885, 169 Iowa 324.

Me.—Hasen v. Wight, 32 A. 887, 87 Me. 233

N.C.—Williams v. Charles Stores Co., 184 S.E. 496, 209 N.C. 591, 39 C.J. p. 1311 note 48

Duty to use due care

Servant does not escape from individual duty to treat with proper care persons with whom servant must come in contact to carry on master's business—Newton v. Southern Grocery Stores, D.C.S.C., 16 F. Supp. 164.

Conversion

Even though a person has acted as the servant of another, such person may, under some circumstances,

der the doctrine of respondeat superior does not of itself relieve the servant of liability.⁹⁰ Generally it is not the servant's contract with his master which exposes the servant to, or protects him from, liability to third persons,⁹¹ and liability does not arise from the existence of the relation of master and servant;⁹² the servant's liability arises from his breach of a duty owed to a third person under the law,⁹³ or, as otherwise stated, from the servant's common-law obligation so to use that which he controls as not to injure another.⁹⁴

It has been laid down broadly that a servant is liable for an injury to third persons caused solely by the servant's negligent act in the course of his employment,⁹⁵ where the wrongful act of the servant is the direct and proximate cause of the injury.⁹⁶ In order to constitute a cause of action against a servant in favor of a third person, however, the

negligence charged must constitute a breach of duty which the servant owes to such third person.⁹⁷ Generally the servant is rendered liable by such breach of duty,⁹⁸ and it has been held or recognized that, where in the performance of the duties of his employment the servant owes a duty to the public as well as to his master, the servant may be liable to a third person for an injury resulting from a violation, nonperformance, or negligent performance, of such duty.⁹⁹

Where the act of the servant is not a mere omission of duty but is a misfeasance he, as well as the master, will be liable to a third person injured thereby;¹ and, if acting outside of the scope of his employment, he may be liable even though the master is not liable.² In some jurisdictions a distinction is drawn between acts of misfeasance and nonfeasance, and it is held, as a general rule, that the serv-

be liable for conversion of property
Me—*Smith v Colby*, 67 Me 169
R I—*Singer Mfg Co v King*, 14 R I 511

Employees of different masters engaged on the same premises in the prosecution of one construction project were business invitees with a duty of exercising reasonable care for their mutual safety.—*Wallace v King*, 80 P 3d 533, 27 Cal App 2d 174
90. *US—Newton v Southern Grocery Stores, DCSC*, 18 F Supp 164

Fla—*Greenberg v. Post*, 19 So 3d 714, 155 Fla 135

Ga—*Atlantic Coast Line R Co. v Knight*, 171 SE 919, 48 Ga App 53

W Va—*Fleming v. Nay*, 200 SE 577, 120 W Va. 635

91. Ga—*Southern Ry Co. v Smith*, 191 SE 181, 55 Ga App 689—*Atlantic Coast Line R Co. v Knight*, 171 SE 919, 48 Ga App 53

92. Mo—*Ryan v. Standard Oil Co of Indiana*, App, 144 SW 2d 170

93. Mo—*Ryan v. Standard Oil Co of Indiana*, supra

94. Ga—*Southern Ry Co v Smith*, 191 SE 181, 55 Ga App. 689—*Atlantic Coast Line R Co v Knight*, 171 SE 919, 48 Ga App 53

95. Ill—*Lasko v. Meier*, 67 NE 2d 162, 394 Ill 71

Ind—*Bailey v Washington Theatre Co.*, 41 NE 2d 819, 112 Ind App 336—*Dunbar v Demaree*, 2 NE 2d 1008, 102 Ind App 585.

96. *US—Forrest v Southern Ry Co, DCSC*, 20 F Supp 753

Ark—*Missouri Pac R Co v Miller*, 41 SW 2d 971, 184 Ark 61, certiorari denied 52 S Ct. 210, 284 US 683, 76 L Ed. 580

97. Mont—*Uhlen v Schwieger*, 12 P 3d 856, 92 Mont 331.

ND—*McBain v Lang*, 218 NW 641, 56 ND 630

Okl—*Chicago, R I & P Ry Co v Witt*, 291 P 59, 144 Okl 346

Sufficiency of mine supports

Duty of superintendent of mining company to adjoining landowner to support mines which had been abandoned for many years at time superintendent assumed duties related only to need of artificial supports, and did not concern sufficiency of supports left at time of abandonment of mines, except as they should have been supplemented to satisfy duty of ordinary care.—*Sloss-Sheffield Steel & Iron Co v Wilkes*, 165 So. 764, 231 Ala 511, 109 ALR 385

Inspection and repair

Mere nonfeasance or omission of resident superintendent or foreman to perform his duties to his master of inspection and repair does not render him liable to third persons for injuries occasioned because of such nonfeasance or omission, he having duty to his employer rather than to injured third person.—*Davis v. St Louis & S F Ry Co, DC Okl*, 8 F Supp 519

98. Cal—*Peterson v General Geophysical Co, App*, 185 P 2d 56—*Willis v. J J Newberry Co*, 111 P 2d 346, 43 Cal App 2d 595.

Mo—*Devine v Kroeger Grocery & Baking Co*, 162 SW 2d 813, 399 Mo 621.

99. *US—Burrichter v Chicago, M & St P R Co, DC Minn*, 10 F 2d 165—*Donaldson v Tucson Gas, Electric Light & Power Co, DC Ariz*, 14 F Supp 248

Ga—*Southern Ry Co. v Sewell*, 90 SE 94, 18 Ga App 544

NC—*Williams v. Charles Stores Co*, 184 SE 496, 209 NC 591

1. Ga—*Southern Ry Co v Sewell*, 90 SE 94, 18 Ga App 544.

Ill—*Metzler v Layton*, 19 NE 2d 130, 298 Ill App 529, affirmed 25 NE 2d 60, 373 Ill 88

Kan—*Corpus Juris* cited in *Duen-sing v Learman*, 102 P 2d 992, 994, 152 Kan 42

La—*Young v Broussard*, App, 189 So 477

Mo—*McMahon v Chicago, B & Q R Co, App*, 277 SW 356

SC—*Johnson v Atlantic Coast Line R Co*, 140 SE 448, 142 SC 125 39 C.J. p 1311 note 48.

Positive wrong

Act of misfeasance is positive wrong, and every employee owes duty not to injure another by a negligent act of commission.—*Shirkey v Keokuk County*, 281 NW 837, 235 Iowa 1159—*Montanick v McMillin*, 280 NW. 608, 225 Iowa 442

Positive negligent acts

An employee may be held personally liable at suit of a third person for positive negligent acts committed by him.—*Greenberg v. Post*, 19 So 2d 714, 155 Fla. 135

Various torts

Where the cause of action is for negligence, assault, false imprisonment, or fraud and deceit, the servant is liable because of his own misfeasance or wrongful act.—*Blasina v Albert Wenzlick Real Estate Co*, 138 SW 2d 721, 235 Mo App 526

2. Ark—*Pickens v Westbrook*, 88 SW 2d 830, 191 Ark 156

Ga—*Fraser v Southern Ry Co*, 35 SE 2d 525, 73 Ga App 58, reversed on other grounds 37 SE 2d 774, 200 Ga 590, conformed to 38 SE 2d 183, 73 Ga App 815—*Southeastern Fair Ass'n v Wong Jung*, 102 SE 32, 24 Ga App 707

Minn—*Kwiechen v Holmes & Hall-lowell Co*, 118 NW. 668, 106 Minn. 148, 19 L.R.A.N.S., 255.

ant is liable only for acts of misfeasance,³ but in other jurisdictions it is held that the servant may be personally liable to a third person for injuries sustained, whether his wrongful acts causing the injury were those of misfeasance or nonfeasance,⁴ liability

being dependent on the existence of a duty to the third person and breach of such duty as the proximate cause.⁵

In any event, no action can be maintained against a servant unless he can be considered a wrongdoer;⁶

3. N.Y.—Potter v Gilbert, 115 N Y S 425, 130 App Div 632, affirmed 90 NE 1165, 196 NY 576 39 C.J. p 1311 note 50

In Georgia

(1) The broad statement that a servant is liable for a misfeasance, but not for a nonfeasance, has long been an accepted principle—Atlantic Coast Line R Co v Knight, 171 SE 919, 48 Ga App 53

(2) The principle has been criticized and limited, but the tendency has been nominally to adhere to the letter of the principle, but to say that a nonfeasance in most instances amounts to a misfeasance—Atlantic Coast Line R Co v Knight, supra.

(3) It has been laid down that a servant is personally liable to a third person when his wrongful act in the course of employment is the direct and proximate cause of injury to the third person, whether the wrongful act is one of misfeasance or nonfeasance—Southern Ry Co v Smith, 191 SE 181, 55 Ga App 689—Atlantic Coast Line R Co v Knight, supra.

(4) Failure of an employee digging a ditch to cover it up so as to render it safe for people lawfully in the neighborhood at night is part of ditch construction, and is an act of misfeasance and not nonfeasance—Southern Ry Co v Bottoms, 134 SE 824, 35 Ga App 804

(5) The servant's liability is based on the ground that he is a wrongdoer and responsible for any injury that he may cause—Risby v Sharp-Boylston Co, 7 SE 2d 917, 62 Ga App 101—Atlantic Coast Line R Co v Knight, 171 SE 919, 48 Ga App 53.

(6) Before liability may arise, however, it is essential that there should have been an agreement to perform, or an assumption of performance of, an act with respect to which the alleged liability arose—Risby v Sharp-Boylston Co, 7 SE 2d 917, 62 Ga App 101

In Missouri

(1) The rule stated in the text has been announced—US—Franklin v. May Department Stores Co, DCMo, 25 F Supp 735—Mo—Ryan v Standard Oil Co of Indiana, App, 144 SW 2d 170—McMahon v. Chicago, B & Q R Co, App, 277 SW 356. 39 C.J. p 1311 note 50

(2) The rule has been questioned

and criticized but apparently has not been overruled expressly, the court suggested as the most reasonable test of liability "the rule that a servant or agent is liable for acts or omissions causing injury to third persons whenever, under the circumstances, he owes a duty of care in regard to such matters to such third persons. In short, he would be liable whenever he is guilty of such negligence as would create a liability to another person if no relation of master and servant or principal and agent existed between him and someone else"—Lambert v Jones, 98 SW 2d 752, 759, 339 Mo 677

(3) It has been stated that usually a wrongful commission is regarded as misfeasance, while a wrongful omission is a nonfeasance, within the meaning of the rule—Ryan v Standard Oil Co. of Indiana, supra

(4) However, a wrongful omission is not always regarded as mere nonfeasance, and under some circumstances is regarded as misfeasance

US—Franklin v May Department Stores Co, supra

Mo—Ryan v Standard Oil Co of Indiana, supra.

(5) Where the servant is in active control and management of an instrumentality, the servant may be liable whether his negligence consisted of affirmative or negative acts—Zumwalt v Chicago & A R Co, 266 SW 717

(6) Servant is liable to third person for misfeasance if he negligently performs duty undertaken, whether negligence is omission or commission—Varas v James Stewart & Co, 17 SW 2d 651, 223 Mo App 385

(7) Ministerial servant is not liable to third person for omitting something not within his duties as servant—Varas v James Stewart & Co, supra.

4. Iowa—Montanick v. McMullin, 280 NW 608, 235 Iowa 442

Ky—Pirtle's Adm'r v Hargis Bank & Trust Co, 44 SW 2d 541, 241 Ky 455, followed in Taylor's Adm'r v Hargis Bank & Trust Co, 44 SW 2d 549, 241 Ky 36 and Pirtle's Adm'r v. Hargis Bank & Trust Co, 49 SW 2d 1002, 243 Ky 752

Me—Brooks v Jacobs, 81 A 2d 414, 139 Me 371.

N.C.—Wachovia Bank & Trust Co

v Southern Ry Co, 133 SE 620, 209 NC 304

39 C.J. p 1311 note 51

In Alabama

(1) The rule stated in the text has been recognized—Corpus Juris cited in Carter v Franklin, 173 So 861, 863, 234 Ala 116—39 C.J. p 1311 note 51.

(3) It has been held or recognized, however, that if a servant omits to enter on the performance of a duty which the master owes another the servant would not be liable to such other for the omission—Southeastern Greyhound Lines v Callahan, 13 So 2d 660, 244 Ala 449—Gloss-Sheffield Steel & Iron Co v Wilkes, 165 So 764, 231 Ala 511

(3) But, where the servant enters on the service and negligently performs it, he is liable, even though the negligence of the servant may result from his omission to do what ought to have been done by him or anyone else in exercising due care in performing the service—Southeastern Greyhound Lines v Callahan, supra—Gloss-Sheffield Steel & Iron Co v Wilkes, supra.

5. Me—Brooks v Jacobs, 81 A 2d 414, 139 Me 371

6. Ala—Corpus Juris cited in Carter v Franklin, 173 So 861, 863, 234 Ala 116

Ga—Monroe v Guess, 154 SE 301, 41 Ga App 697.

Kan—Campbell v Weathers, 111 P 2d 72, 153 Kan 316

ND—McBain v Lang, 218 NW 641, 56 ND 630

Okla—Wick v Wasson, 142 P 2d 124, 193 Okl 209

39 C.J. p 1312 note 52

Want of control of instrumentality

Servant is not liable to third person for negligence of master with respect to instrumentality not operated or controlled by him—McBain v Lang, 218 NW 641, 56 ND 630

Conversion

(1) A person acting under the direction of another as servant is not guilty of conversion merely by carrying articles from place to place without any knowledge of wrongdoing, supposing the articles to belong to or to be rightfully in the possession of the person from whom they are received—Smith v Colby, 67 Me 169.

(2) The reception of goods by a servant from one whom he is entitled to regard as the owner and the transportation of such goods to

and, where the servant obeys the commands of his master without negligence on his part, generally he is not liable for injuries to third persons unless he knew, or had reason to believe, that the act or acts were hazardous and liable to occasion injury to some third person.⁷ It has been held that a servant who innocently obeys the orders of his master without knowledge that he is acting wrongfully is not liable to the person injured,⁸ but it is otherwise where the servant knows that the act commanded to be done is unlawful.⁹ A servant may be liable to a third person who is injured by the servant's negligent handling of property where the servant owes a duty to such third person in this respect,¹⁰ especially where he has the complete control of property,¹¹ and, according to some cases, one who actually participates in a negligent use of property, with full knowledge of danger to third persons, is negligent, and he cannot avoid liability by showing that he merely assisted the negligent owner as servant or agent.¹² The view has been expressed, however, that a servant owes a duty to protect a third person only when the servant has such control over the property as the master otherwise would have.¹³

An employee who does not participate in the acts of another employee of a common master, on which it is sought to predicate liability to a third person, is not liable for such acts.¹⁴ The selection by an employee of a substitute is not negligence on the part of the employee toward the public if the substitute is competent and there is no failure of due supervision.¹⁵ The view has been taken that a servant is not liable in tort for procuring a breach by the master of the master's contract with a third person.¹⁶

§ 578. — To Fellow Servants

As a general rule a servant may be liable for injuries negligently inflicted by him on a fellow servant in the transaction of the master's business.

While in some earlier cases the rule was announced that a servant is not liable for injuries to a coservant due to his negligence,¹⁷ this doctrine has quite generally been repudiated and the general rule is well settled that a servant may render himself liable for injuries negligently inflicted by him on a fellow servant in the transaction of the master's business.¹⁸ This rule does not rest on any duty imposed by privity of contract, but depends on the com-

the master to whom they are sent do not constitute tortious acts and do not render such servant liable as for a conversion—*Burditt v Hunt*, 25 Me 419, 43 AmD 289

(3) Where a servant received from his master a trust fund of another and held and disbursed it under the master's orders, with notice of the rights of such other and of the master's insolvency, the master, and not the servant, had control of the fund, and the servant was not liable for converting it—*Hodgson v St Paul Plow Co*, 80 NW 958, 78 Minn. 172, and note, 50 L.R.A. 664

7. US—*Gustafson v. Chicago, R I & P R Co*, CCMo, 128 F. 85.

8. Colo—*Ashcraft v. Tucker*, 215 P 877, 73 Colo 383, 28 A.L.R. 692.

9. NH—*Hill v. Caverly*, 7 NH 215, 28 AmD 735
Or—*Corpus Juris cited in Wood v Miller*, 76 P.2d 963, 966, 158 Or 444

10. Mont—*Ulmen v. Schwieger*, 12 P 2d 858, 92 Mont 331

11. Mo—*Giles v Moundridge Milling Co.*, 173 S.W.2d 745, 351 Mo. 568—*Lambert v Jones*, 98 S.W.2d 752, 339 Mo. 677—*Brown v Yeckel, Erickson & Co*, App, 129 S.W.2d 66.

12. Mass—*Bottcher v Buck*, 163 NE 182, 265 Mass 4—*Corliss v Keown*, 93 NE 143, 207 Mass 149

13. Mont—*Ulmen v Schwieger*, 12 P 2d 858, 92 Mont 331.

14. Ga—*Massachusetts Cotton Mills v Hawkins*, 139 SE 52, 164 Ga 594, answers conformed to 139 SE 429, 37 Ga.App 198

Or—*Giusti v C H Weston Co*, 108 P 2d 1010, 165 Or 525—*Wemmett v. Mount*, 292 P. 93, 134 Or 805
SC—*Beauchamp v Winnaboro Granite Corporation*, 101 SE 856, 113 SC 523

Control of instrumentality

A servant is not liable to a third person for negligence of coservants with respect to an instrumentality not operated or controlled by him—*McBain v. Lang*, 213 NW 641, 56 ND. 630

15. Neb—*Rose v Gisi*, 298 N.W 333, 139 Neb 593

Wrong to employer

Such selection constitutes a wrong to the employer where such delegation is unauthorized—*Rose v Gisi*, supra.

16. NY—*Hicks v. Haight*, 11 NYS 2d 912, 171 Misc 151

17. Mass—*Albro v. Jaquith*, 4 Gray 99, 84 AmD 58
39 CJ p 1312 notes 58, 59

18. Ga—*Dunn v Gallahar*, 38 SE 2d 382, 72 Ga.App 135—*Moody v Hardeman*, 162 SE 653, 44 Ga App 676

Kan—*Le Clair v Hubert*, 107 P.2d 703, 152 Kan 706

Mass—*Bresnahan v Barre*, 190 NE 815, 286 Mass 593—*Rose v Franklin Surety Co*, 183 NE 913, 281 Mass 538

Miss—*Corpus Juris* quoted in *Greer v Pierce*, 147 So 303, 304, 167 Miss 65

NY—*Judson v Fielding*, 237 NYS 348, 227 AppDiv 430, affirmed 171 NE 798, 253 NY 596, and followed in *Johnson v Palmer*, 242 NYS 763, 229 AppDiv 813
NC—*Wooten v Holleman*, 88 SE 480, 171 NC 461

Ohio—*East Ohio Gas Co v O'Hara*, 17 Ohio App 352

Pa—*Zimmer v Casey*, 146 A 130, 396 Pa 529

Wis—*McGonigle v Gryphan*, 329 N. W 81, 201 Wis 369

39 CJ p 1312 note 60

Joint enterprise or adventure

(1) The rule of joint enterprise with resultant imputation of negligence cannot be invoked to prevent one servant from recovering from his fellow servant—*East Ohio Gas Co v O'Hara*, 17 Ohio App 352.

(2) Occupant of automobile employed by another to show customers houses and one driving automobile at time of accident as accommodation for such other were fellow servants, and there was no joint adventure, as affecting liability of driver for injury to such occupant—*Greer v. Pierce*, 147 So. 303, 167 Miss. 65.

mon-law obligation of the servant so to conduct himself as not to cause injury to another,¹⁹ and the doctrine that exempts an employer from liability to his servant for injuries inflicted by a fellow servant does not in any way affect the liability of the servant inflicting the injury.²⁰ His liability is not affected by the fact that the master has incurred no liability to the injured servant,²¹ nor is his liability affected by the provisions of the Federal Employers' Liability Act,²² and no right of action by an employee of a common carrier against his fellow servant is created by such act.²³ So also certain state employers' liability acts do not create a cause of action against an employee.²⁴

In some cases it has been either held or intimated that the servant is liable only in case of misfeasance,²⁵ but in others the distinction has been repudiated and the servant held liable for nonfeasance as well as for misfeasance.²⁶ In some cases in which the distinction²⁷ has been considered or has been given effect, particular matters have been regarded as cases of misfeasance²⁸ or as not being cases of misfeasance.²⁹

A servant is not liable for injuries to another servant where he has omitted no duty with which he is personally charged,³⁰ or where at the time of the injury the injured servant was working for himself

Status of independent contractors

Coeemployees occupy, as to each other, status of independent contractors, as affecting liability of one for injury to another—*Zimmer v Casey*, 146 A 130, 296 Pa 529

Doctrine of respondeat superior not applicable

Doctrine of respondeat superior does not apply to negligent acts as between coemployees so as to defeat liability—*Zimmer v Casey*, supra

Servant engaged in own affair

When servant engages in affair of his own, he ceases to act for master and becomes liable for his act—*Waldo v Galveston, H & S A Ry Co*, Tex Com App, 50 SW2d 274

Effect of workmen's compensation acts see the CJS title Workmen's Compensation Acts § 985, also 71 CJ p 1530 note 64-p 1531 note 80

19. Conn.—*Stulginski v Cizauskas*, 5 A 2d 10, 125 Conn 293

Miss—*Mississippi Power & Light Co v Smith*, 153 So 376, 169 Miss 447—*Corpus Juris* quoted in *Greer v Pierce*, 147 So 303, 304, 187 Miss 65

Pa.—*Zimmer v Casey*, 146 A 130, 296 Pa 529

39 CJ p 1312 note 61

20. Ga.—*Dunn v Gallaheer*, 33 SE 2d 382, 72 Ga App 135

Kan.—*Le Clair v Hubert*, 107 P 2d 703, 152 Kan 706

Wis.—*Lawton v Waite*, 79 NW 321, 163 Wis 244, 45 L.R.A. 616

39 CJ p 1313 note 62

21. Mass.—*Osborne v. Morgan*, 137 Mass 1

22. U.S.—*Lee v Central of Georgia R. Co*, 40 S Ct 254, 252 US 109, 64 L Ed 482

23. U.S.—*Sheaf v Minneapolis, St P & S S M R. Co*, CC AND, 162 F 2d 110.

24. In Oregon

(1) The rule stated in the text has been applied.—*Gray v Hammond Lumber Co*, 233 P 437, 113 Or 570,

rehearing denied 233 P 561, 113 Or 570—39 CJ p 1313 note 63 [a]

(2) With respect to the provision of the statute imposing criminal liability, it was laid down that the provision neither enlarged nor lessened the liability of a servant in charge of particular work—*Malloy v Marshall-Wells Hardware Co*, 178 P 267, 90 Or 303, reheard 175 P 659, 90 Or 303 and 176 P 589, 90 Or 303

(3) In an earlier case, however, it was stated that the liability of a servant in charge of particular work, for injuries resulting from his failure to perform the duties enjoined by the Employers' Liability Act, was not affected by a further provision of that act declaring that a person in charge of particular work shall be held the agent of the employer in cases for damages—*Cauldwell v Bingham & Shelley Co*, 155 P 190, 84 Or 257

25. U.S.—*Morefield v Ozark Pipe Line Corporation*, D C Okl, 27 F 2d 890

Mo.—*McMahon v Chicago, B & Q R Co*, App, 277 SW 356
39 CJ p 1311 note 50, p 1313 note 65.

26. Ky.—*Evans Chemical Works v Hall*, 187 SW 390, 159 Ky 399

39 CJ p 1313 note 67

27. "Misfeasance" and "nonfeasance" distinguished

Mass.—*Osborne v Morgan*, 130 Mass 102, 39 Am R 437

39 CJ p 1313 note 70

28. Matters constituting misfeasance

(1) If a servant undertakes to perform a particular work for master and has full charge and control thereof, he is liable to another servant for an act of negligence, whether it be of commission or omission, and in such case any omission of duty on his part is deemed a misfeasance—*Vaughn v Mountain Grove Creamery, Ice & Electric Co*, App, 275 S W 593, quashed in part on other grounds State ex rel Mountain

Grove Creamery, Ice & Electric Co v Cox, 286 SW 368, 315 Mo 619

(2) A line construction superintendent and foreman, who chose time, place, and manner of replacing pole under power line, assisted in work, and failed to have proper equipment, to deenergize power line, to warn or instruct employee subsequently electrocuted, or to take other precautions, would be guilty of misfeasance, rather than nonfeasance, and hence liable—*Dudley v Community Public Service Co*, CCA Tex, 108 F 2d 119

(3) Other matters see 39 CJ p 1313 note 68

29. Matters not constituting misfeasance

(1) Allegations of foreman's negligence in directing employee to do certain work without sufficient light and without sufficient help were allegations of nonfeasance, for which employer, and not foreman, was liable—*McMahon v Chicago, B & Q R Co*, Mo App, 277 SW 356

(2) Other matters see 39 CJ p 1313 note 69

30. Ga.—*Atkinson v Bibb Mfg Co*, 178 SE 537, 50 Ga App 434

La.—*Wilson v Yazoo & M V R Co*, App, 181 So 600

Mont.—*Thurman v Pittsburg & Montana Copper Co*, 108 P. 588, 41 Mont 141

NC.—*Rogers v American Tobacco Co*, 178 SE 94, 207 NC 865.

Wyo.—*Smith v Beard*, 110 P 2d 260, 66 Wyo 375

Liability not shown

(1) Fact that foreman told employee to assist another in getting a barrel of paint, when there allegedly was paint on the floor to foreman's knowledge, would not constitute negligence as ground for recovery by employee for injuries suffered in fall on floor—*Tucker Duck & Rubber Co v Harvey*, 154 SW 2d 828, 202 Ark 1033

(2) Foreman, expressing erroneous opinion as to safety of journey, was

and not for the master and the servant whom it is sought to hold liable was not in charge of, or connected with, such work.⁸¹ In order to render an intermediate superior employee liable to another employee, there must be personal negligence of such superior employee, involving an immediate act or command which is the efficient, or coefficient, cause of the injury.⁸² A servant is not liable for injuries to another servant because of the failure of the master to furnish a safe place to work or suitable appliances or instrumentalities⁸³ or for the negligent failure of another employee, on whom rested the duty, to take proper precautions to protect workmen.⁸⁴ It has been held that a servant is not liable in tort for procuring a breach by the master of a contract for the employment of another.⁸⁵

Servants are not jointly liable for injuries to another servant unless caused by their joint negligence, each is liable only for his own negligence.⁸⁶

§ 579. Joint or Several Liability of Master and Servant

In some, but not in all, jurisdictions a joint action will lie against a master and servant in cases in which the master is liable solely under the doctrine of respondeat superior; usually a joint action will lie where the concurrent negligence of the master and of the servant is the cause of the injury to another servant.

There is a conflict of authority as to whether a master and servant can be sued jointly where the liability of the master is based not on a participation by him in the servant's tort, but solely on the doctrine of respondeat superior.⁸⁷ In some jurisdictions, where the master's liability for the negligent or wrongful act of the servant is based solely on the doctrine of respondeat superior, and not by reason of any personal share in the negligent or wrongful act, by his presence or express directions, a joint action cannot be brought against them,⁸⁸ the liability of the master and of the servant in such case is regarded as several,⁸⁹ and not as joint and

not liable to employee freezing in storm—*Brady v Oregon Lumber Co*, 243 P 96, 117 Or 188, 45 A.L.R. 812, rehearing denied 245 P 732, 118 Or 15, 45 A.L.R. 812

31 Or—*Malloy v Marshall-Wells Hardware Co*, 173 P 287, 90 Or 303, reheard 175 P 659, 90 Or 308 and 176 P 589, 90 Or 303

32 US—*Whittle v. Atlas Powder Co*, D.C. Tenn., 34 F.Supp. 563

Employee held liable

(1) General manager of affairs of employer, who assumes to direct employee as to manner in which machine shall be operated, owes to employee duty of exercising ordinary care to give proper directions and orders regarding operation of machine, and failure to exercise such care constitutes negligence for which manager may be held individually liable, if such improper directions proximately cause injury.—*Hoevenman v Feldman*, 265 NW 580, 230 Wis. 557

(2) Managing officer of employer, who could by ordinary care have ascertained unsafe condition of appliance furnished by employer and used by employee under direction of managing officer, is personally liable for injuries resulting to such employee.—*Kaumann v White Star Gas & Oil Co*, 63 P.2d 231, 92 Utah 24

(3) Superintendent employing infant at work forbidden by statute was personally liable for injuries.—*Toscani v Litaky*, 135 A 667, 5 N.J.Misc. 100, reargument denied 136 A 198, 5 N.J.Misc. 268

(4) It was duty of superintendent of cotton gin to exercise reasonable care to prevent injury to person op-

erating gin—*Mississippi Power & Light Co v. Smith*, 153 So 376, 169 Miss 447

(5) Where employee in cottonseed oil mill, who had been directed to fix any machinery he saw broken down or clogged up while engaged in his duties of oiling machinery, was both youthful and inexperienced, superintendent had duty to instruct employee concerning best method of servicing cleaning machines and to warn of hidden danger from revolving cylinder which mangled employee's arms as he attempted to clear machine of congested condition.—*Perkins Oil Co of Delaware v Fitzgerald*, 121 S.W.2d 877, 197 Ark 14

(6) Foreman of coal mine was guilty of gross negligence in permitting high voltage electric wires to dangle from roof of air course, the track in which was used to spot empty and loaded cars, with respect to liability of such foreman.—*West Kentucky Coal Co v Hazel's Adm'x*, 129 S.W.2d 1000, 279 Ky. 5.

33. US—*Whittle v Atlas Powder Co*, D.C. Tenn., 34 F.Supp. 563
39 C.J. p 1313 note 73

34. Mont—*De Sandro v Missoula Light & Water Co*, 136 P. 711, 48 Mont 226

35. N.Y.—*Hicks v Haight*, 11 N.Y. S.2d 912, 171 Misc. 151.

36. Mont—*Allen v Bear Creek Coal Co*, 115 P 673, 48 Mont 269

37. Ill.—*Corpus Juris* quoted in *Barran v. Adanick*, 251 Ill App 481, 483

Pa.—*Corpus Juris* cited in *East*

Broad Top Transit Co v Flood, 192 A. 401, 402, 226 Pa 363
39 C.J. p 1314 notes 85, 86

38. US—*Ammond v Pennsylvania R Co*, CCA Ohio, 125 F.2d 747, certiorari denied 62 S.Ct. 1383, 316 US 691, 86 L.Ed. 1763

Mass—*Gordon v Cross & Roberts*, 191 NE 407, 287 Mass 362—*Popkin v Goldman*, 185 NE 656, 266 Mass 531

Ohio—*Ohio Casualty Ins Co v Capolino*, App., 65 NE.2d 287—*Schultz v Brunhoff Mfg Co*, 153 NE 924, 22 Ohio App 220—*Kaiser v Rodenbaugh*, Com Pl., 68 NE.2d 228—*Albers v Great Central Transport Corporation*, 14 Ohio Supp 25

39 C.J. p 1314 note 85

In Vermont

(1) The rule stated in the text obtains—*Jones v Valisi*, 18 A.2d 179, 111 Vt 481—*Raymond v Capobianco*, 178 A. 896, 107 Vt. 295, 98 A.L.R. 1051

(2) In a case arising in the federal court in Vermont involving an injury which was sustained in Vermont, the right to sue the master and servant jointly was upheld—*Henry W. Putnam Memorial Hospital v. Allen*, CCA Vt., 34 F.2d 927.

39. Mass—*Karcher v Burbank*, 21 NE.2d 642, 303 Mass 303, 124 A.L.R. 1292—*Gordon v Cross & Roberts, Inc*, 191 NE 407, 287 Mass 362

Ohio—*Schultz v. Brunhoff Mfg Co*, 153 NE. 924, 22 Ohio App 220
Vt—*Jones v Valisi*, 18 A.2d 179, 111 Vt 481—*Raymond v Capobianco*, 178 A. 896, 107 Vt. 295, 98 A.L.R. 1051.

several⁴⁰

In other jurisdictions, however, a joint action against a master and his servant may be maintained for injuries resulting from the negligence or other wrongful act of the servant for which the master is liable under the doctrine of respondeat superior,⁴¹ or the master and the servant may be sued sepa-

ately;⁴² the liability of the master and servant in such case is regarded as joint and several,⁴³ but, notwithstanding the liability is so regarded, according to some cases they are not regarded as joint tort-feasors⁴⁴

Where the injury is due to the concurrent negligence or other torts of a master and of a servant,

Action against master or servant

(1) One injured through negligence of a servant acting for his master may sue either the servant or the master, or both in separate actions, since a judgment against one, until satisfied, is no bar to an action against the other—*Losito v Kruse*, 24 NE2d 705, 136 Ohio St 183, 126 ALR 1194—*Schultz v Brunhoff Mfg Co*, 153 NE 924, 22 Ohio App 220.

Liability of master secondary

Ohio—*Ohio Casualty Ins Co v. Capolino*, App., 65 NE2d 287

40. Vt—*Jones v Valis*, 18 A 2d 179, 111 Vt 481—*Raymond v Capobianco*, 178 A 898, 107 Vt 295, 98 ALR 1051

41. U.S.—*Norwalk v Air-Way Electric Appliance Corporation*, CCA NY, 87 F2d 817, 110 ALR 183—*Corpus Juris* cited in *La Flower v Merrill*, DCCal, 28 F2d 784, 786—*Burrichter v Chicago, M & St P R Co*, DCMinn, 10 F2d 165—*Norwood v Carolina Power & Light Co*, DCS.C, 74 FSupp 483—*Forrest v Southern Ry Co*, DCS.C, 20 FSupp 753—*Newton v Southern Grocery Stores*, DCS.C, 16 FSupp 164—*Donaldson v Tucson Gas, Electric Light & Power Co*, DCAriz, 14 FSupp 246—*Judd v Oregon Short Line R. Co*, DCIdaho, 4 FSupp 657

Ala—*Griffin v Bozeman*, 173 So 857, 234 Ala 136

Ark—*Missouri Pac R Co v Miller*, 41 SW2d 971, 184 Ark 61, certiorari denied 52 S Ct 210, 284 U S 688, 76 LEd 580, stating Oklahoma law

Cal.—*Rannard v Lockheed Aircraft Corp*, 157 P2d 1, 36 Cal3d 149

Conn—*Stulginski v Cizauskas*, 5 A 2d 10, 125 Conn 293

Fla.—*International Shoe Co v Hewitt*, 187 So 7, 123 Fla 587

Ga.—*Southern Ry Co v Davenport*, 148 SE 171, 39 Ga App 645

Ind.—*Bailey v Washington Theatre Co*, 41 NE2d 819, 112 IndApp 836

Ky.—*Sherwood v Huber & Huber Motor Exp Co*, 151 SW2d 1007, 286 Ky 775, 135 ALR 363

Md.—*Bernheimer-Leader Stores v Burlingame*, 136 A 622, 152 Md 284

Mo.—*Blasina v Albert Wenzlick Real Estate Co*, 138 SW2d 721, 235 Mo App 528.

Neb.—*Fonda v Northwestern Public Service Co*, 278 NW 836, 134 Neb 430

NJ.—*Goodman v Grace Iron & Steel Corporation*, 13 A 2d 228, 125 NJ Law 28

NY.—*Magidson v Bloom*, 11 NYS 2d 324, 170 Misc 832—*Kinsey v William Spencer & Son Corporation*, 300 NYS 391, 185 Misc 143, affirmed 8 NYS 2d 529, 355 App Div 995, affirmed 22 NE2d 168, 281 NY 601

SC.—*Parker v Bissonette*, 26 SE2d 497, 203 SC 155, 147 ALR 773—*Cravens v Lawrence*, 156 SE 269, 181 SC 165, followed in *Sikes v Lawrence*, 186 SE 926, 181 SC 235—*Johnson v Atlantic Coast Line R Co*, 140 SE 443, 143 SC 135

Tex.—*Texas & P R Co v Tucker*, 106 SW 764, 48 Tex Civ App 115, error refused

Wash.—*Johns v Hake*, 131 P2d 933, 15 Wash 2d 651

39 C.J. p 1314 note 86

In Illinois

(1) The rule stated in the text obtains—*Lasko v Meier*, 67 NE2d 162, 394 Ill 71—*Skala v Lehon*, 175 NE 832, 343 Ill 602—*B F Hirsch, Inc. v C T Gustafson Co*, 43 NE 2d 123, 315 Ill App 56—*Metzler v Layton*, 19 NE2d 130, 298 Ill App 529, affirmed 25 NE2d 60, 373 Ill 88—*Martin v Starr*, 255 Ill App 189—*Richardson v Moore*, 254 Ill App 511—*Corpus Juris* quoted in *Barran v Adanick*, 251 Ill App 481, 482—*Van Meter v Gurney*, 240 Ill App 165

(2) In some cases, however, the right to sue the master and the negligent servant jointly was denied

US—*Scherrer v Foster*, DC Ill, 5 F2d 236

Ill.—*Buckley v Edgewater Beach Hotel Co*, 247 Ill App 289—*Bartlett v Sullivan*, 241 Ill App 410—39 C.J. p 1314 note 85.

In Pennsylvania

(1) It has been stated that, where an injury results to a third person from the negligent performance of his duties by an employee, the employer and employee are not joint tort-feasors—*Scotney v Weesaw*, 56 Pa Dist & Co 551

(2) Under common-law practice servant and master, not being joint tort-feasors, could not be sued joint-

ly where the liability of the master was based on the doctrine of respondent superior—*East Broad Top Transit Co v Flood*, 192 A 401, 326 Pa 353

(3) But under the statutes permitting the bringing in of additional defendants, whether liable over to the original defendant, or jointly or severally liable with him, or solely liable, plaintiff may join master and servant in one action, whatever the basis of their respective liabilities—*East Broad Top Transit Co v Flood*, supra—*Marcus v May's Beauty Shop*, Com Pl, 29 Del Co 432—*Brown v George B Newton Coal Co*, Com Pl, 28 Del Co 23—*Di Meglio v Morgan*, Com Pl, 27 Del Co 202

42. Ala.—*Griffin v Bozeman*, 173 So 857, 234 Ala 136

Cal.—*Wills v J J Newberry Co*, 111 P2d 346, 43 Cal App 2d 596

Ill.—*Skala v Lehon*, 258 Ill App 252, affirmed 175 NE 832, 343 Ill 602

Ind.—*Dunbar v Demaree*, 2 NE2d 1003, 103 Ind App 585

Ky.—*Sherwood v Huber & Huber Motor Exp Co*, 151 SW2d 1007, 286 Ky 775, 135 ALR 363

Md.—*Bernheimer-Leader Stores v Burlingame*, 136 A 622, 152 Md 284

Mo.—*Blasina v Albert Wenzlick Real Estate Co*, 138 SW2d 721, 235 Mo App 528

NJ.—*Goodman v Grace Iron & Steel Corporation*, 13 A 2d 228, 125 N. J Law 28

SC.—*Parker v Bissonette*, 26 SE2d 497, 203 SC 155, 147 ALR 773

Wash.—*Johns v Hake*, 131 P2d 933, 15 Wash 2d 651

43. Miss.—*Granquist v. Crystal Springs Lumber Co*, 1 So2d 216, 190 Miss 572

Neb.—*Fonda v Northwestern Public Service Co*, 278 NW 836, 134 Neb 430.

NY.—*Magidson v Bloom*, 11 N.Y.S. 2d 324, 170 Misc 832

Va.—*McLaughlin v Siegel*, 185 SE 473, 166 Va 374

Wash.—*Johns v Hake*, 131 P2d 933, 15 Wash 2d 651.

44. Miss.—*Granquist v. Crystal Springs Lumber Co*, 1 So3d 216, 190 Miss. 572.

they may be liable jointly⁴⁵ or jointly and severally,⁴⁶ and the master and servant are jointly and severally liable in damages where they jointly breach some duty which they owe to a third person and damages result from such breach⁴⁷ Where the act complained of is done by command of the master, the master and servant may be jointly liable,⁴⁸ especially where the master personally assists in committing the act⁴⁹ This principle has been applied where the master directs the servant to convert the property of another⁵⁰ Where a master employs a servant to do an act which involves the use of force against the person or property of another, and the servant, in the course of his employment, uses force in a manner or to an extent unlawful and unjustifiable, both are answerable as trespassers and may be sued jointly⁵¹

Liability for injury to servant. While the view has been taken that a joint action against a master and a servant will not lie where the master is liable solely under the doctrine of respondeat superior,⁵² it has been held or recognized that a joint action will lie against a master and a servant where the tort of such servant causes an injury to another servant for which the master is also liable,⁵³ pro-

vided, according to the rule in some jurisdictions, the injury was caused by the misfeasance of the servants so joined, as distinguished from mere non-feasance⁵⁴

Also a joint action will lie where the master and servant each violates a duty owing to another servant with a resultant injury to such other,⁵⁵ where the negligence of the master concurs with that of the fellow servant so that the negligence of each proximately contributes to the injury,⁵⁶ or where a vice principal violates a duty owed to another servant by the master and such vice principal,⁵⁷ and in these circumstances the law will not undertake to apportion the negligence⁵⁸ The rule permitting a joint action against a master and a servant may apply even though the master's liability is statutory while that of the servant is imposed by common law,⁵⁹ although, according to some cases, a joint action against a master and servant will not lie under the Federal Employers' Liability Act⁶⁰

Where, in an action by a servant against the master and another servant, liability of the master is dependent on the negligence of such other servant, the master may not be held liable if such other servant was not negligent⁶¹

B. WORK OF INDEPENDENT CONTRACTOR

§ 580. In General

The relationship of contractee-independent contractor presupposes a binding contract between the parties.

The relationship of contractee-independent contractor presupposes a binding contract between the parties.⁶² The mere fact that an employee had rea-

45. Ga.—Atlantic Coast Line R Co v Knight, 171 SE 919, 48 Ga App 53

Mo.—Zumwalt v Chicago & A. R Co, 266 SW 717

46. Ala.—Carter v Franklin, 173 So 861, 234 Ala 116

Mo.—Greene v Spinning, App, 48 SW 2d 51

47. Tenn.—Campbell v Campbell, App, 199 SW 2d 931.

48. Ark.—New Coronado Coal Co v Jasper, 222 SW 22, 144 Ark 58

Cal.—Benson v Southern Pac Co, 171 P 948, 177 Cal 777

39 C.J. p 1815 notes 89, 91.

Act not in course of employment

Even though taxicab driver was not acting in course of employment at time he committed assault and battery, if employer directed, requested, or inspired commission of the battery, then employer would be liable as a joint tort-feasor.—Normington v Neely, 70 P2d 396, 58 Idaho 184

49. Cal.—Gosliner v. Briones, 204 P. 19, 187 Cal 567

39 C.J. p 1815 note 89.

50. Ark.—New Coronado Coal Co v Jasper, 222 S.W. 22, 144 Ark 58.

51. Mass.—Holmes v Wakefield, 94 Mass 580, 90 Am D 171

39 C.J. p 1815 note 92

52. Ohio.—French v Central Constr Co, 81 NE 751, 76 Ohio St 509

39 C.J. p 1314 note 85

53. Mo.—Whiteley v Eagle-Picher Lead Co, 115 SW 2d 536, 232 Mo App 178

Wash.—Schosboek v Chicago, M, St P & P. R. Co., 71 P2d 548, 191 Wash 425

Wyo.—Stanolind Oil & Gas Co v. Bunce, 62 P2d 1297, 51 Wyo 1

39 C.J. p 915 note 84, p 1814 note 86
Liability of servant for injury to co-servant generally see supra § 578

54. U.S.—Kelly v. Robinson, D.C. Mo, 262 F 695

39 C.J. p 915 note 85

55. Miss.—Mississippi Power & Light Co v. Smith, 153 So 376, 169 Miss 447

N.C.—Givens v Savona Mfg Co, 145 S.E. 681, 196 N.C 377, followed in Walters v Phoenix Utility Co, 345 SE 926, 196 NC 817.

56. U.S.—Tolbert v Jackson, C.C.A. Ga, 99 F2d 513, rehearing denied 100 F2d 909.

Miss.—Curry & Turner Const Co v Bryan, 185 So 256, 184 Miss 44

57. Ga.—Moody v Hardeman, 162 S E 853, 44 Ga App 678

Ill.—Devine v Grand Trunk Western R Co, 188 Ill App 612

Miss.—Mississippi Power & Light Co. v Smith, 153 So 376, 169 Miss 447.

N.C.—Crisp v. Champion Fibre Co, 136 SE 238, 193 NC 77, followed in Brown v National Veneer Co, 141 SE 926, 195 NC 856

58. N.C.—Wooten v. Holleman, 83 SE 480, 171 NC 461.

59. U.S.—Southern Ry Co. v. Miller, Ga., 30 S Ct 450, 217 US 209, 54 L Ed. 732—Tolbert v. Jackson, C.C.A. Ga., 99 F2d 513, rehearing denied 100 F2d 909.

39 C.J. p 915 note 86, p 1815 note 87

60. Ga.—Lee v Central of Georgia R Co, 94 SE 558, 147 Ga 428, 13 ALR 156.

39 C.J. p 915 notes 87, 88.

61. Mo.—Michely v. Mississippi Valley Structural Steel Co, 399 SW 830, 221 Mo App 205

62. Iowa.—Sanford v Goodridge, 13 NW 2d 40, 234 Iowa 1036.

son to believe, from the acts and conduct of the owner, that the one employing him was simply the servant of the owner will not estop the owner to deny such relation of master and servant and to rely on the rule applicable to independent contractors.⁶³ Likewise, the fact that the employer's name and insignia are on an automobile does not estop it to claim, in an action for personal injuries to a third person, that the driver was an independent contractor and not a servant.⁶⁴

§ 581. Test of Relationship

The tests for determining whether there is a master-servant or a contractee-independent contractor relationship are generally the same whether the question arises with respect to liability for injuries or with respect to other issues and the matter is therefore treated generally *supra* §§ 3 (2)-3 (8)

Examine Pocket Parts for later cases

§ 582. Subcontractors

A subcontractor may be an independent contractor as to his contractor.

A subcontractor under an original contractor may be an independent contractor as to such original contractor,⁶⁵ and in determining whether a subcontractor is an independent contractor, in so far as his relation to the principal contractor is concerned, the rules that have already been considered *supra*

§§ 3 (2)-3 (8) as between the original employer and employee apply.⁶⁶ Where a subcontractor is an independent contractor, the relation of master and servant does not exist between the contractor and the subcontractor or between the contractor and the subcontractor's servants.⁶⁷

§ 583. Dual Capacity of Servant and Contractor

One may be an independent contractor as to certain parts of the work and a servant as to other parts

A person employed to do certain work may be an independent contractor or subcontractor as to certain parts of the work and merely a servant of the one employing him as to the residue of the work.⁶⁸

§ 584. General Rule as to Nonliability of Contractee for Acts or Omissions of Contractor or His Servants

The general rule is that a contractee is not liable for the torts or negligence of his contractor or his contractor's servants.

The doctrine of respondeat superior does not apply where the relationship of the parties is that of contractee and independent contractor,⁶⁹ and, although the rule is subject to numerous qualifications and exceptions, which are discussed *infra* §§ 585-598, the general rule is that a contractee is not liable for the torts or negligence of his contractor or of

Ohio—Snodgrass v Cleveland Co-op Coal Co., 167 NE 493, 81 Ohio App 470

Relationship contractual

Whether one is an employee or independent contractor, relationship in either event is contractual—Miller v St Louis Realty & Securities Co., Mo App, 103 S.W.2d 510.

63. Iowa—Johnson v Owen, 38 Iowa 512

39 C.J. p 1316 note 4

64. Ill.—Trust v Chicago Motor Club, 276 Ill App 289

65. Cal.—Slyter v Clinton Const Co of California, 290 P 643, 107 Cal App 348

La.—Crysel v Gifford-Hill & Co., App, 158 So 264

39 C.J. p 1323 note 1

66. Cal.—Slyter v Clinton Const Co of California, 290 P. 643, 107 Cal App 348

Idaho—People ex rel Heartburg v Interstate Engineering & Construction Co., 75 P 2d 997, 58 Idaho 457

Ky.—Dempster Const Co v. Tackett, 285 SW 191, 215 Ky 461

La.—Crysel v Gifford-Hill & Co., App, 158 So 264

Mich.—Wight v H G Christman Co., 231 NW 314, 244 Mich 208

Tex.—Allen v Republic Bldg Co., Civ App, 84 SW 2d 506

39 C.J. p 1323 note 2

67. Mass.—Herrick v City of Springfield, 192 NE 626, 288 Mass 212

Miss.—Cook v Wright, 171 So 686, 177 Miss 644—Shell Petroleum Corporation v Linham, 163 So 839.

NC.—Greer v Callahan Const Co., 130 SE 739, 190 NC 632

68. U.S.—Birmingham v Bartels, C C A Iowa, 157 F 2d 295

Conn.—Scorpion v American-Republican, 37 A 2d 802, 131 Conn 42

Ky.—American Sav Life Ins Co v Riplinger, 60 SW 2d 115, 249 Ky 8.

Mo.—Vert v Metropolitan Life Ins Co., 117 SW 2d 252, 342 Mo 629, 116 A.L.R. 1381

Okl.—Fairmont Creamery Co of Lawton v Carsten, 55 P 2d 757, 175 Okl 592

39 C.J. p 1323 note 3

69. U.S.—Great American Indemnity Co v Fleniken, C C A La., 134 F 2d 208, certiorari denied Fleniken v. Great American Indemnity Co., 68 S Ct 1167, 319 U.S. 753, 87

L Ed 1706, rehearing denied 68 S Ct 1434, 319 U.S. 785, 87 L Ed 1728—Corpus Juris cited in Hoffman v Lamb Knit Goods Co., D C Mich., 27 F Supp 188, 190

Ark.—Froman v J R Kelley Slave & Heading Co., 123 SW 2d 1081, 197 Ark 545

Ill.—Hartley v Red Ball Transit Co., 176 NE 751, 344 Ill 534—Dean v Ketter, 65 NE 2d 572, 328 Ill App 206

Mo.—Bass v Kansas City Journal Post Co., 148 SW 2d 548, 347 Mo. 681

N.J.—Giroud v Stryker Transp Co., 140 A 305, 104 N.J. Law 424

NC.—Hudson v Gulf Oil Co., 3 S. E 2d 36, 215 N.C. 423

Ohio—Miller v Metropolitan Life Ins Co., 16 NE 2d 447, 131 Ohio St 289

Utah—Globe Grain & Milling Co v Industrial Commission, 91 P 2d 512, 98 Utah 26, rehearing denied 97 P 2d 582, 98 Utah 48

Wis.—Brabson v. Johannes Bros. Co., 286 NW. 21, 231 Wis 426

39 C.J. p 1327 note 39

Negligence of the contractor is not imputed to the employer as that of a servant or employee in the ordinary sense—Cramblitt v. Percival-

the contractor's servants,⁷⁰ nor is he liable for the | torts and negligence of subcontractors and their

- Porter Co., 144 NW 23, 162 Iowa 283
70. US—S H Kress Co v Bullock Shoe Co, CCA Ala., 56 F2d 713
- Continental Ins Co v I Bahcall, Inc, D C Wis., 39 F Supp 315
- Ala—W E Belcher Lumber Co v Woodstock Land & Mineral Co, 15 So 2d 625, 245 Ala 5—Alabama Power Co v Pierre, 183 So 665, 238 Ala 531—Dixie Stage Lines v Anderson, 134 So 23, 222 Ala 673
- Ariz—S A Geriand Co v Fricker, 27 P 2d 678, 42 Ariz 503
- Ark—Rice v Sheppard, 168 SW 2d 198, 205 Ark 193—Hammond Ranch Corporation v Dodson, 138 SW 2d 484, 199 Ark 846—Humphries v Kendall, 111 SW 2d 492, 195 Ark 45
- Cal—Taylor v Oakland Scavenger Co, 110 P 2d 1044, 17 Cal 2d 594—Snow v Marian Realty Co, 299 P 720, 213 Cal 622—La Malfa v Piombo Bros, 161 P 2d 984, 70 Cal App 2d 840—Casselmann v Hartford Accident & Indemnity Co, 98 P 2d 539, 36 Cal App 2d 700
- Colo—Thayer v Kirchhof, 266 P. 225, 83 Colo 480
- Conn—Jacob v Mosler Safe Co, 14 A 2d 736, 127 Conn 136
- Del—Langrell v Harrington, 41 A 2d 461, 3 Terry 547
- Ga—Whitehall Chevrolet Co v Anderson, 186 SE 185, 53 Ga App 406—Lovelace v Ivey, 152 SE 266, 41 Ga App 204—Calvert v Atlanta Hub Co, 139 SE 917, 37 Ga App 295
- Ill—Postal Tel Sales Corporation v Industrial Commission, 37 NE 2d 175, 377 Ill 533—Danner v Colby, 31 NE 2d 950, 375 Ill 558, mandate conformed to 35 NE 2d 952, 311 Ill App 352—Frost v Andes Candies, 69 NE 2d 732, 329 Ill App 535—Ryan v Associates Inv. Co of Illinois, 18 NE 2d 47, 297 Ill. App 544
- Ind—Stewart v Huff, 14 NE 2d 322, 105 Ind App 447—Scott Const Co v Cobb, 159 NE 783, 86 Ind App 699
- Kan—Smith v Brown, 107 P 2d 718, 152 Kan 758—Hurle v. Capper Publications, 87 P.2d 552, 149 Kan 369
- Ky—Jennings v Vincent's Adm'x, 145 SW 2d 537, 284 Ky 614—Leachman v Belknap Hardware & Mfg Co, 84 SW 2d 46, 260 Ky 123—City of Covington v Parsons, 79 SW 2d 853, 258 Ky. 22—American Sav. Life Ins Co v Riplinger, 60 SW 2d 115, 249 Ky 8
- La—Crysel v. Gifford-Hill & Co., App, 158 So. 264—Marbury v Louisiana Highway Commission, App, 158 So 590—E C Taylor Co v N. Y. & Cuba Mail S S Co, 1 La App. 738, annulled and set aside on other grounds 105 So 379, 159 La 381
- Md—Bernheimer-Leader Stores v Burlingame, 186 A 623, 152 Md 284
- Mich—Grinnell v Carbide & Carbon Chemicals Corporation, 276 NW 535, 382 Mich 509—Holloway v Nassar, 287 NW 619, 276 Mich 212
- Mo—Stubblefield v Federal Reserve Bank of St Louis, 204 SW 2d 718—Mattan v Hoover Co, 168 SW 2d 557, 350 Mo 506—Skidmore v Haggard, 110 SW 2d 726, 341 Mo 837—Manus v Kansas City Distributing Corporation, 74 SW 2d 506, 228 Mo App 905—Mueller v David, App, 31 SW 2d 570—Kiehling v Humes-Deal Co, App, 16 SW 2d 637—Burgess v Garvin, 272 SW 103, 219 Mo App 163—Wendt v Holbrook-Blackwelder Real Estate Trust Co, App, 298 SW 66—Aubuchon v Security Const Co, App, 291 SW 187
- Mont—Ulmen v Schwieger, 12 P 2d 856, 92 Mont 331—Neyman v Pincus, 267 P 805, 82 Mont 467
- Neb—Dabelstein v City of Omaha, 273 NW 43, 132 Neb 710
- Nev—Wells, Inc, v Shoemake, 177 P 2d 451
- NH—Frear v. Manchester Traction, Light & Power Co, 139 A 86, 83 NH 64, 61 A L R 1280
- NJ—Rosenquist v Brookdale Homes, 44 A 2d 33, 183 NJ Law 305—Messina v Terhune, 148 A 758, 106 NJ Law 119—Bush v Margolis, 130 A 525, 102 NJ Law 179
- NY—Schwartz v Merola Bros Construction Corporation, 48 NE 2d 299, 290 NY 145—Weinfeld v. Kaplan, 26 NE 2d 287, 332 NY 348, reargument denied 27 NE 2d 209, 282 NY 804—Fragiacome v 404-6 East 88th St Realty Corp, 58 NYS 2d 109, 269 App Div 635—May v 11½ East 49th St Co, 54 NYS 2d 860, 269 App Div 180, affirmed 68 NE 2d 881, 296 NY. 599—Irwin v Klein, 276 NYS 41, 243 App Div 28—Ahbol v. Harden Contracting Co, 270 NYS 515, 241 App Div 764, affirmed 193 N. E. 323, 265 NY 564—Kuhn v P J Carlin Const Co, 278 NYS 635, 154 Misc 892—Paquet v Pictorial Review Holding Corporation, 223 NYS 686, 130 Misc 359—Frawley v Miller, 212 N.Y.S 223, 125 Misc 864.
- NC—Bass v Fremont Wholesale Corporation, 193 SE 1, 212 N C 352—Peters v Carolina Cotton & Woolen Mills, 155 SE 867, 199 NC 758—Inman v Gulf Refining Co, 140 SE 289, 194 NC 566—Drake v City of Asheville, 138 SE 343, 194 NC 6—Greer v Callahan Const Co, 130 SE 739, 190 NC 632
- Ohio—Klar v Erie R Co, 162 NE 793, 118 Ohio St 612, appeal dismissed and certiorari denied 49 S Ct 342, 279 US 818, 73 L Ed 975—Visconi v Stauffert, 186 NE 829, 45 Ohio App 113—Post Pub Co v Schickling, 154 NE 751, 22 Ohio App 318, affirmed Schickling v Post Pub Co, 155 NE 143, 115 Ohio St 589—Albers v Great Central Transport Corporation, 14 Ohio Supp 25
- Okl—Oklahoma City v Caple, 105 P 2d 209, 187 Okl 600—Texas Pipe Line Co. of Oklahoma v Willis, 45 P 2d 138, 172 Okl 148—Corpus Juris quoted in Aetna Life Ins Co v Watts, 296 P 977, 984, 148 Okl 28
- Or—Carter v La Dee Logging Co, 20 P 2d 1086, 142 Or 439
- Pa—Doerr v Rand's, 16 A 2d 377, 340 Pa 188—Fuller v Palazzolo, 197 A 225, 329 Pa 98—Silveus v Grossman, 161 A 362, 307 Pa 272—Weldon v Steiner, 10 A 2d 19, 138 Pa Super 66—Baier v Glen Alden Coal Co, 200 A 190, 131 Pa Super 309, affirmed 3 A 2d 349, 322 Pa 561—Tyler v MacFadden Newspapers Corporation, 163 A 79, 107 Pa Super 166
- RI—Blount v Tow Fong, 138 A 52, 48 R L 453
- Tex—T J. Mansfield Const Co v Gorsline, Com App, 292 SW 187—Walter Irvin, Inc, v Vogel, Civ App, 158 SW 2d 93, error refused—Cocke & Braden v Ayer, Civ App, 108 SW 2d 946—Montgomery v Garza, Civ App, 290 SW 210
- Utah—Gleason v. Salt Lake City, 74 P 2d 1225, 95 Utah 1
- Vt—Jourdenais v Hayden, 153 A 684, 104 Vt 215
- Wash—Bill v Gattavara, 167 P 2d 434, 24 Wash 2d 819—Amann v City of Tacoma, 16 P 2d 601, 170 Wash 296
- W Va—Rogers v Boyers, 170 S.E. 905, 114 W Va 107
- Wis—Medley v Trenton Inv Co, 236 NW 713, 205 Wis 30, 76 A L R 1250—Kruse v Weigand, 235 NW 426, 204 Wis 195, followed in 235 NW 431, 204 Wis 206, Smith v. Weigand, 235 NW 431, 204 Wis 207, Smith v. Weigand, 235 NW 431, 204 Wis 208, two cases, and Woodard v Weigand, 235 NW 432, 204 Wis 209—Campbell v. Suttitt, 214 N.W. 374, 193 Wis. 370, 53 A L R 771.
- 39 C.J. p 1324 note 11
- Early authority to the contrary
- NH—Stone v Cheshire R. Corp., 19 NH 427, 51 Am D. 192.
- 39 C.J. p 1324 notes 4, 5.

servants.⁷¹ Similarly, as discussed *infra* § 609, a contractor is not liable for the torts or negligence of his subcontractors or their servants.

This doctrine has been expressly reaffirmed by statutory provisions in some jurisdictions⁷² and is not affected by a statute providing that a company shall be liable for all damages occasioned by its negligence,⁷³ or by the negligence of its agents or servants,⁷⁴ or by a statute relating to recovery on contractor's bonds,⁷⁵ or by an ordinance fixing liability on owners, contractors, and builders, etc., "having control or supervision" of the construction of the building, for injuries inflicted during the course of such construction,⁷⁶ or by a statute making it the duty of owners, contractors, and subcontractors engaged in the construction of any building to see that all appliances are carefully tested for

the safety of their employees, as such statute applies only to the particular person having charge of the work.⁷⁷

The doctrine of nonliability for the acts or omissions of an independent contractor or his servants is founded on the principle that one person should not be compelled to answer for the fault or neglect of another over whom he has no control,⁷⁸ and that the employer has a right to rely on the presumption that the contractor will discharge his legal duties owing to his employees and third persons.⁷⁹

The general rule that the contractee is not liable for the torts or negligence of his contractor applies where the work is performed on premises owned or occupied by the contractee,⁸⁰ or where the contractee is a railway company.⁸¹ The rule has been applied *inter alia* to contracts for the erection of build-

71. Ga.—Masse & Felton Lumber Co v Macon Cooperage Co, 163 SE 396, 44 Ga App 590

NC—Greer v Callahan Const Co, 130 SE 739, 190 NC 632

Tex—Allen v Republic Bldg Co, Civ App, 84 SW 2d 506
38 CJ p 1336 note 18

72. Ga.—Ridgeway v Downing Co, 34 SE 1028, 109 Ga 591
39 CJ p 1336 note 13

73. Pa.—Chartiers Valley Gas Co v Waters, 16 A 423, 123 Pa 220

74. RI—Sanford v Pawtucket St R Co, 35 A 67, 19 RI 537, 33 L RA 564

75. Wis—Kolb v Hayes, 215 NW 578, 194 Wis 40

76. Ill—Gibbons v Chapin, 147 Ill App 575

77. Or—Tamm v Sauset, 135 P 868, 67 Or 292, 297, L RA 1917D 988
39 CJ p 1336 note 17

78. Mo—Bass v Kansas City Journal Post Co, 148 SW 2d 548, 347 Mo 681
39 CJ p 1327 note 36

79. Ga.—Corpus Juris quoted in Georgia Power Co v Gillespie, 176 SE 786, 789, 49 Ga App 738
Okl—Kaw Boiler Works v Frymeyer, 227 P 453, 100 Okl 81
RI—O'Connor v Narragansett Electric Co, 173 A 889, 54 RI 317

80. Conn—Mann v Leake & Nelson Co, 43 A 2d 461, 132 Conn 251
Mass—Rasimas v Swan, 67 NE 2d 662, 320 Mass 60—Berman v Greenburg, 50 NE 2d 773, 314 Mass 556—Wilson v Norumbega Park Co, 178 NE 514, 275 Mass 422—Mintz v White, 169 NE 138, 269 Mass 218
NY—Caspersen v La Sala Bros, 171 NE 754, 253 NY 491—Bae-vitz v Levison, 220 NY S 162, 219

App Div 741—Midolla v State, 46 NY S 2d 345—Farrell v Utica Lincoln Realty Corporation, 35 NY S 2d 847, 175 Misc 695, appeal denied 37 NY S 2d 474, 261 App Div 1092

Ohio—Maxwell v Chew Pub Co, 61 NE 2d 818, 70 Ohio App 108

Tex—Humble Oil & Refining Co v Bell, Civ App, 180 SW 2d 970, error refused 181 SW 2d 569, 142 Tex 645—Beil v San Antonio Amusement Co, Civ App, 69 SW 3d 333

39 CJ p 1324 note 9

English rule see 39 CJ p 1324 notes 7, 8

81. Ga—Fulton County St R Co v McConnell, 13 SE 828, 87 Ga 756

Ind—Wabash, St L & P R Co v Farver, 12 NE 296, 111 Ind 195, 60 Am R 696

Mo—Barnes v Real Silk Hosiery Mills, 108 SW 2d 58, 341 Mo 563

NJ—Rosenquist v Brookdale Homes, 41 A 2d 883, 132 NJ Law 581, reversed on other grounds 44 A 2d 33, 133 NJ Law 805

NY—Wolf v Third Ave. R Co, 74 NY S 336, 74 App Div 605

Okl—Texas Pipe Line Co of Oklahoma v Willis, 45 P 2d 138, 172 Okl 148

RI—Sanford v Pawtucket St R Co, 35 A 67, 19 RI 537, 33 L RA 564

Tex—Perez v Thompson, Civ App, 189 SW 2d 6—Socony-Vacuum Oil Co v Premeaux, Civ App, 187 SW 2d 690, affirmed in part and reversed in part on other grounds 192 SW 2d 138, 144 Tex 558

Vt—Bailey v Troy & B R Co, 57 Vt 252, 52 Am R 139.

Operation of train.

(1) In case of injuries due to the negligent or improper operation of trains on roads or parts thereof

which are being built by construction contractors, the railroad company will not be liable if the train is exclusively controlled and operated by the contractor and his servants Ala—Rome & D R Co v Chasteen, 7 So 94, 88 Ala 591

Ark—St Louis, A & T R Co v Knott, 16 SW 9, 54 Ark 424

Iowa—Miller v Minnesota & N W R Co, 39 NW 188, 76 Iowa 655, 14 Am SR 253

Kan—St Louis, Ft S & W R Co v Willis, 16 P 728, 38 Kan 330—Kansas Cent R Co v Fitzsimmons, 18 Kan 34

Md—City & S R Co v Moores, 30 A 643, 80 Md 348, 45 Am SR 345

Neb—Hitte v Republican Valley R Co, 28 NW 284, 19 Neb 520—Meyer v Midland Pac R Co, 2 Neb 319

Tex—Cunningham v International R Co, 51 Tex 503, 33 Am R 632
Wyo—Union Pac R Co v Hause, 1 Wyo 27

(2) This is true although the car belonged to the railroad company and was furnished to the contractor as a part of the consideration for the work done—Hitte v Republican Valley R Co, *supra*

(3) It also applies although the servants in charge of the train were employed primarily by the railroad company—Cunningham v International R Co, *supra*

Loading cars

NY—King v New York Cent. & H R R Co, 66 NY 181, 23 Am R 37

Removing fences

Ark—St Louis, A & T R Co v Knott, 16 SW 9, 54 Ark 424

Mo—Clark's Adm'r v Hannibal & St J R Co, 36 Mo 202—McKinley v Chicago, S. F. & C. R Co, 40 Mo App 449.

ings⁸² or bridges,⁸³ to contracts for the construction of a sewer,⁸⁴ road,⁸⁵ or railroad,⁸⁶ to logging contracts,⁸⁷ to contracts for excavations,⁸⁸ for mining,⁸⁹ for repair and improvement of buildings,⁹⁰ for painting,⁹¹ for window cleaning,⁹² for transportation,⁹³ or for towage;⁹⁴ to contracts to do plumbing,⁹⁵ to do slating,⁹⁶ to erect signs,⁹⁷ to drill for oil or gas,⁹⁸ to lay gas pipes,⁹⁹ to deliver newspa-

pers,¹ to operate a gas and oil station,² to pile lumber,³ or to work as a stevedore.⁴ The rule has been applied to torts of such independent contractors as draymen, truckmen, and the like,⁵ paper hangers,⁶ a collection agency,⁷ contractors for the removal of a building or well,⁸ and contractors for the laying of a sidewalk.⁹

Vt—Clark v Vermont & C R Co, 28 Vt 103

Trespasses on neighboring property

Ala—Alabama Midland R Co v

Martin, 14 So 401, 100 Ala 511

Ark—St Louis, A & T R Co v

Knott, 16 SW 9, 54 Ark 424

Ind—Bloomfield R Co v Grace, 13

NE 680, 112 Ind 128

Iowa—Waltmeyer v Wisconsin, I

& N R Co., 33 NW 140, 71 Iowa

626

Me—Eaton v European & N A R

Co, 59 Me 530, 8 Am R 430

Miss—New Orleans & N E R Co

v Reese, 61 Miss 581

Mo—Clark's Adm'r v Hannibal &

St J R Co, 36 Mo 203

NC—Waters v Greenleaf-Johnson

Lumber Co, 20 SE 718, 115 NC

648

Ohio—Hughes v Cincinnati & S R

Co, 39 Ohio St 461

Vt—Clark v Vermont & C R Co,

28 Vt 103

82. Cal—Snow v Marian Realty

Co, 299 P 720, 212 Cal 622

Ky—Jennings v Vincent's Adm'r,

145 SW 2d 537, 284 Ky 614

NY—Whitehill v Hartman Const

Co, 149 NYS 518, 87 Misc 134,

affirmed 153 NYS 1149, 168 App

Div 928

Pa—Tallarico v. Autenreith, 31 A

2d 906, 347 Pa 170, 146 ALR

520—Doer v Rand's, 16 A 2d 377,

340 Pa 183

Tex—Allen v. Republic Bldg Co,

Civ App, 84 SW 2d 606.

39 C.J. p 1326 note 19

Trover and conversion not main-

tainable against builder whose archi-

tect, independent contractor, used

another architect's ideas.—Mackay v

Benjamin Franklin Realty & Holding

Co, 185 A 613, 288 Pa 207, 50 AL

R 1164.

83. NY—Dorn v Snare & Triest

Co, 114 NYS 820, 62 Misc 269

84. Okl—Oklahoma City v Cople,

105 P 2d 209, 187 Okl 600

85. Ariz—Alhberg v Louise Mining

& Development Co., 241 P 510, 29

Ariz 818.

86. Ky—Slusher v. Asher, 61 SW

2d 1057, 350 Ky 83

Ga—Lee v Atlanta, B. & A R Co,

72 SE 165, 9 Ga App 752

Ill—Orange v. Pitcairn, 280 Ill App

566.

Kan—Kansas Cent R Co v Fitz-

simmons, 18 Kan 34

Ky—Rumans v Keller & Brady Co,

133 SW 980, 141 Ky 827

Neb—Hitte v Republican Valley E

Co, 28 NW 284, 19 Neb 620

NC—Smith v South & W R Co,

66 SE 435, 151 NC 479

Ohio—Hughes v Cincinnati & S R

Co, 39 Ohio St 461

Tex—Cunningham v International

R Co, 51 Tex 503, 32 Am R 632

Va—Bibb's Adm'r v Norfolk & W

R Co, 14 SE 163, 37 Va 711.

39 C.J. p 1327 note 31

87. Ark—W H Moore Lumber Co

v Starrett, 279 SW 4, 170 Ark 92

Ga—Massee & Felton Lumber Co v

Macon Cooperage Co, 162 SE 396,

44 Ga App 590

Ky—Yellow Poplar Lumber Co v

Adkins, 299 SW 963, 231 Ky 794

La—Beck v Dubach Lumber Co,

131 So 198, 171 La 423

Miss—Hutchinson-Moore Lumber

Co v Pittman, 122 So 191, 154

Miss 1

Or—Carter v La Dee Logging Co,

20 P 2d 1086, 142 Or 439

39 C.J. p 1327 note 30

88. Minn—Mix v City of Minne-

apolis, 18 NW 2d 130, 219 Minn

389.

39 C.J. p 1326 note 21

89. Ky—General Refractories Co

v Mozier, 30 SW 2d 952, 235 Ky

252—Eustler v Huff, 299 SW

1070, 232 Ky 48—Glover's Adm'r

v James, 290 SW 344, 217 Ky

573

39 C.J. p 1326 note 22

90. La—Giacona v Orleans Ice

Mfg Co, 5 La App 259

NY—Farrell v Utica Lincoln Real-

ty Corporation, 25 NYS 2d 847,

175 Misc 695, appeal denied 27 N

YS 2d 474, 261 App Div 1095

39 C.J. p 1326 note 23

91. NY—Levy v. Socony-Vacuum

Oil Co, 24 NYS 2d 641, 260 App

Div 1044

Ohio—Maxwell v Chew Pub. Co.,

App, 61 NE 2d 816

92. Mass—Pickett v Waldorf Sys-

tem, Inc, 136 NE 64, 241 Mass

469, 23 ALR 1014.

93. US—Pittsburgh Valve Foundry

& Construction Co v Gallagher,

CCA Ohio, 32 F 2d 436

Ky—Structure Oil Co v Chambers,

270 SW 458, 203 Ky 30.

NY—Conti v Oppenheimer Casing

Co, 142 NE 272, 236 NY 532—

Chapin-Owen Co v Yeoman, 250

NYS 95, 232 App Div 560, motion

denied 253 NYS 568, 233

App Div 492

94. NY—McLoughlin v New York

Lighterage & Transportation Co,

27 NYS 248, 7 Misc 119

95. Cal—Bennett v Truebody, 6 P

329, 66 Cal 509, 66 Am R 117.

96. Me—McCarthy v Second Par-

ish in Town of Portland, 71 Me

318, 36 Am R 320

97. Tex—Beil v San Antonio

Amusement Co, Civ App, 69 SW

2d 833, error refused

Vt—Jourdenais v Hayden, 158 A

664, 104 Vt 215

98. Okl—Riverland Oil Co v Chis-

holm, 287 P 379, 143 Okl 120

99. Tex—Lone Star Gas Co v Kel-

ly, Com App, 46 SW 2d 656

1. Ky—Courier Journal & Louis-

ville Times Co v Akers, 175 SW

2d 360, 295 Ky 745

La—Turner v Item Co, 6 La App

270

Tex—Carter Publications v Davis,

Civ App, 63 SW 2d 640, error re-

fused

2. Miss—Shell Petroleum Corpora-

tion v Linham, 163 So 839

NC—Hudson v Gulf Oil Co., 2 SE

2d 26, 215 NC 423

3. Md—Surry Lumber Co. v Zis-

sett, 133 A 458, 150 Md 494.

4. US—Dwyer v National SS Co,

CCNY, 4 F 493, 17 Blatchf 472

39 C.J. p 1327 note 29

5. Okl—Branham v. International

Supply Co, 27 P 2d 354, 166 Okl

273

SC—Googe v Speaks, 9 SE 2d 439,

194 SC 206

39 C.J. p 1327 note 33

6. Mass—Berman v. Greenburg, 50

NE 2d 773, 314 Mass 556

7. Ala—Lynch Jewelry Co v. Bass,

124 So 222, 220 Ala 98

8. NY—Engel v Eureka Club, 32

NE 1052, 137 NY 100, 33 Am SR

692

9. Ala—Massey v. Oates, 39 So

142, 143 Ala 248

Mass—Kunan v. De Matteo, 32 NE

2d 618, 308 Mass 427.

§ 585. Circumstances under Which Contractee Liable

The well-recognized exceptions to the rule exempting a contractee from liability to a third person for injury or damage resulting from the wrongful or negligent manner in which work is done by an independent contractor or his servants are discussed *infra* §§ 586-598

Examine Pocket Parts for later cases

§ 586. — Negligence of Contractee

A person is liable for injuries to third persons resulting from his own negligence, even in connection with work being done for him by an independent contractor and although the contractor is also negligent.

Notwithstanding work is being done by an independent contractor, the contractee will be liable for injuries resulting from his own negligence to third persons,¹⁰ or to the independent contractor himself, as discussed *infra* § 607, or to the servants of the latter, *infra* § 601. So, where a part of the work is done by employees of the contractee, the failure to guard the work done by such employees renders the contractee liable, although other work in connection therewith was performed by an independent

contractor¹¹

Concurrent negligence. The rule, discussed *supra* § 584, exempting the contractee from liability for injuries resulting from the negligence of an independent contractor or his servants cannot be so extended as to relieve the contractee from liability for injuries caused by his own negligence, even though the contractor may also be negligent.¹²

§ 587. — Injury Necessarily Resulting from Work

The employer is liable for the act of his independent contractor which causes an injury where the act is one which the contractor was employed to do and the injury results, not from the manner of doing the work, but from the doing of it at all

Where the act which causes the injury is one which the contractor was employed to do and the injury results, not from the manner of doing the work, but from the doing of it at all, the employer is liable for the acts of his independent contractor¹³. This is true where the work involves the commission of a trespass¹⁴ or where the work contracted for, as distinguished from the method of doing it, itself creates a nuisance¹⁵. On the other hand, the contractee is not liable under this exception where the

10. Ark—Humphries v Kendall, 111 S W 2d 492, 195 Ark 45
Ind—City of Gary v Bontrager Const Co, 47 N E 2d 182, 113 Ind App 151

Ky—Yellow Creek Coal Co v Lawson, 16 S W 2d 1043, 229 Ky 245
Mass—Ferguson v Ashkenazy, 29 N E 2d 828, 307 Mass 197,
N Y—Roper v Ulster County Agricultural Society, 120 N Y S 644, 136 App Div 97

N C—State Highway & Public Works Commission v Diamond S S Transp Corp, 38 S E 2d 214, 226 N C 371

39 C J p 1328 note 44

11. Ohio—Hawyer v Whalen, 29 N E 1049, 49 Ohio St 69, 14 L R A 628

39 C J p 1341 note 35

12. U S—Corpus Juris quoted in The W D Anderson, D C Pa., 17 F Supp 754 756, affirmed C.C.A., 94 F 2d 877, certiorari denied Atlantic Refining Co v Smith, 58 S Ct 764, 303 U.S. 658, 82 L Ed 1117

Ark—Humphries v Kendall, 111 S W 2d 492, 195 Ark 45

N.Y.—Platt v Erie County Agricultural Society, 149 N Y S 520, 164 App Div 99

39 C J p 1328 note 49, p 1341 note 84 [a]

Joint wrongful act of contractor and contractee see *infra* § 597

13. U.S.—Gulf Refining Co v. Mark

C Walker & Son Co, C.C.A. Tenn., 124 F 3d 420, certiorari denied 62 S Ct 1268, 316 U S 682, 86 L Ed 1755—Charles Weaver & Co v Gulf Refining Co, C.C.A. Tenn., 124 F 2d 420, certiorari denied Gulf Refining Co v Charles Weaver & Co, 62 S Ct 1269, 316 U S 622, 86 L Ed 1755

La—Marbury v Louisiana Highway Commission, App., 153 So 590
Mont—Neyman v Pincus, 267 P. 805, 82 Mont 467

N Y—Halligan v Fitzpatrick, 276 N Y S 679, 243 App Div 353

Pa—Weldon v Steiner, 10 A 2d 19, 138 Pa Super. 66—Baier v Glen Alden Coal Co, 200 A 190, 131 Pa Super 309, affirmed 3 A 2d 349, 333 Pa 561—Corpus Juris quoted in Silveus v Grossman, 156 A 716, 717, 103 Pa Super 365, affirmed 161 A 363, 307 Pa 272—Foeler v New York Short Line R Co, 40 Pa Super 7

R I—Corpus Juris cited in Blount v Tow Fong, 138 A 52, 63, 48 R I 453

Tex—Moore v Roberts, Civ App., 93 S W 2d 236, error refused
39 C.J. p 1328 note 51.

Work necessarily operating to injure or destroy property of third person

D C—Shapiro v. Vautier, Mun App., 36 A 2d 349

39 C.J. p 1328 note 51 [b].

Manner and method of work contemplated by contract

Employer is liable where injury is direct or natural result of the manner and method of doing the work contemplated and directed by the contract

Ohio—Maxwell v Chew Pub Co., App., 61 N E 2d 816

Tex—McDaniel Bros v Wilson, Civ App., 70 S W 2d 618, error refused.

14. Ky—Elizabeth, Lexington & Big Sandy R Co v Prewitt, 8 Ky Op 654

Tex—McDaniel Bros v Wilson, Civ App., 70 S W 2d 618, error refused
39 C J p 1329 note 55

Damages increased by contractor's negligence

Where flooding lands is natural consequence of work contracted for, employer is liable for all damages inflicted, although the amount of the damage was increased by the negligence of the independent contractor.

—Stout Lumber Co v Reynolds, 1 S W 2d 77, 175 Ark 938.

15. U S—Gulf Refining Co v Mark C Walker & Son Co, C.C.A. Tenn., 124 F 3d 420, certiorari denied 62 S Ct 1268, 316 U.S. 686, 86 L Ed 1755—Charles Weaver & Co. v. Gulf Refining Co, C.C.A. Tenn., 124 F 2d 420, certiorari denied Gulf Refining Co v. Charles Weaver and Co, 62 S Ct 1269, 316 U.S. 622, 86 L Ed. 1756.

injury does not naturally and necessarily result from the work contracted for,¹⁶ as where the work contracted for does not call for, or necessarily involve, a trespass,¹⁷ or, when done in the ordinary manner and according to the contract, does not naturally create a nuisance¹⁸

§ 588. — Injuries Caused by Unlawful Work

The contractee will be liable for injuries resulting from the performance of unlawful acts contracted to be done.

If the acts contracted to be done are in themselves unlawful, the contractee will be liable for injuries resulting from the performance of such acts¹⁹ However, this rule is subject to the limitation that the doing of the unlawful act must be the proximate cause of the injury;²⁰ and it is not applicable to an act which is not unlawful²¹

DC—Shapiro v Vautier, Mun App, 36 A 2d 849

Ind—Stewart v Huff, 14 NE 2d 832, 105 Ind App 447—Scott Const Co v Cobb, 159 NE 763, 86 Ind App 699.

Ky—Jennings v Vincent's Adm'x, 145 S W 2d 537, 284 Ky 614

Mass—Rasimas v Swan, 67 NE 2d 662, 320 Mass 60

NJ—Levine v Bochiario, 52 A 2d 528, 135 NJ Law 423

Tex—Moore v. Roberts, Civ App, 93 S W 2d 236, error refused

Va—Epperson v De Jarnette, 180 S E 412, 164 Va. 482

Wis—Medley v Trenton Inv Co, 238 NW 713, 205 Wis 80, 76 A L R 1250

39 C J p 1329 note 59

Nuisance on street or sidewalk

(1) A store owner by employing an independent contractor is not relieved of liability for the creation and maintenance of a nuisance in the public street—Pitzer v Sears, Roebuck & Co., 31 NE 2d 450, 66 Ohio App 35

(2) Where contract for repair and remodeling of store front cannot be performed except under right of owner who retains right of access, such owner who causes sidewalk in front of premises to be obstructed by scaffolding constructed by independent contractor is bound, at his peril, to see that a nuisance is not created by scaffolding, and, where the structure is a nuisance because erected at a place other than the one authorized by a permit, abutting owner is not absolved from liability for injuries sustained by pedestrian who tripped over portion of scaffold by fact that contractor acted as independent contractor in erecting and supervising such structure.—Whit-

taker v Town of Brookline, 60 NE 2d 85, 318 Mass 19

Filling station

Corporation employing person to operate filling station for it is liable for results of his operation thereof in ordinary manner, even though he controlled means for operating it—Greene v Spinning, Mo App, 48 S W. 2d 61

16. Okl—Tankersley v. Webster, 243 P 745, 116 Okl 203

39 C J p 1329 note 53

Contemplated manner of doing work

The contractee is not liable where the injury is not the direct or natural result of the doing of the work in the manner contemplated and stipulated by the contract

Ohio—Maxwell v Chew Pub Co, App, 61 NE 2d 816

Utah—Gleason v Salt Lake City, 74 P 2d 1225, 94 Utah 1

39 C J p 1329 note 53 [a]

17. Ky—Harris v Stone, 77 S W 2d 18, 256 Ky. 737—Yellow Poplar Lumber Co v Adkins, 299 S.W. 963, 221 Ky 794.

39 C J. p 1329 note 56.

18. Ga.—Louisville & N R Co v Hughes, 67 SE 542, 134 Ga. 75.

Ky—Harris v Stone, 77 S W 2d 18, 256 Ky. 737—Yellow Poplar Lumber Co v Adkins, 299 S.W. 963, 221 Ky 794

39 C J. p 1330 note 60.

Repairing oil burner

NJ—Levine v Bochiario, 52 A 2d 528, 135 NJ Law 423

Stretching of wire across highway not required by contract

Ky.—Slusher v Asher, 61 S W.2d 1057, 250 Ky 68

19. Cal—Friedman v Pacific Outdoor Advertising Co, 170 P 2d 67, 74 Cal App 2d 948

§ 589. — Injuries Caused by Defective Plans or Specifications

If injury results from work done by an independent contractor in accordance with defective plans and specifications furnished by the contractee, the latter is liable for the injury except where he employed a competent and skillful architect to furnish the plans and specifications, or used ordinary care in selecting an architect for this purpose, and did not know of, and by ordinary care could not have known of, the defects in the plans and specifications.

As a general rule, if injury results from work done by an independent contractor in accordance with defective plans or specifications furnished by the contractee, the latter will be liable for the injury.²² However, if the contractee employs a competent and skillful architect to furnish the plans and specifications²³ or uses ordinary care in selection of an architect for this purpose,²⁴ he will not be liable by reason of defects in the plans and speci-

Ind—B A. Kipp Co v Waldon, App, 75 NE 2d 675—Stewart v Huff, 14 NE 2d 322, 105 Ind App. 447—Scott Const Co v Cobb, 159 NE 763, 86 Ind App 699

Iowa—Hough v Central States Freight Service, 269 NW. 1, 223 Iowa 548

Mo—Mattan v Hoover Co, 166 S W 2d 557, 350 Mo 506

Okl—Marion Machine, Foundry & Supply Co v Duncan, 101 P 2d 813, 187 Okl 160

Tex—Moore v Roberts, Civ App, 93 S W 2d 236, error refused—Gulf, C & S F Ry Co v Stephenson, Civ App, 273 S W 294

Wash—Amann v City of Tacoma, 16 P 2d 601, 170 Wash 296

39 C J p 1330 note 61

20. Ind—B A Kipp Co v Waldon, App, 75 NE 2d 675

Me—Wilbur v White, 66 A 657, 98 Me 191

Lack of permit required by ordinance

Vt—Jourdenais v Hayden, 158 A 664, 104 Vt 215.

21. Vt—Jourdenais v Hayden, supra

Installation of electric sign

Vt—Jourdenais v Hayden, supra

22. NJ—Tooker v Lonky, 147 A. 445, 106 NJ Law 110

Wash—Amann v City of Tacoma, 16 P 2d 601, 170 Wash 296

39 C J. p 1330 note 63

23. NY—Burke v. Ireland, 50 N.Y. S. 369, 26 App Div 487.

Tex—Hamblen v. Mohr, Civ App, 171 S.W.2d 188.

24. Ky—Jennings v. Vincent's Adm'x, 145 S.W.2d 537, 284 Ky. 614.

Tex—Hamblen v. Mohr, Civ App,

cations of which he did not know and of which by ordinary care he could not have known. In these circumstances, the contractee is entitled to rely on the safety of the plans until the care attributable to the ordinarily careful man likewise circumstanced suggests a suspension of that reliance,²⁵ but, if he is told of defects in the plans made by a competent architect employed by him, it is negligence for him to proceed with the erection of the building called for by the plans,²⁶ and where the contractor is employed only to achieve a result, and the plan is his own, the employer will be liable where the plan is known by him to be hazardous or injurious to third persons.²⁷

Where the injury complained of was not caused by the defective plans furnished, there can be no recovery on that ground.²⁸

Where the work can be done by reasonably careful persons, using such precaution as the law enjoins in the doing of the work, that is to say, if the work contemplated would not, when properly done,

necessarily cause injury to third persons, no right of action accrues because of the plans alone.²⁹

§ 590. — Work Dangerous unless Precautions Observed

a. In general

b. What work is inherently dangerous

a. In General

Liability cannot be evaded by employing an independent contractor to do work which is inherently or intrinsically dangerous unless proper precautions are taken.

A very important exception to the general rule, discussed supra § 584, exempting the contractee from liability for injuries caused by the negligence of an independent contractor or his servants is that, where the work is dangerous of itself, or, as often termed, is "inherently" or "intrinsically" dangerous, unless proper precautions are taken, liability cannot be evaded by employing an independent contractor to do it.³⁰ Stated in another way, where, in the

171 S W 2d 168—White v. Green, Civ App, 32 S W 329

25. Ala.—Looker v Gulf Coast Fair, 81 So 882, 203 Ala. 42

26. Ala.—Looker v Gulf Coast Fair, supra

27. Cal.—Luthringer v. Moore, App, 181 P 2d 89

28. Ark.—Arkansas Land & Lumber Co v Secrist, 177 S W 37, 118 Ark 661

29. Mo.—McGrath v St. Louis, 114 S W 611, 215 Mo 191

30. Ariz.—Corpus Juris cited in S A Gerrard Co v Fricker, 27 P 2d 678, 680, 42 Ariz 603

Ark.—Hammond Ranch Corporation v Dodson, 136 S W 2d 484, 199 Ark 846

Conn.—Jacob v Mosler Safe Co, 14 A 2d 786, 127 Conn 186—Campus v McElligott, 187 A 29, 122 Conn 14

Del.—Corpus Juris cited in Langrell v Harrington, 41 A 2d 461, 463, 3 Terry 547

Ill.—Corpus Juris quoted in Haas v. Herdman, 1 N E 2d 598, 571, 284 Ill App. 103—Van Auker v. Barr, 270 Ill App. 150

Ind.—Stewart v Huff, 14 N E 2d 322, 105 Ind App 447—Scott Const. Co v Cobb, 159 N E 763, 86 Ind App. 699

La.—Corpus Juris quoted in Montgomery v Gulf Refining Co of Louisiana, 121 So 578, 581, 168 La 73

Mass.—Rasimas v. Swan, 67 N E 2d 662, 320 Mass 60—Ferguson v Ashkenazy, 29 N E 2d 838, 307 Mass 197.

Mich.—Corpus Juris cited in Wat-

kins v Gabriel Steel Co, 245 N W 801, 260 Mich 692

Mo.—Stubbsfield v Federal Reserve Bank of St. Louis, 304 S W 2d 718 —Mattan v Hoover Co, 166 S W 2d 557, 350 Mo 506—Corpus Juris quoted in Mallory v Louisiana Pure Ice & Supply Co, 6 S W 2d 617, 624, 320 Mo 95—Stocker v City of Richmond Heights, 132 S W 2d 1116, 235 Mo App 277.

Mont.—Ulmen v Schwieger, 12 P 2d 856, 92 Mont 331.

NY—Midolla v State, 46 N Y S 2d 345

NC—Evans v Elliott, 17 S E 2d 135, 220 NC 253—Peters v Carolina Cotton & Woolen Mills, 155 S E 867, 199 NC 753.

Ohio—Massachusetts Bonding & Insurance Co v Dingle-Clark Co, 52 N E 2d 340, 142 Ohio St 346—Visconti v Staufert, 186 N E 329, 45 Ohio App 112—Albers v. Great Central Transport Corporation, 14 Ohio Supp 25

Okl.—Oklahoma City v Caple, 105 P 2d 209, 187 Okl 600—Marion Machine, Foundry & Supply Co v Duncan, 101 P 2d 813, 187 Okl 160.

RI—Corpus Juris cited in Blount v Tow Fong, 138 A. 53, 53, 48 RI 453

Tex.—Hamblen v. Mohr, Civ App, 171 S W 2d 168—L. E. Whitham Const Co. v Wilkins, Civ App, 90 S W 2d 816—Montgomery v Garza, Civ App, 290 S W. 210

Utah.—Gleason v Salt Lake City, 74 P 2d 1225, 94 Utah 1.

Wash.—Amann v City of Tacoma, 16 P 2d 601, 170 Wash. 296.

39 C J p 1331 note 71.

Reasonably expected inherent danger

Generally, if danger is inherent in work contracted to be done and might reasonably be expected, employer is liable for contractor's negligence—Wright v Tudor City Twelfth Unit, 12 N E 2d 307, 276 N Y 803, 115 A L R 963—Boylhart v. Di Marco & Reimann, 200 N E 793, 270 N Y 217

Readily foreseeable inherent danger
NY—May v 11½ East 49 St. Co., 54 N Y S 2d 860, 269 App Div 180, affirmed 68 N E 2d 881, 296 N Y. 599

Imputation of contractor's negligence to employer

(1) If work done by an independent contractor has in it an inherent element of danger, and through negligence of the contractor proper provision has not been taken to guard against such danger, such negligence is imputed to the employer—American Pacific Whaling Co v. Kristensen, C C A Wash., 98 F 2d 17.

(2) Where there is such an imputation of negligence, it is immaterial that the contractee was not actively negligent—Randle v Naugle, Tex. Civ App, 299 S W 297

Owner of building abutting on highway is jointly liable with independent contractors for their negligence, where work is inherently dangerous to traveling public—Finkelstein v Majestic Realty Corporation, 224 N W. 743, 198 Wis. 537.

Matters not affecting exception

(1) The application of the exception is not restricted to work which may involve serious bodily harm or

natural course of things, injuries to third persons must be expected to arise unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief³¹ and cannot relieve himself of his responsibility by employing some one else, whether it is the contractor employed to do the work from which the danger arises³² or some independent person,³³ to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. The taking of these precautions, it is said, is a nondelegable duty owing to third persons who may sustain injuries from the work,³⁴ and the contractor is considered an agent

or servant for whose act his employer is responsible³⁵

While this exception is applicable where the work will necessarily be dangerous³⁶ or result in injury³⁷ unless adequate precautions are taken, it is not essential that injury be a necessary result of the work,³⁸ it is sufficient that injurious consequences to others will probably³⁹ or likely⁴⁰ attend the doing of the work, or, in the natural course of events, may reasonably be anticipated,⁴¹ unless proper preventive measures are taken. However, the work must be such as will probably, and not which merely may, cause injury if proper precautions are not taken.⁴² If the work is of such a nature that it

death—Nashua Gummed & Coated Paper Co. v Noyes Buick Co., 41 A 2d 920, 93 NH 348

(2) The liability of the employer is not affected by the fact that the precautions are usually taken or that independent contractor explicitly agrees to provide them—Evans v Elliott, 17 SE 2d 125, 220 NC 353

Rule does not obtain in Pennsylvania

Pa—Silveus v Grossman, 161 A 362, 307 Pa 273, distinguishing Foehr v New York Short Line R Co., 40 Pa Super 7—Baier v Glen Alden Coal Co., 200 A 190, 131 Pa Super 309, affirmed 3 A 2d 849, 333 Pa 561

31. Del—Langrell v Harrington, 41 A 2d 461, 3 Terry 547

Mo—Stubblefield v Federal Reserve Bank of St Louis, 204 SW 2d 718—Corpus Juris quoted in Mallory v Louisiana Pure Ice & Supply Co., 6 SW 2d 617, 624, 320 Mo 95

NC—Evans v Elliott, 17 SE 2d 125, 220 NC 353

Ohio—Richman Bros Co v Miller, 3 NE 2d 860, 131 Ohio St 424

Va—Epperson v De Jarnette, 180 SE 412, 164 Va 482

39 C.J. p 1332 note 73

32. Del—Langrell v Harrington, 41 A 2d 461, 3 Terry 547

Mo—Corpus Juris quoted in Mallory v Louisiana Pure Ice & Supply Co., 6 SW 2d 617, 624, 320 Mo 95

NC—Evans v Elliott, 17 SE 2d 125, 220 NC 353

Ohio—Richman Bros Co v Miller, 3 NE 2d 860, 131 Ohio St 424

Va—Epperson v De Jarnette, 180 SE 412, 164 Va 482

39 C.J. p 1332 note 73

33. Del—Langrell v Harrington, 41 A 2d 461, 3 Terry 547

Mo—Corpus Juris quoted in Mallory v Louisiana Pure Ice & Supply Co., 6 SW 2d 617, 624, 320 Mo 95

NC—Evans v Elliott, 17 SE 2d 125, 220 NC 353

Ohio—Richman Bros Co v Miller, 3 NE 2d 860, 131 Ohio St 424

34. US—Holt v Texas-New Mexico Pipeline Co., CCA Tex., 145 F 2d 862, certiorari denied 65 SCt 1570, 325 US 879, 89 LEd 1996

Ill—Hanneken v Eichler, App., 75 NE 2d 214—Andronick v Daniszewski, 268 Ill App 543

Ky—Nashville Bridge Co v Marsh, 279 SW 1099, 213 Ky 728

Mo—Corpus Juris quoted in Mallory v Louisiana Pure Ice & Supply Co., 6 SW 2d 617, 624, 320 Mo 95—Galentine v Borglum, 150 SW 2d 1088, 235 Mo App 1141

RI—Corpus Juris cited in Blount v Tow Fong, 138 A 52, 53, 48 RI 453

Tex—Loyd v Herrington, 182 SW 2d 1003, 143 Tex 135—Missouri Valley Bridge & Iron Co v Ballard, 116 SW 93, 53 Tex Civ App 110

Nondelegable duties generally see infra § 591

35. US—Doll & Sons v Ribetti, Pa., 203 F 593, 121 CCA 621.

Ariz—S A Gerrard Co v Fricker, 27 P 2d 678, 42 Ariz 508

Mo—Corpus Juris quoted in Mallory v Louisiana Pure Ice & Supply Co., 6 SW 2d 617, 624, 320 Mo 95

36. Mich—Olsh v Katz, 207 NW 892, 234 Mich 112

Mo—St Paul & Kansas City Short Line R Co v U. S Fidelity & Guaranty Co., 105 SW 2d 14, 231 Mo App 613

NC—Barnhardt v City of Concord, 196 SE 310, 213 NC 364

37. Mass—Kunan v De Matteo, 32 NE 2d 413, 308 Mass 427—Herrick v City of Springfield, 192 NE 636, 288 Mass 212

Wash—Thompson-Cadillac Co v Matthews, 23 P 2d 389, 173 Wash 353—Van Slyke Warehouse Co v Vilter Mfg Co., 291 P 1103, 158 Wash 659

38. Mo—Corpus Juris quoted in Mallory v Louisiana Pure Ice &

Supply Co., 6 SW 2d 617, 624, 320 Mo 95

39 C.J. p 1332 note 77

39. Conn—Millstone Corp v Laurel Oil Co., 41 A 2d 711, 131 Conn 636—Jacob v Mosler Safe Co., 14 A 2d 736, 137 Conn 186—Welz v Manzillo, 155 A 841, 118 Conn 674

Ind—Stewart v Huff, 14 NE 2d 322, 105 Ind App 447—Scott Const Co v Cobb, 159 NE 763, 86 Ind App 699

Mo—Corpus Juris quoted in Mallory v Louisiana Pure Ice & Supply Co., 6 SW 2d 617, 624, 320 Mo 95

Mont—Ulmen v Schwieger, 12 P 2d 856, 92 Mont 331

NH—Nashua Gummed & Coated Paper Co v Noyes Buick Co., 41 A 2d 920, 93 NH 348

Wash—Corpus Juris cited in H W Van Slyke Warehouse Co v Vilter Mfg Co., 291 P 1103, 1105, 158 Wash 659

W Va—Trump v Bluefield Waterworks & Improvement Co., 139 SE 809, 99 W Va 425

39 C.J. p 1332 note 78

40. Neb—Wilson v Thayer County Agricultural Soc., 213 NW 966, 115 Neb 579, 52 ALR 1393

NC—Evans v Elliott, 17 SE 2d 125, 220 NC 353

Work likely to cause danger

US—American Pacific Whaling Co v Kristensen, CCA Wash., 93 F 2d 17

Ohio—Richman Bros Co v Miller, 3 NE 2d 860, 131 Ohio St 424—Maxwell v Chew Pub Co., App., 61 NE 2d 816

41. Wash—State v Williams, 120 P.2d 496, 12 Wash 2d 1

42. Ky—Corpus Juris cited in Jennings v Vincent's Adm'x, 145 SW 2d 537, 541, 384 Ky 614

Mo—Corpus Juris quoted in Mallory v Louisiana Pure Ice & Supply Co., 6 SW 2d 617, 624, 320 Mo 95

39 C.J. p 1332 note 79.

can be done without probable injury to anyone except in the event of negligence in the manner of doing it, no liability attaches to the employer⁴³

This exception is based on the unusual danger to third persons which inheres in the mere performance of the work itself aside from any negligence on the part of the contractor or his servants,⁴⁴ and the reason for the imposition of liability is the duty of due consideration which one in a civilized community owes to his fellows and to the public, which duty precludes the ordering of that which if done will be inherently dangerous.⁴⁵

A substantial difference between the general rule considered supra § 584 and the exception now under consideration is that in the one case the work is of such character, that, if properly done, no injurious consequences can arise, and in the other the work is of a character from which damages are likely to arise unless precautionary measures are adopted⁴⁶

Premises dangerous to invitees Where the owner, lessee, or possessor of premises under his control employs an independent contractor to do

work upon them, which from its nature is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, lessee, or possessor, such owner, lessee, or possessor is not relieved by reason of the contract from the obligation of seeing that due care is used to protect such persons⁴⁷

b. What Work Is Inherently Dangerous

- (1) In general
- (2) Obstructions, excavations, or openings in public thoroughfare

(1) In General

Generally work is inherently dangerous, within the meaning of the exception, where there is a recognizable and substantial danger inherent in it

The exception does not apply where the work in question or the instrumentality for doing it is not inherently dangerous and, therefore, the facts do not bring the case within the exception⁴⁸ Where danger is not naturally expected to result in the use of a substance or instrumentality, it cannot be said to be inherently dangerous and the owner

43. Ky—*Corpus Juris* cited in *Jennings v Vincent's Adm'x*, 145 S.W. 2d 537, 541, 284 Ky 614

Mo—*Corpus Juris* quoted in *Mallory v Louisiana Pure Ice & Supply Co.*, 6 S.W.2d 617, 624, 320 Mo 95 39 C.J. p 1332 note 80

Casual or collateral negligence

(1) No recovery may be allowed against employer or contractor for injury resulting entirely from independent contractor's or his employees' fault purely collateral to work

US—*Holt v Texas-New Mexico Pipeline Co.*, CCA Tex., 145 F.2d 862, certiorari denied 65 S.Ct. 1570, 325 U.S. 879, 89 L.Ed. 1996

Tex—*Loyd v Herrington*, 182 S.W. 2d 1008, 143 Tex 186 39 C.J. p 1332 note 80 [a]

(2) The employer is not liable if danger arises from unforeseeable negligence collateral to the work—*Wright v Tudor City Twelfth Unit*, 12 N.E.2d 307, 276 N.Y. 303, 115 A.L.R. 962—*Boylhart v Di Marco & Reimann*, 200 N.E. 793, 270 N.Y. 317

(3) Negligence in performance of operative details of work, as distinguished from negligence based on danger created by nature of work itself, is collateral negligence, for which the contractor is not liable—*May v 11½ East 49th St Co.*, 54 N.Y.S.2d 860, 269 App.Div. 180, affirmed 68 N.E.2d 881, 296 N.Y. 599.

(4) Where lease provided that landlord should repair heating plant and tenant should do inside painting,

painter employed by tenant could not recover from landlord for negligence of servants of independent contractor engaged by landlord to repair heating equipment, in leaving an unguarded opening through which painter fell, since such negligence arose casually out of the mere performance of the work and was not directly connected with landlord's obligation to have the work done—*Weinfeld v Kaplan*, 26 N.E.2d 287, 282 N.Y. 348, reargument denied 27 N.E.2d 209, 283 N.Y. 304

44. La—*Corpus Juris* quoted in *Montgomery v. Gulf Refining Co. of Louisiana*, 121 So. 578, 581, 168 La. 73 39 C.J. p 1333 note 81

45. La—*Corpus Juris* quoted in *Montgomery v. Gulf Refining Co. of Louisiana*, 121 So. 578, 581, 168 La. 73 39 C.J. p 1333 note 82

46. Mo—*Corpus Juris* cited in *Mallory v Louisiana Pure Ice & Supply Co.*, 6 S.W.2d 617, 624, 320 Mo 95

Ohio—*Richman Bros Co v Miller*, 3 N.E.2d 360, 131 Ohio St. 424 39 C.J. p 1333 note 85

47. Ill—*Frost v Andes Candies*, 69 N.E.2d 732, 339 Ill.App. 535 Mass—*Levesque v Hildreth & Rogers Co.*, 177 N.E. 633, 276 Mass. 429—*Wilson v Norumbega Park Co.*, 176 N.E. 514, 275 Mass. 422, N.Y.—*Eisenberg v Irving Kemp, Inc.*, 11 N.Y.S.2d 449, 256 App.Div. 698.

Okl—*E. S. Billington Lumber Co v Cheatham*, 74 P.2d 120, 181 Okl. 403 39 C.J. p 1333 note 87

Supervision of appliances or methods

(1) A possessor of land who holds it open to the entry of the public for his business purposes is subject to liability to members of the public, entering for such purposes, for bodily harm caused to them by his failure to exercise a reasonably careful supervision of the appliances or methods of an independent contractor or concessionaire whom the possessor has employed or permitted to carry on upon the land an activity which is directly or indirectly connected with his business use thereof

Cal—*Basye v Craft's Golden State Shows*, 111 P.2d 746, 43 Cal.App. 2d 732

Pa—*Engstrom v. Huntley*, 26 A.2d 461, 345 Pa. 10

(2) This is true regardless of whether the invitees pay for admission or receive privilege of entry as gratuity from possessor—*Basye v Craft's Golden State Shows*, supra

48. Ky—*Jennings v Vincent's Adm'x*, 145 S.W.2d 537, 284 Ky. 614

N.Y.—*Fragiacomo v. 404-5 East 88 St Realty Corp.*, 58 N.Y.S.2d 109, 269 App.Div. 635—*Puchall v Emigrant Industrial Sav. Bank*, 32 N.Y.S.2d 153

Utah—*Gleason v. Salt Lake City*, 74 P.2d 1225, 94 Utah 1.

is not liable for injuries caused by the negligent use thereof by an independent contractor.⁴⁹ However, whether work of a given character is to be regarded as "necessarily," or "inherently," or "intrinsically" dangerous, or its performance "attended with danger to others," within the meaning of such terms when used in this connection, is often a matter as to which different opinions may be entertained,⁵⁰ and the courts have found no rule of universal application by which they may abstractly draw a line of classification in every case between work which is inherently dangerous and that which is not.⁵¹ The question is dependent on the facts of each case,⁵² and important factors to be understood and considered are the contemplated conditions under which the work is to be done and the known circumstances attending it.⁵³ The proper test, it has been said, is whether danger inheres in the performance of the work,⁵⁴ and it is sufficient if there is a recognizable and substantial danger inherent in the work,⁵⁵ even though a major hazard is not involved.⁵⁶ The test is not whether a man of ordinary prudence would have anticipated that the injury would have ensued from the work,⁵⁷ nor can mere liability to injury from doing the work be the test, since injuries may happen in any undertaking and many are attended with great danger if carelessly managed, although with proper

care they are not specially hazardous.⁵⁸

Work held inherently dangerous, within the exception, includes: Building of a brick wall abutting on a highway,⁵⁹ depositing an insecticide, consisting of a poisonous dust or spray, on a field,⁶⁰ erection of awnings as appurtenant to a building on a much frequented street in a populous city;⁶¹ fumigation of an apartment by gas,⁶² installation of doors on an elevator shaft where the elevator was kept running for the benefit of tenants,⁶³ propelling of gas through mains before the mains were thoroughly cemented together,⁶⁴ removing a decayed oil derrick,⁶⁵ and setting off fireworks.⁶⁶

Work held not inherently dangerous, within the exception, includes: Calcimining interior walls of a building,⁶⁷ constructing a reinforced concrete bridge over a city street,⁶⁸ constructing a telephone line,⁶⁹ construction of a culvert under railroad tracks,⁷⁰ cutting down trees in a forest;⁷¹ cutting walls with compressed air drills,⁷² disinfecting cars with a medicated creosote solution,⁷³ erection of a grandstand,⁷⁴ excavation preparatory to erection of a building,⁷⁵ fencing a railroad right of way,⁷⁶ floating logs downstream,⁷⁷ grading and improving a street,⁷⁸ installation of pipes in a building to carry water to the ground,⁷⁹ installation of a ventilator,⁸⁰ laying brick,⁸¹ laying a pipe line;⁸² level-

49. Ky—Jennings v Vincent's Adm'x, 145 S.W.2d 537, 284 Ky 614.

50. Mo.—Johnson v. J. I. Case Threshing Mach. Co., 182 S.W. 1089, 193 Mo. App. 198.

51. N.C.—Evans v Elliott, 17 S.E. 2d 125, 220 N.C. 253.

52. N.Y.—Wright v Tudor City Twelfth Unit, 13 N.E.2d 307, 276 N.Y. 303, 115 A.L.R. 962.

53. N.C.—Evans v Elliott, 17 S.E. 2d 125, 220 N.C. 253.

54. N.C.—Scales v Lewellyn, 90 S.E. 521, 172 N.C. 494.

55. N.C.—Evans v Elliott, 17 S.E. 2d 125, 220 N.C. 253.

56. N.C.—Evans v Elliott, *supra*.

57. N.C.—Scales v Lewellyn, 90 S.E. 521, 172 N.C. 494.

58. Kan.—Laffery v U.S. Gypsum Co., 111 P. 498, 83 Kan. 349, 45 L.R.A.N.S., 930, Ann. Cas. 1912A 590. N.C.—Vogh v. F. C. Geer Co., 88 S.E. 874, 171 N.C. 672.

59. Mass.—Jager v Adams, 128 Mass. 26, 25 Am.R. 7. 39 C.J. p. 1333 note 94.

60. Ariz.—S. A. Gerrard Co. v Fricker, 27 P.2d 678, 42 Ariz. 503. Cal.—Miles v. A. Arena & Co., 73 P.2d 1260, 28 Cal.App.2d 680.

Care in selection of contractor is no defense where no adequate measures were adopted to prevent plaintiff's property from being sprinkled with the poison—Pannella v Reilly, 23 N.E.2d 87, 304 Mass. 172.

61. Tenn.—McHarge v Newcomer, 100 S.W. 700, 117 Tenn. 595, 9 L.R.A.N.S., 298.

39 C.J. p. 1333 note 95.

62. Mass.—Ferguson v Ashkenazy, 29 N.E.2d 828, 307 Mass. 197.

63. N.Y.—Beaser v. Central Trust Co., 130 N.E. 577, 230 N.Y. 357, 23 A.L.R. 1081.

64. Ill.—Chicago Economic Fuel Gas Co. v Myers, 48 N.E. 66, 168 Ill. 139.

65. La.—Vinton Petroleum Co. v. L. Seiss Oil Syndicate, 139 So. 543, 19 La. App. 179.

66. R.I.—Sroka v Halliday, 97 A. 965, 39 R.I. 119.

39 C.J. p. 1333 note 98.

67. Ala.—Drennen Co. v. Jordan, 61 So. 938, 181 Ala. 570, 23 A.L.R. 981.

68. N.C.—Gadsden v. Craft, 92 S.E. 174, 173 N.C. 418.

69. Minn.—Vosbeck v Kellogg, 80 N.W. 957, 73 Minn. 176.

70. Ky.—Louisville & N. R. Co. v Smith, 119 S.W. 241, 134 Ky. 47.

71. N.C.—Young v Fosburg Lumber Co., 60 S.E. 654, 147 N.C. 26.

Instrumentalities used in cutting and removing timber are not intrinsically and inherently dangerous—Beck v Dubach Lumber Co., 131 So. 196, 171 La. 423.

72. Conn.—Jacob v Mosler Safe Co., 14 A.2d 736, 127 Conn. 186.

73. Tex.—Crow v McAdoo, Civ. App., 319 S.W. 241.

74. Ala.—Looker v Gulf Coast Fair, 81 So. 832, 203 Ala. 42.

75. Tex.—Dixon v Robinson, Civ. App., 276 S.W. 770.

76. Okl.—Missouri, K. & O. R. Co. v Ferguson, 96 P. 755, 21 Okl. 286. 39 C.J. p. 1334 note 9.

77. N.Y.—Pierrepont v. Loveless, 72 N.Y. 211.

78. Wash.—Seattle Lighting Co. v. Hawley, 103 P. 6, 51 Wash. 137.

79. N.Y.—Hyman v. Barrett, 121 N.E. 271, 224 N.Y. 436.

80. N.Y.—Schneider v. Leblang Realty Corporation, 288 N.Y.S. 348, 248 App. Div. 175.

81. Tex.—Allen v Republic Bldg. Co., Civ. App., 84 S.W.2d 606.

82. Tex.—Lone Star Gas Co. v Kelly, Com.App., 46 S.W.2d 656.

ing a ditch with picks and shovels,⁸³ making a cellar in a building waterproof,⁸⁴ piling pipe in a city street,⁸⁵ putting up⁸⁶ or taking down⁸⁷ signs on buildings; raising the roof of a brick building,⁸⁸ raising a party wall,⁸⁹ removal of a boiler from a truck,⁹⁰ removing wallpaper by use of a machine,⁹¹ repairing chimneys,⁹² rolling a wheelbarrow across a sidewalk or street for the purpose of removing discarded building material,⁹³ and steaming out a gasoline tank.⁹⁴

Construction or erection of a building ordinarily is not considered inherently dangerous,⁹⁵ but it is otherwise as to the construction of a building eight stories high, abutting a sidewalk on which there is heavy travel, without a protecting cover over the sidewalk.⁹⁶

Dynamiting may be inherently dangerous, in the absence of proper precaution, so as to render the contractee liable for injuries resulting therefrom,⁹⁷ as where large charges of dynamite are used to break up iron machinery within one hundred and fifty feet of a highway.⁹⁸ On the other hand, the use of dynamite may not be inherently dangerous under the facts of the case,⁹⁹ as where the work is done in a barren rural section¹ or where small dynamite charges are used in making a seismograph test not nearer than one hundred feet to buildings.²

Leaving soapy water on sidewalk. While it has been held that the washing of store windows is not within the exception, even though the washing is done in such manner that soapy water runs onto the sidewalk,³ it has also been held that cleaning hotel mats and runners with soap and water on the sidewalk of a busy street in a large city involves danger to pedestrians which a jury might find to be inherent in the work and readily foreseeable.⁴

Painting a sign extending over a sidewalk has been held to be within the exception,⁵ but it is otherwise as to painting the shutters of a house⁶ or painting the interior and exterior of a business building.⁷

Setting fires According to some decisions the burning over of land for the purpose of clearing it is inherently dangerous to other landowners, and the one whose land is being thus cleared cannot evade liability for injuries sustained by another landowner by reason of the fire escaping to his premises, although the work of clearing was done by an independent contractor.⁸ In other decisions, however, a contrary conclusion has been reached.⁹ There is also authority to the effect that whether acts of this character are inherently dangerous depends on the circumstances of the particular case.¹⁰ The matter is not controlled by a statute dealing with the setting of a fire by a hireling;¹¹ and the owner is not

83. US—Holt v Texas-New Mexico Pipeline Co, CCA Tex, 145 F 2d 862, certiorari denied 65 S Ct 1570, 325 US 879, 89 L Ed 1996.

84. NY—Maltbie v Bolting, 26 N. Y S 2d 903, 8 Misc 389.

85. Mo—O'Hara v Laclede Gas Light Co, 148 S.W. 2d 244, 244 Mo 395.

86. NY—McNulty v Ludwig, 109 NYS 708, 125 App Div. 291, 39 CJ p 1334 note 17.

Installing electric sign
Vt—Jourdenais v. Hayden, 158 A. 664, 104 Vt. 215.

87. Mo—Press v Penny, 145 S.W. 458, 242 Mo 98, 39 CJ p 1334 note 18.

88. Tex—Smith v Humphreyville, 104 S.W. 495, 47 Tex Civ App 140.

89. NY—Negus v. Becker, 38 NE 290, 143 NY 303, 42 Am SR 724, 25 LRA 667.

90. N.Y.—Marvin Briggs, Inc. v New York Public Library, Astor, Lenox and Tilden Foundations, 20 NYS 2d 977, 260 App Div 218.

91. Mass—Berman v Greenburg, 50 NE 2d 778, 314 Mass 556.

92. Mass—Boomer v Wilbur, 57 N. E 1004, 176 Mass. 482, 53 LRA 172.

93. Tex—Wilson v Crutcher, Civ App, 176 S.W. 625.

94. Conn—Millstone Corp v Laurel Oil Co, 41 A 2d 711, 131 Conn 636.

95. Ohio—Visconsi v Stauffert, 186 NE 829, 45 Ohio App 113.
Wash—Amann v City of Tacoma, 16 P 2d 601, 170 Wash 296, 39 CJ p 1334 note 7.

Block building
Tex—Allen v Republic Bldg. Co., Civ App, 84 S.W. 2d 506.

Department store building
Tex—Hamblen v Mohr, Civ App, 171 S.W. 2d 168.

Warehouse
NC—Peters v Carolina Cotton & Woolen Mills, 155 SE 867, 199 N C 753.

96. Mo—Neal v 12th & Grand Ave Bldg Co, 70 S.W. 2d 186, 238 Mo App 536.

97. Ind—Scott Const Co v Cobb, 159 NE 782, 86 Ind App. 699. *Blasting see Explosives* § 8 e.

98. Ind—Falender v Blackwell, 79 NE 393, 39 Ind App 121.

99. Wis—Kolb v Hayes, 215 N.W. 578, 194 Wis 40.

1. US—Holt v Texas-New Mexico Pipeline Co, CCA Tex, 145 F 2d

862, certiorari denied 65 S Ct 1570, 325 US 879, 89 L Ed 1996.

2. Tex—Seismic Explorations v Dobray, Civ App, 169 S.W. 2d 789, error refused.

3. Conn—Swearsky v Stanley Dry Goods Co, 186 A 556, 122 Conn 7.

4. NY—Wright v Tudor City Twelfth Unit, 12 NE 2d 307, 276 NY 303, 115 ALR 962.

5. Ohio—Richman Bros Co v Miller, 3 NE 2d 360, 131 Ohio St 424.

6. Mass—Davis v John L. Whiting, etc., Co, 87 NE 199, 201 Mass. 91.

39 CJ p 1334 note 14.

7. Ohio—Maxwell v. Chew Pub. Co, App, 61 NE 3d 816.

8. Mich—Inglish v Millersburg Driving Assoc, 136 N.W. 443, 169 Mich 311, Ann Cas 1913D 1174, 39 CJ p 1334 note 26.

9. NY—Ferguson v Hubbell, 97 N. Y 507, 49 Am R 544, 39 CJ p 1334 note 27.

10. Ark—St. Louis, I M & S. R. Co v Yonley, 14 S.W. 800, 53 Ark. 503, 9 LRA 604, 39 CJ p 1334 note 28.

11. Ark—St. Louis, I M & S. R. Co v Yonley, 13 S.W. 823, 39 CJ p 1334 note 24 [c].

liable where the contract for clearing the land did not contemplate the use of fire and he did not know that the contractor intended to resort to that means of removing stumps and debris.¹²

There is authority both for¹³ and against¹⁴ the proposition that the contractee is liable for the damages resulting where, during the performance of a contract for the burning of a protective fireguard along or around certain property, fire is communicated to other property.

Maintenance of fires to keep concrete work from freezing has been held not so intrinsically dangerous as to render the employer of an independent contractor liable for fires destroying adjacent property in the absence of evidence that such act could not be safely performed in the exercise of due care.¹⁵

It has been held that gasoline is essentially a dangerous instrumentality and hence that a person employing an independent contractor to deliver gasoline is liable for damages from a fire arising from the negligence of the independent contractor or his servant,¹⁶ but it has also been held that the contractee is not liable.¹⁷

According to some authorities, where an independent contractor is authorized to use, in performing his work, such dangerous instrumentalities as steam engines, the contractee will be liable for injuries to property of others caused by fire communicated to the property from such engines.¹⁸ In such case the engine is a source of great danger to adjacent property and the danger raises a duty which the contractee cannot shift from himself to another.¹⁹ However, it has been both affirmed²⁰ and de-

nied²¹ that the operation of a steam sawmill is intrinsically dangerous, and it has been held that a steam engine used in digging a well is not in its nature dangerous as an instrumentality likely to set fire to neighboring buildings.²²

Tearing down building or walls The demolition of a complete building which has been used up to the time of demolition, and has not become dangerous or a nuisance through decay or similar conditions, is not intrinsically dangerous,²³ but it has been held otherwise as to the demolition of a building in a crowded section of a city.²⁴ While it has been held that the taking down of a decayed or ruined wall is not intrinsically dangerous, as the only danger to be apprehended is in doing the work carelessly or unskillfully,²⁵ it has also been held that the taking down of a ruined wall is intrinsically and inherently dangerous and that the duty imposed by law on the owner to take down walls left standing by fire as being a menace to the public and the property of persons in the vicinity, and to observe due care in so doing, cannot be delegated to an independent contractor so as to avoid liability for his negligence in doing the work.²⁶

(2) Obstructions, Excavations, or Openings in Public Thoroughfare

The employment of an independent contractor does not prevent a person from being liable for injuries resulting from a failure to guard, or take other reasonable precautions to prevent injury to the public from, excavations, openings, or obstructions in a street, highway, or sidewalk.

A person who employs an independent contractor to do work, on a public way or in a place where the public are habitually and lawfully passing, which

12. La.—Levy v. McWilliams, 127 So 761, 13 La.App 444, modified on other grounds 129 So. 170, 13 La.App 444.

13. Kan.—St Louis & S F R. Co v Madden, 93 P 586, 77 Kan. 80, 17 L.R.A.N.S., 788, 39 C.J. p 1334 note 24 [b].

14. Iowa.—Kellogg v. Payne, 21 Iowa 575, 39 C.J. p 1334 note 24 [a].

15. U.S.—Swift & Co. v. Bowling, CCA W Va., 293 F. 279.

16. La.—Montgomery v. Gulf Refining Co. of Louisiana, 121 So 578, 168 La. 73.

17. Fla.—Gulf Refining Co v Wilkinson, 114 So 503, 84 Fla. 664.

18. La.—Brady v. Jay, 86 So. 132, 111 La. 1071, 39 C.J. p 1334 note 29.

Propelling engine, known to be defective, along highway in dry season.

Mo.—Johnson v J I Case Threshing Mach Co., 182 SW 1089, 193 Mo App 198.

19. N.C.—Thomas v Hammer Lumber Co., 69 SE 275, 153 N.C. 351, 32 L.R.A.N.S., 584.

20. N.C.—Royal v. Dodd, 98 SE 599, 177 N.C. 206, 39 C.J. p 1334 note 29 [b].

21. Ga.—Lovelace v Ivey, 152 SE 266, 41 Ga.App 204.

Small steam sawmill
Va.—Epperson v De Jarnette, 180 S. E 412, 164 Va. 482.

22. Ga.—Edmondson v. Town of Morven, 152 SE 280, 41 Ga.App 209.

23. Wash.—Amann v City of Tacoma, 16 P.2d 601, 170 Wash 296.

24. N.Y.—Hanley v Central Sav. Bank, 8 N.Y.S.2d 371, 355 App Div 543, affirmed 21 N.E.2d 513, 280 N.Y. 734.

Exting brick building abutting busy city street

Ill.—Van Auker v. Barr, 270 Ill.App. 150.

25. N.Y.—Engel v Eureka Club, 32 N.E. 1052, 137 N.Y. 100, 33 Am S R 692.

Removal of brick foundation walls where use of dynamite not contemplated

Tex.—Dixon v Robinson, Civ App., 276 SW 770.

26. Ky.—A H. Bowman & Co v Williams, 21 S.W.2d 790, 231 Ky 433.

39 C.J. p 1336 note 43

Walls of burned-out theater in thickly settled business district

Del.—Langrell v Harrington, 41 A. 2d 461, 3 Terry 547.

will cause danger to the public unless precautions are taken must see that reasonable precautions to prevent injury are taken and is liable for injuries resulting from a failure to take such precautions.²⁷

According to the weight of authority, an excavation in a street, highway, or sidewalk is so inherently dangerous that the person in whose behalf it is made cannot, by having the work done by an independent contractor, escape liability for injuries to others resulting from the contractor's failure properly to guard the excavation or to take other necessary precautions to prevent injury to travelers.²⁸ According to some decisions, however, where a contract is made for work which requires excavation in streets, highways, or sidewalks and reasonable care is used to secure a competent contractor, the contractor alone is liable for injuries sustained by reason of his negligence in failing properly to guard the excavation,²⁹ and where this latter view prevails it is considered that such work is not intrinsically dangerous or hazardous³⁰ and that it becomes an incident to the undertaking of the contractor to do the work in a manner reasonably safe to passers-by, and this duty includes the making of necessary safeguards.³¹

Openings. An abutting owner is liable for a contractor's negligence in leaving unguarded and unlighted openings in the sidewalk.³² So too an occupier of premises who, for his own convenience, maintains a fixed covered opening or aperture in the adjacent sidewalk is liable for injuries resulting from the negligence of an independent contractor in removing the cover and not guarding the opening.³³

Obstructions. While there is some authority to the contrary,³⁴ it has generally been held that, where

work to be done under a contract necessarily obstructs and encumbers a public street or highway and renders it unsafe for public travel, unless the obstruction is properly guarded or travelers are otherwise protected, the doctrine of independent contractor does not apply, and liability for injuries resulting from such obstruction is to be determined as though the work had been done by the employer and not by the contractor.³⁵ However, a limitation on this doctrine is that, where the obstruction caused or created in the street or elsewhere is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his servants, the contractee is not liable,³⁶ and the contractee is not liable where the obstruction was not the proximate cause of the injury.³⁷

§ 591. — Nondelegable Duties of Contractee

- a. In general
- b. Work done under license, franchise, or corporate charter

a. In General

A person who, by law or contract, is charged with an absolute duty to another person or the public cannot, by delegating performance of that duty to an independent contractor, relieve himself from liability for nonperformance or negligent performance thereof.

One who owes, and is personally bound to perform, an absolute and positive duty to the public or an individual cannot escape the responsibility of seeing that duty performed by delegating it to an independent contractor, and will be liable for injuries resulting from the contractor's negligence in the performance thereof,³⁸ whether the duty is imposed by

27. Ill.—Hanneken v Eehler, App., 75 NE 2d 244

Mass.—Kunan v De Matteo, 32 NE 2d 613, 308 Mass 427

Ohio.—Richman Bros Co v Miller, 3 NE 2d 260, 131 Ohio St 424—Warden v Pennsylvania R Co, 175 NE 207, 123 Ohio St 304—Maxwell v Chew Pub Co, App., 61 NE 2d 816

Work creating nuisance in street or on sidewalk see *supra* § 587

28. Cal.—Sawaya v DeCou, 140 P 2d 98, 60 Cal App 2d 146—Robbins v Hercules Gasoline Co, 251 P 697, 80 Cal App 271

Ga.—Mixon v Savannah & A Ry, 111 SE 90, 28 Ga App 390

Mont.—Corpus Juris cited in Ulman v Schweiger, 12 P 2d 856, 859, 92 Mont 331

39 C.J. p 1328 note 51 [e] (2), (3), p 1335 note 32.

Damage to telephone equipment

Ohio.—Cincinnati & Suburban Bell Tel Co v Hadler, 61 NE 2d 795, 75 Ohio App 258

Damage to adjoining property from construction of tunnel under street D.C.—Philadelphia, B & W R Co v Karr, 38 App D.C. 103

29. Ind.—Ryan v Curran, 64 Ind 345, 31 Am R 123

39 C.J. p 1335 note 33

30. Ill.—Moline v McKinnie, 30 Ill App 419

31. Ill.—Kepperly v. Ramsden, 83 Ill. 554

32. Tex.—Randle v Naugle, Civ App, 299 SW. 297

33. Ill.—Hanneken v Eehler, App., 75 NE 2d 244

Ohio.—Globe Indemnity Co v Schmitt, 53 NE 2d 790, 142 Ohio St 595.

34. Va.—Richmond v Sitterding, 43

SE 562, 101 Va 854, 65 L.R.A. 445, 99 Am SR 879

39 C.J. p 1335 note 36

35. Cal.—Sawaya v DeCou, 140 P 2d 98, 60 Cal App 2d 146—Robbins v Hercules Gasoline Co, 251 P. 697, 80 Cal App 271

Conn.—Campus v McElligott, 187 A. 29, 122 Conn 14—Swearsky v Stanley Dry Goods Co, 186 A 556, 122 Conn 7

39 C.J. p 1328 note 51 [e], p 1335 note 38

36. U.S.—St Paul Water Co v Ware, Minn., 16 Wall 566, 21 L.Ed 485

39 C.J. p 1336 note 40, p 1338 note 51 [c] (1)

37. Minn.—Vosbeck v Kellogg, 80 NW. 957, 78 Minn 178.

39 C.J. p 1336 note 41.

38. U.S.—S H Kress & Co. v Reaves, C.C.A.N.C., 85 F 2d 915,

certiorari denied 57 S Ct. 322, 299 US 616, 81 L Ed 454

Ala.—Alabama Power Co v Pierre, 183 So 665, 286 Ala. 521—Alabama Power Co v Emens, 158 So 729, 228 Ala. 466—Dixie Stage Lines v Anderson, 184 So 23, 222 Ala. 673—Republic Iron & Steel Co v Barter, 118 So 749, 218 Ala. 369

Cal.—Katz v Helbing, 10 P 2d 1001, 215 Cal 449

Del.—Langrell v Harrington, 41 A 2d 481, 3 Terry 547

D C.—Bailey v Zlotnick, 149 F 2d 505, 80 US App DC 117, 162 A L R 1108

Ind.—Indianapolis Water Co v Schoenemann, 20 NE 2d 671, 107 Ind App 308

Mich.—Grinnell v Carbide & Carbon Chemicals Corporation, 278 NW 535, 282 Mich 509

N J.—Newman v Pasternack, 135 A 877, 103 NJ Law 434, 50 A L R 483

Okl.—Oklahoma Ry Co v Boyd, 282 P 157, 140 Okl 45

Utah.—Gleason v Salt Lake City, 74 P 2d 1235, 94 Utah 1
39 C J p 1338 note 46

Duty arising from doing of act

(1) A person causing something to be done, the doing of which casts on him a duty, cannot escape from responsibility attached to him of seeing that duty performed by delegating it to a contractor

Ala.—W. E. Belcher Lumber Co v Woodstock Land & Mineral Co, 15 So 2d 625, 245 Ala 5

Ky.—Brown Hotel Co v Sizemore, 197 SW 2d 911, 303 Ky. 431

(2) On this theory, where defendant corporation equipped a person with machinery and finances to enter upon its land to engage in mining operation, defendant corporation was under duty, for protection of adjoining landowners, to inform person engaging in mining operations of location of boundaries of its holdings, and if, as proximate result of breach of such duty, person engaged in mining operation went upon plaintiff's adjoining land and took therefrom iron ore, defendant corporation was liable as a joint tort-feasor with person engaging in mining operation in conversion of the ore.—W. E. Belcher Lumber Co v Woodstock Land & Mineral Co, *supra*.

(3) So too a landowner who undertakes the erection of a building cannot excuse himself for trespass on adjoining property by showing that he gave over the location of the building wholly to his builder with only a general direction to keep inside the boundary line, responsibility in this respect cannot be shifted to an independent contractor.—Bran-

dolino v Carrig, 44 NE 2d 788, 312 Mass 295—Kershishian v Johnson, 96 NE 56, 210 Mass 185, 86 L R A., NS, 402

Installation of gas stove

A chemical company from whose representative a gas stove was purchased for installation on yacht could not avoid liability for injuries sustained in an explosion of stove as result of its defective installation on ground that representative was an independent contractor, since the nature of the installation imposed a duty on employer which it could not delegate to a representative.—Grinnell v Carbide & Carbon Chemicals Corporation, 278 NW 535, 282 Mich 509

Duty incident to ownership, possession, or proprietorship

(1) One who owns property that may become dangerous cannot delegate a duty and escape liability for injury incident to his proprietorship.—Galentine v Borglum, 150 SW 2d 1088, 235 Mo 1141

(2) The duty of exercising care is one of those absolute duties which rests on every owner of fixed property, and he cannot shift the responsibility on an independent contractor for failure to perform his duty.—Northcross v Loew's Memphis Theater Co, 3 Tenn App 51

(3) Company owning timber on land leased by owners as a pasture could not delegate its responsibility to use reasonable care not unnecessarily to injure improvements on the land, including the fences, to a third person in such manner as to be relieved of liability.—D L Fair Lumber Co v Weems, 16 So 2d 770, 198 Miss 201, 181 A L R 631

(4) If an independent contractor is employed to perform the nondelegable duty which a possessor of land owes to others to put and maintain land in a reasonably safe condition, the possessor is answerable for harm caused by negligent failure of contractor to put or maintain buildings and structures in reasonably safe condition, irrespective of whether contractor's negligence lies in his incompetence, carelessness, inattention, or delay.—Brown v George Pepperdine Foundation, 143 P 2d 929, 23 Cal 2d 256

(5) Duty of landlord to tenant in respect of repairs, improvements, or safe condition, of premises see Landlord and Tenant § 417.

Duty to invitees

Ark.—Aluminum Ore Co v George, 186 SW 2d 656, 208 Ark. 419

Mo.—Cannon v S S Kresge Co, 116 SW 2d 559, 233 Mo App. 173.

NY.—Eisenberg v Irving Kemp,

Inc. 11 NY S 2d 449, 256 App Div 698

Duty to traveling public

(1) Duty to refrain from interfering with right of public to safe and unimpeded use of highways and streets is one of which employer cannot divest himself by committing work to a contractor

Ohio.—Richman Bros Co v Miller, 3 NE 2d 360, 131 Ohio St 424—Maxwell v Chew Pub Co, App, 61 NE 2d 816

Tex.—Randle v Naugle, Civ App, 299 SW 297

(2) An owner of a building has an affirmative nondelegable duty to protect members of public traveling on adjacent sidewalk.—Schwartz v Merola Bros Const Corporation, 48 NE 2d 299, 290 NY 145

(3) The owner or possessor of abutting property for whose special and private benefit a coal hole or similar structure is maintained in a public way cannot cast the burden of the proper maintenance of the structure on another, even though primary negligence with respect to the structure is that of an independent contractor.—Brown Hotel Co v Sizemore, 197 SW 2d 911, 303 Ky 431

(4) Obstructions, excavations, or work in or on street, highway, or sidewalk as inherently dangerous unless precautions taken see *supra* § 590 b (2)

Protection of party wall

Owners of building being razed could not delegate to independent contractor duty to protect party wall.—Marks v F W Woolworth Co, C CA Tex, 32 F 2d 145

Preventing animal from being at large

Where a railroad company had, as a connecting carrier, come into possession of a steer, and the steer was being reloaded into a car, the company owed a duty to the public, under the circumstances, to prevent the animal from being at large and it could not delegate the performance of this duty to an independent contractor and thereby escape liability for nonperformance.—Yazoo & M V R Co v Gordon, 186 So 631, 184 Miss 885

Fitting eyeglasses properly

Where customer purchased glasses in department store without knowledge of arrangement between store and its agent who examined eyes and fitted glasses, act of store was a discharge of its nondelegable duty properly to fit plaintiff with glasses.—Gilbert v Louis Pizitz Dry Goods Co, 186 So 179, 237 Ala. 249.

law³⁹ or by contract,⁴⁰ or, if it is imposed by law, whether it is imposed by the common law,⁴¹ by statute,⁴² or by municipal ordinance,⁴³ and it is of no consequence whether or not the owner exercised care in selecting the contractor⁴⁴ or whether the breach of the employer's duty occurs during the progress of the work or from a defective condition of the work after it is finished⁴⁵

The rule is especially applicable where the contractee personally, or through a servant acting within the scope of his employment, acquires knowledge or is put on notice of a dangerous condition existing during the progress, or after the completion, of the work and fails to remove or correct such condition⁴⁶. However, the negligence of an independent contractor which does not make the result fall short of that which it is the employer's duty to attain is

collateral negligence for which the employer is not liable,⁴⁷ and, in respect of a statutory duty, a landowner is not liable, notwithstanding the employment of an independent contractor, where he has complied with the statute in so far as it is applicable to him.⁴⁸ Where a duty is imposed by ordinance on the owner "or" general contractor, the owner is not liable where the duty is in connection with work done by the contractor,⁴⁹ and a statute providing that "any company laying a pipe line under the provisions of the act shall be liable for all damages occasioned by reason of the negligence of such company" does not impose a duty on the company to the public or to individuals such as will render it liable for the injuries caused by the negligence of an independent contractor employed by it.⁵⁰

39. Ala.—Hampton v. Brackin's Jewelry & Optical Co., 186 So 178, 237 Ala. 212—Alabama Power Co v Pierre, 183 So 685, 236 Ala. 521—Dixie Stage Lines v Anderson, 134 So 23, 222 Ala. 673

Ind.—Bates Motor Transport Lines v Mayer, 14 NE 3d 91, 213 Ind. 664—Stewart v Huff, 14 NE 2d 322, 105 Ind App 447—Scott Const Co v Cobb, 159 NE 763, 86 Ind App 699

Mo.—Corpus Juris cited in Cotton v Ship-By-Truck Co., 85 SW 2d 80, 84, 337 Mo 270—Corpus Juris cited in Neal v 12th & Grand Ave Bldg Co., 70 SW 2d 136, 141, 228 Mo App 536

Mont.—Corpus Juris cited in Ulmen v. Schwieger, 12 P 2d 856, 880, 92 Mont 331.

Ohio—Globe Indemnity Co v Schmitt, 53 NE 2d 790, 142 Ohio St 595

Okl.—Oklahoma City v Caple, 105 P 2d 209, 187 Okl 600—Marion Machine, Foundry & Supply Co v Duncan, 101 P 2d 813, 187 Okl 160—Corpus Juris quoted in Great American Indemnity Co v Deatherage, 52 P 2d 827, 831, 175 Okl 28

RI.—Corpus Juris cited in Blount v Tow Fong, 138 A. 52, 53, 48 R I 453

39 C.J. p 1336 note 46

40. US.—Continental Ins Co v I Bahcall, Inc., DC Wis., 39 F Supp 815

Ala.—Hampton v Brackin's Jewelry & Optical Co., 186 So 173, 237 Ala. 212—Alabama Power Co v Pierre, 183 So. 685, 236 Ala. 521—Dixie Stage Lines v Anderson, 134 So 23, 222 Ala. 673

Ind.—Stewart v Huff, 14 NE 2d 322, 105 Ind App 447—Scott Const Co v Cobb, 159 NE 763, 86 Ind App 699

Ky.—Armour & Co v. Young, 35 SW 2d 906, 237 Ky 444.

Minn.—Pacific Fire Ins Co v. Kenney Boiler & Manufacturing Co., 277 NW 226, 201 Minn 500

Mont.—Ulmen v Schwieger, 12 P 2d 856, 92 Mont. 331

NY.—May v. 11½ East 49th St Co., 54 NYS 860, 269 App Div 180, affirmed 68 NE 2d 881, 296 N.Y. 599

Okl.—Oklahoma City v. Caple, 105 P. 2d 209, 187 Okl 600—Marion Machine, Foundry & Supply Co v Duncan, 101 P 2d 813, 187 Okl 160

Or.—Corpus Juris cited in Gusti v C H Weston Co., 108 P 2d 1010, 1013, 165 Or 535

39 C.J. p 1339 note 58.

41. NY.—Union Course Holding Corp v Tomassetti Const Co., 52 NYS 3d 19, 184 Misc. 383, affirmed 55 NYS 2d 576, 269 App Div 775, appeal denied 56 NYS 2d 520, 269 App Div 841, affirmed 66 NE 2d 582, 295 NY 803, motion denied 67 NE 2d 525, 295 NY 894

Okl.—Corpus Juris quoted in Great American Indemnity Co v Deatherage, 52 P 2d 827, 831, 175 Okl 28

39 C.J. p 1337 note 47

42. NJ.—Corpus Juris cited in Merola v Howard Sav Inst., 160 A 416, 417, 109 NJ Law 37.

NY.—May v. 11½ East 49th St Co., 54 NYS 2d 860, 269 App Div 180, affirmed 68 NE 2d 881, 296 NY 599—Kowalsky v Conreco Co., 260 NYS 688, 237 App Div 23, reargument denied 261 NYS. 963, 237 App Div. 875—Union Course Holding Corp v Tomassetti Const Co., 52 NYS 2d 19, 184 Misc 382, affirmed 55 NYS 2d 576, 269 App Div 775, appeal denied 56 N.Y.S 2d 520, 269 App Div. 841, affirmed 66 NE 2d 582, 295 NY 803, motion denied 67 NE 2d 525, 295 NY. 894

39 C.J. p 1337 notes 47, 49, p 1338 note 51

43. Cal.—Corpus Juris cited in

Taylor v. Oakland Scavenger Co., 110 P 2d 1044, 1050, 17 Cal 2d 594

—Snow v Marian Realty Co., 299 P 720, 212 Cal 622

NJ.—Corpus Juris cited in Merola v Howard Sav Inst., 160 A 416, 417, 109 NJ Law 37

NY.—Victor A Harder Realty & Const Co v City of New York, 64 NYS 3d 310

RI.—Corpus Juris cited in Blount v Tow Fong, 138 A 52, 53, 48 R. I 453.

39 C.J. p 1337 note 49, p 1338 note 51

44. Iowa.—Goodwin v. Mason, 155 NW 966, 173 Iowa 546

Okl.—Corpus Juris quoted in Great American Indemnity Co v Deatherage, 52 P 2d 827, 831, 175 Okl 28

Selection of incompetent contractor as exception to general rule of nonliability see infra § 592

45. DC.—Bailey v Zlotnick, 149 F 2d 506, 80 US App DC 117, 162 A. LR 1108

Liability of contractee for injuries from defective condition of work after completion generally see infra § 595.

46. Fla.—Breeding's Dania Drug Co v Runyon, 2 So 3d 376, 147 Fla. 123

NY.—Schwartz v Merola Bros. Const Corporation, 48 NE 2d 299, 290 NY 145

47. NJ.—Rosenquist v Brookdale Homes, 44 A 2d 83, 133 NJ Law 805

48. Or.—Carter v. La. Dee Logging Co., 20 P 2d 1086, 142 Or 439

49. NY.—Koch v. Fox, 75 NYS. 813, 71 App Div. 288

39 C.J. p 1338 note 52.

50. Pa.—Chartiers Valley Gas Co. v. Waters, 16 A. 423, 123 Pa 220.

b. Work Done under License, Franchise, or Corporate Charter

An individual or a corporation cannot evade liability for negligence by delegating performance of work to an independent contractor where such individual or corporation is carrying on an activity, involving danger to others, under a license or franchise granted by public authority and subject to certain obligations or liabilities imposed by public authority.

An individual or a corporation cannot evade liability for negligence by delegating performance of work to an independent contractor where such individual or corporation is carrying on an activity, involving danger to others, under a license or franchise granted by public authority⁵¹ and subject to certain obligations or liabilities imposed by public authority⁵². This rule is often applied where obstructions and excavations in streets and highways are made pursuant to authority derived from, and subject to conditions or requirements imposed by, a statute, municipal ordinance, or permit or license granted by a municipality⁵³.

Chartered power or privilege of corporation. Corporations have been held liable for the wrong-

ful act of an independent contractor while exercising, with the assent of the corporation, some chartered power or privilege of the corporation⁵⁴. However, it has been held that the liability is limited to wrongs done in the performance of acts which could not have been done except for the existence of the charter of the company⁵⁵. If the act is one which might have been done by an individual, no different rule obtains as to liability merely because the contractee is a corporation⁵⁶.

§ 592. — Employment of Incompetent Contractor

An employer who failed to exercise reasonable care to select a competent contractor is liable for injuries sustained by third persons as a result of the negligent or wrongful acts of the contractor.

Although there is some authority to the contrary,⁵⁷ it has generally been held that the duty rests on the employer to select a skilled and competent contractor,⁵⁸ and the employer is liable to third persons for the negligent or wrongful acts of an independent contractor employed by him where he knew his character for negligence, recklessness, or incom-

51. U.S.—*Venuto v Robinson*, C.C.A. N.J., 118 F.2d 679, certiorari denied *Ross, Agent, Inc. v Venuto*, 63 S Ct 58, 314 U.S. 637, 86 L.Ed. 504 —*Hodges v. Johnson*, D.C.Va., 52 F.Supp. 488

Mass.—*Barry v. Keeler*, 76 N.E.2d 158

N.C.—*Brown v L. H. Bottoms Truck Lines*, 42 S.E.2d 71, 227 N.C. 299

Wash.—*Norwegian Danish Methodist Episcopal Church of Spokane Falls v Home Telephone Co.*, 119 P. 834, 66 Wash. 511

Certificate of public service commission

A carrier hauling passengers for hire under certificate issued by the public service commission cannot employ an independent contractor who has no certificate to perform such service so as to escape liability for negligence.—*Ettna Casualty & Surety Co v Prather*, 2 S.E.2d 115, 59 Ga.App. 787

52. Cal.—*Taylor v. Oakland Scavenger Co.*, 110 P.2d 1044, 17 Cal.2d 594—*Snow v. Marian Realty Co.*, 299 P. 720, 212 Cal. 622

N.Y.—*Francis C. Neale, Inc. v New York Steam Co.*, 132 N.Y.S. 71, 147 App.Div. 725.

Pa.—*Baier v. Glen Alden Coal Co.*, 3 A.2d 349, 332 Pa. 561
39 C.J. p. 1337 note 49 [c].

53. R.I.—*Corpus Juris* cited in *Blount v. Tow Fong*, 138 A. 52, 53, 48 R.I. 453

Wash.—*Frostman v. Stirrat & Goetz Inv. Co.*, 118 P. 742, 65 Wash. 608
39 C.J. p. 1338 note 51.

54. Ill.—*Orange v. Pitcairn*, 280 Ill. App. 566
39 C.J. p. 1338 note 55.

Operation of railroad
Ga.—*Chattanooga, R. & C. R. Co. v Whitehead*, 15 S.E. 44, 89 Ga. 190
—*Chattanooga, R. & C. R. Co. v Liddell*, 11 S.E. 853, 85 Ga. 423, 21 Am.S.R. 169

Or.—*Lakin v. Willamette Valley & C. R. Co.*, 11 P. 68, 13 Or. 436, 57 Am. R. 25

39 C.J. p. 1338 note 55 [e]

Carriage of freight by motor truck

A corporation which is engaged as a common carrier of freight by motor truck, and holds itself out as such to the public, cannot delegate to a third person the carrying of goods on a public highway so as to relieve itself from liability for negligent acts committed in the performance of its duties as a common carrier under its charter.—*Liberty Highway Co. v Callahan*, 157 N.E. 708, 24 Ohio App. 374

Public policy as to performance of duties

(1) On principles of public policy, corporations cannot, without the consent of the state, absolve themselves from any duties imposed by charter or the general laws of the state, by any agreement with a third person.—*St. Louis, I. M. & S. R. Co. v Coutech*, 162 S.W. 1103, 111 Ark. 5

(2) Public policy requires that a corporation chartered to perform the public duties of a common carrier should not be permitted to contract with persons, who may be irrespons-

ble, for the performance of a part of its duties under its charter and thus avoid responsibility for the negligent performance thereof.—*Liberty Highway Co. v Callahan*, 157 N.E. 708, 24 Ohio App. 374

55. Ill.—*Orange v. Pitcairn*, 280 Ill. App. 566
39 C.J. p. 1339 note 56

Construction or reconstruction of railroad within acquired right of way

Contract for construction or reconstruction of railroad within right of way already acquired is not delegation of charter power or privilege, and railroad company may enter into such contract without constituting contractor its servant.—*Orange v. Pitcairn*, supra—39 C.J. p. 1339 note 56 [a], [b]

56. Ill.—*Bovd v. Chicago & N. W. R. Co.*, 75 N.E. 496, 217 Ill. 332, 108 Am.S.R. 253

Ind.—*Rooker v. Lake Erie & W. R. Co.*, 114 N.E. 998, 66 Ind.App. 521

57. Tenn.—*Knoxville Iron Co. v. Dobson*, 7 Lea 367
39 C.J. p. 1339 note 60

58. Ill.—*Andronick v. Daniszewski*, 268 Ill. App. 543

Mo.—*Mattan v. Hoover Co.*, 166 S.W. 2d 557, 350 Mo. 506—*Skidmore v. Haggard*, 110 S.W.2d 736, 341 Mo. 837—*Corpus Juris* quoted in *Baker v. Scott County Milling Co.*, 20 S.W.2d 494, 499, 323 Mo. 1089—*Galentine v. Borglum*, 150 S.W.2d 1088, 235 Mo. App. 1141

N.Y.—*Fox v. Ireland*, 61 N.Y.S. 1061, 46 App.Div. 541.

petency at the time he employed him,⁵⁹ or where the employer was negligent in failing to exercise reasonable care in the selection of a competent contractor⁶⁰ However, where the independent contractor is in fact a competent person to perform the work, it is of no consequence whether or not due care was used in the selection⁶¹ The fact that a contractor is negligent in respect of the work in question raises no presumption that the employer was guilty of negligence in employing him.⁶²

§ 593. — Active Interference with Work

Where the employer interferes with the performance of the work and assumes control or direction of the method of performing it, the original relation of employer and independent contractor is changed to that of master and servant and the employer becomes liable for injuries resulting from wrongful or negligent acts done in pursuance of his orders or directions

In order that an employer may be shielded from liability by the employment of an independent contractor, the contractor must be allowed to do the work according to his own methods and be subject to control by the employer only as to the results of the work⁶³ The employer is liable for injuries resulting from the acts of one originally an independent contractor where he assumes to control or direct the method of work in whole or in part and the

injuries complained of are the result of his interference.⁶⁴ In these circumstances the relation of employer and independent contractor is destroyed⁶⁵ and the relation of master and servant substituted.⁶⁶ This doctrine has been expressly affirmed by statute in some jurisdictions and these provisions may properly be characterized as being merely declaratory of the common law⁶⁷

However, the supervision exercised, or right of supervision reserved, in a particular case by the contractee over the contractor may be of such limited scope as not to make him responsible for the contractor's negligence,⁶⁸ as where it is confined to the purpose of requiring the work to be done in accordance with the contract, or, in other words, extends only to results and not to the manner and method of doing the work,⁶⁹ it is only when the employer goes beyond the limits of his right to supervise results and commits some affirmative act of negligence, as by taking some part in the performance of the work other than such general supervision as is necessary to insure its performance, that he is chargeable.⁷⁰ Also there is not such an assumption of control over, or interference with, the manner of performing the work as to change the relation to that of master and servant and render the employer lia-

59. Mo—Galentine v Borglum, 150 S W 2d 1088, 235 Mo App 1141
39 C J p 1339 note 62

60. Idaho—Corpus Juris cited in Joslin v Idaho Times Pub Co, 91 P 2d 386, 388, 60 Idaho 235

Mo—Corpus Juris quoted in Baker v Scott County Milling Co, 20 S W 2d 494, 499, 323 Mo 1089

NJ—Bush v Margolis, 130 A. 525, 102 N J Law 179

N.Y.—Kuhn v P J Carlin Const. Co., 278 N Y S 635, 154 Misc 892

Tex—Hamblen v Mohr, Civ App, 171 S W 2d 168

39 C J. p 1339 note 63

61. Conn—Wilmot v McPadden, 65 A 157, 79 Conn 367, 19 L R A, N S, 1101

Mich—Eger v Helmar, 262 N W 298, 272 Mich 513

Tex—Moore v Roberts, Civ.App, 93 S W 2d 236, error refused

62. N.Y.—Hawke v Brown, 50 N Y. S 1032, 28 App Div 37

63. Mo—Mattan v Hoover Co, 166 S W 2d 557, 350 Mo 506

Contractor must be in complete control of entire situation—Levesque v Hildreth & Rogers Co, 177 N. E 623, 276 Mass. 429

64. Cal—King v. Emerson, 288 P 1099, 110 Cal App 414, adopted 294 P 768, 110 Cal App 414

N.Y.—Hanley v. Central Sav Bank, 8 N Y S 2d 371, 255 App.Div. 542,

affirmed 21 N E 2d 513, 280 N Y 734

Pa.—Weldon v Steiner, 10 A 2d 19, 138 Pa Super 66
39 C J p 1340 note 66

Trespass committed under order or direction of employer

Ala—Alabama Power Co v Bodine, 105 So 869, 213 Ala. 637

NJ—Wegener v Sugarman, 138 A 699, 104 N J Law 26

Wash—Bill v Gattavara, 187 P 2d 434, 24 Wash 2d 819

39 C J p 1329 note 55

Failure to exercise control with reasonable care

One who intrusts work to independent contractor, but retains control of any part of the work, is subject to liability for bodily harm to others, for whose safety employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care—La Malfa v Piombo Bros, 161 P 2d 964, 70 Cal App 2d 840

Direction through employee

If pipe line company's employee acting within scope of employment caused independent contractors to construct bridge to span ditch on plaintiff's premises, employee's act was act of company, and company was under a duty to use reasonable care to prevent a dangerous condition from arising as a result of removal of the bridge by the contrac-

tor's employees—Denton v Buffalo Pipe Line Corporation, 39 N Y S 2d 83, leave to appeal denied 16 N Y S 2d 698, 258 App Div 860

65. Ark—Humphries v Kendall, 111 S W 2d 493, 195 Ark 45

Ky—Pine Mountain R Co v Finley, 117 S W 413

66. US—Gammage v International Agricultural Corp, CCA Ga., 268 F 246

39 C J p 1340 note 68

67. US—International Agricultural Corp v Slappey, CCA Ga., 261 F 279

39 C J p 1340 note 69.

68. N.Y.—Kuhn v. P J. Carlin Const Co, 278 N Y S. 635, 154 Misc 892

69. La—Corpus Juris cited in Beck v Dubach Lumber Co, 131 So 196, 197, 171 La 423—Crysel v Gifford-Hill & Co, App, 158 So. 264

NJ—Messina v Terhune, 148 A 758, 106 N J Law 119

N.Y.—Loses v Paramount Hotel Corporation, 242 N Y S. 608, 137 Misc 530

39 C J p 1321 note 53

70. Ark—Meyer v. Moore, 115 S W. 2d 1087, 195 Ark 1114

La—Corpus Juris quoted in Beck v. Dubach Lumber Co, 131 So. 196, 197, 171 La 423.

39 C J. p 1321 note 55.

ble where the employer makes suggestions,⁷¹ points out to the contractor the place where the work is to be performed,⁷² gives directions which merely change the order of work and do not increase the hazards,⁷³ or makes an arrangement with the contractor to pay the latter's employee.⁷⁴

§ 594. — Ratification of Contractor's Acts

An employer may become liable for the negligent or wrongful acts of an independent contractor by ratification thereof.

Although not otherwise liable, a contractee may be liable for the negligent or wrongful acts of the contractor or the contractor's servants because of his ratification of such acts.⁷⁵ Nevertheless, the ratification must relate to the wrong itself, and not merely to the authority of the independent contractor to act as such for the employer;⁷⁶ and the mere acceptance by the employer of the benefits naturally flowing from the proper performance by the independent contractor of his contract, and the retention of such benefits with knowledge that the contractor, in the performance of the contract, committed an independent tort, do not amount to a ratification by the employer of the tort itself.⁷⁷

§ 595. — Abandonment, Completion, or Acceptance of Work

The contractee is liable for injuries arising from defects, of which he had knowledge or which would have been disclosed by a reasonable inspection, after the work has been completed or accepted or the contractor

has been dismissed or has abandoned the contract and the contractee has assumed control.

Where the contractor is dismissed,⁷⁸ or where he abandons the contract and the owner assumes control,⁷⁹ the contractee's liability attaches as to injuries thereafter resulting from the work done, and if the work is completed the contractee is responsible for injuries thereafter resulting from its imperfect construction or dangerous condition in which he permits it to remain,⁸⁰ especially after the contractee has accepted the work.⁸¹ In these circumstances the general rule is that the responsibility for maintaining defective conditions is shifted to the owner,⁸² and it is of no consequence whether the person performing the work was a servant or an independent contractor.⁸³ The liability of the employer extends to,⁸⁴ and only to,⁸⁵ injuries arising from defects of which he had knowledge or which would have been disclosed by a reasonable inspection in the exercise of ordinary care.

No formal acceptance of the work is necessary to render the employer liable,⁸⁶ acceptance may result from conduct,⁸⁷ and there is a sufficient acceptance where the employer assumes full control of the subject matter of the contract,⁸⁸ or appropriates the structure to the use for which it was erected,⁸⁹ or accepts the work done by the contractor and pays for it.⁹⁰

Removal of contractor's property from premises. Although the contract has been completely performed, the contractee will not be liable for the negligent acts of the contractor in removing his own

71. NC—Hudson v. Gulf Oil Co., 3 SE 2d 26, 215 NC 432

Wis—Kolb v. Hayes, 215 NW 578, 194 Wis 40

72. Ga—Edmondson v. Town of Morven, 152 SE 280, 41 Ga. App. 209

73. La—Radford v. Gibert, App. 13 So 2d 613

74. Mo—Dorsett v. Pevely Dairy Co., App. 134 SW 2d 624

75. NY—Herman v. Buffalo, 108 NE 451, 214 NY 816
39 CJ p 1340 note 70

76. Ga—Calvert v. Atlanta Hub Co., 139 SE 917, 37 Ga. App. 295

77. Ga—Calvert v. Atlanta Hub Co., supra.

Retention of collected money admittedly due

Where the object of the contract was the collection of a debt owing to the employer, the acceptance by the employer from the independent contractor of the amount collected, which was no greater than the amount admittedly due him, and the retention of that amount with knowledge of an unauthorized tort commit-

ted by the contractor in making the collection, did not amount to a ratification of the unauthorized wrong—Calvert v. Atlanta Hub Co., supra.

78. U.S.—Philadelphia, Wilmington & Baltimore R Co v. Philadelphia & Havre de Grace Steam Tow Boat Co., 23 How 209, 16 L. Ed. 438.

79. Ga—Savannah & W. R. Co. v. Phillips, 17 SE 82, 90 Ga. 829

80. Conn—Newell v. K. & D. Jewelry Co., 176 A. 405, 119 Conn. 332
39 CJ p 1340 note 78

81. Conn—Bogoratt v. Pratt & Whitney Aircraft Co., 157 A. 860, 114 Conn. 136

Tex—T. J. Mansfield Const. Co. v. Gorsline, Com. App., 292 S.W. 187
39 CJ p 1340 note 74

82. Conn—Bogoratt v. Pratt & Whitney Aircraft Co., 157 A. 860, 114 Conn. 136

La—Schott v. Ingargolia, App., 180 So 462
39 CJ p 1341 note 75

83. Va—McCrorey v. Thomas, 63 SE 1011, 109 Va. 373, 17 Ann. Cas. 373.

84. Ga—Hickman v. Toole, 134 SE 635, 35 Ga. App. 697

39 CJ p 1340 note 74 [a], [d]

85. Pa—Miller v. City of Erie, 16 A 2d 37, 340 Pa. 177

Lay inspection

The contractee is justified in relying on the technical knowledge and skill of the contractor; and his sole obligation is to make such an examination of work on completion as might be expected of a prudent layman, followed by inspections thereafter at reasonable intervals—Doerr v. Rand's, 16 A 2d 377, 340 Pa. 183.

86. Conn—Mann v. Leake & Nelson Co., 43 A 2d 461, 132 Conn. 251.
39 CJ p 1341 note 77

87. Conn—Mann v. Leake & Nelson Co., supra.

88. Conn—Mann v. Leake & Nelson Co., supra.

89. RI—Taylor v. Winsor, 73 A 383, 30 RI 44—Read v. East Providence Fire Dist., 40 A. 760, 30 RI 574

90. Minn—Bast v. Leonard, 15 Minn. 304.

property from the premises⁹¹

§ 596. — Failure to Remedy Nuisance

An employer is liable for injuries from an unabated nuisance of which he has notice, although he has employed a contractor to abate it or although the necessity of creating a nuisance in order to do the work contracted for was not apparent until the work was in progress.

Liability for maintaining a nuisance continues until the nuisance is abated, although a contractor has been employed to abate it.⁹² Where an employer has no reason to believe that the act contracted to be done is a nuisance, and it turns out during the progress of the work that it is necessary to create a nuisance in order to do the work, then the employer is not liable for injuries to third persons resulting from the nuisance before he had notice of its existence,⁹³ but on receiving such notice he must, in order to protect himself, take such reasonably prompt and efficient means as are in his power to suppress the nuisance.⁹⁴

§ 597. — Joint Wrongful Act of Contractor and Contractee

The contractee is liable for an injury caused by the joint or concurrent negligence of the contractee and himself.

Where the negligence or wrongful act of the contractor joins or concurs with that of the contractee in causing the injury, the contractee is liable.⁹⁵

§ 598. — Subterfuge and Identity of Interest

A master is not relieved of liability for the acts of another employed in fact as a servant, although a contract nominally, and as a subterfuge, created the relation of employer and independent contractor.

The mere nominal employment of an independent contractor will not relieve the master of liability for his torts where he is in fact employed as a servant,⁹⁶ and a contract which on its face creates the relation of independent contractor will not protect the contractee from liability if it is designed as a subterfuge.⁹⁷ Also, where the proprietor of a store permits a luncheonette to be operated by a concessionaire apparently as a part of the store, and employees of the concessionaire are apparently employees of the store, such proprietor has been held to owe to patrons of the luncheonette, while consuming food on the premises, the duty of seeing to it that they are not injured by the negligent acts of such employees.⁹⁸

§ 599. Stipulations as Exempting Contractee from Liability

Stipulations with an independent contractor are ineffective to release the contractor from liability to third persons for injuries sustained.

One who employs another as a contractor cannot release himself from liability for damages by any stipulation with the contractor in so far as the rights of third persons who may be injured are concerned.⁹⁹

§ 600. Liability of Contractee to Servants of Contractor or Subcontractor

Ordinarily the contractee is not liable for injuries to a servant of the independent contractor, or of a subcontractor, caused by the acts or negligence of the independent contractor, a subcontractor, or a coemployee of the injured servant.

Since, as discussed supra § 3 (1), the servant of an independent contractor or of a subcontractor is not a servant of the contractee, ordinarily the con-

91. D C—Swart v. Justh, 34 App DC 596

Hot tar

The contractee was not liable for injuries to a boy who fell into a bucket of hot tar placed on an adjacent lot, not owned by the contractee, by a subcontractor after finishing work, placing the bucket on the lot was not a part of the job, but a collateral act, and even under the doctrine of ordinary care, the contractee was not required to examine vacant lots in the vicinity to ascertain whether any buckets of hot tar had been placed there—Barlow v. Kriehoff Co., 16 N.W.2d 715, 310 Mich 195.

92. N J—Fiducia v. Magenheim, 43 A.2d 688, 133 N.J.Law 145, affirmed Appeal of Drill, 45 A.2d 315, 133 N.J.Law 560—Corra v. Magenheim, 43 A.2d 688, 133 N.J.Law 145, af-

firmed Appeal of Magenheim, 45 A.2d 453, 133 N.J.Law 559

93. Ky—James v. McMinimy, 20 S.W. 435, 93 Ky. 471, 14 Ky.L. 486, 40 Am.S.R. 200

94. Cal—Snow v. Marian Realty Co., 299 P. 720, 212 Cal. 622.
Ky—James v. McMinimy, 20 S.W. 435, 93 Ky. 471, 14 Ky.L. 486, 40 Am.S.R. 200

95. Ky—Yellow Creek Coal Co. v. Lawson, 16 S.W.2d 1043, 229 Ky. 245

N C—State Highway & Public Works Commission v. Diamond S. S. Transp. Corp., 38 S.E.2d 214, 226 N.C. 371

39 C.J. p. 1341 note 84

Liability of contractee for his own negligence generally see supra § 586

96. Neb—Bodwell v. Webster, 154

N.W. 229, 98 Neb. 664, L.R.A. 1918C 624

97. Kan—Nelson v. American Cement Plaster Co., 115 P. 578, 84 Kan. 797

Pa—Bekelja v. James E. Strates Shows, Com.Pl., 56 Dauph. Co. 317, 39 C.J. p. 1341 note 87

98. Mass—Barron v. McLellan Stores Co., 39 N.E.2d 953, 310 Mass. 778

99. La—Brady v. Jay, 36 So. 182, 111 La. 1071

Me—Vease v. Penobscot R. Co., 49 Me. 119

Mo—Cannon v. S. S. Kresge Co., 116 S.W.2d 559, 233 Mo.App. 173.

39 C.J. p. 1341 note 88.

Stipulation is not binding on injured third persons

La—Goff v. Sinclair Refining Co., App., 162 So. 452.

tractee is not liable for injuries to such servant caused by the acts or negligence of the contractor,¹ or subcontractor,² or coemployee of the injured servant.³ This is true although the workmen thought they were working for the contractee,⁴ but there is also authority apparently to the contrary.⁵ The rule is not affected by a statute making it the duty of owners, contractors, and subcontractors, engaged in designated work, to take designated precautions for the safety of their employees,⁶ since such statutes are intended to apply only to that member of the class enumerated who was engaged in the work designated at the time when the injury occurred.⁷

While the contractee is not absolutely exempt in all cases from liability for injuries to a servant of

the contractor or subcontractor,⁸ there being exceptions, discussed *infra* §§ 601-606, to the general rule of nonliability, nevertheless he is not liable unless he owed some duty to the employee,⁹ he failed to perform that duty,¹⁰ and such nonperformance was the proximate cause of the injury.¹¹ The contractee does not owe to the employees of the independent contractor the same duties he owes to his own employees.¹² So too the duties which a contractee owes to employees of the independent contractor are less than those owing to third persons;¹³ and consequently his liability to such employees is not as extensive as his liability to third persons, that is, the act may be such as to render the contractee liable to third persons although it would not make him liable to a servant of the contractor.¹⁴

1. *US*—*Daroca v Metropolitan Life Ins Co*, CCA La., 121 F2d 917, certiorari denied 62 S Ct 482, 314 US 700, 86 L Ed 559

Ga.—*Georgia Power Co v Gillespie*, 176 SE 788, 49 Ga App 788

Ky.—*Standard Oil Co v Cheek*, 138 SW 2d 950, 278 Ky 508—*Hamblyn's Adm'r v Gatliff Coal Co*, 128 SW 2d 577, 278 Ky 248—*Louisville & N R Co v Smith's Adm'r*, 119 SW 241, 134 Ky 47

Me.—*Powers v Maine Cent R Co*, 95 A 879, 114 Me 198

NC.—*Mack v. Marshall Field & Co*, 12 SE 2d 235, 218 NC 697—*James v Farmers' Peanut Co*, 151 SE 728, 198 NC 380—*Greer v Callahan Const Co*, 130 SE 739, 190 NC 632

Okl.—*Beasley v Bond*, 48 P 2d 299, 173 Okl 355

Tex.—*Continental Paper Bag Co v Bosworth, Com App*, 276 SW 170—*Humble Oil & Refining Co v Bell*, Civ App, 180 SW 2d 970, error refused 181 SW 2d 569, 142 Tex 645

Wash.—*Seattle Erie No 1 of Fraternal Order of Eagles v Commissioner of Unemployment Compensation and Placement*, 160 P 2d 614, 28 Wash 2d 187, motion denied 163 P 2d 921, 23 Wash 2d 187 39 CJ p 1341 note 90

Contractee does not stand in shoes of contractor and manifestly, if he is concerned only in the general results of the work and has no control of the details and manner in which the work is to be accomplished, he should not be liable for injuries caused to employees of the contractor during the progress of the work.—*Le Vonas v Acme Paper Bd Co*, 40 A 2d 43, 184 Md. 16

Manner of doing work

Where an independent contractor is engaged to remove a scaffold, the contractee is not liable to a servant of the contractor for the manner in

which the removal is effected—*Nashville Bridge Co v Marsh*, 279 SW 1099, 213 Ky. 728

2. *Ind*—*Looney v Prest-O-Lite Co*, 117 NE 678, 65 Ind App 617

NY.—*Kowalsky v Conreco Co*, 190 NE 206, 264 NY 125, reargument denied 191 NE 620, 264 NY 674 NC.—*Mack v Marshall Field & Co*, 12 SE 2d 235, 218 NC 697

3. *Neb*—*Dabelstein v City of Omaha*, 273 NW 43, 132 Neb 710

Tex.—*Humble Oil & Refining Co v Bell*, Civ App, 180 SW 2d 970, error refused 181 SW 2d 569, 142 Tex 645

Servant lent by contractee

Where magazine subscription solicitor farmed out work to canvasser who hired sales crews, and assumed transportation of crews and payment for transportation, but solicitor employed and paid supervisor to travel with and instruct the crews, canvasser was independent contractor and supervisor was "lent" servant, and hence canvasser alone was liable for injuries to members of crew resulting from supervisor's negligent driving of automobile—*Still v Union Circulation Co*, CCA NY, 101 F 2d 11, certiorari denied 60 S Ct 78, 308 US 565, 84 L Ed 474.

4. *Cal*—*Smith v Belshaw*, 26 P 834, 89 Cal 427.

5. *Kan*—*Solomon R Co v Jones*, 2 P 657, 30 Kan 601

39 CJ p 1342 note 96

6. *Okl*—*Corpus Juris* quoted in *Beasley v Bond*, 48 P 2d 299, 311, 173 Okl 355

39 CJ p 1343 note 97

7. *Okl*—*Corpus Juris* quoted in *Beasley v Bond*, 48 P 2d 299, 311, 173 Okl 355

39 CJ p 1343 note 97.

8. *Mo*—*Mallory v Louisiana Pure Ice & Supply Co*, 6 SW 2d 617, 320 Mo. 95.

NC.—*Greer v Callahan Const Co*, 130 SE 739, 190 NC 632

9. *US*—*McHugh v National Lead Co*, DCMo, 60 F Supp 17

Protection against contractor's negligence

(1) Owner engaging independent contractor to perform work does not owe duty to exercise ordinary care to protect contractor's employee from risk arising from negligence of contractor, and such rule is not changed by fact that employee is on premises by express invitation of owner rather than by implied invitation—*Humble Oil & Refining Co v Bell*, Civ App, 180 SW 2d 970, error refused 181 SW 2d 569, 142 Tex 645

(2) One who employs a contractor to erect a building, or to do any other mechanical work, does not become a guarantor to all the employees of the contractor for his skill and care in performing the work—*Hunt v Pennsylvania R Co*, 51 Pa 475

10. *US*—*McHugh v National Lead Co*, DCMo, 60 F Supp 17

11. *Ky*—*Lexington & E Ry. Co v White*, 206 SW 467, 182 Ky 267.

12. *US*—*United Production Corporation v Chesser*, CCA Tex, 94 F 2d 790, rehearing denied 95 F 2d 521, certiorari denied *Chesser v. United Production Corporation*, 59 S Ct 75, 305 US 616, 83 L Ed 393 Ark.—*Aluminum Ore Co. v George*, 186 SW 2d 656, 208 Ark 419

NC.—*Greer v Callahan Const Co*, 130 SE 739, 190 NC 632

Identity of duties in respect of providing safe place to work see *infra* § 603.

13. *Ky*—*Louisville & N. R. Co v Smith's Adm'r*, 119 SW. 241, 134 Ky 47.

14. *Neb*—*Omaha Bridge & Ter*

Negligence of another independent contractor or his servants. As a corollary of the rule that the contractee is not liable for injuries to servants of the contractor caused by the negligence of the contractor, it may be stated that the contractee is not liable for injuries to the contractor's servants due to the negligence of another independent contractor¹⁵ or of his employees¹⁶. He is under no obligation to protect the servants of one contractor from the negligence of the servants of another¹⁷. In order to make the owner liable in such a case there must have been some negligence on his own part,¹⁸ or a failure on his part to perform some duty imposed on him by express contractual provision,¹⁹ or an interference by him with the prosecution of the work.²⁰

Identity of interest. Where the interests of a contractor and contractee are such as to show they are one and the same, the contractee will be liable to the servants of the contractor as though they were his own.²¹

§ 601. — Negligence of Contractee or His Servants

A contractee is liable for injuries sustained, during the course of his employment, by a servant of an independent contractor or subcontractor by reason of the negligence of the contractee, or of his servants, acting within the scope of their employment, or by the combined fault of the contractor and contractee.

Where injuries are sustained by the servant of an

independent contractor or subcontractor during the course of his employment, by reason of the negligence of the contractee,²² or of his servants, acting within the scope of their employment,²³ or by the combined fault of the contractor and the contractee,²⁴ the contractee will be liable, there being no contractual²⁵ assumption of risk by the injured servant in such case,²⁶ but if the servant of the contractee was not acting within the scope of his employment at the time of the injury complained of the contractee will not be liable.²⁷ A contract between the owner and the contractor will not be construed as indemnifying the owner as against his own negligence in the absence of an express stipulation to that effect.²⁸

A contractee may be liable for injury to an employee of an independent contractor resulting from the negligence of that or another independent contractor where he failed to exercise reasonable care in the selection of a competent contractor or contractors,²⁹ but not in the absence of negligence in that respect,³⁰ and it has been held that knowledge of the incompetency of the contractor does not make the contractee liable to a servant of the contractor for injuries resulting therefrom.³¹ So too, where construction work was being done by an independent contractor according to plans furnished by the contractee, the latter may be liable for injuries to an employee of the contractor when,³² and only

minal R Co v Hargadine, 98 N W 1071, 5 Neb (Unoff.) 418

15. Ill.—Haugh v Ryerson, 171 Ill App 414

39 C.J. p 1343 note 99

16. N.H.—Porter v Consolidation Coal Co, 142 A 453, 83 N.H. 334 39 C.J. p 1343 note 1

17. N.Y.—Joyce v Convent Ave Constr Co, 140 N.Y.S. 663, 155 App Div 586

No duty of active vigilance

N.Y.—Smith v Matthews Const Co, 241 N.Y.S. 689, 137 Misc 290

18. N.Y.—Silverman v Binder, 115 N.Y.S. 54, 130 App Div 581. 39 C.J. p 1343 note 2.

19. Ky.—Cumberland Coal Co v. Lee, 119 S.W. 746

20. N.Y.—Joyce v Convent Ave Constr Co, 140 N.Y.S. 663, 155 App Div 586—Silverman v Binder, 115 N.Y.S. 54, 130 App Div 581

21. Wash.—Norwegian Danish M E Church v. Home Tel Co, 119 P 834, 66 Wash 511. 39 C.J. p 1343 notes 7-8.

22. Pa.—Adams v MacDonald, Com Pl, 31 Del Co 263

Tex.—Continental Paper Bag Co v Bosworth, Com App, 276 S.W. 170 —Humble Oil & Refining Co v

Bell, Civ App, 180 S.W.2d 970, error refused 181 S.W.2d 569, 142 Tex 645

39 C.J. p 1343 note 10

23. Me.—Powers v Maine Cent R R Co, 95 A 879, 114 Me 193

Mass.—Engel v Boston Ice Co, 4 N.E.2d 455, 295 Mass 428

Tex.—Burton v Galveston, H & S A R Co, 61 Tex 538—Montgomery v Houston Textile Mills, Com App, 45 S.W.2d 140—Humble Oil & Refining Co v Bell, Civ App, 180 S.W.2d 970, error refused 181 S.W.2d 569, 142 Tex 645—Harbour v Graham Mfg Co, Civ App, 47 S.W.2d 700, error dismissed

39 C.J. p 1343 note 11

24. U.S.—Corpus Juris cited in Steinman v Pennsylvania R Co, CCANJ, 54 F.2d 1052, 1054, certiorari denied 52 S.Ct. 408, 285 U.S. 552, 76 L.Ed. 942—Corpus Juris quoted in The W D Anderson, D.C.Pa., 17 F.Supp. 754, 758, affirmed, CCA, 94 F.2d 377, certiorari denied Atlantic Refining Co v Smith, 58 S.Ct. 764, 303 U.S. 658, 82 L.Ed. 1117.

39 C.J. p 1343 note 12

25. U.S.—United Production Corporation v Chesser, CCA Tex, 95 F.2d 521, denying rehearing 94 F.2d

790, certiorari denied Chesser v United Production Company, 59 S.Ct. 75, 305 U.S. 616, 83 L.Ed. 393

26. Cal.—Osterlag v Dethlehem Shipbuilding Corporation, 151 P.2d 647, 65 Cal App 2d 795

La.—Finney v Banner Cleaners & Dyers, 126 So 573, 13 La App 101

27. Ohio.—Halkias v Walkoff Co, 47 N.E.2d 199, 141 Ohio St 139

N.J.—Bielecki v Max Hertz Leather Co, 128 A 543, 3 N.J. Misc 375, affirmed 131 A 921, 102 N.J. Law 433

39 C.J. p 1343 note 13

28. Pa.—Perry v Payne, 66 A. 553, 217 Pa 252, 11 L.R.A.N.S., 1173, 10 Ann Cas 589

29. Mo.—Baker v Scott County Milling Co, 20 S.W.2d 494, 323 Mo. 1089

30. Mass.—Parker v Taylor, 3 N.E.2d 25, 295 Mass 51

39 C.J. p 1343 note 99 [a] (2)

31. Minn.—Schip v Pabst Brewing Co, 66 N.W. 3, 64 Minn 22

39 C.J. p 1344 note 16

32. Ala.—St. Louis-San Francisco Ry Co. v Kimbrell, 145 So 433, 236 Ala 114.

Duty as to plans

Owner had duty in projecting work

when,³³ the plans were defective and the injuries resulted proximately from the defects.

§ 602. — Retention or Assumption of Control of Work

An employer who reserves the right to direct the manner of performing the details of the work, or interferes and assumes control, may become liable for an injury to a servant of the contractor.

Where an employer reserves the right to direct the performance of the work, he owes to the employees of the contractor the duty of ordinary care in directing such matters.³⁴ Also an employer of an independent contractor may become liable for an injury to a servant of the contractor by interfering and assuming control.³⁵ If an employer in fact assumes the relation of master to the servants of one whom he has engaged to produce a given result, the duties and responsibilities which the law imposes on such a relation attach.³⁶ On the other hand, the contractee has been held not to be liable where it does not appear that he had a right to, or did, direct the manner of performing the details of the work.³⁷ He does not incur a liability in respect of an injury to a servant of the contractor by reason of the mere fact that he furnishes an inspector or overseer,³⁸ or reserves, or exercises

under a reservation, a superintendency over the work to see that it is done according to the specifications of the contract,³⁹ even though, for that purpose, he reserves the right to object to the employment of servants selected by the contractor⁴⁰ or to stop the work if it is not being properly done.⁴¹ Furthermore, the contractee is not rendered liable by the fact that he or his representative makes suggestions concerning the work⁴² or gives a noncompulsory direction to an employee of the contractor to do promptly an act within the scope of the servant's employment and of the work undertaken by the contractor, the direction being purely supervisory and intended to coordinate the work in the interest of speed.⁴³

§ 603. — Safety of Place to Work

One who is having work done on his premises by an independent contractor, and who retains control of the premises during the progress of the work, is under an obligation to use ordinary care to keep the premises in a reasonably safe condition for the servants of the contractor.

The contractee is liable for injuries to servants of a contractor or subcontractor resulting from breach of a duty imposed by contract⁴⁴ or statute⁴⁵ to provide a safe place to work

requiring excavation under wall, attended with danger to contractor's employee, to use reasonable care to provide plans requiring proper precautionary measure—*Mallory v Louisiana Pure Ice & Supply Co.*, 6 S W.2d 617, 330 Mo. 95

33. Ala.—*Kimbrell v St Louis-San Francisco Ry. Co.*, 129 So 274, 221 Ala 505.

34. Mo.—*State ex rel Wors v Hostetter*, 124 S W.2d 1072, 343 Mo 945

Ohio—*Hilleary v Bromley*, App, 61 NE 2d 781, reversed on other grounds 64 NE 2d 832, 146 Ohio St. 212.

39 C J p 1344 note 18.

Cleaning oil tanks

Where defendant oil company had requested decedent's employer to send two men without a foreman or tools to clean sediment from defendant's oil tanks, defendant had supervision and control over decedent who was asphyxiated while cleaning tanks, and was under duty to exercise due care to see that the work was done by reasonably safe and prudent means—*Amacker v Skelly Oil Co.*, CCA Tex., 132 F.2d 481.

Employee sent to work under defendant's manager

Where window cleaning company sent employee to certain store to clean walls under the direction of the

store manager, store owner owed employee some duty of due care—*Virginia Dare Stores v Schuman*, 1 A 2d 897, 175 Md 287

35. U S—*Corpus Juris* cited in *Steinman v Pennsylvania R Co.*, CCANJ, 54 F.2d 1052, 1054, certiorari denied 52 S Ct 408, 285 U S 552, 76 L Ed 942

Mo—*Corpus Juris* cited in *Klaber v Fidelity Bldg Co.*, App, 19 S W.2d 758, 762

39 C J p 1344 note 19

36. Kan.—*Kansas City, M & O R Co v Loosley*, 90 P 990, 76 Kan 103

39 C J p 1323 note 89

Representative on premises

Where a company, having hired an independent contractor, has taken over the work under an agreement made at the time of the hiring that this could be done under certain circumstances, an agent of the company who was its sole representative on the premises will be deemed to have authority to prosecute the work so as to render the laborers servants of the company—*Freeman v Dells Paper & Pulp Co.*, 135 NW 540, 150 Wis 98.

37. N.Y.—*Latini v Zavodnick*, 173 NE 217, 254 NY 346

38. Mo.—*Thurston v Kansas City Terminal R Co.*, App, 168 S W 236

39. Ind.—*Marion Shoe Co v Eppley*, 104 NE 65, 181 Ind 219, Ann Cas 1916D 220

39 C J p 1344 note 22

40. La.—*Robichaux v Morgan's Louisiana & T R & S S. Co.*, 60 So 208, 131 La 737

41. Ind.—*Marion Shoe Co v Eppley*, 104 NE 65, 181 Ind 219, Ann Cas 1916D 220

42. Miss.—*Regan v Foxworth Vaneer Co.*, 174 So 48, 178 Miss 654

43. U S—*Steinman v Pennsylvania R Co.*, CCANJ, 54 F.2d 1052, certiorari denied 52 S Ct 408, 285 U S 552, 76 L Ed 942.

44. Ky.—*Cumberland Coal Co v. Lee*, 119 S W 746

39 C J p 1344 note 26.

45. N.Y.—*Semanchuck v Fifth Ave. & Thirty-Seventh St Corporation*, 49 NE 2d 507, 290 NY 412—*Berla v Zambetti*, 257 NYS 179, 235 App Div 464—*M. H. Treadwell Co v U S Fidelity & Guaranty Co.*, 287 N.Y.S 49, 158 Misc 939, affirmed 293 NYS 928, 249 App Div 809, reversed on other grounds 9 NE 2d 818, 275 N.Y 158

Wis.—*Criswell v Seaman Body Corporation*, 290 NW 177, 233 Wis. 806

39 C J p 1344 note 27, p 1351 note 98.

The weight of authority supports the rule that, independently of contract or statute, one who is having work done on his premises by an independent contractor is under the obligation to use ordinary care to keep the premises in a reasonably safe condition for the servants of the contractor,⁴⁶ especially where the work is of an exceptionally dangerous character,⁴⁷ and in some jurisdictions where this view prevails it has been held that the contractee owes the same duty to the servants of the contractor as he owes to his own employees,⁴⁸ while in others the duty which the contractee owes to the servants of the contractor is the duty which he owes to any invitee lawfully on his premises,⁴⁹ except where, by going on a part of the premises other than that where the construction work is in progress, an employee of the contractor loses his status as an in-

invitee and becomes a licensee, in which case the contractee owes him only the duty of refraining from acts willfully injurious.⁵⁰ Nevertheless, if the employer of an independent contractor furnishes to the latter reasonably safe premises as measured by the usual manner of doing work, the employer is not liable to servants of the contractor for injury,⁵¹ and, if under such conditions injury to employees results, it will be deemed caused by negligence of the contractor.⁵² The owner is not liable for injury to, or death of, an employee of a contractor or subcontractor, on the ground that he furnished such employee an unsafe place to work, where the employee was injured or killed because of conditions he was correcting or defects he was repairing.⁵³ The duty of a mine owner to an employee of an independent contractor, working therein, to keep the

46. US—Holt v. Texas-New Mexico Pipe Line Co., CCA Tex., 145 F 2d 863, certiorari denied 65 S Ct 1570, 325 US 879, 89 L Ed 1916—Sinclear Prairie Oil Co v Thornley, CCA Okl., 137 F 2d 128—United Production Co v Chesser, CCA Tex., 94 F 2d 790, rehearing denied 95 F 2d 521, certiorari denied Chesser v United Production Corporation, 59 S Ct 75, 305 US 616, 83 L Ed 393

Ark—Corpus Juris cited in Aluminum Ore Co v George, 186 SW 2d 658, 208 Ark 419

Ky—Hotel Operating Co v Saunders' Adm'r., 141 SW 2d 260, 283 Ky 345

Md—Le Vonas v Acme Paper Bd Co., 40 A 2d 43, 184 Md 16

Mass—Wood v National Theatre Co., 42 NE 2d 536, 311 Mass 550

NY—M H Treadwell Co v U S Fidelity & Guaranty Co., 287 NY S 49, 158 Misc 939, affirmed 293 N.Y.S. 928, 249 App Div 809, reversed on other grounds 9 NE 2d 818, 275 NY 158—Holdren v Morris, 74 N.Y.S. 2d 807.

Ohio—Bosnjak v Superior Sheet Steel Co., 62 NE 2d 305, 145 Ohio St 538—Baer v De Kay, 24 NE 2d 459, 62 Ohio App 445

Pa—Debenjak v. Parkway Oil Co., 49 A 2d 521, 152 Pa Super. 603.

Tex—Montgomery v Houston Textile Mills, Com App., 45 SW 2d 140 39 CJ p 1345 note 29

Furnishing protection against hidden dangers see *infra* § 606

A flagpole, not designed to accommodate human weight, is not a place to work afforded by the owner—Larsen v Home Owners' Loan Corporation, 44 N.Y.S. 2d 414, 266 App Div 1007, appeal denied 44 N.Y.S. 2d 954, 267 App Div 772

47. Ark—Corpus Juris cited in Aluminum Ore Co v George, 186 S.W.2d 656, 658, 208 Ark 419.

Pa—Heyse v Philadelphia Electric Co., 93 A 877, 248 Pa 99

48. Md—Le Vonas v Acme Paper Bd Co., 40 A 2d 43, 184 Md 16

39 CJ p 1345 note 32—45 CJ p 819 notes 11, 12.

49. US—Holt v Texas-New Mexico Pipe Line Co., CCA Tex., 145 F 2d 862, certiorari denied 65 S Ct 1570, 325 US 879, 89 L Ed 1996—American Steel & Wire Co v Sieraski, CCA Ohio, 119 F 2d 709—McHugh v National Lead Co., DCMo., 60 F Supp 17

Ark—Aluminum Ore Co v George, 186 SW 2d 656, 208 Ark 419

Cal—La Malfa v Piombo Bros., 161 P 2d 964, 70 Cal App 2d 840

Ky—Hotel Operating Co v Saunders' Adm'r., 141 SW 2d 260, 283 Ky 345

Ohio—Bosnjak v Superior Sheet Steel Co., 62 NE 2d 305, 145 Ohio St 538—Hozian v Crucible Steel Casting Co., 9 NE 2d 143, 132 Ohio St 453, 112 ALR 333—Manchester v Youngstown Sheet & Tube Co., App., 46 NE 2d 780—Baer v De Kay, 24 NE 2d 459, 62 Ohio App 445

39 CJ p 1345 note 29 [a.] (3)

Invitees and duty thereto generally see the CJS title Negligence §§ 42-53, also 45 CJ, p 808 note 6-p 838 note 58

Business invitee

US—United Production Co v Chesser, CCA Tex., 94 F 2d 790, rehearing denied 95 F 2d 521, certiorari denied Chesser v United Production Corporation, 59 S Ct 75, 305 US 616, 83 L Ed 393

Business visitor

Pa—Debenjak v. Parkway Oil Co., 49 A 2d 521, 152 Pa Super 603

50. N.J.—Sullivan v. Delaware, L & W. R. Co., 144 A 580, 105 NJ Law 450

Va.—Davis Bakery, Inc v Daxler, 124 S.E. 411, 139 Va. 628.

51. US—Cook v Phillips Petroleum Co., CCA Tex., 158 F 2d 10

Okl—Kaw Boiler Works v Frymyer, 227 P 453, 100 Okl 81

Limits of duty

(1) Ordinary care does not require that the contractee speculate on a possibility as distinguished from a probability, and the contractee will not be held negligent in not providing safe premises where to so hold would, in effect, be equivalent to a requirement that a high degree of care be exercised and that consequences unknown to the contractee should have been anticipated—Aluminum Ore Co v George, 186 SW 2d 656, 208 Ark 419

(2) An owner of premises is not required to inspect independent contractor's work in order to determine whether it is being done in a way that will provide a safe place for contractor's employees to work—McHugh v. National Lead Co., DCMo., 60 F Supp 17.

(3) Where owner engaged independent contractor to dig slush pit, owner was under no obligation to contractor's employee to inspect pit for presence of unexploded dynamite before contractor completed the pit—Humble Oil & Refining Co v Bell, Civ App., 180 SW 2d 970, error refused 181 SW 2d 569, 142 Tex 645

52. Okl—Kaw Boiler Works v Frymyer, 227 P 453, 100 Okl. 81

53. N.J.—Broecker v. Armstrong Cork Co., 24 A 2d 194, 138 NJ Law 3.

NY—Kowalsky v Conreco Co., 190 NE 206, 264 N.Y. 125, reargument denied 191 NE 620, 264 N.Y. 674.

"Vice principal" of independent contractor

Okl—Fox v. Superior Oil Co., 107 P. 2d 185, 188 Okl. 165.

mine in reasonably safe condition extends only to conditions existing when the mine was turned over to the contractor, not to those arising from changes caused by the progress of the work the contractor undertook to do.⁵⁴

According to some authorities the obligation to furnish a safe place in which to work applies only when the relation of master and servant exists, and the owner of premises on which an independent contractor is doing work is in general under no obligation to the latter's employees to see that they have a safe place to work.⁵⁵

Effect of control of premises Where the contractee retains control of the premises on which the work is being done, it is his duty to use reasonable care to keep them in a reasonably safe condition and he will be liable for injuries to servants of the contractor resulting from a breach of his duty,⁵⁶ especially where the contractee gives the workmen the right to understand that he is caring for their safety and that they may rely on him to guard against negligent conduct in the contractors and others,⁵⁷ but, where the working place is furnished and maintained by the independent contractor, possession of

the site having been delivered to him for the purpose of constructing a building, the owner owes the employees only the negative duty, imposed by law, of refraining from rendering the place unsafe by any act of his own,⁵⁸ and not an affirmative duty to keep the premises safe for the workmen.⁵⁹

§ 604. — Safety of Appliances or Work

A contractee is liable for injuries to an employee of an independent contractor resulting from a defective or unsafe appliance or instrumentality when, but only when, he furnished the appliance or instrumentality, or was under a contractual or statutory obligation to do so, and failed to use ordinary care to furnish a proper appliance reasonably safe for the intended use.

A contractee is not liable for injuries to an employee of an independent contractor arising from a defective or unsafe appliance or instrumentality where he was not obligated⁶⁰ by contract⁶¹ or statute⁶² to furnish the appliance or instrumentality, and did not in fact assume to furnish it,⁶³ even though the appliance belonged to him⁶⁴ and was used with⁶⁵ or without⁶⁶ his consent.

Conversely, the contractee is liable where he furnished the appliance or instrumentality,⁶⁷ or was re-

54. Ala.—U S Cast Iron Pipe & Foundry Co v Fuller, 102 So 25, 212 Ala 177—Stoss-Sheffield Steel & Iron Co v Edwards, 70 So 285, 14 Ala App 337.

55. Or.—Warner v Synnes, 235 P 305, 114 Or 451
39 C.J. p 1345 note 38

Where contractee engaged in performance of governmental function
Iowa.—Ford v Independent School Dist of Shenandoah, 273 NW 870, 223 Iowa 795.

56. Md.—Le Vonas v Acme Paper Bd Co, 40 A 2d 43, 184 Md. 16
Ohio.—Bosnjak v Superior Sheet Steel Co, 62 NE 2d 305, 145 Ohio St 538

39 C.J. p 1346 note 40.

57. Mich.—Samuelson v Cleveland Iron Mm Co, 13 NW 499, 49 Mich 164, 48 Am R 456
39 C.J. p 1346 note 41.

58. US.—Southern Pac Co. v McCready, CCA Cal, 47 F 2d 673, certiorari denied 52 S Ct 10, 284 U.S. 624, 76 L Ed 532.

59. US.—McCready v. Southern Pac Co, CCA Cal, 26 F 2d 569

60. N.Y.—Wingert v Krakauer, 87 N.Y.S. 261, 93 App Div 228
Or.—Warner v. Synnes, 235 P 305, 114 Or 451, affirming judgment on rehearing 280 P 862, 114 Or 451
39 C.J. p 1346 note 43 [a]

Automatic coupler on car of logging railroad

Logging road was not under duty

to injured employee of contractor loading logs to install and maintain automatic couplers—Moore v Rawls, 144 S.E. 552, 186 NC 125

Contractor's duty

If it is the duty of the contractor to furnish appliances for performing the work, the owner is not liable for injuries sustained by the contractor's employee by reason of his negligence in furnishing unsafe appliances—Parker v Taylor, 8 NE 2d 25, 295 Mass. 51—39 C.J. p 1346 note 44.

61. Ala.—Connors-Weyman Steel Co v Kilgore, 66 So 609, 189 Ala 643

39 C.J. p 1346 note 43

62. US.—Gucciardi v Chisholm, D C N.Y., 49 F Supp 581, reversed on other grounds, CCA, 145 F 2d 514.

N.Y.—Iacono v. Frank & Frank Contracting Co, 182 NE 23, 259 N.Y. 377—Anderson v 143 Linden Blvd Corporation, 16 N.Y.S. 2d 149, 258 App Div 887—Sweeney v. Spring Products Corporation, 13 N.Y.S. 2d 73, 257 App Div 104, motion denied 14 N.Y.S. 2d 278, 257 App Div 958, reargument denied 26 NE 2d 814, 282 N.Y. 685

Okl.—Beasley v. Bond, 48 P 2d 299, 173 Okl 355.

63. Ala.—Connors-Weyman Steel Co v Kilgore, 66 So 609, 189 Ala 643

N.Y.—Wingert v. Krakauer, 87 N.Y.S. 261, 92 App Div 228.

Okl.—Beasley v Bond, 48 P 2d 299, 173 Okl 355

64. N.Y.—Mercante v Hygrade Food Products Corporation, 17 N.Y.S. 2d 625, 258 App Div 641, appeal denied 19 N.Y.S. 2d 312, 269 App Div 732—Sweeney v Spring Products Corporation, 13 N.Y.S. 2d 73, 257 App Div 104, motion denied 14 N.Y.S. 2d 278, 257 App Div 958, reargument denied 26 NE 2d 814, 282 N.Y. 685

Loan, or lack of insistence on use, of appliance

In an action by an employee of an independent contractor against an owner for injuries caused by the breaking of a rope belonging to the owner, where it did not appear that the owner insisted on the use of the rope or that the rope was not merely lent to the contractor, the owner was not liable on the theory that he furnished an inherently dangerous instrumentality, especially where the case was not tried on that theory—Fay v. German Gen Benev Soc, 124 P 844, 183 Cal 118

65. Ky.—Bush v Grant, 61 SW 363, 22 Ky L 1766
39 C.J. p 1346 note 44 [b]

66. Tex.—Burton-Lingo Co. v Armstrong, Civ App, 116 SW 2d 791, error refused.

67. US.—United Production Corporation v Chesser, CCA Tex, 94 F 2d 790, rehearing denied 95 F 2d 521, certiorari denied Chesser v.

quired by contract⁶⁸ or statute⁶⁹ to furnish it, and failed to exercise ordinary care to furnish a proper appliance reasonably safe for the intended use. In these circumstances it has been said that the duty of the contractor to the servants of the employer is the same as that which he owes to his own servants.⁷⁰ Liability is avoided where the contractee furnishes to a competent contractor appliances which are apparently good, sufficient, and satisfactory,⁷¹ and, while there is some authority to the contrary,⁷² it has generally been held that if reasonably safe appliances are furnished, and they afterward become defective, the contractee is not liable⁷³ unless the contract requires continued supervision of the appliances and the keeping of them in repair, in which event a breach of duty by the contractee will render him liable for injuries to the contractor's servant resulting therefrom.⁷⁴

Although the contractee is bound by agreement to furnish appliances, he need not keep watch of the work to determine when appliances are necessary,⁷⁵ his duty is fulfilled by delivering suitable appliances on the contractor's request, or by providing such appliances at a place where the contractor can secure them on demand.⁷⁶

Negligent use of appliances Where suitable appliances are furnished by the contractee, he is not liable for injuries resulting from a negligent use thereof.⁷⁷

§ 605. — Materials Furnished by Contractee

The contractee is liable for injuries to servants of

the contractor arising from the contractee's failure to perform, or his negligent or inadequate performance of, his agreement to furnish materials connected with the work.

Where the contractee agrees to furnish materials to be used in the performance of the work, or to be used in making the place safe for work, and by reason of his failure to do so, or of his negligent or inadequate performance of his duty in this respect, the servants of the contractor are injured, the contractee will be liable.⁷⁸ However, where the materials furnished by the owner are rejected by the employees of the contractor, and such employees select other materials belonging to the owner, the latter is not liable for an injury resulting from the use of such other materials,⁷⁹ and if materials for a scaffold are selected by servants of the contractor, with the consent of the contractee, but in the absence of any agreement with respect thereto, from lumber on the premises, and the scaffold breaks, the contractee is not liable,⁸⁰ especially where it is not shown that proper lumber could not have been found on the premises.⁸¹

§ 606. — Latent or Potential Dangers; Warnings and Instructions

A person who is having work done on his premises by an independent contractor, and has actual or constructive knowledge of latent or potential dangers on the premises, owes a duty to give warning of, or use ordinary care to furnish protection against, such dangers to employees of the contractor and subcontractors who are without actual or constructive notice of the dangers.

Where there is some extraordinary latent danger

United Production Corporation, 59 S Ct 75, 805 US 616, 83 L Ed 393
 NC—*Peters v. Carolina Cotton & Woolen Mills*, 155 SE 867, 189 NC 753—*Moore v. Rawls*, 144 SE 552, 196 NC 125
 Ohio—*Hilleary v. Bromley*, App. 61 NE 2d 731, reversed on other grounds 64 NE 2d 832, 146 Ohio St 212
 39 CJ p 1346 note 45
 68. Tex—*Continental Paper Bag Co. v. Bosworth*, Civ App. 216 SW 126
 39 CJ p 1347 notes 46, 48
 69. US—*Burris v. American Chic Co.*, DCNY, 38 F Supp 104, affirmed, CCA, 130 F 2d 218
 70. Mass—*Crimmins v. Booth*, 88 NE 449, 203 Mass 17, 132 Am SR 468—*Sullivan v. New Bedford Gas & Edison Light Co.*, 76 NE 1048, 190 Mass 288
 Principle of master and servant is applicable
 N.C.—*Paderick v. Goldsboro Lumber Co.*, 130 SE 29, 190 NC 808

71. La.—*Riley v. State Line SS Co.*, 29 La Ann 791, 29 Am R 249
 39 CJ p 1347 note 49
 72. Mich—*Johnson v. Spear*, 43 NW 1092, 76 Mich 139, 15 Am SR 298
 NC—*Moore v. Rawls*, 144 SE 552, 196 NC 125
 73. Mo—*Kiser v. Suppe*, 112 SW 1005, 133 Mo App 19, 29
 39 CJ p 1347 note 51
 74. Mass—*Toomey v. Donovan*, 33 NE 396, 158 Mass 232
 39 CJ p 1347 note 52
 75. Wash—*Miller v. Moran Bros Co.*, 81 P. 1089, 39 Wash 631, 109 Am SR 917, 1 LRA NS, 383
 76. Wash—*Miller v. Moran Bros Co.*, supra
 77. Mich—*Reier v. Detroit Steel & Spring Works*, 67 NW 120, 109 Mich 244
 NC—*Moore v. Rawls*, 144 SE 552, 196 NC 125

Substance or instrumentality not inherently dangerous
 Ky—*Jennings v. Vincent's Adm'x.*, 145 SW 2d 537, 284 Ky 614
 78. Cal—*McCall v. Pacific Mail SS Co.*, 55 P 706, 133 Cal 42
 39 CJ p 1348 notes 57-59
 The opposite conclusion has been reached on the grounds that the contractual duty of the contractee is owing to the contractor only and that, under a statute, it is the non-delegable duty of the contractor to inspect the material and see that it is proper and safe to be used—*Warner v. Synnes*, 235 P 305, 114 Or 451
 79. NY—*Nugent v. Atlas SS Co.*, 3 NYS 861, 16 NYS 66, 51 Hun 306, affirmed 42 NE 724, 147 NY 709.
 80. Mass—*Callahan v. Phillips Academy*, 62 NE 260, 180 Mass 183
 81. Mass—*Callahan v. Phillips Academy*, supra.

or perilous condition attaching on the service,⁸² or where the premises on which the work to be done by an independent contractor are potentially unsafe by reason of a dangerous element in use thereon,⁸³ or where there is some hidden danger connected with the condition of the premises which the owner or occupier having the work done knows or should know of, and of which the servants of the independent contractor or subcontractor do not have actual or constructive notice,⁸⁴ the owner or occupier owes a duty to use reasonable care to protect the servants from the danger, and he will be liable for injuries sustained by a servant who has not been duly warned of the danger.⁸⁵ However, except where the contractee has assumed the duty of giving warning or otherwise affording protection,⁸⁶ the foregoing is true only in respect of latent dangers of which the servant of the contractor or subcontractor did not know and could not reasonably have discovered and of which the contractee knew or should have

known.⁸⁷ The contractee performs his duty by giving due notice or warning,⁸⁸ and, except for hidden defects,⁸⁹ he is not required to alter the premises to make them safe for employees of a contractor or subcontractor.⁹⁰

There is authority for the view that the benefit of the rule, discussed supra § 590 a, that liability cannot be evaded by employing an independent contractor to do work which is inherently or intrinsically dangerous, unless proper precautions are taken, extends to an employee of an independent contractor,⁹¹ but there is also authority for the opposite view where the danger is not increased by any negligent act or omission of the contractee.⁹² At any rate, the contractee may not be held liable by application of this rule where the work was not inherently dangerous.⁹³

Dangerous machinery Where in furnishing machinery the contractee includes a machine which is

82. Ga.—Huey v. Atlanta, 70 S E 71, 8 Ga App 597

83. Minn.—Hoppe v. Winona, 129 N W 577, 113 Minn. 252, 38 L.R.A., NS, 490, Ann Cas 1913A 247
39 C.J. p 1348 note 65

84. US.—McHugh v. National Lead Co., D.C. Mo., 60 F Supp 17
NC—Corpus Juris cited in Deaton v. Board of Trustees of Elon College, 38 S E 2d 561, 564, 228 NC 483

39 C.J. p 1345 note 31, p 1346 note 38

85. US.—The W. D. Anderson, D.C. Pa., 17 F Supp 754, affirmed, C.C.A., 94 F 2d 377, certiorari denied Atlantic Refining Co. v. Smith, 58 S Ct 764, 303 US 658, 82 L Ed 1117

Mass.—Williams v. United Men's Shop, 58 NE 2d 2, 317 Mass 319—Gallo v. Leahy, 8 NE 2d 782, 297 Mass 265

Pa.—Debenjak v. Parkway Oil Co., 49 A 2d 531, 152 Pa Super 608
39 C.J. p 1348 note 66

86. NH.—Wentworth v. Boston & M R R, 166 A 265, 86 NH 251

87. US.—McHugh v. National Lead Co., D.C. Mo., 60 F Supp 17
Ala.—Kimbrell v. St. Louis-San Francisco Ry Co., 129 So. 274, 231 Ala 505.

Ky.—Young's Adm'r v. Farmers & Depositors Bank, 103 S W 2d 667, 267 Ky 845—Mattingly's Adm'r v. Hines, 232 S W. 376, 192 Ky 176.

Md.—Le Vonas v. Acme Paper Bd. Co., 40 A 2d 43, 184 Md. 16

Neb.—Dabelstein v. City of Omaha, 273 N W. 43, 132 Neb 710

N.Y.—Larsen v. Home Owners' Loan Corporation, 44 N Y S 2d 414, 266 App Div 1007, appeal denied 45 N Y S 2d 954, 267 App Div. 772—

Dinkuhn v. Western New York Water Co., 297 N Y S 376, 262 App Div 51, affirmed 17 NE 2d 460, 279 N Y 606

NC—Corpus Juris cited in Deaton v. Board of Trustees of Elon College, 38 S E 2d 561, 565, 228 NC 483

Ohio—Cleveland Electric Illuminating Co. v. O'Connor, 197 N.E 428, 50 Ohio App 30

Tex.—Ray v. St. Louis Southwestern Ry Co. of Texas, Civ App., 289 S W 1080

39 C.J. p 1349 note 67

Danger created by employees of contractor

(1) The contractee is not liable for failure to give warning of a danger that did not exist when the work began, but was brought about subsequently by the injured employee and his associates—Halley v. Missouri, K & T R Co., Tex Civ App., 70 S W.2d 249, error refused

(2) He is not liable where the danger that culminated in an explosion was created by the negligence of the employees of the independent contractor in failing to discover and remove unexploded dynamite, the existence of the danger was not known to him, and knowledge was not imputable to him—Holt v. Texas-New Mexico Pipeline Co., C.C.A. Tex., 145 F 2d 862, certiorari denied 65 S Ct 1570, 325 US 879, 89 L Ed 1996

88. Ohio—Cleveland Electric Illuminating Co. v. O'Connor, 197 N.E 428, 50 Ohio App 30

Pa.—Com Trust Co v. Carnegie-Illinois Steel Corp., Com Pl., 94 Pittsb Leg J 1, affirmed 44 A 2d 594, 353 Pa 150

Notice to contractor

In a case involving injuries to employees of a subcontractor, it was held that the building owner's duty was performed when it gave notice to contractor and it had no duty to foresee that contractor would not perform his duty to give warning to subcontractor—Valles v. Peoples-Pittsburgh Trust Co., 13 A 2d 19, 339 Pa. 33

89. Mass.—Gallo v. Leahy, 8 NE 2d 782, 297 Mass 265

90. Mass.—Gallo v. Leahy, supra. Pa.—Com Trust Co v. Carnegie-Illinois Steel Corp., Com Pl., 94 Pittsb Leg J 1, affirmed 44 A 2d 594, 353 Pa. 150

91. Mo.—Mallory v. Louisiana Pure Ice & Supply Co., 6 S W 2d 617, 320 Mo 95

Static work

Where decedent had been sent by his employer, an independent contractor, to clean sediment from defendant oil company's tanks and decedent was asphyxiated while engaged in that task, the doctrine that an owner is not liable for injuries caused by changing character of work where dangers to be anticipated necessarily arise from work to be done was inapplicable, since work was static and precautions against injury from it could easily have been taken—Amacker v. Skelly Oil Co., C.C.A. Tex., 132 F 2d 431.

92. Tex.—Humble Oil & Refining Co. v. Bell, Civ App., 180 S.W 2d 970, error refused 181 S.W.2d 569, 142 Tex. 645

93. N.Y.—Kuhn v. P. J. Carlin Const. Co., 278 N Y S 635, 154 Misc 892.

dangerous when operated by one not properly instructed, the contractee is liable to an employee of the contractor injured thereby because not properly instructed as to its use.⁹⁴ Where an electric light plant is in actual operation, a contract with the constructors that they are to keep a man in charge for a specified time to make adjustments and instruct attendants does not leave the possession in the hands of the latter during such period, so as to absolve the company from liabilities resulting from negligence to the servant of an independent contractor.⁹⁵

§ 607. Liability of Contractee for Injuries to Contractor

An independent contractor is expected to determine for himself whether the place in which he chooses to work is safe or unsafe; and ordinarily he may not recover against the contractee for injuries sustained by him in the performance of the contract.

The liability, if any, of a contractee for injuries to an independent contractor employed by him is the same as that imposed on him in respect of injuries to third persons generally.⁹⁶ He is not liable as master of the independent contractor even in respect of injuries inflicted by one of his contractors on another;⁹⁷ but it has been held that one who hires an independent contractor to do some work for him owes such independent contractor the same duty of care as though he were an employee hired to perform the same kind of service.⁹⁸ Ordinarily the contractee is not liable for injuries sustained by the contractor in performance of the contract,⁹⁹ but if the employer retains the right of control a different

rule applies.¹ Where the contractor supplies his own instrumentalities for doing the work agreed on, the contractee owes no duty to him to use care to see that such instrumentalities are not defective;² but where the contractee agrees or undertakes to furnish,³ and retains control of,⁴ the appliances or instrumentalities for doing the work he must use due care to the end that the appliances furnished are reasonably safe for the purposes for which they are furnished. Also ordinarily a contractee does not owe to the contractor the duty to furnish him a reasonably safe place to work,⁵ and the contractor is expected to determine for himself whether the place in which he chooses to work is safe or unsafe;⁶ but it has been recognized that the owner may be liable under particular circumstances where a duty devolving on him is not performed,⁷ as in the case of a duty arising from his undertaking to furnish, and retention of possession and control over, the place where the contract is to be performed.⁸

While a person having work done on his premises by an independent contractor should exercise reasonable care to protect the contractor from dangers arising from the condition of the premises, concerning which he is aware, and concerning which the contractor has neither actual nor constructive notice,⁹ this is true only of latent dangers of which the contractee knows or should know and of which the contractor does not know and could not reasonably discover.¹⁰

The contractee is liable for an injury occasioned by his own negligence¹¹ or by the wrongful act of

94. Ohio—*Jacobs v. Fuller & Hunsipiller Co.*, 65 NE 617, 67 Ohio St 70, 65 LRA 833

95. Tex—*International Light & Power Co v Maxwell*, 65 SW 78, 27 Tex Civ App 294.

96. NC—*Deaton v Board of Trustees of Elon College*, 38 SE 2d 561, 226 NC 433

97. Ill—*Shaw v Dorris*, 124 NE 796, 290 Ill 196

Minn—*Resnikoff v Friedman*, 144 NW 1095, 124 Minn 343

98. Mass—*Campbell v Rockland Trust Co.*, 42 NE 2d 586, 311 Mass 663

Incidental risks and dangers

One who hires an independent contractor to perform a service for him has been held not to owe him any duty of care with reference to the risks and dangers incidental to the work he contracts to perform—*Campbell v. Rockland Trust Co.*, 42 NE 2d 586, 311 Mass 663

99. NC—*Deaton v Board of Trustees of Elon College*, 38 SE 2d 561, 226 NC 433.

Ohio—*Hilleary v Bromley*, 64 NE 2d 832, 146 Ohio St 313

1. Ohio—*Hilleary v Bromley*, 64 NE 2d 832, 146 Ohio St 313

2. Mass—*Parker v Taylor*, 3 NE 2d 25, 295 Mass 51

3. Ohio—*Hilleary v Bromley*, 64 NE 2d 832, 146 Ohio St 313

4. Mo—*Cummings v Union Quarry & Construction Co.*, 87 SW 2d 1039, 231 Mo App 1224

5. Ky—*Wells v W G Duncan Coal Co.*, 162 SW 821, 157 Ky 196 39 C.J. p 1345 note 36

6. Mich—*Corpus Juris cited in Holgate v Chrysler Corporation*, 271 NW 639, 541, 279 Mich. 24 39 C.J. p 1346 note 36 [a]

7. Ky—*Wells v W G Duncan Coal Co.*, 162 SW 821, 157 Ky 196

8. Mo—*Cummings v Union Quarry & Construction Co.*, 87 SW 2d 1039, 231 Mo App 1224

9. Ky—*Wells v W G Duncan Coal Co.*, 162 SW 821, 157 Ky 196

Mo—*McLaughlin v Creamery Package & Manufacturing Co.*, App. 130 SW 2d 656

NC—*Corpus Juris cited in Deaton v Board of Trustees of Elon College*, 38 SE 2d 561, 564, 226 NC 433

10. Ill—*National Builders Bank of Chicago v Schuham*, 49 NE 2d 825, 319 Ill App 546

NC—*Deaton v Board of Trustees of Elon College*, 38 SE 2d 561, 226 NC 433

Condition brought about by contractor

Independent contractor to mine coal, who received personal injuries caused by unsafe condition in mine, brought about solely by his own acts, could not recover against mine owner—*Rawson v Jones-Winifrede Coal Co.*, 130 SE 492, 100 W Va 263, 48 ALR 330

11. Kan—*Ianard v Edgar Zinc Co.*, 106 P. 1003, 81 Kan. 765.

his building engineer in the course of the latter's employment¹²

§ 608. Liability of Contractors

As a possessor of real estate while in charge of reconstruction work, a general contractor is liable for personal injuries sustained by an independent contractor and arising from the artificial condition of the premises if, but only if, he had no reason to believe that the independent contractor would discover the perilous condition and realize the risk involved.

As a possessor of real estate while in charge of the reconstruction of a building, a general contractor is liable to an independent contractor who, as a business visitor to the premises, sustained personal injuries occasioned by the artificial condition of the premises, if he had no reason to believe that the person injured would discover the condition or realize the risk involved,¹³ but not where he had no superior knowledge of the perilous condition and he had every reason to believe that the independent contractor would discover the condition and realize the risk involved.¹⁴ Where there was active negligence on the part of the contractor or his servants, and a direct act of negligence caused an injury which any reasonably prudent person should have foreseen, the contractor is liable even though he was never in occupation or control of the property, this having been always in the owner and the contrac-

tor's servants having been on the property by invitation and permission of the owner¹⁵

The general liability of a contractor for injuries resulting from his negligence is discussed in the C J S title Negligence § 95, also 45 C J. p 883 note 5-p 885 note 39, and the similar liability of a subcontractor in the C J S title Negligence § 96, also 45 C J. p 886 notes 44-55. The liability of a contractor for the acts or omissions of a subcontractor is discussed *infra* § 609, and his liability for injuries to servants of a subcontractor or another independent contractor *infra* § 610.

§ 609. — For Acts or Omissions of Subcontractors

An independent contractor is not liable for injuries occasioned by the negligent acts or omissions of his subcontractor unless the circumstances bring the case within some exception to the rule.

Where it is sought to hold a contractor liable for injuries caused by the negligence of his subcontractor, the same rule applies as where it is attempted to hold the owner liable for injuries resulting from the negligence of the contractor¹⁶ An independent contractor is not liable for injuries occasioned by the negligent acts or omissions of his subcontractor,¹⁷ or of the latter's servants,¹⁸ unless the circumstances bring the case within some exception to the general rule,¹⁹ as where the work delegated to the

12. Tex—Lowry v Anderson-Berney Bldg Co, 161 SW 2d 459, 139 Tex 29

13. Okl—Long Const Co v Fournier, 128 P 2d 689, 190 Okl 361

14. Okl—Long Const Co v Fournier, *supra*

Limits of duty and liability

The general contractor in charge of remodeling a building is not an insurer of the safety of invitees on the premises, and is not required at his peril to keep the premises absolutely safe, the measure of his duty is reasonable or ordinary care, and in determining whether such care has been exercised, the purposes for which the building is primarily intended may be considered—Long Const. Co. v. Fournier, *supra*.

15. N Y—Haverstick v Clarence Hansen & Sons, 13 NE 2d 753, 377 NY 158, reargument denied 15 NE 2d 72, 278 NY. 482.

16. Wash—Amann v City of Tacoma, 16 P.2d 601, 170 Wash 298 39 C J p 1349 note 76

Analogy

A general contractor having control of a vessel undergoing repairs is in a position analogous to that of shipowner, and general contractor is not necessarily relieved from liability

ity which, although created by a subcontractor, he passively or actively permits to exist—Gucciardi v Chisholm, CCANY, 145 F 2d 514

17. US—Gucciardi v Chisholm, DCNY, 49 FSupp 581, reversed on other grounds, CCA, 145 F 2d 514

Cal—Rivera v Goodenough, 162 P 2d 498, 71 Cal App 2d 223

Ky—H H Miller Const Co v Collins, 108 SW 2d 663, 289 Ky 670—Dempster Const Co v Tackett, 285 SW 191, 215 Ky 461

La—Giacona v Orleans Ice Mfg. Co, 5 La App 259

Mass—Kunan v De Matteo, 32 NE 2d 613, 308 Mass 427

Mich—Barlow v Kriehoff Co., 16 NW 2d 715, 310 Mich 195.

Miss—Shell Petroleum Corporation v Linham, 163 So 839

NY—Moore v. Charles T Wills, Inc., 165 NE 835, 250 NY 428.

Tex—Allen v Republic Bldg Co, Civ App, 84 SW 2d 506.

39 C J p 1349 note 76

Injury arising from collateral act of subcontractor

Mich—Barlow v Kriehoff Co., 16 NW 2d 715, 310 Mich 195

Tex—Lloyd v Herrington, 182 SW 2d 1003, 143 Tex 135

Negligence which could not have been reasonably contemplated by contractor

Mass—Kunan v De Matteo, 32 NE 2d 613, 308 Mass 427

Status of injured person

The text rule applies where the injured person is a stranger or third person, but where owner of property has specifically contracted with a contractor for the doing of work on the owner's property, if that contractor sees fit to engage an independent contractor to do the work and the independent contractor negligently causes damage, the contractor cannot escape liability to the owner by the application of the independent contractor doctrine—Continental Ins Co v I Bahcall, Inc., DC Wis., 39 FSupp 315

18. La—Crysel v Gifford-Hill & Co, App, 153 So 261

NY—Breheney v Delaney, 34 NY S 2d 735

Pa—Tallarico v Antenreith, 31 A 3d 906, 347 Pa 170, 146 ALR 520—Konyk v Nolan, 40 A 2d 888, 156 Pa Super 531.

39 C J p 1349 note 76 [b].

19. NM—Rosenberg v. Schwartz, 188 NE 282, 360 NY. 162. 39 C J p 1349 note 77.

subcontractor was unlawful,²⁰ or necessarily produced injury,²¹ or, under the circumstances, was inherently or intrinsically dangerous²² unless proper precautions were taken,²³ or necessarily subjected third persons to unusual danger,²⁴ or it involved a nondelegable duty of the contractor to the public or an individual,²⁵ or where the contractor, who was present and observed that the subcontractor's method of doing work created a dangerous condition, failed to correct the danger,²⁶ or the contractor failed to use due care in selecting a competent subcontractor,²⁷ or the contractor retained or exercised control over the work,²⁸ other than a limited power of general supervision for the purpose of seeing that the subcontractor did the work properly according to the plans and specifications.²⁹

Joint liability Where the original contractor and the subcontractor have joint supervision over the

construction of the building, and cooperation in its construction is necessary between them, and that part of the construction undertaken by the subcontractor is concurrently and conjointly done with the remaining portion of the work which is under the control of the original contractor, they are jointly liable to persons injured by reason of their negligence.³⁰

§ 610. — For Injuries to Each Other's Servants

A contractor or subcontractor is liable for injuries sustained by an employee of another contractor or subcontractor engaged in work on the same premises when, but only when, the injuries were caused by the negligence of himself, or of his servants acting within the scope of their employment, in the performance of a duty owing by him to the injured employee; he is not liable where the injuries resulted from the negligence of the injured employee's own employer.

Nuisance

A contractor who causes a highway to be obstructed by a subcontractor is bound to see at his peril that a nuisance is not created—*Luce v Holloway*, 103 P 886, 156 Cal 162

20. Mo—*Wilkey v Rouse Const Co*, 28 SW 2d 674, 224 Mo App 495

39 C.J. p 1349 note 77 [b]

21. Mo—*Wilkey v. Rouse Const Co*, supra

22. U.S.—*Asheville Const Co v Southern Ry Co*, CCANC, 19 F 2d 83

23. U.S.—*Blair v. Durham, CCA Tenn*, 134 F 2d 729, rehearing denied 139 F 2d 260

Mass—*McConnon v Charles H Hodggate Co*, 185 NE 483, 282 Mass 584

Mo—*Stubblefield v Federal Reserve Bank of St Louis*, 204 SW 2d 718 39 C.J. p 1349 note 77 [c]

24. Mich—*Barlow v Kriehoff Co*, 16 NW 2d 715, 310 Mich 195

Neglect

When steel joists were placed in position for putting planking thereon, masonry contractor had right to assume that steel joists were fastened in reasonably secure manner and steel joists contractor was liable for masonry contractor's injury resulting from neglect to secure the joists, which neglect subjected the masonry contractor to an unusual danger in the performance of his work, notwithstanding joist contractor had sublet contract to independent contractor who did the work—*Watkins v Gabriel Steel Co*, 245 NW 801, 280 Mich 692, followed in *Watkins v Gabriel Steel Co*, 256 NW 333, 268 Mich 264

25. Mich—*Wight v. H G Christ-*

man Co, 221 NW 314, 244 Mich 208

Mo—*Wilkey v Rouse Const Co*, 28 SW 2d 674, 224 Mo App 495

Duty imposed by statute or municipal ordinance

Wash—*Amann v City of Tacoma*, 16 P 2d 601, 170 Wash 296.

39 C.J. p 1337 note 50

26. NY—*Schwartz v Merola Bros Const. Corporation*, 48 NE 2d 299, 290 NY 145

Realization of unlawful and dangerous manner of doing work

An independent general contractor who is present and sees and realizes that a subcontractor is doing his work in an unlawful and dangerous manner may be liable for an injury resulting directly to a third person from such unlawful and negligent conduct—*Schwartz v Merola Bros Const Corporation*, supra—*Rosenberg v Schwartz*, 183 NE 283, 260 NY 162

27. NY—*Kuhn v P J Carlin Const Co*, 278 NYS 635, 154 Misc 392

28. Mich—*Bittker v Groves*, 288 NW 327, 291 Mich 40

NY—*Rosenberg v Schwartz*, 183 NE 282, 260 NY 162

39 C.J. p 1350 note 78

Partial control or supervision

Mich—*Bittker v Groves*, 288 NW 327, 291 Mich 40

39 C.J. p 1350 note 79

Order given by contractor's servant

NY—*Butts v J. C Mackey Co*, 25 NYS 631, 72 Hun 562, affirmed 42 NE 723, 147 NY 715

Retention and exercise as equivalent

In determining liability of principal contractor for negligent acts of his subcontractor, supervision in fact exercised is equivalent to supervision expressly retained by the prin-

cipal contractor—*Bittker v Groves*, 288 NW 327, 291 Mich 40.

Contractual right or legal duty to control and supervise

A general contractor is not liable for subcontractor's negligence unless contractor's right to control or supervise subcontractor as to time, place and manner of performing work exists under their contract, or unless duty to assume such control and supervision is imposed, as matter of law, by reason of some peculiar relation which person for whom work is being performed bears to third persons as to time, place or manner of performance—*Mix v City of Minneapolis*, 18 NW 2d 130, 219 Minn 369

Opportunity to prevent work being done in dangerous way

Where principal contractor intrusts part of work to subcontractors but superintends the entire job, principal contractor is subject to liability if he fails to prevent subcontractors from doing the work in a way unreasonably dangerous to others, if he knows or by reasonable care could know that subcontractors' work is being so done and has the opportunity to prevent it by exercising power of control retained in himself—*La Malfa v. Piombo Bros*, 161 P 2d 964, 70 Cal App 2d 840.

29. U.S.—*Guccardi v Chisholm, D C.N.Y.*, 49 F Supp 581, reversed on other grounds, CCA., 145 F 2d 514

NY—*Moore v Charles T. Wills, Inc*, 165 NE 835, 250 NY 426 39 C.J. p 1350 note 78 [b]

30. Ky—*Baumeister v Markham*, 39 SW 844, 101 Ky 123, 19 Ky. L 308, 72 Am SR 397, reheard 41 SW 816, 101 Ky 132, 19 Ky L 308, 72 Am SR 397

Where two or more independent contractors, or a general contractor and one or more subcontractors, are engaged in work on the same premises, it is the duty of each contractor, in prosecuting his work, to use ordinary and reasonable care not to cause injuries to the servants of another contractor,³¹ and an employee of one contractor may recover against another contractor for injuries caused by the negligence of the latter contractor, or of his employees acting within the scope of their employment, in the performance of a duty owed by such contractor to the injured employee.³² It is, however, essential to recovery that defendant shall have owed a duty to plaintiff which was neglected or breached³³ and, where the negligent act was that of a servant of defendant, that it was within the scope of his employment.³⁴ Ordinarily the general contractor or other contractor sued is not liable to an employee of a subcontractor or another independent contractor for injuries caused by the negligent act or omission of plaintiff's employer,³⁵ since there is no duty on the part of a general contractor to protect the employee of an independent contractor against the negligence

of his own employer,³⁶ but he is not absolutely exempt from liability in all cases,³⁷ and he has been held liable for a breach of duty where he procured the independent contractor to do work involving the use of a dangerous instrumentality.³⁸

A contractor does not owe to the employees of a subcontractor the same duties he owes to his own employees.³⁹ He owes to the employee of a subcontractor no higher duty than he owes to his own employees,⁴⁰ and he is not obligated to exercise any greater degree of care for the safety of such employee than the employee is willing to exercise for his own safety.⁴¹

Where construction work is in charge of several contractors and their workmen, each independent of the other, and none of them is subject to the control and direction of the other, each contractor is responsible only for the negligence of his own servants and not the negligence of the servants of other contractors resulting in injury to the servant of one contractor.⁴²

Warning. A general or independent contractor has no duty to warn an employee of a subcontractor

31. *U.S.—Sinclair Prairie Oil Co v Thornley*, CCA Okl., 127 F.2d 128.
Mo.—Howard v. S. C. Sacks, Inc., App., 76 S.W.2d 480.
NY.—Lynch v. Fred T. Ley & Co., 197 N.Y.S. 360, 119 Misc. 681.
Tex.—Snelling v. Harper, Civ. App., 137 S.W.2d 232, error dismissed, judgment correct.
 39 C.J. p. 1350 notes 83, 85 [e]—45 C.J. p. 883 note 12 [a] (1).

Employee not trespasser

Contractor's employee required to work under pile driver operated by subcontractor was not trespasser where contractor and subcontractor cooperated in driving piles—*Simmons v. Doullut & Ewin*, 145 So. 708, rehearing denied, La. App., 146 So. 772.

32. *Cal.—Perry v. D. J. & T. Sullivan, Inc.*, 26 P.2d 485, 219 Cal. 384.
Kiernan v. Herbert M. Baruch Corporation, 66 P.2d 748, 20 Cal. App.2d 289.
Ind.—Forum-James, Inc. v. Johnson, 59 N.E.2d 730, 115 Ind. App. 655.
Mo.—Pettyjohn v. Interstate Heating & Plumbing Co., 161 S.W.2d 248.
Howard v. S. C. Sacks, Inc., App., 76 S.W.2d 480.
NY.—Sernanckuck v. Fifth Ave. & Thirty-Seventh St. Corporation, 49 N.E.2d 507, 290 N.Y. 412.
Dudar v. Miele Realty Corporation, 180 N.E. 102, 258 N.Y. 415.
Flanagan v. Fred T. Ley & Co., 150 N.E. 575, 241 N.Y. 607.
Pink v. Kraus & Silverman, 28 N.Y.S.2d 340, 262 App. Div. 156, affirmed 53 N.E.2d 366, 201 N.Y. 786.
Kuhn v. P. J. Carlin, Const. Co., 278 N.Y.S. 635, 154 Misc. 892.
Tex.—Herndon v. Halliburton Oil Well Cementing Co., Civ. App., 154 S.W.2d 163, error refused.
 39 C.J. p. 1350 note 85—45 C.J. p. 883 notes 13, 13.
In absence of statutory regulation.
Fla.—Younger v. Giller Contracting Co., 196 So. 690, 143 Fla. 335.
Injury from thrown hammer.
Cal.—Carr v. Wm. C. Crowell Co., 171 P.2d 5, 28 Cal. 2d 652.
 33. *Cal.—Slyter v. Clinton Const. Co. of California*, 290 P. 643, 107 Cal. App. 348.
NY.—Lotocka v. Elevator Supplies Co., 158 N.E. 874, 246 N.Y. 295.
Rizzo v. Murray, 10 N.Y.S.2d 92, 256 App. Div. 956, affirmed 26 N.E. 2d 806, 282 N.Y. 670.
 34. *Pa.—Roberts v. Scott Bros.*, 172 A. 681, 315 Pa. 341.
 35. *Cal.—George v. Trinity Church*, 169 P. 69, 176 Cal. 553.
Hayden v. Paramount Productions, 91 P.2d 231, 33 Cal. App.2d 287.
Slyter v. Clinton Const. Co. of California, 290 P. 643, 107 Cal. App. 348.
Ky.—McLellan v. Brown, 120 S.W.2d 742, 275 Ky. 30.
N.C.—Greer v. Callahan Const. Co., 180 S.E. 739, 190 N.C. 632.
 39 C.J. p. 1349 note 76 [c], p. 1350 note 84.
Negligence of foreman employed by plaintiff's employer.
Miss.—Cook v. Wright, 171 So. 686, 177 Miss. 644.

36. *U.S.—Gucciardi v. Chisholm*, D. C.N.Y., 49 F.Supp. 581, reversed on other grounds, CCA, 145 F.2d 514.
 37. *NC.—Greer v. Callahan Const. Co.*, 180 S.E. 739, 190 N.C. 632.
 38. *NC.—Greer v. Callahan Const. Co.*, supra.
 39. *NC.—Greer v. Callahan Const. Co.*, supra.
 40. *U.S.—Kuptz v. Ralph Sollitt & Sons Const. Co.*, CCA Tex., 88 F.2d 522, certiorari denied 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 537.

41. *U.S.—Kuptz v. Ralph Sollitt & Sons Const. Co.*, supra.

Not insurer or warrantor

General building contractor was not insurer of safety of electrical subcontractor's foreman or warrantor of safety of work performed by carpenter subcontractor's employees in constructing temporary wooden concrete forms, one of which gave way when such foreman stepped on it—*Kuptz v. Ralph Sollitt & Sons Const. Co.*, supra.

Employee's duty

Electrical subcontractor's foreman was charged with duty of exercising due care for his own safety in walking on temporary wooden concrete form, insecure condition of which, being as open and patent to him as to general building contractor, was risk ordinarily incident to construction work—*Kuptz v. Ralph Sollitt & Sons Const. Co.*, supra.

42. *NY.—Wolf v. American Tract. Soc.*, 58 N.E. 31, 164 N.Y. 30, 51 L.R.A. 241.

or another independent contractor of a danger which is obvious⁴³ or is known and appreciated by the employee⁴⁴

Safe place to work. No duty to furnish or provide a reasonably safe place to work is owed by an independent contractor to an employee of another independent contractor,⁴⁵ and, according to some authorities, this is also true, in the absence of special circumstances, in respect of this duty when

claimed to be owing by a contractor to his subcontractor,⁴⁶ but other authorities take the opposite view.⁴⁷ It has been held, on the one hand, that a subcontractor has no duty to furnish an employee of the general contractor a safe place to work,⁴⁸ and, on the other hand, that a subcontractor owes a duty to an employee of the general contractor to use reasonable care to keep and maintain the premises, and the structure wherein the employee is required to work, in a safe condition.⁴⁹

C. ACTIONS

§ 611. Nature and Form

Case, rather than trespass, ordinarily is the appropriate remedy against an employer for injuries resulting from the negligence of an employee; but trespass may lie where the master ordered the commission of the wrongful act of an employee.

An action on the case ordinarily is the proper⁵⁰ and only⁵¹ remedy which will lie for injuries committed by a servant, in the course of his master's business, which resulted from negligence or want of proper care or skill on the part of the servant. Also, where a servant is commanded by the master to do a lawful act and he does it in an unlawful way so as to injure another, the latter may have his remedy by an action on the case.⁵² If the action is brought against the master and servant jointly, the form of the action is in case.⁵³

Trespass is generally held not the proper remedy for an injury occasioned by the wrongful act of defendant's servant or agent, for which defendant is liable,⁵⁴ at least when the force causing the injury was not directly applied by the employer, or authorized or ratified by him.⁵⁵ So it has been held that, where a servant, while in the actual employment of the master, commits a willful trespass, without either the authority or implied assent of the master, the latter cannot be made liable in trespass.⁵⁶ However, trespass will lie where the master orders the commission of an act resulting in the injury complained of, or where the act is unlawful in itself,⁵⁷ and it will also lie where the injuries resulted from acts of violence committed under the orders of the master,⁵⁸ or where the act is committed under an order of the master to do an act implying the use

43. Cal.—*Slyter v. Clinton Const Co of California*, 290 P 643, 107 Cal App 348

44. Mass.—*Shea v Frangioso*, 183 NE 745, 281 Mass 412

45. Ky.—*Brauner v Leutz*, 169 S W2d 4, 293 Ky 406

46. Fla.—*Watt & Sinclair of Florida v Hunter*, 171 So 817, 126 Fla 750

39 C J p 1350 note 85 [c] (2), (3)

47. NY.—*Wohlfron v Brooklyn Edison Co*, 265 NYS 18, 238 App Div 463, affirmed 189 NE 691, 263 NY 547.

39 C J p 1350 note 85 [c] (1).

48. Tex.—*Jones v Beck, Civ App*, 109 SW2d 787, error refused

49. Ind.—*Samuel E Pentecost Const Co v O'Donnell*, 89 NE2d 812, 112 Ind.App 47

50. Ala.—*Lehigh Portland Cement Co. v Sharit*, 173 So 886, 234 Ala 40—*Aldrich v Tyler Grocery Co*, 89 So 289, 206 Ala. 138, 17 A L R 617

Pa.—*Cochran v Gall*, 17 Pa.Dist & Co 329, 43 Lanc L Rev 238

39 C J p 1350 note 88—1 C J. p 1002 note 98

Absence of order or force by employer

(1) Trespass on the case is the proper action for injuries resulting from negligence, and for wrongful acts committed by a man's servant without his order, but for which he as master is responsible—*Maier v Harriman*, 79 F2d 408, 65 App D. C 52

(2) Trespass on the case is available against employer for willful injury done by employee when the force was not directly employed by employer, or authorized or ratified—*W E Belcher Lumber Co v. York*, 17 So 2d 281, 245 Ala 286

51. DC.—*Lisner v Hughes*, 258 F 512, 49 App DC 40

39 C J p 1351 notes 89, 97.

"An action on the case is the exclusive remedy against the master in cases where the servant, without the assent or authority of his master, commits a tort, even though it be direct, forcible and immediate, for which, in consequence of the relation between them, the master is in law liable"—*Maier v Harriman*, 79 F2d 408, 410, 65 App DC 52.

Wrongful entry on land

Where defendant's employees

wrongfully went on plaintiff's land, in absence of defendant's prior authority, or subsequent ratification or personal participation in trespass, plaintiff's damage could only be redressed in an action of trespass on the case against defendant—*W E Belcher Lumber Co v York*, 17 So. 2d 281, 245 Ala 286

52. Ill.—*St Louis, A & C. R. Co v Dalby*, 19 Ill 353

53. Ala.—*Shelby Iron Co v. Morrow*, 95 So 370, 209 Ala 116—*Southern R Co v Hanby*, 52 So 334, 166 Ala 641

54. DC.—*Maier v Harriman*, 79 F. 2d 408, 65 App DC 52

1 C J p 1002 note 98

55. Ala.—*W. E Belcher Lumber Co. v York*, 17 So 2d 281, 245 Ala 286

56. Ky.—*Johnson v Castleman*, 2 Dana 377

39 C J p 1351 note 97.

57. DC.—*Lisner v Hughes*, 258 F. 512, 49 App DC 40

38 C J p 1351 note 93—1 C J p 1002 note 99

58. Ill.—*Chicago Union Traction Co v Brethauer*, 125 Ill App 204, affirmed 79 NE 237, 223 Ill. 521, 114 Am SR 352.

of force and personal violence.⁵⁹

Action on bond of police officer. Where an officer is not considered the servant of the person requesting his appointment, such as a special policeman in some states, the remedy is on the bond given by the person securing his appointment.⁶⁰

§ 612. Grounds of Action, Conditions Precedent, and Defenses

The general grounds on which the action against the master for the acts of his servant may be based, and the substantive rules of law on which the master may predicate his defense to such an action, have been discussed *supra* § 555 et seq

Examine Pocket Parts for later cases.

§ 613. Parties

In an action by a third person based on injuries caused by the negligence of a servant, the servant is not a necessary party to an action against the master, nor is the master a necessary party to an action against the servant.

In an action for injuries to a third person caused by the negligence of a servant, the servant is not a necessary party to an action against the master based on such negligence,⁶¹ nor is the master a necessary party to an action against the servant.⁶² As discussed *supra* § 579, there is a conflict of authority on the question whether the master and servant can be sued jointly where the liability of the master is based solely on the doctrine of respondeat superior. Where the employment is joint, so that several are liable as masters, any one of them may be

sued alone.⁶³ Where liability for injuries to third persons due to a failure to take proper precautions cannot be evaded by employing an independent contractor to do the work, as in cases where work is intrinsically dangerous unless proper precautions are taken, the employer and contractor may be sued jointly.⁶⁴

Use of fictitious name. Under a statute authorizing the naming of a fictitious defendant in a complaint and providing for an amendment to show his true name when it is discovered, it has been held that plaintiff can name a fictitious person as employer of a named defendant, even though plaintiff does not know, when he files the complaint, that any relation of respondeat superior in fact exists.⁶⁵

§ 614. Pleading

- a. Declaration, petition, or complaint
- b. Plea or answer
- c. Issues, proof, and variance

a. Declaration, Petition, or Complaint

- (1) In general
- (2) Master's responsibility for, or connection with, injury

(1) In General

The complaint in an action brought by a third person against the master for injuries suffered by reason of the tortious act of a servant must allege facts sufficient to constitute a cause of action.

The declaration, petition, or complaint, in an action by a third person against the master for injuries caused by a servant or independent contractor,⁶⁶ or

59. N.Y.—*Priest v. Hudson River R. Co.*, 40 How Fr 456
39 C.J. p 1351 note 95

60. Mass.—*Healey v. Lothrop*, 59 N.E. 653, 178 Mass 151
Liability of private person or corporation for acts of special police officer see *supra* § 565.

61. Ga.—*Coleman v. Nail*, 174 S.E. 178, 49 Ga App 51
Ohio—*Ohio Casualty Ins Co v. Capolino*, App., 65 N.E.2d 287
S.C.—*Camp v. Petroleum Carrier Corporation*, 28 S.E.2d 683, 204 S.C. 133
Wash.—*Johns v. Hake*, 131 P.2d 933, 15 Wash.2d 651
39 C.J. p 1352 note 15.

Statutory authority

A statute authorizing maintenance of action against person causing injury, and also against his employer, authorizes action against employer alone, without joining employee—*Schilling v. Central California Traction Co.*, 1 P.2d 53, 115 Cal App 30

—*Aungst v. Central California Traction Co.*, 1 P.2d 56, 115 Cal App 113

62. Ohio—*Ohio Casualty Ins Co v. Capolino*, App., 65 N.E.2d 287
Wash.—*Johns v. Hake*, 131 P.2d 933, 15 Wash.2d 651

63. Ala.—*Empire Clothing Co. v. Hammons*, 81 So. 838, 17 Ala App 60

Ill.—*Fisher v. Cook*, 17 N.E. 763, 125 Ill. 380

64. Mo.—*Carson v. Blodgett Constr Co.*, 174 S.W. 447, 189 Mo App. 120
Ohio—*Globe Indemnity Co. v. Schmitt*, App., 51 N.E.2d 1016, reversed on other grounds 53 N.E.2d 790, 142 Ohio St. 595

65. Cal.—*Day v. Western Loan & Bldg Co.*, 108 P.2d 702, 42 Cal App 2d 226

66. Fla.—*Reece v. Ebersbach*, 9 So.2d 805, 152 Fla. 763, certiorari denied 63 S.Ct. 855, 318 U.S. 784, 87 L.Ed. 1151, rehearing denied 63 S.Ct. 1155, 319 U.S. 781, 87 L.Ed. 1725

Pa.—*Adams v. MacDonald*, Com Pl., 31 Del Co 263

Tex.—*Nolte v. Olmos Dinner Club*, Civ App., 118 S.W.2d 841, error dismissed
39 C.J. p 1352 note 23

Allegations held sufficient

(1) Generally

U.S.—*King v. Yancey*, C.C.A.Nev., 147 F.2d 379

Ala.—*Gloss-Sheffield Steel & Iron Co. v. Wilkes*, 165 So. 764, 231 Ala. 511, 109 A.L.R. 385

Ark.—*Missouri Pac. R. Co. v. Miller*, 41 S.W.2d 971, 184 Ark. 61, certiorari denied 52 S.Ct. 210, 284 U.S. 688, 76 L.Ed. 580

Fla.—*Hartquist v. Tamiami Trail Tours*, 190 So. 533, 139 Fla. 328—*Banfield v. Addington*, 140 So. 893, 104 Fla. 661.

Ge.—*White v. American Sec. Co.*, 172 S.E. 853, 48 Ga App 370—*Atlantic Ice & Coal Co. v. Harris*, 165 S.E. 134, 45 Ga App 419—*Mount v. Southern Ry Co.*, 156 S.E. 701, 42 Ga App 546.

in an action by one servant against a fellow servant,⁶⁷ must allege all the facts necessary to constitute a cause of action. If the action is based on a statute the complaint must allege the necessary facts to bring the case within the statute.⁶⁸ Where the action is brought by an employee of a contractor against the owner, the complaint must set forth the facts to show the liability of the owner.⁶⁹

Where the allegations of the pleading are as applicable to an employee defendant as to an employer defendant, and charge the employee with committing the acts complained of, if the pleading states a cause of action against the employer defendant, it also states a cause of action against the employee

defendant.⁷⁰ A petition which charges defendant with a wrongful act committed while he was in the employment of another, but which does not allege that the act was done within the scope of his employment, is not demurrable by him on the ground of respondeat superior.⁷¹ Immaterial and irrelevant matter should not be set forth in the pleading.⁷² In an action against one employer by an employee of another employer, the complaint need not allege that plaintiff's fellow servants were not guilty of contributory negligence.⁷³

Charging wrongful act. The servant's negligence or other wrongful act must be alleged,⁷⁴ and that it

Ind—*Skell v. Prest-O-Lite Co.*, 118 NE 601, 66 Ind App 635

Ky—*Wells v. Kentucky Distilleries & Warehouse Co.*, 138 SW 278, 144 Ky 438

NY—*Zerder v. Friman Holding Co.*, 274 NY S 588, 153 Misc 235

Pa—*Bylock v. Colonial Ice Cream Co.*, 9 Pa Dist & Co 460.

SC—*Frye v. Elrod*, 198 SE 884, 187 SC 232

39 CJ p 1352 note 23 [a] (1)

(2) Assault and battery

Ga.—*J. M. High Co. v. Holler*, 157 SE 209, 42 Ga App 657—*Bussell v. Dannenberg Co.*, 132 SE 230, 34 Ga App 792

Mo—*Priest v. Missouri Pac. R. R.*, App, 77 SW 2d 120—*Doyle v. Scott's Cleaning Co.*, 31 SW 2d 242, 234 Mo App 1168

39 CJ p 1352 note 23 [a] (2)

(3) Blasting operations—*Forcum-James, Inc. v. Johnson*, 69 NE 2d 730, 115 Ind App 655

(4) Perpetration of practical joke—*Andrews v. Norvell*, 15 SE 2d 808, 65 Ga App 241.

(5) Trespass—*Personal Finance Co. of Atlanta v. Loggins*, 179 SE 162, 50 Ga App 562—*American Security Co. v. Cook*, 176 SE 798, 49 Ga App 723

(6) Wrongful shooting

Ala—*Mount Vernon-Woodberry Mills v. Little*, 133 So 710, 222 Ala 605

Cal—*Martin v. Leatham*, 71 P.2d 336, 22 Cal App 2d 442

39 CJ p 1352 note 23 [a] (3).

Allegations held insufficient

(1) Generally

US—*Knecht v. Castleman River R. Co.*, CCA Pa., 104 F 2d 677

Ga—*Edmondson v. Town of Morven*, 152 SE 280, 41 Ga App 209

39 CJ p 1352 note 23 [b].

(2) Assault—*Atlanta Baseball Co. v. Lawrence*, 144 SE 351, 38 Ga App 497.

(3) Shooting—*Harris v. Sevier*, 138 So 459, 19 La App 165.

(4) Trespass—*Ogletree v. MacDougald Const Co.*, 163 SE 320, 45 Ga App 128

67. Allegations held sufficient

Petition alleging that plumber, who was fellow servant of plumber's helper, improperly and without warning began unscrewing pipe plug, and that in order to avoid potash or lye, which both parties knew was in the pipe, from being spewed into the helper's face and eyes, the helper jumped from ladder on which he was standing and was injured, stated a cause of action against the plumber in favor of the helper—*Strickland v. Foughner*, 12 SE 2d 371, 63 Ga App 805

Allegations held insufficient

Ga.—*Atkinson v. Bibb Mfg. Co.*, 178 SE 537, 50 Ga App 434

68. Ill—*Tuller v. Voght*, 13 Ill 277

69. Me—*Boardman v. Creighton*, 49 A 663, 95 Me 154

39 CJ p 1352 note 25

70. Fla—*Great Atlantic & Pacific Tea Co. v. Sawyer*, 160 So 753, 119 Fla 491

Petition held demurrable as to agent
In invitee's action against property owner and owner's renting agent for injuries received as result of concurrent negligence in maintaining steps in dilapidated condition, a petition, alleging that agent was authorized by owner to rent premises and collect rents and to keep premises in repair for benefit of occupants, but failing to allege that agent assumed duty of keeping premises in repair or accepted authority to repair, was demurrable as to agent—*Risby v. Sharp-Boylston Co.*, 7 SE 2d 917, 62 Ga App 101

71. Ohio—*Hoffman v. Gordon*, 15 Ohio St. 211.

Personal liability of servant to third persons generally see supra § 577

72. Ga—*Ford v. Mitchell*, 179 S.E. 215, 50 Ga App. 617.

Conviction of crime

In petition against master by plaintiff shot by watchman employed to keep trespassers off master's premises, allegation that watchman was convicted of shooting at plaintiff was held irrelevant—*Ford v. Mitchell*, supra

73. Ind—*Kentucky & I Bridge Co. v. Hall*, 25 NE 219, 125 Ind 220

74. Ky—*Camp Taylor Development Co. v. Wimberg*, 113 SW 2d 9, 271 Ky 635

Mo—*Zimmerman v. Kansas City Public Service Co.*, 41 SW 2d 579, 226 Mo App 369

Pa—*Simmons v. Duran*, Com Pl., 27 North Co 353

39 CJ p 1353 note 34

Allegations held sufficient

Petition alleging that while wife was recuperating from a serious operation, defendant's agent, knowing of her condition, threatened her with his fist, and that wife, fearing that agent would strike her, jumped up, causing stitches in recent incision to be torn loose and wound to be ripped open internally, so that she suffered excruciating pain and mental agony, set up a cause of action, and was good against general and special demurrers—*Jewel Tea Co. v. Rowling*, 194 SE 397, 57 Ga App 123—*Jewel Tea Co. v. Rowling*, 194 SE 398, 57 Ga App 116.

Allegations held insufficient

(1) Generally—*Kirkpatrick v. Al-an Wood Steel Co.*, 32 Pa Dist & Co 206

(2) Petition showing that bystander shot by trespasser being ejected, but not showing that employer's watchman wrongfully used force, did not aver action against employer—*Harris v. Sevier*, 138 So 459, 19 La App 165

(3) Petition for injuries sustained by striker when train conductor summoned police, who shot strikers with tear gas or similar substance on conductor's order, stated no cause of action against railroad or conductor,

was the proximate cause of the injury,⁷⁵ although it has been held unnecessary to allege the particular acts which constituted negligence.⁷⁶ In a jurisdiction in which an employee, although liable to third persons for his acts of misfeasance, is not liable for mere omissions or nonfeasances, a petition which does not charge the employee with active negligence has been held insufficient as to such a defendant.⁷⁷ It has been asserted that, when the injury or loss results from active force applied, and arises under the doctrine of respondeat superior, the rules of good pleading require that the complaint by way of inducement show the instrumentality causing the injury, and that the agent or servant to whose acts negligence is ascribed had actual manual control of such instrumentality or was present directing its movement.⁷⁸

Designation of guilty servant. It is generally held that the complaint need not designate or name the particular servant guilty of the negligence.⁷⁹ There is, however, some authority to the effect that, in alleging specific negligence, an averment as to the particular servants whose negligence is complained of is necessary.⁸⁰

Construction. In the interpretation of the complaint, the entire pleading should be considered and construed as a whole.⁸¹

(2) Master's Responsibility for, or Connection with, Injury

(a) In general

(b) Scope of employment; furtherance of master's interests

(a) In General

The complaint must allege facts showing the master's responsibility for the injury, and, where liability is based on the relation of master and servant, facts must be alleged showing the existence of such relationship.

In order to state a cause of action against defendant for a wrong committed by his servant, the ultimate fact necessary to be alleged is that the wrongful act was in legal effect committed by defendant.⁸² This may be alleged either by alleging that defendant by his servant committed the act,⁸³ or, without noticing the servant, by alleging that defendant committed the act.⁸⁴ An allegation that an act was done by defendant's servants, agents, or employees does not show a participation by defendant, but rests alone on the doctrine of respondeat superior.⁸⁵

Existence of relation of master and servant. A complaint seeking to charge one person for the tortious act of another on the ground that the person causing the injury was the employee of the other must contain allegations showing the existence of

because it showed that plaintiff was criminal trespasser and did not allege that police used more force in removing plaintiff than was necessary under circumstances—*Kent v. Southern Ry. Co.*, 184 S.E. 688, 52 Ga. App. 781.

75. *Ind.—Broadstreet v. Hall*, 80 N.E. 145, 168 Ind. 192, 120 Am.S.R. 356, 10 L.R.A.N.S., 933.

76. *Cal.—McComas v. A. G. Barnes Shows Co.*, 12 P.2d 680, 215 Cal. 685.

77. *Tex.—Montgomery v. Allis-Chalmers Mfg. Co.*, Civ. App., 164 S.W.2d 556, error refused.

Personal liability of servant to third persons generally see *supra* § 577.

78. *Ala.—Pure Oil Co. v. Cooper*, 26 So.2d 249, 248 Ala. 58—*Smith v. Tripp*, 20 So.2d 870, 246 Ala. 421.

79. *Cal.—Dillard v. Kern County*, 144 P.2d 865, 23 Cal.2d 271, 150 A.L.R. 1048.

DC—*Corpus Juris* cited in *Western Union Telegraph Co. v. Scrivener*, 13 F.2d 162, 165, 57 App.D.C. 120.

Fla.—Dowling v. Nicholson, 135 So. 288, 101 Fla. 672.

Ga.—South Georgia Ry. Co. v. Ryals, 51 S.E. 428, 123 Ga. 830—*City of Rome v. Justice*, 149 S.E. 88, 40 Ga. App. 196—*Bibb Mfg. Co. v. Thornton*, 102 S.E. 465, 25 Ga. App. 73—*Atlantic Coast Line R. Co. v. Bur-*

roughs, 92 S.E. 1010, 20 Ga. App. 197.

39 C.J. p. 1352 note 36.

80. *Mo.—Zimmerman v. Kansas City Public Service Co.*, 41 S.W.2d 579, 226 Mo. App. 369.

81. *Ala.—Hanson v. Foremost Dairy Products*, 155 So. 627, 229 Ala. 200.

Case or trespass

Complaint charging that defendant's servant, acting within scope of his employment, wrongfully caused arrest and imprisonment of plaintiff, was held to proceed on theory of case and not trespass—*Hanson v. Foremost Dairy Products*, *supra*.

Individual or representative capacity

In action against operator of store, and also against creamery company which he represented, for injuries suffered by customer from alleged negligence in leaving injurious substances in drinking cup, petition showing that the individual defendant conducted the store, and furnished water for drinking purposes to customers, sufficiently stated cause of action against him individually rather than as agent—*Duensing v. Leaman*, 102 P.2d 992, 152 Kan. 42.

82. *US—Corpus Juris* quoted in *Saucer v. Willys-Overland*, D.C. Fla., 49 F.2d 385, 387.

III—*Corpus Juris* quoted in *Rich v.*

Albrecht, 21 N.E.2d 633, 635, 300 Ill. App. 493.

39 C.J. p. 1352 note 31.

Allegations held sufficient

Ala.—Lehigh Portland Cement Co. v. Sharit, 173 So. 386, 234 Ala. 40.

83. *US—Corpus Juris* quoted in *Saucer v. Willys-Overland*, D.C. Fla., 49 F.2d 385, 387.

III—*Corpus Juris* quoted in *Rich v. Albrecht*, 21 N.E.2d 633, 635, 300 Ill. App. 493.

39 C.J. p. 1352 note 32.

84. *US—Corpus Juris* cited in *The Brilliant*, D.C.S.D. Fla., 49 F.2d 388, 389—*Corpus Juris* quoted in *Saucer v. Willys-Overland*, D.C. Fla., 49 F.2d 385, 387.

Ala.—Corpus Juris cited in *Farmers' & Merchants' Warehouse Co. v. Perry*, 118 So. 406, 408, 218 Ala. 223.

Colo.—Corpus Juris cited in *Kendall v. Lively*, 31 P.2d 343, 344, 94 Colo. 483.

Ga.—Corpus Juris cited in *Trawick v. Chambliss*, 156 S.E. 268, 269, 42 Ga. App. 833.

III—*Corpus Juris* quoted in *Rich v. Albrecht*, 21 N.E.2d 633, 635, 300 Ill. App. 493.

Mo.—Gordon v. Bleck Automobile Co., App., 233 S.W. 265.

39 C.J. p. 1352 note 33.

85. *Ala.—Collum Motor Co. v. Anderson*, 133 So. 693, 222 Ala. 643.

the relationship of master and servant,⁸⁶ and also that such relationship existed at the time of the injury⁸⁷ and with respect to the particular transaction from which the tort arose.⁸⁸ Nevertheless, a direct averment of these facts is not necessary,⁸⁹ and it is sufficient to allege the facts which establish such relationship.⁹⁰ Where liability is sought to be imposed under the doctrine of emergency employment of the person responsible for causing the injuries, the facts averred must show that an emergency existed.⁹¹

Selection or retention of incompetent servant or contractor. Ordinarily, the master's negligence in selecting the servant need not be alleged in an action for injuries to a third person inflicted by a servant.⁹² However, in an action for assault wherein a third person seeks to hold an employer liable for engaging and retaining an employee having vicious propensities, the complaint must contain allegations showing a causal connection between the negligence of the employer in hiring and retaining such an employee, and the injuries sustained by plaintiff.⁹³ A

pleading wherein plaintiff seeks to impose liability on one who engaged an independent contractor to do a certain piece of work, for the consequences of such work being done negligently, must contain allegations showing that defendant did not exercise due care to secure a competent contractor.⁹⁴

(b) Scope of Employment, Furtherance of Master's Interests

In an action against a master by a third person for injuries sustained through the act of a servant, the complaint ordinarily must contain allegations showing that the act was within the scope of the servant's employment, or was authorized or ratified by the master.

Ordinarily, in an action by a third person seeking to recover damages from the master for injuries resulting from the tortious act of a servant, the allegations of the complaint must show that the act complained of was within the scope of the servant's employment or in furtherance of the master's business or interests,⁹⁵ or else that defendant specially

86. Ga.—Bibb Mfg Co v Souther, 184 S.E. 421, 52 Ga.App. 722 39 C.J. p. 1352 note 26.

Allegations held sufficient

(1) Allegation that clerk was servant of dealer, acting within scope of authority, was held sufficient to hold dealer for unlawful sale of firearms to minor—Driesse v Verblauw, 153 A. 388, 9 N.J. Misc. 178.

(2) In action for injuries as result of firing of tear-gas gun, complaint alleging that certain persons went on grounds of another defendant to guard and protect employees and property, and that such property was not at the time in the custody of the law, was not subject to objection of insufficiency on ground that such persons were acting as peace officers in the discharge of their duties, rather than servants, agents, or employees—Hogle v Reliance Mfg Co, 48 N.E. 2d 75, 113 Ind.App. 488, rehearing denied 48 N.E. 2d 999, 113 Ind.App. 488.

87. Ga.—Bibb Mfg. Co v Souther, 184 S.E. 421, 52 Ga.App. 722 39 C.J. p. 1352 note 27.

88. Ill.—Shein v John R. Thompson Co., 225 Ill.App. 490.

Plaintiff's ignorance of employee's duties

Where a person is said to be an employee of another, and the nature of the employment, together with the duties connected therewith, is given, and it is further alleged that, at the time of the accident such employee was on an errand or mission of his employer, the petition discloses a cause of action, even though it is alleged that plaintiff does not know the particular duties then be-

ing performed by the employee but that such knowledge rests with the employer and employee—Dilworth v Hebert, La.App., 7 So. 3d 626.

89. Ind.—Grand Rapids & I R Co v Oliver, 108 N.E. 1066, 181 Ind. 145.

90. Ind.—Grand Rapids & I R Co v Oliver, supra 39 C.J. p. 1352 note 30.

91. Ala.—Burkhalter v Birmingham Electric Co., 6 So. 2d 864, 242 Ala. 388.

92. La.—Ragas v. Douglas, 72 So. 242, 139 La. 773.

Reason for rule

Where plaintiff is not a fellow servant of defendant's employee, he assumes no risk with respect to such employee, but is entitled to recover from the employer whatever damage he may have sustained by reason of the fault of the employee—Ragas v Douglas, supra.

93. N.Y.—Koblitz v George A. Krug Baking Co., 281 N.Y.S. 348, 156 Misc. 295.

Tex.—Pratley v Sherwin-Williams Co. of Texas, Civ.App., 56 S.W. 2d 510.

Allegations held sufficient

(1) Petition against landlord and agent who assumed management of premises, for injuries to guest of tenant shot by janitor, when he became enraged, stated cause of action in so far as based on theory that janitor, within knowledge of landlord and agent, was man of vicious character and that they were negligent in retaining him as janitor with knowledge of such traits—Henderson v Nolting First Mortg Corporation, 193

S.E. 347, 184 Ga. 724, 114 A.L.R. 1023.

(2) In action for death of person shot by plantation gamekeeper, against owner and superintendent of plantation, petition alleging that gamekeeper was retained with knowledge that he was of bloodthirsty and dangerous disposition and frequently threatened persons, and that owner and superintendent falsely testified at coroner's inquest that gamekeeper was game warden, was held sufficient to state cause of action for negligence in selection of gamekeeper and for ratification of his acts—Estridge v Hanna, 189 S.E. 864, 54 Ga.App. 817.

94. Pa.—Fuller v Palazzolo, 197 A. 225, 329 Pa. 98.

95. U.S.—Saucer v Willys-Overland, D.C. Fla., 49 F. 2d 385.

Ala.—Farmers' & Merchants' Warehouse Co v Perry, 118 So. 406, 218 Ala. 223—Reed v. L. Hammel Dry Goods Co., 111 So. 237, 215 Ala. 494.

Ga.—Stewart v Peerless Furniture Co., 28 S.E. 2d 396, 70 Ga.App. 286—Bates v Southern Ry Co., 188 S.E. 819, 52 Ga.App. 576—Lewis v Amorous, 59 S.E. 338, 3 Ga.App. 50.

Ky.—Camp Taylor Development Co v Wimberg, 113 S.W. 2d 9, 271 Ky. 635.

La.—McCurdy v. City Cab Co., App., 32 So. 2d 720—Moore v Day Builders' Supply Co., 3 La.App. 575.

N.C.—Hoover v. Globe Indemnity Co., 174 S.E. 808, 206 N.C. 468.

Tex.—Missouri-Kansas-Texas R. Co of Texas v. Salaman, Civ.App., 58 S.W. 2d 1026, error dismissed.

authorized⁹⁶ or ratified⁹⁷ the act. Where it appears that the act was within the scope of the servant's authority it is not necessary to allege that the negligent act complained of was in the interest of the master, or that it was in the prosecution of the master's business⁹⁸.

An allegation that the tortious act was committed by a named individual, the servant of defendant, has been held insufficient unless accompanied by other allegations showing that the acts were within the course and scope of the servant's employment,⁹⁹ but an allegation that "defendant by its servant or agent" committed the tortious act, or words to that effect, is sufficient without further amplifying it by adding that the servant was acting within the scope of his employment.¹ The petition must be construed in the light of the facts set forth, and not solely in view of a bare allegation, in the nature of a conclu-

sion, that the act of the employee was done in the scope of his employment,² and, where the specific allegations of the petition plainly negative the general charge that the acts complained of were in the prosecution of the master's business, and within the scope of the servant's employment, the specific averments will prevail.³ The particular words "within the scope of his employment" are not indispensable,⁴ any language of equivalent import, conveying the meaning that the servant was in fact acting within the scope of his employment and in pursuance of the master's business, will suffice.⁵

Where a willful and intentional injury by the servant is charged, a failure of the complaint to show that he was acting within the scope of his employment or in furtherance of his master's business or interests renders it insufficient.⁶ A direct averment in terms to this effect is unnecessary if it ap-

Wash.—*Estes v Brewster Cigar Co*, 287 P 36, 156 Wash 465
39 C.J. p 1353 note 43

Allegations held insufficient

Petition in employee's action against employer's freight elevator insurer for injuries sustained by fall of elevator, alleging that special inspectors designated by insurer were negligent in inspecting elevator and that they permitted elevator to be used in violation of law in order that defendant's insurance could be continued, did not state a cause of action in absence of allegation that inspectors were authorized by insurer to promote its business in such manner or that insurer assumed employer's duty in relation to elevator—*Taylor v Continental Casualty Co*, 61 NE2d 919, 75 Ohio App 299

96. NC—*Hoover v Globe Indemnity Co*, 174 SE 308, 206 NC 468

97. NC—*Hoover v Globe Indemnity Co*, supra

98. Ala.—*Jones v Strickland*, 77 So 562, 201 Ala 138

39 C.J. p 1354 note 49.

99. U.S.—*Saucer v. Willys-Overland*, DCFia, 49 F2d 385

Reason for rule

The mere allegation that the wrongdoer was an employee of defendant does not necessarily imply that while doing the wrong he was acting within the scope of his employment—*Kelikian v Star Brewing Co*, 20 NE2d 465, 303 Mass 53

1. U.S.—*The Brilliant*, DCFia, 49 F2d 388—*Saucer v. Willys-Overland*, DCFia, 49 F2d 385.

Ala.—*Farmers' & Merchants' Warehouse Co. v. Perry*, 118 So 408, 218 Ala 223

2. Ga.—*Atlanta Coca Cola Bottling Co. v. Brown*, 167 S.E. 776, 46 Ga App. 451.

3. Ga.—*Atlanta Coca Cola Bottling Co v Brown*, supra.

4. Hawaii—*Taba v Jardin*, 30 Hawaii 452

5. Hawaii—*Taba v Jardin*, supra.

6. Ala.—*Corpus Juris* cited in *Farmers' & Merchants' Warehouse Co v Perry*, 118 So 408, 218 Ala 223

Okl.—*Corpus Juris* quoted in *Adakona Bridge Co v. Cargo*, 21 P 2d 1, 6, 163 Okl 122

Tex.—*Missouri-Kansas-Texas R. Co of Texas v Salaman*, Civ App, 58 SW2d 1026, error dismissed

39 C.J. p 1353 note 44

Allegations held sufficient

(1) Generally

Ga.—*Winoker v Warfield*, 71 SE 1051, 136 Ga 742—*Gomez v Great Atlantic & Pacific Tea Co*, 172 SE 750, 48 Ga App 398—*Great Atlantic & Pacific Tea Co v Dowling*, 159 SE 609, 43 Ga App 549

Ky.—*Fournier v Churchill Downs-Latonia*, 166 SW2d 38, 292 Ky 215

Mo.—*Redd v Missouri Pac Ry Co*, 143 SW 555, 161 Mo App 522

SD.—*Hasche v Wagner*, 227 NW 66, 55 SD 595

W Va.—*Nees v Julian Goldman Stores*, 146 SE 61, 106 W Va 502
39 C.J. p 1353 note 45 [a]

(2) Petition alleging that petitioner suffered relapse as result of refusal of defendant finance company's collection agent to leave petitioner's home, where he was attempting to intimidate petitioner into paying illegal debt, was held not generally demurrable as showing that employee was acting outside scope of employment—*Personal Finance Co. of Macon v. Whiting*, 172 SE 111, 48 Ga App. 154.

(3) Petition alleging that plaintiff

was attacked by general agent of bus company because plaintiff parked his automobile in vicinity of bus depot which agent was charged with duty of keeping clear of automobiles, and that agent was acting within scope of his employment and in furtherance of business of the companies, stated cause of action as against agent and bus companies—*Brown v Union Bus Co*, 6 SE2d 388, 61 Ga App 496

(4) Complaint alleging that taxicab company maintained a cabstand and starter who was to control traffic so as to keep parking space open for movement of company's cabs, that starter assaulted motorist when he stopped in parking space, and that acts of starter were done while engaged in business of taxicab company, was sufficient to state a cause of action against taxicab company for acts of starter—*Shapiro v Checker Taxi Co*, 10 NE2d 898, 292 Ill App 632

(5) Petition which alleged that employee was working as foreman for employer, that employee struck plaintiff, that the unlawful acts were done pursuant to instructions from employers who conspired and co-operated to make such unlawful attack, and that employee's wrongful acts had been ratified by employers and were the proximate cause of plaintiff's injuries, was held sufficient as charge that assault was made by employee in furtherance of work of his employment—*Davis v. Clark*, Civ App, 78 SW2d 1008, reversed on other grounds 105 SW2d 190, 129 Tex. 520.

(6) Complaint in assault and battery action, alleging that defendants were owners of a roadhouse, that they employed codefendant as floor manager at such place, and that co-

pears by necessary implication from the facts stated,⁷ and, in general, a petition is sufficient which alleges that a willful tort by a servant was committed in the prosecution and within the scope of his business and employment, and states facts in support thereof, which, in connection with legitimate inferences, may establish the truth of the allegation.⁸

There is authority holding that it is not necessary for the pleading to amplify the allegation of the ultimate fact that the act was committed while the servant was engaged in his master's business and in furtherance of the master's interests,⁹ but other authorities hold that facts must be stated to show that the act was within the scope of the servant's employment,¹⁰ since the general averment that the acts were within the scope is considered insufficient because it is a mere conclusion of law.¹¹ A general demurrer is properly sustained to a petition containing a general averment that the act complained of was in the prosecution of the master's business and within the scope of the manager's authority, where the petition also contains a specific allegation showing that the acts complained of were committed by the servant in his personal capacity.¹²

defendant attacked plaintiff at defendants' direction and as their agent, contained sufficient allegations that codefendant was acting within scope of authority at time of alleged assault and battery—*Stewart v Reutier*, 89 P 2d 402, 32 Cal App 2d 195

Allegations held insufficient

(1) Generally.

US—*Chaney v Frigidaire Corporation*, CCA La., 31 F 2d 977
DC—*Johnson v M J Uline Co*, Mun App, 40 A 2d 260
Fla—*Reece v Ebersbach*, 9 So 2d 805, 152 Fla 763, certiorari denied 63 S Ct 855, 318 US 784, 87 L Ed 1151, rehearing denied 63 S Ct 1155, 319 US 781, 87 L Ed 1726
Ga—*Ford v Mitchell*, 179 SE 215, 50 Ga App 617
39 CJ p 1353 note 45 [b]

(2) Petition against landlord and mortgagee in control of premises for injuries to guest of tenant shot by janitor, when janitor became enraged during idle conversation with tenant, stated no cause of action, in so far as based on theory of respondeat superior, since shooting was entirely disconnected with janitor's employment—*Henderson v Nolting First Mortg Corporation*, 198 SE 347, 184 Ga 724, 114 A L R 1022

(3) Petition alleging that agent of railroad for handling of cars directed police to shoot plaintiff stated no

cause of action against railroad because failing to disclose connection of act complained of with agent's employment—*Bates v Southern Ry Co*, 183 SE 819, 52 Ga App 576

(4) A petition, alleging that manager of defendant corporation's store loudly demanded what plaintiff was doing in such store and pushed her out of door, telling her to stay away from store, thereby causing her humiliation and embarrassment, stated no cause of action against corporation for damages, since allegations clearly showed that assault was not committed in furtherance of corporation's business—*Falls v Jacobs Pharmacy Co*, 31 SE 2d 426, 71 Ga App 547

(5) Petition alleging that telegraph company's messenger boy, after summoning plaintiff to door of her home by ringing bell, stated that he had lost receipt for telegram, which he had delivered to her earlier, and had come to procure a duplicate receipt, that while she was in the act of writing a duplicate receipt, he entered the house and struck her and made indecent proposal, was demurrable for failing to disclose that his acts were done in scope of his employment so as to render the telegraph company liable—*Stafford v Postal Telegraph & Cable Co*, 198 SE 117, 58 Ga App 213, followed in 198 SE 120, 58 Ga App 219.

7. Ala—*Corpus Juris* cited in

b. Plea or Answer

Plea or answers in actions against a master to recover for injuries sustained by a third person through the acts of a servant or independent contractor engaged by him are governed by the general rules pertaining to a defendant's pleadings in civil actions.

The general rules prevailing in other actions apply to pleas or answers in actions against the master to recover for injuries sustained through the acts of his servants.¹³ Where liability of the employer is predicated on the doctrine of respondeat superior, a defense pleaded by the employee which is not personal to him, but goes to the merits of the case, inures to the benefit of the employer.¹⁴ In at least one jurisdiction, in actions of trespass for personal injuries, a defendant who wishes to deny the averments in a statement of claim as to the person by whom the act was committed, the agency or employment of such person, the ownership or possession of the vehicle, machinery, property, or instrumentality involved, or any similar averment, must do so in an affidavit of defense, or else such averments will be taken to be admitted,¹⁵ but in this connection it has been held that only averments of fact contained in plaintiff's statement of claim, and not legal conclusions, are admitted by failure to file an affidavit of defense.¹⁶

Farmers' & Merchants' Warehouse Co v Perry, 118 So 406, 408, 218 Ala 233

Iowa—*Hrncick v. Chicago, M & St P Ry Co*, 175 NW 30, 187 Iowa 1145

Okl—*Corpus Juris* quoted in *Adakonawa Bridge Co v Cargo*, 21 P 2d 1, 6, 163 Okl 122

39 CJ p 1353 note 45

8. Ga—*Estridge v Hanna*, 189 SE 364, 54 Ga App 817

9. NY—*Kobitz v. George A Krug Baking Co*, 281 NYS 348, 156 Misc 295

10. NJ—*Letts v Hoboken R Warehouse & Steamship Connecting Co*, 57 A 392, 70 NJ Law 358
39 CJ p 1354 note 46

11. Neb—*Davis v Houghtellin*, 50 NW 765, 33 Neb 582, 14 L R A 737

39 CJ p 1354 note 47

12. Ga—*Daniel v Excelsior Auto Co*, 131 SE 692, 31 Ga App 631

13. Ala—*Looker v Gulf Coast Fair*, 81 So 832, 203 Ala 42

Answer held sufficient

SD—*Christiansen v Fantie Bros*, 228 NW 407, 56 SD 350

14. Cal—*Freeman v Churchill*, 188 P 2d 4

15. Pa—*Morgan v Debon*, 12 A 2d 5, 337 Pa 452.

16. Pa—*Mazzo v F. W. Woolworth Co*, 11 A 2d 683, 139 Pa Super. 243

Independent contractor. Where a declaration in an action against an employer for injuries sustained through work done by an independent contractor alleges facts which bring the case within an exception to the general rule exempting the employer for injuries inflicted by an independent contractor or his employee, a plea which fails to deny the allegations which bring the case within an exception to the general rule is insufficient.¹⁷ However, the defense of independent contractor is not an affirmative defense and need not be specially pleaded;¹⁸ it may be raised under a general denial.¹⁹

c. Issues, Proof, and Variance

The rules as to issues, proof, and variance in actions against a master for injuries sustained by third persons are in general the same as those in other civil actions.

General rules as to issues, proof, and variance

17. Miss—Mississippi Cent R Co v. Holden, 54 So 851, 99 Miss 124

18. Okl—Texas Pipe Line Co of Oklahoma v Willis, 45 P 2d 138, 172 Okl 148

19. Okl—Texas Pipe Line Co of Oklahoma v Willis, supra

20. Conn—Epstein v M Blumenthal & Co, 158 A 234, 114 Conn 195

Ill—Merlo v Public Service Co of Northern Illinois, 45 N E 2d 665, 381 Ill 300, followed in 45 N E 2d 677, 381 Ill 336

Evidence held admissible under pleadings

(1) Under an answer alleging that the person causing the injury complained of was an independent contractor, any circumstance that would elucidate the question whether the person operating defendant's mill at the time of the accident was acting as defendant's agent, as his foreman, or as an independent contractor, would be admissible.—McKinney v Saluda Lumber Co., 120 S E 234, 126 S C 503

(2) Allegation that defendant was the proprietor of an amusement pier and negligently equipped, constructed, and maintained a device on its premises, was sufficient to admit proof that defendant maintained the pier, received part of the gross receipts of the concession for the device, and failed to inspect it to test its safety.—McCordie v Crawford, 142 P 2d 7, 23 Cal 2d 1

(3) General allegation of negligence in application of electric current, in suit for injuries sustained while receiving permanent wave, was held sufficient to permit consideration of negligent movement of wire, especially where there had been no request for a more specific state-

ment, and the testimony was admitted without objection.—Lesick v Proctor, 150 A 618, 300 Pa 347

(4) A complaint against master and servant for assault and battery which alleged that servant in making the assault and battery was acting in the course of his employment, and for and on behalf of, and in the employ and pay and under the direction and instructions of, the employer and its managing agents was sufficient to justify the admission of evidence in support thereof.—Kornec v. Mike Horse Mining & Milling Co, Mont, 180 P 2d 252

Variance held fatal

In action against employer and two employees wherein complaint alleged negligence of both employees, proof of negligence of only one employee was held a fatal variance.—Sloss-Sheffield Steel & Iron Co v Wilkes, 165 So 764, 231 Ala 511, 109 A L R 385

21. Ky—Hamblin's Adm'x v Gatliff Coal Co, 128 S W 2d 577, 278 Ky 248.

Amendment of pleading

The court can assume that a final amendment of a pleading expresses the settled position of the party presenting it.—Hamblin's Adm'x v Gatliff Coal Co, supra

22. Minn—Porter v Grennan Bakeries, 16 N W 2d 908, 219 Minn 14. Utah—Zimmerman v Auerbach, 17 P 2d 251, 81 Utah 554 39 C J p 1354 note 55

Breach of agreement

(1) Contractor's employee, suing for injury, cannot make case against contractor in pleadings, and by impersonal statements in testimony make case against owner of premises for breach of contract to furnish contractor with materials reasonably

have been applied in actions seeking to impose liability on a master for injuries to third persons,²⁰ and, in determining the issues, the court has the right to consider all the pleadings.²¹ Evidence outside the issues presented by the pleadings is not admissible,²² and, where plaintiff predicates liability on negligence, he must stand on the allegations of negligence set out in his complaint.²³ Where the servant's negligence is the only ground relied on in the complaint, evidence is inadmissible to show the incompetency or intemperateness of the servant,²⁴ or to show defects in machinery or instrumentalities.²⁵ Allegations in a complaint which are not of the gist of the action,²⁶ such as the mental unfitness of the servant²⁷ and the intent of the master,²⁸ need not be proved by plaintiff to authorize a recovery. Defenses which are shown by the declaration itself are available without being specially pleaded in the answer.²⁹

suitable to work.—Warner v Synnes, 235 P 305, 114 Or 451

(2) Where plaintiffs sustained damage from fall of pole installed in yard of defendants' premises by independent contractor, if defendants' promise to repair damage was relied on, it must be pleaded; and no recovery on such theory could be had under a mere averment of negligence.—Frawley v Miller, 212 N Y S 323, 125 Misc 864.

Variance held not shown

Variance was held not to exist between complaint alleging that defendant, through two servants, acting in scope of authority, unlawfully searched house, and evidence that one with authority called other to assist.—Joubert & Goslin Machine & Foundry Co v Atchley, 117 So 640, 218 Ala 105.

23. Or—Whitechurch v Mutsig, 210 P. 623, 105 Or 692

S C—Johnson v Atlantic Coast Line R Co, 140 S E 443, 142 S C 125

24. Ala.—Louis Pizitz Dry Goods Co v Yeldell, 104 So 526, 213 Ala 222, affirmed 47 S Ct 509, 274 US 112, 71 L Ed 952, 51 A L R 1376. 39 C J p 1354 note 63

25. Iowa—Healy v Patterson, 98 N. W 576, 123 Iowa 73

La—Carson v De George, App, 18 So 2d 856

26. Conn—Black v. Hunt, 115 A. 429, 96 Conn. 663

Ga—Christian v Columbus & R R. Co, 15 S E 701, 90 Ga. 124

27. Ga.—Christian v Columbus & R R Co, supra

28. Ga.—Christian v. Columbus & R R Co, supra.

29. Ill—Shaw v Dorris, 124 N.E 796, 290 Ill. 196.

In accordance with principles considered supra subdivision a (2) of this section, where defendant is charged with negligently inflicting injuries, evidence that the injuries complained of were committed by his servant is admissible,³⁰ but evidence that the master participated in the negligent act of the servant by directing the latter to do or perform the act is not admissible since it would operate to change the master's act from negligence to willfulness,³¹ and, where suit is brought jointly against the master and servant for negligence, there can be no recovery where the proof shows negligence on the part of the servant only.³² Where the complaint proceeds on the theory of case, not trespass, and seeks to fasten liability on defendant on the doctrine of respondeat superior for the wrong of the servant, proof of defendant's participation in the wrongful acts is unnecessary.³³

*Under the general issue or denial evidence tending to disprove the injury complained of is admissible.*³⁴ While there is some authority to the contrary,³⁵ it has usually been held that, under a plea of the general issue or general denial, defendants may show that the relation of master and servant between themselves and the person causing the injury did not exist,³⁶ as for instance, that the person responsible for the injury complained of was an independent contractor.³⁷ It may also be shown under that pleading that the servant was not acting

within the scope of his employment at the time of the injury.³⁸ Where the basis of the action is an assault by defendant's servant, it may be shown under the general issue that plaintiff assaulted the servant first and that the latter acted in self-defense.³⁹

§ 615. Evidence

- a Presumptions
- b Burden of proof
- c Admissibility
- d Weight and sufficiency

a. Presumptions

In an action against a master for injuries sustained by a third person, the facts may give rise to a presumption that the one causing the injury was a servant of another and acting within the scope of his employment; but the mere fact that a servant is in the general employment of a master does not alone necessarily create a presumption that his acts were within the scope of his employment.

As a general rule, in the absence of evidence on the subject, no presumption exists that an employee is either a servant or an independent contractor.⁴⁰ The facts may, however, raise a presumption that a person causing injury to another was in the employ of defendant at the time of the injury.⁴¹ Thus a person who is performing work and labor for another,⁴² or who is in possession of property of an-

30. U.S.—*Corpus Juris* cited in *Saucer v Willys-Overland*, D.C. Fla., 49 F.2d 385, 387.

Ga.—*Trawick v Chambliss*, 156 S.E. 268, 42 Ga.App. 333.

Ill.—*Skala v Lehon*, 175 N.E. 832, 343 Ill. 602.

Tex.—*Jackson v. Dickey*, Com.App., 281 S.W. 1043.

39 C.J. p 1354 note 60.

31. Ala.—*Birmingham R. Light & Power Co v Randle*, 43 So. 355, 149 Ala. 539.

32. Colo.—*Western Union Tel Co v Olsson*, 90 P. 841, 40 Colo. 264.

33. Ala.—*Hanson v Foremost Dairy Products*, 155 So. 627, 229 Ala. 200. *Willful or wanton wrong*.

A complaint drawn properly under the doctrine of respondeat superior, although the charge is willful, intentional, or wanton wrong, does not require proof that the master participated in the damaging act.—*Atlantic Coast Line R. Co v Brackin*, 28 So.2d 193, 248 Ala. 459.

34. Ind.—*Haywood v Hendrick*, 94 Ind. 340.—*Oakland City Agricultural & Industrial Soc v Bingham*, 31 N.E. 383, 4 Ind.App. 545.

35. Ky.—*Dorsey v Proctor*, 269 S.W. 216, 207 Ky. 385. 39 C.J. p 1355 note 68.

Limits of rule

The issue raised by the plea of not guilty in an action of tort is whether or not defendant in person or by means of agency did the wrongful act charged, or suffered the breach of duty alleged, and, where agency is alleged in the declaration, such agency is not put in issue by the plea of not guilty, but it does not follow that plaintiff is excused from proving either that defendant himself, or his servant, or his instrumentality was involved in the wrongful acts where the plea of not guilty is interposed.—*Dowling v. Nicholson*, 135 So. 288, 101 Fla. 672.

36. Mont.—*De Sandro v Missoula Light & Water Co*, 136 P. 711, 48 Mont. 226.

39 C.J. p 1355 note 69.

37. Okl.—*Gulf, C & S F R Co. v. Beasley*, 168 P. 200, 67 Okl. 27.

39 C.J. p 1355 note 70.

38. Mo.—*Cousins v Hannibal & St J R Co*, 66 Mo. 572.

39 C.J. p 1355 note 71.

39. Ind.—*Oakland City Agricultural & Industrial Soc v Bingham*, 31 N.E. 383, 4 Ind.App. 545.

40. U.S.—*Continental Ins Co. v I Bahcall, Inc.*, D.C.Wis., 39 F.Supp. 315.

41. Ark.—*Mississippi River Fuel Corporation v Young*, 67 S.W.2d 581, 188 Ark. 575.

D.C.—*Corpus Juris* cited in *Western Union Telegraph Co v Scrivener*, 18 F.2d 162, 164, 57 App.DC 120.

N.Y.—*Kilmer v. New York Telephone Co*, 238 N.Y.S. 512, 228 App.Div. 63.

Ohio.—*Corpus Juris* cited in *Hozian v Crucible Steel Casting Co*, 9 N.E.2d 143, 145, 132 Ohio St. 453, 112 A.L.R. 333.

39 C.J. p 1356 note 86.

Presumptions as to employment generally see supra § 12.

Going to, or coming from, work

In determining liability of an employer for negligence of an employee while he is going to, or coming from, work, if the employer pays transportation expenses of the employee, it is a possible, although not conclusive, inference that the employer has impliedly agreed that service to him shall start from the time the employee leaves home and shall continue until he arrives back at his home.—*Breland v Traylor Engineering & Manufacturing Co*, 136 P.2d 455, 52 Cal.App.2d 415.

42. Cal.—*Robinson v George*, 105 P.2d 914, 16 Cal.2d 288.

other and uses it in the service of the owner,⁴³ is presumed to be a servant of such other person. If the master is being driven by the servant, it may be inferred without other proof that the latter is engaged in the master's business and is subject to his control.⁴⁴ Where one is employed generally to perform certain services for another, and there is no specific contract to do a certain piece of work according to specifications for a stipulated sum, it is inferable that the employer has retained the right to control the manner, method, and means of the performance of the contract, and that the employee is not an independent contractor.⁴⁵

The fact that an independent contractor was negligent in respect of the work he was engaged to do affords no presumption that the employer was guilty

of negligence in having engaged him.⁴⁶ Where the customary violation of a safety rule has continued so long that the master either knew of it, or by the exercise of ordinary care could have known of it, and he acquiesced in it, he is presumed to have consented to its repeal or to have waived obedience to it.⁴⁷

Scope of employment. The mere fact that a servant is in the general employment of a master does not alone necessarily give rise to a presumption that a given act done by him was within the scope of his employment,⁴⁸ especially where there is direct proof to the contrary.⁴⁹ The particular facts may, however, give rise to a presumption that the servant was acting within the scope of his employment.⁵⁰ Thus, if the injury occurred while one was employed in the

Mo—Mattocks v Emerson Drug Co, App, 38 S W 2d 142

Okl—Ellis & Lewis v Trimble, 78 P.2d 312, 182 Okl 414

Tex—Ochoa v Winerich Motor Sales Co, 94 S W 2d 416, 127 Tex 542, on remand Winerich Motor Sales Co v Ochoa, Civ.App, 98 S W 2d 235—Taylor, B & H R Co v Warner, 32 S W 868, 88 Tex 642—Texas Co v Freer, Civ App, 151 S W 2d 907, error dismissed, judgment correct—Gibson v Gillette Motor Transport, Civ App, 138 S W 2d 293, error refused—Broadus v Long, Civ App, 125 S W 2d 840, affirmed 138 S W 2d 1057, 135 Tex 853—Buckley v Gulf Refining Co, Civ App, 123 S W 2d 970, error dismissed, judgment correct—Glazier v Roberts, Civ App, 103 S W 2d 829—Commercial Credit Co v Groseclose, Civ App, 66 S W 2d 709, error dismissed

Ordinary services for wages

A presumption of the existence of the relation of master and servant arises when the proof shows that one is rendering ordinary services for another for wages—Moreman v Armour & Co., Tex.Civ.App, 65 S W 2d 334, error refused

Bicyclist delivering groceries

In action against bicycle rider and his alleged employer for injuries sustained when plaintiff was struck by bicycle, evidence that accident occurred during usual business hours of alleged employer, and was result of negligence of bicycle rider employed to deliver groceries for alleged employer, gave rise to presumption that bicycle rider was working for alleged employer at time of accident—Greene v Pennamgton, 108 S.W.2d 1013, 270 Ky. 28.

Contractor and subcontractor

In action by landowners for flooding as result of dirt embankment which was placed on land by one company while performing work

which another was bound by contract to perform, presumption obtained that relation between companies was that of master and servant so as to render contractor liable for act of subcontractor—Parsons v City of Athens, Tex.Civ.App, 78 S W 2d 1098

43. SC—Chandry v Pettit Motor Co, 152 S E 753, 155 S C 1—Snipes v Augusta-Aiken Ry & Electric Corporation, 149 S E 111, 151 S C 391—Williamson v Pike, 138 S E 831, 140 S C 376—Osteen v South Carolina Cotton Oil Co, 86 S E 203, 102 S C 146, L.R.A. 1916B 629

44. Pa—Kelton v Eifer, 26 Pa Super 603

45. Ga—Mitchem v Shearman Concrete Pipe Co, 165 S E 889, 45 Ga App 809, followed in Teichmiller v Steale, 187 S E 911, 46 Ga App 468

46. Pa—Fuller v Palaszolo, 197 A 235, 339 Pa 93—Adams v MacDonald, Com Pl, 31 Del Co 363

47. NC—Fry v. Southern Public Utilities Co, 111 S E 354, 183 NC 281

48. US—Dismang v Western Union Telegraph Co, D.C Okl, 24 F Supp 782

La—Edminston v Terrill Bros Grocery Co, 135 Sp 495, 12 La.App 873

Md—Great Atlantic & Pacific Tea Co v Noppenberger, 189 A 434, 171 Md 378

Okl—Greis v Smith, 125 P 2d 763, 190 Okl 517

Private fight

Shooting of ex-employee on owner's premises by night watchman who had day duties did not raise presumption that shooting took place during anything other than private fight between watchman and ex-employee, as respects owner's liability for ex-employee's death—Phillips' Adm'r v Tway, 108 S W 2d 525, 269 Ky. 533.

49. NY—Nardone v Milton Fire Dist, 27 NYS 2d 489, 261 App Div 717, affirmed 42 NE 2d 746, 288 NY 654

Okl—Greis v Smith, 125 P 2d 763, 190 Okl 517.

After finishing owner's business

As respects building owner's liability to pedestrian slipping on grease spilled on abutting sidewalk by building superintendent who was greasing truck owned by him, presumption could not be indulged that building owner was in control of truck while superintendent was greasing it after he had finished owner's business—Bernstein v East 167th Street Corporation, 293 NYS 109, 161 Misc 836

50. US—Edwards v Gisi, D.C Neb, 45 F Supp 17

Ala—Western Union Telegraph Co v Gorman, 185 So 743, 237 Ala 146

DC—Corpus Juris cited in Western Union Tel Co v Scrivener, 13 F 2d 162, 164, 57 App DC 120

NY—Nardone v Milton Fire Dist, 27 NYS 2d 489, 261 App Div 717, affirmed 42 NE 2d 746, 288 NY 654

Ohio—Corpus Juris cited in Homan v Crucible Steel Casting Co, 9 NE 2d 143, 132 Ohio St 453, 112 ALR 333

39 C J p 1356 note 87.

Possession of vehicle

At common law the possession of a vehicle gave rise to a presumption that the driver was on the owner's business—Pariso v Towse, C.C.A.N.Y., 45 F 2d 962

Messenger boy in uniform

A presumption that a telegraph messenger was acting within the course and scope of his employment may arise from the fact that he was dressed in the uniform of a telegraph company messenger boy at the time his bicycle struck a pedestrian.

usual course, and for the benefit of the owner, a presumption may arise that the servant was acting within the scope of his authority.⁵¹

A servant may be presumed to have been acting in the course of his employment, wherever it appears, not only that his master was owner of the given instrumentality, but also that, at the time when the alleged tort was committed, it was being used under conditions resembling those which normally attended its use in connection with the master's business.⁵² The master's assent to acts of his servant which do not amount to a turning aside completely from the master's business, so as to be inconsistent with its purpose, and which are only such as might be reasonably expected, may be fairly assumed.⁵³ A presumption raised by the evidence that a servant was acting within the scope of his authority about his master's business ordinarily is rebuttable and subject to be overcome by proof to the contrary.⁵⁴

Dual capacity of servant and special officer. Where an officer is commissioned at the request of a corporation to guard its property and is paid by it, acts done by him will be presumed to have been performed in his capacity as officer in the absence of evidence to show the contrary.⁵⁵

Hiring out of employee. In the absence of evidence to the contrary, there is an inference that the servant remains in his general employment as long as, by the service rendered another, he is performing the business intrusted to him by his general employer,⁵⁶ as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered.⁵⁷ When a master hires out the services of an employee for the operation of an instrumentality owned by the master, without relinquishing to the hirer the power to discharge such servant, the legal presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the operation of the instrumentality.⁵⁸ In the absence of proof that the general employer has surrendered control completely, it must be presumed that his control continued,⁵⁹ since there is no inference that because the general employer has permitted a division of command or control he has surrendered it.⁶⁰

US—Western Union Telegraph Co. v. Kirby, CCA Pa., 37 F2d 480—Futtermann v. Western Union Tel Co., DCLa., 43 FSupp 729.

DC—Tipton v. Western Union Tel Co., DC, 68 FSupp 854

La—Whittington v. Western Union Tel Co., App., 1 So 2d 327

51. Pa.—Schroeder v. Gulf Refining Co. of Port Arthur, Tex., 150 A 663, 300 Pa 397

"The presumption exists that, when the servant is in performance of his master's business, he is acting within the scope of his employment."—Ada-Konawa Bridge Co. v. Cargo, 21 P.2d 1, 7, 163 Okl. 122

52. Tenn.—Maysay v. Hickman, 97 SW 2d 662, 20 Tenn App 262—Hall Grocery Co. v. Wall, 13 Tenn App 203

Employment to operate instrumentality

Where it is shown that defendant owned instrumentality causing injury, and that person operating instrumentality was defendant's employee, and that he was employed generally in defendant's business to operate such instrumentality, a rebuttable inference arises that operator was acting within scope of his authority, but no such inference can arise in absence of proof that operator was employed for that purpose.—Halkias v. Wilkoff Co., 47 NE 2d 199, 141 Ohio St. 139

53. Cal.—Westberg v. Willde, 94 P

2d 590, 14 Cal 2d 360—Krusse v. White Bros., 253 P 178, 81 Cal App 86

54. US—Futtermann v. Western Union Tel Co., DCLa., 43 FSupp 729.

DC—Tipton v. Western Union Tel Co., DC, 68 FSupp 854

Ga.—Atlanta Laundries v. Goldberg, 30 SE 2d 349, 71 Ga. App 130

Ill.—Trust v. Chicago Motor Club, 276 Ill App. 289

La.—Whittington v. Western Union Tel Co., App., 1 So 2d 327.

Ohio—Halkias v. Wilkoff Co., 47 NE 2d 199, 141 Ohio St 139

55. Ill.—Roll v. Springfield Cons R Co., 225 Ill App 411

56. Kan.—Leathers v. Dillon, 131 P 2d 668, 156 Kan 132

NJ—Younkers v. Ocean County, 33 A 2d 898, 130 NJ Law 607.

57. Cal.—Lowell v. Harris, 74 P 2d 551, 24 Cal App 2d 70.

NY—Delisa v. Arthur F Schmidt, Inc., 34 NE 2d 336, 285 N.Y. 314—

Irwin v. Klein, 3 NE 2d 601, 271 NY 477—Charles v. Barrett, 135 NE 199, 233 NY 127—Chapin-Owen Co. v. Yeoman, 250 N.Y.S. 95, 232 App Div 560, motion denied 253 N.Y.S. 568, 233 App Div 492—Smith v. Styne & Lachman, 25 N.Y.S. 2d 628.

58. Cal.—Billig v. Southern Pacific

Co., 209 P 241, 189 Cal 477—Lowell v. Harris, 74 P 2d 551, 24 Cal App 2d 70—Peters v. United Studios, 277 P 156, 98 Cal App 373.

Ohio—Manchester v. Youngstown Sheet & Tube Co., App., 46 NE 2d 780

59. Iowa.—McDonald v. Dodge, 1 N.W. 2d 280, 231 Iowa 325

NY—Wawrzonek v. Central Hudson Gas & Electric Corporation, 12 NE 2d 525, 276 N.Y. 412—Irwin v. Klein, 3 NE 2d 601, 271 NY 477—Smith v. Styne & Lachman, 25 N.Y.S. 2d 628

Operatives of steam shovel, paid by owner furnishing machine and men to contractor at stipulated price, were held presumably in employer's control—Bartolomeo v. Charles Bennett Contracting Co., 156 NE 98, 245 NY 66

60. Cal.—Lowell v. Harris, 74 P 2d 551, 24 Cal App 2d 70

Kan.—Leathers v. Dillon, 131 P.2d 668, 156 Kan. 132

NJ—Younkers v. Ocean County, 33 A 2d 898, 130 NJ Law 607

NY—Irwin v. Klein, 3 NE 2d 601, 271 N.Y. 477—Charles v. Barrett, 135 NE 199, 233 N.Y. 127—Chapin-Owen Co. v. Yeoman, 250 N.Y.S. 95, 232 App Div 560, motion denied 253 N.Y.S. 568, 233 App Div. 492—Smith v. Styne & Lachman, 25 N.Y.S. 2d 628

Res ipsa loquitur. It may sometimes be presumed from the mere happening of an accident, in the absence of an explanation, that it occurred from want of reasonable care,⁶¹ and under the circumstances of particular cases the doctrine of *res ipsa loquitur* has been held applicable⁶² or inapplicable.⁶³

b. Burden of Proof

The burden is on plaintiff to establish the liability of the master by showing, for example, that the relation of master and servant existed at the time of the injury with respect to the particular transaction in question, and that the servant acted within the scope

of his employment. The burden is on defendant to rebut a *prima facie* case.

In an action to recover from a master for injuries inflicted by his servant, plaintiff must establish all the facts out of which the master's liability is claimed to rest.⁶⁴ So, ordinarily the burden is on plaintiff to show that the person whose act caused the injury was the servant of defendant,⁶⁵ that the relation existed at the time of the injury⁶⁶ and with respect to the particular transaction from which the tort arose,⁶⁷ and that the servant acted within

61. NJ—Barbero v Pellegrino, 156 A 765, 108 NJ Law 156

62. Particular circumstances

(1) Injury suffered by beauty parlor patron in course of receiving permanent wave

Iowa—Pearson v Butts, 276 NW 65, 234 Iowa 376

La—Lanza v Metcalf, App, 25 So 2d 453

Mo—Glossip v Kelly, 67 SW 2d 513, 228 Mo App 392—Givens v Spalding Cloak Co, 63 SW 2d 819, 238 Mo App 169

(2) Falling into unguarded elevator shaft—Kickels v Fem, 10 NE 2d 297, 104 Ind App 606

(3) Throwing of debris through window—Kesten v Ehnhorn & Singer Development Corporation, 249 NY 205, 232 App Div 144, affirmed 180 NE 327, 258 NY 549

63. Pa—Marcus v May's Beauty Shop, Com Pl, 29 Del Co 432

Particular circumstances

(1) Breaking of rope—Anderson v International Mercantile Marine Co, 264 NYS 175, 238 App Div 509, motion denied 188 NE 124, 262 NY 693, affirmed 191 NE 497, 264 NY 425

(2) Automobile leaving the road—Lewis v. Chitwood Motor Co., 115 S W 2d 1072, 196 Ark 86

(3) Falling of log—Reed v Jeffries Lumber Co, La App, 9 So 2d 87

64. Ala—Great Atlantic & Pacific Tea Co. v Lantrip, 153 So. 296, 26 Ala App 79

Ky—Phillips' Adm'r v Tway, 108 SW 2d 525, 269 Ky 588. 39 C.J. p 1355 note 79.

Possession of premises

In action against corporation for injuries sustained at its gasoline service station by visitor, burden was on plaintiff to show affirmatively by competent evidence that defendant was in possession of premises through its employee and agent at time of accident—Horan v Richfield Oil Corporation, 106 P 2d 514, 56 Ariz 64

Lack of sufficient help

Where truck owner, while assisting employees of defendant to load

pipes which owner contracted to haul for defendant, was injured by the negligence of an employee, and owner pleaded that he aided in the loading so that his truck would not be detained an unnecessary length of time, owner had burden of proving that defendant had not provided sufficient help to prevent truck from being detained an unnecessary length of time, and that owner was justified in assisting employees—Stallcup v United Gas Public Service Co, Tex Civ App, 119 SW 2d 574, error dismissed

65. U.S.—P F Collier & Son Distributing Corporation v Drinkwater, CCANC, 81 F 2d 200—Continental Ins. Co v I Bahcall, Inc, DC Wis, 39 F Supp 815

Ala—Alabama Power Co v Key, 140 So 233, 224 Ala 286, followed in 140 So 322, 224 Ala 702—Hill v Decatur Ice & Coal Co, 122 So 338, 219 Ala 380

Ariz—Lee Moor Contracting Co v Blanton, 65 P 2d 35, 49 Ariz 130

Cal—Brooks v Johnson, 72 P 2d 194, 22 Cal App 2d 618—Pilger v City of Paris Dry Goods Co, 261 P 328, 86 Cal App 277

Idaho—Whalen v Zinn, 96 P 2d 434, 60 Idaho 722—Corpus Juris cited in Joslin v Idaho Times Pub Co, 53 P 2d 323, 324, 56 Idaho 243

Ill—Darnier v Colby, 31 NE 2d 950, 375 Ill 558, mandate conformed to 35 NE 2d 952, 311 Ill App 352—Dean v Ketter, 65 NE 2d 572, 328 Ill App 206—Cohen v Fayette, 233 Ill App 458

Iowa—Grimmore v Consolidated Products Co, 5 NW 2d 646, 232 Iowa 328—Reynolds v. Skelly Oil Co, 287 NW 823, 227 Iowa 168—Compas v Wm H. Metz Co, 271 NW 847, 222 Iowa 1328

Ky—Bickel Coal Co v Louisville Tire Co., 14 SW 2d 775, 228 Ky 239—Saunders' Ex'rs v Armour & Co, 295 SW 1014, 220 Ky 719.

La—Mack v Magnolia Petroleum Co, App, 160 So 158

Mass—Crocker v MacLean, 15 NE 2d 237, 300 Mass 255

Mo—Burgess v Garvin, 272 SW 108, 219 Mo App 162

NY—Young v Grant Lunch Corpo-

ration, 4 NYS 2d 366, 254 App Div 174

NC—Mason v Texas Co, 175 SE 291, 208 NC 805—Martin v Greensboro-Fayetteville Bus Line, 150 SE 501, 197 NC 720

Ohio—Halkias v Wilkoff Co, 47 N. E 2d 199, 141 Ohio St 139

Okla—Spartan Aircraft Co v Jamison, 75 P 2d 1096, 181 Okl 645—Crews v Garber, 73 P 2d 855, 181 Okl 373

Pa—Schroeder v Gulf Refining Co of Port Arthur, Tex, 150 A 663, 300 Pa 397—Rucinski v Cohn, 146 A 445, 297 Pa 105—Painter v. Roth, 180 A 49, 118 Pa Super 474

Va—Master Auto Service Corporation v Bowden, 18 SE 2d 679, 179 Va 507

Wash—Miles v Pound Motor Co, 117 P 2d 179, 10 Wash 2d 492—Walter v Everett School Dist No 24, 79 P 2d 689, 195 Wash 45

39 C.J. p 1355 note 82

Burden of proof as to employment generally see supra § 12

Control over filling station attendant

In action for injuries suffered as the result of igniting of gasoline negligently sold by filling station attendant, burden was on plaintiff to establish that defendant exercised some control over attendant who sold the gasoline—Greiving v. La Plante, 181 P 2d 898, 156 Kan 198.

66. Cal—King v Emerson, 288 P 1099, 110 Cal App 414, adopted 294 P. 768, 110 Cal App 414

Ill—Darnier v Colby, 31 NE 2d 950, 375 Ill 558, mandate conformed to 35 NE 2d 952, 311 Ill App 352—Dean v Ketter, 65 NE 2d 572, 328 Ill App 206—Haynes v Holman, 49 NE 2d 324, 319 Ill App 396—Flood v Bitzer, 40 NE 2d 557, 313 Ill App 359

Okla—Grais v Smith, 125 P 2d 763, 190 Okl 517

Or—Hantke v Harris Ice Mach Works, 54 P 2d 293, 152 Or 564

39 C.J. p 1355 note 83.

67. Ill—Darnier v Colby, 31 NE 2d 950, 375 Ill 558, mandate conformed to 35 NE 2d 952, 311 Ill App 352—Dean v Ketter, 65 NE 2d 572, 328 Ill App 206—Haynes

the scope or course of his employment.⁶⁸ The burden is also on plaintiff to show negligence on the part of defendant's servants,⁶⁹ and that it was the cause of plaintiff's injury.⁷⁰

If the action is based on the employment of an incompetent servant, the burden is on plaintiff to show that the servant was in fact incompetent⁷¹ and that defendant knew or could have known of such incompetency by the exercise of reasonable diligence.⁷² Where plaintiff seeks to fasten liability on defendant under the emergency servant doctrine, it

is part of plaintiff's case to establish the emergency which necessitated the calling of an assistant.⁷³ A plaintiff claiming that the wrongful acts of an employee were ratified by the employer has the burden of so proving.⁷⁴ In an action against a servant for wrongful conversion the burden has been held to be on plaintiff to show that, although acting under the direction of the master, the servant knew that his act was in effect a conversion.⁷⁵

The burden rests on defendant to rebut a prima facie case or showing made by plaintiff.⁷⁶ De-

v. Holman, 49 NE 2d 324, 319 Ill App 396—Flood v Bitzer, 40 NE 2d 557, 313 Ill App 359
39 C.J. p 1355 note 84

68. US—National Battery Co v Levy, CCA Minn, 126 F 2d 33, certiorari denied Levy v National Battery Co, 62 S Ct 1294, 316 U S 697, 86 L Ed. 1787—P F Collier & Son Distributing Corporation v Drinkwater, CCAN C, 81 F 2d 200—Edwards v Gisi, DC Neb, 45 F Supp 17—Dismang v Western Union Tel Co, DC Okl, 24 F Supp 782

Ala—Hill v Decatur Ice & Coal Co, 122 So 338, 219 Ala 380—Augusta Friedman's Shop v Yeates, 113 So 299, 316 Ala 434.

Ill—Cohen v Fayette, 233 Ill App 458

Iowa—Grismore v Consolidated Products Co, 5 NW 2d 646, 233 Iowa 328

La—May v Yellow Cab Co, 6 La App 614

Me—Neallus v Hutchinson Amusement Co, 139 A 671, 136 Me 469, 55 A L R 1191

Md—Carroll v Hillendale Golf Club, 144 A 693, 156 Md 542—Philadelphia, B & W. R Co v Stumpo, 77 A 266, 112 Md 571

Mass—Henriques v Franklin Motor Car Co, 157 NE 580, 260 Mass 518

Mo—Oganaso v Mellow, 201 SW 2d 365—Green v Western Union Tel Co, App, 58 SW 2d 772

NY—Taub v. New York Board of Fire Underwriters, 265 NYS 644, 238 App Div 587, motion granted 189 NE 699, 363 NY 565—Bernstein v East 187th Street Corporation, 393 NYS 109, 161 Misc 836

NC—Martin v Greensboro-Fayetteville Bus Line, 150 SE 501, 197 NC 730

ND—Parker Motor Co v Northern Packing Co, 227 NW 226, 58 ND 685—Kohlman v Hyland, 210 NW 643, 54 ND. 710, 50 A L R 1437

Ohio—Halkias v Wilkoff Co, 47 N E 2d 199, 141 Ohio St 139

Okl—Spartan Aircraft Co v Jamison, 75 P 2d 1096, 181 Okl 645—Crews v. Garber, 73 P 2d 955, 181

Okl 373—Wilson & Co v. Shaw, 10 P 2d 448, 157 Okl 34

Or—Hantke v Harris Ice Mach Works, 54 P 2d 293, 152 Or 554

Pa—Sebastianelli v Cleland Simpson Co, 31 A 2d 570, 152 Pa Super 303—Painter v Roth, 180 A 49, 118 Pa Super 474—Seman v Schwartz, Com Pl, 4 Sch Reg 394, 51 York Leg Rec 143

Tex—Missouri-Kansas-Texas R Co of Texas v Salsman, Civ App, 58 SW 2d 1036, error dismissed—Guitar v Wheeler, Civ App, 36 SW 2d 325, error dismissed—McCoy v Beach-Wittman Co, Civ App, 22 SW 2d 714, error dismissed—Mayes v American Nat Ins Co, Civ App, 16 SW 2d 333—Rosenthal Dry Goods Co v Hillebrandt, Civ App, 299 SW 655, reversed on other grounds, Com App, 7 SW 2d 521, rehearing denied 9 SW 2d xxxii

Va—Master Auto Service Corporation v Bowden, 19 SE 2d 679, 179 Va 507

39 C.J. p 1355 note 85

Reentry on employer's business

In action to hold employer liable for negligence of employee, on proof of deviation by employee from employer's business, the burden shifts to plaintiff to establish a reentry on such business—Caldwell v Unity Industrial Life Ins Co, La App, 17 So 2d 757—Williamson v De Soto Wholesale Grocery Company, Inc, La App, 16 So 2d 739

Employment of peace officer by private person

A plaintiff seeking to hold a private employer liable for the wrongful acts of a constable or peace officer has the burden of proving that the acts were performed in the course of his duties to his private employer, rather than in his official or public capacity—Erie R Co v Johnson, CCA Ohio, 106 F 2d 550—Red River Lumber Co v Cardenas, CCA Cal, 95 F 2d 157

69. US—P F Collier & Son Distributing Corporation v Drinkwater, CCAN C, 81 F 2d 200.

NJ—Barbero v Pellegrino, 156 A 765, 108 N J Law 158

NC—Martin v Greensboro-Fayetteville Bus Line, 150 SE 501, 197 NC 720.

39 C.J. p 1355 note 80.

Last clear chance

In order to establish liability under "humanitarian doctrine," or "last clear chance," plaintiff must prove that servant saw person in place of danger, but failed thereafter to use ordinary care to avert injury—Oklahoma Ry Co v Overton, 12 P 2d 537, 158 Okl 96—Gypsy Oil Co v Ginn, 3 P 2d 714, 152 Okl 30

70. Okl—Spartan Aircraft Co v Jamison, 75 P 2d 1096, 181 Okl. 645

39 C.J. p 1355 note 81

71. US—Texas Breeders & Racing Ass'n v Blanchard, CCA Tex, 81 F 2d 382, motion dismissed 85 F. 2d 1019.

72. US—Texas Breeders & Racing Ass'n v Blanchard, CCA Tex, 81 F 2d 382, motion dismissed 85 F. 2d 1019

Mo—Porter v Thompson, 206 SW. 2d 509

39 C.J. p 1355 note 76

73. Pa—Saldukas v McKerns, 16 A 2d 30, 340 Pa 113—Saldukas v. McKerns, Com Pl, 7 Sch Reg 97.

74. US—Erie R Co v Johnson, CCA Ohio, 106 F 2d 550

Okl—Mason v Nibel, 263 P. 121, 139 Okl 7

75. Colo—Ashcraft v Tucker, 315 P 877, 73 Colo 363, 28 A L R 693.

76. US—Strawser v Norfolk & W. Ry Co, CCA Ohio, 24 F 2d 411.

DC—Western Union Telegraph Co. v Scrivener, 18 F 2d 162, 57 App. DC 120

Ga—Haygood v Bell, 157 SE 239, 42 Ga App 602

Md—Jones v Sherwood Distilling Co, 132 A 278, 150 Md 24

Mo—Glossip v Kelly, 67 SW 2d 518, 228 Mo App 392

Tenn—The Vogue, Inc, v Cox, 190 SW 2d 307, 28 Tenn App 344.

39 C.J. p 1355 note 89

Status of messenger boy

Where evidence established that, at time bicycle struck pedestrian, bicyclist who was a telegraph mes-

defendant ordinarily has the burden of establishing an affirmative defense asserted by him.⁷⁷ Where it is claimed that under the facts of the case a judgment in favor of the servant is a bar to recovery against the master, the burden of proof is on the one asserting the claim.⁷⁸ A master claiming that he is not liable because he was merely acting as agent for others has the burden of so proving.⁷⁹ A general master, who seeks to avoid liability for the negligence of his servants on the ground that they were pro hac vice servants of another, has the burden of establishing the new relation;⁸⁰ and in this connection the burden has been held to be on him to show not only that he loaned the servant,⁸¹ but also that he surrendered control and direction over the servant to the borrower.⁸²

Liability for acts of independent contractor or his servants If it is sought to charge the employer with liability for injuries sustained during performance

of work by an alleged employee, and defendant claims that he is not liable because the work was being done by an independent contractor, the burden is on him to prove such relationship,⁸³ especially where a prima facie case to show the relation of master and servant is made out,⁸⁴ or where the facts recited are as consistent with the theory of the relationship of master and servant as with that of independent contractor.⁸⁵ If the facts are such as to exempt the owner of the property improved, or the person for whom the work is being performed, from liability for the acts of those performing such work, it devolves on the person claiming such exemption to make proof of the terms of the contract, showing that the relation of master and servant did not exist.⁸⁶ On the other hand, if it appears that the work was in fact done by an independent contractor, the burden is on plaintiff to show facts bringing the case within an exception to the general rule exempting the employer for liability resulting from work so

senger boy had left his work for the day and was engaged in personal affairs, presumption that bicyclist was acting in course and scope of his employment, arising from fact that he was dressed in the telegraph company's uniform, was rebutted—*Futtermann v. Western Union Tel. Co.*, D.C. La., 43 F. Supp. 729.

77. N.J.—*Garton v. Public Service Electric & Gas Co.*, 189 A. 403, 117 N.J. Law 520.

Special defense peculiarly within defendant's knowledge

Defendant has been held bound to establish a special defense peculiarly within its knowledge and not easily contradicted by plaintiff—*Harris v. George E. Eldridge, Inc.*, La. App., 164 So. 494.

78. Minn.—*Berry v. Daniels*, 263 N.W. 115, 195 Minn. 366.

79. Cal.—*Campbell, State Compensation Ins. Fund, Intervener v. Fong Wan*, 141 P.2d 43, 60 Cal. App. 2d 553.

80. U.S.—*Central R. Co. of New Jersey v. DeBusley*, C.C.A. Pa., 261 F. 561.

Wash.—*Clarke v. Bohemian Breweries*, 110 P.2d 197, 7 Wash. 2d 487.

81. Iowa.—*Anderson v. Abramson*, 13 N.W.2d 315, 234 Iowa 793.

Wash.—*Clarke v. Bohemian Breweries*, 110 P.2d 197, 7 Wash. 2d 487.

82. Iowa.—*Anderson v. Abramson*, 13 N.W.2d 315, 234 Iowa 793.

83. Ark.—*Warren v. Hale*, 153 S.W.2d 51, 203 Ark. 608—*Mississippi River Fuel Corporation v. Young*, 67 S.W.2d 581, 188 Ark. 575.

Ga.—*Corpus Juris* cited in *Mitchem v. Shearman Concrete Pipe Co.*, 165 S.E. 889, 45 Ga. App. 809.

La.—*Corpus Juris* quoted in *Taylor v. Victoria Nav. Co.*, App., 176 So. 519, 523—*Crysel v. Gifford-Hill & Co.*, App., 158 So. 264—*Goetschel v. Glassell-Wilson Co.*, 127 So. 81, 13 La. App. 434.

Minn.—*Gilbert v. Megears*, 257 N.W. 73, 192 Minn. 495.

N.Y.—*Corpus Juris* quoted in *Adams v. F. W. Woolworth Co.*, 257 N.Y. S. 776, 780, 144 Misc. 27.

Okla.—*Ellis & Lewis v. Trimble*, 78 P.2d 312, 183 Okl. 414.

Pa.—*Corpus Juris* cited in *Bross v. Varner*, 48 A.2d 880, 882, 159 Pa. Super. 495.

Tenn.—*National Life & Accident Ins. Co. v. Morrison*, 183 S.W.2d 501, 179 Tenn. 28—*Knight v. Hawkins*, 173 S.W.2d 168, 26 Tenn. App. 448—*Ely v. Rice Bros.*, 167 S.W.2d 355, 26 Tenn. App. 19.

Tex.—*Glasier v. Roberts*, Civ. App., 108 S.W.2d 829—*Dr. Pepper Bottling Co. v. Rainboldt*, Civ. App., 68 S.W.2d 496, reversed on other grounds—*Schroeder v. Rainboldt*, 97 S.W.2d 679, 128 Tex. 269—*Commercial Credit Co. v. Groseclose*, Civ. App., 86 S.W.2d 709, error dismissed—*Moreman v. Armour & Co.*, Civ. App., 65 S.W.2d 334, error refused.

39 C.J. p. 1356 note 95.

Operation of amusement devices

One who holds himself out to the public as operating all of the amusement devices in a group carries the burden of proving that a particular device was operated by an independent contractor and not by himself—*Shankland v. Morris & Castle Shows*, 4 La. App. 326.

84. La.—*Corpus Juris* quoted in *Taylor v. Victoria Nav. Co.*, App., 176 So. 519, 523.

N.Y.—*Corpus Juris* quoted in *Adams v. F. W. Woolworth Co.*, 257 N.Y. S. 776, 780, 144 Misc. 27.

39 C.J. p. 1357 note 96.

85. La.—*Corpus Juris* quoted in *Taylor v. Victoria Nav. Co.*, App., 176 So. 519, 523.

N.Y.—*Corpus Juris* quoted in *Adams v. F. W. Woolworth Co.*, 257 N.Y. S. 776, 780, 144 Misc. 27.

Tenn.—*Ely v. Rice Bros.*, 167 S.W.2d 355, 26 Tenn. App. 19—*Tennessee Valley Appliances v. Rowden*, 146 S.W.2d 845, 24 Tenn. App. 437.

Wash.—*Dishman v. Whitney*, 209 P. 12, 121 Wash. 157, 29 A.L.R. 460.

86. Tex.—*Ochoa v. Winerich Motor Sales Co.*, 94 S.W.2d 416, 137 Tex. 542, on remand *Winerich Motor Sales Co. v. Ochoa*, Civ. App., 98 S.W.2d 285—*Taylor, B. & H. R. Co. v. Warner*, 32 S.W. 868, 88 Tex. 642—*Texas Co. v. Freer*, Civ. App., 151 S.W.2d 907, error dismissed, judgment correct—*Gibson v. Gillette Motor Transport*, Civ. App., 138 S.W.2d 293, error refused—*Broadus v. Long*, Civ. App., 125 S.W.2d 340, affirmed 138 S.W.2d 1057, 135 Tex. 353—*Buckley v. Gulf Refining Co.*, Civ. App., 123 S.W.2d 970, error dismissed, judgment correct.

Engagement of independent contractor by vendor of house

Where vendor sold house under contract requiring him to install a sewer line and fixtures, in action for personal injuries sustained by child who fell into sewer ditch, existence of a contract whereby vendor engaged an independent contractor to install the sewer line was a matter to be proved by the vendor—*Evans v. Elliott*, 17 S.E.2d 125, 220 N.C. 253.

performed.⁸⁷ Thus, a plaintiff seeking to impose liability on defendant on the ground that defendant did not exercise due care to secure a competent contractor must so prove.⁸⁸

c. Admissibility

- (1) In general
- (2) Existence of relation of master and servant
- (3) Scope of employment
- (4) Negligence of servant

(1) In General

The admissibility of evidence in actions by a third person against an employer for injuries caused by a servant or independent contractor is governed by the general rules as to the admissibility of evidence in civil actions.

General rules apply in respect of the admissibility of evidence in actions against a master to recover for injuries inflicted by the acts or omissions of his servants,⁸⁹ or of a contractor engaged to do work for him.⁹⁰ Where the liability of the master is based on his alleged negligence in selecting an incompetent servant, evidence of the habits of the servant is admissible to show that he was not a suitable person to be employed, and that the master, by reasonable diligence, might have discovered what

his habits were,⁹¹ and a like rule applies where the relation is that of contractor and contractee, instead of master and servant.⁹² So, evidence of the servant's habit of doing the act resulting in the injury is admissible to show that the master knew of and permitted the act, or in the use of ordinary care should have known of it.⁹³

Ratification as basis for punitive damages Circumstantial evidence tending to prove ratification of an employee's wrongful act, so as to charge defendant with liability for punitive damages, is admissible.⁹⁴ Thus, ratification of agent's wrongful and oppressive conduct by the principal may be shown by the fact that the servant is continued in the employment of the principal after notice of the commission of the willful wrong, on the question of allowing punitive damages.⁹⁵

(2) Existence of Relation of Master and Servant

Competent evidence is admissible in an action against the master on the issue whether the person committing the tortious act was or was not a servant or an independent contractor.

Any competent evidence tending to prove the relation of master and servant is admissible.⁹⁶ Testimony of an employee that he was employed by the

87. Tex.—L E Whitham Const Co v Wilkins, Civ App., 90 SW 2d 916

39 C J p 1356 note 94.

88. Pa.—Fuller v Palozzolo, 197 A 225, 329 Pa 93

89. Iowa.—Everingham v Chicago, B & Q R Co, 127 NW 1009, 148 Iowa 663, Ann Cas 1912C 848

39 C J p 1357 note 99

Evidence held admissible

(1) Generally

Ala.—Alabama Fuel & Iron Co v Powaski, 166 So 782, 232 Ala 66

Ky.—Courier-Journal & Louisville Times Co v Crossland, 188 SW 2d 428, 300 Ky 361

Mo.—Hinson v Morris, App., 298 SW 354

NY.—Young v Grant Lunch Corporation, 4 NYS 2d 366, 254 App Div 174

Tex.—Lloyd v Herrington, Civ App., 178 SW 2d 694, reversed on other grounds 182 SW 2d 1003, 143 Tex 135

(2) On issues of notice and due care—Hoxian v Crucible Steel Casting Co, 9 NE 2d 143, 132 Ohio St 453, 112 ALR 333

(3) On question of malice or ill will—Kornec v Mike Horse Mining & Milling Co, Mont., 180 P 2d 252

(4) On question whether defendant was operating mine—Deep Vein

Coal Co v Dowdle, Ind., 66 NE 2d 598

Evidence held inadmissible

(1) Generally

Ala.—Western Union Tel Co v Gorman, 199 So 702, 240 Ala 482

La.—Harris v George E Eldridge, Inc., App., 164 So 494

Or.—Tauscher v Doernbecher Mfg Co, 56 P 2d 318, 153 Or 153

(3) Certified copy of police court record showing that plaintiff was arrested, charged with breach of peace and loitering, pleaded nolo contendere, and was convicted on former charge—Krowka v Colt Patent Fire Arm Mfg Co, 8 A 2d 5, 125 Conn 705

(3) Order of industrial accident commission prohibiting employers from requiring employees to perform any function in proximity to high-voltage line—Hayden v Paramount Productions, 91 P 2d 231, 33 Cal App 2d 287

90. Evidence held admissible

(1) Where a contractor is sought to be made liable for an injury to an employee of a subcontractor by the fall of a building, evidence is admissible, on the issue of notice to defendant, that some time before the accident the superintendent of the building notified defendant that the building was unsafe—Nelson v.

Young, 87 NYS 69, 91 App Div 457, affirmed 72 NE 1146, 180 NY 528

(2) Where an employee of a subcontractor was injured on a train of the construction company, evidence is admissible to show that the employee frequently rode on the train, and that the construction company made no objection—Mathews v Great Northern R Co, 84 NW 101, 81 Minn 363, 83 Am SR 338

91. Tenn.—Southern Ry Co v Hooper, 65 SW 2d 847, 16 Tenn App 112

39 C J p 1357 note 14

Negligence of servant see *infra* subdivision c (4) of this section

92. NY.—Berg v Parsons, 35 N.Y. S 780, 90 Hun 267, reversed on other grounds 50 N.E 957, 156 NY 109, 66 Am SR 542, 41 L. RA 391

93. Ill.—Sammis v Chicago, B & Q R Co, 97 Ill App 28

Mich.—Schulte v Holliday, 19 N.W. 752, 54 Mich 73

94. NY.—Rainess v American League Baseball Club, 185 NYS 582

95. Miss.—Pullman Co v Alexander, 78 So 293, 117 Miss 348

96. Ky.—Greene v Pennington, 108 SW 2d 1013, 270 Ky 28

Admissibility of evidence on issue of

party sought to be charged is competent to establish the fact of employment.⁹⁷ On the other hand, extrajudicial declarations or statements of an employee, standing alone, ordinarily are not admissible to establish the status of such person as an employee,⁹⁸ although, where there is other evidence sufficient to show such employment *prima facie*, such declarations or statements are admissible in corroboration,⁹⁹ especially when they constitute a part of the *res gestæ* and were made at the time of, and in connection with, the transaction in question.¹

In order to show the relationship of master and servant, evidence of the giving of orders by the former to the latter,² or evidence that the master's name was on the wagon which the servant was driving,³ that the uniform and tools of the alleged servant were visibly marked with defendant's name,⁴ or that business cards of defendant were found in the vehicle⁵ has been held admissible. Where the servant of one master is loaned to another master, evidence is admissible to show which one was his employer;⁶ and in this connection the fact that the

general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an intent to retain control over the instrumentality.⁷ Immaterial evidence on the question whether the person committing the tortious act was the employee of the person sought to be charged is properly excluded.⁸

Independent contractor or servant. Any legal evidence is admissible to show that the alleged servant was or was not an independent contractor, or the servant of an independent contractor.⁹ In this connection, the contract between the parties is not conclusive on a third person suing for injuries.¹⁰ Thus, notwithstanding the existence of a written contract between the employer and the party engaged to do the work, evidence may be admitted to show the dealings and course of business of the parties,¹¹ and the authority or control exercised by the party sought to be charged.¹² It has been held proper to introduce in evidence a liability insurance policy, in determining the status of the offending person as an employee or an independent contractor.¹³

employment generally see *supra* § 12.

Evidence held admissible

(1) Generally

Ind.—Deep Vein Coal Co. v Dowdle, 66 NE 2d 598

Ky.—Greene v. Pennington, 108 SW 2d 1013, 270 Ky 28

Pa.—Witherow v A. F. Rees, Inc., Com Pl, 52 Dauph Co 489

(2) Written agreements

US.—Southern S S Co v Meyners, CCA Tex, 110 F2d 376, certiorari denied 61 S Ct 40, 311 US 674, 85 L Ed 433

Tenn.—Texas Co v Ingram, 64 S W 2d 208, 16 Tenn App 267

(3) Defendant's daily report sheets and pay rolls.—Terry Dairy Co v. Parker, 228 SW 6, 144 Ark. 401

97. Pa.—Sebastianelli v Cleland Simpson Co, 31 A 2d 570, 152 Pa. Super 203.

98. La.—Mancuso v Hurwitz-Mintz Furniture Co, App, 183 So 481

Miss.—Byrd v. Anderson-Tully Co, 6 So 2d 319

Tex.—McAfee v Travis Gas Corporation, 153 SW 2d 442, 137 Tex 314—Western Union Tel Co v Brown, Civ App, 297 SW. 267

99. Tex.—McAfee v Travis Gas Corporation, 153 SW 2d 442, 137 Tex 314—Western Union Telegraph Co v. Brown, Civ App, 297 SW. 267.

L. Pa.—Sebastianelli v Cleland Simpson Co, 31 A 2d 570, 152 Pa. Super 203

Tex.—McAfee v. Travis Gas Corpo-

ration, 153 SW 2d 442, 137 Tex 314—Western Union Tel Co v Brown, Civ App, 297 SW 267

2. Mo.—Steinhauser v Spraul, 31 S W 515, 114 Mo 551, reheard 21 SW 559, 114 Mo 551

3. Mich.—Schulte v Holliday, 19 N W 752, 54 Mich. 73

Mo.—Fleishman v Polar Wave Ice & Fuel Co, 127 SW. 660, 148 Mo App 117

4. Pa.—Roskins v. Peoples, 43 Pa. Super 611

5. Minn.—Langworthy v Owens, 133 NW 865, 116 Minn 342

6. US.—Bertino v Marion Steam Shovel Co, CCA Mo, 64 F2d 409

7. Cal.—Lowell v Harris, 74 P 2d 551, 24 Cal App 2d 70

8. Colo.—Thayer v Kirchhof, 266 P 225, 83 Colo 480

Routes of defendant's drivers

In an action for injuries sustained by reason of the negligence of the driver of a wagon said to belong to defendant, testimony as to the routes of defendant's drivers on the morning of the accident, for the purpose of showing that the wagon referred to was not one of defendant's, was properly excluded.—Perlstien v. American Express Co, 59 NE 194, 177 Mass 580, 52 L.R.A. 959.

9. Mo.—Andres v Cox, 23 SW 2d 1068, 223 Mo App 1139

39 C.J. p 1357 notes 8, 9

Evidence as conflicting or conclusive

Where evidence is conflicting as to contract, proof that inspector on job exercised control over details is admissible to show nature of con-

tract, but, where relation of independent contractor is conclusively established, fact that inspector on job may have exceeded his duties and exercised control over details is immaterial.—Lone Star Gas Co v. Kelly, Tex Com App, 46 SW 2d 656 —Clark v Lynch, Tex Civ App, 139 SW 2d 294

Written estimate

In tenant's action against landlord for injuries resulting from negligence of paper hanger in operation of machine used in removing wallpaper, the admission of paper hanger's written estimate for doing the work was not error, since it had bearing on question whether he was a servant of landlord or an independent contractor.—Berman v. Greenburg, 50 NE 2d 773, 314 Mass. 556

10. US.—Marion Steam Shovel Co. v Bertino, CCA Mo, 82 F 2d 541, rehearing denied 82 F 2d 945, certiorari denied 67 S Ct 17, 299 U. S 556, 81 L Ed 409

Mo.—Andres v Cox, 23 SW 2d 1066, 223 Mo App 1139

Okl.—World Pub Co v Smith, 161 P 2d 861, 195 Okl 691

11. Tenn.—Gulf Refining Co of Louisiana v Huffman & Weakley, 297 SW 199, 155 Tenn 580

12. Okl.—World Pub. Co v Smith, 161 P 2d 861, 195 Okl 691

Tenn.—Gulf Refining Co of Louisiana v Huffman & Weakley, 297 S. W. 199, 155 Tenn 580

13. Ala.—Moore-Handley Hardware

Where the servant is also a police officer, evidence of such fact is admissible, it being material to show in what capacity he was acting at the time of the injury,¹⁴ and, on an issue whether a person committing an assault on plaintiff was acting as a police officer or as a servant of defendant, evidence tending to show the extent of authority exercised by defendant, in and about the village in which its plant was located, is admissible.¹⁵

(3) Scope of Employment

Competent evidence is admissible to prove or disprove the fact that the servant committing the tortious act was acting within the scope of his employment at the time.

Any evidence having a legitimate tendency to prove or disprove the fact that the servant was acting within the scope of his employment at the time of the injury complained of is admissible.¹⁶ It is competent to show what acts were customarily performed by defendant's servant.¹⁷ Evidence of previous acts of the servant reasonably related in point of time to the act complained of is admissible.¹⁸ The fact that a servant has returned to his line of travel, after having deviated therefrom, is a cir-

cumstance which may be considered with other facts involved, in ascertaining whether the servant is acting in his employer's business.¹⁹ Evidence of orders given by the master may be admitted,²⁰ and also evidence of a custom to disregard them for the purpose of showing that the orders had been waived by the master.²¹ Evidence of instructions or directions given by defendant's employee is inadmissible to charge defendant with liability where it does not appear that the employee had authority to give such instructions or directions,²² or that defendant authorized or ratified them.²³

(4) Negligence of Servant

General rules of evidence have been applied in determining the admissibility of evidence, in an action by a third person against the master, to show negligence of the servant.

In an action by a third person against an employer based on the negligence of his servant, general rules prevail in determining the admissibility of evidence as to the negligence of the servant.²⁴ Evidence is inadmissible on behalf of the master to show that he properly instructed the servant as to the use of the property,²⁵ or that instructions were

Co v Williams, 189 So 757, 238 Ala 189

39 C J p 1357 note 8 [b]

14. Md.—Deck v Baltimore & O R Co, 59 A 650, 100 Md 168, 108 Am SR 399

15. Miss.—Walters v. Stonewall Cotton Mills, 101 So 495, 136 Miss 361

16. Mo.—Fishang v. Eyermann Contracting Co, 63 SW 2d 30, 338 Mo 874

39 C J p 1358 note 30

Evidence held admissible

(1) Generally—Guinan v Famous Players-Lasky Corporation, 167 N E 235, 287 Mass 501.

(2) It may be shown that defendant's name was on the vehicle driven by the servant at the time of the injury—Fleishman v Polar Wave Ice & Fuel Co, 127 S.W 660, 148 Mo App 117.

Evidence held inadmissible

(1) Generally—McDonald v Cooperative restaurant, 64 F2d 883, 62 App DC 48

(2) The conduct of a servant is not evidence of his authority to commit a tort, although he had been employed a long time and was not called as a witness to deny his authority.—Fletcher v Willis, 62 N E 2, 180 Mass 243.

(3) Where a servant testifies that no authority had been given him to invite anyone to come on the premises, evidence that instructions had been given him not to permit per-

sons to visit such premises is immaterial—Houston & T C R Co v Bulger, 80 SW 577, 35 Tex Civ App 478

(4) In action against telegraph company for injuries sustained when bicyclist alleged to be company's agent or servant ran against plaintiff, evidence that other messenger boys on sporadic occasions went on missions of their own in no way connected with their employment while in uniform was without probative force as showing that bicyclist on occasion of accident was on such a mission—Western Union Tel. Co v Gorman, 199 So 702, 240 Ala 482

(5) Where a case is tried on the theory that the act of defendant's driver in whipping up his horses was an act performed in furtherance of his duty as an employee, evidence that defendant did not allow him to use a whip was immaterial—Tier v Miller, 79 A 417, 80 N J Law 691.

17. Ark.—St Louis, I M & S R Co v Pell, 115 SW 957, 89 Ark 87

18. Ala.—Louisville & N R Co v. Chamblee, 54 So 881, 171 Ala 188, Ann Cas 1918A 977

Interference with competitors' employees

Where it was part of employee's duties to obtain favorable display space on racks in stores of customers, evidence of such employee's interference and trouble with competitors' employees concerning such dis-

play space, known to his employer, was admissible as showing scope of employment—Porter v Grennan Bakeries, 16 NW 2d 906, 219 Minn 14

19. NY—Riley v Standard Oil Co, 132 NE 97, 231 NY. 301, 23 ALR 1382

20. ND—Moe v. Job, 45 NW 700, 1 ND 140

39 C J p 1358 note 33

21. NC—Fry v Southern Public Utilities Co, 111 SE 864, 183 N C 281

22. NH—Morin v People's Wet Wash Laundry Co, 156 A 499, 85 NH 233

Utah—Looney v Bingham Dairy, 283 P. 1080, 75 Utah 53, 73 ALR 427

23. NH—Morin v. People's Wet Wash Laundry Co, 156 A 499, 85 NH 233

24. Evidence held inadmissible

Evidence that defendant ordered an animal, injured through the negligence of his servant, to be shot, and that he expected to pay plaintiff its value, is not admissible where liability is not predicated on the fact that defendant ordered the animal shot, but rather on the prior negligence of the servant causing the injury to the animal—Nulsen v Priemeyer, 30 Mo App 128

25. NJ—Read v. Pennsylvania R. Co, 44 N J Law 280.

given the servant to be cautious.³⁶ Where liability is predicated on negligence of the servant, evidence is not admissible to establish that the servant was ordinarily a sober, careful, or skillful man,³⁷ since no amount of skill could exonerate him from the charge of negligence,³⁸ or prove that he was not negligent on the occasion when the injury complained of occurred,³⁹ and, conversely, in order to show negligence on the part of the servant, evidence of his general incompetency is inadmissible,³⁰ but evidence that the servant was intoxicated at the time of the accident is admissible.³¹

It has been held that evidence of the discharge of the servant after the act complained of is not admissible as being an implied admission by the employer of the servant's negligence or incompetence,³² but there is authority to the contrary.³³ It has been held that, where the negligence charged is a violation of the rules of the master, a book containing such rules is admissible,³⁴ but as to this there is also authority to the contrary.³⁵ Where punitive damages are not recoverable, and defendant admits the negligence, evidence of the circumstances of the injury and of gross negligence is inadmissible.³⁶

An ordinance limiting the rate of speed of a vehicle has been held admissible in an action against owners for a tort of their driver;³⁷ but an ordinance requiring the maintenance of prescribed bar-

riers is inadmissible where the absence of barriers was not a proximate cause of the injury.³⁸

d. Weight and Sufficiency

- (1) In general
- (2) Particular applications

(1) In General

The general rules governing the weight and sufficiency of evidence in civil actions have been applied in actions by a third person against an employer for injuries caused by a servant or independent contractor.

General rules in respect of the weight and sufficiency of evidence apply in actions to recover from a master for injuries inflicted by his servant, or against an employer for the acts of independent contractors or their servants causing injury.³⁹ A preponderance of the evidence is necessary⁴⁰ and sufficient,⁴¹ and, even in an action against a master for damages for a willful homicide committed by his servant, no element of the case need be established with such certainty as to leave no reasonable doubt in the minds of the jury.⁴²

Prima facie showing. The evidence may be sufficient to make a prima facie showing of the existence or nonexistence of a material fact.⁴³ The relation of master and servant is prima facie established where it is shown that the alleged servant was performing labor for defendant at the time of the injury,⁴⁴ or that he was in possession of property

26. Ind.—Hammond & E. C. Electric R. Co. v. Spychalski, 46 N E 47, 17 Ind App 7.

27. US—Harriman v. Pullman Palace-Car Co., Mo., 85 F 352, 29 C C A 194.

29 C J p 1358 note 22.

Evidence as to negligence of master in selecting incompetent servant see supra subdivision c (1) of this section.

28. Tex.—Adams v. International & G. N. R. Co., Civ App, 122 S W. 895.

29. Conn.—Young v. Crystal Ice Co., 76 A 514.

30. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Hudson, Com App, 17 S W.2d 793.

39 C J p 1358 note 17.

31. US—Northern Pac. R. Co. v. Craft, Or., 69 F 124, 16 C C A 175.

NY—Connor v. Koch, 71 N Y S 836, 63 App Div 267.

32. Mass.—Gillet v. Shaw, 104 N. E 719, 217 Mass. 59—Hewitt v. Taunton St. R. Co., 46 N E 106, 187 Mass 483.

NY.—New York Polyclinic Medical School and Hospital v. Mason-Seaman Transp. Co., 155 N Y S 200.

33. NH—Martin v. Towle, 59 N H 31.

39 C J p 1358 note 19.

34. Me.—Hobbs v. Eastern R. Co., 66 Me 572.

35. Minn.—Fonda v. St. Paul City R. Co., 74 N W 166, 71 Minn 438, 70 Am S R 341.

36. Wis.—Rueping v. Chicago & N. W. R. Co., 93 N W 843, 116 Wis 625, 96 Am S R 1013.

37. Colo.—Denver Omnibus & Cab Co. v. Mills, 122 P 798, 21 Colo App 582.

38. Ohio—Guy v. Henry J. Spieker Co., 186 N E 335, 45 Ohio App 178.

39. Pa.—White v. Roydhouse, 60 A 316, 211 Pa 13.

39 C J p 1359 note 47.

40. Fla.—Thomas v. Western Union Telegraph Co., 176 So 122, 129 Fla 155.

III.—Cohen v. Fayette, 233 Ill App 453.

Iowa.—Comparet v. Wm. H. Metz Co., 271 N W. 847, 232 Iowa 1328.

N J.—Barbero v. Pellegrino, 156 A 765, 108 N J Law 158.

Ohio.—Ealkias v. Wilkoff Co., 47 N E 2d 199, 141 Ohio St 139.

41. Ga.—Rome R. Co. v. Barnett, 20 S.E. 355, 94 Ga. 446.

42. Ga.—Rome R. Co. v. Barnett, supra.

43. US—Jacob Doll & Sons, Inc. v. Ribetti, Pa., 203 F 593, 121 C C A 621.

39 C J p 1360 note 34.

Illegality of assault

Where plaintiff proves that servant committed assault on plaintiff in course of servant's employment, plaintiff makes prima facie case against master, under presumption that all assaults are unlawful—Alamo Downs, Inc. v. Briggs, Tex Civ App, 106 S W 2d 733, error dismissed.

Public officer

Special police officer for railway company, commissioned by governor under statutory authority, is prima facie public officer and not a private servant—Thompson v. Norfolk & W Ry Co., 182 S E 880, 116 W Va. 705.

44. Cal.—Robinson v. George, 106 P 2d 914, 16 Cal 2d 238.

Mo.—Corpus Juris quoted in Schide v. Gottschick, 43 S W 2d 777, 780, 239 Mo. 64—Corpus Juris cited in Margulis v. National Enameling & Stamping Co., 23 S W.2d 1049, 1051, 324 Mo 420.

Pa.—Corpus Juris cited in Bross v.

of the owner and using it in his service at the time of the injury,⁴⁵ or, as sometimes said, that he was performing services peculiar to defendant's business or affairs on or about the latter's property.⁴⁶ On the question whether the person causing the injury was a servant or an independent contractor, evidence that defendant controlled the manner and means by which the work was done for his benefit shows, prima facie, that the relationship was that of master and servant.⁴⁷ Where it appears that it was necessary to have a person on the spot to act in an emergency, and to determine whether certain things should or should not be done, the fact that there was a person on the spot who was acting as though he had express authority is prima facie evidence that he had authority.⁴⁸

There is authority holding that proof of ownership of an instrumentality is not alone sufficient to make out a prima facie case that a person operating it was in the owner's employ for that purpose and, as such, was at a specific time acting within the scope of his authority,⁴⁹ and in order to establish a prima facie case in this connection it must be shown, in addition to such ownership, not only that the operator was an employee of the owner but that he was employed generally in the business of his employer to operate such instrumentality.⁵⁰ How-

ever, it is very generally held that proof of ownership of a vehicle is prima facie evidence that the driver who caused the damage by its negligent operation was the servant of the owner and using the vehicle in the owner's business at the time the injury occurred,⁵¹ although other circumstances surrounding the injury may overcome this prima facie showing.⁵² If the same testimony which proves the relationship of master and servant also proves that, at the time of the act for which it is claimed the master was liable, the servant was not acting within the scope and in the course of his employment, the prima facie case made by plaintiff is rebutted, and it becomes unnecessary for defendant to negate his liability as master, inasmuch as plaintiff has done so himself.⁵³

(2) Particular Applications

In actions by a third person against a master to recover for injuries sustained through the tortious acts of a servant or independent contractor, the sufficiency of the evidence has been adjudicated with respect to a great many matters, such as the existence of the relationship of master and servant or of employer and independent contractor, and the scope of a servant's employment.

In the notes will be found cases in which it was held that the evidence was sufficient to sustain a verdict or judgment for plaintiff⁵⁴ or was sufficient

Varner, 48 A 2d 880, 882, 159 Pa Super. 495

Tex—Moreman v Armour & Co., Civ App, 65 S W 2d 334, error refused

39 C J p 1361 note 95

Work on telephone lines

Evidence that workmen were found working on telephone lines was prima facie proof that they were servants of company—Kilmer v New York Telephone Co., 238 N Y S 512, 228 App Div 63

45. Ill.—Kane v Wehner, 39 N E 2d 51, 312 Ill App 391

Mo—Corpus Juris quoted in Schide v Gottschick, 43 S W 2d 777, 780, 329 Mo 44

Ohio—Hoxian v Crucible Steel Casting Co., 9 N E 2d 143, 132 Ohio St 453, 112 A L R 333

SC—Polatty v. Charleston & W. C R Co., 45 S E 932, 67 S C 391, 100 Am S R 750

46. Ohio—Hoxian v Crucible Steel Casting Co., 9 N E 2d 143, 132 Ohio St 453—Manchester v. Youngstown Sheet & Tube Co., App., 46 N E 2d 780

Tex—McAfee v. Travis Gas Corporation, 153 S W 2d 442, 137 Tex 314

47. Mo—Gorman v. A R Jackson Kansas City Showcase Works Co., App., 19 S W 2d 559.

48. N Y—Osipoff v City of New York, 36 N E 2d 646, 286 N Y 422, 136 A L R 1351

49. Ohio—Halkias v Wilkoff Co., 47 N E 2d 199, 141 Ohio St 139

50. Ohio—Halkias v Wilkoff Co., supra

51. N Y—Flococo v Carver, 137 N E 309, 234 N Y 219

39 C J p 1361 note 98

52. Wash—Savage v Donovan, 204 P 805, 118 Wash 693

39 C J p 1361 note 99

53. Cal—Crouch v Gilmore Oil Co., 54 P 2d 709, 5 Cal 2d 330—Kish v California State Automobile Ass'n, 212 P 27, 190 Cal 246

54. Ala.—W E Belcher Lumber Co v Woodstock Land & Mineral Co., 16 So 2d 625, 245 Ala 5—Hanson v Foremost Dairy Products, 155 So 627, 229 Ala 200

Ark—Stout Lumber Co v Reynolds, 1 S W 2d 77, 175 Ark 988

Cal—Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P.2d 546, 121 Cal App 719

Conn—Mann v Leake & Nelson Co., 43 A 2d 461, 132 Conn 251.

Ga.—Jewel Tea Co. v Rowling, 194 S E 393, 57 Ga App 116—Southern Grocery Stores v Braun, 194 S E 219, 57 Ga App 31—Great Atlantic & Pacific Tea Co v Dowling, 159 S E 609, 43 Ga App 549

Ill—Moen v Ruth's Beauty Shoppes, 4 N E 2d 642, 287 Ill App 612

Ind—Deep Vein Coal Co v Dowdle, 66 N E 2d 598

Ky—Carey-Reed Co v Hart, 53 S W 2d 689, 245 Ky 325—Louisville & N R Co v Bryant, 252 S W 145, 200 Ky 177.

La—Cooper v The Powder Puff, App, 184 So 593—Woodall v Dickson Ice Cream Co., App, 180 So 193—Fulmer v Louisville & N R Co., App, 152 So 148

Mich—Conover v Hecker, 26 N W 2d 774, 317 Mich 285

N J—Kelleher v Borden's Condensed Milk Co., 128 A 866, 3 N J Misc 522

N Y—Hagen v. American Machine & Foundry Co., 287 N Y S 857, 248 App Div 612—MacDowell v Western Union Telegraph Co., 279 N Y S 360, 244 App Div 843, affirmed 199 N E 522, 269 N Y. 533—Reardon v Erie R Co., 166 N Y S 287, 179 App Div 374.

Ohio—Manchester v Youngstown Sheet & Tube Co., App., 46 N E 2d 780.

Okl—Wells v. Mayer, 91 P 2d 784, 185 Okl 355

Pa—Festi v Proctor & Schwartz, 168 A 354, 107 Pa Super. 349—Cooper v. American Stores Co., 97 Pa Super 474—Vogel v. Hay, 86 Pa Super 266—Marcus v. May's

to sustain a verdict or judgment against plaintiff⁵⁵ More specifically, the evidence has been held sufficient, in particular cases, to show that the servant was negligent⁵⁶ or that his act was willful, wanton, or reckless,⁵⁷ that the act of the servant was the proximate⁵⁸ cause⁵⁹ of the injury, or that the master authorized or ratified the wrongful act⁶⁰ in that he advised or procured an assault⁶¹ Also the evi-

dence has been held sufficient to show incompetency of the servant,⁶² negligence of the master in employing or retaining an incompetent or unfit servant,⁶³ negligence of the master in failing to make reasonable inspection;⁶⁴ ownership by defendant of the instrumentalities by which the injury was inflicted,⁶⁵ that plaintiff was guilty of,⁶⁶ or free

Beauty Shop, Com Pl., 29 Del Co 433

Tenn.—Southern Ry Co v Russell, 66 S W 2d 1007, 17 Tenn App 221

Tex.—Continental Paper Bag Co v Bosworth, Com App, 276 S W 170 —Gulf Production Co v Adams, Civ App, 49 S W 2d 889, error refused—Western Union Telegraph Co v. Bowdoin, Civ App, 168 S W 1.

Wash.—Netherlands American Mortg Bank v Eastern Ry & Lumber Co, 268 P 604, 148 Wash 249

39 C J p 1859 note 50

55. Cal.—Pickering v California Airways Co, 4 P 2d 271, 117 Cal App 636

D C.—McDonald v Cooperative Restaurant, 64 F.2d 383, 62 App D C 48

Ga.—Marsh v Postal Telegraph & Cable Co, 196 S E 918, 57 Ga App 817

La.—Lang v Jersey Gold Creameries, App, 172 So 389—Acres v Monroe Transfer & Warehouse Co, App, 154 So 385

Neb.—Gallagher v Law, 281 N W 806, 135 Neb 381

39 C J p 1359 notes 51, 52.

56. U S.—Western Telegraph Co v Bromberg, CCA Or, 143 F 2d 388 —Panama R Co v Curran, Canal Zone, 256 F 768, 168 CCA 114

Ark.—Missouri Pac R Co v Hampton, 112 S W 2d 438, 195 Ark 335

Cal.—Miller v Dufau, App, 172 P 2d 586—Wallace v King, 80 P 2d 523, 27 Cal App 2d 174—Callahan v. Harm, 277 P 529, 98 Cal App 568

Fla.—J C Penny Co v McLaughlin, 188 So 785, 137 Fla 594

Ga.—Haygood v. Bell, 157 S E. 239, 42 Ga App 602

Ill.—Pabst v Hillman's, 13 N E 2d 77, 293 Ill App 547

Ky.—Davis v Graves, 63 S W 2d 808, 250 Ky 454

La.—Woodall v Dickson Ice Cream Co, App, 180 So 193—Baham v F. W Woolworth & Co, App, 169 So 798, amended on other grounds and rehearing denied 170 So 507—Harris v George E Eldridge, Inc, App, 164 So 494—Cassidy v. Beauty Studio, App., 144 So 617—Resor v Capelle, App, 140 So 699—Sebastian v. Jenness, 133 So. 468, 16 La App 156

Mass.—Cannon v. Crowley, 61 N E 2d

662, 318 Mass 373—Dragan v Artiste Permanent Wave Co, 30 N E 2d 856, 308 Mass 32—Engel v Boston Ice Co, 4 N E 2d 455, 295 Mass 428—Gavin v Kluge, 176 N E 193, 275 Mass 372

Mich.—Mayala v Underwood Veneer Co, 275 N W 198, 281 Mich 434 Mo.—Groehl v Betz, App, 38 S W 2d 289

Neb.—Butler v Dixon, 239 N W 644, 123 Neb 884

N Y.—Thompson v Western Union Tel. Co, 26 N Y S 2d 433, 261 App Div. 994

Ohio.—National Refining Co v Clancy, 166 N E 205, 31 Ohio App 99

Pa.—Jann v Linton's Lunch, 29 A 2d 219, 150 Pa Super 653

R I.—O'Connor v Narragansett Electric Co, 172 A 889, 54 R I 817.

Tex.—Atex Const Co v Farrow, Civ App, 71 S W 2d 323, error refused —Gulf Production Co v Adams, Civ App, 49 S W 2d 889, error refused

Wash.—McEachran v Rothschild & Co 237 P. 711, 135 Wash 260, modified on other grounds 241 P 969, 135 Wash 260

39 C J p 1860 note 63

57. Ill.—Vos v Franke, 202 Ill App 133

58. Cal.—Madsen v Le Clair, 13 P 2d 939, 125 Cal App 393

Colo.—Averch v Johnston, 9 P 2d 291, 90 Colo 321

Ill.—Pabst v Hillman's, 13 N E 2d 77, 293 Ill App 547

Va.—Gregory v Lehigh Portland Cement Co, 162 S E 881, 157 Va 545

59. U S.—Joy v Winder, CCA Okl, 78 F 2d 283

La.—Cassidy v Beauty Studio, App, 144 So 517

Minn.—Hammerstad v Arrow Head Steel Products Co, 265 N.W 433, 196 Minn 561.

Mo.—Nolan v Joplin Transfer & Storage Co, App, 203 S W 2d 740—Wise v Standard Oil Co of Ind, App, 198 S W 2d 1014

N.H.—Emery v Tilo Roofing Co, 195 A 409, 89 N H 165

N Y.—Kesten v Bnhorn & Singer Development Corporation, 249 N Y S 205, 232 App Div. 144, affirmed 180 N E 827, 253 N Y 549—Kilmer v. New York Telephone Co, 238 N Y S 513, 228 App Div 68

Okl.—Rabinovitz v Taylor, 129 P 2d 860, 191 Okl 287

Pa.—Palmer v Miller North Broad Storage Co, 158 A 616, 105 Pa Super 21

Wash.—Crabb v Wilkins, 109 P. 807, 59 Wash 302

39 C J p 1360 note 66

60. U S.—Radich v. U S, CCA Cal, 160 F 2d 616

Ala.—W E Belcher Lumber Co v Woodstock Land & Mineral Co, 15 So 2d 625, 245 Ala 5

Cal.—Sloss v General Motors Acceptance Corporation, 120 P 2d 85, 48 Cal App 2d 574—Jameson v Gavett, 71 P 2d 937, 22 Cal App 2d 646

Idaho.—Hammond v McMurray Bros, 286 P 603, 49 Idaho 207

R I.—Vogel v McAuliffe, 31 A 1, 18 R I 791

61. Tex.—Alamo Downs, Inc, v Briggs, Civ App, 106 S W 2d 733, error dismissed

62. Ala.—Alabama City, G & A R Co v Bessiera, 66 So 805, 190 Ala 59

63. Tex.—Chicago, R I & G Ry Co v Carter, Civ App, 250 S W 192, certified questions answered, Com App, 245 S W 228, 112 Tex 260, affirmed, Com App, 261 S W 135

39 C J p 1360 note 62

Violent temper

In action for death of decedent when shot by railroad officer who was investigating robbery, evidence sustained finding that railroads were negligent in knowingly employing officer with violent temper who would shoot without provocation—Southern Ry Co v Hooper, 65 S W 2d 847, 16 Tenn App 112

64. Cal.—McCordic v Crawford, 142 P 2d 7, 23 Cal 2d 1—Basye v Craft's Golden State Shows, 111 P 2d 746, 43 Cal App 2d 782

65. Ill.—Heideman v Bremner, 176 Ill App 280, affirmed 103 N E 275, 260 Ill 439

Ind.—Polk Sanitary Milk Co v Qualiza, 172 N E 576, 92 Ind App 72 S C.—Frye v Elrod, 196 S E. 884, 187 S.C 233

66. Wash.—Stewart v. Balfour, 98 P. 103, 51 Wash. 127

39 C J p 1360 note 70.

Plaintiff's own negligence as proximate cause of injury

Proximate cause of injury to boy struck by truck while pursuing fowl

from,⁶⁷ contributory negligence; a waiver of rules or orders of the masters;⁶⁸ or to show other matters⁶⁹

The evidence has been held insufficient in some cases to warrant a verdict or judgment for plaintiff⁷⁰ Further the evidence has been held insufficient, under the circumstances of particular cases, to show that the servant was negligent⁷¹ or that his act was willful, wanton, or reckless,⁷² that the tor-

tious act was that of a servant of defendant rather than that of some other person,⁷³ that the act of the servant was the cause of the injury,⁷⁴ or that the employer directed the wrongful act of the servant⁷⁵ or ratified the servant's acts.⁷⁶ Also the evidence has been held insufficient to show that the master was negligent in employing or retaining an incompetent or unfit servant⁷⁷ or that such alleged negligence was the proximate cause of the injury,⁷⁸ that plaintiff was guilty of,⁷⁹ or free from,⁸⁰ con-

at request of employee of produce firm was held, under evidence, boy's own negligence—*Edminston v Terrill Bros Grocery Co*, 125 So 495, 12 La App 373

67. US—*Western Union Telegraph Co v Bromberg*, CCA Or, 143 F 2d 288

Cal—*Miller v Dufau*, App, 172 P 2d 586

Mass—*Cannon v Crowley*, 61 NE 2d 662, 318 Mass. 378

68. NC—*Fry v Southern Public Utilities Co*, 111 SE 354, 183 NC 281

69. US—*Marion Steam Shovel Co v Bertino*, CCA Mo, 82 F 2d 541, rehearing denied 82 F 2d 945, certiorari denied 57 S Ct 17, 299 US 556, 81 L Ed 409

Mass—*Ferguson v Ashkenazy*, 29 NE 2d 828, 307 Mass 197—*Herrick v City of Springfield*, 192 N. E 626, 288 Mass 212

Mo—*Wise v Standard Oil Co of Ind*, App, 198 SW 2d 1014

NY—*Semanchuck v Fifth Ave & Thirty-Seventh St Corporation*, 49 NE 2d 507, 290 NY 412

Particular matters

(1) Absence of participation by president of corporate defendant—*Dugan v Midwest Cap Co*, Iowa, 229 NW 847

(2) Duty of master to see that equipment is maintained in reasonably safe condition—*Bayse v Craft's Golden State Shows*, 111 P 2d 746, 43 Cal App 2d 782.

(3) Violation of statute—*Wolinetz v William Treib, Inc.*, 53 NYS 2d 499, 269 App Div 679

(4) Waiver of employer's rule against carrying of passengers in employer's automobiles—*Pettit v Swift & Co*, 281 NW. 44, 208 Minn 270.

70. Ala—*Great Atlantic & Pacific Tea Co v Lantrip*, 153 So 296, 26 Ala App 79

Ark—*Southern Kansas Stage Lines Co v Carlisle*, 121 SW 2d 77, 196 Ark 1066.

Cal—*Yore v Pacific Gas & Electric Co*, 277 P 878, 99 Cal App 81

Conn—*Swearsky v Stanley Dry Goods Co*, 186 A. 556, 122 Conn 7.

Ga—*Henderson v Nolting First*

Mortgage Corporation, 199 SE 103, 186 Ga 831

Ill—*Ewald v Piolet Scrap Iron & Metal Co*, 33 NE 2d 930, 310 Ill App 218—*George v Citizens' Nat Bank*, 271 Ill App 275

Ky—*Kentucky Utilities Co v Carter*, 176 SW 2d 81, 296 Ky 30

La—*Cado v Many*, App, 180 So 185

Mass—*Gallo v Leahy*, 3 NE 2d 782, 297 Mass 265—*Murphy v Hurley*, 146 NE 45, 250 Mass 582

Mo—*Pfeifer v United Bakers Supply Co*, App, 160 SW 2d 795

NJ—*Latronica v Damerly*, 15 A 2d 763, 125 NJ Law 323

NY—*Anderson v 143 Lunden Blvd Corporation*, 16 NYS 2d 149, 258 App Div 387—*Blah v Greco*, 41 NYS 2d 390

NC—*Catoe v Baker*, 193 SE 735, 212 NC 520

Okla—*Spartan Aircraft Co v Jamison*, 75 P 2d 1096, 181 Okl 645

Pa—*Dincher v Great Atlantic & Pacific Tea Co*, 51 A 2d 710, 356 Pa 151—*Nickolls v Personal Finance Co*, 185 A 286, 323 Pa 67

Tenn—*Hoover Motor Express Co v Thomas*, 65 SW 2d 621, 16 Tenn App 664

Tex—*Humble Oil & Refining Co v Bell*, Civ App, 180 SW 2d 970, error refused 181 SW 2d 569, 142 Tex 645—*Burton-Lingo Co v Armstrong*, Civ App, 118 SW 2d 791, error refused.

Va—*Epperson v De Jarnette*, 180 SE 412, 164 Va 482

Wis—*Brabason v Joannes Bros Co*, 286 NW 21, 281 Wis 426

More knowledge on part of employer of use by employee of particular instrumentality, is not sufficient to warrant or sustain finding that employer directed use of the instrumentality or reserved right of control of character of instrumentality to be used—*Riggs v Higgins*, 106 S W 2d 1, 341 Mo 1.

71. Fla—*Weis-Patterson Lumber Co v King*, 177 So 318, 181 Fla 342

La—*Lanza v Metcalf*, App, 25 So 2d 453—*Farque v Gulf States Utilities Co*, App, 140 So 90—*Paulet v Yvette Co*, 127 So. 420, 13 La App. 857.

NC—*Catoe v Baker*, 193 SE 735, 212 NC 520

39 CJ p 1360 note 64

72. La—*Edminston v Terrill Bros. Grocery Co*, 125 So 495, 12 La. App 373

39 CJ p 1360 note 78.

73. Ill—*McLaughlin v S S Kresge Co*, 12 NE 2d 337, 293 Ill App. 638.

La—*Sampere v Nola Oil Co*, 143 So 54, 175 La 218—*Mack v Magnolia Petroleum Co*, App, 160 So. 158

Wash—*Barnes v J C Penney Co*, 70 P 2d 311, 190 Wash 833

74. Conn—*Acme Upholstery Co v Garber*, 147 A 561, 110 Conn 166

NY—*Kummer v Christopher & Tenth St R Co*, 21 NYS 941, 2 Misc 298

Shooting by several persons

In action against railway and special police officer employed by it by person who was shot while attempting to escape from posse, evidence was held insufficient to show that defendant special police officer shot plaintiff, where two of railway police officers were members of posse, each fired twice, and two shots were fired by unknown person—*Thompson v Norfolk & W Ry. Co*, 182 SE 880, 116 W Va 705

75. Cal—*Maggi v Pompa*, 287 P. 982, 105 Cal App 496

76. Cal—*Edmunds v Atchison, T & S F R Co*, 162 P 1038, 174 Cal 246

Ga—*Massee & Felton Lumber Co v. Macon Cooperage Co*, 162 SE 396, 44 Ga App 590

77. US—*Texas Breeders & Racing Ass'n v Blanchard*, CCA Tex, 81 F 2d 382, motion dismissed 85 F 2d 1019

Pa—*Dincher v Great Atlantic & Pacific Tea Co*, 51 A 2d 710, 356 Pa. 151

Tex—*Lowry v Anderson-Berney Bldg Co*, 161 SW 2d 459, 139 Tex. 29

78. Ky—*Phillips' Adm'r v. Tway*, 108 SW 2d 535, 269 Ky 583

79. Cal—*Callahan v. Harm*, 277 P. 529, 98 Cal App 568.

Kan—*Kiser v Skelly Oil Co.*, 18 P. 2d 181, 136 Kan. 812

80. N.Y.—*Spitzer v. Healy*, 144 N.Y.

tributary negligence, or to show other matters⁸¹

Independent contractors. While the facts of the case should be carefully examined where the defense is that the operations out of which the injury arose were conducted by an independent contractor,⁸² nevertheless something more than speculation and conjecture is necessary to convert a bona fide contract independently performed into one of master and servant.⁸³ In determining whether the person causing the injury was a servant rather than an independent contractor, it has been held, where the instrumentality causing the injury was far from the employer, that the employer's right of control over such instrumentality should be implied only from reasonably clear evidence showing it⁸⁴

In particular cases it has been held that the evidence was sufficient to show the existence of the relation of employer and independent contractor,⁸⁵ that the acts complained of were committed by servants of an independent contractor,⁸⁶ or that the injury was caused by the negligence of an independent contractor or his servants for which negligence defendant was not responsible,⁸⁷ also, that the re-

lationship of employer and independent contractor did not exist,⁸⁸ that the offending person was a servant of defendant, rather than an independent contractor,⁸⁹ or that the offending person was an employee of defendant rather than an employee of an independent contractor.⁹⁰ Also the evidence has been held sufficient to show the inherently dangerous character of the work on which the contractor was engaged,⁹¹ the employer's knowledge that work delegated to an independent contractor was being done in a way from which danger to the public was reasonably foreseeable,⁹² the principal contractor's knowledge of the unsafe condition of appliances furnished,⁹³ interference by the employer in the methods of work being done by his contractor,⁹⁴ or negligence of the employer in failing to provide a reasonably safe place for work for the employees of the contractor.⁹⁵

In other cases the evidence has been held insufficient to show the existence of the relation of employer and independent contractor,⁹⁶ that the offending person was a servant of defendant, rather than an independent contractor,⁹⁷ that the employer had

§ 828, 159 App Div 505, appeal dismissed 113 NE 490, 218 NY. 737.

81. U.S.—Sinclair Prairie Oil Co v Thornley, CCA Okl., 127 F 2d 138
Tex—Humble Oil & Refining Co v Bell, Civ App., 180 SW 2d 970, error refused 181 SW 2d 569, 143 Tex 645

Particular matters

(1) Anticipation of danger to customers—Creamer v Kroger Grocery & Baking Co., 86 SW 2d 288, 260 Ky 544.

(2) Employer's acquiescence in plaintiff's going out with employer's driver on his route—Reis v Mosebach, 12 A 2d 37, 337 Pa. 412

(3) Negligence of employer in not prohibiting employees' carelessly using cigarettes or matches—Yore v Pacific Gas & Electric Co., 277 P 878, 99 Cal App 81

82. Ark.—J. L. Williams & Sons v Hunter, 133 SW 2d 892, 199 Ark 891

83. Ark.—J. L. Williams & Sons v Hunter, *supra*.

84. Wyo.—Stockwell v. Morris, 22 P. 2d 189, 46 Wyo. 1.

85. U.S.—Defense Supplies Corp. v Lawrence Warehouse Co., D.C. Cal., 67 F Supp 16

Ill.—Trust v Chicago Motor Club, 276 Ill App. 289

Ind.—Zaney v Rieman, 151 NE 625, 84 Ind App 480

Ky.—Maggard v Louisville Cooperage Co., 23 SW 2d 279, 232 Ky 20

Mass.—Herrick v City of Springfield, 192 NE 626, 288 Mass. 212.

N.J.—Rosenquist v. Brookdale Homes, 44 A 2d 38, 133 NJ Law 305

Okl.—Texas Pipe Line Co of Oklahoma v Willis, 45 P 2d 138, 172 Okl 148

Tex.—Allis-Chalmers Mfg Co v. Board, Civ App., 118 SW 2d 998

Wash.—Bill v Cattavara, 167 P 3d 434, 24 Wash 2d 819—Amann v City of Tacoma, 16 P 2d 601, 170 Wash 296

39 C.J. p 1380 note 74

86. N.Y.—Wood v Long Island R. Co., 122 N.Y.S. 159, 137 App Div. 63.

Wash.—Christiansen v Mehlhorn, 262 P 638, 116 Wash 240

87. Ill.—Coleman v Ashland Catering Co., 199 Ill App 398

88. Conn.—Nichols v Harvey Hubbell, Inc., 103 A. 835, 92 Conn. 611, 19 A L R 221

39 C.J. p 1380 note 78.

89. Colo.—Farmers' Reservoir & Irrigation Co. v. Fulton Inv Co., 255 P. 449, 81 Colo 69

Nev.—Montgomery Ward & Co v. Stevens, 109 P 2d 895, 60 Nev 358

Tex.—Gulf Refining Co v. Rogers, Civ App., 57 SW 2d 183, error dismissed

Salesman

Evidence that defendant's advance salesman could obtain orders only from persons residing in territory assigned to him, that orders had to comply with designated requirements, and that defendant reserved right to refuse to make deliveries or pay commissions, and to cancel or-

ders because of violation of rules, was sufficient to authorize finding that salesman was defendant's servant and not an independent contractor, with respect to defendant's liability for salesman's negligent acts—Jewel Tea Co v. Rowling, 194 SE 893, 57 Ga App 116.

90. Cal.—Wilmot v Golden Gate Inv Co., 107 P 2d 263, 41 Cal App. 2d 664

91. Ala.—Wright-Nave Contracting Co v Alabama Fuel & Iron Co., 99 So 728, 211 Ala. 89

N.Y.—Riedell v S Karpen & Bros., 42 N.Y.S 2d 112, 266 App Div 850, affirmed 58 NE 2d 572, 291 NY 802

92. N.Y.—Wright v Tudor City Twelfth Unit, 12 NE 2d 307, 276 NY 308, 115 A L R 962

93. N.Y.—Lester v Graham, 142 N. Y.S. 789, 157 App Div. 651.

94. Mich.—Ripley v Priest, 135 N. W 258, 169 Mich. 383.

Tex.—Humble Oil & Refining Co. v Bell, Civ App., 180 SW 2d 970, error refused 181 SW 2d 569, 143 Tex 645.

95. Ill.—Houlihan v. Sulsberger & Sons Co., 118 NE 429, 282 Ill 76

96. La.—Goetschel v Glassell-Wilson Co., 127 So 81, 13 La App 424. 39 C.J. p 1380 note 75.

97. Ark.—W. H. Moore Lumber Co. v. Starrett, 279 S.W. 4, 170 Ark 92.

Mass.—Crocker v. MacLean, 15 NE 2d 237, 300 Mass. 255.

notice that the contractor was doing an unlawful act,⁹⁸ that an owner had knowledge of a contractor's contemplated method of procedure,⁹⁹ an assumption of duty to furnish appliances for servants of an independent contractor,¹ want of due care in selecting an independent contractor,² or such interference with the work as would destroy the relationship of independent contractor and create that of master and servant.³

Relationship of master and servant In order to hold a master liable for a tort committed by an alleged servant, the evidence must be sufficient to show that the relationship of master and servant existed

between the wrongdoer and the party sought to be held as master⁴ and that such relationship existed at the time of the commission of the tort⁵ The relationship of master and servant may be proved by circumstantial evidence.⁶ In particular cases it has been held that the evidence was sufficient⁷ or insufficient⁸ to show that the relation of master and servant existed, or sufficient to show that the offending person was not an employee of defendant;⁹ and, in cases in which the servant of one master was lent to another, the evidence has been held sufficient to justify a finding that the servant remained under the control of his original master,¹⁰ or sufficient to show

98. NY—Freund v Composite Realty Co, 165 NYS 951

99. US—Defense Supplies Corp v Lawrence Warehouse Co, D Cal, 67 F Supp 16.

1. Ala—Connors-Weyman Steel Co v Kilgore, 66 So 609, 189 Ala. 643

2. Ky—Maggard v Louisville Co-operation Co, 22 SW2d 279, 232 Ky 20

NY—Mehler v Fisch, 120 NYS 807, 65 Misc 549

3. US—Steinman v Pennsylvania R Co, CCANJ, 54 F2d 1052, certiorari denied 52 S Ct 408, 285 US 552, 76 L Ed 942

Ky—Maggard v Louisville Co-operation Co, 22 SW2d 279, 232 Ky 20

Tex—Carter Publications v Davis, Civ App, 68 SW2d 640, error refused

4. Ohio—Lashure v East Ohio Gas Co, 165 NE 305, 31 Ohio App 161, affirmed 162 NE 41, 119 Ohio St 9.

Weight and sufficiency of evidence as to employment generally see supra § 12

5. Mo.—Yerger v Smith, 89 SW2d 66, 338 Mo 140

Okl—Rabinovits v Taylor, 106 P. 2d 827, 188 Okl 84—Barall v McDonald, 44 P2d 997, 172 Okl 376

6. Mo.—Ward v Scott County Milling Co, App, 47 SW2d 250.

Okl—Western Union Telegraph Co v Martin, 95 P2d 849, 186 Okl 24

7. US—Radich v U. S., CCA Cal, 160 F2d 616

Ark—Malco Theatres v McLain, 117 SW2d 45, 196 Ark 188—Delamar & Allison v Ward, 41 SW2d 760, 184 Ark 82

Cal—Ryan v Farrell, 280 P 945, 208 Cal 300—Moss v Chronicle Pub Co, 258 P 88, 201 Cal 610, 55 A. L.R. 1258—Miller v Dufau, App, 172 P.2d 586—Callahan v Harm, 277 P 529, 98 Cal App 568

Conn—Scorpion v American-Republican, 37 A2d 802, 131 Conn. 42.

Ill—Stokes v Hansberry, 40 NE2d 823, 314 Ill App 195—Van Meter v Gurney, 240 Ill App 165

La—Gulf Ins Co v Temple, App, 187 So 814—Dinet v Orleans Dredging Co, App, 149 So 126

Md—Bernheimer-Leader Stores v Burlingame, 136 A 622, 152 Md 284

Mass—Rogers v United Markets, 38 NE2d 566, 310 Mass 829

Miss—Montgomery Ward & Co v Windham, 16 So2d 622, 195 Miss 848, suggestion of error overruled 17 So2d 208, 195 Miss 848

Mo—Becker v Aschen, 131 SW2d 533, 344 Mo 1107—Wise v Standard Oil Co of Ind, App, 198 SW2d 1014

NY—Kinsey v William Spencer & Son Corporation, 8 NYS2d 529, 255 App Div 995, affirmed 22 NE2d 168, 281 NY. 601—Getlar v Rubinstein, 11 NYS2d 943, 171 Misc 40, affirmed 16 NYS2d 527, 258 App Div 795

Pa—Joseph v United Workers Ass'n, 23 A2d 470, 343 Pa 636—Bekelja v James E Strates Shows, Com Pl, 56 Dauph Co 317

Tex—Spokane v Coy, Civ App, 153 SW2d 672—Taylor v Esparza, Civ App, 8 SW2d 288, error dismissed—Western Union Telegraph Co v Brown, Civ App, 297 S.W. 267.

Wis—Zamecnik v Royal Transit, 300 NW 227, 239 Wis 175

39 CJ p 1359 note 54

2. US—Texas Co v. Brice, CCA Tenn, 26 F2d 164, certiorari denied Brice v Texas Co, 49 S Ct 84, 278 US 640, 73 L Ed 555

Conn—Krowka v Colt Patent Fire Arm Mfg. Co, 8 A2d 5, 125 Conn 705

Iowa—Reynolds v Skelly Oil Co, 287 NW 823, 227 Iowa 163

Mass—Cutler v. Jordan Marsh Co, 163 NE 868, 285 Mass 245.

NY—Fewer v. Gerosa Crane Service Co, 288 NYS 285, 248 App Div 621.

Ohio—Johnson v. Wagner Provision Co, 49 NE2d 925, 141 Ohio St 584—Lashure v East Ohio Gas Co, 162 NE 41, 119 Ohio St. 9.

Okl—Cook v Stegall, 166 P2d 767, 196 Okl 534.

Pa—Patanyi v Davis, 9 A2d 430, 336 Pa. 476—Molli v. Knoxville College, Com Pl, 82 Pittsb Leg J 374, 58 York Leg Rec 104

Tex—R. E. Cox Dry Goods Co v Kellogg, Civ App, 145 SW2d 676, error refused

39 CJ p 1359 note 55.

Financial benefit

Facts that partners were financially benefited by salesman's services, and, whenever they learned of prospective customer, requested salesman to call, did not establish master-servant relationship under respondeat superior doctrine—Counham v Luftstufka Bros & Co, 5 P2d 694, 118 Cal App 602

9. Mass—Kunan v De Matteo, 32 NE2d 613, 308 Mass 427

Miss.—Yazoo & M V R Co v Denton, 133 So 656, 160 Miss 850, affirmed Denton v Yazoo & M V R Co, 52 S Ct. 141, 284 US 305, 76 L Ed 310

Or—Olds v Von der Hellen, 263 P 907, 127 Or 276, modified on other grounds 270 P 497, 127 Or 276

Utah—Jensen v Logan City, 83 P2d 311, 96 Utah 53, affirmed 88 P2d 459, 96 Utah 522

Wash—Miles v Pound Motor Co, 117 P2d 179, 10 Wash2d 492.

Control; right to hire or discharge

In action against carnival manager for assault on plaintiff by employee of boxing and wrestling show affiliated with carnival, evidence that manager had no control over show or of hiring or discharge of employees thereof and that employee in assaulting plaintiff was not acting under instructions from defendant sustained finding that perpetrator of assault was not employee of defendant, precluding plaintiff's recovery.—Free v Tidwell, Tex Civ.App., 84 S.W.2d 512.

10. Cal—Madsen v. Le Clair, 13 P. 2d 939, 125 Cal App 393.

that the offending person was a servant of the master to whom he had been lent¹¹

Scope or course of employment Where it is sought to hold a master responsible for the torts committed by his alleged servant, there must be sufficient competent evidence to show that the tortious act complained of was committed in the course of the servant's employment or in the furtherance of the master's business¹² If the act complained of is done in the course of the ordinary work of the servant and is within the ostensible authority of one performing such work, the burden of showing that the servant was acting on behalf and by the authority of defendant is sustained by showing what was done¹³ Proof that the tortious act was committed by the servant in the course of his employment may be made by circumstantial evidence,¹⁴ and the master's consent, express or implied, to the act of a servant may be established by the verbal testimony

of witnesses, or by surrounding circumstances, or both¹⁵ It has been held that if it clearly appears that a detective in defendant's employ shot the injured person, slight evidence of the extent of his authority and of the use of unnecessary force would suffice to put defendant to its defense¹⁶

The acts and declarations of a servant have been held not sufficient of themselves to establish the fact that certain acts of the servant were within the scope of his employment;¹⁷ and the wanton and malicious quality of an act done by a servant ordinarily is strong evidence against an intention on his part to further his master's employment¹⁸ The use of property for another, producing the harm complained of, does not of itself prove authority to perform the act causing damage.¹⁹

In particular cases it has been held that the evidence was sufficient to show the servant was²⁰ or

11. Cal.—Pierce v Sinner, 140 P.2d 474, 60 Cal App 2d 259

Private detective

In action for death of person killed by employee of detective service, who was hired to protect skating pavilion and to maintain order, evidence was held sufficient to sustain finding that employee of detective service at time of the killing was an agent of skating pavilion operator—Martin v Leatham, 71 P.2d 836, 22 Cal App 2d 442

12. Mo.—Yerger v Smith, 89 SW 2d 66, 388 Mo 140

NC.—Salmon v Pearce, 27 SE 2d 647, 228 NC 587.

Okl.—Rabinovitz v Taylor, 106 P.2d 837, 188 Okl. 84—Barall v McDonald, 44 P.2d 997, 172 Okl 376

Va.—Bivens v Manhattan For Hire Car Corporation, 159 SE 395, 156 Va 483

13. Mass.—Henriques v Franklin Motor Car Co., 157 NE 580, 260 Mass 518

14. Okl.—Western Union Telegraph Co v Martin, 95 P.2d 849, 186 Okl 24

15. Ky.—John v Lococo, 76 SW 2d 897, 256 Ky. 607

16. N.Y.—Hill v Erie R Co., 224 NY 540, 221 App Div 518

17. Okl.—Mason v. Nibel, 263 P 121, 129 Okl 7.

18. Wis.—Linden v. City Car Co., 300 NW. 225, 239 Wis 236

19. Pa.—Schroeder v. Gulf Refining Co of Port Arthur, Tex., 150 A. 668, 300 Pa. 397

20. U.S.—Henry W. Cross Co. v Burns, CCA Ark., 81 F.2d 856.

Ark.—Missouri Pac. R Co v Hill, 138 SW 2d 782, 200 Ark 253

Cal.—Sloss v. General Motors Ac-

ceptance Corporation, 120 P.2d 85, 48 Cal App 2d 574—O'Shea v Pacific Gas & Electric Co., 62 P.2d 1066, 18 Cal App 2d 32—Smith v Pickwick Stages System, 297 P 940, 113 Cal App. 118—Sullivan v People's Ice Corporation, 268 P 934, 92 Cal App 740

DC.—Dill v Johnson, 107 F.2d 669, 71 App DC 139

Fla.—J C Penny Co v McLaughlin, 188 So 785, 137 Fla 594

Ga.—Rubin & Cherry Exposition v Bray, 6 SE 2d 425, 61 Ga App 232

Ind.—Montgomery Ward & Co v Fogle, 50 NE 2d 871, 221 Ind 597—Goodyear Tire & Rubber Co v Paddock, 40 NE 2d 697, 219 Ind 672

Iowa.—Grimore v Consolidated Products Co., 5 NW 2d 646, 232 Iowa 338—Hrncick v Chicago, M & St P Ry Co., 175 NW 30, 187 Iowa 1145

Kan.—Proctor v St. Louis-San Francisco Ry Co., 229 P 365, 116 Kan. 720

Ky.—Louisville & N R Co. v Moore's Adm'r, 166 SW 2d 68, 292 Ky 223

La.—McAllister v Jackson Brewing Co., App., 6 So 2d 179

Mass.—Ridge v J J. Foley Cafe, 61 NE 2d 829, 318 Mass 310—Kees v William F. Hene's Sons Co., 8 NE 2d 8, 297 Mass 142—Gunan v Famous Players-Lasky Corporation, 167 NE 235, 267 Mass 501

Miss.—Woods v. Illinois Cent. R Co., 118 So. 197, 151 Miss 395

Mo.—Ragdale v Riverside Jockey Club, App., 108 SW 2d 948—Groehl v Betz, App., 38 SW 2d 289—Uptegrove v Walker, App., 7 SW 2d 734—Hinson v Morris, App., 298 S.W. 254—Harrison v St. Louis-

San Francisco Ry. Co., App., 291 SW 525—Flynn v Burgess, App., 259 SW 147—Redd v Missouri Pac Ry Co., 143 SW 555, 161 Mo App 522

NJ.—Smith v Bosco, 19 A.2d 637, 126 NJ Law 452

NY.—McDonald v Lanzetta, 31 N.Y.S.2d 702, 263 App Div 750—Ulm v Western Union Telegraph Co., 14 N.Y.S.2d 841, 258 App Div 776, reargument denied 15 N.Y.S.2d 831, 258 App Div 849, affirmed 25 N.E. 2d 985, 282 NY 645

Okl.—McKinney v Bland, 112 P.2d 798, 188 Okl 661.

Pa.—Orr v. William J Burns International Detective Agency, 12 A.2d 25, 337 Pa 587—Fletcher v Central Wrecking Corporation, 188 A 612, 124 Pa Super 271

SC.—Lazar v Great Atlantic & Pacific Tea Co., 14 SE 2d 560, 197 SC 74

Tenn.—Southern Ry Co v Hooper, 65 SW 2d 847, 16 Tenn App 112

Tex.—McAfee v. Travis Gas Corporation, 158 SW 2d 442, 137 Tex 314—Anderson-Berney Bldg Co v. Lowry, Civ App., 177 SW 2d 984, error refused—Michels v Crouch, Civ App., 150 SW 2d 111, error dismissed, judgment correct—Jacobs v Bailey, Civ App., 118 SW 2d 484, error dismissed—Gulf, C & S F. Ry Co v Cobb, Civ App., 45 SW. 2d 228, error dismissed
39 C.J. p 1359 note 58

Protection of contents of building

In action for injuries sustained when struck by stone thrown by employee in attempting to eject boy from employers' premises, evidence sustained finding that act of employee was committed in course of his employment so as to render master liable where it was shown that

was not²¹ acting within the scope or course of his employment at the time of the injury, or that the evidence was insufficient to show that the servant was acting in the scope of his authority or in furtherance of the master's business²²

§ 616. Trial and Judgment

a In general

b Dismissal, nonsuit, or directed verdict

a. In General

In actions to charge an employer for acts of his servants or of contractors employed by him the general rules governing the trial of civil actions ordinarily apply.

General rules governing the trial of civil actions ordinarily apply in actions to charge an employer for acts of his servants or of contractors employed by him.²³

Where a master's liability in an action against him and a fellow servant is based in part on the master's

negligence in constructing defective appliances, the fact that the verdict is in favor of the fellow servant is not a ground for new trial as to the master²⁴ Where an action for injuries to a servant was originally instituted against the master and a fellow servant, and a verdict rendered in favor of the fellow servant, he may properly be eliminated as a party on a new trial²⁵

b. Dismissal, Nonsuit, or Directed Verdict

Where there is a conflict in the evidence as to material issues or different inferences may be drawn from the evidence, a nonsuit, directed verdict, or demurrer to the evidence should not be granted.

Under the general rules considered in the C.J.S. title Trial § 225 et seq, also 64 C.J. p 371 note 2 et seq, if there is any evidence tending to prove the cause of action from which different inferences may be drawn, or if there is a conflict in the evidence as to material issues, a nonsuit, directed verdict, or demurrer to the evidence should not be granted.²⁶ On

employee, in addition to attempting to protect his own tools, also attempted to protect contents of building generally—Jameson v Gavett, 71 P 2d 937, 22 Cal App 2d 646

Collection of money due

Where evidence showed that quarrel between plaintiff and employee was precipitated by employee's efforts to collect for drinks which had been served to customers and that both argument over bill and encounter occurred in course of employee's unfinished effort to induce plaintiff to pay for drinks, trial judge properly held that assault was committed as part of business which employee was authorized to transact for owner and that therefore owner was liable to plaintiff—Andrews v Seidner, 121 P 2d 863, 49 Cal App 2d 427

21. La.—Whittington v Western Union Tel Co, App, 1 So 2d 327
Tenn.—Cole v Standard Oil Co of N J, App, 197 SW 2d 13

Tex.—Brady v Gulf, C & S F Ry Co, Civ App, 71 SW 2d 303, error refused—Mayes v American Nat Ins Co, Civ App, 16 SW 2d 333
39 C.J. p 1359 note 59, p 1360 note 62

Assault to avenge opprobrious epithets

Evidence established that assault on customer by manager of store, even if wrongful, was not made in his capacity as manager, so that customer could hold store owner liable, but that it was an independent assault made by manager to avenge opprobrious epithets applied to him by customer after he had taken merchandise from customer and restored his money to him—Hodson v Great Atlantic & Pacific Tea Co, D.C. Mo., 66 F.Supp 514.

22. Conn.—Krowka v Colt Patent Fire Arm Mfg. Co, 8 A 2d 5, 135 Conn 705

Idaho.—Normington v Neely, 70 P 2d 396, 58 Idaho 134

La.—Cado v Many, App, 180 So 185

Md.—Philadelphia, B & W R Co v Stumpo, 77 A 266, 112 Md 571

Mass.—Murphy v Harley, 146 NE 45, 250 Mass 582

Mich.—Vinson v Thomas, 27 NW 2d 523, 318 Mich 175

Miss.—Tarver v J W. Sanders Cotton Mill, 192 So 17, 187 Miss 111.

Mo.—Dovino v General American Life Ins Co, App, 127 SW 2d 732

—Priest v F W Woolworth Five & Ten Cent Store, App, 106 SW 2d 936

N.Y.—De Wald v Seidenberg, 72 NY 2d 185, 272 App Div 937—Greenfield v Union News Co, 22 NYS 2d 78.

N.C.—Bright v Western Union Telegraph Co, 195 SE 391, 213 NC 208

Okl.—Greis v Smith, 125 P 2d 763, 190 Okl 517

Va.—Western Union Telegraph Co v Phelps, 169 SE 574, 160 Va 674

Safety of apartment after fumigation

In tenant's action against landlord for injuries sustained when she was overcome by fumes remaining in building after fumigation by independent contractor engaged by landlord, evidence failed to show that landlord's janitor was authorized to make statement with respect to tenant's returning to apartment after fumigation which was binding on landlord—Ferguson v Ashkenazy, 29 NE 2d 828, 307 Mass 197.

23. RI.—Blount v Tow Fong, 138 A 52, 48 RI 453

Tex.—Nolte v Olmos Dinner Club, Civ App, 118 SW 2d 841, error dismissed

24. S.C.—Roberts v Virginia-Carolina Chemical Co, 66 SE 298, 84 SC 283

39 C.J. p 1259 note 96

25. Ala.—Vaughn v Dwight Mfg. Co, 91 So 77, 206 Ala 552

26. U.S.—Western Union Telegraph Co, CCANJ, 69 F 2d 149—Western Union Telegraph Co v Kirby, CCA Pa, 37 F 2d 480—Marks v F W. Woolworth Co, CCA Tex, 32 F 2d 145

Ala.—Knight Iron & Metal Co. v Ardis, 199 So 716, 240 Ala 305—Alabama Great Southern R Co v Robbins, 173 So 630, 233 Ala 499—Wheeler Motor Co v Stringer, 133 So 10, 222 Ala 494

Ark.—Guthrie v Few, 277 SW. 15, 169 Ark 776

Cal.—Montgomery v. Nelson, 295 P 1034, 211 Cal 497.

Ill.—Kovatch v Ross, 230 Ill App 330—George v Illinois Cent. R Co, 197 Ill App 152

Ky.—Greene v Pennington, 108 SW 2d 1013, 270 Ky 28

Mo.—Kearley v. St. Louis Car Co, App, 111 SW 2d 976, certiorari quashed State ex rel. St. Louis Car Co v. Hostetter, 131 SW 2d 558, 345 Mo 102—Chisholm v. Berg, App, 78 SW 2d 486—Clayton v Hydraulic Press Brick Co, App, 27 SW 2d 52

N.J.—Gilbert v. Junior Trucking Corporation, 141 A 776, 104 N.J. Law 608

N.Y.—Delisa v. Arthur F Schmidt,

the other hand, where the evidence is not conflicting and only one inference can be drawn therefrom, or where there is no evidence to prove a material fact as to which plaintiff has the burden of proof, it is proper to grant a nonsuit or direct a verdict²⁷ and error to submit the case to the jury.²⁸ The inference that one found performing service for another is such other's servant, may be so destroyed by other evidence that a nonsuit is warranted.²⁹ Where an action against master and servant is based solely on the theory of respondeat superior and the court directs a verdict for the servant, it is error to submit the issue of the negligence of the master.³⁰

§ 617. — Questions of Law and Fact

- a. Liability of master for injury caused by servant
- b. Liability of employer for injuries to independent contractor or servants
- c. Liability of employer for acts of contractor or his servants
- d. Liability of other persons

a. Liability of Master for Injury Caused by Servant

(1) In general

Inc. 34 NE2d 336, 385 NY 314—
Hochman v Aronowitz, 397 N.Y.S.
439, 351 App Div 914
NC—Williams v. May, 81 SE 604,
173 NC 78
Ohio—Lloyd v General Tire & Rub-
ber Co., 156 NE 531, 24 Ohio App.
63
Okl—Claxton v Page, 124 P2d 977,
190 Okl 432—Small v Shull, 134
P2d 381, 190 Okl 418—Russell-
Locke Super-Service v Vaughn, 40
P2d 1090, 170 Okl 377.
Pa—Finch v Horn & Hardart Bak-
ing Co., 94 Pa Super 589
Wash—Hobbs v Postal Telegraph-
Cable Co., 141 P2d 648, 19 Wash
2d 103.
39 C.J. p 1365 note 39.
27. US—Texas Breeders & Racing
Ass'n v. Blanchard, CCA Tex., 81
F2d 382, motion dismissed 85 F2d
1019—Western Union Telegraph
Co v Hill, C.C.A. Ala., 67 F2d 487
Ala—Gray v Williams, 160 So. 715,
230 Ala. 14.
Ariz—Horan v Richfield Oil Corpo-
ration, 105 P2d 514, 56 Ariz. 64
Ark—Tucker Duck & Rubber Co. v
Harvey, 154 S.W.2d 828, 202 Ark
1088
Cal—Fields v. Sanders, 180 P2d 684,
29 Cal 2d 884—Malcolm v Tevis,
293 P 640, 110 Cal.App 76
Colo—Thayer v Kirchhof, 266 P
225, 83 Colo 480
Ga—Mulkey v Griffin Const. Co
200 SE 163, 58 Ga App. 808—Van

Pelt v Atlanta Hub Co., 179 SE
908, 51 Ga App 257—Latimore v
Louisville & N R Co., 129 SE
108, 34 Ga App 263
Ill—Boehmer v Norton, 65 NE2d
212, 328 Ill App 17.
Ky.—Courier Journal & Louisville
Times Co v Akers, 175 SW2d
350, 295 Ky 745—Coburn v North
American Refractories Co., 174 S
W2d 757, 295 Ky 566—McBee's
Adm'x v Indian Head Mining Co.,
132 SW2d 515, 280 Ky 82
Me—Stevens v Frost, 32 A.2d 164,
140 Me 1.
NJ—Collins v West Jersey Express
Co., 70 A 344, 76 NJ Law 551
NY—Wolnietz v William Treib,
Inc., 53 N.Y.S.2d 499, 269 App Div
679—Smith v Matthews Const
Co., 241 N.Y.S 689, 137 Misc 290
NC—Mack v. Marshall Field & Co.,
12 SE.2d 285, 218 NC 697
Ohio—Halkias v Wilkoff Co., 47 N
E2d 199, 141 Ohio St 139
Okl—Rabinovitz v Taylor, 106 P2d
827, 188 Okl 84
Pa—Messner v. Komo Chemical Co.,
19 Pa Dist & Co 889—Gregoris v
Wolfe, Com.Pl., 55 Dauph Co 273—
Kittila v. Standard Stoker Co.,
Com.Pl., 28 Erie Co 74
RI—Haining v. Turner Centre Sys-
tem, 149 A. 376, 50 RI 481
SD—Morman v Wagner, 262 NW
78, 83 SD 547
39 C.J. p 1365 note 40.

- (2) Relationship of master and servant
- (3) Scope of employment
- (4) Negligence and contributory negli-
gence
- (5) Relationship of employer and inde-
pendent contractor

(1) In General

Where the evidence is in conflict or more than one inference can be drawn therefrom, the liability of the master for injury caused by his servant is to be deter-
mined by the jury.

General rules relating to questions of law and fact in civil actions ordinarily are applicable in ac-
tions against a master for injuries resulting from
the tortious acts of his servants.³¹ Accordingly,
questions of fact are for the jury and questions of
law are for the court.³² Where the facts present
no conflict and furnish the basis for but a single in-
ference and that favorable to the master, his free-
dom from liability is to be determined by the court
as a question of law.³³ On the other hand, where
there is a conflict in the evidence, or more than one
inference can be drawn from it, the liability of the
master is to be determined by the jury.³⁴

Where the evidence is conflicting or more than

28. Md—Dearholt Motor Sales Co
v Merritt, 105 A 316, 133 Md 323
29. Cal—Hammel v Keehn, 63 P2d
1165, 18 Cal App 2d 387
30. Okl—Kansas City, M & O. R.
Co. v Leuch, 158 P 1146, 60 Okl
18.
31. W Va.—Hicks v. Southern Ohio
Quarries Co., 182 SE 874, 116 W
Va 748
Liability of master for injury caused
by servant generally see supra §
555 et seq
32. Md—Great Atlantic & Pacific
Tea Co v Noppenberger, 189 A.
434, 171 Md. 378
33. Ark—Oklahoma Gas & Electric
Co. v Hofrichter, 116 SW2d 599,
196 Ark 1
DC—Argonne Apartment House Co.
v Garrison, 42 F2d 605, 59 App
DC 370
Mo—Corpus Juris quoted in Schide
v Gottschick, 43 SW2d 777, 781,
329 Mo. 64
NC—Hudson v Gulf Oil Co., 2 SE
2d 26, 215 NC 422
SD—Morman v. Wagner, 262 NW
78, 83 SD 547
39 C.J. p 1361 note 4
34. Ark—Oklahoma Gas & Electric
Co v Hofrichter, 116 S.W.2d 599,
196 Ark 1.
DC—Maher v Harriman, 79 F2d
408, 65 App DC 52
Ill—Metsler v. Layton, 25 NE2d 60,
278 Ill 88.

one inference can be drawn therefrom, it is for the jury to determine whether the instrumentality which caused the injury was a dangerous instrumentality, within the rule holding the master liable for injuries caused by his servant in the use thereof,³⁵ whether the master knew or ought to have known of the carelessness or incompetency of the servant, and whether he might have known by the exercise of diligence,³⁶ whether the employer or contractor had control of the building operations,³⁷ the cause of the injury,³⁸ the ownership of the instrumentality causing the injury,³⁹ the incompetency of the servant,⁴⁰ ratification by the master of the servant's act;⁴¹ and the amount of damages suffered.⁴²

Joint liability of master and servant. In an action against the employer and his servant where there is no testimony on which the servant can be held liable and there is no liability asserted except that growing

out of the doctrine of respondeat superior, the liability of the master as a matter of fact and of law is for the court.⁴³

(2) Relationship of Master and Servant

The question whether the relationship of master and servant existed at the time of the injury is one of fact for the jury where the evidence is conflicting or more than one inference can be drawn from the evidence.

The question whether the relationship of master and servant existed at the time of the injury complained of is one of mixed law and fact.⁴⁴ Where the evidence is conflicting or more than one inference can be drawn from the evidence, it is a question of fact for the jury, or the judge sitting without a jury, to determine whether the relationship of master and servant existed at the time of the injury complained of.⁴⁵

On the other hand, the existence of the relation

Kan—Kiser v Skelly Oil Co, 18 P 2d 181, 186 Kan 812

Ky—Caskey v Nussbaum, 18 SW 2d 493, 227 Ky 479

Md—Ericsson Line v Hawkins, 198 A 429, 174 Md 223—State, for Use of Peach, v Cavey, 198 A 303, 173 Md 445

Mass—O'Brien v Freeman, 11 NE 2d 582, 299 Mass 20

Mich—Goldsberry v Kamachos, 239 NW 513, 255 Mich 647

Mo—Elgin v Kroger Grocery & Baking Co, 206 SW 2d 501—Arnold v May Department Stores Co, 85 SW 2d 748, 337 Mo 727—Daugherty v Spuck Iron & Foundry Co, App, 175 SW 2d 45—Ryan v Standard Oil Co of Indiana, App, 144 SW 2d 170—Wright v Crown Drug Co, App, 90 SW 2d 145—Daniel v Artesian Ice & Cold Storage Co, App, 45 SW 2d 548

Mont—Ellinghouse v Ajax Livestock Co, 162 P 481, 51 Mont 275, L R A 1916D 886

NY—Hagen v American Machine & Foundry Co, 276 N.Y.S. 657, 243 App Div 625

NC—West v F W Woolworth Co, 1 SE 2d 546, 215 NC 211

Ok—Empire Oil & Refining Co. v Fields, 78 P 2d 164, 181 Okl 281

RI—Whipple v. Marwell, 198 A 665, reargument denied 1 A 2d 97, 61 R I 449

Tex—Newton v. Rhoads Bros., Com App, 24 SW 2d 378

Instrumentalities under control of defendant

(1) Where defendant controlled process and instrumentalities employed in giving permanent wave, very slight proof of negligence was sufficient to take case to jury—Lesick v Proctor, 150 A 618, 300 Pa 347—Nallon v. Rothstein, Pa.Com Pl, 85 Luz.Leg Reg. 83

(2) Action by beauty parlor patron for injuries received in course of beauty treatment by cosmetologist employed by proprietor was properly submitted under the res ipsa loquitur rule, where all instrumentalities used in connection with the treatment were under control of cosmetologist, and injury would not ordinarily follow from the treatment—Pearson v Butts, 276 NW 65, 224 Iowa 376.

35. Miss—Barmore v Vicksburg, S & P R Co, 38 So 210, 85 Miss 426, 70 L R A 627

36. Colo—Arkansas Valley R. Light & Power Co v. Ballinger, 178 P 566, 65 Colo 548

Ill—Calumet Electric St R Co v Peters, 88 Ill App 112

Servant with vicious propensities
Master's negligence in retaining servant with knowledge of vicious propensities as bearing on liability for assault and battery was for jury—Jones v Alden Mills, 116 So 438, 150 Miss 90

37. NY—Peard v Karst, 10 N.Y.S. 463, 56 Hun 649.

38. US—Henry W Cross Co v Burns, CCA Ark, 81 F 2d 856—Western Union Telegraph Co v Topping, CCA N.J., 66 F 2d 1006 Ala—Alabama Power Co v. Pierre, 183 So 665, 236 Ala 521

Conn—Antinozzi v A. Vincent Pepe Co, 166 A 392, 117 Conn 11.

Ill—Heide v Lincoln Furniture & Rug, Inc, 4 NE 2d 808, 287 Ill App 616

Md—Deck v Baltimore & O. R Co, 59 A 650, 100 Md 168

Miss—Lee County Gin Co v Middlebrooks, 187 So 108, 161 Miss 422

Mo—Givens v. Spalding Cloak Co, 63 SW 2d 819, 228 Mo App. 169

Pa—Gudfelder v Pittsburgh, C, C & St L Ry Co, 57 A 70, 207 Pa 629

39 CJ p 1361 note 12

39. Ill—Page v Brmk's Chicago City Express Co, 192 Ill App 389

40. Ill—Calumet Electric St R Co v Peters, 88 Ill App 112.

41. Ark—Ice Service Co v Forbess, 21 SW 2d 411, 180 Ark 253

Wis—Manol v Moskin Credit Clothing Co, 338 NW 579, 203 Wis 47—Cobb v Simon, 97 NW 276, 119 Wis 597, 100 Am SR 909.

42. Ala—Cleaney v Parker, 51 So 951, 167 Ala 134, 140 Am SR 21

39 CJ p 1362 note 17

43. Ark—Stanton v Arkansas Democrat Co, 108 SW 2d 584, 194 Ark 135

Joint liability of master and servant

see supra § 579

44. Ill—Merlo v Public Service Co of Northern Illinois, 45 NE 2d 665, 381 Ill 300, followed in 45 NE 2d 677, 381 Ill 386

Mo—Burgess v Garvin, 272 SW 108, 219 Mo App. 162

NY—Hagen v American Machine & Foundry Co, 276 N.Y.S. 657, 243 App Div 625

45. US—S S Kresge Co v Dunne, CCA Mass, 77 F 2d 755—De Bord v Proctor & Gamble Distributing Co, D.C. Ca., 58 F.Supp 157, affirmed, CCA, 146 F 2d 54—Philips v Davidson, D.C.S.C., 24 F Supp 184

Ark—Arkansas Fuel Oil Co v Scalotta, 140 SW 2d 684, 200 Ark 645

—Mississippi River Fuel Corporation v Young, 67 SW 2d 581, 188 Ark 575—Ice Service Co v. Forbess, 21 SW 2d 411, 180 Ark 253

Cal—Burlingham v Gray, 187 P 2d 9, 22 Cal 2d 87—Robinson v George, 105 P 2d 914, 16 Cal 2d 238

—King v. Emerson, 288 P. 1099,

is a question of law for the court where there is no conflict in the evidence relating to the question and but one inference may be drawn therefrom.⁴⁶ It is usually a question of law where the contract claimed to have established the relation is in writing.⁴⁷

Servant of general or special employer. The question whether a lent or hired servant was at the time of the injury complained of a servant of his general employer or a servant of the borrower or hirer ordinarily is a question of fact for the jury.⁴⁸

110 Cal App 414, adopted 294 P 768, 110 Cal App 414

DC—Western Union Telegraph Co v Scrivener, 18 F 2d 162, 57 App DC 120

Ill—Ryan v. Associates Inv Co of Illinois, 18 NE 2d 47, 297 Ill App 544—Watson v Trinz, 274 Ill App 379

Kan—Houdek v Gloyd, 107 P 2d 751, 152 Kan. 789

Ky—Greene v Pennington, 108 SW 2d 1018, 270 Ky 28

Md—Baltimore Transit Co v State, to Use of Schrieffer, 40 A 2d 678, 184 Md 250

Mass—Altoonian v Muldonian, 177 NE 870, 277 Mass 53.

Minn—Hector Const Co v Butler, 260 NW 496, 194 Minn 310.

Mo—Becker v Aschen, 131 SW 2d 533, 844 Mo 1107—Corpus Juris

quoted in Schide v Gottschick, 43 SW 2d 777, 781, 329 Mo 64—Moon

v St Louis Transit Co, 141 SW 870, 237 Mo 425, Ann Cas 1918A

183—Young v Sinclair Refining Co, App, 92 SW 2d 995—Guthrie

v Albert Wenzlick Real Estate Co, App, 54 SW 2d 801—Ward v

Scott County Milling Co, App, 47 SW 2d 350—Burgess v Garvin,

272 SW 108, 219 Mo App 162.

NH—McCarthy v Souther, 137 A. 445, 83 NH 29

NJ—Vreeland v Wilkinson Gaddis & Co, 29 A 2d 387, 129 NJ Law

283—Ostrowski v Zolmerowicz, 16 A 2d 808, 125 NJ Law 516—Warner

v Davis, 159 A 817, 10 NJ Misc 539, affirmed 166 A. 164, 110 NJ

Law 458

NY—Kutner v Weiner, 45 NYS 2d 35, 266 App Div 1023

NC—Robinson v McAlhaney, 198 S E 647, 214 NC 180

Ohio—Manchester v. Youngstown Sheet & Tube Co, App, 46 NE 2d

780—Ford v Commercial Motor Freight, 14 NE 2d 854, 57 Ohio

App 384

Pa—Joseph v. United Workers Ass'n, 23 A 2d 470, 343 Pa 636

SC—Mims v Bennett, 158 SE 124, 160 SC 39, 78 ALR 360—Williamson v. Pike, 138 SE 831, 140

SC 376.

Tenn—Western Union Telegraph Co v. Bender, 148 SW 2d 44, 24 Tenn

App 643

Tex—Moreman v. Armour & Co, Civ App, 65 SW 2d 334, error refused

—Solo Serve Co v Howell, Civ App, 85 SW 2d 474, error refused

—Harvey v Meadowlake Milk Products Co, Civ App, 27 SW 2d 299.

Utah—Kendall v Fordham, 9 P 2d 183, 79 Utah 256

39 C J p 1362 note 18, p 1359 note 56

Relationship created by employment contract as question of law or fact generally see supra § 13

Substantial evidence of reservation of right to control manner of doing

work presents jury question as to relationship of master and servant.—

Ice Service Co v Forbess, 21 SW 2d 411, 180 Ark 253

Where there is evidence that lease contract is executed as cover-up

agreement, to conceal the true master and servant relationship existing

between parties to the contract, question of relationship between parties

is for jury—Arkansas Fuel Oil Co v Scaletta, 140 SW 2d 684, 200

Ark 645

Whether employee is servant of contractor or contractor is a question

for the jury where the evidence is conflicting or more than one inference

may be drawn therefrom—Black Springs Lumber Co v Palmer,

96 SW 2d 469, 192 Ark 1032—39 C J p 1362 note 18 [a]

Whether person employed by servant to assist him was a servant of

the master was question of fact for jury or for judge sitting without a

jury.

NJ—Kosick v Standard Properties, 177 A 428, 13 NJ Misc 219

Okl—Ada-Konawa Bridge Co. v. Cargo, 21 P 2d 1, 163 Okl 122

46. US—De Bord v Proctor & Gamble Distributing Co, D C Ga,

58 F Supp 157, affirmed, CCA, 146 F 2d 54

Cal—Burlingham v Gray, 137 P 2d 9, 22 Cal 2d 87.

Idaho—Whalen v Zinn, 96 P 2d 434, 60 Idaho 722

Ill—Watson v Trinz, 274 Ill App. 379.

NY—Haykl v Drees, 286 NYS 38, 247 App Div 90, motion granted

Witaszek v Drees, 4 NE 2d 745, 272 NY 576, and Haykl v Drees,

4 NE 2d 745, 272 NY 577

Ohio—Halkias v Wilkoff Co, 47 N E 2d 199, 141 Ohio St 139—Kind-

berg v. C I T Corporation, App, 41 NE 2d 1021—Lashure v East

Ohio Gas Co, 165 NE 305, 81 Ohio App 161, affirmed 162 NE.

41, 119 Ohio St 9

Pa—Joseph v. United Workers Ass'n, 23 A 2d 470, 343 Pa 636

Tex—Texas Co v Wheat, 168 SW. 2d 632, 140 Tex 468

Va—Costan v. Smith, 180 SE 285, 143 Va. 348

W Va—Rice v. Builders Material Co, 2 SE 2d 527, 130 W Va 585

39 C J p 1362 note 19

Evidence held insufficient To warrant or require submission

to jury

Cal—Pilger v City of Paris Dry Goods Co, 261 P 328, 86 Cal App

277.

SD—Morman v Wagner, 262 NW. 78, 63 SD 547

Wash—Handley v Anacortes Ice Co, 105 P 2d 505, 5 Wash 2d 384

Wyo—Montgomery Ward & Co v Arbogast, 81 P 2d 885, 53 Wyo 275

Where employment contract is oral, there is no material conflict in

evidence, terms of contract are not ambiguous or disputed and only one

inference can be drawn, question of whether master and servant relation-

ship exists is question of law for court—Houdek v Gloyd, 107 P 2d

751, 152 Kan 789

Whether person employed by servant to assist him was a servant of

the master was improperly submitted to jury—Ford v Commercial

Motor Freight, 14 NE 2d 354, 57 Ohio App 384

47. Cal—Batt v San Diego Sun Pub Co, 69 P 2d 216, 21 Cal App 2d

429

39 C J. p 1362 note 20

48. US—Bertino v Marion Steam Shovel Co, CCA Mo, 64 F 2d 409

—The H C Jefferson, D C Pa, 69 F Supp. 650.

Cal.—Valdick v Le Clair, 289 P 673, 106 Cal App. 489

Ill.—Meyer v. All-Electric Bakery, Inc, 271 Ill App 522

Iowa—Anderson v Abramson, 18 N W 2d 315, 234 Iowa 792—Kanipe v

Grundy County Rural Electric Co-op, 300 NW 662, 231 Iowa 187

Md—Baltimore Transit Co. v State, to Use of Schrieffer, 40 A 2d 678,

184 Md 250

Neb—Mansfield v Andrew Murphy & Son, 298 N.W 749, 139 Neb. 793

NJ—Pederson v. Edward Shoe Corporation, 142 A 13, 104 NJ Law

566

NY—Shaffer v Northeast Co, 21 N YS 2d 13, 259 App Div 1053, reargument denied 23 NYS 2d 928, 260

App Div 810.

Okl—City of Tulsa v Randall, 52 P 2d 33, 174 Okl 630

39 C J p 1362 note 18 [d].

Always question of fact

Ariz—Lee Moor Contracting Co. v. Blanton, 65 P.2d 85, 49 Ariz 130.

Where it is not entirely clear who was the controlling master of the borrowed or hired employee, and different inferences in that respect can fairly be drawn from the evidence, it is for the jury, and not the court, to determine the question.⁴⁹ Where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court.⁵⁰

(3) Scope of Employment

The question whether a servant was acting within

the scope of his employment at the time of the injury complained of ordinarily is one of fact.

The question whether a servant was acting within the scope of his employment at the time of the injury complained of may be a question of fact or of law.⁵¹ Where the evidence is conflicting or more than one inference can be drawn therefrom, it is for the jury to determine, under appropriate instructions from the court, whether the servant was acting within the scope of his employment at the time of the injury complained of.⁵² Whether the presumption raised by the evidence that the servant was acting

49. Pa.—Kissell v Motor Age Transit Lines, 53 A 2d 593, 357 Pa 204—Sudekum v Animal Rescue League of Pittsburgh, 45 A 2d 59, 353 Pa 408—Dunmire v Fitzgerald, 37 A 2d 596, 349 Pa 511

50. Md.—Baltimore Transit Co v State, to Use of Schrieffer, 40 A 2d 678, 184 Md 250

Neb.—Mansfield v Andrew Murphy & Son, 298 NW 749, 139 Neb 793

51. Me.—Stevens v Frost, 32 A 2d 164, 140 Me 1

52. US.—Hubbard v Lock Joint Pipe Co, D C Mo, 70 F Supp 589

Ala.—Joubert & Goslin Machine & Foundry Co v Atchley, 117 So 640, 218 Ala 105

Cal.—Fields v Sanders, 180 P 2d 684, 29 Cal 2d 834—McChristian v Popkin, 171 P 2d 85, 75 Cal App 2d 249

—Fields v Sanders, App, 170 P 2d 490—Cragun v Krossoff, 114 P 2d 431, 45 Cal App 2d 480—O'Shea v Pacific Gas & Electric Co, 62 P 2d 1066, 18 Cal App 2d 32—Barty v Collins, 292 P 979, 109 Cal App 34—May v Farrell, 271 P 789, 94 Cal App 703

Conn.—Rappaport v Rosen Film Delivery System, 18 A 2d 362, 127 Conn 524—Neville v Adorno, 195 A 613, 128 Conn 395—Antinozzi v A. Vincent Pepe Co, 166 A 393, 117 Conn 11—Hickson v W W Walker Co, 149 A 400, 110 Conn 604, 68 A L R 1044—Werebeychick v Morris Land & Development Co, 142 A 739, 108 Conn 226—De Nezzo v General Baking Co, 138 A 127, 106 Conn 396

DC.—Grimes v B F Saul Co, 47 F 2d 409, 60 App D C 47

Ga.—Parker v Smith, 18 S E 2d 559, 46 Ga App 567—Rhodes v Industrial Finance Corporation, 13 S E 2d 883, 64 Ga App 549—Broome v Primrose Tapestry Mills, 200 S E 506, 59 Ga App 70—Plumer v Southern Bell Telephone & Telegraph Co, 199 S E 353, 58 Ga App 622—Jump v Anderson, 197 S E 644, 58 Ga App 126—American Sec Co v Cook, 176 S E 798, 49 Ga App 723—Corpus Juris cited in

Gomez v Great Atlantic & Pacific Tea Co, 172 S E 750, 752, 48 Ga

App 398—Personal Finance Co of Macon v Whiting, 173 S E 111, 48 Ga App 154—Atlanta Hub Co v Jones, 171 S E 470, 47 Ga App 778

—Friedman v Martin, 160 S E 126, 43 Ga App 677—Great Atlantic & Pacific Tea Co v Dowling, 159 S E 609, 43 Ga App 549.

Idaho.—Scrivner v Boise Payette Lumber Co, 268 P 19, 46 Idaho 334

Ill.—Metzler v Layton, 19 NE 2d 180, 298 Ill App 529, affirmed 25 NE 2d 60, 373 Ill 88—Bandosz v A Daigger & Co, 255 Ill App 494

—Kavale v Morton Salt Co, 242 Ill App 205, affirmed 160 NE 753, 329 Ill 445

Iowa.—Corpus Juris cited in Hoblit v Schnepf, 296 NW 210, 211, 229 Iowa 1085—Corpus Juris cited in

Heints v Iowa Packing Co, 268 NW 607, 612, 222 Iowa 517

Ky.—Hayes v Berea College, 136 S W 2d 563, 281 Ky 492

Md.—Julian Goldman Stores v Bugg, 143 A 589, 156 Md 36—Jones v Sherwood Distilling Co, 132 A 278, 150 Md 24

Mass.—Dennehy v Jordan Marsh Co, 71 NE 2d 758—Lord v Lowell Institution for Savings, 28 NE 2d 101, 304 Mass 212—Denny v Riverbank Court Hotel Co, 184 NE 452, 282 Mass 176—Altoonian v Muldonian, 177 NE 830, 277 Mass 53

Mich.—Hale v Cole, 217 NW 898, 241 Mich 624

Miss.—Corpus Juris cited in Loper v Yazoo & M V R Co, 145 So 743, 745, 166 Miss 79

Mo.—Simmons v Kroger Grocery & Baking Co, 104 SW 2d 857, 340 Mo 1118—Brunk v Hamilton-Brown Shoe Co, 66 SW 2d 903, 334 Mo 517—State ex rel Gosselin v Trimble, 41 SW 2d 801, 328 Mo 760—Nolan v Joplin Transfer & Storage Co, App, 308 SW 2d 740

—Daugherty v Spuck Iron & Foundry Co, App, 175 SW 2d 45—Dovino v General American Life Ins Co, App, 137 SW 2d 732—Beitling v S S. Kresge Co, 116 SW 2d 522, 232 Mo App 1195—Chisholm v Berg, App, 78 SW 2d 486—Doyle v Scott's Cleaning Co,

31 SW 2d 242, 224 Mo App 1168—Klusman v Harper, 298 SW 121, 221 Mo App 1110—Harvey v O'Connor, App, 284 SW 171.

Mont.—Kornec v Mike Horse Mining & Milling Co, 180 P 2d 252

Neb.—Vanderlippe v Midwest Studios, 289 NW 341, 137 Neb 289—Peterson v Brinn & Jensen Co, 280 NW 171, 134 Neb 909

NJ.—Smith v Bosco, 19 A 2d 637, 126 NJ Law 452—Henion v D Fullerton & Co, 179 A 309, 115 N J Law 366—Fullmer v Scott-Powell Dairies, 166 A 129, 111 NJ Law 44—Warner v Davis, 159 A 817, 10 NJ Misc 539, affirmed 166 A 164, 110 NJ Law 458—Cleaves v Yeakel, 133 A 393, 102 NJ Law 621—Kinsey v Butts, 131 A 686, 4 NJ Misc 100, affirmed 134 A 918, 103 NJ Law 197

NY.—Delisa v Arthur F Schmidt, Inc, 34 NE 2d 336, 285 NY 314—Kutner v Weiner, 45 NYS 2d 35, 266 App Div 1023—Biniewski v City of New York, 44 NYS 2d 543, 287 App Div 108—Ford v Grand Union Co, 270 NYS 163, 240 App Div 294—Bussing v Lowell Film Productions, 253 NYS 719, 233 App Div 471 affirmed 182 NE 194, 259 NY 593—Galletta v Taylor-Fichter Steel Const Co, 249 NYS 581, 232 App Div 256—Policastro v Tidewater Paper Mills Co, 212 NYS 901, 215 App Div 692—Denton v Buffalo Pipe Line Corporation, 39 NYS 2d 83, leave to appeal denied 16 NYS 2d 698, 258 App Div 860

NC.—Robinson v McAlhane, 198 S E 647, 214 NC 180—Colvin v Kitchen Lumber Co, 153 S E 394, 198 NC 776.

Ohio.—Biddle v New York Cent R Co, 182 NE 601, 48 Ohio App 6—Great Atlantic & Pacific Tea Co v Davis, 167 NE 613, 32 Ohio App 100

Okla.—Small v Shull, 124 P 2d 381, 190 Okl 418

Pa.—Davis v Tredwell, 82 A 2d 411, 347 Pa 341—Orr v William J Burns International Detective Agency, 12 A 2d 25, 337 Pa 587—Schroeder v Gulf Refining Co of Port Arthur, Tex, 150 A 663, 300

31 SW 2d 242, 224 Mo App 1168—Klusman v Harper, 298 SW 121, 221 Mo App 1110—Harvey v O'Connor, App, 284 SW 171.

Mont.—Kornec v Mike Horse Mining & Milling Co, 180 P 2d 252

Neb.—Vanderlippe v Midwest Studios, 289 NW 341, 137 Neb 289—Peterson v Brinn & Jensen Co, 280 NW 171, 134 Neb 909

NJ.—Smith v Bosco, 19 A 2d 637, 126 NJ Law 452—Henion v D Fullerton & Co, 179 A 309, 115 N J Law 366—Fullmer v Scott-Powell Dairies, 166 A 129, 111 NJ Law 44—Warner v Davis, 159 A 817, 10 NJ Misc 539, affirmed 166 A 164, 110 NJ Law 458—Cleaves v Yeakel, 133 A 393, 102 NJ Law 621—Kinsey v Butts, 131 A 686, 4 NJ Misc 100, affirmed 134 A 918, 103 NJ Law 197

NY.—Delisa v Arthur F Schmidt, Inc, 34 NE 2d 336, 285 NY 314—Kutner v Weiner, 45 NYS 2d 35, 266 App Div 1023—Biniewski v City of New York, 44 NYS 2d 543, 287 App Div 108—Ford v Grand Union Co, 270 NYS 163, 240 App Div 294—Bussing v Lowell Film Productions, 253 NYS 719, 233 App Div 471 affirmed 182 NE 194, 259 NY 593—Galletta v Taylor-Fichter Steel Const Co, 249 NYS 581, 232 App Div 256—Policastro v Tidewater Paper Mills Co, 212 NYS 901, 215 App Div 692—Denton v Buffalo Pipe Line Corporation, 39 NYS 2d 83, leave to appeal denied 16 NYS 2d 698, 258 App Div 860

NC.—Robinson v McAlhane, 198 S E 647, 214 NC 180—Colvin v Kitchen Lumber Co, 153 S E 394, 198 NC 776.

Ohio.—Biddle v New York Cent R Co, 182 NE 601, 48 Ohio App 6—Great Atlantic & Pacific Tea Co v Davis, 167 NE 613, 32 Ohio App 100

Okla.—Small v Shull, 124 P 2d 381, 190 Okl 418

Pa.—Davis v Tredwell, 82 A 2d 411, 347 Pa 341—Orr v William J Burns International Detective Agency, 12 A 2d 25, 337 Pa 587—Schroeder v Gulf Refining Co of Port Arthur, Tex, 150 A 663, 300

31 SW 2d 242, 224 Mo App 1168—Klusman v Harper, 298 SW 121, 221 Mo App 1110—Harvey v O'Connor, App, 284 SW 171.

Mont.—Kornec v Mike Horse Mining & Milling Co, 180 P 2d 252

Neb.—Vanderlippe v Midwest Studios, 289 NW 341, 137 Neb 289—Peterson v Brinn & Jensen Co, 280 NW 171, 134 Neb 909

NJ.—Smith v Bosco, 19 A 2d 637, 126 NJ Law 452—Henion v D Fullerton & Co, 179 A 309, 115 N J Law 366—Fullmer v Scott-Powell Dairies, 166 A 129, 111 NJ Law 44—Warner v Davis, 159 A 817, 10 NJ Misc 539, affirmed 166 A 164, 110 NJ Law 458—Cleaves v Yeakel, 133 A 393, 102 NJ Law 621—Kinsey v Butts, 131 A 686, 4 NJ Misc 100, affirmed 134 A 918, 103 NJ Law 197

NY.—Delisa v Arthur F Schmidt, Inc, 34 NE 2d 336, 285 NY 314—Kutner v Weiner, 45 NYS 2d 35, 266 App Div 1023—Biniewski v City of New York, 44 NYS 2d 543, 287 App Div 108—Ford v Grand Union Co, 270 NYS 163, 240 App Div 294—Bussing v Lowell Film Productions, 253 NYS 719, 233 App Div 471 affirmed 182 NE 194, 259 NY 593—Galletta v Taylor-Fichter Steel Const Co, 249 NYS 581, 232 App Div 256—Policastro v Tidewater Paper Mills Co, 212 NYS 901, 215 App Div 692—Denton v Buffalo Pipe Line Corporation, 39 NYS 2d 83, leave to appeal denied 16 NYS 2d 698, 258 App Div 860

NC.—Robinson v McAlhane, 198 S E 647, 214 NC 180—Colvin v Kitchen Lumber Co, 153 S E 394, 198 NC 776.

Ohio.—Biddle v New York Cent R Co, 182 NE 601, 48 Ohio App 6—Great Atlantic & Pacific Tea Co v Davis, 167 NE 613, 32 Ohio App 100

Okla.—Small v Shull, 124 P 2d 381, 190 Okl 418

Pa.—Davis v Tredwell, 82 A 2d 411, 347 Pa 341—Orr v William J Burns International Detective Agency, 12 A 2d 25, 337 Pa 587—Schroeder v Gulf Refining Co of Port Arthur, Tex, 150 A 663, 300

31 SW 2d 242, 224 Mo App 1168—Klusman v Harper, 298 SW 121, 221 Mo App 1110—Harvey v O'Connor, App, 284 SW 171.

Mont.—Kornec v Mike Horse Mining & Milling Co, 180 P 2d 252

Neb.—Vanderlippe v Midwest Studios, 289 NW 341, 137 Neb 289—Peterson v Brinn & Jensen Co, 280 NW 171, 134 Neb 909

NJ.—Smith v Bosco, 19 A 2d 637, 126 NJ Law 452—Henion v D Fullerton & Co, 179 A 309, 115 N J Law 366—Fullmer v Scott-Powell Dairies, 166 A 129, 111 NJ Law 44—Warner v Davis, 159 A 817, 10 NJ Misc 539, affirmed 166 A 164, 110 NJ Law 458—Cleaves v Yeakel, 133 A 393, 102 NJ Law 621—Kinsey v Butts, 131 A 686, 4 NJ Misc 100, affirmed 134 A 918, 103 NJ Law 197

NY.—Delisa v Arthur F Schmidt, Inc, 34 NE 2d 336, 285 NY 314—Kutner v Weiner, 45 NYS 2d 35, 266 App Div 1023—Biniewski v City of New York, 44 NYS 2d 543, 287 App Div 108—Ford v Grand Union Co, 270 NYS 163, 240 App Div 294—Bussing v Lowell Film Productions, 253 NYS 719, 233 App Div 471 affirmed 182 NE 194, 259 NY 593—Galletta v Taylor-Fichter Steel Const Co, 249 NYS 581, 232 App Div 256—Policastro v Tidewater Paper Mills Co, 212 NYS 901, 215 App Div 692—Denton v Buffalo Pipe Line Corporation, 39 NYS 2d 83, leave to appeal denied 16 NYS 2d 698, 258 App Div 860

NC.—Robinson v McAlhane, 198 S E 647, 214 NC 180—Colvin v Kitchen Lumber Co, 153 S E 394, 198 NC 776.

Ohio.—Biddle v New York Cent R Co, 182 NE 601, 48 Ohio App 6—Great Atlantic & Pacific Tea Co v Davis, 167 NE 613, 32 Ohio App 100

Okla.—Small v Shull, 124 P 2d 381, 190 Okl 418

Pa.—Davis v Tredwell, 82 A 2d 411, 347 Pa 341—Orr v William J Burns International Detective Agency, 12 A 2d 25, 337 Pa 587—Schroeder v Gulf Refining Co of Port Arthur, Tex, 150 A 663, 300

within the scope of his employment has been suc- | cessfully rebutted by testimony is usually a jury

Pa 397—Allen v Posternock, 163 A 336, 107 Pa.Super 332—Rice v Gibson, 94 Pa.Super 511—Sebastianelli v Cleland-Simpson Co, Com Pl, 35 Berks Co 453, affirmed 31 A 2d 570, 153 Pa.Super 203—Witherow v A F Rees, Inc, Com Pl, 52 Dauph Co 439.

RI—Haining v Turner Centre System, 149 A 376, 50 RI 481

SC—Plovden v Wilson, 195 SE 847, 186 SC 285—Hancock v Aiken Mills, 185 SE 188, 180 SC 93

Tenn—Home Stores v Parker, 186 SW 2d 619, 179 Tenn 373—Cole v Standard Oil Co of N J, App, 197 SW 2d 13

Tex—Lowry v Anderson-Berney Bldg Co, 161 SW 2d 459, 139 Tex 29—West Texas Utilities Co v. Wills, Civ App, 164 SW 2d 405—National Life & Accident Ins. Co v Ringo, Civ App, 187 SW 2d 828, error refused—Houston Packing Co v Benson, Civ App, 114 SW 2d 429—Pratley v Sherwin-Williams Co of Texas, Civ App, 56 SW 2d 510

Va—Western Union Telegraph Co v Phelps, 169 SE 574, 160 Va 674—Thalhimer Bros v Shaw, 159 SE 87, 156 Va 863

Wash—Corpus Juris cited in Rice v Garl, 98 P 2d 301, 305, 2 Wash 2d 403

Wis—Mandel v Byram, 211 NW 145, 191 Wis 446

39 C J p 1363 notes 21, 22.

Evidence held sufficient

To warrant submission of question to jury

Ala—Hill Grocery Co v Carroll, 136 So 789, 233 Ala 376—Wheeler Motor Co v Stringer, 123 So 10, 232 Ala 494

Ky—Greene v Pennington, 108 S W 2d 1013, 270 Ky 28

Mo—Daniel v Artesian Ice & Cold Storage Co, App, 45 SW 2d 548—Vasaska v Sneloff Packing Co, App, 287 SW 827.

NY—McLoughlin v New York Edison Co, 169 NE 277, 253 N.Y. 303.

SC—Lazar v Great Atlantic & Pacific Tea Co, 14 SE 2d 560, 197 SC 74—Watson v American Equitable Assur Co, 12 SE 2d 30, 195 SC 463.

39 C J p 1360 note 60.

Servant as special officer

Whether servant who is also special officer was acting in capacity of servant or officer is ordinarily question for jury

Conn—Krowka v. Colt Patent Fire Arm Mfg Co, 8 A 3d 5, 125 Conn 705.

Ga—Massachusetts Cotton Mills v Hawkins, 139 SE 52, 164 Ga. 594, answers conformed to 139 SE 429, 37 Ga.App. 198.

Me—Neallus v Hutchinson Amusement Co, 139 A 671, 126 Me 469, 55 A L R 1191

Mich—Wiley v Pere Marquette Ry Co, 209 NW 59, 235 Mich 279

Mo—Priest v Missouri Pac R R, App, 77 SW 2d 120

NY—Eniewski v City of New York, 44 NYS 2d 543, 267 App Div 108

Okla—Empire Oil & Refining Co v Fields, 73 P 2d 164, 181 Okl 331

Pa—Filipovich v Pittsburgh Coal Co, 172 A 136, 314 Pa 585

Tex—Brady v Gulf, C & S F Ry Co, Civ App, 71 SW 2d 303, error refused

W Va—Thompson v Norfolk & W. Ry Co, 182 SE 880, 116 W Va 705

39 C J p 1363 note 22 [e].

Whenever reasonable minds may differ as to whether servant was at certain time involved wholly or partly in performance of his master's business, or within scope of his employment, question is one for jury

—Carter v Bessey, 93 P 2d 490, 97 Utah 427

Whether servant's tort of wanton and malicious character was committed within scope of employment is question for jury—Thompson-Starratt Co v Heinold, CCA Pa, 60 F 2d 380

Assault and battery

US—Western Union Telegraph Co v Hill, CCA Ala, 67 F 2d 487—Thompson-Starratt Co v Heinold, CCA Pa, 60 F 2d 380

Ala—Honeycutt v Louis Pimtz Dry Goods Co, 180 So. 91, 235 Ala 507—Alabama Fuel & Iron Co v Powaski, 166 So 782, 232 Ala 66

Ark—Robb v Woosley, 295 SW 13, 175 Ark 43—Missouri Pac. R Co v Gregory, 238 SW 54, 152 Ark 335

Cal—Sullivan v People's Ice Corporation, 268 P. 934, 92 Cal App 740

Conn—Rappaport v Rosen Film Delivery System, 18 A 3d 362, 127 Conn 524

DC—Dull v Johnson, 107 F 2d 669, 71 App DC 139

Ga—Crawford v Exposition Cotton Mills, 11 SE 2d 234, 63 Ga App 458—Schwartz v Nunnally Co, 5 SE 2d 91, 60 Ga App 858—Friedman v Martin, 160 SE 126, 43 Ga App 677—Furney v Tower, 181 S E 177, 34 Ga App 739, affirmed 137 SE 850, 36 Ga.App 698—Seaboard Air Line Ry v Arrant, 87 SE 714, 17 Ga App 489.

Ill—Heide v Lincoln Furniture & Rug, Inc, 4 NE 2d 808, 287 Ill App 416—Basick v Illinois Cent. R Co, 201 Ill App 63

Ind—Junior Toy Corporation v Novak, 21 NE 2d 445, 107 Ind App 427—Matthews v. New York, C

& St L R Co, 161 NE 653, 93 Ind App 618

Me—Neallus v Hutchinson Amusement Co, 139 A 671, 126 Me 469, 55 A L R 1191

Md—McCrory Stores Corporation v. Satchell, 129 A 348, 148 Md 279

Mass—Schultz v Purcell's, Inc, 70 NE 2d 526, 330 Mass 579

Mo—Simmons v Kroger Grocery & Baking Co, 104 SW 2d 357, 340 Mo 1118—Knight v Western Auto Supply Co, App, 193 SW 2d 771—Ragsdale v Riverside Jockey Club, App, 106 SW 2d 948—Mason v Down Town Garage Co, 53 SW 2d 409, 237 Mo App 297—Scott v St Louis-San Francisco Ry Co, App, 52 SW 2d 459—Gosselin v Yellow Cab Co, App, 29 SW 2d 186, certiorari quashed State ex rel Gosselin v Trimble, 41 SW 2d 801, 328 Mo 760

Mont—Kornec v Mike Horse Mining & Milling Co, 180 P 2d 253

NY—Curran v Buckpitt, 233 NYS 249, 225 App Div 380

NC—Robinson v McAlhaney, 198 SE 647, 214 NC 180

Ohio—Lloyd v General Tire & Rubber Co, 156 NE 531, 24 Ohio App 62

Okla—Chuck's Bar v Wallace, 176 P 2d 484, 198 Okl 152.

Pa—Patanyi v Davis, 9 A 2d 430, 336 Pa 476—Sebastianelli v Cleland Simpson Co, 31 A 2d 570, 152 Pa.Super 203

SC—Lazar v Great Atlantic & Pacific Tea Co, 14 SE 2d 560, 197 SC 74—Watson v American Equitable Assur Co, 12 SE 2d 30, 195 SC 463—Cantrell v Clausens Bakery, 174 SE 438, 172 SC 490

Tex—Felder v Houston Transit Co, Civ App, 203 SW 2d 831—Davis v Clark, Civ App, 78 SW 2d 1008, reversed on other grounds 105 S W 2d 190, 129 Tex 520—Gulf, C & S F Ry Co. v Cobb, Civ App, 45 SW 2d 823, error dismissed

Wash—Nolan v Fisher Co, 19 P 2d 937, 172 Wash 267

Wis—Manol v Moskin Credit Clothing Co, 233 NW 579, 208 Wis 47.

39 C J p 1362 note 23 [c].

False imprisonment

Pa—Sebastianelli v Cleland Simpson Co, 31 A 2d 570, 152 Pa.Super 203

Injury occasioned by telegraph messenger boy

US—Western Union Telegraph Co. v Dubell, CCA NJ, 69 F 2d 149

—Western Union Telegraph Co v. Kirby, CCA Pa, 37 F 2d 480

Ala—Western Union Telegraph Co v Gorman, 185 So 743, 237 Ala 146

Ga—Marsh v. Postal Telegraph &

& St L R Co, 161 NE 653, 93 Ind App 618

Me—Neallus v Hutchinson Amusement Co, 139 A 671, 126 Me 469, 55 A L R 1191

Md—McCrory Stores Corporation v. Satchell, 129 A 348, 148 Md 279

Mass—Schultz v Purcell's, Inc, 70 NE 2d 526, 330 Mass 579

Mo—Simmons v Kroger Grocery & Baking Co, 104 SW 2d 357, 340 Mo 1118—Knight v Western Auto Supply Co, App, 193 SW 2d 771—Ragsdale v Riverside Jockey Club, App, 106 SW 2d 948—Mason v Down Town Garage Co, 53 SW 2d 409, 237 Mo App 297—Scott v St Louis-San Francisco Ry Co, App, 52 SW 2d 459—Gosselin v Yellow Cab Co, App, 29 SW 2d 186, certiorari quashed State ex rel Gosselin v Trimble, 41 SW 2d 801, 328 Mo 760

Mont—Kornec v Mike Horse Mining & Milling Co, 180 P 2d 253

NY—Curran v Buckpitt, 233 NYS 249, 225 App Div 380

NC—Robinson v McAlhaney, 198 SE 647, 214 NC 180

Ohio—Lloyd v General Tire & Rubber Co, 156 NE 531, 24 Ohio App 62

Okla—Chuck's Bar v Wallace, 176 P 2d 484, 198 Okl 152.

Pa—Patanyi v Davis, 9 A 2d 430, 336 Pa 476—Sebastianelli v Cleland Simpson Co, 31 A 2d 570, 152 Pa.Super 203

SC—Lazar v Great Atlantic & Pacific Tea Co, 14 SE 2d 560, 197 SC 74—Watson v American Equitable Assur Co, 12 SE 2d 30, 195 SC 463—Cantrell v Clausens Bakery, 174 SE 438, 172 SC 490

Tex—Felder v Houston Transit Co, Civ App, 203 SW 2d 831—Davis v Clark, Civ App, 78 SW 2d 1008, reversed on other grounds 105 S W 2d 190, 129 Tex 520—Gulf, C & S F Ry Co. v Cobb, Civ App, 45 SW 2d 823, error dismissed

Wash—Nolan v Fisher Co, 19 P 2d 937, 172 Wash 267

Wis—Manol v Moskin Credit Clothing Co, 233 NW 579, 208 Wis 47.

39 C J p 1362 note 23 [c].

False imprisonment

Pa—Sebastianelli v Cleland Simpson Co, 31 A 2d 570, 152 Pa.Super 203

Injury occasioned by telegraph messenger boy

US—Western Union Telegraph Co. v Dubell, CCA NJ, 69 F 2d 149

—Western Union Telegraph Co v. Kirby, CCA Pa, 37 F 2d 480

Ala—Western Union Telegraph Co v Gorman, 185 So 743, 237 Ala 146

Ga—Marsh v. Postal Telegraph &

question⁵³ Where it is doubtful whether a servant in injuring a third person was acting within the scope of his authority, the doubt will be resolved against the master, as considered supra § 570, at least to the extent of requiring the question to be submitted to the jury for determination⁵⁴

On the other hand, where there is no dispute as

to the facts and they are susceptible of but one inference, the question is one of law and should not be submitted to the jury.⁵⁵ Where reasonable men could not conclude from the evidence that a servant was acting within the course of his employment, the court must hold as a matter of law that he was not so acting⁵⁶

Cable Co., 196 S.E. 918, 57 Ga. App. 817.

Tenn.—Western Union Telegraph Co. v. Bender, 148 S.W.2d 44, 24 Tenn. App. 643

Wash.—Hobbs v. Postal Telegraph-Cable Co., 141 P.2d 648, 19 Wash. 2d 102

Libel and slander

Mo.—Starnes v. St. Joseph Ry., Light, Heat & Power Co., 52 S.W.2d 852, 331 Mo. 44—Conrad v. Allis-Chalmers Mfg. Co., 78 S.W.2d 438, 228 Mo. App. 817

Mont.—Keller v. Safeway Stores, 108 P.2d 605, 111 Mont. 28

NC.—Gillis v. Great Atlantic & Pacific Tea Co., 27 S.E.2d 282, 223 NC 470, 150 A.L.R. 1380—West v. F. W. Woolworth Co., 1 S.E.2d 546, 215 NC 211

Shooting of third person

(1) In general

NY.—Ford v. Grand Union Co., 270 N.Y.S. 162, 240 App. Div. 294

Okla.—Chuck's Bar v. Wallace, 176 P.2d 484, 198 Okla. 152

(2) By filling station operator—

Buck v. Standard Oil Co. of New York, 280 N.Y.S. 192, 224 App. Div. 299, affirmed 164 N.E. 597, 249 N.Y. 595

(3) By loan company manager—

Metzler v. Layton, 25 N.E.2d 60, 373 Ill. 88

(4) By railroad special officer.

Ill.—Kovatch v. Ross, 280 Ill. App. 330

Mich.—Cook v. Michigan Cent. Ry., 155 N.W. 541, 189 Mich. 456

(5) By watchman

Ky.—McBee's Adm'x v. Indian Head Mining Co., 132 S.W.2d 516, 280 Ky. 82

N.J.—Heenan v. Horne Coal Co., 170 A. 894, 12 N.J. Misc. 263, affirmed 174 A. 551, 113 N.J. Law 388

Tex.—Chicago, R. I. & G. Ry. Co. v. Carter, Civ. App., 250 S.W. 192, certified questions answered 245 S.W. 228, 112 Tex. 260, and affirmed, Com. App., 261 S.W. 135

53. Ga.—Atlanta Laundries v. Goldberg, 30 S.E.2d 349, 71 Ga. App. 180.

54. Iowa.—Johnson v. Chicago, R. I. & P. R. Co., 141 N.W. 430, 157 Iowa 738, L.R.A.1916F 945.

Ky.—Ashland Coca Cola Bottling Co. v. Ellison, 66 S.W.2d 52, 252 Ky. 172

N.C.—Pinnix v. Griffin, 12 S.E.2d 667,

668, 219 N.C. 35—Long v. Eagle, 5, 10 and 25¢ Store Co., 198 S.E. 573, 214 N.C. 146—Corpus Juris quoted in Cole v. Atlantic Coast Line R. Co., 191 S.E. 353, 356, 211 N.C. 591—Corpus Juris quoted in Colvin v. Kitchen Lumber Co., 183 S.E. 394, 395, 198 N.C. 776

SC.—Corpus Juris quoted in Carroll v. Beard-Laney, Inc., 35 S.E.2d 425, 127, 307 S.C. 339—Corpus Juris cited in Hyde v. Southern Grocery Stores, 15 S.E.2d 353, 357, 197 S.C. 263

Va.—Corpus Juris quoted in Crowell v. Duncan, 134 S.E. 576, 579, 145 Va. 489, 50 A.L.R. 1425

55. U.S.—Ernie R. Co. v. Johnson, C.C.A. Ohio, 106 F.2d 550

Cal.—Malcolm v. Tavis, 293 P. 640, 110 Cal. App. 76

DC.—Dill v. Johnson, 107 F.2d 669, 71 App. DC 139

Ga.—Plumer v. Southern Bell Telephone & Telegraph Co., 199 S.E. 353, 58 Ga. App. 622

Hawaii.—Ellis v. Mutual Telephone Co., 29 Hawaii 604

Me.—Leek v. Cohen, 38 A.2d 460, 141 Me. 18—Corpus Juris cited in Stevens v. Frost, 32 A.2d 164, 166, 140 Me. 1

Md.—A. S. Abell Co. v. Sopher, 22 A.2d 462, 179 Md. 687—Eyerly v. Baker, 178 A. 691, 168 Md. 599—Carroll v. Hillendale Golf Club, 144 A. 693, 156 Md. 542

Ohio.—Halkins v. Wilkoff Co., 47 N.E.2d 199, 141 Ohio St. 139

Okla.—Atchley v. McFadden, 64 P.2d 269, 178 Okla. 303

Pa.—Orr v. William J. Burns International Detective Agency, 13 A.2d 25, 387 Pa. 587—Chamberlain v. Riddle, 38 A.2d 521, 155 Pa. Super 507

Va.—Western Union Telegraph Co. v. Phelps, 169 S.E. 574, 160 Va. 674—Appalachian Power Co. v. Robertson, 129 S.E. 224, 142 Va. 454

W.Va.—Corpus Juris cited in Cochran v. Michaels, 157 S.E. 173, 175, 110 W.Va. 127

89 C.J. p. 1363 note 23

Evidence held insufficient

To warrant submission of issue to jury

Md.—Carroll v. Hillendale Golf Club, 144 A. 693, 156 Md. 542

Mass.—Kowalczyk v. Murphy, 4 N.E.2d 310, 295 Mass. 551—Wojcik v. Cadillac Berkshire Co., 152 N.E. 326, 256 Mass. 317.

Miss.—Gabbert v. Treadaway, 13 So. 2d 157, 194 Miss. 435

Mo.—Mullally v. Langenberg Bros. Grain Co., 98 S.W.2d 645, 339 Mo. 583—State ex rel. Gosselin v. Trimble, 41 S.W.2d 801, 328 Mo. 760—Dovino v. General American Life Ins. Co., App., 127 S.W.2d 732

—Green v. Western Union Telegraph Co., App., 58 S.W.2d 772

S.D.—Morman v. Wagner, 282 N.W. 78, 63 S.D. 547

Tenn.—Hoover Motor Express Co. v. Thomas, 65 S.W.2d 631, 16 Tenn. App. 664

Assault and battery

US.—Elder v. Dixie Greyhound Lines, C.C.A. Mo., 158 F.2d 200—Ernie R. Co. v. Johnson, C.C.A. Ohio, 106 F.2d 550

Cal.—Fields v. Sanders, 180 P.2d 684, 29 Cal.2d 834

Miss.—Western Union Telegraph Co. v. Stacy, 139 So. 604, 162 Miss. 286

Tenn.—Hoover Motor Express Co. v. Thomas, 65 S.W.2d 621, 16 Tenn. App. 664

Tex.—National Life & Accident Ins. Co. v. Ringo, Civ. App., 137 S.W.2d 828, error refused

Shooting of third person

(1) By watchman—McBee's Adm'x v. Indian Head Mining Co., 132 S.W.2d 516, 280 Ky. 82

(2) Other cases—Texas Breeders & Racing Ass'n v. Blanchard, C.C.A. Tex., 81 F.2d 382, motion dismissed 85 F.2d 1019.

Slander

Miss.—Craft v. Magnolia Stores Co., 138 So. 405, 161 Miss. 756

Servant as special officer

(1) Where official or private capacity of police officer clearly appears, there is no question for jury—Neall v. Hutchinson Amusement Co., 139 A. 671, 126 Me. 469, 55 A.L.R. 1191

(2) Whether officer was acting within scope of his employment as a corporation's servant or in his capacity as a public officer is a question of law where the conclusion that the officer was acting as servant of the corporation cannot be reasonably supported—Krowka v. Colt Patent Fire Arm Mfg. Co., 8 A.2d 5, 125 Conn. 705.

58. Ill.—Boehmer v. Norton, 65 N.E.2d 212, 328 Ill. App. 17.

Deviation from course of employment. Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact,⁵⁷ but where the conclusion to be drawn from the nature and extent of the deviation is not doubtful, the question is one of law and not of fact⁵⁸

Where deviation from the course of his employment by the servant is slight and not unusual, the court may, as a matter of law, find that the servant was still executing his master's business⁵⁹ On the other hand, if the deviation is very marked and unusual the court may determine that the servant was not on the master's business at all but on his own⁶⁰ Cases falling between these extremes will be regarded as involving a question of fact for the determi-

nation of the jury;⁶¹ where the deviation is uncertain in extent and degree, or where the surrounding facts and circumstances leave room for legitimate inferences as to whether or not, notwithstanding the deviation, the servant may still be engaged in the master's business within the scope of his general employment, the question is for the jury.⁶²

(4) Negligence and Contributory Negligence

The negligence of the servant and the contributory negligence of the plaintiff are questions for the jury where the facts are in dispute or more than one inference can be drawn therefrom

Where the facts are in dispute, or more than one inference can be drawn therefrom, the question of the employee's negligence is for the jury,⁶³ as is the

57. U.S.—Thomas v Slavens, CCA Mo, 78 F2d 144.

Cal—Loper v Morrison, 145 P2d 1, 23 Cal 2d 600—Westberg v Willde, 94 P2d 590, 14 Cal 2d 360—Dolinar v Pedone, 146 P2d 237, 63 Cal App 2d 169—Cain v Marquez, 88 P2d 200, 31 Cal App 2d 430—Barton v. McDermott, 291 P 591, 108 Cal App 373—Krusse v White Bros, 253 P 178, 81 Cal App 86

Okl—Brayton v Carter, 163 P2d 960, 196 Okl 135

Utah—Carter v Bessey, 93 P2d 490, 97 Utah 427

"In a given case, this may present a question of law for the court, but in by far the greater number of cases, where the question turns upon the mere extent of the deviation from the strict course of the employment, it has been held to be a question of fact for the jury"—Garriepy v Ballou & Nagle, 157 A 535, 537, 114 Conn 46.

Mixed question of law and fact

NJ—Efsthathopoulos v Federal Tea Co, 196 A 470, 119 N.J.Law 408—Dunne v. Hely, 140 A 327, 104 N J.Law 84

58. Conn—Wells v New York, N H & H R. Co, 128 A 700, 102 Conn 361

59. Ala—Jackson v De Bardelaben, 118 So 504, 22 Ala.App. 615 Ariz—Peters v Pima Mercantile Co, 27 P2d 143, 42 Ariz. 454

Cal—Barton v McDermott, 291 P 591, 108 Cal App. 372—Mand v Rose, 274 P. 392, 96 Cal App 564—Krusse v. White Bros, 253 P 178, 81 Cal App 86.

Conn—Neville v Adorno, 195 A. 613, 123 Conn 395—Shiembob v. Ringling, 160 A. 429, 115 Conn 62—Garriepy v. Ballou & Nagle, 157 A 535, 114 Conn 46

Ill—Boehmer v Norton, 65 N.E.2d 212, 328 Ill App 17.

Ky.—Corpus Juris quoted in Dennes

v Jefferson Meat Market, 14 SW 2d 408, 409, 228 Ky 164

Md—Carroll v Hillendale Golf Club, 144 A 693, 156 Md 542

Mo—Fuqua v Lumbermen's Supply Co, 76 SW 2d 715, 229 Mo App 210

SC—Adams v South Carolina Power Co, 21 SE 2d 17, 200 SC 438

Utah—Carter v Bessey, 93 P2d 490, 97 Utah 427

39 C.J. p 1363 note 24

60. Ala—Jackson v De Bardelaben, 118 So 504, 22 Ala.App. 615

Ariz—Peters v Pima Mercantile Co, 27 P2d 143, 42 Ariz. 454

Cal—Barton v McDermott, 291 P 591, 108 Cal App. 372—Mand v Rose, 274 P. 392, 96 Cal App 564

—Krusse v White Bros, 253 P 178, 81 Cal App 86

Conn—Garriepy v Ballou & Nagle, 157 A 535, 114 Conn 46—Hickson v W. W Walker Co, 149 A 400, 110 Conn 604, 68 A.L.R. 1044

DC—Grimes v B F Saul Co, 47 F2d 409, 60 App DC 47

Ky—Dennes v Jefferson Meat Market, 14 SW 2d 408, 228 Ky 164

Md—Carroll v Hillendale Golf Club, 144 A 693, 156 Md 542

Mo—State ex rel Gosselin v Trimble, 41 SW 2d 801, 328 Mo 760—Chisholm v Berg, App, 78 SW 2d 486—Fuqua v. Lumbermen's Supply Co, 76 SW 2d 715, 229 Mo. App 210.

NJ—Tildesley v John, 35 A2d 699, 131 N.J.Law 179—Smith v Bosco, 19 A2d 637, 126 N.J.Law 452—Fullmer v Scott-Powell Dairies, 166 A. 129, 111 N.J.Law 44.

SC—Adams v South Carolina Power Co, 21 SE 2d 17, 200 SC 438.

Tenn—Home Stores v Parker, 166 SW 2d 619, 179 Tenn 372

Utah—Carter v Bessey, 93 P2d 490, 97 Utah 427

39 C.J. p 1363 note 25.

Servant deviating five miles on errand for relative is, as matter of

law, acting without scope of employment—Waack v Maxwell Hardware Co, 292 P 966, 210 Cal 636

61. Cal—Mand v Rose, 274 P 392, 96 Cal App 564

Conn—Garriepy v Ballou & Nagle, 157 A 535, 114 Conn 46

Ill—Boehmer v Norton, 65 N.E.2d 212, 328 Ill App 17

Ky—Dennes v Jefferson Meat Market, 14 SW 2d 408, 228 Ky 164

Mo—Chisholm v Berg, App, 78 SW 2d 486—Fuqua v. Lumbermen's Supply Co, 76 SW 2d 715, 229 Mo App 210

SC—Adams v South Carolina Power Co, 21 SE 2d 17, 200 SC 438

39 C.J. p 1363 note 26

62. U.S.—Thomas v Slavens, CCA Mo, 78 F2d 144

Cal—Barton v McDermott, 291 P 591, 108 Cal App 372—Krusse v. White Bros, 253 P 178, 81 Cal App 86

Conn—Neville v Adorno, 195 A 613, 123 Conn 395

Ga—Gomez v Great Atlantic & Pacific Tea Co, 173 SE 750, 48 Ga App 398

Utah—Carter v Bessey, 93 P2d 490, 97 Utah 427

By joining some private business of his own with that of his master a servant does not step without the course of his employment as a matter of law, except where he makes a marked deviation from his master's business.—Rainwater v. Wallace, App, 169 SW 2d 450, transferred, see 174 SW.2d 835, 351 Mo 1044.

63. Ala—Honeycutt v. Louis Piatz Dry Goods Co, 180 So 91, 235 Ala. 507

Ark—Guthrie v Few, 277 SW 15, 169 Ark 776

Cal—Mehollin v. Ysuehiyama, 77 P 2d 855, 11 Cal 2d 53—Carlson v Sun-Maid Raisin Growers' Ass'n, 9 P.2d 546, 121 Cal App 713—

contributory negligence of plaintiff.⁶⁴ On the other hand, where the evidence is not in conflict and but one inference may be drawn therefrom, the questions are of law for the court.⁶⁵

(5) Relationship of Employer and Independent Contractor

The question whether the relationship of employer and independent contractor existed at the time of the injury ordinarily is one of fact

Whether the relationship of employer and independent contractor exists may be a mixed question of law and fact or of law alone.⁶⁶ The question ordinarily is one of fact.⁶⁷ Where the facts are in dispute or they are susceptible of more than one inference, the question is one of fact to be determined by the jury,⁶⁸ acting under instructions from the court as to what is requisite to constitute the rela-

Valdick v Le Clair, 289 P 673, 106 Cal App 489

Colo—Averch v Johnston, 9 P 2d 291, 90 Colo 321

Ill—Hallis v Stover Co, 275 Ill App 44

Md—Clough & Molloy v Shilling, 181 A 843, 149 Md 189

Mass—Sundelof v Simco Trading Co, 29 NE 2d 190, 302 Mass. 603
—O'Connor v Benson Coal Co, 16 NE 2d 636, 301 Mass 145—O'Brien v Freeman, 11 NE 2d 582, 299 Mass 20

Miss—Lee County Gin Co v Middlebrooks, 137 So 108, 161 Miss 422

N.Y.—Haverstick v Clarence Hansen & Sons, 13 NE 2d 753, 277 NY 158, reargument denied 15 NE 2d 72, 278 NY 482—Galletta v Taylor-Fichter Steel Const Co, 249 NYS 581, 232 App Div 256

N.C.—Proper v Great Atlantic & Pacific Tea Co, 193 SE 275, 212 NC 393

Ohio—National Refining Co v Clancy, 166 NE 205, 31 Ohio App 99

Pa.—Juhas v Reading Co, 192 A 403, 326 Pa 417—Lesick v Proctor, 150 A 618, 300 Pa 347—Dunn v Philadelphia & R R Co, 65 Pa Super 406, 408, followed in 65 Pa Super 408

R.I.—Kimatian v New England Telephone & Telegraph Co, 141 A 331, 49 RI 186

Tex.—El Paso & S W R Co v. Murtie, 108 SW 998, 49 Tex Civ App 278, error refused

Va.—Andrews v. Chesapeake & O Ry Co, 37 SE 2d 29, 184 Va 951—Gregory v Lehigh Portland Cement Co, 162 SE 881, 157 Va 545
39 C.J. p 1363 note 27, p 1360 note 65.

64. U.S.—S. S. Kresge Co v Dunne, CCA Mass, 77 F 2d 755

Ark—Malco Theatres v McLain, 117 SW 2d 45, 196 Ark 188

Cal—Wallace v King, 80 P 2d 623, 27 Cal App 174

Md—Ericsson Line v. Hawkins, 198 A 429, 174 Md 223

Mass—Barrett v Conragan, 18 NE 2d 869, 302 Mass 33—O'Brien v Freeman, 11 NE 2d 582, 299 Mass 20—Kees v William Filene's Sons Co., 8 NE 2d 8, 297 Mass 143

Mo—Fischer v Sears, Roebuck & Co., App, 93 SW 2d 1036.

N.H.—Manning v Leavitt Co, 5 A 2d 667, 90 NH 167, 122 ALR 249

—Miltimore v Milford Motor Co, 197 A 330, 89 NH 272—Emery v Tilo Roofing Co, 195 A 409, 89 NH 165

N.Y.—Galletta v Taylor-Fichter Steel Const Co, 249 NYS 581, 232 App Div 256

Pa.—Juhas v Reading Co, 192 A 403, 326 Pa 417
39 C.J. p 1363 note 28

Humanitarian rule

In order to make submissible case under humanitarian rule, it is essential that the injured party came into position of imminent peril, that the employees of defendant became aware of such imminent peril or should have done so by reasonable care, and that by the exercise of reasonable exertion and care they could have prevented injury, thereby creating duty for them so to do—Costello v Pitcairn, Mo App, 116 SW 3d 257

Where trial is before court without jury, question is one of fact for court—Gavin v Kluge, 176 NE 193, 375 Mass 373

65. Ala—Sloss-Sheffield Steel & Iron Co v Wilkes, 165 So 784, 231 Ala 511, 109 ALR 385

N.Y.—Barker v 131 Riverside Drive Corporation, 51 NYS 3d 315, 268 App Div 914, affirmed 65 NE 3d 426, 295 NY 716

Va.—C D. Kenny Co v Dennis, 189 SE 164, 167 Va 417

Wash—Femling v Star Pub Co, 84 P 2d 1008, 195 Wash 395

66. Cal—Jameson v Gavett, 71 P. 2d 937, 22 Cal App 3d 646

Wash—Simard v. Western Union Telegraph Co, 77 P 2d 605, 194 Wash 169
39 C.J. p 1364 note 29.

Relationship created by employment contract as question of law or fact generally see supra § 13

Whether commission salesman is an employee or independent contractor generally is a mixed question of law and fact—Graetch v Dix, 156 P 2d 79, 68 Cal App 2d 115

67. Conn.—Scorpion v. American-Republican, 37 A 2d 802, 131 Conn. 42—Ross v Post Pub Co, 29 A. 2d 768, 129 Conn 564—Robert C.

Buell & Co v Danaher, 18 A 2d 697, 127 Conn 606

Ill—Ryan v Associates Inv Co of Illinois, 18 NE 2d 47, 297 Ill App 544

Ky—Corpus Juris quoted in Bowen v Gradison Constr Co, 33 SW 2d 1014, 1019, 286 Ky 270

Mo—Russell v Union Elec Co of Mo, 191 SW 2d 278, 338 Mo App 1078—Corpus Juris quoted in Manus v Kansas City Distributing Corporation, 74 SW 2d 506, 510, 228 Mo App 905—Givens v Spalding Cloak Co, 68 SW 2d 819, 328 Mo App 169—Andres v. Cox, 23 SW 2d 1066, 223 Mo App 1139

Mont—Corpus Juris cited in Coombes v Letcher, 66 P 2d 769, 773, 104 Mont 371

Tenn—Knight v Hawkins, 173 S W 3d 163, 26 Tenn App 448

Tex—Dave Lehr, Inc, v Brown, Civ App, 58 SW 2d 886, reversed on other grounds 91 SW 2d 693, 127 Tex 286—McElwath v Dixon, Civ App, 49 SW 2d 995

Control of mode and manner of work
In absence of agreement on subject of alleged employer's right to control mode and manner of doing work, jury may determine existence or nonexistence of such right by drawing reasonable inference from the circumstances shown in evidence—Graetch v. Dix, 156 P 2d 79, 68 Cal App 2d 115

68. U.S.—De Bard v. Proctor & Gamble Distributing Co, D.C.Ga., 58 F Supp 157, affirmed, CCA, 146 F 2d 54

Cal—Burlingham v Gray, 137 P 2d 9, 22 Cal 2d 87—May v Farrell, 271 P 789, 94 Cal App 708

Ga.—Edwards v Gulf Oil Corporation, 31 SE 2d 677, 71 Ga App 649

Ky—Courier Journal & Louisville Times Co v Akers, 175 SW 2d 350, 295 Ky 745—Ruth Bros v Stambaugh's Adm'r, 122 SW 2d 601, 275 Ky 677

Mass—McConnon v Charles H. Hodggate Co, 185 NE 488, 282 Mass. 684

Mich—Conover v Hecker, 26 N.W. 2d 774, 317 Mich 285—Wight v. H G Christman Co, 221 N.W 814, 244 Mich. 208—Sullen v Chicago & N W Ry Co, 209 N.W. 124, 235 Mich 240.

tion,⁶⁹ and a failure to submit the question to the jury is erroneous.⁷⁰ Where the facts are undisputed and the evidence is reasonably susceptible of but a single inference, the question whether the relationship of employer and independent contractor exists is one of law for the court.⁷¹

The existence of such relation ordinarily is a question of law for the court where its determination depends on a written contract which is definite and unambiguous in its terms,⁷² and such is the case where the facts are clear and undisputed, although the contract rests in parol.⁷³ Notwithstanding a

Minn—Gilbert v. Megears, 257 N W 73, 192 Minn 495

Mo—Mallory v Louisiana Pure Ice & Supply Co., 6 SW 2d 617, 320 Mo 95—Hoelker v American Press, 296 SW 1008, 317 Mo 61—Russell v Union Elec Co of Mo., 191 SW 2d 278, 238 Mo App 1078—Ingram v Great Lakes Pipe Line Co., App., 153 SW 2d 547—Young v Sinclair Refining Co., App., 92 SW 2d 995—Givens v Spalding Cloak Co., 63 SW 2d 819, 228 Mo App 169—Ward v Scott County Milling Co., App., 47 SW 2d 250—Mattocks v Emerson Drug Co., App., 38 SW 2d 143—Andres v Cox, 23 SW 2d 1066, 228 Mo App 1139—Klaber v Fidelity Bldg Co., App., 19 SW 2d 758—Stanley v Louisiana Pure Ice & Supply Co., App., 279 SW 157—Semper v American Press, 273 SW 186, 217 Mo App 55

NY—Nasca v St Mary's Roman Catholic Church Soc of Dunkirk, 293 NYS 383, 249 App Div 732—Zera v Kaplan, 260 NYS 709, 287 App Div 135

Ohio—Ford v Commercial Motor Freight, 14 NE 2d 854, 57 Ohio App 384

Okl—World Pub Co v Smith, 161 P 2d 861, 195 Okl 691—Modern Motors v Elkins, 113 P 2d 969, 189 Okl 134

Pa—McGrath v Edward G. Budd Mfg. Co., 36 A 2d 803, 348 Pa 619—Bojarski v M F Howlett, Inc., 140 A 544, 291 Pa 485—Corpus Juris cited in Bross v Varner, 48 A 2d 880, 159 Pa Super 495—Burns v Elliott-Lewis Electrical Co., 178 A 47, 118 Pa Super 243

SD—Biggins v Wagner, 245 NW 385, 60 SD 581, 85 ALR 776.

Tenn—Gulf Refining Co of Louisiana v Huffman & Weakley, 297 S W 199, 155 Tenn 580—Texas Co. v Ingram, 64 SW 2d 208, 16 Tenn App 267.

Tex—Haynes v Taylor, Com App., 35 SW 2d 104, rehearing denied Haynes v Taylor, 38 SW 2d 1101—Texas Co. v Freer, Civ App., 151 SW 2d 907, error dismissed, judgment correct—Moreman v Armour & Co., Civ App., 65 SW 2d 834, error refused—Smith Bros v O'Bryan, Civ App., 62 SW 2d 505, set aside on other grounds 94 SW 2d 145, 127 Tex 429—Kelly v Lone Star Gas Co., Civ App., 32 SW 2d 699, reversed on other grounds Lone Star Gas Co v Kelly, Com App., 46 SW 2d 656—Har-

din v Rust, Civ App., 294 SW 635 Va—Standard Oil Co of New Jersey v Davis, 163 SE 29, 157 Ga 709

39 CJ p 1364 note 32, p 1360 note 78

Different inferences from admitted facts

Where admitted facts are such that fair-minded men might draw different inferences from them, case is one for jury—Hicks v Southern Ohio Quarries Co., 182 SE 874, 116 WV 748

Telegraph messenger boy

Wash—Simard v Western Union Telegraph Co., 77 P 2d 605, 194 Wash 169.

69. Va—Emmerson v Fay, 26 SE 886, 94 Va 60

70. Kan—Laffery v U S Gypsum Co., 111 P 498, 83 Kan 349, 45 L R A NS, 930, Ann Cas 1912A 590 Minn—Vosbeck v Kellogg, 80 N W 957, 78 Minn 176

71. US—De Bord v Proctor & Gamble Distributing Co., DCGa., 58 F Supp 157, affirmed, CCA., 146 F 2d 54

Ariz—Horan v Richfield Oil Corporation, 105 P 2d 514, 58 Ariz 64

Ark—Harger v Harger, 222 SW 736, 144 Ark 375.

Cal—Burlingham v Gray, 137 P 2d 9, 22 Cal 2d 87—Robinson v George, 105 P 2d 914, 18 Cal 2d 233—Chapman v Edwards, 24 P 2d 211, 133 Cal App 72

Ill—Ryan v Associates Inv Co of Illinois, 14 NE 2d 47, 297 Ill App 544

Mo—Mallory v Louisiana Pure Ice & Supply Co., 6 SW 2d 617, 320 Mo 95—Young v Sinclair Refining Co., App., 92 SW 2d 995—Ward v Scott County Milling Co., App., 47 SW 2d 250—Mattocks v Emerson Drug Co., App., 38 SW 2d 142

NJ—Giroud v Stryker Transp Co., 140 A 305, 104 NJ Law 424

Okl—Hawk Ice Cream Co v. Rush, 180 P 2d 154, 198 Okl 544—World Pub Co v Smith, 161 P 2d 861, 195 Okl 691—Marion Machine, Foundry & Supply Co v Duncan, 101 P 2d 813, 187 Okl 180—Blackwell Cheese Co v Pedigo, 96 P 2d 1043, 186 Okl 159—Bradley v Chickasha Cotton Oil Co., 84 P 2d 629, 184 Okl 51—Fairmont Creamery Co of Lawton v Carsten, 55 P 2d 757, 175 Okl 592—Branham v International Supply Co., 27 P 2d 354, 168 Okl 278.

Pa—McGrath v Edward G. Budd

Mfg Co, 36 A 2d 803, 348 Pa 619—Bojarski v M F Howlett, Inc., 140 A 544, 291 Pa 485—Bross v Varner, 48 A 2d 880, 159 Pa Super 495

Tenn—Ridgeway Land Co v Vincent, 7 Tenn App 262

Tex—Taylor v Haynes, Civ App., 19 SW 2d 850, reversed on other grounds Haynes v Taylor, Com App., 35 SW 2d 104, rehearing denied 38 SW 2d 1101—Taylor v Eapara, Civ App., 8 SW 2d 288, error dismissed

Commission salesman

Cal—Graetich v Dir, 156 P 2d 79, 68 Cal App 2d 115—Lee v Nanny, 100 P 2d 832, 38 Cal App 2d 90

72. Cal—Batt v San Diego Sun Pub Co., 69 P 2d 216, 21 Cal App 2d 429

Colo—Thayer v Kerchlof, 266 P 225, 83 Colo 480

Ill—Hartley v Red Ball Transit Co., 176 NE 751, 344 Ill 584

Kv—Ruth Bros v Stambaugh's Adm'r, 122 SW 2d 501, 275 Ky 677

Mich—Wight v H G Christman Co., 221 NW 314, 244 Mich 208

Minn—Wallace v Pine Tree Lumber Co., 185 NW 600, 150 Minn 386

Mo—Dagley v National Cloak & Suit Co., 22 SW 2d 892, 224 Mo App 61

NC—Kessler Const Co v Dixon Holding Corporation, 175 SE 843, 207 NC 1—North Carolina Lumber Co v Spear Motor Co., 135 SE 115, 193 NC 377

Okl—Ottinger v Morris, 104 P 2d 254, 187 Okl 617—City of Muskogee v McMurry, 8 P 2d 670, 155 Okl 203—Tankersley v Webster, 243 P 746, 116 Okl 208

Tex—Kelly v Lone Star Gas Co., Civ App., 32 SW 2d 699, reversed on other grounds Lone Star Gas Co v Kelly, Com App., 46 SW 2d 656

39 CJ p 1364 note 30

73. Ky—Courier Journal & Louisville Times Co v Akers, 175 SW 2d 850, 295 Ky 745—Ruth Bros v Stambaugh's Adm'r, 122 SW 2d 501, 275 Ky 677

Mo—Manus v Kansas City Distributing Corporation, 74 SW 2d 506, 228 Mo App 905

Ohio—Post Pub. Co v Schickling, 154 NE 751, 22 Ohio App 318, affirmed Schickling v Post Pub. Co., 155 NE 143, 115 Ohio St 589.

written contract, the parties may so construe it by their acts and conduct as to deprive the contractor of the right to do the work according to his own methods and to make the final results of the work in the methods employed depend on the directions of the contractee, and in such case the question whether the status of the contractor is that of an independent contractor becomes a question for the jury.⁷⁴ Where the written contract is ambiguous the relationship is for the jury.⁷⁵ Where the contract of employment is in writing and oral evidence is introduced with reference to the practice under it, and but one inference can be drawn from the evidence, the question whether an employer and independent contractor relationship exists is for the court.⁷⁶

b. Liability of Employer for Injuries to Independent Contractor or Servants

The question whether an employer has been guilty of such negligence as to render him liable for an in-

jury to an independent contractor or servant thereof is for the jury where the facts are in dispute or more than one inference can be drawn therefrom.

Where the facts are in dispute or more than one inference can be drawn from them, it is a question for the jury whether an employer has been guilty of such negligence as to render him liable for an injury to the servant of an independent contractor.⁷⁷ It is for the jury on conflicting evidence to determine whether the employer reserved the right to direct the performance of the work so as to be liable for injuries to a servant of the independent contractor.⁷⁸ Likewise, where the evidence is in conflict or more than one inference can be drawn therefrom, it is for the jury to determine whether the servant of the independent contractor has been guilty of contributory negligence.⁷⁹

On the other hand, where there is no conflict in the evidence and but one inference may be drawn therefrom the questions are of law for the court.⁸⁰

Okl.—Ottinger v Morris, 104 P 2d 354, 187 O'kl 517
39 C.J. p 1364 note 31

74. Ind.—Howe Fire Apparatus Co v Humphrey, 46 N.E 2d 259, 113 Ind App 167

Mo.—Young v Sinclair Refining Co, App, 93 S.W.2d 995.

Tenn.—Gulf Refining Co of Louisiana v Huffman & Weakley, 297 S.W. 199, 155 Tenn 530

75. Tex.—J. M. Huber Petroleum Co v Yake, Civ App, 121 S.W.2d 670

76. Okl.—City of Muskogee v McMurry, 8 P 2d 670, 155 Okl 203

77. U.S.—Sinclair Prairie Oil Co. v Thornley, C.C.A. Okl, 127 F 2d 128
—Strawser v Norfolk & W Ry Co, C.C.A. Ohio, 24 F 2d 411

Ala.—Kimbrell v St. Louis-San Francisco Ry Co, 129 So 274, 221 Ala 505

Ark.—Fordyce Lumber Co v. Eberhart, 145 S.W.2d 538, 201 Ark 690

Cal.—Ostertag v Bethlehem Shipbuilding Corporation, 151 P 2d 647, 65 Cal App 2d 795

Conn.—Bogoratt v Pratt & Whitney Aircraft Co, 157 A 660, 114 Conn 126

Mass.—Engel v Boston Ice Co, 4 N.E 2d 455, 295 Mass 428

Mo.—Mallory v. Louisiana Pure Ice & Supply Co., 6 S.W.2d 617, 330 Mo 95

N.Y.—Dudar v Milef Realty Corporation, 180 N.E 102, 258 N.Y. 415—Anderson v 143 Linden Blvd Corporation, 16 N.Y.S.2d 149, 258 App Div. 837—Kowalsky v Conreco Co, 260 N.Y.S. 688, 237 App Div 23, reargument denied 261 N.Y.S. 963, 237 App Div. 875.

Ohio.—Hoxian v Crucible Steel Casting Co, 9 N.E 3d 143, 132 Ohio St 453, 112 A.L.R. 333

Tex.—Montgomery v Houston Textile Mills, Com App, 45 S.W.2d 140—Harbour v Graham Mfg Co, Civ App, 47 S.W.2d 700, error dismissed—Roberts v J. C. Penney Co, Civ App, 44 S.W.2d 454

W.Va.—McHugh v First Huntington Nat Bank, 191 S.E. 844, 118 W.Va. 700

39 C.J. p 1364 note 36

Liability of employer for injuries to servant of independent contractor generally see supra §§ 600-606

Furnishing safe place to work

N.Y.—Peloso v New York, 205 N.Y. S 606, 210 App Div 265

39 C.J. p 1364 note 36 [a]

Evidence held sufficient

To require or warrant submission to jury

U.S.—Amacker v Skelly Oil Co., C. C.A. Tex, 132 F 2d 431

Md.—Spanish American Cork & Specialty Co v State, 107 A 531, 134 Md. 605

N.Y.—Papagno v Home Owners' Loan Corporation, 50 N.Y.S.2d 875, 268 App Div. 883, certiorari denied

52 N.Y.S.2d 790, 268 App Div 999.

N.C.—Mack v Marshall Field & Co, 12 S.E.2d 235, 218 N.C. 697

Evidence held insufficient

To require or warrant submission to jury

U.S.—United Production Corporation v Chesser, C.C.A. Tex, 94 F 2d 790, rehearing denied 95 F 2d 521, certiorari denied Chesser v United Production Corporation, 59 S.Ct 75, 305 U.S. 616, 83 L.Ed 893.

Ark.—Nowlin-Carr Co. v. Cook, 283 S.W. 7, 171 Ark 51.

Tex.—Humble Oil & Refining Co v. Bell, Civ App., 180 S.W.2d 970, error refused 181 S.W.2d 569, 142 Tex 645—Allen v Republic Bldg. Co, Civ App, 84 S.W.2d 506—Houston Textile Mills v Montgomery, Civ App, 83 S.W.2d 754, error refused

78. Mo.—Klaber v Fidelity Bldg Co, App, 19 S.W.2d 758

Where contract employing independent contractor is oral and employer's control is disputed, employer's liability for injury to servant of independent contractor is for jury—Klaber v Fidelity Bldg Co, supra.

79. U.S.—Sinclair Prairie Oil Co. v. Thornley, C.C.A. Okl, 127 F 2d 128—Strawser v Norfolk & W Ry Co, C.C.A. Ohio, 24 F.2d 411

Cal.—Ostertag v Bethlehem Shipbuilding Corporation, 151 P 2d 647, 65 Cal App 2d 795.

Mo.—Berthing v S. S. Kresge Co, 116 S.W.2d 522, 232 Mo App. 1195.

N.Y.—Dudar v Milef Realty Corporation, 180 N.E 102, 258 N.Y. 415.

Tex.—Herdon v. Halliburton Oil Well Cementing Co, Civ.App, 154 S.W.2d 163, error refused

W.Va.—McHugh v First Huntington Nat Bank, 3 S.E.2d 497, 121 W.Va. 351.

80. Assumption of risk

(1) Since no contractual relation exists between the employer and servant of an independent contractor, defense of assumption of risk was properly withdrawn in action against employer for injuries to employee of independent contractor.—Harvey v Chas. R. McCormick Lumber Co of Delaware, 271 P. 65, 149 Wash 368

Injuries to independent contractor. Where the evidence is conflicting or more than one inference may be drawn therefrom, the question whether the employer has been guilty of such negligence as to render him liable for an injury to an independent contractor is one of fact.⁸¹

c. Liability of Employer for Acts of Contractor or His Servants

The liability of a contractee for the acts of his contractor or servants is a question for the jury where the evidence is conflicting or different inferences may be drawn therefrom.

Where there is conflicting evidence, or different inferences may be drawn, the liability of the contractee for the acts of his contractor or the contractor's servants is a question for the jury.⁸²

d. Liability of Other Persons

Where the evidence is in conflict or different inferences may be drawn, it is for the jury to determine the personal liability of a servant to a third person or fellow servant and the liability of a contractor for injuries suffered by a servant of a subcontractor.

Where the evidence is conflicting or different inferences may be drawn, the liability of a servant to a third person⁸³ or to a fellow servant⁸⁴ is a question of fact for the jury.

Liability of contractors. Where the evidence is in conflict or more than one inference may be drawn

from the facts, the question whether the contractor is liable for an injury suffered by a subcontractor's employee is for the jury,⁸⁵ but where the evidence is undisputed and but one inference may be drawn therefrom the question of the contractor's liability is for the court.⁸⁶ Where a contractor delegates to an independent subcontractor the performance of the contract, in an action by the contractee against the contractor for damages resulting from the failure to use due care in the performance of the contract the question of the cause of the damage is properly submitted to the jury where there is evidence tending to prove that it was due to the negligence of the contractor, to the negligence of the contractee, or to the negligence of both.⁸⁷

§ 618. — Instructions

In actions against a master to recover for injuries resulting from the acts of his servants or from the acts of an independent contractor or his servants, the general rules relating to instructions in civil actions ordinarily apply.

General rules relating to instructions in civil actions, as considered in the C.J.S. title Trial §§ 266-448, also 64 C.J. p 510 note 3 et seq, ordinarily apply in actions against a master to recover for injuries resulting from the acts of his servants or from the acts of an independent contractor or his servants.⁸⁸ The instructions should contain a cor-

(2) Apprentice electrician, employed by independent contractor in shipbuilding corporation's plate shop, did not, as matter of law, assume risk of injury by being crushed between electric crane and upright steel beam in such shop because of negligence of such corporation's employee in operating crane while such apprentice was necessarily working with his back to crane under journeyman electrician's immediate direction—*Ostertag v Bethlehem Shipbuilding Corporation*, 151 P 2d 647, 65 Cal App 2d 795.

(3) In action against oil well owner for death of employee of independent contractor who had been engaged to deepen oil well as result of explosion occurring while well was being circulated and aquajelled by another company engaged by owner, even if defense of assumption of risk was available, whether deceased assumed risk was question for jury—*Sinclair Prairie Oil Co v Thornley*, CCA Okl., 127 F 2d 128.

81. Evidence held sufficient

To require or warrant submission to jury—*Carlson v Sun-Maid Raisin Growers' Ass'n*, 9 P 2d 546, 131 Cal App 719.

82. Md.—*Surry Lumber Co v Zissett*, 138 A. 458, 150 Md 494.

NY—*Hanley v Central Sav Bank*, 8 NYS 2d 371, 255 App Div 542, affirmed 21 NE 2d 513, 280 NY 734.

RI—*Blount v Tow Fong*, 138 A 52, 48 RI 453.

39 C.J. p 1364 note 85.

Work inherently dangerous

(1) In general—*Mallory v Louisiana Pure Ice & Supply Co*, 6 SW 2d 617, 320 Mo 95—39 C.J. p 1364 note 35 [c].

(2) Whether work performed by contractor of washing windows of store front was inherently dangerous as to pedestrians using sidewalk adjacent to such windows so as to impose liability on employer for injuries sustained by pedestrian was for jury—*Kammerman v 170th St Pharmacy*, 55 NYS 2d 678, 269 App Div 430, affirmed 64 NE 2d 655, 295 NY 631.

(3) Whether electric sign was inherently dangerous, and owners contracting therefor did not take reasonable precautions to protect pedestrians, was for jury—*Blount v Tow Fong*, 138 A 52, 48 RI 453.

83. Fla—*Greenberg v Post*, 19 So 2d 714, 155 Fla 135.

Personal liability of servant see supra §§ 576-578.

84. Ark—*American Refrigerator Transit Co v Stroope*, 88 SW 2d 840, 191 Ark 955.

Mo—*Gardner v Stout*, 119 SW 2d 790, 342 Mo 1206.

Effect of coemployee's testimony as to his negligence was for jury although uncontradicted—*Missouri Pac R Co v Hampton*, 113 SW 2d 428, 195 Ark 335.

85. Whether person causing injury was servant of contractor was for jury under conflicting evidence—*Cal—Kiernan v Herbert M Baruch Corporation*, 66 P 2d 748, 20 Cal App 2d 289.

Ohio—*Guy v Henry J Spieker Co*, 186 NE 835, 45 Ohio App 178.

86. NY—*Vlastos v Atlantic Basin Iron Works*, 55 NYS 2d 276, 269 App Div 788, appeal denied 57 NY 2d 847, 269 App Div. 942—*Hooey v Airport Const Co*, 289 NYS 639, 228 App Div 83, modified on other grounds 171 NE 752, 253 NY 486, motion denied 175 NE 831, 255 NY 603.

87. Minn—*Pacific Fire Ins. Co. v Kenny Boiler & Manufacturing Co*, 277 NW 226, 201 Minn 500.

88. Ga—*Friedman v Martin*, 160 S. E 126, 43 Ga App 677.

Kan—*Proctor v St. Louis-San Fran-*

rect statement of the law,⁸⁹ and must be applicable to the issues⁹⁰ and to the facts which the evidence tends to prove.⁹¹ In addition, it is the duty of the court to inform the jury what the law is as applica-

cisco R Co, 229 P 365, 116 Kan 720

Mo—Clayton v Hydraulic Press-Brick Co, App, 27 SW 2d 52 39 C J p 1365 note 44

Instructions held proper

US—Sinclair Prairie Oil Co v Thornley, CCA O'1, 127 F.2d 128 —Pacific Telephone & Telegraph Co v White, CCA Or, 104 F.2d 923—Henry W Cross Co v Buins, CCA Ark, 81 F.2d 856

Ga—Byrd v Grace, 158 SE 467, 43 Ga App 255—Furney v Tower, 137 SE 850 36 Ga App 698

Kan—Proctor v St Louis-San Francisco Ry Co, 229 P 365, 116 Kan. 720

Mo—Baker v Scott County Milling Co, 20 SW 2d 494, 323 Mo 1089—Kearley v St Louis Car Co, App, 111 SW 2d 976, certiorari quashed

State ex rel St Louis Car Co v Hostetter, 131 SW 2d 558, 345 Mo 102—Scott v St Louis-San Francisco Ry Co, App, 52 SW 2d 459 —Semper v American Press, 273 SW 186, 217 Mo App 55

Mont—Kornec v Mike Horse Mining & Milling Co, 180 P.2d 252

Pa—Griffith v Atlantic Refining Co, 157 A 791, 305 Pa 386

SC—Tate v Mauldin, 154 SE 431, 157 SC 392

Tenn—Cole v. Standard Oil Co. of N. J., App, 197 SW 2d 13

In case submitted on special issues it is error to give a general charge to the jury—Davis v Clark, 105 S W 2d 190, 129 Tex 520

Instructions as to negligence

(1) In general—San Antonio & A P Ry Co v Hoiges, 118 SW 767, 54 Tex Civ.App 364, error denied 120 SW 848, 102 Tex 524—see 39 C J p 1365 note 44 [a]

(2) In action for injuries to independent contractor's employee from explosion in electric switch house, instruction that jury were not obliged to find negligence from the occurrence, even though defendant could not explain it, but might consider the explanation and determine whether or not to infer negligence from the occurrence, considering the facts shown, did not deny plaintiff the full benefit of the maxim, Res ipsa loquitur—Garton v Public Service Electric & Gas Co, 189 A 408, 117 NJ Law 520.

(3) In action against beauty parlor proprietor for injury to patron's head while permanent wave was being given, instruction submitting question of defendant's negligence in general terms without requiring finding of particular act of negligence was not error, case being within res ipsa loquitur doctrine—Glossip v.

Kelly, 67 SW 2d 513, 228 Mo App 92

Instructions as to scope of employment

(1) In general—Vasenska v Sietloff Packing Co, Mo App, 237 SW 827—39 C J p 1365 note 44 [c]

(2) Instructions held proper in action for assault

US—Pacific Telephone & Telegraph Co v White, CCA Or, 104 F.2d 933

Cal—Fields v Sanders, 180 P.2d 684, 29 Cal 2d 834

Ga—Great Atlantic & Pacific Tea Co v Dowling, 159 SE 609, 43 Ga App 549.

Mont—Kornec v Mike Horse Mining & Milling Co, 152 P.2d 252

Tex—Alamo Downs, Inc, v Briggs, Civ App, 106 SW 2d 733, error dismissed

(3) In action for assault and battery committed by bus driver on motorist who collided with bus, instruction that term "within the scope and course of his employment" meant that act was done by driver while he was engaged in service of his employer about his employer's business and in furtherance thereof was proper—Felder v Houston Transit Co, Tex Civ App, 203 SW 2d 831

Ordinary care

In customer's action against operator of beauty shop for burns allegedly received from permanent wave machine, aside from instruction with respect to measure of damages, an instruction based on exercise of ordinary care on part of operator or owner in giving treatment is all that is necessary, and "ordinary care" should be defined as that degree of care usually exercised by persons of ordinary skill, ability and prudence engaged in business of giving permanent wave treatments—Hogan v Hornbeck, 138 SW 2d 1032, 382 Ky 574

Joint liability of master and servant

(1) In general—Van Meter v Gurney, 240 Ill App 165—39 C J p 1365 note 44 [e].

(2) Instructions held proper, not erroneous, or improperly refused Colo—Willy v. Atchison, T & S F Ry Co, 172 P.2d 958, 115 Colo 306 Miss—Gabbert v Treadaway, 13 So 2d 157, 194 Miss 435—Southern Bell Telephone & Telegraph Co v Quick, 149 So 107, 167 Miss 488

(3) Where in action against railroad company and employees in charge of train by pedestrian walking along railroad tracks for injuries when struck by train, employer's liability was merely derivative since based on doctrine of respondeat superior, and evidence failed to show

negligent conduct of train crew members dismissed from the action on plaintiff's motion at close of testimony, instructions should not have permitted verdict against railroad unless jury also found against one or more train crew members not dismissed from action—Louisville & N R Co v Farney, 172 SW 2d 656, 295 Ky 8

(4) In action for death at railroad crossing, fact that recovery against engineer was not authorized under one instruction submitting negligence under humanitarian doctrine did not make it error to submit case under another instruction as against both engineer and railroad company on ground that both were guilty of negligence in running engine at excessive speed, as against objection that, if engineer was not negligent, the company could not be—Rawie v. Chicago, B & Q R Co, 274 SW. 1031, 310 Mo 72

29. US—Sinclair Prairie Oil Co v. Thornley, CCA O'1, 127 F.2d 128.

Ark—Meyer v Moore, 115 SW 2d 1087, 195 Ark 1114

Conn—Welz v Manzillo, 155 A. 641, 113 Conn 674

Ind—Bailey v Washington Theatre Co, 41 NE 2d 819, 112 Ind App 338

Mo—Axon v. Kansas City Public Service Co, App, 142 SW 2d 342—Beitling v S S Kresge Co, 116 S W 2d 522, 233 Mo App. 1195

NY—Gewirtzman v Schneider, 162 NE 532, 248 NY 579

NC—Robinson v McAlhane, 198 SE 647, 214 NC 180—Hayes v Pine State Creamery, 141 SE 340, 195 NC 113

Or—Tauscher v. Doernbecher Mfg Co, 56 P.2d 313, 153 Or 152

Utah—Looney v Furgis, 2 P.2d 112, 78 Utah 172.

Va—Thalhimer Bros v. Shaw, 159 SE 87, 156 Va 863

39 C J p 1366 note 45

90. US—Ellsworth v Hunt, CCA. Ill, 168 F 506, 93 CCA 662.

39 C J p 1366 note 46

Instructions held applicable to issues Ark—Robb v. Woosley, 295 SW 13, 175 Ark 43

Mo—Baker v Scott County Milling Co, App, 43 SW 2d 441—Semper v American Press, 273 SW 186, 217 Mo App 55

NJ—Marmorstein v. State Theaters' Corporation, 140 A. 2, 6 NJ. Misc 68, affirmed 146 A 915, 106 NJ Law 574

91. Mo—Kearley v. St Louis Car Co, App, 111 SW 2d 976, certiorari quashed State ex rel St Louis Car Co v. Hostetter, 131 SW.2d 558, 345 Mo. 102.

ble to the facts of the case, and not merely lay down the general principles applicable to the case and leave the jury to apply them.⁹²

The instructions must not be misleading.⁹³ Instructions are erroneous which are not supported by the facts in evidence,⁹⁴ which improperly assume the existence of facts not proved,⁹⁵ which submit questions of law to the jury,⁹⁶ or which invade the province of the jury.⁹⁷ If the court assumes to give a binding instruction on certain enumerated facts, the instruction must recite all the facts on which liability depends.⁹⁸

The instructions are to be construed as a whole, and the fact that one portion considered separately might be open to contradiction does not constitute error if the charge is correct in its entirety.⁹⁹

Requests for instructions. Under the general

rules considered in the C.J.S. title Trial §§ 390-412, also 64 C.J. p 819 note 65 et seq, parties to actions of the character under consideration are entitled, if timely request is made, to instructions correctly stating the law applicable to the facts of the case, and it is the duty of the court to comply with a request for such instructions¹ unless the substance thereof is correctly stated in other instructions given,² and a refusal to give such instructions is erroneous.³ Nevertheless, in order to make it incumbent on the court to give in its charge requested instructions, such instructions must be complete in themselves.⁴ If a party desires a more specific charge, a request therefor should be made.⁵

A requested instruction is properly refused where it states the law incorrectly,⁶ where there is no evidence on which it can be based,⁷ where it is too general,⁸ or where it contains a partial⁹ or mislead-

N.C.—*Evans v Elliott*, 17 S.E.2d 125, 220 N.C. 253

Va.—*Baskett v. Banks*, 45 S.E.2d 173, 186 Va. 1023

39 C.J. p 1366 note 47.

92. Conn.—*Dore v Babcock*, 50 A. 1016, 74 Conn. 425

39 C.J. p 1366 note 43

93. Ill.—*Busick v Illinois Cent R Co*, 201 Ill.App. 63. See *Neville v. Chicago & A. R. Co.*, 210 Ill.App. 168

Md.—*Surry Lumber Co. v. Zissett*, 133 A. 458, 150 Md. 494

N.C.—*Peters v. Carolina Cotton & Woolen Mills*, 155 S.E. 867, 199 N.C. 753

39 C.J. p 1366 note 49, p 1365 note 44 [c] (2)

Instructions held not misleading

Cal.—*Mathe v White Auto Co.*, 291 P. 599, 108 Cal.App. 286

Mass.—*Moran v Otis Elevator Co.*, 197 N.E. 11, 291 Mass. 314

Mo.—*Fischer v Sears, Roebuck & Co.*, App., 93 S.W.2d 1036

Wis.—*Sandeen v Willow River Power Co.*, 252 N.W. 706, 214 Wis. 166.

39 C.J. p 1366 note 49 [a]

94. Ala.—*Gray v. Williams*, 160 So. 715, 230 Ala. 14

Ky.—*Hogan v. Hornbeck*, 138 S.W. 2d 1032, 283 Ky. 574

Md.—*Surry Lumber Co. v. Zissett*, 133 A. 458, 150 Md. 494.

Mo.—*Walker v. Klein, App.*, 127 S.W. 2d 51—*Beitling v. S. S. Kresge Co.*, 116 S.W.2d 523, 232 Mo.App. 1195

39 C.J. p 1366 note 50

Instructions supported by evidence

Cal.—*Stewart v Lido Café*, 56 P.2d 553, 13 Cal.App.2d 46

Ga.—*Furney v. Tower*, 137 S.E. 850, 36 Ga.App. 698, affirming 131 S.E. 177, 84 Ga.App. 739

Ind.—*Deep Vein Coal Co. v. Dowdle*, 66 N.E.2d 598.

Mich.—*Goldsherry v Kamachos*, 239 N.W. 515, 255 Mich. 647

Mo.—*Mallory v Louisiana Pure Ice & Supply Co.*, 6 S.W.2d 617, 320 Mo. 95—*Fischer v Sears, Roebuck & Co.*, App., 93 S.W.2d 1036—*Bouillon v Laclede Gas Light Co.*, 147 S.W. 1107, 165 Mo.App. 320

Nev.—*Nevada Transfer & Warehouse Co. v. Peterson*, 99 P.2d 633, 60 Nev. 87

N.C.—*Evans v Elliott*, 17 S.E.2d 125, 220 N.C. 253

Tex.—*Continental Paper Bag Co. v. Bosworth*, Com.App., 276 S.W. 170

95. N.J.—*Eagan v Prudential Ins Co of America*, 45 A.2d 622, 133 N.J.Law 603

39 C.J. p 1366 note 51.

96. Ill.—*Krzikowsky v. Sperring*, 107 Ill.App. 493.

39 C.J. p 1366 note 52.

97. U.S.—*Swift & Co. v. Bowling*, CCA W.Va., 293 F. 279.

39 C.J. p 1366 note 53.

98. Ind.—*Princeton Coal Co. v. Dowdle*, 142 N.E. 419, 194 Ind. 262

99. U.S.—*Schultz v Brown*, Mont., 256 F. 187, 167 CCA 403

Tex.—*International & G. N. R. Co. v. Branch*, 68 S.W. 338, 29 Tex.Civ. App. 144.

1. Ala.—*Southern Ry. Co. v. Lockridge*, 130 So. 557, 232 Ala. 15

Idaho.—*Scrivner v Boise Payette Lumber Co.*, 268 P. 19, 46 Idaho 334

Ky.—*Yellow Creek Coal Co. v. Lawson*, 16 S.W.2d 1043, 229 Ky. 245

Md.—*Baltimore & O. R. Co. v. Strube*, 73 A. 697, 111 Md. 119

Mo.—*Baker v. Scott County Milling Co.*, 30 S.W.2d 494, 323 Mo. 1089

N.Y.—*Parker v New York State Realty & Terminal Co.*, 385 N.Y.S. 273, 246 App.Div. 222—*Herschco-*

witz v Kleinman, 336 N.Y.S. 669, 227 App.Div. 62

N.C.—*Robinson v McAlhaney*, 198 S.E. 647, 214 N.C. 180.

39 C.J. p 1366 note 58

2. N.Y.—*Stignitz v. Lamborghini*, 157 N.Y.S. 724.

3. Colo.—*Western Union Tel. Co. v. Olsson*, 90 P. 841, 40 Colo. 264

39 C.J. p 1366 note 60.

4. Ala.—*Rome & D. R. Co. v. Chastee*, 7 So. 94, 88 Ala. 591

5. Ga.—*Southern Ry. Co. v. Parham*, 73 S.E. 763, 10 Ga.App. 531

6. Ala.—*Western Union Tel. Co. v. Gorman*, 199 So. 702, 240 Ala. 432.

Cal.—*Carlson v. Sun-Maid Raisin Growers' Ass'n*, 9 P.2d 546, 131 Cal.App. 719

Ga.—*Cotton Mills v. Crawford*, 19 S.E.2d 335, 67 Ga.App. 135

N.Y.—*Marvin Briggs, Inc. v. New York Public Library, Astor, Lenox and Tilden Foundations*, 20 N.Y.S. 2d 977, 260 App.Div. 213

Tenn.—*Cole v. Standard Oil Co. of N. J.*, App., 197 S.W.2d 13—*Rice-Stix Dry Goods Co. v. Self*, 101 S.W.2d 182, 20 Tenn.App. 488

Va.—*Thalhimer Bros. v. Shaw*, 159 S.E. 87, 156 Va. 863

39 C.J. p 1367 note 62

7. Ala.—*Alabama Power Co. v. Shaw*, 111 So. 17, 215 Ala. 436.

Cal.—*Ostertag v. Bethlehem Shipbuilding Corporation*, 151 P.2d 647, 65 Cal.App.2d 795—*Wallace v King*, 80 P.2d 523, 27 Cal.App.2d 174

Ga.—*Southern Ry. Co. v. Bottoms*, 134 S.E. 624, 35 Ga.App. 804.

39 C.J. p 1367 note 63

8. Mo.—*Glossip v. Kelly*, 87 S.W.2d 513, 228 Mo.App. 392

9. Ala.—*Jebbes-Colias Confectionery Co. v. Boozie*, 62 So. 12, 181 Ala. 456.

ing¹⁰ statement of the law applicable to the case, or needs some construction to avoid misleading the jury,¹¹ or ignores material facts,¹² or does not apply to the issues,¹³ or withdraws material issues from the jury.¹⁴

§ 619. — Verdict, Findings, and Judgment

a. In general

b Verdict against master only

a. In General

The general rules controlling verdicts, findings, and judgments in civil actions ordinarily apply in actions to charge an employer for acts of his servants or of contractors employed by him.

General rules governing verdicts, findings, and judgments in civil actions ordinarily are applicable to verdict and findings¹⁵ and to judgments¹⁶ in actions to charge an employer for acts of his servants or of contractors employed by him

Exoneration of master as releasing servant.

Where the alleged negligence of the servant causes injury and there is no independent negligence on the

part of the master, a verdict exonerating the master also absolves the servant¹⁷ A judgment favorable to the master does not in all cases exonerate the servant, the court may have found that the relation of master and servant did not exist, and that the master did not actively participate in the wrongful act, as well as because, it may be, that no trespass was committed¹⁸ A verdict exonerating the employer because the statute of limitations has run does not absolve the servant against whom the statute has not run.¹⁹

b. Verdict against Master Only

Where a master and servant are sued jointly in an action based solely on the servant's tortious conduct and the servant is acquitted, as a general rule there can be no recovery against the master.

While the rule is otherwise in some jurisdictions,²⁰ as a general rule, where a master and servant are sued jointly in an action based solely on the tortious conduct of the servant, and the servant is acquitted, there can be no recovery against the master²¹ Under such circumstances, a verdict against the master and an acquittal of the servant is equiv-

10. Ala.—Lewy Art Co v. Agricola, 53 So 145, 169 Ala 60.
39 C J p 1367 note 65

11. Ala.—Jebbles-Colias Confectionery Co v Booze, 62 So 12, 181 Ala 456.

12. Md.—Surry Lumber Co v Zissett, 133 A 458, 150 Md 494.

Va.—Thalhimer Bros v Shaw, 159 SE 87, 156 Va 863
39 C J p 1367 note 67

13. Ark.—Patterson v. Risher, 221 SW 468, 143 Ark. 376

14. Ark.—Stout Lumber Co v Reynolds, 1 SW 2d 77, 175 Ark. 988

Va.—Peele v Bright, 39 SE 238, 119 Va 182

15. Cal.—Haworth v Elliott, 153 P. 2d 804, 67 Cal App 2d 77

Mass.—Moran v Plymouth Rubber Co, 38 NE 2d 931, 310 Mass 830

Tex.—Nolte v Olmos Dinner Club, Civ App, 118 SW 2d 841, error dismissed

39 C J p 1367 note 72.

Plaintiff must obtain jury finding on every essential controversial issue necessary to support cause of action—Nolte v Olmos Dinner Club, supra

Implied findings

In guest's action against owners of roadhouse for alleged assault, finding that codefendant was employed by owners as a bouncer was equivalent to finding codefendant was employed to use force upon guests whenever necessary to keep peace and preserve order—Stewart

v Reutler, 39 P 2d 402, 32 Cal App 2d 195

Consistency of special findings with general verdict

Cal.—Callahan v Harm, 277 P 529, 98 Cal App 568

Kan.—Wilson v Fowler Packing Co, 255 P 1109, 123 Kan 470

Directing verdict for defendant after jury returned verdict for plaintiff, where finding that defendant's servant violated duty toward plaintiff was warranted, was error—Conley v Rosenfield, 171 NE 452, 271 Mass 433

16. La.—Costa v. Yochim, 28 So 992, 104 La 170

39 C J p 1367 note 73

17. Wash.—Schosboek v. Chicago, M, St P & P R Co, 71 P 2d 548, 191 Wash 425.

Judgment for master as bar to subsequent action against servant see Judgments § 757

18. Ala.—Griffin v Bozeman, 173 So. 857, 234 Ala. 136

19. Wash.—Schosboek v. Chicago, M, St P. & P R Co, 71 P 2d 548, 191 Wash 425.

20. Idaho.—Strickfaden v Green Creek Highway Dist, 248 P. 456, 42 Idaho 738, 49 A L R 1057

Tex.—S. H. Kress & Co v. Hall, Civ App, 154 SW 2d 278, error refused

39 C J. p 1367 note 74 [a]

21. Ala.—Southwestern Greyhound Lines v Callahan, 13 So 2d 660, 344 Ala 449—Brooks v. City of Birmingham, 194 So 525, 239 Ala. 172

—Griffin v. Bozeman, 173 So 857, 234 Ala 136

Cal.—Freeman v Churchill, 183 P 2d 4—Will v Southern Pac Co, 116 P 2d 44, 18 Cal 2d 468—Jentick v.

Pacific Gas & Electric Co, 114 P 2d 343, 18 Cal 2d 117—Wills v J.

J Newberry Co, 111 P 2d 346, 43 Cal App 2d 595—Johnston v. City

of San Fernando, 95 P 2d 147, 35 Cal App 2d 244—Davison v Dia-

mond Match Co., 51 P 2d 452, 10 Cal App 2d 218—Ellis v Owen

Roofing Co, 43 P 2d 553, 6 Cal App 2d 25—Armas v City of Oak-

land, 27 P 2d 666, 135 Cal App 411, rehearing denied 28 P 2d 422, 135

Cal App 411—Mackie v Ambassa-

dor Hotel & Investment Corpora-

tion, 11 P 2d 3, 123 Cal App 215, followed in 11 P 2d 7, 123 Cal App

770

Fla.—Colle v Atlantic Coast Line R Co, 14 So 2d 422, 153 Fla 258—

Webster v Snyder, 138 So 755, 103 Fla 1131

Ga.—Kallil v. Spivey, 27 S E 2d 475, 70 Ga App 84—Southern Ry. Co v.

Nix, 8 S E 2d 409, 62 Ga App 119—Southern Ry Co v Davenport, 148

SE 171, 39 Ga App 645

Ind.—Childress v Lake Erie & W. R Co, 105 NE 467, 182 Ind. 251.

Iowa.—Hall v. Miller, 235 NW 298, 212 Iowa 835—Lahr v. Chicago &

N. W Ry Co, 234 N.W. 228, 212 Iowa 644

Md.—Barone v Winebrenner, 55 A 2d 505

Minn.—Begin v Liederbach Bus Co, 208 NW 546, 167 Minn 84

Mo.—Atterbury v. Temple Stephens

alent to a finding that no cause of action exists and will not support a judgment against the master,²³ in such case the verdict is self-contradictory and inconsistent.²³ Such a verdict should be set aside²¹ or judgment for the master entered notwithstanding the verdict,²⁵ but it has also been held that in such case no judgment predicated on the verdict should be entered for or against plaintiff, as to either the master or the servant, but that on motion

of either plaintiff or defendant master the court should set aside the whole verdict, the expressed or implied finding for the servant as well as the finding against the master.²⁶

The rule absolving the master from liability on exoneration of the servant is not confined to negligence cases, but applies with equal force to other torts,²⁷ such as assault and battery,²⁸ false imprisonment,²⁹ and fraud and deceit.³⁰ It is also ap-

Co., 181 S.W.2d 659, 353 Mo. 5—Devine v. Kroger Grocery & Baking Co., 162 S.W.2d 813, 349 Mo. 621—State ex rel. Shell Petroleum Corporation v. Hostetter, 156 S.W.2d 673, 343 Mo. 841, quashing certification Cuddy v. Shell Petroleum Corporation, 127 S.W.2d 24—Corpus Juris cited in Stoutimore v. Atchison, T. & S.F. Ry. Co., 92 S.W.2d 658, 660, 338 Mo. 463—Ruehling v. Pickwick-Greyhound Lines, 55 S.W.2d 602, 337 Mo. 196—Corpus Juris cited in Stith v. J. J. Newberry Co., 79 S.W.2d 447, 457, 336 Mo. 467—Oliver v. Morgan, 73 S.W.2d 993—Presley v. Central Terminal Co., App., 142 S.W.2d 799—Corpus Juris cited in Blasina v. Albert Wenzlick Real Estate Co., 138 S.W.2d 721, 725, 235 Mo. App. 526—Beck v. Mo'l. App., 102 S.W.2d 671—Corpus Juris cited in Stevens v. D. M. Oberman Mfg. Co., 79 S.W.2d 516, 518, 229 Mo. App. 627—Michely v. Mississippi Valley Structural Steel Co., 299 S.W. 830, 221 Mo. App. 205
Neb.—Zitnik v. Union Pac. R. Co., 136 N.W. 995, 91 Neb. 679

N.C.—Morrow v. Southern Ry. Co., 195 S.E. 383, 213 N.C. 127—Whitehurst v. Elks, 192 S.E. 850, 212 N.C. 97—Nichols v. Champion Fibre Co., 128 S.E. 471, 190 N.C. 1.

Okla.—Shell Petroleum Corporation v. Blair, 65 P.2d 180, 178 Okl. 361—Shell Petroleum Corporation v. Wilson, 65 P.2d 173, 178 Okl. 355—Consolidated Gas Utilities Co. v. Beatie, 27 P.2d 813, 167 Okl. 71—Chicago, R. I. & P. Ry. Co. v. Brooks, 156 P. 362, 57 Okl. 163.

Or.—Fish v. Southern Pac. Co., 143 P.2d 917, 173 Or. 294, rehearing denied 145 P.2d 991, 173 Or. 294.

S.C.—Carter v. Atlantic Coast Line R. Co., 10 S.E.2d 17, 194 S.C. 494—Mullikin v. Southern Bleachery & Print Works, 192 S.E. 655, 184 S.C. 449—Chapman-Storm Lumber Corporation v. Minnesota-South Carolina Land & Timber Co., 180 S.E. 117, 183 S.C. 31—Pettis v. Standard Oil Co. of New Jersey, 179 S.E. 894, 176 S.C. 88—Cherry v. Singer Sewing Mach. Co., 164 S.E. 126, 165 S.C. 451—Weeks v. Carolina Power & Light Co., 153 S.E. 119, 156 S.C. 158—Johnson v. At-

lantic Coast Line R. Co., 140 S.E. 443, 142 S.C. 125

Tenn.—D. B. Loveman Co. v. Bayless, 160 S.W. 841, 128 Tenn. 307, Ann. Cas. 1915C 187—Mahaffey v. Mahaffey, 15 Tenn. App. 570
Wash.—Johns v. Hake, 181 P.2d 938, 15 Wash.2d 651—Miller v. Alaska S. S. Co., 246 P. 296, 139 Wash. 207

39 C.J. p. 1367 note 75

Joint liability of master and servant see supra § 579

Judgment for or against servant as bar to action against master see Judgments § 757

In Kentucky

(1) Where master's liability is predicated on negligence or other tort of servant under doctrine of respondeat superior, a finding or verdict that servant was not guilty conclusively establishes nonliability of master—Chesapeake & O. Ry. Co. v. Williams' Adm'x, 190 S.W.2d 549, 300 Ky. 850—Dillon v. Harkleroad, 174 S.W.2d 419, 395 Ky. 308—Louisville & N. R. Co. v. Farney, 172 S.W.2d 656, 295 Ky. 8—Illinois Cent. R. Co. v. Applegate's Adm'x, 105 S.W.2d 153, 268 Ky. 458.

(2) Formerly it was held that, notwithstanding liability of master, in action against master and servant jointly, was based solely on doctrine of respondeat superior, master could be held liable although servant was acquitted—Nashville, C. & St. L. Ry. v. Byars, 67 S.W.2d 497, 252 Ky. 507, certification denied 54 S.Ct. 633, 292 U.S. 629, 78 L.Ed. 1483—Illinois Cent. Ry. Co. v. Lashley, 270 S.W. 806, 208 Ky. 374—J. I. Case Threshing Mach. Co. v. Haynes, 189 S.W. 786, 178 Ky. 644—39 C.J. p. 1367 note 74 [a], [b]

22. Cal.—Johnston v. City of San Fernando, 95 P.2d 147, 85 Cal. App. 2d 244

Colo.—Willy v. Atchison, T. & S. F. Ry. Co., 172 P.2d 958, 115 Colo. 306
Mo.—Corpus Juris quoted in Stith v. J. J. Newberry Co., 79 S.W.2d 447, 458, 336 Mo. 467.
39 C.J. p. 1368 note 76

23. Ala.—Pollard v. Coulter, 191 So. 231, 238 Ala. 421—Carter v. Franklin, 173 So. 861, 234 Ala. 116

Neb.—Bohmont v. Moore, 295 N.W. 419, 138 Neb. 784, 133 A.L.R. 270,

rehearing denied 297 N.W. 559, 138 Neb. 907, 133 A.L.R. 279

N.J.—Maldonado v. Ironbound Transp. Co., 156 A. 275, 9 N.J. Misc. 985

N.Y.—Agoado v. Cohen, 254 N.Y.S. 134, 234 App. Div. 37.

Pa.—Goedicke v. Magro, Com. Pl., 29 West Co. L.J. 139

24. Ala.—Pollard v. Coulter, 191 So. 231, 238 Ala. 421—Louisville & N. R. Co. v. Maddox, 183 So. 849, 236 Ala. 594, 118 A.L.R. 1318—Carter v. Franklin, 173 So. 861, 234 Ala. 116—Southern Ry. Co. v. Lockridge, 130 So. 557, 222 Ala. 15—Walker v. St. Louis-San Francisco Ry. Co., 108 So. 388, 214 Ala. 492
Fla.—Williams v. Hines, 86 So. 695, 80 Fla. 690

25. Colo.—Willy v. Atchison, T. & S. F. Ry. Co., 172 P.2d 958, 115 Colo. 306

Fla.—Williams v. Hines, 86 So. 695, 80 Fla. 690

Ky.—Chesapeake & O. Ry. Co. v. Williams' Adm'x, 190 S.W.2d 549, 300 Ky. 850

26. Va.—Monumental Motor Tours v. Eaton, 35 S.E.2d 105, 184 Va. 311—Barnes v. Ashworth, 153 S.E. 711, 154 Va. 218

When such verdict is set aside, as a general rule a new trial against both defendants should be awarded on the question of the amount of damages and on the liability of defendants, but in such a case, when a demurrer to the evidence would have been sustainable as to the liability of the party who is alleged to have committed the act of negligence complained of, the court should enter final judgment for both defendants—Monumental Motor Tours v. Eaton, 35 S.E.2d 105, 184 Va. 311—Barnes v. Ashworth, 153 S.E. 711, 154 Va. 218

27. Mo.—Blasina v. Albert Wenzlick Real Estate Co., 138 S.W.2d 721, 235 Mo. App. 526

28. Mo.—Presley v. Central Terminal Co., App., 142 S.W.2d 799

29. Mo.—Wade v. Campbell, 243 S.W. 248, 211 Mo. App. 274.

30. Ill.—Billstrom v. Triple Tread Tire Co., 220 Ill. App. 550

Mo.—Blasina v. Albert Wenzlick

plicable whether the master is a corporation or an individual³¹

Where a master and servant are sued jointly, a verdict against the master only is in effect a verdict for the servant,³² and the rule exonerating the master on the acquittal of the servant generally applies.³³ However, in a number of decisions it has been held that the failure of the jury to return a verdict against the servant is no ground for setting aside a judgment on a verdict rendered against the master³⁴

Extent and limits of rule The rule that on acquittal of the servant the master is exonerated from liability has no application except in cases where the liability of the master is based solely on the

wrongful acts of the servant, who is acquitted.³⁵ If the liability is not so based, a finding that the act of the particular servant was not wrongful does not prevent the rendition of a verdict against the master based on the acts of other servants shown to be wrongful and for which the master is liable under the doctrine of respondeat superior³⁶ In addition, a verdict against the master and an acquittal of the servant will be sufficient to sustain a judgment against the master where the act resulting in the injury complained of was committed under the express command of the master,³⁷ or where the master and servant are sued jointly for injuries resulting from the negligence of both and there is evidence of negligence on the part of the master distinct from the alleged negligent act of the servant³⁸

Real Estate Co., 138 S.W.2d 721, 235 Mo App 526

31. Mo—B'essnay v Albert Wenzel Real Estate Co, *supra*.

32. Minn—Ayer v Chicago, M St P & P. Ry Co, 244 N.W. 681, 187 Minn 169—Begin v Liederbach Bus Co, 208 N.W. 546, 167 Minn 84

33. Ky—Louisville & N. R. Co v Farney, 172 S.W.2d 656, 295 Ky 8

Mich—Tutton v Olsen & Ebann, 232 N.W. 399, 251 Mich 642

Minn—Begin v Liederbach Bus Co, 208 N.W. 546, 167 Minn 84

Va—Barnes v Ashworth, 153 S.E. 711, 154 Va 218

W Va—Wills v Montfair Gas Coal Co, 133 S.E. 749, 104 W.Va. 13 39 C.J. p 1367 notes 75, 76

34. N.J.—Dunbaden v Castles Ice Cream Co, 135 A. 886, 103 N.J. Law 427

Utah—Anderson v Salt Lake City, 10 P.2d 927, 79 Utah 324

39 C.J. p 1369 note 85

35. Ala—Pollard v Coulter, 191 So 231, 238 Ala 421

Cal—Hedlund v Sutter Medical Service Co, 124 P.2d 878, 51 Cal App.2d 327—McCullough v Langer, 73 P.2d 649, 23 Cal App.2d 510—Fitch v Bekins Van & Storage Co, 70 P.2d 670, 22 Cal App.2d 101—Klennan v Herbert M. Baruch Corporation, 66 P.2d 748, 20 Cal App.2d 289

Mo—Elgin v Kroger Grocery & Baking Co, 206 S.W.2d 501—Atterbury v Temple Stephens Co, 181 S.W.2d 659, 353 Mo 5—Devine v Kroger Grocery & Baking Co, 162 S.W.2d 813, 349 Mo 621—Stith v J. J. Newberry Co, 79 S.W.2d 447, 336 Mo 467—McMahon v Chicago, B & Q. R. Co., App. 277 S.W. 358

Neb—Fonda v Northwestern Public Service Co, 292 N.W. 712, 138 Neb 262

Okl—Southern Kansas Stage Lines

Co v Crain, 89 P.2d 968, 185 Okl 1

SC—Mullikin v Southern Bleachery & Print Works, 192 S.E. 665, 184 SC 449—Pettis v Standard Oil Co of New Jersey, 179 S.E. 894, 176 SC 88—Miller v Atlantic Coast Line R. Co., 138 S.E. 675, 140 SC 123, certiorari denied Camp Mfg Co v Miller, 48 S.Ct. 117, 275 U.S. 556, 72 L.Ed. 424—James v Western Union Telegraph Co, 126 S.E. 653, 130 SC 533

Tenn—D. B. Loveman Co v Bavelless, 160 S.W. 841, 128 Tenn 307, Ann Cas 1945C 187

Wash—Aldrich v Island Empire Telephone & Telegraph Co, 113 P.2d 64, 62 Wash 173

W Va—Wills v. Montfair Gas Coal Co, 133 S.E. 749, 104 W.Va. 13 39 C.J. p 1368 note 80

36. Ala—Pollard v Coulter, 191 So 231, 238 Ala 421—Louisville & N. R. Co v Maddox, 183 So 849, 236 Ala 594, 118 A.L.R. 1318

Cal—Wills v J. J. Newberry Co, 111 P.2d 846, 43 Cal App.2d 595

Ind—New York Cent R. Co v Verpleatse, 59 N.E.2d 916, 116 Ind App. 1, rehearing denied 60 N.E.2d 784

Mo—Stokes v Wabash R. Co, 197 S.W.2d 304, 355 Mo 602—De Moulain v Roetheli, 189 S.W.2d 562, 354 Mo 425—Atterbury v. Temple Stephens Co, 181 S.W.2d 659, 353 Mo 5—Devine v Kroger Grocery & Baking Co, 162 S.W.2d 813, 349 Mo 621—Stoutimore v Atchison, T & S F. Ry Co, 92 S.W.2d 658, 338 Mo 463—Stith v J. J. Newberry Co, 79 S.W.2d 447, 336 Mo 467—Ryan v Standard Oil Co of Indiana, App. 144 S.W.2d 170

Neb—Corpus Juris quoted in Fonda v Northwestern Public Service Co, 292 N.W. 712, 719, 138 Neb. 262.

Okl—Chicago, R. I. & P. Ry Co v Pedigo, 252 P. 1095, 123 Okl 218

Or—Fish v Southern Pac. Co., 143

P.2d 917, 173 Or 294, rehearing denied 145 P.2d 991, 173 Or 294

SC—Mullikin v Southern Bleachery & Print Works, 192 S.E. 665, 184 SC 449—Collins v. Atlantic Coast Line R. Co., 190 S.E. 817, 183 SC 284—Chapman-Storm Lumher Corporation v Minnesota-South Carolina Land & Timber Co, 190 S.E. 117, 183 SC 31—Pettis v. Standard Oil Co of New Jersey, 179 S.E. 894, 176 SC 88—Weeks v Carolina Power & Light Co, 153 S.E. 119, 156 SC 158

Wash—Senske v Washington Gas & Electric Co., 4 P.2d 523, 165 Wash. 1

39 C.J. p 1368 note 81.

37. Cal—Hedlund v Sutter Medical Service Co, 124 P.2d 878, 51 Cal App.2d 327—McCullough v Langer, 73 P.2d 649, 23 Cal App.2d 510—McInerney v San Francisco United R. Cos., 195 P. 958, 50 Cal App 538

Neb—Corpus Juris quoted in Fonda v Northwestern Public Service Co, 292 N.W. 712, 720, 138 Neb 262

Okl—Kurn v Campbell, 112 P.2d 886, 188 Okl 636—St. Louis-San Francisco Ry Co v Simmons, 242 P. 151, 116 Okl 126

SC—Corpus Juris quoted in Mullikin v Southern Bleachery & Print Works, 192 S.E. 665, 669, 184 SC 449

38. Ala—Southeastern Greyhound Lines v Callahan, 13 So.2d 660, 344 Ala 449

Cal—Nichols v Southern Pac. Co., 138 P.2d 332, 58 Cal App.2d 91—Ellis v Owen Roofing Co., 43 P.2d 558, 6 Cal App.2d 25

Ind—New York Cent R. Co v Verpleatse, 59 N.E.2d 916, 116 Ind App. 1, rehearing denied 60 N.E.2d 784—Lake Erie R. Co v Reed, 103 N.E. 137, 57 Ind.App. 65.

Kan—Morris v Kansas City, L. & W. Ry Co., 285 P. 1047, 118 Kan 432.

In the foregoing circumstances a verdict of acquittal of the servant is not inconsistent with a verdict holding the master liable and does not vitiate it.³⁹

Under comparative negligence rule, where, in an action for negligence against a corporation and certain of its employees, there is a plea of contributory negligence on the part of defendant and evidence tending to establish it, the jury may, if the evidence justifies it under the comparative negligence rule, find in favor of such employees and against the corporation.⁴⁰

Action by servant against master and coservant. There is a conflict of authority as to the legal effect of the verdict where in an action by a servant against his master and a coservant there is a verdict against the master and either a verdict for or

no finding against the coemployee.⁴¹ On the one hand, it has been held that such a verdict constitutes a mistrial⁴² or that it requires a judgment in favor of the master.⁴³ On the other hand, it has been held that such a verdict is sufficient to sustain a judgment for the servant.⁴⁴

§ 620. Appeal and Error

The review by appeal and error of judgments in actions against a master for the acts of his servants or of contractors employed by him is considered in Appeal and Error § 1 et seq.

§ 621. Costs

Costs in civil actions are considered in Costs § 1 et seq.

VI. LIABILITY OF THIRD PERSON FOR INJURIES TO SERVANT

§ 622. Rights of Master

A master has been held to be entitled to maintain an action for injuries to his servants because of the negligent or willful acts of third persons which result in damage to the master through loss of services, although it has also been held that such a recovery will be denied unless the injury to the employee is intentionally calculated to harm the employer in his contractual obligations.

Under the common law it has been held that a master may maintain an action for all injuries to his servants because of the negligent or willful acts of third persons which result in damage to the master through loss of services.⁴⁵ However, this right of the master, it has been held, is an old remedy at

Ky—Dillon v Harkleroad, 174 S.W. 2d 419, 295 Ky. 308.
Minn—Berry v. Daniels, 263 N.W. 115, 195 Minn. 368.
Mo—Devine v. Kroger Grocery & Baking Co., 163 S.W.2d 813, 349 Mo. 631—Stuth v J J Newberry Co., 79 S.W.2d 447, 338 Mo. 457.
Neb—Lewis v Union Pac R Co., 226 N.W. 318, 118 Neb. 705.
N.H—Abbott v Hayes, 26 A.2d 843, 92 NH 126.
N.J—Maldonado v Ironbound Transp Co., 156 A. 275, 9 N.J. Misc. 985.
N.C—Corpus Juris quoted in Ledford v Tallahassee Power Co., 138 S.E. 424, 427, 194 NC 98—Nichols v Champion Fibre Co., 128 S.E. 471, 190 N.C. 1.
Okla—Kurn v Campbell, 112 P.2d 886, 188 Okl. 636—Texas Co. v Taylor, 61 P.2d 574, 178 Okl. 21—Apache Gas Co v Thompson, 61 P.2d 567, 177 Okl. 594—Indian Territory Illuminating Oil Co v. Graham, 50 P.2d 720, 174 Okl. 438—Southern Drilling Co v. McKee, 42 P.2d 265, 171 Okl. 409—Texas Co v Alred, 28 P.2d 556, 167 Okl. 128—Spruce v Chicago, R I & P. Ry. Co., 281 P. 556, 139 Okl. 123.
S.C—Seay v Southern Ry Co., 37 S.E.2d 535, 208 S.C. 171—Corpus Juris quoted in Mullikin v Southern Bleachery & Print Works, 192

S.E. 665, 669, 184 S.C. 449—Rhodes v Southern Ry Co., 137 S.E. 434, 139 S.C. 139.
Wash—Miller v Alaska S S. Co., 246 P. 296, 139 Wash. 207.
39 C.J. p 1368 note 83.
Presumption of negligence against employer
Ark—Missouri Pac. R Co v Morrison, 55 S.W.2d 933, 186 Ark. 689, certiorari denied 53 S.Ct. 793, 289 US 759, 77 L.Ed. 1503—Kansas City Southern Ry. Co v Cockrell, 277 S.W. 7, 169 Ark. 698.
Fla—Colle v Atlantic Coast Line R. Co., 14 So.2d 422, 153 Fla. 258.
Duty of owner to maintain apartment in safe condition for tenants was independent as well as related to duty of employees in charge of building, and hence exoneration of employees did not relieve owner from liability for injuries to tenant—Walters v Western States Realty Co., 50 P.2d 451, 9 Cal. App. 2d 583.
39. Minn—Carver v Luverne Brick & Tile Co., 141 N.W. 488, 131 Minn. 888.
Neb—Usher v. American Smelting & Refining Co., 150 N.W. 814, 97 Neb. 526.
40. Ark—Louis B Siegel & Co v Moore, 161 S.W.2d 387, 204 Ark. 50—Dierks Lumber & Coal Co. v.

Notes, 148 S.W.2d 650, 201 Ark. 1088—Missouri Pac R Co v Morrison, 55 S.W.2d 933, 186 Ark. 689, certiorari denied 53 S.Ct. 793, 289 US 759, 77 L.Ed. 1502—Corpus Juris quoted in Mississippi River Fuel Corporation v. Senn, 43 S.W. 2d 255, 258, 184 Ark. 554.
39 C.J. p 1369 note 87.
41. Mont—Verlinda v Stone & Webster Engineering Corp., 119 P. 573, 44 Mont. 223.
42. ND—Bauer v Great Northern R Co., 169 N.W. 84, 40 ND 542.
43. Wash—Doremus v Root, 63 P. 572, 23 Wash. 710, 54 L.R.A. 649.
39 C.J. p 1254 note 56.
44. Mo—Warren v. American Car & Foundry Co., 38 S.W.2d 718, 327 Mo. 755.
39 C.J. p 1255 note 57.
45. US—Corpus Juris quoted in Jones v Waterman S S Corp., C. C.A. Pa., 155 F.2d 992, 993.
N.J—Interstate Tel. & Tel v Public Service Elec. Co., 90 A. 1062, 86 N.J. Law 26.
39 C.J. p 1369 note 91.
Right of employer or insurer liable to employee under workmen's compensation acts to reimbursement or indemnity from person causing injury see the C.J.S. title Workmen's Compensation Acts §§ 992-1011,

common law when the basis of society was that of "status" and the servant was looked on as a member of the master's family,⁴⁶ and, since the master-servant relationship is now⁴⁷ generally based on contract, the master's cause of action for loss of his employee's services remains as an anomaly in the law,⁴⁸ and has been held to be of doubtful right under modern conditions.⁴⁹ The right of action is for the actual losses suffered from the inability of the servant to serve his master,⁵⁰ and the master has no right of action unless some loss of service or capacity to serve results from the injury.⁵¹ It has been held that the employer's right of recovery does not include damages for wages and expenses paid by him during the servant's incapacity,⁵² but it has also been held that, where an employer was required

by contract to pay a seaman maintenance and cure, such employer can recover from a third person negligently causing the seaman's injury not only for loss of services, but also for any sums expended for maintenance and cure.⁵³

On the other hand, it has also been held that an employer has no right of action against a third person responsible for injuries to his employee,⁵⁴ except where expressly given such right by statute,⁵⁵ or where the injury to the employee is intentionally calculated to harm the employer in his contractual obligations.⁵⁶ Thus, it has been held that, where a servant is injured through the wrongful act of another, and the master suffers an indirect loss from some contract obligation to the injured servant, the loss is not actionable,⁵⁷ but there is also authority

also 71 C.J. p 1547 note 6-p 1573 note 51.

Right of master to indemnity for expenses, etc., paid out on behalf of servant due to another's wrong see Indemnity § 21.

Right of master to recover for personal injuries to apprentice see Apprentices § 19.

Dog bite

The rule has been applied where the loss of services is the result of a bite by defendant's dog—*McCarthy v. Guild*, 12 Metc. Mass., 291—38 C.J. p 1369 note 97.

At common law in England, the master might bring an action for damages against a third person for any loss he might have sustained by reason of such person unlawfully injuring his servant, but this right given the master applied only to menial servants.

US—U S v. Atlantic Coast L. R. Co., DCNC, 64 F.Supp. 289.

SC—Burgess v. Carpenter, 2 SC 7, 16 AmR 643.

46. US—Standard Oil Co. of Cal v U S, CCA Cal, 153 F2d 958, affirmed U S v Standard Oil Co of Cal, 67 SCt 1604, 332 US 301, 91 LEd 2067—U. S. v Atlantic Coast L. R. Co., DCNC, 64 F Supp 289.

Pa—City of Philadelphia v. Philadelphia Rapid Transit Co., 10 A 3d 434, 337 Pa 1.

47. US—Standard Oil Co. of Cal v U S, CCA Cal, 153 F2d 958, affirmed U S v Standard Oil Co of Cal, 67 SCt 1604, 332 US 301, 91 LEd 2067—U S v Atlantic Coast L. R. Co., DCNC, 64 F.Supp. 289.

48. US—Standard Oil Co. of Cal v U S, CCA Cal, 153 F2d 958, affirmed U S v Standard Oil Co of Cal, 67 SCt 1604, 332 US 301, 91 LEd 2067—U S v. Atlantic Coast L. R. Co., DCNC, 64 F Supp. 289.

49. US—U S v Atlantic Coast L. R. Co., supra.

Pa—City of Philadelphia v Philadelphia Rapid Transit Co., 10 A 3d 434, 337 Pa. 1.

50. US—Standard Oil Co. of Cal v U S, CCA Cal, 153 F2d 958, affirmed U S v Standard Oil Co of Cal, 67 SCt 1604, 332 US 301, 91 LEd 2067.

NJ—Interstate Tel. & Tel. v Public Service Elec. Co., 90 A 1062, 86 NJLaw 26.

51. Ga—Fluker v. Georgia R. & Banking Co., 8 SE 529, 81 Ga 461, 12 AmSR 328, 2 L.R.A. 843.

39 C.J. p 1369 note 1.

52. NJ—Interstate Tel. & Tel. v Public Service Elec. Co., 90 A 1062, 86 NJLaw 26.

Pa—City of Philadelphia v Philadelphia Rapid Transit Co., 10 A 3d 434, 337 Pa. 1.

Hospital and medical expenses

Government could not recover from third person for hospital and medical care furnished to a member of the armed forces or for wages paid to him during incapacity due to injuries received through the negligence of such third person—Standard Oil Co. of Cal v U S, CCA Cal, 153 F2d 958, affirmed U S v Standard Oil Co. of Cal, 67 SCt 1604, 332 US 301, 91 LEd 2067—U S v Atlantic Coast L. R. Co., DCNC, 64 F.Supp. 289.

53. US—Jones v Waterman S. S. Corp., CCA Pa., 155 F2d 992.

54. Va—Noblin v Randolph Corporation, 23 SE2d 209, 180 Va 345.

The ordinary rules of tort law will apply to the relationship of employer and employee, as respects third person's liability to employer for injuries to employee, until the legislature deems it wise to create a specific social employer-employee status, with additional obligations and immunities thereunto appertaining—

Crab Orchard Improvement Co v. Chesapeake & O Ry Co., CCA W Va., 115 F2d 277, certiorari denied 61 SCt 807, 312 US 702, 85 LEd 1135.

55. US—Standard Oil Co. of Cal v U S, CCA Cal, 153 F2d 958, affirmed U S v Standard Oil Co of Cal, 67 SCt 1604, 332 US 301, 91 LEd 2067—Crab Orchard Improvement Co v Chesapeake & O Ry Co., CCA W Va., 115 F2d 277, certiorari denied 61 SCt 807, 312 US 702, 85 LEd. 1135.

Cal—Darmour Productions Corporation v. Herbert M Baruch Corporation, 27 P2d 664, 135 Cal App 351.

Okla—Johnson v Harris, 102 P2d 940, 187 Okl 239.

Va—Noblin v Randolph Corporation, 23 SE2d 209, 180 Va 345.

56. US—Jones v Waterman S. S. Corp., CCA Pa., 155 F2d 992—Crab Orchard Improvement Co v. Chesapeake & O Ry Co., CCA W Va., 115 F2d 277, certiorari denied 61 SCt 807, 312 US 702, 85 LEd 1135.

57. Mass—Chelsea Moving & Trucking Co v Ross Towboat Co., 182 N.E 477, 280 Mass. 282.

Salary

Employer obligated by contract to pay injured employee regular salary during employee's disability could not recover against one injuring employee for loss to employer from employee's decreased working ability.—Chelsea Moving & Trucking Co v. Ross Towboat Co., supra.

Increased compensation premiums

Contractor could not recover from subcontractor for increased workmen's compensation insurance premiums which contractor was compelled to pay in consequence of employee's death caused by subcontractor's negligence.—Northern States Contracting Co v. Oakes, 253 NW 371, 191 Minn 88.

to the contrary.⁵⁸ It has likewise been held that a third person is not liable in damages to the master where the injury to the servant resulted from the mere omission to perform a contract duty owing to the servant.⁵⁹

Existence of master and servant relationship. Where the master has a right of action against a third person for injuries to his servant, the relationship of master and servant must be established to permit a recovery.⁶⁰ In this connection it has been held that the relationship of master and servant does not exist between the United States and a member of the military services,⁶¹ or between a state and a national guardsman,⁶² or between a municipality and a volunteer fireman,⁶³ but, under a statute forbidding any injury to a servant which affects his ability to serve his master, an actress has been held to be a servant.⁶⁴

If the servant dies shortly after the infliction of the injury, the right of the master to recover is limited to the loss of services sustained between the

time of the accident and the death of the servant.⁶⁵ Where the servant dies immediately on sustaining the injury, the master has no right of action unless by virtue of some special statutory provision.⁶⁶

Procedure In an action against a third person for damages resulting from injuries to a servant, general rules of procedure apply with respect to the pleadings,⁶⁷ burden of proof,⁶⁸ and the weight and sufficiency of evidence.⁶⁹

§ 623. Rights of Servant

An injured employee has the right to maintain an action against any negligent tort-feasor responsible for his injury.

An injured employee has the right to maintain an action against any negligent tort-feasor responsible for his injuries,⁷⁰ unless such right is expressly or by necessary inference denied him by statute.⁷¹ Thus, the servant has a right of action for his personal injury, separate and apart from the master's action for loss of services.⁷²

53. U.S.—Jones v. Waterman S. S. Corp., C.C.A. Pa., 155 F.2d 992

59. Pa.—Fairmount & Arch St. Pass R. Co. v. Stutler, 54 Pa. 375, 93 Am. D. 714

39 C.J. p. 1369 note 99

60. U.S.—Standard Oil Co. of Cal. v. U.S. C.C.A. Cal., 153 F.2d 958, affirmed U.S. v. Standard Oil Co. of Cal., 67 S.Ct. 1604, 332 U.S. 301, 91 L.Ed. 2067

39 C.J. p. 1369 note 2.

61. U.S.—Standard Oil Co. of Cal. v. U.S. C.C.A. Cal., 153 F.2d 958, affirmed U.S. v. Standard Oil Co. of Cal., 67 S.Ct. 1604, 332 U.S. 301, 91 L.Ed. 2067—United States v. Atlantic Coast L.R. Co., D.C.N.C., 64 F.Supp. 289

62. Ill.—Hays v. Illinois Terminal Transp. Co., 2 N.E.2d 309, 363 Ill. 397

63. N.Y.—Employers' Liability Assur. Corp., Limited, of London, England v. Daley, 67 N.Y.S.2d 233.

64. Cal.—Darmour Productions Corporation v. Herbert M. Baruch Corporation, 27 P.2d 664, 135 Cal.App. 351

65. Mich.—Hyatt v. Adams, 16 Mich. 180.

66. Mass.—Carey v. Berkshire R. Co., 1 Cush. 475, 48 Am.D. 616

N.Y.—Green v. Hudson River R. Co., 2 Abb. Dec. 277, 2 Keyes 294.

39 C.J. p. 1370 note 6.

67. Cal.—Darmour Productions Corporation v. Herbert M. Baruch Corporation, 27 P.2d 664, 135 Cal.App. 351

Complaint held sufficient

Cal.—Darmour Productions Corporation v. Herbert M. Baruch Corporation, supra

Pleading held insufficient

Petition requesting damages for the value of master's house abandoned after the willful killing of a servant was held insufficient since only damages recoverable are for the loss of servant's services.—Clark v. Gay, 38 S.E. 81, 112 Ga. 777.

68. Del.—Robinson v. Burton, 5 Del. 335

39 C.J. p. 1369 note 2.

69. Del.—Robinson v. Burton, supra

70. Mass.—McCarthy v. Guild, 12 Metc. 291

N.Y.—Woodward v. Washburn, 3 Den. 369.

Va.—Noblin v. Randolph Corporation, 23 S.E.2d 209, 180 Va. 345

Joint and several liability for injuries to servant see supra § 195

Liability of employer to another's employee under Employers' Liability Act see supra § 555.

Evidence

(1) Proof that plaintiff, while

working, was struck and injured by object falling from above, that, on floors above, only employees of defendant subcontractor were engaged, and that such floors were open and unprotected in violation of labor law and city's building code, was held to establish prima facie case of negligence against general contractor—Caminiti v. Matthews Const. Co., 272 N.Y.S. 245, 241 App. Div. 879.

(2) Where employee of independent contractor constructing railroad underpass was injured by cave-in, evidence was held insufficient to show that railroad was negligent in operating trains over excavation or in use of its tools in working on its tracks—Hailey v. Missouri, K. & T. R. Co., Tex. Civ. App., 70 S.W.2d 249, error refused.

71. Va.—Noblin v. Randolph Corporation, 23 S.E.2d 209, 180 Va. 345

72. Mass.—McCarthy v. Guild, 12 Metc. 291

N.Y.—Woodward v. Washburn, 3 Den. 369.

Master's statutory right of action

The fact that a master is given by statute a right of action for injury to a servant when the injury affects the servant's liability to serve his master does not deprive the servant of the right to recover for his own injury—Johnson v. Harris, 102 P.2d 940, 187 Okl. 239.

VII. INTERFERENCE WITH THE RELATION BY THIRD PERSONS

A. CIVIL LIABILITY

§ 624. In General

Malicious interference with the advantageous relations between employer and employee, to the injury of either party, may subject the wrongdoer to an action for damages

It has been broadly held that malicious interference with the advantageous relations between employer and employee, to the injury of either party, may subject the wrongdoer to an action for damages,⁷³ since there is a property right in a contract of employment.⁷⁴ This rule has been held to apply to interference preventing the formation of employment contracts as well as to interference with existing contractual relations.⁷⁵ A third person may not maliciously destroy an employer's freedom of

choice of the men he will hire and of the conditions of employment; nor may an outsider maliciously destroy the workers' freedom of choice whether they will accept and continue the employment offered them.⁷⁶

Generally, in order to render an act which interferes with another's employment a violation of his rights, there must be an intention to bring about a particular result, the use of unlawful means, and the absence of justification.⁷⁷ "Unlawful means," used in this connection, does not apply to means in themselves unlawful, but to those which are unlawful as being prima facie an invasion of plaintiff's rights.⁷⁸ The term "malice," as used in the rule

73. Cal—Buxbom v Smith, 145 P. 2d 305, 23 Cal 2d 535

Mass—Comerford v Meier, 19 NE 2d 711, 302 Mass 398

NY—Lamb v S Cheney & Son, 125 NE 817, 237 NY 418—S C Posner Co v Jackson, 119 NE 573, 223 NY 325—Vail-Ballou Press v Casey, 213 NYS 113, 125 Misc 689

Interference with contract relations generally see the CJS title Torts §§ 42-44 also 63 C.J. p 1137 note 28—p 1148 note 99.

Injunction

Against inducing breach of contract generally see Injunctions § 89

Against interference with trade, business, or occupation see Injunctions §§ 138-149

Legality of acts of labor organizations generally see supra § 28 (19)

Liability for conspiracy see Conspiracy §§ 10-14.

Unfair labor practices see supra §§ 28 (43)-28 (63).

Effect of constitutional provisions

(1) Constitutional provision that any person maliciously interfering or hindering any citizen from enjoying employment already obtained shall be deemed guilty of misdemeanor is only for protection of citizens, and cannot be relied on by one who does not allege himself to be citizen—Gottschalk v. Shepperd, 260 N.W. 573, 65 ND 544.

(2) Effect of Thirteenth Amendment to U S Constitution see Constitutional Law § 204

Detention of servant

Bank's action in closing doors and detaining a servant is not justified and gives rise to a cause of action in favor of the master for loss of service of his servant, even though the bank doors were closed at the usual

closing time and the servant knew the closing hour—Woodward v Washburn, 3 Den. N.Y., 369.

Freedom from molestation

An employer has right to carry on its business without molestation and to have its employees, and those seeking employment, free to come and go without molestation—Jefferson & Indiana Coal Co v. Marks, 134 A 430 287 Pa. 171, 47 A.L.R. 745

Interference held not malicious or unjustified

When, as result of play producer's failure to pay members of cast their salaries at end of unsuccessful first week, actors' equity association representatives had directed members of cast, who as members of association were bound by its rules, not to put on certain performances, producer was not entitled to recover damages from association, since association's interference with performance of employment contracts was not malicious or unjustified—Du Roy & La Maistre v Gillmore 284 NYS 385, 246 App Div. 37, affirmed 3 NE 2d 866, 272 N.Y. 454.

Withholding of wages

Plaintiff could not maintain action against defendant wrongfully notifying plaintiff's employer that defendant held assignment of plaintiff's wages and causing employer to withhold wages—Pickens v Hal J. Copeland Grocery Co, 123 So 223, 219 Ala. 697

74. Ala—Evans v Swaim, 18 So 2d 400, 245 Ala 641—Hill Grocery Co v Carroll, 136 So 789, 233 Ala 376

Cal—Blender v Superior Court for Los Angeles County, 130 P 2d 179, 55 Cal App 2d 34

Mass—Caverno v Fellows, 15 NE 2d 483, 300 Mass 331

NJ—Feller v Local 144, International Ladies Garment Union, 191 A 111, 121 N.J.Eq 452—Driver v Smith, 104 A. 717, 89 N.J.Eq 339

NY—S C Posner Co v Jackson, 119 NE 573, 223 NY 325—Vail-Ballou Press v Casey, 213 N.Y. S 113, 125 Misc 689—Hardy v. Erickson, 86 NYS 2d 823.

75 Colo—Order of Railway Conductors v. Jones, 239 P. 883, 78 Colo 80

Kan—Hilton v Sheridan Coal Co, 297 P. 413 132 Kan 525

Or—De Marais v Stricker, 53 P 2d 715, 152 Or 362.

76. NY—Interborough Rapid Transit Co v Lavin, 159 NE 863, 247 NY 65, 63 A.L.R. 188

77. Or—De Marais v Stricker, 53 P 2d 715, 152 Or 362

Betterment of wage

(1) Peaceful effort to bring about cessation of labor in order to enforce demand for betterment of wage or living conditions is lawful—Jefferson & Indiana Coal Co v Marks, 134 A 430, 287 Pa. 171, 47 A.L.R. 745

(2) Acts of labor organizations generally see supra § 28 (19)

Ouster from employment

Bank stockholders seeking to exclude from employment in bank all but those of particular origin did not incur liability in tort to bank officer unless purpose to oust officer from employment was primary object of combination entered into with malicious intention of damaging the officer and unless means used caused his damage—Comerford v Meier, 19 NE 2d 711, 302 Mass. 398

78. Or—De Marais v. Stricker, 53 P.2d 715, 152 Or. 362.

imposing liability for malicious interference with the employment relation, means the intentional doing of a wrongful act without justification or excuse.⁷⁹ It has been held that fraud is not an essential element of the right of action for maliciously inducing the breach of an employment contract.⁸⁰

Actions. The declaration or complaint in an action for wrongful interference with the employment relation must properly allege the essential facts constituting the cause of action.⁸¹ General rules have been applied with respect to the weight and sufficiency of evidence⁸² and questions of law and fact.⁸³

§ 625. Enticing Servant to Leave Employment

- a. In general
- b. Relation of master and servant
- c. Intent, malice; absence of just cause or excuse

79. N.Y.—*Lamb v S Cheney & Son*, 125 N.E 817, 227 N.Y. 418.
Or.—*De Marais v Stricker*, 53 P. 2d 715, 152 Or. 362.

80. N.Y.—*Lenkiewicz v Wiktorak*, 213 N.Y.S. 705, 128 Misc. 218.

81. Mass.—*Comerford v Meier*, 19 N.E.2d 711, 302 Mass. 398.

Complaint held insufficient
Mass.—*Comerford v Meier*, supra.

82. N.Y.—*Van Wyck v Mannino*, 9 N.Y.S.2d 684, 256 App. Div. 256, reargument denied 11 N.Y.S.2d 558, 256 App. Div. 1004.

Evidence held insufficient
N.Y.—*Van Wyck v Mannino*, supra.

83. Colo.—*Order of Railway Conductors v Jones*, 239 P. 882, 78 Colo. 80.

Mass.—*Sullivan v Burke*, 36 N.E.2d 875, 309 Mass. 493.

Or.—*De Marais v Stricker*, 53 P. 2d 715, 152 Or. 362.

84. Ky.—*Bourlier v Macauley*, 15 S.W. 60, 91 Ky. 135, 34 Am. S.R. 171, 11 L.R.A. 550.

39 C.J. p. 1370 note 12.

85. U.S.—*Thomas v Cincinnati, N.O. & T. P. R. Co.*, C.C.Ohio, 62 F. 803—*Old Dominion Steamship Co v. McKenna*, C.C.N.Y., 30 F. 48, 18 Abb. N. Cas. 262.

Cal.—*Buxbom v. Smith*, 145 P.2d 305, 23 Cal.2d 535—*Corpus Juris* cited in *Buxbom v. Smith*, 132 P.2d 4, 6, reheard 145 P.2d 305, 23 Cal.2d 535.

Ill.—*Randall Dairy Co. v. Pevely Dairy Co.*, 278 Ill. App. 350—*Bloom v. Bohemans*, 123 Ill. App. 269.

Mass.—*Anderson v. Moskovitz*, 157 N.E. 801, 260 Mass. 528.

Mo.—*F. C. Church Shoe Co. v. Turner*, 379 S.W. 232, 218 Mo. App. 516.

Neb.—*State v. Employers of Labor*, 169 N.W. 717, 102 Neb. 708, dissenting opinion 170 N.W. 185, 102 Neb. 768.

N.J.—*Corpus Juris* cited in *Feller v. Local 144, International Ladies Garment Workers Union*, 191 A. 111, 113, 121 N.J. Eq. 452—*Driver v. Smith*, 104 A. 717, 89 N.J. Eq. 339.

N.Y.—*Campbell v. Gates*, 141 N.E. 914, 238 N.Y. 457—*Lamb v. S. Cheney & Son*, 125 N.E. 817, 227 N.Y. 418—*American League Baseball Club of N.Y. v. Pasquel*, 63 N.Y.S.2d 537, 137 Misc. 230—*Lee v. Silver*, 27 N.Y.S.2d 236, 176 Misc. 307, modified on other grounds 28 N.Y.S.2d 333, 262 App. Div. 149, affirmed 38 N.E.2d 233, 287 N.Y. 575—*Vail-Ballou Press v. Casey*, 213 N.Y.S. 113, 125 Misc. 689—*International Tailoring Co. of N.Y. v. Lukas*, 64 N.Y.S.2d 879—*Hardy v. Erickson*, 36 N.Y.S.2d 823.

Pa.—*Caskie v. Philadelphia Rapid Transit Co.*, 5 A.2d 368, 334 Pa. 33.

Tex.—*Corpus Juris* cited in *Thomason v. Sparkman*, Civ. App., 55 S.W.2d 871, 872.

Wis.—*Bitzke v. Folger*, 286 N.W. 36, 231 Wis. 513.

39 C.J. p. 1370 notes 13, 14.

Enticing away or harboring apprentices see *Apprentices* §§ 26, 27.

Legality of acts of labor organizations generally see *supra* § 28 (19).

Liability for interference with contract relations generally see the C.J.S. title *Torts* §§ 42-44, also 62 C.J. p. 1137 note 28—p. 1148 note 99.

Employment by an agent of a third person, without the latter's authority, knowledge, or consent, does not make him liable, unless he sub-

a. In General

Generally, one who, knowing of the existence of the relation of master and servant between two parties, maliciously or willfully without just cause or excuse, entices the servant to quit his employment to the master's injury, is liable for the resulting damages.

While there is some authority to the contrary,⁸⁴ it is very generally held independently of statute that one who, knowing of the existence of the relation of master and servant between two parties, maliciously or willfully without just cause or excuse, entices the servant to quit his employment to the master's injury, is liable for the resulting damages,⁸⁵ since an employer has a property right in the contract of employment with his servant.⁸⁶ It has been held that the operation of the rule is not affected by the fact that the employment was not for a term but at the will of the parties,⁸⁷ or by the fact that there is no right of action against the person

subsequently ratifies the act—*Lee v. West*, 47 Ca. 311.

Parent's advice to child

The rule has been held not to impose liability for advice given by a parent to an infant child to disaffirm a contract, since public policy dictates that parents should have an absolute right to advise their infant children with regard to all matters and that such right should be exercised freely and should not subject the parent to any inquiry as to motive—*Lee v. Silver*, 28 N.Y.S.2d 333, 262 App. Div. 149, affirmed 38 N.E.2d 233, 287 N.Y. 575.

88. N.J.—*Feller v. Local 144, International Ladies Garment Union*, 191 A. 111, 121 N.J. Eq. 452—*Driver v. Smith*, 104 A. 717, 89 N.J. Eq. 339.

N.Y.—*Vail-Ballou Press v. Casey*, 213 N.Y.S. 113, 125 Misc. 689.

87. U.S.—*Falstaff Brewing Corporation v. Iowa Fruit & Produce Co.*, C.C.Neb., 113 F.2d 101—*Bausch & Lomb Optical Co. v. Wahlgren*, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., *Wahlgren v. Bausch & Lomb Optical Co.*, 68 F.2d 680, certiorari denied 54 S.Ct. 774, 293 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 293 U.S. 615, 78 L.Ed. 1491.

N.J.—*Driver v. Smith*, 104 A. 717, 89 N.J. Eq. 339.

Wis.—*Bitzke v. Folger*, 286 N.W. 36, 231 Wis. 513.

39 C.J. p. 1371 note 15.

In New York

(1) It has been held that malicious attempts to induce employees to leave their employer are illegal, even if there is no contract for a definite term between them and their employer and the employment is

who was induced or influenced to terminate his service or to refuse to perform his agreement.⁸⁸ Also, the rule may apply notwithstanding the servant was enticed to leave before the services had actually commenced,⁸⁹ or the injury inflicted was not for the benefit of the wrongdoer.⁹⁰

Ordinarily, the fact that one is engaged in a competing business and wishes to engage workmen therefor is not a legal excuse for enticing away employees of another,⁹¹ and a competitor who selfishly, intentionally, and without justification induces the breach of a contract for a definite, unexpired period may be liable in damages to the employer.⁹² It has been held, however, that, where an employee is free to leave his employment and in so doing violates no contract, the employer has no such vested interest in the continuity of his services as to warrant recovery of damages from a rival, who, in the legitimate interest of its business and by fair means, induces the employee to leave his present employment and enter its own,⁹³ in the absence of some monopolistic purpose,⁹⁴ although the immunity against liability is not retained if unfair methods are used in interfering with the employment relation.⁹⁵

Generally, no action will lie where a master consents to the employment of his servant,⁹⁶ where the master has wrongfully terminated the contract,⁹⁷

or where the servant has rightfully terminated the contract which is for any reason invalid.⁹⁸ Also, a person making a contract with a servant of another, to take effect at the expiration of his term of service, is not liable.⁹⁹

Employees, it has been held, must not entice other employees to leave during their terms of employment,¹ but they may negotiate between themselves looking to their future betterment after the expiration of their existing contracts of employment,² and no action lies against an employee for hiring other employees after the expiration of their contracts and the severance of their employment.³

b. Relation of Master and Servant

In order to maintain an action for enticing away a servant, there must be a contract to hire with the party complaining, entered into by the servant himself or by some other person having authority to bind him to the service.

In order to maintain an action for enticing away a servant, there must be a contract to hire with the party complaining, entered into by the servant himself or by some other person having authority to bind him to the service.⁴ The relation need not be created by a written contract in order to constitute one a servant, so that a third person will be liable to the master for enticing him away,⁵ unless, as discussed *infra* § 626, it is otherwise provided by

terminable at will—*American League Baseball Club of N Y v Pasquel*, 63 N.Y.S.2d 537, 187 Misc 230

(2) It has also been held, however, that it is not illegal to induce employee to break contract of employment, where employment is not for express definite term, because, if employee has agreed to work for another but for no fixed period, either may end contract whenever he chooses—*Vail-Ballou Press v Casey*, 212 N.Y.S. 118, 126 Misc 689

68. Wis.—*Bitzke v Folger*, 286 N.W. 36, 231 Wis. 513

89. Mass.—*Walker v. Cronin*, 107 Mass 555
39 C.J. p 1371 note 16.

90. W Va.—*Thacker Coal Co v Burke*, 53 S.E. 161, 59 W Va. 253, 5 L.R.A.N.S., 1091, 8 Ann Cas 885

91. US—*Bausch & Lomb Optical Co v Wahlgren*, D.C. Ill., 1 F Supp 799, affirmed, C.C.A., *Wahlgren v Bausch & Lomb Optical Co*, 68 F.2d 660, certiorari denied 54 S.Ct. 774, 292 US 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 US 615, 78 L.Ed. 1491

NY—*Small v Kronstat*, 24 N.Y.S.2d 535, 175 Misc 626

92. Mass.—*Beekman v Marsters*, 80 NE 817, 195 Mass 205, 11 L.R.A. 201

93. US—*Falstaff Brewing Corporation v Iowa Fruit & Produce Co.*, C.C.A. Neb., 112 F.2d 101—*McCluer v Super Maid Cook-Ware Corporation*, C.C.A. Kan., 62 F.2d 426—*Harley & Lund Corporation v Murray Rubber Co.*, C.C.A. N.Y., 31 F.2d 932, certiorari denied 49 S.Ct. 513, 279 US 872, 73 L.Ed. 1007—*Du-Art Film Laboratories v Consolidated Film Industries*, D.C. N.Y., 15 F Supp 689—*Triangle Film Corp v. Artercraft Pictures Corp.*, N.Y., 250 F.981, 163 C.C.A. 231

La.—*Jones v. Ernst & Ernst*, 134 So. 375, 172 La. 406

Mass.—*Beekman v Marsters*, 80 NE 817, 195 Mass. 205, 11 L.R.A. 201

N.J.—*Driver v Smith*, 104 A. 717, 89 N.J. Eq. 339

Wash.—*Porter v King County Medical Soc.*, 58 P.2d 367, 186 Wash. 410.

94. US—*McCluer v Super Maid Cook-Ware Corporation*, C.C.A. Kan., 62 F.2d 426—*Triangle Film Corp v Artercraft Pictures Corp.*, N.Y., 250 F.981, 163 C.C.A. 231.

95. Cal.—*Buxbom v Smith*, 145 P. 2d 305, 23 Cal.2d 535

96. US—*Sample v Plating & Galvanizing Co.*, D.C. N.H., 27 F.Supp. 125

Miss.—*Alford v Pegues*, 46 So. 76, 92 Miss 558

97. Miss.—*Beale v Yazoo Yarn Mill*, 88 So. 411, 125 Miss 807

98. SC—*Poston v. Lyerly*, 89 S.E. 292, 105 S.C. 37—*Duckett v Pool*, 11 S.E. 689, 33 S.C. 238

99. Mass.—*Boston Glass Manufactory v Binney*, 4 Pick 425

1. Ala.—*Perfection Mattress & Spring Co v Dupree*, 113 So. 74, 216 Ala. 303

2. Ala.—*Perfection Mattress & Spring Co. v Dupree*, *supra*.

La.—*Jones v. Ernst & Ernst*, 134 So. 375, 172 La. 406

3. La.—*Jones v Ernst & Ernst*, *supra*

4. N.H.—*Campbell v. Cooper*, 34 N.H. 49

Ohio—*Iron Molders' Union v. I. & E. Greenwald Co.*, 4 Ohio N.P.N.S. 161.

5. N.J.—*Frank v. Herold*, 52 A. 152, 68 N.J. Eq. 443.

39 C.J. p 1371 note 27.

statute. It is not essential that the contract should have been made in the presence of witnesses.⁶

Liability for enticing away an employee may exist notwithstanding the contract of employment would be unenforceable in an action between the parties thereto.⁷ So, while there is some authority to the contrary,⁸ it has been held that, if the servant is actually performing services under the contract, the master may maintain an action for damages against a third person who interferes and entices the servant to leave his employment, although the contract is voidable at the option of the servant,⁹ as for failure to comply with the requirements of the statute of frauds,¹⁰ or by reason of the infancy of the servant.¹¹ Furthermore, the terms of the employment need not bind the servant to give his exclusive personal services to the master for the whole time agreed on.¹²

The rule imposing liability for enticing away servants applies to all cases in which the relation of service exists and is not confined to contracts for

menial service.¹³ It has been held that a cropper is a servant, within the rule as to enticing away,¹⁴ but there is also authority to the contrary.¹⁵

c. Intent; Malice; Absence of Just Cause or Excuse

In order to sustain an action for unlawfully enticing away a servant, it must be shown that the defendant had notice of the relation of master and servant, and that he intentionally, willfully, or maliciously interfered with the relation, without right or justification.

In order to sustain an action for unlawfully enticing away a servant, it is essential that defendant had notice of the existence of the relation of master and servant between plaintiff and his servant¹⁶ and that he intentionally,¹⁷ willfully,¹⁸ or maliciously¹⁹ interfered with that relation, without right or justifiable cause.²⁰ Malice in inducing an employee to break his contract of employment is established, if it is shown that defendant acted intentionally without just cause or excuse,²¹ and it is not essential that there should be malice in the sense of personal ill will.²²

6. SC—Huff v. Watkins, 18 SC 510.

7. NY—American League Baseball Club of N.Y. v. Pasquel, 63 NY S2d 537, 187 Misc 230—Hardy v. Erickson 36 NYS2d 823.

Wis—Bittke v. Folger, 286 N.W. 36, 231 Wis 513.

8. NH—Campbell v. Cooper, 34 N.H. 49.
39 CJ p 1371 note 30.

9. Ga—Salter v. Howard, 43 Ga. 601.

SC—Duckett v. Pool, 11 SE 689, 33 SC 238.
39 CJ p 1371 note 31.

10. SC—Duckett v. Pool, supra.

11. Ga—Salter v. Howard, 43 Ga. 601.
39 CJ p 1371 note 33.

12. SC—Duckett v. Pool, 13 SE 542, 34 SC 311.

13. Ill—Bloom v. Boheman, 233 Ill. App 269.
39 CJ p 1370 note 14 [e].

Actor is a "servant" within rule Ill—Bloom v. Boheman, supra.

14. SC—Huff v. Watkins, 15 SC 82, 40 Am R. 680.
39 CJ p 1372 note 35.

15. Ga—Barron v. Collins, 49 Ga. 580.

16. Cal—Corpus Juris cited in Buxbom v. Smith, 132 P 3d 4, 6, reheard 145 P 3d 305, 23 Cal 2d 535.
Tex—Thomason v. Sparkman, Civ. App., 55 S.W.2d 871.
W.Va.—Thacker Coal Co. v. Burke, 53 S.E. 161, 69 W.Va. 253.
39 C.J. p 1371 note 21.

17. Cal—Buxbom v. Smith, 145 P 2d 305, 23 Cal 2d 535.

NY—Vail-Ballou Press v. Casey, 212 NYS 113, 125 Misc 689.
39 CJ p 1372 note 38.

18. Ill—Randall Dairy Co. v. Pevely Dairy Co., 278 Ill. App 350.
39 CJ p 1372 note 39.

19. US—American Steel Foundries v. Tri-City Central Trades Council, Ill., 42 S.Ct. 73, 257 US 185, 66 L.Ed. 189, 27 ALR 360—Falstaff Brewing Corporation v. Iowa Fruit & Produce Co., CCA Neb., 112 F 2d 101.

Mass—Anderson v. Moskovitz, 157 N.E. 601, 260 Mass 523.

NY—American League Baseball Club of N.Y. v. Pasquel, 63 NYS 2d 537, 187 Misc 230—Lee v. Silver, 37 NYS 2d 236, 176 Misc 307, modified on other grounds 28 N.Y. S2d 333, 262 App Div 149, affirmed 38 NE2d 233, 287 NY 575—Hardy v. Erickson, 36 NYS 2d 823.

Pa—Caskie v. Philadelphia Rapid Transit Co., 5 A2d 363, 334 Pa 33—Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No. 10, 157 A 588, 305 Pa 206.
Wis—Bittke v. Folger, 286 N.W. 36, 231 Wis 513.
39 CJ p 1370 note 14.

Malicious procurement of discharge see infra § 630.

20. US—American Steel Foundries v. Tri-City Trades Council, Ill., 42 S.Ct. 73, 257 US 185, 66 L.Ed. 189, 27 ALR 360—Bausch & Lomb Optical Co. v. Wahlgren, D.C. Ill., 1 F Supp 799, affirmed, C.C.

A, Wahlgren v. Bausch & Lomb Optical Co., 68 F2d 660, certiorari denied 54 S.Ct. 774, 292 US 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 863, 292 U.S. 615, 78 L.Ed. 1491.

Ill—Randall Dairy Co. v. Pevely Dairy Co., 278 Ill. App 350.

Pa—Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No. 10, 157 A 588, 305 Pa. 206.

39 CJ p 1372 note 43.

21. Ill—Doremus v. Hennessy, 52 NE 924, 176 Ill 608, 68 Am.S.R. 203, 43 L.R.A. 797, rehearing denied 54 NE 524, 176 Ill 608, 68 Am.S.R. 203, 43 L.R.A. 797.

Mass—Anderson v. Moskovitz, 157 N.E. 601, 260 Mass 523.

NY—Lamb v. S. Cheney & Son, 125 NE 817, 227 NY 418—Du Roy & La. Maistre v. Gillmore, 284 N.Y. S 385, 246 App Div 37, affirmed 3 NE 2d 866, 272 NY 454—Lee v. Silver, 27 N.Y.S 2d 236, 176 Misc 307, modified on other grounds 28 N.Y.S 333, 262 App Div 149, affirmed 38 NE 2d 233, 287 NY 575.
Okla—Prairie Oil & Gas Co. v. Kinney, 192 P 586, 79 Okl 206.

Knowledge on the part of defendant of the existence of the contract of employment supplies the element of malicious or unlawful motive necessary to make the act of defendant, in enticing the servant, a tort—Thomason v. Sparkman, Tex Civ App., 55 S.W.2d 871.

22. Ill—Doremus v. Hennessy, 52 NE 924, 176 Ill 608, 68 Am.S.R. 203, 43 L.R.A. 797, rehearing de-

What constitutes just cause or excuse. The justification, in order to be sufficient to exempt one from liability for procuring the breach of another's contract, must be an equal or superior right in the party justifying.²³ It has been held that, where there is a bona fide controversy over conditions and terms of employment,²⁴ peaceful labor tactics may be employed to persuade employees to cease work, although such tactics may have the effect of inducing breaches of contract between employer and employee.²⁵ A third person has been held to have the right, at the proper time and in a proper manner, to point out to employees that their contracts, whether legal or illegal, were unwise, and that the employees should therefore exercise their privilege to withdraw from the employment,²⁶ but it has also been held that a third person has no right to go on the property of another to persuade persons working there to break their contracts of employment.²⁷

§ 626. — Under Special Statutory Provisions

- a. In general
- b. Hiring before commencement of work or after abandonment of contract

a. In General

Special statutes have been enacted in some jurisd.-

tions with the view of preventing interference with contract relations between master and servant.

A number of statutes have been enacted with the view of preventing interference with contract relations between master and servant,²⁸ and the validity of these statutes has been upheld as against various objections.²⁹ The purpose of these enactments is to incite and constrain laborers who are under engagements for a specified time to the performance of their contracts, by rendering it difficult for them to secure employment elsewhere during the term for which they have been engaged.³⁰ Statutes of this character must be strictly construed in favor of liberty of contract and of the person.³¹

Actual knowledge of the relation of master and servant by the one employing the servant is necessary to charge him with liability under some statutes.³² No liability attaches by reason of the fact that defendant might have known by diligence or reasonable inquiry that the servant was in the employ of another.³³ Under a statute forbidding one "knowingly to hire, contract with, decoy, or entice away," it has been held that a third person inducing a servant to become a partner with him is liable to the employer if, at the time he induced the servant to come with him, he knew that he was under

nied 54 NE 524, 176 Ill 608, 68 Am SR 203, 43 LRA 797

NY—Lamb v Scheney & Son, 125 NE 817, 227 NY 418—Du Roy & La Maistre v Gillmore, 284 NYS 385, 346 App Div 37, affirmed 3 NE 2d 866, 273 NY 454—Lee v Silver, 37 NYS 2d 236, 176 Misc 307, modified on other grounds 28 NYS 2d 333, 262 App Div 149, affirmed 38 NE 2d 233, 287 N.Y. 575

Okl.—Prairie Oil & Gas Co v Kinney, 192 P 586, 79 Okl 206
39 C.J. p 1372 note 42

23. Ill.—Doremus v Hennessy, 52 NE 924, 176 Ill 608, 68 Am SR 203, 43 LRA 797, rehearing denied 54 NE 524, 176 Ill 608, 68 Am SR 203, 43 LRA 797

W Va.—Thacker Coal Co v Burke, 53 SE 161, 59 W Va. 253, 5 LRA, NS, 1091, 8 Ann Cas 885
39 C.J. p 1372 note 48

Misinterpretation of the meaning of the contract between the master and servant has been held no defense in an action for inducing its breach—Anderson v. Moskovitz, 157 NE 601, 260 Mass 523

24. NY—De Agostina v Holmden, 286 NYS 909, 157 Misc 819

25. Cal.—Imperial Ice Co v. Rossier, 112 P.2d 631, 18 Cal.2d 33.

Mo—F C Church Shoe Co v Turner, 279 SW 232, 318 Mo App 516
Neb—State v Employers of Labor, 169 NW 717, 102 Neb 768, dissenting opinion 170 NW 185, 102 Neb 768

Legality of acts of labor organizations generally see supra § 38 (19)

Unfair labor practices see supra §§ 28 (43)—28 (63)

Reason for rule

The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful although they have the effect of inducing breaches of contract between employer and employee—Imperial Ice Co v Rossier, 112 P.2d 631, 18 Cal.2d 33.

26. Pa.—Kraemer Hosiery Co v American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No. 10, 157 A 588, 305 Pa 206

Affiliation with union

Third person was free to act by peaceful persuasion to induce employees, who had signed individual agreements not to become members of union while employed, to withdraw from employment and affiliate with union—Kraemer Hosiery Co v. American Federation of Full Fashioned

Hosiery Workers, Reading Branch, Local No. 10, supra

27. US—United Mine Workers of America, Dist No 17 v. Chafin, D C W Va., 286 F 959

28. Ark.—Simonson v Butler, 287 SW 1014, 171 Ark 1189.

Miss—Armstrong v Bishop, 117 So 512, 151 Miss 353—Thompson v Box, 113 So 597, 147 Miss 1
Tenn.—Jordan v Lewis, 39 SW 2d 743, 163 Tenn 653—P D Crim Motor Co v Schackleton, 9 Tenn App 678

29. Miss.—Hoole v Dorroh, 23 So 829, 75 Miss 257
39 C.J. p 1372 note 51.

30. Miss.—Hoole v Dorroh, supra—Armistead v Chatters, 15 So. 39, 71 Miss 509

31. Miss.—Thompson v. Box, 113 So 597, 147 Miss 1.

32. Miss.—Beale v Yazoo Yarn Mill, 88 So 411, 125 Miss 307.
39 C.J. p 1372 note 54

Employment by a tenant of a third person, without the latter's authority, knowledge, or consent, does not make such person liable for the tort—Sunnyside Co. v. Read, 70 SW. 462, 71 Ark. 59.

33. Miss.—Beale v Yazoo Yarn Mill, 88 So. 411, 125 Miss. 307.

employment with another.³⁴

Written consent of employer Under some statutes, the written consent of the employer is required before a third person may knowingly hire his employee,³⁵ and an understanding by a third party that the former employer had released the employee is insufficient under such statutes to absolve the third person from liability.³⁶

Who are servants within statute. A cropper has been held to be a servant within the meaning of the statutes,³⁷ and, where the contract of employment to make a crop does not fix the exact date of expiration, it has been held that the time therefor is necessarily implied as that which is necessary to make and harvest the crop.³⁸ An actress, it has been held, is not within the meaning of a statute rendering liable for damages any person willfully enticing from employment "any person or persons who have contracted to labor for a fixed period of time."³⁹

b. Hiring before Commencement of Work or after Abandonment of Contract

Under some statutes, no liability attaches for the hiring of another's servant where the servant has not yet actually entered on the service provided for by the contract or if the employee abandoned his original employment prior to the hiring.

The question whether hiring before a servant has actually entered on the service provided for by the contract gives a cause of action depends on the wording of the statute.⁴⁰ No liability attaches under a statute fixing a penalty to be collected by civil actions for enticing one to "leave the service", of his employer, for inducing a servant to break his contract before actually entering into the service, and commencing work.⁴¹ However, it is otherwise where the statute makes it unlawful for any person to employ an employee of another or in any way disturb the relation of master and servant when such relation "shall have been created."⁴²

Under some statutes, if the employee has abandoned his original employment, a third person subsequently employing the servant is not liable in damages therefor,⁴³ at least where the servant left his employment for good and sufficient cause.⁴⁴ So, it has been held that one who knowingly employs a servant who has abandoned his service under a parol contract of hiring is not liable for damages under a statute making it unlawful to employ any person under contract with another, provided the contract is in writing.⁴⁵ Under a statute making liable in damages persons who willfully induce, knowingly employ, or entice away a laborer before the expiration of his contract to leave his employer, it has been held that no liability exists where a third person hires another believing in good faith that such employee has abandoned his original contract;⁴⁶ and, where one employs a person, without knowledge that he is the servant of another and has quit before the expiration of his term, discovers such facts before the termination of the period of the original employment, he is not liable, although he afterward refuses to discharge the servant.⁴⁷

It has been held, on the other hand, that the fact that the laborer had voluntarily broken the contract of service before being employed by defendant does not affect plaintiff's right to damages, under a statute which makes it unlawful to hire one who is "at the time under contract or in the employ of another."⁴⁸

§ 627. — Actions

An employer may maintain an action at law for damages against a third person unlawfully enticing his servant to leave his employment; such an action is for a tort, and not for a breach of implied contract, and the proper form thereof is trespass on the case.

An employer may maintain an action at law for damages against a third person unlawfully enticing his servant to leave his employment,⁴⁹ but it has

34. Tenn.—P D Crim Motor Co v. Shackleton, 9 Tenn App 678.

35. Miss.—Armstrong v. Bishop, 117 So 512, 151 Miss 358.

36. Miss.—Armstrong v. Bishop, supra.

37. Miss.—Armstrong v. Bishop, supra.
Tenn.—McCutchin v. Taylor, 11 Lea 359.

38. Miss.—Armstrong v Bishop, 117 So 512, 151 Miss 358.

39. Ky.—Bourlier v Macauley, 15 S. W. 60, 91 Ky. 135, 13 Ky L 737, 34 AmSR 171, 11 L.R.A. 550
39 C.J p 1372 note 58.

40. NC—Sears v Whitaker, 48 S.E 517, 136 NC 37.

41. Miss.—Alford v Peques, 46 So 76, 92 Miss 568
NC—Sears v Whitaker, 48 S.E 517, 136 NC 37.

42. Ga.—McBride v O'Neal, 57 S.E 789, 138 Ga 473.

43. Ark.—Simonson v Butler, 287 S W 1014, 171 Ark 1189
Miss.—Thompson v Box, 112 So 597, 147 Miss 1.
39 C.J p 1373 notes 61, 63.

Abandonment shown

Servant may be shown to have abandoned employment, even though he continued to sleep on the master's

farm—Johns v Patterson, 223 S.W. 382, 145 Ark 46.

44. Tenn.—Jordan v Lewis, 39 S.W. 2d 743, 162 Tenn. 653.

45. Ga.—Caldwell v. O'Neal, 45 S.E. 41, 117 Ga. 775.

46. Miss.—Thompson v. Box, 112 So 597, 147 Miss. 1.

47. La.—Wolf v. New Orleans Tailor-Made Pants Co., 37 So. 2, 113 La. 338.

48. Tenn.—Morris v. Neville, 11 Lea 271.

49. N.Y.—International Tailoring Co of N. Y. v. Lukas, 64 N.Y.S 2d 879.

been held that such remedy at law is not necessarily exclusive,⁵⁰ except where the third person has already accomplished the breach of the contract of employment.⁵¹ An action for enticing away a servant is for a tort, and not for a breach of an implied contract.⁵² It has been held that the proper form of action is trespass on the case,⁵³ and this remedy is available, notwithstanding the existence of a remedy by an action for the penalty, as provided for by statute,⁵⁴ where it is merely cumulative.⁵⁵

The right to sue may be lost by failure to notify the third person of the prior contract of hire,⁵⁶ or by a failure to comply with conditions precedent in the statute,⁵⁷ such as a prior conviction where by statute the act is made a criminal offense,⁵⁸ but, under some provisions, a prior conviction is not a condition precedent to the civil liability of one

sought to be held liable under the statute.⁵⁹

Procedure. In actions to recover for damages for wrongfully enticing away servants, the courts have applied the general rules applicable to pleadings,⁶⁰ burden of proof,⁶¹ issues, proof, and variance,⁶² admissibility,⁶³ and weight and sufficiency⁶⁴ of evidence, questions of law and fact,⁶⁵ and the giving of instructions.⁶⁶

§ 628. — Damages

The measure of damages for enticing away the servant of another is the actual loss sustained by the master as a direct and proximate result of defendant's wrongful acts.

The measure of damages for enticing away the servant of another is the actual loss sustained by the master as a direct and proximate result of defendant's wrongful acts,⁶⁷ but no damages may be

50. NY—International Tailoring Co of N Y. v Lukas, *supra*

51. NY—Small v Kronstat, 24 N Y S 2d 535, 175 Misc 626

52. US—Falstaff Brewing Corporation v Iowa Fruit & Produce Co, CCA Neb, 113 F 2d 101

Cal—Corpus Juris cited in Buxhom v Smith, 132 P 4, 6, reheard 145 P 2d 305, 23 Cal 2d 535
39 C J p 1373 note 66.

53. NY—Scidmore v Smith, 13 Johns 322

54. NY—Scidmore v Smith, *supra*.

55. NY—Scidmore v Smith, *supra*.

56. NY—Demyer v Souzer, 6 Wend 436

57. La—Kline v Eubanks, 33 So 211, 109 La 241.

58. La—Kline v Eubanks, *supra*
39 C J p 1373 note 74.

59. Ark—Johns v Patterson, 211 S W 387, 138 Ark 420
38 C J p 1373 note 74 [b]

60. Okl—Prairie Oil & Gas Co v Kinney, 192 P. 586, 79 Okl 206
39 C J p 1373 note 75

Complaint held sufficient

(1) Generally.

US—Original Ballet Russe v Ballet Theatre, CCA NY, 133 F 2d 187.

Mass—Walker v Cronin, 107 Mass 555

39 C J p 1373 note 75 [b].

(2) A complaint which alleges a specific contract for a definite period of time, defendant's knowledge thereof, that it "maliciously" induced the servant to break his contract and enter the employment of defendant, and by reason thereof damages were sustained, states a cause of action—Lamb v S. Cheney & Son, 135 N.E 817, 227 N.Y. 418

(3) Complaint, alleging that de-

fendant, knowing the necessity for specially skilled and trained workmen in plaintiff's business of tailoring to the trade men's clothing and the difficulty of securing such workmen maliciously induced some of plaintiff's employees to breach their contract of employment with plaintiff and enter defendant's employment to plaintiff's damage, states a cause of action for recovery of damages—International Tailoring Co of N Y v Lukas, 64 N.Y.S 2d 379

Complaint held insufficient

US—Du-Art Film Laboratories v. Consolidated Film Industries, DC N.Y., 15 F Supp 689

NY—Lee v Silver, 27 N.Y.S 2d 236, 176 Misc 307, modified on other grounds 28 N.Y.S 2d 333, 262 App Div 149, affirmed 33 N.E 2d 333, 287 N.Y. 575

61. Tenn—Jordan v Lewis, 39 S.W. 2d 743, 162 Tenn. 653

62. US—Milburne v Byrne, D.C., 17 F Cas No 9,542, 1 Cranch C.C. 339

39 C J p 1373 notes 76, 78 [d]

63. NY—Du Roy & La Maistre v. Gillmore, 284 N.Y.S 385, 346 App Div 37, affirmed 3 N.E 2d 866, 273 N.Y. 454

39 C J p 1373 note 77

64. Pa.—Caskie v. Philadelphia Rapid Transit Co., 5 A 2d 368, 334 Pa 33

39 C J p 1373 note 78

Only substantial proof can make out a case of tort based on malicious interference with employment contract, and conjecture will not suffice—Caskie v Philadelphia Rapid Transit Co, *supra*

Evidence held sufficient

Miss—Thompson v. Box, 112 So 597, 147 Miss 1

NY—Vail-Ballou Press v. Casey, 212 N.Y.S 113, 125 Misc 689

Pa.—Kraemer Hosiery Co v American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No 10, 157 A 538, 305 Pa. 206

39 C J p 1373 note 78 [a]

Evidence held insufficient

(1) Generally

Ark—Simonson v Butler, 237 S.W 1014, 171 Ark 1139

NY—Du Roy & La Maistre v Gillmore, 284 N.Y.S 385, 346 App Div. 37, affirmed 3 N.E 2d 866, 272 N.Y. 454.

Tex—Thomason v Sparkman, Civ App, 55 S.W 2d 871

(2) To show enticement—Simonson v Butler, *supra*.

(3) To sustain judgment for plaintiff.

Ark—Sturdivant v Tollette, 105 S.W. 1037, 84 Ark 412

N.Y.—American Button Co. v Warsaw Button Co., 31 N.Y.S 2d 395, affirmed 33 N.Y.S 2d 570, 265 App. Div. 905.

65. US—Falstaff Brewing Corporation v Iowa Fruit & Produce Co, CCA Neb, 113 F.2d 101.

66. SC—Duckett v. Pool, 13 S.E 542, 34 S.C 311.

39 C J p 1374 note 79.

Instruction held erroneous

Tenn—Jordan v Lewis, 39 S.W 2d 743, 162 Tenn 653—McCutchin v. Taylor, 11 Lea 259

39 C J p 1374 note 79 [b]

67. Mass—Anderson v Moskovitz, 157 N.E 601, 260 Mass 523—Walker v. Cronin, 107 Mass 555

39 C J p 1374 note 81

Award of damages in conspiracy suit see Conspiracy § 33

Award of damages in injunction suit see Injunctions, § 217.

assessed for the breach of plaintiff's contract with his employee.⁶⁸ If an entire loss of service during the balance of the term of employment is shown, the value of the services for all of such time is recoverable.⁶⁹ As in tort injuries generally, damages in actions of this nature are rarely ascertainable in any accurate sense, but are merely matters of reasonable proportions considering all of the circumstances of the case.⁷⁰ In a proper case exemplary damages may be awarded,⁷¹ and under some statutes double damages may be recovered.⁷²

§ 629. Intimidation, Coercion, or Violence to Prevent Service

Generally, the use of intimidation, coercion, or violence to prevent a servant from continuing in the employ of the master is an actionable wrong which imposes civil liability on the wrongdoer in favor of the master.

As a general rule, the use of intimidation, coercion, or violence to prevent a servant from continuing in the employ of the master is an actionable wrong which imposes civil liability on the wrongdoer in favor of the master,⁷³ and the fact that there is no fixed period of service does not affect the operation of the rule.⁷⁴ This question usually arises in connection with combinations of laboring men

whose acts amount to a conspiracy. The right to recovery of damages, therefore, is discussed in Conspiracy §§ 10-15, and the right to an injunction against the acts complained of with damages is considered in Injunctions §§ 133-145. The legality of acts of labor organizations in relation to employers generally is considered supra § 28 (19), and unfair labor practices are discussed supra §§ 28(43)-28(63).

General rules applicable to civil actions govern actions of this nature.⁷⁵

§ 630. Malicious Procurement of Discharge

a In general

b. Malice; absence of just cause or excuse

a. In General

One who maliciously or without just cause or excuse procures the discharge of a servant from his employment is liable to him for the resulting damages.

As a general rule, one who maliciously or without just cause or excuse procures the discharge of a servant from his employment is liable to him for the resulting damages,⁷⁶ since an employee has a property right in his contract of employment which may not be unlawfully interfered with by another.⁷⁷

Damages in torts generally see the C.J.S. title Torts § 65, also 62 C.J. p 1160 notes 84-88.

68. Mass—Anderson v. Moskovitz 157 N.E. 601, 260 Mass 523—Walker v. Cronin, 107 Mass 555

69. Ill.—Hays v. Borders, 6 Ill 46

70. U.S.—Falstaff Brewing Corporation v. Iowa Fruit & Produce Co. C.C.A. Neb., 112 F.2d 101

71. S.C.—Oxner v. Seaboard Air Line R. Co., 96 S.E. 559, 110 S.C. 386

39 C.J. p 1374 note 84.

72. Miss.—Hools v. Dorroh, 22 So. 829, 75 Miss 257

39 C.J. p 1374 note 85

73. N.Y.—Aberon Bakery Co. v. Raimist, 254 N.Y.S. 38, 141 Misc 774.

39 C.J. p 1374 note 86.

74. Mass.—Vegelehan v. Guntner, 44 N.E. 1077, 167 Mass 92, 57 Am. S.R. 443, 35 L.R.A. 732.

75. N.M.—Horchheimer v. Prewitt, 268 P. 1062, 33 N.M. 411

Evidence held sufficient

N.M.—Horchheimer v. Prewitt, supra

76. Ala.—Evans v. Swaim, 18 So. 2d 400, 245 Ala. 641—Hill Grocery Co. v. Carroll, 136 So. 789, 223 Ala. 376.

Cal.—Blender v. Superior Court of

Los Angeles, 130 P.2d 179, 55 Cal. App. 2d 24

Colo.—Order of Railway Conductors v. Jones, 339 P. 882, 78 Colo. 80
Ga.—Corpus Juris quoted in Ott v. Gandy, 19 S.E.2d 180, 182, 66 Ga. App. 684

Ill.—Cavanagh v. Elliott, 270 Ill. App. 21.

Me.—Taylor v. Pratt, 195 A. 205, 135 Me. 82

N.J.—Strollo v. Jersey Central Power & Light Co., 26 A.2d 559, 20 N.J. Misc. 217

N.Y.—Connell v. Stalker, 45 N.Y.S. 1048, 30 Misc. 423, affirmed 48 N.Y.S. 77, 21 Misc. 609—Hardy v. Erickson, 36 N.Y.S.2d 823—Ciapanzano v. Uneda Credit Stores, 32 N.Y.S.2d 269

Or.—De Marais v. Stricker, 53 P.2d 715, 153 Or. 362
39 C.J. p 1375 note 90

Interference with contractual rights generally see the C.J.S. title Torts §§ 42-44, also 62 C.J. p 1137 note 28, p 1148 note 99.

Employer's insurer

(1) Insurer coercing employer to discharge employee drawing disability compensation by threat to cancel employer's insurance if employee was retained is liable in damages to employee—Hilton v. Sheridan Coal Co., 297 P. 413, 132 Kan. 525

(2) Act of compensation insurer in

writing letter to subscriber requesting plaintiff's discharge from permanent employment because he had formerly received compensation from insurer is actionable and makes insurer liable for all damages resulting therefrom—Harris v. Traders' & General Ins. Co., Tex. Civ. App., 82 S.W.2d 750, error refused

(3) A casualty company, insuring an employer against loss through accidental injury to employees by a policy stipulating that insurer may cancel the policy at will, is liable to an employee seeking settlement for an injury if it causes his discharge by threat to cancel the policy in an effort to accomplish settlement for a nominal sum

Ala.—U. S. Fidelity & Guaranty Co. v. Millonas, 89 So. 723, 206 Ala. 147

Ill.—London Guarantee & Accident Co. v. Horn, 69 N.E. 526, 206 Ill. 493, 99 Am. S.R. 185

Words held not defamatory or actionable

Ill.—Creutz v. Bennett, 273 Ill. App. 88.

77. Ala.—Evans v. Swaim, 18 So. 2d 400, 245 Ala. 641—Hill Grocery Co. v. Carroll, 136 So. 789, 223 Ala. 376.

Cal.—Blender v. Superior Court of Los Angeles County, 130 P.2d 179, 55 Cal. App. 2d 24.

It has been held, however, that, if one is acting in the legitimate exercise of his own rights, he is not liable in damages for the discharge of an employee which is the direct or indirect result of his acts.⁷⁸

Thus, it has been said that, if persons in the employment of a master consider others in that employment obnoxious, either personally or because of their character or conduct, they have a perfect right to put to their employer the alternative whether he will discharge the obnoxious person or persons and retain their services, or lose them and retain the obnoxious persons.⁷⁹

It has very generally been held that the rule imposing liability for the malicious procurement of an employee's discharge is applicable, although the service was for no definite or fixed period,⁸⁰ but there is some authority to the contrary.⁸¹ It has been held that the fact that the act of discharge does

not give a right of action against the employer himself,⁸² or that the wages are not fixed,⁸³ constitutes no defense, nor is it a defense that defendant acted on the advice of counsel where only compensatory damages are claimed.⁸⁴ Nevertheless, there must be an actual discharge terminating the employment,⁸⁵ since, if the attempt to procure the discharge, although malicious, is not successful, the act is not actionable.⁸⁶

Assignments of wages. Where an employee makes a valid assignment of wages, the assignee is not liable for the discharge of the employee occurring when the assignment is filed with the employer,⁸⁷ at least in the absence of fraud or overreaching in the procurement of the assignment.⁸⁸ Likewise, the assignee is not liable for a refusal to withdraw the assignment to permit the reemployment of the employee.⁸⁹ The fact that the assignment is void, it has been held, does not change the

School teacher

A plaintiff's right to the position of high school teacher was a "legally protected interest" within rule that an intentional invasion of a legally protected interest without legal justification creates liability, even though plaintiff's employment as a teacher was terminable by the school committee in accordance with statutory provisions for dismissal and was terminable by teacher at will—*Caverno v. Fellows*, 15 N.E.2d 483, 800 Mass 331.

78. Cal.—Blender v. Superior Court of Los Angeles County, 130 P.2d 179, 55 Cal App 2d 24.

Particular acts held not actionable

(1) A high school principal reporting to superintendent the failure of high school teacher to prepare for publication material for newspaper page under teacher's supervision was not liable for dismissal of teacher in absence of evidence of express malice—*Caverno v. Fellows*, 15 N.E.2d 483, 800 Mass 331.

(2) Business manager of clinic employed for unlimited term by physicians who, in order to avoid expulsion from medical society pursuant to by-law, were compelled to abandon their clinical and group contract practice had no cause of action for damages against society or its competing clinic—*Porter v. King County Medical Soc.*, 58 P.2d 367, 136 Wash. 410.

(3) Since a confidential relationship existed between sponsor of radio program and its agent, sponsor could not be held liable for breach of contract by agent with individual for services on radio program because of any influence exercised by sponsor on agent to repudiate contract—*Hopper v. Lennen & Mitchell, D.C.*

Cal., 53 F.Supp 319, affirmed in part and reversed in part on other grounds, C.C.A., 146 F.2d 364, 161 A.L.R. 283.

(4) Other particular acts—*Caverno v. Fellows*, supra.

Acts held not legitimate exercise of defendant's rights

(1) Letter written by compensation insurer to subscriber requesting him to discharge employee for protection of insurer's business was not within the exercise of its rights when subscriber was bound to carry compensation insurance—*Harris v. Traders' & General Ins. Co.*, Tex. Civ. App., 83 S.W.2d 750, error refused.

(2) Members of state embalmers' examining board had no jurisdiction to require applicant for license to conduct funeral home to discharge embalmer and agree not to reemploy him as a condition to obtaining license, as regards board members' liability to embalmer for loss of embalmer's position—*De Marais v. Stricker*, 53 P.2d 715, 152 Or. 362.

79. Mass.—*Berry v. Donovan*, 74 N.E. 603, 188 Mass 353, 108 Am.S.R. 499, 5 L.R.A.N.S., 899, 3 Ann.Cas. 738.

13 C.J. p. 571 note 12.

80. Ala.—*Hill Grocery Co. v. Carroll*, 136 So. 789, 223 Ala. 376.

Ga.—*Corpus Juris* quoted in *Ott v. Gandy*, 19 S.E.2d 180, 182, 66 Ga. App. 684.

Kan.—*Hilton v. Sheridan Coal Co.*, 297 P. 413, 132 Kan. 535.

N.Y.—*Hardy v. Erickson*, 36 N.Y.S. 2d 823.

Or.—*De Marais v. Stricker*, 53 P.2d 715, 152 Or. 362.

39 C.J. p. 1375 note 93.

Contracts terminable at will

The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others.

U.S.—*Truax v. Raich*, Ariz., 86 S.Ct. 7, 239 U.S. 33, 60 L.Ed. 131.

Ga.—*Ott v. Gandy*, 19 S.E.2d 180, 66 Ga. App. 684.

N.C.—*Holder v. Cannon Mfg. Co.*, 50 S.E. 681, 138 N.C. 308.

Pa.—*Bonsall v. Reagan*, 7 Del.C. 545.

82. Ala.—*U. S. Fidelity & Guaranty Co. v. Millonas*, 89 So. 732, 206 Ala. 147.

39 C.J. p. 1375 note 93.

Legal right of employer to discharge employee is no defense, where the interference is such that the employer is not free to exercise his independent judgment—*De Marais v. Stricker*, 53 P.2d 715, 152 Or. 362.

83. Fla.—*Chipley v. Atkinson*, 1 So. 934, 23 Fla. 206, 11 Am.S.R. 367.

84. N.Y.—*Carmen v. Fox Film Corp.*, 198 N.Y.S. 766, 204 App.Div. 776.

85. Fla.—*Chipley v. Atkinson*, 1 So. 934, 23 Fla. 206, 11 Am.S.R. 367.

86. Fla.—*Chipley v. Atkinson*, supra.

87. Ala.—*Southern Finance Co. v. Foster*, 95 So. 338, 19 Ala.App. 109, certiorari denied Ex parte Southern Finance Co., 95 So. 340, 209 Ala. 113.

N.Y.—*Messina v. Confidential Purchasing Co.*, 5 N.E.2d 62, 272 N.Y. 125.

39 C.J. p. 1375 note 99 [c].

88. N.Y.—*Messina v. Confidential Purchasing Co.*, supra.

89. N.Y.—*Messina v. Confidential Purchasing Co.*, supra.

rule, where the assignor had the right to assign his wages⁹⁰

Trade unions. A trade union wrongfully causing the discharge of an employee may be liable in damages therefor,⁹⁰ and it is no defense that plaintiff's employment was at the will of the employer.⁹² On the other hand, the mere discharge of a nonunion employee brought about by actions of a union that are not unlawful does not render the union so liable.⁹³ A threat of a union to call a strike against an employer violating his agreement to employ union labor exclusively gives no cause of action to a nonunion employee against the union for his discharge resulting from such threat where no malice is charged or unlawful means threatened.⁹⁴ An appeal taken by an expelled member within his union is not a waiver of his right to damages against the union for unlawfully causing his discharge.⁹⁵

b. Malice; Absence of Just Cause or Excuse

The bad motive of the third person who procures the servant's discharge is immaterial where the acts done by him are legal in themselves, and, on the other hand, if there is an intentional interference with the employment relation without just cause or excuse, malice in the sense of actual ill will need not be shown, and it is immaterial by what means the discharge is effected.

Ordinarily, the bad motive of the third person who procures the servant's discharge is immaterial where the acts done by him are legal in themselves and violate no superior right of the servant,⁹⁶ since an act lawful in itself is not rendered unlawful and actionable by a malicious motive, as discussed in Actions § 14. Also, a threat to do that which defendant has a right to do has been held not such a threat as will make defendant liable irrespective of motive.⁹⁷ On the other hand, malice in the sense of actual ill will on the part of the person procuring the discharge need not be shown, it being sufficient that there was an intentional interference without just cause or excuse.⁹⁸

Where the act resulting in the discharge of the employee is without just cause or excuse, it is immaterial by what means the purpose is effected.⁹⁹ In the absence of just cause or excuse for inducing a servant's discharge, defendant will be equally liable whether the means used consist in false, fraudulent,¹ or defamatory statements, coercion or intimidation,² or merely successful persuasion.³ This distinction, however, is to be observed in respect of the means used to effect the discharge: If the means used are false, fraudulent, or slanderous statements,⁴

90. Iowa—Coyle v. Des Moines Gately's, Inc., 298 NW 797, 230 Iowa 511—Haines v. Walker, 165 NW 1027, 183 Iowa 431.

Defective acknowledgment

Defendant taking apparently valid assignment of wages had right to serve notice thereof on assignor's employer without becoming liable for causing assignor's discharge, even if acknowledgment was defective—Hutchins v. Jones Piano Co., 228 N.W. 281, 209 Iowa 394.

91. NY—Connell v. Stalker, 45 N.Y.S. 1048, 30 Misc. 423, affirmed 48 N.Y.S. 77, 21 Misc. 609.

Pa.—Dorrington v. Manning, 4 A.2d 886, 135 Pa. Super 194—Mische v. Local Union No. 898, Dist. No. 1, United Mine Workers of America, Com. Pl., 31 Luz. Leg. Reg. 377.

63 C.J. p. 675 note 2.

Legality of acts of labor organizations generally see supra § 28 (19).

Unfair labor practices see supra §§ 28 (43)—28 (63).

Approval of membership

Where general membership of labor union knew of, and acquiesced in, arbitrary action of union officials in procuring discharge of former members without according them a hearing, the union should respond in damages for their unjustified discharge—O'Brien v. Papas, 49 N.Y.S. 2d 521.

92. Colo.—Order of Railway Con-

ductors v. Jones, 239 P. 882, 78 Colo. 80.

93. Ill.—Kemp v. Division No. 241, 99 NE 389, 255 Ill. 213.

Okla.—Roddy v. United Mine Workers of America, 139 P. 126, 41 Okl. 621, L.R.A. 1915D 789.

Pa.—Brown v. Lehman, 15 A.2d 513, 141 Pa. Super 487.

63 C.J. p. 675 note 3.

94. Ohio—Local Branch No. 248 v. Solt, 8 Ohio App. 437.

95. N.J.—Blanchard v. Newark Joint District Council of United Brotherhood of Carpenters & Joiners of America, 71 A. 1131, 77 N.J. Law 389.

96. Ala.—Corpus Juris cited in Comerford v. International Harvester Co., 178 So. 894, 896, 235 Ala. 376—Southern Finance Co. v. Foster, 95 So. 338, 19 Ala. App. 109, certiorari denied Ex parte Southern Finance Co., 95 So. 340, 209 Ala. 113.

39 C.J. p. 1376 note 99.

97. Fla.—Chiple v. Atkinson, 1 So. 934, 23 Fla. 206, 11 Am. S.R. 367.

39 C.J. p. 1376 note 1.

98. Colo.—Order of Railway Conductors v. Jones, 239 P. 882, 78 Colo. 80.

Mass.—Sullivan v. Barrows, 21 NE 2d 275, 303 Mass. 197—Caverno v. Fellows, 15 NE 2d 483, 300 Mass. 331.

NY—Lenkiewicz v. Wiktorek, 213 N.Y.S. 705, 128 Misc. 218—Crapanzano v. Uneeda Credit Clothing Stores, 32 N.Y.S. 2d 269.

Or.—De Marais v. Stricker, 53 P. 2d 715, 152 Or. 262.

Pa.—Dorrington v. Manning, 4 A.2d 886, 135 Pa. Super 194.

39 C.J. p. 1376 note 2.

99. Colo.—Order of Railway Conductors v. Jones, 239 P. 882, 78 Colo. 80.

Mass.—Caverno v. Fellows, 15 NE 2d 483, 300 Mass. 331.

NY—Crapanzano v. Uneeda Credit Clothing Stores, 32 N.Y.S. 2d 269.

39 C.J. p. 1376 note 3.

1. N.J.—Strollo v. Jersey Central Power & Light Co., 26 A.2d 559, 20 N.J. Misc. 217.

39 C.J. p. 1376 note 4.

2. N.J.—Malone v. Brotherhood Locomotive Firemen & Enginemen, 110 A. 696, 94 N.J. Law 347—Blanchard v. Newark Joint District Council of U.B.C. & J.A., 71 A. 1131, 77 N.J. Law 389, affirmed 76 A. 1087, 78 N.J. Law 737.

3. Mass.—Moran v. Dunphy, 59 NE 126, 177 Mass. 485, 82 Am. S.R. 289, 52 L.R.A. 115.

N.J.—Strollo v. Jersey Central Power & Light Co., 26 A.2d 559, 20 N.J. Misc. 217.

4. Iowa—Hollenbeck v. Rustine, 86 NW 377, 114 Iowa 353.

39 C.J. p. 1376 note 7.

or intimidation or coercion,⁵ there can be no justification, for the obvious reason that the justification must cover not only the object sought to be attained,⁶ but also the means used to obtain that object,⁷ and on the other hand, if persuasion is the only means used, circumstances may exist which cause the right to immunity from interference with contractual relations to cease to exist.⁸

It has been said that the justification for inducing a breach of contract must be an equal or superior right in the party inducing the breach.⁹ Competition in trade, employment, and business, it has been said, constitutes a sufficient justification for interference resulting in the discharge of a servant.¹⁰ However, there is no sufficient justification where the end sought to be attained is to cause the employee to surrender a claim against defendant,¹¹ or to coerce payment by the employee of an unjust demand,¹² or to prevent him from earning money to prosecute a suit against defendant.¹³ The conduct of the servant in going on a strike and refusing to make up for lost time cannot be used by the employer to effect his discharge from a subsequent employment.¹⁴ Acting on the advice of counsel alone does not constitute a defense.¹⁵

§ 631. — Actions

An action for procuring the discharge of a servant from his employment is based on tort, and not on equitable grounds.

An action for procuring the discharge of a servant from his employment is based on tort,¹⁶ and not on equitable grounds.¹⁷ Such an action, it has been held, is of a type different and distinct from an action for slander,¹⁸ and the fact that the language uttered by defendant in inducing plaintiff's discharge from employment may give rise to a cause of action for slander does not prevent plaintiff from prosecuting an action for wrongful discharge.¹⁹

Limitations. Where there are different statutes of limitation governing actions for slander and wrongful discharge, and neither statute has run, plaintiff has the option of maintaining either action,²⁰ and, if the action is based on wrongful discharge caused by slanderous statements, it is not governed by the statute of limitations applicable to actions for slander.²¹

Pleading. In accordance with the general rules of pleading, the statement, declaration, petition, or complaint in an action by a servant to recover damages from one who wrongfully procures his discharge from employment must allege all the facts necessary to constitute a cause of action.²² Where

5. Me—Perkins v Pendleton, 38 A 96, 90 Me 166, 60 Am SR 252

6. Mass—Martell v White, 69 NE 1085, 185 Mass 255, 102 Am SR 341, 64 L R A. 260

7. Mass—Martell v. White, supra

8. Ill—London Guarantee & Accident Co v Horn, 69 NE 526, 206 Ill 493, 99 Am SR 185.

NJ—Booth v Burgess, 65 A 226, 72 N J Eq 181.

9. Colo—Order of Railway Conductors v Jones, 239 P 882, 78 Colo 80

Acts held not unjustified

Pa—Brown v. Lehman, 15 A 2d 513, 141 Pa Super. 467

Justification held insufficient

(1) Fact that insurer might cancel insurance if miner drawing disability compensation were retained in lessee's employ was no justification for mine owner coercing miner's discharge.—Hilton v. Sheridan Coal Co, 297 P. 413, 182 Kan 525.

(2) Fact that applicant for funeral director's license was not licensed at time it contracted to employ embalmer did not render contract void and justify action of state board in requiring applicant to discharge embalmer before granting license, where embalmer was licensed and did not know that applicant had no license.—De Marais v Stricker, 53 P 2d 715, 152 Or. 362.

10. Ill—London Guarantee & Accident Co. v Horn, 69 NE 526, 206 Ill 493, 99 Am SR 185.

11. Ill—London Guarantee & Accident Co v Horn, supra.

12. Ala—Hill Grocery Co. v Carroll, 136 So 789, 223 Ala 376

13. Wis.—Johnson v Aetna Life Ins Co, 147 NW 32, 158 Wis. 56, Ann Cas 1916E 603

14. NC—Holder v Cannon Mfg Co, 47 SE 481, 135 NC 392.

15. NY—Carmen v. Fox Film Corp., 198 N.Y.S. 766, 204 App Div 776.

16. Colo—Order of Railway Conductors v. Jones, 239 P 882, 78 Colo. 80

NY—Crapanzano v. Uneda Credit Clothing Stores, 32 N Y S 2d 269.

17. Colo—Order of Railway Conductors v Jones, 239 P. 882, 78 Colo 80.

18. Cal.—Blender v Superior Court of Los Angeles County, 130 P 2d 179, 55 Cal.App 2d 24.

19. Cal—Blender v Superior Court of Los Angeles County, supra.

NJ—Strollo v. Jersey Central Power & Light Co., 26 A.2d 559, 20 N J Misc 217.

20. N.J.—Strollo v Jersey Central Power & Light Co, supra.

21. N.J.—Strollo v Jersey Central Power & Light Co, supra.

22. Pa.—Sweeney v Gleason, 31 Pa Dist & Co. 577, 31 Luz Leg Reg 453

Tex—Harris v Traders' & General Ins Co, Civ App, 82 SW 2d 750, error refused

Complaints held sufficient

Cal—Blender v Superior Court of Los Angeles County, 130 P 2d 179, 55 Cal App 2d 24

Ga.—Ott v Gandy, 19 S E.2d 180, 66 Ga App 684—Rhodes v Industrial Finance Corporation, 13 S E 2d 883, 64 Ga App 549

NJ—Strollo v Jersey Central Power & Light Co, 26 A.2d 559, 20 N J Misc 217.

NY—Brown v Yaspas, 10 N Y S 2d 502, 256 App Div 991—Lenkiewicz v. Wiktoerek, 213 N Y S 705, 126 Misc. 218—Crapanzano v Uneda Credit Clothing Stores, 32 N Y S. 2d 269

Tex—Harris v. Traders' & General Ins Co, Civ App., 82 SW 2d 750, error refused

39 C J p 1876 note 19 [a]

Complaints held insufficient

Mass—Cormerford v. Meier, 19 N E 3d 711, 302 Mass 398

NY—Messina v Continental Purchasing Co, 5 N E 3d 62, 272 N Y. 125—Bradford v. Sonet, 64 N Y S. 2d 876.

Okl.—Roddy v. United Mine Workers of America, 139 P. 126, 41 Okl. 621, L R A 1915D 789.

the means alleged for procuring the discharge of the servant are false statements, the substance of the statements must be set out;²³ but it is not necessary to allege in a complaint of this character that the master was thereby coerced to discharge the servant.²⁴

Issues, proof, and variance. Any evidence otherwise admissible may be received if the matters to which it relates are expressly or by clear inference substantially embraced within the scope of the pleadings,²⁵ but evidence of facts on issues not made by the pleadings is inadmissible.²⁶ Where the complaint alleges a contract of employment for a defi-

nite period of time, no recovery can be had where there is no evidence of a contract for a definite term of service.²⁷

Evidence. General rules have been applied in respect of burden of proof,²⁸ admissibility,²⁹ and weight and sufficiency³⁰ of evidence.

Instructions. General rules apply to the propriety and validity of instructions in actions of this character.³¹

Questions of law and fact. General rules determine whether a particular question is one of fact for the jury or one of law for the court.³²

Pa.—Sweeney v. Gleason, 31 Pa. Dist. & Co. 577, 31 Luz. Leg. Reg. 453.
Tenn.—Gregory v. Dealers' Equipment Co., 300 S.W. 563, 156 Tenn. 373.

Dismissal

If all essential elements of the cause of action are set forth in the complaint, it will not be dismissed because it is unskillfully drawn—Crapanzano v. Uneeda Credit Clothing Stores, 32 N.Y.S.2d 269.

23. Mass.—Moran v. Dunphy, 59 N.E. 125, 177 Mass. 485, 83 Am. S.R. 289, 53 L.R.A. 115.

24. Tex.—Cotton v. Cooper, Civ. App., 160 S.W. 597, affirmed Com. App., 209 S.W. 135.

25. Mo.—Joslin v. Chicago, M. & St. P. Ry. Co., 3 S.W.2d 352, 319 Mo. 250.

26. Ala.—Tennessee Coal, Iron & R. Co. v. Kelly, 50 So. 1008, 163 Ala. 348.

27. Fla.—Chipley v. Atkinson, 1 So. 934, 23 Fla. 206, 11 Am. S.R. 387.

Md.—Lucke v. Clothing Cutters' & Trimmers' Association No. 7507, K. of L., 26 A. 505, 77 Md. 396, 39 Am. S.R. 421, 19 L.R.A. 408.

28. Okl.—Reardon v. Layton & Forsyth, 124 P.2d 987, 190 Okl. 444, 39 C.J. p. 1377 note 25.

Wrongful discharge

In order to establish cause of action for wrongful procurement of plaintiff's discharge from employment by his employer, it was incumbent on plaintiff to show by competent evidence, and not by surmise or conjecture, that he had been wrongfully discharged and that his discharge was brought about by the malicious and wrongful interference of defendant—Reardon v. Layton & Forsyth, supra.

29. Ala.—Hill Grocery Co. v. Carroll, 136 So. 789, 223 Ala. 376, 39 C.J. p. 1377 note 26.

Evidence held admissible

(1) Generally—Sullivan v. Burke, 86 N.E.2d 875, 309 Mass. 493—Gould

v. Kramer, 149 N.E. 142, 253 Mass. 433.

(2) In action against union and its officers for wrongfully procuring plaintiff's discharge from her employment for failure to pay dues, arbitration award in proceedings between union and employer involving failure of another employee to pay dues was admissible and was a circumstance to be considered by jury along with all other evidence on issue of malice vel non—Local 204 of Textile Workers Union of America v. Richardson, 15 So.2d 578, 245 Ala. 37.

(3) In damage action against former employer for causing employee's discharge, evidence of lost time and earnings, despite reasonable efforts to obtain new employment, was properly admitted—Hill Grocery Co. v. Carroll, 136 So. 789, 223 Ala. 376.

Evidence held inadmissible

Or.—De Marais v. Stricker, 53 P.2d 715, 152 Or. 362.

Immaterial issues

Cal.—Bartlett v. Federal Outfitting Co., 24 P.2d 877, 133 Cal. App. 747, 39 C.J. p. 1377 note 26 [c].

30. Mo.—Joslin v. Chicago, M. & St. P. Ry. Co., 3 S.W.2d 352, 319 Mo. 250.

Evidence held sufficient

(1) Generally.

Ala.—Hill Grocery Co. v. Carroll, 136 So. 789, 223 Ala. 376.

Mo.—Joslin v. Chicago, M. & St. P. Ry. Co., 3 S.W.2d 352, 319 Mo. 250, 39 C.J. p. 1377 note 27 [a].

(2) To support finding that there was no justification—Order of Railway Conductors v. Jones, 239 P. 882, 78 Colo. 80.

(3) To sustain jury's finding that defendant by intimidation procured plaintiff's discharge from employment which would otherwise have continued—Taylor v. Pratt, 195 A. 205, 135 Me. 282.

(4) To show that plaintiff was discharged from employment, not because of complaint or demand by de-

fendants, but solely because of separate charge and investigation by plaintiff's employer—Joslin v. Chicago, M. & St. P. Ry. Co., supra.

Evidence held insufficient

(1) Generally—Osborne v. Sundheim, 73 A. 214, 224 Pa. 207—39 C.J. p. 1377 note 27 [b].

(2) To establish that defendant maliciously caused employer to breach employment contract—Langley v. Russell, 10 S.E.2d 721, 218 N.C. 216.

(3) To warrant submission to jury of questions whether defendants directly or indirectly caused plaintiff's discharge from employment. Mo.—Joslin v. Chicago, M. & St. P. Ry. Co., 3 S.W.2d 352, 319 Mo. 250. Okl.—Reardon v. Layton & Forsyth, 124 P.2d 987, 190 Okl. 444.

Malicious motive is inferable from the fact that defendant knowingly and intentionally interfered with the employment contract between plaintiff and their employer and caused the breach thereof, as regards plaintiff's right to recover damages therefor—Crapanzano v. Uneeda Credit Clothing Stores, 32 N.Y.S.2d 269.

31. Ga.—Chambliss v. Melton, 56 S.E. 414, 127 Ga. 414, 39 C.J. p. 1377 note 29.

Instructions held proper or not erroneous

Kan.—Hilton v. Sheridan Coal Co., 297 P. 413, 132 Kan. 525.

Instructions held improper or properly denied

Kan.—Hilton v. Sheridan Coal Co., supra, 39 C.J. p. 1377 note 29 [a].

32. Mass.—Gould v. Kramer, 149 N.E. 142, 253 Mass. 433, 39 C.J. p. 1377 note 31.

Questions of fact

(1) Generally—Sullivan v. Burke, 86 N.E.2d 875, 309 Mass. 493—Gould v. Kramer, 149 N.E. 142, 253 Mass. 433.

(2) Justification for procuring discharge.

§ 632. — Damages

Ordinarily the measure of damages for wrongfully procuring the discharge of an employee is the amount which would have been earned by him except for such interference.

The measure of damages for unlawfully procuring the discharge of an employee is based on the direct and proximate results of the wrongful acts of defendant,³³ and not on the breach of the contract of employment,³⁴ and ordinarily plaintiff may recover the amount which would have been earned by him except for defendant's interference,³⁵ less such sums as were actually earned at other employments.³⁶ The speculative profits of a new or proposed partnership between the employer and the employee are too uncertain to be recoverable.³⁷

Mitigation of damages. The general rule, as between employer and employee, that it is the duty of an employee who has been wrongfully discharged before his term has expired to seek other employment and thus diminish the damages, as discussed supra § 59, has been held to apply in an action by

the employee against a third person for wrongfully procuring his discharge,³⁸ although generally the employee is under no obligation to seek or accept employment in other localities,³⁹ or of a different or inferior kind.⁴⁰ It has been held, however, that an employee is under no obligation to minimize the damages by seeking or taking other employment where he is discharged as a result of the intentional wrong of a third person.⁴¹

Mental anguish. Where in procuring the discharge of a servant the one procuring the discharge acted wantonly, wilfully, or maliciously, a recovery may be had for mental anguish.⁴² It has been held that damages for mental anguish are within the sound discretion of the jury, since the law furnishes no way by which to measure reasonable compensation for such injury.⁴³

Exemplary damages may, in a proper case, be recovered,⁴⁴ and, in proportion to the actual damages recovered, this must depend on the particular facts of the case.⁴⁵

B. CRIMINAL LIABILITY

§ 633. Enticing Servant

Under some statutes the enticing away or the wrongful employment of a servant of another is made a criminal offense.

In the absence of statute expressly so providing,

an indictment will not lie for enticing a servant to leave the employ of his master.⁴⁶ Under some statutes, however, the enticing away or the wrongful employment of a servant of another is made a criminal offense.⁴⁷ Also, by express provision, an at-

Ala.—*Evans v Swaim*, 18 So 2d 400, 245 Ala 641.

Colo.—*Order of Railway Conductors v Jones*, 239 P. 882, 78 Colo 80.
Or.—*De Marais v Stricker*, 53 P.2d 715, 152 Or 362.

(3) Time or cause of discharge.

Mass.—*Gould v Kramer*, supra.

Me.—*Taylor v. Pratt*, 195 A. 205, 135 Me 282.

(4) Right to punitive damages—*Hill Grocery Co. v. Carroll*, 136 So 789, 223 Ala 376.

33. Mass.—*Sullivan v Barrows*, 21 NE 2d 275, 303 Mass 197.

34. Mass.—*Sullivan v. Barrows*, supra.

35. Ala.—*Hill Grocery Co v. Carroll*, 136 So 789, 223 Ala. 376.
39 C.J. p 1377 note 32.

Contract price is the correct measure of damages if there is no claim that employee could have obtained other employment—*Smetherham v Laundry Workers' Union*, Local No 75, 111 P 2d 948, 44 Cal App 2d 131.

Amount held not excessive

Kan.—*Hilton v Sheridan Coal Co.*, 297 P. 413, 132 Kan 525.

38. Mo.—*Lally v. Cantwell*, 40 Mo App. 44.

37. Fla.—*Chiple v Atkinson*, 1 So 934, 23 Fla 208, 11 Am SR 367.

38. Cal.—*Smetherham v Laundry Workers' Union*, Local No 75, 111 P 2d 948, 44 Cal App 2d 131.
N.Y.—*O'Brien v. Papas*, 49 NYS 2d 521.

Lost time and earnings

Employee suing former employer for causing loss of employment could recover for lost time and earnings, except to extent that he omitted to minimize damages by diligence in attempting to secure employment—*Hill Grocery Co v. Carroll*, 136 So 789, 223 Ala 376.

39. N.Y.—*Connell v. Stalker*, 45 N. YS 1048, 20 Misc. 423, affirmed 48 NYS. 77, 21 Misc. 609.

40. Cal.—*Smetherham v Laundry Workers' Union*, Local No 75, 111 P 2d 948, 44 Cal App 2d 131.

41. N.Y.—*Carmen v. Fox Film Corp.*, 198 NYS. 766, 204 App Div. 776.

42. Ala.—*Hill Grocery Co. v Carroll*, 136 So 789, 223 Ala. 376.
39 C.J. p 1377 note 36.

43. Ala.—*Hill Grocery Co v. Carroll*, supra.

44. Kan.—*Corpus Juris* cited in

Hilton v Sheridan Coal Co., 297 P. 413, 132 Kan 525.

39 C.J. p 1377 note 38.

45. Ala.—*Hill Grocery Co. v. Carroll*, 136 So 789, 223 Ala 376.
39 C.J. p 1377 note 39.

Character and degree of wrong

In action against former employer for causing employee's discharge, awarding punitive damages is within jury's discretion, and, in fixing amount, jury may consider character and degree of wrong—*Hill Grocery Co. v. Carroll*, supra.

Amount held not excessive

Kan.—*Hilton v. Sheridan Coal Co.*, 297 P. 413, 132 Kan 525.
39 C.J. p 1377 note 39 [a].

46. La.—*State v. Sypher*, 19 La. Ann 71.
39 C.J. p 1377 note 42.

47. U.S.—*Dorothy v. State of Kansas*, Kan., 47 S.Ct 86, 272 US 306, 71 L Ed 248.

Ga.—*Rhoden v. State*, 129 S.E. 640, 161 Ga. 78.

Miss.—*Shilling v. State*, 109 So 737, 143 Miss. 709.

39 C.J. p 1378 note 43.

Criminal liability of combinations to induce breach of contract of em-

tempt to entice away the servant of another may be made a offense, although the servant does not actually leave the employment.⁴⁸ Statutes of this character have been held valid as against various objections,⁴⁹ and have been held to be a legitimate exercise of the police power,⁵⁰ and not in violation of the Civil Rights Bill.⁵¹ It has been held that statutes rendering it a criminal offense to entice away the servant of another were designed to prevent intruders from willfully interfering with a contract of employment, or to entice a person from the premises of another with whom he had contracted, or knowingly to employ a person in the employ of another before such employment has been abandoned.⁵²

§ 634. — Nature and Elements of Offense

All of the elements of the offense must be established to authorize a conviction under statutes imposing criminal penalties for wrongfully enticing away the servant of another.

In order to authorize a conviction under statutes imposing criminal penalties for wrongfully enticing away the servant of another, all of the elements of the statutory offense must be established.⁵³ There must be a valid subsisting contract of service at the time of the enticement,⁵⁴ and, if the statute so provides, the contract must be in writing⁵⁵ and attested by one or more witnesses.⁵⁶ It is further essential that accused had notice of the existence of the contract,⁵⁷ and that there was an enticement,⁵⁸ or employment of the servant without the consent of the master.⁵⁹

No offense is committed by hiring a servant after

the term of his employment has expired,⁶⁰ or where the employment is for an indefinite time.⁶¹ It has been held that a conviction does not lie for enticing away,⁶² or employing,⁶³ a servant after he has abandoned a former contract; but there is also some authority to the contrary.⁶⁴

Prior contract with accused. No offense is committed where accused had a prior verbal contract with the laborer, the term of which had not expired, and which the prosecutor enticed him to abandon,⁶⁵ even though the contract was voidable under the statute of frauds,⁶⁶ where treated by the parties thereto as valid.⁶⁷

Who are servants or laborers. "Croppers"⁶⁸ and employees of a cotton mill⁶⁹ have been deemed servants or laborers within the meaning of these statutes. However, one who rents a farm and is to make a crop and have full control of the farm is not a servant,⁷⁰ although he is obliged to pay as rent half of all he makes.⁷¹ Where a tenant contracts that in addition to payment of the stipulated amount he will work for the landlord whenever he can leave his own crop and is needed by the landlord, this does not constitute the relation of master and servant, and the person employing the tenant is not guilty of enticing a "servant."⁷² A superintendent or "boss" is not a servant within such a statute.⁷³

Infant servants. Where an infant makes a contract for his services, one who entices him away from the service is guilty of a violation of the statute,⁷⁴ although the contract is voidable at his instance, since the right to avoid the contract is per-

ployment see Conspiracy §§ 68, 70, 71

Servant's breach of contract as criminal offense see supra § 80 a.

48. Ga.—Bright v. State, 61 SE 289, 4 Ga.App 333.

49. Ga.—Rhoden v. State, 129 SE 640, 161 Ga. 73.

39 C.J. p 1378 notes 49, 51, 52
Enticing away or harboring apprentices see Apprentices § 28

Labor union officials

Court of Industrial Relations Act, authorizing criminal prosecution of labor union officers for inducing others to quit employment, is not unconstitutional, as applied to strike ordered to enforce personal claim of member of union—Dorchy v State of Kansas, Kan, 47 S Ct 36, 272 U.S. 306, 71 L Ed 248

50. Ark.—Tucker v State, 111 SW 375, 86 Ark. 436.

Miss.—State v Hurdle, 74 So 681, 113 Miss 736

51. Ala.—Murrell v. State, 44 Ala. 367.

52. Miss.—Waldrup v State, 122 So 771, 154 Miss 646.

39 C.J. p 1378 note 43 [a]

53. Miss.—Waldrup v. State, 122 So 771, 154 Miss 646

54. Ala.—Abingdon Mills v Grogan, 52 So 596, 167 Ala 146

39 C.J. p 1378 notes 55, 60-65

55. NC.—State v Rice, 76 NC 194
39 C.J. p 1378 note 55

56. Ga.—Hightower v State, 72 Ga. 482

57. Miss.—Shilling v. State, 109 So 737, 143 Miss 709

39 C.J. p 1378 note 57.

58. Ga.—Sanders v. State, 108 SE 68, 27 Ga App 269.

59. Miss.—Ward v State, 12 So. 249, 70 Miss 245.

39 C.J. p 1378 note 66.

60. Miss.—Goolsby v. State, 54 So 155, 98 Miss 703

39 C.J. p 1378 note 62

61. Miss.—Goolsby v State, supra

62. Miss.—Waldrup v State, 122 So 771, 154 Miss 646

63. Miss.—Waldrup v. State, supra, 39 C.J. p 1378 note 65

64. Ala.—Tarpley v. State, 79 Ala. 271.

65. Ala.—Turner v. State, 48 Ala. 549.

66. Ala.—Tartt v. State, 5 So. 577, 86 Ala. 26

67. Ala.—Tartt v. State, supra.

68. Ark.—Mondschein v State, 18 S W. 383, 55 Ark 389.

Miss.—Ward v State, 12 So 249, 70 Miss 245

69. Ala.—Abingdon Mills v Grogan, 52 So 596, 167 Ala 146

70. Ark.—Mondschein v State, 18 SW 383, 55 Ark 389.

71. Ark.—Mondschein v. State, supra

72. NC.—State v. Hoover, 12 SE 451, 107 NC 795, 10 L.R.A. 726

73. Ga.—Bryan v. State, 44 Ga. 328

74. Ala.—Murrell v State, 44 Ala. 367

NC.—State v Harwood, 10 SE 171, 104 NC 724.

sonal to the infant, as discussed in Infants § 75. However, after he has abandoned the contract, one who employs him is not guilty of violating a statute which makes it an offense to entice away or employ a servant who has contracted in writing to serve another for a specified time, "such contract being in force, and binding upon the parties thereto,"⁷⁵ but it is otherwise under a statute which makes the offense dependent on the mere existence of a contract in writing, eliminating the element of "being in force, and binding upon the parties thereto."⁷⁶ While there is some authority apparently to the contrary,⁷⁷ these statutes are ordinarily held to apply only to contracts entered into by the servant himself and employer,⁷⁸ and, hence, if the contract for the infant's services was made with his father⁷⁹ or guardian,⁸⁰ instead of with the infant himself, a person enticing the servant away is not guilty of an offense where the statute forbids the enticing away of a servant under contract with another. Also, a father, after hiring out his minor child, may entice or order him to quit without committing a punishable offense.⁸¹

§ 635. — Indictment, Complaint, or Affidavit

An indictment, complaint, or affidavit for enticing away or employing the servant of another must state all facts which are made elements of the offense by the statute on which it is based, but ordinarily, an indictment in the language of the statute is sufficient.

General rules relating to complaints and indictments or informations have been applied in prosecutions for enticing away or employing the servant of another. Accordingly, the indictment, complaint, or affidavit must state all facts which are made elements of the offense by the statute on which it is based,⁸² but ordinarily an indictment in the lan-

guage of the statute is sufficient.⁸³ An indictment for enticing away must either state the Christian name of the laborer or allege that it is unknown,⁸⁴ the fact that the person enticed or employed was a laborer;⁸⁵ the name of the person in whose employ the servant was at the time of the alleged illegal act,⁸⁶ the name of the agent of accused who is alleged to have unlawfully employed the servant,⁸⁷ and the absence of the employer's consent to the re-employment.⁸⁸ However, the acts or words by which the enticement was effected need not be specified,⁸⁹ nor, unless such an averment is necessary to bring the case within the statute, need the indictment specify whether the contract of employment was written or oral.⁹⁰

Issues, proof, and variance. General rules as to issues, proof, and variance apply in prosecutions of the character under consideration.⁹¹ A conviction cannot be had on a charge of enticing away a laborer or servant, by proof of enticing away a renter or share cropper, where the two acts are made different offenses by statute.⁹² Although a statute makes it an offense to entice away any laborer or renter before the expiration of the contract, there can be no conviction under an indictment which charges accused with enticing away a laborer, where it is shown that the person so enticed was a renter.⁹³ So, an indictment for enticing away or hiring a servant of another is not supported by evidence that the hiring was done by defendant's agent or partner in business, and that accused knowingly received a part of the profits of the laborer's service.⁹⁴ Under an indictment for knowingly interfering with a laborer who had contracted in writing to serve a certain person, proof that the servant had contracted in writing to serve a different person constitutes a fatal variance.⁹⁵

Criminal liability for enticement of an infant from service of his parent see the C J S title Parent and Child § 103, also 48 C J p 1370 note 67-p 1371 note 71

75. Ala.—Langham v State, 55 Ala 114

76. Ala.—Driscoll v State, 77 Ala 84

77. Ala.—Winslow v State, 9 So 728, 92 Ala 78
39 C J p 1379 note 83

78. NC—State v Anderson, 10 S E 475, 104 NC 771

79. SC—State v Rhody, 45 S E 205, 67 SC 287—State v Aye, 41 S E 519, 63 SC 458.

80. Miss—State v Richardson, 38 So. 497, 36 Miss 439.

81. Ala.—Driscoll v. State, 77 Ala 84

NC—State v Anderson, 10 S E 475, 104 NC 771

82. Ga.—Rhoden v State, 129 S E 640, 161 Ga 73
39 C J p 1379 note 93

83. Colo.—People v Fontuccio, 215 P 145, 73 Colo 288
39 C J p 1379 note 95

84. Ala.—Roseberry v State, 50 Ala 160

85. Miss.—Jackson v State, 18 So 935

86. Ga.—Hudson v State, 46 Ga 624

87. Ga.—Hudson v State, supra.

88. Miss.—Ward v State, 12 So 349, 70 Miss 245

39 C J p 1379 note 1.

89. NC—State v Harwood, 10 S E 171, 104 NC 724.

90. Ark.—Mondschein v. State, 18 S W 383, 55 Ark 389
NC—State v Harwood, 10 S E 171, 104 NC 724.

91. Ala.—Streater v. State, 34 So. 394, 137 Ala 93.

92. Ala.—Streater v. State, supra.

93. Ark.—Mondschein v. State, 18 S W 383, 55 Ark 389.

94. Ala.—Roseberry v. State, 50 Ala 160.

95. Ala.—Jones v State, 54 So 500, 170 Ala 76.

§ 636. — Evidence

General rules relating to burden of proof, admissibility, and weight and sufficiency of evidence apply in prosecutions for interfering with the relation of master and servant

General rules relating to burden of proof,⁹⁶ admissibility,⁹⁷ and weight and sufficiency⁹⁸ of evidence apply in prosecutions for interfering with the relation of master and servant.

§ 637. — Trial

Ordinarily, the general rules governing the trial of criminal cases apply as to instructions to the jury and questions of law and fact in prosecutions for enticing a servant.

In prosecutions for interference with the relation of master and servant, ordinarily the general rules governing the trial of criminal actions⁹⁹ apply, as with respect to instructions to the jury¹ and questions of law and fact.²

§ 638. Intimidation or Coercion of Servant

Some statutes prohibit the attempt by threats, intimidation, or force to prevent or hinder a person from continuing in any lawful work, or to compel a servant to refrain from working for his master.

Although not an offense at common law,³ some statutes prohibit the attempt, by threats, intimidation, or force, to prevent or hinder a person from continuing in any lawful work, or to compel a servant to refrain from working for his master.⁴ Statutes of this nature have been held valid as against various objections,⁵ and have also been held to manifest a legislative intent to prevent individual in-

terference with the right to work as well as organized effort to accomplish that purpose.⁶ A person may be guilty of unlawfully intimidating or coercing a servant notwithstanding he did not directly interfere with the servant where he aided and abetted in preventing the servant from engaging in his employment.⁷

Under such statutes, it has been held that union men or other employees have the right to seek, by peaceable persuasion, to induce others to leave, or refrain from working for, employers,⁸ if the persuasion is not in the nature of intimidation or coercion.⁹ Thus, it has been held that peaceful picketing is not an offense, notwithstanding the fear of employees was aroused as to the loss of their jobs if the union prevailed.¹⁰ An assault of an employee for the purpose of coercing him from going to work at a strike-bound plant may constitute a violation of the statute notwithstanding the employee was on his way home after an unsuccessful attempt to gain entrance to the plant.¹¹

In conformity with general rules an indictment for intimidating employees to compel them to abandon their employment,¹² or for preventing a servant from performing the duties of his employment,¹³ must state all facts which are made essential elements of the offense charged by the statute on which it is based. The question whether the threats were verbal or in writing,¹⁴ or were direct or implied,¹⁵ need not be alleged.

General rules control the admission and rejection,¹⁶ and the weight and sufficiency¹⁷ of evidence,

96. Ga.—*Sanders v State*, 108 S.E. 68, 27 Ga App 269

39 C.J. p 1379 note 12

97. Ala.—*Holland v. State*, 194 So

412, 29 Ala App 181

39 C.J. p 1379 note 13

98. Ga.—*Thompson v State*, 118 S.E. 796, 30 Ga App 666.

39 C.J. p 1379 note 14.

Evidence held sufficient

Ga.—*Thompson v State*, supra.

39 C.J. p 1379 note 14 [a].

Evidence held insufficient

Ala.—*Holland v State*, 194 So. 412, 29 Ala App 181

Miss.—*Waldrop v. State*, 122 So 771, 154 Miss 646

39 C.J. p 1379 note 14 [b]

99. Ark.—*State v Moore*, 265 S.W. 363, 166 Ark 412

1. Ark.—*State v Moore*, supra.

2. Ark.—*State v. Moore*, supra.

3. Conn.—*State v. McGee*, 69 A. 1059, 80 Conn. 614.

4. Wis.—*State v Jakubowski*, 27 N.W. 2d 742, 251 Wis 74.

39 C.J. p 1380 note 20.

Criminal liability for conspiracy to prevent laborers from working by force and intimidation see Conspiracy § 67.

5. Mich.—*People v Washburn*, 280 N.W. 132, 285 Mich 118

6. Mich.—*People v. Washburn*, supra.

7. Mich.—*People v. Washburn*, supra.

8. Ill.—*People v. Young*, 188 Ill App 208

Legality of acts of labor organizations generally see supra § 28 (19) Unfair labor practices generally see supra §§ 28 (43)—38 (63).

9. Ill.—*People v. Young*, supra

10. Mich.—*People v Bashaw*, 295 N.W. 242, 295 Mich. 503

11. Wis.—*State v Jakubowski*, 27 N.W. 2d 742, 251 Wis 74.

12. Wis.—*Fischer v. State*, 76 N.W. 594, 101 Wis 23.

39 C.J. p 1380 note 22

13. Tex.—*Luter v State*, 22 S.W. 140, 32 Tex Cr 69

39 C.J. p 1380 note 23

14. Miss.—*Breeland v. State*, 31 So 104, 79 Miss 527

39 C.J. p 1380 note 24

15. Miss.—*Breeland v. State*, supra.

39 C.J. p 1380 note 25

16. Wis.—*State v Jakubowski*, 27 N.W. 2d 742, 251 Wis 74

39 C.J. p 1380 note 27

Motive

In prosecution for assault with intent to prevent an employee from working at a strike-bound plant, where employee had earlier been assaulted by another, and defendant's assault was subsequent thereto, evidence concerning the earlier assault, a conversation between the person committing that assault and defendant, and defendant's act in immediately trailing the employee and again assaulting him were admissible as bearing on motives and purposes of defendant in committing the assault.—*State v Jakubowski*, supra.

17. Mich.—*People v Washburn*, 280 N.W. 132, 285 Mich 119

Evidence held sufficient

Mich.—*People v. Washburn*, supra.

and instructions¹⁸

§ 639. Bribing Servant with Intent to Influence His Relation with Master

Some statutes make it an offense to give or promise a servant any gift or gratuity without the master's consent for the purpose of influencing his actions in relation to his master's business.

Some statutes make it an offense to give or promise a servant any gift or gratuity without the master's consent for the purpose of influencing his ac-

tions in relation to his master's business¹⁹ The validity of such statutes has been upheld,²⁰ but they are to be strictly construed²¹ The provisions of the statute are violated by giving the servant a gratuity to induce him to give defendant secret formulae²² or secret information²³ of his master, regardless of whether or not injury results thereby to the employer²⁴ The statute, being purely penal in character, does not give the wronged master, who received the benefits of the contract, any right to recover back the entire compensation paid.²⁵

MASTER BUILDER. See Contracts § 11.

MASTER COMMISSIONER. See Equity §§ 514-521.

MASTER PLUMBER. As synonymous with "employing plumber" see 30 C.J.S. p 224 note 83.

Wis—State v Jakubowski, 27 NW 2d 742, 351 Wis 74

39 C J p 1380 note 27 [b]

Evidence held insufficient

Tex—Luter v State, 23 SW 140, 32 Tex Cr 69.

12. Ill—People v. Young, 188 Ill App 208

Kan—State v Personett, 220 P 520, 114 Kan 680

39 C J p 1380 note 16 [a]

19. N J—State v. Landecker, 137 A. 919, 103 N J.Law 716

N.Y—People v Davis, 160 N Y S 769, 33 N Y Cr 460

Interference with relation of principal and agent by third person see Agency § 10

Fraud

A person tampering with employer-employee relationship for purpose

of causing employee to breach his duty is in effect "defrauding" employer of a lawful right, the actual deception being in continued representation of employee to employer that he is honest and loyal to employer's interests—U S v. Procter & Gamble Co, D C Mass, 47 F.Supp 676

Increase of purchase price

The statute making criminal the giving of gratuities without knowledge of the principal or employer, with an intent to influence an employee's action, is not limited to cases where payments have been made to a purchasing agent which increased the purchase price in some way—Nathanson v Brown & Williamson Tobacco Corp, 68 N.Y.S 2d 914.

20. N Y—People v. Davis, 160 N.Y. S 769, 33 N Y Cr. 460.

21. N Y—Rosenwasser v. Amusement Enterprises, Inc, 150 N.Y.S. 561, 38 Misc 57.

22. N.J.—State v Landecker, 137 A. 919, 103 N J Law 716

Evidence as to whether accused undertook to dispose of the formulae to a certain person is proper as bearing on accused's motive.—State v. Landecker, *supra*.

23. N Y—Applebee v. Skiwanek, 140 N Y S 450, 27 N.Y.Cr 78.

24. N J—State v Landecker, 137 A. 919, 103 N J.Law 716

25. N Y—Hearn v. Schuchman, 141 N Y S 242, 80 Misc. 311, affirmed 143 N.Y.S. 573, 157 App Div. 926.

MASTERS' AND EMPLOYERS' ASSOCIATIONS

This Title includes associations of employers for the protection of the members thereof against unjust demands of their employees, and of handling industrial disputes, also the nature and status of such associations, and their powers, rights and liabilities.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1. Definition, nature, and status—p 444
- 2 Right and manner of organization—p 444
- 3 Dissolution—p 445
- 4 Powers and liabilities; constitution and by-laws—p 445
- 5 Membership—p 446
- 6 Officers—p 447
- 7 Meetings—p 447
- 8 Actions—p 447

See also descriptive word index in the back of this Volume

§ 1. Definition, Nature, and Status

A master's or an employer's association may be defined as an association which has for its purpose the protection of its members from unjust demands of employees or the adoption of just and equitable dealings between members and their employees; such an association is not a partnership and its members are not partners.

From a consideration of the purpose of particular organizations, as set forth in pertinent cases, a "master's association" or an "employer's association" may be defined as such an association as has for its objects or purposes the protection of its members against unjust demands of employees, and making provision for cooperation in the handling of industrial disputes,¹ or as such an association as has for its object or purpose the adoption of just and equitable dealings between members of the association and their employees.²

As in the case of unincorporated associations gen-

erally, as considered in Associations § 1, an unincorporated employers' association which does not contemplate trade and profit is not a partnership,³ and its members are not partners,⁴ although the association may incidentally accumulate property in the promotion of its real purpose.⁵

§ 2. Right and Manner of Organization

Employers of labor may form organizations for their own benefit where the object or purpose is legal, and generally speaking their right in this regard is as extensive as is the right of employees to organize; employers' associations may be either unincorporated or incorporated.

As long as the object or purpose is legal,⁶ employers of labor may form organizations for their own personal benefit,⁷ as may workmen, in accordance with the rules discussed in Master and Servant §§ 28 (1)—28 (42) and in the C.J.S. title Trade Unions § 4, also 63 C.J. p 656 note 15—p 658

1. Conn.—See Associated Hat Mfrs v Baird-Unterselt Co, 91 A 373, 88 Conn. 333

39 C.J. p 1382 note 2
"Association" defined generally see Associations § 1.

2. Ohio—Webster v Taplin, 29 Ohio Cir Ct 543
39 C.J. p 1382 note 2.

3. Ill.—A. J. Lindemann & Hoverson Co v Advance Stove Works, 170 Ill App 423

Ohio—Webster v Taplin, 29 Ohio Cir Ct 543.

4. Ill.—A. J. Lindemann & Hoverson Co v Advance Stove Works, 170 Ill App 423

5. Ill.—A. J. Lindemann & Hoverson Co v Advance Stove Works, supra

6. Md—Willner v Silverman, 71 A 962, 109 Md 341, 21 L.R.A.N.S., 895

7. Ill.—Carpenters' Union v Citizens' Committee to Enforce Landis Award, 244 Ill App 540, reversed on other grounds 164 N.E. 833, 833 Ill. 235, 63 A.L.R. 157.

39 C.J. p 1382 note 3.

Organization of associations generally see Associations § 3.

To stabilize industry

Members of dress manufacturers' and dress retailers' organizations had right to co-operate to correct abuses or stabilize industry, provided their endeavors did not amount to unlawful boycott or constitute unreasonable restraint of trade—Wolfenstein v Fashion Originators' Guild of America, 280 N.Y.S. 361, 244 App Div 656.

note 35. Their right to form and organize associations is the same⁸ In the absence of a statute to the contrary, that which is lawful for the one is lawful for the other⁹ There is authority for the view that employers have the right to combine to refuse employment to any kind or class of workmen just as fully as employees have the right to combine to refuse to work for any employer who employs men of whom they disapprove or who conducts his business contrary to their views.¹⁰

Employers' associations may be either unincorporated¹¹ or incorporated.¹² Sometimes they are organized into local associations, each local organization having its own distinct name, and several local associations are organized into a national or international association. The local associations are made up of employers in a given locality, and the national or international association is made up of the individual local associations.¹³

§ 3. Dissolution

The withdrawal of one or more members of an employers' association does not necessarily operate as a dissolution of the association.

The withdrawal of one or more members of an employers' association does not ipso facto operate as a dissolution of that body, if it is evident that the association was designed to have a continuing existence.¹⁴

The dissolution of associations generally is discussed in Associations §§ 9, 10.

§ 4. Powers and Liabilities; Constitution and By-Laws

As a general rule an employers' association may and must employ a lawful means to accomplish its object, and by-laws and regulations are part of the machinery by which such an association operates.

As a general rule an employers' association may adopt any lawful means to accomplish its object,¹⁵

but must employ lawful methods for the attainment of its purposes¹⁶ Each member of an employers' association submits his freedom to contract, to a greater or lesser extent, to the will of the association¹⁷

By-laws and regulations are a part of the machinery by which an employers' association operates.¹⁸ A by-law providing for a fine on the members of an employers' association for disobedience of its lawful orders is not unlawful,¹⁹ but, as discussed infra § 5, a member of the association is not liable for the fine or penalty for noncompliance with a by-law or regulation which is not within the purpose or object of the association or which is against public policy.

In comparatively early cases, it has been held or recognized that an association of employers may enact a by-law giving it the right to order a shutdown of the factories of its members, provided the object sought is within its lawful purpose and the means used are lawful,²⁰ and that in a proper case the association may order its members to maintain open shops²¹ So, the view has been taken that, while an individual employer may lawfully agree with a labor union to employ its members only, a contract by which an employer agrees to employ only union labor is contrary to public policy, where the agreement is one which takes in an entire industry of any considerable proportions in a community, so that it operates generally in that community to prevent or seriously to deter workmen from obtaining employment under favorable conditions without joining a union, as considered in Contracts § 267, and that it is against public policy for an employers' association which practically controls the whole trade in a community to promulgate a by-law or regulation or to enter into any agreement or contract having for its object the compelling of workmen to join a particular union as a condition of employment²² or

8. Neb—State v. Employers of Labor, 169 N.W. 717, 102 Neb 768, dissenting opinion 170 N.W. 185, 102 Neb 768

39 C.J. p 1382 note 11.

9. Neb—State v. Employers of Labor, supra

10. N.J.—Atkins v. W. A. Fletcher Co., 55 A. 1074, 65 N.J.Eq. 658

32 C.J. p 185 note 22

11. N.Y.—Schwarz v. International Ladies' Garment Workers' Union, 124 N.Y.S. 968, 68 Misc 528.

12. N.Y.—Sackett & Wilhelms L. & P. Co. v. National Ass'n of Employing Lithographers, 133 N.Y.S. 372, 148 App.Div. 598, reversed on other grounds 105 N.E. 1102, 211 N.Y. 554.

13. U.S.—Barnes v. Berry, Ohio, 169 F. 225, 94 C.C.A. 501.

14. Ill.—A. J. Lindemann & Hoverson Co. v. Advance Stove Works, 170 Ill.App. 428

15. Conn.—Associated Hat Mfrs. v. Baird-Unteidt Co., 91 A. 373, 88 Conn. 332

Ill.—Carpenters' Union v. Citizens' Committee to Enforce Landis Award, 244 Ill.App. 540, reversed on other grounds 164 N.E. 393, 333 Ill. 225, 63 A.L.R. 157

16. Md.—Willner v. Silverman, 71 A. 982, 109 Md. 341, 24 L.R.A.N.S. 895

N.Y.—McCord v. Thompson-Starrett Co., 113 N.Y.S. 385, 129 App.Div.

130, affirmed 92 N.E. 1090, 198 N.Y. 587

17. Conn.—Associated Hat Mfrs. v. Baird-Unteidt Co., 91 A. 373, 88 Conn. 332

39 C.J. p 1382 note 28.

18. Conn.—Associated Hat Mfrs. Co. v. Baird-Unteidt Co., supra.

19. Conn.—Associated Hat Mfrs. v. Baird-Unteidt Co., supra.

39 C.J. p 1382 note 31.

20. Conn.—Associated Hat Mfrs. Co. v. Baird-Unteidt Co., supra.

21. Conn.—Associated Hat Mfrs. v. Baird-Unteidt Co., supra.

22. N.Y.—McCord v. Thompson-Starrett Co., 113 N.Y.S. 385, 129 App.Div. 180, affirmed 92 N.E. 1090,

under penalty of loss of their employment²³ Collective bargaining under modern labor relations laws is discussed in Master and Servant §§ 28(1)-28(42), and particular reference should be made to § 28 (28), discussing collective bargaining units.

The rights, powers, and liabilities of an association generally are discussed in Associations §§ 12-17 and the articles of association, constitution, and by-laws of an association generally are considered in Associations § 11.

§ 5. Membership

- a. Eligibility and admission to membership
- b. Termination of membership
- c. Duties and liabilities of members

a. Eligibility and Admission to Membership

As a general rule members of an employers' association may be either corporations, partnerships, or individual natural persons.

Ordinarily, the members of an employers' association may be either corporations,²⁴ partnerships,²⁵ or individual natural persons.²⁶

Acting as a member of an association for an extended period may estop one from denying that he is a member, notwithstanding want of compliance with formalities as to application required by the by-laws.²⁷

Eligibility and admission to membership in an association generally are considered in Associations §§ 22, 23.

b. Termination of Membership

Membership in an employers' association may be terminated by resignation or by expulsion.

As in the case of associations generally, under rules discussed in Associations §§ 24, 25, the ordinary methods of terminating membership in an employers' association are resignation,²⁸ or expulsion.²⁹ The resignation of a member becomes effective on presentation and compliance with the rules of the association without acceptance, unless acceptance is made a prerequisite to resignation.³⁰ The laws of the association sometimes provide for the withdrawal of members, in which case there can be no withdrawal except in the manner and on the conditions prescribed.³¹ The noncompliance with any of the laws of the association may be ground for expulsion.³²

c. Duties and Liabilities of Members

Generally, a member of an employers' association is bound by the provisions of the constitution and by-laws of the association, and he may be held liable for dues or other monetary obligations which have been duly imposed.

By the act of joining the association the member obligates himself to conform to the constitution and by-laws of the association as they existed at the time of his admission into membership,³³ or that may be duly amended during the course of his membership.³⁴ Obedience to the lawful orders of the association is the condition of membership voluntarily encountered by previous assent to the by-laws.³⁵ A decision, order, prohibition, or regulation of the association which has no relation to the object for which it was organized,³⁶ or which is against public policy,³⁷ is not binding on its members.

As to dues, fines, and the like. The benefits to be received from membership in the association are sufficient consideration for the agreement to pay the dues and other sums required by the constitution.

198 N.Y. 587—Schwarz v. International Ladies' Garment Workers' Union, 124 N.Y.S. 968, 68 Misc. 528.

23. N.Y.—Curran v. Galen, 46 N.E. 297, 152 N.Y. 23, 57 Am.S.R. 496, 87 L.R.A. 903—Schwarz v. International Ladies' Garment Workers' Union, 124 N.Y.S. 968, 68 Misc. 528.

39 C.J. p 1383 note 35.

24. U.S.—Barnes v. Berry, Ohio, 169 F. 225, 94 C.C.A. 501.

39 C.J. p 1383 note 37.

Membership in incorporated non-profit association

Ill.—Electrical Contractors' Ass'n of City of Chicago v. A. S. Schulman Electric Co., 57 N.E.2d 220, 334 Ill.App. 28.

25. U.S.—Barnes v. Berry, Ohio, 169 F. 225, 94 C.C.A. 501.

26. U.S.—Barnes v. Berry, supra.

27. Ill.—Electrical Contractors' Ass'n of City of Chicago v. A. S. Schulman Electric Co., 57 N.E.2d 220, 334 Ill.App. 28.

28. Ill.—A. J. Lundemann & Hoverson Co. v. Advance Stove Works, 170 Ill.App. 423.

Ohio—Webster v. Taplin, 29 Ohio Cir.Ct. 543.

29. Ohio—Webster v. Taplin, supra.

30. Conn.—Associated Hat Mfrs. v. Baird-Unteidt Co., 91 A. 373, 88 Conn. 332.

31. Conn.—Associated Hat Mfrs. v. Baird-Unteidt Co., supra. 39 C.J. p 1384 note 46.

32. N.Y.—Goldman v. Senner & Kaplan Co., 165 N.Y.S. 394.

33. Conn.—Associated Hat Mfrs. v. Baird-Unteidt Co., 91 A. 373, 88 Conn. 332.

N.Y.—Goldman v. Senner & Kaplan Co., 165 N.Y.S. 394.

34. N.Y.—Goldman v. Senner & Kaplan Co., supra.

35. Conn.—Associated Hat Mfrs. v. Baird-Unteidt Co., 91 A. 373, 88 Conn. 332.

36. N.Y.—Werther-Rausch Co. v. National Assoc. of Employing Lithographers, 105 N.E. 1102, 211 N.Y. 554—McCord v. Thompson-Starrett Co., 113 N.Y.S. 385, 129 App.Div. 130, affirmed 92 N.E. 1090, 198 N.Y. 587.

37. N.Y.—McCord v. Thompson-Starrett Co., supra.

tion or by-laws of the association.³⁸ The fact that a member has been expelled will not cancel his obligation for dues and assessments which he owed at the time of the expulsion.³⁹ Employer and surety on his bond have been held liable for violation of rule of employers' association of which he was a member, fixing maximum wages to be paid by employers.⁴⁰ A member of the association is liable for the amount properly paid out by it on his behalf as a natural consequence of his membership in the association,⁴¹ even though there is no express provision for its recovery in the by-laws of the association.⁴² The fact that the by-laws provide that non-compliance with any of its articles or violation of any of its articles operates as an immediate expulsion of a member does not relieve him for the payment made on his behalf by the association.⁴³ A member of the association is not liable for a fine or penalty for noncompliance with a by-law or regulation which is not within the purpose or object of the association or which is against public policy.⁴⁴

§ 6. Officers

Employers' associations are usually governed by a board of directors or governors.

Ordinarily, employers' associations are governed by a board of directors or governors which has authority to act on all matters which are incident to the ordinary business affairs of the association, in the absence of, or subject to, any limitation by law, charter, or by-laws.⁴⁵

Rules as to officers of associations generally are considered in Associations §§ 19-21.

§ 7. Meetings

General rules governing the conduct of meetings of associations generally apply to meetings of employers' associations.

General rules governing the conduct of meetings of associations, as discussed in Associations § 18, apply as to the meetings of employers' associations.⁴⁶

§ 8. Actions

An action by an employers' association against one of its members is not subject to the objection that a partnership cannot sue one of its members, in view of the rule that such an association is not a partnership; some statutes authorize the bringing of an action in the name of specified officers of the association.

Since an employers' association is not considered a partnership, as discussed supra § 1, there is no objection on that ground to an action by the association against one of its members.⁴⁷

Rules governing actions by or against associations generally are discussed in Associations §§ 35-37.

Who may sue, parties A statute permitting the bringing of actions in the name of specified officers of unincorporated associations, as considered generally in Associations § 35, applies to unincorporated employers' associations,⁴⁸ some statutes permitting such an association to sue in the name of its president⁴⁹ or treasurer.⁵⁰ Where the wrongful acts alleged are directed alike against each of the members of the association, under some circumstances all of them may join as plaintiffs to prevent a multiplicity of suits.⁵¹

The directors of some employers' associations have authority to bring an action to recover the stipulated liquidated damages from a member who has violated a resolution or regulation of the association, on the theory that such an action is a matter which is a mere incident to the ordinary business affairs of the association and, therefore, is within the control of the directors.⁵²

38. Ohio—Webster v. Taplin, 29

Ohio Cir Ct 543

39. N.Y.—Goldman v. Senner & Kaplan Co., 165 N.Y.S. 394

Ohio—Webster v. Taplin, 29 Ohio Cir Ct 543

40. Ind.—Andrioff v. Building Trades Employers' Ass'n, 148 N.E. 203, 83 Ind App 294.

41. N.Y.—Goldman v. Senner & Kaplan Co., 165 N.Y.S. 394, 38 C.J. p 1384 note 56.

42. N.Y.—Goldman v. Senner & Kaplan Co., supra.

43. N.Y.—Goldman v. Senner & Kaplan Co., supra.

44. N.Y.—McCord v. Thompson-Starrett Co., 113 N.Y.S. 385, 129 App Div 130, affirmed 92 N.E. 1090, 195 N.Y. 587

45. Conn.—Associated Hat Mfrs v. Baird-Unteidt Co., 91 A. 373, 88 Conn 332, 39 C.J. p 1384 notes 61-68

46. Conn.—Associated Hat Mfrs v. Baird-Unteidt Co., 91 A. 373, 88 Conn 332

47. Ohio—Webster v. Taplin, 29 Ohio Cir Ct. 543.

48. N.Y.—Schwarcz v. International

Ladies' Garment Workers' Union, 124 N.Y.S. 968, 68 Misc 528

49. N.Y.—Schwarcz v. International Ladies' Garment Workers' Union, supra.

50. N.Y.—Schwarcz v. International Ladies' Garment Workers' Union, supra.

51. N.Y.—Schwarcz v. International Ladies' Garment Workers' Union, supra.

52. Conn.—Associated Hat Mfrs. v. Baird-Unteidt Co., 91 A. 373, 88 Conn 332.

39 C.J. p 1385 note 81.

MASTERS IN CHANCERY. See Equity §§ 514-521.

MASTERY. The status, position, or authority of a master, superiority or ascendancy in war or competition; skill or display of skill or technique.¹ "Mastery" has been held synonymous with "influence" see 43 C.J.S. p 378 note 1.2

MASTHEAD. At the very top of the standing mast.²

"Masthead" is a technical term of the printing trade,³ and refers to the page in a publication which shows the title of the publication, the titles of publications which have been merged or consolidated under the name of the publication, the names of publishers and editors, the place where published, the subscription rates, the date of issue, and the frequency of publication.⁴

MASTITIS. Inflammation of the udder of a cow.⁵

MAST SELLING. In old English law, the practice of selling the goods of dead seamen at the mast.⁶

MASTURBATION. Self-defilement; onanism.⁷

MAT. A piece of coarse fabric made by weaving or plaiting sedge, rushes, flags, husks, straw, hemp, or similar material; hence anything of similar form and use, however made.⁸

In the printing trade the word is sometimes applied to a matrix see post p 454 note 19.

MATAMOS. A Spanish term meaning "we kill."⁹

MATCH. A word sometimes used as denoting honorable marriage.¹⁰ It is said that the word has not acquired the meaning of illicit or criminal intercourse.¹¹

MATE. The first officer of a vessel under the master;¹² a respectable officer of the ship.¹³ It has been held that a mate is not included within the meaning of the term "mariner" see 55 C.J.S. p 709 note 69. As to whether a mate is or is not within the meaning of the term "seaman" see the C.J.S. title Seamen § 1, also 56 C.J. p 924 notes 46, 72.

MATERIA. In English law, matter; substance; subject matter.¹⁴

Materia medica. The substances employed as remedial agents.¹⁵ The term is defined and discussed in connection with the practice of medicine in the C.J.S. title Physicians and Surgeons § 1; with respect to the narcotic laws see the C.J.S. title Poisons §§ 10-13.

MATERIAL.

In General

"Material" is a relative term¹⁶ of diversified use¹⁷ and of general signification,¹⁸ but having a well-defined and understood legal significance.¹⁹

As a Noun

Material is some physical substance,²⁰ the term importing the substance matter of which anything is made.²¹ As usually employed in law, the word "material" signifies things furnished to a workman or artisan to be used in his work,²² and it is com-

1. Webster New Int D

2. Eng.—The Telegraph, 1 Spinks 427, 164 Reprint 246, 29 Eng L & Eq 49, 57

3. U.S.—American Photographic Pub Co v Ziff-Davis Pub Co, C CA Ill, 135 F 2d 569, 573

4. U.S.—American Photographic Pub Co v Ziff-Davis Pub Co, CCA Ill, 135 F 2d 569, 573—American Photog.aphic Pub Co v Ziff-Davis Pub Co, Cust & Pat App, 127 F 2d 808, 310, 29 C.C.P.A.(Patents) 1014.

5. Vt.—Cano v. Ladd, 50 A 2d 425, 115 Vt. 53.

6. Black L D.

7. Ind.—Young v. State, 141 NE 309, 310, 194 Ind 221

As not amounting to such cruelty as will constitute grounds for divorce see Divorce § 28 c

8. Webster New Int D

9. Tex.—Benavides v. State, Civ App, 214 SW. 568, 571.

10. Md.—Brinsfield v Howeth, 68 A 566, 568, 107 Md 278, 24 L.R.A.N. S. 583.

Wis.—Clute v Clute, 76 NW 1114, 101 Wis 137

11. Md.—Brinsfield v Howeth, 68 A 566, 568, 107 Md. 278, 24 L.R.A.N. S. 583

Wis.—Clute v Clute, 76 N.W 1114, 101 Wis. 137.

12. La.—Millaudon v. Martin, 6 Rob 531, 539

39 C.J. p 1385 note 10.

13. U.S.—Atkins v Burrows, D.C. Pa., 2 F.Cas No 618, 1 Pet Adm 244, 246

14. Black L D.

15. Cal.—Millsap v. Alderson, 219 P 469, 473, 63 Cal App 513

16. Ky.—Chase's Ex'r v. Commonwealth, 145 SW 2d 58, 61, 284 Ky 471

17. U.S.—Davis v. Commissioners of Sewerage of City of Louisville, D.C Ky, 13 F Supp 672, 680

18. Ky.—Century Indemnity Co. of

Chicago, Ill v Shunk Mfg Co, 68 SW 2d 772, 773, 253 Ky 50

Mass.—Commonwealth v Hayden, 97 NE. 783, 784, 211 Mass 296

19. Ky.—Century Indemnity Co. of Chicago, Ill v Shunk Mfg Co, 68 SW 2d 772, 773, 253 Ky. 50.

Ohio.—Royal Indemnity Co v Day & Maddock Co, 150 NE 426, 427, 114 Ohio St 58, 44 A.L.R. 374.

39 C.J. p 1386 note 21

20. N.Y.—Travelers' Ins Co v Village of Ithaca, 213 N.Y.S. 206, 207, 126 Misc. 275

21. Md.—Fidelity & Deposit Co of Maryland v Mattingly Lumber Co, 4 A.2d 447, 450, 176 Md 217.

N.Y.—Troy Public Works Co v Yonkers, 129 N.Y.S. 920, 921, 145 App Div 527.

Ohio.—Corpus Juris quoted in Royal Indemnity Co v. Day & Maddock Co, 150 NE 426, 427, 114 Ohio St. 58, 44 A.L.R. 374.

22. La.—Interstate Wholesale Grocer Co. v. Prutsman, 1 La App. 731, 732.

monly used to designate any article employed in the erection and completion of buildings,²³ or matter which is intended to be used in the creation of a mechanical structure,²⁴ or, it may be, such articles as are capable of being so used and are furnished for that purpose.²⁵

The word "material" is defined as meaning the substance or matter of which anything is made or may be made;²⁶ everything of which anything is made,²⁷ the substance or substances, or the parts, goods, stock, or the like, of which anything is composed or may be made;²⁸ something that becomes a part of the finished structure;²⁹ something that goes into and forms part of the finished structure;³⁰ such articles only as enter into, and form a part of, the finished structure³¹ or finished product;³² that

which goes into, and becomes a part of, a construction or repair;³³ such goods, wares, and merchandise as may be furnished for, and intended to enter into and become directly or indirectly a part of, the completed improvement.³⁴

The word "material" has been held to mean the apparatus necessary to the doing of anything,³⁵ but according to lexicographical definitions³⁶ the term does not include tools, machinery, or appliances used for the purpose of facilitating the work but which are not incorporated into the structure.³⁷ So it does not include machinery that may be used for the manufacture of the materials themselves.³⁸ There is authority for the proposition that a broad and comprehensive interpretation of the word "material" may under various circumstances be translated

23. Ohio—*Corpus Juris* quoted in *Royal Indemnity Co v Day & Maddock Co*, 150 N.E. 426, 427, 114 Ohio St. 58, 44 A.L.R. 374.

Tex—*Ellis v Cochran*, 28 S.W. 243, 344, 8 Tex. Civ. App. 510.

24. Ky—*Century Indemnity Co of Chicago, Ill. v Shunk Mfg. Co*, 68 S.W.2d 772, 773, 253 Ky. 50.

Md—*Fidelity & Deposit Co of Maryland v Mattingly Lumber Co*, 4 A.2d 447, 450, 176 Md. 217.

Mont—*Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland*, 255 P. 722, 723, 79 Mont. 111.

Ohio—*Corpus Juris* quoted in *Royal Indemnity Co v Day & Maddock Co*, 150 N.E. 426, 427, 114 Ohio St. 58, 44 A.L.R. 374.

39 C.J. p 1385 note 18.

25. N.Y.—*Smull v Delaney*, 25 N.Y. S.2d 387, 394, 175 Misc. 795.

Wash.—*United States Fidelity & Guaranty Co v Feenaughty Machinery Co*, 85 P.2d 1085, 1089, 197 Wash. 569.

26. U.S.—*Corpus Juris* cited in *U. S. v Grunenwald*, D.C.Pa., 66 F. Supp. 223, 227—*Davis v Commissioners of Sewerage of City of Louisville*, D.C.Ky., 13 F.Supp. 672, 680.

Cal.—*Arata & Peters v Snow Mountain Water & Power Co*, 267 P. 932, 92 Cal.App. 227.

Mont—*Corpus Juris* cited in *Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland*, 255 P. 722, 723, 79 Mont. 111.

N.Y.—*Butts v Randall*, 260 N.Y.S. 713, 721, 145 Misc. 708.

Ohio—*Corpus Juris* quoted in *Royal Indemnity Co v Day & Maddock Co*, 150 N.E. 426, 427, 114 Ohio St. 58, 44 A.L.R. 374.

39 C.J. p 1385 note 18.

Similarly defined.

(1) The substance of which anything is made.—*Mutual Lumber Co v Sheppard*, Tex. Civ. App., 173 S.W. 2d 494, 498—*Stone v. Morrison &*

Powers, Tex. Civ. App., 294 S.W. 641, 644.

(2) Substance or matter of which a thing is made or improvements are made.—*Century Indemnity Co. of Chicago, Ill. v Shunk Mfg. Co*, 68 S.W.2d 772, 773, 253 Ky. 50.

27. La.—*Interstate Wholesale Grocer Co v Prutsman*, 1 La. App. 731, 732.

Ohio—*Corpus Juris* quoted in *Royal Indemnity Co v Day & Maddock Co*, 150 N.E. 426, 427, 114 Ohio St. 58, 44 A.L.R. 374.

39 C.J. p 1385 note 17.

28. U.S.—*Hawkins v. Frick-Read Supply Corp.*, C.C.A. Tex., 154 F.2d 85, 89.

29. Ky.—*Corpus Juris* quoted in *Century Indemnity Co of Chicago, Ill. v Shunk Mfg. Co*, 68 S.W.2d 772, 773, 253 Ky. 50.

39 C.J. p 1386 note 23.

Similarly defined.

Material is that which enters into, becomes a part of, and remains with, the completed work.—*Road Supply & Metal Co v Bechtelheimer*, 240 P. 846, 847, 119 Kan. 560.

Comprehensive definition.

Material is something that is consumed in the use, as coal, for instance, or labor performed, or is such material as goes into and makes part of the reality, or the product, in such a way as to be indistinguishable from the mass, as timber put into a building, or cotton that is manufactured.—*Jenkins Hardware Co v Globe Indemnity Co*, 170 S.E. 643, 644, 205 N.C. 185.

30. Ky.—*Corpus Juris* quoted in *Century Indemnity Co of Chicago, Ill. v Shunk Mfg. Co*, 68 S.W.2d 772, 773, 253 Ky. 50.

39 C.J. p 1386 note 23 [c].

31. N.Y.—*Smull v Delaney*, 25 N.Y. S.2d 387, 394, 175 Misc. 795.

Wash.—*United States Fidelity & Guaranty Co. v Feenaughty Ma-*

chinery Co, 85 P.2d 1085, 1089, 197 Wash. 569—*Western Clinic & Hospital Ass'n v Gabriel Const. Co*, 12 P.2d 417, 418, 168 Wash. 411.

32. Tex.—*Oliver v State*, 8 S.W.2d 184, 185, 110 Tex. Cr. 263.

33. Mont.—*Gary Hay & Grain Co. v Fidelity & Deposit Co of Maryland*, 255 P. 722, 723, 79 Mont. 111.

Similarly defined.

Materials are elements entering into construction.—*Segar v. Irish*, 282 N.Y.S. 450, 452, 158 Misc. 714.

34. Iowa.—*Etna Casualty & Surety Co of Hartford, Conn. v Kimball*, 222 N.W. 31, 32, 206 Iowa 1251.

35. U.S.—*Hawkins v. Frick-Read Supply Corp.*, C.C.A. Tex., 154 F.2d 85, 89.

36. Ky.—*Corpus Juris* quoted in *Century Indemnity Co of Chicago, Ill. v Shunk Mfg. Co*, 68 S.W.2d 772, 773, 253 Ky. 50.

Ohio—*Corpus Juris* quoted in *Royal Indemnity Co v Day & Maddock Co*, 150 N.E. 426, 427, 114 Ohio St. 58, 44 A.L.R. 374.

39 C.J. p 1386 note 26.

37. Ohio—*Corpus Juris* quoted in *Royal Indemnity Co v Day & Maddock Co*, 150 N.E. 426, 427, 114 Ohio St. 58, 44 A.L.R. 374.

39 C.J. p 1386 note 27.

38. Ohio—*Corpus Juris* quoted in *Royal Indemnity Co. v Day & Maddock Co*, 150 N.E. 426, 427, 114 Ohio St. 58, 44 A.L.R. 374.

39 C.J. p 1386 note 28.

Articles not attached to a machine. Many articles may, when attached to a machine, become machinery, but prior to the time of attachment these articles may properly be denominated "material".—*Hawkins v. Frick-Read Supply Corp.*, C.C.A. Tex., 154 F.2d 85, 89.

to mean "food,"³⁹ and under some circumstances the term may include groceries.⁴⁰ However, under other circumstances the contrary has been held.⁴¹ The word "material" has been held to include or not to include various other articles or substances.⁴² What constitutes "material" as used in any particular instrument is determined by the construction of the instrument like any other instrument, in view of the work to be performed and the light of the circumstances surrounding the transaction.⁴³

Comparisons and distinctions "Material" has been held to be synonymous with "element" see 29 C.J.S. p 662 note 32, and has been distinguished from "appliance" see 6 C.J.S. p 75 note 2, and "provisions."⁴⁴ "Materials" have been distinguished from "means,"⁴⁵ "supplies,"⁴⁶ and "tools,"⁴⁷ as well as from "equipment" see 30 C.J.S. p 296 note 21.

Cross references In the law of liens the word "material" is treated and discussed in Maritime Liens §§ 16-19 and in Mechanics' Liens §§ 40-44. Liability for payment for materials furnished for construction work is treated throughout this work in titles dealing with the type of construction, and

reference is made to the C.J.S. titles Bridges § 23, Drains § 43 d (2), Highways § 210 c (3), and Railroads §§ 188, 189, also 51 C.J. p 729 note 48-p 734 note 72. Liability for payment for materials used in the performance of contracts with the federal government, the state governments, and the various political subdivisions of the states, liability being under a contractor's bond or otherwise, is treated with reference to the federal government in the C. J.S. title United States §§ 102, 109, also 65 C.J. p 1324 note 91-p 1327 note 44; with reference to the state governments in the C.J.S. title States §§ 119, 126, 127, also 59 C.J. p 180 note 71-p 183 note 19, p 190 note 62-p 192 note 11; and with reference to counties see Counties § 201. For reference to the treatment of this subject in connection with municipal corporations and towns see Descriptive-Word Index.

Phrases employing the word "material" as a noun are set out in the note ⁴⁸

As an Adjective

The word "material," as an adjective, is defined

39. U.S.—U S v. Russell-Taylor, Inc., D.C.Mich., 64 F.Supp 748, 752

40. U.S.—Brogan v National Surety Co., Mich., 38 S.Ct. 250, 252, 346 U.S. 257, 63 L.Ed 703.
39 C.J. p 1386 note 29.

41. Wash.—Mitchell v. Berlin-McNitt Co., 158 P 264, 265, 91 Wash 582.

42. Electricity

From the physical standpoint electricity is not a material substance, but from the standpoint of parties who are selling and buying it at a price for measured and ascertained quantities it may well be regarded as material, especially since it produces certain definite results in directly forwarding the progress of the work in proportion to the amount used and is itself directly expended in the process.—Johnson-Foster Co v D'Amore Const Co, 50 N.E.2d 89, 93, 314 Mass 416

Lumber

"It is true that the lumber is not consumed immediately, as powder is in blasting, nor is it a part of the structure in the same sense that lumber is that is built into and remains a part of the building, yet, for all this, lumber used, as shown in the present case, is consumed as material necessary to the structure just as completely for all lumber purposes as if it were burned in the using"—Cohn & Goldberg v Walker Constr Co, 175 S.W. 536, 537, 181 Tenn 445.

Book

U.S.—Davis v Commissioners of Sewerage of City of Louisville, D Ky., 13 F.Supp 672, 680

43. Vt.—U S v. U. S. Fidelity & Guaranty Co., 71 A. 1106, 1109, 83 Vt. 94
39 C.J. p 1386 note 25

44. Cal.—Arata & Peters v Snow Mountain Water & Power Co., 287 P 932, 93 Cal.App 227
Wash.—United States Fidelity & Guaranty Co v Feenaughty Machinery Co., 85 P.2d 1085, 1089, 197 Wash 569
39 C.J. p 1386 note 23 [c]

45. Mich.—Lawson v. Higgins, 1 Mich 225, 227

46. N.Y.—Smull v Delaney, 35 N.Y. S.2d 387, 394, 175 Misc 795
Tex.—Oliver v State, 6 S.W.2d 184, 185, 110 Tex.Cr 263
Wash.—United States Fidelity & Guaranty Co v Feenaughty Machinery Co., 85 P.2d 1085, 1089, 197 Wash 569
60 C.J. p 1166 note 27 [a]

"Supplies" a broader term

Md.—Fidelity & Deposit Co. of Maryland v Mattingly Lumber Co., 4 A.2d 447, 450, 176 Md. 217
Mont.—Gary Hay & Grain Co v Fidelity & Deposit Co of Maryland, 255 P. 722, 728, 79 Mont 111

47. N.Y.—Segar v Irish, 282 N.Y.S. 450, 452, 156 Misc 714.

48. Phrases

(1) "Materials used" relates to materials or things which have gone into the finished structure and have become a part of it. The term would also include material which was consumed, wasted, or destroyed, almost or altogether in the work, even though it was not incorporated in the structure so as to become a constituent part of it.—Corpus Juris cited in Marion Steam Shovel Co v. Union Indemnity Co., 75 S.W.2d 541, 542, 543, 255 Ky 817

(2) "Plumbing material" is the material used in a plumbing job and is understood in a general way to mean such articles as gas, sewer, and water pipes, boilers, sinks, bathtubs, etc.—Lanier v Lovett, 313 P. 391, 392, 25 Ariz 54

(3) "Raw material" see Manufactures § 3 b

(4) "Unwrought material" is material that has not been worked into shape, material which is unlabored, unelaborated, rough, and crude, but the term also implies a material which is capable of being transformed from its crude state to an improved condition, produced by the labor to which it may be subjected.—U. S. v Wells, Fargo & Co., 1 Ct. Cust.App 158, 161.

(5) Other phrases employing the word "material" as a noun and as to which more recent adjudications have not been found see 39 C.J. p 1386 note 31-p 1387 note 68.

as meaning important;⁴⁹ essential,⁵⁰ more or less necessary;⁵¹ not to be dispensed with;⁵² of consequence,⁵³ having influence or effect⁵⁴ Also, of the substance;⁵⁵ of solid or weighty character,⁵⁶ specific.⁵⁷ The term is also defined as meaning substantial,⁵⁸ as opposed to formal;⁵⁹ having to do with matter, as distinguished from form,⁶⁰ in respect of the material cause;⁶¹ relating to, or consisting of, matter; corporeal; not spiritual; physical⁶²

In law Constituting a matter that is entitled to consideration,⁶³ going to the merits,⁶⁴ such as does or would affect the determination of a case, the effect of an instrument, or the like,⁶⁵ such as must be considered in deciding a case on its merits⁶⁶

Comparisons and distinctions. As an adjective, "material" has been held to be synonymous with

"pertinent"⁶⁷ and interchangeable with "relevant."⁶⁸

"Material" has been distinguished from "essential" see 30 C.J.S. p 1228 note 631, "minor,"⁶⁹ and "trivial,"⁷⁰ and has been contrasted with "casual" see 14 C.J.S. p 28 note 19, and "impertinent" see 42 C.J.S. p 403 note 88

"Material" is not synonymous with "necessary,"⁷¹ "relating to,"⁷² or "touching."⁷³ and the words "material" and "not material" are absolutely contradictory in that they exclude all middle ground and together include everything thinkable.⁷⁴

Phrases employing the word "material" as an adjective are set out in the note.⁷⁵

MATERIALITY. The property of substantial importance or influence, especially as distinguished

49. Ky—Chase's Ex'x v Commonwealth, 145 S.W.2d 58, 61, 284 Ky 471—Pacific Mut Life Ins Co v Arnold, 90 S.W.2d 44, 48, 262 Ky 267

39 C.J. p 1387 note 67

50. Ind—Indianapolis & M Rapid Transit Co v Edwards, 74 N.E. 533, 534, 36 Ind App 202

51. Ga—Hartz v Sobel, 71 S.E. 995, 1001, 136 Ga 565, 38 L.R.A., N.S., 397, Ann Cas 1912D 165

39 C.J. p 1387 note 68

52. Ky—Ray v Commonwealth, 268 S.W. 804, 805, 207 Ky 96

39 C.J. p 1387 note 69

53. Ky—Chase's Ex'x v Commonwealth, 145 S.W.2d 58, 61, 284 Ky 471—Pacific Mut Life Ins Co v Arnold, 90 S.W.2d 44, 48, 262 Ky 267—Ray v Commonwealth, 268 S.W. 804, 805, 207 Ky 96

39 C.J. p 1387 note 70

54. Wash—Hansen v Sandvik, 222 P. 205, 207, 128 Wash 60

39 C.J. p 1387 note 66

55. Ind—Indianapolis & M Rapid Transit Co v Edwards, 74 N.E. 533, 534, 36 Ind App 202

56. Ky—Chase's Ex'x v Commonwealth, 145 S.W.2d 58, 61, 284 Ky 471

39 C.J. p 1387 note 71

57. Okl—Connecticut Fire Ins Co v George, 153 P. 116, 119, 52 Okl 432—Thompson v State, 117 P. 216, 224, 6 Okl Cr 50

58. Ariz—Campbell v Territory, 125 P. 717, 721, 14 Ariz 109

Ky—Chase's Ex'x v Commonwealth, 145 S.W.2d 58, 61, 284 Ky 471—Pacific Mut Life Ins Co v Arnold, 90 S.W.2d 44, 48, 262 Ky 267

39 C.J. p 1387 note 74

59. U.S.—David Bradley Mfg Co v Eagle Mfg Co, 111, 57 F. 980, 986, 6 C.C.A. 661.

60. Ga—Hartz v Sobel, 71 S.E. 995, 1001, 136 Ga 565, 38 L.R.A., N.S., 797, Ann Cas 1912D 165

Ind—Indianapolis & M Rapid Transit Co v Edwards, 74 N.E. 533, 534, 36 Ind App 202

Similarly expressed

In respect of the matter, as distinguished from the form—In re National Lock Co, D.C. Ill., 9 F.Supp 432, 435

61. U.S.—In re National Lock Co, supra

62. Ill—People v Jones, 92 Ill App 447, 449

63. Okl—Connecticut Fire Ins. Co v George, 153 P. 116, 119, 52 Okl 432—Thompson v State, 117 P. 216, 224, 6 Okl Cr 50

64. Ga—Hartz v Sobel, 71 S.E. 995, 1001, 136 Ga 565, 38 L.R.A., N.S., 797, Ann Cas 1912D 165

Ind—Indianapolis & M Rapid Transit Co v Edwards, 74 N.E. 533, 534, 36 Ind App 202

65. Okl—Thompson v State, 117 P. 216, 224, 6 Okl Cr 50

39 C.J. p 1387 note 83.

66. Okl—Connecticut Fire Ins. Co v George, 153 P. 116, 119, 52 Okl 432—Thompson v State, 117 P. 216, 224, 6 Okl Cr 50

67. N.Y.—People v Brill, 165 N.Y.S. 65, 69, 100 Misc. 93

68. N.Y.—People v Barbuti, 202 N.Y.S. 126, 130, 207 App Div 385

69. Ky—Pacific Mut Life Ins Co v Arnold, 90 S.W.2d 44, 48, 262 Ky 267.

70. Ky—Pacific Mut Life Ins. Co v Arnold, supra.

71. Iowa—Johnston v Hoover, 117 N.W. 377, 278, 139 Iowa 143

N.Y.—Koplin v Hoe, 108 N.Y.S. 602, 603, 123 App Div. 827

72. U.S.—National Labor Relations

Board v Goodyear Tire & Rubber Co, D.C. Ohio, 36 F.Supp 413, 415

73. U.S.—National Labor Relations Board v Goodyear Tire & Rubber Co, supra

74. Ga—Bennett v Ware, 61 S.E. 546, 550, 4 Ga App 293

75. *Phrases*

(1) "Material allegation" defined see the C.J.S. title Pleading § 43, also 39 C.J. p 1387 note 86, and 49 C.J. p 101 notes 7-10

(2) "Material alteration" or "material change" and other phrases of like import with reference to contractual instruments as between the original parties see Alteration of Instruments § 4, as to accommodation parties of commercial paper see Bills and Notes § 755, as to sureties see Principal and Surety § 124, also 50 C.J. p 118 note 35-p 128 note 11, as to contracts of guaranty see Guaranty § 74, and with reference to noncontractual instruments see references in Alteration of Instruments § 6

(3) "Material fact" see 35 C.J.S. p 385 note 32-p 386 note 86

(4) "Material income-producing factor" with reference to personal service corporations see Internal Revenue § 396 b

(5) "Material mistake" as constituting grounds for reformation of an instrument see the C.J.S. title Reformation of Instruments § 25, also 63 C.J. p 928 note 96-p 929 note 1

(6) "Material variance" between pleading and proof as essential in order to defeat the right to recover see the C.J.S. title Pleading § 532, also 49 C.J. p 807 notes 15-18

(7) Other phrases employing the word "material" as an adjective and as to which more recent adjudications have not been found see 39 C.J. p 1388 notes 90-15.

from formal requirement;⁷⁶ also capability of properly influencing the result of a trial.⁷⁷

For a discussion of what constitutes materiality of evidence, with reference to civil cases see Evidence § 159; and with reference to criminal cases see Criminal Law §§ 637-640. Materiality of statement as an essential element of perjury see the C.J.S. title Perjury §§ 9-16, also 43 C.J. p 832 note 3-p 842 note 13.

MATERIALLY. "Materially" is used as a legal term, having a legal meaning and force,⁷⁸ and it is said that the word means and is understood the same in the ordinary vernacular as in its technical definition.⁷⁹ It is defined as meaning in an important manner,⁸⁰ regard,⁸¹ or degree;⁸² essentially;⁸³ really,⁸⁴ substantially⁸⁵

"Materially" has been compared with, or distinguished from, "essentially" see 30 C.J.S. p 1228 note 69, and has been held not synonymous with "unduly"⁸⁶

Phrases employing the word are set out in the note.⁸⁷

MATERIALMAN or MATERIALMEN. A "materialman" is one who furnishes material to be used in the construction of a building, whether furnished direct to the owner or to someone else.⁸⁸ The word "materialman" is frequently employed in lien law,

and is defined in this connection in Mechanics' Liens § 89.

"*Materialmen*" are persons who furnish material to be used in the construction or erection of ships, houses, or buildings;⁸⁹ persons who furnish materials used in the construction or repair of a building or vessel.⁹⁰ The term is not restricted to persons who are in the business of furnishing materials or who have such materials in their possession.⁹¹

MATERNAL. That which belongs to, or comes from, the mother.⁹²

MATERNA MATERNIS. In French law, a term denoting the descent of property of a deceased person derived from his mother to the relations on the mother's side.⁹³

MATERNITY. The state or condition of a mother.⁹⁴

MATHEMATICAL. According to mathematics; of or pertaining to mathematics.⁹⁵ The word is sometimes used in the sense of demonstrable by the use of mathematics.⁹⁶ It also means theoretically precise.⁹⁷

MATHEMATICS. That science, or class of sciences, which treats of the exact relations existing between quantities of magnitudes and operations, and of the methods by which, in accordance with these

76. US David Bradley Mfg Co v Eagle Mfg Co, 111, 57 F 980, 986, 6 CCA 661.

39 C.J. p 1388 note 22

77. NY—People v Barbuti, 202 N. Y.S. 126, 130, 207 App Div 285, 39 C.J. p 1388 note 23.

78. US—Hoffman v. Supreme Council A. L. H., CCVa., 45 F 352, 354.

79. Wash—Hansen v Sandvik, 222 P 205, 307, 128 Wash 60

80. Ind—Cousins v. Glassburn, 24 NE 2d 1013, 1016, 216 Ind. 431—Earle v Porter, 40 NE 2d 331, 334, 113 Ind App 71.

81. NC—State v. Bowen, 39 SE 2d 740, 741, 226 NC 601.

82. Ind—Cousins v. Glassburn, 24 NE 2d 1013, 1016, 216 Ind. 431—Earle v Porter, 40 NE 2d 331, 334, 113 Ind App 71.

Iowa—Artz v. Chicago, R. I. & P. R. Co., 38 Iowa 293, 296.

NC—State v. Bowen, 39 SE 2d 740, 741, 226 NC 601

83. Mich—Grand Rapids Hydraulic Co v American Fire Ins Co, 53 NW 538, 539, 93 Mich 396

84. Mich—Grand Rapids Hydraulic

Co. v American Fire Ins Co, supra

85. Ind.—Cousins v. Glassburn, 24 NE 2d 1013, 1016, 216 Ind. 431—Earle v Porter, 40 NE 2d 331, 334, 113 Ind App 71.

Mich—Grand Rapids Hydraulic Co v American Fire Ins Co, 53 NW 538, 539, 93 Mich 396.

NC—State v. Bowen, 39 SE 2d 740, 741, 226 NC 601.

86. Iowa—Walters v. Marshalltown, 120 NW. 1046, 1048, 145 Iowa 457, 26 L.R.A., NS, 199.

39 C.J. p 1388 note 28 [a].

87. Phrases

(1) "Materially and unduly"—Walters v Marshalltown, 120 NW 1046, 1048, 145 Iowa 457, 26 L.R.A., NS, 199

(2) "Materially false statement in writing respecting financial condition" as employed in the bankruptcy law see Bankruptcy § 521 b

(3) Other phrases as to which more recent adjudications have not been found see 39 C.J. p 1389 notes 31-33

88. Or—Drake Lumber Co v. Lundquist, 170 P 2d 712, 719, 179 Or 403

89. US—United States Fidelity & Guaranty Co. for Use of Reedy, v American Surety Co of New York, DCPa., 25 F.Supp 280, 283

Ohio—Royal Indemnity Co v Day & Maddock Co, 150 NE 426, 427, 114 Ohio St 58, 44 A.L.R. 374.

90. NY—Material Men's Mercantile Ass'n v Material Men's Credit Agency, 191 App Div. 73, 180 N.Y.S 801

91. US—United States Fidelity & Guaranty Co. for Use of Reedy, v American Surety Co of New York, DCPa., 25 F.Supp 280, 283.

92. Black L D

93. Black L D

94. Black L D

95. Webster New Int D.

96. NC—Brown v House, 24 S.E. 786, 791, 118 NC 870

"Mathematical demonstration" compared with "moral certainty" see Certainty 14 C.J.S. p 110 note 36

97. Kan—Wall v. Pierpont, 240 P. 251, 256, 119 Kan 420.

relations, quantities sought are deducible from others known or supposed.⁹⁸

MATRICIDE. See Homicide § 1.

MATRICULA. A register in which are inscribed the names of persons who become members of an association or society.⁹⁹

Matricula clericorum. In the ancient church, a catalogue of the officiating clergy.¹

Matricula de commercio. In Spanish law, registries of commerce.²

Matricula pauperum. In the ancient church, a list of the poor to be relieved.³

MATRICULATE. To enroll; to enter in a register; specifically, to enter or admit to membership in a body or society, particularly in a college or university, by enrolling the name in a register; to go through the process of admission to membership, as by examination and enrollment, in a society or college.⁴

Matriculated. To be entered in a university is to be matriculated.⁵

Matriculation is defined as the act of matriculating.⁶

MATRIMONIA DEBENT ESSE LIBERA. See 39 C.J. p 1389 note 56.

MATRIMONIAL. Of or pertaining to matrimony or the estate of marriage.⁷

MATRIMONIO. In Spanish law, marriage.⁸ For the two forms of marriage recognized by Spanish law, and for the various Spanish phrases employing

the word "matrimonio," see 39 C.J. p 1389 note 64.

MATRIMONIUM. As the first word of maxims as to which there have been no recent applications see 39 C.J. p 1389 notes 65, 66.

MATRIMONY. The union of man and woman as husband and wife; the married state; marriage; wedlock; the relation which is derived from marriage; the status derived from marriage⁹ "Matrimony" has been held to be equivalent to "wedlock"¹⁰

"Lawful matrimony" and "unlawful matrimony." It has been said that the terms "lawful matrimony" and "unlawful matrimony" are confusing.¹¹ Since matrimony is the status derived from marriage, if there is such status it is matrimony and therefore lawful; and where there is no marriage, ceremonial or common, yet the parties cohabit, then for want of a better description the phrase "unlawful matrimony" is used.¹² The unlawful assumption of matrimonial relations is "unlawful matrimony."¹³ However, the expression "lawful matrimony" has little significance since there can be no unlawful matrimony.¹⁴

MATRIX. A plaster or papier-maché impression of type used in stereotyping and electrotyping;¹⁵ a reproduction made on blotting paper which a customer has the printer use by pouring melted type metal thereon, thus obtaining metal reproductions which can be used on printing presses.¹⁶ Printers, newspapers, and advertisers use this means of making further reproductions, insuring uniformity in printing, and permitting the making of large quantities of printed matter from one setting of type or one

98. Webster New Int D.

"The rules of surveying . . . is a branch of the science of mathematics"—Brown v House, 24 SE 786, 791, 118 NC 870

99. Ga.—State v Regents of University System of Georgia, 175 S. E 567, 574, 575, 179 Ga 210.

1. Ga.—State v Regents of University System of Georgia, supra

2. Escriche Diccionario, Suplemento

39 C.J. p 1389 notes 48-55

3. Ga.—State v Regents of University System of Georgia, supra.

4. Ga.—State v. Regents of University System of Georgia, supra.

5. Ga.—State v. Regents of University System of Georgia, supra.

6. Ga.—State v. Regents of University System of Georgia, supra

Right of a state university to charge

matriculation fees see Colleges and Universities § 27.

7. Black L D.

Phrases

(1) "Matrimonial action" defined see Actions § 1 a (28).

(2) "Matrimonial cohabitation" defined in connection with common-law marriage see Marriage § 22, generally see Cohabitation 14 C.J.S p 1812 note 56

(3) "Matrimonial domicile" defined generally see Domicile § 4, as considered with reference to jurisdiction of divorce proceedings see Divorce § 71 and as affecting jurisdiction of foreign courts see Divorce § 333 c, as affecting jurisdiction in actions to annul marriage see Marriage § 52 Choice of "matrimonial domicile" see Husband and Wife § 10, law of "matrimonial domicile" as governing relationship of husband and wife see Husband and Wife § 7, and as gov-

erning community property rights see Husband and Wife § 466 a; change of "matrimonial domicile" as affecting law governing wife's separate estate see Husband and Wife § 227.

(4) Other phrases as to which more recent adjudications have not been found see 39 C.J. p 1389 notes 59, 60.

8. Escriche Diccionario.

9. ND—State v Colton, 17 NW.2d 546, 549, 550, 73 ND. 582, 156 A.L.R. 1403

10. ND—State v. Colton, supra.

11. ND—State v. Colton, supra.

12. ND—State v. Colton, supra.

13. ND—State v Colton, supra.

14. ND—State v. Colton, supra.

15. Webster New Int. D

16. Ill—A R C Electrotpe & Co. v. Ames, 4 NE.2d 476, 364 Ill. 360.

pattern.¹⁷ When used in connection with a monotype machine a matrix is a metal mold containing a negative of a character into which molten type is forced by the monotype machine to create a single piece of type.¹⁸ A matrix is also called a "mat."¹⁹

In the civil law, the protocol or first draft of a legal instrument from which all copies must be taken.²⁰

MATRIZ. In Spanish law, the original or recorded copy of a public instrument.²¹

MATRON. A married woman, an elderly woman;²² also, a head of any institution;²³ the family head or superintendent of any institution; a head nurse in a hospital.²⁴

Matron as an officer of a jail or prison entitled to compensation see the C.J.S. title Prisons § 10, also 50 C.J. p 337 note 71; and as a police officer see the C.J.S. title Municipal Corporations § 590, also 43 C.J. p 822 note 52—p 823 note 58.

MATREONS, JURY OF. Such a jury is impaneled to try if a woman condemned to death is with child.²⁵

MATTE. A product obtained in smelting sulphide

ores of certain metals, as copper, lead, or nickel. It is crude metal combined with more or less sulphur, and requires to be further purified.²⁶

MATTER. The word "matter" is of broad signification,²⁷ having several meanings,²⁸ and therefore variously defined.²⁹ It has been defined as that with regard to or about which anything takes place or is done, the subject of action, discussion, consideration, the thing aimed at, treated of, or treated;³⁰ some substance or essential thing, opposed to form.³¹ Also, affair; business.³² It has likewise been defined as that of which any physical object is composed; material; substance, constituents, elements.³³ In connection with this meaning it has been said that matter is divided into three general classes, animal, vegetable, and mineral.³⁴

In law It has been said that the most general legal meaning of the word is facts; substance, as distinguished from form;³⁵ a fact or facts constituting a whole or a part of a ground of action or defense.³⁶

Comparisons and distinctions "Matter" has been held to be synonymous with "fact" see 35 C.J.S. p 385 note 28, and "subject."³⁷

Phrases employing the word are set out in the note.³⁸ Other phrases as to which more recent ad-

17. Ill.—A. B. C. Electrotpe Co. v.

Ames, supra

39 C.J. p 1889 note 70

18. U.S.—American Type Founders v. Lanston Monotype Machine Co., D.C.Pa., 45 F.Supp. 531 533

19. N.Y.—Finnegan v. Butler, 182 N.Y.S. 671, 673, 112 Misc. 280

20. Tex.—Downing v. Diaz, 16 S.W. 49, 53, 80 Tex. 436

21. Escribiche Diccionario

22. Black L.D.

23. Mich.—Fisher v. Gardner, 150 N.W. 358, 359, 183 Mich. 660

24. Mich.—Fisher v. Gardner, supra

25. Black L.D.

See Criminal Law § 1568

26. U.S.—Harshaw, Fuller & Goodwin v. U.S., 11 Ct. Cust. App. 3, 10.

27. Pa.—Williamsport v. Citizens Electric Co., 72 Pa. Super. 452, 458.

28. N.Y.—Rubin v. Sheldon, 324 N.Y.S. 340, 342, 130 Misc. 538

29. N.Y.—Rubin v. Sheldon, supra.

30. Va.—John Diebold & Sons Stone Co. v. Tatterson, 80 S.E. 555, 587, 115 Va. 766

31. Ala.—Douglas v. Beasley, 40 Ala. 142, 148

32. Kan.—Carter v. McPherson, 177 P. 533, 534, 104 Kan. 59.

33. Webster New Int. D.

34. Ill.—Kinder v. La Salle County Carbon Coal Co., 141 N.E. 537, 539, 310 Ill. 126

40 C.J. p 736 note 51

35. N.Y.—Rubin v. Sheldon, 324 N.Y.S. 340, 342, 130 Misc. 538

36. Ind.—Nelson v. Johnson, 18 Ind. 329, 332

37. N.Y.—Rubin v. Sheldon, 324 N.Y.S. 340, 342, 130 Misc. 538

38. Ind.—Clarke v. Dair, 80 N.E. 688, 690, 156 Ind. 692

39. Phrases

(1) "Judicial matter" see Actions § 1 h (1) (a)

(2) "Matter in controversy," "matter in dispute," and "matter in demand" as synonymous with "amount in controversy" see 3 C.J.S. p 1057 note 4

(3) "Matter in deed" see 26 C.J.S. p 165 note 44

(4) "Matter in dispute" see 37 C.J.S. p 353 note 27

(5) "Matter in pais," matter of fact that is not in writing—Black L.D. "In pais" see 42 C.J.S. p 488 notes 84, 85.

(6) "Matter of course;" anything done or taken in the course of routine or usual procedure, which is permissible and valid without being

especially applied for and allowed—Black L.D.

(7) "Matter of fact" as the antithesis of "matter of law" and "matter of opinion" see 35 C.J.S. p 386 note 37

(8) "Matter of form" see 37 C.J.S. p 114 notes 49-52

(9) "Matter of record," any judicial matter or proceeding entered on the records of a court, and to be proved by the production of such record—Black L.D.

(10) "Matters of subsistence for man," a phrase which comprehends all articles or things, whether animal or vegetable, living or dead, which are used for food, and whether they are consumed in the form in which they are bought from the producer, or are consumed only after undergoing a process of preparation, which is greater or less, according to the character of the article—Sladd v. Commonwealth, 19 Gratt. 813, 823, 10 Va. 813, 822

(11) "Matter of substance," that which goes to the merits, the opposite of matter of form—Black L.D.—39 C.J. p 1390 note 92

(12) "Printed matter," in its ordinary meaning, a paper, or some other like substance, commonly used for the purpose, printed in the ordinary or usual way—Forbes Lithograph

judications have not been found see 39 C J p 1391 notes 94-25.

MATURE. To bring or hasten to maturity; to perfect; to advance toward maturity; to become ripe,³⁹ to hasten the due date.⁴⁰

MATURELY. The adverb of "mature"⁴¹

MATURITY. State or quality of being mature, full development; also, a becoming due⁴² The term has been used as meaning lawful age,⁴³ majority;⁴⁴ the time of becoming marriageable,⁴⁵ also, the combined result of age and education⁴⁶

It has been held that it is not synonymous with "legal majority"⁴⁷

The term "maturity" is defined or discussed with reference to bonds see Bonds § 93 b (1); commercial paper see Bills and Notes § 245 a; contracts generally see Contracts § 304; and policies of insurance see Insurance § 49.

MATUTIORA SUNT VOTA MULIERUM QUAM VIROBUM. See 39 C.J. p 1392 note 48.

MATZOON. The Armenian name for fermented milk.⁴⁸

MAUKA. A Hawaiian word meaning toward the mountain, or away from the sea⁴⁹

MAUSOLEUM. Defined and distinguished from

"cemetery" and from "tombstone" see Cemeteries § 1.

MAXIM. An established principle or proposition; a principle of law universally admitted, as being a correct statement of the law, or as agreeable to natural reason⁵⁰ It has been said that maxims are but attempted general statements of rules of law and are law only to the extent that they are applied in the adjudicated cases⁵¹

Equitable maxims and the principles governing their application are treated in Equity §§ 89-111; the common law maxims are discussed in Common Law § 14. Particular maxims will be found throughout this work in their proper alphabetical order.

MAXIMA, MAXIME, or MAXIMUS. As the first words of maxims as to which there have been no recent applications see 39 C.J. p 1392 notes 2-4, 14-51.

MAXIMUM. There is neither difference in nor shades of meaning given by lexicographers and the courts to the word "maximum"⁵² It is an adjective,⁵³ the superlative of "great,"⁵⁴ implying the comparison of one thing with another of a lesser degree.⁵⁵

"Maximum" is universally defined to mean the highest or greatest amount, quality, value, or degree;⁵⁶ the greatest;⁵⁷ the greatest in quantity or

Mfg Co v Worthington, C C Mass, 25 F 899, 900 Imposition of duty on printed matter see Customs Duties § 44

(13) "Tabular matter," in the printing trade, matter set up in the form of a table, with figures one under the other, so as readily to exhibit to the eye the information to be conveyed, and which requires two or more justifications—Murray v Auglaize County, 1 Ohio N P N S 89, 92

39. Webster New Int D.

Phrases

(1) "Permitting certain weeds to grow or mature and go to seed" as creating liability see Agriculture § 25

(2) Other phrases as to which more recent adjudications have not been found see 39 C J p 1391 note 39

40. Tex—Vestal v Texas Employers' Ins Ass'n, Com App, 285 S W. 1041, 1045.

41. Webster New Int D. 39 C J p 1391 note 40.

42. Webster New Int D.

43. Md—Carpenter v Bouliden, 48 Md 122, 129 39 C J p 1391 note 42

44. N Y—Cruikshank v Cruikshank, 80 N Y S 8, 11, 39 Misc 401

45. Ga—Robertson v Johnston, 24 Ga 103, 108

46. N J—Condict v King, 13 N J Eq 375, 380

47. N J—Condict v King, supra

48. N Y—Dadrian v Theodorian, 37 N Y S 611, 612, 15 Misc 300

49. US—De Fries v Scott, C C A. Hawaii, 268 F 952, 953

50. Black L D

39 C J p 1392 note 1 [a]—[c], [e]

Sir Frederick Pollock's statement

"A maxim is a symbol or vehicle of the law, so far as it goes, it is not the law itself, still less the whole of the law, even on its own ground."—Swetland v Curtiss Airports Corporation, D C Ohio, 41 F 2d 929, 938

Maxims as misleading

"In Yarmouth v France, 19 Q B D 647, 652, 21 E R C 217, Lord Esher said: 'I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for

the most part so large and general in their language that they always include something which really is not intended to be included in them'"—Swetland v Curtiss Airports Corporation, supra

51. US—Swetland v Curtiss Airports Corporation, supra

52. Ill—Moweaqua Coal Corporation v Industrial Commission, 195 NE 607, 610, 360 Ill 194.

53. Wash—Poolman v Langdon, 182 P 578, 580, 94 Wash 448

54. Mich—In re Manaca, 110 N W. 75, 77, 146 Mich 697

55. Cal—Stevenson v Fleming, 117 P 2d 717, 720, 47 Cal App 2d 325

56. Ill—Moweaqua Coal Corporation v Industrial Commission, 195 NE 607, 610, 360 Ill 194

Phrases

(1) "Maximum rent date" method of rent control under the Emergency Price Control Act see the C.J.S. title War §§ 19, 20

(2) Other phrases as to which more recent adjudications have not been found see 39 C J p 1392 notes 11-13

57. Mich—In re Manaca, 110 N W. 75, 77, 146 Mich 697.

highest in degree attainable or attained;⁵⁸ the greatest possible amount, quantity, or degree;⁵⁹ the greatest quantity or value attainable in a given case;⁶⁰ the utmost extent or limit;⁶¹ also, the greatest or highest allowed by law or authority.⁶²

It is the opposite of "minimum."⁶³

MAY.

As a Noun

As a proper noun, "May," the fifth month of the year, containing thirty-one days.⁶⁴

As a Verb

—In General. Generally speaking, "may" is an

auxiliary verb.⁶⁵ It is an elastic word⁶⁶ of most common use,⁶⁷ having a wide scope of meaning⁶⁸ or having various meanings,⁶⁹ the particular meaning often being dependent on the context⁷⁰ or the connection in which it is used.⁷¹ As a general rule, it is construed in its ordinary and usual signification where no intention to the contrary is shown.⁷²

As an auxiliary verb, "may" is used for the purpose of qualifying the meaning of another verb by expressing ability,⁷³ competency,⁷⁴ contingency,⁷⁵ liability,⁷⁶ possibility,⁷⁷ probability,⁷⁸ or potentiality.⁷⁹

—As Permissive or mandatory. The verb "may" may be, and usually is, employed as implying per-

58. Ohio—State ex rel Engle v Industrial Commission, 52 N.E.2d 743, 747, 142 Ohio St. 425
Wash.—Poolman v Langdon, 162 P. 578, 580, 94 Wash. 448

59. Cal.—Stevenson v Fleming, 117 P.2d 717, 720, 47 Cal. App. 2d 225

60. Mich.—In re Manaca, 110 N.W. 75, 77, 146 Mich. 697.

61. Ohio—State ex rel Engle v Industrial Commission, 52 N.E.2d 743, 747, 142 Ohio St. 425

62. Wash.—Poolman v Langdon, 162 P. 578, 580, 94 Wash. 448.

63. Ohio—State ex rel Engle v Industrial Commission, 52 N.E.2d 743, 747, 142 Ohio St. 425.

64. Webster New Int. D.
39 C.J. p. 1392 note 52.

65. Del.—Corpus Juris cited in Bird v Wilmington Soc. of Fine Arts, 43 A.2d 476, 491

Pa.—Marshall v Pennsylvania Sav. Building & Loan Ass'n, 175 A. 739, 740, 115 Pa. Super. 396.

Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88
39 C.J. p. 1392 note 53.

66. Iowa.—Union Trust & Savings Bank v Blair-Harper Seed Co., 202 N.W. 839, 841, 200 Iowa 374.
Minn.—In re Trusteeship of First Minneapolis Trust Co., 277 N.W. 899, 902, 202 Minn. 187.

67. U.S.—Lewiston Milling Co. v Cardiff, C.C.A. Idaho, 266 F. 753, 759.

Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88

68. Mo.—Reynolds v. St. Louis Transit Co., 88 S.W. 50, 53, 189 Mo. 408, 107 Am. S.R. 360.

Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88

Utah.—Corpus Juris cited in Klinge v Southern Pac. Co., 57 P.2d 367, 372, 89 Utah 284.

69. Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88

Utah.—Corpus Juris cited in Klinge v Southern Pac. Co., 57 P.2d 367, 372, 89 Utah 284
39 C.J. p. 1392 note 63

70. Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88
39 C.J. p. 1392 note 64.

71. Mass.—Boston & A. R. Co. v New York Cent. R. Co., 153 N.E. 19, 21, 256 Mass. 600

Similarly expressed

The construction to be given the word is to be determined by the intention gathered from the connection in which it is used—Rural Agr. School Dist. No. 1, Grosse Pointe Tp., Wayne County, Mich. v Guardian Nat. Bank of Commerce of Detroit, D.C. Mich., 6 F. Supp. 432, 433

72. Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88

39 C.J. p. 1392 note 65.

Similarly expressed

The usual connotation of the word "may" must be recognized unless the context requires other meanings—State v. McIntyre, 66 P.2d 879, 881, 93 Utah 177.

73. Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88.
39 C.J. p. 1392 note 56.

74. Or.—Henry v. Postal Tel. Co., 197 P. 253, 260, 100 Or. 179

Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88.

75. Del.—Corpus Juris cited in

Bird v Wilmington Soc. of Fine Arts, 43 A.2d 476, 491

Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88
39 C.J. p. 1392 note 58.

76. Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88

39 C.J. p. 1392 note 59.

77. U.S.—U. S. v. Lexington Mill & Elevator Co., Mo., 34 S.Ct. 337, 340, 232 U.S. 399, 58 L.Ed. 658, L.R.A. 1915B 774—Lewiston Milling Co. v Cardiff, C.C.A. Idaho, 266 F. 753, 759

Del.—Corpus Juris cited in Bird v Wilmington Soc. of Fine Arts, 43 A.2d 476, 491

Ill.—Home Ins. Co. v. P. & P. U. Ry. Co., 78 Ill. App. 137, 140.

N.C.—Wiltz Veneer Co. v. Ange, 80 S.E. 886, 888, 165 N.C. 54

Or.—Henry v. Postal Telegraph Co., 197 P. 253, 260, 100 Or. 179.

Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88

78. U.S.—U. S. v. Lexington Mill & Elevator Co., Mo., 34 S.Ct. 337, 340, 232 U.S. 399, 58 L.Ed. 658, L.R.A. 1915B 774—Lewiston Milling Co. v Cardiff, C.C.A. Idaho, 266 F. 753, 759

Del.—Corpus Juris cited in Bird v Wilmington Soc. of Fine Arts, 43 A.2d 476, 491.

Ill.—Home Ins. Co. v. P. & P. U. Ry. Co., 78 Ill. App. 137, 140.

Or.—Henry v. Postal Telegraph Co., 197 P. 253, 260, 100 Or. 179

Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88

79. N.C.—Wiltz Veneer Co. v. Ange, 80 S.E. 886, 888, 165 N.C. 54

Tenn.—Corpus Juris quoted in Black v. State, 290 S.W. 20, 21, 154 Tenn. 88.

missive⁸⁰ or discretionary,⁸¹ and not mandatory,⁸² action or conduct; or it may be employed as implying imperative or mandatory action or conduct.⁸³ More specifically, "may" has been construed sometimes to mean "shall,"⁸⁴ and sometimes not to mean "shall;"⁸⁵ sometimes to mean "must,"⁸⁶ and sometimes not to mean "must;"⁸⁷ sometimes to mean "must" or "shall,"⁸⁸ and sometimes not to mean "must" or "shall."⁸⁹ Whether the word is to be construed as mandatory or as permissive is to be determined in each case from the apparent intention

as gathered from the context,⁹⁰ considering the whole instrument in which it is used;⁹¹ and it is always construed in a permissive sense unless necessary to give effect to the intent in which it is used.⁹²

In continuation of the idea previously expressed that "may" usually is employed as implying permissive or discretionary rather than mandatory action or conduct, it has been held that "may," in its ordinary and primary signification, is a word of permission⁹³ and is not a word of command.⁹⁴ It indicates, imports, or denotes permission,⁹⁵ discretion;⁹⁶ liber-

90. Ill—Rankin v Rankin, 54 NE 2d 58, 59, 322 Ill App 90

ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn 88

39 CJ p 1393 note 67

81. Ill—Rankin v Rankin, 54 NE 2d 58, 59, 322 Ill App 90

ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn 88

39 CJ p 1393 note 68.

82. Ill—Rankin v Rankin, 54 NE 2d 58, 59, 322 Ill App 90

NJ—Wemple v B F Goodrich Co, 12 A 2d 716, 718, 127 NJ Eq 333

ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn 88

39 CJ p 1393 note 69.

Similarly expressed

Taken in its ordinary colloquial sense, the word "may" implies no mandate—Wemple v. B F Goodrich Co, 12 A 2d 716, 718, 127 NJ Eq 333

83. ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn 88

39 CJ p 1393 note 70.

Similarly stated

(1) The word "may" is usually permissive rather than mandatory in meaning although it often expresses a peremptory command—In re Edelmuth's Estate, 62 N.Y.S 2d 708, 712.

(2) The word "may," ordinarily permissive in quality, is frequently given a mandatory meaning—Dupont v Mills, 186 A. 168, 178, 9 Harr, Del, 42, 119 A.L.R. 174.

84. U.S.—Rural Agr. School Dist No. 1, Grosse Pointe Tp, Wayne County, Mich v. Guardian Nat Bank of Commerce of Detroit, D.C Mich., 6 F Supp. 482, 483.

ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Iowa—Lincoln Nat Life Ins. Co v Fischer, 17 NW 2d 273, 277, 235 Iowa 506

Tenn—Corpus Juris cited in Fiske v Grider, 106 SW 3d 553, 555, 171 Tenn 565—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn 88

Tex—Ross v Tide Water Oil Co., 145 SW 2d 1089, 1092, 136 Tex 66

39 CJ p 1393 note 71.

85. ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn 88

39 CJ p 1393 note 72

86. U.S.—Rural Agr. School Dist No 1, Grosse Pointe Tp, Wayne County, Mich v. Guardian Nat Bank of Commerce of Detroit, D.C Mich., 6 F Supp. 482, 483

Ga—Weesner-Wilkinson Co v Collier, 8 SE 2d 171, 176, 62 Ga App 457

ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn 88

Utah—Corpus Juris cited in Klinge v Southern Pac Co, 57 P 2d 367, 373, 89 Utah 284

39 CJ p 1393 note 73

87. ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn 88

39 CJ p 1394 note 74

88. ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn 88

39 CJ p 1394 note 75

89. ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black

v State, 290 SW 20, 21, 154 Tenn 88

39 CJ p 1394 note 76

90. ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn. 88

Tex—Ross v Tide Water Oil Co., 145 SW 2d 1089, 1092, 136 Tex. 66

39 CJ p 1394 note 77

Similarly expressed

The use of the permissive word "may" is always to be considered in connection with its context and subject matter.—Wilson-Weesner-Wilkinson Co v Collier, 8 SE 2d 171, 176, 62 Ga App 457.

91. ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn. 88

39 CJ p 1394 note 78.

92. ND—Corpus Juris quoted in Murie v Cavalier County, 278 NW 243, 248, 68 ND 242.

Tenn—Corpus Juris quoted in Black v State, 290 SW 20, 21, 154 Tenn. 88

39 CJ p 1394 note 79

93. NJ—Wemple v B F Goodrich Co, 12 A 2d 716, 718, 127 NJ Eq. 333

Tex—Ross v. Tide Water Oil Co. 145 SW 2d 1089, 1092, 136 Tex 66—Samuell v. American Mortgage Corporation, Civ.App, 78 S.W. 2d 1036, 1040.

94. Tex—Ross v. Tide Water Oil Co., 145 SW 2d 1089, 1092, 136 Tex 66.

95. Kan—State v Howland, 110 P. 2d 801, 807, 153 Kan 352

Ky—City of Dawson Springs v. Hamby, 117 S.W.2d 204, 209, 273 Ky 523

Tex—Ross v. Tide Water Oil Co., 145 S.W.2d 1089, 1092, 136 Tex. 66

Utah—State v McIntyre, 66 P.2d 879, 881, 92 Utah 177.

96. Mass.—Irwin v. Justice of Mu-

ty,⁹⁷ liberty to do;⁹⁸ privilege;⁹⁹ lack of restraint;¹ opportunity.² It imports a grant of opportunity or power and is never properly used in a denial, a restriction, or a limitation, except in connection with the word "not."³ It has been defined as meaning to have permission; to be allowed;⁴ to have the power;⁵ to be able,⁶ to do a given thing.

—As Indicating Possibility, Probability, Potentiality, or Contingency. In one of its usable senses⁷ the verb "may" comprehends the idea of possibility,⁸ and, so used, becomes equivalent to the expression "might possibly."⁹ It has been defined as to be possible.¹⁰

It has been said that the word "may" itself naturally looks to the future and indicates doubt instead of certainty;¹¹ it does not carry the idea of

reasonable certainty on the one hand,¹² and it does not always imply mere conjecture on the other,¹³ but is suggestive of possibility or contingency, and negatives absolutism with reference to a future happening or event.¹⁴ However, the word may comprehend the idea of probability,¹⁵ and also the thought of what is, with more or less certainty, to be expected.¹⁶ Whether it carries the thought of probability,¹⁷ or of possibility and not probability,¹⁸ often depends on the context. It has been said that it comprises all the possible rather than the reasonably probable consequences,¹⁹ but that it is not to be taken as including every conceivable possibility,²⁰ and that it must be reasonably applied,²¹ having in mind the purpose in view.²² "May," as implying ability or possibility, now oftener expressed by the verb "can,"²³ means potentiality.²⁴

municipal Court of Brighton Dist., 10 NE 2d 92, 93, 298 Mass 158
Tex—Ross v Tide Water Oil Co., 145 SW 2d 1089, 1092, 136 Tex 66

97. Kan.—State v Howland, 110 P 2d 801, 807, 153 Kan 352

Ky—City of Dawson Springs v Hamby, 117 SW 2d 204, 209, 273 Ky 523

98. Utah—State v McIntyre, 66 P 2d 879, 881, 92 Utah 177.

99. Utah—State v McIntyre, supra

1. Utah—State v McIntyre, supra

2. Kan.—State v Howland, 110 P 2d 801, 807, 153 Kan 352.

Ky—City of Dawson Springs v Hamby, 117 SW 2d 204, 209, 273 Ky 523

3. Utah—State v McIntyre, 66 P 2d 879, 881, 92 Utah 177.

4. Iowa—Bechtel v Board of Sup'rs of Winnebago County, 251 NW 633, 635, 217 Iowa 251.

Mo—High v Quincy, O & K C R Co., 300 SW 1102, 1105, 318 Mo 444—Hall v Wabash R. Co., 80 Mo App 463, 470

Tenn—Corpus Juris quoted in Black v State, 290 S.W. 20, 21, 154 Tenn 88—Hartford Accident & Indemnity Co v. White, 115 SW 2d 249, 251, 23 Tenn App. 1.

5. Cal—National Auto & Cas Ins Co v. Garrison, 173 P 2d 67, 68, 76 Cal App 3d 415

ND—Murie v. Cavalier County, 278 NW 243, 248, 68 ND 242.

Similarly defined

To have the power or ability.—Bechtel v. Board of Sup'rs of Winnebago County, 251 NW 633, 635, 217 Iowa 251

6. ND—Murie v Cavalier County, 278 NW 243, 248, 68 ND 242.

7. Mo—Dean v Kansas City, St L & C R Co., 97 S.W. 910, 913, 199 Mo. 386.

Neb—Corpus Juris quoted in State ex rel English v Ruback, 281 N W 607, 610, 135 Neb 335

8. Del—Corpus Juris cited in Bird v Wilmington Soc of Fine Arts, 43 A 2d 476, 491

Kan—State v Howland, 110 P 2d 801, 807, 153 Kan 352

Ky—City of Dawson Springs v Hamby, 117 SW 2d 204, 209, 273 Ky 523

Neb—Corpus Juris quoted in State ex rel English v Ruback, 281 N. W 607, 610, 135 Neb 335
39 C J p 1394 note 81

9. Neb—Corpus Juris quoted in State ex rel English v. Ruback, 281 NW 607, 610, 135 Neb 335
39 C J p 1394 note 82

10. D.C.—Owen v Kelly, 6 D C 191, 193

Neb—Corpus Juris quoted in State ex rel English v Ruback, 281 N W 607, 610, 135 Neb 335

"The word 'may' includes in its definition possibilities"—State ex rel English v Ruback, 281 NW 607, 610, 135 Neb 335

11. Mass—Boston & A. R. Co v New York Cent R. Co., 153 NE 19, 21, 256 Mass 600

12. Mo—Evans v. Farmers Elevator Co., 147 SW 2d 593, 601, 247 Mo 326

13. Iowa—Steburg v Vincent Clay Products Co., 155 NW 337, 342, 173 Iowa 248.

39 C J p 1394 note 84 [a].

14. NY—Sheila v. Flynn, 299 N.Y S. 64, 73, 164 Misc. 302.

15. Del—Corpus Juris cited in Bird v. Wilmington Soc. of Fine Arts, 43 A 2d 476, 491

Neb—Corpus Juris quoted in State ex rel English v. Ruback, 281 N W. 607, 610, 135 Neb 335.

39 C J. p 1394 note 84.

16. Neb—Corpus Juris quoted in State ex rel English v Ruback, 281 NW 607, 610, 135 Neb 335
39 C J p 1395 note 85

17. Mo—Reynolds v St Louis Transit Co., 88 SW 50, 53, 189 Mo 408, 107 Am SR 360

Neb—Corpus Juris quoted in State ex rel English v Ruback, 281 N W 607, 610, 135 Neb 335

18. Neb—Corpus Juris quoted in State ex rel English v. Ruback, 281 NW 607, 610, 135 Neb 335—Henry v Omaha Packing Co., 115 NW 777, 780, 81 Neb 237

19. US—Lewiston Milling Co. v. Cardiff, CCA Idaho, 266 F 753, 758, 759

Neb—Corpus Juris quoted in State ex rel English v Ruback, 281 N W 607, 610, 135 Neb 335

20. US—Lewiston Milling Co. v Cardiff, CCA Idaho, 266 F. 753, 758, 759

Neb—Corpus Juris quoted in State ex rel English v Ruback, 281 N W 607, 610, 135 Neb 335

21. US—Lewiston Milling Co v Cardiff, CCA Idaho, 266 F 753, 758, 759

Neb—Corpus Juris quoted in State ex rel English v Ruback, 281 N W 607, 610, 135 Neb 335.

22. US—Lewiston Milling Co v Cardiff, CCA Idaho, 266 F 753, 758, 759

Neb—Corpus Juris quoted in State ex rel. English v. Ruback, 281 N. W 607, 610, 135 Neb. 335.

23. N.C.—Wilts Veneer Co v Ange, 80 SE 886, 888, 165 N.C 54.

24. N.C.—Wilts Veneer Co. v. Ange, supra.

—Comparisons and Distinctions. "May" has been held to be synonymous with "shall"²⁵ and "should,"²⁶ and has been used interchangeably with "can" see 12 C.J.S. p 891 note 70, "must,"²⁷ "shall,"²⁸ "should,"²⁹ and "will."³⁰

"May" has been compared with, or distinguished from, "must,"³¹ "should,"³² and "will,"³³ and has been held not synonymous with "is to."³⁴

—"Might." The word "might" in its verbal sense is the preterit of "may;"³⁵ hence the definitions of "may" have been extended to "might."³⁶

The word is one of common use,³⁷ comprehending the idea of probability³⁸ as well as the idea of possibility.³⁹ It has been said that the word comprises all the possible rather than the reasonably probable consequences.⁴⁰ However, it is not to be

taken as including every conceivable possibility,⁴¹ but must be reasonably applied,⁴² having in mind the purpose in view.⁴³ "Might" denotes not alone possibility,⁴⁴ but also ability⁴⁵ and capability.⁴⁶ It has been defined as equivalent to "had power;"⁴⁷ "was possible;"⁴⁸ or "have the physical or moral opportunity to be contingently possible"⁴⁹

It has been held that, while there is a technical distinction between "might" and "could," this distinction is sometimes disregarded, and in popular use the two words have been used interchangeably and the phrase "could or would" has been used as the equivalent of "might," see 12 C.J.S. p 891 note 80, p 892 notes 81, 91. "Might" has been used interchangeably with "should"⁵⁰ and "would."⁵¹

—Cross references. The word "may" is frequent—

25. Iowa—Vale v Messenger, 168 NW 281, 283, 184 Iowa 553 57 C.J. p 554 note 29 [b].

26. Ill—Chicago & E. R. Co v Meech, 45 N.E. 290, 293, 163 Ill 305

27. Iowa—Union Trust & Savings Bank v Blair-Harper Seed Co, 202 NW 839, 841, 200 Iowa 374

Minn—In re Trusteeship of First Minneapolis Trust Co, 277 N.W. 899, 902, 202 Minn 187

N.M.—Reese v. Dempsey, 152 P.2d 157, 162, 48 N.M. 417

N.Y.—In re Thurber's Estate, 56 N.E. 631, 633, 162 N.Y. 244.

Used without discrimination

Such words as "may," "must," "shall," or "will" are often used without clear discrimination—Union Trust & Savings Bank v Blair-Harper Seed Co, 202 NW 839, 841, 200 Iowa 374

28. Iowa—Union Trust & Savings Bank v Blair-Harper Seed Co, supra

Minn—In re Trusteeship of First Minneapolis Trust Co, 277 N.W. 899, 902, 202 Minn 187 57 C.J. p 554 note 29 [a]

29. N.M.—State v Starr, 173 P. 674, 679, 24 N.M. 180.

Utah—Corpus Juris cited in Klinge v Southern Pac Co, 57 P.2d 367, 372, 89 Utah 284

In some connections the words "should" and "may" have substantially the same meaning—Elliot v Maves, 136 Ill App 605, 608

30. Iowa—Union Trust & Savings Bank v Blair-Harper Seed Co, 202 NW. 839, 841, 200 Iowa 374

Minn—In re Trusteeship of First Minneapolis Trust Co, 277 N.W. 899, 902, 202 Minn 187

N.M.—State v. Starr, 173 P. 674, 679, 24 N.M. 180.

31. N.D.—Murie v Cavalier County, 278 NW 243, 248, 68 N.D. 242

32. Okl—St Louis & S F R. Co v. Brown, 144 P 1075, 1080, 45 Okl 143

57 C.J. p 558 note 17

33. Minn—Carson v Turrish, 168 NW 349, 352, 140 Minn 445, L.R. A 1918F 154

39 C.J. p 1395 note 96

Distinction stated

(1) "Will" is a term of certainty and "may" is one of speculation and uncertainty—Carson v Turrish, supra

(2) "Colloquially these auxiliary verbs may be so used and understood (that is, interchangeably) but in grammatical construction they perform entirely distinct offices, and therefore convey essentially different meanings, the one importing a mere possibility or vague or indefinite speculation as to the existence of some fact or thing, the other the unqualified or unconditional existence of some fact or thing; or, in other words, the one meaning an existence in possibility, and the other an existence in actuality. A sick patient, for illustration, would much prefer to have his physician say, 'You will recover,' to the expression of the doubtful prognosis, 'You may recover.'"—Sally v W. T. Garratt & Co, 104 P. 325, 332, 11 Cal App. 138.

34. Cal—White v Disher, 7 P. 826, 827, 67 Cal 402

35. U.S.—Lewiston Milling Co v Cardiff, CCA Idaho, 266 F. 753, 758, 759

N.Y.—In re Weidberg's Estate, 15 N.Y.S.2d 252, 257, 172 Misc. 524

Wash—Larson v City of Seattle, 171 P.2d 212, 214, 25 Wash.2d 291.

"Might" as a noun see post.

36. U.S.—Lewiston Milling Co v. Cardiff, CCA Idaho, 266 F. 753, 758, 759

39 C.J. p 1395 note 1

37. U.S.—Lewiston Milling Co v. Cardiff, supra

38. Tex—Scott v Shine, Civ App. 194 SW 964, 969.

39. Tex—Scott v Shine, supra

40. U.S.—Lewiston Milling Co. v. Cardiff, CCA Idaho, 266 F. 753, 758, 759

39 C.J. p 1395 note 7.

41. U.S.—Lewiston Milling Co. v. Cardiff, supra.

42. U.S.—Lewiston Milling Co v. Cardiff, supra.

43. U.S.—Lewiston Milling Co v Cardiff, supra.

44. Mont—Nelson v Boston & M. Cons. Copper & Silver Min Co, 88 P. 785, 786, 35 Mont. 223.

Wash—Larson v City of Seattle, 171 P.2d 212, 214, 25 Wash.2d 291.

45. Wash—Larson v. City of Seattle, supra

39 C.J. p 1395 note 12

46. Wash—Larson v City of Seattle, supra

39 C.J. p 1395 note 13.

47. N.Y.—In re Weidberg's Estate, 15 N.Y.S.2d 252, 257, 172 Misc. 524.

Wash—Larson v City of Seattle, 171 P.2d 212, 214, 25 Wash.2d 291.

39 C.J. p 1395 note 3

48. N.Y.—In re Weidberg's Estate, 15 N.Y.S.2d 252, 257, 172 Misc. 524.

Wash—Larson v City of Seattle, 171 P.2d 212, 214, 25 Wash.2d 291.

39 C.J. p 1395 note 3

49. N.Y.—In re Weidberg's Estate, 15 N.Y.S.2d 252, 257, 172 Misc. 524.

50. Mo—State v Renfrow, 30 S.W. 299, 301, 111 Mo 589

51. Tex.—Garratt v State, 91 S.W. 577, 49 Tex Cr. 335.

ly employed in constitutional provisions and statutes, and the question most often presented in connection with such use of the word is whether it should be construed as a mandatory term or should be interpreted as a word of permission, discretion, and direction. This subject is treated, with reference to constitutional provisions, in Constitutional Law § 61, and with reference to statutes in the C. J.S. title Statutes § 380, also 59 C.J. p 1079 note 93—p 1087 note 21.

The use of the words "may" and "might" in civil cases in instructions to jurors is treated in the C.J.S. title Trial § 327, also 64 C.J. p 637 note 68.

—Phrases.

"May be." It has been said that the term "may be" is to be construed with reference to the situ-

ation of the subject matter.⁵² It may,⁵³ but does not necessarily,⁵⁴ have reference to the future. The term connotes or implies possibility⁵⁵ or probability,⁵⁶ but it does not connote certainty.⁵⁷ On some occasions it is used as meaning shall be⁵⁸ or shall have been,⁵⁹ and it has been used as equivalent to "possible," "perhaps," and "by chance."⁶⁰ For other cases discussing the meaning of the term see 39 C.J. p 1396 note 21.

Phrases employing the words "may be" are set out in the note.⁶¹

Other phrases employing "may," or the preterit "might," are set out in the note.⁶²

MAYBE. As an adverb, used for "it may be;" perhaps.⁶³ As an adjective, possible, probable, but not sure—a rare use.⁶⁴

52. U.S.—Callaway County v. Foster, Mo., 93 U.S. 567, 573, 23 L. Ed. 911.

53. U.S.—Chicago Pneumatic Tool Co. v. Ziegler, D.C.Pa., 51 F.Supp. 199, 200.

Ala.—Morgan County Nat. Bank v. Terry, 104 So. 762, 763, 213 Ala. 313.

39 C.J. p 1396 note 21 [b].

54. U.S.—Chicago Pneumatic Tool Co. v. Ziegler, D.C.Pa., 51 F.Supp. 199, 200.

55. Ky.—National Life & Accident Ins. Co. v. Barlow, 57 S.W.2d 997, 999, 247 Ky. 509.

Pa.—In re Hirsh's Estate, 5 A.2d 160, 163, 334 Pa. 172.

56. Ky.—National Life & Accident Ins. Co. v. Barlow, 57 S.W.2d 997, 999, 247 Ky. 509.

57. Pa.—In re Hirsh's Estate, 5 A.2d 160, 163, 334 Pa. 172.

58. Ohio—Holly v. Industrial Commission, 50 N.E.3d 152, 156, 143 Ohio St. 79.

39 C.J. p 1396 note 21 [d].

59. Kan.—Brown v. Wyandotte County, 50 P. 888, 889, 58 Kan. 672.

39 C.J. p 1396 note 21 [c].

60. Kan.—State v. Howland, 110 P. 2d 801, 807, 153 Kan. 352.

61. Phrases

(1) "It may be" has been used as equivalent to "possible," "perhaps," and "by chance"—State v. Howland, *supra*.

(2) "May be granted" is intransitive and means "to be able to be granted"—Chicago Pneumatic Tool Co. v. Ziegler, C.C.A.Pa., 151 F.2d 784, 791.

(3) Other phrases employing the words "may be" and as to which more recent adjudications have not been found see 39 C.J. p 1396 note 21 [e]—[af].

62. Phrases

(1) "May request."—Stiedler v. Pennsylvania R. Co., 109 A. 512, 513, 94 N.J. Law 197.

(2) "May set apart" construed to mean "must set apart"—Lemp v. Lemp, 184 P. 222, 223, 32 Idaho 397.

(3) "Might find."—Neff v. Harrisburg Traction Co., 43 A. 1020, 1021, 193 Pa. 501, 73 Am.S.R. 825.

(4) Other phrases as to which more recent adjudications have not been found see 39 C.J. p 1395 note 14—p 1397 note 64.

63. Kan.—State v. Howland, 110 P. 2d 801, 807, 153 Kan. 352.

64. Kan.—State v. Howland, *supra*.

MAYHEM

This Title includes infliction of personal injuries which deprive one of any member or organ of his body or cause other permanent disability or disfigurement, attempts to maim, and assaults with intent to maim, nature and extent of criminal responsibility therefor, and grounds of defense, and prosecution and punishment of such acts as public offenses.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1. Definitions and distinctions—p 461
- 2. By and upon whom committed—p 461
- 3. Nature and elements—p 462
- 4. — Assault with intent to maim—p 466
- 5. — Attempt to maim—p 466
- 6. Defenses—p 466
- 7. Indictment and information; appeal of mayhem—p 467
- 8. — Language of statute—p 467
- 9. — Averments as to particular matters—p 468
- 10. Evidence—p 470
- 11. Trial—p 472
- 12. Sentence and punishment—p 474

See also descriptive word index in the back of this Volume

§ 1. Definitions and Distinctions

"Mayhem" at common law is defined as the unlawful and violent deprivation of another of the use of his members as may render him less able in fighting to defend himself or to annoy his adversary.

"Mayhem" at common law is defined as the unlawful and violent deprivation of another of the use of such of his members as may render him less able in fighting to defend himself or to annoy his adversary,¹ but, if the injury disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem at common law.² By statute the scope of the common-law offense has been extended, and the statutes sometimes contain a definition of the term.³ It has been held that, as used in a statute, the words "to maim" have no technical meaning, and should be construed in

their plain ordinary sense,⁴ and, as usually defined, they mean the infliction of some serious bodily injury.⁵

"Maim" and "mayhem" compared. "Maim" and "mayhem" have been regarded as equivalent words; the former but a newer form of the latter, the difference being in orthography and not in sense,⁶ but, as used in a statute, the word "maim" has been construed as meaning "mutilated," and not as synonymous with the act of committing the offense of mayhem as understood in the technical sense.⁷

§ 2. By and upon Whom Committed

Mayhem may be committed by one standing in loco parentis to the injured person.

The offense may be committed by a white man

1. Ky—*Coleman v. Commonwealth*, 133 S.W.2d 555, 280 Ky. 410.
Neb—*Hiller v. State*, 218 N.W. 386, 116 Neb. 582, 58 A.L.R. 1322.
N.J—*Clyde v. Parillo*, 55 A.2d 810.
N.M—*State v. Martin*, 250 P. 842, 32 N.M. 48.
W.Va—*State v. Taylor*, 142 S.E. 254, 105 W.Va. 298.
40 C.J. p. 2 note 1.

2. Ky—*Coleman v. Commonwealth*, 133 S.W.2d 555, 280 Ky. 410.

3. Colo—*Carpenter v. People*, 72 P. 1072, 31 Colo. 284.

Ky—*Coleman v. Commonwealth*, 133 S.W.2d 555, 280 Ky. 410.
Neb—*Hiller v. State*, 218 N.W. 386, 116 Neb. 582, 58 A.L.R. 1322.
40 C.J. p. 2 note 8.

4. Mo—*State v. Foster*, 220 S.W. 958, 281 Mo. 618.

5. Kan—*State v. Thomas*, 142 P. 2d 692, 157 Kan. 526, certiorari de-

nied 64 S.Ct. 1055, 322 U.S. 739, 88 L.Ed. 1578.

Mo—*State v. Foster*, 220 S.W. 958.

6. Kan—*Corpus Juris* cited in *State v. Thomas*, 142 P.2d 692, 693, 157 Kan. 526, certiorari denied 64 S.Ct. 1055, 322 U.S. 739, 88 L.Ed. 1578.

Ohio—*State v. Johnson*, 51 N.E. 40, 58 Ohio St. 417, 65 Am.S.R. 769.

7. Mass—*Commonwealth v. Newell*, 7 Mass. 245.

on the body of a slave,⁸ and a statute may apply to an injury to the internal organs of the female as well as to the external organs of the male.⁹ Under some statutes relating to maiming the offense may be committed by one standing in loco parentis to the injured person.¹⁰

Conspiracy. Under the general rule the question as to whether a person is responsible for the offense when actually committed by another, on the theory of a conspiracy, depends on whether or not the act performed is the ordinary and probable effect of the wrongful act, specifically agreed on, so that the connection between them may be reasonably apparent,¹¹ and not a fresh and independent product of the mind of one of the conspirators outside of, or foreign to, the common design.¹² In the Philippines, where several persons attack the injured person but there is no proof of the existence of a conspiracy on the part of the aggressors, it has been held that only the one who actually performed the act charged is guilty of a lesion grave.¹³

§ 3. Nature and Elements

- a. In General
- b. Intent, malice, and premeditation
- c. Nature, means, and extent of injury

a. In General

Mayhem was a felony at common law or at least of a degree of felony.

There is authority for the view that the crime was a felony at the ancient common law,¹⁴ or at least of the degree of felony,¹⁵ but as to whether it was so regarded at common law after the retaliatory punishment was superseded by fine and imprison-

ment the authorities are not in accord, some taking the view that it is a felony,¹⁶ while others regard it as a misdemeanor,¹⁷ except in the one case of mayhem by castration.¹⁸ The nature of the offense has since been fixed by various statutory provisions as a felony¹⁹ or as a misdemeanor,²⁰ according to the gravity of the injury against which the statute provides or the circumstances under which the injury is inflicted.²¹

Injury sustained in conflict. It has been said that, at common law²² and under some of the statutes,²³ liability as for mayhem is excluded when the act is done by "chance medley, sudden affray, or adventure," or in a fight by mutual consent; and some of these statutes provide that the person inflicting the injury shall be guilty of a high misdemeanor,²⁴ or an aggravated affray.²⁵ However, under some statutes, the offense may be committed during a fight.²⁶

Proof of a conspiracy is not essential, or incidental, to a charge of maiming.²⁷

Murder or manslaughter if death had ensued. Under some statutes the offense may be committed where the circumstances are such that the offense would have constituted murder or manslaughter if death had ensued.²⁸

b. Intent, Malice, and Premeditation

- (1) In general
- (2) Premeditation, deliberation, and lying in wait

(1) In General

Under some statutes, the act must have been committed unlawfully, maliciously, wilfully, intentionally, etc., to constitute mayhem.

8. Va.—Commonwealth v. Carver, 5 Rand 660, 26 Va. 660
40 C.J. p 2 note 8

9. Ga.—Kitchens v. State, 7 SE 209, 80 Ga. 810
40 C.J. p 2 note 9

10. W.Va.—State v. McDonie, 109 S. E. 710, 89 W.Va. 185
40 C.J. p 2 note 12.

11. Tex.—Bowers v. State, 7 S.W. 247, 24 Tex. App. 542, 6 Am. S.R. 901.

12. Tex.—Bowers v. State, supra.

13. Philippine.—U. S. v. Solis, 4 Philippine 178

14. Mass.—Commonwealth v. Newell, 7 Mass. 345
Neb.—Hiller v. State, 218 NW 386, 116 Neb. 582, 58 A.L.R. 1323

15. Ga.—Adams v. Barrett, 5 Ga. 404

16. Pa.—Commonwealth v. Porter, 1 Pittsb. 503, 504
40 C.J. p 3 notes 23, 24

17. Ga.—Adams v. Barrett, 5 Ga. 404.
40 C.J. p 3 note 25

18. Ga.—Adams v. Barrett, supra.
40 C.J. p 3 note 26

19. W.Va.—Crookham v. State, 5 W. Va. 510
40 C.J. p 3 note 29

20. Del.—State v. Holmes, 55 A. 343, 20 Del. 196
40 C.J. p 3 note 30

21. Del.—State v. Holmes, supra.
40 C.J. p 3 note 31

Anger, rage, or excitement

Offense of castration was held not reduced to lower degree of assault, because of anger, rage, or excitement of accused at time—Ramirez v. State, 40 S.W.2d 138, 119 Tex. Cr. 362, certiorari denied Ramirez v. State of Texas, 52 S.Ct. 36, 284 U.S. 659, 76 L.Ed. 558

22. Ky.—Coleman v. Commonwealth, 133 S.W.2d 655, 280 Ky. 410.

23. Ark.—Henry v. State, 133 S.W. 539, 135 Ark. 237.
40 C.J. p 3 note 33

24. Colo.—Carpenter v. People, 72 P. 1072, 31 Colo. 284—Foster v. People, 1 Colo. 293.

25. Ark.—Strawn v. State, 14 Ark. 549

26. Cal.—People v. Wright, 29 P. 240, 93 Cal. 564.

Ky.—Coleman v. Commonwealth, 133 S.W.2d 655, 280 Ky. 410—Hamphill v. Commonwealth, 96 S.W.2d 686, 265 Ky. 194.

27. W.Va.—State v. Wisman, 126 S. E. 701, 98 W.Va. 250

28. Mo.—State v. Mulhall, 97 S.W. 583, 199 Mo. 202, 7 L.R.A.N.S. 630, 8 Ann. Cas. 781.

At common law the act, to constitute mayhem, must have been done with malice,²⁹ and under the Coventry Act the deed must have been committed of malice aforethought and of a deliberate and premeditated design to do an injury of the sort described, as discussed infra subdivision b (2) (a) of this section; but the malicious intention need not have been directed against any particular person,³⁰ and, although the statute provided against the particular acts "with intention to maim or disfigure," if the intent was of a higher nature, as to murder, and in the attempt the offender did not kill but only maimed, it was an offense within the act.³¹ Statutes have been enacted aimed at acts committed unlawfully,³² maliciously,³³ willfully,³⁴ intentionally,³⁵ on purpose,³⁶ and of malice aforethought, as discussed infra subdivision b (2) (a) of this section, and these elements must be present in order that the act charged may constitute the offense,³⁷ but this is generally all that is necessary,³⁸ and, unless specifically provided for, neither the specific intent to commit the unlawful act charged,³⁹ nor the specific intent to injure as to a particular part of the body,⁴⁰ is necessary. Thus, where the offense is simply the unlawful depriving of the member, etc., the specific intent to maim is not necessary,⁴¹ and a like rule applies under a statute providing for the punishment of maiming when inflicted under such circumstances as would have made the offense murder or manslaughter if death had ensued,⁴² but, under the statutes in some jurisdic-

tions, a specific intent to maim, disfigure, or disable is an essential element of the offense.⁴³ Where malice is an element of the offense, it has been held that it may arise either previous to,⁴⁴ or at the time of, the act.⁴⁵

(2) Premeditation, Deliberation, and Lying in Wait

(a) In general

(b) Injury inflicted in conflict

(a) In General

Malice aforethought and premeditation are essential elements of the crime of mayhem where so provided by statute.

At common law the act might have amounted to mayhem no matter how sudden the occasion, and, under some statutes, malice aforethought is not an essential element,⁴⁶ and proof of premeditation⁴⁷ or deliberation⁴⁸ is not required but under the Coventry Act there not only must have been malice aforethought, but also a lying in wait for the premeditated purpose,⁴⁹ and so some statutes in this country require malice aforethought,⁵⁰ lying in wait,⁵¹ or premeditation⁵² evinced by lying in wait or otherwise.⁵³ "Malice aforethought," as used in a statute relating to mayhem, has been construed as meaning a malicious design to injure,⁵⁴ and it has been held that it is immaterial at what period of time this malicious design was formed.⁵⁵ Under some statutes the premeditated design does not

29. NC—State v Wilson, 135 S.E. 612, 188 NC 781

30. Tex—Rankin v State, 139 SW 3d 811, 139 Tex Cr 247.

40 CJ p 3 note 41

31. Eng—Rex v Coke, 16 How St Tr 54

40 CJ p 3 note 42

32. Neb—Hiller v State, 218 NW. 386, 116 Neb 582, 58 A.L.R. 1322

40 CJ p 3 note 43

33. Neb—Hiller v State, supra

40 CJ p 3 note 44

34. Neb—Hiller v State, supra.

Tex—Corson v State, 190 SW 2d 726, 148 Tex Cr 630

40 CJ p 4 note 45

35. Neb—Hiller v State, 218 NW 386, 116 Neb 582, 58 A.L.R. 1322

40 C.J. p 4 note 46

36. Neb—Hiller v State, supra.

40 CJ p 4 note 47

37. Ala—Molette v State, 49 Ala.

18—State v Simmons, 3 Ala 497

40 CJ p 4 note 49

38. Ala—Molette v. State, 49 Ala.

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40 C.J. p 4 note 50.

39. Tex—Corson v State, 190 S.W. 2d 726, 148 Tex Cr. 630

40 CJ p 4 note 51

40. Ala—Molette v. State, 49 Ala.

18

40 CJ p 4 note 52

41. Colo—Carpenter v. People, 72 P 1072, 31 Colo 284

42. Mo—State v Mulhall, 97 SW 583, 199 Mo 302, 7 L.R.A., NS, 630, 3 Ann.Cas 781.

43. Ala—Patterson v State, 1 So 2d 759, 30 Ala App 135

Neb—Hiller v State, 218 NW 386, 116 Neb 582, 58 A.L.R. 1322

40 CJ p 4 note 55

44. Dak—U. S. v. Gunther, 38 N W. 79, 5 Dak 234.

45. Dak—U S v. Gunther, supra

46. Cal—People v. Nunes, 190 P.

486, 47 Cal App. 346

40 C.J. p 4 note 60.

47. Tex—Keith v. State, 232 S.W.

321, 89 Tex.Cr 264, 16 A.L.R. 949

40 C.J. p 4 note 61

48. Cal—People v Wright, 29 P

240, 93 Cal 564—People v Nunes,

190 P 486, 47 Cal App. 346

49. NJ—State v Mairs, 1 N.J.Law 463

40 CJ p 4 note 63

50. Kan—Corpus Juris quoted in State v Thomas, 142 P.2d 692, 693,

157 Kan 526, certiorari denied 64 S.Ct 1055, 323 US 739, 88 L.Ed 1578

Mo—State v Ma. Foo, 19 SW 222, 110 Mo 7, 33 Am.S.R. 414

51. Pa—Respublica v Langcake, 1 Yeates 415—Commonwealth v. McBurnie, Add 28.

52. Okl—De Arman v State, 243 P 783, 33 Okl Cr 79

40 CJ p 5 note 66.

53. N.Y.—Tully v People, 67 N.Y 15

40 C.J. p 5 note 67

54. Ala—State v Simmons, 3 Ala. 497

Kan—Corpus Juris quoted in State v Thomas, 142 P.2d 692, 693, 157

Kan 526, certiorari denied 64 S.Ct 1055, 322 US 739, 88 L.Ed. 1578

55. Ala—State v Simmons, 3 Ala. 497

Kan—Corpus Juris quoted in State v. Thomas, 142 P.2d 692, 693, 157

mean that there must be a design to maim the person injured in the exact way or to the extent actually perpetrated.⁵⁶

(b) Injury Inflicted in Conflict

Under some statutes relating to mayhem, there must be a premeditated design if the injury arose from a sudden attack, but it is immaterial when the design was formed.

Under the statutory rule that there must be a premeditated design, as discussed supra subdivision b (2) (a), if the injury arises out of a sudden attack unconnected with any premeditated design against the person, the offense is not committed,⁵⁷ and a like rule has been applied under a statute which did not specifically make a premeditated design an element of the offense.⁵⁸ On the other hand, it is held that even while the act must be done with malice aforethought, it is entirely immaterial at what period of time the design was formed⁵⁹, and in other cases, under provisions which are fully met by proof of the commission of the act, from which the law will presume that it was done unlawfully and maliciously unless the evidence shows the contrary, it does not matter that the intent was formed during the conflict.⁶⁰

c. Nature, Means, and Extent of Injury

- (1) In general
- (2) Means
- (3) Extent

(1) In General

While the offense of mayhem at common law could be committed only if the injury diminished the victim's corporal abilities, the offense has been enlarged by statutes

If the injury disfigured only without diminishing the victim's corporal abilities it did not fall within the crime of mayhem at common law.⁶¹ The offense was at an early date enlarged by statutes, many of which declare what acts shall constitute maiming, although some of the acts enumerated amount to mayhem at common law and some do not,⁶² the blending of them in the same definition putting all of them on the same legal footing,⁶³ as under provisions directed against the depriving of a human being of a member of his body or disfiguring, mutilating, disabling, or rendering it useless, and sometimes expressly defining the acts so resulting as mayhem or maiming,⁶⁴ or making punishable maiming, wounding, or disfiguring, in more general terms,⁶⁵ with intent to maim and disable.⁶⁶ The

Kan 536, certiorari denied 64 S Ct 1055, 322 US 739, 88 L Ed 1578.

58. Okl.—Boulding v State, Cr. 177 P2d 152—De Arman v State, 242 P 783, 33 Okl Cr 79. 40 C.J. p 5 note 70.

57. N.Y.—Tully v. People, 67 N.Y. 15. 40 C.J. p 5 note 72.

58. Or.—State v Cody, 23 P 891, 18 Or 506, dissenting opinion, 24 P 895, 18 Or 506. 40 C.J. p 5 note 73.

59. Kan.—Corpus Juris quoted in State v. Thomas, 143 P.2d 692, 693, 157 Kan 526, certiorari denied 64 S Ct 1055, 322 US. 739, 88 L Ed 1578. 40 C.J. p 5 note 75.

60. Kan.—Corpus Juris quoted in State v Thomas, 143 P.2d 692, 693, 157 Kan 526, certiorari denied 64 S Ct 1055, 322 US. 739, 88 L Ed 1578. 40 C.J. p 5 note 76.

61. N.Y.—Foster v. People, 50 N.Y. 598, 1 Cow Cr. 508. 40 C.J. p 5 note 79.

62. Mont.—State v. Sheldon, 169 P. 37, 54 Mont 185. Va.—Shackelford v Commonwealth, 32 S E 2d 682, 183 Va. 423.

Military or combative importance

Generally speaking the military or combative importance of the organ injured or destroyed, to which the ancient common law had special regard, has no significance under the statutes—Kitchens v. State, 7 S E 209, 30 Ga 810.

63. Ark.—Guest v. State, 19 Ark 405. 40 C.J. p 5 note 83.

64. Ga.—Mathis v. State, 17 S E 2d 194, 66 Ga App 111. Va.—Shackelford v Commonwealth, 32 S E 2d 682, 183 Va. 423. 40 C.J. p 5 note 83.

Particular acts and injuries within the statutes

(1) Putting out or destroying eye Cal—People v. Long, 161 P2d 278, 70 Cal App 2d 470.

Tex—Phillips v State, 143 SW 2d 591, 140 Tex Cr. R. 84. 40 C.J. p 5 note 83 [f] (1).

(2) Castration—People v Kopke, 33 NE 2d 216, 376 Ill. 171, certiorari denied Kopke v State of Illinois, 62 S Ct 87, 314 US 646, 86 L Ed 518—People v Saylor, 149 NE 2d 767, 319 Ill. 205—40 C.J. p 5 note 83 [f] (7).

(3) Knocking out a front tooth—Olson v. Union Pac R Co, 112 P.2d 1005, 62 Idaho 433.

(4) Biting off part of an ear—Mathis v. State, 17 S E 2d 194, 66 Ga App. 111—40 C.J. p 5 note 83 [f] (2).

(5) Other acts and injuries see 40 C.J. p 5 note 83 [f].

Member of body

The following have been regarded as members of the body within the statutes referring to maiming, disfiguring, etc.

(1) Testicles—People v. Kopke, 33 NE 2d 216, 376 Ill. 171, certiorari denied Kopke v State of Illinois, 62 S Ct 87, 314 US 646, 86 L Ed 518—People v. Saylor, 149 NE 767, 319 Ill. 205—40 C.J. p 5 note 83 [g] (3).

(2) Other parts of the body see 40 C.J. p 5 note 83 [g].

65. Va.—Shackelford v. Commonwealth, 32 S E 2d 682, 183 Va. 423. 40 C.J. p 5 note 84.

Wound

(1) To constitute a wound under a statute for the punishment of wounding, etc., with intent to maim or disable, there must be a breaking of the skin—Harris v Commonwealth, 142 S E 354, 150 Va. 580, 58 A L R 1316—40 C.J. p 5 note 84 [a] (1).

(2) A break of the skin within the nose is sufficient under some statutes—Shackelford v Commonwealth, 32 S E 2d 682, 183 Va. 423.

66. Ill.—People v. Saylor, 149 NE 767, 319 Ill. 205. 40 C.J. p 5 note 85.

mere fact that in the body of a statute which enumerates acts, some of which do and others do not constitute mayhem at common law, such acts are not designated as mayhem does not prevent the statutory offense from being regarded as mayhem,⁶⁷ but the failure of the statute to designate the acts enumerated as "mayhem" has been regarded as immaterial.⁶⁸ The statutory crime of mayhem includes only those injuries which are designated specifically or impliedly by the statute,⁶⁹ and there is authority for the view that since the offense has been fully regulated by statute, the crime of mayhem includes only those injuries which are designated by the statute.⁷⁰

(2) Means

Under some statutes relating to mayhem the instrument used or the means employed in committing mayhem is immaterial.

Under some statutes the particular means or instrument used in committing the offense is immaterial,⁷¹ as where the statute is aimed at a disfigurement "by means of a knife or other instrument."⁷² Moreover, some statutes expressly provide that it is immaterial by what means or instruments,⁷³ or in what manner,⁷⁴ the injury is inflicted. It has been held that the offense may be committed by "biting," under statutes aimed at "cutting,"⁷⁵ or "slitting,"⁷⁶ but, on the other hand, there is authority for the view that a "biting" is not necessarily a "cutting"⁷⁷ or a "slitting"⁷⁸ within some statutes.

The word "bite" in a statute making it unlawful to bite off a member of another person's body has been held not to mean a severance by pinching with the application of some tool or implement, but severance produced by means of the teeth.⁷⁹ In order

to inflict a wound within the meaning of a statute aimed at wounding with intent to maim it has been held necessary to use an instrument of some description.⁸⁰

(3) Extent

Where the inhibition is directed against an injury which disfigures, it is not necessary that the whole member be mutilated or detached where the injury causes a disfigurement.

Where the inhibition is directed against an injury which disfigures, it is not necessary that the whole member should be mutilated or detached if the injury impairs comeliness.⁸¹ However, the cutting or biting off of a small portion of the member which does not disfigure the person, and could only be discovered by close inspection, or examination, when attention is directed to it, will not constitute mayhem under some statutes,⁸² nor, it has been held, does the biting off of a portion of a member necessarily show that the injured person was deprived of the use of such member.⁸³ Under some statutes a mere disfigurement of the organ referred to is not sufficient,⁸⁴ unless such disfigurement results in rendering the organ useless.⁸⁵ The injury is ordinarily sufficient to bring the case within the statute where it is such as to deprive the injured person of the organ for the ordinary and usual practical purposes of life.⁸⁶ Under a provision defining maim as, among other acts, the depriving of one of any member of his body, if the act is once completely committed the offense is not less complete because the member was put back and grew to its proper place.⁸⁷ The crime may be complete notwithstanding there is a bare possibility that the injured person may recover the use of the member,⁸⁸ or that the member is not completely severed during the en-

67. Or.—State v. Cody, 23 P. 891, 18 Or. 508, dissenting opinion 24 P. 895, 18 Or. 506.

40 C.J. p 6 note 86.

68. Mass.—Commonwealth v. Newell, 7 Mass. 245.

40 C.J. p 6 note 87.

69. Ohio.—State v. Johnson, 51 NE 40, 58 Ohio St. 417, 65 AmSR 769 40 C.J. p 6 note 89.

70. N.Y.—Foster v. People, 50 N.Y. 598, 1 Cow Cr. 508 40 C.J. p 6 note 90.

71. Ill.—People v. Kopke, 33 NE2d 216, 376 Ill. 171, certiorari denied Kopke v. State of Illinois, 62 SCt 87, 314 U.S. 646, 86 LEd 518. 40 C.J. p 7 note 91.

72. Tex.—Lee v. State, 148 SW. 567, 66 Tex. Cr. 567, 40 L.R.A., N.S., 1132 40 C.J. p 7 note 92.

73. Nev.—State v. Enkhous, 160 P. 23, 40 Nev. 1.

Okla.—Payne v. State, 209 P. 334, 21 Okla. Cr. 416.

74. Okla.—Payne v. State, supra.

75. N.J.—State v. Mairs, 1 N.J. Law 453.

40 C.J. p 7 note 95.

76. Nev.—State v. Enkhous, 160 P. 23, 40 Nev. 1.

40 C.J. p 7 note 96.

77. U.S.—U. S. v. Askins, DC, 24 F. Cas. No. 14,471, 4 Cranch CC. 98.

78. Cal.—People v. Demasters, 39 P. 35, 105 Cal. 669.

79. Ky.—Hemphill v. Commonwealth, 96 SW2d 586, 265 Ky. 194.

80. W.Va.—State v. Gibson, 68 SE 295, 67 W.Va. 548, 28 L.R.A., N.S., 965.

40 C.J. p 7 note 99.

81. Ga.—Mathis v. State, 17 SE2d 194, 66 Ga. App. 111.

40 C.J. p 7 note 2.

82. Ala.—Green v. State, 44 So. 194, 151 Ala. 14, 125 AmSR 17, 15 Ann. Cas. 81.

40 C.J. p 7 note 3.

83. Tex.—Bowers v. State, 7 SW. 247, 24 Tex. App. 542, 5 AmSR 901.

40 C.J. p 7 note 4.

84. Cal.—People v. Nunes, 190 P. 486, 47 Cal. App. 346.

85. Cal.—People v. Nunes, supra.

86. Tex.—Phillips v. State, 148 S.W. 591, 140 Tex. Cr. 84 40 C.J. p 7 note 7.

87. Tex.—Slattery v. State, 41 Tex. 619.

88. Cal.—People v. Nunes, 190 P. 486, 47 Cal. App. 346.

counter, if it is subsequently necessary to sever it.⁸⁹ Moreover, there is authority for the view that the injured person is not bound to submit to a surgical operation to relieve accused of the results of his unlawful acts.⁹⁰ It has been stated generally that "mayhem" implies a permanent injury or crippling,⁹¹ and it is generally held that, by the disabling of a limb or member, the statute contemplates a permanent injury, not a mere temporary disabling.⁹²

Construction of statutes. These statutes, like other penal statutes must be strictly construed in favor of accused,⁹³ but this does not mean that the strictness must be so narrow as to emasculate the purpose of the statute or to impair the intention of the legislature.⁹⁴ The simple mayhem statutes existing before and after common-law offenses were abolished must be construed in the light of the common law.⁹⁵

§ 4. — Assault with Intent to Maim

Under some statutes, it is an offense to commit an assault with intent to maim, and accomplishment of the mayhem is not necessary.

Sometimes the statute provides specifically against certain assaults with intent to maim.⁹⁶ While the phrase "with intent to maim" in a charge of assault with intent to maim is sometimes regarded as simply descriptive of the character of the offense,⁹⁷ where the intent to maim is wanting, the offense is not made out, although there may have been an assault.⁹⁸ A charge of assault with intent to maim cannot be supported as to the intent charged where there is no proof of an intent to commit an injury which would constitute a maiming.⁹⁹ On charge of an assault with intent to maim, accomplishment of the mayhem is not necessary, since the

assault charged is the crime.¹

Where maiming is a felony, an assault with intent to maim is an assault with intent to commit a felony under a statute punishing the latter offense.²

§ 5. — Attempt to Maim

In order to constitute an attempt to commit mayhem, there must be both an overt act and a specific intent.

In order to constitute an attempt to commit mayhem within a statute there must be some overt act in part execution of the intent to commit the offense,³ and there must also exist the specific intent to commit the offense.⁴ Apparent ability to commit the offense is also necessary,⁵ and, if the means employed are both absolutely and apparently inadequate, the attempt is not the subject of criminal prosecution.⁶

§ 6. Defenses

Self-defense is a good defense to an indictment for mayhem, but the resistance must be in proportion to the injury offered.

In addition to the defenses available in all criminal prosecutions, as discussed in Criminal Law §§ 38-54, the nonexistence of one or more of the essential elements of the offense of mayhem is of course a defense. The fact that the acts charged were committed in legitimate and necessary self-defense is a good defense to an indictment or to an appeal of mayhem at common law, and may be shown in a prosecution under the modern statutes,⁷ but the defense can only be sustained by proof that the resistance was in proportion to the injury offered,⁸ and of course is not sustained where there is nothing to show that the acts of the injured person would warrant a reasonable person in believ-

89. Pa.—Commonwealth v. Petck, 2 Pa. Dist. & Co. 237

90. Philippine—U. S. v. Marasigan, 27 Philippine 504.

40 C.J. p 7 note 11.

91. La.—State v. Foster, 101 So. 255, 156 La. 891

N.M.—State v. Raulie, 59 P.2d 359, 40 N.M. 318

92. Va.—Lee v. Commonwealth, 115 S.E. 671, 135 Va. 572.

40 C.J. p 7 note 13

93. Ga.—Mathis v. State, 17 S.E.2d 194, 66 Ga. App. 111

Pa.—Commonwealth v. Petck, 2 Pa. Dist. & Co. 227

94. Ga.—Mathis v. State, 17 S.E.2d 194, 66 Ga. App. 111.

95. Ind.—Pierce v. State, 41 N.E.2d 797, 220 Ind. 225

96. Ill.—People v. Kopke, 33 N.E.2d

216, 376 Ill. 171, certiorari denied; Kopke v. State of Illinois, 62 S.Ct.

87, 314 U.S. 646, 86 L.Ed. 518

40 C.J. p 8 note 17

97. Mo.—State v. Foster, 220 S.W. 958, 281 Mo. 618

98. Ill.—People v. Kopke, 33 N.E.2d 216, 376 Ill. 171, certiorari denied

Kopke v. State of Illinois, 62 S.Ct. 87, 314 U.S. 646, 86 L.Ed. 518.

40 C.J. p 8 note 20

99. Ohio—O'Brien v. State, 31 Ohio Chr.Ct. 33.

40 C.J. p 8 note 21.

Disable testicles

An assault with intent to disable a person's testicles constitutes an attempt to commit mayhem within statute.—People v. Kopke, 33 N.E.2d 216, 376 Ill. 171, certiorari denied; Kopke v. State of Illinois, 62 S.Ct. 87, 314 U.S. 646, 86 L.Ed. 518.

1. Ill.—People v. Kopke, 33 N.E.2d 216, 376 Ill. 171, certiorari denied

Kopke v. State of Illinois, 62 S.Ct.

87, 314 U.S. 646, 86 L.Ed. 518

2. Mo.—State v. Brown, 60 Mo. 141 —State v. Thompson, 30 Mo. 470

3. Ill.—Dahlberg v. People, 80 N.E. 310, 225 Ill. 485

Va.—Commonwealth v. Clark, 6 Gratt. 675, 47 Va. 675.

4. Ill.—Dahlberg v. People, 80 N.E. 310, 225 Ill. 485

5. Ill.—Dahlberg v. People, supra

6. Ill.—Dahlberg v. People, supra 40 C.J. p 8 note 26.

7. Ala.—Green v. State, 44 So. 194, 151 Ala. 14, 135 Am.S.R. 17, 15 Ann. Cas. 81.

40 C.J. p 11 notes 20, 21.

8. Ky.—Coleman v. Commonwealth, 133 S.W.2d 555, 280 Ky. 410.

40 C.J. p 11 note 22.

ing that an attack would be made.⁹ The mere fact that accused voluntarily entered into the conflict during which the acts charged were committed does not prevent him from relying on this defense.¹⁰

Forcible ejection of accused from a certain building The fact that the acts complained of were committed while the injured person was in the exercise of a legal right and without the use of undue force, attempting to eject accused from a certain building is not a defense.¹¹

Right of one standing in loco parentis to chastise the injured person is not a defense where it appears that the chastisement inflicted was beyond any real or apparent necessity.¹²

Mutual conflict. While under some statutes the mere fact that the injury occurred in the course of an altercation between accused and the injured person is no defense, under other statutes liability as for mayhem is excluded when the act is done by "chance medley, sudden affray or adventure," or in a fight had by consent, as discussed supra § 3

§ 7. Indictment and Information; Appeal of Mayhem

a. In general

b. Joinder of offenses

a. In General

At common law the remedy for the offense of mayhem was by appeal of mayhem, but the statutory offense is prosecuted by indictment or information.

At ancient common law, if the injured person sought satisfaction by loss of member for member, his remedy was by an appeal of mayhem,¹³ and the sovereign punished the injury to his subject by an indictment for mayhem.¹⁴ The various statutory offenses are prosecuted by indictment or information.¹⁵

Surplusage A defective¹⁶ or unnecessary¹⁷ averment in an information may be disregarded as surplusage where the remaining averments sufficiently allege an offense within the statute.

Negating statutory exceptions Conditions which will prevent the application of a particular statutory provision need not be negated in the indictment where they are contained in distinct clauses.¹⁸

Issues, proof, and variance. The general rules as to issues, proof, and variance in criminal prosecutions apply in prosecutions for mayhem.¹⁹

b. Joinder of Offenses

Under a statute enumerating disjunctively several offenses connected with the same transaction, or providing several means in the alternative whereby the offense may be committed, an indictment may charge them conjunctively.

Where the words of the statute are in the disjunctive, with intent to maim or with intent to disfigure, an averment of either is sufficient;²⁰ and the general rule is applied that, under a statute enumerating disjunctively several offenses connected with the same transaction²¹ and with the intent necessary to commit the offense,²² they may be alleged conjunctively; and must be so alleged when embraced in one count.²³ So, under a statute providing several means in the alternative whereby the offense may be committed, an indictment may charge them conjunctively as one offense.²⁴

§ 8. — Language of Statute

It is sufficient to allege the commission of the offense of mayhem in the language of the statute.

Where the statute defines what acts shall constitute the offense, it is sufficient to allege the commission of such acts in the terms of the statute,²⁵ although the exact language need not be employed if

9. Cal.—People v. Alexander, 205 P. 876, 56 Cal App 487.

10. Mo.—State v. Bunyard, 161 S W 756, 253 Mo 347.

11. Mo.—State v. Bunyard, supra 40 C.J. p 11 note 25.

12. W Va.—State v. McDonie, 109 S E 710, 89 W Va. 185.

13. Mass.—Commonwealth v. Newell, 7 Mass 245 40 C.J. p 8 note 28.

14. Mass.—Commonwealth v. Newell, supra.

15. Mo.—State v. Bunyard, 161 S W 756, 253 Mo 347. 40 C.J. p 8 note 30.

16. Mo.—State v. Kyle, 76 S W 1014, 177 Mo 659. 40 C.J. p 8 note 32.

17. W Va.—State v. Wisman, 116 S E. 698, 98 W Va. 183 40 C.J. p 8 note 33.

18. Ohio—Geiger v. State, 5 Ohio Cir Ct. 282, 3 Ohio Cir Dec 141. 40 C.J. p 9 note 42.

19. N.C.—State v. Wilson, 125 S.E. 612, 188 NC 781. 40 C.J. p 11 note 16.

Material variance not shown

It has been held that there is no material variance where an indictment alleging that the entire member of the body was bitten off and proof showing only a part thereof was bitten off.—Mathis v. State, 17 S E 2d 194, 66 Ga App 111.

20. Cal.—People v. Alexander, 205 P. 876, 56 Cal App 487.

21. Mo.—State v. Nieuhaus, 117 S W 73, 217 Mo 332 40 C.J. p 11 note 11.

22. Va.—Angel v. Com., 2 Va Cas 231, 4 Va 231 40 C.J. p 11 note 12.

23. Va.—Angel v. Commonwealth, supra.

24. Tenn.—State v. Ailey, 3 Heisk. 8 40 C.J. p 11 note 14.

Election

Ky.—Coleman v. Commonwealth, 138 S W 2d 555, 280 Ky. 410.

25. Ill.—People v. Yuskaukas, 109 N.E. 819, 268 Ill. 328. 40 C.J. p 8 note 35.

equivalent terms²⁶ or, it has been held, more comprehensive terms²⁷ are used; and, where there are joined to the essential statutory words other allegations which clearly charge the offense, it is sufficient.²⁸ Where, however, material terms of the statute are omitted, the indictment is insufficient.²⁹

Assault with intent to maim Similarly in case of an assault with intent to maim, the offense is properly alleged in the terms of the statute³⁰

§ 9. — Averments as to Particular Matters

- a. In general
- b. Feloniousness
- c. Willfulness, malice, and unlawfulness
- d. Premeditation and lying in wait
- e. Means, manner, and circumstances of inflicting injury
- f. Nature and extent of injury

a. In General

An indictment under a statute making the intent to maim an essential element of the offense must allege such intent.

An indictment under a statute making the intent or purpose an essential element of the offense must allege such intent,³¹ and the intent charged must be to accomplish the particular result against which the statute is directed.³²

Assault with intent to maim. There is authority for the view that in the case of an assault with intent to maim the intent should be alleged in the words of the statute.³³ However, it is sufficient if the offense is so alleged,³⁴ without setting forth particularly the manner in which it was intended to inflict the injury.³⁵

Attempt to maim An indictment for an attempt to maim should allege some overt act done by accused³⁶

b. Feloniousness

As a general rule, where a statutory offense is a felony, it is necessary that the word "feloniously" be used.

At common law, if the offense is regarded as a felony in both the appeal of mayhem and the indictment, the offense must be alleged to have been committed feloniously,³⁷ but, where the offense is not regarded as a felony, a count for a common-law mayhem should not contain the word feloniously.³⁸ Where a statutory offense is a felony, it is ordinarily necessary that the word "feloniously" should be used,³⁹ but it has been held that, where the word enters into no part of the definition of the offense as created by the statute, it is properly omitted in the indictment.⁴⁰

c. Willfulness, Malice, and Unlawfulness

The indictment should allege that the act was done maliciously, willfully, and unlawfully, where these are essential elements of the offense of mayhem.

It should be alleged that the act was done maliciously,⁴¹ willfully,⁴² voluntarily,⁴³ or unlawfully,⁴⁴ or that it was done on purpose,⁴⁵ where these elements are essentials of the statutory offense; but, where the foregoing are not elements of the offense, they need not be alleged,⁴⁶ and, where the charge as a whole shows that the essential elements have been alleged, it is ordinarily sufficient.⁴⁷

d. Premeditation and Lying in Wait

Where premeditated design and lying in wait are essential elements of the offense of mayhem, the indictment should allege them.

Short form held sufficient

Ky.—Hemphill v. Commonwealth, 96 S.W.2d 586, 265 Ky 194

26. Nev.—State v. Enkhhouse, 160 P.2d 33, 40 Nev. 1

40 C.J. p 8 note 36.

27. N.Y.—Tully v. People, 67 N.Y. 15.

28. Mo.—State v. Bunyard, 161 S.W. 756, 253 Mo 347.

29. Va.—Commonwealth v. Lester, 2 Va. Cas 198, 4 Va 198

40 C.J. p 8 note 39

30. Mo.—State v. Foster, 220 S.W. 958, 281 Mo 618

40 C.J. p 9 note 40

31. Va.—Tompkins v. Commonwealth, 13 S.E.2d 409, 177 Va 853

—Williamson v. Commonwealth, 181 S.E. 351, 165 Va 750—Meyers v Commonwealth, 188 S.E. 483, 148 Va 725

40 C.J. p 9 note 45.

32. Ohio—State v. Johnson, 51 NE 40, 58 Ohio St 417, 65 Am SR 769

33. Md.—State v. Elborn, 27 Md. 483.

40 C.J. p 9 note 43.

34. Mo.—State v. Foster, 220 S.W. 958, 281 Mo 618.

Ohio—Ridenour v. State, 38 Ohio St 273

35. Mo.—Ridenour v. State, supra

36. Va.—Commonwealth v. Clark, 6 Gratt. 675, 47 Va 675

37. Pa.—Commonwealth v. Porter, 1 Pittsb 502.

40 C.J. p 9 note 53.

38. Va.—Commonwealth v. Lester, 2 Va. Cas 198, 4 Va. 198

39. Mo.—State v. Foster, 220 S.W. 958, 281 Mo. 618

40 C.J. p 9 note 56.

40. Ala.—State v. Absence, 4 Port. 397.

41. La.—State v. Watson, 7 So. 125, 41 La. Ann 598

40 C.J. p 9 note 58

42. La.—State v. Watson, supra.

40 C.J. p 9 note 59.

43. Pa.—Respublica v. Reiker, 3 Yeates 282

44. Ala.—State v. Briley, 3 Port 472.

45. Mo.—State v. Foster, 220 S.W. 958, 281 Mo 618.

40 C.J. p 9 note 62.

46. Mo.—State v. Nieuhaus, 117 S.W. 73, 217 Mo 332—State v. Moore, 65 Mo 606.

47. Ala.—Patterson v State, 1 So.2d 759, 30 Ala.App. 135.

Tex.—Phillips v. State, 143 S.W.2d 591, 140 Tex Cr 84.

40 C.J. p 9 note 64.

Where "malice aforethought"⁴⁸ or "lying in wait"⁴⁹ is an essential element of the offense, the indictment should allege it. Also, where "premeditated design" is essential, it should be alleged,⁵⁰ but the circumstances showing it need not be alleged.⁵¹ Where malice aforethought is not an element of the offense, it need not be alleged.⁵² Under a statute providing that the offense may be committed without lying in wait, the failure of the indictment to allege whether or not the offense was committed either with or without lying in wait is immaterial.⁵³

e. Means, Manner, and Circumstances of Inflicting Injury

Under some statutes relating to mayhem failure to describe or specify the means used, or the manner of its use, does not render the indictment insufficient.

Under some statutes failure to describe or specify⁵⁴ with particularity⁵⁵ the instrument or means used, or the manner of its use,⁵⁶ or the circumstances,⁵⁷ does not render the accusation insufficient. There is authority for the view that, under an indictment for the statutory offense of cutting and wounding with intent to maim, it is not necessary to designate the instrument with which the wound was inflicted,⁵⁸ and that an allegation in the alternative as to the weapon used does not render the accusation insufficient;⁵⁹ but the means should be specified if it is sought to bring the case within a general provision of the statute as to the means used.⁶⁰ An express allegation that accused assaulted the injured person is not necessary.⁶¹ However the fact that the information or indictment states that accused assaulted the injured person does not

render it defective,⁶² even though it contains no statement that a battery was committed.⁶³

Murder or manslaughter if death had ensued. Under a statute providing for the punishment of maiming or disfiguring inflicted under such circumstances as would have made the offense murder or manslaughter if death had ensued, it is not necessary to allege that the offense would have been murder or manslaughter if death had ensued;⁶⁴ but it is sufficient⁶⁵ and essential⁶⁶ to state the circumstances which would have made the offense murder or manslaughter if death had ensued.

f. Nature and Extent of Injury

Where the statute specifically punishes, as an offense, a disabling or disfiguring, as a result of an injury, the indictment should charge that the victim was thereby maimed.

At common law the indictment must set forth particularly the consequences following the injury inflicted, and must include the allegation that the injured person was thereby maimed.⁶⁷ So, under statutes it should be charged that he was maimed or disfigured,⁶⁸ or disabled,⁶⁹ where the statute punishes, as an offense, a disabling or disfiguring by the infliction of certain injuries, notwithstanding a fixed purpose to maim is not an element of the offense,⁷⁰ although there is authority for the view that, if the term used is more comprehensive than that used in the statute, the charge is not defective.⁷¹ Generally speaking, an averment which fails to describe an injury which is within the statute is not sufficient,⁷² but the nature of the injury need not be set forth more specifically than in the general language of the act.⁷³ Under statutes which enumerate several dif-

48. Mo—State v Foster, 220 S.W. 958, 281 Mo 618.
40 C.J. p 9 note 65.

49. Pa—Respublica v. Reiker, 3 Yeates 282.

50. N.Y.—Tully v. People, 67 N.Y. 15.

51. N.Y.—Tully v People, supra.
40 C.J. p 9 note 69.

52. Mo—State v Bohannon, 21 Mo 490.

53. Del.—State v. Holmes, 55 A. 343, 20 Del. 196.
40 C.J. p 9 note 71.

54. Mo—State v. Nieuhaus, 117 S.W. 73, 217 Mo 332.

55. Mo—State v. Nerzinger, 119 S.W. 379, 220 Mo 36.
40 C.J. p 9 note 75.

56. Ky—Hemphill v. Commonwealth, 96 S.W.2d 586, 265 Ky 194.
Mo—State v. Nerzinger, 119 S.W. 379, 220 Mo. 36.

Okla—Boulding v State, Cr, 177 P.2d 153.
40 C.J. p 10 note 76.

57. Ky—Hemphill v Commonwealth, 96 S.W.2d 586, 265 Ky 194.

58. Va—Jackson v. Com., 30 S.E. 452, 96 Va. 107.
40 C.J. p 10 note 77.

59. W.Va.—State v Newsom, 13 W.Va. 859.
40 C.J. p 10 note 78.

60. W.Va.—State v. Gibson, 68 S.E. 295, 67 W.Va. 548, 28 L.R.A.N.S. 965.

61. Va.—Commonwealth v. Woodson, 9 Leigh 669, 36 Va. 669.
40 C.J. p 10 note 80.

62. Va.—Canada v Commonwealth, 22 Gratt. 899, 63 Va. 899.
40 C.J. p 10 note 81.

63. Okla—Payne v State, 209 P. 331, 21 Okla Cr 416.

64. Mo—State v Janke, 141 S.W. 1136, 238 Mo 378.
40 C.J. p 10 note 84.

65. Mo—State v Van Zant, 71 Mo 541—Jennings v. State, 9 Mo. 262.
40 C.J. p 10 note 85.

66. Mo—Jennings v. State, supra.

67. Mass—Commonwealth v. Newell, 7 Mass 245.
40 C.J. p 10 note 89.

68. Tenn—Terrell v State, 3 S.W. 212, 86 Tenn 523.

69. Va.—Commonwealth v. Lester, 2 Va.Cas 198, 4 Va. 198.

70. Tenn—Terrell v. State, 3 S.W. 212, 86 Tenn 523.

71. N.Y.—Tully v. People, 67 N.Y. 15.
40 C.J. p 10 note 93.

72. Mo.—State v. Kyle, 76 S.W. 1014, 177 Mo. 659.
40 C.J. p 10 note 94.

73. N.C—State v. Green, 29 N.C. 39.
40 C.J. p 10 note 95.

ferent injuries, denominated "mayhem" therein, the indictment need not aver this statutory conclusion.⁷⁴ Also, under a statute which prescribes a punishment for certain acts without giving a name to the offense, it has been held that an indictment need not aver that the victim was maimed,⁷⁵ and the fact that the indictment designates the crime as mayhem does not affect the validity of the verdict.⁷⁶

Assault and specific injuries, with intent to maim. Where the statute punishes specific injuries inflicted with intent to maim and disfigure, it is not necessary to allege that accused did maim and disfigure.⁷⁷ In an indictment for assault with intent to maim, it is not necessary to set forth what member of the body accused intended to destroy.⁷⁸

Permanent injury. In the absence of a demurrer, an objection that the information does not allege that the injury or disfiguration is permanent in character is not well taken.⁷⁹

§ 10. Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

In a prosecution for mayhem, the state has the burden of proving all the essential elements of the offense, and the usual presumptions arising in criminal cases will be indulged.

As in other criminal cases, as discussed in Criminal Law § 566 et seq, the prosecution must prove every element of the offense as charged.⁸⁰

Intent. Where a specific intent to maim, disfigure, or disable is an element, the intent may generally be presumed from the circumstances connected with the commission of the act,⁸¹ or from the commission of the prohibited act unless the contrary

appears,⁸² and further proof need not be adduced to show intent. Moreover, where a specific intent is not required by the terms of the statute, the intent to inflict an injury may be presumed from the commission of the act,⁸³ and in such case, if the means used in the commission of the offense were such as would in the manner used ordinarily result in maiming, the law presumes that the intention was to maim, without regard to the knowledge of the party using such means as to whether or not they were calculated to maim.⁸⁴ On the other hand, there is authority for the view that the doing of the act does not raise a presumption that it was done with the specific intent,⁸⁵ and no presumption that the specific intent existed may be indulged where the result which would constitute the offense is not the ordinary or natural result of the instrumentality used by accused.⁸⁶ Under a charge of assault with intent to maim, where no maiming actually results, there is not any presumption of fact or of law that accused intended that which his act in fact produced,⁸⁷ but the specific intent may be inferred from the surrounding circumstances,⁸⁸ and, where there has been an actual maiming, the existence of the specific intent may be inferred from the fact of maiming.⁸⁹

Malice, unlawfulness, and willfulness. It may be presumed from the commission of the act that it was done unlawfully,⁹⁰ maliciously,⁹¹ or on purpose.⁹² Moreover, malice may be presumed from the instrumentality used.⁹³

Premeditation and lying in wait. It has been held, under a statute making a premeditated design evinced by lying in wait or otherwise an element of the offense, that the existence of the design cannot be found from the mere proof of the commission of the act.⁹⁴ There is authority, however, for

74. Ala.—State v. Absence, 4 Port 397.

40 C.J. p 10 note 97.

75. Ky.—Humphill v Commonwealth, 96 S.W.2d 586, 265 Ky. 194.

76. Ky.—Swan v Commonwealth, 5 Ky L. 238.

Or.—State v Vowels, 4 Or. 324.

77. Dak.—U. S. v Gunther, 38 N.W. 79, 5 Dak 234.

Pa.—Commonwealth v Read, 4 Pa. LJR 459, 10 Pa L.J. 141.

78. Ohio—Ridenour v. State, 38 Ohio St 372.

40 C.J. p 10 note 4.

79. Nev.—State v Enkhous, 160 P 28, 40 Nev 1.

80. Va.—Tester v. Commonwealth, 160 S.E. 62, 157 Va. 326.

81. Ala.—Patterson v State, 1 So 2d 759, 30 Ala App 135.

Okl.—De Arman v State, 242 P. 783, 33 Okl Cr 79.

40 C.J. p 12 note 36.

82. Iowa—State v. Jones, 30 N.W. 750, 70 Iowa 505.

40 C.J. p 12 note 37.

83. Tex.—Rankin v State, 139 S.W. 2d 811, 139 Tex Cr. 247.

40 C.J. p 12 note 39.

84. Tex.—Rankin v State, 139 S.W. 2d 811, 139 Tex Cr. 247—Davis v State, 2 S.W. 680, 22 Tex App 45.

85. Fla.—Smith v. State, 100 So 738, 87 Fla 502.

86. Va.—Lee v. Commonwealth, 115 S.E. 671, 135 Va. 572.

40 C.J. p 12 note 42.

87. Ohio—O'Brien v State, 31 Ohio Cir Ct. 33.

88. Mo.—State v Foster, 230 S.W. 958, 281 Mo 618.

40 C.J. p 12 note 44.

89. Ohio—Ridenour v. State, 38 Ohio St 372.

90. Cal.—People v Wright, 29 P. 240, 98 Cal 564.

91. Tex.—Phillips v State, 143 S.W. 2d 591, 140 Tex Cr 84.

40 C.J. p 12 note 47.

92. N.C.—State v Skidmore, 87 N.C. 509—State v. Evans, 2 N.C. 281.

93. Mo.—State v Ma Foo, 19 S.W. 222, 110 Mo. 7, 33 Am.S.R. 414.

94. N.Y.—Godfrey v People, 63 N.Y. 207—Burke v. People, 4 Hun 481, 2 Cow Cr 258.

the view that a lying in wait⁹⁵ or malice aforethought⁹⁶ may be presumed from the circumstances surrounding the case

Self-defense On the theory that the burden of proof never shifts, as discussed in Criminal Law § 566, it is erroneous to charge that, if the injury is found to have been inflicted, the burden is on defendant to satisfy the jury that he acted in his necessary self-defense,⁹⁷ but the contrary view has also been taken⁹⁸ Where self-defense is regarded as an affirmative defense, it has been held that it may arise as an issue on the evidence introduced by the prosecution⁹⁹

Extent of injury Where the injury is such as would ordinarily be permanent, the presumption that it is permanent will be indulged in the absence of a showing to the contrary.¹

b. Admissibility

In a prosecution for mayhem, evidence which tends to establish a particular issue involved may be considered, but evidence which has no bearing on any matter at issue or which otherwise violates rules of evidence should not be admitted

General rules as to the admissibility of evidence

95. Pa.—*Republica v Langcake*, 1 Yeates 418

96. Mo.—*State v Nerzinger*, 119 S W 379, 220 Mo 36.
40 C.J. p 12 note 53

Use of profane language; drawing knife

The malice aforethought essential to commission of offense of assault with intent to maim may be shown from the conduct of accused or the circumstances attending commission of offense, such as use of profane language in addressing victim and drawing of a knife with which to intimidate or attack him—*State v Thomas*, 142 P 2d 692, 157 Kan 526, certiorari denied 64 S Ct 1055, 323 U S 739, 88 L Ed 1578

97. Okl.—*Donahue v State*, 3 P 2d 746, 52 Okl Cr 179.
40 C.J. p 12 note 56

98. N.C.—*State v Skidmore*, 87 N C 509.
40 C.J. p 12 note 57

99. Mo.—*State v Bidstrup*, 140 S W 904, 237 Mo 273.

1. Ark.—*Baker v State*, 4 Ark 56
40 C.J. p 13 note 60.

2. Tex.—*Cole v State*, 138 S W. 109, 62 Tex Cr 270.
40 C.J. p 13 note 62.

3. Va.—*Jackson v Commonwealth*, 30 S E 452, 96 Va 107.
40 C.J. p 13 note 64.

4. Tex.—*Bowers v State*, 7 S W 247, 24 Tex App 542, 5 Am S R 901
40 C.J. p 13 note 65

5. Okl.—*White v State*, 210 P. 313, 22 Okl Cr 131
40 C.J. p 13 note 66

6. Va.—*Jackson v Commonwealth*, 30 S E 452, 96 Va 107

Affairs with other women

In prosecution for castration, evidence that prosecuting witness had had affairs with other women than daughter of defendant was properly excluded—*Ramirez v State*, 40 S W 2d 138, 119 Tex Cr 362, certiorari denied *Ramirez v State of Texas*, 53 S Ct 36, 76 L Ed 558.

7. Okl.—*White v State*, 210 P. 313, 22 Okl 131
40 C.J. p 13 note 68

8. Mo.—*State v Bidstrup*, 140 S W 904, 237 Mo 273

9. Uncorroborated testimony

Conviction of offense of maiming may be based on uncorroborated testimony of prosecuting witness—*Robinson v Commonwealth, Va*, 45 S E 2d 162

Evidence held sufficient

Cal.—*People v Dugger*, 54 P 2d 707, 5 Cal 2d 337—*People v Long*, 161 P 2d 278, 70 Cal App 2d 470—*People v Crooms*, 152 P 2d 533, 66 Cal App 2d 491—*People v Foster*, 39 P 2d 271, 3 Cal App 2d 35
Ga.—*Prior v State*, 39 S E 2d 559, 74 Ga.App. 226

in criminal cases, as discussed in Criminal Law § 600 et seq, are applied in prosecutions for mayhem, including the statutory maim, or for injuring or assaulting with intent to maim Accordingly, if otherwise in accord with the rules of evidence, any evidence which fairly tends to throw light on a particular issue involved may be considered,² such as evidence as to whether the act was inflicted maliciously³ and willfully⁴ or as to motive⁵ However, evidence which has no bearing on any matter at issue⁶ or which otherwise violates rules of evidence⁷ should not be admitted A plan or diagram of the locus in quo is properly excluded where it is so inaccurate as to confuse the jury.⁸

c. Weight and Sufficiency

The general rules as to the weight and sufficiency of evidence in criminal cases are applied in prosecutions for mayhem

General rules as to the weight and sufficiency of evidence, as discussed in Criminal Law § 900 et seq, are applied in prosecutions for mayhem, including the statutory maim, or for injuring or assaulting with intent to maim,⁹ and in applying these rules there have been decisions as to the sufficiency of evidence on the issues as to the identity of the

Ill.—*People v Kopke*, 33 NE 2d 216, 376 Ill 171, certiorari denied *Kopke v State of Illinois*, 62 S Ct 87, 314 U S 646, 86 L Ed 518—*People v Jankowski*, 158 NE 362, 327 Ill. 68
Kan.—*State v Hamilton*, 240 P. 416, 119 Kan 564.

Ky.—*Coleman v Commonwealth*, 133 S W 2d 555, 280 Ky 410

Mo.—*State v Meier*, 152 S W.2d 59
Neb.—*Hiller v State*, 218 NW 386, 116 Neb 582, 53 A.L.R. 1323

Ohio—*Vey v State*, 172 NE 484, 35 Ohio App 324

Okl.—*Boulding v State, Cr*, 177 P 2d 153—*Smith v State, Cr*, 165 P 2d 381, concurring opinion 167 P 2d 83 reheard 177 P 2d 523—*Payne v State*, 63 P 2d 775, 66 Okl Cr 223—*Caster v. State*, 287 P 804, 47 Okl Cr 51

Tex.—*Henderson v State*, 114 S W 2d 881, 134 Tex Cr 130—*Ramirez v State*, 40 S W.2d 138, 119 Tex Cr 362, certiorari denied *Ramirez v State of Texas*, 52 S Ct 36, 76 L Ed 558.

Va.—*Robinson v. Commonwealth*, 45 S E 2d 162, 186 Va 992—*Harrison v Commonwealth*, 167 S.E. 251, 159 Va 986—*McElroy v. Commonwealth*, 149 S E. 481, 153 Va. 377—*Pfister v. Commonwealth*, 141 S. E 115, 149 Va 457.
40 C.J. p 13 note 73 [a]

Evidence held insufficient

Va.—*Tester v. Commonwealth*, 160 S.E. 62, 157 Va 826.
40 C.J. p 13 note 73 [b].

guilty person,¹⁰ intent,¹¹ malice aforethought,¹² the nature and extent of the injury,¹³ and as to self-defense¹⁴

§ 11. Trial

- a. Questions of law and fact
- b. Instructions
- c. Verdict

a. Questions of Law and Fact

Generally, in a prosecution for mayhem, the question of the accused's guilt and all other questions of fact in issue are for the jury.

In accordance with the rules governing criminal prosecutions generally, in a prosecution for mayhem the question whether the offense has been committed is a question for the jury,¹⁵ and this includes questions as to certain specific elements of the offense, such as intent,¹⁶ malice,¹⁷ premeditation,¹⁸ and means used.¹⁹ Likewise, the question as to whether the injury was of such character as would render accused guilty of the offense charged has been held to be a question for the jury.²⁰

Guilt of person who did not personally inflict injury. The question as to whether the act charged was the ordinary and probable effect of the wrongful act specifically agreed on by conspirators so as

to render liable one of the conspirators who had not actually committed the act is ordinarily for the jury.²¹

Defenses. On an issue of self-defense, where there is sufficient evidence thereon, questions as to whether accused had reasonable cause to apprehend the immediate danger of death or great bodily harm,²² as to which person was the aggressor, and as to whether accused used more force than was necessary,²³ and as to whether certain alleged threats by the prosecuting witness had been communicated to accused,²⁴ should be submitted to the jury.

b. Instructions

The court must instruct on the law of the case, defining the offense charged, and submit all questions of fact to the jury.

General rules as to instructions, as discussed in Criminal Law § 1189 et seq, apply in prosecutions for mayhem, including the statutory maim, or for injuring or assaulting with intent to maim.²⁵ The court must submit all questions of fact to the jury and cannot assume as true what must be found by the jury as a fact,²⁶ but an instruction is not open to the objection that the court has assumed as existing a particular fact, where it appears from the

10. Ill.—People v. Connors, 92 NE 567, 216 Ill 9
40 C.J. p 13 note 74 [a].

11. Va.—Shackelford v. Commonwealth, 32 SE2d 682, 183 Va 423
40 C.J. p 13 note 75

Evidence held sufficient
Ark.—Pate v State, 177 SW2d 938, 206 Ark 693

12. Kan.—State v Thomas, 142 P 2d 692, 157 Kan 526, certiorari denied 64 S Ct. 1055, 322 U.S. 739, 88 LE1 1578.

13. Tex.—Phillips v. State, 143 SW 2d 591, 140 Tex Cr 84—Rankin v State, 139 SW2d 811, 139 Tex Cr 247.

40 C.J. p 13 note 76.

Broken ribs

Evidence that prosecutor from a blow in the back administered by accused sustained two broken ribs was insufficient to support conviction of malicious wounding—Johnson v. Commonwealth, 35 SE2d 594, 184 Va 409

14. Tex.—Keith v. State, 232 S.W. 321, 89 Tex Cr 264, 16 A.L.R. 949.
40 C.J. p 13 note 77.

15. Ill.—People v. Kopke, 33 NE2d 216, 376 Ill 171, certiorari denied Kopke v State of Illinois, 62 S Ct 87, 314 US 646, 86 LEd 518.

Ky.—Coleman v. Commonwealth, 133 S.W2d 555, 280 Ky. 410.

Evidence held sufficient to take to jury question of defendants' guilt of castrating prosecuting witness—State v Ammons, 169 SE 631, 204 NC 753.

Member of body

Under a statute providing that to maim is to cut off or otherwise deprive a person of the hand, arm, finger, foot, leg, nose, or ear, to put out an eye, or in any way to deprive the person of another member of his body, whether a part of the human body not mentioned in the statute is a member of the body, is a question for the jury—Slattery v. State, 41 Tex 619—40 C.J. p 14 note 82

16. Ill.—People v Kopke, 33 NE2d 216, 376 Ill 171, certiorari denied Kopke v State of Illinois, 62 S Ct 87, 314 US 646, 86 LEd 518
40 C.J. p 14 note 80

17. Dak.—U. S. v. Gunther, 38 NW 79, 5 Dak. 234.

Pa.—Republica v. Langcake, 1 Yeates 415.

18. NY.—Tully v. People, 67 N.Y. 15.
40 C.J. p 14 note 82

19. Ill.—People v. Kopke, 33 NE2d 216, 376 Ill 171, certiorari denied Kopke v State of Illinois, 62 S Ct 87, 314 US 646, 86 LEd 518

20. Tex.—Bowers v. State, 7 S.W.

247, 24 Tex App 542, 5 Am SR. 901.

40 C.J. p 14 note 84

21. Tex.—Bowers v. State, supra.

Evidence held sufficient to allow jury to conclude that accused acted together with companion and agreed to the commission of the offense—Osborne v State, 151 S.W.2d 811, 142 Tex Cr. 195

22. Mo.—State v Bidstrup, 140 S.W. 904, 237 Mo 278.

23. Okl.—Donahue v. State, 3 P.2d 746, 52 Okl Cr 179.

24. Tex.—Keith v State, 232 SW 321, 89 Tex Cr. 264, 16 A.L.R. 949
40 C.J. p 14 note 87.

25. Mo.—State v. Ma Foo, 19 SW 222, 110 Mo 7, 33 Am SR. 414.
40 C.J. p 14 note 89.

Referring to sulphuric acid as poison

(1) It has been held that the court did not commit error in referring in its instructions to sulphuric acid as a poison—Hiller v State, 218 N W 386, 116 Neb. 582, 58 A.L.R. 1222

(2) This is true because a poison may be defined as substance which, when introduced into system directly or by absorption, produces violent, morbid, or fatal changes, destroying living tissue—Hiller v. State, supra.

26. Tex.—Slattery v. State, 41 Tex. 619.

whole instruction that the question has been fairly submitted for the determination of the jury.²⁷ Where the law provides that the acts must be done "willfully" or "maliciously," the court should so instruct the jury,²⁸ and it has been held that the court should define or explain such terms to the jury.²⁹ Moreover, the circumstances may be such as to require a requested instruction emphasizing a particular element of the offense charged.³⁰ The court should not submit to the jury a theory of guilt which is not covered by the formal accusation,³¹ nor should a charge be given which permits a conviction, even though a necessary element of the offense may have been lacking.³² The court should not submit to the jury a count in the indictment which is not supported by the evidence.³³

Under general rules of instructions in criminal cases, the court may properly refuse a requested charge which does not contain a correct statement of the law applicable,³⁴ as where it imposes a greater burden of proof on the prosecution than the law requires of it,³⁵ or a requested instruction which has already been covered sufficiently by other instructions.³⁶

Defenses. The court need not instruct as to a theory of defense for which there is no support in the evidence.³⁷ A charge on the subject of self-defense should give a correct statement of the law applicable to the subject,³⁸ and it is ordinarily the duty of the court to charge on questions as to self-defense where there is warrant for such charge in the evidence,³⁹ at least where such charge has been

requested by accused,⁴⁰ and the instruction should be given, it has been held, even though the question arises as an issue solely on the evidence introduced by the prosecution.⁴¹ However, a requested charge seeking the benefit of this defense is properly refused where it omits certain necessary elements of the law as to self-defense,⁴² and it is neither necessary nor proper to give an instruction with respect to this defense where there is no evidence to authorize such instruction.⁴³ Where the court submits the question of self-defense as an unlimited right, not qualified by any question as to provocation by accused, it is not necessary to instruct as to the right of accused to seek the injured person for an explanation with respect to certain difficulties between them.⁴⁴

c. Verdict

In order to sustain a conviction for mayhem, a verdict of guilty must be certain as to the elements specially found, but reasonable certainty is usually all that is required.

In a prosecution for mayhem a verdict of guilty must be certain as to the elements specially found.⁴⁵ Where accused is acquitted of the greater offense charged in the indictment and found guilty of a lesser grade embraced in such charge, the verdict should show with reasonable certainty that the jury has found him guilty of the offense of the lesser grade,⁴⁶ but reasonable certainty is usually all that is required.⁴⁷ The mere failure to designate the offense where both greater and lesser offenses are submitted is not fatal where the verdict fixes a

27. Mo—State v. Ma Foo, 19 S.W. 222, 110 Mo 7, 33 Am.S.R. 414
40 C.J. p 14 note 91.

28. Charge held not erroneous
Tex—Phillips v. State, 143 S.W.2d 591, 140 Tex.Cr. 84.

29. Tex—Bowers v. State, 7 S.W. 347, 24 Tex.App. 542, 5 Am.S.R. 901
40 C.J. p 14 notes 92, 93.

30. Va—Lee v. Commonwealth, 115 S.E. 871, 135 Va. 572
40 C.J. p 14 note 94.

31. Mo—State v. Kyle, 76 S.W. 1014, 177 Mo 659
40 C.J. p 14 note 95.

32. Ala—State v. Absence, 4 Port 397
40 C.J. p 14 note 96.

33. NC—State v. Malpass, 38 S.E. 2d 156, 226 NC 403

34. Okl—Payne v. State, 209 P. 324, 21 Okl.Cr. 416
40 C.J. p 14 note 98.

35. Mo—State v. Nerninger, 119 S.W. 379, 220 Mo 36
40 C.J. p 14 note 99.

36. Cal—People v. Alexander, 205 P.

376, 56 Cal.App. 437—People v. Nunes, 190 P. 486, 47 Cal.App. 346

37. Tex—Keith v. State, 232 S.W. 321, 89 Tex.Cr. 264, 16 A.L.R. 949
40 C.J. p 15 note 9

38. Mo—State v. Bunyard, 161 S.W. 756, 253 Mo 347
40 C.J. p 15 note 10.

Instruction held proper

In prosecution for biting off end of finger of police officer arresting defendant, instruction that defendant was guilty if biting was not in necessary or apparent necessary self-defense, and that police officer had right to arrest defendant without warrant for public offense committed in police officer's presence, and that it was defendant's duty when arrested peaceably to submit thereto, was proper as forestalling possible defense that biting grew out of fight brought about by defendant's attempt either to evade arrest or subsequently escape therefrom—Hemphill v. Commonwealth, 98 S.W.2d 536, 265 Ky. 194.

39. Okl—Donahue v. State, 3 P.2d 746, 52 Okl.Cr. 179
40 C.J. p 15 note 11.

40. Okl—Donahue v. State, supra.
Va—Jackson v. Commonwealth, 30 S.E. 452, 96 Va. 107

41. Mo—State v. Bidstrup, 140 S.W. 904, 237 Mo 273.
40 C.J. p 15 note 13.

42. Ala—Green v. State, 44 So. 194, 151 Ala. 14, 125 Am.S.R. 17, 15 Ann.Cas. 81

43. Mo—State v. Bunyard, 161 S.W. 756, 253 Mo 347—State v. Bailey, 31 Mo 484.

44. Tex—Keith v. State, 232 S.W. 321, 89 Tex.Cr. 264, 16 A.L.R. 949

45. Wis—State v. Bkadow, 45 Wis. 279
40 C.J. p 15 note 19.

46. La—State v. French, 23 So. 606, 50 La. Ann. 461
40 C.J. p 15 note 20.

47. Va—Jones v. Commonwealth, 31 Gratt. 830, 72 Va. 830.
40 C.J. p 15 note 21.

punishment applicable only to the greater offense.⁴⁸ A finding that accused is guilty of an offense of a higher degree than that charged cannot be sustained.⁴⁹ A general verdict has been held sufficient.⁵⁰

§ 12. Sentence and Punishment

The punishment on conviction for mayhem is regulated by statute

The punishment on conviction for mayhem is

regulated by statute, which either fixes the grade of the offense and assesses the punishment or merely assesses the punishment.⁵¹ At the ancient common law accused on conviction was punished by the loss of the same member of which he had caused the loss,⁵² but later this mode of punishment went out of use and then by the common law as it stood for some time the offense was punished by fine or imprisonment.⁵³

MAYOR. See the C.J.S. title Municipal Corporations § 463, also 40 C.J. p 17 notes 1-4, and 43 C.J. p 595 note 2.

MAYORAZGO. In Spanish law, formerly, the right of succession to property held in perpetuity under prohibition of alienation.¹

MAYOR DE EDAD. In Spanish law, one who has attained majority.²

MAYORDOMO. In some jurisdictions, an officer in the charge of an irrigation water system.³

MAYOR'S COURT. See Courts § 11.

MAZA. A Hindustani word meaning "taste."⁴

M.D. See Abbreviations 1 C.J.S. p 276 note 5.

ME. The objective case of "I."⁵

MEADOW. A tract of low or level land producing grass which is mowed for hay,⁶ cultivated land growing grass sowed thereon;⁷ tillable, mowing, or grass land, exclusive of uninclosed woodlands.⁸ The term is sometimes applied to low ground adjacent to streams,⁹ including salt marshes and beaches,¹⁰ and it also is applied to firm land above high tide.¹¹

"Meadow" has been held to be the equivalent of "marsh" see 55 C.J.S. p 954 note 13, and has been distinguished from "sedge-flat."¹²

MEAL. Pulverized grain ground but unbolted.¹³ The term has been held to include oatmeal and the like.¹⁴ "Meal," in this sense, has been distinguished from "flour" see 36 C.J.S. p 1032 note 68.

48. Tex.—Lee v State, 148 S.W. 567, 66 Tex.Cr. 567, 40 L.R.A.N.S., 1132.

49. Philippine—U S v. Punsalan, 23 Philippine 375, 377.

40 C.J. p 16 note 23.

50. Mo.—State v. Hampton, 256 S.W. 745.

40 C.J. p 16 note 24.

51. Nev.—State v. Enkhhouse, 160 P. 33, 40 Nev. 1.

40 C.J. p 16 note 30.

Recommendation of jury

Under some statutes it has been held that the punishment for the offense of mayhem provides for no recommendation of the jury—Coward v. State, 130 S.E. 358, 34 Ga.App. 517.

Sentences held excessive

Pa.—Commonwealth v. Ashe, 142 A. 317, 293 Pa. 332.

40 C.J. p 16 note 30 [d]

Sentence held not excessive

Sentence to four years in penitentiary for mayhem in gouging out eye of person with whom defendant had been fighting after defendant left scene of difficulty and returned with pliers with which he gouged out eye was held not excessive.—

Payne v State, 63 P.2d 779, 60 Okl. Cr. 223.

52. Neb.—Hiller v. State, 218 N.W. 386, 116 Neb. 582, 58 A.L.R. 1322. 40 C.J. p 16 note 26.

53. Ga.—Adams v. Barrett, 5 Ga. 404.

40 C.J. p 16 note 27.

1. Escriche Diccionario.

As being void by reason of code provisions see 40 C.J. p 17 notes 6, 7.

2. Escriche Diccionario.

3. N.M.—Candelaria v. Vallejos, 81 P. 589, 595, 13 N.M. 146.

4. Eng.—In re Denham, [1895] 2 Ch. 176, 179, 188.

5. Webster New Int. D.

See also "T" 42 C.J.S. p 371 notes 17-19.

A jurat, "Sworn before me," and signed by two justices, might be interpreted by referring the words in the singular number to each of the justices separately and successively, and was not invalid—Regina v. Silkstone, 2 Q.B. 520, 42 E.C.L. 788, 114 Reprint 204.

6. N.C.—State v. Crook, 44 S.E. 32, 23, 132 N.C. 1053.

40 C.J. p 17 note 15.

7. N.C.—State v. Crook, supra.

8. Me.—Barrows v. McDermott, 73 Me. 441, 451.

9. N.H.—Scott v. Wilson, 3 N.H. 321, 322.

10. N.Y.—Sandiford v. Hampstead, 90 N.Y.S. 76, 82, 97 App. Div. 163.

The term is applied to the tracts which lie above the shore and are overflowed by spring and extraordinary tide only and yield grasses which are good for hay—Church v. Meeker, 34 Conn. 421, 429.

11. Pa.—Gibson v. Hoffman, 164 A. 783, 310 Pa. 51.

12. Conn.—Church v. Meeker, 34 Conn. 421, 429.

13. Ohio—Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co., 5 Ohio St. 450, 486. 40 C.J. p 17 note 19.

Phrases

(1) "Coarse meal" see 14 C.J.S. p 1300 note 33.

(2) "Corn meal" and "unbolted corn meal" see 18 C.J.S. p 284 notes 72, 89.

14. Ala.—Holt v. Long, 174 So. 759, 760, 284 Ala. 369.

In a different sense the word "meal" is defined as food that is eaten to satisfy the requirements of hunger;¹⁵ the portion or quantity of food taken either at one of the regular times for refreshment or on occasions of hunger to satisfy the appetite¹⁶

The question as to what constitutes a meal is intimately connected with, and controlled by, individual tastes, conditions of diet, and other circumstances, and it is obviously impossible for a court to lay down a general rule of law determinative of the question which will be applicable in all cases.¹⁷ It is a matter of common knowledge that to one who is accustomed to simple sustenance a sandwich with a beverage would constitute a meal.¹⁸ On the other hand, the generally accepted concept of a meal is that it not only consists of a larger quantity of food than that which ordinarily comprises a single sandwich, but that usually it consists of a diversified selection of foods which would not be susceptible of consumption in the absence of at least some articles of tableware and which could not conveniently be consumed while one was standing or walking about.¹⁹ Thus, while a "hot dog" or hamburger sandwich is the type of food frequently offered for sale to, and desired by, persons who wish to eat something while walking about, it is not the type of food generally ordered by a person who patronizes a hotel, restaurant, or other public eating establishment with the intention of securing a meal.²⁰ It also has been stated that a meal implies that that which will be served will be more substantial in sat-

isfying the normal appetite than that which is served at a soda fountain in a drug store,²¹ since a normal person would not consider that the food and drink which he could secure at such a place would constitute a meal one day after another, and, although it might provide subsistence, it surely would not meet the demand of normal living.²²

What constitutes a meal under statutes permitting the sale of intoxicants when served with meals is discussed in *Intoxicating Liquors* § 266; and what constitutes a meal within the meaning of an order establishing a minimum wage for women and minors is discussed in *Master and Servant* § 152. License tax provisions relating to meals are discussed in *Licenses* § 30 a, d (2) (f).

MEAN.

As a Noun

A middle between two extremes, whether applied to persons, things, or time.²³

—**Means.** The plural form of the noun "mean,"²⁴ often construed as a singular noun,²⁵ with singular sense and construction.²⁶

In one sense the word "means" signifies an intermediate agency or measure;²⁷ that through which, or by the help of which, an end is attained;²⁸ that which produces a result;²⁹ something tending to an object desired;³⁰ the medium through which anything is done;³¹ the instrument or agency through which an end or purpose is accomplished;³² instruments,³³ instrumentality,³⁴ necessary condition or

15. Eng.—*Regina v Sauer*, 3 BC 308, 309, 1 Can Cr Cas 317

16. NY—*People v Friedman*, 142 NYS 367, 370, 157 App Div 437

17. Cal—*Sandelin v Collins*, 33 P 2d 1009, 1013, 1013, 1 Cal 2d 147, 93 ALR 953

18. Cal—*Sandelin v Collins*, *supra*

19. Cal—*Treasure Island Catering Co v State Board of Equalization*, 130 P 2d 1, 4, 19 Cal 2d 181

20. Cal—*Treasure Island Catering Co v State Board of Equalization*, *supra*

21. Ohio—*Greco v Moosbrugger*, App, 43 NE 2d 211, 213

22. Ohio—*Greco v. Moosbrugger*, *supra*

23. Black L D 40 C.J. p 18 note 23

24. Ill—*Ebbert v Metropolitan Life Ins Co*, 7 NE 2d 336, 342, 289 Ill App 342

Mo—*Caldwell v Travelers' Ins Co*, 267 SW 907, 921, 305 Mo 619, 39 ALR 56

Tenn.—*Provident Life & Accident*

Ins Co v. Campbell, 79 SW 2d 292, 296, 18 Tenn App 452

25. Ill—*Ebbert v Metropolitan Life Ins Co*, 7 NE 2d 336, 342, 289 Ill App 342

26. Mo—*Caldwell v Travelers' Ins Co*, 267 SW 907, 921, 305 Mo 619, 39 ALR 56

Tenn—*Provident Life & Accident Ins Co v Campbell*, 79 SW 2d 292, 296, 18 Tenn App 452

27. Ind—*Littell v State*, 33 NE 417, 418, 133 Ind. 577

Mo—*Caldwell v Travelers' Ins Co*, 267 SW 907, 921, 305 Mo 619, 39 ALR 56—*Pope v Business Men's Assur Co of America*, 131 SW 2d 887, 892, 235 Mo App 263

Tenn—*Provident Life & Accident Ins. Co v. Campbell*, 79 SW 2d 292, 296, 18 Tenn App 452

28. Ind—*Littell v State*, 33 NE 417, 418, 133 Ind. 577

Mo—*Caldwell v Travelers' Ins Co*, 267 SW 907, 921, 305 Mo 619, 39 ALR 56—*Pope v Business Men's Assur Co of America*, 131 SW 2d 887, 892, 235 Mo App. 263

Tenn.—*Provident Life & Accident*

Ins Co v Campbell, 79 S.W.2d 292, 296, 18 Tenn App 452

29. NY—*Tucker v Hartford Mut Ben Life Ins Co*, 4 N.Y.S 505, 506, 50 Hun 50

40 C.J. p 18 note 35

30. Mo—*Caldwell v Travelers' Ins Co*, 267 SW 907, 921, 305 Mo 619, 39 ALR 56—*Pope v Business Men's Assur. Co of America*, 131 SW 2d 887, 892, 235 Mo App 263

Tenn—*Provident Life & Accident Ins Co v. Campbell*, 79 SW 2d 292, 296, 18 Tenn App 452

31. Ill—*Ebbert v Metropolitan Life Ins Co*, 7 NE 2d 336, 342, 289 Ill App 342

32. Tex—*Fort Worth Mut Benev Ass'n of Texas v Miller*, Civ App, 280 SW 332, 340.

33. Mo—*Caldwell v Travelers' Ins Co*, 267 SW 907, 921, 305 Mo 619, 39 ALR 56—*Pope v Business Men's Assur Co of America*, 131 SW 2d 887, 892, 235 Mo App 263

Tenn—*Provident Life & Accident Ins Co v Campbell*, 79 SW 2d 292, 296, 18 Tenn App 452

34. Ill—*Ebbert v. Metropolitan*

coagent;³⁵ a plan or method of procedure;³⁶ the process adopted in order to attain an end;³⁷ procurement or instigation.³⁸ In this sense the word may be used as synonymous with "agency" see Agency § 1 a (2), "cause" see 14 C.J.S. p 42 note 25, and "instrumentality" see 14 C.J.S. p 42 note 54; and is distinguishable from "event" see 31 C.J.S. p 473 note 19, "machine" see 54 C.J.S. p 892 note 80, and "materials" see ante p 450 note 45.

In another sense the word "means" signifies estate;³⁹ income;⁴⁰ property;⁴¹ resources;⁴² disposable resources;⁴³ any resources from which the wants of life may be supplied;⁴⁴ and the word may signify money,⁴⁵ without necessarily being restricted to money on hand.⁴⁶ It may consist either of property of a physical character, frequently referred to as assets, or it may consist of income from such property or income from labor or services performed.⁴⁷ The word refers to property or capabilities of producing property and does not include gifts which may or may not be made at some future time.⁴⁸

As an Adjective

Average; in a mathematical sense, having an intermediate value between two extremes, or between the several successive values of a variable quantity during one cycle of variation.⁴⁹

As a Verb

A transitive verb⁵⁰ defined as to have in mind;⁵¹

to intend.⁵²

"Means" has sometimes been taken as synonymous with "includes," and the words have also been compared or distinguished see 42 C.J.S. p 526 notes 11, 15. The participial forms, "meaning" and "meant," have also been compared with, or distinguished from, "includes" see 42 C.J.S. p 526 notes 14, 16.

Cross References and Phrases

"Means" of husband as a factor in determining the amount of temporary alimony or support see Divorce § 212; and as a factor in determining the amount of permanent alimony or support see Divorce § 236. Abandoning a wife and leaving her without adequate means of support as a criminal or quasi-criminal offense see Husband and Wife § 630. What constitutes "means" as bearing on the right to receive old-age assistance benefits under social security legislation is discussed in the C.J.S. title Social Security and Public Welfare. The patentability of a means of producing a physical result is discussed in the C.J.S. title Patents § 9, also 48 C.J. p 20 note 12. What constitutes the mean of the reserve fund of a life insurance company for the purposes of computing income tax deductions and credits is discussed in Internal Revenue § 249 b. The signification of the word "mean" when applied to a horse is discussed in Animals § 176 d.

—Phrases.

Accidental means The phrases "accidental means,"

- Life Ins. Co. 7 NE2d 336, 342, 289 Ill App 342
35. Mo.—Caldwell v. Travelers' Ins Co, 287 SW 907, 921, 305 Mo 619, 39 A.L.R. 56—Pope v Business Men's Assur Co of America, 131 SW2d 887, 893, 235 Mo App 263
- Tenn.—Provident Life & Accident Ins. Co v. Campbell, 79 S.W.2d 292, 296, 18 Tenn App 452
36. Tex.—Texas & P. R. Co v Beezley, 101 SW. 1051, 1052, 48 Tex Civ App 108
37. Ill.—Ebbert v. Metropolitan Life Ins Co, 7 NE2d 836, 342, 289 Ill App. 342.
38. Mass.—Fitchburg v Cheshire R Co, 110 Mass. 210, 212.
39. Mo.—Corpus Juris quoted in Moore v State Social Security Commission, 122 S.W.2d 391, 394, 233 Mo App. 536
- 40 C.J. p 18 note 41.
40. Mo.—Corpus Juris quoted in Moore v State Social Security Commission, 122 S.W.2d 391, 394, 233 Mo App 536
- 40 C.J. p 18 note 42
41. Mo.—Corpus Juris quoted in

- Moore v State Social Security Commission, 122 SW2d 391, 394, 233 Mo App 536
- NC.—Vass v Southall, 26 N.C. 301, 303
42. Mo.—Corpus Juris quoted in Moore v State Social Security Commission, 122 S.W.2d 391, 394, 233 Mo App 536
- 40 C.J. p 18 note 45
43. Mo.—Moore v. State Social Security Commission, 122 SW2d 391, 394, 233 Mo App 536.
44. La.—Bowsky v. Silverman, 168 So 121, 122, 184 La. 977.
45. Mo.—Corpus Juris quoted in Moore v State Social Security Commission, 122 S.W.2d 391, 394, 233 Mo App. 536.
- NY.—Anonymous v. Anonymous, 19 NYS2d 953, 956
- 40 C.J. p 18 note 43.
- According to the context, the term has been held to exclude money—Leinkauf v Barnes, 5 So 402, 403, 66 Miss 207, 215.
46. N.Y.—People v. Palmer, 35 NYS 231, 232, 13 Misc. 727.
- 40 C.J. p 18 note 43 [b].

47. La.—Bowsky v. Silverman, 168 So 121, 122, 184 La. 977.
48. Mo.—Moore v. State Social Security Commission, 122 S.W.2d 391, 394, 233 Mo App 536.
- Similarly expressed
- "No court or law writer, so far as our research has disclosed, has ever said that an indigent person whose only support is contributions made by one who is not under legal duty to make them, has resources, means or means of support."—Moore v State Social Security Commission, supra.
49. In insurance
- US—Western & Southern Life Ins Co v. Huwe, CCA Ohio, 116 F2d 1008, 1009, 1010.
50. Mo.—La. Hue v. Bungenstock, 249 SW. 402, 404, 297 Mo. 577
51. Mo.—La. Hue v. Bungenstock, supra
- 40 C.J. p 18 note 25.
52. Mo.—La. Hue v. Bungenstock, supra.

"external, violent, and accidental means of injury," and other phrases of like import are frequently employed in policies of insurance, particularly accident insurance policies, see Insurance §§ 753 b, 754, and double indemnity clauses of life insurance policies see Insurance § 938 c, d. See also 1 C.J.S. p 452 note 47.

Means of support. In its general sense, all those resources from which the necessities and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income.⁵³ In a limited sense, it signifies any resource from which the wants of life may be supplied.⁵⁴

Other phrases employing the word "mean" in its various forms are set out in the note,⁵⁵ and for additional phrases as to which more recent adjudications have not been found see 40 C.J. p 18 note 47—p 19 note 79.

MEANDER. A turn or winding, as of a stream; hence, a winding path or course, a labyrinth⁵⁶ The term is defined as used with reference to boundaries of a tract of land or territory in Boundaries § 4.

Phrases employing the word are set out in the note.⁵⁷

MEANTIME. During the interval between two

given times;⁵⁸ the time during the interval between two given dates,⁵⁹ during the intervening time; during the interval; at the same time.⁶⁰

MEANWHILE. During the interval between two given times; during the intervening time; during the interval; at the same time.⁶¹

MEASURE. Anything devised or done with a view to the accomplishment of a purpose;⁶² a plan or course of action intended to obtain some object;⁶³ any course of action proposed or adopted by a government⁶⁴

The word "measure," when employed as a noun to indicate a unit of measure, or when used as a verb meaning to compute or ascertain the extent, degree, quantity, dimensions, or capacity of, by a rule or standard, or to take or make a measurement or measurements, is defined and discussed in the C.J.S. title Weights and Measures § 1, also 40 C.J. p 19 notes 83, 84, 89, and 68 C.J. p 151 note 5.

As a legislative enactment the term is defined and discussed in the C.J.S. title Statutes § 1, also 40 C.J. p 19 note 88.

The noun "measure" has been compared with, or distinguished from, "estimate," and the verb "measure" has been held to be equivalent to, or a synonym of, "estimate," see 31 C.J.S. p 183 note 48, p 184 note 55 "Measured" has been compared with,

53. Ill—Pearson v. Renfro, 50 NE 2d 598, 600, 601, 320 Ill App 202—Earp v. Lilly, 120 Ill App. 123, 127 Pa—Corpus Juris quoted in In re Richardson's Estate, 6 Pa.Dist. & Co. 785, 788 40 C.J. p 19 note 73 [a] (1).

54. Ill—Pearson v. Renfro, 50 NE 2d 598, 600, 601, 320 Ill App 202—Earp v. Lilly, 120 Ill App. 123, 127. Pa—Corpus Juris quoted in In re Richardson's Estate, 6 Pa.Dist. & Co. 785, 788 40 C.J. p 19 note 73 [a] (2).

55. Phrases

(1) "Anti-means doctrine" see 3 C.J.S. p 1397 note 34

(2) "Mean and include" as sometimes synonymous with "includes," and as compared with, or distinguished from, "includes," see 42 C.J.S. p 525 note 10, p 526 note 13.

(3) "Mean low tide" and "mean lower low tide" see 54 C.J.S. p 883 note 17.

(4) "Mean reserve" as an insurance term see Insurance § 103.

(5) "Means of knowledge" as equivalent to "knowledge" see 51 C.J.S. p 465 note 75.

(6) "Means' religious doctrine" see 27 C.J.S. p 1311 note 98.

(7) "Mean sun time" or "mean solar time" see the C.J.S. title Time § 7, also 62 C.J. p 862 notes 41–45

(8) "Means which 'thereby caused' as equivalent to, or interchangeable or synonymous with, 'proximate cause' see 14 C.J.S. p 46 note 98

(9) "Mean width" as not a synonym of 'frontage' see 37 C.J.S. p 1387 note 5

(10) "Reasonable means" has been held to signify such means as a reasonably prudent person would use under like circumstances—Terre Haute, I & E Traction Co. v. Stevenson, 123 NE 785, 789, 189 Ind 100

(11) "Shall mean" as equivalent to "shall be construed" see 16 C.J.S. p 1517 note 8

(12) "Without visible means of support" as used in connection with vagrancy laws see the C.J.S. title Vagrancy § 1 et seq., also 66 C.J. p 399 note 1 et seq

56. Webster New Int.D.

57. Phrases

(1) "Meander corner" defined see Boundaries § 4

(2) "Meandered waters" see

Boundaries § 80 "Meander line" treated and discussed with reference to navigable waters see the C.J.S. title Navigable Waters §§ 5, 63, 82, 103, also 45 C.J. p 416 note 93, p 494 notes 86–90, p 527 note 47 [f], p 552 note 93 As discussed with reference to nonnavigable waters see the C.J.S. title Waters §§ 107, 108, also 67 C.J. p 854 note 64—p 855 note 67, p 556 note 80

52. NJ—Gates v. Plainfield Trust Co., 191 A 304, 309, 121 NJ Eq 460

"In the meantime" see 42 C.J.S. p 481 notes 53–57

59. Fla—Eli Witt Cigar & Tobacco Co. v. Somers, 127 So 333, 334, 99 Fla 592

60. NJ—Gates v. Plainfield Trust Co., 191 A 304, 309, 121 NJ Eq 460

61. NJ—Gates v. Plainfield Trust Co., supra

62. Ohio—McFarlan v. Norwood, 19 Ohio NP, NS, 145, 150.

"Measure of damages" defined generally see Damages § 71.

63. Ohio—McFarlan v. Norwood, supra

40 C.J. p 19 note 86.

64. Ohio—McFarlan v. Norwood, supra.

or distinguished from, "estimated" see 31 C.J.S. p 194 note 65.

MEASUREMENT. Act or result of measuring something, also, the extent, size, capacity, amount, or quantity ascertained by measuring.⁶⁵

MEAT. While the term "meat" may be used in a generic and comprehensive sense so as to include foods other than the flesh of animals,⁶⁶ the term applying not only to the flesh of all animals used for food, but, in a general sense, to all kinds of provisions⁶⁷ fit for the sustenance of man,⁶⁸ in its usual interpretation it is defined as the flesh of vertebrate animals used as food, sometimes limited colloquially to the flesh of mammals, as opposed to poultry, game, fish, frogs, turtles, and the like;⁶⁹ flesh, as distinguished from fish or fowl.⁷⁰

Phrases employing the word are set out in the note ⁷¹

MECHANIC. A term derived from the Latin "mechanicus."⁷²

As a Noun

The word "mechanic" is generally construed in

its ordinary meaning and acceptation,⁷³ and, while it is a term somewhat loosely applied,⁷⁴ as a general rule, in order to be a mechanic, it is necessary that the person should be an operative engaged in a business requiring some particular skill in doing work.⁷⁵ The word connotes a manual occupation;⁷⁶ a performance of mechanical labor, or work at one of many constructive trades, as a principal means of livelihood,⁷⁷ although it has been said that it always excludes agricultural laborers or laborers who work with pick, shovel, spade, or similar tools.⁷⁸ At one time the word was synonymous with "artisan" see 6 C.J.S. p 779 note 6, but it now is commonly restricted to a workman who is skilled in constructing, repairing, or using machinery.⁷⁹ It is used in contradistinction to contractors, superintendents, capitalists, or mere owners of machinery,⁸⁰ and it includes all mechanics, whether master workmen or journeymen.⁸¹

In its broadest sense, a mechanic is any one who is a skilled worker with tools;⁸² and the term is defined as meaning any skilled worker with tools;⁸³ one who is skilled in the use of tools or instruments;⁸⁴ one skilled in a mechanical occupation or art;⁸⁵ one who practices any mechanic⁸⁶ or mechanical⁸⁷ art or trade,⁸⁸ one who follows a mechanical occupa-

65. Webster New Int D

"Survey measurement" distinguished from "conversion method" see 18 C.J.S. p 42 note 82.

66. Ind—Gardner v State, 108 NE 330, 183 Ind 101

67. Ark—State v. Oakley, 10 SW 17, 51 Ark 112

NC—State v. Patrick, 79 NC 655, 856, 38 Am R 340

Held to include

Veal, which is dead meat obtained from a calf—Williams v Davies, 89 L.J.K.B. 1164, 1165

Held not to include

Ice cream—Slater v Evans, [1918] 2 KB 403

68. Wis—State v. Morey, 2 Wis 494, 495, 60 Am D 439

69. Ind—Gardner v State, 108 NE 330, 183 Ind 101

70. U.S.—Neuman & Schwiers Co v U.S., 19 Cust. & Pat App. Customs, 375, 379

71. Phrases

(1) "Cured meat" as equivalent to "salted meat" and as distinguished from "fresh meat" see 25 C.J.S. p 30 note 33

(2) "Meat food product."—Pittsburgh Melting Co v Totten, Pa., 39 S Ct 3, 4, 248 US 1, 7, 63 L Ed 97

(3) "Meat house" see 41 C.J.S. p 366 note 83

(4) "Meat market" as synonymous

with "butcher shop" see 13 C.J.S. p 860 note 73

(5) "Meat packing house" see 41 C.J.S. p 366 note 83

(6) "Meat prepared or preserved" as subject to customs duties see Customs Duties § 38

(7) "Meat stores" should be construed to include all sorts of meats, whether fish, flesh, or fowl—Vosse v Memphis, 9 Lea, Tenn., 294, 299

72. Ark—Gulledge v. Preddy, 82 Ark 433, 434

73. Alta—Hutchinson v Shearer, 13 Alta L 809, 41 Dom L R 418, 419, [1918] 2 West Wkly 480

74. Pa.—Mechanical Business Cases, 9 Pa Co 1, 3.

75. Ga—Evans v Beddingfield, 32 SE 664, 106 Ga 755

76. Mass—Lesuer v City of Lowell, 116 NE 483, 484, 227 Mass 44, L R A 1918F 197

40 C.J. p 20 note 30

77. Mass—Lesuer v City of Lowell, supra.

78. Pa.—Mechanical Business Cases, 9 Pa Co 1, 3

79. Ariz—Mack v Boots, 289 P 794, 795, 29 Ariz 116.

Kan—State v. Ottawa, 113 P 391, 393, 84 Kan. 100

Okl—Russell Flour & Feed Co v Walker, 298 P. 291, 292, 148 Okl 164.

Similarly expressed

The term is sometimes restricted to those employed in making or repairing machinery—Mechanical Business Cases, 9 Pa.Co 1, 3

80. SC—Parkerson v. Wightman, 35 SCL 363, 365.

81. SC—Parkerson v. Wightman, supra

40 C.J. p 21 note 38

82. Okl—Russell Flour & Feed Co. v Walker, 298 P 291, 292, 148 Okl 164

40 C.J. p 21 note 34 [a.]

83. US—In re Osborn, DCNY., 104 F 780, 781

La—New Orleans v Lagman, 10 So 244, 245, 43 La Ann 1180

84. Mich—Smith v German Ins Co., 65 NW. 286, 239, 107 Mich. 270, 30 L R A 368

85. Iowa—Smith v Osburn, 5 NW. 681, 682, 53 Iowa 474

86. Ariz—Arizona Eastern Railway Co v. Matthews, 180 P 159, 161, 20 Ariz 282, 7 A L R. 1149

Ga—Wager v Carrollton Bank, 130 SE 116, 119, 156 Ga. 783.

Okl—Russell Flour & Feed Co v Walker, 298 P 291, 292, 148 Okl 164

87. Pa.—Mechanical Business Cases, 9 Pa Co 1, 2

88. Okl—Russell Flour & Feed Co v. Walker, 298 P. 291, 292, 148 Okl 164.

tion for a living;⁸⁹ one employed in mechanical or manual labor;⁹⁰ a workman or laborer other than agricultural;⁹¹ one actually engaged with his own hands in constructive work;⁹² one engaged in operating a machine or machinery;⁹³ one who works and performs services with machinery or mechanics;⁹⁴ one who works with machines or instruments.⁹⁵

The word has been broadly defined as meaning an artificer;⁹⁶ an artisan;⁹⁷ an artist;⁹⁸ a handicraftsman;⁹⁹ a laborer;¹ a mechanician;² an operative.³

More comprehensive definitions are to the effect that a mechanic is one skilled or employed in shaping and uniting materials, as wood, metal, etc., into any kind of a structure, machine, or other objects requiring the use of tools or other instruments.⁴

a workman employed in shaping and uniting materials, such as wood, metal, etc., into some kind of structure, machine, or other object, requiring the use of tools,⁵ a person whose occupation is to construct machines, or goods, wares, instruments, furniture, and the like.⁶

Defined in connection with the building trade, a mechanic is a person skilled in all the trades which have to do with the construction of buildings;⁷ a workman who shapes and applies material in the construction of houses.⁸

In the subjoined notes examples are given of particular persons or occupations which the term has been held to include,⁹ and which the term has been held not to include.¹⁰

"Mechanic" has been held synonymous with "artisan" see 6 CJS p 779 note 6, and has been com-

89. Mich—Smith v German Ins Co, 65 NW 236, 239, 107 Mich 270, 278, 30 LRA 368

Pa—Mechanical Business Cases, 9 Pa Co 1, 3

Spanish Academy dictionary meaning
The word "mechanic," according to all dictionaries, and particularly that of the Spanish Academy, means he who earns his livelihood with his hands—Domingo v Osorio, 7 Philippine 405, 407

90. US—White Cleaners & Dyers v Hughes, DCLa., 7 F Supp 1017, 1020

La—State v Banner Cleaners & Dyers, Inc, 168 So 127, 128, 184 La 997—State v Up-To-Date Shoe Repairing Co, 144 So 714, 715, 175 La 917—State v Chicago Hat Works, 141 So 844, 845, 174 La 814—State v. C C Hartwell Co, 41 So 444, 447, 117 La 144—Theobalds v. Conner, 7 So 689, 690, 43 La Ann 787.

Similarly defined

(1) One employed in mechanical labor—Mechanical Business Cases, 9 Pa Co 1, 3

(2) One who is employed in manual occupation, a handicraft man, or a skilled workman, especially one who is concerned with the making or use of machinery—Hutchinson v Shearer, 13 Alta L 809, 311, 41 Dom L R 418, [1918] 2 West Wkly. 480

91. Mont—Merrigan v. English, 22 P 454, 457, 9 Mont 113, 5 LRA 837.

40 CJ p 20 note 18.

92. La—New Orleans v Lagman, 10 So 244, 245, 43 La Ann 1180

93. Mo—Tatum v Crescent Laundry Co, 208 SW 139, 142, 201 Mo App 97

94. Okl—Kansas City Southern R

Co v Wallace, 132 P 908, 911, 38 Okl 233, 46 LRA NS, 112

95. Iowa—Smith v Osborn, 5 NW 681, 682, 53 Iowa 474
40 CJ p 20 note 28

96. Ga—Wager v Carrollton Bank, 120 SE 116, 119, 156 Ga 783
40 CJ p 20 note 7

97. Ariz—Arizona Eastern Railway Co v Matthews, 150 P 159, 161, 30 Ariz 282, 7 ALR 1149

Okl—Russell Flour & Feed Co v Walker, 298 P. 291, 293, 148 Okl 164
40 CJ p 20 note 8.

98. Pa—Berk County v. Bertolet, 13 Pa 522, 524.

99. NY—People v Buffalo, 42 NY S 545, 547, 18 Misc 533, 536

1. Kan—Missouri, K & T. R Co v Baker, 14 Kan 563, 567.

2. Ga—Wager v Carrollton Bank, 120 SE 116, 119, 156 Ga. 783.

3. Pa—Mechanical Business Cases, 9 Pa Co 1, 3

4. Ariz—Arizona Eastern Railway Co v Matthews, 180 P. 159, 161, 20 Ariz 282, 7 ALR 1149

Okl—Russell Flour & Feed Co v Walker, 298 P. 291, 293, 148 Okl 164
40 CJ p 20 note 17 [a] (1).

5. Mich—Smith v German Ins Co, 65 NW 236, 239, 107 Mich 270, 30 LRA 368
40 CJ p 20 note 17.

6. Ga—Savannah & C R. Co v Calahan, 49 Ga. 506, 511.
Iowa—Smith v Osburn, 5 NW 681, 682, 53 Iowa 474

7. NY—People v. Buffalo, 42 NY S 545, 547, 18 Misc 533

8. La—New Orleans v Lagman, 10 So. 244, 245, 43 La Ann, 1180,

9. Held included

(1) Barber

La—State v Chicago Hat Works, 141 So 844, 845, 174 La 814

Me—State v Cohen, 177 A 403, 405. 133 Me 293

40 CJ p 21 note 40

(2) Carpenter see 12 CJS p 1151 note 91

(3) Civil engineer—Amazon Irr Co v. Briesen, 41 P 1116, 1119, 1 Kan App 758

(4) Dentist see the CJS title Physicians and Surgeons § 1, also 40 CJ p 21 note 45

(5) Machinist and a master machinist see 54 CJS p 894 notes 24, 25

(6) Painter.—Garrebian v. Continental Ins Co, 67 A. 90, 93, 75 N.J. Law 577, 13 LRA NS., 443

(7) Other particular persons or occupations see 40 CJ p 21 notes 29, 41, 44, 46, 48, 50-53

10. Held not included

(1) Civil engineer—Gulf & B V R Co v Berry, 72 SW 1049, 1050, 31 Tex Civ App 408

(2) Dentist see the CJS title Physicians and Surgeons § 1, also 40 CJ p 21 note 60

(3) Fireman—Dewney's Case, 111 NE 788, 789, 223 Mass. 370—40 CJ p 21 note 65

(4) Optometrist see the CJS title Physicians and Surgeons § 1, also 40 CJ p 21 note 73

(5) Painter—Smith v German Ins Co, 65 NW 236, 239, 107 Mich 270, 30 LRA 368

(6) Photographer—Mullinnix v. State, 60 SW 768, 42 Tex Cr 526, 527—40 CJ p 21 note 75

(7) Other particular persons or occupations see 40 CJ p 21 notes 54-56, 58, 59, 61-64, 66-72, 76-79.

pared with, or distinguished from, "artificer," "artisan," and "craftsman" see Artificer 6 C.J.S. p 778 note 73. "Mechanic" has also been compared with, or distinguished from, "laborer" see 51 C.J.S. p 480 note 67, "manufacturer" see Manufactures § 1 b (3), "painter,"¹¹ and "workman."¹²

The term "mechanic" has been defined and discussed as used in exemption statutes in Exemptions § 24 d (4); and as used in statutes providing for mechanics' liens see Mechanics' Liens § 87. The admissibility in evidence of books of mechanics is treated in Evidence § 683 d, and for other references to mechanics in the law of evidence see the index to that title.

Phrases employing the word are set out in the note.¹³

As an Adjective

The word "mechanic," when employed as an adjective, means pertaining to manual labor,¹⁴ involving manual skill¹⁵

MECHANICAL. The word "mechanical" is de-

rived from the Latin "mechanicus" and the Greek "mechane."¹⁶ It has a very broad meaning,¹⁷ and has a primary meaning¹⁸ as well as derivative meanings more or less remote from the primary sense of the term.¹⁹

Primarily, the word "mechanical" means pertaining to machinery,²⁰ of, pertaining to, or concerned with, machinery or mechanism;²¹ having relation to, produced or accomplished by, the use of mechanism or machinery;²² pertaining to, or in accordance with, the principal laws of mechanics;²³ of the nature or character of a machine or machinery,²⁴ pertaining to, governed by, or in accordance with, mechanics or the laws of motion;²⁵ pertaining to the science of mechanics or mechanism;²⁶ resembling a machine.²⁷

The term is frequently defined as meaning employment in manual labor,²⁸ engaged in manual labor;²⁹ of, pertaining to, or concerned with, manual labor;³⁰ belonging to or relating to those who live by hand labor,³¹ of the artisan class;³² pertaining to artisans or mechanics or their implements;³³ skilled in mechanics.³⁴

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| <p>11. Mich—Smith v. German Ins Co, 65 N.W. 236, 239, 107 Mich 270, 80 L.R.A. 368
46 C.J. p 1170 note 63 [d]
12. Kan—State v. Ottawa, 113 P. 391, 393, 54 Kan 100
71 C.J. p 178 note 80.
13. Phrases
(1) "Mechanic's shop" distinguished from "factory" see Manufactures § 1 c (2)
(2) "Practical mechanic," one who is especially skilled in the art of building, and acquainted with the rules and methods observed and pursued by those engaged in constructing, altering, and repairing buildings of all kinds, and possessing the skill to apply those rules, and to adopt and follow those methods—People v. Buffalo, 43 N.Y.S. 545, 547, 18 Misc 532—40 C.J. p 20 note 29
14. Ind—McErlain v. Taylor, 192 N.E. 260, 262, 207 Ind 240, 94 A.L.R. 1284.
Okl—Russell Flour & Feed Co v. Walker, 298 P. 291, 392, 148 Okl 164
15. Okl—Russell Flour & Feed Co. v. Walker, supra.
16. Pa—Mechanical Business Cases, 9 Pa.Co. 1, 3
17. Mo—Tatum v. Crescent Laundry Co, 208 S.W. 139, 143, 201 Mo App 97.
18. Conn—Coast & Lakes Contracting Corp v. Martin, 101 A. 502, 503, 92 Conn 11
Pa—Mechanical Business Cases, 9 Pa.Co. 1, 3.</p> | <p>19. Pa—Mechanical Business Cases, supra
20. Conn—Coast & Lakes Contracting Corp v. Martin, 101 A. 502, 503, 92 Conn 11.
21. Ariz—Arizona Eastern R. Co v. Matthews, 180 P. 159, 161, 20 Ariz 282, 7 A.L.R. 1149
Neb—State v. Crounse, 181 N.W. 562, 563, 105 Neb. 672, 16 A.L.R. 533
Similarly defined
(1) Of or pertaining to mechanism or machinery—In re Keystone Laundry Co, 18 Pa.Co. 444.
(2) Pertaining to mechanics or machinery—Tatum v. Crescent Laundry Co, 208 S.W. 139, 143, 201 Mo.App 97.
(3) Depending on mechanism or machinery—In re Keystone Laundry Co, supra.
(4) Dependent on the use of mechanism—In re Keystone Laundry Co, supra.
22. Okl—Layne v. Oklahoma Tax Commission, 179 P.2d 682, 685, 198 Okl 458
23. Pa—Mechanical Business Cases, 9 Pa.Co. 1, 3
24. Pa—In re Keystone Laundry Co, 18 Pa.Co. 444
25. Pa—In re Keystone Laundry Co, supra.
26. Pa—Mechanical Business Cases, 9 Pa.Co. 1, 3
27. Pa—Mechanical Business Cases, supra.</p> | <p>28. U.S.—White Cleaners & Dyers v. Hughes, D.C.La., 7 F.Supp. 1017, 1020
La—State v. Banner Cleaners & Dyers, Inc, 168 So. 127, 128, 184 La 997—State v. Up-To-Date Shoe Repairing Co, 144 So. 714, 715, 175 La 917—State v. Chicago Hat Works, 141 So. 844, 845, 174 La. 814—State v. C. C. Hartwell Co, 41 So. 444, 447, 117 La. 144—Theobalds v. Conner, 7 So. 689, 690, 42 La Ann. 787.
29. Ariz—Arizona Eastern R. Co. v. Matthews, 180 P. 159, 161, 20 Ariz. 282, 7 A.L.R. 1149
Neb—State v. Crounse, 181 N.W. 562, 563, 105 Neb. 672, 16 A.L.R. 533
30. Ariz—Arizona Eastern R. Co v. Matthews, 180 P. 159, 161, 20 Ariz. 282, 7 A.L.R. 1149
Neb—State v. Crounse, 181 N.W. 562, 563, 105 Neb. 672, 16 A.L.R. 533
31. Pa—Mechanical Business Cases, 9 Pa.Co. 1, 2.
32. Neb—State v. Crounse, 181 N.W. 562, 563, 105 Neb. 672, 16 A.L.R. 533
Pa—Mechanical Business Cases, 9 Pa.Co. 1, 2, 3.
Similarly defined
Bred to manual labor.—Mechanical Business Cases, supra.
33. Pa—Mechanical Business Cases, supra.
34. Pa—Mechanical Business Cases, supra.</p> |
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The word "mechanical" is also defined to mean done as if by a machine or without conscious exertion of will, proceeding from habit, not from intention or reflection, as a mechanical action or movement;³⁵ appertaining to or exhibiting constructive power;³⁶ made or formed by a machine or with tools³⁷

Mechanical pursuit The term "mechanical pursuit" is defined as a business, calling, or occupation which cannot be utilized unless resort is had to the use of some machinery or instrument of force, or appliance of power, in aid of manual work, in some physical undertaking, in which the intervention or interaction of a superior mind is not required. That is, the occupation must be one by which the object realized is not dependent for its confection on the exertion of a controlling intellect, but rather on the adaptation of some helping mechanism, or use of some auxiliary tool or instrument³⁸ In determining whether a particular occupation is a mechanical pursuit or a profession, the test, as stated in numerous definitions and by many authorities, is whether or not the intellectual quality predominates over manual skill in performing the duties of the particular calling. If the mental aspect is controlling, then the pursuit is classified as a profession. If skill in the manipulation of the hands, tools, and machinery is emphasized over the mental side, then

the calling is classified as a mechanical pursuit.³⁹ There are certain callings which require both intellect and skill, but in such instances the pursuit is classified or listed as a profession, as in the case of artists, dentists, surgeons, etc., and there are instances where it is extremely difficult to determine which of the two qualities is most emphasized or required in the proper carrying out of the duties of the occupation. All skilled artisans engaged in mechanical pursuits by the very nature of their occupation require some education, periods of apprenticeship, and experience, even though the state or the subdivision thereof has not passed legislation to regulate them⁴⁰ What constitutes a "mechanical pursuit" within the meaning of statutes dealing with the employment of convict labor is treated in Convicts § 26.

Other phrases employing the word are set out in the note,⁴¹ and for additional phrases as to which more recent adjudications have not been found see 40 C.J. p 22 note 17, p 23 notes 20-22, 24, 25.

MECHANICIAN. One skilled in the theory or construction of machines; a machinist.⁴²

MECHANICS. That science, or branch of applied mathematics, which treats of the action of forces on bodies⁴³

35. Pa.—Mechanical Business Cases, *supra*.

36. Pa.—In re Keystone Laundry Co., 18 Pa Co 444

37. Ariz.—Arizona Eastern R Co v Matthews, 180 P 159, 161, 20 Ariz 282, 7 A L R 1149

Neb.—State v Crounse, 181 NW 562, 563, 105 Neb 672, 16 A L R. 533

38. La.—State v Cohn, 165 So 449, 451, 184 La 53—New Orleans v Robira, 8 So 402, 403, 42 La Ann 1098, 11 L R A 141.

Tex.—Western Co v Sheppard, Civ App, 181 S W 2d 850, 853

39. La.—State v Cohn, 165 So 449, 452, 184 La 53.

Tex.—Western Co v Sheppard, Civ App, 181 S W 2d 850, 854

40. La.—State v Cohn, 165 So 449, 452, 453, 184 La 53

41. Phrases

(1) "Mechanical arm" see 6 C J S p 341 note 23.2.

(2) "Mechanical business" see 12 C J S p 804 note 59 1

(3) "Mechanical contrivance" see 18 C J S p 28 note 12

(4) "Mechanical corporation" see Corporations § 22 c

(5) "Mechanical devices" as subject of copyright see Copyright and Literary Property § 40.

(6) "Mechanical engineer" see 30 C J S p 251 note 30

(7) "Mechanical equivalent" generally see 30 C J S p 1131 note 4, and in patent law see the C J S title Patents §§ 209, 299, also 48 C J p 227 note 83—p 228 note 87, p 310 note 90—p 313 note 30

(8) "Mechanical establishment" see 30 C J S p 1234 notes 84-86

(9) "Mechanical labor" see 51 C J S. p 473 note 40—p 474 note 44.

(10) "Mechanical manipulation" see the C J S title Physicians and Surgeons § 1.

(11) "Mechanical movement;" the combination and arrangement of mechanical parts intended for translation or transformation of motion—Campbell Printing-Press & Mfg Co v Miehle Printing-Press & Mfg Co, III, 102 F 159, 168, 42 CCA 235—40 C J p 22 note 15.

(12) "Mechanical skill" defined in patent law see the C J S title Patents § 55, also 48 C J p 69 notes 57-60 Contracts requiring mechanical skill as not subject to a decree for specific performance see the C J S. title Specific Performance § 82, also 58 C J p 1058 note 41.

(13) "Useful or mechanical or industrial arts" distinguished from "fine art" see 6 C J S p 772 note 25. 42. Webster New Int D See Wager v Carrollton Bank, 120 S.E 116, 119, 156 Ga 783

43. Webster New Int D See Le-suer v. City of Lowell, 116 N.E 432, 434, 237 Mass. 44, L R A 1918D 419.

MECHANICS' LIENS

This Title includes statutory liens on specific real property as security for the price or value of work performed or materials furnished for the erection, improvement, or repair of buildings or other structures on the property; nature and grounds of such liens; what property may be subjected to such liens, and by whom and for what purposes property may be subjected thereto, who may be entitled to the benefit of such liens; proceedings to acquire and perfect such liens, and waiver, discharge, or extinguishment thereof; bonds, etc., to secure against such liens; priorities of such liens, and enforcement of mechanics' liens.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

I. IN GENERAL, §§ 1-19

II. RIGHT TO LIEN, §§ 20-117

- A. NATURE OF IMPROVEMENT, §§ 20-32
- B. SERVICES RENDERED AND MATERIALS FURNISHED, AND AMOUNT OF CLAIM, §§ 33-51
- C. CONTRACT WITH, OR CONSENT OF, OWNER, §§ 52-85
- D. PERSONS ENTITLED TO LIEN, §§ 86-117
 - 1. *In General*, §§ 86-96
 - 2. *Subcontractors, and Contractors' Workmen and Materialmen*, §§ 97-117

III. PERFECTION OF LIEN, §§ 118-171

- A. IN GENERAL, §§ 118-130
- B. FILING AND RECORDING CLAIM OR STATEMENT AND CONTRACT, §§ 131-171
 - 1. *In General*, §§ 131-149
 - 2. *Form and Contents of Claim or Statement*, §§ 150-171

IV. OPERATION AND EFFECT OF LIEN, §§ 172-215

- A. AMOUNT SECURED, §§ 172-176
- B. DURATION, §§ 177-183
- C. PROPERTY, ESTATES, AND RIGHTS AFFECTED, §§ 184-196
- D. PRIORITIES, §§ 197-215

V. ASSIGNMENT, §§ 216-221

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION, §§ 222-254

- A. WAIVER OF RIGHT TO LIEN, §§ 222-228
- B. ESTOPPEL TO CLAIM LIEN, §§ 229-231
- C. BOND OR DEPOSIT TO PREVENT OR DISCHARGE LIEN, §§ 232-239
- D. DISCHARGE, EXTINGUISHMENT, RELEASE, OR PAYMENT, §§ 240-254

VII. STIPULATIONS FOR PAYMENT OF CLAIMS AND INDEMNITY AGAINST LIENS, §§ 255-262

VIII. ENFORCEMENT, §§ 263-354

- A. IN GENERAL, §§ 263-291
- B. PLEADING, §§ 292-307

See also descriptive word index in the back of this Volume

VIII. ENFORCEMENT—Continued

- C. EVIDENCE, §§ 308-310
- D. TRIAL OR HEARING, §§ 311-316
- E. JUDGMENT OR DECREE, §§ 317-335
- F. EXECUTION AND ENFORCEMENT OF JUDGMENT OR DECREE, AND SALE AND REVIEW, §§ 336-349
- G. COSTS AND FEES, §§ 350-354

*Sub-Analysis***I. IN GENERAL—p 491**

- § 1. Definition, nature, and distinctions—p 491
- 2. What law governs—p 495
- 3. Constitutional and statutory provisions—p 495
- 4. — Construction, operation, and effect in general—p 499
- 5. — Retroactive operation—p 505
- 6. — Change or repeal—p 505
- 7. Persons who may obtain lien—p 506
- 8. Property subject to lien—p 507
- 9. — Property of private corporations—p 507
- 10. — Public property—p 507
- 11. — Property of quasi-public corporations—p 508
- 12. — Property of religious, educational, or charitable organizations—p 509
- 13. — Cemeteries and cemetery structures—p 509
- 14. — Homestead—p 509
- 15. Estate or interests subject to lien—p 510
- 16. — Equitable estates or interests—p 511
- 17. — Leaseholds—p 512
- 18. — Mortgaged or encumbered property—p 512
- 19. — Trust estates—p 512

II. RIGHT TO LIEN—p 513**A. NATURE OF IMPROVEMENT—p 513**

- § 20. In general—p 513
- 21. Buildings or structures and improvements in general—p 513
- 22. — Erection or construction—p 517
- 23. — Repairs, alterations, and additions—p 518
- 24. — Removal or destruction—p 519
- 25. — Excavations and foundations—p 519
- 26. Fixtures and interior improvements—p 520
- 27. — Apparatus for heating, cooking, lighting, or water supply—p 522
- 28. — Machinery—p 523
- 29. — Theater fixtures—p 524
- 30. Improvements outside building—p 524
- 31. — Roads, walks, and street improvements—p 526
- 32. — Storage or removal of ashes and refuse—p 527

B. SERVICES RENDERED AND MATERIALS FURNISHED, AND AMOUNT OF CLAIM—p 527

- § 33. In general—p 527
- 34. Services—p 528
- 35. — Preparatory work in general—p 529
- 36. — Services of architect—p 529

II. RIGHT TO LIEN—Continued**B. SERVICES RENDERED AND MATERIALS FURNISHED, AND AMOUNT OF CLAIM—Continued**

- § 37 — Superintendence—p 530
- 38 — Work other than construction—p 531
- 39 — Work not done on premises—p 531
- 40 Materials—p 531
- 41 — Nature, quality, and quantity—p 532
- 42 — Furnishing—p 532
- 43 — Actual use—p 533
- 44 — Incorporation in building or improvement—p 535
- 45 Intent or purpose in furnishing—p 538
- 46 Reliance on credit of building or property—p 538
- 47 Advances of money—p 539
- 48 Board and lodging—p 539
- 49 Profits and commissions—p 540
- 50. Transportation—p 540
- 51. Requisite amount or value—p 540

C. CONTRACT WITH, OR CONSENT OF, OWNER—p 541

- § 52 Necessity and effect—p 541
- 53 — Extras—p 543
- 54 — Damages—p 544
- 55 — Subsequent marriage or death of owner—p 544
- 56 Who may contract or consent—p 544
- 57 — Ownership—p 545
- 58 — Possession—p 548
- 59 — Agency—p 549
- 60 — Corporations and persons interested therein—p 550
- 61 — Guardians, executors, administrators, or receivers—p 551
- 62 — Heir or widow—p 552
- 63 — Husband or wife—p 552
- 64. — Infants and their agents—p 557
- 65 — Lessors and lessees—p 557
- 66 — Licensees—p 566
- 67. — Life tenants—p 566
- 68 — Mortgagors and mortgagees—p 567
- 69. — Part or joint owners—p 567
- 70 — Trustees and cestui que trust—p 568
- 71 — Vendors and vendees—p 569
- 72. — Other persons—p 575
- 73 Form, requisites, and sufficiency—p 576
- 74 — Time and place of making—p 581
- 75 — Necessity of writing—p 581
- 76 — Description of land—p 582
- 77 — Description of improvement, labor, and materials—p 583
- 78 — Amount to be paid—p 583
- 79 — Terms; time of payment or performance—p 584
- 80 — Inclusion of nonlienable items—p 584
- 81 — Signature and authentication—p 585
- 82. Filing or recording—p 586
- 83. Construction of contract—p 589
- 84. Statutory notice by owner of nonresponsibility—p 590
- 85. Assignment by principal contractor—p 596

II. RIGHT TO LIEN—Continued**D. PERSONS ENTITLED TO LIEN—p 597****1. In General—p 597**

- § 86 In general—p 597
- 87 Mechanics—p 598
- 88 Laborers—p 599
- 89 Materialmen—p 599
- 90 Contractors in general—p 602
- 91 ——— Lien for labor and material furnished—p 604
- 92 ——— Stipulations of contract as to lien—p 604
- 93. ——— Modification of contract—p 604
- 94 ——— Rescission of contract—p 605
- 95 ——— Performance of contract—p 605
- 96. ——— Abandonment by contract—p 606

2. Subcontractors, and Contractors' Workmen and Materialmen—p 607

- § 97. In general—p 607
- 98 Subcontractors—p 608
- 99. Subcontractors of subcontractors—p 609
- 100 Employees of contractor, subcontractor, or materialman—p 609
- 101 Persons furnishing materials to contractors—p 610
- 102 Persons furnishing material to subcontractor—p 610
- 103 Persons furnishing materials to another materialman—p 610
- 104 Persons furnishing labor to contractor—p 610
- 105. Nature of lien—p 611
- 106 ——— Lien by subrogation—p 612
- 107. Effect of filing of principal contract by owner—p 612
- 108 Effect of stipulations in principal contract—p 613
- 109 ——— As to lien—p 613
- 110 ——— As to payment—p 615
- 111 Modification or rescission of principal contract—p 615
- 112 Default in performance of principal contract—p 616
- 113 Subcontract and performance thereof—p 617
- 114. Lien on money due contractor—p 619
- 115. ——— When, and to whom, right available—p 620
- 116 ——— Demand and notice—p 621
- 117. ——— Satisfaction and disposition of balance—p 622

III. PERFECTION OF LIEN—p 622**A. IN GENERAL—p 622**

- § 118. Nature and form of proceedings in general—p 622
- 119. Necessity for compliance with statutory requirements—p 622
- 120. Notice to owner—p 624
- 121. ——— Necessity—p 624
- 122. ——— Waiver or excuse—p 627
- 123. ——— By whom given—p 627
- 124. ——— To whom given—p 627
- 125. ——— Time for giving—p 630
- 126 ——— Form and contents—p 632
- 127. ——— Signature and verification—p 636
- 128 ——— Service—p 636

III. PERFECTION OF LIEN—Continued**A. IN GENERAL—Continued**

- § 129 — Defects and amendment—p 638
- 130 Furnishing statement or account to owner—p 638

B FILING AND RECORDING CLAIM OR STATEMENT AND CONTRACT—p 639**1. In General—p 639**

- § 131. Necessity and object—p 639
- 132 Filing contract—p 643
- 133 Filing one or more claims or statements by same claimant—p 643
- 134 — Two or more buildings or improvements—p 644
- 135 — Double house—p 646
- 136 — Properties of different owners—p 646
- 137. Filing one or more claims or statements by two or more claimants—p 647
- 138 Place for filing—p 647
- 139. Time for filing—p 647
- 140 — Before or after certain date in general—p 651
- 141 — Accrual or maturity of indebtedness—p 651
- 142. — Completion of building or improvement—p 652
- 143. — Commencement of work or of furnishing material—p 656
- 144 — Completion, abandonment, or cessation of contract, work, or furnishing of materials—p 656
- 145. Mode and sufficiency of filing and recording—p 664
- 146 Notice of filing or service of copy of claim—p 666
- 147. Withdrawal after filing—p 668
- 148. Renewal or extension of period in general—p 668
- 149. — Doing or furnishing further work or materials—p 668

2. Form and Contents of Claim or Statement—p 672

- § 150. General rules—p 672
- 151 Statement of claim of lien in general—p 675
- 152 Accrual of lien—p 675
- 153 Amount due or to become due—p 675
- 154. — Credits and offsets—p 677
- 155. — Apportionment between buildings or improvements—p 679
- 156. Name, address, and status of claimant—p 630
- 157. Names of encumbrancers or other lienors—p 681
- 158. Notice to owner—p 681
- 159. Time of filing—p 681
- 160. Nature of improvement—p 681
- 161. Description of property or improvement—p 682
- 162. Ownership of property—p 689
- 163. Contract or consent of owner—p 695
- 164. Name, residence, and status of employer or contractor—p 697
- 165. Services or materials and charge therefor—p 699
- 166. Signature—p 708
- 167. Verification—p 709
- 168 Proof of execution—p 713
- 169. Errors or defects—p 713
- 170 Amendment of claim or statement—p 715
- 171. Striking off claim or statement—p 719

IV. OPERATION AND EFFECT OF LIEN—p 721**A. AMOUNT SECURED—p 721**

- § 172 In general—p 721
- 173. Value of labor and materials—p 722
- 174. Amount fixed or due under contract or subcontract—p 722
- 175. Abandonment or part performance of contract—p 726
- 176 Interest—p 728

B. DURATION—p 730

- § 177. Accrual or commencement—p 730
- 178 — On making or recording of contract—p 731
- 179. — On commencement of building or improvement—p 731
- 180 — Interruption of work or change of plans—p 732
- 181. — On performance of labor or furnishing of material—p 733
- 182. — On date of notice to owner—p 734
- 183. Continuance and expiration—p 734

C. PROPERTY, ESTATES, AND RIGHTS AFFECTED—p 735

- § 184. In general—p 735
- 185. Land—p 736
- 186. — Amount or area—p 736
- 187. Building or improvement—p 738
- 188 — Building or improvement alone—p 739
- 189 Several lots or buildings—p 741
- 190 Fixtures, materials, and personal property—p 743
- 191 Estates or interests—p 744
- 192 — Of person named in claim or statement as owner—p 745
- 193. — At particular time—p 745
- 194. — Interest of vendor for improvements of purchaser—p 746
- 195. — Reversion of landlord for improvements by tenant—p 746
- 196. Rents and proceeds of property—p 746

D. PRIORITIES—p 747

- § 197. In general—p 747
- 198. Between different mechanics' liens—p 747
- 199 Between mechanic's lien and mortgages or like encumbrances—p 751
- 200. — Priority in time—p 752
- 201. — Nature, validity, subject matter, and provisions of mortgage—p 758
- 202 — Provisions of building contract—p 764
- 203. — Independent agreements—p 764
- 204 — Loss of priority; waiver or estoppel—p 765
- 205 — Extent of priority—p 771
- 206. — Effect of priority, remedies—p 777
- 207. Between mechanics' lien and other lien or encumbrance—p 779
- 208. — Lien for purchase price—p 781
- 209 — Lien for supplies—p 784
- 210. Between mechanic's lien and other claims, interests, or rights—p 784
- 211 — Assignment or transfer—p 785
- 212. — Claim against decedent's estate—p 786
- 213 — Promissory note—p 787
- 214. — Rights or claims asserted in receivership—p 787
- 215. — Rights of sureties completing contract—p 787

V. ASSIGNMENT—p 787

- § 216 Of inchoate lien—p 787
- 217. — Nature, subject matter, and purpose of assignment or transfer—p 788
- 218. — In whose name lien perfected and enforced—p 789
- 219. Of perfected lien—p 790
- 220 — In whose name lien enforced—p 791
- 221 Rights of assignee—p 791

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION—p 792

A. WAIVER OF RIGHT TO LIEN—p 792

- § 222 In general—p 792
- 223. What constitutes in general—p 794
- 224 Agreements—p 795
- 225 Action on claim—p 798
- 226 Taking or transfer of note, draft, or order note—p 798
- 227 Taking security—p 800
- 228. Persons entitled to set up waiver—p 803

B. ESTOPPEL TO CLAIM LIEN—p 803

- § 229 In general—p 803
- 230. By knowledge, representations, or directions as to payment—p 804
- 231 Of party to indemnify bond—p 805

C. BOND OR DEPOSIT TO PREVENT OR DISCHARGE LIEN—p 806

- § 232 Bond or undertaking in general—p 806
- 233 Deposit in court in general—p 806
- 234 Who may give security—p 807
- 235 Time for giving security—p 807
- 236. Form, requisites, and validity of bond—p 807
- 237 Effect of bond or deposit—p 809
- 238 Liability on bond—p 809
- 239 Action on bond—p 810

D. DISCHARGE, EXTINGUISHMENT, RELEASE, OR PAYMENT—p 812

- § 240 Discharge in general—p 812
- 241 Extinguishment or loss in general—p 813
- 242 Destruction or removal of building or improvement—p 814
- 243 Transfer of title in general—p 815
- 244 — Judicial proceedings or sale—p 818
- 245 Extinguishment or merger of interest or estate to which lien attached—p 818
- 246 Release—p 820
- 247 Payment in general—p 822
- 248 — Application of payments in general—p 823
- 249. — Payments by contractor with money received from owner or other interested person—p 826
- 250. — Payments by subcontractor with money received from contractor—p 828
- 251 Payments to contractor as affecting liens of other persons—p 828
- 252. Payment to subcontractors, laborers, or materialmen as affecting lien of other persons—p 834
- 253. — Liens of other subcontractors, laborers, or materialmen—p 835
- 254. Tender—p 836

VII. STIPULATIONS FOR PAYMENT OF CLAIMS AND INDEMNITY AGAINST LIENS—p 836

- § 255. Contracts and stipulations in general—p 836
- 256. Bonds or undertakings in general—p 838
- 257. Requisites and validity of bond—p 840
- 258. Construction and effect of bond in general—p 843
- 259. Liabilities on bond—p 845
- 260. — Liability of surety completing work—p 852
- 261. — Measure and limit of recovery—p 853
- 262. Action on bond—p 854

VIII. ENFORCEMENT—p 868**A. IN GENERAL—p 868**

- § 263. In general—p 868
- 264. Legal or equitable proceedings—p 872
- 265. Personal actions or proceedings in rem—p 873
- 266. Exclusive, cumulative, and concurrent remedies—p 874
- 267. Removal of improvements from premises—p 875
- 268. Conditions precedent—p 875
- 269. — Suit by subcontractor—p 877
- 270. Compelling enforcement—p 878
- 271. Restraining or staying enforcement—p 878
- 272. Joinder and splitting of liens—p 879
- 273. Defenses in general—p 881
- 274. — Want of title in defendant or debtor—p 883
- 275. — Waiver and estoppel to assert defenses—p 883
- 276. Recoupment, set-off, and counterclaim—p 884
- 277. — Default in performance—p 885
- 278. Persons entitled to enforce—p 887
- 279. Persons entitled to contest—p 887
- 280. — Contest by contractor of lien of subcontractor—p 888
- 281. Jurisdiction and venue—p 888
- 282. Time to sue, limitations, and laches—p 889
- 283. Parties plaintiff—p 899
- 284. Parties defendant—p 900
- 285. Intervention, addition, or substitution of parties—p 911
- 286. Process in general—p 913
- 287. Attachment—p 915
- 288. Scire facias—p 916
- 289. Notice of pendency of action—p 917
- 290. Dismissal before hearing—p 918
- 291. Receiver—p 920

B. PLEADING—p 921

- § 292. Declaration, bill, complaint, or petition—p 921
- 293. — Form, requisites, and sufficiency in general—p 921
- 294. — Particular averments in general—p 923
- 295. — Purpose of suit—p 937
- 296. — Status of claimant—p 937
- 297. — Anticipating defense—p 937
- 298. — Joinder of counts and causes—p 937
- 299. — Verification—p 939
- 300. Plea, answer, or affidavit of defense—p 939
- 301. — Form and sufficiency—p 939

VIII. ENFORCEMENT—Continued

B. PLEADING—Continued

- § 302 Cross bill or cross complaint—p 944
- 303. — Answer to cross complaint—p 946
- 304 Replication or reply—p 946
- 305. Demurrer—p 947
- 306. Amendments—p 950
- 307. Issues, proof, and variance—p 952

C. EVIDENCE—p 959

- § 308 Presumptions and burden of proof—p 959
- 309 Admissibility—p 968
- 310 Weight and sufficiency—p 975

D TRIAL OR HEARING—p 989

- § 311. In general—p 989
- 312 References—p 990
- 313. Survey—p 992
- 314. Questions of law and fact—p 992
- 315. Instructions—p 997
- 316. Verdict and findings—p 998

E. JUDGMENT OR DECREE—p 1002

- § 317. Nature as in rem or in personam—p 1002
- 318. Judgment by default—p 1002
- 319. Requisites and essentials in general—p 1004
- 320. Description of property—p 1007
- 321. Conformity to lien statement—p 1008
- 322. Conformity to pleadings, issues, and proof—p 1008
- 323. Conformity to findings or verdict—p 1009
- 324. Direction for sale and distribution of proceeds—p 1010
- 325. Determination as to priorities—p 1012
- 326. Judgment against both owner and contractor—p 1012
- 327. Single or separate judgments—p 1013
- 328. Personal judgment—p 1013
- 329. — Failure to establish lien—p 1014
- 330. — Deficiency judgment—p 1015
- 331. — Against whom judgment rendered—p 1015
- 332. Imposing conditions precedent to entry of judgment—p 1018
- 333. Amendment or vacation—p 1018
- 334. Operation and effect—p 1019
- 335. — Lien—p 1021

F. EXECUTION AND ENFORCEMENT OF JUDGMENT OR DECREE, AND SALE AND REVIEW—p 1022

- § 336. In general—p 1022
- 337. Sale in general—p 1023
- 338. Property or interest to be sold in general—p 1024
- 339. Where priority over mortgage limited to building or improvement—p 1024
- 340. Stay of, or injunction against, sale—p 1025
- 341. Notice and terms of sale—p 1026
- 342. Confirming or setting aside sale—p 1026

VIII. ENFORCEMENT—Continued

F. EXECUTION AND ENFORCEMENT OF JUDGMENT OR DECREE, AND SALE AND REVIEW—Continued

- § 343 Conveyance to purchaser and recovery of purchase money—p 1027
- 344 Title and rights of purchaser—p 1027
- 345 — Purchaser of building alone—p 1029
- 346 Title and rights of third persons—p 1030
- 347 Redemption—p 1030
- 348 Distribution of proceeds—p 1033
- 349 Review—p 1034

G. COSTS AND FEES—p 1034

- § 350. In general—p 1034
- 351. Consolidation of proceedings, joinder of all lienholders—p 1036
- 352 Filing and recording fees; abstract—p 1037
- 353. Attorney's fees—p 1037
- 354. Costs on appeal—p 1040

I. IN GENERAL

§ 1. Definition, Nature, and Distinctions

- a. Definition and nature
- b. Distinctions
- c. Origin and creation

a. Definition and Nature

A mechanic's lien or, as otherwise termed, a materialman's lien is a lien created by constitutional or statutory provision in favor of one who has performed work or furnished material in and for the erection or improvement of a building. It is a particular lien, and by some authorities is regarded as merely a right to charge the property which it affects with the payment of a particular debt.

A mechanic's lien or, as sometimes termed with respect to materials furnished, a materialman's

lien¹ is a species of lien created by constitution or statute which exists in favor of a person who has performed work or furnished material in and for the erection of a building.² In a narrow and restricted sense, a mechanic's lien is a lien for labor,³ as distinguished from a materialman's lien,⁴ but in a broad sense it means a lien for material as well as for labor,⁵ and it is frequently used as a general term to designate liens of contractors, subcontractors, laborers, and materialmen.⁶ Where it is secured by constitutional provisions the lien of a mechanic is one of the highest possible dignity.⁷

It is not a general,⁸ but a particular,⁹ lien, and

1. Ala.—Emanuel v. Underwood Coal & Supply Co., 14 So.2d 151, 154, 244 Ala. 436.

Fla.—Tallahassee Variety Works v. Brown, 144 So. 848, 852, 106 Fla. 599.

Or.—Auld v. Starbald, 173 P. 664, 665, 89 Or. 284.

2. Ohio—Eggar v. Corwin, 29 Ohio C.A. 65, 70.
40 C.J. p 40 note 2.

Similar definitions

(1) A lien "declared by law as a protection to those whose labor and material have brought the building or improvement into being"—Fleming v. Kirkland, 146 So. 384, 385, 226 Ala. 222.

(2) "A claim created by law for the purpose of securing priority of payment of the price or value of work performed and materials fur-

nished in erecting or repairing a building or other structure"

US—In re Louisville Daily News & Enquirer, D.C. Ky., 20 F.Supp. 466, 468.

Mont.—Smith v. Gunniss, 144 P.2d 186, 189, 115 Mont. 363.
40 C.J. p 40 note 2 [a] (1).

(3) "A statutory right given to a contractor furnishing labor and material to protect himself against loss"—Joyce Lumber Co. v. Marshalltown Construction League, 283 N.W. 912, 915, 225 Iowa 274.

(4) Other definitions see 40 C.J. p 40 note 2 [a].

"Mechanics' Lien" is generic name for any lien on realty in favor of persons furnishing labor or materials in or for erection of buildings or making improvements on realty—Emanuel v. Underwood Coal & Supply Co., 14 So.2d 151, 244 Ala. 436.

3. Tex.—Dilworth v. Steves, Civ. App., 169 S.W. 680, error dismissed 174 S.W. 279, 107 Tex. 78.

4. Tex.—Dilworth v. Steves, supra.

5. N.C.—Broyhill v. Gauthier, 26 S.E. 31, 119 N.C. 443.
40 C.J. p 40 note 5.

6. Tex.—Dilworth v. Steves, Civ. App., 169 S.W. 680, error dismissed 174 S.W. 279, 107 Tex. 78.

7. Cal.—Martin v. Becker, 146 P. 665, 169 Cal. 801, Ann.Cas. 1916D 171.

8. Mont.—Mochon v. Sullivan, 1 Mont. 470.

Ohio—Freeman v. Cram, 3 N.Y. 305.
—Eggar v. Corwin, 29 Ohio C.A. 65, 70.

9. Mont.—Mochon v. Sullivan, 1 Mont. 470.

Ohio—Eggar v. Corwin, 29 Ohio C.A. 65, 70.

has been said to be a secret lien¹⁰ during the period between the time when it attaches and the time when the claim or statement is filed or recorded,¹¹ where, under the statutes, it attaches at, or relates back to, a time prior to the date when the claim or statement is filed or recorded, as discussed infra § 177. It has also been described as a mere preference¹² or privilege¹³ conferred by statute.

As property. While some authorities declare that the lien is property or an interest in property,¹⁴ according to other authorities the lien is neither property¹⁵ nor a right in or to property,¹⁶ but is a mere right or remedy to charge the property which it affects with the payment of a particular debt,¹⁷ to which it is incident.¹⁸ An inchoate mechanic's lien is a present property right in the property to which it relates, a right coupled with an interest.¹⁹

Equitable character. Although, as stated infra subdivision c of this section, a mechanic's lien is not recognized in equity apart from the constitutional or statutory provisions which created it, it

has been held that a mechanic's lien is of an equitable character,²⁰ that it springs out of the appropriation and use by the landowner of the mechanic's labor or the furnisher's materials,²¹ and that it rests on broad grounds of natural equity,²² natural justice,²³ and commercial necessity.²⁴ On the other hand it has been held that such a lien is legal, in its essential nature, rather than equitable.²⁵

b. Distinctions

A mechanic's lien differs in some respects from all other liens, and has been distinguished from the lien claim or statement.

A mechanic's lien is in its nature peculiar,²⁶ differing in some respects from all other liens known to the law.²⁷

Mortgage or security. Like a mortgage, a mechanic's lien has the element of security for debt,²⁸ and it has been declared to be an encumbrance²⁹ or in the nature of a mortgage.³⁰ Nevertheless a mortgage and a mechanic's lien are substantially different,³¹ such as with respect to the mode of

10. Ariz.—Corpus Juris cited in *Wazara v. Golden Turkey Mining Co.*, 135 P.2d 149, 150, 60 Ariz. 252, 40 C.J. p. 40 note 9.

11. W.Va.—*Charleston Lumber & Manufacturing Co. v. Brockmyer*, 18 W.Va. 586.

12. Utah—*Volker-Seawcroft Lumber Co. v. Vance*, 88 P. 896, 32 Utah 74, 125 Am.S.R. 838.

Priority of mechanics' liens over subsequent liens see infra §§ 207-209.

13. Ill.—*Hoier v. Kaplan*, 145 N.E. 243, 313 Ill. 448—*Philip Gollner Co. v. Hepburn*, 209 Ill.App. 535.

Mo.—*Fleming-Gilchrist Const. Co. v. McGonigle*, 89 S.W.2d 15, 335 Mo. 68, 107 A.L.R. 1003.

Personal privilege

Or.—*Phillips v. Graves*, 9 P.2d 490, 189 Or. 316, 83 A.L.R. 1.

14. Fla.—*Hogue v. D. N. Morrison Const. Co. of Virginia*, 156 So. 377, 115 Fla. 293, 95 A.L.R. 357.

N.Y.—*B & F Concrete Co. v. Colton Realty Corporation*, 17 N.Y.S.2d 593.

40 C.J. p. 40 note 13.

15. Ala.—*Sorsby v. Woodlawn Lumber Co.*, 81 So. 68, 203 Ala. 566—*Porter v. Miles*, 67 Ala. 130.

16. Ala.—*Sorsby v. Woodlawn Lumber Co.*, 81 So. 68, 203 Ala. 566, 40 C.J. p. 40 note 14.

No present title or right to possession.

A mechanic's lienor acquires no present title or right to possession of the property by perfecting a lien thereon.—*City Lumber Co. of*

Bridgeport v. Murphy, 179 A. 339, 120 Conn. 160.

17. Ala.—*Sturdivant v. First Ave. Coal & Lumber Co.*, 123 So. 178, 219 Ala. 303.

N.J.—*Passaic Plumbing Supply Co. v. Fidelity Union Title & Mortgage Co.*, 163 A. 278, 113 N.J.Eq. 80.

40 C.J. p. 40 note 15.

Special remedy in rem

Pa.—*Bezar v. Dorfman*, 45 Pa.Dist. & Co. 136.

18. N.J.—*Passaic Plumbing Supply Co. v. Fidelity Union Title & Mortgage Co.*, 163 A. 278, 113 N.J.Eq. 80.

Tex.—*Crowell v. Mickolasch*, Civ. App., 297 S.W. 234, 40 C.J. p. 40 note 16.

19. N.J.—*West New Jersey Homeopathic Hospital v. Gibbs*, 143 A. 316, 318, 108 N.J.Eq. 262.

20. Mont.—*Mochon v. Sullivan*, 1 Mont. 470.

Ohio.—*Eggar v. Corwin*, 29 Ohio C.A. 65, 70.

40 C.J. p. 41 note 21.

21. Ark.—*Anderson v. Seamans*, 5 S.W. 799, 49 Ark. 475.

40 C.J. p. 41 note 22.

22. Mont.—*Mochon v. Sullivan*, 1 Mont. 470.

40 C.J. p. 41 note 23.

23. Mont.—*Mochon v. Sullivan*, supra.

40 C.J. p. 41 note 24.

24. Mont.—*Mochon v. Sullivan*, supra.

40 C.J. p. 41 note 25.

25. Mich.—*Saginaw Lumber Co. v.*

Wilkinson, 254 N.W. 340, 266 Mich. 661.

26. Ohio.—*Eggar v. Corwin*, 29 Ohio C.A. 65, 70.

40 C.J. p. 41 note 30.

27. Mont.—*Mochon v. Sullivan*, 1 Mont. 470.

40 C.J. p. 41 note 31.

Distinguished from:

Attachment see Attachment § 1.

Bailee's lien see Bailments § 35.

Lis pendens see Lis Pendens § 10.

28. Ariz.—*Zimmerman v. Western Builders' & Salvage Co.*, 297 P. 449, 38 Ariz. 91.

Cal.—*Withington v. Shay*, 117 P.2d 415, 47 Cal.App.2d 68, hearing denied 119 P.2d 1, 47 Cal.App.2d 68—*Gross v. Haseltine*, 290 P. 673, 107 Cal.App. 446.

40 C.J. p. 41 note 32.

The building is collateral security for the debt for the work done and the materials furnished.—*Schwartz v. Whelan*, 146 A. 525, 295 Pa. 425, 65 A.L.R. 277.

29. Mass.—*Trask v. Searle*, 121 Mass. 229.

40 C.J. p. 41 note 40.

30. Cal.—*Withington v. Shay*, 117 P.2d 415, 47 Cal.App.2d 68, hearing denied 119 P.2d 1, 47 Cal.App.2d 68.

Mich.—*Adams v. Central City Granite Brick & Block Co.*, 117 N.W. 932, 154 Mich. 448, 139 Am.S.R. 484.

40 C.J. p. 41 note 41.

31. Tex.—*Schutze v. Dabney*, Civ. App., 204 S.W. 342.

40 C.J. p. 41 note 42.

their creation, a mortgage lien being created by contract and a mechanic's lien being created by statute.³² The right to claim a mechanic's lien and the right to claim a priority for such lien over an antecedent mortgage are quite different in their nature³³

Vendor's lien A mechanic's lien has been regarded as somewhat analogous to the equitable lien of a vendor for unpaid purchase money of lands sold,³⁴ but it differs from a vendor's lien in that it arises only by compliance with the statute under which it is created³⁵

Claim or statement Although the lien claim or statement is sometimes referred to as the "lien," the lien is a charge on the property arising by operation of law on the filing of a proper instrument in writing within the required time, the lien claim, statement, or account or other instrument in writ-

ing filed is not itself the lien³⁶ After it has attached, the lien is, of course, something more than a mere claim to a lien³⁷

c. Origin and Creation

A mechanic's lien is created either by a constitutional provision or by statute, and, independently of statute, it is not recognized at common law or allowed in equity

In some states a mechanic's lien has its origin and operation by constitutional provision and statutes, enacted pursuant to constitutional directions, providing for the enforcement of the lien,³⁸ and, although it has been stated that the lien is wholly a creature of the constitution,³⁹ it has also been held that a mechanic's lien so created is a creature of statute.⁴⁰ In most states, however, a mechanic's or materialman's lien, or the right to acquire and enforce such a lien, is purely a creature of statute,⁴¹ and, unless

32. Tex.—Schutze v Dabney, supra
33. Iowa.—Green v Saxton, 196 N W 27, 196 Iowa 1086

Priority between mechanics' liens and mortgages see infra §§ 199-306

34. Ala.—Ex parte Schmidt, 62 Ala 252.

Ohio.—Eggar v Corwin, 29 Ohio C A 65

35. Nev.—Skyrme v. Occidental Mill & Mining Co., 8 Nev 219, 232

Necessity for compliance with statutory requirements see infra § 119

36. Wash.—Neukirch v Wong, 81 P 2d 499, 195 Wash 451

40 C J p 42 note 55
Claim or statement generally see infra § 131 et seq

37. Iowa.—Carter v Humboldt Fire Ins. Co., 12 Iowa 287.

38. Cal.—Burr v Peppers Cotton Lumber Co., 266 P 1025, 91 Cal App 268.

Tex.—Morrison v. State Trust Co., Civ.App., 274 S.W. 341, reversed on other grounds State Trust Co v Morrison, Com App., 282 S.W. 314
40 C J p 42 note 60, p 64 note 54
Whether constitutional provision self-executing see Constitutional Law § 51

As guaranty

"The constitution and statute guarantee the contractor and materialmen the protection of a lien under specific conditions to secure their compensation for labor and materials furnished"—Coombs v Green Mill, 290 P. 620, 623, 107 Cal App 204.

Right of mechanic's lien is created by organic law, and must be considered as part of fundamental law of state—Burr v. Peppers Cotton Lumber Co., 266 P. 1025, 91 Cal App 268,

followed in Willett v Peppers Cotton Lumber Co., 266 P. 1038, 91 Cal App 798

39. Tex.—McBride v Beakley, Civ. App., 203 S.W. 1137

40. Cal.—Spinney v Griffith, 32 P. 974, 98 Cal 149—Stanislaus Lumber Co v Pike, 124 P 2d 190, 51 Cal App 2d 54—Hayward Lumber & Investment Co. v Coast Federal Savings & Loan Ass'n of Los Angeles, 117 P 2d 822, 47 Cal App. 2d 211—Holm v Bramwell, 67 P. 2d 114, 20 Cal App 2d 332

41. U S.—In re Louisville Daily News & Enquirer, D.C.Ky., 20 F Supp 465

Ala.—Security Federal Savings & Loan Ass'n v Underwood Coal & Supply Co., 16 So 2d 100, 245 Ala. 56—Corpus Juris quoted in Emanuel v Underwood Coal & Supply Co., 14 So 2d 151, 155, 244 Ala 436 —Richards v William Beach Hardware Co., 7 So 2d 492, 242 Ala. 535.

Ark.—Wyatt Lumber & Supply Co v Hansen, 147 S.W. 2d 886, 201 Ark 534—Superior Lumber Co. v National Bank of Commerce, 2 S.W. 2d 1093, 176 Ark 300—Commercial Credit Co. v Hayes-Lamb Motor Co., 398 S.W. 217, 174 Ark. 945

Conn.—Grass v Miskinis, 34 A 2d 600, 130 Conn 367—New Haven Orphan Asylum v. James A Haggerty Co., 142 A. 847, 108 Conn 232.

Del.—E J Hollingsworth Co v Continental-Diamond Fiber Co., 175 A 266, 6 W W Harr 303—In re Republic Engineering Co., 130 A. 498, 3 W W Harr. 81.

Fla.—Masterbilt Corporation v. S. A. Ryan Motors of Miami, 6 So 2d 818, 149 Fla. 644—Baker v Webster, 191 So. 825, 140 Fla. 471—

Rieck & Fleece v Cunniff, 190 So. 8, 138 Fla. 742—Southern Paint Mfg Co v Crump, 182 So 291, 132 Fla. 799—Spinney v Sanford-Orlando Kennel Club, 166 So 559, 123 Fla 113—Hogue v D N Morrison Const Co of Virginia, 156 So 377, 115 Fla 293, 95 A.L.R. 357—Goldsmith v Orange Belt Securities Co., 156 So 3, 115 Fla 683—Corpus Juris cited in Tallahassee Variety Works v Brown, 144 So 848, 952, 106 Fla. 599—Logan Moore Lumber Co. v Legato, 131 So 381, 100 Fla. 1451—Drake Lumber Co v Semple, 130 So 577, 100 Fla. 1757, 1771, 75 A.L.R. 687—Paxton-Pavey Lumber Co of Florida v Rehbaum, 129 So 766, 100 Fla. 88 —Bowery v. Babbit, 128 So 801, 99 Fla. 1151—Ft Meade Hotel Co v Knoxville Iron Co., 127 So 898, 99 Fla. 947—Harper Lumber & Mfg Co v Teate, 125 So. 21, 98 Fla. 1055—Allardice & Allardice v Weatherlow, 124 So. 88, 98 Fla. 475.

Ga.—Williams v Brewton, 152 S.E. 441, 170 Ga. 164

Ill.—People ex rel Bradford Supply Co v Circuit Court of Pulaski County, 66 N.E. 2d 420, 393 Ill 520 —Gunther v. O'Brien Bros Const Co., 16 N.E. 2d 890, 369 Ill. 362—Alexander Lumber Co. v. Coberg, 190 N.E. 99, 356 Ill 49—Decatur Lumber & Mfg Co. v Crall, 183 N. E. 228, 350 Ill 319—Chas. A. Hohmeier Lumber Co. v. Knight, 183 N.E. 715, 350 Ill 248—Schwulst Gerling Co. v. Frost, 369 Ill.App. 218.

Iowa.—Knapp v. Baldwin, 238 N.W. 542, 213 Iowa 24—Schoeneman Lumber Co. v. Davis, 205 N.W. 502, 200 Iowa 673

Kan.—McHenry v McHenry, 95 P.2d 261, 150 Kan. 498.

a statutory provision therefor exists, materialmen and laborers are mere general creditors of the contractor.⁴² A mechanic's lien is not recognized at common law,⁴³ but is in derogation thereof,⁴⁴ nor is it allowed in equity⁴⁵ independently of statute.⁴⁶ It is not created or obtained by, through, or in, le-

Ky—Powers v Brewer, 38 S.W.2d 466, 238 Ky 579

Me—Andrew v. Bishop, 172 A 752, 132 Me. 447, 100 A.L.R. 121—Otis Elevator Co v Finks Clothing Co, 159 A 563, 181 Me 95

Md—House v. Fissell, 51 A.2d 669—Moreland v. Meade, 159 A 101, 162 Md 95—Adkins & Douglas Co v Webb, 154 A 259, 160 Md 571

Mich—Fox v Martin, 283 N.W. 9, 387 Mich 147—Netting Co v Touscany, 225 N.W. 556, 247 Mich 279.

Mo—Corpus Juris cited in Davis Estate v. West Clayton Realty Co, 39 S.W.2d 22, 36, 338 Mo. 69—Corpus Juris cited in Fleming-Gilchrist Const Co v McGonigle, 89 S.W.2d 15, 18, 338 Mo 56, 107 A.L.R. 1003—Goodner v Mosher-Roe Abstract & Guaranty Co, 282 S.W. 698, 314 Mo 151—Realty Sav. & Inv. Co v Washington Sav. & Bldg. Ass'n, App, 63 S.W.2d 167

Mont—Smith v Gunniss, 144 P.2d 186, 115 Mont 363

NJ—Belmont Coal & Lumber Co v. James F Wood Builders, 15 A.2d 625, 125 N.J.Law 315—Gibraltar Mfg Co. v DeMund, 31 A.2d 336, 133 N.J.Eq 323—Fidelity & Deposit Co of Maryland v McClintic-Marshall Corporation, 171 A. 382, 115 N.J.Eq 470, affirmed 176 A. 341, 117 N.J.Eq 440—Woodbridge Lumber Co v Varascas, Cir Ct, 194 A 392

NM—Ackerson v Albuquerque Lumber Co, 29 P.2d 714, 38 NM 191.

NY—Ausable Chasm Co v Hotel Ausable Chasm & Country Club, 33 N.Y.S.2d 427, 263 App Div 486—Frank Teicher, Inc. v. Gold, 267 N.Y.S. 164, 239 App Div 285—Sracusa v Inch Corporation, 298 N.Y.S. 878, 184 Misc 820—Travelers Ins Co v Village of Ithaca, 213 N.Y.S. 206, 126 Misc 275.

ND—Dunham Lumber Co v. Grass, 2 N.W.2d 175, 71 N.D. 491, 141 A.L.R. 60—Austad v. Dreier, 221 N.W. 1, 57 N.D. 224.

Ohio—Cooper v Haynes, 177 N.E. 476, 477, 39 Ohio App 475—Brown v. Banks, 177 N.E. 242, 39 Ohio App. 188—Brennemann v. Brown, 163 N.E. 921, 30 Ohio App 84.

Okl.—Pace v National Bank of Commerce of Tulsa, 125 P.2d 178, 190 Okl. 503—Consolidated Cut Stone Co v Seldenbach, 114 P.2d 480, 180 Okl 128—American Tank & Equipment Co v T. E. Wiggins, Inc., 42 P.2d 115, 170 Okl 504

Or—Phillips v. Graves, 9 P.2d 490, 139 Or 336, 83 A.L.R. 1.

Pa.—Clothier v. Kniffen, 36 Luz Leg. Reg. 241.

RI—Art Metal Const Co v. Knight, 185 A 136, 56 R.I. 228

Tenn—McDonnell v. Amo, 34 S.W.2d 212, 162 Tenn 36—Brown v. Brown & Co, 160 S.W.2d 431, 25 Tenn App 509—Handerson v. Watson, 160 S.W.2d 429, 25 Tenn App 506—Bell Bros & Co v. Arnold, 68 S.W.2d 958, 17 Tenn App 493

Vt—Goodro v. Tarkey, 22 A.2d 509, 112 Vt 212.

Va—Wallace v. Brumback, 13 S.E.2d 801, 177 Va 86—Cain v. Rea, 166 S.E. 478, 159 Va 446

Wash—Neukirch v. Wong, 81 P.2d 499, 195 Wash 451

40 C.J. p 42 note 61, p 64 note 56

In determining the existence of the lien all that may be considered is the statute creating it—Gunther v. O'Brien Bros Const. Co, 16 N.E.2d 890, 369 Ill 362

The Uniform Mechanics' Lien Act has been held to apply to statutory mechanics' and laborers' liens pursuant to command of constitution that legislature should provide for giving to mechanics and laborers an adequate lien on the subject matter of their labor—Atkins v. Kendrick, 190 So 248, 138 Fla 776

42. NJ—Gibraltar Mfg Co v DeMund, 31 A.2d 336, 133 N.J.Eq 223

43. Ala—Corpus Juris quoted in Emanuel v. Underwood Coal & Supply Co., 14 So.2d 151, 155, 244 Ala 436

Ill—People ex rel Bradford Supply Co v Circuit Court of Pulaski County, 66 N.E.2d 420, 393 Ill 520—Alexander Lumber Co v. Coberg, 190 N.E. 99, 356 Ill 49—Charles A. Hohmeier Lumber Co v Knight, 182 N.E. 715, 350 Ill 248—Rasmussen v Harper, 5 N.E.2d 357, 387 Ill App 404—Schwulst Gerling Co v. Frost, 269 Ill App 213.

Kan.—Corpus Juris cited in Bell v Hernandez, 30 P.2d 1101, 1102, 139 Kan. 216

Ky—Powers v Brewer, 38 S.W.2d 466, 238 Ky 579.

Me—Andrew v Bishop, 172 A. 752, 132 Me. 447, 100 A.L.R. 121

Minn—Martin v. Tucker, 14 N.W.2d 105, 217 Minn 104

Mo—Davis Estate v West Clayton Realty Co, 39 S.W.2d 22, 338 Mo 69—Fleming-Gilchrist Const Co v McGonigle, 89 S.W.2d 15, 338 Mo. 56, 107 A.L.R. 1003.

Mont—Smith v Gunniss, 144 P.2d 186, 115 Mont 363.

N.Y.—Schenectady Homes Corporation v Greenside Painting Corporation, 37 N.Y.S.2d 53

Pa.—Sundheim v School Dist of Philadelphia, 166 A. 365, 311 Pa.

90—Clothier v. Kniffen, 36 Luz Leg Reg 241

Tex—Morrison v State Trust Co, Civ App, 274 S.W. 341, reversed on other grounds State Trust Co v Morrison, Com App, 282 S.W. 214.

Vt—Goodro v. Tarkey, 22 A.2d 509, 112 Vt 212

40 C.J. p 43 note 62, p 64 note 57

44. Del—E. J. Hollingsworth Co v. Continental-Diamond Fiber Co, 175 A 266, 6 W.W.Harr 303

Ind—Cincinnati, R. & M. R. Co. v. Shera, 73 N.E. 293, 36 Ind App 315

NY—Eno v. Rapp, 7 N.Y.S.2d 513, 169 Misc 473

Ohio—Crandall v. Irwin, 39 N.E.2d 608, 139 Ohio St 253, 139 A.L.R. 895, adhered to 40 N.E.2d 933, 139 Ohio St 463, 139 A.L.R. 900

Okl—American Tank & Equipment Co v T. E. Wiggins, Inc, 42 P.2d 115, 170 Okl 504

45. Ala—Emanuel v. Underwood Coal & Supply Co., 14 So.2d 151, 155, 244 Ala 436

Ill—People ex rel Bradford Supply Co v Circuit Court of Pulaski County, 66 N.E.2d 420, 393 Ill 520—Alexander Lumber Co v. Coberg, 190 N.E. 99, 356 Ill 49—Charles A. Hohmeier Lumber Co v Knight, 182 N.E. 715, 350 Ill 248—Schwulst Gerling Co. v. Frost, 269 Ill App. 213

Ky—Powers v. Brewer, 38 S.W.2d 466, 238 Ky 579.

Mo—Davis Estate v. West Clayton Realty Co, 39 S.W. 22, 338 Mo 69—Fleming-Gilchrist Const. Co v. McGonigle, 89 S.W. 15, 338 Mo. 56, 107 A.L.R. 1003.

Tex—Morrison v. State Trust Co, Civ.App., 274 S.W. 341, reversed on other grounds State Trust Co. v. Morrison, Com App, 282 S.W. 214

Vt—Goodro v. Tarkey, 22 A.2d 509, 112 Vt 212

40 C.J. p 43 note 63.

General equitable principles cannot be made the basis of a lien in favor of a materialman; he cannot establish a lien on the basis of equitable estoppel or other general equitable principles—Buetner Bros v. Good Hope Missionary Baptist Church, 18 So.2d 75, 245 Ala. 553.

46. Ala—Corpus Juris quoted in Emanuel v. Underwood Coal & Supply Co., 14 So.2d 151, 155, 244 Ala 436

Ill—Charles A. Hohmeier Lumber Co v Knight, 182 N.E. 715, 350 Ill 248—Schwulst Gerling Co. v. Frost, 269 Ill App 213.

40 C.J. p 43 note 64.

gal proceedings⁴⁷ but attaches by operation of law when a contract has been entered into and the work has been performed or the materials furnished, which adds to the value of the property.⁴⁸

Contract. While a contract with the owner for, or at least his consent to, the making of the improvement in question is necessary before a lien can be established, as discussed *infra* § 52, and in such a sense the lien may be said to arise out of, or to be based on, contract,⁴⁹ nevertheless the lien is created by, and arises from, statute and not by or out of contract.⁵⁰ The provisions of a contract cannot enlarge the statute⁵¹ and give a lien to a person not entitled thereto under the law,⁵² and it has been held that the lien cannot be restricted or extended by the acts of the contracting parties.⁵³ However, by agreement, independent of statute, a lien in the nature of a mechanic's lien may be reserved between the parties,⁵⁴ and may be enforced against anyone acquiring a subsequent interest with notice of such lien.⁵⁵

Civil law. Mechanics' liens on buildings and land were recognized and favored by the civilians,⁵⁶ and were clearly defined and regulated in the civil law.⁵⁷

§ 2. What Law Governs

The creation and operation of a mechanic's lien are governed by the law of the state where the real property benefited is situated.

A mechanic's lien is a creature of the law of the state where the real property, benefited by the labor or materials, is situated,⁵⁸ and that law governs the mode of its creation and operation,⁵⁹ and also the method whereby it may be continued;⁶⁰ and this rule applies although the contract for labor or materials was made in another state.⁶¹

§ 3. Constitutional and Statutory Provisions

- a. In general
- b. Constitutionality

a. In General

The theory and purpose of mechanics' lien statutes are to protect persons who contribute labor or materials to the construction, improvement, or repair of a building or other structure, thereby enhancing the value of the land, by affording them security for their compensation.

Statutes creating mechanics' liens and prescribing means for their perfection and enforcement exist in practically all, if not all, of the states,⁶² although some of the earlier statutes applied only to certain designated localities or parts of the state.⁶³ A mechanics' lien law does not create a new substantive right, but merely provides an additional means of enforcing the payment of a debt,⁶⁴ it generally provides a means for creating the lien as well as a means for enforcing it.⁶⁵ It does not affect the law of contracts or create any new con-

47. U.S.—*Kemp Lumber Co v Howard*, N.M., 237 F. 574, 577, 150 C.C. A. 456.

48. C.J. p. 43 note 65.

49. Va.—*Cain v Rea*, 166 S.E. 478, 159 Va. 446, 85 A.L.R. 945.

49. Ala.—*Fleming v Kirkland*, 146 So. 384, 226 Ala. 222.

50. Ga.—*Crane Co. v Hirsch*, 7 S.E. 2d 88, 61 Ga. App. 632.

50. Ala.—*Buettner Bros v Good Hope Missionary Baptist Church*, 18 So. 2d 75, 245 Ala. 553—*Richards v William Beach Hardware Co*, 7 So. 2d 492, 242 Ala. 535.

51. Fla.—*Hogue v D N Morrison Const Co of Virginia*, 156 So. 377, 115 Fla. 393, 95 A.L.R. 357—*Corpus Juris* cited in *Tallahassee Variety Works v Brown*, 144 So. 848, 852, 108 Fla. 599—*Harper Lumber & Mfg. Co v Teate*, 125 So. 21, 98 Fla. 1055.

52. Ga.—*Williams v Brewton*, 152 S.E. 441, 170 Ga. 164.

53. Mo.—*Davis Estate v West Clayton Realty Co*, 89 S.W. 2d 22, 338 Mo. 69.

54. Mont.—*Smith v Gunniss*, 144 P. 2d 186, 115 Mont. 363.

40 C.J. p. 44 note 68.

Whether lien is reserved, intended, or contemplated is immaterial if

party performing work or furnishing material comes within statute, lien arises in his favor which can be established and enforced by compliance with statutory requirements—*Davis Estate v West Clayton Realty Co*, 89 S.W. 2d 22, 338 Mo. 69.

51. Tenn.—*Lowenstein v Reynolds*, 22 S.W. 210, 92 Tenn. 543.

52. Tenn.—*Lowenstein v Reynolds*, *supra*.

Persons entitled to lien see *infra* §§ 86–117.

53. Colo.—*Johnston v Bennett*, 40 P. 347, 6 Colo. App. 362.

40 C.J. p. 44 note 71.

54. Ill.—*Smith v Kennedy*, 89 Ill. 485.

40 C.J. p. 44 note 72.

55. Ill.—*Smith v Kennedy*, *supra*.

40 C.J. p. 44 note 73.

56. Me.—*Durling v Gould*, 21 A. 833, 83 Me. 184, 187.

57. Ky.—*Powers v Brewer*, 38 S.W. 2d 466, 238 Ky. 579.

Vt.—*Goodro v Tarkey*, 22 A. 2d 509, 112 Vt. 212.

40 C.J. p. 44 note 75.

58. U.S.—*In re Willax*, C.C.A.N.Y., 93 F.2d 293.

59. U.S.—*In re Willax*, *supra*.

State laws and decisions as to me-

chanics' liens applicable in federal court see *Federal Courts* § 189.

What law governs remedy see *infra* § 263.

60. U.S.—*In re Willax*, *supra*.

61. Kan.—*United States Inv Co v Phelps & Bigelow Windmill Co*, 37 P. 982, 54 Kan. 144.

N.M.—*Genest v Las Vegas Masonic Bldg Ass'n*, 67 P. 743, 11 N.M. 251.

Okla.—*Lively v Evans-Howard Fire Brick Co*, 242 P. 773, 115 Okla. 259.

62. Wash.—*Armour v Western Constr. Co*, 78 P. 1106, 38 Wash. 529.

40 C.J. p. 44 note 76.

No mechanic's lien.

(1) In England.—*Westcott v Bunker*, 22 A. 388, 83 Me. 499—40 C.J. p. 44 note 77.

(2) In Mexico.—*Stowell v Simmons*, 1 Cal. 452—*Macondray v Simmons*, 1 Cal. 393.

(3) In the Philippines.—*Fressel v Chaco*, 34 Philippine 122.

63. Ga.—*Prince v Neal-Millard Co*, 53 S.E. 761, 763, 124 Ga. 884.

40 C.J. p. 44 note 76 [c].

64. Ohio.—*Lockland Lumber Co. v Robinson*, 157 N.E. 376, 116 Ohio St. 725.

65. Okla.—*Holland v Spurrier Lumber Co*, 229 P. 206, 100 Okla. 288.

tractual liability,⁶⁶ but gives a contractor a remedy for enforcing his claim in addition to, and not affecting the enforcement of, his contract rights with the property owner by common-law or equitable means.⁶⁷

The theory and purpose of statutes creating mechanics' liens are to protect, not ordinary contract creditors⁶⁸ or persons possessed of claims in tort against the contractor,⁶⁹ but persons who have, in good faith, contributed labor or material to the construction, improvement, or repair of a building or other structure,⁷⁰ thereby enhancing the value of

the land,⁷¹ by according them security for their compensation⁷² independent of the account of indebtedness between the owner and the contractor.⁷³ It has been further stated that the object of the statutes is to prevent the owner of land from obtaining the labor and capital of other persons, and retaining the benefit thereof, without paying therefor.⁷⁴ The statutes are based on, and justified by, the principle that the building constructed becomes a part of the realty,⁷⁵ increasing the value thereof,⁷⁶ and that the persons who have contributed labor or material to the improvement of property are entitled to look to that property for compensation.⁷⁷

66. N.Y.—Brigham v. Duany, 183 N.E. 507, 241 N.Y. 485—Smith v. Vara, 241 N.Y.S. 202, 186 Misc. 500.

67. Ill.—H. G. Wolff Co. v. Gwynne, 246 Ill. App. 86.

68. N.Y.—Edison Electric Illum. Co. v. Horace E. Frick Co., 116 N.E. 369, 221 N.Y. 1, L.R.A. 1917F. 1123.

69. N.Y.—Edison Electric Illum. Co. v. Horace E. Frick Co., supra.

70. U.S.—In re Louisville Daily News & Enquirer, D.C.Ky., 20 F. Supp. 465.

Ala.—David Lupton's Sons Const. Co. v. Hugger Bros. Const. Co., 148 So. 610, 227 Ala. 25.

Ariz.—Wylie v. Douglas Lumber Co., 8 P.2d 256, 39 Ariz. 511, 83 A.L.R. 918.

Ill.—Colp v. First Baptist Church of Murphysboro, 173 N.E. 67, 68, 341 Ill. 73, 71 A.L.R. 106—Gunter v. O'Brien Bros. Const. Co., 12 N.E.2d 23, 293 Ill. App. 28, reversed on other grounds 16 N.E.2d 890, 369 Ill. 383.

Mo.—Sol Abrahams & Son Const. Co. v. Osterholm, App., 136 S.W.2d 86. N.Y.—Arrow Iron Works v. Greene, 247 N.Y.S. 4, 139 Misc. 265, affirmed 255 N.Y.S. 931, 235 App. Div. 712, modified on other grounds 183 N.E. 515, 260 N.Y. 330, reargument and motion denied 184 N.E. 151, 260 N.Y. 698—Schenectady Homes Corporation v. Greenside Painting Corporation, 37 N.Y.S.2d 53.

Ohio—Corpus Juris cited in Cooper v. Haynes, 177 N.E. 475, 477, 39 Ohio App. 281.

Okl.—National Gas Co. v. Ada Iron & Metal Co., 98 P.2d 529, 185 Okl. 415.

Or.—Drake Lumber Co. v. Lundquist, 170 P.2d 712, 179 Or. 402, 40 C.J. p. 45 note 86.

Purpose

(1) "The object and purpose of the Mechanics' Lien Law was to protect a person who, with the consent of the owner of real property, enhanced its value by furnishing materials or performing labor in its improvement, by giving him an interest

therein to the extent of the value of such material or labor"—John P. Kane Co. v. Kinney, 66 N.E. 619, 174 N.Y. 69—Charles C. Kellogg & Sons Co. v. DeLia, 17 N.Y.S.2d 330, 331, 173 Misc. 156, reversed on other grounds 28 N.Y.S.2d 4, 262 App. Div. 803.

(2) The purpose of the statute is to assist the miner and laborer to recover wages—Mitchell v. Beaver Dredging Co., 8 Alaska 566.

The lien law affords complete protection to laborers and materialmen by authorizing them to file a lien against the premises guaranteeing that no money earned by the lienor will escape him—Rubinstein v. Jamaica Nat. Bank of New York, 40 N.Y.S.2d 23, affirmed 44 N.Y.S.2d 950, 268 App. Div. 977, affirmed 61 N.E.2d 455, 294 N.Y. 727, motion granted 62 N.E.2d 394, 294 N.Y. 843.

71. U.S.—In re Louisville Daily News & Enquirer, D.C.Ky., 20 F. Supp. 465.

Ariz.—Wylie v. Douglas Lumber Co., 8 P.2d 256, 39 Ariz. 511, 83 A.L.R. 918.

Ill.—Colp v. First Baptist Church of Murphysboro, 173 N.E. 67, 68, 341 Ill. 73, 71 A.L.R. 106.

Mass.—Winer v. Rosen, 121 N.E. 79, 231 Mass. 413—Shaughnessy v. Isenberg, 99 N.E. 975, 213 Mass. 159.

N.M.—Albuquerque Lumber Co. v. Montevista Co., 38 P.2d 77, 39 N.M. 6.

N.Y.—Charles C. Kellogg & Sons Co. v. DeLia, 17 N.Y.S.2d 330, 173 Misc. 156, reversed on other grounds 28 N.Y.S.2d 4, 262 App. Div. 803—Schenectady Homes Corporation v. Greenside Painting Corporation, 37 N.Y.S.2d 53.

Ohio—Cooper v. Haynes, 177 N.E. 475, 477, 39 Ohio App. 281.

72. N.J.—Woodbridge Lumber Co. v. Varacaka, 194 A. 392.

N.Y.—C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 N.Y.S.2d 671, 188 Misc. 376—Schenectady Homes Corpora-

tion v. Greenside Painting Corporation, 37 N.Y.S.2d 53.

N.D.—Dunham Lumber Co. v. Gress, 2 N.W.2d 175, 71 N.D. 491, 141 A.L.R. 60.

40 C.J. p. 45 notes 88, 89.

73. Cal.—Burr v. Peppers Cotton Lumber Co., 268 P. 1025, 91 Cal. App. 268, followed in Willett v. Peppers Cotton Lumber Co., 268 P. 1028, 91 Cal. App. 798.

74. Ill.—Colp v. First Baptist Church of Murphysboro, 173 N.E. 67, 68, 341 Ill. 73, 71 A.L.R. 106—Rasmussen v. Harper, 5 N.E.2d 257, 287 Ill. App. 404.

Ind.—Moore-Mansfield Constr. Co. v. Indianapolis, N. & T. R. Co., 101 N.E. 296, 179 Ind. 358, 44 L.R.A. N.S. 816, Ann. Cas. 1915D 917—Beeson v. Overpeck, 44 N.E.2d 195, 112 Ind. App. 195.

75. Del.—Corpus Juris cited in Girdler Corporation v. Delaware Compressed Gas Co., 183 A. 489, 482.

Mont.—Smith v. Gunniss, 144 P.2d 186, 115 Mont. 362.

Ohio—Corpus Juris cited in Cooper v. Haynes, 177 N.E. 475, 477, 39 Ohio App. 281.

40 C.J. p. 45 notes 91, 92.

76. Del.—Corpus Juris cited in Girdler Corporation v. Delaware Compressed Gas Co., 183 A. 489, 482.

Mont.—Smith v. Gunniss, 144 P.2d 186, 115 Mont. 362.

Ohio—Cooper v. Haynes, 177 N.E. 475, 477, 39 Ohio App. 281.

40 C.J. p. 45 note 93.

Benefit or increased value as being immaterial see *infra* § 20.

77. Ala.—David Lupton's Sons Const. Co. v. Hugger Bros. Const. Co., 148 So. 610, 227 Ala. 25.

Ind.—Jackson v. J. A. Franklin & Son, 23 N.E.2d 23, 107 Ind. App. 38.

Mont.—Smith v. Gunniss, 144 P.2d 186, 115 Mont. 362.

Ohio—Cooper v. Haynes, 177 N.E. 475, 477, 39 Ohio App. 281.

40 C.J. p. 45 note 94.

The statutes are sometimes said to be equitable in purpose,⁷⁸ or to have an equitable basis,⁷⁹ their aim and purpose being to do substantial justice between the parties,⁸⁰ by protecting the owner as well as the lienholder,⁸¹ and to accomplish what a court of equity could not do.⁸² Where the lien is conferred by constitutional provision, the existence of the lien is not dependent on compliance with any statute,⁸³ the object of statutes enacted thereafter being to supply the means of enforcing the lien conferred.⁸⁴

Extraterritorial effect. Mechanics' lien laws have no extraterritorial effect.⁸⁵ In the case of lands which have been ceded to the United States by a state for governmental uses the laws of the state apply,⁸⁶ but where a territory is carved out of a state, and there is no provision making the laws of

the state applicable to the new territory, no lien can be acquired in the territory under such state laws.⁸⁷

b. Constitutionality

- (1) In general
- (2) Under constitutional provisions creating or favoring lien

(1) In General

Statutes providing for mechanics' liens have generally been upheld as valid.

The validity and constitutionality of mechanics' lien laws generally,⁸⁸ as well as the validity and constitutionality of particular provisions or features thereof,⁸⁹ have been upheld, such as a provision giving a lien to a subcontractor who has no contract

78. Colo.—Lowell Hardware Co v May, 149 P 831, 59 Colo 475—Cannon v Williams, 28 P 456, 14 Colo 21

Mo—Corpus Juris quoted in Johnson v Brill, 295 SW 558, 562

Ohio—Cooper v Haynes, 177 N.E. 475, 477, 39 Ohio App 281

79. Mont.—Stritzel-Spaberg Lumber Co v Edwards, 144 P. 772, 50 Mont 49
40 C.J. p 45 note 96

80. Mo—Corpus Juris quoted in Johnson v Brill, 295 SW 558
40 C.J. p 46 note 97

81. Cal.—Shafer v Los Serranos Co, 17 P 2d 1036, 128 Cal App 357, followed in Gonzales v Los Serranos Co, 17 P 2d 1038, 128 Cal App 780

Iowa—Cedar Rapids Sash & Door Co v Heinbaugh, 168 NW 270, 183 Iowa 1236

La.—Glassell, Taylor & Robinson v John W Harris Associates, 26 So 2d 1, 209 La 957

N.J.—Woodbridge Lumber Co v Varacaka, 184 A 392, 394.

40 C.J. p 46 note 97 [a]

"It is very clear that the purpose of the statute is to secure to persons furnishing labor or materials for use in the construction of a building payment for such labor or materials, but it is likewise clear that it was also the purpose of the statute to provide a means by which owners might have a building erected for them without subjecting the land and building to a lien in favor of a person or persons to them unknown involving amounts over which the owner would have no control"—Woodbridge Lumber Co v Varacaka, supra.

82. Mo—Corpus Juris quoted in Johnson v Brill, 295 SW 558, 562
Ohio—Park v Williamson Heater Co, 20 Ohio N.P.N.S., 150

83. US—Bovaird Supply Co v American Tank Co, CCA Tex., 29 F 2d 361

84. Cal.—Los Angeles Pressed Brick Co v Higgins, 97 P 414, 420, 8 Cal App 514

85. NY—Birmingham Iron Fdy v Glen Cove Starch Mfg Co, 78 NY 30

Acquisition of lien by nonresident see infra § 7

86. US—Crook v Old Point Comfort Hotel Co, CCA Va., 54 F 604

87. Colo.—Townsend v Wild, 1 Colo 10

88. Ill.—Cooper v Palais Royal Theatre Co, 242 Ill App 184

N.M.—Baldridge v Morgan, 106 P 342, 15 NM 249, Ann Cas 1912C, 337, followed in Nash v Morgan, 106 P 344, 15 NM 258 and Metz v Romero, 106 P 344, 15 NM 273

40 C.J. p 46 note 5

Application of particular constitutional provisions see Constitutional Law §§ 210, 386, 498, 547, 631

89. Del.—State v Tabasso Homes, 28 A 2d 348

Mo—Imse-Schilling Sash & Door Co v Kellems, 179 SW 2d 910, 287 Mo App 960.

Neb.—Gibson v Koutschy-Brennan-Vana Co, 9 N.W 2d 298, 143 Neb 328.

N.M.—Baldridge v. Morgan, 106 P 342, 15 NM 349, Ann Cas 1912C, 337, followed in Nash v. Morgan, 106 P. 344, 15 NM 258 and Metz v Romero, 106 P 344, 15 NM 273
40 C.J. p 46 note 6.

Particular provisions held constitutional

(1) Statute providing for the creation and enforcement of mechanic's lien claim against married woman's separate statutory property.—Piereson v Reinhardt, 138 So 553, 101 Fla.

1392, rehearing denied 136 So 250, 101 Fla 1392

(2) Statute declaring moneys received for erection of a building to be trust funds, and making it unlawful to use or pay out such moneys until all claims due for labor and materials are paid.—State v Tabasso Homes, Del., 28 A 2d 248.

(3) Statute obligating owner to pay claims of laborers and materialmen when not requiring certificate of unpaid claims.—Chapel State Theatre Co v Hooper, 175 NE 450, 123 Ohio St 322, affirmed 52 S Ct 137, 284 US 588, 76 L Ed 508

(4) Statute providing for lien for material furnished subcontractor for forms or form work in concrete construction.—Douglas Lumber Co. v Chicago Home for Incurables, 43 N E 2d 535, 380 Ill 87

(5) Statute requiring that bond for performance of building contract shall include guaranty that contractor will make payment to materialmen and laborers, and that, if such provision is omitted, bond should inure to protection of materialmen and laborers as if provision were expressed

US—Hartford Accident & Indemnity Co. v. N O Nelson Mfg Co, Miss, 54 S Ct. 392, 291 US 352, 78 L Ed 840.

Miss—U. S Fidelity & Guaranty Co v. Parsons, 112 So 469, 147 Miss 385, 53 A L R 88

(6) Statute subjecting to mechanic's lien only house, building, etc., erected, constructed, etc., at instance of one not owner of land, unless done by owner's written consent.—Cheers Floor & Screen Co. v. Gidden, 131 So 426, 159 Miss. 288.

(7) Other provisions.—Kempter v. Buckley, Pa Com Pl., 40 Lack Jur 117—40 C.J. p 46 note 6 [a].

with the owner,⁹⁰ or requiring an owner having knowledge of improvements to disclaim responsibility in a certain manner, and within a specified time, in order to escape liability,⁹¹ or authorizing the amendment of the lien claim or statement.⁹² Particular sections, provisions, or features of some statutes have been held unconstitutional,⁹³ such as a provision which vests a subcontractor or materialman with the right to a lien in a case where the original contractor has waived his right to a lien before the materials are furnished or the labor performed,⁹⁴ or which requires the owner to take from the contractor a bond for the benefit of subcontractors, laborers, and materialmen.⁹⁵ However, even though a part of a mechanics' lien law may be unconstitutional the remainder, if separable, may be valid.⁹⁶

A provision giving the legislature power to create a lien on buildings separate from the land has been held constitutional,⁹⁷ but there is also authority to the contrary.⁹⁸ Likewise, although there is authority to the contrary,⁹⁹ statutes conferring on mechanics' liens priority over other liens or encumbrances have been held constitutional,¹ and it has

been held that the legislature may withdraw priorities which materialmen enjoy and decree equality of division of available money among liens of equal rank.² A law providing that a materialman or a subcontractor may enforce his lien without regard to the indebtedness existing between the contractor and the owner has been held constitutional,³ but there is also authority to the contrary.⁴

(2) Under Constitutional Provisions Creating or Favoring Lien

Under a constitutional provision creating or favoring mechanics' liens, the legislature may prescribe the means for protecting, perfecting, or enforcing the lien, but generally cannot limit or restrict the right to the lien.

Under constitutional provisions creating mechanics' liens, the legislature may prescribe means for protecting, perfecting, and enforcing the lien,⁵ and it may extend the right to such a lien,⁶ but it cannot deny, limit, impair, or detract from the right conferred by the constitution,⁷ such as with respect to equality between the class of persons who may be entitled to the lien⁸ or with respect to the limitation of liability of the owner to the lien claimant.⁹ A constitutional provision favoring a me-

90. Wyo.—Becker v Hopper, 188 P 179, 23 Wyo 237, Ann Cas 1916D 1041—Becker v Hopper, 147 P 1085, 23 Wyo 209, Ann Cas 1918B 85.

40 C.J. p 46 note 6 [a] (4).

91. Or.—Title Guarantee & Trust Co. v Wrenn, 56 P 271, 35 Or. 62, 76 Am SR 454.

40 C.J. p 46 note 6 [a] (3).

92. Kan.—Atkinson v Woodmansee, 74 P. 640, 68 Kan. 71, 64 L.R.A. 325.

40 C.J. p 46 note 6 [a] (9).

93. Minn.—Meyer v. Berlandi, 40 NW 518, 39 Minn 438, 12 Am S.R. 663, 1 L.R.A. 777.

Pa.—Silfies v Austin, 158 A. 661, 104 Pa Super. 344.

40 C.J. p 47 note 10.

Particular statutory provisions held unconstitutional

(1) Allowing amendments of lien claims in matters of substance after the time for filing the lien has expired—South Philadelphia Builders' Supply Co. v. Testa, 8 Pa Dist & Co., 794.

(2) Authorizing lien on public school buildings.—Boise-Payette Lumber Co. v. Challis Independent School Dist. No 1 of Custer County, 288 P. 28, 46 Idaho 403.

(3) Respecting private construction contract bonds being applicable only to a particular county.—J. O. Plott Co. v. H. K. Ferguson Co., 168 S.W. 688, 202 N.C. 446.

(4) Attempting to authorize the

filing of a mechanic's lien for equipment in or about a building, other than that which is permanent in character and forms an integral part of the structure itself—Philadelphia Gas Range Co. v. Shallcross, 20 Pa Dist & Co. 118.

(5) Other particular provisions see 40 C.J. p 47 note 10 [a].

94. Ill.—Kelly v Johnson, 95 NE 1068, 251 Ill 135, 36 L.R.A.N.S. 573.

40 C.J. p 10 note [a] (1).

95. Tex.—Williams v Baldwin, Com App, 302 S.W. 975.

40 C.J. p 47 note 10 [a] (3).

96. U.S.—New England Engineering Co. v Oakwood St Engineering Co., C.C.Ohio, 75 F 162.

Ohio—McCune v. Snyder, 8 Ohio S. & CP 316.

40 C.J. p 47 note 11.

97. Mo.—Joplin Supply Co. v. West, 130 S.W. 156, 149 Mo App 78.

98. Pa.—Taylor Lumber Co. v Carnegie Inst., 74 A 357, 225 Pa. 486.

99. Pa.—Page v. Carr, 81 A. 430, 232 Pa. 371.

1. La.—Gleissner v Hughes, 95 So. 529, 153 La 133.

40 C.J. p 47 note 14.

As impairing obligation of contracts see Constitutional Law § 386 b.

2. N.Y.—Alberene Stone Co. v. Board of Education of City of New York, 276 N.Y.S. 29, 153 Misc 813, affirmed Alberene Stone Co. v. Grinnell Co., 279 N.Y.S. 976, 244 App.Div. 711.

3. U.S.—Jones v Great Southern Fireproof Hotel Co., Ohio, 86 F 370, 30 C.C.A. 108.

40 C.J. p 48 note 16.

4. Ala.—Selma Sash, Door & Blind Factory v Stoddard, 22 So 555, 116 Ala 251.

40 C.J. p 48 note 17.

5. Tex.—Strang v. Pray, 35 S.W. 1054, 89 Tex 525.

40 C.J. p 48 note 19.

Time of filing claim

A constitutional provision that mechanics, materialmen, artisans, and laborers shall have a lien for value of labor done or material furnished is not paramount to the statute prescribing time within which claim must be filed—Ferguson v Gearhart, 186 P. 376, 44 Cal App 245.

6. U.S.—Huttig Sash & Door Co. v. Stitt, Tex., 218 F 1, 133 C.C.A. 641.

40 C.J. p 48 note 20.

7. U.S.—Huttig Sash & Door Co. v. Stitt, supra.

40 C.J. p 48 note 21.

Conditions of forfeiture cannot be affixed to the lien by the legislature.—McBride v Beakley, Tex Civ App., 203 S.W. 1137.

8. Cal.—Stimson Mill Co. v. Nolan, 91 P. 262, 5 Cal App 754, 759.

40 C.J. p 48 note 21 [b].

Persons entitled to lien in general see infra § 86-96.

9. Cal.—Pacific Portland Cement Co. v. Hopkins, 162 P. 1016, 174 Cal 251.

40 C.J. p 48 note 21 [c].

chanic's lien, although the lien is purely a creature of statute,¹⁰ has been held to confer unlimited power on the legislature to legislate on the subject of mechanics' liens¹¹

§ 4. — Construction, Operation, and Effect in General

- a. In general
- b. Strict or liberal construction
- c. Operation and effect in general

a. In General

A mechanics' lien law should receive a fair and reasonable construction in order to effectuate the object and purpose of the statute.

In accordance with the general rules of statutory construction, as discussed in the CJS title Statutes §§ 311-386, also 59 C.J. p 943 note 29-p 1105 note 38, a mechanics' lien law should be given a

fair and reasonable construction so as to effectuate the object and purpose of the statute¹² and to protect mechanics and materialmen in their claims.¹³ In making such construction the court should accept the plain language of the statute as written,¹⁴ construe the statute in its entirety,¹⁵ and construe related statutes in connection with each other;¹⁶ but a specific provision or statute will control the construction of a general provision or statute.¹⁷ The various provisions of a statute dealing with the subject of mechanics' liens will be construed as relating to all mechanics' liens,¹⁸ including liens on the property of private owners and liens on public improvements,¹⁹ except where the language of the section evidences a different intent,²⁰ or where from the nature of the subject regulations as to one class are inapplicable to the other.²¹

Decisions as precedents. By reason of the dissimilarity of the mechanics' lien statutes of the

10. Ohio—*Elgar v. Corwin*, 29 Ohio CA 65
40 C.J. p 49 note 23.

11. Ohio—*West Side Lumber & Manufacturing Co v Lancaster Paper Mill Co*, 26 Ohio Cir Ct, N S, 413

12. US—*Egyptian Supply Co v. Boyd*, CCA Ky, 117 F 2d 608, 612
Conn—*City Lumber Co of Bridgeport v Borsuk*, 41 A 2d 775, 131 Conn. 640, 158 A L R 677—*Pierce, Butler & Pierce Mfg Corporation v Eiders*, 174 A. 169, 118 Conn 610—*Burque v. Naugatuck Lumber Co*, 155 A 414, 113 Conn 350—*J L Purcell, Inc, v Libbey*, 149 A 225, 111 Conn 132, 68 A L R 1258—*New Haven Orphan Asylum v. James A Haggerty Co*, 142 A 847, 108 Conn 232

D C.—*James B Lambie Co v. Bigelow*, 34 App DC 49

Ill.—*Alexander Lumber Co v Coberg*, 190 NE 99, 356 Ill 49—*Crown v. Meyer*, 174 NE 55, 342 Ill 46—*Hoffman v. Lake View Avenue Building Corporation*, 12 NE 2d 340, 293 Ill App 627

Ky.—*Hodges v. Quire*, 174 SW 2d 9, 295 Ky 78

La.—*Glassell, Taylor & Robinson v. John W Harris Associates*, 26 So. 2d 1, 209 La. 957—*Truscon Steel Co. v B & T Const. Co*, 129 So 644, 170 La. 1083

N.J.—*Woodbridge Lumber Co v. Varasaka*, Cir Ct, 194 A. 393

N.Y.—*American Hardware Corp v. Lyttle*, 118 NE 604, 222 NY 201.

Okl.—*Guest v Shamburger*, 251 P. 97, 120 Okl. 164.

Utah—*Park City Meat Co v Comstock Silver King Min. Co*, 103 P. 254, 36 Utah 145.

Where more than one reasonable interpretation may be applied to language used in any section of mechanics' lien law, court will adopt the reasonable interpretation which will best carry out evident purposes of statute as a whole—*Art Metal Const Co v Knight*, 185 A 136, 56 RI 228
13. N.J.—*Shoemaker v Maloney*, 132 A 806, 102 NJ Law 363—*In re Dujanski*, 179 A 693, 13 NJ Misc 546.

Okl.—*Guest v Shamburger*, 251 P. 97, 120 Okl. 164

14. Ill.—*Alexander Lumber Co v. Coberg*, 190 NE 99, 356 Ill 49
Tenn.—*Pillow v Kelly*, 296 SW 11, 155 Tenn. 597—*Allen v Brown*, 14 Tenn App 405

Strict legal definition of terms used need not always be followed in construing remedial statute providing for enforcement of liens—*Gallagher v Campodonico*, 5 P.2d 486, 121 Cal App (Supp) 785

15. Cal.—*Hendrickson v Bertelson*, 35 P 2d 318, 1 Cal 2d 430—*Hammond Lumber Co v. Barth Inv Corporation*, 262 P. 31, 202 Cal. 606
Conn.—*J L Purcell, Inc v Libbey*, 149 A 225, 111 Conn 132, 68 A L R 1258—*New Haven Orphan Asylum v James A Haggerty Co*, 142 A. 847, 108 Conn 232.

Idaho—*Boise Payette Lumber Co v. Sharp*, 264 P 665, 45 Idaho 611

La.—*Glassell, Taylor & Robinson v John W. Harris Associates*, 26 So 2d 1, 209 La. 957

N.Y.—*Kelly v Bloomingdale*, 34 NE 919, 139 NY 343

Utah—*Eccles Lumber Co. v Martin*, 87 P 713, 31 Utah 341

Absurd consequences

The statute may be construed as a whole so as to effectuate the legis-

lative intent and avoid absurd consequences resulting from construction of the act section by section.—*Glassell, Taylor & Robinson v. John W Harris Associates*, 26 So 2d 1, 209 La. 957

16. La.—*Monroe Hardware Co v. Thompson*, 110 So 495, 162 La. 335—*J J Clarke Co v Petivan*, 109 So 913, 161 La 1095
Tenn.—*Richardson v Lanus*, 263 S. W 799, 150 Tenn 133.
40 C.J. p 49 note 38

Public works act must be read in light of entire scheme provided by law for protection of mechanics, materialmen, and others—*Cassaretto v. City and County of San Francisco*, 62 P 2d 777, 18 Cal App 2d 8

17. US—*Caldwell v Steinfeld*, C. C A Ariz, 294 F 270

A land title law, recognizing an earlier mechanics' lien law, being a special enactment, controls the earlier enacted provisions in conflict therewith—*Hammond Lumber Co. v Moore*, 286 P. 504, 104 Cal App. 528

18. N.Y.—*Brace v. Gloversville*, 60 NE 779, 167 NY 453

All mechanics' liens may be created by certain sections of mechanics' lien law, although liens for labor done or furnished otherwise than under contract with, or at request of, owner are specifically created by another section—*Art Metal Const. Co v Knight*, 185 A 136, 56 RI 228.

19. N.Y.—*Brace v. Gloversville*, 60 NE 779, 167 NY. 452

20. N.Y.—*Brace v. Gloversville*, supra

21. N.Y.—*Brace v. Gloversville*, supra.

different states, the decisions of the courts of one state construing the statute of that state are generally not considered as of great value as precedents in construing the statute of another state.²² However, the general rule of statutory construction that, where one state adopts the statute of another, it adopts it with the construction placed on it by the highest court of judicature of the latter state is applicable where a mechanic's lien statute of one state is adopted by another state.²³ Where the construction of a local mechanics' lien law is not free from doubt, the construction given to it by courts in the locality where the act operates should have great weight with the court of last resort in construing the statute.²⁴

b. Strict or Liberal Construction

- (1) Strict construction
- (2) Liberal construction

22. Colo.—*Stewart v. Talbott*, 146 P 771, 58 Colo 568, Ann Cas 1916C 1116

40 C.J. p 49 note 45.

23. Nev.—*Hunter v. Truckee Lodge* No 14 I O O. F., 14 Nev 34

24. N.Y.—*Cornell v. Barney*, 94 N Y. 394.

25. Ala.—*Richards v. William Beach Hardware Co.*, 7 So 2d 492, 242 Ala 535

Del.—*Gardner Corporation v. Delaware Compressed Gas Co.*, 183 A 480, 7 W.W.Harr. 344—*Pittman-Berger Co. v. Parkinson*, 180 A 645, 7 W.W.Harr 105—*C. L. Pierce & Co. v. Security Trust Co.*, 175 A 770, 6 W.W.Harr 348—*E. J. Hollingsworth Co. v. Continental-Diamond Fiber Co.*, 175 A 266, 6 W.W.Harr 303—*Iannotti v. Kalmbacher*, 156 A 366, 4 W.W.Harr 600—*Heitz v. Sayers*, 113 A 901, 1 W.W.Harr. 221

Ill.—*Alexander Lumber Co. v. Coberg*, 190 NE 99, 356 Ill 49—*United Cork Cos. v. Volland*, 2 NE 2d 579, 284 Ill App 652, reversed on other grounds 7 NE 2d 301, 284 Ill App. 652—*Westphal v. Berthold*, 273 Ill App. 266.

Iowa.—*Melcher Lumber Co. v. Robertson Co.*, 250 NW 594, 217 Iowa 31

La.—*Glassell, Taylor & Robinson v. John W. Harris Associates*, 26 So. 2d 1, 209 La. 957—*Conservative Homestead Ass'n v. Boyle*, 135 So 663, 172 La. 878—*Cole v. Schexnandre*, 111 So. 651, 163 La. 132—*Griffith v. Williams*, App. 19 So. 2d 277—*Yellow Pine Lumber Co. v. Maniscalco*, App. 9 So. 2d 320—*Callender v. Marks*, App. 186 So 891—*Texas Lumber Co. v. E. D. Green Realty Co.*, 140 So 823, 19 La App 585—*Southern Gas Line*

v. Dixie Oil Co., 133 So 181, 16 La App 26—*Fowler Commission Co. v. E. J. Deas & Co.*, 127 So 456, 13 La App 141—*Lawrence v. Wright*, 124 So. 697, 11 La App 703—*Price v. Lee*, 123 So. 458, 11 La App 291—*Casey v. Allain*, 120 So 420, 9 La App 725

Mass.—*Cook Borden & Co. v. Commonwealth*, 199 NE 551, 293 Mass. 174

Or.—*Corpus Juris* cited in *Phillips v. Graves*, 9 P 2d 490, 494, 139 Or 336, 83 ALR 1.

Pa.—*Jennings v. Dubinsky*, Com Pl, 43 Lack Jur 53

R.I.—*Anastos v. Brown*, 161 A 218, 52 RI 462

40 C.J. p 50 note 51

Necessity of strict or substantial compliance with statute see *infra* § 119

In Connecticut

(1) In a recent case it was held that a mechanics' lien is a creature of statutes and must be strictly construed—*Gruss v. Miskinis*, 34 A 2d 600, 130 Conn 367

(2) In an earlier case the contrary was held—*Martin Tire & Rubber Co. v. Kelly Tire & Rubber Co.*, 122 A 102, 99 Conn 396—40 C.J. p 51 note 60 [b]

26. Del.—*E. J. Hollingsworth Co. v. Continental-Diamond Fiber Co.*, 175 A 266, 6 W.W.Harr. 303—*Iannotti v. Kalmbacher*, 156 A 366, 4 W.W.Harr 600—*Heitz v. Sayers*, 113 A 901, 1 W.W.Harr 221.

Ill.—*Charles A. Hohmeier Lumber Co. v. Knight*, 182 NE 715, 350 Ill 248—*United Cork Cos. v. Volland*, 2 NE 2d 579, 284 Ill App 652, reversed on other grounds 7 NE 2d 301, 365 Ill. 564—*Westphal v. Berthold*, 273 Ill App 266.

(3) As controlled by nature of provisions construed

(1) Strict Construction

In some states it is stated as a general rule that mechanics' lien statutes must be strictly construed

In some states it is stated as a general rule that mechanics' lien statutes must be strictly construed,²⁵ on the theory that they are in derogation of the common law,²⁶ as well as opposed to,²⁷ and in derogation of,²⁸ common right. This rule of strict construction is particularly applicable where the statute is a special one, entirely local in its nature, and in abrogation of the general lien law of the state.²⁹ However, even under the rule of strict construction, the statutes must nevertheless be given a construction which is reasonable³⁰ and which will render them effectual,³¹ rather than one which will impair or nullify them³² or defeat their obvious purpose

Pa.—*Kempton v. Buckley*, 40 Lack Jur 117

40 C.J. p 50 note 52.

27. Ill.—*M. Pugh Co. v. Wallace*, 64 NE 1005, 198 Ill 422

40 C.J. p 50 note 53.

28. La.—*Glassell, Taylor & Robinson v. John W. Harris Associates*, 26 So 2d 1, 209 La. 957—*Griffith v. Williams*, App. 19 So 2d 277—*Yellow Pine Lumber Co. v. Maniscalco*, App. 9 So 2d 320—*Callender v. Marks*, App. 186 So 891—*Southern Gas Line v. Dixie Oil Co.*, 133 So 181, 16 La App 26—*Casey v. Allain*, 120 So. 420, 9 La App. 725

40 C.J. p 50 note 54

29. N.C.—*Orinoco Supply Co. v. Masonic & Eastern Star Home*, 79 S E 964, 163 N.C. 513, 516.

30. Conn.—*New Haven Orphan Asylum v. James A. Haggerty Co.*, 142 A 847, 108 Conn 232

Del.—*Pittman-Berger Co. v. Parkinson*, 180 A 645, 7 W.W.Harr 105

Ill.—*Hoffman v. Lake View Avenue Building Corporation*, 12 NE 2d 340, 293 Ill App. 627.

40 C.J. p 50 note 55.

31. Conn.—*Parsons v. Keeney*, 130 A 505, 98 Conn. 745—*Tramonte v. Wilens*, 94 A 978, 89 Conn 520

Ill.—*Hoffman v. Lake View Avenue Building Corporation*, 12 NE 2d 340, 293 Ill App 627—I *Lurya Lumber Co. v. Bernstein*, 168 Ill App 77, 85

32. Ill.—*North Side Sash & Door Co. v. Goldstein*, 121 NE 563, 286 Ill 209

N.J.—*Wix v. Frankel*, 100 A. 555, 87 N.J. Eq. 487

40 C.J. p 50 note 51.

and intention³³ Where the rights or interests of third persons have intervened, a stricter construction of the statute will be adhered to than where the controversy is between mechanics or materialmen and the original owner³⁴

(2) Liberal Construction

In most states the mechanics' lien statutes are regarded as remedial in their nature, and therefore must

be liberally construed, subject to the limitation that the construction must be reasonable.

In most states mechanics' lien statutes are regarded as remedial in their nature,³⁵ and therefore generally should be liberally construed³⁶ so as to effectuate their objects and purposes³⁷ and protect laborers, materialmen, or other claimants within the scope of the statutes,³⁸ as well as to promote sub-

33 Ill—Cada v Sack, 207 Ill App 328

Iowa—Bernstein v Alcorn, 190 NW 975, 194 Iowa 1109.

34 Ill—Hoffman v Lake View Avenue Building Corporation, 12 NE 2d 340, 293 Ill App 627—Schwulst Gerling Co v Frost, 269 Ill App 213

35 Ariz—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

Cal—Hammond Lumber Co v Barth Inv Corporation, 262 P 29, 202 Cal 601

Mo—Better Roofing Materials Co v Sztukowski, App, 183 SW 2d 400—Schwartz Materials Co v West End Realty & Construction Co, App, 154 SW 2d 366—Hannenkamp v Hagedorn, App, 110 SW 2d 826—Henry Evers Mfg Co v Grant, App, 284 SW 525

Mont—Smith v Gunniss, 144 P 2d 186, 115 Mont 362—Federal Land Bank of Spokane v Green, 90 P 2d 489, 108 Mont. 56

Neb—Gibson v Koutsy-Brennan-Vana Co, 9 N.W.2d 298, 143 Neb 326

N.M.—Dysart v Youngblood, 102 P. 2d 664, 44 N.M. 351—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 N.M. 3

N.Y.—John P. Kane Co v Kinney, 66 NE 619, 174 N.Y. 69.

Okl—American Tank & Equipment Co v T E Wiggins, Inc., 42 P 2d 115, 170 Okl 504

Or—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 349. 40 C.J. p 51 notes 59, 60

36 U.S.—Canton Lumber Co v. Cooper, C.C.A.Md., 75 F 2d 92—Powell v. Baker Ice Mach Co, C. C.A Ark., 8 F 2d 125

Ariz—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160.

Cal.—Hendrickson v. Bertelson, 35 P. 2d 318, 1 Cal 2d 430—Trout v Siegel, 262 P. 320, 202 Cal 706—Hammond Lumber Co v Barth Inv Corporation, 262 P 29, 202 Cal 601—Hammond Lumber Co v Richardson, 270 P. 751, 94 Cal App 119—Winship v Holden, 265 P. 572, 90 Cal App 71

Fla.—Hendry Lumber Co. v. Bryant, 189 So 710, 138 Fla. 485

Idaho—Dybvig v. Willis, 82 P 2d 95, 59 Idaho 160—Poynter v Fargo, 281 P. 1111, 48 Idaho 271—Gem State Lumber Co. v. Union Grain

& Elevator Co, 278 P 775, 47 Idaho 747—Boise Payette Lumber Co v. Sharp, 264 P 665, 45 Idaho 611

—Phillips v Salmon River Mining & Development Co, 72 P 556, 9 Idaho 149

Ky—Ohio Oil Co. v Smith-Haggard Lumber Co, 156 SW 2d 111, 238 Ky 278—Powers v Brewer, 38 S W 2d 466, 238 Ky 579

Mo—Chance v Franke, 165 SW 2d 678, 350 Mo 162—Fuhler v Gohman & Levine Const Co, 142 SW 2d 182, 346 Mo 588—Better Roofing Material Co v. Sztukowski, App, 183 SW 2d 400—Arthur Morgan

Trucking Co v Shartz, 174 SW 2d 226 237 Mo App 535—Schwartz Materials Co v West End Realty & Construction Co, App, 154 S W 2d 366—La Crosse Lumber Co.

v Goddard, App, 161 SW 2d 455—Miners Lumber Co v Miller, App, 117 SW 2d 711—Major v. McVey, App, 94 SW 2d 1122—Mansfield Lumber Co v Johnson, App, 91 S W 2d 239—Concrete Engineering Co v Grande Bldg Co, 86 SW 2d 595, 230 Mo App 443—Arthur Maier

Plumbing Co v Dieckmann, App, 74 SW 2d 495—Harry Cooper Supply Co v Rolla Nat. Bldg Co, App, 66 SW 2d 591—St. Louis Concrete Products Mfg. Co v Walker, App, 64 SW 2d 131—Leach v Bopp, 12 SW 2d 512, 233 Mo App 254—Security Stove & Mfg Co v Stevens, 9 SW 2d 808, 232 Mo App 1029—Rogers Foundry Co v Squires, 297 SW 470, 221 Mo App 17—Julius Seidel Lumber Co v Hydraulic Press Brick Co, App, 288 SW. 979—Independent

Plumbing & Heating Supply Co v Glennon, App, 287 SW 824—Henry Evers Mfg Co v Grant, App, 284 SW. 525

Mont—Smith v Gunniss, 144 P 2d 186, 115 Mont 362—Caird Engineering Works v. Seven-Up Gold Mining Co, 111 P 2d 267, 111 Mont 471—Federal Land Bank of Spokane v Green, 90 P 2d 489, 108 Mont 56—Interstate Lumber Co v. Rider, 19 P 2d 644, 93 Mont 489

Neb—Corpus Juris cited in Gibson v Koutsy-Brennan-Vana Co, 9 N W 2d 298, 302, 143 Neb 326

Nev—Nellis v Johnson, 57 P 2d 392, 57 Nev 17.

N.M.—Dysart v. Youngblood, 102 P 2d 664, 44 N.M. 351—Hot Springs

Plumbing & Heating Co v. Wallace, 27 P 2d 984, 38 N.M. 3

N.Y.—John P. Kane Co v Kinney, 66 NE 619, 174 N.Y. 69—Eno v Rapp, 7 N.Y.S 2d 513, 169 Misc 473

Ohio—Cincinnati Builders' Supply Co v Roehm, 182 NE 680, 43 Ohio App 299

Okl—American Tank & Equipment Co v T E Wiggins, Inc., 42 P.2d 115, 170 Okl. 504

Or—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—State v U S Fidelity & Guaranty Co, 265 P 775, 125 Or 13, followed in State v Aetna Casualty & Surety Co, 265 P 782, 125 Or 194

S.D.—Hill v Alliance Bldg Co., 60 NW 752, 6 S.D. 160

Wis—Findorff v Fuller & Johnson Mfg Co, 248 N.W. 766, 212 Wis 385—Roseliep v Herro, 239 NW 413, 306 Wis 356

40 C.J. p 51 note 60

Mechanics' lien laws favored

Cal—MacQuiddy v Rice, 118 P.2d 853, 47 Cal App 2d 755.

37. Cal—Cassaretto v City and County of San Francisco, 62 P 2d 777, 18 Cal App 2d 8—Hammond Lumber Co v Richardson, 270 P 751, 94 Cal App 119

Idaho—Dybvig v Willis, 82 P 2d 95, 59 Idaho 160—Phillips v. Salmon River Mining & Development Co, 72 P 826, 9 Idaho 149

Mo—Chance v Franke, 163 SW 2d 778, 348 Mo. 403—Sol Abrahams & Son Const Co v. Osterholm, App, 186 SW 2d 86.

Mont—Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 111 Mont 471.

Neb—Gibson v. Koutsy-Brennan-Vana Co, 9 NW 2d 298, 302, 143 Neb 326

N.Y.—John P. Kane Co. v. Kinney, 66 NE 619, 174 N.Y. 69—Eno v Rapp, 7 N.Y.S 3d 513, 169 Misc 473

40 C.J. p 52 note 61.

38. Fla.—Hendry Lumber Co v Bryant, 189 So 710, 138 Fla. 485

Ky—Ohio Oil Co v. Smith-Haggard Lumber Co, 156 S.W.2d 111, 288 Ky. 278

Minn—Sandberg v Burns, 270 NW 575, 198 Minn. 472.

Mo.—Roy F. Stamm Electric Co v. Hamilton-Brown Shoe Co, 171 S W.2d 580, 350 Mo 1173, 146 A.L.R.

stantial justice and equity³⁹ as to all parties concerned⁴⁰ This rule has been said to be the better doctrine and to represent the trend of more recent decisions⁴¹

A constitutional provision giving a right to assert a mechanic's lien has been held remedial in character, and therefore should be liberally construed to effect its objects and promote justice,⁴² and the right to such a lien cannot be destroyed or defeated, either by the legislature or by the courts, unless grave reasons therefor are shown.⁴³

Even where the rule of liberal construction prevails, the liberal construction should be a reasonable one;⁴⁴ the courts should not give to the statute a forced, unnatural,⁴⁵ or unfair⁴⁶ construction, nor should they extend the statute to a state of facts not fairly within its general scope and purview,⁴⁷ or

create a lien under circumstances not covered by the statute,⁴⁸ or dispense entirely with certain provisions of the statute⁴⁹ The rule of liberal construction has also been held not to apply where interests other than those of the lienor and owner are involved⁵⁰

Statutory rule. Under the express provisions of some mechanics' lien statutes they must be liberally construed⁵¹ to secure the beneficial purposes thereof.⁵² However, it has been held that such provision of the statute should not be considered in determining whether a particular claim of lien is enforceable as such,⁵³ and that, notwithstanding such provision, the statute should be strictly construed with respect to the requirements on which the right to the lien depends⁵⁴ A statutory rule that a general statute in derogation of the common law shall be liberally construed to promote its object has been

917—Chance v. Franke, 153 S.W.2d 378, 348 Mo. 402—Hanenkamp v. Hagedorn, App., 110 S.W.2d 826.
Neb—Corpus Juris cited in Gibson v. Koutsky-Brennan-Vana Co., 9 N.W.2d 298, 303, 143 Neb. 326.
Or.—Drake Lumber Co. v. Lundquist, 170 P.2d 712, 179 Or. 402.
40 C.J. p. 52 note 62.

39. Cal.—Hammond Lumber Co. v. Richardson, 270 P. 751, 94 Cal. App. 119.

Fla.—Hendry Lumber Co. v. Bryant, 189 So. 710, 138 Fla. 485.

Idaho—Dybvig v. Willis, 82 P.2d 95, 59 Idaho 160.

Me.—Andrew v. Bishop, 172 A. 752, 132 Me. 447, 100 A.L.R. 121—Otis Elevator Co. v. Finks Clothing Co., 159 A. 563, 131 Me. 95.

Neb.—Gibson v. Koutsky-Brennan-Vana Co., 9 N.W.2d 298, 302, 143 Neb. 326.

Or.—Drake Lumber Co. v. Lundquist, 170 P.2d 712, 179 Or. 349.
40 C.J. p. 52 note 63.

40. S.D.—Hill v. Alliance Bldg. Co., 60 N.W. 752, 6 S.D. 160, 55 Am. S.R. 819.

40 C.J. p. 52 note 64.

41. Ind.—Williamson v. Shank, 83 N.E. 641, 41 Ind. App. 513.

Mo.—De Witt v. Smith, 68 Mo. 263.

Neb.—Gibson v. Koutsky-Brennan-Vana Co., 9 N.W.2d 298, 302, 143 Neb. 326.

40 C.J. p. 52 note 65.

42. Cal.—Hammond Lumber Co. v. Barth Inv. Corporation, 262 P. 31, 203 Cal. 606.

40 C.J. p. 52 note 82 [d].

43. Cal.—Hammond Lumber Co. v. Barth Inv. Corporation, supra.

44. Colo.—Consumers' Lumber & Investment Co. v. Hayutin, 226 P. 860, 75 Colo. 483.

Mo.—O'Malley v. Reynolds, 182 S.W.

743, 286 Mo. 595—Hanenkamp v. Hagedorn, App., 110 S.W.2d 826.

45. Colo.—Florman v. El Paso County School Dist. No. 11, 40 P. 469, 6 Colo. App. 319.

40 C.J. p. 53 note 72.

46. Wash.—Baker v. Yakima Valley Canal Co., 137 P. 342, 77 Wash. 70.

47. U.S.—Canton Lumber Co. v. Cooper, C.C.A. Md., 75 F.2d 92.

Ind.—Morris v. Louisville, N.A. & C.R. Co., 24 N.E. 335, 123 Ind. 489.

N.Y.—Eno v. Rapp, 7 N.Y.S.2d 513, 169 Misc. 473—John Roshart, Inc. v. Rosenstock, 247 N.Y.S. 420, 138 Misc. 515.

Okla.—American Tank & Equipment Co. v. T. E. Wiggins, Inc., 42 P.2d 115, 170 Okl. 504.

40 C.J. p. 53 note 74.

Construction should be as favorable to mechanics and materialmen as its terms will legitimately permit in order to advance its remedial purpose of affording effective security to persons furnishing labor and materials used in making improvements on others' property—Roy F. Stamm Electric Co. v. Hamilton-Brown Shoe Co., 171 S.W.2d 580, 350 Mo. 1178, 146 A.L.R. 917.

48. Ohio—Cincinnati Builders' Supply Co. v. Roehm, 182 N.E. 680, 43 Ohio App. 299.

49. N.Y.—Pearce v. Knapp, 127 N.Y.S. 1100, 71 Misc. 324.

50. Mo.—H. B. Deal & Co. v. Hamilton-Brown Shoe Co., 160 S.W.2d 719, 349 Mo. 275.

Other creditors of bankrupt owner

In action by contractor to recover a judgment for balance allegedly due on a contract to repair building, and to have the judgment declared a mechanic's lien, alleged rule that where there are no interests involved ex-

cept those of the lienor and owner a liberal construction of the mechanic's lien law should be given, was not applicable, where the owner was a bankrupt and was represented by a trustee in bankruptcy—H. B. Deal & Co. v. Hamilton-Brown Shoe Co., supra.

51. N.Y.—C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 N.Y.S.2d 671, 168 Misc. 376.

Wash.—Westinghouse Electric Supply Co. v. Hawthorne, 150 P.2d 55, 21 Wash.2d 74.

40 C.J. p. 52 note 66.

52. Cal.—Burr v. Peppers Cotton Lumber Co., 266 P. 1025, 91 Cal. App. 268.

N.Y.—C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 N.Y.S.2d 671, 168 Misc. 376.

Wash.—Westinghouse Electric Supply Co. v. Hawthorne, 150 P.2d 55, 21 Wash.2d 74.

40 C.J. p. 52 note 67.

53. Wash.—Westinghouse Electric Supply Co. v. Hawthorne, supra.

54. Ill.—Charles A. Hohmeier Lumber Co. v. Knight, 182 N.E. 715, 350 Ill. 248—Liese v. Hentze, 158 N.E. 428, 326 Ill. 632—North Side Sash & Door Co. v. Hecht, 129 N.E. 273, 295 Ill. 515—Erickson v. Ginocchio, 24 N.E.2d 884, 303 Ill. App. 159—Gunther v. O'Brien Bros. Const. Co., 12 N.E.2d 23, 293 Ill. App. 28.

reversed on other grounds 16 N.E.2d 890, 389 Ill. 362—Rasmussen v. Harper, 5 N.E.2d 257, 287 Ill. App. 404—Gottschalk Const. Co. v. Carlson, 253 Ill. App. 520.

N.Y.—C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 N.Y.S.2d 671, 168 Misc. 376.

40 C.J. p. 50 note 51 [b].

held applicable to a mechanics' lien statute.⁵⁵

(3) As Controlled by Nature of Provisions Construed

A distinction has been drawn between different provisions of the same mechanics' lien statute, some provisions being subject to a strict construction while other provisions are subject to a liberal construction.

Attempts have been made to reconcile the apparently conflicting decisions relating to the construction of mechanics' lien statutes by drawing a distinction between different provisions of the same

statute and considering some parts of the statute subject to a strict construction and other parts subject to a liberal construction.⁵⁶ It has been held that provisions relating to the creation, existence, or right to the lien, being in derogation of the common law,⁵⁷ should be strictly construed,⁵⁸ but there is also authority to the contrary.⁵⁹ On the other hand, it has been held that provisions relating to the enforcement of the lien after it has once attached, being remedial in character,⁶⁰ should be liberally construed⁶¹ in favor of the persons entitled to the

55. Kan.—General Air Conditioning Corporation v Stuewa, 181 P 2d 638, 156 Kan 182, 143 A.L.R. 1184 40 C.J. p 53 note 70

Statutory rule of liberal construction of general statute in derogation of common law see the C.J.S. title Statutes § 314, also 59 C.J. p 948 notes 87-89

56. Colo.—Cary Hardware Co v McCarty, 50 P 744, 10 Colo.App. 200

40 C.J. p 53 note 78

57. Alaska.—Johnson v. Halla, 7 Alaska 638.

Cal.—Corpus Juris quoted in Burr v Peppers Cotton Lumber Co, 266 P 1025, 1027, 91 Cal.App. 268

Del.—Iannotti v Kalmbacher, 156 A 366, 4 W.W.Harr. 600

Ind.—Puritan Engineering Corporation v Robinson, 191 N.E. 141, 207 Ind. 58

Tenn.—Allen v Brown, 14 Tenn.App. 405

40 C.J. p 53 note 79.

58. Alaska.—Johnson v. Halla, 7 Alaska 638.

Cal.—Burr v. Peppers Cotton Lumber Co, 266 P. 1025, 91 Cal.App. 268

Del.—Iannotti v Kalmbacher, 156 A 366, 4 W.W.Harr. 600—In re Republic Engineering Co, 130 A. 498, 3 Harr. 81

D.C.—Deming v. Wardman Const. Co, 39 F.2d 504, 59 App.D.C. 254.

Ill.—Decatur Lumber & Mfg. Co. v. Crall, 183 N.E. 228, 350 Ill. 819—Charles A. Hohmeier Lumber Co v. Knight, 182 N.E. 715, 350 Ill. 248—Hoffman v Lake View Avenue Building Corporation, 13 N.E. 2d 340, 293 Ill.App. 627—Schwulst Gerling Co v. Frost, 269 Ill.App. 213—Gottschalk Const. Co. v. Carlson, 253 Ill.App. 520

Ind.—Puritan Engineering Corporation v Robinson, 191 N.E. 141, 207 Ind. 58—Mensenberger v American State Bank, 198 N.E. 819, 101 Ind. App. 600.

Mich.—Huebner v. Lashley, 214 N.W. 107, 239 Mich. 50

Ohio.—Crandall v Irwin, 39 N.E.2d 608, 139 Ohio St. 253, 139 A.L.R. 895, adhered to 40 N.E.2d 933, 139 Ohio St. 463, 139 A.L.R. 900—Rob-

ert V Clapp Co v Fox, 178 N.E. 586, 124 Ohio St. 331

Okl.—American Tank & Equipment Co v T. E. Wiggins, Inc., 42 P.2d 115, 170 Okl. 504

Or.—Phillips v Graves, 9 P.2d 490, 139 Or. 336, 83 A.L.R. 1

Tenn.—Arnstein Realty Co v. Williams, 40 S.W.2d 1007, 163 Tenn. 69—Bell Bros & Co v Arnold, 68 S.W.2d 958, 17 Tenn.App. 493—Allen v Brown, 14 Tenn.App. 405—Ford v Whittle Trunk & Bag Co, 12 Tenn.App. 486—Variety Fire Door Co v Hanson-Worden Co, 10 Tenn.App. 254.

Tex.—Morrison v. State Trust Co. Civ.App. 274 S.W. 341, reversed on other grounds State Trust Co. v Morrison, Com.App. 283 S.W. 214

W.Va.—Scott Lumber Co v. Wheeling Cemetery Ass'n, 186 S.E. 117, 117 W.Va. 534.

40 C.J. p 53 note 80.

Debt not contracted by owner

A provision which operates to charge the land of one person with a debt not contracted by him should be strictly construed.—Belmont Coal & Lumber Co. v. James F. Wood Builders, 15 A.2d 625, 125 N.J.Law 315—Smith & Richards Lumber Co v Hurley, 185 A. 10, 116 N.J.Law 429—In re Dujanski, 179 A. 693, 13 N.J. Misc. 546—Rubino v Tranor, 152 A. 647, 8 N.J.Misc. 815—Woodbridge Lumber Co v Varacaska, Cir.Ct., 194 A. 393.

40 C.J. p 53 note 78 [b] (2).

Particular provisions strictly construed

(1) Provision by which owner of property may relieve himself from or escape liability for a mechanic's lien.—Hayward Lumber & Investment Co v Ross, 90 P.2d 135, 32 Cal.App.2d 455—Hammond Lumber Co v. Goldberg, 13 P.2d 814, 125 Cal.App. 120.

(2) Statute providing for lien for improvements on lands held by husband and wife jointly.—F. M. Sibley Lumber Co v. Letterman, 207 N.W. 869, 234 Mich. 32.

(3) A statute which limits the right of a person who does work or labor on, or furnishes material for,

the construction of an improvement upon real estate to recover full value of such labor or material.—Howk v Krotzer, 42 N.E.2d 640, 140 Ohio St. 100

59. Mo.—Concrete Engineering Co v Grande Bldg Co, 86 S.W.2d 595, 230 Mo.App. 443—St. Louis Concrete Products Mfg. Co v. Walker, App. 64 S.W.2d 131

A provision which attempts to exempt property from mechanics' liens should be liberally construed.—Woodbridge Lumber Co v. Varacaska, N.J. Cir.Ct., 194 A. 392

60. Cal.—Burr v. Peppers Cotton Lumber Co, 266 P. 1025, 91 Cal. App. 268.

Ohio.—Robert V. Clapp Co v Fox, 178 N.E. 586, 124 Ohio St. 331.

Tenn.—Arnstein Realty Co v. Williams, 40 S.W.2d 1007, 163 Tenn. 69.

40 C.J. p 53 note 81.

61. Alaska.—Johnson v. Halla, 7 Alaska 638.

Cal.—Corpus Juris quoted in Burr v Peppers Cotton Lumber Co, 266 P. 1025, 1027, 91 Cal.App. 268

Del.—In re Republic Engineering Co, 130 A. 498, 3 Harr. 81

Ill.—Gunter v O'Brien Bros Const. Co, 12 N.E.2d 23, 293 Ill.App. 28, reversed on other grounds 16 N.E.2d 890, 369 Ill. 382—Gottschalk Const. Co. v. Carlson, 253 Ill.App. 520

Ohio.—Crandall v. Irwin, 39 N.E.2d 608, 139 Ohio St. 253, 139 A.L.R. 895, adhered to 40 N.E.2d 933, 139 Ohio St. 463, 139 A.L.R. 900—Robert V. Clapp Co v. Fox, 178 N.E. 586, 124 Ohio St. 331.

Okl.—American Tank & Equipment Co v. T. E. Wiggins, Inc., 42 P.2d 115, 170 Okl. 504

Tenn.—Arnstein Realty Co v. Williams, 40 S.W.2d 1007, 163 Tenn. 69—Ford v. Whittle Trunk & Bag Co, 12 Tenn.App. 486—Brantingham v Beasley, 3 Tenn.App. 598—Christie v. Williamson, 4 Tenn.Civ. A. 161

Wash.—Western Clinic & Hospital Ass'n v. Gabriel Const. Co., 12 P.2d 417, 168 Wash. 411

W.Va.—Pfaft & Smith Builders' Supply Co. v. Mason, 137 S.E. 356, 103

benefit of the lien⁶² in order to effect the object of the statutes⁶³

Provisions dealing with claim or statement. Statutory provisions relating to the form,⁶⁴ contents,⁶⁵ amendment,⁶⁶ or time for filing⁶⁷ of the claim, statement, or notice filed to perfect or preserve the lien should be liberally construed, but not so liberally as to ignore explicit directions of the provision.⁶⁸ Conversely statutory provisions should be strictly construed which require service by a materialman, on the owner, of an attested account⁶⁹ or which prescribe a forfeiture of the lien for willfully misstating matters required to be stated in the claim.⁷⁰

c. Operation and Effect in General

The character, operation, and extent of a mechanic's

lien must be determined from the terms of the statute creating and defining it, and cannot be extended beyond the obvious designs and plain requirements of the statute.

Since a mechanic's lien is purely the creature of statute, as discussed supra § 1 c, the terms of the statute creating and defining it must be looked to in determining whether the lien attaches,⁷¹ the right thereto,⁷² and its character, operation, and extent,⁷³ and unless the facts bring a claimant within the terms of the statute no lien exists.⁷⁴ The lien cannot be extended beyond the obvious designs and plain requirements of the statute,⁷⁵ such as to persons or objects not embraced within the statute,⁷⁶ and the remedies provided by the statute should not be extended beyond its obvious design and clear requirements.⁷⁷ It has been held that the lien can-

W Va. 318—Georgia Lumber Co v Harrison Const. Co., 136 S.E. 399 103 W Va 1

Wis—Roseliep v Herro, 239 N.W. 413, 206 Wis 256.
40 C.J. p 53 note 82.

Where it is clear that the lien has been honestly earned, and that the lien claimant is within the statute, the statutes should be liberally construed to further the equity—Otis Elevator Co v Finks Clothing Co., 159 A 563, 131 Me. 95

Subject matter and remedy

When the existence of the lien is determined, the statute will be liberally construed with respect to the subject matter to which the lien should attach and as to the remedy for its enforcement—Variety Fire Door Co. v Hanson-Worden Co., 10 Tenn App. 254

62. Ark.—Wildwood Amusement Co v. Stout Lumber Co., 13 S.W.2d 911, 173 Ark 977

D.C.—Deming v. Wardman Const. Co., 39 F.2d 504, 59 App.D.C. 254

Me.—Andrew v. Bishop, 172 A. 752, 132 Me 447, 100 A.L.R. 121

Mo.—Waters v. Gallamore, App., 41 S.W.2d 870.

Tex.—Morrison v State Trust Co., Civ App., 274 S.W. 341, reversed on other grounds State Trust Co. v Morrison, Com.App., 282 S.W. 214.
40 C.J. p 54 note 82.

63. Ind.—Brannum-Keene Lumber Co. v Cole, 119 N.E. 721, 67 Ind App. 687
40 C.J. p 54 note 84.

64. Me.—Durling v. Gould, 21 A. 833, 83 Me. 134

N.J.—McNab & Harlin Mfg. Co. v Paterson Bldg Co., 67 A. 103, 72 N.J.Eq. 929.

65. Ark.—Anderson v Seaman, 5 S.W. 799, 49 Ark 475.
40 C.J. p 54 note 86.

66. Pa.—May v. Mora, 50 Pa.Super 359—Raymond v. Brookside Dis-

tilling Products Corporation, Com Pl., 44 Lack Jur 181

67. Cal.—Hayward Lumber & Investment Co v Ford, 148 P.2d 689, 64 Cal App 2d 346

68. N.J.—Lloyd v. Connella, 119 A. 503, 94 N.J.Eq. 322.

69. La.—Casey v Allam, 120 So 420, 9 La App 725

70. N.J.—Buchanan & Smock Lumber Co v Einstein, 93 A. 716, 87 N.J.Law 307.

40 C.J. p 54 note 89.

71. Wash.—Western Clinic & Hospital Ass'n v Gabriel Const Co., 12 P.2d 417, 168 Wash 411—Turner v. Furleigh, 213 P. 454, 124 Wash 45

The lien attaches as a matter of course, where the statutory provisions are fully met and prescribed conditions exist—Crabb v William Cameron & Co, Tex.Com.App., 63 S.W.2d 367.

72. Kan.—McHenry v McHenry, 95 P.2d 281, 150 Kan 498

Okl.—Pace v. National Bank of Commerce of Tulsa, 125 P.2d 178, 190 Okl 503.

73. Ala.—Emanuel v. Underwood Coal & Supply Co., 14 So.2d 151, 244 Ala 436.

N.D.—Dunham Lumber Co v. Gresz, 2 N.W.2d 175, 71 N.D. 491, 141 A.L.R. 60.

Ohio.—Black River Lumber Co. v. Kent, 176 N.E. 682, 124 Ohio St. 20—Mahoning Park Co v. Warren Home Development Co., 142 NE 883, 109 Ohio St. 358—D & H Coal Co. v. Lay, 175 NE 30, 37 Ohio App. 433.

Okl.—Consolidated Cut Stone Co v Seidenbach, 114 P.2d 480, 180 Okl 128.

40 C.J. p 257 note 2.

74. U.S.—In re Louisville Daily News & Enquirer, D.C.Ky., 20 F Supp 465.

Ark—Sebastian Building & Loan Ass'n v Minten, 27 S.W.2d 1011, 181 Ark 700.

75. Iowa—Melcher Lumber Co v. Robertson Co., 250 N.W. 594, 217 Iowa 31

La—Conservative Homestead Ass'n v. Boyle, 135 So 663, 172 La. 878 —Yellow Pine Lumber Co v Maniscalco, App., 9 So 2d 320

Mich—Fox v Martin, 283 NW 9, 287 Mich 147—Healy v Toles, 354 NW 218, 266 Mich 584, 92 A.L.R. 749—Leverens Lumber & Building Co v. Rickels, 231 NW 112, 251 Mich 57

N.J.—Woodbridge Lumber Co. v. Varascaka, 194 A. 392

Okl.—Pace v National Bank of Commerce of Tulsa, 125 P.2d 178, 190 Okl 503

Wash—Western Clinic & Hospital Ass'n v. Gabriel Const Co., 12 P.2d 417, 168 Wash. 411.

40 C.J. p 257 note 3.

76. Md.—House v. Fissell, 51 A.2d 669

Tenn.—Pillow v. Kelly, 296 S.W. 11, 155 Tenn, 597—Allen v. Brown, 14 Tenn App. 405.

Mechanics' liens are stricti juris and cannot be recognised unless specially provided for—Morehouse Lumber & Building Material Co v. Jacob & Walker, App., 144 So 190, affirmed 147 So 504, 177 La. 78.

To meet different facts

The courts are without power to extend it to meet facts which they believe present case of equal merit or necessity of the same kind as cases or necessities for which the statute provides.—Emanuel v Underwood Coal & Supply Co., 14 So 2d 151, 244 Ala 436—Copeland v. Kehoe & Ramsey, 67 Ala. 594.

77. N.J.—Ayres v. Revere, 25 N.J. Law 474—In re Dujanaki, 179 A. 693, 13 N.J.Misc. 546.

not be extended beyond the scope of the statute by equitable principles,⁷⁸ but, on the other hand, it has been held that the lien may be enlarged by some established equitable principle based on the maxims of equity based on right and justice,⁷⁹ and that, after the lien has attached, equitable principles will prevail to carry out the purposes of the statute⁸⁰

§ 5. — Retroactive Operation

A mechanics' lien statute is generally not retroactive in its operation.

The provisions of a mechanics' lien statute are usually held not to be retroactive unless an intent to the contrary clearly appears,⁸¹ particularly where they would be unconstitutional if held retroactive.⁸² A mechanics' lien law is usually held to apply only to labor performed or materials furnished subsequent to its taking effect,⁸³ and according to some authorities it does not apply where the contract was entered into prior to the time the statute took effect.⁸⁴ However, although there is authority to the contrary,⁸⁵ it is generally held that a mechanic's lien may be acquired under a statute passed before the work was done or the materials furnished, although the contract therefor was made before such enactment,⁸⁶ and a lien law has also been held to apply in the case of work done or materials furnished partly before and partly after it went into

effect⁸⁷ except where the statute expressly provides that it shall apply only to claims wherein the work was commenced to be performed or the materials were commenced to be furnished after the date of its approval.⁸⁸ A statute requiring building contracts containing a prohibition against mechanics' liens to be filed or recorded does not apply where all the material was furnished prior to the passage of the statute.⁸⁹

Amendment of claim Statutes authorizing amendments of the lien claim are prospective in their operation,⁹⁰ and not retrospective so as to apply to claims filed before their enactment.⁹¹

§ 6. — Change or Repeal

The right to a mechanic's lien is usually determined by the statute in force at the time the work is performed or the materials are furnished; but the lien must be enforced in accordance with the law in force at the time the necessary proceedings are taken for that purpose. A repeal of the statute destroys inchoate rights thereunder unless there is a saving clause as to such rights.

The right to a mechanic's lien is usually determined by the statute in force at the time the work is done or the materials are furnished,⁹² or, according to some authorities, at the time when the contract is executed,⁹³ but the lien must be enforced by the law in force at the time the necessary proceedings are had for that purpose,⁹⁴ that is, at the time they are instituted,⁹⁵ unless there is a saving

78. Mich.—Healy v Toles, 254 N.W. 213, 266 Mich 584, 92 A.L.R. 749—Leverenz Lumber & Building Co v Rickels, 231 N.W. 112, 251 Mich. 57

79. Ala.—Security Federal Savings & Loan Ass'n v Underwood Coal & Supply Co, 16 So 2d 100, 245 Ala. 58

80. Mich.—Leverenz Lumber & Building Co v Rickels, 231 N.W. 112, 251 Mich. 57

81. U.S.—Hernandez v First Nat Bank & Trust Co of Yonkers, D.C. N.Y., 27 F.Supp. 874

Ill.—Chicago Pump Co v Lakeside Engineering Corporation, 15 N.E. 2d 929, 296 Ill.App. 126—Jones v Young, 78 Ill.App. 78, reversed on other grounds 54 N.E. 235, 180 Ill. 216

Mass.—See v Kolodny, 116 N.E. 885, 227 Mass. 446

N.J.—Guise v John C Guise, Inc., 174 A. 681, 116 N.J.Eq. 590

S.D.—Atlas Lumber Co v Semmler, 205 N.W. 376, 48 S.D. 541

Tex.—Nail v. McCue, Civ App., 55 S.W. 2d 211—American Surety Co of New York v Alamo Iron Works, Civ App., 29 S.W. 2d 498, reversed on other grounds, Com App., 36 S.W. 2d 714.

40 C.J. p 54 note 91.

82. Ill.—Chicago Pump Co v Lakeside Engineering Corporation, 15 N.E. 2d 929, 296 Ill.App. 126

83. N.J.—Steuerwald v Munn, 107 A. 796, 90 N.J.Eq. 474
40 C.J. p 54 note 92

84. Ill.—Universal Portland Cement Co v St Joseph Sisters of Charity, 216 Ill.App. 165
40 C.J. p 54 note 93

85. Cal.—Bailey Ornamental Iron Co v Goldschmidt, 166 P. 363, 33 Cal.App. 661

Pa.—Horn & Brannen Mfg. Co v Stelman, 64 A. 403, 215 Pa. 187

86. Tex.—American Surety Co of New York v Alamo Iron Works, Com App., 36 S.W. 2d 714
40 C.J. p 55 note 95

87. Cal.—Kerckhoff-Cuzner Mill & Lumber Co v Olmstead, 24 P. 648, 85 Cal. 80

Minn.—Mason v Heyward, 5 Minn. 74

88. Pa.—Orr v Rogers, 39 Pa.Super. 175

40 C.J. p 55 note 97

89. Pa.—Rhine v Mauk, 21 Pa.Co. 345, 14 Montg.Co. 197

90. Pa.—Gebhard v Levering, 14 Phila. 120.

91. Kan.—Drake v. Green, 29 P. 584, 48 Kan. 534.
40 C.J. p 55 note 1

Order allowing amendment, nunc pro tunc, of notice of lien, so as to include due dates of amounts claimed by lienor, was error, where contracts for improvement antedated effective date of act, providing for amendments, but excluding cases involving contracts previously made—Frank Teicher, Inc. v Gold, 267 N.Y.S. 164, 239 App.Div. 385

92. N.D.—Mahon v. Surerus, 81 N.W. 64, 9 N.D. 57
Wyo.—Becker v Hopper, 138 P. 179, 22 Wyo. 237, Ann.Cas. 1916D 1041
40 C.J. p 55 note 2.

A court of equity has no power to amend the statute so as to render an account filed thereunder effective as of an earlier date.—Hale v. Coleman, 23 Ohio Cir.Ct.N.S., 55.

93. U.S.—Natural Carbon Paint Co. v Fred Bredel Co., Ill., 193 F. 897, 114 C.C.A. 111.
40 C.J. p 55 note 3.

94. N.D.—Mahon v. Surerus, 81 N.W. 64, 9 N.D. 57
40 C.J. p 55 note 4.

95. Ill.—Berndt v. Armknecht, 59 Ill.App. 467.

clause in the new law with respect to rights acquired under the old law,⁹⁶ as, for instance, concerning the statement for a lien,⁹⁷ or unless to require enforcement under the new remedy would infringe substantial vested rights.⁹⁸ Where, however, the right to a lien has accrued under a statute allowing a certain time in which to perfect or enforce the lien, such time will not as a rule be cut down by a subsequent statute allowing a shorter time,⁹⁹ and where the new statute extends the time for enforcement of the lien it will be held applicable.¹

Repeal. When a mechanics' lien law is repealed² or superseded,³ all inchoate rights under the old law are destroyed unless there is a saving clause as to such rights.⁴ The courts will give effect to an intent apparent in the statute to preserve or continue,⁵ rather than destroy,⁶ rights under the old law, and to allow their enforcement under the new law.⁷ Where the right has become vested, it is not affected by the repeal of the law.⁸ A general statute stating that the provisions of any statute, as

far as they are the same as any prior statute, shall be construed as a continuation of such prior statute, and not as a new enactment, is applicable to reenacted provisions of a repealed mechanics' lien law.⁹

§ 7. Persons Who May Obtain Lien

Any person who is competent to make the contract which is the basis of a mechanic's lien has capacity to obtain such lien.

Generally whoever is competent to make the contract which is the basis of the lien, discussed infra §§ 56-72, has capacity to obtain a mechanic's lien.¹⁰ The term "person," as used in a statute providing for liens in favor of any person who furnishes labor or materials in the erection of any building or other improvement, is construed to mean either a natural or an artificial person.¹¹ The lien may be acquired by a partnership.¹²

Corporation. A mechanics' lien may ordinarily be acquired by a corporation, as a "person," within the meaning of the statute,¹³ and this rule applies

Mass—Chertock v Morang, 118 N.E. 385, 228 Mass 598.

40 C.J. p 56 note 5.

96. Colo.—Bitter v. Mouat Lumber & Investment Co., 51 P. 519, 10 Colo App 307.

40 C.J. p 56 note 6.

97. Minn.—Hill v Lovell, 50 N.W. 81, 47 Minn 293

40 C.J. p 56 note 6 [b]

98. Colo.—Spangler v Green, 42 P. 674, 21 Colo 505, 52 Am SR 259—Tabor-Pierce Lumber Co v International Trust Co, 75 P. 150, 19 Colo App 108

99. Minn.—Nystrom v Hamm, 49 N.W. 324, 47 Minn 23

40 C.J. p 56 note 8

1. Cal.—Asbestos Mfg & Supply Co v. American Bonding Co of Baltimore, 145 A 107, 25 Cal App 641

Ky.—Montgomery v Allen, 53 S.W. 813, 107 Ky 298, 21 Kv.L 1001—Fox v Somerset Odd Fellows Hall & Auditorium Co, 53 S.W. 835, 21 Ky L 1272

N.Y.—Trim v Willoughby, 44 How. Pr 189.

Change in procedure

A statute extending the time for presenting claims and filing suits under a bond, given for a municipal improvement, applies where the bond was executed before the amending act was passed, since it is a mere change in procedure not affecting the right or remedy—Asbestos Mfg. & Supply Co v. American Bonding Co of Baltimore, 145 P 107, 25 Cal.App. 641.

2. La.—Rose v Eunice Electric Theatre Co., 97 So 322, 154 La. 31

Pa.—Cole Lumber & Supply Co v Beck, Com Pl, 90 Pittsb Leg J 583, affirmed 33 A 2d 684, 153 Pa Super 97.

40 C.J. p 56 note 12

Statutes held repealed

Ala.—Griffin Lumber Co v. O'Gara, 160 So 685, 230 Ala 287.

Md.—McDonagh v. Matthews-Howard Co, 153 A. 47, 180 Md 264

N.J.—Shaheen v New Jersey Fidelity & Plate Glass Ins. Co., 160 A. 553, 109 N.J.Law 201

40 C.J. p 56 note 12 [a]

Statutes held not repealed

US—In re Lyon, D.C.Ky., 35 F.2d 351.

Fla.—State ex rel Gore v Chillingworth, 171 So. 649, 126 Fla 645.

La.—Thibodeaux Boiler Works v People's Sugar Co, 122 So. 290, 11 La App 377

40 C.J. p 56 note 12 [b]

3. Ill.—Holcomb v Boyton, 37 N.E. 1031, 151 Ill 294

Me.—Gray v. Carleton, 85 Me 481—Bangor v Goding, 85 Me 73

40 C.J. p 56 note 13

4. Ill.—Weber v Bushnell, 49 N.E. 728, 171 Ill 587.

40 C.J. p 56 note 14.

5. Or.—Ainslie v. Kohn, 19 P. 97, 16 Or 363

10 C.J. p 56 note 15

6. US.—Sabin v. Connor, D.C.Nev., 21 F.Cas No 12,197

Ill.—Turney v. Saunders, 5 Ill 527

7. Ill.—Turney v. Saunders, supra Or.—Ainslie v Kohn, 19 P. 97, 16 Or 383.

8. ND.—Craig v Herzman, 81 N.W. 288, 9 N.D. 140

40 C.J. p 56 note 18

9. Ill.—Hacken v Isenberg, 124 N.E. 306, 288 Ill 589

N.Y.—Whale-Phillips Co v Fitzgerald, 121 NE 763, 325 N.Y. 137

10. Mass.—Donahy v. Clapp, 12 Cush 440.

40 C.J. p 56 note 24.

Persons entitled to lien see infra §§ 86-117

11. Neb.—Chapman v Brewer, 62 N.W. 320, 43 Neb 890, 47 Am SR 779

40 C.J. p 56 note 25

12. Pa.—Chambersburg Woollen Mfg Co. v Hazelet, 3 Brewst 98

Utah.—Doane v Clinton, 2 Utah 417

40 C.J. p 56 note 26

13. US.—Wetzel & T Ry Co v. Tennis Bros. Co., W Va., 145 F. 458, 75 C.C.A. 266, 7 Ann Cas 426

Ala.—Henderson v Alabama Auto Co, 96 So 627, 209 Ala 482

Mont.—Caird Engineering Works v. Seven-Up Gold Mining Co, 111 P. 2d 267, 111 Mont 471

Okl.—Diftenbach v. H. H. Mahler Co, 30 P.2d 907, 167 Okl 518.

Or.—Nicolai-Neppach Co. v. Poore, 351 P 268, 120 Or 163

40 C.J. p 56 note 29.

Corporation furnishing drawings and specifications for building and thereafter supervising construction thereof is "person" entitled to lien for contract price of services performed—Diftenbach v H. H. Mahler Co., 30 P.2d 907, 167 Okl. 518.

to either a domestic¹⁴ or a foreign¹⁵ corporation. This rule has been held to apply, with respect to a foreign corporation, although it has not obtained a certificate or permit to do business within the state,¹⁶ unless such certificate or permit is expressly required by statute.¹⁷ However, a corporation organized for the purpose of manufacturing and selling lumber has been held not to be entitled to a lien for labor performed, as the act is beyond its corporate powers.¹⁸

Nonresident. Unless the benefit of the statutes is expressly restricted to residents of the state or of a particular locality,¹⁹ nonresidents as well as residents of the state may be entitled to the lien,²⁰ provided, under some statutes, they are authorized to do business within the state.²¹

Owner of property. The owner of property cannot enforce a mechanic's lien on it in favor of himself to the prejudice of third persons who hold liens on it.²² The rule has been applied by holding that a member of an unincorporated association cannot acquire a lien on the property of the association²³ which will be available as against the liens of other persons who are not members.²⁴

§ 8. Property Subject to Lien

A mechanic's lien ordinarily attaches only to privately owned property.

A mechanic's lien ordinarily attaches only to privately owned property,²⁵ as distinguished from property devoted to public use, discussed *infra* § 10, although it has been said that the various provisions of the law should be held to relate to all mechanics' liens affecting real property, whether public, semipublic, or private, unless the statute evinces a different intent or the nature of the subject renders regulations as to one class inapplicable to the other.²⁶ A private enterprise is subject to a mechanic's lien although its purpose is wholesome and beneficial to the public.²⁷

§ 9. — Property of Private Corporations

The property of a private corporation is subject to a mechanic's lien.

The property of a private corporation²⁸ or of a corporation which is not in fact a public or quasi-public one,²⁹ like that of an individual, is subject to a mechanic's lien.

§ 10. — Public Property

By the weight of authority, public property devoted to public use is not subject to a mechanic's lien.

Although there are some decisions to the contrary,³⁰ by the great weight of authority a public building or other public property devoted to public use is not subject to a mechanic's lien³¹ unless it is

14. Neb.—Chapman v Brewer, 62 N W 320, 48 Neb 890, 47 Am SR 779

NY—Gaskell v Beard, 11 N.Y.S 399, 58 Hun 101

15. NY—Warren Trading Corporation v Kraglan Bldg Corporation, 220 N.Y.S 455, 220 App Div 3, 40 C.J. p 56 note 31

16. NY—Miller v Fitzpatrick, 236 N.Y.S 838, 227 App Div 745—Johnson v. Thomas Breen Co., 257 N.Y.S 718, 143 Misc 908, affirmed 254 N.Y.S 1043, 235 App Div 553—Dick Sand Co v State, 244 N.Y.S 312, 137 Misc 633

Foreign corporation doing business in state but occasionally and furnishing elevators for building, was entitled to mechanic's lien on building, even though it had not complied with laws relative to foreign corporations doing business in state—Paterson v. Condos, 28 P 2d 499, 55 Nev 134, rehearing denied 30 P 2d 283, 55 Nev 260

17. Mich.—Vander Horst v. Kalamazoo Apartments Corporation, 215 N.W 57, 239 Mich 593.

Permit procured

Where general contractor, which was foreign corporation, at time of contracting with subcontractor had procured certificate to transact busi-

ness, and had valid contract with owners, lien of subcontractor is valid—Whitehead & Kales Co v Taan, 308 N.W 143, 233 Mich 597

18. Or.—Dalles Lumber & Mfg. Co v Wasco Woolen Mfg Co, 3 Or 527

19. Md.—Miller v Cumberland Cotton Factory, 26 Md 478

20. NY—Campbell v. Coon, 44 NE 300, 149 NY 556, 38 L.R.A 410 40 C.J. p 57 note 36.

21. Ohio—Dabney v Rose Bros Co, 191 NE 810, 47 Ohio App 278

22. Kan.—McHenry v McHenry, 85 P 2d 261, 150 Kan 498. 40 C.J. p 57 note 37.

23. Pa.—Feinour v Farmers' Alliance, 27 Pa.Co 257, 8 North Co 315

24. Pa.—Babb v Read, 6 Rawle 151, 28 Am D 650

25. Ark.—Holcomb v. American Surety Co, 42 S.W 2d 765, 184 Ark 449

NY—John Kennedy & Co v New York World's Fair, 22 N.Y.S 2d 901, 260 App Div 386, affirmed 41 NE 2d 789, 288 NY 494.

Property, estates, and rights affected see *infra* §§ 184-196

26. N.Y.—Schaghticoke Powder Co.

v. Greenwich & J Ry Co., 76 NE 153, 156, 183 NY 306, 2 L.R.A. N.S. 388, 111 Am SR 751, 5 Ann Cas 443—Brace v Gloversville, 60 NE 779, 167 N.Y. 452—Standard Sand & Gravel Co v City of New York, 157 N.Y.S 447, 172 App Div 80—Globe Plaster Co of Buffalo v Seaboard Surety Co, 274 N.Y.S 962, 153 Misc 415.

27. Wis.—Fulton v First Volunteer Co of Oconto, 236 N.W. 130, 204 Wis 355.

28. ND.—Arrison v. North Dakota Nat Guard Co D, 98 N.W. 83, 12 ND 554, 1 Ann Cas 388. 40 C.J. p 60 note 94.

29. US—Corpus Juris quoted in Pittsburg Equitable Meter Co. v Cary, C.C.A. Okl., 67 F 2d 65, 66. 40 C.J. p 60 note 81.

30. Kan.—Huttig Mill Work Co. v. Randel, 266 P 106, 125 Kan. 744 40 C.J. p 57 note 43

31. US—Crisp County, Ga v. S. J. Groves & Sons Co, C.C.A. Ga., 73 F 2d 327, 96 A.L.R 391—Maryland Casualty Co. v. Fowler, D.C.N.C., 27 F 2d 421, affirmed, C.C.A., 81 F. 2d 881, 63 A.L.R 1375—Hartford Accident & Indemnity Co. v. Board of Education of Dist. of Beaver Pond, in Mercer County, C.C.A.W.

provided for by contract³² or is expressly made subject to the lien statute,³³ since it is considered, in the absence of such a provision, that property devoted to public use is by implication exempted from the operation of the lien laws.³⁴ The reasons for the rule are that a lien on such property would be contrary to public policy³⁵ and also would be unenforceable.³⁶ A public building is not brought within the operation of the mechanic's lien law by a statutory requirement of a contractor's bond for the protection of persons furnishing labor or material for state, municipal, or other public work,³⁷ or by a provision of such law that every person furnishing material to be used in the construction of "any building" shall have a lien thereon.³⁸

Lien on fund. Under some statutes the fund appropriated or set apart for the erection of a public building is not subject to a lien.³⁹ However, other

statutes authorize, in the case of a public building or improvement, a lien for labor and material on the fund appropriated and due the contractor.⁴⁰

Private property acquired by public corporation, and vice versa. An existing lien on private property is not displaced or defeated by its acquisition by a public corporation,⁴¹ and after public property has been sold to an individual it may be subjected to a mechanic's lien.⁴²

§ 11. — Property of Quasi-Public Corporations

As a general rule the property of a quasi-public corporation, which is affected with a public use, is not subject to a mechanic's lien.

As a general rule the property of a quasi-public corporation, which is affected with a public use, is not subject to a mechanic's lien.⁴³ A mechanic's

Va., 15 F.2d 317—In re Flotation Systems, D.C. Cal., 65 F.Supp. 698.
 Ala.—Corpus Juris cited in N. O. Nelson Mfg. Co. v. County Board of Education, 152 So. 221, 228 Ala. 45.
 Ariz.—Corpus Juris cited in Webb v. Crane Co., 80 P.2d 698, 703, 52 Ariz. 299.
 Ark.—Holcomb v. American Surety Co., 42 S.W.2d 785, 184 Ark. 449.
 Cal.—C. C. Harris Oil Co. v. Standard Construction & Development Co., 173 P. 83, 178 Cal. 810—Los Angeles Stone Co. v. National Surety Co., 173 P. 79, 178 Cal. 247—Grigsby v. Ross, 33 P.2d 450, 138 Cal. App. 757.
 Idaho.—Corpus Juris cited in Boise-Payette Lumber Co. v. Challis Independent School Dist. No. 1 of Custer County, 268 P. 26, 27, 46 Idaho 403.
 Iowa.—Cities Service Oil Co. v. Longebona, 6 N.W.2d 325, 232 Iowa 850.
 Ky.—Steel & Leiby v. Flynn-Sullivan Co., 54 S.W.2d 325, 245 Ky. 772.
 La.—Turfitt v. Police Jury of Tangipahoa Parish, 186 So. 52, 191 La. 635—Decatur Cornice & Roofing Co. v. Caldwell Bros., 138 So. 511, 173 La. 694.
 Mich.—McClintic-Marshall Co. v. Ford Motor Co., 236 N.W. 792, 254 Mich. 305, 72 A.L.R. 307.
 Miss.—Mississippi Fire Ins. Co. v. Evans, 120 So. 738, 153 Miss. 635.
 Mo.—Cabool School Dist. v. U. S. Fidelity & Guaranty Co., App. 9 S.W.2d 103.
 N.Y.—Montgomery Bros. & Co. v. G. L. Cole, Inc., 244 N.Y.S. 702, 138 Misc. 53.
 N.C.—A. T. Griffin Mfg. Co. v. Bray, 137 S.E. 151, 193 N.C. 350—J. S. Schofield's Sons Co. v. Bacon, 131 S.E. 659, 191 N.C. 253.

Pa.—Sundheim v. School Dist. of Philadelphia, 166 A. 365, 311 Pa. 90.
 R.I.—Providence Pipe & Sprinkler Co. v. Aetna Casualty & Surety Co., 31 A.2d 1, 69 R.I. 51.
 S.C.—Atlantic Coast Lumber Corporation v. Morrison, 149 S.E. 243, 152 S.C. 305.
 Tex.—Metropolitan Casualty Ins. Co. v. Cheaney, Civ. App., 33 S.W.2d 691, affirmed, Com. App., 55 S.W.2d 654—Smith v. Fidelity & Deposit Co. of Maryland, Com. App., 280 S.W. 767—Southern Surety Co. v. Klein, Civ. App., 278 S.W. 527.
 Va.—Legg v. School Board of Wise County, 160 S.E. 60, 157 Va. 395—Fairbanks, Morse & Co. v. Town of Cape Charles, 131 S.E. 437, 144 Va. 56.
 Wash.—Hall & Olswang v. Aetna Casualty & Surety Co., 296 P. 162, 161 Wash. 38.
 W.Va.—Fidelity & Deposit Co. of Maryland v. Lewis County Court, 15 S.E.2d 803, 123 W.Va. 409—Tug River Lumber Co. v. Smiley, 148 S.E. 850, 107 W.Va. 485.
 40 C.J. p. 57 note 44.
 World's Fair Corporation.
 N.Y.—John Kennedy & Co. v. New York World's Fair 1939, 22 N.Y.S.2d 901, 260 App. Div. 386, affirmed 41 N.E.2d 789, 288 N.Y. 494.
 32. Miss.—Mississippi Fire Ins. Co. v. Evans, 120 So. 738, 153 Miss. 635.
 33. Ariz.—Corpus Juris cited in Webb v. Crane Co., 80 P.2d 698, 703, 52 Ariz. 299.
 Idaho.—Boise-Payette Lumber Co. v. Challis Independent School Dist. No. 1 of Custer County, 268 P. 26, 46 Idaho 403—Storey & Fawcett v. Nampa & Meridian Irr. Dist., 187 P. 946, 32 Idaho 713.

Miss.—Mississippi Fire Ins. Co. v. Evans, 120 So. 738, 153 Miss. 635.
 40 C.J. p. 58 note 45.
 34. Me.—Goss Co. v. Greenleaf, 57 A. 581, 98 Me. 436.
 40 C.J. p. 58 note 46.
 35. Ala.—N. O. Nelson Mfg. Co. v. County Board of Education, 152 So. 221, 228 Ala. 45.
 Idaho.—Corpus Juris cited in Boise-Payette Lumber Co. v. Challis Independent School Dist. No. 1 of Custer County, 268 P. 26, 27, 46 Idaho 403.
 40 C.J. p. 58 note 47.
 36. Idaho.—Storey & Fawcett v. Nampa & Meridian Irr. Dist., 187 P. 946, 32 Idaho 713.
 40 C.J. p. 58 note 48.
 37. Ariz.—Webb v. Crane Co., 80 P.2d 698, 52 Ariz. 299.
 Contractor's bond generally see infra § 256.
 38. Ariz.—Webb v. Crane Co., supra.
 39. Ala.—Scruggs v. Decatur, 46 So. 989, 155 Ala. 616.
 40 C.J. p. 58 note 51.
 Lien on fund generally see infra §§ 114-117.
 40. Kv.—Steele & Leiby v. Flynn-Sullivan Co., 54 S.W.2d 325, 245 Ky. 772.
 40 C.J. p. 58 note 52.
 41. Wis.—Findorff v. Fuller & Johnson Mfg. Co., 248 N.W. 766, 213 Wis. 365.
 40 C.J. p. 59 note 72.
 Effect of conveyance of property on existing lien generally see infra § 243.
 42. Tex.—Spencer v. Brown, Civ. App., 198 S.W. 1179.
 40 C.J. p. 59 note 73.
 43. U.S.—Ackroyd v. Winston Bros. Co., CCA Mont., 113 F.3d 657, 460—Corpus Juris quoted in Pittsburgh

lien may, however, be enforced against property of a quasi-public corporation which is not essential to the carrying out of the public purposes for which it was established,⁴⁴ or property to which the lien has attached before it became impressed with a public use,⁴⁵ but as to the latter proposition there is also authority to the contrary.⁴⁶ Under the provisions of some constitutions or statutes a lien may attach to the property of a public service corporation,⁴⁷ such as a telephone company.⁴⁸

§ 12. — Property of Religious, Educational, or Charitable Organizations

Property of a religious, educational, or charitable organization may be subject to a mechanic's lien.

A mechanic's lien may attach to college buildings,⁴⁹ and, although there is at least one decision to the contrary,⁵⁰ the weight of authority sustains the view that a church building is subject to a mechanic's lien⁵¹ and is not exempted therefrom by the fact that the seats or pews are exempt⁵² or that the church is exempt from taxation.⁵³ It has also been held that a mechanic's lien may attach to an orphanage,⁵⁴ but under some statutes, if a home for the aged and infirm or an orphanage belongs to a religious society, the lien may attach only by order of court.⁵⁵ A hospital building is exempt from mechanics' liens where it is used for purely public

purposes⁵⁶ even though the affairs of the hospital are administered by a charitable corporation under the regulation and control of the state.⁵⁷

§ 13. — Cemeteries and Cemetery Structures

Under some statutes monuments, gravestones, cemeteries, and cemetery structures may be the subject of mechanics' liens.

Under some statutes a mechanic's lien may attach to monuments, gravestones, and cemetery structures, and it has been held that a mechanics' lien statute not expressly mentioning a cemetery is applicable thereto.⁵⁸ On the other hand, it has also been held that, on grounds of public policy, neither lots of land in a cemetery nor any kind of monument or building erected thereon is subject to a lien under a statute not expressly mentioning them.⁵⁹

§ 14. — Homestead

Under some constitutional and statutory provisions homestead property is not subject to a mechanic's lien, but under other provisions a contrary rule obtains.

Under some constitutional and statutory provisions property held exempt from ordinary debts as a homestead is not subject to a mechanic's lien⁶⁰ except to the extent that the value of the homestead exceeds a prescribed exemption amount.⁶¹ On the

Equitable Meter Co v Cary, CC A Okl., 67 F 2d 65, 66.

Mich—McClintic-Marshall Co v Ford Motor Co, 236 NW 792, 254 Mich 305, 72 ALR 807

40 C J p 60 note 74

Public policy forbids a mechanic's lien against the property of a quasi-public corporation—*Pittsburg Equitable Meter Co v. Cary*, CCA Okl., 67 F.2d 65

44. US—*Ackroyd v Winston Bros. Co*, CCA Mont., 113 F 2d 657, 660 —*Corpus Juris* quoted in *Pittsburg Equitable Meter Co v. Cary*, CCA Okl., 67 F 2d 65, 66.

40 C J. p 60 note 75.

45. Or—*Benbow v. The James Johns*, 103 P 434, 56 Or 554

Wis—*Hill v La Crosse & M R Co.*, 11 Wis. 214.

46. US—*Pittsburg Equitable Meter Co v Cary*, CCA Okl., 67 F 2d 65

Gas company

Meter company has been held not entitled to lien on gas company's property for price of meters installed in latter's plant even though before devotion of its gas distribution system to public use—*Pittsburg Equitable Meter Co v Cary*, supra.

47. Tex—*Panhandle Telephone & Telegraph Co. v. Kellogg Switch-*

board & Supply Co., 132 SW 963, 62 Tex Civ App 402

48. US—*Pittsburg Equitable Meter Co v Cary*, CCA Okl., 67 F 2d 65, 66

Tex—*Panhandle Telephone & Telegraph Co v Kellogg Switchboard & Supply Co*, 132 SW 963, 62 Tex Civ App. 402

49. Mo—*Ray County Sav Bank v Cramer*, 54 Mo App 587

40 C J p 60 note 86.

50. Ark—*Eureka Stone Co v Ft Smith First Christian Church*, 110 SW 1042, 86 Ark 212

51. Fla—*Corpus Juris* cited in *Chapman v St Stephens Protestant Episcopal Church*, 136 So 238, 241, 105 Fla. 683, modified on other grounds 145 So 757, 105 Fla 683

NJ—*Rabb v Ellison*, 39 A 119, 39 NJ Law 416

Va—*Cain v Rea*, 166 SE 478, 159 Va 446, 85 ALR 945

40 C J p 60 note 88

Church property held by trustees is subject to a properly filed mechanic's lien

Fla—*Chapman v St Stephens Protestant Episcopal Church*, 136 So 238, 105 Fla 683, modified on other grounds 145 So 757, 105 Fla. 683

Va—*Cain v Rea*, 166 SE 478, 159 Va 446, 85 ALR 945

52. Or—*Harrisburg Lumber Co v Washburn*, 44 P 390, 29 Or 150

53. Pa—*Presbyterian Church v Allison*, 10 Pa 413.

54. Ark—*Morris v Nowlin Lumber Co*, 140 SW 1, 100 Ark 253.

55. Neb—*Horton v Tabitha Home*, 145 NW 1023, 95 Neb 491, 31 L R A, NS, 161, Ann Cas 1315D 1139

56. Pa—*Pennsylvania Electric Equipment Co v Phoenixville Hospital*, 37 Pa Co 671.

57. Pa—*Pennsylvania Electric Equipment Co v Phoenixville Hospital*, supra

58. NY—*Johnson v Ocean View Cemetery*, 191 NYS 138, 193 App Div 854

59. Tex—*Peterson v Stolz*, Civ App, 369 SW 113

60. SD—*Home Lumber Co v Heckal*, 393 NW 549, 67 SD 429 —*Botsford Lumber Co v. Clouse*, 251 NW 801, 62 SD 108

40 C J. p 61 note 2.

Homesteads as subject to liens for wages and materials generally see *Homesteads* § 106

61. SD—*Union Central Life Ins. Co. v. Cooperative Lumber Co*, 212 NW. 876, 51 SD 197

other hand, under other constitutions and statutes, such homestead property is subject to a mechanic's lien the same as other property,⁶² provided there is strict compliance with the constitutional and statutory provisions relating thereto⁶³ and subject to such limitations as may be prescribed by the constitution or statute.⁶⁴ The question whether particular property is a homestead, with respect to such a lien, is generally determined as of the time of the making of the contract under which the labor was performed or the materials were furnished,⁶⁵ and, if the owner failed to disclose his intention to use the property as a homestead and permitted representations otherwise to be made, he is estopped to assert, as against a mechanic's lien claimant, that he intended to use the property as his homestead.⁶⁶

Homestead rights in public lands. Under the federal statutes providing that land acquired under the provisions of the Homestead Act cannot in any event become liable to the satisfaction of any debt

or debts contracted prior to the issuing of the patent therefor, discussed in the C. J. S. title Public Lands § 233, also 50 C. J. p 1135 notes 26-29, a mechanic's lien does not attach to land acquired under the Homestead Act before the patent is issued,⁶⁷ and it has been held that a lien cannot be acquired on a building permanently attached to the soil by the homestead settler previous to the issuing of a patent,⁶⁸ but that it may be acquired on the building⁶⁹ or on machinery.⁷⁰ It has also been held that a pre-emption right is an interest in land which can be subject to a mechanic's lien.⁷¹

§ 15. Estate or Interests Subject to Lien

A mechanic's lien may attach to any right, title, or interest which the owner of the building or improvement may have in the lot or land on which it is situated.

A mechanic's lien may attach to any right, title, or interest which the owner of the building or improvement may have in the lot or land on which it is situated,⁷² provided the interest is such that it can

Right to lien for improvement on homestead see *infra* § 21.

Excess value supports lien

Any excess of value of homestead supports mechanic's lien giving lien or right to pay off exemption and encumbrances applying balance to discharge lien—*Union Central Life Ins Co v. Cooperative Lumber Co.*, supra

62. Cal—*MacQuiddy v Rice*, 118 P. 2d 853, 47 Cal App 2d 755.

Okla—*Sutherland Lumber Co. v Gale*, 277 P. 242, 136 Okl 233, 85 A.L.R. 1186—*In re Gardner's Estate*, 250 P 490, 132 Okl 26

Tex—*Towery v Plainview Building & Loan Ass'n*, Civ App, 99 S.W.3d 1039—*Middleton v. Dozier Const. Co.*, Civ App, 70 S.W.2d 243—*White v. Dozier Const. Co.*, Civ. App, 70 S.W.2d 240—*Peebles v Smith Bros.*, Civ.App, 65 S.W.2d 777—*Atwood v. Guaranty Const. Co.*, Civ.App, 63 S.W.2d 685

40 C.J. p 61 notes 3, 4.

Lien attaching before homestead see *Homesteads* § 97.

Both contract and constitutional or statutory materialman's liens may be secured on homestead property—*J D McCollom Lumber Co. v Whitfield*, Tex.Civ.App., 59 S.W.3d 1106, error refused.

Lot occupied by owners by living in garage immediately after purchase and at time building contract was executed constituted "homestead," with respect to materialman's and contractor's lien—*Eldridge v Poirier*, Tex.Civ.App., 50 S.W.2d 888, error refused

In Minnesota

(1) Since the amendment to the

Constitution in 1888, L 1889 p 1, homesteads are subject to mechanics' liens to same extent as other real estate—*Gale v Hopkins*, 206 N.W. 164, 165 Minn 177—*Hasey v McMullen*, 123 N.W. 1078, 109 Minn 332—*Landberg v Peterson*, 101 N.W. 74, 93 Minn 267—*Nickerson v Crawford*, 77 N.W. 292, 74 Minn 366, 73 Am S.R. 366

(2) Prior to this amendment a homestead could not be made subject to a mechanic's lien in the absence of an agreement between the parties to that effect—*Meyer v Berlandi*, 40 N.W. 613, 39 Minn 438—40 C.J. p 61 note 2

63. Tex—*Collier v Valley Building & Loan Ass'n*, Com App, 62 S.W.2d 82, conformed to *Valley Bldg & Loan Ass'n v Collier*, Civ App, 88 S.W.2d 611—*Sommers v Stout*, Com App, 44 S.W.2d 901—*Schmoker v Waelder*, Civ App, 115 S.W.2d 1134—*J D McCollom Lumber Co v Whitfield*, Civ App, 59 S.W.2d 1106

Necessity for.

Compliance with statutory requirements generally see *infra* § 119. Signature of husband and wife see *infra* § 81

Written contract see *infra* § 75.

Lien by contract

Where the owner of a homestead voluntarily encumbers it in the manner prescribed by statute, by giving a materialman furnishing materials for an improvement thereon a lien therefor, the materialman acquires a lien not by virtue of the statute creating a lien, but by virtue of the contract.

Utah—*Volker-Scowcroft Lumber Co*

v Vance, 88 P. 896, 32 Utah 74, 125 Am S.R. 828.

64. NC—*Cameron v McDonald*, 6 SE 2d 497, 216 N.C. 713
40 C.J. p 61 note 4 [a].

65. Tex—*Miller v Harmon*, Civ App, 46 S.W.2d 342

66. Tex—*Miller v Harmon*, supra.

67. ND—*Bovey-Shute Lumber Co v. Erickson*, 170 N.W. 628, 629, 41 ND 365

40 C.J. p 61 note 8

68. Kan—*Kansas Lumber Co v Jones*, 4 P 74, 32 Kan 195

69. ND—*Mahon v. Surerus*, 81 N.W. 64, 9 ND 57.

70. Wis—*Paige v. Peters*, 35 N.W. 328, 70 Wis 178, 5 Am S.R. 156.

71. Ill—*Turney v. Saunders*, 5 Ill. 527.

72. Ind—*Fletcher Ave Saving & Loan Ass'n v Roberts*, 188 N.E. 794, 99 Ind App 891

Mass—*Webber Lumber & Supply Co v Erickson*, 102 N.E. 940, 216 Mass. 81

Mich—*McClintic-Marshall Co v. Ford Motor Co*, 236 N.W. 792, 795, 254 Mich 305—*Skupinski v. Provident Mortg Co*, 221 N.W. 338, 244 Mich 309

Ohio—*United Banking & Trust Co. v Russell*, 176 N.E. 166, 38 Ohio App. 275.

40 C.J. p 62 note 24.

"A mechanic's or materialman's lien may be imposed upon whatever interest the individual who contracts for the work or materials may own in the property upon which the work is done or the materials used, whether the interest of such individual is a legal or equitable one."

be assigned, transferred,⁷³ mortgaged,⁷⁴ or sold under execution⁷⁵ It may attach to, and can be supported by, an estate in fee,⁷⁶ or an estate or interest smaller than a fee,⁷⁷ such as an estate for life,⁷⁸ an estate in remainder,⁷⁹ an estate by entirety,⁸⁰ or the interest of a person in possession claiming title⁸¹ It has been held that a husband's curtesy estate may be subject to such a lien,⁸² but there is also authority to the contrary⁸³ Where realty is owned by several persons as joint tenants or tenants in common, a mechanic's lien may attach to the share or interest of one or more of such cotenants, leaving the shares of the others unaffected⁸⁴

Rights or privileges held not to constitute such an estate or interest in land as to be subject to a mechanic's lien include a mere license,⁸⁵ the right

of a tenant to receive payment from the landlord for fixtures placed on the demised premises during the term,⁸⁶ and the rights of a person making a conditional sale of boilers, engines, and machinery to the owner of the land.⁸⁷

§ 16. — Equitable Estates or Interests

A mechanic's lien ordinarily may attach to an equitable estate or interest in land

Although there is authority to the contrary,⁸⁸ ordinarily a mechanic's lien may attach to an equitable estate or interest in land⁸⁹ unless the title is held under some condition which prohibits the owner of the equitable interest from placing a lien thereon⁹⁰ The interest of one who is in possession of land under a contract of purchase and who erects a build-

Ind—Fletcher Ave Savings & Loan Ass'n v Roberts, 188 NE 794, 795, 99 Ind App 391

Ky—Hines v Hollingsworth-Young Hardware Co, 198 SW 716, 717, 178 Ky 233, 4 A LR 1018

Partner's individual interest

Fact that obligation for labor and material was partnership obligation does not relieve partner's individual interest in land from operation of mechanic's lien statutes—Shea v Peters, 368 P 989, 126 Or 76.

73. Fla—Service Lumber & Supply Co v Cox, 123 So 820, 98 Fla 405

Mass—Webber Lumber & Supply Co v Erickson, 102 NE 940, 216 Mass 81

Mich—Corpus Juris quoted in McClintic-Marshall Co v Ford Motor Co, 236 NW 792, 795, 254 Mich 305, 72 A LR 807

74. Mich—McClintic-Marshall Co v Ford Motor Co, 236 NW 792, 795, 254 Mich 305, 72 A LR 807 40 C J p 62 note 26

75. Cal—McGreary v Osborne, 9 Cal 119

Mass—Webber Lumber & Supply Co v Erickson, 102 NE 940, 216 Mass 81

Mich—Corpus Juris quoted in McClintic-Marshall Co v Ford Motor Co, 236 NW 792, 795, 254 Mich 305, 72 A LR 807

76. Ind—Fletcher Ave Saving & Loan Ass'n v Roberts, 188 NE 794, 99 Ind App 391.

NJ—Davis v Mial, 90 A 315, 86 NJ Law 167, Ann Cas 1916E 1028 40 C J p 61 note 16

77. Fla—Service Lumber & Supply Co v Cox, 123 So. 820, 98 Fla. 405

40 C J p 61 note 17

Dower see Dower § 37.

Estate or interest affected by lien see infra §§ 191-195.

Separate estate of married woman see infra § 63.

Construction of particular provisions of statute

Sections of mechanics' lien law creating right of lien against tenant or lessee and against person who owns less than freehold in land are, in substance, subdivisions of section creating right of lien against owner of freehold, and should be similarly interpreted and applied—Art Metal Const Co v Knight, 185 A 136, 36 RI 228

78. Iowa—Floete v Brown, 73 NW 483, 104 Iowa 154, 45 Am SR 434

40 C J p 61 note 18

79. NJ—Davis v Mial, 90 A 315, 86 NJ Law 167, Ann Cas 1916E 1028

40 C J p 62 note 20

80. Mo—Nold v Ozenberger, 133 S W. 349, 152 Mo App 439

A husband's right of possession to property wherein he has an estate by entirety is such as is subject to mechanic's lien.—Nold v Ozenberger, supra

81. Fla—Service Lumber & Supply Co v Cox, 123 So 820, 98 Fla. 405

Ill—Randolph v Chisholm, 29 Ill App 173, affirmed 21 NE 215, 128 Ill 115

82. Conn—Flannery v Rohrmeyer, 46 Conn 558, 33 Am R 36

Mass—Kirby v Tead, 13 Metc 149

83. Ohio—Spinning v. Blackburn, 13 Ohio St 131

40 C J p 62 note 24

84. Mass—Roxbury Painting & Decorating Co v Nuts, 123 NE 391, 238 Mass. 112, 4 A LR 680.

Wash—Patrick v Bonthius, 124 P 2d 550, 13 Wash 2d 310.

40 C J p 62 note 28

Contract by part or joint owner see infra § 69.

85. Kan—Parham v. McCarty, 205 P. 622, 110 Kan 771.

40 C J p 62 note 30

86. Ill—Gardner v Watson, 18 Ill App 386, affirmed 10 NE 192, 119 Ill 312

87. Ind—Portland v. Indianapolis Mortar & Fuel Co., 106 NE 785, 57 Ind App 166

88. NJ—Franklin Soc for Home Building & Savings v Thornton, 96 A 921, 85 NJ Eq 525 40 C J p 63 note 36

89. Ark—Bell v. Koontz, 290 SW. 597, 172 Ark 370.

Ind—Fletcher Ave Saving & Loan Ass'n v Roberts, 188 NE 794, 99 Ind App 391

Mo—Lee & Boutell Co v C A. Brockett Cement Co., 106 SW 2d 451, 341 Mo 95

Pa—Wormer v. Gearhart, 16 Pa. Dist & Co 359

Va—Corpus Juris cited in Wallace v Brumback, 12 SE3d 801, 804, 177 Va 36—Feuchtenberger v Williamson, Carroll & Saunders, 130 S E 357, 137 Va 578.

40 C J p 62 note 37

Equity of redemption

Roofing company was held entitled to establish lien for installation of a roof against mortgagor and sell equity of redemption—Becker Roofing Co v Wysinger, 124 So. 858, 220 Ala 276

The term "owner" within mechanic's lien statutes is not used in narrow sense as meaning only owner of fee, but extends to owner of equitable interest in realty—Fletcher Ave Saving & Loan Ass'n v Roberts, 188 NE 794, 99 Ind App 391.

90. Ind—Fletcher Ave Saving & Loan Ass'n v Roberts, supra

Ky—Hines v. Hollingsworth-Young Hardware Co, 198 SW. 716, 178 Ky 233, 4 A LR 1018.

ing or other improvements thereon is subject to the lien.⁹¹ A mechanic's lien, however, cannot attach to the equitable lien of a vendor for the purchase money, when he has conveyed the whole title.⁹²

§ 17. — Leaseholds

A leasehold estate or interest may be subject to a mechanic's lien.

A mechanic's lien may attach to, and be enforced against, a leasehold estate⁹³ for labor or materials furnished under a contract with the lessee, as discussed *infra* § 65, regardless of whether the lessee has an estate for years⁹⁴ or is merely a tenant from month to month⁹⁵. The lien may attach notwithstanding the buildings, fixtures, etc., put on the leased premises by the tenant may for some purposes, and under some circumstances, be considered as personal property,⁹⁶ and even though the tenant has the privilege of removing the buildings, machinery, or fixtures from the premises at the end of the term.⁹⁷ Such a lien may also attach to the interest of a sublessee, assignee, or other person holding under the lessee⁹⁸ or to the interest of the holder

of the lease with an option to purchase.⁹⁹ However, a mechanic's lien on a leasehold estate attaches subject to all the terms and conditions of the lease¹ and subject to the paramount interest of the lessor or the holder of the fee.²

§ 18. — Mortgaged or Encumbered Property

A mechanic's lien may attach to a mortgagor's interest or equity of redemption in the mortgaged property prior to foreclosure.

A mechanic's lien may attach to the interest or equity of redemption of the mortgagor in mortgaged property³ prior to foreclosure.⁴ The lien, however, does not attach to the mortgagor's mere right of redemption after a foreclosure sale.⁵

§ 19. — Trust Estates

Property held in trust may be the subject of a mechanic's lien unless there is a provision to the contrary in the trust deed.

Property held in trust may be the subject of a mechanic's lien⁶ except where the trust deed, which

91. Conn.—Gruss v Miskinis, 34 A 2d 600, 130 Conn 337

Kan.—Corpus Juris cited in Noll v Graham, 27 P 2d 277, 281, 138 Kan 678

N.J.—Kolkman v Eshelman, 330 N YS 91, 132 Misc 428

40 C.J. p 63 note 38

Contract with person in possession under contract of purchase see *infra* § 71

Effect of extinguishment of vendee's interest see *infra* § 245

A prospective purchaser of land, who is in possession under an agreement for the subsequent execution of a contract which never materializes, has no interest to which a mechanic's lien may attach—U S Lumber & Supply Co v River Park Land & Improvement Co, 151 NE 354, 85 Ind App 140

92. N.Y.—Smullen v. Hall, 13 Daly 393.

40 C.J. p 63 note 39

93. Kan.—Corpus Juris cited in J B Ehrsam & Sons Mfg. Co. v. Rice, 112 P 2d 95, 98, 153 Kan 483

Minn.—Moorhead Lumber Co. v Remington Packing Co., 206 NW. 453, 165 Minn. 411.

40 C.J. p 63 note 40.

A garnishee's leasehold may be subject to a mechanic's or materialman's lien, notwithstanding the garnishee leased only a part of the building.—Raithel v. Hamilton-Schmidt Surgical Co., Mo.App., 43 S W 2d 79.

94. Ga.—James G. Wilson Mfg Co v Chamberlin-Johnson-Du Bose Co, 79 SE 465, 140 Ga 593

40 C.J. p 63 note 42

95. Mo.—Deatherage v Sheldley, 50 Mo App 490

96. Kan.—Hathaway v Davis, 5 P 29, 33 Kan 693

Okl.—Jarrell v. Block, 92 P 167, 19 Okl 467

40 C.J. p 63 note 40 [f]

97. Kan.—Corpus Juris cited in J B Ehrsam & Sons Mfg Co v Rice, 112 P 2d 95, 98, 153 Kan 483

—Hathaway v. Davis, 5 P 29, 33 Kan. 693

40 C.J. p 63 note 44

Removal of building or improvement as defeating lien see *infra* § 243.

Right of removal of improvements generally see *infra* § 267

98. Colo.—Cary Hardware Co v McCarty, 50 P. 744, 10 Colo App 200

Tenn.—Daniel v Weaver, 5 Lea 392

99. Ind.—Koehring v Bowman, 142 NE 117, 194 Ind. 433

Wis.—Owens v. Hughes, 205 NW. 312, 188 Wis 215.

40 C.J. p 63 note 40 [c]

Waiver of forfeiture of option

Where lessor, under lease giving lessee option to buy, did not give notice of forfeiture after expiration of option, but waived forfeiture and executed a contract of sale to lessee, he thereby recognized lessee's interest in realty, which interest was

subject to lien for improvements made at lessee's request—Owens v Hughes, *supra*

1. Ala.—Woodson v Wilson, 144 So 122, 25 Ala App 241.

Ill.—F K Ketler Co v. County Fair Grounds Corporation, 21 NE 2d 779, 301 Ill App 117.

40 C.J. p 63 note 45

Effect of extinguishment of leasehold interest see *infra* § 245

2. Okl.—Jarrell v Block, 92 P 167, 19 Okl 467—Block v. Pearson, 91 P 714, 19 Okl 432

3. Ill.—Erickson v. Ginocchio, 24 N E 2d 884, 303 Ill App 159

Mich.—Skupinski v. Provident Mortg. Co., 221 NW 338, 244 Mich. 309.

Tex.—Schultze v Alamo Ice & Brewing Co., 21 S.W. 160, 2 Tex Civ App. 236.

40 C.J. p 63 note 21.

As affected by contract see *infra* § 68.

4. Tex.—Schultze v. Alamo Ice & Brewing Co., *supra*.

40 C.J. p 63 note 22.

5. Ill.—Erickson v Ginocchio, 24 N E 2d 884, 303 Ill App 159.

40 C.J. p 63 note 22 [a] (1), (2)

6. Fla.—Chapman v St Stephens Protestant Episcopal Church, 136 So. 238, 105 Fla 683, modified on other grounds 145 So. 767, 105 Fla. 683

Va.—Cain v Rea, 166 SE 478, 159 Va 446, 35 ALR 946.

is duly recorded, expressly provides that no contract creating a lien shall be made.⁷ The income of property held under a spendthrift trust is not subject to a mechanic's lien.⁸ It has also been held that a husband's interest in a lease for an unex-

pired term of nine hundred and ninety-nine years, owned by his wife, could not be subjected to a mechanic's lien,⁹ since the lease is merely a chattel real vesting in the husband only a life estate in trust with remainder to the wife.¹⁰

II. RIGHT TO LIEN

A. NATURE OF IMPROVEMENT

§ 20. In General

In order to establish a mechanic's lien it is usually necessary that the materials furnished or labor performed should have gone into something which has attached to, and become a part of, the realty, whether the value of the realty must have been increased depends on the statute under which the lien is claimed.

In order to establish a mechanic's lien it is usually necessary that the materials furnished or labor performed should have gone into something which has attached to and become a part of the realty.¹¹ While, under some statutory provisions, it has been held that the materials furnished or labor performed must have added substantially to the value of the realty,¹² under other statutory provisions questions of benefit to the owner of the property¹³ or of the enhancement or increase in the value of the property¹⁴ have been held immaterial.

§ 21. Buildings or Structures and Improvements in General

a. In general

b. Particular property

a. In General

(1) In general

(2) Improvements

(1) In General

The nature of the building, structure, or improvement for which a mechanic's lien may be acquired depends entirely on the terms of the particular statute under which the lien is claimed.

The nature of the building, structure, or improvement for which a mechanic's lien may be acquired depends entirely on the terms of the particular statute under which the lien is claimed. Thus a mechanic's lien may be conferred for the performance of services, as discussed *infra* §§ 34-39, or for the furnishing of materials, discussed *infra* §§ 40-44, in the erection or construction, discussed *infra* § 22, alteration, addition, or repair, discussed *infra* § 23, of certain buildings, structures, or improvements specifically mentioned,¹⁵ or any building,¹⁶ structure,¹⁷ or improvement,¹⁸ depending on the particular statutory provisions involved.

A "building," within the meaning of mechanics' lien laws, has been held to be an edifice constructed for use or convenience, as a house, church, shop,

7. Ill.—*Franklin Sav Bank v Taylor*, 23 NE 397, 131 Ill 376
40 C.J. p 64 note 49
Contract with trustee see *infra* § 70

8. Kan.—*Pond v Harrison*, 152 P 655, 96 Kan 542, L.R.A.1916B 1264

9. Conn.—*Flannery v. Rohrmayer*, 49 Conn 27

10. Conn.—*Flannery v Rohrmayer*, *supra*.

11. Del.—*Corpus Juris cited in Girdler Corporation v. Delaware Compressed Gas Co.*, 183 A 430, 482, 7 WW Harr 344

Mont.—*Caird Engineering Works v Seven-Up Gold Mining Co.*, 111 P 2d 267, 111 Mont 471.
40 C.J. p 64 note 59.

12. Del.—*Corpus Juris cited in Girdler Corporation v. Delaware Compressed Gas Co.*, 183 A 430, 482, 7 WW Harr 344.
40 C.J. p 64 note 60.

Destruction or removal of building or improvement as giving right to lien see *infra* § 21

Enhancement of value as underlying principle of statutes conferring lien see *supra* § 3

13. Cal.—*Hardwood Interior Co. Inc v Bull*, 140 P 702, 24 Cal App 129

Nonbeneficial alteration of property see *infra* § 23

14. N.M.—*Albuquerque Lumber Co v Montevist Co.*, 38 P2d 77, 39 N.M 6

40 C.J. p 64 note 62.

Increase in value not indispensable
Increase in value of property as result of improvements has been held not indispensable as condition to attachment of mechanic's lien for labor and material furnished
Nev.—*Nichols v Levy*, 32 P2d 120, 55 Nev 310

N.M.—*Albuquerque Lumber Co v. Montevist Co.*, 38 P2d 77, 39 N M 6

Where no question of other encumbrances is involved, an enhancement in the value of the realty improved has been held not necessary—*Overhead Door Co of Illinois v. Bernstein*, 3 NE 2d 169, 285 Ill App 587.

15. Me.—*Baker v Waldron*, 42 A 225, 92 Me 17, 69 AmSR 483
40 C.J. p 65 note 69

16. Cal.—*Hardwood Interior Co. Inc v Bull*, 140 P. 702, 24 Cal App 129

Conn.—*Waterbury Lumber & Coal Co v Asterchinsky*, 87 A 739, 87 Conn 316, Ann Cas 1916B 613.

17. Cal.—*Williams v Mountaineer Gold Min Co.*, 34 P. 702, 103 Cal 134, reheard 36 P 388, 103 Cal 134
Or.—*McCormack v. Bertschinger*, 237 P 383, 115 Or 250.

18. Iowa.—*National Life Ins. Co. v. Ayres*, 32 NW. 607, 111 Iowa 200.
40 C.J. p 65 note 72

etc, attached to, and becoming part of, the land.¹⁹ It has been held not to include every species of erection on land,²⁰ such as fences, gates, or other like structures.²¹ An "appurtenance," as used in a statute allowing a lien for materials furnished or services rendered in the construction of a building or any of its appurtenances, has been held to cover what might not otherwise be deemed to belong to the building.²²

The fact that a building is erected, or an addition is made thereto, for the purpose of being put to an unlawful use has been held not to prevent a person furnishing labor or material therefor from acquiring a mechanic's lien²³ unless he had knowledge, at the time, of the intended use.²⁴ However, it has also been held that one furnishing materials to another to be used on certain realty is charged with knowledge of the existing zoning regulations relative to such realty and may not assert a lien based on such person's violation of the ordinances in building a structure with such materials,²⁵ since the one furnishing the materials is not excused from inquiring into what use is to be made of the materials and the legality of such use.²⁶

"Structure." The meaning of the word "structure," as used in a statute authorizing a lien for labor performed or materials furnished in connection with the creation, improvement, or repair of a structure, is to be ascertained by referring to the meaning of the words associated with it,²⁷ and where all the associated terms designate classes of property attached or appurtenant to, or a part of,

the land, the word "structure" is to be likewise restricted,²⁸ notwithstanding it may be susceptible of other definitions.²⁹ Under some statutory provisions the meaning of the words "structure" and "property" has been held to be the same.³⁰

"Other structure." The words "other structure," following an enumeration of particular things in mechanics' lien acts, have been held to include all objects built on the soil, which are property within the constitution, having permanency and put in place to accomplish some definite purpose,³¹ and to comprehend all the properties specifically enumerated,³² and any similar thing constructed, should the enumeration prove incomplete.³³ However, the words have been held to include only objects similar to the preceding objects specifically named,³⁴ and not to embrace matters not resembling, related to, or belonging in, the same class with the structures or improvements specifically enumerated.³⁵

(2) Improvements

Where statutory provisions relating to mechanics' liens do not expressly define the term "improvement," there is a conflict of authority as to its meaning.

Some statutory provisions expressly define the term "improvement."³⁶ However, where the statutes do not define the term the courts are not in accord as to its meaning. Thus it has been held that the term is synonymous with "building,"³⁷ or means an entire building or independent erection³⁸ or such a permanent and substantial erection as essentially augments the interest which a tenant has in the lands.³⁹ On the other hand, it has been held that

19. N.J.—Rabb v W P Ellison, Inc., 99 A 119, 89 N.J.Law 416, affirmed 103 A 1054, 90 N.J.Law 716.

40 C.J. p 65 note 73.

"Building" defined generally see 13 C.J.S. p 378 note 66—p 384 note 49.

20. U.S.—Central Trust Co v Cameron Iron & Coal Co, C.C.Iowa, 47 F 136.

40 C.J. p 65 note 74.

21. Mass.—Truesdell v Gay, 13 Gray 311.

Fences generally see infra subdivision b (3) of this section.

22. Conn.—Waterbury Lumber & Coal Co v Asterchinsky, 37 A 739, 37 Conn 316, Ann Cas 1916B 613—Balch v Chaffee, 47 A 327, 73 Conn 318, 84 Am S.R. 155.

Appurtenances affected by lien see infra § 184.

23. Iowa.—Dorsey v Langworthy, 3 Greene 341.

24. Iowa.—Dorsey v Langworthy, supra.

25. Ill.—Wolthausen v Lederer, 39 N.E.2d 71, 313 Ill.App 143.

26. Ill.—Wolthausen v Lederer, supra.

27. Cal.—Corpus Juris quoted in Western Electric Co v Cooley, 251 P 331, 333, 70 Cal.App. 770.

Mont.—Barnes v Montana Lumber & Hardware Co, 216 P. 335, 67 Mont 481.

28. Cal.—Corpus Juris quoted in Western Electric Co v Cooley, 251 P 331, 333, 70 Cal.App. 770.

Mont.—Barnes v Montana Lumber & Hardware Co, 216 P. 335, 67 Mont 481.

29. Cal.—Corpus Juris quoted in Western Electric Co v Cooley, 251 P 331, 333, 70 Cal.App. 770.

40 C.J. p 65 note 73.

"Structure" defined generally see the C.J.S. definition Structure, also 60 C.J. p 666 note 1—p 667 note 17.

30. Pa.—O'Kane v Murray, 25 Pa. Dist 37, affirmed 97 A. 94, 252 Pa. 60.

31. Cal.—Western Electric Co. v Cooley, 251 P. 331, 70 Cal.App. 770.

32. Cal.—Mendoza v Central Forest Co, 174 P. 359, 37 Cal.App. 289.

33. Cal.—Mendoza v Central Forest Co, 174 P. 359, 37 Cal.App. 289.

34. Mich.—Healy v Toles, 254 N.W. 213, 266 Mich. 584, 92 A.L.R. 749.

35. Idaho.—Armitage v Bernheim, 187 P. 938, 32 Idaho 594.

36. N.Y.—Caldwell v. Glasner, 123 N.Y.S. 622, 138 App.Div. 626.

40 C.J. p 65 note 82.

37. Mo.—Richardson v. Koch, 81 Mo. 264—Collins v. Mott, 45 Mo. 100.

"Improvement:"

Defined generally see 42 C.J.S. p 416 note 94—p 420 note 31.

As addition see infra § 23.

A town site is neither a "structure" nor an "improvement" within Comp St 1919, §§ 7839, 7844, and is not the subject of a lien under these sections—Armitage v Bernheim, 187 P. 938, 32 Idaho 594.

38. Iowa.—Getchell v. Allen, 34 Iowa 559.

39. Pa.—Orth v West View Oil Co., 28 A 180, 159 Pa 333.

40 C.J. p 65 note 87.

the term is not necessarily synonymous with, or restricted to, buildings,⁴⁰ and that it may not include even an ordinary dwelling house where the words with which it is associated exclude such a construction.⁴¹ In order to support a mechanic's lien, under some statutory provisions, it has been held that the work or materials furnished must permanently improve the land affected.⁴² As discussed *infra* § 23, there is a conflict of authority on the question whether the term includes additions.

"Other improvements." It has been held that the expression "other improvements," refers only to improvements of a character similar to those previously mentioned.⁴³

Improvements on homestead. Under some constitutional provisions a lien may be allowed for an improvement made on a homestead.⁴⁴ Although it has been held that the improvements for which a lien may be allowed need not be made on a residence used as a home,⁴⁵ they must be of a nature not inconsistent with homestead use.⁴⁶ Marking off and grading part of a homestead and erecting a dwelling house thereon constitutes an improvement of the homestead for which mechanics' liens may be allowed.⁴⁷

b. Particular Property

(1) Mining and railroad property

(2) Oil, gas, steam, or electrical property

- (3) Fences and windmills
- (4) Flumes, aqueducts, dams, and bridges
- (5) Wharves, piers, and vessels
- (6) Other property

(1) Mining and Railroad Property

Mining or railroad property has been held to come within the meaning of some general mechanics' lien statutes relating to structures and improvements.

A mine has been held to be a structure⁴⁸ or improvement⁴⁹ within the meaning of general mechanics' lien statutes relating thereto. Also a smelter has been held to be a mill or manufactory within the meaning of a statute giving a lien for the erection or improvement of such structures.⁵⁰ In some,⁵¹ but not other,⁵² jurisdictions a mechanic's lien has been allowed in respect of a railroad, while in still other jurisdictions it has been allowed in respect of some,⁵³ but not other,⁵⁴ railroad property. Thus a railway tunnel has been held to be a structure within the meaning of a general mechanics' lien statute.⁵⁵

(2) Oil, Gas, Steam, or Electrical Property

Oil, gas, steam, or electrical property has been held to be a structure or improvement within some general mechanics' lien statutes.

A gas plant is such an improvement as will give rise to a mechanic's lien under some statutes.⁵⁶ Also the statutes include a plant for the generation of steam to be distributed under a municipal franchise.

40. Ala.—Bates v Harte, 26 So 898, 124 Ala 427, 82 AmSR 186

40 CJ p 65 note 88

41. Pa.—Appeal of Wetmore, 91 Pa 276

40 CJ p 65 note 89.

42. Cal.—Ogden v Byington, 244 P 832, 198 Cal 151—Gross v Hazel-tine, 290 P 678, 107 Cal App 446

What constitutes permanent im-provement

Ill.—Alexander Lumber Co v Swin-dlehurst, 32 NE2d 637, 309 Ill App 438—Westphal v Berthold, 273 Ill App 266

43. Ark.—Eastern Arkansas Hedge-fence Co v Tanner, 58 SW 886, 67 Ark 156.

44. Tex.—Wilson v. Hinton, 116 S. W2d 365, 131 Tex 593
Homestead as subject to mechanics' liens generally see *supra* § 14.

Improvements essential to existence of homestead

A contract or lien, which excludes the idea of a mere loan and is executed in accordance with the formalities required by the constitution with the purpose and effect of securing the necessary labor and materials used in constructing improve-

ments on a homestead, will be up-held, particularly where the improve-ments are essential to the very ex-istence of the homestead.—Wilson v Hinton, *supra*.

45. Tex.—Atwood v Guaranty Const Co, Com App., 63 SW2d 685—Macomber v Home Bldg & Loan Co, Civ App., 291 SW 294

46. Tex.—Atwood v Guaranty Const Co, Com App., 63 SW2d 685.

Reasonable use

The improvements must be rea-sonably usable with the proper use of the property as a homestead.—Atwood v. Guaranty Const. Co, *supra*.

47. Minn.—Gale v Hopkins, 206 N W. 164, 165 Minn 177

48. Cal.—Helm v. Chapman, 5 P. 352, 66 Cal 291.

Liens incident to working of mines see the CJS title Mines and Min-erals §§ 259-269, also 40 CJ p 1163 note 5—p 1185 note 38.

49. US—Central Trust Co. v. Shef-field & Birmingham Coal, Iron & R Co, CCA Ala., 42 F 106, 9 LRA 67

Okla.—Peaceable Creek Coal Co v.

Jackson, 108 P. 409, 26 Okl 1, Ann Cas 1912B 1.

50. Ariz.—McAllister v. Benson Mining & Smelting Co, 16 P. 271, 2 Ariz 350

51. US—Ban v Columbia Southern R Co, Or, 117 F 21, 54 CCA 407.
40 CJ p 66 note 7

Liens for labor or supplies to rail-roads see the CJS title Railroads §§ 267-281, also 51 CJ p 812 note 89—p 826 note 32

52. Ohio—Rutherford v Cincinnati & P R Co, 35 Ohio St 559
40 CJ p 66 note 8

53. Wis.—Hill v LaCrosse & M R. Co, 11 Wis 214
40 CJ p 66 note 9.

54. Wis.—La Cross & M R Co. v. Vanderpool, 11 Wis 119, 78 Am D. 491
40 CJ. p 66 note 10.

55. W Va.—Atlas Powder Co v. Nelson and Chase & Gilbert Co., 20 SE2d 890, 124 W.Va. 298—Blue-field Supply Co v M. P. Smith Const. Co, 177 SE 296, 115 W Va. 537.

56. Ill.—Chicago Smokeless Fuel Gas Co. v. Lyman, 82 Ill App. 538.

through pipes laid in the streets⁵⁷ Electric light or power lines, including poles, wires, and insulators, have been held within some statutes relating to mechanic's liens for structures or improvements, etc.,⁵⁸ but not within other statutes⁵⁹

Various statutes have been held to include an oil well derrick or oil rig⁶⁰ and an oil refinery.⁶¹ An oil tank has been held to be within a statute relating to erections and improvements,⁶² but not within one relating to buildings.⁶³

(3) Fences and Windmills

While fences and windmills may come within the provisions of some mechanics' lien statutes, such property may not be within the contemplation of other statutes.

In some jurisdictions mechanics' liens may be acquired for the construction of fences,⁶⁴ at least when constructed as appurtenant to a building,⁶⁵ and at the same time⁶⁶ or when included with a building in the same contract.⁶⁷ However, it has been held otherwise under a statute giving a lien merely for labor or materials furnished for erecting or repairing any "building or the appurtenances of any building."⁶⁸ A mechanic's lien has been allowed for a windmill on the ground that it is an "improvement"⁶⁹ or an "appurtenance"⁷⁰ within the meaning of the statutes.

(4) Flumes, Aqueducts, Dams, and Bridges

The provisions of the statute under which a mechanic's lien is claimed determine whether a lien will be allowed for flumes, aqueducts, dams, or bridges.

Mechanics' liens have been allowed for aqueducts,⁷¹ flumes,⁷² and dams.⁷³ Some statutes do not confer a lien for the construction of an irrigation system as such,⁷⁴ but only for the construction of the specific structures comprising it.⁷⁵ It has been held that a mechanic's lien may not be acquired for a bridge as a building⁷⁶ or wharf.⁷⁷ However, some statutes have expressly created a lien on account of bridges,⁷⁸ and have been construed to extend to railroad bridges.⁷⁹

(5) Wharves, Piers, and Vessels

Mechanics' liens are allowed with respect to wharves, piers, or vessels under some statutes.

A general mechanics' lien law has been held not to comprehend vessels,⁸⁰ since, as discussed in Maritime Liens § 5, there are other statutes specifically relating to liens on vessels. However, under some statutory provisions, a mechanic's lien may be acquired for a wharf,⁸¹ a wharf boat,⁸² and sheds erected on piers.⁸³ It has been both affirmed⁸⁴ and denied⁸⁵ that a lien may be acquired on account of

57. Ind.—Wells v Christian, 76 N.E. 518, 165 Ind 662
40 C.J. p 66 note 15

58. Cal.—Western Electric Co v Cooley, 251 P. 331, 79 Cal App 770
40 C.J. p 66 note 13

Electrical property as "structures"
(1) In general.—Forbes v. Willamette Falls Electric Co, 23 P. 670, 19 Or. 61, 30 Am S R 793

(2) An electric power line has been held to be a "structure" within a statute giving lien on building or other structure.—Western Electric Co. v Cooley, 251 P. 331, 79 Cal App 770

59. N.C.—Fulp v. Kernersville Light & Power Co, 72 S.E. 869, 157 N.C. 154

60. W Va.—Showalter v Lowndes, 49 S.E. 448, 56 W Va. 462
Wells see infra § 30

61. Pa.—Short v Miller, 14 A. 374, 120 Pa. 470
40 C.J. p 66 note 17.

62. U.S.—American Tank Co. v Continental & Commercial Trust & Savings Bank, C.C.A. Ark., 3 F 2d 123
40 C.J. p 66 note 18

63. Pa.—Seiders & Co International Boiler Works v Lewis & Bros Co, 7 Pa.Dist 278, 31 Pa Co 60.

64. Idaho.—Armitage v Bernheim, 187 P. 988, 33 Idaho 594
40 C.J. p 66 note 23.

65. Mo.—Henry v Plitt, 81 Mo 237
W Va.—O'Neil v Taylor, 53 S.E. 471, 59 W Va 370

66. Mo.—Henry v. Plitt, 84 Mo 237
67. Mo.—Marshall v. Archie Bank, 76 Mo App 92.

40 C.J. p 66 note 26
68. Ill.—Canisius v Merrill, 65 Ill 67
Fence as not within term "building" see supra subdivision a (1) of this section.

69. Kan.—Phelps & Bigelow Windmill Co v. Baker, 30 P. 472, 49 Kan 434.

70. Neb.—Phelps & Bigelow Windmill Co v. Shay, 48 N.W. 896, 32 Neb. 18

71. Mass.—Nash v. Commonwealth, 51 N.E. 865, 174 Mass. 335.
40 C.J. p 67 note 31
Ditch see infra § 30.

72. N.J.—Derrickson v. Edwards, 29 N.J. Law 468, 473, 30 Am D 220
40 C.J. p 67 note 32

73. Or.—Willamette Falls Transp & Milling Co. v. Remick, 1 Or 169
40 C.J. p 67 note 33

74. U.S.—Colonial Trust Co. v Vale-Oregon Irr. Co., D C Or., 265 F 393

75. U.S.—Colonial Trust Co. v. Vale-Oregon Irr Co, supra.
40 C.J. p 67 note 35.

76. Wis.—La Crosse & M. R. Co v Vanderpool, 11 Wis. 119, 78 Am.D 691

40 C.J. p 67 note 36

77. Cal.—Burt v. Washington, 3 Cal 248

78. Ind.—Jenckes v. Jenckes, 44 N.E. 632, 145 Ind 624.
40 C.J. p 67 note 38

79. Ohio.—Smith Bridge Co. v Bowman, 41 Ohio St 37, 52 Am R 67.

Wis.—Purtell v Chicago Forge & Bolt Co, 42 NW 265, 71 Wis 182

80. Cal.—United Iron Works v Outer Harbor Dock & Wharf Co., 141 P. 917, 168 Cal 81
40 C.J. p 67 note 40

81. U.S.—Canton Lumber Co. v Cooper, C.C.A. Md., 75 F 2d 92
40 C.J. p 67 note 42

What constitutes wharf
U.S.—Canton Lumber Co. v. Cooper, supra.

82. Ark.—Galbreath v. Davidson, 25 Ark. 490, 99 Am D. 233
40 C.J. p 67 note 43.

83. N.Y.—Collins v. Drew, 6 Daly 234, affirmed 67 N.Y. 149.
40 C.J. p 67 note 44.

84. Ind.—Olmsted v. McNall, 7 Blackf. 887

85. N.J.—Coddington v. Beebe, 31 N.J. Law 477.

a floating wharf or dock under a statute relating to "buildings."

(6) Other Property

Whether various kinds of property constitute structures or improvements, etc., depends on the statutory provisions under which the lien is claimed.

The mechanics' lien statutes have been held to include, among other things,⁸⁶ an aerial tramway,⁸⁷ an ice house,⁸⁸ a structure intended for the shelter, use, and convenience of a professional baseball club, its agents, players, and patrons,⁸⁹ and an amphitheater and framework built on posts firmly imbedded in the soil.⁹⁰

On the other hand, lien statutes have been held not to include a coke oven⁹¹ or swings and seats erected in a fair ground and park.⁹² A kiln has been held not to be within a statute relating to buildings,⁹³ but, of course, it is within a statute expressly naming it.⁹⁴ Some statutory provisions have been held not to include a mausoleum,⁹⁵ but, under other statutory provisions, a lien may be allowed on the premises where a mausoleum is situated for the placing of stained glass windows in the mausoleum.⁹⁶

A "public improvement" has been held to include a schoolhouse⁹⁷ and an ice plant.⁹⁸

Mills and factories. A lien usually may be acquired for labor performed in, or materials furnished for, the construction of mills and factories,⁹⁹ the statutes in some states expressly mentioning such structures.¹

Lightning rods. It has been held in some jurisdictions that a lien may attach for labor and materials used in the construction and erection of lightning rods,² but such a lien has been denied in other jurisdictions,³ and, as discussed infra § 314, in still other jurisdictions it has been held to be a question of fact, to be determined by the jury, whether a lightning rod was furnished "in and about the erection and construction" of a house, so as to give rise to a lien.

§ 22. — Erection or Construction

- a. In general
- b. Commencement or completion of building

a. In General

What constitutes a construction or erection under statutes requiring that an improvement be a construction or erection in order that a lien may be allowed therefor may be determined by whether or not a new, or substantially new, building has been put up.

Under some statutory provisions a lien may be acquired on property for the construction of a building thereon.⁴ What constitutes construction or erection under statutes which do not confer a lien for repair or alteration, so that there can be no lien unless the improvement in question falls under the head of construction or erection, may be determined by whether or not a new building has been put up,⁵ or, in the case of remodeling, rebuilding, or alterations, whether the old building has lost its identity,⁶ or whether the structure of the building has been so completely changed that it may properly be termed

86. N.Y.—Keck v Charles B. Saxon, Inc., 297 N.Y.S. 7, 161 Misc. 17 affirmed 6 N.Y.S.2d 93, 254 App. Div. 781.

A plaster model for a group furnished by sculptor to contractor to be used in guiding stone cutters in constructing a pediment over entrance of building was furnished for or constituted an "improvement" of realty under lien law, for which sculptor was entitled to a lien—Keck v Charles B. Saxon, Inc., supra.

87. Tex.—A Leschen & Sons Rope Co. v. Moser, Civ. App., 159 S.W. 1018.
40 C.J. p. 67 note 48.

88. Pa.—Thomas v. Smith, 42 Pa. 68.
40 C.J. p. 67 note 49.

89. N.J.—Rabb v W. P. Ellison, Inc., 99 A. 119, 89 N.J. Law 416, affirmed 103 A. 1054, 90 N.J. Law 716.
40 C.J. p. 67 note 50.

90. Neb.—H. F. Cady Lumber Co. v.

Greater American Exposition Co., 93 N.W. 961, 4 Neb. Unoff., 268.
40 C.J. p. 67 note 51.

91. U.S.—Central Trust Co. v. Cameron Iron & Coal Co., C.C.Pa., 47 F. 136.
40 C.J. p. 67 note 52.

92. Cal.—Lothian v. Wood, 55 Cal. 159.
40 C.J. p. 67 note 54.

93. Pa.—Cowdrick v. Morris, 9 Pa. Co. 312.

94. N.H.—Lavoie v. Burke, 38 A. 723, 69 N.H. 144.

95. N.Y.—Brown v. City Nat. Bank, 131 N.Y.S. 92, 72 Misc. 201, 208.
40 C.J. p. 67 note 53.

96. Wis.—Wagner-Larscheid Co. v. Fairview Mausoleum Co., 208 N.W. 241, 190 Wis. 357.

97. Ill.—Spalding Lumber Co. v. Brown, 49 N.E. 725, 171 Ill. 487.
31 C.J. p. 265 note 70 [g].

98. Ky.—U. S. Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co., 206 S.W. 806, 182 Ky. 473.

99. Wis.—Vilas v. McDonough Mfg. Co., 65 N.W. 438, 91 Wis. 607, 51 Am. S.R. 925, 30 L.R.A. 778.
40 C.J. p. 66 note 96.

1. Ariz.—McAllister v. Benson Mining & Smelting Co., 16 P. 271, 2 Ariz. 850.

Ind.—Wells v. Christian, 76 N.E. 518, 165 Ind. 662.

2. Iowa—Harris v. Schultz, 21 N.W. 22, 64 Iowa 539.
40 C.J. p. 66 note 20.

3. Ill.—Draw v. Mason, 81 Ill. 498, 499, 25 Am. R. 288.
40 C.J. p. 66 note 21.

4. Okl.—Wass v. Vickery, 13 P.2d 142, 158 Okl. 227.

5. U.S.—Fusey v. Pennsylvania Paper Mills, C.C.Pa., 173 F. 684, affirmed 185 F. 481, 107 C.C.A. 581.
40 C.J. p. 67 note 65.

6. N.J.—Combs v. Lippincott, 35 N.J. Law 481.

Pa.—In re Sabbaton's Estate, 2 Am. L.J. 83.
40 C.J. p. 68 note 66.

a new building or a rebuilding,⁷ even though some portion of the old materials may remain in it⁸

While the adaption of an old structure or other improvement to a new or distinct use which effects a material change in the interior or exterior thereof has been held a construction or erection thereof,⁹ a mere change of purpose of the building is not a proper test of the difference between an old and a new building¹⁰ Under some constitutional provisions the labor and materials furnished must have gone into the "making,"¹¹ or, as discussed infra § 23, "repairing" of the building or article for which the lien is claimed.

Additions to a building may come within a statute relating to erection or construction,¹² provided the additions are substantial¹³ Work which is in substance that of new construction after a fire is not prevented from constituting erection or construction by the fact that a comparatively small part of the work, if standing by itself, would properly be classed as repairs,¹⁴ it being proper to consider such work as a part of the construction of the building or plant as an entirety¹⁵ Painting a house has been considered a part of the work of finishing and erecting it.¹⁶

b. Commencement or Completion of Building

The right to a lien for work done in the construction of a building is not dependent on whether the build-

ing is actually completed, but on whether the construction is commenced.

The right to a lien for work done in the construction of a building is not dependent on whether the building is actually completed,¹⁷ but on whether the construction is commenced.¹⁸ If this is done and lienable work is done in aid thereof, the right to a lien thereby becomes perfect¹⁹ and may not thereafter be defeated by any act of the proprietor.²⁰ It has also been held that a right to a lien may exist, although, owing to the fault of the owner in abandoning the project, there has been no actual beginning of the improvement.²¹ The erection of a brick house, complete in so far as the brick work is concerned, is an improvement on the premises within the meaning of a statute giving a lien therefor.²²

§ 23. — Repairs, Alterations, and Additions

Under some statutes a lien may be acquired for repairs, alterations, or additions to a building.

Under some of the statutes providing for mechanics' liens, such a lien may be acquired for repairs²³ or alterations,²⁴ but under others no lien may be acquired for any repairs to,²⁵ or alterations in,²⁶ an old building. Under some statutory provisions a mechanic's lien may not be acquired for repairs to a building unless such repairs amount to one fourth

7. Mich.—Washtenaw Lumber Co. v. Belding, 208 N.W. 152, 233 Mich. 608

Okl.—Home Building & Loan Ass'n v. White, 284 P. 889, 141 Okl. 240 40 C.J. p. 68 note 87

Rebuilding on another and larger scale has been held to constitute a new building.

Okl.—Home Building & Loan Ass'n v. White, 284 P. 889, 141 Okl. 240. Pa.—Miller v. Hershey, 59 Pa. 64—Dreisbach v. Keller, 2 Pa. 77—Eisenberg v. Wolf, 86 Pa. Super. 169.

8. Mich.—Washtenaw Lumber Co. v. Belding, 208 N.W. 152, 233 Mich. 608

Okl.—Home Building & Loan Ass'n v. White, 284 P. 889, 141 Okl. 240 Pa.—Eisenberg v. Wolf, 86 Pa. Super. 169.

9. Pa.—Eisenberg v. Wolf, supra.

10. Mich.—Washtenaw Lumber Co. v. Belding, 208 N.W. 152, 233 Mich. 608

Pa.—Miller v. Hershey, 59 Pa. 64—Malone v. Hosfeld, 53 Pa. Super. 134

11. Tex.—McConnell v. Frost, Civ. App., 45 S.W.2d 777, error refused—Black, Sivalis & Bryson v. Op-

erator's Oil & Gas Co., Civ. App. 37 S.W.2d 813, error dismissed

Fixtures and interior improvements generally see infra §§ 26-30

12. Pa.—Miller v. Hershey, 59 Pa. 64—Eisenberg v. Wolf, 86 Pa. Super. 169.

40 C.J. p. 68 note 70

Additions generally see infra § 28

13. Pa.—Miller v. Hershey, 59 Pa. 64—Eisenberg v. Wolf, 86 Pa. Super. 169

40 C.J. p. 68 note 71.

14. Pa.—Union Savings & Bldg. Ass'n v. Vahle, 84 A. 407, 235 Pa. 435

15. Pa.—Union Savings & Bldg. Ass'n v. Vahle, supra.

16. Ill.—Martine v. Nelson, 51 Ill. 422.

17. Wis.—Fitzgerald v. Walsh, 82 N.W. 717, 107 Wis. 92, 81 Am. S.R. 824.

Excavation or foundation without superstructure see infra § 25

18. Wis.—Fitzgerald v. Walsh, supra.

Lien as attaching on commencement of building see infra § 179

19. Me.—Baker v. Waldron, 42 A. 225, 92 Me. 17, 69 Am. S.R. 483.

Wis.—Fitzgerald v. Walsh, 82 N.W. 717, 107 Wis. 92, 81 Am. S.R. 824.

20. Wis.—Fitzgerald v. Walsh, supra.

40 C.J. p. 68 note 79

21. Minn.—Lamoreaux v. Andersch, 150 N.W. 908, 128 Minn. 261, L.R.A. 1915D 204.

40 C.J. p. 68 note 80.

22. Ga.—Gaskill v. Davis, 63 Ga. 645

23. Ill.—Fehr Constr. Co. v. Postl System of Health Building, 124 N. E. 315, 288 Ill. 634, 642

Pa.—Heller v. Millis, Com. Pl., 60 Lanc. Rev. 415, 61 York Leg. Rec. 41

40 C.J. p. 69 note 83

Interior improvements generally see infra § 26.

"Moving" a building see infra § 24.

24. Or.—Matthiesen v. Arata, 60 P. 1015, 32 Or. 342, 67 Am. S.R. 535.

40 C.J. p. 69 note 84.

25. Miss.—Kirk v. Taliaferro, 16 Miss. 754.

26. N.J.—Udike v. Skillman, 27 N. J. Law 131.

40 C.J. p. 69 note 86

Alterations as constituting a new building see supra § 23.

of the entire value of the building.²⁷ Under some constitutional provisions, the labor and materials furnished must have gone into the "making," as discussed supra § 22, or "repairing" of the building or article for which the lien is claimed.²⁸

A mechanic's lien for additions may be acquired under a statute expressly allowing it.²⁹ A lien for additions may be acquired under a statute relating to improvements,³⁰ but the contrary has also been held.³¹ It has been held that the term "improvement," within the meaning of a mechanic's lien statute, is used in the sense of an addition to property rather than in the restricted sense of improvement by repair.³² Further, a statute relating to improvements has been held not applicable to temporary and insignificant additions.³³

§ 24. — Removal or Destruction

Under some statutes a mechanic's lien may be acquired for moving or tearing down a building or a part thereof.

Under some statutes a mechanic's lien may be acquired for moving a building,³⁴ but under other statutes a lien will not be allowed.³⁵ While it has been held, under a statute allowing a lien for the "removal of any building," that a lien may be ac-

quired for tearing down a building or a part thereof and hauling it away,³⁶ ordinarily no lien arises for simply tearing down or wrecking and removing a building or a part thereof.³⁷ However, while there is some authority to the contrary,³⁸ it has been held that where improvements for which a lien can properly be obtained are made, and the work of tearing down old structures or parts thereof, and removing the debris, is a necessary part of the making of the improvements, such work may be included in the lien,³⁹ and that the lien may also attach where under the contract the old material is to be used to erect a new building.⁴⁰

§ 25. — Excavations and Foundations

The right to a mechanic's lien for an excavation usually depends on the purpose for which it was made, and excavations and foundations for a building or other improvement may give rise to a lien although the building is not completed.

Ordinarily the right to a lien for an excavation depends on the purpose for which it was made.⁴¹ Excavations and foundations for a building⁴² or other improvement⁴³ may give rise to a lien even though the building is not completed⁴⁴ or even though the project is abandoned and no superstructure is erected,⁴⁵ but as to the latter proposition

27. Md.—Parker v Tilghman v Morgan, Inc., 183 A. 224, 170 Md 7 40 C J p 49 note 83.

28. Tex.—McConnell v Frost, Civ App, 45 S W 2d 777, error refused —Black, Sivalls & Bryson v Operators' Oil & Gas Co., Civ App, 37 S W 2d 813, error dismissed.

Not part of improvement

Furnishing labor for construction of cyclorama foreground, and labor and materials for illuminating building and cyclorama, was held not "making" or "repairing" of cyclorama, hence furnishers had no lien thereon, where cyclorama never became part of improvements—McConnell v Frost, Tex Civ App, 45 S W 2d 777, error refused

29. N.J.—Lake & Risley Co. v Still, 144 A. 110, 7 N J Misc 47, 40 C J p 49 note 69

Substantial additions as erection or construction see supra § 22.

What constitutes addition

(1) In general.—Udike v Skillman, 27 N J Law 131—40 C J. p 69 note 89 [a]

(2) Construction of rooms without changing lateral frontage, has been held not addition for which lien can be acquired—Lake & Risley Co v. Still, 144 A. 110, 7 N J Misc 47.

30. Ala.—Wimberley v Mayberry, 10 So 157, 94 Ala. 240, 14 L R A 305.

31. Colo.—Church v. Smuthea, 35 P 267, 4 Colo App 175

Iowa.—Gatchell v Allen, 34 Iowa 559.

32. Mont.—Interstate Lumber Co v. Rider, 19 P 2d 644, 93 Mont 489

33. Pa.—Orth v West View Oil Co., 38 A. 180, 159 Pa 388, 40 C J p 69 note 93.

34. Wis.—Findorff v Fuller & Johnson Mfg Co., 248 N W 766, 212 Wis 365

40 C J p 70 note 95.

Removal of fixtures see infra § 26.

35. Ill.—Stephens v. Holmes, 64 Ill 336

40 C J p 70 note 96

36. Wis.—Findorff v Fuller & Johnson Mfg Co., 248 N W 766, 212 Wis 365.

Removal and removal of part of building and carrying away of debris has been held "removal of building" within mechanic's lien statute, the words "removal of building," within such a statute, should not be limited merely to removal of building as unit to another location—Findorff v. Fuller & Johnson Mfg Co., supra.

37. Mo.—Corpus Juris quoted in Arthur Morgan Trucking Co. v Shartzler, 174 S W 2d 226, 229, 237 Mo App 535

N Y.—Goldberger-Raabin, Inc. v. 74

Second Ave Corporation, 169 N E 405, 252 N Y 336

Wash.—Bon Marche Realty Co v Southern Surety Co., 278 P 479, 152 Wash 604, 63 A L R 1246 40 C J p 70 note 97.

38. Wash.—Sound Transfer Co. v Phinney Realty & Inv. Co., 128 P. 1047, 71 Wash 473

39. Mo.—Corpus Juris quoted in Arthur Morgan Trucking Co v Shartzler, 174 S W 2d 226, 229, 237 Mo App 535

N Y.—Goldberger-Raabin, Inc., v 74 Second Ave. Corporation, 169 N E 405, 252 N Y. 336

40 C J p 70 note 99

40. Mass.—Whitford v. Newall, 2 Allen 424.

Rebuilding as erection or construction see supra § 22.

41. Minn.—Colvin v Weimer, 65 N. W 1079, 64 Minn 37

42. Pa.—McCrystal v Cochran, 23 A. 444, 147 Pa. 225, 40 C J. p 70 note 3.

43. Minn.—Colvin v. Weimer, 65 N. W 1079, 64 Minn 37.

44. Mass.—Somerville v Walker, 47 N.E 127, 168 Mass 388 40 C.J. p 70 note 5.

45. Minn.—Stravs v. Steckbauer, 161 N W 259, 136 Minn 69

Mo.—Carroll Contracting Co v. New-some, 210 S W. 114, 201 Mo.App. 117.

there is also authority to the contrary.⁴⁶ An excavation for a building, made in violation of an ordinance requiring a building permit by one who knows such permit is required, does not give rise to a lien therefor.⁴⁷ An excavation made other than for the purpose of making an improvement on the land,⁴⁸ such as one made solely for exploration purposes,⁴⁹ does not give rise to a lien. It has been held that the mere earthwork of a railroad cannot be regarded as a structure within the meaning of a general mechanics' lien statute.⁵⁰

§ 26. Fixtures and Interior Improvements

Under numerous mechanics' lien statutes a lien may be allowed for interior improvements and fixtures, that is,

articles which were at one time personal property, but which are so attached to the realty as to become a part thereof; ordinarily, however, a lien will not be allowed for trade fixtures.

Under numerous mechanics' lien statutes a lien may be allowed for fixtures,⁵¹ that is, articles which were at one time personal property, but which are so attached to the realty as to become a part thereof.⁵² On the other hand, a mechanic's lien may not be acquired in respect of articles which are not so attached to the building or land as to become a part thereof⁵³ and which consequently have not lost their character as personalty.⁵⁴ As a general rule mechanics' lien statutes do not allow a lien for trade fixtures⁵⁵ or chattels, fixtures, improvements, or ad-

46. Pa.—*Alguire v. Keller*, 63 Pa. Super 279.

40 C.J. p 70 note 7.

47. Ill.—*Baird v. Northwestern University*, 5 NE 2d 269, 287 Ill. App 424.

48. Minn.—*Colvin v. Welmer*, 65 N.W. 1079, 64 Minn 37.

49. Minn.—*Colvin v. Welmer*, supra.

40 C.J. p 70 note 9.

50. Ky.—*Hagan v. English*, 6 Ky. Op 467.

51. Ill.—*Johns-Manville Corporation of Delaware v. La Tour D'Argent Corporation*, 277 Ill. App 503. Ind.—*Menzenberger v. American State Bank*, 198 NE 819, 101 Ind. App 600.

Minn.—*Knoff Woodwork Co. v. Zoltas*, 6 N.W.2d 264, 213 Minn 204. Nev.—*Corpus Juris cited in Reno Electrical Works v. Ward*, 274 P. 196, 197, 51 Nev. 291, 62 A.L.R. 247.

N.M.—*Corpus Juris cited in Porter Lumber Co. v. Wade*, 32 P.2d 819, 820, 38 N.M. 333.

Pa.—*Jennings v. Dubnitsky*, Com. Pl., 43 Lack. Jur. 53.

Wash.—*Westinghouse Electric Supply Co. v. Hawthorne*, 150 P.2d 55, 21 Wash.2d 74.

40 C.J. p 70 notes 14, 17.

52. Minn.—*Ustruck v. Home Ass'n*, 207 N.W. 324, 166 Minn 183.

Nev.—*Corpus Juris cited in Reno Electrical Works v. Ward*, 274 P. 196, 197, 51 Nev. 291, 62 A.L.R. 247.

N.M.—*Corpus Juris cited in Porter Lumber Co. v. Wade*, 32 P.2d 819, 820, 38 N.M. 333.

40 C.J. p 70 note 18.

Constructive attachment

(1) It has been held that it is not absolutely necessary that an article be actually fastened to the freehold in order to make it a part thereof.—*Reno Electrical Works v. Ward*, 274 P. 196, 51 Nev. 291, 62 A.L.R. 247.

(2) Constructive annexation or at-

tachment to the realty may be sufficient.

Minn.—*Willcox Boiler Co. v. Messier*, 1 N.W.2d 130, 211 Minn 304. N.Y.—*Sherwin v. Benevolent & Protective Order of Elks*, Brooklyn Lodge No. 23, 265 N.Y.S. 14, 116 Misc 453.

40 C.J. p 70 note 18 [a].

Lien held allowable

(1) In general.—*Woodling v. Westport Hotel Operating Co.*, 63 S.W.2d 207, 227 Mo. App. 1331—40 C.J. p 70 note 18 [b].

(2) For iron grillwork and curtain poles and rods attached to walls or woodwork by screws and not removable without damage to the house itself.—*Menzenberger v. American State Bank*, 198 NE 819, 101 Ind. App 600.

(3) Sound-proofing of ceiling and walls of a building where numerous holes were made in the plaster for bolts used in fastening the tile and other materials in place.—*Johns-Manville Corporation of Delaware v. La Tour D'Argent Corporation*, 277 Ill. App 503.

(4) For booths built into and securely fastened to floors and walls of building so as to become permanently attached thereto.—*Sandberg v. Burns*, 270 N.W. 575, 198 Minn 472.

(5) For electrical wiring and accessories and appliances used in connection therewith, whether unprotected or in conduits or otherwise covered, which are attached to building and hence to realty, even though building is of single construction.—*Westinghouse Electric Supply Co. v. Hawthorne*, 150 P.2d 55, 21 Wash.2d 74.

53. Ind.—*Corpus Juris cited in Menzenberger v. American State Bank*, 198 NE 819, 825, 101 Ind. App 600.

Pa.—*Philadelphia Gas Range Company v. Shallockross*, 20 Pa. Dist. & Co 118.

Wash.—*Westinghouse Electric Supply Co. v. Hawthorne*, 150 P.2d 55, 21 Wash.2d 74.

40 C.J. p 70 note 19.

Lien held not allowable

(1) In general

U.S.—*In re Danville Hotel Co.*, D.C. Ill., 83 F.2d 162, affirmed in part and reversed in part on other grounds C.C.A., 38 F.2d 10.

Ind.—*Menzenberger v. American State Bank*, 198 NE 819, 101 Ind. App 600.

40 C.J. p 70 note 19 [a].

(2) Small articles of household use which any householder may buy in the market and attach to the wall where desired in his house have been held not to be lienable items.—*A. Y. McDonald Mfg. Co. v. Newstone*, 244 N.W. 806, 187 Minn 237.

54. Ind.—*Corpus Juris cited in Menzenberger v. American State Bank*, 198 NE 819, 825, 101 Ind. App 600.

40 C.J. p 71 note 20.

55. Ill.—*Crowley Bros v. Ward*, 54 NE 2d 753, 322 Ill. App 687.

Minn.—*Willcox Boiler Co. v. Messier*, 1 N.W.2d 130, 211 Minn 304.

Nev.—*Corpus Juris cited in Reno Electrical Works v. Ward*, 274 P. 196, 197, 51 Nev. 291, 62 A.L.R. 247.

N.M.—*Corpus Juris cited in Porter Lumber Co. v. Wade*, 32 P.2d 819, 821, 38 N.M. 333.

40 C.J. p 71 note 21.

Articles held trade fixtures

(1) Bowling alleys have been held to be trade fixtures although they are removable without material injury to floor of building, and are necessary to enable lessees of building to carry on their business.—*Porter Lumber Co. v. Wade*, 32 P.2d 819, 38 N.M. 333.

(2) Other articles see 40 C.J. p 71 note 21 [a].

in Missouri

(1) It has been held that a lien may be acquired for improvements

ditions which a tenant may remove during his tenancy or at the expiration thereof⁵⁶ However, where no rights of a tenant are involved, it has been held that the doctrine of trade fixtures may not be invoked as against a claimant otherwise entitled to a lien⁵⁷ Rules governing fixtures generally have been held applicable in determining whether any particular article of personalty has become a fixture⁵⁸

Partitions placed in a building to make it suitable for a different use have been held to constitute an improvement and not a repair so as to be lienable within a mechanics' lien statute allowing liens for improvements⁵⁹ A lien has been denied for the taking down of fixtures, and putting them up in an-

other store⁶⁰ Also the cutting, removal, and storage of pipe to be used later in the same building when removed to another lot is not lienable as work on a new building subsequently begun on the old site⁶¹ Papering or decorating a house may be lienable as an "improvement" of the building.⁶²

Doors, windows, and mirrors. A mechanic's lien has been allowed for window frames,⁶³ sash,⁶⁴ and glass,⁶⁵ as well as for window and door screens manufactured for, and fitted to, a building,⁶⁶ but not for window shades.⁶⁷ Doors, placed in a building to make it suitable for a different use, have been held to be an improvement and not a repair, so as to be lienable under a mechanics' lien statute allowing liens for improvements⁶⁸ A lien may exist for

enhancing the value of a leasehold, whether or not such improvements are trade fixtures—*Rathel v Hamilton-Schmidt Surgical Co*, App. 48 S W 3d 79

(2) However, it has also been held that a trade fixture is not subject to a mechanic's lien for the reason that it is not part of the realty—*Carroll v Shooting the Chutes Co* 85 Mo App 563—*O'Brien Boiler Works Co v Hlydock*, 59 Mo App 653

58. Minn—*Willcox Boiler Co v Messier*, 1 N W 2d 130, 211 Minn 304

Nev—*Corpus Juris* cited in *Reno Electrical Works v Ward*, 274 P 196, 197, 51 Nev 291, 63 A L R 247

N M—*Corpus Juris* cited in *Porter Lumber Co v Wade*, 32 P 2d 819, 821, 38 N M 333
40 C J p 71 note 22

57. Minn—*Willcox Boiler Co v Messier*, 1 N W 2d 130, 211 Minn 304

58. Ind—*Menzenberger v American State Bank*, 198 N E 819, 825, 101 Ind App 600

Pa.—*Jennings v Dubnitsky*, Com Pl, 43 Lack Jur 53
40 C J p 71 note 24.

Intention generally

(1) Ordinarily in determining whether an article has become a part of the realty, effect will be given to the intention with which it was placed on land or in a building
Cal—*Hammond Lumber Co v Gordon*, 258 P 612, 84 Cal App. 701
Mo—*Security Stove & Mfg Co v Stevens*, 9 S W 2d 808, 222 Mo App 1029

Nev—*Reno Electrical Works v Ward*, 274 P. 196, 51 Nev. 291, 63 A L R 247.

40 C J p 71 note 24 [b]

(3) Intention of the one annexing article to realty has been held controlling in case of doubt as to whether article is fixture, if intention to make it permanent accession to real-

ty affirmatively and plainly appears—*Porter Lumber Co v Wade*, 32 P. 2d 819, 38 N M 333

(3) Fact that an article was specially constructed or fitted with a view to its location and use in the particular building tends to show that it was intended to constitute a part of the building so as to entitle one providing the article to a lien on the building—*Knoff Woodwork Co v Zotalis*, 6 N W 2d 264, 213 Minn 204

(4) Where words and acts conflict, the intention of the parties is best determined by their acts so that title to automatic sprinkler system installed in original construction of building passed to owner thereof so as to entitle party installing it to mechanic's lien although bailment lien contract provided that title should not pass, or apparatus become part of realty until fully paid for—*Clayton v Lienhard*, 167 A. 321, 312 Pa 433

Concealed or undisclosed purpose or intent

(1) It has been held that one may not be deprived of a lien for something which would ordinarily become part of the realty by the concealed purposes of persons responsible for construction—*Hammond Lumber Co v Gordon*, 258 P. 612, 84 Cal App 701

(2) In determining the intention of an owner of property as to whether materials claimed to be lienable were placed on the building as fixtures, the court is not bound by his undisclosed purpose or intent—*Security Stove & Mfg Co v Stevens*, 9 S W 2d 808, 222 Mo App 1029

Particular rules held applicable

(1) The rules of law applicable as between a mortgagor and mortgagee of realty
Mo—*Security Stove & Mfg. Co. v Stevens*, 9 S.W.2d 808, 222 Mo App 1029

Wash—*Westinghouse Electric Sup-*

ply Co v Hawthorne, 150 P 2d 55, 21 Wash 2d 74

40 C J p 71 note 24 [a] (3).

(2) The rules of law applicable as between vendor and vendee of realty

Mo—*Security Stove & Mfg Co. v Stevens*, supra

Wash—*Westinghouse Electric Supply Co v Hawthorne*, supra

40 C J p 71 note 24 [a] (2)

Particular rules held inapplicable

(1) The rules of law applicable as between a landlord and tenant—*Westinghouse Electric Supply Co. v Hawthorne*, supra—40 C J p 71 note 24 [a] (1)

(2) Other rules see 40 C J p 71 note 24 [a] (4)

59. Minn—*Knoff Woodwork Co v Zotalis*, 6 N W 2d 264, 213 Minn 204

60. N Y—*A F Engelhardt v Benjamin*, 39 N Y S 21, 5 App Div. 475

61. Conn—*Hillhouse v. Duca*, 125 A. 367, 101 Conn 92

62. Cal—*La Grill v. Mallard*, 27 P. 294, 90 Cal 373

40 C J p 71 note 27.

63. N Y—*Western Sash, Door & Lumber Co v Gaul Constr Co*, 126 N Y S 1110

64. N Y—*Western Sash, Door & Lumber Co. v. Gaul Constr Co*, supra

65. N Y—*Spitz v Brooks*, 206 N.Y. S. 313, 210 App Div 438—*Western Sash, Door & Lumber Co v. Gaul Constr Co*, 126 N Y S 1110

66. Iowa—*Spahn & Rose Lumber Co v. Eells*, 192 N.W. 243, 195 Iowa 555

40 C J p 71 note 31.

67. N Y—*Spitz v Brooks*, 206 N.Y. S. 313, 210 App Div 438

68. Minn—*Knoff Woodwork Co. v Zotalis*, 6 N.W.2d 264, 213 Minn. 204

mirrors set in a wall,⁶⁹ as well as for a mirror case,⁷⁰ but not for mirrors in removable frames⁷¹

§ 27. — Apparatus for Heating, Cooking, Lighting, or Water Supply

- a. Heating or cooking
- b. Lighting
- c. Water supply

a. Heating or Cooking

Ordinarily a mechanic's lien may be allowed for furnaces, heaters, stoves, ranges, or other equipment for heating or cooking purposes where they are installed in a house or other building and attached thereto with the intention of making them a part of the building.

Although there is some authority to the contrary,⁷² ordinarily a mechanic's lien may properly be claimed for furnaces, heaters, stoves, ranges, or other equipment for heating or cooking purposes where they are installed in a house or other building and attached thereto with the intention of making them a part of the building.⁷³ Thus it has been held that gas ranges installed in apartments and connected with a fixture placed therein are fixtures for which a lien may be allowed,⁷⁴ and the fact that the ranges can easily be disconnected and are of a general design has been held not to disprove their character as lienable fixtures⁷⁵ However, it has also been held that a gas range connected with the realty by a gas supply pipe is not a lienable fixture,⁷⁶ and that portable stoves, ranges, or heaters are not within the lien laws,⁷⁷ even though furnished during the construction of the building⁷⁸ or provided for in the original contract.⁷⁹

A lien may not be allowed for furnishing a furnace where the transaction was merely a sale of a furnace as personal property⁸⁰ or where it is not so attached to the realty as to lose its character as movable personal property.⁸¹ A lien has been denied for a cover for a stovepipe flue.⁸² A steam sterilizer, attached to a building but easily removable therefrom, has been held not to constitute a fixture for which a lien may be allowed.⁸³ Connections furnished for heating equipment have been held not to be subject to a lien unless such connections were intended to become part of the premises.⁸⁴

b. Lighting

Mechanics' liens have been allowed for lighting equipment installed in a building, but the authorities differ as to whether a lien may be allowed for the installation of lighting fixtures, such as globes, chandeliers, etc.

A mechanic's lien has been allowed for a gas machine,⁸⁵ electric wires,⁸⁶ conduits,⁸⁷ and switches⁸⁸ installed in a building, and for an electric sign attached to a theater.⁸⁹ While it has been held that a mechanic's lien is not allowable for the installation of gas or electric lighting fixtures, such as globes, chandeliers, etc.,⁹⁰ it has also been held that a lien may be allowed for such fixtures.⁹¹ Fluorescent fixtures furnished for the use of a house have been held to constitute materials of a sort which may be the subject of a lien,⁹² but electric bulbs have been held not the proper subject of a lien⁹³ A lien for furnishing materials in providing a hotel with an electric lighting plant has been held not

69. N.Y.—Ward v Kilpatrick, 85 N. Y. 413, 39 Am.R. 674—McKeage v. Hanover Fire Ins. Co., 81 N.Y. 38, 37 Am.R. 471.

70. Mo.—Woodling v Westport Hotel Operating Co., 63 S.W.2d 207, 227 Mo.App. 1231.

71. N.Y.—Vogel v. Farrand, 55 N. Y.S. 977, 26 Misc. 130.

72. Me.—Lambard v Pike, 33 Me. 141.

40 C.J. p 72 note 42.

73. Mich.—Peninsular Stove Co v Young, 228 N.W. 225, 247 Mich. 580.

Mo.—Security Stove & Mfg. Co. v Stevens, 9 S.W.2d 808, 222 Mo.App. 1029.

40 C.J. p 71 note 41.

74. Mich.—Peninsular Stove Co v Young, 226 N.W. 225, 247 Mich. 580.

75. Mo.—Security Stove & Mfg. Co. v Stevens, 9 S.W.2d 808, 222 Mo.App. 1029.

76. Pa.—Philadelphia Gas Range Company v. Shallcross, 20 Pa.Dist. & Co. 118.

77. Mass.—Boston Furnace Co v Dimock, 33 N.E. 647, 158 Mass. 552.

40 C.J. p 72 note 45.

78. Colo.—Michael v Reeves, 60 P. 577, 14 Colo.App. 460.

Mass.—Boston Furnace Co v Dimock, 33 N.E. 647, 158 Mass. 552.

79. Pa.—Harrison v. Women's Homeopathic Ass'n, 19 A. 804, 134 Pa. 558, 19 Am.S.R. 714—Philadelphia Gas Range Company v. Shallcross, 20 Pa.Dist. & Co. 118.

80. Mass.—Turner v. Wentworth, 119 Mass. 459.

81. Colo.—Michael v. Reeves, 60 P. 577, 14 Colo.App. 460.

40 C.J. p 72 note 44.

82. Mont.—Missoula Mercantile Co v O'Donnell, 60 P. 594, 24 Mont. 65, rehearing denied 60 P. 991, 24 Mont. 65.

83. Mo.—Woodling v Westport Hotel Operating Co., 63 S.W.2d 207, 227 Mo.App. 1231.

84. Ill.—Daly v Ling, 248 Ill.App. 104.

85. Pa.—Light Co. v. Gill, 14 Pa.Co. 6.

86. Wash.—Westinghouse Electric Supply Co v Hawthorne, 150 P.2d 55, 21 Wash.2d 74.

40 C.J. p 72 note 59.

Electric light poles, wires, and insulators generally see supra § 21.

87. R.I.—Scannevin v Consolidated Mineral Water Co., 55 A. 574, 25 R.I. 318.

88. R.I.—Scannevin v. Consolidated Mineral Water Co., supra.

89. Cal.—Blanc v. Commonwealth Amusement Corp., 127 P. 805, 19 Cal.App. 720.

90. Minn.—Lyons v Westerdahl, 150 N.W. 1083, 128 Minn. 288.

40 C.J. p 72 note 64.

91. Ark.—O'Neill v Lyric Amusement Co., 178 S.W. 406, 119 Ark. 454.

40 C.J. p 72 note 63.

92. N.Y.—Waring v. Burke Steel Co., 69 N.Y.S.2d 399.

93. N.Y.—Waring v. Burke Steel Co., supra.

allowable under some statutes.⁹⁴ A lien may not be allowed for wires, lights, and appliances for lighting which constitute removable trade fixtures.⁹⁵

c. Water Supply

Generally a mechanic's lien may be allowed for certain property or articles built or installed in a building for the purpose of facilitating the acquisition, storage, and use of water.

The property or articles built or installed in a house or building for the purpose of facilitating the acquisition, storage, and use of water for which a mechanic's lien may be acquired have been held to include plumbing appliances and fixtures,⁹⁶ water and sewer pipes,⁹⁷ tanks and reservoirs,⁹⁸ pumps,⁹⁹ sinks and bathtubs,¹ and laundry apparatus.² However, it has been held that a lien may not be acquired for plumbing and drain connections unless such connections were intended to become a part of the premises.³ While a lien may not be acquired for fire apparatus, such as valves, hoses, and racks, which, although attached to a building, are easily detachable therefrom without damage to the structure,⁴ a lien may be acquired where such apparatus was attached to the building with the intent that it become a permanent part thereof.⁵ It has further been held that a lien may be acquired for a fire-extinguishing sprinkler system which is im-

movable and merged with a building.⁶

§ 28. — Machinery

While there is no lien for machinery where the transaction by which it was furnished was merely an ordinary sale of personalty, under some statutes a lien may be allowed for machinery provided it is stationary and firmly attached to the realty so as to become a part thereof.

While there is no lien for machinery where the transaction by which it was furnished was merely an ordinary sale of personalty,⁷ and under some statutory provisions a lien may not attach for furnishing machinery,⁸ under other statutes a lien may be allowed for machinery,⁹ provided, as a general rule, the machinery is stationary and firmly attached to the realty so as to become a part thereof,¹⁰ or, in other words, provided it has become a fixture.¹¹ However, it has been held that where an article constitutes a part of a plant or machinery necessary to the operation of the whole,¹² or its use is essential to the operation of some part of the machinery which is physically attached to the freehold,¹³ it may be classed as a fixture subject to a lien even though it lacks permanent attachment to the realty, and under some statutes a mechanic's lien may be allowed although the machinery is not intended to become affixed permanently to the freehold and is not technically a fixture.¹⁴

94. *U.S.—Industrial & Mining Guaranty Co v Electrical Supply Co*, Ohio, 58 F 732, 7 C.C.A. 471.

40 C.J. p 73 note 65

95. *Minn.—Johnson v Grady*, 244 N W 409, 187 Minn 104

96. *Minn.—Knoff Woodwork Co v. Zotalis*, 6 N.W.2d 264, 213 Minn 204

97. *Ariz.—Lanier v. Lovett*, 213 P. 391, 25 Ariz 54.

Mass.—Beatty v. Parker, 6 NE 754, 141 Mass 523

Pipes outside building see *infra* § 30

98. *Ind.—Parker Land & Improvement Co v. Reddick*, 47 NE 848, 18 Ind App 616

40 C.J. p 72 note 51.

99. *Cal.—Goss v Helbing*, 19 P 277, 77 Cal 190

40 C.J. p 72 note 52.

1. *Ariz.—Lanier v Lovett*, 213 P. 391, 25 Ariz 54

40 C.J. p 72 note 53.

2. *Pa.—Dimmick v. Cook*, 3 A 627, 115 Pa. 578.

3. *Ill.—Daly v. Ling*, 248 Ill App. 104.

4. *NY.—Chambers v Vassar*, 143 N YS 615, 81 Misc 562.

Pa.—Latta v Cambridge Springs Co, 25 Pa Co 310

5. *Mo.—Crane Co v Epworth Ho-*

tel Construction & Real Estate Co, 98 S.W. 795, 121 Mo App 209

6. *U.S.—Whitney Cent Trust & Savings Bank v. U S Construction Co*, La., 250 F. 784, 163 C.C.A. 118

An automatic sprinkler system has been held a proper subject of a mechanic's lien where it is a part of the original erection and construction of a building, is of a permanent character, and, from its nature, use, and affixation, is a part of the freehold—*Clayton v. Lienhard*, 167 A. 321, 312 Pa 433.

7. *U.S.—Reeves v. York Engineering & Supply Co*, Tex., 248 F 513, 161 C.C.A. 438, certiorari denied 39 S.Ct 182, 248 U.S 584, 63 L.Ed. 433

40 C.J. p 74 note 78

Sale of material in usual course of trade see *infra* § 45.

8. *Tenn.—Allman v. Corban*, 4 Baxt 74—*East Tennessee Iron Mfg. Co v Bynum*, 3 Sneed 263, 65 Am D 56

9. *Colo.—Dawson v. Scruggs-Vandervoort Barney Realty Co*, 268 P. 584, 84 Colo 152

40 C.J. p 73 note 70

10. *Colo.—Dawson v. Scruggs-Vandervoort Barney Realty Co*, *supra*.

La.—Bain-Beard Co v Bellevoir Co, 7 La App 118

40 C.J. p 73 note 71.

Printing press not part of realty

U.S.—In re Louisville Daily News & Enquirer, D.C Ky., 20 F Supp. 465

Purpose or intention

(1) The intent that the machinery be a permanent accession to the freehold and the use to which the machinery was intended to be applied have been held to control—*Dawson v Scruggs-Vandervoort Barney Realty Co*, 268 P. 584, 84 Colo 152

(2) It has been held that the test as to whether a person is entitled to a mechanic's lien is the intent permanently to incorporate and use the machinery furnished in the building—*In re Louisville Daily News & Enquirer*, D.C Ky., 20 F Supp. 465.

(3) Other statements of intention see 40 C.J. p 73 note 71 [a]

11. *Ill.—R Haas Electric & Mfg Co v Springfield Amusement Park Co*, 86 NE 248, 236 Ill 452, 127 Am.S.R. 297, 23 L.R.A., N.S., 620.

40 C.J. p 74 note 73

12. *Colo.—Smith v Strohle Machinery & Supply Co*, 126 P.2d 341, 109 Colo. 460

13. *Colo.—Smith v. Strohle Machinery & Supply Co*, *supra*.

14. *U.S.—Randall v. Le Bron Elec-*

Some statutory provisions have been held not to confer a lien for carding machines,¹⁵ or iron castings, denominated as "sill castings" or "channels"¹⁶ Electric fans, fastened to the walls of a building so as to be removable without injury to the structure, have been held to be trade fixtures which do not form an integral part of the realty so as to subject the realty to a lien,¹⁷ and the fact that the fans were a necessity for the business has been held insufficient to subject the building to a lien for them.¹⁸ It has been held that a mechanic's lien may attach for furnishing engines¹⁹ and boilers.²⁰ However, under some provisions no lien may be had for a claim relating to the installation of an engine in a building.²¹

Completion or erection of building. Under some statutes a lien has been held to attach for machinery purchased for and placed in a building, regardless of whether the building is already completed or is being erected at the time of the purchase of the machinery,²² but under other statutes it has been held that there is no lien for placing machinery in a building already erected.²³

Removal or repairs. A lien may be acquired for repairs on a boiler constituting part of the realty.²⁴ However, in order to authorize a mechanic's lien for repairs of machinery, such repairs must be in the nature of fixtures,²⁵ and not small parts of a machine which are constantly wearing out and have to be replaced.²⁶ A lien has been denied for removing a portable engine.²⁷

§ 29. — Theater Fixtures

A mechanic's lien may be allowed for theater fixtures made from special designs to harmonize with the interior construction and decoration of the building.

A mechanic's lien may be allowed for theater fixtures made from special designs to harmonize with the interior construction and decoration of the building.²⁸ While it has been held that a mechanic's lien may properly be claimed in respect of the curtain, scenery, and stage fittings of a theater,²⁹ there is some authority to the contrary.³⁰ A lien may be allowed for the stationary chairs or seats in a theater,³¹ an electric sign for a theater, as discussed supra § 27, and a vacuum cleaner, operated by electricity and consisting of certain parts permanently attached to a theater.³² However, carpeting installed in a theater has been held not to constitute the basis for a mechanic's lien.³³

§ 30. Improvements outside Building

- a. In general
- b. Wells, ditches, pipes, pumps, dredging, and draining

a. In General

A mechanic's lien may be acquired for an improvement outside a building or structure under some statutes.

Whether or not a mechanic's lien may be acquired for an improvement outside a building or structure depends on the provisions of the statute under which

trical Works, C.C.A.Neb., 1 F.2d 813

40 C.J. p 74 note 72.

15. Mo—Graves v. Pierce, 53 Mo 423.

16. Mo—Banner Iron Works v. Etna Iron Works, 122 S.W. 762, 143 Mo App 1.

17. Nev.—Reno Electrical Works v. Ward, 274 P. 196, 51 Nev. 291, 62 A.L.R. 247.

Trade fixtures generally see supra § 26.

18. Nev.—Reno Electrical Works v. Ward, supra.

19. Colo.—Horn v. Clark Hardware Co., 131 P. 405, 54 Colo 522, 45 L.R.A.N.S., 100

40 C.J. p 73 note 67

Tools or machinery used in manufacturing material or carrying on construction work see infra § 44

20. Pa.—Appeal of Dickey, 7 A. 577, 115 Pa. 73.

40 C.J. p 73 note 68

21. Tex.—Byrne v. Williams, Civ. App., 45 S.W.2d 336, error dismissed.

22. Ark.—White v. Chaffin, 32 Ark. 59

Mo—Progress Press Brick & Machine Co v Gratiot Brick & Quarry Co., 52 S.W. 401, 151 Mo 501, 74 Am S.R. 557

23. Conn.—Rose v. Perse & Brooks Paper Works, 29 Conn. 256

40 C.J. p 74 note 77.

24. Mass.—Kelley v. Border City Mills, 126 Mass 148

25. N.M.—Ripley v. Cochiti Gold Min Co., 76 P. 285, 12 N.M. 186.

Brine pipes

A refrigerating plant connected with the freehold by brine pipes and brackets has been held part of the freehold, so as to entitle one manufacturing and furnishing new brine pipes to replace the old worn out pipes to a mechanic's lien—Dawson v. Scruggs-Vandervoort Barney Realty Co., 268 P. 584, 84 Colo 152

26. N.M.—Ripley v. Cochiti Gold Min Co., 76 P. 285, 12 N.M. 186.

27. Tenn.—Truxall v. Williams, 15 Lea 427

28. N.Y.—Wahle-Phillips Co v. Fitzgerald, 146 N.Y.S. 562, 53 Misc. 636,

affirmed 157 N.Y.S. 1150, 172 App Div 907.

29. Ga.—Waycross Opera House Co v. Sossaman, 20 S.E. 252, 94 Ga. 100, 47 Am R. 144

40 C.J. p 71 note 27.

30. Pa.—Randall Bldg & Loan Ass'n v. Manayunk Realty Co., 103 A. 830, 260 Pa. 421

40 C.J. p 71 note 26

31. N.Y.—Pike v. Naylon Securities Co., 251 N.Y.S. 659, 140 Misc. 734.

40 C.J. p 71 note 28

Chairs, specially manufactured, to harmonize with a decorative scheme carried out in a theater, and to conform to the slope of the theater floor to which they are screwed, have been held to be fixtures on which a mechanic's lien may be based—Pike v. Naylon Securities Co., supra.

32. Tenn.—Tuec Co v. McKnight, 203 S.W. 338, 140 Tenn. 67.

33. N.Y.—Pike v. Naylon Securities Co., 251 N.Y.S. 659, 140 Misc. 734

Even though specially manufactured, with quality and color to harmonize with the general scheme of

the lien is claimed³⁴ Thus it has been held that an improvement outside a building is not lienable under a statute relating to a building or appurtenances of a building³⁵ unless it is appurtenant to the building.³⁶

Grading, cultivating, and planting. While a lien may be denied under some statutes for filling, grading, or sodding,³⁷ and a grade has been held not to be a building or article within a provision allowing a lien for making or repairing a building or article,³⁸ under other statutes a lien may be allowed,³⁹ at least in certain cases⁴⁰ A lien for breaking land for cultivation has been denied under a statute relating to improvements,⁴¹ but a lien has been allowed for grading and leveling land, where it constitutes a permanent improvement and so changes the surface of the ground that it can be irrigated.⁴²

While it has been held that a mechanic's lien may be acquired for the planting and setting out of hedges, flowers, trees, vines, and shrubbery, under a statute giving a lien for improvements,⁴³ the contrary has also been held.⁴⁴ The planting and setting out of hedges, flowers, trees, vines, and shrubbery has been held not to authorize a lien under a statute relating to the construction or erection of a building,⁴⁵ but in construing a mechanics' lien act it has been held that the word "erection" is broad

enough, when construed in connection with the context of the act, to entitle one planting shrubs and trees and making a lawn to a lien for such improvements.⁴⁶ Under a statute relating to the construction, alteration, or repair of buildings or improvements, it has been held that a lien may not be acquired for the cultivation and care of land set out in trees.⁴⁷ It has also been held that a lien may not be acquired for labor performed in cultivating and caring for an orchard or vineyard under a statute relating to grading, filling, or improving land.⁴⁸

b. Wells, Ditches, Pipes, Pumps, Dredging, and Draining

Whether a mechanic's lien may be acquired for wells, ditches, pipes, pumps, dredging, or draining depends on the statutory and constitutional provisions under which the lien is claimed.

In some jurisdictions a lien for constructing wells is expressly given by statute.⁴⁹ In jurisdictions where no express lien is given the decisions are not uniform, it being held in some jurisdictions that a lien exists⁵⁰ and in others that it does not.⁵¹ In a jurisdiction where a statutory lien may be acquired for drilling an oil well it has been held that no constitutional lien may be acquired therefor.⁵² This lack of uniformity exists even in jurisdictions where the statutes are identical or similar, it being various-

the decorations of the interior of a theater, carpeting, which can easily be taken up and removed without damage to the structure, has been held not to constitute a fixture on which a mechanic's lien may be based—*Pike v. Naylor Securities Co.*, supra.

34. Kan.—*Badger Lumber Co. v. Marion Water Supply, Electric Light & Power Co.* 29 P. 476, 48 Kan. 182, 30 Am.S.R. 301, 15 L.R.A. 652.

35. Pa.—*Cowan v. Pennsylvania Plate Glass Co.*, 38 A. 1081, 184 Pa. 16.

40 C.J. p. 74 note 84.
Fences see supra § 21 b.

30. Kan.—*Badger Lumber Co. v. Marion Water Supply, Electric Light & Power Co.*, 29 P. 476, 48 Kan. 182, 30 Am.S.R. 301, 15 L.R.A. 652.

40 C.J. p. 74 note 85.

37. Minn.—*Pratt v. Duncan*, 32 N.W. 709, 36 Minn. 545, 1 Am.S.R. 697.

40 C.J. p. 74 note 89.

Lien for labor, or advances of money or supplies, for raising of crop generally see Agriculture §§ 44-52. Grading street see infra § 31.

38. Tex.—*Black, Sivals & Bryson v. Operators' Oil & Gas Co.*, Civ. App., 37 S.W.2d 313, error dismissed.

33. Cal.—*Williams v. Rowell*, 78 P. 735, 145 Cal. 259.

40 C.J. p. 74 note 90.

40. Kan.—*Southwestern Electrical Co. v. Hughes*, 30 P.2d 114, 139 Kan. 89.

40 C.J. p. 74 note 91.

Grading necessary under a plan of construction may be a feature of construction quite as essential as the building of steps to get up and down—*Southwestern Electrical Co. v. Hughes*, supra.

41. Cal.—*Ogden v. Byington*, 244 P. 332, 198 Cal. 151.

40 C.J. p. 75 note 93.

Lien for clearing land generally see Agriculture §§ 59-64.

42. Cal.—*Thomas v. Gismegian*, 216 P. 601, 191 Cal. 440.

43. Cal.—*Grom v. Center*, 146 P. 186, 26 Cal.App. 198—*California Portland Cement Co. v. Wentworth Hotel Co.*, 118 P. 103, 16 Cal.App. 692, rehearing denied 113 P. 113, 16 Cal.App. 692.

44. Ark.—*Eastern Arkansas Hedge-Fence Co. v. Tanner*, 53 S.W. 836, 67 Ark. 156.

Tenn.—*Nans v. Cumberland Gap Park Co.*, 53 S.W. 999, 103 Tenn. 299, 76 Am.S.R. 650, 47 L.R.A. 273.

45. Pa.—*Parkhill v. Hendricks*, 53 Pa.Super. 9.

48. Ill.—*Beaudry v. Bell*, 250 Ill. App. 468.

47. Fla.—*Goldsmith v. Orange Belt Securities Co.*, 156 So. 3, 115 Fla. 683.

40. Wash.—*Howe v. Myers*, 162 P. 1000, 94 Wash. 563, L.R.A. 1917D 349.

40 C.J. p. 75 note 97.

40. Or.—*West v. Wilson*, 297 P. 847, 136 Or. 262.

40 C.J. p. 75 note 98.

Unsuccessful drilling

A claim for labor and material furnished in unsuccessful drilling of wells on defendant's property has been held lienable, since a well is a hole dug in the ground to obtain water, though water is not in fact found—*Koch v. Fishburn*, 164 N.E. 721, 90 Ind.App. 287.

50. La.—*Southern Gas Line v. Dixie Oil Co.*, 133 So. 181, 16 La.App. 26.

40 C.J. p. 75 note 99.

Oil and gas wells

La.—*Southern Gas Line v. Dixie Oil Co.*, supra.

51. Neb.—*Omaha Cons. Vinegar Co. v. Burns*, 68 N.W. 492, 49 Neb. 229.

40 C.J. p. 75 note 1.

52. Tex.—*Ball v. Davis*, 18 S.W.2d 1063, 118 Tex. 534.

ly held that a well constitutes⁵³ or does not constitute⁵⁴ an "improvement" within the meaning of a statute, or that it is⁵⁵ or is not⁵⁶ an "appurtenance" to a building. A water well has been held to be a "structure" under a statute giving a lien for the performance of labor on a structure, or the furnishing of materials to be used in the construction of a structure.⁵⁷

Ditches, pipes, pumps, and dredging. While a ditch may not fall within the general terms of a mechanics' lien statute,⁵⁸ and canals which are merely ditches have been held not to constitute a structure within a statute allowing a lien for a structure,⁵⁹ a lien may, of course, be acquired for a ditch where it is expressly mentioned in the statute.⁶⁰ A mechanic's lien may be acquired for labor performed or materials furnished outside a building in laying or connecting pipes leading into a dwelling, plant, or factory.⁶¹ However, where piping and a pump do not bear some relation, or are not appurtenant, to a structure or building, no lien may be acquired therefor.⁶² Where the statute so provides, a person who dredges for a riparian proprietor may have a lien.⁶³ It has been held that one dredging and filling in submerged or marsh lands for the owner thereof may acquire a lien on such land,⁶⁴ but not for draining land.⁶⁵

§ 31. — Roads, Walks, and Street Improvements

A mechanic's lien may be acquired for the construction of walks and some street improvements under statutory or constitutional provisions in some jurisdictions.

Under some statutory provisions a mechanic's lien may not be acquired for the construction of a road,⁶⁶ or for the construction of sidewalks⁶⁷ or such other street improvements as paving,⁶⁸ curbing,⁶⁹ and grading⁷⁰ a street, unless such improvement in the street is connected with an improvement on the lot or tract of land.⁷¹ However, under other statutory and constitutional provisions, a lien may be allowed for sidewalks⁷² and streets,⁷³ as distinguished from public roads and highways.⁷⁴ Under some statutory provisions a mechanic's lien may be acquired for the construction of sewers,⁷⁵ and it has been held that a mechanic's lien may be acquired for the construction of a sewer in connection with houses.⁷⁶ However, a lien may not be acquired for the installation of sewer lines and water mains under a constitutional provision allowing a mechanic's lien for "erecting a building, or making or repairing an article."⁷⁷ A lien has been allowed for the construction of walks appurtenant to a building,⁷⁸ and for the laying out and surfacing of roads,⁷⁹ as well as the paving of a plaza,⁸⁰ in a cemetery. However, a lien for a stone driveway has been denied.⁸¹

53. S.D.—*Rolewitch v Harrington*, 107 NW 207, 20 S.D. 875, 6 L.R.A., NS, 550

Tex.—*Oil Field Salvage Co v Simon*, 168 S.W. 2d 848, 140 Tex. 456.
40 C.J. p 75 note 2

54. Ark.—*Guise v Oliver*, 11 S.W. 515, 51 Ark. 356.

55. Conn.—*Balch v. Chaffee*, 47 A. 827, 73 Conn. 318, 84 Am.S.R. 155.

56. Neb.—*Omaha Cons Vinegar Co. v Burns*, 68 N.W. 492, 49 Neb. 229.

Appurtenant to structure on land.
No lien may be acquired for a well which has no relation, or is not appurtenant, to a structure or building on the land.—*Pillow v. Kelly*, 296 S.W. 11, 155 Tenn. 597

57. N.M.—*Dysart v Youngblood*, 102 P.2d 664, 44 N.M. 351

58. Cal.—*Hillison v. Jackson Water Co.*, 12 Cal. 542.
40 C.J. p 75 note 7

Fiumes and aqueducts see supra § 21 b

59. Mich.—*Healy v. Toles*, 254 NW 213, 266 Mich. 584, 92 A.L.R. 749.

60. Idaho.—*Armitage v Bernheim*, 187 P. 938, 32 Idaho 594
40 C.J. p 75 note 8

61. Colo.—*Curtis v McCarthy*, 125 P. 109, 53 Colo. 284
40 C.J. p 75 note 9

Pipes in house see supra § 21 b

62. Tenn.—*Pillow v Kelly*, 296 S.W. 11, 155 Tenn. 597

63. Wis.—*Williams v. Lane*, 58 N.W. 77, 87 Wis. 152

64. Fla.—*Clark Dredging Co v Sunny Isles Ocean Beach Co*, 116 So. 644, 97 Fla. 1077, followed in *Palm Beach Ocean Realty Co v Atlantic Gulf & Pacific Co*, 121 So. 105, 97 Fla. 454

65. Mich.—*Besold v Beach Development Co*, 244 N.W. 204, 259 Mich. 693.

66. Mich.—*Besold v Beach Development Co*, 244 N.W. 204, 259 Mich. 693.

67. Colo.—*Fleming v. Prudential Ins Co*, 78 P. 752, 19 Colo.App. 125
40 C.J. p 75 note 11

68. Ill.—*Cronin v Tatge*, 118 NE 35, 281 Ill. 336—*Smith v Kennedy*, 89 Ill. 485

69. Ill.—*Cronin v Tatge*, 118 NE 35, 281 Ill. 336
40 C.J. p 75 note 14.

70. Ill.—*Cronin v Tatge*, supra—*Smith v. Kennedy*, 89 Ill. 485

71. Ill.—*Cronin v. Tatge*, 118 NE 35, 281 Ill. 336

72. Ark.—*Leiper v Minnis*, 86 SW 407, 74 Ark. 510, 4 Ann.Cas. 1013
40 C.J. p 76 note 17.

73. Tex.—*Lewis v Roach Manigan Pav. Co*, Civ.App., 184 S.W. 680

74. Tex.—*Denison Nat Bank v Coleman*, Civ.App., 151 S.W. 1123
40 C.J. p 76 note 21.

75. Cal.—*Williams, Belser & Co v Rowell*, 78 P. 725, 145 Cal. 259
40 C.J. p 76 note 18.

76. Idaho.—*Poynter v Fargo*, 281 P. 1111, 48 Idaho 271.

77. Tex.—*Campbell v City of Dallas*, Civ.App., 120 S.W. 2d 1095, error refused

78. Fla.—*Palm Beach Bank & Trust Co. v Lainhart*, 95 So. 123, 84 Fla. 862.
40 C.J. p 76 note 22.

79. N.Y.—*Johnson v Ocean View Cemetery*, 191 N.Y.S. 128, 198 App. Div. 854

80. N.Y.—*Johnson v. Ocean View Cemetery*, supra.

81. Mo.—*Missouri Valley Cut Stone Works v Brown*, 50 Mo.App. 407

§ 32. — Storage or Removal of Ashes and Refuse

A lien has been denied for the construction of receptacles designed for the reception and temporary deposit of ashes and garbage and to be placed on the ground in the rear of a house

A lien has been denied for the construction of boxes or receptacles designed for the reception and temporary deposit of ashes and garbage and to be placed on the ground, and not attached thereto, in the rear of a house.⁸²

B. SERVICES RENDERED AND MATERIALS FURNISHED, AND AMOUNT OF CLAIM

§ 33. In General

The right to a mechanic's lien must be predicated on a valid and subsisting claim of a kind contemplated by the mechanics' lien statutes.

The right to a mechanic's lien must be predicated on a valid claim⁸³ of a kind contemplated by the statute⁸⁴. There must be something due the person claiming the lien,⁸⁵ or, in other words, the relation of debtor and creditor must exist,⁸⁶ or there must be such an existing right to compensation or payment⁸⁷ as would entitle the claimant to a personal judgment for the amount due.⁸⁸

As discussed *infra* § 34, all the mechanics' lien statutes confer a lien for work or labor performed or services rendered, and, as discussed *infra* § 40, practically all confer a lien for materials furnished; but as a rule they confer a lien only for labor or materials⁸⁹. A right to a mechanic's lien may not arise where an act subsequent to the furnishing of the labor and materials,⁹⁰ and not the furnishing of the labor and materials,⁹¹ creates the indebtedness. A lien may not be had as security in favor of one who lends his credit to another to enable him to purchase materials.⁹² Under some constitutional

82. Mass—Curtis & Pope Lumber Co v. Wolmer, 100 N E 670, 213 Mass 456

83. Ill—Clow v. Goldstein, 147 Ill App 571

Inclusion of lienable and nonlienable items in one contract see *infra* § 80

84. Okl—Lewis v Red, 152 P 2d 690, 194 Okl 432
40 C J p 76 note 32

Claims held not lienable

(1) In general

Mich—Equitable Trust Co. v. Detroit Golf & Recreation Co., 245 N W 531, 260 Mich 606

Tenn—Variety Fire Door Co v. Hanson-Worden Co., 10 Tenn App 254

40 C J p 76 note 32 [a]—[g]

(2) For supplying a bond to a contractor erecting a building pursuant to a contract, under a statute allowing a lien for labor performed or materials furnished for the erection and construction of a building—Harry Pinsky & Son Co. v. Wike, 136 A 920, 101 N J Eq 45, affirmed 141 A 920, 103 N J Eq 18.

(3) For the payment for water, taxes, interest, etc., under a statute allowing a lien for permanent improvements—Gross v Hazeltine, 290 P 673, 107 Cal App. 446

(4) For taxes paid under a statute creating liens for material furnished and labor done for the erection, alteration, or repair of buildings—Lewis v Red, 152 P 2d 690, 194 Okl 432

(5) For the cost of a bond generally—Variety Fire Door Co v Hanson-Worden Co., 10 Tenn App 254—40 C J p 76 note 32 [j]

Heat during construction

(1) It has been held that a lien may not be allowed for temporary heat during construction while the laborers are working on the structure.

Mo—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 S W 2d 995, 332 Mo 440
Tenn—Variety Fire Door Co v Hanson-Worden Co., 10 Tenn App 254

40 C J p 76 note 32 [j] (1).

(2) However, it has also been held that fuel used to heat a building, where it was necessary for the building operation, is lienable.—Walker v Collins Const. Co., 236 N W 334, 121 Neb 157—40 C J p 76 note 32 [j] (2).

Insurance

(1) Claims for the payment of insurance generally have been held not lienable

Mich—Equitable Trust Co v Detroit Golf & Recreation Co., 245 N W 531, 260 Mich 606.

Okl—Lewis v Red, 152 P 2d 690, 194 Okl 432

Tenn—Variety Fire Door Co. v Hanson-Worden Co., 10 Tenn App. 254

40 C J p 76 note 32 [h].

(2) It has been held that no lien may be acquired for supplying insurance on a building, under a statute allowing a lien for labor performed or materials furnished for the erection or construction of a building—Harry Pinsky & Son Co v Wike, 136 A 920, 101 N J Eq 45, affirmed 141 A 920, 103 N J Eq 18

(3) No lien may be acquired for the payment of a premium on workmen's compensation insurance or for

social security for workmen, under some statutory provisions—Wormhoudt Lumber Co v Union Bank & Trust Co of Ottumwa, 2 N W 2d 267, 231 Iowa 928

(4) However, it has been held that a contractor may acquire a lien for the cost of casualty insurance—Paget v Peters, 286 P. 983, 133 Or. 608, rehearing denied 289 P 1119, 133 Or 608

85. Md—Blenard v Blenard, 45 A. 2d 335, 185 Md 548.

Mont—Dewey Lumber Co. v. McQuirk, 30 P.2d 475, 96 Mont. 294
NC—Brown v Ward, 20 S E 2d 324, 231 NC 344

40 C J p 76 note 33

Lien of subcontractor as dependent on amount owing to contractor see *infra* § 106

86. NC—Brown v. Ward, *supra*
40 C J p 77 note 34.

87. Cal—Spinney v Griffith, 32 P 974, 98 Cal 149
40 C J p 77 note 35.

88. NC—Brown v Ward, 20 S E 2d 324, 231 NC 344

89. NJ—Harry Pinsky & Son Co v Wike, 136 A 920, 101 N J Eq 45, affirmed 141 A 920, 103 N J Eq 18
Okl—Lewis v. Red, 152 P 2d 690, 194 Okl 432

40 C J p 77 note 38.

90. Cal—Gross v Hazeltine, 290 P. 673, 107 Cal App 446.

91. Cal—Gross v Hazeltine, *supra*.

92. Ark—Corpus Juris quoted in Middleton v Watkins Hardware Co., 116 S.W 2d 1043, 1045, 196 Ark 133.

Fla—Lovingood v Butler Const. Co., 131 So. 126, 100 Fla. 1262, 74 A.L.R. 513.

and statutory provisions, a lien for labor, or for labor and material together, but not for material alone, may be acquired against a homestead,⁹³ and under such provisions a lien on a homestead under a contract for labor and material is valid as to all work done and materials furnished after the execution of the contract.⁹⁴

§ 34. Services

All mechanics' lien statutes confer a lien for work, labor, or services; but, in order that a lien may be acquired, the labor must be of such a nature as to come within the meaning of the statutory or constitutional provision under which the lien is claimed.

All mechanics' lien statutes confer a lien for work, labor, or services.⁹⁵ However, in order that a lien may be acquired for work, labor, or services, they must be of such a nature as to come within the meaning of the statutory or constitutional provision under which the lien is claimed,⁹⁶ they must be done, performed, bestowed, or furnished accordingly as the statute may provide.⁹⁷ Further, they must be performed in the construction, erection,

etc., of the building, structure, or improvement as provided in the statute,⁹⁸ and they must be such as are reasonably included in the contract between the owner and the contractor.⁹⁹ A mechanics' lien statute has been held to extend to the use of equipment where the lien is for labor and the tools or equipment are instrumentalities in the performance of labor,¹ and the use of tools and machines, controlled by workmen, rendering their labor on a building or other structure more effective and valuable than it would be if performed with their hands alone, has been held not to defeat a claim for a lien for labor in the operation of such machines.² The cost or expense of transporting a workman to and from his place of work is a lienable item where it is involved in his employment and is a part of his compensation.³

Furnishing labor. While a lien for labor furnished has been denied,⁴ as under statutes conferring a lien for labor done,⁵ it has also been allowed,⁶ as under statutes expressly allowing a lien for labor furnished⁷ or under statutes allowing a

Ill.—Ruggles v Blank, 15 Ill App 436

Advances of money see infra § 47.

93. NC—Johnson v Leavitt, 125 S E 490, 188 NC 682
40 C.J. p 61 note 4 [a].

94. Tex.—Melcher v. Higbee, Civ. App., 165 S.W. 478

95. US—Franklinville Realty Co v. Arnold Const. Co., CCA Fla., 120 F.2d 144

Colo.—Tiger Placers Co v Fisher, 54 P.2d 891, 98 Colo 221

Fla.—Bowery v. Babbitt, 128 So. 801, 99 Fla 1151

Mo.—Tual v Martin, 68 S.W.2d 969, 228 Mo App 30

N.Y.—Nieman v Nadelman, 240 NY S 47, 138 Misc 386, affirmed 243 N.Y.S. 811, 229 App Div 865—Schenectady Homes Corporation v Greenside Painting Corporation, 37 N.Y.S.2d 53.

40 C.J. p 77 note 59

Laborers as persons entitled to lien see infra § 88

A technical violation of an ordinance by a failure to file an application to do certain work has been held not to invalidate a lien for such work—Kastner v. Security Savings & Loan Ass'n, 256 P. 289, 123 Kan 632.

96. Cal.—Hurst v. Bigelow, 277 P. 497, 98 Cal App 688

Kan.—Road Supply & Metal Co. v Bechtelheimer, 240 P. 846, 119 Kan. 560

Tex.—McQuerry v. Glenn, Civ. App., 1 S.W.2d 339, error dismissed. 40 C.J. p 78 note 60.

Skilled or unskilled labor

(1) The term "labor," as used in a mechanics' lien statute, has been held to refer to physical labor or a specific kind of labor mentioned therein—Road Supply & Metal Co v Bechtelheimer, 240 P. 846, 119 Kan 560

(2) It has been held that the term "labor" within mechanics' lien statute is not confined to physical or manual labor—Dittenbach v H H Mahler Co, 30 P.2d 907, 167 Okl 518—40 C.J. p 78 note 60 [a]

27. La.—Favalora v Bourgeois, 114 So 119, 164 La 521

Or.—Sparhawk v Stevens, 91 P.2d 1116, 162 Or 375
40 C.J. p 78 note 61.

Work performed or to be performed

(1) A mechanic's lien may be acquired only for work and labor actually performed—Hoekstra v Hopkins, 87 Pa Super 15—40 C.J. p 78 note 61 [a].

(2) Employee is not entitled to mechanic's lien to secure wages for time he is idle—Nelson v Boise Petroleum Corporation, 32 P.2d 782, 54 Idaho 179.

98. Okl.—Consolidated Cut Stone Co v Seidenbach, 75 P.2d 442, 181 Okl 578

Tex.—McConnell v Frost, Civ. App., 45 S.W.2d 777, error refused
40 C.J. p 78 note 63.

Work other than construction see infra § 38

All labor performed in the construction or reconstruction of a building has been held lienable under

some statutory provisions—Dybvig v. Willis, 82 P.2d 95, 59 Idaho 160.

99. SD.—Stokes v. Green, 73 N.W. 100, 10 S.D. 286
40 C.J. p 78 note 64.

1. Okl.—Consolidated Cut Stone Co. v Seidenbach, 75 P.2d 442, 181 Okl 578.

2. Or.—Corpus Juris cited in Randolph v Christensen, 265 P. 797, 799, 124 Or 661
40 C.J. p 79 note 71

Liens for tools and machinery as materials see infra § 44.

3. Cal.—Kritzer v Tracy Engineering Co, 116 P. 700, 16 Cal App 287

Md.—Whicher Dev Corp v. Ross, 121 A 373, 143 Md 522.

Transportation of material as labor see infra § 50

4. Colo.—Kern v Guiry Bros. Wall Paper Co, 153 P 87, 60 Colo 286. Contractor's lien for labor and materials furnished see infra § 91.

5. Ark.—Little Rock, H. S. & T. R. Co v Spencer, 47 S.W. 196, 65 Ark 183, 42 L.R.A. 334.
40 C.J. p 79 note 73.

6. NY.—Kerby v. Daly, 45 N.Y. 84
Okl.—Wass v Vickery, 13 P.2d 142, 158 Okl 227.
40 C.J. p 79 notes 75–77.

7. Okl.—Wass v Vickery, supra.
40 C.J. p 79 note 75.

lien for labor performed⁸ or bestowed.⁹

§ 35. — Preparatory Work in General

Under a contract for materials only, a lien may not be had for labor performed in preparing or manufacturing the materials as a claim for "labor," a lien may be allowed to a contractor for planning the work of reconstructing a building

Where a materialman contracts to deliver material in prepared or manufactured form, the contract is for materials only, and a lien may not be had for labor performed in preparing or manufacturing the materials as a claim for "labor."¹⁰ A contractor for the reconstruction of a building has been held to be entitled to a lien for his services in planning the work of repairing and reconstructing the building.¹¹

§ 36. — Services of Architect

Under many statutes an architect who prepares plans and specifications for a building or otherwise performs the ordinary duties of his profession may acquire a me-

chanic's lien for his services; but there is also authority holding otherwise.

An architect who prepares plans and specifications for a building or otherwise performs with respect thereto the ordinary duties of his profession may acquire a mechanic's lien for his services under many statutes.¹² While architects may acquire a lien for their services under statutes expressly so providing,¹³ as well as under statutes conferring a lien for work, labor, or services,¹⁴ under other statutes an architect has no lienable claim for the services rendered by him¹⁵ as work and labor "on" a building.¹⁶

An architect who merely furnishes plans, drawings, and specifications may acquire a lien for his services,¹⁷ but in some cases the proposition has been doubted or left undetermined,¹⁸ and it has also been held that an architect is not entitled to a lien for such services.¹⁹ Under many statutes a lien may be allowed to architects who furnish plans and also superintend the construction,²⁰ but it has also

8. U.S.—Couper v Gaboury, Fla., 69 F 7 16 CCA 113
Minn.—Periv v Duluth Transfer R. Co., 57 NW 792, 56 Minn 306.

9. Cal.—Macomber v. Bigelow, 58 P 312 126 Cal 9
40 C.J. p 79 note 77

10. Me.—Monroe v Clark, 77 A. 696, 107 Me 134 30 L.R.A.N.S., 82
40 C.J. p 79 note 70

Removal or destruction of building as necessary part of making of improvement see supra § 24

11. Iowa.—Dybvig v Willis, 82 P 2d 95, 59 Idaho 160

12. Colo.—Park Lane Properties v. Fisher, 5 P 2d 577, 89 Colo 591

Ill.—Crown v Meyer, 174 NE 55, 342 Ill 46

Ind.—Berson v Overpeck, 44 NE 3d 195, 112 Ind App 195

Mont.—Caird Engineering Works v. Seven-Up Gold Mining Co., 111 P 2d 267, 111 Mont 471

Nev.—Paterson v Condos, 28 P 2d 499, 55 Nev 134, rehearing denied 30 P 2d 283, 55 Nev 260

N.M.—Gaastra, Gladding & Johnson v Bishop's Lodge Co., 299 P 347, 35 NM 396

Pa.—Sillies v Austin, 158 A 661, 104 Pa Super 344.

Va.—Cain v Rea, 166 SE 478, 159 Va. 446, 85 ALR 945

Wis.—Neumann v Strandt, 219 NW. 348, 195 Wis 610

5 C.J. p 266 note 4—40 C.J. p 79 note 80

At common law an architect had no lien for his services on a building erected by him—Gould v McCormick, 134 P. 676, 75 Wash 61, 47 L.R.A.N.S., 765, Ann Cas 1915A 710

13. Colo.—Park Lane Properties v. Fisher 5 P 2d 577 89 Colo 591

Ill.—Crown v Meyer, 174 NE 55, 342 Ill 46

5 C.J. p 266 note 1—40 C.J. p 80 note 81

Statute construed

In a statute providing that every architect and engineer performing any work and labor on any building may have a lien on the property on which the work is done, the terms "architect" and "engineer" are not used qualitatively to mean that the actual labor must have been done on the premises and on the very structure being erected but the term contemplates services as they are usually performed—Caird Engineering Works v Seven-Up Gold Mining Co., 111 P 2d 267, 111 Mont 471

14. Ind.—Berson v Overpeck, 44 NE 3d 195 112 Ind App 195

Mich.—Chesnow v Gorelick, 225 NW 4, 246 Mich 571

Nev.—Paterson v Condos, 28 P 2d 499, 55 Nev. 134, rehearing denied 30 P 2d 283, 55 Nev 260

N.J.—Furlong v Housing Authority of City of Newark, 28 A 2d 424, 133 N.J. Eq 341

N.M.—Gaastra, Gladding & Johnson v Bishop's Lodge Co., 299 P 347, 35 NM 396

Va.—Cain v Rea, 166 SE 478, 159 Va. 446, 85 ALR 945

5 C.J. p 266 note 4—40 C.J. p 80 note 82

15. Ohio.—Pierson Lumber Co. v Roehm, 183 NE 795, 43 Ohio App 515

Tenn.—Howe v. Kaucher-Hodges & Co., 13 Tenn App 367

5 C.J. p 266 notes 3, 6—40 C.J. p 80 note 83

Architect not employed by owner

Architect employed at salary by consulting engineer having contract with owner to draft plans and specifications and to perform work and labor in construction of buildings, and who prepared drawings writings and specifications, and who made decisions and interpretations of such drawings and specifications, has been held not a "laborer" or one who "furnishes labor or materials" within a lien statute and hence not entitled to lien where architect gave no notice of lien to owner—Marquis v Peterson, 1 NW 2d 786 219 Wis 358

16. Ohio.—Robert V Clapp Co v Fox, 178 NE 588, 134 Ohio St 331

17. N.M.—Corpus Juris cited in Gaastra Gladding & Johnson v. Bishop's Lodge Co., 299 P 347, 348, 35 NM 396

5 C.J. p 267 note 9—40 C.J. p 80 note 88

Although he does not supervise construction, an architect preparing and furnishing plans for a building actually constructed in accordance therewith has been held to be entitled to a lien therefor—Gaastra, Gladding & Johnson v Bishop's Lodge Co., supra.

18. N.D.—Buckingham v Flummerfelt, 106 NW 403, 15 N.D. 112

5 C.J. p 267 note 10.

19. Mich.—Chesnow v Gorelick, 225 NW 4, 246 Mich 571

5 C.J. p 267 note 11—40 C.J. p 80 note 89

20. Mich.—Chesnow v. Gorelick, supra.

Mont.—Corpus Juris cited in Caird Engineering Works v. Seven-Up

been held that, although an architect's services consist of both furnishing plans for a building and superintending its construction in accordance therewith, he may be entitled to a lien only for the superintendence and not for the plans,²¹ and it has further been held that such an architect does not come within a mechanic's lien statute and may not acquire a lien for his services.²²

Under statutory provisions whereby an architect may not acquire a lien for preparing plans and specifications, it has been held that he is not entitled to any lien under an entire and indivisible contract for preparing plans and superintending construction.²³ However, although an architect may not acquire a lien merely for preparing plans and specifications, where he both furnishes the plans and specifications and superintends the construction, he may be entitled to a lien for both services, where the contract for his services is indivisible.²⁴ It has been held that no lien may be had for services rendered by engineers in designing machinery or plants for installation in buildings where they do not become part of the buildings on which the lien is claimed.²⁵

Use of plans and specifications. An architect may

acquire a lien for his services where his plans and specifications are used in the construction of a building.²⁶ While there is some authority holding that he may acquire a lien even though his plans and specifications are not used,²⁷ ordinarily no lien may be allowed for plans and specifications not used.²⁸ An architect may not be entitled to a lien for preparing plans and specifications for a building actually constructed on a different plan, after the plans for which the lien is claimed had been actually abandoned,²⁹ but, where the fundamental principles of architects' plans are used in the construction of a building, the fact that the identical plans are not used has been held not to deprive the architects of their lien.³⁰

§ 37. — Superintendence

A mechanic's lien may be acquired for services in superintending the construction of a building or other improvement in some jurisdictions.

In many jurisdictions, a mechanic's lien may be acquired for services in superintending the construction of a building or other improvement,³¹ but in some jurisdictions the work of superintendence has been held not to be within the terms or meaning of

Gold Mining Co., 111 P 2d 267, 281, 111 Mont 471.
Nev—Paterson v Condos, 28 P 2d 499, 55 Nev 134, rehearing denied 30 P 2d 283, 55 Nev 260.
NJ—Furlong v Housing Authority of City of Newark, 28 A.2d 424, 132 N.J. Eq 341.
NM—Gaastra, Gladding & Johnson v Bishop's Lodge Co., 299 P 347, 35 NM 396.
Va—Cain v Rea, 186 SE 478, 159 Va 446, 85 A.L.R. 945.
Wis—Neumann v Strandt, 219 N.W. 348, 195 Wis 610.
5 C.J. p 286 note 4, p 267 note 2—40 C.J. p 80 note 87.
Superintendence generally see *infra* § 37.

"Inspection" as "superintendence"

It has been held that a mechanic's lien may be acquired for an architect's services coupled with services for "inspection" and issuing certificates during construction, since there is no substantial difference between services of "superintendence" and those of "inspection"—Silfies v Austin, 158 A. 661, 104 Pa Super 344.

Remodeling building

(1) An architect has, under some statutory provisions, been held entitled to a lien for his services in drawing plans or specifications and supervising the remodeling of a building—Beeson v Overpeck, 44 N.E.2d 195, 112 Ind App 195.

(2) It has been held that one superintending remodeling of building

may have lien for plans and drawings only because they enhance work of supervising actual construction—Hoekstra v Hopkins, 87 Pa Super 15.

21. Mass—Mitchell v Packard, 47 NE 113, 168 Mass 467, 60 Am.S.R. 404.

22. Tenn—Howe v Kaucher-Hodges & Co., 18 Tenn App 367.

23. Ohio—Robert V. Clapp Co. v Fox, 178 NE 586, 124 Ohio St 331. 5 C.J. p 267 note 13—40 C.J. p 80 note 90, p 81 note 91.

24. Mich—Chesnow v Gorelick, 225 N.W. 4, 246 Mich 571.

25. Del—Girdler Corporation v. Delaware Compressed Gas Co., 183 A. 480, 7 W.W. Harr 344.

26. NM—Gaastra, Gladding & Johnson v Bishop's Lodge Co., 299 P 347, 35 NM 396. 40 C.J. p 80 note 84.

27. Minn—Jandrich v Svabek, 211 N.W. 957, 170 Minn 24—Lamoireaux v Andersch, 150 NW 908, 128 Minn. 261, L.R.A. 1915D 204.

28. Wis—Clark v. Smith, 290 N.W. 592, 234 Wis 138, 127 A.L.R. 406. 40 C.J. p 80 note 86.

Building not erected

(1) Where construction of building, for which architects were employed to draw plans and specifications, was not begun, no lien for their services could attach.

Wash.—Lipscomb v. Spokane Exch. Nat. Bank, 141 P. 686, 80 Wash 296.

Wis—Clark v. Smith, 290 NW 592, 234 Wis 138, 127 A.L.R. 406.

(2) This rule has been applied where the contract was oral—Malinger v Shapiro, 244 Ill App 228, affirmed 161 NE 104, 329 Ill 629.

(3) However, it has also been held that where an owner refuses to proceed with his written agreement, after the architect has prepared his plans, the architect may be entitled to a lien—Crowen v. Meyer, 174 NE 55, 342 Ill 46.

(4) A structural engineer has been held not entitled to a lien on realty for services rendered where the proposed structure could not be erected on the realty according to the plans drawn by him because of ordinances prohibiting such structure—Konstant v. Maggos, 42 NE 2d 137, 315 Ill App. 131.

29. ND—Buckingham v. Flummerfelt, 106 NW 403, 15 ND 112. 40 C.J. p 80 note 86 [b].

30. Colo—Park Lane Properties v. Fisher, 5 P 2d 577, 89 Colo 591.

31. Del—Breeding v. Nelson, 143 A. 23, 4 W.W. Harr. 9, 60 A.L.R. 1262.

Idaho—Dybvig v. Willis, 82 P 2d 95, 59 Idaho 160.

Or—Sparhawk v. Stevens, 91 P.2d 1116, 162 Or 375.

the statutes,³² and under some provisions, where an owner pays all material and labor bills, it has been held that a contractor may not be allowed a lien for his services in supervising the work and selecting the materials.³³ It has been held that superintendence is lienable when done by a contractor,³⁴ as well as when done by a person employed by the contractor,³⁵ but not where the superintendence of the contractor consisted of merely supervising his own workmen.³⁶

§ 38. — Work Other than Construction

Ordinarily a mechanic's lien may not be acquired for work other than construction, under the statutes

Ordinarily a lien may not be acquired for work other than construction, under the statutes,³⁷ and, where the labor for which a lien is claimed is only remotely and indirectly connected with the construction work, no lien may be allowed.³⁸

§ 39. — Work Not Done on Premises

The work or labor for which a mechanic's lien may be acquired need not be performed on the premises where

the building or structure is being erected or the improvement is being made, provided it is necessarily connected with the construction or improvement.

It is not essential that the work or labor for which a lien may properly be claimed should be performed on the premises where the building or structure is being erected or the improvement is being made,³⁹ provided it is necessarily connected with the construction or improvement on the premises.⁴⁰ Thus work done in the workshop or yard of the contractor, in fitting materials for use in the building, is labor or work performed in the erection of the building.⁴¹

§ 40. Materials

As a general rule the statutes expressly provide for liens for materials furnished for, or to be used in, the erection, alteration, or repair of any building or other improvement.

The statutes, as a general rule, expressly provide for liens for materials furnished for, or to be used in, the erection, alteration, or repair of any building or other improvement.⁴² However, where the statutes merely provide for liens for labor per-

Pa.—Haug v. Atlantic Refining Co., Com Pl., 86 Pittsb Leg J 42
40 C J p 81 note 93.

Superintendence by architect of construction see supra § 36

Although he is an architect, a superintendent of work has been held to be entitled to a lien for his services where he did no architectural work on the building—National Homestead Ass'n v Graham, 147 So 348, 176 La. 1062

What constitutes superintendence

(1) Preparing and securing contracts with subcontractors have been held not to constitute superintendence.

N Y—Goldberger-Rabin, Inc. v 74 Second Ave Corporation, 169 NE 405, 252 N Y. 336.

Pa.—Bennett v. Frederick R. Gerry Co., 117 A. 345, 273 Pa. 585

(2) Other services see 40 C J. p 81 note 93 [a]

32. Tenn.—Variety Fire Door Co v Hanson-Worden Co., 10 Tenn App 254.

40 C J. p 81 note 94.

A time keeper who merely supervises the work of the laborers has been held not a mechanic, undertaker, founder, machinist or contractor within the meaning of the statute and not entitled to a lien claim for his salary—Variety Fire Door Co. v Hanson-Worden Co., supra

33. Tex.—Mood v. Methodist Episcopal Church South, Civ. App., 289 S W 461, affirmed, Com App., Mood v. Methodist Episcopal Church

South of Cisco, 296 S W 506, modified on other grounds 300 S W 30

34. Mo.—Tual v. Martin, 66 S W 2d 969, 238 Mo App 30—Fagan v Brock Motor Car Co., App., 282 S W. 135

35. Mo.—Fuhler v. Gohman & Levine Const. Co., 142 S W 2d 482, 346 Mo 588

40 C J p 81 note 95

A subcontractor's charges for superintendence have been held lienable items—Fuhler v. Gohman & Levine Const. Co., supra—Leach v. Bopp, 12 S W 2d 512, 223 Mo App 354—Carroll Contracting Co v New-some, 210 S W 114, 201 Mo App 117

36. Mo.—Blakey v. Blakey, 27 Mo 39.

37. ND.—Buckingham v. Flummerfelt, 106 N W 403, 15 ND 112

40 C J p 78 note 63

Labor done for care of house has been held not lienable item under statute creating lien for labor done for erection, alteration or repair of buildings—Lewis v. Red, 153 P 2d 690, 194 Okl 432

38. Ill.—Hoier v. Kaplan, 145 NE 243, 313 Ill 448

40 C J p 78 note 65

39. Mass.—Daley v. Legate, 47 NE 1013, 169 Mass 257

40. Ind.—Vellis v. Christian, 76 NE 518, 165 Ind 663

40 C J p 79 note 67.

41. Me.—Monroe v. Clark, 77 A. 696, 107 Me 134, 136, 30 L R A N S., 82

40 C J. p 79 note 68.

42. US—Franklinville Realty Co v. Arnold Const Co., CCA Fla. 130 F 2d 144

Cal.—Linder Hardware Co v Kelley, 268 P. 1076, 93 Cal App 17

Fla.—Bowery v. Babbit, 128 So 801, 99 Fla 1151.

Ill.—Douglas Lumber Co. v Chicago Home for Incurables, 43 NE 2d 585, 380 Ill 87.

Kan.—Southwestern Electrical Co v Hughes, 80 P 2d 114, 139 Kan 89.

La.—Favolara v. Bourgeois, 114 So 119, 164 La 521

N Y.—Nieman v. Nadelman, 240 N Y. S 47, 136 Misc 386, affirmed 243

N Y S 811, 229 App Div 865—Schenectady Homes Corporation v Greenside Painting Corporation, 37

N Y S 2d 53

Okla.—Consolidated Cut Stone Co v. Serdenbach, 75 P 2d 442, 181 Okl 578

Or.—Johnson v. Heightsman, 21 P 2d 788, 143 Or 114

Wash.—Standard Oil Co v Long-Bell Lumber Co., 6 P 2d 402, 166 Wash 156

40 C J p 81 note 98

"Materialman" as person entitled to lien see infra § 89

Persons furnishing materials to contractors as entitled to lien see infra § 101

Lien on homestead

Under some constitutional and statutory provisions mechanic's lien against homestead, executed by husband and wife to cover materials furnished for construction of home on lot, has been held valid—Granmar v Hesperian Bldg & Sav Ass'n, Tex.

formed in the erection or alteration of buildings or other improvements, no lien can be had for materials furnished for an improvement.⁴³

§ 41. — Nature, Quality, and Quantity

The nature, quality, and quantity of the materials furnished for which a lien may be acquired depends on the statute under which the lien is claimed and on the terms of the contract.

The mechanics' lien statutes do not expressly define the kind of material entering into the construction of a building which shall be covered by their provisions.⁴⁴ Where the term is qualified by the words, for the "erection, building, construction, alteration, or repair" of any building or other improvement, it has a restricted meaning,⁴⁵ depending on the construction of the words quoted.⁴⁶ It has been stated generally that the right to a lien for materials furnished extends to all such materials as ordinarily enter into, or are used in the construction, repair, or improvement of, buildings, etc.,⁴⁷ and which are within the express or implied terms of the building contract.⁴⁸

Provided it is within, and conforms to the terms of, the contract, the material for which a lien may properly be claimed need not be in any precise state,⁴⁹ it may be raw or crude material⁵⁰ or perfectly adapted to the purposes intended.⁵¹ A lien may be acquired for materials ordered by the owner and complying with the contract regardless of whether or not they are fit for the purpose intended.⁵² However, a breach of guaranty prevents the acquisition of a lien by a party to the contract.⁵³ A lien may be acquired for materials which were defective when, after being repaired, they were accepted by the owner.⁵⁴ A materialman may not acquire a lien for all the materials he may choose to

furnish on the credit of the building,⁵⁵ but only for such as are reasonably necessary⁵⁶ in view of the size and apparent character of the building.⁵⁷

Building or parts thereof as materials. One who has sold a portion of an old house and moved it to another lot, putting it on a foundation constructed by the buyer, has been held entitled to a lien as for material furnished.⁵⁸ So too, where one agreed to put upon a lot a small frame house already constructed, and to make additions thereto, it has been held that, by regarding this house as material going to the construction of the whole, it might be covered by the statute,⁵⁹ although, if considered as a building already constructed, it could not be.⁶⁰ It has also been held that where, after an old building was partly repaired by plaintiff, it was torn down, and a new one erected by him in its stead, he may claim a lien on the new building for materials furnished for, and used in, the old building which were afterward used in the new.⁶¹

§ 42. — Furnishing

- a. In general
- b. Place

a. In General

In order that there may be a lien for materials they must have been actually furnished to the person designated in the statute under which the lien is claimed.

In order that there may be a lien for materials it is necessary that they shall have been actually furnished⁶² to the owner or contractor or other person designated in the statute under which the lien is claimed.⁶³ A mere purchase of, or contract for, materials is not sufficient,⁶⁴ nor may a person who has retaken materials claim at the same time that

Civ App. 70 S.W.2d 230, error refused

43. Wis.—Kelleher v Reedal, 143 N. W. 193, 154 Wis 456
40 C.J. p 81 note 97

44. Pa.—Porter Screen Mfg Co v Hunter, 68 Pa.Super 23.

45. Cal.—Selden v Meeks, 17 Cal 128.

"Material" defined generally see the definition Material ante p 418 note 20—p 450 note 48

46. Cal.—Selden v Meeks, supra

47. Md.—Basshor v Baltimore & O. R Co., 3 A 285, 65 Md. 99.
40 C.J. p 82 note 4.

Necessity of.

Actual use see infra § 43
Incorporation in building or improvement see infra § 44.

43. Md.—Basshor v Baltimore & O R Co, supra
40 C.J p 82 note 5

43. RI.—Sweet v James, 2 RI. 270
Necessity of materials supplied to contractor conforming to terms of principal contract see infra § 108

50. Or.—Hume v Seattle Dock Co., 137 P 753, 68 Or 477, 50 L.R.A., N. S., 153

RI.—Sweet v James, 2 RI 270

51. Or.—Hume v Seattle Dock Co., 137 P 753, 68 Or 477, 50 L.R.A., N. S., 153.

52. Pa.—Harlan v. Rand, 27 Pa 511

53. Ind.—Coonse & Caylor Ice Co v. Home Stove Co., 121 N.E. 293, 70 Ind App 236
40 C.J p 82 note 12.

54. Wis.—Tingley v. Richter, 177 N. W. 901, 172 Wis. 16.

55. Pa.—Harlan v. Rand, 27 Pa. 511

56. Pa.—Harlan v Rand, supra—Boyd v Mole, 9 Phila. 113.

57. Pa.—Harlan v. Rand, 27 Pa. 511.

58. Or.—Johnson v. Heightman, 21 P 2d 786, 143 Or 114

59. Cal.—Selden v. Meeks, 17 Cal 128.

60. Cal.—Selden v. Meeks, supra.

61. Conn.—Nichols v. Culver, 51 Conn 177.

62. Pa.—Hoekstra v. Hopkins, 87 Pa.Super 15

40 C.J. p 82 note 21.
Intent or purpose in furnishing see infra § 45

63. Iowa.—A. B. Shorthill Co. v Aetna Indemn. Co., 124 N.W 613

64. Md.—Maryland Brick Co. v Spilman, 25 A. 297, 76 Md 337, 35 Am.S.R. 431, 17 L.R.A. 599.
40 C.J p 82 note 25.

he has furnished them⁶⁵ To furnish materials, within the meaning of a mechanics' lien statute, ordinarily means to sell⁶⁶ and deliver⁶⁷ or supply or provide⁶⁸ them for use in making the improvement or the erection of the building, as discussed *infra* § 45.

It has been held that title to the materials need not pass to the owner of the building in order that a lien may be allowed therefor⁶⁹ Under some circumstances materials may be regarded as "furnished," so that a lien therefor may exist, where they are prepared and ready for delivery,⁷⁰ as where they are especially designed and manufactured for the particular building⁷¹ under a contract directly with the owner⁷² and the latter refuses to accept or receive them⁷³ It has been held that, where the materials furnished were actually used in the building in question, it is immaterial what agency performed the physical act of delivery.⁷⁴

b. Place

While it has been held that materials may be furnished so as to give rise to a lien therefor, although they are not delivered on or near the premises where the building is being erected or the improvement is being made, there is some authority to the contrary.

While there is some authority holding that, to furnish materials for a building within the meaning of a mechanics' lien statute, there must be a delivery at or near the building,⁷⁵ and it has been held that

materials are not furnished within the meaning of such a statute when delivered from point of shipment,⁷⁶ it has generally been held that materials may be furnished so as to give rise to a lien therefor, even though they are not delivered on or near the premises where the building is being erected or the improvement is being made⁷⁷ This has been held to be true where the materials are actually used in the construction of the building,⁷⁸ and according to some,⁷⁹ but not other,⁸⁰ authorities a mechanic's lien may exist under some circumstances for materials which are neither delivered on the premises nor actually used in the construction of the building While there is some authority to the contrary,⁸¹ it has been held that a mechanic's lien may be acquired for materials delivered and furnished outside the state⁸²

§ 43. — Actual Use

While under the statutes in many jurisdictions materials furnished must have been actually used in the construction of the building or the making of the improvement in question, under some statutes this rule does not obtain.

Under the statutes in many jurisdictions it is a general rule that it is essential to the acquisition of a lien for materials that the materials furnished shall have been actually used in the construction of the building or the making of the improvement in question.⁸³ The rule should not be enforced with

65. N.Y.—Giant Portland Cement Co v New York, 134 N.E 322, 232 N.Y. 395

40 C.J. p 83 note 26

66. Minn.—Burns v. Sewell, 51 N.W. 224, 48 Minn. 425

67. Ill.—Colp v First Baptist Church of Murphysboro, 173 N.E. 67, 341 Ill. 73, 71 A.L.R. 106

40 C.J. p 83 note 28

68. U.S.—Grainger v. Johnson, C.C. Ark., 286 F. 833, 33 A.L.R. 316, certiorari denied 43 S.Ct. 524, 262 U.S. 749, 67 L.Ed. 1213

40 C.J. p 82 note 29

69. Ind.—Jackson v. J. A. Franklin & Son, 23 N.E.2d 28, 107 Ind.App. 83

70. U.S.—Haskell v. McClintic-Marshall Co., C.C.A.Wash., 289 F. 405

40 C.J. p 82 note 31.

Materials prepared or furnished but not used see *infra* § 43

71. N.Y.—North American Iron Works v G. De Kimpe, Inc., 251 N.Y.S. 144, 232 App.Div. 579

40 C.J. p 82 note 32

Where material is not specially designed for the dwelling against which a lien is claimed, and the material is not delivered, no lien may

be acquired therefor—Warming v. Hargis, 294 P. 218, 159 Wash. 501—10 C.J. p 82 note 32 [a]

72. U.S.—Haskell v. McClintic-Marshall Co., C.C.A.Wash., 289 F. 405

73. U.S.—Haskell v. McClintic-Marshall Co., *supra*
Tex.—Trammell v. Mount, 4 S.W. 377, 65 Tex. 210, 2 Am.S.R. 479

74. Wash.—Standard Lumber Co. v. Fields, 187 P.2d 283.

75. Ind.—Foster Lumber Co. v. Sigma Chi Chapter House, 97 N.E. 501, 49 Ind.App. 528.

40 C.J. p 82 note 35

Filing material on another lot

It has been held that material piled on a lot other than the one on which the structure is to be erected, even though such lot was owned by the owner of the structure and it was done with permission, was not so furnished and delivered as to be the subject of a lien—Cooper v. Palais Royal Theatre, 242 Ill.App. 184

76. W.Va.—Georgia Lumber Co. v. Harrison Const. Co., 186 S.E. 399, 103 W.Va. 1

77. Iowa—A. E. Shorthill Co. v.

Etna Indemn. Co., 124 N.W. 613, 817.

40 C.J. p 83 note 36.

78. Or.—Peerless Pac. Co. v. Rogers, 158 P. 271, 81 Or. 51.

79. U.S.—Haskell v. McClintic-Marshall Co., C.C.A.Wash., 289 F. 405

40 C.J. p 83 note 38.

80. Ky.—Whitfield v. Kentucky Sales Corporation, 278 S.W. 105, 211 Ky. 809.

40 C.J. p 83 note 39

Necessity of actual use generally see *infra* § 43

81. N.Y.—Birmingham Iron Foundry v. Glen Cove Starch Mfg. Co., 78 N.Y. 30

40 C.J. p 83 note 41

82. Wis.—Mallory v. La Crosse Abattoir Co., 49 N.W. 1071, 80 Wis. 170

40 C.J. p 83 note 40

Materials furnished under contract made outside of state see *infra* § 74

83. Ala.—Wood Lumber Co. v. Greathouse, 148 So. 135, 226 Ala. 641

Ark.—Half Moon Gin Co. v. E. C. Robinson Lumber Co., 181 S.W.2d 339, 207 Ark. 483—Sebastian Build-

such rigidity as to work injustice,⁸⁴ it being sufficient to show with reasonable certainty that the material furnished was actually used in the construction of the building in question.⁸⁵ Under the statutes in some jurisdictions this rule does not obtain,⁸⁶ although, of course, even in these jurisdictions, a lien may not exist, under the circumstances in some cases, for materials which are not used in the construction of the building in question.⁸⁷ However, where materials are delivered pursuant to contract, and the building is completed and there is nothing to show that the materials were not used therein, and it is shown that some of the materials entered into its construction, it may be concluded that the materials did in fact go into the building and a lien may be allowed therefor.⁸⁸

In both classes of jurisdictions there may be cir-

cumstances under which a lien may be allowed for materials which are not actually used.⁸⁹ It has been held that, where materials are delivered in good faith to be incorporated in a building, a lien may be acquired therefor, even though they have not been used for the purpose for which they were ordered,⁹⁰ and it has further been held that a seller of material, acting in good faith, who delivers it to the situs where such material is intended to be and should be used, is not required to follow the transaction to the ultimate end of seeing that such material is actually so used or consumed as a condition precedent to the efficacy of his lien.⁹¹ Thus it has been held that a lien may be acquired for materials where they have been prepared or furnished as ordered and the owner refuses to accept or use them,⁹² goes into bankruptcy,⁹³ allows his property,

ing & Loan Ass'n v. Minten, 27 S W 2d 1011, 181 Ark. 700

Cal.—Nevada County Lumber Co. v. Janiss, 78 P 2d 200, 25 Cal App 2d 579

Ind.—Puritan Engineering Corporation v. Robinson, 191 NE 141, 207 Ind 58—Ohio Oil Co. v. Fidelity & Deposit Co. of Maryland, 42 NE 2d 406, 113 Ind App 452—Jackson v. J. A. Franklin & Son, 23 NE 2d 23, 107 Ind App 38.

Mo.—Tallman Co. v. Villmer, App. 133 S W 2d 1085.

Okl.—Consolidated Cut Stone Co. v. Seidenbach, 75 P 2d 442, 181 Okl 578

Or.—State v. Johnson Contract Co., 253 P 520, 120 Or 638

40 C J p 83 note 43

Furnishing for purpose of being used see *infra* § 45.

Materials neither delivered on premises nor used see *supra* § 42 b

84. W Va.—Bateson & Co. v. Baldwin Forging & Tool Co., 84 S.E. 887, 75 W Va. 574.

85. Mo.—Tallman Co. v. Villmer, App., 133 S W 2d 1085.

W Va.—Bateson & Co. v. Baldwin Forging & Tool Co., 84 S.E. 887, 75 W Va. 574.

86. Idaho—Idaho Lumber & Hardware Co. v. DiGiacomo, 102 P 2d 637, 61 Idaho 383.

NY—Rapid Fireproof Door Co. v. Largo Corporation, 215 N Y S. 283, 216 App Div. 895, reversed on other grounds 154 NE 531, 243 NY 432, motion denied 158 NE 898, 244 NY 568.

Wash.—Standard Lumber Co. v. Fields, 187 P 2d 283

40 C J. p 84 note 46.

Furnishing material to be used in building

Where materials are furnished to be used in a building, they need not be used upon the building in order

that a lien may be acquired therefor—Idaho Lumber & Hardware Co. v. DiGiacomo, 102 P 2d 637, 61 Idaho 383

Furnishing for improvement of realty

Materials furnished in good faith for the improvement of realty may be lienable although not actually used in the work

Minn.—Johnson v. Starret, 149 N.W. 6, 127 Minn 138

Neb.—Walker v. Collins Const. Co., 286 N.W. 334, 121 Neb. 157.

87. Wash.—Westinghouse Electric Supply Co. v. Hawthorne, 150 P 2d 55, 21 Wash 2d 74.

40 C J p 84 note 47.

Agreement to return or use elsewhere

The rule that one may acquire a lien for materials actually delivered on the property, although they are subsequently used in another building, has been held to have no application where the one furnishing the materials agrees, prior to such delivery, that any material remaining over and not used in the building shall be returned to him or used in another job, and after the building is constructed the unused material is sorted and checked over and used elsewhere—Boyer-Van Kuran Lumber & Coal Co. v. Colonial Apartment House Co., 142 N.W. 519, 94 Neb 180.

Delivery after completion of structure

One delivering material after the completion of the structure against which a lien is claimed for such material has been held not entitled to a lien—Kellison v. Godfrey, 281 P. 733, 154 Wash 219

88. Wash.—Standard Lumber Co. v. Fields, 187 P 2d 283.

89. Ind.—Jackson v. J. A. Franklin

& Son, 23 NE 2d 23, 107 Ind App. 38

40 C J p 84 note 48.

Estoppel

It is not always necessary to show that material for the improvement of property went into a building in order to claim a lien, since the circumstances may be such that the owner of the building is estopped to invoke the general rule—Jackson v. J. A. Franklin & Son, 23 NE 2d 23, 107 Ind App. 38—40 C J p 84 note 48 [a]

In Texas

(1) Under some statutory provisions it has been held that a lien may be acquired for materials furnished although such materials are not actually used in the construction of a building or structure—W. L. MacAttee & Sons v. House, 153 S W 2d 460, 137 Tex 259—Trammell v. Mount, 4 S W 377, 68 Tex. 210, 2 Am. S R 479

(2) However, there is authority holding that materials not used in the construction of a building are not lienable—Whaley Lumber Co. v. Reliance Brick Co., Civ App., 2 S W. 2d 911—Murphy v. Fleetford, 70 S. W 989, 30 Tex Civ App 487.

90. Wash.—Westinghouse Electric Supply Co. v. Hawthorne, 150 P 2d 55, 21 Wash 2d 74.

91. La.—Hanchey v. Kildair, App., 6 So 2d 202—Derbes v. Marshall, App., 183 So. 74.

92. Minn.—Berger v. Turnblad, 107 NW 543, 98 Minn 163, 116 Am S. R 353.

40 C J. p 84 note 49.

93. NY—Sears v. Wise, 64 N.Y.S. 1063, 52 App Div 118

Pa.—Hinchman v. Graham, 2 Serg & R 170.

while unfinished, to go into the hands of a receiver,⁹⁴ diverts the materials to other uses⁹⁵ or to another building or structure,⁹⁶ or otherwise appropriates them without the consent of the furnisher.⁹⁷

Similarly one who delivers material to an owner's contractor on the premises may be entitled to a lien therefor although the material is diverted to another project by the contractor.⁹⁸ Also it has been held that a lien may be acquired for materials specially fabricated for inclusion, but not installed in a building, where such materials are being held awaiting the instructions of the owner,⁹⁹ and that subcontractors who furnish materials specially designed and made for a building are not deprived of their lien if the contractor suspends work.¹ So too the fact that material purchased by a contracting company for the construction of a line of electric railroad under authority given by the railroad company, as provided by the contract, had not been used at the time the contract was terminated by the railroad company has been held not to affect the right to a lien therefor.² However, one who delivers material specially designed for a particular structure and who, at the time of delivery knows that the material will not be used in the construction of the building, is not entitled to a lien therefor.³

Provided they were furnished for use in the construction of the building or the making of the improvement in question, as discussed infra § 45, and the portion which entered into the construction or

improvement can be shown,⁴ it has been held that a lien may be had for such materials as actually entered into the construction or improvement in question, even though other materials furnished by the same person were not so used.⁵ Where materials furnished to a subcontractor are actually placed in the building for which they were furnished, the materialman has been held entitled to a lien, notwithstanding the subcontractor fraudulently disposed of the materials to a third person by whom they were placed in the building.⁶ A lien may exist for materials which were once used in the construction of a building, even though they were subsequently removed or taken out.⁷

§ 44. — Incorporation in Building or Improvement

Where the materials, although used in construction, do not become a constituent part of the building, structure, or improvement, it has been held that ordinarily no lien may be acquired therefor; but this rule is not applicable in all jurisdictions regardless of the circumstances of particular cases.

The word "material," as used in mechanics' lien statutes, has been held to be something which enters into, becomes a part of, and remains with, the completed work or the finished structure.⁸ A lien may properly be asserted for materials which become a part of the structure or improvement,⁹ but where the materials, although used in construction, do not become a constituent part of the building, structure, or improvement, it has been held that, unless they

94. Ind.—Totten & Hogg Iron & Steel Fdy Co v Muncie Nail Co, 47 NE 703, 148 Ind. 372.

40 C.J. p 84 note 51.

95. Ind.—Ohio Oil Co v. Fidelity & Deposit Co of Maryland, 43 N. E 2d 406, 112 Ind App 452.

40 C.J. p 84 note 52.

Lien held acquired

(1) The fact that some of the items of material sold are actually used by the purchaser for purposes other than that for which they were sold, unbeknown to the lien claimant, has been held not to destroy a lien therefor—Botsford Lumber Co v Fuller, 213 N.W. 22, 170 Minn 130—Moorhead Lumber Co v. Remington Packing Co, 206 N.W. 653, 165 Minn 411—40 C.J. p 85 note 52 [a].

(2) Where materials are sold and delivered to owner of land for construction of improvements, materialman's lien therefor may not be defeated by proof that buyer used a part of the materials for other purposes—Brick & Tile v Parker, 186 S.W.2d 66, 143 Tex. 383.

96. Minn.—Moorhead Lumber Co v Remington Packing Co, 206 N.W. 653, 165 Minn 411.

40 C.J. p 85 note 53.

97. Ohio—Beckel v. Pettierew, 6 Ohio St 247—Franklin Bank v Cincinnati, 10 Ohio S & C.P. 545, 8 Ohio N.P. 517.

98. Ohio—East End Lumber Co v Bennett, 187 N.E. 786, 46 Ohio App 104.

40 C.J. p 84 note 53 [a].

99. U.S.—Franklinville Realty Co. v. Arnold Const Co, C.C.A.Fla., 120 F.2d 144.

1. Wash.—Huttig Bros. Mfg Co. v. Denny Hotel Co, 32 P. 1073, 6 Wash 122.

2. U.S.—Tennis Bros Co. v Wetzel & T R Co, C.C.W.Va., 140 F. 193, affirmed 145 F. 453, 75 C.C.A. 268, 7 Ann Cas 426.

3. Ill.—Vierck v Lindberg, 39 N.E. 2d 393, 313 Ill App. 150.

4. Wash.—Little Bros Mill Co v Baker, 106 P. 910, 57 Wash. 311, 135 Am S.R. 980.

40 C.J. p 85 note 53.

5. Ill.—Portones v Badenoch, 23 N. E. 319, 132 Ill 377.

W.Va.—Bateson & Co v Baldwin Forging & Tool Co, 84 S.E. 887, 75 W.Va. 574.

6. Mo.—A. M. Stevens Lumber Co v Kansas City Lumber Co, 72 Mo App 248.

7. Cal.—Johnson v Smith, 276 P. 146, 97 Cal App 752.

40 C.J. p 85 note 61.

Defective installation

Where a lien claimant is not responsible for the defective installation of the material furnished by him, the fact that the material is later removed because of such defective installation has been held not to affect his right to a lien therefor—Johnson v Smith, 276 P. 146, 97 Cal App 752.

8. Kan.—Road Supply & Metal Co. v Bechtelheimer, 240 P. 846, 119 Kan 560.

40 C.J. p 85 note 62.

9. La.—Young v. Barelli, 125 So. 258, 169 La. 319.

40 C.J. p 85 note 63.

come within an express statutory exception,¹⁰ no lien may be acquired therefor,¹¹ and that real property is not to be subjected to a lien for materials which do not enter into the construction of some improvement which becomes a part thereof.¹² However, it is unsafe to accept this as a general rule applicable in all jurisdictions regardless of the circumstances of particular cases.¹³

Ordinarily, unless expressly so provided by statute,¹⁴ no lien may be acquired for the value or use of tools, machinery, equipment, or appliances furnished or lent for the purposes of facilitating the work,¹⁵ where they remain the property of the contractor¹⁶ and are not consumed in their use,¹⁷ but remain capable of use in other construction or improvement work.¹⁸ While charges for parts entering into incidental repairs of equipment, made dur-

ing the continuance of construction work, have been held to be lienable, whether or not consumed on the job,¹⁹ it has also been held that the use of tools and machines which wear out in the use does not give a right to a lien for their value as materials.²⁰ So too a lien has been denied for other materials which remain the property of the contractor,²¹ such as patterns²² and materials furnished for a temporary bridge to be used during the construction of a permanent bridge.²³

Generally a lien may be acquired for materials which, although not incorporated in the building or improvement, are used in the construction and, by their use, are actually or practically consumed, wasted, destroyed, or rendered worthless or unfit for further use.²⁴ Thus a lien has been allowed for explosives,²⁵ and, although there is some authority to the contrary,²⁶ for lumber and other materials fur-

10. Ill.—Hoier v Kaplan, 145 N.E. 243 313 Ill. 448

40 C.J. p. 85 note 65

11. U.S.—Sklar v Oil Incomes, C.C. A La., 133 F.2d 512

40 C.J. p. 85 note 64

12. Kan.—Sach & Sales Co. v. Early, 232 P. 232, 117 Kan. 425

Material furnished for building movable cupboard not attached to building has been held not ground for lien on realty—Badger Lumber & Coal Co. v. Schmidt, 251 P. 196, 123 Kan. 48

Center resting on the floor of a building has been held not immovable and not to constitute materials for the erection of a building—D. v. Bldg. Material Co. v. Chartier, 8 La. App. 469

13. Wis.—Barker & Stewart Lumber Co. v. Marathon Paper Mills Co. 130 N.W. 866, 146 Wis. 12, 36 L.R. A.N.S., 875

40 C.J. p. 85 note 66

14. Cal.—Los Angeles v. Kautz, 179 P. 716 39 Cal. App. 702

Tex.—Burke v. Brown, 30 S.W. 936, 10 Tex. Civ. App. 298

15. Kan.—Wilkinson v. Pacific Midwest Oil Co., 107 P.2d 726, 152 Kan. 713—Road Supply & Metal Co. v. Bechtelheimer, 240 P. 346, 119 Kan. 560

Ky.—Corpus Juris cited in Marion Steam Shovel Co. v. Union Indemnity Co., 75 S.W.2d 541, 542, 255 Ky. 817—Steele & Leiby v. Flynn-Sullivan Co., 54 S.W.2d 325, 245 Ky. 772

N.Y.—John H. Black Co. v. Surdam Holding Corporation, 250 N.Y.S. 17, 140 Misc. 113

Okl.—Consolidated Cut Stone Co. v. Seidenbach, 75 P.2d 442, 181 Okl. 578

W.Va.—Corpus Juris cited in Rhodes

v. Riley, 169 S.E. 525, 526, 113 W. Va. 679

40 C.J. p. 86 note 70.

Regular equipment for job

Charges for articles which should have been included in contractor's regular equipment for job that he undertook have been held not lienable—Bluefield Supply Co. v. M. P. Smith Const. Co., 177 S.E. 296, 115 W. Va. 537

Rule held applicable

(1) To files, buckets, hammer handles, brooms, shovels, etc.—Walker v. Collins Const. Co., 236 N.W. 334, 121 Neb. 157.

(2) To purchase price of pipe furnished to contractor for use in pumping sand and water in constructing embankment on railroad right of way—American Tank & Equipment Co. v. T. E. Wiggins, Inc., 42 P.2d 115, 170 Okl. 504

(3) To rental for use of pans and ends furnished to contractor to hold concrete in place in building operations—Consolidated Cut Stone Co. v. Seidenbach, 75 P.2d 442, 181 Okl. 578

(4) To rented crane—Steele & Leiby v. Flynn-Sullivan Co., 54 S.W.2d 325, 245 Ky. 772

(5) Other equipment see 40 C.J. p. 86 note 70 [a]

16. Idaho.—Nunneman v. Lewiston, 129 P. 1073, 23 Idaho 169

Ky.—Corpus Juris cited in Marion Steam Shovel Co. v. Union Indemnity Co., 75 S.W.2d 541, 542, 255 Ky. 817.

17. Ky.—Corpus Juris cited in Marion Steam Shovel Co. v. Union Indemnity Co., 75 S.W.2d 541, 542, 255 Ky. 817

40 C.J. p. 86 note 72.

18. Idaho.—Nunneman v. Lewiston, 129 P. 1073, 23 Idaho 169

Ky.—Corpus Juris cited in Marion

Steam Shovel Co. v. Union Indemnity Co., 75 S.W.2d 541, 542, 255 Ky. 817

Wis.—Wehb v. Freng, 194 N.W. 155, 181 Wis. 39.

19. W.Va.—Bluefield Supply Co. v. M. P. Smith Const. Co., 177 S.E. 296, 115 W. Va. 537

20. Mass.—George H. Sampson Co. v. Commonwealth, 88 N.E. 911, 202 Mass. 326

21. Cal.—Stimson Mill Co. v. Los Angeles Tract Co., 74 P. 357, 141 Cal. 30—Bridgeport First Nat. Bank v. Perris Irr. Dist., 40 P. 45, 107 Cal. 55

22. Cal.—Bridgeport First Nat. Bank v. Perris Irr. Dist., supra, 40 C.J. p. 86 note 76

23. Cal.—Stimson Mill Co. v. Los Angeles Tract Co., 74 P. 357, 141 Cal. 30.

24. Neb.—Walker v. Collins Const. Co., 236 N.W. 334, 121 Neb. 157. Okl.—Tway v. Thompson, 16 P.2d 76, 160 Okl. 279, 84 A.L.R. 457—Lively v. Evans-Howard Fire Brick Co., 243 P. 773, 115 Okl. 259.

40 C.J. p. 86 note 78.

Articles not included in regular equipment

It has been held that charges for all articles not included in contractor's regular equipment and which are not lienable as incidental repairs are lienable if articles were used exclusively and consumed entirely in work—Bluefield Supply Co. v. M. P. Smith Const. Co., 177 S.E. 296, 115 W. Va. 537.

25. Minn.—Johnson v. Starrett, 149 N.W. 6, 127 Minn. 138, L.R.A.1915B 708

40 C.J. p. 86 note 79.

26. Pa.—Hoffman Lumber Co. v. Gibson, 119 A. 741, 276 Pa. 79.

nished and used in making forms or molds to hold and support concrete until it hardens and becomes self-supporting.²⁷ While a lien has been allowed regardless of the salvage value of the lumber so used,²⁸ it has also been held that, where the lumber is removed and remains fit for use in the construction of other buildings, no lien may be acquired therefor.²⁹ A lien has been allowed for materials entering into a cofferdam.³⁰ A claim for feed sold to a contractor to be used in feeding teams employed in construction on, or improvement of, realty has been held not to be lienable.³¹

Shoring and scaffolding. While a lien has been denied for lumber used for scaffolding,³² it has also been held that a lien may be allowed for such portion of the lumber as is entirely consumed and cannot be used again,³³ or that a lien may be allowed although the lumber was not wholly consumed,³⁴ the lien, in such case, being allowed for the depreciation in value of such portion as is not entirely consumed but has become depreciated in value.³⁵ A like rule has been applied in determining the existence and amount of a lien for lumber used as shoring.³⁶

Fuel and oil. There is a conflict of authority on the question whether a lien may be acquired for coal or other fuel used to generate power for the operation of the machinery by which the construction or improvement work is carried on, so that, while it has been held that it may be acquired,³⁷ it has also been held that it may not be acquired.³⁸ There is a like conflict of authority on the question whether oil, grease, or other lubricant is lienable, some courts having held that it is lienable³⁹ and others that it is not lienable.⁴⁰

Packages and shelter. It has been held that, where material is usually delivered in certain packages, it is proper to charge for it as packaged,⁴¹ although the small material constituting the package does not literally go into the construction of the building.⁴² Thus it has been held that including a charge for lime barrels⁴³ or cement sacks⁴⁴ is proper where they are not returned. A lien has been allowed for materials furnished for the construction of a tool house,⁴⁵ but not for the construction of shelter for the workmen and animals of a contractor or subcontractor,⁴⁶ or for the construction of sheds for the protection of materials.⁴⁷

Under statute relating to public improvements

Under a statute granting a lien for the furnishing of materials in the construction of a public improvement, lumber purchased by contractor, using it in construction of cement forms, has been held not lienable as material used in construction of such improvement—*Melcher Lumber Co v Robertson Co*, 250 N.W. 594, 217 Iowa 31.

27. *Okl—Tway v Thompson*, 16 P 2d 76, 160 Okl 279, 84 A.L.R. 457.
40 C.J. p 86 note 81.

In Illinois

(1) The statute allows a lien for the furnishing of material for forms or form work in concrete construction—*Douglas Lumber Co v Chicago Home for Incurables*, 43 N.E.2d 535, 380 Ill 87—*Cooper v. Palais Royal Theatre*, 242 Ill App. 184—40 C.J. p 85 note 81 [e] (1).

(2) Prior to the adoption of this statute no lien was allowed for lumber furnished for the molds and forms into which concrete was poured—*Douglas Lumber Co v Chicago Home for Incurables*, 43 N.E.2d 535, 380 Ill 87—*Cooper v. Palais Royal Theatre*, 242 Ill App. 184—40 C.J. p 87 note 81 [e] (2).

22. *Ill—Douglas Lumber Co v Chicago Home for Incurables*, 43 N.E.2d 535, 380 Ill 87.

Neb—Walker v Collins Const Co, 236 N.W. 334, 121 Neb 157.

23. *Mass—Kennedy v Commonwealth*, 65 N.E. 828, 182 Mass 480.

Wis—Wiedenbeck-Dobelin Co v Mahoney, 152 N.W. 479, 160 Wis 641.

33. *Idaho—Chamberlain v Lewiston*, 129 P 106ⁿ, 23 Idaho 151.

Wis—Barker & Stewart Lumber Co v Marathon Paper Mills Co, 130 N.W. 565, 145 Wis 12, 36 L.R.A. N.S. 875.

31. *Cal—Linder Hardware Co v Kelley*, 255 P 1076, 93 Cal App 17.
Okl—*Bank of Earlsboro v. J. E. Crosbie, Inc.*, 77 P 2d 547, 182 Okl 327.

32. *Pa—Hoffman Lumber Co v Gibson*, 119 A 741, 276 Pa. 79.
40 C.J. p 87 note 84.

33. *Wis—Webb v Freng*, 194 N.W. 155, 181 Wis 39.

34. *Neb—Walker v. Collins Const Co*, 236 N.W. 334, 121 Neb 157.

35. *Wis—Webb v Freng*, 194 N.W. 155, 181 Wis 39.

36. *Wis—Webb v Freng*, supra—*Moritz v Sands Lumber Co*, 146 N.W. 1120, 155 Wis. 49, 51 L.R.A. N.S. 1040.

37. *Neb—Walker v. Collins Const Co*, 236 N.W. 334, 121 Neb. 157.
40 C.J. p 87 note 89.

Gasoline and oil used for hauling materials see infra § 50.

If reasonably necessary to proper construction, fuel used in generating steam to operate hoists and m.xer may be lienable—*Walker v. Collins Const Co*, 236 N.W. 334, 121 Neb 157.

32. *La—Southern Gas Line v Dixie Oil Co*, 133 So 181, 16 La App 26.

Okl—*Corpus Juris cited in Bank of Earlsboro v J. E. Crosbie, Inc.*, 77 P 2d 547, 551, 182 Okl 327.

Pa—Favo v Merlot, 94 Pa Super 90.

Wash—Standard Oil Co v Long-Bell Lumber Co, 6 P 2d 402, 166 Wash 156.
40 C.J. p 87 note 90.

39. *Cal—Pacific Sash & Door Co v Bumiller*, 124 P 230, 123 Cal 664, 667, 41 L.R.A. N.S. 298.

40 C.J. p 87 note 91.

40. *Wis—Barker & Stewart Lumber Co v Marathon Paper Mills Co*, 130 N.W. 565, 146 Wis 12, 36 L.R.A. N.S. 875.

40 C.J. p 87 note 92.

41. *Cal—Snell v Payne*, 46 P 1068, 115 Cal 218.

42. *Cal—Snell v Payne*, supra.

43. *Cal—Snell v Payne*, supra.

44. *Mo—Glencoe Lime & Cement Co v Polar Wave Ice & Fuel Co*, App. 184 S.W. 953.

Neb—Crowell Lumber & Grain Co v Ryan Co, 193 N.W. 609, 110 Neb. 225.

45. *Minn—Johnson v. Starrett*, 149 N.W. 6, 127 Minn. 138, L.R.A. 1915B 708.

46. *Colo—Farmers' Irr. Co. v. Kamm*, 135 P 766, 55 Colo. 440.

47. *Pa—Hoffman Lumber Co v. Gibson*, 119 A. 741, 276 Pa. 79.

§ 45. Intent or Purpose in Furnishing

In order that a lien may be acquired, the labor and materials must be furnished for the purposes contemplated by the statute under which the lien is claimed, usually statutes allowing a lien for materials furnished apply only to materials furnished for building purposes

In order that a lien may be acquired, the labor and materials must be furnished for the purposes contemplated by the statute under which the lien is claimed.⁴⁸ The statutes allowing a lien for materials furnished usually apply only to furnishing for building purposes,⁴⁹ and do not include a furnishing for general⁵⁰ or unknown⁵¹ purposes, or an ordinary sale in the usual course of trade⁵² or on a general or open account,⁵³ or a sale without any reference as to what shall be done with the material sold.⁵⁴ It has been held that, while the materials must be furnished for building purposes as distinguished from general or unknown purposes, still it is not essential that any particular building should be in the contemplation of the parties at the time the materials are sold.⁵⁵ However, the weight of authority is to the effect that it is essential that the materials shall have been sold or furnished for the purpose of being used in the particular building on which a lien is claimed,⁵⁶ although, where the materials are sold for the purpose of building a house, the fact that the materialman did not know the exact location of the land upon which the building was to be erected will not defeat the lien.⁵⁷

It has been held that one who furnishes material

with knowledge that it may be used on several different jobs is not entitled to a lien against the structure in which the material is used.⁵⁸ However, it has also been held that, when labor or materials are furnished to a contractor engaged in the construction of several buildings for different owners, each building with the lot on which it stands may be subjected to a lien for materials used in, or labor expended on, it,⁵⁹ even though, according to some,⁶⁰ but not other,⁶¹ authorities, the labor and materials were furnished indiscriminately for use in the construction of the several buildings. When materials are furnished as ordered, and there is no special contract for the furnishing of all the materials to be used in the erection of several buildings, a lien against a particular building may not be acquired, after its sale, by the furnishing of materials to be used in the other buildings.⁶²

§ 46. Reliance on Credit of Building or Property

Usually, in order that a mechanic's lien may be acquired, the labor must have been performed, or the materials furnished, on the credit of the particular building, and not merely on the general credit of the owner, contractor, or other person.

In order that a mechanic's lien may be acquired, usually it is necessary that the labor shall have been performed, or the materials furnished, on the credit of the building,⁶³ and not merely on the general and personal credit of the owner, contractor, or

48. Mich.—Bezold v. Beach Development Co., 244 N W 204, 259 Mich 693.

49. Minn.—Ryan Drug Co v Rowe, 69 N W. 468, 66 Minn 480. 40 C.J. p 88 note 6.

50. Ind.—Ohio Oil Co v. Fidelity & Deposit Co of Maryland, 42 N E 2d 406, 112 Ind App 452

Iowa—Cotes v Shorey, 8 Iowa 416
Me—J. W White Co v. Griffith, 145 A 134, 127 Me 516.

51. Iowa—Cotes v. Shorey, 8 Iowa 416

52. Ind.—Ohio Oil Co v Fidelity & Deposit Co of Maryland, 42 N E 2d 406, 112 Ind App 452

Wash—Westinghouse Electric Supply Co v Hawthorne, 150 P 2d 55, 21 Wash 2d 74. 40 C.J. p 88 note 3.

53. Ind.—Ohio Oil Co. v. Fidelity & Deposit Co. of Maryland, 42 N E 2d 406, 112 Ind App. 452.

Me.—J W. White Co. v. Griffith, 145 A 134, 127 Me 516

Wis—Esslinger v Huebner, 22 Wis 632.

Sale on general credit of owner or contractor see infra, § 46

54. Ind.—Smith v Newbaur, 42 N E 40, 1094, 144 Ind 85, 33 L.R.A. 685 40 C.J. p 88 note 11.

55. Minn.—Emery v Hertig, 61 N W 830, 60 Minn 54. 40 C.J. p 88 note 15.

56. Ill.—Colp v First Baptist Church of Murphysboro, 173 N E 67, 341 Ill 72, 71 A.L.R. 106

Ind.—Puritan Engineering Corporation v Robinson, 191 N E 141, 207 Ind 58—Ohio Oil Co v Fidelity & Deposit Co of Maryland, 42 N E 2d 406, 112 Ind App 452—Jackson v J. A. Franklin & Son, 28 N E 2d 23, 107 Ind App 38
Me—J W White Co v Griffith, 145 A 134, 127 Me 516

R.I.—Phillips Lead & Supply Co v Swartz, 132 A 4, 47 R.I. 203—Gurney v Walsham, 19 A 323, 16 R.I. 693 40 C.J. p 88 note 16

57. Wash—Corpus Juris cited in Berger v. Baist, 6 P.2d 412, 416, 165 Wash 590 40 C.J. p 89 note 17

58. R.I.—Phillips Lead & Supply Co v Swartz, 132 A 4, 47 R.I. 203

59. Mass.—Sexton v. Weaver, 8 N. E 367, 141 Mass 273 40 C.J. p 89 note 18

60. Pa.—Davis v Farr, 13 Pa 167, followed in Harper v Keely, 17 Pa 234

61. Mass.—Childs v. Anderson, 128 Mass 108 40 C.J. p 89 note 20

62. Md.—Ortwine v Caskey, 43 Md 134 40 C.J. p 89 note 21.

63. Del.—E J Hollingsworth Co v. Continental-Diamond Fiber Co, 175 A 266, 6 W W Harr 303
Ind.—Ohio Oil Co v Fidelity & Deposit Co of Maryland, 42 N.E 2d 406, 112 Ind App 452

Okla.—Corpus Juris quoted in Schuman v Teague, 156 P 2d 1010, 1011, 195 Okl 328 40 C.J. p 89 note 23.

"Credit of the building"

The phrase "credit of the building" has been held to be a statutory phrase used in mechanics' lien laws, referring to labor or material furnished for a particular structure, but extended to include within its meaning skilled labor, where the mechanic did not know into what building the

some other person⁶⁴ However, it has been held that, where materials are furnished for use in a particular building a lien may be had therefor, although at the time of sale the materialman intended to rely for payment solely on the personal credit of the buyer.⁶⁵ At any rate, the mere fact that the materialman looks to the contractor in the first instance, and, if he fails, to the building, will not defeat the lien.⁶⁶ Also the materialman need not, at the time of furnishing the materials, expressly state his intention of relying on his right to a lien.⁶⁷

§ 47. Advances of Money

A mechanic's lien ordinarily may not be acquired for money lent or advanced to a contractor or other person to enable him to purchase material for, or pay for labor upon, a building or other improvement.

There may be no mechanic's lien for money lent or advanced to a contractor or other person for the purpose of enabling him to purchase material for, or pay for labor upon, a building or other improvement.⁶⁸ One who lends money to an owner to enable him to procure a loan on his property is not en-

titled to a lien therefor.⁶⁹ However, a lien against a homestead, executed by a husband and wife, covering money advanced for improvements and payment of a vendor's lien, has been held valid.⁷⁰

§ 48. Board and Lodging

While it has been held that a mechanic's lien may not be acquired for board or lodging of workmen, it has also been held that a lien for board may be allowed as part of the compensation due under a contract.

It has been held that a mechanic's lien may not properly be claimed in respect of board or lodging⁷¹ of a foreman⁷² or of workmen,⁷³ either in respect of the food furnished⁷⁴ or of the services rendered in cooking.⁷⁵ However, it has also been held that a lien for board may be allowed as part of the compensation due under a contract.⁷⁶ Under a statute allowing a lien for provisions, goods, or supplies furnished, it has been held that a lien may be allowed for groceries furnished to a subcontractor for the maintenance of a boarding house for his men,⁷⁷ but not for supplies consumed by men not working on the job in question.⁷⁸

result of his work was to be placed
—Emery v Hertig, 61 NW 830, 60 Minn 54, 59

64. Ind.—Ohio Oil Co v. Fidelity & Deposit Co of Maryland, 42 NE 2d 406, 112 Ind App 452

Okl.—Corpus Juris quoted in Schuman v Tague, 156 P 2d 1010, 1011, 195 Okl 328

RI—Cook, Borden & Co v R Z L Realty Corporation, 147 A 891, 50 RI 375

40 C J p 89 note 24

65. Mont.—Corpus Juris cited in Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 277, 111 Mont 471.

40 C J p 89 note 25.

Necessity of agreement

In order to secure a lien it has been held not necessary that at time of sale, agreement existed that materials were furnished on credit of particular building and not on buyer's credit—Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 111 Mont 471.

66. Mont.—Corpus Juris cited in Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 277, 111 Mont 471.

Nev.—Paterson v. Condos, 28 P 2d 499, 55 Nev. 134, rehearing denied 30 P 2d 288, 55 Nev. 260.

40 C J p 89 note 26

67. Ala.—Eufaula Water Co. v. Ad-dyston Pipe & Steel Co, 8 So 25, 89 Ala. 552.

Tenn.—Bassett v Bertorelli, 22 SW 423, 92 Tenn 548.

68. Ala.—Wood Lumber Co v Greathouse, 161 So 236, 230 Ala

362—Byrum Hardware Co v Jenkins Bldg Supply Co, 147 So 411, 226 Ala. 448

Ariz.—Lilley v J. D Halstead Lumber Co, 28 P 2d 616, 42 Ariz 546

Ark.—Corpus Juris quoted in Middleton v Watkins Hardware Co, 116 SW 2d 1043, 1045, 196 Ark 133

Cal.—Glassco v El Sereno Country Club, 17 P 2d 703, 217 Cal 90—Howard v Societa Di Unione E Beneficenza Italiana, 145 P 2d 694, 62 Cal App 2d 842

Fla.—Lovingood v. Butler Const Co, 131 So 126, 100 Fla 1252, 74 A L R 513

La.—Central Lumber Co v Schroeder, 114 So. 644, 164 La. 759

Miss.—Sadler v. Glenn, 199 So 305, 190 Miss. 112—City Coal & Lumber Co v Gulf Refining Co, 185 So 260, 184 Miss 260

Tex.—Verschoyle v Holfield, 123 S. W 2d 878, 132 Tex. 516—West v. First Baptist Church of Taft, 71 S W 2d 1090, 123 Tex 388—Owen v Griffin, Civ App, 34 S W 2d 338—Hewitt v. Buchanan, Civ App, 4 S. W 2d 169

40 C J p 77 note 47.

Loan of credit see supra § 33.

One who, without taking subrogation, advances to a contractor, at an owner's request, money used to pay for labor on a building, is not entitled to a lien therefor, since the advance of the money is simply a loan and gives no lien or privilege on the improvements or property—Liberty Lumber Yard v. Tabb, 126 So 714, 12 La.App 597.

Money voluntarily advanced by a contractor to pay claims against an

owner for work and materials which the contractor is not obligated to pay has been held not to give rise to a lien—Burr v Peppers Cotton Lumber Co, 266 P 1025, 91 Cal App 268, followed in Willett v. Peppers Cotton Lumber Co., 266 P 1023, 91 Cal App 798

Transaction held not loan

Tex.—Wilson v Hinton, 116 SW 2d 865, 131 Tex. 593

69. Wyo.—Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 59 Wyo 334, 147 A L R. 1089

70. Tex.—Grammar v Hesperian Bldg & Sav Ass'n, Civ App, 70 S. W 2d 220, error refused.

71. Tex.—Van Horn Trading Co. v. Day, Civ App, 148 SW. 1129.

72. Pa.—Wethered v. Garrett, 7 Pa Co 529

73. NH.—Perrault v Shaw, 38 A. 724, 69 NH 180, 76 Am SR. 160

74. Cal.—Malone v. Big Flat Gravel Min Co, 18 P. 772, 76 Cal 578—Arata & Peters v Snow Mountain Water & Power Co, 267 P 932, 93 Cal App 227, followed in 267 P 933, 2 cases, 92 Cal App. 792.

75. Cal.—Clark v. Beyrle, 116 P. 739, 160 Cal 306.
40 C J p 77 note 53.

76. Iowa.—Crane Co. v. Westerman, 8 NW 2d 412, 232 Iowa 1394.
40 C J. p 77 note 54

77. Colo.—Olson v Model Land & Irrigation Co, 225 P. 259, 75 Colo. 221

78. Colo.—Olson v. Model Land & Irrigation Co., supra.

§ 49. Profits and Commissions

Profits and commissions ordinarily are not lienable items unless included in the contract price or in the reasonable worth of the labor or materials furnished, no lien may be allowed for profits or commissions not earned

Profits and commissions ordinarily are not lienable items⁷⁹ unless included in the contract price,⁸⁰ as where the contract provides for payment of the cost of, or reimbursement for the amount actually paid out for, labor and material, plus a certain per cent as commissions, profit, or compensation,⁸¹ or unless included in the reasonable worth of the labor or materials furnished,⁸² as where the actual cost is less than the reasonable worth.⁸³ There also is authority holding that a lien is regulated by the amount and value of the work done, and not by any supposed profits contracted for.⁸⁴ No lien may be allowed for profits or commissions not earned,⁸⁵ as on labor not done or material not furnished,⁸⁶ or on that portion of the contract which is not completed.⁸⁷

§ 50. Transportation

A mechanic's lien is frequently allowed for the transportation of material.

While a lien for the transportation of material has in some instances been denied,⁸⁸ as where there is no agreement to pay a hauling charge,⁸⁹ frequently it has been allowed,⁹⁰ sometimes as labor performed in the erection or construction of a building⁹¹ and sometimes as part of the value, cost, or price of the material.⁹² Under some statutory provisions no lien may be allowed for the transportation of material where the person claiming the lien is merely engaged to haul materials.⁹³ Although it has been held that gasoline and oil used in vehicles for hauling materials are not "materials furnished" within the meaning of a mechanics' lien law,⁹⁴ it has also been held that a lien is allowable for their cost as "debts contracted" for work done for or about a building.⁹⁵

§ 51. Requisite Amount or Value

Under some statutes mechanics' liens may be acquired only for claims exceeding a specified amount, but under other statutes a lien may be allowed irrespective of the amount of the claim.

Under some statutes mechanics' liens may be acquired only for claims exceeding a specified

79. Ark.—Corpus Juris quoted in Shaw v Rackensack Apartment Corporation, 295 S.W. 966, 968, 174 Ark 493

Ky—Corpus Juris quoted in Bond v W T Congleton Co., 129 S.W.2d 570, 572, 278 Ky 829
40 C.J. p 77 note 39.

80. Ark.—Corpus Juris quoted in Shaw v Rackensack Apartment Corporation, 295 S.W. 966, 968, 174 Ark 492

Ky—Corpus Juris quoted in Bond v W T Congleton Co., 129 S.W.2d 570, 572, 278 Ky 829.
40 C.J. p 77 note 40

81. Ky—Corpus Juris quoted in Shaw v Rackensack Apartment Corporation, 295 S.W. 966, 968, 174 Ark 492—Corpus Juris quoted in Bond v W T Congleton Co., 129 S.W.2d 570, 572, 278 Ky 829.

Md—House v. Fissell, 51 A.2d 669
Mo—Fagan v Brock Motor Car Co., App., 282 S.W. 135.
40 C.J. p 77 note 41

82. Ark.—Corpus Juris quoted in Shaw v Rackensack Apartment Corporation, 295 S.W. 966, 968, 174 Ark 493

Kan.—Elder Mercantile Co v Ottawa Inv. Co., 165 P. 279, 100 Kan 597.

83. Ark.—Corpus Juris quoted in Shaw v Rackensack Apartment Corporation, 295 S.W. 966, 968, 174 Ark 492
40 C.J. p 77 note 42.

84. Tenn—Reehl v. Henck, 5 Tenn App. 153.

85. Kan.—Elder Mercantile Co. v Ottawa Inv. Co., 165 P. 279, 100 Kan. 597

86. Kan.—Elder Mercantile Co. v Ottawa Inv. Co. supra
Pa.—Hoekstra v. Hopkins, 87 Pa. Super 15.

87. N.Y.—Goldberger-Rasbin, Inc. v 74 Second Ave Corporation, 169 N.E. 405, 252 N.Y. 336
40 C.J. p 77 note 46.

Breach of contract

(1) Where not specifically provided for by statute, it has been held that no lien may be acquired for loss of profits by reason of a breach of contract.—Schenectady Homes Corporation v Greenside Painting Corporation, 37 N.Y.S.2d 53

(2) However, work performed and materials furnished at time of notice to contractor of default and loss of profits by manufacturer of articles tendered at job were held proper items for mechanic's lien.—Nieman v Nadelman, 240 N.Y.S. 47, 136 Misc 336, affirmed 243 N.Y.S. 811, 229 App Div. 865.

88. U.S.—In re Kent Refining Co., D.C.Mich., 20 F.Supp. 662.
40 C.J. p 87 note 2.

Transportation of workmen see supra § 34.

89. Md.—Schneider v Menaquale, 49 A.2d 330

90. Iowa—Crane Co v Westerman, 8 N.W.2d 412, 232 Iowa 1894

Mo—Fagan v Brock Motor Car Co., App., 282 S.W. 135.

Mont—Caird Engineering Works v Seven-Up Gold Mining Co., 111 P.2d 267, 111 Mont 471

N.J.—West Jersey & S S R Co. v County of Cape May, 135 A. 74, 100 N.J.Eq 181

Ohio—Indemnity Ins Co of North America v Portsmouth Ice, Coal & Building Material Co., 172 N.E. 152, 122 Ohio St 439

Wash.—Siler Mill Co v Charles Nelson Co., 162 P. 590, 94 Wash. 477.
40 C.J. p 87 note 3

91. N.J.—West Jersey & S S R Co v County of Cape May, 135 A. 74, 100 N.J.Eq 181
40 C.J. p 88 note 4.

92. Cal.—Hayward Lumber & Investment Co v Ross, 90 P.2d 135, 32 Cal App 2d 455

Kan.—Southwestern Electrical Co v. Hughes, 30 P.2d 114, 139 Kan 89.
Mo—Fagan v Brock Motor Car Co., App., 282 S.W. 135.

Ohio—Indemnity Ins Co. of North America v Portsmouth Ice, Coal & Building Material Co., 172 N.E. 152, 122 Ohio St 439

Wash.—Siler Mill Co v Charles Nelson Co., 162 P. 590, 94 Wash. 477
40 C.J. p 88 note 5.

93. Cal.—Wilson v. Nugent, 57 P. 1008, 125 Cal 280—Hayward Lumber & Investment Co v Ross, 90 P.2d 135, 32 Cal.App.2d 455.

94. Md—House v. Fissell, 51 A.2d 669

95. Md—House v. Fissell, supra.

amount,⁹⁶ but under other statutes a lien may be allowed irrespective of the amount of the claim.⁹⁷ It has been held that no lien may be allowed for materials of uncertain value or amount.⁹⁸

C. CONTRACT WITH, OR CONSENT OF, OWNER

§ 52. Necessity and Effect

As a general rule, in order that a mechanic's lien may be acquired for improvements on realty, the owner must, in law or in fact, authorize the improvement, or be estopped to deny such authorization.

As a general rule, in order that a mechanic's lien may be acquired for improvements on realty, the owner must, in law or in fact, authorize the improvement, or be estopped to deny such authorization.⁹⁹ Such a lien may not be acquired against the property of an owner who had no knowledge of the improvement,¹ or, under some statutes, had no knowledge that the lien claimant furnished the materials used.² Mere knowledge of the improvement, in the absence of statute providing otherwise, will not subject the owner's title or interest to a lien for labor or material used in its construction,³ nor is it alone sufficient to enable a claimant to acquire a lien that the work done or material furnished en-

hances the value of the property.⁴ Under some statutes, however, the owner's consent is not required to authorize a lien for alterations or repairs whenever the total cost thereof exceeds a specified amount.⁵

A mechanic's lien may be acquired for materials furnished or labor performed pursuant to a contract with the owner of the property or interest sought to be charged or his agent or statutory representative,⁶ although not under circumstances other than those contemplated by the statutes.⁷ Also, such a lien may be established where, subsequent to the performance of the work or the furnishing of materials, the owner ratifies the contract and acknowledges liability therefor.⁸ Under various statutes, some of which expressly so provide, a contract with the owner or his agent or other designated representative is essential to the establishment of such a lien.⁹

96. Conn.—*Marchetti v Sleeper*, 133 A 845, 100 Conn 339

Pa.—*Boalton v Phillips*, 51 Pa Dist. & Co 694, 60 Montg Co. 181
40 C.J. p 77 note 57.

97. Md.—*Watts v Whittington*, 48 Md 353

98. Cal.—*Hammond Lumber Co v. Pile*, 262 P 715, 203 Cal 624

99. Ala.—*Harden v Wood Lumber Co*, 178 So 540, 235 Ala 310

Conn.—*Drzen Lumber Co v. Jente*, 155 A 505, 113 Conn 344

Ga.—*Georgia State Sav Ass'n v Wilson*, 5 S E 2d 14, 189 Ga 21—*Morris v. West*, 153 S E 361, 170 Ga. 550

Mo.—*Mundet Cork Corporation v Three Flowers Ice Cream Co*, App. 146 S W 2d 678

N.C.—*Honeycutt v Kenilworth Development Co*, 154 S E 628, 199 NC 373

Tex.—*Throckmorton v Robinson*, Civ App, 83 S W 2d 696.

Mistake

A materialman has no right to a lien for materials furnished to one who through mistake erects an improvement on the land of another—*Honeycutt v Kenilworth Development Co*, 154 S E 628, 199 N.C. 373

1. La.—*Yellow Pine Lumber Co. v. Maniscalco*, App. 9 So 2d 320.

Or.—*Pacific Spruce Corporation v Oregon Portland Cement Co*, 286 P 520, 133 Or 223, 72 A L R 1507, rehearing denied 289 P. 489, 133 Or 223, 72 A L R 1507

2. Me.—*J W White Co v Griffith*, 145 A 134, 127 Me 516

3. Ga.—*Georgia State Sav Ass'n v Wilson*, 5 S E 2d 14, 189 Ga 21
N.Y.—*Sullivan v O'Dea Realty Corporation*, 274 N Y S 750, 153 Misc 634

N.C.—*Brown v Ward*, 20 S E 2d 324, 221 NC 314

4. Mont.—*Dewey Lumber Co v McQuirk* 30 P 2d 475, 96 Mont 294

Utah.—*Belnap v Condon*, 97 P 111, 34 Utah 213, 23 L R A N S. 601

5. N.J.—*Weinstein v V & J Realty & Investment Co.*, 21 A 2d 862, 127 N J Law 198

Unauthorized repair

Claimant's right to a lien is not affected by the fact that the person who ordered the work done had no authority to do so—*Weinstein v V & J. Realty & Investment Co*, supra

6. Ga.—*Crane Co v Hirsch*, 7 S E 3d 88, 61 Ga App 632

Ill.—*Douglas Lumber Co v. Chicago Home for Incurables*, 43 NE 2d 535, 380 Ill 87.

Ky.—*T W Spinks Co. v Pachoud Bros.*, 92 S W 2d 50, 263 Ky 119

Me.—*J W White Co v. Griffith*, 145 A 134, 127 Me 516.

N.J.—*J D Loizeaux Lumber Co. v Steinberg*, 131 A 181, 102 N J Law 15

N.C.—*Honeycutt v Kenilworth Development Co*, 154 S E 628, 199 NC 373

Homestead

(1) A lien on a homestead may be

given in a contract providing for the work and material—*Lippencott v York*, 34 S W. 275, 86 Tex 276

(2) However, although a contract for improvements on a homestead provides for a "mechanic's lien," it will not be held to be a contract for a mere statutory lien unless the contract shows an intention so to limit it—*Lippencott v York*, supra

Use under different contracts

Use of material's confusedly under original and supplemental contracts did not relieve owner formally accepting building from liability to materialmen—*Bell v. Lieber*, 125 So 271, 169 La 731.

Temporary refusal to deliver

Where lumber company for a time refused to deliver any more material to defendant when it became known that loan would not be granted in full, but later lumber company furnished additional material, the original contract was held not ended for purpose of determining extent of lumber company's mechanics' lien—*Mawson-Peterson Lumber Co. v Sprinkle*, 140 P 2d 588, 59 Wyo. 334, 147 A L R 1089.

7. Fla.—*Harper Lumber & Mfg Co v Teate*, 125 So 21, 98 Fla 1055.

8. Cal.—*Dixon v Fredericks*, 19 P. 2d 372, 129 Cal App 703

9. Ala.—*Buettner Bros. v Good Hope Missionary Baptist Church*, 18 So 2d 75, 245 Ala 553—*Becker Roofing Co v Hanks*, 155 So 360, 228 Ala 685—*Byrum Hardware Co v Jenkins Bldg. Supply Co.*, 147

or to the establishment of such a lien against a homestead¹⁰ or the land of a married woman,¹¹ or where the claimant is in privity with the owner.¹² A contract with the owner has been held essential to the establishment of a mechanics' lien under some statutes not expressly providing therefor, such as statutes providing that the labor shall be performed or the materials furnished at the instance¹³ or request¹⁴ of the owner. Under some statutes, if a

claim for a lien is not timely filed, a contract is essential to its acquisition.¹⁵

A contract, however, is not essential under all statutes to the acquisition of a mechanic's lien.¹⁶ Under varying statutes it may be acquired generally, or except as to specified property where a contract is expressly required, where the improvement is made at the instance,¹⁷ or request,¹⁸ or by the au-

So 411, 228 Ala. 448—Sturdavant v First Ave Coal & Lumber Co, 122 So 178, 219 Ala 303
Ark.—Hawkins v Faubel, 31 SW 2d 401, 182 Ark 304—Morehart v A. B. Beeler Lumber Co, 4 SW 2d 29, 176 Ark 818.
Colo.—Johnston v Bennett, 40 P. 847, 6 Colo App 382
Del.—E J Hollingsworth Co v Continental-Diamond Fiber Co, 176 A 366, 6 WW Harr 303
Fla.—Spinney v Sanford-Orlando Kennel Club, 166 So 559, 123 Fla. 113—Hogue v D N. Morrison Const Co. of Virginia, 158 So 877, 115 Fla. 293, 95 ALR 357—Tallahassee Variety Works v. Brown, 144 So 848, 106 Fla 599, reversing 138 So 759, 106 Fla 599.
Iowa.—Perkins Supply & Fuel Service v Rosenberg, 232 NW 371, 226 Iowa 27—Finn v Grant, 278 NW 225, 224 Iowa 527—Nolan v. Wick, 254 NW 80, 218 Iowa 660—Southern Surety Co. v. York Tire Service, 227 NW 608, 309 Iowa 104—Eclipse Lumber Co v. Murphy Co, 231 NW 930, 206 Iowa 1280—Queal Lumber Co v Lipman, 206 NW 627, 200 Iowa 1376—Schoeneman Lumber Co v Davis, 205 NW 502, 200 Iowa 373
Kan.—F. M. Spalding Lumber Co v Slusher, 246 P 999, 121 Kan 155
Md.—Blenard v Blenard, 45 A 2d 335, 185 Md 548—Moreland v Meade, 159 A 101, 162 Md 95
Mass.—Adams & Powers Co v Seder, 154 NE 184, 257 Mass 453
Mont.—Morin Lumber Co. v Person, 99 P 2d 206, 110 Mont 114—Dewey Lumber Co v McQuirk, 30 P 2d 475, 96 Mont 294
Neb.—Barry v Barry, 26 NW 2d 1, 147 Neb 1067—Platner Lumber Co v Krug Park Amusement Co., 270 NW 473, 131 Neb 331
NJ.—J D Loizeaux Lumber Co v. Steinberg, 131 A 131, 102 NJ Law 16.
N.C.—Brown v Ward, 20 SE 2d 324, 221 N.C. 344.
Okla.—Caldwell v Overall, 99 P 2d 496, 186 Okl 616—Rogers v Crane Co, 68 P 2d 520, 180 Okl 139—Deka Development Co v Fox, 39 P 2d 143, 170 Okl 338—Whitheld v Frensley Bros Lumber Co, 283 P 985, 141 Okl 44—T. J Stewart Lumber Co. v. Derry, 253 P 485, 122 Okl 208—Treese v Spurrier

Lumber Co, 242 P 285, 115 Okl 188
Or.—Gabriel Powder & Supply Co v Thompson, 97 P 2d 182, 168 Or 623
Pa.—Clothier v Kniffen, Com.Pl., 36 Luz Leg Reg 241
Tenn.—Allen v Brown, 14 Tenn App 405
Wis.—Fraser Lumber & Manufacturing Co v Laeyendecker, 9 NW 2d 97, 243 Wis 25—Delap v Parcell, 283 NW 305, 230 Wis 152.
40 C.J p 90 note 29, p 91 note 34, p 400 note 6
Must conform to contract
In order for materialman to acquire a lien, the material furnished must conform to the contract between the builder and the owner—A M Lewin Lumber Co v Heatt, 43 NE 2d 508, 69 Ohio App. 353
Ratification
Materialman's lien is based on contract, express or implied, or effectual ratification of contract—Sturdavant v First Ave Coal & Lumber Co, 122 So 178, 219 Ala 303.

Where purchaser agreed not to charge owner
A lien cannot be acquired for materials furnished on the order of one who, unknown to the materialman, had agreed with the owner to pay for the materials, so that there was no contract between the materialman and the owner—Manning v Bienville Lumber Co, 152 So. 385, 169 Miss 643

10. Iowa.—Aalfs Wall Paper & Paint Co v. Bowker, 162 NW. 33, 179 Iowa 726.
Tex.—Kepley v Zachry, 116 SW 2d 699, 131 Tex 554, opinion supplemented 131 SW 2d 595, 131 Tex 554—United Sav Bank of Detroit v Frazier, Civ App, 116 SW 2d 933, error dismissed—Farm & Home Savings & Loan Ass'n of Missouri v Muhl, Civ App, 37 SW 2d 316, error refused

Simulated lien contract
A simulated lien contract is invalid as a lien against a homestead—Marinick v Continental Southland Savings & Loan Ass'n, Tex Civ App, 97 SW 2d 480

11. Tenn.—Bell Bros. & Co v. Arnold, 68 SW 2d 958, 17 Tenn App 493

Special contract with the owner or his agent is necessary—Bell Bros & Co v Arnold, supra.

12. Fla.—Harper Lumber & Mfg Co v Teate, 135 So 21, 98 Fla 1055.

13. Colo.—Stewart v. Talbott, 146 P. 771, 58 Colo. 563, Ann Cas 1916C 1116.

14. Cal.—McCray v Wotkins, 182 P 972, 41 Cal App 449

15. La.—Haffner & Taylor v. Perloff, 141 So 377, 174 La 637
Necessity for filing claim for lien generally see infra § 131.

16. **Technical contract not required**
Materialmen and laborers may be secured by mechanics' liens on land improved or affected by their material or labor, without respect to technical and ancient concepts of privity of contract—Hartford Accident & Indemnity Co v N O Nelson Mfg Co, Miss, 54 S Ct. 392, 391 U S 852, 78 L Ed 840

17. Or.—Potter v. Davidson, 20 P 2d 409, 143 Or. 101, rehearing denied 21 P 2d 785, 143 Or. 101—Roberts v Gerlinger, 263 P. 916, 124 Or 461.
40 C.J p 90 note 30.

18. Idaho.—Parker v. Northwestern Inv. Co, 255 P 307, 44 Idaho 68.
La.—Berg v Schneider, App, 12 So 2d 501—Patterson v Lumberman's Supply Co., App. 167 So 471
NY—Eno v Rapp, 7 NYS 2d 513, 169 Misc 473—Majestic Tile Co v Nicholls, 291 NYS. 551, 161 Misc 231—B & F Concrete Co. v. Colton Realty Corporation, 17 N. YS 2d 593

Or.—Potter v. Davidson, 20 P 2d 409, 143 Or 101, rehearing denied 21 P 2d 785, 143 Or. 101.
40 C.J p 90 note 31.

After contractor's abandonment of contract

Owner is personally liable and his property is subject to liens for labor and materials furnished on his personal order after he took over management of the work on the builder's abandonment of the construction—Christian v. Bremer, 34 SE 2d 40, 199 Ga. 285.

thority,¹⁹ or with the consent,²⁰ of the owner or his agent or statutory representative, or, where the improvement is placed on the premises under contract, with one the owner has authorized or knowingly permitted to improve the property.²¹

Contractual provision against lien A provision in the contract against filing mechanic's liens, which is coupled with a promise to obtain a loan on the completed improvement to be used to pay for it, will not prevent a lien from being acquired where the owner, with knowledge that the loan could not be obtained, permitted the improvement to be constructed.²²

Personal liability. It has been held that it is not necessary, in order to constitute the consent contemplated by statute, that the owner shall have entered into an agreement or contract, express or implied, to pay or become personally liable for the work done or materials furnished,²³ although there is also some authority to the contrary.²⁴ Personal liability on a mechanic's lien generally is discussed *infra* § 263.

§ 53. — Extras

The claimant's right to a lien extends to extras subsequently ordered under the express terms of the contract or as an incident to the whole enterprise, but not where the contract provisions do not cover, or preclude, extras, or where the owner did not order or otherwise authorize them.

As a general rule extras subsequently ordered will be covered by the lien where the contract is for a building generally,²⁵ or for specifically listed items,²⁶ and the extras are an incident merely of the whole enterprise and material to its completion²⁷ and not wholly outside of the contract,²⁸ and particularly where provision for extras is made in the original contract²⁹ or in an extension or modification thereof.³⁰ The lien will not cover extras, however, where there is no contract provision covering the extra work or material,³¹ or where there is such a provision, but conditions attached thereto have not been complied with³² or waived.³³ Furthermore, under some statutes, a lien on a homestead has been held not to extend to extras and additions ordered by the husband without the written consent of the wife, and which materially increase the cost of the improvements.³⁴

19. Mo—Mundet Cork Corporation v Three Flowers Ice Cream Co., App, 146 S.W.2d 678
40 C.J. p 91 note 32

20. Ga—Georgia State Sav Ass'n v. Wilson, 5 S.E.2d 14, 189 Ga. 21—Williams v Brewton, 152 S.E. 441, 170 Ga. 164

Ky—T W Spinks Co v Pachoud Bros, 92 S.W.2d 50, 268 Ky. 119.

La—Berg v Schneider, App, 13 So. 2d 501—Patterson v Lumberman's Supply Co., App, 167 So. 471

Me—J W White Co v. Griffith, 145 A. 134, 127 Me. 516

NY—Bingham v Duany, 150 N.E. 507, 241 N.Y. 435—Eno v Rapp, 7 N.Y.S.2d 513, 169 Misc. 473—C. Wilson's Plumbing Shop on Wheels v Trustees of Dartmouth College, 6 N.Y.S.2d 671, 168 Misc. 376—Majestic Tile Co v Nicholls, 291 N.Y.S. 551, 161 Misc. 231—Sullivan v O'Dea Realty Corporation, 274 N.Y.S. 760, 153 Misc. 634—B & F Concrete Co. v Colton Realty Corporation, 17 N.Y.S.2d 593

W.Va—Corpus Juris cited in Mahan v. Bitting, 137 S.E. 889, 891, 103 W. Va. 449, 62 A.L.R. 689.

40 C.J. p 91 note 33.

What constitutes consent see *infra* § 73.

Constitutional and statutory provisions granting a lien have been held inapplicable in the absence of notice to, and consent by, the owner—R. B. Spencer & Co v. Thorp Springs Christian College, Tex Civ App., 41 S.W.2d 482, error dismissed.

Contract unnecessary

A contract is not necessary where, under a statute authorizing a lien in such a case, labor is performed or materials are furnished with the consent of the owner—Berman Bldg Corporation v Rafferty, 236 N.Y.S. 67, 227 App.Div. 630—40 C.J. p 91 notes 39, 40

Intent of statute is to give interest in property to contractor making improvement thereon with owner's consent or at his request—Rapid Fireproof Door Co v. Largo Corporation, 154 N.E. 531, 243 N.Y. 482, motion denied 154 N.E. 898, 244 N.Y. 583

21. Ill—Douglas Lumber Co v Chicago Home for Incurables, 43 N.E. 2d 535, 380 Ill. 87

22. Kan—Hallard v Kinney, 10 P. 2d 836, 135 Kan. 323

23. NY—Sullivan v. O'Dea Realty Corporation, 274 N.Y.S. 760, 153 Misc. 634
40 C.J. p 91 note 41

24. Conn—Avery v. Smith, 113 A. 813, 96 Conn. 323—Peck v Brush, 98 A. 561, 90 Conn. 651.

25. La—Haffner & Taylor v. Perloff, 141 So. 377, 174 La. 687

Pa—Eisenberg v Wolf, 86 Pa. Super. 169

40 C.J. p 92 note 45.

26. Wis—Venzke v. Magdanz, 9 N.W.2d 604, 343 Wis. 155

27. Pa—Eisenberg v Wolf, 86 Pa. Super. 169.

28. Colo—Tabor v. Armstrong, 12 P. 157, 9 Colo. 285

29. La—Haffner & Taylor v. Perloff, 141 So. 377, 174 La. 687.
40 C.J. p 92 note 46

30. Tex—Dallas Nat Bank v. Peaslee-Gaulbert Co., Civ App., 35 S.W.2d 221, error dismissed
40 C.J. p 92 note 47.

31. Mo—Ward v. Nolds, 168 S.W. 596, 259 Mo. 285
40 C.J. p 92 note 48.

Order of owner

(1) Extras which are not ordered by the owner or his agent are not included within the lien—Edward Edinger Co. v. Willis, 260 Ill. App. 106

(2) Under some statutes, extras are included within the lien where they are furnished in compliance with the wishes of the owner or are so great or patent they cannot be supposed to have been made without the knowledge of the owner—Groner v Cavender, 133 So. 825, 16 La. App. 565.

32. Mich—Boots v. Steinberg, 58 N.W. 657, 100 Mich. 134.
40 C.J. p 92 note 49.

33. Wis—Coorsen v. Ziehl, 79 N.W. 562, 103 Wis. 331—Siebrecht v. Hogan, 75 N.W. 71, 99 Wis. 427.

34. Tex—Brown v. Rice, Civ App., 290 S.W. 784, affirmed Rice v. Brown, Com App., 296 S.W. 495

Everything which must be done and furnished in order duly to perform the contract is covered by the contract price, and does not give rise to a lien as extras.³⁵

§ 54. — Damages

A mechanic's lien will not be allowed for unliquidated damages for breach of contract.

A mechanic's lien will not be allowed for unliquidated damages for breach of contract.³⁶ Thus, there is no lien for damages sustained by the contractor by reason of a breach of the contract by the owner,³⁷ or damages of protest on an acceptance given for work and labor.³⁸ Neither is a subcontractor entitled to a lien for damages and expense incurred through idleness,³⁹ or because of work made necessary by the default or negligence of the principal contractor,⁴⁰ or for breach of contract on his part.⁴¹

It has been held, however, that a mechanic's lien may be acquired for damages arising from misrepresentation as to the value of property constituting part of the consideration to be paid for the improvement, since in such case the damages are liquidated and certain.⁴² Also, it has been held that, where a contract for a public improvement provides for reimbursement of the contractor for loss sustained by him by reason of the failure of the other party to comply with certain provisions of the contract, so-called damages which are in fact due the contractor as reimbursements in accordance with

provisions of the contract are money due the contractor under the contract, within the meaning of a statute allowing a lien on the money due the contractor under the contract.⁴³

§ 55. — Subsequent Marriage or Death of Owner

A claimant's right to a mechanic's lien for improvements made on the property of another is not affected by the subsequent marriage or death of the owner.

The death of the owner of the property, with whom the contract for an improvement was made, does not affect the right of lien claimants to perfect and enforce their liens.⁴⁴ Also, where a feme sole contracts for improvements on her lands, her subsequent marriage before the improvements are completed does not in any way affect the mechanics' liens therefor.⁴⁵

§ 55. Who May Contract or Consent

Only such persons as are within the provisions of the statute can subject property to a mechanic's lien under contracts for its improvement.

Since mechanics' liens for materials furnished or labor performed in the improvement of property exist purely by virtue of statutes, as discussed supra § 1, only such persons as are within the provisions of the statute can subject property to such a lien under contracts for its improvement.⁴⁶ Likewise, since, as discussed supra § 1, the lien is a mere incident to the legal liability to pay the debt, it is necessary that the contracting owner should have the capacity to make a valid contract.⁴⁷ The

35. Wis.—Venzke v Magdanz, 9 N. W. 2d 604, 243 Wis 155.

40 C.J. p 92 note 51

36. Mo.—Rust Sash & Door Co. v Brvant, App. 124 S.W.2d 544, transferred see Rust Sash & Door Co. v Gate City Bldg Corporation, 114 S.W.2d 1023, 342 Mo 206.

N.Y.—Schenectady Homes Corporation v Greendale Painting Corporation, 37 N.Y.S.2d 53.

Pa.—Leiby v Erdman, Com Pl. 20 Lehigh Co.L.J. 153, 57 York Leg Rec 51.

Wash.—Corpus Juris cited in Terry v United States Fidelity & Guaranty Co., 82 F.3d 632, 534, 196 Wash 206.

40 C.J. p 93 note 52.

Nature of claim generally see supra § 33.

Breach of contract

Right to mechanic's lien is not dependent on breach of contract—Cain v Rca, 166 S.E. 478, 159 Va. 446, 85 A.L.R. 945.

37. Mo.—Rust Sash & Door Co. v Bryant, App. 124 S.W.2d 544, transferred, see Rust Sash & Door Co. v Gate City Bldg. Corpora-

tion, 114 S.W.2d 1023, 342 Mo 206
40 C.J. p 92 note 51

Ca.—Idaho—Bradbury v. Idaho & Oregon Land Impr Co., 10 P. 620, 2 Idaho, Hasb 239, affirmed 10 S. Ct 177, 132 U.S. 509, 83 L.Ed 433.

33. Colo.—Tabor v Armstrong, 12 P. 157, 9 Colo 285.

Wis.—Siebrecht v. Hogan, 75 N.W. 71, 99 Wis 437.

40. Colo.—Tabor v. Armstrong, 12 P. 157, 9 Colo 285.

Wis.—Siebrecht v. Hogan, 75 N.W. 71, 99 Wis 437.

41. Wis.—Seeman v Biemann, 84 N.W. 490, 106 Wis 365.

40 C.J. p 92 note 58

42. Cal.—Schulte v. Buben, § P.2d 843, 215 Cal 172, 81 A.L.R. 764.

43. Ill.—Hood v Community High School Dist No. 304, 228 Ill App 451.

44. Pa.—In re Baker's Estate, 47 Pa Dist. & Co. 444, 48 Lanc.L Rev 365.

40 C.J. p 93 note 61

45. Ind.—Caldwell v. Asbury, 29 Ind 451.

Contract by married women generally see infra § 63.

43. Ala.—Bvrum Hardware Co. v. Jenkins Bldg Supply Co., 147 So. 411, 226 Ala 448.

Colo.—Johnston v Bennett, 40 P. 847, 6 Colo App 363.

Iowa.—Perkins Supply & Fuel Service v Rosenberg, 282 N.W. 371, 226 Iowa 27.

Kan.—F. M. Spalding Lumber Co v Slusher, 216 P. 999, 121 Kan 155.

Mo.—Badger Lumber & Coal Co v Pugsley, 61 S.W.2d 425, 227 Mo App 1203.

Church

Statute prescribing method by which church may voluntarily incur or sell property does not prohibit it from entering into contract with laborers or materialman for improving property, as regards validity of mechanic's lien—Cain v Rca, 166 S.E. 478, 159 Ark. 446, 85 A.L.R. 945.

47. N.D.—Viker v Beggs, 208 N.W.

383, 53 N.D. 858.

40 C.J. p 93 note 66.

power of an owner to make contracts is not exhausted when he has entered into an agreement with one person which contains a covenant against liens,⁴⁸ he may make new contracts with other persons.⁴⁹

§ 57. — Ownership

As a general rule, in order that a mechanic's lien may be established, the contract, consent, authorization, or request pursuant to which the materials were furnished or labor was performed must have been made with or by the owner of the property or interest sought to be charged.

In general, in order that a mechanic's lien may be established, the contract, consent, authorization, or request pursuant to which the materials were furnished or labor was performed must have been made with or by the owner of the property or interest sought to be charged,⁵⁰ or, as discussed infra § 59, his agent or authorized representative. Such

person must have some kind of ownership,⁵¹ and ordinarily he must have some estate or interest in the land,⁵² which ownership must exist at the time the contract, consent, authorization, or request was entered into or made,⁵³ and at the time the lien attached,⁵⁴ that is, a mechanic's lien on land cannot be acquired under a contract with, or at the instance, request, authorization, or consent of, a person who, at the time thereof, has no right, title, or interest in the land and who does not act with the consent of or as the agent of the true owner.⁵⁵ It has been held immaterial that he subsequently acquires title to the property.⁵⁶ However, under statutes providing therefor a lien may be acquired for materials furnished or labor performed in the improvement of property for one who acquired title to the realty subsequent to the commencement of the improvement,⁵⁷ or the making of the contract for the

Capacity of:

Infants see infra § 64

Married women see infra § 63

48. Pa.—Spring Brook Lumber Co. v Watkins, 26 Pa Super 199

49. Pa.—Spring Brook Lumber Co v Watkins, supra

50. US—Credit Finance Corporation v Hale & Perry, CCA Colo, 66 F 2d 357

Ala.—Byrum Hardware Co v Jenkins Bldg Supply Co, 147 So 411, 326 Ala 448

Ark.—Hawkins v Faubel, 31 S.W 2d 401, 182 Ark 304—Sebastian Building & Loan Ass'n v Minten, 27 S W 2d 1011, 181 Ark 700—Morehart v A B Beeler Lumber Co, 4 S W 2d 29, 176 Ark 818

Del.—E J Hollingsworth Co v Continental-Diamond Fiber Co, 175 A 266, 6 W W Harr 303

D C—Deming v Wardman Const Co, 39 F 2d 504, 59 App DC 254

Ga.—Rutland Contracting Co v Sallie E Gay Estate, 18 S E 2d 835, 193 Ga 468.

Ind.—Ohio Oil Co v Fidelity & Deposit Co of Maryland, 42 N.E 2d 406, 112 Ind App 452—Jackson v J A Franklin & Son, 28 N.E 2d 23, 107 Ind App 38.

Iowa.—Schoeneman Lumber Co v Davis, 205 NW 502, 200 Iowa 878

La.—Berg v. Schneider, App, 12 So 2d 501.

Okl.—Caldwell v Overall, 99 P 2d 496, 136 Okl 615—Deka Development Co v Fox, 39 P 2d 143, 170 Okl, 228—Whitfield v. Frenshley Bros Lumber Co, 283 P. 935, 141 Okl 44—T J Stewart Lumber Co v. Derry, 253 P 485, 122 Okl 208 —Treese v. Spurrier Lumber Co, 242 P. 285, 115 Okl 188.

Contract with, or consent, authorization, or request by, agent of owner see infra § 59.

Lien is predicated on existence of authority from the owner to the contractor or other person to have the improvement made—Rutland Contracting Co v Sallie E Gay Estate, 18 S E 2d 835, 193 Ga 468

Necessity to supply materials to owner

Materialman's lien to be enforced required proof that labor done or materials furnished were supplied to owner of realty or his authorized agent—Smith v. Turner, 151 S E 368, 169 Ga 641.

51. W Va.—Mahan v Bitting, 137 S E 889, 103 W Va 449, 52 A L R 689

40 C J p 94 note 32

Reputed owner may do nothing creating lien on lot for improvement thereon.—Parker v. Northwestern Inv Co, 255 P 307, 44 Idaho 66

52. W Va.—Mahan v Bitting, 137 S E 889, 103 W Va 449, 52 A L R 689

40 C J p 94 note 33

53. Ala.—Benson Hardware Co v Jones, 136 So 441, 223 Ala 287

—Sturdavant v First Ave. Coal & Lumber Co, 122 So 178, 219 Ala 303

Ark.—Sebastian Building & Loan Ass'n v. Minten, 27 S W 2d 1011, 181 Ark 700.

D C—Deming v. Wardman Const Co, 39 F 2d 504, 59 App DC 254

Iowa.—Eclipse Lumber Co. v Murphy Co, 221 N.W. 930, 206 Iowa 1280.

Former owner

Request by former owner is insufficient—Alexander Hendry Co v Moorar, 242 Ill.App. 516.

54. US—Brace v Gauger-Korsmo Const Co, CCA Ark, 36 F 2d 661, certiorari denied 50 S.Ct. 333, 281 U.S. 738, 74 L Ed 1158.

W Va.—Mahan v Bitting, 137 S E 889, 103 W Va 449, 52 A L R 689

55. Ala.—Byrum Hardware Co v Jenkins Bldg Supply Co, 147 So 411, 326 Ala 448

D C—Deming v Wardman Const Co, 39 F 2d 504, 59 App DC 254

Ga.—Rutland Contracting Co v. Sallie E Gay Estate, 18 S E 2d 835, 193 Ga 468—Smith v Turner, 151 S E 368, 169 Ga 641

Minn.—Peterson v Lundberg, 206 N W 641, 165 Minn 463

W Va.—Corpus Juris cited in Mahan v Bitting, 137 S E 889, 391, 103 W Va 449, 52 A L R 689

40 C J p 94 note 34

Trespasser

Lien cannot be acquired for improvements made by mere trespasser without any interest in the property, possessory or otherwise

Miss.—Cheers Floor & Screen Co v Gidden, 181 So 426, 159 Miss 288

Tex.—Morrison v State Trust Co, Civ App, 274 S.W. 341, judgment reversed on other grounds State Trust Co v Morrison, Com App, 282 S W 214.

56. Ark.—Sebastian Building & Loan Ass'n v Minten, 27 S W 2d 1011, 181 Ark 700

D C—Deming v Wardman Const Co, 39 F 2d 504, 59 App DC 254.

NY—J Adelman, Inc., v Church Extension Committee of Presbytery of New York, 241 N.Y.S. 197, 136 Misc 810

W Va.—Corpus Juris cited in Mahan v Bitting, 137 S E 889, 391, 103 W Va 449, 52 A L R 689

40 C J p 94 note 35.

Attaching of lien to larger interest subsequently acquired see infra § 193

57. Mich.—Winkworth Fuel & Supply Co. v. Bloomsbury Corporation, 253 N.W. 304, 266 Mich. 293.

improvement with the owner,⁵⁸ or the execution of a mechanic's lien contract,⁵⁹ and under some statutes a lien may be acquired on the building or improvement under a contract with a person who is the owner of the building or improvement, but has no legal title to the land⁶⁰ In the absence of actual or constructive notice of a change therein a lien claimant is entitled to rely on the title as it stood at the time the contract for the improvement was made⁶¹ A lien may be acquired for materials purchased by the owner of realty in the name of a third person for use in the improvement of his property.⁶²

The owner of one of several adjoining lots cannot, in the absence of any agency, so contract as to charge the other lots with a lien,⁶³ or so as to charge his own lot with a lien for work done on the adjoining lots.⁶⁴ However, persons owning two or more lots in severalty may make a joint contract for the erection of buildings on the lots,⁶⁵ and, where

several persons contract for the improvement of land owned by one of them only, mechanics' liens will attach to the property⁶⁶

Statutory definitions of the term "owner," as used in mechanics' lien statutes, are controlling,⁶⁷ although in determining who are owners the term is given a broad meaning⁶⁸ Under some statutes an owner is a person who has any estate⁶⁹ or interest⁷⁰ in the property which is assignable, transferable, or conveyable,⁷¹ and which the court may order sold,⁷² or it has been held that he must have some interest, either legal or equitable, which may be enforced in the courts.⁷³ While a person who has a fee simple estate is an owner,⁷⁴ the term also includes a lesser estate,⁷⁵ a person need not be the absolute owner⁷⁶ or own a fee in the land⁷⁷ in order to be an owner within the meaning of the statutes.

It is sometimes declared generally that the owner of either the legal title⁷⁸ or that the owner of the

Mo—Jefferson County Lumber Co v Robinson, App, 121 SW 2d 209

58. N.J.—J D Louzeaux Lumber Co v Steinberg, 131 A 131, 103 N.J. Law 15

59. Tex.—Land Title Bank & Trust Co. v Witherspoon, Civ App, 128 SW 2d 71

60. Iowa.—Royal Lumber Co v Hoelsner, 201 NW 53, 199 Iowa 24.

Mich.—Winkworth Fuel & Supply Co v Bloomsbury Corporation, 253 NW 304, 266 Mich 298—Leverenz Lumber & Building Co v Rickels, 231 NW 112, 251 Mich 57

Miss.—Cheers Floor & Screen Co v. Gidden, 131 So. 426, 159 Miss 233

N.J.—J D. Louzeaux Lumber Co v. Steinberg, 131 A. 131, 103 N.J. Law 15

40 C.J. p 94 note 36
Lien as attaching to building alone see infra § 188.

61. Ala.—Sturdavant v. First Ave Coal & Lumber Co., 122 So. 178, 219 Ala 303

Unrecorded transfer to husband, who contracted for the improvement, and his wife by the entireties will not preclude claimant from acquiring lien—Leverenz Lumber & Building Co v. Rickels, 231 NW. 112, 251 Mich 57 .

62. Miss.—Stubbs v Capital Paint & Glass Co., 131 So 806, 160 Miss 822, suggestion of error overruled 135 So. 495, 160 Miss. 832.

63. Colo.—Johnston v. Bennett, 40 P. 847, 6 Colo App 362.

Kan.—F M Spalding Lumber Co v. Slusher, 346 P. 999, 121 Kan 155.

64. Colo.—Johnston v Bennett, 40 P 847, 6 Colo App 362

65. N.Y.—Mandeville v Reed, 13 Abb Pr. 173

40 C.J. p 94 note 39
Contract by joint owners see infra § 69

Filing joint claim as to properties of different owners see infra § 136
Lien as attaching to property of separate owners see infra § 189

66. Ill.—Roach v Chapin, 27 Ill 194.

40 C.J. p 94 note 30

67. Pa.—Hoekstra v Chambers-Wylie Memorial Presb Church, 51 Pa Super. 405

40 C.J. p 93 note 69

68. N.D.—Viker v Beggs, 208 NW 383, 53 ND 853

69. Okl.—Corpus Juris quoted in Pirtle v Brown, 284 P. 898, 901, 141 Okl 227

Pa.—Womer v. Gearhart, 16 Pa Dist & Co 359

40 C.J. p 93 note 70

70. Colo.—Bankers' Building & Loan Ass'n v Fleming Bros Lumber Co., 264 P 1087, 83 Colo 335

Okl.—Corpus Juris quoted in Pirtle v Brown, 284 P. 898, 901, 141 Okl 227.

Pa.—Womer v Gearhart, 16 Pa Dist. & Co 359

40 C.J. p 93 note 71

71. Colo.—Bankers' Building & Loan Ass'n v Fleming Bros Lumber Co., 264 P. 1087, 83 Colo 335

Okl.—Corpus Juris quoted in Pirtle v. Brown, 284 P. 898, 901, 141 Okl 227.

40 C.J. p 93 note 72.

72. N.Y.—Elio v. Rapp, 7 N.Y.S 2d 513, 169 Misc 473

Okl.—Corpus Juris quoted in Pirtle v Brown, 284 P. 898, 901, 141 Okl 227

40 C.J. p 93 note 73.

73. Ark.—Sebastian Building & Loan Ass'n v Minten, 27 SW 2d 1011, 181 Ark 700

74. Ky.—T W Spinks Co v Pachoud Bros., 92 SW 2d 50, 283 Ky 119

Or.—Schram v Manary, 260 P 214, 123 Or 354, modified on other grounds 262 P 263, 123 Or 354

40 C.J. p 93 note 74
75. Kan.—Miller v Bankers' Mortg. Co., 287 P 618, 130 Kan 543

Or.—Schram v Manary, 260 P 214, 123 Or 354, modified on other grounds 262 P. 263, 123 Or 354.

76. Iowa.—Royal Lumber Co v. Hoelsner, 201 NW 53, 199 Iowa 24.

N.M.—Freidenbloom v. Pecos Valley Lumber Co., 290 P. 797, 35 N.M. 154

40 C.J. p 93 note 75.

77. Kan.—Miller v Bankers' Mortg Co., 287 P 618, 130 Kan 543—Bond v. Westine, 278 P. 12, 128 Kan 370

Ohio—Choteau v. Thompson, 2 Ohio St 114

40 C.J. p 93 note 76

78. Ark.—Sebastian Building & Loan Ass'n v. Minten, 27 SW 2d 1011, 181 Ark 700

Fla.—Chapman v St Stephens Protestant Episcopal Church, 136 So 238, 105 Fla. 632, modified on other grounds 145 So. 757, 105 Fla. 633

40 C.J. p 93 note 77.

equitable title⁷⁹ is within the statute. Also, the word "owner" has been held to mean the party in interest who is the source of authority for the improvement.⁸⁰

Legal title to the land on which a mechanic's lien is claimed is not necessarily conclusive of the right to a lien on such land, or on a structure which has been constructed thereon,⁸¹ a contract with the holder of the mere legal title cannot give rise to a lien where the equitable owner is in open, visible, and exclusive possession,⁸² and a naked equitable right, which might be enforced in equity, to reinvest the grantor with the title which had passed, does not constitute him the owner within the statute.⁸³

Person benefited by improvement. In the absence of a statute so providing, the mere fact that an owner's property was benefited by the labor performed or materials supplied will not entitle claimant to a lien thereon.⁸⁴ However, under statutes so providing, the word "owner" includes every person for whose immediate use or benefit the building, erection, or improvement is made.⁸⁵ Some courts, construing such statutes in connection with other statutes, deem an owner to be a person who owns an interest in the land and for whose immediate use and benefit the improvement is made,⁸⁶ although,

where the statute also requires the owner to have capacity to contract, it has been held that the test of ownership is contractual capacity rather than actual enjoyment.⁸⁷ It has also been held that the purpose of the statute is to enlarge⁸⁸ rather than limit⁸⁹ the ordinary definition of the word "owner." Under the latter construction a person who owns both the building and the fee is an owner regardless of whether or not the improvement is made for his immediate benefit.⁹⁰

Notice and inquiry. A person contracting to furnish labor or materials for the improvement of property is charged with the duty of ascertaining the existence, nature, and extent of the title or interest, if any, of the person with whom he contracts.⁹¹ He is bound to take notice and is charged with knowledge of matters shown by the public records,⁹² and is put on inquiry by the fact that the title to the property is not in the name of the party making the contract,⁹³ or by knowledge that, although in possession, he is not the owner of the premises.⁹⁴ On the other hand, in the absence of knowledge or notice, the lien claimant is entitled to rely on the record title.⁹⁵ A lien claimant is not precluded from asserting a lien against property by negligence in failing to ascertain its true legal status where, al-

79. U.S.—Credit Finance Corporation v Hale & Perry, C.C.A. Colo., 66 F.2d 357.

Ark.—Sebastian Building & Loan Ass'n v Minten, 27 S.W.2d 1011, 181 Ark. 700—Bell v Koontz, 290 S.W. 597, 172 Ark. 370.

Colo.—Bankers' Building & Loan Ass'n v Fleming Bros Lumber Co., 264 P. 1087, 83 Colo. 335.

Fla.—Chapman v. St Stephens Protestant Episcopal Church, 136 So. 238, 105 Fla. 683, modified on other grounds 145 So. 757, 105 Fla. 683.

Hawaii—C B Hofgaard & Co v Smith, 30 Hawaii 882.

Pa.—Womer v Gearhart, 16 Pa. Dist. & Co. 359.

40 C.J. p. 93 note 78.

Equitable owner under dry trust see infra § 70.

80. N.M.—Freidenbloom v Pecos Valley Lumber Co., 290 P. 797, 35 N.M. 154.

Holder of power of attorney over property who had the sole financial interest therein, and at whose instance material was delivered, was held "owner" against whom materialman could proceed to establish mechanic's lien—Albert S Eastwood Lumber Co v Britto, 155 A. 354, 51 R.I. 406.

81. Colo.—Empire Land & Canal Co v Engley, 33 P. 153, 18 Colo. 388. Trustee see infra § 70.

82. N.H.—Marston v. Stickney, 60 N.H. 113.

Effect of possession generally see infra § 58.

83. Colo.—Griffin v. Seymour, 68 P. 809, 15 Colo. App. 487.

84. Kan.—F. M. Spalding Lumber Co v Slusher, 246 P. 999, 121 Kan. 155.

85. Iowa.—Murray v Kelroy, 275 N.W. 21, 228 Iowa 1331—Knapp v Baldwin, 238 N.W. 542, 213 Iowa 24—Schoeneman Lumber Co v Davis, 205 N.W. 502, 200 Iowa 873.

N.D.—Viker v Beggs, 208 N.W. 883, 53 N.D. 858.

40 C.J. p. 94 note 91.

86. N.D.—Johnson v. Soliday, 126 N.W. 99, 19 N.D. 483.

87. N.D.—Viker v Beggs, 208 N.W. 383, 53 N.D. 858.

88. Iowa.—Schoeneman Lumber Co v Davis, 205 N.W. 502, 200 Iowa 873—Royal Lumber Co v Hoelsner, 201 N.W. 53, 199 Iowa 24—Jones v Osborn, 79 N.W. 143, 108 Iowa 409.

40 C.J. p. 94 note 93.

89. Iowa.—Schoeneman Lumber Co v Davis, 205 N.W. 502, 200 Iowa 873—Jones v Osborn, 79 N.W. 143, 108 Iowa 409.

Mo.—Ward v. Nolde, 168 S.W. 596, 259 Mo. 285.

90. Mo.—Ward v. Nolde, supra.

91. Fla.—Chapman v St Stephens Protestant Episcopal Church, 136 So. 238, 105 Fla. 683, modified on other grounds 145 So. 757, 105 Fla. 683.

Pa.—Womer v. Gearhart, 16 Pa. Dist. & Co. 359.

40 C.J. p. 95 note 97.

92. Idaho.—Boise-Payette Lumber Co v Bickel, 245 P. 92, 42 Idaho 245, 45 A.L.R. 575.

Iowa.—Knapp v Baldwin, 238 N.W. 542, 213 Iowa 24—Royal Lumber Co v Hoelsner, 201 N.W. 53, 199 Iowa 24.

Okl.—Corpus Juris cited in Deka Development Co v Fox, 39 P.2d 143, 148, 170 Okl. 228.

Tex.—Harveson v Youngblood, Com. App. 38 S.W.2d 781.

Wash.—Pitcher v. Ravven, 242 P. 375, 137 Wash. 343.

40 C.J. p. 95 note 98.

Possession as notice see infra § 58.

Record of trust see infra § 70.

93. Tex.—Harveson v Youngblood, Com. App. 38 S.W.2d 781.

40 C.J. p. 95 note 99.

94. N.Y.—Hankinson v. Vantine, 46 N.E. 292, 152 N.Y. 20.

95. Mich.—Leverenz Lumber & Building Co. v. Ruckels, 281 N.W. 112, 251 Mich. 57.

though the owner did not own it at the time of the contract for the materials, he promised to pay for the materials and had an interest in the building from the beginning, and thereafter acquired title to the land⁹⁶

Estoppel. Where a contract for an improvement on land is made with one who has no interest or only a partial interest, in the land but who fraudulently represents that he is the owner, or has an interest therein, and the true owner stands by and connives at the representation of such person, the true owner will be estopped to assert his ownership so as to defeat the mechanics' liens claimed for such improvement.⁹⁷ However, in the absence of statutory provision to the contrary an estoppel does not result from mere knowledge by the owner of the making of the improvement, not accompanied by any concealment or deceit on his part,⁹⁸ or from the mere fact that his property was bettered by the improvement.⁹⁹ A claimant is not entitled to a lien on the ground of estoppel where he had notice from the public records that the person with whom he contracted,¹ or that the principal of an agent with whom he contracted² was not the owner.

§ 58. — Possession

Lien claimants must take notice of the rights of persons in possession, but ordinarily mere possession is not

of itself sufficient to enable one to subject realty to a mechanic's lien.

Persons about to furnish labor or materials for the making of an improvement on real estate must take notice of the rights of persons in possession,³ and the extent of their interest.⁴ However, possession of land is not necessarily conclusive of the right to a lien thereon.⁵ A lien does not arise under a contract for improvements with an occupant of land who has no interest therein and no authority from the owner to contract for improvements.⁶ Hence, a lien does not arise under a contract with a person wrongfully or fraudulently in possession;⁷ and the weight of authority supports the view that the mere fact that a person is in lawful possession and control of land does not give him authority to subject it to a mechanic's lien.⁸ However, in some cases mere possession has been held to involve such right and interest as makes the possessor an owner within the Mechanics' Lien Law, so that the lien attaches to such interest and possession and right of possession if such right exists.⁹ A mere momentary seizure is not sufficient to support a mechanic's lien.¹⁰

Actual or constructive possession. Where the person making the contract has some estate in the land and is in constructive possession, his estate can

96. Colo.—Jones v. Mawson-Peterson Lumber Co., 150 P.2d 795, 112 Colo. 493.

97. Mo.—Dean & Hancock v. O'Bryan, App., 290 S.W. 641.

40 C.J. p 95 note 2.

Estoppel of wife see infra § 63

Corporation

Subsidiary corporation whose officers and stockholders knew of or supervised construction of home that president of parent corporation contracted to have built on land to which subsidiary held title was estopped to deny that president owned the land—Moody-Seagraves Ranch v. Brown, Tex.Civ.App., 69 S.W.2d 840, error refused

Parent

A lien may be acquired for materials furnished to repair realty where the repairs were caused to be made with the knowledge and consent of the record owner by his son who was in possession and claimed an interest in the realty—Koon v. Bond-Howell Lumber Co., 151 So. 709, 113 Fla., 85.

98. Iowa.—Knapp v. Baldwin, 283 N.W. 542, 213 Iowa 24—Ellis v. Simpson, 202 N.W. 554, 199 Iowa 671.

Kan.—F. M. Spalding Lumber Co v. Slusher, 246 P. 999, 121 Kan. 155

Ky.—German v. Frey Planing Mill Co., 77 S.W.2d 414, 257 Ky. 128

Okl.—Corpus Juris quoted in Whitfield v. Frenley Bros Lumber Co., 283 P. 985, 990, 141 Okl. 44

Tenn.—Ford v. Whittle Trunk & Bag Co., 12 Tenn.App. 486

Tex.—Union Cent. Life Ins. Co. v. Austin, Civ.App., 52 S.W.2d 536, error refused.

Wash.—Pitcher v. Ravven, 242 P. 375, 137 Wash. 343

Duty to disclose ownership

Where a stranger to title or other person contracts or employs a third person to make improvements, owner of land is not bound to disclose to such third person the fact of his ownership—Rutland Contracting Co. v. Sallie E. Gay Estate, 18 S.E.2d 835, 193 Ga. 468.

99. Kan.—F. M. Spalding Lumber Co. v. Slusher, 246 P. 999, 121 Kan. 155.

1. Cal.—City Lumber Co. v. Brown, 189 P. 830, 46 Cal.App. 603

Tex.—Union Cent. Life Ins. Co. v. Austin, Civ.App., 52 S.W.2d 536, error refused.

2. R.I.—Sullivan v. Bradic, 118 A. 513, 44 R.I. 447.

3. Ind.—Gardner v. Sullivan Mfg. Co., 133 N.E. 31, 77 Ind.App. 60.

Possession

As evidence of ownership see infra § 810

By equitable owner as precluding lien from contract with holder of the mere legal title see supra § 57.

4. Ind.—Gardner v. Sullivan Mfg. Co., supra

5. Colo.—Empire Land & Canal Co. v. Engley, 33 P. 153, 18 Colo. 388

6. Ind.—U. S. Lumber & Supply Co. v. River Park Land & Improvement Co., 151 N.E. 354, 85 Ind.App. 140.

7. Utah.—Doyle v. West Temple Terrace Co., 152 P. 1180, 47 Utah 288

40 C.J. p 95 note 10.

8. Ark.—Sebastian Building & Loan Ass'n v. Minten, 27 S.W.2d 1011, 131 Ark. 700—Mansfield Lumber Co. v. Gravette, 5 S.W.2d 726, 177 Ark. 31.

40 C.J. p 95 note 11.

9. Ohio.—Dakin v. Lecklider, 19 Ohio Cir.Ct. 254, 10 Ohio Cir.Dec. 308.

40 C.J. p 95 note 12.

10. N.J.—Clark v. Butler, 32 N.J.Eq. 664.

be subjected to the lien,¹¹ unless some other person is in actual possession.¹²

§ 59. — Agency

A contract with the authorized agent of the owner is as a rule sufficient to render the property subject to a mechanic's lien.

A contract with the authorized agent of the owner is as a rule sufficient to render the property subject

to a lien,¹³ many of the statutes expressly providing for a mechanic's lien in favor of persons who furnish materials or perform labor in the construction of buildings under a contract with the agent of the owner.¹⁴ The contract must be within the scope of the agent's authority.¹⁵ A mere general agency¹⁶ or an agency for other purposes,¹⁷ such as an agency to sell¹⁸ or to look after¹⁹ the property, is not sufficient. However, if the agent has the power to

11. Pa.—Pruzman v. Bushong, 83 Pa 526

12. Pa.—Pruzman v. Bushong, supra

13. Ala.—Buettner Bros v. Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala. 553—Byrum Hardware Co v Jenkins Bldg Supply Co, 147 So 411, 226 Ala. 448—Sturdavant v First Ave Coal & Lumber Co, 122 So 178, 219 Ala 303

Ark.—Hawkins v Faubel, 31 SW 2d 401, 182 Ark. 304

Del.—E J. Hollingsworth Co v Continental-Diamond Fiber Co, 175 A. 266, 6 WW Harr 303

Fla.—Spinney v Sanford-Orlando Kennel Club, 166 So 559, 123 Fla 113

Iowa.—Perkins Supply & Fuel Service v Rosenberg, 282 NW. 371, 226 Iowa 27—Finn v Grant, 278 NW 225, 224 Iowa 527

Kan.—Kastner v Security Savings & Loan Ass'n, 256 P 939, 123 Kan 632—F M Spalding Lumber Co v Slusher, 246 P 999, 121 Kan. 155

Ky.—Ohio Oil Co v Smith-Haggard Lumber Co, 156 SW 2d 111, 288 Ky 278

La.—Patterson v Lumberman's Supply Co, App, 167 So 471

Mo.—Badger Lumber & Coal Co v Pugsley, 61 SW 2d 425, 227 Mo App 1203

Neb.—Barry v Barry, 26 NW 2d 1, 147 Neb 1067

Okl.—Caldwell v. Overall, 99 P 2d 496, 186 Okl 615—Mansfield Lumber Co v. First State Bank of Vian, 293 P 1079, 147 Okl 8, 79 A.L.R. 958—T J Stewart Lumber Co v. Derry, 253 P 485, 122 Okl 208

40 C.J. p 91 note 34, p 95 note 18
Necessity of contract with owner or agent see supra § 52

Particular persons as agents:

Administrator see infra § 61.

Contractor see infra § 105.

Husband see infra § 62.

Lessee see infra § 65

Vendee see infra § 71

Determination of meaning

In determining the meaning of the term "authorized agent" in mechanics' lien statute, all the law of agency with respect to binding a party to the act of another, particularly as to the classification of an agent,

must be considered—Ohio Oil Co v Smith-Haggard Lumber Co, 156 S W 2d 111, 288 Ky 278

Undisclosed principal

(1) The doctrine of undisclosed principal applies to mechanics' liens
Mo.—Concrete Engineering Co v Grande Bldg Co, 86 SW 2d 595, 230 Mo App 413

N.C.—North Carolina Lumber Co v Spear Motor Co, 135 SE 115, 192 NC 377

40 C.J. p 95 note 18 [c].

(2) Accordingly, a materialman would not be precluded from recovering for labor and material on alleged ground that defendant was acting as agent, if, at time of execution of contract, materialman had no knowledge of existence of principal—Nusbaum v. Warwick Hotel Co, 170 A. 388, 112 Pa.Super 277

Owner's knowledge of improvements on premises did not make employer his agent—Price v. Lee, 123 So 458, 11 La App 291.

Effect of agreement

Workman employed by person repairing premises is bound by agreement between owner and his employer making his employer liable for wages of workmen employed, even though the owner is equally interested in repairing the premises—Price v. Lee, supra.

Circumstances held sufficient to establish agency

(1) Generally.—North Carolina Lumber Co v. Spear Motor Co, 135 SE 115, 192 N.C. 377—40 C.J. p 95 note 18 [d]

(2) Of builder who commenced construction of buildings as independent contractor, and who, when he abandoned the construction, instructed the workmen to do whatever was requested by the owner of the realty, who took over the management of the work—Christian v Bremer, 34 SE 2d 40, 199 Ga. 285

Circumstances held not sufficient to establish agency

Mo.—Reis v. Taylor, App, 103 SW 2d 892.

Pa.—Miller v. Stoudt, 14 Pa.Dist & Co. 141

40 C.J. p 95 note 18 [e].

14. Ky.—Ohio Oil Co v Smith-Hag-

gard Lumber Co, 156 SW 2d 111, 288 Ky 278.

40 C.J. p 96 note 19.

Statutes making contractor agent of owner see infra § 105

18. Conn.—Drazen Lumber Co v Jente, 155 A 505, 113 Conn 344
Or.—Corpus Juris cited in Williams v Sharpe, 265 P 793, 795, 125 Or 379

40 C.J. p 96 note 20

Agent of corporation

Where farm landlord continued to manage farm after he conveyed it to corporation, his acts, in acquiescence of tenant's purported authority to order building materials for repair of buildings on farm, were binding on corporation, as respects enforceability of mechanic's lien against corporation—Iowa Builders' Supply Co v Petersen, 287 NW 716, 221 Iowa 978.

16. Vt.—Greene v McDonald, 40 A. 1035, 70 Vt 372

Under a statute permitting a lien against the owner's interest for improvements, repairs, or alterations for which he knowingly permits his agent to contract, however, it has been held that knowledge of, or notice to, an agent in general charge of the property of such work is imputed to the owner, even though the agent has no authority to contract for such work—Johns-Manville Corporation of Delaware v La Tour D'Argent Corporation, 277 Ill App 503—Mutual Construction Co v Baker, 237 Ill App 596

17. Ill.—Baxter v Hutchings, 49 Ill 116

18. Ark.—Daly v. Arkadelphia Milling Co., 189 S.W. 1058, 126 Ark 405

19. Okl.—Lewis v Red, 152 P 2d 690, 194 Okl. 432.

40 C.J. p 96 note 24.

To take charge for period of years

A contract between an owner and his agent under which the agent takes charge of the property, collects rents, and repairs and maintains it over a period of years is not such a contract as will enable the agent to obtain a mechanic's lien for materials furnished and labor performed in the improvement, alteration, or repair of the property—Lewis v. Red, supra.

contract, it has been held that the lien cannot be defeated because the amount is in excess of his authority.²⁰

The agency may be express or implied.²¹ Where the owner clothes the agent with apparent or ostensible authority, this may be equivalent to express authority, as far as it concerns the rights of persons dealing with the agent in good faith.²² Written authority is not required unless the statute so provides.²³ A person may be the agent of the owner, to an extent sufficient to bind the real estate for improvements thereon, although his acts may not bind the owner personally.²⁴

Ratification. Where a person acting without authority or in excess of his authority assumes to contract as agent of the owner of land for its improvement, a ratification by the owner of such person's act will subject the land to the mechanic's lien.²⁵ However, unless authorized by statute,²⁶ a lien cannot be established on the basis of the owner's ratification of the acts of one who in obtaining the improvements acted solely for himself and not as agent,²⁷ since it is necessary in order for ratifica-

tion to exist that the person purport to act as agent of the owner.²⁸ The owner's retention of the improvement with knowledge of the facts has been held to operate as a ratification of the purported agent's acts,²⁹ but retention of the improvement will not result in ratification if the improvement cannot be removed without substantial injury to the owner's property.³⁰

Estoppel. The owner is estopped to deny the agency where, without repudiating it, he stands by and expressly consents to, or silently acquiesces in, contracts for improvements entered into with a person who claims to be his agent.³¹ Also, the owner may, under the circumstances of the case, be estopped to deny the authority of his agent to enter into the contract.³²

§ 60. — Corporations and Persons Interested Therein

A corporation may contract for the improvement of its property so as to subject such property to a mechanic's lien therefor; a corporation's property may be subjected to a lien for improvements contracted for by its promoters

20. Cal—Scribante v Edwards, 181 P 75, 40 Cal App. 581.

40 C.J. p 98 note 25

21. Mo—Concrete Engineering Co. v Grande Bldg Co., 86 SW 2d 595, 230 Mo App 443—Badger Lumber & Coal Co v Pugsley, 61 SW 2d 425, 227 Mo App 1202—Hydraulic Press Brick Co. v R B Winn Contracting Co., App, 219 SW. 681

22. US—Mammoth Min Co v Salt Lake Fdy & Mach Co, Utah, 14 S Ct 384, 151 US 447, 38 L Ed 229 Ky—Corpus Juris cited in Ohio Oil Co. v Smith-Haggard Lumber Co., 156 SW 2d 111, 115, 288 Ky. 278 Mont—Doney v. Ellison, 64 P.2d 343, 103 Mont. 591.

23. NJ—American Brick & Tile Co v Drinkhouse, 36 A. 1084, 59 NJ Law 462.

24. Mo—Lyvers v. Rutherford, 80 SW 2d 729, 230 Mo App 921 40 C.J. p 97 note 29

25. Fla—Chapman v St. Stephens Protestant Episcopal Church, 136 So 238, 105 Fla. 683, modified on other grounds 145 So 757, 105 Fla. 683

Neb—Hawkins v Mullen, 223 NW 670, 118 Neb 129

Ohio—Slamey v City Material Co., 165 NE 55, 30 Ohio App. 435.

40 C.J. p 97 note 30

Acts held to constitute ratification

(1) Owner's failure to repudiate liability within ten days after he secures knowledge of improvement.—Dixon v. Fredericks, 19 P 2d 272, 129 Cal App 708

(2) Farm owner's failure to give notice of tenant's want of authority to contract for erection of house after learning that it was being built—Wm Cameron & Co v Gibson, Tex Civ App, 278 SW 522

(3) Other acts see 40 C.J. p 97 note 30 [a]

Circumstances held not to show ratification

(1) Generally—Reis v Taylor, Mo App, 108 SW 2d 892—40 C.J. p 97 note 30 [b]

(2) Purchaser of mortgage who ratified mortgage company's unauthorized foreclosure by taking possession of property did not ratify unauthorized construction contract entered into by mortgage company in its name, where it did so to protect its own misdoing in selling mortgage on an unfinished building under an agreement to sell a mortgage on a finished building—Drasen Lumber Co v Jente, 155 A 505, 113 Conn. 344

26. Pa.—Meehan v Hollister, Com Pl, 5 Sch Reg. 326.

27. Conn—Drasen Lumber Co v. Jente, 155 A. 505, 113 Conn 344 Iowa—Knapp v Baldwin, 238 NW. 542, 213 Iowa 24.

28. Conn—Drasen Lumber Co. v Jente, 155 A. 505, 113 Conn. 344 Iowa—Knapp v Baldwin, 238 NW. 542, 213 Iowa 24

29. Mont—Arnold v. Gensberger, 31 P.2d 296, 96 Mont. 358

30. Mont—Arnold v. Gensberger, 31 P 2d 296, 96 Mont 358.

College's retention of building on its lands has been held not to ratify its president's unauthorized contract therefor—R. B. Spencer & Co v Thorp Springs Christian College, Tex Civ App, 41 S.W.2d 482, error dismissed.

31. Fla—Corpus Juris cited in Chapman v St. Stephens Protestant Episcopal Church, 136 So. 238, 241, 105 Fla. 683, modified on other grounds 145 So 757, 105 Fla. 683. 40 C.J. p 97 note 31.

32. Fla—Corpus Juris cited in Chapman v St. Stephens Protestant Episcopal Church, 136 So 238, 241, 105 Fla. 683, modified on other grounds 145 So 757, 105 Fla. 683 Tex—Wm Cameron & Co. v. Gibson, 278 SW 522 40 C.J. p 97 note 32.

Circumstances held to establish estoppel

Fla—Chapman v. St. Stephens Protestant Episcopal Church, 136 So 238, 105 Fla. 683, modified on other grounds 145 So 757, 105 Fla. 683 Ky—Ohio Oil Co v Smith-Haggard Lumber Co, 156 SW.2d 111, 288 Ky 278

Retention of improvement

College retention of building constituting fixture on its lands did not estop it from denying liability thereon—R. B. Spencer & Co. v Thorp Springs Christian College, Tex Civ. App, 41 S.W.2d 482, error dismissed.

or subscribers prior to its incorporation or by its president and sole stockholder after its dissolution by expiration of its charter.

A private corporation as owner of its property may contract for its improvement so as to subject the property to a mechanic's lien arising out of the making of the improvement,³³ and it cannot defeat the lien on the ground that its contract for the improvement was ultra vires.³⁴ However, the fact that the corporation making the contract has an interest as stockholder in another corporation does not render the property of the latter corporation subject to a lien.³⁵

Where the promoters or subscribers of a proposed corporation enter into a contract for the improvement of land to be acquired and conveyed to the corporation when formed, mechanics' liens have been held to attach to the property so conveyed to the corporation and on which the improvement is made,³⁶ even though no personal liability attaches to the corporation to pay for the improvement.³⁷ If the property on which the improvement was made was owned by any or all of the promoters at the time the contract for the improvement thereon was made, and was by them conveyed to the corporation, the mechanic's lien will undoubtedly attach,³⁸ unless the promoter owning the land is the lien claimant.³⁹ However, in some cases the courts have refused to enforce a mechanic's lien for the improvement where the promoters or subscribers did not own any interest in the land at the time the contract was entered into, and the land was not acquired by them and conveyed to the corporation, and where their contract was several, each being liable for only the amount of stock for which he subscribed.⁴⁰ Where a deed to a corporation was delivered before the corporation came into existence and hence did not vest title in it, as discussed in Corporations § 127,

a contract with one of the subscribers in whom the legal title vests is a contract with the owner within the meaning of the mechanics' lien statutes.⁴¹

Contract after dissolution. A mechanic's lien on the property of a solvent corporation may arise under a contract entered into in its name by its president and sole stockholder without actual knowledge that the charter of the corporation has expired by operation of law,⁴² and the contract may be upheld on the theory that he is a statutory trustee in charge of a defunct corporation.⁴³

§ 61. — Guardians, Executors, Administrators, or Receivers

A guardian, executor, or administrator, ordinarily does not have such ownership of the property held in his official capacity as will enable mechanics' liens to be acquired thereon for materials furnished or labor performed in its improvement under contract with him, or at his request, or with his consent.

In the absence of some provision in the will whereby title to the real estate is vested in the executor or administrator, he has no authority, without an order of court, to contract for the improvement of his decedent's real estate so as to subject it to mechanics' liens therefor.⁴⁴ It has been held that an executor or administrator is neither an owner of the property⁴⁵ nor an agent of the heirs⁴⁶ within the meaning of the statutes relating to mechanics' liens, but other authority has held that executors authorized by the will of the testator to manage and control the property, with power to sell, borrow money, execute mortgages, and to dispose of and execute deeds are owners within a mechanic's lien statute, even though they cannot of their own discretion subject the property to a lien for improvements thereon.⁴⁷ The administrator of a partnership estate cannot contract in the name of the

33. Pa.—General Fire Extinguisher Co. v. Magee Carpet Works, 49 A. 366, 199 Pa. 647.

Defects in incorporation of lessee undertaking to construct improvement on realty will not preclude a claimant otherwise entitled from subjecting the property to a lien—Concrete Engineering Co. v. Grande Bldg. Co., 86 S.W.2d 595, 230 Mo. App. 443.

34. Pa.—General Fire Extinguisher Co. v. Magee Carpet Works, 49 A. 366, 199 Pa. 647.

35. Ga.—Consolidated Lumber Co. v. Ocean SS Co., 82 S.E. 532, 142 Ga. 186—Sparks v. Dunbar, 29 S.E. 295, 102 Ga. 129.

36. Ky.—Waddy Bluegrass Creamery Co. v. Davis-Rankin Bldg. &

Mfg. Co., 45 S.W. 895, 103 Ky. 579, 20 Ky. L. 259.

40 C.J. p. 97 note 36.

37. Ind.—Davis & Rankin Bldg. & Manufg. Co. v. Vice, 43 N.E. 889, 15 Ind. App. 117.

38. Ohio—Burnap v. Sylvania Butter Co., 12 Ohio Cir. Ct. 639, 5 Ohio Cir. Dec. 582.

39. Iowa—Littleton Sav. Bank v. Osceola Land Co., 39 N.W. 201, 76 Iowa 660.

40 C.J. p. 97 note 39.

40. Neb.—Davis v. Ravenna Creamery Co., 67 N.W. 436, 48 Neb. 471. 40 C.J. p. 97 note 40.

41. Tex.—Cameron v. Trueheart, Civ. App., 165 S.W. 58.

42. Mo.—Automatic Sprinkler Co. v.

Stephens, 267 S.W. 888, 306 Mo. 518.

43. Mo.—Automatic Sprinkler Co. v. Stephens, supra. Contracts by trustees generally see infra § 70.

44. N.D.—Viker v. Beggs, 208 N.W. 383, 53 N.D. 858. 40 C.J. p. 98 note 45.

45. Ark.—Doke v. Benton County Lumber Co., 169 S.W. 327, 114 Ark. 1, 52 L.R.A.N.S. 870. Cal.—San Francisco Pav. Co. v. Fairfield, 66 P. 255, 124 Cal. 220.

46. Ark.—Doke v. Benton County Lumber Co., 169 S.W. 327, 114 Ark. 1, 52 L.R.A.N.S. 870.

47. N.D.—Viker v. Beggs, 208 N.W. 383, 53 N.D. 858.

partnership for the sale of material,⁴⁸ and hence cannot enforce a lien as such administrator for materials so furnished⁴⁹

A guardian cannot, by an unauthorized contract for the improvement of his ward's land, subject it to mechanics' liens for such improvement⁵⁰

The subjection of property in the hands of receivers to mechanics' liens for materials furnished and labor performed, both before and after the appointment of the receiver, is considered in the C.J.S. title Receivers § 137, also 40 C.J. p 98 notes 49, 50 and 53 C.J. p 126 notes 49-52.

§ 62. — Heir or Widow

An heir has sufficient ownership after the death of his ancestor to subject his interest in the ancestor's property to a mechanic's lien; but an heir before the death of his ancestor and a widow before dower is assigned have been held not to have sufficient ownership to support a mechanic's lien.

A widow, before dower is assigned,⁵¹ or an heir before the death of his ancestor,⁵² does not have sufficient ownership to support a mechanic's lien, but, after the death of the ancestor, an heir has such an interest in the property as to be an owner within the meaning of a mechanics' lien statute,⁵³ even

though the estate is in the course of administration.⁵⁴

§ 63. — Husband or Wife

- a. In general
- b. Homestead property
- c. Property of wife
- d. Dower or curtesy

a. In General

A mechanic's lien may be acquired on property owned jointly by husband and wife under a contract with both spouses, but, in the absence of express statutory authorization, such a lien cannot be acquired thereon under a contract with one spouse, unless the other spouse authorized, consented to, or ratified the contract. A mechanic's lien may be acquired on community property under a contract with the husband.

In the absence of a statute to the contrary,⁵⁵ a contract with one spouse is not a sufficient basis for a mechanic's lien on property owned jointly by husband and wife,⁵⁶ including land held by them as tenants by the entirety,⁵⁷ or as joint purchasers under an executory contract to purchase.⁵⁸

A lien may arise, however, under a contract with one spouse where the other spouse has authorized

48. Mo—Richardson v. O'Connell, 88 Mo App. 12

49. Mo—Richardson v. O'Connell, supra

50. Cal—Fish v. McCarthy, 31 P. 539, 96 Cal 484, 31 Am SR 337
28 C.J. p 1136 note 6—40 C.J. p 98 note 48

51. Kan—Ermul v. Kullok, 3 Kan 499

52. R.I.—Watson v. Woods, 3 R.I. 236.

53. Nev—Riverside Fixture Co. v. Quigley, 126 P 545, 35 Nev 17
ND—Viker v. Beggs, 208 N.W. 383, 53 N.D. 858.

54. Nev—Riverside Fixture Co. v. Quigley, 126 P 545, 35 Nev. 17.
ND—Viker v. Beggs, 208 N.W. 383, 53 N.D. 858.

55. Fla.—Le Roy v. Reynolds, 193 So 843, 141 Fla 586

Tenn—Wittichen v. Miller, 166 S.W. 2d 612, 179 Tenn 352

Former rule

Prior to the enactment of the statute neither husband nor wife, acting separately, could create a mechanic's lien on property held by the entireties—Allardice & Allardice v. Weatherlow, 124 So 38, 98 Fla 475—Ferris-Lee Lumber Co. v. Fulghum, 123 So 697, 98 Fla 171

56. Mass.—Katauskas v. Lonstein, 164 NE 810, 266 Mass 29

Mich—Frolich v. Blackstock, 119 N.W. 906, 155 Mich 604

Mo—Badger Lumber & Coal Co. v. Pugsley, 61 S.W.2d 425, 227 Mo App 1203

Neb—Corpus Juris quoted in Barry v. Barry, 28 N.W.2d 1, 5, 147 Neb 1067.

Part or joint owners generally see infra § 69

57. Mich.—Title & Bond Guaranty Co. v. Pomter, 220 N.W. 786, 243 Mich. 415—Wingilia v. Ashman, 217 N.W. 909, 241 Mich 534—F. M. Sibley Lumber Co. v. Letterman, 207 N.W. 869, 234 Mich 32

Mo—Magidson v. Stern, 148 S.W.2d 144, 235 Mo App. 1039—Badger Lumber & Coal Co. v. Pugsley, 61 S.W.2d 425, 227 Mo App. 1203—R. D. Kurtz, Inc. v. Field, 14 S.W.2d 9, 223 Mo App 270—I. R. Goldberg Plumbing Supply Co. v. Taylor, 237 S.W. 900, 209 Mo App 98.

Neb—Barry v. Barry, 28 N.W.2d 1, 147 Neb 1067.

NC—Johnson v. Leavitt, 125 SE 490, 182 NC 682

Pa.—Womer v. Gearhart, 16 Pa Dist & Co. 359.

Tenn—Bell Bros & Co. v. Arnold, 68 S.W.2d 958, 17 Tenn App 493.
30 C.J. p 574 note 14—40 C.J. p 98 note 57

Construction by agent

Husband's authorization for tenant to erect buildings or ratification of tenant's agency to do so, after

completion of the buildings, is insufficient to bind wife so as to subject property held by the entireties to a lien for the improvement—Cochran v. Johnston, Mo App, 25 S.W.2d 130
Debt against both

In order that the lien may be valid it must appear that the contract for the improvement purported to make both husband and wife debtors—Blenard v. Blenard, 45 A.2d 385, 185 Md 548.

Knowledge of title

Where prior to making of contract husband and wife were owners and seized in fee as tenants by entirety, the lien claimant was held either to have had actual knowledge or to be charged with constructive knowledge of state of title of property when he entered into contract—Wilson v. Fower, 155 S.W.2d 502, 236 Mo App 532

Judicially separated spouses

After judicial separation from wife, husband could not encumber his wife's estate in property held by the entirety except with her consent—Landes v. Landes, 277 N.Y.S 886, 243 App Div 464.

58. Mich—Clawson Lumber Co. v. Gray, 216 N.W. 59, 261 Mich. 173—F. M. Sibley Lumber Co. v. Letterman, 207 N.W. 869, 234 Mich. 32.
Pa.—Womer v. Gearhart, 16 Pa. Dist. & Co. 359.

Lien under contract for improvement by vendee generally see infra § 71.

or consented to the contract,⁵⁹ or ratified it,⁶⁰ or has had knowledge of the contract and the improvement and stood by without objection,⁶¹ or has dealt actively with the person furnishing the labor and material and assisted in raising funds for the doing or completion of the work,⁶² and such a lien may attach to property held by husband and wife as tenants by the entirety where the contract is made or indebtedness incurred by both spouses.⁶³ Mere knowledge on the part of the wife that a building or other improvement is being erected on the property and passive acquiescence therein on her part,⁶⁴ or such a participation in the matter as is merely a proper display of wifely interest therein,⁶⁵ is insufficient to enable a lien to be acquired thereon.

Lien against interest of one spouse in property held jointly. It has been held that a husband, by his contract, can subject to a mechanic's lien his interest in property held jointly by husband and wife.⁶⁶ Other authority, however, has held that the husband cannot, by his contract, alone, subject his

interest in property held by the entirety to a mechanic's lien.⁶⁷

Community property. The husband, where community property is in his control, as considered in Husband and Wife § 506, can subject it to a mechanic's lien for improvements.⁶⁸

b. Homestead Property

A lien on a homestead for improvements thereon may arise under a contract with the spouse owning the property without the joinder of the other spouse under some constitutional and statutory provisions, but under other provisions both spouses must join in the contract for the improvement.

Under some constitutional and statutory provisions a lien on a homestead for materials furnished for its improvement may arise under a contract with the spouse owning the property without the joinder of the other spouse.⁶⁹ Under other constitutional or statutory provisions, in order that a claimant may be able to acquire a lien, both spouses must join in the contract for the improvement,⁷⁰ which contract must be executed in compliance with constitutional

59. Wis.—Fischer v Meiroff, 213 N W 283, 192 Wis 482

Wyo.—Phelan v Cheyenne Brick Co., 188 P 354, 26 Wyo 493, rehearing denied 189 P 1103, 26 Wyo 493

Effect of consent

Wife, by consenting to improvements on property owned by her and her judicially separated husband as tenants by the entirety consented to the creation of whatever lien might result from such improvements by operation of law, but to no other lien—Landes v Landes, 277 NYS 886, 243 App Div. 464

60. Wyo.—Phelan v Cheyenne Brick Co., 188 P 354, 26 Wyo. 493, rehearing denied 189 P 1103, 26 Wyo. 493.

Subsequent encumbrance

Fact that wife subsequently joined husband in executing trust deed on estate by entirety, against which plaintiff sought mechanic's lien, was insufficient to show acquiescence in making improvement—R D Kurtz, Inc. v. Field, 14 SW2d 9, 223 Mo App. 270.

61. Ind.—Kohring v Bowman, App., 137 NE 767.

Lien from failure of spouse to give notice of nonresponsibility see infra § 84

62. Mo.—Magidson v. Stern, 148 S W 2d 144, 235 Mo App 1039

Tenn.—Bell Bros. & Co v Arnold, 68 SW2d 958, 17 Tenn App 493.

63. NC.—Johnson v Leavitt, 125 S E 490, 188 NC 682, 30 C.J. p 574 note 13

64. Md.—Blenard v Blenard, 45 A 2d 335, 185 Md. 548

Mo.—Wilson v Fower, 155 SW2d 502, 236 Mo App 532—Magidson v Stern, 148 S W 2d 144, 235 Mo App 1039—R D Kurtz, Inc. v Field, 14 SW2d 9, 223 Mo App 270

65. Mo.—Magidson v Stern, 148 S W 2d 144, 235 Mo App 1039

66. Mass.—Katauskas v Lonstein, 164 NE 810, 268 Mass 29

Realty held as tenants by entirety NJ—Washburn v Burns, 84 NJ Law 18

Or.—Heacock v Loder, 211 P. 950, 106 Or 323

67. Md.—Blenard v Blenard, 45 A 2d 335, 185 Md 548

Tex.—Hadley-Dean Glass Co v. Schaefer, Civ.App., 11 SW2d 61.

In Missouri

(1) It is now the established rule that the husband has no such interest in an estate by the entirety as can be subjected to a mechanic's lien by his contract.—Cochran v Johnston, App., 25 SW2d 180—R D Kurtz, Inc. v Field, 14 SW2d 9, 223 Mo App 270—H. B. McCray Lumber Co v Standard Const Co., App., 285 SW. 104—I. R. Goldberg Plumbing Supply Co v Taylor, 237 S.W. 900, 209 Mo App. 98.

(2) In order that property owned jointly by husband and wife at the time of trial may be subject to a mechanic's lien for improvements placed thereon under a contract with the husband, it must appear that at the time the materials were begun to be furnished the husband owned the land or that he was the agent of his wife—H. B. McCray Lumber

Co v Standard Const Co., App., 285 SW 104

(3) Formerly it was held that the husband, or each spouse, is an owner of property held by the entirety within the meaning of the mechanics' lien statutes and may by contract subject his or her estate therein to liens for improvements made on the land—Brockett Cement Co. v. Logan, 173 SW 727, 187 Mo App 322—Independence Sash Door & Lumber Co v Bradfield, 134 SW 118, 153 Mo App 527—Nold v Ozenberger, 133 SW 349, 153 Mo App 439

68. Tex.—Brick & Tile v Parker, 186 SW2d 66, 143 Tex 383, 40 C.J. p 98 note 65

69. Iowa.—Aalfs Wall Paper & Paint Co v Bowker, 162 NW 83, 179 Iowa 726, 40 C.J. p 98 note 67.

70. Tex.—Kempsey v Zachry, 116 S W 2d 699, 131 Tex 554, opinion supplemented 121 SW2d 595, 131 Tex 554—Hicks v Wallis Lumber Co., Civ App., 70 SW2d 440—Whalley Lumber Co. v. Reliance Brick Co, Civ App., 2 SW2d 911—Brown v Rice, Civ App., 290 SW. 784, affirmed Rice v. Brown, Com.App., 296 SW. 495

Community property

Consent of wife to husband's contract for improvement on community property constituting their homestead is required where contract is sought which may expose the homestead to a forced sale—Grammar v. Hesperian Bldg. & Sav. Ass'n, Tex. Civ App., 70 S.W.2d 220, error refused.

and statutory requirements.⁷¹

Estoppel. Regardless of whether or not as a proposition of law a valid lien can be created against a homestead by estoppel,⁷² it has been held that, where a husband and wife lead an innocent third person to believe that a valid lien has been created on their homestead and such third person is caused to invest his funds on the faith and credit of such lien, the husband and wife are estopped as to such person to plead that the lien is invalid.⁷³ However, there can be no estoppel if the truth is known to all parties.⁷⁴

c. Property of Wife

(1) In general

(2) Contract of husband

(1) In General

A married woman may contract for, authorize, or consent to repairs or improvements on her property so as to subject it to a mechanic's lien in jurisdictions where her common-law disability to contract has been removed, but not where such disability still exists.

A married woman, whose common-law disability to contract, as discussed in Husband and Wife § 176, has not been removed, cannot enter into a contract for the improvement of her property, which will subject it to a mechanic's lien.⁷⁵ Where, however, constitutional and statutory provisions give to a married woman power to contract generally or with respect to her separate estate, as discussed in Husband and Wife §§ 178, 309, it is generally held that mechanics' lien statutes apply so as to enable such a lien to be acquired for repairs or improvements made on the separate property of a married woman under a contract with her or with her express or implied authority.⁷⁶

The acquisition of a mechanic's lien on a married woman's property is subject to such restrictions and limitations, if any, as are imposed by statute,⁷⁷ there must be a compliance with all the requirements of the statutes in order that a lien may

71. *Tex*—*Kepley v. Zachry*, 116 S W 2d 699, 131 *Tex* 554, opinion supplemented 121 S W 2d 595, 131 *Tex* 554—*Sommers v. Stout*, Com App, 44 S W 2d 901—*Guaranty Const Co v. Atwood*, Civ App, 43 S W 2d 159, reversed on other grounds *Atwood v. Guaranty Const. Co.*, Com App, 63 S W 2d 685—*Burton v. Schwartz*, Civ App, 26 S W 2d 1086, error dismissed—*Wright v. A. G. McAdams Lumber Co.*, Civ App, 218 S W 571.

72. *Tex*—*Ackerson v. Farm & Home Savings & Loan Ass'n of Missouri*, Civ App, 77 S W 2d 559, error refused.

73. *Tex*—*United Sav. Bank of Detroit v. Frazier*, Civ App, 116 S W 2d 933, error dismissed—*Marinick v. Continental Southland Savings & Loan Ass'n*, Civ App, 97 S W 2d 480—*Hufstetler v. Glenn*, Civ App, 82 S W 2d 783—*Hollums v. Glenn*, Civ App, 82 S W 2d 781, error dismissed—*Ackerson v. Farm & Home Savings & Loan Ass'n of Missouri*, Civ App, 77 S W 2d 559, error refused—*Farm & Home Savings & Loan Ass'n of Missouri v. Muhl*, Civ App, 87 S W 2d 316, error refused—*Garrett v. Katz*, Civ App, 23 S W 2d 436.

Estoppel held shown

Tex—*United Sav. Bank of Detroit v. Frazier*, Civ App, 116 S W 2d 933, error dismissed.

Estoppel held not shown

Tex—*Hicks v. Wallis Lumber Co.*, Civ App, 70 S W 2d 440.

Existence of contract

Where husband and wife enter into a contract which purports to create a valid mechanic's lien, they are estopped, after the transfer of the

contract to an innocent purchaser for value, to claim that there is in fact no contract—*Cain v. Bonner*, Civ App, 149 S W 702, affirmed 194 S W, 1098, 108 *Tex* 399, 3 A L R 874.

Wife's failure to act

Failure of wife to indorse check, which bank loaning money on basis of mechanic's lien contract made payable to husband and wife, is immaterial where transaction is a community affair, and husband has right to collect the check and direct disbursement of proceeds in erection of building on which mechanic's lien was executed—*United Sav. Bank of Detroit v. Frazier*, *Tex Civ App*, 116 S W 2d 933, error dismissed.

Representations in instrument

(1) Recital in renewal deed of trust that mechanic's lien is valid and subsisting is not of itself sufficient to estop licensee from asserting invalidity of lien against holder thereof—*Davis v. Peck, Wright, Peck Inv Co.*, *Tex Civ App*, 94 S W 2d 1245, error dismissed—*Hill v. Engel*, *Tex Civ App*, 89 S W 2d 219, error refused.

(2) However, grantee of property under deed which expressly recognized validity of lien by recitation that conveyance was subject thereto is estopped to deny right of foreclosure of lien—*Miller v. Standard Savings & Loan Ass'n of Detroit, Mich.*, *Tex Civ App*, 88 S W 2d 523, error refused.

Right to foreclose

(1) If the facts are such as to estop the makers from pleading its invalidity, the holder of a void mechanic's lien is entitled to foreclosure—*Davis v. Peck, Wright, Peck Inv. Co.*, *Tex Civ App*, 94 S W 2d

1245, error dismissed—*Hill v. Engel*, *Tex Civ App*, 89 S W 2d 219, error refused—*Quillin v. State Trust Co.*, *Tex Civ App*, 50 S W 2d 879—*Bernstein v. Hibbs*, *Tex Civ App*, 284 S W 234.

(2) Right of assignee of mechanic's lien to enforce it generally see *infra* §§ 217-220.

74. *Tex*—*Marinick v. Continental Southland Savings & Loan Ass'n*, Civ App, 97 S W 2d 480.

75. *Ark*—*Rogers v. Phillips*, 8 *Ark* 368, 47 *Am D.* 727.
40 C J p 98 note 73.

Personal Liability

Where husband and wife had occupied property as their family homestead for many years, the wife under her plea of coverture had no personal liability on mechanics' lien contract in which husband and wife agreed to pay sum evidenced by paving certificates—*City of Ranger v. Gholson*, *Tex Civ App*, 141 S W 2d 396, error dismissed, judgment correct.

76. *Ala*—*Herrin v. Burnett*, 114 *So* 406, 217 *Ala* 23.

Fla—*Roughan v. Rogers*, 199 *So* 572, 145 *Fla* 421—*Dalton v. Camp*, 194 *So* 219, 141 *Fla* 892, overruling *Atkins v. Kendrick*, 190 *So* 248, 138 *Fla* 776.

Ky—*Williamson Heater Co. v. Kaiser*, 277 *S W* 287, 211 *Ky* 193.
30 C J p 917 note 75—40 C.J. p 99 note 75.

77. *Fla*—*Roughan v. Rogers*, 199 *So* 572, 145 *Fla* 421—*Dalton v. Camp*, 194 *So* 219, 141 *Fla* 892.
40 C J p 99 note 76.

Necessity of writing see *infra* § 75.

be obtained.⁷⁸ Under some statutes a mechanic's lien may be acquired against the property of a married woman the same as if she were a feme sole,⁷⁹ and may arise where the circumstances are such as to bind her and her property.⁸⁰ In order that mechanics' liens may arise out of a contract by a married woman for the improvement of her separate estate, it is not necessary that it should have been her intention at the time to charge the estate with such liens.⁸¹

(2) Contract of Husband

(a) In general

(b) Wife's knowledge, consent, or failure to object

(a) In General

In the absence of some statutory provision authorizing it, a mechanic's lien does not arise on the property of a married woman under a contract for a building or other improvement entered into by her husband, unless she has expressly or impliedly authorized him to act as her agent, or is estopped to deny his agency, or has subsequently ratified his acts.

As a general rule, in the absence of some statutory provision expressly authorizing it,⁸² a me-

chanic's lien does not arise on the property of a married woman under a contract for a building or improvement entered into by the husband,⁸³ particularly where the contract is in his own name and on his own credit,⁸⁴ unless he is her agent in making the contract,⁸⁵ or she consents to the contract, as discussed *infra* subdivision c (2) (b) of this section, or, under the circumstances, she is estopped, as against the lien claimant, to set up her ownership⁸⁶ or to deny the agency of the husband,⁸⁷ or that the contract and improvement were made for her immediate use, enjoyment, or benefit,⁸⁸ or, in other words, unless she has expressly or impliedly authorized the husband to contract as her agent,⁸⁹ or has held him out as her agent,⁹⁰ or has subsequently ratified his acts.⁹¹ The rule that the wife's property is not subject to a mechanic's lien under a contract with the husband is especially applicable where the contract or improvement is made against her protest,⁹² even though her protest is made to the husband and not to the person furnishing materials.⁹³

The husband's agency to contract for improvements for the wife on her property may be inferred

78. Ky—Lugart v Lexington Turf Club, 118 S.W. 814, 130 Ky. 478.
80 C.J. p 917 note 78.

79. Ky—Williamson Heater Co v Kaiser, 277 S.W. 287, 211 Ky. 192.
—Mingo Lime & Lumber Co v Parsley, 248 S.W. 169, 197 Ky. 740.
Tenn—Gould v Frost, 186 S.W. 949, 138 Tenn. 467.
—Bell Bros & Co. v Arnold, 68 S.W.2d 958, 17 Tenn. App. 493.
80 C.J. p 917 note 80.

80. Ky—Tackett v Pikeville Supply & Planing Mill Co., 61 S.W.2d 881, 249 Ky. 835.

81. Ind.—Jones v Pothast, 72 Ind. 158.
40 C.J. p 99 note 77.

82. Kan—Robert Garrett Lumber Co v Loftus, 109 P. 179, 82 Kan. 556.
40 C.J. p 99 note 78.

83. Ala—Becker Roofing Co v Hanks, 155 So. 360, 228 Ala. 685.
Herrin v. Burnett, 114 So. 406, 217 Ala. 23.

Ark—Morehart v. A. B. Beeler Lumber Co., 4 S.W.2d 29, 176 Ark. 818.
Iowa—Royal Lumber Co v. Hoelsner, 201 N.W. 58, 199 Iowa 24.

Miss—Alexander v Becker Roofing Co., 148 So. 801, 164 Miss. 648.
Okla—Swetnam v Hale, 280 P. 437, 138 Okla. 69.

Tenn—Holder v. Crump, 10 Lea. 320.
Tex—Brick & Tile v Parker, Civ. App., 186 S.W.2d 64, affirmed in part and reversed in part on other

grounds 186 S.W.2d 66, 143 Tex. 383.

40 C.J. p 99 note 79.

84. Ala—Herrin v. Burnett, 114 So. 406, 217 Ala. 23.
Conn—Huntley v Holt, 20 A. 469, 58 Conn. 445, 9 L.R.A. 111.

Miss—Stubbs v. Capital Paint & Glass Co., 131 So. 806, 160 Miss. 822, suggestion of error overruled.
135 So. 495, 160 Miss. 822—Cheers Floor & Screen Co v Gidden, 131 So. 426, 159 Miss. 288.

Mo—Badgley Lumber & Coal Co v Fugaley, 61 S.W.2d 425, 227 Mo. App. 1203.
80 C.J. p 917 note 84.

85. Ark—Morehart v A. B. Beeler Lumber Co., 4 S.W.2d 29, 176 Ark. 818.

Ky—Williamson Heater Co v Kaiser, 277 S.W. 287, 211 Ky. 192.

Md—Blenard v. Blenard, 45 A.2d 335, 135 Md. 548.

Mo—Henry Evers Mfg Co v Grant, App., 284 S.W. 525.

Okla—Swetnam v Hale, 280 P. 437, 138 Okla. 69.

80 C.J. p 917 note 82—40 C.J. p 100 note 80.

Intent to charge

Married woman's intent to charge her property is not necessary to the creation of a mechanic's lien for improvements she authorized him to contract for as her agent—Jones v Pothast, 72 Ind. 158.

86. Ill—Bastrup v. Prendergast, 53

N.E. 995, 179 Ill. 553, 70 Am.S.R. 128.

40 C.J. p 100 note 83.

87. Mo—Boeckeler Lumber Co v. Wahlbrink, 177 S.W. 741, 191 Mo. App. 334.

40 C.J. p 100 note 83.

88. Mo—Marshall v Hall, App., 200 S.W. 770.

89. Ark—Morehart v. A. B. Beeler Lumber Co., 4 S.W.2d 29, 176 Ark. 818.

40 C.J. p 100 note 85.

90. Iowa—Miller v Hollingsworth, 33 Iowa 224.

40 C.J. p 100 note 86.

91. Ala—Herrin v. Burnett, 114 So. 406, 217 Ala. 23.

40 C.J. p 100 note 87.

Ratification not shown

Wife's letter to lien claimant denying her execution of husband's contract for, and consent to, improvement, but begging time to pay therefor and promising to assist in making payment when able, was held not ratification of husband's act.—Becker Roofing Co v Hanks, 155 So. 360, 228 Ala. 685.

92. Ark—Morehart v A. B. Beeler Lumber Co., 4 S.W.2d 29, 176 Ark. 818.

40 C.J. p 100 note 88.

93. Iowa—Royal Lumber Co v. Hoelsner, 201 N.W. 58, 199 Iowa 24.

N.D.—Christianson v. Hughes, 122 N.W. 284, 18 N.D. 282, 138 Am.S.R. 762.

from the circumstances of the case.⁹⁴ It will not be implied, however, merely from the marital relation,⁹⁵ or from the mere fact that he occupies⁹⁶ or manages and controls⁹⁷ her real estate, or from the mere fact that he discussed the question of repairs with her.⁹⁸

Acts of the wife which standing alone are not necessarily conclusive of the agency of the husband for her, but which may be considered, and, in connection with other facts, may justify a finding of agency, include the making of payments by her under the contract,⁹⁹ her subsequent occupation of the building as a residence,¹ and her suggestions or directions as to the work,² provided such suggestions or directions are such as to evidence something more than the interest ordinarily shown by a wife in improvements made by her husband.³ Also, the wife's joinder in, or execution of, a mortgage or deed of trust to raise money to pay for the improvement is generally considered a circumstance which, although not conclusive, tends to establish the agency of the husband in contracting for the improvement,⁴ and in some instances appears to have been sufficient, of itself, to establish his agency for her in the matter.⁵ It is not required, in order to subject the wife's property to a mechanic's lien, that the husband be such an agent as can bind her personally

for the improvement constructed.⁶

It has been held that, where parties have contracted with the husband for the erection of a building on property as community property, without notice of any claim of his wife that it was her separate property, their liens will prevail over such a claim asserted by her after they were acquired.⁷

(b) Wife's Knowledge, Consent, or Failure to Object

A married woman's property is not subject to a mechanic's lien for improvements made thereon under a contract with her husband merely by reason of her knowledge of the making of the improvement or the contract therefor, or her consent, acquiescence, or failure to object to it, unless a statute authorizes a lien where she consents or fails to object to the improvement.

The property of the wife is not subject to a mechanic's lien for an improvement made under a contract with her husband merely by reason of her knowledge of the making of the improvement,⁸ or her knowledge of a contract made in her husband's name,⁹ or, under conditions where the common-law disability of a married woman to make oral contracts exists, by the fact that the work is done under her inspection or direction.¹⁰ Furthermore, except under some statutes,¹¹ such a lien will not arise by reason of her knowledge and consent, acquiescence,

94. Ky—Mingo Lume & Lumber Co v Parsley, 248 SW 169, 197 Ky 740

Okl.—Caldwell v Overall, 99 P 2d 496, 186 Okl. 615.

95. Ark.—Morehart v A. B. Beeler Lumber Co., 4 SW 2d 29, 176 Ark 818

Md.—Blenard v Blenard, 45 A.2d 335, 185 Md 548.

Okl.—Corpus Juris cited in Caldwell v Overall, 99 P 2d 496, 186 Okl. 615 —Swetnam v. Hale, 280 P. 437, 138 Okl. 69.

Tenn.—Bell Bros & Co v. Arnold, 68 SW 2d 958, 17 Tenn. App 493. 40 C.J. p 100 note 90.

96. Ark.—Hoffman v. McFadden, 19 SW 753, 56 Ark 217, 35 Am SR 101.

97. Ark.—Morehart v A. B. Beeler Lumber Co., 4 SW 2d 29, 176 Ark 818—Hoffman v. McFadden, 19 S. W. 753, 56 Ark 217, 35 Am SR 101

Okl.—Caldwell v Overall, 99 P.2d 496, 186 Okl. 615

98. Okl.—Swetnam v. Hale, 280 P. 437, 138 Okl. 69.

99. Okl.—Corpus Juris cited in Caldwell v Overall, 99 P 2d 496, 186 Okl. 615

40 C.J. p 100 note 92.

1. Ala.—Herrin v Burnett, 114 So 406, 217 Ala 23 40 C.J. p 101 note 93

2. Ala.—Herrin v Burnett, 114 So 406, 217 Ala. 23

Okl.—Corpus Juris cited in Caldwell v Overall, 99 P 2d 496, 186 Okl. 615

40 C.J. p 101 note 94

3. Ark.—Hoffman v McFadden, 19 S.W. 753, 56 Ark. 217, 35 Am SR 101.

40 C.J. p 101 note 95.

No estoppel

Fact that wife takes interest in improvements being made on her property by her husband is not alone sufficient to estop wife from denying that contract was for her benefit—Bovard v. Owen, Mo App, 30 SW 2d 154.

4. Ind.—Thompson v. Shepard, 85 Ind 352

Mo.—Badgley Lumber & Coal Co v Pugsley, 61 S.W.2d 425, 227 Mo. App 1203.

Tenn.—Bell Bros & Co v Arnold, 68 SW 2d 958, 17 Tenn. App 493.

40 C.J. p 100 note 91

Under an early statute which permitted a married woman to charge her real estate with contracts for such improvements as are necessary and proper to its full enjoyment, the fact that the wife joined in a note

with her husband given in payment for materials purchased by the husband for the improvement was held not to show that the husband was authorized as her agent to purchase the materials, so as to subject her estate to a mechanic's lien therefor —Johnson v Tutewiller, 35 Ind 353

5. Mo.—Bovard v. Owen, App, 30 SW 2d 154—Boeckeler Lumber Co. v Wahlbrink, 177 SW 741, 191 Mo App 334

6. Mo.—Henry Evers Mfg Co v. Grant, App, 284 SW 525

7. Tex.—House v Schulze, 52 SW 654, 21 Tex. Civ App 243 40 C.J. p 101 note 97

8. Ala.—Herrin v Burnett, 114 So. 406, 217 Ala. 23

Ark.—Morehart v A. B. Beeler Lumber Co., 4 SW 2d 29, 176 Ark 818 Miss—Alexander v Becker Roofing Co., 146 So 301, 164 Miss 648 40 C.J. p 101 note 98

9. Mo.—Halliwell Cement Co. v Eiser, 137 SW 626, 156 Mo App 291.

10. N.J.—Johnson v Parker, 27 N. J. Law 239 30 C.J. p 918 note 87

11. Ill.—Paul v. Shukes, 47 NE 2d 374, 317 Ill App 650

NY—Stanley Patch Lumber Co. v.

or failure to object to the improvement¹² This rule is particularly applicable under statutes requiring a contract with the owner or his authorized agent, and under such statutes the mere passive permission or consent to the contract of the husband is not sufficient to render her property subject to the lien.¹³ The wife's mere acceptance of the status quo after the improvement has been completed and her recognition of an obligation to pay for it will not suffice to create a lien on her property.¹⁴

On the other hand, the wife's property has frequently been held subject to the lien where she has knowledge of, and consents to, the improvement¹⁵ or both the contract and the improvement,¹⁶ or where she has knowledge of both the contract and the improvement and fails to object¹⁷ or to disclose her ownership¹⁸ A lien on the wife's land does not arise from her consent or permission that her husband shall build on the land at his own expense¹⁹

d. Dower or Curtesy

The wife's inchoate right of dower in her husband's property cannot be cut off or barred in a mechanic's lien proceeding where she neither knew of, nor consented to, the improvement in question.

The wife's inchoate right of dower in her husband's property cannot be cut off or barred in a mechanic's lien proceeding where she neither knew of, nor consented to, the improvement in question²⁰ Under some statutes the husband cannot charge his curtesy estate in his wife's land unless she joins with him in the contract²¹

§ 64. — Infants and Their Agents

An infant under disability to contract cannot subject his property to a mechanic's lien for its improvement, except where a statute provides otherwise.

Since an infant is under a common-law disability to contract, he cannot by a contract for the improvement of his land subject it to a mechanic's lien for such improvement,²² nor will a retention of the property as improved, after majority, amount to such ratification as to sustain a lien²³ Other authority has held that an infant may disaffirm as against a mechanic's lien for materials furnished either with his consent or at his request.²⁴ However, under mechanics' lien statutes providing that minors over the age of eighteen years shall be included within the word "owner," the property of a minor over the prescribed age may be subject to a lien under a contract made by another as his agent, and either authorized²⁵ or ratified²⁶ by him. Of course there is no lien on an infant's property under a contract made by another person not his guardian and not possessing any authority to bind him.²⁷

§ 65. — Lessors and Lessees

- a. In general
- b. Creation of lien on interest of lessees and sublessees
- c. Creation by lessee of lien on estate or property of lessor

a. In General

The lessor of realty may subject his interest therein to a lien in favor of materialmen, as where, on his express direction, materials are furnished to, or labor performed for, his lessee or a person he holds out as his agent.

The lessor of realty may subject his interest therein to a lien in favor of materialmen.²⁸ The property of the lessor is subject to a lien for materials furnished the lessee on the express direction of the lessor²⁹ or of a person whom he has held out

Barry, 265 NYS 879, 148 Misc 376.

40 C.J. p 101 note 99.

12. Md.—Blenard v Blenard, 45 A. 2d 335, 185 Md. 548

Miss.—Alexander v Becker Roofing Co., 146 So 301, 164 Miss. 648

30 C.J. p 917 note 85, p 918 note 86—40 C.J. p 101 note 1.

13. Mo.—Berkshire v Holcker, 216 S.W. 556, 202 Mo App 433

14. Ala.—Becker Roofing Co v. Hanks, 155 So 360, 228 Ala 685.

15. Wis.—Lents v Eimmermann, 97 N.W. 181, 119 Wis. 492.

40 C.J. p 101 note 3

16. Iowa.—Wheeler Lumber, Bridge & Supply Co v White, 145 N.W. 917, 164 Iowa 495

40 C.J. p 101 note 4.

17. Ill.—Paul v Shukes, 47 N.E.2d 374, 317 Ill App. 650.

40 C.J. p 101 note 5.

Lien from failure of spouse to give notice of nonresponsibility see infra § 84

18. Ark.—Harris v. Graham, 111 S.W. 984, 86 Ark. 570.

40 C.J. p 101 note 6.

19. Conn.—Huntley v. Holt, 20 A. 469, 58 Conn 445, 9 L.R.A. 111

Iowa.—Gabriel v. Cornell, 154 N.W. 1002, 172 Iowa 734

20. Wis.—W H Pipkorn Co v Tratnik, 152 N.W. 141, 161 Wis. 91, 16 A.L.R. 975.

21. Ky.—Fetter v. Wilson, 12 B. Mon. 90.

22. Ill.—McCarty v. Carter, 49 Ill 53, 95 Am.D. 572

Pa.—Clothier v. Kniffen, Com Pl, 36 Lug.Leg.Reg. 241

40 C.J. p 102 note 14.

23. Neb.—Bloomer v Nolan, 53 N.

W 1039, 36 Neb. 51, 38 Am S.R. 690.

40 C.J. p 102 note 15

24. N.Y.—Wyatt v Lortscher, 216 N.Y.S. 571, 217 App Div. 224

25. Mo.—Tucker v Gest, 46 Mo 339

—Riverside Lumber Co v Oxford, 209 S.W. 986, 201 Mo App 190

26. Mo.—Riverside Lumber Co. v. Oxford, supra.

27. Iowa.—Denniston & Partridge Co v Brown, 167 N.W. 190, 183 Iowa 398

Guardians see supra § 61.

28. Hawaii.—Lewers & Cooke, Ltd. v Wong Wong, 22 Hawaii 765.

Mo.—Dean & Hancock v O'Bryan, App. 390 S.W. 641.

29. Cal.—Grenfell Lumber Co. v Peck, 155 P 1012, 29 Cal.App. 347

as his agent,³⁰ even though the tenant may have failed to comply with the intention and instructions of the lessor and his agent to use old lumber obtained from a wrecked building.³¹ A lien also may be acquired on the lessor's interest for materials furnished the lessee and used in the improvement of the leased property where he and the lessee are engaged in a joint adventure³² or where he is active and instrumental in having the improvement made.³³

A materialman who refuses to sell to the lessee in possession, but instead sells to a stranger and holds such stranger personally liable, has been held not to be entitled to a lien on either the owner's interest or the improvements.³⁴

b. Creation of Lien on Interest of Lessees and Sublessees

A lessee or a sublessee is an owner within the meaning of mechanics' lien statutes, and his interest may be subjected to a lien for improvements.

A lessee is an owner within the meaning of the mechanics' lien statutes,³⁵ and his interest is subject to a lien for improvements made under a contract with him,³⁶ or for improvements made with his consent under a contract with a sublessee,³⁷ or for im-

provements made by a sublessee, where the lessee, by his conduct and course of dealing, has estopped himself to disclaim liability.³⁸ Likewise a sublessee may subject his own interest to a lien.³⁹ A month-to-month tenant, however, has been held to have no interest in the realty on which a lien can be levied.⁴⁰

Estoppel. A lessor may be estopped to assert that the lessee has a less interest than he represented him to have when negotiations for the improvements were being made with the lien claimant.⁴¹

Provision in lease against liens. A provision in the lease prohibiting the enforcement of a lien against the leased property will not prevent the acquisition of a lien against the lessee's interest in the leased premises, as such a provision is for the benefit of the lessor and not the lessee.⁴²

Lien on building or improvement. Under some statutes a mechanic's lien may be had on a building erected or improvement made by a lessee upon the demised premises,⁴³ at least where the building or improvement does not become a part of the realty,⁴⁴ and in some instances even though the lease provides that all improvements shall belong to the lessor on termination of the lease.⁴⁵ In other cases, how-

30. Cal—Grenfell Lumber Co. v. Peck, *supra*

31. Cal—Grenfell Lumber Co. v. Peck, *supra*

32. Ind—Morgan v. Brightwood Lumber Co., 7 NE 2d 525, 104 Ind App 4.

33. Ind—Morgan v. Brightwood Lumber Co., *supra*.

False representation as to lease

Contractor who made repairs and improvements on building under contract with one the owner falsely represented to be a lessee and authorized to make improvements and repairs could establish a mechanic's lien against the interest of the owner—Dean & Hancock v. O'Bryan, Mo App, 290 S.W. 641.

34. Okl—Deka Development Co v. Fox, 39 P.2d 143, 170 Okl 228.

35. Kan—Miller v. Bankers' Mortg Co., 287 P. 618, 130 Kan 543.

Mo—Julius Seidel Lumber Co v. Hydraulic Press Brick Co., App, 238 S.W. 979.

N.Y.—Landes v. Landes, 277 N.Y.S. 886, 243 App Div 464.

40 C.J. p 102 note 24.

Leasehold as subject to lien see *supra* § 17.

Lessee with option to purchase

Wis—Owens v. Hughes, 205 NW 813, 188 Wis 215.

36. US—Stowers v. Wheat, CCA Fla., 78 F.2d 25.

Ala—Harden v. Wood Lumber Co., 178 So 540, 235 Ala 310.

Ariz—Demund Lumber Co v. Franke, 14 P.2d 256, 40 Ariz 461.

Ill—F. K. Ketler Co v. County Fair Grounds Corporation, 21 NE 2d 779, 301 Ill App 117.

Iowa—Queal Lumber Co v. Lipman, 206 NW 627, 200 Iowa 1376.

Ky—Cincinnati Stucco Co v. North Kentucky Fair, 291 S.W. 715, 218 Ky. 493.

La—Berg v. Schneider, App, 12 So. 2d 501—Callender v. Marks, App, 166 So 891—Shreveport Long Leaf Lumber Co v. Parker, App, 144 So 153.

Mo—Dean & Hancock v. O'Bryan, App, 290 S.W. 641—Julius Seidel Lumber Co v. Hydraulic Press Brick Co., App, 238 S.W. 979.

N.J.—Harris v. Bergamo, 148 A 645, 7 N.J. Misc 1098.

Okl—Deka Development Co v. Fox, 39 P.2d 143, 170 Okl 228—T. J. Stewart Lumber Co v. Derry, 253 P 485, 122 Okl 208.

40 C.J. p 102 note 25.

Interest subsequently acquired

Interest at time of commencement of work or thereafter acquired by lessee with option to purchase the leased premises is subject to lien—Owens v. Hughes, 205 NW 813, 188 Wis. 215.

Lessee of part of building

Kan—Miller v. Bankers' Mortg Co., 287 P 618, 130 Kan 543.

37. N.Y.—Schwartz & Co., Inc. v. Aimwell Co., Inc., 198 N.Y.S. 838,

204 App Div 769, affirmed 142 N.E. 330, 236 N.Y. 672.

40 C.J. p 102 note 27.

38. Wash—Shaw v. Spencer, 107 P 883, 57 Wash 587.

39. N.Y.—Sager v. Renwick Park & Traffic Ass'n, 159 N.Y.S. 4, 172 App Div. 359.

40. Wash—Seattle Ass'n of Credit Men v. Daniels, 130 P.2d 892, 15 Wash.2d 393.

41. Mo—Dean & Hancock v. O'Bryan, App, 290 S.W. 641.

42. Ind—Robertson v. Sertell, 161 N.E. 669, 88 Ind App 591.

43. Ala—Harden v. Wood Lumber Co., 178 So 540, 235 Ala 310.

N.J.—Harris v. Bergamo, 148 A 645, 7 N.J. Misc 1098.

Okl—Simpson v. Davidson Case Lumber Co., 300 P 631, 150 Okl 132—Whitfield v. Frensley Bros Lumber Co., 283 P 985, 141 Okl 44.

Wash—Columbia Lumber Co v. Bothell Dairy Farm, 25 P.2d 1037, 174 Wash 662.

40 C.J. p 102 note 30.

Lien on building or improvement alone generally see *infra* § 183.

44. Okl—Anderson v. Gibbs Lumber Co., 10 P.2d 416, 157 Okl. 17.

40 C.J. p 102 note 31.

45. Okl—Simpson v. Davidson Case Lumber Co., 300 P. 631, 150 Okl 132.

Wash—Columbia Lumber Co v. Bothell Dairy Farm, 25 P.2d 1037, 174 Wash 662, overruling Colby &

ever, a lien has been denied on a building which the lease required the lessee to erect and provided should revert to the lessor on the termination of the lease,⁴⁶ although where the lessee is entitled to remove the building at the termination of the lease the lien has been granted.⁴⁷

Where a building constructed by a lessee without the lessor's consent has become a part of the freehold because of the termination of the tenancy, it has been held that thereafter a lien cannot be acquired against it under a contract with the lessee.⁴⁸ A lien will not arise against a preexisting building for its reconstruction, alteration, or repair by a lessee under circumstances which give no lien against the estate of the lessor.⁴⁹

c. Creation by Lessee of Lien on Estate or Property of Lessor

(1) In general

Dickinson v Baker, 261 P 101, 145 Wash 584

46. Iowa—Queal Lumber Co. v Lipman, 206 NW. 627, 200 Iowa 1376

47. Iowa—Lane-Moore Lumber Co v Kloppenburg, 215 NW 637, 204 Iowa 613

48. NJ—Harris v Bergamo, 148 A 645, 7 NJ Misc 1098

49. Mo—Masterson v Roberts, 78 SW 2d 856, 336 Mo 158, 97 ALR 862—Mundet Cork Corporation v Three Flowers Ice Cream Co., App. 146 SW 2d 678

50. Ariz—Mulcahy Lumber Co v. Ohland, 36 P 2d 579, 44 Ariz 301—Demund Lumber Co. v. Franke, 14 P 2d 256, 40 Ariz 461

Ark—Hawkins v Faubel, 31 S.W. 2d 401, 182 Ark 304

DC—Langley v D'Audigne, 31 App DC 409

Ga—Stevens Supply Co v Stamm, 152 S.E. 602, 41 Ga.App. 239

Ill—Donkle & Webber Lumber Co. v. Rehrmann, 33 N.E. 2d 709, 310 Ill App 17—F. K. Ketler Co v. County Fair Grounds Corporation, 21 N.E. 2d 779, 301 Ill App 117

Ky—Corpus Juris cited in Cincinnati Stucco Co v North Kentucky Fair, 291 SW 715, 218 Ky. 493

La—Berg v Schneider, App., 12 So 2d 501—Shreveport Armature & Electric Works v. Harwell, App. 172 So. 463, followed in Bolinger Gain-Yay, Inc v Harwell, 172 So 471—Klema Realty Co. v. Fauria, 130 So 569, 15 La App 7.

Mo—Mundet Cork Corporation v. Three Flowers Ice Cream Co., App. 146 SW 2d 678—Cochran v. Johnston, App. 25 SW 2d 130.

Neb—Platner Lumber Co. v. Krug Park Amusement Co., 270 N.W. 473, 131 Neb 831.

NJ—Stein v. Pennsylvania Dock & Warehouse Co., 159 A. 633, 10 N J Misc 568

NM—Rio Grande Lumber & Fuel Co v Buergo, 73 P 2d 312, 41 N M 624, 123 ALR 1

NY—Charnin Contracting Corporation v Keenan, 5 NYS 2d 40, 254 App Div 876, reargument denied In re Cavanagh's Estate, 7 NYS 2d 108, 255 App Div 779, appeal granted 18 NE 2d 46, 279 NY 809

40 C.J. p 103 note 32.

Construction of statute

Statute giving lien on real property and buildings thereon for improvements, alterations, or repairs made under contract with lessee does not give lien on fee-simple owner's interest in land—Masterson v Roberts, 78 SW 2d 856, 336 Mo 158, 97 ALR 862.

Creditor's rights limited to those of tenant

NC—Brown v Ward, 20 S.E. 2d 324, 221 NC 344

Estoppel to forfeit lease

Materialmen furnishing tenant with materials for construction of building upon leased premises was held not entitled to mechanic's lien against fee on ground that estoppel against landlord to exercise option to forfeit lease because rent payments were delinquent resulted in merger of leasehold with fee, where there had been no forfeiture, since such estoppel caused estates to remain separate—Platner Lumber Co v. Krug Park Amusement Co., 270 N.W. 473, 131 Neb 831.

Reservation in contract

The text rule applies even though the mechanic or materialman specifically reserves in his contract the right to file a mechanic's lien on the

(2) Consent of lessor

(3) Lessor's knowledge and permission or acquiescence or failure to object

(4) Effect of provisions of lease

(1) In General

The estate or property of a lessor is not subject to a mechanic's lien for improvements contracted for by his lessee unless the lessor has made him his agent or otherwise conferred the requisite authority on him, or has ratified his acts, or is estopped to deny the validity of the lien.

A contract of a lessee for improvements does not give rise to a lien against the estate or property of the lessor⁵⁰ unless the lessee is the agent⁵¹ or other statutory representative⁵² of the lessor. In other words, a lien does not arise against the lessor's estate for such improvements unless the lessor has conferred the requisite authority on the lessee⁵³ or

fee—Abrams v Silver, 1 NE 2d 286, 102 Ind App. 97

51. Ariz—Mulcahy Lumber Co v Ohland, 36 P 2d 579, 44 Ariz 301—Demund Lumber Co v Franke, 14 P.2d 256, 40 Ariz 461

Cal—P W Wood, Inc v. Blalack, 261 P 737, 86 Cal App 573

La—Shreveport Armature & Electric Works v. Harwell, App. 172 So 463, followed in Bolinger Gain-Yay, Inc v. Harwell, 172 So 471

Mo—Concrete Engineering Co v Grande Bldg Co, 86 SW 2d 595, 230 Mo App 443.

Okl.—Deka Development Co. v Fox, 39 P.2d 143, 170 Okl 328—T J Stewart Lumber Co v. Derry, 253 P. 485, 122 Okl 203.

40 C.J. p 103 note 33

Agency not shown

(1) Lessee installing improvements for own benefit, and not at lessors' request, was not lessors' agent so as to attach lien to freehold—Martin-Welch Hardware & Plumbing Co v Moor, Mo App., 16 SW 2d 667

(2) Mere fact that lessor urged lessee to use insurance money, received after burning of dwelling, for constructing new residence did not render lessee agent of lessor in erection of new building—Shreveport Long Leaf Lumber Co. v Parker, I.A. App. 144 So 153.

52. La—Shreveport Armature & Electric Works v Harwell, App. 172 So. 463, followed in Bolinger Gain-Yay, Inc. v Harwell, 172 So. 471.

53. Fla.—Taylor v Ferroman Properties, 139 So. 149, 103 Fla. 960
Ga—Stevens Supply Co. v Stamm, 152 S.E. 602, 41 Ga.App. 239.

Neb.—Platner Lumber Co. v. Krug

has ratified his acts,⁵⁴ or is estopped to deny the validity of the lien,⁵⁵ or unless the lease is a mere artifice or scheme resorted to by the lessor to secure the placing of valuable improvements on his property without liability of his estate therefor,⁵⁶ or, according to some authorities, unless the improvements are made by the lessee or sublessee at the request⁵⁷ or with the consent, as discussed *infra* subdivision c (2) of this section, of the lessor. Also the character of the alteration or improvement must be within the scope of those for which a lien may be acquired against the lessor's interest or estate.⁵⁸ Moreover, it has been held that a lien will not arise against the interest of the lessor where the work is done by the lessee himself.⁵⁹

While the mere relation of landlord and tenant does not alone create an agency in the tenant authorizing him, by his contract for improvements, to render the landlord's interest in the property subject to a mechanic's lien⁶⁰ or create a contractual liability by the landlord for the improvements,⁶¹ nevertheless the tenant may, irrespective of the relation of landlord and tenant, be constituted the agent of the landlord with authority to bind the interest of the latter.⁶² In determining whether the lessee is the agent of the lessor, the court is not con-

fined to the provisions of the lease⁶³ but may consider all the facts connected with the transaction.⁶⁴ The landlord's interest is not rendered subject to a lien by a mere understanding that it is optional with the tenant to make repairs at his own expense⁶⁵ or by a deduction of the cost of the repairs from the rent without any previous agreement therefor⁶⁶ and simply because the tenant had suffered a misfortune.⁶⁷

(2) Consent of Lessor

Under statutes requiring a contract with the owner or his agent, a mechanic's lien against the lessor's interest does not arise from his consent to improvements by the lessee; but it may arise therefrom where the statutes allow a lien to be predicated on the consent of the owner unless the statute is expressly made inapplicable to improvements of a lessee.

Under some statutes, such as those requiring a contract with the owner or his agent, a mechanic's lien against the interest of the lessor does not arise from his consent to the making of improvements or alterations by the lessee,⁶⁸ especially where the lessor's consent was made on the condition that the improvement should be made without cost to him,⁶⁹ and even though the lessee paid the lessor a certain sum as an inducement to obtain his consent.⁷⁰ Such consent is not deemed to constitute the lessee

Park Amusement Co., 270 NW 478, 131 Neb 831.

40 C.J. p 103 note 34

54. Cal.—Dixon v Fredericks, 19 P. 2d 272, 129 Cal App 703

Mont.—Morin Lumber Co v. Person, 99 P 2d 206, 110 Mont. 114.

40 C.J. p 103 note 35

Matification held not shown

Pa.—Mohrkern v Pivrotto, 20 Pa. Dist & Co 218

55. Ariz.—Demund Lumber Co v Franke, 14 P 2d 256, 40 Ariz 461. Cal.—P. W. Wood, Inc. v Blalack, 261 P. 787, 86 Cal App. 572

Stockholders of lessee

Fact that lessors are stockholders of lessee corporation does not subject their interest to lien for improvements by lessee where they were minor stockholders and not in control of lessee.—Mundet Cork Corporation v Three Flowers Ice Cream Co., Mo App., 146 SW 2d 678

56. N.M.—Rio Grande Lumber & Fuel Co v. Buergo, 73 R.2d 312, 41 N.M. 624, 123 A.L.R. 1.

57. N.Y.—Sager v Renwick Park & Traffic Ass'n, 159 N.Y.S. 4, 172 App. Div. 859

58. Minn.—Northwestern Lumber & Wrecking Co v Parker, 145 N.W. 964, 125 Minn 107

Repairs or improvement

(1) Under statutes so providing, a lien is not given as against a les-

sor for repairs made by or at the instance of the lessee.—Minneapolis Plumbing Co v Arcade Inv Co., 145 NW 37, 124 Minn 317—40 C.J. p 103 note 32 [a] (2), (3).

(2) Painting, decorating, and repair of floor, roof, or other parts of building, as part of a general plan of fitting up the premises for the initial occupancy of the tenant, constitute a permanent improvement and not repairs.—Knoff Woodwork Co v Zotalis, 6 NW 2d 264, 213 Minn 204—Sandberg v Burns, 270 NW 575, 193 Minn 472—40 C.J. p 103 note 32 [a] (4).

59. La.—Shreveport Armature & Electric Works v Harwell, App., 172 So 463, followed in Bolinger Gain-Yay, Inc. v. Harwell—172 So 471

60. Ga.—Stevens Supply Co v Stamm, 152 SE 602, 41 Ga App 239

Iowa.—Lane-Moore Lumber Co v Kloppenburg, 215 N.W. 637, 204 Iowa 613.

Mo.—Masterson v Roberts, 78 S.W. 2d 856, 336 Mo 158, 97 A.L.R. 862—Sol Abrahams & Son Const. Co v. Osterholm, App., 136 S.W.2d 86

N.M.—Rio Grande Lumber & Fuel Co v Buergo, 73 P 2d 312, 41 N.M. 624, 123 A.L.R. 1.

N.C.—Brown v. Ward, 20 S.E.2d 324, 221 N.C. 344

40 C.J. p 104 note 38

61. N.Y.—Brigham v Duany, 150 N.E. 507, 241 N.Y. 435

62. Mo.—Ward v Nolde, 188 S.W. 596, 259 Mo 285

40 C.J. p 104 note 39.

63. Mo.—Allen Estate Ass'n v Boeke, 254 S.W. 858, 300 Mo. 575

64. Mo.—Allen Estate Ass'n v Boeke, supra—Concrete Engineering Co v Grande Bldg Co, 86 S.W.2d 595, 230 Mo App 442—Dean & Hancock v. O'Bryan, App., 290 S.W. 641

65. Ark.—Langston v. Matthews, 172 S.W. 397, 117 Ark 626.

66. Ark.—Langston v. Matthews, supra.

67. Ark.—Langston v. Matthews, supra.

68. Ark.—Donald v Heigel Lumber Co, 63 S.W.2d 646, 187 Ark 1014—Hawkins v Faubel, 81 S.W.2d 401, 182 Ark. 304

Fla.—Masterbilt Corporation v. S. A. Ryan Motors of Miami, 8 So 2d 818, 149 Fla. 644

Mo.—Sol Abrahams & Son Const Co v. Osterholm, App., 136 S.W.2d 86

40 C.J. p 104 note 43

69. Ark.—Donald v. Heigel Lumber Co, 63 S.W.2d 646, 187 Ark 1014

70. Fla.—Masterbilt Corporation v. S. A. Ryan Motors of Miami, 8 So 2d 818, 149 Fla. 644.

the agent of the lessor within the meaning of such statutes,⁷¹ and, where it fails to appear that the lessee was constituted by the landowner as his agent to make the improvement, the claimant's lien can extend no further than the improvements constructed.⁷² Also under some statutes the mere inactive consent of the lessor to improvements by the lessee is insufficient to enable a lien to be acquired against the lessor's interest.⁷³

Under other statutes, such as those allowing a lien to be predicated on the consent of the owner, a mechanic's lien against the estate or property of the lessor may arise where he consents to improvements by the lessee or sublessee.⁷⁴ Even under such statutes a lien cannot be based on the alleged consent of the lessor unless he has given his consent⁷⁵ or by his conduct and declarations has created the appearance of doing so.⁷⁶ Also the consent given must be such as is contemplated by statute,⁷⁷ with the intent of subjecting the land to a lien,⁷⁸ and the work done must be within the scope of the consent given.⁷⁹

Some statutes allowing a mechanic's lien generally for an improvement made with the consent of the owner are, by their express terms, inapplicable where work or material is furnished at the request of a lessee.⁸⁰

(3) Lessor's Knowledge and Permission or Acquiescence or Failure to Object

Generally a mechanic's lien on the estate or property of a lessor for improvements made by his lessee cannot be predicated on his mere knowledge thereof, or on his knowledge and acquiescence, permission, or failure to object thereto, or on his expectation that the lessee will make them, but under some statutes his estate is subject to a lien for improvements he knowingly permits the lessee to make.

It has generally been held that a mechanic's lien on the estate or property of a lessor cannot be predicated on his mere knowledge that improvements are being made by the lessee,⁸¹ or on his knowledge and acquiescence,⁸² permission,⁸³ or failure to object,⁸⁴ or on the lessor's expectation that the lessee will make certain improvements.⁸⁵ However, under the

71. Mo—Sol Abrahams & Son Const Co v Osterholm, App, 136 SW 2d 86.

40 C.J. p 104 note 49.

72. Mo—Martin-Welch Hardware & Plumbing Co. v Moor, App, 16 S.W. 2d 667.

Okl—T J Stewart Lumber Co v Derry, 235 P 485, 122 Okl 208.

73. Ind—Abrams v Silver, 1 NE 2d 286, 102 Ind App. 97.

74. Minn—Sandberg v Burns, 270 NW 575, 198 Minn 472.

NY—Boyle v Paolini Cafeteria & Restaurant, 222 NYS 19, 220 App Div 482—C Wilson's Plumbing Shop on Wheels v Trustees of Dartmouth College, 6 NYS 2d 671, 168 Misc 376.

40 C.J. p 104 note 52.

Strict construction

The statute should not be liberally construed in favor of lien claimant—Shreveport Armature & Electric Works v Harwell, La App, 172 So 463, followed in Bolinger Gain-Yay, Inc. v Harwell, 172 So 471.

75. NJ—Rugarber v Potter, 90 A 1020, 86 NJ Law 177.

40 C.J. p 104 note 53.

Consent held shown

NY—Mayer v Delson Holding Corporation, 247 NYS 346, 139 Misc 410, affirmed 352 NYS. 930, 334 App Div 671.

Consent held not shown

RI—Elliot & Watrous v Harrington, 27 A 2d 338, 68 RI 237.

76. Me—York v Mathis, 68 A 746, 103 Me 67.

77. NJ—Stein v Pennsylvania Dock & Warehouse Co., 159 A 683,

10 NJ Misc 568—Harris v Bergamo, 118 A 645, 7 NJ Misc 1098.

NY—C Wilson's Plumbing Shop on Wheels v Trustees of Dartmouth College, 6 NYS 2d 671, 168 Misc 376.

40 C.J. p 104 note 55.

Provisions in lease as consent see infra subdivision c (4) (a) of this section.

Written consent see infra § 75.

78. NJ—Stein v Pennsylvania Dock & Warehouse Co., 159 A 683, 10 NJ Misc 568.

79. NY—Hankinson v Vantine, 46 NE 291, 153 NY 20.

40 C.J. p 104 note 56.

80. Wis—Rohn v Cook, 162 NW. 183, 165 Wis 299.

81. Ariz—Mulcahy Lumber Co v Ohland, 36 P 2d 579, 44 Ariz 301. Ga—Stevens Supply Co v Stamm, 152 SE 603, 41 Ga App 239.

Iowa—Corpus Juris quoted in Lane-Moore Lumber Co v Kloppenburg, 215 NW 637, 638, 204 Iowa 613.

NC—Brown v Ward, 20 S.E. 2d 324, 221 NC 344.

40 C.J. p 105 note 60.

Knowledge and failure to give statutory notice of nonresponsibility see infra § 84.

No personal liability

Knowledge and consent given to an improvement made by lessee is not sufficient to bind lessor personally, or to make his property subject to lien—Shreveport Armature & Electric Works v Harwell, La App, 172 So 463, followed in Bolinger Gain-Yay, Inc. v Harwell, 172 So 471.

82. Ariz—Mulcahy Lumber Co v Ohland, 36 P 2d 579, 44 Ariz 301.

Iowa—Corpus Juris quoted in Lane-Moore Lumber Co v Kloppenburg, 215 NW 637, 638, 204 Iowa 613.

La—Shreveport Armature & Electric Works v Harwell, App, 172 So 463, followed in Bolinger Gain-Yay, Inc. v Harwell, 172 So 471.

Mo—Masterson v Roberts, 78 S.W. 2d 856, 336 Mo. 158, 97 A.L.R. 862.

NY—P Delany & Co. v Duvoli, 16 NE 2d 354, 278 NY. 328, reargument denied P Delaney & Co. v. Labes, 17 NE 2d 136, 278 NY 715,

and P Delany & Co. v. Labes, 18 NE 2d 314, 279 NY 685—C Wilson's Plumbing Shop on Wheels v Trustees of Dartmouth College, 6 NYS 2d 671, 168 Misc 376.

40 C.J. p 105 note 61.

83. Iowa—Corpus Juris quoted in Lane-Moore Lumber Co. v Kloppenburg, 215 NW. 637, 638, 204 Iowa 613.

40 C.J. p 105 note 62.

84. Iowa—Corpus Juris quoted in Lane-Moore Lumber Co v Kloppenburg, 215 NW 637, 638, 204 Iowa 613.

La—Callender v. Marks, App, 166 So 891.

NY—P. Delany & Co. v. Duvoli, 16 NE 2d 354, 278 NY. 328, reargument denied P Delaney & Co. v. Labes, 17 NE 2d 136, 278 NY 715,

and P Delany & Co. v. Labes, 18 NE 2d 314, 279 NY 685.

40 C.J. p 105 note 63.

85. Ariz—Mulcahy Lumber Co v Ohland, 36 P.2d 579, 44 Ariz 301.

terms of some statutes the estate of the lessor is subject to the lien where he knowingly permits improvements to be made by the lessee,⁸⁶ or has knowledge or constructive notice of such improvements,⁸⁷ or knowingly suffers or permits the tenant, acting as though he were the owner, to make a contract for the improvement⁸⁸

The failure of the landlord, having knowledge of the making of the improvements by his tenant, to object thereto is an important circumstance to be considered on the question of his consent,⁸⁹ and there is some authority for the view that a lien may be based on the failure of the lessor, having knowledge of the improvements, to object thereto.⁹⁰

(4) Effect of Provisions of Lease

- (a) In general
- (b) Provisions as to nature or ownership of improvements
- (c) Provisions as to liability for cost

88. Ill.—Crowley Bros v. Ward, 54 NE 2d 753, 322 Ill App 687—Young v. Bergner, 243 Ill App 473—Mutual Construction Co v. Baker, 237 Ill App. 596.

40 C.J. p 105 note 64

Actual notice of improvements held shown

Ill.—Bingaman v. Dahm, 30 NE 2d 509, 307 Ill App. 432

Enhancement of value

It is unnecessary to show that the improvement enhanced the value of the property—Westphal v. Berthold, 273 Ill App 266

87. Ill.—Young v. Bergner, 243 Ill App 473

88. Pa.—Fluke v. Lang, 128 A 663, 283 Pa. 54

89. N.Y.—National Wall Paper Co v. Sire, 57 NE 293, 183 NY 122

90. Ill.—Goldstein v. McAlonan, 17 NE 2d 993, 297 Ill App 643—Overhead Door Co. of Illinois v. Bernstein, 3 NE 2d 169, 285 Ill App. 587
40 C.J. p 105 note 67.

Necessity for improvement

Owner who was advised of the character of improvement being installed on the premises under contract with his lessee and who did not object to its installation cannot defend against a mechanic's lien therefor on the ground that it was unnecessary and did not increase the value of the premises.—Young v. Bergner, 243 Ill App 473

91. Ariz.—Mulcahy Lumber Co v. Ohland, 86 P 2d 579, 44 Ariz. 301
Cal.—Ott Hardware Co v. Yost, 159 P 2d 663, 69 Cal App 2d 593
Idaho.—Gem State Lumber Co v. Union Grain & Elevator Co, 278 P 775, 47 Idaho 747.

Mich.—Merithew v. Bennett, 20 N W 2d 860, 313 Mich. 189—Hart v. Reid, 219 NW 692, 243 Mich. 175
Mo.—Masterson v. Roberts, 78 SW 2d 856, 336 Mo 158, 97 A L R 862
—Sol Abrahams & Son Const Co v. Osterholm, App, 136 SW 2d 86—American Sash & Door Co. v. Stein, 96 SW 2d 927, 231 Mo App 321—Concrete Engineering Co. v. Grande Bldg Co., 86 SW 2d 595, 230 Mo App. 443—Dean & Hancock v. O'Bryan, App, 290 SW 641.
N.Y.—C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 NYS 2d 671, 168 Misc 378.

Or.—Lorenz v. Pilsener Brewing Co of Oregon, 81 P 2d 104, 159 Or 552
Wash.—Pioneer Sand & Gravel Co v. A. R. Turner Co, 17 P 2d 9, 170 Wash 618
Wyo.—Jordan v. Natrona Lumber Co., 75 P 2d 378, 52 Wyo. 393.
40 C.J. p 105 note 72.

Expiration of time to construct
Mechanic's lien against lessors is not precluded on ground that time for construction of building had expired, where lessors did not assert right of forfeiture, but accepted rent after expiration of time for construction and after erection of improvements for which lien was claimed had begun—Concrete Engineering Co v. Grande Bldg. Co., 86 SW 2d 595, 230 Mo App. 443.

Provision against assignment of lease
Provision in lease that no assignment thereof would release lessee from obligation to erect improvements would not make erection of building by lessee's assignee wholly unauthorized by lessor, so as to exempt lessor from mechanic's lien.—

(d) Provisions against liens

(e) Provisions as to notice or consent

(a) In General

Generally a lessor's estate or property is subject to mechanics' liens for alterations, improvements, or repairs which the lease requires or obligates the lessee to make, but not for those it merely authorizes or permits him to make.

It has frequently been held that a lien attaches where the terms of the lease require or obligate the lessee to make improvements,⁹¹ at least improvements of a permanent character or which are beneficial to the reversionary interests of the lessor, as discussed infra subdivision c (4) (b) of this section. Such provisions are deemed to constitute consent by the lessor to the making of the improvements⁹² or to constitute the tenant the agent of the lessor.⁹³ On the other hand, in some cases a lien has been denied even where the lease obligated the tenant to make improvements,⁹⁴ particularly where

Concrete Engineering Co. v. Grande Bldg Co., supra.

Services prior to execution of lease

Architect, who before making lease designed building to be erected by lessee did not have lien on property, at least where lessee was not agent of owner—Seattle Lighting Fixture Co v. Broadway Central Market, 286 P 43, 156 Wash 189, corrected on other grounds 286 P 1119, 156 Wash 189.

92. N.Y.—C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 NYS 2d 671, 168 Misc 378

40 C.J. p 105 note 74.

93. Ariz.—Mulcahy Lumber Co v. Ohland, 86 P 2d 579, 44 Ariz. 301
Cal.—Ott Hardware Co v. Yost, 159 P 2d 663, 69 Cal App 2d 593

Idaho.—Gem State Lumber Co v. Union Grain & Elevator Co, 278 P 775, 47 Idaho 747

Mo.—Masterson v. Roberts, 78 SW 2d 856, 336 Mo. 158, 97 A L R 862
—Sol Abrahams & Son Const Co v. Osterholm, App, 136 SW 2d 86.

Or.—Lorenz v. Pilsener Brewing Co. of Oregon, 81 P 2d 104, 159 Or 552—Nicolai-Neppach Co. v. Poore, 251 P 288, 120 Or. 183

Wash.—Pioneer Sand & Gravel Co v. A. R. Turner Co, 17 P 2d 9, 170 Wash 618—Seattle Lighting Fixture Co v. Broadway Central Market, 286 P 43, 156 Wash. 189, corrected on other grounds 286 P 1119, 156 Wash 189

Wyo.—Jordan v. Natrona Lumber Co, 75 P 2d 378, 52 Wyo. 393.
40 C.J. p 106 note 75.

94. N.M.—Rio Grande Lumber & Fuel Co. v. Buergo, 73 P.2d 312, 41 N.M. 624, 128 A.L.R. 1.

the improvement is primarily for the benefit of the tenant,⁹⁵ and such provisions have been held not to constitute the lessee the agent⁹⁶ or contractor⁹⁷ of the lessor. According to some authorities, provisions merely authorizing or permitting the lessee to make improvements do not constitute him the agent of the lessor,⁹⁸ or make the tenant and lessor joint proprietors in the construction of the improvement,⁹⁹ or render the property of the lessor subject to a lien.¹ There are cases, however, in which a lien has been allowed where the provisions of the lease authorized improvements by the lessee,² but the lessor's interest will not be bound by a lien for improvements contracted for by his lessee where the lease authorizes the lessee to make improvements only on the performance of conditions precedent, which are not performed.³

In some,⁴ but not other,⁵ cases a lien on the estate or property of the lessor for repairs made by

the lessee has been allowed where the lease contained a provision for the making of repairs by the lessee.

A lien against the interest of the lessor does not exist for an improvement other than that provided for in the lease⁶ unless there are other facts sufficient to constitute a basis for a lien.⁷

Constructive knowledge of terms. A person contracting with the lessee is charged with knowledge of the terms of the lease where it is on record⁸ or where he knows that the person with whom he is dealing is not the owner of the property⁹ or has received a letter from the lessor calling attention to the provisions of the lease.¹⁰

(b) Provisions as to Nature or Ownership of Improvements

The lessor's estate or property has been held subject to mechanics' liens for improvements made by the lessee

SD—Smith v McCoy, 235 N.W. 661, 58 SD 256
40 C.J. p 106 note 79

95. NC—Brown v. Ward, 20 SE 2d 324, 231 NC 344

96. NM—Rio Grande Lumber & Fuel Co. v. Buergo, 73 P 2d 312, 41 NM 624, 123 ALR 1

SD—Smith v. McCoy, 235 N.W. 661, 58 SD 256
40 C.J. p 106 note 80

97. Mont—Block v. Murray, 31 P 550, 12 Mont 545.

Privity of contract

Lease obligating lessee to construct race track did not create privity of contract between lessor and contractor—Smith v. McCoy, 235 N.W. 661, 58 SD 256.

98. Ariz—Mulcahy Lumber Co v. Ohland, 36 P 2d 579, 44 Ariz 301
Mo—Martin-Welch Hardware & Plumbing Co v. Moor, App, 16 S W 2d 667

Okl—Deka Development Co. v. Fox, 39 P 2d 143, 170 Okl 228
Or—Lorenz v. Pilsener Brewing Co. of Oregon, 81 P 2d 104, 159 Or 552
Wash—Seattle Ass'n of Credit Men v. Daniels, 130 P 2d 892, 15 Wash 2d 393—Miles v. Bunn, 22 P 2d 955, 173 Wash. 303—Pioneer Sand & Gravel Co. v. A. R. Turner Co., 17 P 2d 9, 170 Wash. 618—Colby & Dickinson v. Baker, 261 P. 101, 145 Wash 584
40 C.J. p 106 note 78

99. Or—Lorenz v. Pilsener Brewing Co. of Oregon, 81 P 2d 104, 159 Or. 552.

1. Ariz—Mulcahy Lumber Co v. Ohland, 36 P 2d 579, 44 Ariz 301
Ark—Hawkins v. Faubel, 31 S W 2d 401, 182 Ark. 304
Mo—Cochran v. Johnston, App, 25 S W 2d 130.

Okl—Deka Development Co. v. Fox, 39 P 2d 143, 170 Okl 228

Or—Lorenz v. Pilsener Brewing Co. of Oregon, 81 P 2d 104, 159 Or 552
Wash—Miles v. Bunn, 22 P 2d 955, 173 Wash. 303—Pioneer Sand & Gravel Co. v. A. R. Turner Co., 17 P 2d 9, 170 Wash 618—Colby & Dickinson v. Baker, 261 P. 101, 145 Wash 584.
40 C.J. p 106 note 77

Authorization of minor improvements

Lease provision authorizing lessee to make improvements, which contemplates only minor improvements, will not enable him to create a lien for a major improvement—Callender v. Marks, La App, 166 So 891.

2. Ill—Overhead Door Co. of Illinois v. Bernstein, 3 NE 2d 169, 285 Ill App 587

NY—Gescheidt & Co v. Bowery Sav Bank, 298 NYS 306, 251 App Div 266, affirmed 15 NE 2d 68, 278 N.Y. 472—Boyle v. Paulina Cafeteria & Restaurant, 220 App Div 482, 222 NYS 19.
40 C.J. p 106 note 78.

3. Ill—Edward Solomon, Inc. v. Padorr, 282 Ill App 269

Strict construction

On question whether lien arises against sublessor, sublease will be strictly construed—Edward Solomon, Inc. v. Padorr, supra.

4. Ark—Whitcomb v. Gans, 119 S W. 676, 90 Ark 469.
40 C.J. p 107 note 89.

5. Mo—Sol Abrahams & Son Const. Co. v. Osterholm, App, 136 S W 2d 86
Or—Williams v. Sharpe, 265 P 793, 125 Or 379
40 C.J. p 107 note 90.

6. NY—Sager v. Renwick Park & Traffic Ass'n, 159 NYS. 4, 172 App Div. 359

40 C.J. p 107 note 91

7. NY—National Wall Paper Co v. Sire, 57 NE 293, 163 NY 123
40 C.J. p 107 note 92

8. US—Stowers v. Wheat, CCA Fla., 78 F 2d 25
NJ—Stein v. Pennsylvania Dock & Warehouse Co., 159 A. 683, 10 N.J. Misc 568.
40 C.J. p 105 note 70.

Claimant not a "subsequent purchaser"

A mechanic's lien claimant is not a "subsequent purchaser," within the meaning of the recording act—Queal Lumber Co v. Lipman, 206 NW 627, 200 Iowa 1376.

Nullification of notice

Effect of constructive notice of recording of lease, which provides that the lessor shall expend a specified sum for improvements, is nullified by subsequent action of lessor in agreeing to expend a greater sum, of which increase no record is made, and also by payment for extra work and material—McLean v. Nolan, 44 App DC 1

Right to record

The lessor has a right to record a lease which contains provisions as to the obligation of the lessee to erect improvements and against the subjection of the property to mechanics' liens—Queal Lumber Co v. Lipman, 206 NW 627, 200 Iowa 1376.

9. NY—Jewett Refrigerator Co v. Lawless, 198 NYS 617, 120 Misc. 443

10. Ill—F. K. Ketler Co v. County Fair Grounds Corporation, 21 N. E 2d 779, 301 Ill App 117

where the lease provides that they shall belong or revert to the lessor or it is contemplated they will be of benefit to the lessor, but not where the lease provides that the improvements shall remain the property of the lessee

A mechanic's lien has frequently been held to attach to the estate or property of the lessor for improvements made by the lessee which, by the terms of the lease, are to belong or revert to the lessor,¹¹ or are to be permanent in character, becoming part of the realty and of benefit to the lessor,¹² or which are to be maintained on the premises during the entire term of the lease and on which the lessor will have a lien for rent and taxes.¹³ In some cases, however, lease provisions that improvements made by the lessee are to belong or revert to the lessor have been deemed not to constitute the lessee an agent of the lessor with authority to charge the property,¹⁴ and a lien on the lessor's interest for such improvements has been denied,¹⁵ at least where their construction is optional with the lessee¹⁶ and for his use, benefit, and convenience.¹⁷ It has generally been held that no lien attaches to the lessor's interest where the lease provides that the building, structure, or material shall remain the property of the lessee and be removable by him at the expiration

of the lease;¹⁸ but in some cases, where the improvements made were of a permanent character, such a provision has been regarded as nugatory and ineffectual to prevent a lien.¹⁹

(c) Provisions as to Liability for Cost

In some decisions a lien has been allowed against the property of the lessor where the lease provides for the making of improvements by the lessee at the cost of the lessor.

In some decisions a lien has been allowed against the estate or property of the lessor where the lease provides for the making of improvements by the lessee at the cost of the lessor, either generally²⁰ or by deducting the cost from the rent,²¹ or for the reimbursement of the lessee from the rentals arising out of the improvement,²² or where, under the lease, the owner is obligated to reimburse the tenant for the cost of the improvements,²³ and in such case the mere fact that the lease provides that the building shall be constructed at the cost of the lessee does not prevent the attachment of the lien.²⁴ In other decisions a lien has been denied where the lease provides for a deduction of the cost of the improvements from the rent,²⁵ at least where the lease pro-

11. Ill.—McKeown Bros Co v. Ogden Kennel Club, 269 Ill.App 622 NY—C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 NYS2d 671, 168 Misc 376.

Wash.—Seattle Lighting Fixture Co v. Broadway Central Market, 286 P. 43, 156 Wash 189, corrected on other grounds 286 P. 1119, 156 Wash 189
40 C.J. p 106 note 82.

12. Mo.—Sol Abrahams & Son Const Co v. Osterholm, App, 136 SW 2d 86—American Sash & Door Co. v. Stein, 96 SW 2d 937, 231 Mo App 221—Dean & Hancock v. O'Bryan, App, 290 SW 641

NY—C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 NYS2d 671, 168 Misc 376.

40 C.J. p 106 note 83

Improvements for benefit of lessor
Repairs and improvements which make building suitable for purpose for which it was designed, and more rentable and salable, are of immediate benefit to lessor—Jordan v. Natrona Lumber Co., 75 P2d 378, 52 Wyo. 393

Primary benefit of lessor

It has been held that a lien attaches to the lessor's interest where the improvement is made for the primary benefit of the lessor—Deka Development Co v. Fox, 39 P2d 143, 170 Okl 228—Mansfield Lumber Co. v. First State Bank of Vian, 293 P. 1079, 147 Okl 8, 79 A.L.R. 958

13. Wash.—Pioneer Sand & Gravel Co v. A. R. Turner Co., 17 P2d 9, 170 Wash 618

14. Okl.—Deka Development Co v. Fox, 39 P2d 143, 170 Okl 228—Simpson v. Davidson Case Lumber Co., 300 P. 631, 150 Okl 132

Tex.—Wotola Royalty Corporation v. Bethlehem Supply Co., Civ App, 152 SW2d 480, affirmed Bethlehem Supply Corporation v. Wotola Royalty Corporation, 165 SW2d 443, 140 Tex. 9
40 C.J. p 106 note 85.

15. Tex.—Wotola Royalty Corporation v. Bethlehem Supply Co., Civ App, 152 SW2d 480, affirmed Bethlehem Supply Corporation v. Wotola Royalty Corporation, 165 SW2d 443, 140 Tex. 9
40 C.J. p 106 note 84

16. Wash.—Colby & Dickinson v. Baker, 261 P. 101, 145 Wash 584.

17. Okl.—Deka Development Co v. Fox, 39 P2d 143, 170 Okl 228—Simpson v. Davidson Case Lumber Co., 300 P. 631, 150 Okl 132

18. Iowa.—Southern Surety Co v. York Tire Service, 227 NW 606, 209 Iowa 104—Lane-Moore Lumber Co. v. Kloppenburg, 215 NW 637, 204 Iowa 613

Okl.—Anderson v. Gibbs Lumber Co., 10 P2d 416, 157 Okl 17.
40 C.J. p 107 note 86

19. Ill.—E. R. Darlington Lumber Co v. Burton, 156 Ill.App. 82.

20. Pa.—Boteler v. Epen, 99 Pa 313.

21. Cal.—Ott Hardware Co v. Yost, 159 P2d 663, 69 Cal App2d 593

Mich.—Merithew v. Bennett, 20 N.W. 2d 860, 313 Mich 189.
Okl.—Mansfield Lumber Co v. First State Bank of Vian, 293 P 1079, 147 Okl 8, 79 A.L.R. 958
40 C.J. p 107 note 94

22. Okl.—Mansfield Lumber Co v. First State Bank of Vian, supra

23. Okl.—Deka Development Co v. Fox, 39 P2d 143, 170 Okl 228

In lieu of rent

Where the lessee agrees to make improvements and no rental is exacted for his use of the premises, it must be held that in legal effect the lessor agreed to pay the cost of the improvements—Jordan v. Natrona Lumber Co., 75 P2d 378, 52 Wyo 393.

Option to acquire insufficient

Fact that lessor is given option in lease to acquire improvements made by lessee under certain conditions is not tantamount to obligation to reimburse lessee so as to render lessor's interest subject to laborers' and materialman's liens—Deka Development Co. v. Fox, 39 P2d 143, 170 Okl 228.

24. Okl.—Mansfield Lumber Co. v. First State Bank of Vian, 293 P 1079, 147 Okl 8, 79 A.L.R. 953.

25. N.M.—Rio Grande Lumber & Fuel Co. v. Buergo, 73 P2d 312, 41 N.M. 624, 123 A.L.R. 1.
40 C.J. p 107 note 95.

vision with respect to repairs and alterations is permissive and the lessee is under no obligation to make them,²⁶ and, under some statutes, even though the lease requires the lessee to make the repairs or improvements for which a lien is sought.²⁷ A provision in the lease that, at the end thereof, there shall be an equitable adjustment for improvements made does not constitute the lessee an agent of the lessor so as to render the property subject to a mechanic's lien for improvements made under contract with the lessee.²⁸

A lien against the estate of the lessor has been allowed for improvements made by a lessee whose lease provides that improvements by him shall be at his own expense,²⁹ where, despite such a provision, the lessor knowingly permitted the improvement to be made,³⁰ but such a lien has also been denied³¹ even though the lessor had knowledge of the furnishing of the material.³² A general consent in the lease, however, for the lessee to make alterations or improvements at his own expense has been held not to subject the lessor's interest to a lien for alterations made exclusively for the benefit of the tenant and to which he did not specifically consent.³³

Since, as discussed supra subdivision c (4) (a)

of this section, in some jurisdictions a lien attaches where the terms of the lease require or obligate the lessee to make improvements, it has been stated that the lessor's interest is subject to the lien under such circumstances, irrespective of whether the cost of the improvement is to be borne by the lessor or by the lessee.³⁴

(d) Provisions against Liens

Under the statutes in some jurisdictions stipulations contained in the lease and intended to protect the interest of the lessor against mechanics' liens are given effect, but under the terms of the statutes in other jurisdictions such stipulations are regarded as unavailing unless the lien claimant had notice of the lease.

Under the statutes in some jurisdictions stipulations contained in the lease and intended to protect the interest of the lessor against mechanics' liens are given effect,³⁵ even though the lessor is interested ultimately in the improvement,³⁶ and by the terms of the lease the lessee is required to make the improvement.³⁷ Under the terms of the statutes in other jurisdictions, however, such stipulations are regarded as unavailing to prevent a lien which would otherwise attach³⁸ unless claimant had notice of the stipulation.³⁹

26. Wash—Seattle Ass'n of Credit Men v Daniels, 130 P 2d 892, 15 Wash 2d 393.

27. N.M.—Rio Grande Lumber & Fuel Co v Buergo, 73 P 2d 312, 41 NM 624, 123 ALR 1.

28. Ga.—Consolidated Lumber Co v. Ocean SS Co, 82 SE 532, 142 Ga 186.

40 C.J. p 107 note 96.

29. Mo.—Concrete Engineering Co v Grande Bldg Co, 86 S.W.2d 595, 230 Mo App 443.

N.Y.—C Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 NYS 2d 671, 168 Misc 376.

40 C.J. p 107 note 97.

30. Ill.—Loeff v Meyer, 119 NE 908, 284 Ill 114.

40 C.J. p 108 note 1.

31. Ariz.—Mulcahy Lumber Co v. Ohland, 86 P 2d 579, 44 Ariz 301.

La.—Shreveport Armature & Electric Works v Harwell, App. 172 So 463, followed in Bolinger Gain-Yay, Inc. v Harwell, 172 So 471.

N.J.—Stein v. Pennsylvania Dock & Warehouse Co., 159 A. 683, 10 N J Misc 568.

Okl.—Deka Development Co v Fox, 89 P 2d 143, 170 Okl. 228—Simpson v Davidson Case Lumber Co, 300 P. 631, 150 Okl 132.

40 C.J. p 107 note 98.

Right to contract

Lessors have right in good faith

to enter into contract with lessees that all improvements shall be made by lessees at their own expense—Perkins Supply & Fuel Service v Rosenberg, 282 NW 371, 226 Iowa 27—Thompson Yards v Haakinson & Beatty Co, 229 N.W. 266, 209 Iowa 985.

32. Iowa.—Cedar Rapids Sash & Door Co v Dubuque Realty Co, 193 N.W. 801, 195 Iowa 679.

33. N.Y.—Schuldt v Chuckrow, 236 NYS 220, 222 App Div 441—C Wilson's Plumbing Shop on Wheels v Trustees of Dartmouth College, 6 NYS 2d 671, 168 Misc 376.

34. Wyo.—Jordan v. Natrona Lumber Co, 75 P 2d 378, 52 Wyo. 393.

35. U.S.—Stowers v. Wheat, CCA Fla., 78 F 2d 26.

Iowa.—Perkins Supply & Fuel Service v Rosenberg, 282 N.W. 371, 226 Iowa 27—Queal Lumber Co v Lipman, 206 NW 627, 200 Iowa 1376.

N.J.—Stein v Pennsylvania Dock & Warehouse Co., 159 A. 683, 10 N. J Misc 568.

40 C.J. p 108 note 2.

Recorded lease

The text rule is particularly true where the lease is recorded.

Iowa.—Queal Lumber Co v Lipman, 206 NW. 627, 200 Iowa 1376.

N.J.—Stein v Pennsylvania Dock & Warehouse Co., 159 A. 683, 10 N J Misc 568.

Right to stipulate in lease

A lease of land may require lessee to erect improvements, which shall not be subject to any mechanic's lien—Queal Lumber Co. v Lipman, 206 NW 627, 200 Iowa 1376.

Waiver not shown

The lessor does not waive his rights under lease provision against attachment of lien by advancing specified sum for payment of labor and material in remodeling of building—Thompson Yards v Haakinson & Beatty Co, 229 N.W. 266, 209 Iowa 985.

36. U.S.—Stowers v. Wheat, CCA Fla., 78 F 2d 26.

Iowa.—Queal Lumber Co v Lipman, 206 NW. 627, 200 Iowa 1376.

37. Iowa.—Queal Lumber Co v Lipman, supra.

38. Mo.—Concrete Engineering Co v Grande Bldg Co., 86 S.W.2d 595, 230 Mo App 443.

Okl.—Mansfield Lumber Co v First State Bank of Vian, 293 P. 1079, 147 Okl 8, 79 ALR 958.

Wash.—Seattle Lighting Fixture Co. v. Broadway Central Market, 286 P 48, 156 Wash. 189, corrected on other grounds 286 P. 1119, 156 Wash 189.

40 C.J. p 108 note 3.

39. Ill.—F. K. Ketler Co. v. County Fair Grounds Corporation, 21 NE 2d 779, 301 Ill App. 117.

(e) Provisions as to Notice or Consent

In order for a lien to be acquired against a lessor's estate for alterations or improvements by the lessee, there must be a compliance with provisions in the lease as to the necessity for notice of, or consent to, such improvements or alterations, unless waived; the lessor's consent, in accordance with the provisions of the lease, will not subject his estate to a lien where under the statutes a lien may not be predicated against a lessor's estate merely on his consent to the improvement.

Where a lien against the lessor's estate may be predicated on the lessor's consent to improvements by the lessee, as discussed supra subdivision c (2) of this section, and where there is a provision in the lease that changes, alterations, or additions shall not be made without the consent of the landlord, a lien on the lessor's interest arises when and only when the required consent has been given,⁴⁰ there has been a compliance with all conditions attached to the consent,⁴¹ and the work done is within the scope of the consent given.⁴² Such a provision controls other provisions of the lease which might otherwise be construed to authorize a contract by the lessee which would give rise to a lien against the estate of the lessor.⁴³ On the other hand, where a lien against the lessor's estate cannot be predicated merely on his consent to the making of improvements by the lessee, as discussed supra subdivision c (2) of this section, the lessor's interest cannot be subjected to a lien from the mere fact that he consents in accordance with provisions of the lease prohibiting the lessee from making alterations without the lessor's consent.⁴⁴

Waiver. A provision in the lease that no improvements shall be made except with the owner's written consent may be waived.⁴⁵ Also a provision

of the lease requiring a prior notice to the landlord of alterations may be waived by him,⁴⁶ as by failing to object after acquiring knowledge that alterations are being made.⁴⁷

§ 66. — Licensees

A mechanic's lien cannot be acquired for materials furnished or labor performed in the construction of improvements on land under a contract with a licensee acting without authority from the licensor.

A licensee has no title or interest in the land, as considered in Licenses § 84, and no lien will arise for materials furnished or labor performed in the construction of improvements upon the land under a contract with a licensee,⁴⁸ who has no authority, express or implied, to bind the licensor.⁴⁹

§ 67. — Life Tenants

A life tenant may subject his interest in the property to a mechanic's lien, but he cannot subject the remainder or reversion thereto unless the remainderman or reversioner authorizes or permits it.

A life tenant may, by contract for the improvement of the land, subject it to a mechanic's lien to the extent of his life interest,⁵⁰ but he cannot create a lien on the reversion or remainder⁵¹ unless, under the provisions of some statutes, the remainderman knowingly permits the contract to be made⁵² or unless the remainderman has promised to make the improvement or repairs out of insurance proceeds received by him and has failed to keep his promise.⁵³

A remainderman cannot create a lien on the interest of the life tenant.⁵⁴

40. N.Y.—Gescheldt & Co v Bowery Sav. Bank, 296 N.Y.S. 306, 251 App.Div. 266, affirmed 15 N.E.2d 68, 278 N.Y. 472.

40 C.J. p 108 note 4.

41. Ill.—Rasmussen v Harper, 5 N.E.2d 257, 287 Ill.App. 404.

40 C.J. p 108 note 5.

Written consent.

Ill.—Rasmussen v Harper, supra. Statutory requirement for written consent see infra § 75.

42. N.Y.—McNulty v Offerman, 128 N.Y.S. 765, 141 App.Div. 730.

43. Ill.—Hacken v Isenberg, 124 N.E. 306, 288 Ill. 589.

N.Y.—Regan v Borst, 32 N.Y.S. 810, 11 Misc. 92.

44. Mo.—Sol. Abrahams & Son Const. Co v Osterholm, App., 136 S.W.2d 86.

45. N.Y.—Gates v. National Fair & Exposition Ass'n, 121 N.E. 741, 225

N.Y. 142, motion granted 122 N.E. 621, 226 N.Y. 558.

Necessity for written consent see infra § 75.

46. Ill.—Loeff v Meyer, 119 N.E. 908, 284 Ill. 114.

47. Ill.—Loeff v Meyer, supra. 40 C.J. p 108 note 10.

48. Iowa.—Hoag v. Hay, 72 N.W. 525, 103 Iowa 291.

49. Iowa.—Hoag v Hay, supra.

50. Tenn.—Corpus Juris cited in Allen v. Brown, 14 Tenn.App. 405, 408.

Tex.—Land Title Bank & Trust Co v Witherspoon, Civ.App., 126 S.W.2d 71.

40 C.J. p 108 note 14.

51. Ill.—Williams v Vanderbilt, 34 N.E. 476, 145 Ill. 238, 36 Am.S.R. 486, 21 L.R.A. 489.—Donkle & Webber Lumber Co v Rehmann, 38 N.E.2d 709, 310 Ill.App. 17.

Tenn.—Corpus Juris cited in Allen v. Brown, 14 Tenn.App. 405, 408.

Power to use.

Power of life tenant under will to use property to best advantage and to keep it in repair, but not to encumber it, did not authorize life tenant to subject interest of remainderman to lien of materialman or mechanic.—German v. Frey Planing Mill Co., 77 S.W.2d 414, 257 Ky. 128.

52. Ill.—Donkle & Webber Lumber Co v Rehmann, 38 N.E.2d 709, 310 Ill.App. 17.—Wertz v Mulloy, 144 Ill.App. 329.

53. Minn.—Rendahl v. Hall, 200 N.W. 744, 180 Minn. 602, rehearing denied 200 N.W. 940, 180 Minn. 602.

54. Tex.—Union Cent. Life Ins. Co. v Austin, Civ.App., 52 S.W.2d 536, error refused.

§ 68. — Mortgagors and Mortgagees

A mortgagor can subject his, but not the mortgagee's, interest in the property to a mechanic's lien. A mortgagee is an owner within the meaning of mechanic's lien statutes where he is in, but not where he is out of, possession.

A mortgagor in possession can by his contract give rise to a lien affecting his interest,⁵⁵ but he cannot subject the property to mechanics' liens for improvements thereon as against the rights of his mortgagee⁵⁶ unless the latter assents to the contract⁵⁷ or improvement.⁵⁸ The mere fact that the mortgagee consented to the improvement, however, has been held insufficient to subject his interest to a mechanic's lien therefor,⁵⁹ although it has also been held that the assent of a mortgagee holding the legal title to real property to an improvement thereon is sufficient to subject his title to the lien arising from the improvement.⁶⁰ As against the mortgagee the lien claimant may have a right to a lien on the improvement itself.⁶¹ After a decree of foreclosure and sale thereunder, the mortgagor has no such ownership as will give a lien to a person who afterward furnishes material or performs work on his contract,⁶² unless through subsequent purchase or

other circumstances he may be held to have an interest in the premises.⁶³ A mortgagee is to be deemed an owner, within the meaning of the mechanics' lien statutes, where he is in,⁶⁴ but not where he is out of,⁶⁵ possession.

§ 69. — Part or Joint Owners

A part owner of property is an owner within the meaning of mechanics' lien statutes and may subject his interest to a lien for the entire cost of improvements on the common property; but he cannot bind his cotenant's interest unless the latter consents thereto. Partnership property may become subject to a mechanic's lien under a contract made in the partnership name by one or more of the partners.

A cotenant of an undivided interest in realty is an owner within the meaning of mechanics' lien statutes;⁶⁶ and where a part owner contracts for, or authorizes the making of, an improvement on the common property his interest therein may be subjected to a lien for the entire cost thereof.⁶⁷ A tenant in common in possession may contract so as to bind his interest,⁶⁸ but has no authority to bind his cotenant's interest⁶⁹ unless the latter consents

55. Ala.—Central Lumber Co v Jacks, 132 So 721, 222 Ala 475
Iowa.—Crawford-Fayram Lumber Co v Mann, 211 NW 225, 203 Iowa 748

40 C.J. p 108 note 19

Priority between mortgage and mechanic's lien see *infra* §§ 199-206

56. Iowa.—Crawford-Fayram Lumber Co v Mann, 211 NW 225, 203 Iowa 748

Mo.—Bovard v Owen, App., 30 SW 2d 154

40 C.J. p 108 note 21.

In Alabama

(1) The text rule is now followed—Central Lumber Co. v. Jacks, 132 So 721, 222 Ala 475

(2) In an early case it was stated that under a contract with a mortgagor in possession for improvements to be placed on the premises mechanics and materialmen might acquire a lien on the premises which might be enforced against the interest of the mortgagee—Sorsby v. Woodlawn Lumber Co., 81 So 68, 202 Ala 566.

57. Ga.—Williams v. Chatham Real Estate & Improvement Co., 78 SE 869, 13 Ga.App 42.

58. Mo.—Price v. Merritt, 55 Mo. App 640

59. Mo.—Bovard v. Owen, App., 30 SW 2d 154

Communication to lien claimant

It has been held that, although the holder of a security deed has co-op-

erated with the owner in plans for the improvements, or even if he has been active and instrumental in having the improvements made, some definite and affirmative act on his part, communicated to the materialman and acted on by the latter, is necessary before the rights of the holder of the security deed will be affected, in the absence of an antecedent unrecorded lien of the materialman or actual notice of the materialman's claim at the time of the execution and record of the security deed—Georgia State Sav. Ass'n v. Wilson, 5 SE 2d 14, 189 Ga. 21

60. Minn.—Lindholm v. Hamilton, 198 NW 289, 159 Minn. 81

Mo.—Price v. Merritt, 55 Mo App 640.

61. Ala.—Central Lumber Co v Jacks, 132 So. 721, 222 Ala 475

62. Ill.—Davis v. Connecticut Mut Life Ins Co., 84 Ill 508—Erickson v. Ginocchio, 24 NE 2d 884, 303 Ill App 159

40 C.J. p 62 note 22 [a].

63. N.Y.—Majestic Tile Co v. Nicholas, 291 NYS 551, 161 Misc 231
Equitable owner

Where second mortgagee, after having agreed for a consideration to discontinue foreclosure action, foreclosed the mortgage and purchased the premises at foreclosure sale and thereafter the mortgagor obtained possession of the premises under a contract of purchase and contracted for work and materials for the re-

pair of the premises, such mortgagor was the equitable owner of the premises for the purpose of determining the rights of mechanics' lien claimants—Majestic Tile Co v. Nicholas *supra*

64. Minn.—Lindholm v. Hamilton 198 NW 289, 159 Minn 81.
40 C.J. p 109 note 26

65. US—Allis-Chalmers Co v Central Trust Co. Me., 190 F 700, 111 C.C.A. 428, 89 L.R.A.N.S. 84
40 C.J. p 109 note 27

66. ND—Viker v Beggs, 208 NW 383, 53 ND 858

67. Minn.—Berglund v Abram, 182 NW 634, 148 Minn 412

Neb.—Corpus Juris quoted in Barry v Barry, 26 NW 2d 1, 5, 147 Neb 1067—Hollingsworth v McLean, 300 NW 580, 140 Neb 568

Wash.—Patrick v Bonthius, 124 P 2d 550, 13 Wash 2d 210

Failure of part owner to give statutory notice of nonresponsibility see *infra* § 134

Property owned jointly by husband and wife see *supra* § 63 a

68. La.—Boutte & Courrage v. Derokay, App., 188 So 39.

40 C.J. p 109 note 30.

69. La.—Boutte & Courrage v. Derokay, *supra*.

Neb.—Barry v Barry, 26 N.W.2d 1, 147 Neb 1067.

Pa.—Kreitner Bros., Inc v Lake Rose Realty Co., 20 Pa.Dist & Co 498.

40 C.J. p 109 note 31.

to⁷⁰ or ratifies⁷¹ the contract, in which case the entire interest may be bound. Mere knowledge of a coowner that another coowner is improving the property will not, however, subject his interest to a mechanic's lien⁷². Where tenants in common enter into a contract for the erection of a building on the property, the contract binding each separately to the payment only of the amount subscribed by him, which is proportionate to his interest in the property, the lien attaches to the undivided interest of each of the owners for the amount personally owing by him,⁷³ and not to the entire lot and building for the balance unpaid on the entire contract.⁷⁴

Partnership property may become subject to a mechanic's lien under a contract made in the partnership name by one or more of the partners,⁷⁵ even though the legal title to the property is in one or more, but not all, of the partners,⁷⁶ or is in an agent of the partners.⁷⁷ In the case of a joint adventure, the act of one member in contracting for a building or improvement which is germane to the general purpose of the joint enterprise is sufficient to render not only his interest⁷⁸ but also the interest of the other members⁷⁹ subject to a mechanic's lien, his interest being bound on the ground that he is a joint owner⁸⁰ and the interest of the other members being bound on the ground that he is their agent⁸¹.

§ 70. — Trustees and Cestuis Que Trust

A trustee of an express trust may not contract for improvements so as to subject the trust property to a mechanic's lien unless he is empowered to do so by statute, a court order, or the provisions of the trust, but a trustee of a resulting or unrecorded trust may do so. A cestui que trust may subject the trust property to a mechanic's lien where the trust is a simple or dry trust, but not where the trustee has power to manage and control the trust property unless empowered to do so by statute.

The trustee of an express trust may not by his contract create a mechanic's lien on the trust property⁸² unless the requisite power is conferred on him by statute⁸³ or by a court of competent jurisdiction,⁸⁴ or there is something in the instrument which created the trust which empowers him to do so,⁸⁵ and what the trustee is without power to do directly, he may not do indirectly,⁸⁶ as by failing to object to the furnishing of materials on the order of other persons⁸⁷.

A trustee having full power to manage, improve, and repair the trust property may usually by his contract subject it to a mechanic's lien⁸⁸. On the other hand, no mechanic's lien will attach under the contract of the trustee for the repairs or improvements, where he has no power to make such a contract on behalf of the estate,⁸⁹ or where the instrument creating the trust, although authorizing improvements by the trustee, expressly provides that

70. U.S.—In re North Babylon Estates, CCAN Y, 30 F.2d 372.
La.—Boutte & Courrage v Derokay, App, 168 So 39.

Pa.—Kreitner Bros, Inc v Lake Rose Realty Co, 20 Pa Dist & Co 493.

40 C.J. p 109 note 33.

71. Pa.—Kreitner Bros, Inc v Lake Rose Realty Co, 20 Pa Dist & Co 493.

72. La.—Boutte & Courrage v Derokay, App, 168 So 39.

73. Ala.—Hines v Chicago Bldg & Mfg Co, 22 So. 160, 116 Ala. 637.

74. Ala.—Hines v. Chicago Bldg & Mfg Co, supra.

75. Neb.—Hoagland v. Lusk, 60 N. W. 162, 33 Neb. 376, 29 AmSR 485.

40 C.J. p 109 note 35.

76. Neb.—Hoagland v. Lusk, supra. 40 C.J. p 109 note 36.

Land owned by partners in their own names as subject to payment of firm creditors for payment of improvement placed thereon for partnership purposes see the CJS title Partnership § 188, also 47 C.J. p 917 notes 27-29.

Construction by partnership

Construction of house for part-

nership at request of partner on land owned by partner and another as cotenants was held to subject partnership's interest in the house and the partner's interest in the land to a mechanic's lien for the labor and materials furnished—Shea v Peters, 268 P 989, 126 Or 76.

77. DC.—Davidson v E F. Brooks Co, 46 App.DC 457.

78. Okl.—O K Boiler & Welding Co v Minnetonka Lumber Co, 229 P 1045, 103 Okl 226.

79. Okl.—O K Boiler & Welding Co v Minnetonka Lumber Co, supra.

Lease held not to show joint enterprise

Ill.—F. K Ketler Co v County Fair Grounds Corporation, 21 N.E.2d 779, 801 Ill App 117.

80. Okl.—O K Boiler & Welding Co v Minnetonka Lumber Co, 229 P 1045, 103 Okl 226.

81. Okl.—O K Boiler & Welding Co v Minnetonka Lumber Co, supra.

82. Ky.—Hines v. Hollingsworth-Young Hardware Co, 198 S.W. 716, 178 Ky 333, 4 A.L.R. 1018.

Statutory trustee of defunct corporation see supra § 60.

83. Ky.—Hines v. Hollingsworth-Young Hardware Co, supra. 40 C.J. p 109 note 44.

84. Ky.—Hines v Hollingsworth-Young Hardware Co, supra.
Pa.—Fenner v. Real Estate Trust Co, 13 Pa Dist 47, 29 Pa.Co 329.

85. ND.—Viker v Beggs, 208 N.W. 383, 53 N.D. 358.

Tex.—Tucker v Dougherty Roofing Co, Civ App, 137 S.W.2d 884, error dismissed, judgment correct. 40 C.J. p 109 note 46.

86. Neb.—Horton v Tabitha Home, 145 N.W. 1023, 95 Neb 491, 51 L.R.A.N.S., 161, Ann Cas 1915D 1189.

87. Neb.—Horton v. Tabitha Home, supra.

ND.—Viker v Beggs, 208 N.W. 383, 53 N.D. 358.

88. ND.—Viker v. Beggs, supra.
Tex.—Tucker v. Dougherty Roofing Co, Civ App, 137 S.W.2d 884, error dismissed, judgment correct. 40 C.J. p 109 note 49.

Power of trustee to make repairs and improvements generally see the CJS title Trusts § 282, also 65 C.J. p 712 note 62-p 716 note 20.

89. Ky.—Maynard v. Columbus, 150 S.W. 1019, 150 Ky 817.

NY.—Herbert v Herbert, 67 How Fr 333.

there shall be no lien created thereby on the premises,⁹⁰ or authorizes him only to make repairs and improvements out of the gross income derived from the estate,⁹¹ and the deed or will creating the trust is on record.⁹² However, where the record title is in a trustee free of any trust, and persons without knowledge of the trust contract with him for the improvement of the property, they may enforce mechanics' liens on the property as against the cestui que trust.⁹³

In case of a simple or dry trust a mechanic's lien may exist for labor performed or materials furnished under or by virtue of a contract with, or the consent of, the equitable owner of the property;⁹⁴ but, where a trustee has power to manage and control the trust property, a contract with the cestui que trust alone, not consented to or approved by the trustee, is not sufficient as a basis for a mechanic's lien.⁹⁵ In some instances the statutes expressly provide that cestui que trust shall be deemed owners.⁹⁶

Trust to secure debt. A trustor who executes a trust deed solely to secure a debt is the owner of the property as far as the establishment of a mechanic's lien is concerned.⁹⁷

§ 71. — Vendors and Vendees

- a. In general
- b. Vendors
- c. Vendees

a. In General

Both parties to an executory contract for the sale of real property may be treated, under certain circumstances, as owners within the meaning of mechanics' lien statutes, but prior to the making of the contract a prospective purchaser may not be so considered.

Under certain circumstances both parties to an executory contract for the sale of real property may be treated as owners within the meaning of the mechanics' lien statutes.⁹⁸ On the other hand, various persons have been held not to be owners within the meaning of such statutes, such as a person in possession under a deed placed in escrow until payment of the purchase money,⁹⁹ a lessee in possession with an unexercised option to purchase,¹ the holder of a naked option to purchase,² or one who is merely negotiating for the purchase of realty.³

b. Vendors

A vendor who holds merely a vendor's lien is not an owner within the meaning of mechanics' lien statutes, but a vendor under an executory contract of sale may be so considered.

A person merely holding a vendor's lien does not have sufficient ownership to support a lien⁴ or to require his written consent to the improvement in order to waive his lien, where a statute requires the owner's written consent in order to subject his interest to a lien for improvements made at the instance of a person not the owner of the land.⁵ Where the vendee under a contract of purchase is

90. Ill.—Franklin Sav. Bank v. Taylor, 28 NE 397, 131 Ill 376 40 C.J. p 110 note 51

91. Ky.—Hall v Bullock, 97 SW 351, 29 Ky L 1254

92. Ky.—Maynard v. Columbus, 150 SW 1018, 150 Ky 817—Hall v Bullock, 97 SW 351, 29 Ky L 1254

Destruction and restoration of record

(1) The destruction of the record by fire has no effect on the constructive notice existing by virtue of the recording—Franklin Sav Bank v. Taylor, 28 NE 397, 131 Ill 376

(2) Also the fact that after the execution of the contract the burnt record was restored by a decree falsely reciting that the trustee had power to encumber could not validate the lien—Franklin Sav Bank v Taylor, supra

93. Ill.—Springer v. Kroeschell, 43 NE 1084, 161 Ill 858. 40 C.J. p 110 note 54.

94. Fla.—Corpus Juris quoted in Chapman v St Stephens Protestant Episcopal Church, 136 So 238, 241, 105 Fla 683, modified on other grounds 145 So 757, 105 Fla 683 40 C.J. p 110 note 56.

Equitable owner generally see supra § 57

Use of church

Trust property held for use of church or religious society is not exempt from mechanic's lien—Chapman v St Stephens Protestant Episcopal Church, 136 So 238, 105 Fla 683, modified on other grounds 145 So 757, 105 Fla 683 40 C.J. p 110 note 57.

95. Fla.—Corpus Juris quoted in Chapman v. St Stephens Protestant Episcopal Church, 136 So 238, 241, 105 Fla 683, modified on other grounds 145 So 757, 105 Fla 683 40 C.J. p 110 note 57.

96. Mo.—Ambrose Mfg. Co v. Gapen, 22 Mo App 397

97. Cal.—Wasco Creamery & Construction Co v Coffee, 3 P.2d 588, 117 Cal App 298

Legal estate in trustor

Trust deed executed solely to secure debt conveys legal title only as far as necessary to execution of trust—Wasco Creamery & Construction Co v Coffee, supra.

98. Iowa.—Knapp v Baldwin, 238 NW 542, 213 Iowa 24—Veale Lumber Co v. Brown, 195 NW 348, 197 Iowa 240.

ND—Viker v Beggs, 208 NW 388. 53 ND 858

Sale after lien has attached see infra § 243

99. Ark.—Mansfield Lumber Co v Gravette, 5 SW 2d 726, 177 Ark 31

Legal title not shown

Where deed to land contract vendee was in escrow when vendee conveyed land to wife through third person, wife had no legal title and hence mechanic's lien claimant's failure to contract with her did not defeat lien—Lewis Mfg Co. v. Lee, 256 N.W 457, 268 Mich 383

1. Mo.—Martin-Welch Hardware & Plumbing Co v Moor, App, 16 S. W.2d 667

2. Kan.—F M Spalding Lumber Co. v Slusher, 248 P. 999, 121 Kan 155

3. Minn.—Peterson v Lundberg, 206 NW. 641, 165 Minn 453.

4. Colo.—Griffin v. Seymour, 63 P 809, 15 Colo App 487.

5. Miss.—Arwell v Mohamed, 143 So. 863, 164 Miss 80.

in possession of the land, his vendor cannot without authority from him subject the land as against his vendee to mechanics' liens for improvements thereon.⁶ On the other hand, a vendor is an owner, within the meaning of the statutes, until the title passes.⁷ Where the vendor in an executory contract of sale directly contracts for improvements, he thereby subjects his interest in the land to a mechanic's lien,⁸ and, as discussed subdivision c (3) (a) of this section, under various statutes he may subject his interest to a lien by consenting to a contract for improvements entered into by the vendee.

Where a person sells real property under agreement that certain improvements are to be made on it by him, a lien for work performed for, or materials furnished to, him may exist on the theory that he is the owner of the property,⁹ or at least that he is the authorized agent of the vendee in making the improvements,¹⁰ or that the vendee has consented to the contract for labor and materials.¹¹ Where the holder of an unrecorded bond for a conveyance stands by and sees work go on under a contract with the holder of the legal and record title, who is in possession, he cannot afterward defeat a lien by the production of such bond.¹²

c. Vendees

- (1) In general
- (2) Lien on vendee's interest
- (3) Lien on vendor's interest
- (4) Lien on improvement

6 NH—Marston v Stickney, 40 N H 112.
40 C.J. p 110 note 61.

7 Conn—Hannan v Handy, 184 A 71, 104 Conn 653, 47 A.L.R. 259.
Wis—Evans-Lee Co v Knudtson, 208 NW 872, 190 Wis. 207.
40 C.J. p 110 note 62.

Undivided interest

A vendor of an undivided fractional interest who retains legal title and the beneficial interest of the unsold fractional interest is an owner within the statute and not merely a security holder—Viker v Bergs, 208 NW 383, 53 N.D. 358.

8 Iowa—Veale Lumber Co v. Brown, 185 NW 248, 197 Iowa 240.
40 C.J. p 110 note 63.

9 Mo—J H Magill Lumber Co. v Carter, App., 17 SW 2d 581.
Tex—Panhandle Tel & Tel Co v. Kellogg Switchboard & Supply Co., 132 SW 963, 62 Tex Civ App. 402.

Land and improvement

The text rule applies at least where the contract of sale is for both the land and the improvement

and not a contract for sale of the land with a contract by the vendor to build an improvement thereon as a contractor.

Conn—Hannan v Handy, 184 A 71, 104 Conn 653, 47 A.L.R. 259.
Wis—Evans-Lee Co v. Knudtson, 208 NW 872, 190 Wis. 207.

10. Tex—Panhandle Tel. & Tel Co. v. Kellogg Switchboard & Supply Co., 132 SW. 963, 62 Tex.Civ App 402.

11. NY—Pope v Heckscher, 96 N.Y.S. 533, 109 App Div 495, affirmed 88 NE 1130, 190 N.Y. 508.
40 C.J. p 110 note 67.

12. Colo—Mellor v. Valentine, 3 Colo 255.

13. Conn.—Gruss v. Miskinis, 34 A. 3d 600, 130 Conn 367.

14. Iowa—Darragh v Knolk, 264 NW 22, 218 Iowa 686—Knapp v Baldwin, 238 NW. 542, 213 Iowa 24.

N.M.—Freidenbloom v Pecos Valley Lumber Co., 290 P. 797, 35 N.M. 154.

(1) In General

A vendee in possession of realty under an unrecorded deed or executory contract to purchase generally is held to be an owner within the meaning of mechanics' lien statutes.

A purchaser or vendee in possession under an unrecorded deed¹³ or under an executory contract to purchase¹⁴ generally is held to be an owner within the meaning of mechanics' lien statutes, and a mechanic's lien may be acquired under a contract with him for improvements on the property.¹⁵ In some cases the question whether a mechanic's lien may exist under a contract with a vendee of land is considered from the standpoint of a lien on the land, and it has been held that a person in possession of land under a contract of purchase and who, by reason of breach of contract or otherwise, does not acquire title is not such an owner, within the meaning of the mechanics' lien statute, as to be able to fix a lien on the land.¹⁶ However, except in at least one jurisdiction,¹⁷ it has also been held that, where he subsequently receives a conveyance, a lien may exist under his contract for labor or materials,¹⁸ particularly where the vendor knew the improvements were being made.¹⁹

(2) Lien on Vendee's Interest

A purchaser in possession of real property under a contract of sale is so far an owner that he can subject his interest therein to a mechanic's lien for improvements thereon.

Although there are decisions to the contrary,²⁰ the weight of authority is to the effect that a pur-

Or—Randolph v. Christensen, 265 P. 797, 124 Or 661.
40 C.J. p 111 note 77.

15. Iowa—Knapp v Baldwin, 238 NW 542, 213 Iowa 24.

Ky—T W. Spinks Co v Pachoud Bros., 92 SW 2d 50, 363 Ky 119.
Mo—Lyvers v Rutherford, 80 SW. 2d 729, 230 Mo App. 921.

16. Kan—Kennedy v Atchison, 178 P 2d 987, 152 Kan 694.

Tex—Bledsoe v Colbert, Civ.App. 120 SW 2d 909.
40 C.J. p 111 note 70.

17. Mass—Hayes v Fessenden, 106 Mass 228.

18. Idaho—Corpus Juris cited in Poynter v Fargo, 281 P 1111, 1112, 48 Idaho 271.

40 C.J. p 111 note 72.

19. Idaho—Poynter v. Fargo, 281 P. 1111, 48 Idaho 271.

20. Me—Johnson v. Pike, 35 Me. 291.

40 C.J. p 111 note 76.

chaser in possession of real property under a contract of sale is so far an owner that he can by his contract for improvements on the land render his interest therein subject to a mechanic's lien,²¹ including any interest which he subsequently acquires under his contract of purchase,²² at least where the contract of sale provides for construction of the improvement by the vendee.²³ The rule has been held applicable where the vendee is in possession under an oral contract of sale,²⁴ where the circumstances are such as to take the contract out of the statute of frauds and make it enforceable,²⁵ but there is other authority which holds that a vendee under an oral contract to purchase does not have sufficient ownership in the property to render it subject to a mechanic's lien thereon,²⁶ particularly where the contract to purchase is not enforceable.²⁷ The vendor and the vendee cannot, by any stipulation between themselves, deprive third persons, not parties to the contract of sale, of their statutory rights to liens for material or labor subsequently furnished to the vendee for the construction of buildings on the premises.²⁸

A purchaser who is not in possession is not an owner within the meaning of some mechanics' lien

statutes.²⁹ However, it has been held that the purchaser is estopped to set up his lack of possession as against a lien claimant with whom he contracted.³⁰ The title of a purchaser at a mortgage foreclosure sale may be subjected to a lien for materials used at his request or with his consent for the subsequent improvement of the property.³¹

(3) Lien on Vendor's Interest

- (a) In general
- (b) Knowledge, permission, or failure to object
- (c) Where contract provides for improvements

(a) In General

A lien affecting the interest of the vendor of land cannot arise out of the doing of work or furnishing of materials pursuant to a contract with the vendee unless the vendor has authorized or consented to it in such manner as the statute requires for the acquisition of a lien against the property of an owner.

No lien affecting the interest of the vendor of land can arise out of the doing of work or furnishing of materials pursuant to a contract with the purchaser,³² particularly where the contract of sale

21. *U.S.—Credit Finance Corporation v. Hale & Perry, CCA Colo., 66 F.2d 357*

Ala.—*Clark v. Ingram, 160 So. 229, 230 Ala. 160*

Ark.—*Sebastian Building & Loan Ass'n v. Minten, 27 S.W.2d 1011, 181 Ark. 700*

Conn.—*Seipold v. Gibbud, 148 A. 328, 110 Conn. 392—Hannan v. Handy, 134 A. 71, 104 Conn. 653, 47 A.L.R. 259*

Hawaii.—*C. B. Hofgaard & Co. v. Smith, 30 Hawaii 332*

Iowa.—*Darragh v. Knoll, 254 N.W. 22, 218 Iowa 686—Joyce Lumber Co. v. Wick, 205 N.W. 476, 200 Iowa 796*

Ky.—*Corpus Juris* quoted in *T. W. Spinks Co. v. Pachoud Bros., 92 S.W.2d 50, 55, 263 Ky. 119*

Mo.—*Joplin Cement Co. v. Greene County Building & Loan Ass'n, 74 S.W.2d 250, 238 Mo.App. 883—H. B. McCray Lumber Co. v. Standard Const. Co., App., 285 S.W. 104*

N.Y.—*Kolkman v. Eshelman, 230 N.Y.S. 91, 132 Misc. 428*

Okl.—*Kerfoot v. Salyer, 293 P. 1033, 146 Okl. 194—Pirtle v. Brown, 284 P. 898, 141 Okl. 237*

Or.—*Barr v. Lynch, 97 P.2d 185, 163 Or. 607*

Utah.—*Burton Walker Lumber Co. v. Howard, 66 P.2d 134, 92 Utah 92*

Wis.—*Delap v. Parcell, 283 N.W. 305, 230 Wis. 152—Owens v. Hughes, 206 N.W. 812, 188 Wis. 215*

40 C.J. p. 111 note 77.

Forfeiture of vendee's interest after attachment of lien see *infra* § 245

Character of vendee's interest

Purchaser's interest under executory contract of sale, in which title is reserved, is not fixed or determinable undivided interest with respect to materialman's lien.—*Albuquerque Lumber Co. v. Tomei, 250 P. 21, 32 N.M. 5*

Vendee of partial interest cannot contract for improvement so as to encumber the whole title.—*Byrum Hardware Co. v. Jenkins Bldg. Supply Co., 147 So. 411, 226 Ala. 448*

22. Conn.—*Hannan v. Handy, 134 A. 71, 104 Conn. 653, 47 A.L.R. 259*

Not limited to part interest

Where the vendee completes the purchase, the lien is not limited to a part interest in the property, but attaches to the whole thereof, at least where any mortgages the vendor may have thereon are not shown to be purchase-money mortgages.—*Poynter v. Fargo, 281 P. 1111, 48 Idaho 271*

23. Ala.—*Anniston Banking & Loan Co. v. Worsham, 149 So. 91, 227 Ala. 48—Ingram v. Howard, 128 So. 893, 221 Ala. 328*

24. Kan.—*Noll v. Graham, 27 P.2d 277, 138 Kan. 676—Bond v. Westine, 278 P. 12, 138 Kan. 370*

40 C.J. p. 111 note 77 [a] (1)

25. Conn.—*Seipold v. Gibbud, 148 A. 328, 110 Conn. 392*

N.Y.—*Kolkman v. Eshelman, 230 N.Y.S. 91, 132 Misc. 428*

40 C.J. p. 111 note 77 [a] (2).

26. Mass.—*Courtemanche v. Blackstone Valley St. Ry. Co., 48 N.E. 937, 170 Mass. 50, 64 Am.S.R. 275*

27. Ark.—*Sebastian Building & Loan Ass'n v. Minten, 27 S.W.2d 1011, 181 Ark. 700*

40 C.J. p. 111 note 77 [a] (3)

28. Minn.—*Malmgren v. Phinney, 52 N.W. 915, 50 Minn. 457, 18 L.R.A. 753*

Okl.—*Thomas v. Soper Lumber Co., 171 P. 735, 69 Okl. 197*

29. N.Y.—*Mitchell Vance Co. v. Daker, 19 N.Y.S. 378*

30. Pa.—*Commonwealth Title Ins. & Trust Co. v. Ellis, 8 Pa.Dist. 5, 32 Pa.Co. 86*

31. N.Y.—*Rapid Fireproof Door Co. v. Largo Corporation, 154 N.E. 531, 243 N.Y. 483, motion denied 155 N.E. 898, 244 N.Y. 568*

Materials furnished former owner

Title of purchaser may be subjected to lien for materials furnished former owner and used with consent or at request of purchaser in subsequent improvement of property.—*Rapid Fireproof Door Co. v. Largo Corporation, supra*

32. Fla.—*Arbuthnot v. Moody Co., 155 So. 840, 115 Fla. 503*

Ind.—*Courtney v. Luce, 200 N.E. 501, 101 Ind.App. 632—Robert Hixon*

provides that the vendee shall not suffer or permit any mechanics' liens to attach against the premises or improvements thereon,³³ unless, under statutes permitting the acquisition of a lien against the property of an owner who has authorized the improvement discussed supra § 52, the vendor has expressly agreed thereto,³⁴ or has expressly or impliedly authorized it,³⁵ or has subsequently ratified it,³⁶ or has induced the making of the improvement,³⁷ or has been active and instrumental in having the im-

provement made,³⁸ or has co-operated with the vendee in plans for the improvements,³⁹ or has in some way consented to it⁴⁰ or acquiesced therein,⁴¹ or has knowingly permitted the making of the contract for the improvement,⁴² or, by his conduct, has so far concurred in the improvement as to be estopped to deny the validity of the lien,⁴³ or unless the improvement is for his use or benefit.⁴⁴ Under some statutes and the construction placed thereon a lien does not attach to the interest of the vendor who

Lumber Co v Rowe, 149 NE 92, 53 Ind App 508
Iowa—Ilten & Taegle v Pfister, 211 NW 407, 203 Iowa 833—Jovce Lumber Co v Wick, 205 NW 476, 200 Iowa 796
Kan—Kennedy v Atchison, 178 P 2d 957, 162 Kan 694
La—Berg v Schneider, App, 12 So 2d 501
Md—Moreland v Meade, 159 A 101, 162 Md 95
Mont—Corpus Juris quoted in Dewey Lumber Co v McQuirk, 30 P 2d 475, 477, 96 Mont 294
NJ—Behr v Interlaken Const Co, 147 A 499, 7 N.J.L.S. 743
NY—Kolkman v Eshelman, 230 N Y S 91, 132 Misc 428
Ohio—Sunbeam Heating Co v. Dukes, 27 Ohio N.P.N.S., 103
Okl—Pirtle v Brown, 284 P 698, 141 Okl 327
Or—Dyer v Thrift, 264 P 428, 134 Or 349
Utah—Burton Walker Lumber Co v Howard, 66 P 2d 134, 92 Utah 92
Wash—Newell v Vervaeke, 63 P 2d 488, 189 Wash 144—Pitcher v Ravven, 342 P 375, 137 Wash 343
Wis—Delap v Parcell, 283 NW 305, 230 Wis 152
40 C.J. p 111 note 82
Effect of forfeiture of vendee's interest on lien thereon see infra § 245
Priority between vendor's lien and mechanic's lien see infra § 208

A mere executory contract of purchase between others does not furnish a sufficient basis on which to predicate a mechanic's lien against the owner of land
Mont—Corpus Juris quoted in Dewey Lumber Co v McQuirk, 30 P 2d 475, 477, 96 Mont 294
Tex—McCallen v Mogul Producing & Refining Co, Civ App, 257 SW 918

Cancellation of contract

Plaintiffs furnishing building materials to purchaser in possession, where vendor later declared sales contract canceled, had no lien on building repaired and land—Fine v Dyke Bros., 300 SW 375, 175 Ark 672, 58 A.L.R. 907.

Not agent of vendor

Where purchaser under executory contract causes improvement to be made, he is not agent of vendor, so as to bind him or his property
NM—Albuquerque Lumber Co v Tomci, 250 P 21, 32 N.M. 5
Or—Gabriel Powder & Supply Co v Thompson, 97 P 2d 182, 163 Or 623—Williams v Sharpe, 265 P 793, 125 Or 379

33. Ill—Mackey v. Sherman, 263 Ill App 109

34. Wis—Delap v Parcell, 283 NW 305, 230 Wis 152

35. Ga—Corpus Juris cited in Williams v Brewton, 152 SE 441, 443, 170 Ga 164

Ill—Edward Hines Lumber Co v Great Lakes Chemical Works, 237 Ill App 246

Iowa—Murray v Kelroy, 275 NW 21, 223 Iowa 1331

Md—Moreland v Meade, 159 A 101, 162 Md 95

Utah—Burton Walker Lumber Co v Howard, 66 P 2d 134, 92 Utah 92
40 C.J. p 112 note 86

36. Neb—Hawkins v Mullen, 223 NW 670, 118 Neb 129

Utah—Burton Walker Lumber Co v Howard, 66 P 2d 134, 92 Utah 92—Belnap v Condon, 97 P 111, 84 Utah 213, 23 L.R.A.N.S., 601

37. Ga—Williams v. Brewton, 152 SE 441, 170 Ga 164
40 C.J. p 112 note 88

38. Ga—Corpus Juris cited in Williams v Brewton, 152 SE 441, 443, 170 Ga 164

Ind—Better Homes Co v Hildebrand Hardware Co, 171 NE 321, 202 Ind 6—Holland v Farmer, 130 NE 828, 75 Ind App 368.

Rule not extended

It has been held that the rule expressed in the text will not be extended—Georgia State Sav Ass'n v Wilson, 5 SE 2d 14, 189 Ga 21

39. Ga—Corpus Juris cited in Williams v Brewton, 152 SE 441, 443, 170 Ga 164

Ind—Better Homes Co v. Hildebrand Hardware Co, 171 NE 321, 202 Ind 6

Neb—Guou v Ryckman, 110 NW 759, 77 Neb 833, 124 Am S.R. 877
Ohio—Shannon Co v Wurlitzer, 186 NE 879, 45 Ohio App 194

Rule not extended

It has been held that the rule expressed in the text will not be extended—Georgia State Sav Ass'n v Wilson, 5 SE 2d 14, 189 Ga 21.

40. Ga—Corpus Juris cited in Williams v Brewton, 152 SE 441, 443, 170 Ga 164

Iowa—Murray v Kelroy, 275 NW 21, 223 Iowa 1331

NY—Kolkman v Eshelman, 230 N Y S 91, 132 Misc 428

Utah—Burton Walker Lumber Co v Howard, 66 P 2d 134, 92 Utah 92
40 C.J. p 112 note 83

Necessity of written consent see infra § 75

41. ND—North Dakota Lumber Co v Haney, 137 NW 411, 23 ND 504
40 C.J. p 112 note 84

42. Ill—Roberts v. Wilmering, 220 Ill App 620
40 C.J. p 112 note 85

43. Cal—McGinn v Pritchard, 161 P 1171, 32 Cal App 75

Affirmative act required

Estoppel did not arise against unpaid vendor doing no affirmative act to induce lien claimant to advance credit to purchaser—Fine v Dyke Bros., 300 SW 375, 175 Ark 672, 58 A.L.R. 907.

Knowledge of agent representing vendors in management of property constituted knowledge of vendors that vendee had defaulted at time buildings were begun—Moreland v. Meade, 159 A 101, 162 Md 95.

Estoppel held shown

Md—Moreland v. Meade, 159 A 101, 162 Md 95

44. Iowa—Kimball Bros Co v Fehleisen, 169 NW 445, 184 Iowa 1109.

merely acquiesced in,⁴⁵ or consented to,⁴⁶ the furnishing of the material or the performance of the labor.

Recorded contract Under some statutes a vendor under a recorded contract of sale is not estopped to resist lien claims where he has neither in his contract authorized the improvement nor said or done things which operate as an estoppel,⁴⁷ and he is not required to forfeit the contract immediately on default in order to prevent the attachment of liens⁴⁸

(b) Knowledge, Permission, or Failure to Object

The fact that the vendor has knowledge of the making of the improvements by his vendee does not subject his interests to the mechanics' liens.

The fact that the vendor has knowledge of the making of the improvements by his vendee does not subject his interests to the mechanics' liens,⁴⁹ nor are his interests subjected thereto by the fact that he obtains knowledge that they have been made some time after they are completed⁵⁰ or from the mere expectation that the vendee will make them⁵¹ Also, in the absence of a statute providing that a failure to object or to give notice of nonresponsibility shall subject his interest to a lien, as discussed *infra* § 84, a vendor does not subject his interest to

a lien by a mere failure to object to improvements by his vendee,⁵² since in many instances he is powerless to prevent the making of the improvements⁵³

Even permission to make the improvements may not render the interest of the vendor subject to lien,⁵⁴ especially where the permission is indefinite and does not relate to specific improvements,⁵⁵ and particularly where the statute requires the improvement to have been requested by the owner⁵⁶ In order to subject the vendor's interest to the lien there must be some affirmative act which shows that he consented to subordinate his claim to that of the laborers and materialmen.⁵⁷

Where there is no fraud or deceit, a lien cannot be obtained for materials furnished one who, with the consent of the owners, is permitted to build under a license from the holder of an option to buy⁵⁸

(c) Where Contract Provides for Improvements

The interest of the vendor under an executory contract of sale may be subjected to a mechanic's lien for buildings or improvements which the contract requires the vendee to make, but not for those the contract merely authorizes him to make.

While there is some authority to the contrary,⁵⁹ as a general rule, where the contract of purchase

45. Ark—*Fine v Dyke Bros*, 300 S W 375, 175 Ark 672, 58 A.L.R. 907

NY—*P. Delany & Co v Duvoli*, 16 NE 2d 354, 278 NY 328, reargument denied *P. Delaney & Co v Labes*, 17 NE 2d 136, 278 NY 715 and *P. Delany & Co v Labes*, 18 NE 2d 314, 279 NY 685—*Kolkman v Eshelman*, 230 N.Y.S. 91, 132 Misc. 428

40 C.J. p. 113 note 94

Mere acquiescence as not constituting consent see *infra* § 73

46. Ark—*Fine v Dyke Bros*, 300 S W 375, 175 Ark 672, 58 A.L.R. 907

Idaho—*Parker v Northwestern Inv. Co.*, 255 P. 307, 44 Idaho 68

Ind—*Robert Hixon Lumber Co v Rowe*, 149 NE 92, 83 Ind. App. 508

40 C.J. p. 113 note 95

47. Wash—*Pitcher v Ravven*, 242 P. 375, 137 Wash. 343

48. Wash—*Pitcher v Ravven*, *supra*

49. Ark—*Fine v Dyke Bros*, 300 S W 375, 175 Ark 672, 58 A.L.R. 907

Idaho—*Corpus Juris* cited in *Parker v Northwestern Inv. Co.*, 255 P. 307, 309, 44 Idaho 68

Ind—*Robert Hixon Lumber Co v Rowe*, 149 NE 92, 83 Ind. App. 508.

Iowa—*Nolan v Wick*, 254 NW 80, 218 Iowa 660—*Darragh v Knolk*, 254 NW 22, 218 Iowa 686—*Schoeneman Lumber Co v Davis*, 205 NW 502, 200 Iowa 873—*Joyce Lumber Co v Wick*, 205 NW 476, 200 Iowa 796

Wash—*Pitcher v Ravven*, 242 P. 375, 137 Wash. 343
40 C.J. p. 113 note 97.

No estoppel

Vendor's knowledge that purchaser in possession under executory contract to purchase was having improvements made is insufficient to constitute an estoppel

Ark—*Sebastian Building & Loan Ass'n v Minten*, 27 SW 2d 1011, 181 Ark 700

Iowa—*Knapp v Baldwin*, 238 NW. 542, 213 Iowa 24

No personal liability

Vendor's mere knowledge that material is being furnished to her contract vendee and failure to protest against it does not render her liable personally—*Arbuthnot v Moody Co.*, 155 So 840, 115 Fla 503

50. Iowa—*Darragh v Knolk*, 254 NW 22, 218 Iowa 686

51. Iowa—*Nolan v Wick*, 254 NW 80, 218 Iowa 660—*Darragh v Knolk*, 254 NW 22, 218 Iowa 686—*Knapp v Baldwin*, 238 NW 542, 213 Iowa 24.

40 C.J. p. 112 note 86 [a]

52. Fla—*Arbuthnot v Moody Co.*, 155 So 840, 115 Fla 503

Wash—*Pitcher v Ravven*, 242 P. 375, 137 Wash. 343

40 C.J. p. 113 note 98

53. Iowa—*Darragh v Knolk*, 254 NW 22, 218 Iowa 686

40 C.J. p. 113 note 99

54. Ark—*Sebastian Building & Loan Ass'n v Minten*, 27 SW 2d 1011, 181 Ark 700

Idaho—*Corpus Juris* cited in *Parker v Northwestern Inv. Co.*, 255 P. 307, 309, 44 Idaho 68

Ind—*Robert Hixon Lumber Co v Rowe*, 149 NE 92, 83 Ind. App. 508

40 C.J. p. 113 note 1

55. Idaho—*Corpus Juris* cited in *Parker v Northwestern Inv. Co.*, 255 P. 307, 309, 44 Idaho 68

NY—*Petrillo v Pelham Bay Park Land Co., Inc.*, 196 N.Y.S. 124, 119 Misc. 146

56. Idaho—*Parker v Northwestern Inv. Co.*, 255 P. 307, 44 Idaho 68

57. Ark—*Sebastian Building & Loan Ass'n v Minten*, 27 SW 2d 1011, 181 Ark 700

58. Idaho—*Boise-Payette Lumber Co v Bickel*, 245 P. 92, 42 Idaho 245, 45 A.L.R. 576

59. Pa—*Connolly v Pennsylvania Co for Ins on Lives & Granting Annuities*, 70 Pa. Super 514, fol-

expressly requires or obligates the purchaser to erect certain buildings or make certain improvements, the interest of the vendor becomes subject to the liens of persons furnishing labor and materials for the buildings or improvements,⁶⁰ even though the vendee forfeits his contract,⁶¹ it being considered that the vendor consents to the improvements⁶² or makes the vendee his agent.⁶³ In such case a further stipulation in the contract of sale that any mechanic's lien shall be subject to the vendor's interest in the property does not destroy the vendor's consent,⁶⁴ nor is it sufficient to subordinate to the

vendor's rights the lien of a person furnishing material and work who is not in privity with either of the parties to the contract and who has no notice of the stipulation.⁶⁵ However, in some cases stipulations limiting the right to create liens are given effect.⁶⁶

On the other hand, although there is some authority to the contrary,⁶⁷ generally where the improvements are not required to be made by the vendee under the contract of sale and where no authority to install them is otherwise given by the vendor to either the vendee or to his contractor,⁶⁸ or where a

lowed in *McBain v Smith*, 70 Pa. Super 517

SD—*Pinkerton v. Le Beau*, 54 NW 97, 3 SD 440

60 Idaho—*Hendrix v Gold Ridge Mines*, 54 P 2d 354, 56 Idaho 326—*Boise Payette Lumber Co v Sharp*, 264 P 665, 45 Idaho 611

Iowa—*Darragh v Knolk*, 254 NW 22, 218 Iowa 686—*Knapp v Baldwin*, 238 NW 542, 213 Iowa 24—*Schoeneman Lumber Co v Davis*, 205 NW 503, 200 Iowa 873

Ky—*Corpus Juris* quoted in *Penney v Kentucky Utilities Co.*, 37 SW 2d 5, 7, 238 Ky 167

Mo—*Corpus Juris* cited in *Davis Estate v West Clayton Realty Co.*, 89 SW 2d 23, 27, 338 Mo 69

Okl—*Kerfoot v Neal*, 31 P 2d 585, 168 Okl. 1

Tex—*Corpus Juris* quoted in *Gugenheim v Dallas Plumbing Co.*, Civ App, 42 SW 2d 268, 271, reversed on other grounds *Gugenheim v Dallas Plumbing Co.*, Com App, 59 SW 2d 105

40 C.J. p 113 note 4

Express or implied requirement in contract that vendee erect improvement or building is sufficient to subject vendor's interest to lien.—*T W Spinks Co v Pachoud Bros.*, 92 SW 2d 50, 263 Ky 119

Contract construed

Contract requiring purchaser to install bathroom equipment was held not to contemplate installation of furnace with respect to mechanic's lien.—*Ilten & Taage v Pfister*, 211 NW 407, 203 Iowa 833

In Connecticut

(1) The rule of the text applies—*Seipold v Gibbud*, 148 A 328, 110 Conn 393—*Hillhouse v Pratt*, 49 A 905, 74 Conn 113

(3) In an early case, however, a mechanic's lien for labor performed and materials furnished in the construction of an improvement under a contract with one holding the realty under a contract to purchase, which provided for construction of the improvement as part of the consideration for the sale, was denied as against the interest of the vendor—

McGinniss v Purrington, 43 Conn 113

In Ohio

(1) The rule of the text applies—*Shannon Co v. Wurltizer*, 186 NE 879, 45 Ohio App 191

(3) It was held in an early case, however, that a contract of sale which provided that the vendor would convey the property to the vendee on the vendee's erection of certain improvements and payment of the purchase price, but which did not contain an agreement by the vendee to erect the improvements mentioned, did not constitute the vendee the agent of the vendor for the erection of the improvements so as to subject the vendor's interest to a mechanic's lien therefor.—*Lapham v Ransford*, 27 Ohio Cir Ct 80

In Washington

(1) The rule of the text applies—*Newell v Vervaeke*, 63 P 2d 488, 189 Wash 144

(2) In an early case, however, a mechanic's lien was denied a claimant who furnished labor and materials at the request of a vendee under a recorded contract, which provided that if the vendee expended certain amounts in the construction of specified improvements the vendor would convey the property to the vendee, where the vendee forfeited his rights by a failure to expend the amounts or construct the improvements required.—*Northwest Bridge Co v Tacoma Shipbuilding Co.*, 78 P 996, 36 Wash 333

61. Idaho—*Boise Payette Lumber Co v. Sharp*, 264 P 665, 45 Idaho 611

Ky—*Corpus Juris* quoted in *Penney v Kentucky Utilities Co.*, 37 SW 2d 5, 7, 238 Ky 167

Tex—*Corpus Juris* quoted in *Gugenheim v Dallas Plumbing Co.*, Civ App, 42 SW 2d 268, 271, reversed on other grounds *Gugenheim v Dallas Plumbing Co.*, Com App, 59 SW 2d 105

40 C.J. p 113 note 5

62. Ky—*T W Spinks Co v Pachoud Bros.*, 92 SW 2d 50, 263 Ky

119—*Penney v Kentucky Utilities Co.*, 37 P 2d 5, 238 Ky 167

Tex—*Corpus Juris* quoted in *Gugenheim v Dallas Plumbing Co.*, Civ App, 42 SW 2d 268, 271, reversed on other grounds *Gugenheim v Dallas Plumbing Co.*, Com App, 59 SW 2d 105

40 C.J. p 113 note 6

63. Idaho—*Hendrix v Gold Ridge Mines*, 54 P 2d 354, 56 Idaho 326—*Corpus Juris* cited in *Boise Payette Lumber Co v Sharp*, 264 P 665, 45 Idaho 611

Iowa—*Knapp v Baldwin*, 238 NW 542, 213 Iowa 24

Mo—*Corpus Juris* cited in *Davis Estate v West Clayton Realty Co.*, 89 SW 2d 22, 27, 338 Mo 69

Or—*Drake v Riley*, 9 P 2d 130, 139 Or 172

Tex—*Corpus Juris* quoted in *Gugenheim v Dallas Plumbing Co.*, Civ App, 42 SW 2d 268, 271, reversed on other grounds *Gugenheim v Dallas Plumbing Co.*, Com App, 59 SW 2d 105

40 C.J. p 114 note 7

64. NY—*Miller v Mead*, 28 NE 387, 127 NY 544, 13 L.R.A. 701

Tex—*Corpus Juris* quoted in *Gugenheim v Dallas Plumbing Co.*, Civ App, 42 SW 2d 268, 271, reversed on other grounds *Gugenheim v Dallas Plumbing Co.*, Com App, 59 SW 2d 105

65. NY—*Miller v Mead*, 28 NE 387, 127 NY 544, 13 L.R.A. 701

Tex—*Corpus Juris* quoted in *Gugenheim v Dallas Plumbing Co.*, Civ App, 42 SW 2d 268, 271, reversed on other grounds *Gugenheim v Dallas Plumbing Co.*, Com App, 59 SW 2d 105

66. Kan—*Chicago Lumber Co v Schweiter*, 25 P 592, 45 Kan 207

67. Ill—*Edward Hines Lumber Co v Great Lakes Chemical Works*, 237 Ill App 246

68. Iowa—*Darragh v Knolk*, 254 N. W. 22, 218 Iowa 686.

provision in the contract of sale merely authorizes, but does not require, the vendee to make improvements on the property,⁶⁹ he is not, in doing so, the agent of the vendor, and the vendor's estate or interest is not subject to a lien for such improvements.⁷⁰ Where a vendor stipulates with his vendee for the improvement of land at the latter's cost but the contract leaves it optional with the vendee as to whether he shall improve, the vendor's title is not subject to a lien under the vendee's contract for improvements.⁷¹ Also an agreement by the vendor to advance money to the purchaser to build does not alone render the vendor's interest subject to a mechanic's lien,⁷² but, in connection with a stipulation requiring the vendee to build, it is sufficient for this purpose.⁷³

A provision in the contract of sale for the vendee to keep the premises in good condition and repair does not authorize the vendee to purchase and install new equipment or make improvements so as to subject the vendor's interest to a mechanic's lien therefor,⁷⁴ particularly where the contract also provides that the vendee shall not make any material alterations in the premises or create any lien thereon without the written consent of the vendor.⁷⁵

Contract authorizing mortgage for improvements. Where the contract of sale expressly authorizes a mortgage by the vendee to raise money for the erection of the building which should have precedence of the vendor's lien for the purchase price, and the building is erected without a mortgage being given, it has been held that mechanics' liens to the extent

of the authorized mortgage have precedence over the vendor's lien,⁷⁶ as the vendee in the erection of the building should be considered to such an extent the agent of the vendor.⁷⁷

(4) Lien on Improvement

Under some statutes a lien for improvements made by the vendee will attach to the improvement itself.

Under some statutes, although a lien for improvements erected by the vendee will not affect the interest of the vendor, as discussed supra subdivision c (3) (a) of this section, it will attach to the improvement itself, such as a building,⁷⁸ in which case the lien will not be invalidated by the failure of the owners of the land to contract for the materials used.⁷⁹ With respect to such building the lien will have precedence over any claim of the vendor,⁸⁰ even though some injury to the realty may result from the removal of the building,⁸¹ or, under some statutes, the lien attaches to the building improved to the extent that the improvement increases its value.⁸² In the absence of some statutory provision, however, the lien cannot be enforced against the improvement to the injury of the vendor.⁸³

§ 72. — Other Persons

Various persons, including a purchaser at a judicial sale before the deed is delivered, have been held not to have such ownership as will support a lien under contract with them.

A purchaser at a judicial sale, before the deed is delivered, does not have such ownership as will support a lien under a contract with him,⁸⁴ and this

69. Mo—Davis Estate v West Clayton Realty Co., 89 SW 2d 22, 338 Mo 69.

70. Ind—Courtney v Luce, 200 NE 501, 101 Ind App 622.

Mo—Davis Estate v West Clayton Realty Co., 89 SW 2d 22, 338 Mo 69.

NJ—Behr v Interlaken Const Co., 147 A 499, 7 NJ Misc 743.

71. Mo—Westport Lumber Co v Harris, 110 SW 609, 131 Mo App 94.

40 CJ p 114 note 11.

72. NY—Loonie v Hogan, 9 N.Y. 435, 61 AmD 683.

40 CJ p 114 note 12.

73. Ohio—Shannon Co v Wurlitzer, 136 NE 879, 46 Ohio App 194.

40 CJ p 114 note 13.

74. Iowa—Darragh v Knolk, 254 N.W. 22, 218 Iowa 686.

Or—Dyer v Thrift, 264 P. 428, 124 Or 249.

75. Iowa—Darragh v Knolk, 254 N.W. 22, 218 Iowa 686.

76. Iowa—James v Osborne, 79 N.W. 143, 108 Iowa 409.

77. Iowa—James v. Osborne, supra.

78. Mich—Strand Lumber Co v Dostie, 245 NW 777, 260 Mich 422—Lazenby v Wright, 229 N.W. 437, 250 Mich 203.

Mo—Corpus Juris quoted in Lyvers v Rutherford, 80 SW 2d 729, 734, 230 Mo App 921.

40 CJ p 114 note 17.

Lien on building alone generally see infra § 188.

In Oklahoma

(1) Lien for repair and improvement of buildings on the premises at the time of sale will not be allowed—Pirtle v Brown, 284 P. 898, 141 Okl 227.

(2) Prior to 1923, at which time the statute was amended so as to authorize a lien on the building and improvements separate from the land where title to the land is not in the person contracting for the improvement, the statute precluded a person furnishing materials to a purchaser under a contract for title from obtaining a lien on either the land or the improvements without the written consent of the holder of

the record title—Rosell v Antrim Lumber Co., 281 P. 221, 139 Okl 54.

79. Mich—Strand Lumber Co v Dostie, 245 NW 777, 260 Mich 422.

80. Mich—Lazenby v Wright, 229 NW 437, 250 Mich 203.

Mo—Corpus Juris quoted in Lyvers v Rutherford, 80 SW 2d 729, 734, 230 Mo App 921.

40 CJ p 114 note 18.

81. Mont—Stritzel-Spaberg Lumber Co v Edwards, 144 P. 772, 50 Mont 49.

82. Ala—Anniston Banking & Loan Co v Worsham, 149 So 91, 227 Ala 48.

83. Mont—Dewey Lumber Co v McQuirk, 30 P 2d 475, 96 Mont 294.

40 CJ p 114 note 20.

84. NY—Robbins v Arendt, 23 N.Y.S. 1019, 4 Misc 196, modified on other grounds 43 NE 165, 148 N.Y. 673.

is also true as to an insurance company rebuilding a house to discharge its liability for one burned⁸⁵ and a school district with respect to school property⁸⁶

§ 73. Form, Requisites, and Sufficiency

- a In general
- b Consent
- c Instance, request, permission, or privity

a. In General

The right to a mechanic's lien under a particular con-

tract depends on the nature of the contract, which must be valid and enforceable and bring the claimant within the terms of the law authorizing a lien.

The right to a mechanic's lien under a particular contract, at the outset, depends on the nature of the contract and not on what is done under it⁸⁷. In order to acquire a lien a claimant must show that the contract, as of the date of its making, brings him within the terms of the law authorizing a lien⁸⁸. The contract must be valid⁸⁹ and enforceable⁹⁰. The contract may be express,⁹¹ or, except in jurisdictions or situations where the statutes contemplate that there shall be an express contract,⁹² it may be

85. Pa.—Bruner v Sheik, 9 Watts & S 119

86. Colo.—Florman v El Paso County School Dist No 11, 40 P 469, 6 Colo.App 319

Whether school buildings subject to mechanics' liens see the CJS title Schools and School Districts § 117, also 10 C.J. p 59 notes 65-68

87. Ill.—Ley Fuel Co v Weisman, 265 Ill.App 185

Estoppel by allowing another to contract as owner see supra § 57

Necessity of

Furnishing of materials see supra § 43

Performance of.

Contract see infra § 95

Services see supra §§ 34-39

Requisites and sufficiency of contract of materialman or subcontractor with contractor see infra § 113

88. Ill.—Ley Fuel Co v Weisman, supra

40 C.J. p 115 note 28

Agreement to lend money for improvement

Agreement by person selling land to lend purchaser money to make improvement thereon is not building contract within statute giving person furnishing work and labor or materials lien on moneys due on contract in performance of which work and labor or materials are furnished—Loonie v. Hogan, 9 NY 435, 61 Am D 683

89. Ala.—Sturdavant v First Ave Coal & Lumber Co, 122 So 178, 219 Ala 303

Cal.—Holm v Bramwell, 67 P 2d 114, 20 Cal App 2d 332

Or.—Potter v Davidson, 20 P 2d 409, 143 Or. 101, rehearing denied 21 P 2d 785, 143 Or 101

40 C.J. p 115 note 29

Contract held fraudulent

Where contract between landowners and carpenter provided that carpenter who was to supervise remodeling of dwelling house was to employ assisting workmen who were to be paid certain wages by owners, transactions by which workmen agreed to work for less and to pay

the difference to carpenter were fraudulent—Sparhawk v Stevens, 91 P 2d 1116, 162 Or 375

Illegal contracts

(1) An illegal contract procured contrary to law will not support a lien—Holm v Bramwell, 67 P 2d 114, 20 Cal App 2d 332

(2) Lien claimant who engaged in concerted plan with assignee of lease to violate gambling laws by construction of improvements for dog racing for gambling has been held not entitled to a lien—Denver Park & Amusement Co v Kirchhof, 3 P 2d 411, 89 Colo 399

(3) Other authority, however, has held that the right to a lien is not precluded because each of the parties in all probability knew that when all of the structures were completed dog races would be run, and that there would be betting on the races which would be illegal—McKeown Bros Co v Ogden Kennel Club, 269 Ill App 632

Unlicensed contractor

Where materialman had no knowledge that construction contract was void because contractor had not obtained license, with respect to materialman's right to enforce lien, owner was estopped to deny existence of valid construction contract, and register of contractors was not constructive notice as to who were licensed contractors—Hunt v Douglas Lumber Co, 17 P 2d 815, 41 Ariz 276

Violation of zoning ordinance

Ill.—Wolthausen v Lederer, 39 NE 2d 71, 313 Ill App 143

Written authorization to materialman under which he furnished lumber and building material was sufficient contract to support lien—Miligan v Rappaport, 234 NW 166, 253 Mich 120.

90. Ala.—Richardson v. Little, 96 So 144, 209 Ala 351

Cal.—Holm v Bramwell, 67 P 2d 114, 20 Cal App 2d 332

40 C.J. p 115 note 30

91. Ala.—Becker Roofing Co v.

Hanks, 155 So 360, 228 Ala 685—Sturdavant v First Ave Coal & Lumber Co, 122 So 178, 219 Ala 303

Del.—E J Hollingsworth Co v Continental-Diamond Fiber Co, 175 A 266, 6 WV Harr 303

Ill.—Douglas Lumber Co v Chicago Home for Incurables, 43 NE 3d 635, 380 Ill 87

Iowa.—Southern Surety Co v York Tire Service, 227 NW 606, 209 Iowa 104

Mont.—Smith v Gunniss, 144 P 2d 186, 115 Mont 363

Neb.—Barry v Barry, 26 NW 2d 1, 147 Neb 758

NC.—Honeycutt v Kenilworth Development Co, 154 SE 628, 199 NC 373

Okl.—Rogers v Crane Co, 68 P 2d 520, 180 Okl 139

Pa.—Clothier v Kniffen, Com Pl, 36 Luz Leg Reg 241

Tex.—Morrison v State Trust Co, Civ App, 274 SW 341, reversed on other grounds State Trust Co v Morrison, Com App, 282 SW 214

40 C.J. p 115 note 32.

Instruments constituting contract

Building contract for the construction of the improvement and the contractor's bond constitute the contract between the parties—Central Lumber Co v Schilleci, 148 So 614, 227 Ala. 29—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 227 Ala. 25

92. Wis.—Fraser Lumber & Manufacturing Co v Laeyendecker, 9 NW 3d 97, 243 Wis 25

40 C.J. p 115 note 33

Improvements on realty of parent

Children are not entitled to lien for money spent in improving realty of parent without expectation of reimbursement except as they might share in division of property on parent's death, in absence of evidence of contract for reimbursement—Barry v Barry, 26 NW 2d 1, 147 Neb 758

Instrument held contract

An instrument addressed to ma-

implied,⁹³ or partly expressed and partly implied.⁹⁴

It is sufficient if work and materials are furnished and accepted,⁹⁵ or there is a mere request to furnish materials which are accordingly furnished,⁹⁶ or an employment and undertaking to do work which is accordingly done,⁹⁷ or a substantial promise to pay for materials to be furnished.⁹⁸ However, a contract cannot be implied merely from the fact that the work is done on a building belonging to a person sought to be charged,⁹⁹ and where the statute requires a contract, discussed supra § 52, mere knowledge on the part of the owner is not sufficient.¹ Where a contractor is doing business under a trade name other than his own, a contract made with him in such name shows that he is the real party in interest and entitled to a lien.²

Under some constitutional and statutory provisions, in order for a lien to be acquired against a homestead for improvements placed thereon, the contract must expressly pledge the homestead by giving a lien thereon, and a contract merely for the improvement is insufficient for the acquisition of a lien thereon.³

Joint or separate contract It is immaterial to the establishment of a lien claimed against separate lots and the improvements on each for materials

furnished and used in the erection of such improvements at a time when the lots were owned by the same person whether a joint contract for all the improvements or a separate contract for each was entered into between the builder and the owner.⁴

Subsequent contract The property is subject to a lien where, although the original contractor fails to complete the building and his surety secures another contractor to complete it, the owner joins in the contract with the second contractor,⁵ and, in addition, subsequently acts as though he had actually procured the completion of the building through the agency of the second contractor.⁶

b. Consent

- (1) In general
- (2) Conditional or qualified consent

(1) In General

In order to constitute consent of the owner on which a mechanic's lien may be based, there must be such a meeting of the minds as to make it fairly apparent that the parties intended the same thing in the same sense. Ordinarily such consent may be express or implied.

The word "consent," as used in statutes allowing a mechanic's lien to be predicated on consent of the owner, does not import a contract⁷ or make the lien dependent on the ordering of the work by the own-

terialman and signed by owner stating that money had been deposited by owner to be paid to materialman on owner's acceptance of materials furnished constituted a contract between owner and materialman—*Fraser Lumber & Manufacturing Co v Laeyendecker*, 9 NW 2d 97, 243 Wis 25

Owner of realty

Mechanic's lien does not extend to the interest of owner in land in absence of express agreement between owner and lienor—*Delap v Parcell*, 283 NW 305, 230 Wis 152

93. Ala.—*Becker Roofing Co v Hanks*, 155 So 360, 228 Ala 685—*Sturdivant v First Ave Coal & Lumber Co*, 122 So 178, 219 Ala 303

Del.—*E J Hollingsworth Co v Continental-Diamond Fiber Co*, 175 A 256, 6 WW Harr 303

Fla.—*Spinney v Sanford-Orlando Kennel Club*, 166 So 559, 123 Fla 113

Ill.—*Douglas Lumber Co v Chicago Home for Incurables*, 43 NE 2d 535, 380 Ill 87

Iowa.—*Southern Surety Co. v York Tire Service*, 227 NW. 686, 209 Iowa 104

Mont.—*Smith v Gunniss*, 144 P 2d 186, 115 Mont. 363

Neb.—*Barry v Barry*, 26 NW 2d 1, 147 Neb 758

NC.—*Honeycutt v Kenilworth Development Co*, 154 SE 628, 199 NC 373

Okl.—*Rogers v Crane Co*, 68 P 2d 530, 180 Okl 139

Pa.—*Clothier v Kniffen*, Com Pl, 36 Luz Leg Reg 241

Tex.—*Morrison v State Trust Co*, Civ App, 274 SW 341, reversed on other grounds *State Trust Co v Morrison*, Com App, 282 SW 214

Wyo.—*Corpus Juris cited in Jordan v Natrona Lumber Co*, 75 P 2d 378, 385, 52 Wyo 393
40 C J p 115 note 34

Where express contract void

Where contractor, whose express contract is void for impossibility of performance is entitled to recover on quantum meruit, his lien is supported by the implied contract—*Smith Engineering Co v Rice*, CC A Mont, 102 F 2d 492, certiorari denied *Rice v Smith Engineering Co*, 59 S Ct 1034, 307 US 637, 83 L Ed 1519, rehearing denied 60 S Ct 68, two cases, 308 US 632, 84 L Ed 527

Where material furnished directly

Express contract is not necessary for lien where material is furnished direct to lot owner and afterward used for his benefit thereon—*National Loan & Exchange Bank of Columbia v Argo Development Co*, 139 SE 183, 141 SC 72

94. Ill.—*Driver v Ford*, 90 Ill 595
40 C J p 115 note 35

95. Pa.—*Carey v Seifert*, 44 Pa. Super 577

96. NY.—*Henderson v Wasserman*, 12 NYS 151, 58 Hun 608

97. Tenn.—*Barnes v. Thompson*, 2 Swan 313

40 C J p 115 note 38

98. NY.—*Richardson & Boynton Co v Reid*, 3 NYS 224, 50 Hun 606.

99. Kan.—*Stout v McLachlin*, 15 P. 902, 38 Kan 120

1. NC.—*Brown v Ward*, 20 SE 2d 324, 221 NC 344
40 C J p 115 note 42

2. Wash.—*Littell v Saulsberry*, 82 P 909, 40 Wash 550

3. Utah.—*Volker-Skowcroft Lumber Co v Vance*, 88 P 896, 32 Utah 74, 135 Am SR 828

4. Md.—*Caltrider v. Isberg*, 130 A. 53, 148 Md. 657

5. W Va.—*Pittsburgh Steel Products Co v Huntington Masonic Temple Assoc*, 94 SE 127, 81 W. Va. 222

6. W Va.—*Pittsburgh Steel Products Co v Huntington Masonic Temple Assoc*, supra

7. NY.—*Wyatt v Lortscher*, 216 N. YS 571, 217 App Div 224

"Consent" defined generally see 15 C.J.S. p 979 note 69—p 982 note 77.

er⁸ It does, however, import a voluntary act⁹ and implies a power of choice¹⁰ and the exercise of the will in respect of the subject matter thereof,¹¹ a power to authorize¹² and prevent;¹³ an agreement to that which could not exist without such consent¹⁴ While such a meeting of the minds as is necessary to the making of a contract is not required,¹⁵ there must be such a meeting of the minds as to make it fairly apparent that the parties intended the same thing in the same sense¹⁶

There must be a compliance with any statutory requirements as to the manner and form of the owner's consent to the contract or improvement¹⁷ The consent of the owner may be either express¹⁸ or implied.¹⁹ Where there is no express consent, the facts from which the inference of consent is to be

drawn must be such as to indicate at least a willingness on the part of the owner to have the improvements made,²⁰ or an acquiescence in the means adopted for that purpose, with the knowledge of the object for which they are employed.²¹ The consent contemplated as sufficient for the acquisition of a lien is affirmative in nature and must be an affirmative factor in procuring the improvement²² In order to constitute consent, at least where the owner is not in possession and control of the premises,²³ something more is required than a vacant or neutral attitude,²⁴ mere knowledge on the part of the owner that an improvement is being made²⁵ particularly where the owner has no power to prevent the improvement,²⁶ mere acquiescence in the erection or alteration, with knowledge,²⁷ failure to object,²⁸ or a mere inactive consent.²⁹ However, where the

8. N.Y.—C Wilson's Plumbing Shop on Wheels v Trustees of Dartmouth College, 6 N.Y.S.2d 671, 168 Misc 376

9. N.Y.—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App Div 224

10. N.Y.—McNulty v Offerman, 126 N.Y.S. 755, 141 App Div 730
S.C.—Metz v. Critcher, 68 S.E. 627, 86 S.C. 348

11. N.Y.—McNulty v Offerman, 126 N.Y.S. 755, 141 App Div 730

12. N.Y.—Mosher v. Lewis, 31 N.Y.S. 433, 10 Misc 373
40 C.J. p 116 note 50

13. N.Y.—Mosher v. Lewis, supra
S.C.—Metz v. Critcher, 68 S.E. 627, 86 S.C. 348.

14. Me.—Corey v. H. P. Cummings Constr Co., 105 A. 405, 118 Me. 34
S.C.—Metz v. Critcher, 68 S.E. 627, 86 S.C. 348

15. Conn.—Huntley v. Holt, 20 A. 469, 58 Conn. 445, 9 L.R.A. 111

16. Conn.—Huntley v. Holt, supra.
40 C.J. p 116 note 55.

17. Ky.—Cincinnati Stucco Co. v North Kentucky Fair, 291 S.W. 715, 218 Ky. 493.

18. Ga.—Georgia State Sav Ass'n v. Wilson, 5 S.E.2d 14, 189 Ga. 21—Williams v Brewton, 152 S.E. 441, 170 Ga. 164

N.Y.—Auerbach v. Alland, 196 N.Y.S. 145.

Written consent

Where a statute requires the consent of the owner to be in writing, it has been held that the writing must unequivocally express such an intent—Behr v. Interlaken Const Co., 147 A. 499, 7 N.J.Misc 743

19. Ga.—Georgia State Sav Ass'n v. Wilson, 5 S.E.2d 14, 189 Ga. 21—Williams v Brewton, 152 S.E. 441, 170 Ga. 164.

40 C.J. p 116 note 57.

Annexation to realty

Purchaser who annexed to realty materials furnished former owner could not deny consent to furnishing of such materials—Rapid Fireproof Door Co v Largo Corporation, 154 N.E. 531, 243 N.Y. 482, motion denied 154 N.E. 898, 344 N.Y. 563

Consent of owner

Consent may be implied from the conduct of the owner indicating willingness that improvements be made—Majestic Tile Co. v Nicholls, 291 N.Y.S. 551, 161 Misc. 231.

Consent held shown

N.Y.—Sullivan v O'Dea Realty Corporation, 274 N.Y.S. 760, 153 Misc 634

20. N.Y.—National Wall Paper Co v Sire, 57 N.E. 293, 163 N.Y. 122
40 C.J. p 116 note 58

21. N.Y.—Cowen v Paddock, 33 N.E. 154, 137 N.Y. 188
40 C.J. p 116 note 59.

22. Ga.—Georgia State Sav Ass'n v Wilson, 5 S.E.2d 14, 189 Ga. 21
N.Y.—P Delany & Co v Duvoli, 16 N.E.2d 354, 278 N.Y. 328, motion denied 298 N.Y.S. 1004, 252 App Div 749, reargument denied P Delaney & Co v Labes, 17 N.E.2d 136, 278 N.Y. 715, and 18 N.E.2d 314, 279 N.Y. 685—Wyatt v. Lortscher, 216 N.Y.S. 571, 217 App Div 224—C Wilson's Plumbing Shop on Wheels v Trustees of Dartmouth College, 6 N.Y.S.2d 671, 168 Misc. 376—Sullivan v O'Dea Realty Corporation, 274 N.Y.S. 760, 153 Misc 634—Smith v Vara, 241 N.Y.S. 202, 136 Misc 500—Kolkman v. Eshelman, 230 N.Y.S. 91, 132 Misc. 428
40 C.J. p 116 note 60

23. N.Y.—C Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 N.Y.S.2d 671, 168 Misc 376

24. N.Y.—Sullivan v O'Dea Realty Corporation, 274 N.Y.S. 760, 153 Misc 634—Smith v Vara, 241 N.Y.S. 202, 136 Misc 500
40 C.J. p 116 note 61

25. Ga.—Rutland Contracting Co v. Sallie E Gay Estate, 18 S.E.2d 835, 193 Ga. 468—Georgia State Sav Ass'n v. Wilson, 5 S.E.2d 14, 189 Ga. 21

La.—Boutte & Courrege v Derokay, App, 168 So. 39

N.Y.—Sullivan v O'Dea Realty Corporation, 274 N.Y.S. 760, 153 Misc. 634—Smith v Vara, 241 N.Y.S. 202, 136 Misc 500
40 C.J. p 117 note 64

26. N.Y.—Vosseller v Slater, 49 N.Y.S. 478, 25 App Div 368
40 C.J. p 117 note 65

27. N.Y.—P Delany & Co v Duvoli, 16 N.E.2d 354, 278 N.Y. 328, reargument denied P Delaney & Co v Labes, 17 N.E.2d 136, 278 N.Y. 715, and 18 N.E.2d 314, 279 N.Y. 685—Sullivan v O'Dea Realty Corporation, 274 N.Y.S. 760, 153 Misc 634—Smith v. Vara, 241 N.Y.S. 202, 136 Misc 500
40 C.J. p 116 note 63.

The passive acquiescence of an owner will not, in itself, entitle a person to a lien.

Conn.—Bridgeport People's Sav Bank v Palaza, 161 A. 526, 115 Conn. 357

N.Y.—Rice v Culver, 64 N.E. 761, 172 N.Y. 60—C Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 N.Y.S.2d 671, 168 Misc 376.

28. N.Y.—Smith v Vara, 241 N.Y.S. 202, 136 Misc 500.

Presumption of consent from failure to give statutory notice see infra § 84

29. Ind.—Better Homes Co v. Hil-

owner is in possession and control of the premises, consent may be found when he assents to improvements expecting to reap benefits from them³⁰ or has knowledge of the making of the improvement and does not object to it.³¹ Consent should not be implied contrary to the obvious truth where the owner is not estopped on equitable principles to assert the truth³² Where the owner of land upon which an improvement is being erected by a third person, on knowledge thereof, expressly prohibits the continuance of the work, he certainly cannot be considered as consenting to the continued work on the improvement.³³

Homestead. Under some statutes, in order for a mechanic's lien to be acquired on a homestead, the consent of the wife to the contract for the improvement must be given in the same manner as is required in making a sale and conveyance of the homestead.³⁴

(2) Conditional or Qualified Consent

As a general rule the consent of the owner to the improvements for which a mechanic's lien is claimed must be absolute and unconditional.

As a general rule the consent of the owner to the improvements for which a mechanic's lien is claimed must be absolute³⁵ and not clogged with conditions³⁶ A consent conditioned on the doing of the work without any expense or payment on the part of the owner is in effect a protest against the doing of the work at his expense.³⁷ The mere general consent

on the part of the owner that a third person may make alterations, etc., on the premises at his own expense, the particular alterations, etc., not being specified, does not show his consent to alterations, etc., thereafter made so as to subject his interest to mechanics' liens therefor.³⁸ However, where the consent of the owner is to the making of particular improvements, a qualification that his interest shall not be subjected to liens therefor will not prevent the liens from attaching,³⁹ especially where the person claiming a lien for material furnished or labor performed was ignorant of such qualification,⁴⁰ or where the owner had actual knowledge of the making of the improvement and expressed his satisfaction therewith⁴¹

c. Instance, Request, Permission, or Privity

Material furnished or labor performed with the permission, consent, or knowledge of the owner is not at his instance or request, and mere knowledge of the improvement or contract therefor is not sufficient to create a lien under a statute authorizing a lien where the owner knowingly suffers or permits the improvement. Under a statute authorizing a lien by persons in privity with the owner, a primary obligation by the owner to pay for the material furnished or labor performed is required.

Under a statute authorizing or requiring, in order for a lien to be acquired, that material be furnished or labor be performed at the instance or request of the owner, labor performed or material furnished with the permission, consent, or knowledge of the owner is not at his request so as to subject his interest to a lien⁴² A lien has been held to arise,

debrand Hardware Co., 171 N E 321, 202 Ind 6

40 C J p 116 note 62

Authority and direction of owner

(1) It is necessary in order for a lien to attach to real estate for material used in a building erected thereon that such material should be furnished by the authority and direction of the owner—*Snelling v Wortman*, 24 N E 2d 791, 107 Ind App 422—*Abrams v. Silver*, 1 N E 2d 286, 102 Ind App 97—*Courtney v Luce*, 200 N E 501, 101 Ind App 622—*Robert Hixon Lumber Co v Rowe*, 149 N E 92, 83 Ind App 508

(2) The lien may attach if the owner of the realty is active and instrumental in having the improvement made.—*Snelling v. Wortman*, supra.

Active consent held shown

Ind—*Better Homes Co. v. Hildebrand Hardware Co.*, 171 N E 321, 202 Ind 6

30. N Y—*Wyatt v. Lortscher*, 216 N Y S 571, 217 App Div 224—*C Wilson's Plumbing Shop on Wheels v Trustees of Dartmouth College*, 6 N Y S 2d 671, 168 Misc 376 40 C J. p 116 note 60 [c] (1)

31. Ga—*Macarthy v Ross Co*, 154 S E 914, 41 Ga App 758

32. N Y—*Sullivan v O'Dea Realty Corporation*, 274, N Y S. 760, 153 Misc 634

40 C J p 117 note 66

Estoppel see supra §§ 57, 63, 65, 71

33. N Y—*Cowen v. Paddock*, 17 N Y S 387, 62 Hun 622, affirmed 33 N. E 154, 137 N Y 138

34. Tex—*Sommers v Stout*, Com App, 44 S W 2d 901—*Standard Savings & Loan Ass'n v Davis*, Civ App, 85 S.W.2d 333, error refused—*Guaranty Const Co v Atwood*, Civ App, 43 S W 2d 159, reversed on other grounds, *Atwood v. Guaranty Const Co*, Com App, 63 S W 2d 685

35. N J—*Behr v Interlaken Const. Co*, 147 A 499, 7 N J Misc 743

40 C J p 117 note 68

36. N J—*Hervey v Gay*, 42 N J Law 168—*Smith v. Gay*, 3 N J Law J. 145.

Refusal to acquiesce in condition

A condition that payment is not to be made unless water in sufficient quantity is obtained is not a part of a contract for drilling a well where, although the owner desired

to make such condition a part of the contract, the contractor refused to acquiesce therein and, after such refusal, was allowed to enter on and prosecute the work—*Benne v Staphish*, 122 P 1002, 68 Wash 204

37. Wis—*Clark v North*, 111 NW 681, 131 Wis 599, 11 L.R.A.N.S. 764, 11 Ann Cas 1080

38. N Y—*Hankinson v Vantine*, 46 N E 292, 152 N Y 20—*C Wilson's Plumbing Shop on Wheels v Trustees of Dartmouth College*, 6 N Y S. 2d 671, 168 Misc 376

Provision in lease for improvements at expense of tenant see supra § 65 c.

39. N Y—*Miller v Mead*, 28 N E. 387, 127 N Y 544, 13 L.R.A. 701

40. N Y—*Schmalts v Mead*, 26 N. E 251, 125 N.Y. 133

ND—*Viker v Beggs*, 208 NW. 333, 53 ND 858

41. N Y—*National Wall Paper Co v Sire*, 57 N E 293, 163 N.Y. 122.

42. Idaho—*Parker v Northwestern Inv Co*, 255 P 307, 44 Idaho 68 Presumption of request from failure to give statutory notice see infra § 84.

however, under such a statute, where materials are furnished on the credit of the owner and in ignorance of the fact that another person has an independent contract to erect the building⁴³ "Knowingly suffer or permit," as used in some statutes, does not comprehend mere knowledge of the improvement of the property⁴⁴ or of the contract therefor,⁴⁵ but requires something more,⁴⁶ as, for example, some willful inducing act⁴⁷ or silence, amounting to a legal fraud, where there is a duty to speak⁴⁸

Privity. Under some statutes mechanics' liens for labor or material may be acquired either by persons in privity with the owner⁴⁹ or by persons not in privity with the owner,⁵⁰ but unless the prescribed notice is given the owner, as discussed *infra* § 121, privity between the owner and the claimant is essential to the establishment of the lien⁵¹ Where privity exists with the owner a lien is acquired by the performance of labor or the furnishing of materials on the property.⁵²

As used in such statutes "privity" is not employed in its common-law sense⁵³ It means a partaker;

persons connected together or having a mutual interest in the same action or thing,⁵⁴ and implies special or particular knowledge, showing active consent or concurrence⁵⁵ It contemplates that there shall be a direct relationship between the owner and the lien claimant with respect to the furnishing of the materials or performance of labor so that a primary and direct liability on the part of the owner to pay for them will arise⁵⁶ Privity exists only when claimant in furnishing the materials or performing the labor has acted on the owner's obligation, express or implied, to pay therefor as a primary debtor,⁵⁷ and not as a secondary debtor or surety⁵⁸ Privity of contract between the owner and claimant must exist,⁵⁹ and it will not arise from mere knowledge on the part of the owner that claimant is performing labor for, or furnishing materials to, the contractor,⁶⁰ or from a relation of direct contractual privity between the contractor and the owner,⁶¹ or out of a requirement by the owner that the contractor pay for materials before the owner pay him⁶²

43. Or.—Heacock v. Loder, 211 P. 950, 106 Or 323

44. Pa.—Meile v. McCuean, 18 Pa Dist. 675

45. Pa.—Fluke v. Lang, 128 A 663, 283 Pa. 54

46. Pa.—Meile v. McCuean, 18 Pa Dist. 675

40 C.J. p 117 note 80

47. Pa.—Meile v. McCuean, *supra*.

48. Pa.—Meile v. McCuean, *supra*. 40 C.J. p 117 note 82

49. Fla.—Tallahassee Variety Works v. Brown, 144 So 848, 106 Fla 599—Anderson Mill & Lumber Co v. Clements, 134 So 588, 101 Fla. 523

50. Fla.—Anderson Mill & Lumber Co v. Clements, *supra*.

51. U.S.—Stowers v. Wheat, C.C.A. Fla., 78 F.2d 25

Fla.—First Nat Bank v Southern Lumber & Supply Co., 145 So. 594, 106 Fla. 821.

52. U.S.—Frank T Budge Co. v. Horst, C.C.A.Fla., 32 F.2d 157.

Fla.—Tallahassee Variety Works v Brown, 144 So 848, 106 Fla. 599—Anderson Mill & Lumber Co v Clements, 134 So 588, 101 Fla. 523—Bowery v Babbitt, 128 So. 801, 99 Fla 1151

53. Fla.—Spinney v Sanford-Orlando Kennel Club, 166 So 559, 123 Fla. 113—First Nat. Bank v Southern Lumber & Supply Co., 145 So 594, 106 Fla. 821—Taylor v Ferroman Properties, 139 So. 149, 103 Fla. 960—Waring v. Bass, 80 So 514, 76 Fla. 583.

"Privity" defined generally see the CJS definition Privity also 50 C J. p 404 note 23-p 409 note 36

54. Fla.—Spinney v Sanford-Orlando Kennel Club, 166 So 559, 123 Fla. 113—Taylor v Ferroman Properties, 139 So 149, 103 Fla. 960.

As arising from contract

It has been stated that those in privity with the owner are such as have a material or successive relationship with him to the same thing, right of action, or property which does not arise by contract between them, and that it may arise by contract or conveyance to them by others.—Anderson Mill & Lumber Co v Clements, 134 So. 588, 101 Fla. 523

55. Fla.—Spinney v. Sanford-Orlando Kennel Club, 166 So 559, 123 Fla 113—First Nat Bank v. Southern Lumber & Supply Co., 145 So 594, 106 Fla 821—Taylor v Ferroman Properties, 139 So 149, 103 Fla 960—Harper Lumber & Mfg Co v Teate, 125 So. 21, 98 Fla. 1055—Waring v. Bass, 80 So. 514, 76 Fla 583.

56. Fla.—Harper Lumber & Mfg Co. v. Teate, 125 So 21, 98 Fla. 1055.

Subsequent promise by the owner to pay for materials previously furnished the contractor on the contractor's credit cannot operate retroactively to create a state of privity between the owner and materialman which did not exist at the time the materials were furnished.—

Harper Lumber & Mfg Co v Teate, *supra*.

57. Fla.—First Nat Bank v Southern Lumber & Supply Co., 145 So 594, 106 Fla. 821—Harper Lumber & Mfg Co v Teate, 125 So 21, 98 Fla. 1055.

58. Fla.—First Nat Bank v Southern Lumber & Supply Co., 145 So 594, 106 Fla. 821—Harper Lumber & Mfg Co v Teate, 125 So 21, 98 Fla. 1055

59. Fla.—First Nat Bank v. Southern Lumber & Supply Co., 145 So 594, 106 Fla. 821—Tallahassee Variety Works v Brown, 144 So 848, 106 Fla. 599

60. Fla.—First Nat Bank v. Southern Lumber & Supply Co., 145 So 594, 106 Fla. 821—Tallahassee Variety Works v Brown, 144 So 848, 106 Fla. 599

61. Fla.—First Nat. Bank v Southern Lumber & Supply Co., 145 So 594, 106 Fla. 821—Tallahassee Variety Works v. Brown, 144 So. 848, 106 Fla. 599

62. Fla.—First Nat Bank v. Southern Lumber & Supply Co., 145 So 594, 106 Fla. 821.

Contractor's misapplication of payment

Fact that contractors, taking mortgage for contract price and assigning mortgage as security for loan as to be used for materials, did not so use funds obtained, will not entitle materialman to lien.—First Nat Bank v. Southern Lumber & Supply Co., *supra*.

§ 74. — Time and Place of Making

A mechanic's lien may be acquired under a contract made outside the state. Under various statutes the contract under which the lien arises must have been made before the work was done or materials were furnished in order that a mechanic's lien may be acquired either on property generally or on a homestead.

In the absence of a statutory provision to the contrary, a mechanic's lien may be acquired for work done or materials furnished pursuant to a contract made outside the state.⁶³ Under some statutes it has been held that a lien cannot be acquired for materials furnished or labor performed prior to the execution of the contract for the improvement pursuant to which they are furnished or performed⁶⁴ or prior to the execution of a written contract therefor,⁶⁵ but under other statutes a contract made after the work is finished may support the lien.⁶⁶

Homestead property. Under some statutes, in order to support a lien on a homestead, the contract must have been made before the work was done or the materials furnished,⁶⁷ and failure to comply with the requirements of the law cannot be waived or

ratified by any contract made after the material is furnished or the labor done.⁶⁸ A contract for improvements on a homestead need not be executed by the husband and wife at the same time, but the wife's consent thereto may be to a contract already executed by the husband.⁶⁹

§ 75. — Necessity of Writing

It is not essential to the acquisition of a mechanic's lien, unless required by statute, that the contract for the improvement, or the owner's consent thereto, be in writing; but under various statutes the contract or consent is required to be in writing, either generally or in certain cases.

In the absence of an express statutory requirement it is not essential to the acquisition of a mechanic's lien that the contract with the owner under which the labor is performed or materials furnished shall be in writing.⁷⁰ Under various statutes, however, it is required that the contract be in writing, either generally⁷¹ or in certain cases, as where the amount to be paid under the contract exceeds a specified sum.⁷²

63. NY—Campbell v Coon, 44 NE 300, 149 NY 556, 38 L.R.A. 410 40 C.J. p 117 note 86

Nonresidents as entitled to lien see supra § 7

Place of furnishing material see supra § 42

64. NJ—J. D. Loizeaux Lumber Co v Steinberg, 131 A 131, 102 N.J. Law 15

Wis—Fraser Lumber & Manufacturing Co v Laeyendecker, 9 N.W.2d 97, 243 Wis 25

65. Mass—Lampasona v Capriotti, 4 N.E.2d 621, 296 Mass 34, 108 A.L.R. 430

66. Tex—Mundine v Berwin, 62 Tex 341

67. Tex—Kepley v Zachry, 116 S.W.2d 699, 131 Tex 554, opinion supplemented 121 S.W.2d 595, 131 Tex 554—Davis v Peck, Wright, Peck Inv. Co, Civ. App., 94 S.W.2d 1245, error dismissed—Hill v Engel, Civ. App., 89 S.W.2d 219, error refused—Ackerson v Farm & Home Savings & Loan Ass'n of Missouri, Civ. App., 77 S.W.2d 559, error refused—Hicks v Wallis Lumber Co, Civ. App., 70 S.W.2d 440—Burton v Schwartz, Civ. App., 36 S.W.2d 1066, error dismissed 29 C.J. p 870 notes 4, 5—40 C.J. p 117 note 87

Funds advanced by bank

Fact that funds to improve homestead, advanced by bank prior to execution of contract, were not checked out and used until after mechanic's lien contract was executed is immaterial and will not validate the lien—Lubbock Nat

Bank v Nickels, Tex. Civ. App., 63 S.W.2d 764

Renewal of agreement

Subsequent renewal and extension of original contract will not create a valid lien if the original contract did not establish a valid lien—Hicks v Wallis Lumber Co, Tex. Civ. App., 70 S.W.2d 440

68. Tex—Kepley v Zachry, 116 S.W.2d 699, 131 Tex 554, opinion supplemented 121 S.W.2d 595, 131 Tex 554

Conveyance

Conveyance by owner and wife to contractor after most of improvements had been finished and reconveyance by contractor reserving lien did not create valid lien against homestead—Burton v Schwartz, 36 S.W.2d 1066, Tex. Civ. App., error dismissed

69. Tex—Grammar v Hesperian Bldg & Sav. Ass'n, Civ. App., 70 S.W.2d 220, error refused

70. Ala—Becker Roofing Co v Hanks, 155 So 360, 228 Ala. 685

Ill—Johns-Manville Corporation of Delaware v La Tour D'Argent Corporation, 277 Ill. App 503

Ky—Ohio Oil Co v Smith-Haggard Lumber Co, 156 S.W.2d 111, 288 Ky 278

Mont—Smith v. Gunniss, 144 P.2d 186, 115 Mont 363

Okl—Lewis v Red, 152 P.2d 690, 194

Okl 432—Deka Development Co v Fox, 89 P.2d 143, 170 Okl 228—Whitfield v Frenesley Bros Lumber Co, 283 P 985, 141 Okl 44—T J Stewart Lumber Co v Derry, 258 P 485, 122 Okl 208

Tex—Gugenheim v. Dallas Plumbing Co, Civ. App., 42 S.W.2d 268, reversed on other grounds Gugenheim v Dallas Plumbing Co, Com. App., 59 S.W.2d 105

40 C.J. p 117 note 89

Contract may be special or parcel Neb—Barry v Barry, Neb., 26 N.W. 2d 1, 147 Neb 758

71. Mass—Lampasona v Capriotti, 4 N.E.2d 621, 296 Mass 34, 108 A.L.R. 430—Katauskas v Lonstein, 164 N.E. 810, 266 Mass 29—Adams & Powers Co v Seder, 154 N.E. 184, 257 Mass 453

40 C.J. p 118 note 90

Contract partly in writing

(1) Where a written contract is essential to the acquisition of a lien, a contract partly written and partly oral is not sufficient—Cook, Borden & Co v R Z L Realty Corporation, 147 A. 891, 50 R.I. 375

(2) Oral modification of written contract whereby part of the work called for is eliminated does not prevent work and materials furnished under unchanged portion of contract from being furnished under a written contract—Lampasona v Capriotti, 4 N.E.2d 621, 296 Mass 34, 108 A.L.R. 430

72. Colo—Armour & Co of Delaware v McPhee & McGinnity Co, 275 P. 12, 85 Colo 262

40 C.J. p 118 note 91

Small claims

There can be no mechanic's lien apart from small claims for personal labor except for labor and material furnished by virtue of written contract—Lampasona v Capriotti, 4

Where, as discussed supra § 52, the consent of the owner to the improvement is sufficient to support a mechanic's lien, under some statutes such consent must be in writing.⁷³ Such statutes, either expressly or by construction, have been held to require the written consent of the owner where the labor is performed or the materials are furnished at the request of, or under a contract with, another person,⁷⁴ such as a lessee⁷⁵ or vendee under an executory contract to purchase.⁷⁶ Where, however, a statute grants a lien on the improvements separate from the real estate, the written consent of the lessor has been held unnecessary to the validity of the lien.⁷⁷

Homestead. Under the constitutional or statutory provisions of some jurisdictions a written contract is necessary where it is sought to subject a homestead to a lien.⁷⁸

Joint property of husband and wife. In some jurisdictions a written contract is necessary to the acquisition of a lien on realty owned jointly by hus-

band and wife,⁷⁹ such as realty held by them as tenants by the entirety⁸⁰ or under an executory contract to purchase,⁸¹ but in other jurisdictions the rule is otherwise.⁸²

Separate property of married woman. Under some statutes,⁸³ but not other statutes,⁸⁴ a contract in writing is necessary where it is sought to reach the separate property of a married woman, and under some statutes, where the contract for the improvement is made by the husband, the wife's consent thereto must be in writing in order that a lien may be acquired.⁸⁵

§ 76. — Description of Land

Where a statute so requires, the land on which the improvement is to be erected or on which the work is to be done must be specified or described.

Under some statutes the land on which the building is to be erected or the work done must be specified or described.⁸⁶ It has been held, where evi-

NE 2d 621, 296 Mass 34, 108 A L R 430

In Louisiana

(1) Acts 1916 No 229 does not require the contract to be reduced to writing, regardless of the amount, but authorizes the privilege, whether the contract be written or verbal, provided the lien is recorded within the time prescribed by statute—*Mercier v Munich*, 120 So 522, 9 La. App 373—40 C J p 118 note 91 [b] (3)

(2) Necessity for written contract under other statutory provisions see 40 C J p 118 note 91 [b] (1), (2), (4), (5)

73. Ky.—*Weir v Jarecki Mfg Co*, 72 S W 2d 450, 254 Ky 738—*Penney v Kentucky Utilities Co*, 37 S W 2d 5, 238 Ky 167

NJ.—*Behr v Interlaken Const. Co*, 147 A. 499, 7 N.J. Misc 743

Written contract obligating purchaser to repair and remodel hotel constitutes "written consent of owner"—*Penney v. Kentucky Utilities Co*, 37 S W 2d 5, 238 Ky 167.

74. Ky.—*Ohio Oil Co v Smith-Haggard Lumber Co*, 156 S W 2d 111, 288 Ky 278—*Corpus Juris* cited in *Cincinnati Stucco Co v North Kentucky Fair*, 291 S W. 715, 218 Ky. 493

40 C J p 118 note 92

75. Ky.—*Weir v Jarecki Mfg Co*, 72 S W 2d 450, 254 Ky 738—*Cincinnati Stucco Co v. North Kentucky Fair*, 291 S W 715, 218 Ky. 493

NJ.—*Stein v. Pennsylvania Dock & Warehouse Co*, 159 A 683, 10 N.J. Misc 568—*Harris v Bergamo*, 148 A 645, 7 N.J. Misc 1098.

RI.—*Elliott & Watrous v Harrington*, 27 A 2d 338, 68 RI 237

76. NJ.—*Behr v. Interlaken Const Co*, 147 A 499, 7 N.J. Misc 743

Condition precedent to jurisdiction

Under statutes so providing the courts may not proceed in behalf of materialman, where written consent of record owner of real estate in possession of purchaser under executory contract of sale to creation of lien has not been given—*Etina Life Ins Co v S H Weakley Lumber Co*, 245 P 560, 117 Okl 70

Person against whom lien asserted

The text rule applies whether the lien is claimed to exist against the vendor or others claiming an interest in the real estate—*Etina Life Ins Co v S H Weakley Lumber Co*, supra

A vendor's receipt on an agreement to sell realty permitting the purchaser to move a house thereon is a sufficient written consent to enable the mover to establish a mechanic's lien on the realty for the cost of moving the house—*C Van Howling & Sons v Kietrys*, 167 A 529, 11 N J Misc 549

77. Okl.—*Whitfield v. Frensey Bros. Lumber Co*, 283 P. 985, 141 Okl 44.

78. Tex.—*Kepley v. Zachry*, 116 S W 2d 699, 131 Tex 554, opinion supplemented 121 S W 2d 595, 131 Tex. 554—*Sommers v. Stout*, Com App, 44 S.W.2d 901—*Standard Savings & Loan Ass'n v. Davis*, Civ App, 85 S W 2d 333, error refused—*Beckner v. Barrett*, Civ App, 81 S W 2d 719, error dismissed—*Hicks v. Wallis Lumber Co*, Civ App, 70 S W 2d 440—*Lub-*

bock Nat Bank v Nickels, Civ App, 63 S W 2d 764—*Guaranty Const Co v Atwood*, Civ App, 43 S W 2d 159, reversed on other grounds *Atwood v Guaranty Const Co*, Com App, 63 S W 2d 685—*Brown v Rice*, Civ App, 290 S W 784, affirmed *Rice v Brown*, Com App, 296 S W 495
29 C J. p 870 notes 2, 3—40 C J p 118 note 93

79. Mich.—*Clawson Lumber Co v Gray*, 246 NW 59, 261 Mich 173

80. Mich.—*Colonial Brick Co v Zimmerman*, 239 NW 301, 255 Mich 655—*Sheldon v. Bremer*, 132 NW. 117, 166 Mich 578

81. Mich.—*Clawson Lumber Co v Gray*, 246 NW 59, 261 Mich 173
Forfeiture of land contract subsequent to purchase of materials for which lien is claimed will not enable materialman to obtain lien—*Clawson Lumber Co v Gray*, supra.

82. Ind.—*Haehnel v Seidentopf*, 114 NE 422, 63 Ind App 218.
40 C J. p 119 note 97

83. NC.—*Weathers v Borders*, 28 S E 524, 121 NC 387
30 C J p 917 note 81—40 C J p 118 note 94.

84. Ky.—*Mingo Lime & Lumber Co v Parsley*, 248 S W. 169, 197 Ky 740.
40 C J. p 118 note 95.

85. Miss.—*Schiaffino v. Christ*, 51 So 546, 96 Miss 301.
NJ.—*Johnson v. Parker*, 27 N.J. Law 239

86. Ill.—*Burkhart v Reisig*, 24 Ill. 539.
40 C J. p 119 note 98.

dence alunde the contract must be relied on in order to identify the property to be charged, that the contract is too general and indefinite to enable a lien to be acquired, at least as against third persons.⁸⁷ A contract is sufficient, however, if enough appears therein to identify the property,⁸⁸ and there is authority which holds that an omission or misdescription may be cured by a correct description in the petition⁸⁹ or an admission in the answer.⁹⁰ The contract need not describe the land in the absence of statutory requirement.⁹¹

§ 77. — Description of Improvement, Labor, and Materials

Although it is required under some statutes, under others it is unnecessary that the contract should describe in detail the improvement, labor, and materials for which a mechanic's lien is sought.

Under some statutes contracts have been held insufficient for vagueness and indefiniteness with respect to the improvement to be made,⁹² the material to be furnished,⁹³ or the labor to be performed,⁹⁴ especially where it was sought to establish the lien as against a mortgage given after the making of the contract but before the performance of the labor or the furnishing of the material.⁹⁵ Under other statutes, however, it is not necessary that the contract should describe in detail the work to be done and the improvements or repairs to be made,⁹⁶ and there is no requirement that the contract should be for a specific amount of labor or quantity of mate-

rial,⁹⁷ or that the kind of materials to be used in making a contemplated improvement or portion thereof,⁹⁸ or every item furnished⁹⁹ should be specifically named at the time of making the contract. Some,¹ but not other,² authorities consider the plans and specifications essential parts of the contract. The failure to file specifications for a portion of buildings constructed for a tenant whose lease prohibits the imposition of mechanic's liens on the land will not enable the contractor to acquire a lien, where he had actual or constructive knowledge of the prohibition against liens contained in the lease.³

§ 78. — Amount to Be Paid

Under some, but not all, statutes, in order that a lien may be acquired, the contract for the improvement must fix the amount due or to become due or provide for its ascertainment with certainty.

Under some statutes, in order that a lien may be acquired, the amount due or to become due must be fixed in the contract⁴ although the prices for the various items need not be set forth in the written contract,⁵ or the contract must be of such character and on such terms and stipulations between the parties that the amount which may be earned under it may in some way be ascertained and determined with precision and certainty.⁶ However, in other jurisdictions a lien may be enforced, although a definite amount to be paid was not expressly agreed on⁷ or stated in the contract.⁸

Quantum meruit. Under some statutes it has been.

87. La.—Stamm-Scheele Mfg Co v Fontenot, 131 So 728, 171 La 614

88. Tex.—Ross v Fort Worth Nat Bank, Civ App, 30 SW 2d 518, error refused

40 CJ p 119 note 99

Descriptions held sufficient

(1) Description of property by street, number, and city is sufficient—Ross v Fort Worth Nat Bank, supra

(2) Other descriptions held sufficient see 40 CJ p 119 note 99 [a]

89. Ill.—Clark v Manning, 90 Ill 380

40 CJ p 119 note 1

90. Ill.—Burns v Lane, 23 Ill App 504

91. Cal.—Yancy v Morton, 29 P 1111, 94 Cal 553

40 CJ p 119 note 3

92. Mass.—Varnum v Kogios, 123 NE 678, 233 Mass. 264—Wilder v French, 9 Gray 393

93. Mass.—Varnum v Kogios, 123 NE 678, 233 Mass. 264

94. Mass.—Varnum v Kogios, supra

40 CJ p 119 note 6.

95. Mass.—Manchester v Searle, 131 Mass 418.

96. Tex.—Miller v Standard Savings & Loan Ass'n of Detroit, Mich, Civ App, 38 SW 2d 522, error refused

97. Ill.—Thielman v Carr, 75 Ill 385

40 CJ p 119 note 8

98. N.M.—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 NM 3

99. Tex.—Hollums v Glenn, Civ App, 32 SW 2d 731, error dismissed—Brown v Rice, Civ App, 290 SW 784, affirmed Rice v Brown, Com App, 296 SW. 495

40 CJ p 119 note 9.

Sufficient compliance

Statute requiring terms of contract for improvement on homestead to be set forth is complied with by a recitation that the material is of a specified value—Brown v Rice, supra.

1. Cal.—Donnelly v Adams, 59 P 208, 127 Cal 24

40 CJ p 119 note 10

Filing plans and specifications see infra § 82

2. Tex.—Standard Savings & Loan Ass'n v Davis, Civ App, 35 SW 2d 333, error refused—Harrop v National Loan & Investment Co, Civ App, 204 SW. 378

3. N.J.—Stein v Pennsylvania Dock & Warehouse Co, 159 A 683, 10 NJ Misc 568

4. Tex.—Brown v Rice, Civ App, 290 SW 784, affirmed Rice v Brown, Com App, 296 SW 495

40 CJ p 119 note 12

Lien on homestead

Tex.—Brown v Rice, supra.

5. Tex.—Hollums v Glenn, Civ App, 32 SW 2d 731, error dismissed.

6. La.—Hibernia Bank & Trust Co v C F Knoll Planting & Mfg Co, 63 So 288, 133 La 697

40 CJ p 119 note 13

7. Wis.—Hutchins v Bautch, 101 N. W 671, 123 Wis 394, 107 AmSR 1014.

40 CJ p 119 note 14

8. Cal.—Snell v Bradbury, 73 P. 150, 139 Cal 379.

held that there can be no lien for a quantum meruit performance in the execution of a contract for improvements on a homestead unless there is such an express provision in the written contract providing for the lien;⁹ but there is substantial authority to the effect that a lien claimant who has justifiably abandoned full performance of his contract is entitled to a lien for the reasonable value of the work and materials furnished, as discussed *infra* § 175

§ 79. — Terms; Time of Payment or Performance

Where a statute so requires, the contract must set forth the terms thereof, or the time of payment or performance, in order for a mechanic's lien to be acquired. Under some statutes the contract must provide for payment of the contract price in installments at specified times and in certain per cents or persons other than the contractor who perform labor or furnish materials may acquire a lien for the value thereof.

A statute requiring, in the case of a homestead, a contract in writing, setting forth the terms thereof,¹⁰ means that the essentials of the contract shall be included in the written instrument,¹¹ and compliance with such requirement has been held sufficient where the essential elements of parties, consideration, and subject matter appear on the face of the contract, even though in somewhat general terms.¹² Under some statutes the written contract must set out the date when the work is to be finished, and failure to do this prevents the lien from attaching.¹³ The fact that the contractor agrees to give credit for a part of the contract price does not prevent him from acquiring a lien for the balance.¹⁴

Installments. Under the provisions of some statutes the contract price must by the terms of the contract be made payable in installments at specified

times after the commencement of the work or on the completion of specified portions of the work or of the whole work,¹⁵ and a certain part of the contract price must be made payable not earlier than a designated number of days after the final completion of the contract,¹⁶ and unless the contract conforms substantially to these requirements persons other than the contractor who perform labor or furnish materials have a lien for the value thereof irrespective of the contract price.¹⁷

Contracts payable otherwise than in money. The right of a person who furnishes labor or materials pursuant to a contract with the owner to enforce a mechanic's lien is not affected by the fact that by the terms of the contract the price was to be paid otherwise than in money, where the owner refuses to pay in the manner agreed on.¹⁸

§ 80. — Inclusion of Nonlienable Items

Nonlienable items cannot be rendered lienable by inclusion in a contract with lienable items; and, although a lien may be acquired for lienable items under a severable contract which contains both lienable and nonlienable items, in the absence of a statute providing otherwise a lien may not be acquired where the contract is an entirety and indivisible.

A nonlienable item cannot be rendered lienable by including it in a contract with other items which are lienable.¹⁹ Furthermore a lien cannot be acquired under a contract which includes both lienable and nonlienable items where the contract is an entirety, for a gross sum, and is not divisible.²⁰ However, even though the contract includes both lienable and nonlienable items, a lien may be acquired for the lienable items where the contract is severable and not an entirety,²¹ where there are separate

9. Tex.—Dupuy v Shilling, Civ App, 293 S W 934—Harrop v. National Loan & Investment Co of Detroit, Mich, Civ App, 204 S W 878—Paschall v Pioneer Savings & Loan Co, 47 S W 98, 19 Tex Civ App 102

10. Tex.—Standard Savings & Loan Ass'n v Davis, Civ App, 85 S W.3d 333, error refused
40 C J p 119 note 17

11. Tex.—Harrop v National Loan & Investment Co, Civ App, 204 S W 878
40 C J p 119 note 18.

Contracts held to contain all essentials necessary to create a valid mechanic's lien on a homestead.—Hollums v Glenn, Tex Civ App, 83 S W 2d 731, error dismissed—40 C J p 119 note 18 [a]

12. Tex.—Standard Savings & Loan Ass'n v Davis, Civ App, 85 S W 2d 333, error refused

13. Mass.—Katauskas v Lonstein, 164 N E 810, 266 Mass 29—Adams & Powers Co v Seder, 154 N E 184, 257 Mass 453

Time for completion of work and payment therefor

Ill.—Concord Apartment House Co v O'Brien, 81 N E 1076, 228 Ill 476

40 C J p 119 note 19.

14. Ala.—Tyler v Birmingham Realty Co, 92 So 264, 207 Ala 210
Stipulation for credit as waiver of lien see *infra* § 224

15. Colo.—Chicago Lumber Co. v Newcomb, 74 P. 786, 19 Colo App 265.

40 C J p 120 note 23

16. Colo.—Chicago Lumber Co v Newcomb, *supra*
40 C J p 120 note 25

17. Colo.—Chicago Lumber Co v Newcomb, *supra*.
40 C J p 120 note 26.

18. Cal.—Schulte v Buben, 8 P 2d 848, 215 Cal 172, 81 A L R 764

40 C J p 120 note 27
Effect of payment see *infra* §§ 247-253.

19. Mo.—Carroll Contracting Co v Newsome, 210 S W 114, 201 Mo App 117

Wash.—Sound Transfer Co v. Phinney Realty & Inv. Co, 128 P. 1017, 71 Wash. 473

What matters are lienable see *supra* §§ 32-51

20. Md.—House v. Fissell, 51 A 2d 669

Mass.—Libbey v Tidden, 78 N E 213, 192 Mass 175, 7 Ann Cas. 617

Ohio.—Robert V. Clapp Co v Fox, 178 N E 586, 124 Ohio St 331
40 C J p 120 note 30

21. Ill.—Bairstow v Northwestern University, 5 N E 2d 269, 287 Ill App 424.

and distinct agreements, although embodied in the same writing,²² where the contract, although an entire one, does not specify the price to be paid for the whole,²³ or where, even though the contract is an entirety and for an entire price, a statute provides that in such case a lien may be acquired for the lienable items involved²⁴

§ 81. — Signature and Authentication

Under various constitutional or statutory provisions the contract necessary to the establishment of a mechanic's lien must be signed by the owner of the premises sought to be charged, and in order to fix a lien on their homestead both husband and wife must sign the contract and the wife privily acknowledge it.

Under statutes which require an express agreement or contract between the lien claimant and the owner of property charged as a prerequisite to the establishment of a mechanic's lien, discussed generally supra § 73 a, it has been held that such an agreement does not exist until it is signed by the owner,²⁵ although under some statutes a contract signed by the reputed owner is sufficient.²⁶

Homestead property. In order to fix a mechanic's lien on a homestead it is required under some constitutional and statutory provisions that the contract be signed by both husband and wife²⁷ and be privily acknowledged by the wife²⁸ before the labor or ma-

terial is furnished.²⁹ Under such a statutory requirement an acknowledgment of the contract after part performance will not create a lien for labor and material previously put into the improvement;³⁰ but it will give a right to a lien for that which is subsequently done or furnished³¹ except where the contract is an entirety, as where it calls for payment of a lump sum for a completed improvement.³² Where the lien contract is signed and acknowledged by husband and wife in the required statutory manner, the fact that the wife is ignorant of the effect of the contract after having had it fully explained to her will not prevent the lien from attaching to the homestead.³³

Joint property of husband and wife. Under some statutes it is essential to the acquisition of a lien on land owned jointly by husband and wife that both sign the contract.³⁴

Married woman's separate estate. Under some statutes, in order for a lien to be obtained on a married woman's separate estate, the contract for the improvements must be signed by the wife.³⁵

Liening lien to principal contractor. Under statutes so providing, in order that a contract for an improvement may preclude others than the original contractor from the right to a mechanic's lien, the contract must be signed by the record owner of the realty³⁶ and, as discussed infra § 107, must be

22. Pa.—Fullmer v Proust, 26 A 543, 155 Pa 275, 35 Am SR 881 40 C J p 121 note 33

23. Mass.—Felton v Minot, 7 Allen 412

24. Mass.—Scannell v Hub Brewing Co, 59 NE 628, 178 Mass 288—Moore v Erickson, 32 NE 1081, 158 Mass 71—Casey v Weaver, 6 NE 372, 141 Mass 280 40 C J p 121 note 31

25. Wis.—Fraser Lumber & Manufacturing Co v Laeyendecker, 9 NW 2d 97, 243 Wis 25

Surplusage

The mere fact that the contract for the improvement, which is signed by the owner, is also signed by one who has no title to the property will not defeat claimant's right to a mechanic's lien, and such signature may be disregarded as surplusage—Better Roofing Materials Co v Sztukowski, Mo App, 183 SW 2d 400

26. Cal.—Dunlop v Kennedy, 34 P. 92, 4 Cal Unrep Cas 196

27. Tex.—Kepley v Zachry, 116 S W 2d 699, 131 Tex 554, opinion supplemented 121 SW 2d 595, 131 Tex 554—Hicks v Wallis Lumber Co, Civ App, 70 SW 2d 440 40 C J p 121 note 35

28. Tex.—Kepley v Zachry, 116 S

W 2d 699, 131 Tex 554, opinion supplemented 121 SW 2d 595, 131 Tex 554—Marinick v Continental Southland Savings & Loan Ass'n, Civ App, 97 SW 2d 480—Willborg v Gentry, Civ App, 93 SW 2d 1204—Hicks v Wallis Lumber Co, Civ App, 70 SW 2d 440 40 C J p 121 note 36

Effect of acknowledgment

Mechanic's lien contract, properly acknowledged by wife, constituted enforceable lien against spouses' property, even if homestead—Lancaster v. Whaley Lumber Co, Tex. Civ App, 18 SW 2d 796, error dismissed.

Husband's acknowledgment

The wife's homestead rights are not affected by the fact that the husband acknowledged the lien contract—Spoor v Gulf Bitulithic Co, Tex Civ App, 172 SW 2d 377, error refused

Prior to existence of homestead

Wife's acknowledgment of contract for improvement is not necessary to acquisition of mechanic's lien where homestead did not exist prior to execution of contract—Guajardo v Emery, Tex. Civ App, 73 SW 2d 615, error refused

29. Tex.—Kepley v Zachry, 116 S W 2d 699, 131 Tex 554, opinion

supplemented 121 SW 2d 595, 131 Tex 554—Hicks v Wallis Lumber Co, Civ App, 70 SW 2d 440 40 C J p 121 note 37

30. Tex.—Kepley v Zachry, Civ. App, 90 SW 2d 571, modified on other grounds 116 SW 2d 699, 131 Tex 554, opinion supplemented 121 SW 2d 595, 131 Tex 554

31. Tex.—Heady v Bexar Bldg & Loan Assoc, Civ App, 26 SW 468 40 C J p 121 note 37 [a]

32. Tex.—Kepley v Zachry, 116 S W 2d 699, 131 Tex 554, opinion supplemented 121 SW 2d 595, 131 Tex 554

33. Tex.—Bernstein v Hibbs, Civ App, 284 SW 234

34. Mich.—Clawson Lumber Co v Gray, 246 NW 59, 261 Mich 173—Bauer v Long, 110 NW 1059, 147 Mich 351, 118 Am SR 552, 11 Ann. Cas 86

Land held by entireties

Mich.—Colonial Brick Co v Zimmerman, 239 NW 301, 255 Mich 655

35. Tenn.—City Lumber Co. v Barnhill, 168 SW. 159, 129 Tenn. 676

30 C J p 917 note 81.

36. N.J.—Pfeifer v Reiman, 161 A. 825, 10 N.J. Misc. 898.

filed; and a contract signed by the authorized agent of the owner is insufficient to restrict liens to that of the principal contractor.³⁷

§ 82. Filing or Recording

- a In general
- b Time and place
- c Papers to be filed or recorded
- d Effect

a. In General

Under various mechanics' lien statutes the filing or recording of contracts for alterations, improvements, or repairs, or of specified contracts therefor, is required

In some states the filing or recording of the contract is, or at times has been, provided for by stat-

ute³⁸ The application of such statutes depends on the wording of the particular statute and the construction placed thereon³⁹ Particular statutes are variously held to apply where there is a contract in writing⁴⁰ signed by the record owner⁴¹ in the possession of claimant,⁴² where the contract price exceeds a specified amount,⁴³ or where it is sought to fix a lien on a homestead,⁴⁴ and not to apply to a contract contained in an ordinary lease⁴⁵ or to a writing merely authorizing a person to act as agent⁴⁶ In some jurisdictions the statutes relating to the filing or recording of the contract do not apply to the contracts of subcontractors⁴⁷ or materialman,⁴⁸ while in other jurisdictions the statutes apply to contracts of persons other than the original contractor,⁴⁹ such as a subcontractor,⁵⁰ but do not

Effect of interpleading lien claimants

Facts that claimants were decreed to interplead and filed statements and that court took jurisdiction did not preclude right of claimants to mechanics' liens where contract was not signed by record owner of land—*Pfeifer v. Reiman*, *supra*

Stop notice

The remedy by stop notice is not made available by the filing of a contract not signed by the record owner of land—*Pfeifer v. Reiman*, *supra*

37. NJ—*Pfeifer v. Reiman*, *supra*

In absence of statutory requirement a contract signed by an authorized agent is sufficient to deny to everyone except the contractor the privileges of filing mechanics' liens—*Earle v. Willetts*, 29 A 198, 56 N J Law 334

38. US—*John Murland, Inc v. Empire Trust Co.*, C.C.A.N.J., 39 F2d 341

Colo—*Armour & Co of Delaware v. McPhee & McGinnity Co.*, 275 P 12, 85 Colo 262

Mass—*Lampasona v. Capriotti*, 4 N E2d 621, 296 Mass 34, 108 A.L.R. 430

NJ—*Smith & Richards Lumber Co v. Hurley*, 185 A 10, 116 N.J. Law 429—*Meyer v. Standard Accident Ins. Co.*, 177 A 255, 114 N.J. Law 483—*Eastern Sash & Door Co v. Sebastiani*, 156 A 451, 108 N.J. Law 333—*Guerrero v. Di Trollo*, 143 A 803, 105 N.J. Law 5—*American Homes Co v. Krantz*, 24 A3d 518, 131 N.J. Eq 213—*William F. Glasser & Co v. Muencks*, 133 A 430, 99 N.J. Eq 42—*Passaic Bergen Lumber Co v. Brown*, 192 A 736, 15 N.J. Misc 514, affirmed 196 A 740, 119 N.J. Law 428—*Pfeifer v. Reiman*, 161 A 825, 10 N.J. Misc 898—*Patterson Sash & Door Co v. Loscalzo*, 152 A 453, 8 N.J. Misc 922—*Wood-*

bridge Lumber Co. v. Varacska, Cir.Ct., 194 A 392

40 C.J. p 121 note 41

Annexing contract or copy thereof to claim or statement see *infra* § 163

Recording

Of contract stipulation against lien see *infra* §§ 92, 109

Or filing of contract as step essential to perfection of lien see *infra* § 132

Object of recordation is to give public notice and to create a lien and privilege in favor of the statutory beneficiaries against the ground and building on which the work is done or for which the materials are furnished—*Monroe Hardware Co v. Thompson*, 110 So 495, 162 La 335

Duty of owner

It is owner's duty to see that contract and bond given pursuant to statute applying to cases where owner lets the contract to an independent contractor for the construction as a whole are timely recorded—*Monroe Hardware Co v. Thompson*, *supra*

39. US—*John Murland, Inc. v. Empire Trust Co.*, C.C.A.N.J., 39 F2d 341

NJ—*Woodbridge Lumber Co v. Varacska*, Cir.Ct., 194 A 392

40. US—*John Murland, Inc. v. Empire Trust Co.*, C.C.A.N.J., 39 F2d 341

Mass—*Lampasona v. Capriotti*, 4 N E2d 621, 296 Mass 34, 108 A.L.R. 430

NJ—*Guerrero v. Di Trollo*, 143 A 803, 105 N.J. Law 5—*William F. Glasser & Co v. Muencks*, 133 A 430, 99 N.J. Eq 42—*Woodbridge Lumber Co v. Varacska*, Cir.Ct., 194 A 392

40 C.J. p 121 note 43

41. NJ—*Woodbridge Lumber Co v. Varacska*, *supra*

Husband and wife

The filing of a contract signed by the husband alone for erection of

building on premises owned by both husband and wife was held sufficient—*Woodbridge Lumber Co v. Varacska*, *supra*

42. Tex—*Warner El Mfg Co v. Maverick*, 30 SW 437, 88 Tex 489, reheard 31 SW 353, 88 Tex 489

40 C.J. p 123 note 44

43. Colo—*Armour & Co of Delaware v. McPhee & McGinnity Co.*, 275 P 12, 85 Colo 262

40 C.J. p 123 note 45

In Louisiana

(1) Acts 1916 No 229 does not require the contract to be recorded, regardless of the amount, but authorizes the privilege on the filing of a sworn statement, that is, on the recording of the lien—*Mercier v. Munich*, 120 So 522, 9 La.App 373—40 C.J. p 123 note 45 [b] (3)

(2) Other particulars of the Louisiana rules see 40 C.J. p 122 note 45 [b] (1), (2), (4), (5).

44. Tex—*Kepley v. Zachry*, 116 S W2d 699, 131 Tex 554, opinion supplemented 121 SW2d 595, 131 Tex 554

40 C.J. p 122 note 46.

45. Colo—*Empire Coal Co v. Rosa*, 142 P 192, 26 Colo App 230

40 C.J. p 122 note 47

46. Cal—*Needham v. Chandler*, 96 P 325, 8 Cal App 124

47. Cal—*Reed v. Norton*, 26 P 767, 90 Cal 590, reheard 27 P 426, 90 Cal 590

48. Cal—*Hinckley v. Field's Biscuit & Cracker Co.*, 27 P. 594, 91 Cal 136

40 C.J. p 122 note 50

49. Tex—*Kahler v. Carruthers*, 45 SW 160, 18 Tex Civ App 216.

50. Tex—*Cameron v. Terrell*, Civ. App., 36 SW 142.

apply to the contract of the original contractor.⁵¹

b. Time and Place

There must be a compliance with requirements of mechanics' lien statutes as to the place and time for the filing of contracts for alterations, improvements, or repairs.

The statutes of different jurisdictions variously provide, or at times have provided, for the filing or recording of the contract in the office of the county recorder,⁵² county clerk,⁵³ or clerk of the county court,⁵⁴ or in the registry of deeds.⁵⁵ Where the statute provides that the contract shall be recorded "in a book kept for that purpose," it is not necessary that it should be recorded in a book kept exclusively for that purpose.⁵⁶ A recording in a deed book has been held sufficient under some statutes.⁵⁷ Some statutes contemplate a filing before the work is commenced or materials are furnished.⁵⁸ Other statutes require a filing not later than a prescribed period of time after the accrual of the indebtedness.⁵⁹ Where an express lien is given by the contract, it has been held that it need not be recorded within the time prescribed by statute.⁶⁰

c. Papers to Be Filed or Recorded

(1) In general

(2) Pleas and specifications

(1) In General

In order to comply with a requirement of mechanics' lien statutes for the filing or recording of the contract, the instrument filed or recorded must be a real, valid contract for a construction or improvement, and the one under which the improvement is carried out. Under some statutes, instead of the original contract, a duplicate, memorandum, or notice thereof may be filed.

The contract to be filed or recorded is the one which embodies a real, rather than a fictitious, agreement between an owner and a contractor for the erection of a building by the latter,⁶¹ which truly recites the terms of the agreement⁶² and by virtue of which the work is done or the materials furnished,⁶³ and it must be a contract for a construction or improvement, not a sale.⁶⁴ The contract need not be acknowledged in order to be entitled to record under some statutes.⁶⁵

Provision is made under some statutes, as an alternative to the filing or recording of the original contract, for the filing or recording of a duplicate⁶⁶ or memorandum⁶⁷ of the contract, or as much of the contract as shows the contract price and the times of its payment.⁶⁸ The contract or memorandum filed must conform to, and contain all the terms and provisions prescribed by, statute or the filing will be without effect.⁶⁹

51. Tex.—Kahler v Carruthers, 45 SW 160, 18 Tex Civ App 216 40 CJ p 122 note 53

52. Colo.—Armour & Co of Delaware v McPhee & McGinnity Co., 275 P. 12, 85 Colo 262 40 CJ p 122 note 54

53. US—John Murtland, Inc v Empire Trust Co, CCANJ, 39 F2d 341

NJ—Guerrero v Di Trolio, 143 A 803, 105 NJ Law 5—Passaic Bergen Lumber Co v Brown, 192 A 736, 15 NJ Misc 514, affirmed 196 A 740, 119 NJ Law 428—Paterson Sash & Door Co v Loscalzo, 152 A 453, 8 NJ Misc 922

Tex—Kepley v Zachry, 116 SW 2d 699, 131 Tex 554, opinion supplemented 121 SW 2d 595, 131 Tex 554

40 CJ p 122 note 55

54. W Va.—Collins v Davis & Elkins College, 79 SE 10, 72 W Va 583

55. Mass.—Lampasona v Capriotti, 4 NE2d 621, 296 Mass 34, 108 ALR 430

56. Tex.—Lignoski v Crooker, Civ App, 22 SW 774—Bosley v Pease, Civ App, 22 SW 516

57. Pa.—Glading v Frick, 88 Pa 460

58. US—John Murtland, Inc v

Empire Trust Co, CCANJ, 39 F2d 341

Mass—Lampasona v Capriotti, 4 NE2d 621, 296 Mass 34, 108 ALR 430

NJ—Smith & Richards Lumber Co v Hurley, 185 A 10, 116 NJ Law 429—Guerrero v Di Trolio, 143 A 803, 105 NJ Law 5

40 CJ p 122 note 59

59. Tex—Claes v Dallas Homestead & Loan Ass'n, 18 SW 421, 83 Tex 50

40 CJ p 123 note 60

60. Tex—Farrell v Palestine Loan Ass'n, Civ App, 30 SW 814—Phelps & Bigelow Windmill Co v Parker, Civ App, 30 SW 365

61. NJ—Improved Bldg & Loan Ass'n v Larkin, 101 A 1043, 88 N. J Eq 52

40 CJ p 123 note 62

Consideration

Contract for construction of hotel building was held not void because consideration was to be paid in stock of hotel company—John Murtland, Inc, v Empire Trust Co, CCANJ, 39 F2d 341

Right to object

In absence of fraud, lien claimants could not object to validity of building contract under which they furnished labor and materials—John Murtland, Inc, v Empire Trust Co, supra.

62. NJ—Murphy-Hardy Lumber Co v Nicholas, 49 A 447, 66 NJ Law 414.

40 CJ p 123 note 63

63. US—John Murtland, Inc v Empire Trust Co, CCANJ, 39 F 2d 341

40 CJ p 123 note 64

64. NJ—Jackson v Houghton Engineering Co, 145 A 465, 105 NJ Law 283

65. US—In re Hobbs, DCW.Va., 145 F 211.

40 CJ p 123 note 65

Acknowledgment generally see supra § 81

66. NJ—American Homes Co v Krantz, 24 A2d 518, 131 NJ Eq 213

67. Cal—Butterworth v. Levy, 38 P 897, 104 Cal 506

Colo—Armour & Co of Delaware v. McPhee & McGinnity Co, 275 P. 12, 85 Colo 262

40 CJ p 123 note 68

68. W Va—Collins v Davis & Elkins College, 79 SE 10, 72 W Va 583

69. Colo—Armour & Co of Delaware v McPhee & McGinnity Co, 275 P 12, 85 Colo 262

Description of lands

The contract need not particularly describe the lands on which the improvement contracted for is to be

ments entered into as parts of one transaction will be read together² and construed with reference to each other³. Also the statutes regarding mechanics' liens are considered a part of the contract⁴. Various contracts have been held to be entire⁵ or not entire⁶. A contract prepared on a blank form has been construed to require only the furnishing of materials and not the building of a house, where the blanks in that part of the form relating to the building of a house were not filled in⁷ and the parties themselves so construed the contract.⁸

Correction of errors

Erroneous insertion of owner's name in place of contractor's will be corrected by construction to effectuate the intention of the parties where perusal of entire instrument shows the error—*Eldridge v. Poirier*, supra.

Particular contracts construed

(1) Generally—*Kelsay Lumber Co v Crowell*, Tex Civ App, 19 S W 2d 368, error dismissed.

(2) Where question was whether mechanic's lien claimant was a prime contractor or a subcontractor, disclosure in exhibit that extra work claimed for was ordered by a third person did not require construction that claimant's contract was with third person and not with owners—*Russell M Howe, Inc v Beloff*, 56 A 2d 352.

2. Tex—*Barber v Herring*, Com App, 229 S W 472—*Kelsay Lumber Co v Crowell*, Civ App, 19 S W 2d 368, error dismissed.

3. Tex—*Barber v Herring*, Com App, 229 S W 472—*Taliaferro v Warren*, Civ App, 30 S W 2d 393—*Kelsay Lumber Co v Crowell*, Civ App, 19 S W 2d 368, error dismissed.

4. Ala—*Fleming v. Kirkland*, 146 So 384, 226 Ala 222.
Fla—*Florida Fruit Co v Shukelford*, 198 So 841, 145 Fla 216.

5. Tex—*Kelsay Lumber Co v Crowell*, Civ App, 19 S W 2d 368, error dismissed.

40 C J p 125 note 97

Entirety of contract

As affecting time for filing claim

or statement see infra § 144 c

Evidence of

Presumptions see infra § 308

Weight see infra § 310

Supplemental contract

Recorded building contract and subsequent unrecorded agreement

for additional story were held contract and supplemental contract and not distinct and separate contracts—*Bell v Loeber*, 125 So 871, 169 La. 731.

6. RI—*Briggs v Titus*, 7 RI 441

Contract held severable

Contract for removal of building from one parcel of land to another, and for its alteration and reconstruction on the lot where removed to was held severable—*Mott v Wright*, 184 P 617, 43 Cal App 21.

7. Tex—*Griffin v Shamburger*, Civ App, 262 S W 144.

8. Tex—*Griffin v Shamburger*, supra.

9. Cal—*Dixon v Fredericks*, 19 P 2d 273, 129 Cal App 703—*Hammond Lumber Co v Goldberg*, 13 P 2d 814, 125 Cal App 120—*Lorenz v Rousseau*, 258 P 690, 85 Cal App 1.

Colo—*Bankers' Building & Loan Ass'n v Fleming Bros Lumber Co*, 261 P 1087, 83 Colo 335.

Minn—*Snell Sash & Door Co v Florsheim*, 18 NW 2d 776, 217 Minn 21.

Nev—*Reno Plumbing & Heating Co v Bickel*, 35 P 2d 302, 55 Nev 367—*Nichols v Levy*, 32 P 2d 120, 65 Nev 310.

N M—*Albuquerque Lumber Co v Montevista Co*, 38 P.2d 77, 39 N M 6.

Or—*Barr v Lynch*, 97 P 2d 185, 163 Or 607—*Drake v Riley*, 9 P 2d 130, 139 Or 172—*Randolph v Christensen*, 265 P 797, 124 Or 661—*Roberts v Gerlinger*, 263 P 916, 124 Or 461—*Schram v Manary*, 260 P 314, 123 Or 354, modified on other grounds 262 P 263, 123 Or 354—*Nicolai-Neppach Co v Poore*, 251 P 268, 120 Or 163.

S D—*Smith v McCoy*, 235 NW 651, 58 S D 266.

10 C J p 135 note 3

Failure to object to improvement generally see supra §§ 63, 65, 71, 73.

§ 84. Statutory Notice by Owner of Non-responsibility

a In general

b Application of statutes

a. In General

Under various statutes the estate or property of an owner who has knowledge of the construction of improvements thereon by third persons is subject to a mechanic's lien therefor unless within a specified time after obtaining such knowledge he files or posts a specified notice of nonresponsibility.

Under some statutes, where the owner knows that buildings are being erected or improvements are being made on his property,⁹ or where he receives due

Power of legislature

The legislature may provide that improvements made with the knowledge of the landowner shall be deemed to have been made at his instance unless he disclaims responsibility therefor in the manner and within the time prescribed by the statute—*Knoff Woodwork Co v Zotalis*, 6 NW 2d 264, 213 Minn 204.

Purpose of statute

(1) The statute was enacted for the protection of the owner—*Gabriel Powder & Supply Co v Thompson*, 97 P 2d 182, 163 Or 623.

(2) The purpose of the statute is to give actual notice to workmen or materialmen that the owner of the property disclaims responsibility for liens on it for their services or supplies—*Milner v Shuey*, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159—*Didier v Webster Mines Corporation*, 234 P 520, 49 Nev 5—*Phillips v Snowden Placer Co*, 160 P 786, 40 Nev 66.

(3) The statute was also intended to take each case out of the realms of uncertainty which could arise from conflicting or unsatisfactory evidence as to the fact of claimant's knowledge of the owner's disclaimer of responsibility—*Milner v Shuey*, supra.

(4) Statements of other purposes see 40 C J p 125 note 3 [a].

Object of notice

The object of the notice is to bring home to those who are expending labor or materials on a building the fact that the owner of the land will not be responsible for such labor or materials—*English v Olympic Auditorium*, 20 P 2d 946, 217 Cal 631, 87 A L R 1281—*Hayward Lumber & Investment Co v Ford*, 148 P 2d 689, 64 Cal App 3d 346.

Strict construction

The statute is to be strictly construed—*George v Wentworth*, 53 P. 2d 1193, 56 Nev 380.

or written notice that material will be furnished or labor done,¹⁰ his estate is subject to a mechanic's lien unless within a specified time after obtaining such knowledge he gives notice that he will not be responsible therefor. It is expressly provided by some of the statutes that, where the owner, with knowledge of the improvement, fails to give the prescribed notice, the improvement shall be held to have been made at his instance or request or by his authority,¹¹ as far as to subject his interest to liens.¹² Such statutes have no bearing on the question of personal liability for the labor performed or material furnished.¹³ Some courts state that a lien under such statutes does not grow out of contract¹⁴ but arises from estoppel,¹⁵ and that the statute does no more than furnish a rule of evidence whereby the owner's consent or acquiescence may be determined.¹⁶ Other courts, however, have expressed the opinion that the lien created by such statutes is not founded on estoppel,¹⁷ but rather on the presumption of consent¹⁸ or authorization¹⁹ raised by the statute on failure of the owner to give the prescribed notice after acquiring knowledge that the improvement is being made. Some statutes expressly provide that the owner's failure to give the prescribed notice shall constitute ratification of the

contract.²⁰ Under the various statutes the legal effect of a failure of the owner to give notice after acquiring knowledge is, as far as a lien is concerned, the same as though he had expressly and affirmatively authorized, contracted for, or consented to the making of the improvement.²¹

b. Application of Statutes

- (1) In general
- (2) Knowledge
- (3) Compliance with statutes

(1) In General

Statutes subjecting an owner's interest to mechanics' liens for improvements on his property unless he gives notice of nonresponsibility therefor apply to an owner who has knowledge of, but who has not authorized or caused, the improvement, and not to one whose interest in the property is as a lienor or encumbrancer, or to an owner who has contracted for the improvement or otherwise caused it to be made.

The statutes under consideration apply to a person who has not authorized the improvement²² or caused it to be made,²³ but who has knowledge of the making of the improvement, as discussed infra subdivision b (2) of this section, and is the owner²⁴ of the legal title to,²⁵ or has an interest in,²⁶ the

10. Ala.—Buettner Bros v. Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala 553—Sturdevant v First Ave Coal & Lumber Co, 122 So 178, 219 Ala 303—Aوندale Lumber Co v Hudson, 106 So 803, 214 Ala 128

11. Cal.—Dixon v Fredericks, 19 P 2d 272, 129 Cal App 703
Minn.—Snell Sash & Door Co v Florsheim, 13 NW 2d 776, 217 Minn 21—Knoff Woodwork Co v Zotalis, 6 NW 2d 264, 213 Minn 204

Nev.—Nichols v Levy, 32 P 2d 120, 55 Nev 310
40 CJ p 125 note 4

12. Cal.—Dixon v Fredericks, 19 P 2d 272, 129 Cal App 703
Minn.—Snell Sash & Door Co v Florsheim, 13 NW 2d 776, 217 Minn 21—Knoff Woodwork Co v Zotalis, 6 NW 2d 264, 213 Minn 204

NM.—Albuquerque Lumber Co v Montevista Co, 38 P 2d 77, 39 NM 6
Or.—Roberts v Gerlinger, 263 P 916, 124 Or 461

13. Cal.—Marchant v Hayes, 52 P 154, 120 Cal 137
40 CJ p 125 note 6.

14. Colo.—Stewart v Talbott, 146 P 771, 58 Colo 563, Ann Cas 1916C 1116

Personal contract unnecessary

The lien does not depend on the

owner's personal contract for the labor or materials—Dixon v Fredericks, 19 P 2d 272, 129 Cal App 703

15. Cal.—Allen v Wilson, 174 P 661, 178 Cal 874—Lorenz v Rousseau, 258 P 690, 85 Cal App 1
Ill.—Beaudry v Bell, 250 Ill App 468

Nev.—Nichols v Levy, 32 P 2d 120, 55 Nev 310
NM.—Albuquerque Lumber Co v Montevista Co, 38 P 2d 77, 39 NM 6
Or.—Dyer v Thrift, 264 P 428, 124 Or 249

40 CJ p 125 note 8

16. NM.—Albuquerque Lumber Co v Montevista Co, 38 P 2d 77, 39 NM 6

17. Minn.—Dower Lumber Co v Rodewald, 196 NW 473, 157 Minn 314

40 CJ p 125 note 9

18. Minn.—Knoff Woodwork Co v Zotalis, 6 NW 2d 264, 213 Minn 204—Dower Lumber Co v Rodewald, 196 NW 473, 157 Minn 314
NJ.—Lake & Risley Co v Rabinovitch, 140 A 311, 104 NJ Law 309

Conditions

Where tenant in common prescribes conditions on which improvement may be made by cotenant in possession, which are not brought to knowledge of lien claimant, although tenant knew work was in progress, tenant is presumed to have consent-

ed thereto—Viker v Beggs, 208 N W 383, 53 ND 858

19. Or.—Gabriel Powder & Supply Co v Thompson, 97 P 2d 182, 163 Or 623

20. Pa.—Kreitner Bros, Inc v Lake Rose Realty Co, 20 Pa Dist & Co 498

21. Minn.—Snell Sash & Door Co v Florsheim, 13 NW 2d 776, 217 Minn 21

40 CJ p 125 note 11

22. SD.—Smith v McCoy, 235 N W 661, 58 SD 256

23. Cal.—S H Harmon Lumber Co v Brown, 131 P 368, 165 Cal 193
40 CJ p 125 note 12

24. Colo.—Bankers' Building & Loan Ass'n v Fleming Bros Lumber Co, 264 P 1087, 83 Colo 335
40 CJ p 125 note 14

25. Cal.—West Coast Lumber Co v Newkirk, 22 P 331, 80 Cal 275
Or.—Title Guarantees & Trust Co v Wrenn, 56 P 271, 35 Or 62, 76 Am SR 454

26. SD.—Smith v McCoy, 235 N W 661, 58 SD 256
40 CJ p 125 note 16

Legal title not required

It is not necessary that the owner shall have the legal title in order to come within the provisions of the statute; equitable ownership is sufficient—Bankers' Building & Loan

land otherwise than as a lienor or encumbrancer.²⁷ They do not apply to a person who causes the building to be constructed²⁸ or who contracts for the improvement,²⁹ directly or indirectly,³⁰ or to a participating owner, even though acting through his agent,³¹ or to one at whose instance the improvement is in fact made.³² In such case the interest of such a person is liable to a mechanic's lien under other statutes, and he cannot relieve such interest from liability by giving the statutory notice that he will not be responsible.³³ However, a few statutes of this nature have been construed to refer only to an owner who has become liable under other statutes³⁴ and wishes to terminate his liability³⁵ and prevent it from extending to labor or material furnished after the giving of the notice.³⁶

The notice will preclude the acquisition of a lien against the land or interest therein of the owner filing the notice,³⁷ but it will not prevent the acquisition of a lien against the improvement itself.³⁸

Lienable character of work repairs and improvements by lessee. It is essential to the application of the statutes that the work done shall be of a lienable character,³⁹ but provisions in a lease as to the character of, and the right to remove, im-

provements or additions to be made by the lessee will not prevent their application so as to preclude a claimant without actual or constructive knowledge of such lease provision from acquiring a mechanic's lien on the lessor's estate.⁴⁰ While by virtue of express provisions of some statutes they do not apply to the lessor in respect of repairs made by, or at the instance of, the lessee,⁴¹ under such statutes a mechanic's lien attaches to the lessor's interest for improvements other than repairs unless, after acquiring knowledge that they are being made, he protects himself in the manner prescribed by statute.⁴²

Husband and wife. Under various statutes, some expressly so providing, contracts by one spouse for improvements on property owned by the other or by both bind the estate of the other so as to make it subject to mechanics' liens therefor,⁴³ or in such case the contracting spouse is presumed to be the agent of the other, or the wife is deemed to have consented to the improvement,⁴⁴ unless such noncontracting spouse gives notice objecting to the improvement in the manner provided by statute.

Lessors and lessees. The statutes apply to a lessor⁴⁵ unless he has entered into a contract with ref-

Ass'n v Fleming Bros Lumber Co., 264 P 1087, 83 Colo 335

Interest of mortgage foreclosure purchaser and grantee was subject to improvement liens, in absence of statutory notice to contrary—Bankers' Building & Loan Ass'n v Fleming Bros Lumber Co., supra

27. *S.D.—Smith v McCoy*, 235 NW 661, 58 SD 256

40 C.J. p 126 note 17

28. *Or.—Title Guarantee & Trust Co v Wrenn*, 56 P 271, 35 Or 62, 76 Am SR 454

40 C.J. p 126 note 18

29. *Colo.—Stewart v Talbott*, 146 P 771, 58 Colo 563, Ann Cas 1916C 1116

Nev.—Verdi Lumber Co v Bartlett, 161 P 933, 40 Nev 317

30. *Colo.—Miller v Davis*, 146 P 714, 26 Colo App 483

40 C.J. p 126 note 20

31. *Cal.—Barr Lumber Co v Perkins*, 6 P 2d 948, 214 Cal 531—*Ott Hardware Co v Yost*, 159 P 2d 663, 69 Cal App 2d 593

Person held not participating owner

Fact that owner of adjoining premises purchased gravel for both to be spread by lessee of each did not necessarily make owner a participating owner so as to deprive him of right to file a nonresponsibility notice and claim exemption from materialman's lien for materials furnished one lessee and used in alter-

ations made on building—*Hayward Lumber & Investment Co v Ford*, 148 P 2d 689, 64 Cal App 2d 346

32. *U.S.—Arctic Lumber Co v Borden, Alaska*, 211 F 50, 127 CCA 486, certiorari denied 35 S Ct 209, 235 US 704, 59 L Ed 433

33. *Cal.—Ott Hardware Co v Yost*, 159 P 2d 663, 69 Cal App 2d 593

40 C.J. p 126 note 24

34. *S.C.—Metz v Critcher*, 68 SE 627, 86 SC 348

40 C.J. p 126 note 25

35. *S.C.—Metz v Critcher*, supra

36. *S.C.—Metz v Critcher*, supra

37. *Cal.—Cain v Whiston*, 137 P. 2d 479, 58 Cal App 2d 738

38. *Cal.—English v Olympic Auditorium*, 20 P 2d 946, 217 Cal 631, 87 ALR 1281—*Cain v Whiston*, 137 P 2d 479, 58 Cal App 2d 738

39. *Cal.—Moses v Pacific Bldg Co.*, 207 P 946, 58 Cal App 90

40 C.J. p 127 note 42

Claims for which lien may be acquired generally see supra §§ 20-61

40. *Cal.—Hammond Lumber Co v Gordon*, 258 P 612, 84 Cal App 701

41. *Minn.—Fausser v McElroy*, 195 NW 786, 167 Minn 116

42. *Minn.—Knoff Woodwork Co v Zotalis*, 6 NW 2d 264, 213 Minn 204

40 C.J. p 126 note 33

43. *Fla.—Le Roy v Reynolds*, 193 So 843, 141 Fla 586

Ill.—Paul v Shukes, 47 NE 2d 374, 317 Ill App 650

Tenn.—Wittichen v Miller, 166 SW 2d 612, 179 Tenn 352

44. *N.J.—Lake & Rusley Co v Rabinovitch*, 140 A 311, 104 NJ Law 309

Construction

Statute is in derogation of common law, and must be strictly construed—*Stanley Patch Lumber Corporation v Barry*, 265 NYS 879, 148 Misc 376

Extent of presumption

Statutory presumption of husband's agency for wife in contracting for improvement of her property extends only to creation of lien on particular parcel of land improved and does not establish an agency for any other purpose—*Stanley Patch Lumber Corporation v Barry*, supra

45. *Cal.—English v Olympic Auditorium*, 20 P 2d 946, 217 Cal 631, 87 ALR 1281—*Barr Lumber Co v Perkins*, 6 P 2d 948, 214 Cal 531—*Dixon v Fredericks*, 19 P 2d 272, 129 Cal App 703—*Hammond Lumber Co v Goldberg*, 13 P 2d 814, 125 Cal App 120

Nev.—Nichols v Levy, 32 P 2d 120, 55 Nev 310

S.D.—Smith v McCoy, 235 NW. 661, 58 SD 256

40 C.J. p 126 note 28.

erence to the improvement,⁴⁶ or has caused the improvement to be made through the lessee as his agent,⁴⁷ or the improvement is made at his instance⁴⁸ Where the building of the improvement is optional with the lessee, the posting and filing of the notice of nonresponsibility by the lessor relieves the land from the lien, but the improvement itself is subject to the lien⁴⁹

Partners The statutes have been held to apply to a partner at whose instance a building was erected for the partnership on land owned by himself and another as cotenants⁵⁰

Vendors and vendees mortgagees or other lienholders Although there is some authority to the contrary,⁵¹ the statutes have generally been held to apply to a vendor under an executory contract of sale⁵² even though the purchaser does not have the right of possession.⁵³ On the other hand, the statutes do not apply to the holder of a vendor's lien⁵⁴ or a mortgagee,⁵⁵ but it has been held otherwise as to the holder of a deed of trust given to secure a debt,⁵⁶ especially where, by virtue of an agreement between the parties, the improvement is to be made as a joint enterprise and both are in fact interested in the property⁵⁷

(2) Knowledge

In order to subject an owner's estate to a mechanic's lien because of his failure to give a prescribed notice of nonresponsibility for improvements thereon, he must have knowledge of the fact of construction of the particular improvement involved, and not merely of the intent to construct it; the knowledge may be either actual or constructive and may be imputed to the owner from the knowledge of an authorized agent

Knowledge on the part of the owner or person having an interest in the property is necessary in order to render applicable the statutes under consideration,⁵⁸ which knowledge, it has been held under some statutes, must be of a degree similar to that present in an estoppel⁵⁹ The knowledge required is knowledge of the particular improvement involved, not knowledge of a different improvement,⁶⁰ but it has been held that adjoining landowners need not have actual knowledge of the exact character or location as to their different properties of an improvement constituting in law one structure which is placed on their properties⁶¹

It is not required that the owner have actual,⁶² absolute,⁶³ or full and detailed⁶⁴ knowledge, or that he actually see the work in progress⁶⁵ It is sufficient if he has constructive knowledge,⁶⁶ that is, notice of such facts and circumstances as would put

46. Colo—Stewart v Talbott, 146 P 771, 58 Colo 563, Ann Cas 1916C 1116

40 C J p 126 note 29

47. Cal—Ott Hardware Co v Yost, 159 P 2d 663, 69 Cal App 2d 593 40 C J p 126 note 30

48. US—Arctic Lumber Co v Borden, Alaska, 211 F 50, 127 CCA 486, certiorari denied 35 S Ct 209, 235 US 704, 59 L Ed 433

49. Cal—English v Olympic Auditorium, 20 P 2d 946, 217 Cal 631, 87 A L R 1281

50. Or—Shea v Peters, 268 P 989, 126 Or 76

51. ND—Johnson v Soliday, 126 NW 99, 19 ND 463

40 C J p 126 note 35

52. Cal—Allen v Wilson, 174 P 661, 178 Cal 674—McDowell v Perry, 51 P 2d 117, 9 Cal App 2d 655.

Minn—Snell Sash & Door Co v Florsheim, 13 NW 2d 776, 217 Minn 21

Or—Gabriel Powder & Supply Co v Thompson, 97 P 2d 182, 163 Or 423—Drake v Riley, 9 P 2d 130, 139 Or 172—Randolph v Christensen, 265 P 797, 124 Or 661—Schram v Mansary, 260 P 214, 123 Or 354, modified on other grounds 262 P 263, 123 Or 354

40 C J p 126 note 36

Abandonment of improvement

Interest of vendor under executory

contract of sale who did not file prescribed notice of nonliability is charged along with that of the vendee for mechanic's lien for improvements abandoned before completion through the fault of the vendee, even though the vendor is blameless with respect to the abandonment—Albuquerque Lumber Co v Montevista Co, 38 P 2d 77, 39 NM 6

53. Minn—Fauser v McElroy, 195 NW 786, 157 Minn 116 40 C J p 126 note 37

54. Cal—Kuschel v Hunter, 50 P 397, 5 Cal Unrep Cas 793 40 C J p 126 note 38

55. NM—Stearns-Roger Mfg Co v Astec Gold Mining & Mill Co, 93 P 706, 14 NM 300 40 C J p 126 note 39

56. Cal—Fuquay v Stuckney, 41 Cal 583

57. Cal—City Lumber Co v Brown, 189 P 630, 46 Cal App 603

58. Cal—Maxwell Hardware Co v Foster, 277 P 327, 207 Cal 167—P W Wood, Inc, v Bialack, 261 P 737, 86 Cal App 572

Or—Pacific Spruce Corporation v Oregon Portland Cement Co, 286 P 520, 133 Or 223, 72 A L R 1507, rehearing denied 289 P 489, 133 Or 223, 72 A L R 1507—Williams v Sharpe, 265 P 793, 125 Or 379—Dyer v Thrift, 264 P 428, 124 Or

249—Roberts v Gerlinger, 263 P 916, 124 Or 461

40 C J p 127 note 43

Time knowledge obtained

Mechanic's lien filed before owner secures knowledge of labor performed on building is ineffectual—Dixon v Fredericks, 19 P 2d 272, 129 Cal App 703.

59. Or—Dyer v Thrift, 264 P 428, 124 Or 249

40 C J p 127 note 43 [a]

60. NM—Albuquerque Lumber Co v Tomei, 260 P 21, 32 NM 5

61. Cal—Hammond Lumber Co v Goldberg, 13 P 2d 814, 125 Cal App 120

62. Cal—Ralsch v Helfrich, 190 P 848, 47 Cal App 494

63. Cal—Gentle v Britton, 111 P 9, 158 Cal 328

64. Cal—Perazzi v Doe Estate Co, 181 P 398, 40 Cal App 617

Or—Dailey v Cremen, 156 P 797, 80 Or 183

65. Cal—Hayward Lumber & Investment Co v Orondo Mines, 94 P 2d 380, 34 Cal App 2d 697

66. Cal—Hayward Lumber & Investment Co v Orondo Mines, supra—Hammond Lumber Co v Goldberg, 13 P 2d 814, 125 Cal App 120

Or—Roberts v Gerlinger, 263 P 916, 124 Or 461

40 C J p 127 note 47.

a prudent man on inquiry as to the nature and extent of the work being done.⁶⁷ This knowledge may be acquired through the provisions of a lease or sales contract as to intended construction,⁶⁸ and acceptance of the work conclusively establishes knowledge thereof.⁶⁹ It has been held, however, under some of the statutes that knowledge of the fact of construction is necessary⁷⁰ and that knowledge merely of an intention to construct is not sufficient.⁷¹

Knowledge of agent Knowledge on the part of an agent of the owner possessing general authority in respect of the property, or the interest of the owner therein, is chargeable to the owner,⁷² provided it relates to facts within the scope of the agent's authority.⁷³ Knowledge of a broker who leased the premises⁷⁴ or of an agent to collect the rent⁷⁵ cannot be imputed to the owner. Also the knowledge of the husband of the owner is not notice to her in the absence of evidence that he is her agent.⁷⁶ In the case of a corporation, knowledge on

the part of an officer,⁷⁷ agent,⁷⁸ or general manager,⁷⁹ but not the knowledge of a director,⁸⁰ is attributable to it.

(3) Compliance with Statutes

Strict compliance with the statutory requirements as to the posting and filing or recording of a notice of nonresponsibility, including those relating to its form, content, time of posting, and the manner and duration thereof, is required in order for it to prevent the acquisition of a mechanic's lien against an owner's property or estate.

Strict compliance with a statute of the character under consideration is necessary to relieve an owner from responsibility in a case falling within its terms,⁸¹ and such compliance will prevent the acquisition of a lien on his property.⁸² Under statutes so providing the notice must be a written notice,⁸³ in which case an oral notice is insufficient.⁸⁴ The notice must contain the information required by statute.⁸⁵

The notice must apply to a definite and particular structure, improvement, or work,⁸⁶ and where a

67. Cal—Hayward Lumber & Investment Co v Orondo Mines, 94 P 2d 380, 34 Cal App 2d 697 40 C J p 127 note 48

68. Cal—Hayward Lumber & Investment Co v Orondo Mines, supra

Lease

A lessor has been held chargeable with constructive notice of lienable improvements made by a lessee where the lease required or contemplated the making of such improvements—S H Harmon Lumber Co v Brown, 131 P 368, 165 Cal 193—40 C J p 127 note 54

Sales contract

A vendor has been held to have knowledge of improvements by the vendee where the contract of sale required them to be made—Althen v Tarbox, 50 NW 1018 48 Minn 18, 31 Am S R 616

69. Cal—Roscius v Bohlrig, 162 P 100, 173 Cal 687

70. Cal—Hayward Lumber & Investment Co v Orondo Mines, 94 P 2d 380, 34 Cal App 2d 697—Hayward Lumber & Investment Co v Ross, 90 P 2d 135, 32 Cal App 2d 455

40 C J p 127 note 49

71. Cal—Hayward Lumber & Investment Co v Orondo Mines, 94 P 2d 380, 34 Cal App 2d 697—Hayward Lumber & Investment Co v Ross, 90 P 2d 135, 32 Cal App 2d 455

Or—Dyer v Thrift, 264 P 428, 124 Or 219

40 C J p 127 note 51

72. Colo—Fisher v McPhee & Mc-

Ginnity Co, 135 P 132, 24 Colo App 420

Minn—Henning v McAdam, 193 N W 124, 155 Minn 194

73. Cal—Lorenz v Rousseau, 258 P 690, 85 Cal App 1

Or—Williams v Sharpe, 265 P 793, 125 Or 379

74. Cal—Lorenz v Rousseau, 258 P 690, 85 Cal App 1

75. Cal—Lorenz v Rousseau, supra

Or—Williams v Sharpe, 265 P. 793, 125 Or 379

76. Cal—McCray v Wotkyns, 183 P 972, 41 Cal App 449

77. Cal—Western Well Works, Inc v California Farms Co, 214 P 491, 60 Cal App 749

40 C J p 127 note 58

78. Nev—Gould v Wise, 3 P. 30, 18 Nev 253

79. N M—Stearns-Roger Mfg Co v Aztec Gold Min & Mill Co, 93 P 706, 14 N M 300

80. Cal—Lothian v. Wood, 55 Cal 159

81. Cal—Hayward Lumber & Investment Co v Ross, 90 P 2d 135, 32 Cal App 2d 455—Oil Tool Exchange v Hasson, 41 P 2d 211, 4 Cal App 2d 544—Hammond Lumber Co v Goldberg, 13 P 2d 814, 125 Cal App 120—Coombs v Green Mill, 290 P 620, 107 Cal App 304—Pasqualetti v Hilson, 185 P 693, 43 Cal App 718

Minn—Snell Sash & Door Co v Florsheim, 13 NW 2d 776, 217 Minn 21

Nev—George v Wentworth, 53 P 2d 1193, 56 Nev 380

Or—Corpus Juris quoted in Schram v Manary, 260 P 214, 217, 123 Or 354, modified on other grounds 262 P 263, 123 Or 354

82. Cal—Barr Lumber Co v Perkins, 6 P 2d 948, 214 Cal 531—Hayward Lumber & Investment Co v Orondo Mines, 94 P 2d 380, 34 Cal App 2d 697—McDowell v Perry, 51 P 2d 117, 9 Cal App 2d 555

Or—Gabriel Powder & Supply Co v Thompson, 97 P 2d 182, 163 Or 623—Schiam v Manary, 260 P 214, 123 Or 354, modified on other grounds 262 P 263, 123 Or 364

83. Cal—Oil Tool Exchange v Hasson, 41 P 2d 211, 4 Cal App 2d 544

84. Cal—Flora v Hankins, 268 P 331, 204 Cal 351

Mass—Shaw v Tompson, 105 Mass 345

85. Cal—Barr Lumber Co v Perkins, 6 P 2d 948, 214 Cal 531—Hammond Lumber Co v Goldberg, 13 P 2d 814, 125 Cal App 120

Reference to contract

Notice of nonresponsibility by owner of land contract, making no reference to contract, lease, or lessee, was held insufficient, especially where neither land contract nor lease was recorded—Hammond Lumber Co v Goldberg, 13 P 2d 814, 125 Cal App 120

86. Cal—Coombs v Green Mill, 290 P 620, 107 Cal App 204

A general notice to be applied wholesale to all future improvements is not authorized—Coombs v. Green Mill, supra.

notice is posted and recorded with reference to a particular structure it will not relieve the owner's property from a lien for the construction of a different building, which is constructed at a later time by a different person, and of which the owner had no knowledge at the time of posting the notice.⁸⁷ However, one notice for each structure, improvement, or work is sufficient,⁸⁸ it is not necessary for the owner to post a notice of nonresponsibility after the delivery of materials or the performance of work by every lien claimant.⁸⁹

Manner and duration of posting. The usual requirement is that a notice of nonresponsibility shall be posted in a conspicuous place in the building or on the property.⁹⁰ Under some statutes the notice must be kept posted during the performance of the labor or the furnishing of the materials,⁹¹ but under others that is not required.⁹² Under the latter statutes it must be so posted that under ordinary conditions it will remain displayed for a reasonable length of time.⁹³ It is insufficient if it is so posted that it will be destroyed prior to the claimant's employment,⁹⁴ but it is sufficient if the notice is posted

in good faith with the intent and purpose that it shall remain as long as the notice would remain in a place of that nature under ordinary conditions.⁹⁵

Time of posting. The notice prescribed by statute may be given on any day the work is in progress,⁹⁶ provided it is given within the prescribed statutory time,⁹⁷ but if not given within such time it is not effective for any purpose.⁹⁸ Ordinarily the period of time within which an effective notice may be posted, the length of which varies according to the terms of the different statutes, is a specified time after the owner obtains knowledge of the construction,⁹⁹ even though such information was not obtained until after its completion,¹ and not from the time he obtains knowledge of any part or stage of it,² or from the time of the claimant's filing notice of claim of lien,³ or notice that a lien may be claimed.⁴

The period for posting the notice must be measured from the time knowledge of actual, not intended, construction is obtained where the only statutory period specified is one after obtaining knowledge of the construction,⁵ and, even where the pe-

87. Cal—Coombs v Green Mill, supra.

Prior notice presumptively inapplicable

Contractor erecting building for lessee had right to presume that exemption notice recorded by owner prior to former construction did not apply to new structure—Coombs v Green Mill, supra.

88. Cal—Barr Lumber Co v Perkins, 6 P 2d 948, 214 Cal 531.

Or—Gabriel Powder & Supply Co v Thompson, 97 P 2d 182, 163 Or 623.

89. Or—Gabriel Powder & Supply Co v Thompson, supra.

90. Cal—Oil Tool Exchange v Hasson, 41 P 2d 211, 4 Cal App 2d 544.

Nev—Nichols v Levy, 32 P 2d 120, 55 Nev 310.

40 C J p 127 note 63.

91. Minn—Fauser v McElroy, 195 NW 786, 157 Minn 116—Kraus v Murphy, 38 NW 112, 38 Minn 422.

92. Alaska—Turner v Enstrom, 5 Alaska 118.

Or—Marshall v Cardinell, 80 P 652, 46 Or 410.

93. Nev—Nichols v Levy, 32 P 2d 120, 55 Nev 310—Phillips v Snowden Placer Co, 160 P 786, 40 Nev 66.

94. Nev—Nichols v Levy, 32 P 2d 120, 55 Nev 310—Phillips v Snowden Placer Co, 160 P 786, 40 Nev 66.

95. Or—Marshall v Cardinell, 80 P 652, 46 Or 410.

96. Cal—Gentle v Britton, 111 P. 8, 158 Cal 328.

Or—Corpus Juris quoted in Schram v Manary, 260 P 214, 217, 123 Or 354, modified on other grounds 262 P 263, 123 Or 354.

97. Cal—Gentle v Britton, 111 P. 8, 158 Cal 328—Oil Tool Exchange v Hasson, 41 P 2d 211, 4 Cal App 2d 514.

Or—Corpus Juris quoted in Schram v Manary, 260 P 214, 217, 123 Or 354, modified on other grounds 262 P 263, 123 Or 354.

Delivery of material

Notice of nonresponsibility has been held insufficient to prevent lien where it was not served until after contract for building had been entered into and material to be used delivered on premises—Westphal v Berthold, 273 Ill App 266.

98. Cal—Hayward Lumber & Investment Co v Orondo Mines, 94 P 2d 380, 34 Cal App 2d 697.

99. Cal—Hayward Lumber & Investment Co v Ross, 90 P 2d 135, 32 Cal App 3d 455—Oil Tool Exchange v Hasson, 41 P 2d 211, 4 Cal App 2d 544—Hammond Lumber Co v Goldberg, 13 P 2d 814, 125 Cal App 120.

Or—Barr v Lynch, 97 P 2d 185, 163 Or 607—Gabriel Powder & Supply Co v Thompson, 97 P 2d 182, 163 Or 623—Schram v Manary, 260 P 214, 123 Or 354, modified on other grounds 262 P 263, 123 Or 354.

1. Cal—Coombs v Green Mill, 290 P 620, 107 Cal App 204.

2. Cal—Hammond Lumber Co v Goldberg, 13 P 2d 814, 125 Cal App 120.

Adjoining landowners

Where tenant's construction of improvement on adjoining lots of different owners constitutes in law a single structure, although composed of different buildings, the time within which the owner of a particular lot may file a notice of nonresponsibility dates from the time he obtained knowledge of the commencement of the building operations and not from the time he obtained knowledge of the commencement of building operations on his property—Hammond Lumber Co v Goldberg, supra.

3. Or—Barr v Lynch, 97 P 2d 185, 163 Or 607.

4. Or—Gabriel Powder & Supply Co v Thompson, 97 P 2d 182, 163 Or 623.

Failure to file notice of possible lien

Owner who knows of construction of improvement is not relieved from obligation to post notice of disclaimer by failure to receive mailed notice that claimant had commenced to deliver material and that a lien may be claimed therefor—Drake v. Riley, 9 P 2d 130, 139 Or 172.

5. Cal—Hayward Lumber & Investment Co v Ross, 90 P 2d 135, 32 Cal App 2d 455.

40 C J p 127 note 65 [a.] (2)

Knowledge of intent to construct
The posting of notice of nonresponsibility prior to the commence-

riod specified is one after obtaining knowledge of the construction or the intended construction, a notice posted within the specified time after obtaining knowledge of the actual construction is sufficient, although it is not within the specified period if measured from the time the owner obtained knowledge of the intent to construct the improvement⁶

Filing or recording Under some statutes, in order to relieve his property from a lien, the owner, in addition to posting a notice of nonresponsibility, must also file or record a verified or duplicate copy thereof in a specified county office⁷ within a specified time after it has been posted⁸ The filing of such a copy, however, will not give the required notice where the posting of the notice was not effective⁹

Knowledge of claimant. Actual knowledge of the lien claimant of the state of the title of the property

on which he claims a lien¹⁰ or that the owner intends or desires to avail himself of the exemption offered by the statute¹¹ is not sufficient to debar him from the enforcement of his lien against the estate of an owner who failed to give the prescribed notice of nonresponsibility, at least in the absence of circumstances sufficient to create an estoppel against him.¹²

§ 85. Assignment by Principal Contractor

Subject to statutory restrictions, the principal contract under which a mechanic's lien may arise may be assigned

Subject to statutory restrictions,¹³ the principal contract under which a mechanic's lien may arise may be assigned,¹⁴ and an assignment of the owner's note for the contract price and the mechanic's lien securing it gives the assignee no greater rights than the assignor had¹⁵ Liens arising under me-

ment of the construction and within the statutory period, if measured from the time knowledge of the intent to construct was obtained, is insufficient—Hayward Lumber & Investment Co v Ross, supra

6. NM—Rio Grande Lumber & Fuel Co. v Buergo, 73 P 2d 312, 41 NM 524, 123 ALR 1

40 C.J. p 127 note 65 [a] (1)

7. Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159—George v Wentworth, 53 P 2d 1193, 56 Nev 380

40 C.J. p 128 note 70

Such requirement is mandatory Nev—George v Wentworth, supra

8. Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159

Late posting

The filing of the duplicate notice after the time prescribed is equivalent to no filing at all—Milner v Shuey, supra

9. Nev—Nichols v. Levy, 32 P 2d 120, 55 Nev 310

10. NM—Albuquerque Lumber Co v Montevista Co, 38 P 2d 77, 39 NM 6

11. Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159

40 C.J. p 128 note 72

12. Cal—Leon v Quinn, 209 P 551, 189 Cal 622

13. Miss—Hartford Accident & Indemnity Co v Natchez Inv Co, 119 So 366, 155 Miss 31

Assignments of mechanic's liens generally see infra §§ 216-221

Effect of assignment or transfer on priority of mechanic's lien over other claims, interests, or rights see infra § 210.

Giving of bond

A statute prohibiting the assignment by a contractor of the proceeds of the contract to the detriment of subcontractors, journeymen, laborers, and materialmen, unless bond is issued in accordance with the statute, has been held to be valid—Hartford Accident & Indemnity Co v Natchez Inv. Co, 119 So 366, 155 Miss 31

14. **Fraud in obtaining vendor's written consent** to the improvement, which does not go to the execution of the instrument, will not preclude an assignee of the contractor from obtaining and enforcing a mechanic's lien against the property—B & D Investment Co v. Peters, 274 Ill App 500

What constitutes assignment

(1) General contractor's delivery of notes and bonds secured by deed of trust constituted assignment of amount due—De Witt v Coffey, 143 SE 710, 150 Va 365

(2) Contractor's assignment of owner's note and mechanic's lien securing it constitutes assignment of entire amount due under contract where note evidences full contract price due—Garvin v Armstrong Bros, Tex Civ App, 20 SW 2d 358, modified on other grounds Modern Plumbing Co v Armstrong Bros, Com App, 36 SW 2d 1011

(3) Contractor's assignment of owner's note evidencing moneys payable under contract and of mechanic's lien securing note does not constitute assignment of entire contract where he retains right and obligation to perform contract—Gollnick v Fry, 23 SW 2d 677, 119 Tex 23—Modern Plumbing Co v Armstrong Bros, Tex Com App, 36 SW 2d 1011

15. Tex—Modern Plumbing Co v Armstrong Bros, supra

Claims not defeated

(1) Property owner's acceptance of contractor's assignment of note to bank financing the contractor was held not to defeat claims of labor and material claimants to unpaid balance of contract price represented by the note—American Employers' Ins Co v Roddy, Tex Com App, 51 SW 2d 280

(2) Rights of surety and labor and material claimants in balance of unpaid contract price represented by owner's note is not affected by fact that bank to whom contractor assigned note expended a portion of price it agreed to pay contractor for note in carrying on work after contractor abandoned it—American Employers' Ins Co v. Roddy, supra

Conditions

Where payment of the note is conditioned on proof that all bills for labor and material have been paid, it inures to the benefit of unpaid labor and lien claimants—American Employers' Ins Co v. Roddy, supra

Priority between assignees

Building contractor's unrecorded assignment to surety of all deferred payments and retained per cents due under contract gives surety priority over bank, which subsequently, without notice, took assignment of property owner's note for the contract price and mechanic's lien securing it—American Employers' Ins Co v Roddy, supra

Consent to subsequent assignment

Surety's consent to contractor's assignment of note for final installment on building contract could not militate against surety's right to same fund under prior assignment

chanics' and materialmen's lien contracts have been held not to be subject to attack in the hands of an innocent purchaser for value because of the inclusion of improper items in the principal of the note secured.¹⁶ Materialmen have been held to have no claim to payment out of a lien note executed by the owner and transferred to a different materialman who furnished materials and advanced cash to the contractor in excess of the total amount due by the owner to the contractor.¹⁷ Under some statutes provision is made for recording an assignment of money due or to become due or for recording orders for the payment of money against funds in the hands of the owner.¹⁸

A contractor's assignment to a materialman of a stated sum from the amount due under the contract has been held to impose no duty on the owner to pay the materialman more than such amount and to fix no lien on the property for the amount assigned,¹⁹ and it is not good as against sums required to complete the building after the contractor has abandoned the work, where a statute limits me-

chanics' liens to the amount due by the owner to the contractor and subordinates such liens to any amount expended by the owner for the completion of the contract after failure of the contractor to do so.²⁰

Where the original contractor incorporates during the performance of the contract, materialmen who furnish materials to the original contractor or to his corporate successor, or to both, have been held entitled to mechanics' liens for the materials furnished.²¹

Failure to file contract. The failure to file the contract will not affect the rights and liabilities of an assignee of the contractor, since, as his position is the same as that of the original contractor, he is deemed to have had notice of the contract provisions.²²

Who may be assignee. An assignee of a building contractor or a surety on a contractor's bond may be a successor in interest to the contractor, but the interest of the owner of the building is adverse to that of the contractor.²³

D. PERSONS ENTITLED TO LIEN

1 IN GENERAL

§ 86. In General

A mechanic's lien can be acquired only by a person who is within the class or one of the classes of persons to whom the lien is given by the statute or constitutional provision under which he claims.

A mechanic's lien can be acquired only by a per-

son who is within the class or one of the classes of persons to whom the lien is given by the statute or constitutional provision under which he claims.²⁴ While some of the earlier mechanics' lien statutes confined their protection to a very limited class or

of retained per cent—*American Employers' Ins Co v Roddy*, supra.

16. *Tex—Timmins v Independent Lumber Co*, Civ App, 7 SW 2d 130

17. *Tex—Hardin Lumber Co v Shepherd*, Civ App, 40 SW 2d 215, error dismissed

18. *NY—George E Sealy Co v Ards Bldg Corporation*, 214 NYS 768, 216 App Div 313, affirmed 155 NE 899, 244 NY 565

Failure to record

Order made by contractor to be paid out of contract price and accepted by owner, but not filed as required by lien law, was void as to subsequent creditors—*Labre v Nanz*, 5 NYS 2d 612, 255 App Div 710, affirmed 20 NE 2d 11, 280 NY 549

Notes

Payments by promissory notes on account of work done or to be done do not operate as assignments of specific funds or as orders on a fund, and hence are not included within the terms of such a statute—*George E Sealy Co v. Ards Bldg Corpora-*

tion, 214 NYS 768, 216 App Div 313, affirmed 155 NE 899, 244 NY 565

19. *Va—Southern Residence Corporation v City Supply Co*, 169 SE 579, 160 Va 660

20. *Va—Southern Residence Corporation v City Supply Co*, supra

21. *Minn—W T. Bailey Lumber Co v Elks' Bldg Corporation*, 208 NW 198, 167 Minn 5

22. *Cal—Pacific Ready-Cut Homes v Law*, 272 P 577, 205 Cal 685

23. *Fla—Curtiss-Bright Ranch Co v Selden Cypress Door Co*, 107 So 679, 91 Fla 354—*Dekle v Valrico Sandstone Co*, 77 So 95, 74 Fla 346

24. *Cal—Howard v Societa Di Unione E Beneficenza Italiana*, 145 P 2d 694, 62 Cal App 3d 842—*Burr v Peppers Cotton Lumber Co*, 266 P 1025, 91 Cal App 268, followed in *Willett v. Peppers Cotton Lumber Co*, 266 P 1028, 91 Cal App 798

Idaho—Riggen v Perkins, 246 P 962, 42 Idaho 391

Ill—Weinberg v Jenkins, 55 NE 2d 542, 323 Ill App 363

Kan—McHenry v McHenry, 95 P 2d 261, 150 Kan 498

Ky—Haas v Fidelity & Columbia Trust Co, 136 SW 2d 1088, 281 Ky 671

La—National Homestead Ass'n v Graham, 147 So 348, 176 La 1062

Pa—Favo v Merlot, 94 Pa Super 90—*Moser v Loeper*, 8 Pa Dist & Co 651, 22 Schuyl Leg Reg 306—*Octave v Beltz*, Com Pl, 23 West Co LJ 218

Tenn—Variety Fire Door Co v Hanson-Worden Co, 10 Tenn App 254
Tex—Huddleston v Nislar, Civ App, 72 SW 2d 959

W Va—Rosenbaum v Price Const Co, 184 SE 261, 117 W Va 160

Wis—Marquis v Peterson, 1 NW 2d 786, 239 Wis 358

40 CJ p 64 note 55, p 128 note 75
Architect as entitled to lien for services see supra § 86

Capacity to acquire lien see supra § 7

Superintendent as entitled to lien for services see supra § 37

classes of persons,²⁵ other statutes, especially the later ones, are more extensive in scope,²⁶ and the protection accorded by them is not confined exclusively to "mechanics" in the strict sense of that term²⁷ or to persons who may be supposed to need the special protection of the state²⁸ Indeed, some of the statutes confer a lien on "any person" who has performed or furnished labor or furnished material, irrespective of whether the lienor is the general contractor or subcontractor, or simply a laborer or materialman.²⁹ Other statutes, including the earlier ones, enumerate the classes of persons entitled to the lien, such as artisans,³⁰ builders,³¹ carpenters,³² cartmen,³³ founders,³⁴ journeymen,³⁵ machinists,³⁶ masons,³⁷ and undertakers.³⁸

It has been held that the codification or substantial reenactment of prior laws which employs a specific enumeration rather than the prior general designation does not reduce or limit the classes of persons entitled to the lien.³⁹ It has also been held that, while a statute specifically enumerating certain classes of persons refers primarily to the per-

sons designated,⁴⁰ it also embraces a person who buys the labor and material which enters into the improvement.⁴¹

Lien in two capacities Sometimes the same person is held entitled to a lien in two capacities.⁴²

§ 87. Mechanics

A mechanic, within the meaning of the lien statutes, is a person skilled in the practical use of tools; a workman who shapes and applies material in the building of a house or other structure mentioned in the statutes; a person who performs manual labor.

Some statutes and constitutions expressly confer the right to a lien on mechanics.⁴³ A mechanic, within the meaning of such statutes, is a person skilled in the practical use of tools,⁴⁴ a workman who shapes and applies material in the building of a house or other structures mentioned in the statutes,⁴⁵ a person who performs manual labor.⁴⁶ The term has been held not to include contractors,⁴⁷ subcontractors,⁴⁸ or a person who, although a mechanic by trade, contracts to do the work in question otherwise than in the capacity of a mechanic,⁴⁹ neither does the term include persons who

25. Ga.—Savannah & C R Co v. Callahan, 49 Ga. 506

40 C.J. p 128 note 76

26. N.Y.—Stryker v Cassidy, 76 N.Y. 50, 32 Am R 262

27. R.I.—Sweet v James, 2 R.I. 270

28. N.Y.—Stryker v Cassidy, 76 N.Y. 50, 32 Am R 262

29. Del.—In re Republic Engineering Co, Super, 130 A 498

Mass.—Friedman v Hampden County, 90 NE 851, 304 Mass 494

30. Ark.—Duncan v Eateman, 23 Ark 337, 79 Am D 109

40 C.J. p 128 note 81

Constitutional provision

Tex.—Strang v Pray, 35 S.W. 1054, 89 Tex 525—Warner Memorial University v Ritenour, Civ App, 56 S.W.2d 236, error refused—Gugenheim v Dallas Plumbing Co, Civ App, 42 S.W.2d 268—Farmers' & Mechanics' Nat Bank v Taylor, Civ App, 40 S.W. 876

A plasterer has been held an artisan within the lien law—Warner Memorial University v Ritenour, Tex Civ App, 56 S.W.2d 236, error refused

31. Ark.—Little Rock, H S & T Ry Co v Spencer, 47 S.W. 196, 65 Ark 183

9 C.J. p 693 note 6 [b] (2)—40 C.J. p 128 note 81

32. Ga.—Pitts v Bomar, 33 Ga. 96

40 C.J. p 128 note 85

33. La.—Equitable Real Est Co v National Surety Co, 63 So 104, 133 La 118

34. Tenn.—Carolina Portland Ce-

ment Co v Hitt Lumber & Box Co, 208 S.W. 336, 141 Tenn 210

40 C.J. p 128 note 88

35. Tenn.—Stevens v. Wells, 4 Sneed 387

40 C.J. p 128 note 89

36. Tenn.—Carolina Portland Cement Co v Hitt Lumber & Box Co, 208 S.W. 336, 141 Tenn 210

40 C.J. p 128 note 91

37. Ga.—Pitts v Bomar, 33 Ga. 96

40 C.J. p 128 note 92

38. Tenn.—Carolina Portland Cement Co v Hitt Lumber & Box Co, 208 S.W. 336, 141 Tenn 210

40 C.J. p 128 note 96

39. N.Y.—Kerwin v Post, 104 N.Y.S. 1005, 120 App Div 179

40. N.Y.—Kerwin v Post, supra

40 C.J. p 129 note 98

41. N.Y.—Kerwin v Post, supra

42. Ga.—Thurman v Pettitt, 72 Ga. 38

40 C.J. p 129 note 1

43. Mo.—Gardner v North Kansas City Alfalfa Mills, App, 61 S.W. 2d 374

Tex.—Strang v Pray, 35 S.W. 1054, 89 Tex 525—Local No 65, Musicians Protective Ass'n v Sammons, Civ App, 127 S.W.2d 226, error dismissed, judgment correct—Sammons v Local No 65, Musicians Protective Ass'n of A F of M of Houston, Civ App, 106 S.W.2d 785—Warner Memorial University v Ritenour, Civ App, 56 S.W.2d 236, error refused—Gugenheim v Dallas Plumbing Co, Civ App, 42 S.W.2d 268—Farmers' & Mechanics'

Nat Bank v Taylor, Civ App, 40 S.W. 876

44. N.C.—Stephens v Hicks, 72 S.E. 313, 156 N.C. 239, 36 L.R.A.N.S. 354, Ann Cas 1913A 272

Tex.—Corpus Juris quoted in Warner Memorial University v Ritenour, Civ App, 56 S.W.2d 236, 237

45. Tex.—Corpus Juris quoted in Warner Memorial University v Ritenour, Civ App, 56 S.W.2d 236, 237, error refused

40 C.J. p 129 note 5

A plasterer has been held a mechanic within the lien law

Mont.—Merrigan v English, 22 P. 454, 9 Mont 113, 5 L.R.A. 837

Tex.—Warner Memorial University v Ritenour, Civ App, 56 S.W.2d 236, error refused

46. Tex.—Corpus Juris quoted in Warner Memorial University v Ritenour, Civ App, 56 S.W.2d 236, 237, error refused

40 C.J. p 129 note 6

47. Or.—Corpus Juris cited in Bennett v Bruchou, 96 P.2d 762, 766, 163 Or 175

40 C.J. p 129 note 7

48. Or.—Corpus Juris cited in Bennett v Bruchou, 96 P.2d 762, 766, 163 Or 175

Tex.—Huffman v McDonald, Civ. App., 261 S.W. 146

49. Ga.—Savannah, G & N A R Co v Grant, Alexander & Co, 56 Ga. 68

40 C.J. p 129 note 10

merely sell, furnish, or supply materials⁵⁰ or machinery⁵¹ or who furnish materials to another materialman.⁵²

Under some statutes a mechanic is entitled to a lien for materials bought by him and placed in position on the premises, where the services of the mechanic were necessary in order to put up and fit together the articles so purchased, for the use for which they were intended.⁵³ While it has been held that the proprietor of a sawmill is in no sense a mechanic,⁵⁴ the contrary has been held with respect to a person who owns a sawmill and machinery, and works therein, not as a mere speculator or buyer and seller of lumber, but in shaping and fitting lumber to be useful as materials in a building.⁵⁵

§ 88. Laborers

The mechanics' lien statutes variously confer a lien on laborers, workmen, or any person performing work and labor.

The mechanics' lien statutes variously confer a lien on laborers,⁵⁶ workmen,⁵⁷ or any person performing work and labor.⁵⁸ A laborer, within the meaning of such statutes, is a person who performs labor⁵⁹ or manual labor,⁶⁰ or the main ingredient of whose services is physical toil.⁶¹ A mechanic,⁶² a plasterer,⁶³ and a teamster⁶⁴ have been held to

be laborers within the statute.

On the other hand, the term "laborer" does not include a person who simply sells or furnishes material,⁶⁵ a superintendent of a mill,⁶⁶ or a person employed to act as clerk and make himself generally useful.⁶⁷ Also some courts hold that a contractor personally performing manual labor is not entitled to a lien as a laborer,⁶⁸ and that a subcontractor is not included in the term "laborer."⁶⁹ However, other courts interpret the term "laborer," as used in mechanics' lien legislation, to include contractors⁷⁰ and subcontractors.⁷¹ The term "laborer" or "laborers," as used in mechanics' lien statutes, includes one who performs labor for day's wages.⁷²

§ 89. Materialmen

Ordinarily a materialman, within the meaning of the statutes, is a person who does not follow the business of building or contracting to build homes for others, but who manufactures, purchases, or keeps for sale materials which enter into buildings, and who sells or furnishes such materials without performing any work or labor in installing or putting them in place.

While a materialman has been held not to come within some early mechanics' lien statutes restricted to particular classes of persons and not expressly mentioning a materialman,⁷³ nevertheless many stat-

50. Ark—Duncan v Bateman, 23 Ark 327, 79 AmD 109
40 C J p 129 note 11

51. Tenn—Greenwood v Tennessee Mfg Co, 2 Swan 130

52. Tenn—Carolina Portland Cement Co v Hitt Lumber & Box Co, 208 SW 336, 141 Tenn 210

53. Ga—Collins v Nicolson, 51 Ga 560
40 C J p 129 note 14

54. Ga—Evans v Beddingfield, 32 SE 664, 106 Ga 755

55. Ark—Gulledge v. Preddy, 32 Ark 433

56. Ark—Home Oil Co v Helton, 14 SW 2d 549, 179 Ark 132

Fla—Florida Fruit Co v Shakelford, 198 So 841, 145 Fla 216

La—Officer v Combre, App, 194 So 441

40 C J p 129 note 18
Labor as lienable claim see supra § 34

Laborer
As mechanic see supra § 87
Employed by contractor or subcontractor see infra § 100

Lien for wages generally see Master and Servant §§ 139-150

57. La—Equitable Real Est Co v National Surety Co, 63 So 104, 133 La 443.

58. Del—In re Republic Engineering Co, Super, 130 A 498
Fla—Moon v Wilson, 130 So 25, 100 Fla 791

Idaho—Riggen v Perkins, 246 P 962, 42 Idaho 391—Hill v Twin Falls Salmon River Land & Water Co, 125 P 204, 22 Idaho 274

Kan—Isbell v Payne, 147 P 2d 718, 158 Kan 298

Mont—Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 111 Mont 471

Ohio—Howk v Krotzer, 42 NE 2d 640, 140 Ohio St 100

40 C J p 129 note 20

59. Cal—Hihm-Hammond Lumber Co v Elsom, 154 P 13, 171 Cal 570, Ann Cas 1917C 798

40 C J p 129 note 22

Skilled laborers have been held to be within the meaning of the statute—Home Building & Loan Ass'n v White, 284 P 889, 141 Okl 240

60. NC—Stephens v Hicks, 72 SE 313, 156 NC 239, 36 LRA, NS, 354, Ann Cas 1913A 272—Moore v American Industrial Co, 50 SE 687, 138 NC 304

61. Miss—Williams v Alcorn Electric Light Co, 53 So 958, 98 Miss 468, Ann Cas 1913B 137

62. Okl—Home Building & Loan

Ass'n v White, 284 P 889, 141 Okl 240

63. Mont—Merrigan v English, 22 P 454, 9 Mont 113, 5 LRA 837

64. Ind—McElwaine v Hosey, 35 NE 272, 135 Ind 481

65. RI—Arnold v Budlong, 11 RI 561

66. NC—Moore v American Industrial Co, 50 SE 687, 138 NC 304

67. NC—Nash v Southwick, 27 SE 137, 120 NC 459

68. Ga—Tuck v Moss Mfg Co, 56 SE 1001, 127 Ga 729
40 C J p 129 note 31

69. Miss—Rivers v Mulholland, 62 Miss 766

70. Kan—Corpus Juris quoted in Isbell v Payne, 147 P 2d 718, 720, 158 Kan 298

40 C J p 130 note 33

71. Kan—Corpus Juris quoted in Isbell v Payne, 147 P 2d 718, 720, 158 Kan 298

40 C J p 130 note 34.

72. Ind—Johnson v Spencer, 96 NE 1041, 49 Ind App 166

Iowa—Morvan v Carroll, 35 Iowa 22

73. RI—Arnold v Budlong, 11 RI 561
40 C J p 130 note 40

utes, especially the later ones, expressly confer a lien on a materialman⁷⁴ or a person furnishing materials,⁷⁵ and this is true in some jurisdictions where former statutes denied, or greatly restricted, the lien of a materialman⁷⁶. The rights of materialmen are fixed by law⁷⁷ and nothing that the owner can do can change them⁷⁸. Ordinarily a materialman, within the meaning of the statutes, is a person who does not follow the business of building or contracting to build homes for others,⁷⁹ but who manufactures,⁸⁰ purchases,⁸¹ or keeps for sale⁸² materials which enter into buildings, and who sells or furnishes such materials⁸³ without performing any work or labor in installing or putting them

in place,⁸⁴ the materials being incorporated in, or attached to, real estate by the labor of others⁸⁵.

According to some,⁸⁶ but not other,⁸⁷ authorities the term "materialman" may include a person who not only sells the materials, but also furnishes the labor necessary to install them, at least where the labor furnished is slight in comparison with the value of the materials. Also a builder and contractor who keeps a warehouse of material for sale to other builders and contractors may be a materialman and entitled to a lien as such for material furnished when it goes into a building being constructed by someone other than himself.⁸⁸ A person is

74. Cal—Hinkley v Field's Biscuit & Cracker Co, 27 P 594, 91 Cal 136

NY—Plattsburg Gas & Electric Co v Miller, 206 NYS 42, 123 Misc 651, reversed on other grounds 207 NYS 335, 211 App Div 633

75. Ariz—Watson v Murphy, 285 P 1037, 36 Ariz 377

Ark—Home Oil Co v Helton, 14 S W 2d 549, 179 Ark 132

Fla—Moon v Wilson, 130 So 25, 100 Fla 791

Idaho—Idaho Lumber & Hardware Co v DiGiacomo, 102 P 2d 637, 61 Idaho 383—Riggen v Perkins, 246 P 962, 42 Idaho 391

La—Officer v Combre, App, 194 So 441—Jahncke Service v McGuire, 119 So 765, 9 La App 698

Md—Wilhelm v Roe, 149 A 428, 158 Md 615

Mich—People, for Use of Belson Mfg Co v Wayne Electric Motor Co, 257 NW 877, 269 Mich 537—Hart v Reid, 219 NW 692, 243 Mich 175

Mont—Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 111 Mont 471—Federal Land Bank of Spokane v Green, 90 P 2d 489, 108 Mont 56—Dewey Lumber Co v McQuirk, 30 P 2d 475, 96 Mont 294

Neb—Barry v Barry, 26 NW 2d 1, 147 Neb 1067

Ohio—Howk v Krotzer, 42 NE 2d 640, 140 Ohio St 100

Or—Corpus Juris cited in Heacock Sash & Door Co v Weatherford, 294 P 344, 346, 135 Or 153

Tex—W L MacAttee & Sons v House, 153 SW 2d 460, 137 Tex 259

40 C.J. p 130 note 42

Furnishing materials as lienable claim see supra § 40

Statute held inapplicable

Statute protecting materialman dealing directly with owner has been held inapplicable where material was furnished to contractors—Central Lumber Co v Douglas, 127 So 43, 12 La App 680.

Conditional seller of furnace held properly awarded lien—Kastner v Security Savings & Loan Ass'n, 256 P 989, 123 Kan 632

Mechanic's lien is not limited to person who physically delivers materials, but extends to those who furnished materials through other persons, and agency may include owner himself—Grammar v Hesperian Bldg & Sav Ass'n, Tex Civ App, 70 SW 2d 220, error refused

76. Ga—Guaranty Investment & Loan Co v Athens Engineering Co, 110 SE 873, 152 Ga 596

77. La—Thompson v O'Leary, 84 So 116, 146 La 843

78. La—Thompson v O'Leary, supra

79. Or—Corpus Juris cited in Heacock Sash & Door Co v Weatherford, 294 P 344, 346, 135 Or 153

Tex—Corpus Juris quoted in Huddleston v Nislar, Civ App, 72 S W 2d 959, 962

40 C.J. p 130 note 44

80. NY—Chambers v George Vassar's Sons & Co, Inc, 143 NYS 615, 81 Misc 562

Or—Corpus Juris cited in Heacock Sash & Door Co v Weatherford, 294 P 344, 346, 135 Or 153

Tex—Corpus Juris quoted in Huddleston v Nislar, Civ App, 72 S W 2d 959, 962

40 C.J. p 130 note 46

81. Or—Corpus Juris cited in Heacock Sash & Door Co v Weatherford, 294 P 344, 346, 135 Or 153

Tex—Corpus Juris quoted in Huddleston v Nislar, Civ App, 72 S W 2d 959, 962

40 C.J. p 130 note 47

82. Or—Corpus Juris cited in Heacock Sash & Door Co v Weatherford, 294 P 344, 346, 135 Or 153

Tex—Corpus Juris cited in Heacock Sash & Door Co

v Weatherford, 294 P 344, 346, 135 Or 153

Tex—Corpus Juris quoted in Huddleston v Nislar, Civ App, 72 S W 2d 959, 962

40 C.J. p 130 note 48

Other definitions

(1) "A materialman, ordinarily, is one from whom the principal contractor or a subcontractor secures material of a general type for use on the structure"—Marsh v Rothery, 183 SE 914, 915, 117 W Va. 94

(2) Statutory definitions

Mich—People, for Use of Belson Mfg Co v Wayne Electric Motor Co, 257 NW 877, 879, 269 Mich 537—Hart v Reid, 219 NW 692, 694, 243 Mich 175

Ohio—Matzinger v Harvard Lumber Co, 155 NE 131, 115 Ohio St 555

40 C.J. p 130 note 48 [a]

84. Tex—Corpus Juris quoted in Huddleston v Nislar, Civ App, 72 S W 2d 959, 962

40 C.J. p 130 note 49

85. NY—Chambers v George Vassar's Sons & Co, Inc, 143 NYS 615, 81 Misc 562

86. Cal—Harris & Stunston v Yorba Linda Citrus Ass'n, 26 P 2d 654, 135 Cal App 154

Labor as part of price of material
(1) It has been held that a materialman who employs labor to put in iron work as a completed job is entitled to a lien for such labor, not as such, but as part of the price of material furnished in the place to be used—Terry v Klein, 201 S W 801, 133 Ark 366

(2) It has also been held, however, that labor paid for by a materialman cannot be treated as part of the price for the material—Bell v Koontz, 290 SW 597, 172 Ark 870—40 C.J. p 130 note 51.

87. NY—Herrmann v New York, 114 NYS 1107, 130 App Div 531, 1 NY Civ Proc. NS, 213, affirmed 93 NE 376, 199 NY 600

88. Ariz—Watson v Murphey, 285 P 1037, 36 Ariz 377.

entitled to a lien for materials sold and furnished by him directly to the owner, rather than the contractor, on the promise of the owner to pay therefor.⁸⁹ While a person who merely pays for materials furnished by others,⁹⁰ or who merely guarantees payment of materials purchased by another,⁹¹ is not entitled to a lien for materials furnished, it has been held that a person has sufficient interest in the materials to entitle him to a lien as a materialman where, on the shipment of material to him, he pays the draft of the shipper and delivers the materials on the request of the owner and contractor.⁹² An owner of a mill who saws lumber from timber of another, under a contract with the latter to be paid for the sawing, and who delivers the lumber to the owner of the land or his agent, by whom it is used in the improvement of the owner's real estate, does not occupy the position of a materialman.⁹³

Contractors and subcontractors distinguished. Under some statutes a materialman or person furnishing material is deemed to be either a contractor⁹⁴ or a subcontractor⁹⁵ accordingly as he does or does not contract directly with the owner, and to be entitled to a lien only when he occupies the position of a contractor⁹⁶ or subcontractor.⁹⁷ Also under some statutes the liens of contractors and materialmen are deemed to be of the same character⁹⁸ and governed by the same principles of law.⁹⁹ Under

other statutes, however, the courts recognize a clear distinction between materialmen and contractors¹ or subcontractors.² They hold that in order to be entitled to a lien a materialman need not be a contractor³ or subcontractor⁴ for the erection or repair of the building, that a person is not a "contractor," within the meaning of the statute, by reason of the fact that he is under contract to sell or furnish materials,⁵ that a person selling materials to a contractor is not made a subcontractor by reason of the contract involved in the sale,⁶ and that the mere knowledge on the part of a person selling material to a contractor that it is to be used in the performance of a certain contract between the owner and the contractor does not make him a subcontractor.⁷

In various cases a particular person has been held by the court to be a materialman and not a contractor⁸ or subcontractor,⁹ or not to be a materialman but rather a contractor¹⁰ or subcontractor.¹¹ In some jurisdictions the test applied in determining whether a person is a materialman, on the one hand, or a contractor or subcontractor, on the other hand, is whether he furnishes material only or labor and material combined.¹² However, in other jurisdictions, where a person may be a materialman even though he installs or puts the materials in place, the test sometimes applied is whether the value of the labor supplied in putting the materials in place is

89. Wis—Wisconsin Planing-Mill Co v Grams, 39 NW 531, 72 Wis 275—Willer v Berghenthal, 7 NW 352, 50 Wis 474

40 C.J. p 130 note 54 [a]

90. Neb—Barry v Barry, 26 NW 2d 1, 147 Neb 1067

91. Me—Rounds v Basham, 100 A 936, 116 Me 199

92. NC—Lindsey v Mitchell, 93 SE 955, 174 NC 458

93. Ga—Georgia Steel Co v White, 71 SE 890, 136 Ga 492

94. Ill—City of Salem v Lane & Bodley Co, 60 NE 37, 189 Ill 593, 82 Am SR 481

Pa—Susquehanna Lumber Co v Yurkowski, Com Pl, 31 Luz Leg Reg 413

40 C.J. p 131 note 63

95. Okl—Mobley v Leeper Bros Lumber Co, 214 P 174, 89 Okl 95

40 C.J. p 131 note 64

96. DC—Leitch v Central Dispensary & Emergency Hospital, 6 App DC 247

40 C.J. p 131 note 65

97. DC—Leitch v Central Dispensary & Emergency Hospital, supra

98. Ga—Guaranty Investment & Loan Co v Athens Engineering Co, 110 SE 873, 152 Ga 596

99. Ga—Guaranty Investment & Loan Co v Athens Engineering Co, supra

1. Cal—Hinckley v Field's Biscuit & Cracker Co, 27 P 594, 91 Cal 136

40 C.J. p 131 note 69

2. Wash—Baker v Yakima Valley Canal Co, 137 P 342, 77 Wash 70

40 C.J. p 131 note 70

3. Conn—Chapin v Persse & Brooks Paper Works, 30 Conn 461, 79 Am D 263

4. Conn—Chapin v Persse & Brooks Paper Works, supra

5. Cal—Hinckley v Field's Biscuit & Cracker Co, 27 P 594, 91 Cal 136

40 C.J. p 131 note 73

6. NY—Hedden Constr Co v Proctor & Gamble Co, 114 NYS 1103, 62 Misc 129, modified on other grounds 118 NYS 920, 134 App Div 244

40 C.J. p 131 note 74

7. NY—Hedden Constr Co v Proctor & Gamble Co, supra

8. Ark—Nowlin v Noteware, 7 S W 2d 791, 177 Ark 688

Or—Drake Lumber Co v Lindquist, 179 P 2d 712, 179 Or 402—Hiscock

Sash & Door Co v Weatherford, 294 P 344, 135 Or 153

40 C.J. p 131 note 76

9. Cal—Harris & Stunston v Yorba Linda Citrus Ass'n, 26 P 2d 654, 135 Cal App 154

Ohio—Matzinger v Harvard Lumber Co, 155 NE 131, 115 Ohio St 555

W Va—Marsh v Rothey, 183 SE 914, 117 W Va 94

40 C.J. p 132 note 77

10. Cal—Rapp v Horgan, 281 P 1034, 101 Cal App 605

Mich—Vander Horst v Kalamazoo Apartments Corporation, 215 NW 57, 239 Mich 593

Okl—Rogers v Crane Co, 68 P 2d 520, 180 Okl 139

40 C.J. p 132 note 78

11. Cal—Bird v American Surety Co, 166 P 1009, 175 Cal 625

40 C.J. p 132 note 79

12. Mich—Van Horst v Kalamazoo Apartments Corporation, 215 NW 57, 239 Mich 593

Ohio—Matzinger v Harvard Lumber Co, 155 NE 131, 115 Ohio St 555

Okl—Rogers v Crane Co, 68 P 2d 520, 180 Okl 139

40 C.J. p 132 note 80.

small in comparison with the value of the material,¹³ but it has also been held that something more than this is necessary to a determination of the status of a lien claimant,¹⁴ and that a person who, under an agreement with the contractor, and with material furnished by himself, erects a definite part of a building or structure is a subcontractor within the meaning of the statutes, regardless of the comparative cost of labor and material.¹⁵

§ 90. Contractors in General

As used in mechanics' lien statutes the term "contractor" has a restricted meaning. A contractor, or principal contractor, or original contractor, within such statutes, is a person who contracts directly with the owner of the property to erect or construct a building or other structure or improvement or any main division or part thereof.

While the rule was otherwise under a few early

statutes,¹⁶ under the more modern mechanics' lien statutes the contractor is usually entitled to a lien.¹⁷ Although in a general sense, a contractor is any person who enters into a contract, as used in mechanics' lien statutes the term has a restricted meaning.¹⁸ However, some courts have held that the term "original contractor" employed in the statutes is used in its usual sense¹⁹ as designating a person who for a fixed price agrees to perform certain work for some other person.²⁰ A contractor, or principal contractor, or original contractor, within the meaning of such statutes, is a person who contracts directly with the owner of the property²¹ to erect or construct a building or other structure or improvement²² or any main division or part thereof.²³ Some statutes expressly define the term "contractor" as used therein.²⁴

13. Cal—Pugh v Moxley, 128 P 1037, 164 Cal 374
40 C.J. p 132 note 82

14. Cal—Hihn-Hammond Lumber Co v Elsom, 154 P 12, 171 Cal 570, Ann Cas 1917C 798

15. Cal—Hihn-Hammond Lumber Co v Elsom, supra

16. U.S.—Winder v Caldwell, D.C., 14 How 434, 14 L.Ed 487
Ga—Savannah, G & N A R Co v Grant, 56 Ga 68

17. Ark—Lammers v Cart-Ritter Co, 121 S.W.2d 95, 196 Ark 1159, followed in 121 S.W.2d 519, 196 Ark 1178

Ill—Paul v Shukes, 47 N.E.2d 374, 317 Ill.App 650

La—National Homestead Ass'n v Graham, 147 So 348, 176 La 1062
N.Y.—P Grassi & Bros v Lovisa & Pistoresi, 182 N.E. 68, 259 N.Y. 417, 83 A.L.R. 1149—Nieman v Nadelman, 240 N.Y.S. 47, 136 Misc 386, affirmed 243 N.Y.S. 811, 229 App Div 865

Tenn—Arnstein Realty Co v Williams, 40 S.W.2d 1007, 163 Tenn 69

Tex—Wilson v Hinton, 116 S.W.2d 365, 131 Tex 593—Mood v Methodist Episcopal Church South, of Cisco, Com App, 300 S.W. 30

W.Va—Rosenbaum v Price Const Co, 184 S.E. 261, 117 W.Va. 160
40 C.J. p 132 note 88

Constitution and statutes

The mechanic's lien contemplated by the constitution and statutes may be created in favor of one who actually furnishes labor and material under a written contract in construction of an improvement, even though it is furnished through the agency of another—Wilson v Hinton, 116 S.W.2d 365, 131 Tex 593

18. Cal—Gross v Hazeltine, 290 P 673, 107 Cal App 446

La—Frank v Waters, 110 So 413, 162 La 255

40 C.J. p 132 note 90

19. Tex—Huddleston v Nislar, Civ App, 72 S.W.2d 959—Van Horn Trading Co v Day, Civ App, 148 S.W. 1129

20. Tex—Huddleston v Nislar, Civ App, 72 S.W.2d 959—Van Horn Trading Co v Day, Civ App, 148 S.W. 1129

21. La—Corpus Juris cited in Frank v Waters, 110 So 413, 415, 162 La 255

Or—Corpus Juris cited in Prouty Lumber & Box Co v McGuirk, 68 P.2d 481, 483, 156 Or 418, rehearing denied 68 P.2d 473, 156 Or 418

40 C.J. p 132 note 93

Contractor distinguished from materialman see supra § 89

Other statement

A person furnishing labor or material and labor on a contract direct with the owner is an original contractor within the meaning of the mechanics' lien law

Okl—Rogers v Crane Co, 68 P.2d 520, 180 Okl 139

Or—Drake Lumber Co v Lindquist, 170 P.2d 712, 179 Or 402—Barr v Lynch, 97 P.2d 185, 163 Or 607—Shea v Graves, 19 P.2d 406, 142 Or 503—Shea v Peters, 268 P. 989, 126 Or 76—Bernard v Hassan, 118 P. 201, 60 Or 201

Statutory agent of owner

It has been held that a person furnishing materials or performing labor, or doing both, at instance of statutory agent of owner of property cannot hold relationship of original contractor as to the owner—Barr v Lynch, 97 P.2d 185, 163 Or 607

22. Cal—Hihn-Hammond Lumber

Co v Elsom, 154 P 12, 171 Cal 570, Ann Cas 1917C 798

40 C.J. p 132 note 94

Other definitions

(1) A contractor has also been defined as one, who under contract with the owner, undertakes for a consideration to furnish the material, labor, and superintendence required in the improvement of the owner's premises, either in the erection of a structure thereon or in the alteration or repair of one in existence

Ark—Home Oil Co v Helton, 14 S.W.2d 549, 550, 179 Ark 132

Cal—Gross v Hazeltine, 290 P 673, 675, 107 Cal App 446

Mo—Dougherty Moss Lumber Co v Churchill, 90 S.W. 405, 407, 114 Mo App 578

(2) Further definitions see 40 C.J. p 132 note 94 [a] (2)

23. Cal—Pugh v. Moxley, 128 P 1037, 164 Cal 374
40 C.J. p 132 note 95

24. Ill—Paul v Shukes, 47 N.E.2d 374, 317 Ill.App 650
40 C.J. p 132 note 96

Particular statutory definitions

(1) "One who, by contract or agreement, express or implied, with the owner or the one who acts for the owner, plans or superintends the structure or other improvement or any part thereof, or furnishes labor, skill or superintendence thereto, or supplies or hauls materials reasonably necessary for and actually used therein, or any or all of them, whether as an architect, superintendent, builder or material man"—Smith-Paris Co, for Use of Keasbey & Mattison v Jameson Memorial Hospital Ass'n, 169 A. 233, 234, 313 Pa 254—40 C.J. p 132 note 96 [a] (1).

The term "contractor" as used in the mechanics' lien statutes does not include a lessee,²⁵ vendor,²⁶ or vendee²⁷ of real property who is making improvements thereon, or an insurance company which elects, under the policy of insurance, to repair buildings damaged by fire,²⁸ nor does the term "original contractor" include a day laborer²⁹ or a journeyman³⁰. The fact that a contract, instead of being for a stipulated sum, is what is known as a "cost plus" contract does not convert the person contracting with the owner into an agent³¹ or disentitle him to a lien as a contractor³². Also the fact that the contractor does not pay for quite all the material purchased and furnished by him does not change his relation to the owner into one of agency³³.

"Subcontractors" distinguished It sometimes becomes of vital importance to determine whether the lien claimant or the person with whom he contracted stands in the position of a contractor or a subcontractor³⁴. Particular persons have been held to be contractors, principal contractors, or original contractors, and not subcontractors,³⁵ or to be subcontractors and not contractors or principal contractors³⁶. The definitions of a contractor as a person who contracts with the owner and of a subcontractor as a person who contracts directly with the principal contractor point out one ground of distinction between a contractor and a subcontractor³⁷. A company employed by a general contractor acting

as the agent of the owner has been held a contractor and not a subcontractor³⁸. It has been held that, where two or more persons who have jointly, as original contractors, entered into a contract to erect a building agree between themselves that each shall do a particular portion of the work and receive a specified part of the compensation, this makes each of them a subcontractor under the original contract³⁹ although it does not release them from their joint liability for the due performance of their contract,⁴⁰ but other cases have held that they remain principal contractors for all purposes and do not become subcontractors by reason of such agreement⁴¹.

Where, after a contract for the erection of a house for an entire sum has been executed, the contractor takes another person into partnership with himself in the mason work but not in the other work, and the owner makes no agreement with the new firm, it has been held that as to the mason work the partnership is a subcontractor⁴². The mere fact that a building contract with relation to property held in the names of the individual partners is made with the firm does not show that the contractor is a subcontractor, the firm being the principal contractor⁴³. An assignee of the contractor, who has furnished the material and performed the labor called for by the contract, is entitled to a lien for the amount due either as a contractor or as a subcontractor, where nothing was paid to the original con-

(2) "A person who enters into a contract with the owner of real property for the improvement thereof"—P Grassi & Bro v Lovisa & Pistoresi, 182 NE 68, 69, 259 NY 417, 83 ALR 1149—Landes v Landes, 277 NYS 886, 889, 243 App Div 464—40 CJ p 133 note 96 [a] (2)

(3) Under this definition the word "contractor" means one who, in the usual course of trade, undertakes to improve property of another—McNulty v Offerman, 116 NE 775, 776, 221 NY 98—P Grassi & Bro. v Lovisa & Pistoresi, supra

25. Cal—Gross v Hazeltine, 290 P 673, 107 Cal App 446
NY—Landes v Landes, 277 NYS 886, 243 App Div 464
RI—Elliott & Watrous v Harrington, 27 A 2d 338, 68 RI 237
40 CJ p 133 note 97

26. NY—P Grassi & Bro v Lovisa & Pistoresi, 182 NE 68, 259 NY 417, 83 ALR 1149

27. Cal—McDowell v Perry, 51 P 2d 117, 9 Cal App 2d 555.
40 CJ p 133 note 98

28. Del—J G Justis Co v Spicer, 95 A 239, 28 Del 534.

29. Pa—Octave v Beltz, Com Pl, 23 West Co LJ 218
Tex—Van Horn Trading Co v Day, Civ App, 148 SW 1129

Hourly basis

Stonemason who was engaged on hourly basis to work for indefinite time under direction of owner of buildings, and who was not employed to perform any distinct piece of work, was not original contractor within statute—Bennett v Bruchou, 96 P 2d 762, 163 Or 175

30. Pa—Miller v Stoudt, 14 Pa Dist & Co 141—Octave v Beltz, Com Pl, 23 West Co LJ 218

31. Mich—Knowlton v Gibbons, 178 NW 63, 210 Mich 547
Miss—Williams v Warren, 99 So 266, 134 Miss 899

32. Mich—Knowlton v Gibbons, 178 NW 63, 210 Mich 547
Lien for profits and commissions see supra § 49

33. Iowa—Nunemaker v Kulhavy, 196 NW 1009, 197 Iowa 962

34. Colo—Western Elaterite Roofing Co v Fisher, 273 P 19, 85 Colo 5
Or—Stark-Davis Co v Lansdon, 265 P 792, 125 Or 89

35. Ga—Buffalo Forge Co. v South-

ern Ry Co, 159 SE 301, 43 Ga App 445

Or—Stark-Davis Co v Lansdon, 265 P 792, 125 Or 89
40 CJ p 134 note 7

36. Conn—Kinney v Blackmer, 10 A 568, 55 Conn 261
40 CJ p 134 note 8

37. Del—Travis v Meredith, 43 A 176, 16 Del 376
39 CJ p 134 note 11

38. Ga—Buffalo Forge Co v Southern Ry Co, 159 SE 301, 43 Ga App 445

39. NY—Vogel v Whitmore, 25 NYS 202, 72 Hun 417, affirmed 44 NE 1129, 149 NY 595—Stroebe v Ochse, 35 NYS 1089, 14 Misc 522

40. NY—Vogel v Whitmore, 25 NYS 202, 72 Hun 417, affirmed 44 NE 1129, 149 NY 595

41. Cal—Davis v Livingston, 29 Cal 283
Wis—Harbeck v Southwell, 18 Wis 413

42. Ill—Shaar v Knickerbocker Ice Co, 37 NE 54, 149 Ill 441

43. Mo—Hill v. Gray, 81 Mo App 456

tractor and the latter did no part of the work under the contract and has waived all claim thereunder ⁴⁴

§ 91. — Lien for Labor and Material Furnished

Ordinarily a contractor is entitled to a lien for labor and material furnished by him in the performance of his contract

While the contrary has been held under a few statutes,⁴⁵ it is generally held that a contractor is entitled to a lien for labor furnished by him and actually performed by persons working under him,⁴⁶ and even though his workmen have taken out liens the effect is only to diminish the contractor's lien pro tanto ⁴⁷ The contractor has also a lien for necessary materials furnished by him in order to comply with his contract ⁴⁸ A contractor is not entitled to a lien for labor⁴⁹ or materials⁵⁰ furnished by others, and for which he did not pay, and it is doubtful whether a contractor to do certain work is entitled to a lien for a profit on labor and material furnished by other persons under contracts directly with the owner for the doing of work bearing no relation to the work performed by him ⁵¹

§ 92. — Stipulations of Contract as to Lien

A stipulation in the contract between the owner and the contractor that the contractor will not assert a lien is binding

Where the contract between the owner and contractor stipulates that the contractor will assert no lien, the contractor will, of course, be bound by such stipulation,⁵² but the stipulation must be explicit⁵³ Its intent⁵⁴ and interpretation⁵⁵ should be reasonably clear, and, where so provided by statute, it must be made a matter of record ⁵⁶ Stipulations that the contractor shall promptly pay for all materials, so that a lien will not arise,⁵⁷ that he shall give security that no liens will be filed,⁵⁸ that he shall present a certificate that the property is free from liens,⁵⁹ that the building shall be delivered free from liens,⁶⁰ that all bills shall be paid by check of the contractor,⁶¹ that the contractor will satisfy every claim,⁶² or that the contractor will not permit any liens to be set up by subcontractors⁶³ have been held not to defeat the right of the contractor to a lien

It has been held, however, that a stipulation of the contractor to complete the work free from mechanics' liens,⁶⁴ or to transfer the house to the owner clear of all claims or encumbrances,⁶⁵ excludes a lien in his favor, and that the covenant of the contractor to furnish a release from liens is, as to himself, the equivalent of a covenant not to file a lien ⁶⁶

§ 93. — Modification of Contract

Slight alterations or modifications of the contract as to the manner of execution will not abrogate the right of a contractor to a lien.

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| <p>44. Iowa—Haney & Campbell Mfg Co v Adaza Co-op Creamery Co, 79 NW 79, 108 Iowa 313</p> <p>45. Ark—Cook v Moore, 239 SW 750, 152 Ark 590
40 CJ p 134 note 19</p> <p>46. Idaho—Riggin v Perkins, 246 P 962, 42 Idaho 391</p> <p>Kan—<i>Corpus Juris</i> quoted in Isbell v. Payne, 147 P 2d 718, 720, 158 Kan 398</p> <p>Mont—<i>Corpus Juris</i> cited in Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 281, 111 Mont 471</p> <p>Okl—Shefts Supply v Brady, 41 P 3d 820, 170 Okl 590</p> <p>Or—James A C Tait & Co v Stryker, 243 P 104, 117 Or 338
40 CJ p 134 note 20</p> <p>47. Idaho—Riggin v Perkins, 246 P 962, 42 Idaho 391</p> <p>Or—James A C Tait & Co v Stryker, 243 P 104, 117 Or 338</p> <p>R.I.—Sweet v James, 2 R.I. 270
40 CJ p 134 note 21</p> <p>48. Ala—Murray v Bessemer Lumber Co, 106 So 857, 214 Ala 115</p> <p>Idaho—Riggin v Perkins, 246 P 962, 42 Idaho 391</p> <p>Or—James A C Tait & Co v Stryker, 243 P 104, 117 Or 338</p> | <p>Tev—Mood v Methodist Episcopal Church South, of Cisco, Com App, 300 SW 30
40 CJ p 134 note 22</p> <p>49. Tex—Dupuy v Shilling, Civ App, 298 SW 934</p> <p>50. Tex—Dupuy v Shilling, supra
40 CJ p 134 note 23</p> <p>51. NY—Russell v Pichler, 198 N YS 702
40 CJ p 134 note 24</p> <p>52. NJ—Bates Mach Co v Trenton & N B R Co, 58 A 935, 70 NJ Law 684—Stein v Pennsylvania Dock & Warehouse Co, 159 A 682, 10 NJ Misc 568
40 CJ p 135 note 26</p> <p>Stipulation as affecting right of subcontractor, materialman, or workman to lien see <i>infra</i> § 109</p> <p>Waiver of lien by agreement see <i>infra</i> § 224</p> <p>53. Mo—Barker v Berry, 4 Mo App 585
40 CJ p 135 note 27</p> <p>54. NY—Kertscher v Green, 99 N E 146, 205 NY 522, Ann Cas 1313E 561</p> <p>55. NY—Kertscher v Green, supra
Pa—Schwartz v Whelan, 145 A 525, 295 Pa 425, 65 A L R 277.</p> | <p>56. Pa.—Carle v Neeld, 24 Pa Co 223
40 CJ p 135 note 30</p> <p>57. Neb—Zaris v Keck, 58 NW 933, 40 Neb 456</p> <p>58. Pa—Young v. Lyman, 9 Pa. 449</p> <p>59. Mass—Morrison Co v. Williams, 86 NE 838, 200 Mass 406
40 CJ p 135 note 33</p> <p>60. Pa—Schmid v Palm Garden Impr Co, 29 A 727, 162 Pa 211
40 CJ p 135 note 34</p> <p>61. Tenn—Lowenstein v Reynolds, 22 SW 210, 92 Tenn 543</p> <p>62. Tex—Childress v Smith, Civ App, 37 SW 1076</p> <p>63. Pa—Nice v Walker, 25 A 1065, 153 Pa 123, 34 Am SR 688
40 CJ p 135 note 37</p> <p>64. Ill—Herman H Hettler Lumber Co v Hodge, 227 Ill App 333</p> <p>65. Ind—Fuhrman v Frech, 109 N E 781, 60 Ind App 349</p> <p>66. Pa—Wyss v Beaver Valley Brewing Co, 65 A 814, 216 Pa 443
40 CJ p 135 note 40.</p> |
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Slight alterations or modifications of the contract as to the manner of the execution and the like will not abrogate the right of a contractor to a lien ⁶⁷

§ 94. — Rescission of Contract

The contractor cannot have a lien where the owner rescinds the contract before any work is done

Where the owner, before any work is done, rescinds the contract, the contractor cannot proceed and have a lien,⁶⁸ his remedy being an action for damages for breach of contract,⁶⁹ but where a partly performed building contract is canceled by mutual consent, and the value of the work already performed and of the materials furnished ascertained and agreed on, and the owner promises to pay such agreed value, the right to a lien is not waived or lost by the contractor ⁷⁰

§ 95. — Performance of Contract

In the absence of an adequate excuse for nonper-

formance or a waiver thereof by the owner, performance of his contract is necessary in order to entitle the contractor to a lien

In the absence of an adequate excuse for nonperformance,⁷¹ or of waiver by the owner of nonperformance,⁷² performance of his contract is necessary in order to entitle the contractor to a lien ⁷³ The contractor is not entitled to a lien where he has not substantially performed his contract,⁷⁴ or where he has failed to perform a material and considerable part of the work required under the contract,⁷⁵ or where he has willfully or intentionally departed from, or failed to carry out, the terms of the contract,⁷⁶ even though in an unimportant respect ⁷⁷

On the other hand, the contractor is entitled to a lien where he has acted in good faith in endeavoring to perform his contract⁷⁸ and has substantially performed it,⁷⁹ even though there are slight, minor, or trifling defects or omissions ⁸⁰ An intention substantially to perform is negated by a refusal

67. Ala.—Montandon v Deas, 14 Ala 33, 48 AmD 84

40 C J p 137 note 68

68. Ill.—Horr v Slavik, 35 Ill App 140

69. Ill.—Horr v Slavik, supra

70. Minn.—Bruce v Lennon, 54 N W 739, 52 Minn 547

71. Pa.—Pierce, Butler & Pierce Mfg Co v Rogers, 60 Pa Super 293

40 C J p 135 note 42

Equitable lien

On proof by building contractor of his allegations that he had complied with his contract to construct building in so far as he was permitted by owner, and that his failure to complete the contract was due to failure of owner to comply with his obligation under the contract to make advances to contractor for purpose of meeting pay rolls, contractor would be entitled to an equitable lien on the improvement made, and for the amount of his recovery on quantum meruit, just as though he had fully performed the contract as contemplated by the statute setting up lien in his favor—Shubert v Speir, 38 SE2d 835, 201 Ga 20

72. Mass.—McCue v Whitwell, 30 NE 1134, 156 Mass 205

40 C J p 136 note 43

73. Fla.—Cooper v Passmore, 138 So 48, 103 Fla 744

Mass.—Glaser v Schwartz, 176 NE 613, 276 Mass 54

NY—Mink v Heep, 227 NYS 698, 233 AppDiv 220

Tex.—Sommers v Stout, Com App, 44 SW2d 901—Carille v Harris, Civ App, 38 SW2d 622—Farm & Home Savings & Loan Ass'n of

Missouri v Muhl, Civ App, 37 S W2d 316, error refused

40 C J p 135 note 44

Abandonment by contractor see infra § 96

Default in performance of principal contract as affecting right of subcontractor, materialman, or workman to lien see infra § 112

74. Mo.—Johnson v Brill, 295 SW 558

Or.—McComb v Cogswell, 15 P 2d 716, 140 Or 676

Tex.—Sommers v Stout, Com App, 44 SW2d 901—Postal Savings & Loan Ass'n v Powell, Civ App, 47 SW2d 343, error refused

40 C J p 135 note 45

Agreement as to substantial performance

Parties to contract for improvements on homestead could not, by contract, agree in advance what should be conclusive evidence of substantial compliance with contract—Sommers v Stout, Tex Com App, 44 SW2d 901

75. Or.—Pippy v Winslow, 125 P 298, 62 Or 219

40 C J p 136 note 46

76. Mass.—Glaser v Schwartz, 176 NE 613, 276 Mass 54

NY—De Martini v Blade Realty Corp, 58 NE2d 519, 293 NY 778

Or.—McComb v Cogswell, 15 P 2d 716, 140 Or 676

40 C J p 136 note 47.

77. Or.—Pippy v Winslow, 125 P 298, 62 Or 219

40 C J p 136 note 48

78. Ill.—Industrial Roofing Co v Meek, 39 NE2d 57, 312 Ill App 663

Or.—M J Walsh Co v Nelson, 126 P 606, 63 Or 84

40 C J p 136 note 49

Dry well

A contractor employed to drill a well was held not deprived of a lien by the fact that the well drilled is a dry one

Ind.—Koch v Fishburn, 164 NE 731, 90 Ind App 287

NM—Dysart v Youngblood, 102 P 2d 664, 44 NM 351

79. Cal.—Monarch Metal Weather Strip Co v Clynick, 3 P 2d 593, 117 Cal App 270

Ill.—Industrial Roofing Co v Meek, 39 NE2d 57, 312 Ill App 653—Goldstein v McAlonan, 17 NE2d 993, 297 Ill App 643

Md.—Parker v Tilghman V Morgan, Inc, 183 A 224, 170 Md 7

Mo.—Hankenamp v Hagedorn, App, 110 SW2d 826

Or.—Birkemeier v Knobel, 40 P 2d 694, 149 Or 292

Pa.—Venditti v A Piece of Land, Com Pl, 22 Erie Co 208

Tex.—North American Building & Loan Ass'n v Bell, Civ App, 88 S W2d 633—Miller v Standard Savings & Loan Ass'n of Detroit, Mich, Civ App, 88 SW2d 522, error refused

40 C J p 136 note 50

Plans and specifications

In action to foreclose mechanic's lien, whether building was adequate to serve purposes for which built was held immaterial, where it was erected according to plans and specifications furnished by lessee having contract to purchase—Anselmo v Sebastiani, 26 P 2d 1, 219 Cal 292.

80. Kan.—Kastner v Security Sav-

to cure defects or complete the contract when called on to do so⁸¹ Compliance with the contract is sufficiently shown where it appears that claimant offered to do any work which the owner should designate that should be done, and the owner failed to designate any,⁸² or that the owner accepted the building, knowing the defects complained of,⁸³ but the taking of possession of the premises by the owner and the mere use and occupancy thereof do not, without more, constitute an unequivocal acceptance⁸⁴

Performance to satisfaction of architect or owner

Where, by the terms of the contract, it is to be performed to the satisfaction of an architect⁸⁵ or the owner,⁸⁶ such satisfaction must be shown Thus, where a contract provides that the work shall be done to the full and complete satisfaction of the architect, and payment made on presentation of his certificate that the contractor is entitled thereto, a contractor who has not furnished such a certificate or shown any excuse for not furnishing it is not entitled to a lien for the amount of his claim⁸⁷ Neither the owner⁸⁸ nor the architect⁸⁹ will be allowed to defeat the lien by unjust or capricious action in the matter, and failure to produce an architect's certificate is excused where, owing to the discharge of the architect, there is no one who can

give a certificate⁹⁰ A provision in the contract for the production of a certificate of the architect may be waived by the owner⁹¹

Time of performance Mere delay in completing a contract which contains no stipulation limiting the time of performance and which still subsists as a binding agreement is not fatal to the maintenance of a lien⁹² in the absence of bad faith in the final part of the performance,⁹³ and, even where the contract limits the time for completion, failure to complete within the stipulated time ordinarily will not prevent a lien,⁹⁴ but it is otherwise when the time of completion is of the essence of the contract.⁹⁵

§ 96. — Abandonment by Contractor

Where a contractor, without sufficient grounds or excuse, abandons the contract or ceases work, he loses the right to a mechanic's lien

Where the contractor abandons the contract or ceases work before completion, he forfeits all right to a lien⁹⁶ where such abandonment or cessation of work is due to his fault⁹⁷ or is without sufficient grounds or excuse⁹⁸ Where, however, the abandonment is attributable to the fault of the owner, and the contractor was free from fault in the matter and justified in abandoning the work, he is entitled to a lien for what was done or furnished⁹⁹

ings & Loan Ass'n, 256 P 989, 123 Kan 633

Tex—Alexander v Waggoman, Civ App, 287 SW 144

40 C J p 136 note 51

Trivial imperfections as affecting time for filing lien claim see infra § 142

81. NY—Kohl v Fleming, 47 NY S 1092, 21 Misc 690

82. Cal—Monarch Metal Weather Strip Co v Clynick, 3 P2d 593, 117 Cal App 270

Wash—Windham v Independent Tel Co, 76 P 936, 35 Wash 166

40 C J p 137 note 57

83. Wash—Windham v Independent Tel Co, supra

40 C J p 137 note 58

84. Mich—Gier v Daiber, 111 NW 773, 148 Mich 190

40 C J p 137 note 59

85. Ill—Barney v Giles, 11 NE 206, 120 Ill 154

40 C J p 137 note 61

86. Mich—Evans v Woodley, 138 NW 275, 173 Mich 20

40 C J p 137 note 62

87. Ill—Provost v Shirk, 79 NE 178, 223 Ill 468

40 C J p 137 note 63

88. Wash—Windham v Independent Tel Co, 76 P 936, 35 Wash 166

Wis—Mindeman v Douville, 88 NW 299, 112 Wis 413

89. Ill—McDonald v Patterson, 67 NE 1027, 186 Ill 381

40 C J p 137 note 65

90. NJ—Federal Trust Co v Guigues, 74 A 652, 76 NJ Eq 495

91. Ill—Salomon-Waterton Co v Union Asbestos & Rubber Co, 263 Ill App 583

NY—Hartley v Murtha, 39 NYS 212, 5 App Div 408

92. Mass—See v Kolodny, 116 NE 888, 227 Mass 446—Shaughnessy v Isenberg, 99 NE 975, 213 Mass 159

93. Mass—See v Kolodny, 116 NE 888, 227 Mass 446—Shaughnessy v Isenberg, 99 NE 975, 213 Mass 159

94. Neb—McGowan v Gate City Malt Co, 130 NW 965, 89 Neb 10

40 C J p 137 note 55

95. US—D A Tompkins Co v Monticello Cotton Oil Co, CC Ga, 137 F 625

96. Ill—General Fire Extinguisher Co v Seymour, 204 Ill App 198

Tex—Trout v Wichita State Bank & Trust Co, Civ App, 23 SW 2d 871

Accommodation contractor

It has been held that a mechanic's lien contained in construction contract executed by husband and wife

against homestead, as security for payment of notes which accommodation contractor transferred to mortgage company which advanced money directly to husband and wife, constituted a valid lien, notwithstanding contract was abandoned by such contractor and work was completed by husband—Wiegel v Sweeney, Tex Civ App, 122 SW 2d 673, error refused

97. Tex—Food Machinery Corporation v Moon, Civ App, 165 SW 2d 773

40 C J p 137 note 73

Willful abandonment

Where the original contractor abandoned construction, whether he would be entitled to a lien or other affirmative relief would depend on whether the abandonment occurred under such circumstances as to come within the exception to the general rule that willful abandonment is a bar to any recovery—Bradfield v Bollier, 128 P 2d 942, 169 Or 425

98. Ill—Gottschalk Const Co. v. Carlson, 253 Ill App 520

40 C J p 138 note 74

99. Idaho—Dybvig v Willis, 82 P 2d 95, 59 Idaho 160

Ill—Cooper v Palais Royal Theatre Co, 242 Ill App 184

NM—Dysart v Youngblood, 102 P. 2d 664, 44 NM 351.

It has generally been held that the owner's refusal to pay an installment due under the contract is a justification of the contractor's refusal to complete his contract,¹ and entitles him to enforce a lien for what has been done,² although in some jurisdictions the rule has been given a limited application.³ Matters held not to constitute an abandonment, discontinuance of the work, or election not to go on with the contract include the filing of a claim of lien by the contractor before the completion of the work⁴ or a stoppage of the work in pursuance of

an agreement between the owner and contractor that it be stopped until the owner procures funds.⁵

Completion by owner Where the contract contains a stipulation authorizing the owner to complete the work on the contractor's neglect or refusal so to do, and the owner does so, the contractor may have a lien for the difference between the cost of completion and the balance unpaid on the contract,⁶ provided, of course, the cost of completion does not exceed such balance,⁷ but this rule is inapplicable in the absence of such a stipulation.⁸

2 SUBCONTRACTORS, AND CONTRACTORS' WORKMEN AND MATERIALMEN

§ 97. In General

The right to a mechanic's lien extends to persons who do work and furnish materials under a contract with, or employment by, the contractor.

The right to a mechanic's lien is not confined to persons contracting directly with the owner of the property⁹ or performing labor or furnishing material with the actual knowledge of the owner,¹⁰ but extends to persons who do work and furnish materials under a contract with, or employment by, the contractor.¹¹ It is sufficient if there is a contract

between the owner and some one for the improvement of the property,¹² claimant is a laborer, materialman, or subcontractor under contract with, or employment by, the contractor,¹³ and he does work or furnishes material for the contractor in pursuance of the latter's agreement with the owner.¹⁴

In order to be entitled to a lien, however, a claimant must connect himself with the owner in some way, directly or indirectly, by some link of a contractual nature.¹⁵ The owner must be actually liable therefor according to the terms of his contract

NY—Majestic Tile Co v Nicholls, 291 NYS 551, 161 Misc 231
Or—James A C Tait & Co v Stryker, 243 P. 104, 117 Or 338
RI—Green v Haley, 5 RI 260
40 CJ p 138 note 75

Abandonment by owner

By terminating contract for remodeling of home before its completion, the owners abandoned the improvements and they were deemed completed as far as concerns right of contractor to assert his lien under statute—Smith v. Gunniss, Mont., 144 P 2d 186

Constructive completion

Abandonment of improvement through fault of owner and without fault of lien claimant has been held to constitute constructive completion with respect to right to lien—Albuquerque Lumber Co v Montevista Co, 38 P 2d 77, 39 NM 6

1. Mass—Scholl v Fleischer, 146 NE 725, 251 Mass 451
40 CJ p 138 note 76

2. NY—Wright v Reusens, 31 NE 215, 133 NY 298
40 CJ p 138 note 76

3. Ill.—Abbau v Grassie, 104 NE 1020, 262 Ill 636, Ann Cas 1915B 414
40 CJ p 138 note 79

4. US—Faick v Stephens, Ohio, 250 F 185, 162 CCA 321, certiorari denied 39 S Ct 8, 248 US 562, 63 L Ed 422
40 CJ p 138 note 80.

5. Ill.—Abbau v Grassie, 104 NE 1020, 262 Ill 636, Ann Cas 1915B 414

6. Wash—Sweatt v Hunt, 84 P 1, 42 Wash 96
40 CJ p 138 note 82

Amount of lien on abandonment generally see infra § 175

7. NY—Condon v St Augustine Church, 98 NYS 253, 112 App Div 168

8. Tex—Murphy v Williams, 124 S W 900, 103 Tex 155
40 CJ p 139 note 85

9. La.—National Homestead Ass'n v Graham, 147 So 348, 176 La 1062

Mont—Corpus Juris quoted in Morin Lumber Co v Person, 99 P 2d 206, 207, 110 Mont 114
40 CJ p 139 note 87

Necessity and effect of filing or non-filing of principal contract see supra § 82

10. Mont—Corpus Juris quoted in Morin Lumber Co v Person, 99 P 2d 206, 207, 110 Mont 114
40 CJ p 139 note 88

11. La.—National Homestead Ass'n v Graham, 147 So 348, 176 La 1062

Mont—Corpus Juris quoted in Morin Lumber Co v Person, 99 P 2d 206, 207, 110 Mont 114

Okl—Rogers v Crane Co, 68 P 2d 520, 180 Okl 139

Or—James A C Tait & Co v Stryker, 243 P 104, 117 Or 338
40 CJ p 139 note 89

Nature of attachment or garnishment

The lien as respects subcontractors, mechanics, laborers, and materialmen who have no direct contractual relations with owner of property improved operates in nature of attachment or garnishment of fund in owner's hands and due contractor, with property as security therefor—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 227 Ala 25

12. Mont—Corpus Juris quoted in Morin Lumber Co v Person, 99 P 2d 206, 207, 110 Mont 114
40 CJ p 139 note 90

Necessity of contract with, or consent of, owner see supra § 52 et seq

13. Mont—Corpus Juris quoted in Morin Lumber Co v Person, 99 P 2d 206, 207, 110 Mont 114
40 CJ p 139 note 89

14. Mont—Corpus Juris quoted in Morin Lumber Co v Person, 99 P 2d 206, 207, 110 Mont 114

Okl—Rogers v Crane Co, 68 P 2d 520, 180 Okl 139—Mobley v Leeper Bros Lumber Co, 214 P 174, 89 Okl 95

Pa—Hamilton v Means, 38 A 2d 528, 155 Pa Super 245

15. La—Price v Lee, 123 So 458, 11 La App 291.

with his contractor,¹⁶ and, where claimant has not contracted directly with the owner, it is generally deemed necessary that he shall have contracted with,¹⁷ or furnished material to,¹⁸ the contractor. Persons contracting with a person other than the owner are charged with the duty of ascertaining whether the person with whom they contract has such a contractual relation with the owner as to be authorized to bind the latter's property.¹⁹ The statutes do not confer on subcontractors and materialmen, not in privity of contract with the owner, a right of action independent of their lien.²⁰

The death of the contractor, after the completion of the work, does not deprive a subcontractor, laborer, or materialman of the right to acquire a lien for what was done or furnished at the request of the contractor.²¹

§ 98. Subcontractors

A subcontractor entitled to a mechanic's lien is one who directly contracts with the principal contractor to

construct or erect some part of a structure and to furnish the material therefor, or one to whom the principal contractor sublets a portion, or even all, of the contract.

As a general rule the mechanics' lien statutes give subcontractors the right to a lien,²² although under some statutes, mostly early ones, such right is, or at one time was, denied to them.²³ It has been stated that the rights of a subcontractor are neither superior nor inferior to those of the contractor, where the subcontractor does or furnishes what the contractor agreed to furnish.²⁴ The lien conferred by statute on a subcontractor cannot be suspended by a declaration of the owner that claimant is not to hold the owner's property for material furnished or labor performed for the original contractor, but that he must look to the original contractor.²⁵ A lien may be filed by a subcontractor even though the contractor has previously filed a lien for the entire contract.²⁶

A subcontractor, within the meaning of the mechanics' lien statutes has been held to be one who directly contracts with the principal contractor.²⁷

Mich—*Wingilia v Ashman*, 217 N W 909, 241 Mich 534

Mont—*Corpus Juris* quoted in *Morin Lumber Co v Person*, 99 P 2d 206, 207, 110 Mont 114

Pa—*Russell M Howe, Inc v Beloff*, Super, 56 A 2d 352

40 C J p 139 note 93

16. N Y—*Pendleburg v Meade*, 1 E D Smith 728

17. Del—*Wilmington Sash & Door Co v Nuttall*, 95 A 902, 29 Del 1 40 C J p 139 note 2

18. Iowa—*A E Shorthill Co v Aetna Indemn Co*, 124 N W 613

40 C J p 139 note 3

19. Pa—*Brown v Cowan*, 1 A 520, 110 Pa 588

40 C J p 140 note 6

20. Neb—*Corpus Juris* cited in *Parsons Const Co v Gifford*, 263 N W 508, 514, 129 Neb 617

40 C J p 140 note 7

21. Okl—*Eberle v Drennan*, 136 P. 162, 40 Okl 59, 51 L R A, N S, 68

40 C J p 140 note 9

22. Ark—*Home Oil Co v Helton*, 14 S W 2d 549, 179 Ark 132

Del—*Westinghouse Electric Supply Co v Franklin Institute of State of Pennsylvania for Promotion of Mechanic Arts*, 21 A 2d 204, 2 Terry 319

D C—*Battista v Horton, Myers & Raymond*, 128 F 2d 29, 76 US App DC 1

Ill—*Douglas Lumber Co v Chicago Home for Incurables*, 43 N E 2d 535, 380 Ill 87

Ind—*Nash Engineering Co v Marcy Realty Corporation*, 54 N E 2d 263,

322 Ind 396—*Waverly Co v Moran Electric Service*, 26 N E 55, 108 Ind App 75—*Algiers, Winslow & Western Ry Co v Foulkes Contracting Co*, 200 N E 438, 101 Ind App 632

La—*National Homestead Ass'n v Graham*, 147 So 348, 176 La 1062

Neb—*Parsons Const Co v Gifford*, 263 N W 508, 129 Neb 617

Okl—*Schuman v Teague*, 156 P 2d 1010, 195 Okl 328—*Rogers v Crane Co*, 68 P 2d 520, 180 Okl 139

Pa—*Smith-Faris Co, for Use of Keasbey & Mattison, v Jameson Memorial Hospital Ass'n*, 169 A 233, 313 Pa 254—*Houston-Starr Co v Weston*, Comp Pl, 92 Pittsb Leg J 325

W Va—*Rosenbaum v Price Const Co*, 184 S E 261, 117 W Va 160

40 C J p 140 note 11

The written consent of the owner to the subcontract is necessary, under some statutes, to entitle a subcontractor to a lien—*Hartford Building & Loan Assoc v Goldreyer*, 11 A 659, 71 Conn 95—40 C J p 140 note 8

23. Miss—*Rivers v Mulholland*, 62 Miss 766

40 C J p 140 note 12

24. Okl—*Rogers v Crane Co*, 68 P 2d 520, 180 Okl 139—*Mobley v Leeper Bros Lumber Co*, 214 P 174, 89 Okl 95

Subcontractor's lien not defeated

(1) By fact that he made no demands on owner and received payments from time to time from original contractor—*English v Branum*, 245 P 252, 31 N M 334

(2) By fact that original contractor to his knowledge was to furnish and pay for all labor and materials—*English v Branum*, supra

25. Fla—*Stringfellow v Coons*, 49 So 1019, 57 Fla 158, 131 Am SR 1089

26. Md—*Parker v Tilghman v Morgan, Inc*, 183 A 224, 170 Md 7

Pa—*Rice v Baxter*, 15 Pa Co 198 40 C J p 140 note 14

27. Kan—*Nixon v Cydon Lodge*, No 6 K of P, 43 P 236, 238, 56 Kan 298

As ordinarily understood word "subcontractor" is used in mechanics' lien law as ordinarily understood—*Huddleston v Nislar*, Tex Civ App, 72 S W 2d 959, error refused

Statutory definitions

(1) "Any person, firm, or corporation who undertakes to construct, alter, erect, improve, repair, remove, dig, or drill any part of the structures or improvements mentioned herein under a contract with any person other than the owner"—*Matzner v Harvard Lumber Co*, 155 N E 131, 115 Ohio St 555

(2) Other statutory definitions—*American Trust & Savings Bank of Cedar Rapids v West*, 243 N W 297, 298, 214 Iowa 508—40 C J p 141 note 16 [a]

Held not subcontractor

(1) In general
Pa—*Favo v Merlot*, 94 Pa Super 90
RI—*Elliott & Watrous v Harrington*, 27 A 2d 338, 68 RI 237.
40 C J p 140 note 16 [f].

to construct or erect some part of the structure²⁸ and to furnish the material therefor,²⁹ or one to whom the principal contractor sublets a portion,³⁰ or even all,³¹ of the contract. Also some courts define a subcontractor as one who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance,³² but other courts, while recognizing this as a literal definition,³³ hold that, in respect of the mechanics' lien law, the word has a much narrower meaning.³⁴ A laborer working by the day is not a "subcontractor" within the meaning of the lien law.³⁵ However, it has been said that a day laborer who works under an agreement with the contractor is in one view a subcontractor.³⁶ At any rate, where a person is a subcontractor by reason of his having contracted with the contractor to perform a specific part of the work which the contractor has contracted with the owner to do, his status is not changed by the fact that the compensation is to be computed by the day.³⁷

Lienable matters A subcontractor as such is en-

titled to a lien for labor³⁸ and material³⁹ furnished and paid for by him in the performance of his subcontract. In other words, a subcontractor is entitled to a lien not only for his own labor,⁴⁰ but also for labor furnished by him and actually performed by other persons whom he employs.⁴¹ Under some statutes a subcontractor is not entitled to a lien for materials furnished by him.⁴²

§ 99. Subcontractors of Subcontractors

Under some statutes a subcontractor of a subcontractor is entitled to a mechanic's lien.

Under some statutes,⁴³ but not under others,⁴⁴ a subcontractor of a subcontractor is entitled to a mechanic's lien.

§ 100. Employees of Contractor, Subcontractor, or Materialman

The employees of the principal contractor or of a subcontractor may be entitled to a mechanic's lien.

The right to a mechanic's lien is usually,⁴⁵ but

(2) Where owner believed that he was buying materials for construction of improvements from retail lumber dealer but the dealer purchased the material from plaintiff dealer under invoices which were altered so that owner would not know where material came from, plaintiff was held not to be a subcontractor within protection of lien law—*Schuman v Teague*, 156 P 2d 1010, 195 Okl 328

28. Cal—Hihn-Hammond Lumber Co v Elsom, 154 P 12, 14, 171 Cal 570, Ann Cas 1917C 798

29. Cal—Hihn-Hammond Lumber Co v Elsom, supra
W Va—Collins v Board of Trustees of Davis & Elkins College, 79 S E 10, 14, 72 W Va 583

30. Okl—Rogers v Crane Co, 68 P 2d 520, 524, 180 Okl 139
W Va—Marsh v Rothery, 183 S E 914, 117 W Va 94
40 C J p 141 note 18

31. W Va—Marsh v Rothery, supra

32. Mass—Holt & Bugbee Co v City of Melrose, 41 N E 2d 562, 563, 311 Mass 424, 141 A L R 319
Okl—Rogers v Crane Co, 68 P 2d 520, 524, 180 Okl 139
40 C J p 141 note 20

This definition includes one who contracts to supply materials manufactured or processed especially for and in accordance with plans of the general contractor or those by which he is bound—*Holt & Bugbee Co v City of Melrose*, 41 N E 2d 562, 311 Mass 424, 141 A L R 319

33. Cal—Hihn-Hammond Lumber

Co v Elsom, 154 P 12, 171 Cal 570, Ann Cas 1917C 798

34. Cal—Hihn-Hammond Lumber Co v Elsom, supra

35. Ind—Johnson v Spencer, 96 S E 1041, 49 Ind App 166
Pa—Octave v Beltz, Com Pl, 63 West Co L J 218

Stone mason who was engaged on hourly basis to work for indefinite time under direction of owner of buildings, and was not employed to perform any distinct piece of work, has been held not a subcontractor within meaning of mechanics' lien law—*Bennett v Bruchou*, 96 P 2d 763, 163 Or 175.

36. Kan—Rankin v Rankin, 122 P 1120, 86 Kan 899

37. Wash—Chavelle v Island Gun Club, 137 P 511, 77 Wash 304

38. Mo—*Corpus Juris* quoted in City of St Louis ex rel Sears v Southern Surety Co, 62 S W 2d 432, 435, 333 Mo 180

Okl—Bank of Barisboro v J E Crosbie, Inc, 77 P 2d 547, 182 Okl 327
40 C J p 141 note 29

39. Mo—*Corpus Juris* quoted in City of St Louis ex rel Sears v Southern Surety Co, 62 S W 2d 432, 435, 333 Mo 180

Wash—Chavelle v Island Gun Club, 137 P 511, 77 Wash 304

40. Mo—*Corpus Juris* quoted in City of St Louis ex rel Sears v Southern Surety Co, 62 S W 2d 432, 435, 333 Mo 180.

40 C J p 141 note 31

41. Kan—*Corpus Juris* quoted in Isbell v Payne, 147 P 2d 718, 720, 158 Kan 298

Mo—*Corpus Juris* quoted in City of St Louis ex rel Sears v Southern Surety Co, 62 S W 2d 432, 435, 333 Mo 180

40 C J p 141 note 32

42. RI—Hatch v Faucher, 8 A 543, 15 RI 459

43. Ind—Nash Engineering Co v. Marcy Realty Corporation, 54 N E 2d 263, 223 Ind 396

W Va—Rosenbaum v Price Const Co, 184 S E 261, 117 W Va 160
40 C J p 139 note 5, p 141 note 24

44. DC—Battista v Horton, Myers & Raymond, 128 F 2d 29, 76 US App DC 1

Pa—Smith-Faris Co, for Use of Keasbey & Mattison, v Jameson Memorial Hospital Ass'n, 169 A 233, 313 Pa 254—Hamilton v Means, 38 A 2d 538, 155 Pa Super 245—Moser v Loeper, 8 Pa Dist & Co 651, 22 Schuy'l Leg Reg 306.
40 C J p 142 note 35

45. Ala—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 227 Ala 35

DC—Battista v Horton, Myers & Raymond, 128 F 2d 29, 76 US App DC 1

Iowa—American Trust & Savings Bank of Cedar Rapids v. West, 243 N W 297, 214 Iowa 568

Okl—Newman v Kirk, 28 P 2d 163, 164 Okl 147.

Wash—Coast Trucking Co v West Seattle Dairy, 268 P 598, 148 Wash 200.

40 C J p 142 note 39.

not always,⁴⁶ extended to employees of the principal contractor. The employees of a subcontractor are entitled to a lien under some,⁴⁷ but not other,⁴⁸ statutes. The statutes have been held not to confer a lien on a person performing labor for a materialman.⁴⁹

§ 101. Persons Furnishing Materials to Contractors

As a general rule a person furnishing material to the principal contractor is entitled to a mechanic's lien.

As a general rule, under the later statutes, a person furnishing material to the principal contractor is entitled to a mechanic's lien⁵⁰ although under some of the earlier statutes this right was denied.⁵¹

§ 102. Persons Furnishing Material to Subcontractor

Persons who furnish materials to subcontractors are given a mechanic's lien under some statutes

Persons who furnish materials to subcontractors are given a mechanic's lien therefor under some statutes,⁵² but where it does not clearly appear to be the legislative intent that such persons shall have a lien it is not allowed.⁵³

§ 103. Persons Furnishing Materials to Another Materialman

Persons furnishing material to materialmen are usually not entitled to a mechanic's lien.

Persons furnishing material to materialmen are usually not entitled to a mechanic's lien⁵⁴ although under some constitutional provisions a lien is allowed to them.⁵⁵

§ 104. Persons Furnishing Labor to Contractor

A person merely furnishing labor to the principal contractor is not entitled to a mechanic's lien for the value thereof.

46. Miss—Wenger v First Nat Bank, 161 So 229, 174 Miss 311
Pa—Miller v Stoudt, 14 Pa Dist & Co 141

40 C J p 142 note 40

47. Ky—Whitt v Maddix, Ky, 124 SW 270

40 C J p 142 note 41

48. Pa—McQuown v Lias, 8 Pa Dist & Co 583, 3 Som Leg J 226
40 C J p 142 note 42

49. W Va—Marsh v Rothey, 183 S E 914, 117 W Va 94
40 C J p 142 note 43

50. Ariz—Watson v Murphey, 285 P 1037, 36 Ariz 377

Ark—Home Oil Co v Helton, 14 S W 2d 549, 179 Ark 132

Ga—Buffalo Forge Co v Southern Ry Co, 159 SE 301, 43 Ga App 445

Idaho—Idaho Lumber & Hardware Co v DiGiacomo, 102 P 2d 637, 61 Idaho 383

Ind—Jackson v J A Franklin & Son, 23 NE 2d 23, 107 Ind App 38

La—Bell v Lieber, 125 So 871, 169 La 731—Dixie Bldg Material Co v Massachusetts B & Ins Co, 119 So 405, 167 La 399

Md—Bounds v Nuttle, 30 A 2d 263, 181 Md 400

Minn—St Paul Foundry Co v Evenson, 211 NW 834, 169 Minn 485, reargument denied 213 NW 352, 169 Minn 485

Ohio—Matzinger v Harvard Lumber Co, 155 NE 131, 115 Ohio St 555

Okl—Rogers v Crane Co, 68 P 2d 520, 180 Okl 139

Tex—Texas Co v Schriewer, Civ App, 38 SW 2d 141, modified on

other grounds Smith v Texas Co, Com App, 53 SW 2d 774—Penniman Gravel & Material Co v Hutton, Civ App, 16 SW 2d 848, affirmed, Com App, 27 SW 2d 135

40 C J p 142 note 45

Contractor and subcontractor distinguished see supra § 90

Delivery by original seller

One buying materials and furnishing them to contractor by delivery from original seller to contractor may have materialman's lien—Twist v Roane, 294 SW 62, 174 Ark 35

Corporations joining contractors as coprincipals in execution of bond indemnifying owner against claims for material furnished contractors, have been held not entitled to lien on property for materials they furnished to contractors—Central Lumber Co v Schilleci, 148 So 614, 227 Ala 29

51. Minn—Toledo Novelty Works v Bernheimer, 8 Minn 118

40 C J p 143 note 46

52. Minn—Illinois Steel Warehouse Co v Hennepin Lumber Co, 182 NW 994, 149 Minn 157

Tex—Texas Co v Schriewer, Civ App, 38 SW 2d 141, modified on other grounds Smith v Texas Co, Com App, 53 SW 2d 774, followed in Smith v G B Johnson Hardware Co, 53 SW 2d 779 and Smith v Jacksboro Stone Products Co, 53 SW 2d 780—Penniman Gravel & Material Co v Hutton, Civ App, 16 SW 2d 848, affirmed Stanfill v Penniman Gravel & Material Co, Com App, 27 SW 2d 135

40 C J p 143 note 47

Contractor and subcontractor distinguished see supra § 90

In Louisiana

(1) The rule stated in the text has been applied—Dixie Bldg Material Co v Massachusetts B & Ins Co, 119 So 405, 167 La 399

(3) Under prior statutes it was held that a person furnishing material to a subcontractor was not entitled to a lien—Frank v Waters, 110 So 413, 162 La 255—Jeter v Lyon, 8 La App 115—Steen v Mid-City Lumber Co, 7 La App 683

53. Ga—Buffalo Forge Co v Southern Ry Co, 159 SE 301, 43 Ga App 445

Pa—Favo v Merlot, 94 Pa Super 90—McQuown v Lias, 8 Pa Dist & Co 583, 3 Som Leg J 226
40 C J p 143 note 48

54. Cal—Harris & Stunston v Yorba Linda Citrus Ass'n, 26 P 2d 654, 135 Cal App 154

Iowa—Forsberg v Koss Const Co, 252 NW 268, 218 Iowa 818

Mich—People, for Use of Belson Mfg Co v Wayne Electric Motor Co, 257 NW 877, 269 Mich 537—Hart v Reid, 219 NW 692, 243 Mich 175—Van Cleve Glass Co v Erratt, 68 NW 978, 110 Mich 650

Ohio—Ivorydale Lumber Co v Cincinnati Union Terminal Co, 187 NE 126, 45 Ohio App 353

W Va—Marsh v Rothey, 183 SE 914, 117 W Va 94
40 C J p 143 note 49

55. U S—Huttig Sash & Door Co v Stutt, Tex, 218 F 1, 133 CCA 641

40 C J p 143 note 50.

Under some statutes a person merely furnishing labor to the principal contractor has been held not entitled to a lien for the value thereof.⁵⁶

§ 105. Nature of Lien

- a. In general
- b. Direct lien

a. In General

Two systems seem to have been adopted for the protection of the subcontractor, materialman, or laborer, one conferring a lien by subrogation, the other conferring a direct lien.

The protection of the subcontractor and materialman, with a just regard to the rights of the owner of the property, has been the subject of much solicitude with most of the legislatures.⁵⁷ Two systems seem principally to have been adopted, one conferring a lien by subrogation and known as the New York system, the other conferring a direct lien and known as the Pennsylvania system.⁵⁸ A clear conception of the distinction between these two systems is necessary to an understanding of the cases, for not only have different systems prevailed in different states, but in some instances the legislative history of a single state shows that each of the two systems mentioned has prevailed therein at some period,⁵⁹ and many propositions of law laid down with reference to one system are totally inapplicable where the other system prevails.⁶⁰ The fact that

under the New York system the subcontractor cannot recover more than is due from the owner to the contractor while under the Pennsylvania system payment to the original contractor is no defense to a claim of a subcontractor is said to constitute the prominent distinction between the two systems.⁶¹ However, some statutes adopting the Pennsylvania system incorporate certain features of the New York system.⁶²

b. Direct Lien

Under some statutes an absolute, direct, and independent mechanic's lien is conferred on a subcontractor, laborer, or materialman, irrespective of the right of the principal contractor to a lien.

Statutes embodying what is known as the Pennsylvania system⁶³ confer a mechanic's lien on a subcontractor, laborer, or materialman, not by subrogation to the rights of the original contractor,⁶⁴ but rather an absolute,⁶⁵ direct,⁶⁶ and independent⁶⁷ lien, irrespective of the right of the principal contractor to a lien,⁶⁸ the state or condition of the account between the owner and the contractor,⁶⁹ or whether there is anything due the contractor from the owner.⁷⁰ These statutes proceed on the view that by the contract the owner makes the contractor an agent with power to bind the property for such labor and materials as are reasonably necessary to fulfill the contract,⁷¹ or that the owner, on entering into the contract, knows or understands that the

56. Colo.—Kern v Gurry Bros Wall Paper Co, 153 P 87, 60 Colo 286 40 C J p 143 note 51

57. Miss.—Spengler v Stiles-Tull Lumber Co, 48 So 966, 94 Miss 780, 19 Ann Cas 426

Nev.—Hunter v Truckee Lodge No 14 I O O F, 14 Nev 24

58. Miss.—Spengler v Stiles-Tull Lumber Co, 48 So 966, 94 Miss 780, 19 Ann Cas 426 40 C J p 144 note 54

59. Miss.—Spengler v Stiles-Tull Lumber Co, supra 40 C J p 144 note 57

60. Miss.—Spengler v Stiles-Tull Lumber Co, supra Rules affected by particular system adopted see infra §§ 112, 174, 251

61. Idaho.—Weeter Lumber Co v Fales, 118 P 289, 291, 20 Idaho 255, Ann Cas 1913A 403 40 C J p 144 note 61

62. Colo.—Great Western Sugar Co v F H Gilcrest Lumber Co, 136 P 553, 25 Colo App 1 40 C J p 144 note 62

63. Idaho.—Weeter Lumber Co v Fales, 118 P 289, 20 Idaho 255, Ann Cas 1913A 403 40 C J p 145 note 72.

64. Ala.—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 102 A L R 346 40 C J p 145 note 73

65. Idaho.—Weeter Lumber Co v Fales, 118 P 289, 20 Idaho 255, Ann Cas 1913A 403 40 C J p 145 note 74

66. Ala.—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 102 A L R 346

Colo.—Armour & Co of Delaware v McPhee & McGinnity Co, 275 P 13, 85 Colo 262

Mont.—Smith v Gunniss, 144 P 2d 186, 115 Mont 362

Ohio.—Howk v Krotzer, 42 NE 2d 640, 140 Ohio St 100 40 C J p 145 note 75

67. Ala.—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 102 A L R 346

Ark.—Cost v Newport Builders' Supply Hardware Co, 108 SW 509, 85 Ark 407, 14 Ann Cas 142

68. Pa.—Linden Steel Co v Rough Run Mfg Co, 27 A 895, 158 Pa 238 40 C J p 145 note 77

69. Md.—Parker v Tilghman V Morgan, Inc, 183 A 234, 170 Md 7—Treusch v Shryock, 51 Md 162. 40 C J p 146 note 79

70. Wyo.—Becker v Hopper, 147 P 1085, 23 Wyo 209, Ann Cas 1918B 35 40 C J p 146 note 81

71. Idaho.—Boise-Payette Lumber Co v Felt, 258 P 169, 44 Idaho 377

Ind.—Waverly Co v Moran Electric Service, 26 NE 2d 55, 108 Ind App. 75

N C.—North Carolina Lumber Co v Spear Motor Co, 135 SE 115, 192 NC 377

Tex.—Dallas Nat Bank v Peaslee-Gaulbert Co, Civ App, 35 SW 2d 221, error dismissed 40 C J p 146 note 82

Contractor held agent of owner

(1) Under contracts on a cost plus basis—Gilbert Mfg Co v Connelley, Tex Com App, 265 SW 375—Smith v Spencer-Sauer Lumber Co, Tex Civ App, 129 SW 2d 384—Smith v Sanders, Tex Civ App, 128 SW 2d 160—Moody-Seagraves Ranch v Brown, Tex Civ App, 69 SW 2d 840, error refused—Dallas Nat Bank v Peaslee-Gaulbert Co, Tex Civ App, 35 SW 2d 221, error dismissed

contractor must employ others to do work and furnish material⁷² and therefore consents to what is done and furnished by persons so employed,⁷³ or that claimant is entitled to be protected because of his having contributed to the making of the improvement⁷⁴ and the enhancement of the value of the property⁷⁵. The objects of such statutes are to prevent collusion between the contractor and the owner⁷⁶ and to protect those who perform labor in, or furnish material for the erection of, a building from being defrauded⁷⁷.

§ 106. — Lien by Subrogation

Under some statutes the lien of a subcontractor, materialman, or workman is based on a species of subrogation to the rights of the original contractor.

Under statutes embodying what is known as the New York system,⁷⁸ the lien of a subcontractor, materialman, or workman is based on a species of

subrogation to the rights of the original contractor,⁷⁹ he is entitled to a lien only when the contractor is entitled to one⁸⁰ and there is something due or to become due to the principal contractor⁸¹.

§ 107. Effect of Filing of Principal Contract by Owner

Under the express provisions of some statutes the effect of a filing of a contract between the owner and the original contractor is to protect the building and the land on which it stands from a lien in favor of any person except the original contractor.

Under the express provisions of some statutes the effect of a filing of the contract between the owner and the original contractor is to protect the building and the land on which it stands from a lien in favor of any person except the original contractor for work done or materials furnished pursuant to the contract, and subcontractors, workmen, or materialmen are not entitled to a lien⁸². However, a

(2) Under other contracts—Price v J. P. Guerry & Son, 183 So. 1, 133 Fla. 754—40 C.J. p. 146 note 82 [c].

Contractor held not agent of owner—Pa—Miller v. Staudt, 14 Pa. Dist. & Co. 141.

Statutory agency

Some statutes expressly make certain enumerated persons, such as the contractor, subcontractor, architect, builder, or person having charge of the construction, an agent of the owner for the purpose of establishing a lien.

Ariz.—Lilley v. J. D. Halstead Lumber Co., 28 P.2d 616, 42 Ariz. 546—Hunt v. Douglas Lumber Co., 17 P.2d 815, 41 Ariz. 276—Wylie v. Douglas Lumber Co., 8 P.2d 256, 39 Ariz. 511, 83 A.L.R. 918.

Cal.—McDowell v. Perry, 51 P.2d 117, 9 Cal. App.2d 555—40 C.J. p. 145 note 83 [d] (2).

Limitations of agency

(1) The contractor is not an agent of the owner in all respects—Tallman Co. v. Villmer, Mo. App., 133 S.W.2d 1085—40 C.J. p. 146 note 82 [e].

(2) The contractor's authority to bind the property for the value of the material extends only to such as is reasonably sufficient property to construct the building in accordance with the plans or under the agreement between the owner and the builder—Boise-Payette Lumber Co. v. Melt, 258 P. 169, 144 Idaho 377—Valley Lumber Co. v. Nickerson, 93 P. 24, 13 Idaho 682.

(3) The contractor is not the owner's agent so far as to make a laborer employed by it a direct contract employee of the owner—Riggen v. Perkins, 246 P. 962, 42 Idaho 391.

72. N.M.—Houston-Hart Lumber

Co. v. Neal, 113 P. 621, 16 N.M. 197.

40 C.J. p. 146 note 84.

73. Mass.—Perry v. Potashinski, 47 N.E. 1023, 169 Mass. 351.

40 C.J. p. 146 note 84.

74. Neb.—Pomeroy v. White Lake Lumber Co., 49 N.W. 1131, 33 Neb. 243.

75. S.D.—Pittsburg Plate Glass Co. v. Leary, 126 N.W. 271, 25 S.D. 256, 31 L.R.A. (N.S.), 746, Ann. Cas. 1913B 923.

40 C.J. p. 147 note 86.

76. Neb.—Ballou v. Black, 31 N.W. 873, 21 Neb. 131.

77. Neb.—Ballou v. Black, *supra*.

78. Miss.—Spengler v. Stiles-Tull Lumber Co., 48 So. 966, 94 Miss. 780, 784, 803, 19 Ann. Cas. 426.

40 C.J. p. 144 note 65.

79. Conn.—Tice v. Moore, 73 A. 133, 82 Conn. 244, 17 Ann. Cas. 113.

40 C.J. p. 144 note 66.

Derivative in nature

Subcontractor's lien is derivative in nature, and his rights as lienor are measured by the rights of the general contractor—Travis v. Nansen, 26 N.Y.S.2d 590, 176 Misc. 44—40 C.J. p. 144 note 66 [a].

80. Conn.—Draxen Lumber Co. v. Jente, 155 A. 505, 113 Conn. 344.

Ill.—Douglas Lumber Co. v. Chicago Home for Incurables, 43 N.E.2d 535, 380 Ill. 87.

40 C.J. p. 145 note 67.

81. N.Y.—Nassau Suffolk Lumber & Supply Corporation v. Bruce, 31 N.Y.S.2d 906, 177 Misc. 825, modified on other grounds 38 N.Y.S.2d 73, 265 App. Div. 879, appeal denied 39 N.Y.S.2d 618, 265 App. Div. 1002.

40 C.J. p. 145 note 68.

Contract fully performed

Where contract between property owner and contractor has been fully performed, owner's knowledge of, or acquiescence in, subcontractor's performance of same work on property is insufficient to give subcontractor right to lien thereon—W. E. Blume, Inc. v. Postal Telegraph-Cable Co., 39 N.Y.S.2d 539, 265 App. Div. 1062.

82. N.J.—Smith & Richards Lumber Co. v. Hurley, 185 A. 10, 116 N.J. Law 429—Meyer v. Standard Accident Ins. Co., 177 A. 255, 114 N.J. Law 483—Eastern Sash & Door Co. v. Sebastiani, 156 A. 451, 108 N.J. Law 333—Guerrino v. Di Trolio, 143 A. 803, 105 N.J. Law 5—Lake & Risley Co. v. Rabinovitch, 140 A. 311, 104 N.J. Law 309—Orange Lumber Co. v. De Fago, 134 A. 865, 103 N.J. Law 8—J. D. Loizeaux Lumber Co. v. Steinberg, 131 A. 181, 102 N.J. Law 15—William F. Glasser & Co. v. Muencks, 133 A. 430, 99 N.J. Eq. 42—Passaic Bergen Lumber Co. v. Brown, 192 A. 736, 15 N.J. Misc. 514, affirmed 196 A. 740, 119 N.J. Law 438.

40 C.J. p. 124 notes 81, 82, p. 123 note 63 [a].

Filing or recording contract generally see *supra* § 82.

Signing of contract by record owner of realty see *supra* § 81.

Object of statute is to give notice to persons other than the original contractor, who may be about to furnish material or labor for construction of building, that they cannot rely on lien for payment—American Homes Co. v. Krantz, 24 A.2d 518, 131 N.J. Eq. 213.

Conditional sales contract

The filing of a paper by a seller as a contract of conditional sale and

claimant other than the original contractor may obtain a lien for work done or materials furnished prior to the filing of the contract.⁸³ The failure of the recording officer properly to file a contract delivered to him for filing will not make the filing insufficient so as to deprive the owner of the benefit thereof.⁸⁴

§ 108. Effect of Stipulations in Principal Contract

Subcontractors, materialmen, and workmen are chargeable with notice of the terms of the original contract, and, as a general rule their right to a mechanic's lien is controlled by its terms.

Subcontractors, materialmen, and workmen are chargeable with notice of the terms of the original contract,⁸⁵ and, except in some jurisdictions,⁸⁶ as a general rule their right to a mechanic's lien is controlled by the terms of such contract.⁸⁷ Also it has been held that they are entitled to a lien only where the claim is for work done or materials furnished in conformity with the terms of the contract with the owner,⁸⁸ although there is also authority to the contrary.⁸⁹

not as a building contract is insufficient to protect the owner against liens of materialmen and laborers—*Jackson v Houghton Engineering Co*, 145 A 465, 105 N J Law 283

Contract held not fictitious

Owner's knowledge that third person considered himself contractor was held not to render contract filed fraudulent or fictitious as against materialman selling materials to him—*Eastern Sash & Door Co v Sebastiani*, 156 A 451, 108 N J Law 333

Fraud required to invalidate

Contract executed between owner and general contractor and filed for record must itself be tainted with fraud to avoid effect of filing—*Ewart v Johnson*, 166 A 716, 11 N J Misc 472

Remedy of claimant

Where building contract was timely filed, lien claimants had no remedy by filing mechanics' lien claims, but remedy was by notice to owner—*John Murtland, Inc. v Empire Trust Co*, C C A N J, 39 F 2d 341

83. N J—*Smith & Richards Lumber Co v Hurley*, 185 A 10, 116 N J Law 429

40 C J p 124 note 87 [a], p 143 note 47 [b]

84. N J—*Passaic Bergen Lumber Co v Brown*, 192 A 736, 15 N J Misc 514, affirmed 196 A 740, 119 N J Law 428

Irregular indexing

(1) Filing of building contract was held sufficient, notwithstanding Christian name of owner was in-

dexed under Italian spelling—*Guerriero v Di Trolio*, 143 A 803, 105 N J Law 5

(2) Fact that contract was not indexed under real name of contractor, but under fictitious name, does not enable claimant to claim he did not receive notice—*Cole Lumber & Supply Co v Beck*, Com Pl, 90 Pittsb Leg J 583, affirmed 33 A 2d 534, 153 Pa Super 97

85. Ala—*David Lupton's Sons Const Co v Hugger Bros Const Co*, 148 So 610, 227 Ala 25—C G Kershaw Contracting Co v Cascade Corporation of Alabama, 138 So 515, 224 Ala 116

40 C J p 147 note 90

86. Neb—*Coates Lumber, etc. Co v Klaas*, 168 NW 647, 102 Neb 660

40 C J p 147 note 91

87. La—*Morehouse Lumber & Building Material Co v Jacob & Walker*, App, 144 So 190, affirmed 147 So 504, 177 La 76

W Va—*Rosenbaum v Price Const Co*, 184 SE 261, 117 W Va 160

40 C J p 147 note 92

Stipulation against liens see *infra* § 109

88. Okl—*Rogers v Crane Co*, 68 P 2d 520, 180 Okl 139

40 C J p 147 note 93

89. Cal—*Howe v Schmidt*, 90 P 1056, 151 Cal 436

40 C J p 147 note 94

90. Mont—*Morin Lumber Co v Person*, 99 P 2d 306, 110 Mont 114
Waiver of lien generally see *infra* §§ 222–228

§ 109. — As to Lien

The courts are not in harmony as to whether a stipulation against liens in the contract between the owner and the contractor will deprive the subcontractor, materialman, or workman of the right to a mechanic's lien.

The courts are not in harmony as to whether a stipulation against liens in the contract between the owner and the contractor will deprive the subcontractor, materialman, or workman of the right to a mechanic's lien which the statute gives him.⁹⁰ There is authority that such a stipulation will not deprive the subcontractor, materialman, or workman of the right to a lien⁹¹ unless he assents or agrees to the stipulation⁹² or at least has actual notice thereof⁹³ before accepting the employment⁹⁴ or furnishing the materials.⁹⁵

In some jurisdictions a covenant or stipulation against liens in a contract between the owner and the contractor is binding on all persons who furnish labor or materials so as to preclude their acquiring any lien,⁹⁶ provided it is so clear and plain that it

91. Ark—*Home Oil Co v Helton*, 14 SW 2d 549, 179 Ark 132

Mont—*Morin Lumber Co v Person*, 99 P 2d 206, 110 Mont 114
Neb—*Corpus Juris* cited in *Walker v Collins Const Co*, 236 NW 334, 336, 121 Neb 157
40 C J p 148 note 8

92. Mont—*Morin Lumber Co v Person*, 99 P 2d 206, 110 Mont 114
Neb—*Corpus Juris* cited in *Walker v Collins Const Co*, 236 NW 334, 336, 121 Neb 157
40 C J p 148 note 9

Sub-subcontractor

Where general contractors and subcontractor had entered into written agreements with owners not to permit or suffer any mechanics' liens to be filed against property but contract between subcontractor and sub-subcontractor did not specifically impose that condition on the sub-subcontractor, it was entitled under its contract to retain all its legal rights until payment or a valid tender of payment—*Battista v Horton, Myers & Raymond*, 128 F 2d 29, 76 US App DC 1

93. N J—*Stein v Pennsylvania Dock & Warehouse Co*, 159 A 683, 10 N J Misc 568
40 C J p 148 note 10

94. N J—*Stein v Pennsylvania Dock & Warehouse Co*, *supra*
40 C J p 148 note 11

95. Or—*St Johns Lumber Co v Pritz*, 146 P 483, 75 Or 286

96. Ind—*Clarage v Palace Theatre Corporation*, 165 NE 550, 95 Ind App 443

must be understood,⁹⁷ or, in other words, provided it is either direct, positive, and express,⁹⁸ or is so clearly and necessarily implied from the language employed that a mechanic or materialman cannot fail to understand it:⁹⁹ without consulting a lawyer as to its legal effect,¹ and provided the stipulation is not made and entered into as a part of a fraudulent scheme to cheat subcontractors,² and provided further, where it is so required by statute, either that claimant has actual notice of the stipulation before any labor or materials are furnished by him³ or that a duly written⁴ and signed⁵ contract having the effect claimed⁶ is filed in a designated county office,⁷ within the time limited by statute,⁸ and is properly indexed⁹

The stipulation need not be in the original contract,¹⁰ but may be in a separate contract,¹¹ a modification of the original contract,¹² or a new contract superseding the original contract,¹³ provided it

exists before the making of the subcontract,¹⁴ the ordering of the materials,¹⁵ the performance of the services,¹⁶ or the furnishing of the materials¹⁷ under or for which the lien is claimed. Where the stipulation is contained in the original contract and the building is erected from beginning to completion under such contract, a subcontractor is bound thereby notwithstanding the conveyance of the property during the course of construction and prior to the making of the subcontract.¹⁸

Where the contract is fairly and reasonably susceptible of any other construction, it will not be construed as containing a stipulation against liens.¹⁹ Provisions which recognize and provide for the contingency of liens being filed,²⁰ such as provisions for indemnity or security against liens,²¹ do not of themselves bar a lien by persons not contracting directly with the owner, but a clear, direct, and positive provision prohibiting the filing of liens is not

Pa.—Bennar v Central Mausoleum Co, 156 A 239, 304 Pa 569—Rich v Boguszinsky, 88 Pa.Super 586 40 C.J. p 149 note 13

Activity of agent for contractor and bonding company, who completed contract, did not enlarge subcontractor's right to file lien against owner—Bennar v Central Mausoleum Co, 156 A 239, 304 Pa 569

Person protected

The stipulation against the filing of mechanics' liens is for the benefit of the owner, and not the contractor—Waldner v. Johnson, 22 Pa Dist 701

Waiver

The owner may waive the protection of the stipulation as to one claimant without waiving it as to others—Kyle v Graham, 46 Pa Super 6

97. Pa.—Burger v S R Moss Cigar Co, 74 A 219, 225 Pa 400 40 C.J. p 149 note 14

98. Ind.—Clarage v Palace Theatre Corporation, 165 NE 550, 95 Ind App 443 40 C.J. p 149 note 15

99. Pa.—Schwartz v Whelan, 145 A 525, 295 Pa 426, 65 A.L.R. 277 40 C.J. p 149 note 16

1. Pa.—Schwartz v Whelan, supra 40 C.J. p 149 note 17

2. Ill.—Illinois Interior Finish Co v Poenie, 277 Ill App 554 40 C.J. p 149 note 18.

3. Ill.—Illinois Interior Finish Co v Poenie, supra

Ind.—Holding v Lewis Mfg Co, 161 NE 702, 87 Ind App 296

Pa.—Bennar v Central Mausoleum Co, 156 A 239, 304 Pa 569—McCrary-Rodgers Co v Nenoff, 39 A 2d 260, 155 Pa Super 555—Houser

v Childs, 196 A 517, 129 Pa Super 565

40 C.J. p 149 note 19

4. Pa.—Bennar v Central Mausoleum Co, 156 A 239, 304 Pa 569—McCrary-Rodgers Co v Nenoff, 39 A 2d 260, 155 Pa Super 555—Houser v Childs, 196 A 547, 129 Pa Super 565

40 C.J. p 149 note 20

5. Pa.—Bennar v Central Mausoleum Co, 156 A 239, 304 Pa 569—McCrary-Rodgers Co v Nenoff, 39 A 2d 260, 155 Pa Super 555—Houser v Childs, 196 A 547, 129 Pa Super 565

40 C.J. p 149 note 21

6. Pa.—McCrary-Rodgers Co v Nenoff, 39 A 2d 260, 155 Pa Super 555—Houser v Childs, 196 A 547, 129 Pa Super 565

40 C.J. p 149 note 22

7. Pa.—Bennar v Central Mausoleum Co, 156 A 239, 304 Pa 569—McCrary-Rodgers Co v Nenoff, 39 A 2d 260, 155 Pa Super 555—Houser v Childs, 196 A 547, 129 Pa Super 565

40 C.J. p 150 note 23

Filing of contract generally see supra § 82

8. Pa.—Bennar v Central Mausoleum Co, 156 A 239, 304 Pa 569—McCrary-Rodgers Co v Nenoff, 39 A 2d 260, 155 Pa Super 555—Houser v Childs, 196 A 547, 129 Pa Super 565—Rich v Boguszinsky, 88 Pa Super 586—T N Olivieri Co v East Pennsylvania Eldership of the Church of God, 16 Pa Dist & Co 722

40 C.J. p 150 note 24

9. Pa.—Cole Lumber & Supply Co v Beck, 33 A 2d 534, 153 Pa Super

97—Houser v Childs, 196 A 547, 129 Pa Super 565

40 C.J. p 150 note 25

Indexing held sufficient

Pa.—Cole Lumber & Supply Co v Beck, 33 A 2d 534, 153 Pa Super 97

Indexing held insufficient

Pa.—Houser v Childs, 196 A 547, 129 Pa Super 565

10. Pa.—Kyle v Graham, 46 Pa Super 6

11. Pa.—Kyle v Graham, supra

12. Ill.—Kelly v Johnson, 95 NE 1068, 251 Ill 135, 36 L.R.A.N.S. 573

13. Pa.—Lee v Williams, 30 Pa Super 349

14. Pa.—Smith v Levick, 26 A 97, 153 Pa 522

40 C.J. p 150 note 30

15. Pa.—Lee v Williams, 30 Pa Super 349

16. Ill.—Kelly v Johnson, 95 NE 1068, 251 Ill 135, 36 L.R.A.N.S. 573

17. Ill.—Kelly v Johnson, supra Pa.—Lee v Williams, 30 Pa Super 349

18. Pa.—Felin v Locust Realty Co, 81 A 158, 232 Pa 123

40 C.J. p 150 note 34

19. Ind.—Peter & Burghard Stone Co v Marion Nat Bank of Marion, 153 NE 472, 198 Ind 581

40 C.J. p 150 note 38

20. Ind.—Peter & Burghard Stone Co v Marion Nat. Bank of Marion, supra

40 C.J. p 150 note 39.

21. Ind.—Peter & Burghard Stone Co v Marion Nat Bank of Marion, supra

40 C.J. p 150 note 40.

defeated by other provisions of the contract.²²

§ 110. — As to Payment

A subcontractor or other person not contracting directly with the owner is charged with notice of, and is bound by, the terms of the contract between the owner and the contractor relating to the mode and terms of payment.

A subcontractor or other person not contracting directly with the owner is charged with notice of,²³ and is bound by,²⁴ the terms of the contract between the owner and the contractor relating to the mode and terms of payment; and his contract with the contractor is presumed to have been made with reference to such terms.²⁵ Where the mode of payment provided for in the original contract is inconsistent with the existence of a lien in favor of subcontractors and others, they can have no lien²⁶ unless the owner has by his conduct deprived himself of the right to set up such provisions against the lien claimant.²⁷

Also the owner cannot be required to pay money to the lien claimant before it becomes payable according to the contract between the owner and the contractor,²⁸ but a subcontractor can enforce a lien for materials furnished notwithstanding an architect's certificate was not furnished the owner as required by the terms of the building contract before payments should be made, where it appears that the owner availed himself of a right given him by the terms of the contract in case the contractor abandoned the work to complete the building himself,²⁹ since the provision of the contract requiring the furnishing of an architect's certificate applies only under the condition that the contractor has performed his contract.³⁰ The owner, contractor, and his surety cannot, without the materialman's

consent, destroy his lien for materials furnished to the contractor by stipulations in a building contract or in the contractor's bond directing disposition of the unpaid balance resulting from performance of the contract by the contractor, or one standing in his shoes.³¹ Where an owner refuses to pay the contractor, relying on a provision of the contract that permits him to retain enough of the contract price to satisfy liens of subcontractors, he cannot also refuse to pay the subcontractors.³² A provision of the contract, reserving to the owner the right to see that money due the contractor, or as much thereof as may be necessary, should be applied to the payment of material and labor authorizes him to make a subsequent agreement with a materialman to pay for materials.³³

§ 111. Modification or Rescission of Principal Contract

The rights of subcontractors, materialmen, and workmen cannot be affected by any subsequent agreement between the owner and the contractor to which they have not assented and of which they have had no notice

The rights of subcontractors, materialmen, and workmen cannot be affected by any subsequent agreement between the owner and the contractor to which they have not assented³⁴ and of which they have had no notice.³⁵ Neither can the owner, by canceling his contract with the contractor, disappoint those who on the faith of the contract have entered into engagements with the contractor to furnish labor or materials,³⁶ especially where the materials have been furnished to a considerable extent³⁷ or subsequent work is done by subcontractors³⁸ without notice of the cancellation. A lien is not acquired, however, by a delivery of materials

22. Ind—Baldwin Locomotive Works v Edward Hines Lumber Co, 125 NE 400, 189 Ind 189, 13 ALR 1059, dissenting opinion 127 NE 275, 189 Ind 189. 40 C J p 150 note 41

23. Neb—Frost v Falgetter, 73 N W 12, 52 Neb 692 40 C J p 148 note 96

24. Pa—Campbell v. Scaife, 1 Phila 187 Va—Maddux v Buchanan, 92 SE 830, 121 Va 102

25. Ill—Orrell v. Snyder, 174 Ill App 239

26. Neb—Frost v Falgetter, 73 N W 12, 52 Neb 692 40 C J p 148 note 99

27. Ill—Welch v Sherer, 93 Ill 64 40 C J p 148 note 1.

28. NY—Doughty v Devlin, 1 ED Smith 625 40 C J p 148 note 2

29. NY—Campbell v Coon, 44 NE 300, 149 NY 556, 38 LRA 410.

30. NY—Campbell v Coon, supra

31. Ala—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 227 Ala 26 Rights of sureties completing contract see infra § 215

32. NY—Travis v Smith, 6 NY St 371

33. SC—Morgan-Austin Co v Essay, 86 SE 673, 102 SC 358

34. Mo—Corpus Juris quoted in Kierns v Gibson, App, 289 SW 358, 362 40 C J p 150 note 43

After notice of its terms and character, the contract cannot be

changed to the prejudice of the subcontractor or materialman—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 227 Ala 26—Cranford Mercantile Co v Wells, 70 So 666, 195 Ala 251

35. Mo—Corpus Juris quoted in Kierns v Gibson, App, 289 SW 358, 362 40 C J p 151 note 44

36. Ind—Coonse & Caylor Ice Co v. Home Stove Co, 121 NE 293, 70 Ind App 226 La—Girarthy v. Campbell, 6 Rob. 378.

37. La—Girarthy v Campbell, supra

38. Iowa—Garrison Grain & Lumber Co v Farmers' Mercantile Co, 164 NW 791, 181 Iowa 568 40 C J. p 151 note 49

after the contract between the owner and the contractor, pursuant to which the delivery is claimed to have been made, has terminated³⁹ Where the original contract is modified, but the modified contract would have been valid originally and the performance of it the basis for a lien, the fact that the performance was according to the terms of the modified, and not of the original, contract does not defeat the lien of a subcontractor⁴⁰

§ 112. Default in Performance of Principal Contract

As a general rule the failure of the principal contractor to complete his contract does not of itself defeat the right of the subcontractor, workman or materialman to a mechanic's lien.

It is well established as a general rule that the failure of the principal contractor to complete his contract does not of itself defeat the right of the subcontractor, workman, or materialman to a me-

chanic's lien⁴¹ The rule is especially applicable where the contractor has substantially, although not wholly, performed his contract⁴² or where the owner has waived the default of the contractor⁴³ Also the rule is especially applicable under statutes conferring a direct lien,⁴⁴ and even under statutes conferring a lien by subrogation the rule is applicable where, notwithstanding the abandonment of the contract by the contractor, there is something due him at the time claimants give notice or file their lien claims,⁴⁵ as where installments of the contract price are due and unpaid,⁴⁶ but under such statutes the right of a claimant to a lien, where the contractor abandons the contract,⁴⁷ as in all other cases, depends on there being something due or to become due the contractor, and hence there is no lien where the contractor abandons the contract or fails to complete it under such circumstances that there is nothing due or to become due him when claimant gives notice or files his lien claim,⁴⁸ as

39. Iowa.—A E Shorthill Co v Aetna Indemn Co, 134 NW 613
40 C J p 151 note 49

40. Ill.—Winkle Terra Cotta Co v Galena Safety Vault & Trust Co, 64 Ill App 184

41. Ala.—Corpus Juris cited in Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 597, 228 Ala 612, 102 A L R 346

Mo.—Concrete Engineering Co v Grande Bldg Co, 86 SW 2d 595, 230 Mo App 443

40 C J p 151 note 52

Default in performance as affecting Amount of lien see *infra* § 175
Lien of contractor see *supra* § 95
Performance of subcontract see *infra* § 113
Time for notice of lien see *infra* § 125

Abandonment by owner

The abandonment of an improvement before the completion thereof, by the owner of the premises, without fault of contractor, does not abrogate the right of laborers and materialmen to mechanics' liens for the value of the work done and the material furnished.—Smith v Gunness, 144 P 2d 186, 115 Mont 363

Nothing short of complete abandonment or full performance and payment before statutory notice is given owner of claimed lien for materials furnished to contractor, can deprive lienor of his rights.—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 227 Ala 25

Failure to obtain architect's certificate

The lien of a person other than the contractor is not defeated by the

failure of the contractor to obtain an architect's certificate

NY.—Rieser v Commeau, 114 NY S 154, 129 App Div 490, affirmed 92 NE 1100, 198 NY 560

Wis.—Seeman v Biemann, 84 NW 490, 108 Wis 365

Where the owner has made improper payments to the contractor after being served with notice of claims, the right to a lien to the extent of such payments is not defeated by the fact that the contractor abandoned or failed substantially to perform the contract.—Paris First Nat Bank v Lyon-Gray Lumber Co, 217 SW 133, 110 Tex 162

Notice of default

Completion of construction by owner before registering notice of contractor's default was immaterial with respect to liability to claimants, where claims were timely recorded.—Cook v Ruston Oil Mills & Fertilizer Co, 127 So 347, 170 La 10

Financial inability of lessee to complete construction of building, after work was done and materials furnished for which lien was sought, has been held not to defeat mechanic's lien.—Concrete Engineering Co v Grande Bldg Co, 86 SW 2d 595, 230 Mo App 443

42. NY.—Heckmann v Pinkney, 81 NY 211

43. Conn.—Hubbell, Hall & Randall Co v Pentecost, 93 A. 672, 89 Conn 262

40 C J p 151 note 54

44. ND.—Langworthy Lumber Co v Hunt, 123 NW 865, 19 ND 433

40 C J p 151 note 55

45. NY.—Rukeyser v Fountain, 173 NYS 21, 185 App Div 263
40 C J p 152 note 57

Trust fund

Where, shortly before completion of work under a contract for construction of a garage, the owner of the property placed a mortgage thereon, wherein he stipulated that proceeds of mortgage should constitute a trust fund to be applied to the cost of constructing the garage, the fact that principal contractor failed substantially to perform his contract would not relieve property owner of obligation to apply balance of proceeds of mortgage in payment of liens of subcontractors for material and labor furnished for construction of garage with knowledge and consent of property owner.—Cassino v Yacevich, 27 NYS 2d 95, 261 App Div 685

46. NY.—Foshay v Robinson, 32 N E 1041, 137 NY 134

40 C J p 152 note 58

47. Ill.—Hansen v Muldoon, 210 Ill App 513

NY.—Troughton v Digmores Holding Co, 173 NYS 659, 105 Misc 638

48. NH.—Bennett v Smith, Inc, 160 A 478, 85 NH 478

NY.—George E Sealy Co v Ards Bldg Corporation, 214 NYS 768, 216 App Div 313, affirmed 155 NE 899, 244 NY 565

40 C J p 152 note 61

Per cent retained by owner

Where the contract contains a provision for payment from time to time of a certain proportion of the value of the work done, the remainder to be paid on completion of the contract, and the contractor abandons, the amounts so retained never

where by the terms of the contract no part of the price is due until the contract is performed⁴⁹

The failure of the owner to take possession, as authorized by the contract, of plumber's supplies left on the premises at the time the contractor abandoned the work is not ground for a lien⁵⁰ Where a contractor has abandoned his contract for the construction of a building, he has no authority thereafter to purchase material so as to bind the owner⁵¹ However, it has been held that a subcontractor is not bound to know of the violation or non-fulfillment of the principal contract⁵²

Delay in performance The failure of the contractor to complete the construction of the building within the time limited in the contract does not deprive subcontractors or materialmen of their liens where time is not of the essence of the contract,⁵³ or where the owner extended the time for performance⁵⁴ or waived the right to terminate the contract on the ground of delay⁵⁵

Worthless improvement Some authorities hold that a subcontractor or materialman may be entitled to a lien even though, owing to the contractor's default, the improvement is worthless,⁵⁶ but other authorities take a contrary view⁵⁷

Completion by owner. Where the owner completes the work, after abandonment by the contractor, and the cost of completion equals or exceeds the unpaid portion of the contract price, no lien can be enforced⁵⁸ provided it appears that the owner completed the building according to the plan contemplated by the original contract⁵⁹ Conversely,

where the cost of completion by the owner is less than the unpaid balance on the contract, there is a right to a lien,⁶⁰ provided, according to some authorities, there is a provision in the contract authorizing the owner, on the contractor's abandonment or default, to complete the work and deduct the cost from the contract price⁶¹ and the owner acts under such provision.⁶² No lien can be acquired for what is done or furnished pursuant to the contract after the contractor has lost his right to continue work through his failure to perform and the owner has entered into possession for the purpose of completing on his own account⁶³ unless the work is done under a new agreement made directly with the owner⁶⁴

Completion by assignee or surety The completion of a contract by a surety or assignee of the contractor, after it has been abandoned by him, has the same effect as a completion by the contractor as far as the right of a subcontractor or materialman to a lien is concerned⁶⁵

§ 113. Subcontract and Performance Thereof

- a. In general
- b. Performance

a. In General

The contract of a subcontractor or materialman with the contractor need not be express but may be implied

The contract of a subcontractor or materialman with the contractor need not be express but may be implied⁶⁶ A general employment of a carpenter

become due the contractor and hence do not afford a basis for a lien—*Sioux Falls Pressed Brick Co v Sioux Falls Bd of Education*, 125 NW 291, 25 SD 36—40 CJ p 152 note 69

49 Ky—*Terrell v McHenry*, 89 S W 306, 121 Ky 452, 28 Ky L 402 40 CJ p 152 note 62

50. Conn—*Hubbell, Hall & Randall Co v Pentecost*, 93 A 672, 89 Conn 262

51. Minn—*Lampert Lumber Co v Campfield*, 127 NW 6, 111 Minn 359

52. Kan—*Elder Mercantile Co v Ottawa Inv Co*, 165 P 379, 100 Kan 597

53. Mo—*St Louis Fire Door & Sheet Metal Works v Viviano*, 185 SW 218, 194 Mo App 440

54. Mass—*Rockwood v Walcott*, 3 Allen 458

55. N Y—*Heckmann v Pinkney*, 81 N Y 211

Wyo—*Phelan v Cheyenne Brick Co*,

188 P 354, 26 Wyo 493, rehearing denied 189 P 1103, 26 Wyo 493

56. Wis—*W H Pipkorn Co v. Tratnik*, 152 NW 141, 161 Wis 91, 16 ALR 976

57. Ky—*Monyahan v Lancaster*, 182 SW 862, 168 Ky 677, 40 CJ p 153 note 72

58. Ala—*David Lupton's Sons Const Co v Hugger Bros Const Co*, 148 So 610, 227 Ala 25

Fla—*Curtiss-Bright Ranch Co v Selden Cypress Door Co*, 107 So 679, 91 Fla 354

N Y—*J W Van Cott & Son v Galion*, 298 NYS 67, 163 Misc 914

N C—*Piedmont Electric Co v Vance Plumbing & Electric Co*, 149 SE 858, 197 NC 495

40 CJ p 153 note 79

59. Ark—*Cost v Newport Builders' Supply Hardware Co*, 108 SW 509, 85 Ark 407, 14 Ann Cas 142 —*Long v Abeles*, 93 SW 67, 77 Ark 156

60. Colo—*Rice v Rhone*, 111 P 685, 49 Colo 41

40 CJ p 153 note 81

61. N Y—*Cassino v Yacevich*, 27 NYS 2d 95, 261 App Div 685—*George E Sealy Co v Ards Bldg Corporation*, 214 NYS 768, 216 App Div 313, affirmed 156 NE 899, 244 N Y 565

40 CJ p 153 note 83

62. N Y—*Ogden v Alexander*, 35 N E 638, 140 N Y 356

40 CJ p 153 note 84

63. Mass—*O'Driscoll v Bradford*, 50 NE 628, 171 Mass 231

64. Mich—*Delray Lumber Co v Keohane*, 92 NW 489, 132 Mich 17

40 CJ p 153 note 86

65. Md—*Gill v Mullan*, 116 A 563, 140 Md 1

40 CJ p 153 note 87

66. Mo—*Bruce v Berg*, 8 Mo App 204

Necessity of contract between claimant and contractor see supra § 97

by the contractor to work at day's wages to be afterward fixed is a sufficiently definite contract for the foundation of a mechanic's lien.⁶⁷ Where work is done and materials are furnished for a building by persons as partners, and the owner knows that such persons are doing the work, their right to a lien is not affected by the fact that one of them made the agreement with the contractor without disclosing the fact that he was acting for the firm.⁶⁸ Where it appears that the labor and material for which a subcontractor claims a lien went, by actual measurement, into the house on which the lien is claimed, it is immaterial whether the contract between the contractor and claimant, which related to two houses, fixed the price for each at the amount claimed or the price for both at double that amount.⁶⁹ Where general contractors and a subcontractor enter into a written agreement with owners not to permit or suffer any mechanics' liens to be filed, but such a condition is not contained in the contract between the subcontractor and a sub-subcontractor, it has been held that a provision requiring work to be done in accordance with plans and specifications in the principal contract does not impose an obligation on the sub-subcontractor either to furnish a release of lien or to see to it that no liens are filed.⁷⁰

Under the former statutes of some jurisdictions requiring the contract to provide for the completion of the work within a specified period of time after the date of the contract, it was sufficient if the original contract complied with the statute,⁷¹ even though the subcontract might not have fixed any time for completion,⁷² or fixed a time limit for performance beyond that provided in the original contract.⁷³

Cancellation. A subcontractor is not entitled to a lien where the subcontract has been canceled by agreement of the parties.⁷⁴

b. Performance

In order to entitle a subcontractor, or persons claiming under him, to a mechanic's lien it is as a rule necessary that he shall have substantially performed his subcontract.

In order to entitle a subcontractor, or persons claiming under him, to a mechanic's lien it is as a rule necessary that he shall have substantially performed his subcontract.⁷⁵ A trifling failure in the performance of the contract is not sufficient to defeat the lien where it appears that there has been a substantial compliance.⁷⁶ While the rule requiring substantial performance is applicable notwithstanding the contractor's waiver of complete performance,⁷⁷ and the contractor's erroneous construction of the subcontract in one detail does not justify the subcontractor's failure to perform other work concededly within the contract,⁷⁸ a subcontractor does not lose his right to a lien because of his failure to complete the work under the contractor where the cause of his ceasing work was the contractor's insolvency and failure to pay him,⁷⁹ or abandonment of the contract,⁸⁰ or where he was prevented from fully performing his contract by the act of the owner,⁸¹ or where he was stopped in the performance of the work by disputes between the contractor and the owner,⁸² or where the owner waived full performance⁸³ or is estopped to claim that the subcontractor did not fully perform.⁸⁴

The right of a subcontractor to a lien will not be defeated by defects in the work arising from the architecture,⁸⁵ and where the subcontractor offers to correct work differing from the plan, but is pre-

67. Mass—Wilson v Sleeper, 131 Mass 177, distinguishing Manchester v Searle, 121 Mass 418.

68. Mass—Wahlstrom v Trulson, 43 NE 183, 165 Mass 439.

69. Mo—Hannon v Logan, 14 Mo App 33.

70. DC—Battista v Horton, Myers & Raymond, 128 F2d 29, 76 US App DC 1.

71. Ill—Miller v Benson, 146 Ill App 132.

72. Ill—Miller v Benson, supra—Merritt v Crane Co., 126 Ill App 337, affirmed 80 NE 103, 225 Ill 181.

73. Ill—Miller v Calumet Lumber & Manufacturing Co., 121 Ill App 56.

74. Cal—Fontaine v Storrie, 45 P 2d 361, 7 Cal App 2d 104.

75. Cal—Fontaine v Storrie, 45 P 2d 361, 7 Cal App 2d 104.

Ill—Guaranty Iron & Steel Co v Leyden, 235 Ill App 191.

Neb—Parsons Const Co v Gifford, 262 NW 508, 129 Neb 617.

Or—Davis v Bertschinger, 241 P 53, 116 Or 127.

40 C J p 154 note 97.

Substantial compliance not shown.

Cal—Fontaine v Storrie, 45 P 2d 361, 7 Cal App 2d 104.

Neb—Parsons Const Co v Gifford, 262 NW 508, 129 Neb 617.

76. Neb—Parsons Const Co v Gifford, supra.

77. NY—Szemko v Weiner, 163 N YS 382, 176 App Div 620.

40 C J p 154 note 98.

78. NY—MacKnight Flintic Stone Co v New York, 79 NYS 521, 78 App Div 641, affirmed 68 NE 1119, 176 NY 586.

79. Mass—Pierce v Cabot, 34 NE 362, 159 Mass 202.

40 C J p 154 note 1.

80. NJ—Turck v. Allard, 94 A 583, 87 NJ Law 721.

40 C J p 154 note 2.

81. NY—Greenberg v Marsh, 167 NYS 102, 101 Misc 18, affirmed 170 NYS 1083, 184 App Div 890.

82. NY—Warwick First Nat Bank v Mitchell, 93 NYS 231, 46 Misc 30.

83. Conn—Ennis v Parkhurst, 69 A 346, 87 Conn 686.

84. Ill—Mantonys v Reilley, 56 NE 426, 184 Ill 183.

40 C J p 154 note 7.

85. Ill—Welch v Sherer, 93 Ill. 64.

Or—Davis v Bertschinger, 241 P. 53, 116 Or. 127.

vented by the owner from doing so, he may enforce his lien if the cost of correction is trifling⁸⁶

Architect's certificate Where the contract between the principal contractor and the subcontractor requires an architect's certificate as to the work done by the subcontractor, a compliance therewith is a condition precedent to the assertion of a lien⁸⁷ unless it is waived⁸⁸ or unreasonably refused⁸⁹

Completion by contractor Where a principal contractor on a default of a subcontractor undertook with the consent of the owner and a materialman, who had furnished materials to the subcontractor, to complete the work, the right of the materialman to claim a lien on the money coming due under the contract from the principal contractor to the subcontractor continued as though the subcontractor had completed his contract⁹⁰ However, where subcontractors, unable to complete their contract, authorize the contractor to complete it on their account, which he does, the cost is to be deducted from the contract price before anything be-

comes due to the subcontractors to which a lien may attach⁹¹

§ 114. Lien on Money Due Contractor

Under some statutes subcontractors, materialmen, laborers, and others who have done work for, or furnished materials to, the contractor are given a lien on the balance due or to become due to the contractor from the owner.

Although not entitled to such a lien in the absence of statute,⁹² under some statutes subcontractors, materialmen, laborers, and others who have done work for, or furnished materials to the contractor are given a lien on the balance due or to become due to the contractor from the owner⁹³ Under such statutes a subcontractor, workman, or materialman has the right to serve on the owner a notice or statement of the amount due him by the contractor,⁹⁴ commonly called a "stop notice,"⁹⁵ and it then becomes the duty of the owner to hold back out of any money due or to become due the contractor a sufficient amount to meet the claim,⁹⁶ and to the extent of the amount due or to become

86. Ill—Welch v Sherer, 93 Ill 64

87. N.Y.—Schillinger Fire Proof Cement & Asphalt Co v Arnott, 32 N.Y.S. 343, 86 Hun 182, affirmed 46 N.E. 956, 152 N.Y. 584

88. N.Y.—Schillinger Fire Proof Cement & Asphalt Co v Arnott, supra

89. N.Y.—Schillinger Fire Proof Cement & Asphalt Co v Arnott, supra

40 C.J. p 155 note 12

90. N.Y.—Martin v Flahive, 98 N.Y.S. 577, 112 App.Div. 347

91. N.Y.—Brainard v Kings County, 32 N.Y.S. 311, 84 Hun 290, affirmed 50 N.E. 263, 155 N.Y. 538

92. La.—Morehouse Lumber & Building Material Co v Jacob & Walker, App., 141 So. 190, affirmed 147 So. 504, 177 La. 76

N.J.—Guise v John C. Guise, Inc., 174 A. 681, 116 N.J.Eq. 590

93. U.S.—Hartford Accident & Indemnity Co v N. O. Nelson Mfg. Co., Miss., 54 S.Ct. 392, 291 U.S. 352, 78 L.Ed. 840

Ala.—David Lupton's Sons Const. Co v Hugger Bros Const. Co., 148 So. 610, 227 Ala. 25

Ill.—Douglas Lumber Co v Chicago Home for Incurables, 43 N.E.2d 635, 380 Ill. 87

Ind.—Nash Engineering Co v Marcy Realty Corporation, 54 N.E.2d 263, 222 Ind. 396

N.J.—Meyer v Standard Accident Ins. Co., 177 A. 255, 114 N.J.Law 483—Harry Pinsky & Son Co v Wike, 136 A. 920, 101 N.J.Eq. 45, affirmed 141 A. 920, 103 N.J.Eq. 18.

Tex.—Gay v Acme Brick Co., Civ. App., 15 S.W.2d 725, error refused 40 C.J. p 155 note 16

Provision in contract for retention of money due contractor see infra § 255

Liberal construction

The statute should be liberally construed in favor of stop notice claimant to effect object of securing payment to materialmen or subcontractors on default of contractor as long as there is no hardship on owner—Vogel v Sloan, 130 A. 889, 98 N.J.Eq. 300

Contractor or subcontractor

It has been held that the purpose of the statute is to secure to workmen and materialmen the moneys due them, whether from the contractor or subcontractor—St. Michael's Orphan Asylum and Industrial School, Hopewell, N.J., v Conneen Const. Co., 166 A. 458, 114 N.J.Eq. 276, affirmed 170 A. 649, 115 N.J.Eq. 334

Amount due for extra work

(1) The fact that final amount against which stop notice claims are perfected includes money due for extra work does not defeat such liens when filed contract includes extra work at specified rates—Harry Pinsky & Son Co v Wike, 136 A. 920, 101 N.J.Eq. 45, affirmed 141 A. 920, 103 N.J.Eq. 18

(2) When a contract for a structure provides for changes in the plans and specifications, and extra work is done in completing the structure, without a new contract, a subcontractor of any part of the

job may perfect a lien on the amount due from the owner to the contractor for such extra work—Dunn v Rankin, 27 Ohio St. 132

94. Fla.—Standard Accident Ins. Co v Bear, 184 So. 97, 134 Fla. 523, 127 A.L.R. 1

Miss.—White's Lumber & Supply Co v Rea, 131 So. 259, 158 Miss. 695

Tex.—Bradley v Oldham, Civ. App., 134 S.W.2d 422, error refused—Compton v Jennings Lumber Co., Civ. App., 295 S.W. 308

40 C.J. p 155 note 17

Necessity and sufficiency of notice see infra § 116

Filing of contract

In some jurisdictions the remedy by stop notices is limited to cases where the contract and specifications have been filed—English v Warren, 54 A. 860, 65 N.J.Eq. 80—Pfeifer v Reiman, 161 A. 825, 10 N.J.Misc. 898

95. N.J.—Tile Wholesalers & Importers v Ruppert, 17 A.2d 607, 135 N.J.Law 597—Harry Pinsky & Son Co v Wike, 136 A. 920, 101 N.J.Eq. 45, affirmed 141 A. 920, 103 N.J.Eq. 18—Vogel v Sloan, 130 A. 889, 98 N.J.Eq. 300

40 C.J. p 155 note 19—p 157 note 41

98. Fla.—Standard Accident Ins. Co v Bear, 184 So. 97, 134 Fla. 523, 127 A.L.R. 1

N.J.—Brown v Home Development Co., 18 A.2d 742, 129 N.J.Eq. 172 N.C.—Schnepp v Richardson, 22 S.E.2d 555, 222 N.C. 228

40 C.J. p 155 note 19

Stop notice operates on sums due or to become due from owner to the

due the contractor,⁹⁷ but not further,⁹⁸ the owner then becomes directly liable to claimant, who, to the extent of his demand, takes the place of the contractor.⁹⁹

While this right is usually conferred by the same statutes which provide for mechanics' liens and is termed a "lien," the remedy provided is really more in the nature of an equitable garnishment,¹ or, as frequently stated, the notice to the owner has the effect of working an assignment pro tanto of that which is due or to become due from the owner to the contractor from the time of the service of such notice.² The remedy is distinct³ and disconnected⁴ from, and additional to,⁵ the remedy by lien on the land and building, and should be regarded with favor by the courts.⁶ Except in at least one jurisdiction,⁷ it does not depend on the right to acquire and enforce a mechanic's lien on the property,⁸ but may, and frequently does, exist where the property itself is not subject to a lien,⁹ as where the right to a lien on the premises has been waived,¹⁰ or, except in at least one jurisdiction,¹¹ where the building or structure is public property.¹²

The right is not dependent on the completion of the principal contract by the contractor.¹³ A recovery of judgment against the contractor does not

destroy the rights acquired by the notice,¹⁴ nor is the dismissal of a suit brought by the contractor against the owner on the ground that there is nothing due him a determination against claims of subcontractors on the fund still in the owner's hands.¹⁵ Under the terms of a statute a claimant who, on the written demand of the owner, refuses to give a stop notice is deprived of the right to claim a mechanic's lien on the property.¹⁶

Liens on public funds appropriated and due contractors are considered in Counties § 201, Drains § 43; Highways § 209, the CJS title Municipal Corporations § 1216, also 44 CJ p 416 note 4-p 422 note 7, the CJS title Schools and School Districts § 317, also 56 CJ p 526 note 54-p 528 note 91; the CJS title States § 127, also 59 CJ p 191 note 82-p 192 note 11; and the CJS title United States § 102.

§ 115. — When, and to Whom, Right Available

In order to be entitled to a lien on money due the contractor, a person must be within the class contemplated by the statute.

In order to be entitled to the statutory remedy of a lien on money due the contractor, a person must be within the class contemplated by the stat-

contractor—*Wilkinson v Behringer*, 189 A 405, 118 NJ Law 5—*Meyer v Standard Accident Ins Co*, 177 A 255, 114 NJ Law 483

Money due under mortgage

Claimant furnishing materials to contractor erecting building may have amount due him retained by owner from money still due contractor under mortgage—*Schindel v Muencks*, 141 A 4, 101 NJ Law 223

Money held to cover assignments

It has been held to be no defense as against materialman that moneys in hands of owner, unpaid to general contractor at time of service of stop notice, were held to cover assignments by general contractor to other materialmen—*Decker Building Material Co v Meyer*, 162 A 531, 109 NJ Law 408

97. NJ—*Stone Post Co v Corcoran*, 77 A 1031, 80 NJ Law 549
40 CJ p 156 note 20

98. NJ—*Wilkinson v Behringer*, 189 A 405, 118 NJ Law 5
40 CJ p 156 note 21

99. Fla—*Standard Accident Ins Co v Bear*, 184 So 97, 134 Fla 523, 127 A L R 1

NJ—*Stone Post Co v Corcoran*, 77 A 1031, 80 NJ Law 549
40 CJ p 156 note 22

1. Cal—*Diamond Match Co v Silberstein*, 171 P 871, 165 Cal 282
40 CJ p 156 note 25.

2. NJ—*Brown v Home Development Co*, 18 A 2d 742, 129 NJ Eq 173—*De Mas v F W Bowden Co*, 132 A 607, 99 NJ Eq 70
40 CJ p 156 note 26

Not all qualities of assignments

Stop notices have not all the qualities of assignments, since owner cannot claim credit for amount claimed in the notices unless he has in fact paid amount claimed to be due—*Tile Wholesalers & Importers v Ruppert*, 17 A 2d 607, 125 NJ Law 597

3. Cal—*Southern California Electric Co v McDonald*, 173 P 760, 178 Cal 386
40 CJ p 156 note 27

4. Cal—*Southern California Electric Co v McDonald*, supra
40 CJ p 156 note 28

5. Cal—*Weldon v Los Angeles County Super Ct*, 71 P 502, 138 Cal 427
40 CJ p 156 note 29

6. Cal—*Weldon v Los Angeles County Super Ct*, supra
40 CJ p 156 note 30

7. Tex—*Muller v McLaughlin*, 84 S W 687, 37 Tex Civ App 449

8. Cal—*Stettin v Wilson*, 166 P 6, 175 Cal 423
40 CJ p 156 note 32

9. Ill—*Douglas Lumber Co v Chi-*

cago Home for Incurables, 43 N E 2d 535, 380 Ill 87
40 CJ p 156 note 33

10. Ill—*Douglas Lumber Co v Chicago Home for Incurables*, supra
40 CJ p 156 note 34

11. Iowa—*Breneman v Harvey*, 30 N W 846, 70 Iowa 479

12. NY—*McKee v Rapp*, 35 NY S 175
40 CJ p 156 note 36

Completion by bonding company

Owner continuing to disburse money after contractor's abandonment through agent of bonding company was not relieved of liens of which she had no notice before abandonment—*Gay v Acme Brick Co*, Tex Civ App, 16 S W 2d 725, error refused

13. Ala—*Corpus Juris cited in Baker Sand & Gravel Co v Rogers Plumbing & H Co*, 154 So 591, 697, 228 Ala 612, 103 A L R 346
NJ—*F Bowden Co v Baer*, 123 A 737, 99 NJ Law 361—*Brown v Home Development Co*, 18 A 2d 742, 129 NJ Eq 172
40 CJ p 156 note 38

14. NJ—*Anderson v Huff*, 23 A 654, 49 NJ Eq 349

15. Ohio—*Owen v Murry*, 6 Ohio S & C P 233, 4 Ohio NP 151

16. Cal—*N O Nelson Mfg Co v Rush*, 174 P 327, 178 Cal 569.

ute¹⁷ While some statutes of this nature are available to a person furnishing material to a subcontractor¹⁸ regardless of the state of the account between the principal contractor and the subcontractor,¹⁹ under other statutes claimant must be a creditor of the contractor²⁰ The claim must be for work done on, or materials furnished for, the building or other improvement,²¹ the principal contract must be within the statutes,²² there must be something due, or to become due, the contractor,²³ and there must be something due claimant from the contractor²⁴

§ 116. — Demand and Notice

Compliance with statutory requirements, with re-

gard to demand and notice, is necessary to obtain a lien on money due the contractor from the owner.

It is only by compliance with the statute that the lien on money due the contractor from the owner may be obtained²⁵ Where the statute requires a notice, a notice conforming to the statutory requirements²⁶ must be given²⁷ within the required time²⁸ by the proper person²⁹ and served on the proper person³⁰ Under some statutes claimant must have demanded payment from the contractor of such an amount as he was entitled to receive at once and been refused,³¹ and the notice must recite such demand and refusal³² Also under some statutes the owner must be satisfied of the correctness of the demand³³ While the owner cannot

17. Ind—Nash Engineering Co v Marcy Realty Corporation, 54 N E 2d 263, 232 Ind 396

NY—Burst v Jackson, 10 Barb 219
Subcontractor of subcontractor cannot give effective stop notice—Gammill Co v Guesnard, 150 So 214, 167 Miss 868

18. NJ—Morris County Golf Club v Hegeman-Harris Co, Ch, 121 A 528
40 C J p 157 note 43

19. NC—Powell v King Lumber Co, 84 S E 1032, 168 NC 632—Borden Brick & Tile Co v Pulley, 84 S E 513, 168 NC 371

20. Ohio—Stephens v United Railroads Stock Yard Co, 29 Ohio St 227
40 C J p 157 note 45

21. NJ—Seton Hall College v Calumet Constr Co, 88 A 387, 81 N J Eq 148, affirmed 88 A 390, 81 N J Eq 219, 220, 221
40 C J p 157 note 46

22. Pa—Adams v City Controller, 20 Pa Dist 1021

23. NJ—Post v Geldziler, 145 A 323, 105 N J Law 370—J. D Loizeaux Lumber Co v Steinberg, 131 A 131, 102 N J Law 15—Brunetti v Grandi, 104 A 139, 89 N J Eq 116

NY—Bay Ridge Plastering Corporation v John B Sweeney & Son Corporation, 44 N Y S 2d 186
40 C J p 157 note 48

24. NJ—Seton Hall College v Calumet Constr Co, 88 A 387, 81 N J Eq 148, affirmed 88 A 390, 81 N J Eq 219, 220, 221
40 C J p 157 note 49

25. Miss—White's Lumber & Supply Co v Rea, 131 So 259, 158 Miss 695

NJ—Meyer v Standard Accident Ins Co, 177 A 255, 114 N J Law 483

Ohio—Cincinnati Builders' Supply

Co v Roehm, 182 N E 680, 43 Ohio App 299
40 C J p 157 note 51

Contract with owner

Statute providing procedure whereby materialman may preserve lien has application only where materials are not furnished direct to owner—Dallas Nat Bank v Peaslee-Gaulbert Co, Tex Civ App, 35 S W 2d 221, error dismissed

26. Miss—U S Fidelity & Guaranty Co v Parsons, 122 So 544, 154 Miss 587

40 C J p 157 note 52
Notice to perfect lien on property see infra §§ 120-129

Amount of claim

(1) Honest error in amount of stop notice claim does not destroy validity of claim, especially where it does not contribute to circumstance of nonpayment—Harry Pinsky & Son Co v Wike, 136 A 920, 101 N J Eq 45, affirmed 141 A 920, 103 N J Eq 18

(2) Stop notice, claiming over one hundred dollars too much, and reciting contract sum seven hundred dollars below that proved, was invalid—Hasson v Bruzel, 144 A 819, 104 N J Eq 95

Description of property

Fact that stop notice described property as located on "avenue" instead of "road" has been held not so misleading from remainder of description, which was accurate, as to warrant nonsuiting materialman—J D Loizeaux Lumber Co v Steinberg, 131 A 131, 102 N J Law 15

27. Ill—Pirola v W J Turnes Co, 87 N E 354, 238 Ill 210
40 C J p 158 note 53

28. Cal—San Mateo Planing Mill Co v Davenport Realty Co, 24 P 2d 787, 218 Cal 702

40 C J p 158 note 54

29. NJ—South End Impr Co v Harden, Ch, 52 A 1127
40 C J p 158 note 55

30. Cal—San Mateo Planing Mill Co v Davenport Realty Co, 24 P. 2d 787, 218 Cal 702
40 C J p 158 note 56

Contractor

Materialman may recover value of materials, from owner of property protected from mechanic's lien, out of money due by owner to contractor without service of stop notice on contractor, where failure to serve notice is due to death of contractor, or that he has absconded and cannot be found—J D Loizeaux Lumber Co v Steinberg, 131 A 131, 102 N J Law 15

Husband of owner

(1) Service of stop notice on owner's husband who had full charge of building, held valid and effective—Sanders v Van Sant-Willis Co, 163 A 550, 112 N J Eq 162, affirmed Sanders v Osborne & Marsellis Co, 168 A 388, 114 N J Eq 21

(2) Where husband signed contract for erection of building in own name, but as agent for wife, protecting her estate from liens of materialmen, fact that service of stop notice was made on husband and not on wife did not prevent materialman from suing wife for value of materials furnished out of funds due contractor by wife as owner of properties secured against liens, since wife cannot accept benefit of her husband's acts and repudiate his agency, as far as acceptance of service of stop notice is concerned—J D Loizeaux Lumber Co v Steinberg, 131 A 131, 102 N J Law 15

31. NJ—Evans v Lower, 58 A 294, 67 N J Eq 232
40 C J p 158 note 57.

32. NJ—Cicalese v Fortunato, 112 A 608, 92 N J Eq 339
40 C J p 158 note 58

33. NJ—Tile Wholesalers & Importers v Ruppert, 17 A 2d 607, 125 N J Law 597
40 C J p 159 note 59.

properly express dissatisfaction without just cause therefor,³⁴ nevertheless, where he is properly satisfied that the demand is correct only in part, he is not authorized by the statute to retain out of the moneys due the contractor a sum sufficient to pay such part.³⁵ Until he has given, served, or filed the prescribed notice, accordingly as the particular statute may provide, the subcontractor, workman, or materialman has no preferential right to payment out of the sum due the contractor from the owner.³⁶

§ 117. — Satisfaction and Disposition of Balance

The owner is required by statute to pay the claimant when a stop notice has been served and sufficient money becomes due from owner to the contractor. The contractor's right to the balance over the amount of the claims for which notices have been filed remains unimpaired.

On being satisfied of the correctness of the demand, the owner is required by statute to pay claimant when a stop notice has been served and sufficient money becomes due from the owner to the contractor.³⁷ Since the subcontractor acquires no general lien on the whole fund in the owner's hands,³⁸ but what amounts to a specific appropriation of a part sufficient to pay his account,³⁹ the

contractor's right to the balance over the amount of the claims for which notices have been filed remains unimpaired.⁴⁰ Where the lien can be satisfied out of the amount due the principal contractor when notice is served or filed, it will not attach to an amount subsequently becoming due.⁴¹ On the other hand, where nothing is then due, or the amount due is insufficient to satisfy the lien, it attaches to any amount subsequently becoming due under the contract.⁴² However, in such case, the owner must withhold a sufficient amount to meet the claims out of the moneys first becoming due thereafter,⁴³ and, if an installment becoming due next after the service of such notices satisfies them and leaves a residue, that residue is at the disposal of the contractor⁴⁴ and liable to the attack of his outside creditors,⁴⁵ but, if there is a deficiency unsatisfied, notices will operate on the next installment which comes due under the contract in the progress of the work, and so on until the final installment has been disposed of in the same manner,⁴⁶ the effect of the stop notice not being limited to the money due at the time of the giving of the notice, or falling due next after the use in the building of the materials on account of which the notice is given.⁴⁷

III. PERFECTION OF LIEN

A IN GENERAL

§ 118. Nature and Form of Proceedings in General

The rules relating to the necessity for compliance with statutory requirements, notice to the owner, and furnishing a statement or account to the owner are discussed in the sections immediately following.

Examine Pocket Parts for later cases.

§ 119. Necessity for Compliance with Statutory Requirements

Compliance with statutory requirements is essential to perfection of a mechanic's lien.

While some authorities deny that there can be an inchoate mechanic's lien on real property,⁴⁸ other authorities hold or recognize that the doing of work

34. NJ—Tuttle v Cadwell, 105 A 11, 92 NJ Law 26

35. NJ—Tuttle v Cadwell, supra

36. NJ—Adams v Wells, 53 A 610, 64 NJ Eq 211

40 C J p 159 note 63

Priority between person giving stop notice and

Assignee of contractor see infra § 211

Other persons giving stop notices see infra § 198

37. NJ—Ford v R C Church of Our Lady of Mt Carmel, 154 A 403

Owner protected by statute

If owner pays stop notice claims of laborers and materialmen in order in which they are filed, he is protected by statute—Brown v Home

Development Co, 18 A 2d 742, 129 NJ Eq 172

Property owner executing mortgage to contractor in advance of time stipulated has been held liable to pay stop notices out of his own funds, in absence of agreement with contractor exacting releases from claims of those furnishing labor and materials for building—William F Glasser & Co v Muencks, 133 A 430, 99 NJ Eq 42

38. Ohio—McCullom v Richardson, 2 Handy 274, 12 Ohio Dec 440

39. Ohio—McCullom v Richardson, supra

40. NJ—Flaherty v Atlantic Lumber Co, 41 A 186, 58 NJ Eq 467 40 C J p 159 note 71

41. NY—Herrman v New York, 120 NYS 146, 136 App Div 28

42. NY—Herrmann v New York, 114 NYS 1107, 130 App Div 531, affirmed 93 NE 376, 199 NY 600

43. Cal—Diamond Match Co v Silberstein, 131 P 874, 165 Cal 283

44. NJ—Donnelly v Johnes, 44 A 180, 58 NJ Eq 442

45. NJ—Donnelly v Johnes, supra

46. NJ—Donnelly v Johnes, supra

47. Cal—Fuller v Towne, 193 P 88, 184 Cal 89

48. NY—Tisdale Lumber Co v Read Realty Co, 138 NYS 829, 154 App Div 270—Chambers v George Vassar's Sons & Co, Inc. 143 NYS 615, 81 Misc 662

or furnishing of materials gives an inchoate or imperfect lien or right to acquire a lien,⁴⁹ but that only an inchoate lien exists prior to its perfection in the manner required⁵⁰ The lien is lost unless perfected within the time and in the manner prescribed by statute,⁵¹ and, since the existence and continuation of a mechanic's lien depend on statute rather than on equitable principles, knowledge by the purchaser or lienor of construction of the building cannot take the place of compliance with statutory requirements⁵²

The statutes prescribe the steps to be taken to perfect the lien,⁵³ and a compliance with the statutory requirements is necessary in order to acquire a valid and enforceable lien,⁵⁴ but the same rule which makes this essential renders it unnecessary to take any other step than is thus required⁵⁵ There must be at least a substantial compliance with the statutory requirements,⁵⁶ and, according to some authorities, there must be a strict compliance,⁵⁷ but, according to other authorities, a substantial compliance is sufficient,⁵⁸ and it is some-

49. Ga.—Green v Farrar Lumber Co, 46 SE 62, 119 Ga 30
40 C J p 160 note 82

50. Ga.—Carter-Moss Lumber Co v Short, 18 SE 2d 61, 66 Ga App 330
—Middle Georgia Lumber Co v Hunt, 186 SE 714, 53 Ga App 578
40 C J p 160 note 83

51. Va.—Wallace v Brumback, 12 SE 2d 801, 177 Va 36

52. Va.—Wallace v Brumback, supra
Excuse for not giving notice, or waiver of notice, see *infra* § 122

53. Ga.—Carter-Moss Lumber Co v Short, 18 SE 2d 61, 66 Ga App 330
—Middle Georgia Lumber Co v Hunt, 186 SE 714, 53 Ga App 578
40 C J p 160 note 84

54. Ala.—Buettnier Bros v Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala 553—Richards v William Beach Hardware Co, 7 So 2d 492, 212 Ala 535

Conn.—Swift & Upson Lumber Co v W L Hatch Co, 162 A 19, 115 Conn 491

Del.—Hendrix v Kelley, 143 A 460, 4 WW Harr 120

DC.—Deland v Wagner, 64 F 2d 552, 62 App DC 64—Chamberlin Metal Weather Strip Co v Karrick, 53 F 2d 928, 60 App DC 316

Kan.—General Air Conditioning Corporation v Stuewe, 131 P 2d 638, 156 Kan 182, 143 ALR 1181—Baker v Griffin, 243 P 1057, 120 Kan 448

Ky.—Powers v Brewer, 38 SW 2d 466, 238 Ky 579

Mo.—Schwartz Materials Co v West End Realty & Construction Co, App, 154 SW 2d 366—Hankenamp v Hagedorn, App, 110 SW 2d 826
—Concrete Engineering Co v Grande Bldg Co, 86 SW 2d 595, 230 Mo App 443—Realty Sav & Inv Co v Washington Sav & Bldg Ass'n, App, 63 SW 2d 167
NJ.—Smith & Richards Lumber Co v Hurley, 185 A 10, 116 NJ Law 429—Slaff v Tramontin, 155 A 458, 107 NJ Law 484

NY.—Frank Teicher, Inc, v Gold, 267 NYS 164, 239 App Div 285—Syracusa v Inch Corporation, 298 NYS 878, 164 Misc 820,

Ohio.—Crandall v Irwin, 39 NE 2d 608, 139 Ohio St 253, 139 ALR 895, adhered to 40 NE 2d 933, 139 Ohio St 463, 139 ALR 900—Marcum v Home Loan & Building Ass'n, 186 NE 920, 45 Ohio App 237—Brown v Banks, 177 NE 242, 39 Ohio App 188

Or.—Lorenz v Pilsener Brewing Co of Oregon, 81 P 2d 104, 159 Or 552
Pa.—Flesher v Layton, Comp L, 33 West Co 195

RI.—Art Metal Const Co v Knight, 185 A 136, 56 RI 228

Tenn.—McDonnell v Amo, 34 SW 2d 212, 162 Tenn 36—Henderson v Watson, 160 SW 2d 429, 25 Tenn App 506

40 C J p 160 note 85

Creature of statute

Mechanic's lien is creature of statute, and in order to entitle claimant to such lien, there must be fair compliance with statutory requirements—Northwestern Mut Savings & Loan Ass'n v Kessler, 268 NW 692, 66 ND 737

Mandatory despite liberal construction

A provision for liberal construction of mechanic's lien law does not justify relinquishment of a mandatory requirement—C C Constance & Sons v Lay, 172 NE 283, 122 Ohio St 468

Single omission

All statutory provisions for perfection of mechanic's liens are indispensable, and omission of any one of them is fatal—Coleman v Pearman, 165 SE 371, 159 Va 72

55. Cal.—Corbett v Chambers, 41 P 873, 109 Cal 178

56. Ala.—Richards v William Beach Hardware Co, 7 So 2d 492, 242 Ala 535

Ark.—Morehart v A B Beeler Lumber Co, 4 SW 2d 29, 176 Ark 818
Cal.—Stanislaus Lumber Co v Pike, 124 P 2d 190, 51 Cal App 2d 54—Holm v Bramwell, 67 P 2d 114, 20 Cal App 2d 332

Fla.—Masterbilt Corporation v S A Ryan Motors of Miami, 8 So 2d 818, 149 Fla 644

ND.—Corpus Juris cited in Austed

v Dreier, 221 NW 1, 2, 57 ND 224

Okl.—Clark v Oklahoma Electric Co, 288 P 935, 144 Okl 31.

Or.—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—Shea v Graves, 19 P 2d 406, 142 Or 503
Va.—Coleman v Pearman, 165 SE 371, 159 Va 72

40 C J p 161 note 87

57. Fla.—Paxton-Pavey Lumber Co of Florida v Rehbaum, 129 So 766, 100 Fla 88—Ft Meade Hotel Co v Knoxville Iron Co, 127 So 896, 99 Fla 947

Ill.—Liese v Hentze, 158 NE 428, 326 Ill 633—F E Schoenberg Mfg Co v Broadway Central Hotel Corporation, 259 Ill App 40—Gottschalk Const Co v Carlson, 253 Ill App 520

Mass.—William S Howe Co v Theyson, 160 NE 287, 263 Mass 37

Mich.—Grand River Lumber & Coal Co v Glenn, 207 NW 855, 234 Mich 310

Ohio.—Higgins Mfg Co v Hing, 175 NE 710, 38 Ohio App 87—D & H Coal Co v Lay, 175 NE 30, 37 Ohio App 433

Pa.—Bezar v Dorfman, 45 Pa Dist & Co 136—Nardy v DeCaro, Comp Pl, 34 Del Co 231—Schoser v Chapin, Comp Pl, 33 Luz Leg Reg 51

40 C J p 161 note 88

Estate by entireties

Since remedy to impress materialman's lien against estate by entireties is purely statutory, there must be strict compliance with the statute—Velazquez v Suarez, 153 So 708, 113 Fla 856

58. Ark.—Wildwood Amusement Co v Stout Lumber Co, 12 SW 2d 911, 178 Ark 977

NM.—Ackerson v Albuquerque Lumber Co, 29 P 2d 714, 38 NM 191

W Va.—Georgia Lumber Co v Harrison Const Co, 136 SE 399, 103 W Va 1

40 C J p 161 note 89

In determining what constitutes substantial compliance with statutory requirements for materialman's lien, purpose of requirement and effect of misperformance will be con-

times expressly so provided by statute⁵⁹ Every materialman's lien must be perfected as an entity,⁶⁰ and, where there are two or more liens, each must be perfected by a separate compliance with statutory requirements⁶¹

§ 120. Notice to Owner

The purpose of statutory provisions requiring notice to the owner of intention to claim a lien is to furnish him information for his protection.

A statutory notice to the owner of an intention to claim a lien is for the benefit⁶² and protection⁶³ of the owner, it is intended to furnish him information⁶⁴ and enable him to take steps to guard himself against loss⁶⁵ Where such notice is given and there is compliance with other requirements of the statute, the lien is acquired⁶⁶ Ordinarily, it is not required that the notice be filed or recorded⁶⁷

Notice to the owner as part of the procedure of perfecting a lien is to be distinguished from the notice, commonly called a "stop notice," given to the

owner by subcontractors, laborers, or materialmen for the purpose of acquiring a lien on the amount due or to become due the contractor, as discussed supra § 114, and from the lien claim or statement, sometimes termed a "notice of lien," which is required of every claimant regardless of whether he is a contractor, subcontractor, laborer, or materialman, as discussed infra § 131 Also it is to be distinguished from the notice of filing required by some statutes, as discussed infra § 146.

§ 121. — Necessity

Generally, the statutes require notice of intent to claim a lien to be given the owner only in cases where the lien claimant does not deal directly with the owner or his authorized agent.

As a general rule, one not dealing directly with the owner and who wishes to acquire a lien is required by statute to notify the owner that he has furnished labor or materials for which he has not been paid and that he intends to claim a lien,⁶⁸ and

sidered—Ackerson v Albuquerque Lumber Co, 29 P 2d 714, 38 NM 191

Matters of detail

Reasonable compliance with specific provisions of mechanic's lien statutes is necessary, but courts are liberal in construing errors in matters of detail—City Lumber Co of Bridgeport v Borsuk, 41 A 2d 775, 131 Conn 640, 158 A L R 677

59. NY—Dwelle-Kaiser Co v Niagara County, 171 NYS 361, 103 Misc 460—Krause v Brunett, 130 NYS 1086, 73 Misc 438

Revision of statute omitting express provision rendering substantial compliance sufficient did not have the effect of requiring claimant of a materialman's lien to be absolutely perfect in making his notice and claim of lien—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

60. Ala.—Richards v William Beach Hardware Co, 7 So 2d 492, 242 Ala 535

61. Ala.—Crawford v Sterling, 46 So 849, 155 Ala 511

62. Ark.—Corpus Juris cited in Ellis v Fayetteville Lumber & Cement Co, 112 SW 2d 613, 615, 195 Ark 385

Fla.—Corpus Juris cited in Hendry Lumber Co v Bryant, 189 So 710, 712, 138 Fla 485—Harper Lumber & Mfg Co v Teate, 125 So 21, 98 Fla 1055

40 C J p 161 note 99

63. Ark.—Corpus Juris cited in Ellis v Fayetteville Lumber & Cement Co, 112 SW 2d 613, 615, 195 Ark 385.

Fla.—Corpus Juris cited in Hendry Lumber Co v Bryant, 189 So 710, 712, 138 Fla 485—Harper Lumber & Mfg Co v Teate, 125 So 21, 98 Fla 1055

NH—Poirier v East Coast Realty Co, 152 A 612, 84 NH 461

40 C J p 161 note 1

Double payment

The purpose of notice of intent to claim mechanics' lien is to protect owner against being compelled to pay for the same labor or material a second time—Saginaw Lumber Co v Stirling, 9 NW 2d 680, 305 Mich 478

64. Ark.—Corpus Juris cited in Ellis v Fayetteville Lumber & Cement Co, 112 SW 2d 613, 615, 195 Ark 385

Fla.—Corpus Juris cited in Hendry Lumber Co v Bryant, 189 So 710, 712, 138 Fla 485

40 C J p 162 note 2

65. Ark.—Corpus Juris cited in Ellis v Fayetteville Lumber & Cement Co, 112 SW 2d 613, 615, 195 Ark 385

Fla.—Corpus Juris cited in Hendry Lumber Co v Bryant, 189 So 710, 712, 138 Fla 485

Pa.—Moss & Blakeley Plumbing Co v Schauer, 28 A 2d 323, 150 Pa Super 318

40 C J p 162 note 3

Accomplishment of purpose

Where owners in making settlement with building contractor retained sufficient funds to pay claim of materialman who had served notice of intention to file a mechanic's lien, the purpose of such notice was accomplished—Logan Lumber Co, v

Knapp, 39 A 2d 275, 155 Pa Super 580

To put owner on inquiry

Notice of lien is required for the purpose of giving information to the owner of realty, so that he may, on inquiry, ascertain whether or not material has been actually furnished, and the value thereof—Waring v Burke Steel Co, 69 NYS 2d 399

66. Ala.—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 227 Ala 25

Fla.—Anderson Mill & Lumber Co v Clements, 134 So 588, 101 Fla 523

Ohio—B F Sturtevant Co v Board of Education of City School Dist of Cincinnati, 1 NE 2d 148, 51 Ohio App 348

Failure of owner to object

Where materialman, before furnishing materials to contractor, notified owner of his intention so to do, failure of owner to object thereto and to notify materialman in writing that he would not be responsible for price, gave materialman lien for full price of materials furnished—Thornton v Vines, 106 So 42, 213 Ala. 646

67. Ind.—Gilman v. Gard, 29 Ind 291

68. Ala.—Le Grand v. Hubbard, 112 So 826, 216 Ala 164

Ark—Morehart v A B Beeler Lumber Co, 4 S.W.2d 29, 176 Ark 818

Conn—Hannan v Handy, 134 A 71, 104 Conn 653, 47 A L R 259

Fla—Anderson Mill & Lumber Co v Clements, 134 So. 588, 101 Fla 523.

this rule has been applied in the case of subcontractors⁶⁹ and materialmen⁷⁰ On the other hand, notice ordinarily is unnecessary where the lien claimant deals directly with the owner,⁷¹ or his duly

Ill—Stolze Lumber Co v Oglesby, 266 Ill App 569

Ky—Hazard Lumber & Supply Co v South, 7 SW 2d 206, 224 Ky 737

Md—Parker v Tilghman V Morgan, Inc, 183 A 224, 170 Md 7
Mass—Pruner v Schulman, 158 N E 785, 261 Mass 417

Mich—Saginaw Lumber Co v Stirling, 9 NW 2d 680, 305 Mich 473

NH—Poirier v East Coast Realty Co, 152 A 612, 84 NH 461

Or—Barr v Lynch, 97 P 3d 185, 163 Or 607—Lorenz v Pilsener Brewing Co of Oregon, 81 P 2d 104, 159 Or 552—Randolph v Christensen, 265 P 797, 124 Or 661

RI—Art Metal Const Co v Knight, 185 A 136, 56 RI 228

Tex—R B Spencer & Co v Thorp Springs Christian College, Civ App, 41 SW 2d 482, error dismissed

Wash—Pioneer Sand & Gravel Co v Hedlund, 34 P 2d 878, 178 Wash 273

W Va—Duncan Box & Lumber Co v Stewart, 30 SE 2d 391, 126 W Va 871

Wis—Marks Bros Co v Goossen, 222 NW 818, 197 Wis 562
40 CJ p 162 note 4

Contract with lessee

(1) Contractors dealing with lessee, who was not owner's agent, have no lien on realty for labor and materials of repairs and alterations where the contractors gave no notice to the owner, or lessor, as required by statute—Seattle Ass'n of Credit Men v Daniels, 130 P 2d 892, 15 Wash 2d 393

(2) The construction of a building by lessee on leased premises pursuant to a mere lease contract privilege so to do does not constitute lessee an agent of owner so as to charge land with liens for labor and materials without the five days' notice to owner required by statute—Stouffer-Bowman, Inc, v Webber, 139 P 2d 717, 18 Wash 2d 416

(3) Where, under the statutes, the lessor's interest in a building erected by a lessee is subordinate to a mechanic's right of lien, the lessor is not the "owner" of the building in the sense contemplated by the statute requiring notice to the owner—Columbia Lumber Co v Bothell Dairy Farm, 25 P 2d 1037, 174 Wash 662

(4) Under some statutes, notice to fee owners was unnecessary to subject building, erected on land with their consent by lessee, to lien for materials furnished latter—Geisreiter v Standard Lumber Co, 63 S W 2d 347, 187 Ark 893

Laborer's lien

Giving ten days' notice before filing lien is condition precedent to claimants' right to enforce laborers' lien against property—Hayden v Tyler Oil Corporation, Tex Civ App, 6 SW 3d 777, error dismissed

In Pennsylvania

(1) The statutes have been held to require notice in accordance with the text rule—Meier v Harney & Duffy, 99 Pa Super 229—Susquehanna Lumber Co v Yurkowski, Com Pl, 31 Luz Leg Reg 413—40 C J p 162 note 4

(2) Under early statutes it was held that a notice was necessary in the case of an improvement consisting of repairs, alterations, or additions—Wheeler v Pierce, 31 A 649, 167 Pa 416, 48 Am SR 679—40 C J p 163 note 14

(3) On the other hand, notice was not essential in the case of a new structure—Juniata Planing Mill Co v Saxton Iron Co, 12 Pa Dist 171—40 C J p 164 note 15

In Tennessee

(1) It has been held that the text rule prevails—Conger Lumber & Supply Co v White, 66 SW 2d 999, 17 Tenn App 206—B E Buffalo & Co v Jones, 6 Tenn App 316

(2) The case of Brantingham v Beasley, 2 Tenn App 598, was held not controlling in so far as the opinion therein stated that notice was unnecessary where suit had been begun, this statement being regarded as dictum—Conger Lumber & Supply Co v White, supra

69. Ill—Agies v Stolze Lumber Co, 260 Ill App 14—Throgmorton v Mosak, 245 Ill App 330

Md—Parker v Tilghman V Morgan, Inc, 183 A 224, 170 Md 7

NH—Poirier v East Coast Realty Co, 152 A 612, 84 NH 461

Or—Lorenz v Pilsener Brewing Co of Oregon, 81 P 2d 104, 159 Or 552

Pa—Meier v Harney & Duffy, 99 Pa Super 229—Rich v Boguszinski, 10 Pa Dist & Co 217, 24 Luz Leg Reg 333—Austin v Rozell, Com Pl, 40 Lack Jur 99

Wash—Robinson Tile & Marble Co v Samuels, 266 P 701, 147 Wash 445

40 C J p 162 note 6

Restriction to amount specified by contractor

Subcontractor having failed to serve notice of lien, its lien claim was restricted to amount stated to be due it in original contractor's sworn statement—Netting Co v Berke, 219 NW 683, 243 Mich 81

"Subcontractor" defined

A "subcontractor," within the meaning of statutory provisions of this character, has been defined as a person whose relation to the principal contractor is substantially the same as to a part of the work as the latter's relation is to the proprietor—Marks Bros Co v Goossen, 222 NW 818, 197 Wis 562—Farmer v St Croix Power Co, 93 NW 830, 117 Wis 76, 98 Am SR 914

70. Ark—Morehart v A B Beeler Lumber Co, 4 SW 2d 29, 176 Ark 818

Fla—First Nat Bank v Southern Lumber & Supply Co, 145 So 594, 106 Fla 821—Tallahassee Variety Works v Brown, 141 So 848, 106 Fla 599

Ky—Hazard Lumber & Supply Co v South, 7 SW 2d 206, 224 Ky 737

Mich—Wyoming Park Lumber & Fuel Co v Vander Ark, 289 NW 238, 291 Mich 496

NC—Economy Pumps v F W Woolworth Co, 17 SE 3d 639, 220 NC 499—Huske Hardware House v Percival, 164 SE 334, 203 N C 6

Or—Barr v Lynch, 97 P 3d 185, 163 Or 607—Schram v Manary, 260 P 214, 123 Or 354, modified on other grounds 262 P 263, 133 Or 354—Johnson v Alm, 254 P 803, 121 Or 285

Tenn—Conger Lumber & Supply Co. v White, 66 SW 2d 999, 17 Tenn App 206

Tex—Cotten v Heimbecher, Civ App, 48 SW 2d 402

Wash—Pioneer Sand & Gravel Co v Hedlund, 34 P 2d 878, 178 Wash 273

W Va—Bailey Lumber Co v Ball, 20 SE 2d 241, 124 W Va 340
40 C J p 162 note 6

71. Ala—Sherrod v Crane Co, 182 So 48, 238 Ala 344

Ark—Brannan v Paul Sanders & Son, 144 S W 2d 474, 201 Ark 306—Kull v Dierks Lumber & Coal Co, 292 SW 695, 173 Ark 445

Conn—Hannan v Handy, 134 A 71, 104 Conn 653, 47 A LR 269

Fla—Roughan v Rogers, 199 So. 572, 145 Fla 421—Hendry Lumber Co v Bryant, 189 So 710, 138 Fla 485

Mo—Waters v Gallemore, App, 41 SW 2d 870

Or—Drake Lumber Co v Lindquist, 170 P 3d 712, 179 Or 402—Paget v Peters, 286 P 983, 133 Or 608, rehearing denied 389 P 1119, 133 Or 608—Beach v Cooper, 266 P 633, 125 Or 256—Randolph v Christensen, 265 P 797, 124 Or 661—Nicolaï-Neppach Co v Poore, 251 P 268, 120 Or 163.

the contract was made or the materials were furnished,⁹⁵ and in this respect the persons who may be regarded as owners entitled to notice may depend on the terms of the statute.⁹⁶ Where the notice is given to the person who appears by the public records to be the owner, the lien is not defeated because it subsequently appears that some other person is the real owner.⁹⁷ However, notice need not be given to the legal or record owner of property holding it for another who is the equitable owner in fee and contracts for construction of a building,⁹⁸ as in the case of a pretended and fraudulent owner holding record title for the protection of the real owner with whom the contract was made.⁹⁹ Notice need not be given to the original contractor¹ or to a mortgagee,² and service of notice on an owner has been held sufficient without service on a lessee who contracted for the improvements.³

Two or more owners Where there are two or more owners, notice should be served on all,⁴ the interest of any joint owner not served will not be

bound by the lien.⁵ Some courts hold that a notice to only one of two or more owners binds his interest,⁶ but other courts hold the contrary where the work is being done under the authority of all the tenants in common.⁷ Service of a notice to a partnership on one partner is sufficient.⁸

Change of ownership. Where there has been a change of ownership, the person who is the owner at the time the lien attaches is the proper person to be served,⁹ and notice need not be given to prior¹⁰ or subsequent¹¹ owners.

b. Representative of Owner

Generally, notice of intent to claim a lien made to the duly authorized agent of the owner is sufficient.

Under a few statutes, notice to an agent of the owner of intention to file a lien, required by statute, is not sufficient,¹² but under many of the statutes it is sufficient that the notice be served on the authorized agent of the owner,¹³ at least where the owner cannot be served in the county.¹⁴ Under

Notice held properly given

Mo—H B McCray Lumber Co v Standard Const Co, App, 285 S W 104

Materialman's notice to lessee as owner or reputed owner was not sufficient to establish lien against owner—Globe Electric Co v Union Leasehold Co, 6 P 2d 394, 166 Wash 45

95. Mo—Brown v Wright, 25 Mo App 54
40 C J p 164 note 37

96. Mich—Wyoming Park Lumber & Fuel Co v Vander Ark, 289 N W 228, 291 Mich 496

Same meaning under different provisions

Under statutes providing that a subcontractor may perfect a mechanic's lien by filing a memorandum of lien and by giving written notice to "owner" of property or his agent and that one who furnishes materials to a subcontractor may perfect a lien by filing a memorandum and giving written notice to "owner" of property or his agent and to general contractor, quoted word has same meaning as when used in statute concerning procedure to be followed by a general contractor in perfecting a mechanic's lien—Wallace v Drumback, 12 S E 2d 801, 177 Va 36

Purchaser

Under statute providing that word "owner," within statute providing that notice of intention to claim lien must be given owner, should include all the legal or equitable interest of person under contract of purchase, purchasers of house un-

der contract were "owners" within contemplation of statute and were entitled to notice of intention to claim lien by company furnishing material for house, the statute was not intended to distinguish between contract to purchase land, and contract to purchase land and to construct a building thereon—Wyoming Park Lumber & Fuel Co v Vander Ark, 289 N W 228, 291 Mich 496

97. Md—Shryock v Hensel, 53 A 412, 95 Md 614
40 C J p 164 note 38

98. Pa—Schwartz v Whelan, 145 A 525, 295 Pa 425, 65 A L R 277

99. Mo—Baltis v. Friend, 90 Mo App 408

1. Tex—Burns & Hamilton Co v Denver Inv Co, Civ App, 217 S W 719—Wilson v Sherwin-Williams Paint Co, Civ App, 160 S W 418

2. Or—Randolph v Christensen, 265 P 797, 124 Or 661
40 C J p 165 note 41

3. Ill—McKeown Bros Co v Ogden Kennel Club, 269 Ill App 622

4. Ill—Mantonya v Reilly, 83 Ill App 275, affirmed 56 NE 425, 184 Ill 183

Mo—Townner v Remick, 19 Mo App 205

"Any one"

Under mechanic's lien statute requiring that the name of "any one" who is the owner of land to which lien is to attach be named in notice of intention to furnish labor or materials to be used in a building, the words "any one" include each and every one—Belmont Coal &

Lumber Co v James F Wood Builders, 15 A 2d 625, 125 N J Law 315

5. Or—Shea v Peters, 268 P 989, 126 Or 76
40 C J p 165 note 43

6. Or—Shea v Peters, supra
Pa—Grass v Eisenbrey, Com Pl, 59 Montg Co 258
40 C J p 165 note 44

7. Mass—Webber Lumber & Supply Co v Erickson, 102 NE 940, 216 Mass 81

8. Ill—I Lurya Lumber Co v Bernstein, 168 Ill App 85

9. Or—J W Copeland Yards v Sheridan, 297 P 837, 136 Or 37—E J Struntz Planing Mill Co v Paget, 262 P 263, 123 Or 651, rehearing denied 263 P 389, 123 Or 651
40 C J p 165 note 47.

10. Mass—Martin v Stewart, 90 NE 687, 204 Mass 122
40 C J p 165 note 47 [a] (2).

11. Ky—Whitaker v Howell & Goins, 143 S W 2d 179, 283 Ky 738
Mo—Reese v. Cibulka, App, 68 S W 2d 902

Or—J W Copeland Yards v Sheridan, 297 P 837, 136 Or 37
40 C J p 165 note 47 [a] (1)

12. Ga—Pou v Covington & M R Co, 10 S E 744, 84 Ga 311, followed in Bullard v Dudley, 28 S E 845, 101 Ga 299

13. Iowa—Wickham v Monroe, 57 NW 434, 89 Iowa 666
40 C J p 165 note 49

14. Pa—Lofink v Schuette, 14 Pa Dist 558.

the latter statutes the person served must be such an agent as the statute contemplates,¹⁵ and in some cases, it has been held insufficient to serve the owner's architect,¹⁶ clerk,¹⁷ or attorney,¹⁸ although, where an attorney at law is the duly authorized agent of the owner for such purpose, service of the notice on the attorney has been held sufficient.¹⁹ Under a statute authorizing service on the party in possession of the structure or improvement where the owner cannot be served in the county, the party in possession need not be the agent of the owner.²⁰ A statutory requirement that notice of a claim for lien shall be served on the owner of a building or his agent is not complied with by service on a member of a building committee of an unincorporated society,²¹ but service of notice as to an unincorporated body has been held sufficient where made on trustees holding the record title to the realty,²² or where made on a trustee or other representative in actual charge of the construction work.²³

Spouse of owner or part owner Where a wife's land is built on by the husband or by some person employed by him in his character as husband, and

he undertakes to make the improvement in the exercise of his own authority as such, the notice must be given to the wife,²⁴ and notice to the husband is not sufficient,²⁵ but, where the husband in making improvements on his wife's land acts as her agent, notice to him is sufficient,²⁶ and no notice to the wife is necessary.²⁷ Mere proof of marriage does not suffice to show agency of one spouse for the other.²⁸ Where husband and wife are tenants in common, the husband has no authority, either as husband,²⁹ or as tenant in common,³⁰ to accept service for the wife, and in such cases notice to each is essential to perfection of a lien,³¹ but, where the husband is the wife's agent in making a contract for construction on a lot owned by them as tenants in common, or by the entirety, no notice of intent to claim a lien is required.³² There is also authority holding that service on the husband is equivalent to service on both tenants by the entirety since by fiction of law they are a unit, and their interest in the property is indivisible.³³

Trustee or executor Service on a trustee is sufficient in some cases.³⁴ However, after the death

15. Fla.—Ft Meade Hotel Co v Knoxville Iron Co, 127 So 896, 99 Fla 947
40 C J p 165 note 51

Express designation or general authority

(1) The agent to whom notice may be given must be such agent as the owner has expressly authorized to receive notice, or be an agent of general authority, in such managerial or directing situation with respect to the construction of the building as would constitute him the alter ego of the owner

Ark—Ellis v Fayetteville Lumber & Cement Co, 112 SW 2d 613, 195 Ark 385

Tex—Burns & Hamilton Co v Denver Investment Co, Civ App, 217 SW 719

(2) Newspaper designation of a named person to handle all business of part owner of building under construction during such part owner's absence did not make that person the owners' agent to receive notice of materialman's lien of company furnishing materials to contractor—Ellis v Fayetteville Lumber & Cement Co, supra

Service on "statutory agent" insufficient

Wash—Stouffer-Bowman, Inc, v Webber, 139 P 2d 717, 18 Wash 3d 416

16. Wis—Corpus Juris quoted in Bates Expanded Steel Truss Co v Sisters of Mercy of Janesville, 243 NW 456, 459, 208 Wis, 457
40 C J p 165 note 51 [d]

17. Pa—Lofink v Schuette, 14 Pa Dist 558

40 C J p 165 note 51 [e]

18. Ohio—Mahoning Park Co v Warren Home Dev Co, 142 NE 883, 109 Ohio St 358

40 C J p 165 note 51 [f]

19. Ohio—Kocher v Ricketts, App, 49 NE 2d 85

20. Pa—Merritt v Poli, 84 A 683, 236 Pa 170—Lofink v Schuette, 14 Pa Dist 558

21. Tex—Padgett v Dallas Brick & Construction Co, Civ App, 51 SW 539—McCreary v Waco Lodge No 70 I O O F, 2 Tex Unrep Cas 675

22. Pa—Strayer & Co v Gaines, 100 Pa Super 203

Church

Pa—Strayer & Co v Gaines, supra
Tex—Park Presbyterian Church of Italy v Wm Cameron & Co, Civ App, 38 SW 2d 901, reversed on other grounds, Com App, 58 SW 2d 63

23. Pa—Strayer & Co v Gaines, 100 Pa Super 203

24. Md—Adkins & Douglas Co v Webb, 154 A 259, 160 Md 571
40 C J p 165 note 55

Service on husband in presence of wife

Pa—Delaware County Supply Co v Scavicchia, Com Pl, 33 Del Co 119

25. Ind—Shafer v Archbold, 18 NE 56, 116 Ind 29

26. Pa—Sullivan v Justice, 22 Pa Dist 801

40 C J p 165 note 57

27. Md—Adkins & Douglas Co v Webb, 154 A 259, 160 Md 571
40 C J p 166 note 58

28. Ill—Western Plumbing Supply Co v Horn, 269 Ill App 612—Throgmorton v Mosak, 245 Ill App 330

29. Mass—Webber Lumber & Supply Co v Erickson, 102 NE 940, 216 Mass 81

Mich—Corpus Juris quoted in Nurmi v Beardsley, 266 NW 368, 369, 275 Mich 328

30. Mass—Webber Lumber & Supply Co v Erickson, 102 NE 940, 216 Mass 81

Mich—Corpus Juris quoted in Nurmi v Beardsley, 266 NW 368, 369, 275 Mich 328

31. Ill—Liese v Hentze, 158 NE 428, 326 Ill 633

Md—Blenard v Blenard, 45 A 2d 335, 185 Md 548—Adkins & Douglas Co v Webb, 154 A 259, 160 Md 571

NJ—Belmont Coal & Lumber Co v James F Wood Builders, 15 A 2d 625, 125 NJ Law 315

Pa—Chapin Lumber Co v Zagorski, Com Pl, 38 Luz Leg Reg 57

32. Md—Blenard v Blenard, 45 A 2d 335, 185 Md 548—Adkins & Douglas Co v Webb, 154 A 259, 160 Md 571

33. Fla—Le Roy v Reynolds, 193 So 843, 141 Fla 586

34. Mo—Grace v Nesbitt, 18 SW. 1118, 109 Mo 9

40 C J p 166 note 61.

of the owner who contracted for the improvement, his executors,³⁵ rather than trustees to whom the property was devised,³⁶ have been held the proper persons to serve with notice.

Corporate owner Where the owner is a corporation, service on one of its officers is sufficient.³⁷ Where a corporation has only a few stockholders, and notice of intent to claim a lien on certain corporate property is addressed to the persons doing business as the named company and served on all of the stockholders, it has been held to be sufficient, even though no notice addressed to the named corporation is served on it as a distinct entity.³⁸

§ 125. — Time for Giving

- a. In general
- b Particular statutory provisions

a. In General

Notice of intent to claim a mechanic's lien should be timely

In order to preserve and perfect a mechanic's lien, notice of intent to claim it must be timely,³⁹ and served within such period as may be prescribed by statute.⁴⁰ However, a notice, even though given within the time required by statute, has been held to be too late when given after the contractor has been adjudicated a bankrupt.⁴¹ Where the statute designates no specific time within which notice may be given, but provides for a lien for work or materials from the time of service of notice for the amount unpaid on the contract between owner and

original contractor, a laborer or materialman not in privity with the owner may give notice at any time within his discretion, as long as it is served before expiration of the time limited by statute, that is, before all moneys have been paid on the original contract.⁴² A notice given before the taking effect of the statute authorizing it is ineffective.⁴³

b. Particular Statutory Provisions

- (1) At or before time of furnishing labor or materials
- (2) Within prescribed period after furnishing labor or materials

(1) At or before Time of Furnishing Labor or Materials

Under some statutory provisions notice should be given at or before the time of furnishing labor or materials

Under some of the statutes the required notice of intent to file a lien must be given at or before the time of furnishing the labor or materials,⁴⁴ and a lien can be acquired only for materials furnished or labor performed after such notice is given.⁴⁵ Where the notice is given after the commencement and during the furnishing of material, the view taken by some authorities is that no lien can be acquired for what is subsequently furnished,⁴⁶ but other authorities take the opposite view.⁴⁷ In a few jurisdictions, a failure to give notice, as required by statute, at the time each item of material is furnished is not fatal where the interested parties are not injured or prejudiced,⁴⁸ as where notice is given

35. Mo—P M Bruner Granitoid Co v Klein, 73 SW 313, 100 Mo App 289

36. Mo—P M Bruner Granitoid Co v Klein, *supra*

37. Md—Brunt v Farinholt-Meredith Co, 88 A 42, 121 Md 126
40 C J p 166 note 64

Counsel

Service of notice of lien on counsel of corporation owning building was sufficient, where counsel delivered notice to executive officer of corporation within statutory time—In re Danville Hotel Co, D C Ill, 33 F2d 162, affirmed in part and reversed in part on other grounds, C C A, 38 F2d 10

President

Wis—G W Hirth, Inc, v Clivbourn Realty Co, 232 NW 857, 202 Wis 432

Receiver

Service of such a notice on the receiver of a corporation has been held insufficient—Miami Savings & Loan Association v Arnold Bros-Weiss, Inc, 28 Ohio NP, NS, 401

38. Ark—Wildwood Amusement Co v Stout Lumber Co, 12 SW 2d 911, 178 Ark 977

39. Ill—Agles v Stolze Lumber Co, 260 Ill App 14

Tenn—East Lake Lumber Box Co v Simpson, 5 Tenn App 51

Notice held premature

Tenn—B E Buffalo & Co v Jones, 6 Tenn App 316—East Lake Lumber Box Co v Simpson, 5 Tenn App 51

Notice held tardy

Miss—Turman v Tupelo Brick & Tile Co, 192 So 40, 187 Miss 33

Notice held timely

Ky—Akers & Co v Weil, 65 SW 2d 712, 251 Ky 689

Mo—H B McCray Lumber Co v Standard Const Co, App, 285 SW 104

Or—Livesay v Lee Hing, 9 P 2d 133, 139 Or 450, 84 ALR 118

40. Pa—Pressel & Son v Platts, Com Pl, 55 York Leg Rec 61

RI—Rhode Island Marble & Tile Co v Spear, 143 A 777, 49 RI 441

Vt—King v Hoadley, 26 A 2d 103, 112 Vt 394

Va—Coleman v Pearman, 165 SE 371, 159 Va 72

40 C J p 166 note 68.

41. Ill—Interstate Contracting & S Co v Belleville Sav Bank, 197 Ill. App 30

42. Fla—Harvey v Fisher, 112 So. 560, 93 Fla 587

43. Wash—Walker v Lanning, 133 P 462, 74 Wash 253

44. Ind—Quack v Schmid, 30 NE 514, 131 Ind 185

40 C J p 166 note 72

45. Dak—McMillan v Phillips, 40 NW 349, 5 Dak 294

40 C J p 166 note 73

46. Mass—French v Hussey, 84 N. E 362, 159 Mass 206

40 C J p 166 note 74

47. Ind—Hubbard v Moore, 31 NE 534, 132 Ind 178—Quack v Schmid, 30 NE 511, 131 Ind 185

48. Tex—Ogburn Gravel Co v Watson Co, Civ App, 190 SW 205—Breneman v Beaumont Lumber Co, 34 SW 198, 12 Tex Civ App 517.

before the owner has paid out all the contract price⁴⁹

Under some statutes notice must be given before the owner settles with the contractor⁵⁰ Under statutes requiring notice prior to the completion of the contract, an abandonment of the contract when partially completed is deemed not to be a completion of the contract⁵¹ Under some statutes, notice of the claim must be given to the owner a certain period of time before filing the lien,⁵² but, in the absence of such an express requirement, a failure to give the notice before the filing of the lien is not fatal⁵³

(2) Within Prescribed Period after Furnishing Labor or Materials

Under statutes varying in their terms, it may be necessary and proper to serve notice of intent to claim a lien within a prescribed period after furnishing work or materials, and, where labor or material is furnished at different times, the statutory limitation for notice will begin to run from the date of the last item if the contract is single, or from the respective dates of each item if furnished under separate contracts

The statutes of a number of jurisdictions variously require, or at times have required, the giving of notice within a certain time after the furnishing of the work or materials,⁵⁴ the commencement of furnishing of the labor or materials,⁵⁵ the completion

of the furnishing of labor or materials,⁵⁶ the completion of the work,⁵⁷ the completion of the principal contract,⁵⁸ or permanent abandonment of construction,⁵⁹ the completion of the subcontract,⁶⁰ or the time when payment should have been made.⁶¹ Where the statute requires the giving of notice within a certain time after furnishing material, and the lien claimant furnishes material over an extended period, he has a lien on all material furnished within the statutory time of notice but none for material furnished prior thereto⁶²

The statutes are ordinarily construed as fixing a time beyond which notice may not be given,⁶³ but not to prohibit the giving of notice before the completion or other act mentioned,⁶⁴ provided the notice is given after the subcontract is made⁶⁵ There is authority, however, to the effect that a notice given before completion of the work is not one given within a specified period after completion so as to satisfy the statute⁶⁶

Alternative provisions. Where the statute provides for the giving of notice within a specified time after the happening of one of two or more events, the notice may⁶⁷ and should⁶⁸ be given within the specified time after the event which first occurs, and, of course, it is not in time where, re-

49. Tex—Ogburn Gravel Co v Watson Co, Civ App, 190 S W 205—Wilson v Sherwin-Williams Paint Co, Civ App, 160 S W 118

50. NC—Orinoco Supply Co v Masonic & Eastern Star Home, 79 S E 964, 163 NC 513

Tex—Garvin v Armstrong Bros, Civ App, 20 S W 2d 358, modified on other grounds, Com App, Modern Plumbing Co v Armstrong Bros, 36 S W 2d 1011

Vt—King v Hoadley, 26 A 2d 103, 112 Vt 394

51. ND—Langworthy Lumber Co v Hunt, 122 N W 865, 19 ND 433

52. Ark—Leifer Mfg Co v Gross, 124 S W 1039, 93 Ark 277
40 C J p 167 note 84

53. Tex—Wilson v Sherwin-Williams Paint Co, Civ App, 160 S W 418

54. Md—Alter v Eckhardt, 123 A 388, 143 Md 658
40 C J p 167 note 87

55. Or—Barr v Lynch, 97 P 2d 185, 163 Or 607

Wis—Bates Expanded Steel Truss Co v Sisters of Mercy of Janesville, 248 N W 456, 208 Wis 457
40 C J p 167 note 88

Lien claimed for subsequent materials

Owner was entitled to lien notice within thirty days after furnishing

of first materials, notwithstanding materialman claimed lien only for subsequent materials—Walton v Dayton Hotel Co, 236 N W 595, 205 Wis 112

56. RI—Rhode Island Marble & Tile Co v Spear, 143 A 777, 49 R I 441

Tenn—Oliver King Sand & Lime Co v Sterchi, 7 Tenn App 647

W Va—Bailey Lumber Co v General Const Co, 133 S E 135, 101 W Va 567

40 C J p 167 note 89

Notice held timely

Fla—Le Roy v Reynolds, 193 So 843, 141 Fla 586

Reasonable time

Subcontractor's notice to owner of filing of lien need not be served within sixty days after material was last furnished or labor performed, but may be served within reasonable time thereafter, and what is a reasonable time is a question of fact depending on the circumstances of the particular case—Thacher v International Supply Co, 54 P 2d 376, 176 Okl 14

57. Or—Barr v Lynch, 97 P 2d 185, 163 Or 607

Pa—Grass v Eisenbrey, Com Pl, 59 Montg Co 258—Silver v Leonards, Com Pl, 54 Montg Co 432

Tenn—Cole Mfg Co v Falls, 22 S W 856, 92 Tenn 607.

58. Ark—Basham v Toors, 11 S W 282, 51 Ark 309

40 C J p 167 note 91

59. Or—Barr v Lynch, 97 P 2d 185, 163 Or 607.

60. Ill—Metz v Lowell, 83 Ill 565
40 C J p 167 note 92

61. Ill—Weber v Bushnell, 49 NE 728, 171 Ill 587
40 C J p 167 note 93

62. Or—Nicolai-Neppach Co v Poore, 251 P 268, 120 Or 163

63. Ill—Cary-Lombard Lumber Co v Fullenwider, 37 NE 899, 150 Ill 629
40 C J p 167 note 95

64. Conn—Waterbury Lumber, etc, Co v Coogan, 48 A 204, 78 Conn 519
40 C J p 167 note 96

65. Ill—Cary-Lombard Lumber Co v Fullenwider, 37 NE 899, 150 Ill 629—Berkshire Warehouse Co v Hilger, 190 Ill App 49, affirmed 109 NE 287, 268 Ill 463

66. Tenn—Cole Mfg Co v Falls, 22 S W 856, 92 Tenn 607
40 C J p 167 note 94

67. Tenn—Bassett v Bertorelli, 22 S W 423, 92 Tenn 548

68. Mo—Patrick v Ballentine, 22 Mo 143.

ardless of which event is taken as the beginning of the prescribed period, the notice is not given within the period.⁶⁹

Work or material furnished at different times. Where work or material is furnished at different times under a single contract, it is generally held that the statutory period for giving notice starts to run from the date on which the last work or material was furnished, both under statutes requiring notice to be given within a specified period after the last item is furnished⁷⁰ and under statutes requiring notice to be given within a specified period after the furnishing of the labor or material.⁷¹ The statute runs from the date of the last item, even though the doing of the last item of work is somewhat delayed,⁷² provided the delay is not for the purpose of extending the period for giving notice.⁷³ It is, however, essential that the work or materials at different times be furnished under one continuous contract, express or implied, in order that the date of the last item be taken as that from which limitation for giving notice of intention to claim a lien shall run,⁷⁴ and, where there are separate jobs or contracts, the notice for each must be given within the required time, and separate items cannot be tacked together so that a notice within the required time after the completion of the last will give a lien as to all.⁷⁵

Under a statute requiring notice in writing to be given within sixty days after the materials are placed on the land, it has been held the materialman is entitled to a lien only for materials placed on the land within sixty days prior to the giving of notice to the landowner,⁷⁶ although all the materials were furnished to the contractor under an entire contract.⁷⁷ Under a statute requiring notice to be given within a certain period of time after the commencement of the work, a notice given within the required time after the commencement of a second

and new employment is sufficient in respect of work done under that employment.⁷⁸

In order that the time may be extended by a delivery of materials, there must be such a delivery as comes within the terms of the particular statute.⁷ Where the right to a lien has been lost by failure to comply with a statutory requirement that notice of the claim shall be served on the owner within a specified time after the materials have been furnished, it cannot be revived by a subsequent collusive delivery of materials which are not used.⁸⁰ Neither can a delivery of materials after the contract between the owner and the contractor has come to an end by the owner's acceptance of the building as completed avail to extend the time for notice to secure a lien for what was delivered while such contract was in force.⁸¹ However, where, after possession of a building is given, defects and omissions are discovered which the supervising architect requires to be supplied and which are supplied by the subcontractors, the subcontracts are not completed until such additional work is done,⁸² and notices of liens by such subcontractors may be given with respect to this point of time.⁸³ Some statutes expressly provide that in the case of extra or additional work or material, notice shall be given within a specified time after the completion of the extra or additional material.⁸⁴

§ 126. — Form and Contents

a. In general

b. Statements of particular matters

a. In General

A notice of intent to claim a mechanic's lien should substantially comply with statutory requirements as to form and contents.

The notice of intent to claim a lien must at least substantially conform to the statutory requirements,⁸⁵ and contain the statements required by law

69. Tenn.—Bird v Southern Surety Co., 200 SW 978, 139 Tenn 11—Cole Mfg Co v Falls, 22 SW 856, 92 Tenn 607

70. Ky.—National Surety Co v Price, 172 SW 1072, 162 Ky 632 40 C.J. p 167 note 2

Where twenty-one orders were filled under a single, running account, one notice sufficed and it was not necessary for the subcontractor to protect himself by serving a special notice for each order—Weil v Bomash, 237 Ill App 544

71. Md.—Henscl v Johnson, 51 A 575, 94 Md 729 40 C.J. p 167 note 3.

72. Md.—Gill v Mullan, 116 A 563, 140 Md 1

73. Ky.—Koehler v Hines, 214 SW 906, 185 Ky 270

Md.—Gill v Mullan, 116 A 563, 140 Md 1

74. Md.—Parker v Tilghman V Morgan, Inc, 183 A 234, 170 Md 7

75. Md.—Parker v Tilghman V Morgan, Inc, supra

40 C.J. p 168 note 7

76. RI.—Gurney v Walsham, 19 A 823, 16 RI 698

77. RI.—Newell v Campbell Mach Co, 20 A 158, 17 RI 74

78. RI.—Aubin v Darling, 59 A 390, 26 RI 469

40 C.J. p 168 note 11.

79. Ill.—Beidler v Hutchinson, 84 NE 228, 233 Ill 192 40 C.J. p 168 note 12

80. Md.—Greenway v Turner, 4 Md 296

81. Ga.—Sheehan v South River Brick Co, 36 SE 759, 111 Ga 444

82. Ill.—St Louis Nat Stock Yards v O'Reilly, 85 Ill 546

83. Ill.—St Louis Nat Stock Yards v O'Reilly, supra

84. Ill.—Illinois Malleable Iron Co v Brennan, 174 Ill App 88

85. Fla.—Myers v Harkins, 136 So 382, 102 Fla 577—Harper Lumber & Mfg Co v Teate, 125 So 21, 98 Fla 1055

NY.—Telsey v. Calvin-Morris Cor-

to be included,⁸⁶ otherwise it is fatally defective⁸⁷ Where no particular form of notice is prescribed, it must be made in some way which puts the owner on his guard as to claimant's intention to assert a lien,⁸⁸ or warns him that the initiatory step to the acquisition of a lien is being taken, and gives him the necessary information with respect to the claim for which it is proposed to hold a lien⁸⁹ It is, however, sufficient if the notice gives the information required by the statute, although it does not use the exact words of the statute⁹⁰ The same exactness is not insisted on in the notice as in the lien itself⁹¹ The statute need not be referred to by name or section⁹² Neither is it necessary to state the facts necessary to make the lien valid⁹³ Merely informing the owner that the materialman is furnishing materials and looks to the owner for payment

has been held sufficient in some,⁹⁴ but not other,⁹⁵ cases However, it is not sufficient for the materialman to inform the owner in a casual conversation that he is furnishing material⁹⁶

The lien is not defeated by superfluous statements⁹⁷ or unimportant errors⁹⁸ in the notice In determining the question whether the notice is sufficient, the exhibits and affidavits attached thereto are to be considered,⁹⁹ but, where a claimant serves more than one notice claiming a lien for the same account, the several notices cannot be considered together for the purpose of determining the sufficiency of notice to hold a lien,¹ but each must stand on its own merits,² and no lien will exist unless one of the notices is in itself sufficient to give it³ The fact that the notice is not dated does not affect its sufficiency⁴

poration, 184 N E 53, 260 N Y 456, reargument denied 185 N E 765, 261 N Y 622

Pa.—Meier v Harney & Duffy, 99 Pa Super 229

W Va.—Forman v Kelly, 139 S E 708, 104 W Va 211
40 C J p 168 note 18

Notices held sufficient

(1) Generally

Ariz.—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

Fla.—Roughan v Rogers, 199 So 572, 145 Fla 421

Ind.—Robertson v Sertell, 161 N E 669, 88 Ind App 591

Mich.—Saginaw Lumber Co v Stirling, 9 N W 2d 680, 305 Mich 473
N Y.—Waring v Burke Steel Co, 69 N Y S 2d 399

Pa.—Moss & Blakeley Plumbing Co v Schauer, 28 A 2d 323, 150 Pa Super 318—Currie v Koehler, 90 Pa Super 197—Delaware County Supply Co v Scavicchia, Com Pl, 33 Del Co 119—Austin v Rozell, Com Pl, 40 Lack Jur 99

W Va.—Georgia Lumber Co v Harrison Const Co., 136 S E 399, 103 W Va 1

40 C J p 168 note 18 [a]

(2) Notice is sufficient if it states amount of claim, to whom and by whom it is due, for what it is claimed, and contains a sufficient description of premises by which they can be identified—Waverly Co v Moran Electric Service, 26 N E 2d 55, 108 Ind App 75

(3) Notice of lien, after setting forth the name of defendant and owner of realty, and stating total amount of lien claimed and the various items of which it consisted with their respective prices, and concluding the paragraph with the words "for the improvement of said real property hereinafter described," was sufficient notwithstanding it failed

to state that the materials were used in improving the property—Waring v Burke Steel Co, 69 N Y S 2d 399

86. Pa.—Keever v Ulrich, 10 Pa Dist & Co 13, 30 Dauph Co 289
40 C J p 168 note 19

87. Md.—Hess v Poultney, 10 Md 257

Notices held insufficient

(1) Generally—Economy Pumps v F W Woolworth Co, 17 S E 2d 639, 230 N C 499

(2) Notice to charge owner with mechanic's lien in favor of one not in privity with owner must be personal, and the mere writing of a letter to owner purporting to give notice of lien claim is insufficient notice to create lien against owner in favor of materialman not in privity with owner—Harper Lumber & Mfg Co v Teate, 125 So 21, 98 Fla 1055

88. Ind.—Quaack v Schmid, 30 N E 514, 131 Ind 185

Miss.—McLendon v Indianola Lumber Co, 90 So 885, 123 Miss 265
40 C J p 168 notes 21, 23

89. Ind.—Simonds v Buford, 18 Ind 176

90. Wis.—Dusick v Meiselbach, 95 N W 144, 118 Wis 240
40 C J p 168 note 24

91. Pa.—Ott v DuPlan Silk Corp., 114 A 630, 271 Pa 322

W Va.—Corpus Juris cited in Georgia Lumber Co v Harrison Const Co., 136 S E 399, 400, 401, 103 W Va 1

92. Wis.—Hausmann Bros Mfg Co v Kempfert, 67 N W. 1136, 93 Wis 587

93. Ohio—Bender v Stettinius, 10 Ohio Dec (Reprint) 186, 19 Cinc L Bul 163

94. Ind.—Quaack v. Schmid, 30 N E 514, 131 Ind 185

95. Pa.—Langenheim v Anschutz-Bradberry Co, 2 Pa Super 285, 38 Wkly N C 505

96. Ind.—Newhouse v Morgan, 26 N E 158, 137 Ind 436—Caylor v Thorn, 25 N E 217, 125 Ind 201

97. Wis.—Wambold v Gehring, 85 N W 117, 109 Wis 123
40 C J p 169 note 31

Setting forth improper items

The fact that some of the materials stated in the notice of lien were personal property and hence not proper subject of a lien did not invalidate the notice, where they were separately set forth with a statement of their respective values and agreed price—Waring v Burke Steel Co, 69 N Y S 2d 399

98. Fla.—Roughan v Rogers, 199 So 572, 145 Fla 421

Or.—Nicola-Neppach Co v Poore, 251 P 268, 120 Or 163
40 C J p 169 note 32

99. Pa.—Este v Pennsylvania R Co, 27 Pa Super 521

W Va.—Elswick v Deskins, 69 S E 894, 68 W Va 396

1. Cal.—Davis v Livingston, 29 Cal 283

Fla.—Corpus Juris cited in Harper Lumber & Mfg Co v Teate, 125 So 21, 25, 98 Fla 1055

2. Cal.—Davis v Livingston, 29 Cal 283

Fla.—Corpus Juris cited in Harper Lumber & Mfg Co v Teate, 125 So 21, 25, 98 Fla 1055

3. Cal.—Davis v Livingston, 29 Cal 283

Fla.—Corpus Juris cited in Harper Lumber & Mfg Co v Teate, 125 So 21, 25, 98 Fla 1055

4. Ill.—Rosenberg v Union Iron & Foundry Co, 63 Ill App 99.

40 C J p 169 note 37

Waiver of defects Defects in the notice have been held subject to waiver.⁵ A defect in a notice is not waived, however, by the act of the owner in pleading to a scire facias on the lien.⁶

Oral or written notice Where the statutes require that the notice shall be in writing, compliance in this respect is essential,⁷ unless waived by the owner,⁸ but in the absence of such a requirement oral notice may be sufficient.⁹

b. Statements of Particular Matters

- (1) Intent to claim lien
- (2) Amount and particulars of claim
- (3) Identity and description of parties and property

(1) Intent to Claim Lien

The notice should in some unequivocal manner disclose the claimant's intent to assert a lien.

The notice must indicate in some way the intention of claimant to assert a lien on the property of the owner,¹⁰ or to claim the benefit of the statute conferring the lien,¹¹ the presentation to the owner of an account¹² or order¹³ is not sufficient, as it does not show anything more than an intention to hold the owner personally liable.¹⁴ However, a notice may be sufficient in this respect, although it does not employ the word "intention,"¹⁵ or express-

ly claim a lien on the property,¹⁶ any phraseology which clearly and distinctly apprises the owner of the intention of claimant to claim a lien will satisfy the requirements of the statute.¹⁷

(2) Amount and Particulars of Claim

A notice of intent to claim a lien should set forth the amount and particulars of the claim in substantial compliance with statutory provisions.

The notice of intent to assert a lien must give information as to the nature and extent of the claim,¹⁸ it must be sufficiently definite fairly to apprise the owner of the service rendered and the charge made therefor.¹⁹ Among the requirements variously imposed by particular statutes are that the notice shall state or show the amount for which a lien will be claimed,²⁰ the amount due,²¹ or to become due,²² that the contractor is indebted to claimant in the sum stated in the notice,²³ that claimant was employed by the contractor,²⁴ that the work was done for or the materials furnished to a contractor with the owner,²⁵ that claimant furnished the materials,²⁶ and the date when the last work was done or the last material was furnished.²⁷ A failure to attach a copy of the plans and specifications to the notice is not necessarily fatal where it appears that the plans and specifications are in the possession of the owner.²⁸

5. Fla.—Harper Lumber & Mfg Co v Teate, 125 So 21, 98 Fla 1055
Waiver of notice generally see supra § 122

Circumstances showing waiver
Owner, by promising to withhold funds from contractor and pay them to lien claimant, waived defect in form of notice given by lien claimant not in privity with owner—Harper Lumber & Mfg Co v Teate, supra

6. Pa.—McVey v Kaufmann, 72 A 503, 223 Pa 125
40 C J p 169 note 38

7. Tenn.—Conger Lumber & Supply Co. v White, 66 SW 2d 999, 17 Tenn App 206

Tex.—Owen v Griffin, Civ App, 34 S W 2d 333
40 C J p 169 note 40

Registered mail

Notice by registered mail of mechanic's lien claim was sufficient to comply with statute requiring "notice in writing"—Doran v Britto, 161 A 141, 52 RI 425

8. Ark.—Buckley v Taylor, 11 SW 280, 51 Ark 302
Waiver of notice generally see supra § 122

9. Ind.—Quaack v Schmid, 30 NE 514, 131 Ind 185
40 C J p 169 note 42

10. Ky.—Wright v Monroe Lumber Co, 160 SW 788, 156 Ky 83
Pa.—Bezar v Dorfman, 45 Pa Dist & Co 136

11. Miss.—McLendon v Indianola Lumber Co, 90 So 885, 128 Miss 265

12. Ky.—Clinton Mfg & Packing Co v. Fullerton, 181 SW 172, 167 Ky 573
40 C J p 169 note 45

13. Ill.—Davis v Rittenhouse & Embree Co, 92 Ill App 341, modified on other grounds 61 NE 76, 191 Ill 372

Ky.—Wright v Monroe Lumber Co, 160 SW 788, 156 Ky 83

14. Ky.—Wright v Monroe Lumber Co, supra

15. Md.—Fulton v Parlett, 64 A 58, 104 Md 62

16. Fla.—Truelsen v Southern Lumber & Supply Co, 100 So 267, 87 Fla 327.

17. Md.—Fulton v Parlett, 64 A 58, 104 Md 62
40 C J p 169 note 50

18. Ala.—Trammell v Hudmon, 6 So 4, 86 Ala 472
40 C J p 170 note 51

19. Pa.—Ott v DuPlan Silk Corp, 114 A 630, 271 Pa 322.
40 C J p 170 note 52

20. Ky.—Jackson v Rechlin, 269 S W 714, 207 Ky 539
40 C J p 170 note 53

21. NC.—Economy Pumps v F W Woolworth Co, 17 SE 2d 639, 220 NC 499

Pa.—Meier v Harney & Duffy, 99 Pa Super 229—Bezar v Dorfman, 45 Pa Dist & Co 136
40 C J p 170 note 54

22. Ill.—Davis v Rittenhouse & Embree Co, 92 Ill App 341
40 C J p 170 note 55

23. Fla.—Langford v South Florida Lumber & Supply Co, 59 So 12, 63 Fla 484
40 C J p 170 note 56

24. Wis.—Dusick v Green, 95 NW. 144, 118 Wis 240
40 C J p 170 note 57

25. Ind.—Gilman v Gard, 29 Ind 291

26. Wis.—Dusick v Green, 95 NW 144, 118 Wis 240
40 C J p 170 note 59

27. Pa.—Meier v Harney & Duffy, 99 Pa Super 229
40 C J p 171 note 62

28. Pa.—National Supply & Construction Co v Fitch, 55 Pa Super. 212
40 C J p 171 note 65.

Under some statutes, the notice must contain an itemized account,²⁹ and it must be specified what labor was performed or what materials were furnished,³⁰ but under other statutes, the notice need not specify the items of work or material,³¹ or the prices for each item³² Under some,³³ but not other,³⁴ statutes it must be stated that the materials were used in constructing the building, but the lack of a distinct and affirmative statement in this respect is not fatal³⁵ where the statement made may, by construction, be deemed to fulfill the statutory requirement³⁶ It has been held under some statutes that a subcontractor must state in his notice the nature of the subcontract,³⁷ although it has been held unnecessary to attach a copy of the contract to the notice³⁸

Under particular statutes it has been held unnecessary to state in the notice when payment became³⁹ or will become⁴⁰ due, the conditions of the sale of the material to the principal contractor,⁴¹ that the material was delivered,⁴² when it was to be delivered,⁴³ or that there was any fixed time when

it was to be delivered,⁴⁴ or the particular character of the materials,⁴⁵ or to give a specific description of the materials furnished and used⁴⁶ Also, under some statutes, a written cautionary notice that materials will be furnished need not state the amount claimed for the materials⁴⁷

(3) Identity and Description of Parties and Property

The notice of intent to claim a lien should name and describe the parties and premises involved in substantial compliance with statutory requirements.

In compliance with particular statutory provisions, the notice of intent to claim a lien must so name or describe the parties as to indicate who is claiming the lien,⁴⁸ as well as the person or organization against whom it is claimed,⁴⁹ and the name of the contractor or person from whom the debt is owing,⁵⁰ or the name of the one for whom the labor is to be performed or to whom the materials are to be furnished⁵¹ While a notice which shows that the amount claimed is due a person other than claimant is insufficient,⁵² and a notice addressed

29. Tex.—Owen v Griffin, Civ App, 34 S W 2d 333

W Va.—Fireproof Products Co v Logan, 169 S E 400, 113 W Va 703

30. NC.—Economy Pumps v F W Woolworth Co, 17 S E 2d 639, 220 NC 499

40 C J p 170 note 60

Nature and kind of materials furnished

Pa.—Meier v Harney & Duffy, 99 Pa Super 229—Hite v Houck, Com Pl, 88 Pittsb Leg J 662

40 C J p 170 note 61

31. Ind.—Rhodes v Webb-Jameson Co, 49 N E 283, 19 Ind App 195

40 C J p 171 note 73

32. Pa.—Louis Werner Saw-Mill Co v General Chemical Co, 11 Pa Dist 722

40 C J p 171 note 74

33. W Va.—Elswick v Deskins, 69 S E 894, 68 W Va 396

34. Cal.—Davis v Livingston, 29 Cal 283

40 C J p 171 note 78

35. W Va.—Elswick v Deskins, 69 S E 894, 68 W Va 396

36. W Va.—Elswick v Deskins, supra

40 C J p 171 note 80

37. W Va.—Forman v Kelly, 139 S E 708, 104 W Va 211

38. Pa.—Ott v Duplan Silk Corporation, 114 A 630, 271 Pa 322—Logan Lumber Co v Knapp, 39 A 2d 275, 155 Pa Super 580.

Contrary rule under earlier statutes
Pa.—Herr v S R Moss Cigar Co, 85 A 151, 237 Pa 232

40 C J p 171 note 63

No written contract

It has been held not necessary to attach a copy of the contract to a notice of lien where there was no written contract, or subcontract, within the contemplation of the law—Murphy v Cicero Lumber Co, 97 Ill App 510

39. Ill.—Beck Coal & Lumber Co v H A Peterson Mfg Co, 86 N E 715, 237 Ill 250

40 C J p 171 note 66

40. Ill.—Beck Coal & Lumber Co v H A Peterson Mfg Co, supra

40 C J p 171 note 67

41. Wis.—Laev Lumber Co v Auer, 101 N W. 425, 123 Wis 178

42. Ill.—I Lurya Lumber Co. v Bernstein, 168 Ill App 85

43. Ill.—Miller v Calumet Lumber & Mfg Co, 121 Ill App 56

40 C J p 171 note 70

44. Ill.—Miller v Calumet Lumber & Mfg Co, supra

40 C J p 171 note 71

45. Cal.—Davis v Livingston, 29 Cal 283

46. Tenn.—Bassett v Bertorelli, 23 S W 423, 92 Tenn 548

47. Fla.—Truelsen v Southern Lumber & Supply Co, 100 So 267, 87 Fla 327

40 C J p 171 note 76

48. Ind.—Waverly Co v Moran

Electric Service, 26 N E 2d 55, 108 Ind App 75

40 C J p 171 note 81.

Notice held sufficient

Ind.—Waverly Co v Moran Electric Service, supra

49. Md.—Kenly v St Joseph Sisters of Charity, 63 Md 306

40 C J p 171 note 82

50. Fla.—Harper Lumber & Mfg Co v Teate, 125 So 21, 98 Fla 1055

Pa.—Meier v Harney & Duffy, 99 Pa Super 229

40 C J p 171 note 83

Notice held sufficient

Ill.—McKeown Bros Co v Ogden Kennel Club, 269 Ill App 622

Mo.—H B McCray Lumber Co v Standard Const Co, App, 285 S W 104

Or.—Eastern & Western Lumber Co v Henderson, 275 P 677, 129 Or 102

Pa.—Moss & Blakeley Plumbing Co v Schauer, 28 A 3d 323, 150 Pa Super 318

51. N J.—Passaic-Bergen Lumber Co v Currie, 166 A 711, 111 N J Law 63

Notice held insufficient

Notice of intention to furnish materials erroneously stating that materials were to be furnished to owner instead of general contractor was insufficient—Passaic-Bergen Lumber Co v Currie, supra

52. Miss.—Vicksburg Mfg & Supply Co v J H Jaffray Constr Co, 49 So 116, 94 Miss 282.

simply to the agent of the owner has been held insufficient,⁵³ nevertheless the courts are liberal in sustaining a notice which, despite errors or discrepancies therein as to the name of the owner⁵⁴ or contractor or person from whom the debt is owing,⁵⁵ is sufficient to put the owner on guard and does not mislead or prejudice him. Some statutes, although requiring that notice be given the owner, as discussed supra § 124, do not require that it be directed or addressed to him⁵⁶.

Description of property Under some statutes a description of the property to be affected by the lien is an essential part of the required notice to the owner⁵⁷. Other statutes, however, have been held not to require that the notice given to the owner should describe the premises⁵⁸. At any rate, a notice will not be held insufficient in this respect where it contains enough to identify the building⁵⁹ or premises⁶⁰.

§ 127. — Signature and Verification

The notice of intent to claim a lien should be signed by the claimant or his representative and verified where required by statute.

The notice of intent to claim a lien should be

signed by claimant⁶¹ or his agent⁶² or attorney⁶³. The fact that it is in the handwriting of claimant will not cure the want of a signature⁶⁴. Where claimant is a copartnership, a notice signed in the firm name is sufficient⁶⁵. A notice by a firm signed in the presence and by the authority of the firm, although not individually by one of the members, is sufficiently signed⁶⁶. Where claimant is a corporation, the notice may be signed by an agent⁶⁷ or attorney⁶⁸ without attaching the seal of the corporation⁶⁹.

Under some statutes the notice must be attested,⁷⁰ or verified by affidavit,⁷¹ and the latter statutes are construed to mean that the notice itself must contain a jurat showing that the paper is sworn to⁷².

§ 128. — Service

Compliance must be had with statutory requirements in serving notice of intent to claim a mechanic's lien.

There should be a due compliance with statutory requirements in serving notice of intent to claim a mechanic's lien⁷³. It has been held that the notice may be efficiently served in any form or by any

53. Ill—Legnard v Armstrong, 18 Ill App 549

54. Mo—Fruin-Bambrick Constr Co v Jones, 80 Mo App 1, 40 C J p 172 note 86

55. Mo—Kansas City Pump Co v Vrooman, 160 S W 48, 174 Mo App 63—Fruin-Bambrick Constr Co v Jones, 60 Mo App 1

56. Wis—G W Hirth, Inc. v Clybourn Realty Co, 232 N W 857, 202 Wis 432, 40 C J p 172 note 89

57. Wis—Mark Paine Lumber Co v Douglas County Impr Co, 68 N W 1013, 94 Wis 322

58. Ind—Gilman v. Gard, 29 Ind 291

59. Ill—Weil v. Bomash, 237 Ill App 544

Mo—Bambrick v. King, 59 Mo App 284

Street and number

A lien notice describing property in designated city by street and by number, and referring to dwelling house for which labor and materials had recently been furnished, was sufficient under statute—Isbell Lumber & Coal Co v Marchessau Plumbing Co, 11 N E 2d 518, 104 Ind App 373

60. Wash—Brace & Hergert Mill Co v Burbank, 151 P 803, 87 Wash 356, Ann Cas 1917E 739, 40 C J p 172 note 93

Error as to section number not fatal
Ind—Watson v Strohl, 46 N E 2d 204, 230 Ind 673

61. Mo—Schulenburg v Bascom, 38 Mo 188, 40 C J p 172 note 96

62. Mo—Towner v Remick, 19 Mo App 205
N J—Williams v Brodford, Ch, 21 A 331

63. Md—Tieusch v Shryock, 51 Md 163

Mo—Towner v Remick, 19 Mo App 205

64. Cal—Davis v Livingston, 29 Cal 283

65. Mo—Dwyer Brick Works v Flanagan, 87 Mo App 340

66. N J—Williams v Bradford, Ch, 21 A 331

67. Ill—I Lurya Lumber Co v Bernstein, 168 Ill App 77

68. Ill—Cary-Lombard Lumber Co v Fullenwider, 37 N E 899, 150 Ill 629

69. Ill—Cary-Lombard Lumber Co v Fullenwider, supra—I Lurya Lumber Co v Bernstein, 168 Ill App 85

70. Conn—Swift & Upton Lumber Co v W L Hatch Co, 162 A 19, 115 Conn 494

Prejudice to other subcontractors

Subcontractors' failure to attest copies of notices of intent to claim liens served on owner was held to

defeat liens, although owner did not complain, where other subcontractors who complied with statute would otherwise be prejudiced—Swift & Upton Lumber Co v W L Hatch Co, supra.

71. Pa—Expanded Metal Fire-Proofing Co v Delp, 93 A 496, 247 Pa 337—Orlando v Nick, 94 Pa Super 269—Wyoming Paint Co v Brandwene, Com Pl, 41 Lack Jur 134

W Va—Bailey Lumber Co v Ball, 20 S E 2d 241, 124 W Va 340

Verification by attorney

Subcontractor's lien was valid, notwithstanding statement which statute required original contractor to deliver to owner "from each subcontractor" was sworn to by subcontractors' attorney—Perfection Frame & Lumber Co v Banas, 177 N E 922, 39 Ohio App 471

72. Pa—Expanded Metal Fire-Proofing Co v Delp, 93 A 496, 247 Pa 337—Orlando v Nick, 94 Pa Super 269

73. Conn—City Lumber Co of Bridgeport v Borsuk, 41 A 2d 775, 131 Conn 640, 158 A L R 677

Ill—Western Plumbing Supply Co v. Horn, 269 Ill App 612—Agles v. Stolze Lumber Co, 260 Ill App 14, N H—Poirier v East Coast Realty Co, 152 A 612, 84 N H 461.

Subsequent error

Where service on owners at time of contracts was valid, it is imma-

method which in effect gives the written notice prescribed by the statute,⁷⁴ and that the mode or manner of service is immaterial where it is shown that the owner actually received the notice within the time limited,⁷⁵ but, under statutes requiring verification, as discussed supra § 127, service has been held insufficient where the server removed the affidavit⁷⁶

Under some statutes, personal service is not required,⁷⁷ and substituted⁷⁸ or constructive⁷⁹ service, such as by mail⁸⁰ or by leaving the notice or a copy thereof at the owner's usual place of abode⁸¹ with a member of his family,⁸² is sufficient. However, other statutes require personal service,⁸³ unless it is shown that such service could not be obtained by the exercise of reasonable diligence,⁸⁴ and under such statutes service by mail⁸⁵ or by leaving the original notice or a copy thereof at the residence of the owner, with a member of his family,⁸⁶ has been held insufficient. Under some statutes, where the owner or his agent is not to be found in the county, the notice may be served by

filing in the clerk's office.⁸⁷ Service of a copy of the notice ordinarily is sufficient.⁸⁸

By posting on premises Under some statutes service may be made by posting the notice on the most public part of the structure or other improvement where the owner cannot be served in the county, and no other person authorized to accept service can be found.⁸⁹ Posting the notice on the building is not sufficient without proof that because of absence or other causes personal service could not be made.⁹⁰

Place It has been held that service may be made on the owner anywhere,⁹¹ and under some statutes a like rule is applicable in respect of service on an agent,⁹² but under other statutes, service on an agent or architect outside of the county where the building is situated is not sufficient.⁹³

Who may make The notice may be served by anyone who would be a competent witness to make affidavit to the service⁹⁴ or by any officer authorized to serve writs or other process of a court,⁹⁵ the service need not be made by an officer⁹⁶ or by

rial that form of service of notice of mechanic's lien on owners under subsequent conveyances was invalid—*R D Kurtz, Inc. v Field*, 14 SW 2d 9, 223 Mo App 270

Proof of service

Conn—*City Lumber Co of Bridgeport v Borsuk*, 41 A 2d 775, 131 Conn 640, 158 A LR 677

Pa—*Chapin Lumber Co v Zagorski*, Com Pl, 38 Luz Leg Reg 57

74. NJ—*Fehling v Goings*, 58 A 642, 67 NJ Eq 375

75. Ohio—*Kocher v Ricketts*, App, 49 NE 2d 85

40 CJ p 172 note 10

76. W Va—*Bailey Lumber Co v Ball*, 20 SE 2d 241, 124 W Va 340

77. Mo—*L J Mueller Furnace Co v Dreibelbis*, App, 229 SW 240

40 CJ p 172 note 11

78. W Va—*Williams & Davisson Co v Bailey*, 70 SE 696, 68 W Va.

681

79. Mo—*L J Mueller Furnace Co v Dreibelbis*, App, 229 SW 240

80. NY—*Hesse-Schnitt v Brahe*, 234 NYS 535, 134 Misc 67

40 CJ p 172 note 14

Last address

Mailing notice to last directory address was sufficient to bind owner, knowing of work and receiving benefit—*Nicolai-Neppach Co v Poore*, 251 P 268, 120 Or 163

Rank of loss

Statute requiring as prerequisite to materialmen's lien, delivery or mailing to owner or reputed owner of property notice in writing as to

having commenced to deliver materials and supplies not later than five days after date of first delivery, is fully complied with when materialman mails notice to owner and the risk of loss in the mails is on the owner—*Building Supplies v Gillingham*, 135 P 2d 832, 17 Wash 2d 489

Wrong address

The fact that notice was sent to the wrong address is not a fatal defect where it was sent within the time required and was actually received by the owner—*Blossom Province Lumber Co v Schumacher*, 266 P 167, 147 Wash 369

81. RI—*American Radiator Co v Hampson*, 102 A 799, 41 RI 87

82. Mo—*R D Kurtz, Inc. v Field*, 14 SW 2d 9, 223 Mo App 270—*H B McCray Lumber Co v Standard Const Co*, App, 285 SW 104

40 CJ p 173 note 16

83. Mass—*Street Lumber Co v Sullivan*, 87 NE 905, 201 Mass 484, 16 Ann Cas 354

40 CJ p 173 note 17

84. Ill—*Western Plumbing Supply Co v Horn*, 269 Ill App 612

Reasonable diligence not shown

Ill—*Western Plumbing Supply Co v Horn*, 269 Ill App 612

85. Ill—*Carney v Tully*, 74 Ill 375—*Sykes Steel Roofing Co v Bernstein*, 156 Ill App 500—*Peck v Hinds*, 68 Ill App 319

86. Md—*Hensel v Johnson*, 51 A 575, 94 Md 729.

Pa—*Maddocks v McGann*, 12 Pa Dist 701

87. Wis—*Neil & Co, Inc v Wisconsin Tel Co*, 175 NW 89, 170 Wis 298—*Charles Baumbach Co v Laube*, 74 NW 96, 99 Wis 171

88. Wis—*Lentz v Eimermann*, 97 NW 181, 119 Wis 492

89. Md—*Bounds v Nuttle*, 30 A 2d 263, 181 Md 400

Ohio—*Herferth v Nisbet*, 190 NE 51, 47 Ohio App 40

Pa—*Merritt v Poli*, 84 A 683, 236 Pa 170

40 CJ p 173 note 23

90. Md—*Hensel v Johnson*, 51 A 575, 94 Md 729

91. Wis—*Dusick v Green*, 95 NW 144, 118 Wis 210

40 CJ p 173 note 24

92. Wis—*Neil & Co, Inc v Wisconsin Tel Co*, 175 NW 89, 170 Wis 298

93. Pa—*Merritt v Poli*, 80 A 1116, 231 Pa 611

94. Mo—*Hassett v Rust*, 64 Mo 335

Who may give notice see supra § 123

Interest

Statutes were held not to require that notice to owner by materialman's lien claimant be served by disinterested party—*Nicolai-Neppach Co v Poore*, 251 P. 268, 120 Or 163

95. Mo—*Hassett v Rust*, 64 Mo 325

40 CJ p 173 note 28

96. Tenn—*Bassett v Bertorelli*, 22 SW 423, 92 Tenn 548

claimant in person ⁹⁷

§ 129. — Defects and Amendment

Minor defects in the notice of intent to claim a lien will not invalidate the lien, and it has been held that in a proper case the notice may be amended.

Where there is a substantial compliance with statutory requirements, minor or technical defects in the notice will not invalidate the lien,⁹⁸ and it has been held that only the property owner may complain of defects in respect of service of the notice of intent to claim a lien.⁹⁹ Some courts hold that the notice may be amended at the trial in a proper case.¹ Other courts hold that the notice cannot be amended after the expiration of the time within which the statute requires it to be given,² and that statutory provisions authorizing amendment of lien claims, as discussed *infra* § 170, furnish no authority for amendment of a notice of intention to claim a lien.³ Verification may not be supplied by amendment,⁴ but the mere failure of a

notary to affix his seal to the jurat may be cured by amendment.⁵

§ 130. Furnishing Statement or Account to Owner

Under some statutory provisions a contractor seeking to acquire a lien must furnish to the owner a statement showing names and claims of subcontractors, laborers and materialmen, and a similar statement may be required of a subcontractor.

Under a few statutes, a contractor, in order to acquire a lien, must give to the owner a sworn statement showing the names of all subcontractors, laborers, and materialmen and the amounts due to each.⁶ The requirement has been held to apply, although the owner and contractor were the only parties involved,⁷ and despite the contractor's showing that the work and materials were paid for, or that labor was performed by permanent employees and materials furnished from general stock.⁸

97. N.J.—Fehling v Goings, 58 A 642, 67 N.J.Eq 375
40 C.J. p 173 note 30

98. Conn.—Pierce, Butler & Pierce Mfg Corporation v Enders, 174 A 169, 118 Conn 610

Referring to subcontractor as "contractor"

Conn.—Pierce, Butler & Pierce Mfg Corporation v Enders, *supra*

99. Mo.—Harry Cooper Supply Co v Gillioz, App., 107 S.W.2d 798

Notice for exclusive benefit of owner

The property owner alone can complain of failure properly to serve notice of intention to file a mechanic's lien, since purpose of such notice is to give property owner an opportunity to see that debt is discharged before lien is filed and is for his benefit alone—Harry Cooper Supply Co v Gillioz, *supra*

1. Pa.—Chapin Lumber Co v Zagorski, Com Pl., 38 Luz Leg Reg 57

Wash.—Ellis-Mylroie Lumber Co v Bratt, 205 P 398, 119 Wash 143

2. Wis.—Mark Paine Lumber Co v Douglas County Impr Co, 68 N.W. 1013, 94 Wis 322

3. N.J.—Belmont Coal & Lumber Co v James F Wood Builders, 15 A 2d 625, 125 N.J.Law 315

4. W.Va.—Bailey Lumber Co v Ball, 30 S.E.2d 241, 124 W.Va 340

5. W.Va.—Georgia Lumber Co v Harrison Const Co, 136 S.E. 399, 103 W.Va 1

6. Fla.—Fred Howland, Inc v Gore, 13 So.2d 303, 152 Fla 781—Dodson v Florida Nursery & Landscape Co, 190 So 695, 138 Fla 887

Mich.—Wood v Bolinger, 233 N.W.

390, 253 Mich 489—Pinto v Will Inv Co, 228 N.W. 777, 249 Mich 230—Netting Co v Touscany, 225 N.W. 556, 247 Mich 279—Vander Horst v Kalamazoo Apartments Corporation, 215 N.W. 57, 239 Mich 593

Ohio—Pierson Lumber Co v Roehm, 183 N.E. 795, 43 Ohio App 615—Frisch v Ammon, 171 N.E. 247, 34 Ohio App 447—Ulmer v Portage Const & Finance Co, 26 Ohio N.P.N.S. 257

40 C.J. p 173 note 32

Loss of lien for failure to furnish statement on demand see *infra* § 241

Purpose of provision

The purpose of statutory provisions is to enable recipient to retain out of moneys due or to become due to contractor amount sufficient to pay subcontractors, laborers, and materialmen—Nurmi v Beardsley, 266 N.W. 368, 275 Mich 328

Statements held sufficient

(1) An affidavit negating that subcontractors, materialmen, or laborers could have mechanics' liens is sufficient to entitle contractor to mechanics' lien—Vander Horst v Kalamazoo Apartments Corporation, 215 N.W. 57, 239 Mich 593

(2) Failure of contractor claiming mechanic's lien to give cost of extras was held not to violate statute requiring statement, on request, of work and materials furnished, where the detailed bills were then in possession of the owner and it was difficult for the contractor to segregate the cost of extras from total cost without having the bills for reference—Hopper-McAllister Corpora-

tion v Pelham, 217 N.W. 9, 241 Mich 235

Delivery in owner's presence

Delivery of contractor's statement, in owner's presence, and with his acquiescence, to representative of company furnishing money for building, was sufficient service on owner—Hopper-McAllister Corporation v Pelham, *supra*

No duty on one not "contractor"

Fla.—Pinellas Lumber Co v Lynch, 192 So 475, 140 Fla 559

Liability for debt

(1) The contractor's failure to comply with the statutory requirements does not cancel the debt due him from the owner—Fred Howland, Inc, v Gore, 13 So.2d 303, 152 Fla 781

(2) Owners are not absolved from paying reasonable value of materials and services which actually went into building—Union Supply Co v Morris, 30 P.2d 394, 220 Cal 331

Waiver

Under a statute providing that a failure to furnish such names may be pleaded in bar of such contractor's recovery against the owners unless it can be shown that all of such claims have been paid, failure, if any, of principal contractor to furnish complete list was immaterial, where building was inspected and approved by architect after completion—Hogue v D N Morrison Const Co of Virginia, 156 So 377, 115 Fla 293, 95 A.L.R. 357

7. Mich.—Netting Co v Touscany, 225 N.W. 556, 247 Mich 279

8. Mich.—Netting Co v. Touscany, *supra*,

Under a few statutes, subcontractors claiming liens are required to furnish statements similar to those required of contractors⁹. However, unless requested by the owner,¹⁰ a subcontractor need not furnish his statement directly to the owner¹¹ but may furnish it to the contractor¹² whose duty it is to furnish it to the owner¹³. The fact that the statement of a subcontractor is not served on the owner until after the lien claim is filed is not fatal, provided it is served before the expiration of the time for filing the claim, as discussed *infra* § 139 a.

Some statutes expressly provide that merchants

and dealers in materials only shall not be required to furnish statements,¹⁴ and, under the construction placed on other statutes, it is unnecessary for materialmen, laborers, etc., in order to preserve their liens and privileges on the property of the owner, to file sworn statements with the owner¹⁵.

Account Under some statutes, subcontractors, materialmen, and laborers are required to serve attested accounts on the owner¹⁶. Also, the rendering of periodic accounts to the owner is required by some statutes¹⁷.

B. FILING AND RECORDING CLAIM OR STATEMENT AND CONTRACT

1. IN GENERAL

§ 131. Necessity and Object

- a Necessity
- b Object of requirement

a. Necessity

- (1) In general
- (2) As determined by status of claimant
- (3) As against particular persons
- (4) Alternative requirements, excuses

(1) In General

In order to establish, perfect, or preserve a mechanic's lien, the lienor is generally required to file or have recorded an instrument, variously designated, showing that he claims a lien on certain property.

The statutes generally require a person desiring to assert a mechanic's lien to file or have recorded an instrument showing that a lien on certain property is claimed by him¹⁸. This instrument is vari-

Ohio—Frisch v Ammon, 171 NE 247, 34 Ohio App 447—Ulmer v Portage Const & Finance Co, 26 Ohio N.P.N.S., 257

9. Ohio—Gannon v Potter, Tears & Co, 29 Ohio C.A. 566, 12 Ohio App 9
40 C.J. p 173 note 33.

Substantial compliance

Where general contractor allegedly left home for unknown place, subcontractors' service of preliminary affidavits directly on owner was held substantial compliance with statute, although subcontractors did not avail themselves of statute providing for service of notices through sheriff or by registered mail—Marcum v Home Loan & Building Ass'n, 186 NE 920, 45 Ohio App 237

10. Ohio—Schuholz v Walker, 145 NE 537, 111 Ohio St 308

11. Ohio—Williamson Heater Co v Radich, 190 NE 403, 128 Ohio St 124
40 C.J. p 173 note 35

12. Ohio—Williamson Heater Co v Radich, *supra*
40 C.J. p 173 note 36.

13. Ohio—Schuholz v Walker, 145 NE 537, 111 Ohio St 308—Silver v Thomas, 29 Ohio C.A. 455, 9 Ohio App 187

14. Ill—Gilbert v Croshaw, 178 Ill App 10.

15. La—Musey v Prater, 84 So 498, 147 La 71
40 C.J. p 173 note 43

Contract not recorded

Under a statute providing that, where the owner of real estate has entered into a written contract with another to erect, improve, or repair a building thereon but does not record the contract, any person furnishing service or material may record a copy of his estimate or an affidavit of his claim, which recordation shall create a lien, does not require a service on the owner in order to create a lien—Derbes v Marshall, La App, 183 So 74

Materialmen

Ohio—Matzinger v Harvard Lumber Co, 155 NE 131, 115 Ohio St 555

16. La—Casey v Allain, 120 So 420, 9 La App 725
40 C.J. p 174 note 44

17. NH—Lawson v Kimball, 38 A 380, 68 NH 549
40 C.J. p 174 note 45

18. Ariz—Intermountain Building & Loan Ass'n v Albert Steinfeld & Co, 14 P.2d 742, 40 Ariz 545—Morgan v O'Malley Lumber Co, 7 P.2d 252, 39 Ariz 400

Ark—McGehee Realty & Lumber Co v Kennedy, 141 SW 2d 524, 200 Ark 926—St Mathews Church v White, 291 SW 977, 172 Ark 1152

DC—Merrill v B R Acker Co, 142 F.2d 103, 79 US App DC 51

Ind—Ohio Oil Co v. Fidelity & Deposit Co of Maryland, 42 NE 2d 406, 113 Ind App 452—Jackson v J A Franklin & Son, 23 NE 2d 23, 107 Ind App 38

Ky—Fugate v Taulbee Lumber & Coal Co, 172 SW 2d 61, 294 Ky 422—Power v Brewer, 38 SW 2d 466, 238 Ky 579

La—Capital Building & Loan Ass'n v Carter, 113 So 886, 164 La 388—Bart v Conforto, App, 30 So 2d 885—Markel v C W M Const Co, App, 6 So 2d 768—Julius Aaron & Son v Keyser, 2 La App 649

Mo—Hill-Behan Lumber Co v Flegle, App, 183 SW 2d 862—Holekamp Lumber Co v Skay, App, 65 SW 2d 669

NJ—Belmont Coal & Lumber Co v James F Wood Builders, 15 A 2d 625, 125 NJ Law 315

NY—Schenectady Homes Corporation v Greenside Painting Corporation, 37 NY S 2d 53

Ohio—Ulmer v Portage Const & Finance Co, 26 Ohio N.P.N.S., 257

Okl—Pacific Petroleum Co v Sunbeam Oil Co, 64 P.2d 1054, 176 Okl 293

Or—Lorenz v Pilsener Brewing Co of Oregon, 81 P.2d 104, 159 Or 552

Pa—Nick v McMullen, 17 Pa Dist & Co 716, 14 Erie Co 41.

ously termed a "claim," "notice," "statement," an "account," or an "affidavit" according to the phraseology employed in the statutes of different jurisdictions,¹⁹ and, as discussed *infra* §§ 138-171, it must be filed or recorded in the place, and at or within the time, designated in the statute, and must contain certain statements concerning the claim and the property against which enforcement is sought. Substantial compliance with the requirements of

the statute with respect to the filing or recording of the instrument has been held essential.²⁰ The filing of the instrument is necessary to establish,²¹ fix and secure,²² perfect,²³ preserve,²⁴ and enforce²⁵ the lien. While the proper filing or recording of the instrument is said to give or create the lien,²⁶ it has also been held that the filing of the claim does not create the lien²⁷ but merely fixes,

SD—Botsford Lumber Co v Schri-ver, 306 NW 123, 49 SD 68

Tenn—*Corpus Juris* quoted in McDonnell v Amo, 34 SW 2d 212, 213, 162 Tenn 36

W Va—Duncan Box & Lumber Co v Stewart, 30 SE 2d 391, 126 W Va. 871

40 C.J. p 174 note 52

Filing of claim or notice:

As

Condition precedent to suit on contractor's bond see *infra* § 382

Fixing time when lien attaches see *infra* § 177

To obtain lien on money due contractor see *supra* § 116

No lien, inchoate, equitable, or otherwise, exists on failure of claimant to file notice—Smith v Vara, 241 NYS 202, 136 Misc 500

Alteration and repair

Work on house embracing no exterior alteration, except that back porch was raised and room was built under it, did not add "substantial addition" so as to make mechanic's lien valid, notwithstanding notice of intention to file claim and claim were not filed, as required in cases of alteration and repair—Huber v Ros-sell, 161 A 583, 105 Pa.Super 290

Homestead

Where it is sought to affix a mechanic's lien on a homestead, the filing of a lien claim or statement is necessary, as in other cases—Hol-land v Robbins, 219 P 387, 92 Okl 225

Public improvement

The recording of a claim is not required by some statutes where a lien is claimed for work done on a public improvement—Goldtree v San Diego, 97 P 216, 8 Cal App 505

19. Tenn—*Corpus Juris* quoted in McDonnell v Amo, 34 SW 2d 212, 213, 162 Tenn 36

Instrument termed "mechanic's lien" see *supra* § 1

Necessity for filing notice of intent to claim lien see *supra* § 120

20. Mo—Landers Lumber & Cement Co v Short, 37 SW 2d 981, 225 Mo App 416

21. Ark—McGehee Realty & Lum-ber Co v Kennedy, 141 SW 2d 521, 200 Ark 926

Okla—Pacific Petroleum Co v Sun-beam Oil Co, 54 P 2d 1054, 176 Okl 393—Bryan v Orient Lumber & Coal Co, 156 P 897, 55 Okl 370

Tenn—*Corpus Juris* quoted in McDonnell v Amo, 34 SW 2d 212, 213, 162 Tenn 36—Brown v Brown Co, 160 SW 2d 431, 25 Tenn App 509

22. Ariz—Intermountain Building & Loan Ass'n v Albert Steinfeld & Co, 14 P 2d 742, 40 Ariz 545—Mor-gan v O'Malley Lumber Co, 7 P 2d 252, 39 Ariz 400

Mo—Hill-Behan Lumber Co v Fle-gle, App, 183 SW 2d 863—Landers Lumber & Cement Co v Short, 37 SW 2d 981, 225 Mo App 416

23. Ky—Fugate v Taulbee Lumber & Coal Co, 172 SW 2d 61, 294 Ky 422

Tenn—*Corpus Juris* quoted in McDonnell v Amo, 34 SW 2d 212, 213, 162 Tenn 36—Brown v Brown Co, 160 SW 2d 431, 25 Tenn App 509

W Va—Duncan Box & Lumber Co v Stewart, 30 SE 2d 391, 126 W Va. 871

40 C.J. p 175 note 56

Lien is inchoate until the filing

US—American Surety Co of New York v Franciscus, CCA Mo, 127 F 2d 810

Conn—J L Purcell, Inc v Libbey, 149 A 225, 111 Conn 132, 68 A LR 1268

Lien is not tangible encumbrance until set forth in document filed in conformity with statute—Goodner v Mosher-Roe Abstract & Guaranty Co, 282 SW 698, 314 Mo 151

Knowledge of owner is immaterial

—Powers v Brewer, 28 SW 2d 466, 238 Ky 579

24. Tenn—*Corpus Juris* quoted in McDonnell v Amo, 34 SW 2d 212, 213, 162 Tenn 36

W Va—Duncan Box & Lumber Co v Stewart, 30 SE 2d 391, 126 W Va. 871

40 C.J. p 175 note 57.

Loss of lien

(1) Under some of the statutes failure properly to file or record the notice or claim results in a termination of, or loss of right to, the lien, in the absence of a proper excuse for such failure

La—Bart v Conforto, App, 30 So 2d 885

Okla—Pacific Petroleum Co v Sun-beam Oil Co, 54 P 2d 1054, 176 Okl 293

SD—Botsford Lumber Co v Schri-ver, 206 NW 423, 49 SD 68

(2) However, the personal right against the owner is not lost there-by—Bart v Conforto, *supra*

25. NJ—White & Shauger v Strait, 157 A 889, 10 NJ Misc 133

Okla—Ferry v Brophy, 243 P 506, 116 Okl 99

Tenn—*Corpus Juris* quoted in McDonnell v Amo, 34 SW 2d 212, 213, 162 Tenn 36—Brown v Brown & Co, 160 SW 2d 431, 25 Tenn App 509

40 C.J. p 175 note 58

Enforcement of lien generally see *infra* §§ 263-354

26. Ark—Planters' Cotton Oil Co v Galloway, 280 SW 999, 170 Ark 712

La—Haffner & Taylor v Perloff, 141 So 377, 174 La 687—Cox v Rock-hold, 138 So 702, 14 La App 170—Rain-Beard Co v Bellevoir Co, 7 La App 118

Mo—Holekamp Lumber Co v Skay, App, 65 SW 2d 669

Or—Phillips v Graves, 9 P 2d 490, 139 Or 336, 83 ALR 1

Tex—Towery v Plainview Building & Loan Ass'n, Civ App, 99 SW 2d 1039, error refused—Stewart v Woods Electric Co, Civ App, 73 S W 2d 657

Not final lien

Under some statutes the lien obtained by the filing is merely cautionary and not final, the amount and finality depending on the judgment ultimately obtained in the proceedings to enforce the lien—Iannotti v Kalmbacher, 156 A 366, 4 WW Harr, Del, 600—Armstrong & Latta Co v Wilmington Sugar Refining Co, 120 A 94, 2 WW Harr, Del, 600

Right to payment of specific amount is not established by filing of the notice—Brescia Coal, Feed & Lumber Corporation v Scheuplein, 9 NYS 2d 921, 170 Misc 229, order modified and judgment vacated on other grounds 17 NYS 2d 622, 258 App Div 920

27. SD—Botsford Lumber Co v Clouse, 251 NW 801, 62 SD 108

perfects, preserves, or perpetuates it²⁸ A fortiori, no lien results from the filing of a claim against property not subject to a mechanic's lien,²⁹ such as a homestead,³⁰ but the rule is otherwise if the homestead is subject to a mechanic's lien³¹

The filing of the claim does not constitute the lien,³² but has been held to be³³ and not to be³⁴ the foundation of the lien. It also has been both affirmed³⁵ and denied³⁶ that the claim or notice, as filed or recorded, is the foundation of an action to enforce the lien. At any rate the claim, notice, or affidavit is not a pleading,³⁷ process,³⁸ judgment,³⁹ or conveyance⁴⁰ The filing of the notice of a lien for materials furnished does not of itself result in a conversion of personal property into real property where such materials have not been annexed to the realty,⁴¹ nor does such filing result in a transfer of the title to the materials⁴²

Refiling or reinscribing lien Under some statutes a mechanic's lien claimant must have the lien

reinscribed in the records within a specified time after its original recordation, and failure so to do prescribes the lien,⁴³ even as against the owner.⁴⁴

(2) As Determined by Status of Claimant

Under some statutes subcontractors are not required to file a claim or notice.

Under some statutes subcontractors are not required to file a claim or notice,⁴⁵ but under other statutes subcontractors or materialmen must file and have recorded their claims⁴⁶ notwithstanding the contract between the owner and principal contractor is not filed or recorded⁴⁷

(3) As against Particular Persons

Under some statutes filing a recording is essential only to preserve the lien as against third persons.

Under some statutes the filing of the prescribed statement is essential even though enforcement of the lien is sought solely against the owner and no rights of other persons are involved,⁴⁸ but under

Tex—Estacado Oil Co v Parker, Civ App, 36 S W 2d 1095
40 C J p 265 note 41

29. Ala—Benson Hardware Co v Jones, 135 So 411, 223 Ala 287
Conn—J L Purcell, Inc, v Libbey, 149 A 225, 111 Conn 132, 68 A L R 1258

SD—Botsford Lumber Co v Clouse, 251 NW 801, 62 SD 108

Tex—Estacado Oil Co v Parker, Civ App, 36 S W 2d 1095
40 C J p 265 note 42

29. SD—Botsford Lumber Co v Clouse, 251 NW 801, 62 SD 108

30. SD—Botsford Lumber Co v Clouse, supra.

31. Tex—Towery v Plainview Building & Loan Ass'n, Civ App, 99 S W 2d 1039, error refused

32. NM—Weggs v Kreugel, 205 P 730, 28 NM 24

33. Mo—Landers Lumber & Cement Co v Short, 37 S W 2d 981, 235 Mo App 416

34. NM—Weggs v Kreugel, 205 P 730, 28 NM 24

35. Or—Kelley v Anderson, 166 P 555, 85 Or 138

36. NM—Weggs v Kreugel, 205 P 730, 28 NM 24

37. Minn—Northwestern Cement & Concrete Pavement Co v Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 45 NW 868, 43 Minn 449

Mo—Berkshire Lumber Co v J S Chick Inv Co, 155 S W 904, 170 Mo App. 1.

38. Minn—Northwestern Cement & Concrete Pavement Co v Norwegian-Danish Evangelical Lutheran

Augsburg Seminary, 45 NW 868, 43 Minn 449

39. Minn—Northwestern Cement & Concrete Pavement Co v Norwegian-Danish Evangelical Lutheran Augsburg Seminary, supra

40. Minn—Northwestern Cement & Concrete Pavement Co v Norwegian-Danish Evangelical Lutheran Augsburg Seminary, supra

41. NY—Rapid Fireproof Door Co v Largo Corporation, 154 NE 531, 243 NY 482, motion denied 154 NE 898, 244 NY 563

42. NY—Rapid Fireproof Door Co v Largo Corporation, supra

43. La—Shreveport Long Leaf Lumber Co v Wilson, 197 So 566, 195 La 814

Continuance and expiration of lien see infra § 183

44. La—Shreveport Long Leaf Lumber Co v Wilson, supra.

Nonresident owner

Where materialman furnishing materials to the contractor brought action in rem to have materialman's lien recognized and enforced, and reserved right to proceed against non-resident owner of the improved property, the trial court on determining that the lien was prescribed properly dismissed the suit—Shreveport Long Leaf Lumber Co v Wilson, supra

45. Ill—Maxwell v Koertiz, 35 Ill App 300

NC—Porter v Case, 122 SE 483, 187 NC 629.

46. Ga—Chambers Lumber Co v Gilmer, 5 SE 2d 84, 60 Ga App 832
Neb—Parsons Const Co v Gifford, 262 NW 508, 129 Neb 617.

NJ—White & Shauger v Strait, 157 A 889, 10 NJ Misc 133

Ohio—Cincinnati Builders' Supply Co v Roehm, 182 NE 680, 43 Ohio App 299

Subcontractor or materialman supplying contractor

(1) Under a statute requiring every person intending to claim a lien to file a claim within the time specified, a materialman supplying a contractor was held not entitled to sue to enforce the lien where he failed to file a claim—White & Shauger v Strait, 157 A 889, 10 NJ Misc 133

(2) Contractor, agreeing to furnish material and construct improvement, was not agent for owner so as to bind him in favor of materialman, in absence of compliance with law relating to liens in favor of subcontractors—Holmes v Dolese Bros Co, 246 P 372, 117 Okl 298

47. Cal—Madera Flume & Trading Co v Kendall, 52 P 304, 120 Cal 182, 65 Am SR 177—Willamette Steam Mills Lumbering & Manuf'g Co v Los Angeles College Co, 29 P 629, 94 Cal 229
40 C J p 175 note 76

Filing by laborers or materialmen does not create lien in behalf of contractor.—Officer v Combre, La App, 194 So 441

48. Okl—Holland v Robbins, 219 P 387, 92 Okl 225
40 C J p 175 note 80.

In south Dakota

(1) Failure properly to file terminates the lien absolutely—Botsford Lumber Co v Schriver, 206 N W 423, 49 SD 68

(2) Under an earlier statute fail-

other statutes the filing is necessary only to preserve the lien against third persons, such as purchasers or encumbrancers in good faith without notice.⁴⁹ In at least one jurisdiction filing is necessary as against the owner where claimant has not contracted directly with the owner,⁵⁰ but is not necessary where claimant has contracted directly with the owner and hence has a lien by virtue of the constitutional provision conferring it.⁵¹ However, filing is necessary as against subsequent purchasers without notice, actual or constructive.⁵²

(4) Alternative Requirements, Excuses

Under some statutes the institution of a suit to enforce the lien within the time required for filing of the claim makes filing of the claim unnecessary.

Except in at least one jurisdiction⁵³ the filing of a claim or statement is not necessary where suit is brought to enforce the lien within the time allowed for such filing,⁵⁴ some statutes expressly providing, in the alternative, for the filing of the claim or the bringing of suit within a specified time.⁵⁵ Filing of separate liens by laborers or materialmen unwilling to extend credit to the contractor may be but one of several alternatives open to them.⁵⁶

Where the person entitled to the lien is prevented by the act of the owner from complying with the law, such act will excuse the nonperformance of the duty imposed by the statute.⁵⁷ On the other hand, actual notice on the part of the owner will not excuse a failure to comply with the statute,⁵⁸ nor can the owner's expression of willingness that the lien should be valid have the effect of continuing its existence as against other lienholders when lost by failing to file an account as required by statute.⁵⁹ The appointment of a receiver for the property on which the improvement is being erected will not excuse the failure to file and record the statement required by statute,⁶⁰ and, in the case of a mechanic's lien proper, the filing of a claim or notice is not dispensed with where the owner is in failing circumstances,⁶¹ a statute providing that, where the owner is in failing circumstances, certain claims shall be preferred debts, whether or not notice of lien is filed, being construed to be limited to claims for wages of persons employed in or about any shop, etc.,⁶² and not to extend to the claims of contractors, subcontractors, mechanics, laborers, or other persons performing labor or furnishing material for the erection, alteration, or repair of any

ure to file did not per se defeat the lien, but merely postponed it as to purchasers and encumbrancers in good faith without notice—*Hill v Alliance Bldg Co*, 60 N.W. 752, 6 S.D. 160, 55 Am.S.R. 819.

49. Fla.—*Hendry Lumber Co v Bryant*, 189 So. 710, 138 Fla. 485.
La.—*Greater New Orleans Homestead Ass'n v Korner*, App., 144 So. 507—*Robinson-Slagle Lumber Co v Waterman*, 1 La.App. 309.
N.D.—*Northwestern Mut Savings & Loan Ass'n v Kessler*, 268 N.W. 692, 66 N.D. 737.
40 C.J. p. 176 note 81.

Property held by entireties

Where materials are furnished under direct contract with the owners, notice of lien need not be filed to acquire a lien against the owners unless the property is held as an estate by the entireties—*Rieck & Fleece v Cunniff*, 190 So. 8, 138 Fla. 713.

Absence of privity with owner

Purchasers and creditors of owner without notice and not in privity with him may acquire lien on real estate after giving notice to owner, and, in addition, recording notice of lien—*Anderson Mill & Lumber Co v Clements*, 134 So. 588, 101 Fla. 523.

Purchaser takes free of lien in the absence of registration of statement or filing of attachment suit—*Brantingham v Beasley*, 2 Tenn.App. 598.
50. Tex.—*Paris First Nat Bank v*

Lyon-Gray Lumber Co, 217 S.W. 133, 110 Tex. 162.
40 C.J. p. 176 note 82.

51. Tex.—*Brick & Tile v Parker*, 186 S.W.2d 66, 143 Tex. 383—*Black, Sivalis & Bryson v Operators' Oil & Gas Co*, Civ.App. 37 S.W.2d 313, error dismissed.
40 C.J. p. 176 note 83.

Property not homestead

Mechanic's liens on property not homestead are valid without recording of claims—*Gugenheim v Dallas Plumbing Co*, Tex.Civ.App. 42 S.W.2d 268, reversed on other grounds *Gugenheim v Dallas Plumbing Co*, Com.App. 59 S.W.2d 105.

52. Tex.—*Black, Sivalis & Bryson v Operators' Oil & Gas Co*, Civ.App. 37 S.W.2d 313, error dismissed.

53. Wis.—*Wright v Allen*, 26 Wis. 661.

54. Ark.—*Standard Lumber Co of Pine Bluff v Wilson*, 296 S.W. 27, 173 Ark. 1024.

Ill.—*Advance Heating Co v Catholic Bishop of Chicago*, 5 N.E.2d 102, 287 Ill.App. 623.

Okl.—*National Gas Co v Ada Iron & Metal Co*, 93 P.2d 539, 185 Okl. 415—*Bank of Earlsboro v J. E. Crosbie, Inc.*, 77 P.2d 547, 182 Okl. 327—*Newman v Kirk*, 23 P.2d 163, 164 Okl. 147—*Wass v Vickery*, 278 P. 336, 137 Okl. 52—*Sutherland Lumber Co v Gale*, 277 P. 243, 136 Okl. 233, 65 A.L.R. 1186.
40 C.J. p. 176 note 86.

Filing of attachment suit

Tenn.—*Brantingham v Beasley*, 2 Tenn.App. 598.

55. US.—*Sexton Mfg Co v Singer Sewing Mach Co*, Ill., 194 F. 56, 114 C.C.A. 76.

Ill.—*F. E. Schoenberg Mfg Co v Broadway Central Hotel Corporation*, 259 Ill.App. 40.
40 C.J. p. 176 note 87.

56. Va.—*Coleman v Pearman*, 165 S.E. 371, 159 Va. 72.

57. Tex.—*Warner El Mfg Co v Maverick*, 30 S.W. 437, 88 Tex. 489, reheard 31 S.W. 353, 88 Tex. 489.
40 C.J. p. 176 note 88.

58. N.M.—*Ackerson v Albuquerque Lumber Co*, 29 P.2d 714, 38 N.M. 191.

40 C.J. p. 176 note 89.

59. Tex.—*Lyon v Elser*, 12 S.W. 177, 72 Tex. 304.

60. Okl.—*Corpus Juris cited in Pacific Petroleum Co v Sunbeam Oil Co*, 54 P.2d 1054, 1055, 176 Okl. 293.
40 C.J. p. 176 note 91.

61. Ind.—*National Supply Co v Stranahan*, 69 N.E. 447, 161 Ind. 602.

40 C.J. p. 176 note 94.

62. Ind.—*National Supply Co v Stranahan*, supra.
40 C.J. p. 176 note 94.

house or other building⁶³

Filing promissory note given for amount due. Under some statutes, where a lien claimant has received a promissory note for the amount due him, the note or a copy thereof, with a statement as to the origin of the indebtedness, may be filed instead of the usual lien claim or statement⁶⁴ Such a statute has been held to be permissive rather than compulsory,⁶⁵ and even where a note has been taken the filing of an itemized statement in the usual form will sustain the lien,⁶⁶ claimant need not file both the usual itemized statement and a copy of the note⁶⁷

b. Object of Requirement

Generally the purpose of requiring a statement of claim to be filed is to give notice of the existence of the lien

The purpose of requiring a statement of claim to be filed is to give notice of the existence of the lien⁶⁸ In some cases it has been said that the filing and recording are intended not only to give notice of the lien, but also to give anyone interested all the information necessary to enable him to determine the validity and extent of the lien,⁶⁹ together with its relative rank and merits⁷⁰ A further object of the requirement is to enable plaintiff in foreclosure proceedings to join other lien claimants as parties to the action so as to simplify and expedite the proceedings⁷¹

§ 132. Filing Contract

Some statutes require the contract with the owner for the construction or improvement of a building or structure to be recorded if the lien is to be preserved

Under some statutes provision is made for the recordation of contracts entered into with an owner for the construction or improvement of any building or structure for the purpose of creating and preserving the liens and privileges of the contractor, workmen, and materialmen against the building or other structure.⁷² Under other statutes, however, a failure to file the contract does not defeat the lien of the contractor as against the owner⁷³ or any other person charged with notice,⁷⁴ such statutes being construed, as far as one who contracts directly with the owner is concerned, as being intended only to protect the contractor as against subsequent purchasers, mortgagees, and lienholders in good faith without notice, by furnishing constructive notice to them⁷⁵

§ 133. Filing One or More Claims or Statements by Same Claimant

As a general rule but one valid lien can be filed by the same claimant against the same property for work done under an entire contract

Mechanics' lien statutes do not contemplate that a contractor or subcontractor may from time to time, as the work progresses, file successive liens for work and materials performed and furnished under an entire contract, and thus acquire distinct liens for the different portions of his account, he is entitled to acquire only one lien⁷⁶ Only one valid lien can be filed against the same property for the same account,⁷⁷ and, except in some jurisdictions,⁷⁸ where a claimant who has filed a good and valid lien claim fails to bring suit thereon within the time limited therefor, he cannot cure his neglect by filing

63. Ind.—National Supply Co v Stranahan, *supra*
40 C J p 176 note 94

64. Kan.—Higley v Ringle, 45 P 619, 57 Kan 222
40 C J p 176 note 95

65. Kan.—Higley v Ringle, *supra*

66. Kan.—Higley v Ringle, *supra*

67. Neb.—Jarrett v Hoover, 59 N W 353, 41 Neb 231

68. ND.—Northwestern Mut Savings & Loan Ass'n v Kessler, 268 NW 692, 66 ND 737

Tenn.—Brantingham v Beasley, 2 Tenn App 598
40 C J p 176 note 99.

Constructive notice

Pa.—Lhormer v Frank, Com Pl, 87 Pittsb Leg J 255

69. Ariz.—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

Cal.—Hammond Lumber Co v Richardson, 270 P 751, 94 Cal App 119
40 C J p 177 note 2.

70. Utah.—Morrison v Willard, 53 P 832, 17 Utah 308, 70 Am SR 784
40 C J p 177 note 3

71. Minn.—State v Anderson, 199 NW 6, 159 Minn 245
Parties in foreclosure proceedings see *infra* §§ 383, 284

72. La.—Truscon Steel Co v B & T Const Co, 129 So 644, 170 La 1083—Officer v Combres, App, 194 So 441

Mass.—Lampasona v Capriotti, 4 N E 2d 621, 296 Mass 34, 108 A L R 430

Filing or recording of contract generally see *supra* § 82

Method not exclusive

This provision for creation and preservation of mechanics' liens was held not to provide exclusive method of preserving privilege—Cox v Rockhold, 128 So 702, 14 La App 170

73. Tex.—Strang v Pray, 35 SW 1054, 89 Tex 525
40 C J p 124 note 92

74. Tex.—D June & Co v Doke, 80 SW 402, 35 Tex Civ App 240
40 C J p 124 note 93

75. Tex.—D June & Co v. Doke, *supra*
40 C J p 124 note 94

76. Ill.—Thomas v Illinois Industrial Univ, 71 Ill 310
Iowa.—Merchant v Ottumwa Water Power Co, 6 NW 709, 54 Iowa 451.

77. Mo.—Mulloy v Lawrence, 31 Mo 583—Hormann v Wirtell, 59 Mo App 846

Lien is not rendered invalid by fact that contractor filed two statutory liens instead of one—Lammers v Cart-Ritter Co, 121 SW 2d 95, 196 Ark 1159, followed in 121 SW 2d 519, 196 Ark 1178

78. NY.—Matter of Cohen, 205 N. Y S 90, 209 App Div 413
40 C J p 177 note 12.

a second lien within the time allowed for filing.⁷⁹ However, where the lien claim filed is defective and not sufficient under the law, the lien claimant is entitled to fix his lien by filing a second claim within the time limited by statute,⁸⁰ and it has been held, where there is uncertainty as to who is the owner of the land on which the building or improvement was erected⁸¹ or as to the person for whom the material was furnished,⁸² that claimant may file two or more liens to cover the exigencies of the case although there may, of course, be but one recovery of the amount due.⁸³

The lien statement may cover and include more than one claim or demand⁸⁴ accruing in favor of the same person and against the same person and property,⁸⁵ provided the statutory requirements are complied with as to each.⁸⁶ The rule is applicable where work is done or materials are furnished under several different contracts between the same parties and relating to the same property,⁸⁷ where the performance of the labor or the supplying of materials is substantially continuous,⁸⁸ or where all the items involved are part of a reasonably continuous transaction,⁸⁹ but not where labor or materials are furnished under contracts between different parties.⁹⁰ A subcontractor may file a single lien for all material furnished under a single and entire contract between him and the contractor, even though the latter has two or more contracts with the owner.⁹¹

Some statutes providing for the filing of two

statements, one to be filed by all claimants, and the other, a preliminary statement of an intention to perform labor or to furnish labor or materials and to claim a lien, to be filed by subcontractors, laborers, and materialmen, have been construed to make the filing of the former statement indispensable⁹² and the filing of the latter permissive.⁹³

Succession in interest of owner or contractor. Where a firm to which, as owner, the materials were to be furnished was converted into a corporation before the contract was completed, a single lien account cannot be filed covering what was furnished both before and after the incorporation.⁹⁴ However, where the original contractor dies, and his executor completes the building contract, a subcontractor may include in a single lien claim all the work done and materials supplied by him whether for or to the contractor or the executor.⁹⁵

§ 134. — Two or More Buildings or Improvements

- a In general
- b On same lot or parcel
- c On separate lots or parcels

a. In General

Whether a single lien may be filed to cover work done on more than one building or structure depends on the terms of the particular statute involved.

Under the statutes of some jurisdictions it is unnecessary to file a separate lien on each building for work done under one contract in connection

79. Mo—Mulloy v. Lawrence, 31 Mo 583

Time to sue see *infra* § 282

80. Ill—Corpus Juris cited in Edwin Pratt's Sons Co v Shafer, 7 N E2d 901, 904, 290 Ill App 80 40 C J p 177 note 14

Amendment of claim or statement see *infra* § 170

Refiling or reinscribing claim see *supra* § 131 a

81. Pa—Clark v Miller, 14 Pa Co 227

40 C J p 178 note 15

Designation or description of owner in lien claim or statement see *infra* § 162

82. Pa—Clark v Miller, *supra*

83. Pa—Clark v Miller, *supra*

84. Minn—Kinney v Duluth Ore Co, 60 NW 23, 58 Minn 455, 49 Am SR 528

40 C J p 178 note 20

Construction and repairs

Pa—Delaware County Supply Co v Scavicchia, Com Pl, 33 Del Co 35

85. Ala—Alabama State Fair & Agricultural Ass'n v Alabama Gas

Fixture & Plumbing Co, 31 So 26, 131 Ala 256

40 C J p 178 note 21

86. Minn—Kinney v Duluth Ore Co, 60 NW 23, 58 Minn 455, 49 Am SR 528

Filing within required period after completion of each contract see *infra* § 144 c (3)

87. Conn—Burque v. Naugatuck Lumber Co, 155 A 414, 113 Conn 350

Mo—Corpus Juris cited in Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 1000, 332 Mo 440

40 C J p 178 note 23

Additions and modifications

Mich—David Lupton's Sons Co v Berghoff Printing Co, 229 NW 810, 249 Mich 455

Mo—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 332 Mo 440

88. Alaska—Read v Luther Gold Dredging Co, 7 Alaska 348

Pa—McCready-Rodgers Co v Nenoff, Com Pl, 92 Pittsb Leg J 171, re-

versed on other grounds 39 A 2d 260, 155 Pa Super 555

40 C J p 178 note 23 [a]

89. SD—Botsford Lumber Co v Schriver, 206 NW 423, 49 SD 68

90. US—Hooven, Owens & Rentschler Co v John Featherstone's Sons, Mo, 111 F 81, 49 CCA 229

Pa—Commercial Sash and Door Co v Thompson, 17 Pa Dist 996

91. Kan—Chicago Lumber & Coal Co v Smith, 114 P. 372, 84 Kan 190

92. Utah—Morrison v. Carey-Lombard Co, 33 P 238, 9 Utah 70

40 C J p 178 note 18

93. Utah—Langton Lime & Cement Co v Peery, 159 P 49, 48 Utah 112

40 C J p 178 note 19

94. Mo—Allen v Frumet Mining & Smelting Co, 73 Mo 688

95. Mo—Bambrick v Webster Groves Presbyterian Church Ass'n, 53 Mo App 225.

with the construction or repair of several buildings⁹⁶ Under the statutes of other jurisdictions it is not permissible to file a single claim against several structures⁹⁷ unless all are intended to form a part of one plant⁹⁸ or come within some similar exception, as discussed *infra* subdivisions b, c of this section

b. On Same Lot or Parcel

Under some statutes a single claim may be filed covering several buildings or improvements on the same lot or tract of land Some statutes require separate claims to be filed unless the buildings are so connected in construction or intended use as to constitute one building.

Under some statutes, where several buildings or structures are erected on the same lot or tract of land, a single claim of lien may be filed covering all the property and including all the items,⁹⁹ whether the work was done or the materials furnished under one general contract¹ or under separate contracts;² but it is also permissible in such case to file a separate claim against each building,³ and under some statutes separate claims must be filed⁴ unless the buildings are so connected in construction⁵ or intended use⁶ as to constitute but one building⁷ or lienable unit⁸ within the meaning and intent of the law, as in the case of a dwelling with its appurtenant outbuildings⁹ or several buildings constituting a single plant¹⁰

It has been held that one single lien cannot cover several distinct alterations in the same building

made at different times and independent of each other¹¹

c. On Separate Lots or Parcels

- (1) In general
- (2) Contiguous lots

(1) In General

Under some statutes a single general lien may be filed against all the property for which labor and materials have been furnished under a single contract notwithstanding the improvements are made on separate lots which are not contiguous.

Under some statutes a single general lien may be filed against all the property for which labor and materials have been furnished under a single contract notwithstanding the improvements are made on separate lots¹² which are not contiguous,¹³ but under others a contrary rule obtains,¹⁴ at least where the lots are not contiguous¹⁵ At any rate, separate liens may be filed¹⁶ when the amount and value of the material going into each building is ascertained,¹⁷ even though the contract does not specify the amount and value of the material which is to be furnished for, or to go into, each building¹⁸

(2) Contiguous Lots

As a general rule one claim covering all the property may be filed for work done or materials furnished, under one general contract, on several structures on contiguous lots.

96. Ohio—Ulmer v Portage Const & Finance Co, 26 Ohio NP, NS, 257

Or—Warrenton Lumber Co v Smith, 245 P 313, 117 Or 530
40 C J p 178 note 29

Lien as extending to two or more lots or buildings see *infra* § 189
Specification of amount due on each building or improvement see *infra* § 155

97. Pa—Todd v Gernert, 72 A 249, 223 Pa 103—Wolfe v Gibbs, Com Pl, 46 Dauph Co 369
40 C J p 178 note 30

98. Pa—Todd v Gernert, 72 A 249, 223 Pa 103
40 C J p 178 note 31

99. Or—McCormack v Bertschinger, 237 P 363, 115 Or 250
40 C J p 179 note 33

1. Ohio—East End Lumber Co v Bennett, 187 NE 786, 46 Ohio App 104
40 C J p 179 note 34.

2. Wis—Fischer v Meiroff, 213 N W 288, 192 Wis 482
40 C J p 179 note 35

3. Conn—Halsted & Harmount Co v Arick, 56 A 628, 76 Conn 382
40 C J p 179 note 36

4. Ind—Crawford v Anderson, 28 NE 314, 129 Ind 117
40 C J p 179 note 37

5. Conn—Cronan v Corbett, 62 A 662, 78 Conn 475
40 C J p 179 note 38

6. Conn—Ginsberg v Capone, 99 A 501, 91 Conn 169—Wilcox v Woodruff, 24 A 521, 1056, 61 Conn 578, 29 Am SR 222, 17 L R A 314

7. Ind—Crawford v Anderson, 28 NE 314, 129 Ind, 117
40 C J p 179 note 40

8. Conn—Burque v Naugatuck Lumber Co, 155 A 414, 113 Conn 350
40 C J p 179 note 41

House and garage
Conn—Burque v Naugatuck Lumber Co, *supra*.

9. Conn—Burque v. Naugatuck Lumber Co, *supra*
40 C J p 179 note 42

10. Ind—Premier Steel Co v McElwaine-Richards Co, 43 NE 876, 144 Ind 614

11. Me—Baker v Fessenden, 71 Me 292

12. Wash—Hoagland v Magarrell, 197 P 20, 115 Wash 259
40 C J p 179 note 45

13. Kan—Golden Belt Lumber Co v McLean, 26 P 2d 274, 138 Kan 351
40 C J p 179 note 46

14. RI—McElroy v Kelly, 68 A 238, 27 RI 474
40 C J p 180 note 47

15. Minn—S H Bowman Lumber Co v Piersol, 180 NW 106, 147 Minn 300
40 C J p 180 note 48

16. Ala—Richards v William Beach Hardware Co, 7 So 2d 492, 242 Ala 535

DC—Roth v Eisinger Mill & Lumber Co, 70 F 2d 294, 63 App DC 128
40 C J p 180 note 49

17. Ala—College Court Realty Co v J C Letcher Lumber Co, 78 So 218, 201 Ala 362—College Court Realty Co v J C Letcher Lumber Co, 78 So 217, 201 Ala 361

18. Ala—College Court Realty Co v J. C Letcher Lumber Co, 78 So 218, 201 Ala 362

Although the lienor has the right to file a separate claim as to each piece of property if he prefers to do so,¹⁹ and under a few statutes is required to do so,²⁰ as a general rule it is not necessary to file separate claims, but one claim covering all the property and including all the work done or materials furnished is sufficient, where improvements are made under one general contract on several contiguous lots.²¹ The rule is applicable where the contiguous lots are owned by the same person,²² and in some, but not other, jurisdictions, where they are owned by different persons, as discussed *infra* § 136. On the other hand, where the work is done or the materials furnished under separate contracts relating to the different properties, a single lien claim covering all the properties cannot be filed although such properties are contiguous.²³

§ 135. — Double House

Except under a few statutes, separate lien claims need not be filed covering materials used in each side of

a single building divided by a solid partition wall so as to make it two houses adapted and intended for separate use.

Where a building is constructed with a solid partition wall dividing it so as to make two houses adapted and intended for separate use, it is not necessary,²⁴ except under a few statutes,²⁵ that a separate certificate or claim of lien should be filed for the materials used in each half.

§ 136. — Properties of Different Owners

Under some statutes a single lien may and should be filed where several owners of contiguous properties jointly contract for the improvement of such properties.

Under some statutes a single lien cannot be claimed on two or more pieces of property belonging to different owners²⁶ even though the properties are contiguous²⁷ and the work was done or the materials furnished under an entire contract.²⁸ Under others, where the several owners of contiguous properties jointly contract for the improvement of their properties, a single lien covering all the prop-

19. Neb.—Hines v Cochran, 62 N W 299, 44 Neb 12
40 C J p 180 note 52

20. Pa.—Koons v Harding, 3 Pa Dist & Co 741

21. Or.—Dimitre Electric Co v Paget, 151 P 2d 630, 175 Or 72
40 C J p 180 note 54

"Contiguous lots"

(1) The word "contiguous" in statute providing that separate lien on each of two or more buildings, situated on contiguous lots, for work done or materials furnished, need not be filed, is used in its primary, usual, and ordinary sense as implying actual contact or connection, so that mere close proximity is insufficient, but there must be actual joining or touching of lots.—Roy F Stamm Electric Co v Hamilton-Brown Shoe Co, 171 S W 3d 580, 350 Mo 1178, 146 A L R 917

(2) "Contiguous lots" touch along a considerable part, while "adjacent lots" lie close to each other, but not necessarily in actual contact.—Tallapoosa Lumber Co v Copeland, 134 So 658, 223 Ala 41, 75 A L R 1325

(3) Other statements see 40 C J p 180 note 54 [b]

What constitutes general contract

(1) The words "erected under one general contract" as used in some statutes are not to be confined to cases where the owner may contract for the completion of the building in one general contract.

Mo.—National Plumbing Supply Co v Torretti, 175 S W 2d 947, 237 Mo App 570.

Ohio.—Ulmer v Portage Construction & Finance Co, 26 Ohio N P, NS, 357

40 C J p 180 note 54 [d] (1)

(2) They include a case where entire building is not let to a contractor but lienor furnishes to owner for all the buildings material which goes into such erection, notwithstanding such material may comprise only part of such erections

Mo.—National Plumbing Supply Co v Torretti, *supra*

Ohio.—Ulmer v Portage Const & Finance Co, *supra*

40 C J p 180 note 54 [d] (2)

(3) Other statements see 40 C J p 180 note 54 [d]

Lots separated by public alley

One owning lots abutting on both sides of alley dedicated to public use was holder of fee in alley, subject only to servitude of such use, so that lots touched and were in actual contact with each other at center line of alley and hence were "contiguous" within statute.—Roy F Stamm Electric Co v Hamilton-Brown Shoe Co, 171 S W 2d 580, 350 Mo 1178, 146 A L R 917

22. Or.—Willamette Steam Mills Lumbering & Manufacturing Co v Shea, 32 P 759, 24 Or 40
40 C J p 181 note 55

23. Ohio.—Ulmer v Portage Construction & Finance Co, 26 Ohio N P, NS, 357

Or.—Dimitre Electric Co v Paget, 151 P 2d 630, 175 Or 72.

40 C J p 181 note 57

Absence of general contract

(1) Where improvements consisting of several buildings were constructed by owner without general contractor, materialman having no general contract should have filed separate lien for each building.—Mansfield Lumber Co v Johnson, Mo App, 91 S W 2d 239

(2) Where agreement relative to the furnishing of electrical fixtures for houses under construction did not contemplate a completed sale until the fixtures desired for each house had been selected, and the price to be charged for each was subject to approval, there was not a single binding contract covering the furnishing of fixtures for all the houses, and a single lien claim filed against all the properties for all fixtures furnished was invalid.—Dimitre Electric Co v Paget, 151 P 2d 630, 175 Or 72

24. Conn.—Halsted & Harmount Co v Arick, 56 A 628, 76 Conn 383
Mo.—McKelleget v Eckhard, 4 Mo App 589

25. Pa.—Goodyear v Emale, 21 Pa Dist 881
40 C J p 181 note 59

26. Iowa.—Bartlett v Bilger, 61 N. W 233, 93 Iowa 732
40 C J p 181 note 60

27. Pa.—Kurtzberg v. Fox, 19 Pa. Dist & Co 421
40 C J p 181 note 61

28. Mass.—Rathbun v Hayford, 5 Allen 406
R I.—Butler v Rivers, 4 R I 38

erties may²⁹ and should³⁰ be filed, or subcontractors may file a single apportioned lien against all the properties for which they have furnished labor or materials under a single contract with the contractor, although such properties belong to different owners³¹ However, separate claims should be filed where there are separate and distinct contracts with the different owners³² It has also been held that there can be no lien, where there are separate contracts between the contractor and owner, and an entire contract between the contractor and claimant³³

§ 137. Filing One or More Claims or Statements by Two or More Claimants

Some statutes permit or do not forbid, while others prohibit, a joint notice of lien to be filed by two or more claimants

Under some statutes a joint notice or claim of lien filed by two or more claimants is invalid,³⁴ but other statutes permit³⁵ or do not forbid³⁶ such joinder.

§ 138. Place for Filing

The notice or claim of lien must be filed with, or in the office of, the officer designated by the statute

The statutes of different jurisdictions variously provide, or at times have provided, for the filing of the claim, notice, or statement with, or in the office of, the recorder,³⁷ county clerk,³⁸ town clerk,³⁹ or the clerk of a designated court⁴⁰ A filing with different public officers is generally provided for in the

case of a public improvement,⁴¹ and, where the Torrens Act is in force and applicable, the claim should be filed with the registrar of titles⁴² It is necessary to the perfection of the lien that the notice, claim, or statement should be filed with, or in the office of, the particular public officer designated by the statute⁴³ Also it is necessary that the claim should be filed in the proper county, town, or judicial district,⁴⁴ in the determination of which the situs of the property to be charged governs⁴⁵ Where the property extends into two or more counties, it has been held that the lien must be filed in every county wherein the property is located which the lien is designed to cover,⁴⁶ but other cases deny this⁴⁷ and hold that it is sufficient to file the lien in the county where the work was done or the materials were furnished⁴⁸

§ 139. Time for Filing

- a In general
- b As determined by status of claimant

a. In General

As a general rule the notice or claim of lien must be filed within the time limited by statute.

All the mechanics' lien statutes prescribe and limit the time for filing the claim, notice, or statement, and, as a general rule, the statutes are deemed mandatory in this respect,⁴⁹ and it is essential to the existence and validity of a mechanic's lien that the claim or statement shall be filed or recorded within the time limited by the statute⁵⁰ This is true even

29. ND—Stoltze v Hurd, 128 NW 115, 20 ND 412, 30 L.R.A. NS, 1219, Ann Cas 1912C 871
40 C.J. p 181 note 63

30. ND—Stoltze v Hurd, supra
40 C.J. p 181 note 64

31. N.J.—Culver v Lieberman, 55 A 812, 69 N.J. Law 341

32. ND—Meyer Lumber Co v Trygstad, 134 NW 714, 22 ND 558
40 C.J. p 181 note 66

33. Mass.—Cahill v Capen, 18 NE 419, 147 Mass 493
40 C.J. p 181 note 67

34. Ind.—McGrew v. McCarty, 78 Ind 496
40 C.J. p 177 note 6
Proceedings to enforce liens—
Consolidation see infra § 272
Making other lienors parties see
infra § 284

35. Wash.—Powell v Nolan, 67 P 712, 27 Wash 318, reheard 68 P 389, 27 Wash 318.
40 C.J. p 177 note 7.

36. Mass.—De Vingo v Hall, 91 N E 390, 205 Mass 407
40 C.J. p 177 note 8

37. RI.—Gurney v Walsham, 19 A 323, 16 RI 698
40 C.J. p 181 note 68

38. N.Y.—Whipple v Christian, 15 Hun 321, affirmed 80 NY 523

39. Mass.—Weeks v Walcott, 15 Gray 54
40 C.J. p 181 note 70

40. W.Va.—Doss v Gulf Smokeless Coal Co, 135 SE 575, 102 W.Va 470
40 C.J. p 181 note 71.

41. N.Y.—Terwilliger v Wheeler, 31 NYS 173, 81 App Div 460
40 C.J. p 181 note 72

42. Ill.—Hacken v Isenberg, 124 N E 306, 288 Ill 589
Wash.—McMullen v Croft, 164 P 930, 96 Wash 275

43. Neb.—Tidball v Holyoke, 97 N W 1019, 70 Neb 726
40 C.J. p 182 note 74

44. Neb.—Noll v Kenneally, 56 N W 722, 37 Neb 879

Okl.—Bryan v Orient Lumber & Coal Co, 156 P 897, 55 Okl 370

45. US.—Phoenix Furniture Co v Put-in-Bay Hotel Co, C.C. Ohio, 66 F 683
40 C.J. p 182 note 76

46. Colo.—Arkansas River, Land, Reservoir & Canal Co v Flinn, 33 P 1006, 3 Colo App 381

Va.—Boston v Chesapeake & O R Co, 76 Va 180

47. Ind.—Farmers Loan & Trust Co v Canada & St L R Co, 26 NE 784, 127 Ind 250, 11 L.R.A. 740

48. Ind.—Farmers Loan & Trust Co v Canada & St L R Co, supra

49. Fla.—Pierson v Reinhardt, 133 So 553, 101 Fla 1392, rehearing denied 136 So 250, 101 Fla 1392

RI.—Corpus Juris cited in Rhode Island Marble & Tile Co v Spear, 143 A 777, 49 RI 441

Tenn.—Brown v Brown & Co, 160 S. W 3d 431, 25 Tenn App 509
40 C.J. p 186 note 44.

50. US.—Lane v Gilbertson, C.C.A. Alaska, 160 F 2d 211

Alaska.—Bloom v McCluskey, 7 Alaska 349.

as between the parties⁵¹ However, under a few statutes a failure to file within the prescribed period does not defeat the lien as against the owner of the property,⁵² in the absence of an intervening encumbrance or transfer of the property,⁵³ but operates merely to postpone it to the rights of purchasers without notice and the claims of third persons which have arisen since the expiration of such time and before the claim is actually filed,⁵⁴ or to afford the owner protection with respect to payments made to the contractor after the expiration of such time and before the claim is filed⁵⁵

Premature filing A lien claim or statement filed before the time when the filing thereof is authorized by the statute is ineffectual and unenforceable⁵⁶ It has been held that the services for the rendering of which a lien is sought must have been rendered before the certificate is filed⁵⁷ However, some statutes expressly allow a filing before or during the performance of the contract or during the progress of the work, as discussed *infra* § 144

Filing within statutory period The claim may be filed at any time within the period limited therefor by the statute⁵⁸ A lien claimant has the whole of

- Ark—Sebastian Building & Loan Ass'n v Minten, 27 S W 2d 1011, 181 Ark 700
- Cal—Progress Lumber Co v Davis, 17 P 2d 105, 217 Cal 95—C Ganahl Lumber Co v Thompson, 270 P 965, 205 Cal 354—Baird v Havas, 164 P 2d 952, 72 Cal App 2d 520—Baird v Havas, 151 P 2d 10, 65 Cal App 2d 523—Stanislaus Lumber Co v Pike, 124 P 2d 190, 51 Cal App 2d 54—Gross v Hazeltine, 290 P. 673, 107 Cal App 446—Hurst v Bigelow, 277 P 497, 98 Cal App 668—Hickman v Freiermuth, 132 P 772, 21 Cal App 629
- Colo—Tiger Placers Co v Fisher, 54 P 2d 891, 98 Colo 221
- Del—Bethlehem Const Co v Christiansa Const Co, 144 A 830, 4 W W Harr 147
- DC—Harper v Galliher & Huguey, 29 F 2d 452, 58 App DC 252, certiorari denied Galliher & Huguey v Harper, 49 S Ct 185, 278 US 657, 73 L Ed 565
- Fla—Pierson v Reinhardt, 133 So 553, 101 Fla 1392, rehearing denied 136 So 250, 101 Fla 1392—Nobles v Hobbs, 133 So 553, 101 Fla 1383, amended on other grounds 135 So 535
- Ga—Carter-Moss Lumber Co v Short, 18 S E 2d 61, 66 Ga App 330—Chambers Lumber Co v Gilmer, 5 S E 2d 84, 60 Ga App 832
- Ill—United Cork Companies v Voland, 7 N E 2d 301, 365 Ill 564
- Kan—Gooch v Wilcox, 11 P 2d 743, 135 Kan 683
- Kv—Woods v Constantine, 289 S W. 282, 217 Ky 195
- La—Hartman-Salmen Co v White, 123 So 715, 168 La 1067—Capital Building & Loan Ass'n v Carter, 113 So 886, 164 La 388—J J Clarke Co v Petivan, 109 So 913, 161 La 1095—Cook v Carter, 106 So 704, 160 La 88—Hicks v Tate, App, 7 So 2d 737, followed in N O Nelson Co v Tate, 7 So 2d 740—Markel v C W M. Const Co, App, 6 So 2d 768
- Mass—Peerless Unit Ventilation Co v D'Amore Const. Co, 186 N E 280, 283 Mass 121.
- Neb—Parsons Const Co v Gifford, 263 N W 508, 129 Neb 617
- NJ—Weinberger v Goldstein, 151 A 397, 106 N J Eq 489—Home Builders' Realty & Mortgage Co v Schneider, 117 A 784, 105 N J Eq 326
- NY—Thomson Wood Finishing Co v Matvienko, 267 N Y S 838, 240 App Div 910—Farabella v Porter, 225 N Y S 417, 130 Misc 680
- Ohio—A. M. Lewin Lumber Co v Hieatt, 43 N E 2d 508, 69 Ohio App 353—Garrett v Lishawa, 172 N E 845, 36 Ohio App 129—McKenzie v Jacob, 27 Ohio N P. N S, 57
- Okl—Fry v Long Bell Lumber Co, 167 P 2d 654, 196 Okl 670—Lewis v Red, 152 P 2d 690, 194 Okl 432
- Pa—Hamilton v Means, 38 A 2d 528, 155 Pa Super 245—Rozell v Dubin, Com Pl, 40 Lack Jur 3—Keystone Lumber Co v Russo, Com Pl, 89 Pittsb Leg J 416, 55 York Leg Rec 98
- RI—Corpus Juris cited in Rhode Island Marble & Tile Co v Spear, 143 A 777, 49 RI 441
- SD—Big Sioux Lumber Co. v Miller, 234 N W 31, 57 S D 506
- Tenn—Brown v Brown & Co., 160 S W 2d 431, 25 Tenn App 509
- Tex—Nystel v. Gully, Civ App, 257 S W 286
- Va—Coleman v Pearman, 165 S E 371, 159 Va 72
- Wash—Brown v Mychel Co, 56 P 2d 1020, 186 Wash 97—Warming v Hargis, 294 P 248, 159 Wash 501—John Dower Lumber Co v McCammon, 250 P 107, 141 Wash 381
- Wis—Carl Miller Lumber Co v Federal Home Development Co, 286 N W 58, 231 Wis 509, 122 A L R 752—Layne-Bowler Chicago Co v Peshtigo Paper Co, 217 N W 312, 194 Wis 631
- 40 C J p 186 note 45
- Purpose of statute** is to protect the diligent subcontractor if he acts within a specified time—Ideal Cement Stone Co v Dohse, 16 N W 2d 151, 145 Neb 246
- Lien terminates** on failure to file within required time—Larson v Anderson, 220 N W 498, 53 S D. 236—
- Botsford Lumber Co v Schriver, 208 N W 423, 49 S D 68
- After death of contractor**
The death of decorating contractor ordering paints used in decorating apartment building did not deprive partnership furnishing paint of the right to file notice of lien—Shapiro v Golub, 13 N Y S 2d 498
51. Okl—Bryan v Orient Lumber & Coal Co, 156 P 897, 55 Okl 370
40 C J p 186 note 46
52. Iowa—Crane Co v Westerman, 8 N W 2d 412, 232 Iowa 1394
40 C J p 186 note 47
53. Iowa—Crane Co v Westerman, supra
54. Iowa—Crane Co v Westerman, supra
40 C J p 187 note 48
55. Iowa—Cedar Rapids Sash & Door Co v Heinbaugh, 168 N W 270, 183 Iowa 1286
40 C J p 187 note 49
Effect of payments to contractor generally see *infra* § 251
56. Ala—Corpus Juris cited in Gori Lumber Co v McMillan, 143 So 173, 176, 225 Ala 303—Corpus Juris quoted in Snelling Lumber Co v Porter, 142 So 560, 561, 225 Ala 164
- Mass—Peerless Unit Ventilation Co v D'Amore Const Co, 186 N E 280, 283 Mass 121
- Or—Birkemeier v Knobel, 40 P 2d 694, 149 Or 292
- Va—Coleman v Pearman, 165 S E 371, 159 Va 73
40 C J p 187 note 53
57. Conn—Marchetti v Sleeper, 123 A 845, 100 Conn 339—Booth v Von Beren, 73 A 775, 82 Conn 298
58. Cal—Ward v Crane, 50 P 839, 118 Cal 676—Cowan v Herman, 293 P 175, 109 Cal App 503—Battersby v Shepard, 265 P. 506, 89 Cal App 756
- Fla—Pierson v Reinhardt, 133 So 553, 101 Fla 1392, rehearing denied 136 So 250, 101 Fla 1392
- Okl—Claude Ricker Lumber & Paint Co v Barger, 158 P 2d 1021, 195 Okl 504.

the statutory period in which to file his lien,⁵⁹ and the mere fact that he has postponed the filing of his lien until toward the end of the time limited for that purpose will not affect his statutory right,⁶⁰ no matter what may have been the motive which prompted such delay on his part.⁶¹ However, the right of a claimant to file his claim or affidavit at any time within the statutory period is restricted as against land registered under the Torrens Act and transferred to a bona fide purchaser within the statutory period,⁶² and it is necessary, in order to preserve his rights as against a prospective purchaser, to file what is known as a caveat giving notice to the prospective purchaser of a right to a lien.⁶³

Filing before serving notice or statement The validity of a lien is not affected by the fact that the claim or certificate is filed before the service on the owner of the statement⁶⁴ or notice⁶⁵ required by statute, where both the filing and the service are within the time limited therefor. However, where the statute provides for service of notice of intention on the owner a specified time before the filing

of the lien, the lien may be filed only after such a notice has been served and the specified time has elapsed.⁶⁶

Estoppel. The owner may be estopped by his acts or representations to take advantage of the failure of a subcontractor to file his claim or notice of lien within the statutory period,⁶⁷ but merely standing by and permitting claimant to sleep on his rights does not estop the owner.⁶⁸

b. As Determined by Status of Claimant

The statutes sometimes fix different periods for filing a claim of lien by different classes of claimants.

Some statutes make no distinction whatever among lienholders as to the time within which the lien shall be filed.⁶⁹ Other statutes, however, prescribe different periods for different classes of claimants.⁷⁰ Such statutes generally distinguish between, and prescribe different periods for the filing of the claims of, contractors and subcontractors,⁷¹ or contractors and other claimants.⁷² Under such statutes claimant may and must file his

Va—Coleman v Pearman, 165 SE 371, 159 Va 72
40 C J p 188 note 58

59. Cal—Battersby v Sheppard, 265 P 506, 89 Cal App 756
Neb—Bohn Sash & Door Co v Case, 60 NW 576, 42 Neb 281

"Within" as not beyond

Filing of contractor's lien is "within" time specified by statute when it does not extend beyond time specified—Battersby v Sheppard, 265 P 506, 89 Cal App 756

60. Neb—Bohn Sash & Door Co v Case, 60 NW 576, 42 Neb 281

61. Neb—Bohn Sash & Door Co v Case, supra

62. Ohio—Mizner v Paul, 29 Ohio CA 33

Transfer of title as affecting lien generally see infra § 243

63. Ohio—Mizner v. Paul, supra

64. Mich—Holliday v Mathewson, 109 NW 669, 146 Mich 336

Ohio—Phillips v Braham, 19 Ohio NP, NS, 229

Furnishing statement to owner see supra § 180

65. Conn—Shattuck v. Beardsley, 46 Conn 386

Notice to owner see supra §§ 120-129

66. Pa—Rich v Boguszinsky, 88 Pa. Super. 586

67. Cal—Pence v Martin, 185 P. 503, 43 Cal App 626

Iowa—Cedar Rapids Sash & Door Co v Heinbaugh, 168 NW 270, 183 Iowa 1236

68. Cal—Pence v Martin, 185 P 503, 43 Cal App 626

69. Utah—Eclipse Steam Mfg. Co v Nichols, 1 Utah 252

70. Ala—Thornton v Vines, 106 So 42, 213 Ala 646

Nev—Nellis v Johnson, 57 P 2d 392, 57 Nev 17

Okl—Cameron v Speer, 68 P 2d 810, 180 Okl 209

40 C J p 188 notes 69-72

71. Iowa—Crane Co v Westerman, 8 NW 2d 412, 232 Iowa 1394

NM—Freidenbloom v Pecos Valley Lumber Co, 290 P 797, 35 NM 154

Wis—Union Trust Co of Maryland v Rodeman, 264 NW 508, 220 Wis 453

40 C J p 188 note 70

72. Ariz—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

Kan—Byrnes v Forbes, 185 P 598, 90 Kan 557

Nev—Nellis v Johnson, 57 P 2d 392, 57 Nev 17

Or—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—Anderson v Turpin, 142 P 2d 999, 172 Or 430—Bennett v Bruchou, 96 P 2d 762, 163 Or 175—Prouty Lumber & Box Co v McGuirk, 66 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418—Pacific Coast Steel Co v Uhrbrand & Leurick Const Co, 279 P 848, 130 Or 225—Eastern & Western Lumber Co. v

Williams, 276 P 257, 129 Or 1—James A C Tait & Co v. Stryker, 243 P 104, 117 Or 338

Tex—Estacado Oil Co v Parker, Civ App, 36 SW 2d 1095

Wyo—Jordan v Natrona Lumber Co, 75 P 2d 378, 52 Wyo 393
40 C J p 188 note 71.

Undisclosed agency for owner

Mechanics' lienor, notwithstanding at commencement of work it had supposed husband of woman constructing building was general contractor and it a subcontractor, was on subsequently discovering that husband was merely acting as agent of wife, entitled, as a contractor, to six months within which to file claim—Union Trust Co of Maryland v Rodeman, 264 NW 508, 220 Wis 453

In Louisiana

(1) Under an early statute the privileges of parties furnishing materials to the owner erecting a building without a contract had to be recorded within a specified time from completion of the building or work thereon—Central Lumber Co v Schroeder, 114 So 644, 164 La. 759—Capital Building & Loan Ass'n v Carter, 113 So 886, 164 La 388—Greater New Orleans Homestead Ass'n v Korner, App, 144 So 507

(2) Where there was a building contract, the materialman had to record his lien within the specified time after the owner's registry of the acceptance of the work or of the contractor's default, or recordation of the architect's certificate of completion.—Lieber v Levy, 118 So 394, 165 La 949—Greater New Orleans Homestead Ass'n v Korner, supra

claim or statement within the period allowed for the class to which he belongs⁷³

A person who has a contract directly with the owner or his agent to furnish materials or labor or both is an original or principal contractor within the meaning of some of such statutes,⁷⁴ this being so although the materialman furnishes the materials to the contractor,⁷⁵ but one who merely furnishes material to be used in the construction of a building is a materialman, whether the material is furnished direct to the owner or to another.⁷⁶ Materialmen and laborers are not "original contractors" within the meaning of other statutes, however, even though they contract directly with the owner.⁷⁷ Under some statutes a subcontractor furnishing materials and labor under a contract with the

principal contractor is treated as a principal contractor where the contract between the owner and the principal contractor is not filed as required.⁷⁸ Under others, where the contractor abandons his contract, and the owner finishes the building in his own way on his own account and credit, and does not adopt the contract of the contractor or undertake to fulfill or complete it so as to become in effect substituted for the contractor, a subcontractor is obliged to file his lien within the prescribed time after the last furnishing of material to the contractor.⁷⁹

A few statutes allow a longer period for filing as against the owner than as against other creditors, encumbrancers, or purchasers.⁸⁰ Also some statutes allow a longer period as against purchasers

73. Ala.—Thornton v Vines, 106 So 42, 213 Ala 646

Ariz.—Lesson v Bartol, 99 P 2d 485, 55 Ariz 160

Colo.—Mortgage Brokerage Co v W B Barr Lumber Co, 16 P 2d 32, 91 Colo 445—Western Elaterite Roofing Co v Fisher, 273 P 19, 85 Colo 5

Del.—Pittman-Berger Co v Parkinson, 180 A 645, 7 W W Harr 105

Ill.—National Theater Supply Co v Blum, 276 Ill App 123

Kan.—Byrnes v Forbes, 135 P 598, 90 Kan 557

Neb.—Parsons Const Co v Gifford, 262 N W 508, 129 Neb 617

Nev.—Nellis v Johnson, 57 P 2d 392, 57 Nev 17

N M.—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 N M 3

Or.—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—Anderson v Turpin, 142 P 2d 999, 172 Or 420—Bennett v Bruchou, 96 P 2d 762, 163 Or 175—Prouty Lumber & Box Co v McGuirk, 66 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418—Heacock Sash & Door Co v Weatherford, 294 P 344, 135 Or 153—Pacific Coast Steel Co v Uhrbrand & Leurick Const Co, 279 P 848, 130 Or 225—Eastern & Western Lumber Co v Williams, 276 P 257, 129 Or 1—James A C Tait & Co v Stryker, 243 P 104, 117 Or 338 40 C J p 188 note 73

74. Ala.—Morris v Bessemer Lumber Co, 116 So 528, 217 Ala 441—Avondale Lumber Co v Hudson, 106 So 803, 214 Ala 128

Colo.—Mortgage Brokerage Co v W B Barr Lumber Co, 16 P 2d 32, 91 Colo 415—Platte Valley Lumber Co v Courtright, 197 P 235, 70 Colo 57

Del.—Breeding v Melson, 143 A 23, 4 W W Harr 9, 60 A L R 1252.

Mo.—J H Magill Lumber Co v Carter, App, 17 S W 2d 581

N M.—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 N M 3—Friedenbloom v Pecos Valley Lumber Co, 290 P 797, 35 N M 154

Or.—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—Barr v Lynch, 97 P 2d 185, 163 Or 607—Shea v Graves, 19 P 2d 406, 142 Or 503—Shea v Peters, 268 P 989, 136 Or 78

Wyo.—Jordan v Natrona Lumber Co, 75 P 2d 378, 52 Wyo 393 40 C J p 188 note 74

Who is "contractor" within statutes conferring right to lien see supra § 90

Contract may be verbal

Tex.—Oil Field Salvage Co v Simon, 168 S W 2d 848, 140 Tex 456

Contract may be implied

Wyo.—Jordan v Natrona Lumber Co, 75 P 2d 378, 52 Wyo 393.

Contract with contractor

Lumber company, furnishing materials used in construction of house under agreement with building contractor, was not original contractor within mechanics' lien law, contractor not being agent of house owner because of provision in their contract that owner should pay for materials—Prouty Lumber & Box Co v McGuirk, 66 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418

Hourly worker

Stonemason who was engaged on hourly basis to work for indefinite time under direction of owner of buildings, and was not employed to perform any distinct piece of work, was neither an original contractor nor a subcontractor within meaning of mechanics' lien law—Bennett v Bruchou, 96 P 2d 762, 163 Or 175
Owner's subsidiary as agent
Mo.—National Plumbing Supply Co

v Torretti, 175 S W 2d 947, 237 Mo. App 570

Contracts held with owner

(1) Contract with conditional vendee in possession—Friedenbloom v Pecos Valley Lumber Co, 290 P 797, 35 N M 154

(2) Contract with lessee erecting building—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 N M 3

Contract held not with owner

Del.—Pittman-Berger Co v Parkinson, 180 A 645, 7 W W Harr 105

75. Ala.—Morris v Bessemer Lumber Co, 116 So 528, 217 Ala 441

76. Or.—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—Heacock Sash & Door Co v Weatherford, 294 P 344, 135 Or 153—Inman v Henderson, 45 P 300, 29 Or 116

Stonemason selling granite

Stonemason, under no contract with owner to furnish material and perform labor, who had in his possession some granite and stone which owner of buildings, on which mason performed labor on hourly basis, purchased during course of construction of the buildings, for use in the buildings, was as to such granite and stone a materialman within meaning of mechanics' lien law—Bennett v Bruchou, 96 P 2d 762, 163 Or 175

77. Cal.—Schwartz v Knight, 16 P 235, 74 Cal 432 40 C J p 189 note 75

78. Colo.—Western Elaterite Roofing Co v Fisher, 273 P 19, 85 Colo 5

79. Kan.—Byrne v Forbes, 135 P 598, 90 Kan 557

80. Ill.—Hacken v Isenberg, 124 N E 306, 288 Ill 589. 40 C J p 189 note 76.

with notice than as against purchasers without notice⁸¹

§ 140. — Before or after Certain Date in General

The statutes determine the date from which the time for filing a notice or claim of lien is to be computed

The statutes of different jurisdictions, and sometimes the statutes of the same jurisdiction, under changes or amendments thereof or in respect of different classes of claimants, fix different dates from which the period for filing the claim, notice, or statement is to be computed⁸² The date otherwise applicable continues to be applicable notwithstanding a transfer of the owner's title during the making of the improvement, the doing of the work, or the furnishing of the material,⁸³ a filing within the statutory period after the transfer of title is neither authorized nor required⁸⁴ Also the date otherwise applicable controls notwithstanding a

change in the personnel of the contracting firm⁸⁵

When the date from which the period allowed for filing the lien claim is to run is established, the usual rules as to the computation of time govern.⁸⁶

§ 141. — Accrual or Maturity of Indebtedness

Under some statutes the accrual of the indebtedness fixes the date from which the time for filing the notice or claim of lien is computed.

Under some statutes the lien claim statement must be filed within a specified time after the indebtedness sought to be secured by the lien has accrued or become due,⁸⁷ filing before such time being held ineffectual⁸⁸ Some courts hold that, as used in a statute requiring the lien to be filed within a certain time "after the indebtedness shall have accrued," the quoted expression means within such time after the work is finished,⁸⁹ the last labor is

Owner as "creditor, encumbrancer, or purchaser"

Ill.—National Theater Supply Co v Blum, 276 Ill App 122

81. NC—Raeford Lumber Co v Rockfish Trading Co, 79 SE 627, 163 NC 314

82. Knowledge of prior statutes

In construing statute it must be assumed that legislature, at time of enacting mechanics' lien act had complete knowledge of prior statute passed to protect parties furnishing materials and doing labor after supreme court's decision that building contractor purchasing lumber as he needed it made new contract at every purchase and that law barred filing of his claim for purchases over six months old—McCready-Rodgers Co v Nenoff, 39 A 2d 260, 155 Pa Super 565

From date of last charge

(1) Under some statutes time runs from the date of the last charge for the materials or labor furnished—Carl Miller Lumber Co v Federal Home Development Co, 286 NW 58, 231 Wis 509, 122 ALR 752

(2) The time when claimant issued a credit order for unused materials returned, for which claimant made a trucking charge, is not the date of the last charge, where claimant was under no obligation to take back any of the unused materials—Carl Miller Lumber Co v Federal Home Development Co, supra

(3) Fact that the last item of material furnished and incorporated in a building under the original contract was paid for in cash was held not to take such item out of such

requirement—Usiak v Kubiak, 225 NW 168, 198 Wis 600

83 Ind—Conlee v Clark, 42 NE 762, 14 Ind App 205, 56 Am SR 298

Mass—Gale v. Blaikie, 126 Mass 274

40 CJ p 189 note 82

Effect of transfer of title on lien generally see infra § 243

84. Mo—Williams v Chicago, S F & C R Co, 30 SW 631, 112 Mo 463, 34 Am SR 403

40 CJ p 189 note 83

85. Mo—Miller v Hoffman, 26 Mo App 199

40 CJ p 189 note 84

86. Pa—Rich v. Boguszinsky, 88 Pa Super 586

40 CJ p 187 note 52

Computation from date or event

Date on which last material was furnished must be excluded in determining whether mechanics' lien claim was filed within requisite time—Warshaw v De Mayo, 150 A 214, 8 NJ Misc 359.

Month

The term "month" as used in the statutes relating to the filing of claims for mechanics' liens means a calendar month—Rich v Boguszinsky, 88 Pa Super 586—Lillo Bros Co v Fayette Coal Co, 36 Pa Co 72

Sunday

(1) In accordance with general rules, if the last day for filing the claim falls on a Sunday, filing on the Monday following is in time—Warshaw v De Mayo, 150 A 214, 8 NJ Misc 359

(2) Under a statute providing that the "time within which an act is to be done, shall be computed by ex-

cluding the first day and including the last, if the last day be Sunday, it shall be excluded," when the time prescribed for filing expires on Sunday, the lien is insufficient unless filed on the Saturday preceding—Patrick v Faulke, 45 Mo 312

87. Ala—Gorr Lumber Co v McMillan, 143 So 173, 225 Ala 303—Snelling Lumber Co v Porter, 142 So 560, 225 Ala 164—Wofford Bond & Mortgage Co v Adams, 133 So 254, 222 Ala 527—Morris v Bessemer Lumber Co, 116 So 528, 217 Ala 441

Tex—Ball v Davis, 18 SW 2d 1063, 118 Tex 534—Keystone Pipe & Supply Co v Wright, Civ App, 37 SW 2d 227—Nystel v Gully, Civ App, 257 SW 286

Wyo—Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 59 Wyo 334, 147 ALR 1089—Jordan v Natrona Lumber Co, 75 P 2d 378, 52 Wyo 393

40 CJ p 189 note 86

Filing contract within specified period after accrual of indebtedness see supra § 82

Subsequent agreement to extend time for payment as extending time for filing see infra § 148

Partial invalidity

Filing of account did not give lien as to so much of account as accrued more than required time before filing—Ball v Davis, 18 SW 2d 1063, 118 Tex 534

88. Ala—Snelling Lumber Co v. Porter, 142 So 560, 225 Ala 164.

39. Mo—General Fire Extinguisher Co v Schwartz Bros Commission Co, 65 SW 318, 165 Mo 171—Rodefeld v Winklemann, 136 SW 4, 156 Mo App 130

performed,⁹⁰ or the last material is furnished⁹¹ or installed in the premises,⁹² rather than when the debt is due,⁹³ although it has also been held by such courts that, where materials are furnished by a person not contracting directly with the owner, the question is when the indebtedness accrues against the building,⁹⁴ and that it so accrues when the material is placed in the building,⁹⁵ rather than when it is sold and delivered to the contractor or subcontractor.⁹⁶

Other courts hold that the indebtedness accrues within the meaning of such a statute when it comes to maturity so as to be due and payable⁹⁷ under the contract,⁹⁸ and that, where credit is given, the period runs from the time when the credit expires.⁹⁹ Under a contract for payment in installments containing an acceleration clause, default in payment under such clause does not mature the entire debt so as to start the time running for the filing of the lien¹ unless the claimant elects so to treat the default by declaring the entire debt to be due.² Some statutes provide that, when material is furnished, the indebtedness shall be deemed to have accrued at the date of the last delivery of such material³ unless there is an agreement to pay for such ma-

terial at a specified time.⁴

Filing before money payable According to some authorities the claim or statement should not be filed before the money claimed is due and payable,⁵ but according to other authorities the claim may be filed when the money becomes due, although by the terms of the contract it is not payable until some time thereafter.⁶

§ 142. — Completion of Building or Improvement

a In general

b What constitutes or is equivalent to completion

a. In General

Under some statutes the completion of the building or improvement fixes the date from which time to file the notice or claim of lien is to be computed.

In a number of jurisdictions the statutes provide, or at times have provided, at least in certain cases or in respect of certain classes of claimants, for the filing of the claim or statement within a specified period of time after the completion of the building, structure, or improvement.⁷ Some statutes name

90. Mo—Bolen Coal Co v Ryan, 48 Mo App 512

91. Wyo—Big Horn Lumber Co v Davis, 84 P 900, 14 Wyo 455, 7 Ann Cas 940, rehearing denied 85 P 1048, 14 Wyo 455

40 C J p 189 note 89

92. Mo—Harry Cooper Supply Co v Gilhoz, App, 107 SW 2d 798

93. Mo—General Fire Extinguisher Co v Schwartz Bros Commission Co, 45 SW 318, 165 Mo 171—Bolen Coal Co v Ryan, 48 Mo App 512

40 C J p 189 note 90

94. Mo—U S Water Co v Sunny Slope Realty Co, 133 SW 371, 152 Mo App 300

40 C J p 189 note 91

95. Mo—Benning v Farmers' Bank, App, 190 SW 983—U S Water Co v Sunny Slope Realty Co, 133 SW 371, 152 Mo App 300

Material furnished before approval

Where plumbing installation of subcontractor was not approved by architect until final items were added, materialman furnishing materials used by subcontractor for such installation could file lien statement within required time after installation of final items—Harry Cooper Supply Co v Rolla Nat Bldg Co, Mo App, 66 SW 2d 591

96. Mo—U S Water Co v Sunny Slope Realty Co, 133 SW 371, 152 Mo App 300.

97. Ala—Thornton v Vines, 106 So 42, 213 Ala 646

Tex—Keystone Pipe & Supply Co v Wright, Civ App, 37 SW 2d 227

40 C J p 190 note 94

Later delivery of materials

Time runs from the date the debt accrues and is payable under the contract, although materials are delivered subsequent thereto—Wofford Bond & Mortgage Co v Adams, 133 So 254, 222 Ala 537

98. Ala—Gorr Lumber Co v McMillan, 143 So 173, 225 Ala 303

99. Ala—Hagan v Riddle Co, 96 So 863, 209 Ala 606

40 C J p 190 note 95

1. Ala—Gorr Lumber Co v McMillan, 143 So 173, 225 Ala 303

Reason for rule

The acceleration of the maturity of the debt by reason of an acceleration clause is not intended to confer a right on the debtor to change his unconditional contract by his own default—Gorr Lumber Co v McMillan, supra

2. Ala—Gorr Lumber Co v McMillan, supra

3. Tex—Keystone Pipe & Supply Co v Wright, Civ App, 37 SW 2d 227

40 C J p 190 note 96

4. Tex—Keystone Pipe & Supply Co v Wright, supra—Electra First Nat Bank v Federal Supply Co, Civ App, 260 SW 881.

Payment on delivery

Indebtedness for materials furnished under agreement for cash payment as delivered, on presentation of approved bills, was held to have accrued on delivery and presentation of bills, this being a specified time within the meaning of the statute—Kellam v Hardin, Tex Com App, 285 SW 611.

5. Mass—Girouard v Jasper, 106 NE 849, 219 Mass 318

40 C J p 190 note 98

6. Cal—Battersby v Sheppard, 265 P 506, 89 Cal App 756

Mich—Saginaw Lumber Co v Wilkinson, 254 NW 240, 266 Mich 661—Knowlton v Gibbons, 178 N W 63, 210 Mich 647—Smalley v Ashland Brown-Stone Co, 72 NW 29, 114 Mich 104

N Y—Ringle v Wallis Iron Works, 24 NYS 757, 4 Misc 15, affirmed 28 NYS 107, 76 Hun 449

40 C J p 190 note 99

7. Ariz—Lesson v Bartol, 99 P 2d 485, 55 Ariz 485—Morgan v O'Malley Lumber Co, 7 P 2d 262, 39 Ariz 400

Cal—Reinhart Lumber & Planing Mill Co v Hladik, App, 259 P 363—Hickman v Freiermuth, 132 P 772, 21 Cal App 629

Colo—Park Lane Properties v Fisher, 5 P 2d 577, 89 Colo 591

Del—Bethlehem Const Co v Chris-

the completion of the building as an alternative date from which the period may be computed, at least as to certain claimants,⁸ other dates mentioned in the same statutes being the completion or performance of the labor or the furnishing of the materials, or the cessation of work or the furnishing of materials, as discussed *infra* § 144.

Some courts have held, where the statute requires the claim to be filed within a certain time after completion of the building, that a filing before the building is completed is premature and confers no rights⁹ unless the contract is for the construction only of a portion of the building and such portion has been completed,¹⁰ but other courts have taken a contrary view.¹¹ At any rate, where the statute allows merely a certain period after the doing of the work or the furnishing of the materials, the completion of the entire building is not a prerequisite to the right of a person to file his lien claim¹² unless his contract is not performed until then.¹³ Where a lien claimant of a particular class is required to file his lien within a limited time after the completion of his contract, he must do so, as discussed *infra* § 144 b, even though the building is not complete.¹⁴

On the other hand, where the statute makes the completion of the building the time from which the period for filing the notice of lien runs, a notice filed within such period after such completion is in time, although more than the period allowed has

elapsed since claimant completed his work;¹⁵ and this is so although the statute fixes the completion or performance of the work as an alternative time from which the period is to be computed.¹⁶ Under such a statute, however, the lien may be filed within the required time after the furnishing of the labor or materials although before substantial completion of the building.¹⁷

b. What Constitutes or Is Equivalent to Completion

- (1) In general
- (2) Abandonment or cessation of work generally
- (3) Acceptance or occupation of building
- (4) Notice of completion

(1) In General

Completion of a building which starts the period for filing the notice or claim of lien running may be either actual or constructive.

When a building is completed within the meaning of the statute is a question to be determined in view of the circumstances of each case.¹⁸ The parties may by mutual consent make the completion of the building depend on any lawful event that may suit their purposes.¹⁹ The completion of the building or improvement, within the meaning of the statutes under consideration, may be either actual²⁰

tiana Const Co, 144 A 830, 4 W W Harr 147
40 C J p 190 note 1

Purchasers and encumbrancers

Statute requiring claim to be filed within specified period after completion of building does not mean that claim must be filed within time specified after completion of work only to protect lien claimant against purchasers and encumbrancers who become such after expiration of the period.—Brown v Brown & Co., 160 S W 2d 431, 25 Tenn App 609

Time fixed in lien notice

Materialmen's lien claimants were held bound by statements in notices respecting date building was completed.—Morgan v O'Malley Lumber Co, 7 P 2d 252, 39 Ariz 400

8. Colo.—Park Lane Properties v Fisher, 5 P 2d 577, 89 Colo 591
40 C J p 190 note 2

Subcontractors, materialmen, and laborers

Or.—Prouty Lumber & Box Co v McGuirk, 66 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418.—Heacock Sash & Door Co v Weatherford, 294 P 344, 135 Or 153.—Eastern & Western Lumber Co v Williams, 276 P 257, 129

Or 1—Nicolai-Neppach Co v Poore, 251 P 268, 120 Or 163.—James A C Tait & Co v Stryker, 243 P 104, 117 Or 338

9. Cal.—Gross v Hazeltine, 290 P 673, 107 Cal App 446
40 C J p 190 note 5

Strict construction

Strict construction does not require unreasonable construction of mechanic's lien statute, as prohibiting filing of statement until actual completion of building long after discontinuance of work by claimant.—Bethlehem Const Co v Christiana Const Co, 144 A 830, 4 W W Harr, Del, 147

10. Del.—Malone v Zelman, 40 A 944, 15 Del 285
40 C J p 191 note 6

11. Ariz.—Arizona Eastern R Co v Globe Hardware Co, 129 P 1104, 14 Ariz 397
40 C J p 191 note 7.

12. Minn.—Lamoreaux v Andersch, 150 NW 908, 128 Minn 261, L R A 1915D 204

Pa.—Guilfoyle v MacIntyre, 11 Montg Co 12

13. Minn.—Lamoreaux v Andersch, 150 NW 908, 128 Minn 261, L R A 1915D 204

14. Cal.—Pacific Mut L Ins Co v Fisher, 39 P 758, 106 Cal 224
40 C J p 191 note 12

15. Or.—Bennett v Bruchou, 98 P. 2d 762, 163 Or 175
40 C J p 191 note 14

16. Colo.—Park Lane Properties v Fisher, 5 P 2d 577, 89 Colo 591

17. Or.—Dement v. Eastes, 264 P. 348, 124 Or 170

18. Hawaii.—Lucas v Hustace, 21 Hawaii 119, Ann Cas 1915C 1186
N M.—Corpus Juris quoted in Allison v Schuler, 36 P 2d 519, 520, 38 N M 506
40 C J p 191 note 16

Additional work or materials after completion, as extending time for filing see *infra* § 149

19. Tenn.—Harrison v Knafie, 161 S W 1003, 128 Tenn 329

20. Cal.—Baird v Havas, 164 P 2d 952, 72 Cal App 2d 520
40 C J p 191 note 18

Actual or constructive completion where notice of completion not filed see *infra* subdivision b (4) of this section

or constructive,²¹ a constructive completion arising from facts which are declared by statute to be equivalent to completion.²² There is also a constructive completion of the building where performance of the contract is rendered impossible through no fault of the contractor,²³ as in a case where a receiver is appointed for the owner of the property.²⁴ The time for filing the claim runs from such a constructive completion although work is thereafter resumed on the building.²⁵

A building may be deemed completed, with reference to the time for filing lien claims or statements, when it is substantially completed,²⁶ notwithstanding trivial imperfections²⁷ or omissions,²⁸ but it is not completed while work of considerable value and importance remains to be done,²⁹ although the unfinished part constitutes a mere convenience and the building may be used without it.³⁰

Estoppel of owner If the owner intentionally leads the lien claimant to believe that the building is not completed, and the lien claimant relies on the

representations, the owner is estopped to assert the earlier completion of the building.³¹

(2) Abandonment or Cessation of Work Generally

Permanent abandonment of the work on a building is generally deemed a completion of the building, sometimes by reason of express provision of the statute, for the purpose of fixing the time for filing a claim of lien.

The permanent abandonment of work on a building is deemed a completion of the building for the purpose of fixing the time for filing a claim of lien,³² provided the time of abandonment can be fixed,³³ if, under some statutes, the abandonment is through fault of the owner and without fault of the lien claimant.³⁴ It has been held that, where a contractor abandons his contract after having done work thereon, subcontractors and materialmen must file their claims within the required time thereafter and cannot wait until the work is completed by the owner or under a new contract with another contractor.³⁵ In order to constitute an abandonment within the rule there must be a conclusion or inten-

21. Cal—Baird v Havas, supra—Baird v Havas, 151 P 2d 10, 85 Cal App 2d 523—Stanislaus Lumber Co v Pike, 124 P 2d 190, 51 Cal App 2d 54—Nevada County Lumber Co v Janiss, 78 P 2d 200, 25 Cal App 2d 579—Shumway v Woolwine, 257 P 898, 84 Cal App 220 40 C J p 191 note 19

22. Cal—Shumway v Woolwine, supra 40 C J p 191 note 20 [a]

Conveyance of unfinished building unfit for occupancy was held not completion thereof—Farmers' Life Ins Co v Connor, 257 P 260, 82 Colo 81

23. Del—Bethlehem Const Co v Christiana Const Co, 144 A 830, 4 W W Harr 147

24. Del—Bethlehem Const Co v Christiana Const Co, supra

Contractor's ignorance of appointment has been held no excuse for his failure to file the claim within the required time after the appointment—Bethlehem Const Co v Christiana Const Co, supra

25. Cal—Baird v Havas, 164 P 2d 952, 73 Cal App 2d 520—Stanislaus Lumber Co v Pike, 124 P 2d 190, 51 Cal App 2d 54

26. Cal—Grettenberg v Collman, 5 P 2d 911, 119 Cal App 7—Shumway v Woolwine, 257 P 898, 84 Cal App 230

N M—Allison v Schuler, 36 P 2d 519, 38 N M 506 40 C J p 191 note 21

27. Cal—Hammond Lumber Co v Barth Inv Corporation, 262 P 31,

203 Cal 606—Grettenberg v Collman, 5 P 2d 944, 119 Cal App 7

Colo—Boise-Payette Lumber Co v Longwedel, 295 P 791, 88 Colo 233

40 C J p 191 note 22
Imperfections as wholly preventing filing of lien see supra § 95

Liberal construction

Requirement that trivial imperfection in work should not prevent filing lien must be liberally construed in favor of lien claimant—Hammond Lumber Co v Barth Inv Corporation, 262 P 31, 202 Cal 606

What constitutes

(1) "Trivial imperfections," with respect to time for filing lien, are those of nature not preventing contractor's recovery for substantial performance—Hammond Lumber Co v Barth Inv Corporation, supra

(2) Substantial work required to obtain inspector's certificate was held not mere "trivial imperfection"—Hammond Lumber Co v Barth Inv Corporation, 262 P 29, 202 Cal 601

28. Colo—Boise-Payette Lumber Co v Longwedel, 295 P 791, 88 Colo 233

40 C J p 192 note 23

29. U S—Arctic Lumber Co v Borden, Alaska, 211 F 50, 127 CCA 486, certiorari denied 35 S Ct 209, 235 US 704, 59 L Ed 433

40 C J p 192 note 24

30. Cal—Coss v MacDonough, 44 P 325, 111 Cal 662

40 C J p 192 note 25

31. Cal—Baird v Havas, 164 P 2d 952, 73 Cal App 2d 520

32. Del—Corpus Juris cited in Bethlehem Const Co v Christiana Const Co, 144 A 830, 831, 4 W W Harr 147

D C—Corpus Juris quoted in Harper v Galliher & Huguey, 29 F 2d 452, 453, 58 App DC 252, certiorari denied Galliher & Huguey v Harper, 49 S Ct 185, 278 US 657, 73 L Ed 565

N M—Corpus Juris cited in Albuquerque Lumber Co v Montevista Co, 38 P 2d 77, 82, 39 N M 6

Or—Bennett v Bruchou, 96 P 2d 762, 163 Or 175—Drake v Riley, 9 P 2d 130, 139 Or 172—Block v Love, 1 P 2d 588, 136 Or 685—James A C Tait & Co v Stryker, 243 P 104, 117 Or 338

40 C J p 192 note 27
Abandonment of contract see infra § 144 b

Cessation of labor

By claimant see infra § 144 a
In connection with acceptance or occupation of building see infra subdivision b (3) of this section

Notice of completion see infra subdivision b (4) of this section

33. Del—Bethlehem Const Co v Christiana Const Co, 144 A 830, 4 W W Harr 147

34. N M—Albuquerque Lumber Co v Montevista Co, 38 P 2d 77, 39 N M 6

35. D C—Harper v Galliher & Huguey, 29 F 2d 452, 58 App DC 252, certiorari denied Galliher & Huguey, 49 S Ct 185, 278 US 657, 73 L Ed 565.

tion by the participants to cease operations,³⁶ permanently or indefinitely,³⁷ to the knowledge of the lien claimant³⁸ A mere temporary suspension in the doing of the work or the furnishing of materials is not such an abandonment as will start the time running in which claimant must file his notice³⁹

The statutes of a few states expressly provide that cessation from labor for a specified time shall be deemed equivalent to a completion⁴⁰ The completion arising from facts bringing the case within such a statute is constructive,⁴¹ the statute does not apply to a cessation of labor resulting from actual completion⁴² In order to bring a case within such a statute there must be a cessation of labor⁴³ for the time specified in the statute⁴⁴

(3) Acceptance or Occupation of Building

Acceptance of the building, or occupation and use thereof, by the owner are equivalent to completion under some of the statutes fixing the time for filing a lien claim.

Under some statutes the occupation or use of the building by the owner is deemed equivalent to, or conclusive evidence of, completion,⁴⁵ at least in the case of contractors,⁴⁶ but in order to have this effect the occupation must be open, entire, and exclusive,⁴⁷ and of such a character as to be inconsistent with a continuance by the contractor in the completion of his contract⁴⁸ In order to be equivalent to completion, within the meaning of some of the statutes, the occupation by the owner of the building must be accompanied by a cessation of labor thereon,⁴⁹ the statutory period is not started running by the occupation or use by the owner of the building or improvement while work thereon is still in progress⁵⁰ or by the taking possession of the building by the owner, not for the purpose of occupying or using it, but for the purpose of completing the work abandoned by the contractor.⁵¹

Acceptance of building Sometimes,⁵² but not

36. Or—Block v Love, 1 P 2d 588, 136 Or 685—Pacific Coast Steel Co v Uhrbrand & Leurick Const Co, 279 P 848, 130 Or 225—Stark-Davis Co v Fellows, 277 P 110, 129 Or 281, 64 A L R 271—Eastern & Western Lumber Co v Williams, 276 P 257, 129 Or 1

37. Or—Block v Love, 1 P 2d 588, 136 Or 685—Pacific Coast Steel Co v Uhrbrand & Leurick Const Co, 279 P 848, 130 Or 225—Stark-Davis Co v Fellows, 277 P 110, 129 Or 281, 64 A L R 271—Eastern & Western Lumber Co v Williams, 276 P 257, 129 Or 1

New contract by owner

Owner, contracting for construction after original contractors' suspension, did not abandon building and start running of time for filing mechanic's lien—Pacific Coast Steel Co v Uhrbrand & Leurick Const Co, 279 P 848, 130 Or 225

38. Or—Block v Love, 1 P 2d 588, 136 Or 685

Cessation of labor without disclosing intention to abandon to lien claimant was held not permanent abandonment of construction—Stark-Davis Co v Fellows, 277 P 110, 129 Or 281, 64 A L R 271

Actual or constructive knowledge is necessary—Pacific Coast Steel Co v Uhrbrand & Leurick Const Co, 279 P 848, 130 Or 225

39. N M—Allison v Schuler, 36 P 2d 519, 38 N M 506—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 N M 3

Work done as fast as possible

Suspension of plumbing work for three months was held not abandonment of undertaking, so as to start

time within which claim must be filed for work done prior to suspension, where work was done as fast as progress in construction of building permitted—Hot Springs Plumbing & Heating Co v Wallace, supra

40. Cal—Baird v Havas, 151 P 2d 10, 65 Cal App 2d 523—Stanislaus Lumber Co v Pike, 124 P 2d 190, 51 Cal App 2d 54—Remington v Mulholland, 5 P 2d 667, 118 Cal App 479

Colo—Boise-Payette Lumber Co v Longwedel, 295 P 791, 88 Colo 233

40 C J p 192 note 28

Statute starts running on cessation of work for the specified period in the same manner as after actual completion of the building—Stanislaus Lumber Co v Pike, 124 P 2d 190, 51 Cal App 2d 54

41. Cal—Pence v Martin 185 P 503, 43 Cal App 626—Mott v Wright, 184 P 517, 43 Cal App 21

42. Cal—Mott v Wright, supra

43. Colo—Joramson v McPhee, 71 P 419, 31 Colo 26
40 C J p 192 note 31

44. Cal—Marchant v. Hayes, 52 P 154, 120 Cal 137
40 C J p 192 note 32

45. Cal—Orlandi v Gray, 58 P 15, 125 Cal 372—Shumway v Woolwine, 267 P 898, 84 Cal App 220

46. Colo—Platte Valley Lumber Co v Courtright, 197 P 235, 70 Colo 57

40 C J p 192 note 34

47. Cal—Orlandi v Gray, 58 P 15, 125 Cal 372—Willamette Steam Mills Lumbering & Mfg Co v

Los Angeles College Co, 29 P 629, 94 Cal 229

48. Cal—Orlandi v. Gray, 58 P 15, 125 Cal 372

49. In California

(1) Occupancy or use by the owner or his agent to constitute completion must be accompanied by a cessation of labor—Nevada County Lumber Co v Janiss, 78 P 2d 200, 25 Cal App 2d 579

(2) Where, after occupation of a building by a tenant, the sewer system failed to work, necessitating the removal and replacement of defective materials, the building was held not to have been completed until after such replacement—Nevada County Lumber Co v Janiss, supra

(3) The cessation of labor need not continue for any particular time—Baird v Havas, 164 P 2d 952, 72 Cal App 2d 520

(4) Cessation for a specified time was required under an earlier statute—Sunset Lumber Co v Bachelor, 140 P 35, 167 Cal 512, Ann Cas 1916B 664—40 C J p 192 note 37 [a]

50. Cal—Farnham v California Safe Deposit & Trust Co, 96 P 788, 8 Cal App 286
40 C J. p 192 note 38

51. Cal—C Ganahl Lumber Co v Weinsveig, 117 P 954, 16 Cal App 687

52. Cal—Trimlett v. De Coursey, 151 P 390, 28 Cal App 90
Mo—Bewick v Price, 154 SW 876, 169 Mo App 51
40 C J p 192 note 40.

always,⁵³ the statutory period is computed from the date when the building is accepted by the owner. An owner's refusal to make a certain payment under the contract until the contractor had settled with all lien claimants has been held not a contemporaneous construction as to the date of acceptance of the building.⁵⁴ Under some of the statutes an absolute cessation of labor for a specified period of time must accompany the acceptance of the building by the owner in order to constitute a completion.⁵⁵

(4) Notice of Completion

Under some statutes a notice of completion filed by the owner within a specified time after completion of the building or cessation of labor constitutes completion for the purpose of computing the time for filing the notice or claim of lien. A longer period to file the lien is permitted on failure of the owner to file the notice of completion.

Some statutes provide that the owner shall, within a specified number of days after the completion of the building or improvement⁵⁶ or after the cessation of labor thereon for a specified period,⁵⁷ file for record in a specified county office a notice stating the date of such completion or cessation. Such statutes provide that the filing of the notice shall be

deemed equivalent to a completion,⁵⁸ and that, where the notice is not filed, claimants shall file their claims of lien within a specified period, longer than is otherwise permissible, after the completion of the building or improvement.⁵⁹ In order to be effective, the notice of completion must comply with the provision of the statute.⁶⁰

§ 143. — Commencement of Work or of Furnishing Material

Under some statutes the claim of lien must be filed within a specified time after the commencement of the work or the furnishing of the materials.

Under at least one statute, the lien claim must be filed within a specified time from the commencement of the work or the commencement of furnishing the materials.⁶¹

§ 144. — Completion, Abandonment, or Cessation of Contract, Work, or Furnishing of Materials

- a Completion or cessation of work or furnishing of materials
- b Completion or abandonment of contract
- c Entire or separate contracts

Subcontractor's Lien

Ohio—McKenzie v Jacob, 27 Ohio N.P.N.S., 57

53. Colo—Lichty v Houston Lumber Co, 88 P 846, 39 Colo 53. 40 C.J. p 193 note 41

54. Cal—Hammond Lumber Co v Yeager, 197 P 111, 185 Cal 355

55. Cal—Baird v Havas, 164 P.2d 952, 72 Cal App 2d 520 40 C.J. p 193 note 40 [a]

56. Cal—Baird v Ocequeda, 67 P. 2d 1055, 8 Cal 2d 700—Hammond Lumber Co v Barth Inv Corporation, 262 P 31, 202 Cal 606—Baird v Havas, 164 P.2d 952, 72 Cal App 2d 520—Baird v Havas, 151 P.2d 10, 65 Cal App 2d 523—Stanislaus Lumber Co v Pike, 124 P.2d 190, 51 Cal App 2d 54

40 C.J. p 193 note 44

Notice of completion of contract see infra § 144 b

57. Cal—Baird v Ocequeda, 67 P. 2d 1055, 8 Cal 2d 700—Hammond Lumber Co v Barth Inv Corporation, 262 P 31, 202 Cal 606—Robison v Mitchel, 114 P 984, 159 Cal 581

58. Cal—C Ganahl Lumber Co v Thompson, 270 P 965, 205 Cal 354—Stanislaus Lumber Co v Pike, 124 P.2d 190, 51 Cal App 2d 54—Los Angeles City School Dist of Los Angeles County v Tucker, App, 279 P 491 40 C.J. p 193 note 46.

Time begins to run from the filing of the notice of completion—Reinhart Lumber & Planing Mill Co v Hladik, Cal App, 259 P 363

59. Cal—Baird v Ocequeda, 67 P. 2d 1055, 8 Cal 2d 700—C Ganahl Lumber Co v Thompson, 270 P 965, 205 Cal 354—Hammond Lumber Co v Barth Inv Corporation, 262 P 31, 202 Cal 606—Baird v Havas, 164 P.2d 952, 72 Cal App 2d 520—Baird v Havas, 151 P.2d 10, 65 Cal App 2d 523—Stanislaus Lumber Co v Pike, 124 P.2d 190, 51 Cal App 2d 54—Nevada County Lumber Co v Janiss, 78 P.2d 200, 25 Cal App 2d 579—Gross v Hazeltine, 290 P 673, 107 Cal App 446 40 C.J. p 193 note 47

What constitutes completion

(1) Completion may be actual or constructive—Baird v Havas, 164 P.2d 952, 72 Cal App 2d 520—40 C.J. p 193 note 47 [a] (1), (2)

(2) Occupancy by the owner or his agent accompanied by a cessation of labor, or acceptance plus a cessation of labor for thirty-day period constitutes completion—Baird v Havas, supra—Nevada County Lumber Co v Janiss, 78 P.2d 200, 25 Cal App 2d 579—40 C.J. p 193 note 47 [a] (4), (5)

(3) So does cessation of labor for a specified number of days—Baird v Havas, 151 P.2d 10, 65 Cal App 2d

533—Stanislaus Lumber Co v Pike, 124 P.2d 190, 51 Cal App 2d 54

(4) Owner's secret acceptance of uncompleted building from contractor does not constitute completion as to materialman claiming lien—Hammond Lumber Co v Barth Inv Corporation, 262 P 31, 202 Cal 606

Effect of temporary suspension

Where construction work is suspended and later resumed, materialman has specified time from final completion for filing lien, where owner fails to file notice of completion—Hammond Lumber Co v Barth Inv Corporation, supra.

60. Cal—C Ganahl Lumber Co v Thompson, 270 P 965, 205 Cal 354

Designation of owners

Notice of completion describing property, giving owner's address, with verification that named person was one of the owners was held sufficient, even though property was owned by husband and wife in joint tenancy—Progress Lumber Co v Davis, 17 P.2d 105, 217 Cal 95.

Tardy filing

Owner's notice of completion tardily filed is not equivalent of completion—C Ganahl Lumber Co v Thompson, 270 P. 965, 205 Cal 354.

61. R.I.—Murphy v Guisti, 48 A. 944, 22 R.I. 588—Gurney v Walsham, 19 A. 323, 16 R.I. 698.

a. Completion or Cessation of Work or Furnishing of Materials

(1) In general

(2) What constitutes furnishing last material or labor

(1) In General

Under many statutes the period for filing the claim of lien runs from the completion or cessation of the work or furnishing of the materials, or from the date when the last item of work or materials is done, performed, or furnished

Under numerous statutory provisions, varying somewhat in phraseology, but not in effect, the statutory period for filing a claim, notice, or statement of a lien is computed, at least in respect of particular classes of claimants, from the completion⁶² or cessation⁶³ of the work, labor, or furnishing of the materials, or from the date when the last item of work, labor, or materials is done, performed, or furnished⁶⁴. Where the last item in a lien statement is not proved, the claim is nevertheless valid

62. Colo—Tiger Placers Co v Fisher, 54 P 2d 891, 98 Colo 221—Western Elaterite Roofing Co v Fisher, 273 P 19, 85 Colo 5

Fla—Pierson v Reinhardt, 133 So 553, 101 Fla 1392, rehearing denied 136 So 250, 101 Fla 1392

Ill—National Theater Supply Co v Blum, 276 Ill App 123

La—A Stef Lumber Co v Mattingly, 122 So 893, 168 La 645—Clarke Co v Bourgeois & Duvigneaud, 5 La App 358

Or—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—Andersen v Turpin 142 P 2d 999, 172 Or 420—Prouty Lumber & Box Co v McGuirk 66 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418—Nicolai-Neppach Co v Poore, 251 P 268 130 Or 163
40 C J p 193 note 50

Additional work or materials as extending period see infra § 149

Substantial completion

Ill—Alexander Hendry Co v Moorar, 242 Ill App 516

Test of work

Notice of intention to hold mechanic's lien filed within required time after test of work and materials, required by owner before payment, was held timely—Clarage v Palace Theater Corporation, 151 N E 629, 84 Ind App 506

63. Cal—Davis v Bortveit, 16 P 2d 327, 127 Cal App 675

Mass—Peerless Unit Ventilation Co v D'Amore Const Co, 186 N E 280 283 Mass 121

Or—Andersen v Turpin, 142 P 2d 999, 172 Or 420—Prouty Lumber & Box Co v McGuirk, 66 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418—Nicolai-Neppach Co v Poore, 251 P 268, 120 Or 163

W Va—Bailey Lumber Co v General Const Co, 133 S E 135, 101 W Va 567

40 C J p 193 note 51

Statement must follow cessation, not precede it—Peerless Unit Ventilation Co v D'Amore Const Co, 186 N E 280, 283 Mass 121

Work interrupted by creditors

Filing of materialman's lien within five days after interruption of

work by creditors was held in time—Nicolai-Neppach Co v Poore, 251 P 268, 120 Or 163

64. Ark—Sebastian Building & Loan Ass'n v Minten, 27 S W 2d 1011, 181 Ark 700—Georgia State Sav Ass'n v Marrs, 9 S W 2d 785, 178 Ark 18—Whitener v Purifoy, 5 S W 2d 724, 177 Ark 39—Planters' Cotton Oil Co v Galoway, 280 S W 999, 170 Ark 712

Ga—Crane Co v Hirsch, 7 S E 2d 83, 61 Ga App 632—Chambers Lumber Co v Gilmer, 5 S E 2d 84, 60 Ga App 832

Ill—United Cork Cos v Volland, 7 N E 2d 301, 365 Ill 564

Iowa—Crane Co v Westerman, 8 N W 2d 412, 232 Iowa 1394

Kan—Gooch v Wilcox, 11 P 2d 743, 135 Kan 683

Ky—Siler v Corbin Building & Supply Co, 176 S W 2d 250, 296 Ky 132—Mingo Lime & Lumber Co v Stanley, 79 S W 2d 4, 257 Ky 687
Mich—Michels v Everts, 249 N W 875, 264 Mich 363

Neb—Davidson v Shields, 263 N W 490, 129 Neb 877—Parsons Const Co v Gifford, 263 N W 508, 129 Neb 617

N J—Rubino v Tranor, 152 A 647, 8 N J Misc 815—Home Builders' Realty & Mortgage Co v Schneider, 147 A 784, 105 N J Eq 326

N Y—Farabella v Porter, 225 N Y S 417, 130 Misc 680

Ohio—A M Lewin Lumber Co v Heatt, 43 N E 2d 508, 69 Ohio App 253—Garrett v Lushawa, 172 N E 845, 36 Ohio App 129—A M Lewin Lumber Co v Gutman, 171 N E 342, 34 Ohio App 458

Okl—Fry v Long Bell Lumber Co, 167 P 2d 651, 196 Okl 670—Cameron v Speer, 68 P 2d 810, 180 Okl 209—Wass v Vickery, 13 P 2d 142, 158 Okl 227—Norman v Hearne & Tittle, 292 P 332, 145 Okl 217

Or—Prouty Lumber & Box Co v McGuirk, 66 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418—Nicolai-Neppach Co v Poore, 251 P 268, 120 Or 163

S D—Big Sioux Lumber Co v Miller, 231 N W 31, 57 S D 506—Barry v G L Wood Farm Mortgage Co, 211 N W 688, 50 S D 652

Wash—Warming v Hargis, 294 P 248, 159 Wash 501

Wis—Layne-Bowler Chicago Co v Peshtigo Paper Co, 217 N W 312, 194 Wis 631

40 C J p 194 note 52

Accrual of indebtedness on performance or furnishing of last item see supra § 141

Absence of contract or recordation

(1) Under some statutes, where the owner or his agent undertakes the work of construction, improvement, or repair for the account of the owner, for which no contract has been entered into or recorded, the claim for a lien by anyone furnishing services or material or performing labor on the job must be recorded within a specified time after the last delivery of all the materials, or last performance of all services or labor done, to complete the job, and, if so recorded, is sufficient—H R Hayes Lumber Co v H M Jones Drilling Co, 148 So 899, 177 La 626—Bell v Lieber, 135 So 871, 169 La 731—Hortman-Salmen Co v White, 123 So 715, 168 La 1067—Hicks v Tate, La App, 7 So 2d 737, followed in N O Nelson Co v Tate, 7 So 2d 740—Rex Electric Co v Glorioso 140 So 236, 19 La App 712, —Cox v Rockhold, 128 So 702, 14 La App 170—Shreveport Long Leaf Lumber Co v Spurlock, 120 So 126, 9 La App 224

(2) Filing as provided by this statute was held necessary where the contract involved was verbal—Hicks v Tate, La App, 7 So 2d 737, followed in N O Nelson Co v Tate, 7 So 2d 740

(3) Thereunder, last labor performed or material furnished refers to that performed or furnished by anyone to complete the work on the building, not necessarily to the last labor performed or materials furnished by claimant—National Homestead Ass'n v Graham, 147 So 348, 176 La 1062

(4) Lien for material used in repairing roof, filed within sixty days after last delivery of material which was necessary to complete repair job was held valid as against contention that such material was for patching

if the statement is filed within the specified time after the last item stated and proved,⁶⁵ but, where only the last item was furnished within the statutory period before the filing, the whole proceeding must fail unless the right to recover for that item under the lien as filed can be sustained⁶⁶

(2) What Constitutes Furnishing Last Material or Labor

As a general rule, the last materials are furnished, so as to start the statutory period running for filing a claim of lien, on the date of the last actual delivery on the premises or at some point where title to the materials passes from the seller to the purchaser. The last work or labor performed is the last work or labor performed to complete the building contract.

The last materials are furnished, within the meaning of the statutes under consideration, so as to start the running of the statutory period for filing the claim, on the date of the last actual delivery⁶⁷ on the premises,⁶⁸ or near the place where the building is to be constructed,⁶⁹ or at some point where the title to the material passes from the seller to the purchaser⁷⁰. While in some,⁷¹ although not other,⁷² cases it is held that the statutory period may be computed from the last delivery of materials only when such materials are used in the building, where the last material furnished is so used, ordinarily the period is not to be computed from the time of such use,⁷³ but, under special circumstances,

the rule may be otherwise.⁷⁴ The time for filing the statement will not be computed from the date of the order for the materials,⁷⁵ but rather, it has been held, from the date on which the material was furnished, as shown by the invoice to the owner⁷⁶

Where materials are sent from a distance, it has been held that the date of their arrival at their destination and receipt by the person to whom they are furnished is the date on which they are furnished⁷⁷

Where the contract of sale calls for a delivery free on board of cars at a designated place, it has been held that the statutory period begins to run from the date when material is so loaded on board the cars,⁷⁸ but there is authority to the contrary⁷⁹

The last work or labor performed which starts the statutory period running is the last work or labor performed in good faith to complete the building contract⁸⁰. It has been held that, where the contract is regarded as completed, or where the contract is terminated by reason of abandonment or cancellation, the last labor performed is that performed on or prior to the completion or termination of the contract⁸¹

b. Completion or Abandonment of Contract

(1) In general

(2) What constitutes; premature filing

(3) Delay in completion

defects in original completed job—Taylor-Seidenback Co v Miller, La App, 158 So 842

(5) Under a plumbing or electrical installation contract requiring the installations to be in working condition, work done after final tests, including correction of defects, necessary to put the electric or plumbing system in operation, was held to constitute the last performance of service or labor within the statute—Rex Electric Co v Glorioso, 140 So 236 19 La App 712—Cox v Rockhold, 138 So 702, 14 La App 170

(6) Where governmental inspection and approval of the work done and materials furnished are necessary, the last delivery of materials or performance of labor has been held not to occur until after such inspection and approval—Shreveport Long Leaf Lumber Co v Spurlock, 120 So 126, 9 La App 224

(7) Where he does the work, the owner is the contractor, and the work is completed and accepted when last material is furnished and last labor is performed—National Homestead Ass'n v Graham, supra

(8) However, it has also been held that last labor is done and last service or material is furnished before

building is considered or treated as completed—Hortman-Salmen Co v White, 133 So 715, 168 La 1067

65. Minn—Lundell v Ahlman, 54 N W 936, 53 Minn 57

66. Pa—Miller v Heath, 22 Pa Super 313

67. La—Clarke Co v Bourgeois & Duvigneaud, 5 La App 358

Okl—Corpus Juris cited in Norman v Hearne & Tittle, 292 P 332, 334, 145 Okl 217

40 C J p 194 note 56

Additional materials as extending time to file see infra § 149

68. Mich—Smalley v Gearing, 79 N W 1114, 121 Mich 190, rehearing denied 80 N W 797, 121 Mich 190

40 C J p 194 note 57

69. Ark—Van Houten Lumber Co v Planters' Nat Bank, 252 S W 614, 159 Ark 535

70. Ind—Foster Lumber Co v Sigma Chi Chapter House, 97 N E 801, 49 Ind App 528

71. Okl—P T Walton Lumber Co Cox, 116 P 798, 29 Okl 237

40 C J p 194 note 60

Necessity of use of material generally see supra § 43

72. Iowa—Page v Grant, 103 N W 124, 127 Iowa 249

Minn—John Paul Lumber Co v Hormel, 63 N W 718, 61 Minn 303 40 C J p 194 note 61

73. Ark—Van Houten Lumber Co v Planters' Nat Bank, 252 S W 614, 159 Ark 535

Ind—Foster Lumber Co v Sigma Chi Chapter House, 97 N E 801, 49 Ind App 528

74. Neb—Marble v Jones & Magee Lumber Co, 28 N W 309, 19 Neb 732

40 C J p 194 note 63

75. Kan—Geppelt v Middle West Stone Co, 135 P 573, 90 Kan 539

76. Kan—Geppelt v Middle West Stone Co, supra

77. Neb—Buchanan v Selden, 61 N W 732, 43 Neb 559

40 C J p 195 note 66

78. Mont—McEwen v Union Bank & Trust Co, 90 P 359, 35 Mont 470

40 C J p 195 note 67.

79. Okl—Crane Co v Naylor, 172 P 956, 70 Okl 75

80. Mich—Mielis v Everts, 249 N W 875, 264 Mich 363

81. Okl—Norman v Hearne & Tittle, 292 P 332, 145 Okl 217.

(1) In General

Under some statutes the notice or claim of lien must be filed within a specified time after completion of the contract.

In some jurisdictions the statutes expressly provide, or at times have provided, at least in respect of certain classes of claimants, such as contractors and subcontractors, for the filing of the claim, notice, or statement within a specified period after the completion of the contract.⁸² Thereunder, the lien may be filed at any time after completion of the contract and until expiration of the time specified.⁸³ It has been held that the contract referred to in the statutes under consideration is the contract between the owner and the original contractor.⁸⁴ In other jurisdictions it is a general rule that, where work is done or materials furnished under a contract, the period does not begin to run until the contract is performed,⁸⁵ unless the contract is abandoned, terminated, or canceled by the other party, in which case the claim may be filed at once⁸⁶ and may and should be filed within the statutory period computed from the date of the abandonment, termination, or cancellation.⁸⁷ However, it has been held that the statutory period cannot be computed from the date of the termination of the contract where the last work was done or the last material was furnished prior to such date.⁸⁸

(2) What Constitutes, Premature Filing

(a) In general

(b) Approval or acceptance of work, notice of completion

(a) In general

The question when a contract was completed is to be determined by ascertaining the conditions of the contract, the conduct of the parties with respect thereto, and the surrounding facts and circumstances.

The question when a contract was completed is to be determined by ascertaining the conditions of the contract,⁸⁹ the conduct of the parties with respect thereto,⁹⁰ and the surrounding facts and circumstances.⁹¹ In general, final completion of the contract dates from the time the last work demanded by the terms of the contract was done at the owner's request,⁹² or from the completion of the building under contract.⁹³ While the time for filing does not begin to run until the date of the completion of the entire contract,⁹⁴ it may start to run on substantial completion,⁹⁵ where the contract is substantially completed and full performance in minor details is dispensed with by the party to whom it is due⁹⁶ or is attributable to his failure to do what the contract requires of him,⁹⁷ a lien claim filed thereafter is not premature.

Where the parties agree to consider the work completed, although certain finishing touches are not then put on it, the period for filing a lien claim runs from that time and not from actual completion.⁹⁸ It has been held that a lien will not be defeated by the fact that claimant, acting in good

82. Cal.—Battersby v Sheppard, 265 P 506, 89 Cal App 756

Or.—Birkemeier v Knobel, 40 P 2d 694, 149 Or 292—Shea v. Graves, 19 P 2d 406, 142 Or 503

Pa.—Hamilton v Means, 38 A 2d 528, 155 Pa Super 245
40 C J p 195 note 69

What constitutes "contract"

Word "contract," within statute, means agreement or undertaking, and not legally enforceable agreement—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 NM 3

Alteration or new construction

Generally, in order to form a "new structure", there must be such change in external appearance and main mass of building as will result in and indicate newness of construction—Duplex Electric Co v Simons, Brittain & English, 172 A 159, 113 Pa Super 163—Zussman v Yeagle, Pa Com Pl, 58 Montg Co 262

83. Cal.—Battersby v Sheppard, 265 P 506, 89 Cal App 756.

84. Cal.—Irwin v Silva, 180 P 361, 40 Cal App 135
40 C J p 196 note 75

85. Wis.—Findorff v Fuller & John-

son Mfg Co, 248 NW 766, 212 Wis 365

40 C J p 195 note 71

86. Minn.—Lamoreaux v Andersch, 150 NW 908, 128 Minn 261, L R A 1915D 304

40 C J p 195 note 72

87. Wash.—John Dower Lumber Co v McCammon, 250 P 107, 141 Wash 381

40 C J p 195 note 73

Receivership

(1) Receivership of an owner corporation does not necessarily start running of the period for filing a statement—Ulmer v Portage Const & Finance Co, 26 Ohio N P, N S, 257

(2) However, if completion of the contract is prevented by the appointment of a receiver for the owner, a claim filed within the statutory period after such appointment is in time—Feick v Stephens, Ohio, 250 F 185, 162 CCA 321, certiorari denied 39 S Ct 8, 248 US 562, 63 L Ed 422

88. Del.—Voightmann v Wilmington Trust Bldg Corp, 78 A 920, 23 Del 265

89. Idaho—Gem State Lumber Co v Witty, 217 P 1027, 37 Idaho 489

90. Idaho—Gem State Lumber Co v Witty, supra

91. Idaho—Gem State Lumber Co v Witty, supra

92. Or.—Shea v Graves, 19 P 2d 406, 142 Or 503

Pa.—Eisenberg v Wolf, 86 Pa Super 169

93. Pa.—Houser v Matsinger, 156 A 738, 102 Pa Super 192

94. N Y.—Watts-Campbell Co v Yuengling, 25 NE 1060, 125 NY 1
40 C J p 196 note 85

95. Or.—Birkemeier v Knobel, 40 P 2d 694, 149 Or 292
40 C J p 196 note 86

Additional work or materials to complete contract as extending period see infra § 149

What constitutes

Or.—Birkemeier v Knobel, supra

96. Pa.—Stewart v. McQuade, 48 Pa 191

40 C J p 196 note 87

97. N Y.—McMechan v Baker, 11 N Y S 781, distinguished Foster v Schneider, 2 N Y S 875, 50 Hun 151

98. Va.—Franklin St Church v Davis, 7 S E 245, 85 Va 193.

contract rather than a severable one³² A like rule is applicable where all the work or items furnished are parts of one continuous and connected transaction,³³ or of a continuous and running account.³⁴

In order that the requisite continuity may exist it is not necessary that all the work or materials should be ordered at one time,³⁵ that the amount of

work or quantity of materials should be determined at the time of the first order,³⁶ or that the prices should be then agreed on,³⁷ or the time of payment fixed³⁸ Except in some jurisdictions,³⁹ it is sufficient if the last item of labor or materials is furnished in pursuance of a mere general arrangement to furnish labor or materials for a particular building or improvement,⁴⁰ or, according to the deci-

ard Lumber Co of Pine Bluff v Wilson, 296 SW 27, 173 Ark 1024
 Colo—Smith v Stroehle Machinery & Supply Co, 136 P 2d 341, 109 Colo 460
 Kan—Corpus Juris cited in Southwestern Electrical Co v Hughes, 30 P 2d 114, 116, 139 Kan 89
 Ky—Will B Miller Co v Laval, 140 SW 2d 376, 283 Ky 55
 Mich—Neely v International Corn Products Corporation, 205 NW 96, 232 Mich 81
 NY—Boyle v Paolini Cafeteria & Restaurant, 222 NYS 19, 220 App Div 482
 Ohio—J & F Harig Co v Fountain Square Bldg, 187 NE 872, 46 Ohio App 157
 Okl—Clark v Oklahoma Electric Co, 288 P 935, 144 Okl 21
 Or—Spaeth v Beckett, 41 P 2d 1064, 150 Or 111, 97 A L R 771
 Wis—Warnke v Braasch, 289 NW 598, 233 Wis 398—Usiak v Kubiak, 225 NW 168, 198 Wis 600
 40 C J p 198 note 30

Change of plans of gin plant by substituting oil engine for electric, requiring an oil engine house, was held not to change contract for materials, so as to bar materialman's lien claim filed within required time after last materials were furnished for the house—Planters' Cotton Oil Co v Galoway, 280 SW 999, 170 Ark 712

Lapse of time

(1) Mere lapse of time between items of work and material is not conclusive that all were not under one contract

Mich—Washtenaw Lumber Co v Belding, 208 NW 152, 233 Mich 608

Mont—Bartholomew v James, 246 P 771, 76 Mont 359

(3) Where no time is specified for completion of the contract, fact that the work was performed and materials furnished at great intervals is no ground for disallowance of the lien if the delays were not fraudulent with a view to extending the time for filing the lien—Rose v O'Reilly, 244 P 124, 138 Wash 18

Last uncontroverted item

One agreeing to furnish contractor all material required must file lien statement within time limited after delivery of last uncontroverted

item—Cleary v Siemens-Marshall Electric Co, Mo App, 296 SW 445

Contracts held not divisible or severable

Wis—Findorff v Fuller & Johnson Mfg Co, 248 NW 766, 212 Wis 365

40 C J p 198 note 30 [e]

32. Ky—Will B Miller Co v Laval, 140 SW 2d 376, 283 Ky 55

La—Cox v Rockhold, 128 So 702, 14 La App 170

40 C J p 198 note 30 [b]

Materials furnished for use in different structures come within rule

Ark—McCann v Dyke, 60 SW 2d 918, 187 Ark 507

Or—Nicolai-Neppach Co v Poore, 251 P 268, 120 Or 163

33. Ala—Wofford Bond & Mortgage Co v Adams, 133 So 254, 232 Ala 527

Colo—Mellor v Valentine, 3 Colo 255

Kan—Southwestern Electrical Co v Hughes, 30 P 2d 114, 139 Kan 89

Mont—Bartholomew v James, 246 P 771, 76 Mont 359

NY—Boyle v Paolini Cafeteria & Restaurant, 222 NYS 19, 220 App Div 482

Okl—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl 578

Or—Spaeth v Beckett, 41 P 2d 1064, 150 Or 111, 97 A L R 771

Pa—McCready-Rodgers Co v Nenoff, 39 A 2d 260, 155 Pa Super 555

40 C J p 199 note 31

The last work which sets the time running must be part of the work included in the claim—Peerless Unit Ventilation Co v D'Amore Const Co, 186 NE 280, 283 Mass 121

34. Ark—Arkansas Foundry Co v American Portland Cement Co, 75 SW 2d 387, 189 Ark 779—Geisreiter v Standard Lumber Co, 63 SW 2d 347, 187 Ark 893—McCann v Dyke, 60 SW 2d 918, 187 Ark 507—Twist v Roane, 294 SW 62, 174 Ark 35

Colo—Smith v Stroehle Machinery Co, 126 P 2d 341, 109 Colo 460

Ga—Chambers Lumber Co v Gilmer, 5 SE 2d 84, 60 Ga App 832

Mont—Bartholomew v James, 246 P 771, 76 Mont 359

Okl—Mid-Co Pipe & Supply Co v Central Torpedo Co, 280 P. 753, 127 Okl 273

40 C J p 199 note 32.

Last item must be lienable

The time for filing lien for materials cannot be computed from date of last item in claimant's account unless such item was subject of a lien—Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 59 Wyo 334, 147 A L R 1089

35. Ark—Twist v Roane, 294 SW 62, 174 Ark 35

N M—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 NM 3

Okl—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl 578—Chickasha Cotton Oil Co v Standard Lumber Co, 52 P 2d 816, 175 Okl 15—Clark v Oklahoma Electric Co, 288 P 935, 144 Okl 21—Mid-Co Pipe & Supply Co v Central Torpedo Co, 280 P 753, 127 Okl 273—Sherbondy v Tulsa Boiler & Mach Co, 226 P 564, 99 Okl 214

Or—Corpus Juris quoted in Spaeth v Beckett, 41 P 2d 1064, 1065, 150 Or 111, 97 A L R 771

Pa—McCready-Rodgers Co v Nenoff, 39 A 2d 260, 155 Pa Super 555

40 C J p 200 note 33

36. Or—Corpus Juris quoted in Spaeth v Beckett, 41 P 2d 1064, 1065, 150 Or 111, 97 A L R 771

40 C J p 200 note 34

37. Or—Corpus Juris quoted in Spaeth v Beckett, 41 P 2d 1064, 1065, 150 Or 111, 97 A L R 771

40 C J p 200 note 35

38. Ind—Patton v Matter, 52 NE 173, 21 Ind App 277

Or—Corpus Juris quoted in Spaeth v Beckett, 41 P 2d 1064, 1065, 150 Or 111, 97 A L R 771

39. Ala—Lane & Bodley Co v Jones, 79 Ala 156

40. US—Redman v Murray W. Sales Co, CCA Mich, 266 F 272.

40 C J p 200 note 38

Same general purpose

Where materials, even though ordered at different times, are furnished to be used for same general purpose, and form an entire whole, furnishing of materials will be considered a single contract or transaction and lien filed within statutory time after furnishing last item will relate back to first purchase and cover all materials furnished

Okl—Chickasha Cotton Oil Co v Standard Lumber Co, 52 P 2d 816,

sions on the question, an agreement,⁴¹ understanding,⁴² or reasonable expectation⁴³ that further labor or materials may or will be required and furnished

(2) Separate Contracts

As a general rule, separate and independent contracts cannot be tacked together to enlarge the time for filing a lien for work done or materials furnished under either.

Where labor or materials are furnished under separate contracts, the contracts cannot be tacked together so as to enlarge the time for filing a lien for what was done or furnished under either,⁴⁴ but a lien must be filed for what was done or furnished under each contract within the statutory pe-

riod after its completion.⁴⁵ This is true, even though the contracts are between the same parties⁴⁶ or relate to the same building or improvement,⁴⁷ and a fortiori it is true where the contracts are between the same claimant and different parties⁴⁸ or where they relate to different buildings or improvements.⁴⁹

Some courts recognize exceptions to the rule, however, and hold that, although there are several contracts, a filing of the claim within the statutory period after the last item is sufficient as to all the items where the labor is done or materials furnished continuously,⁵⁰ or there is one continuous employment,⁵¹ or the work being done constitutes one con-

175 Okl 15—Mid-Co Pipe & Supply Co v Central Torpedo Co, 260 P 753, 127 Okl 273—Sherbondy v Tulsa Boiler & Mach Co, 226 P 564, 99 Okl 214
Or—Spaeth v Becktell, 41 P 2d 1064, 150 Or 111, 97 A L R 771.

41. Mont—Rogers-Templeton Lumber Co v Welch, 208 P 600, 68 Mont 287

40 C J p 200 note 39

Contract held not entire

Materials bought from time to time under oral agreement to deliver them to owner's employees as called for and to charge against owner's account were held not bought under one entire contract—Botsford Lumber Co v Schriver, 206 NW 423, 49 SD 68

42. NM—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 NM 3

40 C J p 200 note 40

43. Ark—Arkansas Foundry Co v American Portland Cement Co, 75 S W 2d 387, 189 Ark 779

40 C J p 200 note 41.

44. Ga—Crane Co v Hirsch, 7 S E 2d 83, 61 Ga App 632

Mass—Massachusetts Gas & Electric Light Supply Co v Rugo Const Co, 71 N E 2d 408, 321 Mass 20

Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686

Minn—A Y McDonald Mfg Co v Newstone, 244 NW 806, 187 Minn 237

Neb—Ideal Cement Stone Co v Dohse, 16 NW 2d 151, 145 Neb 246—Walker v Collins Const Co, 236 NW 334, 121 Neb 157

Ohio—J & F Harig Co v Fountain Square Bldg, 187 N E 872, 46 Ohio App 157

SD—Big Sioux Lumber Co v Miller, 234 NW 31, 57 SD 508—Larson v. Anderson, 220 NW 498, 53 SD 236—Botsford Lumber Co

v Schriver, 206 NW 423, 49 SD 68

Wash—Kirk v Rohan, 187 P 2d 607—Corpus Juris cited in Swensson v Carlton, 135 P 2d 450, 454, 17 Wash 2d 396

Wis—Warnke v Braasch, 289 NW 598, 233 Wis 398

40 C J p 200 note 42, p 201 note 43
Renewal or extension of period see infra §§ 148, 149

Maintenance and repair contract

Time for filing mechanic's lien for installation of heating and plumbing plant began to run from date when work thereon ceased and not from date when repairs were made, notwithstanding agreement for maintenance and repair was made at same time as agreement to install plants, where agreements contemplated distinct jobs and repair work was not integral part of installation job or in any way related thereto—Brown v Mychel Co, 56 P 2d 1020, 186 Wash 97

45. Ark—Arkansas Foundry Co v American Portland Cement Co, 75 S W 2d 387, 189 Ark 779

Colo—Smith Machinery & Supply Co, 126 P 2d 341, 109 Colo 460
Ga—Crane Co v Hirsch, 7 S E 2d 83, 61 Ga App 632

Mass—Massachusetts Gas & Elec Light Supply Co v Rugo Const Co, 71 N E 2d 408, 321 Mass 20

Neb—Ideal Cement Stone Co v Dohse, 16 NW 2d 151, 145 Neb 246
SD—Larson v Anderson, 220 NW 498, 53 SD 236

40 C J p 201 note 43

46. Cal—Fly v Cline, 193 P 615, 49 Cal App 414

Kan—Unit Sash & Sales Co v Early, 232 P 232, 117 Kan 425

40 C J p 201 note 43

47. Ga—Crane Co v Hirsch, 7 S E 2d 83, 61 Ga App 632

40 C J p 201 note 45

48. Mich—Corpus Juris cited in R C Mahon Co v Ford Motor Co, 239 NW 348, 256 Mich 255

NJ—Rubino v Tranor, 152 A 647, 8 N J Misc 815

40 C J p 201 note 46

Contracts with different contractors

Materialman's claim against one contractor not timely filed was held not a lien against premises, even though claim against second contractor also for materials furnished was timely filed—Rubino v. Tranor, supra

Second contract with owner

Contract with owner for labor and materials cannot be tacked to separate contract with principal contractor so as to extend time for filing liens

Ind—Kendallville Lumber Co v Adams, 176 N E 555, 93 Ind App 141

Mich—R C Mahon Co v Ford Motor Co, 239 NW 348, 256 Mich 255

Break in transaction

A seller was not entitled to a lien for supplies sold over a period of time on part of supplies which were sold before a break in the transactions, where statutory lien claim was not filed within the required time after such break, the recipient of the supplies before the break being a different person from the recipient after the break—Home Lumber & Coal Co v Hartford Mining Co, 81 P 2d 1063, 58 Nev 361, rehearing denied 83 P 2d 1049, 58 Nev 361

49. Neb—Carr & Neff Lumber Co v Krogh, 143 NW 813, 94 Neb 537

40 C J p 201 note 47.

50. Okl—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl 578

Pa—McCready-Rodgers Co v Ne-noff, 39 A 2d 260, 156 Pa Super. 555

40 C J p 201 note 48

51. Conn—Parsons v Keeney, 130 A 505, 98 Conn 745.

40 C J p 201 note 49.

tinuous job,⁵² there being deemed to be a unity of purpose if not of contract.⁵³ Also, the rule has been relaxed where a materialman or subcontractor was without knowledge that the construction was under separate contracts between the owner and the contractor.⁵⁴

After completion of contract or improvement
The rule applies where, after the completion of the improvement and the contract therefor, a new contract is entered into in respect of another improvement,⁵⁵ such as another improvement not contemplated at the time of the original contract⁵⁶ or the completion thereof.⁵⁷ So, work done or materials furnished under a new and independent arrangement, made after the original contract or continuing employment has ended, does not set the time running so as to preserve a lien for the earlier work.⁵⁸

§ 145. Mode and Sufficiency of Filing and Recording

As a general rule, a mechanic's lien is not vitiated by

reason of any neglect or mistake of the recording officer in recording a notice or claim of lien, which has been filed by the claimant with the proper officer.

In general, the proper filing of a claim consists in placing the sworn statement in the custody of, and leaving such statement with, the proper officer for the purpose of recording.⁵⁹ Filing a copy of a notice of lien, instead of the original, has been held ineffective to create a lien.⁶⁰ Some statutes expressly designate the book in which mechanics' liens shall be recorded,⁶¹ or provide that they shall be recorded in a book kept for that purpose,⁶² but a statute of the latter class has been held not to make it necessary that the book in which they are recorded shall be kept exclusively for that purpose.⁶³ A filing by a person duly authorized by claimant is sufficient as against an objection that the claim was not filed by claimant,⁶⁴ especially where the claim is indorsed by the recorder as filed by claimant.⁶⁵ Also, it is immaterial that the physical act of recording the claim in the proper book is performed by an employee of the recording officer.⁶⁶

52. N.M.—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 N.M. 3

40 C.J. p 202 note 50.

Extras or additions

(1) Where labor and materials are continuously furnished under different contracts which relate to similar kinds of work, and are in fact additional to the original contract, and are made before the contract is completed, the services are regarded as continuous.—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl. 578

(2) In order to permit tacking, additional labor and materials furnished must be parts of one reasonably continuous transaction.—Big Sioux Lumber Co v Miller, 234 N.W. 31, 57 S.D. 506

Plumbing installations

Where, at the time of the original contract for a plumbing installation, the parties contemplated the installation of a water meter, the installation of the meter under a separate contract after completion of the plumbing installation is part of the same plant and constitutes the time from which to compute the filing date for all the work done.—In re Baker's Estate, Pa. Orph., 47 Pa. Dist. & Co. 444, 48 Lanc. L. Rev. 365

Transactions held not continuous

S.D.—Botsford Lumber Co v Schriver, 206 N.W. 423, 49 S.D. 68

53. Pa.—Hofer's Appeal, 9 A. 441, 116 Pa. 360

40 C.J. p 202 note 51

54. Idaho—Gem State Lumber Co

v School Dist No. 8, in Caribou County, 256 P. 949, 44 Idaho 359—Valley Lumber & Mfg. Co v Driessel, 93 P. 765, 13 Idaho 662, 15 L.R.A. NS, 299, 13 Ann. Cas. 63

Wash.—Building Supplies v Gillingham, 135 P. 2d 832, 17 Wash. 2d 489

Duty to inquire

Neither the sequence in ordering materials nor the fact that three buildings were constructed on defendants' land put materialman on inquiry to determine whether there was more than one contract between the contractor and the defendant owners.—Standard Lumber Co v Fields, Wash., 187 P. 2d 283

Rule inapplicable

Where foundation and floors of basement and garage were constructed by same contractor under separate contracts of which materialman had no knowledge, but more than five weeks elapsed after last delivery of material for foundation before contractor ordered material for floors, materialman had sufficient notice and could not include material for foundation in lien filed after expiration of statutory period from date of last delivery of such material on theory that furnishing of all materials constituted one continuous transaction.—Ideal Cement Stone Co v Dohse, 16 N.W. 2d 151, 145 Neb. 246

55. Or.—Hobkirk v Portland Baseball Club, 76 P. 776, 44 Or. 605

40 C.J. p 202 note 53

56. S.D.—Botsford Lumber Co v Schriver, 206 N.W. 423, 49 S.D. 68

40 C.J. p 202 note 54

57. Minn.—Villaume Box & Lumber Co v Condon, 178 N.W. 492, 146 Minn. 156

58. Mass.—Peerless Unit Ventilation Co v D'Amore Const. Co, 186 N.E. 280, 283 Mass. 121

Minn.—A. Y. McDonald Mfg. Co v Newstone, 244 N.W. 806, 187 Minn. 237

Wash.—Swensson v Carlton, 135 P. 2d 450, 17 Wash. 2d 396

59. Okl.—Pacific Petroleum Co v Sunbeam Oil Co, 54 P. 2d 1054, 176 Okl. 293

40 C.J. p 182 note 81.

Deputy clerk

Fact that claimant filed affidavit before the deputy clerk instead of the clerk did not prevent foreclosure of the lien.—Lammers v Cart-Ritter Co, 121 S.W. 2d 95, 196 Ark. 1159, followed in 121 S.W. 2d 519, 196 Ark. 1178

60. N.Y.—Terrell v Meisenhelder, 257 N.Y.S. 625, 143 Misc. 911

61. Ind.—Wilson v Logue, 30 N.E. 1079, 131 Ind. 191, 31 Am. S.R. 436

40 C.J. p 182 note 82

62. R.I.—Spencer v Doherty, 20 A. 232, 17 R.I. 89

63. Tex.—Lyon v Logan, 5 S.W. 72, 68 Tex. 521, 2 Am. S.R. 511

40 C.J. p 182 note 84

64. Cal.—Corbett v Chambers, 41 P. 873, 109 Cal. 178

65. Cal.—Corbett v Chambers, 41 P. 873, 109 Cal. 178

66. Ga.—Calhoun Brick Co v Patillo Lumber Co, 73 S.E. 23, 10 Ga. App. 181

40 C.J. p 182 note 87.

Under a few statutes a mere filing of the claim or notice is not sufficient,⁶⁷ since it is necessary that the claim or notice shall be actually and properly recorded in the proper book and the proper office within the required time,⁶⁸ but under most statutes it is held that, where claimant has filed his claim by leaving it with the proper officer for the purpose of recording, he has done all that is required of him⁶⁹ or is possible for him to do,⁷⁰ and that he does not lose his lien by reason of any neglect, default, or mistake of the recording officer.⁷¹ This is true as between the parties,⁷² and even, it has been held, as against third persons,⁷³ although the contrary has also been held with respect to subsequent bona fide purchasers or encumbrancers.⁷⁴ Thus, it has been held that the lien is not nullified

or lost, although the recording officer fails to collect the filing or recording fee in advance,⁷⁵ or wholly fails to record the lien,⁷⁶ or records it after the prescribed time for filing has expired,⁷⁷ or records only an abstract instead of spreading the lien in full on the record,⁷⁸ or records it in the wrong book,⁷⁹ or fails to enter a minute of the filing,⁸⁰ or to indorse the date and time of filing,⁸¹ or to make an abstract of it,⁸² or to forward a copy of the account filed to the secretary of state as required by law.⁸³

Index Under some statutes requiring the officer with whom claims or notices of liens are filed or recorded to keep an index thereof, it has been held that neither the owner⁸⁴ nor a third person⁸⁵ is bound to look beyond the index prescribed. Under others, however, actual indexing has been held not

67. Ga.—Jones v Kern, 28 SE 850, 101 Ga 309

RI—Dodge v Walsham, 19 A 326, 16 RI 704

68. Ga.—Jones v Kern, 28 SE 850, 101 Ga 309

40 C J p 182 note 89

69. Ind.—Adams v Buhler, 30 N E 883, 181 Ind 66

40 C J p 183 note 93

As substantial compliance

When county clerk has received and admitted to record notice that lien is claimed on property, materialman has no duty to cause it to be spread on record by court proceeding or otherwise, as between owner and materialman there is substantial compliance with statute by latter when county clerk has received and admitted to record legal notice of claim of lien within the required time—Bailey Lumber Co v General Const Co, 133 SE 135, 101 W Va 567

70. Wis.—Lang v Menasha Paper Co, 96 NW 393, 119 Wis 1

40 C J p 183 note 93

71. Ind.—Adams v Shaffer, 31 NE 1108, 132 Ind 331

40 C J p 183 note 93

Duty of clerk

Clerk accepting custody of mechanic's lien claim and part of filing fee had duty to record instrument without delay—Charles K Spaulding Logging Co v Ryckman, 6 P 2d 25, 139 Or 230

72. Wis.—Goodman v Baerlocher, 60 NW 415, 88 Wis 287, 43 Am SR 893

40 C J p 183 note 94.

73. Ind.—Wilson v Hopkins, 51 Ind 231, overruling Falkner v Col-shear, 39 Ind 201

74. US—In re Rose, D C Tex, 22 F Supp 988.

Defective record as no notice

A fatally defective record of a properly executed lien affidavit is not sufficient to meet requirements of statute requiring recordation, and does not operate as notice—In re Rose, supra

75. Or.—Charles K Spaulding Logging Co v Ryckman, 6 P 2d 25, 139 Or 230

Absence of demand for payment

The claim is regarded as having been filed at time of its receipt by the clerk, where at such time he made no demand for payment of his fee as condition for filing, as he had a right to do

NM—Hedrick v Jagger, 129 P 2d 340, 46 NM 379

Wis.—Lang v Menasha Paper Co, 96 NW 393, 119 Wis 1

Collection of part of fee

Lien claim timely filed was held not invalidated because only part of filing fee was then paid, amount being then unknown and balance being paid after time for filing expired—Charles K Spaulding Logging Co v Ryckman, 6 P 2d 35, 139 Or 230

76. Neb.—Watkins v Bugge, 77 N W 83, 56 Neb 615

40 C J p 183 note 96

77. La.—Taylor-Seidenback Co v Miller, App, 158 So 842

Or.—Charles K Spaulding Logging Co v Ryckman, 6 P 2d 25, 139 Or 230

40 C J p 183 note 97

78. W Va.—Doss v Gulf Smokeless Coal Co, 135 SE 575, 102 W Va 470

79. Ind.—Wilson v Logue, 30 NE 1079, 181 Ind 191, 31 Am SR 436

40 C J p 183 note 98

80. Kan.—O'Keef v Seip, 17 Kan 131

81. ND—Red River Lumber Co v Children of Israel, 73 NW 203, 7 ND 46

Wis.—Goodman v Baerlocher, 60 NW 415, 88 Wis 287, 43 Am SR 893

82. Mo.—Cornelius v Grant, 8 Mo 59

ND—Red River Lumber Co v Children of Israel, 73 NW 203, 7 ND 46

83. Mo.—St Louis Bridge & Const Co v Memphis, C & N W R Co, 72 Mo 664

84. Cal.—Diamond Match Co v Sanitary Fruit Co, 234 P. 322, 70 Cal App 695

85. Pa.—Cessna's Appeal, 10 A. 1, 7 Pa.Cas 183

Object of statute

Object of provision for indexing of memorandum or claim of a mechanic's lien in general index of deeds in name of owner of property and claimant of lien is to protect a purchaser who might acquire property after perfection of a mechanic's lien, or a subsequent lienor who might be affected thereby, and the provision was intended to conform recordation or registration of mechanics' liens with recordation or registration of deeds of trust and similar liens which are required to be indexed in same manner under registry act—Wallace v Brumback, 12 SE 2d 801, 177 Va 36

Claims sufficiently indexed

Claim of materialman for materials furnished to contractor for completion of contract with state university was held sufficiently indexed, where names under which claim was indexed included names of state university and contractor as required by statute—Royal Indemnity Co v. American District Steam Co, Tex Civ App, 88 SW 2d 1091, error dismissed

essential to the validity of the lien, if the claim has been properly filed with the officer,⁸⁶ and a lien has been held valid as between the parties, although the prothonotary omitted to index their names alphabetically⁸⁷

§ 146. Notice of Filing or Service of Copy of Claim

Under some statutes a copy of the claim of lien, or

a notice of the filing thereof, must be served on the owner.

Under some of the statutes the person claiming a mechanic's lien is required, at least where he is a subcontractor,⁸⁸ to serve on the owner⁸⁹ or his agent,⁹⁰ if he can be found within the county,⁹¹ a copy of the claim, statement, notice, or affidavit,⁹²

86. Tex.—Royal Indemnity Co v American District Steam Co, *supra*

Reason for rule

(1) Indexing of materialman's claim is unnecessary to create valid lien, since statute imposed on claimant duty only to file proper claim and imposed on clerk duty of indexing—Royal Indemnity Co v American District Steam Co, *supra*

(2) In the absence of express statutory requirement otherwise, the registration is effective as constructive notice from the time the instrument is filed with the proper official—Royal Indemnity Co v American District Steam Co, *supra*

87. Pa.—Irish v Harvey, 44 Pa 76

88. Okl.—King v Long-Bell Lumber Co, 105 P 2d 1060, 188 Okl 46—Moore v Morris, 243 P 933, 118 Okl 234

40 C J p 183 note 10

Contract with owner

Service of statement of account and lien on owner, part owner, or lessee by parties contracting directly with them is not required by the statute—Michels v Everts, 249 NW 875, 264 Mich 363—40 C J p 183 note 10 [a]

89. Ark.—Ellis v Fayetteville Lumber & Cement Co, 112 SW 2d 613, 195 Ark 385

DC—Merrill v B R Acker Co, 112 F 2d 102, 79 US App DC 51

Mich.—Lowrie & Webb Lumber Co v Ferguson, 20 NW 2d 209, 312 Mich 331

Va.—Coleman v Pearman, 165 SE 371, 159 Va 72

40 C J p 183 note 11

Owner at particular time

(1) Statute requiring service of copy of claim of lien on "owner" refers to person owning premises when claim is made or filed—Lewis Mfg Co v Lee, 256 NW 457, 268 Mich 383—Strand Lumber Co v Dostie, 245 NW 777, 260 Mich 422—Peninsular Stove Co, 197 NW 693, 226 Mich 130

(2) Hence, where deed of land contract vendee given to wife through third party and recorded prior to filing of mechanics' lien claim became operative on delivery to vendee of deed of land contract vendor held in escrow, wife became owner enti-

tled to be served with notice of filing of lien—Lewis Mfg Co v Lee, *supra*

(3) Where lien is claimed against building only, notice of filing of lien is not required to be given to one who became owner subsequent to filing of lien claim and before filing bill for foreclosure—Lewis Mfg Co v Lee, *supra*—Strand Lumber Co v Dostie, *supra*

Corporate owner

Proof of service of statement of mechanic's lien on named persons, without proof that such persons were officers or agents of corporation to which materials were furnished, was held insufficient proof of valid service as basis for lien—Bezdol v Beach Development Co, 244 NW 204, 259 Mich 693

Joint ownership

(1) Where the property is owned jointly by two or more persons, each coowner must be served for the lien to be effective against the interest of each

Ohio—Martin Co v Frautschi, 43 NE 2d 514, 69 Ohio App 283

Pa.—Hamilton v LeSueur, 46 Pa Dist & Co 516, 24 Erie 341

(2) However, fact that joint ownership was vested in two persons has been held not to require posting of two copies of claim of mechanic's lien instead of one—Hurd v Meyer, 242 NW 882, 259 Mich 190

90. Iowa.—Wickham v Monroe, 67 NW 434, 89 Iowa 666

40 C J p 184 note 12

Joint owner as agent

Where a notice of filing of mechanic's lien was sent by registered mail to the place of business of two tenants in common of property and post office receipt was signed by one cotenant for himself and as agent of the other, such notice was insufficient to effect a lien as to such other cotenant, who did not see or receive a copy of the affidavit and did not authorize first cotenant to receive statutory notice for him—Martin Co v Frautschi, 43 NE 2d 514, 69 Ohio App 283

91. Colo.—Sayre-Newton Lumber Co v Park, 36 P 445, 4 Colo App 483

Resident owner

(1) Placing of copy of affidavit

for lien on desk of agent of resident owner of property, in agent's absence therefrom, and placing of copy in conspicuous place in and on building being constructed thereon was held not such service as required by statute—Commerce-Guardian Bank v Catawba Cliffs Beach Club, 7 NE 2d 830, 54 Ohio App 437

(2) Delivery of copy of affidavit for mechanic's lien at usual place of residence of owner of realty was held not sufficient under statute requiring service on owner, or, if owner cannot be found in county, by posting on premises—Crane Co v Koper Heating Co, 5 NE 2d 238, 53 Ohio App 403

Owner not in county

(1) Under some statutes service by posting in a conspicuous place on the building or premises involved is permitted where neither the owner nor his agent can be found within the county

Mich.—Hurd v Meyer, 242 NW 882, 259 Mich 190

Ohio—Brown v Banks, 177 NE 242, 39 Ohio App 188

40 C J p 184 note 13 [a] (1)

(2) Such a service is sufficient where the owners lived in another county—Hurd v Meyer, *supra*

(3) Service by posting is insufficient where the owner lives on the premises—Becker Plumbing Supply Co v Rialto Improvement Co, 172 NE 700, 36 Ohio App 102

92. Mich.—Waters v Johnson, 96 NW 504, 184 Mich 436

40 C J p 184 note 14

Purpose of requiring a claimant of a materialman's lien to serve a copy on property owner is to give property owner opportunity to protect himself and time to investigate claim and determine whether it is a proper charge—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

Duplicate or copy

(1) A duplicate of the bill of particulars filed to secure the lien must be served according to the provisions of some statutes—Berry v McAdams, 55 SW 1112, 93 Tex 431—40 C J p 184 note 14 [a]

(2) The expression "duplicate copies of a notice and claim of lien," as used in the statute, has been construed to mean duplicate notice and

or a written⁹³ notice of the filing thereof⁹⁴ at or within a specified time⁹⁵ Where the statute does not specify the time for serving the copy of the claim or the notice of the filing, service may and must be made within a reasonable time,⁹⁶ but need not be made within the statutory time for filing the claim⁹⁷

Except in some jurisdictions,⁹⁸ compliance with the statutes respecting service of the notice or copy of the claim is essential to the validity of the lien,⁹⁹ but substantial compliance is sufficient¹ The notice must be given irrespective of actual notice or knowledge on the part of the owner² Where an insufficient statement is filed and a copy thereof is served on the owner, and subsequently a new and sufficient statement is filed, a copy of such new and

sufficient statement must be served on the owner in order to preserve the lien³ However, the owner alone may insist on the notice,⁴ and, since it is for his benefit,⁵ he may waive it⁶ or estop himself by conduct from questioning the sufficiency of the service⁷ Under some of the statutes, a failure to serve the owner with a statement of the claim does not affect the validity of the lien of workmen or materialmen if the building contract between the owner and contractor was not recorded⁸

Service by mail is sufficient under some statutes⁹ However, under other statutes service by mailing a copy to a person at a place outside the county is insufficient¹⁰ Some statutes require the filing of an affidavit setting forth the fact and manner of service,¹¹ and a failure to comply with this requirement

claim of lien, or duplicate originals, in order to preserve rights intended to be protected—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

(3) Such construction permits the notice and claim of lien to be made in duplicate, or in one operation, instead of two or more operations, as is necessary in making ordinary copies of an original—Leeson v Bartol, supra

93. Okl.—W E Caldwell Co v John Williams-Taylor Co, 150 P 498, 50 Okl 798
40 C J p 184 note 15

94. Ark.—Ellis v Fayetteville Lumber & Cement Co, 112 SW 2d 613, 195 Ark 385
40 C J p 184 note 16

Notice held insufficient

Pa.—Nick v McMullen, 17 Pa Dist & Co 716, 14 Erie Co 41

95. Mich.—Waters v. Johnson, 96 NW 504, 134 Mich 436
Pa.—Sears Roebuck & Co v Grey, 38 North Co 355
40 C J p 184 note 17

Statutes read together

Mechanic's lien statutes must be read together in determining time for written notice to owner of subcontractor's claim in order to create valid lien—Coleman v Pearman, 165 SE 371, 159 Va 72

96. Kan.—Home Lumber & Supply Co v McCurley, 115 P 590, 84 Kan 751
40 C J p 184 note 18

Delay held not unreasonable

Kan.—Miller v Bankers' Mortg Co, 287 P 618, 130 Kan 542

97. Okl.—Union Bond & Investment Co v Bernstein, 139 P. 974, 40 Okl 527

Tex.—Gillespie v. Remington, 18 S W 338, 66 Tex 108

Time for filing claim see infra §§ 139-144.

98. NY—Kenney v Apgar, 93 NY 539
40 C J p 185 note 20

Absent payments to contractor

The failure of lien claimant to serve a notice of lien on the owner had no effect on the validity of the lien where there was no claim that owner had made any payments to principal contractor without knowledge of lien claimed—Owens v Ebner, 74 NYS 2d 169

99. Ark.—Ellis v Fayetteville Lumber & Cement Co, 112 SW 2d 613, 195 Ark 385

Ariz.—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

Mich.—Lowrie & Webb Lumber Co v Ferguson, 20 NW 2d 209, 312 Mich 331—Lewis Mfg Co v Lee, 256 NW 457, 268 Mich 383

Ohio—Martin Co v Frautschi, 43 NE 2d 514, 69 Ohio App 283—Commerce-Guardian Bank v Catawba Cliffs Beach Club, 7 NE 2d 830, 54 Ohio App 437—Becker Plumbing Supply Co v Rialto Improvement Co, 172 NE 700, 86 Ohio App 102

Pa.—Hamilton v Le Sueur, 46 Pa Dist & Co 516, 24 Erie Co 341—Nick v McMullen, 17 Pa Dist & Co 716, 14 Erie Co 41—Rozell v Dubin, Com Pl, 40 Lack Jur 3
40 C J p 185 note 21

1. Ark.—Ellis v Fayetteville Lumber & Cement Co, 112 SW 2d 613, 195 Ark 385
Ariz.—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

Service before filing

Where service of a notice of filing a mechanic's lien was made on the day of its date, and one day before filing, there was a sufficient compliance with a statute providing that the notice must be served within ten days after filing—Fairbairn v Moody, 74 NW 386, 116 Mich 61, reheard 75 NW 469, 116 Mich 61

2. Va.—Coleman v Pearman, 165 SE 371, 159 Va 72

40 C J p 185 note 22

3. Colo.—Rice v Carmichael, 34 P. 1010, 4 Colo App 84

4. Iowa—Maryland Casualty Co v Des Moines City Evangelization Union, 167 NW 695, 184 Iowa 246
40 C J p 185 note 24

5. Okl.—Steger Lumber Co v Oklahoma Presb College, 127 P 381, 34 Okl 827

6. Okl.—Steger Lumber Co v Oklahoma Presb College, supra
40 C J p 185 note 26

Affirmative evidence of waiver is necessary—Coleman v Pearman, 165 SE 371, 159 Va 72

7. Okl.—Steger Lumber Co v Oklahoma Presb College, 127 P 381, 34 Okl 827

40 C J p 185 note 27

8. La.—Madison Lumber Co v Rossi, 137 So 221, 18 La App 461—Madison Lumber Co v McGuire, 124 So 700, 14 La App 336—Lawrence v Wright, App, 124 So 697

9. Kan.—Southwestern Paint & Wall Paper Co v Perkins, 136 P 324, 90 Kan 725
40 C J p 185 note 28

Proof of service

Where copy of affidavit for mechanic's lien is mailed by registered letter to business address of owner rather than to his place of residence, proof of receipt of letter by owner must be shown to establish proper service of affidavit—Barnes v Butler County Lumber Co, 176 NE 103, 38 Ohio App 445.

10. Mich.—Hannah & Lay Mercantile Co v Mosser, 62 NW 1120, 105 Mich 18

11. Pa.—O'Kane v Murray, 97 A 94, 252 Pa 60—Rozell v. Dubin, Com Pl, 40 Lack Jur 3
40 C J p 185 note 30.

is fatal to the lien¹²

Amendments of the notice of filing,¹³ or of the affidavit of service thereof,¹⁴ are permissible under some statutes

Notice of intention to file lien distinguished A notice of the filing of a lien is distinct from,¹⁵ and additional to,¹⁶ a notice of intention to file a lien, as discussed supra § 120.

§ 147. Withdrawal after Filing

After due recording of the lien claim, the withdrawal of the original paper does not destroy the lien

A temporary withdrawal of the lien claim after its filing will not defeat the lien as between the parties,¹⁷ and, where the lien claim or an abstract thereof has been duly recorded as required by law, the withdrawal of the original paper from the files will neither destroy the lien¹⁸ nor defeat the constructive notice to all persons resulting from the record¹⁹

§ 148. Renewal or Extension of Period in General

The time for filing a notice or claim of lien cannot be extended by agreement of the parties

It has been held that a court has no jurisdiction to give leave to file a lien nunc pro tunc after the time allowed by statute for such filing has expired²⁰ The time for filing a mechanic's lien claim cannot be extended by agreement of the parties,²¹ as by an agreement made after payment became due under the contract to extend the time for payment,²² and a fortiori a mere agreement not to press for payment for a reasonable time does not extend the time²³ Similarly, the fact that the money account was per-

mitted to run does not extend the time for filing the notice or claim of lien²⁴ However, an owner permitting the delivery of materials under an agreement to extend the time for filing is estopped to assert that the lien was filed too late,²⁵ as is the grantee of such owner,²⁶ it is otherwise with respect to a purchaser from the owner who was not a party to the agreement and had no notice thereof or of deliveries thereunder.²⁷

An unintentional omission to deliver a part of machinery purchased cannot extend the time of the accrual of the indebtedness²⁸ or the time within which the lien claim must be filed,²⁹ since such omission is a matter of which only the purchaser can take advantage³⁰

§ 149. — Doing or Furnishing Further Work or Materials

- a In general
- b In performance of contract
- c To meet requirements of public authorities
- d To repair damage caused by other persons

a. In General

As a general rule, once the time for filing the notice or claim of lien has begun to run, claimant cannot thereafter extend the time by doing or furnishing additional small items.

Where the period allowed by statute for filing a lien has commenced to run, claimant cannot thereafter extend the time by doing or furnishing small items and thereby fixing a date from which the period must commence anew to run,³¹ especially

Recitals

Affidavit reciting service of statement of account and lien within ten days was sufficient in absence of challenge—*David Lupton's Sons Co v Berghoff Printing Co.*, 239 N W 810, 249 Mich 455

12. Pa—*O'Kane v Murray*, 97 A 94, 252 Pa 60
40 C J p 185 note 31

13. Pa—*Kihm-Bowen Mach Co v Midwest Steel & Supply Co.*, 3 Pa Dist & Co 755
Amendment of claim or statement see infra § 170

14. Pa—*Boettiger v Weber*, 22 Pa Dist 477

15. Pa—*Compton v Sankey*, 13 Pa Dist 635, 29 Pa Co 35—*Maddocks v McGann*, 12 Pa Dist 701

16. Pa—*Compton v Sankey*, 13 Pa Dist 535, 29 Pa Co 25—*Maddocks v McGann*, 12 Pa Dist 701

17. Kan—*Great Spirit Springs Co*

v *Chicago Lumber Co.*, 28 P 714, 47 Kan 672

40 C J p 185 note 39

18. Minn—*Paul v Nample*, 47 N W 51, 44 Minn 453

40 C J p 185 note 40

19. Ala—*Bell v. Teague*, 3 So 861, 85 Ala 211

40 C J p 185 note 40

20. NY—*Adler v Lumley*, 61 N Y S 688, 46 App Div 229

21. Ill—*Smutzler v Filer*, 135 Ill App 61

Mo—*General Fire Extinguisher Co v Schwartz Bros Commn Co.*, 65 S W 318, 165 Mo 171

Delivery of material pursuant to agreement with owner to extend time to file lien does not extend time—*Belt Line Brick Co v Standard Home Bldg Co.*, 213 N W 41, 170 Minn 509

22. Ill—*Dawson v Black*, 36 N E 413, 148 Ill 484

Ind—*Goodhub v Hornung*, 26 N E 770, 127 Ind 181

23. N Y—*Lazzari v Havens*, 79 N. Y S 395, 39 Misc 255

24. Wash—*Brown v Mychel Co.*, 56 P 2d 1020, 186 Wash 97

25. Minn—*Belt Line Brick Co. v Standard Home Bldg Co.*, 213 N W 41, 170 Minn 509

26. Minn—*Belt Line Brick Co v Standard Home Bldg Co.*, supra

27. Minn—*Belt Line Brick Co v Standard Home Bldg Co.*, supra

28. Mo—*Great Western Mfg Co v Burns*, 59 Mo App 391

29. Mo—*Great Western Mfg Co v Burns*, supra

30. Mo—*Great Western Mfg Co v Burns*, supra

31. Ariz—*Intermountain Building & Loan Ass'n v Albert Steinfeld & Co.*, 14 P 2d 742, 40 Ariz 645—

where the doing or furnishing of such items is merely colorable and the real intention is to save or restore a right which is already imperiled or lost,³² or to obtain an advantage over other persons,³³ or where the additional work is done or additional materials are furnished without the knowledge,³⁴ authority,³⁵ direction,³⁶ request,³⁷ or consent³⁸ of

the owner, or where the work done is not properly construction work,³⁹ or was not in the contemplation of the original contract,⁴⁰ or where the work done or materials furnished are not reasonably necessary to the completion of the building or improvement in question,⁴¹ or the furnishing of labor is relied on to extend the time for filing a lien for

Morgan v O'Malley Lumber Co, 7 P 2d 252, 39 Ariz 400

Del—Corpus Juris cited in Breeding v Melson, 143 A 23, 27, 4 W W Harr 9, 60 A L R 1252

Fla—Corpus Juris cited in People's Bank of Jacksonville v Virginia Bridge & Iron Co, 113 So 680, 685, 94 Fla 474, followed in Atlanta & Lowry Nat Bank v Bicknell-Rice Residential Builders, 126 So 493, 99 Fla 409

Ill—Alexander Hendry Co v Moorar, 242 Ill App 516

Ind—Chapman-Stein Co v Lippincott Glass Co, 161 NE 645, 87 Ind App 411

Ky—City of Ashland v Ben Williamson & Co, 171 SW 2d 968, 294 Ky 446—Akers & Co v Weil, 65 SW 2d 712, 251 Ky 689—Vogt v Cannon Electric Co, 54 SW 2d 338, 245 Ky 766

La—H R Hayes Lumber Co v H M Jones Drilling Co, 148 So 899, 177 La 626—Northrop v Guy, 134 So 738, 172 La 543—Hicks v Tate, App, 7 So 3d 737, followed in N O Nelson Co v Tate, 7 So 2d 740

Mass—Peerless Unit Ventilation Co v D'Amore Const Co, 186 NE 280, 283 Mass 121

Mich—Hibbard v Finch, 247 NW 781, 263 Mich 506

NC—Beaman v Elizabeth City Hotel Corporation, 163 SE 117, 202 NC 418

Ohio—Butler County Lumber Co v Stieg, 178 NE 33, 40 Ohio App 37

Or—Stark-Davis Co v. Wilson, 248 P 1095, 119 Or 308

Utah—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

40 C J p 202 note 68.
Entire and separate contracts see supra § 144

Items for operation of equipment

Labor and material furnished for ordinary operation of a newspaper plant within the statutory period before the filing of the claim for a lien do not preserve the lien as to items furnished, more than the required time before such filing, under a contract for the installation of equipment for such plant—Clark v Oklahoma Electric Co, 288 P 935, 144 Okl 21

Testing and regulation

Where dealer, who agreed by terms of sales contract to examine, regulate, and test air conditioner

after it had been installed in residence by purchaser, failed to file a lien statement within required time after date of purchase and installation, such service of examination, regulation, and test by dealer was not the "performance of labor in putting up of fixture" under statute fixing rights to a mechanic's lien, and conferred no right to a mechanic's lien—General Air Conditioning Corporation v Stuewe, 131 P 2d 638, 156 Kan 182, 143 A L R 1184

32. Ind—Koring v Varner, 168 NE 582, 90 Ind App 258

Iowa—Nielsen v Buser, 222 NW 856, 207 Iowa 288

Ky—City of Ashland v Ben Williamson & Co, 171 SW 2d 968, 294 Ky 446

Minn—Belt Line Brick Co v Standard Home Bldg Co, 213 NW 41, 170 Minn 509

Ohio—McKenzie v Jacob, 27 Ohio NP NS, 57

Utah—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

40 C J p 203 note 69

33. Or—Inman v Henderson, 45 P 300, 29 Or 116

40 C J p 203 note 70

34. Ark—East Arkansas Lumber Co v Gerald, 45 SW 2d 862, 185 Ark 42

Ohio—Walter v Brothers, 181 NE 554, 42 Ohio App 15

40 C J p 203 note 71

New owner

Materialman having lienable claim against premises at time of conveyance could not, with knowledge of transfer, keep lien rights alive by furnishing, without grantee's knowledge, additional material to former owner under duty to complete building—Capital City Lumber Co v Schroeder, 242 NW 489, 208 Wis 157

35. Ind—Sulzer-Vogt Mach Co v Rushville Water Co, 65 NE 583, 160 Ind 202

40 C J p 203 note 72

36. Ind—Koring v Varner, 168 NE 582, 90 Ind App 258

37. Ill—Schaller-Hoerr Co. v Gentile, 153 Ill App 458

Me—Hahnel v Warren, 123 A 420, 123 Me 422

Request of agent of original owner does not bind new owner at time of request—Alexander Hendry Co v Moorar, 242 Ill App 516

38. Ark—East Arkansas Lumber Co v Gerald, 45 SW 2d 862, 185 Ark 42

Ohio—Koblitz v Arnold, 22 Ohio Cir Ct NS, 410

39. Cal—Hubbard v Jurian, 190 P 1052, 47 Cal App 543

40 C J p 203 note 75

Repairs

Repairs by subcontractor long after house was completed were held not part of original contract, and did not authorize lien for entire contract price on general contractor's default—Higgins Mfg Co v Hinig, 175 NE 710, 38 Ohio App 87

40. Del—Breeding v Melson, 143 A 23, 4 W W Harr 9, 60 A L R 1252

Ill—Alexander Hendry Co v Moorar, 242 Ill App 516

Ky—Vogt v Cannon Electric Co, 54 SW 2d 338, 245 Ky 766

Mass—Peerless Unit Ventilation Co v D'Amore Const Co, 186 NE 280, 283 Mass 121

Mo—Schwartz Materials Co v West End Realty & Construction Co, App, 154 SW 2d 366

NC—Beaman v Elizabeth City Hotel Corporation, 163 SE 117, 202 NC 418

Ohio—A M Lewin Lumber Co v Gutman, 171 NE 342, 34 Ohio App 458

Okl—Donaldson & Yahn v Stillwater Building & Loan Ass'n, 45 P 2d 65, 172 Okl 258

Tenn—East Lake Lumber Box Co v Simpson, 5 Tenn App 51

Wis—Layne-Bowler Chicago Co v Peshtigo Paper Co, 217 NW 312, 194 Wis 631

Insignificant items

A lien cannot be revived or effected by the doing of an act not originally contemplated, where it is so insignificant as to form no part of the original conception, such as the making good of trifling defects—East Lake Lumber Box Co v Simpson, 5 Tenn App 51

Items eliminated from original contract

Where the parties modify a contract by eliminating specified items therefrom, the subsequent furnishing of such items long after does not extend filing time with respect to items furnished under the original contract—Larson v Anderson, 220 NW 498, 53 SD 236

41. Ky—City of Ashland v Ben Williamson & Co, 171 SW 2d 968,

materials⁴² Thus, labor gratuitously performed cannot have the effect of extending the time for filing a lien for what was done or furnished under a contract,⁴³ nor can a person extend the time for filing his lien claim by gratuitously repairing or replacing defective work or articles previously furnished and charged for.⁴⁴ However, a lien for the new article may be established, if the claim therefor is filed in the required time after its installation⁴⁵

It has been held in some cases that extra work done or additional materials furnished at the request of the owner after the full completion of the original contract may extend the time for filing a lien claim for all the work,⁴⁶ but in other cases the contrary is held.⁴⁷ The question whether the work done is sufficient to extend the time for filing the

lien does not arise where the work is done by a person other than claimant, or for a new owner, and the statute requires the filing of the claim within a specified period of time after claimant has ceased to labor or furnish materials⁴⁸

b. In Performance of Contract

Where, even after the contract is substantially completed, claimant does further work or furnishes further material which is necessary for the proper performance of his contract, and this is done in good faith at the demand or request of the owner or for the purpose of fully completing the contract, the period for filing the lien will run from the doing of such work or the furnishing of such materials, regardless of the value thereof.

Where, even after the contract is substantially completed, claimant does further work or furnishes further material which is necessary for the proper performance of his contract,⁴⁹ and this is done in

294 Ky 446—Akers & Co v Weil,
65 SW 2d 712, 251 Ky 639
Mo—Schwartz Materials Co v West
End Realty & Construction Co,
App, 154 SW 2d 366
40 C J p 203 note 76

42. Tex—A Leschen & Sons Rope
Co v. Moser, Civ App, 159 SW
1018
40 C J p 203 note 77

43. Ark—Sebastian Building &
Loan Ass'n v Minten, 27 SW 2d
1011, 181 Ark 700

Mass—Carter v Commonwealth,
194 NE 915, 290 Mass 97—Peer-
less Unit Ventilation Co v
D'Amore Const Co, 186 NE 280,
283 Mass 121

Ohio—Bohunek v Smith, 173 NE
852, 86 Ohio App 146

Wash—Swensson v Carlton, 135 P
2d 450, 17 Wash 2d 396

Wis—Layne-Bowler Chicago Co v
Peshtigo Paper Co, 217 NW 312,
194 Wis 631

40 C J p 203 note 78

44. US—In re Wilson, CCA Ill,
108 F 2d 468

Ariz—Morgan v O'Malley Lumber
Co, 7 P 2d 252, 39 Ariz 400

Ark—Sebastian Building & Loan
Ass'n v Minten, 27 SW 2d 1011,
181 Ark 700

Iowa—Nielsen v Buser, 222 NW
856, 207 Iowa 288

Ky—City of Ashland v Ben Wil-
liamson & Co, 171 SW 2d 968, 294
Ky 446

La—H R Hayes Lumber Co v H
M Jones Drilling Co, 148 So 899,
177 La 626—Northrop v Guy, 134
So 738, 172 La 643—Hortman-
Salmen Co v White, 123 So 715,
168 La 1067—General Lumber &
Supply Co v McLellan, App, 200
So 501

Neb—Davidson v. Shields, 263 NW
490, 129 Neb 877

Ohio—Walter v Brothers, 181 NE

554, 43 Ohio App 15—Bohunek v
Smith, 173 NE 852, 36 Ohio App
146

Okl—Norman v Hearne & Tittle, 292
P 332, 145 Okl 217

Or—Birkemeier v Knobel, 40 P 2d
694, 149 Or 292—Block v Love,
1 P 2d 588, 136 Or 685

40 C J p 203 note 79

Replacement dates back to date on
which defective item was originally
furnished

Okl—Taylor Bros v Gill, 359 P
236, 136 Okl 293, 54 ALR 979
SD—Barry v G L Wood Farm
Mortg Co, 211 NW 688, 50 SD
652

Expired lien cannot be thus re-
vived

US—In re Wilson, CCA Ill, 108 F
2d 468

Iowa—Nielsen v Buser, 222 NW
856, 207 Iowa 288

Okl—Norman v Hearne & Tittle, 292
P 332, 145 Okl 217

45. Minn—A Y McDonald Mfg Co
v Lima, 244 NW 804, 187 Minn
240

46. US—New England Engineering
Co v Oakwood St R Co, CC
Ohio, 75 F 162

40 C J p 204 note 80

47. NY—Fay v Huhliker, 20 NY
S 671, 1 Misc 321

40 C J p 204 note 81

Furnishing extras at owner's re-
quest, not contemplated by original
contract, was held not "carrying for-
ward, performing, or completing con-
tract" so as to authorize filing lien
more than specified time after com-
pletion of building—A M Lewin
Lumber Co v Gutman, 171 NE 342,
34 Ohio App 458

48. Idaho—Valley Lumber & Mfg
Co v Nickerson, 93 P 24, 13 Idaho
682

40 C J p 204 note 82

Completion of building

(1) Under some statutes, where
there has been cessation of work on
a structure for more than a specified
period, the resumption of work does
not operate to extend the time to
file mechanics' liens from the ac-
tual completion of the building—
Stanislaus Lumber Co v Pike, 124
P 2d 190, 51 Cal App 2d 54—40 C J
p 204 note 83 [a]

(2) Thereunder, where purchasers
of a building, on which there has
been a cessation of work for more
than the specified time, had no notice
of vendor's debt for materials or a
claim of lien by the materialman,
their subsequent purchase of lumber
from the materialman created an
"implied contract" to pay for it sepa-
rate from the obligation of the ven-
dor which was not revived notwith-
standing the subsequent completion
of the structure by the purchaser—
Stanislaus Lumber Co v Pike, supra

49. Ky—City of Ashland v Ben
Williamson & Co, 171 SW 2d 968,
294 Ky 416

Mich—Corpus Juris quoted in Bol-
huis Lumber & Mfg Co v Van
Tubergen, 230 NW 910, 911, 250
Mich 686

Mont—Bartholomew v James, 246 P
771, 76 Mont 359

SD—Botsford Lumber Co v Schriv-
er, 206 NW 423, 49 SD 68

Utah—Wilcox v Cloward, 56 P 2d 1,
88 Utah 503

40 C J p 204 note 85

Remedy of defect

Wash—Kirk v Rohan, 187 P 2d 607

Repairs

Where subcontractor installing
heating system does repair work
after completion of job, he must es-
tablish that work was done as part
of obligation imposed under original
contract—Bohunek v Smith, 173 N
E 852, 36 Ohio App 146.

good faith,⁵⁰ not too long after completion of the main work,⁵¹ at the demand or request of the owner⁵² or his agent⁵³ or architect,⁵⁴ or in the case of a subcontractor at the request of the contractor,⁵⁵ or for the purpose of fully completing the contract,⁵⁶ and not merely for the purpose of fixing a later date from which to compute the time for filing the lien claim or statement,⁵⁷ or as a gratuity or act of friendly accommodation,⁵⁸ especially if part of a chain of similar or larger tasks performed in the process of finishing up or tapering off,⁵⁹ the period for filing the lien will run from the doing of such work or the furnishing of such materials, regardless of the value thereof,⁶⁰ if not so trivial or inconsequential that failure to do it would still leave the contract substantially performed,⁶¹ and there are no intervening rights⁶²

Thus, where the owner or his authorized agent claims that certain details of the work are not according to the contract or not satisfactory, and they are accordingly changed or set right by claimant, the lien is in time if filed within the statutory period after such changes are made or such additional work is done,⁶³ since the owner is estopped, in such case, from subsequently claiming that the contract was completed before the doing of the additional work or the furnishing of the additional materials demanded by him under the contract⁶⁴ Where a material and substantial thing required by the original contract has been omitted, the final completion dates from the time such omission is supplied by the contractor⁶⁵ It has also been held that work actually called for by the contract or continuing employment, performed in good faith with the in-

50. Ariz.—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686—Vander Horst v Kalamazoo Apartments Corporation, 215 NW 57, 239 Mich 593—Neely v International Corn Products Corporation, 205 NW 96, 232 Mich 81 Mo—Harry Cooper Supply Co v Rolla Nat Bldg Co, App, 66 SW 2d 591

Mont—Bartholomew v James, 246 P 771, 76 Mont 359

Utah—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

Wash—American Plumbing & Steam Supply Co v Alavekuu, 282 P 917, 154 Wash 436—Rose v O'Reilly, 244 P 124, 138 Wash 18 40 CJ p 204 note 86

51. Utah—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

52. Ariz.—Leeson v Bartol, 99 P 2d 485, 55 Ariz 160

Ind—Holding v Lewis Mfg Co, 161 NE 702, 87 Ind App 296

Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686

Wash—Kirk v Rohan, 187 P 2d 607—American Plumbing & Steam Supply Co v Alavekuu, 282 P 917, 154 Wash 436

40 CJ p 204 note 87

Request of owner bears great weight in working an extension of time—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

53. Colo—Curtis v McCarthy, 125 P 109, 53 Colo 284

Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686

54. Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg. Co v Van

Tubergen, 230 NW 910, 911, 250 Mich 686

Mo—Harry Cooper Supply Co v Rolla Nat Bldg Co, App, 66 SW 2d 591—Christopher & Simpson Architectural Iron, etc, Co v E A Steininger Constr Co, 205 SW 278, 200 Mo App 33

55. Me—Farnham v. Richardson, 40 A 553, 91 Me 559

Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686

56. Ind—Holding v Lewis Mfg Co, 161 NE 702, 87 Ind App 296

Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686

Mo—Harry Cooper Supply Co v Gillioz, App, 107 SW 2d 798

NC—Beaman v Elizabeth City Hotel Corporation, 163 SE 117, 202 NC 418

40 CJ p 204 note 91

Acts in furtherance of contract

Wash—Kirk v Rohan, 187 P 2d 607.

57. Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686

Mont—Bartholomew v James, 246 P 771, 76 Mont 359

Ohio—Walter v Brothers, 181 NE 554, 42 Ohio App 15

Wash—Kirk v Rohan, 187 P 2d 607—Flint v Bronson, 86 P 2d 218, 197 Wash 686—Petro Paint Mfg Co v Taylor, 265 P. 155, 147 Wash 158

40 CJ p 204 note 92

58. Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686

Ohio—McKenzie v Jacob, 27 Ohio NP, NS, 57

40 CJ p 204 note 93

59. Utah—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

60. Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686

Mo—Harry Cooper Supply Co v. Rolla Nat Bldg Co, App, 66 SW 2d 591

Wash—Flint v Bronson, 86 P 2d 218, 197 Wash 686

40 CJ p 204 note 94

61. Utah—Wilcox v Cloward, 56 P. 2d 1, 88 Utah 503

Work held not trivial or inconsequential

Utah—Wilcox v Cloward, supra

40 CJ p 205 note 94 [a]

Insignificant items

Wash—Petro Paint Mfg Co v Taylor, 265 P 155, 147 Wash 158

62. Mich—Corpus Juris quoted in Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 911, 250 Mich 686

40 CJ p 205 note 95

63. Or—Shea v Graves, 19 P 2d 406, 142 Or 503

Utah—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

Wash—Flint v Bronson, 86 P 2d 218, 197 Wash 686—American Plumbing & Steam Supply Co v Alavekuu, 282 P 917, 154 Wash 436

40 CJ p 205 note 96

64. Or—Shea v Graves, 19 P 2d 406, 142 Or 503

40 CJ p 205 note 97

Owner's request eliminates question of good faith—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

65. Ky—City of Ashland v Ben Williamson & Co, 171 SW 2d 968, 294 Ky 446

Or—Stark-Davis Co v Wilson, 248 P. 1095, 119 Or 808.

tention of completing the job, permits the filing of the claim or statement within the specified time after the doing of the last work, although done with the ulterior purpose of saving the lien and postponed until long after the bulk of the work has been completed ⁶⁶

Effect of guarantee Work done or repairs made pursuant to a time guarantee of the work done under the contract has been held not to extend the time for filing the notice of lien ⁶⁷

c. To Meet Requirements of Public Authorities

The time to file the notice of lien may be computed from the time additional work is done to meet the requirements of public authorities.

The statutory period for filing the notice or claim of lien may be computed from the time additional work is done to meet the requirements of the public authorities,⁶⁸ although in so holding the courts do not always place their decisions on the

same grounds ⁶⁹ It has been held otherwise with respect to a trivial matter not called for by the contract ⁷⁰

d. To Repair Damage Caused by Other Persons

Repair of damage caused by another which the claimant was under no obligation to make does not constitute the last work done under the contract.

Where, after claimant's work is done, certain damage is caused by workmen engaged in other work on the same improvement, and he is under no obligation to make good, the repairing of the damage cannot be considered the last item of work done under the contract,⁷¹ and, even though the contract for a particular class of work may expressly or by custom include the making of repairs necessitated by other and subsequent work on the building, nevertheless the making of repairs by claimant may not extend the time for filing his lien under the circumstances of the particular case.⁷²

2. FORM AND CONTENTS OF CLAIM OR STATEMENT

§ 150. General Rules

- a. Compliance with statutory requirements
- b. Form, completeness, and construction

a. Compliance with Statutory Requirements

In order to be sufficient, the claim, notice, or state-

ment which must be filed must comply substantially with all the requirements of the statute.

In order to be sufficient, a claim, notice, or statement must comply with the statutory requirements.⁷³ Accordingly the validity of the claim, notice, or statement depends on a substantial compliance with the statutory provisions,⁷⁴ and a substan-

66. Mass—Carter v Commonwealth, 194 NE 915, 290 Mass 97—Peerless Unit Ventilation Co v D'Amore Const Co, 186 NE 280, 283 Mass 121

67. Ky—City of Ashland v Ben Williamson & Co, 171 SW 2d 968, 294 Ky 446

Independent guarantee

Performance of work under independent guaranty a year after completion of work provided for in main contract does not extend time to file lien four months after work under guaranty—J Adelman, Inc, v Church Extension Committee of Presbytery of New York, 241 NYS 197, 136 Misc 810

68. Mass—Winer v Rosen, 121 NE 79, 231 Mass 418

Mo—Bruns v Braun, 35 Mo App 337

Correction of imperfections

Work in substantial amount required as condition to obtaining inspector's certificate was held to mark completion of building as to materialmen filing lien—Hammond Lumber Co v Barth Inv Corporation, 262 P 31, 202 Cal 606

Replacement

Where labor and material used in installing new furnace, after first

was found defective, amounted to more than one-half of contract price, time for filing lien ran from date of furnishing them—Stark-Davis Co v Wilson, 248 P 1095, 119 Or 308

69. Mass—Winer v Rosen, 121 NE 79, 231 Mass 418
40 C J p 205 note 99

70. Ky—Vogt v. Cannon Electric Co, 54 SW 2d 338, 245 Ky 766

71. US—In re Abbott-Gamble Co, NY, 195 F 465, 115 CCA 367.

72. Ohio—Koblitz v Arnold, 22 Ohio Cir Ct. NS, 410
40 C J p 205 notes 2-4

73. Cal—Norton v Bedell Engineering Co, 264 P 311, 88 Cal App 777
La—Julius Aaron & Son v Keyser, 2 La App 649

Ohio—D & H Coal Co v Lay, 175 NE 30, 37 Ohio App 433

Tex—Black, Sivalls & Bryson v Operators' Oil & Gas Co, Civ App, 37 SW 2d 313, error dismissed
40 C J p 205 note 7

Variance between claim or statement and pleading or proof see *infra* § 307.

Covenant

Purpose of statute requiring assignment of money due under con-

tract for public improvements to contain covenant by assignor that he will receive money advanced by assignee as trust fund to be applied first to payment of claims of specified creditors under the contract was to bring home the trust character of such money to assignor by means of his own covenant and to require assignee to see to inclusion of covenant at peril of losing his priority—Vulcan Rail & Construction Co v Westchester County, 293 NYS 945, 250 App Div 212

Claims, notices, or statements held sufficient

Cal—Trout v Siegel, 262 P 320, 202 Cal 706

Pa—Russell M Howe, Inc, v Beloff, 56 A 2d 352, 162 Pa Super 33

Wash—Wolk v Bonthius, 124 P 2d 553, 13 Wash 2d 217

40 C J. p 205 note 7 [a]

74. NY—Pascual v Greenleaf Park Land Co, 157 NE 144, 245 NY 294, followed in Goldberger-Raabin Inc, v 74 Second Ave Corp, 234 NYS. 802, 226 App Div 787, reversed on other grounds 169 NE 405, 252 NY 336—Brescia Const Co v Walart Const Co, 291 NYS 960, 249 App Div. 151, affirmed 8

tial compliance therewith is sufficient,⁷⁵ especially where no one has been misled to his prejudice,⁷⁶ as is usually the case where only the rights of the owner or the original parties to the contract are involved.⁷⁷ It has sometimes been held that less strictness of compliance with the statutory requirements is required as against the owner⁷⁸ or a purchaser pendente lite⁷⁹ than as against a third person,⁸⁰ such as a mortgagee.⁸¹

Matters to be stated in general It has been held that the claim, notice, account, affidavit, or statement should show on its face all the facts necessary to create and fix the lien,⁸² but there is also some authority to the contrary.⁸³ At any rate all the matters which the statute requires to be stated must be substantially set forth,⁸⁴ regardless of the knowledge of the owner,⁸⁵ since the statute is mandatory in this respect.⁸⁶ Conversely, matters as to which the statute requires nothing to be stated may properly be omitted,⁸⁷ but the fact that the claim states

more than is required does not render it invalid,⁸⁸ as unnecessary recitals or statements may be treated as mere surplusage.⁸⁹

In some jurisdictions, in order that a mechanic's lien claim may bind the estate of a married woman, it must show on its face every requisite to make it a valid claim against her.⁹⁰ Her coverture must explicitly appear,⁹¹ and the claim must show that the work or material was necessary for the improvement or repair of her separate estate⁹² and that it was so applied.⁹³

b. Form, Completeness, and Construction

A mechanic's lien statement is not required to be in any particular form, and a statement following the language of the statute or a form provided by statute is sufficient.

The lien statement is not required to be in any particular form,⁹⁴ and statutes relating to form have been held to be permissive rather than mandatory.⁹⁵ While a statement following the language

NE 2d 330, 273 NY 648—Waters v Goldberg, 108 NYS 992, 124 App Div 511

Ohio—D & H Coal Co v Lay, 175 NE 30, 37 Ohio App 433

Okl—Corbitt v Logan, 20 P 2d 894, 163 Okl 86

40 C J p 205 note 9

Compliance by implication

Statements in notice of lien must meet requirements of statute by implication at least—John Roshirt, Inc. v Rosenstock, 247 NYS 420, 138 Misc 515

75. NY—Kolkman v Eshelman, 230 NYS 91, 133 Misc 428—Cleg Co v Henry Moss & Co, 64 NYS 2d 99

Okl—Corbitt v Logan, 20 P 2d 894, 163 Okl 86

Pa—Moss & Blakeley Plumbing Co v Schauer, 28 A 2d 323, 150 Pa Super 318

W Va—Moriconi v Chesapeake & O Ry Co, 145 SE 599, 106 W Va 74

40 C J p 206 note 13

Substantial compliance exists where information appearing on face of claim points the way to a successful inquiry—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 246—Raymond v Brookside Distilling Products Corporation, Pa Com Pl, 41 Lack Jur 181

76. Utah—Culmer v Clift, 47 P 85, 14 Utah 286

40 C J p 206 note 14

77. Wash—Dearborn Fdy Co v Augustine, 31 P 327, 5 Wash 67

40 C J p 206 note 15

78. Or—Heiser v Hamilton Mammoth Mines Co, 223 P 735, 110 Or 403

40 C J p 206 note 16

79. US—Natural Carbon Paint Co v Fred Bredel Co, Ill, 193 F 897, 114 CCA 111

80. US—Natural Carbon Paint Co v Fred Bredel Co, supra

81. US—Natural Carbon Paint Co v Fred Bredel Co, supra

82. Cal—Hayward Lumber & Investment Co v Ford, 148 P 2d 689, 64 Cal App 2d 346

40 C J p 206 note 20

83. ND—Red River Lumber Co v Children of Israel, 78 NW 203, 7 ND 46

84. Ala—Hancock v Taylor, 31 So 2d 308, 246 Ala 521

40 C J p 206 note 22

Statements held sufficient

Ala—Central Lumber Co v Jacks, 132 So 721, 222 Ala 475

Cal—Baird v Ocequeda, 67 P 2d 1055, 8 Cal 2d 700

40 C J p 206 note 22 [b]

Statement held insufficient

Tex—Cook v Yandell Realty Co, Civ App, 275 SW 850

85. Wash—U S Savings, Loan & Bldg Co v Jones, 37 P 666, 9 Wash 434—Fairhaven Land Co v Jordan, 83 P 729, 5 Wash 729

86. Pa—Crider v McCafferty, 13 Pa Dist 638

87. Cal—Slight v Patton, 31 P 248, 96 Cal 384

40 C J p 206 note 25

Commencement and completion of building

(1) In the absence of any statutory requirement to that effect, it is not necessary for the claim to show that the building has been completed—Harmon v Ashmead, 9 P 183, 68 Cal 321.

(2) Likewise it is not necessary for the claim to show the date when it was commenced or completed

Cal—Slight v Patton, 31 P 248, 96 Cal 384

NJ—Gordon v Torrey, 15 NJ Eq 112, 82 Am D 273

(3) It has also been held that a contractor for a particular portion of the work, as the painting and glazing, need not state the time when the building as a whole was begun and completed, but only when his portion was begun and finished—France v Woolston, 9 Del 557

88. Minn—John Paul Lumber Co v Hormel, 63 NW 718, 61 Minn 303

40 C J p 207 note 26

Errors in unnecessary statements see infra § 160

89. Kan—Brown v Walker, 164 P 1093, 100 Kan 542, rehearing denied 166 P 873, 101 Kan 293

40 C J p 207 note 27

90. Fla—Cox v Rieck & Fleece, 177 So 301, 129 Fla 373—Salomon v Galinsky, 137 So 386, 103 Fla 417

40 C J p 207 note 29

Contract or consent see infra § 163

91. Pa—Wolfe v Oxnard, 25 A 806, 152 Pa 623

40 C J p 207 note 30

92. Pa—Wolfe v Oxnard, supra

40 C J p 207 note 31

93. Pa—Wolfe v Oxnard, supra

40 C J p 207 note 32

94. Or—McFeron v Doyens, 116 P 1063, 59 Or 366

40 C J p 207 note 34

95. Mich—Milligan v Rappaport, 234 NW. 166, 253 Mich 120.

of the statute or a form provided by statute is sufficient,⁹⁶ it is not necessary that the exact words of the statute should be used,⁹⁷ and a mere deviation from the generally used form will not invalidate the claim if it is otherwise sufficient.⁹⁸ At least as against the owner,⁹⁹ the lien will not be defeated because the claim or statement is awkwardly and inartistically drawn¹ or because of merely technical objections.² The definiteness and precision of a pleading are not necessary,³ certainty to a common intent is sufficient.⁴ However, the notice should disclose information from which those interested may determine the existence of a lien,⁵ and must contain information sufficient on inquiry to give the owner the necessary knowledge to enable him to determine the correctness of the claim.⁶

The statement must be complete and sufficient in and of itself without reference to extrinsic proof to supplement deficiencies in it,⁷ it cannot be aided by the clerk's docket⁸ or by the bill, complaint, or petition in a suit to enforce the lien.⁹ However, in determining its sufficiency, the lien statement must be construed as a whole,¹⁰ and an exhibit,¹¹ as well as the affidavit verifying the claim,¹² may

be deemed a part of the statement for this purpose.

The statement will be liberally construed,¹³ and, if possible, so as to sustain the lien.¹⁴ Some courts have held that a most liberal rule should be applied in passing on the validity of the lien paper filed where the owner or his agent was actively concerned in ordering and looking after the delivery of the material furnished by claimant,¹⁵ but other courts deny that a more liberal rule should obtain in construing the notice of lien where claimant contracted directly with the owner¹⁶ or where the owner has actual knowledge of the matters involved,¹⁷ and it has been held that the same rules of construction should apply in determining the sufficiency of a claim filed by the original contractor who dealt with the owner, and a claim filed by a materialman who dealt with the contractor.¹⁸

Caption and address Where the statement contains all the statutory requisites, it is sufficient although there is no formal caption¹⁹ or although the caption is not in all particulars exactly correct.²⁰ It is not necessary that the statement be addressed to any particular person.²¹

96. Mich—Acme Lumber Co. v. Modern Constr Co, 183 NW 192, 214 Mich 357

Pa—Delaware County Supply Co v Scavichia, Com Pl, 33 Del Co 35 40 C J p 207 note 35

Statutes considered together

Statute relative to manner of securing mechanic's lien and statute prescribing form of affidavit for such claim when debtor is not the owner must be read together and considered as a whole—Detroit Fidelity & Surety Co v State, 76 SW 2d 492, 124 Tex 145

97. Mont—Wertz v Lamb, 117 P 89, 43 Mont 477 40 C J p 207 note 36

98. Cal—Leibowitz v Berry, 299 P 779, 114 Cal App 5

99. Mo—Banner Lumber Co v Robson, 168 SW 244, 182 Mo App 611, certiorari quashed 182 SW 743, 266 Mo 595

1. Ind—Clark v Huey, 40 NE 152, 12 Ind App 224, reheard 36 NE 52, 12 Ind App 224 40 C J p 207 note 38

2. Nev—Maynard v. Ivey, 29 P 1090, 31 Nev 241 40 C J p 207 note 39

3. Minn—Merriman v Bartlett, 26 NW 728, 34 Minn 524

Mo—Mitchell Planning-Mill Co v Allison, 40 SW 118, 138 Mo 50, 60 Am SR 511

4. Mont—Wertz v Lamb, 117 P 89, 43 Mont 177 40 C J p 208 note 11.

5. W Va—Moriconi v Chesapeake & O Ry Co, 145 SE 599, 106 W Va 74

6. Pa—Cuirie v Koehler, 90 Pa Super 197

7. NY—John Roshirt, Inc. v Rosenstock, 247 NYS 420, 138 Misc 515—Farabella v Porter, 225 NYS 417, 130 Misc 680 40 C J p 208 note 42

Prima facie case

Owner of property against which mechanic's lien claim has been filed is not obliged to defend a scire facias, prepare an affidavit of defense, and go to trial unless the claimant presents a claim which, on its face, including amendments, makes out a prima facie case for recovery—Hamilton v Means, 38 A 2d 528, 155 Pa Super 245

8. Ill—Ehdim v Murphy, 48 NE 956, 170 Ill 399—McDonald v Rosengarten, 25 NE 429, 134 Ill 126

9. Colo—Perkins v Boyd, 86 P 1015, 37 Colo 265

Pa—Wolfe v Gibbs, Com Pl, 46 Dauph Co 369 40 C J p 208 note 44

10. Cal—Leibowitz v Berry, 299 P 779, 114 Cal App 5—Winship v Holden, 205 P 572, 90 Cal App 71 NC—King v Elliott, 147 SE 701, 197 NC 93

Pa—Raymond v Brookside Distilling Products Corporation, Com Pl, 44 Lack Jur 181 40 C J p 208 note 45

11. Wash—Johnston v Harrington, 31 P 316, 5 Wash 73 40 C J p 208 note 46

Bill of particulars attached to claim Md—Caltrider v Isberg, 130 A 53, 148 Md 657—40 C J p 208 note 46 [a]

12. Mo—Moller-Vandenboom Lumber Co v Boudreau, 85 SW 2d 141, 231 Mo App 1127 40 C J p 208 note 47

13. NY—Pascual v Greenleaf Park Land Co, 157 NE 144, 245 NY 294, followed in Goldberger-Raabin, Inc. v 74 Second Ave Corp, 234 NYS 802, 226 App Div 787, reversed on other grounds 169 NE 405, 252 NY 336—Weaver Hardware Co v Solomovitz, 163 NYS 121, 98 Misc 413

14. Pa—Hoffmaster v. Knupp, 15 Pa Co 140

15. Mo—Banner Lumber Co v Robson, 168 SW 244, 182 Mo App 611, certiorari quashed 182 SW 743, 266 Mo 595

16. Wash—U S Savings, Loan & Bldg Co v Jones, 37 P 666, 9 Wash 434

17. Wash—U S Savings, Loan & Bldg Co v Jones, supra

18. Cal—Winship v Holden, 265 P. 572, 90 Cal App 71

19. DC—Phoenix Iron Co v The Richmond, 17 DC 180

20. DC—Phoenix Iron Co v The Richmond, supra

21. Ind—Peck v Hensley, 21 Ind 344

§ 151. Statement of Claim of Lien in General

It has been both affirmed and denied that it is necessary to state expressly in the claim or statement that the claimant claims a mechanic's lien

It has been both affirmed²² and denied²³ that it is necessary to state expressly in the claim or statement that claimant claims a mechanic's lien. At any rate a statement that claimant "claims and holds a lien"²⁴ or that he claims or demands the benefit of the lien laws²⁵ is a sufficient statement that a lien is claimed. A lien account or statement must fairly apprise the owner and the public of the nature of the demand asserted as a lien,²⁶ as well as its amount, discussed *infra* § 153. A statement of the demand means something more than a statement of the amount claimed.²⁷ The mere fact that one who has a lien on a building claims also a lien on land which he cannot subject thereto will not defeat his lien on the buildings situated on the land²⁸ if they can be identified.²⁹

§ 152. Accrual of Lien

When so required by statute, the date when the amount claimed is due must be stated, but in the absence of such requirement it is not necessary to show the date of the maturity of the claimant's claim

Under some statutes the date from which the lien is claimed or the date of the commencement of the claim must be stated,³⁰ and a claimant is estopped to assert that the lien attached at an earlier day than that stated.³¹ Where the statute giving a mechanic's lien contemplates two classes of claims, due and not due, the notice should so describe the claim as

to inform the public to which class it belongs,³² and ambiguities should operate to the prejudice of claimant rather than to that of the public.³³

When so required by statute, the date when the amount claimed is due must be stated,³⁴ but in the absence of a statutory requirement to that effect it has been held that it is not necessary to show the date of the maturity of claimant's claim,³⁵ and an erroneous statement of such date will not affect the lien where there was no fraudulent intent or improper motive and no one has been prejudiced thereby.³⁶ Failure to state that the claim is due does not impair the notice as between the original parties,³⁷ and therefore, as between such parties, the lien is not lost by a failure to state whether credit was or was not given.³⁸ A statement that the amount claimed is a lien against the building is a sufficient statement that it is a subsisting debt against the buyer of the material.³⁹

§ 153. Amount Due or to Become Due

- a In general
- b Erroneous statement

a. In General

As a general rule under the statutes the notice, claim, or statement which must be filed or recorded in order to perfect a mechanic's lien must set forth the amount due claimant.

As a general rule under the various statutes the notice, claim, or statement must set forth the amount due claimant,⁴⁰ the amount claimed to be

22. Utah—Culmer v Caine, 61 P 1008, 22 Utah 216

23. Minn—Smith v Headley, 23 NW 550, 33 Minn 354
40 C J p 210 note 90

24. Colo—Rico Reduction & Mining Co v Musgrave, 23 P 158, 14 Colo 79

25. Cal—Bringham v Knox, 59 P. 198, 127 Cal 40
40 C J p 210 note 92

26. Mo—Schroeter Bros Hdw Co v Croatian "Sokol" G Ass'n, 58 S W 2d 995, 332 Mo 440—Hankenamp v Hagedorn, App, 110 S W 2d 826—Harry Cooper Supply Co v Gilloz, App, 107 S W 2d 798—Moller-Vandenboom Lumber Co v Boudreau, 85 S W 2d 141, 231 Mo App 1127

40 C J p 210 note 93

27. Wash—U S Savings, Loan & Bldg Co v Jones, 37 P 666, 9 Wash 434

28. Mont—Morrow v Dahl, 213 P 603, 66 Mont 251

29. Mont—Morrow v Dahl, *supra*

Description of building see *infra* § 161

30. Conn—Westland v Goodman, 47 Conn 83

NY—Ryan v Klock, 36 Hun 104

31. Conn—Harford Bldg & Loan Assoc v Goldreyer, 41 A 659, 71 Conn 95

Mo—Landau v Cottrill, 60 S W. 64, 159 Mo 308

32. Ind—Schneider v. Kolthoff, 59 Ind 568

40 C J p 210 note 8

33. Ind—Wade v Reitz, 18 Ind 307.

Subsequent purchasers

Where the notice does not state that a credit has been given on the claim, subsequent purchasers or encumbrancers may assume that no credit was given

Ind—Schneider v Kolthoff, 59 Ind 568

Or—Allen v Roufs, 30 P 2d 766, 146 Or 451

34. US—In re Rose, D C Tex, 22 F Supp 988

NY—Frank Teicher, Inc, v Gold, 267 N Y S 164, 239 App Div 285

Tex—Ball v Davis, 18 S W 2d 1063, 118 Tex 534—Keystone Pipe & Supply Co v. Wright, Civ App, 37 S W 2d 227

40 C J p 210 note 5

35. Vt—Baldwin v Spear, 61 A 235, 79 Vt 43

40 C J p 210 note 6

36. Ill—Culver v Schroth, 39 NE 115, 153 Ill 437

37. Ind—Albrecht v C C Foster Lumber Co, 26 NE 157, 126 Ind 318

40 C J p 211 note 8

38. Ind—Albrecht v. C C Foster Lumber Co, *supra*

40 C J p 211 note 9

39. Mo—Hydraulic Press Brick Co. v McTaggart, 76 Mo App 347

40 Cal—Richmond Sanitary Co v. Franklin, 9 P 2d 855, 122 Cal App 229

Ohio—C C Constance & Sons v Lay, 172 NE 283, 122 Ohio St 468

40 C J p 211 note 13

Terms of contract see *infra* § 163

Value or price of labor or materials see *infra* § 165

due,⁴¹ the amount unpaid to the lienor,⁴² the amount of the demand,⁴³ or must fairly apprise the owner and the public of the nature, as discussed supra § 151, and amount⁴⁴ of the demand asserted as a lien. The lien affidavit and account filed must show that a sum certain is due,⁴⁵ and the amount claimed must be stated with definiteness and certainty⁴⁶. However, the definiteness of a pleading is not required,⁴⁷ the exact words of the statute need not be used in stating the amount,⁴⁸ and it is sufficient if from the whole statement, including all the papers filed, the amount due clearly appears, although the language used is not as apt or accurate as might be desirable⁴⁹.

Where the statement is that "the balance due and to become due" is a certain amount, and it sufficiently appears that the entire indebtedness has accrued, the words "to become due" should be disregarded as surplusage⁵⁰. A claim for extras furnished in the performance of a building contract may be properly included in a claim for a mechanic's lien for the amount due under the contract⁵¹. Also it is proper for the contractor to include in his claim amounts due from him to subcontractors⁵². A statement by one to whom a number of claims have been as-

signed, showing merely the total and not the amount of each claim, is insufficient⁵³.

On the other hand, where the statute requires claimant in setting out and recording his lien to state merely that he claims a lien on certain property, it has been held that he need not set forth the amount claimed for material furnished⁵⁴.

Interest. Where the amount of the claim is stated, the addition of the words "with interest" does not vitiate the lien notice,⁵⁵ and, if need be, they may be rejected as surplusage.⁵⁶

b. Erroneous Statement

Generally an error in stating the amount for which a lien is claimed will defeat the lien when, and only when, it is made knowingly, intentionally, or fraudulently.

As a general rule, an error in stating the amount for which a lien is claimed will defeat the lien when, and only when, it is made knowingly, intentionally, or fraudulently,⁵⁷ an error arising from mere mistake will not have this effect⁵⁸.

An understatement of the amount due when there is no bad faith and no prejudice to the owner or other lienholders merely causes loss of the lien for that part of the claim omitted⁵⁹. A mistake of

Just and true account

Some statutes require the lienor to file a just and true account of the demand due him—Holekamp Lumber Co v Skay, Mo App, 65 S W 2d 669—Gill v Harris, 34 S W 2d 673, 234 Mo App 717.

41. Fla.—Rathburn v Landess, 129 So 738, 100 Fla 507.

Okl.—Corbitt v Logan, 20 P 2d 894, 163 Okl 86.

Pa.—Currie v Koehler, 90 Pa Super 197—McAdoo v Schultz, Com Pl, 35 Erie Co 113—Raymond v Brookside Distilling Products Corporation, Com Pl, 44 Lack Jur 181.

40 C J p 211 note 14.

42. N Y.—Brescia Const Co v Walart Const Co, 391 N Y S 960, 249 App Div 151—Brescia Const Co v Walart Const Co, 264 N Y S 862, 238 App Div 360.

40 C J p 211 note 15.

43. Ala.—Hancock v Taylor, 21 So 2d 308, 246 Ala 521.

La.—Julius Aaron & Son v Keyser, 2 La App 619.

Va.—Wallace v Drumbach, 13 S E 2d 801, 177 Va 36.

40 C J p 211 note 16.

Against married woman's separate property

Fla.—Cox v Rieck & Fleece, 177 So 301, 129 Fla 872—Salomon v Galinsky, 137 So 366, 103 Fla 417.

44. Mo.—Schroeter Bros Hdw Co v Croatian "Sokol" G Ass'n, 58 S

W 2d 995, 333 Mo 440—Hansenkamp v Hagedorn, App, 110 S W 2d 836—Harry Cooper Supply Co v Gilhous, App, 107 S W 2d 798—Moller-Vandenboom Lumber Co v Boudreau, 85 S W 2d 141, 231 Mo App 1137.

45. Tex.—Ball v Davis, 18 S W 2d 1061, 118 Tex 531—Keystone Pipe & Supply Co v Wright, Civ App, 37 S W 2d 227.

46. Kan.—Geppelt v Middle West Stone Co, 135 P 573, 90 Kan 539.

40 C J p 211 note 17.

47. Mo.—Mitchell Planing-Mill Co v Allison, 40 S W 118, 138 Mo 50, 60 Am SR 511.

48. Or.—Amslie v Kohn, 19 P 97, 16 Or 363.

49. Colo.—Harris v Harris, 47 P 841, 9 Colo App 211.

40 C J p 211 note 21.

50. Colo.—Bitter v Mouat Lumber & Investment Co, 51 P. 519, 10 Colo App 307.

51. Mo.—A A Nicol Heating & Plumbing Co v J B Neevel & Sons Constr. Co, 174 S W 161, 187 Mo App 584.

40 C J p 211 note 23.

Work performed under implied contract

Where building contractor did not breach his contract, but performed different and additional work demanded of him under new implied con-

tract after abandonment of the old contract, lien claim by him on basis of quantum meruit was not objectionable as not constituting a just and true account, notwithstanding reasonable items of ten per cent for overhead and ten per cent for profit were included over actual cost, the claim exceeded original contract price, and original contract price had been set up as a bookkeeping item and extras added—Fuhler v Gohman & Levine Const Co, 142 S W 2d 482, 346 Mo 588.

52. Mich.—Spicer v Dugrey, 190 N W 646, 221 Mich 264—Halpin v Garman, 158 N W 29, 192 Mich 71.

53. Colo.—Hanna v Colorado Sav Bank, 31 P 1030, 3 Colo App 28.

54. Ga.—Wager v Carrollton Bank, 120 S E 116, 156 Ga 783.

55. N Y.—McMillan v Seneca Grape & Wine Co, 5 Hun 12, reversed on other grounds 67 N Y 215.

56. N Y.—McMillan v Seneca Grape & Wine Co, supra.

57. Cal.—Richmond Sanitary Co v Franklin, 9 P 2d 856, 122 Cal App 229.

40 C J p 214 note 65.

58. N Y.—Hurley v Tucker, 112 N Y S 980, 128 App Div 580, affirmed 92 NE 1087, 198 N Y 534.

40 C J p 214 note 66.

59. Mich.—Spicer v Dugrey, 190 N W 646, 221 Mich 264.

claimant in crediting a discount for which there was no consideration does not preclude him from asserting the right to recover the value of the materials disregarding the discount ⁶⁰

It has been well established as a general rule that the fact that a claimant claims an amount greater than is really due to him will not defeat the lien where the error is not made willfully or with an intent to deceive or defraud but is due to an honest mistake ⁶¹ and no one is misled or prejudiced thereby ⁶². In such case the lien may be sustained and enforced pro tanto for the true amount to which claimant is entitled, ⁶³ provided such amount can be segregated from the aggregate amount claimed ⁶⁴

On the other hand, the entire lien of a claimant is defeated where he knowingly and willfully, intentionally, or fraudulently claims a larger amount than is due him, ⁶⁵ or where, through culpable negligence, he overstates the amount due him, ⁶⁶ as where he might have known by the exercise of reasonable dil-

igence that the statement filed by him is not a true statement of his claim ⁶⁷

Refusal of enforcement by court of equity. In some cases it has been held that a court of equity is without power to deprive plaintiff of his lien by reason of his conduct in filing a claim for a larger amount than is found to be due, ⁶⁸ but in other cases it has been held that a court of equity will treat as insufficient a claim which is largely excessive, ⁶⁹ or that, where there is a willful and intentional overstatement of the amount due, a court of equity will refuse to enforce the lien on the principle that plaintiff comes into court with unclean hands ⁷⁰

§ 154. — Credits and Offsets

The statutes generally provide that the claim, notice, or statement which is filed or recorded in order to perfect a mechanic's lien shall set forth the amount due claimant after allowing all just and proper credits and offsets, and the intentional omission of credits which should be given will defeat the lien

60. Tex.—Noyes v Smith, Civ App., 77 S W 649

61. Ill.—Alexander Lumber Co v Kellerman, 271 Ill App 571, affirmed 193 NE 913 358 Ill 207

Mass.—Lampazona v Capriotti, 4 N E 2d 621, 296 Mass 34, 108 A L R 430

Mich.—Equitable Trust Co v Detroit Golf & Recreation Co., 245 N W 531, 260 Mich 606—Hart v Reid 219 N W 692, 243 Mich 175 —Morman v Ryskamp, 209 N W 52, 235 Mich 140—Ypsilanti Lumber & Coal Co v Leslie, 188 N W 395, 218 Mich 664

Mont.—Smith v Gunniss, 144 P 2d 136, 115 Mont 363—Eskestrand v Wunder, 20 P 2d 632, 94 Mont 57
N Y—Yonkers Builders Supply Co v Petro Luciano & Son, 199 N E 45, 269 N Y 171, 102 A L R 759—Clemente Const Corporation v P T Cox Contracting Co., 16 N Y S 2d 483, 172 Misc 904—John Rosshirt, Inc v Rosenstock, 247 N Y S 420, 138 Misc 515

R I—Art Metal Const Co v Knight, 185 A 136, 56 R I 228

S D—Wittrock v Hall, 211 N W 801, 51 S D 39

40 C J p 214 note 70

Inclusion of nonlienable items see infra § 165

Amendment

Fact that notice of mechanic's lien was for excessive amount did not defeat right of lien, where claimant amended lien notice before objection—Zindorf v Roe, 255 P 107, 143 Wash 266

Facts held not to show fraud or bad faith

(1) Creditor's filing of mechanic's lien for full amount of bill for plumb-

ing materials, notwithstanding it had collateral for portion thereof, did not establish that lien was filed for an excessive amount so as to invalidate it for fraud, where collateral had not been foreclosed before lien was filed—Hibbs v Morrison Supply Co., 73 P 2d 325, 41 N M 644

(2) Lien for labor based on opinion and estimate, no account having been kept at time, was not void as being willfully exaggerated even though amount was drastically reduced by court—Sullivan v O'Dea Realty Corporation, 274 N Y S 760, 153 Misc 634

(3) Other facts held not to show fraud or bad faith see 40 C J p 214 note 70 [d]

62. Ind.—Albrecht v C C Foster Lumber Co., 26 N E 157, 126 Ind 318

40 C J p 214 note 71

63. N Y—Goldberger-Rabin, Inc. v 74 Second Ave Corporation, 169 N E 405, 262 N Y 336, following Pascual v Greenleaf Park Land Co., 157 N E 144, 245 N Y 294

R I—Art Metal Const Co v Knight, 185 A 136, 56 R I 228

40 C J p 214 note 72

Court has power to determine value of services performed and value of materials furnished, notwithstanding it be different from that stated in mechanic's lien claim—Majestic Tile Co v Nicholls, 291 N Y S 551, 161 Misc 231

64. U S—Hooven, Owens & Rentschler Co v Featherstone, Mo., 111 F 81, 49 C C A 229

65. Ala.—Byrum Hardware Co v Jenkins Bldg Supply Co., 147 So 411, 226 Ala 448

Colo.—Armour & Co of Delaware v McPhee & McGinnity Co., 285 P 942, 87 Colo 97

Mich.—Morman v Ryskamp, 209 N W 52, 235 Mich 140

N Y—Yonkers Builders Supply Co v Petro Luciano & Son, 199 N E 45, 269 N Y 171, 102 A L R 759—Clemente Const Corporation v P T Cox Contracting Co., 16 N Y S 2d 483, 172 Misc 904—Parsons v Dura Realty Corporation, 240 N Y S 542, 136 Misc 700

40 C J p 215 note 74

Where no action or proceeding has been begun to enforce the lien, the statute providing that willful exaggeration shall void the lien does not apply—In re Lustbader Contracting Corporation, 259 N Y 103, 141 Misc 875

Overstatement held intentional

Or—West v Wilson, 297 P 347, 136 Or 262

66. N M—Berry v Van Soelen, 295 P 301, 35 N M 253

Or—Bartels v McLaughlin, 201 P. 783, 102 Or 66

67. Or—Equitable Savings & Loan Assoc v Hewitt, 20 P. 447, 55 Or. 329

40 C J p 215 note 75

68. Cal—California Portland Cement Co v Wentworth Hotel Co., 118 P. 103, 113, 16 Cal App 2d 22.

40 C J p 215 note 76

69. Mich.—Brennan v Miller, 56 N. W 354, 97 Mich 22

40 C J p 215 note 77

70. Ala.—Byrum Hardware Co. v. Jenkins Bldg Supply Co., 147 So. 411, 226 Ala 448—Hanning v McDade, 93 So 618, 27 Ala 650.

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Okla.—*Corbitt v Logan*, 20 P 2d 894, 163 Okl 86.

Pa.—*Currie v Koehler*, 90 Pa Super 197—*McAdoo v Schultz*, Com Pl, 25 Erie Co 112—*Raymond v Brookside Distilling Products Corporation*, Com Pl, 41 Lack Jur 181.
40 C J p 211 note 14.

42. N Y.—*Brescia Const Co v Walart Const Co*, 391 N Y S 960, 249 App Div 151—*Brescia Const Co v Walart Const Co*, 264 N Y S 862, 238 App Div 360.
40 C J p 211 note 15.

43. Ala.—*Hancock v Taylor*, 21 So 2d 308, 246 Ala 521.
La.—*Julius Anon & Son v Keyser*, 2 La App 649.
Va.—*Wallace v Brumback*, 12 S E 2d 801, 177 Va 36.
40 C J p 211 note 16.

Against married woman's separate property

Fla.—*Cox v Rieck & Fleece*, 177 So 101, 129 Fla 872—*Salomon v Galinsky*, 137 So 336, 103 Fla 417.

44. Mo.—*Schoeter Bros Bldg Co v Croatian "Sokol" G Ass'n*, 58 S

W 2d 995, 333 Mo 140—*Hanenkamp v Hagedorn*, App, 110 S W 2d 836—*Hairy Cooper Supply Co v Gilhoiz*, App, 107 S W 2d 798—*Moller-Vandenboom Lumber Co v Boudreau*, 85 S W 2d 141, 231 Mo App 1137.

45. Tex.—*Bill v Davis*, 18 S W 2d 1061, 118 Tex 531—*Keystone Pipe & Supply Co v Wright*, Civ App, 37 S W 2d 237.

46. Kan.—*Geppelt v Middle West Stone Co*, 135 P 573, 90 Kan 539.
40 C J p 211 note 17.

47. Mo.—*Mitchell Planing-Mill Co v Allison*, 40 S W 118, 138 Mo 50, 60 Ann SR 511.

48. Or.—*Ainslie v Kohn*, 19 P 97, 16 Or 363.

49. Colo.—*Harris v Harris*, 47 P 841, 9 Colo App 211.
40 C J p 211 note 21.

50. Colo.—*Bitter v Mouat Lumber & Investment Co*, 51 P 519, 10 Colo App 307.

51. Mo.—*A A Nicol Heating & Plumbing Co v J D Neevel & Sons Constr Co*, 171 S W 161, 187 Mo App 584.
40 C J p 211 note 23.

Work performed under implied contract

Where building contractor did not breach his contract, but performed different and additional work demanded of him under new implied con-

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52. Mich.—*Spicer v Dugrey*, 190 N W 646, 221 Mich 264—*Halpin v Garman*, 158 N W 29, 192 Mich 71.

53. Colo.—*Hanna v Colorado Sav Bank*, 31 P 1030, 3 Colo App 28.

54. Ga.—*Wager v Carrollton Bank*, 120 S E 116, 156 Ga 783.

55. N Y.—*McMillan v Seneca Grape & Wine Co*, 5 Hun 12, reversed on other grounds 67 N Y 215.

56. N Y.—*McMillan v Seneca Grape & Wine Co*, supra.

57. Cal.—*Richmond Sanitary Co v Franklin*, 9 P 2d 855, 122 Cal App 229.
40 C J p 214 note 65.

58. N Y.—*Hurley v Tucker*, 112 N Y S 980, 128 App Div 580, affirmed 92 NE 1087, 198 N Y 534.
40 C J p 214 note 66.

59. Mich.—*Spicer v Dugrey*, 190 N W 646, 221 Mich 264.

claimant in crediting a discount for which there was no consideration does not preclude him from asserting the right to recover the value of the materials disregarding the discount ⁶⁰

It has been well established as a general rule that the fact that a claimant claims an amount greater than is really due to him will not defeat the lien where the error is not made willfully or with an intent to deceive or defraud but is due to an honest mistake⁶¹ and no one is misled or prejudiced thereby⁶². In such case the lien may be sustained and enforced pro tanto for the true amount to which claimant is entitled,⁶³ provided such amount can be segregated from the aggregate amount claimed ⁶⁴

On the other hand, the entire lien of a claimant is defeated where he knowingly and willfully, intentionally, or fraudulently claims a larger amount than is due him,⁶⁵ or where, through culpable negligence, he overstates the amount due him,⁶⁶ as where he might have known by the exercise of reasonable dil-

igence that the statement filed by him is not a true statement of his claim ⁶⁷

Refusal of enforcement by court of equity In some cases it has been held that a court of equity is without power to deprive plaintiff of his lien by reason of his conduct in filing a claim for a larger amount than is found to be due,⁶⁸ but in other cases it has been held that a court of equity will treat as insufficient a claim which is largely excessive,⁶⁹ or that, where there is a willful and intentional overstatement of the amount due, a court of equity will refuse to enforce the lien on the principle that plaintiff comes into court with unclean hands ⁷⁰

§ 154. — Credits and Offsets

The statutes generally provide that the claim, notice, or statement which is filed or recorded in order to perfect a mechanic's lien shall set forth the amount due claimant after allowing all just and proper credits and offsets, and the intentional omission of credits which should be given will defeat the lien

60. Tex.—Noyes v Smith, Civ App., 77 S W 649

61. Ill.—Alexander Lumber Co v Kellerman, 271 Ill App 571, affirmed 193 NE 913, 358 Ill 207

Mass.—Lampasona v Capriotti, 4 N E2d 621, 296 Mass 34, 108 A L R 430

Mich.—Equitable Trust Co v Detroit Golf & Recreation Co., 245 N W 531, 260 Mich 606—Hart v Reid, 219 N W 692, 243 Mich 175—Morman v Ryskamp, 209 N W 52, 235 Mich 140—Ypsilanti Lumber & Coal Co v Leslie, 188 N W 395, 218 Mich 664

Mont.—Smith v Gunniss, 141 P 2d 136, 115 Mont 363—Eskestrand v Wunder, 20 P 2d 632, 94 Mont 57
N Y—Yonkers Builders Supply Co v Petro Luciano & Son, 199 NE 45, 269 N Y 171, 102 A L R 759—Clemente Const Corporation v P T Cox Contracting Co., 16 N Y S 2d 483, 172 Misc 904—John Rosshirt, Inc v Rosenstock, 247 N Y S 420, 138 Misc 515

R I—Art Metal Const Co v Knight, 185 A 136, 56 R I 228

S D—Wittrock v Hall, 211 N W 801, 51 S D 39

40 C J p 214 note 70

Inclusion of nonlienable items see infra § 165

Amendment

Fact that notice of mechanic's lien was for excessive amount did not defeat right of lien, where claimant amended lien notice before objection—Zindorf v Roe, 255 P 107, 143 Wash 266

Facts held not to show fraud or bad faith

(1) Creditor's filing of mechanic's lien for full amount of bill for plumb-

ing materials, notwithstanding it had collateral for portion thereof, did not establish that lien was filed for an excessive amount so as to invalidate it for fraud, where collateral had not been foreclosed before lien was filed—Hibbs v Morrison Supply Co., 73 P 2d 335 41 N M 644

(2) Lien for labor based on opinion and estimate, no account having been kept at time, was not void as being willfully exaggerated even though amount was drastically reduced by court—Sullivan v O'Dea Realty Corporation, 274 N Y S 760, 153 Misc 634

(3) Other facts held not to show fraud or bad faith see 40 C J p 214 note 70 [d]

62. Ind.—Albrecht v C C Foster Lumber Co., 26 NE 157, 126 Ind 318

40 C J p 214 note 71

63. N Y—Goldberger-Rabin, Inc., v 74 Second Ave Corporation, 169 N E 405, 252 N Y 336, following Pascual v Greenleaf Park Land Co., 157 NE 144, 245 N Y 294

R I—Art Metal Const Co v Knight, 185 A 136, 56 R I 228

40 C J p 214 note 72

Court has power to determine value of services performed and value of materials furnished, notwithstanding it be different from that stated in mechanic's lien claim—Majestic Tile Co v Nicholls, 291 N Y S 551, 161 Misc 231

64. US—Hooven, Owens & Rentschler Co v Featherstone, Mo., 111 F 81, 49 CCA 229

65. Ala.—Byrum Hardware Co v Jenkins Bldg Supply Co., 147 So 411, 226 Ala 448

Colo.—Armour & Co of Delaware v McPhee & McGinnity Co., 285 P 942, 87 Colo 97

Mich.—Morman v Ryskamp, 209 N W 52, 235 Mich 140

N Y—Yonkers Builders Supply Co v Petro Luciano & Son, 199 NE 45, 269 N Y 171, 102 A L R 759—Clemente Const Corporation v P T Cox Contracting Co., 16 N Y S 2d 483, 172 Misc 904—Parsons v Dura Realty Corporation, 240 N Y S 542, 136 Misc 700

40 C J p 215 note 74

Where no action or proceeding has been begun to enforce the lien, the statute providing that willful exaggeration shall void the lien does not apply—In re Lusthader Contracting Corporation, 259 N Y S 103, 144 Misc 875

Overstatement held intentional

Or—West v Wilson, 297 P 847, 136 Or 262

66. N M—Berry v Van Soelen, 295 P 301, 35 N M 259

Or—Bartels v McCullough, 201 P. 733, 102 Or 66

67. Or—Equitable Savings & Loan Assoc v Hewitt, 106 P 447, 55 Or. 329

40 C J p 215 note 76

68. Cal—California Portland Cement Co v Wentworth Hotel Co., 118 P. 103, 113, 16 Cal App 692

40 C J p 215 note 77.

69. Mich.—Brennan v Miller, 56 N. W 354, 97 Mich. 182

40 C J p 215 note 78

70. Ala.—Byrum Hardware Co v. Jenkins Bldg Supply Co., 147 So 411, 226 Ala 448—Fleming v McDade, 93 So 618, 207 Ala 650

The statutes generally provide, in varying language, that the claim, notice, or statement shall set forth the amount due claimant after allowing all just and proper credits and offsets.⁷¹ Although the authorities are at variance on the question of what constitutes a fatal departure from the statute, they are agreed that it is not necessary to use the exact words of the statute in stating that all just credits and offsets have been allowed or deducted.⁷² While it is proper to state the whole amount which became due to claimant, and to give credit for any payments and offsets, and then state the balance remaining due and unpaid,⁷³ and it has been held necessary to state the account in this manner,⁷⁴ other decisions are to the effect that it is sufficient to state merely the balance claimed to be due,⁷⁵ without in terms declaring that all just credits have been given,⁷⁶ or to state that a certain sum is due, after allowing all just credits, deductions, and set-offs, without setting out any credits or deductions.⁷⁷ The statutes under consideration do not require the credits to be itemized.⁷⁸

Erroneous statements The receipt of payment is a fact particularly within claimant's knowledge⁷⁹ and he is bound to state it truly.⁸⁰ However, it is

not every failure to credit payments properly that may be declared, as a matter of law, to render the lien account invalid.⁸¹ The intentional omission from the lien claim or statement of credits which should be given will defeat the lien.⁸² On the other hand, the lien is not lost where the omission is not willful,⁸³ intentional,⁸⁴ or negligent,⁸⁵ but is due to an inadvertence⁸⁶ or an honest mistake,⁸⁷ especially where the amount of the offset is only a small part of the contract price.⁸⁸ The lien will not be defeated by the omission of a credit as to which claimant has not accurate information⁸⁹ and is unable to get a statement,⁹⁰ or which is unliquidated and in dispute⁹¹ or not within the knowledge of claimant.⁹²

In some jurisdictions it has been held or recognized that the failure to state the proper credits is fatal where the error could have been avoided by the exercise of reasonable diligence,⁹³ but in other jurisdictions, it has been held that, under the statutes, the question is one of intention,⁹⁴ and that, where the error was unintentional, it does not vitiate the lien, even though there may have been gross carelessness on the part of claimant.⁹⁵ Under some circumstances a failure to credit land to be taken in payment does not render the lien invalid.⁹⁶

71. Ark—Arkansas Foundry Co v American Portland Cement Co, 75 S W 2d 387, 189 Ark 779

Cal—Richmond Sanitary Co v Franklin, 9 P 2d 855, 122 Cal App 329

Mo—Holekamp Lumber Co v Skay, App, 65 S W 2d 669—Gill v Harris, 34 S W 2d 673, 234 Mo App 717

Ohio—D & H Coal Co v Lay, 175 N E 30, 37 Ohio App 483

Or—Drake Lumber Co v Lundquist, 170 P 2d 712, 179 Or 402—Warrenton Lumber Co v. Smith, 245 P 313, 117 Or 530

10 C J p 212 note 30

Deficiencies in affidavit for mechanic's lien, not showing that amount claimed was above all legal set-offs, may not be supplied by evidence—C C Constance & Sons v Lay, 172 N E 283, 122 Ohio St 468

72. Mont—Wertz v Lamb, 117 P. 89, 43 Mont 477

40 C J p 212 note 31

73. N.Y.—Riley v Durfey, 180 N.Y. S 297, 145 App Div 583—Hurley v. Tucker, 112 N.Y.S. 980, 128 App Div 580, affirmed 92 N.E. 1087, 198 N.Y. 534

74. Ohio—D & H Coal Co v Lay, 175 N E 30, 37 Ohio App 483

10 C J p 212 note 34

75. N.M.—Ford v Springer Land Assoc., 41 P 541, 8 N.M. 37, affirmed 18 S.Ct. 170, 168 U.S. 513, 43 L.Ed. 563

10 C J p 212 note 35

76. Cal—Heberling v Day, 209 P 908, 59 Cal App 13

40 C J p 212 note 36

77. Cal—Star Mill & Lumber Co v Porter, 88 P 497, 4 Cal App 470

40 C J p 212 note 37

78. Colo—Small v Foley, 47 P 64, 8 Colo App 435

10 C J p 212 note 38

79. Or—Equitable Savings & Loan Assoc v Hewitt, 106 P 447, 55 Or 329

80. Or—Equitable Savings & Loan Assoc v Hewitt, supra

Account held not "just and true account"

Mo—Holekamp Lumber Co. v Skay, App, 65 S W 2d 669

81. Mo—Wilson-Reheis-Rolfes Lumber Co v Ware, 138 S W 690, 158 Mo App 179

N.M.—Hobbs v Morrison Supply Co, 73 P 2d 325, 41 N.M. 644

82. Mich—Equitable Trust Co v Detroit Golf & Recreation Co, 245 N.W. 531, 260 Mich 606

40 C J p 215 note 83

83. Or—Columbia River Door Co v Todd, 175 P 413, 860, 90 Or 147—Rowland v. Harmon, 34 P 357, 24 Or 529

84. Mo—Woodling v Westport Hotel Operating Co, 63 S W 2d 207, 227 Mo App 1231

40 C J p 216 note 85

85. Or—Rowland v. Harmon, 34 P 357, 24 Or 529

40 C J p 216 note 86

86. Cal—Stockton Lumber Co v Schuler, 101 P 307, 155 Cal 411

87. Or—Columbia River Door Co v Todd, 175 P 443, 860, 90 Or 147

40 C J p 216 note 88

88. Cal—California Portland Cement Co v Wentworth Hotel Co, 118 P 103, 113, 16 Cal App 693

89. Va—Rison v. Moon, 22 S.E. 165, 91 Va 384

90. Mo—Kasper v St Louis Terminal R Co, 74 S.W. 145, 101 Mo App 323

91. Ill—Hayes v Hammond, 44 N.E. 422, 162 Ill 133

40 C J p 216 note 92

92. Mo—Christopher & Simpson Architectural Iron & Foundry Co v E A Steiminger Const Co, 205 S.W. 278, 200 Mo App 33

93. Neb—Consolidated Stone Co v Union Pac R Co, 148 N.W. 318, 96 Neb 521

40 C J p 216 note 94

94. Mo—Wilson-Reheis-Rolfes Lumber Co v Ware, 138 S.W. 690, 158 Mo App 179

95. Mo—Wilson-Reheis-Rolfes Lumber Co v Ware, supra

96. U.S.—Springer Land Assoc v Ford, N.M., 18 S.Ct. 170, 168 U.S. 513, 43 L.Ed. 562

40 C J p 216 note 98.

It has been held that an admittedly erroneous credit entry, which never in fact had been paid, will not defeat the lien for the amount of such credit when no one has been prejudiced thereby⁹⁷

§ 155. — Apportionment between Buildings or Improvements

Under a number of statutes a claimant who files one claim against two or more buildings or other improvements must designate the amount due, or which he claims to be due, on each of such buildings or improvements.

In a number of jurisdictions statutes have been enacted relating to the apportionment of the amount of a claim among several buildings,⁹⁸ such as statutes providing that a claimant who files one claim against two or more buildings or other improvements shall designate the amount due, or which he claims to be due, on each of such buildings or other improvements⁹⁹ However, owing to a difference in the wording of the statutes and the construction placed thereon, there is considerable divergence of holding in respect of questions of apportionment. In some instances in the same jurisdiction there has been a change in the statutes¹ or in the construction placed thereon² Some decisions have held that a compliance with such statutes is essential,³ but other decisions have regarded the statutes as permissive⁴ or held that a failure to apportion the claim merely postpones the lien to other specific liens on

each improvement⁵ and does not entirely defeat it,⁶ unless one of the buildings belongs to a third person⁷ or unless the claim was not filed in time as to part of the buildings⁸

Where several buildings or improvements intended to be used together are erected on the same lot of land, it is not necessary to specify the amount due for labor or materials on each separately,⁹ but such a specification is necessary where the buildings or improvements are on separate lots or tracts,¹⁰ especially when owned by different persons¹¹ In some jurisdictions apportionment is unnecessary in case of a claim of lien on several buildings on adjoining lots,¹² while in other jurisdictions apportionment is permissible and necessary where the buildings or lots are adjoining,¹³ but is not permissible where they do not adjoin¹⁴ It has been held that a claim for a lien on a "double house," that is, a building erected at one time but completely divided by a solid partition wall into two houses intended for separate use and occupancy, need not be apportioned,¹⁵ but there is also authority to the contrary.¹⁶

Some statutes provide for an apportionment where several buildings are erected under one contract;¹⁷ but under other statutes a designation of the amount due on each building is deemed inapplicable where two or more buildings are constructed under one contract¹⁸ It has been held that the

97. Ill.—Alexander Lumber Co v Kellerman, 271 Ill App 571, affirmed 193 NE 913, 358 Ill 207

98. Pa.—Brant v Hartrick, 60 Pa Super 507
40 C J p 212 note 40

99. Cal.—Hendrickson v Bertelson, 35 P 2d 318, 1 Cal 2d 430

Del.—Newark Lumber Co v. Continental Diamond Fibre Co, 157 A 729, 5 W W Harr 60

Utah—U S Building & Loan Ass'n v Midvale Home Finance Corporation, 44 P 2d 1090, 86 Utah 506, rehearing denied 46 P 2d 672, 86 Utah 522

40 C J p 212 note 41

Use of word "factories" in statement of claim did not sufficiently show that property was industrial or manufacturing plant or unit, under rule that statement of claim failing to designate amount on each building was fatally defective—E J Hollingsworth Co v Continental-Diamond Fibre Co, 175 A 266, 6 W W Harr, Del, 303

L Pa.—Koons v Harding, 3 Pa Dist & Co 741
40 C J p 212 note 42

2. Cal.—Booth v Pendola, 23 P 200,

88 Cal 36, reheard 25 P 1101, 88 Cal 36

40 C J p 213 note 44

3. Del.—Newark Lumber Co v Continental Diamond Fibre Co, 157 A 729, 5 W W Harr 60

40 C J p 213 note 45

Statute held not complied with

Sworn testimony apportioning liens amongst various buildings erected, in hearing to determine their priority, was not a compliance with law requiring apportionment—Board v Freedman, 131 A 913, 99 NJ Eq 351

4. Colo.—Buerger Inv Co v B F Salzer Lumber Co, 237 P 162, 165 40 C J p 213 note 46

5. Cal.—Hendrickson v Bertelson, 35 P 2d 318, 1 Cal 2d 430

Md.—Caltrider v Isberg, 130 A 53, 148 Md 657

40 C J p 213 note 47.

6. Cal.—Booth v Pendola, 23 P 200, 88 Cal 36, reheard 25 P. 1101, 88 Cal 36

40 C J p 213 note 48

7. Wash.—Sarginson v H S Turner Inv Co, 124 P 379, 69 Wash 234

8. Ill.—Schmidt v Anderson, 97 N E 291, 253 Ill 29

9. RI.—Miller v Trinity Union M E Church, 101 A 106, 40 RI 456
40 C J p 213 note 51

10. NJ.—Board v Freedman, 131 A 913, 99 NJ Eq 351
40 C J p 213 note 52

11. Conn.—De Wolf v Bonee, 101 A 233, 91 Conn 712
40 C J p 213 note 53

12. US.—Phillips v Gilbert, D Ct, 101 US 721, 25 L Ed 833

Mo.—Bickel v Gray, 81 Mo App 653

13. Fla.—Rathburn v Landess, 129 So 738, 100 Fla 507

40 C J p 213 note 55

14. Pa.—Sumption v Rogers, 89 A 121, 242 Pa 348, Ann Cas 1915B 623
40 C J p 213 note 56

15. Ill.—Bastrup v Prendergast, 53 NE 995, 179 Ill 553, 70 Am SR 128

16. Pa.—Roat v Frear, 31 A 861, 167 Pa 614—Malone's Appeal, 79 Pa 481

17. NJ.—Franklin Soc for Home Bldg and Sav v Bens, 152 A. 376, 107 NJ Eq 326
40 C J p 213 note 59

18. Ala.—Richardson Lumber Co v Howell, 122 So 343, 219 Ala 328

claim need not expressly state that the amount due is determined by apportionment, provided it is in fact so determined.¹⁹ The apportionment is to be made among houses or other buildings,²⁰ but not against pieces of ground upon which houses are yet to be erected.²¹

§ 156. Name, Address, and Status of Claimant

The claim, notice, or statement filed or recorded must show by whom the mechanic's lien is claimed, and, where so required by statute, the residence, business address, or principal place of business of the claimant.

The claim or statement filed or recorded must show by whom the mechanic's lien is claimed,²² but the courts are liberal in upholding claims or statements in this respect.²³ When so required by statute, the residence,²⁴ business address,²⁵ or principal place of business²⁶ of claimant must be stated in the notice, claim, or statement. In some decisions it has been held that it is not essential to state the capacity in which claimant did the work and in which he claims a lien,²⁷ and it has also been held that an error in this respect is not fatal,²⁸ but there is also authority to the contrary.²⁹ Various claims and affidavits have been construed as showing claimant to be a contractor.³⁰

Cal—Hendrickson v Bertelson, 35 P 2d 318, 1 Cal 3d 430

Utah—U S Building & Loan Ass'n v Midvale Home Finance Corporation, 44 P 2d 1090, 86 Utah 506, rehearing denied 46 P 2d 672, 86 Utah 523

40 C J p 213 note 60

19. Pa—Koons v Harding, 3 Pa. Dist & Co 711

20. Pa—Pierce, Butler & Pierce Mfg Co, Inc v Rogers, 60 Pa. Super 293

21. Pa—Pierce, Butler & Pierce Mfg Co, Inc v Rogers, supra

22. Idaho—Corpus Juris cited in Sullivan Const Co v Twin Falls Amusement Co, 258 P 529, 531, 44 Idaho 520

La—Julius Aaron & Son v Keyser, 2 La App 649

NY—Johnson Service Co v E H Monin, Inc, 237 NYS 152, 227 App Div 123, modified on other grounds 171 NE 692, 253 NY 417, 77 ALR 214, amended 173 NE 862, 254 NY 551

Okla—Corbitt v Logan, 20 P 2d 894, 163 Okl 86

Pa—Moss & Blakeley Plumbing Co v Schauer, 28 A 2d 323, 150 Pa. Super 318—Connolly v Fierman, 8 Pa Dist & Co 92, 24 Luz Leg Reg 78—McAdoo v Schultz, Com Pl, 25 Erie Co 112

Va—Wallace v. Brumback, 12 SE 2d 801, 177 Va 38

40 C J p 216 note 99

Name, residence, and status of employer or contractor see infra § 164

23. Idaho—Corpus Juris cited in Sullivan Const Co v Twin Falls Amusement Co, 258 P. 529, 531, 44 Idaho 520

40 C J p 216 note 1

Partners or joint contractors or survivor or successor thereof

(1) Contention that mechanic's lien account was invalid because made and filed in the partnership name, without setting out names of

individual members of the partnership, was held untenable—Cochran v Johnston, Mo App, 25 SW 2d 130—40 C J p 216 note 1 [f] (2)

(2) Other decisions with respect to partners or joint contractors see 40 C J p 216 note 1 [f]

24. NY—Johnson Service Co v E H Monin, Inc, 237 NYS 152, 227 App Div 123, modified on other grounds 171 NE 692, 253 NY 417, 77 ALR 214, amended 173 NE 862, 254 NY 551—John Roshirt, Inc v Rosenstock, 247 NYS 420, 138 Misc 515

40 C J p 217 note 2

Application of, and compliance with, statute

(1) Notice of lien in action to foreclose mechanic's lien which stated name of town, county, and state wherein lienors resided was a sufficient description of residence and place of business of lienors—Brooks v Dinnerstein, 286 NYS 347, 247 App Div 848

(2) Failure of notice of mechanic's lien to state claimant's residence as provided in statute rather than business address would be disregarded, where it was not shown that any substantial right of owner was thereby prejudiced—Murdock v Kleist, 293 NYS 583, 250 App Div 127.

(3) Further applications of statute see 40 C J p 217 note 2 [a]

25. NY—Johnson Service Co v E H Monin, Inc, 237 NYS 152, 227 App Div 123, modified on other grounds 171 NE 692, 253 NY 417, 77 ALR 214, amended 173 NE 862, 254 NY 551

40 C J p 217 note 3

26. NY—John Roshirt, Inc, v Rosenstock, 247 NYS 420, 138 Misc 515

40 C J p 217 note 4.

Foreign corporation

(1) Under some statutes the only requirement in the case of a foreign corporation, is that "its principal place of business within this state"

shall be stated in a notice of lien filed by it—Johnson Service Co v E H Monin, Inc, 237 NYS 152, 227 App Div 123, modified on other grounds 171 NE 692, 253 NY 417, 77 ALR 214, amended 173 NE 862, 254 NY 551—Lincoln Nat Bank v John Pierce Co, 164 NYS 421, 98 Misc 325

(2) Foreign corporation which leased premises where it kept large stock of goods for distribution throughout state, employing persons and trucks in connection therewith, was held to have "place of business within state" within statute prescribing contents of notice of lien—John Roshirt, Inc v Rosenstock, 247 NYS 420, 138 Misc 515

(3) Lien by subcontractor stating that it was foreign corporation and naming principal place of business in state but shown not to be corporation when filing lien, was invalid—Johnson Service Co v E H Monin, Inc, supra

(4) Foreign corporation's sales office in state was held not to be its "principal place of business" within lien notice statute and, where it had no principal place of business in state, recital in its notice of lien for materials respecting its principal place of business outside state was sufficient—Butts v Valerio Const Co, 259 NYS 93, 236 App Div 299, affirmed 185 NE 768, 261 NY 630

27. Kan—Brown v Walker, 164 P 1092, 100 Kan 542

40 C J p 217 note 5

28. Idaho—Sullivan Const Co v Twin Falls Amusement Co, 258 P 529, 44 Idaho 520

40 C J p 217 note 6

29. Colo—Denver Hardware Co v Croke, 36 P 624, 4 Colo App 530

30. Mich—McMonegal v Wilson, 61 NW 495, 103 Mich 264

Pa—Gerhart v. Christ, No 2, 10 Pa. Dist. & Co 816, 41 Lanc.L Rev 77

40 C J p 217 note 8.

§ 157. Names of Encumbrancers or Other Lienors

As a general rule the statutes do not require the lien statement to set forth the names of mortgagees, encumbrancers, or other lienors

As a general rule the statutes do not require the lien statement to set forth the names of mortgagees,³¹ encumbrancers,³² or other lienors³³

§ 158. Notice to Owner

It is not necessary that the filed or recorded claim or statement set forth that a notice of intention to claim a mechanic's lien has been given unless the statute expressly requires such an averment.

Although the statute may require that claimant shall serve on the owner a notice of his intention to claim a lien as discussed supra § 121, it is not necessary that the filed or recorded claim or statement should set forth that such notice has been given³⁴ unless the statute expressly requires such an averment.³⁵

§ 159. Time of Filing

Under some statutes the statement or claim ordinarily must show that it is timely filed; under other statutes such averment is not required.

Under some statutes it has been held that it is

necessary for the claim or statement to show on its face that it is timely filed after the completion of the work or furnishing of materials or after the accrual of the indebtedness³⁶ unless completion of the contract has been prevented,³⁷ and that the statement is ineffectual to perfect a lien if it shows affirmatively on its face that it is filed too late,³⁸ even though the fact is otherwise³⁹ Under other statutes, however, it has been held that the statement of claim need not aver or show that it was timely filed,⁴⁰ that the recitals in the statement as to time are not conclusive on the lienor,⁴¹ and that a claim which was in fact filed within the required time will not be defeated by dates, or averments as to time in the claim, which incorrectly show the contrary.⁴² At any rate, where the recitals or averments of the claim or statement are sufficient to show that it was filed within the requisite time, it is immaterial which rule prevails⁴³

§ 160. Nature of Improvement

Generally the claim or statement should specify the building or improvement on which the work was done or for which the materials were furnished.

Although such a specification is not necessary under some statutes,⁴⁴ as a general rule under the various statutes the claim or statement should specify

31. N.J.—Samuel Cohen & Son v Tudor Apartments, 145 A. 6, 7 N J Misc 199

40 C J p 217 note 9

Naming mortgagee as owner see infra § 162

32. Ala.—Vesuvius Lumber Co v Alabama Fidelity Mortg & Bond Co, 82 So 107, 203 Ala 93

40 C J p 217 note 10

33. Ala.—Vesuvius Lumber Co v Alabama Fidelity Mortg & Bond Co, supra

40 C J p 217 note 11.

34. Ind.—Adams v Shaffer, 31 NE 1108, 132 Ind 331

40 C J p 217 note 13.

35. Mich.—Webster v Cooper Development Co, 234 NW 186, 266 Mich 505

Attaching proof of service of notice to claim

Materialmen who did not attach proof of service of notice of intention to claim lien to verified statement of account when filed with registrar of deeds was not entitled to a lien—Webster v. Cooper Development Co, supra

In Pennsylvania

(1) It has been held that the mechanic's lien claim does not have to set forth when and how notice was given to the owner of the intention to file the claim—Hamilton v

Means, 38 A 2d 538, 155 Pa Super 345—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 246—Delaware County Supply Co v Scavicchia, Com Pl, 33 Del Co 35—Lindsay v Compagnone, Com Pl, 92 Pittsb Leg J 189—40 C J p 217 note 14 [a] (2)

(2) However, under statutes in force at particular times, it has also been held that such an averment is necessary—Lindsay v Compagnone, supra—40 C J p 217 note 14 [a] (1)

(3) It has also been held that a copy of the notice served on the owners need not be attached to the claim—Grass v Eisenbrey, Com Pl, 59 Montg Co 258—Stockdale Hardware Co v Knapp, Com Pl, 25 West Co L J 4

36. Ohio—Ulmer v Portage Const & Finance Co, 26 Ohio N P N S, 257

40 C J p 217 note 16

Time for filing see supra § 139 et seq

Date

Account accompanying affidavit of subcontractor filing mechanic's lien should be dated so as to show that it was filed within the time prescribed by statute—Grant v McAuliffe, Tex Civ App, 8 SW 2d 226, error dismissed

37. U.S.—Feick v Stephens, Ohio,

250 F 185, 162 CCA 321, certiorari denied 39 S Ct. 8, 248 U.S. 562, 63 L Ed 423

40 C J p 218 note 17

38. Minn.—Olson v Pennington, 33 NW 791, 37 Minn 298

Ohio—Macklin v Miller Improved Gas Engine Co, 13 Ohio Cir Ct, N.S. 94, 32 Ohio Cir Ct 16

39. Minn.—Olson v Pennington, 33 NW 791, 37 Minn 298

40. W Va.—H C Houston Lumber Co v Wetzel & T R Co, 72 SE 786, 69 W Va 682.

40 C J p 218 note 20

41. Colo.—Burleigh Bldg Co. v. Merchant Brick & Building Co, 59 P 83, 13 Colo App 455

Iowa—Empire State Surety Co v. Des Moines, 131 NW 870, 152 Iowa 531, rehearing denied 132 N. W 337, 152 Iowa 531

42. Mich.—Knowlton v Gibbons, 178 NW 63, 210 Mich 547

40 C J p 218 note 22

43. Mo.—Mitchell Planing-Mill Co. v Allison, 40 SW 118, 138 Mo. 50, 60 Am SR 544

40 C J p 218 note 23.

Statements held sufficient

Or—Andersen v. Turpin, 142 P 2d 999, 172 Or 420.

40 C J p 218 note 23 [a]

44. Ala.—Cook v Rome Brick Co, 12 So. 918, 98 Ala 409.

the building or improvement on which the work was done or for which the materials were furnished,⁴⁵ so as to exclude work done or materials furnished for anything else,⁴⁶ and to show that the improvement is of a character for which a lien can be acquired under the statute.⁴⁷ Where the claim misdescribes the character of the improvement⁴⁸ or fails to mention the nature of the improvement⁴⁹ it is fatally defective unless the case falls within a statute providing that the lien shall not be affected by any inaccuracy in the particulars of the lien statement.⁵⁰

New structure or addition, alteration, or repair

Under some statutes the claim must specify on its face the class to which it belongs, whether for original erection and construction, or for addition, alteration, or repair.⁵¹ A claim on its face relating to one class will not support a lien relating to the other,⁵² but a claim which shows by apt words the class to which it belongs is sufficient,⁵³ although it does not use the statutory phrase.⁵⁴

§ 161. Description of Property or Improvement

a. Necessity

b. Sufficiency

a. Necessity

Statutes regulating the acquisition of mechanics' liens universally require that the lien notice, claim, or statement shall contain a description of the property on which the lien is claimed.

The statutes regulating the acquisition of mechanics' liens universally require that the lien notice, claim, or statement shall contain a description of the property on which the lien is claimed⁵⁵ for the purpose of having the papers on record afford a ready means of identification of the property⁵⁶ and to impart notice to any interested person that the lien attaches to a certain piece of property.⁵⁷

b. Sufficiency

- (1) In general
- (2) Errors and mistakes generally
- (3) Matters in aid of description
- (4) Area included in description
- (5) Location in respect of streets or other property
- (6) Numbers of lot and block or government subdivision
- (7) Failure to name political division or subdivision
- (8) Description of building or improvement generally
- (9) Lien on improvement alone

45. Cal—Hayward Lumber & Investment Co v Ford, 148 P 2d 689, 64 Cal App 2d 346

Pa—McAdoo v Schultz, Com Pl, 25 Erie Co 112
40 C J p 218 note 26

46. Del—Riverside Lumber Co v Hampton, 32 A 960, 12 Del Co 486

40 C J p 218 note 27

47. N J—Whitenack v Noe, 11 N J Eq 321

Lienable improvements see supra §§ 30-32

48. N J—Cox v Flanagan, Ch, 2 A 33

Void as to mortgages

Or—Dow v Courteney Lumber Co, 113 P 652, 58 Or 329

49. W Va—Scott Lumber Co v Wheeling Cemetery Ass'n, 186 S E 117, 117 W Va 534

50. Minn—Atlas Lumber Co v Dupuis, 145 NW 620, 125 Minn 45
40 C J p 218 note 30

51. U S—Pusey & Jones v Pennsylvania Paper Mills, Pa, 173 F 634, affirmed 185 F 481, 107 CCA 581

Pa—Keystone Lumber Co v Russo, Com Pl, 89 Pittsb Leg J 416, 55 York Leg Rec 98

40 C J p 218 note 31

52. N J—Cox v Flanagan, Ch, 2 A 33

40 C J p 218 note 32.

53. Pa—Womer v Gearhart, 16 Pa Dist & Co 359—Keystone Lumber Co v Russo, Com Pl, 89 Pittsb Leg J 416, 55 York Leg Rec 98
40 C J p 218 note 33

54. Pa—Wharton v Real Estate Inv Co, 36 A 725, 180 Pa 168, 57 Am SR 629—Keystone Lumber Co v Russo, 89 Pittsb Leg J 416, 55 York Leg Rec 98.

55. U S—In re Friedal Corporation, CCANY, 53 F 2d 758

Ala—Hancock v Taylor, 21 So 2d 308, 246 Ala 521.

Ark—Arkansas Foundry Co v American Portland Cement Co, 75 SW 2d 387, 189 Ark 779

Cal—Hayward Lumber & Investment Co v Ford, 148 P 2d 689, 64 Cal App 2d 346—Hayward Lumber & Investment Co v Pride of Mojave Mining Co, 110 P 2d 439, 43 Cal App 2d 146—Bishop v. Hayward Lumber & Investment Co, 65 P 2d 125, 19 Cal App 2d 234

Fla—Rieck & Fleece v Cunniff, 190 So 8, 138 Fla 742—Rathburn v Landess, 129 So 738, 100 Fla 607

Idaho—Gem State Lumber Co v Cameron, 258 P 539, 44 Idaho 595
La—Julius Aaron & Son v Keyser, 2 La App 649

Minn—Hydraulic Press Brick Co v Pierz Co-op Ass'n, 211 N.W 836, 169 Minn 452

NM—Ackerson v Albuquerque Lumber Co, 29 P 2d 714, 38 NM 191

Ohio—Delskamp Paint Co v Stotter, 28 Ohio NPNS, 451

Or—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402

Pa—McAdoo v. Schultz, Com Pl, 25 Erie Co 112

Va—Wallace v Brumback, 12 SE 2d 801, 177 Va 36

Wash—Coast Trucking Co v West Seattle Dairy, 268 P 598, 148 Wash 200

W Va—Duncan Box & Lumber Co v Stewart, 30 SE 2d 891, 126 W Va 871

Wyo—Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 59 Wyo. 334, 147 ALR 1089

40 C J p 218 note 35

Limitation of lien to property described in claim or statement see infra § 184

Charging married woman's separate property

Fla—Cox v Rieck & Fleece, 177 So 301, 129 Fla 872—Salomon v Galinsky, 137 So 386, 103 Fla 417

56. Cal—Leibowitz v. Berry, 299 P 779, 114 Cal App 5
40 C J p 218 note 36

57. Mont—Federal Land Bank of Spokane v Green, 90 P 2d 489, 108 Mont 56.

(1) In General

The test generally applied in determining the sufficiency of the description of the property in a lien notice, claim, or statement is whether it will enable one familiar with the locality to identify with reasonable certainty the property on which the lien is intended to be claimed.

The courts are liberal in upholding imperfect descriptions of the property in a lien notice, claim, or statement,⁵⁸ and are reluctant to set aside a mechanic's lien claim merely because of a loose description of the property⁵⁹ since the statutes generally con-

template that claimants should prepare their own papers.⁶⁰ While a description which would be sufficient in a deed will be sufficient in a mechanic's lien claim or notice,⁶¹ the same fullness and precision of description is not required in a lien statement as in the case of a conveyance⁶² or a judgment.⁶³ On the other hand the lien notice, claim, or statement must sufficiently identify the property,⁶⁴ with reasonable certainty,⁶⁵ and the claim must describe the land with sufficient accuracy to

58. Kan—*Corpus Juris* cited in *Gaudreau v Smith*, 40 P 2d 365, 367, 141 Kan 133

Wyo—*Corpus Juris* quoted in *Mawson-Peterson Lumber Co v Sprinkle*, 140 P 2d 588, 590, 59 Wyo 334, 147 A L R 1089

40 C J p 220 note 40

A substantial compliance with the statute is all that is required in describing the property—*Warrenton Lumber Co v Smith*, 245 P 313, 117 Or 530

Descriptions held sufficient

Ark—*Geisreiter v Standard Lumber Co*, 63 SW 2d 347, 187 Ark 893

Mo—*Joplin Cement Co v Greene County Building & Loan Ass'n*, 74 SW 2d 250, 228 Mo App 883.

40 C J p 219 note 38

Descriptions held insufficient

US—*In re Friedal Corporation*, C C A N Y, 53 F 2d 758

40 C J p 219 note 39

59. Wyo—*Corpus Juris* quoted in *Mawson-Peterson Lumber Co v Sprinkle*, 140 P 2d 588, 590, 59 Wyo 334, 147 A L R 1089.

40 C J p 220 note 41.

As between claimant and owner the courts hesitate to hold a description of the property fatally defective—*Chance v Franke*, 165 SW 2d 678, 350 Mo 162—*Independent Plumbing & Heating Supply Co v Glennon*, Mo App, 287 SW 824

Full or precise descriptions

It is not necessary that the description should be either full or precise

Ark—*Georgia State Sav Ass'n v Marrs*, 9 SW 2d 785, 178 Ark 18—*Ferguson Lumber Co v Scriber*, 258 SW 353, 162 Ark 349—*Barnett Bros v Wright*, 172 SW 254, 116 Ark 44

Cal—*Planing Mill Co v Roman Catholic Bishop*, 176 P 166, 179 Cal 229—*Willamette Steam Mills Co v Kramer*, 29 P 633, 94 Cal 206—*Leibowitz v Berry*, 299 P 779, 114 Cal App 5

Ind—*McNamee v Rauck*, 27 NE 423, 128 Ind 59

Mo—*Chance v Franke*, 165 SW 2d 678, 350 Mo 162

NY—*Hurley v. Tucker*, 112 N Y S

980, 128 App Div 580, affirmed 92 NE 1087, 198 NY 534

60. Ark—*Georgia State Sav Ass'n v Marrs*, 9 SW 2d 785, 178 Ark 18—*Ferguson Lumber Co v Scriber*, 258 SW 353, 162 Ark 349—*Barnett Bros v Wright*, 172 SW 254, 116 Ark 44

Cal—*Planing Mill Co. v Roman Catholic Bishop*, 176 P 166, 179 Cal 229—*Willamette Steam Mills Co v Kramer*, 29 P 633, 94 Cal 206—*Leibowitz v Berry*, 299 P 779, 114 Cal App 5

NY—*Hurley v Tucker*, 112 N Y S 980, 128 App Div 580, affirmed 92 NE 1087, 198 NY 534

40 C J p 220 note 42.

61. Conn—*Charleston Bank v Curtiss*, 18 Conn 342, 46 Am D 325

40 C J p 220 note 44

62. SD—*Velten v McDonald*, 234 NW 23, 57 SD 524

40 C J p 220 note 45

63. Cal—*Leibowitz v Berry*, 299 P 779, 114 Cal App 5

SD—*Velten v McDonald*, 234 NW 23, 57 SD 524.

40 C J p 220 note 46

64. Ark—*Georgia State Sav Ass'n v Marrs*, 9 SW 2d 785, 178 Ark 18

Cal—*Hayward Lumber & Investment Co v Ford*, 148 P 2d 689, 64 Cal App 2d 346—*D I. Nofsinger Lumber Co v Waters*, 101 P 38, 10 Cal App 89

Idaho—*Gem State Lumber Co v Cameron*, 258 P 539, 44 Idaho 595

Ky—*Powers v Brewer*, 38 SW 2d 466, 238 Ky 579—*Lebanon Lumber Co v Clarke*, 152 SW 550, 151 Ky 543

La—*Julius Aaron & Son v Keyser*, 2 La App 649

Minn—*Jandrich v Svabek*, 211 N W 957, 170 Minn 24

NY—*Kolkman v Eshelman*, 230 N Y S 91, 132 Misc 428—*Cleg Co v Henry Moss & Co*, 64 N Y S 2d 99

Ohio—*Delskamp Paint & Glass Co v Stotter*, 28 Ohio NP, NS, 451

Or—*Drake Lumber Co v Lindquist*, 170 P 2d 712, 179 Or 402—*Warrenton Lumber Co v Smith*, 245 P

313, 117 Or 530

Tex—*Collier v Valley Building & Loan Ass'n*, Com App, 63 SW 2d 82, conformed to *Valley Bldg & Loan Ass'n v Collier*, Civ App, 88 SW 2d 611

40 C J p 218 note 35 [a]

Alternative description held insufficient

Ill—*Fifty-Ninth Street Lumber Co. v. Emery*, 237 Ill App 416

An adequate and ascertainable description of the land on which a materialman's lien is claimed is essential to comply with the materialman's lien statute—*Duncan Box & Lumber Co v Stewart*, 30 S E 2d 391, 126 W Va 871.

Constructive notice

In claim for materialman's lien, description of property "sufficient for identification" requires description which, spread on public records, fairly and reasonably constitutes constructive notice—*Ackerson v Albuquerque Lumber Co*, 29 P 2d 714, 38 NM 191.

One description

A mechanic's lien notice is sufficient if the lienor selects one description, among the possible descriptions or forms of description, which will enable the owner or another lienor to identify the subject matter of the claim of lien, and furnishes a street number which will enable the owner or another lienor to locate the property, but it is not enough unless the notice meets both requirements—*In re Friedal Corporation*, C C A N Y, 53 F 2d 758

65. Minn—*Hydraulic Press Brick Co v Pierz Co-op Ass'n*, 211 NW. 386, 169 Minn 452

Knowledge by owner

Subcontractor was not precluded from enforcing lien because notice to owner failed to describe lot with reasonable certainty, where contractor named in notice was building only one building for owner, and owner admitted that he knew that subcontractor was furnishing material, and that notice was supposed to refer to home owner was building—*Lentz Co v Dougherty*, 261 NW. 218, 218 Wis 493.

enable the court to decree the sale⁶⁶ and the purchaser to find the land under such description⁶⁷

The test generally applied in determining the sufficiency of the description is whether it will enable one familiar with the locality to identify with reasonable certainty the property on which the lien is intended to be claimed⁶⁸. Other tests sometimes stated are whether the description is sufficient to apprise interested persons what property is sought to be charged,⁶⁹ or whether the description, when defective and insufficient of itself, affords a reliable clue to extrinsic facts which will render it definite and certain,⁷⁰ or whether the description aided by such extrinsic evidence as is suggested by the description itself would charge one dealing with real estate with notice of the claim for a lien⁷¹. It has been held sufficient to describe the building and the land;⁷² it is not necessary specially to describe an appurtenance belonging to either.⁷³

(2) Errors and Mistakes Generally

A mistake in the description of the property sought to be charged will not invalidate the mechanic's lien where it is not of a character to mislead and the property intended can be certainly identified.

A mistake in the description of the property sought to be charged will not invalidate the lien where it is not of a character to mislead and the property intended can be certainly identified⁷⁴. Thus false calls in the description are not fatal where, on their rejection, enough remains to identify the property.⁷⁵ A lien is rendered void by an intentional⁷⁶ or fraudulent⁷⁷ misdescription, or a description which is so grossly inaccurate as to show that no attempt was made to give a true and accurate description⁷⁸. A lien cannot be sustained when, after eliminating the false, inaccurate, or misleading parts of the claim or statement, there is left either no description⁷⁹ or a description which is not sufficient to identify with reasonable certainty the premises intended to be charged with the lien.⁸⁰

66. Minn.—Knox v Starks, 4 Minn 20

Pa.—Ely v Wren, 90 Pa. 148
40 C.J. p 221 note 59

67. S.D.—Velten v McDonald, 234 N.W. 23, 57 S.D. 524
40 C.J. p 221 note 60

68. Ark.—Arkansas Foundry Co v American Portland Cement Co, 75 S.W.2d 387, 189 Ark. 779—Georgia State Sav. Ass'n v Mairs, 9 S.W.2d 785, 178 Ark. 18—Ferguson Lumber Co v Scriber, 258 S.W.2d 353, 162 Ark. 319—Barnett Bros v Wright, 172 S.W.2d 254, 116 Ark. 44
Cal.—Planning Mill Co v Roman Catholic Bishop, 176 P. 166, 179 Cal. 229—Willamette Steam Mills Co v Kierner, 29 P. 633, 94 Cal. 205—Leibowitz v Berry, 299 P. 779, 114 Cal. App. 5

Del.—Pittman-Berger Co v Parkinson, 180 A. 645, 7 W.W.Hair 105

Ill.—Donkle & Webber Lumber Co v Rohrmann, 33 N.E.2d 709, 310 Ill. App. 17

Ind.—Isbell Lumber & Coal Co v Marchesseau Plumbing Co, 11 N.E.2d 518, 104 Ind. App. 373

Mo.—Chance v Franke, 165 S.W.2d 678, 350 Mo. 162.

N.Y.—Hurley v Tucker, 112 N.Y.S. 980, 128 App. Div. 580, affirmed 92 N.E. 1087, 198 N.Y. 534—John Ro-shirt, Inc. v Rosenstock, 247 N.Y.S. 420, 138 Misc. 515

Ohio.—Shannon Co v Wurhlitzer, 186 N.E. 879, 45 Ohio App. 194

Okla.—Kennedy v Uhrsch, 62 P.2d 994, 178 Okla. 366—Corbett v Logan, 20 P.2d 891, 163 Okla. 86

Pa.—Fisher v Layton, 23 W.2d Co. L.J. 195

S.D.—Velten v McDonald, 234 N.W. 23, 57 S.D. 524

Wyo.—Corpus Juris quoted in Mawson-Peterson Lumber Co v Sprinkle, 140 P.2d 588, 590, 59 Wyo. 331, 147 A.L.R. 1089
40 C.J. p 220 note 47

All that is necessary is that a person of ordinary understanding should be able to find and recognize the premises intended by the description—Gensreiter v Standard Lumber Co, 63 S.W.2d 347, 187 Ark. 893—Brown v Turrage Hardware Co, 26 S.W.2d 1114, 181 Ark. 606

Description held valid rule

Description in lien claim giving wrong street number, omitting number of tract block, and referring to wrong record, was sufficient for identification as enabling a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the exclusion of others—Bothum v Kreis, 282 P. 414, 101 Cal. App. 687

Exclusion of other property

The description must itself furnish the needed information to identify the property to the exclusion of all other property—Headrick v Waterbury, 126 S.W.2d 411, 277 Ky. 288—Tackett v Pikeville Supply & Planning Mill Co, 61 S.W.2d 881, 249 Ky. 835—Powers v Brewer, 38 S.W.2d 466, 238 Ky. 579

69. Mont.—Johnson v Erickson, 185 P. 1116, 56 Mont. 550

Wyo.—Corpus Juris quoted in Mawson-Peterson Lumber Co v Sprinkle, 140 P.2d 588, 590, 59 Wyo. 334, 147 A.L.R. 1089

70. Wyo.—Corpus Juris quoted in Mawson-Peterson Lumber Co v Sprinkle, 140 P.2d 588, 590, 59 Wyo. 334, 147 A.L.R. 1089.

40 C.J. p 221 note 49

71. Neb.—Drexel v Richards, 70 N.W. 23, 50 Neb. 509

72. Utah—Park City Meat Co v Comstock Silver King Min. Co, 103 P. 254, 36 Utah 145

73. Utah—Park City Meat Co v Comstock Silver King Min. Co, supra

74. Ark.—Georgia State Sav. Ass'n v Mairs, 9 S.W.2d 785, 178 Ark. 18—Barnett Bros v Wright, 172 S.W.2d 254, 116 Ark. 44

Ill.—Huebner v Kornajzer, 259 Ill. App. 540

N.Y.—Janotta v Noslac Realty Corporation, 246 N.Y.S. 510, 231 App. Div. 864

Wyo.—Corpus Juris quoted in Mawson-Peterson Lumber Co v Sprinkle, 140 P.2d 588, 590, 59 Wyo. 334, 147 A.L.R. 1089

40 C.J. p 221 note 57

75. Minn.—Hydraulic Press Brick Co v Pierz Co-op Ass'n, 211 N.W. 836, 169 Minn. 452

40 C.J. p 221 note 58

76. Conn.—Tramonte v. Wilens, 94 A. 978, 89 Conn. 520—Rose v Perse & Brooks Paper Works, 29 Conn. 256

77. Conn.—Tramonte v. Wilens, 94 A. 978, 89 Conn. 520.

78. Conn.—Tramonte v. Wilens, supra—Rose v Perse & Brooks Paper Works, 29 Conn. 256

79. Minn.—H. S. Johnson Co v Ludwigson, 182 N.W. 619, 148 Minn. 468.

Or.—Joshua Hendy Mach Works v Pacific Cable Constr. Co, 33 P. 403, 24 Or. 152

80. Minn.—Hydraulic Press Brick Co v Pierz Co-op Ass'n, 211 N.W. 836, 169 Minn. 452—H. S. Johnson

A description is obviously insufficient to create or preserve a lien on land where the land which may be subjected to the lien is not described at all, but the description given is entirely of land other than that improved.⁸¹

(3) Matters in Aid of Description

Various matters have been considered by the courts in upholding otherwise imperfect descriptions.

Matters taken into consideration and given weight in upholding an otherwise imperfect description include matters referred to in the description,⁸² the fact that the person sought to be charged could not have been misled,⁸³ the status of the persons who are parties to the suit and whose rights will be affected,⁸⁴ the fact that no other property answers the description in the notice,⁸⁵ and the fact that the owner named owns no other property in the locality.⁸⁶ Insufficiency of description in one part of the statement is cured by a correct description in a subsequent part.⁸⁷ A sufficient but imperfect description may be aided by averments in the complaint,⁸⁸ but a notice which is void for uncertainty

may not be made effective as a lien by averment.⁸⁹ It has been held that proof of actual notice will not cure a fatally defective description.⁹⁰

(4) Area Included in Description

- (a) Inclusion of too much land
- (b) Failure to include all land subject to lien

(a) Inclusion of Too Much Land

Generally the fact that the claim or statement describes more land than is subject to the lien does not defeat the lien as to the land properly subject thereto if there is no fraudulent intent and no one is injured thereby.

As a general rule the fact that the claim or statement describes more land than is subject to the lien does not defeat the lien as to the land properly subject thereto if there is no fraudulent intent and no one is injured thereby.⁹¹ Where the tract on which the improvement is erected is of greater area than the statute allows to be subjected to the lien, it has been held that a claim or statement describing the entire tract, without specifically describing a por-

Co v Ludwigson, 182 NW 619 148 Minn 468

81. Ky—Headrick v Waterbury, 126 SW 2d 411, 277 Ky 288—Powers v Brewer, 38 SW 2d 466, 238 Ky 579

Minn—Hydraulic Press Brick Co v Piers Co-op Ass'n, 211 NW 836, 169 Minn 452

NM—Ackerson v Albuquerque Lumber Co, 29 P 2d 714, 38 NM 191

NY—John Roshirt, Inc. v Rosenstock, 247 NYS 430, 138 Misc 515

W Va—Duncan Box & Lumber Co v Stewart, 30 SE 2d 391, 126 W Va 871

40 CJ p 221 note 66

82. Cal—Hayward Lumber & Investment Co v Ford, 148 P 2d 689, 64 Cal App 2d 346—Leibowitz v Berry, 299 P 779, 111 Cal App 5 40 CJ p 221 note 68

Reference held insufficient

Cal—Hayward Lumber & Investment Co v Pride of Mojave Mining Co, 110 P 2d 439, 43 Cal App 2d 146

Separate instruments

Where instrument, purporting to create mechanic's lien and containing insufficient description of land to fix lien thereon, was assigned on same piece of paper with same description, execution at about same time of note and deed of trust describing land could not supply insufficiency in description in original instrument where they were separate instruments not referred to in original—Collier v Valley Building

& Loan Ass'n, Tex Com App, 62 S W 2d 82, conformed to Valley Building & Loan Ass'n v Collier, Civ App, 38 SW 2d 611, error refused

83. Wyo—Corpus Juris cited in Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 590, 59 Wyo 334, 147 ALR 1089 40 CJ p 222 note 69

84. Or—McFeron v Dovens, 116 P 1063, 59 Or 366 40 CJ p 222 note 70

85. Ark—Georgia State Sav Ass'n v Maris, 9 SW 2d 785, 178 Ark 18—Ferguson Lumber Co v Scriber, 258 SW 353, 162 Ark 319—Barnett Bros v Wright, 172 SW 254, 116 Ark 44

NY—Hurley v Tucker, 112 NYS 980, 128 App Div 580, affirmed 92 NE 1087, 198 NY 534 40 CJ p 222 note 71

86. Wyo—Corpus Juris cited in Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 590, 59 Wyo 331, 147 ALR 1089 40 CJ p 222 notes 72, 73

87. Wash—Whittier v Stetson & Post Mill Co, 33 P 393, 6 Wash 190, 86 Am SR 149

88. Ind—White v Stanton, 13 NE 48, 111 Ind 510—Stephens v Duffy, 81 NE 1154, 41 Ind App 385, rehearing denied 83 NE 268, 41 Ind App 385

89. Ind—Irwin v Crawfordsville, 72 Ind 111

90. Neb—Holmes v Hutchins, 57 N W 514, 38 Neb 601

91. US—Suburban Improvement Co v Scott Lumber Co, CCA W

Va, 59 F 2d 711, 87 ALR 330, certiorari denied Scott Lumber Co v Suburban Imp Co, 53 S Ct 123, 287 US 660, 77 L Ed 569

Idaho—Corpus Juris cited in White v Constitution Mm & Mill Co, 55 P 2d 152, 159, 56 Idaho 403

Ill—Alexander Lumber Co v Swindlerhurst, 32 NE 2d 637, 309 Ill App 433

Kan—Golden Belt Lumber Co v McLean, 26 P 2d 374, 138 Kan 351

NY—Jannotta v Noslac Realty Corporation, 246 NYS 510, 231 App Div 864—Kolkman v Eshelman, 230 NYS 91, 132 Misc 428

SD—Wittrock v Hall, 211 NW 801, 51 SD 39

40 CJ p 222 note 78

Willful or malicious claim

Refusal to enforce lien for labor and material and allowance of damages to defendant in foreclosure suit was not justified on ground that lien covered much more realty than was necessary or proper, in absence of showing that excessive claim was made willfully or maliciously or was brought to court's attention until final submission of case on merits—Yates v Wells, 62 P 2d 1354, 138 Wash 701

Procedure to limit lien

Where defendant claims that a mechanic's lien has been filed against more land than should be justly included thereon, the proper procedure to limit it is by petition and rule—Bickerton v Vaughn, 38 Pa Dist & Co 645, 3 Fay LJ 105, 88 Pittsb Leg J. 393

tion thereof which is of the permitted area, is sufficient,⁹² as in such case it is for the court to decide what portion of the land is to be subjected to the lien.⁹³ Under this rule all that is essential is that the portion of land or the building be designated in such language as will afford information concerning the situation of the property to be charged with the lien.⁹⁴ On the other hand, under such circumstances it has also been held that the claim or statement must describe the portion of the tract on which the lien is to be enforced.⁹⁵

(b) Failure to Include All Land Subject to Lien

The validity of the claim is not affected by the fact that it does not cover as much land as it might properly have covered.

The validity of the claim is not affected by the fact that it does not cover as much land as it might properly have covered.⁹⁶ In some jurisdictions it has been held that, where a house is built or other improvement is made on two or more lots and the lien claim describes less than the whole number of lots, the failure to describe the remaining lot or lots

does not defeat the lien on the lot or lots described,⁹⁷ but in other jurisdictions the contrary has been held,⁹⁸ at least where the work done and materials furnished cannot be apportioned between the lots.⁹⁹ It has been held that the lien may be enforced against the building and the land which properly goes with it, even though a part of the land covered by the building is not included in the description in the lien claim,¹ but it has also been held that where the claim describes part of, but less than, the entire tract, the balance of the tract not described is not subject to the lien,² and it has further been held that there is no lien where the building is substantially upon a lot not described and only to a slight extent upon the lot described.³

(5) Location in Respect of Streets or Other Property

Descriptions which include a statement of the location of the property with reference to certain named streets, or with respect to other property, have been upheld.

The courts have upheld descriptions including a statement of the location of the property with reference to certain named streets.⁴ In some,⁵ but not

92. Wash—Keane v Thomas B Watson Co, 271 P 73, 149 Wash 424
40 C J p 222 note 79

93. Idaho—Corpus Juris cited in White v Constitution Min & Mill Co, 55 P 2d 152, 159, 56 Idaho 403
40 C J p 222 note 80

94. Ark—Whitener v. Purifoy, 5 S W 2d 724, 177 Ark 39—Ferguson Lumber Co v Scriber, 258 S W 353, 162 Ark 349

It is sufficient that description points out and indicates premises, so that, by applying it to the land, the structure into which the materials are placed can be found and identified—Geisreiter v Standard Lumber Co, 63 S W 2d 347, 187 Ark 893—Brown v Turnage Hardware Co, 26 S W 2d 1114, 181 Ark 606

In the application of this principle the fact that the claim filed under the statute described more land than is subject to the lien does not defeat the lien as to the amount of land subject thereto under the statute where the claim and the account filed with it, duly verified, indicate the improvement, so that it can be identified by persons of ordinary intelligence, to hold otherwise would subject substance to form and deny the lien to persons clearly entitled thereto under the statute—Arkansas Foundry Co v American Portland Cement Co, 75 S W 2d 387, 189 Ark 779—Brown v Turnage Hardware Co, 26 S W 2d 1114, 181 Ark 606

Survey

Where affidavit for mechanic's lien sufficiently describes improvements, law fixes amount of land to be covered by lien and it is mere matter of surveying to determine correct description—Arkansas Foundry Co v American Portland Cement Co, 75 S W 2d 387, 189 Ark 779

Improvements held sufficiently described

Ark—Arkansas Foundry Co v American Portland Cement Co, supra

95. Ala—Fowler v Mackentepe, 172 So 266, 233 Ala 458
40 C J p 222 note 81

Rural lots or lands

Description, in bill and statement attached as an exhibit, of property on which it was sought to enforce materialman's lien as frame building and one acre in addition to the land upon which the building was situated being part of tracts described by government subdivisions and containing eighty acres more or less and not in a city, town, or village, was sufficient as to the building and the land on which it rested, but not as to the additional acre of adjacent land—Fowler v Mackentepe, supra

96. Ill—Crowen v Meyer, 174 N E 55, 342 Ill 46

N J—Riverside Apartment Corporation v Capitol Const Co, 152 A 713, 107 N J Eq 405, affirmed 158 A 710, 110 N J Eq 67
40 C J p 222 note 83

97. Ill—Sorg v Pfelzgraf, 113 Ill App 569
40 C J p 223 note 84

98. Wash—Whittier v Stetson & Post Mill Co, 33 P 393, 6 Wash 190, 36 Am S R 149

Notice held insufficient

Mechanic's lien notice description omitting portion of premises to which lien might attach, and including land to which it could not attach, giving only one of four street numbers applicable, and metes and bounds description fitting no part of property which street numbers fitted was insufficient—In re Friedal Corporation, C C A N Y, 53 F 2d 758

99. N Y—Storch v Marginal Realty Corp, 180 N Y S 611, 109 Misc 669—General Electric Co v Mori, 201 N Y S 561

1. Ohio—Delaskamp Paint & Glass Co v Stotter, 28 Ohio N P, N S, 451
40 C J p 223 note 87

2. N J—Riverside Apartment Corporation v Capitol Const Co, 152 A 713, 107 N J Eq 405, affirmed 158 A 740, 110 N J Eq 67

3. Hawaii—City Mill Co, Ltd v Horita, 21 Hawaii 585

4. Tex—Gillespie v Remington 18 S W 338, 66 Tex 108
40 C J p 223 note 89

5. Va—Taylor v Netherwood, 20 S E 888, 91 Va 88
40 C J p 223 note 90.

other,⁶ cases a description stating that the property is located on a certain side of a named street between two other named streets has been held sufficient. A description stating the street and number may be sufficient,⁷ but not where only one street number is stated, the work was done on two lots and cannot be apportioned, and it does not appear that the number stated is commonly used to designate both lots.⁸ Some statutes expressly require the street and number, if known, to be stated where the property is located in a city or village.⁹ However, a description otherwise sufficient for purposes of identification is not rendered insufficient by a failure to state the street number in the absence of a showing that property in the community bears numbers.¹⁰ A slight error in spelling the name of the street on which the property is located is not fatal where no one is misled thereby.¹¹

A description of the property as adjoining that of other named persons is sufficient where there is no other property answering the description,¹² but not where only one person is named and he owns property on both sides of the street.¹³ In connection with other descriptive statements, a statement that the property adjoins in a named direction certain described premises¹⁴ or the property of another person¹⁵ may be sufficient.

(6) Numbers of Lot and Block or Government Subdivision

A description of city or town lots by lot and block numbers as appearing on a recorded plat to which reference is made is sufficient; and a description by government subdivisions giving the section numbers, etc., has also been held sufficient to identify and locate the property.

It is a sufficient description of city or town lots to give the lot and block numbers as appearing on a recorded plat to which reference is made,¹⁶ and a description by government subdivisions giving the section numbers, etc., has also been held sufficient to identify and locate the property with sufficient certainty to sustain the lien.¹⁷ A description by block number alone has been held sufficient in some,¹⁸ and insufficient in other,¹⁹ decisions. The lien has been held not to be defeated by a mistake in the number of the block²⁰ or section²¹ in which the property is located; but it has also been held that in so far as the notice of lien gives the wrong section number it is fatally defective.²²

In some,²³ but not other,²⁴ decisions a like holding has been made in respect of a mistake in the platted number of the lot. In some cases the lien has been held not to be defeated by a mistake in the name of the subdivision in which the property is lo-

6. Mo—Matlack v Lare, 32 Mo 262
7. NY—Hurley v Tucker, 112 NY S 980, 128 App Div 580, affirmed 92 NE 1087, 198 NY 534—Walkam v Henry, 27 NYS 997, 7 Misc 532

Alternative description

Such a description has been held insufficient to correct a notice describing land in the alternative—Fifty-Ninth Street Lumber Co v Emery, 237 Ill App 416

8. NY—General Electric Co v Mori, 201 NYS 561
9. US—In re Friedal Corporation, CCANY, 53 F2d 758
- NY—Hurley v Tucker, 112 NYS 980, 128 App Div 580, affirmed 92 NE 1087, 198 NY 534—Cleg Co v Henry Moss & Co, 64 NYS 2d 99
10. NY—Krauss v Brunett, 130 NYS 1086, 73 Misc 428
11. NY—Hurley v Tucker 112 NYS 980, 128 App Div 580, affirmed 92 NE 1087, 198 NY 534
40 CJ p 223 note 96
12. Pa.—Shaffer v Hull, 2 Pa LJ R 93, 3 Pa LJ 321
13. Pa.—In re Hill's Estate, 2 Pa LJR 96, 3 Pa LJ 323
14. Tex.—Gillespie v Remington, 18 SW 338, 66 Tex 108.

15. Pa.—Shaw v Barnes, 5 Pa 18, 47 Am D 399

16. Mo—Roy F Stamm Electric Co v Hamilton-Brown Shoe Co, 171 SW 2d 580, 350 Mo 1178, 146 ALR 917
40 CJ p 224 note 3

Alley between lots

Description of two lots in mechanics' lien statement as bounded and described on recorded plat embraced lands to center of alley between lots, although alley was not specifically described or referred to in such statement—Roy F Stamm Electric Co v Hamilton-Brown Shoe Co, supra.

Dimensions of property

Where the lot number and dimensions of the property as stated in the lien statement are correct and there is only one other lot in the block of exactly the same dimensions, designation of the lot intended as being on a particular side of the tract in which they are both located has been held to be sufficient—Chance v Frank, 165 SW 2d 678, 350 Mo 162

Showing contiguity of lots

Description in mechanic's lien claim of several lots by numbers designated on a plat, duly recorded among the land records of the county, giving book and folio and reference to deeds by which lots were con-

veyed, was sufficient, it not being necessary to state specifically that lots were contiguous—Caltrider v Isberg, 130 A 53, 148 Md 657—40 CJ p 224 note 3 [c]

17. Minn—Nelson v Sampson, 248 NW 105, 186 Minn 271
40 CJ p 224 note 4
18. Iowa—Chicago Lumber Co v Des Moines Driving Park, 65 NW 1017, 97 Iowa 25
40 CJ p 224 note 5
19. Minn—Knox v Starks, 4 Minn 20
20. Kan—Corpus Juris quoted in Gaudreau v Smith, 40 P2d 365, 367, 141 Kan 123
Mich—Grand River Lumber & Coal Co v Glenn, 207 NW 855, 234 Mich 310
40 CJ p 224 note 7
21. Kan—Corpus Juris quoted in Gaudreau v Smith, 40 P2d 365, 367, 141 Kan 123
40 CJ p 224 note 8
22. Cal—Hayward Lumber & Investment Co v Pride of Mojave Mining Co, 110 P2d 439, 48 Cal. App 2d 146
23. Minn—Atlas Lumber Co v Dupus, 145 NW. 620, 125 Minn. 45
40 CJ p 224 note 9
24. Mont—Goodrich Lumber Co. v. Davie, 32 P. 282, 13 Mont. 76.

cated,²⁵ but it has been held otherwise where there is in fact another subdivision corresponding to the one named²⁶

(7) Failure to Name Political Division or Subdivision

A description which fails to name the political division or subdivision has been held insufficient, but such omission may not be fatal where the notice apprises the parties that a lien is claimed or where the description sufficiently identifies the property and distinguishes it from all others.

A description which does not name the state, county, city, borough, or town in which the property is situated has been held insufficient²⁷ However, a failure to name the state or territory, the legal subdivision thereof, or the city wherein the premises to be charged are situated may not be fatal,²⁸ provided there is sufficient in the notice, taken in connection with all the circumstances²⁹ and the place where the notice is filed or recorded,³⁰ to apprise persons dealing with the property that a lien is claimed thereon, or provided the description is sufficient to identify the property and to distinguish it from every other piece of property³¹

(8) Description of Building or Improvement Generally

It is sometimes expressly required that the building

shall be described, and that the statement of claim shall set forth the locality of the building, house, or structure, with such description as may be sufficient to identify it.

A description of the buildings may aid in the identification of the property intended to be subjected to the lien,³² as where the land is not clearly described³³ It is sometimes expressly required that the building shall be described³⁴ and that the statement of claim shall contain and set forth the locality of the building, house, or structure,³⁵ with such description as may be sufficient to identify it³⁶ Although under the statute the property to be identified by the description in the claim or notice is the building or other improvement,³⁷ it may be identified by reference to the land upon which it is situated³⁸ Unless the statute requires the building to be described, a description of the land will include the buildings on it³⁹ and the lien will attach to both, although the buildings are not mentioned⁴⁰ In setting out the situation and peculiarities of a building, such matters of description as are adequate to identify the building are sufficient⁴¹ It is not necessary to state the name of the building,⁴² but, where the building has a well-known name which distinguishes it from all other buildings in the locality, the use of such name in the description may of itself serve as a sufficient identification of the

25. Ind—Smith v Newbaur, 42 N E 40, 1094, 144 Ind 95, 33 L R A 685

40 C J p 224 note 11.

26. Mont—Johnson v Erickson, 185 P 1116, 56 Mont 550

27. Or—Lorenz Co v Gray, 298 P 222, 136 Or 605, rehearing denied and opinion adhered to Lorenz Co v Day & Co, 300 P 949, 136 Or 605

Pa—Brown v. Myers, 23 A 254, 145 Pa. 17

28. Colo—Pacific Lumber Co v Watters, 219 P 782, 74 Colo 147 40 C J p 224 note 15

29. Mich—Acme Lumber Co v Modern Constr Co, 183 NW 192, 214 Mich 357 40 C J p 224 note 16

30. Alaska—Irvine v. McDougall, 4 Alaska 702

31. Colo—Pacific Lumber Co v. Watters, 219 P 782, 74 Colo 147 Ill—Neison v. Urban, 236 Ill App 447

32. Colo—Miller v Davis, 145 P 714, 26 Colo App 483

33. Ind—McNamee v Rauck, 27 N E 413, 128 Ind 59—Crawfordsville v Johnson, 51 Ind 397

34. Or—Lorenz Co v Gray, 298 P 222, 136 Or 605, rehearing denied and opinion adhered to Lorenz Co

v Day & Co, 300 P 949, 136 Or 605

Pa—McAdoo v Schultz, Com Pl, 25 Erie Co 112 40 C J p 224 note 22

35. Del—Pittman-Berger Co v Parkinson, 180 A 645, 7 WW Harr 105

Pa—Stockdale Hardware Co v Knapp, Com Pl, 25 West Co L J 4

36. Del—Pittman-Berger Co v Parkinson, 180 A 645, 7 WW Harr 105

Description held sufficient

Del—Pittman-Berger Co v. Parkinson, supra

37. Mont—Federal Land Bank of Spokane v Green, 90 P 2d 489, 108 Mont 56. 40 C J p 225 note 23

38. Mont—Midland Coal & Lumber Co v Ferguson, 202 P 389, 61 Mont 402—Johnson v Erickson, 185 P 1116, 56 Mont 550

39. Colo—Miller v Davis, 145 P 714, 26 Colo App 483 40 C J p 225 note 25

40. Colo—Miller v Davis, supra Minn—Johnson v Salter, 72 NW 974, 70 Minn 146, 68 Am SR 516

41. Ky—Tackett v Pikeville Supply & Planing Mill Co, 61 SW 2d 881, 249 Ky 835

40 C.J. p 225 note 27.

Reference by job number

Descriptions in mechanics' liens were sufficient where three houses, built on single unsubdivided corner lot, were referred to by number of job—Shannon Co v Wurlitzer, 186 NE 879, 45 Ohio App 194

Only building answering description

The building may be identified sufficiently by such a description of the building itself as will enable a person familiar with the locality to point it out as the only one corresponding with the description contained in the lien—Federal Land Bank of Spokane v Green, 90 P 2d 489, 108 Mont 56—40 C J p 225 note 27 [b]

Descriptions held sufficient

Ill—Huebner v. Kornajzer, 259 Ill App 540

Ky—Tackett v Pikeville Supply & Planing Mill Co, 61 SW 2d 881, 249 Ky 835

40 C J p 225 note 27 [c]

Descriptions held insufficient

Minn—Hydraulic Press Brick Co v Pierz Co-op Ass'n, 211 NW 836, 169 Minn 452

40 C J p 225 note 27 [d]

42. Minn—Northwestern Cement & Concrete Pavement Co v Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 45 NW, 868, 43 Minn 449

40 C J p 225 note 28.

property.⁴³

Separate or entire buildings. Where there are two or more buildings on the premises, the claim or notice may describe less,⁴⁴ but should not describe more,⁴⁵ than the number lienable, nor should it leave uncertain the building upon which the lien is claimed.⁴⁶ However, the inclusion by a materialman of old buildings on the same lot as the new building, in his certificate of lien, under a mistaken belief that part of his materials had been used in such old buildings, is such a mistake of fact as will not invalidate his lien on the new building.⁴⁷ A description of two or more buildings or structures as one building has been upheld where all were located on a parcel of land belonging to a single owner and where all were connected to some extent,⁴⁸ but not where they were separate buildings owned by different persons and located upon separate tracts of land⁴⁹ or where part of the buildings were new and part were old.⁵⁰

Where several structures form a single plant, it is better practice to state that fact clearly in the claim,⁵¹ but a failure to do so is not fatal.⁵² The description is insufficient where it describes a part of a single building as a separate building,⁵³ but where a stamp mill and a tramway from the mill to a mine are built, the mill, mine, and tramway do not constitute such an entire "structure" within the meaning of the statute as to invalidate a lien filed for materials used in erecting the mill and constructing the tramway because such lien was not filed against the mine also.⁵⁴

(9) Lien on Improvement Alone

When the lien can be enforced or is claimed only against the building, erection, or improvement, and not against the land on which it is situated, a description of such building, erection, or improvement sufficiently defi-

nite to enable the officer who may be called on to remove it from the premises to identify it from all other buildings, erections, or improvements on the premises is indispensable to obtaining the lien.

When the lien can be enforced or is claimed only against the building, erection, or improvement, and not against the land on which it is situated, a description of such building, erection, or improvement sufficiently definite and certain to enable the officer who may be called on to remove it from the premises to identify it from all other buildings, erections, or improvements on the premises is indispensable to obtaining the lien.⁵⁵ However, if the building is sufficiently described for the purposes of identification, the lien is not defeated by a failure to describe the land,⁵⁶ or by an imperfect or insufficient description of the land,⁵⁷ unless the jurisdiction is one in which, as discussed *infra* § 188, a lien cannot exist or be enforced against the structure separate from the land, in which case the question to be determined is the sufficiency of the description of the land and the building and not of the building alone.⁵⁸

§ 162. Ownership of Property

- a. Name and address of owner
- b. Estate or interest of owner

a. Name and Address of Owner

- (1) Necessity
- (2) Persons or bodies to be named
- (3) Form of statement
- (4) Omission, error, and mistake

(1) Necessity

Under a number of the statutes, in order to perfect a lien, the lien claim or statement must state the name of the owner or reputed owner of the property sought to be charged, provided the name is known to the claimant.

Under some statutes the lien statement need not

43. Neb—Drexel v Richards, 70 N W 23, 50 Neb 509.

40 C J p 225 note 29

44. Dak—McCormack v Phillips, 34 N W 39, 4 Dak 506

45. US—Pusey v Pennsylvania Paper Mills, C C Pa., 173 F 631, affirmed 185 F 481, 107 CCA 581

46. Idaho—Gem State Lumber Co v Cameron, 258 P 539, 44 Idaho 595

SD—Velten v McDonald, 234 N W 23, 57 SD 524—Smith v Bowder, 141 N W 786, 31 SD 607

In determining to which "frame building" on certain land materialman's lien attached, list of materials attached to and made part of lien, which included materials which could have been used only in dwelling house, was to be considered as part

of description of building, notwithstanding some of the materials listed could not have gone into dwelling house—Federal Land Bank of Spokane v Green, 90 P 2d 489, 108 Mont 56

47. Conn—Peck v Brush, 94 A 981, 89 Conn 554

48. Conn—Burque v Naugatuck Lumber Co, 155 A. 414, 113 Conn 350

40 C J p 225 note 31

49. Conn—De Wolf v Bonee, 101 A 233, 91 Conn 712

50. US—Pusey v Pennsylvania Paper Mills, C C Pa., 173 F 634, affirmed 185 F 481, 107 CCA 581
Pa—Wharton v Douglas, 93 Pa 66

51. Pa—Union Savings & Bldg Ass'n v Vahle, 84 A. 407, 285 Pa 435

52. Pa—Union Savings & Bldg Ass'n v Vahle, *supra*

53. Pa—Philadelphia Packing & Provision Co's Estate, 4 Pa Dist 57, 15 Pa Co 650

54. Or—Watson v Noon-Day Min Co, 60 P 994, 37 Or 287

55. Idaho—Corpus Juris quoted in Gem State Lumber Co v Cameron, 258 P 539, 510, 44 Idaho 595
Mo—Hydraulic Press Brick Co. v Weidner, 88 Mo App 17

56. Or—Kearney v Marks, 16 P 407, 15 Or 539

40 C J p 225 note 42

57. Ala—Robinson v Crotwell Bros. Lumber Co, 52 So 733, 167 Ala. 566

40 C J p 225 note 43

58. Hawaii—City Mill Co, Ltd v. Horita, 21 Hawaii 585

contain the name of the owner of the property on which the lien is claimed.⁵⁹ In order to acquire a lien under a number of the statutes, however, the lien claim or statement must state the name of the owner,⁶⁰ part owner,⁶¹ or reputed owner⁶² of the property sought to be charged, provided the name is known to claimant.⁶³ Under such statutes where the owner's name is known a statement thereof is essential to the validity of the claim.⁶⁴ Where the name of the owner is unknown, it has been held that that fact ought to be stated,⁶⁵ but it has also been held that in such case the claim need aver nothing on the subject.⁶⁶

It has been held that a statement of the address of the owner in the statement of claim is not essential to the validity of the lien.⁶⁷

(2) Persons or Bodies to Be Named

(a) In general

- (b) Where property has been leased, mortgaged, sold, or transferred

(a) In General

The claim must mention the name of the owner of the interest to be charged by the mechanic's lien.

The name of the owner required to be mentioned in the claim is the name of the owner of the interest to be charged.⁶⁸ Claimant can only be charged with knowledge of the ownership as apparent on the public records,⁶⁹ and he is justified in naming as owner the person shown to be such by the public records.⁷⁰ However, it has been held that in ascertaining who is the owner, and naming him in the statement for a lien, claimant cannot rest alone on the public records and ignore all other sources of information.⁷¹

Where the property is owned by the state⁷² or by

59. Neb.—Garlachs v Donnelly, 60 N W 323, 42 Neb 57 40 C J p 226 note 46

60. Ala.—Hancock v Taylor, 21 So 2d 308, 246 Ala 521. Fla.—Rieck & Fleece v Cunniff, 190 So 8, 138 Fla 742.

La.—Julius Aaron & Son v Keyser, 2 La App 619

Mass.—William S Howe Co v Theyson, 160 N E 287, 263 Mass 27

Mich.—F M Sibley Lumber Co v. Gottesman, 22 N W 2d 72, 314 Mich 60—Lowrie & Webb Lumber Co v Ferguson, 20 N W 2d 209, 312 Mich 331—Sara v Andrews, 232 N W 254, 251 Mich 376—Skupinski v Provident Mortg Co, 221 N W 338, 244 Mich 309—Huebner v Lashley, 214 N W 107, 239 Mich 50—Noud v Stedman, 160 N W 547, 193 Mich 459

Mont.—Blöse v Havre Oil & Gas Co, 31 P 2d 738, 96 Mont 450

Okl.—Kennedy v Uhrich, 69 P 2d 991, 178 Okl 366

Or.—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—Paget v Peters, 286 P 983, 133 Or 608, rehearing denied 289 P 1119, 133 Or 608

Pa.—Moss & Blakeley Plumbing Co v Schauer, 28 A 2d 823, 150 Pa Super 318—Brown v Engle, 75 Pa Super 592—Connolly v Fierman, 8 Pa Dist & Co. 92, 24 Luz Leg Reg 78—McAdoo v Schultz, Com Pl, 25 Erie Co 112

Va.—Wallace v Blumback, 12 S E 2d 801, 177 Va 36

40 C J p 226 note 47

Purpose of requirement

(1) The evident purpose of the statute is to give notice to the person most vitally interested that a lien is asserted against his property.

—Skupinski v Provident Mortg Co, 221 N W 338, 244 Mich 309

(2) "A statement of the name of the owner against whose interest the lien is claimed is required for purposes of identification"—Abelman v Myer, 106 N Y S 978, 122 App Div 470, 472

Charging married woman's separate property

Fla.—Salomon v. Galinsky, 137 So 386, 103 Fla 417

61. Mich.—F M Sibley Lumber Co v. Gottesman, 22 N W 2d 72, 314 Mich 60—Lowrie & Webb Lumber Co v Ferguson, 20 N W 2d 209, 312 Mich 331—Sara v Andrews, 232 N W 254, 251 Mich 376—Skupinski v Provident Mortg Co, 221 N W 338, 244 Mich 309—Huebner v Lashley, 214 N W 107, 239 Mich 50—Noud v Stedman, 160 N W 547, 193 Mich 459

62. Or.—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—Paget v Peters, 286 P 983, 133 Or 608, rehearing denied 289 P 1119, 133 Or 608

Pa.—Moss & Blakeley Plumbing Co v Schauer, 28 A 2d 823, 150 Pa Super 318—McAdoo v Schultz, Com Pl, 25 Erie Co 112 40 C J p 226 note 48

63. Mich.—F M Sibley Lumber Co v Gottesman, 22 N W 2d 72, 314 Mich 60—Lowrie & Webb Lumber Co v Ferguson, 20 N W 2d 209, 312 Mich 331—Skupinski v Provident Mortg Co, 221 N W 338, 244 Mich 309—Huebner v Lashley, 214 N W 107, 239 Mich 50—Noud v Stedman, 160 N W 547, 193 Mich 459 Or.—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402—Paget v Peters, 286 P 983, 133 Or 608, re-

hearing denied 289 P 1119, 133 Or 608

40 C J p 226 note 49

64. Cal.—Diamond Match Co v Sanitary Fruit Co, 234 P 322, 70 Cal App 695

40 C J p 227 note 51

65. Colo.—Lowell Hardware Co v May, 149 P 831, 59 Colo 475 40 C J p 227 note 58

66. Me.—Durling v Gould, 21 A 833, 83 Me 134

40 C J p 227 note 59

67. Mich.—Milligan v Rappaport, 234 N W 166, 253 Mich 120

68. D C.—Chamberlin Metal Weather Strip Co v Karrick, 58 F 2d 928, 60 App D C 316

40 C J p 227 note 60

Person not interested

Naming in the claim of lien one whose interest in the property is not affected thereby is not required—Strand Lumber Co v Dostie, 245 N. W 777, 260 Mich 422—Sara v Andrews, 232 N W 254, 251 Mich 376

The legal owner is the one to be named—Sprague Inv Co v Mouat Lumber & Investment Co, 60 P 179, 14 Colo App 107—40 C J p 227 note 61.

69. Colo.—Bitter v Mouat Lumber & Investment Co, 51 P. 519, 10 Colo App 307

Md.—Shryock v. Hensel, 53 A 412, 95 Md. 614

70. N Y.—Rubin v Coles, 253 N Y S. 808, 142 Misc 139

40 C J p 227 note 63.

71. Kan.—Lang v Adams, 80 P. 593, 71 Kan 309

72. Mich.—Lowrie & Webb Lumber Co v Ferguson, 20 N W 2d 209, 312 Mich 331.

a corporation,⁷³ the state or corporation should be named as owner. If the property is owned by an unincorporated association the persons composing it should be described by their associate or joint name,⁷⁴ or otherwise so that they can be identified,⁷⁵ and where the owner is an individual doing business under a trade name it is proper to designate him by such name.⁷⁶ A statement naming as the owner the estate of a certain decedent has been held sufficient.⁷⁷ Likewise the naming of an heir as owner has been upheld.⁷⁸

In order to perfect a lien against the building or improvement alone, it is sufficient to name the owner of the building or improvement.⁷⁹

(b) Where Property Has Been Leased, Mortgaged, Sold, or Transferred

Where there has been a change of ownership, the rule obtaining in a majority of jurisdictions is that the person to be named as owner is the one who owns the property at the time when the claim of lien is made or filed.

In case there has been a change of ownership, the rule obtaining in a majority of jurisdictions is that the person to be named as owner is the one who owns the property at the time when the claim of lien is made or filed,⁸⁰ and the claim is sufficient if it names such person only.⁸¹ In some jurisdictions,

however, it has been held that the name of the person who owned the property at the time when the contract was made⁸² or when the work was commenced⁸³ or completed⁸⁴ is the proper one to be given. It has also been held proper to name the original owner even after he has filed a voluntary petition in bankruptcy⁸⁵ or made an assignment for the benefit of creditors,⁸⁶ and, where a lien claim has correctly named the real owners, the fact that at the time of the suit the land is in the name of a trustee has been deemed to be immaterial.⁸⁷

An owner of property who has made an executory contract of sale remains the owner nevertheless, as discussed in the CJS title Vendor and Purchaser § 106, also 66 C.J. p 702 note 35 to p 707 note 55, and is properly named as owner in the notice of lien.⁸⁸ Some statutes require that the statement shall include the name of any person under contract of purchase.⁸⁹

Mortgaged property Under some statutes it has been held that a mortgagee is not an owner in the sense that he is required to be named as such in the claim of lien,⁹⁰ but it has also been held that, where the lienor files his lien only against the mortgagor as owner, he can assert no claim against the mortgagee.⁹¹ Where a deed absolute on its face is intended as a mortgage, it has been held proper to name the grantee as owner or reputed owner,⁹² but

73. N.Y.—Beals v B'Nai Jeshurun Cong, 1 ED Smith 654
40 C.J. p 227 note 65

74. Wash.—Chavelle v Island Gun Club, 137 P 511, 77 Wash 304
40 C.J. p 227 note 66

75. N.Y.—Beals v B'Nai Jeshurun Cong, 1 ED Smith 654

76. N.C.—Porter v Case, 122 S.E. 483, 187 N.C. 629.

77. Pa.—Reece v Haymaker, 30 A. 404, 164 Pa. 575
40 C.J. p 227 note 69

78. Nev.—Riverside Fixture Co v Quigley, 126 P 545, 35 Nev 17
40 C.J. p 227 note 70

79. Mich.—Strand Lumber Co v Dostie, 245 NW 777, 260 Mich 422
40 C.J. p 227 note 71.

80. Mich.—Lowrie & Webb Lumber Co v Ferguson, 20 NW 2d 209, 312 Mich 331.—Lewis Mfg Co v Lee, 256 NW 457, 268 Mich 383.—Strand Lumber Co v Dostie, 245 NW 777, 260 Mich 422

Or.—Corpus Juris cited in Paget v Peters, 286 P 983, 984, 183 Or 608, rehearing denied 289 P 1119, 133 Or 608

Va.—Corpus Juris quoted in Wallace v Brumback, 12 S.E.2d 801, 805, 177 Va 38
40 C.J. p 228 note 76.

Recordation of memorandum

Under statute providing that in order to perfect a mechanic's lien a general contractor shall file in clerk's office in county or city in which building is located a memorandum showing name of "owner of the property sought to be charged," quoted phrase means person who owns property, or interest therein to be affected, at time of recordation of memorandum of lien.—Wallace v Brumback, 12 S.E.2d 801, 177 Va 38

81. Cal.—Ah Louis v Harwood, 74 P 41, 140 Cal 500

Va.—Corpus Juris quoted in Wallace v Brumback, 12 S.E.2d 801, 805, 177 Va 38

82. Kan.—M R Smith Lumber Co v Russell, 144 P 819, 93 Kan 521
40 C.J. p 228 note 78

83. W Va.—Thorn v Barringer, 81 S.E. 846, 73 W Va 618, Ann Cas 1916B 635
40 C.J. p 228 note 79

84. Pa.—Wagner v Manbeck, 18 Pa Co 471
40 C.J. p 228 note 80

85. N.Y.—Horton v Queens County Mach Corp, 166 N.Y.S. 662, 101 Misc 31, affirmed 169 N.Y.S. 1097, 182 App Div 932

86. N.Y.—Hall v. Thomas, 111 N.Y. S 979

87. Mich.—Huebner v Lashley, 214 NW 107, 239 Mich 50

88. N.Y.—Kealey v Murray, 15 N.Y. S 408, distinguishing Jones v Manning, 6 N.Y.S. 338
40 C.J. p 228 note 86

89. Mich.—F M Sibley Lumber Co v Goitesman, 22 NW 2d 72, 314 Mich 60

The words "owner, part owner or lessee" shall be construed to include all the interest, either legal or equitable, which such person may have in the real estate upon which the improvements are made, including the interest held by any person under contract of purchase, whether in writing or otherwise.—Skupinski v Provident Mortg Co, 221 NW. 338, 244 Mich 309

90. Mich.—Huebner v Lashley, 214 NW 107, 239 Mich. 50
40 C.J. p 228 note 91

Naming of mortgagees and encumbrancers generally see supra § 157

91. N.Y.—Pennsylvania Steel Co v Title Guarantee & Trust Co, 100 N.Y.S. 299, 50 Misc 51, affirmed 105 N.Y.S. 1135, 130 App Div 879

92. Wash.—Harrington v Miller, 31 P 325, 4 Wash 808

it has also been held proper to name the grantor as owner⁹³

Leased property. Under some statutes, in order to perfect a lien, the claim or statement of lien must contain the name of a lessee in possession of the premises, provided the name is known to claimant⁹⁴ It has been held that a lien claim against a leasehold interest only need not name the owners of the fee.⁹⁵ It has also been held proper in a mechanics' lien statement to designate a lessee⁹⁶ or an administrator of a lessee⁹⁷ as "owner".

(3) Form of Statement

The lien statement must clearly and explicitly show who is the owner of the property.

The lien paper must clearly and explicitly show who is the owner of the property⁹⁸ It is not sufficient that the name of the owner appears in the lien paper incidentally,⁹⁹ or as part of the description of the property,¹ or as part of the caption, address, or title,² but that he is the owner of the property sought to be charged must appear in the body of the paper³ as an independent matter,⁴ either directly or by necessary inference.⁵ However, a substantial compliance with the statute in this respect is all that is required,⁶ and if, on considering the entire lien, it can be ascertained with reasonable certainty who the owner is it will be sufficient.⁷ Where it is necessarily to be implied from the language used in the lien paper that a certain person named therein is the owner of the property, this is sufficient, although it is not stated in positive and direct terms that such is the case.⁸

It is not necessary to state in so many words that a lien is claimed against the interest of any particular person or owner,⁹ but the statutory requirements are satisfied when the name of the person against whose interest the lien is claimed is given together with a statement of the facts subjecting his interest to the lien¹⁰ An allegation in a mechanic's lien claim that a married woman is the owner of a building will not be extended to the ground on which it is erected,¹¹ although as against a person sui juris an averment that the building belonged to a named person may be considered as an averment that the land also belonged to such person, in the absence of any evidence tending to show that the owner of the building was not also the owner of the land¹² A simple statement that the premises are the premises of the person named is a sufficient averment of ownership¹³

Alternative or conjunctive statements. Where the statute requires a statement of the name of the owner or reputed owner, it is sufficient to designate a particular person in the conjunctive as owner and reputed owner¹⁴ or in the alternative as owner or reputed owner¹⁵ The naming of two persons in the alternative as owner has been upheld.¹⁶

(4) Omission, Error, and Mistake

As a general proposition, in order to perfect a mechanic's lien, the ownership of the property sought to be charged must be truly stated in the claim or statement of lien

As a general proposition, in order to perfect a mechanic's lien, the ownership of the property

93. Mich—Skupinski v Provident Mortg Co, 221 NW 338, 244 Mich 309—Huebner v Lashley, 214 NW 107, 239 Mich 50
40 C J p 228 note 94

94. Mich—F M Sibley Lumber Co v Gottesman, 22 NW 2d 72, 314 Mich 60—Lowrie & Webb Lumber Co v Ferguson, 20 NW 2d 209, 313 Mich 331—Sara v Andrews, 232 NW 254, 251 Mich 376—Skupinski v Provident Mortg Co, 221 NW 338, 244 Mich 309—Noud v Stedman, 160 NW 547, 193 Mich 459

95. Mich—Sara v Andrews, 232 NW 254, 251 Mich 376

Surplusage

The attempt to set forth in the claim of lien filed the names of the owners of the fee was mere surplusage—Sara v Andrews, *supra*

96. Kan—Geppelt v Middle West Stone Co, 135 P 573, 90 Kan 539

97. Ala—Laverne v Evans Bros Constr. Co, 52 So 318, 166 Ala 239.

98. Minn—Rugg v Hoover, 10 NW 473, 28 Minn 404
10 C J p 229 note 99

99. Minn—Couter v Farrington, 48 NW 1131, 46 Minn 336
Or—Gordon v Deal, 31 P 287, 23 Or 153

1. Or—Gordon v Deal, *supra*
2. Colo—Sprague Inv. Co v Mouat Lumber & Investment Co., 60 P 179, 14 Colo App 107.
40 C J p 229 note 3

3. Colo—Sprague Inv Co v Mouat Lumber & Investment Co., *supra*
40 C J p 229 note 3

4. Or—Gordon v Deal, 23 P 287, 23 Or 153, distinguishing Kezartee v Marks, 16 P 407, 15 Or 529

5. Or—Gordon v Deal, 31 P 287, 23 Or 153

6. Minn—Huilbert v New Ulm Basket-Works, 49 NW. 521, 47 Minn 81
40 C J p 229 note 7.

7. W Va—Doss v. Gulf Smokeless

Coal Co, 135 SE 575, 102 W Va 470

40 C J p 229 note 8

8. Or—Curtis v Sestanovich, 37 P 67, 26 Or 107.

9. NY—Ross v Simon, 9 NYS, 536, 16 Daly 159, resignation denied 10 NYS 742, 16 Daly 159
40 C J p 229 note 10

10. NY—Ross v. Simon, *supra*

11. Pa—Shannon v. Shultz, 87 Pa 481

12. Mass—Patrick v. Smith, 120 Mass 510
40 C J p 229 note 13

13. Cal—Corbett v. Chambers, 41 P 873, 109 Cal 178
40 C J p 229 note 14

14. Colo—Lowell Hardware Co. v May, 149 P 831, 59 Colo. 475
40 C J p 229 note 15

15. Colo—Lowell Hardware Co v May, *supra*
40 C J p 229 note 16.

16. NY—Abelman v. Myer, 106 NYS 978, 122 App Div 470

sought to be charged must be truly stated in the claim or statement of lien¹⁷ Thus the failure to name any person as the owner¹⁸ or the failure to state the name of the owner required to be mentioned¹⁹ renders the claim or statement fatally defective, and notices stating the names of the owners but failing to allege them to be the owners have been held insufficient²⁰ However, the statutory requirement is satisfied by substantial accuracy,²¹ and the courts have been liberal in sustaining the lien where the owner has been incorrectly designated but no one has been misled²² The lien is not defeated by a mistake in the name of the owner,²³ or even by an honest mistake in naming the wrong person as the owner, believing him to be such²⁴ Accordingly, where claimant has in good faith named a particular person as reputed owner, under a statute allowing this, the lien is not lost if it turns out that another person is the real owner,²⁵ and a fortiori the lien is not defeated by naming the real owner as reputed owner²⁶

There is a conflict of authority on the question

whether a failure to name all the owners, in case there are two or more, invalidates the lien, some decisions holding that it does²⁷ and others that it does not,²⁸ and the latter decisions take the view that the only effect of the omission of the names of part of the owners is to exempt the interests of such owners from the operation of the lien²⁹

At least where there is no dispute as to the identity of the person named,³⁰ a claim or statement is not rendered fatally defective by a mistake in,³¹ or the omission of,³² the initial letter of the owner's name, or by the use of the initial letter of his Christian name instead of the full name,³³ or by a statement of the surname alone, with the additional statement that the Christian name is unknown to claimant³⁴ So also a slight error in stating the name of a corporation which is the owner will not defeat the lien where the effect is not to mislead,³⁵ and even naming another corporation than the one sought to be charged is not fatal where the two are so closely connected as to be substantially the same company³⁶

17. W Va.—*Corpus Juris* cited in *Doss v Gulf Smokeless Coal Co*, 135 S E 575, 577, 102 W Va 470
40 C J p 229 note 18

"Failure"

As used in a statute relative to mechanics' liens, the word "failure" may imply an unsuccessful attempt to name or designate the true owner, lessee, general assignee, or person in possession of the premises against whose interest a lien is claimed—*De Klyn v Gould*, 31 N Y Civ Proc 223

Where deeds were for security only, lien claim describing grantors as equitable owners and grantees as part owners claiming interest has been held to name owners correctly—*Huebner v Lashley*, 214 N W 107, 239 Mich 50

18. Fla.—*Rieck & Fleece v Cunniff*, 190 So 8, 138 Fla 742
Mont.—*Blose v Havre Oil & Gas Co*, 31 P 2d 738, 96 Mont 450
40 C J p 227 note 52

19. DC—*Chamberlin Metal Weather Strip Co v Kassick*, 53 F 2d 928, 60 App DC 316

Mich.—*Lowrie & Webb Lumber Co v Ferguson*, 20 N W 2d 209, 312 Mich 331—*Lewis Mfg Co v Lee*, 256 N W 457, 268 Mich 383—*Skupinski v Provident Mortg Co*, 221 N W 338, 244 Mich 309

Unrecorded contract purchasers

Alleged mechanics' liens for building materials and labor were fatally defective for failure to include in statement filed with register of deeds the names of unrecorded contract purchasers who were in open and notorious possession of residential

property when the last of the materials were furnished and when the statements were filed—*F M Sibley Lumber Co v Gottesman*, 32 N V 3d 72, 314 Mich 60

Knowledge of claim

Failure of materialman's lien claim to state name of record owner of premises is not fatal where defendant had actual knowledge of the claim—*Glen State Lumber Co v Union Grain & Elevator Co*, 278 P 775, 47 Idaho 747

20. Fla.—*Rieck & Fleece v Cunniff*, 190 So 8, 138 Fla 742—*Goldsmith v Orange Belt Securities Co*, 156 So 3, 115 Fla 683

21. W Va.—*Corpus Juris* cited in *Doss v Gulf Smokeless Coal Co*, 135 S E 575, 577, 102 W Va 470
Wis.—*Milwaukee Bldg Supply Co v Illinois Surety Co*, 157 N W 545, 163 Wis 48

22. W Va.—*Corpus Juris* cited in *Doss v Gulf Smokeless Coal Co*, 135 S E 575, 577, 102 W Va 470
40 C J p 230 note 20

23. Mich.—*Hopper-McAllister Corporation v Pelham*, 217 N W 9, 241 Mich 235

W Va.—*Corpus Juris* cited in *Doss v Gulf Smokeless Coal Co*, 135 S E 575, 577, 102 W Va 470
40 C J p 230 note 21

24. W Va.—*Corpus Juris* cited in *Doss v Gulf Smokeless Coal Co*, 135 S E 575, 577, 102 W Va 470
40 C J p 230 note 22

Best information

In mechanic's lien statement, designation of husband of real owner

as owner of premises was not fatal defect, where made according to lienor's best information—*Nelson v Sampson*, 243 N W 105, 186 Minn 271

25. Cal.—*Ah Louis v Harwood*, 74 P 41, 140 Cal 500

40 C J p 230 note 23

26. Cal.—*Bryan v Abbott*, 63 P 363, 131 Cal 222

40 C J p 230 note 24

27. Kan.—*F A Drew Glass Co v Eagle Mill Co*, 42 P 387, 1 Kan App 614

40 C J p 237 note 54

28. Alaska—*Turner v Enstrom*, 5 Alaska 118

Colo.—*Buerger Inv Co v B F Salzer Lumber Co*, 237 P 163, 77 Colo 401

29. Colo.—*Buerger Inv Co v B F Salzer Lumber Co*, supra
40 C J p 237 note 56

30. Del.—*Syrit v Gause*, 111 A 780, 31 Del 146

31. Del.—*Syrit v Gause*, supra

32. Pa.—*Appeal of Knabb*, 10 Pa 186, 51 Am D 472.

33. Mich.—*Hicks v Finbarg*, 155 N. W 359, 189 Mich 332

34. Mont.—*Richards v Lewisohn*, 47 P 645, 19 Mont 128

35. W Va.—*Grafton Grocery Co v Home Brewing Co*, 54 S E 349, 60 W Va 281

40 C J p 230 note 30

36. W Va.—*Corpus Juris* cited in *Doss v Gulf Smokeless Coal Co*, 135 S E 575, 577, 102 W Va 470
Wis.—*Milwaukee Bldg Supply Co v*

A claim, notice, or statement which names the true owner or owners is not rendered invalid by the fact that it also names as owner another person who has no interest in the property,³⁷ nor is such claim, notice, or statement rendered void by the fact that it also names persons who have an interest in the property other than the owner.³⁸ On the other hand, where claimant knows the true owner and gives a wrong name in the statement, the lien is defeated,³⁹ and it has been held that, where claimant positively but mistakenly states in his claim that a certain person is the owner, he can excuse the mistake only by showing that it is justly chargeable to the true owner.⁴⁰ Naming claimant himself as owner is fatal.⁴¹

Under statutes so providing, an error in the notice or statement as to the name of the owner does not affect the existence of the lien,⁴² but such a statute refers to an unsuccessful attempt to state the name of the true owner, and not to a case where no attempt is made to name the persons against whose interests a lien is claimed.⁴³ Under such statutes the validity of the lien is preserved where the person named as owner has some title or interest, although a lesser estate than that of the fee,⁴⁴ but not where he has no interest,⁴⁵ in the latter case the lien cannot be extended against the person who is the true owner and who has not been named in the notice.⁴⁶

Married woman. Under some statutes a notice seeking to charge a married woman's separate estate must contain the name or names of the owner or owners of the property involved,⁴⁷ and a failure to comply therewith renders the notice insufficient.⁴⁸ A claim filed against the husband alone as owner and contractor, not referring to the wife or in any way making her a party to the record, gives no lien against her interest.⁴⁹ It is not necessary to name in the lien notice as an owner or reputed owner of the premises a wife who has only a potential or inchoate right of dower in the premises.⁵⁰ However, where the property is owned by husband and wife as an estate by the entirety, a claim naming the husband alone as owner is fatally defective,⁵¹ and this is also true in respect of community property when,⁵² but only when,⁵³ the claim shows on its face that claimant has knowledge that the wife has a community interest in the property. A statement which describes the property by naming the wife as the true owner is not rendered invalid by the fact that it also names as owner the husband who has no interest in the property.⁵⁴

Change of ownership. A claim stating the names of both the owner when claimant was employed or the contract was made and the owner when the claim is filed,⁵⁵ without stating at what time title passed from the one to the other,⁵⁶ is sufficient. A notice which does not name the vendor under an

Illinois Surety Co, 157 NW 545, 163 Wis 48

Ownership not in dispute

Claim for mechanic's lien was not fatally defective because it named wrong corporation as owner of premises, where evidence of ownership was not in dispute and was admitted without objection—*G W Hirth, Inc., v Clybourn Realty Co*, 232 NW 857, 202 Wis 432

37. Nev—*Corpus Juris* cited in *Zasucha v Allen*, 51 P 2d 1029, 1030, 56 Nev 339

40 C J p 230 note 32.

38. Mich—*Huebner v. Lashley*, 214 NW 107, 239 Mich 50

39. Mass—*William S Howe Co v Theyson*, 160 NE 287, 263 Mass 27

40 C J p 230 note 33.

40. NY—*Curtis Bros Lumber Co v Madansky*, 126 NYS 442, 141 App Div 883

10 C J p 230 note 34

Misinformation by owner given materialman after filing mechanic's lien was not ground for estopping assertion of invalidity of lien because of mistake in giving name of owner—*Grand River Lumber & Coal Co v Glenn*, 207 NW 855, 234 Mich 310.

41. Cal—*Diamond Match Co v Sanitary Fruit Co*, 234 P 322, 70 Cal App 695

Mont—*Interstate Lumber Co v Magill-Nevin Plumbing & Heating Co*, 188 P 144, 57 Mont 334

42. NY—*In re Thomas J Dorsey, Inc*, 268 NYS 295, 240 App Div 1005

40 C J p 230 note 36

43. NY—*De Klyn v Gould*, 59 NE 95, 165 NY 282, 80 AmSR 719

44. US—*In re North Babylon Estates*, CCA NY, 30 F 2d 372

NY—*Strauchen v Pace*, 88 NE 51, 195 NY 167

45. NY—*Church E Gates & Co, Inc, v National Fair & Exposition Ass'n*, 121 NE 741, 235 NY 142

46. NY—*Strauchen v Pace*, 88 NE 51, 195 NY 167

47. Fla—*Cox v Rieck & Fleece*, 177 So 301, 129 Fla 872—*Salomon v Galinsky*, 137 So 386, 108 Fla 417

48. Fla—*Cox v Rieck & Fleece*, 177 So 301, 129 Fla 872

49. Pa—*Appeal of Finley*, 67 Pa 453

"Any one" who is owner

Under a statute providing that the notice shall contain the name of "any one" who, within ten days prior

to the filing, shall have been the owner of record, a notice giving the name of the husband as owner, where the land is owned by husband and wife, is not proper—*Belmont Coal & Lumber Co v James F Wood Builders*, 15 A 2d 625, 125 NJ Law 315

50. Or—*Winters v Falls Lumber Co*, 31 P 2d 177, 146 Or 592

51. Mich—*Grand River Lumber & Coal Co v Glenn*, 207 NW 855, 234 Mich 310—*Lallewich v Bartoszewicz*, 171 NW 351, 205 Mich 375

52. Wash—*Sagmeister v Foss*, 30 P 80, 4 Wash 320, dissenting opinion 30 P 744, 4 Wash 320

53. Wash—*Bolster v Stocks*, 43 P 534, 13 Wash 460, modified on other grounds 43 P 1099, 13 Wash 460

40 C J p 227 note 75

54. Ky—*Tackett v Pikeville Supply & Planing Mill Co*, 61 SW 2d 881, 249 Ky 835

55. Cal—*Ah Louis v Harwood*, 74 P 41, 140 Cal 500

40 C J p 228 note 83

56. Cal—*Ah Louis v Harwood*, supra.

executory contract of sale as owner is fatally defective,⁵⁷ or at least is ineffective as against his interest.⁵⁸ It has been held, however, that a statement naming only the vendee was sufficient to create a lien on the building owned by him,⁵⁹ although the lien could not affect the land.⁶⁰

Leased property. A claim, notice, or affidavit stating only the name of the lessee creates no lien on the lessor's interest,⁶¹ and, conversely, a notice simply naming the lessor as owner, possessor, and occupant creates no lien on the estate of the lessee.⁶²

b. Estate or Interest of Owner

Generally it is not necessary to set forth in the claim or statement of lien the nature and extent of the owner's estate or interest in the property.

As a rule it is not necessary that the claim or statement of lien should set forth the nature and extent of the owner's estate or interest in the property.⁶³ However, a few statutes expressly require that the claim or notice shall state the interest of the owner, as far as known to the lienor,⁶⁴ or whether the lien is claimed against the fee itself or a lesser estate or interest.⁶⁵

§ 163. Contract or Consent of Owner

- a. In general
- b. Terms, conditions, and description of contract
- c. Annexing contract or copy thereof

a. In General

Unless required by statute, a mechanic's lien claim or statement need not show that the labor was performed

or the materials furnished pursuant to a contract with, or with the consent of, the owner of the property or of the interest sought to be charged.

In the absence of statutory directions, a mechanic's lien claim or statement need not show that the labor was performed or the materials supplied pursuant to a contract with, or with the consent of, the owner of the property or of the interest sought to be charged.⁶⁶ The existence of any contract or consent of the owner such as will render his land subject to the lien is considered a matter of pleading and proof at the trial,⁶⁷ and, when included in the lien claim or statement, it will be treated as mere surplusage.⁶⁸ Under some statutes, however, it has been held that the lien notice, claim, or statement should show that the work was done or the materials furnished pursuant to a contract with, or with the consent of, the owner of the property or of the interest sought to be charged.⁶⁹

Where the owner is a married woman, it is necessary, under some statutes, that the claim show that the work or material was done or furnished at her instance and request,⁷⁰ on her contract,⁷¹ or by her authority and with her consent.⁷² Merely naming the husband as contractor is not sufficient.⁷³ Under other statutes, however, it is not necessary, where a husband or wife has contracted for improvements on the property of the other spouse, to recite that fact in the lien statement.⁷⁴ A statement in a lien notice regarding a written building contract between the contractor and husband, representing himself and wife, owners, does not prevent the contractor from proceeding against the husband alone and securing his lien on the in-

57. NY—Packard v Sugarman, 66 NYS 30, 31 Misc 623

58. NY—Fish v Anstey Constr Co, 130 NYS 927, 71 Misc 2

59. Or—Kazartee v Marks, 16 P 407, 15 Or 529

60. Or—Kazartee v Marks, supra

61. NY—De Klyn v Gould, 59 NE 95, 165 NY 282, 80 AmSR 719
40 CJ p 228 note 97

62. NY—Jones v Manning, 6 NY S 338

Pa—Carey v Wintersteen, 60 Pa 395

63. Ala—Lavergne v Evans Bros Constr Co, 52 So 318, 166 Ala 289
40 CJ p 231 note 42

Mistake as to nature of title

As against the owner of the property, a lien notice sufficiently alleges the ownership although it erroneously states that the equitable title only is in him, and the legal title is in

another—McHugh v Slack, 39 P 674, 11 Wash 370

64. NY—Church E Gates & Co, Inc, v National Fair & Exposition Ass'n, 121 NE 741, 225 NY 142

65. Pa—Maddocks v McGann, 12 Pa Dist 701

40 CJ p 231 note 44

66. Or—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 403

SC—National Loan & Exchange Bank of Columbia v Argo Development Co, 139 SE 183, 141 SC 73

40 CJ p 231 note 49

Effect of reformation of contract

Reformation of the contract to conform to the oral agreement did not constitute a reformation of the lien notice, since the contract was not part of, and need not have been described in, the lien notice—Collins v Heckart, 270 P 907, 127 Or 34

67. Cal—Davies-Henderson Lumber

Co v Gottschalk, 22 P 860, 81 Cal 641

40 CJ p 231 note 51

68. Neb—Way v Cameron, 144 N W 172, 94 Neb 708

69. Ky—Headrick v Waterbury, 136 SW 2d 411, 277 Ky 388

ND—Austad v Dreier, 221 NW 1, 57 ND 224

40 CJ p 231 note 48

70. Pa—Wolfe v Oxnard, 25 A 806, 152 Pa 623

40 CJ p 231 note 53

Claim against married woman generally see supra § 150

71. Pa—Lloyd v Hibbs, 81 Pa 306
40 CJ p 232 note 54

72. Pa—Wolfe v Oxnard, 25 A 806, 152 Pa 623

40 CJ p 232 note 55

73. Pa—Wolfe v Oxnard, supra
40 CJ p 232 note 56

74. Kan—Hardman Lumber Co. v. Blanch, 192 P 743, 107 Kan 459

terest of the husband in the property.⁷⁵

Liability created by contract. In the absence of statute, the lien claim or statement need not set forth the extent and character of the liability created by the contract.⁷⁶

Performance of contract. It has been held that, in the absence of any statutory requirement, it is not necessary that the claim show that claimant has performed his contract,⁷⁷ but there is authority tending to the contrary.⁷⁸

b. Terms, Conditions, and Description of Contract

Unless required by statute, a mechanic's lien claim or statement need not set forth the terms or conditions of the contract.

In the absence of any statutory requirement, it is not necessary to set forth in a mechanic's lien claim or statement the terms or conditions of the contract.⁷⁹ With some variations in particular jurisdictions, some statutes require the lien claim to state the terms, time given, and conditions of claimant's contract with the owner or the contractor, as

the case may be.⁸⁰ Such a requirement applies only to terms and conditions expressly agreed on; it does not apply to matters not agreed on,⁸¹ or to a promise or agreement implied by law.⁸²

In some decisions it has been held that it is not necessary to state whether or not the contract is in writing,⁸³ but it has also been held that, where the contract is in writing, that fact should be stated.⁸⁴ It seems that it is not necessary to state the date of the contract.⁸⁵ At any rate an incorrect statement of the date of claimant's contract does not invalidate the lien where the terms and conditions are correctly set forth and are sufficient to identify the contract referred to, and no one is misled by the error.⁸⁶

Sufficiency Under statutes requiring the terms, time given, and conditions of the contract to be stated, the claim or notice must state these matters plainly, unequivocally,⁸⁷ and correctly⁸⁸ or it will be fatally defective. The sufficiency of the claim or notice in this respect is to be ascertained by determining whether it substantially complies with the statutory requirement.⁸⁹

75. Mass—Katauskas v Lonstein, 164 NE 810, 286 Mass 29

76. Mo—Dorchester Lumber Co v J S Chick Inv Co, 155 SW 904, 170 Mo App 1

40 C.J. p 234 note 89

77. Cal—Jewell v McKay, 23 P 139, 82 Cal 144

Ga—Ford v Wilson, 11 SE 559, 85 Ga 109

In New York

(1) Under Lien L § 9 subd 4, the notice of lien must only state the labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to, the real property and the agreed price or value, and it is not necessary, as formerly, to state in addition the labor to be performed or materials to be furnished—Pascual v Greenleaf Park Land Co, 157 NE 144, 245 NY 294—40 C.J. p 234 note 88

(2) A notice of lien which falsely alleged full performance did not comply with Lien L § 9 subd 4, and was void—Copasso v Apfel, 212 NY 587, 214 App Div 638

(3) Statement of services or materials see infra § 165

78. Pa—King v Philadelphia First Brethren Church, 14 Pa Dist 265, 32 Pa Co 288

40 C.J. p 234 note 87

What constitutes allegation of performance

(1) Allegation of lien that claimant furnished and installed heater

was allegation of complete performance of contract—Eastern & Western Lumber Co v Henderson, 275 P 677, 129 Or 102

(2) Statement in notice of lien claim that claimant ceased to labor and furnish materials on certain date was not allegation of complete performance—Lorenz Co v Gray, 298 P 222, 136 Or 605, rehearing denied and opinion adhered to Lorenz Co v Day & Co, 300 P 949, 138 Or 605

(3) Other statements see 40 C.J. p 234 note 87 [a]

79. Pa—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 246—Delaware County Supply Co v Scavichia, Com Pl, 33 Del Co 35—Fletcher v Layton, Com Pl, 23 West Co L J 195

Vt—Baldwin v Spear, 64 A 235, 79 Vt 43

40 C.J. p 232 note 60 [d]

In California

(1) Under Code Civ Proc § 1187, it is not necessary for lien claimant to state in claim of lien "the terms, time given and conditions of his contract"—Baird v Ocequeda, 67 P 2d 1055, 1057, 8 Cal 2d 700

(2) Formerly the statute required a statement of "the terms, time given and conditions of his contract"—Santa Monica Lumber & Mill Co v Hege, 51 P 555, 119 Cal 376—40 C.J. p 232 notes 59-63

(3) "The quoted provision has been deleted from the section for many years and cases decided under the law as it formerly read are not

in point"—Baird v Ocequeda, 67 P 2d 1055, 1057, 8 Cal 2d 700

80. Nev—Porteous Decorative Co v Fee, 91 P 135, 29 Nev 375

40 C.J. p 232 notes 59, 60

81. Nev—Lonkey v Wells, 16 Nev. 271

40 C.J. p 232 note 62

82. Wash—Fairhaven Land Co v Jordan, 32 P 729, 5 Wash. 729

40 C.J. p 232 note 63

83. Vt—Baldwin v Spear, 64 A 235, 79 Vt 43

84. Pa—O'Kane v Murray, 25 Pa. Dist 87, affirmed 97 A 94, 252 Pa. 60

85. Cal—Pacific Mut Life Ins Co v Fisher, 42 P 154, 109 Cal 566—California Powder Works v Blue Tent Cons Hydraulic Gold Mines, 22 P 391, 3 Cal Unrep Cas 145

86. Ill—Hayes v Hammond, 44 N. E 423, 162 Ill 133

40 C.J. p 232 note 68

Errors as to dates generally see infra § 169

87. Idaho—White v Mullins, 31 P. 801, 3 Idaho 434

40 C.J. p 233 note 70

88. Cal—Robinet v Brown, 141 P 368, 167 Cal 735.

40 C.J. p 233 note 71

89. Cal—McGinty v Morgan, 54 P. 392, 122 Cal 103

40 C.J. p 233 note 72

Substantial accuracy in the required statement is essential—Adams & Powers Co v Seder, 154 NE 184, 257 Mass 453—Pratt & Forrest Co.

A general statement of what each party to the contract obligates himself to do, without incorporating all the minutiae and detail of the work to be done, is a sufficient compliance with the statutory requirement⁹⁰ However, the fact that the contract is with the owner instead of with the contractor will not excuse a lien claimant from fully and accurately stating the terms and conditions of the contract in the lien notice filed by him on the ground that the owner has knowledge of the terms⁹¹

A notice which refers to a copy of the contract attached to the notice and made a part thereof in which the terms, time given, and conditions are stated is sufficient⁹² Further, a notice of lien of a materialman which refers to the contract between the contractor and the owner of the building for the times of making payments to the materialman, which were to be made at the times when payments became due to the contractor, is not invalidated because it does not repeat the provisions of the principal contract on that subject where the principal contract has been duly recorded and the terms of payment can be ascertained therefrom.⁹³ A notice which in stating the terms of the contract refers to the plans and specifications, which are not attached to the notice, is not thereby rendered defective if it states their substance,⁹⁴ although it would be otherwise, if their substance were not stated⁹⁵

c. Annexing Contract or Copy Thereof

The contract or a copy thereof need not be filed with a mechanic's lien claim or statement unless such filing is required by statute.

In the absence of a statutory requirement it is

not necessary to set forth a copy of the contract in a mechanic's lien claim or statement⁹⁶ Under some statutes, however, where claimant had a written contract, he must file it or a copy thereof with his claim or statement,⁹⁷ and a failure to comply with the statute in this respect defeats the lien,⁹⁸ unless such compliance was prevented by the wrongful act of the person for whom the work was done⁹⁹ When the contract was a verbal one, the fact that by inadvertence or mistake claimant alleged in his affidavit that it was in writing does not estop him, in a suit to foreclose the lien, from alleging and proving that the contract was in fact a verbal one,¹ nor does it make the verified "account of items" filed to obtain a lien incompetent evidence²

The number of days of labor performed or furnished must be stated, under some statutes, in a claim for labor alone where there is an entire contract for both labor and materials,³ but not where the contract is for labor only⁴ However, where it is so provided by statute, no statement shall be deemed invalid or insufficient solely by reason of any inaccuracy in stating or failing to state the number of days' labor performed or furnished, provided there was no intention to mislead, and the parties entitled to notice of the statement were not in fact misled thereby⁵

§ 164. Name, Residence, and Status of Employer or Contractor

When required by statute, a mechanic's lien claim or statement must plainly state the name of the person by whom the claimant was employed, or for whom the labor was performed, or to whom the material was furnished

v Strand Realty Co, 123 NE 771, 233 Mass 314—40 C J p 233 note 72 [a]

Claims held sufficient

Ill—Guaranty Iron & Steel Co v Leyden, 235 Ill App 191

Md—Caltrider v Isberg, 130 A 53, 148 Md 657

Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159 40 C J p 233 note 72 [c]

Variance

Substantial variance between statement of lien notice as to terms and conditions of contract and actual contract proved is fatal to lien—Schwulst Gerling Co v Frost, 269 Ill App 218—40 C J p 233 note 72 [b]

90. Colo—Branham v Nye, 47 P 402, 9 Colo App 19 40 C J p 233 note 73

91. Cal—California Portland Cement Co v Wentworth Hotel Co, 118 P. 103, 16 Cal App 693

Wash—U S Savings, Loan & Bldg Co v Jones, 87 P 666, 9 Wash 431

92. NM—Ford v Springer Land Ass'n, 41 P 541, 8 NM 37, affirmed 18 S Ct 170, 168 US 513, 42 L Ed 562

93. Cal—San Diego Lumber Co v Wooldredge, 27 P 431, 90 Cal 574

94. Wash—Mras v Duff, 39 P. 267, 11 Wash 36

95. Wash—Mras v Duff, supra

96. In Pennsylvania

(1) Prior to amendment of 1905 it was required that the claim set forth a copy of the contract, but this provision was omitted when the amendment was made—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 346—Kreitner Bros, Inc, v Lake Rose Realty Co, 20 Pa Dist & Co 498—40 C J p 233 note 80 [d]

(2) Where contract is oral, it is obviously impossible to set forth a

copy thereof in the lien—Stockdale Hardware Co v Knapp, Com Pl, 25 West Co L J 4

97. Minn—Abbott v Nash, 29 NW 65, 35 Minn 451 40 C J p 233 note 80

98. Neb—Barnacle v Henderson, 60 NW 382, 42 Neb 169

99. Neb—McCormick v Lawton, 3 Neb 449

1. Neb—Barnacle v Henderson, 60 NW 382, 42 Neb 169

2. Neb—Barnacle v Henderson, supra

3. Mass—Martin v Stewart, 90 N. E 587, 204 Mass 122. 40 C J p 233 note 43

4. Mass—Martin v Stewart, 95 N E 212, 208 Mass 583—Patrick v Smith, 120 Mass 510

5. Mass—Devine v. Clark, 84 NE 309, 198 Mass 56

In the absence of statutory requirement it is not necessary for a mechanic's lien claim or notice to state the name of the person with whom the contract was made⁶ or by whom the claim is owing.⁷ However, it is generally required by statutes, varying somewhat in language, that the claim or statement shall state the name of the person by whom claimant was employed, or for whom the labor was performed, or to whom the material was furnished or, if claimant is a contractor or subcontractor, the person with whom his contract was made,⁸ and a failure to comply with this requirement defeats the lien,⁹ unless the failure is waived¹⁰ or cured.¹¹ Under some statutes the claim or notice must show from whom the account is due.¹² A contractor, however, need be named only when the contract was made with a builder distinct from the owner of the building.¹³ Where the name of the contractor is unknown, that fact should be stated as an excuse for not naming him.¹⁴

Sufficiency The claim, notice, or statement must plainly designate the person to whom the materials were furnished, by whom claimant was employed, or with whom the contract was made,¹⁵ and a merely incidental mention of the name of the contractor is not sufficient,¹⁶ but, if it is a necessary inference from the language used in the claim that the material was furnished to, or claimant was employed by, a person named therein, although this fact may not be directly stated, the claim is sufficient.¹⁷ Some courts have held that it is not necessary that the claim should show that the person with whom claimant contracted or to whom he furnished material, etc., stood in such a relation to the owner that he could bind the property,¹⁸ or at least that a failure to do so is not fatal,¹⁹ but other courts have also held that it is essential for the claim to show that the person to whom the materials were furnished, when other than the owner, sustained some contractual relation with the owner,²⁰ although they hold it sufficient to designate such per-

6. Mass.—Brosnan v Trulson, 41 N E 660, 164 Mass 410
7. Ind.—Cline v Indianapolis Mortar & Fuel Co., 117 N E 509, 65 Ind App 383, disapproving Windfall Natural Gas, Mining & Oil Co v Roe, 85 N E 722, 42 Ind App 278
8. Cal.—Shafer v Los Serranos Co., 17 P 2d 1036, 128 Cal App 357, followed in Gonzales v Los Serranos Co., 17 P 2d 1038, 128 Cal App 780
- Fla.—Myers v Harkins, 136 So 382, 103 Fla 577
- Idaho.—Riggen v Perkins, 246 P 962, 42 Idaho 391
- Kan.—Badger Lumber & Coal Co v Schmidt, 251 P 196, 122 Kan 48
- La.—Julius Aaron & Son v Keyser, 2 La App 649
- N Y.—Lichtenstein v Grossman Const Corporation, 225 N Y S 118, 221 App Div 527, modified on other grounds 162 N E 292, 248 N Y 390—Cohn v Gersh Realty Corporation, 242 N Y S 671, 137 Misc 215, affirmed 250 N Y S 830, 233 App Div 795—J Adelman, Inc. v Church Extension Committee of City of New York, 241 N Y S 197, 136 Misc 810
- Or.—Potter v Davidson, 21 P 2d 785, 113 Or 101
- Pa.—Hamilton v Means, 38 A 2d 528, 155 Pa Super 245—Moser v Loeper, 8 Pa Dist & Co 651, 22 Sch Leg Rec 306—Connolly v Fierman, 8 Pa Dist & Co 92, 24 Luz Leg Rec 78—McAdoo v Schultz, Com Pl, 25 Erie Co 112
- 40 C J p 231 note 91
- Name, address, and status of claimant see supra § 156
9. Pa.—Hamilton v Means, 38 A

- 2d 528, 155 Pa Super 245—Moser v Loeper, 8 Pa Dist & Co 651, 22 Sch Leg Rec 306
- 40 C J p 235 notes 91, 92
10. N Y.—McBride v. Crawford, 1 E D Smith 658
- 40 C J p 235 note 93
- Waiver of error or defects in claim or statement generally see infra § 169.
11. Pa.—McCay's Appeal, 37 Pa 125
- 40 C J p 235 note 94
- Aider by allegations of petition to enforce
- Lien statement's failure to designate contractor is not aided by allegations of subcontractor's petition to enforce lien—Badger Lumber & Coal Co v Schmidt, 251 P 196, 122 Kan 48
12. RI.—Maroni v Junty, 58 A 450, 26 R I 109
13. Kan.—Brown v Walker, 164 P. 1092, 100 Kan 542, 545
- 40 C J p 235 note 97
- Name of owner generally see supra § 162
14. Colo.—Denver Hardware Co v. Croke, 36 P 624, 4 Colo App 530
15. Ill.—Sawyer Goodman Co. v. Neagle, 110 Ill App 178
- 40 C J p 235 note 2
- Statements held sufficient
- Ill.—U S Gypsum Co v Randall, 21 NE 2d 327, 300 Ill App 610
- Mo.—Lee & Boutell Co v C A Brockett Cement Co, 106 S W 2d 451, 341 Mo 95
- N Y.—Mayer v Delson Holding Corporation, 247 N Y S 346, 139 Misc 410, affirmed 252 N Y S. 930, 234 App Div 671

- Or.—Winters v Falls Lumber Co., 31 P 2d 177, 146 Or 593
- Pa.—Moss & Blakeley Plumbing Co v Schauer, 28 A 2d 323, 150 Pa Super 818—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 246
- 40 C J p 235 note 2 [c]
16. Kan.—Chicago Lumber & Coal Co v Washington, 103 P 80, 80 Kan 613
- 40 C J p 235 note 3
17. N Y.—Lichtenstein v Grossman Const Corporation, 225 N Y S 118, 221 App Div 527, modified on other grounds 162 N E 292, 248 N Y 390
- 40 C J p 235 note 4
- Name in caption of claim
- (1) Failure to affix to mechanic's lien statement caption making original contractor party to proceeding does not invalidate statement—Lannotti v Kalmbacher, 156 A 366, 4 W W Harr Del, 600
- (2) Mechanic's lien claim was not insufficient on ground that claim did not disclose identity of contractor, where contractor's name was set out in caption of claim, since caption and body of claim would be read together—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 246
18. Cal.—Davies-Henderson Lumber Co v Gottschalk, 22 P. 860, 81 Cal 641
- 40 C J p 235 note 5.
19. N Y.—Darrow v. Morgan, 65 N Y 333
20. Kan.—Chicago Lumber & Coal Co v Washington, 103 P. 80, 80 Kan 613.

son as "contractor,"²¹ without further stating his capacity or relation to the owner by the word "original" or other descriptive addition²²

Literal exactness and rigid adherence to precise form are not required²³ As a rule a mistake in the statement as to the name of the person with whom claimant contracted or by whom he was employed,²⁴ or a misconception or misdescription of the status of such person, or of his true relation to the owner,²⁵ will not defeat the lien, where there was no intention to deceive and no one has been misled to his detriment, but it is otherwise when the mistake is of such a character as to be clearly misleading,²⁶ and it has been held that, under a statute requiring that a notice of lien on moneys due to a contractor shall state the amount of the lien, and from whom it is due to claimant, a notice which states that the amount claimed is due by a contractor under a contract made with his agent, when the fact is that the alleged agent was a subcontractor, and not an agent, and that the money is due from him, and not from the contractor, is insufficient²⁷

Where there are several co-contractors, a claim or notice naming one only may be sufficient,²⁸ if a firm is the contractor, a notice naming as contractor only the individual partner with whom claimant dealt is not fatally defective,²⁹ and a claim correctly naming a subcontractor is not vitiated because it also names the contractor³⁰ While it has

been held generally that a statement that the materials were furnished at the instance of the owner and the contractor is fatally defective where it subsequently appears that they were furnished by contract with the contractor alone,³¹ the contrary has been held under the circumstances of some cases.³²

Where under the statute a building contract is void because unrecorded, or because not containing proper provisions as to the payment of installments, and the labor and materials are deemed to have been done and furnished at the instance of the owner, it is immaterial whether the claim mentions the name of the owner or of the contractor³³

§ 165. Services or Materials and Charge Therefor

- a. In general
- b Use or furnishing for use
- c Time of rendering or furnishing
- d Value or price
- e Particularity and itemization

a. In General

When required by statute, the lien claim or statement must set forth the nature and amount of the labor performed or materials furnished for which the lien is claimed.

Except in a few jurisdictions,³⁴ it is generally required that the claim, notice, or statement set forth the nature and amount of the labor performed or materials furnished for which the lien is claimed,³⁵

21 Kan—Drown v Walker, 164 P 1092, 100 Kan 512, rehearing denied 166 P 873, 101 Kan 293

22 Kan—Drown v. Walker, supra 40 C.J. p 235 note 9

23. Cal—Prince v Hill, 149 P 578, 170 Cal 192

24. Cal—Corpus Juris quoted in Hammond Lumber Co v Richardson, 270 P 751, 752, 94 Cal App 119

Minn—W T Bailey Lumber Co v Elks' Bldg Corporation, 208 NW 198, 167 Minn 5
40 C.J. p 236 note 12

Claimant misled by owner

Where lienor in his statement of lien and bill to enforce lien alleged that labor and materials were furnished pursuant to contract with individual contractor, and that lien was claimed on land and building of which company was owner, but evidence showed that individual was not contractor, but that labor and materials were furnished directly to company owning premises, and lienor was misled by officer of company into believing that he had contracted with individual, company

was estopped to take advantage of lienor's mistake, and grantee of company was in no better position—Pinte v Will Inv Co, 228 NW 777, 249 Mich 230

25. Conn—Pierce, Butler & Pierce Mfg Corporation v Enders, 174 A 169, 118 Conn 610

40 C.J. p 236 note 13
Errors and defects generally see infra § 169

26. Ill—Sawyer Goodman Co. v. Neagle, 110 Ill App 178
40 C.J. p 236 note 14

27. N.Y.—Fiske v Rogers, 18 N.Y.S. 191, 60 N.Y. Super 418

28. Cal—Davis v. Livingston, 29 Cal 283

Wash—Ellis-Mylroie Lumber Co v Bratt, 205 P 398, 119 Wash 142

29. Mich—David Lupton's Sons Co v Berghoff Printing Co, 229 NW 810, 249 Mich 455
40 C.J. p 236 note 17.

30. Mo—Hydraulic Press Brick Co v McTaggart, 76 Mo App 347

31. Ky—Tischendorf-Chreste Lumber Co v Hegan, 119 SW 163, 134 Ky 1.

32. Cal—Reed v Norton, 26 P 767, 90 Cal 590, reheard 27 P. 426, 90 Cal 590

40 C.J. p 236 note 20

33. Cal—McClain v Hutton, 63 P 182, 131 Cal 132, motion granted 63 P 622, 131 Cal 132
40 C.J. p 237 note 24

34. Or—Drake v Riley, 9 P 2d 130, 139 Or 172—Paget v Peters, 286 P 983, 133 Or 608, rehearing denied 289 P 1119, 133 Or 608—Eastern & Western Lumber Co v Henderson, 275 P 677, 129 Or 102
40 C.J. p 237 note 25

35. Fla—Rieck & Fleece v Curriff, 190 So 8, 138 Fla 742—Goldsmith v. Orange Belt Securities Co, 156 So 3, 116 Fla 683—Velazquez v Suarez, 152 So 708, 113 Fla 856
Ind—Nash Engineering Co v Marcy Realty Corporation, 54 N.E.2d 263, 222 Ind 396

Mo—Mansfield Lumber Co v Johnson, App, 91 SW 2d 239

N.Y.—Pascual v Greenleaf Park Land Co, 157 N.E. 144, 245 N.Y. 294, followed in Goldberger-Rabin, Inc. v 74 Second Ave Corp., 234 N.Y.S. 802, 226 App Div. 787,

although this has been held to be necessary only when claimant contracted with the contractor and not when his contract was directly with the owner or his agent³⁶ What the work or materials were for which the lien is claimed must appear on the face of the claim, statement, notice, or account,³⁷ without resort to extrinsic evidence,³⁸ but, where this appears with reasonable certainty and precision, the statement is sufficient,³⁹ and in determining whether the claim or statement imparts the required information, in terms which cannot be misunderstood, concerning the nature or kind of labor or material furnished, all the papers constituting it, including the affidavit, the claim or statement proper, and an exhibit, bill of particulars, or other paper referred to therein and attached thereto, may be considered together.⁴⁰

The statement should so describe the labor and materials as fairly to apprise the owner of what he is charged with,⁴¹ enable him to determine the

bona fides and reasonableness of the contract,⁴² and advise those who may have a legal interest in the subject as to the character and extent of the demand on which the claim to a lien is based⁴³ In the case of materials, the statement must be such as fairly to apprise the owner⁴⁴ and the public⁴⁵ of the nature and kind of the materials, and it has been held in some cases that the statement should be sufficient to enable one not a party to the contract to identify the things for which the lien is claimed⁴⁶ A statement merely reciting the kinds of materials furnished is to be distinguished from an itemized statement⁴⁷

The description of the work done or materials furnished must be as accurate as the circumstances will permit,⁴⁸ but precise accuracy as to the amount of material furnished is not essential to the validity of the statement⁴⁹ While a lien cannot be enforced for labor or material not embraced in the statement of claim, as considered *infra* § 172, the

reversed on other grounds 169 N E 405, 252 N Y 336—Lawrence v Herkimer County, 363 N Y S 710, 239 App Div 754—Preiser v Schine, 324 N Y S 890, 221 App Div 878, affirmed 161 N E 194, 247 N Y 591
Pa—Rice v Cornelius, 48 Pa Dist & Co 86—Delaware County Supply Co v Scavichia, Com Pl, 33 Del Co 35—McAdoo v Schultz, Com Pl, 25 Erie Co 113—Hassler v Haas, Com Pl, 34 Berks Co L J 103, 55 York Leg Rec 199—Raymond v Brookside Distilling Products Corporation, Com Pl, 44 Lack Jur 181—Silvert v Leonards, Com Pl, 54 Mont Co 423
40 C J p 237 note 26

Labor to be performed

(1) In absence of statutory requirement, it is not necessary or proper to include in notice of lien any statement as to labor to be performed or materials to be furnished—Pascual v Greenleaf Park Land Co, 157 N E 144, 245 N Y 294—Lehigh Structural Steel Co v Nyack Kennel Club, 11 N Y S 2d 665, 256 App Div 717, motion denied 22 N E 2d 872, 281 N Y 677, and 25 N E 2d 111, 282 N Y 586, affirmed 28 N E 2d 29, 283 N Y 617—B & F Concrete Co v Colton Realty Corporation, 17 N Y S 2d 593

(2) Statements in notices of materialman's lien that agreed price and value of material were stated sum related solely to value of material actually furnished, not value of both such material and material to be furnished, when read in light of all statements therein, including one that amount unpaid for "material to be furnished" was undeter-

mined—Lehigh Structural Steel Co v Nyack Kennel Club, *supra*

In California

(1) Under Code Civ Proc § 1187, notice of lien must state the kind of work done or materials furnished—Shiafer v Los Serranos Co, 17 P 2d 1036, 128 Cal App 357, followed in Gonzales v Los Serranos Co, 17 P 2d 1038, 128 Cal App 780—Noiton v Dedell Engineering Co, 264 P. 311, 88 Cal App 777

(2) Under prior statutes, it was not necessary to state in the notice of lien the kind of work done or materials furnished—McChain v Hutton, 63 P 182, 131 Cal 133, motion granted 63 P 622, 131 Cal 133—Davis v Livingston, 29 Cal 283

36. Pa—Harnish v Heri, 98 Pa 6
40 C J p 237 note 27

37. Mo—Dwyer Brick Works v Flanagan, 87 Mo App 340, distinguished Henry v Plitt, 84 Mo 237

Statements held insufficient

Mo—Mansfield Lumber Co v Johnson, App, 91 SW 2d 239
N Y—B & F Concrete Co v Colton Realty Corporation, 17 N Y S 2d 593
40 C J p 237 note 28 [a]

38. Mo—Dwyer Brick Works v Flanagan, 87 Mo App 340

39. N Y—Ogden v Alexander, 35 N E 638, 140 N Y 356
40 C J p 237 note 30

Statements held sufficient

Cal—Winship v Holden, 265 P 572, 90 Cal App 71
Mo—Leach v Bopp, 12 SW 2d 513, 223 Mo App 254—H B McCray Lumber Co v Standard Const Co, App, 285 SW 104

N Y—Goldberger-Raabin, Inc v 74 Second Ave Corporation, 169 N E 405, 252 N Y 336—Fuller v Knapp, 263 N Y S 689, 146 Misc 654—Parabellia v Porter, 225 N Y S 417, 130 Misc 680

Pa—Frey v Snyder, 6 Pa Dist & Co 581, 11 Lehigh Co L J 177—Fletcher v Layton, Com Pl, 23 West Co L J 195

Wash—American Plumbing & Steam Supply Co v Alavekuu, 282 P 917, 154 Wash 436

40 C J p 237 note 30 [a]

40. Mo—Holland v Cunliff, 69 S W 737, 96 Mo App 67

40 C J p 237 note 31

41. Wash—Tacoma Lumber & Mfg Co v Kennedy, 30 P 79, 4 Wash 305

42. Wash—Warren v. Quade, 29 P 827, 3 Wash 750

43. N Y—Toop v Smith, 73 N E 1113, 181 N Y 283, reargument denied 74 N E 1126, 183 N Y 509

44. Mo—Leach v Bopp, 12 SW 2d 512, 223 Mo App 254

40 C J p 238 note 35

45. Mo—Leach v Bopp, *supra*

40 C J p 238 note 36

46. Wyo—Becker v Hopper, 138 P 179, 23 Wyo 237, Ann Cas 1916D 1041, reheard 147 P 1035, 23 Wyo 209, Ann Cas 1918B 35

47. Or—St Johns Lumber Co v Fritz, 146 P 483, 75 Or 286

48. Pa—McCloy v Goldbloom, 2 Pa Dist & Co 428

49. Conn—Halsted & Harmount Co v. Arick, 56 A. 628, 76 Conn 382

statement is not insufficient because it does not include all the labor performed or material furnished by claimant, where the labor or material omitted has been paid for and no lien is claimed therefor.⁵⁰

b. Use or Furnishing for Use

When required by statute, the lien claim or statement must state that the materials were furnished for the purpose of being used, or were used, in the building on which the lien is claimed

While a lien for materials is not defeated by the failure of the statement to set forth in express terms that the materials were furnished by claimant,⁵¹ it is defeated where the notice or statement does not show in any way that any of the materials were furnished or supplied,⁵² and a claim averring that some of the materials were not delivered, after they were manufactured, by reason of a notice by the owner preventing delivery, is defective in respect of such materials unless it also avers that the materials were entirely completed prior to the notice given by the owner.⁵³

Under some statutes it must be stated in substance that the materials were furnished for the purpose of being used in the building on which the lien is claimed,⁵⁴ and the failure of the lien claim to state the necessary facts in this respect is not cured by verdict on testimony showing the necessary facts to have actually existed.⁵⁵ Under other statutes, such a statement is not necessary.⁵⁶ Under some statutes it must be stated that the materials actually went into or were used in the building,⁵⁷ while under other statutes such statement is unnecessary.⁵⁸

One or more structures Where several buildings are erected under the same contract for the same

owner, a claim or notice which does not specify the particular building for which the materials were furnished⁵⁹ or in which they were used⁶⁰ is not fatally defective

Materials furnished for an addition to a dwelling house with which it is to be occupied, and through which is the only means of access, are properly described as furnished for the dwelling house;⁶¹ but the rule is otherwise where the structure for which the materials were furnished is not an integral part of the dwelling house and was not erected under the same contract.⁶²

A claim for extra labor is insufficient where it does not show that it is for work performed on the structure in question.⁶³

c. Time of Rendering or Furnishing

A mechanic's lien claim or statement need not state the time of doing the work or furnishing the materials unless such a statement is required by statute.

In the absence of any statutory requirement it has been held not necessary to the validity of a mechanic's lien claim that it should state the time of doing the work or furnishing the materials,⁶⁴ or at least that it is not necessary to make any statement in respect of time other than one sufficient to show that the claim was filed within the period allowed by statute therefor,⁶⁵ although it is the better practice to give in the account the dates on which the items were done or furnished.⁶⁶

Generally, however, it is required by statute that the claim or statement shall show the time when the work was done or the materials furnished for which the lien is claimed.⁶⁷ In order to comply with the statutory requirement all that is necessary is such

50. Mass—Sexton v Weaver, 6 N E 367, 141 Mass 273
40 C J p 238 note 42.

51. Colo—Sickman v Wollett, 71 P 1107, 31 Colo 58

52. N Y—Riley v Dufey, 130 N Y S 297, 145 App Div 583

53. Pa—Romberger v Bartos, 28 Pa Dist 163

54. Utah—Morrison v Willard, 53 P 832, 17 Utah 306, 70 Am SR 784

40 C J p 238 note 49

Statements held sufficient

Pa—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 246

40 C J p 238 note 49 [a]

55. Mo—Fathman & Miller Planning Mill Co v Rutter, 33 Mo App 404

56. Ala—Cook v Rome Brick Co, 12 So 918, 33 Ala 409.

Cal—Neihaus v Morgan, 45 P 255, 5 Cal Unrep Cas 391

57. Wash T—Merchant v Humes-ton, 7 P 903, 2 Wash T 433

40 C J p 238 note 52

58. Ala—Powers v Grayson, 109 So 164, 215 Ala 13

40 C J p 238 note 53

59. Wash—Wheeler v Ralph, 30 P 709, 4 Wash 617

60. N Y—White v Livingston, 75 N Y S 466, 69 App Div 361, affirmed 66 NE 1118, 174 N Y 538

Apportionment between buildings see supra § 155

61. RI—Petrosinelli v Pisani, 68 A 368

62. Pa—Miller v Heath, 22 Pa Super 313

63. Or—Hoskins v Powder Land & Irrigation Co, 176 P 124, 90 Or 217

64. Or—Corpus Juris quoted in

Paget v Peters, 286 P 983, 985, 133 Or 608, rehearing denied 289 P 1119, 133 Or 608

40 C J p 239 note 60

65. Mo—Powers, Boyd, Cornice & Roofing Co v Muir, 123 SW 490, 146 Mo App 36

40 C J p 239 note 61

Filing of claim within statutory period

Generally see supra §§ 139-144

Statement as to see supra § 159.

66. Neb—Noll v Kenneally, 56 N. W 722, 37 Neb 879

40 C J p 239 note 62

67. US—In re Rose, D C Tex, 22 F Supp 988

Pa—Hamilton v Means, 38 A 2d 528, 155 Pa Super 245—Raymond v Brookside Distilling Products Corporation, Com Pl, 44 Lack Jur

181—Schwartz v Stefan, Com Pl, 94 Pittsb Leg J 83

40 C J p 239 note 63

certainty as will enable those interested to discover during what period the materials were delivered or the work done so as to individuate the transaction.⁶⁸ The use of the expressions "on or about" a specified date has been held not to render the statement insufficient.⁶⁹ The exact language of the statute need not be followed if it otherwise appears that the materials were furnished at the time stated.⁷⁰ The use of figures in stating months and days has been upheld.⁷¹ It is sufficient if the required statement is made in an exhibit⁷² or in an itemized account filed with the sworn statement and claim of lien.⁷³

Where it appears that claimant is asserting a lien for materials only, any reference in his claim or notice to the time of performance of items of work may be ignored as surplusage.⁷⁴

The omission of the year, the months and days being stated, is fatal under a statute requiring the claim to state the time when the materials were furnished or the work done,⁷⁵ but not under a statute requiring merely "a just and true account."⁷⁶ Where the year is stated only at the head of the account but the paper itself shows that such year refers to the days and months placed opposite the items, it is sufficient.⁷⁷ Likewise, the omission of the year in connection with part of the items of an account is not fatal where the year may be ascertained by reference to other items in the account⁷⁸ or to an averment in the lien statement proper.⁷⁹

Errors and defects In some jurisdictions where the statutes are strictly construed it has been held that a false statement of the time is fatal to the lien.⁸⁰ More frequently, however, it has been held that mere inaccuracy in fixing the time will not defeat the lien where the statement was filed within the statutory period after the furnishing of the last item, and no one was prejudiced.⁸¹ An obvious error in stating an impossible date is not fatal where the true date may be ascertained⁸² by construction⁸³ or from other parts of the lien papers.⁸⁴

d. Value or Price

When required by statute, a lien notice, claim, or statement must state the agreed price or value of the labor performed or materials furnished.

A lien claim for services should show the value of the services rendered under an express or implied contract.⁸⁵ A lien cannot be sustained as a claim for work actually performed, independent of the contract, where there is no statement of the value of such work,⁸⁶ but the value of the labor performed or material furnished under contract need not be stated where the contract price is stated,⁸⁷ and in some jurisdictions it has been held generally that it is not necessary for the lien paper to state the reasonable value of the materials furnished.⁸⁸

Some statutes expressly require the notice of lien to state the agreed price or value of the labor performed or materials furnished,⁸⁹ or of materials

68. N.Y.—Hurley v Tucker, 113 N.Y.S. 980, 128 App.Div. 580, affirmed 92 N.E. 1087, 198 N.Y. 531.
40 C.J. p. 239 note 64.

Statements held sufficient
Del.—Pittman-Berger Co. v Parkinson, 180 A. 645, 7 W.W.Harr. 105 N.Y.—Clegg Co. v Henry Moss & Co., 61 N.Y.S.2d 99.
40 C.J. p. 239 note 64 [a].

69. Ill.—Kendall v Fader, 99 Ill. App. 104, affirmed 65 N.E. 318, 199 Ill. 394.
40 C.J. p. 239 note 65.

70. Minn.—St. Paul & M. Pressed Brick Co. v Stout, 47 N.W. 971, 45 Minn. 327.

71. Ill.—Sorg v Crandall, 84 N.E. 181, 231 Ill. 79.
Tex.—Compton v Jennings Lumber Co., Civ. App., 266 S.W. 569.

72. Wash.—Johnston v Harrington, 11 P. 316, 5 Wash. 73.

73. Neb.—Garlicks v Donnelly, 60 N.W. 323, 42 Neb. 57.

74. N.Y.—Barrett v Schaefer, 146 N.Y.S. 1056, 162 App.Div. 62, affirmed 112 N.E. 1054, 217 N.Y. 722.

75. Pa.—Rehner v Zeigler, 3 Watts & S. 258.
40 C.J. p. 240 note 72.

76. Mo.—Cole v Barron, 8 Mo. App. 509.
W.Va.—H. C. Houston Lumber Co. v Wetzel & T. R. Co., 72 S.E. 786, 69 W.Va. 682.

77. Ill.—Blanchard v Fried, 44 N.E. 880, 162 Ill. 163.
40 C.J. p. 240 note 74.

78. W.Va.—Huntington Plumbing & Supply Co. v McGuffin, 83 S.E. 194, 75 W.Va. 78, followed in Pittsburgh Steel Products Co. v Huntington Masonic Temple Ass'n, 94 S.E. 127, 81 W.Va. 222.

79. Mont.—McAboy v Junk, 216 P. 1111, 68 Mont. 193.

80. Ill.—May, Purington & Bonner Brick Co. v General Engineering Co., 76 Ill. App. 380, affirmed 54 N.E. 638, 180 Ill. 535.

81. Fla.—Florida New Deal Co. v Crane Co., 194 So. 865, 112 Fla. 471.
N.Y.—Zielinski v Hilton, 235 N.Y.S. 182, 134 Misc. 303—Farabella v

Porter, 225 N.Y.S. 417, 130 Misc. 630.

40 C.J. p. 240 note 79.

82. Pa.—Hillary v. Pollock, 13 Pa. 186.

83. N.Y.—Schwartz v Lewis, 123 N.Y.S. 319, 138 App.Div. 566.

84. Iowa.—Dangs v Beig, 48 N.W. 90, 82 Iowa 350.

85. Pa.—Bennett v Frederick R. Geary Co., 117 A. 345, 273 Pa. 585.

86. Pa.—Dyer v Wallace, 107 A. 754, 164 Pa. 169.

87. Cal.—Bringham v Knox, 59 P. 193, 127 Cal. 40.
40 C.J. p. 240 note 86.

88. Mo.—McDonnell v Nicholson, 67 Mo. App. 408.

89. N.Y.—Pascual v Greenleaf Park Land Co., 157 N.E. 144, 245 N.Y. 394, reversed on other grounds 169 N.E. 405, 252 N.Y. 336—Brescia Const. Co. v Walart Const. Co., 291 N.Y.S. 960, 249 App.Div. 151, affirmed 8 N.E.2d 330, 273 N.Y. 648—Brescia Const. Co. v Walart Const. Co., 264 N.Y.S. 862, 238 App. Div. 360—Charles S. Utterson, Inc.,

actually manufactured for, but not delivered to, the real property,⁹⁰ and a failure to comply therewith is fatal to the lien.⁹¹

The omission of the dollar mark opposite figures showing the value or price of the work or material will not defeat the lien where it clearly appears that the figures represent dollars and cents.⁹²

e. Particularity and Itemization

- (1) In general
- (2) Contract for gross sum generally, extras
- (3) Measurement and computation
- (4) Time
- (5) Price or value and credits
- (6) Trade terms and abbreviations
- (7) Inclusion of nonlienable items

(1) In General

A mechanic's lien claim or statement must contain an itemized account when itemization is required by statute, but substantial compliance with the statute ordinarily is sufficient.

v. Snyder, 231 N Y S 110, 224 App Div 471—Preiser v Schine, 224 N Y S 890, 221 App Div 878, affirmed 161 NE 194, 217 N Y 591
40 C J p 240 note 88

Statements held sufficient

N Y—Goldberger-Raabin, Inc. v 74 Second Ave Corporation, 169 NE 405, 252 N Y 336
40 C J p 240 note 88 [e].

90. N Y—Rapid Fireproof Door Co v Largo Corporation, 154 NE 531, 243 N Y 482, motion denied 154 NE 898, 244 N Y 563
40 C J p 240 note 89

91. N Y—Flaum v Picarreto, 133 NE 739, 226 N Y 468
40 C J p 240 note 90

92. Ill—Dotto v. Ringwald, 60 Ill App 415
Minn—Smith v Headley, 23 NW 550, 33 Minn 384

93. Mo—Fuhler v Gohman & Levine Const Co, 142 SW 2d 482, 346 Mo 588—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 955, 332 Mo 440—Major v McVey, App, 128 SW 2d 347—Rust Sash & Door Co v Bryant, App, 124 SW 2d 544, transferred, see Rust Sash & Door Co v Gate City Bldg Corporation, 114 SW 2d 1023, 342 Mo 206

N Y—In re Sperry, 5 N Y S 2d 249, 254 App Div 819

Pa—Frank J Hagerty Mantel Co v Bohbruch, 96 Pa Super 544—Raymond v Brookside Distilling Products Corporation, Com Pl, 44 Lack

Jur 181—Schwartz v Stefan, Com Pl, 94 Pittsb Leg J 33
Tex—Lewis v Phillips, 114 SW 2d 864, 131 Tex 313—Royal Indemnity Co v American District Steam Co, Civ App, 88 SW 2d 1091, error dismissed
40 C J p 241 note 93

Itemized account or bill of particulars in proceedings to enforce lien see *infra* § 294

Object

(1) Itemization is required so that debtor and other creditors may determine from inspection of recorded account for what lien is claimed, whether for work and labor, and if so, nature of it, when performed, and at what price, or materials, and if so, the kind, quality, and price, and when furnished, or both labor and materials, and if so, the kind, quality, and price of each and when performed or furnished

Tex—Corpus Juris cited in Aetna Casualty & Surety Co v Hawn Lumber Co, 97 SW 2d 460, 462, 127 Tex 296

W Va—Giant v Cumberland Valley Cement Co, 52 SE 36, 58 W Va 182

(2) Other statements of object of statute see 40 C J p 241 note 93 [b]

Claim not fatally defective

Okl—Spurrer Lumber Co v Montgomery, 24 P 2d 1005, 165 Okl 67—Key v Hill, 219 P 308, 93 Okl 64

94. Okl—Spurrer Lumber Co v Montgomery, 24 P 2d 1005, 165 Okl 67

Pa—Duplex Electric Co v Simons,

In some jurisdictions it is necessary that the claim or statement should contain an itemized account of the work done and materials furnished,⁹³ at least where claimant is a subcontractor.⁹⁴ In other jurisdictions in some of which the statutory provisions are substantially the same or very similar, an itemized account is not necessary,⁹⁵ although even in such jurisdictions it is better practice to state in the notice of lien a particular description of the labor and material used in the construction of the building on which the lien was claimed.⁹⁶

Combination or separation of labor and material claims Whether the claim is for work or materials must be shown.⁹⁷ Claims for both labor and material ordinarily must be stated as separate items,⁹⁸ unless furnished under an entire contract for a gross sum,⁹⁹ but in some jurisdictions they may be combined in one item.¹

Separate contracts. Where a claimant combines claims due on separate contracts in one lien statement, and asserts a claim in a lump sum without specifying the particular amount due under each,

Brittain & English, 156 A 617, 102 Pa Super 97—Johnson Service Co v Fayette Title & Trust Bldg, 96 Pa Super 535—Currie v Koehler, 90 Pa Super 197—Rice v Cornelius, 48 Pa Dist & Co 86—Philadelphia Const Co v DeCaro, Com Pl, 33 Del Co 564—Schwartz v Stefan, Com Pl, 94 Pittsb Leg J 33—Fletcher v Layton, Com Pl, 23 West Co L J 195
40 C J p 241 note 94

95. Ala—Powers v Grayson, 109 So 164, 215 Ala 33
Ark—B S Halbert & Son v Baker, 4 SW 2d 1, 176 Ark 971—Standard Lumber Co of Pine Bluff v Wilson, 296 SW 27, 173 Ark 1024
40 C J p 241 note 96

Subcontractor

Rule of text is the same where lien is sought to be enforced by one with a contract direct with the owner or by a subcontractor—B S Halbert & Son v Baker, 4 SW 2d 1, 176 Ark 971

96. Hawaii—Wong Wong v Honolulu Skating Rink, Ltd, 24 Hawaii 181

97. Pa—Robinson v Davis, 8 Del Co 237
40 C J p 241 note 99

98. Wash—Gates v. Brown, 25 P. 911, 1 Wash 470
40 C J p 241 note 1

99. Minn—Leads v Little, 44 NW 309, 43 Minn 414
40 C J p 242 note 2

1. N Y—Weaver Hardware Co v Solomovitz, 163 N Y S 121, 98 Misc 413.

his claim for lien is void as against purchasers, creditors, and other lien claimants,² but, where a single lien may be obtained because the work was continuous, although done under different contracts, it is not necessary to state the amount due on each of the separate contracts³

Sufficiency generally The requirement of the statutes that the account must be itemized means that it must be set out by items⁴ The account filed must be fairly⁵ and reasonably⁶ itemized, and the particulars of the claim must be fully stated,⁷ that is, the itemized account or bill of particulars should be as full and specific as the nature of the case admits in respect of all matters as to which the adverse party ought to have information⁸

To what extent the account must be itemized depends somewhat on circumstances⁹ The sufficiency of the itemization must be determined in view of the objects and purposes of the statute¹⁰ The court will not require too great a particularity in the specification of the quality of the materials,¹¹ nor will the lien be lost because the items of the ac-

count do not descend to minute particulars¹² It is sufficient if there is a substantial compliance with the statutory requirement,¹³ if the statement of claim is itemized as nearly as practicable,¹⁴ or if the claim or account is as definite and specific as the contract under which the work or material was furnished¹⁵ Itemization in form is unnecessary if it appears in substance and effect¹⁶ It is sufficient if the required itemization appears in an account or other paper annexed to the claim, referred to therein and made a part thereof as an exhibit¹⁷ Where the statute requires both the specifications of the contract and an account of items to be filed, the same paper may serve both purposes when appropriate for both¹⁸

Sometimes part of the items are sufficiently stated, while others are not, and in such case the entire claim is not defeated¹⁹

Omission of proper items The owner is not entitled to complain because the lien account does not contain all the items for which a lien might have been maintained²⁰

2. Okl.—Tulsa Exch Nat Bank v Okeya Oil & Gas Co., 229 P 765, 107 Okl 62

Statement of amount due generally see supra §§ 153-155

3. Utah—Culner v. Caine, 61 P 1008, 22 Utah 216

4. Tex.—Ball v Davis, 18 SW 2d 1063, 118 Tex 534—Trinity Universal Ins Co v Wontaske, Civ App, 148 SW 2d 235, error dismissed, judgment correct

5. Mo.—Rude v Mitchell, 11 SW 225, 97 Mo 365
40 C J p 242 note 8

Accounts held sufficiently itemized
La.—Monroe Hardware Co v Delatte, 4 La App 66

Mo.—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 383 Mo 440
—Hanenkamp v Hagedorn, App, 110 SW 2d 826

Pa.—Hopkins v German Beneficial Union Dist No 321 of Ambridge, 158 A 312, 103 Pa Super, 134—Delaware County Supply Co v Scavichia, Com Pl, 33 Del Co 95
Tex.—Oil Field Salvage Co v Simon, 168 SW 2d 848, 140 Tex 456

Va.—Rust v Indiana Flooring Co, 145 SE 321, 151 Va 845
40 C J p 242 note 8 [a]

Accounts held not sufficiently itemized

Mo.—H B Deal & Co v Hamilton-Brown Shoe Co, 160 SW 2d 719, 349 Mo 275

Pa.—Frank J Hagerly Mantel Co v Bolbruch, 96 Pa Super 644—Johnson Service Co v Fayette Ti-

tle & Trust Bldg, 96 Pa Super 535
Tex.—Lewis v Phillips, 114 SW 2d 864, 131 Tex 318—Ball v Davis, 18 SW 2d 1063, 118 Tex 534—Austin Bridge Co v Drake, Civ App, 79 SW 2d 677
40 C J p 242 note 8 [b]

6. Ill.—Sorg v Crandall, 84 NE 181, 233 Ill 79

7. Iowa.—Greene v Ely, 2 Greene 508

8. Tex.—Ferguson v. Ashbell, 53 Tex 245
40 C J p 242 note 11.

9. Mo.—Harry Cooper Supply Co v Rolla Nat Bldg Co, App, 66 SW 2d 591
40 C J p 242 note 12

10. Tex.—Ball v Davis, 18 SW 2d 1063, 118 Tex 534—Royal Indemnity Co v American District Steam Co, Civ App, 58 SW 2d 1091, error dismissed

11. Pa.—Ferguson v. Vollum, 1 Phila 181

12. Mont.—McAboy v. Junk, 216 P 1111, 68 Mont 198

13. NY.—Murdock v Kleist, 293 N YS 583, 250 App Div. 127.
40 C J p 242 note 15

14. La.—McNaspy v Eunice Electric Theatre Co, 97 So 327, 154 La 96

15. Mo.—Harry Cooper Supply Co v. Rolla Nat Bldg. Co, App, 66 SW 2d 591
40 C J p 242 note 17.

16. W Va.—Grant v. Cumberland

Valley Cement Co, 62 SE 36, 53 W Va 162

17. NC.—King v Elliott, 147 SE 701, 197 NC 93
40 C J p 242 note 20

Failure to attach exhibit

(1) Lien in general form referring to exhibit containing such information which is not attached is fatally defective—Rice v. Cornelius, 48 Pa Dist. & Co 86

(2) A claim referring to bill of particulars averred to be annexed thereto as part thereof showing kinds and prices of materials furnished is bad if the bill is not annexed, even though the bill had been attached to the notice of intention to file a claim which had been personally served on the owner—South Philadelphia Builders' Supply Co v Testa, 8 Pa Dist. & Co 794

Exhibit attached to notice of intention

Where notice of intention to file mechanic's claim cannot be considered as part of claim, fact that notice served on defendants had attached thereto an exhibit giving sufficient details of nature of claim did not cure defect in claim itself—Rice v Cornelius, 48 Pa Dist. & Co 86

18. US.—Sosman v Great Southern Fireproof Hotel Co, Ohio, 116 F 800, 54 CCA 162

19. Md.—Whicher Dev. Corp v Ross, 121 A 372, 142 Md. 522
40 C J p 242 notes 23, 24.

20. Mo.—State v. Reynolds, 182 S W. 743, 266 Mo 595.

(2) Contract for Gross Sum Generally, Extras

Itemization of a mechanic's lien claim or statement generally is not necessary where the work was done or the materials furnished under an entire contract to do or furnish the work or materials for a gross sum

It is well established that, where the work was done or the materials furnished under an entire contract to do or furnish the work or materials for a gross sum, it is not necessary that claimant should itemize his account in his lien statement.²¹ The most usual application of this rule is in the case of persons who contract directly with the owner,²² but the same rule has also been held to be applicable in the case of a subcontractor whose contract with the principal contractor is for a gross sum in payment for all work done or material furnished,²³ although there is some authority to the contrary.²⁴

Extras Where the claim is for the contract price and extras, it is sufficient to state the contract price and to itemize the extras.²⁵ Itemization or specification of extras is necessary where the sum claimed therefor was not agreed on or fixed,²⁶ but not where they were furnished under an agreement²⁷ for a specified price.²⁸ A failure to item-

ize the extras does not defeat the entire claim.²⁹

(3) Measurement and Computation

Where the amount of the claim is not a sum agreed on or fixed, but is the result of computation, the elements of the computation are the subject of an account which should be given.

Where the contract is that the price of the work shall be ascertained by measurement and computation after its completion, it is sufficient to set out generally in the lien claim or statement the nature of the work and the amount due without further specifications,³⁰ but, where the amount of the claim is not a sum agreed on or fixed, but is the result of computation, the elements of the computation are the subject of an account which should be given.³¹ Where the work is of a kind usually charged for by measurement and estimate, such as bricklaying, lathing, plastering, etc., it is sufficient to show the quantity and measurement of each of the different elements, with the price charged per unit of computation, and the total price.³² Where the claim is for labor, an account showing the number of days' or hours' labor performed or furnished, with the price per day or per hour and the total amount claimed to be due, is sufficient.³³ In some decisions it has been held that each article should

21. Mo—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 332 Mo 440. Neb—Green v Fieister, 252 NW 397, 125 Neb 874.

NC—Corpus Juris quoted in King v Elliott, 147 SE 701, 704, 197 NC 93.

Pa—Silfies v Austin, 158 A 661, 104 Pa Super 344—Johnson Service Co v Fayette Title & Trust Bldg, 96 Pa Super 535—Philadelphia Const Co v DeCaro, Com Pl, 33 Del Co 564—Raymond v Brookside Distilling Products Corporation, Com Pl, 44 Lack Jur 181.

40 CJ p 242 note 27.

"A distinction runs through the authorities in regard to the particularity required in specifying the amount and character of the work done or materials furnished, and the prices charged therefor, where the claim rests upon open account and where the work done or materials furnished were contracted for as an entirety. More particularity of statement is required in the former than in the latter instance."

NC—King v Elliott, 147 SE 701, 704, 197 NC 93.

Va—H N Francis & Co, Inc v Hotel Rueger, Inc, 99 SE 690, 125 Va 106, 121.

22. Pa—Duplex Electric Co v Simons, Brittain & English, 156 A 617, 102 Pa Super 97.

40 CJ p 212 note 28.

23. Mo—Leach v Bopp, 12 SW 2d 512, 233 Mo App 254.

40 CJ p 243 note 29.

24. Tex—Meyers v Wood, 65 SW 174, 95 Tex 67—Corpus Juris cited in Union Indemnity Co v Rockwell, Com App, 57 SW 2d 90, 91—Corpus Juris cited in National Surety Co v United Brick & Tile Co, Civ App, 71 SW 2d 937, 941.

In Pennsylvania

(1) Claim by subcontractor setting forth lump contract price but giving no details or particulars as to work done or materials furnished is insufficient—Duplex Electric Co v Simons, Brittain & English, 156 A 617, 102 Pa Super 97—40 CJ p 243 note 30 [a].

(2) Subcontractor, filing lien for labor and materials furnished under two contracts, each for lump sum, need not itemize list of materials—Currie v Koehler, 90 Pa Super 197.

(3) Where subcontractor's lien claim is for individual article made up of parts in completed form constituting unit, material and parts need not be itemized—Duplex Electric Co v Simons, Brittain & English, 156 A 617, 102 Pa Super 97—Johnson Service Co v Fayette T & T Bldg, 96 Pa Super 535.

(4) Subcontractor's lien claim for installing "complete duplex grade A cable in concrete vault alarm sys-

tem" of bank was sufficient without itemizing parts composing "system"—Duplex Electric Co v Simons, Brittain & English, supra.

25. Kan—Home Lumber & Supply Co v McCurley, 115 P 590, 84 Kan 751.

Neb—Doolittle v. Plentz, 20 NW 116, 16 Neb 153.

26. Mo—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 332 Mo 440.

40 CJ p 244 note 32.

27. Mo—A A Nicol Heating & Plumbing Co v J B Neevel & Sons Constr Co, 174 SW 161, 187 Mo App 584—Bruns v Braun, 35 Mo App 337.

28. Pa—Sumption v Rogers, 53 Pa Super 109, affirmed 89 A 121, 242 Pa 348.

40 CJ p 244 note 34.

29. Ill—Sedgwick v Concord Apartment House Co, 104 Ill App 5.

30. Pa—Miller v Bedford, 86 Pa 454—Hill v McDowell, 14 Pa 175.

31. RI—McPherson v Greenwell, 61 A 175, 27 RI 178.

40 CJ p 344 note 37.

32. Mo—McDermott v Claas, 15 S W 995, 104 Mo 14, 23.

40 CJ p 344 note 38.

33. Mo—Brockmeier v. Dette, 58 Mo App 607.

be stated separately,³⁴ but in other decisions it has been held permissible to combine in one item materials of the same kind and price,³⁵ or several days' labor performed by the same person,³⁶ and it is not necessary to state each day's service of each particular person as a separate item³⁷

(4) Time

In the absence of statutory requirement, a mechanic's lien claim or statement need not state the date on which each particular item was furnished

It is not essential to the validity of a mechanic's lien claim or statement that the date on which each particular item was furnished should be given³⁸ Except in some jurisdictions,³⁹ the requirement as to the statement of time is fulfilled by stating that the work was done or the material furnished between two given dates,⁴⁰ at least where the work was done or the material furnished, or both, under an entire contract for a gross sum,⁴¹ or when claimant worked or furnished material under a contract continuously between the given dates,⁴² or where the owner and the contractor are one and the same person,⁴³ although not, it has been held, where it is obvious that the work could not have been continuously performed during the period elapsing between the dates mentioned,⁴⁴ or work was done on several buildings,⁴⁵ or claimant is a subcontractor⁴⁶

Indeed, some,⁴⁷ but not all,⁴⁸ statutes expressly require that the notice shall state the time when the first and last items of work were performed and materials were furnished. It has been held that

the designation of the time merely of the last item is not sufficient,⁴⁹ but it has also been held in the same and other jurisdictions that one item for an article which required time for its completion, stating the day the last work is done and the article completed, will sustain the lien,⁵⁰ that, where the work is done by contract with the owner, the whole work and materials are in contemplation of law furnished when the contract is finished, and the statement of that date alone is sufficient;⁵¹ and that, where but one date is given in connection with the work done or materials furnished, such date is presumed to be the day on which the materials were furnished⁵² or the work completed⁵³

Where an entire bill of materials is purchased at one time but the items are delivered at various subsequent dates, it is proper either to arrange all the items under the one date of purchase, or to start with the date of purchase and continue with dates corresponding to the deliveries, but it would be more complete to state that the whole was purchased at one date and delivered piecemeal at certain named times thereafter⁵⁴

(5) Price or Value and Credits

Unless an aggregate price was agreed on between the claimant and the contractor or the owner, a mechanic's lien claim or statement ordinarily should state the prices charged for the various items.

Ordinarily the prices charged for the various items should be stated,⁵⁵ but, where an aggregate price was agreed on between claimant and the con-

34. Tex.—Meyers v Wood, 65 SW 671, 26 Tex Civ App 591

35. Mo.—Banner Lumber Co v Robson, 168 SW 244, 182 Mo App 611, certiorari denied State v Reynolds, 182 SW 743, 266 Mo 595

36. Ill.—Sorg v Crandall, 84 N.E. 181, 333 Ill. 79

37. W Va.—Grant v Cumberland Valley Cement Co., 52 SE 36, 58 W Va 162

40 C J p 244 note 43

38. Mo.—State v Reynolds, 182 SW 743, 266 Mo 595
40 C J p 244 note 44

Where contract is between claimant and owner

Pa.—Diem v Whirt, Com Pl., 50 Lanc L Rev 259, 13 Som Leg J 163

39. N J.—Jersey Co Associates v Davison, 29 N J Law 415

40. Iowa.—Banks v Beig, 48 NW 90, 82 Iowa 350
40 C J p 244 note 47

Delivery within six months last past
Pa.—Hamilton v Means, 38 A 2d 528, 155 Pa Super 245

41. Ill.—Kendall v Pader, 65 NE 318, 199 Ill 294.

40 C J p 244 note 48

42. Ill.—Hayes v Hammond, 44 N E 422, 162 Ill 133
40 C J p 244 note 49

43. Pa.—Brennan v Kennedy, 69 Pa Super 77.

44. Pa.—Burrows v Carson, 53 Pa Super 488, affirmed 90 A 549, 244 Pa 6
40 C J p 244 note 51

45. Ill.—Buckely v Commercial Nat Bank, 49 NE 617, 171 Ill 284

46. Pa.—Crane Co v Rogers, 60 Pa Super 305—Crane Co v Rogers, 60 Pa Super 300

47. N Y.—Mahley v. German Bank, 67 NE 117, 174 N Y 499
40 C J p 244 note 54

48. Colo.—Mouat Lumber & Investment Co v Freeman, 42 P. 1040, 7 Colo App 152
40 C J p 245 note 55

49. Pa.—Lynch v. Feigle, 11 Phila 247

50. Pa.—Young v. Elliott, 2 Phila 353

51. N J.—Edwards v Derrickson, 28 N J Law 39
40 C J p 245 note 59

52. Pa.—Knabb's Appeal, 10 Pa 186, 51 Am D 472

53. Pa.—Donahoo v Scott, 12 Pa 45

54. Mo.—Louisiana & Gulf Lumber Co v. O'Connell, 87 Mo App 671

55. Mo.—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 333 Mo 440
N Y.—Callipari v 516 East 11th St Corporation, 1 N Y S 2d 384, 166 Misc 79

Pa.—Schwartz v Stefan, Com Pl., 94 Pittsb Leg J 33

Tex.—Black, Sivalis & Bryson v Operators' Oil & Gas Co, Civ App, 37 SW 2d 313, error dismissed
40 C J p 245 note 64

tractor⁵⁶ or the owner,⁵⁷ it is not essential that the price of each item set forth in the account should be stated, but it is sufficient where the account gives the aggregate price so agreed on by the parties⁵⁸ and the items are specified⁵⁹ with such particularity as to enable anyone interested to investigate as to whether the materials set forth in the account went into the structure and as to their value⁶⁰. The price of each item need not be stated where there is no statutory requirement calling for a statement of the price of each article⁶¹.

Separation of value of labor and material In the absence of statutory directions, the value of labor and material need not be separately stated⁶².

Itemization of credits. A statute providing for an itemized account of labor done and material furnished does not require the credits to be itemized⁶³.

(6) Trade Terms and Abbreviations

A mechanic's lien is not invalidated by the use of ordinary bookkeeping or commercial abbreviations in stating the account or by the use of trade terms or abbreviations in describing the items.

A mechanic's lien is not invalidated by the use of ordinary bookkeeping,⁶⁴ or commercial⁶⁵ abbreviations in stating the account, or by the use of trade terms⁶⁶ or abbreviations⁶⁷ in describing the items, and a fortiori, where there is a sufficient general designation or description of each article, the addition, by way of more particular description, of letters or abbreviations not commonly understood by persons not in the business of furnishing such materials, does not vitiate the account⁶⁸.

(7) Inclusion of Nonlienable Items

The inclusion in a mechanic's lien claim or statement in good faith of nonlienable items which are separable from the lienable items ordinarily does not invalidate the lien as to the proper and lienable charges.

The lien is not defeated by the inclusion in the lien claim or statement of charges for items which are not lienable,⁶⁹ such as materials which were not actually furnished⁷⁰ or used in the building or improvement,⁷¹ where the inclusion of such charges is due to inadvertence or an honest mistake without fraudulent intent,⁷² the lien paper contains one

58. Mo—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 332 Mo 440
Pa—Currie v Koehler, 90 Pa Super 197

Tex—Corpus Juris cited in Royal Indemnity Co v American District Steam Co, Civ App, 88 SW 2d 1091, 1093, error dismissed
40 CJ p 245 note 65

57. Mo—Dallas v. Brown, 60 Mo App 493

58. Mo—H B Deal & Co v Hamilton-Drown Shoe Co, 160 SW 2d 719, 349 Mo 275

Tex—Royal Indemnity Co v American District Steam Co, Civ App, 88 SW 2d 1091, error dismissed
40 CJ p 245 note 68

59. Mo—Grace v Nesbitt, 18 SW 1118, 109 Mo 9
40 CJ p 245 note 69

60. W Va—Hough v Watson, 112 S E 303, 91 W Va 161.
40 CJ p 245 note 70

61. Pa—Bennett Lumber & Manufacturing Co. v. Hartrick, 61 Pa. Super 456
40 CJ p 245 note 71

62. NY—Felgenhauer v Haas, 108 NYS 476, 123 App Div. 75
40 CJ p 245 note 73

63. W Va—Dickerson Lumber Co v Paul, 132 SE 270—Bateson v Baldwin Forging & Tool Co, 84 S E 887, 75 W Va 574

Omission of credits see supra § 154

64. US—Great Southern Fireproof Hotel Co v. Jones, Ohio, 116 F

793, 54 CCA 165, affirmed 24 S Ct. 576, 193 US 532, 48 L Ed 778
Mo—Schulenburg v. Wernier, 6 Mo App 292

65. Mo—Kneisley Lumber Co v Edward B Stoddard Co, 88 SW 774, 113 Mo App 306

Tex—Compton v Jennings Lumber Co, Civ App, 266 SW. 569

66. Mo—State v Reynolds, 182 S W 743, 266 Mo 595
40 CJ p 245 note 77

67. Mo—Wilson-Reheis-Rolfes Lumber Co v Ware, 138 SW 690, 158 Mo App 179

40 CJ p 245 note 78

68. Minn—Smith v Headley, 23 N. W 550, 33 Minn 384

69. Iowa—Consumers' Independent Lumber Co v Rozema, 237 NW 433, 213 Iowa 696

Mo—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 332 Mo 440
—Harry Cooper Supply Co v Rolla Nat Bldg Co, App, 66 SW 2d 591—Woodling v Westport Hotel Operating Co, 63 SW 2d 207, 237 Mo App 1231, transferred, see, 55 SW 3d 477, 331 Mo 1231

ND—Viker v Beggs, 208 NW 383, 53 ND 858

Wash—Keane v Thomas B Watson Co, 271 P 73, 149 Wash 424
40 CJ p 246 note 83

70. Neb—Platner Lumber Co v Theodore, 235 NW 467, 120 Neb 804

40 CJ p 246 note 84.

71. Mo—Moller-Vandenboom Lumber Co v Boudreau, 85 SW 2d 141, 231 Mo App 1127

Or—Paget v Peters, 286 P 983, 133 Or. 608, rehearing denied 289 P. 1119, 133 Or 608—Northwest Lumber & Fuel Co. v. Plants, 268 P 763, 126 Or 69
40 CJ p 246 note 85

Diverting small amount of lumber sold for construction of store building, and using it in walks attached to building, described in lien notice as erections and superstructures, did not vitiate lien—Warrenton Lumber Co v Smith, 215 P 313, 117 Or 530

72. Cal—Shumway v Woolwine, 257 P 898, 84 Cal App 220

Iowa—Consumers' Independent Lumber Co v Rozema, 237 NW 433, 213 Iowa 696

Mich—Currier Lumber Co v Ruoff, 299 NW 163, 398 Mich 505

Mo—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 332 Mo 440
—Harry Cooper Supply Co v Gilhoiz, App, 107 SW 2d 798—Reese v Hoyer, App, 95 SW 2d 884—Moller-Vandenboom Lumber Co v Boudreau, 85 SW 2d 141, 231 Mo App 1127—Woodling v. Westport Hotel Operating Co, 63 SW 2d 207, 237 Mo App 1231, transferred, see, 55 SW 2d 477, 331 Mo 812

Mont—Smith v Gunniss, 144 P 2d 186, 115 Mont 363

Neb—Platner Lumber Co v Theodore, 235 NW 467, 120 Neb 804

Wash—Westinghouse Electric Sup-

lienable item,⁷³ and the items for which claimant is entitled to a lien can be segregated from those which are improperly included,⁷⁴ in such case the illegal charges will be eliminated⁷⁵ and the lien will be enforced as to the proper and lienable charges.⁷⁶

The inclusion of such improper charges will, however, defeat the entire lien where they are willfully and intentionally included by claimant in order to obtain a lien for a larger amount than he is entitled to,⁷⁷ or where their inclusion is due to gross carelessness⁷⁸ or a recklessness tantamount to bad faith,⁷⁹ or where the account is so stated that the lienable and nonlienable items cannot be segregated⁸⁰

According to some authorities, it is proper to receive evidence to segregate the lienable from the

nonlienable items,⁸¹ but according to other authorities, the segregation must be made from an inspection of the lien paper itself⁸² without resort to extrinsic evidence⁸³

§ 166. Signature

Unless required by statute, a lien notice, claim, statement, or account need not be signed

In the absence of statutory requirement, a lien notice, claim, or statement need not be signed,⁸⁴ although, as considered supra § 156, the claim or statement must disclose on its face by whom the lien is claimed. It is generally required by statute, however, that the notice, claim, statement, or account shall be signed⁸⁵ by claimant⁸⁶ or by some one in his behalf⁸⁷

ply Co v Hawthorne, 150 P 2d 55, 21 Wash 2d 74

40 C J p 246 note 86

73. Pa—McCrystal v Cochran, 23 A 444, 147 Pa 225

40 C J p 246 note 87.

74. Mo—Harry Cooper Supply Co v Gilloz, App, 107 S W 2d 798—Moller-Vandenboom Lumber Co v Boudreau, 85 S W 2d 141, 231 Mo App 1127—Harry Cooper Supply Co v Rolla Nat Bldg Co, App, 86 S W 2d 591

Mont—Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 111 Mont 471

Or—Warrenton Lumber Co v Smith, 245 P 313, 117 Or 530

40 C J p 246 note 88

75. Or—Warrenton Lumber Co v Smith, supra

40 C J p 247 note 89

76. Or—Warrenton Lumber Co v Smith, supra

40 C J p 247 note 90

77. Alaska—Bloom v McCluskey, 7 Alaska 349

Mich—Jenks v Daniel, 7 N W 2d 286, 304 Mich 239—Sacchetti v Recreation Co, 7 N W 2d 265, 304 Mich 185—Currier Lumber Co v Ruoff, 299 N W 163, 298 Mich 505

Mo—Major v McVey, App, 128 S W. 2d 347—Reese v Hoyer, App, 95 S W 2d 884—Sechrist v Hufty Rock Asphalt Co, App, 63 S W.2d 193

Or—Phillips v Graves, 9 P 2d 490, 139 Or 336, 83 A L R 1—Warrenton Lumber Co v Smith, 245 P. 313, 117 Or 530

Wash—Keane v Thomas B Watson Co, 271 P 73, 149 Wash 424.

40 C J p 247 note 91

Under some statutes any person who shall willfully include in his claim work or materials not performed on or furnished for the property described in his claim shall forfeit his lien—Shumway v Woolwine,

257 P 898, 84 Cal App 320—40 C J p 247 note 91 [a]

Fictitious claim for labor performed
Where contractor induced purchaser to execute note to furnace manufacturer as security for payment of furnace which contractor installed for purchaser, transaction did not constitute assignment of contractor's claims against purchaser's property, since execution of note as security did not extinguish debt, and manufacturer was not varied in including fictitious item in lien account for labor performed by contractor in installing furnace—Reese v Hoyer, Mo App, 95 S W 2d 884

78. Neb—Consolidated Stone Co v Union Pac R Co, 148 N W 318, 96 Neb 521

79. Iowa—Stephenson v Svenson, 174 N W 570, 187 Iowa 802

Smallness of false item does not affect rule of text—Currier Lumber Co v Ruoff, 299 N W 163, 298 Mich 505

80. Mich—Healy v Toles, 254 N W 213, 266 Mich 584, 92 A L R 749—*Corpus Juris* cited in Bezold v Beach Development Co, 244 N W 204, 205, 259 Mich 693

Or—Phillips v Graves, 9 P 2d 490, 139 Or 336, 83 A L R 1—*Corpus Juris* cited in Valder v Berg, 260 P 240, 241, 123 Or 661—Johnson v Alm, 254 P 803, 121 Or. 385—James A C Tait & Co v. Stryker, 243 P 104, 117 Or 338

40 C J p 247 note 94

Even where nonlienable item is separable, the entire lien may be denied because of bad faith—Reese v. Hoyer, Mo App, 95 S W 2d 884

81. Colo—Barnes v Colorado Springs & C. D. R. Co, 94 P 570, 42 Colo 461

In Arizona

(1) Where contract for furnishing both lienable and nonlienable mate-

rials to contractor is unit and parties did not intend separate charges for separate items, evidence as to reasonable value of different items, so as to enable foreclosure of lien for lienable articles, is inadmissible, but, where contract for delivery of lienable and nonlienable materials to contractor was intended to be severable as to different items, but lien claimant inadvertently lumped all items in lien claim, oral evidence is admissible in foreclosure suit as to amount of different items—Lilley v J D Halstead Lumber Co, 28 P 2d 616, 42 Ariz 546, distinguishing Wolfley v Hughes, 71 P. 951, 8 Ariz 203

(2) Where recorded lien notice of materialman lumped lienable materials delivered to contractor together with cash advanced, extrinsic evidence was admissible in foreclosure suit as to amount of lienable items—Lilley v J D Halstead Lumber Co, 28 P 2d 616, 42 Ariz 546

82. Or—James A C Tait & Co v Stryker, 243 P 104, 117 Or. 338

40 C J p 247 note 96

83. Or—Phillips v Graves, 9 P 2d 490, 139 Or 336, 83 A L R 1—James A C Tait & Co. v. Stryker, 243 P 104, 117 Or 338

40 C J p 247 note 97

84. N Y—Moore v McLaughlin, 21 N Y S 55, 66 Hun 133

40 C J p 247 note 2

Signature to

Notice to owner see supra § 127. Verification of lien claim or statement see infra § 167

85. Me—Stratton v Shoenbar, 10 A 446

40 C J p 247 note 98

86. Mass—Lays v Hurley, 103 N E 52, 215 Mass 582

W Va—Stout v Golden, 9 W. Va. 231

87. Mass—Lays v Hurley, 103 N E 52, 215 Mass 582

40 C J p 247 note 1.

A signing by the agent⁸⁸ or attorney⁸⁹ of claimant is sufficient. A claim by a firm is sufficiently signed if signed in the individual names of all the partners,⁹⁰ or the name of one of the partners,⁹¹ or if signed with the firm name.⁹² When the notice states the full name of the corporation claiming the lien but is signed by using an abbreviated designation, the notice is sufficient, as no one could be misled or injured.⁹³

Except under statutes requiring that the statement or account be "subscribed,"⁹⁴ it is not necessary that the name of claimant shall be signed at the end of the claim, but it is sufficient if the affidavit or verification is signed⁹⁵ or if the name of claimant appears at the commencement or in the body of the statement.⁹⁶

§ 167. Verification

- a. In general
- b. Persons entitled to verify
- c. Person before whom verification made
- d. Sufficiency of verification

a. In General

The failure to verify a mechanic's lien claim or statement as required by statute ordinarily defeats the lien.

It is usually required by statute that a mechanic's lien claim or statement shall be verified,⁹⁷ and as a rule a lack of verification defeats the lien⁹⁸ although under some statutes it merely postpones the lien as to purchasers and encumbrancers in good faith whose rights accrued after the expiration of the time for filing.⁹⁹

Time to Raise Objection. An objection that the notice or statement of lien is not sufficiently verified can be raised at the trial, and need not be raised any sooner.¹

b. Persons Entitled to Verify

Such person or persons as the statutes designate may verify a mechanic's lien claim or statement.

The verification of a mechanic's lien claim or statement may be made by such person or persons as the statutes designate.² In the absence of a statutory requirement, the verification need not be made by claimant in person,³ but it may be made by other persons,⁴ such as an agent,⁵ attorney,⁶ or bookkeeper⁷ of claimant, whether claimant is a nat-

88. Kan—Sharon Town Co v Morris, 18 P 230, 39 Kan 377
40 C J p 247 note 4

89. Wis—Brown v La Crosse City Gas Light & Coke Co., 21 Wis 51
40 C J p 247 note 5

90. Ind—Duckwall v Jones, 58 N E 1055, 156 Ind 682, reheard 60 N E 797, 156 Ind 682

91. Wis—White v Dumpke, 45 Wis 454

92. Ind—Abromson v Edmundson, 136 N E 22, 79 Ind App 409
40 C J p 247 note 8

93. Mo—Mississippi Planing Mill v Presbyterian Church, 54 Mo 520
40 C J p 247 note 9

94. Me—Stratton v Shoenbar, 10 A 446

W Va—Mayes v Ruffners, 8 W Va 384
40 C J p 248 note 11

95. Wash—Brace & Hergert Mill Co v Burbank, 151 P 803, 87 Wash 356, Ann Cas 1917E 739.
40 C J p 248 note 13

96. N Y—Moore v McLaughlin, 21 N Y S 55, 66 Hun 133
Pa—Sturdevant v Nugent, 9 Kulp 176.

97. Mo—Goodner v Mosher-Roe Abstract & Guaranty Co., 282 S W 698, 314 Mo 151

N Y—Hurd Bros v H R Day Const Co., 261 N Y S 90, 146 Misc 103

Tenn—McDonnell v Amo, 34 S W 2d 212, 163 Tenn 36
40 C J p 248 note 15
Verification of notice to owner see supra § 127.

Waiver

(1) Failure to object to want of verification constitutes waiver—Barker Bros v Coates, 297 P 8, 211 Cal 756—Patten & Davies Lumber Co v Hayden, 298 P. 129, 113 Cal App 103

(2) Materialman failing to comply with statutory requirements for preservation of lien occupied status of general creditor except to extent of interest acquired under contractor's order on owner, since unsworn statements and verbal notices to owner have no legal effect in acquiring lien, in that requirement of statute for sworn statement cannot be waived by contractor or owner—B F Sturtevant Co v Board of Education of City School Dist of Cincinnati, 1 N. E 2d 148, 51 Ohio App 348

98. N Y—Kingston v M S Const Corporation, 164 N E 573, 249 N Y. 533, followed in Mozarsky v. Whinston Bros., 237 N Y S 842, 228 App Div 642, affirmed 173 N E 863, 254 N Y 552—In re James Passero & Sons, 261 N Y S 661, 237 App Div 638—Hurd Bros v H R Day Const Co., 261 N Y S 90, 146 Misc 103

Or—Lorenz Co v Gray, 298 P 222, 136 Or 605, rehearing denied and

opinion adhered to Lorenz Co v. Day & Co., 300 P 949, 136 Or 605
Tenn—McDonnell v Amo, 34 S W 2d 212, 163 Tenn 36
40 C J p 248 note 18

99. S D—Hill v Alliance Bldg Co., 60 N W 752, 6 S D 160, 55 Am S R. 819
40 C J p 248 note 17

As between materialmen and owner, failure to verify account is not fatal—Rust v Kelley Bros Lumber Co., 21 S W 2d 973, 180 Ark 517

1. N Y—Conklin v Wood, 3 E D. Smith 662

2. Cal—Monarch Metal Weather Strip Co v Clynick, 3 P 2d 593, 117 Cal App 270

40 C J p 248 note 19

3. Ark—Georgia State Sav. Ass'n v Marra, 9 S W 2d 785, 178 Ark. 18.

40 C J p 248 note 19

4. Ark—Georgia State Sav Ass'n v. Marra, supra

5. La—Central Lumber Co v Douglas, 127 So 43, 12 La App 680
40 C J p 248 note 20.

6. Cal—Monarch Metal Weather Strip Co v Clynick, 3 P.2d 593, 117 Cal App 270

40 C J p 249 note 21

7. Ark—Georgia State Sav. Ass'n v Marra, 9 S W 2d 785, 178 Ark. 18.
Pa—Billmeyer & Small Co v Brubaker, 17 York Leg Rec 113

ural person or a corporation⁸ Where the lien is claimed by a corporation, a verification by its president,⁹ secretary,¹⁰ or by a person who has full charge of its business and is substantially its general manager¹¹ is proper; and a verification by a person described as a member of the corporation has been held sufficient¹² One of two or more joint lienors may verify the claim on behalf of all¹³ In case the lien is claimed by a firm, a verification by one of the partners¹⁴ or the manager of the firm¹⁵ is sufficient, while an attempted verification by the firm is invalid¹⁶

c. Person before Whom Verification Made

Such persons as are designated by statute may take the verification to a mechanic's lien claim or statement

The verification to a mechanic's lien claim or statement may be made before such person as the statutes may designate¹⁷ The oath of verification may be made before any person authorized to administer oaths¹⁸ or take depositions¹⁹

While there is authority to the contrary,²⁰ it has been held that, under a statute requiring the statement to be verified, but silent as to where or before whom such affidavit shall be made, the affidavit may be made in another state before any officer authorized by the laws of such state to admin-

ister oaths,²¹ and, except in some jurisdictions,²² it has been held that an affidavit to a mechanic's lien statement sworn to before a notary in another state is sufficient²³ An affidavit of verification showing on its face that it was taken outside the jurisdiction of the notary who administered the oath is invalid²⁴

Where a lien is claimed by partners, one of the partners who is a notary has no right to administer the oath to the other partner who verifies the statement,²⁵ but the verification is not rendered invalid by the fact that it is made before an officer otherwise empowered to administer the oath, who is attorney²⁶ or general manager²⁷ for claimant.

d. Sufficiency of Verification

- (1) In general
- (2) Showing of knowledge or information and belief
- (3) Signature
- (4) Jurat

(1) In General

A verification to a mechanic's lien claim or statement generally is sufficient when it complies substantially with statutory requirements.

The verification may be made before,²⁸ but not after,²⁹ the filing of the claim; in order to be ef-

8. Neb—Henry & Coatsworth Co. v Fisherick, 55 NW 643, 37 Neb 207

9. Del—Pittman-Berger Co v Parkinson, 180 A. 645, 7 WW Harr 105

10. Mont—Rogers-Templeton Lumber Co v Welch, 184 P. 838, 56 Mont 321

Or—Cooper Mfg Co v Delahunt, 51 P. 649, 36 Or 402, reheard 60 P. 1, 36 Or 402

11. Cal—Coghlan v Quartararo, 115 P. 664, 15 Cal App 663.

12. Ala—Alabama State Fair & Agricultural Ass'n v Alabama Gas Fixture & Plumbing Co, 31 So. 26, 131 Ala 256

40 C J p 249 note 25

ratification by corporation

Materialman's statutory affidavit, signed "C Lumber Company, Inc, by W L De Loach," was sufficient in form, and such affidavit was ratified by the corporation's bringing suit for the materials—Central Lumber Co v. Douglas, 127 So 43, 12 La App 680

13. NY—Waters v Goldberg, 108 NYS 992, 124 App Div. 511.

Utah—Culmer v. Caine, 61 P. 1008, 22 Utah 216

14. Kan—Sharon Town Co v Morris, 18 P. 330, 39 Kan 377.

40 C J p 249 note 27

15. Kan—Pierce v Osborn, 19 P. 656, 40 Kan 168—Sharon Town Co v Morris, 18 P. 330, 39 Kan 377.

16. NY—Kane v Hutkoff, 81 NY S 85, 81 App Div 105.

17. Nev—Arrington v. Wittenberg, 12 Nev. 99

Persons who may administer or take. Affidavits see Affidavits § 10

Oaths see the CJS title Oaths and Affirmations § 5, also 46 C J. p 840 note 73 et seq

County recorders

Under statute empowering county recorders "to take and certify the acknowledgment and proof of all conveyances affecting any real estate, or of any other written instrument," they have authority to administer the oath and certify to the verification of a mechanic's lien claim—Arrington v Wittenberg, supra—40 C J. p 249 note 34

18. Ohio—Dabney v Rose Bros Co, 191 NE 810, 47 Ohio App 278

40 C J p 249 note 32

19. Notary public

Kan—Carr v Hooper, 29 P. 398, 48 Kan 253

20. Ala—Chandler v Hanna, 73 Ala 390

40 C J p 249 note 35

21. Minn—Wood v St Paul City

R Co, 44 NW. 308, 42 Minn 411, 7 L R A 149

22. Ala—Chandler v Hanna, 73 Ala 390

40 C J p 249 note 37.

23. Minn—Wood v St Paul City R Co, 44 NW. 308, 42 Minn 411, 7 L R A 149

Neb—Phelps & Bigelow Wind-Mill Co. v. Shay, 48 NW. 896, 32 Neb 19

24. Neb—Byrd v. Cochran, 58 NW 127, 39 Neb 109.

25. Mich—Smalley v Bodinus, 79 NW. 567, 120 Mich 363, 77 Am S R 602

26. Ohio—Corpus Juris quoted in Evans v Lawyer, 173 NE 735, 737, 123 Ohio St 62

40 C J p 249 note 42

27. Ohio—Dabney v Rose Bros Co, 191 NE 810, 47 Ohio App 278

28. Del—Powell v Carlisle, 74 A. 365, 24 Del 3

40 C J p 250 note 45

29. Colo—Rice v Carmichael, 34 P 1010, 4 Colo App 84

Amendment of verification after expiration of time for filing see infra § 170

fectual the oath of verification must be in writing as a part of the paper filed for record for the purpose of claiming the lien³⁰ Although it has been held that there must be strict compliance with the statutory requisites with respect to the verification of the statement,³¹ and that, in determining whether an affidavit conforms to the law, it will be strictly construed,³² it has also been held that a verification which is in substantial compliance with the statute is sufficient.³³ The verification need not be in the exact language of the statute,³⁴ or in the exact form prescribed by statute,³⁵ although it is sufficient where it follows the exact language of the statute,³⁶ it is not defeated by a clerical error which is not misleading³⁷ or by frivolous objections to its form or wording³⁸

Various alleged defects or irregularities have been held not to render the verification insufficient³⁹ Some statutes require a verification by affidavit⁴⁰ of particular matters,⁴¹ and under such statutes not only is an affidavit necessary⁴² but it must sufficiently cover the matters specified in the statute.⁴³ Under such statutes,⁴⁴ or under statutes

requiring a verification to the effect that the statements contained in the notice are true,⁴⁵ a statement or notice having merely a certificate of acknowledgment is insufficient; but some statutes do not prescribe or require any particular form of verification,⁴⁶ and under such statutes an affidavit is not essential,⁴⁷ and a claim signed by claimant and verified by his oath,⁴⁸ the notary certifying that claimant swore to it,⁴⁹ is sufficient, although even in such case the better practice is to have the verification in the form of an affidavit annexed to the claim to the effect that the facts therein stated are true.⁵⁰

The verification need not be in form like that attached to a pleading,⁵¹ it is sufficient if the entire lien paper is in form an affidavit⁵² It is not necessary that the affidavit of verification should restate the facts on which the claim is based,⁵³ and it is sufficient to state that the claim or statement is true⁵⁴ or that the facts stated therein are true;⁵⁵ but an affidavit of verification certifying merely that a part of the statement is true and not that the whole of it is true has been held insufficient⁵⁶

No greater certainty is required in the affidavit

30. W Va.—Hill Clutch Co. v. Independent Steel Co., 82 SE 223, 74 W Va 353—Lockhead v. Berkeley Springs Waterworks & Improvement Co., 21 SE 1031, 40 W Va 553

31. Ala.—McGeever v Harris, 41 So 930, 148 Ala 503

32. Del.—Heitz v Sayers, 113 A 901, 31 Del 221

Ill.—F E Schoenberg Mfg Co v Broadway Central Hotel Corporation, 259 Ill App 40.

33. Ala.—Thomasson v Benson Hardware Co., 131 So. 563, 222 Ala 176

Iowa.—Dalbey Bros Lumber Co v Crispin, 12 NW 2d 277, 234 Iowa 151

NY.—In re Wilaka Const Co., 2 NY 2d 251, 166 Misc 185

40 CJ p 250 note 50

34. NY.—Schwartz v. Allen, 7 NY S 5

40 CJ. p 250 note 51

The word "install" in affidavit to lien meant to set up or fix in position—King v Elliott, 147 SE 701, 197 NC 93

35. NY.—Chambers v George Vassar's Sons & Co., Inc., 143 NYS 615, 81 Misc 563

40 CJ p 250 note 52

36. NY.—Union Stove Works v Klingman, 46 NYS 721, 20 APP Div 449, affirmed 58 NE 1093, 164 NY 589

40 CJ. p 250 note 53

37. Colo.—Consumers' Lumber & In-

vestment Co v Hayutin, 228 P 860, 75 Colo 483

40 CJ p 250 note 54

Errors and defects generally see infra § 169.

38. Cal.—Corbett v Chambers, 41 P 873, 109 Cal 178

40 CJ p 250 note 55

39. US.—Grafton Hotel Co v Walsh, W Va., 238 F 5, 142 CCA 461

40 CJ p 250 note 56.

40. Mont.—Wertz v. Lamb, 117 P 89, 43 Mont 477

41. Mont.—Leigland v Rundle Land & Abstract Co., 208 P 1075, 64 Mont 154

40 CJ p 250 note 58

42. Mont.—Crane & Ordway Co v. Baatz, 164 P 533, 53 Mont 438

43. Mont.—Crane & Ordway Co v Baatz, supra

40 CJ p 250 note 60

44. Mont.—Crane & Ordway Co v Baatz, supra

45. NY.—Schenectady Contracting Co v Schenectady R Co., 94 NY S 401, 106 App Div 336

40 CJ p 250 note 62

Acknowledgment by corporate lien claimant of notice of lien in usual form of corporate acknowledgment was not sufficient compliance with statute requiring that notice of lien be verified—Owens v Ebner, 74 NY S 2d 169

46. Or.—Christman v. Salway, 205 P 541, 103 Or 666

40 CJ p 250 note 63

47. NM.—Lyons v Howard, 117 P 842, 16 NM 327—Minor v Marshall, 27 P 481, 6 NM 194

48. Or.—Christman v. Salway, 205 P 541, 103 Or 666

40 CJ p 251 note 65

49. NM.—Lyons v Howard, 117 P. 842, 16 NM 327

40 CJ p 251 note 66

50. Or.—Kearney v Marks, 16 P 407, 15 Or 529

51. Cal.—Monarch Metal Weather Strip Co v Clynick, 3 P 2d 593, 117 Cal App 270

40 CJ p 251 note 68.

52. Ill.—O'Brien v Krockinski, 50 Ill App 456

Mont.—Wertz v Lamb, 117 P 89, 43 Mont 477

53. Ill.—Hayes v Hammond, 44 NE 423, 162 Ill 133

NM.—Hot Springs Plumbing & Heating Co v. Wallace, 27 P 2d 984, 38 NM 3

54. NM.—Hot Springs Plumbing & Heating Co v Wallace, supra

40 CJ p 251 note 71

55. Cal.—Corbett v Chambers, 41 P. 873, 109 Cal 178

Minn.—Nordine v Knutson, 64 NW. 565, 62 Minn 264

56. Ill.—Orr & Lockett Hardware Co v Needham Co., 48 NE 444, 169 Ill 100, 61 AmSR 151.

40 CJ p 251 note 73.

In New Mexico

(1) Verifications of mechanic's lien claims were held not insufficient because verified only as to part of

than in the statement of claim⁵⁷ Certainty to a common intent is sufficient⁵⁸ One of the rules in testing the sufficiency of an affidavit to a mechanic's lien is whether perjury is assignable on it⁵⁹

Statement of relation of affiant to claimant

Where the verification is made by a person other than claimant, it is perhaps usual to state the relation which affiant bears to claimant,⁶⁰ but, unless so required by statute,⁶¹ it is not necessary that the affidavit of verification shall state that affiant is the agent of claimant⁶² or that he makes the verification in behalf of claimant⁶³

(2) Showing of Knowledge or Information and Belief

Where required by the statute, the verification to a mechanic's lien claim or statement must be based on the affiant's knowledge of the facts stated

Under some statutes a verification on information and belief is permissible⁶⁴ Under other statutes the verification must be based on affiant's knowledge of the facts stated and is insufficient if it appears to be based on information or belief,⁶⁵ although affiant's knowledge of the facts need not be affirmed⁶⁶ where he is one of the persons claiming the lien,⁶⁷ and where the verification is sufficient in form, and affiant swears that he knows the facts alleged in the

notice or statement to be true, the lien is not defeated by the fact that he may not have personal knowledge of the facts so alleged⁶⁸

(3) Signature

The fact that the affidavit of verification to a mechanic's lien claim or statement is not signed by the affiant does not, according to some authorities, invalidate the claim or statement.

The fact that the affidavit of verification is not signed by affiant has been held not to invalidate the statement if it can be proved that it was in fact sworn to,⁶⁹ but there is also authority to the contrary⁷⁰ In particular cases the signing of the verification by affiant has been held sufficient.⁷¹

(4) Jurat

The authorities are in disagreement as to the effect of the omission of, or defects in, a jurat to the verification of a mechanic's lien claim or statement.

It has been held that the absence of the jurat is not fatal to the verification of a mechanic's lien claim or statement,⁷² and that it may be shown by extraneous evidence that the affidavit signed by claimant or some authorized person for him was in fact sworn to,⁷³ but in other jurisdictions a statement without any jurat has been held fatally defective although it was in fact sworn to⁷⁴ In some

statements, where averments of lien statements as to name of property owner against which liens were claimed, description of property, and itemized statement attached were specifically verified—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 NM 3

(3) It has been held, however, that a verification covering some, but not all, of the elements of the statement of the claim is insufficient—Minor v. Marshall, 27 P 481, 6 NM 194

(3) The latter holding has been declared to have been made at a time "when the rule of strict construction of the mechanic's lien law prevailed in this jurisdiction"—Hot Springs Plumbing & Heating Co. v. Wallace, supra

57. Ill—Grace v Oakland Bldg Ass'n, 46 NE 1102, 186 Ill 637.

58. Ill—Grace v. Oakland Bldg Ass'n, supra.
40 C J p 251 note 75.

59. Mont—Gregg v Sigurdson, 215 P. 663, 67 Mont 272.

60. Neb—Chapman v Brewer, 62 N W 320, 43 Neb 890, 47 Am SR 779

Who may verify see supra subdivision b of this section

61. Va—Clement v Adams Bros—

Paynes Co, 75 SE 294, 113 Va 547

40 C J p 251 note 79.

62. Mo—McLaughlin v. Schultz, 28 S W 755, 125 Mo 469
40 C J p 251 note 80

63. Colo—Consumers' Lumber & Investment Co v. Hayutin, 226 P 860, 75 Colo 483

64. La—Central Lumber Co v Douglas, 127 So 43, 12 La App 680
40 C J p 251 note 82

65. Del—Heitz v Sayers, 113 A. 901, 31 Del 231
40 C J p 251 note 84.

66. Ala—Cook v Rome Brick Co, 12 So 918, 98 Ala 409.
40 C J p 251 note 85

67. Ala—McGeever v Harris, 41 So 930, 148 Ala. 503
40 C J p 251 note 86.

68. Ala—Powers v. Grayson, 109 So 164, 215 Ala 33.
40 C J p 252 note 87.

Knowledge as officer of corporation
Statement of person making claim that he has personal knowledge substantially complied with statute, notwithstanding failure to show person making affidavit had knowledge as officer or employee of claimant corporation of correctness of statement—Thomasson v Benson Hardware Co, 131 So 563, 222 Ala. 176.

69. Ill—Glencoe State Bank v Cole, 265 Ill App 158
Or—Ainslie v Kohn, 19 P. 97, 16 Or 363

40 C J p 252 note 88
Signature to claim or statement see supra § 166.

70. Iowa—Crenshaw v. Taylor, 30 N W 647, 70 Iowa 386.
40 C J p 252 note 89

71. **Affidavit held sufficiently signed**
(1) Notice of lien claim was not void because jurat commenced in name of president of claimant corporation and was signed in name of corporation followed by president's name—Paget v Peters, 286 P 983, 133 Or 608, rehearing denied 289 P 1119, 133 Or. 608

(2) Other affidavits—Ulmer v. Portage Const & Finance Co, 26 Ohio NP, NS, 257—40 C J p 252 note 90 [a]

72. Ky—Dobson v. Thurman, 101 S W 310, 30 Ky L 1331
ND—Turner v. St. John, 78 NW 340, 8 ND 245

Jurat or certificate of officer generally see Affidavits § 21
Supplying jurat, or omissions therein, by amendment see infra § 170 b (2)

73. ND—Turner v St. John, supra

74. Iowa—McGillivray v Balton Dist Tp, 65 N.W. 974, 96 Iowa 839.

jurisdictions the failure of the officer to sign the jurat has been held not fatal,⁷⁵ but in other jurisdictions it has been held that the verification is insufficient where the jurat is not signed by the officer before whom the oath was made,⁷⁶ although his seal is upon it,⁷⁷ and the defect cannot be supplied by proof aliunde⁷⁸

In some jurisdictions the verification is insufficient where the signature of the officer is not authenticated by his official seal⁷⁹ or other certificate of authority,⁸⁰ and proof aliunde that the claim was sworn to is not permissible,⁸¹ but in other jurisdictions the failure of the officer administering the oath to impress his official seal on the lien claim or notice before recording cannot be urged to defeat the lien, at least by any one other than a subsequent innocent purchaser who relied on the record.⁸² The word "seal" written after the notary's name in a copy of the notice set out in the record indicates that the seal was properly attached to the original, even though the copy does not bear the impression of the seal itself.⁸³

Where the statement is filed in the office of the person administering the oath, the omission of his seal,⁸⁴ or his failure to give the title of his office⁸⁵ or his full official title,⁸⁶ does not invalidate the lien

Statement of expiration of commission Failure of a notary to add after his official signature the date of the expiration of his commission does not render the lien void.⁸⁷

Venue The failure of the notary to state in the jurat the county in which he is a notary has been held not to be fatal.⁸⁸

Foreign affidavit. An affidavit taken before an officer of another state must be properly authenticated, as required by statute, so as to show the official character of the officer before whom it was sworn to,⁸⁹ the genuineness of his signature,⁹⁰ and his authority to administer oaths.⁹¹

§ 168. Proof of Execution

Proof of the execution of the lien statement by the affidavit of a subscribing witness is not necessary, in the absence of statute, before the statement may be recorded

In the absence of a statutory requirement, it is not necessary to prove the execution of the lien statement by the affidavit of a subscribing witness before the statement may be recorded.⁹²

§ 169. Errors or Defects

- a In general
- b Waiver or cure

a. In General

A trivial and unintentional error, misstatement, omission, or defect in a mechanic's lien claim or statement which is not misleading does not defeat the lien.

A mechanic's lien is not defeated by reason of a trivial and unintentional error, misstatement, omission, or defect in the lien claim or statement which is not misleading⁹³ and which, according to the de-

75. Okl.—Key v Hill, 219 P 308, 93 Okl 64

40 C J p 252 note 97

76. Or—Christman v. Salway, 205 P 541, 103 Or 666

SD—Hill v Alliance Bldg Co, 60 NW 752, 6 SD 160, 55 Am SR 819

77. Or—Christman v Salway, 205 P 511, 103 Or 666

SD—Hill v Alliance Bldg Co, 60 NW 752, 6 SD 160, 55 Am SR 819

78. Or—Christman v Salway, 205 P 541, 103 Or 666

79. Minn—Hodge v Anderson, 201 NW 603, 161 Minn 147. 40 C J p 252 note 1

80. SD—Hill v Alliance Bldg Co, 60 NW 752, 6 SD 160, 55 Am SR 819

81. Wash—Stetson & Post Mill Co v McDonald, 32 P 108, 5 Wash 496

82. In Washington

(1) Under Mechanic's Lien Law, Remington Comp St § 1129 et seq. notice of lien is not vitiated by absence of seal of notary administer-

ing oath—Davidson v National Can Co, 273 P 185, 150 Wash 370

(2) Under prior territorial laws the omission of the notary's seal was fatal—Stetson & Post Mill Co v McDonald, 32 P 108, 5 Wash 496—Gates v Brown, 25 P 914, 1 Wash 470

83. Wash—Griffith v Maxwell, 55 P 571, 20 Wash 403.

84. Iowa—Wheelock v Hull, 100 NW 863, 124 Iowa 752 40 C J p 252 note 7

85. Mass—Jackman v. Gloucester, 9 NE 740, 143 Mass. 380

86. Iowa—Wetmore v Marsh, 47 NW 1021, 81 Iowa 677 11 C J p 844 note 11 [a] (1)

87. Kan—Phelps & Bigelow Windmill Co v Baker, 30 P 472, 49 Kan 434

88. US—Grafton Hotel Co v Walsh, W Va., 228 F 5, 142 CCA 461

Iowa—Milligan v. Zeller, 196 NW 793, 197 Iowa 79

89. Minn—Hickey v Collom, 50 N. W 918, 47 Minn 565

40 C J p 252 note 12

90. W Va—Hill Clutch Co v Independent Steel Co, 82 SE 223, 74 W Va 353

40 C J p 252 note 13

91. W Va—Hill Clutch Co v Independent Steel Co, supra 40 C J p 252 note 14

92. Provision of general registry law that "before any deed or instrument in writing can be recorded in the proper office, the execution thereof shall be first proved by an affidavit in writing of a subscribing witness to such instrument" does not apply to a mechanic's lien statement.—Murphy v. Valk, 9 SE 101, 30 SC 262

93. US—Suburban Improvement Co. v Scott Lumber Co, CCA W Va., 59 F2d 711, 87 ALR 330, certiorari denied Scott Lumber Co v. Suburban Imp Co, 53 S.Ct. 123, 287 US 660, 77 LEd 569

Ark—Brown v Turnage Hardware Co, 26 SW 2d 1114, 181 Ark 606

Cal—Leibowitz v. Berry, 299 P 779, 114 Cal App 5—Patten & Davies

cisions on the question, can be easily corrected,⁹⁴ but an intentional false statement of a material matter will vitiate the claim.⁹⁵ Rules substantially to this effect are expressly embodied in some statutes.⁹⁶ A claim or statement which does not even substantially comply with the statutory requirements is fatally defective in a majority of jurisdictions, as considered *supra* § 150, and in such case relief against the defect is beyond the remedial powers of a court of equity;⁹⁷ and it is immaterial to whose fault the insufficiency is attributable⁹⁸ unless it is that of the party sought to be charged.⁹⁹ The fact that the owner himself bought the materials and promised to pay for them furnishes no reason for sustaining a defective claim.¹ Any person interested may take advantage of a defect in the lien claim.²

Errors in unnecessary recitals. Errors in respect

of matters not required to be included in the statement of lien will not invalidate the statement³ or defeat the lien.⁴ This is especially true as affecting the rights of the original parties to the contract.⁵

Mistake as to date. Although there is authority to the contrary,⁶ it has generally been held that a mistake or inaccuracy in the statement as to a date is not necessarily fatal where no one is misled thereby to his prejudice,⁷ and that such mistake does not preclude claimant, when necessary to sustain his lien, from showing the true date.⁸

b. Waiver or Cure

A defect or irregularity in the lien claim or statement may be waived.

A defect or irregularity in the lien claim or statement may be waived.⁹ A defect or irregularity is waived by a failure to object to it¹⁰ in the answer¹¹

Lumber Co v Hayden, 298 P 129, 113 Cal App 103

Ill—Alexander Lumber Co v. Kellerman 192 NE 913, 358 Ill 207—Velde v Schrock, 253 Ill App 274

Mich—Hopper-McAllister Corporation v Pelham, 217 NW 9, 241 Mich 235

Minn—Hydraulic Press Brick Co v Pierz Co-op Ass'n, 211 NW 836, 169 Minn 452

Mo—Miners Lumber Co v Miller, App, 117 SW 2d 711—Woodling v Westport Hotel Operating Co, App, 63 SW 2d 207, 227 Mo App 1281

NJ—Meister v J Meister, Inc, 142 A 312, 103 NJ Eq 78

NY—Goldberger-Rabin, Inc v 74 Second Ave Corporation, 169 NE 405, 252 NY 336—Lichtenstein v Grossman Const Corporation, 225 NYS 118, 221 App Div 527, modified on other grounds 163 NE 292, 248 NY 390—Majestic Tile Co v Nicholls, 291 NYS 551, 161 Misc 281

Or—Davis v Bertschinger, 241 P 53, 116 Or 127

40 C J p 208 note 57.

Errors and defects in notice to owner see *supra* § 129

94. Wash—Cornelius v. Washington Steam Laundry, 100 P. 727, 52 Wash 272

40 C J p 209 notes 57, 58

Amendment of claim or statement see *infra* § 170

95. US—Harrington Bros v City of New York, DCNY, 51 F2d 508

Ill—Hyde Park Inv Co v Hyde Park State Bank, 257 Ill App 539

Or—West v Wilson, 297 P 847, 136 Or 262—Davis v Bertschinger, 241 P. 53, 116 Or 127

40 C J p 209 note 59

96. Cal—Consolidated Pipe Co v.

Volaki, 296 P 277, 211 Cal 563—Stone v Serimian, 246 P 45, 188 Cal 520—Richmond Sanitary Co v

Franklin, 9 P 2d 855, 132 Cal App 229—Los Angeles Board of Adjusters v Bailes, 2 P 2d 557, 116 Cal App 316—Johnson v Smith, 276 P 146, 97 Cal App 752

Ill—United Cork Cos v Volland, 7 NE 2d 301, 365 Ill 564—Alexander Lumber Co v Kellerman, 271 Ill App 571, affirmed 192 NE 913, 358 Ill 207

Minn—Nelson v Sampson, 243 NW 105, 186 Minn 271—W T Bailey Lumber Co v Elks' Bldg Corporation, 208 NW 198, 167 Minn. 5 40 C J p 209 note 60

97. Cal—Diamond Match Co v Sanitary Fruit Co, App, 234 P 323

98. Ind—Windfall Natural Gas, Mining & Oil Co v Roe, 84 NE 996, 41 Ind App 687 40 C J p 209 note 63

99. Ind—Windfall Natural Gas, Mining & Oil Co v Roe, 84 NE 996, 41 Ind App 687

1. Wash—Fairhaven Land Co v. Jordan, 32 P 729, 5 Wash 729.

2. NY—Pittsburgh Plate Glass Co v Vanderbilt, 143 NYS 609.

40 C J p 209 note 66

Persons entitled to contest lien generally see *infra* §§ 279, 280.

3. Ind—Cline v. Indianapolis Mortar & Fuel Co, 117 NE 509, 65 Ind App 383.

40 C J p 209 note 67

4. Ind—Cline v Indianapolis Mortar & Fuel Co, *supra*

RI—Art Metal Const Co v Knight, 185 A 136, 56 RI 228

40 C J p 209 note 67

5. Ind—Cline v Indianapolis Mortar & Fuel Co, 117 NE 509, 65 Ind App 383

6. Ill—May, Purington & Bonner Brick Co v General Engineering Co, 54 NE 638, 180 Ill 535

7. US—Harrington Bros v City of New York, DCNY, 51 F2d 503 Fla—Florida New Deal Co v Crane Co, 194 So 865, 142 Fla 471

NY—Zielinski v Hilton, 235 NYS 182, 134 Misc 308—Farabella v Porter, 225 NYS 417, 130 Misc 680

40 C J p 209 note 71

8. Ark—Georgia State Sav Ass'n v Marra, 9 SW 2d 785, 178 Ark 18 40 C J p 209 note 72

9. Ill—Donkle & Webber Lumber Co v Rehmann, 33 NE 2d 709, 310 Ill App 17

Bill, complaint, or petition as aiding claim see *supra* § 150

Waiver and estoppel to assert:

Defenses in action to enforce lien see *infra* § 275

Mechanic's lien see *infra* §§ 222–231.

Waiver of particular objections see *supra* § 150 et seq

10. Cal—Barker Bros v Coates, 297 P 8, 211 Cal 756—Patten & Davies Lumber Co v Hayden, 298 P 129, 113 Cal App 103

Minn—Ustruck v Home Ass'n, 207 NW 324, 166 Minn 183

NY—Boyd v. Bassett, 16 NYS 10, 61 Hun 623.

Objection first made on appeal see Appeal and Error § 240

11. Ill—Donkle & Webber Lumber Co v Rehmann, 33 NE 2d 709, 310 Ill App 17

40 C J p 210 note 75

Admissions in answer

(1) In general—Hummel v. Field, 256 SW 515, 216 Mo App. 136—40 C J p 210 note 75 [c].

(2) Admission of defendant in answer recognizing that plaintiff had

or at the time when it is offered in evidence to establish the lien,¹² and going to trial on the merits.¹³

In addition, the owner waives his right to object to a defect or inaccuracy in the claim by obtaining a rule on claimant to issue a scire facias on the lien,¹⁴ entering into an agreement with claimant that the issuance of a scire facias shall be postponed for a specified period of time,¹⁵ joining in an agreed statement of facts, setting forth that he was not misled by an inaccuracy in the certificate of claim,¹⁶ or by failing to request a more specific statement of claim after leave was granted to amend the claim but it was not formally amended.¹⁷ After giving security and having the lien discharged, it is too late for the owner,¹⁸ although not for other lienors,¹⁹ to raise objections to defects in the lien. On the other hand, the mere appearance of defendants in proceedings to foreclose a lien does not waive a defect in the notice,²⁰ and it has been held that the owner does not by merely reading the claim as filed to the jury on the trial admit it²¹ or become estopped to allege that it is defective.²² Where the lien claim or statement is fatally defective,

the fact that a purchaser, subsequent lien creditor, or other person interested in the estate has actual notice of the claim will not cure the defect as against him.²³

§ 170. Amendment of Claim or Statement

- a. In general
- b. Time and nature of amendment
- c. Procedure

a. In General

A mechanic's lien claim or statement may be amended pursuant to statutory authorization.

It has been laid down flatly that the notice or claim of a mechanic's lien must be complete in itself at the time when it is filed for record in order to authorize its enforcement, and that it is not capable of being amended or reformed,²⁴ but it has also been held that, at least in certain respects or within a specified time, the claim, notice, or statement may be amended.²⁵ In various jurisdictions there are statutes expressly providing for the amendment of the claim or statement.²⁶ Some

filed its claim, and acknowledging that claim was filed in behalf of plaintiff, waived any technical question of sufficiency of claim of lien—*Donkle & Webber Lumber Co v Rehmann*, 33 NE2d 709, 310 Ill App 17.

12. Wash—*Cornelius v Washington Steam Laundry*, 100 P. 727, 52 Wash 272.
40 C.J. p 210 note 76.

13. Pa.—*Koons v. Harding*, 3 Pa Dist & Co 741.
40 C.J. p 210 note 77.

14. Pa.—*Slezak v Ziberna*, 3 Pa Dist & Co 831.

15. Pa.—*Mesta Mach Co v Dunbar Furnace Co*, 95 A 585, 250 Pa 472.

16. Mass.—*Brown v Haddock*, 85 NE 573, 199 Mass 480.

17. Pa.—*Mesta Mach Co v. Dunbar Furnace Co*, 95 A 585, 250 Pa 472.

18. Pa.—*Vansciver v. Churchill*, 35 Pa Super 212.

19. N.Y.—*Pittsburgh Plate Glass Co v Vanderbilt*, 143 NYS 609.

20. N.Y.—*Beals v B'Nai Jeshurun Cong*, 1 ED Smith 654.

21. Pa.—*Harman v Cummings*, 43 Pa 322.

22. Pa.—*Harman v. Cummings*, supra.
40 C.J. p 210 note 87.

23. Pa.—*In re Wells*, 2 Del Co 172.

24. Ohio.—*D & H Coal Co v Lay*, 175 NE 30, 37 Ohio App 433.
40 C.J. p 252 note 20.

Amendment of Notice

Of filing claim see supra § 146.
To owner see supra § 129.
Pleadings see infra § 306.
Completeness of notice or claim generally see supra § 150.

Filing one or more claims see supra § 133.

Statutes authorizing amendments:

Constitutionality see supra § 3.
Construction see supra § 4.
Prospective or retrospective operation see supra § 5.

In California

(1) The rule of the text has been followed—*Madera Plume & Trading Co v Kendall*, 52 P 304, 120 Cal 182, 65 Am SR 177—*Fernandez v Burleson*, 42 P 568, 110 Cal 164, 52 Am SR 75—*Goss v Strelitz*, 54 Cal 640—*Hayward Lumber & Investment Co v Pride of Mojave Mining Co*, 110 P2d 439, 43 Cal App2d 146—*Bishop v Hayward Lumber & Investment Co*, 65 P2d 125, 19 Cal App2d 234.

(2) However, it has been held that an amended lien may be filed within the time an original lien may be filed—*Heberling v Day*, 209 P 908, 59 Cal App 13—40 C.J. p 253 note 21 [a].

25. Filing of new lien cures defect Mich.—*Cooper v. Ross*, 205 NW. 592, 232 Mich 548.

In Rhode Island

After the expiration of the time set for filing by the statute, the notice of lien and the account cannot be amended to correct the omission

of prescribed requirements or to extend the claim, but either of them may be amended to rectify erroneous references or statements therein which are not required by the statute, provided the amendment does not enlarge the account or demand as originally filed—*Art Metal Const. Co v Knight*, 185 A 136, 56 RI 228—40 C.J. p 252 note 20, p 253 note 21 [b].

26. Kan.—*Leidigh & Havens Lumber Co v Wyatt*, 109 P2d 87, 153 Kan 214—*Gaudreau v Smith*, 40 P2d 365, 141 Kan 123.

N.Y.—*In re Thomas J Dorsey, Inc.*, 268 NYS 295, 240 App Div 1005.
Okl.—*Parker v Everetts*, 165 P2d 630—*King v Long-Bell Lumber Co*, 105 P2d 1060, 188 Okl 46—*Spurrer Lumber Co v Montgomery*, 24 P2d 1005, 165 Okl 67.

Pa.—*Knoell v Carey*, 140 A 522, 291 Pa 531—*Hamilton v Means*, 38 A2d 528, 155 Pa Super 245—*Shatzer v Abbott's Alderney Dairies*, 11 Pa Dist & Co 287—*Consorto Const Co v Love*, Com Pl, 33 Del Co 377—*Raymond v Brookside Distilling Products Corporation*, Com Pl, 44 Lack Jur. 181—*Grass v Eisenbrey*, Com Pl, 59 Montg Co 258—*Meehan v Hollister*, Com Pl, 5 Sch Reg 326—*Pagona v Patterson*, Com Pl, 29 West Co Leg J 67.

Wash.—*Schulenburg v. Storra*, 272 P 514, 150 Wash 170—*Greene v Finnell*, 60 P 144, 22 Wash 186—*Sullivan v. Treen*, 43 P. 38, 13 Wash. 261.

Wis.—*Mark Paine Lumber Co. v*

statutes provide that the claim may be amended as pleadings may be,²⁷ but a statute providing for amendment of process, pleadings, or proceedings in actions to enforce liens does not apply to the statement of lien.²⁸ A statute relating to the amendment of mechanics' lien claims does not permit an individual to take advantage of a lien previously filed by a non-entity.²⁹

b. Time and Nature of Amendment

- (1) In general
- (2) Particular matters

(1) In General

Unless authorized by statute, a mechanic's lien claim or statement may not be amended after the expiration of the time for filing.

A mechanic's lien claim or statement may be amended prior to the expiration of the time for

filing,³⁰ but, in the absence of statutory authority, an amendment is not permissible after the lapse of such time.³¹ In various jurisdictions statutes confer authority for the making of the amendment after the expiration of the time for filing.³² Under the terms of the different statutes, and the construction placed thereon, it has been variously held that an amendment may be made after the institution of suit to enforce the claim,³³ at any time when a pleading could be amended,³⁴ on the trial,³⁵ at the close of the evidence,³⁶ after trial and verdict,³⁷ at any time before the entry of judgment,³⁸ and even after judgment.³⁹ While the practice of moving for an amendment in an answer to a rule to strike off is not to be commended,⁴⁰ it seems that an amendment may be allowed after a rule to strike off where it is merely an amplification or correction of the original averment and does not alter the character of the claim.⁴¹

Douglas County Impr Co, 68 N.W. 1013, 94 Wis 322
40 C.J. p 253 notes 22 25

Discretion of court

Granting permission under statute to amend lien statement ordinarily is within sound discretion of court—*Badger Lumber & Coal Co v. Schmidt*, 251 P 196, 122 Kan 48

In New York

(1) Under Lien Law § 12-a the court, in a proper case, may make an order amending a notice of lien—*In re Thomas J Dorsey, Inc.*, 268 N.Y.S. 295, 240 App Div 1005—*Frank Teicher, Inc. v. Gold*, 267 N.Y.S. 164, 239 App Div. 285—*Cleg Co v. Henry Moss & Co.*, 64 N.Y.S.2d 99

(2) Provisions of lien law that no amendment of notice of lien shall be granted to prejudice of existing lien or means liens existing at time of granting of amendment—*Owens v Ebner*, 74 N.Y.S.2d 169

(3) Formerly court was without power to allow amendments—*In re James Passero & Sons*, 261 N.Y.S. 661, 237 App Div 635—40 C.J. p 252 note 20

27. Kan.—*Badger Lumber & Coal Co v. Schmidt*, 251 P 196, 122 Kan 48

Okl.—*Whitfield v Frensley Bros Lumber Co*, 283 P 985, 141 Okl 14

Wash.—*Rose v O'Reilly*, 244 P 124, 138 Wash 15

Wis.—*G. W. Hirth, Inc v Clybourn Realty Co* 232 N.W. 857, 202 Wis. 433—*Mark Paine Lumber Co v Douglas County Imp Co*, 68 N.W. 1013, 94 Wis 322

40 C.J. p 253 note 26

28. Mich.—*Lacy v Pratt Power & Heat Co*, 122 N.W. 113, 157 Mich. 544, 133 Am S.R. 360

29. Md.—*Atlantic Mill & Lumber Realty Co. v Keefer*, 20 A.2d 178, 179 Md 496

30. Pa.—*Kanofsky v Carey*, 89 Pa Super 422
40 C.J. p 253 note 29
Time for filing lien claim or statement see supra §§ 139-144

31. Ark.—*Sebastian Building & Loan Ass'n v Minten*, 27 S.W.2d 1011, 181 Ark 700

Del.—*Corpus Juris* cited in *E. J. Hollingsworth Co v Continental-Diamond Fiber Co*, 175 A. 266, 268, 6 W.W. Harr 303

Idaho.—*Corpus Juris* cited in *Lynch v. Perrine*, 4 P.2d 353, 355, 51 Idaho 152

Ill.—*Fifty-Ninth Street Lumber Co v Emery*, 237 Ill App 416

Kan.—*Badger Lumber & Coal Co v Schmidt*, 251 P 196, 122 Kan 48

Md.—*Atlantic Mill & Lumber Realty Co v Keefer*, 20 A.2d 178, 179 Md 496

Pa.—*South Philadelphia Builders' Supply Co. v Testa*, 8 Pa Dist & Co 794

40 C.J. p 253 note 30

32. Okl.—*Doggett v. Pricer*, 61 P.2d 1049, 178 Okl 130—*Chickasha Cotton Oil Co v Standard Lumber Co*, 52 P.2d 816, 175 Okl 15—*Whitfield v Frensley Bros Lumber Co*, 283 P. 985 141 Okl 44

Pa.—*Gerhart v Christ*, 10 Pa Dist & Co 813, 41 Lanc L Rev 73

Wash.—*Rose v O'Reilly*, 244 P. 124, 138 Wash 18
40 C.J. p 253 note 31.

33. Mo.—*Philip Gruner Lumber Co v Hartshorn-Barber Realty Co*, 154 S.W. 246 171 Mo App 614.
40 C.J. p 253 note 33

34. Okl.—*Ketcham v Cunliff*, 187 P 1095, 77 Okl 287

35. Kan.—*Noll v Graham*, 27 P.2d 277, 138 Kan 676
Wash.—*Schulenburg v Storre*, 272 P 514, 150 Wash. 170
40 C.J. p 254 note 35

36. Kan.—*Brown v Walker*, 164 P 1092, 100 Kan 543

Amendment to conform claim to proof

(1) Under Comp L § 3789, trial court in suit to foreclose labor lien claims has wide discretion in permitting amendments to claims to conform to proof—*Nellis v Johnson*, 57 P.2d 393, 57 Nev. 17.

(2) Motion to amend claim of lien filed against one group of mining claims so as to cover all mining claims of defendant in another group after defendant had offered evidence that work had been performed by claimants on certain claims of other group should have been denied since motion was not to conform pleadings to proof—*Nellis v Johnson*, supra

37. Purely technical amendment

Pa.—*Day v Pennsylvania R. Co*, 35 Pa Super 586

38. N.J.—*Guerber Engineering Co v Stafford*, 114 A. 747, 98 N.J Law 280
40 C.J. p 254 note 38

39. Okl.—*Ketcham v Cunliff*, 187 P 1095, 77 Okl 287.

40. Pa.—*Slezak v. Ziberna*, 8 Pa. Dist & Co 831.

41. Pa.—*Bennett v. Frederick R Gerry Co*, 117 A. 345, 273 Pa 585—*Steinitzer v. Scholl*, 24 Pa Dist 719.

An amendment may be permitted where the lien claim is not fatally defective,⁴² as where it is defective in form⁴³ and not in substance⁴⁴. In a few jurisdictions the statutes expressly provide for amendments in matters of substance,⁴⁵ but in most jurisdictions an amendment is not allowable after the expiration of the time allowed for filing the claim where the claim filed is defective in substance,⁴⁶ or where it is fatally or incurably defective,⁴⁷ or for some other reason the amendment sought would be in effect the filing of a new claim⁴⁸. Where the lien was discharged for failure to issue a summons within the time prescribed by statute, the court is without power to amend the claim where the amendment would result in reviving the claim⁴⁹.

The courts will not permit an amendment after the time allowed for filing so as to affect the rights of a bona fide purchaser or encumbrancer;⁵⁰ but this rule does not apply so as to give a prior mortgagee,⁵¹ a purchaser at a judicial sale,⁵² or a purchaser who has paid only a small part of the purchase price⁵³ a standing to object to the amendment.

Sometimes defendant's consent to the amendment of the complaint obviates the necessity of amending the claim or notice,⁵⁴ and it is proper to refuse leave to amend where the amendment, if made, would be useless⁵⁵.

(2) Particular Matters

Various amendments have been allowed to a mechanic's lien claim or statement, such as an amendment for the purpose of correcting an erroneous or imperfect description of the property or an error or inaccuracy in the statement of the name of the owner.

Amendments to mechanics' lien claims or statements have been permitted to make the claim more precise, specific, and particular,⁵⁶ to apportion the claim,⁵⁷ to change⁵⁸ or supply⁵⁹ a date, to supply an omission to aver notice to the owner of the intention to file the lien,⁶⁰ and to set out more fully the terms and conditions of a verbal contract⁶¹. In addition, an amendment may be allowed for the purpose of correcting an erroneous or imperfect description of the property,⁶² but not for the purpose of describing and charging property entirely different from that described in the claim as originally filed⁶³.

42. Kan—Noll v. Graham, 27 P 2d 377, 138 Kan 676

40 C J p 254 note 42.

43. Kan—Brown v. Walker, 184 P 1092, 100 Kan 542, rehearing denied 166 P 873, 101 Kan 293

40 C J p 254 note 43

44. Pa—Meehan v Hollister, Com Pl, 5 Sch Reg 326

Wash—McMullen v Croft, 164 P 930, 96 Wash 275, 279

40 C J p 254 note 44

45. NJ—American Brick & Tile Co v Drinkhouse, 36 A 1034, 59 NJ Law 462

40 C J p 254 note 45

46. Del—E J Hollingsworth Co v Continental-Diamond Fiber Co, 175 A 266, 6 V W Harr 303

Pa—Rice v Cornelius, 48 Pa Dist & Co 86—South Philadelphia Builders' Supply Co v Testa, 8 Pa Dist & Co 794—Hassler v Haas, 34 Berks Co L J 103, 55 York Leg Rec 199

40 C J p 254 note 46

47. NY—Frank Teicher, Inc. v Gold, 267 NYS 164, 239 App Div 285

40 C J p 254 note 47.

48. Ark—Sebastian Building & Loan Ass'n v Minten, 27 SW2d 1011, 181 Ark 700

40 C J p 254 note 48.

49. NJ—Mels v Goldstein, 133 A 76, 4 NJ Misc 364

50. Iowa—McGillivray v Case, 77 NW 483, 107 Iowa 17

40 C J p 254 note 49.

51. Wash—Sullivan v Treen, 43 P. 38, 13 Wash 261.

52. Pa—H G Vogel Co, Inc v Grape Products Co, 57 Pa Super 501

40 C J p 254 note 51

53. Pa—Heist v Montayne, 53 Pa Super 611

40 C J p 254 note 52

54. US—M A Phelps Lumber Co v McDonough Mfg Co, Wash, 202 F 445, 120 CCA 551

55. Wash—Canyon Lumber Co v Sexton, 161 P 841, 93 Wash 620

56. Pa—Linden Steel Co v Imperial Refining Co, 20 A 867, 138 Pa 10, 9 LRA 863

Itemization

Claim may be amended so as to state the items of the claim

Kan—Leidigh & Havens Lumber Co v Wyatt, 109 P 2d 87, 153 Kan 214—Noll v Graham, 27 P 2d 277, 138 Kan 676

Okl—Spurrier Lumber Co v Montgomery, 24 P 2d 1005, 165 Okl 67

40 C J p 254 note 55 [a]

57. NJ—James v Van Horn, 39 N J Law 353

Pa—Hoffmaster v Knupp, 15 Pa Co 140

58. Pa—Hamilton v Means, 38 A 2d 528, 155 Pa Super 245—Schaeffer v Rohrbach, Wilcox p 250

Date of completion of contract

Wash—Rose v O'Reilly, 244 P 124, 138 Wash 18

Date of furnishing materials

Mich—Lewis Mfg Co v Lee, 256 NW 457, 268 Mich 383

RI—Cook, Borden & Co v R Z L Realty Corporation, 147 A 891, 50 RI 375

Wash—Capital Savings & Loan Ass'n v Vaughn Hardware Co, 1 P 2d 310, 163 Wash 396

59. Pa—Sinnott v Beard, 14 Pa Dist 619—Gebhard v Levering, 14 Phila 120

60. Pa—Grass v Eisenbrey, Com Pl, 59 MontG Co 258—Lhormer v Frank, Com Pl, 87 Pittsb Leg J 255

40 C J p 254, note 59

61. Pa—Sinnott v Beard, 14 Pa Dist 619—Mulhern & Judge Lumber Co v Jones, 5 Lack Jur. 72, 9 North Co 219

62. Kan—Gaudreau v Smith, 40 P 2d 385, 141 Kan 123

NY—In re Thomas J Dorsey, Inc., 268 NYS 295, 240 App Div 1005

Okl—King v Long-Bell Lumber Co, 105 P 2d 1060, 188 Okl 46

Pa—McClellan v Bowser, 27 Pa Dist & Co 131—Gerhart v Christ, No 1, 10 Pa Dist & Co 813, 41 LancL Rev 73

40 C J p 254 note 61

63. Ark—Sebastian Building & Loan Ass'n v Minten, 27 SW2d 1011, 181 Ark 700

Ind—Lindley v. Cross, 31 Ind 106, 93 Am D 610

W Va—Duncan Box & Lumber Co

Except under some statutes,⁶⁴ amendments to the claim introducing new parties cannot be made, at least after the expiration of the statutory period for filing a lien,⁶⁵ but a name improperly appearing may be struck out,⁶⁶ and amendments may be made for the purpose of correcting an error or inaccuracy in the statement of the name of the owner⁶⁷ or lienor,⁶⁸ to cure an omission to show with whom the original contract was made,⁶⁹ and to change the designated status or capacity of a person named in the original claim⁷⁰

Amendment of verification In some jurisdictions an unverified mechanic's lien statement may be amended by adding thereto a proper verification,⁷¹ even after the expiration of the statutory period allowed for the filing of the lien statement,⁷² but

in other jurisdictions the want of verification, or of a sufficient verification, is a defect which cannot be amended, at least after the expiration of the period of time in which the claim is required to be filed⁷³

Amount of claim A claim or statement may not be amended as to the amount claimed where the statute expressly excepts the amount claimed from the matters in respect of which the claim or statement may be amended⁷⁴

c. Procedure

In amending a mechanic's lien claim or statement, the procedure prescribed by statute must be followed.

The procedure prescribed by statute must be pursued in amending a mechanic's lien claim or statement.⁷⁵ The amendment may⁷⁶ and must⁷⁷ be

v Stewart, 30 S E 2d 391, 126 W Va 871

40 C J p 254 note 62

64. Wis—Challoner v Howard, 41 Wis 355

65. Pa—Knox v Hilty, 11 A 792, 118 Pa 430

40 C J p 255 note 64

Substitution

(1) An amendment substituting the name of an entirely different person or corporation as contractor has been denied—Lacy v Platt Power & Heat Co, 122 NW 112, 157 Mich 544, 133 Am SR 360—40 C J p 255 note 64 [a]

(2) Amendment substituting the owner as contractor after time for filing lien has expired cannot be allowed—Keever v Ulrich, 10 Pa Dist & Co 13, 30 Dauph Co 289.

(3) Amendment of mechanics' lien claim, substituting a wholly different defendant, may be filed at any time before time for filing lien has expired—Kanofsky v. Carey, 39 Pa Super 422.

66. Pa—Beetam v. Treibler, 4 Pa Dist 738, 16 Pa Co 605—Aldine Mfg Co v Butler, 9 Kulp 33.

67. Kan—Cooke v Luscombe, 294 P 849, 132 Kan. 147

N.Y.—Rocco v Chain Bldg Corporation, 3 NYS 2d 219, 167 Misc 375—Cleg Co v Henry Moss & Co, 64 NYS 2d 99

Okl—Doggett v Pricer, 61 P 2d 1049, 178 Okl 130—Chickasha Cotton Oil Co v Standard Lumber Co, 53 P 2d 816, 175 Okl 15—Spurrer Lumber Co v Montgomery, 24 P.2d 1005, 165 Okl 67

Wis—G W Hirth, Inc v. Clybourn Realty Co, 232 NW 857, 202 Wis 432

40 C J p 255 note 66

68. N.Y.—Core Joint Concrete Pipe Corporation v Paine Bros, 285 N. YS 706, 247 App Div 746

69. Wis—Dents v Eimmermann, 97 NW. 181, 119 Wis 492.

Name of contractor

Lien statement, which allegedly failed to state contractor's name or name of any person who contracted for material, was amendable, if amendment was necessary, where owner in constructing house and purchasing material acted for himself both as owner and contractor—Leidigh & Havens Lumber Co. v Wyatt, 109 P 2d 87, 153 Kan 214

In Pennsylvania

(1) Where mechanic's lien claim gave name of person with whom claimant contracted but did not set forth in either caption or body of claim that such person was contractor, claim was insufficient although it could have been amended—Hamilton v Means, 38 A 2d 528, 155 Pa Super. 245

(2) The failure to set forth the name of the person with whom the contract was made was not subject to amendment—Connolly v Fielman 8 Pa Dist & Co 92, 24 Luz Leg Reg 78.

70. Okl—Doggett v Pricer, 61 P 2d 1049, 178 Okl 130

Pa—Gerhart v Christ, 10 Pa Dist & Co 813

40 C J p 255 note 68

71. Okl—Barnes v Aggas, 242 P 1046, 115 Okl 115

40 C J p 255 note 69

Amendment disallowed

Where fund to which any liens could attach was insufficient to pay in full the liens of other lienors, amendment nunc pro tunc of lien by permitting proper verification thereof could not be granted—Owens v Ebner, 74 NYS 2d 169

72. Okl—McGill v Cooper Supply Co, 165 P 2d 839, 196 Okl 362—

Barnes v Aggas, 242 P. 1046, 115 Okl 115

40 C J p 255 note 69

73. US—Tygart Valley Brewing Co v Vilter Mfg Co, CCA W Va, 184 F 845, 107 CCA 169

W Va—Lockhead v Berkeley Springs Waterworks & Improvement Co, 21 SE 1031, 40 W Va 553

74. Kan—Leidigh & Havens Lumber Co v Wyatt, 109 P 2d 87, 153 Kan 214—Badger Lumber & Coal Co v Schmidt, 251 P 196, 122 Kan 48

Okl—Parker v Everetts, 165 P 2d 630, 196 Okl 408—Spurrer Lumber Co v Montgomery, 24 P 2d 1005, 165 Okl 67—Whitfield v Frensley Bros Lumber Co, 283 P. 985, 141 Okl 44

40 C J p 255 note 71.

75. NJ—Board v Freedman, 131 A 913

N.Y.—In re Wilaka Const Co, 2 N. YS 2d 251, 166 Misc 185

After award of arbitrators

A claimant who seeks to amend his lien after an award of arbitrators has been filed must pay all costs to the time of his seeking the amendment—Connery v Howe, 4 L T N S. (Pa.) 231

Petition or application

Where the statute requires a petition or other application stating certain matters, the paper presented to obtain the amendment must comply with the statutory requirements—Dyer v Wallace, 107 A 754, 264 Pa 169—40 C J p 255 note 82

Sufficiency of notice of intention may not be decided in proceedings to amend claim—Grass v Eisenbrey, Pa Com Pl, 59 Montg Co 268

76. NJ—Guerber Engineering Co v Stafford, 114 A 747, 96 NJ Law 280

40 C J p 255 note 72

77. Md—Baker v Winter, 15 Md 1

40 C J p 255 note 73.

made in the trial court, by leave or order of court,⁷⁸ an amendment by changing or altering the record is not permissible,⁷⁹ although it is sometimes upheld notwithstanding the irregularity⁸⁰ Under some statutes the amendment must be in writing⁸¹ and signed by the judge⁸² In some jurisdictions the amended lien claim need not be sworn to,⁸³ but in other jurisdictions the amendment should be sworn to by claimant unless some reason is assigned for submitting the affidavit of another person⁸⁴

Defendant may deny the existence of the alleged grounds of amendment,⁸⁵ and, where he does so, claimant has the burden of supporting his motion or petition by proof⁸⁶ It has been held that the burden of showing that a purchaser or encumbrancer would not be prejudiced by the amendment is on claimant;⁸⁷ but it has also been held that, where the record is silent on the subject of intervening rights, claimant is not required to negative such rights⁸⁸

Notice. Such notice of the application to amend a lien claim or statement must be given as the statute may prescribe⁸⁹ On failure to give the required notice the application may be denied without prejudice to renew on proper notice⁹⁰

§ 171. Striking Off Claim or Statement

In a proper case a mechanic's lien claim, notice, or statement may be canceled, discharged, or stricken off.

In a proper case a mechanic's lien claim, notice, or statement may be discharged or canceled.⁹¹ Where the grounds for cancellation of a notice of lien are prescribed by statute, the notice may not be canceled on other grounds⁹² A statute authorizing the court to cancel a mechanic's lien on the ground that no action to enforce it had been commenced within the prescribed time after service of a notice to commence an action is not a statute of limitation making it compulsory for the court to discharge the lien, but is rather a permissive statute which clothes the court with discretionary power to discharge or to refuse to do so for good reason shown⁹³

Where the modes of discharging a mechanic's lien are prescribed by statute it may be discharged only in one of the modes provided⁹⁴ Where separate and distinct statutory provisions govern the discharge of a mechanic's lien and the discharge of a mechanic's notice of intention, a mechanic's notice of intention may be discharged only by pursuing the method prescribed therefor by statute⁹⁵ and the remedies provided for discharge of the lien do

Amendment by master

Under Comp St Suppl 1911-1915 p 943 § 15, a lien claim once filed was unamendable except on an order made by a justice of supreme court or a judge of circuit court, after a hearing had on notice to all parties interested and could not be amended by a master—Board v Freedman, N J, 131 A 913

78. Wash—Brown v Trimble, 93 P 317, 48 Wash 270
40 C J p 255 note 74

By agreement or leave of court
Pa—Kanofsky v Carey, 89 Pa Super 422

79. Kan—Newman v. Brown, 27 Kan 117

80. Dak—Saries v Sharlow, 37 N W 748, 5 Dak 100
40 C J p 255 note 76

81. N J—Drinkhouse v American Brick & Tile Co, 33 A 950, 58 N J Law 432, affirmed 36 A 1034, 59 N J Law 462

82. N J—Drinkhouse v American Brick & Tile Co, 33 A 950, 58 N J Law 432

83. N J—Drinkhouse v American Brick & Tile Co, supra

84. Pa—Sinnott v Beard, 14 Pa Dist 619

85. Pa—Shaffer v. Hamernick, 23 Pa Dist 850.

86. Pa—Shaffer v Hamernick, supra

87. Minn—Wetmore v Royal, 56 N. W 594, 55 Minn 162

88. Pa—Steinitzer v Scholl, 24 Pa Dist 719
40 C J p 256 note 86

89. N Y—In re Wilaka Const Co, 2 N Y S 2d 251, 166 Misc 185

90. N Y—In re Wilaka Const Co, supra

91. Payment of subcontractors' claims

Landowners appealing to equity court to declare mechanic's liens invalid for want of written notice were not equitably required to pay subcontractors' claims from sum paid corporation by owners holding all stock thereof—Coleman v Pearman, 165 S E 271, 159 Va 72

Landowner, canceling construction contract at time when contractors were not in default, was not entitled to have liens in favor of contractors canceled—Wickliffe v Cooper & Sperier, 120 So 52, 167 La 689

Issues, proof and variance

Tex—Garrett v Katz, Civ App, 23 S W 2d 436, judgment corrected 27 S W 2d 373

Petition held insufficient

La—Lieber v Levy, 116 So 394, 165 La 949

Weight and sufficiency of evidence

Md—Blenard v Blenard, 45 A 2d 335
Wash—Daloia v Boyd, 133 P 2d 950, 16 Wash 2d 489

92. N Y—Matter of Bronitsky, 121 N Y S 422, 136 App Div 672

93. N Y—In re Rosen, 13 N Y S 2d 1019, 172 Misc 134

Motion for cancellation denied

Where negotiations were being carried on to settle claim between attorney for the lienor and others, motion to cancel mechanic's lien on ground that no action to enforce it had been commenced within thirty days from the date of service of notice to commence action was denied.—In re Rosen, supra

Lien for public improvement

Filing with comptroller of notice of pendency of action within three months after filing of notice of lien for a public improvement barred summary discharge of lien on ground of failure to commence action to enforce lien within three months—Werra Aluminum Foundry Co v. Levine, 283 N Y S 867, 246 App Div. 733

94. N Y—In re 12 East 86 St. Corporation, 261 N Y S 840, 146 Misc. 235

95. N J—N August, Jr & Co v. Crosta, 23 A 2d 167, 127 N J Law 435

not apply⁹⁶

Where directed by statute, the proceeding for the vacation and cancellation of the lien is by application to a particular court or judge for an order summarily discharging of the record the alleged lien⁹⁷ and where the statute limits the court to a consideration whether from the face of the notice of lien the claimant has a valid lien no other question may be determined⁹⁸. Where no appeal has been taken by the owner from an order establishing the validity of liens on a motion attacking their validity, no further determination thereon is

required in a subsequent motion to vacate and cancel the liens on the ground of willful exaggeration⁹⁹

In some jurisdictions where proper application¹ is timely made² by a person entitled to object,³ the claim or statement may be stricken off in a proper case,⁴ as where the lien is not self-sustaining⁵ and it would be equitable to allow it to remain on record as a lien⁶. The claim can be stricken off for, and only for, defects or irregularities appearing on its face.⁷ The lien will not be stricken off if it

96. Methods for discharge of lien and notice of intention

(1) Mechanics' lien law contemplates that lien claim may be discharged in statutory manner in lien docket pertaining to liens and not in county clerk's book entitled "Mechanic's Notice of Intention."—In re Dujanski, 179 A. 693, 13 N.J. Misc. 546

(2) Provision in mechanics' lien law that notice of intention in case of abandonment shall be discharged only on certificate being filed by parties filing notice was mandatory and exclusive so as to deprive circuit court of jurisdiction to order county clerk to discharge such notice in event of abandonment.—In re Dujanski, supra

97. NY—Fuller v Knapp, 263 N.Y.S. 689, 146 Misc. 654

98. NY—Fuller v Knapp, supra—In re 13 East 86th St. Corporation, 261 N.Y.S. 840, 146 Misc. 235

Issues of fact for trial

Objections which did not involve matters appearing on face of mechanic's lien raised issues of fact for disposition on trial rather than on motion to vacate the lien.—Cleg Co v Henry Moss & Co., 64 N.Y.S.2d 99

Whether materials were readily removable trade fixtures and whether tenant had permission from owner to install the materials were matters of fact which would not summarily be determined on application to vacate and cancel mechanic's lien.—Cleg Co v Henry Moss & Co., supra

99. NY—Schenectady Homes Corporation v Greenside Painting Corporation, 37 N.Y.S.2d 53

1. Pa.—Wharton v Real Estate Inv. Co., 36 A. 725, 180 Pa. 168, 57 Am. S.R. 629

40 C.J. p. 256 note 92

All objections to lien should be set forth in the petition, motion or rule or in an amendment thereto.—Delaware County Supply Co v Seavichia, Pa. Com. Pl., 33 Del. Co. 35

Exceptions

(1) Exceptions in mechanics' lien

proceeding are intended to perform same function as demurrer to declaration, being primarily directed to statement of claim, not bill of particulars.—Thomas v Goldbahn, 156 A. 363, 4 W.W. Harr., Del., 495

(2) Where exceptions are sustained to statement of claim in mechanics' lien proceedings, lien is ordered stricken from record and defendant has execution for his costs.—E.J. Hollingsworth Co v Continental-Diamond Fiber Co., 175 A. 266, 6 W.W. Harr., Del., 303

(3) Entire lien or claim cannot be stricken on exceptions directed only to bill of particulars.—Armstrong & Latta Co v Wilmington Sugar Refining Co., 120 A. 94, 2 Harr., Del., 125

2. Pa.—Koons v. Harding, 3 Pa. Dist. & Co. 741

40 C.J. p. 256 note 93

3. Pa.—Mesta Mach. Co v Dunbar Furnace Co., 95 A. 555, 250 Pa. 472—Hayward v Wandrie, Com. Pl., 20 Erie Co. 246—Haug v Atlantic Refining Co., Com. Pl., 86 Pittsb. Leg. J. 42

40 C.J. p. 256 note 94

Lien is res inter alios acta as to all but the parties to it.—Drake v Stout, 127 A. 639, 282 Pa. 223—Kessler v Mandel, 40 A.2d 926, 156 Pa. Super. 505

4. Pa.—Rice v Cornelius, 48 Pa. Dist. & Co. 86—Hassler v Haas, Com. Pl., 34 Berks Co. L.J. 103, 55 York Leg. Rec. 199

40 C.J. p. 256 note 95

Averments must be accepted as true on motion to strike unless something appears which shows that they could not be true.—Russell M. Howe, Inc v Beloff, Pa. Super., 56 A.2d 352.

Construction of claim on motion to strike

Where averment of mechanic's lien claimant was consistent both for and against his claim, on owners' motion to strike certain items from claim, court should have adopted construction in support of claim and ascertained true meaning after evi-

dence was taken.—Russell M. Howe, Inc v Beloff, supra

Rule to strike denied

Pa.—Bickerton v Vaughn, 38 Pa. Dist. & Co. 645, 3 Fay L.J. 105, 86 Pittsb. Leg. J. 393—Austin v Rozell, Com. Pl., 40 Lack. Jur. 99

Failure to allege claimants were partners

Pa.—Austin v Rozell, supra

Lien for labor alone

Pa.—Austin v Rozell, supra

5. Pa.—Wharton v Real Estate Inv. Co., 36 A. 725, 180 Pa. 168, 57 Am. S.R. 629

40 C.J. p. 256 note 96

6. Pa.—Gerrard v. Ecker, 12 Pa. Dist. 832

7. Pa.—Hamilton v Means, 38 A.2d 528, 155 Pa. Super. 245—Pennsylvania Supply Co v Lumb, Com. Pl., 52 Dauph. Co. 29—Wolfe v Gibbs, Com. Pl., 46 Dauph. Co. 369—Delaware County Supply Co v Seavichia, Com. Pl., 33 Del. Co. 35—Hayward v Wandrie, Com. Pl., 20 Erie Co. 246—Wilson v Cimmi, Com. Pl., 42 Lack. Jur. 135—Burke v Wolf, Com. Pl., 4 Monroe L.R. 35—Stockdale Hardware Co v Knapp, Com. Pl., 35 West Co. L.J. 4—Cook v McNish, Com. Pl., 22 West Co. L.J. 279

40 C.J. p. 256 note 98

Contract against liens

Contract against liens not being part of original contract between owner and contractor, and hence not disclosed by the record of the lien, is not ground for striking off the lien.—Hudak v Falasa, 13 Pa. Dist. & Co. 485—Pennsylvania Supply Co v Lumb, Pa. Com. Pl., 52 Dauph. Co. 29

Notice of intention to file lien

Defective notice of intention to file a lien is not ground for striking off the lien.—Hudak v Falasa, 13 Pa. Dist. & Co. 485—Pennsylvania Supply Co v Lumb, Pa. Com. Pl., 52 Dauph. Co. 29—40 C.J. p. 256 note 98 [d]

Questions of fact generally

Court will decline to strike off a mechanic's lien where it is appar-

contains at least one good item,⁸ but the court may strike out items which are improperly included.⁹ A lien claim which sets forth all the facts required by the statute cannot be stricken off because additional facts are not set forth.¹⁰ Under express statutory provisions the failure of claimant to serve a notice on the owner of the fact of the filing of the claim, or to have service accepted or to file an affidavit setting forth the fact and manner

of the service of the notice of filing, is sufficient ground for striking off the claim.¹¹

Effect of discharge Where a materialman furnishes materials to a contractor, the discharge of the lien because of the improper inclusion of a false item may release the building owner but it does not release the contractor from his obligation to pay the indebtedness.¹²

IV. OPERATION AND EFFECT OF LIEN

A. AMOUNT SECURED

§ 172. In General

As a general and broadly stated rule subject to exceptions, the measure and limit of a mechanic's lien is the full amount due and unpaid for the work and materials furnished.

As a general and broadly stated rule, subject to various exceptions as discussed infra this section and §§ 173-176, the measure and limit of a mechanic's lien is the full amount due and unpaid for the work and materials furnished.¹³ A lien cannot be enforced for labor and material not included in, or for an amount greater than that stated in, the notice, claim, or statement which has been filed pur-

suant to statute,¹⁴ except for incidentals to the claim, such as interest discussed infra § 176, but there is authority which holds that where a statute provides that failure to file the statement shall not defeat the lien except as against purchasers and encumbrancers, the amount claimed in the statement does not limit the recovery against the owner.¹⁵

In accordance with constitutional or statutory provisions, the amount of debt for which the lien may be enforced is fixed as of the date the lien attaches.¹⁶

ent that a question of fact must be determined precedent to application of a controlling principle of law—Cook v McNish, Pa Com Pl, 22 West Co L J 279—40 C J. p 256 note 98 [f]

Status of claimant

Where mechanic's lien claimant did not give statutory notice to owners of intention to claim lien, which notice must be given by a subcontractor, so that validity of lien depended on whether claimant was a prime contractor, determination of such question was not to be summarily made—Russell M Howe, Inc v Beloff, Pa Super, 56 A 2d 352

Depositions cannot be used by either side to show that claim is, in fact, valid or invalid—Keystone Lumber Co v Russo, Pa Com Pl, 89 Pittsb Leg J 416, 55 York Leg Rec 98—40 C J p 256 note 98 [i]

8. Pa—Delaware County Supply Co v Scavichia, Com Pl, 33 Del Co 35—Raymond v Brookside Distilling Products Corporation, Com Pl, 44 Lack Jur 181—Burke v Wolf, Com Pl, 4 Monroe L R 35—Haug v Atlantic Refining Co, Com Pl, 86 Pittsb Leg J 42—Pagana v. Patterson, Com Pl, 29 West Co L J 67.

9. Pa—Landau v Lisan, 7 Pa Dist & Co 610—Raymond v Brookside Distilling Products Corporation, Com Pl, 44 Lack Jur. 181.

However, it has been held that court is without authority under statutes to strike out certain items of a lien on motion—Kihm-Bowen Mach Co v Midwest Steel & Supply Co, 3 Pa Dist & Co 755

10. Pa—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 246

11. Pa—Rozell v Dubin, Com Pl, 40 Lack Jur 3—Sears Roebuck & Co v Grey, Com Pl, 28 North Co 355—Bridgeville Lumber Co v Mitchell, Com Pl., 88 Pittsb Leg J 463—Lhormer v Frank, Com Pl, 87 Pittsb Leg J 255—Pressel & Son v Platts, Com Pl, 55 York Leg Rec 61

Failure to serve one of two owners

Where service of notice of filing of lien has not been validly made on one of two persons owning the real estate as tenants by the entireties, it may be stricken off as to him—Hamilton v LeSueur, 46 Pa Dist. & Co 516, 24 Erie Co 341

12. Mich—Currier Lumber Co v Ruoff, 299 NW 163, 298 Mich 505

13. US—Fred T Ley & Co v Wheat, CCA Fla, 64 F 2d 257 Cal—Gross v Hazeltine, 290 P 673, 107 Cal App 416

Pa—Bryan v Stempkowski, 88 Pa Super 390—Leiby v Erdman, Com Pl, 20 Lehigh Co L J. 153, 57 York

Leg Rec 51.

Tex—Stanfill v Penniman Gravel & Material Co, Com App, 27 S W 2d 135

40 C J p 257 note 5

Lienable and nonlienable items see supra §§ 33-51

Charges according to usages of business

Charges by contractors' employees according to nature and usages of business are good—Johnson v Kusminsky, 135 A 220, 287 Pa 425

14. SD—Symms-Powers Co v Kennedy, 146 N.W 570, 33 SD 355

40 C J p 257 notes 7, 11

Amount of claim or statement see supra §§ 153-155

15. Iowa—Neilson v Iowa Eastern R Co, 1 NW 434, 51 Iowa 184, 33 Am R 124

16. Tex—Bryant-Link Co v W H. Norris Lumber Co, Civ App, 61 S W 2d 160, error dismissed

At time of filing

Mechanic's lien has been held to be valid only for claim for labor performed and materials furnished at time lien was filed, and not thereafter—Fournier v Mauro, 267 N Y S 158, 240 App Div 855—Genesee Lumber & Coal Co v Bonarrigo, 254 N Y S 541, 233 App Div 455, affirmed 182 NE 220, 259 NY 651—Preiser v Pape, 216 N Y S 900, 217 App. Div 760

§ 173. Value of Labor and Materials

In the absence of a special contract fixing the price of the services or materials, the measure and limit of the amount of the mechanic's lien is the reasonable value of what was done or furnished

Where the price of the services or materials has been fixed by a contract between the lienor and the owner, the reasonable value of the services or materials is not the measure of the amount of the lien,¹⁷ but, in the absence of a special contract fixing the price of the services or materials, the measure and limit of the amount of the lien is the reasonable value of what was done or furnished¹⁸ Under statutes conforming strictly to the direct lien or Pennsylvania system, discussed supra § 105, the lien of a person other than the principal contractor is limited to the reasonable value of what was done and furnished,¹⁹ regardless of the price agreed on between claimant and the contractor, as discussed infra § 174 b; but, where a price has been agreed on by contract, such agreed value is sometimes deemed to be, at least prima facie, the value or reasonable value.²⁰ A similar rule which has been applied is that, where a person performs labor or furnishes material at the direction of the purchaser of premises under a contract of sale, without dealing directly with the vendor, he cannot enforce a lien against the vendor's interest in the premises for more than the reasonable value of the labor or materials²¹

Where the owner of property acquiesces in the

use of materials ordered by another to improve the property, the lien attaches for the value of the materials used.²²

§ 174. Amount Fixed or Due under Contract or Subcontract

- a. Persons contracting directly with owner
- b. Persons not contracting directly with owner

a. Persons Contracting Directly with Owner

Generally the amount of the lien of a claimant who has furnished labor or materials for an agreed price under a contract made by him directly with the owner is measured and limited by the price fixed in the contract.

Generally, unless deductions are to be made by reason of payments made or lack of complete performance, the amount of the lien of a claimant who has furnished labor or materials for an agreed price under a contract made by him directly with the owner is measured and limited by the price fixed in the contract.²³ A contractor may have a lien for extras furnished where the contract provides that if extras are furnished an additional charge therefor may be made.²⁴ Where the contract has been rescinded, the amount of the lien is not limited to the contract price.²⁵ A mechanic's lien may not be extended to include charges for attorney's fees provided for by notes given for materials where the lien has matured before the notes

17. Cal—Bosch v Bohlig, 162 P 100, 173 Cal 687

Lien for amount fixed or due under contract see infra § 174

18. Ky—Hazard Lumber & Supply Co v Demumbrum, 295 SW 414, 220 Ky 432

Okl—Whitfield v Frenslay Bros Lumber Co, 283 P 985, 141 Okl 44

40 C J p 257 note 13

Profits as part of value of labor and materials see supra § 49

19. Cal—English v Olympic Auditorium, 30 P 2d 946, 217 Cal 631, 87 A L R 1281

Mo—Cabool School Dist v. U S Fidelity & Guaranty Co, App, 9 S W 2d 103

Wash—F T Crowe & Co v Adkinson Const Co, 121 P 841, 67 Wash 420, Ann Cas 1913D 273

40 C J p 257 note 15

20. Ariz—Lanier v Lovett, 213 P. 391, 25 Ariz 54

40 C J p 258 notes 18, 20

21. Or—Barr v Lynch, 97 P 2d 185, 163 Or 607—Randolph v Christensen, 265 P 797, 124 Or 661

22. Ky—Tackett v. Pikeville Sup-

ply & Planing Mill Co, 61 SW 2d 881, 249 Ky 835

23. Ala—Byrum Hardware Co v Jenkins Bldg Supply Co, 147 So 411, 226 Ala 448

Ariz—Wyllie v Douglas Lumber Co, 8 P 2d 256, 39 Ariz 511, 83 A L R 918

Ill—Moulding-Brownell Corporation v E C Delfosse Const Co, 26 N E 2d 709, 304 Ill App 491

Ind—Peter & Burghard Stone Co v Marion Nat Bank of Marion, 153 N E 472, 198 Ind 581

Kan—Lindas Lumber Co v Drennan, 18 P 2d 179, 136 Kan 866

Md—House v Fissell, 51 A 2d 669

40 C J p 258 notes 22-25

Reduction of lien by partial payment

see infra § 247

Agreement to discount valid mechanic's lien claim, if paid within four months, was held not to affect the amount of the lien for the total price where payment was not made within that time—Hurd v Meyer, 242 NW 882, 259 Mich 190

Cost-plus contractors, fully itemizing materials, may recover at least

their cost—Johnson v Kusminsky, 135 A 220, 287 Pa 425

Sales slips

Acceptance of materials accompanied by sales slips showing a fixed price precludes the landowner from contending that quantum meruit was contemplated rather than the prices charged by the materialman—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 N M 3

24. La—Groner v Cavender, 133 So 825, 16 La App 565

Maximum amount of note under housing statute

Where contract for remodeling home on a cost-plus basis provided that on completion owner would sign a Title One Federal Housing Note, and changes were made in the plans from time to time by the owners which increased cost of construction, the maximum cost could not be said to be fixed at two thousand five hundred dollars because such figure was the maximum amount of such note under federal statute—Smith v Gunniss, 144 P 2d 186, 115 Mont 363

25. Cal—Boomer v Muir, App, 24 P 2d 570.

have been executed²⁶

Filing lien before completion of contract. A lien which is filed before the contract is completed has been held, in accordance with statutory provisions, to be limited to the agreed price or value of the materials actually furnished at the time of filing, rather than the full contract price payable after completion of the contract.²⁷

b. Persons Not Contracting Directly with Owner

- (1) Amount fixed in, or due under, principal contract
- (2) Amount fixed in, or due under, subcontract

(1) Amount Fixed in, or Due under, Principal Contract

- (a) In general
- (b) Effect of payments or guarantees

(a) In General

Under some statutes subcontractors, materialmen, and other persons not contracting directly with the owner may enforce liens for the full amount due them regardless of the contract price agreed on between the owner and the contractor, but under other statutes the contract price agreed on between the owner and the contractor fixes the limit of the amount for which they can enforce their liens.

In accordance with some statutory provisions subcontractors, materialmen, and other persons not contracting directly with the owner may enforce

liens for the full amount due them, regardless of the contract price agreed on between the owner and the contractor²⁸ Under other statutes the contract price agreed on between the owner and the contractor fixes the limit of the amount for which subcontractors, materialmen, and other persons not contracting directly with the owner may enforce their liens,²⁹ provided the owner has not made improper payments, as discussed *infra* subdivision b (1) (b) of this section, and, where the liens of such persons exceed in the aggregate the contract price, claimants share pro rata in the fund,³⁰ subject, of course, to such priorities among themselves as may have been acquired by superior diligence and the like, as discussed *infra* § 198 Where the ostensible contract price is more than the real contract price, such ostensible price is to be taken as the contract price as far as a lien claimant other than the contractor is concerned,³¹ at least where he relied on the price stated in the written contract,³² although not where he was not deceived.³³

Notwithstanding the rule prevailing in many jurisdictions that the liens of persons not contracting directly with the owner cannot exceed the price fixed in the contract between the owner and the principal contract, the owner may become liable for more than the original price by a failure to follow the law as to the rights of subcontractors³⁴ or to comply with the provisions of the statutes which

26. Iowa—*Spieker v. Cass County Fair Ass'n*, 249 NW 415, 216 Iowa 424

Miss—*Walker v. Macon Creamery Co.*, 146 So 442, 165 Miss 121
Recovery of attorney's fees in enforcement of lien see *infra* § 353

27. NY—*Genesee Lumber & Coal Co v Bonarrigo*, 254 NYS 541, 233 App Div 455, affirmed *Genesee Lumber & Coal Co v Bonarrigo*, 182 NE 220, 259 NY 651

28. Ark—*Lyle v Latourette*, 192 S W 2d 521, 209 Ark 714

Pa—*Bryan v Stempkowski*, 88 Pa Super 390
40 CJ p 258 note 38

29. Ala—*Security Federal Savings & Loan Ass'n v Underwood Coal & Supply Co.*, 16 So 2d 100, 245 Ala 56—*Richardson Lumber Co v Howell*, 122 So 343, 219 Ala 338
Ga—*Spirides v Victory Lumber Co.*, App, 45 SE 2d 65

Ky—*Higgins Lumber Co. v Cunningham*, 388 SW 334, 216 Ky 298

NY—*Farm Supplies Corporation v Goldstein*, 270 NYS 430, 240 App

Div 330—*Shapiro v Golub*, 13 NYS 2d 498

Ohio—*Howk v Krotzer*, 42 NE 2d 640, 140 Ohio St 100—*Chapel State Theatre Co v Hooper*, 175 NE 450, 123 Ohio St 322, affirmed 52 S Ct 137, 284 US 538, 76 L Ed 508—*Dabney v Rose Bros Co.*, 191 NE 810, 47 Ohio App 278

Tenn—*Variety Fire Door Co v Hanson-Worden Co.*, 10 Tenn App 254

Vt—*King v Hoadley*, 26 A 2d 103, 112 Vt 394

Va—*Nicholas v Miller*, 30 SE 2d 696, 182 Va 831, 153 ALR 752.
40 CJ p 259 note 42

Amount not payable in money

The fact that the contract does not provide for payment in money, but for payment in some other form, does not operate to deprive laborers or materialmen of their right to enforce a lien against the property to the amount named in the contract between the owner and the contractor—*Voytko v Bunting*, 172 NE 665, 122 Ohio St 552

Provisions construed together
Provision of statute creating sub-

contractor's lien that owner of land affected by lien will not thereby become liable to any claimant for any greater amount than he contracted to pay original contractor does not add or detract from provision granting lien to subcontractor to the same extent as the original contractor for the amount due him—*Consolidated Cut Stone Co v Seidenbach*, 75 P 2d 442, 181 Okl 578.

30. Ky—*Higgins Lumber Co. v Cunningham*, 388 SW 334, 216 Ky. 298

Tenn—*Variety Fire Door Co v. Hanson-Worden Co.*, 10 Tenn App 254

Vt—*King v Hoadley*, 26 A 2d 103, 112 Vt 394
40 CJ p 259 note 43

31. Ohio—*Thompson v Rosenberg*, 22 Ohio Cir Ct. NS, 219

32. NY—*Hitchings v. Teague*, 99 NYS 967, 113 App Div 670

33. NY—*Glatt v Meade*, 206 NYS 64, 123 Misc 630
40 CJ p 260 note 68

34. Iowa—*Page v Grant*, 103 NW 124, 127 Iowa 249

place a limitation on his liability.³⁵ The limitation does not apply under some statutes where the contract between the owner and the contractor is not in writing,³⁶ does not set forth certain prescribed matters,³⁷ or the contract, or contract and bond provided for by statute, are not filed or recorded, as discussed supra § 82 and infra § 257. The liens of persons other than the contractor are not confined to the price fixed in the principal contract where an unreasonably low price is fixed in such contract for the purpose of defrauding subcontractors and others.³⁸

Extra work The value of extra work performed or materials furnished by the contractor in connection with the original contract, and for which the owner is liable to him, is properly taken into account in determining the amount secured by the liens of subcontractor and other persons not contracting directly with the owner,³⁹ but the rule is otherwise where the performance of the extra work or the furnishing of the extra materials is a separate and distinct transaction outside of, and apart from, the original contract.⁴⁰

(b) Effect of Payments or Guarantees

In some jurisdictions subcontractors or other claimants not contracting directly with the owner may enforce their liens up to the limit of the price fixed in the contract between the owner and the contractor irrespec-

tive of amounts paid under the contract, but in other jurisdictions the enforcement of their liens is limited to the portion of the contract price which remains due and unpaid.

In some jurisdictions the price fixed in the contract between the owner and the contractor is the only limitation on the amount of the liens of subcontractors and other claimants not contracting directly with the owner,⁴¹ and within, and up to such limit, their liens may be enforced for the proper amounts,⁴² irrespective of the amount due and unpaid under the principal contract,⁴³ and payments made by the owner to the contractor do not defeat or reduce the liens of subcontractors, laborers, or materialmen, as discussed infra § 251. In other jurisdictions, notably those in which the system of liens by subrogation to the rights of the contractor obtains to its full extent, effect is given to payments which have been made to the contractor, as discussed infra § 251, and the liens of subcontractors, materialmen or other persons not contracting directly with the owner are limited not only to the price fixed in the contract between the owner and the contractor, as discussed supra subdivision b (1) (a) of this section, but also to that portion thereof which remains due and unpaid⁴⁴ at the time they commence work,⁴⁵ give notice of their intention to claim liens,⁴⁶ or file their lien claims,⁴⁷ or which may become due thereafter,⁴⁸ and the claimants

35. Cal.—Union Supply Co v Morris, 30 P 2d 394, 320 Cal 331—Mazzera v Ramsey, 238 P 101, 72 Cal App 601
Ohio—Howk v Krotzer, 42 NE 2d 640, 140 Ohio St 100
36. Cal.—Union Supply Co v Morris, 30 P 2d 394, 220 Cal 331—L W Blinn Lumber Co v Cohn, 165 P 441, 33 Cal App 386
37. Cal.—D I Nofziger Lumber Co v Waters, 101 P 38, 10 Cal App 89
38. Ill.—Mantonya v Reilly, 56 NE 425, 184 Ill 183
40 C J p 260 note 65
39. NY—Keahon Bros v Blank, 292 NYS 257, 161 Misc 574
40 C J p 260 note 73
40. Ohio—Dunn v Rankin, 27 Ohio St 132.
Va.—Schrieber v Citizens' Bank, 38 SE 134, 99 Va 357.
41. Kan.—Rankin v Rankin, 123 P 1120, 86 Kan 899
40 C J p 259 note 46
42. Ky.—Monyahan v Lancaster, 182 SW 862, 168 Ky 677
Tenn.—Richmond Screw Anchor Co v E W Minter Co, 300 SW 574, 156 Tenn 19
43. ND.—Langworthy Lumber Co v Hunt, 122 NW 865, 19 ND 433
SD.—Albright v Smith, 54 NW 816, 3 SD 631
44. Ala.—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 103 ALR 346—C G Kershaw Contracting Co v Cascade Corporation of Alabama, 138 So 815, 224 Ala 116
La.—Officer v Combres, App, 194 So 441
NY—Farm Supplies Corporation v Goldstein, 270 NYS 430, 240 App Div 330—J W Van Cott & Son v Gallon, 298 NYS 67, 163 Misc 914
NC.—Schnepf v Richardson, 23 SE 2d 555, 222 NC 228
Ohio—Howk v Krotzer, 42 NE 2d 640, 140 Ohio St 100
Tex.—McConnell v Frost, Civ App, 45 SW 2d 777, error refused
Vt.—King v Hoadley, 26 A 2d 103, 112 Vt 394
Va.—Nicholas v Miller, 30 SE 2d 696, 182 Va 831, 153 ALR 752
40 C J p 259 note 63
Statute for protection of owner
Statute limiting certain liens of laborers and materialmen to unpaid balance due contractor and requiring written notice to owner of lien is for protection of owner—Le Grand v Hubbard, 112 So 826, 216 Ala 164
45. Utah—Langton Lime & Cement Co v Peery, 159 P 49, 48 Utah 112
Time of installation of equipment
Tex.—McConnell v Frost, Civ App, 45 SW 2d 777, error refused
46. Ala.—Butler v Hawk, 128 So 451, 221 Ala 347
Fla.—Tallahassee Variety Works v Brown, 144 So 848, 106 Fla 599, reversing 138 So. 759, 106 Fla 599
NC.—Schnepf v Richardson, 23 SE 2d 555, 222 NC 228
Va.—Nicholas v Miller, 30 SE 2d 696, 182 Va 831, 153 ALR 752
40 C J p 259 note 55
47. NY—Farm Supplies Corporation v Goldstein, 270 NYS 430, 240 App Div 330—J W Van Cott & Son v Gallon, 298 NYS 67, 163 Misc 914
Tex.—Garvin v Armstrong Bros, Civ App, 20 SW 2d 358, modified on other grounds Modern Plumbing Co v Armstrong Bros, Com App, 36 SW 2d 1011
40 C J p 260 note 56
48. Ala.—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 102 ALR 346
NY—Farm Supplies Corporation v Goldstein, 270 NYS 430, 240 App Div 330—J. W. Van Cott & Son v

share pro rata in the amount remaining⁴⁹ Where the amount due and unpaid is greater than the amount of the liens, the liens must be allowed in full⁵⁰

The rule that the amount of the liens of subcontractors shall not exceed in the aggregate the amount due the contractor at the date of filing notices of liens does not apply where the contract between the owner and contractor provides for payment, not of a gross sum, but according to the character and quantity of work and materials⁵¹ However, where a contractor elects to take a note and mortgage in part payment of the purchase price, in accordance with an option of his contract, a subcontractor is entitled to a lien only to the extent of the balance of the purchase money due in cash⁵² The owner may become liable for more than the original contract price by failing to observe his original contract as to the times of payment⁵³ Liens are not limited to the amount due a certain person as contractor where he does not occupy the status of a contractor⁵⁴ Also interest on the indebtedness of the owner after maturity until paid is available to subcontractors, materialmen, and laborers, as well as the principal sum⁵⁵ A contractor's claim against the owner for damages is not available to increase the amount for which subcontractors and others can enforce a lien⁵⁶

Under some statutes the owner must withhold a certain per cent of the contract price to secure payment of mechanics, and persons employed by the contractor may be given a lien for that amount even though the contractor has been paid in full⁵⁷

Guarantee of payment Where the owner has guaranteed payment to a subcontractor or materialman, the amount of other mechanics' liens filed thereafter may not exceed the difference between

the amount due the contractor under the terms of the contract and the amount of the guaranteed payment⁵⁸

(2) Amount Fixed in, or Due under, Subcontract

Under some statutes a subcontractor, materialman, or other person claiming under a contract with the contractor is entitled to enforce a lien up to, and only up to, the amount fixed by such contract, but under other statutes the price fixed in the contract between the claimant and the contractor is not controlling in fixing the amount of the lien.

Under some statutes a claimant who is a subcontractor, materialman, or other person claiming under a contract with the contractor is entitled to enforce a lien up to, and only up to, the amount fixed by such contract,⁵⁹ or the amount for which the contractor is liable,⁶⁰ subject to the limitations obtaining under many statutes that such person cannot enforce a lien for more than the original contract price agreed on between the owner and the contractor or such portion thereof as remains due and unpaid to the contractor, as discussed supra subdivision b (1) of this section However, in jurisdictions where the measure and extent of the amount of the lien of a claimant other than the original contractor is the value or reasonable value of the labor or material furnished, the price fixed in the contract between claimant and the contractor is not controlling in fixing the amount of the lien,⁶¹ although such contract price is sometimes deemed to be, at least prima facie, the value or reasonable value within the meaning of the rule obtaining in such jurisdictions, as stated supra § 173 Extra material furnished by a subcontractor on the contractor's assurance of payment must be considered for the purpose of the lien without reference to the limits of the subcontract⁶²

Gallon, 298 NYS 67, 163 Misc 814
40 C J p 260 note 57

49. NC—Schnepf v Richardson, 22 SE 2d 555, 222 NC 228

50. Mich—Frank Japes Co v Pangel, 235 NW 521, 248 Mich 700
Settlement for smaller amount than claimed

Tenn—Variety Fire Door Co v Hanson-Worden Co, 10 Tenn.App 254

51. Ill—Boldman v Illinois Cent Tract Co, 145 Ill App 551

52. Iowa—Jones & M Lumber Co v Murphy, 19 NW. 898, 64 Iowa 165

53. Iowa—Page v Grant, 103 NW 124, 127 Iowa 249

54. NY—Schmalz v Mead, 26 NE 251, 135 NY 188
40 C J p 260 note 72

55. NY—Glatt v Meade, 206 NYS 64, 123 Misc 630
40 C J p 260 note 75

56. NY—Nolan v Gardner, 4 ED Smith, 737—Hoyt v Miner, 7 Hill 525
Lien for damages generally see supra § 54

57. Tex—Miller v Harmon, Civ. App, 46 SW 2d 342

Limitation to amount

A statute which requires the owner to withhold ten per cent of the contract price to secure the payment of mechanics authorizes a lien by such mechanics only for ten per cent of the contract price where the

owner fails to comply with the statute—Miller v Harmon, supra

58. Va—Nicholas v Miller, 30 SE 2d 696, 182 Va 831, 153 ALR 752
—Thomas & Co v McCauley, 130 SE 396, 143 Va. 451.

59. Okl—Steger Lumber Co v Haynes, 142 P 1031, 42 Okl 716
40 C J p 258 note 28

Payments to contractor as affecting liens of other persons see infra § 261

60. Ga—Philip Carey Mfg Co v Viaduct Place, 58 SE 274, 1 Ga App 707

61. Ariz—Lanier v Lovett, 213 P 391, 25 Ariz 54
40 C J p 258 note 83

62. Mich—Lewis-Hall Iron Works

Persons employed by, or contracting with, subcontractor In accordance with the provisions of some statutes, persons employed by, or contracting with, a subcontractor cannot enforce liens in excess of the amount due the subcontractor under his contract with the contractor,⁶³ but under other statutes they may do so.⁶⁴ A statute which limits the lien for materials to the amount of the owner's contract with the contractor does not limit the lien of a person supplying a subcontractor to the amount of the contract between the contractor and the subcontractor.⁶⁵

§ 175. Abandonment or Part Performance of Contract

- a Substantial performance
- b Abandonment by contractor

a. Substantial Performance

Where there has been a substantial, but not full, performance of his contract by the claimant, the measure of his lien is generally held to be the contract price less such deductions as should be made because of the errors or omissions in doing the work.

Where there has been a substantial, but not full, performance of his contract by claimant, and he has acted in good faith, he is entitled to a lien, as discussed supra § 95, the measure of which is generally held to be the contract price less such deductions as should be made because of the errors or omissions in doing the work,⁶⁶ and, in such case, the wrongful refusal of the owner to allow the contractor to complete performance does not remit the contractor to a recovery of the reasonable value of

the labor performed and materials furnished.⁶⁷ A like rule is applied in determining the limit of the liens of other claimants who are merely subrogated to the rights of the contractor.⁶⁸ However, in a few cases the lien of the contractor has been measured by the reasonable value of the work performed and materials furnished,⁶⁹ and it has also been held that the owner is liable to subcontractors and other persons not contracting directly with him to the extent of the reasonable value of the improvement to him.⁷⁰

b. Abandonment by Contractor

- (1) Lien of contractor
- (2) Liens of persons other than contractor

(1) Lien of Contractor

Where the lien claimant has justifiably abandoned full performance of his contract, he is generally held entitled to a lien for the reasonable value of the work and materials furnished in proportion to the price stipulated for the whole, but he is sometimes allowed a lien for the unpaid balance of the contract price less the cost of completing the work according to the contract.

Where the lien claimant has justifiably abandoned full performance of his contract, he is generally held entitled to a lien for the reasonable value of the work and materials furnished⁷¹ in proportion to the price stipulated for the whole.⁷² Sometimes, however, he is allowed a lien for the unpaid balance of the contract price less the cost of completing the work according to the contract,⁷³ particularly where the contract expressly so provides,⁷⁴ or where the owner has completed the

v. Bethel African M E Church, 218 N.W. 760, 242 Mich. 126

63. Va.—John T. Wilson Co. v. McManus, 178 S.E. 361, 162 Va. 130, 40 C.J. p. 258 note 35

Payment to subcontractors as affecting liens of other persons see *infra* § 352

64. Ga.—Heard v. Holmes, 38 S.E. 393, 113 Ga. 159

Tex.—Padgett v. Dallas Brick, etc., Co., 50 S.W. 1010, 92 Tex. 626

65. Mich.—Lewis-Hall Iron Works v. Bethel African M E Church, 218 N.W. 760, 242 Mich. 126.

66. Conn.—Daly v. New Haven Hotel Co., 99 A. 853, 91 Conn. 280, 40 C.J. p. 261 note 30

Recovery in ordinary action for substantial performance of building contract see *Contracts* § 509

67. Conn.—Daly v. New Haven Hotel Co., *supra*

68. N.Y.—Holl v. Long, 68 N.Y.S. 522, 34 Misc. 1, 40 C.J. p. 261 note 32.

Offset against contractor

The amount of the lien of one who has furnished labor at the request of a contractor in the construction of a building cannot exceed the amount due or to become due to the contractor from the owner, and hence any offset against the contractor for failure to perform his contract with the owner is available to the owner in arriving at the amount so due or to become due.—King v. Hoadley, 26 A.2d 103, 113 Vt. 394

Work held not defective

In action to foreclose mechanic's lien for materials furnished general contractor, owner was not entitled to deductions from unpaid balance of contract price on account of alleged defects in the performance of work where trial court found that work was not defective in the respects specified.—City Lumber Co. of Bridgeport v. Borsuk, 41 A.2d 775, 131 Conn. 640, 158 A.L.R. 677

69. Ala.—Bell v. Teague, 3 So. 861, 85 Ala. 211

40 C.J. p. 261 note 33

70. Ky.—Monyahan v. Lancaster, 182 S.W. 862, 168 Ky. 677

71. Neb.—Pardue v. Missouri Pac. R. Co., 71 N.W. 1032, 52 Neb. 201, 66 Am.S.R. 489, 40 C.J. p. 261 note 35

72. Mass.—Orr v. Fuller, 53 N.E. 1091, 172 Mass. 597, 40 C.J. p. 261 note 35 [a]

73. Ga.—Spirides v. Victory Lumber Co., App., 45 S.E.2d 65

Wis.—Charnley v. Honig, 42 N.W. 220, 74 Wis. 163

74. Tex.—Mathes v. Williams, Civ. App., 134 S.W.2d 853

Reconstruction

Contract that, if house were not completed as contracted, mechanic's lien existed for contract price, less cost to complete, was held to imply additional work and material, not complete reconstruction.—Sloan Lumber Co. v. Davis, Tex. Civ. App., 19 S.W.2d 355, error refused

building under a provision of the contract authorizing him, on default of the contractor, to do so and to deduct the cost of doing so from the unpaid balance on the contract.⁷⁵ Where the contract was abandoned by mutual consent with the amount due agreed on, a lien may be had for such amount.⁷⁶ Architects, who were to supervise the construction of a building, but were wrongfully discharged before the building was completed, are not entitled to a lien for an amount based on the cost of the building when completed.⁷⁷

(2) Liens of Persons Other than Contractor.

In a number of jurisdictions, where the contractor has abandoned the contract before full performance, the aggregate claims of subcontractors and other claimants not contracting directly with the owner cannot extend beyond the contract price or the amount due and unpaid on the contract. The unpaid balance of the contract price is subject to deductions for the cost of completing the building or for damages sustained by the owner because of the contractor's default.

As in other cases falling within general rules obtaining in certain jurisdictions, considered *supra* § 174, where the contractor has abandoned the contract before full performance, the aggregate liens of subcontractors and other claimants not contracting directly with the owner cannot extend beyond the amount named in the contract between the owner and the contractor⁷⁸ or the amount due and unpaid the contractor under the terms of the contract⁷⁹ at the time of filing of the lien or service of notice on the owner.⁸⁰ Unless performance of the

contract is completed by the assignee or sureties of the contractor,⁸¹ where the contractor has abandoned the contract the unpaid balance of the contract price out of which the claims of the subcontractors and other claimants would be payable is subject to deductions for the cost of completing the building⁸² or for damages sustained by the owner because of the contractor's default,⁸³ and after all deductions have been computed the amount of the contract price remaining in the owner's hands is to be distributed among the mechanics' lien claimants according to the amount and standing of their several claims.⁸⁴ This rule is particularly applicable where the contract gives the owner the right, in case of the contractor's abandonment or failure to prosecute the work vigorously, to complete the building himself and deduct the cost from the contract price.⁸⁵ Another rule which has been applied in some cases is to limit the liens of subcontractors to what the work and materials are reasonably worth, according to the contract price, less payments lawfully made to the contractor and damages sustained by the owner by reason of the abandonment.⁸⁶ Still another rule is to allow each subcontractor, materialman, etc., a lien for such proportion of the amount of his claim as the contract price bears to the entire, actual cost of constructing the building according to the original contract.⁸⁷

Extras not included in the contract are not chargeable against the unpaid balance subject to mechanics' liens.⁸⁸

75. Wash.—Sweatt v. Hunt, 84 P 1, 42 Wash 96

40 C J p 281 note 87

76. Ala.—Wigfield v Akridge, 93 So 612, 207 Ala 560

77. NY—Higgins v G Piel Co, 302 NYS 874, 208 App Div 729

78. Fla.—Curtiss-Bright Ranch Co v Selden Cypress Door Co, 107 So 679, 91 Fla. 354—Stringfellow v Coons, 49 So 1019, 57 Fla 158, 131 Am SR 1089

79. Fla.—Curtiss-Bright Ranch Co v Selden Cypress Door Co, 107 So 679, 91 Fla 354—Dekle v Valrico Sandstone Co, 77 So 95, 74 Fla 346

NY—Owens v Ebner, 74 NYS 3d 169

80. NY—J W Van Cott & Son v Gallon, 298 NYS 67, 163 Misc 914

40 C J p 261 note 93

81. Fla.—Dekle v Valrico Sandstone Co, 77 So 95, 74 Fla 346

40 C J p 262 note 94

82. Ala.—Standard Sanitary Mfg Co v. Aird, 139 So 285, 221 Ala 620.

Fla.—Armstrong Cork & Insulation Co v Groman, 141 So 754, 105 Fla 553

Ga.—Spirides v Victory Lumber Co, App, 45 SE 2d 65

La.—Cook v Ruston Oil Mills & Fertilizer Co, 127 So 347, 170 La 10

NH—Bennett v Smith, Inc, 160 A 478, 85 NH 478

NJ—Wilkinson v Behringer, 189 A 405, 118 NJ Law 6—Post v Geldziler, 145 A. 323, 105 NJ Law 370

—Brown v Home Development Co, 18 A 2d 742, 129 NJEq 172

NY—J W Van Cott & Son v Gallon, 298 NYS 67, 163 Misc 914—Thomas F Reilly & Co v Scheer, 211 NYS 615, 125 Misc 832

Va.—Thomas & Co v McCauley, 130 SE 396, 143 Va 451

40 C J p 262 notes 95, 97

83. Ohio—Howk v Krotzer, 43 N E 2d 640, 140 Ohio St 100

Okla.—Fry v Long Bell Lumber Co, 167 P 2d 654, 196 Okl 670

40 C J p 262 note 96

84. DC—Harper v Galliher & Huguey, 29 F 2d 452, 58 App DC 252, certiorari denied Galliher & Huguey v Harper, 49 S Ct 185, 278 US 657, 73 L Ed 565

Fla.—Schilling v. Harrington, 186 So 222, 135 Fla 466

Subcontractor's work performed by contractor

In his claim of lien, subcontractor must deduct from contract price amount for labor which was voluntarily performed on his behalf by main contractor—Davis v Bertschinger, 241 P 53, 116 Or 137

85. Tex.—Fall v Nichols, 97 SW 145, 43 Tex Civ App 582

40 C J p 262 note 98

86. Ill.—Mehrlie v Dunne, 75 Ill 239

40 C J p 262 note 99

87. Mich.—Godfrey Lumber Co v. Cole, 114 NW 1018, 151 Mich 280

40 C J p 263 note 1.

88. Fla.—Armstrong Cork & Insulation Co. v Groman, 141 So 754, 105 Fla 553

A change in the original plans which does not substantially increase the cost is not an extra within the rule—Cook v Ruston Oil Mills & Fertilizer Co, 127 So 347, 170 La 10

Nonfulfillment of guaranty The fact that the completed work does not fulfill a guaranty by the contractor has been held not to restrict the right of a laborer to a lien for his wages.⁸⁹

Services or materials furnished after abandonment of contract Subcontractors are not limited by the general contract in the enforcement of liens for services or materials furnished after abandonment of the contract by the general contractor,⁹⁰ and where a subcontractor completes his work on the assurance of payment by the owner he is entitled to a lien for full payment for work performed after the abandonment of the contract.⁹¹

§ 176. Interest

a In general

b Date from which computed

a. In General

The lien may include interest on the amount of the claim where the amount is fixed and certain or is capable of being ascertained and made certain.

The lien may include interest on the amount of the claim⁹² where the amount is fixed and certain⁹³

or is capable of being ascertained and made certain by computation⁹⁴ or reference to market rates,⁹⁵ provided, in case claimant has furnished materials to a contractor, he is entitled to interest on the account as against the contractor,⁹⁶ the fund which the owner should have retained to satisfy liens for materials is sufficient to pay the account with interest,⁹⁷ and the rights of third persons will not be injuriously affected.⁹⁸ The fact that the lien will be enforced against a person other than the one who made the contract with claimant,⁹⁹ such as another owner acting with the one who made the contract¹ or a person claiming under an instrument executed, after the lien attached, by the owner who made the contract,² does not preclude the allowance of interest. On the other hand, interest is properly disallowed under the circumstances of some cases,³ as where the owner was ready and willing at all times to pay the full amount owing by him and the delay in payment was through no fault of his,⁴ or the lienor claims a substantial amount more than is due⁵ unless the amount is readily ascertainable and the debtor makes no offer to pay the amount due.⁶

An unliquidated demand does not draw interest.⁷

88. Well

Laborers digging well were held entitled to lien for full amount of wages notwithstanding well did not produce quantity of water provided by contract between owner and contractor—*Keane v Thomas B Watson Co*, 271 P 73, 149 Wash 424.

90. Ill—*Elmhurst Lumber & Coal Co v Alke*, 53 NE2d 139, 321 Ill App 364.

91. Fla—*Schilling v Harrington*, 186 So 222, 135 Fla 466.

92. Ill—*Elmhurst Lumber & Coal Co v Alke*, 53 NE2d 139, 321 Ill App 364.

Nev—*Hobart Estate Co. v. Jones*, 274 P 921, 51 Nev 315.

NJ—*Brown v Home Development Co*, 18 A2d 742, 129 NJEq 172.

NY—*Servidone v Hirschmann*, 51 NYS2d 917, 268 AppDiv 347, reargument denied 52 NYS2d 434, 268 AppDiv 1075, affirmed 62 NE2d 232, 294 NY 786—*New York Protective Union v Nixon*, 1 ED Smith 671.

Pa—*Niland v Gill*, 99 Pa Super 107.

W Va—*Bluefield Supply Co v M P Smith Const Co*, 177 SE 296, 115 W Va 637.

40 C J p 263 note 3.

Contract providing for interest

Allowance of interest in action to enforce contractor's lien was proper where contract provided for payment of legal rate of interest on amount due on each unpaid requisition and certificate—*Franklinville Realty Co*

v Arnold Const Co, CCA Fla, 132 F2d 828, certiorari denied 63 S Ct 994, 318 US 791, 87 L Ed 1157, rehearing denied 63 S Ct 1156, 319 US 781, 87 L Ed 1725.

93. Cal—*Combs v Eberhard*, 7 P 2d 338, 130 Cal App 25.

40 C J p 263 note 4.

94. Cal—*Anselmo v Sebastiani*, 28 P2d 1, 219 Cal 292—*Hauptenthal v Bert L Perry, Inc*, 31 P2d 1088, 138 Cal App 198.

NY—*Gescheidt & Co v Bowery Sav Bank*, 296 NYS 306, 251 App Div 266, affirmed 15 NE2d 68, 278 NY 472.

40 C J p 263 note 5.

95. Cal—*Farnham v California Safe Deposit & Trust Co*, 96 P 788, 8 Cal App 266.

Wis—*Lavcock v Parker*, 79 NW 327, 103 Wis 161.

96. Colo—*Kern v Guiry Bros Wall Paper Co*, 153 P 87, 60 Colo 286.

97. Colo—*Kern v Guiry Bros Wall Paper Co*, supra.

Iowa—*Corpus Juris cited in Southern Surety Co v Jenner Bros*, 237 NW 500, 506, 212 Iowa 1037.

98. Colo—*Kern v Guiry Bros Wall Paper Co*, 153 P 87, 60 Colo 286.

99. Cal—*Farnham v California Safe Deposit & Trust Co*, 96 P 788, 8 Cal App 266.

Ill—*Sorg v Crandall*, 129 Ill App 255, affirmed 84 NE 181, 233 Ill 79.

1. Ill—*Sorg v Crandall*, supra.

2. Cal—*Farnham v California Safe Deposit & Trust Co*, 96 P 788, 8 Cal App 266.

3. DC—*Woodward & Lothrop, Inc. v Union Trust Co*, 262 F 627, 49 App DC 173.

40 C J p 263 note 13.

4. Cal—*Mabrey v McCormick*, 272 P 289, 305 Cal 667.

40 C J p 263 note 14.

Delay held not fault of lienor.

Ill—*Elmhurst Lumber & Coal Co v. Alke*, 53 NE2d 139, 321 Ill App 364.

5. Tenn—*Variety Fire Door Co v. Hanson-Worden Co*, 10 Tenn App 264.

Limitation to interest from judgment Where mechanic overstated claim, and brought action to foreclose lien for amount claimed, but conceded on trial that smaller sum was due him, interest was allowed only from date of judgment on amount thereof—*Eskestrand v Wunder*, 20 P2d 622, 94 Mont 57.

6. Mont—*Federal Land Bank of Spokane v Green*, 90 P2d 489, 108 Mont 56.

7. Cal—*Mabrey v McCormick*, 272 P 289, 305 Cal 667.

NY—*Midtown Contracting Co v Goldsticker*, 150 NYS 809, 165 App Div 264.

40 C J p 263 note 15.

until the amount is ascertained and fixed⁸ by judgment⁹ Interest is not allowable on the amount of noninterest-bearing notes accepted by claimant in settlement of certain payments¹⁰ In some jurisdictions the allowance or disallowance of interest rests in the discretion of the court¹¹ Where the mechanics' lien statute provides for interest, the right to interest on a mechanics' lien demand is controlled by that statute, rather than by the general statute pertaining to interest on unpaid claims¹²

Where the interest has once begun to run it continues to run during the time the suit to enforce the lien is under consideration by the court¹³

Rate In the absence of a contract otherwise providing, interest is properly computed at the legal rate¹⁴ A higher rate of interest than the legal rate may not be allowed where agreed on by the contractor and claimant after the services or materials have been furnished¹⁵ A rate in excess of that fixed by contract is not recoverable¹⁶

b. Date from Which Computed

Interest on claims in mechanics' lien cases has been allowed from various dates on which, by reason of express or implied terms of the contract, the claim became due

Interest on claims in mechanics' lien cases has been allowed from various dates on which, by reason of express or implied terms of the contract, the claim became due¹⁷ Interest has been allowed from the day when claimant's work was completed¹⁸ or he was prevented from proceeding with the work,¹⁹ the day the last material was delivered,²⁰ the date when supplies furnished were certified to by the architect,²¹ the last day of the month in which material was delivered,²² or the day on which a certain statutory period of time after the date on which the last item was furnished has expired²³ Interest has also been allowed from the time when payment was demanded,²⁴ the time of filing the lien claim or notice,²⁵ the time of commencement of the action to enforce the lien,²⁶ or the date of the master's report.²⁷ It is error to al-

8. Ark—Watkins v. Wassell, 20 Ark 410

Admitted correctness

Materialman's claim, admitted by all parties to be correct, becomes liquidated demand—Carmichael Tile Co v National Surety Co, 144 SE 250, 166 Ga 709

9. Cal—Mabrey v McCormick, 272 P 289, 205 Cal 667—Associated Wholesale Electric Co v S H Kress & Co, 54 P2d 88, 11 Cal App2d 592—Combs v Eberhard, 7 P2d 338, 120 Cal App 25—Coghlan v Quartararo, 115 P 664, 15 Cal App 662
40 C J p 263 note 17.

10. NY—Greenberg v Marsh, 167 NYS 102, 101 Misc 18, affirmed 170 NYS 1083, 183 App Div 929

11. Ky—Schnute v Sweeney, 135 S W 180, 136 Ky 773—Kaye v Louisville Bank, 9 Dana 261

12. Ill—Edward Edinger Co v Willis, 260 Ill App 106

13. Ark—Lyle v Latourette, 192 S W2d 521, 209 Ark 721

14. Nev—Hobart Estate Co v Jones, 274 P 921, 51 Nev 315
40 C J p 264 note 20

15. Cal—Sweet v Fresno Hotel Co, 164 P 788, 174 Cal 789, Ann Cas 1918D 346

Iowa—Spieker v Cass County Fair Ass'n, 249 NW. 415, 216 Iowa 424

Tex—Corpus Juris cited in Bryant-Link Co v W H Norris Lumber Co, Civ App, 61 S W2d 160, 162, error dismissed

16. Tex—R B Spencer & Co v Biggers, Civ App, 108 S W2d 268

17. Ala—Harden v Wood Lumber Co, 178 So 540, 235 Ala 310
Ariz—Webb v Crane Co, 80 P2d 698, 52 Ariz 399

Ga—Carmichael Tile Co v National Surety Co, 144 SE 250, 166 Ga 709

Ill—Chicago Art Marble Co v A Smith & Co, 26 NE2d 703, 304 Ill App 582—Hoffman v Lake View Avenue Building Corporation, 13 NE2d 340, 298 Ill App 627—Edward Edinger Co v Willis, 260 Ill App 106

Nev—Hobart Estate Co v Jones, 274 P 921, 51 Nev 315

Wash—Corpus Juris cited in Standard Lumber Co v Fields, 187 P2d 283, 296

40 C J p 264 notes 24, 25

Computation from judgment on unliquidated claim see supra subdivision a of this section

18. US—Central Trust Co of N Y. v Condon, Tenn, 67 F 84, 14 CC A 314

Ill—Larsen v Basikowski, 206 Ill App 1

19. Ill—Mantonya v Reilly, 56 NE 425, 184 Ill 183—Kipp v Maslin, 15 Ill App 300

20. Kan—Sturges v Green, 27 Kan 235

Md—Smith v Shaffer, 50 Md 132

21. NY—Sherwin v Benevolent & Protective Order of Elks, Brooklyn Lodge No 22, 265 NYS 14, 148 Misc 452

22. Ark—McCann v Dyke, 60 S W2d 918, 187 Ark 507

23. Neb—Walker v Collins Const Co, 236 NW 334, 121 Neb 167

Three months

Interest on lien claims of laborers for money due on open accounts would not be allowed from date of finishing work, although interest would be allowed after expiration of three months from date of last item as fixed by statute, and not merely after entry of judgment—Hendrix v. Gold Ridge Mines, 54 P2d 354, 56 Idaho 326.

24. Mo—Christopher & Simpson Architectural Iron & Foundry Co v E A Steininger Constr Co, 205 S W 278, 200 Mo App 33
40 C J p 264 note 29

25. Ark—Lyle v Latourette, 192 S. W2d 521, 209 Ark 721

W Va—Bluefield Supply Co v M P Smith Const Co, 177 SE 296, 115 W Va 537
40 C J p 264 note 30.

Disputed claim

Where mechanics' lien claimant claims too much, and defendant offers too little, claimant bringing suit may recover interest on amount due from date claim is filed—Niland v. Gill, 99 Pa Super 107

26. Cal—Anselmo v Sebastiani, 26 P2d 1, 219 Cal 293—Hauptenthal v Bert L Perry, Inc, 81 P2d 1088, 138 Cal App 198—Reinhart Lumber & Planing Mill Co v Hladik, App, 259 P 363
40 C J p 264 note 31.

27. Ill—Sundstrom v. Weinrich, 207 Ill App 313

low interest from a date prior to the time when the contract was made,²⁸ and where the complaint for foreclosure of the lien asks for interest only from the date of filing the lien notice, it has been held to be error to allow interest prior to the filing of the

lien notice²⁹

An allowance of interest from the date the claim was due covers all proper allowances for delay in payment, and the allowance of an additional sum for vexatious delay in payment is improper³⁰

B DURATION

§ 177. Accrual or Commencement

In most jurisdictions a mechanic's lien may exist on a date prior to the filing or recording of the claim, and on the taking of the proper statutory steps to perfect the lien it relates back to such prior date; but in some jurisdictions the lien dates from the time when the claim or notice is filed.

In some jurisdictions a mechanic's lien originates on,³¹ and dates from,³² the time when the claim or notice of lien is filed or recorded, and does not relate back³³ In a majority of jurisdictions, however, the lien, or at least the right thereto, may exist on a date prior to the filing or recording of the claim,³⁴ and on the taking of the proper statutory steps to perfect the lien it relates back to such prior date³⁵ The attaching of the lien is not postponed until the commencement of an action or proceeding to enforce it,³⁶ for the institution of the action does not create the lien³⁷ but merely perpetuates it and

keeps it intact, as discussed *infra* § 183, and where it is once established by judgment it relates back³⁸

Under a few statutes the lien dates only from the recording of the notice of the lien as against third persons, such as purchasers and creditors, without notice,³⁹ but it is effective from an earlier date as against purchasers and creditors with notice⁴⁰ as well as against the owner,⁴¹ and any purchaser or creditor whose interest arises or is created while the construction or repair work is in progress is deemed to be a purchaser or creditor with notice⁴² The lien does not, of course, relate back to a date earlier than that contemplated by the statutes of the particular jurisdiction⁴³ In jurisdictions where the statutes do not expressly fix the time when the lien accrues or commences, the rules obtaining are arrived at by construction.⁴⁴

28. Ill—Geweke v. Hilsinger, 177 Ill App 467

29. Wash—Huetter v. Redhead, 71 P 1016, 31 Wash 320

30. Ill—Chicago Art Marble Co v. A Smith & Co., 26 NE 2d 708, 304 Ill App 582

31. NY—Travis v. Nansen, 26 NY S 2d 590, 176 Misc 44.
40 CJ p 264 note 26

32. NY—Fournier v. Mauro, 267 NYS 158, 240 App Div 855—Travis v. Nansen, 26 NYS 2d 590, 176 Misc 44.
40 CJ p 264 note 37.

Property owned as estate by entireties

Mechanics' liens on property owned as an estate by the entireties accrue only from the date of filing and recording notice where a statute dealing specifically with mechanics' liens on such property expressly so provides—Parker v. Gamble, 118 So 21, 96 Fla 243

33. NY—Travis v. Nansen, 26 NYS 2d 590, 176 Misc 44
40 CJ p 264 note 38

34. US—American Surety Co of New York v. Franciscus, CCA Mo, 127 F 2d 810

Ala—Benson Hardware Co v. Jones, 135 So 441, 223 Ala 287

Ga—Caldwell v. Northwest Atlanta Bank, 21 SE 2d 619, 194 Ga 370.

Mo—Raithel v. Hamilton-Schmidt Surgical Co, App, 48 SW 3d 79

Tex—Penniman Gravel & Material Co v. Hutton, Civ App, 16 SW 2d 848, affirmed Stanfill v. Penniman Gravel & Material Co, Com App, 27 SW 2d 135
40 CJ p 264 note 39.

35. US—American Surety Co of New York v. Franciscus, CCA Mo, 127 F 2d 810

Ala—Benson Hardware Co. v. Jones, 135 So 441, 223 Ala 287.

Ga—Caldwell v. Northwest Atlanta Bank, 21 SE 2d 619, 194 Ga 370

Mo—Realty Sav & Inv Co v. Washington Sav. & Bldg Ass'n, App, 63 SW 2d 167

NC—Horne-Wilson, Inc v. Wiggins Bros, 164 SE 365, 203 NC 85

Tex—Estacado Oil Co v. Parker, Civ App, 36 SW 2d 1095—Penniman Gravel & Material Co v. Hutton, Civ App, 16 SW 2d 848, affirmed Stanfill v. Penniman Gravel & Material Co, Com App, 27 SW 2d 135
40 CJ p 265 note 40

36. US—American Coal Burner Co v. Merritt, CCA Ky, 129 F 2d 314

Ga—Middle Georgia Lumber Co v. Hunt, 186 SE 714, 53 Ga App 578

Mo—Raithel v. Hamilton-Schmidt Surgical Co, App, 48 SW 2d 79
40 CJ p 265 note 43

37. Mo—Raithel v. Hamilton-Schmidt Surgical Co, supra

38. Ga—Carter-Moss Lumber Co v. Short, 18 SE 2d 61, 66 Ga App 330

39. Fla—Van Espoel Real Estate Co v. Sarasota Milk Co, 129 So 892, 100 Fla 438, 456, followed in Hub Supply Co v. Dunedin Real Estate Co, 129 So 904, 100 Fla 471—Axtell v. Smedley & Rodgers Hardware Co, 52 So 710, 59 Fla 430
40 CJ p 265 note 46

Time of accrual of lien as affecting priorities see *infra* § 200

40. Fla—Bond Lumber Co v. Masland, 34 So 254, 45 Fla 188

Mont—Corpus Juris quoted in Continental Supply Co v. White, 12 P 2d 569, 574, 92 Mont 254

41. Fla—North Bay Shore Land Co v. Perry, 98 So 139, 86 Fla 322
40 CJ p 265 note 48

42. Mont—Corpus Juris quoted in Continental Supply Co v. White, 12 P 2d 569, 574, 92 Mont 254
40 CJ p 265 note 49

43. Fla—Palm Beach Bank & Trust Co v. Lainhart, 95 So 122, 84 Fla 662
40 CJ p 265 note 50

44. Ga—Oglethorpe Savings & Trust Co v. Morgan, 102 SE 528, 149 Ga 787.

The right to have a lien operate from a particular date may be impliedly waived⁴⁵

Land acquired after commencement of construction Under a statute which limits the right to a mechanic's lien to cases where the person causing the work to be done is the owner of the land, mechanics' liens on land which has been purchased after construction of the building has been commenced relate back only to the time when the building owner acquired a lienable interest therein,⁴⁶ and so mechanics' liens for work on a building at the instance of the purchaser under a contract of sale without the vendor's consent do not attach until delivery of the deed to the purchaser.⁴⁷

Retention of title by materialman Where a statute provides that a mechanic's lien shall not attach where the materialman retains title, a mechanic's lien may attach when the materialman waives his right to reclaim the property⁴⁸ by claiming a lien⁴⁹

§ 178. — On Making or Recording of Contract

Under the statutes of some jurisdictions the lien may attach at, or relate back to, the time when the contract was made.

Under the statutes of some,⁵⁰ but not all,⁵¹ jurisdictions the lien may attach at, or relate back to, the time when the contract was made Under the for-

mer statutes of a few jurisdictions the lien attached at the time when the contract for the improvement was recorded⁵²

§ 179. — On Commencement of Building or Improvement

- a In general
- b What constitutes

a. In General

In a number of jurisdictions the lien may relate back to, and attach as of the date of, the commencement of the building or improvement.

In a number of jurisdictions, the lien may relate back to, and attach as of the date of, the commencement of the building or improvement,⁵³ at least if the materials are furnished or the labor performed under a general contract,⁵⁴ regardless of the time when the particular work or material on account of which the lien is claimed was actually done or furnished⁵⁵ This rule does not obtain in some jurisdictions,⁵⁶ and when it does obtain it does not apply where a building or improvement is commenced under one contract and work or materials are subsequently contracted to be furnished and are furnished under a separate and independent contract not embraced or provided for in the original agreement.⁵⁷

45. Ohio—Falls Savings & Loan Ass'n v Brumit, 161 NE 295, 28 Ohio App 60
Waiver of right to lien see infra §§ 222-238

46. Or—Pacific Spruce Corporation v Oregon Portland Cement Co, 286 P 530, 133 Or 223, 72 ALR 1507, rehearing denied 289 P. 489, 133 Or 233, 73 ALR 1507

47. Or—Pacific Spruce Corporation v Oregon Portland Cement Co, supra

48. Nev—Paterson v Condos, 28 P 2d 499, 55 Nev 134, rehearing denied 30 P 2d 283, 55 Nev 260

49. Nev—Paterson v Condos, supra

50. Ill—Goldstein v Weisberg, 258 Ill App 228

Tex—Cleveland v Alpine Lumber Co, Civ App, 75 SW 2d 977—Estacado Oil Co v Parker, Civ App, 86 SW 2d 1095

40 CJ p 265 note 55

51. Iowa—Green v Saxton, 196 N. W 27, 196 Iowa 1086.

40 CJ p 266 note 56

52. US—Homans v Coombe, DC, 12 FCas No 6,554, 3 Cranch CC 365

53. US—McGonigle v Foutch, CC AMo, 51 F 2d 455

Ala—Benson Hardware Co. v Jones,

135 So 441, 223 Ala 287—Wahouma Sav Bank v Southern Plumbing & Heating Co, 124 So 388, 220 Ala 140—Grimsley v First Ave Coal & Lumber Co, 115 So 90, 217 Ala 159

Ariz—Corpus Juris quoted in Wylie v Douglas Lumber Co, 8 P 2d 256, 259, 39 Ariz 511, 83 ALR 918

Kan—Leidigh & Havens Lumber Co v. Wyatt, 109 P.2d 87, 153 Kan 214

Minn—Ustruck v Home Ass'n, 207 NW 324, 166 Minn 183

Pa—Roy Building & Loan Ass'n v. King, 17 Pa Dist & Co 83, 23 Del. Co 297

Wis—Evans-Lee Co v Knudtson, 208 NW 872, 190 Wis 207.

40 CJ p 266 note 58

Material or labor in evidence on land

Mechanic's lien attaches as soon as material or labor is in evidence on the land—Botsford Lumber Co v Schriver, 206 NW 423, 49 SD 68

Visible commencement of operations

Tenn—Brown v Brown & Co, 160 S W 2d 431, 25 Tenn App 509.

54. Ariz—Wylie v Douglas Lumber Co, 8 P 2d 256, 39 Ariz 511, 83 ALR 918

Cal—E K Wood Lumber Co v Mulholland, 5 P 2d 669, 118 Cal

App 475—J & W C Shull v Brooke, 289 P 885, 107 Cal App 88

Commencement of first work

Lien for labor and materials furnished under a contract dates from the commencement of the first work DC—Deland v Wagner, 64 F 2d 553, 62 App DC 54

Wis—Interior Woodwork Co v Larsen, 238 NW 822, 207 Wis 1

Construction by owner under trade-name

As regards commencement of materialman's lien, there was no general construction contract where building was constructed by owner under trade-name—Powers v Soule-Martin Lumber Co, 289 P 809, 209 Cal 567

55. Ariz—Corpus Juris quoted in Wylie v Douglas Lumber Co, 8 P 2d 256, 259, 39 Ariz 511, 83 ALR 918

Wis—Evans-Lee Co v Knudtson, 208 NW 872, 190 Wis 207.

40 CJ p 267 note 59

56. Fla—Palm Beach Bank & Trust Co v Lainhart, 95 So 122, 84 Fla. 662

40 CJ p 267 note 60

57. Ala—Welch v. Porter, 63 Ala. 225.

b. What Constitutes

The commencement of the building or improvement within the meaning of mechanics' liens statutes is the visible commencement of actual operations on the ground for the erection of the building.

The commencement of the building or improvement within the meaning of mechanics' liens statutes is the visible commencement of actual operations on the ground for the erection of the building,⁵⁸ the doing of some work or labor on the ground,⁵⁹ such as beginning to excavate for the foundation⁶⁰ or the basement or cellar,⁶¹ walling the cellar,⁶² or work of a like description, which every one can readily see and recognize as the commencement of a building,⁶³ and which is done with the intention and purpose then formed to continue the work until the completion of the building⁶⁴

On the other hand, work which, although it may improve the property, is merely preparatory to building operations at some future time, and does not of itself tend to contribute directly to the erection, such as clearing,⁶⁵ leveling,⁶⁶ filling up,⁶⁷ or fencing⁶⁸ the property, or tearing down a brick wall left standing after a fire,⁶⁹ does not constitute a commencement for the purpose of fixing the time to which the lien relates, especially when done without any present intention of building⁷⁰ Also staking

out the plan of the building⁷¹ or the line of foundations,⁷² or staking the boundary line of the tract,⁷³ preparing material by marking it ready to be worked up into window frames,⁷⁴ or placing lumber⁷⁵ or other materials⁷⁶ on the premises does not constitute a commencement of the building within the meaning of the lien statutes

§ 180. — Interruption of Work or Change of Plans

A temporary cessation of work does not prevent the lien from relating back to the time of the original commencement where there has been no change of design and no evidence of an intention to abandon prosecution of the work.

A temporary cessation of work, where the design of building is not abandoned and work is subsequently resumed and prosecuted without any substantial change in the design, will not prevent the relation back of liens to the time of the original commencement⁷⁷ However, the work of construction must be carried on with such diligence as to show that the original intention to build has not been abandoned,⁷⁸ where the project is abandoned and work is afterward resumed under a new contract between different parties, a mechanic's lien cannot relate back to the time when the building was originally commenced,⁷⁹ but relates back only

Okl—Fleharty v. National Loan & Investment Co., 215 P 744, 89 Okl 292

58. Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sel-lards, 3 P 2d 481, 483, 133 Kan 747

Minn—Ustruck v Home Ass'n, 307 NW 324, 166 Minn 183

Pa—Roy Building & Loan Ass'n v King, 17 Pa Dist & Co 83, 23 Del Co 297—Lumber & Millwork Co of Philadelphia v Graham, Com Pl, 60 Montg Co 162

40 C J p 267 note 63

59. Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sel-lards, 3 P 2d 481, 483, 133 Kan 747

40 C J p 267 note 64

Lien for architect's fees does not arise prior to the actual and visible beginning of the improvement on the ground—Erickson v Ireland, 158 N W 913, 134 Minn 156

60. Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sel-lards, 3 P 2d 481, 483, 133 Kan 747. 40 C J p 267 note 65

61. Kan—Leidigh & Havens Lum-ber Co v Wyatt, 109 P 2d 87, 153 Kan 214—Corpus Juris quoted in Security Stove & Mfg Co v Sel-

lards, 3 P 2d 481, 483, 133 Kan 747

40 C J p 267 note 66

62. Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sel-lards, 3 P 2d 481, 483, 133 Kan 747

Pa—Pennock v Hoover, 6 Rawle 391

63. Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sel-lards, 3 P 2d 481, 483, 133 Kan 747

40 C J p 267 note 68

64. Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sel-lards, 3 P 2d 481, 483, 133 Kan 747

Pa—Lumber & Millwork Co of Phil-adelphia v Graham, Com Pl, 60 Montg Co 162

40 C J p 267 note 69

65. US—New Hampshire Sav Bank v Varner, Kan, 216 F. 721, 132 CCA 631, affirmed 38 S Ct 409, 240 US 617, 60 L Ed 828—Central Trust Co v Cameron Iron & Coal Co, CCA, 47 F 136

66. Md—Kelly v. Rosenstock, 45 Md 389

67. Iowa—Kiene v Hodge, 57 NW. 717, 90 Iowa 212

68. Conn—Middletown Sav Bank v Fellowes, 42 Conn 36

69. US—George M Newhall Engi-neering Co v Egolf, Pa, 185 F 481, 107 CCA 581

70. Iowa—Kiene v Hodge, 57 NW 717, 90 Iowa 212.

Md—Jean v Wilson, 38 Md 288

71. Pa—Hagenman v. Fink, 19 Pa Co 660

72. Md—Kelly v. Rosenstock, 45 Md 389

73. Pa—Roy Building & Loan Ass'n v King, 17 Pa Dist. & Co 83, 23 Del Co 297

74. NJ—Taylor v La Bar, 25 NJ Eq 222

75. Conn—Middletown Sav Bank v Fellowes, 42 Conn 36

76. Kan—Kansas Mortg Co v Weyerhaeuser, 29 P 153, 48 Kan 335

77. Mont—Corpus Juris cited in Federal Land Bank of Spokane v Green, 90 P 2d 489, 493, 108 Mont 56

40 C J p 267 note 83

78. Mont—Corpus Juris cited in Federal Land Bank of Spokane v Green, 90 P 2d 489, 493, 108 Mont 56

40 C J p 268 note 84

79. Mo—Corpus Juris cited in Schroeter Bros Hardware Co v.

to the time of the recommencement.⁸⁰ Some courts have held that, when the plan of the building is changed and greatly enlarged while it is in the course of erection, the liens of mechanics and materialmen subsequent to such change relate only to the commencement of the alteration on the ground.⁸¹ Other courts have held that alterations in the original plans and specifications for the building cannot be effectual to deprive a person who furnishes the labor and material for such alterations of the benefits of his lien dating from the commencement of the building,⁸² provided such alterations do not change the design and purpose of the building so that the whole, when finished, is substantially a different building from the one first commenced.⁸³

§ 181. — On Performance of Labor or Furnishing of Material

Depending on the provisions of the statutes, a lien for labor attaches at, or relates back to, the time of the performance of the work or the time when claimant com-

menced performance of the work, or a lien for materials arises at, or relates back to, the time of the furnishing of the materials or the time when claimant commenced to furnish materials.

Depending on the provisions of the statutes, a lien for labor attaches at, or relates back to, the time of the performance of the work⁸⁴ or the time when claimant commenced performance of the work,⁸⁵ and a lien for materials arises at, or relates back to, the time of the furnishing of the materials⁸⁶ or the time when claimant commenced to furnish materials⁸⁷. The lien may exist prior to the completion of the contract,⁸⁸ and where a subcontractor has performed his work, and a sum greater than the value thereof has already been earned by the general contractor and is unpaid, the lien of the subcontractor attaches against the owner although the work of the general contractor is still unfinished.⁸⁹ On the other hand, it has been held that the lien is not created until labor is performed⁹⁰ or material furnished,⁹¹ or that, in the absence of a general contract, a lien does not attach before claimant

Croatian "Sokol" Gymnastic Ass'n, 58 S W 2d 995, 1003, 332 Mo 440
40 C J p 268 note 85

80. Pa—Appeal of Kelly, 2 A 868, 1 Pa Cas 280

81. Pa—Appeal of Norris, 30 Pa 122

82. Mo—Corpus Juris cited in Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 S W 2d 995, 1000, 332 Mo 440

ND—Haxtun Steam Heater Co v Gordon, 50 N W 708, 2 ND 246, 33 Am S R 776

Slight change in location of building Wash—Berger v Baist, 6 P 2d 413, 165 Wash 590, 39 A L R 164

83. Mo—Corpus Juris cited in Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 S W 2d 995, 1000, 332 Mo 440
ND—Haxtun Steam Heater Co v Gordon, 50 N W 708, 2 ND 246, 33 Am S A 776

84. Tex—Sprowls v Youngblood, Civ App, 23 S W 2d 879, reversed on other grounds Harveson v Youngblood, Com App, 38 S W 2d 781
40 C J p 268 note 90

85. Ala—Benson Hardware Co v Jones, 135 So 441, 223 Ala 287
Conn—New Haven Orphan Asylum v James A Haggerty Co, 142 A 847, 108 Conn 232

Ga—Marbut-Williams Lumber Co v Dixie Electric Co, 142 S E 270, 166 Ga 42—Spirides v Victory Lumber Co, App, 45 S E 2d 65

Mo—Realty Sav & Inv Co v Washington Sav & Bldg Ass'n, App, 63 S W 2d 167—Rathel v Hamil-

ton-Schmidt Surgical Co, App, 48 S W 2d 79—Julius Seidel Lumber Co v Hydraulic Press Brick Co, App, 288 S W 979

NH—Boulia-Gorrell Lumber Co v East Coast Realty, 148 A 28, 84 NH 174, 69 A L R 1200

NJ—Brown v Home Development Co, 18 A 2d 742, 139 N J Eq 172
NC—Horne-Wilson, Inc, v Wiggins Bros, 164 S E 365, 203 NC 85

RI—Art Metal Const Co v Knight, 185 A 136, 56 RI 228

W Va—Mahan v Bitting, 137 S E 889, 103 W Va 449, 52 A L R 689
40 C J p 268 note 96

86. US—American Surety Co of New York v Franciscus, CCA Mo, 127 F 2d 810

Ga—Marbut-Williams Lumber Co v Dixie Electric Co, 142 S E 270, 166 Ga 42—Spirides v Victory Lumber Co, App, 45 S E 2d 65—Middle Georgia Lumber Co v Hunt, 186 S E 714, 53 Ga App 578

NJ—Brown v Home Development Co, 18 A 2d 742, 139 N J Eq 172
NC—Horne-Wilson, Inc v Wiggins Bros, 164 S E 365, 203 NC 85
RI—Art Metal Const Co v Knight, 185 A 136, 56 RI 228

Tex—Sprowls v Youngblood, Civ App, 23 S W 2d 879, reversed on other grounds Harveson v Youngblood, Com App, 38 S W 2d 781—Penniman Gravel & Material Co v Hutton, Civ App, 16 S W 2d 848, affirmed Stanfill v Penniman Gravel & Material Co, Com App, 27 S W 2d 135
40 C J p 268 note 91

87. Cal—Owens-Parks Lumber Co

v McCarty, 9 P 2d 810, 121 Cal App 623

Conn—J L Purcell, Inc, v Libbey, 149 A 225, 111 Conn 132, 68 A L R 1258

Ga—Caldwell v Northwest Atlanta Bank, 21 S E 2d 619, 194 Ga 370

Mo—Rathel v Hamilton-Schmidt Surgical Co, App, 48 S W 2d 79—J H Magill Lumber Co v Carter, App, 17 S W 2d 581—Julius Seidel Lumber Co v Hydraulic Press Brick Co, App, 288 S W 979

NH—Boulia-Gorrell Lumber Co v East Coast Realty, 148 A 28, 84 NH 174, 69 A L R 1200

W Va—Mahan v Bitting, 137 S E 889, 103 W Va 449, 52 A L R 689.
40 C J p 268 note 96

88. Ga—Oglethorpe Savings & Trust Co v Morgan, 102 S E 528, 149 Ga 787

Under former statutes of a few jurisdictions it was held that the right to a lien accrued when, and only when, claimant had completed the work or the furnishing of the materials—Williams v Chapman, 17 Ill 423, 65 Am D 669—40 C J p 269 note 3

89. NY—New Jersey Steel & Iron Co v Robinson, 68 N Y S 577, 23 Misc 361, affirmed 69 N Y S 728, 60 App Div 69

90. SC—Villard v Finch, 116 S E 96, 133 SC 56

Tenn—Kingsport Brick Corp v Bostwick, 235 S W 70, 145 Tenn 19

91. Ga—Marbut-Williams Lumber Co v Dixie Electric Co, 142 S E 270, 166 Ga 42

40 C J p 268 note 93.

commences to furnish labor or materials⁹² Where the materials are furnished at the request of one who is not the owner of the realty, or the owner's agent, a lien therefor does not attach as of the date of the furnishing of the materials⁹³

The rules under which a mechanic's lien is held to attach at the beginning of the work or of the furnishing of materials have been held applicable at least against the owner of the realty contracting therefor,⁹⁴ and where the labor or material is furnished or supplied under a continuing contract⁹⁵ or running account,⁹⁶ or the work is practically continuous and tends to the accomplishment of one object,⁹⁷ and it has also been held applicable where an individual mechanic or materialman claims a lien if there is no general construction contract⁹⁸ If two deliveries are made under separate contracts and there is no general contractor, the lien for the second delivery does not relate back to the first delivery.⁹⁹ Where the materialman accepts payment for the materials first furnished he waives the lien from the date of the first furnishing of materials.¹

§ 182. — On Date of Notice to Owner

Under some statutes it has been held that the lien of a person other than the contractor attaches when, and only when, he gives notice to the owner of his intention to claim the lien.

Under some statutes it has been held that the lien of a person other than the contractor attaches when and only when he gives notice to the owner of his intention to claim the lien,² but under other statutes the lien does not date from the time of giving such notice to the owner³

§ 183. Continuance and Expiration

The continuance of a mechanic's lien, once established, depends entirely on statutory provisions, and accordingly the duration of the lien may be limited to a certain period unless the lien is revived or continued by the taking of such additional proceedings as may be provided by the statute.

The continuance of a mechanic's lien, once established, depends entirely on statutory provisions,⁴ it is without limit as to duration, and there is no principle which operates to destroy it except such as is provided by statute or is adopted in analogy to its provisions⁵ In accordance with provisions of the statutes the duration of the lien is limited to a certain period⁶ after the doing of the work, the furnishing of the materials, or the completion of the improvement,⁷ the time payment became due,⁸ or the filing of the notice, claim, or statement,⁹ unless the lien is revived or continued by the taking of such proceedings as may be provided by statute,¹⁰ such as by instituting an action or proceeding to enforce the lien¹¹ or scire facias proceedings to revive the

92. Cal—E K Wood Lumber Co v Mulholland, 5 P 2d 669, 118 Cal App 475

93. **Purchaser under uncompleted option**

One furnishing materials at request of purchaser under uncompleted option was held not, as against fee owner, to acquire lien as of date of furnishing materials.—Hayward Lumber & Investment Co v Starley, 12 P 2d 66, 134 Cal App 283

94. Fla—North Bay Shore Land Co v Perry, 98 So 139, 86 Fla 322

40 C J p 269 note 97

95. Fla—Palm Beach Bank & Trust Co v Lainhart, 95 So 122, 84 Fla 662

40 C J p 269 note 98

96. Ohio—Choteau v. Thompson, 2 Ohio St 114

97. Colo—Cary Hardware Co v. McCarty, 50 P. 744, 10 Colo App 300

98. Cal—Powers v Soule-Martin Lumber Co, 289 P. 809, 309 Cal 557—E K Wood Lumber Co v Mulholland, 5 P 2d 669, 118 Cal App 475—J & W C Shull v Brooke, 289 P 885, 107 Cal App 88

99. Cal—J. & W. C Shull v Brooke, supra.

1. Ohio—Falls Savings & Loan Ass'n v Brumit, 161 NE 295, 28 Ohio App 60

2. Miss—Citizens' Lumber Co v Netterville, 102 So 178, 137 Miss 310

40 C J p 270 notes 8, 9

Notice to owner generally see supra §§ 120-129

Lien on money due contractor

NJ—Cicalese v Fortunato, 112 A 508, 93 NJ Eq 329

40 C J p 159 note 62

3. NH—Boulia-Goriell Lumber Co v East Coast Realty, 148 A 28, 84 NH 174, 69 ALR 1200

4. Fla—Sandquist & Snow v Kellogg, 133 So 65, 101 Fla 568, reheard 136 So 235, 101 Fla 579

Statutes governing judgments in rem
Liens perfected by decrees in mechanics' lien proceedings remain in full force without revival proceedings for a period of ten years as provided by statutes governing judgments in rem, unless fully discharged, and do not expire after a period of three years as do the liens of judgments in personam.—Rosenzweig v Ferguson, 158 SW 2d 121, 348 Mo 1144

5. Fla—Sandquist & Snow v Kellogg, 133 So 65, 101 Fla 568, reheard 136 So 235, 101 Fla 579

6. US—In re Freudlart Const Co. CCANY, 88 F2d 413

40 C J p 270 note 11

Termination otherwise than by lapse of time see infra §§ 222-253

7. SD—Botsford Lumber Co v Schriver, 206 NW. 423, 49 SD 68

40 C J p 270 note 12

Second improvement as extending lien

Beginning another structure after the expiration of specified period within which party furnishing material or labor may file a lien as provided by statute, does not extend lien arising from first improvement.—Botsford Lumber Co v Schriver, supra

8. Miss—Jones v. Alexander, 18 Miss 627

40 C J p 270 note 14

9. NY—Storick v M E Realty Co, 233 NYS 194, 236 App Div 674

40 C J p 270 note 15

10. SD—Botsford Lumber Co v Schriver, 206 NW 423, 49 SD 68

11. US—In re Long Island Properties, Inc, CCANY, 143 F2d 349

Intervention of contractor's bankruptcy

Liens not extending liens or suing within three months after filing

lien,¹² or obtaining an order continuing the lien.¹³

The commencement of proceedings to enforce the lien before it has expired by limitation is sufficient to preserve it until the conclusion of such proceedings,¹⁴ provided, when so required by statute, a notice of the pendency of the action is filed.¹⁵ Also under some statutes the lien is continued when, within the statutory period, claimant is made a party defendant in an action to enforce another lien,¹⁶ or

a cross bill is filed by him in such action,¹⁷ and a notice of lis pendens is filed,¹⁸ but the mere commencement of an action to enforce the lien of one person does not have the effect of continuing the liens of other persons against the property.¹⁹ In jurisdictions where the lien relates back to the date of the contract, the lien, having once attached, continues until everything required by the contract has been done²⁰ unless the contract is terminated in some way before it is fully performed.²¹

C. PROPERTY, ESTATES, AND RIGHTS AFFECTED

§ 184. In General

As a general rule a mechanic's lien extends only to the building, structure, or improvement, the land on which it is situated, and the fixtures and appurtenances

As a general rule in the absence of statutory provision to the contrary, a mechanic's lien extends and is confined to the building, structure, or improvement, the land on which it is situated, and the fixtures and appurtenances.²² "Property," within a constitutional provision giving a mechanic's lien,

refers to a building or other structure for which materials have been furnished or labor bestowed, not simply, in case of a tenant, to his leasehold estate.²³ The lien does not cover property not described in the claim filed by the lienor.²⁴

Property primarily or incidentally affected. Some statutes have been construed to confer a primary lien on the building, structure, or improvement²⁵ and to extend the lien to the land only incidentally.²⁶

were held not relieved from statutory requirement by intervention of general contractor's bankruptcy—*Dick Sand Co v State*, 244 NYS 312, 137 Misc 622

12 Md—*Hayes v Armstrong*, 125 A 610, 145 Md 268
40 C J p 270 note 18

13. US—*In re Freudlart Const Co*, CCANY, 88 F2d 413
40 C J p 270 note 19

Notes maturing before expiration of lien

Where notes given to lienor will mature before expiration of mechanic's lien one year after filing, motion to extend lien made before expiration of year is premature—*Storick v M E Realty Co*, 233 NYS 194, 226 App Div 674

Order filed after expiration of period

Where the court order is made before expiration of the period for continuance of the lien, failure to file the order until after the expiration of that time does not affect the validity of the lien if there are no intervening rights—*Dick Sand Co v State*, 244 NYS 312, 137 Misc 622

14. US—*In re Long Island Properties, Inc*, CCANY, 143 F2d 349

NY—*White Plains Sash & Door Co v Doyle*, 186 NE 33, 262 NY 16
40 C J p 271 note 20

Time for bringing proceedings to enforce lien see *infra* § 282

Action for declaratory judgment

A declaratory judgment action by laborers and material claimants against builder and his creditor to

whom he had assigned as security money due from buyers of houses to establish claimants' prior rights as beneficiaries of a trust in the money would not keep alive liens existing at the commencement of the action, since the lien law controls such matter—*Rubinstein v Jamaica Nat Bank of New York*, 40 NYS 2d 23, affirmed 44 NYS 3d 950, 266 App Div 977, affirmed 61 NE 2d 455, 294 NY 727, motion granted 62 NE 2d 394, 294 NY 843

15. NY—*White Plains Sash & Door Co v Doyle*, 263 NYS 44, 147 Misc 2, affirmed 260 NYS 958, 236 App Div 857, affirmed 186 NE 33, 262 NY 16
40 C J p 271 note 21

16. Words "another lien," as used in statute providing that, if the lienor is made a party defendant in an action to enforce another lien, the lien of such defendant is thereby continued, mean another mechanic's lien—*In re Long Island Properties, Inc*, CCANY, 143 F2d 349—40 C J p 271 note 22 [a]

17. Mich—*L J Mueller Furnace Co v Wayne Cir Judge*, 198 N W 248, 226 Mich 672

18. NY—*Danziger v Simonson*, 22 NE 570, 116 NY 329
40 C J p 271 note 24

19. Mich—*L J Mueller Furnace Co v Wayne Cir Judge*, 198 N.W. 248, 226 Mich 672.

20. Mass—*Shaugnessy v Isenberg*, 99 NE 975, 213 Mass 159

21. Mass—*Shaugnessy v Isenberg*, *supra*

22. Utah—*Park City Meat Co v Comstock Silver King Min Co*, 103 P 254, 36 Utah 145

40 C J p 271 note 35

Property subject to lien generally see *supra* §§ 8-14

Price payable in realty

Mechanics' liens not exceeding contract price for construction may be applied to owner's interest in realty even though price was payable in realty—*Voytko v Bunting*, 172 NE 665, 122 Ohio St 552

23. Cal—*English v Olympic Auditorium*, 20 P2d 946, 217 Cal 631, 87 ALR 1281

24. Colo—*Perkins v. Boyd*, 86 P 1045, 37 Colo 265.
40 C J p 271 note 38

25. Cal—*English v Olympic Auditorium*, 20 P2d 946, 217 Cal 631, 87 ALR 1281—*Harmon Lumber Co v Brown*, 131 P 368, 165 Cal 193—*Humboldt Lumber Mill Co v Crisp*, 81 P 30, 146 Cal 686, 106 Am SR 75, 2 Ann Cas 811

Mont—*Interstate Lumber Co v Rider*, 19 P2d 644, 93 Mont 489
40 C J p 271 note 39

26. Cal—*English v Olympic Auditorium*, 20 P2d 946, 217 Cal 631, 87 ALR 1281—*Harmon Lumber Co v Brown*, 131 P 368, 165 Cal 193—*Humboldt Lumber Mill Co v Crisp*, 81 P 30, 146 Cal 686, 106 Am SR 75, 2 Ann Cas 811

Mont—*Stritzel-Spaberg Lumber Co v Edwards*, 144 P. 772, 50 Mont 49.

and in order to effectuate the primary lien²⁷ Other statutes have been construed to confer a lien on buildings or improvements only as appurtenant to the land.²⁸

§ 185. Land

Generally a mechanic's lien extends only to the land on which the building or improvement is situated and does not attach to land on which no lienable improvement has been made.

A mechanic's lien extends to and covers the land on which the building or improvement is situated.²⁹ The lien may be enforced, in some jurisdictions, against both the building or improvement and the land³⁰ or against the building or improvement alone, as discussed infra § 188. It does not attach to land on which no lienable improvement has been made,³¹ nor does it ordinarily extend to land which is outside of, and distinct from, the lot or parcel on which the building or improvement stands;³² but the inclusion in the lien statement of land on which no lienable improvement has been made does not invalidate the lien as to the improved land.³³ Under a few statutes the lien may attach to the land for

the improvement of which materials were furnished, even though the improvement was actually made on other land,³⁴ and under some statutes the lien has been held to extend to all the land described in the lien contract.³⁵

§ 186. — Amount or Area

- a In general
- b Entire lot or tract
- c Statutory limitation of area

a. In General

A mechanic's lien covers the land immediately occupied by the building, structure, or improvement, and such other land as is necessary to the convenient use and occupation of the structure or improvement or is naturally and properly appurtenant thereto.

A mechanic's lien covers the land immediately occupied by the building or structure,³⁶ but it is not restricted to the exact area of ground upon which the building or structure rests;³⁷ it extends to as much of the land as is necessary to the convenient use and occupation of the building, structure, or improvement³⁸ or is naturally and properly appur-

27. Colo.—*Miller v Davis*, 145 P 714, 26 Colo App 483

28. Utah—*Eccles Lumber Co v Martin*, 87 P 713, 31 Utah 241

29. US—*In re Louisville Daily News & Enquirer*, DCKy, 20 F Supp 465

Mont—*Smith v Gunniss*, 144 P 2d 186, 115 Mont 363—*Interstate Lumber Co v Rider*, 19 P 2d 644, 93 Mont 489.

Or—*Livesay v Lee Hing*, 9 P.2d 133, 139 Or 450

40 C J p 272 note 43

30. Ala—*Ingram v Howard*, 128 So 893, 321 Ala 328

Okl—*Shefts Supply v. Brady*, 41 P 2d 830, 170 Okl 590

31. Mo—*Arthur Morgan Trucking Co v Shartzler*, 174 S W 2d 226, 237 Mo App 535—*Independent Plumbing & Heating Supply Co v Glennon*, App, 287 S W 824

40 C J p 272 note 44

Land outside exempt homestead
Where a house is erected on land constituting a homestead, and the homestead is exempt from mechanics' liens under the laws of the particular jurisdiction, the lien cannot attach to land outside the homestead, although constituting part of the same tract—*Atlas Lumber Co v Semmler*, 205 NW 376, 48 SD 541—*Floete Lumber Co v. Hodges*, 143 NW 919, 32 SD 557

Misdescription of property

Where statement described lots improved as church and rectory and claim was for school improvement,

no part of which was located on lots described by claimant, there is no lien on described lots in absence of evidence of materials furnished for church and rectory improvements—*Independent Plumbing & Heating Supply Co v. Glennon*, Mo App, 287 S W 824

32. Ky—*Will B Miller Co v Peerless Lumber Co*, 143 S W 2d 735, 284 Ky 93

Or—*Livesay v Lee Hing*, 9 P 2d 133, 139 Or 450

40 C J p 272 note 45

Improvements outside homestead

Lien cannot be fixed on homestead for improvements made on property which constitutes no part of homestead—*Atwood v Guaranty Const Co*, Tex Com App, 63 S W 2d 685

Tract for extt purpose

Mechanic's lien held not to extend to additional tract not covered by building, but purchased for extt space—*Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n*, 58 S W 2d 995, 332 Mo 440

Land divided into lots

Where a residential development is divided into lots and a building is erected or repaired on one of these lots, the right to a lien under the statute, in the absence of special circumstances, extends no further than the boundaries of the lot whereon the building stands, although the owner may own other realty adjacent thereto—*Suburban Improvement Co v Scott Lumber Co*, CCA W Va, 59 F 2d 711, 87 A L R 330, certiorari

denied *Scott Lumber Co v Suburban Imp Co*, 53 S Ct 123, 287 US 660, 77 L Ed 569

33. US—*Suburban Improvement Co v Scott Lumber Co*, CCA W Va, 59 F 2d 711, 87 A L R 330, certiorari denied *Scott Lumber Co v Suburban Imp Co*, 53 S Ct 123, 287 US 660, 77 L Ed 569

Kan—*Golden Belt Lumber Co v McLean*, 26 P 2d 274, 138 Kan 351

34. ND—*State Loan Co v White Earth Coal Mining, Brick & Tile Co*, 157 NW 834, 34 ND 101.

35. Ark—*Lammers v Cart-Ritter Co*, 121 S W 2d 95, 198 Ark 1159

Tex—*Macomber v Home Bldg & Loan Co*, Civ App, 291 S W 294

36. US—*Corpus Juris cited in Suburban Improvement Co v Scott Lumber Co*, CCA W Va, 59 F 2d 711, 716, 87 A L R 330, certiorari denied *Scott Lumber Co v Suburban Imp Co*, 53 S Ct 123, 287 US 660, 77 L Ed 569.

40 C J p 273 note 49

37. Del—*In re Long*, 86 A. 104, 27 Del 88

40 C J p 273 note 50.

38. Cal—*Anselmo v Sebastiani*, 26 P 2d 1, 219 Cal 292—*Gregg v H & M Drilling Co*, 267 P 903, 92 Cal App 189

NJ—*Federal Trust Co v. Guigues*, 74 A 652, 76 NJ Eq 495

Or—*Livesay v. Lee Hing*, 9 P 2d 133, 139 Or 450, 84 A L R 118—*Drake v Riley*, 9 P 2d 130, 139 Or 172

Pa—*Flesher v Layton*, Com Pl, 23 West Co L J. 195.

tenant thereto³⁹ Conversely, the lien cannot be extended so as to include land not necessary for the convenient and proper use of the building or improvement,⁴⁰ or not properly appurtenant thereto,⁴¹ even though the use and occupation of the building would be much more profitable if such land were used and occupied in connection therewith⁴²

In applying the foregoing rules, due consideration should be given to the character and purpose of the improvement,⁴³ but the market value of the improved land may not be considered in establishing the extent of the lien upon the adjoining land for convenient use of the improved land⁴⁴ The court has a wide discretion in determining the extent of the land about a structure which may be reasonably required for the convenient use and occupation of it,⁴⁵ but its determination must be based on competent evidence⁴⁶

b. Entire Lot or Tract

Ordinarily a mechanic's lien covers the entire lot,

tract, or parcel upon which the building or improvement is situated.

Ordinarily a mechanic's lien covers the entire lot, tract, or parcel upon which the building or improvement is situated⁴⁷ Thus in a case of a farm the lien ordinarily extends to the entire farm,⁴⁸ and in case of a town or city lot it extends to the entire lot.⁴⁹ The word "lot," as used in this connection, does not, except in some instances,⁵⁰ necessarily mean a surveyed or platted lot,⁵¹ but rather means a single and entire tract or parcel⁵² Under this construction the lien may extend to two or more lots used and treated as a single tract or parcel,⁵³ even though they are separately owned by different persons,⁵⁴ or it may cover only part of a lot where the lot has been divided into two or more parcels designed for separate use⁵⁵

There are cases, however, in which the lien has been held not to extend to the entire tract on which the building or improvement is situated,⁵⁶ as where the case comes within statute limiting the lien to a

SD—Atlas Lumber Co v Semmler, 205 NW 376, 48 SD 541
Tex—Ferrell v Ertel, Civ App, 100 SW2d 1084, error dismissed—Bryant-Link Co v W H Norris Lumber Co, Civ App, 61 SW2d 160, error dismissed—Hewitt v Buchanan, Civ App, 4 SW2d 169 40 CJ p 273 note 51

Curtilage

(1) "Curtilage, to be regarded as appurtenant to a building and bound by a mechanic's lien filed against it, is 'such as is reasonably needed for the general purpose' for which the structure is erected, and belongs to the same owner"—Wirsing v Pennsylvania Hotel & Sanitarium Co, 75 A 259, 260, 226 Pa 234, 26 L.R.A. NS, 831—Bickerton v Vaughn, 38 Pa Dist & Co 645, 3 Fay LJ 105, 88 Pittsb Leg J 393—Knepp v Orner, 22 Pa Dist & Co 391

(2) Lot contiguous to lot whereon house was constructed, and acquired during course of construction for driveway for delivering coal and for location of service pipes, was within curtilage and subject to mechanic's lien for building materials, even though use of driveway for delivering coal was subsequently discontinued—Essex Sash & Door Co v Murphy, 166 A 510, 11 NJ Misc 92

(3) Two and one-quarter acre tract whereon large house was erected constituted curtilage and entire tract was subject to mechanics' liens—Riverside Apartment Corporation v Capitol Const Co, 152 A 763, 107 N JE 405, affirmed 158 A 740, 110 N JE 87.

Irrigation well

Land necessary for protection of

well was held subject to mechanics' liens in favor of persons digging well—Keane v Thomas B Watson Co, 271 P 73, 149 Wash 424—40 C J p 273 note 56[c]

39. Del—In re Long, 86 A 104, 27 Del 88
40 CJ p 273 note 52

40. Cal—Gregg v H & M Drilling Co, 267 P 903, 92 Cal App 189
40 CJ p 273 note 53

41. Iowa—Ewing v Allen, 68 NW 702, 99 Iowa 379

42. Cal—Tunis v Lakeport Agricultural Park Ass'n, 33 P 63, 447, 98 Cal 385

Colo—Colorado Iron Works v Taylor, 55 P 942, 12 Colo App 451

43. Or—Drake v Riley, 9 P2d 130, 139 Or 172

40 CJ p 273 note 56

Intended use

Determination of area to be covered by mechanic's lien for erection of building must take into consideration intended use for which building is erected—Anselmo v Sebastiani, 26 P2d 1, 219 Cal 292—40 C J p 273 note 56[b]

Use of improvement, not of adjoining land, determines extent of materialmen's lien under statute subjecting adjoining land, required for convenient use and occupation of that improved, to lien—Gregg v H & M Drilling Co, 267 P 903, 92 Cal App 189

44. Cal—Gregg v H & M Drilling Co, supra

45. NM—Dysart v Youngblood, 102 P2d 664, 44 NM 351

Abuse of discretion not shown

Where dwelling constructed on

twenty-acre ranch was necessary to operation of ranch and benefited the entire tract, imposing a mechanic's lien for material furnished on entire tract rather than on a portion thereof was not an abuse of discretion—W R Spalding Lumber Co v Bradkin, 156 P2d 450, 68 Cal App2d 308

46. Or—Livesay v Lee Hing, 9 P2d 133, 139 Or 450, 84 ALR 118

47. Tex—Bryant-Link Co v W H Norris Lumber Co, Civ App, 61 SW2d 160, error dismissed
40 CJ p 273 note 57

48. Del—In re Long, 86 A 104, 27 Del 88

40 CJ p 274 note 58

49. Del—In re Long, supra

Va—Pairo v Belhell, 75 Va 825

50. Mich—Adams v Central City Granite Brick & Block Co, 117 NW 932, 154 Mich 448, 129 AmSR 484

51. Minn—Lax v Peterson, 44 NW 53, 42 Minn 214

40 CJ p 274 note 61

52. Minn—Lax v Peterson, supra
40 CJ p 274 note 62

53. Wash—Caine-Grumshaw Co v White, 238 P 980, 136 Wash 98
40 CJ p 274 note 63

54. Minn—Menzel v Tubbs, 53 NW 653, 51 Minn 364—Miller v Shepard, 52 NW 894, 50 Minn 268

55. Wis—Hill v La Crosse & M R Co, 11 Wis 214
10 CJ p 274 note 65

56. Cal—Cowan v Griffith, 41 P. 42, 108 Cal 224, 49 AmSR 82

Md—Filston Farm Co v Henderson, 67 A 228, 106 Md 335

40 CJ p 274 notes 68, 69.

specified area, and the tract exceeds the statutory limit, as discussed *infra* subdivision c of this section, or where to extend the lien to the entire lot would work hardship and injustice,⁵⁷ or where the new building is on part of a lot on which is located a homestead exempt from mechanics' liens⁵⁸ Some courts have held that the lien does not extend to the entire lot where there are other independent buildings, previously erected, on the same lot,⁵⁹ but other courts have held that the lien extends to the entire lot, even though there are on it buildings previously erected,⁶⁰ or at least that there must be proof of something more than the mere existence of another building on the lot in order to exclude any part of the lot from the operation of the lien⁶¹

It has been held that the lien may, at the option of the holder thereof, be enforced on a part only of the whole lot,⁶² but there is some authority to the contrary.⁶³ A distinction is sometimes drawn between the amount of land subject to the lien in the first instance and the amount which should be sold to satisfy the lien,⁶⁴ even though an entire tract is subject to the lien, where the tract can be divided without injury only so much thereof as is necessary to satisfy the lien should be sold, as discussed *infra* § 338. It has been held that the lien extends to as much of the tract of land on which the house is built as, with the house, would be required to discharge it⁶⁵

c. Statutory Limitation of Area

Under some statutes a mechanic's lien may not cover more than a designated area of land.

Under some statutes a mechanic's lien may not cover more than a designated area of land.⁶⁶ These statutes are sometimes limited in their application to certain cases,⁶⁷ but, where applicable, they determine the area of land subject to the lien,⁶⁸ even though the building or improvement stands on a single tract larger than the statutory area,⁶⁹ unless the parties have, by contract, extended the area of land to be covered by the lien beyond the statutory limit.⁷⁰

§ 187. Building or Improvement

Generally the mechanic's lien given by statute extends to and covers the entire building, structure, or improvement as such and it cannot be maintained on a part of the building or structure.

As a general rule the lien given by a mechanics' lien statute extends to and covers the entire building, structure, or improvement⁷¹ as such⁷² in its entirety.⁷³ The lien cannot be maintained on, enforced against, or confined to, a part of the building, structure, or improvement,⁷⁴ and this rule applies although the work may have been done for the sole and exclusive benefit of the occupant or lessee of part of the building.⁷⁵ In some jurisdictions, however, the lien may, or must, be confined to a part of the building or improvement in certain cas-

57. Iowa—Ewing v. Allen, 68 NW 702, 99 Iowa 379

58. Tex—Yates v Home Building & Loan Co, Civ App 103 SW2d 1081

Amount needed for proper use

Where building used for rental purposes is erected upon portion of homestead tract, mechanic's lien securing cost of such improvements will attach to land upon which improvements are situated and which are essential to its proper use or as may be shown to be intended for use in such connection—Atwood v Guaranty Const Co, Tex Com App, 63 SW2d 685

59. Conn—Tramonte v. Wilens, 94 A 978, 89 Conn 520

Iowa—Ewing v Allen, 68 NW 702, 99 Iowa 379

60. Tex—Bryant-Link Co v W. H. Norris Lumber Co, Civ App, 61 SW2d 160, error dismissed
40 C.J. p 274 note 71

61. Minn—Bergsma v Dewey, 49 N.W. 57, 46 Minn 357

62. Fla—Service Lumber & Supply Co v Cox, 123 So 820, 98 Fla 405

Tex—Mills v. Paul, Civ App, 30 SW. 558

63. Mass—Whalen v Collins, 41 NE 124, 164 Mass 146

40 C.J. p 273 note 57[4] (1)

64. Colo—Hess Flume Co v La Junta Suburban Land Co, 166 P 246, 63 Colo 236

65. N.J.—Vandyne v Janness, 5 N.J. Eq 485

66. Mont—Federal Land Bank of Spokane v Green 90 P2d 489, 108 Mont 56

N.J.—Riverside Apartment Corporation v Capitol Const Co, 152 A 736, 107 N.J. Eq 405, affirmed 158 A 740, 110 N.J. Eq 67—Federal Trust Co v Guigues, 74 A 652, 76 N.J. Eq 495
40 C.J. p 274 note 78

67. N.J.—Riverside Apartment Corporation v Capitol Const Co, 152 A 736, 107 N.J. Eq 405, affirmed 158 A 740, 110 N.J. Eq 67—Federal Trust Co v Guigues, 74 A 652, 76 N.J. Eq 495.
40 C.J. p 275 note 79

68. Wis—Dusick v Mensebach, 95 NW. 144, 118 Wis 240.
40 C.J. p 275 note 81

69. Wis—Dusick v Mensebach, 95 NW 144, 118 Wis 240
40 C.J. p 275 note 81

70. U.S.—Sheffield Furnace Co. v Witherow, Ala, 13 S.Ct. 986, 149 US 574, 37 L.Ed 853

40 C.J. p 275 note 83

71. Ind—City of Portland v Indianapolis Mortar & Fuel Co, 106 N.E. 735, 57 Ind App. 166
40 C.J. p 275 note 85

72. Hawaii—Emmeluth & Co, Ltd v Au In Kwai, 20 Hawaii 180

73. Iowa—Sheldon v Chicago Bonding & Surety Co, 181 NW 282, 190 Iowa 945
40 C.J. p 275 note 84

74. Ind—City of Portland v Indianapolis Mortar & Fuel Co, 106 N.E. 735, 57 Ind App 166
40 C.J. p 275 note 87

Grade separation easement

Manufacturing company's land, on which it built part of grade separation under contract with city and railroad companies, was not subject to subcontractors' and materialmen's liens.—McClintic-Marshall Co v Ford Motor Co, 286 NW. 792, 254 Mich 305, 72 A.L.R. 807

75. Wash—Wright v. Cowie, 81 P 878, 5 Wash 341.

es,⁷⁶ as in the case of liens covering canals and irrigation systems⁷⁷ and water supply systems,⁷⁸ or where the statute fixes the lien merely on the improvements put on a house⁷⁹

Generally the lien does not extend to a building other than the one for the construction or repair of which the labor was performed or the material was furnished,⁸⁰ such as another building subsequently erected on the same lot under a separate contract by another person,⁸¹ or another building in existence when the building for which the labor or materials were furnished was erected,⁸² unless the old building is appurtenant to the new building⁸³ or stands on ground belonging to the same owner and is so related to the new building as to subserve a common purpose⁸⁴. However, it has been held that on the destruction of the building on account of which the lien is claimed and the erection of another building on the lot by another person, such new building becomes a part of the realty and subject to the lien⁸⁵

76. Mass.—Batchelder v Hutchinson, 37 NE 452, 161 Mass 462
40 C.J. p. 275 note 88

77. Colo.—Fisher v Pioneer Constr Co, 163 P 851, 62 Colo 538
40 C.J. p. 275 note 88[c]

78. Ky.—Whitehead v Collins, 101 SW 2d 190, 267 Ky 78

Water pipe line

In action by plaintiff for material and labor furnished in replacing entire water pipe line, originally constructed by defendants' grantor, which was located on land of water company, third persons, and defendants, and furnished water to third persons and defendants, and seeking to have lien adjudged, evidence of implied agreement held to justify recovery by plaintiff only for that portion of line on defendants' property—Whitehead v Collins, *supra*

79. Ga.—Gaskill v Davis, 66 Ga 665
NJ—Whitenack v. Noe, 11 NJ Eq 321
40 C.J. p. 275 note 88[b]

80. Ohio.—First End Lumber Co v Bennett, 187 NE 786, 46 Ohio App 104

Or.—Dalles Lumber & Mfg Co v Wasco Woolen Mfg Co, 3 Or 527
Several lots or buildings see *infra* § 189

81. Mont.—Bartholomew v James, 246 P 771, 76 Mont 359

82. Conn.—Peck v Brush, 94 A 981, 89 Conn 554
40 C.J. p. 275 note 90

83. Conn.—Peck v Brush, *supra*
40 C.J. p. 276 note 91

84. Pa.—Nagle v. Garrigues, 46 Pa Super 155
40 C.J. p. 276 note 92.

85. Tex.—Cain v Texas Bldg & Loan Ass'n, 51 SW 879, 21 Tex Civ App 61

86. Ala.—Wood Lumber Co v Great-house, 161 So 236, 230 Ala 362—Wood Lumber Co v Greathouse, 148 So 125, 226 Ala 644—Ingram v Howard, 128 So 893, 221 Ala 328

Ark.—Judd v Rueff, 295 SW 370, 174 Ark 362

Cal.—English v Olympic Auditorium, 20 P 2d 946, 217 Cal 631, 87 A.L.R. 1281—Cain v Whiston, 137 P 2d 479, 58 Cal App 2d 738

Kan.—J. B. Ehrsam & Sons Mfg Co v Rice, 112 P 2d 95, 153 Kan 483
Mich.—Lazenby v Wright, 229 NW 437, 250 Mich 203

Miss.—Cheers Floor & Screen Co v Gidden, 131 So 426, 159 Miss 288
Mo.—Cochran v. Johnston, App, 25 SW 2d 130

Mont.—Bartholomew v. James, 246 P 771, 76 Mont 359

Ohio.—Herferth v Nisbet, 190 NE 51, 47 Ohio App 40
40 C.J. p. 276 note 96

87. Mo.—Masterson v Roberts, 78 SW 2d 856, 336 Mo 158, 97 A.L.R. 862
40 C.J. p. 276 note 97

New or existing building

(1) Under statute a contract vendee may subject a new building erected by him to mechanics' liens, although the building is attached to the land, so as to become real property, but, where he merely repairs an existing building, only his interest is subject to such liens, especially where the repairs do not increase the value of the freehold—Ford v Dixon, 157 SW 99, 171 Mo App 275

§ 188. — Building or Improvement Alone

A building or improvement, as distinct from the land, may be subjected to a mechanic's lien under certain circumstances.

A building or improvement, as distinct from the land, may be subjected to a mechanic's lien under certain circumstances,⁸⁶ although a lien on the building or improvement alone has been denied in some cases,⁸⁷ and under some statutes it has been broadly held that a mechanic's lien cannot attach to, or be enforced against, a building alone apart from the land on which it is located⁸⁸

The circumstances under which a lien has been held to attach to the building alone include generally cases in which the contract for the construction of the building or improvement has been made with a person who is not the owner of the land or his authorized agent⁸⁹ or who has no legal title to the land⁹⁰ and the owner has duly posted notice of nonresponsibility,⁹¹ cases where a building is erected wholly on the land of another by mistake,⁹² and

(2) Part of statute authorizing lien on, and removal of buildings, fixtures, machinery, etc., from land for work done or material furnished in mere reconstruction, alteration, or repair thereof under contract with lessee only, was held unconstitutional—Masterson v Roberts, 78 SW 2d 856, 336 Mo 158, 97 A.L.R. 862—Mundet Cork Corporation v Three Flowers Ice Cream Co, Mo App, 146 SW 2d 678

88. La.—Berg v Schneider, App, 12 So 2d 501
40 C.J. p. 276 note 95.

89. Mich.—Lazenby v Wright, 229 NW 437, 250 Mich 203

Miss.—Cheers Floor & Screen Co v Gidden, 131 So 426, 159 Miss 288
Mo.—Cochran v Johnston, App, 25 SW 2d 130

Mont.—Bartholomew v James, 246 P 771, 76 Mont 359

Okl.—Braden Co v Robinson, 43 P. 2d 437, 171 Okl 278—Deka Development Co v Fox, 39 P 2d 143, 170 Okl 228—Braden Co v Lancaster Lumber Co, 38 P 2d 575, 170 Okl 30, 102 A.L.R. 230—Simpson v Davidson Case Lumber Co, 300 P 631, 150 Okl 132—Whitfield v Fiensley Bros Lumber Co, 283 P 985, 141 Okl 44
40 C.J. p. 276 note 98, p. 277 note 1.

90. Mich.—Stephens Lumber Co v Townsend-Stark Corp, 199 NW 706, 228 Mich 182, reheard 201 NW 213, 228 Mich. 182—Sheldon v Bremer, 132 NW. 117, 166 Mich 578

91. Cal.—English v. Olympic Auditorium, 20 P 2d 946, 217 Cal 631, 87 A.L.R. 1281

92. Ill.—Donkle & Webber Lumber

cases where there is a prior encumbrance on the land⁹³ So it has been held that alterations and repairs on a building or structure, if made by a person not the owner of the land, may be subjected to the lien if detachable from the original building without injury⁹⁴ or if capable of identification and practical severance,⁹⁵ but in some jurisdictions the building may be removed even though injury may result to the realty.⁹⁶

Ordinarily the lien may attach to the building or improvement alone where the building is erected or improvement made by a vendee,⁹⁷ and such lien will have precedence over any claim of the vendor,⁹⁸ although generally it will not affect the interest of the vendor in the land, as discussed *infra* § 194. In the absence of some statutory provision, however, the lien cannot be enforced against the improvement to the injury of the vendor.⁹⁹

Where a lessee of land erects a building or makes improvements thereon, the building or improvement alone may be subject to lien,¹ at least where it does not become part of the realty.² So the lien may attach to the building alone where it is erected by a tenant at will³ and is removable by him⁴ Conversely it has been held that the lien cannot attach

to the building alone where it is not subject to removal by the occupant or tenant at will,⁵ although it has also been held that it is no objection to enforcement of a lien on buildings and improvements on leased premises, erected or made under a contract with the lessee, that there is a provision in the lease prohibiting the removal of the improvements from the premises unless the rent is paid.⁶

Where a building is erected or improvement made on the land of a married woman, without her consent, under a contract with her husband, the building or improvement alone has been held subject to lien and removal, if this may be done without injury to the premises,⁷ although no lien may be claimed on the building or premises as a whole, apart from the portion improved by the husband.⁸ Some,⁹ but not other,¹⁰ courts hold that the lien may attach to the building or improvement alone where the land is owned by husband and wife as tenants by the entirety and the contract for the building or improvement is made with the husband alone.

Under some statutes it has been held that the lien may be enforced against the building alone, although the owner of the building is also the owner of the

Co v. Rehmann, 33 NE 2d 709, 810 Ill App 17

Building partly on another's land

Where building was erected partly on premises occupied by owner as life tenant and partly on other premises owned by owner, builder was entitled to a mechanic's lien on premises owned by owner and was not limited to a lien on building alone under statute providing for lien against building erected on land of another by mistake—Donkle & Weber Lumber Co v Rehmann, *supra* 93. Mont—Grand Opera House Co v. Maguire, 37 P 607, 14 Mont 558.

40 C.J. p 276 note 99

94. Miss—Cheers Floor & Screen Co v. Gidden, 131 So 426, 159 Miss. 288.

95. Ala—Woodson v Wilson, 144 So 122, 25 Ala App 241

96. Iowa—Lane-Moore Lumber Co v Kloppenburg, 215 NW 637, 204 Iowa 613

Mont—Stritzel-Spaberg Lumber Co v Edwards, 144 P 772, 50 Mont 49.

97. Ark—Judd v Rieff, 395 SW 370, 174 Ark 362

Mich—Lazenby v Wright, 229 NW 437, 250 Mich 203

Mo—Lyvers v Rutherford, 80 SW 2d 729, 230 Mo App 921

Ohio—Herferth v Nisbet, 190 NE 51, 47 Ohio App 40.

40 C.J. p 114 note 17.

Improvements by vendee as subject to lien generally see *supra* § 71

Where vendee's interest was foreclosed, plaintiff's allegation of fraud between defendants and others did not entitle him to have mechanic's lien on building extended to land itself—Lazenby v Wright, 229 NW 437, 250 Mich 203

98. Mo—Lyvers v Rutherford, 80 SW 2d 729, 230 Mo App 921

40 C.J. p 114 note 17

99. Ind—Toner v Whybrew, 98 N. E 450, 50 Ind App 387.

40 C.J. p 114 note 20

1. Ala—Wood Lumber Co v Greathouse, 161 So 236, 230 Ala 362—Wood Lumber Co v Greathouse, 148 So 125, 226 Ala 644

Kan—J B Ehreman & Sons Mfg Co v Rice, 112 P 3d 95, 153 Kan 483

Mo—Cochran v Johnston, App. 25 SW 2d 130

Mont—Bartholomew v James, 246 P. 771, 76 Mont 359

Okl—Deka Development Co v. Fox, 39 P 2d 143, 170 Okl 228—Simpson v Davidson Case Lumber Co, 300 P 631, 150 Okl 133—Whitfield v Frenley Bros Lumber Co, 283 P 985, 141 Okl 44

40 C.J. p 103 note 30

Failure to remove building

Lessee who, on burning of dwelling house, erected new dwelling without being obliged by lease to do so, had right of ownership therein, and therefore materialman could enforce lien

against building for materials furnished lessee, even though lessee failed to remove building when lease terminated—Shreveport Long Leaf Lumber Co v Parker, La. App. 144 So 153

2. Mass—Forbes v Mosquito Fleet Yacht Club, 56 NE 615, 175 Mass 433

40 C.J. p 102 note 31.

3. Ind—Williamson v Shank, 83 N. E 641, 41 Ind App 513.

4. N.Y.—Ombony v Jones, 19 N.Y. 234

5. Kan—Pond v Harrison, 152 P 635, 96 Kan 542, L.R.A. 1916B 1264

6. Ala—Alabama State Fair & Agricultural Ass'n v Alabama Gas Fixture & Plumbing Co, 31 So 26, 131 Ala 256

7. Miss—Cheers Floor & Screen Co v Gidden, 131 So 426, 159 Miss 288

40 C.J. p 277 note 5

8. Miss—Stubbs v Capital Paint & Glass Co, 131 So 806, 160 Miss 832, suggestion of error overruled 135 So. 495, 160 Miss 832

9. Mo—Nold v Ozenberger, 133 S. W 319, 153 Mo App 439

10. Mich—Bauer v Long, 110 NW. 1059, 147 Mich 351, 118 Am SR 552, 11 Ann Cas 86.

land on which it stands,¹¹ and that enforcement of the lien against the entire interest of the owner of the property is not required,¹² but under other statutes it has been held that, where the owner of the building also owns the land, and there is no prior lien or encumbrance on the land, it is error to limit the lien to the building alone.¹³

§ 189. Several Lots or Buildings

- a In general
- b Single building or improvement on two or more lots
- c Two or more buildings or improvements
- d Property of different owners

a. In General

Generally a lien for the entire amount due for work done on, or materials furnished for, several buildings or lots cannot attach to, or be enforced against, part of the buildings or lots.

While a lien for the entire amount due for work done on, or materials furnished for, several buildings or lots ordinarily cannot attach to, or be enforced against, part of the buildings or lots,¹⁴ a lien has been allowed against part of the buildings or lots under some circumstances.¹⁵ Where it is sought to enforce the lien on less than the whole number of buildings or lots, each building has been held subject to the lien only to the extent of what was done or furnished therefor,¹⁶ and each lot only to the extent of what was done or furnished for the building or improvement thereon.¹⁷ The lien is properly confined to the building upon which the work was done, although the original contract em-

braced other buildings,¹⁸ at least where a separate lien was filed for each building.¹⁹

b. Single Building or Improvement on Two or More Lots

Where one building or improvement extends over two or more adjoining lots or parcels owned by the same person, the lien ordinarily extends to the building or improvement and all the lots or parcels on which it is situated,²⁰ especially where the owner treats all the lots or parcels as a single undivided tract.²¹ This rule applies in the case of a solid block of buildings erected by the same owner at the same time,²² even though the various houses may be distinct,²³ for in such case the entire structure may be regarded as one building.²⁴ However, where a mechanic performs work under two separate contracts on one block of houses, he cannot enforce a lien on the whole block as one estate for the general balance due from the owner.²⁵

Where one building or improvement extends over two or more adjoining lots or parcels owned by the same person, the lien ordinarily extends to the building or improvement and all the lots or parcels on which it is situated,²⁰ especially where the owner treats all the lots or parcels as a single undivided tract.²¹ This rule applies in the case of a solid block of buildings erected by the same owner at the same time,²² even though the various houses may be distinct,²³ for in such case the entire structure may be regarded as one building.²⁴ However, where a mechanic performs work under two separate contracts on one block of houses, he cannot enforce a lien on the whole block as one estate for the general balance due from the owner.²⁵

c. Two or More Buildings or Improvements

Generally the question whether a lien will attach to one or more buildings depends on whether labor was performed or materials were furnished under a single contract or under separate contracts.

Generally the question whether a mechanic's lien will attach to one or more buildings depends on whether labor was performed or materials were furnished under a single contract or under separate contracts.²⁶ Where labor or material is furnished

11. Mo—Kansas City Hotel Co v Sauer, 65 Mo 279

Okl—National Gas Co v Ada Iron & Metal Co, 98 P 2d 529, 185 Okl 415

12. Okl—National Gas Co. v. Ada Iron & Metal Co, supra

13. Iowa—Early v Burt, 28 NW 35, 68 Iowa 716

Mont—Louis v Theatrum Co, 222 P 1062, 69 Mont 50

14. Va—Corpus Juris quoted in Weaver v Harland Corporation, 10 SE 2d 547, 550, 176 Va 224, 130 ALR 417

40 C.J. p 278 note 40

Whether lien extends to—

Land outside lot or parcel on which building or improvement stands see supra § 185

Old buildings situated on same lot as new building see supra § 187

15. Colo—Perkins v Boyd, 86 P 1045, 37 Colo 265

40 C.J. p 278 note 39.

16. Miss—Dodds v Cavett, 97 So 813, 133 Miss 470

Va—Corpus Juris quoted in Weaver v Harland Corporation, 10 SE 2d 547, 550, 176 Va 224, 130 ALR 417

Where mortgage foreclosure cut off lien against one of two buildings, lien remained on other only to value of labor and material put into that building—Lichtenstein v Grossman Const Corporation, 162 NE 292, 248 NY 390.

17. Ill—Crowen v. Meyer, 174 NE 55, 342 Ill 46

Va—Corpus Juris quoted in Weaver v Harland Corporation, 10 SE 2d 547, 550, 176 Va 224, 130 ALR 417

40 C.J. p 279 note 42

18. Va—Corpus Juris quoted in Weaver v Harland Corporation, 10 SE 2d 547, 550, 176 Va 224, 130 ALR 417

40 C.J. p 279 note 43.

19. Ala—Richardson Lumber Co v. Howell, 122 So 343, 219 Ala 328

20. Ala—Sims v Taylor, 135 So 580, 223 Ala 280

Wyo—Mawson-Peterson Lumber Co. v Sprinkle, 140 P 2d 588, 59 Wyo. 334, 147 ALR 1089

40 C.J. p 279 note 44

21. NY—Miller v Schmitt, 67 N. Y S 1077

40 C.J. p 279 note 45

22. US—Phillips v Gilbert, D.C., 101 US 721, 25 LE 833

40 C.J. p 279 note 46

23. Mo—Fitzgerald v Thomas, 61 Mo 499

40 C.J. p 279 note 47.

24. US—Phillips v Gilbert, D.C., 101 US 721, 25 LE 833

40 C.J. p 279 note 48

25. Mass—Landers v Dexter, 104 Mass 531.

26. Fla—Biscayne Trust Co v Wolpert Realty & Improvement Co., 130 So 611, 100 Fla. 1076.

under an entire contract on separate buildings owned by the same person and situated upon the same lot or tract, the lien attaches on the whole property for the whole value of the labor or material,²⁷ but the rule is otherwise where there are separate contracts,²⁸ and the lien must be separate and several, not joint, if the contracts under which the work is done are several²⁹

It has also been held in some jurisdictions that a lien for the entire amount due for labor performed or materials furnished in the construction of several buildings on separate lots under a single contract with the owner attaches to all the buildings and lots,³⁰ at least where the lots are contiguous,³¹ and according to some,³² but not other,³³ authorities even where the lots are not contiguous, but in other jurisdictions it has been held that in such case the lien, instead of being extended to all the buildings and lots for the aggregate value of the labor and materials,³⁴ should be confined, in respect of each building and lot, to the value of the labor and material expended thereon,³⁵ at least where subsequent purchasers and encumbrancers have become interested in different portions of the premises.³⁶

Severable contract It has also been held that a lien attaches to each separate building or lot only for the value of the work or materials furnished that building or lot where, although there is only one contract, it is severable as to each lot and the improvement thereon³⁷

d. Property of Different Owners

It has been held, where an entire contract is made for improvements on adjoining properties of different owners, that an entire lien attaches to the properties as a whole; but other decisions hold that the claim should be apportioned between the properties according to the improvements made if such apportionment is practicable.

It has been held, where the owners of adjoining properties join in making an entire contract for improvements thereon, that an entire lien attaches to the properties as a whole for what was done or furnished thereunder³⁸ and that a valid lien cannot attach only to one lot and the portion of the building thereon³⁹ According to other decisions, where improvements are made on the property of different owners, the lien will attach to each of the lots only for the labor and materials expended in the improvement of the particular lot,⁴⁰ and the total cost of the improvements should be apportioned between or among the lots accordingly,⁴¹ but a single

27. La.—Central Lumber Co v Schroeder, 114 So 644, 164 La 759
Or.—Schram v. Manary, 260 P 214, 123 Or. 354, modified on other grounds 263 P 263, 123 Or. 354
40 C.J. p 279 note 51

Running account

The fact that materials were furnished and labor performed as part of a running account does not prevent the transaction from being one based on a single contract—Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 111 Mont 471

28. Or.—Crane Co v Erie Heating Co, 112 P 480, 57 Or 410
40 C.J. p 279 note 52

29. Cal.—Nevada County Lumber Co v Janiss, 78 P 2d 200, 35 Cal App 2d 579

Separate accounts

Materialman has legal right to keep accounts in such condition as to be able to ascertain and enforce lien against each building for which he has a separate contract—Biscayne Trust Co v Wolpert Realty & Improvement Co, 130 So 611, 100 Fla 1070

30. Ala.—Richards v William Beach Hardware Co, 7 So 2d 492, 243 Ala 535—Tallapoosa Lumber Co v Copeland, 134 So 658, 223 Ala 41, 75 A L R 1325
40 C.J. p 279 note 53.

Joint contract

Where buildings are constructed on separate lots for the same owner under a joint contract, the lien is joint—Biscayne Trust Co v Wolpert Realty & Improvement Co, 130 So 611, 100 Fla 1070

31. Ky.—Will B Miller Co v Peerless Lumber Co, 143 S W 2d 735, 284 Ky 93

S C.—National Loan & Exchange Bank of Columbia v Argo Development Co, 139 S E 183, 141 S C 72
Tex.—Lyon v Logan, 5 S W. 72, 68 Tex 521, 2 Am S R 511
40 C.J. p 279 note 54

32. U S.—Powell v Baker Ice Mach Co, C C A Ark, 8 F 2d 125

Ala.—Richards v William Beach Hardware Co, 7 So 2d 492, 243 Ala 535—Tallapoosa Lumber Co v Copeland, 134 So 658, 223 Ala 41, 75 A L R 1325

Kan.—Golden Belt Lumber Co v McLean, 26 P 2d 274, 138 Kan 351
Mont.—Caird Engineering Works v Seven-Up Gold Mining Co, 111 P 2d 267, 111 Mont 471
40 C.J. p 279 note 55

Machinery for two separate plants was held to have been furnished under a single contract, so as to entitle seller to single mechanic's lien on both plants, notwithstanding two written orders were given for shipment to different places, and third order for shortage and extras—Pow-

ell v Baker Ice Mach Co, C C A Ark, 8 F 2d 125

33. Ark.—Central Lumber Co v Braddock Land & Granite Co, 105 S W 583, 84 Ark 560, 13 Ann Cas 11.

34. Ill.—Culver v Elwell, 73 Ill 536

35. Ill.—Culver v Elwell, supra
40 C.J. p 279 note 58

36. Ark.—Sebastian Building & Loan Ass'n v Minten, 27 S W 2d 1011, 181 Ark 700
40 C.J. p 279 note 59

37. Kan.—Golden Belt Lumber Co v McLean, 26 P 2d 274, 138 Kan 351

40 C.J. p 279 note 60

38. Idaho—*Corpus Juris* cited in Doise-Payette Lumber Co v Felt 258 P 169, 171, 44 Idaho 377
40 C.J. p 280 note 62

39. N D.—Stoltze v Hurd, 128 N W 115, 20 N D 413, 30 L R A. N S. 1219, Ann Cas 1912C 871
40 C.J. p 280 note 63

40. Cal.—Cook v Cappellino, 281 P. 412, 101 Cal App 77

Ohio—Edwards v Edwards, 24 Ohio St 402

The materialman's privilege accorded by statute cannot be in solido against two houses and lots—Crowley Lbr Co v Plaffer, 4 La App 606

41. Ohio—Edwards v Edwards, 24 Ohio St 402

40 C.J. p 280 note 67.

lien may be appropriate where apportionment of the claim is impracticable.⁴² At any rate where there are separate contracts, a lien does not attach to both properties for materials furnished for both.⁴³

§ 190. Fixtures, Materials, and Personal Property

A mechanic's lien generally extends to and covers fixtures which have been divested of their character as personal property by being attached to the realty so as to become a part thereof, and under some statutes materials and machinery, not incorporated in, or attached to, the realty, are covered by the lien.

Ordinarily a mechanic's lien does not apply to personal property as such,⁴⁴ although the lien extends to and covers fixtures.⁴⁵ Usually the lien does not attach to articles which have not been divested of their character as personal property by being attached to the realty so as to become a part thereof,⁴⁶ nor does it attach directly to materials or specific articles, as such, which were furnished for the building,⁴⁷ regardless of whether they are incor-

porated in the building⁴⁸ or are unused.⁴⁹ However, a few statutes give a mechanic's lien on materials furnished,⁵⁰ even though they are not incorporated in the building⁵¹ or have not become a part of the realty.⁵² One view is that under such statutes a mechanic's lien may attach to personalty.⁵³ Another view is that materials furnished in good faith for the construction of a building, but not used therein, are in effect a part of the realty so as to come within the operation of the lien.⁵⁴

Machinery Under the statutes of some jurisdictions a mechanic's lien extends to and covers machinery when,⁵⁵ and only when,⁵⁶ it is so attached to the realty as to be a part thereof, it does not attach to the machinery as such,⁵⁷ but only indirectly to it as part of the building or structure to which it is attached and of which it is a part.⁵⁸ Under the statutes of other jurisdictions a mechanic's lien for furnishing machinery may attach to machinery which retains its character of personalty and does

Contract by prospective purchaser

Mechanic's lien for total amount of materials and services in construction of buildings on lots of different owners, contracted for by a prospective purchaser of the lots could not be charged against all without proportionate segregation—Cook v Cappellino, 281 P 412, 101 Cal App 77.

Improvement by lessee

Where an improvement is made by a lessee which covers the leased property and other property, the cost must be apportioned—Martin-Welch Hardware & Plumbing Co v Moor, Mo App, 16 SW 2d 667.

42. Ill—Rubendall v. Tarbox, 200 Ill App 260.

Several buildings as single structure

"Automobile laundry," consisting of three buildings and appurtenances situated on adjoining lots leased from different owners, was held single structure subject to materialmen's liens without necessity for segregation as to particular buildings or ownership of land for which materials were used—Hammond Lumber Co v Goldberg, 13 P 2d 814, 125 Cal App 120.

43. Idaho—Corpus Juris cited in Boise-Payette Lumber Co v Felt, 258 P 169, 171, 44 Idaho 377. 40 C.J. p 280 note 69.

44. US—In re Louisville Daily News & Enquirer, DCKy, 20 F Supp 465.

Del—Girdler Corporation v Delaware Compressed Gas Co, 183 A 480, 7 WW Harr 344.

45. Del—Girdler Corporation v Delaware Compressed Gas Co, supra.

Ill—Edward Hines Lumber Co v Great Lakes Chemical Works, 237 Ill App 246.

Mont—Bartholomew v. James, 248 P 771, 76 Mont 359.

Tex—Corpus Juris cited in McConnell v Frost, Civ App, 45 SW 2d 777, 780, error refused.

40 C.J. p 277 note 14—26 C.J. p 667 note 28[c].

Affixation with owner's approval

Property owner, having approved tenant's request for electric sign, cannot complain that sign was not fixture in mechanic's lien action—Young v. Bergner, 243 Ill App 473.

Particular fixtures subject to lien

(1) Brooder houses on farm—Moller-Vandenboom Lumber Co v Boudreau, 85 SW 2d 141, 231 Mo App 1127.

(2) Steel service and comfort stations—R Barcroft & Sons Co v Cullen, 20 P 2d 665, 217 Cal 708.

46. Okl—T J Stewart Lumber Co. v Cloud Chief Gin, 50 P 2d 280, 174 Okl 224.

Tex—Corpus Juris cited in McConnell v Frost, Civ App, 45 SW 2d 777, 780, error refused.

Wyo—Corpus Juris cited in Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 594, 59 Wyo 334, 147 A L R 1089.

40 C.J. p 277 note 15.

47. Ala—First Avenue Coal & Lumber Co v McWilson, 62 So 531, 182 Ala 276.

40 C.J. p 277 note 16.

48. Ind—City of Portland v Indianapolis Mortar & Fuel Co, 106 NE 735, 57 Ind App 166.

40 C.J. p 277 note 17.

49. Ala—Porter & Blair Hardware

Co v Lee, 17 So 216, 105 Ala 361.—Lee v King, 13 So. 506, 99 Ala. 246.

40 C.J. p 277 note 18.

50. Ky—Hall v Bullock, 97 SW 351, 29 Ky L 1254.

Ohio—Skinner Engine Co v Metropole Cafe Co, 19 Ohio NP, NS, 113.

Constitutional Lien on article sold or on which labor was performed has been held not to extend to anything other than such article—Black, Sivalls & Bryson v Operators' Oil & Gas Co, Tex Civ App, 37 SW 2d 313, error dismissed.

51. NH—Goudie v American Moore Peg Co, 122 A 349, 81 NH 88.

Incorporation of materials in building as affecting right to lien generally see supra § 44.

52. NH—Virgin v Britton, 117 A. 14, 80 NH 340.

53. Ohio—Skinner Engine Co v Metropole Cafe Co, 19 Ohio NP, NS, 113.

54. Minn—Northland Pine Co v Northern Insulating Co, 177 NW 635, 145 Minn 395.

55. Kan—Geppelt v Middle West Stone Co, 146 P 1157, 94 Kan 560.

56. Ind—City of Portland v Indianapolis Mortar & Fuel Co, 106 NE 735, 57 Ind App 166.

40 C.J. p 278 note 25.

57. Mo—Meistrell v Reach, 56 Mo App 243—Hall v St Louis Mfg. Co, 22 Mo App 33.

58. Mo—Hall v St. Louis Mfg Co, supra.

not become a fixture.⁵⁹

A mortgage may be "subject to" a mechanic's lien in the sense of being "subordinate to" or "inferior to" the lien,⁶⁰ but not in the sense that the lien attaches to the mortgage debt⁶¹ or the mortgage itself.⁶²

Erection or installation by person not owner of land. Any fixture erected or installed by a person not the owner of the land may be subjected to the lien if detachable from the building without injury.⁶³ However, it has been held that a permanent structure, which was erected by a tenant under a lease providing that it become the landlord's property on termination of the lease, does not become a fixture free of lien until all mechanics' lien claimants have been paid, notwithstanding the posting and filing of notice of nonresponsibility.⁶⁴

59. Wis—Paige v. Peters, 35 NW 328, 70 Wis 178, 5 Am SR 156
40 C.J. p 278 note 28

60. NY—P T McDermott, Inc v Lawyers' Mortg. Co., 133 NE 909, 232 NY 336

61. NY—P T McDermott, Inc v Lawyers' Mortg Co., supra

62. NY—P T McDermott, Inc. v Lawyers' Mortg Co., supra

63. Miss—Cheers Floor & Screen Co v Gidden, 131 So 426, 159 Miss 288.

Furnace became part of dwelling in which installed by purchaser, and could not be removed by mechanic's lienor—Ilten & Taege v Pfister, 211 NW. 407, 202 Iowa 833

64. Cal—English v Olympic Auditorium, 20 P2d 946, 317 Cal 631, 87 ALR 1281

65. Ariz—Ernst v Deister, 26 P2d 648, 42 Ariz 379

Fla—Dunlop v Teagle, 135 So 132, 101 Fla 721

Ky—Weir v Jarecki Mfg Co., 72 S W2d 450, 254 Ky 738—Staton Springs Park Co v Keese, 389 S W 292, 217 Ky 329—Hines v Hollingsworth-Young Hardware Co., 198 S W 716, 178 Ky 233

Okl—National Gas Co v Ada Iron & Metal Co., 93 P2d 529, 185 Okl 415

40 C.J. p 280 note 72

Existence of mortgage

Existence of mortgage on land on which was situated building subject to materialman's lien did not reduce owner's interest in land to "less than a fee simple" estate within statute limiting area of lien, providing that in such case only the owner's interest in the land would be subject to materialman's lien—Federal Land Bank of Spokane v. Green, 90 P.2d 489, 108 Mont 56

Interest of residuary legatee

Mechanic's lien for materials furnished to residuary legatee attached only to his estate or interest and is divested when his interest is divested—Caldwell & Gates Co v Mennes, 209 NW 588, 190 Wis 551

Tenancy in common

Where mechanic's lien filed against father and minor children who held property as tenants in common complied with statutory requirements, and apprised father of nature and circumstances surrounding the claim, in a suit to foreclose the mechanic's lien the father's interest was subject to the lien notwithstanding the children's interest was not—Patrick v Bonthuis, 124 P2d 550, 13 Wash 2d 210

Undivided interest

Under statute a mechanic's lien could be enforced against undivided interest in property of party for whom labor was performed and material was furnished—Browne v Park, 198 So 462, 144 Fla 696

66. Ark—Sebastian Building & Loan Ass'n v Minten, 27 S W2d 1011, 181 Ark 700

67. Ark—Sebastian Building & Loan Ass'n v Minten, supra

Kan.—Wichita Federal Savings & Loan Ass'n v Jones, 130 P2d 556, 155 Kan 821

Okl—Long Bell Lumber Co v Prowant, 243 P 165, 114 Okl 35

Wis—Milwaukee Loan & Finance Co v Grundt, 242 NW. 131, 207 Wis 506

Equitable interest of mortgagor

Where improvements were made to entire tract and not merely to that portion to which the mortgagors had received the deed, materialmen were entitled to coordinate liens not only on that portion of real estate, the

§ 191. Estates or Interests

Generally, a mechanic's lien attaches to whatever interest or estate in the property is owned by the person who caused the building or other improvement to be placed thereon.

Generally a mechanic's lien attaches to whatever interest or estate in the property is owned by the person who caused the building or other improvement to be placed thereon,⁶⁵ whether such interest or estate is legal⁶⁶ or equitable⁶⁷ The lien usually extends to the whole of such person's title or interest,⁶⁸ but it may attach only to a portion of such interest where the scope of the lien is limited by statute⁶⁹ Where the person obligated for the improvements owns less than a fee simple estate the lien attaches only to his interest or estate,⁷⁰ and not to other interests or estates in the land owned by other persons who have not rendered their interests liable to the lien under the statutes of the particu-

legal title of which was in the mortgagors, but on the equitable interest of mortgagors in the remainder of the tract—Wichita Federal Savings & Loan Ass'n v Jones, 130 P2d 556, 155 Kan 821

68. Mass—Webber Lumber & Supply Co v Erickson, 102 NE 940, 216 Mass 81

40 C.J. p 280 note 73

Especially rights

Ill—McNulty v White, 242 Ill App 37

69. Tex—Ferrell v Ertel, Civ App. 100 S W2d 1084, error dismissed

70. Ala—Woodson v Wilson, 144 So 123, 25 Ala App 241

Iowa—Queal Lumber Co v Lipman, 206 N W 627, 200 Iowa 1376

Ky—Cincinnati Stucco Co v North Kentucky Fair, 291 S W. 715, 218 Ky 493

La—Shreveport Armature & Electric Works v. Harwell, App., 172 So 463, followed in Bolinger Gain-Yay, Inc, v Harwell, 172 So 471

Okl—Deka Development Co v Fox, 39 P2d 143, 170 Okl 228

40 C.J. p 280 note 74

Improvement and leasehold

(1) Where improvement is made on land by lessee, mechanic's lien extends only to the improvement and the leasehold

Ala—Harden v Wood Lumber Co., 178 So 540, 235 Ala. 310

Kan—J B Ehrsam & Sons Mfg Co v Rice, 112 P2d 95, 153 Kan 483

—Miller v Bankers' Mortg Co., 287 P 618, 130 Kan 543

(2) Mechanic's lien against leasehold is acquired subject to rights of lessor, and must be enforced against improvements and leasehold together—Coen & Conway v Scott County Sav. Bank, 218 NW. 325, 205 Iowa 483

lar jurisdiction⁷¹ It has been held that the purchaser of property is required to pay the amount of liens against the property which he assumed and agreed to pay as part of the purchase price, together with any increase in the amount thereof caused by failure to pay when due⁷²

§ 192. — Of Person Named in Claim or Statement as Owner

It has been held that a mechanic's lien attaches only to the interest, if any, of the person against whom the claim, notice, or statement is filed; but there is some authority to the contrary.

In some jurisdictions it has been held that the lien attaches only to the interest, if any, of the person against whom the claim, notice, or statement is filed⁷³ or who is named therein as owner or reputed owner⁷⁴ In other jurisdictions, however, there are decisions inconsistent with this view⁷⁵

71. Ill.—*F. K. Ketler Co v County Fair Grounds Corporation*, 21 NE 2d 779, 301 Ill App 117

Iowa—*Coen & Conway v Scott County Sav Bank*, 218 NW 325, 205 Iowa 483—*Queal Lumber Co v Lipman*, 206 NW 627, 200 Iowa 1376

La.—*Shreveport Armature & Electric Works v Harwell*, App, 172 So 463, followed in *Bolinger Gain-Yay, Inc. v Harwell*, 172 So 471

Pa.—*Stahl v Wildwood Development Co*, Com Pl, 89 Pittsb Leg J 284, 50 York Leg Rec 60
40 C J p 281 note 75

Improvements by life tenant

(1) Owners of remainder in fee were entitled to consider that alteration of building thereon was being made on credit of life estate holder and his lessees, so that mechanics and materialmen were not entitled to lien against fee—*Masteison v Roberts*, 78 S.W.2d 856, 336 Mo 158, 97 A.L.R. 862.

(2) Lien for improvements under contract with life tenant and part owner of fee without knowledge or consent of other remaindermen attaches only to the life estate and part of the remainder, not to the entire remainder—*Allen v Brown*, 14 Tenn App 405

Owner's declaration of non-liability

Where owner of land upon which building is constructed has definitely made it clear that his property is not to be bound, owner, even though interested ultimately in building, is not, under statutes, to be regarded as having procured work to be done, and builder's lien extends only to interest of lessee who has procured its

doing—*Stowers v Wheat*, C.C.A. Fla., 78 F.2d 25

72. Ky.—*Ward v Butcher*, 92 S.W. 2d 741, 263 Ky 585

73. N.Y.—*Pennsylvania Steel Co v Title Guarantee & Trust Co*, 100 N.Y.S. 299, 50 Misc 51, affirmed 105 N.Y.S. 1135, 120 App Div 879
40 C J p 281 note 79

74. Del.—*In re Long*, 86 A. 104, 27 Del 88

Reliance on record title

Mechanic's lien claimant is entitled to rely on record title to show ownership of property—*Fischer Lime & Cement Co v Kaucher*, 51 S.W.2d 492, 164 Tenn 657—*Thomas v Setliffe*, 28 S.W.2d 344, 160 Tenn 689

75. Pa.—*Citizens' Bank v Lesko*, 120 A 808, 277 Pa 174
40 C J p 281 note 81

76. Idaho—*Pacific Coast Pipe Co v Blaine County Irr Co*, 187 P 940, 32 Idaho 705

Me.—*Otis Elevator Co v Finks Clothing Co*, 159 A 563, 131 Me 95

77. Fla.—*Dunlop v Teagle*, 135 So 132, 101 Fla 721—*Service Lumber & Supply Co v Cox*, 123 So 820, 98 Fla 405
40 C J p 281 note 83.

78. Ohio—*Mahoning Park Co v Warren Home Dev Co*, 142 NE 883, 109 Ohio St 358
Tenn.—*Thomas v Setliffe*, 28 S.W.2d 344, 160 Tenn 689.

79. Conn.—*Hannan v Handy*, 134 A 71, 104 Conn 653, 47 A.L.R. 259

Fla.—*Dunlop v Teagle*, 135 So 132, 101 Fla 721—*Service Lumber & Supply Co v Cox*, 123 So. 820, 98 Fla 405

§ 193. — At Particular Time

A mechanic's lien extends to the interest owned by the person who caused the improvement to be made at the time the lien attached, or when the work or furnishing of materials commenced, and it has been held that the lien also extends to an interest subsequently acquired by him.

A mechanic's lien extends at least to the interest owned by the person who caused the improvement to be made at the time the lien attached⁷⁶ or when the work⁷⁷ or the furnishing of the materials⁷⁸ commenced. It has generally been held that the lien extends also to an interest subsequently acquired by the person responsible for the improvement⁷⁹ at least where no intervening equity forbids⁸⁰ or where the acquisition is during the progress of the improvement⁸¹ or is of an interest which increases or enlarges the estate to which the lien has already attached⁸² as distinguished from a distinct and independent interest which does not merge in the estate previously held⁸³ It has even been held that the lien attaches to an interest subsequently ac-

N.J.—*Loizeaux Lumber Co v Steinberg*, 131 A 131, 102 N.J. Law 15—*Essex Sash & Door Co v Murphy*, 166 A 510, 11 N.J. Misc 92

Or.—*Corpus Juris* quoted in *Paget v. Peters*, 286 P 983, 988, 133 Or. 608, rehearing denied 289 P. 1119, 133 Or 608

Utah—*U. S. Building & Loan Ass'n v Midvale Home Finance Corporation*, 44 P.2d 1090, 86 Utah 506, rehearing denied 46 P.2d 672, 86 Utah 522

40 C J p 281 note 85.

80. Kan.—*Thomas v Hoge*, 48 P. 844, 58 Kan 166

Or.—*Corpus Juris* quoted in *Paget v. Peters*, 286 P 983, 988, 133 Or 608, rehearing denied 289 P 1189, 133 Or 608

Acquisition of title in trust

Acquisition by the tenant of a deed to the property under a parol trust does not extend the lien to the fee acquired but the lien remains attached only to the leasehold—*Roshi v Henck*, 5 Tenn App 153

81. Or.—*Corpus Juris* quoted in *Paget v. Peters*, 286 P 983, 988, 133 Or 608, rehearing denied 289 P 1189, 133 Or 608
40 C J p 281 note 87

82. Kan.—*Robert Garrett Lumber Co v. Loftus*, 109 P. 179, 82 Kan. 556

Or.—*Corpus Juris* quoted in *Paget v. Peters*, 286 P 983, 988, 133 Or 608, rehearing denied 289 P. 1189, 133 Or 608

40 C J p 281 note 85

83. Kan.—*Robert Garrett Lumber Co. v. Loftus*, 109 P. 179, 82 Kan. 556

40 C J p 282 note 89.

quired by a person who had no title or interest at the time the contract was made ⁸⁴

In some jurisdictions, however, the lien is limited to the interest of the owner who caused the improvement to be made at the time the lien attached,⁸⁵ the time the work,⁸⁶ building,⁸⁷ or furnishing of materials⁸⁸ began, or the time the notice or claim was filed,⁸⁹ and does not extend to a subsequently acquired interest ⁹⁰ It has been held, where the owner changes his interest in lots from a fee into a leasehold after the erection of the buildings, that a lien may, at the election of claimant, be claimed against the lesser interest.⁹¹ However, it has also been held that it is not in the power of the lienor to enlarge or diminish the interest to which the lien, by the statute, attaches.⁹²

§ 194. — Interest of Vendor for Improvements of Purchaser

A mechanic's lien for improvements by the purchaser ordinarily does not attach to the vendor's interest in the property if he has not done anything to subject his interest to liability.

As a general rule, where the purchaser of property is responsible for a building, improvement, or structure by reason of which a mechanic's lien may be claimed against his interest, the interest of the vendor of the property is not subject to the lien if he has not done anything which would render his interest liable to the lien under the statutes of the

particular jurisdiction,⁹³ as by consenting to the improvements or knowingly permitting the purchaser to contract therefor, as discussed supra § 71, or by failing to give statutory notice of nonresponsibility after acquiring knowledge of the improvement, discussed supra § 84 The lien against the purchaser's equitable estate ordinarily will not extend to the vendor's fee interest on the acquisition by the vendor of the purchaser's equitable estate ⁹⁴

§ 195. — Reversion of Landlord for Improvements by Tenant

A mechanic's lien for improvements made on land by a tenant ordinarily does not extend to the interest of the landlord if the latter has not done anything to subject his interest to liability

Ordinarily a mechanic's lien for improvements on land made by a tenant does not extend to the interest of the landlord, if, under the statutes, he has not rendered his interest subject to liability,⁹⁵ by consenting to the improvement or knowingly permitting the tenant to contract therefor, as discussed supra § 65, or by failing to give statutory notice of nonresponsibility after acquiring knowledge of the improvement, discussed supra § 84.

§ 196. Rents and Proceeds of Property

Where the property subject to a mechanic's lien has been sold and converted into money, under such circumstances as to be discharged of the lien or beyond the reach of the court, the lien may attach to, and be satisfied out of, the proceeds.

84. Mich—David Lupton's Sons Co v Berghoff Printing Co, 229 NW 810, 249 Mich 455
40 C J p 282 note 90

Subsequent leasehold

Lessee under lease executed after principal contract was made and after furnishing of first of materials and labor had interest to which lien could attach—David Lupton's Sons Co v Berghoff Printing Co, supra—40 C J p 282 note 90[b]

85. Idaho—Smith v Faris-Kesl Constr. Co, 150 P 25, 27 Idaho 407

86. Mich—Sisson v Holcomb, 26 N W 155, 58 Mich 634

87. Md—Goldheim v Clark, 13 A 363, 68 Md 498

88. Mich—Sisson v Holcomb, 26 N W 155, 58 Mich 634

89. Del—In re Long, 86 A 104, 27 Del 88
40 C J p 282 note 95

90. Md—Mills v Matthews, 7 Md 315

91. Md—Goldheim v. Clark, 13 A 363, 68 Md 498.

92. Mass—Webber Lumber & Supply Co v Erickson, 103 NE 940, 216 Mass 81

93. Kan—Kennedy v Atchison, 178 P 2d 987, 162 Kan 694

Okla—Long-Bell Lumber Co v Prowant, 243 P 165, 114 Okl 35

Recording of contract

Lien for improvements by purchaser does not attach to the fee where the vendor recorded the contract which did not authorize improvements—Pitcher v Ravven, 242 P 375, 137 Wash 343

94. Okla—Thomas v Soper Lumber Co, 171 P 736, 69 Okl 197
Wis—Milwaukee Loan & Finance Co v Grundt, 242 NW 131, 207 Wis 506

Rescission of executory contract reserving legal title, for purchaser's default after materialman's lien has attached to equitable interest, does not extend lien to fee—Albuquerque Lumber Co. v. Tomel, 250 P. 21, 32 NM 5

Constructive notice

Mechanic's lien claimant before conveyance under contract to purchase was held charged with knowledge of possibility that interest of

purchasers might be forfeited—Behr v Interlaken Const Co, 147 A 499, 7 N J Misc 743

95. Ala—Harden v. Wood Lumber Co, 178 So 540, 235 Ala 310

Cancellation of lease

Lien for labor and materials furnished lessee did not attach to lessor's interest, where recorded lease providing for cancellation for default and that lessees should make repairs was canceled for default before lien was filed—Carroll v Garros & Miller, 188 NE 364, 46 Ohio App 220

Waiver of right to lien

Where lease providing that contracts made by lessee for erection of buildings should contain waiver of contractor's right to mechanic's lien as against lessor's estate, was terminated on default in payment of rent, and contractor waived right of lien on lessor's estate and lessee did not exercise right of removal of fixtures within time prescribed by lease, nothing remained on which contractor's claim to mechanic's lien could attach—F K Kettler Co v County Fair Grounds Corporation, 21 NE 2d 779, 301 Ill App 117.

Where the property subject to a mechanic's lien has been sold and converted into money, under such circumstances as to be discharged of the lien or beyond the reach of the court, the lien may attach to, and be satisfied out of, the proceeds⁹⁶ However, where the building has been destroyed by fire, the lien does not attach to the proceeds of a fire insurance policy.⁹⁷ Rents of leased premises, continuing in the possession of the owner and his lessee until the date fixed by decree foreclosing mechanic's liens thereon, belong to the owner so that the lienors may be entitled to the award of such rents toward the payment of the owner's debts to them, if they

establish priority over other claimants,⁹⁸ but on expiration of the date fixed by the decree the property may be regarded as appropriated by the lienors, and they are not entitled to payment of rents by the receiver thereof where the value of their equity in the property is sufficient to satisfy the owner's debts to them⁹⁹

In some instances it has been held that, where the lien is unenforceable against the property, claimant is entitled to payment out of rents received by a testamentary trustee¹ or the representatives or heirs of the owner,² but they are not entitled to payment from the revenue of a spendthrift trust.³

D. PRIORITIES

§ 197. In General

Priorities given by mechanics' lien statutes sometimes depend on the filing of the lien, although, if filed, the lien may affect third persons during the period it was not of record.

Under some statutes the priorities given by the mechanics' lien statutes depend on the filing of the lien⁴ and do not exist as inchoate rights arising from the fact that labor has been done or materials furnished⁵ However, a lien or privilege, if recorded within the time and in the manner prescribed by law, may affect third persons during the period in which it was not of record,⁶ and the fact that the work is in progress has been held notice to all who deal with the property of the statutory right of materialmen and mechanics to perfect liens thereon.⁷ It has also been held that the priority of mechanics' liens may be established in equity, although

they were not filed within the time fixed by statute.⁸

§ 198. Between Different Mechanics' Liens

- a. In general
- b. Priority determined by time
- c. Preference or postponement of particular classes of claimants
- d. Effect of intervening encumbrance
- e. Liens on amount due contractor or subcontractor

a. In General

As a general rule all mechanics' liens arising out of the erection of the same improvement are equal and share pro rata if the amount available is insufficient to pay all in full

As a general rule, sometimes by virtue of statute, all mechanics' liens on the same property and arising

96. *US—Corpus Juris* cited in *Oil Well Supply Co v First Nat Bank of Winfield*, CCA Kan., 106 F2d 399, 405

40 C.J. p 278 note 32

Execution sale of leasehold

Persons holding liens for materials and labor furnished lessee in making alterations in leased premises held relegated to the proceeds of the sale of the lease where rights of lessee were sold under a judgment in favor of lessor for rent due under lease, and all of lessee's rights under contract of lease became those of lessor by reason of purchase at sheriff's sale and contract of lease which provided for such a termination—*Shreveport Armature & Electric Works v Harwell*, La App., 172 So 463, followed in *Bolinger Gann-Yay, Inc. v Harwell*, 172 So 471

97. *Minn—Imperial El Co v Bennett*, 149 N.W. 372, 127 Minn 256 40 C.J. p 278 note 33

Liens for subsequent repairs

Where a loss was sustained under

a fire policy payable to the mortgagee, and both property owner and mortgagee joined in negotiations for collection with understanding that proceeds were to be used to repair building, and insurer by virtue of this agreement directed owner to have building repaired, parties furnishing labor and materials with knowledge of such understanding could, to the extent of the insurance fund, collect from the mortgagee, and enforce a lien on the property to the extent of the insurance fund—*Savings Building & Loan Ass'n v Seaman-Packard Lumber Co.*, 40 P 2d 660, 170 Okl 331

98. *Conn—City Lumber Co of Bridgeport v. Murphy*, 179 A. 339, 120 Conn 16

99. *Conn—City Lumber Co of Bridgeport v. Murphy*, supra.

1. *Ky.—Hall v. Bullock*, 97 S.W. 351, 29 Ky L 1254

2. *Miss—Hoover v. Wheeler*, 23 Miss 314.

3. *Kan—Pond v. Harrison*, 152 P 655, 96 Kan 542, L.R.A. 1916B 1264

4. *NY—Riverside Contracting Co. v New York*, 148 N.Y.S. 281, affirmed 150 N.Y.S. 1109, 165 App Div 972, affirmed 113 N.E. 564, 218 N.Y. 596, Ann Cas 1918C 1075

Time of filing as affecting priority between

Different mechanics' liens see *infra* § 198.

Mechanics' liens and mortgages or like encumbrances see *infra* § 204a.

5. *N.Y.—Riverside Contracting Co v New York*, supra

6. *La.—Central Lumber Co v. Schroeder*, 114 So 644, 164 La 759

7. *Ala.—Grimsley v First Ave Coal & Lumber Co*, 115 So 90, 217 Ala 159.

8. *Iowa—Hunt Hardware Co. v. Herzoff*, 195 N.W. 264, 196 Iowa 715.

ing out of the erection of the same building or improvement stand on an equality⁹ and share pro rata in the amount realized where it is not sufficient to pay all in full¹⁰. Sometimes the rule is deemed applicable regardless of whether the claims are for labor or for materials,¹¹ or of the times when the several claimants entered into¹² or registered¹³ their contracts, actually commenced to perform work or furnish materials,¹⁴ served notices of intention to file liens,¹⁵ filed their respective claims, statements, or notices,¹⁶ or proceeded to enforce their liens¹⁷. The claim of a person who has failed to take all the steps necessary fully to protect his rights may be postponed to the claims of other persons¹⁸. The action of lien claimants in lulling other claimants into inactivity may, under some circumstances, be sufficient reason for giving priority to the other labor and material liens¹⁹.

Abandonment of contract by contractor. The

general rule that, where the amount available for the satisfaction of liens is not sufficient to pay all claims in full, all are to share pro rata applies where the principal contractor abandons the work²⁰. However, a subcontractor undertaking to complete the contract of the principal contractor may, by agreement with another subcontractor, be entitled to priority over the latter²¹. Also it has been held that claims for extras, beyond and outside the contract, furnished by a materialman to the owner of a building, in order to enable him to complete it after the contractor had made default, are entitled to priority over claims by materialmen for material furnished the contractor²².

Effect of judgment on lien. The fact that a judgment at law has been entered on a lien does not necessarily give it priority in payment or advantage over liens on which a judgment has not been

9. Conn—Bridgeport People's Sav. Bank v Palaia, 161 A. 526, 115 Conn 357—J. L. Purcell, Inc. v Libbey, 149 A. 225, 111 Conn 132, 68 A.L.R. 1258

Ind—McLaughlin Mill Supply Co v Laundry Service, 184 N.E. 429, 95 Ind App 693

NJ—Naidech v Hempfling, 24 A.2d 524, 127 N.J. Law 430—Posnak & Turkish v Newsit Realty Co., 156 A. 481, 108 N.J. Law 126

NY—Fosson v Elmus Bldg Corporation, 11 N.E.2d 329, 376 N.Y. 30—Corbin-Kellogg Agency v Tasker, 289 N.Y.S. 156, 248 App Div 58—C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth College, 6 N.Y.S.2d 671, 168 Misc 376

Ohio—Crawford v Liston, 176 N.E. 598, 38 Ohio App 294—Ohio Sav. Ass'n v Bell, 158 N.E. 548, 25 Ohio App 84

Tex—Ferrell v Ertel, Civ App, 100 S.W.2d 1084, error dismissed—Corpus Juris cited in McConnell v Frost, Civ App, 45 S.W.2d 777, 781, error refused

Utah—U.S. Building & Loan Ass'n v Midvale Home Finance Corporation, 44 P.2d 1090, 86 Utah 506, rehearing denied 46 P.2d 672, 86 Utah 522

40 C.J. p 283 note 3

Ownership of lot; lien on improvements only

Lien which one performing labor or furnishing material for improvement of lot under contract with one who is not owner of lot has on improvements, separate and apart from realty, is coequal with lien on improvements of one performing labor or furnishing material under contract with owner of lot—Braden Co v. Robinson, 48 P.2d 437, 171 Okl.

378—Braden Co v Lancaster Lumber Co., 38 P.2d 575, 170 Okl. 30, 103 A.L.R. 230

Materials furnished after owner's failure to supply

Facts that owner originally agreed to furnish certain materials, but did not and contractor purchased them on his own account, did not put seller in position of original contractor and give claim priority over other materialmen's claims—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co., 154 So. 591, 228 Ala. 612, 102 A.L.R. 346

Assignment of note secured by contractor's lien

Where a contractor received from the owner two notes, secured by a contractor's lien, the notes were held, under the circumstances, equal in priority, notwithstanding the contractor assigned one of the notes—Malby v Longoria, 78 S.W.2d 176, 134 Tex 428

10. Ark—Rust v Kelley Bros Lumber Co., 21 S.W.2d 973, 180 Ark 517

NJ—Naidech v Hempfling, 24 A.2d 524, 127 N.J. Law 430

Okla—Republic Supply Co v Powell, 175 P. 519, 71 Okl. 105, 3 A.L.R. 352

40 C.J. p 283 note 4

11. Ark—Rust v Kelley Bros Lumber Co., 21 S.W.2d 973, 180 Ark 517

La—Crawford v Soap, 130 So. 631, 14 La App 648

Okla—Braden v Robinson, 48 P.2d 437, 171 Okl. 378

Tex—McConnell v Frost, Civ App, 45 S.W.2d 777, error refused

40 C.J. p 283 note 5

12. Ill—Vivig v Carr, 86 Ill. 347

40 C.J. p 283 note 6

13. La—Jamison v Barelli, 20 La. Ann. 452

14. Cal—Crowell v Gilmore, 18 Cal. 370

Mo—Lee & Boutell Co v C. A. Brockett Cement Co., 106 S.W.2d 451, 341 Mo. 95

15. Conn—Stone v Moomjian, 103 A. 635, 92 Conn. 476

40 C.J. p 283 note 9

16. Ala—Le Grand v Hubbard, 112 So. 826, 216 Ala. 164

Conn—New Haven Orphan Asylum v James A. Haggerty Co., 142 A. 847, 108 Conn. 232

40 C.J. p 283 note 10

Filing within statutory period

Under some statutes materialmen's liens are deemed of same date when recorded within a specified time after completion of work—Picklesimer v Smith, 189 S.E. 72, 164 Ga. 600

17. La—Crawford v Soap, 130 So. 631, 14 La App 648.

18. Tex—Nichols v Dixon, 89 S.W. 765, 99 Tex. 263

40 C.J. p 283 note 15.

19. Wash—Spokane Savings & Loan Soc v Park Vista Improvement Co., 294 P. 1028, 160 Wash. 12

20. Ark—Marianna Hotel Co v Lavermore Foundry & Machine Co., 154 S.W. 952, 107 Ark. 245—Sternberg v Ft. Smith Refrigerator Works, 112 S.W. 174, 87 Ark. 56, 20 L.R.A., NS, 89

Priority between lien claimants and surety completing contract see infra § 215.

21. N.Y.—Held v St. Anthony of Padua Church, 174 N.Y.S. 853, 187 App Div. 916.

22. Tex—Beilharz v. Illingsworth, 132 S.W. 106, 62 Tex. Civ. App. 647.

rendered,²³ and a claimant who has not preserved his lien in the manner required by statute may not obtain priority over other claimants, who have preserved their liens under the statute, by resorting to attachment proceedings and obtaining judgment on his claim²⁴

Different improvements As between mechanics' liens arising out of different improvements on the same property, the lien which first attached has priority²⁵ Under some statutory provisions, in the case of several buildings constructed under one contract, if there are conflicting liens each lienor has priority on the particular building where his labor was performed or his material used,²⁶ and where a lien on particular property is subject to a prior lien covering that property and also other property, and the prior liens are cut off as to the other property, the prior liens take precedence in the particular property only to the extent of the value of the labor and material that went into such property²⁷

b. Priority Determined by Time

Under some statutes mechanics' liens have precedence in the order in which the respective claims accrued or were filed

Under some statutes mechanics' liens have precedence according to the order in which the respective claims, notices, or statements were filed for record,²⁸ at least where statutes preferring or postponing certain classes of claims are not applicable and all claims are in the same class²⁹ Al-

so under some statutes there are priorities between claimants, or at least claimants of a particular class, based on the time when their liens accrued,³⁰ when they severally commenced to render services or furnish materials,³¹ when notices were served³² or steps were taken to enforce their respective liens³³

Under a statute providing for a preferred position to lien claimants who give statutory notice, no preference is obtained by a lien claimant who fails to comply with the statutory requirements as to the form of the notice³⁴ Priority of a mechanic's lien has been held not destroyed by mere formal compliance with a statute providing for the subordination of liens to a subsequent mortgage and the placing of all such subordinated liens on a par with respect to each other³⁵

c. Preference or Postponement of Particular Classes of Claimants

The class or nature of the claim asserted affects the priority of a mechanic's lien under some statutes.

Priorities between different claims or claimants according to the class or nature of the claims are prescribed by the statutes of some jurisdictions³⁶ The liens of laborers are given preference over the liens of other claimants,³⁷ such as materialmen³⁸ or contractors,³⁹ by the statutes of some jurisdictions, at least in certain cases⁴⁰ Also under the statutes of some jurisdictions the rights of the principal contractor are postponed to those of all other claimants whose claims arise through him,⁴¹ and the rights of

23. NJ—Morris County Bank v Rockaway Mfg Co, 16 N J Eq 150 40 C J p 283 note 21

24. Ky—Hyde Park Supply Co v Peck-Williamson Heating & Ventilating Co, 195 SW 1115, 176 Ky 513, reheard 197 SW 391, 176 Ky 656

25. Tex—Cain v Texas Bldg & Loan Ass'n, 51 SW 879, 21 Tex Civ App 61 40 C J p 285 note 54

26. NY—Lichtenstein v Grossman Const Corporation, 225 NYS 118, 221 App Div 527, modified on other grounds 162 NE 292, 248 NY 390

27. NY—Lichtenstein v Grossman Const Corporation, supra

28. US—In re Fleetwood of Hendersonville Hotel Corporation, DC NC, 1 F Supp 125

NC—Boykin v Logan, 165 SE 680, 203 NC 196 40 C J p 283 note 24

29. US—Kemp Lumber Co v Howard, NM, 237 F 574, 150 C CA 456

40 C J p 283 note 26.

30. NH—Kendall v Pickard, 32 A 763, 67 NH 470 40 C J p 283 note 27

31. Conn—Hartford Builders' Finish Co v Anderson, 122 A 76, 99 Conn 343 40 C J p 284 note 28

32. Miss—Citizens' Lumber Co v Netterville, 102 So 178, 137 Miss 310 40 C J p 284 note 29

33. NH—Kendall v Pickard, 32 A 763, 67 NH 470 40 C J p 284 note 30

34. Ala—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 102 ALR 346

35. NY—Cho Realty Corporation v Hefan Bldg Corporation, 238 NY S 127, 227 App Div 489

36. US—Kemp Lumber Co v Howard, NM, 237 F 574, 150 CCA 456 40 C J p 284 notes 32, 33

37. Okl—Pacific Petroleum Co. v Sunbeam Oil Co, 54 P 2d 1054, 176 Okl 293—Central Finance Corpora-

tion v Brown, 54 P 2d 196, 175 Okl 528 40 C J p 284 note 34

Assignees

A person taking assignment of lien claims for wages was entitled to priority over other lien claimants—John H Black Co v Surdam Holding Corporation, 250 NYS 17, 140 Misc 113.

38. Ga—Lakewood Lumber & Supply Co v Hughes, 167 SE 518, 176 Ga 239

NJ—Brown v Home Development Co, 18 A 2d 742, 129 N J Eq 172

NY—Kolkman v Eshelman, 230 NYS 91, 132 Misc 428

Okl—Pacific Petroleum Co v Sunbeam Oil Co, 54 P 2d 1054, 176 Okl 293—Central Finance Corporation v Brown, 54 P 2d 196, 175 Okl 528 —T J Stewart Lumber Co. v Derry, 253 P 485, 122 Okl 208

39. NY—Kolkman v Eshelman, 230 NYS 91, 132 Misc 428.

40. NY—Bracker v Weldgen, 192 NYS 562, 118 Misc 177 40 C J p 284 notes 35, 36

41. Tex—W L MacAtee & Sons v House, 153 SW 2d 460, 137 Tex.

a subcontractor are postponed to those of laborers and materialmen,⁴² or, in other words, to those of all persons other than original contractors and subcontractors⁴³ A statute giving priorities only to laborers and materialmen has been held impliedly to exclude subcontractors⁴⁴

d. Effect of Intervening Encumbrance

The existence of an intervening encumbrance which is superior to some mechanics' liens, but inferior to others, may prevent the equality which would otherwise exist as between the mechanics' liens.

Although as between themselves several mechanics' liens may be entitled to stand on an equality, this may be prevented by the existence of an encumbrance which, while inferior to some of the liens, is superior to others,⁴⁵ in such case the fund is to be applied first to the payment of the liens superior to the intervening encumbrance, in full or pro rata as the case may be, next to the encumbrance, and lastly to the liens inferior to the encumbrance, pro rata.⁴⁶ The rule may apply even though the debt secured by the intervening encumbrance is not yet due and payable⁴⁷

Where one who performs labor or furnishes material under the contract between the owner and the contractor acquires a lien as of the time the contractor commenced his work, but one who furnishes labor or material directly to the owner acquires a

lien only from the time he commences to furnish the labor or material, no lien, mortgage, or other encumbrance can intervene between the liens of laborers and materialmen when the claimants' rights relate to and originate in a contract between the owner and contractor,⁴⁸ whereas, if the labor is performed or the material furnished directly to and on the credit of the owner, mortgage liens and other encumbrances may attach to the property between the dates that their rights to their liens accrue, and thereby defeat the equality which would otherwise exist as between the lien claimants⁴⁹

e. Liens on Amount Due Contractor or Subcontractor

Under some statutes mechanics' liens on funds due to a contractor or subcontractor take precedence in the order in which the lien claimants served their notices; but under other statutes the amount available is distributable pro rata among the claimants

Under some statutes giving subcontractors, materialmen, etc, a lien on the amount due the contractor from the owner, claimants are sometimes entitled to priority of payment out of such fund in the order of the time in which their notices were served on the owner,⁵⁰ or are to be preferred⁵¹ or postponed⁵² according to their diligence or lack of diligence. Under other statutes the amount is to be distributed pro rata among claimants⁵³ who have complied with the statute by giving the proper no-

259—Wilson v Sherwin-Williams Paint Co, 217 SW 372, 110 Tex. 156

40 C J p 284 note 37

42. Idaho—Riggen v Perkins, 246 P 962, 42 Idaho 391

49 C J p 284 note 38

43. U S—Kemp Lumber Co. v Howard, N.M., 237 F. 574, 150 CCA 456

40 C J p 284 note 39

44. N J—Wilkinson v Behringer, 189 A. 405, 118 N J Law 5

45. Ariz—Corpus Juris quoted in Wylie v Douglas Lumber Co, 8 P. 2d 256, 260, 39 Ariz 511, 83 A.L.R. 918

Idaho—Pacific States Sav. Loan & Building Co v Dubois, 83 P. 513, 11 Idaho 319

46. Ariz—Corpus Juris quoted in Wylie v Douglas Lumber Co, 8 P. 2d 256, 260, 39 Ariz 511, 83 A.L.R. 918

N J—Corpus Juris cited in Meister v J Meister, Inc., 142 A. 312, 315, 103 N J Eq 78

N Y—Merritt v Dansmith Corporation, 270 N Y S 675, 240 App Div 338

Okl—Okmulgee Plumbing Co v Comstock, 257 P 320, 125 Okl 245
40 C J p 284 note 42

47. Cal—Burnett v Glas, 97 P 423, 154 Cal 249

40 C J p 285 note 43

48. Ariz—Wylie v Douglas Lumber Co, 8 P. 2d 256, 39 Ariz 511, 83 A.L.R. 918

49. Ariz—Wylie v Douglas Lumber Co, supra.

50. Fla—Curtiss-Bright Ranch Co v Selden Cypress Door Co, 107 So 679, 91 Fla. 354

N J—Brown v Home Development Co, 18 A 2d 742, 129 N J Eq 173—St Michael's Orphan Asylum and Industrial School, Hopewell, N J, v Conneen Const. Co, 166 A. 458, 114 N J Eq 276, affirmed 170 A 649, 115 N J Eq 334—Israel v Baker, 139 A. 526, 101 N J Eq 699—Vogel v Sloan, 130 A. 889, 98 N J Eq 300

40 C J p 285 note 47.

Lien on money due contractor see supra §§ 114-117

Priority between lienors and assignee see infra § 211

Sufficiency of notice

Written notice by claimant, under statute requiring written notice to be given owner of building, handed to architect in charge of building during absence of owner from state, and after search for owner, is sufficient to

give claimant priority over another claimant who gave notice to owner personally after architect handed first notice to owner on his return, where statute does not require service of notice, but only receipt of written notice by owner—Vogel v Sloan, 130 A. 889, 98 N J Eq 300

Filing with owner and county recorder

Materialman filing sworn statement of claim with owner of building and copy thereof with county recorder had valid lien preferred to claims of other materialmen who failed to present sworn statement, regardless of time when copy of statement was filed with county recorder, but failure to file statement with recorder forfeits preference over others who have filed statements with owner—B F Sturtevant Co v Board of Education of City School Dist of Cincinnati, 1 NE 2d 148, 51 Ohio App 348

51. Tex—Rotsky v Kelsay Lumber Co, Com App, 228 SW 558, rehearing denied 230 SW xvi

52. Cal—Southern California Electric Co v McDonald, 173 P. 760, 178 Cal 386

40 C J p 285 note 49

53. NC—Morganton Mfg. & Trad-

tice,⁵⁴ and a claimant who brings an action to enforce his lien against the property gains no advantage over the other claimants in respect of the amount due the contractor.⁵⁵ Under some statutes as between stop notice claimants labor claims take precedence over claims of materialmen.⁵⁶

Where the contractor has completed at a loss work abandoned by a subcontractor, his claim ordinarily takes precedence over the claims of persons who did work for, and furnished materials to, the subcontractor and served stop notices.⁵⁷ At least where title to the materials has not passed to the contractor, and the contractor is not indebted to the subcontractor, one who has supplied materials to the subcontractor and has filed and served a stop notice in compliance with the mechanics' lien law is not entitled to priority of payment out of moneys due the contractor from the building owner.⁵⁸ However, it has been held that where the building contractor has assumed title to all materials delivered on the job he cannot avoid payment from moneys due under the contract merely because he expended more money in completing the subcontract than the balance due thereunder.⁵⁹

Rights of beneficiaries of subcontractor's estate.

ing Co v Andrews, 81 SE 418, 165 NC 285, Ann Cas 1916A 763
40 CJ p 285 note 50

54. NC—Charlotte Pipe & Foundry Co v Southern Aluminum Co, 90 SE 923, 172 NC 704
40 CJ p 285 note 51

55. NC—Charlotte Pipe & Foundry Co v Southern Aluminum Co, supra

56. NJ—Harry Pinsky & Son Co v Wike, 136 A 920, 101 NJEq 45, affirmed 141 A 920, 103 NJEq 18
Preference or postponement of particular classes generally see supra subdivision c of this section

57. NJ—Morris County Golf Club v Hegeman-Harris Co, Ch. 121 A 528, affirmed 125 A 127, 94 NJEq 802

58. US—Noland Co v Chelsea Housing Corporation, CCANJ, 128 F2d 872

Title to materials held not in contractor

Under contract between contractor and subcontractor making rate of subcontractor's pay dependent on amount of materials furnished, prohibiting subcontractor from removing materials from project site, and requiring contractor to keep materials insured, contractor had no title to materials, and hence party which supplied materials to subcontractor and filed and served stop notice was not entitled to priority of payment

out of moneys due contractor from owner where contractor was not indebted to subcontractor—Noland Co v Chelsea Housing Corporation, supra

59. NJ—St Michael's Orphan Asylum and Industrial School, Hopewell, N J, v Conneen Const Co, 166 A 458, 114 NJEq 276, affirmed 170 A 649, 115 NJEq 334

60. Tex—Stanfill v Penniman Gravel & Material Co, Com App, 27 S W 2d 135

61. Mortgagee as real owner of property

(1) Where a mortgagee who was the real owner of the premises, or the sole owner of the equitable title, by reason of a conveyance of title from the mortgagor to an appointee of the mortgagee, contracted for improvements to be put on the premises, mechanics' liens arising as a result thereof were held superior to the mortgage—Fletcher Ave Saving & Loan Ass'n v Roberts, 188 NE 794, 99 Ind App 391

(2) Where a corporation owning the property and a corporation holding a mortgage thereon were practically one and the same company, having the same stockholders, directors, and general manager, their accounts being paid out and received for and on behalf of each other, it was held that the mortgage was not entitled to any preference over the

The lien of a materialman for materials purchased from him by a subcontractor is entitled to priority of payment, out of the amount due by the contractor to the subcontractor, over the rights of the beneficiaries of the estate of the subcontractor.⁶⁰

§ 199. Between Mechanic's Lien and Mortgages or Like Encumbrances

In general priorities as between mechanics' liens and mortgages or like encumbrances depend on the provisions of the various statutes and the facts of the particular case.

In any given case, priorities as between mechanics' liens and mortgages or like encumbrances depend on the provisions of the statutes and the facts and circumstances of the case.⁶¹ Particular statutes, however, have been construed as not affecting the matter of priority as between mortgages and mechanics' liens.⁶² Thus a statute, the purpose and object of which are to define and fix the respective rights of mechanics' liens inter sese only, does not affect the matter of priority as between mechanics' liens and a mortgage.⁶³ A mortgagee takes priority over a lien claimant where it appears that the items for which the lien is claimed are nonlienable.⁶⁴

Notice of a prior mortgage which is void as to

liens of mechanics and materialmen—Keane v Thomas B Watson Co, 271 P 73, 149 Wash 424

Application of loan for payment of labor and materials

Holder of deed of trust which was subordinate to mechanics' lien was held not entitled to convert his lien into a mechanic's lien, or to effect priority over mechanic's liens by application of loan to payment for labor and materials—Rust v Indiana Flooring Co, 145 SE 321, 151 Va. 845

62. Prorating proceeds of construction loan

A statute requiring an owner who secures a loan for the construction of a building to prorate the proceeds among the various contractors has been held not to affect the matter of priority as between mortgages and mechanics' liens—Weil v B E Buffalo & Co, 65 SW2d 704, 251 Ky 673

63. Ariz—Wylie v Douglas Lumber Co, 8 P2d 256, 39 Ariz 511, 83 A L.R. 918

64. NY—Telsey v Calvin-Morris Corporation, 184 NE 53, 260 NY 456, reargument denied 185 NE 765, 261 NY 622

Furniture

Where the articles supplied consisted of furniture, rather than fixtures constituting an improvement to realty, one claiming a lien therefor

him will not affect the priority of the claimant of a mechanic's lien.⁶⁵ One who acquires title through a trust deed superior to a mechanic's lien acquires rights superior to the lien without reference to notice or want of notice of the lien.⁶⁶

§ 200. — Priority in Time

- a In general
- b Making of contract
- c Commencement of building or improvement
- d Performance of labor or furnishing of materials by claimant
- e Time when mortgage attaches

a. In General

The general rule is that, as between mechanics' liens and mortgages or like encumbrances, the one which first attaches is entitled to priority, but under some statutes a lien for labor or materials may take precedence over a prior mortgage.

It is well established as a general rule that, as against other encumbrances such as mortgages and

deeds of trust, a mechanic's lien takes precedence according to the time when it attached to the property.⁶⁷ Thus a mechanic's lien ordinarily has priority over a mortgage or deed of trust given or attaching after the lien accrued,⁶⁸ although under some circumstances a subsequent mortgage or like encumbrance may obtain priority over a mechanic's lien,⁶⁹ as where the mortgage is of a kind given priority by statute, as discussed *infra* § 201, or a priority which would otherwise exist has been lost, as discussed *infra* § 204. Under some statutes mechanics' liens may be rendered subordinate to a mortgage thereafter given where a specified per cent of mechanic's lienholders have given their consent that the liens shall be subordinate to the mortgage.⁷⁰

On the other hand, it is also a general rule that, where the property is subject to a mortgage or like encumbrance at the time of the accrual of a mechanic's lien, such mortgage or encumbrance retains its priority and the mechanic's lien is postponed thereto,⁷¹ notwithstanding the value of the mortgage security is increased by the labor or ma-

could not have priority over the claim of a mortgagee of the premises—*Telsey v Calvin-Morris Corporation*, *supra*.

Materials furnished for other buildings

Materialman cannot have priority over mortgagee for material which, although delivered to the mortgaged premises, was not furnished for the purpose of being used in the construction there, but was in fact furnished for use on buildings located elsewhere—*Mortgage Brokerage Co v W B Bair Lumber Co*, 16 P 2d 32, 81 Colo 445.

65. Ark—*O'Neill v Lyric Amusement Co*, 178 SW 406, 119 Ark 454.

41 C.J. p 553 note 71 [b] (2).

66. Iowa—*W T Joyce Co v Carroll Light, Heat & Power Co*, 133 N.W. 785, 153 Iowa 372.

67. Ala—*Polakow v Rumsey*, 6 So 2d 477, 242 Ala 365—*Grimsley v First Ave Coal & Lumber Co*, 115 So 90, 217 Ala 159.

Fla—*Guaranty Title & Trust Co v. Thompson*, 113 So 117, 93 Fla 983. 40 C.J. p 388 note 16.

Priorities as between laborers' claims and mortgages generally see *Master and Servant* § 148.

Filing of notice

Materialman who filed notice of intent to claim lien before mortgage of premises was entitled to priority over mortgage, and mortgage in turn was entitled to priority over lien claimants, who filed no notice—*Higgins Lumber Co v Cunningham*, 288 SW. 334, 216 Ky 298.

68. US—*In re Braker*, CCA Ohio, 127 F 2d 652—*Jonh B Orr, Inc. v First Trust & Savings Bank*, CCA Fla, 69 F 2d 764.

Cal—*Reinhart Lumber & Planing Mill Co v. Hladik*, App. 259 P 363.

Conn—*City Lumber Co of Bridgeport v Murphy*, 179 A 339, 130 Conn 16.

Ga—*Chenoweth-Holder Lumber Co v Beck & Jones*, 155 SE 318, 171 Ga 280.

Ky—*Weil v B E Buffaloe & Co*, 65 SW 2d 704, 251 Ky 673.

NJ—*Meister v J Meister, Inc.*, 142 A 312, 103 NJ Eq 78.

NM—*Hedrick v Jagger*, 139 P 2d 340, 46 NM 379.

Okl—*Home Building & Loan Ass'n v White*, 284 P 889, 141 Okl 240.

Wis—*Fulton v First Volunteer Co of Oconto*, 236 NW 120, 204 Wis 355.

40 C.J. p 289 note 17.

69. Ill—*Pittsburgh Plate Glass Co v Kransz*, 125 N.E. 730, 291 Ill 84.

40 C.J. p 289 note 18.

Notice of contemplated mortgage

(1) Materialman's lien was held inferior to mortgage executed subsequent to furnishing of materials, where another recorded mortgage stated that the subsequent mortgage was to be executed in place of an existing first mortgage and was to continue as a first lien—*Redford Lumber Co v Knight*, 219 NW 686, 242 Mich. 695.

(3) Where a contract of sale provides for the giving of a second

mortgage for the purchase price and permits the execution of a first mortgage in a designated amount, one furnishing materials to the vendee is not entitled to priority over a first mortgage subsequently given even though such mortgage is recorded after the first material is furnished—*Queal Lumber Co v McNeal*, 284 NW 482, 236 Iowa 637.

(3) In such a case it has been held no ground of complaint on the part of the materialman that the first mortgage ultimately was given for less than the sum contemplated by the contract—*Queal Lumber Co v McNeal*, *supra*.

70. Statute held valid

NY—*Max Fine & Sons v Lindarose, Inc.*, 221 NY S 690, 220 App Div 616, modified on other grounds 161 NE 447, 248 NY 137.

A nonconsenting lienholder who did not have a lien when the statute was enacted is bound by the terms thereof—*Max Fine & Sons v Lindarose, Inc.*, *supra*.

71. Ala—*Polakow v Rumsey*, 6 So 2d 477, 242 Ala 365—*Becker Roofing Co v Jones*, 144 So 865, 235 Ala 638—*Grimsley v First Ave. Coal & Lumber Co*, 115 So 90, 217 Ala 159.

Cal—*Hayward Lumber & Investment Co v Corbett*, 33 P 2d 41, 138 Cal App 644—*Hammond Lumber Co v Roubian*, 30 P 2d 440, 137 Cal App 155.

Colo—*Stark Lumber Co v Keystone Inv Co*, 30 P 2d 306, 92 Colo 259, followed in 20 P 2d 308, 92 Colo 266.

terial of the mechanic's lien claimant⁷² or the building is so changed that very little of the original structure remains⁷³ Under an exception expressly created by some statutes, a lien for labor takes precedence over a prior mortgage⁷⁴ Likewise, under some statutes, the lien of a materialman may be superior to a mortgage even though the mortgage was recorded before the recording of the materialman's claim⁷⁵

Statement in claim as to time of accrual of lien.

A lien claimant will not be permitted to claim or show that the lien attached at a date prior to that fixed in his claim or statement for the purpose of cutting out an encumbrance executed and recorded before that time⁷⁶

b. Making of Contract

Under some statutes a mortgage or trust deed which was given after the time of the making of the contract between the owner and mechanic is subject to the mechanic's lien even though the labor was not performed or

the materials furnished until after the giving of the mortgage.

Under statutes by which a lien attaches at the time the contract between the owner and mechanic is made, discussed supra § 178, a mortgage or trust deed given thereafter is subject to the lien of the mechanic⁷⁷ although the mortgage is given⁷⁸ and recorded⁷⁹ before the labor is performed or the materials furnished Conversely, a mechanic's lien is subject to a mortgage or deed of trust given prior to, and existing at the time of, the making of the contract⁸⁰ even though the improvements for which the lien is claimed were contemplated by the mortgagor prior to the execution of the mortgage,⁸¹ and in order to entitle claimant to priority over a mortgage there must have been at the time the mortgage was made a contract with the owner of the property for the improvement,⁸² of which the mortgagee had actual or constructive notice⁸³

Under other statutes the time when the contract was made is generally not deemed material in de-

Del—*Corpus Juris* cited in *C L Pierce & Co v. Security Trust Co.*, 175 A 770, 771, 6 WWHarr 348

Ga.—*Williams Bros Lumber Co v Massey*, 176 SE 378, 179 Ga 508—*Killian v Willingham*, 146 SE 479, 167 Ga 712

Idaho—*Corpus Juris* quoted in *Finlayson v Waller*, 134 P 2d 1069, 1072, 64 Idaho 618

Iowa—*First State Bank of Fredericksburg v Westendorf*, 239 NW 73, 213 Iowa 475—*Magnesite Products Co v Bensmiller*, 224 NW 514, 207 Iowa 303

Ky—*Ideal Supplies Co v Underhill*, 281 SW 988, 213 Ky 741

La.—*Hortman-Salmen Co v White*, 123 So 711, 168 La 1057

Mich—*Corpus Juris* cited in *Redford Lumber Co v Knight*, 219 NW 686, 687, 242 Mich 695

NJ—*Jackson Trust Co v Gilkinson*, 147 A 113, 105 NJEq 116

NY—*Ausable Chasm Co v Hotel Ausable Chasm & Country Club*, 33 NYS 2d 427, 263 App Div 486

—*Syracuse Capital Corporation v Pattison Const Corporation*, 234 NYS 68, 133 Misc 894, affirmed 235 NYS 895, 227 App Div 652

ND—*Bovey Shute & Jackson v Odegard*, 208 NW 111, 53 ND 871, followed in *American State Bank of Balfour v Odegard*, 208 NW 114, 53 ND 878

Okl—*Shefts Supply v Brady*, 41 P 2d 820, 170 Okl 590—*Pittsburg Mortg Inv Co v Standard Lumber Co*, 298 P 885, 148 Okl 297—*Morley v McCaskey*, 272 P 850, 134 Okl 54—*Morley v McCaskey*, 270 P 1107, 134 Okl 50

Tenn—*Neely v Clarence Saunders Co*, 81 SW 2d 390, 169 Tenn. 30.

Tex—*Hammann v H J McMullen & Co*, 62 SW 2d 59, 123 Tex 476 40 CJ p 289 note 19

Mortgage in hands of assignee takes precedence over mechanic's lien which attached prior to assignment but subsequent to execution of mortgage—*Finlayson v Waller*, 134 P 2d 1069, 64 Idaho 618—41 CJ p 683 note 86 [b]

Homestead or building and loan associations

The priority granted by some statutes to duly recorded bona fide mortgages, over the lien and privilege of a materialman, has been held not limited to mortgages granted to homestead or building and loan associations—*Hortman-Salmen Co v White*, 123 So 711, 168 La 1057—*Hortman-Salmen Co v White*, 123 So 709, 168 La 1049

72. Del—*Corpus Juris* cited in *C L Pierce & Co v Security Trust Co.*, 175 A 770, 771, 6 WWHarr 348

Mass—*Silver v U S Trust Co*, 182 NE 372, 280 Mass 295

40 CJ p 290 note 20

Priority as to improvements or enhanced value see *infra* § 205 c

73. Iowa—*Equitable Life Ins Co v Slye*, 45 Iowa 615

74. Okl—*McGuire v Duncan*, 229 P 199, 100 Okl 217.

40 CJ p 290 note 23

75. La—*Union Homestead Ass'n v Montegut*, 122 So 68, 168 La 369

—*Lawrence v Wright*, 124 So 697, 11 La App 703

Retroactive effect
If the materialman's claim is recorded within the time prescribed by statute, the recording has a retroac-

tive effect against mortgages previously recorded—*Union Homestead Ass'n v Montegut*, 122 So. 68, 168 La 369

76. Mo—*Landau v Cottrill*, 60 S W 64, 159 Mo 308
40 CJ p 291 note 24.

77. Ala—*Becker Roofing Co v Wy-singer*, 124 So 858, 220 Ala 276
40 CJ p 291 note 26

Existence of obligation as test of priority

The test in determining priority as between a mechanic's lien and a deed of trust is whether, prior to the recording of the deed of trust, the lien claimant had become obligated under some contract or agreement, either oral or written, to deliver the materials constituting the basis of the lien—*J & W C Shull v Brooke*, 289 P 885, 107 Cal App 88

78. Me—*Saucier v Maine Supply & Garage Co*, 84 A 461, 109 Me 342
Mass—*Carew v Stubbs*, 30 NE 219, 155 Mass 549

79. Me—*Morse v Dole*, 73 Me 351

80. Ala—*Becker Roofing Co v Wy-singer*, 124 So 858, 220 Ala 276
Ill—*Chicago Title & Trust Co v. Rosenberg*, 281 Ill App 61
40 CJ p 291 note 29.

81. Tex—*Sullivan v Texas Briquette & Coal Co*, 63 SW 307, 94 Tex 541

82. NH—*Sly v Pattee*, 58 NH 102
40 CJ. p 291 note 31.

83. NH—*Sly v. Pattee*, *supra*

termining the priority between a mechanic's lien and a mortgage⁸⁴ Thus in jurisdictions where a mechanic's lien attaches only from the time claimant commenced to perform labor or furnish materials, as discussed supra § 181, the lien is inferior to a mortgage given before that time even though claimant's contract antedated the mortgage⁸⁵ and the mortgagee or trustee in the trust deed knew of the existence of the contract.⁸⁶ Also in some jurisdictions a mechanic's lien takes precedence of a mortgage given after the building or improvement was commenced even though it was given prior to the making of the contract under which the work in question was done⁸⁷

Under a few statutes the lien of a contractor is superior to trust deeds executed and recorded subsequent to the execution of the contract,⁸⁸ but the lien of a materialman does not relate back to the date of the contract between the contractor and the

owner so as to give priority over a mortgage executed after that date but before claimant commenced to furnish material⁸⁹

c. Commencement of Building or Improvement

A mechanic's lien, under some statutes, has priority over a mortgage given and recorded after the building or improvement was commenced even though the mortgage was given before the mechanic's lienor performed work or furnished materials.

Under a number of statutes a mortgage or like encumbrance given and recorded prior to the commencement of the building or improvement takes precedence over mechanics' liens⁹⁰ even though the mortgagee had notice that a building was to be constructed with the money secured from the mortgage⁹¹ Conversely, a mechanic's lien has priority over a mortgage or other encumbrance given or recorded and attaching after the building or improvement was commenced,⁹² even though it was

84. Ind—Ward v. Yarnell, 91 NE 7, 173 Ind 535
40 C J p 291 notes 37, 40, p 292 note 42

85. Ind—Ward v Yarnelle, 91 NE 7, 173 Ind 535
Tenn—In re New Memphis Gaslight Co., 60 SW 206, 105 Tenn 288, 80 Am SR 880

86. NC—McAdams v Piedmont Trust Co., 83 SE 623, 167 NC 494, Ann Cas 1916B 669

87. US—In re Sweet Laboratories Co., D C Ohio, 261 F 810
40 C J p 291 note 40

Commencement of building or improvement see infra subdivision c of this section

88. US—Continental & Commercial Trust & Savings Bank v Corey Bros Constr Co., Idaho, 208 F 976, 126 CCA 64
40 C J p 291 note 41

89. US—Boise-Payette Lumber Co v Halloran-Judge Trust Co, CCA Idaho, 281 F 818
40 C J p 292 note 42.

90. US—In re Taylor, 20 F2d 8, modifying, D C, 16 F2d 808
Cal—Fickling v Jackman, 285 P 810, 203 Cal 657—American Bldg Material Service Co v Wallin, 2 P2d 1007, 116 Cal App 537—Brush v E R Bohan & Co., 283 P 126, 102 Cal App 457

La—Tilly v Bauman, 139 So 762, 174 La 71—City Sav Bank & Trust Co v White, 132 So 124, 171 La 727

Ohio—Commerce-Guardian Bank v Catawba Cliffs Beach Club, 7 NE2d 830, 54 Ohio App. 437

Okl—Antrim Lumber Co v Anderson, 48 P2d 825, 173 Okl 371—Home Savings & Loan Ass'n v Sullivan, 284 P 30, 140 Okl 300

Tex—Wm Cameron & Co v Crabb Civ App, 42 SW2d 638, reversed on other grounds Crabb v William Cameron & Co., Com App, 63 SW2d 367
40 C J p 292 note 44

Lien as attaching on commencement of building see supra § 179

Labor and material; separation
A claim for labor and material which does not separate the items, so that it is impossible to distinguish between a claim for labor, which primes the mortgage, and a claim for materials, which does not, will not prime a mortgage recorded before the building was started—Tilly v Bauman, 139 So 762, 174 La 71

91. Okl—Home Savings & Loan Ass'n v Sullivan, 284 P 30, 140 Okl 300

The words "without notice," as used in a statute providing that as against a bona fide mortgagee or encumbrancer "without notice" no lien shall attach prior to the actual and visible beginning of the improvement on the ground, have been construed to mean without notice of an existing lien, and not without notice of a contemplated improvement, and hence the mere fact that a mortgagee takes his mortgage with knowledge that the construction of an improvement on the property is contemplated does not make the mortgage subject to any liens that may thereafter accrue by reason of the construction of such contemplated improvement—Carr-Cullen Co v Deming, 232 NW 507, 176 Minn 1—Landers-Morrison-Christenson Co v Ambassador Holding Co, 214 NW 503, 171 Minn 445, 53 ALR 573

92. US—Credit Finance Corpora-

tion v Hale & Perry, CCA Colo, 66 F2d 357—Fred T Ley & Co v Wheat, CCA Fla, 64 F2d 257—John Murland, Inc, v. Empire Trust Co, CCA NJ, 39 F2d 341
Ala—Polakow v Rumsey, 6 So2d 477, 242 Ala 365—Grimsley v First Ave Coal & Lumber Co, 115 So 90, 217 Ala 159
Colo—Howard v Fisher, 283 P 1042, 86 Colo 493

Fla—Booker & Co v Leon H Watson, Inc, 123 So 837, 96 Fla 671
Iowa—American Trust & Savings Bank of Cedar Rapids v West, 243 NW 297, 214 Iowa 568

Kan—Leidigh & Havens Lumber Co v Wyatt, 109 P2d 87, 153 Kan 214—Southwestern Electrical Co v Hughes, 30 P2d 114, 139 Kan 89—Golden Belt Lumber Co v McLean, 26 P2d 274, 138 Kan 351
La—H R Hayes Lumber Co v H M Jones Drilling Co, 148 So 899, 177 La 628—Conservative Homestead Ass'n v Boyle, 135 So 663, 172 La 878.

Md—Parker v Tilghman v Morgan, Inc, 183 A 224, 170 Md 7

Mich—Winkworth Fuel & Supply Co v Bloomsbury Corporation, 253 NW 304, 266 Mich 238

Mo—Lee & Boutell Co v C A Brockett Cement Co, 106 SW2d 451, 341 Mo 96—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW2d 995, 332 Mo 440.

NJ—Fischgrund v Eriksen Real Estate Co, 147 A 811, 105 NJEq 345

Ohio—Ohio Sav Ass'n v Bell, 158 NE 548, 35 Ohio App 84

Or—Block v Love, 1 P2d 588, 136 Or 685—Dement v Eastes, 264 P 348, 134 Or 170—Schram v Manary, 260 P 214, 123 Or 354, mod-

given before claimant performed the labor or furnished the materials on which the lien is based⁹³ Under other statutes a mortgage given prior to the time when claimant commenced to perform labor or to furnish materials has priority over a mechanic's lien even though the mortgage was given after the commencement of the building⁹⁴

In order that a particular date may be fixed as that on which the building was commenced, within the meaning of the foregoing rules, it is necessary and sufficient that, on such date, there shall have been done work of such a substantial and conspicuous character as to make it reasonably apparent to the mortgagee that the building has actually commenced,⁹⁵ and that the work shall have continued without abandonment,⁹⁶ change of plan,⁹⁷ or change

of contracting parties⁹⁸ The construction must be founded on a contractual relation in good faith and not on a purpose to deceive⁹⁹ In determining whether an improvement has been begun so as to afford priority to a mechanic's lien over a mortgage given after commencement of the improvement, the term "improvement" has been held to include not only work done but also materials furnished for permanent improvement of the property.¹

Encumbrance created during progress of construction. Under some statutory provisions a mortgagee of premises who acquires his lien during the progress of the construction of a building thereon is charged with constructive notice of a mechanic's lien claim,² but under other statutes the mere fact that a mortgagee or encumbrancer has notice that

fied on other grounds 262 P. 263, 123 Or 354

Wis—Interior Woodwork Co v Larsen, 238 NW 822, 207 Wis 1—Prince v Clubine Co, 234 NW 699, 204 Wis 504
40 C J p 292 note 45.

A deed of trust is a "lien or other encumbrance" within the meaning of a statute giving priority to mechanics' liens over a mortgage, lien, or other encumbrance attaching subsequent to the time when the building, improvement, or structure was commenced—Flicking v Jackman, 265 P 810, 203 Cal 657—Sun Lumber Co v Bradfield, 10 P 2d 183, 122 Cal App 2d 391, followed in 10 P 2d 185, 122 Cal App 788—Wasco Creamery & Construction Co v Coffee, 3 P 2d 588, 117 Cal App 298—American Bldg Material Service Co v Wallin, 2 P 2d 1007, 116 Cal App 527.

Notice

(1) Builder's possession was constructive notice to bondholders purchasing negotiable bonds secured by mortgage—Fred T Ley & Co v Wheat, CCA Fla., 64 F 2d 257

(2) Beneficiary of trust deed executed after construction work had been begun on mortgaged land, irrespective of actual knowledge of work, was charged with notice thereof, so that trust deed was subordinate to liens for work and material—Lee & Boutell Co v C A Brockett Cement Co, 106 SW 2d 451, 341 Mo 95

(3) Evidence held to show that mechanic lien claimants, even if commencing improvement before recording of trust deed, had notice thereof, making lien subordinate thereto—Keeling Collection Agency v Penziner, 11 P 2d 24, 123 Cal App 296

93. Mo—Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 SW 2d 995, 332 Mo 440—Joplin Cement Co v Greene Coun-

ty Building & Loan Ass'n, 74 SW 2d 250, 228 Mo App 883—Waters v Gallemore, App, 41 SW 2d 870
Wis—Prince v Clubine Co, 234 NW 699, 204 Wis 504
40 C J p 292 note 46

Materials needed to complete improvement

Under some statutory provisions the rule set forth in the text applies where the mechanic's lien is for materials necessary to complete the improvement—Ustruck v Home Ass'n, 207 NW 324, 166 Minn 183

94. Neb—Grand Island Banking Co v Koehler, 78 NW 265, 57 Neb 649

Wash—Hutting Bros Mfg Co v Denny Hotel Co, 32 P 1073, 6 Wash 122, dissenting opinion 34 P 774, 6 Wash 624

95. Ala—Corpus Juris cited in Grimsley v First Ave Coal & Lumber Co, 115 So 90, 92, 217 Ala 159

Ga—Corpus Juris cited in Caldwell v Northwest Atlanta Bank, Ga., 21 SE 2d 619, 623, 194 Ga 370

Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sellards, 3 P 2d 481, 483, 133 Kan 747, 76 A L R 1397

Ohio—Ohio Sav Ass'n v Bell, 158 NE 548, 25 Ohio App 84—North Shaker Boulevard Co v Harriman Nat Bank of City of New York, 153 NE 909, 910, 22 Ohio App 487
40 C J p 293 note 47

Removing old building was held not actual and visible beginning of improvement, authorizing attachment of mechanic's lien as regards priority of lien over mortgage—Carr-Cullen Co v Deming, 223 NW 507, 176 Minn 1

Digging of uncovered sewer ditch from alley to rear of proposed building as staked off was held to constitute commencement of building, giving mechanic's lien of plumbing com-

pany priority over subsequent mortgage—Security Stove & Mfg Co v Sellards, 3 P 2d 481, 133 Kan 747, 76 A L R 1397

96. Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sellards, 3 P 2d 481, 483, 133 Kan 747, 76 A L R 1397
40 C J p 293 note 48

97. Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sellards, 3 P 2d 481, 483, 133 Kan 747, 76 A L R 1397.
40 C J p 293 note 49.

98. Kan—Corpus Juris quoted in Security Stove & Mfg Co v Sellards, 3 P 2d 481, 483, 133 Kan 747, 76 A L R 1397
40 C J p 293 note 50.

99. Ohio—North Shaker Boulevard Co v Harriman Nat Bank of City of New York, 153 NE 909, 22 Ohio App 487

1. US—Kyser v MacAdam, CCA NY, 117 F 2d 232.

2. Fla—Dunlop v Teagle, 135 So 132, 101 Fla 731—Sandquist & Snow v Kellogg, 133 So 65, 101 Fla 568, reheard 136 So 235, 101 Fla 579—Bowery v Babbitt, 128 So 801, 99 Fla 1151—People's Bank of Jacksonville v Virginia Bridge & Iron Co, 113 So 680, 94 Fla 474, followed in Bicknell-Rice Residential Builders, 126 So. 493, 99 Fla 409

41 C J p 538 note 13 [b]

Construction substantially completed

Construction of building may be still in progress with respect to notice to mortgagee, although substantially completed, provided material furnished and work done thereafter is furnished and done in exercise of good faith and within reasonable time—Century Trust Co of Baltimore v Allison Realty Co, 141 So 613, 105 Fla 456—Bowery v Babbitt, 128 So 801, 99 Fla 1151

a building is in the course of construction does not make the mortgage subordinate to a mechanic's lien where the lien claimant has not recorded his contract, instituted proceedings to enforce his lien, or given notice to the encumbrancer.³

Necessity of single contract or improvement If there is one main contract, work commenced by any subcontractor inures to the benefit of all subcontractors, materialmen, and the head contractor, in determining priority as against a mortgage filed subsequently to the commencement of the work,⁴ but, if there is more than one principal contract, then only those covered by the contract under which work was commenced may claim the benefit of such priority.⁵ Where fixtures are attached to a building after its completion and after the giving of a mortgage on the property, the contract for the fixtures cannot be tacked to performance of the building contract so as to enable the lien for the fixtures to obtain priority over the mortgage on the ground that the mortgage was given after the commencement of the building.⁶

Where a building consists of two or more distinct units or parts, such as a basement, upper stories, and added rooms, and the units are constructed at different times and under different contracts and

different plans, each unit is considered as a distinct building in determining the commencement of the building or any of its distinct units with respect to the priorities of the mortgage and mechanics' liens.⁷ Where mechanics and materialmen maintain and enforce their liens separately on two lots belonging to the same person, on which buildings are being constructed at the same time, they cannot on one lot claim the advantage of the earlier commencement of the building on the other lot, so as to give them a priority over a mortgage.⁸

d. Performance of Labor or Furnishing of Materials by Claimant

It is generally held that a mechanic's lien has priority over a mortgage or like encumbrance attaching after the commencement of the work or the furnishing of the materials out of which the lien arose.

A lien for materials is superior to a mortgage or deed of trust which was not given or recorded until after the materials were furnished.⁹ In this connection it is not necessary for a materialman to have completed his contract before the creation of the subsequent encumbrance,¹⁰ for it is generally held that a mechanic's lien has priority over a mortgage or other like encumbrance attaching after the commencement of the work or the furnishing of the materials out of which the lien arose,¹¹ especially

Absence of cautionary notice

Creditor taking mortgage while building and sprinkler system were in course of construction was held chargeable with notice of lien for sprinkling system, notwithstanding absence of cautionary notice—*Smith v Loftis*, 150 So 645, 112 Fla 332

3. *Miss—Walker v. Macon Creamery Co*, 146 So 443, 165 Miss 131

4. *Ohio—Dabney v Rose Bros Co*, 191 N.E. 810, 47 Ohio App 278

5. *Ohio—Dabney v Rose Bros Co*, supra

New contract after abandonment

Where, after a building has been partly erected under a contract providing for its completion, the work is stopped and the contract abandoned, and a deed of trust is placed on the property, and thereafter a new contract is made providing for the completion of the building, the latter contract does not relate back to the original abandoned contract and work so as to give a mechanic's lien for work done under the second contract priority over the deed of trust—*Joplin Cement Co v Greene County Building & Loan Ass'n*, 74 S W 2d 250, 228 Mo App 833—*Stumbaugh v. Hall*, Mo App, 30 S W 2d 160

Entirety of contract for materials

Materials bought from time to time under oral agreement with ma-

terialman to deliver materials to landowner or his employees as called for, and to charge owner's account therefor, was held not bought under one entire contract, with respect to priority between materialman's lien and lien of mortgage executed during time material was being furnished—*Antrim Lumber Co v Anderson*, 48 P 2d 825, 173 Okl 371

6. *Kan—E. T. Burrows Co v Parks*, 268 P 81, 126 Kan 334

7. *Okl—Dickason Goodman Lumber Co v Foresman*, 251 P 70, 120 Okl 168

8. *Kan—Security Stove & Mfg Co v Sellards*, 3 P 2d 481, 138 Kan 747, 76 A L R. 1397

9. *Ark—Crown Central Petroleum Corporation v Frick-Reid Supply Co*, 293 S W 1012, 173 Ark 983 40 C J p 293 note 53

Future mortgage merely contemplated

Where at the time that one furnished labor and materials a mortgage was on record containing a statement that it was subject to a first mortgage, but no such first mortgage had in fact been given, and full investigation would have shown nothing more than that the owner contemplated raising money by means of a mortgage at some future time for some undisclosed purpose, the lien of the person furnishing the

labor and material was held prior to that of the mortgage when subsequently given—*Stoneway Lumber Co v Lovenberg*, 286 P. 105, 156 Wash 146

10. *Ga—Picklesimer v Smith*, 139 S E 72, 164 Ga 600

Okl—Farmers' Cooperative Union Gin Co v Rounds & Porter Lumber Co, 37 P 2d 259, 169 Okl 346

11. *US—Fred T. Ley & Co v Wheat, CCA Fla.*, 64 F 2d 257
Ala—Tallapoosa Lumber Co v Copeland, 134 So 653, 223 Ala 41, 75 A L R 1325—*Wofford Bond & Mortgage Co v. Adams*, 133 So 254, 223 Ala 527.

Ark—Georgia State Sav Ass'n v Mairs, 9 S W 2d 785, 178 Ark 18—*Shaw v Rackensack Apartment Corporation*, 295 S W. 966, 174 Ark 492

Cal—Miller v Citizens' Trust & Savings Bank, 16 P 2d 999, 128 Cal App 295—*Bank of Italy v MacGill*, 269 P 566, 93 Cal App 228

Conn—Thames Lumber Co v Cruise, 164 A. 652, 116 Conn 273—*Solomon v Pace*, 160 A. 428, 115 Conn 702.

Ga—Picklesimer v Smith, 139 S E 72, 164 Ga 600—*Wager v Carrollton Bank*, 133 S E 623, 162 Ga 508

La—Hortman-Salmen Co v White, 123 So 709, 168 La. 1049—*Cox v*

where, prior to, and at the time of, taking the mortgage the mortgagee had knowledge that work had commenced¹² or had actual notice of a materialman's claim of lien¹³. Conversely, as a rule a mortgage, deed of trust, or like encumbrance is superior to a mechanic's lien where it was executed and recorded, or attached, before claimant commenced to perform labor or furnish materials,¹⁴ at least, according to some authorities, where there was no general contract covering the work to be done¹⁵

e. Time When Mortgage Attaches

A mortgage may attach, as against mechanics' liens, when it is recorded, or when money is advanced under it,

or at some other time, depending on the terms of the statutes

In some jurisdictions a mortgage or like encumbrance comes into existence and takes effect as against mechanics' liens when it is recorded or registered¹⁶ unless, notwithstanding the recording of the instrument, the debt to be secured thereby did not come into existence prior to the due acquisition of the materialman's or laborer's lien;¹⁷ and the mere fact that the mortgage was executed and delivered prior to the furnishing of the materials on which the lien is based does not give the mortgage priority where the legislature has made recording of the mortgage, and not its creation, the criterion

Rockhold, 128 So 702, 14 La.App 170

NH—Boulia-Gorrell Lumber Co v East Coast Realty, 148 A 28, 84 NH 174, 69 A.L.R. 1200

Ohio—West Side Lumber Co v Balinger, 28 Ohio N.P.N.S., 32

Okl—Farmers' Cooperative Union Gin Co v Rounds & Porter Lumber Co, 37 P 2d 259, 169 Okl 346

Tenn—McDonnell v Amo, 34 S.W. 2d 212, 162 Tenn 36

Wis—Bank of Baraboo v Prothero, 355 N.W. 126, 215 Wis 652

40 C.J. p 293 note 54—41 C.J. p 515 note 89 [d] (6)

Lien of architects commencing services prior to recording of trust deed was held superior to lien of trust deed—Park Lane Properties v Fisher, 5 P 2d 577, 89 Colo 591

12. Wash—Andersonian Inv Co v. Jones, 176 P 17, 104 Wash 142
40 C.J. p 293 note 55

13. Ga—Picklesimer v. Smith, 139 S.E. 72, 164 Ga 600

14. Ala—Wahouma Sav Bank v Southern Plumbing & Heating Co, 124 So 388, 220 Ala 140

Ark—Duncan v Travelers' Building & Loan Ass'n, 9 S.W. 2d 773, 178 Ark 17

Cal—San Pedro Lumber Co v Wilson, 40 P 2d 605, 4 Cal App 2d 41

—Hammond Lumber Co v Roubian, 80 P 2d 440, 137 Cal App 155

Ga—West Lumber Co v McPherson, 159 S.E. 868, 173 Ga. 53—Mitchell v West End Park Co, 156 S.E. 888, 171 Ga. 878—Marbut-Williams

Lumber Co v Dixie Electric Co, 142 S.E. 270, 166 Ga. 42—Picklesimer v Smith, 139 S.E. 72, 164 Ga. 600

Idaho—International Mortg Bank v Whitaker, 256 P 908, 44 Idaho 178

Ky—Staton Springs Park Co v. Keese, 289 S.W. 292, 217 Ky 329

Miss—Bernstein v Schelben, 111 So 97, 144 Miss 717

NH—Anatole Caron, Inc. v Manchester Federal Savings & Loan Ass'n, 10 A.2d 668, 90 NH 560

Ohio—Becker v Wilson, 165 N.E. 108, 30 Ohio App 340

Or—Residential Finance Co v Larkin, 40 P 2d 1008, 149 Or 410

SD—Walrath & Sherwood Lumber Co v Ferris, 247 N.W. 405, 61 S.D. 190

Tenn—Brown v Brown & Co, 160 S.W. 2d 431, 25 Tenn App 509

Tex—Cisco Banking Co v Keystone Pipe & Supply Co, Com App, 277 S.W. 1060

Wash—Dunn v Wolf, 282 P 842, 154 Wash 445

40 C.J. p 293 note 56.

Time of recording

A bona fide holder of security deed executed prior to recording of materialman's lien on the property will take priority over materialman's lien even though the security deed was not recorded until after the first material was furnished, but the rule would be different if the holder of security deed had actual notice of the furnishing of material prior to execution of the deed—Caldwell v Northwest Atlanta Bank, 21 S.E. 2d 619, 194 Ga 370

Actual notice held unnecessary

A materialman need not have actual notice of a mortgage, where it was recorded before the first material was furnished, in order to give the mortgage priority over the lien of the materialman—Queal Lumber Co v McNeal, 284 N.W. 479, 226 Iowa 631

Partial failure of consideration for mortgage

Assignee of note and mortgage before maturity was held entitled to priority as against mechanic's lien claimants for labor performed and material furnished subsequent to date of recording of mortgage, notwithstanding there was partial failure of consideration between mortgagor and mortgagee—First Nat Bank v Horsley, 49 P 2d 495, 174 Okl 83

Material left over from another job

A materialman cannot carry first item of his lien claim back to date

before recording of mortgages by importing into claim material left over from another building job being done by mortgagor for one to whom claimant sold such material—Queal Lumber Co v McNeal, 284 N.W. 479, 226 Iowa 631

15. Cal—Hayward Lumber & Investment Co v Naslund, 13 P 2d 775, 125 Cal App 34—Keeling Collection Agency v Penziner, 11 P 2d 24, 123 Cal App 296—E K Wood Lumber Co v Mulholland, 5 P 2d 669, 118 Cal App 475—Consolidated Lumber Co v Bastien, 5 P 2d 80, 118 Cal App 267—K & K Brick Co v Brooks, 5 P 2d 49, 118 Cal App 192—American Bldg Material Service Co v Wallin, 2 P 2d 1007, 116 Cal App. 527

16. Cal—City Lumber Co v Park, 58 P 2d 403, 14 Cal App 2d 431

Conn—Gruss v Miskinis, 34 A 2d 600, 130 Conn 387

Fla—Guaranty Title & Trust Co v Thompson, 113 So 117, 93 Fla 983

Tenn—Theilen v Chandler, 9 Tenn App 345

Wash—Mutual Reserve Ass'n v Zeran, 277 P 984, 153 Wash 342
40 C.J. p 294 note 61

Time of advancement of money immaterial

Cal—Hayward Lumber & Investment Co v Corbett, 33 P 2d 41, 138 Cal App 644

Furnishing of materials and execution of mortgage on same date

Where a mortgage was executed on the same date as that on which a materialman began furnishing materials, but was recorded after the filing of a notice of lien, and the materialman was ignorant of the existence of the mortgage during the period when the materials were furnished, the lien of the materialman was held to have priority—Sikes v Dade Lumber Co, 123 So 918, 98 Fla 461

17. Fla—Guaranty Title & Trust Co v Thompson, 113 So 117, 93 Fla 983.

of priority¹⁸ In other jurisdictions the lien of a mortgage does not necessarily attach, as against mechanics' liens, when the mortgage is executed¹⁹ or recorded,²⁰ but attaches when money is advanced under the mortgage²¹

Under some statutes a mechanic's lien may take priority over a mortgage recorded before the filing of a mechanic's lien notice, where the mortgagee has actual notice of the mechanic's lien²² Similarly, under some statutes, a mortgage or like encumbrance, although unrecorded, may take effect, as against mechanics' liens, when notice of the encumbrance is given to prospective claimants of a lien²³ On the other hand, where the legislature has expressed an intent to free the lienor of the duty to inquire as to any unrecorded outstanding encumbrance, and has made the recording of the encumbrance the controlling consideration, actual or imputed knowledge of an unrecorded mortgage will not give such mortgage the same precedence over a mechanic's lien as though the mortgage were recorded.²⁴

With respect to priority over mechanics' liens, a deed of trust or mortgage ordinarily cannot attach until the trustor or mortgagor has acquired title to the property²⁵ Further, a mortgage will not be deemed to attach, as against a mechanic's lien, be-

fore it was completely²⁶ executed,²⁷ that is, both signed and delivered,²⁸ it does not attach at a prior date when the loan secured by the mortgage was negotiated²⁹ or the debt secured was renewed,³⁰ or when the agreement was made to make the loan³¹ or to execute the mortgage³² However, it has been held that, where an agreement to give a mortgage is attempted to be carried out, but the mortgage executed is invalid for want of acknowledgment and attestation, and is subsequently perfected and recorded, but not until after a mechanic's lien has been filed on the premises, such mortgage is entitled to priority over the lien³³

§ 201. — Nature, Validity, Subject Matter, and Provisions of Mortgage

- a In general
- b Mortgage for building purposes
- c. Purchase-money mortgage

a. In General

Ordinarily an existing mortgage has priority over subsequent mechanics' liens only where it is a valid, bona fide mortgage supported by a consideration

The general rule that an existing mortgage is superior to a mechanic's lien subsequently arising, discussed supra § 200, is applicable to a valid mortgage³⁴ based, according to the judicial decisions on

18. Conn—Gruss v Miskinis, 84 A 2d 600, 130 Conn 367

19. NH—Virgin v Britton, 117 A 14, 80 NH 840
40 C J p 293 note 59

Time when lien of mortgage attaches generally see the C J S title Mortgages § 210, also 41 C J p 502 note 18—p 503 note 32

20. NH—Virgin v Britton, supra
40 C J p 294 note 60

21. NH—Virgin v Britton, supra
40 C J p 293 note 58
Time of advance as affecting extent of priority see infra § 205 b

22. Ky—Coral Ridge Clay Products Co. v Louisville Trust Co., 4 S W. 2d 737, 223 Ky 694

Ignorance of lien or nature of contract

Mortgagee's knowledge that improvements are being made on property secured by mortgage, but without knowledge of nature of contract with materialmen and laborers and that latter have lien, has been held not to amount to actual notice so as to render mortgage inferior to mechanic's lien—Weil v B E Buffalo & Co., 65 S W 2d 704, 251 Ky. 673.

23. Cal—Hammond Lumber Co v Roubian, 30 P 2d 440, 137 Cal App 155.

Fla—Guaranty Title & Trust Co v Thompson, 113 So 117, 93 Fla 983
Mich—Winkworth Fuel & Supply Co v Bloomsbury Corporation, 253 N W 304, 266 Mich 298

24. Conn—Gruss v. Miskinis, 84 A 2d 600, 130 Conn 367

25. Cal—Sun Lumber Co v Bradfield, 10 P 2d 183, 123 Cal App 391, followed in 10 P 2d 185, 123 Cal App 783

26. Neb.—J. S Gabel Lumber Co v West, 145 N W 849, 95 Neb 394

27. Iowa—Lovell-Scholfield Lumber Co v Carter, 199 N W 405, 198 Iowa 238

Mere application for loan on property to be purchased and agreement to make loan do not create equitable lien superior to mechanic's liens which attached before actual making of loan and mortgage—Iowa Loan & Trust Co v Plewe, 309 N W 399, 202 Iowa 79

28. Neb.—J S Gabel Lumber Co v West, 145 N W 849, 95 Neb 394

Mechanic's lien attaching before delivery of mortgage note

Mortgage did not attach until note, signed by mortgagor and left in possession of mortgagor's agent, was delivered to mortgagee, and mere recording of mortgage before note was delivered to mortgagee could not give

mortgage priority over mechanic's liens attaching between recording of mortgage and delivery of note—Western Loan & Building Co. v Scheib, 23 P 2d 745, 218 Cal 886

29. Kan—Nixon v Cydon Lodge No 5 K. P., 43 P 236, 56 Kan 298

30. Iowa—Lovell-Scholfield Lumber Co v Carter, 199 N W 405, 198 Iowa 238
40 C J p 294 note 68

31. Iowa—Iowa Loan & Trust Co v Plewe, 209 N W 399, 202 Iowa 79

32. Ark—Cook v Moore 239 S W. 750, 152 Ark 590

Agreement for purchase-money mortgage see infra § 201

33. N Y—Payne v Wilson, 74 N.Y. 348

34. Ohio—Square Lumber Co v Goldman, 159 N E 130, 26 Ohio App 180
40 C J p 294 note 74

Priority between mechanics' liens and corporate mortgages see Corporations § 1190 c

Mortgage for future loans or advances

(1) Mortgages securing loan were held invalid against mechanics' liens as not disclosing intention to secure future advances—Groh v. Cohen, 149 A 459, 158 Md 638.

the question, on a consideration³⁵ The mortgage must be a bona fide mortgage,³⁶ since a fictitious or fraudulent mortgage can have no priority over a mechanic's lien,³⁷ although in this connection there are some objections to a mortgage which are not available to a mechanic's lienholder³⁸ A mechanic's lien is superior to a prior mortgage intended to cover, but by mistake not covering, the property in question³⁹ unless the error in the description was palpable⁴⁰ or the lienor had actual knowledge of what property was intended to be covered by the mortgage⁴¹ Likewise a materialman is not entitled to a lien on mortgaged property as against the mortgagee where, although the materials were furnished prior to the giving of the mortgage, the building, by mistake, was erected on land other than that mortgaged.⁴²

A subsequent mortgage on a homestead has no priority over an existing mechanic's lien⁴³ A prior chattel mortgage may be subordinate to a mechanic's lien as to such portions of the property covered by the mortgage as have become fixtures⁴⁴ A mechanic's lien for improvements made pursuant to a lease obligating the lessee to make improvements is prior to an equitable mortgage of the lease which is in form an assignment of the lease⁴⁵

Provision for priority. A stipulation in a mortgage that such mortgage shall be paramount to all other liens and that the mortgagor covenants to keep the premises free from all other encumbrances cannot defeat the priority of mechanics' liens⁴⁶

Mortgage of after-acquired property A mechanic's lien attaching to property when it comes into

the mortgagor's hands is superior to a mortgage executed previously and covering that property as after-acquired property,⁴⁷ but a mechanic's lien for improvements made on the property after the title was acquired by the mortgagor is inferior to a mortgage executed before title was acquired, but covering the property as after-acquired property.⁴⁸

Equitable ownership of property The fact that the mortgagor did not have the legal title, or full legal title, when the mortgage was made will not affect its priority as to his interest in the property, where he had an equitable title before the contract for the construction of the improvements was entered into, and the mortgage contained words of general description⁴⁹ Also the fact that the equitable owner of land in procuring a loan had the person holding the legal title in trust execute a deed of trust thereon to secure repayment of the loan will not affect the lien acquired under such deed, and postpone it in favor of a subsequent lien obtained under the statute in favor of one performing labor and furnishing materials for the erection of buildings thereon⁵⁰

Merger of estates Where a straw party executed a quitclaim deed to the real owner and also executed a trust deed which was transferred to the real owner, the owner's estates merged so as to make a subsequent mechanic's lien superior to the deed of trust⁵¹

b. Mortgage for Building Purposes

(1) In general

(2) Compliance with statutory requirements

(2) However, a subsequent mechanics' lien was held not entitled to priority over mortgage on theory that mortgage did not state amount of future loans or advances which it was intended to secure, because mortgagee by agreement was to retain proceeds and disburse them to contractors as work progressed, and after completion either to apply surplus on mortgage or pay it over to mortgagors, where no other advances were to be made in future—*White Eagle Polish American Building & Loan Ass'n of Baltimore City v Hart Miller Islands Co.*, 178 A 214, 168 Md 199

35. Ohio—*Square Lumber Co v Goldman*, 159 NE 130, 26 Ohio App 130

Failure to state true consideration was held to invalidate a mortgage as respects its priority over mechanics' liens—*Groh v Cohen*, 149 A 459, 158 Md 628

36. Ohio—*Square Lumber Co v*

Goldman, 159 NE 130, 26 Ohio App 130

Mortgage held bona fide

La.—*Hortman-Saimen Co v. White*, 123 So 711, 168 La 1057

37. Ohio—*Square Lumber Co v Goldman*, 159 NE 130, 26 Ohio App 130

40 C J p 294 note 75

38. Pa.—*Sill v Wright*, 5 Pittsb Leg J. NS, 190

40 C J p 294 note 76

39. Or.—*Gaines v Childers*, 63 P 487, 38 Or 200

40 C J p 294 note 79

40. Mont.—*Grand Opera House Co v Maguire*, 37 P 607, 14 Mont 558

41. Mont.—*Grand Opera House Co v Maguire*, supra

42. Minn.—*Smith v Barnes*, 36 N W 346, 38 Minn 240

43. SD.—*Peter Mintener Lumber Co v Janisch*, 181 NW. 914, 44 S D 42

44. N J.—*Currier v Cummings*, 3 A 174, 40 N J Eq 145

45. N Y.—*Leavitt v Waldemar Co.*, 151 N Y S 832, 88 Misc. 285

46. Tex.—*Oriental Hotel Co v Griffiths*, 33 S W 652, 88 Tex 574, 53 Am S R 790, 30 L R A. 765

47. Idaho.—*Pacific Coast Pipe Co v Blaine County Irr Co*, 187 P 940, 32 Idaho 705

40 C J p 297 note 32

48. Ohio.—*Reed v. Ginsburg*, 59 NE. 738, 64 Ohio St 11.

49. U S.—*Toledo D & B R Co v. Hamilton*, Ohio, 10 S Ct 546, 134 U. S 296, 33 L Ed 905

40 C J p 294 note 77

50. Ill.—*Lunt v Stephens*, 75 Ill 507

51. Mo.—*St Louis Concrete Products Mfg Co v. Walker*, App, 64 S W 2d 131.

(1) In General

An improvement mortgage is given priority, under some statutes, over mechanics' liens where the mortgage is filed before the liens. Some authorities hold, under the statutes, that a mortgage given to a lienor or contractor for the price of work or materials is inferior to the claims of mechanics' lienors.

Under the statutes in some jurisdictions a mortgage given for the purpose of improving real property is prior, in certain cases, to mechanics' liens where the improvement mortgage is filed for record before the mechanics' liens are filed⁵² or before the commencement of work or the furnishing of materials.⁵³ In the absence of such a statute, or facts bringing the case within it, the general rules governing priority between mechanics' liens and mortgages ordinarily are deemed applicable notwithstanding the loan secured by the mortgage was made with the purpose, understanding, or expectation that the proceeds thereof would be used in improving the property⁵⁴ or the mortgage was given to secure a debt for work done on, or materials furnished for, the building⁵⁵. Certainly the general rules as to priority are not affected by a provision in the mortgage for the application of proceeds to the erection of buildings where conditions precedent to the operation of the provision have not been performed⁵⁶.

Common enterprise. According to some authorities, where a mortgage is given during the construction of a building for the purpose of completing it, the mortgagee and persons subsequently performing labor or furnishing materials are engaged in a common enterprise⁵⁷ and neither is in a situation

to claim priority⁵⁸.

Mortgage given to lienor or contractor. A prospective lienor cannot gain an advantage over others, known to him to have equities like his own, by securing a real estate mortgage⁵⁹. Thus it has been held that one materialman cannot secure priority of lien over other materialmen by taking a mortgage after the commencement of the building⁶⁰ and that a mortgage given to a materialman in an attempt to obtain an unlawful preference is subordinate to mechanics' lien claimants⁶¹. It has been held that a mortgage or deed of trust given to the contractor for the price of the work to be done by him is inferior to the liens of subcontractors and others notwithstanding in point of time it antedates such liens⁶². However, there is also authority holding that a trust deed delivered to a contractor in part payment of the contract price for the construction of a building, which is recorded prior to the commencement of any work or the furnishing of materials, is, in the absence of fraud or bad faith, prior to mechanics' liens subsequently arising⁶³. Further, it has held that, where the owner, in order to enable the contractor to obtain material, gives a deed of trust to the contractor which he immediately assigns to a materialman, such deed of trust takes priority over the claims of subcontractors and other materialmen subsequently arising.⁶⁴

Where a deed of trust, given to the contractor to secure payment of the contract price, is delivered in escrow and is to be effective on completion of the building as provided in the contract for the construction thereof, its effect with respect to its pri-

52. U S—Kyser v MacAdam, CCA NY, 117 F2d 232

NJ—Riverside Apartment Corporation v Capitol Const Co, 152 A 763, 107 N JE 405, affirmed 158 A 740 110 N JE 67

Ohio—First Federal Savings & Loan Ass'n of Cincinnati v Robbins, App. 36 NE2d 991—Knollman Lumber Co v Hillenbrand, 29 NE2d 61, 64 Ohio App 549 40 CJ p 294 note 87

53. Ark—Sebastian Building & Loan Ass'n v Minten, 27 SW2d 1011, 181 Ark 700

Del—Hance Hardware Co v. Denbigh Hall Inc, 162 A. 130, 17 Del Ch 234

Notice to mortgagees at time of advancement

The text rule is not affected by the circumstance that the mortgagees had notice at the time of making an advancement that mechanics and materialmen were working on, and supplying materials for, the construction and would therefore have the right to file liens against the premises—

Hance Hardware Co v Denbigh Hall Inc, supra

54. Neb—Union Loan & Savings Ass'n v Johnson, 223 NW 467, 118 Neb 17

40 CJ p 295 note 94

Estoppel of mortgagees see infra § 204 b

Priority in time

Fla—Hogue v D N. Morrison Const Co of Virginia, 156 So 377, 115 Fla 293, 95 ALR 357

Iowa—Queal Lumber Co v McNeal, 284 NW 479, 226 Iowa 631.

55. Ind—Carriger v Mackey, 44 NE 266, 15 Ind App 393

Wis—Kendall Mfg Co v. Rundle, 47 NW 364, 78 Wis 150

56. US—Old Colony Trust Co v Standard Beet Sugar Co, CC Neb, 150 F 677

57. Ind—Ward v. Yarnelle, 91 NE 7, 173 Ind 535.

58. Ind—Ward v Yarnelle, supra—McLaughlin Mill Supply Co v Laundry Service, 184 NE 429, 95 Ind App 693

59. NY—Buffalo Farm Exchange v. Heinz, 257 NY S 147, 235 App Div. 277

Equality as between different mechanics' liens see supra § 198.

60. NJ—Riverside Apartment Corporation v Capitol Const Co, 152 A 763, 107 N JE 405, affirmed 158 A 740, 110 N JE 67

61. NJ—Riverside Apartment Corporation v Capitol Const Co, supra—Meister v J Meister, Inc, 142 A 312, 103 N JE 78

62. Ariz—Wylie v Douglas Lumber Co, 8 P2d 256, 39 Ariz 511, 83 ALR 918

Minn—Dassett v. Menage, 53 NW. 1064, 52 Minn. 121

Va—De Witt v. Coffey, 143 SE 710, 150 Va 365

63. Cal—Fickling v. Jackman, 265 P 810, 203 Cal 657

64. Cal—Harper Reynolds Co v Hammond Lumber Co, 196 P. 97, 51 Cal App 74 40 CJ p 295 note 2.

ority over mechanics' liens is the same on performance of the condition as though there had been a direct delivery of an executed deed of trust ⁶⁵

Second mortgage subject to first mortgage providing for advancements. It has been held that a second mortgage, although prior in point of time to mechanics' liens, is inferior thereto where it was taken subject to a first mortgage, the proceeds of which were to be applied in paying for labor and materials, and not all of the money was advanced and applied as agreed, ⁶⁶ but, where the whole amount for which the first mortgage was given is advanced and applied in the construction of the building, a second mortgage, although subject to a first mortgage the proceeds of which are to be applied to the construction of a building, is prior to mechanics' liens subsequently attaching ⁶⁷

(2) Compliance with Statutory Requirements

The priority granted to a building loan mortgage over mechanics' liens by some statutes is available only on compliance with statutory requirements, such as timely filing of the mortgage, inclusion in the mortgage of certain covenants or statements, and application of the money to the erection of the building

The statutes sometimes prescribe certain pre-

requisites as a condition of giving a building loan mortgage priority over mechanics' liens, in which case the lien of a mortgage which does not comply with the statutory requirements is invalid as against duly filed mechanics' liens ⁶⁸ If the statutes require the mortgage to be recorded, the mortgage is not superior where it is not recorded ⁶⁹ Some of such statutes apply only where the mortgage contains covenants specified in the statute, ⁷⁰ as well as statements so specified, ⁷¹ and is given and recorded after the actual commencement of the building or improvement ⁷² and before the filing of mechanics' liens ⁷³ Under some statutes it is essential that the money advanced be actually applied in the erection of a building on the land mortgaged, ⁷⁴ but under other provisions it is the purpose of the loan, ⁷⁵ and not the use to which the money is put, ⁷⁶ which determines the superiority of the mortgage over subsequent mechanics' liens

c. Purchase-Money Mortgage

(1) In general

(2) Improvements before acquisition of title

65. Cal.—Fickling v Jackman, 265 P 810, 203 Cal 657

66. Wash.—Andersonian Inv Co v. Jones, 176 P 17, 104 Wash 142 40 C.J. p 295 note 97

67. Cal.—Brush v E R Bohan & Co, 283 P 126, 102 Cal App 457

68. U.S.—Kyser v MacAdam, C.C. A N.Y., 117 F.2d 232

69. Ark.—Sebastian Building & Loan Ass'n v Minten, 27 S.W.2d 1011, 181 Ark 700

70. U.S.—In re Williams, D.C. Ohio, 252 F 924 40 C.J. p 294 note 88

Receipt of proceeds as trust fund

A mortgage given after commencement of the improvement, and which did not contain a required covenant that the proceeds thereof would be received as a trust fund to be applied first to payment of the cost of improvement, was held subsequent to mechanics' liens, notwithstanding the proceeds were paid directly to the chief contractor, who actually applied them against the cost of the improvement—Kyser v MacAdam, C.C. A N.Y., 117 F.2d 232

71. U.S.—In re Williams, D.C. Ohio, 252 F 924 40 C.J. p 295 note 89

72. Ohio—Rider v Crobaugh, 135 N.E. 130, 100 Ohio St 88 40 C.J. p 295 note 90

73. N.J.—Franklin Soc v Thornton, 96 A 921, 85 N.J. Eq 525.

Effect of delay in filing building loan agreement see *infra* § 204 b

74. N.J.—Feinberg v Building Const Co, 154 A 821, 107 N.J. Law 495—Eleventh Ward Building & Loan Ass'n v Campagna, 154 A 414, 108 N.J. Eq 202

Ohio—Knollman Lumber Co v Hiltenbrand, 29 N.E.2d 61, 64 Ohio App 549

40 C.J. p 295 note 92

Extent of priority see *infra* § 205

"The lien of one who has furnished material used in the construction of a building is entitled to priority over an advance money mortgage made and recorded after the commencement of the building and before the filing of the lien claim, where the proof in the case fails to trace the mortgage money into the hands of laborer or materialman"—Building Supply Co of Englewood v. Greenberg, 153 A 581, 107 N.J. Law 361

Legal services

Portion of mortgage money used to pay for legal services and insurance was held subordinate to claim for labor and materials—Feinberg v Building Const Co, 154 A 821, 107 N.J. Law 495—Riverside Apartment Corporation v Capitol Const Co, 152 A 763, 107 N.J. Eq 405, affirmed 158 A 740, 110 N.J. Eq 67.

Insurance

Moneys advanced under construction mortgage which were used for insurance were held not entitled to

priority over mechanic's lien—Feinberg v Building Const Co, 154 A 821, 107 N.J. Law 495—Riverside Apartment Corporation v Capitol Const Co, 152 A 763, 107 N.J. Eq 405, affirmed 158 A 740, 110 N.J. Eq 67

Materials

Term "money actually advanced and paid" within statute giving construction mortgages priority over mechanics' liens does not include building materials furnished—Riverside Apartment Corporation v. Capitol Const Co, *supra*.

Commixing of funds

Mortgagee advancing money which owner of premises mingled with other moneys in his bank account was held nevertheless entitled to priority over mechanic's lien, to extent of amount applied to erection of building less amount already in account—Riverside Apartment Corporation v Capitol Const Co, *supra*.

75. Ark.—Sebastian Building & Loan Ass'n v. Minten, 27 S.W.2d 1011, 181 Ark 700

76. Ark.—Sebastian Building & Loan Ass'n v Minten, *supra*.

Clearing of title

A mortgage for building purposes does not lose its priority by the fact that some of the loan was devoted to clearing the title—Shaw v Rackensack Apartment Corporation, 295 S.W. 966, 174 Ark 492.

(1) In General

A purchase-money mortgage, whether given to the vendor of the property or to a third person, ordinarily takes priority over a mechanic's lien accruing thereafter, notwithstanding the mortgagee knew that an improvement was contemplated.

A purchase-money mortgage or like encumbrance given prior to the accrual of a mechanic's lien ordinarily will take priority thereof⁷⁷ notwithstanding the knowledge of the mortgagee that the mortgagor intended to build upon the mortgaged property⁷⁸. On the other hand, the status of a purchase-money mortgage given after mechanics' liens have attached is the same as that of the interest being purchased,⁷⁹ and hence, where such liens have attached to the interest of the vendor, they take precedence over the purchase-money mortgage⁸⁰. It has been held that the priority of a purchase-money mortgage over subsequent mechanics' liens is not lost by the fact that the sale transaction includes an agreement on the part of the purchaser to build on the land;⁸¹ but there is also authority holding that the lien is subordinate to a mechanic's lien for work done on, or materials furnished to, the property where the agreement of the vendor and purchaser requires the purchaser to make the improvement,⁸² further, where a vendor agreed to take a mortgage for the unpaid balance of the price if the vendee started to build within a speci-

fied time, and the arrangement was complied with, it was held that the vendor could not assert a lien prior to that of a materialman⁸³.

The fact that a vendor agrees that his purchase-money mortgage shall be subordinate to one given by the purchaser to obtain money with which to erect a building on the premises does not render it subordinate to mechanics' liens⁸⁴. Also the fact that the mortgage is postponed to enable the vendee to record a plat free from encumbrances, the vendor in the meanwhile holding the record title as security for the purchase price, does not increase the rights of the holders of mechanics' liens⁸⁵. It has been said that a doubt, arising from crude and loosely drawn legislation, as to whether a mechanic's lien is prior to a purchase-money mortgage should be resolved in favor of the mortgage⁸⁶.

Person to whom mortgage given In determining whether a mortgage is entitled to priority as a purchase-money mortgage, the test is not whether the mortgage is given to the vendor⁸⁷ but whether it is to be used as purchase money,⁸⁸ and a third person advancing the purchase money and taking a purchase-money mortgage can stand in no better position than the vendor, so that, if mechanics' liens have attached to the vendor's interest in the property, they take priority over the mortgage⁸⁹. Also the mere fact that the proceeds of a loan, obtained from

77. Ga.—Rutland Contracting Co v Sallie E Gay Estate, 18 S E 2d 835, 193 Ga 468.

Kan.—Bond v Westine, 278 P 12, 128 Kan 370

Mo.—Corpus Juris cited in Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 58 S W 2d 995, 1002, 332 Mo 440—Lyvers v Rutherford, 80 S W 2d 729, 280 Mo App 921

Neb.—L P Larson Real Property Co v Norris-Lyddon Produce Co, 355 N W 50, 127 Neb 357

NJ.—Bloom v Thirty-Six Berwyn Street Corporation, 136 A 803, 101 N J Eq 142

NY.—Merritt v Dansmith Corporation, 270 N Y S 675, 240 App Div 338—Buffalo Farm Exchange v Heinz, 257 N Y S 147, 235 App Div 277

Tenn.—Prichard Bros v Causey, 12 S W 2d 711, 158 Tenn 53

Tex.—Guggenheim v Dallas Plumbing Co, Com App, 59 S W 2d 105

Wash.—Dunn v Wolf, 282 P. 842, 154 Wash 445.

40 C J p 295 note 4

Contract for mortgage

A vendor who has a contract under which he is to be given a purchase-money mortgage by the vendee has the same rights, as to pri-

ority, as when he subsequently receives the mortgage—Marker v Davis, 304 N W 287, 200 Iowa 446

Absence of covenant to pay cost of improvements

Provision of lien law requiring, as condition to priority over liens, that mortgage recorded subsequent to commencement of improvement contain covenant to pay cost of improvements, has been held inapplicable to purchase-money mortgages—Shilowitz v Wadler, 261 N Y S 351, 237 App Div 330, reargument denied Shilowitz v Monticello Lumber Co, 261 N Y S 1029, 238 App Div 757

78. Ga.—Rutland Contracting Co v Sallie E Gay Estate, 18 S E 2d 835, 193 Ga 468

Iowa.—Queal Lumber Co v McNeal, 284 N W 482, 226 Iowa 637—Queal Lumber Co v McNeal, 284 N W. 479, 226 Iowa 631

Neb.—Holmes v Hutchins, 57 N W 514, 38 Neb 601

79. Minn.—McCausland v West Duluth Land Co, 53 N W. 464, 51 Minn 246

80. Iowa.—Nunemaker v Kulhavy, 196 N W 1009, 197 Iowa 982

40 C J p 296 note 18

81. Wash.—Dalk v Varick Inv. Co, 10 P 2d 231, 167 Wash 678.

82. Colo.—Longton v Husung, 16 P 2d 423, 91 Colo 501

Ga.—Mitchell v West End Park Co, 156 S E 888, 171 Ga 878

83. Mich.—Winkworth Fuel & Supply Co v Bloomsbury Corporation, 353 N W 304, 266 Mich 298

84. Tenn.—Corpus Juris quoted in Prichard Bros v Causey, 12 S W 2d 711, 712, 158 Tenn 53

Wash.—Dalk v Varick Inv Co, 10 P 2d 231, 167 Wash 678

40 C J p 296 note 22

85. Iowa.—Marker v Davis 204 N W 287, 200 Iowa 446

86. NJ.—Franklin Soc v Thornton, 95 A 374, 85 N J Eq 37, affirmed 96 A 921, 85 N J Eq 525

87. Mo.—Corpus Juris quoted in Joplin Cement Co v Greene County Building & Loan Ass'n, 34 S W 2d 529, 532, 224 Mo App 1064

40 C J p 296 note 24

88. Mo.—Corpus Juris quoted in Joplin Cement Co v Greene County Building & Loan Ass'n, 34 S W 2d 529, 532, 224 Mo App 1064

40 C J p 296 note 24

89. Kan.—Thomas v Hoge, 48 P 844, 58 Kan 166

Minn.—Finlayson v Crooks, 49 N.W. 398, 645, 47 Minn. 74.

a third person and secured by a mortgage, are used in paying the purchase price of land does not confer on the mortgagee an equity superior to prior mechanics' liens⁹⁰ where it does not appear that the lienors had anything to do with the transaction⁹¹ or that the mortgagee stands in any other position than that of an ordinary lender of money on mortgage security⁹²

Notice or recording of mortgage. It has been held that a purchase-money mortgage does not have priority over a lien for materials furnished without actual notice of the mortgage⁹³ or before the mortgage was filed,⁹⁴ but the lien of an alleged laborer who commenced his services prior to the recording of the purchase-money mortgage was held inferior to the mortgage where it appeared that the lien claimant was a promoter of the entire transaction, rather than a mere laborer.⁹⁵

(2) Improvements before Acquisition of Title

A purchase-money mortgage ordinarily takes priority over a mechanic's lien arising out of improvements made by a prospective purchaser of the property before he acquired title, at least where the vendor did not promote or consent to the improvement.

As a general rule, where a person not the owner of the property, but in possession thereof under a contract of sale or otherwise, makes improvements thereon and subsequently receives a deed of the property, and at the same time executes and delivers to the vendor a purchase-money mortgage or like instrument, the mortgage or encumbrance thus created is prior to mechanics' liens arising out of the improvements,⁹⁶ at least where the contract of

sale gave the purchaser no right to do any act before title vested in him which might create a lien on the land,⁹⁷ and where the vendor did not promote⁹⁸ or consent to⁹⁹ the improvement. Likewise, where a prospective purchaser of property obtains a loan from a third person to pay the purchase money, and a mortgage to secure such loan is executed as part of the transaction by which the purchaser receives his deed, such mortgage has priority over mechanics' liens arising out of improvements on the property commenced by the purchaser before he acquired title.¹

On the other hand, according to some authorities, a lien for labor and materials has priority over the lien of a purchase-money mortgage subsequently given where a prospective grantee, who commences an improvement before acquiring title, does so with the mortgagee's knowledge or consent² and active co-operation,³ and, under a statute making the interest of an owner subject to liens for improvements made on his land unless he gives a specified notice after learning that the improvement is being made, a purchase-money mortgage recorded after the improvement is begun is subordinate to the lien for improvements where the mortgagee, although knowing of the improvement, fails to give the required notice.⁴

Character of mortgage as purchase-money mortgage The rule giving a purchase-money mortgage priority over improvements commenced before the purchaser acquired his title applies only to a technical purchase-money mortgage given as part of the transaction by which the property is conveyed

90. Iowa—Wetmore v Marsh, 47 N W 1031, 81 Iowa 677
Kan—Thomas v Hoge, 48 P 844, 58 Kan 166

91. Iowa—Wetmore v Marsh, 47 N W 1031, 81 Iowa 677

92. Kan—Thomas v Hoge, 48 P 844, 58 Kan 166

93. Ga.—Tanner v Bell, 61 Ga 584
—Bryden v Holmes-Hartsfield Co, 60 SE 1031, 4 Ga App 122

94. Wash—Stoneway Lumber Co v Lovenberg, 286 P 105, 156 Wash 146

Ignorance of delivery of materials

A purchase-money mortgage is subordinate to a lien for materials, delivery of which commenced before the mortgage was filed, notwithstanding the vendor, when accepting the purchase money mortgage, did not know that such delivery had commenced—Stoneway Lumber Co. v. Lovenberg, *supra*.

95. Wash—Dalk v Varick Inv Co, 10 P 2d 231, 167 Wash 678

96. Cal—Hayward Lumber & Investment Co v Starley, 12 P 2d 66, 124 Cal App 283

Conn—Bridgeport People's Sav Bank v Palana, 161 A 526, 115 Conn 357

Minn—Reed & Sherwood Mfg Co v Jones, 278 N W 30, 202 Minn 274

Mo—Jefferson County Lumber Co v Robinson, App, 121 SW 2d 209

Or—Pacific Spruce Corporation v Oregon Portland Cement Co, 289 P 489, 133 Or 223, 73 ALR 1507

Tenn—Corpus Juris quoted in Prichard Bros v Causey, 12 SW 2d 711, 712, 158 Tenn 53

40 CJ p 296 note 10.

97. Conn—Hillhouse v Pratt, 49 A 905, 74 Conn 118.

98. Neb—L. P. Larson Real Property Co v Norris-Lyddon Produce Co, 255 N.W 50, 127 Neb 357

99. Mo.—Lee & Boutell Co v. C. A.

Brockett Cement Co, 106 SW 2d 451, 341 Mo 95

1. Mo—Corpus Juris cited in Joplin Cement Co v Greene County Building & Loan Ass'n, 74 SW 2d 250, 251, 228 Mo App 883—Corpus Juris quoted in Joplin Cement Co v Greene County Building & Loan Ass'n, 74 SW 2d 529, 532, 224 Mo App 1064
40 CJ p 296 note 26.

2. Wash—Capital Savings & Loan Ass'n v Vaughn Hardware Co, 1 P 2d 310, 163 Wash 396—Mutual Savings & Loan Ass'n v Johnson, 279 P 108, 158 Wash 41

3. Cal—Avery v Clark, 25 P 919, 87 Cal 619, 22 Am SR 272
Mo—Jefferson County Lumber Co v Robinson, App, 121 SW 2d 209—Lvvers v Rutherford, 80 SW 2d 729, 230 Mo App 921.

4. Minn—Bruer Lumber Co v Kenyon, 208 N.W. 10, 166 Minn. 357.

to the purchaser,⁵ and if the mortgagor had more than a momentary seizin the mechanics' liens have precedence over the mortgage which he gave after having acquired title⁶ notwithstanding such mortgage was given to secure unpaid purchase money.⁷

§ 202. — Provisions of Building Contract

Under the circumstances of particular cases, certain provisions of building contracts have been held not to affect the priority of mechanics' liens as against mortgages.

Where there is no statute providing for the recording of construction contracts, the recording of a contract whereby a contractor agrees that his lien on the building shall be subordinate to a mortgage on the land does not operate as constructive notice to materialmen who furnish material used in the erection of the building.⁸ A provision in a building contract that liens "filed under this contract" for labor and material enumerated in a schedule attached thereto shall be postponed to a certain mortgage does not apply to extra work not covered by the schedule.⁹

§ 203. — Independent Agreements

Independent agreements between mechanics' lien claimants and mortgagees for the subordination of one claim as against another will be given effect, as between the parties, in accordance with their terms.

An agreement between mechanics' lien claimants and mortgagees for the postponement of the claims

of the former to the claims of the latter will be given effect as between the parties thereto.¹⁰ Likewise an agreement between one claimant and a mortgagee for priority of the claim over the mortgage is enforceable by claimant against the mortgagee.¹¹ After encumbrances junior to a mechanic's lien have attached, their priority cannot be disturbed by an agreement between the owner and the lien claimant increasing the amount recoverable by the latter.¹²

A mortgagee who has subordinated his lien merely to the extent of moneys advanced under a subsequent trust mortgage, and used for building purposes, does not thereby subordinate his mortgage to subsequent mechanics' liens,¹³ and, where a mortgagee agreed that his mortgage should be subject to a subsequent mortgage, the second mortgagee has been held not entitled to add payments on mechanics' liens to the indebtedness so as to give them priority over the first mortgage,¹⁴ but persons taking a mortgage with a provision therein subordinating their lien to that of another mortgage, which in turn was subject to a mechanic's lien, necessarily acquire a lien inferior to the mechanic's lien.¹⁵ The holder of a deed of trust who consents that his claim may be subordinated to a deed of trust given to a contractor has been held subsequent in right to the claims of mechanics and materialmen who become subrogated to the rights of the contractor.¹⁶

5. Mass.—Brown v Haddock 85 N E 573, 199 Mass 480

6. Mass.—Osborne v Barnes, 61 N E 276, 179 Mass 597
40 C J p 296 note 13

7. Neb.—Ansley v. Pasahro, 35 N W 885, 22 Neb 662

8. Ala.—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 103 A L R 346

9. Pa.—Sankey v Burton, 46 A 850, 196 Pa 504

10. Fla.—Johnson v Florida Bank at Orlando, 13 So 2d 799, 153 Fla 120

La.—Powell v Superior Pure Ice Co, 141 So 868, 174 La 891
40 C J p 297 note 36

"Where a mechanic's lien claimant has unconditionally postponed his right of lien to the lien of an advance money mortgage and has authorized the mortgagee to pay out the mortgage moneys without restriction, his rights will be controlled by his agreement and not by the statute."—City Hall Building & Loan Ass'n of Newark v Florence Realty Co, 158 A 506, 110 N J Eq 12

Authority to consent

Filing of consent by persons au-

thorized by lienor is essential to give priority to subsequent mortgage over earlier mechanics' liens, and consent, where not given in behalf of lienors and not filed, did not affect priority of nonassenting lienor.—Max Fine & Sons v Lindarose, Inc, 161 N E 447, 248 N Y 137.

Change of plans

Contractor who subordinated his lien to that of a mortgage and deed of trust, on the basis of certain plans, was held not to lose his priority to the extent that the plans were changed.—Mutual Reserve Ass'n v Zeran, 277 P 981, 152 Wash 342

Failure of consideration

Where a laborer and materialman signed a written agreement subordinating all rights, claims, and liens as against the lien of a mortgage which was about to be obtained, and the mortgage contained a provision that it covered loans to be made from time to time, the aggregate amount of which should at no time exceed a specified sum, it was held that the consideration for the subordination agreement did not fail merely because the full amount of the specified sum was not advanced.—Johnson v Florida Bank at Orlando, 13 So 2d 799, 153 Fla 120.

Discontinuance of payments under mortgage

Where materialmen and laborers executed subordination agreement to induce bank to make mortgage loan to owners, the suspension of construction work warranted bank in discontinuing payments on mortgage without losing rights under subordination agreement.—Johnson v Florida Bank at Orlando, supra

11. Wash.—Potvin v Denny Hotel Co, 38 P 1002, 9 Wash 316

Subrogation of mortgagee on enforcement of agreement see infra § 206 a.

12. Tex.—Bryant-Link Co v W H Norris Lumber Co, Civ App, 61 S W 2d 160, error dismissed
40 C J p 297 note 38

13. N J.—Albert & Kernahan v Franklin Arms, 146 A 213, 104 N J Eq 446

14. Wash.—Dunn v. Wolf, 282 P 842, 154 Wash 445

15. Fla.—Dunlop v Teagle, 135 So 132, 101 Fla 721

16. Cal.—Community Lumber Co of Baldwin Park v. Chuta, 10 P 2d 57, 215 Cal 268.

but the priority of the mechanics and materialmen in such case extends only to the amount due under the contractor's deed of trust, and not necessarily to the full amount of the mechanics' and materialmen's claims¹⁷

§ 204. —Loss of Priority; Waiver or Estoppel

- a. By mechanic's lien claimant
- b. By mortgagee

a. By Mechanic's Lien Claimant

- (1) In general
- (2) Failure or delay in perfection or enforcement of lien

(1) In General

A mechanic's lien claimant may be precluded by es-

toppel or waiver from claiming priority over a mortgage; and, where he has expressly waived his priority, the waiver will be given effect according to its terms.

The holder of a mechanic's lien may be precluded by waiver, estoppel, or the like from claiming priority over a mortgage¹⁸. He may, for example, be precluded from claiming priority over a mortgage which he in effect procured to be made¹⁹. A claimant who, after having filed a notice of lien, canceled it in order to enable the owner to borrow money on a mortgage is estopped to claim that the lien is prior to the mortgage²⁰. Where a claimant has expressly waived his lien in favor of a mortgage, the waiver will be given effect according to its terms²¹ unless it was procured from him by fraudulent representations²². However, in particular cases the facts may be insufficient to constitute either a waiver²³ or estoppel²⁴ on the part of the lienholder.

17. Cal—Community Lumber Co of Baldwin Park v California Pub Co, 10 P 2d 60, 215 Cal 274—Community Lumber Co of Baldwin Park v Chute, 10 P 2d 57, 215 Cal 368

18. Colo—Mortgage Brokerage Co v W B Barr Lumber Co, 16 P 3d 82, 91 Colo 445

Iowa—Eclipse Lumber Co v Bitler, 241 NW 696, 213 Iowa 1313

La.—Powell v Superior Pure Ice Co, 141 So 868, 174 La 891

Miss.—Planters' Lumber Co v Griffin Chapel M E Church, 128 So 76, 157 Miss 714.

Or—Charles K Spaulding Logging Co v Ryckman, 6 P 2d 25, 139 Or 230

Wash.—Mutual Reserve Ass'n v Zeran, 277 P 984, 152 Wash 342

46 C J p 297 note 40
Waiver of, or estoppel to assert, lien generally see infra §§ 223-231

Circumstances giving rise to waiver or estoppel

(1) Execution of false or fraudulent receipts to induce advancement of funds

Cal—J & W C Shull v Doerr, 294 P 464, 110 Cal App 613

Wash.—Spokane Savings & Loan Soc v Park Vista Improvement Co, 294 P 1028, 160 Wash 12

(2) Letter by architects stating that fee had been paid—Weiss, Dreyfous & Seiferth v Natchez Inv Co, 140 So 736, 166 Miss 253

(3) Removal of all evidence of commencement of improvements prior to recording of mortgage—North Shaker Boulevard Co v Harriman Nat Bank of City of New York, 153 NE 909, 22 Ohio App 487

(4) Other circumstances—Mississippi Butane Gas System Co v Glisson, 10 So 2d 853, 194 Miss 457

Taking machinery in payment for material

A person who furnishes material and does work on a building, taking machinery in payment therefor, loses priority of lien over a bona fide mortgagee who advanced money after such payment, although the title to the machinery fails and it is taken on replevin by the legal owner—Garrett v Adams, Tenn.Ch.A., 39 S W 730

19. Mich—Heide v Societatea Romana de Ajutor si Cultura Banatiana, 247 NW 702, 262 Mich 394
40 C J p 297 note 43

20. Utah—Spargo v Nelson, 87 P 495, 10 Utah 274

Failure to perfect lien see infra subdivision a (2) (a) of this section

21. Fla—Johnson v Florida Bank at Orlando, 13 So 3d 799, 153 Fla 120

Minn—Minneapolis Builders' Supply Co v Calhoun Beach Club Holding Co, 244 NW 53, 186 Minn 635

NJ—Katchen v Bregman, 141 A 586, 5 NJ Misc 1084.

40 C J p 297 note 41

Consideration

Where general waiver of right to mechanic's lien prior to mortgage lien of company advancing money to pay mechanics was executed in consideration of company's check, fact that owner's check for balance was dishonored was held not to entitle mechanic's lien to priority over mortgage lien—Decatur Lumber & Mfg Co v Crail, 183 NE 238, 350 Ill 319

Particular waivers construed

(1) To be effective as to the amount received by the lienor as consideration for the waiver but to continue his priority as to the balance of the lien claim—Bruce Const Cor-

poration v Federal Realty Corporation, 139 So 209, 104 Fla 93

(2) To give priority to the mortgage up to the amount advanced to the owner or for his account, without showing that the money went into the building—Katchen v Bregman, 141 A 586, 5 NJ Misc 1084

(3) As not limited to the lien right for goods which had already been furnished at the time of the release, but to be applicable as well to those supplied later—Crane Co of Minnesota v Advance Plumbing & Heating Co, 234 NW 847, 177 Minn 133

22. Minn—Guy T. Bisbee Co. v. Granite City Inv Corp, 199 NW 14, 150 Minn 238

Absence of record disclosure as to claim of deceit

A subcontractor who waived his right to file a mechanic's lien, and who thereafter filed such a lien claiming that he had been deceived into agreeing to the waiver, was held postponed to the rights of a mortgagee, where examination of the record would have disclosed nothing regarding the subcontractor's claim of deceit—Toll v Beckerman, 148 A 904, 299 Pa 1

23. Ill—Stolze Lumber Co v Oglesby, 266 Ill App 569

40 C J p 297 note 44

Revocation of arbitration agreement

A waiver of priority of a mechanic's lien, in an agreement to submit to arbitration, is without effect where proceedings to enforce the lien are instituted before award, and such proceedings are deemed a revocation of the agreement to arbitrate—Paulsen v Manske, 18 NE 275, 126 Ill. 72, 9 Am SR 532

24. US—Fred T Ley & Co v. Wheat, CCA Fla, 64 F 2d 257

Fla—Hogue v D N. Morrison Const.

The priority of a mechanic's lien over a mortgage is not affected by a release by the lienor of his rights under a personal judgment against the owner,²⁵ nor does a materialman by taking a note of the owner secured by a quitclaim deed thereby relinquish his claim for a lien on the premises so as to permit a subsequent mortgage to become a prior lien.²⁶ The rights of lienors, otherwise entitled to priority, are not affected by the fact that the liens were filed at the instance of the mortgagor²⁷ or that the mortgagor concealed the existence of such liens from the mortgagee at the time of obtaining the loan for which the mortgage was given.²⁸ A waiver by the contractor which is effective as to himself alone, and which merely subordinates his claim to any surplus after liens of laborers and materialmen are satisfied, cannot operate to defeat the priority over the mortgage which statutes give to a laborer or materialman as to a building erected on the land.²⁹

(2) Failure or Delay in Perfection or Enforcement of Lien

(a) Perfection of lien

(b) Enforcement of lien

(a) Perfection of Lien

Failure of a mechanic's lien claimant to comply with statutory requirements relating to the perfection and preservation of his lien, as, for example, by failing to give notice or to file a claim within the time prescribed by statute, may cause him to lose his priority over a mortgage.

The application of the general rule that a mechanic's lien is entitled to priority over mortgages or like encumbrances subsequently attaching to the property is dependent on compliance by the mechanic's lien claimant with the statutory requirements relating to the perfection and preservation of his lien,³⁰ he may lose priority over encumbrances by failing to give notice to the owner,³¹ to file a claim or statement³² within the time prescribed by statute,³³ or to comply with statutory requirements as to the form and contents of the state-

Co of Virginia, 156 So 377, 115 Fla 293, 95 A L R 357

Pa—Houser v Matsinger, 156 A. 738, 102 Pa Super 192
40 C J p 297 note 45

25. N.Y.—Paris v Lawyers' Title Ins & Trust Co, 126 N.Y.S. 753, 141 App Div 866, affirmed 99 N.E. 83, 206 N.Y. 637

26. Ill.—Alton-Germania Bldg & Loan Ass'n v Glass, 186 Ill App 488

27. N.J.—Gordon v Torrey, 15 N.J. Eq 112, 82 Am D 273

28. N.J.—Gordon v Torrey, *supra*.
Negligence of mortgagee

A mortgagee of property against which a mechanic's lien for building material is sought to be enforced is chargeable with negligence in the making of its loan to the building contractor who, at the time, was the owner of the property, when, although it knew that a building was being erected on the property and was only partially completed, it relied on the contractor's affidavit that all bills for material had been paid in full and turned over to the contractor the full amount of the loan.—Decatur Lumber & Manufacturing Co v Clark, 270 Ill App 33

29. Ala.—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 151 So 591, 228 Ala 612, 102 A. L.R. 346

30. Ga.—Dwight v Acme Lumber & Supply Co, 187 S.E. 668, 183 Ga. 139

Miss—Swift & Co v Everett, 157 So 476, 171 Miss 410—Walker v

Macon Creamery Co, 146 So 442, 165 Miss 121

Ohio—Becker v Wilson, 165 N.E. 108, 30 Ohio App 340

Tenn—Corpus Juris cited in Brown v Brown & Co, 160 S.W.2d 431, 433, 25 Tenn App 509
40 C J p 298 note 55

Failure to file against record owner

An alleged lien filed against one who is not the record owner, and whose contract to buy was not recorded, cannot prejudice the rights of a third person who relies on the faith of clear public records and whose mortgage is properly recorded against the record owner.—Jackson Homestead Ass'n v Zimmer, 134 So 136, 16 La App 647

Extent of mortgagee's duty to examine record

With respect to priority over mechanic's lien, mortgagee dealing with record owner was only obliged to examine appropriate indexes in recorder's office and courts of record.—Toll v Beckerman, 148 A. 904, 299 Pa. 1

31. Tenn—Corpus Juris cited in Brown v Brown & Co, 160 S.W.2d 431, 433, 25 Tenn App 509
40 C J p 298 note 56

Notice to owner see *supra* §§ 120-129

32. Ga.—Georgia State Sav Ass'n v Wilson, 5 S.E.2d 14, 189 Ga. 21
Ky—Weil v B E Buffalo & Co, 65 S.W.2d 704, 251 Ky 673

Tenn—McDonnell v Amo, 34 S.W.2d 212, 162 Tenn 36—Corpus Juris cited in Brown v Brown & Co, 160 S.W.2d 431, 433, 25 Tenn App.

509—Henderson v Watson, 180 S.W.2d 429, 25 Tenn App 506

40 C J p 298 note 57

33. Cal—Remington v Mulholland, 5 P.2d 667, 118 Cal App 479

La—H R Hayes Lumber Co v H M Jones Drilling Co, 148 So 899, 177 La 626—City Sav Bank & Trust Co v White, 132 So 124, 171 La 727—Cook v Carter, 106 So 704, 160 La 88—Surplus Lumber Co v Ferguson, 122 So 908, 10 La App 784

SD—Botsford Lumber Co v Schri-ver, 206 N.W. 423, 29 SD 68

Tenn—Corpus Juris cited in Brown v Brown & Co, 160 S.W.2d 431, 433, 25 Tenn App 509

40 C J p 298 note 58—41 C J p 515 note 89 [d] (3)

Subsequent minor repairs

Privileges of materialmen were lost as against mortgage where claims were not recorded within statutory period after last labor, service, or material was furnished, even though minor repairs were subsequently made.—Hortman-Salmen Co v White, 123 So 715, 158 La. 1067

Mortgagee's knowledge of unpaid bill

Materialman by failing to file notice of lien within statutory period from the date when the last material was furnished permitted mortgage lien to become superior notwithstanding the mortgagee had actual knowledge of the unpaid bill for materials.—Fisher Lumber Co v Verhine, 3 So 2d 374, 147 Fla 670

ment³⁴ The owner cannot waive compliance with statutory requirements so as to affect the rights of a mortgagee,³⁵ nor can he, by admissions inconsistent with the existing facts, restore a lost lien so as to give it precedence over encumbrances made after the lien attached³⁶

A mechanic's lien is not rendered inferior to a mortgage by reason of an error or mistake of the recording officer in indexing the lien³⁷ or in entering satisfaction thereof³⁸ Under a few statutes, where the debtor is in failing circumstances, the mechanics' claims are preferred debts whether or not notices of lien are filed³⁹ Under some statutes, applicable in certain cases, the superiority of a mechanic's lien over a preexisting mortgage may be retained by registry of the contract within a specified time⁴⁰ or lost by failure to record it within the required time⁴¹

After recording of mortgage. Under some statutes a mortgage or like encumbrance given and recorded before the lien claim is filed or perfected is entitled to priority over the lien⁴² unless the mortgagee had notice of the mechanic's lien⁴³ or unless the mortgage is fraudulent as to creditors and is not assigned until after the liens are filed,⁴⁴ but under the statutes of other jurisdictions it is not

necessary, in order to entitle a mechanic's lien to priority over a mortgage, that the lien claim or statement should be filed before the mortgage is given or recorded,⁴⁵ provided claimant perfects his lien within the statutory time⁴⁶ or the mortgagee has actual notice thereof⁴⁷

(b) Enforcement of Lien

A mechanic's lien claimant may lose his priority over encumbrances by failing to commence timely and appropriate proceedings to enforce his lien

A mechanic's lien claimant may lose his priority over encumbrances by failing to commence proceedings to enforce his lien⁴⁸ within the time prescribed by statute⁴⁹ by failing to have established and determined by judgment the attaching of his lien at a date prior to the judgment,⁵⁰ or, where he and the mortgagee are defendants in a proceeding by another claimant, by failing to claim priority in his answer,⁵¹ or to serve a copy of his answer on the mortgagee,⁵² as required by statute It has been held that a lienor who is entitled to priority as to the improvement but not as to the land loses such priority by proceeding against both the land and the improvement⁵³

While in some jurisdictions a mechanic's lien claimant does not forfeit priority over a mortgage

34. N.J.—Board v Freedman, 181 A 913, 99 N.J.Eq 351.
40 C.J. p 298 note 59.

35. Mich.—Adams v Central City Granite Brick & Block Co, 117 N.W. 932, 154 Mich 448, 129 Am.S.R. 484

36. Me.—Frost v Hsley, 54 Me 345

37. Pa.—Citizens' Bank v. Lesko, 120 A 808, 277 Pa 174

38. N.D.—Atlas Lumber Co v Canadian-American Mortg & Trust Co, 161 N.W. 604, 36 N.D. 39
40 C.J. p 298 note 64

39. Ind.—Jenckes v Jenckes, 44 N.E. 632, 145 Ind 624

40. La.—Brown v. Staples, 70 So 529, 138 La 602

41. La.—Officer v Combre, App., 194 So 441
40 C.J. p 299 note 74

42. Cal.—J & W C Shull v Doerr, 294 P 464, 110 Cal.App 613

Fla.—Parker v Gamble, 118 So. 21, 96 Fla 343

Ga.—Caldwell v Northwest Atlanta Bank, 21 S.E.2d 619, 194 Ga 370
—Georgia State Sav Ass'n v Wilson, 5 S.E.2d 14, 189 Ga. 21—Picklesimer v Smith, 139 S.E. 72, 164 Ga 600

Ky.—Southern Coal Co v Martin's Fork Coal Co, 151 S.W.2d 394, 286 Ky 679—Weil v B E Buffaloe & Co, 65 S.W.2d 704, 251 Ky 673

N.Y.—Ausable Chasm Co v Hotel Ausable Chasm & Country Club, 33 N.Y.S.2d 427, 263 App.Div 486
—Schaich v Avitabile, 252 N.Y.S. 413, 140 Misc 868

N.D.—Northwestern Mut Savings & Loan Ass'n v Kessler, 268 N.W. 692, 66 N.D. 737

Pa.—Nick v McMullen, 17 Pa.Dist & Co 716, 14 Erie Co 41

40 C.J. p 298 note 67

43. Ky.—Weil v B E Buffaloe & Co, 65 S.W.2d 704, 251 Ky 673
40 C.J. p 299 note 68

"Actual notice" of existence of unrecorded materialmen's lien which would preclude grantee of security deed from taking property free from the lien is such notice as is positively proved to have been given to him directly and personally or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him on inquiry—Caldwell v Northwest Atlanta Bank, 21 S.E.2d 619, 194 Ga 370

Status as bona fide mortgagee

Under some statutory provisions a mortgagee recording his mortgage before the filing of a mechanic's lien, in order to acquire priority over mechanics' lien creditors, must establish his status as a bona fide mortgagee—Companaro v Gondolfo, C.C.A.N.J., 60 F.2d 451

44. N.Y.—Mahoney v McWalters, 38 N.Y.S. 256, 3 App.Div 248.

45. Iowa.—Denniston & Partridge Co v Luther, 188 N.W. 664, 194 Iowa 464

40 C.J. p 299 note 70

46. La.—Rose v Eunice Electric Theatre Co, Ltd., 97 So 322, 154 La 81

40 C.J. p 299 note 71

47. Iowa.—Lovell-Scholfield Lumber Co v Carter, 199 N.W. 405, 198 Iowa 233

48. Ill.—Shaeffer v Weed, 8 Ill 611
Miss.—Walker v Macon Creamery Co, 146 So 442, 165 Miss 121

Enforcement of lien see *infra* § 263 et seq

49. S.C.—Drewery v. Columbia Amusement Co, 69 S.E. 879, 1094, 87 S.C. 445

40 C.J. p 299 note 76

Time to commence proceedings see *infra* § 282

50. N.D.—Bastien v Barras, 84 N.W. 559, 10 N.D. 29

Or.—Kendall v McFarland, 4 Or 292

51. N.Y.—Dearstine v Carpenter, 173 N.Y.S. 875, 106 Misc 102

52. N.Y.—Dearstine v. Carpenter, *supra*

53. Mo.—State v. Drew, 43 Mo.App. 362.

by failing to make the mortgagee a party in a suit to enforce the lien,⁵⁴ and the lien may be asserted as against a mortgagee after the expiration of the time allowed by statute for foreclosing the lien against the owner,⁵⁵ nevertheless the result of not making the mortgagee a party may be a loss of priority by reason of a failure to commence proceedings as against the mortgagee within the statutory period.⁵⁶ Where the owner and mortgagee are made parties defendant in the suit to establish a mechanic's lien, as required by statute, the priority of the lien over the mortgage is not lost by a failure to make other lien claimants parties.⁵⁷

b. By Mortgagees

- (1) In general
- (2) Filing or recording
- (3) Release, extinguishment, renewal, or substitution of security

(1) In General

A mortgagee may estop himself from claiming priority over a mechanic's lienor; but in order to establish

a technical estoppel in such case the lienor must show some act or concealment which induced him to act otherwise than he would have done.

A mortgagee may be precluded by estoppel or the like from claiming priority over the holder of a mechanic's or materialman's lien,⁵⁸ and, where a mortgagee has failed to take the necessary steps prescribed by statute to obtain priority for himself over mechanics' liens, equity will not disregard the terms of the statutes to avoid the consequences of the mortgagee's own carelessness.⁵⁹ A mortgagee may, by reason of his having induced the furnishing of labor or material, be precluded from asserting the priority of the mortgage over a mechanic's lien.⁶⁰ Also, under a few statutes a mechanic's lien has priority over a mortgage where, before the work has begun or materials are furnished, a written notice of the contract is given the mortgagee and, after the receipt of such notice, he consents⁶¹ or fails to object within a specified time.⁶²

Of course, the facts in particular cases may not be such as to estop or preclude the mortgagee from asserting priority.⁶³ In order to establish an es-

54. Ala.—*Jackson v Farley*, 103 So 882, 212 Ala 594.

Mortgagee as party see *infra* § 284

55. Kan.—*Thomas v Hoge*, 48 P 844, 58 Kan 166.

56. Colo.—*Stark Lumber Co v Keystone Inv Co*, 20 P2d 306, 92 Colo 259, followed in 20 P2d 308, 93 Colo 266.

40 C.J. p 299 note 82

57. Mo.—*Waters v Gallemore*, App. 41 S.W.2d 870

58. Iowa.—*Maine v Waterloo Sav Bank*, 199 N.W. 414, 198 Iowa 16

La.—*Union Homestead Ass'n v Montegut*, 122 So 68, 168 La 369

Mo.—*Voelpel v Wuensche*, 74 S.W. 2d 14

Ohio.—*Fishman v Helwig*, 183 N.E. 883, 43 Ohio App 530

41 C.J. p 597 note 96 [a]

Circumstances establishing estoppel

(1) In general

Kan.—*Wichita Federal Savings & Loan Ass'n v Jones*, 130 P2d 556, 155 Kan 821

N.D.—*Northwestern Mut Savings & Loan Ass'n v Kessler*, 268 N.W. 693, 66 N.D. 737

(2) Vendor releasing blanket mortgage on lot, and taking second mortgage without first obtaining waivers of liens from mechanics and materialmen, was held estopped to assert priority over materialman's lien—*Meagher v Colonial Homes Co*, 146 A 609, 109 Conn 343.

(3) Where vendor following registration of trust deed and purchase-money notes helped to prepare contract between mortgagor and build-

ing contractor for work on premises involved, vendor was held estopped to deny that it had received written notice of contract and failed to object thereto so as to prevent priority of contractor's mechanic's lien—*Neely v Clarence Saunders Co*, 81 S.W.2d 390, 169 Tenn 30.

59. U.S.—*In re Braker*, C.C.A. Ohio, 127 F.2d 652.

Mechanic's lien intervening between first and second mortgages

Where the lien of a first mortgage, by reason of failure to comply with statutory requirements, is subordinated to a subsequent mechanic's lien, although still remaining prior to a second mortgage to which the mechanic's lien is subordinate, the mechanic's lien claim is entitled to payment before any payment on the first mortgage—*Vanderhoff v Wasco*, 158 A 323, 109 N.J.Eq 463

60. Kan.—*Golden Belt Lumber Co v Klinzman*, 28 P2d 736, 138 Kan 877

Mo.—*Corpus Juris* cited in *Magidson v Stern*, 148 S.W.2d 144, 153, 235 Mo App 1039

40 C.J. p 299 note 85

Agreements for postponement of lien generally see *supra* § 203

Promise to furnish money

Where mortgagee's promise to furnish money for buildings induced materialman to furnish material, and failure so to furnish money was a constructive fraud on mortgagors and materialman, it was held that, as to mortgagee, and those claiming under him with knowledge of facts, and those obtaining title to mort-

gage after actual beginning of buildings, interest of materialman was superior to mortgage lien—*Wilson v Hayes-Lucas Lumber Co*, 207 N.W. 155, 49 S.D. 341, modified on other grounds 226 N.W. 343, 55 S.D. 331

Agreement as to insurance proceeds

Where loss was sustained under fire policy, and both property owner and mortgagee joined in negotiations for collection with understanding that proceeds were to be used to repair building and insurer by virtue of understanding directed owner to have building repaired, parties furnishing labor and materials with knowledge of such understanding could, to extent of insurance fund, enforce lien on property superior to claims of both owner and mortgagee—*Savings Building & Loan Ass'n v Seaman-Packard Lumber Co*, 40 P.2d 660, 170 Okl 331

61. Tenn.—*Kingsport Brick Corp v Bostwick*, 235 S.W. 70, 145 Tenn 19—*Electric Light & Power Co v Bristol Gas, Electric Light & Power Co*, 42 S.W. 19, 99 Tenn 371

62. Tenn.—*Electric Light & Power Co v Bristol Gas, Electric Light & Power Co*, *supra*

63. Ark.—*Morrilton Lumber Co v Groom*, 3 S.W.2d 293, 176 Ark 520

Fla.—*Little v Bryan*, 131 So 662, 100 Fla 1577

Idaho.—*International Mortg Bank v Whitaker*, 255 P 903, 44 Idaho 178

Mo.—*Bovard v Owen*, App. 30 S.W. 2d 154

N.Y.—*De Francisco v Perry*, 13 N.Y. 82d 843, 257 App Div 1038

N.D.—*Northwestern Mut. Savings &*

toppel against the mortgagee the lienholder must show some concealment, misrepresentation, act, or declaration on which the lienholder properly relied and by which he was induced to act differently than he would otherwise have acted.⁶⁴ A mortgagee who agrees to subordinate his lien on specified conditions does not waive his prior rights where the conditions stipulated for subordination of his mortgage are not complied with.⁶⁵ It has been held that the mere fact that the mortgagee knew of the work,⁶⁶ and consented⁶⁷ or failed to object⁶⁸ thereto, does not deprive him of priority. However, it has also been held in other cases that a mortgagee, who takes a mortgage with notice that a materialman has commenced to furnish lumber for the erection of a dwelling on the premises, is not in a position to claim that the lien of the mortgage is superior to that of the materialman.⁶⁹ It has been both affirmed⁷⁰ and denied⁷¹ that a mechanic's lien has priority over a mortgage where the mortgagee, after acquiring knowledge of the improvement, fails to post a statutory notice that he will not be liable.

(2) Filing or Recording

In some, although not all, jurisdictions a mortgage loses its priority over mechanics' liens unless it is recorded before the liens accrue; and, under some statutes, a

building loan mortgage loses its priority if the contract for the building loan is not timely filed.

In some jurisdictions the priority of a mortgage executed before a mechanic's lien attached is not lost by reason of the mortgage not being recorded prior to such time.⁷² In other jurisdictions, however, the general rule is that in order for a mortgage or like encumbrance to have priority over a mechanic's lien it must be recorded before the mechanic's lien accrues,⁷³ and the mere fact that it was executed before that time will not give it priority if it is not recorded until afterward,⁷⁴ unless, according to some,⁷⁵ but not all,⁷⁶ authorities, claimant had actual notice of the mortgage. Where a mortgage is not recorded within the time prescribed by statute, it is postponed to mechanics' liens which accrued after its execution but before it was recorded,⁷⁷ although such liens were not perfected until after the mortgage was recorded.⁷⁸ Mere knowledge by a lien claimant that an owner of property was compelled to and did in fact finance a construction on the premises is not sufficient to put such lien claimant on inquiry to ascertain whether or not the property is chargeable with any lien, mortgage, or other encumbrance not of record at the time the materials were commenced to be furnished.⁷⁹

Loan Ass'n v Kessler, 268 N.W. 692, 66 ND 737
40 C.J. p 300 note 86

Purchase by mortgagee on foreclosure

Fact that mortgagee, served with process in suit to foreclose mechanics' liens, bought property on foreclosure of her own mortgage, and that time for redemption had expired, was held not to take away right to litigate question of priority or other material issue with other lienholders.—W E Suhring Co v Starford, 208 NW 136, 166 Minn 430

64. Conn.—Bridgeport People's Sav Bank v Palaia, 161 A 526, 115 Conn 357.

Lienors held not misled

Ohio.—Veller v Shafer, 29 Ohio N P, NS, 399

Consent to sale of materials on credit

In absence of showing of any act by lender that could have led materialman to believe that lender consented to his selling material to borrower on credit, lender was not estopped from enforcing lien of its recorded security deed as superior to materialman's unrecorded claim.—Georgia State Sav Ass'n v. Wilson, 5 SE2d 14, 189 Ga 21

65. Fla.—Little v Bryan, 131 So 652, 100 Fla 1577

66. U.S.—Allis-Chalmers Co v Central Trust Co, Me, 190 F 700, 111 CCA 438, 39 L.R.A.N.S. 84
40 C.J. p 300 note 87

67. Ga.—Georgia State Sav Ass'n v Wilson, 5 SE2d 14, 189 Ga 21
Mo.—Corpus Juris cited in Magidson v Stern, 148 SW2d 144, 153, 235 Mo App 1039
40 C.J. p 300 note 88

68. Mo.—Corpus Juris cited in Magidson v Stern, 148 SW2d 144, 153, 235 Mo App 1039

Tenn.—Pride v Viles, 3 Sneed 125

69. Neb.—H F Cady Lumber Co v Miles, 147 NW 210, 96 Neb 107, Ann Cas 1916B 632

70. Colo.—Seely v Neill, 86 P 334, 37 Colo 198

Statutory notice of nonresponsibility generally see supra § 84

71. Cal.—Williams v Santa Clara Min Ass'n, 5 P 85, 66 Cal 193
Or.—Capital Lumbering Co v. Ryan, 54 P 1093, 34 Or 73

72. Wis.—Mathwig v Mann, 71 N W 105, 96 Wis 213, 65 Am SR 47
40 C.J. p 300 note 1

73. Cal.—J & W C Shull v Brooke, 289 P 885, 107 Cal App 88
Fla.—Van Eepoel Real Estate Co v Sarasota Milk Co, 129 So 892, 100 Fla 438, 456, followed in Hub Sup-

ply Co v Dunedin Real Estate Co, 129 So 904, 100 Fla 471

Idaho.—Poynter v Fargo, 281 P 1111, 48 Idaho 271

Tenn.—Thomas v Setliffe, 28 SW 2d 344, 160 Tenn 689
40 C.J. p 301 note 2

74. Fla.—Van Eepoel Real Estate Co v Sarasota Milk Co, 129 So 892, 100 Fla 438, 456, followed in Hub Supply Co v Dunedin Real Estate Co, 129 So 904, 100 Fla 471

N.Y.—Merritt v Dansmith Corporation, 270 NYS 675, 240 App Div 338

Tenn.—Thomas v Setliffe, 28 SW 2d 344, 160 Tenn 689
40 C.J. p 301 note 3

75. U.S.—Union Terminal Co v Turner Constr Co, Fla, 247 F. 727, 159 CCA 585
40 C.J. p 301 note 4

76. Mass.—Dixon v Hyndman, 59 NE 73, 177 Mass 506.

N.Y.—Schwartz v Rappaport, 187 NYS 611, 115 Misc 237

77. Pa.—Allen v Oxnard, 25 A 568, 152 Pa 621
40 C.J. p 301 note 6

78. Ind.—Jenckes v. Jenckes, 44 N. E 632, 145 Ind 624
40 C.J. p 301 note 7

79. Cal.—J & W C Shull v Brooke, 289 P. 885, 107 Cal App 88.

where the work was done by the day without a continuing contract.⁷

Where by the terms of a contract for the sale of land the purchaser is to make certain improvements before receiving title, mechanics' liens growing out of such improvements take priority over a purchase-money mortgage given pursuant to the contract of sale only to the extent of the labor and materials necessary to the improvement as designated in the contract of sale.⁸ A mortgage in ordinary trust form which secures an entire bond issue is superior to a subsequent mechanic's lien irrespective of how many of the bonds have been placed with investors at the time of the execution of the mortgage, or subsequently.⁹ A mechanic's lien claimant who under an agreement with the owner of the property has paid certain obligations of the owner for nonlienable items cannot have priority over a mortgagee as to such items.¹⁰ The mere fact that the mortgagor borrows less from the mortgagee than he was entitled to under his agreement with the mortgagee does not entitle a subsequent materialman to priority over the mortgage to the extent of the additional amount that the mortgagor might have borrowed.¹¹

Several buildings Where several buildings are being constructed, a proposed mortgagee has a right to look to the written contract between the parties to determine their rights and the value of his security, and, where he finds a separate contract for the material and labor on each building separately, he is justified in determining that a lien, if any, will be claimed as to each building separately for the labor and material furnished therein,¹² and conduct and actions of the parties subsequent to the written contract whereby the owner approves and ratifies deviations, conduct, and actions of a ma-

terialman in such a manner as to be estopped from denying or contesting the right of the materialman to claim a joint lien on all the buildings do not necessarily bind the mortgagee.¹³

Purchase-money mortgage The priority of a purchase-money mortgage over a mechanic's lien extends to the entire balance of the purchase price remaining unpaid,¹⁴ even though part of the land has been released from the mortgage.¹⁵

Attorney's fees Under a statute providing that attorney's fees shall be taxed as costs, but not providing that they shall be a preferred claim, the fees of attorneys of various mechanics' lien claimants and mortgagees take such preference, and such preference only, as is accorded by the judgment to the respective claims and mortgages.¹⁶ It has been held that, although a mortgage given before a mechanic's lien accrued stipulates for attorney's fees in case of default in payment when due, the mechanic's lien has priority over the mortgagee's claim for such amounts.¹⁷ Similarly, it has been held that a claim for attorney's fees due to the lien claimant under his agreement is not entitled to priority over the lien of a mortgage, at least where the fees are not deemed a lienable item.¹⁸

b. Advances or Expenditures by Mortgagee

The priority of a mortgage over mechanics' liens ordinarily is limited to the amount of money actually advanced, and is sometimes further limited to advances applied to the making of the improvement; but priority may extend to advances made after, as well as before, accrual of the mechanics' liens where the making of the advances was obligatory.

As between the original mortgagee and a mechanic's lien claimant, the priority of a mortgage, other than a purchase-money mortgage, over a mechanic's lien does not necessarily extend to the face value of the mortgage,¹⁹ but is limited to the amount

paid for all deliveries made before a mortgage was recorded does not give the mortgagee priority over the materialman for materials subsequently furnished under such contract—*Maxwell Lumber Co v. Connelly*, 287 P 64, 34 NM 562

7. *Mass—Batchelder v Hutchinson*, 37 NE 452, 161 Mass 462

8. *Conn—Hillhouse v Pratt*, 49 A 905, 74 Conn 113

Priority of mechanic's lien for improvements before acquisition of title see supra § 201 c

9. *NJ—Integrity Trust Co v Club Atlantic*, 162 A 241, 111 NJ Eq 295, affirmed *Integrity Trust Co v Ballinger*, 168 A 379, 114 NJ Eq 50

10. *Kan—Bell v Hernandez*, 30 P 2d 1101, 139 Kan 216

11. *Iowa—Queal Lumber Co v McNeal*, 284 NW 479, 226 Iowa 631

12. *Fla—Biscayne Trust Co v Wolpert Realty & Improvement Co*, 130 So 611, 100 Fla 1070

13. *Fla—Biscayne Trust Co v Wolpert Realty & Improvement Co*, supra

14. *Iowa—Marker v Davis*, 204 N W 287, 200 Iowa 446

Use of part of mortgage proceeds to pay purchase price

Where a vendee of land, simultaneously with the delivery of his deed, gave a mortgage to a third person and used part of the proceeds to pay for the land, the priority of such mortgage over a mechanic's lien for improvements made in part before delivery of the deed to the vendee was held limited to the

part so used—*New Jersey Bldg, Loan & Investment Co v Bachelor*, 35 A 745, 54 NJ Eq 600

15. *Iowa—Marker v Davis*, 204 N W 287, 200 Iowa 446

Effect of release of part of land generally see supra § 204 b

16. *Okl—Morley v McCaskey*, 270 P 1107, 134 Okl 50—*McGuvre v Duncan*, 229 P 199, 100 Okl 217 Allowance of attorney's fees on enforcement of lien see infra § 353

17. *Tenn—Garrett v. Adams*, Ch A, 39 SW 730

18. *Ill—Fair Play Development Organization v Sarmach*, 263 Ill App 592

Iowa—Speaker v Cass County Fair Ass'n, 249 NW 415, 216 Iowa 424

19. *Utah—Culmer Paint & Glass*

of money actually advanced by the mortgagee under the mortgage.²⁰ Priority of the mortgage is sometimes further limited to the advances which have been actually applied in the erection of the building or the making of the improvement,²¹ at least, according to some authorities, where the mortgage comes within a statute relating to improvement or construction mortgages,²² although otherwise not.²³ The mortgage will not be allowed priority in respect of fictitious claims of the mortgagee.²⁴ On the other hand, a mortgage, otherwise inferior to a mechanic's lien, will be allowed priority to the extent of the advances which the mortgagee was induced to make by the fraud of the mechanic's lien claim-

ant²⁵

Before or after accrual, registration, or notice of mechanic's lien. In a majority of jurisdictions, a mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of the mechanics' liens,²⁶ at least where the mortgage was recorded prior to the performance of services or the furnishing of the materials,²⁷ and the making of the advances was obligatory on the mortgagee under the terms of his contract with the mortgagor;²⁸ but as to mere voluntary advances made after the mechanics' liens accrued²⁹ and with

Co v Gleason, 130 P 66, 42 Utah 344

40 C J p 302 note 35

20. NH—Peaslee v Evans, 133 A 448, 82 NH 313

NJ—Sharff v. Tosti, 154 A 825, 108 NJ Eq 270—Jersey Bond & Mortgage Co v Wesp Bldg Co, 149 A 340, 105 NJ Eq 664

Okl.—Corpus Juris cited in First Nat Bank v Horsley, 49 P 2d 495, 497, 174 Okl 83

40 C J p 302 note 38

21. US—John Murland, Inc. v Empire Trust Co, CCANJ, 39 F 2d 341

Kan—Kantzer v Southwest Home Inv Co, 278 P 63, 128 Kan 401
Miss—Weiss, Dreyfous & Seifeith v Natchez Inv Co, 140 So 736, 166 Miss 253

22. Ohio—Ulmer v Portage Const & Finance Co, 26 Ohio NP, NS, 257

40 C J p 302 note 39

Statutes conferring priority on mortgages for building purposes see supra § 201 b

23. US—In re Williams, DC Ohio, 253 F 924

40 C J p 302 note 40

In New Jersey

(1) An advance-money mortgage recorded after the commencement of the building is entitled to priority over a subsequently filed mechanic's lien to the extent, and only to the extent, that the advances have been applied to the erection of the new building—Aggressive Building & Loan Ass'n v Kearny Plumbing Supply Co, 160 A 565, 110 NJ Eq 426
—Lumbermen's Ins Co of Philadelphia, Pa, v Russo, 155 A 388, 108 NJ Eq. 407—Lincoln Material Co v Goodwin Const Co, 150 A 829, 106 NJ Eq 326—Fischgrund v Eriksen Real Estate Co, 147 A 811, 105 NJ Eq 345—Thirteenth Ward Building & Loan Ass'n v Kanter, 147 A 809, 105 NJ Eq 339—Franklin Soc v Thornton, 96 A 921, 85 NJ Eq 525

(2) In order to acquire such prior-

ity the mortgagee must trace the money into the hands of laborers or materialmen—Fischgrund v Eriksen Real Estate Co, supra—Thirteenth Ward Building & Loan Ass'n v Kanter, supra

(3) Thus, mortgage money used by builder to repay money he had borrowed and applied to construction is not entitled to priority over mechanic's lien—Thirteenth Ward Building & Loan Ass'n v Kanter, supra

(4) Also, money paid to discharge anterior mortgage is not within statute giving mortgages superiority over mechanics' liens, where money is applied to construction—Thirteenth Ward Building & Loan Ass'n v Kanter, supra

(5) Where an advance-money mortgage is executed and also recorded prior to the commencement of the buildings, the mortgagee is entitled to priority to the extent of moneys advanced to be used in the erection of the buildings, even if the mortgagor did not appropriate the money to the payment of the costs of erection—Sharff v Tosti, 154 A 825, 108 NJ Eq 270—Franklin Soc v Thornton, supra.

24. Utah—Culmer Paint & Glass Co v Gleason, 130 P 66, 42 Utah 344

25. NJ—Haney-White Co v Stafford, 114 A 746, 96 NJ Law 283
40 C J p 302 note 42

26. Ga.—Caldwell v Northwest Atlanta Bank, 21 SE 2d 619, 194 Ga. 370

Idaho—Boise Payette Lumber Co v Winward, 276 P 971, 47 Idaho 485
40 C J p 302 note 43.

27. Cal—Smith v Anglo-California Trust Co, 271 P 898, 205 Cal 496
—Fickling v Jackman, 265 P 810, 203 Cal 657—Owens-Parks Lumber Co. v McCarty, 9 P 2d 310, 121 Cal App 623

Fla.—Franklin Savings & Loan Co v Fisk, 124 So 42, 94 Fla 683

Ga.—Picklesimer v Smith, 139 SE 72, 164 Ga. 600

Kan—Security Stove & Mfg Co v Sellards, 3 P 2d 481, 133 Kan 747, 76 ALR 1397

Minn — Landers-Morrison-Christenson Co v Ambassador Holding Co, 214 NW 503, 171 Minn 445, 53 ALR 573

40 C J p 302 note 44

Necessity of recording mortgage before accrual of lien generally see supra § 204 b

28. Cal—Smith v. Anglo-California Trust Co, 271 P 898, 205 Cal 496
—Fickling v Jackman, 265 P 810, 203 Cal 657—Lumber & Builders' Supply Co v Ritz, 25 P 2d 1002, 134 Cal App 607—Hayward Lumber & Investment Co v Naslund, 13 P 2d 775, 125 Cal App 34—

Yost-Lunn Lumber Co v Williams, 9 P 2d 324, 121 Cal App 571—Owens-Parks Lumber Co v McCarty, 9 P 2d 310, 121 Cal App 623.
Idaho—Boise Payette Lumber Co v Winward, 276 P 971, 47 Idaho 485
Minn — Landers-Morrison-Christenson Co v Ambassador Holding Co, 214 NW 503, 171 Minn 445, 53 ALR 573

NH—Peaslee v Evans, 133 A 448, 82 NH 313

Tenn—Theilen v Chandler, 9 Tenn App 345

40 C J p 302 note 45

Option as to time and amount

Where only option given in trust deed securing loan for fixed sum was in time and amount of advancements during construction, priority of trust deed over mechanic's lien was held not defeated—E K Wood Lumber Co. v Mulholland, 5 P 2d 669, 115 Cal App 475

29. Cal—Fickling v. Jackman, 265 P 810, 203 Cal 657—Hayward Lumber & Investment Co v Corbett, 33 P 2d 41, 138 Cal App 644

Construction required before advancement of money

Where the contract between the parties, the conduct of the mortga-

notice thereof³⁰ the mortgagee is postponed. It has been asserted, however, that the rule which applies where voluntary advances are made by the mortgagee to the mortgagor under an ordinary mortgage does not apply where the mortgage secures coupon bonds which are payable to bearer and pass by delivery and have been sold to bona fide purchasers, and that advances made under such a trust deed or mortgage, even if not obligatory, have priority over all encumbrances arising subsequent to the recording of the trust deed³¹

The undertaking of a mortgagee to make future advances is not deemed optional within the rule which gives subsequent encumbrances priority over optional advances thereafter made, unless it appears from his contract, without resorting to extrinsic evidence, that he has the right to decline to make them,³² and, where the right to refuse to make them depends on a breach of the contract by the other party, the mortgagee is not required to take the chance of establishing such breach to the satisfaction of a court or jury, but may disregard it and make the stipulated advances in reliance on his security.³³

Under some statutes the mortgagee is not entitled to priority in respect of advances made after the filing or registration of the lien.³⁴ Under other statutes, where a claim or statement of lien was not filed until after the mortgage was recorded,

the priority of the mortgage as to advances made depends on whether they were made before or after the mortgagee acquired actual notice that claimants had performed labor or furnished materials for which they had not been paid and for which they were entitled to assert liens, the mortgage being entitled to priority as to advances made before the mortgagee acquired actual notice,³⁵ but not in respect of advances made thereafter³⁶ Under still other statutes the mortgage is entitled to priority only in respect of advances made before the furnishing of the labor or materials for which the lien is claimed.³⁷

Expenditures by mortgagee. A mortgagee whose mortgage is prior to a mechanic's lien cannot claim priority for amounts paid by him for taxes³⁸ or insurance³⁹ on the property where there is no provision in the mortgage securing such payments by its lien. It has been held that a mortgagee whose mortgage is inferior to mechanics' liens cannot claim priority for taxes paid on the property, even though the mortgage provides that on default of the mortgagor in paying the taxes the mortgagee may pay them and tack the amount paid to his mortgage,⁴⁰ but it has also been held that an equitable mortgage of a lease, requiring the tenant to pay taxes, although otherwise inferior to a mechanic's lien, is entitled to priority as to taxes paid.⁴¹ A mortgagee who, on abandonment of the construction of the building by the owner, took possession

gee, and the circumstances surrounding the transaction show that there was an agreement and understanding between the owner and the mortgagee that a building should be constructed before the money was paid, and the mortgagee had a right to refuse payment of the mortgage until the building was constructed, materialmen who furnish material for the construction of the building after the recording of the mortgage, but before the money is paid, have a lien prior to that of the mortgagee—*Home Savings & Loan Ass'n v Sullivan*, 284 P 30, 140 Okl 300

30. Ark—*Corpus Juris* cited in *Superior Lumber Co v National Bank of Commerce*, 2 S W 2d 1093, 1094, 176 Ark 300

Cal—*Community Lumber Co of Baldwin Park v California Pub Co*, 10 P 2d 60, 215 Cal 274—*Yost-Linn Lumber Co v Williams*, 9 P 2d 324, 121 Cal App 571

Idaho—*Boise Payette Lumber Co v Winward*, 276 P 971, 47 Idaho 485 40 C J p 303 note 46

31. Minn—*Landers-Morrison-Christenson Co v Ambassador Holding Co*, 214 NW 503, 171 Minn 445, 53 A L R 573.

32. Minn—*Landers-Morrison-Christenson Co v Ambassador Holding Co*, supra

Waiver of conditions

Where a mortgage calling for advances contains conditions for the benefit of a mortgagee and the purchasers of bonds secured by the mortgage, the waiver of such conditions by parties for whose benefit they were intended affords no ground of complaint on the part of mechanics' lien claimants—*Landers-Morrison-Christenson Co v Ambassador Holding Co*, supra.

Performance of conditions

Where borrower fully performed conditions of trust deed securing advances, fact that deed provided that lender need not advance money under certain conditions and could stop payment was held not to make advances optional with lender as respects priority over mechanics' liens—*Hammond Lumber Co v Roubian*, 30 P 2d 440, 137 Cal App 155

33. Minn—*Landers-Morrison-Christenson Co v Ambassador Holding Co*, 214 NW 503, 171 Minn 445, 53 A L R 573

False representations by mortgagor

Advances made in reliance on representations that the mortgagor had performed the precedent conditions to be performed by him retain their right of priority, although such representations were in fact false—*Landers-Morrison-Christenson Co v Ambassador Holding Co*, 214 NW 503, 171 Minn 445, 53 A L R 573

34. NY—*Sullivan v Young*, 159 N Y S 791, 95 Misc 658 40 C J p 303 note 48

35. Ky—*Kentucky Lumber & Mill Work Co v Kentucky Title Sav Bank & Trust Co*, 211 S W 765, 184 Ky 244, 5 A L R 391

36. Ky—*Kentucky Lumber & Mill Work Co v Kentucky Title Sav Bank & Trust Co*, supra

37. Me—*W A Allen Co v Emerson*, 79 A 905, 108 Me 221

38. SC—*Devereaux v Taft*, 20 S C 555

39. SC—*Devereaux v Taft*, supra

40. Iowa—*Bissell v Lewis*, 9 NW 177, 56 Iowa 331 40 C J p 303 note 59

41. NY—*Leavitt v Waldemar Co*, 151 N Y S 832, 88 Misc 285

and completed it according to the original plans, has a lien for his expenditures superior to a mechanic's lien for material used by the owner,⁴² but the priority does not extend to the cost of improvements not contemplated in the original plan⁴³

c. Property or Interest Covered

- (1) In general
- (2) Priority of mechanic's lien as to building or improvement only
- (3) Enhanced value of property

(1) In General

In the absence of a statute providing otherwise, the general rule is that the priority of the lien first attaching extends to both the land and the building with respect to priority between a mechanic's lien and the lien of a mortgage.

The general rule, in the absence of statute to the contrary, is that the priority of a mechanic's lien over a mortgage or like encumbrance subsequently attaching extends to both the land and the building or improvement⁴⁴ Likewise, in the absence of a statute providing otherwise, an encumbrance on the land, existing before a building is commenced, attaches to the building or improvement as it progresses, and ordinarily is entitled to priority, as to the building or improvement as well as the land,

over mechanics' liens arising out of the construction of the building⁴⁵ As regards his right to priority, the holder of a mechanic's lien ordinarily is protected only to the extent of the interest in the real estate which the person to whom he furnishes material or labor holds⁴⁶

(2) Priority of Mechanic's Lien as to Building or Improvement Only

Under some statutes, where an improvement is erected on encumbered land, the encumbrance retains its priority on the land, but the mechanic's lien has priority with respect to the improvement, at least if the improvement cannot be removed without injury or if the case involves the erection of a distinct structure rather than mere repair of an existing structure.

Under the statutes of many jurisdictions, where a building or improvement is erected on encumbered land, a mechanic's lien on the building or improvement, as distinct from the land, is allowed priority over the previous encumbrance,⁴⁷ although the prior encumbrance is not displaced, but remains superior to the mechanic's lien, in respect of the property covered by the mortgage, at the time the mechanics' liens accrued,⁴⁸ such as the land⁴⁹ and any other improvements which were on it before the mechanic's lien attached⁵⁰ Such statutes, however, do not operate to confer priority on a mechan-

42. Kan—Logan-Moore Lumber Co v Bowersock, 164 P 156, 100 Kan 328

43. Kan—Logan-Moore Lumber Co v Bowersock, supra

44. Ala.—Schwab v Estes Lumber Co, 143 So 829, 225 Ala 453.

Ind—Ward v Yarnella, 91 N E 7, 173 Ind 535

Or—Eastern & Western Lumber Co v Williams, 276 P 257, 129 Or 1
Property affected by mechanic's lien generally see supra §§ 184-196

Land necessary for convenient use of building

Under some statutes, the prior lien of the mechanic extends not only to the building but also to as much land therewith as shall be necessary for the convenient use and enjoyment of the building—Federal Land Bank of Baltimore v Clinchfield Lumber & Supply Co, 198 SE 437, 171 Va 118

45. Cal—Brush v E R Bohan & Co, 283 P 126, 102 Cal App 457

Del—Corpus Juris cited in C L Pierce & Co v Security Trust Co, 175 A 770, 771, 6 WW Harr 348
ND—Corpus Juris quoted in Woolridge v Torgimson, 229 NW 805, 807, 59 ND 307

Okl—Pittsburg Mortg Inv Co v Standard Lumber Co, 298 P 885, 148 Okl 297—Morley v McCaskey, 270 P 1107, 134 Okl 50.

40 C J p 303 note 69.

46. Iowa—Magnetite Products Co v Bensmiller, 224 NW 514, 207 Iowa 303

47. Ala.—Lary v Jones, 187 So 714, 237 Ala 575—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 102 ALR 346—Grayson v Goolsby, 139 So 106, 224 Ala 75—Central Lumber Co v Jacks, 132 So 721, 222 Ala 475—Becker Roofing Co v Wysinger, 124 So 858, 220 Ala 276

Ark—Barton Lumber & Brick Co v Caraway, 13 SW 2d 586, 178 Ark 1034

Mich—Winkworth Fuel & Supply Co v Bloomsbury Corporation, 253 N W 304, 266 Mich 298

Mo—Gold Lumber Co v Baker, 86 SW 2d 130, 225 Mo App 849—Lowry-Miller Lumber Co v Dean, 29 SW 2d 736, 225 Mo App 299

Mont—Interstate Lumber Co v Rider, 19 P 2d 644, 93 Mont 489

ND—Dunham Lumber Co v Gresz, 2 NW 2d 175, 71 ND 491, 141 ALR 80.

Va.—Federal Land Bank of Baltimore v Clinchfield Lumber & Supply Co, 198 SE 437, 171 Va 118
40 C J p 303 note 70

Enforcement by sale and removal of building see infra § 339

Building or improvements as not part of land

The building or improvements placed on the land do not become a part of the land as far as the materialman is concerned—Central Lumber Co v Jacks, 132 So 721, 222 Ala 475.

48. Ala.—Magnolia Land Co v Malone Inv Co, 79 So 641, 202 Ala 157

Mo—Stumbaugh v Hall, App, 30 SW 2d 160

Mont—Interstate Lumber Co v Rider, 19 P 2d 644, 93 Mont 489

49. Ala.—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 102 ALR 346—Schwab v Estes Lumber Co, 143 So 829, 225 Ala 453—Central Lumber Co v Jacks, 132 So 721, 222 Ala 475—Becker Roofing Co v Wysinger, 124 So 858, 220 Ala 276

Ark—Barton Lumber & Brick Co v Caraway, 13 SW 2d 586, 178 Ark 1034

Mo—Gold Lumber Co v Baker, 86 SW 2d 130, 225 Mo App 849

Or—Pacific Spruce Corporation v Oregon Portland Cement Co, 289 P 489, 133 Or 223, 72 ALR 1507.
40 C J p 304 note 72

50. NJ—Morris County Bank v. Rockaway Mfg Co, 14 NJ Eq 189.

ic's lien over a prior encumbrance as to the building or improvement under all circumstances,⁵¹ and do not, for example, affect the priority of a mortgage executed prior to their passage⁵²

In some,⁵³ but not other,⁵⁴ jurisdictions the application of the statutes is dependent on whether the building or improvement is susceptible of removal without material injury. However, susceptibility of the improvement to removal without substantial damage is not the only criterion for determining the question of priority.⁵⁵ Another test of precedence is whether there is a distinct and independent improvement, or merely repairs or additions to, or a remodeling, enlargement, or extension of, an existing building, the mechanic's lien having priority in the former cases,⁵⁶ but not in the latter,⁵⁷ except in some jurisdictions⁵⁸

Where buildings on mortgaged premises are destroyed by fire, a mechanic's lien arising out of the erection of new buildings in their place takes priority over the mortgage,⁵⁹ even though the mortgage permitted the use of insurance money for the erection of such new buildings;⁶⁰ but the mortgage takes priority over the mechanic's lien to the extent

that material salvaged from the old building has been used in the erection of the new.⁶¹ Where the building is only partially destroyed, a lien arising out of the repairing thereof is postponed to the prior mortgage.⁶²

Mortgage for building purpose Under some statutory provisions, the fact that the mortgage was for a construction loan does not deprive the mechanic's lien of its priority as to the building.⁶³ Under other statutes, however, where a loan secured by a mortgage was made for the purpose of raising funds for the construction of a building, the mortgage has priority over mechanics' liens as to the building as well as to the land, to the extent that the money was used for the construction of the building,⁶⁴ although not to the extent that it was diverted and not so used.⁶⁵

(3) Enhanced Value of Property

Where improvements are made on encumbered property, a mechanic's lien is entitled to priority, under some statutes, as to the increased value of the property arising from the improvements, while the encumbrance retains its priority to the extent of the value of the property before the improvements.

51. Colo.—Jorammon v McPhee, 71 P 419, 81 Colo 28.

Defective title to land

Under a statute giving a mechanic's lien on a building or structure to one furnishing labor or material for the erection of the building or structure where the person contracting for such erection has a defective title to the land, a valid mortgage with condition broken does not constitute a defect in title so as to give a lien claimant priority over the mortgage as respects the building—Cooper v Haynes, 177 N E 475, 89 Ohio App 281

52. Ark.—Monticello Bank v. Sweet, 43 S W 500, 64 Ark 502

53. Iowa—Spieker v Cass County Fair Ass'n, 249 N W 415, 216 Iowa 424

Tex.—Hammann v H J McMullen & Co, 62 S W 2d 59, 122 Tex 476—Crabb v William Cameron & Co, Com App, 63 S W 2d 367—R B Spencer & Co v Biggers, Civ App, 108 S W 2d 368

40 C J p 304 note 77

Materials becoming integral part of existing structure

Where materials furnished were used to remodel dwelling house, and became integral part of existing structure, mechanic's lien was held not to take preference over preexisting recorded mortgage—Interstate

Lumber Co v. Rider, 19 P 2d 644, 93 Mont 489

Diminution of mortgagee's security

Statute giving mechanics' liens priority on buildings over prior recorded mortgage covers only structures, additions, or repairs severable without diminishing mortgagee's original security—Bratzel v Stafford, 14 P 2d 454, 140 Or 661, rehearing denied 16 P 2d 991, 140 Or 661.

54. Colo.—Atkinson v Colorado Title & Trust Co, 151 P. 457, 59 Colo 528

40 C J p 304 note 78

Enforcement by sale of entire property and apportionment of proceeds see *infra* § 339

55. Mo.—Elliott & Barry Engineering Co v. Baker, 114 S W 71, 134 Mo App. 95

56. Ark.—Morrilton Lumber Co v Groom, 3 S W 2d 293, 176 Ark 520—Mont—Corpus Juris cited in Dewey Lumber Co v McQuirk, 30 P 2d 475, 477, 96 Mont 294—Corpus Juris cited in Interstate Lumber Co. v Rider, 19 P 2d 644, 647, 93 Mont 489

40 C.J. p 304 note 80

57. Mo.—Lowry-Miller Lumber Co v Dean, 29 S W 2d 736, 225 Mo App 299

Mont—Corpus Juris cited in Dewey Lumber Co v McQuirk, 30 P 2d 475, 477, 96 Mont 294—Corpus Juris

cited in Interstate Lumber Co v Rider, 19 P 2d 644, 647, 93 Mont 489

40 C J p 304 note 81.

58. Ala.—Wimberly v. Mayberry, 10 So 157, 94 Ala. 240, 14 L R A 305

40 C J p 304 note 82

59. Mo.—Lowry-Miller Lumber Co v Dean, 29 S W 2d 736, 225 Mo App 299—Jones Lumber Co v Snyder, 300 S W 850, 221 Mo App 1227

Tex.—People's Bldg, Loan & Savings Ass'n v Clark, Civ.App., 38 S W 881

60. Tex.—People's Bldg, Loan & Savings Ass'n v Clark, *supra*

61. Mo.—Lowry-Miller Lumber Co v Dean, 29 S W 2d 736, 225 Mo App 299—Long v. Kisse, 24 S W 2d 693, 223 Mo App 996

62. Mo.—Schulenburg v Hayden, 48 S W 472, 146 Mo 583

40 C J p 304 note 85

63. Ala.—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala. 612, 102 A L R 346

64. Iowa—Crawford-Fayram Lumber Co v Mann, 211 N W 225, 203 Iowa 748

40 C J p 305 note 87

65. U S—Chauncey v Dyke, Ark, 119 F 1, 55 C C A 579.

40 C J p 305 note 88.

Under some,⁶⁶ but not other,⁶⁷ statutes, where improvements are made on property which is already encumbered, the mechanic's lien is entitled to priority, in certain cases, as to the increased value of the property arising from such improvements, but the prior encumbrance retains its priority to the extent of the value of the property before the work or improvement began.⁶⁸ Conversely, under some statutes, the increased value of the property resulting from the improvement is the limit of the priority of a mechanic's lien over a prior encumbrance.⁶⁹ Enhancement is the increase in market value of the property by reason of the improvement covered by the claim for lien at the time of the making of the improvement, and is not affected by the cost of labor or material, the original amount of the claim, or the balance due thereon.⁷⁰

Lien for repairs or additions. In some,⁷¹ but not other,⁷² jurisdictions, a mechanic's lien has priority over an existing encumbrance to the extent of the betterment or increased value accruing from the repair, extension, or enlargement of an existing building, but the question of increased value has been held to arise only when repairs are made to a building located on land subject to a prior mortgage, and not in a case where an independent building is erected.⁷³

§ 206. — Effect of Priority; Remedies

- a. In general
- b. Proceedings

a. In General

The priority of a mechanic's lien over a mortgage, or vice versa, determines the amount and order in which the parties should be paid. A party who would otherwise be subordinate in right is sometimes entitled to prior payment under the doctrine of subrogation.

The priorities of the liens, as between mechanics' liens and the liens of mortgages or like encumbrances, determine the amount and order in which the parties should be paid; and the particular result in any given case depends on all the facts and circumstances thereof.⁷⁴ Thus, where a mortgage has priority over a mechanic's lien, on a sale of the property after foreclosure of the mechanic's lien, the mechanic's lien is payable only from such proceeds as are left after paying the prior mortgage lien,⁷⁵ and, if the mortgage is foreclosed and the proceeds of the sale do not exceed the amount necessary to satisfy the mortgage, there is nothing remaining on which the mechanic's lien can continue in force.⁷⁶ However, in a jurisdiction where a mechanic's lien has priority over an existing mortgage as to the building, and the mortgage retains its priority as to the land, a foreclosure of the mortgage does not affect the rights of the lienor as

66. Ill.—Alexander Lumber Co. v Kellerman, 192 NE 913, 358 Ill 207—Noel State Bank v Blakely Real Estate Imp Corporation, 53 NE 2d 621, 321 Ill App 594—Moulding-Brownell Corporation v E C Delfosse Const Co, 26 NE 2d 709, 304 Ill App 491—Fair Play Development Organization v Sarmach, 263 Ill App 593

40 C J p 305 note 90

Priority as to increased value as against vendor's lien see *infra* § 208 c

67. Iowa—Curtis v Broadwell, 24 NW 265, 66 Iowa 662

40 C J p 305 note 91

68. Ill.—Alexander Lumber Co v Kellerman, 192 NE 913, 358 Ill 207—Moulding-Brownell Corporation v E C Delfosse Const Co, 26 NE 2d 709, 304 Ill App 491—Schlogl v Newton, 17 NE 2d 990, 297 Ill App 646—Fair Play Development Organization v Sarmach, 263 Ill App 593.

40 C J p 305 note 92

69. La.—New Orleans Land Co v Southern States Fair-Pan-American Exposition Co, 79 So 525, 143 La. 884

40 C J p 305 note 93.

70. Ill.—Moulding-Brownell Corpora-

tion v E C Delfosse Const. Co., 26 NE 2d 709, 304 Ill App 491

71. Ala.—Lary v Jones, 187 So 714, 237 Ala 575—Protective Life Ins Co v Holland Furnace Co, 173 So 379, 234 Ala 38
40 C J p 305 note 3

72. Ark.—Imboden v. Citizens' Bank, 206 S W 734, 163 Ark 615

73. Ala.—Central Lumber Co. v Jacks, 132 So 721, 222 Ala 475

74. N J.—Atlantic City Nat Bank v Wilson, 154 A 537, 108 N J Eq 213—Riverside Apartment Corporation v Capitol Const Co, 152 A 763, 107 N J Eq 405, affirmed 153 A 740, 110 N J Eq 67

Application of rents and profits

(1) The holder of a materialman's lien against property on which there was a superior deed of trust lien was not entitled to insist on application of rentals of building to reduction of obligation secured by deed of trust, since such holder had no lien on rentals in absence of application for appointment of a receiver and the impounding of current rents—R. B Spencer & Co v. Biggers, Tex Civ App, 108 S W 2d 268

(2) Where, following a sale of premises in a mortgage foreclosure suit, a receiver was continued in pos-

session of the property during the period of redemption, a balance of moneys collected by him is payable to mechanic's lien claimants as against the holder of a trust deed whose lien is subordinate to theirs, notwithstanding the trust deed pledges the rents and profits to the payment of the debt secured—Cochran v. Malick, 271 Ill App 476

Full amount of judgment

Where a mortgage given to secure money applied to the erection of a building was *prima facie* prior to mechanic's lien claims, but one such claimant had established the priority of his claim by a judgment in another court, such claimant was held entitled to the full amount of his judgment in preference to the mortgagees and not merely to that proportion of the proceeds which he would receive if all lien claimants were entitled to priority—Riverside Apartment Corporation v Capitol Const Co, 152 A 763, 107 N J Eq 405, affirmed 153 A 740, 110 N J Eq 67

75. Ky.—Hatfield v Corbin Bldg Supply Co, 129 S W 2d 1025, 279 Ky. 30

76. Mass.—Davidson v. Stewart, 86 NE 779, 200 Mass 393.

against the building,⁷⁷ and a foreclosure of the lien does not affect the rights of the mortgagee as against the land.⁷⁸

Where the extent of priority is fixed at a gross sum by decree of court, whatever payments are applied on the gross preference reduce the gross sum accordingly⁷⁹ and to the extent thereof bring the junior claim nearer to the point where there will be no priority over it.⁸⁰ A mortgagee has been held not entitled to complain of the items to which payments, made by an owner to a contractor having a prior lien, were applied.⁸¹ It has been held that a valid judgment by a holder of a mechanic's claim for services rendered cannot be affected by any such expedient as a subsequent foreclosure of a deed of trust on the property,⁸² regardless of whether such foreclosure is "friendly" or otherwise.⁸³

Redemption. The holder of a mechanic's lien may redeem the property from prior encumbrances,⁸⁴ but cannot compel the holders of prior encumbrances to redeem as against his lien.⁸⁵

Subrogation. In accordance with the general principles of subrogation, a mortgagee may be entitled to be subrogated to the rights of mechanics'

lienholders, as where money advanced or paid by him was used to satisfy the prior mechanics' liens,⁸⁶ or he purchased the title, acquired by claimant, of a mechanic's lien,⁸⁷ or by agreement an inferior mechanic's lien was awarded priority over the mortgage.⁸⁸ A mortgagee, otherwise subordinate to a mechanic's lien claimant, may, under the doctrine of subrogation, be entitled to priority over the mechanic's lien to the extent that the moneys loaned by him were applied to the payment of a mortgage⁸⁹ and tax liens⁹⁰ which had priority over the mechanic's lien.

b. Proceedings

Determination of priority between a mechanic's lien and a mortgage may be had in an equity suit brought expressly for such purpose, and the proceedings in such a suit are governed by the usual rules applicable in other equity suits.

Determination of priority between a mechanic's lien and a mortgage or like encumbrance may be had in a suit brought to enforce the lien, as discussed *infra* § 325, or in an equitable suit brought expressly for the purpose of obtaining such determination.⁹¹ The question as to the priority of a materialman's lien over a deed of trust is, under

77. Ala.—Vesuvius Lumber Co v Alabama Fidelity Mortg & Bond Co, 82 So 107, 203 Ala 93

Whole value of improvements

Where several companies supplying labor and materials in the erection of improvements on land have been awarded, by court order, coordinate mechanics' liens inferior to a first and second mortgage as to the value of the land, but superior to such mortgages as to the value of the improvements erected thereon, each company was held entitled to be preferred over such mortgages, not only to the value of the improvements erected by any one of the respective companies, but to the whole value of such improvements, even though other parties furnishing labor and materials had waived their liens—*Mitchell v. Robinovitz*, 272 Ill App 414

78. Ala.—Vesuvius Lumber Co v Alabama Fidelity Mortg & Bond Co, 82 So 107, 203 Ala 93

79. Cal.—Fuller v. McClure, 235 P 731, 196 Cal 1
40 C J. p 306 note 17

80. Cal.—Fuller v. McClure, *supra*

81. Wash.—Powell v Nolan, 87 P 712, 27 Wash 318, reheard 68 P. 389, 27 Wash 318
40 C J. p 306 note 19

82. Cal.—Colver v. W. B. Scarborough Co, 238 P. 1096, 73 Cal App 421.

83. Cal.—Colver v W B Scarborough Co, *supra*

84. Conn.—Card v Quinebaug Bank, 23 Conn 353

85. Conn.—Card v Quinebaug Bank, *supra*.

Redemption by mortgagees from mechanic's lien foreclosure sale generally see *infra* § 347

86. Ohio—Geer v Tuggle, 22 Ohio NP, NS, 129

SD—Peter Mintener Lumber Co v Janisch, 181 N W 914, 44 SD 42

Fraudulent mechanic's lien

Person paying consideration for sale and taking deed of trust was held not subrogated to fraudulent mechanic's lien given by purchaser—*Harveson v Youngblood*, Tex Com App, 38 S W 2d 781

87. Ala.—Jackson v Farley, 103 So 882, 212 Ala 594

88. Wash.—Potvin v Denny Hotel Co, 38 P 1002, 9 Wash 316

89. NJ.—Jackson Trust Co v Gilkinson, 147 A. 113, 105 N J Eq 116

90. NJ.—Jackson Trust Co. v. Gilkinson, *supra*.

91. Fla.—Kurz v. Pappas, 146 So 100, 107 Fla 861, motion granted 147 So 271, 107 Fla 861, and followed in Mediterranean Corporation v Pappas, 146 So 106, 107 Fla 876, motion granted 147 So 270, 107 Fla 876—*Corpus Juris* cited in

Sandquist & Snow v Kellogg, 136 So 235, 237, 101 Fla 579
40 C J. p 305 note 7

Failure to join mortgagee in suit to enforce lien

(1) Where, in suit at law or in equity to enforce a materialman's lien for erection of building, prior mortgagee of land on which building is located is not made a party, materialman may maintain further suit in equity against mortgagee to adjudicate priorities—*Lary v Jones*, 187 So 714, 237 Ala 575

(2) Failure to proceed against subsequent mortgagee within statutory limitation for enforcing mechanic's lien by making him a party defendant in the suit to foreclose the mechanic's lien does not preclude lien claimant from subsequently having priority of mechanic's lien over mortgage determined—*Kurz v Pappas*, 146 So 100, 107 Fla 861, motion granted 147 So 271, 107 Fla 861, and followed in Mediterranean Corporation v Pappas, 146 So 106, 107 Fla 876, motion granted 147 So 270, 107 Fla 876

Question for jury

In action for declaration of materialman's lien prior to lien of trust deed on building lot, evidence was held sufficient to take to jury questions whether plaintiff and such trustees entered into entire, indivisible contract for such materials and whether lumber furnished by plaintiff before registration of trust deed con-

some statutes, determinable as a matter in equity, even in a case which is itself at law to enforce the lien⁹³

Pleadings and evidence. In a suit brought expressly for the purpose of obtaining a determination of priority between a mechanic's lien and a mortgage or like encumbrance, the bill or petition must allege such facts as show priority under the rules obtaining in the particular jurisdiction⁹³ The general rules of evidence applicable in other civil actions have been applied in actions involving priorities as between mechanics' liens and mortgages or like encumbrances⁹⁴ A claim by a mortgagee that the money advanced under his mortgage was used in the erection of a building has been held required to be established by clear, certain, and convincing evidence⁹⁵

Relief In an equitable action for the adjudication and determination of liens and interests affecting the property, the relief granted must be in accord with the statutes and the issues and findings in the case⁹⁶

§ 207. Between Mechanics' Lien and Other Lien or Encumbrance

Priority of time generally determines priority of right as between mechanic's liens and other liens or encumbrances, except to the extent that a party may have waived or subordinated his lien. Under some statutes, a mechanic's lien has priority as to the improvement out of which his lien arose, whereas previously existing liens have priority as to the land.

The priority of a mechanic's lien with respect to other liens or encumbrances, in so far as the matter is regulated by statute, depends on the terms of the particular statute,⁹⁷ and, where such a statute is highly remedial in character, and intended to prevent the injustice made possible under preceding statutes, it is to be construed so as to give the words used the most extensive meaning of which they are reasonably susceptible⁹⁸ Some statutes relating to the preference to be given mechanics' liens where other liens are involved have been held to have no application to a case in which the improvements are made by the owner.⁹⁹

Ordinarily, a mechanic's lien is entitled to priority over subsequent liens or encumbrances¹ attaching

stituted material used in building church on such lot within contract—*Sides v Tidwell*, 5 SE 2d 316, 216 NC 480

92. Mo—*Miners Lumber Co v Miller*, App. 117 S W 2d 711

93. Fla—*Corpus Juris* quoted in *Sandquist & Snow v Kellogg*, 133 So 65, 69, 101 Fla 568, reheard 136 So 235, 101 Fla 579

Ga—*Guaranty Inv & Loan Co v Athens Engineering Co*, 110 SE 873, 152 Ga 596

Priority of encumbrance over adjudicated mechanic's lien

Subsequent encumbrancer desiring to assert that his own encumbrance should be given priority over adjudicated mechanic's lien which, because of adjudication against owner, is *prima facie* of certain amount and superior dignity must allege and prove facts tending to support contention—*Kurz v Pappas*, 146 So 100, 107 Fla 861, motion granted 147 So 271, 107 Fla 861, and followed in *Mediterranean Corporation v Pappas*, 146 So 106, 107 Fla 876, motion granted 147 So 270, 107 Fla 876

Allegations held sufficient

Ala—*Lary v Jones*, 187 So 714, 237 Ala 575

94. Evidence held insufficient

Cal—*Brush v E R Bohan & Co*, 283 P 126, 102 Cal.App 457

Mo—*Joplin Cement Co v Greene County Bldg & Loan Ass'n*, 34 S W 2d 529, 224 Mo App 1064

NJ—*Fischgrund v Eriksen Real Estate Co*, 147 A 811, 105 NJ Eq 345

95. NJ—*Fischgrund v. Eriksen Real Estate Co*, supra

96. Scope of relief

Chancellor in equitable action for adjudication and determination of liens was warranted in determining amount of priority of various liens, including amount remaining unpaid of debts secured by deeds of trust, but was without authority to order house and lots sold together and proceeds divided proportionately—*Gold Lumber Co v Baker*, 86 S W 2d 130, 225 Mo App. 849

97. Laborers distinguished from subcontractors

Persons agreeing with original contractor to furnish material and construct designated part of structure are subcontractors, and not "laborers" within lien law giving laborers' liens precedence over all other liens—*Morley v McCaskey*, 270 P 1107, 134 Okl 50, followed in 272 P. 850, 134 Okl 54

Lien of an assessment may be superior to a prior mechanic's lien—*Appeal of Pittsburgh*, 70 Pa 142—*Pennock v Hoover*, 5 Rawle, Pa, 291

Statutory lien of cotenant

The lien recognized by statute providing that tenant in common receiving more than his share of rents and profits is liable therefor as agent or bailee of cotenant has been held superior to materialmen's liens placed by tenant in possession—*Bank of Tupelo v Collier*, 14 SE 2d 59, 191 Ga 852—*New Winder Lumber Co v Guest*, 187 SE 63, 182 Ga 859.

Compensation of one temporarily taking over property

Claim for compensation of one taking over property to erect improvements and return property to owner, and of his attorney, was held not entitled to priority accorded liens for labor and materials—*Arnstein Realty Co v Williams*, 40 S W 2d 1007, 163 Tenn 69

Private contractual rights

A statute dealing with the priority of mechanics' liens with respect to existing encumbrances has been held not to pertain to police power, or to public right or interest, but to deal solely with private rights arising out of voluntary contracts—*Crawford-Fayram Lumber Co v Mann*, 211 N. W 225, 203 Iowa 748

98. Pa—*Toll v Beckerman*, 148 A. 904, 299 Pa. 1.

99. Iowa—*Consumers' Independent Lumber Co v Rozema*, 237 N.W. 433, 212 Iowa 696

1. Fla—*Moon v Wilson*, 130 So 25, 100 Fla 791

Idaho—*White v Constitution Min & Mill Co*, 55 P 2d 152, 56 Idaho 403

Ky—*Weil v B E Buffalo & Co*, 65 S W 2d 704, 251 Ky 673

Md—*Wilhelm v Roe*, 149 A. 438, 158 Md 615

Wash—*Thompson v O'Leary*, 80 P 2d 661, 176 Wash 606, opinion corrected on other grounds and rehearing denied 83 P 2d 90, 176 Wash 606

40 C J p 285 note 56—41 C J p 559 note 53

to the property after the commencement of the building² or of the work or furnishing of materials out of which the lien arises,³ or after the making of the contract for the work⁴ On the other hand, as a general rule, a mechanic's lien is subordinate to other liens or encumbrances on the property existing at the time the lien attaches,⁵ on the making of the contract,⁶ the commencement of the building,⁷ or of the performance of the labor or the furnishing of the materials,⁸ or the filing of the notice of lien⁹

Under some,¹⁰ but not other,¹¹ statutes the rule

making a mechanic's lien subordinate to prior liens is subject to the qualification that the mechanic's lien claimant must have had actual or constructive notice of the prior liens. The mere fact that one holding a superior lien on the property benefits by improvements placed thereon does not entitle a materialman to priority where the materialman failed to exercise due diligence by ascertaining the ownership and condition of the title¹² The superiority granted to certain liens over the liens of mechanics and materialmen has been held, under some statutes, to relate solely to contractual liens, and not statu-

Priority between mechanic's lien and:
Conveyance see *infra* § 243

Power see Dower § 37

Homestead claim see Homesteads § 97 a.

Landlord's lien see Landlord and Tenant § 615, 636

Widow's allowance see Executors and Administrators § 338 a.

Lien of surety under fidelity bond

Where bank employee used part of bank's money which he converted in construction of building, lien of surety which paid to bank money converted, on employee's fidelity bond, was held inferior to mechanics' liens on such building—Metropolitan Casualty Ins Co of New York v S J Peabody Lumber Co, 192 NE 323, 99 Ind App 307

Fund due to contractor from owner

(1) Mechanic's lien on fund due by owner to contractor takes precedence over other liens which accrued on unpaid fund subsequent to beginning of structure—Standard Sanitary Mfg Co v Aird, 129 So 285, 221 Ala 530—Le Grand v Hubbard, 112 So 826, 216 Ala 164.

(2) Where laborers and materialmen filed timely stop notices and instituted suits against owner before contractor retained attorney, rights of laborers and materialmen to amount due from owner to contractor were held superior to contractor's attorney's lien, and such superior rights extended to sums representing extra work—MacDonnell v Vitille, 162 A 738, 111 N J Eq 502

2. Ala—Polakow v Rumsey, 6 So 2d 477, 242 Ala 365—Grimsley v First Ave Coal & Lumber Co, 115 So 90, 137 Ala 159—Le Grand v Hubbard, 112 So 826, 216 Ala 164

Fla—Booker & Co v Leon H Watson, Inc, 123 So 837, 96 Fla 671—People's Bank of Jacksonville v Virginia Bridge & Iron Co, 113 So 680, 94 Fla 474, followed in Atlanta & Lowry Nat Bank v Bicknell-Rice Residential Builders, 126 So 493, 99 Fla 109

Or.—Schram v Manary, 260 P 214, 123 Or 351, modified on other grounds 263 P 263, 123 Or 354

Tex—Sprowls v Youngblood, Civ App, 23 SW 2d 579, reversed on other grounds Harveson v Youngblood, Com App, 38 SW 2d 781 40 C J p 285 note 57

Word "attached," in a statute giving a mechanic's lien priority over any lien or other encumbrance which may have "attached" subsequent to the time when the building, improvement, or structure was commenced, has been held to have no relation to the recordation of the instrument creating the lien or encumbrance—Sun Lumber Co v Bradfield, 10 P 2d 183, 122 Cal App 391, followed in 10 P 2d 156, 123 Cal App 783

Construction as notice

(1) Construction of new house is notice to subsequent lienholders within statutory period that materialman's lien may exist thereon—Wood Lumber Co v Greathouse, 161 So 236, 230 Ala 362

(2) Persons taking liens on property under construction or on which improvements are being made have duty of inquiring respecting mechanics' or materialmen's liens, and knowing that work is going on, they are charged with constructive if not actual notice of liens—Continental Supply Co v White, 12 P 2d 569, 92 Mont 254

3. Del—C L Pierce & Co v Security Trust Co, 175 A 770, 6 WV Harr 348

Ky—Weil v B E Buffaloe & Co, 65 SW 2d 704, 251 Ky. 673

Utah—U S Building & Loan Ass'n v Midvale Home Finance Corporation, 44 P 2d 1090, 86 Utah 506, rehearing denied 46 P 2d 672, 86 Utah 523

40 C J p 285 note 58.

4. Tex—Investors' Syndicate v Dallas Plumbing Co, Civ App, 61 SW 2d 1039

By filing of verified account, materialman's lien related back to date of contract, and had precedence over subsequently created liens securing builder's notes—Investors' Syndicate v Dallas Plumbing Co, *supra*.

5. US—Stowers v Wheat, CCA Fla., 78 F 2d 25

Ala—Grimsley v First Ave Coal & Lumber Co, 115 So 90, 217 Ala 159

Idaho—Finlayson v Waller, 134 P 2d 1069, 64 Idaho 618

40 C J p 285 note 59, p 289 note 19
Time lien attaches see *supra* §§ 177-182

Mechanic's lienor is not "subsequent purchaser for value," within recording act, and must at his peril take notice of encumbrances—Knapp v Baldwin, 238 NW 542, 213 Iowa 24

Lease as encumbrance

Five-year lease giving lessee option to purchase, and containing restriction on adjoining land, constituted valid encumbrance within statute, taking precedence over mechanics' liens for services rendered subsequent to date when lease was recorded—Storrs v Pannone, 155 A 284, 113 Conn 328

6. Miss—Otley v Haviland, 36 Miss 19

7. Md—McKim v Mason, 3 Md Ch 186

40 C J p 285 note 61

8. Del—C L Pierce & Co v Security Trust Co, 175 A 770, 6 WV Harr 348

Fla—People's Bank v Arbuckle, 90 So 458, 83 Fla 479

Ky—Staton Springs Park Co. v Keese, 289 SW 292, 217 Ky 329

Okl—Shefts Supply v Brady, 41 P 2d 820, 170 Okl 590—Morley v McCaskey, 270 P 1107, 134 Okl 50,

followed in 272 P 850, 134 Okl 54

Tex—Blumberg v Louis Henne Co, Civ App, 5 SW 2d 1015, error refused

9. NY—Payne v. Wilson, 74 N.Y 348

10. Colo—Titch v Norton, 15 P. 680, 10 Colo 337

11. N.Y.—Payne v Wilson, 74 N.Y 348

12. S D—Walrath & Sherwood Lumber Co v Ferris, 247 NW. 405, 61 S D 190.

tory liens¹³

Extent of priority Under some statutes, and the construction placed thereon, a prior lien has preference over a mechanic's lien as to the land,¹⁴ but the mechanic's lien has preference as to the improvement,¹⁵ at least in the case of the erection of a new building.¹⁶ However, a materialman has no right to a lien on a building superior to prior liens on the land except as given him by statute,¹⁷ and under some statutes the precedence of a materialman's lien on the improvements does not extend to an improvement, alteration, repair, or reconstruction of a building standing when the encumbrance was created,¹⁸ or at least in the case of inseparable repairs or improvements, a mechanic's and materialman's lien is subordinate to anterior liens or encumbrances on the property in the condition in which it was before such repairs or improvements were made,¹⁹ and is superior to such liens or encumbrances to the extent only that the added repairs or improvements enhanced its market value.²⁰

Loss of priority; waiver or subordination A mechanic's lien claimant may lose the priority which

he would otherwise have over other liens or encumbrances by failing to perfect his own lien,²¹ or by waiving or subordinating his lien to that of subsequent lienors.²² Mechanics or materialmen who subordinate or waive the priority of their liens to the lien of a mortgage have been held thereby to subordinate their liens to other liens having priority over the mortgage,²³ but such subordination or waiver does not advance liens which are subordinate to the mortgage.²⁴

§ 208. — Lien for Purchase Price

- a. In general
- b. Loss of priority, waiver or estoppel
- c. Extent of priority

a. In General

A vendor's lien is generally superior to a mechanic's lien for improvements made on the property by the vendee, unless the vendor required the making of the improvement.

A lien for the purchase price of real property ordinarily is superior to a mechanic's lien for improvements made on the property by the vendee,²⁵

13. US—Egyptian Supply Co v Boyd, CCA Ky, 117 F 2d 608
Ky—Hodges v. Quire, 174 SW 2d 9, 395 Ky 78

14. Ala—Becker Roofing Co v Jones, 144 So 865, 225 Ala 638
Tex—Hubbell v Texas Southern R Co, 126 SW 313, 59 Tex Civ App 185

15. Ala—Becker Roofing Co v Jones, 144 So. 865, 225 Ala. 638
Or—Schram v Manary, 260 P 214, 133 Or 354, modified on other grounds 262 P 263, 123 Or 354
40 C J p 286 note 67

Priority as to building or improvement of mechanic's lien over prior

Mortgage see supra § 205 c
Vendor's lien see infra § 208 c

16. Mo—Jones Lumber Co v Snyder, 300 SW 850, 221 Mo App 1227
"Entire structure"

(1) The phrase "for any entire structure," as used in a statute giving a lien for work done and material furnished "for any entire structure" priority over any prior lien or encumbrance on the land has been held not used to designate a completed from an incompleting building, but to distinguish new structures, not before existing, from betterments, repairs, improvements, and the like on previously constructed or existing improvements

US—In re Ben Boldt, Jr., Floral Co., CCA Colo, 37 F 2d 499

Colo—Atkinson v Colorado Title & Trust Co, 151 P. 457, 59 Colo 528

(2) Boiler and heating plant installed in greenhouse were held not "entire structure" within statute—In re Ben Boldt, Jr., Floral Co., supra

17. Ark—Morrilton Lumber Co v Groom, 3 SW 2d 293, 176 Ark 520

18. Mo—Jones Lumber Co v Snyder, 300 SW 850, 221 Mo App 1227

19. Ala—Becker Roofing Co v Jones, 144 So 865, 225 Ala 638
40 C J p 286 note 68

20. Ala—Becker Roofing Co. v Jones, supra

21. Ky—Higgins Lumber Co v Cunningham, 288 SW 334, 216 Ky 298

Several buildings

Where separate contracts have been entered into between the owner and the materialman for the construction of two or more buildings, the materialman may proceed in such a manner that he cannot establish and maintain a claim for lien against either or both of the buildings as against a subsequent lien creditor—Biscayne Trust Co v Wolpert Realty & Improvement Co, 130 So 611, 100 Fla 1070

22. Minn—Minneapolis Builders' Supply Co v Calhoun Beach Club Holding Co, 244 NW 53, 186 Minn 635

23. Ala.—Schwab v Estes Lumber Co, 143 So 829, 225 Ala 452
Minn—Minneapolis Builders' Supply Co v Calhoun Beach Club Holding Co, 244 NW 53, 186 Minn 635

24. Ala—Schwab v Estes Lumber Co, 143 So 829, 225 Ala 452

25. Colo—Baughman v Foster Lumber Co, 113 P 2d 423, 108 Colo 37

Fla—Dunan Lumber Co v Florida Travertine Corporation, 162 So 873, 120 Fla 231

Iowa—Knapp v. Baldwin, 238 NW 542, 213 Iowa 24—Iiten & Taege v Pfister, 211 NW 407, 202 Iowa 833
Ky—T W Spinks Co v Pachoud Bros, 92 SW 2d 50, 263 Ky 119—Penney v Kentucky Utilities Co, 37 SW 2d 5, 238 Ky 167—Goodin & Barney Coal Co v. Southern Elkhorn Coal Co, 394 SW 792, 219 Ky 827

Mo—Corpus Juris cited in Schroeter Bros Hardware Co v Croatian "Sokol" Gymnastic Ass'n, 53 SW 2d 995, 1002, 332 Mo 440

Neb—L P Larson Real Property Co v. Norris-Lyddon Produce Co, 255 NW 50, 127 Neb 357—West v Reeves, 73 NW 935, 53 Neb 472
Ohio—Ohio Sav Ass'n v Bell, 158 NE 548, 25 Ohio App 84

SD—Big Sioux Lumber Co v Miller, 234 NW 31, 57 SD 506

Tenn—Prichard Bros v Causey, 12 SW 2d 711, 158 Tenn 53

Tex—Guggenheim v Dallas Plumbing Co, Com App, 59 SW 2d 105—Harveson v Youngblood, Com App, 38 SW 2d 781—Panhandle Const Co v Gilham, Civ App, 84 SW 2d 531, error dismissed—R B Spencer & Co v May, Civ App, 73 SW 2d 665, error refused—McQuerry v

unless the vendor required or authorized the making of the improvement,²⁶ or, under some statutes, unless the improvements were made for the vendee with the written consent of the vendor,²⁷ and mere knowledge on the part of the vendor that the vendee is making or is about to make improvements on the premises is not sufficient to give the lien of laborers or materialmen priority over the vendor's lien.²⁸ On the other hand, it has been held that, where property is sold after commencement of the furnishing of materials and labor, and liens for material and labor are recorded within the time prescribed by law, the privileges resulting are superior in rank to the vendor's lien resulting from the sale of the property within the period allowed for the recordation of such liens.²⁹

Personal property Where a contract for the sale of personal property reserves title in the seller

until the purchase price is paid, the right, lien, or equity of the seller is superior to a mechanic's lien subsequently filed,³⁰ provided the contract is filed or recorded, as required by statute,³¹ prior to a change of the status of the property from chattels to real property.³²

b. Loss of Priority; Waiver or Estoppel

A vendor may by waiver, estoppel, or failure to take proper steps preclude himself from claiming priority over a mechanic's lien.

A vendor may waive his lien in favor of a mechanic's lien,³³ or, by his acts or conduct, estop himself from asserting it.³⁴ The effect of a written waiver whereby a vendor subordinates his lien to subsequent encumbrances must be tested by the language used,³⁵ and, where the vendor has prescribed in precise terms the kind of a lien which should be prior to his vendor's lien, a subsequent mechanic's

Glenn, Civ App, 1 S W 2d 339, error dismissed
40 C J p 287 note 94.

"A prior vendor's lien . . . is superior to a subsequent mechanic's lien, unless the mechanic's lien is given priority or equality by statute"—Hammann v. H. J. McMullen & Co., 63 S W 2d 59, 61, 122 Tex 476

Method of creating vendor's lien

(1) It is generally held that a vendor's lien is superior to that of a mechanic whether the vendor executes a bond for title, or a deed retaining a lien on its face, or executes a joint instrument with his vendee, by which he conveys title to the vendee and the latter, in turn, conveys the property by mortgage or deed of trust to secure the purchase money, or where, contemporaneous with the delivery of the deed, the vendee delivers a deed of trust or mortgage to secure the unpaid purchase money—Prichard Bros v Causey, 12 S W 2d 711, 158 Tenn 53

(2) Where land was conveyed under contract granting permission to purchaser to erect a building thereon, which should be security for purchase price, and price was not paid, vendor did not continually remain the real owner of the land so as to be unable to possess a vendor's lien superior to mechanics' liens which attached by reason of the erection of the building—F C Krotter Co v Harbaugh, 280 N W 211, 66 S D 178

Vendor as "bona fide prior encumbrancer"

Vendor, retaining title for security, is "bona fide prior encumbrancer" within statute giving such encumbrancer priority over mechanics' lien—Big Sioux Lumber Co v Miller, 234 N W. 31, 57 S D 506

Improvement as integral part of building

Plaintiff was held not entitled to enforce a mechanic's lien for material furnished in improvement of building, as against holder of vendor's lien, where improvement became an integral part of the building, and could not be removed without damage to the realty—Joyce Lumber Co v Wick, 205 N W 476, 200 Iowa 796

Where title reverts to vendor, liens for work in construction of improvements, other than of materialman in whose favor vendor has waived lien, are postponed in favor of executory vendor—Okmulgee Plumbing Co v Comstock, 257 P 320, 125 Okl 245

28. Ark—People's Building & Loan Ass'n v. Leslie Lumber Co., 38 S W 2d 759, 183 Ark 800

Iowa—Joyce Lumber Co v Marshalltown Const League, 283 N W 913, 226 Iowa 274

Neb—L P Larson Real Property Co v Norris-Lyddon Produce Co., 255 N W 50, 127 Neb 357—West v Reeves, 73 N W 935, 53 Neb 472

Tex—Gugenheim v Dallas Plumbing Co, Civ App, 42 S W 2d 268, reversed on other grounds Gugenheim v Dallas Plumbing Co, Com App, 59 S W 2d 105

40 C J p 287 note 95
Vendor's interest as subject to lien under contract of sale providing for improvements see supra § 194

Withdrawal of consent

Vendor's purchase-money lien was held superior to lien for material, notwithstanding vendor had consented to acquisition of material for erection of improvements, where vendor withdrew such consent before material was furnished and agreed to indemnify materialman on certain conditions with which materialman did

not comply—T. W Spinks Co v. Pachoud Bros, 92 S W 2d 50, 263 Ky 119

Permission only

Under a statute in effect giving priority to the mechanic's lienor only where the contract of sale requires the purchaser to improve the land, a vendor's lien is not subordinate to a lien for materials used in the erection of a building where the purchaser was merely given permission but was not required, to erect the building—F C Krotter Co v Harbaugh, 280 N W 211, 66 S D 178

27. Ky—Penney v Kentucky Utilities Co., 37 S W 2d 5, 238 Ky 167

28. Iowa—Knapp v Baldwin, 238 N W 542, 213 Iowa 34

Tex—McQuerry v Glenn, Civ App, 1 S W 2d 339, error dismissed

29. La—A Stef Lumber Co v Mattingly, 122 So 893, 168 La 645

30. Mich—Presque Isle Sash & Door Co v Reichel, 146 N W 231, 179 Mich 466

31. Mo—Landreth Mach. Co v Roney, 171 S W 681, 185 Mo App 174

32. U S—In re Superior Drop Forge & Mfg Co, D C Ohio, 208 F 813

Kan—St Marys Mach Co v Iola Mill & Elevator Co, 155 P 1077, 97 Kan 464

33. Okl—Braden Co v. Robinson, 43 P 2d 437, 171 Okl 278—Okmulgee Plumbing Co v Comstock, 257 P 320, 125 Okl 245
40 C J p 287 note 96

34. Cal—Avery v Clark, 25 P. 819, 87 Cal 619, 22 Am SR 272
40 C J p 287 note 97

35. Ark—Harrington v. Rieff, 281 S W. 3, 170 Ark 755

lien which is not of the character, form, or substance prescribed in the waiver will not obtain priority³⁶ Failure of a materialman to give a statutory notice to the holder of the vendor's lien may deprive the materialman's lien of priority over the lien of the vendor³⁷

Failure to record deed or vendor's lien It has been held that a materialman dealing with a vendee is charged with notice of a vendor's lien reserved in the deed, notwithstanding the deed was not recorded³⁸ However, the failure to record a vendor's lien has been held to render it subordinate to a mechanic's lien,³⁹ and a mechanic's lien is entitled to priority where the work or labor is begun or the material furnished prior to the recording of the vendor's lien.⁴⁰

Improper filing of mechanic's lien. A lien claimant, by filing his claim against one who is not the record owner, cannot prejudice the rights of a vendor who relies on the faith of clear public records and properly records his vendor's lien against the record owner.⁴¹

c. Extent of Priority

Under some statutes a vendor's lien has priority only

as to the land and improvements thereon at the time of the inception of the mechanic's lien, the mechanic's lien having priority as to the new improvement.

Under some statutes a vendor's lien has priority only as to the land and improvements thereon at the time of the inception of the mechanic's lien,⁴² the mechanic's lien having priority as to the new improvement.⁴³ Under other statutes, the vendor's lien has priority not only as to the land,⁴⁴ but also as to the building erected thereon,⁴⁵ and a mechanic's lien has no priority in respect of the enhanced value of the property arising from the erection of the building.⁴⁶

Homesteads. It has been held that a vendor's lien on a homestead is superior to a subsequent mechanic's lien on the homestead, at least where the improvements placed on the property are not removable without injury to the property;⁴⁷ but, where a separate and distinct building was erected on property constituting a homestead, and the building was removable without injury to the remainder of the property, and the mechanic's lienor complied with constitutional and statutory provisions relating to the creation of a materialman's lien for improvements, the mechanic's lien was held superior,

36. Ark—Harrington v. Rieff, *supra* Waiver in favor of mortgage only

Where the vendor waived his lien in favor of a first mortgage, it was held that such waiver did not extend to a subsequent mechanic's lien, notwithstanding the amount of the mortgage loan was for less than the sum to which the vendor had agreed to subordinate—Harrington v. Rieff, *supra*

37. Or—Edmiston v. Kiersted, 12 P. 2d 299, 140 Or 299

38. Tex—C. D. Shamburger Lumber Co. v. Holbert, Civ. App., 34 S. W. 2d 614

39. Or—Randolph v. Christensen, 265 P. 797, 124 Or 661

40. La—Conservative Homestead Ass'n v. Boyle, 135 So 663, 173 La. 878—Hortman-Salmen Co. v. White, 123 So 709, 168 La 1049

41. La—Jackson Homestead Ass'n v. Zimmer, 134 So 126, 16 La. App. 647

42. La—Union Homestead Ass'n v. Montegut, 122 So 68, 168 La 369 40 C.J. p 288 note 98

43. Ark—Judd v. Rieff, 295 S.W. 370, 174 Ark 383

La—Union Homestead Ass'n v. Montegut, 122 So 68, 168 La 369
Okl—Braden Co. v. Robinson, 43 P. 2d 437, 171 Okl 278—Braden Co. v. Lancaster Lumber Co., 38 P. 3d 575, 170 Okl 30, 102 A.L.R. 230.
40 C.J. p 288 note 99.

Priority of mechanics' liens, as to improvements alone, over existing mortgages see *supra* § 205 c

Liberal construction of statute

A statute giving priority to laborers and materialmen with respect to the building, over existing liens or encumbrances, should be liberally construed so as to afford to the laborers and materialmen the greatest protection compatible with justice and equity—Pacific Spruce Corporation v. Oregon Portland Cement Co., 286 P 520, 133 Or 223, 72 A.L.R. 1507, rehearing denied 289 P 489, 133 Or 223, 72 A.L.R. 1507.

Duty to assert lien on building alone

In materialman's action for enforcement of his lien as superior to vendor's lien, where mechanic's lien attached by reason of erection of building on land, duty was on materialman, in seeking to have building severed from land and sold separately to satisfy his lien, to assert a lien on the building alone as distinguished from the land—F. C. Krotter Co. v. Harbaugh, 280 N.W. 211, 66 S.D. 178

44. W. Va—Charleston Lumber & Mfg. Co. v. Brockmyer, 18 W. Va. 586

45. W. Va—Charleston Lumber & Mfg. Co. v. Brockmyer, *supra*.

In Texas

(1) It has been held that, where the improvement is of a permanent character and is incapable of being

separated from the land without destroying the improvement itself and damaging the freehold, the whole property may be sold, and the proceeds prorated according to the proportion which the fair market value of the land without the improvement and the improvement alone respectively bear to the value of the whole property—Land Mortg. Bank v. Quanah Hotel Co., 34 S.W. 730, 89 Tex 332—40 C.J. p 288 note 3.

(2) In other cases, however, it has been held that, where a vendor's lien is created prior to a mechanic's lien covering improvements which are not removable without serious injury, the vendor's lien is entitled to priority over the mechanic's lien as to both the improvement and the land—Cameron County Lumber Co. v. Al & Lloyd Parker, Inc., 62 S.W. 2d 63, 122 Tex 487—Hammann v. H. J. McMullen & Co., 62 S.W. 2d 59, 122 Tex 476

46. W. Va—Charleston Lumber & Mfg. Co. v. Brockmyer, 18 W. Va. 586.

47. Tex—Texas Bitulithic Co. v. Warwick, Com. App., 293 S.W. 160—State Trust Co. v. Morrison, Com. App., 282 S.W. 214—Al & Lloyd Parker, Inc. v. Cameron County Lumber Co., Civ. App., 56 S.W. 2d 256, affirmed Cameron County Lumber Co. v. Al & Lloyd Parker, Inc., 62 S.W. 2d 63, 122 Tex 487—C. D. Shamburger Lumber Co. v. Holbert, Civ. App., 34 S.W. 2d 614.

with respect to the building, to a vendor's lien previously existing on the property⁴⁸

§ 209. — Lien for Supplies

A lien for supplies furnished to operate a plant is sometimes superior to a lien for materials furnished for original construction.

Under some statutes a lien for supplies furnished for the operation of a manufacturing plant is prior to a mechanic's lien for materials furnished for original construction⁴⁹

§ 210. Between Mechanic's Lien and Other Claims, Interests, or Rights

Under some statutes, a mechanic's lien must be recorded in order to acquire priority over creditors without notice; but a creditor whose interest arises while construction is in progress is sometimes deemed to be a creditor with notice.

Under some statutes, a materialman's lien is acquired on real estate, as against creditors without notice, only from the time of the record of notice,⁵⁰ and the notice, in order to be effectual as against such creditors, must be filed within the time fixed by statute.⁵¹ A creditor of an owner of property whose interest arises while the construction or repair of the property is in progress is deemed, under the terms of some statutes, to be a creditor with notice of liens which have already attached to the property in favor of persons performing labor or furnishing materials for the construction of such building,⁵² the progress of such construction or repair is legal notice to the subsequent creditor even if such creditor in fact has no actual notice or knowledge of such construction or repair being in progress on the premises,⁵³ but a materialman cannot, under such a statute, preserve his lien, without

record or actual notice, by leaving the building in an apparently finished condition⁵⁴ For the protection of those whose labor and material have brought a building into being, the law, in a proper case, may sever the building from the land, if need be, in working out priorities⁵⁵

Under some statutes the amount expended or obligation incurred by the owner to complete a building or any part thereof after the general contractor fails or refuses to do so is given priority over all mechanic's liens placed on the building by the general contractor, a subcontractor, or any person furnishing labor or materials used in the building⁵⁶ A mechanic's lien claimant has been held to have a lien on a leasehold and improvements thereon superior to the title of an assignor of the lease, under an assignment retaining title until full payment of specified sums, where the assignment further obligated the assignees to make the improvements for which the lien was claimed⁵⁷

Lien on money due contractor. If, before proper notice is served or filed by a subcontractor, workman, or materialman claiming a lien on funds due a contractor, other creditors pursuing the usual remedies for the collection of debts have acquired a legal or equitable right to have the debt applied in satisfaction of other claims, that right is not overreached by liens subsequently acquired,⁵⁸ unless priority is given by the provisions of the statute⁵⁹ Under some statutes the notice, in order to be operative and effective as against other persons claiming rights in the fund, must be given before the date when the final installment matures and falls due under the provisions of the contract,⁶⁰ and a stop notice served subsequent to the time of the maturity

48. Tex.—McAnelly v. Chambliss, Civ App, 68 SW2d 756—J D McCollum Lumber Co v Whitfield, Civ App, 59 SW2d 1106, error refused

49. US—Building Supplies Corp v. Willcox, CCA Va., 284 F 113
40 CJ p 288 note 15

50. US—Frank T Budge Co v. Hott, CCA Fla., 32 F2d 157.

51. US—Frank T Budge Co v Hott, supra

52. US—Frank T Budge Co. v Hott, supra

Fla.—Booker & Co v Leon H Watson, Inc, 123 So 837, 96 Fla 671 —People's Bank of Jacksonville v. Virginia Bridge & Iron Co, 113 So 680, 94 Fla 474, followed in Atlanta & Lowry Nat Bank v Bicknell-Rice Residential Builders, 126 So 493, 99 Fla 409

53. Fla.—Booker & Co v. Leon H.

Watson, Inc, 123 So 837, 96 Fla 671—People's Bank of Jacksonville v Virginia Bridge & Iron Co, 113 So 680, 94 Fla 474, followed in Atlanta & Lowry Nat Bank v Bicknell-Rice Residential Builders, 126 So 493, 99 Fla 409

54. US—Frank T Budge Co. v. Hott, CCA Fla., 32 F2d 157.

55. Ala.—First Ave Coal & Lumber Co v Rimer, 133 So 589, 222 Ala 545.

Lien on building or improvement alone see supra § 188

56. Va.—Anderson v White, 32 SE 2d 72, 153 Va 302—Nicholas v Miller, 30 SE2d 696, 182 Va 831, 153 ALR 753

Guarantee of subcontractor's account
Where owners, in order to secure completion of building when general contractor could not obtain credit, guaranteed subcontractor's account

with general contractor's consent, before any liens were filed against the building, subcontractor who obtained judgment on the guaranty was entitled to priority over all other mechanics' liens—Nicholas v Miller, supra.

57. Ark.—Wildwood Amusement Co v Stout Lumber Co, 12 SW2d 911, 178 Ark 977

58. NJ—Cicalese v Fortunato, 112 A 508, 92 NJEq 329

40 CJ p 159 note 64

Lien on money due contractor generally see supra §§ 114-117

59. NY—Stevens v Ogden, 29 N. E 229, 130 NY 182—McCorkle v Herrman, 22 NE 948, 117 NY 297

60. NJ—Riverton Board of Education v Tait, 83 A. 459, 80 NJEq 94, affirmed 86 A. 379, 81 NJEq 161

40 CJ p 159 note 68.

of the last installment is operative only against the part of the installment remaining unappropriated at the time of the stop notice.⁶¹ Indeed, as to any installment, the right of a claimant who neglects to serve notice until after the maturity thereof is subject to all previously acquired rights of third persons.⁶²

§ 211. — Assignment or Transfer

- a. By contractor
- b By subcontractor

a. By Contractor

Under some statutes, as respects funds due from the owner to the contractor, an assignee of the contractor has priority over a mechanic's lien filed after the assignment; but, under other statutes, a mechanic's lien claimant ordinarily has priority over an assignee of the contractor.

The rule, under some statutes, is that, where a notice or claim of lien is not filed within the time prescribed by law, or is served on the owner or filed after the contractor assigns his claim against the owner, the assignee has the prior right to the fund,⁶³ at least where the owner agrees to the as-

signment.⁶⁴ It is essential to the application of the rule that there be an assignment of a debt due the contractor,⁶⁵ that the assignment shall be valid,⁶⁶ and, where so required by statute, that it be filed⁶⁷ prior to the filing of the lien claim or notice.⁶⁸ On the other hand, the application of the rule is not affected by the fact that the owner knows that the subcontractors are unpaid;⁶⁹ that the consideration for the assignment is a debt not growing out of the construction of the building,⁷⁰ or that the assignee consented to materialmen and laborers furnishing materials and labor,⁷¹ or did not give the lien claimants notice of the assignment.⁷² Some courts hold that the rule is applicable notwithstanding a contractual obligation on the part of the contractor to protect or indemnify the owner against claims or liens of subcontractors.⁷³

Under the terms of some statutes the lien of a subcontractor, laborer, or materialman prevails over an assignment by the contractor,⁷⁴ even where the assignment is made or recorded before the service or filing of the mechanic's lien⁷⁵ or of a stop notice.⁷⁶ Certainly a subcontractor has a right prior

61. NJ—Keupler v Eisele, 83 A 999, 79 NJ Eq 480, 483, 651

62. Cal—Southern California Electric Co v McDonald, 173 P. 760, 178 Cal 386

40 C J p 159 note 68

63. Cal—Fairbanks v Crump Irrigation & Supply Co, 291 P 629, 108 Cal App 197, rehearing denied 292 P 529, 108 Cal App 197—Los Angeles City School Dist of Los Angeles County v Tucker, 278 P 507, 99 Cal App 390, rehearing denied 279 P 491

40 C J p 306 note 31

At common law, assignee of money to become due under contract for improvement took precedence over subsequent lienors—Vulcan Rail & Construction Co v Westchester County, 293 NYS 945, 250 App Div 212

Assignee's failure to collect installment on contract, when due, did not prevent subsequent recovery of such sum free of liens—Fairbanks v Crump Irrigation & Supply Co, 291 P 629, 108 Cal App 197, rehearing denied 292 P 529, 108 Cal App 197

64. Cal—Fairbanks v Crump Irrigation & Supply Co, supra
Tex—Gordon-Jones Constr Co v. Welder, Civ App, 201 SW 681

35. NY—Harley v Mapes Reeves Constr Co, 68 NYS 191, 33 Misc 626

40 C J p 307 note 37

66. Ohio—Franklin Bank v Cincinnati, 10 Ohio S & C P. 545, 8 Ohio NP 517.

40 C J p 307 note 33.

57 C.J.S.—50

67. NY—Kelsey Smith & Co. v Douglas, 151 NYS 549, 165 App Div 707, appeal denied 152 NYS 1121, 167 App Div 942
40 C J p 307 note 39

68. NY—Troy Public Works Co v Yonkers, 124 NYS 807, 68 Misc 372, affirmed 129 NYS 920, 145 App Div 527, affirmed 100 NE 700, 207 NY 81, 44 L.R.A.N.S. 311

69. Wis—Hall v Banks, 48 NW 385, 79 Wis 229

70. Miss—Spengler v Stiles-Tull Lumber Co, 48 So 966, 94 Miss 780, 19 Ann Cas 426

71. Miss—Spengler v. Stiles-Tull Lumber Co, supra

72. Miss—Jake Strickland Lumber Co v Rheinhart, 76 So 643, 115 Miss 749—Spengler v Stiles-Tull Lumber Co, 48 So 966, 94 Miss 780, 19 Ann Cas 426

73. NY—Bates v Salt Springs Nat Bank, 51 NE 1033, 157 NY 322
40 C J p 307 note 41

74. Va—Anderson v White, 32 SE 2d 73, 183 Va 302—De Witt v Coffey, 143 SE 710, 150 Va 365
40 C J p 306 note 28, p 307 note 42 [a]

Liens or "claims"

Under some statutes an assignment by a contractor or subcontractor is subordinate only to liens of laborers, mechanics, and materialmen, and not to mere "claims" of such persons—Fairbanks, Morse & Co v Town of Cape Charles, 131 SE 437, 144 Va 56

Contractor's assignment of note and mechanic's lien

(1) Where a contractor having a note from the owner and a mechanic's lien on the property assigned the note and lien to one who, without notice of any claim of one asserting a laborer's or materialman's lien against the property, furnished material to the contractor and advanced money for his pay roll, the assignee was held to have a prior right to funds provided by the owner under the general contract—Modern Plumbing Co v Armstrong Bros. Tex Com App, 36 SW 2d 1011.

(2) However, as against the one asserting the laborer's or materialman's lien, the assignee was held entitled to recover only the amount representing materials furnished and moneys advanced by him—Modern Plumbing Co v Armstrong Bros., supra

75. NY—John H Black Co v Surdam Holding Corporation, 250 NY S 17, 140 Misc 113

Tex—Corpus Juris quoted in Bridgeport Mach Co v First Nat Bank, Civ App, 44 SW 2d 414, 417 affirmed First Nat Bank v Bridgeport Mach Co, Com App, 67 SW 2d 606

Va—Anderson v White, 32 SE 2d 72, 183 Va 302
40 C J p 306 note 30.

76. NJ—Meyer v. Standard Accident Ins Co, 177 A 255, 114 NJ Law 483—Harry Pinsky & Son Co v. Wike, 136 A. 920, 101 NJ Eq

and superior to that of an assignee of the contractor where his lien is perfected prior to the date of the assignment.⁷⁷ Under some statutes, when the principal contractor assigns all sums due or to become due from the owner under the contract, the claims of persons furnishing the contractor labor and materials which are duly perfected before the owner has actually paid the balance due to the assignee are not defeated by the assignment.⁷⁸ An assignment by the contractor of money due from the owner has been held to have priority over the claims of laborers or materialmen who have failed to take the proper steps to keep their liens alive.⁷⁹

Order as assignment. An order given by the contractor on the owner payable out of what is due under the contract operates as an equitable assignment pro tanto of the fund within the meaning of the rule entitling the assignee to priority over liens subsequently perfected,⁸⁰ at least where the order has been accepted,⁸¹ or payment thereof has been guaranteed,⁸² by the owner, and even, it is held, where it has not been accepted by the owner.⁸³ Some courts hold that an order covering an amount to become due thereafter is within the rule,⁸⁴ but other courts hold that the right of the assignee is inferior to the right of a claimant who gives notice after the assignment but prior to the time when the demand assigned was due.⁸⁵ A draft, bill of exchange, or other order drawn by the contractor on the owner, payable generally and not out of the particular fund, is not an equitable assignment, and will not affect lien claimants who perfect their liens before the fund has been depleted by actual payment of the order therefrom.⁸⁶

Homestead Where the building was intended as a homestead, and the holders of mechanics' liens possessed knowledge sufficient to put them on in-

quiry as to the intended use of the property, their claims were not entitled to priority in the appropriation of a balance due on the original contract which the owner had deposited in court, as against a claim under the original contract by an assignee who had completed the building in accordance with its terms.⁸⁷

b. By Subcontractor

Where a subcontractor assigns funds due him from the contractor, the assignee has priority over one who subsequently files or acquires a lien for work or materials furnished to the subcontractor.

Where a subcontractor assigns the whole or a part of the amount due or to become due him from the contractor, his assignee is entitled to priority over one who subsequently files a lien notice or claim for work done for, or materials furnished to, the subcontractor,⁸⁸ unless the assignment was not filed, as required by statute,⁸⁹ or, in a jurisdiction in which the lien, when perfected, relates back to the date when claimant began to perform labor or to furnish materials, as discussed supra § 181, unless it was subsequent to the beginning of work or the furnishing of materials by claimant.⁹⁰

§ 212. — Claim against Decedent's Estate

Claims against the estate of a decedent may be inferior to a mechanic's lien on property of the decedent, provided the mechanic's lienor has properly filed or enforced his lien.

Where the proceeds of a house and lot of a decedent are in the hands of his administrator for distribution, the claim of a contractor under the foreclosure of his lien for work done on such house and materials furnished therefor will take precedence of a claim of the widow on account of a debt for trust funds.⁹¹ Sometimes a mechanic's lien is

45, affirmed 141 A 930, 103 N J Eq 18

77. Wis.—Neil v Wisconsin Tel Co, 175 N W 89, 170 Wis 298

78. Fla.—Florida East Coast Ry Co v Eno 128 So 623, 99 Fla 887, 70 A L R 506

79. N Y—Rubinstein v Jamaica Nat Bank of New York, 40 N Y S 2d 23, affirmed 44 N Y S 2d 950, 266 App Div 977, affirmed 61 N E 2d 455, 294 N Y 727, motion granted 62 N E 2d 394, 294 N Y 843
W Va.—Atlas Powder Co. v. Nelson and Chase & Gilbert Co., 20 S E 2d 890, 134 W Va. 298

80. N Y—Stevens v Ogden, 29 N E 229, 130 N Y 183
40 C J p 307 note 44

Order on particular fund as equitable assignment generally see Assignments § 61.

81. N J—Wilkinson v. Behringer, 189 A 405, 118 N J Law 5

40 C J p 308 note 45

82. N J—Wilkinson v Behringer, supra
40 C J p 308 note 46

83. N J—Fell v McManus, Ch, 1 A 747.
40 C J p 308 note 47

84. N J—School Dist No 85 Board of Education v Duparquet, 24 A. 922, 50 N J Eq. 234
40 C J p 308 note 48

85. Cal—Southern California Electric Co v McDonald, 173 P. 760, 178 Cal 386
40 C J p 308 note 49.

86. N J—Seyfried v Stoll, 38 A. 965, 56 N J Eq 187
40 C J p 308 notes 50 [a], 51.

87. Tex.—Haldeman v McDonald, Civ App., 58 S W 1040

88. N Y—Wood v Grifenhagen, 75 N Y S 1014, 37 Misc 553

89. N Y—Van Kannel Revolving Door Co v Astor, 104 N Y S 653, 119 App Div 214, 107 N Y S 507, 122 App Div 613—Empire Heating Corporation v James Stewart & Co., 252 N Y S 136, 140 Misc 303

90. N C—Blue Pearl Granite Co v Merchants' Bank, 90 S E 312, 172 N C 354

91. Ga.—Boynton v Westbrook, 74 Ga 68

Priority between mechanics' liens and
Dower see Dower § 37
Widow's allowance see Executors and Administrators § 338 a.

denied priority over the claims of other creditors of a decedent where the lienor has not filed his lien⁹² or taken steps to enforce it,⁹³ at or within a specified time.

§ 213. — Promissory Note

Mechanics' lienors have been held to have priority over the rights of a third person holding an accommodation note given by a contractor to a subcontractor.

An accommodation note given by a contractor to a subcontractor, in the hands of a third person to whom it has been transferred, has been held not prior to the rights of lienors in the real property⁹⁴

§ 214. — Rights or Claims Asserted in Receivership

A mechanic's lien, under some circumstances, has a prior claim on funds in the hands of a receiver.

A laborer may, depending on the circumstances, be entitled to a lien on funds in the hands of a receiver prior to the claims of other creditors⁹⁵ Where a receiver has been appointed for the contractor, and his receivership perfected before a subcontractor or materialman files his notice of lien, the rights of the receiver are superior and prior to the rights of the lien claimant, at least in a jurisdic-

tion where a mechanic's lien does not attach until the filing of the notice of lien.⁹⁶ Claims of laborers employed by a receiver will be held prior to a receivers' certificate where the certificate has been issued subject to expenses,⁹⁷ or where accorded priority by statute⁹⁸ Where mechanics' liens are superior to receivers' certificates but inferior to first mortgage liens, and the latter liens are waived in favor of the certificates, such certificates come in ahead of mechanics' liens⁹⁹

§ 215. — Rights of Sureties Completing Contract

A surety who completes the contract after default of the contractor ordinarily stands in the shoes of the contractor, as far as concerns the question of priorities

Where, on default of the contractor, his surety, as such and in order to protect himself from liability under his contract of suretyship, completes the contract, he stands in the shoes of the contractor¹ and is entitled to the balance due only after all valid mechanics' liens are satisfied² On the other hand, where the surety completes the work under an agreement with the owner, he has a right, superior to that of mechanic's lien claimants, in a fund which the owner might have applied in completing the building if he had completed it himself³

V. ASSIGNMENT

§ 216. Of Inchoate Lien

In some jurisdictions, but not in others, an inchoate mechanic's lien may be assigned so as to invest the assignee with the right to perfect and enforce the same.

In some jurisdictions, sometimes by virtue of stat-

utory provisions, it is held that an inchoate mechanic's lien may be assigned so as to invest the assignee with the right to perfect and enforce the same,⁴ in the same manner and to the same extent

92. Pa—Appeal of Hoff, 102 Pa. 218 40 C J p 308 note 62.

93. Ill—Rietz v. Coyer, 83 Ill. 28 40 C J p 308 note 63

94. NY—Rukeyser v. Rouss, 169 N Y S 840, 102 Misc. 417

95. Ignorance of plan of financing

A person performing labor in construction of a model home, without acquiring knowledge of plan of financing whereby creditors were to be paid out of proceeds of sale of house until after his contract was partially performed, was held entitled to a lien on funds in the hands of a receiver of the property prior to claims of other creditors—Joyce Lumber Co v Marshalltown Const League, 283 NW. 912, 226 Iowa 274.

96. NY—Smith v. Pierce, 60 N Y S 1011, 45 App Div 628. 40 C J p 309 note 70

Accrual of lien see supra §§ 177-182
Priorities as between mechanics' lienors and creditors of insolvent

corporation see Corporations § 1564

97. Wash—Nisbet v Great Northern Clay Co., 33 P 15, 41 Wash 107

98. Wash—Nisbet v Great Northern Clay Co., supra 53 C J p 192 note 78

99. US—Pusey v Pennsylvania Paper Mills, C C Pa. 173 F 634, affirmed Newhall Engineering Co v Egolf, 185 F 481, 107 C C A 581. 53 C J p 192 note 79

1. Ala—Corpus Juris cited in David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 614, 227 Ala 25. 40 C J p 309 note 65

2. Va—Virginia Electric Transmission Co v Pennington Gap Bank, 119 SE 99, 137 Va 94 40 C J p 309 note 66

3. Ala—Corpus Juris cited in David Lupton's Sons Const Co v Hug-

ger Bros Const Co, 148 So 610, 613, 227 Ala 25 40 C J p 309 note 69.

4. Fla—Lawson v. Board of Public Instruction of Franklin County, for Use and Benefit of Alford, 159 So 14, 118 Fla 246

N J—Brown v. Home Development Co, 18 A 2d 742, 129 N J Eq 172—West Jersey Homeopathic Hospital v Gibbs, 143 A. 316, 103 N J Eq 262

Okl—Central Finance Corporation v Brown, 54 P 2d 196, 175 Okl 528—Braden Co v Lancaster Lumber Co, 38 P 2d 575, 170 Okl 30, 103 A L R 230

Wyo—Corpus Juris cited in Shoshoni Lumber Co v Fidelity Deposit Co, 24 P 2d 690, 699, 46 Wyo 241 5 C J p 893 note 10 [e], p 950 note 10—40 C J p 309 note 75

In Texas

(1) In some early cases it was indicated that the right to a lien was

as the assignor might have done;⁵ but in other jurisdictions the right to acquire a lien in the present or future is held to be a personal one⁶ and not assignable.⁷

§ 217. — Nature, Subject Matter, and Purpose of Assignment or Transfer

Where an inchoate mechanic's lien is assignable, an assignment ordinarily carries with it the right to perfect and enforce the lien; but, where an inchoate lien is not assignable, no such right is vested in the assignee.

In jurisdictions where an inchoate mechanic's lien is assignable the mere assignment of a lienable claim will carry with it the right to perfect and enforce a lien.⁸ In jurisdictions where an unperfected lien is not assignable, however, while lienable claims may of course be assigned,⁹ provided there is a

compliance with such statutory requirements relating to filing as are applicable,¹⁰ and the assignee will take title to the claim or debt,¹¹ the assignment, when made before perfection of the lien, carries with it no lien¹² and no right to perfect,¹³ enforce,¹⁴ or assert¹⁵ a lien

An absolute assignment by a lien claimant of the amount due him has been held to deprive him of the right of subsequently filing a lien statement,¹⁶ unless there has been a reassignment,¹⁷ and, in jurisdictions where an assignment of the claim before perfection of the lien confers no rights in respect of the lien on the assignee, such assignment destroys the right to a lien¹⁸ On the other hand, the rule obtaining in some jurisdictions that the right to acquire a lien is destroyed by an assignment

not assignable—*Carlile v Harris*, Civ.App., 38 S W 2d 633—*Muscogee First Nat Bank v Campbell*, 58 S W 628, 21 Tex Civ App 160

(2) However, in a later case it was stated that the holding in these cases was not necessary to the decision thereof, and, noting the conflict among the authorities, it was held that the authorities supporting the theory that the assignee acquires the right to perfect and enforce the lien present the better reasoning—*Corpus Juris* cited in *Southern Surety Co of New York v First State Bank*, Civ App., 54 S W 2d 888, 890

(3) In another case it was held that, when building on homestead was completed, assignment of lien dated back as of date of inception—*Gravin v Armstrong Bros*, Civ App., 30 S W 2d 353, modified on other grounds *Modern Plumbing Co v Armstrong Bros*, Com App., 36 S W 2d 1011

5. Miss—*Kerr v Moore*, 54 Miss 288

6. Cal—*Burr v Peppers Cotton Lumber Co*, 266 P. 1025, 91 Cal App 268—*Willett v Peppers Cotton Lumber Co*, 266 P 1028, 91 Cal App 798

40 C J p 309 note 77

7. Ark—*Superior Lumber Co v National Bank of Commerce*, 2 S W 2d 1093, 176 Ark 300—*Young Men's Building Ass'n v Ware*, 249 S W 545, 158 Ark 137

Cal—*Howard v Societa Di Unione E Beneficenza Italiana*, 145 P 3d 694, 62 Cal App 2d 842—*Burr v Peppers Cotton Lumber Co*, 266 P 1025, 91 Cal App 268, followed in *Willett v Peppers Cotton Lumber Co*, 266 P 1028, 91 Cal App 798

Ga—*Williams v Jay*, 160 S E 426, 173 Ga 372

Mo—*Williams Lumber & Manufacturing Co v Ginsburg*, 146 S W 2d 604, 347 Mo 119.

Or—*Corpus Juris* cited in *Phillips v Graves*, 9 P 2d 490, 492, 139 Or 406

5 C J p 951 note 12—40 C J p 309 note 78

Substitution or subrogation

Where building contractor quit work and did not perfect a mechanics' lien for work done, request of the owners of building that lumber company which furnished material for the work and advanced money to contractor to enable him to meet labor pay rolls, repair leak which developed in roof, even though accompanied by threat to sue for damages if the leak were not repaired, did not operate to substitute the company as the original contractor or to subrogate the company to the rights of the contractor to a lien—*Wyatt Lumber & Supply Co v Hansen*, 147 S W 2d 366, 201 Ark. 534

Rights on sale by owner

In action for foreclosure of mechanic's lien, judgment for plaintiff was reversed and complaint dismissed where, in light of builder's defaults and inability to make them good, owner of land was entitled to sell plot, and status of plaintiff's assignor was not that of a contractor within the Lien Law, but he was entitled to proceeds of sale after deduction of value of land, amount of defaults, cost of putting property in salable condition, and other proper charges—*Henry J Lunde, Inc. v Walker*, 43 N Y S 2d 543, 266 App Div 860, affirmed 54 N E 2d 380, 292 N Y 531

8. N J—*Brown v Home Development Co*, 18 A 2d 742, 139 N J Eq 172—*West Jersey Homeopathic Hospital v Gibbs*, 143 A 316, 103 N J Eq 262

Tex—*Southern Surety Co v First State Bank*, Civ App., 54 S W 2d 888

Wyo—*Shoshoni Lumber Co v Fidel-*

ity & Deposit Co, 24 P 2d 690, 46 Wyo 241

40 C J p 309 note 80

9. Ind—*Jenckes v Jenckes*, 44 N E 633, 145 Ind 634

Assignment of money to become due under building contract generally see *Assignments* § 19

10. N Y—*Lincoln Nat Bank v John Pearce Co*, 127 N E 253, 238 N Y 359

40 C J p 310 note 83

Filing of assignment of building contract or of money due thereunder

Generally see *Assignments* § 57

To preserve priority over liens of subcontractors, etc., see *supra* § 211

11. Or—*Phillips v Graves*, 9 P 2d 490, 139 Or 406—*Loud v Gold Ray Realty Co*, 142 P 785, 72 Or 155

12. Ga—*Williams v Jay*, 160 S E 426, 173 Ga 372

Ind—*Jenckes v Jenckes*, 44 N E 633, 145 Ind 634

13. Or—*Phillips v Graves*, 9 P 2d 490, 139 Or 406

40 C J p 310 note 86

14. Mo—*Williams Lumber Co v Ginsburg*, 146 S W 2d 604, 347 Mo 119

40 C J p 310 note 87.

15. N Y—*Barrett v Schaefer*, 146 N Y S. 1056, 162 App Div. 52, affirmed 112 N E 1054, 217 N Y. 732

16. Minn—*Davis v Crookston Waterworks, Power & Light Co*, 59 N W 482, 57 Minn 402, 47 Am S R 623

40 C J p 310 note 89

17. Nev—*Nichols v Levy*, 32 P 2d 120, 55 Nev 310

18. Neb—*Noll v Kenneally*, 56 N W 722, 37 Neb 879

40 C J p 310 note 91.

thereof does not apply to an assignment made to enable the assignee to sue.¹⁹ Likewise, the right to create a lien may be assigned where the assignment is made for the benefit of the assignor, and to be held by the assignee as his agent, so that the lien may be preserved.²⁰ The mere giving of an order on the debtor which is never presented, accepted, or paid does not defeat the right to a lien.²¹ An assignment of the claim as collateral security does not deprive the assignor of the right of subsequently filing a lien statement²² and enforcing the lien in his own name as discussed *infra* § 218. Also, a contractor may file his notice of lien after assigning a note taken by him for the amount due.²³

Assignment of contract; change in personnel of contractor Where a building contract is assigned, and the assignee continues the work under the contract with the owner's consent and approval, a novation is made and the assignee may enforce a mechanic's lien and include all labor and materials supplied by him whether before or after the assignment of the contract.²⁴ A change in the personnel of the contracting firm does not destroy the right to a lien for what was done or furnished pursuant to the contract,²⁵ a member of a firm who acquires the interests of his partner does not stand simply in the position of an assignee,²⁶ and the rule obtaining in some jurisdictions that the right to create a lien cannot be assigned is not applicable.²⁷ However, the fact that a contractor, after making the contract, entered into a partnership with another person, who is the legal successor of the firm, has been held not to authorize such person to file a lien under the contract between the contractor and

owner to which he was a stranger.²⁸

§ 218. — In Whose Name Lien Perfected and Enforced

Some authorities permit the assignee of an inchoate lien to perfect and enforce the lien in his own name, while other authorities require the lien to be perfected and enforced in the name of the assignor.

According to some authorities the assignee of a lienable claim may perfect a lien in his own name,²⁹ but other cases hold that the lien should be perfected in the name of the assignor.³⁰ So, also, some authorities hold that, where the right to the lien has been assigned, an action to enforce the lien may be brought in the name of the real party in interest,³¹ while others require the lien to be enforced in the name of the assignor for the benefit of the assignee.³²

Where the claim has been assigned as collateral security, the assignor may enforce the lien in his own name,³³ especially where the claim has been re-assigned to the assignor for the purpose of enabling him to register it.³⁴ Where there has been a change in the personnel of the contracting firm, it has been variously held that the lien may and should be perfected and enforced in the firm name,³⁵ the names of the original partners,³⁶ or the names of the successors.³⁷

Assignment of contract. Where a building contract is assigned before completion, and completed by the assignee, the latter may file and enforce a lien in his own name if the effect of the assignment was to substitute him as original contractor, and the owner consented to such substitution,³⁸ but, if the assignee completed the contract merely as

19. U.S.—Irvine v McDougall, Alaska, 235 F 888, 149 CCA 200

20. N.Y.—Rollin v Cross, 45 N.Y. 766

21. Neb.—Omaha Oil & Paint Co v. Greater America Exposition, 93 N.W. 963, 4 Neb. Unoff., 275

22. Ky.—Wagner v Swoope, 54 S.W.2d 395, 246 Ky. 19
40 C.J. p. 310 note 96

23. N.Y.—Linneman v Bieber, 33 N.Y.S. 129, 85 Hun 477
40 C.J. p. 310 note 98

24. Mont.—Smith v Gunniss, 144 P.2d 186, 115 Mont. 363

25. Cal.—Simons v Webster, 40 P.1056, 108 Cal. 16
40 C.J. p. 310 note 99

26. Mo.—Jones v Hurst, 67 Mo. 568
N.Y.—Ogden v Alexander, 35 N.E. 638, 140 N.Y. 356

27. Cal.—Simons v Webster, 40 P.1056, 108 Cal. 16, distinguishing

Mills v La Verne Land Co., 32 P.169, 97 Cal. 254, 33 Am.S.R. 168

28. Pa.—Bohem v Seabury, 21 A.674, 141 Pa. 594.

29. Ill.—Huebner v Kornajzer, 259 Ill.App. 540

N.J.—Brown v Home Development Co., 18 A.2d 742, 129 N.J.Eq. 172
—West Jersey Homeopathic Hospital v Gibbs, 143 A. 316, 103 N.J.Eq. 262.

N.C.—Horne-Wilson, Inc. v Wiggins Bros., 164 S.E. 365, 203 N.C. 85
40 C.J. p. 311 note 6.

30. R.I.—McDonald v Kelly, 14 R.I. 335

S.D.—Hill v Alliance Bldg Co., 60 N.W. 752, 6 S.D. 160, 55 Am.S.R. 819

31. Ala.—Leftwich Lumber Co v Florence Mut Bldg, Loan & Savings Ass'n, 18 So. 48, 104 Ala. 584
40 C.J. p. 311 note 8

Parties defendant in suit by assignee see *infra* § 284

Persons entitled to enforce lien generally see *infra* § 278

In whose name perfected lien enforced see *infra* § 220

32. Mass.—Williams v Weinbaum, 59 N.E. 626, 178 Mass. 238
R.I.—McDonald v Kelly, 14 R.I. 335

33. Ill.—Weber v Bushnell, 49 N.E. 728, 171 Ill. 587
40 C.J. p. 311 note 10

34. Cal.—Macomber v. Bigelow, 58 P. 312, 126 Cal. 9

Ill.—Weber v Bushnell, 49 N.E. 728, 171 Ill. 587

35. Mass.—Busfield v. Wheeler, 14 Allen 139

36. Iowa.—German Bank v Schloth, 13 N.W. 314, 59 Iowa 316

37. Kan.—Brown v. Neosho County School Dist. No. 84, 29 P. 1069, 48 Kan. 709

38. Mont.—Corpus Juris quoted in Smith v Gunniss, 144 P.2d 186, 192, 115 Mont. 363

40 C.J. p. 311 note 15.

representing the original contractor, without being substituted for him, the lien has been held properly perfected and enforced in the name of the assignor for the benefit of the assignee³⁹

§ 219. Of Perfected Lien

Generally, a perfected mechanic's lien is assignable and passes as an incident with assignment of the debt which it secures.

It is well established as a general rule that after a mechanic's lien has been perfected by filing the necessary papers, it may be assigned⁴⁰. A perfected mechanic's lien passes as an incident with the assignment of the demand for which it stands as

security⁴¹. Indeed, the lien cannot be effectively assigned without an assignment of the debt⁴². No particular words are necessary to constitute an assignment of the lien claim,⁴³ and, if the intent of the parties to effect an assignment is clearly expressed, this is sufficient to accomplish the purpose,⁴⁴ although, where the statutes of the particular jurisdiction require the assignment to be made in a particular way, there must be a compliance therewith⁴⁵. According to some authorities an assignment of the lien must be in writing,⁴⁶ but it has also been held that the lien may be assigned by parol⁴⁷. As in the case of written assignments generally, as discussed

39. R.I.—*McDonald v. Kelly*, 14 R. I. 335.

40. Ark.—*Wyatt Lumber & Supply Co v Hansen*, 147 S.W.2d 366, 201 Ark 534—*Superior Lumber Co v National Bank of Commerce*, 2 S.W.2d 1093, 176 Ark 300

Fla.—*Corpus Juris cited in Spears v West Coast Builders' Supply Co*, 133 So. 97, 98, 101 Fla. 980

Mo.—*Williams Lumber & Manufacturing Co v Ginsburg*, 146 S.W.2d 604, 347 Mo. 119

Nev.—*Nichols v Levy*, 32 P.2d 130, 55 Nev. 310

Wyo.—*Corpus Juris cited in Shoshoni Lumber Co v Fidelity & Deposit Co*, 24 P.2d 690, 697, 46 Wyo. 241.

40 C.J. p. 311 note 17

Assignment as security

Fact that contractor paid employees' wages from funds placed by bank to credit of contractor did not prevent bank, taking assignment as security of liens filed by employees, from acquiring enforceable liens thereby—*John H. Black Co v Surdam Holding Corporation*, 250 N.Y.S. 17, 140 Misc. 113

Undertaking for payment

Mechanic's lien is not rendered nonassignable by execution of statutory undertaking for payment of any judgment for enforcement of lien—*John R. Blair Co v Seadco Bldg Corporation*, 239 N.Y.S. 336, 136 Misc. 204

Consideration

Evidence was held not to establish unconditional contract for payment for transfer of note secured by lien on homestead, and assignor alleging unconditional contract for payment for transfer of note secured by lien on homestead could not recover on assignment contract without first showing payment of material and labor claims against homestead which assignor contracted to pay—*Eastland Building & Loan Ass'n v Eastland County Lumber Co*, Tex. Civ. App., 38 S.W.2d 369

41. Cal.—*Union Supply Co v Morris*, 30 P.2d 394, 230 Cal. 331—*Mitchell v Shoreridge Oil Co*, 75 P.2d 110, 24 Cal. App. 3d 383, hearing denied 77 P.2d 221, 24 Cal. App. 2d 382

Ky.—*Weil v B. E. Buffaloe & Co*, 65 S.W.2d 704, 251 Ky. 673—*Steele & Leiby v Flynn-Sullivan Co*, 54 S.W.2d 325, 345 Ky. 772.

40 C.J. p. 311 note 18

Assignment without notice to owner
Where mechanics' claims against owners of land for construction of house thereon were transferred to assignee with written notice to assignee that assignment of lien was included, that owners had no notice of assignment did not prevent assignee from acquiring lien—*Bell Bros & Co v Arnold*, 68 S.W.2d 958, 17 Tenn. App. 493

42. Cal.—*Union Supply Co v Morris*, 30 P.2d 394, 230 Cal. 331

40 C.J. p. 311 note 19

Rights passing as incidents under assignments generally see Assignments §§ 85-89

43. Fla.—*Clarkson v Louderback*, 19 So. 887, 36 Fla. 660

Nev.—*Skyrme v Occidental Mill & Mining Co*, 8 Nev. 219

Equitable assignment

Agreement by purchaser of contractor's lien to pay subcontractor was held to amount, pro tanto, to equitable assignment of lien on property and fund held by purchaser—*Grant v McAuliffe*, Tex. Civ. App., 8 S.W.2d 226, error dismissed

An assignment indorsed on the lien paper of "the within lien and all my rights thereunder" is an assignment of the debt as well as of the lien—*Skyrme v Occidental Mill & Mining Co*, 8 Nev. 219

44. Fla.—*Clarkson v Louderback*, 19 So. 887, 36 Fla. 660

Wrong name of assignee

Where, in a mechanic's lien foreclosure suit, brought by the "Construction Finance Corporation" as the contractor's assignee, a defend-

ant sought to take advantage of the fact that what purported to be the written assignment of the contract was made to the "Contractors' Finance Corporation," but there was testimony that it was to complainant, "Construction Finance Corporation," that the assignment actually was made, and complainant offered in evidence a note for the amount due under the contract, signed by the owners of the property who had entered into the contract, it was held that it was apparent that there was a mere error in the assignment—*Construction Finance Corporation v Kawohl*, 274 Ill. App. 541

45. Tex.—*Indemnity Ins. Co. of North America v Bassett*, Civ. App., 299 S.W. 714

Wis.—*Shearer v Browne*, 78 N.W. 744, 102 Wis. 585

46. N.Y.—*Wood v. Grifenhagen*, 75 N.Y.S. 1014, 37 Misc. 553.

Wis.—*Shearer v Browne*, 78 N.W. 744, 102 Wis. 585

47. Ind.—*Trueblood v Shellhouse*, 49 N.E. 47, 19 Ind. App. 91

Or.—*McFeron v. Doyens*, 116 P. 1063, 59 Or. 366

In California

(1) In an early case, the court followed the rule that the assignment must be in writing—*Ritter v Stevenson*, 7 Cal. 388

(2) However, in a later case it was held that an oral assignment was valid, and the earlier case was held inconsistent with later decisions covering mortgage liens and at variance with the principle that a lien is but an incident of the debt and follows a valid assignment of the debt—*Union Supply Co v Morris*, 30 P.2d 394, 230 Cal. 331, followed in *Mitchell v Shoreridge Oil Co*, 75 P.2d 110, 24 Cal. App. 382

(3) A finding that the claim was transferred and assigned imports, in the absence of anything to show the contrary, that the court found on sufficient evidence that the claim was assigned in writing—*Patent Brick Co v. Moore*, 16 P. 890, 75 Cal. 205.

in Assignments § 56, a written assignment of a mechanic's lien is not effective unless,⁴⁸ and until,⁴⁹ it is delivered.

§ 220. — In Whose Name Lien Enforced

The assignee of a perfected mechanic's lien may bring an action to enforce the lien in his own name in some jurisdictions, but in others it has been held that the lien may and should be enforced in the assignor's name.

According to some authorities the assignee of a perfected lien may enforce the lien in his own name,⁵⁰ but it has also been held that the lien may⁵¹ and should⁵² be enforced in the name of the assignor, at least where he is the real party in interest⁵³. Thus, where the lien has been transferred as collateral security, it has been held that the assignor may enforce the lien in his own name⁵⁴.

However, an assignee for collection has been held the proper person to foreclose the lien, since he was the legal owner⁵⁵.

§ 221. Rights of Assignee

Ordinarily, an assignee of a mechanic's lien obtains only those rights possessed by the assignor at the time of the assignment, and he is subject to all equities and defenses existing against the assignor at the time of the assignment.

The assignee of a mechanic's lien occupies the same position as the assignor,⁵⁶ having the same rights,⁵⁷ and being subject to the same equities,⁵⁸ conditions,⁵⁹ and defenses⁶⁰. Hence, he can enforce no lien where the assignor was not entitled to a lien,⁶¹ as where the contract has not been performed to such an extent as to give rise to a lien.⁶²

48. Cal—Rutter v Stevenson, 7 Cal 388

49. U.S.—Irvine v McDougall, Alaska, 235 F 888, 149 CCA 200.

50. Miss—Hartford Accident & Indemnity Co v N O Nelson Mfg Co, 135 So 349, 160 Miss 504
40 C.J. p 312 note 31

Parties plaintiff generally in proceedings to enforce mechanics' liens see § 283

Persons entitled to enforce lien:
Generally see infra § 278

Where inchoate lien has been assigned see supra § 218

Notice of invalidity

Transferee of note secured by invalid mechanic's lien was held not entitled to foreclosure of lien in absence of proof that lien was purchased in reliance on its validity and without notice of its invalidity—Hill v Engel, Tex Civ App, 89 SW 2d 219, error refused

Assignment to partner

Where one of two partners suing to enforce mechanic's lien had assigned his interest to copartner, assignee was held properly granted foreclosure decree—Blatterman v Cities Service Oil Co, 246 NW. 532, 188 Minn 95

Sealed contract

Mechanic's lien proceeding was held properly brought in name of assignee of real party in interest, even though contract was under seal—Balchunas v Novicki, 257 Ill App 157

51. Mass—Massasoit-Pocasset Nat. Bank v. Borden, 117 NE 911, 228 Mass 581.

52. Ill—Phoenix Mut Life Ins Co v Batchen, 6 Ill App 621
NY—Hallahan v. Herbert, 57 NY 409

53. Mo—Gill v Harris, 24 SW 2d 673, 224 Mo App 717.

54. Ky—Wagner v Swoope, 54 S W 2d 395, 246 Ky 19

55. Cal—Mitchell v. Shoreridge Oil Co, 75 P 2d 110, 24 Cal App 2d 382, hearing denied 77 P.2d 221, 24 Cal App 2d 382

56. Tex—Employers' Liability Assur Corporation v Eckert, Civ App, 46 SW 2d 464, affirmed Minus v Employers' Liability Assur Co, Com App, 65 SW 2d 292—Carlile v. Harris, Civ App, 38 SW 2d 622—Employers' Liability Assur Corporation v Lyon-Gray Lumber Co, Civ App, 29 SW 2d 843
40 C.J. p 312 note 35.

Forged instruments

(1) Transferee of note and mechanic's lien could foreclose lien, notwithstanding forged, instead of original, mechanic's lien note was transferred—Denman v Farm & Home Savings & Loan Ass'n, Tex Civ App, 51 SW 2d 817

(2) As between assignor of mechanic's lien contract and forged note and assignee thereof, assignee acquired assignor's rights in genuine instruments and assignor's liens thereunder, and, where assignment was recorded, assignee's title to lien was held superior to that of assignor's subsequent bona fide assignee of contract and note, receiving genuine note duly indorsed—Wood v Sparks, Tex Com App, 59 SW 2d 361, rehearing denied 63 SW 2d 1109

57. Fla—Lawson v Board of Public Instruction of Franklin County, for Use and Benefit of Alford, 159 So 14, 118 Fla 246—Spears v. West Coast Builders' Supply Co, 133 So 97, 101 Fla 980

Miss—Sadler v Glenn, 199 So 305, 190 Miss 112—Hartford Accident & Indemnity Co v. N O Nelson Mfg Co, 135 So 349, 160 Miss 504

Or—Collins v Heckart, 270 P 907, 127 Or 34

Tex—Hinton v Meador, Civ App, 97 SW 2d 251, reversed on other grounds Wilson v Hinton, 116 S W 2d 365, 131 Tex 593—Denman v Farm & Home Savings & Loan Ass'n, Civ App, 51 SW 2d 817
40 C.J. p 312 note 36.

Rights passing as incidents of assignments generally see Assignments §§ 85-89.

No greater rights

Ala—Le Grand v. Hubbard, 112 So 826, 216 Ala 164

58. Cal—Hammond Lumber Co v. Fanta, 178 P 503, 179 Cal 652
Md—Goldman v Brinton, 44 A 1029, 90 Md 269

59. Iowa—Maryland Casualty Co v Des Moines City Evangelization Union, 167 NW 695, 184 Iowa 246

Expenditures for completing building

Makers of mechanic's lien note, given for building house, were held liable thereon to contractor's assignee for full amount less expenditures for completing building after contractor's default—Galbraith-Foxworth Lumber Co v Long, Tex Civ App, 5 SW 2d 162, error refused

60. Colo—Howard v Fisher, 283 P 1042, 86 Colo 493

Ky—Weil v B E Buffalo & Co, 65 SW 2d 704, 251 Ky 673
40 C.J. p 312 note 39.

61. Ga—Williams v. Jay, 160 SE 426, 173 Ga. 372

Tex—Davis v National Bond & Mortgage Corporation, Civ App, 45 SW 2d 272, reversed on other grounds National Bond & Mortgage Corporation v Davis, Com App, 60 SW 2d 429—Muscogee First Nat Bank v Campbell, 58 SW 628, 24 Tex Civ App 160

62. Tex—Postal Savings & Loan Ass'n v Powell, Civ App, 47 SW 2d 343, error refused.
40 C.J. p 312 note 41.

Neither can the assignee enforce a lien where, prior to the assignment, the assignor waived his right to a lien⁶³ or was estopped to assert it⁶⁴

Payments made by the owner to the assignor after the assignment, but in good faith and without notice thereof, may be set off against the assignee,⁶⁵ and, where the assignment is invalid, the fact that payments were made with notice thereof is immaterial,⁶⁶ but an owner who, after the termination of the original building contract without the fault of the builder, and after the latter had commenced an action to foreclose his mechanic's lien and had assigned the lien and cause of action, but without knowledge of the assignment, entered into a new contract with the assignor with respect to the same subject matter, is not entitled to set off against the assignee any damages arising out of the assignor's failure to perform the new contract⁶⁷ After a

claim and the right to a mechanic's lien therefor have been assigned, the rights of the assignee cannot be affected by any statement made by the assignor in a petition to be declared a bankrupt,⁶⁸ unless such statement is ratified by the assignee⁶⁹

Duty to complete contract An assignee of a mechanic's note and lien has been held not to assume a construction contract⁷⁰ or the duty to complete the building on the contractor's default⁷¹

Simulated lien on homestead. The bona fide purchaser or assignee of a simulated mechanic's lien on a homestead may enforce the lien,⁷² provided he is an innocent purchaser before maturity.⁷³ The purchaser is not entitled to enforce the lien, however, where he is not a purchaser for value without notice of its invalidity,⁷⁴ or where there has not been substantial performance of the contract.⁷⁵

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION

A. WAIVER OF RIGHT TO LIEN

§ 222. In General

The right to a mechanic's lien may be waived.

The principle that a person of full age and acting sui juris can waive a statutory or even a constitu-

tional provision in his own favor, affecting simply his property or alienable rights and not involving considerations of public policy, applies to mechanics' liens,⁷⁶ and when the lien has been once waived

Provision authorizing lien

Under a clause of the contract so providing, a contractor's assignee of mechanic's lien note was held entitled to foreclosure, notwithstanding contractor's default—*Galbraith-Foxworth Lumber Co v Long*, Tex Civ. App., 5 SW 2d 162, error refused

Abandonment of contract

Where under arrangement between contractor and lender, lender was to furnish money to finance construction job, as between lender and parties assigning claim to him, the assignments were controlling, but as to other persons who had furnished labor and materials in construction of building and as to building funds paid into court by owner after contractor had abandoned contract, the lender was not entitled to lien against funds or building, but he was only entitled to a pro rata share.—*Sadler v Glenn*, 199 So 305, 190 Miss 112

63. Wash.—*Kent Lumber Co. v. Ward*, 79 P 455, 37 Wash 60

64. Md.—*Goldman v Brinton*, 44 A. 1029, 90 Md 259

65. N.Y.—*Lawrence v Greenfield Cong Church*, 58 NE 24, 164 NY 115

66. N.Y.—*Nason Mfg Co v Adams*, 134 NYS 1100, 76 Misc 590

67. N.Y.—*Lawrence v. Greenfield*

Cong Church, 58 NE 24, 164 NY 115

68. Mich.—*Kudner v Bath*, 97 NW 685, 135 Mich 241

69. Mich.—*Kudner v Bath*, supra

70. Tex.—*Long Bell Lumber Co v Futch*, Civ App., 20 SW 2d 1076, error refused—*Lancaster v Whaley Lumber Co*, Civ App., 18 SW 2d 769, error dismissed

Liability to subcontractor

Contractor's assignment to lumber company as security reserving right to fulfill contract was held, as matter of law, not to render assignee liable to subcontractor, and a statement to subcontractor of representative of lumber company, taking assignment from contractor as security, that company was financing job, did not render company liable to subcontractor—*Golinick v. Fry*, 23 SW 2d 677, 119 Tex. 23

71. Tex.—*Lancaster v. Whaley Lumber Co*, Civ App., 18 SW 2d 786, error dismissed—*Galbraith-Foxworth Lumber Co v Long*, Civ App., 5 SW 2d 162, error refused

Not liable in damages

Where mortgagee purchased note and mechanic's lien contract but did not assume obligation to make improvements on mortgaged property, mortgagee would not be liable in

damages for failure to make improvements—*Farm & Home Savings & Loan Ass'n of Missouri v Muhl*, Tex Civ App., 37 SW 2d 316, error refused

72. Tex.—*Garrett v Katz*, Civ App., 23 SW 2d 436, corrected 27 SW 2d 373—*Bernstein v Hibbs*, Civ. App., 284 SW 234

Rights of subsequent holders of simulated liens generally on homesteads see *Homesteads* § 148

73. Tex.—*Quillin v State Trust Co*, Civ App., 50 SW 2d 879, error refused

74. Tex.—*Hill v Engel*, Civ App., 39 SW 2d 219, error refused

Notice

Mechanic's and materialman's lien was held void in hands of lien purchaser, where no improvements were made under lien contract, and transaction was simulated, notwithstanding landowners' representation to purchaser that lien was valid and subsisting, since physical facts, when purchaser inspected property, put him on notice that representations were false—*Judge v Shaboub*, Tex Civ App., 57 SW 2d 613.

75. Tex.—*Postal Savings & Loan Ass'n v Powell*, Civ App., 47 SW 2d 343, error refused

76. Cal.—*Giant Powder Co Consolidated v Fidelity & Deposit Co. of*

it cannot afterward be revived⁷⁷ in the absence of an express agreement to that effect with the owner⁷⁸ binding on those whose interests are adversely affected⁷⁹ It has been held that the principal contractor may waive the right, not only of himself,⁸⁰ but also of persons claiming under him,⁸¹ to a mechanic's lien on compliance with statutory requirements⁸² It has also been held, however, that the rights of subcontractors will not be affected by any act of waiver of the principal contractor subsequent

to the original contract⁸³ and that stipulations in contracts between the owner and the principal contractor waiving liens are not binding on laborers and materialmen⁸⁴ unless they have actual notice thereof when they furnish labor or materials⁸⁵

Operation and effect. The courts will accord full force to a waiver voluntarily made,⁸⁶ but they will not extend its operation and effect beyond its plain terms⁸⁷ The waiver of a mechanic's lien is not the

Maryland, 7 P 2d 1023, 211 Cal 619—Kennedy v National Surety Co, 295 P 359, 111 Cal App 306

Ind—*Corpus Juris* quoted in Hammond Hotel & Improvement Co v Williams, 178 NE 177, 95 Ind App 506

Iowa—Joyce Lumber Co v Marshalltown Construction League, 293 NW 912, 226 Iowa 274—Eclipse Lumber Co v Butler, 241 NW 896, 213 Iowa 1313

Minn—Smude v Amidon, 7 NW 2d 776, 214 Minn 266

NJ—Booye v Ries, 134 A 86, 102 NJ Law 322—City Hall Building & Loan Ass'n of Newark v Florence Realty Co, 158 A 506, 110 N J Eq 12

Okla—Eason Oil Co v M A Swatek & Co, 36 P 2d 504, 169 Okl 170

Pa—Clayton v Lienhard, 167 A 321, 313 Pa 433

Tex—*Corpus Juris* cited in Verschoyle v Holfield, Civ App, 90 SW 3d 907, 911

40 C J p 313 notes 50, 51

Abandonment of lien see infra § 241

Release of lien see infra § 246

Waiver of priority over encumbrance see supra § 204

77. Ind—*Corpus Juris* quoted in Hammond Hotel & Improvement Co v Williams, 178 NE 177, 95 Ind App 506

Mich—Pittsburgh Plate Glass Co v Art Centre Apartments, 235 NW 234, 253 Mich 501

40 C J p 313 note 52

78. Ind—*Corpus Juris* quoted in Hammond Hotel & Improvement Co v Williams, 178 NE 177, 95 Ind App 506

Ohio—Whitmer v Arthur, 23 Ohio N P NS, 481

Failure of property owner to carry out his part of contract did not revive mechanic's lien once waived—Hammond Hotel & Improvement Co v Williams, 178 NE 177, 95 Ind App 506

79. Mich—Pittsburgh Plate Glass Co v Art Centre Apartments, 235 NW 234, 253 Mich 501

80. Ill—Moulding-Brownell Corporation v E C Delfosse Const Co, 9 NE 2d 459, 291 Ill App 343—McNulty v White, 242 Ill App 37

Ind—Kokomo Frankfort & Western

Tract Co v Kokomo Trust Co 137 NE 763, 193 Ind 219—Hammond Hotel & Improvement Co v Williams, 176 NE 154, 95 Ind App 506, rehearing denied 178 NE 177, 95 Ind App 506

Agreement of contractor see infra § 324

81. Ill—Moulding-Brownell Corporation v E C Delfosse Const Co, 9 NE 2d 459, 291 Ill App 343—McNulty v White, 242 Ill App 37

Ind—Hammond Hotel & Improvement Co v Williams, 176 NE 154, 95 Ind App 506, rehearing denied 178 NE 177, 95 Ind App 506—Clarage v Palace Theatre Corporation, 165 NE 550, 95 Ind App 443

40 C J p 313 note 55

Stipulation in principal contract against liens as affecting subcontractor, materialman, or workman see supra § 109

82. Ind—Clarage v Palace Theatre Corporation, 165 NE 550, 95 Ind App 443—Hutton v McGuire, 161 NE 648, 88 Ind App 163

Pa—Lumber & Millwork Co of Philadelphia v Graham, Comp Pl, 60 Montg Co 162

Acknowledgment

Where contract for construction of building contained a provision waiving all rights to mechanics' liens was not acknowledged as required by statute, materialmen and subcontractors had right to enforce lien without regard to the fact that they had actual notice of the contract—Hutton v McGuire, 161 NE 648, 88 Ind App 163.

Description of property held sufficient

Description of property in building contract as northwest corner of a named street and avenue was sufficient within law authorizing waiver of lien—Clarage v Palace Theatre Corporation, 165 NE 550, 95 Ind App 443

Recording

Statute does not invalidate waiver of mechanic's lien on part of original contractor, even though contract is not recorded—Hammond Hotel & Improvement Co v Williams, 176 NE 154, 95 Ind App 506, rehearing denied 178 NE 177, 95 Ind App 506

23. Kan—Nixon v Cydon Lodge No 5 K P, 43 P 236, 56 Kan 298

La—Young v Barelli, 125 So 258, 169 La 319

Mo—*Corpus Juris* quoted in Kierbas

v Gibson, App, 289 S W 358, 362

84. Ala—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 613, 102 A L R 346

85. Ala—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, supra

86. Ill—Purnell v Jones, 30 NE 2d 212, 307 Ill App 355—Kasnick v Saunders, 23 NE 2d 573, 303 Ill App 115—Hyde Park Inv Co v Hyde Park State Bank, 257 Ill App 539

Kan—Augusta Building & Loan Ass'n v Speck, 285 P 516, 130 Kan 45

Ohio—Kocher v Ricketts, App, 49 NE 2d 85

40 C J p 313 note 58.

General waiver

"Where a general waiver is executed, and there is nothing in the context to show a contrary intention, there is nothing left for the court to do but to enforce the contract as the parties have made it"—Decatur Lumber & Mfg Co v Crail, 183 NE 228, 230, 350 Ill 319—Turner v Brackle, 94 NE 495, 496, 249 Ill 394

Claimed reservation as to use of waiver of mechanic's lien executed by subcontractor was of no effect unless it was brought to attention of bank which made construction payments prior to bank's payment to principal contractor for subcontractor of amount shown to be due to the subcontractor by sworn statement of the principal contractor—Gottesman v. United Sav Bank, 289 NW 250, 291 Mich 551.

Joint owner

Where materialman withdrew his claim for a mechanic's lien against one of two joint owners of property affected, his lien could not be upheld as to the interest of such joint owner—Dalbey Bros Lumber Co v Crispin, 12 NW 2d 277, 234 Iowa 151

87. Ill—Goldstein v. McAlonan, 17 NE 2d 993, 297 Ill App 643

giving up of a property right, but merely of an added remedy.⁸⁸ When a contractor waives his right to a lien, he thereby agrees to rely on his right to obtain a judgment at common law under the contract in case the owner defaults.⁸⁹ A waiver of a lien by a materialman has been held to remit him to his right to participate in any fund in the hands of the owner.⁹⁰ It has been held that a materialman waiving his lien cannot recover materials not attached to the freehold.⁹¹

Avoidance A waiver may be avoided for fraud or misrepresentation⁹² on showing that it is chargeable to the person for whose benefit the waiver was made⁹³ and that an offer was made to restore benefits received for its execution.⁹⁴

§ 223. What Constitutes in General

While a waiver of a mechanic's lien may be express or implied, an intention to waive must clearly appear.

In order to be effective a waiver must be supported by a consideration.

It has been said that the term "waiver of mechanic's lien" has by long usage become descriptive of a writing having the purpose and effect of releasing, according to its terms, the statutory right to a mechanic's lien.⁹⁵ A waiver of a mechanic's lien may be express,⁹⁶ or it may be implied or inferred⁹⁷ from acts,⁹⁸ conduct,⁹⁹ or the course of dealing between the parties.¹ What constitutes a waiver is essentially a question of intention,² in order to establish it the intention to waive must clearly appear.³ While a claimant will be held to have intended to do what an express waiver particularly states that he does do,⁴ a waiver of the lien will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby,⁵ unless by his conduct the opposite party was misled to his prejudice into the honest belief that such waiver was intended or

Kan—Southwestern Electrical Co v Hughes, 30 P 2d 114, 139 Kan 89
Wash—Lofthus v Cumming, 87 P 2d 283, 198 Wash 115
40 C J p 313 note 59.
Construction and effect of waiver by agreement see *infra* § 224.

Special purpose

(1) "A waiver of lien for a clearly expressed special purpose will be confined by the courts to the purpose intended"—Decatur Lumber & Mfg Co v Crail, 183 NE 228, 230, 350 Ill 319.

(2) Generally a waiver of mechanic's lien to enable owner to secure mortgage loan on property for building construction operates only to extent of money advanced, in the absence of clear language to the contrary—Bruce Const. Corporation v Federal Realty Corporation, 139 So 209, 104 Fla 93

Lien for work or material subsequently furnished

(1) Waiver of right to mechanic's lien for labor and materials furnished to date does not affect right to lien for work or material furnished thereafter—H G Wolff Co v Gwynne, 246 Ill App 86

(2) Materialman giving release required by mortgagee for material which had been furnished before mortgagee would complete loan did not waive right to lien for material subsequently furnished—Southwestern Electrical Co v Hughes, 30 P 2d 114, 139 Kan 89

Release construed with waiver

Separate release and waiver of mechanic's lien claim executed simultaneously and as part of same transaction should be construed together—Pittsburgh Plate Glass Co v Art

Centre Apartments, 235 NW 234, 253 Mich 501

Facts held to show partial waiver
Ill—Ottersen v Zerowski, 267 Ill App 91—Burgoyne v Pyle, 261 Ill App 356

Mich—Saginaw Lumber Co v Stirling, 9 NW 2d 680, 305 Mich 473

88. Ill—H G Wolff Co v Gwynne, 246 Ill App. 86

89. Ind—Hammond Hotel & Improvement Co v Williams, 178 NE 177, 95 Ind App 506

90. NC—Home Building v Nash, 157 SE 134, 200 NC 430

91. Tenn—Prichard Bros v Causey, 12 SW 2d 711, 158 Tenn 58

92. Okl—Kiowa Lumber Co v Oklahoma City Building & Loan Ass'n, 34 P 2d 592, 168 Okl 540

93. Okl—Kiowa Lumber Co v Oklahoma City Building & Loan Ass'n, *supra*

94. Okl—Kiowa Lumber Co v Oklahoma City Building & Loan Ass'n, *supra*

95. Conn—Townsend v Barlow, 124 A 833, 101 Conn 86

96. Iowa—Joyce Lumber Co v Marshalltown Construction League, 283 NW 912, 226 Iowa 274
40 C J p 313 note 61

97. Iowa—Joyce Lumber Co v Marshalltown Construction League, *supra*

Ohio—Fall Savings & Loan Ass'n v Brumit, 161 NE 295, 28 Ohio App 60

Wis—Roseliep v Herro, 239 NW 413, 206 Wis 256.

40 C J p 313 note 64

Implied agreement see *infra* § 224

98. US—Harris v Youngstown

Bridge Co, Ky, 93 F 355, 35 CCA 341

Iowa—Joyce Lumber Co v Marshalltown Construction League, 283 NW 912, 226 Iowa 274

Affirmative act

In order to constitute waiver of materialman's rights against building owner, there must be an affirmative act inducing owner to believe that strict performance is not expected—Compton v Jennings Lumber Co, Tex Civ App, 295 SW 308

99. Cal—Jaekle v Halton, 78 P 2d 441, 25 Cal App 2d 706

Wis—Roseliep v Herro, 239 NW 413, 206 Wis 256—Carl Miller Lumber Co v Meyer, 196 NW 840, 183 Wis 360

1. Ohio—Portsmouth Iron Co v Murray, 38 Ohio St 323

2. Mo—Waters v Gallemore, App. 41 SW 870

Wyo—Corpus Juris quoted in Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 589, 59 Wyo 334, 147 ALR 1089

40 C J p 313 note 69

3. Mich—Saginaw Lumber Co v Wilkinson, 254 NW 240, 266 Mich 661

Tex—Dillard v McGinty, Civ App, 17 SW 2d 167.

Wis—Roseliep v Herro, 239 NW 413, 206 Wis 256

Wyo—Corpus Juris quoted in Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 589, 59 Wyo 334, 147 ALR 1089

40 C J p 314 note 70

4. Ohio—Whitmer v. Arthur, 23 Ohio NP, NS, 481

5. Idaho—Smith v Faris-Kesl Constr Co, 150 P 25, 27 Idaho 407

40 C J p 314 note 72

consented to.⁶

A waiver of a mechanic's lien must be supported by a consideration in order to be effective.⁷ Reliance and action on the waiver may be treated as a sufficient consideration,⁸ as where the owner, relying on the waiver, makes a payment to the contractor⁹ or does not give a notice of nonliability in the manner required by statute,¹⁰ or where a mortgagee pays the proceeds of the loan directly to the owner.¹¹ When authorized,¹² but not otherwise,¹³ a waiver by an agent is binding on the principal.

Applying these rules and principles, the courts have held various particular matters to constitute¹⁴ or not to constitute¹⁵ a waiver. Some courts hold that the submission to arbitration of the matters in dispute under a contract is a waiver of a right to a

mechanic's lien,¹⁶ but other courts take the opposite view.¹⁷

§ 224. Agreements

- a In general
- b Agreements as to payment

a. In General

The right to a mechanic's lien may be waived by an express or implied agreement.

The right to a mechanic's lien may be waived by contract or agreement¹⁸ between the person entitled to the lien and the owner¹⁹ or, except in some jurisdictions,²⁰ the principal contractor.²¹ It is essential to the application of the rule that an agreement to waive the lien shall have been made,²² that

6. Ky—Taylor v Fuller, 172 SW 959, 162 Ky 568
40 C J p 314 note 73

7. Ill—U S Gypsum Co v Randall, 21 NE 2d 327, 300 Ill App 610
Mo—Corpus Juris cited in Giammarino v J W Caldewey Const Co, App, 72 SW 2d 159, 160
Okla—Corpus Juris cited in Eason Oil Co v M A Swatek & Co, 36 P 2d 504, 506, 169 Okl. 170
40 C J p 314 note 74

A seal imports a consideration—H G Wolff Co v Gwynne, 246 Ill App 86—40 C J p 314 note 79

Consideration held valid
U S—In re Danville Hotel Co, CCA Ill, 38 F 2d 10

Failure or want of consideration

(1) Waiver of mechanic's lien given in consideration of full payment fails of consideration where payment is made by check which is not honored, unless evidence discloses agreement to contrary—Eason Oil Co v M A Swatek & Co, 36 P 2d 504, 169 Okl. 170

(2) Where check received by subcontractor in consideration of his execution of mechanic's lien waiver was dishonored, waiver was ineffective for want of consideration, except in so far as property owners in reliance on waiver made payment to principal contractor—Giammarino v J W Caldewey Const Co, Mo App, 72 SW 2d 159

8. Minn—Home Supply Co, Inc, v Ostrom, 204 NW 647, 164 Minn 99

Mo—Corpus Juris cited in Giammarino v J W Caldewey Const Co, App, 72 SW 2d 159, 160

Notice of failure of consideration

It has been held that an owner of premises constructed by contractor may not rely on waiver of lien given by subcontractors and materialmen when owner has notice of failure of

consideration supporting such waiver—Eason Oil Co v M A Swatek & Co, 36 P 2d 504, 169 Okl. 170

9. Mich—Pittsburgh Plate Glass Co v Art Centre Apartments, 235 NW 234, 253 Mich 501

Mo—Corpus Juris cited in Giammarino v J W Caldewey Const Co, App, 72 SW 2d 159, 160
40 C J p 314 note 76

10. SC—Murray v Earle, 13 SC 87.

11. Ill—Bowers v Jarrell, 210 Ill App 256
40 C J p 314 note 78

12. Or—Hughes v Lansing, 55 P 95, 94 Or 118, 75 Am SR 574

13. Neb—Bullard v De Groff, 82 NW 4, 59 Neb 783

14. US—In re Danville Hotel Co, CCA Ill, 38 F 2d 10

Iowa—Fullerton Lumber Co v Miller, 252 NW 760, 217 Iowa 630

Ky—Woods v Constantine, 289 SW 283, 217 Ky 195

40 C J p 314 note 82

15. Matters not constituting waiver

(1) The failure of materialmen to give owner notice of their claims has been held not a waiver of their liens—Armour & Co of Delaware v McPhee & McGinnity Co, 275 P 12, 85 Colo 262

(2) The filing of a second lien account to correct the allegation of ownership in a prior statement did not constitute a waiver of mechanic's lien right—Waters v Gallemore, Mo App, 41 SW 2d 870

(3) Materialman did not waive lien by accepting payment, made without instructions and applied on items sold before first lien items were furnished—Cleary v Siemens-Marshall Electric Co, Mo App, 296 SW 443

(4) Lien of stop notice claimant is not waived or destroyed by filing claim either as general or secured claim with trustee in bankruptcy of

contractor—Harry Pinsky & Son Co v Wike, 136 A 920, 101 NJ Eq 45, affirmed 141 A 920, 103 NJ Eq 18

(5) Other matters

Iowa—Spieker v Cass County Fair Ass'n, 249 NW 415, 216 Iowa 424.

Wyo—Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 59 Wyo. 334, 147 ALR 1089

40 C J p 314 note 83 [a]

16. NY—New York Lumber & Wood-Working Co v Schneider, 1 NY S 441, 15 Daly 15, 15 NY Civ Proc 30, affirmed 24 NE 4, 119 N.Y. 475

17. Ill—Sorg v Crandall, 84 NE 181, 233 Ill 79.

18. Cal—Reinhart Lumber & Planing Mill Co v Hladik, App, 259 P 363

Iowa—Joyce Lumber Co v Marshalltown Construction League, 283 NW 912, 226 Iowa 374

NJ—City Hall Building & Loan Ass'n of Newark v Florence Realty Co, 158 A 506, 110 NJ Eq 12

40 C J p 315 note 87

Waiver or estoppel by becoming party to indemnity bond against liens see infra § 231

19. NY—Cummings v Broadway-94th St Realty Co, Inc, 135 NE 832, 233 NY 407

40 C J p 315 note 88

20. Ga—Massachusetts Bonding & Insurance Co v Realty Trust Co, 83 SE 210, 142 Ga 499, 505, error dismissed 36 S Ct 451, 241 US 687, 60 L Ed 1237

40 C J p 315 note 89

21. Ind—Peter & Burghard Stone Co v Marion Nat Bank of Marion, 153 NE 472, 198 Ind 581

40 C J p 315 note 90

22. Wash—Pacific Lumber & Timber Co v Dailey, 111 P 869, 60 Wash 566

40 C J p 315 note 91.

it shall not have been procured by fraud,²³ and that it shall relate to and cover the lien in question.²⁴ A party cannot properly set up as a waiver a contract containing mutual covenants with which he himself has failed or refused to comply.²⁵ Also, where a waiver by a materialman is contingent on the fulfillment of the contract between the owner and contractor, on nonperformance of that contract by the contractor the materialman is entitled to file a lien.²⁶ On the other hand, where the right to a mechanic's lien is absolutely waived by the contract, the binding effect of such waiver is not defeated by the owner's failure to comply with his own independent covenants and agreements.²⁷ Likewise the binding effect of a waiver contained in a subcontract is not obviated by a breach of contract by the contractor.²⁸

A mechanic's lien may be waived by an express contract or agreement²⁹ or, except in some jurisdictions,³⁰ by an implied agreement.³¹ Conversely, in order to constitute a waiver by contract, there must

be an express covenant waiving the lien³² or a covenant resulting by implication from language so plain that a mechanic can so understand without seeking professional interpretation as to its legal effect.³³ Any agreement or stipulation which clearly shows that it is the intention of the parties that the right to a lien shall be waived is sufficient to accomplish the purpose,³⁴ but the contract must receive a reasonable construction.³⁵ In the absence of language indicating a purpose under no circumstances to claim a lien it is not to be supposed that the contractor intended absolutely to relinquish his right,³⁶ and where the terms of the contract are ambiguous the doubt should be resolved against the waiver.³⁷

A contract inconsistent with the existence, perfection, or enforcement of a mechanic's lien may operate as a waiver thereof,³⁸ but the right to a lien under a contract complete in itself is not waived by entering into another contract relating to a different subject matter.³⁹ Various specific

Agreement to subordinate lien

Contractor's agreement to subordinate any lien which he might have for work, labor, and services or materials furnished to lien of existing mortgage, and agreement to accept a junior mortgage for any unpaid balance of contract price for work done, did not constitute a waiver of mechanic's lien—*Busca v Gasiorowski*, 10 NE 2d 681, 292 Ill App 167.

23. US—*Haskell v McClintic-Marshall Co*, CCA Wash, 289 F 405 Pa—*Vansciver v Churchill*, 35 Pa Super 212.

Fraud held not shown

Contractor's agreement to pay pre-existing debt out of contract price was not unlawful and constituted no evidence of fraud against materialman induced to waive lien—*Home Building v Nash*, 157 SE 134, 200 NC 430.

24. Cal—*Reinhart Lumber & Planing Mill Co v Hladik*, App, 259 P 363.

Mo—*Fuhler v Gohman & Levine Const Co*, 142 S.W 2d 482, 346 Mo. 588.

40 C.J. p 315 note 93.

25. La—*Central Lumber Co v Schroeder*, 114 So 644, 164 La 759.

Wis—*Carl Miller Lumber Co v Meyer*, 196 NW 840, 183 Wis 860.

26. Kan—*Elder Mercantile Co v Ottawa Inv. Co*, 165 P 279, 100 Kan 597.

27. Ind—*Hammond Hotel & Improvement Co v Williams*, 176 NE 154, 95 Ind App 506, rehearing denied 178 NE 177, 95 Ind App 506.

40 C.J. p 315 note 96.

Failure to pay amount due under contract

Covenant waiving mechanic's lien has been held not rendered ineffectual by owner's failure to pay amount due under contract—*Hammond Hotel & Improvement Co v Williams*, supra.

28. Tex—*Collinsville Mfg Co v Street*, Civ App, 196 SW 284.

40 C.J. p 315 note 97.

29. Ill—*Salomon-Waterton Co v Union Asbestos & Rubber Co*, 363 Ill App 583.

Ind—*Hammond Hotel & Improvement Co v Williams*, 176 NE 154, 95 Ind App 506, rehearing denied 178 NE 177, 95 Ind App 506.

Iowa—*Joyce Lumber Co v Marshalltown Construction League*, 283 NW 912, 226 Iowa 274—*Van Dyck Heating & Plumbing Co v Central Iowa Bldg Co*, 205 NW 650, 200 Iowa 1003.

40 C.J. p 315 note 98.

30. US—*In re Wil-Low Cafeterias*, DCNY, 22 F Supp 522.

40 C.J. p 313 note 63.

31. Iowa—*Joyce Lumber Co v Marshalltown Construction League*, 283 NW 912, 226 Iowa 274.

Ohio—*Portsmouth Iron Co v Murray*, 38 Ohio St 338.

32. Ind—*Carson Payson Co v Cleveland, C. & St. L. R. Co*, 105 NE 503, 57 Ind App 357.

40 C.J. p 316 note 2.

33. Ill—*Burgoyne v. Pyle*, 261 Ill App 356.

Pa—*Clayton v Lienhard*, 167 A 321, 312 Pa 433—*Schwartz v Whelan*, 115 A 525, 295 Pa. 425, 65 ALR 277.

40 C.J. p 316 note 3.

34. Ind—*Peter & Burghard Stone Co v Marion Nat Bank of Marion*, 153 NE 472, 198 Ind 581.

Iowa—*Eclipse Lumber Co v Bitler*, 241 NW 696, 213 Iowa 1313—*Van Dyck Heating & Plumbing Co v Central Iowa Bldg Co*, 205 NW 650, 200 Iowa 1003.

40 C.J. p 316 note 4.

Reasonably clear.

In order to deny to contractors, materialmen, and laborers statutory security for payment for work performed or materials furnished, the intent and interpretation of language relied on to constitute waiver of right to claim lien should be reasonably clear—*Nelson v Cohen*, 84 P 2d 658, 160 Or 336.

35. Md—*McLaughlin v Reinhart*, 54 Md 71.

40 C.J. p 316 note 5.

36. Wyo—*Corpus Juris* quoted in *Mawson-Peterson Lumber Co v Sprinkle*, 140 P 2d 588, 589, 59 Wyo 334, 147 ALR 1089.

40 C.J. p 316 note 6.

37. Fla—*Bruce Const. Corporation v Federal Realty Corporation*, 139 So 209, 104 Fla 93.

Ill—*Burgoyne v Pyle*, 261 Ill App 356.

Iowa—*Eclipse Lumber Co v Bitler*, 241 NW 696, 213 Iowa 1313.

Or—*Nelson v Cohen*, 84 P 2d 658, 160 Or 336.

40 C.J. p 316 note 7.

38. Wis—*Carl Miller Lumber Co v Meyer*, 196 NW 840, 183 Wis 860.

40 C.J. p 316 note 8.

39. US—*Haskell v McClintic-Marshall Co*, CCA Wash, 289 F 405.

contract provisions have been held not to operate as a bar or waiver of a mechanic's lien ⁴⁰

Application of general agreement to lien of contractor. The contractor waives his own lien where he expressly agrees not to file it,⁴¹ but the authorities are conflicting on the question whether the contractor waives his own lien by agreeing generally that no lien shall be filed, without expressly mentioning his own lien, some decisions holding that such an agreement amounts to a waiver of his lien⁴² while other decisions hold that it does not⁴³ and that it applies only to the liens of other persons ⁴⁴ It has been held that an agreement of the contractor to complete the building and deliver it to the owner free and clear of all liens, claims, or encumbrances does not amount to a waiver of his lien⁴⁵ and that the liens referred to are those of subcontractors and persons other than the contractor.⁴⁶ Also an agreement of the contractor to furnish a release from liens is not a waiver of his own lien,⁴⁷ but is merely an agreement to furnish releases from his subordinate contractors ⁴⁸

b. Agreements as to Payment

An agreement by a person entitled to a lien that he will look exclusively to the contractor or some person

other than the owner for the payment of his claim is a waiver of his right to a lien. Agreements with respect to the manner or time of payment will not affect a waiver unless the terms agreed on are inconsistent with the existence or enforcement of the lien.

An agreement by a person entitled to a lien that he will look exclusively to the contractor or some person other than the owner for the payment of his claim is a waiver of his right to a lien ⁴⁹ However, agreements with respect to the manner or time of payment will not effect a waiver of the lien unless the terms agreed on are inconsistent with the existence or enforcement of the lien ⁵⁰ A provision in the building contract that payment shall be made only on sufficient evidence that all claims on the building for work and materials are discharged is not a waiver of the contractor's right to a lien ⁵¹ The fact that the contract stipulates for a credit does not show a waiver of the lien⁵² unless the credit is inconsistent with its enforcement,⁵³ as where the time of payment is fixed at a date after the time within which proceedings to enforce the lien must be commenced ⁵⁴ Likewise an extension of the time of payment is not a waiver of the lien⁵⁵ unless the time for payment is extended by agreement beyond the time allowed for enforcing the lien ⁵⁶

40. La.—Ruston Lumber & Supply Co v. Beckham, 128 So 581, 14 La App 304

Mich.—Saginaw Lumber Co v Wilkinson, 254 NW 240, 266 Mich 661

40 C J p 316 note 10

Particular provisions

(1) Arbitration clause in lien claimants' contract—Park Lane Properties v. Fisher, 5 P 2d 577, 89 Colo 591.

(2) Provision that contractor should pay all labor and material claims arising in construction of house and not permit any liens or encumbrances to attach to house, and that owner should pay contractor on proof that no such claims existed—Nelson v Cohen, 84 P 2d 658, 160 Or 336

41. N.Y.—Cummings v Broadway-94th St Realty Co, Inc, 185 NE 832, 233 NY 407

Pa.—Lydick v Anderson, 41 A. 729, 188 Pa 600

Stipulation against lien contract generally see supra § 92

42. Or.—Gray v. Jones, 81 P. 813, 47 Or 40.

40 C J p 316 note 12

43. N.Y.—Kertscher v Green, 99 N E 146, 205 NY 522, Ann Cas 1913C 561

Wash.—Gray v Hickey, 162 P. 564, 94 Wash 370.

44. N.Y.—Kertscher v Green, 99 N. E 146, 205 NY 522, Ann Cas 1913C 561

Wash.—Gray v Hickey, 162 P 564, 94 Wash 370

Waiver of principal contractor as affecting persons claiming under him see supra § 223

45. Ill.—Advance Terra Cotta Co v Moran, 207 Ill App 17

Wis.—Davis v La Crosse Hospital Ass'n, 99 NW 351, 121 Wis. 579, 1 Ann Cas 950

46. Ill.—Advance Terra Cotta Co v Moran, 207 Ill App 17

Wis.—Davis v La Crosse Hospital Ass'n, 99 NW 351, 121 Wis 579, 1 Ann Cas 950

47. Ill.—Concord Apartment House Co v O'Brien, 81 NE 1076, 228 Ill 476

48. Ill.—Concord Apartment House Co v O'Brien, supra

49. N.Y.—Alguire v Barrow, 272 N. Y S 308, 151 Misc 177

Utah.—Dwyer v Salt Lake City Copper Mfg Co, 47 P 311, 14 Utah 339

40 C J p 316 note 20.

Reliance on credit of building or property see supra § 46

50. Cal.—Leibowitz v Berry, 299 P. 779, 114 Cal App 5

Md.—Maryland Brick Co v Spilman, 25 A 297, 76 Md 337, 85 Am SR 431, 17 L R A 599

Mich.—Saginaw Lumber Co. v Wilkinson, 254 NW. 240, 266 Mich 661

Pa.—Schwartz v Whelan, 145 A 525, 295 Pa 425, 65 A L R 277

Va.—Cain v Rea, 166 SE 478, 159 Va 446, 85 A L R 945

Agreement to accept proceeds of mortgage

Contractor's agreement to accept proceeds of mortgage as part payment constituted waiver of lien to extent of amount due under mortgage—Hoffman v Wheat, CCA Fla, 37 F 2d 93

Monthly installments

Ala.—Woodall v Southern Mfg Co, 135 So 446, 223 Ala 262

51. Mass.—Poirier v Desmond, 58 NE 684, 177 Mass 201

52. Pa.—Schwartz v. Whelan, 145 A. 525, 295 Pa 425, 65 A L R 277

RI.—Phillips Lead & Supply Co v. Swartz, 133 A 4, 47 RI 203

40 C J p 317 note 23

53. Mass.—Ellenwood v. Burgess, 11 NE 755, 144 Mass 534.

54. Mo.—Dierks & Sons Lumber Co. v Pearman, 157 SW 970, 172 Mo. App 107

55. Wis.—Thien v Brand, 124 NW. 999, 142 Wis 85, 20 Ann Cas 521

40 C J p 317 note 26

56. N.C.—Raeferd Lumber Co. v.

§ 225. Action on Claim

As a general rule a mechanic's lien is not waived by bringing a personal action on the claim or account or recovering a personal judgment thereon.

As a general rule a mechanic's lien is not waived by bringing a personal action on the claim or account,⁵⁷ causing an attachment to be issued and levied on the property of the debtor for the same claim,⁵⁸ or recovering a personal judgment thereon.⁵⁹ These rules are subject to some limitations and exceptions.⁶⁰ In a few jurisdictions a person who recovers a personal judgment against the debtor cannot subsequently enforce the lien in another suit or proceeding,⁶¹ but this rule does not apply to a judgment rendered in the same proceeding⁶² or to a judgment in respect of a transaction totally distinct and disconnected from the transaction out of which the lien arises.⁶³ Of course, where a claimant obtains a judgment for the enforcement of his lien, the lien is not lost by waiver,⁶⁴ since there is no intent to waive.⁶⁵

Rockfish Trading Co., 79 SE 627, 163 NC 314
40 C J p 317 note 27

57. Iowa—*Corpus Juris* cited in *Southern Surety Co v York Tire Service*, 227 NW 606, 607, 209 Iowa 104

Wis—*Roseliep v Herro*, 239 NW 413, 206 Wis 256
40 C J p 317 note 29

Simultaneous actions to enforce lien and recover personal judgment see *infra* § 266

Materialman, suing builder in personam for materials furnished did not waive statutory lien—*Shoemaker v Maloney*, 132 A 606, 102 NJ Law 363

58. Iowa—*Corpus Juris* cited in *Southern Surety Co v York Tire Service*, 227 NW 606, 607, 209 Iowa 104

40 C J p 317 note 30

59. NJ—*Shoemaker v Maloney*, 132 A 606, 102 NJ Law 363

Wis—*Roseliep v Herro*, 239 NW 413, 206 Wis 256
40 C J p 317 note 32

Entry of judgment on note given for materials and labor has been held not to result in waiver or release of lien—*Roseliep v Herro*, *supra*.

60. Ill—*Carey-Lombard Lumber Co v Burnett*, 68 Ill App 475.
40 C J p 317 note 33

61. Cal—*Mitchell v Shoreridge Oil Co*, 75 P 2d 110, 24 Cal App 2d 382, approval withheld by supreme court 77 P 2d 221, 24 Cal App 2d 382—*California Nat Supply Co v Porter*, 257 P 161, 83 Cal App 758,

followed in *Union Tool Co v Porter*, 257 P 163, 83 Cal App 798

Judgment on note

Seller, by securing judgment on note given for materials, waived right to foreclose mechanic's lien—*California Nat Supply Co v Porter*, 257 P 161, 83 Cal App 758, followed in *Union Tool Co v Porter*, 257 P 163, 83 Cal App 798

In Missouri

(1) The text rule is followed—*In re Interstate Refineries*, DCMo, 18 F 2d 360—40 C J p 318 note 34

(2) In a federal court, however, in which it was held that the decisions of the Missouri appellate courts were not binding on the federal court, it was held that a creditor entitled to a lien did not lose his right by reducing his claim to judgment—*Hudson v Maryland Casualty Co*, CCA Mo, 22 F 2d 791, certiorari denied 48 S Ct 304, 276 US 624, 72 L Ed 737

62. Mo—*Matthews v Stephenson*, 157 S W 887, 172 Mo App 230

63. Mo—*A A Nicol Heating & Plumbing Co v J B Neevel & Sons Constr Co*, 174 S W 161, 187 Mo App 584

64. Mo—*Matthews v Stephenson*, 157 S W 887, 172 Mo App 230

65. Mo—*Matthews v Stephenson*, *supra*

66. US—*McCloskey v DOWNTOWN Woolen Mills*, DCPa, 20 F 2d 190
Conn—*Ford Bros v Frederick M Ward Co*, 140 A 754, 107 Conn 425

Fla—*Heller v Zambetti*, 114 So. 780, 94 Fla 950

Ga—*Brown v Marbut-Williams Lum-*

§ 226. Taking or Transfer of Note, Draft, or Order

a Note

b Draft or order

a. Note

(1) Taking

(2) Transfer

(1) Taking

As a general rule a mechanic's lien claimant does not waive or forfeit his right to a lien merely by taking a promissory note of the owner or the contractor for what is due him.

It is well established as a general rule that a mechanic's lien claimant does not waive or forfeit his right to a lien merely by taking a promissory note of the owner or the contractor for what is due him,⁶⁶ the only effect of such a note is to suspend the right to enforce the lien until its maturity.⁶⁷ In order that the taking of a note may waive or extinguish the lien it is necessary and sufficient that it shall be received in payment,⁶⁸ or, at the time it is

ber Co, 129 SE 575, 84 Ga App 348

Ky—*Bass & Co v Trustees of Madisonville Christian Church*, 61 SW 2d 1074, 350 Ky 36—*Miller v Johnson*, 281 SW 467, 213 Ky 473

Miss—*Hartford Accident & Indemnity Co v N O Nelson Mfg Co*, 135 So 349, 160 Miss 504

NJ—*P E Guerin, Inc, v Parson*, 169 A 810, 112 NJ Law 56—*Harry Pinsky & Son Co v Wike*, 136 A 920, 101 NJ Eq 45, affirmed 141 A 920, 103 NJ Eq 18

NY—*Storick v M E Realty Co*, 233 NYS 194, 226 App Div 674

Pa—*Clayton v Lienhard*, 167 A 321, 312 Pa 433

Tex—*Keystone Pipe & Supply Co v Wright*, Civ App, 37 SW 2d 227

Wis—*Roseliep v Herro*, 239 NW 413, 206 Wis 256

40 C J p 318 note 43

Note or indorsement of third person see *infra* § 227.

67. US—*McCloskey v DOWNTOWN Woolen Mills*, DCPa, 20 F 2d 190

40 C J p 319 note 44

68. Cal—*Giant Powder Co Consolidated v Fidelity & Deposit Co of Maryland*, 7 P 2d 1023, 214 Cal 639

Conn—*Portland Building & Loan Ass'n v Peck*, 149 A 214, 110 Conn 670—*Ford Bros v Frederick M Ward Co*, 140 A 754, 107 Conn 425

NY—*Storick v M E Realty Co*, 233 NYS 194, 226 App Div 674

40 C J p 319 note 45

Payment generally see *infra* §§ 247-253.

taken,⁶⁹ the parties shall agree,⁷⁰ intend,⁷¹ or understand⁷² that it shall have the effect of waiving or extinguishing the lien. These rules are expressly affirmed, in whole or in part, by the statutes of some jurisdictions⁷³

Where the note is taken on the express understanding that the mechanic's lien is to be reserved there is no waiver⁷⁴. An unaccepted tender of a promissory note does not deprive claimant of his lien⁷⁵ unless he has previously agreed to accept the note in payment;⁷⁶ and a mere agreement to accept a note will be no waiver of the lien where the agreement is broken by the refusal of the owner to give it,⁷⁷ even though the lien would be waived if the note had been given and accepted according to the agreement,⁷⁸ as where the agreement is to take the note in payment.⁷⁹ It has been held that the lien of a subcontractor will not be enforced where he has accepted from the contractor a note covering not only the demand in question but also sums due on other accounts⁸⁰

Showing as to taking in payment. In some jurisdictions the taking of a note is prima facie a payment of the account,⁸¹ and, in the absence of an agreement to the contrary, it operates as a payment within the meaning of the rule that the lien is waived or lost by taking a note in payment of the debt.⁸² In other jurisdictions, however, it is not to be presumed that a note taken by a person entitled to a lien was taken as payment,⁸³ but it

must be shown that such was the case.⁸⁴ Even in those jurisdictions, where the doctrine prevails that the acceptance of a negotiable promissory note is presumed, in the absence of any testimony or circumstances to the contrary, to be a payment of the indebtedness for which it was given, this presumption is overcome by the fact that the acceptance of a note in payment would deprive the creditor taking the note of the substantial benefit of some security.⁸⁵ The fact that the lienor on receiving a promissory note gave a receipt for the amount⁸⁶ or credited the amount on his books⁸⁷ does not conclusively establish that the note was taken in payment so as to defeat the lien, but is only a circumstance bearing on the question of whether or not it was so taken,⁸⁸ and such question is one of fact.⁸⁹

Time of maturity of note. The rule that the taking of the note is not a waiver of the lien applies where the note is payable within the time allowed by statute for commencing proceedings to enforce the lien,⁹⁰ but, where the note does not mature until after the expiration of that time, the lien is lost⁹¹ unless it is expressly agreed by the parties that the taking of the note shall not be construed as a waiver of the lien.⁹² Likewise the rule that the taking of a note is not a waiver of the lien applies where the note matures within the time allowed by statute for perfecting the lien,⁹³ and in some,⁹⁴ but not other,⁹⁵ jurisdictions it is held that the rule applies where the note matures within the

Stop notice claimant

Acceptance of note does not destroy lien of stop notice claimant unless note is received in payment—*Harry Pinsky & Son Co v Wike*, 136 A 920, 101 N J Eq 45, affirmed 141 A 920, 103 N J Eq 18

69. *NH—Goudie v American Moore Peg Co*, 122 A 349, 81 NH 88
Tex—Breckenridge City Club v Hardin, Civ App, 253 S W 873

70. *Mich—Netting Co v Berke*, 219 NW 663, 243 Mich 81.
40 C J p 319 note 48

71. *Wis—Roseliep v Herro*, 239 N W 413, 206 Wis 256.
40 C J p 319 note 49

72. *Ky—Bass & Co v Trustees of Madisonville Christian Church*, 61 S W 2d 1074, 250 Ky 86
NH—Goudie v American Moore Peg Co, 122 A 349, 81 NH 88

73. *Wis—Roseliep v Herro*, 239 N W 413, 206 Wis 256.
40 C J p 319 note 51

74. *Ga—Brown v Marbut-Williams Lumber Co*, 129 S E 575, 34 Ga App 348
40 C J p 319 note 52

75. *NJ—Van Nest v Hirsch*, 93 A 568, 87 N J Law 336.

76. *Wash—Ward v Thorndyke*, 117 P 593, 65 Wash 11

77. *US—Van Stone v Stillwell & Bierce Mfg Co*, Mo, 12 S Ct 181, 142 US 128, 35 L Ed 961
40 C J p 319 note 55

78. *Mo—Globe Light & Heat Co v. Doud*, 47 Mo App 439

79. *NY—Lutz v Ey*, 3 ED Smith 621, 3 Abb Pr 475

80. *Mo—Schulenburg v. Robison*, 5 Mo App 561
40 C J p 320 note 59

81. *Ind—Hill v Sloan*, 59 Ind 181

82. *Ind—Teal v Spangler*, 72 Ind 380—*Schneider v. Kolthoff*, 59 Ind 568

83. *Pa—American Car & Foundry Co v Alexandria Water Co*, 70 A 867, 221 Pa 529, 128 Am S R 749, 15 Ann Cas 641
40 C J p 320 note 63

84. *Pa—American Car & Foundry Co v Alexandria Water Co*, supra
40 C J p 320 note 64

85. *Me—Bryant v Grady*, 57 A 92, 98 Me 389

86. *NJ—Haney-White Co v Stafford*, 114 A 746, 96 N J Law 283
40 C J p 320 note 67

87. *Conn—Waterbury Lumber & Coal Co v Asterchinsky*, 87 A 739, 87 Conn 316, Ann Cas 1916B 613
40 C J p 320 note 68

88. *Me—Bryant v. Grady*, 57 A 92, 98 Me 389

89. *Pa—Jones v Shawhan*, 4 Watts & S 257

90. *Mass—Casey v Weaver*, 6 NE 372, 141 Mass 280

91. *Mich—Netting Co v Berke*, 219 NW 663, 243 Mich 81
40 C J p 320 note 72

92. *Tenn—Citizens' Bank v H A. Klyce Co*, 156 S W 1083, 127 Tenn 669
40 C J p 320 note 74.

93. *Minn—Butler-Ryan Co v Silvey*, 73 N W 406, 510, 70 Minn 507

94. *Minn—McKeen v Haseltine*, 49 N W 195, 46 Minn 426
NY—Woolf v. Schaefer, 93 N Y S 184, 103 App Div 567

95. *W Va—Cushwa v Improvement Loan & Building Ass'n*, 32 S E 259, 45 W Va 490
40 C J p 320 note 77

96. *Del—Quinby v. Wilmington*, 10 Del 26.

time allowed for enforcing the lien, even though not until after the expiration of the time allowed for perfecting the lien, it being permissible for claimant to perfect his lien notwithstanding the note is not yet payable,⁹⁶ although he cannot enforce his lien until the money is payable.⁹⁷ Under a statute providing that suit to enforce the lien must be commenced within a certain time after the money became due and payable, it has been held that the acceptance of a note payable at a future day by a creditor claiming a mechanic's lien is an abandonment of the lien if by the terms of the note the time of the payment has been extended beyond the date as fixed by the original contract,⁹⁸ but if the note conforms to the terms of the original contract it is but a memorial of such contract and the lien is unaffected.⁹⁹ A mere agreement to accept notes maturing after the expiration of the period allowed for enforcing the lien is not a waiver of the lien where the notes are not given.¹

(2) Transfer

Ordinarily the mere transfer or negotiation of notes taken by the claimant does not defeat his right to a lien.

The transfer or negotiation of notes taken by claimant does not defeat his right to a lien,² at least where the note is indorsed back to,³ or taken up by,⁴ claimant so that it is in his possession and control at the commencement of the suit and he surrenders it in court at the hearing.⁵ However, one who has taken a note for his claim must, in order to enforce a mechanic's lien, produce the note on the trial for surrender to the maker or satisfactorily account for his failure to do so and show that the note is not in any event enforceable against the maker.⁶ Hence a claimant may, by so disposing of

the note as to put it beyond his control, put himself in a position where he cannot comply with these conditions and hence cannot enforce his lien.⁷ Also his acts in this respect may give rise to the inference or presumption that he regarded the note as payment and waived his lien.⁸ A lienor's failure to surrender notes taken for his claim cannot be set up by a mortgagee claiming priority for his mortgage over mechanics' liens.⁹ It has been held that the proceeds of the note cannot be regarded as a credit reducing the amount of the lien where, because of the insolvency of the maker, claimant will be compelled to pay the note.¹⁰ Under such circumstances it is immaterial whether or not claimant has taken up the note.¹¹

b. Draft or Order

A claimant does not lose his right to a mechanic's lien by taking a bill, draft, or order unless there is an express agreement that the lien shall be waived.

A claimant does not lose his right to a mechanic's lien by taking a bill, draft, or order,¹² even though it is accepted¹³ and partial payment made thereon,¹⁴ unless there is an express agreement that the lien shall be waived¹⁵ or the draft or order was expressly received as payment.¹⁶ Also the lien is not waived or lost by the negotiation of a draft.¹⁷

§ 227. Taking Security

a. In general

b. Mortgage or pledge

a. In General

In some jurisdictions and under some statutes the rule is that a mechanic's lien is waived by taking any other security for the debt, while in other jurisdictions and under other statutes the taking of other security

96. *US—McCloskey v. Downingtown Woolen Mills*, D.C. Pa., 20 F. 2d 190.

Mich—Knowlton v. Gibbons, 178 N. W. 63, 210 Mich. 547.
40 C.J. p. 321 note 79.

97. *NY—Miller v. Moore*, 1 E.D. Smith 739.

98. *Miss—Ehlers v. Elder*, 51 Miss. 495—*Jones v. Alexander*, 18 Miss. 627.

99. *Miss—Ehlers v. Elder*, 51 Miss. 495—*Jones v. Alexander*, 18 Miss. 627.

1. *US—Van Stone v. Stillwell & Bierce Mfg. Co.*, Mo., 12 S.Ct. 181, 142 U.S. 128, 35 L.Ed. 961.
Mo—Globe Light & Heat Co. v. Doud, 47 Mo.App. 489.

2. *Iowa—Lovell-Schofield Lumber Co. v. Carter*, 199 N.W. 405, 198 Iowa 238.
40 C.J. p. 321 note 85.

3. *Kan—Bashor v. Nordyke & Marmon Co.*, 25 Kan. 222.

4. *Ky—Mivelaz v. Genovely*, 89 S.W. 109, 121 Ky. 235, 28 Ky.L. 203.
40 C.J. p. 321 note 87.

5. *Mass—Davis v. Parsons*, 32 N.E. 1117, 157 Mass. 584.
40 C.J. p. 321 note 89.

6. *Md—Wix v. Bowling*, 87 A. 759, 120 Md. 265.
40 C.J. p. 321 notes 90-92.

7. *Ill—Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 21 N.E. 500, 128 Ill. 627.
40 C.J. p. 321 note 93.

8. *Md—Wix v. Bowling*, 87 A. 759, 120 Md. 265.

9. *Ala—Leftwich Lumber Co. v. Florence Mut. Bldg. Loan & Savings Ass'n*, 18 So. 48, 104 Ala. 584.

10. *Ky—National Surety Co. v. Price*, 172 S.W. 1072, 162 Ky. 632.

11. *Ky—National Surety Co. v. Price*, supra.

12. *Fla—U. G. Statton Co. v. L. Smith Steel Co.*, 117 So. 379, 95 Fla. 958.

Mo—Cleary v. Siemers-Marshall Electric Co., App. 296 S.W. 448.
40 C.J. p. 322 note 99.

13. *Tex—Jones v. White*, 12 S.W. 179, 72 Tex. 316.
40 C.J. p. 322 note 1.

14. *Wis—Lentz v. Eimermann*, 97 N.W. 181, 119 Wis. 492.

15. *Tex—Jones v. White*, 12 S.W. 179, 72 Tex. 316.

16. *Wis—Lentz v. Eimermann*, 97 N.W. 181, 119 Wis. 492.

17. *La—Swain v. Barrow*, 11 La. Ann. 517.
40 C.J. p. 322 note 5.

is not a waiver of the lien unless expressly agreed or intended as such or the security is inconsistent with the existence or enforcement of the lien.

The decisions and statutes of the various jurisdictions differ as to the effect on a mechanic's lien of the taking of other security for the claim¹⁸ In some jurisdictions and under some statutes the rule is that a mechanic's lien is waived by taking any other security for the debt,¹⁹ but in other jurisdictions or under other statutes the taking of other security is not a waiver of the mechanic's lien²⁰ unless there is an express agreement to that effect,²¹ or such was the intention of the parties, or the security is inconsistent with the existence or enforcement of the lien²² Under some statutes the rule applicable is dependent on the time the security is taken, a mechanic's lien being denied to a person who takes collateral security at the time of the making of the contract or during the progress of the work,²³ but not to a person who takes security after the completion of the work or the accrual of the right to a lien,²⁴ unless by express agreement the security is given and received in lieu of the lien²⁵

The contract, promise, or property taken must have been intended and accepted as collateral security before the lien can be said to be waived or defeated by the taking thereof²⁶ It is generally,²⁷ but not always,²⁸ held that a mere agreement by a person entitled to a mechanic's lien to accept other

security does not amount to a waiver of the lien where such agreement is not executed It has also been held that after collateral security has been taken it may be surrendered and the lien restored by agreement of the parties so as to be effectual against the owner²⁹ and persons acquiring rights in the property after the lien is filed³⁰

In accordance with these rules it has been held that the right to a mechanic's lien may be enforced notwithstanding the holder of the lien has taken a personal obligation from another for the payment of the debt for which the lien is claimed³¹ It has also been held that the fact that a third person has promised to pay the debt³² or has guaranteed its payment³³ does not defeat the lien. Where material was furnished to a tenant to make improvements on the landlord's farm, the fact that a materialman in the complaint to enforce a lien on the improvements alleged that the landlord was personally liable for the material did not amount to a waiver of the lien by taking collateral security therefor when before trial he dismissed his claim of personal liability against the landlord without prejudice³⁴ Receiving an assignment of policies of insurance on the building has been held not to be a waiver of the lien³⁵ The deposit of money as security may defeat the right to a lien³⁶ It has been held that the transfer of title to the property to the general contractor as security does not affect his right to a lien³⁷

18. Cal.—Bank of Italy v MacGill, 269 P 566, 93 Cal App 228

19. SD—Rolewitch v Harrington, 107 NW 207, 20 S.D. 375, 6 L.R.A., NS, 550

40 C.J. p 322 note 6

20. Cal.—Corpus Juris quoted in Bank of Italy v MacGill, 269 P 566, 570, 93 Cal App 228

Ill.—Donkle & Weeber Lumber Co v Rehmann, 33 NE3d 709, 310 Ill App 17

N.M.—Hobbs v Morrison Supply Co, 73 P 2d 325, 41 N.M. 644

N.Y.—Berman Bldg Corporation v Rafferty, 236 N.Y.S. 67, 227 App Div 630

Pa.—Schwartz v Whelan, 145 A 525, 295 Pa 425, 65 A.L.R. 277—Mohnkern v Pivrotto, 20 Pa Dist & Co 218

40 C.J. p 322 note 7

21. Cal.—Corpus Juris quoted in Bank of Italy v MacGill, 269 P 566, 570, 93 Cal App 228

Pa.—Mohnkern v Pivrotto, 20 Pa. Dist & Co 218.

40 C.J. p 322 note 8.

22. Cal.—Corpus Juris quoted in Bank of Italy v MacGill, 269 P. 566, 570, 93 Cal App 228.

40 C.J. p 322 notes 9, 10.

Statutory lien is deemed abandoned only when collateral consists of inconsistent security and agreement therefor does not reserve statutory lien—Berman Bldg Corporation v Rafferty, 236 N.Y.S. 67, 227 App Div 630

23. Iowa—Eclipse Lumber Co v Bitler, 241 NW 696, 213 Iowa 1313 40 C.J. p 322 note 11

24. Iowa—Perfection Tire & Rubber Co v Kellogg-Mackay Equipment Co, 187 NW. 32, 194 Iowa 523

40 C.J. p 322 note 12

25. Iowa—Perfection Tire & Rubber Co v Kellogg-Mackay Equipment Co, supra—Atlantic Trust Co v Carbondale Coal Co, 68 NW 697, 99 Iowa 234

26. Iowa—Mervin v Sherman, 9 Iowa 331

27. Mo—Fuhler v Gohman & Levine Const Co, 142 S.W. 2d 482, 346 Mo 588

40 C.J. p 323 note 15

28. Md—Willson v. Douglas, 6 A. 530, 66 Md 99

40 C.J. p 323 note 16

29. Iowa—Getchell v Musgrove, 7 NW 154, 54 Iowa 744.

30. Iowa—Getchell v. Musgrove, supra

31. Ind—Johnson v Spencer, 98 N E 1041, 49 Ind App 166

32. Iowa—Bissell v. Lewis, 9 NW 177, 56 Iowa 231 40 C.J. p 324 note 87

33. Cal—Barrett-Hicks Co v Glas, 99 P 856, 9 Cal App 491

Mo—Peck v Bridwell, 10 Mo App 524.

34. Iowa—National Lumber Co v Bowman, 42 NW 557, 77 Iowa 706

35. Ill—Clark v Moore, 64 Ill 273 40 C.J. p 324 note 40

36. SD—Fritschel v Grosshauser, 123 NW 698, 24 S.D. 129.

40 C.J. p 324 note 41

Deposit in court see infra § 233.

37. Tenn.—Arnstein Realty Co v. Williams, 40 S.W. 2d 1007, 163 Tenn. 69

Security for purchase money

Materialman had lien notwithstanding he held legal title to lots as security for purchase money due. —Bell v Koontz, 290 S.W. 597, 172 Ark. 370.

Note on which third person is maker, indorser, or surety It has been held that the lien is waived by accepting the note of a third person,³⁸ but there is also authority to the contrary.³⁹ Likewise there is authority both for⁴⁰ and against⁴¹ the proposition that the lien is waived by accepting a note of the debtor with a third person as joint maker, indorser, surety, or guarantor.

Retention of title to materials furnished Although the rule is otherwise under the statutes in some jurisdictions,⁴² ordinarily the fact that one who furnishes materials or machinery for improvements on land retains the title to the materials or machinery until they are paid for does not deprive him of the right to a mechanic's lien.⁴³ However, reasserting title to materials for which a lien is claimed and selling them to another person constitute a waiver of the lien.⁴⁴

b. Mortgage or Pledge

While it has been held that the lien is waived by taking a mortgage on the property subject to the me-

chanic's lien, there is also authority that a waiver does not result where the parties do not so intend and the rights of third persons are not infringed.

While it has been held that the lien is waived by taking a mortgage on the property subject to the mechanic's lien,⁴⁵ there is also authority holding that a waiver does not result⁴⁶ where the parties do not so intend⁴⁷ and the rights of third persons are not infringed.⁴⁸ It has been held that the lien is not waived by bringing an action to foreclose the mortgage, where the petition in the action is not simply to foreclose the mortgage, but states all the facts and demands judgment for the sum due, and the enforcement of the mechanic's lien substantially as though there had been no mortgage given.⁴⁹ Likewise there is a conflict of authority on the question whether the taking of a mortgage on other real property amounts to a waiver, some courts holding that it does⁵⁰ and others that it does not,⁵¹ where it was not intended that the mortgage should be in substitution or waiver of the lien.⁵² The taking of a chattel mortgage does not amount to a waiver of the lien,⁵³ but it has been held that the lien is

38. Ill.—Cosgrove v. Farwell, 114 Ill App 491

NH—Dutton v. New England Mut F Ins Co, 29 NH 153.

Taking note of owner or contractor see supra § 226

39. Ga.—Ford v. Wilson, 11 SE 559, 35 Ga. 109

40 C.J. p 323 note 30

40. SD.—Edward P. Allis Co. v. Madison Electric Light, Heat & Power Co., 70 NW 650, 9 SD 159
40 C.J. p 323 note 31

41. Miss.—Smith & Vail Co. v. Butts, 16 So 342, 72 Miss 269
40 C.J. p 324 note 32

42. Ill.—Ley Fuel Co. v. Weisman, 265 Ill.App. 185

Miss.—Mississippi Butane Gas System Co. v. Glisson, 10 So 2d 358, 194 Miss 457

40 C.J. p 324 note 33

In Pennsylvania

(1) Under statute a person who seeks to reserve title to materials, supplies, fixtures, or equipment furnished is deprived of the right to a mechanic's lien—Jennings v. Dubnitsky, 41 Pa Dist & Co 121

(2) Prior to enactment of statute it was held that provisions in bailment lease contract for retention of title to automatic sprinkler system and right to remove it on default in payment therefor could not be considered a waiver of right to mechanic's lien on building in which installed—Clayton v. Lienhard, 167 A 321, 312 Pa 433

43. Me.—Otis Elevator Co. v. Finks

Clothing Co., 159 A 563, 131 Me 95

40 C.J. p 324 note 34.

44. Ind.—Barnett v. Stevens, 43 NE 661, 16 Ind App 420, rehearing denied 45 NE 485, 16 Ind App 420

45. Mich.—Bailey v. Jones, 219 NW 629, 243 Mich 159

Mo.—East Arkansas Lumber Co. v. Rainer & Connell Cotton Co., 24 SW 2d 1001, 324 Mo 706

NJ.—Weaver v. Demuth, 40 NJ Law 238—Corpus Juris cited in Meister v. J. Meister, Inc., 142 A 712, 314, 103 NJ Eq 78—Riverside Apartment Corporation v. Capitol Const. Co., 152 A 763, 107 NJ Eq 405, affirmed 158 A 740, 110 NJ Eq 67
Ohio—Black River Lumber Co. v. Kent, 176 NE 862, 124 Ohio St 20
Or.—Charles K. Spaulding Logging Co. v. Ryckman, 6 P 2d 35, 139 Or 230

40 C.J. p 323 note 19

Execution and delivery

Materialman, agreeing with contractor and landowner to accept one-year realty mortgage to secure purchase price of materials to be furnished for construction of building on realty, is bound thereby when mortgage is executed and delivered, but where there is a failure or refusal to deliver mortgage agreed on, he may establish and foreclose lien on realty and improvements—Kerfoot v. Neal, 31 P 2d 585, 168 Okl 1

Mortgage covering additional property

Mechanic's lien is waived by lien claimant's acceptance of mortgage, although mortgage covered property

in addition to that covered by lien and secured indebtedness in addition to lien claim—Black River Lumber Co. v. Kent 176 NE 862, 124 Ohio St 20

46. Neb.—Chapman v. Brewer, 62 NW 320, 43 Neb 890, 47 Am SR 779

40 C.J. p 323 note 20

Acceptance of deed of trust

Cal.—Leibowitz v. Berry, 299 P 779, 114 Cal App 5—Bank of Italy v. MacGill, 269 P 566, 93 Cal App 228

Tex.—J. D. McCollom Lumber Co. v. Whitfield, Civ App, 59 SW 2d 1106, error refused

47. Neb.—Chapman v. Brewer, 62 NW 320, 43 Neb 890, 47 Am SR 779

40 C.J. p 323 note 21

48. Neb.—Chapman v. Brewer, supra

49. Iowa—Gulcrest v. Gottschalk, 39 Iowa 311

50. Or.—Charles K. Spaulding Logging Co. v. Ryckman, 6 P 2d 25, 139 Or 230

40 C.J. p 323 note 24

51. Cal.—Martin v. Becker, 146 P 665, 169 Cal 301, Ann Cas 1916D 171

40 C.J. p 323 note 25

52. Conn.—Halsted & Harmount Co. v. Arick, 56 A 628, 76 Conn 382
Minn.—McKeen v. Haseltine, 49 NW 195, 46 Minn 426

53. Wis.—Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co., 87 NW 158, 111 Wis 570.

40 C.J. p 323 note 27.

waived by the taking of a pledge of other property or choses in action ⁵⁴

§ 228. Persons Entitled to Set Up Waiver

Waivers of mechanics' liens which are addressed generally "to whom it may concern" may be relied on and enforced by the owner of the property or bondholders.

Waivers of mechanics' liens which are addressed generally "to whom it may concern" are a representation to anyone interested in the premises⁵⁵ and may be relied on and enforced by the owner of the

property⁵⁶ or by bondholders⁵⁷. The owner may avail himself of a waiver although it is directed to a building association, since there is no valid objection to the building association acting on behalf of the owner, as well as on its own account, in receiving the waiver⁵⁸. A holder of a mortgage lien on the property may accept and enforce an unconditional waiver of a mechanic's lien⁵⁹. A waiver on the part of a subcontractor is available to both the owner⁶⁰ and the contractor⁶¹. The acts of a person or his agent are sometimes such that he has no standing in equity to claim a waiver.⁶²

B ESTOPPEL TO CLAIM LIEN

§ 229. In General

As a general rule a person entitled to a mechanic's lien may be estopped to assert or enforce it by any act which will render it inequitable for him to do so.

As a general rule a person entitled to a mechanic's lien may be estopped to assert or enforce it⁶³ in equity by any act which will render it inequitable for him to do so⁶⁴. Of course, the facts in particular cases may not be such as to give rise to an estoppel,⁶⁵ and the fact that claimant may be estopped to enforce his lien to the prejudice of a third per-

son does not necessarily show that he is estopped to enforce it against the owner,⁶⁶ especially where the owner was a party to, and reaped the benefit of, the acts which gave rise to the estoppel against the third person⁶⁷. The statements or acts of a lienor cannot estop him to claim a lien as against the owner where the latter was not misled or induced to change his position thereby,⁶⁸ as where he had no knowledge of the matters claimed to constitute the estoppel⁶⁹.

Legal proceedings. A seller who has brought an

54. Ill.—Clark v Moore, 64 Ill 273

55. Ill.—Bowers v Jarrell, 210 Ill App 356

56. Okl.—Antrim Lumber Co v Neal, 44 P 2d 939, 172 Okl 292

57. US.—In re Danville Hotel Co, CCA Ill, 38 F 2d 10

Presumption as to intent

Subcontractors executing waivers of liens are presumed to have intended that bondholders should receive them and rely on contents.—In re Danville Hotel Co, supra

Bondholders' agent was held not negligent in considering subcontractors' waiver of liens as receipt for amount of cash stated therein.—In re Danville Hotel Co, supra

58. Ohio.—Whitmer v Arthur, 23 Ohio NP, NS, 481

59. Okl.—Kiowa Lumber Co v Oklahoma City Building & Loan Ass'n, 34 P 2d 593, 163 Okl 540

60. Wis.—Security Nat Bank v St Croix Power Co, 105 NW 914, 126 Wis 370

61. Wis.—Security Nat Bank v St Croix Power Co, supra

40 C J p 324 note 48

62. Tex.—Southern Bldg & Loan Assoc v Bean, Civ App, 49 SW 910

40 C J p 324 note 49

63. Cal.—Corpus Juris quoted in

Jaekle v Halton, 78 P 2d 441, 443,

25 Cal App 706

Fla.—Rathburn v Landess, 129 So 738, 100 Fla 507

Iowa.—Joyce Lumber Co v Marshalltown Construction League, 333 NW 912, 226 Iowa 274

Ohio.—Botzum Bros Co v Brandau, 153 NE 727, 20 Ohio App 508

Okl.—Detroit Graphite Co v Carney, 53 P 2d 584, 175 Okl 583

40 C J p 325 note 53

Estoppel to assert priority see supra

§ 204

64. Cal.—Corpus Juris quoted in Jaekle v Halton, 78 P 2d 441, 443,

25 Cal App 706

Ill.—Heidenbluth v Rudolph, 38 NE 930, 152 Ill 316—Zimmerman v Garafolo, 29 NE 2d 121, 306 Ill App 504

Okl.—Detroit Graphite Co v Carney, 53 P 2d 584, 175 Okl 583

Wash.—Stewart Lumber Co v Unique Home Builders, 294 P 988, 160 Wash 273

Assignee of securities to finance construction of houses cannot foreclose liens for labor and material furnished, where it negligently intrusted securities to assignor, who embezzled them.—Pacific Ready-Cut Homes v Law, 272 P 577, 205 Cal 685

65. Ill.—Alexander Lumber Co v Swindlehurst, 32 NE 2d 637, 309 Ill App 433

La.—George C Baughan & Sons v Bodley, 1 La App 591

Mich.—Saginaw Lumber Co v Wil-

kinson, 254 NW 340, 266 Mich 661

NM.—English v Branum, 245 P 252, 31 NM 334

Tex.—Compton v Jennings, Civ App, 295 SW 308

Va.—Cain v Rea, 166 SE 478, 159 Va 446, 85 ALR 945

40 C J p 325 note 55

Particular facts

(1) Materialman taking mortgage to secure price did not, by accepting payment of mortgage, estop himself to claim lien for balance of account.—Wofford Bond & Mortgage Co v Adams, 133 So 254, 222 Ala 527

(2) Materialmen did not estop themselves to claim lien by failure to give owner notice of their claims.—Armour & Co of Delaware v McPhee & McGinnity Co, 275 P 12, 85 Colo 262

66. Fla.—Rathburn v Landess, 129 So 738, 100 Fla 507

40 C J p 325 note 56

67. NJ.—Haney-White Co v Stafford, 114 A 746, 96 NJ Law 283

68. Ark.—Hot Springs Golf & Country Club Ass'n v Community Bank & Trust Co, 32 SW 2d 427, 182 Ark 715

Cal.—Jaekle v Halton, 78 P 2d 441, 25 Cal App 2d 706

Kan.—Midwest Lumber Co v Brinkmeyer, 264 P 17, 125 Kan 299

40 C J p 325 note 58

69. Ga.—Massachusetts Bonding,

action of trover for part of the goods sold cannot thereafter foreclose a mechanic's lien for the remainder of the goods.⁷⁰ A person who alleges or admits in his pleadings that he has no lien is estopped to claim a lien as against the owner who, as garnishee, paid out funds which he would have been entitled to retain to satisfy the lien claim if it had been asserted.⁷¹ On the other hand, it has been held that the facts that a contractor sued for the contract price before the last payment was due under the contract, and recovered judgment for the amount due him, do not estop him, in subsequent proceedings to perfect his mechanic's lien, to claim that his whole account was not due at the date of bringing his first suit.⁷²

As against purchaser A person is estopped to assert a lien as against an innocent purchaser where, knowing that a sale was to take place, he failed to give the prospective purchaser any notice or information of his intent to claim a lien.⁷³ A contractor or a materialman is estopped to assert his mechanic's lien to the prejudice of persons whom he has induced to believe that his debt has been satisfied, or that he will claim no lien, and who in that belief have purchased the property on which the lien rests.⁷⁴ It has been held, however, that a mere random statement that the lien was satisfied, made without any fraudulent intent to one who, so far as the lienor knew or had reason to know, had no present or prospective interest in the matter, will not estop the lienor to assert his lien although the

person to whom the statement is made purchases the property in reliance on the statement.⁷⁵ It has also been held that an expression of opinion on a question of law, as to the legal effect of a bond given to discharge a mechanic's lien, does not operate as an estoppel against the lienor in favor of a purchaser of the property.⁷⁶ There is no estoppel against a purchaser who has not been misled or deceived as to any material fact.⁷⁷

As against other claimants or creditors. In particular cases the facts have been such as to estop⁷⁸ or not to estop⁷⁹ a person to assert a mechanic's lien as against other claimants or creditors.

§ 230. By Knowledge, Representations, or Directions as to Payment

A subcontractor, materialman, or laborer is estopped to assert a mechanic's lien where the owner has settled with the contractor, or made payments to the contractor or subcontractors, in reliance on a representation, statement, or direction by the subcontractor, materialman, or laborer that he has been paid.

A subcontractor, materialman, or laborer is estopped to assert a lien where the owner has settled with the contractor, or made payments to the contractor or other subcontractors, in reliance on the subcontractor's, materialman's, or laborer's receipt for the amount due him,⁸⁰ his statement that he has been paid by the contractor,⁸¹ his representation that he will not look to the owner for payment of work performed or materials furnished,⁸² or his direction,⁸³ authorization,⁸⁴ or expressed desire.⁸⁵

etc., *Co v Realty Trust Co*, 83 S E 210, 143 Ga. 499, error dismissed 36 S Ct 451, 241 US 687, 60 L Ed 1237.

70. *Ga—Purdy v Dunn Mach Co*, 83 S E 887, 143 Ga. 308 40 C J p 325 note 60

71. *Idaho—H W Johns-Manville Co v Allen*, 215 P 840, 37 Idaho 153

72. *Ill—Sorg v Crandall*, 84 NE 181, 233 Ill 79

73. *NY—McMillan v Leaman*, 91 NYS 1055, 101 App Div 436

74. *Tenn—Green v Williams*, 21 S W 520, 92 Tenn 230, 19 L R A 478

Wash—Stewart Lumber Co v Unique Home Builders, 294 P. 938, 160 Wash 273

75. *Iowa—Kirchman v Standard Coal Co*, 84 NW 939, 112 Iowa 668, 52 L R A 318.

76. *Mass—Goldstein v Tucker*, 119 NE 698, 230 Mass 259

77. *Ark—Bell v Koontz*, 290 SW 597, 172 Ark 870 40 C J p 325 note 70.

78. *Iowa—Fullerton Lumber Co v Miller*, 252 NW 760, 217 Iowa 630
Ohio—West v Klotz, 37 Ohio St 420 40 C J p 325 note 64

79. *Conn—Hillhouse v Duca*, 125 A 367, 101 Conn 92 40 C J p 325 note 65

80. *Cal—Jaekle v Halton*, 78 P 2d 441, 25 Cal App 2d 706
Ohio—Bolsum Bros Co v Brandau, 153 NE 727, 30 Ohio App 508
Wash—Ostrander v Okerlund, 4 P 2d 828, 165 Wash 18 40 C J p 326 note 72

Payment of checks

Materialman who, for purpose of enabling subcontractor to make collections from principal contractor, assisted subcontractor in causing principal contractor incorrectly to believe that subcontractor had paid checks given to materialman was estopped to claim lien for payment of material, enforcement of which lien would compel principal contractor or owner to pay amount in excess of subcontract price.—*Detroit Graphite Co v Carney*, 53 P 2d 584, 175 Okl 538

81. *Mo—D T Norton Lumber Co*

v Driving Park Assoc, 64 Mo App 377

Agent of materialman

Fact that materialman's agent who represented to buyer that plumber had satisfactorily met contract price for heating plant installed did not know that materialman had refused plumber's note did not relieve materialman from estoppel preventing enforcement of mechanic's lien against buyer's property.—*Bass & Co v Trustees of Madisonville Christian Church*, 61 SW 2d 1074, 250 Ky 36

82. *Iowa—Green Bay Lumber Co v Thomas*, 76 NW 651, 106 Iowa 154

Ky—Bass & Co v Trustees of Madisonville Christian Church, 61 SW 2d 1074, 250 Ky 36

83. *Mich—Frohlich v Ashton*, 129 NW 18, 164 Mich 132 40 C J p 326 note 75

84. *Ga—Baile v Woodward Lumber Co*, 53 SE 332, 141 Ga 806
Wash—Nelson v Culver, 162 P 976, 94 Wash 548

85. *Mich—Fairbairn v Moody*, 74

that payment be made to the contractor. The estoppel created by the foregoing matters is coextensive with the amount of money paid by the owner in reliance thereon,⁸⁶ but does not extend to money paid prior to the making of the statement or representation.⁸⁷

On the other hand, no estoppel will arise from the subcontractor's statements or representations where the owner in making payment is not misled thereby,⁸⁸ and, in the absence of any act, failure to act, or statement on the part of claimant inducing payment to the contractor, mere knowledge on his part of matters relating to payment to the contractor does not create an estoppel,⁸⁹ especially where he is without authority to prevent payment.⁹⁰

§ 231. Of Party to Indemnity Bond

There is authority both affirming and denying that a contractor waives, or is estopped to assert, his own right to a lien where he gives a bond that no mechanic's lien shall be filed or that he will protect the owner against such liens.

There is authority both affirming⁹¹ and denying⁹² that a contractor waives, or is estopped to assert, his own right to a mechanic's lien where he gives a bond that no lien shall be filed on the building or that he will protect the owner against such liens. The denial, however, has been held to be limited to cases where the amount agreed to be paid by the obligee of the bond has not been fully paid.⁹³ So also it has been held in some jurisdictions that

a surety on a contractor's bond is not entitled to enforce a lien in his own behalf as subcontractor or materialman⁹⁴ unless he has been in some way discharged from his contract of suretyship,⁹⁵ while other courts hold that a surety is not estopped to enforce a lien,⁹⁶ although on his attempting to do so the owner may interpose claimant's liability under the bond as a set-off or counterclaim.⁹⁷ In jurisdictions where the latter rule prevails a surety cannot enforce a lien for an amount in excess of the contract price⁹⁸ or the balance which remains due and unpaid,⁹⁹ and where the full contract price has been paid the surety cannot enforce any lien.¹ Whatever waiver or estoppel may exist because of the bond does not extend to work done under a new contract and not covered by the bond.² A partnership is not prevented from asserting a lien for labor or materials furnished by the firm merely because one of the partners, solely in his individual capacity, is a surety on the contractor's bond.³

Guarantor or indemnitor of surety. A guarantor of the surety in the contractor's bond cannot enforce a lien as subcontractor.⁴ Likewise a contractor who gives a bond indemnifying a surety against any loss or damage which may be sustained because of a bond given by the surety to protect the owner from mechanics' liens waives his right to assert a lien on his own behalf.⁵ However, sureties on a bond given by the contractor to another surety to indemnify the latter from liability as surety on the contractor's

NW 386, 116 Mich 61, reheard 76
NW 469, 116 Mich 61

88. Iowa—Goodwin Tile & Brick
Co v DeVries, 13 NW 2d 310, 234
Iowa 566, 155 A.L.R. 346

Kan—Corpus Juris quoted in Mid-
west Lumber Co v Brinkmeyer,
264 P 17, 18, 125 Kan 299
40 C.J. p 326 note 78

87. Or—Zanello v Portland Cent
Heating Co, 139 P 572, 70 Or 69

88. Wis—Simonsen v Stachlewicz,
52 NW 310, 82 Wis 338
40 C.J. p 326 note 80

Additional materials subsequently
furnished

Where owner, when informed by
subcontractor of the amount of the
principal contractor's indebtedness,
knew that some additional materials
would be required to complete the
contract, subcontractor was not es-
topped to assert lien for additional
materials subsequently furnished—
Goodwin Tile & Brick Co v DeVries,
13 NW 2d 310, 234 Iowa 566, 155
A.L.R. 346

89. Ky—Mivelaz v Genovely, 69 S
W 109, 121 Ky 235, 28 Ky L. 203
40 C.J. p 326 note 61.

90. Md—Caltrider v Weant, 128 A
72, 147 Md 338

91. Wis—Davis v La Crosse Hos-
pital Assoc, 99 NW 351, 121 Wis
579

40 C.J. p 326 note 84
Contractor's bond for indemnity
against liens see infra §§ 256-262

92. Mo—Allen Estate Assoc v
Boeke, 251 SW 558, 300 Mo 575
40 C.J. p 326 note 85

93. Mo—Compton v Conrad, 209 S
W 288, 203 Mo App 211
40 C.J. p 326 note 86

94. La—J L & D M Davis v
Methodist Protestant Church of
Haynesville, 111 So 794, 163 La
384

40 C.J. p 326 note 87.

95. D.C.—Herrell v Donovan, 7 App
DC 322

96. Ariz—Prescott Nat Bank v
Head, 90 P 328, 11 Ariz 213, 21
Ann Cas 990
40 C.J. p 327 note 89.

Guaranty to deliver free from liens
It has also been held, however,
that a surety on a building contrac-
tor's bond who has guaranteed the
delivery of the building free of liens

cannot enforce a lien against the
property for materials furnished—
Simpson v Bergmann, 13 P 3d 531,
125 Cal App 1.

97. Ariz—Prescott Nat Bank v.
Head, 90 P 328, 11 Ariz 213, 21
Ann Cas 990
40 C.J. p 327 note 90

98. Neb—Farmers' Lumber & Hay
Co v Shald, 180 NW 253, 105
Neb 298

Or—Schade v. Muller, 146 P 144, 75
Or 225

99. Mo—Fullerton Lumber Co v.
Gates, 89 Mo App 201
40 C.J. p 327 note 92.

1. Idaho—Sanders v. Keller, 111 P.
350, 13 Idaho 590
40 C.J. p 327 note 93.

2. Mo—Compton v Conrad, 209 S.
W 288, 203 Mo App 211.

3. Or—Schade v. Muller, 146 P. 144,
75 Or 225
40 C.J. p 327 note 95.

4. Wash—Todd v Fransvog, 87 P.
631, 44 Wash 520.

5. Wash—Kent Lumber Co v.
Ward, 79 P. 485, 37 Wash 60.

bond to the owner are not estopped to assert liens as materialmen where the owner has settled with the latter surety and released him from further liability on the bond⁶

C BOND OR DEPOSIT TO PREVENT OR DISCHARGE LIEN

§ 232. Bond or Undertaking in General

Some statutes make provision for the execution and filing of a bond or undertaking to prevent or discharge mechanics' liens

Some statutes provide for the execution and filing of a bond or undertaking to prevent or discharge mechanics' liens,⁷ and for the use of persons in whose favor liens might accrue.⁸ A general statute providing that, where an undertaking has been given in any action or proceeding, the court may, in its discretion and if justice so requires, order further or other security to be given in addition to such security, does not apply to an undertaking given to effect a discharge of a mechanic's lien.⁹

§ 233. Deposit in Court in General

Under some statutes a mechanic's lien may be discharged by the owner depositing in court an amount sufficient to satisfy the claim. Under other statutes a bond to cover any costs or interest that may be awarded by a judgment for the claim is required in addition to the deposit.

Under some statutes a mechanic's lien may be discharged by the owner depositing in court an amount sufficient to satisfy the claim¹⁰ or the balance due from him to the contractor.¹¹ An offer to pay such an amount into court must follow the language of the statute or it will be ineffectual.¹² The money deposited stands in place of the lien,¹³ but the payment into court is not an acknowledgment of claimant's right¹⁴ or a waiver of defenses,¹⁵ and a claimant is not entitled to receive, or share in, the amount deposited until he has established his claim and lien.¹⁶

In some jurisdictions the proper method of determining the right of claimant to share in the money deposited is to commence and maintain an action in form the same as one to foreclose the lien,¹⁷ although no sale of the premises can be ordered therein,¹⁸ but in other jurisdictions a different procedure is adopted.¹⁹ It has been held that, where the owner has deposited in court the amount due from him to the contractor, the costs arising from

6. Ark.—Pine Bluff Lodge No 149 B P O E v Sanders, 111 S.W. 255, 86 Ark 201

7. DC—Deland v Wagner, 64 F.2d 552, 62 App DC 54—Maatiko v Fletcher, 39 F.2d 235, 59 App DC 250

Kan.—Lindenberger v Zweifel, 262 P 538, 124 Kan 737

NJ.—Standard Accident Ins Co of Detroit, Mich., v Lloyd, 157 A 657, 10 N.J.Misc 28

NY.—In re Rockefeller Center, 265 N.Y.S. 546, 238 App Div 736 40 C.J. p 328 note 23

Contractor's bond for payment of claims and indemnity against liens see infra §§ 256-263

Distinguished from other bonds

Bond to release mechanic's lien differs essentially from forthcoming bond in attachment, replevin, or execution, on which judgment may be entered against sureties in principal suit—Fidelity & Casualty Co of New York v D N Morrison Const Co of Virginia, 126 So 151, 99 Fla. 309, followed in Granat v. Dubbs, 130 So 164, 100 Fla. 1145 and Fidelity & Casualty Co of New York v. Coley & Peterson of Virginia, 126 So. 157, 99 Fla. 337

Purpose of bonding recorded claims

(1) It has been held that the purpose of legislative acts relating to the bonding of recorded claims by contractors was to provide a method by which contractors on private

works by substituting surety bonds in lieu of liens recorded against their work might obtain the release of funds held by owners to meet the claims secured by the liens—State ex rel Pittman Bros Const Co v Watson, 6 So 2d 709, 199 La 623

(2) It has also been held that the purpose of such acts was to enable clerks of courts to erase inscriptions of liens from mortgage records and to issue clear lien certificates on being furnished with surety bonds—State ex rel Pittman Bros Const Co v Watson, supra

8. Kan.—Lindenberger v Zweifel, 262 P 538, 124 Kan 737

40 C.J. p 329 note 27

9. NY.—Iuppa v Engert, 179 N.Y.S. 927

10. DC.—Woodward & Lothrop v Union Trust Co. of Rochester, N.Y., 262 F.2d 49, 49 App DC 173 40 C.J. p 333 note 36

11. Va.—Francis v Hotel Rueger, Inc., 99 S.E. 690, 125 Va. 106. 40 C.J. p 333 note 37

12. NY.—Burton v Rockwell, 17 N.Y.S. 665, 63 Hun 163

40 C.J. p 333 note 38

13. Cal.—Stockton Lumber Co v Schuler, 101 P 307, 155 Cal. 411 40 C.J. p 334 note 41

14. Pa.—Hall v Blackburn, 84 A. 18, 173 Pa. 310

15. Pa.—Hall v Blackburn, supra.

16. NY.—Application of Standard Tile Co., 11 N.Y.S.2d 603, 256 App Div 1096, reargument denied 12 N.Y.S.2d 188, 257 App Div 834 40 C.J. p 334 note 44

Where validity not established

Where lienor had not established validity of mechanic's lien, but an action had been commenced to set aside allegedly fraudulent transfers and to apply money deposited to discharge the lien to the payment thereof, an order denying a motion for the vacatur of an order directing payment to lienor of money deposited to discharge the lien, and requiring restitution to depositor, was reversed to extent of requiring lienor to deposit with county treasurer, to credit of action to set aside the transfers, the money deposited to discharge the liens, pending outcome of action to set transfers aside—Application of Standard Tile Co., 12 N.Y.S.2d 188, 257 App Div 834

17. NY.—Schillinger Fire-Proof Cement & Asphalt Co v. Arnott, 46 N.E. 956, 152 N.Y. 584. 40 C.J. p 334 note 45

18. NY.—Schillinger Fire-Proof Cement & Asphalt Co v. Arnott, supra. 40 C.J. p 334 note 45

19. Pa.—Hoffman v Haines, 8 Phila. 248 40 C.J. p 334 note 47.

subsequent litigation with respect to the allowed claim should be deducted from the amount deposited before distribution to the persons entitled to liens²⁰

A deposit in court, followed by a withdrawal thereof, does not discharge the lien,²¹ and, when a judgment on plaintiff's default is vacated and the action is reinstated, the moneys which were on deposit to discharge the lien, and which were withdrawn by defendant after judgment, should be re-deposited.²² The money deposited is to be repaid the depositor when the lien is discharged under other provisions of the statute,²³ as where it terminates by lapse of time.²⁴

Deposit and bond Under some statutes a mechanic's lien may be discharged by depositing the amount of the lien claim and filing a bond to cover any attorney's fees, court costs, and interest that may be adjudged against the owner in the event that the lien claimant recovers judgment on claim in the amount for which it was filed.²⁵ The owner does not acknowledge the claimant's right²⁶ or waive any defenses²⁷ by making the deposit and filing the bond. The deposit may not be withdrawn by the owner before the lien claim is finally adjudicated.²⁸

§ 234. Who May Give Security

Who may give the bond for the prevention or discharge of a mechanic's lien is a matter of statutory regulation.

The statutes of different jurisdictions relating to the prevention or discharge of mechanics' liens by the giving of a bond or undertaking variously provide in terms for the giving of the bond or undertaking by any person having an interest in the property,²⁹ defendant,³⁰ the principal contractor,³¹ or either the owner or the contractor.³²

§ 235. Time for Giving Security

Under some statutes the bond for the prevention or discharge of a mechanic's lien may be given and filed at any time after the making of the contract.

Under some statutes the bond for the prevention or discharge of a mechanic's lien may be given and filed at any time after the making of the contract,³³ and it need not be filed before, but may be filed after, the institution of a suit to enforce a lien.³⁴ Under other statutes, however, it has been held that an application to substitute security for the lien is too late when made after suit has been commenced and the case is ready for trial.³⁵ Some statutes require the bond to be recorded within a specified number of days after its approval.³⁶

§ 236. Form, Requisites, and Validity of Bond

The bond given to prevent or discharge a mechanic's lien should comply with statutory requirements.

The bond given to prevent or discharge a mechanic's lien should comply with the statutory re-

20. Va.—Francis v Hotel Rueger, Inc., 99 SE 690, 125 Va 106

21. Kan.—Wichita Sash & Door Co v Weil, 103 P 1003, 80 Kan 606

22. NY—Cunningham v Hatch, 18 NYS 458
40 C J p 334 note 49

23. NY—Matter of Thirty-Fifth St & Fifth Ave Realty Co., 106 NYS 390, 121 App Div 625

24. NY—Matter of Thirty-Fifth St & Fifth Ave Realty Co., supra
40 C J p 334 note 51

25. US—Maryland Casualty Co v Seidenbach, CCA Okl., 133 F 2d 573, certiorari denied 64 SCt 39, 320 US 739, 88 LEd 438
Okl.—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl 578

The deposit stands in the place of the lien—Raitman v McCune, 30 P 2d 878, 167 Okl 511

Failure to recover judgment in amount of claim

Where owner of building had discharged mechanics' liens by depositing amount of lien claims with clerk, and by executing statutory bonds conditioned to pay attorneys' fees,

court costs, and interest, lien claimants' failure to recover judgment on their claims in amount for which claims were filed precluded them from recovering attorneys' fees, court costs, and interest from owner—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl 578

Interest on deposit

It has been held that the depositor is not entitled to interest on difference between amount deposited and amount of lien finally determined—Maryland Casualty Co v Seidenbach, CCA Okl., 133 F 2d 573, certiorari denied 64 SCt 39, 320 US 739, 88 LEd 438

26. Okl.—Raitman v McCune, 30 P 2d 878, 167 Okl 511

27. Okl.—Raitman v McCune, supra

28. Okl.—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl 578

29. Mass.—Rockwell v. Kelly, 77 NE 490, 190 Mass 439
40 C J p 329 note 33

30. DC—Anglo-American Sav & Loan Ass'n v Campbell, 13 App D 581, 43 LRA 623
40 C J p 329 note 34

31. Ill.—Martin v Swift, 12 NE 201, 130 Ill 488

40 C J p 329 note 35

32. Kan.—Lindenberger v Zweifel, 26 P 538, 124 Kan 737
NY—In re Rockefeller Center, 265 NYS 546, 238 App Div 736
40 C J p 329 note 36

33. Ill.—Martin v. Swift, 12 NE 201, 120 Ill 488

Bond held not invalid

It has been held that the fact that the bond was not given until work was partly done did not render it invalid—Lindenberger v Zweifel, 262 P 538, 124 Kan 737.

34. DC—Anglo-American Savings & Loan Ass'n v Campbell, 13 App DC 551, 43 LRA 622
40 C J p 329 note 38

35. Pa.—Maulesbury v. Simpson, 11 Phila 196.

36. Mass.—Goldstein v Tucker, 119 NE 693, 230 Mass 259—Chertok v Morang, 118 NE 285, 228 Mass 598

Approval, filing, or recording see infra § 236

quirements,³⁷ but although it does not do so,³⁸ or although it is given at a time when no statute authorizing a discharge of a lien by the giving of a bond is in force,³⁹ it may be valid and binding as a common-law bond. A bond given pursuant to an unconstitutional statute is, however, void⁴⁰ and cannot be upheld as a common-law obligation.⁴¹ Where a single contract for an entire sum for the erection of one building on two lots is made and the building is constructed, the foreclosure of a mechanic's lien on the two lots cannot be defeated or discharged by the giving of a bond as to one lot only.⁴² A bond under seal given by the owner to dissolve a mechanic's lien conclusively imports a consideration.⁴³

Condition. Whatever condition is required or prescribed by statute must be inserted in the bond.⁴⁴ However, some statutes relating to a bond given after a bill in equity to enforce the lien has been brought do not prescribe the form of bond but leave it to the court, and under such statutes a condition which fully protects the rights of plaintiff is sufficient.⁴⁵

Amount. Under some statutes the bond is required to be in a sum not less than the contract price,⁴⁶ while under other statutes the amount of the bond must be fixed by the court.⁴⁷

Justification and approval of sureties. The statutes usually require that the bond shall be executed with good and sufficient sureties,⁴⁸ who are to be approved by the court or a designated officer.⁴⁹

Statutory provisions for notice of justification of the sureties must be strictly observed.⁵⁰ While the sureties cannot object to the sufficiency of the bond because of their failure to justify as required by statute,⁵¹ where the sureties whose names were signed to the bond were impersonated by others appearing before the master in chancery, who gave false answers with respect to their property, the bond, although signed and approved by the master, does not effect a dissolution of the lien.⁵²

Approval and filing of bond. It is usually required that the bond shall be approved by the court or by a designated officer⁵³ and filed or recorded in a designated office.⁵⁴ It has been held that the court will not approve of the security offered after scire facias has issued on a mechanic's lien unless the issuing of the scire facias is recited in the bond⁵⁵ and it contains a warrant of attorney for entering judgment for the amount that shall be found due, with interest and costs.⁵⁶ The approval of an irregular bond, limited to certain beneficiaries named therein and based on an express waiver of their rights, is a rejection of such bond as to all other persons for whose benefit it was intended.⁵⁷

Estoppel to deny validity. The sureties on a bond to prevent or discharge liens are estopped to deny its validity where persons entitled to liens have in reliance on the bond refrained from filing lien claims and in consequence lost their right to perfect liens⁵⁸ or where liens which have been filed have been discharged on the faith of the bond.⁵⁹ Likewise the obligor, after the bond has been treated as

37. Mass.—Massasoit-Pocasset Nat Bank v Borden, 117 NE 911, 228 Mass 531—Rockwell v Kelly, 77 NE 490, 190 Mass 439

38. N.J.—Burststein v Union Indemnity Co., 166 A. 89, 110 N.J. Law 443

40 C.J. p 329 note 42

39. Okl.—Carr v. Wewoka Oil & Gas Co., 229 P 434, 103 Okl 139

40. Cal.—San Francisco Lumber Co v. Bibb, 72 P 964, 139 Cal 193—Shaughnessy v American Surety Co., 69 P. 250, 71 P 701, 138 Cal 543

41. Cal.—San Francisco Lumber Co v Bibb, 72 P 964, 139 Cal 193—Shaughnessy v American Surety Co., 69 P 250, 71 P 701, 138 Cal 543

42. Kan.—Kille v Bentley, 51 P 332, 6 Kan App 804

43. Mass.—Chertok v Morang, 118 NE 285, 228 Mass 593

44. Mass.—Rockwell v Kelly, 77 N E 490, 190 Mass 439.

40 C.J. p 329 note 48

45. Mass.—La. Centra v Jackson, 139 NE 429, 245 Mass 14

46. Kan.—Lindenberger v Zweifel, 262 P 538, 124 Kan 737—Kille v Bentley, 51 P 332, 6 Kan App 804

Bond held not invalid

Fact that bond protecting against mechanic's liens was for amount then unpaid has been held not to render it invalid—Lindenberger v Zweifel, 262 P 538, 124 Kan 737.

47. N.Y.—In re Rockefeller Center, 265 N.Y.S 546, 238 App Div 716—Copley v Hay, 12 N.Y.S 277, 18 Daly 446

40 C.J. p 330 note 54

48. Kan.—Lindenberger v Zweifel, 262 P 538, 124 Kan 737

40 C.J. p 330 note 55

49. Kan.—Lindenberger v. Zweifel, supra

40 C.J. p 330 note 56

50. N.Y.—Matter of Blumberg, 133 N.Y.S 774, 149 App Div 303

40 C.J. p 330 note 57

51. Cal.—Carpenter v Furrey, 51 P 369, 128 Cal 665

52. Mass.—Breed v. Gardner, 72 N E 933, 187 Mass 300

53. Kan.—Lindenberger v Zweifel, 262 P 538, 124 Kan 737

40 C.J. p 330 note 60

Clerk's failure to note bond as filed or approved until some time after filing has been held not to render it invalid—Lindenberger v Zweifel, supra.

54. Kan.—Lindenberger v. Zweifel, supra

40 C.J. p 330 note 61

55. Pa.—Hood v. Building Ass'n, 9 Phila 105

56. Pa.—Hood v. Building Ass'n, supra

57. Neb.—U S Wind Engine & Pump Co v. Drexel, 74 NW 317, 53 Neb 771.

58. U.S.—Carnegie, Phipps & Co v Hulbert, Neb., 70 F. 209, 16 C.C.A 493

59. N.Y.—Mathiasen v. Shannon, 64 N.Y.S. 305, 25 Misc. 274.

40 C.J. p 332 note 97.

valid by all the parties and the lien discharged, may not object in an action on the bond that the amount thereof exceeded the jurisdiction of the court which accepted it⁶⁰ or evade liability because of the omission of a seal from the bond⁶¹. The lienor is not estopped to assert any objection to the bond which he can make good by reason of his taking part in the proceeding in which the bond was given.⁶²

§ 237. Effect of Bond or Deposit

Under some statutes the effect of a bond given, approved, and filed is to prevent liens from attaching and to discharge liens which have already been filed.

Where a bond is given, approved, and filed as provided by statute, its effect is determined by statute,⁶³ according to the statutes, the effect is to prevent liens from attaching⁶⁴ and to discharge liens which have been already filed,⁶⁵ and the bond is substituted as security in place of the lien on the real estate,⁶⁶ but it does not otherwise change the relation or rights of the parties⁶⁷. The filing of a bond after a suit to enforce a lien has been commenced does not necessitate the dismissal of the suit,⁶⁸ since it is proper to allow the suit to continue for the purpose of having the amount due on the claim ascertained and declared.⁶⁹

After the bond has been filed it is error, accord-

ing to some authorities, to decree a lien⁷⁰ or render a decree in personam,⁷¹ but according to other authorities it seems that, notwithstanding the giving of the bond, a personal judgment against the owner may be rendered,⁷² as may be also a decree in form against the property.⁷³

The giving of a bond to discharge property from a mechanic's lien is not an acknowledgment of the validity of the lien,⁷⁴ and the owner may still contest its existence, amount, and validity.⁷⁵ Where a grantee of land subject to a mechanic's lien has given a bond to discharge the lien, he cannot show for the purpose of defeating a recovery on the bond that the lien could not have been satisfied out of the grantor's interest because of prior encumbrances.⁷⁶

Under some statutes, on the filing of the bond, the principal and surety thereon become parties in any action commenced, or to be commenced on the lien claim.⁷⁷

§ 238. Liability on Bond

The liability of a surety on a bond given to prevent or discharge a mechanic's lien depends on whether the facts bring the case within the condition of the bond.

The liability of a surety on a bond given to pre-

60. N.Y.—Sheffield v Murray, 30 N.Y.S. 799, 80 Hun 555

61. N.Y.—Whitney v Coleman, 9 Daly 238
40 C.J. p. 332 note 99.

62. Mass.—Taunton Sav. Bank v Burrell, 40 N.E. 330, 179 Mass. 421, 423

63. Kan.—Southern Surety Co. v Hudson, 160 P. 209, 98 Kan. 775

64. Kan.—Lindenberger v Zweifel, 263 P. 538, 124 Kan. 737

N.Y.—In re Rockefeller Center, 265 N.Y.S. 546, 238 App. Div. 736.
40 C.J. p. 330 note 67

65. D.C.—Deland v Wagner, 64 F.2d 552, 62 App. D.C. 54—Maitico v Fletcher, 39 F.2d 295, 59 App. D.C. 250

Fla.—Myers v Harkins, 136 So. 382, 102 Fla. 577—Fidelity & Casualty Co. of New York v D. N. Morrison Const. Co. of Virginia, 126 So. 151, 99 Fla. 309, followed in Granat v Dubbs, 130 So. 464, 100 Fla. 1145, and Fidelity & Casualty Co. of New York v Coley & Peterson of Virginia, 126 So. 157, 99 Fla. 327—Union Indemnity Co. of New Orleans v Worthington, 123 So. 759, 98 Fla. 342
40 C.J. p. 330 note 63

66. D.C.—Maitico v Fletcher, 39 F.2d 295, 59 App. D.C. 250

N.Y.—Brescia Const. Co. v Walart Const. Co., 264 N.Y.S. 862, 238 App. Div. 360—John R. Blair Co. v Seadco Bldg. Corporation, 239 N.Y.S. 326, 136 Misc. 204—John Comolli & Co. v Margolies, 224 N.Y.S. 626, 130 Misc. 694
40 C.J. p. 330 note 69

Under acts relating to the bonding of recorded claims by private contractors, the bonds when given take the place of the liens, and, since the lienors are protected by the bonds, no useful purpose could be served by permitting the claims recorded against the contractor to remain uncanceled on the public records—State ex rel Pittman Bros. Const. Co. v Watson, 6 So.2d 709, 199 La. 623

Equitable rights

While it has been held that a bond given by the owner to release mechanic's lien is substituted for the land, it has also been held that it is not substituted for the land in the sense that equity may proceed against the bond as it could against the land—Myers v Harkins, 136 So. 382, 102 Fla. 577—Fidelity & Casualty Co. of New York v D. N. Morrison Const. Co. of Virginia, 126 So. 151, 99 Fla. 309, followed in Granat v Dubbs, 130 So. 464, 100 Fla. 1145, and Fidelity & Casualty Co. of New York v Coley & Peterson of Virginia, 126 So. 157, 99 Fla. 327

67. Mich.—In re J. M. Diver Lumber Co., 220 N.W. 717, 243 Mich. 175

N.Y.—Harley v Plant, 104 N.E. 946, 210 N.Y. 405

68. Ill.—Martin v Swift, 12 N.E. 201, 120 Ill. 488

69. Pa.—Hood v Building Assoc., 9 Phila. 105

70. Ill.—Martin v Swift, 12 N.E. 201, 120 Ill. 488

71. Ill.—Martin v Swift, supra.
40 C.J. p. 331 note 74

72. Fla.—Fidelity & Casualty Co. of New York v D. N. Morrison Const. Co. of Virginia, 126 So. 151, 99 Fla. 309, followed in Granat v Dubbs, 130 So. 464, 100 Fla. 1145, and Fidelity & Casualty Co. of New York v Coley & Peterson of Virginia, 126 So. 157, 99 Fla. 327.
40 C.J. p. 331 note 75

73. N.Y.—Lawson v Reilly, 13 N.Y. Civ. Proc. 290

74. N.Y.—Parsons v. Moses, 57 N.Y.S. 727, 40 App. Div. 58
40 C.J. p. 331 note 78

75. N.Y.—John R. Blair Co. v. Seadco Bldg. Corporation, 239 N.Y.S. 326, 136 Misc. 204

76. N.Y.—Kerrigan v. Fielding, 62 N.Y.S. 115, 47 App. Div. 246

77. N.J.—Standard Accident Ins. Co. of Detroit, Mich., v. Lloyd, 157 A. 657, 10 N.J. Misc. 23.

vent or discharge a mechanic's lien depends on whether the facts bring the case within the condition of the bond,⁷⁸ when that condition is fairly and reasonably construed.⁷⁹ If the principal in the bond is not liable to plaintiff, the surety is not liable.⁸⁰ There is no liability on the bond where the lienor fails to establish a valid lien,⁸¹ regardless of whether the condition of the bond is to pay any judgment which may be rendered against the property for the enforcement of the lien⁸² or is to pay any judgment which may be recovered in an action to enforce or foreclose the lien.⁸³ While the sureties are not released from liability because the judgment in the foreclosure action did not provide for the enforcement of the lien against the property,⁸⁴ nevertheless, where a judgment against the principal for a lien against the property,⁸⁵ or a judgment establishing that the lien, when discharged by the undertaking, was valid and enforceable in a fixed amount,⁸⁶ has been rendered, it is conclusive on the sureties, even though they were not parties to the former action in which it was rendered,⁸⁷ and they cannot object that the action should have been in equity⁸⁸ and all persons in interest made parties.⁸⁹

The fact that the principal procured the signature of a surety on the promise that the principal would afterward obtain the signature of another surety, which was not done, will not relieve the surety from

obligation on a bond delivered, approved, and filed as the law requires.⁹⁰ Also the allowance by the court of a purely formal amendment of the lien claim does not discharge the surety from liability.⁹¹ As between the sureties on a bond to discharge a mechanic's lien, binding them to pay any judgment in an action to enforce the claim or foreclose the lien, and the sureties on an undertaking given by the owner on appeal from a judgment in an action against him to foreclose the lien, the former are in effect principals and the latter sureties,⁹² and the former cannot therefore insist that the person for whose benefit the bond and undertaking were given shall, before proceeding against them, pursue his remedies against the latter.⁹³

Cancellation It has been held that an undertaking given to discharge a mechanic's lien may be canceled on the ground that the lien has terminated by a lapse of time.⁹⁴

§ 239. Action on Bond

In some jurisdictions the remedy of the mechanic against the surety is by an action at law on the undertaking, but in other jurisdictions a recovery on the bond may be had in an equitable proceeding as well as in an action at law.

In some jurisdictions the remedy of the mechanic against the surety is by an action at law on the undertaking,⁹⁵ at least where the bond was given

78. Conn.—Burque v. Naugatuck Lumber Co., 155 A 414, 113 Conn 350

Mass.—Scholl v. Gilman, 160 NE 889, 263 Mass 295
40 C.J. p 331 note 60

79. Mass.—Scholl v. Gilman, supra
NY—McKeeffrey v. Cugley, 145 NY S 102, 83 Misc 481

80. Iowa.—Mason City Brick & Tile Co. v. Lamson, 180 NW 314, 190 Iowa 365

81. Mich.—In re J. M. Diver Lumber Co., 220 NW 717, 243 Mich 175.

NY—Brescia Const. Co. v. Walart Const. Co., 291 NYS 960, 249 App Div 151, affirmed 8 NE2d 330, 273 NY 648—Hensel v. Metropolitan Casualty Ins. Co. of New York, 262 NYS 675, 237 App Div. 739—Atlantic-Terra Cotta Co. v. Rubenfeld Construction Corporation, 213 NYS 21, 126 Misc 279
40 C.J. p 331 note 63

82. NY—Romanik v. Rapoport, 132 NYS 892, 148 App Div 688—Parsons v. Moses, 57 NYS 727, 40 App Div 58

83. NY—Sexauer & Lemke v. Luke A. Burke & Sons Co., 127 NE 329, 228 NY 341, 345
40 C.J. p 331 note 85

84. NY—Ringle v. Matthiessen, 45 NYS 226, 17 App Div 374

85. NY—Ringle v. O'Matthiessen, 39 NYS 92, affirmed 41 NYS 962
10 App Div 274, affirmed 53 NE 1131, 158 NY 740

86. NY—Harley v. Plant, 104 NE 946, 210 NY 405

87. NY—Harley v. Plant, supra

88. NY—Ringle v. O'Matthiessen, 39 NYS 92, affirmed 41 NYS 962, 10 App Div 274, affirmed 53 NE 1131, 158 NY 740

89. NY—Ringle v. O'Matthiessen, supra

90. Kan.—Risse v. Hopkins Planing Mill Co., 40 P 904, 55 Kan 518

91. Pa.—Vansciver v. Churchill, 35 Pa. Super 212

92. NY—Sullivan v. Goodwin, 51 NYS 1000, 30 App Div 194, affirmed 58 NE 1092, 164 NY 583

93. NY—Sullivan v. Goodwin, supra

94. NY—In re Wilbraham Realty Corp., 207 NYS 717, 212 App Div 304—Matter of Thornton Apartment Co., 133 NYS 756, 74 Misc 210

Time for bringing action

It has been held, however, that an undertaking given to discharge a

mechanic's lien may not be canceled where the time within which an action might be brought to recover a judgment against the property on the claim has expired—Matter of Greines, 112 NYS 640, 60 Misc 542

95. US—Phillips v. Gilbert, D.C., 101 US 721, 25 L. Ed 833

Fla.—Fidelity & Casualty Co. of New York v. D. N. Morrison Const. Co. of Virginia, 126 So 151, 99 Fla 309, followed in Granat v. Dubbs, 130 So 464, 100 Fla 1145 and Fidelity & Casualty Co. of New York v. Coley & Peterson of Virginia, 126 So 157, 99 Fla 327

Common-law cognizance

Question of liability is purely of common-law cognizance—Fidelity & Casualty Co. of New York v. D. N. Morrison Const. Co. of Virginia, 126 So 151, 99 Fla 309, followed in Granat v. Dubbs, 130 So 464, 100 Fla 1145, and Fidelity & Casualty Co. of New York v. Coley & Peterson of Virginia, 126 So 157, 99 Fla 327

Bond not enforceable in equity

(1) Equity court cannot enforce penalty of bond, unless there is ground of equitable cognizance to which recovery on bond is incidental—Fidelity & Casualty Co. of New York v. D. N. Morrison Const. Co. of Virginia, 126 So 151, 99 Fla 309, fol-

pending the suit to enforce the lien⁹⁶ In other jurisdictions a recovery on the bond may be had in an equitable proceeding⁹⁷ as well as in an action at law⁹⁸ The lienor may first bring an action against the debtor alone to foreclose the lien,⁹⁹ and, on the recovery of a judgment establishing the validity and amount of the lien, may then maintain an action at law against the sureties on the bond¹ It is not a condition precedent to the bringing of an action against the sureties that the lienor shall exhaust his remedy against the owner by recovering a judgment of foreclosure in form against the property,² but he may bring a single action in equity³ in which all persons interested,⁴ including the owner⁵ and the sureties on the bond,⁶ are made parties, to obtain a determination of the rights, liabilities, and equities of all parties interested,⁷ a judgment establishing the validity and amount of the lien,⁸ and a personal judgment against the principal and sureties on the bond,⁹ and the latter course has been commended as the better practice¹⁰ The real party in interest may sue on the bond,¹¹ and leave of court to sue the sureties is not necessary¹²

Defenses. Where a law action and a statutory equitable proceeding are concurrent remedies, the

defenses are also concurrent¹³ The sureties may set up any legal or equitable defense which would have availed the principal¹⁴ and are not precluded from doing so by the failure of the principal to defend¹⁵ Where an owner for a considerable period of time after a contract for improvements had been executed took no steps to repudiate it because of alleged duress, neither he¹⁶ nor his surety on the release bond¹⁷ can defend an action on the bond on the ground of duress Where building contractors, after giving an undertaking to discharge the mechanic's lien of a subcontractor by securing the payment of any judgment against such property in his favor, brought an action against the owner to foreclose a lien filed by themselves and made the subcontractor a party defendant, and the owner appealed from a judgment establishing both liens, and directing sale of the property and payment, and gave an undertaking to stay execution, this appeal and stay constituted no defense to an action by the subcontractor on the undertaking to discharge his lien¹⁸

Pleadings and evidence. The complaint should contain proper and sufficient allegations of the essential facts¹⁹ and be so framed as to contain the

lowed in *Granat v Dubbs*, 130 So 464, 100 Fla 1145 and *Fidelity & Casualty Co of New York v Coley & Peterson of Virginia*, 126 So 157, 99 Fla 327

(2) Fact that lien discharged by mechanic's lien bond might have been enforced in equity against land does not bring enforcement of bond within field of equitable cognizance—*Fidelity & Casualty Co of New York v D N Morrison Const Co of Virginia*, 126 So 151, 99 Fla 309, followed in *Granat v Dubbs*, 130 So 464, 100 Fla 1145, and *Fidelity & Casualty Co of New York v Coley & Peterson of Virginia*, 126 So 157, 99 Fla 327

96. Mass—*La Centra v Jackson*, 139 NE 429, 245 Mass 14

97. Mich—*Des Lauriers Metal Products Co v Rhodes*, 217 NW 922, 241 Mich 647
40 CJ p 332 note 11

98. Mich—*Des Lauriers Metal Products Co v Rhodes*, 217 NW 922, 241 Mich 647
40 CJ p 332 note 9

99. NY—*Pierce, Butler & Pierce Mfg Co v Wilson*, 103 NYS 678, 118 App Div 662
40 CJ p 332 note 8

1. NY—*John Comolli & Co v Margolies*, 224 NYS 626, 130 Misc 894—*Atlantic Terra Cotta Co v Rubenfield Construction Corporation*, 213 NYS 21, 126 Misc 279
40 CJ p 332 note 9.

2. NY—*Morton v Tucker*, 40 NE 3, 145 NY 244
40 CJ p 332 note 10

3. NY—*Atlantic Terra Cotta Co v Rubenfield Construction Corporation*, 213 NYS 21, 126 Misc 279
40 CJ p 332 note 11.

4. NY—*Morton v. Tucker*, 40 NE 3, 145 NY 244
40 CJ p 332 note 12

Necessary defendants in action to foreclose lien are necessary parties to action on undertaking—*Atlantic Terra Cotta Co v Rubenfield Construction Corporation*, 213 NYS 21, 126 Misc 279

5. NY—*Atlantic Terra Cotta Co v Rubenfield Construction Corporation*, supra.
40 CJ p 332 note 12 [b]

Owner must be served

Owner, joined with surety in mechanics' lienors' action, must be served—*Atlantic Terra Cotta Co v Rubenfield Construction Corporation*, supra

6. NY—*Morton v Tucker*, 40 NE 3, 145 NY 244
40 CJ p 332 note 13

7. NY—*Harley v Plant*, 104 NE 946, 210 NY 405

8. NY—*Pierce, Butler & Pierce Mfg Co v Wilson*, 103 NYS 678, 118 App Div 662—*Mathiasen v Shannon*, 54 NYS 305, 25 Misc 274

9. NY—*Pierce, Butler & Pierce*

Mfg Co v Wilson, 103 NYS 678, 118 App Div 662—*Mathiasen v Shannon*, 54 NYS 305, 25 Misc 274

10. NY—*Morton v Tucker*, 40 NE 3, 145 NY 244
40 CJ p 332 note 17.

11. NY—*Ringle v Wallis Iron Works*, 38 NYS 875, 16 Misc 167, 25 NY Civ Proc 261—*In re John P Kane Co.*, 66 NYS 684, affirmed 65 NYS 1136, 52 App Div 630

12. NY—*Matter of Candee & Howland Co*, 159 NYS 230, 173 App Div 962
40 CJ p 332 note 19

13. Mich—*Des Lauriers Metal Products Co v Rhodes*, 217 NW 922, 241 Mich 647

14. NY—*Aeschlimann v Presbyterian Hospital*, 59 NE 148, 165 NY 296, 80 Am SR 723

15. NY—*Aeschlimann v. Presbyterian Hospital*, supra.

16. NY—*Colon v East One Hundred & Eighty-Ninth St Bldg & Const Co*, 126 NYS 226, 141 App Div 411

17. NY—*Colon v East One Hundred & Eighty-Ninth St Bldg & Const. Co.* supra.

18. NY—*Heagney v Hopkins*, 52 NYS 207, 23 Misc 608

19. NY—*Goldstein v Michelson*, 91 NYS 33, 45 Misc 401.
40 CJ p 333 note 29.

allegations and prayers for relief appropriate to the form of the action.²⁰ It has been held that lienors, joined as defendants in an action to foreclose a lien, are required to set forth their liens in answer, and serve an answer on the owner in order to enforce their claims against the surety.²¹ Some statutes provide that, when the lien has been discharged by giving a bond, the material facts, if any, in dispute between claimant and the parties signing the bond shall be tried by a jury without further pleadings²² with the same effect as though pleadings had been filed and an action commenced at law,²³ but a failure strictly to follow the statute in this respect may be waived by defendant.²⁴ The rules of

evidence obtaining in civil actions generally are applicable in actions of this nature.²⁵

Judgment The decree may be properly rendered against the owner and the surety.²⁶ Where the lien has been discharged by the bond of a surety company, the judgment should be against the company for the amount of the lien.²⁷ However, in an action on the bond there can be no recovery of an amount in excess of that secured by the discharged lien.²⁸ A failure to introduce the lien in evidence does not entitle the sureties to a judgment on the merits,²⁹ but only to a dismissal.³⁰ A lien on the property may not be decreed in favor of the surety after there has been a recovery on the bond.³¹

D. DISCHARGE, EXTINGUISHMENT, RELEASE, OR PAYMENT

§ 240. Discharge in General

After extinguishment of a mechanic's lien it may be canceled of record in proper proceedings had for that purpose.

Where a mechanic's lien is extinguished or satisfied, but still remains of record and an apparent cloud on the title, the owner may compel its discharge of record where, on request, the lienor refuses to act.³² Accordingly it has been held that a

court of competent jurisdiction may entertain an action to annul, vacate, cancel, or discharge a mechanic's lien, and may grant relief in a proper case therefor,³³ even in the absence of statutory authority.³⁴ Where, however, due payment or satisfaction is not shown, the owner may not have the lien canceled and discharged of record,³⁵ and, where the owner's duplicity prevents the perfection of liens in full accordance with statutory requirements, the

20. N.Y.—May v New Amsterdam Cas Co, 60 N.Y.S.2d 613, 270 App Div. 472.

40 C.J. p 333 note 30.

21. N.Y.—Atlantic Terra Cotta Co v Rubenfeld Construction Corporation, 213 N.Y.S. 21, 126 Misc 279.

22. Pa.—Vansciver v Churchill, 35 Pa.Super 312.

23. Pa.—Vansciver v Churchill, supra.

24. Pa.—Schellentrager v O'Donnell, 44 Pa.Super 43.

25. N.J.—Burststein v Union Indemnity Co, 166 A. 89, 110 N.J.Law, 442.

40 C.J. p 333 note 35.

26. D.C.—Deland v Wagner, 64 F.2d 552, 62 App.D.C. 54.

27. N.Y.—Holl v Long, 68 N.Y.S. 523, 34 Misc 1.

28. Conn.—Brin v Mesite, 93 A. 4, 89 Conn 107.

40 C.J. p 332 note 21.

29. N.Y.—Howes v Corti Bldg Co, 135 N.Y.S. 562, 76 Misc 507.

30. N.Y.—Howes v Corti Bldg Co, supra.

31. Fla.—Union Indemnity Co of New Orleans v Worthingstun, 138 So 759, 98 Fla. 242.

Kan.—Lundenberger v Zweifel, 262 P 538, 124 Kan 737.

32. Neb.—Corpus Juris cited in Gibson v Koutsky-Brennan-Vana Co, 9 N.W.2d 298, 302, 143 Neb 326.

33. Neb.—Gibson v Koutsky-Brennan-Vana Co, 9 N.W.2d 298, 302, 143 Neb 326.

34. Neb.—Gibson v Koutsky-Brennan-Vana Co, 9 N.W.2d 298, 143 Neb 326.

40 C.J. p 332 notes 4-7.

Chancery action

A building owner could maintain chancery action to test validity of a material and labor lien filed against owner's property by the contractor, and for an accounting, as against contention that owner's only remedy under statute providing for such liens was to file a bond, where owner alleged that effect of contractor's action was to tie up owner in effort to pay off all claims of subcontractors and materialmen, and that contractor did not act in good faith or by honest mistake in claiming too great a sum in his statement of lien, owner was not precluded from maintaining such action on ground that owner had a "complete and adequate remedy at law"—Jenks v Daniel, 7 N.W.2d 286, 304 Mich 239.

Reconventional demand for balance on contract should be dismissed, where plaintiff's damages from defendant's breach of contract exceeded amount claimed by defendant—Rodick v Martin, 127 So 110, 12 La. App 690.

Sufficiency of evidence

(1) In action to cancel lien, de-

fendant who abandoned contract to furnish materials and plumbing work held not to sustain burden of proving there was balance due him, with respect to reconvention claim which he interposed—Rodick v Martin, 127 So 110, 12 La. App 690.

(2) In building owner's chancery action against contractor to invalidate material and labor lien filed, for an accounting and to recover damages for breach of contract, evidence regarding contractor's defective and unworkmanlike construction warranted decree that owner was indebted to contractor in a certain sum which was much less than amount demanded in lien—Jenks v Daniel, 7 N.W.2d 286, 304 Mich 239.

(3) In suit to cancel mechanic's lien, issue of acknowledgment of mechanic's lien is determinable by preponderance of all evidence—Robertson v Vernon, Tex Com App, 12 S.W.2d 991.

34. Neb.—Gibson v Koutsky-Brennan-Vana Co, 9 N.W.2d 298, 143 Neb 326.

35. La.—Groner v Cavender, 133 So 825, 16 La. App 565.

Extras

Owner cannot have contractor's lien for extras canceled by depositing only unpaid portion of regular contract price—Groner v Cavender, supra.

court will not grant an annulment of liens without payments in full of the liens with interest³⁶

In jurisdictions where the modes of discharging the lien are prescribed by statute it can be discharged only in one of the modes provided,³⁷ since the statutes providing particular methods for discharging the lien negative the idea that the legislature intended to vest in the court the power to discharge the lien by other process, or for other causes, than those expressed in the statutes³⁸ From this construction of the statutes it follows that a discharge unauthorized by the express provisions of the statutes will be vacated and the lien reinstated,³⁹ but an order vacating another order canceling and discharging a mechanic's lien will itself be vacated at the instance of a person who purchased the property immediately after the order of cancellation and who did not receive any notice of the application of the order to vacate⁴⁰ A mechanic's lien cannot be discharged where a motion to cancel the notice of the pendency of an action to foreclose a mechanic's lien should not be granted, and plaintiff's rights under the notice and under the lien are inseparable.⁴¹

Penalty Under statutes providing that a penalty may be recovered of a lienor in a proper case where, on demand, he fails or refuses to cause the lien to be satisfied or discharged of record, the penalty will be imposed only in a case within the statute⁴² and on the filing of a proper and sufficient

complaint in an action to recover the penalty⁴³ A statute subjecting a mortgagee to a penalty for refusing after demand to satisfy of record a mortgage which has been paid is not so extensive as to apply against mechanics' lienholders who have placed a claim on record,⁴⁴ and in any event it would not cover a case where the contention is that a false claim was placed on record and not that a valid lien was placed on record and should have been canceled on demand because subsequently paid⁴⁵

§ 241. Extinguishment or Loss in General

While a mechanic's lien may be lost or abandoned, the courts will not readily hold that a lien once acquired has been extinguished in the absence of circumstances tending to show a waiver or making it inequitable that the lien should remain in force.

Like other lien rights, discussed in Liens § 17, the statutory right to a mechanic's lien may be lost,⁴⁶ abandoned,⁴⁷ or discharged of record, as discussed supra § 240 However, the courts will not readily hold that a mechanic's lien, once duly acquired, has been lost or extinguished in the absence of circumstances tending to show a waiver or making it inequitable that the lien should remain in force.⁴⁸ In jurisdictions where a mechanic's lien is secured by constitutional provision, grave reasons must be shown in every case to justify a holding that such a lien is lost or destroyed.⁴⁹

Numerous particular matters have been held not to result in a loss, destruction, or extinguishment

36. Ohio—*Park v Williamson Heater Co*, 20 Ohio N.P., N.S., 150

37. N.Y.—*In re 12 East 86th St Corporation*, 261 N.Y.S. 840, 146 Misc. 235

40 C.J. p. 328 notes 10, 11

Lack of inherent power

It has been held that courts have no inherent power to cancel or discharge mechanics' liens and that the lien law does not empower courts summarily to cancel or discharge mechanics' liens on grounds other than those specified in such law—*Supreme Plumbing Co v Seadco Bldg Corporation*, 230 N.Y.S. 760, 224 App. Div. 844

38. N.Y.—*Matter of Bronitsky*, 131 N.Y.S. 422, 136 App. Div. 672
40 C.J. p. 328 note 12.

39. N.Y.—*Madden v. Lennon*, 50 N.Y.S. 690, 23 Misc. 79

40. N.Y.—*Matter of Goldberg*, 205 N.Y.S. 649, 123 Misc. 438
40 C.J. p. 328 note 14

41. N.Y.—*Madden v. Lennon*, 50 N.Y.S. 690, 23 Misc. 79.

42. Ill.—*Lavery v. Brooke*, 37 Ill. App. 51.

43. Minn.—*Houlhan v Keller*, 26 N.W. 227, 34 Minn. 407

N.D.—*Sheets v Prosser*, 112 N.W. 72, 16 N.D. 180

44. Ala.—*Coffman v Henderson*, 63 So. 808, 9 Ala. App. 553

45. Ala.—*Coffman v Henderson*, supra

46. Iowa.—*Murray v Kelroy*, 275 N.W. 21, 228 Iowa. 1331

Minn.—*Burns v Carlson*, 54 N.W. 1055, 53 Minn. 70

47. Minn.—*Burns v Carlson*, supra
N.Y.—*Brescia Const Co v Walart Const Co*, 264 N.Y.S. 862, 238 App. Div. 360

Abandonment not shown

(1) By colloquy between court and counsel falling short of election between claims—*Sullivan Const Co v Twin Falls Amusement Co*, 258 P. 529, 44 Idaho 520

(2) By filing second claim or account
Idaho—*Sullivan Const Co v Twin Falls Amusement Co*, supra
Mo.—*Waters v Gallemore*, App. 41 S.W. 2d 870.

(3) By nonremoval from premises of materials furnished after sale un-

der mortgage foreclosure—*Rapid Fireproof Door Co v Largo Corporation*, 154 N.E. 531, 343 N.Y. 482, motion denied 154 N.E. 898, 244 N.Y. 563

(4) By requested judgment against general contractor—*Goodfellow Lumber Co v Blanke*, Mo. App., 41 S.W. 2d 959

48. Iowa.—*Spieker v. Cass County Fair Ass'n*, 249 N.W. 415, 216 Iowa. 424

Mo.—*Giammarino v J W Caldevey Const Co*, App., 72 S.W. 2d 159
N.J.—*Harris v Neswit*, 146 A. 309, 104 N.J. Eq. 465

Equities favoring lien

Lien claimants who furnished labor and material for construction of building erected by lessee had equities in their favor, with respect to landowner's contention that forfeiture of lease freed property from liens—*English v. Olympic Auditorium*, 20 P.2d 946, 217 Cal. 631, 87 A.L.R. 1281

49. Cal.—*Martin v Becker*, 146 P. 665, 169 Cal. 301, Ann. Cas. 1916D 171.

of the lien,⁵⁰ including an unaccepted offer, made in an attempted compromise or settlement, of an amount different from that recoverable,⁵¹ the conversion of an open account, constituting the claim on which the lien is founded, into an account stated,⁵² the mere restatement of the account by deducting certain items,⁵³ the fact that a suit to enforce the lien is prematurely brought,⁵⁴ a nonsuit in a scire facias on the lien,⁵⁵ payment of a mortgage encumbrance by the property owner,⁵⁶ delay in enforcing a judgment of foreclosure,⁵⁷ and proceedings to foreclose a mortgage without notice to the lienor.⁵⁸

Under some circumstances the release of a surety on a bond conditioned to deliver construction notes does not destroy the lien⁵⁹ or lessen the amount thereof.⁶⁰ Also the lien of a subcontractor is not lost by his failure to consolidate his claim for labor with others in an action before a justice of the peace against the original contractor, where such other claims are wholly disconnected with his lien and have no relation to the transaction out of which it arose.⁶¹ The lien, however, may be lost by including nonlienable claims in the judgment.⁶² It has been broadly held that, under a constitutional provision granting mechanics a lien on articles made or

repaired by them, continued possession of the article is not prerequisite to continued existence of the lien.⁶³

Failure to furnish statement on demand Under the express provisions of some statutes a claimant may forfeit his lien by failing to comply with the demand of the owner for a written statement of the amount of work and materials furnished.⁶⁴ Such a statute is enforceable even though the owner possesses knowledge of the facts to be included in the statement⁶⁵ and is not prejudiced by failure of claimant to comply with the demand,⁶⁶ but it does not apply where the demand is not made until after suit is brought to enforce the lien.⁶⁷

§ 242. Destruction or Removal of Building or Improvement

A mechanic's lien on land has been held to survive destruction or removal of the buildings and improvements, but there is also authority to the contrary.

It has been judicially acknowledged that there is a conflict of authority on the question whether a mechanic's lien on land is defeated by the destruction of the building or improvement for which the lien is claimed.⁶⁸ This conflict is said to arise from

50. Cal.—English v Olympic Auditorium, 20 P 2d 946, 217 Cal 631, 87 A L R 1281

Discharge of lien by

Appointment of receiver for principal contractor see the CJS title Receivers § 137, also 53 C J p 126 notes 37-54, and 40 C J p 335 note 74

Contractor's

Bankruptcy see Bankruptcy § 243 c

Insolvency see Insolvency § 11 c
Death of principal contractor after completion of work see supra § 97

Principal contractor's assignment for benefit of creditors see Assignments for Benefit of Creditors § 358

Unlawful detainer action wherein landowners had lease declared forfeited did not destroy mechanics' liens on building only—English v Olympic Auditorium, 20 P 2d 946, 217 Cal 631, 87 A L R 1281

51. Ill.—Nimmons v Lyon, 197 Ill App 376
40 C J p 334 note 60

52. Minn.—Dennis v Smith, 38 N W 695, 38 Minn 494

53. Mich.—Comstock v McCracken, 18 N W 583, 53 Mich 123

54. Ill.—Lorenz v Bloom, 195 Ill App 40.

55. Pa.—Berger v. Long, 1 Walk 143

56. NJ.—Harris v Neswit, 146 A 309, 104 N J Eq 465

57. Ky.—Pittman v Wakefield, 13 S W 525 90 Ky 171, 11 Kv L 972
40 C J p 334 note 65

58. NY.—Hallahan v Herbert, 4 Daly 209, 11 Abb Pr N S, 326, affirmed 57 N Y 409

59. Mo.—Allen Estate Ass'n v Boeke, 254 S W 858, 300 Mo 575
40 C J p 334 note 67

60. Mo.—Allen Estate Ass'n v Boeke, supra
40 C J p 334 note 67

61. Ill.—Meeks v Sims, 84 Ill 422

62. Me.—Salem First Nat Bank v Redman, 57 Me 405
40 C J p 335 note 76

63. Tex.—Shuley-Self Motor Co v Simpson, Civ App, 195 S W 2d 951
Necessity for continued possession of motor vehicle in order to preserve mechanic's lien thereon see the C J S. title Motor Vehicles § 750, also 42 C J p 821 note 49-p 822 note 63

64. Mich.—United Fuel & Supply Co v Manteuffel, 214 N W 191, 239 Mich 190
40 C J p 335 note 77

Perfecting lien by furnishing owner with statement or account see supra § 180

Demand

Under statute, demand for statement of materials furnished by lien claimant need not be in any particular language, materialman will not be heard to say that demand for statement of materials furnished, served on agent who filed lien, was not served on proper officer or agent—United Fuel & Supply Co v Manteuffel, supra

Sufficiency of compliance with demand

Mich.—United Fuel & Supply Co v Manteuffel, supra
40 C J p 335 note 77 [a]

Public buildings

Statute releasing building from lien of materialman failing to furnish owner itemized statement of materials within specified number of days after receiving written request does not apply to materialman on public building—Appalachian Marble Co v Boone, Eason & Wood, 171 S E 751, 114 W Va 307

65. Mich.—William Munroe Co v Scherer, 183 N W 734, 215 Mich 26

66. Mich.—Frohlich v Beecher, 102 N W 736, 139 Mich 278

67. Mich.—William Munroe Co v Scherer, 183 N W 734, 215 Mich 26—Rohde v Weinberg, 120 N W 789, 156 Mich 313

68. Cal.—Pilestrand v Greenamyre, 168 P 1161, 34 Cal App 799.

a difference in the text of the mechanics' lien laws⁶⁹ rather than from any real difference in principle.⁷⁰ In some jurisdictions the destruction of the building or improvement out of which the lien is claimed to arise defeats the lien on the land,⁷¹ regardless of whether the claim of lien is filed before⁷² or after⁷³ the building is destroyed, and regardless of whether the building is completed⁷⁴ or uncompleted⁷⁵ at the time of its destruction. In such a jurisdiction, however, it has been held that the lien survives the destruction of the building where such destruction arises from fault of the owner.⁷⁶

In other jurisdictions, however, it is the rule that a mechanic's lien which has attached to a building or improvement and the land on which it is situated is not defeated or extinguished as to the land by the destruction of the building or improvement by fire or other casualty⁷⁷ even though the destruction takes place before the lien notice, claim, or statement is filed.⁷⁸ This rule has been held applicable even though the building or improvement is destroyed before the work thereon is completed,⁷⁹ at least where by the terms of the contract the risk of destruction by fire was to be on the owner,⁸⁰ but not, it has been held, where under the terms of the contract nothing is due from the owner to the contractor until completion of the building.⁸¹

or where the contract fails to provide that loss from accidental causes is to be borne by the owner.⁸² So also it is held in some jurisdictions,⁸³ but not in others,⁸⁴ that the removal of the building or improvement after the lien has attached does not defeat the lien on the land.

A partial destruction of a structure or improvement does not defeat the lien entirely,⁸⁵ it may attach to the remains of the building or the materials or machinery saved⁸⁶ or to the proceeds of a sale thereof.⁸⁷

§ 243. Transfer of Title in General

- a In general
- b Before or after perfection of lien
- c Before or after commencement of action to enforce lien
- d Notice or absence thereof

a. In General

A sale or conveyance of the premises after a mechanic's lien has attached thereto generally does not affect the rights of the lienor.

A sale or conveyance of the premises after a mechanic's lien has attached thereto generally does not affect the rights of the lienor,⁸⁸ especially where the deed expressly provides that it is subject to ma-

Or—Chenoweth v Spencer, 131 P 302, 64 Or 540, Ann Cas 1914D 678

69. Cal—Pilststrand v Greenamyre, 168 P 1161, 34 Cal App 799

Or—Chenoweth v Spencer, 131 P 302, 64 Or 540, Ann Cas 1914D 678

70. Cal—Pilststrand v Greenamyre, 168 P 1161, 34 Cal App 799

71. Cal—McIntosh v Funge, 292 P 960, 210 Cal 592, 74 A L R 420

NY—John Kennedy & Co v New York World's Fair 1939, 22 N Y S 2d 901, 260 App Div 386, affirmed 41 NE 2d 789, 288 NY 494

40 C J p 335 note 84

72. Pa—Third Associate Reformed Presb Church v Stettler, 26 Pa 246

40 C J p 335 note 85

73. Cal—Kern v San Francisco Co, 124 P 862, 19 Cal App 157

40 C J p 335 note 86

74. Cal—Kern v San Francisco Co, supra

75. Cal—Watson v Alta Inv. Co, 108 P 48, 12 Cal App 560

76. Cal—McIntosh v Funge, 292 P 960, 210 Cal 592, 74 A L R 420

Violation of building laws

Materialmen were entitled to lien on land, notwithstanding house, because of owner's noncompliance with building laws, was completely demolished by order of board of pub-

lic works—McIntosh v Funge, supra

77. Idaho—Chamberlain v Lewiston, 129 P 1069, 23 Idaho 154

40 C J p 335 note 89

78. Ind—Smith v Newbaur, 42 NE 40, 1094, 144 Ind 95, 33 L R A 685

40 C J p 335 note 90

79. Wis—Halsey v Waukesha Springs Sanitarium, 104 NW 94, 125 Wis 311, 110 Am SR 838

40 C J p 335 note 91

80. Ill—Sontag v Brennan, 75 Ill 279

81. Iowa—Kawneer Mfg Co v Renfro, 173 NW. 899, 186 Iowa 1344

82. Mo—Shine v Heimbarger, 60 Mo App 174

83. Ill—Steigleman v McBride, 17 Ill 300

40 C J p 336 note 95.

84. Pa—In re Willauer's Estate, 1 Chest Co 533

85. Cal—Butler v Ng Chung, 117 P 512, 160 Cal 435, Ann Cas 1913A 940

40 C J p 336 note 97.

86. Ind—Holland v Farrier, 130 NE 823, 75 Ind App 368

87. Ill—Paddock v. Stout, 13 NE 182, 121 Ill 571

88. Ala—Becker Roofing Co v

Farmers' & Merchants' Bank of Piedmont, 134 So 635, 223 Ala 132

Colo—Kingdom of Gilpin Mines v McNeill, 291 P 1036, 88 Colo 44

DC—Deland v Wagner, 64 F 2d 552, 62 App DC 54

Ill—Crown v Meyer, 174 NE. 55, 342 Ill 46

Md—Wilhelm v Roe, 149 A 438, 158 Md 615

Mo—Dierks & Sons Lumber Co v Runnalls, App, 54 SW 2d 447—

Waters v. Gallemore, App, 41 SW 2d 870—R D Kurtz, Inc, v Field, 14 SW 2d 9, 223 Mo. App 270—

H B McCray Lumber Co v Standard Const Co, App, 285 SW 104

NH—Boulia-Gorrell Lumber Co v East Coast Realty, 148 A. 28, 84 NH 174, 69 A L R 1200

Wis—Capital City Lumber Co v Schroeder, 242 NW. 489, 208 Wis 157

40 C J p 336 note 2

Lack of notice as defeating lien see infra subdivision d of this section

Contrary clause as negatory

Owner of property making contract for sale of property to contractor requiring contractor to make improvements could not, by clause in contract, defeat materialman's statutory rights—People's Building & Loan Ass'n v Leslie Lumber Co, 38 SW 2d 759, 183 Ark 800.

terial and labor liens⁸⁹ The rule applies to all the property covered by the lien,⁹⁰ but it does not extend to property not covered by the lien⁹¹ Also the rule may apply so as to allow the establishment of a lien for work done or materials furnished after a sale of the premises, where such work was done or materials were furnished pursuant to the original contract;⁹² but not otherwise, at least where the materials were furnished without the knowledge of the purchaser⁹³ A claim for work done under a separate contract with the purchaser of premises has been held to attach as a lien superior to the title of the purchaser where the claim is registered within the time required by law⁹⁴

b. Before or after Perfection of Lien

The rule that a mechanic's lien survives a subsequent conveyance does not apply where the claimant fails to perfect his lien, but has been held to apply where the lien is perfected after the conveyance.

The general rule that, after a mechanic's lien has attached, it is not defeated by a subsequent conveyance of the property does not apply where claimant fails to perfect his lien in accordance with statutory requirements⁹⁵ such as where he fails to file his claim within the statutory period⁹⁶ and in the proper county,⁹⁷ or where he fails to pursue the alternative course of bringing suit in the proper court and within the proper time⁹⁸ However, the general rule does apply where the conveyance is made after a valid and sufficient lien claim or notice is filed,⁹⁹ and it has been held that a person acquiring property subject to a mechanic's lien continues to hold it subject to the lien claimant's right

to foreclose the lien provided the lien is duly perfected and preserved¹ The rule that a mechanic's lien survives transfer of title has been held applicable even though the conveyance is made before the filing of the lien notice or claim required by statute to perfect the lien,² where the time for the perfection of the lien has not yet expired,³ but, as discussed infra subdivision d of this section, under some statutes the lien does not attach as against a bona fide purchaser without actual notice of the lien who purchases before the filing of the lien notice

c. Before or after Commencement of Action to Enforce Lien

The rule that a mechanic's lien survives a subsequent conveyance may apply whether the deed was executed and recorded before or after commencement of a suit to enforce the lien.

The general rule that, where the lien has attached, the rights of the lienor are not affected by a subsequent sale or conveyance of the premises may apply where the deed was executed and recorded before the commencement of an action to enforce the lien,⁴ but it does not apply where, under the constitutional or statutory provisions, the lien has not attached prior to the institution of the suit⁵ A conveyance after proceedings to enforce the lien have been commenced⁶ and a certificate thereof has been filed as provided by statute⁷ is subject to the lien, and a purchaser of property, who has actual notice of a decree foreclosing a mechanic's lien thereon, takes the property subject to the lien⁸ although no notice of lis pendens or transcript of the

89. Ark.—Rust v Kelley Bros Lumber Co, 31 SW2d 973, 180 Ark 517

40 C J p 336 note 3

90. Minn.—Dower Lumber Co v Rodewald, 196 NW 473, 157 Minn 314

40 C J p 336 note 4

91. Tex.—A Leschen & Sons Rope Co v Moser, Civ App., 159 SW 1018

92. Tex.—Tull v Fletcher, 196 SW 436, 196 Mo App 573
40 C J p 337 note 6

93. Md.—Heath v Tyler, 44 Md. 312
40 C J p 337 note 7

94. Tenn.—Brown v Brown & Co, 160 SW2d 431, 25 Tenn App 509

95. La.—Shepherd v Leeds, 12 La. Ann 1—Hortman-Salmen Co v Smith, 4 La App 674

96. Ill.—Von Tobel v Ostrander, 42 NE 152, 158 Ill 499

97. US.—Sexton Mfg Co v Singer Sewing Mach Co, Ill, 194 F 56, 114 CCA, 76.

98. US.—Sexton Mfg Co v. Singer Sewing Mach Co, supra

99. SD.—H C Behrens Lumber Co v Lager, 128 NW 698, 26 SD 160, Ann Cas 1913A 1128
40 C J p 337 note 13

1. Okl.—Claude Ricker Lumber & Paint Co v Barger, 158 P2d 1021, 195 Okl 504—Elm Oil Co v Clark Lumber Co, 65 P2d 1221, 179 Okl 341

2. NC.—McNeal Pipe & Foundry Co v Howland, 16 SE 857, 111 NC 615, 20 LRA 743
40 C J p 337 note 14

3. Ala.—Grimsley v First Ave Coal & Lumber Co, 115 So 90, 217 Ala 159

Liability out of sale proceeds

Where owner sold houses before the expiration of time for filing of subcontractor's lien and at a time when subcontractor's lien might attach to the houses, owner became liable to subcontractors out of the proceeds of the sale for the balance due on a contract to furnish concrete

work for the houses—Will B Miller Co v Laval, 140 SW2d 376, 283 Ky 55

4. Ga.—Oglethorpe Savings & Trust Co v Morgan, 103 SE 528, 149 Ga 787

5. Fla.—Smith v Gauby, 30 So 683, 43 Fla 142
40 C J p 337 note 20

6. Ill.—Bennett v Wilmington Star Min Co, 7 NE 498, 119 Ill 9.
40 C J p 338 note 21

Bound by decree

A person acquiring property subsequent to filing of action asserting a claim to a mechanic's lien against property would be bound by decree in such action unless such person acquired property without notice or knowledge of such claim—Hilton v Reed, 116 P2d 98, 46 Cal App 2d 449

7. Me.—Witham v Wing, 81 A. 100, 108 Me 364

8. Wash.—Frank v Jenkins, 40 P 220, 11 Wash 611.

judgment is filed with the county auditor.⁹ However, where a personal judgment only is rendered in a suit wherein foreclosure of a mechanic's lien is prayed, the title of one purchasing the property during pendency of the suit is relieved from the lien claimed.¹⁰

d. Notice or Absence Thereof

A purchaser with notice of a mechanic's lien takes subject thereto, but it has been held that a purchaser without actual notice of the lien claim and prior to the filing of notice of lien takes free of the lien.

The general rule that a sale or conveyance of the property after a mechanic's lien has attached thereto does not defeat the lien applies where the purchaser has notice of the lien,¹¹ whether actual,¹² or constructive.¹³ So a purchaser acquiring title after commencement of work but before perfection of the lien takes subject thereto if buying with notice of the facts¹⁴ and of the claim of lien.¹⁵ It has been generally held, however, that a purchaser

for value without notice takes free and clear of a mechanic's lien,¹⁶ as for labor¹⁷ or materials,¹⁸ and that, with respect to a bona fide purchaser, the lienholder can have no greater rights than the owner through whom he claims.¹⁹

Under some statutes the lien does not attach as against a bona fide purchaser without actual notice of the lien who purchases before the filing of the lien notice,²⁰ although after the work is commenced,²¹ provided the conveyance is properly recorded prior to the filing or registration of the lien.²² According to other authorities a purchaser, although he acquires the property before filing of the lien notice and without actual notice of the lien claim, may nevertheless take the property subject to the lien²³ on the theory that the mere fact that buildings or improvements are being erected on the property constitutes constructive notice of the mechanics' liens to persons dealing with the property.²⁴ It has also been held that a purchaser who

9. Wash.—Frank v Jenkins, *supra*.

10. Okl.—South Texas Lumber Co. v Epps, 150 P 164, 48 Okl 372

11. Conn.—Peck v Brush, 98 A 561, 90 Conn 651

Or—J W Copeland Yards v Sheridan, 296 P 838, 136 Or 37, rehearing denied 297 P 837, 136 Or 37
Tex.—Brick & Tile v Parker, 186 S W 2d 66, 143 Tex 383

Notice through deed

Purchaser from owner's grantee was affected with notice in title deed of his vendor that conveyance was subject to materialman's liens—Rust v Kelley Bros Lumber Co., 21 S W 2d 973, 180 Ark 517

12. Tex.—Guarantee Savings, Loan & Investment Co v Cash, Civ App., 87 S W 749
40 C J p 338 note 27

13. Fla.—Sandquist & Snow v Kellogg, 132 So 65, 101 Fla 568, reheard 136 So 235, 101 Fla 579

Mich.—Strand Lumber Co. v Dostie, 245 N W 777, 260 Mich 422

Or—Allen v Roufs, 30 P 2d 766, 146 Or 461

Filing of statement

Purchasers, after statement of lien was filed, were held to have constructive notice preventing them from asserting title to prejudice of lien claimant.—Washtenaw Lumber Co v Belding, 208 N W 152, 233 Mich 608,

Recording

Recording of statement of mechanics' lien is constructive notice to purchaser, but only for six months after maturity of indebtedness—Reeder v Cox, 118 So 338, 218 Ala. 182

14. Ala.—Benson Hardware Co v Jones, 135 So 441, 223 Ala 287

Effect of purchase before or after perfection of lien generally see *supra* subdivision b of this section

15. Ga.—Oglethorpe Savings & Trust Co v Morgan, 102 S E 528, 149 Ga 787

16. Ga.—Dwight v. Acme Lumber & Supply Co., 199 S E 178, 186 Ga 825

N Y.—Bay Ridge Plastering Corporation v John B Sweeney & Son Corporation, 44 N Y S 2d 166

Proof of status

A recital of consideration in deed was sufficient to show prima facie that purchaser was "subsequent purchaser for valuable consideration" within statute requiring filing of statement of claim within specified number of days after completion of work to preserve mechanics' lien against subsequent purchaser for valuable consideration—Brown v Brown & Co., 160 S W 2d 431, 25 Tenn App 509

17. Ga.—Beall v Butler, 54 Ga 43

18. Ga.—Caldwell v Northwest Atlanta Bank, 21 S E 2d 619, 194 Ga 370—Dwight v Acme Lumber & Supply Co., 199 S E 178, 186 Ga 825

66 C J p 1194 note 7

Lien from time of notice

Materialman acquires lien on realty only from time of record of notice as against purchasers without notice—Frank T Budge Co v Hortt, C C A Fla., 32 F 2d 157

19. Cal.—Hayward Lumber & Investment Co v Naslund, 13 P 2d 775, 125 Cal App 34

Okl.—First Nat Bank v Horsley, 49 P 2d 495, 174 Okl 83

20. Mich.—Sisson v Holcomb, 26 N W 155, 58 Mich 634

40 C J p 337 note 15, p 338 note 29

21. N Y.—Ernst v Reed, 49 Barb 367

40 C J p 337 notes 15, 16

22. N Y.—Lemmer v Morison, 35 N. Y S 623, 89 Hun 277

40 C J p 337 note 17

23. N C.—Burr v Maulsby, 6 S E 108, 99 N C 263, 6 Am S R 517

40 C J p 338 note 30

24. Mont.—Continental Supply Co v White, 12 P 2d 559, 93 Mont 254

W Va.—Thorn v Bairinger, 81 S E 846, 73 W Va 618, Ann Cas 1916B 625

40 C J p 338 note 31

Building or repair work as affording notice

(1) Purchaser acquiring interest during construction or repair of property, is deemed to have notice of laborer's or materialman's lien

U S.—Frank T Budge Co v Hortt, C C A Fla., 32 F 2d 157

Wash.—National Surety Co v Swasey, 282 P 209, 154 Wash 369

(2) Material or labor in evidence on the land is notice to public of fact of furnishing of such material or labor—Botsford Lumber Co v Schriver, 206 N W 423, 49 S D 68

Recently improved property

(1) Purchaser of recently improved property must take notice of right to file mechanic's lien within ninety days after any work or labor has been performed or material furnished even though record fails to show such lien—Arkansas Foundry Co v American Portland Cement Co, 75 S W 2d 387, 189 Ark 779

(2) Persons acquiring deeds and

buys in good faith for value and without notice takes the land discharged of the mechanic's lien, but that the lien is preserved in full force and unimpaired as against the building.²⁵ A person who, with notice of the nature and amount of a contractor's mechanic's lien, takes a conveyance of the property subject to, it cannot be affected by a subsequent alteration of the contractor's contract.²⁶

Notice to lienor. It has been held that a purchaser's possession of property may charge the lienor with notice of the purchaser's rights notwithstanding failure to record the contract of purchase,²⁷ and that materialmen furnishing supplies to the purchaser are bound by the terms of a previously executed deed between the purchaser and the vendor against whom materialmen seek to foreclose their liens.²⁸ It has also been held, however, that a lienor doing work under a contract with the owner is not bound to take notice of a subsequent conveyance of the property.²⁹

§ 244. — Judicial Proceedings or Sale

On a judicial or execution sale of property a mechanic's lien thereon may attach to the proceeds of sale.

On a judicial³⁰ or execution³¹ sale of property subject to a mechanic's lien, the lien may be discharged as to the real property and transferred to the proceeds of the sale. The lien is discharged from the property where the judicial sale is under a lien or encumbrance prior to the mechanic's lien,³² and in some states the same result follows even though the mechanic's lien is prior to the lien or claim under which the sale is made.³³ Where there are several mechanics' liens arising out of the same improvement and thus of equal rank, a sale under

one of the liens passes the land free from all the others.³⁴

Lien, or priority thereof, limited to land or building alone. The foreclosure of a mechanic's lien, prior in time but limited to the building, will not divest a subsequent mechanic's lien on the land, the two liens attaching on different properties.³⁵ Also, under some statutes where land is sold under a mortgage or deed of trust, a mechanic's lien which attached subsequently to the origin of the encumbrance is lost as to the land,³⁶ but is not extinguished as to the buildings, erections, or improvements for which the labor is performed or the materials are furnished.³⁷ There is also authority to the effect that the holder of a privilege on a building loses it where he permits a sale to be made at the instance of another person without securing an appraisal of the building separate from the lot.³⁸

Contract during pendency of foreclosure proceedings. Where a person improves property under a contract made with the owner during the pendency of an action to foreclose a prior mortgage, it has been held that a decree of sale in such foreclosure proceedings will cut off all the rights of the mechanic or materialman to a lien.³⁹

§ 245. Extinguishment or Merger of Interest or Estate to Which Lien Attached

- a In general
- b Leasehold
- c Vendee's interest

a. In General

The extinguishment or merger of an estate or interest to which a mechanic's lien attaches may destroy

mortgage within period for suit to enforce materialman's lien were not innocent purchasers—*Bell v Koontz*, 290 S.W. 597, 172 Ark. 870.

25. *Miss*—*Buchanan v Smith*, 43 Miss. 90.

26. *Cal*—*Soule v Dawes*, 7 Cal. 575.

27. *Mich*—*F. M. Sibley Lumber Co v Gottesman*, 22 N.W.2d 72, 314 Mich. 60.

28. *Tex*—*Guggenheim v Dallas Plumbing Co*, Com.App. 59 S.W.2d 105.

29. *Mo*—*Brown v Davis*, App. 249 S.W. 696—*Tull v Fletcher*, 196 S.W. 436, 196 Mo.App. 573.

30. *Pa*—*Rosenberg v Cupersmith*, 87 A. 570, 340 Pa. 162, 47 L.R.A., N.S., 706, Ann.Cas.1915A 312—*New Jersey Bridge Co v West Chester, K & W. Electric R Co*, 35 Pa.Co. 78.

Discharge of lien by:

Appointment of receiver for principal contractor see the C.J.S. title Receivers § 137, also 53 C.J. p 126 notes 37-54.

Bankruptcy of contractor see Bankruptcy § 213 c.

Death of principal contractor after completion of work see supra § 97.

Insolvency of contractor see Insolvency § 11 c.

Principal contractor's assignment for benefit of creditors see Assignments for Benefit of Creditors § 358.

31. *Ga*—*Durham v Mayo*, 32 Ga. 192.

32. *Pa*—*Rosenberg v Cupersmith*, 87 A. 570, 340 Pa. 162, 47 L.R.A., N.S., 706, Ann.Cas.1915A 312, 40 C.J. p 339 note 45.

33. *Del*—*Sharpe v Tatnall*, 5 Del. Ch. 302.

34. *Pa*—*Anshutz v McClelland*, 5 Watts 487, 40 C.J. p 339 note 48.

35. *Iowa*—*Clark v Parker*, 12 N.W. 553, 58 Iowa 509.

36. *Mo*—*Crandall v Cooper*, 62 Mo. 478—*McAdow v Sturtevant*, 41 Mo. App. 220.

37. *Mo*—*Crandall v Cooper*, 62 Mo. 478.

38. *SD*—*Laird-Norton Co v Herker*, 62 N.W. 104, 6 S.D. 509.

39. *La*—*Succession of Cox*, 32 La. Ann. 1035, 40 C.J. p 339 note 52.

39. *Ill*—*Green v Sprague*, 11 N.E. 859, 120 Ill. 416—*Davis v Connecticut Mut. Life Ins Co*, 84 Ill. 508.

the lien, and a conveyance of the property to the lienor may merge the lien in the legal title, although it will not necessarily have such effect.

A conveyance of the property to the lienor does not necessarily merge the lien in the legal title,⁴⁰ and, although it has been held that the lien is satisfied and discharged by the conveyance where a part of the consideration therefor is the release of the indebtedness and the lien,⁴¹ it has also been held that the mere recitation in the deed from the owner to the lienholder that the deed was accepted in cancellation of the debt secured by the lien is not conclusive as to the lienholder's intention to merge the two estates.⁴² A mechanic's lien sold and assigned to the owner of the legal title of the property does not merge in the legal title where there was an evident intention to keep the lien alive and a merger would be inequitable and unjust.⁴³ Ordinarily, where mechanics' liens are entered against an equitable estate, they survive or perish with it,⁴⁴ but where one with an equitable title to realty, such as that of a purchaser, authorizes construction work to which a mechanic's lien attaches, the fact that his equitable title is subsequently merged in the legal title through transfer from the legal owner does not destroy the mechanic's lien on the property.⁴⁵

Where the claimant of a mechanic's lien conveys the premises to which the lien attached to the party against whom the lien is asserted, the lien has been held to be merged in the deed of conveyance.⁴⁶

b. Leasehold

A mechanic's lien attaching to a leasehold interest or estate survives a surrender or purchase of such interest by the lessor, but it has been held that the lien will be defeated by expiration or forfeiture of the lease.

The acquisition by the lessor of the leasehold estate, by surrender or purchase, prior to the expiration of the lease, cannot defeat mechanics' liens which have attached to the leasehold estate before the surrender or purchase,⁴⁷ and it has been held that in such case the entire estate becomes liable for payment of the liens.⁴⁸ On the other hand, it has been held that a lien attaching only to the leasehold interest expires with the expiration of the lease.⁴⁹ So also it has been held that the lien cannot be enforced after the lease has been forfeited,⁵⁰ as for nonpayment of rent, pursuant to a provision therein,⁵¹ and the fact that after the forfeiture the owner of the fee purchases the improvements placed by the lessee on the property does not alter the rule,⁵² but the rule is subject to variation under the

40. Idaho—*Corpus Juris* cited in *Brown v Hawkins*, 158 P 2d 840, 846, 66 Idaho 351
40 C J p 338 note 36.

Rights of mortgagee

Where first mortgagee had subordinated his lien to that of mechanic's lienor, and mortgagor had thereafter conveyed mortgaged premises to lienor, lienor's lien would not be regarded as merged with his deed, with respect to first mortgagee, since it was to interest of lienor to keep the two estates separate—*North Texas Building & Loan Ass'n v Overton*, Tex Civ App, 91 S W 2d 429

41. Tex—*Simpson v Masterson*, Civ App, 31 S W 419.

42. Tex—*North Texas Building & Loan Ass'n v Overton*, 86 S W 2d 738, 126 Tex 104, error refused, answers conformed to, Civ App, 91 S W 2d 429

Liability on note

Acceptance by mechanic's lienor of deed from owner of property reciting cancellation of note representing indebtedness secured by mechanic's lien was held merely to relieve owner of property at time of improvement and his grantee from liability on note secured by lien—*North Texas Building & Loan Ass'n v Overton*, 86 S W 2d 738, 126 Tex 104, error refused, answers conformed to, Civ App, 91 S W 2d 429

43. Or.—*Title Guarantee & Trust*

Co v Wrenn, 56 P 271, 35 Or 62, 76 Am SR 454

44. Pa.—*Appeal of Campbell*, 36 Pa. 247, 78 Am D 375

Va.—*Feuchtenberger v Williamson*, 120 SE 257, 137 Va 578

45. Cal.—*Hammond Lumber Co v Goldberg*, 13 P 2d 814, 125 Cal App 130—*Bender v Palmer*, 1 Cal Unrep Cas 601

46. Idaho—*Finlayson v Waller*, 134 P 2d 1069, 64 Idaho 618

Failure to reserve lien

Under statute giving to word "grant" as used in a deed implication that estate conveyed is free from encumbrances of grantor or any one claiming under him, where claimant of mechanic's lien on apartment for services and materials furnished under contract conveyed by grant deed premises to party against whom lien was asserted, claim of lien for services and materials prior to delivery of deed was merged in deed and unenforceable in absence of reservation of title because of lien or otherwise—*Finlayson v Waller*, supra

47. Colo.—*Evans v Young*, 15 P 424, 10 Colo 316, 3 Am SR 583
40 C J p 339 note 55

48. Colo.—*Evans v Young*, supra
40 C J p 339 note 55

49. La.—*Callender v Marks*, App, 166 So 891

Rights of lessor

(1) Under statute a lessor was held entitled to cancellation of lien recorded by contractor engaged by lessee to construct reservoir for swimming pool, after expiration of lease, where lessee was not lessor's agent in undertaking, but lessor was not entitled to attorney's fees in absence of showing that claimant acted maliciously in filing or recording affidavit asserting lien and privilege—*Callender v Marks*, supra

(2) On the other hand, under the same statute, the right of materialman to lien on dwelling for materials furnished lessee was held not affected by subsequent judgment terminating lease and decreeing lessor owner of dwelling—*Shreveport Long Leaf Lumber Co v Parker*, La App, 144 So 153

50. Ill.—*Williams v Vanderbilt*, 34 NE 476, 145 Ill 238, 36 Am SR 486, 21 L R A 489

Wash.—*Colby & Dickinson v Baker*, 261 P 101, 145 Wash 584
40 C J p 339 note 57

51. Cal.—*Gaskill v. Trainer*, 3 Cal. 334

Ill.—*Williams v Vanderbilt*, 34 NE 476, 145 Ill 238, 36 Am SR 486, 21 L R A 489

52. Wash.—*Masow v Fife*, 39 P. 140, 10 Wash 538.

statutes of some jurisdictions⁵³ and the circumstances of some cases⁵⁴

c. Vendee's Interest

A mechanic's lien ordinarily survives a voluntary transfer of the vendee's interest to which it is attached, but not a forfeiture thereof.

It has generally been held that, where a purchaser of land under a contract of sale, to whose interest a mechanic's lien has attached, loses his interest in the land by failure to comply with and complete the contract, no lien can be enforced against the land,⁵⁵ although there is some authority to the contrary.⁵⁶ However, in some,⁵⁷ although not all,⁵⁸ jurisdictions a lien may be enforced against the building or other improvement, as under statutes expressly providing that forfeiture of any title or claim of the contracting party shall not defeat a mechanic's lien on the buildings or structures concerned.⁵⁹

Where the vendor repurchases or takes a surrender of the vendee's interest, the lien remains⁶⁰ unless, because of the purchaser having forfeited his rights, his assignment amounts to nothing more than a surrender of possession, without the formality of an eviction.⁶¹ The rule is especially applicable where the vendor knew at the time that the improvements had been made,⁶² or where the intention of the parties to preserve the lien is clear and

manifest,⁶³ as where, in consideration of the surrender or reconveyance, the vendor promised or agreed to pay the indebtedness secured by the lien.⁶⁴ In some cases the courts have enforced the lien against the whole estate where the vendor, in consideration of the surrender or reconveyance, agreed or undertook to pay the indebtedness secured by the lien⁶⁵ and there was no equitable consideration requiring the vendee's interest to be treated as still outstanding.⁶⁶

§ 246. Release

- a In general
- b Construction, operation, and effect

a. In General

A mechanic's lien is subject to release, but, in order to be effective, such release should be supported by sufficient consideration and comply with statutory requirements.

A mechanic's lien may be waived or released by the express agreement of the lienor entered into subsequent to the original contract,⁶⁷ as during the progress of the work.⁶⁸ In so far as statutes prescribe the method by which a mechanic's lien may be released, a strict compliance with the statutory requirements is essential.⁶⁹ Ordinarily, a release of a mechanic's lien, in order to be effective, must be founded on a consideration,⁷⁰ and if the consid-

53. Ind.—Toner v Whybrew, 98 N E 450, 50 Ind App 387.
40 C J p 339 note 60

54. Minn.—Madler v Twin City Box Factory, 145 N.W. 1072, 125 Minn 207
40 C J p 339 note 61

55. Iowa.—Hunt Hardware Co v Herzoff, 195 N.W. 264, 198 Iowa 715
40 C J p 340 note 63

Interest in premises

Mechanic's lien against purchaser's interest in premises was divested on lawful forfeiture of purchaser's contract because of defaults—Darragh v Knolk, 254 N.W. 23, 218 Iowa 686
56. Minn.—Brown v Jones, 55 N.W. 54, 52 Minn 484
57. Mont.—Stritzel-Spaberg Lumber Co v Edwards, 144 P 772, 50 Mont 49
40 C J p 340 note 66

58. Ind.—Davis v Elliott, 34 N.E. 591, 7 Ind App 246

59. Mich.—Lazenby v Wright, 229 N.W. 437, 250 Mich 303—Washtenaw Lumber Co v Belding, 208 N.W. 152, 233 Mich 608

60. N.D.—Salzer Lumber Co v Claf-lin, 113 N.W. 1036, 16 N.D. 601.
40 C J p 340 note 68.

61. Or.—Alaska Plumbing Co v Bingham, 115 P 159, 58 Or 506
40 C J p 340 note 69

62. N.D.—Salzer Lumber Co v Claf-lin, 113 N.W. 1036, 16 N.D. 601
40 C J p 340 note 70

63. Iowa.—Holstein Lumber Co v Hansen, 201 N.W. 46, 198 Iowa 1264
64. Iowa.—Holstein Lumber Co v Hansen, supra
65. Ill.—Adams v Russell, 85 Ill 284
Minn.—Boyd v Blake, 43 N.W. 483, 43 Minn 1.
66. Minn.—Boyd v Blake, supra
67. Neb.—Corpus Juris cited in Gibson v Koutsky-Brennan-Vana Co., 9 N.W. 2d 298, 302, 143 Neb 326
40 C J p 340 note 76

Action to compel release
In action to compel defendant to release a mechanic's lien filed against plaintiff's property for material furnished and to recover damages for failure to release on notice, on ground that defendant had executed waiver of the lien, directing an accounting between the parties, and awarding personal judgment against plaintiff owners for the difference between value of material furnished

and damages for failure to release lien was not error, since plaintiffs were personally liable for material furnished even though filing of the lien was waived—Gibson v Koutsky-Brennan-Vana Co., 9 N.W. 2d 298, 143 Neb 326.

Nullity
Where an alleged mechanic's lien is a nullity, a so-called "release" thereof is likewise a nullity—Ridley Park Borough School Dist v Seaboard Surety Co, 14 Pa.Dist. & Co 93, 21 Del Co 519, affirmed Ridley Park Borough School Dist, to Use of Gould, Inc., v Seaboard Surety Co, 101 Pa.Super 248.

68. Pa.—Brown v. Williams, 13 A 519, 120 Pa 24, 6 Am S.R. 689
69. Fla.—Myers v Harkins, 136 So 382, 102 Fla. 577
Sufficient compliance shown
Wis.—Yawkey-Crowley Lumber Co v Acker, 217 N.W. 313, 194 Wis 504
70. Fla.—Corpus Juris quoted in Bruce Const. Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla 93
Mo.—Corpus Juris cited in Giammarino v J W Caldwel Const Co, App., 72 S.W. 2d 159, 160.

69. Fla.—Myers v Harkins, 136 So 382, 102 Fla. 577
Sufficient compliance shown
Wis.—Yawkey-Crowley Lumber Co v Acker, 217 N.W. 313, 194 Wis 504
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69. Fla.—Myers v Harkins, 136 So 382, 102 Fla. 577
Sufficient compliance shown
Wis.—Yawkey-Crowley Lumber Co v Acker, 217 N.W. 313, 194 Wis 504
70. Fla.—Corpus Juris quoted in Bruce Const. Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla 93
Mo.—Corpus Juris cited in Giammarino v J W Caldwel Const Co, App., 72 S.W. 2d 159, 160.

69. Fla.—Myers v Harkins, 136 So 382, 102 Fla. 577
Sufficient compliance shown
Wis.—Yawkey-Crowley Lumber Co v Acker, 217 N.W. 313, 194 Wis 504
70. Fla.—Corpus Juris quoted in Bruce Const. Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla 93
Mo.—Corpus Juris cited in Giammarino v J W Caldwel Const Co, App., 72 S.W. 2d 159, 160.

69. Fla.—Myers v Harkins, 136 So 382, 102 Fla. 577
Sufficient compliance shown
Wis.—Yawkey-Crowley Lumber Co v Acker, 217 N.W. 313, 194 Wis 504
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69. Fla.—Myers v Harkins, 136 So 382, 102 Fla. 577
Sufficient compliance shown
Wis.—Yawkey-Crowley Lumber Co v Acker, 217 N.W. 313, 194 Wis 504
70. Fla.—Corpus Juris quoted in Bruce Const. Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla 93
Mo.—Corpus Juris cited in Giammarino v J W Caldwel Const Co, App., 72 S.W. 2d 159, 160.

eration fails the release is void⁷¹ and the lien may be enforced⁷² even though the release is under seal⁷³. Also, it has been held that, in order for a release of liens to be effective, it must be delivered to or for the use of the owner,⁷⁴ but a release may be effective not only as to the parties thereto, or the owner, but also as to the person for whose benefit it was intended⁷⁵. Where a release names no person to whom it is made and expresses no consideration, extrinsic evidence is admissible to show the consideration⁷⁶ and to determine in whose favor it was intended to be made⁷⁷. A mechanic's lienholder may be estopped to show that he is not bound by a release⁷⁸.

Fraud Whether the owner will be allowed in equity to take advantage of a release fraudulently procured by the contractor from a claimant depends on the agency of the contractor, and the owner will not be allowed to take any benefit or advantage of the release where the contractor was the agent of the owner,⁷⁹ and will be entitled to protection only to the extent that he has acted on the faith of the release where the contractor was the agent of claimant⁸⁰.

Cancellation of release. A release will not be canceled for failure to comply with conditions not communicated to the recipient of the release⁸¹ or for duress used in obtaining possession of the release after its return to the releasor through fraud⁸².

Penalty for failure to release lien Statutes providing that a materialman shall forfeit an amount not exceeding one half the amount claimed by his lien for failure to release the lien on notice in a proper case are remedial in nature⁸³ and permit recovery of actual damages in a civil action but limit the amount thereof.⁸⁴ The petition in such an action need not use the word "damages" but may follow the language of the statute.⁸⁵

b. Construction, Operation, and Effect

A release will be construed and given effect in accordance with its terms, purpose, and the subject matter to which it can apply.

A release will be construed and given effect according to its terms,⁸⁶ purpose,⁸⁷ and the subject matter to which it can apply.⁸⁸ Some releases are comprehensive and unqualified,⁸⁹ while others are limited in their application and operation⁹⁰. Ord-

Pa.—Beccia v House, 6 Pa Dist & Co 666, 17 Del Co 14
RI—Albert S Eastwood Lumber Co v Britto, 155 A 354, 51 RI 406
40 C J p 340 note 79

Check held sufficient consideration
Cal—Reinhart Lumber & Planing Mill Co v Hladik, App, 259 P 363

71. Fla.—Corpus Juris quoted in Bruce Const Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla. 93

Pa.—Benson v Mole, 9 Phila 66

72. Fla.—Corpus Juris quoted in Bruce Const Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla. 93

Pa.—Beccia v House, 6 Pa Dist & Co 666, 17 Del Co 14—Benson v Mole, 9 Phila 66

73. Fla.—Corpus Juris quoted in Bruce Const Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla. 93

Pa.—Benson v Mole, 9 Phila 66

74. Fla.—Corpus Juris cited in Bruce Const Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla. 93

Pa.—Wetherill v Harbert, 2 Pa 348

75. Fla.—Bruce Const. Corporation v Federal Realty Corporation, 139 So 209, 104 Fla. 93

76. Ill.—Paulsen v. Manake, 18 N E 275, 126 Ill 72, 9 Am SR 532

77. Ill.—Paulsen v Manake, supra

78. Fla.—Bruce Const Corporation v Federal Realty Corporation, 139 So 209, 104 Fla. 93

Estoppel to claim lien see supra §§ 229-231.

79. NJ.—Tuttle v Harris, 92 A 596, 83 NJ Eq 666.

80. NJ.—Tuttle v. Harris, supra. 40 C J p 340 note 88

81. Okl.—McKinley v A L Scott Lumber Co, 248 P 326, 118 Okl 205

82. Okl.—McKinley v A L Scott Lumber Co, supra

83. Neb.—Gibson v Koutsky-Brennan-Vana Co, 9 NW 2d 298, 143 Neb 326

84. Neb.—Gibson v Koutsky-Brennan-Vana Co, supra

85. Neb.—Gibson v Koutsky-Brennan-Vana Co, supra

86. Fla.—Corpus Juris quoted in Bruce Const Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla. 93

Ky.—Young v Porter-Leach Hardware Co, 148 SW 3d 718, 285 Ky 625

Mich.—Corpus Juris quoted in Sagnaw Lumber Co v Stirling, 9 N W 2d 680, 683, 305 Mich 473

NY.—Hoyt v Miner, 7 Hill 525

87. Fla.—Corpus Juris quoted in Bruce Const Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla. 93

Mich.—Corpus Juris quoted in Sagi-

naw Lumber Co v Stirling, 9 N W 2d 680, 683, 305 Mich 473

10 C J p 341 note 90

Not a certification

Release of a mechanic's lien is not a certification as to the amount of materials furnished, nor is it a certification or guaranty that materials of a similar kind were furnished by others—Tredway v Ingram, 94 Pa Super 310

88. Fla.—Corpus Juris quoted in Bruce Const Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla. 93

Mich.—Corpus Juris quoted in Sagnaw Lumber Co v Stirling, 9 N W 2d 680, 683, 305 Mich 473

40 C J p 341 note 91

89. Fla.—Corpus Juris quoted in Bruce Const. Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla. 93

Mich.—Corpus Juris quoted in Sagnaw Lumber Co v Stirling, 9 NW, 2d 680, 683, 305 Mich 473

40 C J p 341 note 92

Past and future items may be included within coverage of a release of a mechanic's lien—Hammond Hotel & Improvement Co v Williams, 176 NE 154, 95 Ind App 506, rehearing denied 178 NE 177, 95 Ind App 506—40 C J. p 341 note 92 [a]

90. Fla.—Corpus Juris quoted in Bruce Const Corporation v Federal Realty Corporation, 139 So 209, 211, 104 Fla. 93.

narily a valid release of a mechanic's lien will preclude its subsequent enforcement,⁹¹ although it may, while discharging the land and buildings, still leave a contractor liable to pay for labor and materials furnished by a subcontractor.⁹² A release of the lien as to part of the property covered thereby does not destroy the lien on the rest of the property,⁹³ but ordinarily, where one building is released, an item for work or materials therein cannot be included in a lien on the remaining buildings.⁹⁴

A lien once extinguished by virtue of a release cannot be revived or restored by any act of claimant,⁹⁵ but a conditional release is not effective unless the terms on which it is conditioned are complied with by the person asserting a right under it,⁹⁶ and, even though subcontractors may have released their lien, if the contractor fails to complete his contract and they are subsequently employed by the owner to complete certain work they can enforce a lien for what is done under the latter employment.⁹⁷ The release of a lessee under whom the work was done is an implied agreement to release the owner.⁹⁸

Effect of contractor's release on other claimants
Materialmen and subcontractors may be entitled to liens although the contractor has released his own

right to a lien,⁹⁹ but not where he has executed a release of all claims for mechanics' liens.¹

§ 247. Payment in General

Payment of the debt extinguishes a mechanic's lien.

A payment of the debt necessarily extinguishes the lien,² and a partial payment reduces the lien pro tanto³ although it does not destroy the lien for the unpaid balance⁴ unless it is so agreed,⁵ or unless by agreement the owner was liable only for the portion paid, the balance being assumed by a third person.⁶ A purchaser of property has the right to pay a debt thereon and demand cancellation of a mechanic's lien securing such debt,⁷ and under some statutes a lessor has the right to discharge a lien on buildings and improvements made by the lessee and prevent the sale or removal of the building or improvements by paying the purchaser its value,⁸ but such rights do not confer on the lessee the right to redeem the building for his lessor in the absence of express or implied power of attorney or agency.⁹

The rules governing payments generally are applicable in determining what constitutes a payment which will extinguish a mechanic's lien or reduce the amount thereof.¹⁰

Mich.—*Corpus Juris* quoted in *Saginaw Lumber Co v Stirling*, 9 N W 2d 680, 683, 305 Mich 473
40 C J p 341 note 93

91. Mich.—*Club Holding Co v Flint Citizens' Loan & Investment Co.*, 261 N W 133, 272 Mich 66

Va.—*Bernhard v Jones*, 159 S E 82, 156 Va 476

Unambiguous writing

Materialman's lien claimant signing instrument releasing lien was bound thereby, where writing was unambiguous, and mistake was physically and legally impossible—*Stockwell v Holt Land Co.*, 279 P 629, 48 Idaho 176.

92. N J.—*Celluzed Floors v. Glens Falls Indemnity Co of New York*, 156 A 816, 9 N J Misc 1111

93. Va.—*Corpus Juris* quoted in *Weaver v Harland Corporation*, 10 S E 2d 547, 551, 176 Va 224, 130 A L R 417

40 C J p 341 note 94

94. Va.—*Corpus Juris* quoted in *Weaver v Harland Corporation*, 10 S E 2d 547, 551, 176 Va 224, 130 A L R 417

40 C J p 341 note 95

No prejudice to third persons

It has been held that the balance due under an entire contract may be asserted as a lien against the remaining buildings where there are no third persons whose interests

were prejudicially affected by the release

Minn.—*Reilly v Williams*, 50 N W 826, 47 Minn 590

Va.—*Weaver v Harland Corporation*, 10 S E 2d 547, 176 Va 224, 130 A L R 417

95. Fla.—*Corpus Juris* quoted in *Bruce Const Corporation v Federal Realty Corporation*, 139 So 209, 211, 104 Fla 93

40 C J p 341 note 96

96. Fla.—*Corpus Juris* quoted in *Bruce Const Corporation v Federal Realty Corporation*, 139 So 209, 211, 104 Fla 93

Ill.—*Stolze Lumber Company v Oglesby*, 266 Ill App 569

40 C J p 341 note 97

97. Neb.—*Shropshire v Duncan*, 41 N W. 403, 25 Neb 485

98. N Y.—*Auerbach v. Alland*, 196 N Y S 145

99. N H.—*Boulia-Gorrell Lumber Co v East Coast Realty*, 148 A 28, 84 N H 174, 69 A L R 1200

40 C J p 341 note 1

1. Ill.—*Whitcomb v Eustice*, 6 Ill App 574

2. U S.—*In re Wil-Low Cafeterias*, D C N Y, 22 F Supp 533

Cal.—*Stafford v Geary*, 19 P 2d 837, 130 Cal App 32

Kan.—*Bell v Hernandez*, 30 P 2d 1101, 139 Kan 216

N Y.—*Rubin v Coles*, 253 N Y S 808, 142 Misc 139

40 C J p 342 note 9

3. Wash.—*Burnett v Ewing*, 80 P. 855, 39 Wash 45

40 C J p 342 note 10

4. Minn.—*Dennis v Smith*, 38 N W. 695, 38 Minn 494

40 C J p 342 note 11

5. N Y.—*Taylor v Dutcher*, 69 N Y. S 951, 60 App Div 531

6. Iowa.—*Smith v Iowa City Loan & Building Ass'n*, 14 N W 221, 60 Iowa 164

7. Or.—*E J Struntz Planing Mill Co v Paget*, 263 P 389, 123 Or. 651

8. Ala.—*Wood Lumber Co v Greathouse*, 161 So 236, 230 Ala 362—*Wood Lumber Co v Greathouse*, 148 So 135, 226 Ala 644—*Taylor v McGill*, 88 So 564, 205 Ala 458

9. Ala.—*Wildman v Evans Bros Const Co*, 57 So 831, 175 Ala 333

10. U S.—*In re Wil-Low Cafeterias*, D C N Y, 22 F Supp 522

Kan.—*Bell v Hernandez*, 30 P 2d 1101, 139 Kan 216

Wis.—*Findorff v Fuller & Johnson Mfg Co*, 248 N W 766, 212 Wis 365

40 C J p 312 note 15

Book entry held not to constitute payment—*Sullivan v Duval Lumber Co*, 126 So 792, 99 Fla 621

§ 248. — Application of Payments in General

Payments received by a mechanic's lienor should be applied as directed by the debtor, or, in the absence of such direction, they may be applied as the creditor prefers, or, if neither makes an application, the courts will apply such payments as justice may require.

Where the lien claimant at the time of receiving a payment from the owner or the contractor has other claims against the person by whom such payment is made, the effect of the payment on the lien de-

pends on whether the payment was applied to the lienable claim,¹¹ and the application of such payments is governed by the general rules on the subject.¹² If the debtor applies the payment his application governs,¹³ as does the direction of the owner or his representative where making a payment direct to the lien claimant,¹⁴ but in the absence of such a direction the creditor may apply the payment on whichever debt he chooses,¹⁵ and if he applies it to a debt other than the one for which the lien is claimed, as he is ordinarily entitled to do,¹⁶

Deposit

(1) Generally—*Carter v Martin*, 53 NE 1066, 22 Ind App 445—40 C J p 342 note 15 [a]

(2) Property owner may have materialman's lien discharged by making deposit with clerk any time before adjudication of validity of lien claim on appeal—*Williams v C M Mays Lumber Co*, 299 P. 885, 149 Okl 201

Acceptance of checks or notes

(1) In general
La—*Schwartz Supply Co v Breen*, App, 184 So 228

Mo—*Southwest Hardware & Lumber Co v Borgerson*, App, 77 SW 2d 195

Tex—*McGranahan Lumber Co v Pyramid Asbestos & Roofing Co*, Civ App, 18 SW 2d 224, error refused—*Cramer v Dallas Lumber Co*, Civ App, 283 SW 596
40 C J p 342 note 15 [c]

(2) Payment of contract price for construction of buildings by notes entitled owner to same protection as though he had paid cash—*McGranahan Lumber Co v Pyramid Asbestos & Roofing Co*, supra

(3) Claims of materialmen against contractor were not covered by checks of contractor to subcontractor, given subsequent to payments by subcontractor to materialman so as to constitute satisfaction of materialman's lien—*A Y McDonald Mfg Co v Leverett*, 211 NW 849, 303 Iowa 1215

Acceptance of contractor's order

(1) As against rights of mechanic lienors, owner's acceptance of contractor's order to architect, which recited that receipt of amount constituted payment by owner to contractor, was held to constitute payment, and the owner's acceptance of contractor's order to architect was held unconditional, notwithstanding architect and owner made separate agreement as to payment—*Standard Sanitary Mfg Co v Aird*, 129 So. 285, 221 Ala. 520

(2) Amount owner obligated himself to pay to materialman by accepting contractor's order was held not unpaid balance for payment of subsequently created mechanic's

liens—*Standard Sanitary Mfg Co v Aird*, supra

Accepting deed as payment for debt extinguished mechanic's lien on property—*Scalabrin v Harrison*, 149 A 687, 111 Conn 266

11. Mo—*Gantner v Kemper*, 58 Mo. 567

12. NJ—*Dey v Anderson*, 39 NJ Law 199

Application of payments generally see the CJS title Payment §§ 50—80, also 48 C J p 642 note 32—p 664 note 4

Duty of owner

Contract price for erection of structure constitutes fund for payment of subcontractors, laborers, and materialmen, owner and principal contractor must see that contract price is properly distributed to them—*General Sports Co v Lealie & Walter Coombs Lumber Co*, 288 P 949, 143 Okl 297

13. Ariz—*Webb v Crane Co*, 80 P 2d 698 52 Ariz 299

Cal—*Johnston v Groom*, 278 P 935, 99 Cal App 462

Neb—*Platner Lumber Co v Theodore*, 235 NW 467, 120 Neb 804
40 C J p 342 note 18

Effect of misapplication

Materialmen's misapplication of payment for material received on another account of debtor than that directed by debtor will not invalidate entire lien, but credit will be allowed for payment in a lien foreclosure action—*Platner Lumber Co v Theodore*, supra

Misapplication not shown

Idaho—*Bannock Lumber & Coal Co v Tribune Co*, 4 P 2d 662, 51 Idaho 226

Estoppel not shown as to materialman, because latter's employee cashed check owner gave contractor bearing notation "Counter and all Extras in full"—*Bannock Lumber & Coal Co v Tribune Co*, supra

14. Or—*Fawkes v Curtis*, 286 P 981, 133 Or 20

Check as equivalent to direction

Subcontractor receiving check of owner or owner's mortgagee must account for rightful application of proceeds, since the check is in itself

notice of source of fund and direction as to how payment should be applied—*Fawkes v Curtis*, supra

Duty of subcontractor

Sucontractor, receiving payment directly from loan company out of building fund, must apply entire payment to reduce lien claim, and may not deduct amount due him from contractor on private loan and for other work—*Fawkes v Curtis*, supra

Contrary direction of contractor

Materialman, knowing contractor was erecting two buildings, who received check to materialman's order from owner of one sufficient to pay claim for materials used on his land, must credit check on charges against such land irrespective of direction by contractor—*Kubatzky v Pittsburgh Plate Glass Co*, 249 P 412, 119 Okl 236

15. Ariz—*Webb v Crane Co*, 80 P 2d 698, 52 Ariz 299

Ind—*Shea v People's Coal & Cement Co*, 161 NE 849, 93 Ind App 302

NJ—*Reisen Lumber & Millwork Corporation v Schneiderman*, 175 A 185, 13 NJ Misc 798

Okl—*Georgia State Sav Ass'n v Sun Lumber Co*, 280 P 281, 138 Okl 11

SD—*Union Central Life Ins Co v Co-operative Lumber Co*, 213 NW 876, 51 SD 197

40 C J p 342 note 19.

16. US—*Brace v Gauger-Korsmo Const Co*, CCA Ark, 36 F 2d 661, certiorari denied 50 SCt 333, 281 US 738, 74 L Ed 1153

Mo—*Reis v Taylor*, App, 103 SW 2d 893

Tex—*Sprowls v Youngblood*, Civ App, 23 SW 2d 879, reversed on other grounds *Harveson v Youngblood*, Com App, 38 SW 2d 781.

40 C J p 342 note 20

Afterthought

Materialman's application of contractor's payment to unsecured rather than secured contract, if constituting afterthought induced by contractor's bankruptcy, should not be permitted—*Bryce Plumbing & Heating Co v American Surety Co*, 160 SE 593, 162 SC 239.

the payment does not discharge or reduce the lien.¹⁷ Where the creditor once makes an application, however, he is usually bound thereby and cannot change it without consent of all interested parties,¹⁸ and accordingly, where the creditor applies the payment to the lien debt and the lien is thus extinguished, the application cannot be changed without the consent of the debtor so as to revive the lien.¹⁹

The foregoing rules as to the application of payments by the creditor in the absence of directions by the debtor are applicable regardless of whether the creditor is a contractor receiving payments from the owner,²⁰ or a subcontractor, materialman, or laborer receiving payments from the contractor,²¹ or directly from the owner.²² Also the general rule that, in the absence of a direction by the debtor to the contrary, payments on a general account may be applied by the creditor to the oldest item thereof is in most cases applicable to an account for which a mechanic's lien may be established.²³ It has been held, however, that money paid by the owner to materialmen cannot be applied by them to the payment of an amount owed them by the contractor on transactions not connected with the contract for the erection of

the building,²⁴ and that, where a subcontractor employed on defendant's building has had an account with the contractor for work and material on contracts for other buildings, he has no right to credit the contractor on their old account for material furnished by the contractor to the subcontractor and which actually went into defendant's building.²⁵ Under express statutory provisions it has been held that a materialman furnishing materials for several houses being constructed by the same person may apportion a partial payment among the different houses in proportion to the amount of material furnished to each.²⁶

Where no application is made by either the debtor or creditor, the law will apply the payment as justice and equity may require,²⁷ and under the rules governing the application of payments generally the court ordinarily will apply a payment to unsecured debts or nonlienable items, leaving the lienable claim and the lien therefor unaffected,²⁸ or, in the case of a continuous account, it will apply the payment to the first or oldest unpaid debit items thereof.²⁹ However, in cases where the circumstances require it, the courts will not hesitate to de-

Scaffolding

In suit on mechanic's lien for repair of residence, contractor was entitled to credit cash payment on nonlienable item of scaffolding rather than on principal debt for lienable repairs, where application of payment was not otherwise specified—*Reis v Taylor*, App, 103 S W 2d 892

17. Ind.—*Brigham v DeWald*, 34 N E 498, 7 Ind App 115
Or.—*Christman v Salway*, 205 P 541, 103 Or 686

18. Cal.—*Johnston v Groom*, 278 P 935, 99 Cal App 462

Colo.—*Armour & Co of Delaware v McPhee & McGinnity Co*, 285 P 942, 87 Colo 87

Tenn.—*Weaver v Ogle*, 2 Tenn App 563

Owners as third persons

When payment is made on account of lienable obligation, owners are third persons whose rights would be injuriously affected by subsequent appropriation of payment to another obligation.—*Johnston v Groom*, 278 P. 935, 99 Cal App 462

19. Mo.—*Bobb v Wittich*, 82 Mo App 129

Wash.—*Spalding v Burke*, 74 P 829, 33 Wash 679

20. U.S.—*Bankers' Trust Co v T A Gillespie Co, N.C.*, 181 F 448, 104 CCA 196

40 C.J. p 343 note 23

Lien on moneys collected

Laborers and materialmen may be

secured as against the contractor by liens on moneys collected by him from the owner—*Hartford Accident & Indemnity Co v N O Nelson Life Co*, Miss, 54 S Ct. 392, 281 U.S. 352, 78 L Ed 510

21. Wis.—*W H Pipkorn Co v Milwaukee Evangelical Lutheran St Jacobi Soc.*, 129 N W 516, 141 Wis 501

40 C.J. p 313 note 24

22. Okl.—*Georgia State Sav Ass'n v Sun Lumber Co*, 280 P 281, 138 Okl 11

23. U.S.—*John B Orr, Inc. v First Trust & Savings Bank*, CCA Fla, 69 F 2d 764

Cal.—*Bay Lumber Co v Eaton*, 6 P 3d 289, 119 Cal App 362

RI.—*Cook, Borden & Co v R Z L Realty Corporation*, 147 A 891, 50 RI 375

SD.—*Union Central Life Ins Co v Co-operative Lumber Co*, 212 N W 876, 51 SD 197

Wis.—*Bank of Baraboo v Prothero*, 255 N W 126, 215 Wis. 552

40 C.J. p 343 note 26

24. Cal.—*Bowen v Desser*, 176 P 453, 179 Cal 323

25. Mont.—*Mills v Olsen*, 115 P 33, 43 Mont 139

26. N.J.—*J Donnell Lumber Co v Connoi*, 156 A. 27, 9 N.J. Misc 889

27. Mass.—*Lampasona v Capriotti*, 4 N E 2d 621, 296 Mass 34, 108 A L R 430

NY.—*Gescheidt & Co v Bowery Sav Bank*, 296 N Y S 306, 251 App Div 266, affirmed 15 N E 2d 68, 278 N Y 473

40 C.J. p 343 note 27

Application of collateral

Holder of mechanic's lien for amount of bill for plumbing materials was entitled to full amount of lien claimed, notwithstanding he held collateral for portion thereof, but was required to credit amount of lien with proceeds received on foreclosure of the collateral.—*Hobbs v Morrison Supply Co*, 73 P 2d 325, 41 N M 644

28. Conn.—*Ford Bros v Frederick M Ward Co*, 140 A 754, 107 Conn 425

Ill.—*Bingaman v Dahm*, 80 N E 2d 509, 307 Ill App 432—*Young v Bergner*, 243 Ill App 473—*Mutual Construction Co v Baker*, 237 Ill. App 596

Iowa.—*Consumers' Independent Lumber Co v Rozema*, 237 N W 433, 213 Iowa 696

Mass.—*Lampasona v Capriotti*, 4 N E 2d 621, 296 Mass 34, 108 A L R 430

Mo.—*Hanenkamp v Hagedorn*, App. 110 S W 2d 826—*Tual v Martin*, 66 S W 2d 969, 228 Mo App 30

40 C.J. p 343 note 29.

29. Mass.—*Lampasona v Capriotti*, 4 N E 2d 621, 296 Mass 34, 108 A L R 430

40 C.J. p 343 note 30.

part from these rules.³⁰ Sometimes a payment is applied pro rata so as to reduce the lien on each of several buildings³¹ or is applied so as first to discharge the lien on a separate tract sold to a third person after the filing of the lien.³² A payment or credit made at a time when nonlienable indebtedness has not been ascertained or fixed cannot be applied thereto.³³ Likewise a payment made before any breach of contract occurred cannot be applied to the payment of damages for a subsequent breach of the contract.³⁴ It has been held in some decisions that mere credits on continuing contracts or open accounts do not adjust any particular items covered by such continuing contract or open account, where there is no agreement or special circumstances requiring such application of payments.³⁵

Receipt. In cases where there are misrepresentations, a receipt does not necessarily require the amount received for to be credited on the lienable claim.³⁶ A receipt reciting that the payment is on account of "work" does not conclusively show an application of the payment to a labor account alone.³⁷

Trust funds Statutes providing that funds received by a contractor or subcontractor for the improvement of realty shall constitute trust funds in his hands to be applied first to the payment of specified claimants, such as laborers and materialmen, and to payment of surety bond and insurance premiums connected with the improvement, and that any contractor or subcontractor applying or consenting to application of such funds for other purposes and failing to pay such claims shall be guilty of larceny, have for their object the protection of those claimants specified in the statute,³⁸ and it is the

30. Neb.—Ballou v Black, 23 NW 3, 17 Neb 389

RI.—Harris v Gilbert, 128 A 11, 48 RI 350

Single account

On question whether mechanic's lien for materials used in constructing two identical buildings on adjoining tracts under separate contracts should vest against one tract to secure entire unpaid balance due, statute providing for crediting of payments to obligations in order of priority of maturity did not apply where materialman kept only one account against contractor, both buildings were constructed and completed at the same time, and materials were ordered and delivered together.—Nevada County Lumber Co v Janiss, 78 P 2d 200, 25 Cal App 579

Correction of error

If materialman, through misunderstanding, whether arising from its error or from contractor's error, improperly credited payment, error should be corrected.—George B. Breece Lumber Co v Morris, 141 So 787, 19 La App 875

31. Neb.—Ballou v Black, 23 NW 3, 17 Neb 389

Wash.—Powell v Nolan, 67 P 712, 68 P 389, 27 Wash 318

32. Ind.—Dungan v Dollman, 64 Ind 327
40 C J p 343 note 23

33. NY.—Giant Portland Cement Co v New York, 134 NE 322, 232 NY 395

34. US.—Haskell v McClintic-Marshall Co, CCA Wash, 289 F 405

35. Fla.—People's Bank v Arbuckle, 90 So 458, 82 Fla. 479

36. US.—Bankers' Trust Co v T A Gillespie Co, NC, 181 F 448, 104 CCA 196

Cal.—Schallert-Ganahl Lumber Co v Neal, 27 P 743, 91 Cal 362.

37. Mass.—Thompson v Luciano, 97 NE 892, 211 Mass 169
40 C J p 344 note 41

38. NY.—People v Gillette, 31 NYS 2d 858, 177 Misc 702—Mannarino v President and Directors of Manhattan Co, 288 NYS 971, 160 Misc 232

Trust funds in hands of owner see *infra* § 251

Class sharing equitably

The lien law intended to protect all claims of subcontractors, architects, engineers, surveyors, laborers, and materialmen arising out of an improvement, and all persons within the protection of the statute form a class which should equitably share in the funds on which the statute imposes a trust.—In re Marstan Plumbing Co, 28 NYS 2d 190, 176 Misc 956

Public improvements

(1) Funds received by contractor from county for bridge construction and paid to bank in repayment of bank's loans to contractor were not "funds received by contractor from owner for improvement of real property" within statute making such funds trust funds for benefit of laborers and materialmen, since statute did not contemplate funds received for public improvements.—Vulcan Rail & Construction Co v Westchester County, 293 NYS 945, 250 App Div 212

(2) Bank to which money received by contractor from county for bridge construction was paid in payment of

loans to contractor, without knowledge of claims of laborers and materialmen against contractor, could not be held liable to laborers and materialmen on ground that statute imposed trust on such money in favor of such laborers and materialmen, since statute, if construed to impose such trust, imposed the trust only on money in hands of contractor.—Vulcan Rail & Construction Co v Westchester County, 293 NYS 945, 250 App Div 212

Claims for labor and materials

(1) The statutes declaring moneys received for erection of a building to be trust funds, and making it unlawful to use or pay out such moneys until all claims due for labor and materials are paid, has for its object both the protection of the owner whose property, by reason of the implied agency of the contractor, may be liable for subcontracts, labor, or materials furnished for the building, and to give additional protection to the subcontractors, laborers, or materialmen engaged on the building.—State v Tabasso Homes, Del Gen Sess, 28 A 2d 248

(2) The word "contractor" as used in such statutes means one who enters into a contract, directly or indirectly, with the owner of realty for the construction, alteration, or repair of a building thereon.—State v Tabasso Homes, *supra*.

(3) A corporation which agreed with a purchaser to erect a house on realty owned by the corporation and to sell the realty and the house to the purchaser for a unit price without any specific amount representing the cost of the realty and of the house, was the owner and not a contractor within meaning of statute.—State v. Tabasso Homes, *supra*.

duty of contractors³⁹ and subcontractors⁴⁰ to hold and disburse the funds received in accordance with the requirements of the statute. Some decisions hold the statute applicable to protect a claimant even though he has not filed a lien,⁴¹ but other decisions hold that the statute applies only to such claimants as have filed liens.⁴² Although money received for the improvement of realty is under such provisions impressed with a trust, it still remains the property of the one doing the work,⁴³ and there is no basis in the statutes for an action of conversion.⁴⁴ Also such statutory provisions do not abrogate the requirement that creditors' claims be reduced to judgment before resort is had to equity to compel a debtor to account,⁴⁵ and they have been held inapplicable to an assignee merely accepting payment of a debt.⁴⁶ It has also been held that such statutes refer only to established claims which have been asserted and concerning which the holder of funds has definite knowledge of their existence.⁴⁷

39. NY—In re Kornder's Estate, 6 NYS 2d 324, 168 Misc 553

Existence of fund

A general contractor could not contend that there was no fund to which a subcontractor's lien might attach because of a provision in the contract between the general contractor and subcontractor's employer, where the general contractor continuously paid itself and others out of money due the employer and accepted its work after the receipt of subcontractor's order and the filing of the subcontractor's lien—Williamson & Adams v McMahon-McEntegart, Inc., 10 NYS 2d 37, 256 App Div 313

Advances by subcontractor

Where subcontractor advanced money to employer on condition that subcontractor be repaid out of first moneys due employer from general contractor, subcontractor on receiving moneys from employer had the right to repay itself first for moneys advanced to employer as respects right to funds remaining in general contractor's hands, alleged claims of other persons against employer which had not matured into liens, and which were incurred after subcontractor's lien would give no right to general contractor to ignore subcontractor's lien—Williamson & Adams v McMahon-McEntegart, Inc., supra.

40. NY—Williamson & Adams v McMahon-McEntegart, Inc., supra

41. US—Wickes Boiler Co v Godfrey-Keeler Co, CCANY, 121 F2d 415, certiorari denied Godfrey-Keeler Co v Wickes Boiler Co, 62 S Ct 297, 314 US 686, 86 L Ed 549

NY—People v Gillette, 81 NYS 2d 858, 177 Misc 702

42. NY—Saltser & Weinsier v Monroe Plumbing & Heating Supply Corporation, 37 NYS 2d 331, 265 App Div 821, reargument denied 41 NYS 2d 179, 266 App Div 670, affirmed 50 NE 2d 299, 290 NY 903—Putnam Valley Lumber & Supply Corporation v Mahopac Nat Bank, 34 NYS 2d 68

43. NY—Continental Casualty Co v Ben-Mil, Inc., 23 NYS 2d 509, 175 Misc 220, affirmed 27 NYS 2d 448, 261 App Div 958, appeal denied 38 NYS 2d 705, 262 App Div 725

44. NY—Teman v Kahn, 39 NYS 2d 472, 179 Misc 546

45. NY—Continental Casualty Co v Ben-Mil, Inc., 32 NYS 2d 509, 175 Misc. 220, affirmed 27 NYS 2d 448, 261 App Div 958, appeal denied 28 NYS 2d 705, 262 App Div 725

Insurance premiums

Where corporation was indebted to casualty company for insurance premiums, casualty company, without obtaining judgment against corporation, could not maintain action

§ 249. — Payments by Contractor with Money Received from Owner or Other Interested Person

Ordinarily a materialman or other lien claimant receiving payment from a contractor made with money received from the owner or other person interested in the construction may apply the payment as he sees fit unless chargeable with knowledge of the source, in which case he must apply it so as to protect the rights of the person from whom the contractor obtained the funds.

Frequently a person furnishing materials to a contractor engaged in the erection of several buildings accepts from the contractor a payment of money received by the contractor from the owner of one of the buildings or other person interested in the construction, and the question arises whether an application of the payment otherwise than on the claim for materials furnished for the building of the owner for whom the money was paid will be upheld.⁴⁸ The question is generally determined according to claimant's knowledge or notice, or absence thereof, of the source of the money paid, the application being upheld where claimant was without knowledge or notice of the source of the funds,⁴⁹ but not where he had knowledge or notice

under lien law to compel corporation to account for moneys alleged to have been received for work on an improvement of realty—Continental Casualty Co v Ben-Mil, Inc., supra

46. NY—Saltser & Weinsier v Monroe Plumbing & Heating Supply Corporation, 37 NYS 2d 331, 265 App Div 821, reargument denied 41 NYS 2d 179, 266 App Div 670, affirmed 50 NE 2d 299, 290 NY 903

47. NY—People v Kew Gardens Terrace, 38 NYS 2d 246

48. Cal—Corpus Juris cited in Bay Lumber Co v Pickering, 7 P2d 371, 373, 120 Cal App 163
Okl—Corpus Juris quoted in Georgia State Sav Ass'n v Sun Lumber Co, 280 P 281, 282, 138 Okl 11.

Duty of contractor

Contractor is under duty of discharging indebtedness for materials used in repairing and remodeling owner's property out of money received by contractor from owner of property—Madison Lumber Co v Helm, 13 So 2d 349, 202 La 1061

49. Ariz—Watson v Murphey, 285 P 1037, 36 Ariz 377
Cal—Bay Lumber Co v Pickering, 7 P2d 371, 120 Cal App 163
Ky—Trauth v Voss, 21 SW 2d 832, 231 Ky 544

Okl—Corpus Juris quoted in Georgia State Sav Ass'n v Sun Lumber Co, 280 P 281, 282, 138 Okl 11
40 C.J. p 344 note 44.

of the source⁵⁰ Moreover, it has been held that knowledge of the source imposes a duty on the materialman to apply the funds to the particular job even though he receives no such direction from the contractor⁵¹ Where, however, the parties by express or implied agreement consent to a different application of the funds the court will apply the payment in accordance with such intention⁵²

Some courts taking the view that claimant's knowledge or absence of knowledge of the source of the funds is controlling have taken the position that claimant is not bound to ascertain from what particular contract the contractor realized the money with which he made the payment⁵³ Other courts, however, hold that the application will not be upheld even where claimant was without knowledge of the source of the money paid,⁵⁴ since it is incumbent on him to ascertain the account to which the payment is to be applied⁵⁵ In some cases the courts, in refusing to disturb an application by claimant of a payment, give weight to the fact that the owner in paying the money to the contractor gave no di-

rections as to its application,⁵⁶ or that he, with at least implied knowledge of claimant's lien, did not exact a waiver thereof,⁵⁷ and hold that, in the absence of a contrary direction by the contractor, the materialman may apply the payment as he wishes despite knowledge that the owner was the source of the money the contractor paid⁵⁸ It has also been held that, in the absence of fraud and collusion, a materialman receiving from a contractor money paid over by the owner may apply such payment to any debts owed him by the contractor⁵⁹

On the other hand it has been held that, where the owner makes a payment on the assurance of the contractor that it is to be applied to the payment of a claim for materials, it should be so applied, and not applied to the payment of a loan owing by the contractor to the materialman⁶⁰ Also an application by a materialman to other debts of the contractor of money received by cashing a check of the contractor will not be upheld where it is not only contrary to directions given by the owner who furnished the money with which the check was paid,

50. Ariz.—Webb v Crane Co, 80 P2d 698, 52 Ariz 299

Fla.—Standard Accident Ins Co v Duval Lumber Co, 126 So 643, 99 Fla 525

Iowa.—Hawkeye Lumber Co v Day, 210 NW 430, 203 Iowa 172

Ky.—Trauth v Voss, 21 SW2d 832, 231 Ky 544

La.—Schwartz Supply Co v Breen, App, 184 So 228—Schwartz Supply Co v Breen, App, 179 So 636 —Hortman-Salmen Co v Naquin, 126 So 453, 12 La App 491

Okl.—Corpus Juris quoted in Georgia State Sav Ass'n v Sun Lumber Co, 280 P 281, 282, 138 Okl 11

Tenn.—Weaver v Ogle, 2 Tenn App 563

Wash.—Pioneer Sand & Gravel Co v Grevstad, 42 P2d 438, 181 Wash 239

40 C J p 344 note 45

Rights of mortgagee

Materialman receiving contractor's check knowing or chargeable with knowledge that contractor drew against mortgagee's funds must credit payment to job with which mortgagee is connected, but materialman receiving contractor's check through mail may justifiably credit payment to job mentioned on detachable check stub and is not required to change credit thereafter where materialman did not know that contractor drew against funds advanced by mortgagee for different job—Intermountain Building & Loan Ass'n v Allison Steel Mfg Co, 22 P2d 413, 42 Ariz 51

Rights of surety

(1) Materialman, receiving pay-

ment from contractor with knowledge of source thereof, could not impute any part of payment to other accounts between materialman and contractor, even though contractor consented, where imputation of payment to other accounts would increase liability of contractor's surety, and could not, even with contractor's consent, impute part of payment to another and older account between materialman and contractor, in view of rights of surety, even though same surety signed contractor's bond on job in which older account was incurred—Madison Lumber Co v Globe Indemnity Co, La App, 161 So 775, rehearing denied 163 So 434

(2) Materialman, who, with consent of contractor, imputed to account on particular job funds originating with other owners for whom contractor did work, could not in action against contractor's surety withdraw credit thus allowed, where persons furnishing funds had not protested—Madison Lumber Co v Globe Indemnity Co, supra

51. Ariz.—Webb v Crane Co, 80 P2d 698, 52 Ariz 299

52. Wash.—Pioneer Sand & Gravel Co v Grevstad, 42 P2d 438, 181 Wash 239

53. Mo.—Campbell Glass & Paint Co v Davis-Page Planing Mill Co, 110 SW 24, 130 Mo App 474

54. Iowa.—Sioux City Fdy & Mfg Co v Merten, 156 NW 367, 174 Iowa 332, LRA 1916D 1247.

40 C J p 344 note 47

55. Ga.—Williams v Willingham-Tift Lumber Co, 63 SE 584, 5 Ga App 533

40 C J p 344 note 48

Duty of inquiry

Materialman, knowing loan association was financing more than one building, and that contractor was constructing more than one building, was required, on receiving loan association's check delivered by contractor, to inquire of association regarding application of funds and to credit check to certain building account, rather than contractor's personal account—Modesto Lumber Co v Wyde, 19 P2d 238, 217 Cal 431

56. Okl.—Corpus Juris cited in Georgia State Sav Ass'n v Sun Lumber Co, 280 P 281, 282, 138 Okl 11

40 C J p 344 note 49

57. Ill.—Wisconsin Lime & Cement Co. v Reed, 204 Ill App 479

58. Idaho.—Bannock Lumber & Coal Co v Tribune Co, 4 P2d 662, 51 Idaho 226

59. Md.—Bounds v. Nuttle, 30 A2d 263, 181 Md 400

Contractors' obligation to owners is to finish and turn over house without liens, but such obligation does not prevent contractors from using their receipts from one contract to pay on another—Bounds v Nuttle, supra

60. Cal.—Hammond Lumber Co v Fanta, 178 P 503, 179 Cal 652.

but the materialman cashed the check in violation of an agreement not to do so ⁶¹

Some courts, however, have refused to disturb an application of a payment contrary to the directions of the owner to the contractor in the absence of knowledge on the part of claimant of such directions ⁶² The court will not disturb an application of payments where it does not appear from the pleadings ⁶³ or the testimony ⁶⁴ that the money with which the payment was made came from the owner in question Under statutes broadly providing that the risk of payments made to the original contractor shall be on the owner until expiration of a prescribed period and that no owner shall be liable to an action by the contractor until after expiration of such period, where the owner pays the contractor within such period and the contractor pays a materialman without direction as to application and the materialman lacks notice of the source of the funds, the materialman may apply them as he sees fit ⁶⁵

§ 250. — Payments by Subcontractor with Money Received from Contractor

A materialman receiving payment from a subcontractor with knowledge that the funds were derived from a certain contractor has been held obligated to apply the payment to debts connected with the contractor; but it has also been held that he may apply it to a prior debt of the subcontractor and still preserve his lien where no liens have yet been filed against the property.

It has been held that a materialman receiving a payment from a subcontractor with knowledge that the funds came from a certain contractor is obligated to apply the payment on work of the principal contractor rather than on accounts of the subcon-

tractor not connected therewith ⁶⁶ It has also been held, however, that a materialman accepting from a subcontractor a payment of money which the subcontractor has received from the contractor on the contract may apply it to a prior debt of the subcontractor, and still maintain his lien, where no liens have yet been filed against the property and the jurisdiction is one in which a lien does not attach until the notice of the lien is filed ⁶⁷

§ 251. Payments to Contractor as Affecting Liens of Other Persons

- a In general
- b Time of payment
- c Collusive or fraudulent payments
- d. Statutory duties of owner

a. In General

Where a mechanic's lien is regarded as independent of the state of accounts between owner and contractor, payment to the contractor cannot defeat the lien; but, where the mechanic's lien is deemed to arise from subrogation to the contractor's rights, payment to him may defeat the lien

Under statutes conforming to the Pennsylvania system of direct liens, the right of a subcontractor, materialman, or workman to a lien is not dependent on the state of accounts between the owner and contractor, as discussed supra § 105, and hence the lien is not defeated or affected by any payment to the contractor ⁶⁸ However, under the New York system of liens by subrogation, the right of such persons to a lien is dependent on there being something due or to become due the contractor, as discussed supra § 106, and exists only to the extent of such amount, as considered supra § 174, and pay-

61. Neb—Boyer-Van Kuran Lumber & Coal Co v Colonial Apartment House Co, 142 NW 519, 94 Neb 180

40 C J p 344 note 53

62. Or—Bohn v Wilson, 101 P 202, 53 Or 490

63. Or—Portland Floor Co v Chas K Spaulding Logging Co, 130 P 52, 64 Or 316

64. Mich—Sandusky Grain Co v Borden's Condensed Milk Co, 183 NW 218, 214 Mich 306

65. Okl—Titus v Electric Supply Co, 45 P 2d 515, 172 Okl 408

66. Iowa—A. Y McDonald Mfg Co v Leverett, 211 NW 849, 203 Iowa 1215

La.—Carolina Portland Cement Co v U S Fidelity & Guaranty Co, 137 So 381, 18 La App 105

67. N Y—Mack v Collieran, 32 N. E 604, 136 N Y 617

68. Mo—Better Roofing Materials

Co v Sztukouski, App, 183 SW 2d 400

N M—English v. Branum, 245 P 252, 31 N M 334

Tenn—Richmond Screw Anchor Co v E W Minter Co, 300 SW 574, 156 Tenn 19

Wash—Globe Electric Co v Union Leasehold Co, 6 P 2d 394, 166 Wash 45

40 C J p 345 note 63

Theory and purpose of law

(1) Theory of mechanics' lien law is that, if owner negligently pays money out to contractor without taking precautions to see that it is applied to payment of materials which go into building, owner must stand loss rather than materialman who has no opportunity to protect himself when he has delivered the materials—Bounds v Nuttle, 80 A 2d 263, 181 Md 400

(2) Purpose of mechanic's lien statute is to give materialmen, whose materials have enhanced val-

ue of an owner's property, security by giving materialmen preference over owner in situations where a contractor has received payment from owner but failed to pay materialmen, since owner is in a position to protect himself in making original arrangements—Better Roofing Materials Co v Sztukouski, Mo App, 183 SW 2d 400

In Louisiana

(1) It has been said that right of materialman as furnisher of material sued for would not be unfavorably affected by fact that building owner paid contractor all that was due him for services rendered and material furnished in order to comply with agreements between owner and contractor—Derbes v Marshall, La. App, 183 So 74

(2) Earlier authorities are to the contrary—State v Recorder of Mortgages, 35 La Ann 61—Rousset v Kirwin, 8 La Ann 300—Prola v Mazzei, 2 La A., Orleans, 174

ments properly made to the contractor, in good faith and in accordance with the provisions of the contract, before the owner is given statutory notice of their claims, or has acquired actual notice or knowledge thereof, will deprive them of the right to a lien, entirely or pro tanto according as the payments are in full or in part only leaving something still due.⁶⁹

The rule that payment to the contractor may defeat the lien of others may apply even though the owner has permitted the subcontractor to proceed with the work⁷⁰ or although he stated to claimant that he would defer making the payment to a specified date, and then made the payment prior to the date mentioned.⁷¹ However, where the owner promised to make no further payments without notice to the subcontractor, payments subsequently made without regard to such obligation are not effective against the subcontractor,⁷² and under some circumstances, as between a materialman or subcontractor and the owner, claimant may be estopped to claim that a payment by the owner to the contractor was not properly made,⁷³ or the owner may be estopped to claim that the contractor has been paid.⁷⁴

In order that the lien of a subcontractor, laborer, or materialman may be defeated or reduced by a payment by the owner to the contractor, it is essential that there shall have been a payment,⁷⁵ but unless it is provided otherwise by statute or contract the owner may make payment to the principal contractor in any method and at any time that he chooses.⁷⁶ A statute providing that as to all

liens except that of the contractor the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the owner against the contractor refers and applies only to matters dehors the contract.⁷⁷ An owner may not withhold payment from the principal contractor on the ground that materialmen have not been paid, where the latter have not filed liens and the time for such filing has expired,⁷⁸ but the contractor may not recover against the owner before the expiration of the period allowed subcontractors to perfect their liens, without proof of payment to, or waiver by, the subcontractors.⁷⁹

b. Time of Payment

- (1) In general
- (2) Before due under contract
- (3) Before expiration of period for giving notice or filing claim
- (4) After notice or knowledge of claim

(1) In General

In the absence of statutory provision to the contrary, or notice of lien claims by others, the owner may safely pay the principal contractor whenever the money falls due.

Ordinarily and in the absence of statutory provision to the contrary, the contract price of a building is not deemed a trust fund for the benefit of subcontractors and other such lienors until due notice has been given,⁸⁰ and, where the owner has settled in full with the principal contractor prior to notice of any claim of a laborer or materialman, such persons do not acquire liens on the property as against the owner,⁸¹ provided the payee is in

69. NY—W E Blume, Inc v Postal Telegraph-Cable Co, 39 NYS 3d 539, 365 App Div 1062

40 C J p 345 note 67

Payments as trust funds in hands of contractor see supra § 248

Payment of agreed price

Homesteader cannot be compelled to pay more than agreed price, whether agreement was oral, except for statutory lien, or whether homesteader's note and lien were transferred—Modern Plumbing Co v Armstrong Bros, Tex Com App, 36 SW 2d 1011

70. NY—Drall v Gordon, 101 N.Y. S 171, 51 Misc 618—Rosenbaum v Paletz, 114 NYS 802

71. NY—Streever Lumber Co v Mitchell, 170 NYS 272, 183 App Div 129

40 C J p 345 note 69.

72. NY—Rope v Hess, 6 NYS 710, reversed on other grounds 23 NE 138, 118 NY 668

73. Iowa—Garrison Grain & Lum-

ber Co v Farmers' Mercantile Co, 164 NW 791, 181 Iowa 568

40 C J p 346 note 71

74. Ill—Welch v Sherer, 93 Ill 64

40 C J p 346 note 72

75. Iowa—Bartlett v Mahlum, 55 NW 514, 88 Iowa 329

40 C J p 346 note 73

76. Tex—Sunset Brick & Tile Co v Stratton, Civ App, 53 SW 703.

40 C J p 346 note 76

77. Cal—Hampton v Christensen, 84 P 200, 148 Cal 729

40 C J p 346 note 78

78. Ga—Poythress v Hucks, 193 SE 475, 56 Ga App 657

Owner's statutory right and duty to retain funds to meet claims see infra subdivision d (3) of this section

79. Ill—Hall v Harris, 242 Ill App 315

80. N.C—Home Building v Nash, 157 SE 134, 200 NC 430

Money paid into court

Where laborers and materialmen did not file notice under mechanics' lien act, moneys paid into court by owner filing bill of interpleader after contractor had been adjudicated a bankrupt did not constitute a trust fund for benefit of such claimants—Gibraltar Mfg Co v De Mund, 31 A 2d 336, 133 NJ Eq 233

81. N.C—Huske Hardware House v Percival, 164 SE 334, 203 NC 6—Brown v Burlington Hotel Corporation, 161 SE 735, 202 NC 82—Pearce-Young-Angel Co v Sternberg, 153 SE 629, 199 NC 21—Robinson Mfg Co v Blaylock, 135 SE 136, 192 NC 407—Rose v Davis, 134 SE 576, 188 NC 355

Tex—Eldridge v Poirier, Civ App, 50 SW 2d 888, error refused

Va—Coleman v Pearman, 165 SE 371, 159 Va 72

Rule inapplicable to creditor of owner

The rule that a materialman ac-

fact an independent contractor and not merely the owner's agent.⁸² Payments made when due are not in bad faith and do not entitle a materialman to a lien,⁸³ and the fact that an owner knew that the principal contractor was indebted to the materialman at the time that the owner paid the contractor will not charge the owner with bad faith or make the materialman's lien valid as to the amount of the payment which was due the contractor when made, where the materialman had given no notice to the owner as to nonpayment for materials furnished.⁸⁴ In making such payments to the principal contractor the owner has the right to rely on his statements as to the amount he owes materialmen.⁸⁵

After beginning work or furnishing materials
Under the terms of some statutes the lien of a claimant, other than the original contractor, is not defeated or impaired by a payment made by the owner to the contractor after claimant has commenced to perform labor or to furnish materials.⁸⁶

(2) Before Due under Contract

In some jurisdictions, but not in others, payments to

the contractor before they are due according to the terms of the contract are not valid as against lien claimants who give the owner the statutory notice of their claims before the time when such payments fall due.

In a number of jurisdictions payments to the contractor before they are due according to the terms of the contract are not valid as against lien claimants who give the owner the statutory notice of their claims before the time when such payments fall due,⁸⁷ although they may be valid as against claimants who have not served notices before the payments were due⁸⁸ or who have unconditionally authorized the owner to make the payment in question.⁸⁹ However, under the statutes of other jurisdictions and the construction placed thereon, payments by the owner to the contractor before they fall due according to the terms of the contract are good against subcontractors and others, when they are made in good faith,⁹⁰ or, in other words, advance payments will be upheld⁹¹ unless they are made in bad faith,⁹² collusively,⁹³ or for the purpose of avoiding the provisions of the statute⁹⁴ or of defeating the liens of subcontractors or other per-

quires no lien on the owner's property by notice to him after the owner has paid the contractors in full does not apply to a case where plaintiff is not a materialman furnishing things to the contractor, but is a creditor of the owner by virtue of a contract made with the owner's agent—*North Carolina Lumber Co v Spear Motor Co*, 135 SE 115, 192 NC 377.

Payment under prior contract

Where owner paid contractor all money due him under contract, laborer could not enforce his subsequently recorded liens against owner, notwithstanding part of contract price was paid materialmen after liens were recorded under contract owner had entered before laborer recorded his liens—*Wooten v Ford*, 166 SE 449, 46 Ga App 50.

82 Ga.—*Robinson v Reese*, 165 SE 744, 175 Ga 574.

83 NY—*J W Van Cott & Son v Gallon*, 298 NYS 67, 163 Misc 914.

84 NY—*J W Van Cott & Son v Gallon*, *supra*.

Burden not on owner to ascertain facts

NY—*J W Van Cott & Son v Gallon*, *supra*.

85 NY—*J W Van Cott & Son v Gallon*, *supra*.

86 Utah—*Cary-Lombard Lumber Co v Partridge*, 37 P 573, 10 Utah 322.

40 CJ p 348 note 7.

87 Ariz—*Wylie v Douglas Lumber Co*, 8 P2d 256, 39 Ariz 511, 83 A.

LR 918—*Watson v Murphey*, 285 P 1037, 36 Ariz 377.

Kan—*H B McCray Lumber Co v Terry*, 278 P 746, 128 Kan 529.

NJ—*Meyer v Standard Accident Ins Co*, 177 A 255, 114 NJ Law 483—*J D Loizeau Lumber Co v Steinberg*, 131 A 131, 3 NJ Misc 735.

40 CJ p 347 note 80.

As between themselves, owner may pay contractor in full in advance, trusting to contractor's honesty and ability to pay mechanics and materialmen—*Wylie v Douglas Lumber Co*, 83 P2d 256, 39 Ariz 511, 83 A LR 918.

88 Cal—*Pacific Sash & Door Co v Elderton*, 140 P 247, 167 Cal 563. 40 CJ p 347 note 81.

No money due when notice served

Owner is not liable under notice, if he made payments to contractor in advance of terms of contract, but owed no money to contractor when notice was served—*Passaic-Bergen Lumber Co v Peterson*, 147 A 198, 105 NJ Law 537.

89 Ill—*Biggs v Clapp*, 74 Ill 335. 40 CJ p 347 note 82.

90 NY—*J W Van Cott & Son v Gallon*, 298 NYS 67, 163 Misc 914. 40 CJ p 347 note 83-84.

No presumption of bad faith

DC—*Merrill v B R Acker Co*, 142 F2d 102, 79 US App DC 51.

Protection against advance payment

Subcontractors have ample opportunity to protect themselves against advance payments by owner to general contractor under statute enti-

ling subcontractors to require owner to disclose terms of general contract and state of account between himself and general contractor and to secure liens by filing them and giving notice to owner—*Merrill v B R Acker Co*, *supra*.

91 DC—*Merrill v B R Acker Co*, *supra*.

40 CJ p 347 note 85.

92 DC—*James B Lambie Co v Bigelow*, 34 App DC 49.

NY—*Thomas F Reilly & Co, Inc v Scheer*, 211 NYS 615.

93 DC—*Riggs F Ins Co v Shedd*, 16 App DC 150.

40 CJ p 347 note 87.

Intent to defraud

Even if property owner knows, when making advance payment to contractor, that latter owes subcontractor, there is no cause of action against him under lien law, since it must be established in addition that he made payment to defraud subcontractor—*Thomas F Reilly & Co v Scheer*, 211 NYS 615, 126 Misc 825.

Payment of note

Owner's payment to contractor of note given in good faith as advance would not be fraudulent payment of fund to which subcontractor's lien theretofore filed attached—*George E Sealy Co v Ards Bldg Corporation*, 214 NYS 768, 216 App Div 318, affirmed 155 NE 899, 244 NY 665.

94 NY—*George E Sealy Co v Ards Bldg Corporation*, *supra*. 40 CJ p 347 note 88.

sons⁹⁵

In some jurisdictions wherein the rule prevails that advance payments made in good faith are good as against lien claimants, advance payments may be upheld, even though made with knowledge on the part of the owner of the unpaid claim of a subcontractor or materialman⁹⁶ and without notice by the owner to subsequent lienors of such payments,⁹⁷ but the statutes of other jurisdictions provide that no payment made in advance of the time stipulated in the original contract shall be considered as made in good faith unless written notice of intention to make such payment shall be given to each person known to have furnished materials or rendered services a prescribed number of days before such payment is made,⁹⁸ although, even under such statutes, failure to give the prescribed notice to certain persons is not evidence of bad faith where such persons have already been paid in full⁹⁹ or their names and relation to the work are not known to the owner.¹

Particular payments may not be premature under the terms of the contract and the circumstances of the case.² Unless, under the provisions of the contract, the certificate of the architect is the only

mode provided for determining when a payment shall become due,³ the fact that a payment is made before the certificate is given does not necessarily show that it is premature,⁴ nor does the fact that the certificate is given conclusively show that the payment is not premature;⁵ a provision in the contract for a certificate of the architect is for the protection of the owner alone,⁶ and his failure to follow the contract provision is merely a circumstance to be taken into consideration, along with other facts and circumstances of the case, in determining the question of his good faith.⁷

(3) Before Expiration of Period for Giving Notice or Filing Claim

Under some statutes payments made before expiration of the statutory time for giving notice or filing claim are at the owner's risk, but this is not true under other statutes.

Under some,⁸ but not other,⁹ statutes payments made by the owner before the expiration of the time allowed a subcontractor or materialman in which to give his notice or file his claim are at the owner's risk and cannot reduce or defeat the lien unless such payments are distributed among the subcontractors, laborers, and materialmen,¹⁰ or unless no notice is given by the lien claimant in ques-

95. DC—James B Lambie Co v Bigelow, 34 App DC 49

96. NY—Wagner v Butler, 140 N Y S 50, 155 App Div 425
40 CJ p 347 note 90.

97. NY—Tommasi v Archibald, 100 NYS 367, 114 App Div 838

98. Conn—City Lumber Co of Bridgeport v Borsuk, 41 A 2d 775, 131 Conn 640, 158 A L R 677
40 CJ p 347 note 92

Book credits

Mechanic's lien of subcontractor could not be prejudiced through book credits by owner reducing indebtedness owed him by contractors—J L Purcell, Inc, v Libbey, 149 A 225, 111 Conn 132, 68 A L R 1258

Modification of contract

Where building contract was modified so as to permit owner to buy and pay for oil burner originally included in contract, payment therefor before receiving notice of lien, even though after lienors had commenced to furnish materials and render services, related back to date of modification of contract and owner was entitled to credit for such payment as against claim of materialman who had not commenced to furnish materials when contract was modified, in absence of estoppel or actual bad faith—City Lumber Co of Bridgeport v Borsuk, 41 A 2d 775, 131 Conn 640, 158 A L R 677.

99. Conn—Hubbell, Hall & Randall Co v Pentecost, 93 A 672, 89 Conn 262

40 CJ p 347 note 93

1. Conn—Hubbell, Hall & Randall Co v Pentecost, supra.

40 CJ p 347 note 94

2. La—Dreyfus v American Bonding Co, 67 So 342, 136 La 491.

40 CJ p 348 note 95

3. NJ—Someis Lumber Co v Kaufman, 133 A 200, 103 NJ Law 601—Hasson v Bruzel, 144 A 319, 104 NJ Eq 95

40 CJ p 348 note 96

Progress payments

NJ—Joseph Lande & Son v Wellsco Realty, 34 A 2d 418, 131 NJ Law 191

Not open to waiver

Production of architect's certificate, required by building contract and contractor's bond before payments to contractor by owner, cannot be waived as against stop notice materialman's lien claimant—Meyer v Standard Accident Ins Co, 177 A 255, 114 NJ Law 453

4. NJ—Corpus Juris cited in Passaic-Bergen Lumber Co v Peterson, 147 A 198, 105 NJ Law 537
40 CJ p 348 note 97.

5. Cal—Marshall v Vallejo Commercial Bank, 126 P 146, 163 Cal 469

NJ—Corpus Juris cited in Passaic-Bergen Lumber Co v Peterson, 147 A 198, 105 NJ Law 537

6. Cal—Marshall v Vallejo Commercial Bank, 126 P 146, 163 Cal 469

DC—James B Lambie Co v Bigelow, 34 App DC 49

7. DC—James B Lambie Co v Bigelow, supra

8. Okl—National Gas Co v Ada Iron & Metal Co, 93 P 2d 529, 185 Okl 415—Titus v Electric Supply Co, 45 P 2d 515, 172 Okl 408

40 CJ p 348 note 2

Purpose of statute

The purpose of the mechanics' lien statute providing that the risk of all payments made to the original contractor shall be on the owner until the expiration of a specified number of days, during which time the statement for the lien may be filed, is to protect the diligent subcontractor if he acts within a specified and limited time.—Disbrow & Co. v Peterson, 287 NW 220, 136 Neb. 719.

9. Ohio—Courtist v Ehrhardt, 11 Ohio Dec 628, 28 Cinc L Bul 138
W Va.—McKnight v. Washington, 8 W Va 666.

10. Okl—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl 578

40 CJ p 348 note 4.

tion¹¹ or by any lien claimant¹² within the statutory period

(4) After Notice or Knowledge of Claim

An owner's payment of the principal contractor after notice or knowledge of the claims of subcontractors, laborers, and materialmen will not affect or defeat the liens of the latter.

The rights of a subcontractor, materialman, or workman cannot be defeated or impaired by reason of any payment made to the contractor by the owner after the statutory notice of the claim has been filed or served on the owner,¹³ or, except in at least one jurisdiction,¹⁴ after the owner has actual knowledge or notice of such claim¹⁵ or of facts sufficient to put him on inquiry as to its existence;¹⁶ and this is true although the payment is made in accordance with the terms of the contract¹⁷ Sometimes the facts are not sufficient to bring the particular case within the rule,¹⁸ and in any event the payment cannot operate to give claimant rights which otherwise he would not have had¹⁹

c. Collusive or Fraudulent Payments

The owner's fraudulent or collusive payment to the principal contractor will not affect or defeat the lien of a subcontractor, laborer, or materialman.

A collusive payment by the owner to the contractor for the purpose of avoiding the provisions of the lien law will not be allowed to defeat or impair the lien of a subcontractor, laborer, or materialman,²⁰ regardless of whether such payment is made in advance of the time when due under the contract, as discussed supra subdivision b (2) of this section, or is made after such time²¹ It has been held that the fact that a payment was made to a creditor of a

contractor on the false representation of such creditor that he had assumed all the contractor's debts does not make the payment fraudulent as against the subcontractors, and that the owner is not obliged to protect them until they give him the statutory notice²²

d. Statutory Duties of Owner

- (1) In general
- (2) Requiring statement or release
- (3) Retaining funds to meet claim

(1) In General

Under some statutes the owner is under a duty to see that payments made by him to the contractor are appropriated to the just claims of laborers and materialmen.

Under a few statutes, and the construction placed thereon, it is the duty of the owner to see that payments made by him to the contractor are, to the extent of the contract price, appropriated to the payment of valid and just claims of laborers and materialmen,²³ and he is or is not relieved of liability to the extent of such payments to the contractor accordingly as they are or are not appropriated to the payment of valid claims of laborers and materialmen,²⁴ his liability for the claims of laborers and materialmen, in any event, not to exceed the contract price, as discussed supra § 174.

(2) Requiring Statement or Release

Under some statutes payments made by an owner to a contractor cannot defeat or otherwise affect the lien claims of subcontractors, laborers, or materialmen where such payments have been made without first obtaining a statement or release of claims.

11. ND—Bottineau First Nat Bank v Warner, 114 NW 1085, 17 ND 76, 17 Ann Cas 213

In absence of filing of notice within the statutory period the owner may thereafter pay the principal contractor in safety—Disbrow & Co v Peterson, 287 NW 220, 136 Neb 719.

12. Mich.—Hamtramck Lumber & Supply Co v United Home Builders, 192 NW 575, 222 Mich 265

13. Mich.—Frank Japes Co v Pagel, 225 NW 521, 246 Mich 700
NC—Beeson Hardware Co v Burtner, 155 SE 733, 199 NC 743
Tex.—Bradley v Oldham, Civ App, 134 SW 2d 422, error refused
40 CJ p 348 note 10

14. Conn.—Kelly v. Alling, 80 A 782, 84 Conn 487
40 CJ p 349 note 11

15. NY—Kelly v Bloomingdale, 34 NE 919, 139 NY 343.
40 C.J. p 349 note 12

Transferee of note

Homesteader knowing note for contract price was transferred by contractor to materialman claiming lien was required to pay transferee, provided no labor was performed in meantime by one entitled to statutory lien—Modern Plumbing Co v Armstrong Bros, Tex Com App, 36 SW 2d 1011

16. Iowa.—Mason City Brick & Tile Co v. Lamson, 180 NW 814, 190 Iowa 365.

40 C.J. p 349 note 13

17. Cal.—Diamond Match Co v Silberstein, 131 P 874, 165 Cal 282
40 C.J. p 349 note 14

18. NJ—Taylor v. Wahl, 60 A. 63, 72 NJ Law 10
40 C.J. p 349 note 15

19. NJ—Tuttle v Cadwell, 105 A 11, 92 NJ Law 26
40 C.J. p 349 note 16.

20. NY—McCorkle v Herrman, 22

NE 948, 117 NY 297—Cheney v Troy Hospital Assoc, 65 NY. 282

21. NY—Hofgesang v. Meyer, 2 Abb N Cas 111

22. Tex.—Burt v Parker County, 14 SW. 335, 77 Tex 338.

23. Ga.—Holmes v Venable, 109 S E 175, 27 Ga App 431.
40 C.J. p 350 note 23

Purpose of some provisions is to give furnisher of labor and materials claim on owner, to compel owner at his peril to withhold final payment from contractor until owner has received assurance that contractor has paid all material and labor claims which are or which may be perfected into liens—Cutler-Hammer, Inc, v Wayne, CCA Ga., 101 F 2d 823, certiorari denied Wayne v. Cutler-Hammer, Inc, 59 S Ct. 1031, 307 US 635, 83 L Ed 1517

24. Ga.—Green v Farrar Lumber Co, 46 SE 62, 119 Ga. 30.
40 C.J. p 350 note 24.

Under some statutes it is the duty of the owner before making any payment to the contractor to require of him a verified statement of the names of persons furnishing labor or material and the amounts due or to become due to each,²⁵ and payments made without such statement or on an insufficient statement are not rightfully made and cannot defeat or reduce the claim of a subcontractor, etc., for a lien,²⁶ even though he does not serve statutory notice on the owner until after the payment,²⁷ or even though, according to some,²⁸ but not other,²⁹ authorities he wholly fails to serve on the owner a notice or detailed statement of his claim as provided for by statute. Under other statutes it has also been held that the risk of payment rests on an owner until expiration of the statutory period within which liens may be filed where he pays the principal contractor without obtaining the statutory statement from him.³⁰

The owner is protected, on the other hand, if he uses reasonable precautions in following the statutory provisions,³¹ he has a right to rely and act on a sworn statement in the form required by statute,³² even though it is false,³³ where he has no knowledge of its falsity³⁴ and claimant has not served him with the notice provided for by statute.³⁵ Under some circumstances,³⁶ as where nothing is due him at the time,³⁷ a claimant may not be injured by the making of a payment by the owner to the contractor without requiring the latter to

furnish the statutory statement. Where mechanics' liens have been duly waived by a subcontractor or the like, the owner is not required to obtain the statutory statement before paying over money to the general contractor.³⁸

Under some of the statutes imposing on an owner the duty to see that payments made by him to the contractor are by the latter applied to payment of laborers and materialmen, as discussed supra subdivision d (1) of this section, it is further provided that an owner may, on paying the contractor, protect himself from liens for work done and material furnished on the employment of the contractor, by procuring from the contractor a sworn statement that the agreed price or reasonable value of such work or material has been paid,³⁹ and, if the owner produces such sworn statement of the contractor, a materialman is not thereafter entitled to foreclose his asserted lien.⁴⁰ Such a statute, however, contemplates only one affidavit of the contractor,⁴¹ namely, one made on the final completion of the work,⁴² and an owner paying the contractor in installments before the completion of the work cannot protect himself from liens by taking separate affidavits that all work done and materials furnished up to that time have been paid for.⁴³

Obtaining release of liens Where the statute requires the owner to procure from the contractor a verified release of liens before making payments to him, payments made without such release are not

25. Ill.—Ceco Steel Products Corporation v Couri, 35 NE 2d 810, 311 Ill App 297—Gottschalk Const Co v Carlson, 253 Ill App 520 40 C J p 350 note 33

26. Ill.—Liese v Hentze, 158 NE 428, 326 Ill 633—Gottschalk Const Co v Carlson 253 Ill App 520 Mich—Frank Japes Co v Pagel, 226 NW 521, 346 Mich 700 Ohio—Chapel State Theatre Co v Hooper, 175 NE 450, 123 Ohio St 322, affirmed 52 S Ct 137, 284 US 588, 76 L Ed 508 40 C J p 350 note 34

Payment at peril

(1) Owner pays contractor, without requiring statement concerning materialmen's bills, at his peril—Liese v Hentze, 158 NE 428, 326 Ill 633

(2) Owner not requiring certificate of unpaid claims before paying contractor bears risk of distribution of payment ratably among subcontractors, materialmen, and laborers—Chapel State Theatre Co v Hooper, 175 NE 450, 123 Ohio St 322, affirmed 52 S Ct 137, 284 US 588, 76 L Ed 508

Refusal to pay

Owner is justified in withholding payment from contractor on latter's failure to furnish sworn statement of subcontractors' claims on demand—Gottschalk Const Co v Carlson, 253 Ill App 520

Statement held insufficient

Ill.—Ceco Steel Products Corporation v Couri, 35 NE 2d 810, 311 Ill App 297.

27. Ill.—Larsen v Basikowski 206 Ill App 1

28. Mich.—Blitz v Fields, 74 NW 186, 115 Mich 875—Smalley v Ashland Brown-Stone Co, 72 NW 29, 114 Mich 104

29. Ill.—Brannan v McEvoy, 196 Ill App 336

40 C J p 351 note 37

30. Ohio—Howk v Krotzer, 42 NE 2d 640, 140 Ohio St 100

31. Ill.—Berkshire Warehouse Co v Hilger, 109 NE 287, 268 Ill 463

32. Ill.—Berkshire Warehouse Co v Hilger, supra

33. Ill.—Knickerbocker Ice Co v Halsey Bros Co, 104 NE 665, 262 Ill 241

40 C J p 351 note 40

34. Ill.—Knickerbocker Ice Co v Halsey Bros Co, supra 40 C J p 351 note 41

35. Ill.—Knickerbocker Ice Co v Halsey Bros Co, supra

36. Ill.—Berkshire Warehouse Co v Hilger, 109 NE 287, 268 Ill 463

37. Ill.—Berkshire Warehouse Co v Hilger, supra

38. Ohio—Kocher v Ricketts, App. 49 NE 2d 85

39. Ga.—Massachusetts Bonding & Insurance Co v Realty Trust Co, 83 SE 210, 142 Ga 499—Prince v Neal-Millard Co, 53 SE 761, 134 Ga 884

40. Ga.—Chambers Lumber Co v Gilmer, 5 SE 2d 84, 60 Ga App 832

41. Ga.—Massachusetts Bonding & Insurance Co v Realty Trust Co, 83 SE 210, 142 Ga 499

42. Ga.—Massachusetts Bonding & Insurance Co v Realty Trust Co, supra 40 C J p 350 note 28

43. Ga.—Massachusetts Bonding & Insurance Co v Realty Trust Co, supra

effective as against subcontractors and others ⁴⁴

(3) Retaining Funds to Meet Claim

Under some statutes the owner has the right and duty to retain funds to meet claims of subcontractors

Under some statutes the owner has the right, in self-protection, to retain enough of the original contract price to cover the liens of subcontractors ⁴⁵ Under other statutes a payment of any money by the owner to the contractor before all laborers, mechanics, and materialmen have been paid for work done or materials furnished does not relieve him from liability to such persons, ⁴⁶ and lien claimants have a right to assume that the owner will withhold from the general contractor sufficient funds to meet their claims for whatever period may be designated by statute ⁴⁷ It has also been held under some provisions that, where a materialman gives notice of his claim to the owner, sums due or to become due the principal contractor are regarded as a trust fund for the payment of such claim, and that in such case the owner is under a duty to retain a sufficient sum to meet the claim ⁴⁸

Under some statutes it is the duty of the owner to withhold a certain per cent of the contract price for a designated period to meet claims of subcontractors and the like, ⁴⁹ but such provisions do not protect lien claimants who do not come within the classes of persons enumerated by the statute as those for whose protection the per cent is to be retained. ⁵⁰ While there is some authority to the

contrary, ⁵¹ it is generally held that a provision in a contract giving an owner the right to retain a portion of the contract price until a certain time is for the benefit of the owner and may be waived by him and payment made in advance of that time without incurring any liability to subcontractors and others ⁵² Under statutes providing that all payments made by the owner to the principal contractor within a prescribed period shall be at the owner's risk, and that no owner shall be liable to such contractor until expiration of such period, it has been held that the contract price constitutes a fund for payment of subcontractors and materialmen which it is the owner's duty to see is properly distributed ⁵³

§ 252. Payment to Subcontractors, Laborers, or Materialmen as Affecting Lien of Other Persons

Payments made to discharge the liens of subcontractors, laborers, or materialmen may be effective to reduce or defeat the claims of the principal contractor.

Payments made by the owner to discharge valid liens of subcontractors, laborers, or materialmen are effective to reduce or defeat the claim of the principal contractor ⁵⁴ The rule has been held to be applicable where the lien discharged has been carried to final judgment, ⁵⁵ or, provided it is valid, ⁵⁶ where claimant has taken the necessary steps to perfect the lien ⁵⁷ or has commenced an action to enforce it, ⁵⁸ even though final judgment has not been rendered ⁵⁹ When the lien has been pressed to judg-

44. N.J.—Bruce v Pearsall, 34 A 982, 59 N.J. Law 62

40 C.J. p 351 note 58

45. Ill.—Kiefer v Reis, 162 N.E. 157, 331 Ill. 38

Utah—Sierra Nevada Lumber Co v Whitmore, 66 P 779, 34 Utah 130
Right to withhold payment in absence of statutory provision see supra subdivision a of this section

Protection of owner

The statute providing that owner may withhold from his contractor as much of the contract price as may be necessary to meet demands for labor or materials for which contractor is liable to third persons, is for the protection of owners against defaulting contractors, and the provisions of the contract for payments to be made to the contractor will be construed in accordance with the rights of the owner as provided for by the statute—First Church of Christ, Scientist, v Lawrence, 297 N.W. 99, 210 Minn. 37

46. Ark.—Barton v Grand Lodge I O O F, 70 S.W. 805, 71 Ark. 35

Burden on owner

Under mechanics' lien law, burden

is on owner to ascertain that laborers' liens have been discharged through payment by contractor or else withhold from contractor sufficient funds to pay laborers amount due them—Florida Fruit Co v Shaleford, 198 So. 841, 145 Fla. 316
"Mechanics" and "artisans"

Carpenters, painters, and floor finishers are "mechanics" or "artisans" within statute requiring owner to withhold fund for "mechanics" or "artisans"—Miller v Harmon, Tex. Civ. App., 46 S.W.2d 342

47. Ariz.—Leeson v Bartol, 99 P.2d 485, 65 Ariz. 180

48. N.C.—Thomas H. Briggs & Sons v Allen, 175 S.E. 838, 207 N.C. 10

49. Tex.—Rotsky v Kelsay Lumber Co., Com. App., 228 S.W. 558
40 C.J. p 351 notes 48-52

50. Tex.—Huffman v McDonald, Civ. App., 261 S.W. 146—Rotsky v Kelsay Lumber Co., Com. App., 228 S.W. 558.

51. Iowa—Merritt v Hopkins, 65 N.W. 1015, 96 Iowa 653
40 C.J. p 351 note 74

52. Va.—Schrieber v Norfolk Citizens' Bank, 38 S.E. 134, 99 Va. 257
40 C.J. p 351 note 57

53. Kan.—Clough v McDonald, 18 Kan. 114

Okl.—Enson Oil Co v M. A. Swatek & Co., 36 P.2d 504, 169 Okl. 170—Newman v Kirk, 23 P.2d 163, 164 Okl. 147—Treece v Carpenter, 222 P. 330, 92 Okl. 21—Hoggeson Bros v Dickason-Goodman Lumber Co 196 P. 686, 81 Okl. 31

54. Cal.—Clancy v Plover, 40 P. 394, 107 Cal. 372
40 C.J. p 352 note 59

55. R.I.—Bagaglio v Paolino, 85 A. 1048, 35 R.I. 171, 44 L.R.A.N.S. 80, rehearing denied 85 A. 1136

56. Cal.—Wilson v Nugent, 57 P. 1008, 125 Cal. 280
40 C.J. p 352 note 61

57. N.J.—Kirtland v Moore, 2 A. 269, 40 N.J.Eq. 106

58. Wash.—Simpson v Sisters of Charity, 182 P. 937, 108 Wash. 82

59. Wash.—Simpson v Sisters of Charity, supra
40 C.J. p 352 note 64.

ment, the owner may set off against the contractor the amount of the judgment,⁶⁰ including not only the amount of the claim for labor or materials, but also interest,⁶¹ costs,⁶² and attorney's fees.⁶³ However, where the filing of a lien by a subcontractor was due to the owner's refusal to pay an order on him given by the contractor to the subcontractor for the amount of his claim, the owner being at the time of such refusal indebted to the contractor in an amount exceeding the amount of the order, the owner can offset against the contractor only the amount of the lien claim proper and not the costs and expenses incident to the lien.⁶⁴

While it has been held that payments made by the owner to subcontractors without the contractor's knowledge or assent and before the subcontractors have taken the necessary steps to perfect their liens and impose a direct liability on the owner are not available to defeat or reduce the claim of the contractor,⁶⁵ it has also been held that, where the contractor has defaulted in the performance of his contract, the owner is justified in paying and charging to the contractor such claims as might be the subject of liens without waiting for them to be perfected and established,⁶⁶ although even in such case the owner is not justified in paying and charging to the contractor whatever amounts are claimed by persons who have furnished labor or materials, but only the amounts to which they are properly and legally entitled.⁶⁷

Where the statute requires that the contractor should signify his assent or dissent to the owner

within a certain time after being notified of the claim of his journeyman or other person on the owner for work performed, a payment made to a claimant after the lapse of the time specified, and before the contractor has notified his dissent to the owner, will be binding as between the two latter.⁶⁸ A general contractor is not a mere volunteer in paying a materialman before the latter has prosecuted his lien to judgment,⁶⁹ and the general contractor may be entitled to set off, as against a subcontractor's assignee, the amount he has theretofore paid the original subcontractor for materials furnished by the latter.⁷⁰ The mere assumption by one other than the owner of the obligation to pay a materialman does not of itself extinguish his statutory lien.⁷¹

§ 253. — Liens of Other Subcontractors, Laborers, or Materialmen

Payments made to subcontractors, laborers and materialmen who were entitled to file liens may be allowed in reduction of the amount allowable for liens of other such persons, but the fact that a subcontractor has been paid in full will not necessarily preclude one who has furnished labor or material to him from enforcing a lien.

Payments made to subcontractors, materialmen, or laborers who were entitled to file liens and would have filed them but for such payment should be allowed to the owner in reduction of the amount available for the liens of other subcontractors, materialmen, or laborers,⁷² at least under some circumstances,⁷³ but the rule is otherwise where the payment was made in advance of the time when due.⁷⁴

60. Cal.—Whittier v Wilbur, 48 Cal 175

61. Minn.—Westlund-Westerberg Lumber Co v Lindsay, 168 NW 96, 140 Minn 518

62. Minn.—Westlund-Westerberg Lumber Co v Lindsay, supra 40 C J p 352 note 68

63. Cal.—Clancy v Plover, 40 P 394, 107 Cal 272—Covell v Washburn, 27 P 859, 91 Cal 560

64. Cal.—Adams v Burbank, 37 P 640, 103 Cal 646

65. Wis.—Walker v Newton, 10 N W 436, 53 Wis 336

66. RI.—Bagaglio v Paolino, 85 A 1048, 35 RI 171, 44 L R A, N S, 80, rehearing denied 85 A 1136

67. RI.—Bagaglio v Paolino, supra.

68. La.—Baxter v Sisters of Charity, 15 La Ann 686.

69. NY.—Empire Heating Corporation v James Stewart & Co, 252 NYS 136, 140 Misc 303

70. NY.—Empire Heating Corporation v James Stewart & Co, supra

Failure to file notice of assignment

General contractor was held entitled to set off, as against subcontractor's assignee, amount paid by contractor for materials furnished original subcontractor, where contractor established validity of materialman's claim and subcontractor's assignee failed to file notice of assignment.—Empire Heating Corporation v James Stewart & Co, supra

Contractual authorization

Contract authorizing general contractor to withhold from subcontractor sum sufficient to pay costs, expense, attorney's fees, "loss or damage" resulting from filing of lien was held to authorize contractor's payment of claim for materials.—Empire Heating Corporation v James Stewart & Co, supra

71. Fla.—Lovingood v Butler Const Co, 131 So 126, 100 Fla 1252, 74 A L R 513

72. Cal.—Hampton v Christensen, 84 P 200, 148 Cal 729 40 C J p 352 note 78

73. Okl.—Treece v Carpenter, 322 P 230, 93 Okl 21 40 C J p 352 note 79

Payment within period for filing

In suit against building owner to enforce a subcontractor's lien, where costs exceed contract price, owner is entitled to credit for payments to subcontractors to extent of pro rata amounts to which other subcontractors would have been entitled if their liens had been filed, but such pro rata reduction is available to owner only when payment has been made within specified number of days within which subcontractors were entitled to but did not file liens or where liens were timely filed.—Fry v Long Bell Lumber Co, 167 P 2d 654, 196 Okl 670—J B Klein Iron & Foundry Co v Mays & Co, 184 P. 577, 76 Okl 177

74. Cal.—Marshall v. Vallejo Commercial Bank, 126 P 146, 163 Cal. 469

Utah.—Smoot v Checketts, 126 P 412 41 Utah 211, Ann Cas 1915C 1113

or with notice or knowledge on the part of the owner of the claims of other persons⁷⁵ Except in a few jurisdictions⁷⁶ the fact that a subcontractor has been paid in full does not prevent a person who has furnished labor or material to him from enforcing a lien,⁷⁷ at least where there is still something due from the owner to the principal contractor⁷⁸ Some statutes relating to stop notices, discussed supra § 114, do not render a contractor who has made advance payments to a subcontractor liable to persons who are employees or materialmen of the subcontractor and who have served stop notices⁷⁹

§ 254. Tender

A proper tender of the amount due will extinguish a mechanic's lien.

A mechanic's lien may be destroyed and extinguished by a proper and sufficient tender of the amount due⁸⁰ made before the filing of the lien⁸¹ or the commencement of an action to foreclose it,⁸² but not by a tender of less than the amount claimed,⁸³ a tender before the work has been finished, and when nothing is due the lien claimant,⁸⁴ or, it has been held, by a tender which is refused by reason of a mistake of law.⁸⁵

VII. STIPULATIONS FOR PAYMENT OF CLAIMS AND INDEMNITY AGAINST LIENS

§ 255. Contracts and Stipulations in General

Contract provisions for the retention by or for the owner of all or a part of the contract price until claims for work or materials have been paid, or liens therefor discharged, are for the benefit of the owner and the surety and not of laborers or materialmen.

Contract provisions imposing on the contractor the duty of protecting the owner against mechanics' liens inure to the benefit of the owner⁸⁶ and make a compliance therewith by the contractor a condition precedent to recovery by him in a suit to foreclose

a lien,⁸⁷ but they do not impair the rights of third persons furnishing materials to the contractor,⁸⁸ and according to some,⁸⁹ although not other,⁹⁰ authorities they do not increase the rights of such persons

Likewise, contract provisions for the retention by, or on behalf of, the owner, of the contract price, or a part thereof, until claims for work and materials have been paid or liens therefor have been discharged, are construed to be for the benefit of

75. Iowa—Wheeler Lumber, Bridge & Supply Co v White, 145 N W 917, 184 Iowa 495
40 C.J. p 353 note 82

76. N.Y.—French v Bauer, 33 N E 77, 134 N Y 548, 20 L.R.A. 560
40 C.J. p 353 note 83

77. Tex.—W. L. MacAtee & Sons v House, 153 S W 2d 460, 137 Tex 259
40 C.J. p 353 note 84

78. Conn.—Barlow Bros Co v Gaffney, 55 A 583, 76 Conn 107
40 C.J. p 353 note 85

79. N.J.—Mills v Hegeman-Harris Co, 125 A 137, 94 N J Eq 803—Morris County Golf Club v Hegeman-Harris Co, Inc, Ch, 121 A 528

80. Idaho—Boise Lumber Co v Boise City Independent School Dist, 214 P 143, 36 Idaho 778
S.D.—Pittsburg Plate Glass Co v. Leary, 126 N W 271, 35 S.D. 256, 81 L.R.A.N.S., 746, Ann Cas 1912B 928

Refusal at peril

Mechanic's lien plaintiff, refusing to accept sum tendered into court by one purchasing realty after foreclosure proceeding began, does so at his peril—E. J. Struntz Planning Mill Co v Paget, 263 P 389, 123 Or 651

Tender of conveyance

Contractor refusing conveyance of land under contract as part payment

for construction was held not entitled to lien for amount of conveyance—Colonial Brick Co v Zimmerman, 239 N W 301, 255 Mich 655

81. Idaho—Boise Lumber Co v Boise City Independent School Dist, 214 P 143, 36 Idaho 778

82. N.Y.—Schwab v Loubat, 1 N Y Month L Bul 45

83. N.Y.—Dowdney v McCollom, 5 Daly 340

84. Mass.—Patch v Collins, 33 N E 567, 158 Mass 468

85. Mich.—Rubenstein v People's Lumber Co, 204 N W 723, 231 Mich 674

40 C.J. p 341 note 8

86. Ariz.—Tucson Nat Bank v Gomez, 234 P 560, 27 Ariz 510

Mo.—Hiller v Daman, 166 S W 869, 183 Mo App 315

Contract stipulation against liens as affecting right to lien of Contractor see supra § 93
Subcontractors, laborers, or materialmen see supra, § 109

Acceptance of bond as waiver of requirement

Owner's acceptance of contractor's bond conditioned on faithful performance of agreements held waiver of contract specification requiring bond securing payment of labor and materials—Bates Expanded Steel Truss Co v Sisters of Mercy of Kansasville, 243 N W 456, 208 Wis 457.

Interest on unpaid liens

Contractor not paying mechanics' liens, as required by contract, before payment of price, held properly charged with interest thereon, owner not being obliged to pay such interest from balance of price in his hands in order to save contractor expenses of lien foreclosure suits—Bowman v Maryland Casualty Co, 283 P 826, 88 Cal App 481

87. Iowa—Maryland Casualty Co v Des Moines City Evangelization Union, 187 N W 695, 184 Iowa 246
40 C.J. p 365 note 46

88. Cal.—Whittier v Wilbur, 48 Cal 175

89. Wash.—Stetson & Post Mill Co v McDonald, 32 P. 108, 5 Wash 496
40 C.J. p 365 note 48

Guaranty of payment of bills for material

Lumber company, guaranteeing payment of materials in consideration of assignment of amount paid by owner to contractor, was held not to assume contractor's liability to materialmen and not estopped to deny liability to materialmen not knowing of guaranty—Hardin Lumber Co v Shepherd, Tex Civ App, 40 S W 2d 215, error dismissed

90. Ill.—Whitcomb v Seney, 199 Ill App 526
40 C.J. p 365 note 49.

the owner⁹¹ and the surety,⁹² rather than of laborers, materialmen, or subcontractors,⁹³ and not to confer on the latter any rights in the fund retained,⁹⁴ although laborers and materialmen have been held entitled to rely on a clause of the contract providing for the retention by the owner of a certain portion of the money due the contractor for a stipulated period after completion of the work.⁹⁵ Such provisions, and similar statutory provisions, do not apply to payments made in completing the work after the contractor's default.⁹⁶

An agreement by a contractor to give his bond to protect the owner against mechanics' liens is, in order to avoid circuity of action, regarded as tantamount to an agreement not to assert a mechanic's lien,⁹⁷ but his agreement to give a surety bond against mechanics' liens, up to a stated proportion of the amount of the contract, is not so construed.⁹⁸ Where there are claims against a contractor for materials and labor, his failure to furnish the bond required of him by the contract excuses payment of installments due for work completed until such

bond is furnished.⁹⁹ Where a materialman, in reliance on the promise of one financing the contractor to accept the contractor's order to pay the materialman's claim, refrained from taking steps to insure the payment of the debt under the contractor's bond, the promisor is estopped to deny liability.¹ Where a mortgagor assigns future rents to satisfy a materialman's lien on the mortgaged premises, the materialman's claim is required to be satisfied from such assignment.²

A statute governing an owner's personal liability to subcontractors has been held not exclusive, and the owner may guarantee a subcontractor's account by agreement.³ In the absence of a statute fixing a personal liability on a building owner for materials or supplies furnished to a subcontractor, an owner is under no obligation to give notice to subcontractors of his guaranty to a materialman of payment for materials supplied the original contractor.⁴ While the owners of property subject to mechanics' liens may not affect the liens by contract, an agreement allocating the lien to part of the property has

91. US—Hall v Union Indemnity Co, CCA Mo, 61 F2d 85, certiorari denied Union Indemnity Co v Hall, 53 S Ct 222, 287 US 663, 77 L Ed 572.

Ala—Corpus Juris cited in Security Federal Savings & Loan Ass'n v Underwood Coal & Supply Co, 16 So 2d 100, 103, 245 Ala 56.

Ark—Russellville Water & Light Co v Sauerman, 161 SW 503, 109 Ark 501.

NJ—Meyer v Standard Accident Ins Co, 177 A 255, 114 NJ Law 483.

Pa—Getty v Pennsylvania Inst for Instruction of Blind, 45 A 333, 194 Pa 571.

Tex—Corpus Juris quoted in Citizens' Nat Bank in Abilene v Texas & P Ry Co, 150 SW 2d 1003, 1007, 136 Tex 333.

W Va—Atlas Powder Co v Nelson and Chase & Gilbert Co, 20 SE 2d 890, 124 W Va 298.

Indemnity

On showing that contractor is insolvent, owner may obtain authority to apply amount due to contractor in discharge of owner's suretyship on contractor's liability to mechanics' lienors or to retain such amount until indemnified—Tipula v Gardfield Mill, 170 A 228, 115 NJ Eq 246.

Loan association making building loan and guaranteeing that no claim would become lien on property, and agreeing not to pay contractor until labor and material claims were paid, was held liable to owners, where association paid contractor more than amount of valid liens filed—Modesto

Lumber Co v Wylde, 19 P 2d 238, 217 Cal 431.

92. US—Hall v Union Indemnity Co, CCA Mo, 61 F2d 85, certiorari denied Union Indemnity Co v Hall, 53 S Ct 222, 287 US 663, 77 L Ed 572.

NJ—Meyer v Standard Accident Ins Co, 177 A 255, 114 NJ Law 483.

W Va—Atlas Powder Co v Nelson and Chase & Gilbert Co, 20 SE 2d 890, 124 W Va 298.

93. Ala—Corpus Juris cited in Security Federal Savings & Loan Ass'n v Underwood Coal & Supply Co, 16 So 2d 100, 103, 245 Ala 56.

Ark—Russellville Water & Light Co v Sauerman, 161 SW 502, 109 Ark 501.

NY—Skinner Bros Mfg Co v Shevlin Engineering Co, 248 NY S 380, 231 App Div 656, affirmed 178 NE 795, 257 NY 562.

Pa—Getty v Pennsylvania Inst for Instruction of Blind, 45 A 333, 194 Pa 571.

Tex—Corpus Juris quoted in Citizens' Nat Bank in Abilene v Texas & P Ry Co, 150 SW 2d 1003, 1007, 136 Tex 333.

W Va—Atlas Powder Co v Nelson and Chase & Gilbert Co, 20 SE 2d 890, 124 W Va 298.

94. Tex—Corpus Juris quoted in Citizens' Nat Bank in Abilene v Texas & P Ry Co, 150 SW 2d 1003, 1007, 136 Tex 333.

40 CJ p 365 note 52.

Fund retained by state as security for materialmen see the CJS title States § 126, also 59 CJ p 190 notes 70, 71.

No right of subrogation

Ark—Russellville Water & Light Co v Sauerman, 161 SW 502, 109 Ark 501.

95. NJ—Harry Pinsky & Son Co v Wike, 136 A 920, 101 NJ Eq 45, affirmed 141 A 920, 103 NJ Eq 18.

96. La—Minden Presbyterian Church v Lambert, 120 So 61, 167 La 712.

97. Pa—Beccia v House, 6 Pa Dist & Co 668, 17 Del Co 14.

98. Pa—Beccia v House, supra.

99. Wis—Yawkey-Crowley Lumber Co v Sinaiko, 206 NW 976, 189 Wis 298.

1. Cal—Gladding, McBean & Co v Southern Securities Co, 5 P 2d 639, 118 Cal App 737.

2. Ky—Hatfield v Corbin Bldg Supply Co, 129 SW 2d 1025, 279 Ky 80.

3. Va—Nicholas v Miller, 30 SE 2d 696, 182 Va 831, 153 ALR 752.

Deduction of account from contract price

An owner may guarantee subcontractor's account and deduct amount thereof from general contract price, as against both general contractor and other subcontractors, especially when reasonably necessary in order to complete building, and even when preference to one subcontractor would result—Nicholas v. Miller, supra.

4. Va—Thomas & Co v McCauley, 180 SE 396, 143 Va 451.

been held enforceable as between the grantors and a purchaser and all who purchase after recordation of the deed containing such contract or after actual notice thereof.⁵

Actions Where persons contracting for the erection of a building covenant to indemnify the contractor against loss by his waiver of a mechanic's lien in consideration of his guaranty that the cost will not exceed a certain sum, the contractor cannot maintain an action against them without showing performance of the agreement as to cost.⁶ Where a lien is filed against the property, the owner may recover against the contractor for breach of his contract to furnish material and labor, or to keep the property free from liens, even though the owner has not paid the lien claimant's bill.⁷ In actions on contract provisions imposing on the contractor the duty of protecting the owner against mechanics' liens, adjudications have been made with respect to the burden of proof⁸ and the admissibility of evidence.⁹

Attorney's fees. Where a building contract provides in one clause that the contractor shall reimburse the owner for reasonable attorney's fees paid by him as a result of the contract, and in another clause for payment of such fees of not less than a stated per cent of the amount involved, a reasonable fee will be allowed, but not less than such per cent, and more than such per cent should be allowed only where the value of the services is clearly shown to

be more,¹⁰ and the amount involved in any controversy is the bona fide difference between the parties to the litigation, and is measured by the amount of money required to adjust that difference.¹¹ A contract containing a no-lien clause and giving the owner the right, in case there should be evidence of a lien, to retain a sum sufficient to indemnify him does not cover counsel fees incurred by him in resisting a lien.¹²

§ 256. Bonds or Undertakings in General

The effect of an owner's failure to exact from the contractor, as required by statute, a bond conditioned that the latter shall faithfully perform his contract, pay all claims for labor and materials, and indemnify the owner against liens arising out of the work varies with the language of the statutes.

Independently of statute, the owner may require a bond,¹³ and it is a very usual practice that in connection with a building contract the contractor shall execute to the owner a bond with sureties conditioned that the contractor shall faithfully perform his contract, pay all claims for labor and materials, and indemnify the owner against liens arising out of the work.¹⁴ Under some statutes, the effect of a failure of the owner to take such a bond is, with respect to private improvements, that the liens of persons other than the contractor may be enforced for the value of the labor or material without being limited to the contract price agreed on between the owner and the contractor,¹⁵ and the same re-

5. Ky—Ward v Butcher, 92 S W 3d 741, 263 Ky 585

6. Mo—Johnson v Brill, 295 S W 558

7. Okl—Boone v Maloney, 43 P 2d 749, 171 Okl 454

Effect of suing before payment

The only effect of the owner's bringing suit in advance of payment is that he is compelled to prove the breach of contract and the amount of damage independently, instead of relying on a judgment after foreclosure of the lien—Tucson Nat Bank v Gomez, 234 P 560, 27 Ariz 510

8. Burden of proving amount and value

Burden was on property owner suing building contractor for breach of contract and for permitting filing of mechanics' liens, which owner paid, to prove amount and validity of liens—Weaver v Atlantian Const Co, 258 P 114, 84 Cal App 161

9. Entire lien filed against owner's property was admissible in action on contract containing indemnity against liens, subject to elimination of items not covered by contract—Kirpichnikoff v Finkel, 138 A 913, 290 Pa 437.

10. La—Acme Brick Co v People's Homestead Ass'n, 115 So 746, 165 La 543

11. La—Acme Brick Co v People's Homestead Ass'n, supra

12. Pa—Kirpichnikoff v Finkel, 138 A 913, 290 Pa 437

13. Tex—Williams v Baldwin, Com App, 228 S W 554
10 C J p 353 note 98

14. Tex—Southern Surety Co v Nalle, Com App, 243 S W 197
Estoppel of party to indemnity bond to claim lien see supra § 231
Bond to prevent or discharge lien see supra §§ 232-239

Forms of bond

Tex—Texas Glass & Paint Co v Crowder, 193 S W. 1072, 108 Tex 346
40 C J p 354 note 23 [a]

Contractor's failure to pay for materials

With respect to sureties on a contractor's bond, a contract to erect a building at the contractor's expense for labor and materials is not faithfully performed where the contractor fails to pay for materials, leaving them to be paid by liens filed against the building—J L & D M

Davis v Methodist Protestant Church of Haynesville, 111 So 794, 163 La 384

Application of particular statute

A statute relative to building contracts in cities of over fifty thousand inhabitants and requiring a bond to protect the owner, laborers, etc., does not apply to the commissioners of the port of New Orleans, which board is a state agency created to construct wharves and sheds for the accommodation of shipping—Barrett Mfg Co v New Orleans Port Bd of Comrs, 63 So 505, 133 La 1022, 50 L R A, N S, 469

15. Cal—Tyler v J I Mitrovich Bldg Co, 190 P 208, 47 Cal App 59

Effect of taking of statutory bond see infra § 258

Limitation of liens to contract price generally see supra § 174

Purpose of statute permitting owner to require principal contractor to execute bond is to enable owner to protect himself against liens that may be acquired against his property in aggregate exceeding contract price and to make surety liable only if aggregate of liens exceeds contract

sult follows where the owner takes a bond which fails to conform to the statutory requirements¹⁶ Under other statutes the effect of a failure of the owner to exact the bond is that he becomes personally liable for any balance due from the contractor to laborers and materialmen,¹⁷ or liable to them to the same extent as the surety would have been,¹⁸ provided they conform to the statutory requirements as to recording their claims and serving notice on the owner,¹⁹ since otherwise the owner is not bound to them²⁰

Under some statutes the contractor is not required to execute a bond and the owner is not required to exact one,²¹ the parties being at liberty to contract in this respect²² and to waive the execution of a bond²³ Where no bond is given, and no material is furnished on the faith that a bond has been executed, no rights accrue to materialmen under statute,²⁴ and even where the contract calls for the execution of a bond, but none is executed, the owner is under no duty to notify materialmen of such want of execution,²⁵ so that the owner's permitting the contractor to proceed with the construction

without executing a bond does not operate as an estoppel in favor of materialmen²⁶ The fact that a bond taken by an owner from the contractor does not protect a materialman's claim does not render the owner liable for the payment thereof²⁷

The duty of fair dealing and good faith toward the surety is imposed on the owner²⁸ The rights of the surety as to provisions protecting materialmen can rise no higher than those of materialmen²⁹

Bond to protect mortgagee or purchaser of mortgage bonds Where the owner of a lot mortgaged it for funds to erect a building thereon, and gave a bond to protect the mortgagee against mechanic's liens, the bond making no reference to the use to be made of the money, the fund is free from any claim or equity in favor of the surety,³⁰ and applying it in favor of other than lienable claims does not relieve him from liability on the bond³¹ A bond indemnifying the purchaser of mortgage bonds against a direct loss caused by the owner's failure to erect a building does not cover the owner's liability for labor and materials used in erecting a building³²

price—Bluefield Supply Co v M P Smith Const Co, 177 SE 296, 115 W Va 537

16. Cal—Sudden Lumber Co v Singer, 284 P 477, 103 Cal App 386—S R Frazee Co v Arnold, 188 P 822, 46 Cal App 74

Entry of judgment against one of insufficient sureties did not absolve owner's property from liability—Sudden Lumber Co v Singer, 284 P 477, 103 Cal App 386

Where sufficiency of surety was unquestioned, although not established by evidence, court's restriction of recovery by material claimants to contractor and sureties, pursuant to statute, was held not abuse of discretion—Simpson v Bergmann, 13 P 2d 531, 125 Cal App 1

17. La—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 312—R T Pender, Inc v Van Holten, 120 So 726, 10 La App 349—Utley Paint Co v Foster & Shushan, 1 La App 27

40 C J p 353 note 96

Privilege on property

The materialman acquires the right to proceed against the owner and the property, and to recover judgment against the owner with recognition of a privilege on the property, unless there is an agreement to the contrary—Ruston Lumber & Supply Co v Beckham, 128 So 534, 14 La App 204

18. La—Cole v Scheennadire, 111 So 651, 163 La 132—J J Clarke Co v Petivan, 109 So 913, 161 La

1095—R T Pender, Inc, v Van Holten, 120 So 726, 10 La App 349—Richardson v Dasara, 119 So 290, 9 La App 566—Dixie Bldg Material Co v Chartier, 8 La App 469—Demourelle v Vasquez, 4 La App 624—Julius Aaron & Son v Keyser, 3 La App 619—Utley Paint Co v Foster & Shushan, 1 La App 27

40 C J p 353 note 97

Construction of heater put in installing steam-heating system held work contemplated by act imposing such liability on owner—Petty v Jones, 121 So 372, 10 La App 409.

Owner's payment of contractor in full did not relieve him from liability to materialman, where contract was not recorded and no bond was required, the owner standing in the shoes of the surety and being liable to the same extent as he would have been—North Rampart Lumber & Supply Co v Huppenbauer, 123 So 368, 11 La App 371

19. La—Louisiana Glass & Mirror Works v Irwin, 52 So 765, 126 La 555—Meriwether Supply Co v Baugh, 6 La App 730

20. La—Meriwether Supply Co v Baugh, supra.

21. Miss—American Oil Co v Ratliff's Sheet Metal Works, 125 So 249, 155 Miss 779

W Va—Atlas Powder Co v Nelson and Chase & Gilbert Co, 20 SE 2d 890, 124 W Va 298

22. Miss—American Oil Co v Rat-

liff's Sheet Metal Works, 125 So 249, 155 Miss 779

23. Miss—American Oil Co v Ratliff's Sheet Metal Works, supra

24. Miss—American Oil Co v Ratliff's Sheet Metal Works, supra

Extent of owner's liability

Where contractor furnished no bond and discontinued work, owner's liability to claimants was balance due on contract after deducting cost of completion plus amount paid contractor—American Oil Co v Ratliff's Sheet Metal Works, supra

25. Miss—American Oil Co v Ratliff's Sheet Metal Works, supra

26. Miss—American Oil Co v Ratliff's Sheet Metal Works, supra

27. Wash—Cloud v Greenwood Logging Co, 288 P. 910, 157 Wash 261

28. Fla—Standard Accident Ins Co v Bear, 184 So 97, 134 Fla 523, 127 ALR 1

29. Pa—Mock v. Bechtel, 101 Pa. Super 181

30. Minn—Investors' Syndicate v Fidelity & Deposit Co of Maryland, 223 NW 189, 176 Minn 281.

31. Minn—Investors' Syndicate v Fidelity & Deposit Co of Maryland, supra.

32. US—Adair Realty & Trust Co v Globe Indemnity Co, CCA Ga, 60 F 2d 512.

§ 257. Requisites and Validity of Bond

- a In general
- b Parties
- c Consideration
- d Provisions and conditions
- e Amount
- f Execution and filing or recording

a. In General

A contractor's bond may be valid as a common-law bond even though it does not follow statutory requirements or complies with an unconstitutional statute.

A building contractor and his surety have a legal right to make any bond, acceptable to the owner, which they see fit to make.³³ A contractor's bond providing for payment of claims for labor and material, entered into voluntarily and for a valuable consideration, and not repugnant to the letter or policy of the law, is a valid common-law bond, even though the requirements of a statute are not followed³⁴ or even though there is a full compliance with a statute³⁵ which is unconstitutional.³⁶ Where sureties undertake the completion of the contract, they cannot thereafter assert the invalidity of the bond,³⁷ particularly where they receive progress payments as they become due.³⁸

b. Parties

While statutory requirements, as to the parties to contractors' bonds should be observed, immaterial or inadvertent errors in the designation of the parties do not affect the validity of the bond or the liability of the surety.

In order to constitute a statutory bond, the persons for whose benefit the statute requires the bond to be executed must be designated with reasonable certainty as the obligees,³⁹ however, the omission of the word "owner"⁴⁰ or the name of the owner⁴¹ in one clause of the bond is not fatal where it is a mere clerical error and the required information is contained in another clause. The fact that the surety's name does not appear in the recitals of the bond does not affect its validity or his liability, if it is otherwise properly executed and signed by him and if the bond and the circumstances clearly show an intention to charge him,⁴² nor does the failure of the contractors to sign the bond as principals⁴³ or the inadvertent insertion of the building owner's name in the body of the bond⁴⁴ affect the liability of the surety thereon. Under at least one statute, claimants must present their objections, if any, to the sufficiency or solvency of the surety on the bond within a specified number of days after the institution of a concursus proceeding by the owner.⁴⁵

Where a contractor's bond for the payment of claims is executed and filed pursuant to the statute, it is immaterial what interest the nominal obligee has,⁴⁶ or whether he has any interest,⁴⁷ in the land on which the building is to be constructed, if he is the person who, as owner, has contracted to have the building constructed. While, as a general rule, the same person cannot be both obligor and obligee in the bond,⁴⁸ it has been held that the fact that one of several obligees is also a surety on the bond does not prevent the bond from being operative in

33. Cal—Luke v Southern Surety Co, 286 P 490, 104 Cal App 737

In statutory form for public work

It is no defense to a surety that a bond covering a private contract is, for some unexplained reason, in the form required by the statute for public work—F G Schaeffer Iron Works v Standard Accident Ins Co, DC N J, 2 F Supp 764

Substantial compliance with the requirements of a statute have been held sufficient—Sunset Lumber Co v Smith, 267 P 738, 91 Cal App 746

34. Cal—Hammond Lumber Co v Willis, 153 P 947, 171 Cal 565.

35. Cal—Koenig v American Surety Co, 204 P 553, 56 Cal App 37

36. Tex—Southern Surety Co v Nalle, Com App, 242 S W 197, 40 C J p 353 note 8

Compulsion of void statute

In order to avoid contractor's lawful bond, importing consideration, as given under compulsion of unconstitutional statute, surety must show that bond was executed solely on such compulsion, and that rights se-

cured belonged to maker without such compliance, recital in bond that purpose was to secure faithful performance of contract in compliance with statutes which, to presumed knowledge of makers, had been declared unconstitutional, did not show that it was executed solely on compulsion of such statutes—Fife v Indemnity Ins Co of North America, Tex Civ App, 283 S W 645

37. Colo—Howard v Fisher, 283 P 1042, 86 Colo 493

38. Cal—Mazzer v Ramsey, 238 P 101, 72 Cal App 601
40 C J p 354 note 4

39. Cal—Terry v Southwestern Bldg Co, 185 P 213, 43 Cal App 365

La—Hughes v Smith, 38 So 175, 114 La 297, followed in Lhote Lumber Mfg Co v Dugne, 39 So 803, 115 La 669

Persons entitled to sue on bond see *infra* § 262

A bond which is deficient in being made in favor of the owner alone and not in favor of the materialmen and others as required by law has

been held tantamount to no bond at all—Lhote Lumber Mfg Co v Dugne, 39 So 803, 115 La 669—Hughes v Smith, 38 So 175, 114 La 297—Demourelle v Vasquez, 4 La App 634

40. Cal—Mazzer v Ramsey, 238 P 101, 72 Cal App 601

41. Cal—Mazzer v Ramsey, *supra*

42. Cal—C Ganahl Lumber Co v Thompson, 370 P 965, 205 Cal 354

43. Cal—C Ganahl Lumber Co v Thompson, *supra*

44. Cal—C Ganahl Lumber Co v Thompson, *supra*

45. U S—C C Hartwell Co v Miller, La, 256 F 273, 167 C C A 445, construing Louisiana statute
40 C J p 354 note 15

46. Minn—Steffes v Lemke, 41 N W 303, 40 Minn 27
40 C J p 354 note 9

47. Minn—Steffes v Lemke, *supra*

48. Tex—Alfalfa Lumber Co v Hope, Civ App, 225 S W 81.

favor of another obligee in respect of an obligation independent of that owing to the obligee who signed as surety⁴⁹ Where a contractor's bond, given for the use of all persons performing labor or furnishing materials in the building of a house, recites that the principal is a corporation, the sureties cannot escape liability on the ground that the principal had no legal existence as a corporation⁵⁰ and that the persons assuming to act for it in the premises had no authority so to do⁵¹

Estoppel to deny mistake Where a contractor, when applying for a bond, knew the owner of the lot, and gave the name of the owner's husband, as beneficiary or obligee, as the result of negligence or fraud, he and his surety are estopped to deny that the bond was executed in favor of the husband as the result of mutual mistake or that it was the parties' intention that the bond guarantee the performance of the contract with the wife.⁵²

c. Consideration

The consideration supporting the contractor's promise in the building contract is sufficient to bind sureties in his bond given contemporaneously with such contract.

A contractor's bond must be supported by a sufficient consideration⁵³ The same consideration which is sufficient to support the promise or undertaking of the contractor in the building contract is sufficient to bind sureties in the contractor's bond against mechanics' liens, given contemporaneously with the making and delivery of the contract⁵⁴ An antecedent promise of a contractor to give a bond indemnifying against liens is a sufficient consideration for the execution of such a bond subsequent to the execution of the building contract,⁵⁵ and either before⁵⁶ or after⁵⁷ the commencement of work thereunder, but in the absence of some such antecedent agreement no action can be maintained

against a surety on a bond given by a builder to indemnify the owner against loss where the bond is given after the execution of the contract and the commencement of the work by the builder, unless the bond is supported by some new consideration⁵⁸

The payment to subcontractors of the amount of their lien claims is not a sufficient consideration for a bond given by them to indemnify the owner against the liens of other subcontractors⁵⁹

d. Provisions and Conditions

In order to render available to the owner the exemption from, or limitation of, liability resulting from the taking of a statutory bond, the bond must be conditioned as provided by statute.

In order to render available to the owner the exemption from, or limitation of, liability resulting from the taking of a contractor's statutory bond, the bond must be conditioned as provided by statute⁶⁰ The bond may be valid even though it provides for, or guarantees, the payment of claims which cannot be asserted as liens against the property improved⁶¹ A provision in the bond limiting the time for bringing suit thereon may be upheld when, and only when, it is not unreasonable⁶² and does not violate a statutory prohibition⁶³ The fact that no statute authorizes or requires a provision for the protection of third persons in construction contracts, other than for public works, does not prevent the parties from inserting in the bond a provision for the protection of third persons⁶⁴

e. Amount

A bond for less than the statutory amount, while insufficient as a statutory bond, may nevertheless be valid so that materialmen can sue thereon

While the fact that the amount of the bond is less than that prescribed by statute prevents the bond from being sufficient as a statutory bond,⁶⁵

49. Tex.—Alfalfa Lumber Co v Hope, supra.

50. Minn.—Jefferson v McCarthy, 46 NW 140, 44 Minn 26

51. Minn.—Jefferson v. McCarthy, supra

52. Miss.—U S Fidelity & Guaranty Co v Parsons, 122 So 544, 154 Miss 587

53. Consideration held sufficient

Building contractor's bond, executed to induce payment by owner of balance of contract price before actually due, held supported by sufficient consideration.—Detroit Fidelity & Surety Co v Rickey, 165 NE 64, 96 Ind App 704

54. Mo.—North St Louis Planing Mill Co v Essex, 137 SW 295, 157 Mo App 18

55. Mo.—Fullerton Lumber Co v Calhoun, 89 Mo App 209—Oberbeck v Mayer, 59 Mo App 389

56. Mo.—Fullerton Lumber Co v Calhoun, 89 Mo App 209

57. Mo.—Oberbeck v Mayer, 59 Mo App 289

58. Kan.—Hensley v School Dist No 87 of Anderson County, 154 P 253, 97 Kan 56
40 C J p 354 note 21

59. Tenn.—Hanks v Barron, 32 S W 195, 95 Tenn 275

60. Cal.—Mazzera v Ramsey, 238 P 101, 72 Cal App 601—Terry v Southwestern Bldg Co, 185 P 212, 43 Cal App 366

Impossible condition

Requirement as to filing verified statement with public board held im-

possible of performance, where bond covered private work—Luke v Southern Surety Co, 286 P 490, 104 Cal App 727

61. Cal.—Union Sheet Metal Works v Dodge, 62 P 41, 129 Cal 390
40 C J p 354 note 26

62. Cal.—Rechsteiner v New York Nat Surety Co, 187 P 34, 44 Cal App 774
40 C J p 354 note 28
Time to sue on bond see infra § 262 c

63. NC—Guilford Lumber Mfg Co v Johnson, 97 SE 732, 177 N.C. 44
40 C J p 354 note 29

64. Fla.—Johnson Electric Co v Columbia Casualty Co, 133 So 850, 101 Fla 186, 77 ALR 1.

65. La.—Cole v Schexnadire, 111 So.

and from being available as an exemption from, or limitation of, the liability of the owner,⁶⁶ it does not affect the validity of the bond⁶⁷ or prevent the materialmen or their assignees from maintaining an action to recover on the bond,⁶⁸ to the extent of the amount thereof⁶⁹ Certainly the obligors have no ground of complaint,⁷⁰ as the bond is less onerous than it otherwise would have been⁷¹ and they cannot be injured by the insufficiency of the bond to protect the owner⁷²

f. Execution and Filing or Recording

While failure to file or record the bond as required by statute renders the owner liable as though no bond had been given, such failure does not affect the validity of the bond or the contract of suretyship.

Except as bearing on the question of consideration, discussed supra subdivision c of this section, it is immaterial whether the bond is executed before or after the execution of the contract between the owner and the contractor⁷³ or the execution of a mortgage on the premises⁷⁴ The signers of the bond are not released because other persons who they understood would sign did not do so, unless the obligee knew that they signed with such understanding⁷⁵ It is immaterial whether blanks in the bond were filled in after it was signed, since the person signing must be understood to intrust

to the person to whom the bond is delivered the duty of filling it in properly⁷⁶

There should be compliance with statutes requiring the bond to be filed or recorded within a specified time,⁷⁷ and, where they are not so filed and recorded, the owner is liable to the same extent as though no bond had been given,⁷⁸ but a failure to comply with the statutes in this respect does not affect the validity of the bond⁷⁹ or the contract of suretyship,⁸⁰ nor does it relieve the sureties of liability for the claims of materialmen or laborers⁸¹ or others,⁸² and the owner, under at least one statute, becomes bound in solido with the contractor and the surety for the payment of the claims of the mechanics and materialmen⁸³

Likewise while, under particular statutes, the failure to file the original contract and specifications within a prescribed time may result in the liability of the owner for the claims of laborers and materialmen not being limited,⁸⁴ the bond is valid and binding on the sureties⁸⁵ in respect of the claims of materialmen⁸⁶ in the absence of a stipulation in the bond that the contract shall be filed as a condition precedent to the liability of the sureties⁸⁷ Under at least one statute the owner's failure to record the bond makes the contractor the agent of the owner, and makes the latter's property liable for all perfected liens for materials furnished therefor⁸⁸

651, 163 La. 132—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 212—People's Homestead Co v Staub, 5 La A (Orleans) 6

The owner is not bound to estimate the cost of the building, and it is sufficient for him to enter into written construction contract and secure solvent bond in the amount required by law—Cook v Ruston Oil Mills & Fertilizer Co, 127 So 347, 170 La 10

66. Cal—Dodd v Maddox, 238 P 130, 72 Cal App 705

La—Willey v St Charles Hotel Co, 28 So 182, 52 La Ann 1581

Effect of taking sufficient statutory bond see infra § 258

67. La—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 212

Tex—Alfalfa Lumber Co v Hope, Civ App, 225 S W 81

68. Cal—Dodd v Maddox, 238 P 130, 72 Cal App 705

La—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 212

69. La—Arcadia Lumber Co v Austin, supra

Measure and limit of recovery generally see infra § 261

70. La—Arcadia Lumber Co v Austin, supra

Tex—Alfalfa Lumber Co v Hope, Civ App, 225 S W 81

71. Tex—Alfalfa Lumber Co v Hope, supra

72. La—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 212

73. Wash—Spokane & I Lumber Co v Lov, 58 P 672, 60 P 1119, 31 Wash 501

74. Pa—Union Bldg & Loan Ass'n v Hull, 19 A 949, 135 Pa 565

75. Pa—Slack v Cresswell, 2 Montg Co 145

40 C J p 355 note 39

76. Pa—Bugger v Cresswell, 12 A 829, 8 Pa Cas 555

77. Cal—Mangrum v Truesdale, 60 P 775, 128 Cal 145

40 C J p 355 note 40

Owner's duty to record

La—Monroe Hardware Co v Thompson, 110 So 495, 162 La 335

78. La—Cole v Schexnadire, 111 So 651, 163 La 132

40 C J p 355 note 41

Liability of owner not exacting bond see supra § 256

79. Cal—Hammond Lumber Co v Willis, 153 P 947, 171 Cal 565

Tex—Alfalfa Lumber Co v Hope, Civ App, 225 S W 81.

40 C J p 355 note 42

80. La—Cook v Ruston Oil Mills & Fertilizer Co, 127 So 347, 170 La 10

40 C J p 355 note 43

81. Cal—Meda v Lawton, 18 P 2d 665, 217 Cal 282—Dodd v Maddox, 238 P 130, 72 Cal App 705

La—Bell v Lieber, 125 So 871, 169 La 731—Monroe Hardware Co v Thompson, 110 So 495, 162 La 335

82. La—Monroe Hardware Co v Thompson, supra

83. La—Monroe Hardware Co v Thompson, supra

84. Cal—Union Supply Co v Morris, 30 P 2d 394, 220 Cal 331

40 C J p 355 note 46

85. Cal—Hammond Lumber Co v Willis, 153 P 947, 171 Cal 565

40 C J p 355 note 47

86. Cal—Dodd v Maddox, 238 P 130, 72 Cal App 705

87. Cal—Kiesig v Allspaugh, 27 P 662, 91 Cal 234, 34 P 106, 99 Cal 453

88. W Va—Pfaff & Smith Builders' Supply Co v Mason, 137 SE 356, 103 W Va 318.

§ 258. Construction and Effect of Bond in General

The bond of a contractor must be construed in connection with the contract and in accordance with the parties' intentions. The terms of the statute are to be read into a statutory bond and control its interpretation and effect.

The bond of a contractor indemnifying the owner against claims for labor and material must be construed in connection with the building contract,⁸⁹ particularly where the bond provides that the contract shall constitute a part of it,⁹⁰ and this is also true as to plans and specifications referred to in, and made part of, the bond,⁹¹ and the bond must be construed in the light of the statutes in force at the time of its execution,⁹² such as statutes providing for the protection of persons furnishing material and labor in the erection of a building.⁹³

In construing the language of the bond, effect must be given to the intention of the parties, if that intention can be found from the language employed,⁹⁴ notwithstanding less ambiguous language might have been used.⁹⁵ Every provision in the bond is to be given effect if that can reasonably be done.⁹⁶

It has been held that the rules of interpretation governing insurance contracts are applicable to guaranty or indemnity bonds of building contractors,⁹⁷ that the rules of interpretation governing guaranty insurance are applicable where the suretyship is not gratuitous but the surety is a company organized for the purpose of furnishing security for hire,⁹⁸ and that the contract of a paid surety on a building contractor's bond is to be construed most strongly against the surety⁹⁹ since it is in the nature of a contract of insurance.¹ However, the obligation of a contractor's bond for the payment of

89. Ark—Trinity Universal Ins Co v Willbanks, 144 S W 2d 1092, 201 Ark 386

Miss—Hartford Accident & Indemnity Co v Natchez Inv Co, 119 So 366, 155 Miss 31

NJ—Meyer v Standard Accident Ins Co, 177 A 255, 114 NJ Law 483

Va—Bristol Steel & Iron Works v Plank, 178 SE 58, 163 Va 819, 118 A L R 50

Wis—Yawkey-Crowley Lumber Co v Sinaiko, 206 NW 976, 189 Wis 298

40 C J p 355 note 51

Subcontractor's bond

(1) The rule stated in the text applies to a bond given by a subcontractor to the principal contractor. Miss—U S Fidelity & Guaranty Co v Maryland Casualty Co, 199 So 278, 191 Miss 103

Tex—Employers' Liability Assur Corporation v Trane Co, 163 SW 2d 398, 139 Tex 388

(2) In determining the question whether contractor or subcontractor should pay for materials and labor used, entitling claimants to sue on performance bond of subcontractor, all provisions of construction contract should be considered—Topeka Steam Boiler Works Co v U S Fidelity & Guaranty Co, 15 P 2d 416, 136 Kan 317.

Provision for payment of final installment

Provision in building contract for payment of final installment on completion of building and satisfactory proof of payment of labor and material bills, entering into and becoming part of suretyship contract, were held to be for benefit of contractor's surety, as well as of owner—American Employers' Ins Co v Roddy, Tex Com App, 51 SW 2d 280.

90. Kan—Cooke v Luscombe, 294 P 849, 132 Kan 147

Miss—Hartford Accident & Indemnity Co v Natchez Inv Co, 119 So 366, 155 Miss 31

NJ—Meyer v Standard Accident Ins Co, 177 A 255, 114 NJ Law 483

Wis—Yawkey-Crowley Lumber Co v Sinaiko, 206 NW 976, 189 Wis 298

Obligations of contract as those of bond

(1) Bond making construction contract part thereof merged provisions of contract in bond, obligating surety to see that contractor fulfilled contract—Indemnity Ins Co of North America v Stamberger Co, 174 NE 629, 37 Ohio App 236

(2) Under bond securing performance of building contract and referring to contract and making it part of bond, obligations of contract, including specifications, become obligations of bond, rendering surety liable for contractor's default in performance of contract—Hollerman Mfg Co v Standard Accident Ins Co, 239 NW 741, 61 ND 637

(3) A bond incorporating the contract and making the contract, subject to conditions of the bond, a part of the bond, to explain, but not to vary or enlarge the obligation, incorporated the contract for the limited purpose only of explaining the terms, conditions, and obligations of the bond in event of ambiguity—Crane Co v Wise, 124 P 2d 724, 190 Okl 436

91. Ky—Dayton Lumber & Mfg Co v New Capital Hotel, 299 SW 1063, 222 Ky 29

92. Fla—Standard Accident Ins Co v Bear, 184 So 97, 134 Fla 523, 127 A L R 1

La—McDonald v Harris Gas & Oil Co, 2 La App 241

93. Tex—Park Presbyterian Church of Italy v William Cameron & Co, Com App, 58 SW 2d 63

94. US—American Surety Co of New York v Franciscus, CCA Mo, 127 F 2d 810

Cal—C Ganahl Lumber Co v Thompson, 270 P 965, 205 Cal 354

La—Minden Presbyterian Church v Lambert, 120 So 61, 167 La 712

Md—Hospital for Women of Maryland, for Use of Robert S Green Inc, v U S Fidelity & Guaranty Co, 11 A 2d 457, 177 Md 615, 128 A L R 931

Mo—Missouri, K & T Ry Co v America Surety Co of New York, 236 SW 657, 291 Mo 92.

Obligation to pay for materials

Ky—New York Indemnity Co v. Hurst, 66 SW 2d 8, 252 Ky 59, 94 A L R 861

95. Md—Hospital for Women of Maryland, for Use of Robert S Green, Inc, v U S Fidelity & Guaranty Co, 11 A 2d 457, 177 Md 615, 128 A L R 931

96. Conn—Byram Lumber & Supply Co v Page, 146 A 293, 109 Conn. 256

97. NC—Guilford Lumber Mfg Co v Johnson, 97 SE 732, 177 NC 44.

98. Iowa—A E Shorthill Co v Aetna Indemn Co, 124 NW 613, 40 C J p 355 note 56

99. Ark—Aetna Casualty & Surety Co v Big Rock Stone & Material Co, 20 SW 2d 180, 180 Ark. 1.

Ky—New York Indemnity Co v Hurst, 66 SW 2d 8, 252 Ky 59, 94 A L R 864

40 C J p 355 note 56 [a]

1. Ky—New York Indemnity Co v Hurst, supra.

claims is absolute² and not merely an offer of guaranty requiring notice of acceptance³ The rules of law governing an ordinary contract of suretyship are not to be applied indiscriminately⁴

The mere fact that the owner holds the bond of a surety company to indemnify him against any loss resulting to him from the default of the contractor does not effect a change in the relation between the owner and a subcontractor,⁵ but a contractor's bond to the owner, permitting subcontractors, materialmen, and laborers to sue thereon, has been held to relieve the premises of their liens⁶ Also the execution of a bond by the contractor to the owner to indemnify him against the claims of a subcontractor does not seem to imply an agreement on the part of the owner that the subcontractor shall be paid so that he may not make payment to the contractor even in accordance with the terms of the contract without seeing that the subcontractor's claims are satisfied,⁷ but, where a building contractor has covenanted to keep a building free from liens for a time extending beyond the time

fixed for making the last payment, neither he nor his sureties can require the last payment if he is then in default,⁸ and under the terms of some contracts and bonds executed pursuant thereto the owner is estopped, as against persons who have unpaid claims for labor and materials, to assert an equitable right to a trust fund created for the purpose of erecting the building or making the improvement in question⁹ A bond indemnifying the owner against liens has been construed as having no bearing on the right of the contractor to recover in an ordinary action for extra work¹⁰

A statutory bond performs a double function,¹¹ it secures, in the first place, to the owner the faithful performance of the contract by the contractor,¹² and, in the second place, it is intended to protect third persons from whom the contractor obtains materials and labor¹³ The statute and the bond for which it provides should be construed together,¹⁴ the terms of the statute are to be read into the bond¹⁵ and control its interpretation and ef-

2. Cal—Carpenter v Furrey, 61 P 369, 128 Cal 665

3. Cal—Carpenter v Furrey, supra

4. La—U S Fidelity & Guaranty Co v D'Angelo, 90 So 564, 150 La 188

5. Fla—Gramling v Chapman, 88 So 258, 81 Fla 362

6. Tex—Texas Glass & Paint Co v Crowdus, 193 SW 1072, 108 Tex 346—Globe Indemnity Co v West Texas Lumber Co, Civ App, 34 S W 2d 896

7. Iowa—Slagle v De Goover, 88 N W 932, 115 Iowa 401
40 C J p 356 note 60

8. Or—Henry v Hand, 59 P 330, 36 Or 492

9. DC—Hight v. Richmond Park Impr Co, 47 App DC 518

10. Cal—Carpenter v. Markham, 155 P. 644, 172 Cal 113
40 C J p 356 note 63

11. La—U S Fidelity & Guaranty Co v D'Angelo, 90 So 564, 150 La 188

12. La—U S Fidelity & Guaranty Co v D'Angelo, supra—Slagle-Johnson Lumber Co v Roberts, 4 La App 216

13. La—U S Fidelity & Guaranty Co v D'Angelo, 90 So 564, 150 La 188—Slagle-Johnson Lumber Co v Roberts, 4 La App 216

Public work; lien not conferred or removed

(1) Statutes requiring a contractor's bond for the protection of persons furnishing labor or material for state, municipal, or other public

work do not confer the right to a lien—In re Schilling, DC Ohio, 251 F 966—40 C J p 58 note 45 [c] (1)

(2) The federal statute providing for bonds in favor of those who furnish labor or material in the construction of public works is a recognition by congress of the inability of persons supplying contractors for public works with labor and materials to take liens on the public property of the United States, and is a substitute for a mechanics' lien law US—U S v Ansonia Brass & Copper Co, Va, 31 S Ct 49, 218 US 452, 54 L Ed 1107

NY—People v Metropolitan Surety Co, 105 NE 99, 211 NY 107

(3) Neither later statute requiring public officers to exact from contractors mechanics' lien bond nor failure to exact bond will abridge or defeat rights of materialman under mechanics' lien statutes against public buildings—Huttig Mill Work Co v. Randel, 266 P 106, 125 Kan 744

(4) A statute providing that a contractor on public work shall give bond, on which any person having a claim for work or material may sue, does not take from the laborer or materialman his right to a mechanic's lien on a public building—Jewell County v Snodgrass & Young Mfg Co, 34 P 741, 52 Kan 253

14. La—Savings & Homestead Ass'n v Frank, 83 So 491, 146 La 198

15. Ark—Trinity Universal Ins Co v Willbanks, 144 S W 2d 1092, 201 Ark 386—Stewart-McGehee Const

Co v Brewster, 284 SW 53, 171 Ark 197

Cal—Carpenter v. National Surety Co, 76 P 2d 523, 25 Cal App 2d 90

La—Manning v Barelli, 8 La App 91

W Va—Bluefield Supply Co v M P Smith Const Co, 177 SE 296, 115 W Va 537

Inclusion and exclusion of matter in bond

(1) Since the bond is a statutory one, whatever is in the bond that is not required by law should be read out of it, and whatever is not expressed in the bond, and should have been included in it, should be read into it

La—Minden Presbyterian Church v Lambert, 120 So 61, 167 La 712—Monroe Hardware Co v Delatte, 4 La App 66

W Va—Atlas Powder Co v Nelson and Chase & Gilbert Co, 20 S E 2d 890, 124 W Va 298—Bluefield Supply Co v M P Smith Const Co, 177 SE 296, 115 W Va 537—Fireproof Products Co v Logan, 169 SE 400, 113 W Va 703

(2) Statutes relating to such bonds preempt the entire field, so that all provisions outside the statutes must be stricken, only where the bond is given solely and exclusively thereunder—Standard Accident Ins Co v Knox, Civ App, 181 SW 2d 863, reversed on other grounds 184 SW 2d 612, 144 Tex 296

(3) Statutory requirement that contractor's bond shall provide for prompt payment to laborers and ma-

fect,¹⁶ and the bond becomes a part of the contract¹⁷ so that the language of the bond is to be interpreted by treating the contract and the bond as constituting an indivisible contract¹⁸

Under at least one statute, the effect of taking the bond provided for by statute, and its timely filing, is that the court must, where it is equitable to do so, restrict the recovery under liens of persons other than the contractor to an aggregate amount equal to the amount due from the owner to the contractor,¹⁹ and, if the bond as given does not meet the requirements of the statute, the only penalty is that the materialmen, etc., can have liens on the property of the owner irrespective of contract price.²⁰ Under other statutes the effect of the bond is that the owner escapes the personal liability to the laborers and materialmen²¹ which, as discussed supra § 256, would be imposed on him if he did not require the bond, or that funds due the contractor are released from an equity or trust in favor of materialmen and laborers and go into the hands of the contractor untrammelled.²² A bond indicating by its terms that it is intended to be in compliance with the statute will be treated as a statutory bond,²³ conversely, a bond whose terms do not indicate such intention will not be so treated,²⁴ nor is a bond a

statutory bond where it fails to conform to statutory requirements²⁵ or contains provisions contrary to the statute.²⁶

A retroactive construction will not be given to a bond, so as to make it apply to prior obligations, where a contrary intention of the parties appears on its face,²⁷ nor will a statute be construed as requiring a retroactive or retrospective bond unless the legislative intention to do so is clearly expressed.²⁸

What law governs Where a building contract is made and is to be performed in a particular state, and the bond states that it is made for the benefit of persons who may establish a lien for material furnished, or labor performed, for the contractor, under the laws of that state, the nature, validity, and interpretation of the bond must be governed by the laws of that state.²⁹ Where a bond and contract are executed in one state, to be performed partly in that state and partly in another, the interpretation of the contract is governed by the laws of the former state.³⁰

§ 259. Liabilities on Bond

a. In general

b. Release or discharge of sureties

terialmen, being mandatory, will be read into such a bond if it is silent as to such payment—*Hartford Accident & Indemnity Co v Natchez Inv Co*, 132 So 535, 161 Miss 198, suggestion of error overruled 135 So 497, 161 Miss 198, appeal dismissed *Hartford Accident & Indemnity Co v Bunn*, 52 S Ct 354, 285 US 169, 76 L Ed 685, motion denied 52 S Ct 456, 76 L Ed 1301—*Commercial Bank of Magee v Evans*, 112 So 482, 145 Miss 643

(4) Stipulations contrary to such statutory requirement are without effect, but stipulations may be written into bond affecting liability of surety company and contractor to owner or builder—*Hartford Accident & Indemnity Co v Natchez Inv Co*, 132 So 535, 161 Miss 198, suggestion of error overruled 135 So 497, 161 Miss 198, appeal dismissed *Hartford Accident & Indemnity Co v Bunn*, 52 S Ct 354, 285 US 169, 76 L Ed 685, motion denied 52 S Ct 456, 76 L Ed 1301

16. Cal—*Carpenter v National Surety Co*, 76 P 2d 523, 25 Cal App 2d 90

17. Cal—*Sunset Lumber Co v Smith*, 267 P 738, 91 Cal App 746

Discrepancies between bond and contract

Fact that contractor's bond ran in favor of "First Presbyterian

Church," whereas contract was entered into by "Minden Presbyterian Church" and bore different date, did not relieve surety or its indemnitor on ground that bond sued on was not connected with contract under which work was done, where petition showed that bond sued on was bond given under the contract—*Minden Presbyterian Church v Lambert*, 120 So 61, 167 La 712

Sureties as parties to contract
Cal—*Sunset Lumber Co v Smith*, 267 P 738, 91 Cal App 746

18. Cal—*Sunset Lumber Co v Smith*, supra

19. Cal—*Tyler v J I Mitrovich Bldg Co*, 190 P 208, 47 Cal App 59

40 C J p 356 note 71

Filing or recording see supra § 257 f
Limitation of liens to amount due from owner to contractor generally see supra § 174

20. Cal—*Luke v Southern Surety Co*, 286 P 490, 104 Cal App 727

21. La—*Morehouse Lumber & Building Material Co v Jacob & Walker*, 139 So 713, 18 La App 536, affirmed 144 So 190 and 147 So 504, 177 La. 76

40 C J p 356 note 72

Judgment in concursus proceeding for owner, who required bond of contractor, and recorded contract and bond, and made no payments aft-

er filing notice of any claim, and deposited balance of contract price in registry of court, held proper—*Favalora v Bourgeois*, 114 So 119, 164 La 521

22. Miss—*Dickson v U S Fidelity & Guaranty Co*, 117 So 245, 150 Miss 864

23. Miss—*Hartford Accident & Indemnity Co v Natchez Inv. Co*, 119 So 366, 155 Miss 31

24. Ark—*National Surety Co v Standard Lumber Co*, 54 SW 2d 988, 186 Ark 864—*Etina Casualty & Surety Co v Big Rock Stone & Material Co*, 20 SW 2d 180, 180 Ark 1

25. Ark—*Mansfield Lumber Co v National Surety Co*, 5 SW 2d 294, 176 Ark 1035

26. Ark—*Union Indemnity Co v Covington*, 12 SW 2d 884, 178 Ark 533

27. Miss—*U S Fidelity & Guaranty Co v Maryland Casualty Co*, 199 So 278, 191 Miss 103

28. Miss—*U. S Fidelity & Guaranty Co v Maryland Casualty Co*, supra

29. Ark—*F W Offenhauser & Co v Cupp*, 16 SW 2d 7, 179 Ark 361

30. Ohio—*Indemnity Ins Co of North America v Stamberger Co*, 174 NE 629, 37 Ohio App 286

a. In General

The liability of the sureties on a contractor's bond ordinarily is limited by the terms of their undertaking

Where it is sought to recover from the sureties on a building contractor's bond for claims or liens, or damage or loss resulting therefrom, their liability cannot be extended beyond the terms of their contract³¹ unless it is otherwise provided by statute,³² and the liability of the surety is not determined by a stipulation between the owner and the

contractor with respect to the furnishing of a bond³³ In ascertaining the terms of the bond, the same rules of construction must be applied as in other contracts,³⁴ and when the matters for which recovery is sought come within the terms of the undertaking the sureties are liable,³⁵ notwithstanding the surety received no compensation³⁶ In order to establish a pecuniary loss by the contractor's breach in failing to deliver it on time and free of valid liens, the owner must show a loss incurred

31. US—Hall v Union Indemnity Co, CCA Mo, 61 F 2d 85, certiorari denied Union Indemnity Co v Hall, 53 S Ct 222, 287 US 663, 77 L Ed 572—First Nat Bank v American Surety Co of New York, CCA Ala, 53 F 2d 746

Cal—Llewellyn Iron Works v Reed, 11 P 2d 657, 123 Cal App 607—Pacific States Electric Co v U S Fidelity & Guaranty Co, 293 P 812, 109 Cal App 691—Luke v Southern Surety Co, 286 P 490, 104 Cal App 727—Sunset Lumber Co v Smith, 267 P 738, 91 Cal App 746

Ky—Wilson Machinery & Supply Co v Fidelity & Casualty Co of New York, 110 S W 2d 1075, 270 Ky 768—Dayton Lumber & Mfg Co v New Capital Hotel, 299 S W 1063, 222 Ky 29

La—Eddington v Maryland Casualty Co, App, 197 So 195—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 212—Stewart v Segal, 126 So 718, 13 La App 359

Miss—Linde Air Products Co v American Surety Co, 152 So 292, 168 Miss 877—Hartford Accident & Indemnity Co v Natchez Inv Co, 132 So 535, 161 Miss 198, suggestion of error overruled 135 So 497, 161 Miss 198, appeal dismissed Hartford Accident & Indemnity Co v Bunn, 52 S Ct 354, 285 US 169, 76 L Ed 685, motion denied 52 S Ct 456, 76 L Ed 1301

Pa—Aldwyn Corp v Fidelity & Deposit Co of Maryland, Com Pl, 57 Dauph Co 282

Tex—Rotsky v Kelsay Lumber Co, 12 S W 2d 973, 118 Tex 180, answer to certified questions conformed to, Civ App, 19 S W 2d 618, affirmed Fidelity & Deposit Co of Maryland v Kelsay Lumber Co, Com App, 29 S W 2d 1052, modified on other grounds 33 S W 2d 781

Wash—Swasey v Farr, 290 P 866, 158 Wash 299
40 C J p 356 note 76

Matters held not within undertaking

(1) "Material furnished," for which contractor's surety is liable under statute, does not include money advanced to contractor

US—First Nat Bank v American Surety Co of New York, CCA Ala, 53 F 2d 746

La—Smith v Smith, 142 So 132 174
La 937—Young v Barelli, 125 So 258, 169 La 319

(2) Surety on bond conditioned on payment for labor and material held not liable to subcontractor for damages caused by contractor's breach—F G Schaeffer Iron Works v Standard Accident Ins Co, DCNJ, 2 F Supp 764

(3) Lumber used for forms to hold concrete and removed by contractor did not become integral part of structure covered by indemnifying bond insuring payment for material entering into structure—Indemnity Ins Co of North America v Portsmouth Ice, Coal & Building Material Co, 172 NE 152, 122 Ohio St 439

Bond given after materials furnished
Surety on bond to pay for materials furnished principal is liable thereon, even though given after materials were furnished—A Kieckhefer Elevator Co v Music Arts Corporation, 252 NW 591, 214 Wis 133

32. Tex—Cooper v H H Hardin & Co, Civ App, 219 S W 550

33. US—First Nat Bank v American Surety Co of New York, CCA Ala, 53 F 2d 746

34. ND—Northern Light Lodge No 1 I O O F v Kennedy, 73 NW 524, 7 ND 146

35. US—American Surety Co of New York v Franciscus, CCA Mo, 127 F 2d 810

Ark—Trinity Universal Ins Co v Willbanks, 144 S W 2d 1092, 201 Ark 386

Cal—Pacific States Electric Co v U S Fidelity & Guaranty Co, 293 P 812, 109 Cal App 691

La—Schreiber v Edgar, 122 So 285, 168 La 443—Minden Presbyterian Church v Lambert, 120 So 61, 167 La 713

Miss—Linde Air Products Co v American Surety Co, 152 So 292, 168 Miss 877

Neb—Fowler v Doran, 241 NW 759, 123 Neb 37

NJ—Van Order v Johnson, 158 A 416, 110 NJ Eq 54

Ohio—Indemnity Ins Co of North America v Portsmouth Ice, Coal

& Building Material Co, 172 NE 152, 122 Ohio St 439
40 C J p 356 note 78

Unauthorized changes

Where contract limited owner's liability to changes authorized in writing, unauthorized changes constituted breach for which owner, if damaged, could recover from surety—Massachusetts Bonding & Insurance Co v Lentz, 9 P 2d 408, 40 Ariz 46

Cocqual liability of surety and contractor

The liability of surety company on building contractor's bond securing payment of all merchandise and furnishers of material is cocqual with that of contractor—Graphic Arts Bldg Co v Union Indemnity Co, 111 So 470, 163 La 1—Folse v Maryland Casualty Co, La App, 193 So 385

Profits

(1) Profits, even though they be fixed by contract, cannot be recovered on a bond guaranteeing payment of labor and material bills

US—Hardaway v National Surety Co, Ky, 29 S Ct 202, 211 US 552, 53 L Ed 321—Theobald-Jansen Electric Co v P H Meyer Co, CCA NM, 77 F 2d 27

Pa—Aldwyn Corp v Fidelity & Deposit Co of Maryland, Com Pl, 57 Dauph Co 282

(2) Where building contractor contracted with its surety to complete work for compensation or profit measured by per cent of cost, and third person agreed with contractor to take over job for part of net profits, contractor had no claim against its surety for profit hoped for but not realized, and hence third person tracing its right through contractor had no greater right—Theobald-Jansen Electric Co v P H Meyer Co, CCA NM, 77 F 2d 27

36. La—Wills v Fidelity & Deposit Co of Maryland, 83 So 448, 146 La 169—McDonald v Harris Gas & Oil Co, 2 La App 211

Wis—Yawkey-Crowley Lumber Co v Sinaiko, 206 NW 976, 189 Wis 298

or paid because of liens fastened on the building or for which he was liable³⁷ The owner cannot recover against the sureties on an indemnity bond for payments made by him which were entirely voluntary and without compulsion³⁸

It has been held that a judgment establishing a lien is conclusive against the sureties,³⁹ under other authority such a judgment is not conclusive, but is prima facie evidence, against the surety,⁴⁰ who remains at liberty to contest its own liability by establishing affirmatively that the principal is not liable⁴¹ Where the judgment has been satisfied, the sureties are liable⁴² unless the owner neglected to interpose a valid defense in the foreclosure suit⁴³

Where a bond of indemnity is given to a person who lends money to the owner, there can be no recovery on the bond because of liens filed where the lender, without authority from the owner, retains, in order to satisfy another debt, an amount exceeding what would be required to satisfy the liens,⁴⁴ but where a contract for the erection of a building provides that the owner shall withhold a certain per cent of the contract price until the building is completed and also for damages for delay in completion, and the contractor fails to complete the building in the time agreed on, thus subjecting himself to the payment of damages for the delay, and also abandons the work before it is finished, the sureties on the contractor's bond cannot successfully

contend that they are not liable to respond to an action on the bond until the owner has paid the full contract price, predicating such contention on the fact that the owner has withheld the amount of damages due him for delay,⁴⁵ since he is not required to leave his own claim unpaid and apply the money for the benefit of the sureties⁴⁶

Status of particular claim or lien Under some bonds, and the construction placed thereon, it has been held that liability exists for unpaid claims, regardless of whether or not they are lienable,⁴⁷ that a cause of action accrues in favor of the obligee as soon as he is compelled to pay claims,⁴⁸ that the owner is entitled to recover on the bond where, in order to prevent the filing of liens, he pays claims for work and materials which the original contractor has failed to pay,⁴⁹ even though he makes such payments before liens are actually filed,⁵⁰ litigated,⁵¹ or reduced to judgment,⁵² and that liability on the part of the surety exists where a judgment foreclosing a lien has been recovered but not paid⁵³ Under other bonds, and the construction placed thereon, it has been held that there is no liability by reason of the mere existence of an unpaid claim for which no lien has been perfected,⁵⁴ or by reason of the payment of claims, as distinguished from liens,⁵⁵ or of claims for which the owner was not liable⁵⁶ and which could not become liens,⁵⁷ or of alleged liens which are invalid and unenforceable.⁵⁸

37. U.S.—Union Indemnity Co v Vetter, CCA Fla., 40 F2d 608

38. Hawaii—Craig v Uyeoka, 32 Hawaii 913

Mich—Park v Brunswick-Balke-Coller Co, 209 NW 188, 235 Mich 210

40 C.J. p 357 note 79

39. Minn—Strimling v Union Indemnity Co, 215 NW 67, 172 Minn 320

40 C.J. p 357 note 80

40. N.Y.—Brescia Const Co v Wal-art Const Co, 281 N.Y.S. 43, 245 App Div 105

41. N.Y.—Brescia Const Co v Wal-art Const Co, supra

42. Mo—Winfield v Paulus & Williamson Architectural Co, 68 Mo App 194

Neb—Karel v Basta, 170 NW 891, 103 Neb 191

43. Cal—Brill v DeTurk, 62 P 462, 130 Cal 241

44. Mo—Hurst v Randall, 68 Mo App 507

45. Iowa—Gatchell & Martin Lumber & Mfg Co v Peterson & Sampson, 100 NW 550, 124 Iowa 599

46. Iowa—Gatchell & Martin Lumber & Mfg Co v Peterson & Sampson, supra

47. Wash—Crane Co v U.S. Fidelity & Guaranty Co, 132 P 872, 74 Wash 91

40 C.J. p 357 note 84

Recovery by subcontractors, laborers, or materialmen as affected by status of particular claim see infra § 262

48. Minn—Cassan v Maxwell, 40 N.W. 357, 39 Minn 391

40 C.J. p 357 note 85

49. Okl—Wooten v Warmack, 112 P 2d 796, 188 Okl 685, 184 A.L.R. 313

40 C.J. p 357 note 86

50. Ark—Wooten v Warmack, supra

Wis—Yawkey-Crowley Lumber Co v Sinaiko, 206 NW 975, 189 Wis. 298

40 C.J. p 357 note 87

51. Iowa—Fellows v Errington, 170 NW 545, 186 Iowa 322

52. N.D.—Northern Light Lodge No 1, I.O.O.F. v Kennedy, 73 NW 524, 7 ND 146

40 C.J. p 357 note 89.

53. Cal—Hillcrest Co v Shrier, 188 P 239, 41 Cal App 624

Ga—Waldon v Maryland Casualty Co, 116 S.E. 828, 155 Ga 70

54. Hawaii—Craig v Uyeoka, 32 Hawaii 913

La—Greater New Orleans Homestead Ass'n v Globe Indem Co, 8 La App 262

Minn—Simonson v Grant, 31 NW 861, 36 Minn 439

55. Neb—Bell v Paul, 52 NW 1110, 35 Neb 240

56. Mich—Marquette Opera House Bldg Co v Wilson, 67 NW 123, 109 Mich 223

Tex—Texas Fidelity & Bonding Co v Brown, Civ App, 179 SW 1125

57. Mich—Marquette Opera House Bldg Co v Wilson, 67 NW 123, 109 Mich 223

Tex—Texas Fidelity & Bonding Co v Brown, Civ App, 179 SW 1125

Premium for employer's liability insurance

Ark—F. W. Offenhauser & Co v Cupp, 16 SW 2d 7, 179 Ark 361

58. Ga—Aetna Indemnity Co v. Comer, 70 SE 676, 136 Ga 24.

40 C.J. p 357 note 95.

In considering these divergent holdings it must be borne in mind that some bonds are construed to afford indemnity against liability, and not merely against loss,⁵⁹ and that there is a breach of such a bond as soon as any liens are acquired,⁶⁰ while other bonds are construed to be strict indemnity bonds against loss or damage,⁶¹ and a breach of a bond of the latter character does not occur on the mere filing of a lien,⁶² but only when the obligee has been actually damaged⁶³

b. Release or Discharge of Sureties

- (1) In general
- (2) Alteration of, or departure from, contract generally
- (3) Payment or failure to pay

(1) In General

A subcontractor or materialman may waive his rights against the contractor's surety, but his mere waiver or release of his lien, or his right thereto, generally does not release or impair his right to proceed on the bond.

Sureties on contractors' bonds have been held not to be released or discharged by the fact that the

surety and the owner were ignorant of the fact that the contractor had a partner,⁶⁴ by a dissolution or change in the personnel of the contracting firm,⁶⁵ by the execution by the owner of a statutory bond to discharge a mechanic's lien asserted against the property,⁶⁶ by the execution of a note to the sureties by the owner in consideration of their cancellation of a lien filed by them,⁶⁷ by the failure of the architect to sign the certificate of the cost of completing the work after the contractor's default,⁶⁸ by the contractor's disclaimer of liability for debts of the subcontractor,⁶⁹ or by various other acts or circumstances.⁷⁰ The fact that the contractor waives, against the owner, all claims for particular work does not relieve the surety of his obligation to the materialman supplying the articles involved.⁷¹

Waiver of lien or of right against surety A subcontractor or materialman may waive his rights against the contractor's surety.⁷² However, a subcontractor's or materialman's agreement with the contractor or surety to waive or release his lien or right of lien generally does not release or impair his right to proceed on the contractor's bond.⁷³

59. Cal—Carpenter v National Surety Co, 76 P 2d 523, 25 Cal App 2d 90

Ga—Waldon v Maryland Casualty Co, 116 SE 838, 155 Ga. 76
40 C.J. p 357 note 96

60. Neb—Kiewit v Carter, 41 NW 286, 25 Neb 460

Va—Stuart v Carter, 90 SE 537, 79 W Va 92, LRA 1918D 1070

61. Fla—Standard Accident Ins Co v Bear, 184 So 97, 134 Fla 523, 127 ALR 1

40 C.J. p 358 note 98

Measure of recovery under bond indemnifying against damage see infra § 261

62. Nev—Carson Opera House Ass'n v Miller, 16 Nev 327

63. Fla—Standard Accident Ins Co v Bear, 184 So 97, 134 Fla 523, 127 ALR 1

Nev—Carson Opera House Ass'n v Miller, 16 Nev 327

64. Wash—Crowley v U S Fidelity & Guaranty Co, 69 P 784, 29 Wash 268

Termination and release or discharge of surety's liability generally see the C.J.S. title Principal and Surety §§ 116-244, also 50 C.J. p 92 note 28-p 190 note 76

65. Neb—Kaufmann v Cooper, 65 NW 796, 46 Neb 644
40 C.J. p 359 note 29

66. Ky—Mt. Casualty & Surety Co v U S Gypsum Co, 39 SW 2d 234, 239 Ky 247

Bond to prevent or discharge lien generally see supra §§ 232-239

67. Cal—Blyth v Robinson, 37 P 904, 104 Cal 239

68. Ky—Allen County v U S Fidelity & Guaranty Co, 93 SW 44, 122 Ky 825, 29 Ky L 356
40 C.J. p 359 note 31

69. Okl—Tway v Thompson, 16 P 2d 76, 160 Okl 279, 84 ALR 457

70. US—Union Indemnity Co v Blumenfeld Ice & Coal Co, CCA Tenn, 64 F 2d 897—Hartford Accident & Indemnity Co v Federal Bond & Mortgage Co, CCA Minn, 59 F 2d 950

Ariz—Massachusetts Bonding & Insurance Co v Lentz, 9 P.2d 408, 40 Ariz 46

Cal—Lasky v American Indemnity Co, 282 P 974, 103 Cal App 192

Ga—Fidelity & Deposit Co of Maryland v Pittman, for Use of Georgia Marble Co, 183 SE 572, 53 Ga App 394

La—Bell v Lieber, 125 So 871, 169 La 731—Parsons v U S Fidelity & Guaranty Co, 117 So 817, 166 La 749

Wash—J R Delvendahl Co v Lydon, 18 P 2d 492, 171 Wash 551

Taking obligation of contractor or third person

General rule is that persons supplying materials or labor do not, by taking from contractor or subcontractor his own written obligation, or that of third person, discharge paid corporate surety on bond given for

protection of laborers and materialmen—Fred Christensen, Inc. v Hansen Const Co, 21 P 2d 195, 142 Or 549

Settlement agreement

Where foreclosure action by obligee of completion bond against owner-principal, claimants of liens for labor and materials used in construction of building, and surety was dismissed without prejudice, and old loan was refinanced under settlement agreement to which surety was not a party, providing that agreement should not relieve persons liable to lien claimants, surety was not relieved from liability on the bond to laborers and materialmen—Haynes Hardware Co v Western Casualty & Surety Co, 133 P 2d 574, 156 Kan 356

71. La—Young v Barelli, 125 So 258, 169 La 319

72. Cal—Kennedy v National Surety Co, 295 P 359, 111 Cal App 306

Consideration

Cal—Kennedy v National Surety Co, supra

Acceptance of security for claim

Miss—Hartford Accident & Indemnity Co v Natchez Inv Co, 135 So 497, 161 Miss 198, appeal dismissed Hartford Accident & Indemnity Co v Bunn, 53 S Ct 354, 285 US 159, 76 L Ed 685, motion denied 53 S Ct 456, 76 L Ed 1301

73. Cal—Fraters Glass & Paint Co v Southwestern Const Co, 254 P 1097, 200 Cal 688—Fraters Glass

at least where the surety suffered no injury from such waiver,⁷⁴ but the surety has been held released where such waiver induced payment by the owner to the principal contractor and destroyed the surety's right to be subrogated to the materialman's lien.⁷⁵ Where a building contract did not require a written audit or certificate from the architect for the payment of damages recoverable on the contractor's bond, the obligation of the surety on the bond of the contractor, in an action of a subcontractor thereon, is not affected because the owner recovered damages, and by the sum so recovered reduced the amount in his hands applicable to the payment of the subcontractor's claim.⁷⁶

Giving of notice. The surety is not released by the failure of the owner to give him notice of certain matters where no provision for such notice is contained in either the contract or the bond,⁷⁷ or where, although there is such a provision in the bond, the facts do not bring the case within it,⁷⁸ or it has been waived by the surety,⁷⁹ or where the surety had full knowledge of the circumstances⁸⁰ or sustained no loss through the failure to give notice.⁸¹ Also the failure to give the surety notice does not relieve him from liability for liens where the notice is essential only in order to render him liable for the fidelity of the contractor in carrying out the contract.⁸² It has been held that a contractor who has seen the work performed and the material furnished in constructing the building is not in a situation to deny his liability on the ground that he has not been notified and that the surety on

his bond is in the same position.⁸³

Transfer of ownership of the premises does not release the surety on a bond indemnifying against mechanics' liens where it assented to the transfer and the grantee became a principal in the bond jointly with the grantor,⁸⁴ nor can the surety complain of changes in the title occurring after its liability on the bond has attached by the filing of the lien and its failure to take prompt steps to cause a release.⁸⁵

Statutory bond. Where a bond has been taken under the provisions of a statute and inures to the benefit of persons from whom the contractor obtains labor and materials, an owner who releases the surety⁸⁶ or by his acts brings about a situation in which it would be unconscionable to hold the surety to his obligations⁸⁷ becomes liable to the same extent to which he would have if he had not required any bond. However, unauthorized acts of the owner which may be sufficient to release the surety on such a bond as against the owner may not be sufficient to release him as against laborers and materialmen.⁸⁸ Where the statute fixes no period of time for the duration of the surety's responsibility, he is not released from liability to a materialman until the latter's claim has been paid or has become prescribed as provided by law.⁸⁹

(2) Alteration of, or Departure from, Contract Generally

Any material alteration of, or departure from, the building contract without the surety's consent ordinarily discharges him from liability for claims or liens for labor or materials.

- & Paint Co v Southwestern Const Co, 290 P 45 107 Cal App 1—Santa Cruz Portland Cement Co v Snow Mountain Water & Power Co, 274 P 617, 96 Cal App 615
- Mich—Morley Bros v F R Patterson Const Co, 253 NW 213, 266 Mich 52
- NJ—Cellized Floors v Glens Falls Indemnity Co of New York, 156 A 845, 9 NJ Misc 1111
- Release required by trust agreement.** Release of liens by materialmen, as required by trust agreement with mortgagee and owner executed after general contractor's insolvency, did not discharge contractor's surety from obligation to materialmen—*Etina Casualty & Surety Co v U S Gypsum Co*, 39 SW2d 234, 239 Ky 247
- 74. Ill—Danville Hotel Co v. Benson, 262 Ill App 288
- 75. Wis—Weil-McLain Co v Maryland Casualty Co, 258 NW 175, 217 Wis 126
- 76. Iowa—Gatchell & Martin Lum-

- ber & Mfg Co v National Surety Co, 100 NW 556, 124 Iowa 617
- 77. Ark—Pope v Lawson, 174 SW 148, 118 Ark 601
- 78. US—Union Indemnity Co. v Blumenfeld Ice & Coal Co, CCA Tenn, 64 F 2d 897
- 40 CJ p 359 note 35
- 79. NC—Guilford Lumber Mfg Co v Johnson, 97 SE 732, 177 NC 44
- Registered mail notice waived.**
- Wyo—American Surety Co of New York v Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195
- 80. Wash—Lent's, Inc. v Strawn, 83 P 2d 343, 196 Wash 457.
- Wyo—American Surety Co of New York v Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195
- 81. US—Union Indemnity Co v Blumenfeld Ice & Coal Co, CCA Tenn, 64 F 2d 897

- Kan—Martin v Robinson, 272 P 149, 127 Kan 100
- 82. Iowa—A E Shorthill Co v Etina Indem Co, 124 NW 613
- 83. La—Brink v Bartlett, 29 So 958, 105 La 336
- 84. US—Hartford Accident & Indemnity Co v Federal Bond & Mortgage Co, CCA Minn, 59 F 2d 950
- 85. US—Hartford Accident & Indemnity Co v Federal Bond & Mortgage Co, supra
- 86. La—Savings & Homestead Ass'n v Frank, 83 So. 491, 146 La. 198
- Liability of owner not requiring statutory bond see supra § 256.
- 87. La—Savings & Homestead Ass'n v Frank, supra.
- 88. La—U S Fidelity & Guaranty Co v D'Angelo, 90 So 564, 150 La 188
- 40 CJ p 359 notes 45, 46
- 89. La—Truscon Steel Co v B & T Const Co, 129 So 644, 170 La 1083

Under the rule governing the liability of sureties on building contractors' bonds generally, any material alteration of, or departure from, the building contract without the consent of the surety will discharge or release him from liability for claims or liens for labor or materials,⁹⁰ notwithstanding he may have sustained no injury by the change⁹¹ or even though such alteration was designed for his benefit or was to his advantage.⁹² However, the surety is not necessarily released or discharged by every change in, or departure from, the contract,⁹³ especially as against laborers and materialmen⁹⁴ or where the bond has been given under a statute,⁹⁵ particularly a statute providing that no modification of a building contract shall release or exonerate the surety.⁹⁶ Where a building contract authorizes the owner, during the progress of the work, to request alterations, the surety is presumed to have known of the provision and to have agreed to be bound

thereby.⁹⁷

(3) Payment or Failure to Pay

The surety on a contractor's bond is generally held to be released where the owner makes payments to the contractor not in conformity with the contract; but under some authorities the surety on a bond protecting laborers and materialmen, as well as the owner, is not discharged as to the former by such payments.

A surety cannot be discharged because of payments made by the owner in pursuance of, or not departing from, the provisions of the contract,⁹⁸ and the fact that the owner, in making payment under the contract, has taken precautions not required by the contract does not release the contractor's sureties from liability.⁹⁹ On the other hand, sureties on a contractor's bond to keep an owner harmless from mechanics' liens are released by the failure of the owner to pay the contractor according to agreement before default by the contractor.¹ Also

90. N.J.—Meyer v Standard Accident Ins Co, 177 A 355, 114 N.J. Law 483

Tex.—Fidelity & Deposit Co of Maryland v Kelsay Lumber Co, Com App, 33 S.W.2d 731
40 C.J. p 359 note 48

Notes interfering with contract stipulation

Surety on bond providing for payments to contractor from owner in cash or current funds held relieved from obligation to pay owner to extent that notes taken by contractor without surety's consent interfered with contract stipulation—Hartford Accident & Indemnity Co v Natchez Inv Co, 132 So 535, 161 Miss 198, suggestion of error overruled 135 So 497, 161 Miss 198, appeal dismissed Hartford Accident & Indemnity Co v Bunn, 52 S.Ct 354, 285 U.S. 169, 76 L.Ed 685, motion denied 52 S.Ct 456, 76 L.Ed 1301

Variation held not shown

Wis.—Yawkey-Crowley Lumber Co v Sinaiko, 206 N.W. 976, 189 Wis. 298

Provision held not waived

Manner provided by bond for making payments is not waived, as against surety, by provision for latter's payment of materialmen's claims, so as to entitle owner to pay them in different manner without releasing surety—Meyer v Standard Accident Ins Co, 177 A 255, 114 N.J. Law 483

Contract held not breached

Owners did not breach construction contract, so as to relieve contractor's surety, by failing to make good guaranty that proceeds of first mortgage bonds would amount to certain sum, where time for making good deficiency had not arrived—J

R. Delvendahl Co v Lydon, 18 P.2d 492, 171 Wash. 551

91. Tex.—Fidelity & Deposit Co of Maryland v Kelsay Lumber Co, Com App, 33 S.W.2d 731
40 C.J. p 359 note 49

92. Mo.—Fullerton Lumber Co v Gates, 89 Mo App 201
Tex.—Fidelity & Deposit Co of Maryland v Kelsay Lumber Co, Com App, 33 S.W.2d 731

93. Kan.—Standard Asphalt & Rubber Co v Texas Building Co, 163 P. 299, 99 Kan. 567, L.R.A. 1917C 490

Va.—American Surety Co v Plank & Whitsett, 165 S.E. 660, 159 Va. 1
Wyo.—American Surety Co of New York v Broadway Improvement & Investment Co, 371 P. 19, 39 Wyo. 195, rehearing denied 374 P. 13, 39 Wyo. 195

Owner's failure to subscribe for bonds

Fact that owners did not subscribe for part of second mortgage bonds agreed on and pay over to building contractor such sum before commencement of construction held not material alteration of contract lessening surety's liability on contractor's bonds—J. R. Delvendahl Co v Lydon, 18 P.2d 492, 171 Wash. 551

94. Ark.—Hawkins v Bradley, 13 S.W.2d 291, 178 Ark. 1073
Cal.—Western Brick Co v Smith, 271 P. 356, 94 Cal App 370
La.—Baton Rouge Sash & Door Works v Decuir, 3 La App 129
40 C.J. p 360 note 52

Change to cost-plus contract

Change from contract for definite sum to cost-plus contract does not exonerate surety from liability to materialman—Patten & Davies Lum-

ber Co v McConville, 25 P.2d 429, 219 Cal. 161

95. La.—Baton Rouge Sash & Door Works v Decuir, 3 La App 129
40 C.J. p 360 note 53

96. Cal.—Patten & Davies Lumber Co v McConville, 25 P.2d 429, 219 Cal. 161
40 C.J. p 360 note 53 [a]

Transfer of premises by owner to contractor and execution of trust deed by contractor in favor of owner, whereby building was to be sold after completion and proceeds divided between them, do not, under such statute, release surety on bond running in favor of owner, laborers, and materialmen—Western Brick Co v Smith, 371 P. 356, 94 Cal App 370

97. Cal.—Simpson v Bergmann, 13 P.2d 531, 125 Cal App 1

Changes made in accordance with the contract do not avoid the bond Ariz.—Massachusetts Bonding & Insurance Co. v Lentz, 9 P.2d 408, 40 Ariz. 46

Ark.—Trinity Universal Ins Co v Willbanks, 144 S.W.2d 1093, 201 Ark. 386

Ind.—Detroit Fidelity & Surety Co v Rickey, 165 N.E. 64, 96 Ind App 704
40 C.J. p 359 note 51 [a]

98. Wash.—Lent's, Inc. v Strawn, 83 P.2d 343, 196 Wash. 457
W Va.—Bluefield Supply Co v M. P. Smith Const Co, 177 S.E. 296, 115 W Va. 537
40 C.J. p 360 note 54

99. Wash.—Crowley v U.S. Fidelity & Guaranty Co, 69 P. 784, 29 Wash. 268
40 C.J. p 360 note 55

1. Nev.—Carson Opera House Ass'n v Miller, 16 Nev. 327.
40 C.J. p 360 note 56

it has been held that the surety is released where the owner makes payments not in conformity with the contract,² as where he makes payments in advance³ or without withholding a proportion of the price to protect himself against claims and liens of subcontractors, materialmen, and others according to the provisions of the contract,⁴ but in a number of cases the rule has been held not applicable,⁵ and it has been held in some,⁶ although not other,⁷ cases that, where the bond is conditioned for the payment of claims for labor and material as well as for the protection of the owner, the sureties are not discharged from liability to persons furnishing labor and materials by reason of the owner's having made such payments, the theory being that the liability created by the bond in favor of such persons is independent of that assumed by the obligee and cannot be affected by the latter's subsequent acts.⁸ An architect cannot, without the surety's consent, bind the surety by changing the terms of the contract with respect to payment of the contractor, so

as to prevent the surety from claiming a breach of the contract.⁹

An owner who enters into an agreement modifying the building contract as to payments cannot claim reimbursement from the surety for a loss sustained by reason of such modification,¹⁰ and payments made by the owner in violation of a statute release the sureties to the extent thereof.¹¹

A payment by the owner directly to a claimant or his assignee relieves the sureties to the extent thereof,¹² but does not entirely relieve them from their obligations,¹³ as the payment is beneficial, rather than prejudicial, to them.¹⁴ A subcontractor's acceptance of the contractor's written obligation does not preclude it from recovering on the contractor's bond, since such a taking is not a payment of its claim, in the absence of a special agreement to that effect,¹⁵ also a materialman's acceptance of the contractor's promissory note does not release the surety¹⁶ unless there is an agreement

2. US—Hall v Union Indemnity Co, CCA Mo, 61 F2d 85, certiorari denied Union Indemnity Co v Hall, 53 S Ct 222, 287 US 663, 77 L Ed 572

NJ—Meyer v Standard Accident Ins Co, 177 A 255, 114 NJ Law 483

Tex—Fidelity & Deposit Co of Maryland v Kelsay Lumber Co, Com App, 33 SW2d 731
40 CJ p 360 note 57

3. Mich—Park v Brunswick-Balke-Collender Co, 209 NW 188, 235 Mich 210

Minn—Simonson v Grant, 31 NW 861, 36 Minn 439

4. Mich—Park v Brunswick-Balke-Collender Co, 209 NW 188, 235 Mich 210
40 CJ p 360 note 59

Deposit of overpayment in court

Where the contract between the owner and the warrantor of the contractor stipulated that a stated portion of the amount of the contract was to be retained by the owner, and the owner paid more than the remaining portion to the contractor, the owner was required to deposit the amount overpaid, together with the amount due the contractor, into court—Monroe Hardware Co v Delatte, 4 La App 66

5. Ga—Waldon v Maryland Casualty Co, 116 SE 828, 155 Ga 76

Ky—Young Men's Christian Association's Assignee of Paducah v Indemnity Ins Co of North America, 51 SW2d 463, 244 Ky 473

La—Slagle-Johnson Lumber Co v Roberts, 4 La App 216.
40 CJ p 360 note 60.

Withholding held not required or inapplicable

(1) In general—Martin v Robinson, 272 P 149, 127 Kan 100

(2) Contract and surety bond provisions for retaining percentages held inapplicable to building material on premises when contract was executed, and used in construction of building—American Surety Co of New York v Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195

Payment before acceptance of building

Where contract for construction of building provided for payment in three installments, the last one to be made ten days after acceptance of building by owner, and owner made payment for material and labor out of last installment before acceptance of building, and sureties of contractor had full knowledge of progress of construction, owner's failure to withhold payment of all of last installment until after completion and acceptance of building did not operate to the prejudice of the sureties so as to release them from liability—Lent's, Inc, v Strawn, 83 P2d 342, 196 Wash 457

6. Pa—Pennsylvania Supply Co v National Casualty Co, 31 A2d 453, 152 Pa Super 217—Crane Co v National Casualty Co, 40 Pa Dist & Co 649
40 CJ p 361 note 61

7. Tex—Bullard v Norton, 182 SW 688, 107 Tex 571

8. Pa—Pennsylvania Supply Co v National Casualty Co, 31 A2d 453, 152 Pa Super 217—Crane Co v

National Casualty Co, 40 Pa Dist & Co 649

40 CJ p 361 note 61 [a]

9. US—Hall v Union Indemnity Co, CCA Mo, 61 F2d 85, certiorari denied Union Indemnity Co v Hall, 53 S Ct 222, 287 US 663, 77 L Ed 572

10. Tex—Fidelity & Deposit Co of Maryland v Kelsay Lumber Co, Com App, 33 SW2d 731

11. Fla—Standard Accident Ins Co v Bear, 184 So 97, 134 Fla 533, 127 A L R 1

Mich—Park v Brunswick-Balke-Collender Co, 209 NW 188, 235 Mich 210

40 CJ p 361 note 63

12. Cal—Dodd v Maddox, 288 P. 180, 72 Cal App 705

40 CJ p 361 note 64

13. Cal—Dodd v Maddox, supra.

40 CJ p 361 note 65

14. Cal—Dodd v Maddox, supra.

15. Or—Fred Christensen, Inc, v. Hansen Const Co, 21 P2d 195, 142 Or 549

16. Cal—Grant Powder Co Consolidated v Fidelity & Deposit Co of Maryland, 7 P2d 1023, 214 Cal. 639

Miss—Hartford Accident & Indemnity Co v N O Nelson Mfg Co, 135 So 349, 160 Miss 504

Note as account stated

Cal—Hammond Lumber Co v Richardson Building & Engineering Co, 385 P 851, 209 Cal 82, followed in Hammond Lumber Co v Richardson Building & Engineering Co, 385 P 855, 209 Cal 781

Note and trust deed

Cal—Patten & Davies Lumber Co.

that the note is to constitute payment of the indebtedness¹⁷

An extension of time for payment given to the contractor by a materialman who might in the first instance have fixed the time of the maturity of his claim without the knowledge or consent of the surety does not release the surety,¹⁸ and the taking of a trade acceptance by a materialman from the contractor has been held not such an extension of time for payment as to release the surety,¹⁹ likewise, where a contract to furnish material is silent as to the time of payment, the taking of a note with a fixed maturity date is not an extension of time for payment so as to release the surety, but merely establishes the maturity of a previously indefinite obligation²⁰

A general statute providing that the prolongation of the terms granted to the principal debtor without the surety's consent discharges the latter does not apply to a general surety on a contractor's bond for labor and materials to be furnished at a future time by persons then unknown and on terms which could only be agreed on later²¹ In the absence of proof of the law of the state in which the bond was made, the law of the forum governs the question whether an extension of credit to the contractor releases the surety²²

§ 260. — Liability of Surety Completing Work

A surety on a contractor's bond, taking over the

work on the latter's default, is responsible to the owner for liens thereafter imposed on the property.

Where the sureties on a contractor's bond, after the abandonment of the contract by their principal, take over the work or employ another builder to complete it, they assume the relation of principal obligors as to the work thereafter done²³ and are responsible to the owner for liens thereafter imposed on the property by reason of the debts of their employee²⁴ While a surety assuming charge of the work is liable for work done to replace defective work previously done by a subcontractor and not constituting a substantial performance of the subcontract,²⁵ he has been held not liable for the work previously done²⁶ even though the contractor, after surrendering the work to the surety, agreed that both items should be allowed,²⁷ and the surety has been held not to assume the obligation already due a materialman from the contractor.²⁸

On the other hand, the surety may be liable on mechanics' liens accruing before the default,²⁹ and the terms of the surety's agreement with the owner may be such as to make the surety liable to all materialmen³⁰ Where the owner paid claims of mechanics and materialmen, with the knowledge and consent, and at the instance and request, of the building contractor's sureties who had undertaken the completion of the building, he is entitled to recover from them the amount so paid.³¹

A surety taking over the work is not entitled to a mechanic's lien by reason of payments made by it³²

v McConville, 25 P 2d 429, 219 Cal 161

17. Cal—Giant Powder Co Consolidated v Fidelity & Deposit Co of Maryland, 7 P 2d 1033, 314 Cal 639

Claim on note not within statute

Under a statute requiring the bond to be conditioned for the payment of the claims of all persons performing labor or furnishing materials to be used in the work, "claims" do not include claim on promissory note taken in lieu of original claim with agreement that it constitute payment of original debt—Giant Powder Co Consolidated v Fidelity & Deposit Co of Maryland, supra

18. US—Chaffee v U S Fidelity & Guaranty Co, Neb, 128 F 918, 63 CCA 644

19. NY—Buffalo Forge Co. v Fidelity & Casualty Co of New York, 256 NYS 329, 143 Misc 647 40 C J p 359 note 32[s]

Extension held not unreasonable

Subcontractor's taking of sixty-day trade acceptance from contractor for labor and materials furnished held not to extend time of payment

for unreasonable time so as to relieve contractor's surety—Fred Christensen, Inc. v Hansen Const Co, 21 P 2d 195, 142 Or 549

20. Cal—Hammond Lumber Co v Richardson Building & Engineering Co, 285 P 851, 209 Cal 82, followed in Hammond Lumber Co v Richardson Building & Engineering Co, 285 P 855, 209 Cal 781.

21. La—Electrical Supply Co v Eugene Freeman, Inc, 152 So 510, 178 La. 741—W W Carre Co v E J Stewart & Co, 117 So 238, 166 La 317

22. NY—Buffalo Forge Co v Fidelity & Casualty Co of New York, 256 NYS 329, 143 Misc 647.

23. Colo—Howard v Fisher, 283 P 1042, 86 Colo 493

Minn—Robinson v Hagenkamp, 53 NW 813, 53 Minn 101

24. Minn—Robinson v Hagenkamp, supra

25. Wash—Exposition Amusement Co v. Empire State Surety Co, 96 P 158, 49 Wash 637, rehearing denied 97 P 464, 49 Wash 637.

26. Wash—Exposition Amusement Co v Empire State Surety Co, supra

27. Wash—Exposition Amusement Co v Empire State Surety Co, supra

28. La—Toomer v. Price, 122 So 556, 168 La 578.

29. NY—Harley v Mapes Reeves Const Co, 68 NYS 191, 33 Misc 626

Effect of new contract

The rule stated in the text is not affected by the fact that the obligee obtained a new contract from the surety and declared the original contract "voided and forfeited"—Harley v Mapes Reeves Constr. Co, supra

30. Tex—Southern Surety Co v Weaver Bros, Com App, 56 S.W 2d 634—W H Putegnat Co v Fidelity & Deposit Co of Maryland, Com App, 29 S W 2d 1004

31. Cal—Mazzeria v Ramsey, 238 P 101, 72 Cal App 601

32. Colo—Howard v. Fisher, 283 P 1042, 86 Colo. 493.

§ 261. — Measure and Limit of Recovery

The surety's liability cannot exceed the penalty or amount named in the bond. In a proper case the recovery against the surety may include interest, as well as costs and expenses, including attorney's fees, incurred in defending foreclosure suits.

The liability of the surety on a contractor's bond cannot exceed the penalty or amount named in the bond³³. Also, where the bond is one of indemnity against loss or damage, a person suing on the bond cannot recover more in damages than the loss actually suffered,³⁴ the owner is not entitled to recover as against the obligors in the bond the full amount of liens claimed as soon as they become established under the law as liens on the building,³⁵ but it is

necessary for him to pay off and discharge the liens before he can recover more than nominal damages for a breach of the bond³⁶. Ordinarily the amount which a subcontractor can recover on a statutory bond is the contract price³⁷.

In a proper case the recovery against the surety may include interest³⁸ although the bond guaranteeing performance of the contract does not expressly provide therefor,³⁹ as well as costs and expenses incurred in defending foreclosure suits,⁴⁰ including attorney's fees,⁴¹ whether or not such fees have actually been paid, as long as the obligation to pay them has been incurred⁴². However, under the terms of some bonds⁴³ or the circumstances of some

Surety coming into court through assignees or agents acquired no greater rights as to mechanic's lien than if action were in its own name—Howard v Fisher, *supra*

33. Cal.—Sunset Lumber Co v Smith, 267 P 738, 91 Cal App 746
La.—Arcadia Lumber Co v Austin, 131 So 601, 15 La App. 212
40 C J p 358 note 11

34. La.—Parsons v U S Fidelity & Guaranty Co, 117 So 817, 166 La 749

Mo.—Wagner v Dette, 2 Mo App 254

35. Or.—Henry v Hand, 59 P 330, 36 Or 492

36. Or.—Henry v. Hand, *supra*

Payment before trial

In an action on a building contractor's bond, plaintiff could recover for liens discharged by him after commencement of the action and before the trial—Brandrup v Brazier, 127 NW 424, 111 Minn 376

37. Mo.—City of St Louis ex rel Sears v Southern Surety Co, 62 SW 2d 432, 333 Mo 180

38. Ill.—Otis Elevator Co v American Surety Co of New York, 41 NE 2d 987, 314 Ill App 479, applying Pennsylvania law

Miss.—Hartford Accident & Indemnity Co v Natchez Inv Co, 132 So 535, 161 Miss 198, suggestion of error overruled 135 So 497, 161 Miss 198, appeal dismissed Hartford Accident & Indemnity Co v Bunn, 52 S Ct 354, 285 US 169, 76 L Ed 685, motion denied 52 S Ct 456, 76 L Ed 1301—U S Fidelity & Guaranty Co v Parsons, 122 So 544, 154 Miss 587—Mississippi Fire Ins Co v Evans, 120 So 738, 153 Miss 635

Tex.—Fidelity & Deposit Co of Maryland v Kelsay Lumber Co, Com App, 29 SW 2d 1052, modified on other grounds Fidelity & Deposit Co of Maryland v Kelsay Lumber Co, 33 SW 2d 731—Equitable Casualty & Surety Co v

Nowlin, Civ App, 35 SW 2d 1112, error refused
40 C J p 358 note 16

Amount due held sufficiently certain, or capable of being made certain by calculation, to justify award of interest—Meda v Lawton, 18 P 2d 665, 217 Cal 283

Agreement as to rate

(1) Materialman stipulating with building contractor for interest at a stated lawful rate until payment was entitled to hold surety on contractor's bond liable for interest at such rate—Stewart v Segal, 126 So 718, 13 La App 359

(2) Under a statute authorizing proof of interest at the conventional rate only by written agreement of the parties, the mere placing of such rate at the foot of a materialman's account is insufficient to authorize recovery thereof—Bell v Lieber, 125 So 871, 169 La 781

Commencement on date claim due

Ill.—Cherry v Aetna Casualty & Surety Co, 25 NE 2d 11, 372 Ill 534

Unitemized interest not recoverable W Va.—Bluefield Supply Co v M P Smith Const Co, 177 SE 296, 115 W Va 537

39. Miss.—U S Fidelity & Guaranty Co v Parsons, 122 So 544, 154 Miss 587—Mississippi Fire Ins Co v Evans, 120 So 738, 153 Miss 635

40. Minn.—First Church of Christ, Scientist v Lawrence, 297 NW 99, 210 Minn 37—National Tea Co v McDonough, 227 NW 205, 178 Minn 388

Tenn.—Richmond Screw Anchor Co v E W Minter Co, 300 SW 574, 156 Tenn 19

40 C J p 358 note 17

Where surety was properly notified of litigation, but refrained from participating therein, owner could recover from surety necessary and reasonable expenses incurred and surety could not defeat liability on ground that surety was not party to

action—Olmstead v Fidelity & Deposit Co of Maryland, 28 P 2d 722, 138 Kan 825

41. Ariz.—Massachusetts Bonding & Insurance Co v Lentz, 9 P 2d 408, 40 Ariz 46

Kan.—Olmstead v Fidelity & Deposit Co of Maryland, 28 P 2d 722, 138 Kan 825

Minn.—First Church of Christ, Scientist v Lawrence, 297 NW 99, 210 Minn 37—National Tea Co v McDonough, 227 NW 205, 178 Minn 388

Miss.—Hartford Accident & Indemnity Co v Natchez Inv Co, 132 So 497, 161 Miss 198, appeal dismissed Hartford Accident & Indemnity Co v Bunn, 52 S Ct 354, 285 US 169, 76 L Ed 685, motion denied 52 S Ct 456, 76 L Ed 1301

40 C J p 358 note 18

Notice to surety; opportunity to defend

Letter from owner's attorney to surety held sufficient notice of materialman's suit to foreclose lien to give surety opportunity to defend, so as to bind surety by judgment of foreclosure and allowance of attorney's fees—Detroit Fidelity & Surety Co v Frey, 158 NE 910, 96 Ind App 696

Failure to perform conditions of contract

Makers of mechanic's lien note held not entitled to reimbursement under bond for attorney's fees expended by them and allowed against them, where they had not performed conditions of contract or tendered performance—Galbraith-Foxworth Lumber Co v Long, Tex Civ App, 5 SW 2d 162, error refused.

42. Minn.—First Church of Christ, Scientist v Lawrence, 297 NW 99, 210 Minn. 37

43. Ind.—Detroit Fidelity & Surety Co v Frey, 158 NE 910, 96 Ind App 696

Tex.—Wm. Cameron & Co v Amer-

cases,⁴⁴ attorney's fees have been held not recoverable; and it has been held that items cannot be recovered as costs incurred in the lien suit where they were not taxed or legally taxable as such.⁴⁵ Of course, where the facts show that there is no liability on the bond, the question whether a recovery might properly include attorney's fees does not arise.⁴⁶ Where a statute permits the recovery of attorney's fees on certain conditions, the conditions must, of course, be met,⁴⁷ and strict compliance and construction have been required, the statute being penal in its nature.⁴⁸

Recovery has been allowed for loss of rental by reason of delay in the completion of the building,⁴⁹ but not for losses and expenses incident to the purchase and resale of land.⁵⁰ A surety has been held not liable for materials furnished at the request of the owner after the contractor had absconded.⁵¹

The surety is entitled to have the building fund in the hands of the owner properly applied as contemplated by the contract and bond and in accordance with the law,⁵² and it has been held that he is entitled to have the value of extra work offset against the owner's claim.⁵³ Money which a contractor collected under a contract secured by a bond and paid to one who furnished him materials under that job and others should be credited on the bond, relieving the surety to that extent,⁵⁴ and it has

been held that payment by a contractor for materials furnished on a contract secured by a bond should be credited on the bond, whether or not the contractor received the money under that contract.⁵⁵ Where a contract does not show the amount, character, or price of the material to be furnished, and would ordinarily be insufficiently detailed to comply with the statute, the materialman may nevertheless recover thereon where the surety agreed to pay all recorded liens.⁵⁶

§ 262. Action on Bond

- a Right to sue and conditions precedent
- b Form of action
- c Time to sue
- d Parties
- e Defenses
- f Pleadings
- g Issues, proof, and variance
- h Evidence
- i Trial and judgment

a. Right to Sue and Conditions Precedent

- (1) In general
- (2) Suits by subcontractors, laborers, or materialmen

(1) In General

Under a bond promising the owner that the con-

ican Surety Co of New York, Com App, 55 S W 2d 1032
40 C J p 358 note 19

44. La—Stewart v Segal, 126 So 718, 13 La App 359
40 C J p 358 note 20

Where owner waived further claim against contractor, contractor's surety was held not liable for attorney's fees incurred, in litigation to recover on bond for materialmen and laborers—American Surety Co of New York v Wm Cameron & Co, Tex Civ App, 35 S W 2d 217, affirmed in part and reversed on other grounds in part Wm Cameron & Co v American Surety Co of New York, Com App, 55 S W 2d 1032

45. Wash—Sheard v U S Fidelity & Guaranty Co, 107 P 1024, 58 Wash 29, rehearing denied 109 P 276, 58 Wash 29

46. Tenn—Bird v. Southern Surety Co, 200 S W 978, 139 Tenn 11

47. La—W V Carre Co v E J Stewart & Co, 117 So 238, 166 La 317—Stewart v Segal, 126 So 718, 13 La App 359—Manning v Barelli, 8 La App 91

Wash—Electro-Kold Sales Corporation v General Casualty Co of America, 25 P 2d 572, 174 Wash 555

Demand

La—Hortman-Salmen Co v Continental Casualty Co, 129 So 515, 170 La 879—Central Lumber Co v American Employers Ins Co, App, 15 So 2d 229—George E Breece Lumber Co v Morris, 141 So 787, 19 La App 875—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 212

Recovery of full amount claimed

(1) Where a statute provides for the recovery of such fee only where the full amount claimed by the suitor is recovered, the award of a smaller amount will prevent the allowance of such fee—Madison Lumber Co v Globe Indemnity Co, La App, 163 So 434—George E Breece Lumber Co v Morris, 141 So 787, 19 La App 875—Madison Lumber Co v Federal Surety Co, 128 So 50, 13 La App 577—Thibodeaux & Harrison v Globe Indemnity of New York, 6 La App 380

(2) Even a small difference between the amount claimed and the amount awarded will prevent the recovery of such fees—Folse v Maryland Casualty Co, La App, 193 So 385

Statute held not repealed

La—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 212

48. La—Hortman-Salmen Co v Continental Casualty Co, 129 So 515, 170 La 879—Central Lumber Co v American Employers Ins Co, App, 15 So 2d 229—Joubert v U S Fidelity & Guaranty Co, 3 La App 535

49. Tenn—Bird v American Surety Co, 200 S W 978, 139 Tenn 11

50. Pa—Spiese v Shee, 103 A 871, 360 Pa 360

40 C J p 359 note 25

Mortgage foreclosure

La—Parsons v U S Fidelity & Guaranty Co, 117 So 817, 166 La 749

51. La—Lake Charles Planing Mill Co v Grand Lodge, IOOF, 53 So 550, 127 La 238

52. Fla—Standard Accident Ins Co v Bear, 184 So 97, 134 Fla 523, 127 A L R 1

53. Wash—Crowley v U S Fidelity & Guaranty Co, 69 P 784, 29 Wash 268

54. S C—Southern States Supply Co. v Union Indemnity Co, 159 S E 532, 161 S C 219

55. S C—Southern States Supply Co v Union Indemnity Co, supra.

56. La—Bell v Lieber, 125 So 871, 169 La 731.

tractor will perform his contract and promising materialmen to pay them for materials furnished, the owner's and materialmen's rights of action are separate and distinct.

Where a bond contains a promise to the owner that the contractor will perform his contract and a promise to materialmen to pay them for materials furnished the general contractor, the respective rights of action of the owner and the materialmen are separate, distinct, and independent.⁵⁷ An owner who has paid money to discharge liens may recover from the contractor and the surety on the bond⁵⁸ although such right may not accrue until after satisfaction of the liens by payment.⁵⁹ He may proceed against the surety without first exhausting his remedy against the contractor.⁶⁰ A second mortgagee may sue for breach of the condition of a bond by the establishment of valid mechanics' liens against the property, without redeeming from the foreclosure of the first mortgagee.⁶¹ Bondholders of a bankrupt corporation are not entitled to maintain an action against the surety on a contractor's bond as direct beneficiaries, where the bond runs to the corporation as obligee.⁶²

The surety has no cause of action against the owner by reason of the latter's violation of the contract of suretyship⁶³ or of the building contract,⁶⁴ the payment by the surety of the debts owing by the contractor to the materialmen,⁶⁵ or the rendition of a judgment against the surety for claims of subcontractors, laborers, or materialmen.⁶⁶

A contractor cannot recover at law against the

surety on a bond naming the trustees of mortgages as the sole obligees, there being no privity of contract,⁶⁷ and under the language of particular instruments involved the contractor has likewise been held not entitled to recover in equity on the theory that such bond was a guaranty running to him.⁶⁸ However, an indemnity bond may be such as to constitute a contract for the benefit of a third person so as to authorize an action against the surety by the contractor.⁶⁹

An accounting as between the owner and the contractor's surety may be allowed in a proper case.⁷⁰

Arbitration A provision of a contract with respect to arbitration of disputes does not apply, so as to prevent suit on a bond, where the subject matter of the suit is covered by a separate agreement made after the original one.⁷¹

(2) Suits by Subcontractors, Laborers, or Materialmen

(a) In general

(b) As affected by status of particular claim or claimant

(a) In General

Whether subcontractors, laborers, or materialmen may sue on a contractor's bond depends, apart from statute, on the intention of the parties to the bond as evidenced by the language thereof.

Under the provisions of some statutes as to bonds given thereunder, persons performing labor or furnishing materials have a right to recover thereon.⁷²

57. Ill.—Danville Hotel Co. v Benson, 262 Ill App 288

58. Neb.—Karel v Basta, 170 NW 891, 103 Neb 191

Circuity of actions

Surety on bond, which failed to defend lien foreclosure suit, could not complain that suit against it by trustees for bondholders for reimbursement might put it to circuity of actions and multiplicity of suits in order to establish its right of subrogation—Hartford Accident & Indemnity Co v Federal Bond & Mortgage Co, CCA Minn, 59 F 2d 950

59. Tenn.—Richmond Screw Anchor Co v E W Minter Co, 300 SW 574, 156 Tenn 19

60. Mo.—Manny v New York Nat Surety Co, 78 SW 69, 103 Mo App 716

61. Minn.—Strimling v Union Indemnity Co, 222 NW 512, 176 Minn 26

62. Ill.—Cherry v Aetna Casualty & Surety Co, 25 NE 2d 11, 373 Ill 534

63. La.—U S Fidelity & Guaranty

Co v D'Angelo, 90 So 564, 150 La 188

40 CJ p 361 note 69

64. La.—U S Fidelity & Guaranty Co v D'Angelo, supra

40 CJ p 361 note 70

65. La.—U S Fidelity & Guaranty Co v D'Angelo, supra

40 CJ p 361 note 71

66. Tex.—Globe Indemnity Co v West Texas Lumber Co, Civ App, 34 SW 2d 896

40 CJ p 361 note 72

67. DC.—James Stewart & Co v Liberty Trust Co, 50 F 2d 1008, 60 App DC 213

68. DC.—James Stewart & Co v Liberty Trust Co, supra

69. Wis.—A Kieckhefer Elevator Co v Music Arts Corporation, 252 NW 591, 214 Wis 133

70. Mich.—Slater v First M E Church of Pontiac, 214 NW 417, 239 Mich 477

71. Mich.—Morley Bros v F R Patterson Const Co, 253 NW 213, 266 Mich 52

72. US.—Hartford Accident & In-

demnity Co v Board of Education of Dist of Beaver Pond, in Mercer County, CCA W Va, 15 F 2d 317

Cal.—Sunset Lumber Co v Smith, 267 P 738, 91 Cal App 746

Ill.—Ekstrand v Severin, 54 NE 2d 724, 323 Ill App 693, construing Kansas statute

Md.—Hartford Accident & Indemnity Co, Hartford, Conn, v W & J Knox Net & Twine Co, 132 A 261, 150 Md 40

Miss.—Hartford Accident & Indemnity Co v Natchez Inv Co, 119 So 366, 155 Miss 31

Mo.—City of St Louis ex rel Sears v Southern Surety Co, 62 SW 2d 432, 333 Mo 180

40 CJ p 362 note 88

Effect on right to sue contractor

Accrual of cause of action for labor and materials on contractor's bond at completion of work does not interfere with common-law right to sue contractor—Chappell v National Surety Co, 133 SE 21, 191 NC 703

Seeking payment from surety not required

Subcontractor who has obtained judgment against main contractor is

and, apart from such statutes, whether subcontractors, laborers, or materialmen are entitled to sue on a contractor's bond depends on the intention of the parties at the time the bond was executed,⁷³

such intention to be determined by the terms of the bond,⁷⁴ construed as a whole⁷⁵ and in connection with the terms of the building contract⁷⁶ and the attendant circumstances,⁷⁷ but it has also been

not required to look to the latter's surety for payment even though under state law bond covers loss suffered by those furnishing labor or materials directly to principal—*Elgin v Housing Authority of City of Frederick*, D.C.Md., 53 F.Supp. 250

73. *US—Phillips Co v Constitution Indemnity Co of Philadelphia*, C.C.A.Wis., 68 F.2d 304, stating Illinois law—*Maryland Casualty Co v Johnson*, D.C.Mich., 15 F.3d 253

Ala—*Fidelity & Deposit Co of Baltimore, Md. v Rainer*, 125 So. 55, 220 Ala. 262, followed in *Parker v Fidelity & Deposit Co of Maryland*, 125 So. 60, 220 Ala. 267

Cal—*Woodhead Lumber Co v E G Niemann Investments*, 278 P. 913, 99 Cal App. 456

Fla—*Johnson Electric Co v Columbia Casualty Co* 133 So. 850, 101 Fla. 186, 77 A.L.R. 1

Kan—*Haynes Hardware Co v Western Casualty & Surety Co*, 133 P.2d 574, 156 Kan. 356

Ky—*Royal Indemnity Co v International Time Recording Co of New York*, 75 S.W.2d 527, 255 Ky. 823

Md—*Hospital for Women of Maryland, for Use of Robert S Green, Inc. v U S Fidelity & Guaranty Co*, 11 A.2d 457, 177 Md. 615, 128 A.L.R. 931—*Hartford Accident & Indemnity Co, Hartford, Conn. v W & J Knox Net & Twine Co*, 133 A. 361, 150 Md. 40

Mich—*R C Mahon Co v R S Knapp Co*, 247 N.W. 195, 262 Mich. 325

Neb—*Fowler v Doran*, 241 N.W. 759, 123 Neb. 37

N.Y.—*Graybar Electric Co v Seaboard Surety Co*, 283 N.Y.S. 523, 157 M.Sc. 275

N.D.—*Hollerman Mfg. Co v Standard Accident Ins Co*, 239 N.W. 741, 61 N.D. 637

Ohio—*Indemnity Ins. Co of North America v Stamberger Co*, 174 N.E. 629, 37 Ohio App. 336—*Cleveland Window Glass & Door Co v National Surety Co*, 160 N.E. 720, 27 Ohio App. 65

Pa—*Pennsylvania Supply Co v. National Casualty Co*, 31 A.2d 453, 152 Pa.Super. 217

Tex—*Wm Cameron & Co v American Surety Co of New York*, Com App., 55 S.W.2d 1032—*Parker Roofing Co v Aetna Casualty & Surety Co*, Com App., 55 S.W.2d 508—*Commercial Standard Ins Co v Stone*, Civ App., 167 S.W.2d 570, error refused—*Employers Liability Assur Corporation, Ltd. v Trane*

Co, Civ App., 153 S.W.2d 848 reversed on other grounds 163 S.W.2d 398, 139 Tex. 338—*E Nelson Mfg & Lumber Co v Roddy*, Civ App., 34 S.W.2d 624, reversed on other grounds *American Employers' Ins Co v Roddy*, Com App., 51 S.W.2d 280—*Oak Cliff Lumber Co v American Indemnity Co*, Civ App., 266 S.W. 429

Right of third person to sue on contract for his benefit generally see *Contracts* § 519

An assignee of the claims of laborers and materialmen may maintain an action on a bond given for their benefit

US—*Hartford Accident & Indemnity Co v Board of Education of Dist of Beaver Pond*, in Mercer County, C.C.A.Va., 15 F.2d 317

N.C.—*Independence Trust Co v Porter & Boyd*, 132 S.E. 806, 191 N.C. 673

A guaranty that no liens would be filed in connection with a building has been held to run in favor of persons furnishing labor or materials for the job—*W R Spalding Lumber Co v Fradkin*, 156 F.2d 450, 68 Cal App.2d 308

74. Ala—*Fidelity & Deposit Co of Baltimore, Md. v Rainer*, 125 So. 55, 220 Ala. 262, followed in *Parker v Fidelity & Deposit Co of Maryland*, 125 So. 60, 220 Ala. 267

Conn—*Byram Lumber & Supply Co v Page*, 146 A. 293, 109 Conn. 256
Fla—*Curtiss-Bright Ranch Co v Selden Cypress Door Co*, 107 So. 679, 91 Fla. 851—*Dekle v Valrico Sandstone Co*, 77 So. 95, 74 Fla. 346

Kan—*Haynes Hardware Co v Western Casualty & Surety Co*, 133 P.2d 574, 156 Kan. 356

Ky—*Royal Indemnity Co v International Time Recording Co of New York*, 75 S.W.2d 527, 255 Ky. 823

Md—*Hospital for Women of Maryland, for Use of Robert S Green, Inc. v U S Fidelity & Guaranty Co*, 11 A.2d 457, 177 Md. 615, 128 A.L.R. 931—*Hartford Accident & Indemnity Co, Hartford, Conn. v W & J Knox Net & Twine Co*, 132 A. 361, 150 Md. 40

Neb—*Fowler v Doran*, 241 N.W. 759, 123 Neb. 37

N.D.—*Hollerman Mfg Co. v Standard Accident Ins Co*, 239 N.W. 741, 61 N.D. 637

Pa—*Pennsylvania Supply Co v National Casualty Co*, 31 A.2d 453, 152 Pa.Super. 217

Tex—*Employers Liability Assur Corporation, Ltd v Trane Co*, Civ

App., 153 S.W.2d 848, reversed on other grounds 163 S.W.2d 398, 139 Tex. 338—*E Nelson Mfg & Lumber Co v Roddy*, 34 S.W.2d 624, reversed on other grounds *American Employers' Ins Co v Roddy*, Com App., 51 S.W.2d 280
40 C.J. p. 361 note 75

Agreement in condition of bond
Conn—*Byram Lumber & Supply Co v Page*, 146 A. 293, 109 Conn. 256
Ky—*Aetna Casualty & Surety Co v U S Gypsum Co*, 39 S.W.2d 234, 239 Ky. 247

75. Mich—*R C Mahon Co v R S Knapp Co*, 247 N.W. 195, 262 Mich. 325

76. Kan—*Haynes Hardware Co v Western Casualty & Surety Co*, 133 P.2d 574, 156 Kan. 356

Ky—*Royal Indemnity Co v International Time Recording Co of New York*, 75 S.W.2d 527, 255 Ky. 823

Md—*Lange v Board of Education of Cecil County, to Use and Benefit of International Business Machines Corporation*, 37 A.2d 317, 183 Md. 255

Neb—*Fowler v Doran*, 241 N.W. 759, 123 Neb. 37

N.D.—*Hollerman Mfg Co v Standard Accident Ins Co*, 239 N.W. 741, 61 N.D. 637

Tex—*Employers Liability Assur Corporation, Ltd v Trane Co*, Civ App., 153 S.W.2d 848, reversed on other grounds 163 S.W.2d 398, 139 Tex. 338—*E Nelson Mfg & Lumber Co v Roddy*, Civ App., 34 S.W.2d 624, reversed on other grounds *American Employers' Ins Co v Roddy*, Com App., 51 S.W.2d 280
40 C.J. p. 361 note 75

Bond referring to contract
US—*Consolidated Cut Stone Co v Hartford Accident & Indemnity Co*, C.C.A. Okl., 62 F.2d 975, certiorari denied 53 S.Ct. 689, 289 U.S. 743, 77 L.Ed. 1490

Md—*Lange v Board of Education of Cecil County, to Use and Benefit of International Business Machines Corporation*, 37 A.2d 317, 183 Md. 255

Va—*Bristol Steel & Iron Works v Plank*, 178 S.E. 58, 163 Va. 819, 118 A.L.R. 50

77. Tex—*E Nelson Mfg & Lumber Co v Roddy*, Civ App., 34 S.W.2d 624, reversed *American Employers' Ins Co v Roddy*, Com App., 51 S.W.2d 280

General policy of promoting building industry and its orderly conduct by putting bond behind obligations

held that, where the contract and bond are plain and unambiguous, they should be construed by their provisions alone, and the intent and legal effect thereof not arrived at by a consideration of extraneous evidence.⁷⁸ Doubt existing between the parties to a contractor's bond as to whether it covered the claims of laborers or materialmen may be resolved by the subsequent construction placed on it by the parties.⁷⁹ However, a surety on a contractor's bond is not estopped to deny its liability to materialmen by a letter to the latter requesting statements of their claims to facilitate payment to them by the contractor,⁸⁰ nor does the surety's action in undertaking to distribute the contractor's

funds to materialmen constitute a construction of the bond by the surety as binding it to pay materialmen.⁸¹ It has been said that if the terms of the bond admit of two interpretations the one which furnishes the greater indemnity should be adopted.⁸²

The right of such parties to sue on the bond is affirmed not only in cases where the bond expressly provides that they may do so⁸³ or declares that it is for their use or benefit,⁸⁴ but also in cases where it appears by fair and reasonable intendment that their rights and interests were contemplated and provided for,⁸⁵ as where protection to the owner is

of contractor may be considered in ascertaining intent of contractor's bond—Fidelity & Deposit Co of Baltimore, Md., v Rainer, 125 So 55, 220 Ala 262, followed in Parker v Fidelity & Deposit Co of Maryland, 125 So 60, 220 Ala 267

78. Tex—Standard Accident Ins Co v Blythe, 107 SW 2d 880, 130 Tex 201

79. Kan—Haynes Hardware Co v Western Casualty & Surety Co, 133 P 2d 574, 156 Kan 356

80. Wash—Forsyth v. New York Indemnity Co, 293 P 284, 159 Wash 318

81. Wash—Forsyth v New York Indemnity Co, supra.

82. Ohio—Indemnity Ins Co of North America v Stamberger Co, 174 NE 629, 37 Ohio App 236

83. Ind—Nash Engineering Co v Marcy Realty Corporation, 54 N E 2d 263, 222 Ind 396

NY—International Time Recording Co of New York v Southern Surety Co of New York, 254 NYS 668, 142 Misc 501

NC—Guilford Lumber Mfg Co v Johnson, 97 SE 732, 177 NC 44

Wash—Electro-Kold Sales Corporation v General Casualty Co of America, 25 P 2d 572, 174 Wash 555

Persons "who may establish a lien"
Tex—Nash Engineering Co v Aetna Casualty & Surety Co, Civ App, 23 SW 2d 717, affirmed, Com App, 37 SW 2d 740.

84. Ark—Holcomb v. American Surety Co, 42 SW 2d 765, 184 Ark 449—Lena Lumber Co v Brickhouse, 292 SV 1007, 173 Ark 348
NY—Graybar Electric Co v Seaboard Surety Co, 283 NYS 522, 157 Misc 275

Tex—Southern Surety Co v Weaver Bros, Com App, 56 SW 2d 634

40 C J p 361 note 77.

"Any party who furnished materials"

US—F H McGraw & Co v Sherman Plastering Co, D C Conn, 60 F Supp 504, affirmed, CCA, F H McGraw & Co v Milcor Steel Co, 149 F 2d 301, certiorari denied F H McGraw & Co v John T D Blackburn, Inc, 68 S Ct 92, 326 US 753, 90 L Ed 452, and Aetna Casualty & Surety Co v Milcor Steel Co, 66 S Ct 92, 326 US 753, 90 L Ed 452

85. US—Phillips Co v Constitution Indemnity Co of Philadelphia, CCA Wis, 68 F 2d 304, stating Illinois law

Ark—Johnston v Lindsey, 36 SW 2d 396, 183 Ark 466—Aetna Casualty & Surety Co v Big Rock Stone & Material Co, 20 SW 2d 180, 180 Ark 1—Mansfield Lumber Co v National Surety Co, 5 SW 2d 294, 176 Ark 1035

Cal—Woodhead Lumber Co v E G Niemann Investments, 378 P 913, 99 Cal App 456—Sunset Lumber Co v Smith, 267 P 738, 91 Cal App 746

Conn—Byram Lumber & Supply Co v Page, 146 A 293, 109 Conn 256

Fla—Johnson Electric Co v Columbia Casualty Co, 133 So 850, 851, 101 Fla 186—American Surety Co of New York v Smith, 130 So 440, 100 Fla 1012

Ill—Cherry v Aetna Casualty & Surety Co, 25 NE 2d 11, 373 Ill 534

Kan—Haynes Hardware Co v Western Casualty & Surety Co, 133 P 2d 574, 156 Kan 356—Topeka Steam Boiler Works Co v U S Fidelity & Guaranty Co, 15 P 2d 416, 136 Kan 317

Ky—Aetna Casualty & Surety Co v U S Gypsum Co, 39 SW 2d 234, 239 Ky 247

Md—Hartford Accident & Indemnity Co, Hartford, Conn v W & J Knox Net & Twine Co, 133 A 261, 150 Md 40

Minn—St Paul Foundry Co v Evenson, 211 NW 834, 169 Minn 485,

reargument denied 213 NW 352, 169 Minn 485

Neb—Fowler v Doran, 241 NW 759, 123 Neb 37

Ohio—Indemnity Ins Co of North America v Stamberger Co, 174 N E 629, 37 Ohio App 236

Pa—Pennsylvania Supply Co v National Casualty Co, 31 A 2d 453, 153 Pa Super 217

Tex—Wm Cameron & Co v American Surety Co of New York, Com App, 55 SW 2d 1032—Parker Roofing Co v Aetna Casualty & Surety Co, Com App, 55 SW 2d 508—American Employers' Ins Co v Roddy, Com App, 51 SW 2d 280—Commercial Standard Ins Co v Stone, Civ App, 167 SW 2d 570, error refused—Commercial Standard Ins Co v Higginbotham-Bartlett Co, Civ App, 161 SW 2d 63, error refused

Va—Bristol Steel & Iron Works v Plank, 178 SE 58, 163 Va 819, 113 ALR 50

Wash—Electro-Kold Sales Corporation v General Casualty Co of America, 25 P 2d 572, 174 Wash 555

40 C J p 361 note 78

General third-party beneficiary statute or rule

Cal—Sunset Lumber Co v Smith, 267 P 738, 91 Cal App 746

Kan—Haynes Hardware Co v Western Casualty & Surety Co, 133 P 2d 574, 156 Kan 356

SD—Thompson Yards v Van Nice, 239 NW 753, 59 SD 306

Liberal construction for claimants

The weight of authority⁸⁶ is to the effect that a contractor's bond should be liberally construed in favor of laborers and materialmen for whose benefit a bond is ostensibly executed, as against a paid surety company—Hospital for Women of Maryland for Use of Robert S Green, Inc v U S Fidelity & Guaranty Co, 11 A 2d 467, 177 Md 615, 128 ALR 931

Direct benefit

Contractor's bond must have been executed for materialman's direct

not an adequate explanation for the insertion of particular clauses⁸⁶

Subcontractors, laborers, and materialmen are frequently held to have a right to sue on the bond where a promise, covenant, provision, or condition of the bond, or of the contract to which it refers,

either by its express terms, or by the construction placed thereon, is deemed to secure the payment of claims for labor performed or materials furnished by them, or to obligate the contractor to pay for labor and materials,⁸⁷ unless the surety's contract in terms disclaims liability to such per-

benefit in order to authorize suit by or for use of materialman—Fidelity & Deposit Co of Baltimore, Md., v Rainer, 125 So 55, 230 Ala 262, followed in Parker v Fidelity & Deposit Co of Maryland, 125 So 60, 230 Ala 267

Contract direct with principal

One contracting directly with building contractor to furnish materials held entitled to sue on contractor's bond as contemplated beneficiary, where bond contained obligation to pay all persons who have contracts directly with the principal for labor or materials

Ill—Danville Hotel Co v Benson, 262 Ill App 283

NC—Pittsburgh Plate Glass Co v Fidelity & Deposit Co of Maryland, 138 SE 143, 193 NC 769.

ND—Hollerman Mfg Co v Standard Accident Ins Co, 239 NW 741, 61 ND 637

88. US—Phillips Co v Constitution Indemnity Co of Philadelphia, CCA Wis, 68 F2d 304, stating Illinois law

Conn—Byram Lumber & Supply Co v Page, 146 A 293, 109 Conn 256

Tex—American Surety Co of New York v Shaw, Com App, 69 SW 2d 47—Wm Cameron & Co v American Surety Co of New York, Com App, 55 SW 2d 1032

Clause not necessary for owner's protection

Tex—Commercial Standard Ins Co v Stone, Civ App, 167 SW 2d 570, error refused—Commercial Standard Ins Co v Higginbotham-Bartlett Co, Civ App, 164 SW 2d 63, error refused

87. US—William Bayley Co v Columbia Casualty Co, CCA Fla, 50 F2d 899—Hartford Accident & Indemnity Co v Board of Education of Dist of Beaver Pond, in Mercer County, CCA W Va, 15 F2d 817

Ala—Fidelity & Deposit Co of Baltimore, Md., v Rainer, 125 So 55, 230 Ala 262, followed in Parker v Fidelity & Deposit Co of Maryland, 125 So 60, 230 Ala 267

Ark—Aetna Casualty & Surety Co v Big Rock Stone & Material Co, 20 SW 2d 180, 180 Ark 1—Mansfield Lumber Co v National Surety Co, 5 SW 2d 291, 176 Ark 1035

Cal—Llewellyn Iron Works v Reed, 11 P2d 657, 123 Cal App 607—Woodhead Lumber Co v E G

Niemann Investments, 278 P 913, 99 Cal App 456

Conn—Byram Lumber & Supply Co v Page, 146 A 293, 109 Conn 256

Fla—Standard Accident Ins Co v Bear, 181 So 97, 134 Fla 523, 127 ALR 1—Johnson Electric Co v Columbia Casualty Co, 133 So 850, 101 Fla 186, 77 ALR 1

Ill—Cherry v Aetna Casualty & Surety Co, 25 NE 2d 11, 373 Ill 531—Harris v American Surety Co of New York, 21 NE 2d 42, 373 Ill 361, stating Pennsylvania law

Kan—Cooke v Luscombe, 294 P 849, 123 Kan 147

Ky—Royal Indemnity Co v International Time Recording Co of New York, 75 SW 2d 527, 255 Ky 823—New York Indemnity Co v Hurst, 66 SW 2d 8, 252 Ky 59, 94 ALR 864—American Surety Co of New York v Noe, 53 SW 2d 178, 245 Ky 42—Aetna Casualty & Surety Co v U S Gypsum Co, 39 SW 2d 234, 239 Ky 247

La—Graphic Arts Bldg Co v Union Indemnity Co, 111 So 470, 163 La 1—Folse v Maryland Casualty Co, App, 193 So 385

Md—Hartford Accident & Indemnity Co, Hartford, Conn v W & J Knox Net & Twine Co, 133 A 261, 150 Md 40

Minn—St Paul Foundry Co v Evenson, 211 NW 834, 169 Minn 485, reargument denied 213 NW 352, 169 Minn 485

Neb—Fowler v Doran, 241 NW 759, 123 Neb 37

NY—Buffalo Forge Co v Fidelity & Casualty Co of New York, 256 NY 329, 142 Misc 647, stating Kentucky law

NC—Pittsburgh Plate Glass Co v Fidelity & Deposit Co of Maryland, 138 SE 143, 193 NC 769

Ohio—Indemnity Ins Co of North America v Stamberger Co, 174 NE 629, 37 Ohio App 236—Globe Indemnity Co v Jackson Mill & Lumber Co, 156 NE 528, 24 Ohio App 1

Pa—Fleck-Atlantic Co v Indemnity Ins Co of North America, 191 A 51, 326 Pa 15—McClelland v New Amsterdam Casualty Co, 185 A 198, 323 Pa 429—Pennsylvania Supply Co v National Casualty Co, 31 A 2d 453, 152 Pa Super 217—Crane Co v National Casualty Co, 40 Pa Dist & Co 649

SC—Barringer v Fidelity & Deposit Co of Maryland, 159 SE 378, 161 SC 4

SD—Thompson Yards v Van Nice, 239 NW 753, 59 SD 306

Tex—Wm Cameron & Co v American Surety Co of New York, Com App, 55 SW 2d 1032—Parker Roofing Co v Aetna Casualty & Surety Co, Com App, 55 SW 2d 508—Commercial Standard Ins Co v Stone, Civ App, 167 SW 2d 570, error refused—Watson Co v Shaw, Civ App, 47 SW 2d 474, reversed on other grounds American Surety Co of New York v Shaw, Com App, 69 SW 2d 47

Va—Bristol Steel & Iron Works v Plank, 178 SE 58, 163 Va 819, 118 ALR 50

W Va—Tug River Lumber Co v Smithy, 148 SE 850, 107 W Va 482

Wis—Yawkey-Crowley Lumber Co v Sinaiko, 206 NW 976, 189 Wis 298

40 C.J. p 361 note 79

Consideration

The owner's promise to pay the contractor is the consideration for the latter's promise to pay the materialmen—Fidelity & Casualty Co of New York v Plumbing Department Store, 157 So 506, 117 Fla 119—American Surety Co of New York v Smith, 130 So 440, 100 Fla 1012

Bond of subcontractor to contractor

Cal—Pacific States Electric Co v U S Fidelity & Guaranty Co, 293 P 812, 109 Cal App 691

Kan—Topeka Steam Boiler Works Co v U S Fidelity & Guaranty Co, 15 P 2d 416, 136 Kan 317

Effect of owner's default

Materialman could recover on contractor's bond conditioned for payment of person supplying materials, notwithstanding contractor's failure to pay materialman was due to owner's default in furnishing funds to contractor, materialman being donee beneficiary of contractor's absolute promise to pay

Fla—Fidelity & Casualty Co of New York v Plumbing Department Store, 157 So 506, 117 Fla 119

Ill—Cherry v Charles Benson, Inc, 264 Ill App 199

Inconsistent provision

Where construction contract, which was part of completion bond, required owner-contractor to pay claims for labor and materials used in construction of apartment building, claimants of liens for labor and materials were entitled to enforce payment of their claims from surety.

sons,⁸⁸ and it has been held that this principle applies whether or not the bond is required by statute.⁸⁹ The rule also applies to private as well as to public bonds,⁹⁰ and even though the surety was a gratuitous, as distinguished from a paid, one.⁹¹ The fact that a materialman or laborer was not aware of the existence of the bond until after the materials were delivered or the labor performed does not prevent him from taking advantage of it,⁹² nor is it necessary that subcontractors, materialmen, or laborers be named⁹³ or even known⁹⁴ when the obligation is made, or, it has been held, that there be privity between them and the obligor⁹⁵ or obligee⁹⁶ on the bond. On the other hand, it has been held that as to private bonds there must always be privity between the materialman and the

surety.⁹⁷

In some cases subcontractors, laborers, and materialmen are denied a right to recover on the bond,⁹⁸ as where the bond, either alone or taken in connection with the contract, is construed to be for the benefit of the owner only,⁹⁹ where a bond which names only the owner as obligee explicitly provides that no right of action shall accrue thereon, to, or for the use or benefit of, any person other than the obligee named,¹ provided such a limitation is not prohibited by statute and is not regarded as contrary to public policy,² where the bond contains no promise or stipulation for the payment of the claims of subcontractors, laborers, and materialmen,³ but is conditioned merely that the contractor shall perform his contract with the owner,⁴

notwithstanding provision of bond that no right of action should accrue thereon for use of any one other than specified obligees, where claimants did not participate in bond—*Haynes Hardware Co v Western Casualty & Surety Co*, 133 P 2d 574, 156 Kan 356

88. Pa.—Pennsylvania Supply Co v National Casualty Co, 31 A 2d 453, 152 Pa Super 217

89. Pa.—Fleck-Atlantic Co v Indemnity Ins Co of North America, 191 A 51, 326 Pa 15

SD—Thompson Yards v Van Nice, 239 NW 753, 59 SD 306

90. Neb.—Fowler v Doran, 241 N. W 759, 123 Neb 37

Ohio—Indemnity Ins Co of North America v Stamberger Co, 174 N E 629, 37 Ohio App 236—Globe Indemnity Co v Jackson Mill & Lumber Co, 156 NE 528, 24 Ohio App 1

SD—Thompson Yards v Van Nice, 239 NW 753, 59 SD 306

91. Wis.—Yawkey-Crowley Lumber Co v Sinaiko, 206 NW 976, 189 Wis 298

Volunteer surety rule unavailable to paid surety

In this connection, paid surety is not entitled to benefit of rule of construction favoring volunteer sureties—*Byram Lumber & Supply Co v Page*, 146 A 293, 109 Conn 256

92. Kan.—Haynes Hardware Co v Western Casualty & Surety Co, 133 P 2d 574, 156 Kan 356.

NY—Graybar Electric Co v Seaboard Surety Co, 383 NYS 522, 157 Misc 275

93. SD—Thompson Yards v Van Nice, 239 NW 753, 59 SD 306

Tex—Wm Cameron & Co v American Surety Co of New York, Com App, 55 S W 2d 1032—Parker Roofing Co v Aetna Casualty & Surety Co, Com App, 55 S W 2d 508

94. Tex—Wm Cameron & Co v American Surety Co of New York, Com App, 55 S W 2d 1032—Parker Roofing Co v Aetna Casualty & Surety Co, Com App, 55 S W 2d 508

95. Ark—Stewart-McGehee Const Co v Brewster, 284 SW 53, 171 Ark 197

Materialman dealing with subcontractor

Ark—Stewart-McGehee Const Co v Brewster, supra

96. SD—Thompson Yards v Van Nice, 239 NW 753, 59 SD 306

97. Wash.—Forsyth v New York Indemnity Co, 293 P 284, 159 Wash 318

98. Ala.—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 227 Ala 25

Okl—Crane Co v Wise, 124 P 2d 724, 190 Okl 436

Tex—Fidelity & Deposit Co of Maryland v Kelsay Lumber Co, Com App, 33 S W 2d 731

There is no privity of contract between them and the surety—*David Lupton's Sons Const Co v Hugger Bros Const Co*, 148 So 610, 227 Ala 25

Bond of subcontractor to general contractor

Tex—Employers' Liability Assurance Corporation v. Trane Co, 163 S. W 2d 398, 139 Tex 388—*Maryland Casualty Co v Dave Lehr, Inc.*, Civ App, 110 S W 2d 921

99. US—Maryland Casualty Co v Johnson, DCMich, 15 F 2d 253
DC—Sun Indemnity Co of New York v American University, Washington, D C, 26 F 2d 556, 58 App DC 184

Ky—Dayton Lumber & Mfg Co v New Capital Hotel, 299 SW 1063, 222 Ky 29

Md—Hospital for Women of Maryland, for Use of Robert S Green,

Inc, v U S Fidelity & Guaranty Co, 11 A 2d 457, 177 Md 615, 128 A L R 931

Mass—Central Supply Co v U S Fidelity & Guaranty Co, 173 NE 697, 273 Mass 139

Mich—R C Mahon Co v R S Knapp Co, 247 NW 195, 262 Mich 325

NY—Skinner Bros Mfg Co v Shevlin Engineering Co, 248 NY S 380, 231 App Div 656, affirmed 178 NE 795, 257 NY 563

Tex—Standard Accident Ins Co v Blythe, 107 SW 2d 880, 130 Tex 201

Wash—Swasey v Farr, 290 P. 866, 158 Wash 299

40 C J p 362 note 81

Direct or incidental benefit to materialmen by the terms of the bond is insufficient to give them the right to recover

US—Maryland Casualty Co v Johnson, DCMich, 15 F 2d 253

Mass—Central Supply Co v U S Fidelity & Guaranty Co, 173 NE 697, 273 Mass 139

1. Cal—Luke v Southern Surety Co, 286 P. 490, 104 Cal App 727

SC—Crum v Jenkins, 143 SE 21, 145 SC 177

40 C J p 362 note 82.

Subcontractor's bond

Tex—Employers' Liability Assurance Corporation v Trane Co, 163 S W 2d 398, 139 Tex 388

2. SC—Crum v Jenkins, 143 SE 21, 145 SC 177

3. Pa.—Fleck-Atlantic Co v Indemnity Ins Co of North America, 191 A 51, 326 Pa 15

Tex—Standard Accident Ins Co v Blythe, 107 SW 2d 880, 130 Tex 201

40 C J p 362 note 83

4. Tex—M. T Jones Lumber Co v Villegas, 28 SW. 558, 8 Tex Civ. App 669

40 C J. p 362 note 84.

or protect the owner,⁵ or mortgage bondholders,⁶ or a trustee for such bondholders,⁷ against liens, and, in some instances, even where the bond contains a provision for the payment of claims for labor and material,⁸ the view being taken that such a provision, or defeasance clause, standing alone, is insufficient to confer the right to sue on materialmen or laborers, although a different result may follow if it is aided by additional language.⁹

Before subcontractors, laborers, and materialmen can recover from the surety for the contractor's default in his obligation to them, they must show compliance with the required conditions,¹⁰ but a materialman, in order to recover on the bond, is not required to show that all the material sold and delivered by him to the contractor was actually used.¹¹ A materialman seeking to take advantage of the bond takes it subject to all legal defenses and inherent equities arising out of the contract between the contractor and the surety.¹² A materialman may waive his rights against the surety.¹³

Set-off In an action on a subcontractor's bond to the main contractor, brought in the name of the main contractor's trustee in bankruptcy for the

use of the contractor's materialman, the main contractor's indebtedness to the subcontractor has been held not allowable as a set-off against the materialman's claim for materials furnished the subcontractor.¹⁴

What law governs Where the law of the state in which the bond is made gives a materialman the right to sue the surety directly, he is entitled to do so in the state of the forum,¹⁵ but the manner of enforcement is governed by the law of the forum.¹⁶

(b) As Affected by Status of Particular Claim or Claimant

Under some bonds or statutes a laborer, materialman, or subcontractor may sue on the contractor's bond even though he has not perfected his lien.

A laborer, materialman, or subcontractor may have a right to sue on the contractor's bond even though he also has the right to enforce a lien,¹⁷ and under the terms of some,¹⁸ although not other,¹⁹ bonds he must have a right to a lien in order to be entitled to sue on the bond. On the other hand, while there is some authority to the contrary,²⁰ it has generally been held not necessary for

5. Wash—Forsyth v New York Indemnity Co, 293 P 284, 159 Wash 318

40 C J p 363 note 85

6. Ohio—Cleveland Window Glass & Door Co v National Surety Co, 160 NE 720, 27 Ohio App 65, affirmed 161 NE 350, 118 Ohio St 414

7. US—National Surety Co v Brown-Graves Co, CCA Ohio, 7 F 2d 91

8. US—Consolidated Cut Stone Co v Hartford Accident & Indemnity Co, CCA Okl, 62 F 2d 975, certiorari denied 53 S Ct 689, 289 US 743, 77 L Ed 1490—Maryland Casualty Co v Johnson, DC Mich, 15 F 2d 253

DC—Sun Indemnity Co of New York v American University, Washington, DC, 26 F 2d 556, 58 App DC 184

Mass—Central Supply Co v U S Fidelity & Guaranty Co, 173 NE 697, 273 Mass 139

40 C J p 363 note 87

Subcontractor's bond to general contractor

Tex—Employers' Liability Assurance Corporation v Trane Co, 163 S W 2d 398, 139 Tex 388

9. Tex—American Employers' Ins Co v Roddy, Com App, 51 S W 2d 280—Maryland Casualty Co v Wilson, Civ App, 51 S W 2d 1044, error refused

10. Va.—American Surety Co v

Plank & Whitsett, 165 SE 660, 159 Va 1

11. La—Graphic Arts Bldg Co v Union Indemnity Co, 111 So 470, 163 La 1—Folse v Maryland Casualty Co, App, 193 So 385—Marsiglia v McKee, 7 La App 752—Thibodeaux & Harrison v Glone Indemnity of New York, 6 La App 380

Reason for rule

If the rule were otherwise, the furnishing of a bond to secure materialmen would be an idle formality—Haynesville Lumber Co v Casey, 116 So 559, 165 La 1065

12. NC—Pittsburgh Plate Glass Co v Fidelity & Deposit Co of Maryland, 138 SE 143, 193 NC 769

Surety held not to have waived fraud of building contractor and owner's agent by compromising with latter—Pittsburgh Plate Glass Co v Fidelity & Deposit Co of Maryland, supra

13. Cal—Giant Powder Co Consolidated v Fidelity & Deposit Co of Maryland, 7 P 2d 1023, 214 Cal 639

Consideration for waiver

Cal—Giant Powder Co Consolidated v Fidelity & Deposit Co of Maryland, supra

14. Ga.—Fidelity & Deposit Co of Maryland v Pittman, for Use of Georgia Marble Co, 183 SE 572, 52 Ga App 344

15. NY—Buffalo Forge Co v Fidelity & Casualty Co of New York, 256 NYS 329, 142 Misc 647

16. NY—Buffalo Forge Co v Fidelity & Casualty Co of New York, supra

Wash—Electro-Kold Sales Corporation v General Casualty Co of America, 25 P 2d 573, 174 Wash 555

17. Ind—Ochs v M. J. Cainahan Co, 76 NE 788, 42 Ind App 157, rehearing denied 80 NE 163, 42 Ind App 157

18. Wis—Bates Expanded Steel Truss Co v Sisters of Mercy of Janesville, 243 NW 456, 208 Wis 457

40 C J p 363 note 91

19. Ark—Etna Casualty & Surety Co v Big Rock Stone & Material Co, 20 S W 2d 180, 180 Ark 1

40 C J p 363 note 92

20. Fla—Dekle v Valrico Sandstone Co, 77 So 95, 74 Fla 346

NY—Copasso v Apfel, 212 NYS 587, 214 App Div 638

W Va—Atlas Powder Co v Nelson and Chase & Gilbert Co, 20 SE 3d 890, 124 W Va 298

Statutory notice

(1) Materialman failing to give notice required by statute of materialman furnishing material on subcontractor's order had no claim against contractor's bond for materials so furnished—Building Materials, Inc., of Grays Harbor v Elec-

a laborer or materialman to perfect a lien, by taking the statutory steps, before bringing suit on the bond,²¹ this holding being made not only in respect of statutory bonds,²² but also in respect of other bonds made for the use and benefit of persons who may become entitled to liens, it being sufficient under a bond of the latter character that plaintiff has a right to a lien regardless of whether or not he has taken the statutory steps to perfect it²³

Under the terms of particular bonds, or of the

statutes under which they were given, it has been held that suit may be brought thereon by a person who has furnished labor or materials to a subcontractor,²⁴ although the contrary has also been held,²⁵ but suit may not be brought by a person who has furnished materials to another materialman,²⁶ or who has advanced money to pay for labor or material,²⁷ or who has applied money, paid by the contractor and received by the latter from the owner, to a preexisting indebtedness of the

tric Equipment & Engineering Co., 7 P 2d 601, 166 Wash 573

(2) Where notice of lien by subcontractor and materialman to owner of premises, required by statute, was fatally defective, claimant was held not entitled to recover under contractor's bond, notwithstanding bond was broader than statute—Fireproof Products Co v Logan, 189 SE 400, 113 W Va 703

Premature notice

Where lien claimants were induced to give premature lien notices because the owner fixed an erroneous date as that of the completion of the building, the contractor's surety was held bound by such action—Richmond Screw Anchor Co v E W Minter Co, 300 SW 574, 156 Tenn 19

21. Ken—Algonite Stone Mfg Co v Maryland Fidelity & Deposit Co, 163 P 1076, 100 Kan 28, L R A 1917D 723

Ky—New York Indemnity Co v Hurst, 66 SW 2d 8, 252 Ky 59, 94 A L R 864

22. Ark—Stewart-McGehee Const Co v Brewster, 284 SW 53, 171 Ark 197

Cal—General Electric Co v American Bonding Co, 182 P 444, 180 Cal 675—Santa Cruz Portland Cement Co v Snow Mountain Water & Power Co, 274 P 617, 96 Cal App 615

La—Truscon Steel Co v B & T Const Co, 129 So 644, 170 La 1083—American Creosote Works v Aetna Casualty & Surety Co, 120 So 21, 167 La 601—Haynesville Lumber Co v Casey, 116 So 559, 165 La 1065—Albin v Harvey & Jones, App, 162 So 658

40 C J p 362 note 95

Recording

(1) Recording of claim of lien is not required as prerequisite to suit on bond.

Cal—Luke v Southern Surety Co, 286 P 490, 104 Cal App 727

La—Truscon Steel Co v B & T Const Co, 129 So 644, 170 La 1083—American Creosote Works v Aetna Casualty & Surety Co, 120 So 21, 167 La 601—Albin v Harvey & Jones, App, 162 So 658—

N O Nelson Mfg Co v Wilkerson, App, 153 So 157—Colonial Creosoting Co v J H Newton Const Co, 132 So 789, 16 La App 691—Salmen Brick & Lumber Co v Owen, 121 So 201, 10 La App 326—Clifford F Favrot Supply Co v Bachemin, 120 So 723, 11 La App 62, modified on other grounds—Clifford F Favrot Supply Co v U S Fidelity & Guaranty Co, 123 So 593, 163 La 841—Joubert v U S Fidelity & Guaranty Co, 3 La App 525

(2) Liability of building contractor's surety to workmen and materialmen is created by execution of bond and not by recordation thereof—Truscon Steel Co v B & T Const Co, supra

(3) Code articles relating to materialmen's liens, if conflicting with statutory provisions, must yield thereto, as affecting this question—American Creosote Works v Aetna Casualty & Surety Co, supra

Failure to file on contractor's request

Materialman did not lose right of action against surety on contractor's bond because of failure to file lien when requested by contractor, such filing not being required—Colonial Creosoting Co v J H Newton Const Co, 132 So 789, 16 La App 691

Statute held retroactive

Statutory amendment relieving subcontractor and materialman of necessity of filing claims before commencing suit on contractor's bond held applicable to bond executed prior thereto—Simons Brick Co v Eagle Indemnity Co, 294 P 1075, 110 Cal App 676

23. Ark—Lena Lumber Co v Brickhouse, 292 SW 1007, 173 Ark 348

Ill—Danville Hotel Co v Benson, 262 Ill App 288

Ky—New York Indemnity Co v Hurst, 66 SW 2d 8, 252 Ky 59, 94 A L R 864

La—Bell v Lieber, 135 So 871, 169 La 731—Dixie Bldg Material Co v Massachusetts Bonding & Insurance Co, 119 So 405, 167 La 399—Madison Lumber Co v

Bachemin, 118 So 141, 166 La 1066—Dixie Bldg Material Co v Nertz, 141 So 791, 19 La App 881—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 212

Tex—Commercial Standard Ins Co v Higginbotham-Bartlett Co, Civ App, 164 SW 2d 63, error refused—E Nelson Mfg & Lumber Co v Roddy, Civ App, 34 SW 2d 624, reversed on other grounds American Employers' Ins Co v Roddy, Com App, 51 SW 2d 280.

40 C J p 362 note 96

24. US—U S v American Surety Co of New York, Wash, 26 S Ct 168, 200 US 197, 50 L Ed 437—Theobald-Jansen Electric Co v P H Meyer Co, CCANM, 77 F 3d 27

Cal—Pacific States Electric Co v U S Fidelity & Guaranty Co, 293 P 812, 109 Cal App 691

Ind—Nash Engineering Co v Marcy Realty Corporation, 54 NE 2d 363, 233 Ind 396

Kan—Topeka Steam Boiler Works Co v U S Fidelity & Guaranty Co, 15 P 2d 416, 136 Kan 317

Okl—Tway v Thompson, 16 P 2d 76, 160 Okl 279, 84 A L R 457

40 C J p 363 note 98

Subcontractor's bond to main contractor

Ga—Fidelity & Deposit Co of Maryland v Pittman, for Use of Georgia Marble Co, 183 SE 573, 53 Ga App 394

25. Miss—U S Fidelity & Guaranty Co v Maryland Casualty Co, 199 So 378, 191 Miss 103—Alabama Marble Co v U S Fidelity & Guaranty Co, 111 So 573, 146 Miss 414

Okl—Crane Co v. Wise, 124 P 2d 724, 190 Okl 436

26. Mich—People, for Use of Belson Mfg Co v Wayne Electric Motor Co, 257 NW 877, 269 Mich 537

Miss—Alabama Marble Co v U S Fidelity & Guaranty Co, 111 So 573, 146 Miss 414

Mo—Berger Mfg Co v Lloyd, 91 S W 468, 113 Mo App 205

27. Tex—Verschoyle v Holfield, 133 SW 2d 878, 132 Tex 516

contractor,²⁸ and it has been held, under a statute subsequently held unconstitutional, that suit may not be brought by one who has furnished merely tools and machinery²⁹

b. Form of Action

An action on a contractor's bond is based thereon, not on the building contract

An action on a contractor's bond is based thereon rather than on the building contract³⁰ Under the express terms of at least one statute, a recovery on a bond given thereunder may be had either in a suit brought to foreclose liens or in a separate suit on the bond³¹ It has been held that a court of equity, having determined that a claim of lien is unfounded, will not retain jurisdiction to determine whether there is liability on the bond, the latter being a legal question³²

c. Time to Sue

Suit on a contractor's bond must be brought within the period prescribed by statute or by a reasonable provision in the bond

Suit on a contractor's bond must be brought within the period of limitation prescribed by statute³³ or the bond itself,³⁴ if such provision of the bond is reasonable,³⁵ and, where suit is not brought within the time specified, the defense of limitations may be asserted by the surety,³⁶ provided, in the case of a contractual limitation, it has not been waived³⁷ While it has been held that a nonstatutory bond is governed by the limitation provision in the bond and not by the statutory period,³⁸ it has also been held that a suit brought within the statutory period is not barred because not brought within the shorter period provided for by the bond³⁹

28. Ill—Alexander Lumber Co v Aetna Accident & Liability Co, 139 N E 871, 296 Ill 500
40 C J p 363 note 2

29. Tex—American Indemnity Co v Burrows Hardware Co, Civ App, 191 S W 574

30. Ind—Willis v. Knauth, 137 N E 557, 79 Ind App 114

Subcontract not part of pleadings
Va—Burton v Frank A Seifert Plastic Relief Co, 61 S E 933, 108 Va 338

31. Cal—Roberts v Security Trust & Savings Bank, 238 P 673, 136 Cal 557—Purinton v Olsten, 188 P 288, 45 Cal App 621

32. Ill—Standard Oil Co v Kap-schull, Davis Co, 276 Ill App 281

33. Ark—Union Indemnity Co v Covington, 12 S W 2d 884, 178 Ark 533.

La—Dixie Bldg Material Co v Massachusetts Bonding & Insurance Co, 119 So 405, 167 La 399
40 C J p 363 note 6

Limitation statute held not repealed
Ala—Fidelity & Deposit Co of Maryland v Farmers' Hardware Co, 136 So 824, 223 Ala 477

Suit within time for establishing lien required

Ark—Stewart-McGehee Const Co v Brewster, 284 S W 53, 171 Ark 197

Statute as to period for enforcing lien inapplicable

Cal—Luke v Southern Surety Co, 286 P 490, 104 Cal App 727

Actions held not barred

La—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 212
40 C J p 363 note 6 [b]

34. Cal—Rechsteiner v New York Nat Surety Co, 187 P 34, 44 Cal App 774.

Action held brought in time

Ark—National Surety Co v Standard Lumber Co, 54 S W 2d 988, 186 Ark 664

Ill—Cherry, for Use of Simon, v Aetna Casualty & Surety Co, 3 N E 2d 105, 285 Ill App 601

Minn—National Tea Co v McDonough, 227 N W 205, 178 Minn 388

Wyo—American Surety Co of New York v Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195

Assignments as not commencement of new action

In action on bond of building contractor, all causes of action were merged into penalty judgment, and subsequent assignments of breaches in amended declaration were not commencement of new action, so as to be barred under limitation provided in bond—Cherry v Aetna Casualty & Surety Co, 25 N E 2d 11, 372 Ill 534

Effect of failure to complete building

(1) Limitation period for bringing suit under bond of building contractors providing that no suit for default should be brought on bond after three months from final payment did not commence to run, where final payment under contract never became due because of contractor's failure to complete building and to pay claims against it and furnish evidence thereof—Detroit Fidelity & Surety Co v Frey, 158 N E 910, 96 Ind App 696

(2) Provision against suit on bond later than specified date held applicable only if building were completed by date specified, building not having been completed on such date, and surety having been instrumental in keeping contractor on job after time for completion expired, surety waived condition for comple-

tion by date specified, and limitation specified in bond for suing thereon did not apply—American Surety Co of New York v Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195

Payment of lien claim as "final payment"

Under a bond provision limiting the commencement of actions thereon to a stated period after the final payment under the contract is made, payment of a lien claim established by judgment, which was the last payment made by the owner, and not the last payment on the contract price, which was made earlier, is the final payment under the contract—National Tea Co v McDonough, 227 N W 205, 178 Minn 388

35. Wyo—American Surety Co of New York v Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195
40 C J p 354 note 28

36. Cal—Towle v Sweeney, 83 P 74, 2 Cal App 29
40 C J p 363 note 8

37. Ill—Whelan v Massachusetts Bonding & Insurance Co, 205 Ill App 123

38. Ark—National Surety Co v Standard Lumber Co, 54 S W 2d 985, 186 Ark 664

39. Ky—Aetna Casualty & Surety Co v U S Gypsum Co, 39 S W 2d 234, 239 Ky 247

Reason for rule

Any provision in a contract made and to be performed in a particular state, to abridge the period prescribed by the statute of limitations of that state for the bringing of suit, is against public policy and void—Aetna Casualty & Surety Co v U. S Gypsum Co, supra.

In particular circumstances the defense of laches has been held not available ⁴⁰

d. Parties

General principles governing parties to civil actions have been applied in actions on contractor's bonds

In an action by the owner on a contractor's indemnity bond, lien claimants are not necessary parties,⁴¹ and it has been held that the obligee may sue on the bond without joining the person or persons, such as materialmen and subcontractors, for whose benefit the bond was executed.⁴² Also a materialman may sue on such a bond without joining the obligee as a party.⁴³ Where a bond is intended for the benefit of laborers and materialmen, the obligee is not barred from becoming a coplaintiff with laborers or materialmen, in a suit against the surety, by a provision of the bond that no action shall accrue thereon to the use or benefit of anyone other than the obligee named therein.⁴⁴ In some cases an obligee has been held to have sufficient interest to maintain an action against the surety to collect laborers' and materialmen's claims for their use,⁴⁵ and a main contractor's trustee in bankruptcy may maintain an action on a subcontractor's bond to the main contractor, as the nominal plaintiff suing for the use of the subcontractor's materialmen, although such trustee has no right of action on the bond.⁴⁶ The question whether an action on a contractor's bond should be brought in the name of the obligee named in the bond or the real party in interest is controlled by the *lex fori*, since it pertains to the form of the remedy and does not go to the substance of the action.⁴⁷

Under a statute making the contractor and his surety liable in *solido* for all labor and material used in the work, a materialman may sue the surety without joining the contractor as a party,⁴⁸ and apart from such statute the same holding has been made where the contractor's bond is joint and several.⁴⁹

A contractor's assignee of a mechanic's lien note has been held not entitled to sue on a bond protecting the owner against the contractor's default, to recover the amount it was adjudged to pay because of the contractor's default, on the owner's election not to pursue his right on the bond, since there were no contractual relations between the surety and such assignee.⁵⁰ A holder of mortgage notes has been held entitled to sue in his own name on a lien indemnity bond executed by the mortgagor as owner to the mortgagee as obligee and also in favor of any holders of mortgage notes, although the named obligee bought in the liens at a discount in the mortgage foreclosure proceedings.⁵¹

Intervention, based on a materialman's claim, in a suit by the building owner against the contractor and surety must be filed within the statutory period.⁵² A party making a claim which is not covered by the bond will not be permitted to intervene in such a suit.⁵³

e. Defenses

Facts and circumstances not establishing the surety's freedom from liability have been held not available as defenses in actions on contractor's bonds

Among various other alleged defenses,⁵⁴ it has

40. Ill.—Cherry v Aetna Casualty & Surety Co, 25 NE 2d 11, 373 Ill 534

Insolvency of contractor in period during which materialmen delayed suing did not defeat recovery on contractor's bond because of laches, since the surety, at any time during the period, could have paid the materialmen and been subrogated to their claims against the contractor, so that any prejudice to the surety from the materialmen's delay was of the surety's own working.—Aetna Casualty & Surety Co v U S Gypsum Co, 39 SW 2d 234, 239 Ky 247

41. Minn.—Allen v Eneroth, 127 N W 426, 111 Minn 395

42. Fla.—Barry v Columbia Casualty Co, 133 So 852, 101 Fla 168

43. N Y.—Graybar Electric Co v Seaboard Surety Co, 283 N Y S 522, 157 Misc 275

44. Kan.—Haynes Hardware Co v Western Casualty & Surety Co, 133 P 2d 574, 156 Kan 356.

45. Kan.—Haynes Hardware Co v Western Casualty & Surety Co, *supra*

46. Ga.—Fidelity & Deposit Co of Maryland v Pittman, for Use of Georgia Marble Co, 183 SE 572, 52 Ga App 394

47. Mo.—State of Kansas ex rel and to use of Winkle Terra Cotta Co v U S Fidelity & Guaranty Co, 40 SW 2d 1050, 328 Mo 295, certiorari denied U S Fidelity & Guaranty Co v State of Kansas ex rel and to use of Winkle Terra Cotta Co, 52 S Ct 34, 284 US 656, 76 L Ed 556

48. La.—Arcadia Lumber Co v Austin, 131 So 601, 15 La App 213 —Hortman-Salmen Co v Metropolitan Casualty Ins Co of New York, 127 So 424, 13 La App 477

49. Ind.—Adams v McNutt, 149 N E 735, 83 Ind App 694

50. Tex.—Galbraith-Foxworth Lumber Co v Long, Civ App, 5 SW 2d 162, error refused

51. La.—Marks v U S Fidelity & Guaranty Co, 117 So 819, 166 La 756

52. Miss.—Hartford Accident & Indemnity Co v N O Nelson Mfg Co, 135 So 349, 160 Miss 504

53. US.—Theobald-Jansen Electric Co v P H Meyer Co, CCA NM, 77 F 2d 27

54. US.—American Surety Co of New York v Franciscus, CCA Mo, 127 F 2d 810

Ky.—New York Indemnity Co v Hurst, 66 SW 2d 3, 252 Ky 69, 94 ALR 864

La.—Dixie Bldg Material Co v Mertz, 141 So 791, 19 La App 681

Owner's taking possession of building

In suit on contractor's bond, allowance to owner of damages for defective work and materials was held not improper because owner took possession of building, where he gave surety written notice of claim for defective work and materials.—New York Indemnity Co. v. Hurst.

been held that a surety who defended an action to enforce a mechanic's lien cannot, in a suit on the bond, assert a defense which he could have asserted, but did not assert, in the foreclosure action,⁵⁵ and a surety cannot, in a suit against it for reimbursement for the payment of a lien, assert as defenses matters occurring long after the judicial determination of its liability.⁵⁶ The pendency of an action by the lienors to recover personally against sureties for materials is no defense to an action by the owner to recover for the liens imposed on the property.⁵⁷ The facts that the owner and the contractor are acting as principal and agent⁵⁸ and that the owner did not pay the contractor in full⁵⁹ are immaterial with respect to the surety's liability to lien claimants.

A surety guaranteeing faithful performance of a building contract cannot defend on the ground that the contractor engaged to construct the building at too low a price or that the building was worth more to the owner than the agreed price,⁶⁰ likewise,

where a contractor agrees to erect a building for a specified price, his surety, in a suit on the bond for the excess cost of building, is in no position to question the manner in which the excess was paid, or caused to be paid, by the owner.⁶¹ The fact that the owner can credit on his note, payable to the contractor, the amount of the loss occasioned by the contractor's default does not relieve the contractor's surety of liability for such loss,⁶² and the fact that the owner has a surety bond to protect him against loss does not change the legal relations between him and the materialman, who had served a notice of lien on him, with respect to whether the contractor's surety is liable on the contractor's bond to indemnify the owner for the materialman's claim.⁶³

Under at least one statute the surety on a bond given thereunder is limited to such defenses as the principal on the bond can make,⁶⁴ but this is a provision which any party for whose interest it is made may dispense with,⁶⁵ and a materialman dis-

66 S W 2d 8, 252 Ky 59, 94 A L R 864

Application of payments

(1) Surety on contractor's bond could not require application of amount owing by building owner to contractor on other jobs to reduction or satisfaction of surety's liability under bond, since surety was not injured by owner's failure to so apply amount due contractor—New York Indemnity Co v Hurst, *supra*.

(2) Materialman's imputations as to payments by contractor agreed to expressly or tacitly by contractor, the principal debtor, could not be disturbed, even though operating to prejudice of surety—Hortman-Salmen Co v Continental Casualty Co, 129 So 515, 170 La 879.

Owner's default in payment to contractor

Under bond conditioned on contractor's faithful performance of contract and payment of subcontractors, default on part of owner of building in payment to contractor was held not to constitute defense to right of one subrogated to claims of materialmen to recover against surety—Cherry, for Use of Simon, v Aetna Casualty & Surety Co, 3 N E 2d 105, 285 Ill App 601.

Cost of items

Where there were no plans, specifications, or cost limits, surety on completion and lien bond given by mortgagor to mortgagee was held in no position to complain of cost of certain items on mortgagee's completion of construction after foreclosure—Parsons v U S Fidelity & Guaranty Co, 117 So. 817, 166 La 749.

55. Mo—Manny v New York Nat Surety Co, 78 S W 69, 103 Mo App 716

40 C J p 363 note 10

56. US—Hartford Accident & Indemnity Co v Federal Bond & Mortgage Co, C C A Minn, 59 F 2d 950

57. Minn—Robinson v Hagenkamp, 53 N W 813, 52 Minn 101

58. Cal—Meda v. Lawton, 18 P 2d 665, 317 Cal 282

59. Cal—Meda v Lawton, *supra*
Ill—Danville Hotel Co v Benson, 263 Ill App 388

60. Kan—Martin v Robinson, 272 P 149, 127 Kan 100

61. Wyo—American Surety Co of New York v. Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195

62. Tex.—Equitable Casualty & Surety Co v. Nowlin, Civ App, 35 S W 2d 1112, error refused

Damages not chargeable against note
Surety on contractor's indemnity bond held liable to owner for liquidated damages for contractor's default, notwithstanding agreement in contract that such default should not defeat lien, but that lien should exist less amount necessary to complete improvements, since such agreement would not permit charging of liquidated damages against mechanic's lien note—Fidelity & Deposit Co of Maryland v Long, Tex Civ App, 5 S W 2d 169, error refused

63. Fla.—Standard Accident Ins Co v Bear, 184 So. 97, 184 Fla 523, 127 A L R 1

64. La—Truscon Steel Co v B & T Const Co, 129 So 644, 170 La 1033—Graphic Arts Bldg Co v Union Indemnity Co, 111 So 470, 163 La 1—Folse v Maryland Casualty Co, App, 193 So 385—Salmen Brick & Lumber Co v Owen, 131 So 201, 10 La App 326—Clifford F Favrot Supply Co v Bacheman, 120 So 723, 11 La App 62, modified on other grounds Clifford F Favrot Supply Co v U S Fidelity & Guaranty Co, 123 So 593, 168 La. 841—Madison Lumber Co v McGrath, 9 La App 105—Manning v Barelli, 8 La App 91—Marsiglia v McKee, 7 La App 753—Thibodeaux & Harrison v Globe Indemnity of New York, 6 La App 380

40 C J p 363 note 11

Material supplied before bond given
Fact that some of the material on which suit is based was supplied before the bond was given, and is therefore not covered by the bond, is not a defense which the contractor could make, and it is, therefore, not available to his surety—Slagle-Johnson Lumber Co v Roberts, 4 La App 216

Extension of time to pay

La.—Electrical Supply Co v Eugene Freeman, Inc, 153 So 510, 178 La 741.

Payment by subcontractor

La.—N O Nelson Mfg Co v Wilkerson, App, 152 So 157

Materialman's lack of privilege

La.—Graphic Arts Bldg Co v Union Indemnity Co, 111 So 470, 163 La 1

65. La.—Toomer v. Price, 123 So 856, 168 La 578.

penses with it by guaranteeing that no lien will be recorded for his claim⁶⁶ Where the owner seeks to recover the amount of a judgment establishing a mechanic's lien for material furnished to the contractors, it is no defense that plaintiff had refused to pay the contractors two small items for a balance due and for extras, where due credits were received therefor by the contractors and inured to the benefit of the surety on the bond, having been deducted from the amount of plaintiff's claim⁶⁷

In particular circumstances the defense of estoppel has been held not available to a surety⁶⁸

f. Pleadings

The petition in an action on a contractor's bond must state a cause of action. It need not negative matters of defense.

The petition or complaint in an action on a contractor's bond must state a cause of action⁶⁹ so as to be sufficient on demurrer⁷⁰ It must allege the amount of the bond⁷¹ and must show such a breach of the bond as fixes the liability thereon,⁷² but need not negative matters of defense⁷³ or set forth

matters not affecting liability on the bond.⁷⁴

In an action by one lienholder the declaration should aver the interest of other lienholders⁷⁵ If the surety contract, pleaded in *hac verba*, evidences an intent to benefit a third party beneficiary, no further allegation of such intent is necessary.⁷⁶ In an action by a subcontractor the complaint need not set out in detail the contract between the owner and the contractor,⁷⁷ and, if it states a direct and primary cause of action in favor of the subcontractor, other allegations attempting to set up a cause of action by assignment of the bond from the owner may, if insufficient, be ignored⁷⁸ and do not invalidate the complaint.⁷⁹

An answer or affidavit of defense which admits, or does not deny, defendant's liability and plaintiff's right to recover is insufficient⁸⁰ A want of consideration for the bond,⁸¹ or a defense in the nature of an estoppel,⁸² such as false representations inducing the signing of the bond,⁸³ must be specially pleaded to be available as a defense; and a general denial to an answer affirmatively alleging the execu-

66. La.—Toomer v Price, *supra*

67. Wash.—Friend v Ralston, 77 P 794, 35 Wash 422

68. Kan.—Haynes Hardware Co v Western Casualty & Surety Co, 133 P 2d 574, 156 Kan 356

Absence of fraud and misconduct
Ill.—Cherry, for Use of Trueblood, v Aetna Casualty & Surety Co, 21 N E 2d 4, 300 Ill App 392, affirmed Cherry v Aetna Casualty & Surety Co, 25 N E 2d 11, 372 Ill 534

69. US.—American Surety Co of New York v Franciscus, CCA Mo, 127 F 2d 810

Quantum meruit

Subcontractors' petition in suit to recover from surety on contractor's bond, alleging that amounts charged for work performed were "just, due and wholly unpaid," was held to state cause of action in quantum meruit—National Surety Corporation v Mullins, 90 SW 2d 707, 262 Ky 465

Settlement between materialman and contractor

Where a contractor's bond was joint and several, and surety did not agree to be bound by any settlement had by materialmen and contractor, in action by materialman on bond against surety it was unnecessary to allege that settlement had been had between plaintiff and contractor—Adams v McNutt, 149 N E 735, 63 Ind App 694

Complaints and petitions held to state cause of action

Ill.—Harris v American Surety Co

of New York, 24 N E 2d 42, 372 Ill 361

La.—Monroe Hardware Co v. Delatte, 4 La App 66

Mo.—Cabool School Dist v U S Fidelity & Guaranty Co, App, 9 SW 2d 103
40 C J p 363 note 15 [a]

70. Pa.—Bayonne Board of Education v Massachusetts Bonding & Insurance Co, 97 A. 688, 252 Pa 505

40 C J p 363 note 16 [a]

Complaints, petitions, and declarations held sufficient on demurrer

Wash.—Lent's, Inc, v Strawhun, 83 P 2d 342, 196 Wash 457
40 C J p 363 note 16 [b]

Amended petition

Final ruling sustaining demurrer to petition by claimant against surety on completion bond to enforce liens for material and labor used in construction of building did not bar action under amended petition setting forth additional material provisions of construction contract, which was part of bond, charging that bond had been construed to guarantee payment of such claims, and adding an obligee of the bond as coplaintiff—Haynes Hardware Co v Western Casualty & Surety Co, 133 P 2d 574, 156 Kan 356

71. N Y.—International Time Recording Co of New York v Southern Surety Co of New York, 254 N Y S 668, 142 Misc 501

72. Ind.—Standiford v Shideler, 60 N E 168, 26 Ind App 496
40 C J p 363 note 17

73. Minn.—St Paul Fdy Co v Wegmann, 42 N.W 288, 40 Minn 419

40 C J p 364 note 18

74. Minn.—St Paul Fdy Co v Wegmann, *supra*
40 C J p 364 note 19

Recording of claim within statutory period after acceptance of work
—N O Nelson Mfg Co v Wilkerson, La App, 152 So 157—Joubert v U S Fidelity & Guaranty Co, 3 La App 525

75. Ill.—Mason v. Neal, 204 Ill App 538

40 C J p 364 note 20

76. US.—Phillips Co v Constitution Indemnity Co of Philadelphia, CCA Wis, 68 F 2d 304, stating Illinois law.

77. Cal.—Carpenter v Furrey, 61 P 369, 128 Cal 665

Ind.—Conn v State, 25 N E 443, 125 Ind 514

78. Ind.—Ochs v M J Carnahan Co, 76 N E 788, 42 Ind App 137, rehearing denied 80 N E 163, 42 Ind App 157

79. Ind.—Ochs v M J Carnahan Co, *supra*

80. US.—Fidelity & Deposit Co. v. U S, CCA DC, 296 F 952

81. Ind.—Gwinn v Wright, 86 N E 453, 42 Ind App 597

82. La.—Hortman-Salmen Co v. Continental Casualty Co, 129 So. 515, 170 La 879

83. La.—Hortman-Salmen Co v. Continental Casualty Co, *supra*

tion of the bond and the default of the principal contractor is insufficient to raise the issue of fraud in the procurement of the bond⁸⁴ Where the breach alleged is the neglect to pay off certain mechanics' liens, an answer alleging that defendants were unable to pay the mechanics because plaintiffs failed to lend them money as agreed, without showing the terms of the agreed loan or the damage sustained by defendants from losing it, is bad,⁸⁵ and a plea alleging that a materialman, although knowing that money received from the contractor was paid by the owner, applied it to the payment of other indebtedness is fatally defective if it fails to show any duty on the materialman to do with the money otherwise than he did⁸⁶

g. Issues, Proof, and Variance

The allegations and proof must correspond in an action on a contractor's bond

The allegations and the proof must correspond in an action on a contractor's bond⁸⁷ In an action by the owner the amount of claims for material may be proved, even though claimants, made parties

defendant, have not appeared by answer⁸⁸ One furnishing materials for the construction of two buildings, each covered by a bond of the same surety, must, in a suit against the surety, establish what portion of the materials went into each building, where each bond makes the surety liable only for the materials furnished for the building covered by that bond⁸⁹ Evidence is admissible to prove or disprove material facts which have been put in issue by being alleged in the pleading of one party and denied in the pleading of the adverse party⁹⁰ A denial by the surety of all liability under the bond waives the necessity of proof of any notice of default which may be required by the bond as a condition precedent to the maintenance of an action thereon⁹¹

h. Evidence

Actions on contractors' bonds are governed by the rules of evidence obtaining in civil actions generally

The rules of evidence obtaining in civil actions generally are applicable in determining the admissibility⁹² and the weight and sufficiency⁹³ of evi-

Pleading held insufficient

La.—Hortman-Salmen Co v Continental Casualty Co, supra

84. Colo.—Howard v Fisher, 283 P 1043, 86 Colo 493

85. Ind.—Foster v Gaston, 23 NE 1092, 123 Ind 96

86. Fla.—Standard Accident Ins Co v Duval Lumber Co, 126 So 643, 99 Fla 525

Payment by one other than obligee

In such circumstances the surety cannot deny its liability because the excess amount was paid by another than the obligee, and this is true notwithstanding the bond provides that no right of action shall accrue thereon for the benefit of anyone but the named obligee, where the claim is being enforced by the obligee to discharge its moral, if not its legal, obligation to the person making the payment—American Surety Co of New York v Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195

87. Hawaii.—Craig v Uyeoka, 32 Hawaii 913

Novation

Evidence that materialman's acceptance of contractor's note constituted novation relieving surety held improperly admitted in action on contractor's bond in absence of allegation in answer setting up facts showing novation—Griswold Lumber Co v Maryland Casualty Co, 121 So 370, 10 La App 308

88. Wash.—Exposition Amusement Co v Empire State Surety Co, 96

P 158, 49 Wash 637, rehearing denied 97 P 464, 49 Wash 637

89. La.—Clifford F Favrot Supply Co v U S Fidelity & Guaranty Co, 123 So 593, 168 La 841

90. Mich.—Marquette Opera House Bldg Co v Wilson, 67 NW 123, 109 Mich 223

40 C J p 364 note 27

Wrongful imputations of payments

Surety on subcontractor's bond could show under defense of payment that there have been erroneous and illegal imputations of payments, operating as fraud on surety—N O Nelson Mfg Co v Wilkerson, La App, 152 So 157

91. Ill.—Whelan v Massachusetts Bonding & Insurance Co, 205 Ill App 122

92. DC.—Whelan v McCullough, 4 App DC 68

La.—W W Carre Co v E J Stewart & Co, 117 So 238, 166 La 317
Neb.—Comstock v Cameron, 60 NW 105, 41 Neb 814

Evidence held admissible or improperly excluded

Ill.—Ekstrand v Severin, 31 NE 2d 435, 308 Ill App 321

40 C J p 364 note 31 [a]

Evidence held inadmissible or properly excluded

(1) Membership franchise between materialman and contractor held not admissible in materialman's action against surety on building contract—Hortman-Salmen Co v Metropolitan Casualty Ins Co of New York, 127 So 424, 13 La App 477

(2) Where contract limited own-

er's liability for changes to those authorized in writing, evidence of surety regarding changes authorized orally by architect held properly rejected—Massachusetts Bonding & Insurance Co v Lentz, 9 P 2d 408, 40 Ariz 46

(3) Notices of liens held inadmissible as evidence of damages by contractor's abandonment of building completed by owner at his own expense, in absence of evidence that liens were perfected or paid by owner—Union Indemnity Co v Vetter, CCA Fla, 40 F 3d 608

(4) In suit for breach of mechanics' lien bond, there was no error in exclusion of offer of testimony that when surety received notice of pendency of mechanics' lien proceedings it conferred with principal on the bond and was informed that claim would be defeated and that he had employed an attorney to defend the action—American Surety Co of New York v Franciscus, CCA Mo, 127 F 2d 810

(5) Other evidence—Kildall Fish Co v Giguere, 162 NW 671, 136 Minn 401—40 C J p 364 note 31 [b]

93. Evidence held sufficient

(1) To establish that building contractor's surety and its indemnitor acquiesced in owner's taking over work on contractor's default—Minden Presbyterian Church v Lambert, 120 So 61, 167 La 712

(2) To establish that materials were furnished and used for building, within surety bond—Jahncke Service v. King, La App, 157 So

dence, as well as questions relating to presumptions⁹⁴ and burden of proof,⁹⁵ in actions on contractors' bonds

1. Trial and Judgment

General rules governing questions of law and fact, instructions, verdict and findings, and judgment or decree apply in actions on contractors' bonds.

Defendants in actions on contractors' bonds are entitled to have the question of their liability and

the extent thereof determined by the jury,⁹⁶ and various other questions have been held to be questions of fact for the jury.⁹⁷ Instructions not relevant to the issues are properly refused.⁹⁸ All material issues should be passed on,⁹⁹ but matters not in issue cannot be considered.¹ Specific findings as to the reasonable market value of material supplied are not indispensable to a judgment in favor of a materialman.²

The verdict should not include items not claimed

165—Madison Lumber Co v McGrath, 118 So 845, 9 La.App 105

(3) To show that payments of installments were made by owner to contractor in accordance with terms of contract—Fidelity & Casualty Co of New York v Aetna Homestead Ass'n, 162 So 646, 182 La. 865

(4) To show that plaintiff did not furnish materials to contractor, but merely advanced moneys with which contractor bought materials, precluding recovery against surety—Smith v Smith, 142 So 132, 174 La. 937

(5) To support judgment for materialman, suing on contractor's bond—Schreiber v Edgar, 132 So 385, 168 La. 443—Madison Lumber Co v Bachemin, 118 So 141, 166 La. 1066

(6) To sustain finding of damages for breach of condition of bond protecting mortgage against paramount liens—Strimling v Union Indemnity Co, 222 NW 512, 176 Minn 28

(7) To show other matters
Cal—Patten & Davies Lumber Co v McConville, 25 P 2d 439, 219 Cal 161—Lasky v American Indemnity Co, 383 P 974, 102 Cal App 192
La—Haynesville Lumber Co v Casey, 116 So 559, 165 La 1065—Robt P Hyams Coal Co v Webster & Globe Indemnity Co of N Y, 5 La App 370
Minn—Danielski v Pioneer Bldg Co, 242 NW 342, 186 Minn 24
Mo—City of St Louis ex rel Sears v Southern Surety Co, 62 SW 2d 432, 333 Mo 180

Wyo—American Surety Co of New York v Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195

40 C J p 364 note 32 [a]

Evidence held insufficient

(1) To authorize materialman's recovery against building contractor's surety—Truscon Steel Co v B & T Const Co, 139 So 644, 170 La 1083

(2) To show fraud of owners inducing surety to execute building contractor's bond, where surety had possession of contemplated contract several days before execution—J R

Delvendahl Co v Lydon, 18 P 2d 492, 171 Wash 551

(3) To show novation—Griswold Lumber Co v Maryland Casualty Co, 121 So 370, 10 La.App 308

(4) To show other matters—Edgington v Maryland Casualty Co, La.App. 197 So 195—Folse v Maryland Casualty Co, La.App. 193 So 385—Madison Lumber Co v Federal Surety Co, 138 So 50, 13 La.App 577—40 C J p 364 note 32 [b]

Contract price as prima facie evidence of value

Where subcontractors sued surety on contractor's bond, price in contract with contractor was prima facie evidence of reasonable value of material and labor furnished—City of St Louis ex rel Sears v Southern Surety Co, 62 SW 2d 432, 333 Mo 180

94. Or—Fred Christensen, Inc. v Hansen Const Co, 21 P 2d 195, 142 Or 549

40 C J p 364 note 33

Knowledge of statutory obligation

Obligors, obligees, and sureties are presumed to know of statutory obligation of contractor's bond to pay laborers and materialmen—Commercial Bank of Magee v Evans, 112 So 482, 145 Miss 643

95. La—Madison Lumber Co v Federal Surety Co, 128 So 50, 13 La App 577

Or—Fred Christensen, Inc. v Hansen Const Co, 21 P.2d 195, 142 Or 549

SC—Bryce Plumbing & Heating Co v American Surety Co, 160 SE 593, 162 SC 239

Wyo—American Surety Co of New York v Broadway Improvement & Investment Co, 271 P 19, 39 Wyo 195, rehearing denied 274 P 13, 39 Wyo 195

40 C J p 364 note 34

Payment as defense

In materialman's action against subcontractor and his surety, surety who depended on payment as defense had burden of proof—N O Nelson Mfg Co v Wilkerson, La.App. 152 So 157

Allowance of credit for expenses

In materialman's action on contractor's bond, defendants had bur-

den to prove that credit should be allowed for expenses in altering millwork—Madison Lumber Co v Federal Surety Co, 128 So 50, 13 La. App 577

Waiver of requirement as to changes

Burden was on surety claiming credit for changes orally authorized by architect to prove that owner waived contract provision requiring written authorization—Massachusetts Bonding & Insurance Co v Lentz, 9 P 2d 408, 40 Ariz 46

96. Wash—Spokane & Idaho Lumber Co v Lov, 58 P 672, 60 P 1119, 21 Wash 501

40 C J p 364 note 35

97. N Y—Buffalo Forge Co v Fidelity & Casualty Co of New York, 256 N Y S 329, 143 Misc 647

Right to, and amount of, interest
Mich—People to Use of Vermont Marble Co v Bollin, 219 N W 613, 242 Mich 683

Payment for materials furnished

In materialman's action on contractor's bond, evidence held to raise issue for jury as to whether contractor paid for materials furnished—Southern States Supply Co v. Union Indemnity Co, 159 SE 532, 161 SC 219

98. US—American Surety Co of New York v Franciscus, CCA Mo, 127 F 2d 810

Instruction given in prior suit

In suit for breach of mechanics' lien bond, there was no error in exclusion of instruction given in prior suit in which plaintiffs' liability resulting from the establishment of mechanics' lien had been established, where nothing said or done by court in that case could diminish defendant's responsibility under bond in suit—American Surety Co of New York v Franciscus, supra

99. Cal—Ernst v Cummings, 55 Cal 179

40 C J p 364 note 36

1. NJ—Meyer v Standard Accident Ins Co, 177 A. 255, 114 N.J. Law 483

2. Tex—Lake v Jones Lumber Co, Civ App, 233 SW. 1011.

in the pleadings³

In equity, the court may adapt its decree to the circumstances of the case⁴ and offset one claim against another where they grow out of the same transaction⁵

In a subcontractor's action against the surety, the judgment should be for the amount of the penalty of the bond, and not for the amount of damages assessed⁶ In an action against an owner and the surety, where unpaid subcontractors and materialmen are awarded liens against the property, the owner is entitled to judgment over against the surety if the judgment liens are satisfied out of the property,⁷ and, in an owner's action against a contractor and his sureties, where the court awarded the sureties a judgment against the contractor for materials furnished for the building, a provision giving them a judgment against the contractor on satisfying the awards made in the judgment in favor of the lien claimants and the owner should have

been embodied in the judgment⁸ In a contractor's action against a subcontractor for materials, a money judgment against the contractor on a cross complaint on the bond has been held not prejudicial to the contractor in view of a concurrent court order requiring the retention in the registry of the court of sums collected on the judgment, to protect materialmen simultaneously suing the contractor⁹

A judgment against the warrantor in a bond, should not be executed until the owner pays into the hands of the warrantor, or deposits in the registry of the court, the balance due on the contract price, to be applied on the claims of the privilege creditors¹⁰ Where the surety has defended an action brought to enforce a mechanic's lien without questioning the identity of the land, it is too late after verdict in an action on the bond to raise on motion for a new trial the defense that the evidence fails to show that the land on which the lien was filed is the same as that on which the building mentioned in the bond was built.¹¹

VIII. ENFORCEMENT

A. IN GENERAL

§ 263. In General

- a Nature and form of remedy
- b Personal liability

a. Nature and Form of Remedy

The method of enforcing a mechanic's lien is governed by the statute creating the lien.

Since the right to a mechanic's lien is entirely statutory, not only the right itself, but the method of enforcing it, must depend on the statute,¹² and in determining the right to a mechanic's lien and the enforcement thereof, according to the decisions on the question, the requirements of the statute must

3. Cal—Klokke v Raphael, 96 P 392, 8 Cal App 1 40 C J p 365 note 38

4. Tex—Wright v A G McAdams Lumber Co, Civ App, 218 S W 571 40 C J p 365 note 39

Finding liability in terms of money decree

Owner and surety on his lien release and supersedeas bond, suing surety on contractor's bond as assignee of materialman's lien decree for relief against enforcement of such decree, held entitled to have liability of surety on contractor's bond found in terms of money decree and set off against such surety's decree, on theory that suit was in nature of one for specific performance of surety's obligation on contractor's bond—Bear v Standard Accident Ins Co, 168 So 18, 124 Fla 9

5. Tex—Wright v A G McAdams Lumber Co, Civ App, 218 S W 571

6. Mo—City of St Louis ex rel Sears v Southern Surety Co, 62 S W 2d 432, 353 Mo 180

7. Wash—Electro-Kold Sales Corporation v General Casualty Co of America, 25 P 2d 573, 174 Wash 555

8. Wash—Lent's, Inc, v Strawhun, 83 P 2d 342, 196 Wash 457

9. Wash—Dioguardi v Haddow, 8 P 2d 978, 167 Wash 63

10. La—Monroe Hardware Co v Delatte, 4 La App 66

11. Ind—Foster v Gaston, 23 NE 1092, 123 Ind 96

12. Ark—Commercial Credit Co v Hayes-Lamb Motor Co, 298 S W 217, 174 Ark 945

Fla—Rieck & Fleece v Cunniff, 190 So 8, 138 Fla 742—Rathbun v Landess, 129 So 783, 100 Fla 507 Ind—National Brick Co v Russell, 190 NE 614, 99 Ind App 53

Kan—Corpus Juris cited in Bell v Hernandez, 30 P 2d 1101, 1102, 139 Kan 216

Mich—Fox v Martin, 283 NW. 9, 287 Mich 147—Netting Co v Touscany, 225 NW. 556, 247 Mich 279

Mo—Fleming-Gilchrist Const Co v McGonigle, 89 S W 2d 15, 338 Mo 56, 107 A L R 1003

NJ—Weinberger v Goldstein, 151 A 397, 106 N J Eq 489

NY—Rubinstein v Jamaica Nat Bank of New York, 40 N Y S 2d 33, affirmed 44 N Y S 2d 950, 268 App Div 977, affirmed 61 NE 2d 455, 294 NY 727, motion granted 62 NE 2d 394, 294 NY 843. 40 C J p 365 note 55

Nature of lien see supra § 1.

Agreement of parties

Mechanic's lien cannot be foreclosed by agreement of lien claimant and property owner, but only by action in district court—Bell v Hernandez, 30 P 2d 1101, 139 Kan 216

"Enforcement" of statutory lien means that provisions of lien enforcement statutes are invoked and put in operation—Sandquist & Snow v Kellogg, 186 So 235, 101 Fla 579

Effect of undertaking discharging lien

Where undertaking is filed and mechanic's lien is discharged, action,

be followed,¹³ either strictly¹⁴ or substantially,¹⁵ in conformity with the view prevailing in the jurisdiction as to the rule to be applied in the construction of mechanics' lien laws generally, as discussed *supra* § 4

Under the requirements of the particular statute, a proceeding to foreclose a mechanic's lien may be by suit leading to a decree as in other suits of foreclosure,¹⁶ or by attachment followed by judgment and execution for the amount secured, as discussed *infra* § 287, or by an attachment either at law or in equity or by judgment and execution at law to be

levied on the property on which the lien rests.¹⁷ A statute providing for a deficiency judgment of like effect as in an action for the foreclosure of mortgages where, on a sale of the property subject to the lien, there is a deficiency of proceeds to pay plaintiff's claim has been held not to require the entire procedure to be the same as in proceedings to foreclose real estate mortgages,¹⁸ and, on the other hand, such a provision has been held to render the suit like a suit for the foreclosure of a mortgage and to make the procedure conformable thereto.¹⁹ A mechanic's lien may, it has been held, be fore-

ostensibly brought to foreclose lien, is action to test validity of lien had it not been discharged, and, if found valid, to procure judgment on undertaking, rather than judgment of foreclosure against realty.—*Whits Plains Sash & Door Co v Doyle*, 186 N E 33, 263 N Y 16

Enforcement against property of married woman

Fla.—*Dalton v Camp*, 194 So 219, 141 Fla 892—*Pierson v Reinhardt*, 133 So 553, 101 Fla 1392, rehearing denied 136 So 250, 101 Fla 1392

Enforcement against estate by entirety

Fla.—*Velazquez v Suarez*, 152 So 708, 113 Fla 856—*Mead v Picotte*, 134 So 57, 101 Fla 325

Where petitioner had no lien, statutes as to liens on lands and buildings for labor and material were not applicable to relief to which petitioner was entitled.—*Atlantic Coast Lumber Corporation v Morrison*, 149 S E 243, 152 S C 305

13. Ala.—*Snelling Lumber Co v Porter*, 142 So 560, 225 Ala 164

Fla.—*Biscayne Trust Co v Wolpert Realty & Improvement Co*, 130 So 611, 100 Fla 1070

Ind.—*National Brick Co v. Russell*, 190 N E 614, 99 Ind App 53

Kan.—*Corpus Juris* cited in *Bell v Hernandez*, 30 P 2d 1101, 1102, 139 Kan 216—*Baker v Griffin*, 243 P 1057, 120 Kan 448

Me.—*Otis Elevator Co v Finks Clothing Co*, 159 A 563, 131 Me 95

Md.—*Adkins & Douglas Co v. Webb*, 154 A 259, 160 Md 571

ND.—*Austad v Dreier*, 221 N W. 1, 57 ND 224

Tex.—*Ball v Davis*, 18 S W 2d 1063, 118 Tex 534—*Lewis v Phillips*, Civ App, 90 S W 2d 810, affirmed 114 S W 2d 864, 131 Tex 313—*Denny v White House Lumber Co*, Civ App, 40 S W 2d 250, modified on other grounds, Com App, 54 S W 2d 86

40 C J p 366 note 56

Every jurisdictional requirement must be met and all prescribed con-

ditions precedent must be complied with before lienor can prevail.—*Andrew v Bishop*, 172 A 752, 132 Me 447, 100 A L R 121

Purpose of proceeding

(1) The primary purpose of the mechanic's lien statutes providing for determination, in suit to foreclose mechanic's lien, of rights of parties having interest in realty is to protect owners and others interested in the property from multiplicity of suits rather than restriction of rights of lien claimants.—*Chance v Franke*, 153 S W 2d 378, 348 Mo 402

(2) Fixation of debt for labor or materials is very essential of mechanic's lien proceedings.—*Iannotti v Kalmbacher*, 156 A 366, 4 W W Harr, Del, 600

Misdescription of action

Where declaration alleged that it was brought pursuant to statute relating to enforcement of mechanics' liens and contained all necessary averments to constitute such an action, the action was under the statute, notwithstanding plaintiff's writ termed the proceeding an action in contract.—*Goodro v Tarkey*, 22 A 2d 509, 112 Vt 212

14. Fla.—*Baker v Webster*, 191 So 835, 140 Fla 471—*Rieck & Fleece v Cunniff*, 190 So 8, 138 Fla 742

—*Southern Paint Mfg Co v Crump*, 182 So 291, 132 Fla 799—*Velazquez v Suarez*, 152 So 708,

113 Fla 856—*Rathbun v Landess*, 129 So 738, 100 Fla 507—*Curtiss-Bright Ranch Co v Selden Cypress Door Co*, 107 So 679, 91 Fla 354

La.—*Flournoy v Robinson-Slagle Lumber Co*, 136 So. 194, 17 La App 390, reversed on other grounds 139 So 321, 173 La 989

N J.—*Weinberger v Goldstein*, 151 A 397, 106 N J Eq 489

N Y.—*Ausable Chasm Co v Hotel Ausable Chasm & Country Club*, 33 N Y S 2d 427, 263 App Div 486

Pa.—*Bezar v Dorfman*, 45 Pa Dist & Co 136—*Kempton v Buckley*, Com Pl, 40 Lack Jur 117

Tex.—*Royal Indemnity Co v Amer-*

ican District Steam Co, Civ App, 88 S W 2d 1091, error dismissed 40 C J p 366 note 57

15. Ala.—*Snelling Lumber Co v Porter*, 142 So 560, 225 Ala 164

Cal.—*Stanislaus Lumber Co v Pike*, 124 P 2d 190, 51 Cal App 2d 54—*Norton v Bedell Engineering Co*, 264 P 311, 88 Cal App 777

N Y.—*In re Wilaka Const Co*, 2 N Y S 2d 251, 166 Misc 185

40 C J p 366 note 58

Reasonable compliance with statute cannot be dispensed with.—*Mansfield Lumber Co v Johnson*, Mo App, 91 S W 2d 239

It is policy of law to protect and enforce, and not allow defeat of, liens of mechanics or furnishers of materials.—*Reed v Fuller*, 65 S W 2d 841, 16 Tenn App 47

16. Or.—*Johnson v Tucker*, 167 P. 787, 85 Or 646

Proceeding at law or in equity generally see *infra* § 264

Attributes of foreclosure of mortgages apply to mechanics' liens in all essential respects.—*City Lumber Co. of Bridgeport v Murphy*, 179 A 339, 120 Conn 16

17. Tenn.—*Arnstein Realty Co v. Williams*, 40 S W 2d 1007, 163 Tenn.

69—*Warner v Yates*, 102 S W 92, 118 Tenn 548

40 C J p 414 note 8 [a].

Subcontractor's only remedy is by attachment; not being a creditor of the owners of the property upon which the improvements are made, he cannot enforce his lien by judgment and execution.—*Fischer Lime & Cement Co v Kaucher*, 51 S W 2d 492, 164 Tenn 657—*Brantingham v Beasley*, 2 Tenn App 598—40 C J p 366 note 63 [a]

18. ND.—*Erickson v Russ*, 129 N. W 1025, 21 ND 208, 32 L.R.A., NS, 1072

19. N Y.—*Valett v Baker*, 114 N Y. S 214, 129 App Div 514.

40 C J p 366 note 65

closed by a complaint in intervention in an action by the contractor against the owner²⁰

Action or special proceeding Under the statutes in some jurisdictions the proceedings to enforce a mechanic's lien are not by action but by a special proceeding,²¹ but where the statute does not assume to prescribe any special rules of practice or procedure but leaves such matters to be regulated by the general rules governing other actions of a similar nature, the proceeding has been held to be an ordinary civil action and not a special proceeding.²² Under some statutes a mechanic's lien proceeding is a statutory summary proceeding.²³

Assumpsit In some jurisdictions a mechanic's lien suit is regarded as an action in the nature of an action of assumpsit for the price and value of work, labor, and materials furnished by claimant,²⁴ and it is not to be regarded as an action on the written contract precluding a recovery on a quantum meruit.²⁵ Under a statute providing that a subcontractor may either file his petition and enforce his lien or sue the owner and contractor for the amount due him, in which action a personal judgment may be rendered, the only action at law which may be brought against the owner under the Lien Act is assumpsit on a contract implied by law.²⁶ Under some statutes the general procedure under the statute corresponds with the general practice in actions of assumpsit.²⁷

As to matters of general practice, mechanics' lien proceedings are governed by the general rules or

statutory provisions except in so far as particular statutory rules have been adopted,²⁸ it being expressly so provided by statute in some jurisdictions.²⁹

Operation of statutes and what law governs. It has been held that the procedure to enforce a mechanic's lien is governed by the statute in force when the contract is made rather than that in force when the action is brought,³⁰ and that a statute prescribing the procedure to enforce the mechanic's lien does not apply to proceedings instituted before it becomes effective,³¹ but it has also been held that, where the law as to enforcement of mechanic's liens is changed before the lien has accrued, the later law applies.³² It has been held that the remedy of a materialman on a surety bond given in another state is governed by the law of the forum.³³

b. Personal Liability

As a general rule statutes providing for mechanics' liens do not impose any personal liability that would not otherwise exist.

Statutes providing for mechanics' liens do not as a general rule create any personal liability on the part of the owner of the property which has been improved, or on the part of anyone else who would not, independent of the statute, be personally liable to claimant.³⁴ A mechanic's lien does not of itself create a personal liability on the part of the owner of the property,³⁵ it operates only in rem against the property, and not in personam.³⁶ However, personal liability is sometimes imposed on the own-

20. Cal—*Tubbs v Delillo*, 127 P 514, 19 Cal App 612
Intervention see *infra* § 285

21. Cal—*Van Winkle v Stow*, 23 Cal 457
40 C J p 366 note 67

Actions and special proceedings distinguished see *Actions* § 42

22. Minn—*Finlayson v Crooks*, 49 NW 398, 47 Minn 74, rehearing denied 49 NW 645, 47 Minn 74
40 C J p 366 note 68

23. Del—*Hendrix v Kelley*, 143 A 460, 4 WW Harr 120

Summary proceeding held valid
Fla—*State ex rel Gore v Chillingworth*, 171 So 649, 126 Fla 645

24. Del—*Armstrong & Latta Co v Wilmington Sugar Refining Co*, 120 A 94, 2 WW Harr 239—*Hawthorne v Murray*, 84 A 5, 26 Del 349

25. Del—*Armstrong & Latta Co v Wilmington Sugar Refining Co*, 120 A 94, 2 WW Harr 239

26. Ill—*Harty Bros & Harty Co v Polakow*, 86 NE 1085, 237 Ill 559

27. Pa—*Gedrich v Yarosz*, 156 A 575, 102 Pa Super 127

28. Cal—*Withington v Shay*, 117 P 2d 415, 47 Cal App 2d 68, hearing denied 119 P 2d 1, 47 Cal App 2d 68
Pa—*Cain v Redlich*, 164 A 794, 310 Pa 68

40 C J p 366 note 72

Action for recovery of money

An action to foreclose a mechanic's lien is not an action on contract for recovery of money or damages only, and procedural statutes as to such actions are not applicable—*Luebben v Metlen*, 100 P 2d 935, 110 Mont 350

29. Okl—*Hudson-Houston Lumber Co v Parks*, 215 P. 1072, 91 Okl 48.

30. Ill—*McNichols v Tinsler*, 127 Ill App 381, affirmed 85 NE 593, 235 Ill 493

31. Mass—*Goldstein v Tucker*, 119 NE 693, 230 Mass 259

32. Colo—*Orman v Crystal River R Co*, 39 P 434, 5 Colo App 493

33. US—*Federal Surety Co v Min-*

neapolis Steel & Machinery Co, C CA Min, 17 F 3d 242

34. Mo—*Ward v Nolde*, 168 SW 596, 259 Mo 285

40 C J p 46 note 2

Personal

Judgment see *infra* § 328

Liability as element of consent see

supra § 52

Failure to protect lienor

Unless claimant has a valid, potential, or actual mechanic's or materialman's lien, he may not avail himself of the protection afforded by the statute making owner liable only when he has contracted for labor or material under such circumstances that a lien for the payment therefor has or may attach, and has sold or mortgaged property without protecting lienholder before expiration of time provided by law for filing and recording of lien—*Will B Miller Co v Peerless Lumber Co*, 143 SW 2d 735, 284 Ky 93

35. Ky—*Powers v Brewer*, 38 SW 2d 466, 238 Ky 579

36. Ky—*Powers v Brewer*, *supra*.
NJ—*Passaic Plumbing Supply Co*.

er by statute where he fails to take the statutory steps directed for the protection of subcontractors and materialmen,³⁷ and personal liability is imposed under some statutes on one who contracts for an improvement on land which he does not own³⁸

As a general rule one who is not party or privy to the contract for the improvement, work, or materials is not personally liable therefor³⁹ Thus an owner is not liable for work or materials furnished a contractor where he is not party or privy to the contract between the contractor and subcontractor or materialman,⁴⁰ nor is he liable for work done at the request of a tenant⁴¹ although the lease provides that the improvement shall become the owner's

property,⁴² nor is one coowner personally liable for work contracted for by another coowner.⁴³ The consent of the owner to the making of the improvement does not of itself impose on him any personal liability,⁴⁴ and even consent and benefit do not in themselves import contractual liability⁴⁵ Similarly a contractor ordinarily is not liable to one furnishing labor or material to a subcontractor under a contract to which he is not party or privy⁴⁶

One who validly obligates himself to pay for the improvement, work, or materials is personally liable therefor⁴⁷ Under such circumstances the owner may be personally liable to a subcontractor or materialman,⁴⁸ and he is personally liable to those with

v Fidelity Union Title & Mortgage Co., 163 A 278, 112 N J Eq 30
Personal action or proceeding in rem see *infra* § 265

37. La—Glassell, Taylor & Robinson v John W Harris Associates, 26 So 2d 1, 209 La 957

Where owner failed to record contract for construction of housing project or secure a bond for faithful performance of work and payment of subcontractors, laborers, materialmen, etc, owner was personally liable to subcontractor who timely filed and recorded its claims for work done and materials furnished under subcontracts with general contractor—Glassell, Taylor & Robinson v John W Harris Associates, *supra*

Owner at time contract made

La—Glassell, Taylor & Robinson v John W Harris Associates, *supra*

38. La—Yellow Pine Lumber Co v Maniscalco, App, 9 So 2d 320

39. Cal—Shelley v Casa De Oro, Limited, 24 P 2d 900, 133 Cal 720
Tex—Spoor v Gulf Bitulithic Co, Civ App, 172 S W 2d 377, error refused

40. NY—Terrell v Meisenhelder, 257 N Y S 625, 143 Misc 911

Pa—Sundheim v School Dist of Philadelphia, 166 A 365, 311 Pa 90

Liability for compensation of subcontractors and materialmen generally see Contracts § 370 b

A contractual relation between owner of property and person furnishing labor and materials is essential under statute to establish owner's personal liability—Milner v Shuey, 69 P 2d 771, 57 Nev 159

Agent or independent contractor

If corporation employing laborer was agent of owner and not independent contractor, owner would be party personally liable—Ridens v Economy Home Builders, 286 P 431, 104 Cal App 677

False affidavit of payment

Owner making false affidavits that

all labor claims were paid was held not personally liable for unpaid claims in excess of amount in his hands for payment to contractor when served with notices of claims—Switzer v Mills, Tex Civ App, 47 S W 2d 334, error refused

41. NY—Boyle v Paolini Cafeteria & Restaurant, 222 N Y S 19, 220 App Div 482

42. SD—Velten v McDonald, 234 N W 23, 57 SD 524

43. La—Boutte & Courrage v Derokay, App, 168 So 39

Knowledge by coowner of house that one coowner living in property had purchased material for purpose of making repairs did not render such coowners personally liable to materialman or justify a lien for material against respective shares of several coowners—Boutte & Courrage v Derokay, *supra*

Part owner who contracted for improvement without disclosing his position, so that liability for it could not be imposed against the other owners or their interest in the property, was held individually liable for its cost—Hollingsworth v McLean, 300 N W 580, 140 Neb 568

Enhancement of value

Rule that, where one coowner improves property which enhances its value, other coowners are required to pay for such enhancement of their interest in property, did not apply in action by materialman who furnished material at request of one coowner and sought to hold other coowners personally liable for material, as well as to impress his lien on their respective interest in property—Boutte & Courrage v Derokay, La App, 168 So 39

44. NY—Smith v O'Donnell, 36 N Y S 480, 15 Misc 98
Wis—Coorsen v Ziehl, 79 N W 562, 103 Wis 381

45. NY—Smith v Vara, 241 N Y S 202, 136 Misc 500

46. Ky—Steele & Lebby v Ayer &

Lord Tie Co., 55 S W 2d 52, 246 Ky 379

47. Neb—Gibson v Koutsky-Brennan-Vana Co, 9 N W 2d 298, 143 Neb 326

Consideration

Where materialmen and laborers executed subordination agreement to induce bank to make mortgage loan to owners telephonic conversation between bank's officer and lien claimant's bookkeeper after work had been done and materials furnished did not impose obligation on bank to discharge claim of claimant especially where nothing was furnished by claimant in reliance on statement of bank's officer—Johnson v Florida Bank at Orlando, 13 So 2d 799, 153 Fla 120

48. Neb—Gibson v Koutsky-Brennan-Vana Co, 9 N W 2d 298, 143 Neb 326

Moral consideration

Although some materials were furnished prior to signing of instrument whereby owner agreed that money deposited by him should be used to pay for materials, fact that materials went into house and owner received benefit thereof created a moral consideration sufficient to support his promise to pay therefor—Fraser Lumber & Manufacturing Co v Laeyendecker, 9 N W 2d 97, 243 Wis 25

Request for release of lien

Letter to materialmen from owner's attorney stating intention to ask release of liens, at which time owner expected to make payment, was insufficient to make owner personally liable so as to dispense with filing of lien—Pifer v Beals, 163 A 914, 107 Pa Super 438

Contractor or subcontractor

Laborers and materialmen doing work not customarily done by contractor, to which estimates were submitted, estimates being signed by owner's agent or alter ego, were separate contractors within contract making owner directly liable to them

whom he contracted for work or materials⁴⁹ Similarly a contractor who has validly obligated himself to do so is personally liable for the payment of claims for work and material⁵⁰

It has been held that, if labor is performed or material furnished directly to and on the credit of the owner, he is personally liable therefor,⁵¹ but such liability does not exist where the labor or material is furnished to the contractor⁵² or if the owner had no knowledge that the improvement was being undertaken⁵³

—Moody-Seagraves Ranch v Brown, Tex Civ App, 69 S W 2d 840, error refused

49. La.—National Homestead Ass'n v Graham, 147 So 348, 178 La 1062

Mistake as to owner's name in charging for materials and subsequent correction thereof are immaterial on question of owner's personal liability—Guarenire v Bessemer Lumber Co, 106 So 49, 214 Ala. 8

50. Cal.—Kennedy v Dutton, 2 P 2d 856, 116 Cal App 510

Or.—James A. C. Tait & Co v Stryker, 243 P 104, 117 Or 333

Promise to pay lien claims

Building contractor and assignee making affidavit that bills would be paid out of loan on property were liable for materials furnished subcontractors but not for nonlienable advances of money—Owen v Griffin, Tex Civ App, 34 S W 2d 333

51. Ariz.—Wylie v Douglas Lumber Co, 8 P 2d 256, 39 Ariz 511, 83 A L R 918

52. Ariz.—Wylie v Douglas Lumber Co, supra

53. La.—Yellow Pine Lumber Co v Miniscalco, App, 9 So 3d 330

54. Cal.—Hendrickson v Bertelson, 35 P 2d 318, 1 Cal 2d 430—Withington v Shay, 117 P 2d 415, 47 Cal App 2d 68, hearing denied 119 P 2d 1, 47 Cal App 2d 68

Ill.—Gunter v O'Brien Bros Const Co, 12 NE 2d 23, 293 Ill App 28, reversed on other grounds 16 NE 2d 890, 369 Ill 362

Kan.—Thompson v Matthews, 183 P 2d 218, 163 Kan 434

Ohio.—Casey v Gaffney, 153 NE 232, 32 Ohio App 73

Okl.—McGill v Cooper Supply Co, 165 P 2d 829, 196 Okl 362
40 C J p 369 note 2

Chancery proceeding

Foreclosure of a lien under lien act is a chancery proceeding—Alexander Lumber Co v Kellerman, 192 NE 913, 358 Ill 207

Jurisdiction limited by statute

Jurisdiction of equity in mechanic's lien foreclosure is not general, but is limited by statute—Saginaw

Lumber Co v. Wilkinson, 254 NW 240, 266 Mich 661

In federal courts

(1) In the federal courts such a proceeding has been regarded as essentially an equitable proceeding US—Winston & Co v Georgia & F R R, DC SC, 34 F 2d 163

DC—Roth v Essinger Mill & Lumber Co, 70 F 2d 294, 68 App DC 128

40 C J p 369 note 97

(2) This is particularly true where there are conflicting liens to be adjusted—Healey Ice Mach Co v Green, CCNC, 181 F 890, affirmed 191 F 1004, 111 CCA 668

(3) The jurisdiction of equity is not ousted by the fact that the statute conferring the lien gives claimant a choice in the state courts between an action at law and a suit in equity—Sheffield Furnace Co v Witherow, Ala, 13 S Ct 936, 149 U S 574, 37 L Ed 853—Healey Ice Mach Co v Green, CCNC, 181 F 890, affirmed 191 F 1004, 111 CCA 668

(4) Likewise, jurisdiction of equity is not ousted by the fact that under the practice in the state courts such suits may be treated and tried as actions at law—Armstrong Cork Co v Merchants' Refrigerating Co, Mo, 184 F 199, 107 CCA 93—21 C J p 29 note 58 [d]—25 C J. p 807 note 30

In Missouri

(1) Equity has jurisdiction where a number of mechanics' liens are involved—Major v. McVey, App, 94 S W 2d 1122

(2) However, where only one mechanic's lien is involved, the suit ordinarily is at law—Moller-Vandenboom Lumber Co v Boudreau, 85 S W 2d 141, 231 Mo App 1137

(3) Suit to foreclose one mechanic's lien against property otherwise encumbered was held to be in equity to extent that priority of liens must be determined—Coever v. Crescent Lead & Zinc Corporation, 286 S W 3, 315 Mo 276—Major v McVey, App, 128 S W 2d 347—Major v. McVey, App, 94 S W 2d 1122

§ 264. Legal or Equitable Proceedings

In some jurisdictions and under some statutes a proceeding to enforce a mechanic's lien is by a suit in equity, although in other jurisdictions such a lien is to be enforced by an action at law

Under the statutes in a number of jurisdictions a proceeding to enforce a mechanic's lien is by a suit in equity⁵⁴ and is governed by the rules and principles pertaining to chancery practice,⁵⁵ as where the statute expressly assigns the administration of the remedy to any court having equitable jurisdiction⁵⁶ or where the proceeding is a statutory one of an

(4) Where equity has jurisdiction, the proceeding is in equity for every purpose—Rust Sash & Door Co v Bryant, App, 124 S W 2d 544

(5) Statutes providing for action in equity to determine and enforce rights of all parties interested in property on which mechanics' liens are claimed do not create new substantive rights, but merely provide for better method of enforcing substantive rights given by other sections—Fleming-Gilchrist Const Co v McGonigle, 89 S W 2d 15, 338 Mo 58, 107 A L R 1003

In Wisconsin

(1) The foreclosure of a mechanic's lien is an equitable action—Delap v Parcell, 283 NW 805, 230 Wis 153

(2) It has also been held that an action to enforce a mechanic's lien is an "action at law on contract" within an early statute limiting taxable costs—Marsh v Fraser, 27 Wis 598

55. Ill.—Gunter v O'Brien Bros Const Co, 12 NE 2d 23, 293 Ill App 28, reversed on other grounds 16 NE 2d 890, 369 Ill 362
40 C J p 369 note 5

All equitable principles apply on foreclosure of mechanic's lien—Edward Edinger Co. v Willis, 260 Ill App 106

Complainant must come with clean hands

Fla.—Langford v Read, 68 So 723, 69 Fla 198
40 C J p 369 note 5 [a].

Relief favored

Equity makes every effort to aid in procuring payments to building contractors for the materials furnished and work performed when that can be done within the spirit of the lien law and within the court's power—John Kennedy & Co v New York World's Fair 1939, 22 N Y S 2d 901, 260 App Div 386, affirmed 41 N E 2d 789, 288 N Y. 494

56. N Y.—Fargo v. Hamlin, 5 N Y St 297

equitable nature,⁵⁷ and this notwithstanding damages are sought by an answer or cross complaint,⁵⁸ or defendant interposes a legal defense,⁵⁹ or although no particular court is designated in the statute.⁶⁰ Where the statute expressly provides for the enforcement of a particular lien by a bill in equity, that remedy is exclusive.⁶¹ Under some statutes, however, the right has been given to proceed either at law or in equity,⁶² or equity has been given concurrent jurisdiction,⁶³ and in such case equity jurisdiction does not depend on the existence of some special ground of equitable cognizance,⁶⁴ nor is it defeated by the existence of an adequate remedy at law.⁶⁵

Under other statutes the remedy for the enforcement of a mechanic's lien has been prescribed to be by an ordinary action at law or a proceeding in a court of law,⁶⁶ not governed by equitable principles,⁶⁷ and the procedure is that prevailing at law.⁶⁸ Such a remedy has been held to be exclusive of the jurisdiction of a court of equity in the absence of

special circumstances demanding equitable interference,⁶⁹ but a bill will lie when such peculiar circumstances exist as to render the interposition of a court of equity proper.⁷⁰

§ 265. Personal Actions or Proceedings in Rem

A proceeding to enforce a mechanic's lien is generally regarded as in rem.

A mechanic's lien proceeding, in so far as it is directed primarily to charging the particular property with the lien, is generally regarded as a proceeding in rem,⁷¹ or as a proceeding which is quasi in rem,⁷² or in the nature of a proceeding in rem,⁷³ and does not require a judgment in personam.⁷⁴ The lien may be enforced irrespective of whether there is any personal liability on the part of the owner.⁷⁵ The proceeding has been held to be in rem although a personal action is provided for the enforcement of the lien⁷⁶ or although where defendant is personally liable for the debt a judgment

57. Kan.—Elder Mercantile Co v Ottawa Inv Co, 165 P 279, 100 Kan 597
40 C J p 369 note 4

58. Colo.—Selfridge v Leonard-Heftner Co, 117 P 158, 51 Colo 314, Ann Cas 1913B 282

59. Wash.—Kilroy v Mitchell, 26 P 865, 2 Wash 407

60. Ala.—Montandon v. Deas, 14 Ala 33, 48 Am D 84
40 C J p 370 note 8

61. Ill.—O'Brien v Gooding, 62 N E 898, 194 Ill 466

62. Fla.—Futch v Adams, 36 So 575, 47 Fla 257
40 C J p 370 note 10

63. Ala.—Mathis v Holman, 85 So 710, 204 Ala 373

64. Ala.—Gorr Lumber Co v Mc-Millan, 143 So 173, 225 Ala 303—Mathis v Holman, 85 So 710, 204 Ala 373

65. Ala.—Gorr Lumber Co v Mc-Millan, 143 So 173, 225 Ala 303

66. Pa.—Mariotti v Greco, Com Pl, 47 Lack Jur 1

Vt.—Goodro v Tarkey, 22 A 2d 509, 112 Vt 212
40 C J p 370 note 13

Special statutory proceeding

A mechanic's lien is foreclosed by a special statutory proceeding which is not regarded as an ordinary equitable action—Metz v Critcher, 65 S E 394, 83 SC 396—40 C J p 370 note 18

Stop notice

A stop notice operates as an assignment pro tanto of money due the contractor, and the remedy thereon is by an action at law—De Mas; v

F W Bowden Co, 132 A 507, 99 N J Eq 70—B & S Excavating & Construction Co v Angelo Paine Const Corporation, 157 A 886, 10 N J Misc 107—40 C J p 370 note 13 [a]

67. Iowa.—Miller v Hollingsworth, 38 Iowa 224

40 C J p 370 note 14

Court can only administer legal rights

Del.—In re Republic Engineering Co, 130 A 498, 3 W W Harr 81

68. Fla.—Emerson v. Gainey, 7 So 526, 26 Fla 133
Mass.—Manchester v Popkin, 130 N E 62, 237 Mass 434

69. Ala.—Walker v Daimwood, 80 Ala 245

Pa.—Mariotti v Greco, Com Pl, 47 Lack Jur 1
40 C J p 370 note 16

70. Ga.—Oglethorpe Savings & Trust Co v Morgan, 102 SE 528, 149 Ga 787.

Pa.—Mariotti v. Greco, Com Pl, 47 Lack Jur 1.
40 C J p 370 note 17

71. US.—Maxwell Co v Central Hanover Bank & Trust Co, DC NY, 48 F Supp 408

Del.—In re Republic Engineering Co, 130 A 498, 3 W W Harr 81

Ga.—Chambers Lumber Co v Gilmer, 5 SE 2d 84, 60 Ga App 832

Ohio.—Crandall v Irwin, 39 NE 2d 608, 139 Ohio St 253, 139 A LR 895, adhered to 40 NE 2d 933, 139 Ohio St 463, 139 A LR 900

Pa.—Nusbaum v Warwick Hotel Co., 170 A 388, 112 Pa Super 277
40 C J p 370 note 19

A suit by subcontractor to establish a mechanic's lien sounds in

rem, and a judgment therein in favor of subcontractor effects a lien on the property involved—Westinghouse Electric Supply Co v Franklin Institute of State of Pennsylvania for Promotion of Mechanic Arts, 21 A 2d 204, 2 Terry Del, 319—40 C J p 370 note 19 [a]

72. US.—Maxwell Co v Central Hanover Bank & Trust Co, DC NY, 48 F Supp 408

Miss.—Ehlers v Elder, 51 Miss 495.
Tenn.—Fischer Lime & Cement Co v Kaucher, 51 SW 2d 492, 164 Tenn 657

Vt.—Goodro v. Tarkey, 22 A 2d 509, 112 Vt 212

Attachment by other person

Action to enforce mechanic's lien became quasi in rem when one other than complainant sued out and had levied attachment against property subject to lien within year during which complainant could have done so—Reed v Fuller, 65 SW 2d 841, 16 Tenn App 47

73. Del.—Iannotti v Kalmbacher, 156 A 366, 4 W W Harr. 600

Ill.—Rockwood Sprinkler Co v Phillips Co, 265 Ill App 367
40 C J p 371 note 21

74. Ohio.—Crandall v Irwin, 39 N. E 2d 608, 139 Ohio St 253, 139 A LR 895, adhered to 40 NE 2d 933, 139 Ohio St 463, 139 A LR 900

75. Ind.—Gortemiller v Rosengarn, 2 NE 829, 103 Ind 414
40 C J. p 371 note 23

76. Wis.—Dewey v F. field, 2 Wis 73

40 C J p 371 note 25
Personal judgment in lien proceeding see infra § 328.

for the debt and enforcement of the lien may be procured,⁷⁷ but in such case the proceeding has been held to combine the characteristics of an action in personam with those of an action in rem⁷⁸

Under some statutes a mechanic's lien suit is inter partes and not in rem⁷⁹ and cannot be established except as an incident to a personal judgment⁸⁰ Where under the statute the lien attaches, is filed, and is enforced for the security and payment of the judgment obtained on the debt, the action is not to be regarded as a proceeding quasi in rem,⁸¹ and jurisdiction of the person must be acquired as in the case of other judgments in personam⁸²

A statute which gives a lien on property of a wife to one who acts in pursuance of a contract with her husband does not authorize a personal action against her where it does not attempt to charge her personally.⁸³

§ 266. Exclusive, Cumulative, and Concurrent Remedies

A mechanic's lien is a cumulative remedy, and the lienor may resort to the ordinary common-law remedies to enforce his contract.

The lien given by the statute to mechanics and

materialmen is but a cumulative remedy to enforce their respective contracts, and independently of the lien such parties may resort to the ordinary common-law remedies to enforce their contracts, as by action to recover personal judgment⁸⁴ The two remedies may be pursued simultaneously, although there can be but one satisfaction⁸⁵ So a subcontractor may prosecute a petition for a mechanic's lien simultaneously with an action at law against the contractor,⁸⁶ and where by the statute a subcontractor or materialman may acquire a lien on the property to the extent of the value of the materials furnished, or may hold the owner of the building personally liable, not exceeding the amount that may be due or may become due from him to the contractor, they may do one or the other, or both⁸⁷ Where the statute provides a lien in favor of a subcontractor and also gives him the right to sue the contractor and owner jointly for the amount due from the contractor, the subcontractor, unless the statute provides to the contrary, may pursue either of these remedies or may resort to his common-law action against the contractor alone.⁸⁸ Where there is no provision in the statute to the contrary, each lienor may institute or prosecute a separate action for the enforcement of his lien⁸⁹

Procedure to enforce lien. The remedy pre-

77. N.Y.—*Burroughs v. Tostevan*, 75 N.Y. 567
40 C.J. p. 371 note 24

78. Mass.—*Howard v. Robinson*, 5 Cush. 119
40 C.J. p. 371 note 26

79. Mo.—*Macklind Inv. Co. v. Ferry*, 108 S.W.2d 21, 341 Mo. 493

80. Mo.—*Macklind Inv. Co. v. Ferry*, supra.

81. N.C.—*Rutherford v. Ray*, 61 S.E. 57, 147 N.C. 253
40 C.J. p. 371 note 27

82. N.C.—*Rutherford v. Ray*, supra.

83. Ill.—*Wolff v. Schillinger*, 153 Ill. App. 91

84. Alaska.—*Corpus Juris* cited in *Mitchell v. Beaver Dredging Co.*, 8 Alaska 566, 571

Cal.—*Wm. J. Bettingen Lumber Co. v. Kerrin*, 279 P. 163, 99 Cal. App. 686

Del.—*Westinghouse Electric Supply Co. v. Franklin Institute of State of Pennsylvania for Promotion of Mechanic Arts*, 21 A.2d 204, 2 Terry 319

Ill.—*Rockwood Sprinkler Co. v. Phillips Co.*, 265 Ill. App. 267

Neb.—*Corpus Juris* cited in *Gibson v. Koutsky-Brennan-Vana Co.*, 9 N.W.2d 298, 301, 143 Neb. 326

N.Y.—*Lobbett v. Galpin*, 239 N.Y.S. 76, 228 App. Div. 65

Okl.—*Wyant v. Davidson & Case*

Lumber Co., 49 P.2d 151, 173 Okl. 467

Pa.—*Nardy v. DeCaro*, Com. Pl., 34 Del. Co. 231

Tex.—*Bankers Life Co. v. John E. Quarles Co.*, Civ. App., 88 S.W.2d 613, affirmed 112 S.W.2d 1044, 131 Tex. 65—*Tahafarro v. Warren*, Civ. App., 30 S.W.2d 393

Wis.—*Corpus Juris* cited in *Roseliep v. Herro*, 239 N.W. 413, 415, 206 Wis. 256

40 C.J. p. 368 note 86

Garnishment

Materialman suing to foreclose lien had right thereafter to institute garnishment proceedings as incident to common-law action—*F. M. Sibley Lumber Co. v. Murphy*, 220 N.W. 746, 243 Mich. 483

Personal judgment

One is not barred from enforcing the lien by seeking or obtaining a personal judgment

Okl.—*Wyant v. Davidson & Case Lumber Co.*, 49 P.2d 151, 173 Okl. 467

Wis.—*Roseliep v. Herro*, 239 N.W. 413, 206 Wis. 256

The original obligation is not discharged by the taking of a lien—*Federation Savings & Loan Co. v. Schmitt*, 161 N.E. 349, 27 Ohio App. 378

85. Ill.—*Stankiewicz v. Irvine*, 35 N.E.2d 433, 310 Ill. App. 673—*Rock-*

wood Sprinkler Co. v. Phillips Co., 265 Ill. App. 267

40 C.J. p. 368 note 88

Abatement

The pendency of a mechanic's lien suit is not ground for abating a suit to recover the balance due on the contract, as the remedies are concurrent. Ill.—*Erikson v. Ward*, 107 N.E. 593, 266 Ill. 259, Ann. Cas. 1916B 497

Pa.—*Young v. Woodring*, 3 Pa. Dist. & Co. 629

1 C.J. p. 57 notes 85, 86

Personal judgment unnecessary

A suit to foreclose a mechanic's lien may be maintained without seeking a personal judgment for the indebtedness—*McGill v. Cooper Supply Co.*, 165 P.2d 829, 196 Okl. 362

88. Mont.—*O'Rourke v. Butte Lodge* No. 14 I.O.G.T., 48 P. 1106, 19 Mont. 541

RI.—*Hunt v. Darling*, 59 A. 398, 26 RI. 480, 69 L.R.A. 497, 3 Ann. Cas. 1098

87. Ind.—*Andis v. Davis*, 63 Ind. 17. 40 C.J. p. 368 note 91

88. Ill.—*Olson v. O'Maha*, 75 Ill. App. 387

89. N.Y.—*Egan v. Laemmle*, 25 N.Y.S. 330, 5 Misc. 224

Consolidation of proceedings see *infra* § 272

Making other lienors parties see *infra* § 284.

scribed by the statute for the enforcement of the lien itself has been held to be exclusive⁹⁰

§ 267. Removal of Improvements from Premises

The removal of the improvement from the land, under some circumstances, may be the remedy for enforcing a lien on an improvement.

Sometimes, as discussed supra § 188, under particular conditions prescribed by the statute the lien attaches only to the improvement, and the removal of such improvement, if it can be done without material injury to the property as it stood prior to the improvement, is the remedy prescribed for enforcing such lien⁹¹ Other statutes give a right of removal in certain instances where improvements are made in ignorance of the rights of the owner of a superior title⁹² One who has a lien on the fixtures or other equipment installed in a building may under some statutes enforce his lien and have such property sold separately where it may be removed without injury to the realty⁹³

§ 268. Conditions Precedent

There must be a compliance with conditions imposed by the statute and the contract before an action to enforce a mechanic's lien will lie

There can be no foreclosure of the lien until the debt for which the lien is made and held as security has become payable,⁹⁴ and the lienor must have created and perfected his lien in the manner the statute provides before he can successfully bring an action to enforce it⁹⁵ Other conditions cannot be imposed on the right to proceed for the enforcement of the lien unless they arise out of the statute or are incorporated in the contract of the parties,⁹⁶ but where the contract itself annexes conditions,⁹⁷ or where the statute annexes conditions,⁹⁸ such contract or statutory requirements and conditions must be met and performed or the remedy will not be available

The filing of a notice of intention to sue as required by statute may be an essential,⁹⁹ although it has been held that the failure of claimant to serve a statutory notice of intention to enforce a mechanic's lien is not fatal where the owner appears and defends and there is no showing of any prejudice resulting from the failure to give the notice¹ So compliance with a requirement of the statute that the contractor furnish a statement to the owner of persons having claims has been held essential² It has been held that, where a note has been given

90. SC—Tenney v Anderson Water, Light & Power Co, 45 SE 111, 87 SC 11

40 CJ p 369 note 95

Abatement

Parties plaintiff must be the same in both suits in order to cause later mechanic's lien action to abate—Egan v Laemmle, 25 NYS 330, 5 Misc 224—1 CJ p 76 note 22

Lis pendens

In a suit to enforce a subcontractor's lien, for labor and material furnished for defendant's building, action of court in striking a plea of lis pendens setting up pendency of another action was error—Dugan v Howard, 99 A 966, 130 Md 114

91. Wash—Pioneer Sand & Gravel Co v Hedlund, 34 P 2d 878, 178 Wash 273

40 CJ p 371 note 32

Removal by purchaser at sale see infra § 344

Property not owned by lessee

(1) Part of statute authorizing lien on and removal of buildings, fixtures, machinery, etc., from land for work done or material furnished in mere reconstruction, alteration, or repair thereof under contract with lessee only was held invalid as to property not owned by lessee—Masterson v Roberts, 78 SW 2d 856, 336 Mo 158, 97 ALR 862

(2) In materialman's lien action,

building erected by lessee, although not physically attached to land, was not removable, where lease provided buildings were to become lessors' property—Colby & Dickinson v. Baker, 261 P 101, 145 Wash 584

92. Tenn—Thomas v National Conservation Exposition Co, 191 SW 348, 137 Tenn 1

40 CJ p 371 note 33

93. Tex—Dallas Plumbing Co v Harrington, Civ App, 275 SW 190

Cotton house

Tex—Wallace Gin Co v. Burton-Lingo Co, Civ App, 104 SW 2d 891

94. NY—Storick v M. E Realty Co, 233 NYS 194, 226 App Div 674

Effect of default by principal contractor see supra § 113

95. Mo—Holekamp Lumber Co v Skay, App, 65 SW 2d 669—Gill v Harris, 24 SW 2d 673, 234 Mo App 717

Perfection of lien see supra § 118 et seq

96. ND—Erickson v Russ, 129 N W 1025, 31 ND 208, 32 L.R.A.N S, 1072

40 CJ p 372 note 37

97. NY—Boljen v Ellegaard, 43 N YS 2d 527, 181 Misc 326.

40 CJ p 372 note 38

Suit premature

Where builder through an honest correctible mistake did not obtain a certificate of completion of his contract and completion of a mortgage loan to owners, and owners had building worth considerably more than payments made by them to contractors, contractor's proceeding to foreclose a mechanics' lien against owners was dismissed without prejudice as premature—Boljen v Ellegaard, supra

98. La—Baxter v Sisters of Charity, 15 La Ann 686

40 CJ p 372 note 43

Power of court of equity

Absence of prescribed conditions or nonperformance of prescribed act leaves a court of equity powerless, since it can only declare and enforce existing lien—Ackerson v Albuquerque Lumber Co, 29 P 2d 714, 38 N. M 191

99. Mo—Missouri Granitoid Co v George, 131 SW 470, 150 Mo App 650

40 CJ p 372 note 40

1. ND—Atlas Lumber Co. v Canadian-American Mortgage & Trust Co, 161 NW 604, 36 ND. 39

2. Mich—Martin v Warren, 67 N. W 897, 109 Mich 584.

40 CJ p 372 note 42

Outstanding labor liens held shown, so as to make statute ap-

for the amount due without extinguishing the lien, it must be surrendered to the maker or accounted for by showing that it is not in any event enforceable against him as a condition to a final judgment on the lien.³

Release of liens A provision for the release of liens of subcontractors, etc., before the last installment of the contract price shall be paid, has been held not to prevent an effective commencement of the proceedings by the contractor to enforce his lien, although there may be unreleased liens on the record, but he will not be permitted to enforce his claim to the exclusion of such other liens without showing that they have been released.⁴

Demand. Unless required by statute a demand is not necessary before instituting proceedings to enforce the lien,⁵ particularly where the answer shows that it would have been unavailable⁶ or where the owner has prevented performance by a breach of his contract.⁷ The statute may, however, require a demand for payment as a condition precedent.⁸ Where the statute provides that the lien may be enforced after demand and refusal of the amount due or upon neglect to pay on demand, the demand must be made after the lien attaches and before the filing of the suit.⁹ Under some statutes providing a summary remedy by way of execution issued on an affidavit, a demand and refusal to pay before the issuance of the execution is a condition precedent.¹⁰

Arbitration Where the contract provides that the amount due thereunder shall be settled by arbitra-

tion, unless agreed on by the parties, a lien cannot be foreclosed where the amount is not settled in either way,¹¹ and this is also true where the statute conferring the lien requires an account, if disputed, to be first settled by arbitration.¹² However, where no request for an arbitration has been made, an arbitration is not a condition precedent to an action to foreclose a mechanic's lien, although a contract provides for the arbitration of questions in dispute but does not provide that arbitration shall precede an action upon the contract.¹³ Arbitration of a claim for extras as contemplated by the contract is not essential to the institution of a suit to enforce a mechanic's lien where the contractor had a right to such a lien for a balance due on the original contract price,¹⁴ nor is such arbitration necessary where the certificate of the architect as to the amount to be allowed for extras is refused not because of the disagreement as to valuation, but because of the order of the owner of the property.¹⁵

Certificates of architects, engineers, or others Where, under the terms of the contract, the certificate of an architect or other stipulated person is a condition precedent to the right to payment, a proceeding to enforce a mechanic's lien cannot be maintained until such certificate is had,¹⁶ or a valid excuse for failure to obtain it is established,¹⁷ or a waiver is shown.¹⁸ Where the owner has prevented performance by a breach of his contract, the production of a certificate of the architect prior to the institution of an action to foreclose a mechanic's lien is obviated,¹⁹ and where a subcontract-

pliable—*Dodson v Florida Nursery & Landscape Co*, 190 So 695, 138 Fla 887

Contractual waiver of statute held not shown

Fla—*Fred Howland, Inc. v Gore*, 13 So 2d 303, 152 Fla 781

3. Ga.—*Belmont Farm v Dobbs Hardware Co*, 53 SE 312, 124 Ga 827

4. NY—*Fogg v Suburban Rapid Transit Co*, 35 NYS 954, 90 Hun 274

40 CJ p 372 note 45

5. Ind.—*Duckwall v Jones*, 58 NE 1055, 156 Ind 682, reh'ard 60 NE 797, 156 Ind 653

40 CJ p 372 note 46

6. ND.—*McCaull-Webster El Co v Stiles*, 169 NW 577, 41 ND 135

7. NY—*Albright v Trinity Presb Church*, 160 NYS 598

8. NJ.—*Reeve v Elmendorf*, 38 N J Law 125

40 CJ p 372 note 49.

9. Hawaii—*Lewers & Cooke, Ltd v Jones*, 25 Hawaii 214.

40 CJ p 373 note 51

Prior action as demand

In an action to enforce a lien, the commencement of a prior similar action, which was subsequently dismissed, does not constitute a demand on the owner for payment, as required by statute unless the averments in the petition are sufficient to constitute a demand—*Monji v Sanko Contracting Co*, 32 Hawaii 831.

10. Ga.—*Porter v Lively*, 45 Ga 159

40 CJ p 373 note 52

11. Mich.—*Boots v Steinberg*, 58 NW 657, 100 Mich 134

40 CJ p 373 note 53

12. La.—*Baxter v Sisters of Charity*, 15 La Ann 636

40 CJ p 373 note 54

13. Wis.—*Quast v Guetzkow*, 159 NW 810, 164 Wis 197.

40 CJ p 373 note 55

14. US—*Caldwell v Schmulbach*, CCW Va, 175 F 429

40 CJ p 373 note 56

15. US—*Caldwell v Schmulbach*, supra.

16. Mont.—*McGlauffin v Wormser*, 72 P 428, 28 Mont 177.

40 CJ p 373 note 59

Not required by contract

Fact that no architect's certificate was issued did not preclude mechanic's lien claimant from foreclosing his lien where contract did not make such a certificate a prerequisite to the right to receive payment and work was completed and accepted by owner—*United Cork Cos v Volland*, 7 NE 2d 301, 365 Ill 564

17. NY—*Schullinger Fire-Proof Cement & Asphalt Co v. Arnott*, 46 NE 956, 152 NY 584.

40 CJ p 373 note 60

18. Fla.—*Clement v Pensacola Builders Supply Co*, 189 So 852, 138 Fla 629

40 CJ p 373 note 61

19. NY—*Albright v Trinity Presb Church*, 160 NYS 598.

tor's lien under the statute is not dependent on whether anything is due the principal contractor, the production of an architect's certificate of satisfactory performance as required by the contract with the principal contractor is not a prerequisite to the subcontractor's right to enforce his lien²⁰

§ 269. — Suit by Subcontractor

Under some statutes a subcontractor is required to establish his claim by a judgment against the contractor before he can enforce his lien against the owner's property.

The statutory conditions must exist to entitle the subcontractor to sue the owner²¹ Under some statutes the debt must be judicially ascertained by a judgment in favor of the subcontractor against the

contractor before the former can enforce the lien against the owner's property,²² or the contractor must be joined in the action and also sued,²³ but under other statutes this is not required.²⁴ In any event, it is not necessary where the owner is personally liable for the debt²⁵ or where the suit is instituted by the owner²⁶ Under a statute providing that under certain conditions an action at law may be maintained against the owner by a subcontractor on a notice served according to the provisions of the statute to recover the amount claimed in the notice and due to the person who serves such notice from the contractor, the mere disallowance by the contractor of the claim of a subcontractor will not prevent such a suit²⁷ Where the filing of a

20. Wis—Seeman v Biemann, 84 N W 490, 108 Wis 365

21. Ga—Chambers Lumber Co v Gilmer, 5 S E 2d 84, 60 Ga App 832
Minn—Minnesota Lumber & Coal Co v Roinsstad, 208 NW 548, 167 Minn 111

40 C J p 373 note 65

Filing of lien claim

Ga—Chambers Lumber Co v Gilmer, 5 S E 2d 84, 60 Ga App 832

Notice of lien

Ill—Throgmorton v Mosak, 245 Ill App 330

22. Ga—Smith v Walker, 22 S E 2d 160, 194 Ga 586—Robinson v Reese, 165 S E 744, 175 Ga 574—B Miflin Hood Brick Co v Mangham, 131 S E 172, 161 Ga 457—Chambers Lumber Co v Gilmer, 5 S E 2d 84, 60 Ga App 832

Mo—Construction Materials Co v Grund, App, 192 S W 2d 45—Reis Moran Lumber Co v Putney Roofing Co, App, 147 S W 2d 173—Watkins v Mayer, App, 103 S W 2d 566—Watkins v Mayer, App, 103 S W 2d 569

40 C J p 373 note 66

Reason for rule

The function of a suit to foreclose a materialman's lien is not to establish for the first time when and what materials were furnished for a particular job, and it is not a suit in personam when the contractor is not a party, but the purpose is merely to establish absolutely a special lien against the property involved—Chambers Lumber Co v Gilmer, 5 S E 2d 84, 60 Ga App 832

Claim not presented against contractor

A materialman could not try out in a suit to foreclose a lien the question whether it had furnished any items not appearing in the running account presented in its suit against the contractor—Chambers Lumber Co v Gilmer, supra

Limitations

(1) Mechanic's lien statute requires that action by subcontractor against contractor be instituted within specified time after subcontractor's claim becomes due—Smith v Walker, 22 S E 2d 160, 194 Ga 586—Southern Ry Co v Crawford & Slaten Co, 167 S E 756, 46 Ga App 424, affirmed 173 S E 91, 178 Ga 450

(2) In suit by grantee to foreclose deed as equitable mortgage and require others than defendant grantor to appear and assert any claims of liens against realty conveyed, where one of such others filed intervention, praying declaration of prior lien and judgment against grantor for amount due for material furnished by intervenor for improvement of realty, but sought no judgment therefor against contractor until filing of amended intervention over twelve months later, such amended intervention was insufficient to show any lien or right of lien against realty—Smith v Walker, supra

(3) Limitation imposed by statute does not relate to time within which subcontractor must institute action to foreclose lien against owner, as discussed infra § 282 b

23. Ga—Chambers Lumber Co v Gilmer, 5 S E 2d 84, 60 Ga App 832
40 C J p 373 note 66 [a]

On return showing service cannot be had on original contractor, subcontractor's lien may be enforced without obtaining personal judgment against original contractor—Sutherland Lumber Co v Gale, 277 P 242, 136 Okl 233, 65 A L R 1186—Harris v Spurrier Lumber Co, 265 P 637, 130 Okl 99

24. Or—George v Oregon, C & E Ry Co, 247 P 780, 118 Or 502—Ainslie & Co v Kohn, 19 P 27, 16 Or 383

25. Wash—Maxon v Spokane County School Dist No 34, 31 P 462,

5 Wash 142, dissenting opinion 32 P 110, 5 Wash 142

40 C J p 374 note 67

Promise by owner

Where materialman brought action to foreclose materialman's lien and to secure personal judgment against contractor and owner, dismissal of action against contractor did not relieve owner, who had promised to pay materialman for materials furnished, from liability—Sinnock v Young, 142 P 3d 85, 61 Cal App 2d 130

Purchase by agent, not contractor

Where materialman claimed lien as against wife as owner of premises improved and as one to whom materials were furnished, general judgment against husband, who allegedly purchased materials as wife's agent rather than as her contractor, was not prerequisite to filing of petition against wife to foreclose materialman's lien—Gibbs v Carolina Portland Cement Co, 177 S E 760, 50 Ga App 239

26. Ark—People's Building & Loan Ass'n v Leslie Lumber Co, 38 S W 2d 759, 183 Ark 890

Mortgage foreclosure

In suit to foreclose deed as equitable mortgage, where owner of realty conveyed did not seek or obtain injunction restraining materialmen from proceeding to perfect their liens on realty, and no injunction was granted plaintiff as prayed, but intervening materialman was merely made party to case, with privilege of filing such pleadings as he might be entitled to, such owner could defeat intervenor's lien claims on ground of intervenor's failure to obtain judgment against contractor, in absence of showing that intervenor was prevented from perfecting lien in manner required by law—Smith v Walker, 22 S E 2d 160, 194 Ga 586.

27. N J—Reeve v Elmendorf, 38 N. J Law 125

lien statement is not essential to the creation of a lien, it is not a condition precedent to an action to enforce such lien.²⁸

§ 270. Compelling Enforcement

Under some statutes the owner may compel lien claimants to institute proceedings for the enforcement of their claims.

By statute provisions are frequently made under which the owner or person in interest designated by the statute may compel claimant of a lien to proceed to enforce it within a specified time after the making of a statutory demand.²⁹ Under such a statute it is necessary that the demand be by a person falling within the class named,³⁰ and the lien proceeding must be begun as required by the statute,³¹ or claimant must show sufficient cause for not having done so.³² A lien claimant cannot escape his obligation to have summons issued for enforcing the lien within the statutory time after demand by filing a second claim.³³ Under other statutes provision is made for a petition on which claimant is required to proceed as on scire facias regularly issued.³⁴

Bill for general settlement Provision is made in some statutes for a proceeding by which several individual claimants of liens may be compelled by the owner to adjudicate their claims in a single action.³⁵ The original contractor is a necessary party defendant to such a proceeding,³⁶ but he need not be formally named as a party defendant in the owner's petition where he is made a party by the court on motion of defendant lien claimant.³⁷ In such a proceeding, if the assent of the court is nec-

essary to join a new party defendant, it is sufficiently indicated by the fact that the court tries the issues and enters its decree after the party so brought in has filed an answer and plea to the petition and cross bill.³⁸ Where the statute provides that, where there are several defendants, a copy of the petition is necessary for the first one served and as to the others a copy of the writ is sufficient, a copy of the petition need not be served on a subsequent defendant where the first defendant appears and is not complaining as to the way in which he is served.³⁹ The fact that at the time of the trial only a single lien claimant remains does not deprive the court of the power to adjudicate his rights after the others have been satisfied and dismissed.⁴⁰

§ 271. Restraining or Staying Enforcement

Under general equity principles the enforcement of a mechanic's lien may be enjoined or stayed.

Under the general rules controlling the issuance of an injunction against an action or other legal proceeding, discussed in Injunctions § 36 et seq, an injunction may be had against the enforcement of a mechanic's lien,⁴¹ as where the proceeding is instituted after the satisfaction of a judgment obtained by claimant against the sureties on a bond given to discharge liens,⁴² but equity will not interfere to prevent the setting up and establishment of the lien in the proceedings at law where the objection raised affords a full and complete defense in that action.⁴³ In a proper case injunctive relief may be had against the prosecution of separate lien proceedings,⁴⁴ as where they may prevent the owner from availing himself of a defense by way of

28. Iowa—Maryland Casualty Co v Des Moines City Evangelization Union, 167 NW 695, 184 Iowa 246 40 C J p 374 note 71

29. Ohio—Holloway v Allen County Mut Relief Ass'n, 15 NE 2d 155, 57 Ohio App 507

Statute permissive, not mandatory
Ohio—Holloway v Allen County Mut Relief Ass'n, supra

30. Ill—Fleming v Galloway, 213 Ill App 236 40 C J p 374 note 73

31. Iowa—Jones & Magee Lumber Co v Boggs, 19 NW 678, 83 Iowa 589 40 C J p 374 note 74

32. NY—Matter of Selwyn Realty Corp, 170 NYS 491, 184 App Div 355, affirmed 120 NE 876, 224 NY 559 40 C J p 374 note 75

Person in army
Corporate lienor would be required

to commence action on mechanic's lien notwithstanding lienor's president, who was the only person in the corporation with knowledge of the lien, was in the armed forces, where lienor kept books and records and sufficient information might be acquired from president to enable lienor to commence action, and lienor might apply to have the action placed on the military suspense calendar or procure president's deposition for trial—Application of Schmidt, 43 NYS 3d 465, 181 Misc 206

33. NJ—Wheeler v Almond, 46 N J Law 161

34. Pa—Borton v Morris, 2 Miles 109.

35. Ill—Hacken v Isenberg, 124 NE 306, 288 Ill 589 40 C J p 375 note 78

36. Mo—McPherrin v Lumbermen's Supply Co, 242 SW 136, 211 Mo App 385 40 C J p 375 note 79

Parties to lien enforcement proceedings generally see infra § 284

37. Mo—McPherrin v Lumbermen's Supply Co, supra

38. Ill—Hacken v Isenberg, 124 NE 306, 288 Ill 589

39. Mo—McPherrin v Lumbermen's Supply Co, 242 SW 136, 211 Mo App 385

40. Mo—McPherrin v Lumbermen's Supply Co, supra

41. Mass—Chertok v Morang, 118 NE 285, 228 Mass 598

42. Mass—Chertok v Morang, supra

43. Pa—Wolf v Glassport Lumber Co, 59 A 1105, 210 Pa 370 40 C J p 375 note 87

44. Miss—W M Carter Lumber Co v Deopp, 70 So 701, 110 Miss 591. 40 C J p 375 note 88.

counterclaim⁴⁵ or may constitute a multiplicity of suits⁴⁶

Stay of proceedings. Under some circumstances the court in which the mechanic's lien proceeding is pending may stay the proceeding or execution if such a course should become necessary by reason of other proceedings of the same character by other claimants against the same defendant, but only when it appears necessary to a proper administration of justice will this be done⁴⁷ Thus, where the contractor has recovered judgment against the owner and is attempting to enforce it in fraud of the rights of the workmen or materialmen, the court may enjoin its collection, take possession of the funds, and adjust the rights and equities of claimants⁴⁸

Injunction against sale A sale on foreclosure of a mechanic's lien may be enjoined where based on a decree void for want of jurisdiction,⁴⁹ or where there has been a timely tender by the owner of the amount due,⁵⁰ or because of a retention of collateral by the lienor⁵¹ or a misappropriation thereof⁵² No injunction will be granted to restrain a sale on grounds which, if available at all, should have been set up in the foreclosure proceeding⁵³ or where there is an adequate remedy at law⁵⁴ However, the owner may resort to this remedy to prevent a sale of improvements attached to the soil under a contract with a lessee by which the owner was not bound and under proceedings to which he was not a party so that he was not concluded on the ques-

tion of the character of the improvements,⁵⁵ and the court will restrain a sale under a foreclosure proceeding in order to prevent a cloud on complainant's title⁵⁶

Other lienors who are entitled to have their claims adjusted and their rights protected in the chancery proceedings brought to foreclose a mechanic's lien, but who are not made parties thereto, may, by a petition, have the rights and liens of all parties interested adjusted and enforced and to that end a sale under the original proceedings enjoined,⁵⁷ and so, where one who has an interest in the property is not bound by the proceedings because he is not joined as a party therein, he may bring his suit to restrain a sale for reasons which would have defeated the foreclosure proceedings if he had been a party⁵⁸

Insurance proceeds A lienor suing to foreclose a lien on property destroyed by fire may be entitled to enjoin the payment of the insurance to an insolvent owner⁵⁹

§ 272. Joinder and Splitting of Liens

Mechanic's lien statutes frequently provide for the determination of all lien claims against the property in a single suit.

The mechanics' lien laws frequently evidence an intention that there shall not be separate suits brought by each contractor or subcontractor to enforce liens but that they shall all be determined in one suit,⁶⁰ as where it is provided that all persons

45. Mo—Aimee Realty Co v Haller, 106 SW 588, 128 Mo App 66 40 CJ p 375 note 89

46. Mo—Aimee Realty Co v Haller, supra

47. Mo—Flanagan v O'Connell, 88 Mo App 1 40 CJ p 375 note 91

48. N J—Wightman v Brenner, 26 N J Eq 489

49. N M—Robertson v Mine & Smelter Supply Co, 110 P 1037, 10 N M 606

Removal of property

Where owners of land on which contractor reconstructed building for lessee were not made parties in proceeding by contractor to foreclose mechanic's lien, foreclosure was void as to the owners who were entitled to enjoin removal of a portion of building by purchaser on foreclosure—Burgess v Joplin Lumber Co, Mo App, 145 SW 2d 1004

Holder of deed of trust could enjoin sale under judgment in proceeding to enforce mechanic's lien to which he was not made party—

Parsons v Foster, 122 So 387, 154 Miss 363

50. Mich—Rubenstein v People's Lumber Co, 204 NW. 723, 231 Mich 674

40 CJ p 376 note 94

51. US—McGraw v Walsh, W Va, 232 F 122, 146 CCA 314

40 CJ p 376 note 95

52. US—McGraw v. Walsh, supra. 40 CJ p 376 note 96

53. Mo—Macklind Inv Co v Ferry, 108 SW 2d 21, 341 Mo 493

40 CJ p 376 note 97

54. RI—Katersky v P D Humphrey Co, 142 A 147, 49 RI 181

55. Tex—Hammond v Martin, 40 S W 347, 15 Tex Civ App 570

40 CJ p 376 note 98

56. Wash—Quinby v Shippe, 35 P 116, 7 Wash 475, 38 Am SR 899

40 CJ p 376 note 99

57. Ill—Garretson v Appleton Mfg Co, 61 Ill App 443

40 CJ p 376 note 1.

58. Iowa—Gates v Ballou, 10 N W 258, 56 Iowa 741

40 CJ p 376 note 2

59. NY—R Prescott & Son v Nye, 228 NYS 156, 223 App Div 356

60. Ariz—Lilley v J D Halstead Lumber Co, 28 P 2d 616, 42 Ariz 546

Mo—Macklind Inv Co v Ferry, 108 SW 2d 21, 341 Mo 493—Badger Lumber & Coal Co v Robertson, 297 SW 99, 232 Mo App 211

Wis—Erickson v Patterson, 211 N W 775, 191 Wis 628

40 CJ p 376 notes 4, 9

Debtor cannot complain of convening of all lien creditors in suit to enforce mechanic's lien—Farley v Arbogast, 176 SE 709, 115 W Va 432

Equity proceeding as bar to separate suit

(1) Under the mechanics' lien statute the mere institution of an equitable suit to establish and enforce mechanics' lien, that is, the filing of petition with intention that summons shall issue in regular course, precludes the bringing of a separate suit—Imse-Schilling Sash & Door Co v Kellems, 179 SW 2d 910, 237 Mo App 960—Richards Brick Co v

in interest may be made defendants, including those persons entitled to liens whose claims are not due at the time the suit is instituted,⁶¹ or that notice shall be given to all lien claimants,⁶² or that all other lienholders shall be made defendants,⁶³ or that any number of lienholders may join in one suit⁶⁴

In the absence of a statutory provision to the contrary, separate actions may be brought to enforce each lien,⁶⁵ and it has been held that claimants whose interests are several cannot join as plaintiffs in the same action,⁶⁶ but, even where the impropriety of such joinder is recognized, if the claims are stated separately and the findings and judgment are several as to each plaintiff, the error in overruling a demurrer to the complaint is harmless⁶⁷ A mechanic, however, has no power to split up one entire demand and maintain several suits and enforce several liens therefor⁶⁸ Where under a single contract material is furnished for several houses erected on distinct lots, the owner cannot object that claimant seeks to enforce liens on all of the houses in a single proceeding,⁶⁹ and it has been held proper to enforce in one action liens under separate contracts for separate buildings on the same plot,⁷⁰ but a proceeding to enforce mechanic's liens on a number of improvements erected under dis-

tinct contracts on land separately owned has been held multifarious⁷¹

Dealings with different contracts relative to same buildings A single lien may be enforced in one action for an amount due under two separate contracts under which the work and material were furnished, the same property being improved under both agreements and the rights growing out of them being identical in character and as to parties⁷² A single lien may be enforced for all materials furnished in the same building, although there are different contractors therefor.⁷³ A materialman's lien may be enforced in a single proceeding for material furnished to contractors and to subcontractors for use in the same building,⁷⁴ although the contrary has also been held,⁷⁵ and it has been held that a subcontractor cannot join in one claim work done under a contract with the contractor and work done under a contract with the owner⁷⁶

Under contracts with several owners. A claim for services performed on one man's property cannot be charged against the property of another person,⁷⁷ and on this principle it has been held that a joint lien cannot be enforced against the property of several owners for material or labor put into improvements on the several lots of land, but that

Wright, 82 S W 2d 274, 231 Mo App 946

(2) The words "separate suit" as used in statute providing that after institution of equitable action on mechanics' lien claim no separate suit shall be brought on any mechanics' lien are not limited in their meaning to a suit at law, but include as well a suit in equity—Imse-Schilling Sash & Door Co v Kellems, supra—Badger Lumber & Coal Co v Robertson, 297 S W 99, 223 Mo App 211

(3) To warrant dismissal of mechanic's lien suit because of pending equitable mechanic's lien suit, it should appear that pending suit was an equitable mechanic's lien suit within statutes governing such proceeding, that it involved same property as was involved in other suit, and that it had been duly commenced prior to institution of other suit—Richards Brick Co v Wright, supra.

(4) Any claimant who desires enforcement of his lien must bear burden of taking necessary steps to avail himself of exclusive remedy provided by statute, and he must ascertain whether an equitable suit is pending in which lien may be adjudicated—Imse-Schilling Sash & Door Co v. Kellems, supra.

One having claim to property is entitled to have it litigated in suit to determine rights of lien claimants

under statute—Dezino v. William S Drozda Realty Co, Mo App, 13 S W 3d 659

61. Ill—Porter v Western Tube Co, 88 N E 472, 240 Ill 151

40 C J p 376 note 5

Parties defendant generally see infra § 284

62. Nev—Daly v Lahontan Mines Co, 151 P 514, 39 Nev 14, reheard 158 P 285, 39 Nev 14

40 C J p 376 note 6

63. Minn—Gale-Gunner Lumber Co v Melin, 161 N W 387, 136 Minn 118

40 C J p 376 note 7

64. Cal—Miller v Carlisle, 59 P. 785, 127 Cal 327

40 C J p 376 note 8

65. Mo—Wilson, Rehels, Rolfe Lumber Co v Ware, 130 S W 822, 150 Mo App 61

40 C J p 376 note 10

66. Ind—Northwestern Loan & Investment Ass'n v McPherson, 54 N E 130, 23 Ind App 250

40 C J p 377 note 11

67. Ind—Northwestern Loan & Investment Ass'n v McPherson, supra

68. Ill—Thomas v Illinois Industrial Univ, 71 Ill 310

40 C J p 377 note 13

69. Ark—Rust v Kelley Bros Lum-

ber Co, 21 S W 2d 973, 180 Ark 517

40 C J p 377 note 14.

70. Wis—Fischer v Meiroff, 213 N W 283, 192 Wis 483

71. Ala—Bennett Realty Co v Isbell, 122 So 337, 219 Ala 318

72. Ala—Alabama State Fair & Agricultural Ass'n v Alabama Gas Fixture & Plumbing Co, 31 So 26, 131 Ala 256

Conn—Kiel v Carll, 51 Conn 440

73. Ind—Smith v Newbaur, 42 N E 40, 1094, 144 Ind 95, 33 L R A 685

40 C J p 377 note 19

74. Ind—Smith v Newbaur, supra

75. Mo—Dugan v Higgs, 43 Mo App 161

76. Del—Robinson v Davis, 8 Del Co 237

77. Mo—Manchester Iron Works v E L Wagner Const Co, 107 S W 2d 89, 341 Mo 389

40 C J p 377 note 23

Sale after attachment of lien

Where materialman in equitable mechanics' lien action filed single blanket lien against all of five buildings involved, but prayed for all equitable and proper relief, court properly allocated percentages of such claim to each of five buildings where they had passed into hands of different owners after liens had at-

claimant must proceed separately against each owner or lot for separate liens,⁷⁸ even though the contract for the improvements is a joint one by the several owners,⁷⁹ although as to the last proposition there is also contrary authority,⁸⁰ and the full force of these decisions is not maintained in several cases which adopt the view that the separate owners of several contiguous lots may so treat them as to constitute but one lot within the meaning of the statute, and that, if such owners enter into a joint contract for the construction of a building to be situated on such lots, the lien may be treated as a single one covering the entire property and foreclosed as such.⁸¹

Consolidation It is generally held, sometimes by reason of statute, that the court in its discretion may consolidate lien actions involving the same property even though the actions involve different rights and different parties.⁸² After proceedings have been consolidated or other lien claimants have been brought in by interplea under the statute the rights of all the parties should be heard and determined before an order or judgment is made,⁸³ and the action is treated as though it were a single action.⁸⁴ Consolidation has no effect except that the causes are heard at the same time, the issues remain precisely on the pleadings as they were before, between the same parties, and are determined exactly as though the causes were heard separately.⁸⁵ The trial court should endeavor within all

reasonable limitations to protect the rights of all lien claimants⁸⁶ and may proceed to hear the proofs in the action first brought and grant a reasonable continuance for the hearing of the proofs in the other cases.⁸⁷ Each claim should be tried on its own merits, and should not be prejudiced by testimony relating to another.⁸⁸ Each lienholder who, in his complaint or answer, sets forth facts entitling him to a lien makes the action his own for the purpose of foreclosing such lien, and may prosecute it to a final conclusion.⁸⁹ Where a subcontractor appears in a suit in which he is named as a party claiming a lien and files an answer or cross bill setting up his claim, the fact that he had begun an independent proceeding to enforce his demand is no bar to a recovery under his cross bill, although he can have but one satisfaction,⁹⁰ and the fact that a lienor made defendant styles his cross bill as a counterclaim does not bring him within the provisions of a statute, relating to counterclaims in actions at law, requiring that the counterclaim be one existing in favor of defendant and against plaintiff, on which he may be entitled to a judgment against plaintiff.⁹¹

§ 273. Defenses in General

Objections which go to the validity or the existence of the lien or the debt on which it is based may be set up in defense to an action to enforce the lien.

Objections which go to the validity or the existence of the lien,⁹² or the existence or the amount

tached—Manchester Iron Works v E L Wagner Const Co, 107 SW 2d 89, 341 Mo 389

78 Pa—Davis v Farr, 13 Pa 167 40 C J p 377 note 24

79. RI—Butler v Rivers, 4 RI 38

80. NY—Mandeville v. Reed, 13 Abb Pr 173

81. Tex—Green v Shamburger, Civ App, 243 SW 601 40 C J p 377 note 27.

82. Ala—Hagan v Riddle Co, 96 So 863, 209 Ala 606

Ill—Schell v Clements, 73 Ill 613 Mo—Manchester Iron Works v E L Wagner Const Co, 107 SW 2d 89, 341 Mo 389

Nev—Richmond Machinery Co v Bennett, 229 P 1098, 48 Nev 286 40 C J p 377 notes 16, 17

Inherent power

The statutory proceeding for consolidation of mechanics' lien suits is not exclusive of the inherent power of a court of equity in a proceeding in rem, when no personal judgment is sought to order a consolidation in a proper case—Hagan v Riddle Co, 96 So 863, 209 Ala 606

Separate properties

Where materialman brought five separate equitable mechanics' lien actions, one against each of five properties involved, statutes relating to bringing of such actions were held not to preclude court from consolidating actions into one action, to which parties intervening in one of separate actions became parties—Manchester Iron Works v E L Wagner Const Co, 107 SW 2d 89, 341 Mo 389

In Kansas

(1) The text rule is followed—Van Lear v. Kansas Trip-Hammer Brick Works, 43 P 1134, 56 Kan 545

(2) In an early case consolidation on motion of plaintiff's counsel was refused—Harsh v. Morgan, 1 Kan 293

83. Ill—Power v McCord, 36 Ill 214

84. Cal—Willamette Steam Mills Lumbering & Mfg Co v Los Angeles College Co, 29 P 629, 94 Cal 229

40 C J p 378 note 30

85. Ala—Hagan v Riddle Co, 96 So 863, 209 Ala 606

86. Nev—Daly v Lahontan Mines Co, 151 P 514, 39 Nev 14, reheard 158 P 285, 39 Nev. 14

87. Nev—Daly v Lahontan Mines Co, supra

88. Wash—Harrington v Miller, 31 P 325, 4 Wash 808

89. Minn—Gale-Gunner Lumber Co v Melin, 161 NW 387, 136 Minn 118.

90. Ill—Culver v Elwell, 73 Ill 536

91. ND—Dakota Sash & Door Co v Brinton, 145 NW 594, 27 ND 39

40 C J p 378 note 36

92. Mich—Washtenaw Lumber Co v Belding, 208 N.W 152, 233 Mich 608

Pa—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 246

40 C J p 378 note 39

Defective lien

NY—Melrose Concrete Co v Shapiro, 218 NYS 857, 215 App Div. 835.

of the debt for which it is claimed,⁹³ or a proper tender of the amount due,⁹⁴ are properly asserted as matters of defense. In a suit by an undisclosed principal the defenses are available against him which would have been available against the agent.⁹⁵ A prior attempt to subject the interest of another in the land to a lien for the same debt is not available as a bar,⁹⁶ nor does the filing of the notice of a lien which ceases to be operative because of a failure to enforce it prevent the enforcement of a lien which is subsequently filed,⁹⁷ and the abandonment of a totally independent contract has also been held not to be a defense.⁹⁸ If the conditions exist which entitle a mechanic to a lien, the right cannot be defeated because of any collateral consequence attending the steps taken to perfect it⁹⁹ or for other reasons which do not go to the validity of the lien claimed or the right to enforce it.¹ An agreement by one whose duty it is to introduce a defense that he will not make the defense will not be

permitted to prejudice the rights of another on whose behalf the defense would be available.²

In an action by a subcontractor or materialman, the owner, it has been held, may defend on any ground available to the contractor and may take advantage of any defense which would defeat the action, if it were a personal one against the contractor, to recover for the particular work or material.³ So the owner may set up facts showing that the subcontractor or materialman has obtained no lien.⁴ A defendant contractor⁵ or his receiver⁶ may take advantage of any insufficiency of claim or proof in order to defeat a materialman's lien.

Existence or payment of other liens. Where under the statute the owner cannot be held for more than funds in his hands which are not absorbed by prior liens, if there are prior liens which exhaust such funds, the fact is a defense,⁷ but under a statute making it incumbent on the owner to see that payments to the contractor are appropriated to the

Filing excessive claim

(1) The fact that the lien claimant knowingly filed an excessive claim is an absolute defense to his lien—*Massachusetts Gas & Elec Light Supply Co v Rugo Const Co*, 71 N E 2d 408, 321 Mass 20.

(2) Evidence established that materials and labor for repairing a building were furnished under a cost-plus contract, so that plaintiff was not barred by statute defeating a mechanic's lien claim when made for a grossly excessive amount, from filing a mechanic's lien for the amount actually expended under the contract in performance thereof though it greatly exceeded the original estimates—*Lewis & McDowell v Yahr*, 55 A 2d 397, 357 Pa 506.

License

Lien claimant was not precluded from enforcing mechanic's lien on ground that he was not licensed where ordinance provided a penalty for failure to obtain a license.

Ill—*Douglas Lumber Co v Chicago Home for Incurables*, 43 N E 2d 535, 380 Ill 87.

Pa—*Kessler v. Mandel*, 40 A 2d 926, 156 Pa Super 505.

93. Ariz—*Zimmerman v. Western Builders' & Salvage Co*, 297 P 449, 38 Ariz 91.

40 C J p 378 note 40.

Contract not substantially performed
N Y—*Cassino v Yacevich*, 37 N Y S 2d 95, 261 App Div 685.

Insufficient defense to debt

(1) Where purchaser of oil burner removed it without reason and without fair test, seller was entitled to have its claim of lien on premises for burner enforced—*U. S. Heat &*

Power Corporation v Lachman, 209 N W 187, 285 Mich 75.

(2) Where large and heavy heating boiler was installed on owner's premises, fact that use of such boiler may have been discontinued because of alterations increasing efficiency of another boiler did not impair materialman's right to a lien—*Willcox Boiler Co v Messier*, 1 N W 2d 130, 211 Minn 304.

94. Mich—*Rubenstein v. People's Lumber Co*, 204 N W 723, 281 Mich 874.

Return of improvement

In action to recover purchase price of improvement and to establish mechanic's lien on premises where installed, defense that seller agreed in writing to retake the improvement in satisfaction of debt was not established where the alleged agreement was not signed by the seller and was merely a consent to enter premises to retake the improvement—*Mississippi Butane Gas System Co v Glisson*, 10 So 2d 358, 194 Miss 457.

95. N Y—*Berry v Gavin*, 34 N Y S 505, 88 Hun 1.

96. N J—*J C Vreeland Bldg Co v Knickerbocker Sugar Refining Co*, 68 A 215, 75 N J Law 551, 15 Ann Cas 1083.

97. N Y—*Hallahan v. Herbert*, 67 N Y 409.

98. Wis—*Whalen v Eagle Lime Products Co*, 143 N W. 689, 155 Wis 26.

99. N Y—*Mull v Jones*, 18 N Y S 359.

40 C J p 379 note 47.

1. Ill—*Huebner v Kornajzer*, 259 Ill App 540.

40 C J p 379 note 48.

Premature abstract

Fact that abstract relied on by grantee failed to disclose lien against premises could not be asserted by grantee as a defense to foreclosure of lien—*Isbell Lumber & Coal Co v Marchesseau Plumbing Co*, 11 N E 2d 518, 104 Ind App 373.

Unrecorded claims

The existence of unrecorded claims by creditors is no defense to an action to enforce a mechanic's lien—*Williamson & Adams v McMahon-McEntegart, Inc.*, 10 N Y S 2d 37, 256 App Div 313.

2. Pa—*Young v Burtman*, 1 Phila 203.

40 C J p 379 note 49.

3. Pa—*Weitzel v Zane*, 61 Pa.Super 478.

40 C J p 379 notes 50, 51.

4. Neb—*Hoagland v. Van Etten*, 35 N W 869, 22 Neb 681.

40 C J. p 379 note 52.

Stop notice; personal knowledge

The mere fact that owner does not have personal knowledge of facts does not permit him to say that he cannot be "satisfied with correctness of claim" of subcontractor or materialman under a stop notice—*Tile Wholesalers & Importers v Ruppert*, 17 A 2d 607, 125 N J Law 597.

5. Pa—*Commercial Sash & Door Co v. Thompson*, 17 Pa Dist 996.

6. Pa—*Commercial Sash & Door Co v Thompson*, *supra*.

7. N Y—*Lehretter v Koffman*, 1 E D Smith 664, Code Rep N S, 284.

40 C J p 379 note 55.

outstanding claims of materialmen and laborers to the full amount of the contract price, it is no defense to the foreclosure of a materialman's lien that other materialmen may claim liens which would exceed the contract price,⁸ or that others are claiming liens which may create a future liability,⁹ since the owner may defend as against them by showing that the money paid to the contractor actually went to the discharge of liens.¹⁰ Under a contract provision permitting the owner to withhold from the amount due the contractor such sums as may be necessary to indemnify the former against claims filed by subcontractors, the filing of such claims will not defeat the contractor's right to recover the balance,¹¹ and the payment of the entire contract price on claims not legally filed with notice of plaintiff's claim will afford no defense to the latter.¹²

Duty to defend. The owner or contractor, as the case may be, is not required to defend against the liens of subcontractors.¹³

Number of defenses. Under general rules a defendant in a mechanic's lien proceeding may set up as many defenses as he has,¹⁴ whether they are such as are legal or equitable or both.¹⁵

Death of party; abatement. A mechanic's lien survives the property owner's death and may be enforced by a suit brought within the proper time after his death.¹⁶ As a general rule, the death of a

party pending proceedings to enforce a mechanic's lien will not abate the proceedings.¹⁷

§ 274. — Want of Title in Defendant or Debtor

Under some statutes the defendant's want of title to the property against which a mechanic's lien is sought to be enforced is not a defense.

Under some statutes the fact that one not a party to the suit has a paramount title,¹⁸ or want of title in defendant, and allegations that the title is in the third person,¹⁹ will not defeat the action as only the interest of defendant can be bound, and a mechanic's lien on improvements alone cannot be defeated by the party who contracted for them on the ground that he had wrongfully entered upon the land of another and was a trespasser.²⁰ On the other hand, an answer by a wife made a codefendant that the land involved, although appearing to be community property from the deeds, was in fact her separate estate, which was known to the lienor, has been held to present an issue.²¹

§ 275. — Waiver and Estoppel to Assert Defenses

A party may by waiver or estoppel be precluded from resisting or attacking a mechanic's lien.

A party may by waiver or estoppel be precluded from resisting or attacking a mechanic's lien,²² but he should not be held to waive any formality

8. Ga.—Tuck v Moss Mfg Co, 56 SE 1001, 127 Ga 729

9. Ga.—Holmes v Venable, 109 SE 175, 27 Ga App 431

10. Ga.—Tuck v Moss Mfg Co, 56 SE 1001, 127 Ga 729—Holmes v Venable, 109 SE 175, 27 Ga App 431

11. NY.—Perry v Levenson, 81 NY 586, 82 App Div 94, affirmed 70 NE 1104, 178 NY 559

12. Iowa.—Iowa Brick Co v Des Moines, 82 NW 922, 111 Iowa 373 40 CJ p 380 note 60

13. Okl.—Vandenberg v P T Walton Lumber Co, 92 P 149, 19 Okl 169

14. Neb.—Hoagland v Van Etten, 35 NW 869, 22 Neb 681

15. Mo.—McAdow v Ross, 53 Mo 199 40 CJ p 437 note 20

16. Ala.—Fleming v Kirkland, 146 So 384, 226 Ala 222

Enforceable against personal representative

Suit to foreclose mechanic's lien is action founded on contract and may be enforced by or against his personal representative—Treese v Spurrier Lumber Co, 242 P. 235, 115 Okl. 138.

17. NY.—Perry v Levenson, 81 NY 586, 82 App Div 94, affirmed 70 NE 1104, 178 NY 559 1 CJ p 207 note 91

Owner

A suit to enforce a mechanic's lien does not abate on the death of the person against whose property the lien is sought to be enforced—Treese v Spurrier Lumber Co, 242 P 235, 115 Okl 188

18. Wis.—Williams v Lane, 58 NW 77, 87 Wis 152—Cook v Goodyear, 48 NW 860, 79 Wis 606 Estoppel to deny ownership see supra § 57

19. Ga.—James G Wilson Mfg Co v Chamberlin-Johnson-Du Bose Co, 79 SE 465, 140 Ga 593 40 CJ p 380 note 64

20. Iowa.—Lane v Snow, 24 NW 35, 66 Iowa 544

21. Tex.—Owens v. Hord, 37 SW 1093, 14 Tex Civ App 543

22. Fla.—Biscayne Trust Co v Wolpert Realty & Improvement Co, 130 So 611, 100 Fla 1070 40 CJ p 380 note 67

Failure to object
Assignees of mechanics' lien

claims, failing to object to allowance of certain liens, were estopped thereafter to question their validity—Howard v Fisher, 283 P 1042, 86 Colo 493

Defective work or material

(1) The right of subcontractor to a lien will not be defeated because of defects in work due to the use of improper materials furnished by contractor, the use of which was directed by contractor—Davis v Bertschinger, 241 P 53, 116 Or 127

(2) Owner, having received and used material charged for by materialman without objection, was estopped to set up that latter had not substantially complied with contract.—Rylander v Koppe & Steinichen, 133 SE 236, 162 Ga 300

Homestead

Where assignee brought suit for debt and foreclosure on mechanic's lien and note, and no effort was made by maker to reform instrument which created lien on entire realty, or to designate any portion of realty to which lien was intended to attach, maker was estopped to deny that lien did not include that part of realty which constituted homestead.—Williams v Owen, Tex Civ App, 111 SW 2d 1182.

that is necessary to perfect a mechanic's lien against him unless it clearly appears from the evidence that he actually intended to waive it, or his conduct has been such as to estop him to deny that he did waive it.²³ The fact that the owner pleads to a scire facias to enforce a lien does not waive the defense that there has not been a compliance with a condition to the right to file a lien.²⁴ Merely because a grantee purchases property subject to all liens thereon does not estop him to defend against liens.²⁵ It has been held that one who obtained a judgment on the theory that the mechanic's lien was valid is estopped to assert the invalidity of the lien in an action to enforce it.²⁶

§ 276. Recoupment, Set-Off, and Counterclaim

Proper demands against the person seeking to enforce a mechanic's lien may be urged by way of set-off, recoupment, or counterclaim.

Proper demands against the contractor may be set off or pleaded by way of recoupment or counter-

claim to defeat his lien,²⁷ the nature of the demand which may be so availed of and the manner in which it is to be set up ordinarily are controlled by the rules of local practice as to matters of recoupment, set-off, or counterclaim,²⁸ and the right of set-off is permissive but not obligatory.²⁹ The payment of the valid liens of subcontractors and materialmen may be set off against the contractor's lien.³⁰ The payments for which the owner is entitled to credit include interest on such lien claims³¹ and the expenses, such as costs and attorney's fees, of defending against them,³² but it has been held that where the owner wrongfully refuses to pay the contractor or to honor his orders for the payment of workmen, thereby causing liens to be filed, or wrongfully contests the actions brought for foreclosure of the liens, he cannot set off the costs thus caused by his own wrongful act against the claim of the contractor or his assignee.³³

Action by subcontractor, materialman, or laborer

In an action by a subcontractor, the owner cannot

23. Tex.—Krebs v Craig, Civ App, 60 SW 62

40 C.J. p 380 note 68

24. Pa.—McVey v Kaufmann, 72 A. 503, 223 Pa. 125—Mansfield v Ocipa, 28 Pa Dist 121

25. N.Y.—Jones v Manning, 6 NY S 338

40 C.J. p 380 note 70

26. N.Y.—Pike v Naylor Securities Co., 251 NYS 659, 140 Misc 734 SD—Schnabel v St Joseph Church of Elk Point, 249 NW 750, 61 S D 409

27. U.S.—Corpus Jums cited in Suburban Imp Co v Scott Lumber Co, CCA W Va., 59 F 2d 711, 716, 87 ALR 555, certiorari denied Scott Lumber Co v Suburban Imp Co, 53 S Ct 123, 287 US 660, 77 L Ed 569

Ill.—Leffers v Hayes, 64 NE 2d 768, 327 Ill App 440

Md.—Schneider v Menaquale, 49 A 2d 330

Mich.—Sacchetti v Recreation Co., 7 NW 2d 265, 304 Mich 185

Wis.—Nickel v Black, 21 NW 2d 658, 248 Wis 122

40 C.J. p 350 note 71.

Loss of loan

Fact that lien on premises for materials furnished by plaintiff prevented defendant from obtaining loan, causing him to lose property, was too speculative as basis for counterclaim.—Davies v Sutherland 256 P 32, 123 Okl 149

Expense of bonding liens

Allowance may be made to owner for amount expended for premiums and counsel fees in bonding liens.—Willson & Adams Co v Learner Re-

alty Co, 257 NYS 141, 148 Misc 334

Laches

In action by general contractor to recover compensation, tried as an equity cause and defended on ground of damages caused by contractor's negligence in permitting subcontractor to install defective heating and plumbing equipment, such defense was not barred by laches, although not interposed until after contractor had died and five years after suit was brought, where ample testimony by subcontractor was nevertheless available to contractor's executors.—Bickel v Argyle Inv Co, 121 SW 3d 803, 343 Mo 456

Claim not supported by pleading and proof was not allowed.—Eskestrand v Wunder, 20 P 2d 622, 94 Mont 57

28. Kan.—Tracy v. Kerr, 28 P 707, 47 Kan 656

Pa.—Greenberg v Koegler, 59 Pa Dist & Co 31—Millsboro Lumber Co v Bell, Com Pl., 23 Wash Co 98

40 C.J. p 381 note 72

Claims not allowed

(1) Where counterclaim did not tend to diminish or defeat plaintiff's recovery or arise out of transaction set forth in complaint.—Landes v Landes, 277 NYS 886, 243 App Div 164

(2) Where counterclaim did not affect rights of the parties as lienors, and where a decision on counterclaim was not necessary to a determination of validity of mechanics' liens.—Nassau Suffolk Lumber & Supply Corporation v Bruce, 31 NY

S 2d 906, 177 Misc 825, modified on other grounds 38 NYS 2d 73, 265 App Div 879, appeal denied 39 NYS 2d 618, 265 App Div 1002

29. U.S.—In re Kyte, DCPa., 182 F 166.

30. Cal.—Stone v Serimian, 246 P 45, 198 Cal 520—Combs v Eberhard, 7 P 2d 338, 120 Cal App 125 40 C.J. p 380 note 71 [a]

Payments or judgment required

(1) Under a statute providing that during the pendency of an action to enforce the lien of one claiming under the contractor the owner may withhold from the contractor the amount of money for which the claim is filed and in case of judgment deduct the amount thereof from the contractor's claim, such deduction can be made only in case of a judgment.—Powell v Nolan, 123 NE 58, 300 Ill 140

(2) Where a notice by a workman or materialman is construed as working an assignment pro tanto of the debt due by the owner to the contractor, the owner can have no allowance as against the contractor until there is actual payment or what is in law equivalent.—Wightman v Brenner, 26 NJ Eq 489

31. Cal.—Combs v Eberhard, 7 P. 2d 338, 120 Cal App 25

32. Cal.—Stone v Serimian, 246 P 45, 198 Cal 520—Combs v Eberhard, 7 P 2d 338, 120 Cal App 125

33. Wash.—Gordon v Hultin, 261 P. 785, 148 Wash 61

40 C.J. p 380 note 71 [b], p 381 note 74

plead by way of set-off a demand entirely independent of, and unrelated to, the original contract under which the work and material were furnished³⁴ or take advantage of payments to the contractor made contrary to the provisions of the statute,³⁵ but, on the principle that the statute purports to protect lien claimants only to the extent of moneys which may be due from the owner to the contractor under the original contract, it has been held that, while the owner cannot make a subsequently acquired set-off against the contractor available against the demand of a mechanic to defeat his right to resort to an indebtedness of the owner to the contractor which existed when the mechanic performed his labor,³⁶ the owner may set off an indebtedness against the contractor which existed at the time the contract was made to defeat the claims of other mechanics.³⁷ Where the contractor is the primary debtor in an action by a subcontractor in which the former is a party, he may set up by way of counterclaim or set-off any demand which he may have against the subcontractor.³⁸ Where the owner asserts his dissatisfaction with the materials furnished for which a lien is claimed, he cannot, on his liability being es-

tablished, claim the right to reduction from the contract price in the amount that an allowance was made to the lienor by the one from whom the lienor purchased the materials involved because of the expense of collection rendered necessary by the contest of the materialman's claim.³⁹

Surety. It has been held that the surety on a contractor's bond is not entitled to file a cross bill where he is not liable on such bond for the lien sought to be enforced.⁴⁰ Where the lien claimant is also surety on a bond against liens, a judgment on the bond may be set off against his lien.⁴¹

§ 277. — Default in Performance

Damages resulting from a default in the performance of the contract to construct the improvement may be set up to reduce or defeat the claim to a mechanic's lien.

Damages resulting from a default in the performance of a contract for the erection of buildings or improvements, as by delay in completing performance, defects in construction and material used, and the like, may be set up to reduce or defeat the claim of the builder or mechanic⁴² in the absence of a waiver or estoppel to assert them.⁴³ This rule ap-

34. NY—Develin v Mack, 2 Daly 84

40 C J p 381 note 78

35. Mich—Hannah & Lay Mercantile Co v Hartzell, 84 NW 52, 125 Mich 177

40 C J p 381 note 79

36. Ohio—Bullock v Horn, 7 NE 737, 44 Ohio St 420

37. Ohio—Stark v Simmons, 43 NE 999, 54 Ohio St 435.

40 C J p 381 note 81

Credit for payments

Owner in case cost exceeds contract price is entitled to credit for payments to extent of pro rata amounts subcontractors would have been entitled to if liens had been filed—Uhrich Millwork, Limited, v McGuire, 289 P 264, 143 Okl 16.

38. NY—Cody v Turn Verein, 64 NYS 219, 48 App Div 279, affirmed 60 NE 1108, 167 NY 607

40 C J p 382 note 82

39. Ark—Manhattan Constr Co v Pratt, 150 SW 697, 105 Ark 697

40. Ala—Central Lumber Co v Schilleci, 148 So 614, 227 Ala 29

41. Md—German Lutheran Evangelical St Matthew's Cong Church v Heise, 44 Md 453

42. US—Minneapolis Gas-Light Co v Kerr-Murray Mfg Co, Minn, 7 St Ct 1187, 122 US 300, 30 L Ed 1190

Md—Schneider v Menaquale, 49 A 2d 330—Parker v Tilghman V Morgan, Inc., 183 A 224, 170 Md 7.

Mich—Sacchetti v. Recreation Co, 7 NW 2d 265, 304 Mich 185—Koch v Sumner, 108 NW 725, 145 Mich 358—Yeomans v Parker, 63 NW 316, 105 Mich 333

Minn—Knutson v Lasher, 18 NW 2d 688, 219 Minn 594

NY—De Martini v Elade Realty Corp, 58 NE 2d 519, 293 NY 778

Okl—Guest v Shamburger, 251 P 97, 120 Okl 164

Pa—Greenberg v Kogler, 59 Pa Dist & Co 31

SC—W L Brissey Lumber Co v Crowther, 133 SE 208, 135 SC 131

Tex—Mantel v Mitchell, Civ App, 393 SW 835

40 C J p 382 note 84

Beneficial deviation

In contractor's action to enforce mechanic's lien, owners were entitled to deduction for failure to construct concrete roof so as to permit drainage as required by contract, as against contention that roof as built was better than it would have been otherwise—Knutson v Lasher, 18 NW 2d 688, 219 Minn 594

Indemnity bond

Owners, protected against contractor's default by indemnity bond and right of deduction from mechanic's lien note, should not be compelled to look to bond—Galbraith-Foxworth Lumber Co v Long, Tex Civ App, 5 SW 2d 162, error refused

Modification of contract

Where original plan called for installation of concrete areaways and

by agreement contract was changed eliminating need of areaways, house owner was entitled to allowance in contractor's suit to enforce mechanic's lien for balance due—Schneider v Menaquale, Md, 49 A 2d 330

Claim not pleaded was not allowed—Le Roy v Reynolds, 193 So 843, 141 Fla 586

Equitable considerations

(1) A court of equity is governed mainly by consideration of right and justice between the parties. It does not disregard legal rights, on the contrary it follows the law, but it may allow something for what is deemed insufficient work while granting a decree for the amount found equitably due—Heberlein v Wendt, 99 Ill App 506—40 C J p 383 note 93

(2) It is immaterial that there is no express authority for such procedure in the lien law, since the authority flows from the general power of equity to settle all disputes between the parties relative to a subject matter of which it has jurisdiction—Sacchetti v. Recreation Co, 7 NW 2d 265, 304 Mich 185—Koch v Sumner, 108 NW 725, 145 Mich 58

43. Md—Parker v Tilghman V Morgan, Inc., 183 A 224, 170 Md 7

40 C J p 382 note 85

Waiver or estoppel to assert defenses generally see supra § 275

Acceptance of work

(1) In suit to enforce lien, evidence supported finding that owner

plies to the default of a subcontractor, laborer, or materialman, where the proceeding is brought by such a lien claimant,⁴⁴ and, where the general contractor is a party to the proceedings, he may set up by counterclaim a demand for damages against the subcontractor for a default in the performance of the contract.⁴⁵ In some cases, defendant in a suit to foreclose a mechanic's lien has been allowed affirmative relief, such as a personal judgment in his favor for damages arising from plaintiff's failure to construct the building according to contract,⁴⁶ although other authorities have denied the right in the absence of statutory permission.⁴⁷

Damages. The rule as to damages has been held to be the same as it would be on a quantum meruit by the builder against the owner, or by the owner against the builder for damages arising out of defective construction,⁴⁸ and a counterclaim which is based on fraud is to be treated on the same footing as though defendant had brought an action therefor grounded on fraud.⁴⁹ It has been held that

liquidated damages provided for in the contract for such delay, defects, etc., may be recouped or set off against plaintiff's claim to defeat his lien in whole or in part.⁵⁰

Default of contractor against claim of subcontractor, laborer, or materialman. In many cases, particularly where the lien is not regarded as direct, but as by subrogation to the rights of the contractor, the right of the owner to deduct damages because of the default of the contractor as against the claims of subcontractors, laborers, and materialmen has been recognized,⁵¹ but according to other authorities, at least where the lien is regarded as direct and not as by subrogation, the owner is not entitled to assert as against their claims for liens any claim which he may have against the original contractor for his default in the performance of the contract⁵² except as to such damages arising out of the default of the principal contractor as may be said to have been in the contemplation of the parties when the contract was made,⁵³ and it has been

paid full price, thereby accepting work as complete, so as to bar owner's recovery on cross complaint—*Lyle v Latourette*, 192 S W 2d 521, 209 Ark 721

(2) Owner, complaining to contractor soon after house was built, was held not to have accepted work and not precluded from filing counterclaim in action to foreclose mechanics' lien for work done in attempting to repair house—*Jose-Balz Co v De Witt*, 176 N E 864, 93 Ind App 672

Breach caused by owner

(1) In general—*Edward Edinger Co v Willis*, 260 Ill App 106

(3) Owners whose voluntary acts wholly or chiefly caused loss complained of cannot recover therefor from contractor claiming lien, since loss was not necessary result of contractor's alleged breach of contract—*Parker v Tilghman V Morgan, Inc.*, 183 A 224, 170 Md 7

44. La—*Jones v Hardy*, 133 So 472, 11 La App 298
Md—*Parker v Tilghman V Morgan, Inc.*, 183 A 224, 170 Md 7
40 C J p 383 note 86

45. NJ—*Mayer Ice Mach & Engineering Co v Van Voorhis*, 95 A 735 88 N J Law 7
40 C J p 383 note 82, p 383 note 87

46. Mass—*Glazer v Schwartz*, 176 N E 613, 276 Mass 54
40 C J p 383 note 91

47. NJ—*Norton v Sinkhorn*, 50 A 506, 63 N J Eq 313
40 C J p 383 note 92, p 382 note 84 [b].

Recoupment, not counterclaim

In building contractor's action to foreclose mechanic's lien, owners' right to deductions for defects caused by faulty construction is one of recoupment, not counterclaim—*Knutson v Lasher*, 18 N W 2d 688, 219 Minn 594

48. Mass—*Pelatoski v Black*, 100 N E 831, 213 Mass 428

Measure of damages

(1) In general
Cal—*Union Supply Co v Morris*, 30 P 2d 374, 220 Cal 331
Tex—*Mantel v. Mitchell*, Civ App, 293 S W 835
40 C J p 382 note 84 [g]

(3) In action to foreclose mechanic's lien wherein defendant counterclaimed for damages for defective workmanship, application of the cost of replacement theory as the rule of damages was error, since worth in its present condition as compared to worth if properly built was the proper rule of damages—*Venzke v Magdanz*, 9 N W 2d 604, 243 Wis 155

(3) In suit to enforce mechanic's lien, chancellor properly allowed house owner a credit for depreciation in appearance of cellar because of construction of center division off center making recreation room approximately one foot smaller and utility room approximately one foot larger, where mistake in location had no effect on structural stability of house—*Schneider v Menaquale*, Md, 49 A 2d 330

(4) In contractor's suit to enforce mechanic's lien, where it appeared that, according to plans, blind man was to have headroom of six feet

six inches at entrance to cellar and without his permission headroom had been reduced to six feet, he was entitled to allowance of cost of correcting such error—*Schneider v Menaquale*, supra

49. Minn—*Johnson Service Co v Kruse*, 140 N W 118, 121 Minn 28, Ann Cas 1914C 850

50. US—*Winder v Caldwell*, D C, 14 How 434, 14 L Ed 487
40 C J p 383 note 94

Special contract

Tex—*Galbraith-Foxworth Lumber Co v Long*, Civ App, 5 S W 2d 162, error refused

51. Ga—*Young v Harley-Mitchell Hardware Co*, 159 S E 567, 173 Ga 35

Mich—*Lazenby v Wright*, 239 N W 437, 250 Mich 203—*Yeomans v Parker*, 63 N W 316, 105 Mich 323
40 C J p 384 note 2
Direct or indirect character of lien see supra § 105

Owner abandoning work, unfinished by contractor, was not entitled to credit against materialman's lien for amount required to complete it—*Frank Japes Co v Pagel*, 225 N W. 521, 246 Mich 700

52. Ark—*Lyle v Latourette*, 192 S W 2d 521, 209 Ark 721
Ok—*Guest v Shamburger*, 251 P 97, 120 Okl 164
40 C J p 383 note 86

53. Ok—*Consolidated Cut Stone Co. v Seidenbach*, 75 P 2d 442, 181 Okl. 578—*Uhrich Millwork, Limited, v McGuire*, 289 P 264, 143 Okl 16—*General Sports Co v. Leslie &*

held that, although the statute provides that as to liens other than that of the contractor the contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the owner and against the contractor, such provisions shall be taken to have reference to an offset not arising under the terms of the contract and as to which from an inspection of the contract materials and laborers could have no notice⁵⁴ The right to counterclaim as against the lien claimant may arise from the fact that the lien claimant is a surety on the contractor's bond,⁵⁵ and such right may also, as is sometimes the case, be given by express provision of the statute⁵⁶ In any event, the right to assert the principal contractor's default may be waived⁵⁷ or the owner may be estopped to set it up⁵⁸ So, where the owner accepts the building from the contractor as completed within the terms of the contract, he cannot thereafter recoup damages for imperfect work as against the materialman⁵⁹ In proceedings to enforce a mechanic's lien for work and materials, a trustee under a trust deed securing bonds of the owner is entitled to assert the same defenses as the owner might have done, based on the failure of the principal contractor to perform his contract, at least where there is no evidence of fraud or collusion between the parties to the contract,⁶⁰ and is bound by any waiver by the owner of the strict performance of the con-

tract on which a mechanic's lien is based⁶¹

§ 278. Persons Entitled to Enforce

An assignee has been held to be entitled to enforce a mechanic's lien.

The person to whom the debt is due, who is the real party in interest, usually has the right to enforce the lien, as discussed *infra* § 283, but it has been held that one whose interest is merely in the subject matter rather than in the lien cannot enforce such lien⁶² An assignee,⁶³ including an assignee for the benefit of creditors,⁶⁴ may enforce a mechanic's lien existing in favor of the assignor.

§ 279. Persons Entitled to Contest

The enforcement of a mechanic's lien may be contested by anyone claiming an interest in the property against which the lien is sought to be enforced.

In general, anyone claiming an interest⁶⁵ or who may be affected by the judgment enforcing a mechanic's lien⁶⁶ may contest the right to the lien or the amount of the claim, as, for example, the owner⁶⁷ either at the time the lien attached or at the time it is enforced,⁶⁸ a mortgagee,⁶⁹ a subsequent purchaser or encumbrancer,⁷⁰ or a transferee for security⁷¹ A mortgagee or other lienor may show a fatal defect in the perfecting of the principal lien to enforce which the suit was instituted, as they have an interest to secure prior satisfaction of their own claims⁷² The grantee in a deed void as to the

Walter Coombs Lumber Co., 288 P 949, 143 Okl 297

40 C J p 383 note 97

54. Cal.—Builders' Supply Depot v O'Connor, 88 P 982, 150 Cal 265, 119 Am SR 193, 17 L.R.A.N.S., 909, 11 Ann Cas 712

40 C J p 384 note 99

55. Mo.—McAdow v Ross, 53 Mo 199

40 C J p 384 note 1

56. Mich.—Hannah & Lay Mercantile Co v Hartzell, 84 NW 52, 125 Mich 177—Smalley v Gearing, 79 NW 1114, 80 NW 797, 121 Mich 190

57. Mich.—Stevens v Garland, 164 NW 516, 198 Mich 24

40 C J p 384 note 4

Waiver or estoppel to claim defense generally see *supra* § 275

58. Ala.—Cook v Rome Brick Co., 12 So 918, 98 Ala 409.

40 C J p 384 note 5

No estoppel

The action of owner who had right to terminate contract on contractor's default in remaining silent as to intention to claim damages for delay in construction occasioned by contractor's default and in allowing lien claimant thereafter to furnish materials for building was insufficient

to work equitable estoppel against contractor's offset as damages for delay, against contract fund available for satisfaction of subcontractor's lien—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl 578

59. Mich.—Hannah & Lay Mercantile Co v Hartzell, 84 NW 52, 125 Mich 177

60. U.S.—Continental & Commercial Trust & Savings Bank v Corey Bros Constr Co, Idaho, 208 F 976, 121 CCA 64

61. U.S.—Continental & Commercial Trust & Savings Bank v Corey Bros Constr Co, *supra*.

40 C J p 384 note 8

62. Ill.—Roberts v Gates, 64 Ill 374

63. Tex.—Galbraith-Foxworth Lumber Co v Long, Civ App, 5 SW 3d 162, error refused
Assignment of lien generally see *supra* § 216 et seq

In whose name lien enforced after assignment see *supra* §§ 218, 220

64. Iowa.—German Bank v Schloth, 13 NW 314, 59 Iowa 316

65. Pa.—Kessler v Mandel, 40 A 2d 926, 156 Pa.Super 505

RI—Jepherson v Green, 47 A. 599, 22 RI 276

66. Mich.—Wiltale v Harvey, 72 NW 134, 114 Mich 131

40 C J p 395 note 31

67. Va.—Brown v Cornwell, 60 S E 623, 108 Va. 129

Stop notice

Owner of premises may dispute correctness of claim of subcontractor giving stop notice when having reasonable grounds therefor—Ford v R C Church of Our Lady of Mt Carmel, Ridgewood, N J, 154 A 403, 9 N J Misc 505

68. Mich.—Pinte v Will Inv Co., 228 NW 777, 249 Mich 230

40 C J p 395 note 33

69. Colo.—Howard v Fisher, 283 P 1042, 86 Colo 493

40 C J p 395 note 34 [a]

70. Mass.—Richards v O'Brien, 53 NE 858, 173 Mass 332.

40 C J p 395 note 34

71. Pa.—Ronalds & Johnson Co v Rogers, 25 Pa.Dist 25

Va.—Brown v Cornwell, 60 SE 623, 108 Va 129

72. Mich.—Wiltale v Harvey, 72 NW 134, 114 Mich 131.

40 C J p 395 note 37.

grantor's creditors but good as between the parties to it has sufficient interest to entitle him to contest the validity of such lien,⁷³ although, where the owner recognizes the existence of the debt and validity of the lien, and sells the property subject to the lien, it has been held that the purchaser who thus takes the property cannot dispute the validity of the lien.⁷⁴

One who has no interest in the property affected is not entitled to contest the validity of the lien,⁷⁵ but the promisor and surety on a bond given to discharge liens may contest them.⁷⁶

§ 280. — Contest by Contractor of Lien of Subcontractor

A general contractor may contest the lien of a subcontractor, but may not raise objections which affect only the owner of the property.

While a general contractor may contest the lien or claim of a subcontractor or materialman on objections which go to that part of the matter in which the general contractor has an interest, as that the materials were never furnished, or had been paid for, or that the charge was excessive,⁷⁷ he has no concern with objections which affect only the owner of the building and cannot set them up to defeat the lien of a materialman or subcontractor if the owner is satisfied to forego the objections.⁷⁸

§ 281. Jurisdiction and Venue

The jurisdiction of particular courts over proceedings to enforce mechanic's liens depends on the governing statutes.

The jurisdiction of particular courts over proceedings to enforce mechanics' liens depends on the particular provisions of the statutes applicable,⁷⁹ and these differ so widely that no more definite rule can be stated than that, if a particular court is designated to administer the remedy, resort must be had to that court, but, if the character of the remedy only is prescribed, the court within whose general jurisdiction and powers the subject matter falls may administer the remedy,⁸⁰ and, where the statute creating the remedy expressly prescribes the court in which it shall be pursued, that jurisdiction is exclusive.⁸¹ Where the proceeding is purely in rem, it cannot be brought in a court whose jurisdiction is limited to actions for debt or damages,⁸² and a court of limited and inferior jurisdiction which under its constitutional powers cannot deal with proceedings relating to land has no jurisdiction,⁸³ although under some of the statutes jurisdiction is conferred on courts of inferior and limited jurisdiction at least to the extent of declaring and establishing the lien even when the land cannot be sold under its order or judgment.⁸⁴ It has been held that a court does not acquire jurisdiction where on the face of the bill the lien sought to be enforced is nonexistent,⁸⁵ and that, where the

73. N.Y.—*Toop v Smith*, 73 N.E. 1113, 181 N.Y. 283, 34 N.Y.Civ. Proc. 211.

40 C.J. p. 395 note 38.

74. Tex.—*Michigan Sav. & Loan Ass'n v Attebery*, 42 S.W. 569, 16 Tex.Civ.App. 222.

75. Ill.—*Lake Shore & M. S. R. Co. v McMillan*, 84 Ill. 308.

Minn.—*Cogel v Mackow*, 11 Minn. 475.

Persons not party to lien

Generally, persons not parties to lien cannot be heard to object to it.—*Knoell v Carey*, 140 A. 522, 291 Pa. 531.

76. Mich.—*Pinte v. Will Inv. Co.*, 228 N.W. 777, 249 Mich. 230.

77. Pa.—*Wethered v Garrett*, 41 A. 319, 140 Pa. 224.

Tenn.—*Drantingham v Beasley*, 2 Tenn.App. 598.

40 C.J. p. 39 note 40.

78. Ky.—*Corpus Jums cited in Young v Porter-Leach Hardware Co.*, 148 S.W.2d 718, 720, 285 Ky. 625.

40 C.J. p. 396 note 41.

79. Ala.—*Hancock v Taylor*, 21 So. 2d 308, 246 Ala. 521.

Mo.—*State ex rel Sears v Hall*, 28 S.W.2d 1026, 325 Mo. 321.

Tex.—*Parker v Chambers*, Civ.App., 159 S.W.2d 945.

40 C.J. p. 367 note 76.

Stop notice

Supreme court has original jurisdiction to try suit on stop notice under Mechanics' Lien Act.—*Sargeant Bros v Brancati*, 151 A. 843, 107 N.J. 84.

Jurisdiction for all purposes

Court foreclosing mechanic's lien was held to have jurisdiction for all purposes, where receiver in suit to foreclose mortgage, and all other parties thereto, were joined as defendants.—*Lively v Evans-Howard Fire Brick Co.*, 242 P. 773, 115 Okl. 259.

Equity jurisdiction

While county court possesses same power over actions to foreclose mechanics' liens, which supreme court possesses, county court possesses no equitable jurisdiction in such cases unless relief asked for is incident to and part of foreclosure proceedings, and necessary to give effect to determination in favor of or against any party to action, county court had no jurisdiction to impress

trust on funds in hands of superintendent of insurance who was in charge of company which held a first mortgage on premises wherein labor and materials were furnished, since impressing of trust on such funds was not incident to determination of equities of parties in such action.—*Majestic Tile Co v Nicholls*, 291 N.Y.S. 551, 161 Misc. 231.

80. Ill.—*People ex rel Anderson v. Village of Bradley*, 11 N.E.2d 415, 367 Ill. 301.

40 C.J. p. 367 note 77.

81. Tex.—*Parker v Chambers*, Civ. App., 159 S.W.2d 945.

40 C.J. p. 367 note 78.

82. Md.—*Gelston v Thompson*, 29 Md. 595.

40 C.J. p. 367 note 79.

83. Ark.—*White v. Millbourne*, 31 Ark. 486.

40 C.J. p. 367 note 80.

84. N.Y.—*Egan v Laemmle*, 25 N.Y.S. 330, 5 Misc. 224.

40 C.J. p. 367 note 81.

85. Mich.—*Fox v Martin*, 283 N.W. 9, 287 Mich. 147.

land is misdescribed in the lien statement, the court acquires no jurisdiction over the subject matter⁸⁶ Unless the statute provides otherwise, a court of general original jurisdiction may in proceedings to foreclose a mechanic's lien determine the validity and priority of all liens, either prior or subsequent, of proper parties to the action if they are put in issue by the pleading⁸⁷

The venue of actions to enforce mechanic's liens, as governed by general statutes, is discussed in the C J S title Venue § 28, also 40 C J p 367 notes 82-84, 67 C J p 57 notes 2-9 It has been held that a statute authorizing a suit on a claim for labor or materials furnished for an improvement on real estate to be brought in any court having jurisdiction of the property does not apply as to a subcontractor⁸⁸

§ 282. Time to Sue, Limitations, and Laches

- a Time to sue in general
- b Limitations in general
- c. Persons against whom action must be instituted
- d When period begins to run
- e. Nature of proceeding required in general
- f Assertion of lien in other proceedings
- g When proceedings deemed instituted
- h. Amendment after expiration of period
- i Prosecution of proceedings

a. Time to Sue in General

Generally, a suit to enforce a mechanic's lien may not be instituted until the debt secured or some part of it is due and payable.

Unless there is a contrary provision in the statute, a proceeding to enforce a mechanic's lien may be instituted as soon as the amount due claimant becomes payable,⁸⁹ and at any time thereafter within the period of limitations provided by the governing statute⁹⁰ Suit may not be instituted before the debt secured is due and payable⁹¹ Thus, it has been held that suit may not be maintained to enforce a lien before the debt is due even where the contract fixes a time of payment beyond the period limited by the statute for the commencement of an action to enforce a lien⁹² However, it has been held that a proceeding may be begun, although the entire claim is not yet due,⁹³ as where a note which has not matured has been given for a portion of the price⁹⁴ Under some statutes, a lien may be enforced after the lien claim is filed if any amount is then due.⁹⁵ It has been held that, if the statute expressly provides that the proceeding may be taken after a certain time within which the money due is to be paid, it fixes a point of time before which the suit cannot be brought, and, if commenced before that time, it is premature,⁹⁶ although it has also been held that it may be sustained by voluntary appearance after the time at which it may properly be brought⁹⁷

Under some statutes, a subcontractor cannot enforce his lien before payment is due to the contrac-

86. Mo—Chance v Franke, 165 S W 2d 678, 350 Mo 162

87. Neb—Burns v Sholl, 197 NW 393, 111 Neb 628

88. La—General Lumber & Supply Co v McLellan, App, 200 So 501

Statute strictly construed

La—Glover v. Mayer, 25 So 2d 242, 209 La 599

89. Tex—Tucker v Dougherty Roofing Co, Civ App, 137 S W 2d 884, error dismissed, judgment correct

40 C J p 384 note 9

No provision as to time of payment

Where contract did not contain any stipulation regarding time of payment, the law implied an obligation to pay within a reasonable time, and where payment had not been made within reasonable time, suit to foreclose lien was authorized—Tucker v Dougherty Roofing Co, Tex Civ App, 137 S W 2d 881, error dismissed, judgment correct

Conditions as to time of payment

Under contract whereby mechanic agreed to wait for his wages until property owner procured loan on

property or sold it, wages would accrue on expiration of reasonable length of time after owner had opportunity to procure loan or sell property—Allen v Roufs, 30 P 2d 768, 146 Or 451

- default on installment contract

Where materialman declared all installments due because of owner's default, suit to enforce materialman's lien was not instituted before maturity of debt—Woodall v Southern Mfg Co, 135 So 446, 223 Ala 262

Moratorium laws do not apply to statutory liens—Atlantic Life Ins Co v Klotz, 181 So 519, 183 Miss 243

90. Fla—Sandquist & Snow v Kellogg, 133 So 65, 101 Fla 568, affirmed 136 So 285, 101 Fla 579

91. NY—Brescia Const Co v Walart Const Co, 264 NYS 862, 238 App Div 360

40 C J p 385 note 10

Repudiated contract

Suit to enforce mechanic's lien was not prematurely brought, although filed two days before final

payment was due, where defendant had repudiated contract—Janisch v Reynolds, 254 Ill App 569

92. Ky—Hardin v Marble, 13 Bush 58

40 C J p 385 note 15

93. NY—Brescia Const Co v Walart Const Co, 264 NYS 862, 238 App Div 360—Margulies v Seigel, 178 NYS 544, 108 Misc 483

40 C J p 385 note 14

94. NY—Margulies v Seigel, supra

95. NY—Johnson Serv Co v Hildebrand, 134 NYS 187, 149 App Div 680—Ringle v. Wallis Iron Works, 32 NYS 1011, 85 Hun 279, affirmed 49 NE 1103, 155 NY 675.

Same day lien claim filed

Mo—Waters v Gallemore, App, 41 S W 2d 870

96. Neb—Millsap v Ball, 46 NW. 1125, 80 Neb 738

40 C J p 385 note 16

97. Kan—Sutherland v Chesney, 116 P 254, 85 Kan 123

40 C J p 385 note 17.

tor,⁹⁸ but it has been held that a subcontractor may enforce his lien when payment becomes due to him and need not await the completion of the building.⁹⁹ Although the amount due the general contractor is a material issue in a proceeding by a subcontractor to enforce his lien, the fact that a proceeding to determine such amount is pending does not render the subcontractor's suit premature.¹

b. Limitations in General

Unless proceedings to enforce a mechanic's lien are instituted within the time prescribed by the statute, the right to enforce the lien will be barred or the lien discharged.

The mechanics' lien statutes generally prescribe a period of limitation within which a suit to enforce a mechanic's lien must be instituted,² and, where

proceedings to enforce the lien are not instituted within the time prescribed by the statute, the right to enforce the lien will be barred or the lien itself discharged,³ unless an order continuing the lien is obtained,⁴ although the right to recover on the debt secured may remain.⁵ The time for enforcement fixed by the statute has been held by many authorities to enter into, and be a part of, the right of lien,⁶ and the statute in making such provision has been regarded as not a pure statute of limitations,⁷ but other statutes have been held to be statutes of limitation,⁸ and to affect the remedy but not the lien.⁹ It has been held that a failure to institute action to enforce the lien within the time limited by the statute may be waived, as by a failure to plead it,¹⁰ but it has also been held that the matter is juris-

98. NY—Beecher v Schuback, 23 NYS 604, 4 Misc 54
40 C J p 385 note 11

99. Cal—Busset v California Builders Co., 12 P 2d 36, 133 Cal App 657

1. Conn—Pierce, Butler & Pierce Mfg Corporation v Enders, 174 A 169, 118 Conn 610

2. Fla—Booker & Co v Leon H Watson, Inc., 123 So 837, 96 Fla 671

La—Shreveport Long Leaf Lumber Co v Wilson, 197 So 566, 195 La 814

Okl—Claude Ricker Lumber & Paint Co v Barger, 158 P 2d 1031, 195 Okl 504

Pa—Chapin Lumber Co v Zagorski, Com Pl, 38 Luz Leg Reg 16

3. Cal—Howard v Societa Di Unione E Beneficenza Italiana, 145 P 2d 691, 62 Cal App 2d 842

Del—Hendrix v Kelley, 143 A 460, 4 W W Harr 120

Fla—Bittan v Atlantic Nat Bank of Jacksonville, 157 So 26, 117 Fla 19—Henley v Guthrie, 154 So 243, 114 Fla 541—Fulghum v Deno, 146 So 672, 108 Fla 594—Anderson v Dade Lumber Co, 133 So 321, 101 Fla 38—Paxton-Pavey Lumber Co of Florida v Rehbaum, 129 So 346, 100 Fla 85, rehearing denied 139 So 766, 100 Fla 88—Bowery v Babbit, 128 So 801, 99 Fla 1151—Weaver-Loughridge Lumber Co v Hobson, 128 So 642, 99 Fla 1183—Booker & Co v Leon H Watson, Inc., 133 So 837, 96 Fla 671

Ga—Kwilecki v Young, 180 SE 137, 180 Ga 602

Idaho—Corpus Juris quoted in Brown v Hawkins, 158 P 2d 840, 844, 66 Idaho 351

Iowa—Finn v Grant, 278 NW 225, 224 Iowa 527

Kan—Corpus Juris cited in Bell v Hernandez, 30 P 2d 1101, 1104, 139 Kan 216

NY—Malafsky v Becker, 7 NYS 2d 835, 255 App Div 444, motion granted 21 NE 2d 195, 280 NY 685

Pa—Reichert v Houser, 46 Pa Dist & Co 139, 9 Sch Reg 139

RI—Anasios v Brown, 161 A 218, 52 RI 462

Wyo—Peters v Dona, 54 P 2d 817, 49 Wyo 306

40 C J p 385 note 21

Bar when pleaded

Failure to commence action to enforce mechanic's lien within time prescribed is, when pleaded, bar to recovery—Union Tank & Pipe Co v Mammoth Oil Co., 25 P 2d 262, 134 Cal App 229

Benefit of notice lost

Claimant of mechanic's lien may give notice of lien or claim by recording it, but benefit of notice is lost unless suit is filed within statutory time—Torrington Co v Sidway-Tophitt Co., CCA Ind., 70 F 2d 949

Suit held timely

Ark—Union Indemnity Co v Covington, 12 SW 2d 884, 178 Ark 533

4. NY—Application of Standard Tile Co., 11 NYS 2d 603, 255 App Div 1096, reargument denied 13 NYS 2d 188, 257 App Div 831—Malafsky v Becker, 7 NYS 2d 835, 255 App Div 444, motion granted 21 NE 2d 195, 280 NY 685—Siracusa v Inch Corporation, 398 NYS 878, 164 Misc 820

5. NC—Hildebrand v Vanderbilt, 61 SE 620, 147 NC 639
40 C J p 386 note 22

Right to an accounting

Under statute requiring owner to withhold funds to pay claims of materialmen and subcontractors of which he has received notice, subcontractor may maintain action for an accounting, and such action need not be instituted within time limited for enforcing the lien—Grier-Low-

rance Const Co v Winston-Salem Journal Co., 151 SE 631, 188 NC 273—Campbell v Hall, 121 SE 761, 187 NC 464

6. US—Standrod & Co v Utah Impl-Vehicle Co., Idaho, 223 F 517, 139 CCA 65

40 C J p 386 note 23

7. Fla—Alzheimer v Palmer, 141 So 131, 105 Fla 224—Bowery v Babbit, 128 So 801, 99 Fla 1151

Or—Fleshman v Whiteside, 34 P 2d 648, 118 Or 73, 93 ALR 1456

40 C J p 386 note 24

Owners absent from jurisdiction

Under mechanic's lien statute, the limitation of time is made an essence of the right created and a lapse of the statutory period extinguishes the right altogether, notwithstanding absence of owners of property from the state—Crandall v Irwin, 39 NE 2d 608, 139 Ohio St 253, 139 ALR 895, adhered to 40 NE 2d 933, 139 Ohio St 463, 139 ALR 900

8. Cal—Mox, Inc., v Leventhal, 264 P 563, 89 Cal App 253

9. Cal—Hill v Hesse, 15 P 2d 526, 126 Cal App 171

Right of action

Statute limiting mechanic's lien suit goes to remedy and not to right of action—Richards Brick Co v Wright, 82 SW 2d 274, 231 Mo App 946

Perfection of lien

Compliance with statutory provisions respecting time for commencing action to enforce liens is not essential to perfecting of liens—Du Charme v American Wood Pipe Co., 296 P 168, 161 Wash 114

10. Cal—Hill v Hesse, 15 P 2d 526, 126 Cal App 171

Mo—Woodling v Westport Hotel Operating Co., 68 SW 2d 207, 227 Mo App 1231, transferred, see 55 SW 2d 477, 331 Mo 812.

dictional¹¹ and may not be waived¹² Where the statute contains no limitations as to time on the right of claimant to enforce the lien created by it as against the debtor, the right to enforce the lien is not affected by delay¹³

Operation of statute. It has been held that the particular time in which the lien claimant may be allowed to commence his action is a matter of procedure and may be controlled by a statute passed after the contract out of which the lien arises was entered into, enlarging the time in which to commence the action¹⁴ There is, however, authority to the effect that the time within which a lien must be enforced is controlled by the provision of the statute as it existed at the time the contract was entered into¹⁵

Applicability of general statutes The provision contained in the act conferring the lien controls over the provisions of limitation acts relating to other causes of action¹⁶

Construction of provisions The statutory provision limiting the period within which proceedings to enforce mechanic's liens must be instituted is to be

liberally construed to effect its purpose¹⁷ Provisions as to the time within which the lien claim shall be filed and prescribing the time within which action must be begun should be construed together¹⁸ Where, under the express provision of the statute, on the abandonment of the work by the contractor, the subcontractor or party furnishing material may enforce his lien to the same extent that the contractor might, the limitations applicable to a contractor and not to a subcontractor apply to the subcontractor's claim on abandonment by the contractor¹⁹

Suit against contractor. A mechanic's lien statute requiring a subcontractor to obtain judgment against the contractor before instituting action to enforce his lien and limiting the time within which the contractor must be sued does not govern as to the period within which the action to enforce the lien against the owner must be instituted²⁰

Deposit or undertaking to discharge lien Where the owner discharges the lien, under the provisions of the statute, by a deposit of the money in court, it has been held that the limitation prescribed for com-

Pa—Cassel v Stump, Com Pl, 62 Montg Co 12, 60 York Leg Rec 12 40 C J p 386 note 25

General denials of allegations of intervening petition, filed by mechanics' lien claimants in suit to establish plaintiff's lien, did not raise question of limitations, even though interveners alleged that they filed action at law to enforce lien within statutory time—Woodling v Westport Hotel Operating Co, 63 S W 2d 207, 227 Mo App 1231, transferred, see 55 S W 2d 477, 331 Mo 812

Objection to introduction of evidence by mechanics' lien claimants was not proper way to raise question of limitations—Woodling v Westport Hotel Operating Co, supra. Estoppel

(1) Owner and contractor, from whom materialman secured affidavits that work was continuing, with knowledge of their falsity, were not estopped to assert that lien was barred by limitations—Conner v Pacific Ready Cut Homes, 1 P 2d 1027, 115 Cal App 553

(2) Owner's statement that mechanic's lien claim would be settled did not estop him to assert that cross bill of one furnishing labor and materials to contractor to enforce his lien was filed too late and barred—Slater v First M E Church of Pontiac, 214 NW 417, 239 Mich 477

Course of dealing of parties will toll running of statute of limitations

—Brown v Mychel Co, 56 P 2d 1020, 186 Wash 97

Special appearance

In proceeding to foreclose mechanic's lien, the entry of a special appearance by owners of premises did not remove the bar of limitations prescribed by statute—Crandall v Irwin, 40 NE 2d 938, 139 Ohio St 463, 139 ALR 900

Personal representative cannot waive statute within which lien suit must be brought and thus deprive general creditors of assets to which they are otherwise entitled—Fleming v Kirkland, 146 So 384, 226 Ala 322

11. NY—Johnson v Waldo Griffiths, Inc, 259 NYS 386, 144 Misc 773

Or—Fleshman v. Whiteside, 34 P 2d 648, 148 Or 73, 93 ALR 1456

12. Or—Fleshman v Whiteside, supra

13. Fla—Bowery v Babbitt, 128 So. 801, 99 Fla. 1151

Ill—Garrett v. Stevenson, 8 Ill 261.

14. US—Bear Lake & River Waterworks & Irrigation Co v Garland, Utah, 17 S Ct 7, 164 U.S. 1, 41 L Ed 327

Ill—Builders Supply & Lumber Co v Calto, 49 NE 2d 876, 320 Ill App 1

Procedure to interrupt prescription Amendment to materialmen's lien statute which did not change substantive part of original statute but changed procedure required to be

followed in order to interrupt running of prescription, so that prescription would not be interrupted by mere filing of suit and reinscription of lien in mortgage records was necessary was "remedial" in nature and was therefore applicable to lien which was created prior to enactment of the amendment, the word "hereafter" as used in amendment did not require the amendment to be construed to operate prospectively only—Shreveport Long Leaf Lumber Co v Wilson, 197 So 566, 195 La. 814

15. Wis—Augustine v Congregation of Holy Rosary of Pompeii, 252 NW 271, 213 Wis 517 40 C J p 387 note 29

16. Minn—Botsford Lumber Co v Fuller, 212 NW 22, 170 Minn 130 40 C J p 387 note 30

17. Ariz—Lilliey v J D Halstead Lumber Co, 28 P 2d 616, 42 Ariz 546

18. Colo—Pacific Lumber Co v. Lieberman, 231 P 673, 76 Colo 332. 40 C J p 387 note 31

19. Ill—Roberts v Willmerring, 230 Ill App 620—Decatur Bridge Co. v Standart, 208 Ill App 592.

20. Ga—Southern Ry Co v Crawford & Slaten Co, 173 SE 91, 178 Ga 450—Robinson v Reese, 165 SE 744, 175 Ga 574—Buck v Tifton Mfg Co, 62 SE 107, 4 Ga App 695

Necessity of judgment against contractor see supra § 269

mencing an action or procuring an order continuing the lien has no application²¹ So, where the owner discharges the lien by a bond, the land is no longer liable and a provision requiring an action to be commenced to enforce the lien and a lis pendens to be filed within a prescribed time does not apply²²

c. Persons against Whom Action Must Be Instituted

The institution of proceedings to enforce a mechanic's lien has been held to stop the running of the statute of limitations only as to those persons made parties to the action, and an action which does not include all necessary parties has been held not to stop the running of the statute.

The institution of proceedings to enforce a mechanic's lien has been held to stop the running of the statute of limitations only as to those persons made parties to the action.²³ An action which does not include all necessary parties has been held not to stop the running of the statute,²⁴ and, where the statute requires that the contractor be party to a suit by a subcontractor or materialman to enforce a lien, the suit is not commenced within the limitations provision until he is made party, although proceedings were previously instituted against the owner²⁵

Owner Where an action to enforce a mechanic's lien is not instituted against the owner within the statutory time, it may not be enforced as against him,²⁶ and it would seem that in such case the lien is barred and is not enforceable, although other encumbrancers or lien claimants are made parties and served with process,²⁷ and is properly dismissed for want of prosecution,²⁸ the objection being one

which may be urged by other lien claimants or parties in interest²⁹ Moreover, as discussed infra subdivision h of this section, the defect may not be cured by joining the owner as a party after the statutory period has expired It has been held that the time within which an action must be begun cannot be extended as against another encumbrancer by an agreement between the lienor and the owner³⁰

Other lien claimants and parties in interest By express provision of some of the lien statutes no person is bound by an action to enforce the lien provided, unless made a party to the proceedings to enforce it within a period fixed,³¹ and generally under statutes making the time within which proceedings shall be instituted a part of the right to a lien, it ceases to exist as against all those whose rights, estates, or interests are claimed to be adverse and subordinate, unless they are made parties to an action to foreclose the lien within the statutory period,³² and this is true, although a proceeding to which they have not been made parties has been instituted in time³³ However, this rule has been held not to apply as to subsequent purchasers and encumbrancers in the absence of a statutory requirement that they be made parties to the lien proceedings³⁴ The statute sometimes particularly provides the period within which proceedings must be commenced as against other creditors and encumbrancers, the effect of which is that, if the proceeding is not brought within the time prescribed, the lien becomes unavailable as against such other creditors and encumbrancers,³⁵ but it has been held that the owner has no concern with this provision

21. NY—Hafker v Henry, 39 NY S 134, 5 App Div 258
40 CJ p 387 note 33

22. NY—Kelly v. Highland Constr Co., 118 NYS 123, 133 App Div 579
40 CJ p 387 note 34.

23. Cal—Union Tank & Pipe Co v Mammoth Oil Co, 25 P 2d 262, 134 Cal App 229

24. Mo—Reis v. Taylor, App, 103 SW 2d 892.

25. Ark—St Mathews Church v White, 291 SW 977, 173 Ark 1153
Fla—Anderson v Dade Lumber Co, 133 So 321, 101 Fla 38

Mo—Quigley v William M Rideout & Co, App, 127 SW 2d 37—Reis v Taylor, App, 103 SW 2d 892

26. NY—L Davidson, Inc, v Bellows, 3 NYS 2d 854, 254 App Div 703

27. Fla—Weaver-Loughridge Lumber Co v Hobson, 128 So 642, 99 Fla 1183

40 CJ p 387 note 35.

28. ND—Sleeper v Elliott, 162 N W 305, 36 ND 280, 283
40 CJ p 387 note 36

29. NY—Martin v De Coppet, 118 NYS 523, 64 Misc 385
40 CJ p 387 note 37

30. Idaho—Boise Payette Lumber Co v Weaver, 234 P. 150, 40 Idaho 516
40 CJ p 387 note 38

31. Minn—Bauman v Metzger, 176 NW 497, 145 Minn 133—Morrison County Lumber Co v Duclos, 163 NW 734, 138 Minn 20

32. Cal—Paramount Securities Co v Daze, 17 P 2d 1049, 128 Cal App 515

Colo—Stark Lumber Co v Keystone Inv Co, 20 P 2d 308, 92 Colo 259, followed in 20 P 2d 308, 92 Colo 266

40 CJ p 388 note 40.

33. Cal—Paramount Securities Co.

v. Daze, 17 P 2d 1049, 128 Cal App 515

Colo—Stark Lumber Co v Keystone Inv Co., 20 P 2d 306, 92 Colo 259, followed in 20 P 2d 308, 92 Colo 266

40 CJ p 388 note 41

34. Ala—Sturdavant v First Ave. Coal & Lumber Co, 122 So 178, 219 Ala. 303

Fla—Kurz v Pappas, 146 So 100, 107 Fla. 861, motion granted 147 So 271, 107 Fla. 861, and followed in Mediterranean Corporation v Pappas, 146 So 106, 107 Fla 876, motion granted 147 So 270 107 Fla 876—Booker & Co v Leon H Watson, Inc, 123 So 837, 96 Fla 671

La—Corpus Juris quoted in Conservative Homestead Ass'n v Boyle, 135 So 663, 664, 172 La. 878
40 CJ p 388 note 42

35. Ill—McGraw v Bayard, 96 Ill 146

40 CJ p 388 note 43.

and that only the creditor or encumbrancer who comes within it can complain of a violation thereof.³⁶ Where the lien has been seasonably established in an action at law or otherwise, although the encumbrancer was not made a party thereto, a bill in equity which seeks merely the determination of priorities between the lienor and the encumbrancer is not such a suit for the enforcement of the lien as must be begun within a statutory period after the maturity of the indebtedness,³⁷ but, where the lien is one which cannot be enforced at law, the suit in equity, being a primary proceeding for the establishment of the lien, must be begun within the period fixed by statute.³⁸

d. When Period Begins to Run

The point from which the statutory period within which an action to enforce a mechanic's lien must be instituted begins to run depends entirely on, and must be gathered from, the statute itself.

The point from which the statutory period within

which action to enforce the lien must be instituted begins to run depends entirely on and must be gathered from, the statute itself.³⁹

Commencement of work or delivery of materials. Where the statute so provides, proceedings to establish a mechanic's lien for labor or materials must be begun within a specified period after the commencement of the work or delivery of the materials.⁴⁰

Filing of lien claim or statement. Under various provisions the proceeding to enforce a mechanic's lien is to be brought within a fixed time from the filing of the lien or claim,⁴¹ and it has been held that, if the lien is filed before the expiration of the period limited therefor, the limitation of the proceeding to enforce it will nevertheless run from the filing,⁴² and that the failure to file a lien does not relieve from the necessity of bringing the action within the statutory period from the time when the lien should have been filed.⁴³ Where the right to

36. Ill.—Jennings v Hinkle, 81 Ill 183

40 C J p 388 note 44.

37. Ala.—Pilcher v E R Porter Co, 94 So 72, 208 Ala 202

Fla.—Sandquist & Snow v Kellogg, 138 So 65, 101 Fla 588, affirmed 136 So 235, 101 Fla 579

New improvement

A bill to separate the interests of the mechanic's lienor from those of a prior mortgagee where new improvements have been made on previously mortgaged property is not barred by the limitation applicable to proceedings for the enforcement of mechanics' liens generally.—Lary v Jones, 187 So 714, 237 Ala 575—40 C J p 386 note 27

38. Ala.—Pilcher v E R Porter Co, 94 So 72, 208 Ala 202

40 C J p 388 note 46

Enhancement in value of existing improvement

A proceeding in equity for the purpose of enforcing a lien as against the increase in the value of mortgaged property due to the work and material furnished in improving an existing improvement on the property must be begun within the time prescribed by statute for the enforcement of a lien generally.—Lary v Jones, 187 So 714, 237 Ala 575—Jefferson County Sav Bank v Ben F Barbour Plumbing & Electric Co, 68 So 43, 191 Ala 238

39. La.—George C Vaughan & Sons v Bodley, 1 La App 591

R.I.—Art Metal Const Co v Knight, 185 A 136, 56 R I 228

40. R.I.—Art Metal Const Co v Knight, supra

40 C J p 389 note 63.

Contract for work and labor

Fact that materialman performs labor on materials furnished does not make "contract for work and labor" within provision as to time to sue to enforce lien in case of such contracts.—Cook, Borden & Co v R Z L Realty Corporation, 147 A 891, 50 R I 375

No written contract

Mechanic's lien claim for materials furnished otherwise than under written contract is governed by section of mechanics' lien law requiring legal process to enforce lien to be commenced within six months from time of commencement of delivery of materials.—Art Metal Const Co. v Knight, 185 A 136, 56 R I 228

41. Cal.—Union Tank & Pipe Co v Mammoth Oil Co, 25 P 2d 262, 134 Cal App 229

Fla.—Roughan v Rogers, 199 So 572, 145 Fla 421—Drake Lumber Co v Semple, 130 So 577, 100 Fla 1757, 1771, 75 A L R 687—Paxton-Pavey Lumber Co of Florida v Rehbaum, 129 So 766, 100 Fla 83

Kan.—Bell v Hernandez, 30 P 2d 1101, 139 Kan 216

Mo.—Reis v Taylor, App, 103 SW 2d 892

N Y.—Application of Standard Tile Co, 11 N Y S 2d 603, 256 App Div 1096, reargument denied 12 N Y S 2d 188, 257 App Div 834

Okl.—Claude Ricker Lumber & Paint Co v Barger, 158 P 2d 1021, 195 Okl 504

Pa.—Leiby v Erdman, Com Pl, 20 Lehigh Co L J 153, 57 York Leg Rec 51—Chapin Lumber Co v Zagorski, Com Pl, 38 Luz Leg Reg 16—Cassel v Stump, Com Pl, 62 Montg Co, 12, 60 York Leg Rec 13

Wyo.—Peters v Dona, 54 P 2d 817, 49 Wyo 306

40 C J p 389 note 64

Filing lien extends time to sue owner, as well as persons as to whom constructive notice is necessary.—Alzheimer v Palmer, 141 So 121, 105 Fla 224

Married woman's separate property

Suit to enforce mechanic's lien claim against married woman's separate statutory property must be brought within twelve months from filing of notice of lien.—Pierson v Reinhardt, 133 So 553, 101 Fla 1392, rehearing denied 136 So 250, 101 Fla 1392

Mortgagee nonresident

Time for bringing action to foreclose mechanic's lien is not tolled by fact that mortgage holder, whose rights would be affected by foreclosure of lien, is nonresident of state.—Bell v Hernandez, 30 P 2d 1101, 139 Kan 216

Judgment not properly recorded

Materialman's lien, recorded more than two years prior to suit to cancel it as cloud, was not kept alive by judgment thereon not properly recorded and canceled over year before such suit.—Moseley v Levy, 137 So 559, 18 La App 70

Personal action

La.—Hicks v Tate, App, 7 So 2d 737, followed in N O Nelson Co. v Tate, 7 So 3d 740

42. Colo.—Hart & Schlessenger Corp v Mullen, 4 Colo 512

Time to file see supra § 139 et seq

43. Iowa.—Squier v Parks, 9 NW 324, 56 Iowa 407—Gilcrest v Gottschalk, 39 Iowa 311.

file a new or amended claim of lien exists, the time of beginning the action runs from the filing of an amended claim.⁴⁴ It has been held that, where receivership proceedings have been begun, an intervening petition within the time fixed by the court for proof of claims may entitle the lienor to enforcement of his claim, although the intervening petition is not filed until more than the statutory period has elapsed after the filing of the lien claim.⁴⁵

Maturity of claim or accrual of indebtedness
Under some statutes, the lien proceeding must be commenced within the period, prescribed after the accrual of the indebtedness or the arrival of the time of payment,⁴⁶ or the expiration of the term of credit where credit is given,⁴⁷ and a statute which prescribes a limitation of a number of days within which to enforce the lien by proper proceedings after the expiration of a credit given does not, without more, refer only to liens based on direct contract with the owner.⁴⁸ If no credit is given by the contractor the debt becomes due when the material is furnished,⁴⁹ or when the contract has been performed.⁵⁰

The last item on an account filed, in the absence of anything else showing that it matured by agreement at a different date, may be treated as the date of the indebtedness sought to be secured by lien.⁵¹

Under some of the statutes, where the payments become due in installments, the proceedings may be brought within the time prescribed after the payment of the last installment is due,⁵² but, under other statutes, the period of limitations commences on default in any payment.⁵³ It has been held that the time within which a subcontractor must institute action is determined, not by the time when the contractor is to be paid, but by the date of payment as fixed in the contract between the contractor and subcontractor.⁵⁴

Completion of work or furnishing of material.
Under some statutes a proceeding to enforce a mechanic's lien must be brought within the specified time after the performance of the work or the furnishing of materials.⁵⁵ Under such statutes, the period will run from the time the last material was

44. Wash—Lindley v McGlaulin, 109 P 118, 58 Wash 636

45. Ind—Randall v Wagner Glass Co, 94 NE 739, 47 Ind App 439

46. Ala.—Sherrod v Crane Co, 182 So 48, 236 Ala 344—Estes Lumber Co v Investors' Syndicate, 137 So 31, 223 Ala 408

Ga.—Kwelecki v Young, 180 SE 137, 180 Ga 602—Carter-Moss Lumber Co v Short, 18 SE2d 61, 66 Ga App 330

Miss.—Eagle Lumber & Supply Co v Peyton, 111 So 141, 145 Miss 432

RI—Anastos v Brown, 161 A 218, 52 RI 462—Placella v Pineli, 158 A 372, 52 RI 121
40 CJ p 390 note 69

Extension of time to pay, or forbearance by creditor, does not extend the time within which suit must be brought—Inerarity v A S Wade & Co, 106 So 828, 141 Miss 552.

47. Or.—Fleshman v Whiteside, 34 P 2d 648, 148 Or 73, 93 ALR 1456
40 CJ p 390 note 70

Partial payment on claim of holder of materialman's lien is not a "credit" within the statute providing that a lien shall bind an improvement only six months after filing unless action be brought within that time, or, if a "credit" is given, then six months after expiration of such credit

Alaska—Rutherford v Maki, 9 Alaska 350

Or.—Fleshman v Whiteside, 34 P 2d 648, 148 Or 73, 93 ALR 1456

48. Cal—Hughes v Hoover, 84 P 681, 3 Cal App 145
40 CJ p 390 note 71

49. Miss.—Inerarity v A S Wade & Co, 106 So 828, 141 Miss 552
40 CJ p 390 note 72

50. Ill.—Sedgwick v Concord Apartment House Co, 104 Ill App 5
40 CJ p 390 note 73

51. Ga.—Stewart v Randall, 76 SE 352, 138 Ga 796
40 CJ p 390 note 74

52. Cal—Hughes v Hoover, 84 P 681, 3 Cal App 145
40 CJ p 390 note 75

53. RI—Art Metal Const Co v Knight, 185 A 136, 56 RI 228

Default may not be waived and time to sue thereby extended—Inerarity v A S Wade & Co, 106 So 828, 141 Miss 552

Default not maturing entire debt

Where note, secured by mechanic's lien, provided for acceleration of payment only if default should be made in payment of any six principal installments together with interest thereon, default in payment of principal only was held not to have matured entire indebtedness, and hence period of limitations for foreclosing lien ran from date when last installment matured in ordinary course, and not from any accelerated date—Crumley v Ramsey, Tex Civ App, 93 S W 3d 191, error refused

54. Ill.—Material Service Corpora-

tion v Ford, 173 NE 179, 341 Ill 80

Contra.—George Green Lumber Co v Fendl, 216 Ill App 132

55. Fla.—Booker & Co v Leon H Watson, Inc, 123 So 837, 96 Fla 671—Carter v Gearty, 105 So 329, 90 Fla 170

Ill.—Builders Supply & Lumber Co v Calto, 49 NE2d 876, 320 Ill App 1

RI—Albert S Eastwood Lumber Co v Britto, 155 A 354, 51 RI 406

40 CJ p 390 note 76

Architect's lien

Suit for enforcement of architect's lien must be instituted within statutory time after building is completed, not after services are rendered—Park Lane Properties v. Fisher, 5 P 2d 577, 89 Colo 591

Without record of notice of mechanic's lien, lien exists only for twelve-month-period from date on which last labor or material was furnished—Alzheimer v Palmer, 141 So 121, 105 Fla 224—Nobles v Hobbs, 133 So 553, 101 Fla 1383, amended on other grounds 135 So 535—Paxton-Pavey Lumber Co of Florida v Rehbaum, 129 So 766, 100 Fla 88

Contract provision as to time of furnishing materials is not controlling as to limitations, it is the date of actual performance that governs—Consumers' Independent Lumber Co v Rozema, 237 NW. 433, 212 Iowa 696

furnished,⁵⁶ or last work done,⁵⁷ or from the completion of the work where continuous labor is performed under the entire contract⁵⁸

Where the work is done or materials furnished at different times under one contract, the time will begin to run from the date of the last work, or at the time the last item of material was furnished,⁵⁹ but a single lien cannot cover several distinct improvements made at different times and independent of each other, in such a case the suit must be brought within the statutory period after the labor on the particular improvement is finished in order to enforce a lien for that improvement⁶⁰ Where the statute requires suit to be brought within a prescribed period after the work is completed, it refers to the particular work undertaken either by the original contractor or by a subcontractor⁶¹ Where the contract is entire and the building is substantially completed and is treated by all parties as completed, the limitation will run, although there may be minor and unimportant details of the work left undone, especially if intervening rights have attached in favor of third persons,⁶² but substantial performance will not start the running of the statute where work is thereafter done in good faith within a reasonable time and in accord with the terms of the contract and such work is necessary to a finished performance⁶³ Under a statute fixing the completion of the building as the point from which the period of limitations is computed, the owner's acceptance of a building from the contractor will not start limitations running as against a materialman where substantial materials or labor are placed in the building by others after such acceptance.⁶⁴

Where a subcontractor is discharged before he

has completed his work, the time for filing a lien runs from the time of his discharge⁶⁵ So, where the lienee induces a termination of the contract before it has been completed by the lienor, the limitation runs from that time, nothing further having been done under the contract,⁶⁶ and, where the lienor stops work because of the default of the lienee, the statutory period has been held to run from that time⁶⁷ Where the owner completes the building under terms of the contract authorizing him to do so on default of the principal contractor, the rights of the materialmen are determined as if completion had been by the contractor⁶⁸

e Nature of Proceeding Required in General

In order to toll the running of limitations, the proceeding which is instituted to enforce the lien must be such as is contemplated by statute.

In order to toll the running of limitations, the proceeding which is instituted to enforce the lien must be such as is contemplated by statute⁶⁹ Where a court of law has no jurisdiction to render a decree, its judgment does not prevent the running of limitations as against the appropriate proceeding in equity⁷⁰ An application for permission to sue to enforce the lien or the grant of such permission has been held not to be a commencement of the action required by the statute.⁷¹

f. Assertion of Lien in Other Proceedings

The requirement that the lienor institute proceedings to enforce the lien within the statutory period is met where the lienor properly asserts his lien within the statutory time in a proceeding instituted by others.

A statutory limitation of the time for asserting a lien claim has been held to apply to a claimant made a party defendant to the suit of another lien claimant,⁷² or to a claimant who intervenes in such

56. Fla.—Drake Lumber Co v Semple, 130 So 577, 100 Fla 1757, 1771, 75 A L R 687

Ill.—Builders Supply & Lumber Co v Calto, 49 NE 2d 876, 320 Ill App 1

Iowa—Consumers' Independent Lumber Co v Rozema, 237 NW 433, 212 Iowa 696—Fryman v McCaffrey, 222 NW 19, 208 Iowa 531, rehearing denied 224 NW. 95, 208 Iowa 531

Minn.—Botsford Lumber Co v Fuller, 212 NW 22, 170 Minn 130 40 C J p 391 notes 78, 89

Last lienable item

Iowa—Consumers' Independent Lumber Co v Rozema, 237 NW 433, 212 Iowa 696

57. Ill.—Hoffman v Lake View Avenue Building Corporation, 12 NE 2d 340, 293 Ill App 627 40 C J p 391 notes 79, 90

58. NH—Hill v Callahan, 58 NH 497

59. Minn.—Doyle v Wagner, 111 N W 275, 100 Minn 380 40 C J p 391 note 87

60. Me.—Baker v Fessenden, 71 Me 292 40 C J p 391 note 88

61. Ky.—Longest v Breden, 9 Dana 141 40 C J p 391 note 77.

62. Tenn.—Luter v Cobb, 1 Coldw 525 40 C J p 391 note 81

63. Fla.—Century Trust Co of Baltimore v Allison Realty Co., 141 So 612, 105 Fla 456

64. Colo.—Curtis v Nunns, 131 P 403, 54 Colo 554—Lichty v Houston Lumber Co., 68 P 846, 39 Colo 53

65. Ill.—Huntington v Barton, 64 Ill 502

66. NH—Freeto v Houghton, 58 NH 100

67. US—South Fork Canal Co v Gordon, Cal., 6 Wall 561, 18 L Ed 894 40 C J p 391 note 85

68. Cal.—Hughes v Hoover, 84 P 681, 3 Cal App 145

69. Or.—Coggan v Reeves, 3 Or 275 40 C J p 391 note 92

70. Ala.—Jefferson County Sav Bank v Ben F Barbour Plumbing & Electric Co., 68 So 43, 191 Ala 338

71. Cal.—Wells v California Tomato Juice, 113 P 2d 916, 47 Cal App 2d 634

72. W Va.—Corpus Juris cited in

a suit,⁷³ or who asserts his lien by cross bill in a proceeding not to enforce a mechanic's lien,⁷⁴ although there is authority to the contrary where the statute allows one or more lien claimants to bring an action to which all others are to be parties for the purpose, among other things, of ascertaining the amount of all other liens with which plaintiff must share the proceeds.⁷⁵ It has been held that the lienor's rights are preserved where he is made party defendant to a suit instituted within the statutory period by another lienor,⁷⁶ or a suit whose purpose is to effect a proper distribution of the proceeds of the sale of the property against which the lien is claimed.⁷⁷ Proceedings to enforce the lien of a defendant or intervener have been regarded as not commenced as of the date on which the original action was instituted,⁷⁸ but as of the time a pleading setting forth the claim to a lien is filed.⁷⁹ A mere appearance in the action, it has been held, is not enough,⁸⁰ but the filing of an answer⁸¹ or cross bill,⁸² or a petition in intervention⁸³ setting forth the claim within the time prescribed, is as effectual as the bringing of an independent proceeding. Unless the statute requires the service of a cross complaint, it is sufficient that it be filed within the statutory time.⁸⁴ One who timely instituted a suit to enforce his mechanic's lien has been held to be entitled to pursue his remedy in a pending equity suit, although made party to such suit after

the statutory period expired.⁸⁵

Statutory provision for continuing. Under a statute providing that the lien shall be continued if the lienor is made a party defendant in an action to enforce another lien, the action which will keep the lien alive must be an action to foreclose the lien created by the lienor.⁸⁶ An action to foreclose a mortgage is not within such a provision.⁸⁷ However, such a provision does not limit the effect of an answer in the nature of a cross bill by a lienor.⁸⁸ Such a statute applies as to a lienor who is served with summons within the time within which an action to enforce a mechanic's lien must be brought, although other defendants are not served within such time.⁸⁹

Where a suit is brought by the owner to determine the validity of the liens of respective claimants, the lien of a claimant who was not a party to prior suits by other claimants and who has not proceeded to enforce his lien within the time prescribed by statute cannot be allowed.⁹⁰

g. When Proceedings Deemed Instituted

Under the various statutes, proceedings to enforce a mechanic's lien have been regarded as instituted when process is served, when the summons is issued, when the summons is delivered to the officer with the intent that it be served immediately, or on the filing of a complaint, bill, or petition.

Amato v Hall, 174 SE 686, 687, 115 W Va 79

40 C.J. p 388 note 47

73. Mo—Woodling v Westport Hotel Operating Co., 63 SW 2d 207, 227 Mo App 1331, transferred, see, 55 SW 2d 477, 331 Mo 812

Va—Richmond Engineering & Mfg Corp v Loth, 115 SE 774, 135 Va 110

40 C.J. p 389 note 48

74. Conn—Persky v Puglisi, 127 A 351, 101 Conn 658

75. Wis—Rohn v. Cook, 162 NW 183, 165 Wis 299

40 C.J. p 389 note 50

76. N.Y.—Malafsky v Becker, 7 NYS 2d 826, 255 App Div 444, motion granted 21 NE 2d 195, 280 NY 685

W Va—Amato v Hall, 174 SE 686, 115 W Va 79

Wis—Erickson v Patterson, 211 NW 775, 191 Wis 628

Effect of dismissal of plaintiff's lien claim see infra § 290

77. W Va—Amato v Hall, 174 SE 686, 115 W Va 79

78. Cal—Graham v California Drilling Exploration Co., 123 P 2d 88, 49 Cal App 2d 522

79. Cal—Graham v California Drilling Exploration Co., supra

Mo—Richards Brick Co v Wright, 82 SW 2d 274, 231 Mo App 946

Amendment

(1) Where answer seeking enforcement of mechanic's lien was defective, amendment not filed within four months after final payment became due was ineffectual.—In re Danville Hotel Co., DC Ill., 33 F 2d 162, affirmed in part and reversed in part on other grounds, CCA, 38 F 2d 10

(2) Amendment after expiration of statutory period generally see subdivision h of this section

Issuance of summons

Under mechanics' lien statute, even if equitable suit is pending in which lien of claimant may be adjudicated, if summons is not issued for claimant within period in which he must commence his action, his remedy is to enter his appearance and plead in the equitable suit before expiration of such period, in which event his action is commenced in time.—Imse-Schilling Sash & Door Co v Kellems, 179 SW 3d 910, 237 Mo App 960—Richards Brick Co v Wright, 82 SW 2d 274, 231 Mo App 946.

80. Fla—Drake Lumber Co v Sample, 130 So 577, 100 Fla 1757, 1771, 75 ALR 687

81. Ariz—Lilley v J D Halstead Lumber Co., 28 P 2d 616, 42 Ariz 546

40 C.J. p 389 note 51

82. U.S.—Continental & Commercial Trust & Savings Bank v. North Platte Valley Irr Co., Wyo., 219 F 438, 136 CCA 150

83. Cal—Mars v McKay, 14 Cal 127

40 C.J. p 389 note 53

84. Utah—Culmer v Caine, 61 P 1008, 22 Utah 216

85. Mo—Manchester Iron Works v E L Wagner Const. Co., 107 SW 2d 89, 341 Mo 389

86. N.Y.—Philbrick v Ignatz Florio Co-op Ass'n, 122 NYS 341, 137 App Div 613, affirmed 93 NE 1128, 200 NY 526

87. N.Y.—Philbrick v Ignatz Florio Co-op Ass'n, supra

88. N.Y.—Lincoln Nat Bank v John Peirce Co., 127 NE 253, 228 NY 359

89. N.Y.—Martin v De Coppet, 118 NYS 523, 64 Misc 385

90. Va—H N Francis & Co, Inc., v Hotel Rueger, Inc., 99 SE 690, 125 Va. 106.

Under some statutes, a proceeding to enforce a mechanic's lien is not regarded as begun until process has been served, which must be on the necessary parties and within the period prescribed for the life of the lien,⁹¹ or the necessary parties must have appeared,⁹² and it is not sufficient that the complaint be filed⁹³ or that process issue⁹⁴ within such period, and that service be had thereafter. Under other statutes, the suit is commenced within the limitation period when the summons is issued within it,⁹⁵ although served afterward.⁹⁶ The proceedings are deemed commenced under other statutes when the summons is delivered to the officer with the intent that it be served immediately.⁹⁷

Under still other provisions, the proceeding is regarded as begun on the filing of a complaint, bill, or petition,⁹⁸ the filing of which within the statutory period is sufficient without regard to the time of service of process or other steps necessary to be taken in the progress of the cause,⁹⁹ provided the issuance of summons is not delayed or obstructed by the lienor.¹ It has also been held under some statutes that the proceeding is not regarded as begun until process has been served² and a petition has been filed,³ and it is not sufficient that a complaint has been filed where process has not been served,⁴ or that process has been served where no complaint has been filed.⁵

91. Minn—Thompson Yards v Standard Home Bldg Co, 201 NW 300, 161 Minn 143
40 C J p 391 note 95
Process to institute proceeding see infra § 286

Lis pendens

(1) Filing of notice of pendency to foreclose mechanic's lien within three months after filing of lien is sufficient to continue validity of lien and it is unnecessary in addition to filing of notice of pendency that all defendants be served with process within same period—O'Neill v Seglin Const Co, 286 NYS 849, 158 Misc 742, affirmed 288 NYS 798, 248 App Div 684, affirmed 7 NE2d 686, 273 NY 549

(2) Necessity of notice of pendency of proceeding to enforce mechanic's lien generally see infra § 289

Service by publication

Where beginning of publication of service on nonresident owners was within the period, but it was not completed until after the period had expired, action was commenced in due time, since it was not necessary that service be completed within that time—Neukirch v Wong, 81 P 2d 499, 195 Wash 451.

Estoppel

An agreement, entered into by owner with attorney for corporation furnishing materials to contractors to waive service of summons and enter appearance in corporation's action to recover balance due for such materials and enforce lien on building therefor, rendered further service unnecessary and estopped owner to plead that suit was not brought within such time—Robins v East Arkansas Builders Supply Co, 137 SW2d 924, 199 Ark 1174.

92. Minn—Smith v Hurd, 52 NW 922, 50 Minn 503, 38 Am SR 661

93. Okl—Archer v Holmes, 271 P 1035, 133 Okl 267

94. Minn—Botsford Lumber Co v Fuller, 212 NW 22, 170 Minn 130

Okl—Archer v Holmes, 271 P 1035, 133 Okl 267

40 C J p 392 note 98

95. N.J.—Paterson Glass Co v Goldstein, Cir Ct, 129 A 422
40 C J p 392 note 99

96. Mass—Spofford v Huse, 9 Allen 575
Neb—Burlington v Cooper, 53 NW 1025, 36 Neb 73

97. Iowa—Consumers' Independent Lumber Co v Rozema, 237 NW 433, 212 Iowa 696
40 C J p 392 note 2

98. Fla—Drake Lumber Co v Sample, 130 So 577, 100 Fla 1757, 1771, 75 ALR 687—Baugher v Cohen, 124 So 813, 98 Fla 1081

Ill—Alexander Lumber Co v Kellerman, 192 NE 913, 358 Ill 207
Mich—Home Sav Bank v Young, 295 NW 474, 295 Mich 725

Mo—Hill-Behan Lumber Co v Sellers, App, 149 SW2d 465—Richards Brick Co v Wright, 82 SW 2d 274, 231 Mo App 946—Henry Evers Mfg Co v Grant, App, 284 SW 535

Or—Corpus Juris cited in Shea v Graves, 19 P 2d 406, 409, 142 Or 503

40 C J p 392 notes 3, 4

"Filing of suit" on lien claims within one year from date of recording was "judicial proceedings" which interrupted running of prescription against liens, although service of citation was not made within a year—National Homestead Ass'n v Graham, 147 So 348, 176 La 1062

Filing of complaint prevented by defendant

Lien for architectural services ceased to exist where no complaint to enforce lien was served or filed within year of last charge for services, and no affidavit to enlarge time for filing of lien was filed, notwithstanding filing of complaint was prevented by defendant's willful failure to furnish data—Augustine v Congregation of Holy Rosary of Pompeii, 352 NW 271, 213 Wis 517.

Enlarging time for filing

Court was without discretion to avoid statutory bar to lien for architectural services by enlarging period for filing complaint on plaintiff's motion, where no affidavit for enlargement of time was filed—Augustine v Congregation of Holy Rosary of Pompeii, supra

99. Ill—Alexander Lumber Co v Kellerman, 192 NE 913, 358 Ill 207

Mo—Richards Brick Co v Wright, 82 SW2d 274, 231 Mo App 946

Or—Shea v Graves, 19 P 2d 406, 142 Or 503

40 C J p 392 note 5

Affidavit

Where unknown owners and holders of note were made defendants in bill to foreclose materialman's lien commenced within limitation period, filing of affidavit to obtain jurisdiction of persons of unknown owners within that period was unnecessary—Alexander Lumber Co v Kellerman, 192 NE 913, 358 Ill 207

1. Mo—Hill-Behan Lumber Co v Sellers, App, 149 SW2d 465—Richards Brick Co v Wright, 82 SW2d 274, 231 Mo App 946

Sheriff's return

The return of issuance of summons in mechanic's lien suit signed by sheriff, which stated that summons was returned unexecuted by order of plaintiff's attorney, was prima facie evidence that writ was unexecuted by order of plaintiff's attorney—Hill-Behan Lumber Co v Sellers, Mo App, 149 SW2d 465

2. Wash—City Sash & Door Co v Bunn, 156 P 854, 90 Wash 669, Ann Cas 1918B 31

3. Wash—Davis v Williams, 30 P. 2d 668, 176 Wash 604

4. Wash—City Sash & Door Co v Bunn, 156 P 854, 90 Wash 669, Ann Cas 1918B 31

5. Wash—Davis v Williams, 30 P. 2d 668, 176 Wash 604

40 C J p 392 note 8 [a] (1).

Under the provisions of some statutes the lien may be preserved by an unsuccessful attempt to commence the action within the prescribed period,⁶ provided service is thereafter made within a stipulated time.⁷

h. Amendment after Expiration of Period

A defect which does not go to the validity of the lien may be cured by amendment after the time limited for commencing the proceeding, but necessary parties may not be joined after such time.

A defect which does not go to the validity of the lien may be cured by amendment after the time limited for commencing the proceeding,⁸ as where the cause of action is not changed,⁹ but an amendment after the time limited to supply a step which is prerequisite to the validity of the lien itself cannot be allowed, since the lien has been discharged by the omission,¹⁰ nor can additional property be included by amendment after the lien is barred,¹¹ or an entirely new cause of action set up.¹²

Persons who are necessary parties to the action

may not be joined after the statutory period has expired,¹³ and it has been held that a substitution as to party plaintiff may not be made after the statutory time has expired.¹⁴ Where the owner or an encumbrancer or other person acquiring an interest in the property which cannot be affected by the foreclosure proceeding in his absence from the record is originally omitted and thereafter brought in by amendment, the statutory bar will operate in his favor if the period expired before the date of the amendment because as to him the suit is commenced at the date of the amendment making him a party,¹⁵ but it has also been held that the statutory provision as to time is limited to the owner and that other persons may be made parties after the statutory time has expired.¹⁶ Where the principal contractor is a necessary party to an action by a subcontractor to enforce his lien, it has been held that the general contractor may not be made party after the statutory time has expired,¹⁷ but there is also contrary authority,¹⁸ and, where the contractor is not a necessary party, the bringing in of the general

6. NY—Gee v Torrey, 28 NYS 239, 77 Hun 23
40 C.J. p 392 note 7

7. Ohio—Crandall v Irwin, 40 NE 2d 933, 139 Ohio St 463, 139 ALR 900

Service after period held valid if within life of lien—Archer v Holmes, 271 P 1035, 133 Okl 267

8. Ill—Charles A Hohmeier Lumber Co v Knight, 182 NE 715, 350 Ill 248

Or—Andersen v Turpin, 142 P 2d 899, 172 Or 430

SC—National Loan & Exchange Bank of Columbia v Argo Development Co, 139 SE 183, 141 SC 72

40 C.J. p 394 note 14

Description of property

Amendment to complaint to enforce mechanic's lien, which described one improved acre of land by metes and bounds, was not commencement of new action, but only more particular description of land on which lien was sought—Arkansas Foundry Co v American Portland Cement Co, 75 SW 2d 387, 189 Ark 779

9. Ill—Charles A Hohmeier Lumber Co v Knight, 182 NE 715, 350 Ill 248

40 C.J. p 394 note 15

10. Ill—Lord Lumber & Fuel Co. v Hancock, 278 Ill App 497

40 C.J. p 394 note 16

11. Miss—Dodds v Cavett, 97 So 813, 133 Miss 170

12. Man—Davidson v Campbell, 5 Man 250

Contract instead of subcontract

Amendment of pleading to assert mechanic's lien claim as contractor instead of as subcontractor made over six months after filing lien statement was barred—McDonald Amusement Co v Fleming Bros Lumber Co, CCA Wyo, 35 F 2d 638

13. Fla—Anderson v Dade Lumber Co, 133 So 321, 101 Fla 38

Mo—Reis v Taylor, App, 103 SW 2d 892

Wyo—Peters v Dona, 54 P 2d 817, 49 Wyo 306

14. Okl—Garrett v Downing, 90 P 2d 636, 185 Okl 77

Action brought by individual instead of corporation

The commencement of suit to foreclose the lien by stockholder in corporation as an individual within the time required by statute did not inure to the benefit of the corporation which had performed the work and furnished the material, notwithstanding the corporation was a family corporation, and notwithstanding the stockholder who had filed the action owned a majority of the stock—Garrett v Downing 90 P 2d 636, 185 Okl 77

15. Cal—Union Tank & Pipe Co v Mammoth Oil Co, 25 P 2d 262, 134 Cal App 329

Wyo—Corpus Juris quoted in Peters v Dona, 54 P 2d 817, 823, 49 Wyo 306

40 C.J. p 394 note 19.

Owner

Defect is not cured by making owner a party after the statutory period has expired—Weaver-Lough-

ridge Lumber Co v Hobson, 128 So 642, 99 Fla 1183

16. Okl—Ketcham v Cunliff, 137 P 1095, 77 Okl 287

Subsequent mortgagee or grantee is joined only for purpose of establishing priority and not for purpose of establishing lien, and amendment joining such parties after expiration of statutory period for enforcing lien is proper

Ala—Sturdavant v First Ave Coal & Lumber Co, 122 So 178, 219 Ala. 303

Fla—Booker & Co v Leon H Watson, Inc, 123 So 837, 96 Fla 671

Subsequent purchaser with notice

Mechanic's lien suit commenced within statutory period against one owning premises at time lien attached was not barred as to subsequent owner taking with notice, who was later joined for purpose of foreclosing right of redemption—Brace v Gauger-Korsmo Const Co, CCA Ark, 36 F 2d 661, certiorari denied 50 S Ct 333, 281 US 738, 74 L Ed 1163

17. Mo—Quigley v William M Rideout & Co, 127 SW 2d 37

40 C.J. p 395 note 20

18. Del—Corpus Juris cited in Westinghouse Electric Supply Co v Franklin Institute of State of Pennsylvania for Promotion of Mechanic Arts, 21 A 2d 304, 207, 9 Terry 319

40 C.J. p 395 note 21.

Procedure

In order to make general contractor a party defendant after the return date of the writ of scire facias,

contractor as defendant after the expiration of the statutory period in an action by a materialman or subcontractor will not affect the original action which was brought in time,¹⁹ at least where the owner is not prejudiced.²⁰ It has been held that, where in proceedings to foreclose a mortgage a receiver of the property involved has been appointed, the receiver may be brought in by amendment after the period for limitations for foreclosing the mechanic's lien has expired.²¹ The fact that trustees of a prior mortgage against whom no relief was sought were not brought in until after the period of limitations had expired is no ground for defeating the mechanic's lien as against the mortgagor.²²

1. Prosecution of Proceedings

Diligent prosecution has been required of suits to enforce mechanic's liens.

The requirements of the statute in respect of the steps to be taken in the prosecution of the lien claim must be pursued,²³ and a diligent prosecution of a mechanic's lien suit has been required in order to preserve the lien.²⁴ Under some statutes, a failure of diligence is presumed where judgment has not been rendered within a specified time.²⁵

§ 283. Parties Plaintiff

A suit to enforce a mechanic's lien should be brought by, and in the name of, the real party in interest.

The rule that an action should be brought by, and in the name of, the real party in interest is applied to suit to enforce mechanics' liens,²⁶ but one has no such interest as will make him a proper party to enforce such lien unless that interest is in the lien itself as distinguished from a mere interest in the result of the action.²⁷ Where the lienor, before the commencement of an action to enforce the lien, assigns a part of his claim to another person, such assignee is not a necessary party to the action.²⁸ Under a statute which entitles a subcontractor or materialman to an accounting from an owner on whom he has served notice of his claim, a subcontractor may sue in his own name where he has given the requisite notice,²⁹ and in such case the general contractor may not sue for such claim,³⁰ but suit may be brought in the general contractor's name where the notice has not been given.³¹ Under the rule that, when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, whether or not he describes himself to be an agent, either the agent or principal may sue on the contract, an undisclosed principal may sue to enforce the lien under a contract made

the proceeding may be stayed and a writ of scire facias issued commanding the appearance of general contractor at a date designated therein, or a rule may be granted, returnable within a reasonable time and before final adjournment of the term of court at which original scire facias was returnable, requiring general contractor to show cause why he should not be brought in and made a party defendant, the second method of procedure being preferred—*Westinghouse Electric Supply Co v Franklin Institute of State of Pennsylvania for Promotion of Mechanic Arts*, supra.

19. Or—*Andersen v Turpin*, 142 P 2d 999, 172 Or 420
40 C J p 395 note 21

20. W Va—*Huntington Plumbing & Supply Co v McGuffin*, 83 S E 194, 75 W Va. 78—*Augur v Warder*, 81 S E 708, 74 W Va. 103

21. Mich—*Prather Engineering Co v Detroit, F & S R Co*, 116 N W 376, 152 Mich 582

22. Tenn—*Niehaus v C B Baker Constr Co*, 186 S W 461, 135 Tenn 382, Ann Cas 1918B 28

23. N Y—*Mushlitt v Silverman*, 50 N Y 860
40 C J p 393 note 10

24. N J—*Hendrickson v Frieland*, 150 A. 326, 106 N J Law 427—

Standard Lumber Co v Modern Home Bldg Const Co, 142 A. 665, 6 N J Misc 743
40 C J p 393 note 11
Dismissal for lack of diligence see infra § 290

25. N J—*Standard Lumber Co v Modern Home Bldg Const Co*, supra

Lienor has burden of overcoming presumption

N J—*Joseph Harris & Sons v Delaware, L & W R Co*, 154 A 823, 108 N J Law 141—*Standard Lumber Co v Modern Home Bldg Const Co*, 142 A 665, 6 N J Misc 743
40 C J p 393 note 12 [c].

26. Ala—*Pensacola R Co. v Schaffer*, 76 Ala 233
Neb—*Hoagland v Van Etten*, 35 N W 869, 22 Neb 681

Action at law or in equity

In an action at law to enforce a lien, the mechanic or materialman, as claimant, is plaintiff, and the building contractor and owner of the property are defendants, while in an equitable action one of many claimants may bring the action and make all other claimants, as well as contractor and owner of the property, defendants—*Wiles-Chipman Lumber Co v Pieper*, Mo App, 176 S W 2d 50

Where the remedy is a special proceeding, the statutory provision that "every action must be prosecuted in the name of the real party in interest," has no application—*Hallahan v Herbert*, 57 N Y 409

27. N Y—*Moscowitz v Sassulsky*, 126 N Y S 513, 141 App Div 763, affirmed 100 NE 1130, 206 N Y 720
40 C J p 396 note 44

28. NC—*Boyle v Robbins*, 71 NC 130
In whose name assigned lien enforced see supra §§ 218, 220

29. NC—*Grier-Lowrance Const Co v Winston-Salem Journal Co*, 151 S E 631, 198 NC 273
40 C J p 396 note 43 [b]

Detailed statement

Notice giving subcontractor right to maintain suit against owner must be detailed statement, but, if contract is for gross sum, particularity is not essential—*Grier-Lowrance Const Co v Winston-Salem Journal Co*, 151 S E 631, 198 NC 273

30. NC—*Grier-Lowrance Const Co v Winston-Salem Journal Co*, supra

31. NC—*Grier-Lowrance Const. Co v Winston-Salem Journal Co*, supra.

with the agent,³² and, if a party does business in his own name as agent for an undisclosed principal and files the lien in the same name, the action to enforce the lien is properly brought in that name³³

Joinder of plaintiffs. If the cause of action accrues jointly to more than one, all must join and the action cannot be maintained by one in his own name³⁴. Two or more persons may join if they together have furnished the work or materials and are jointly interested in the lien,³⁵ but one who has no interest in the lien itself, although he may have an interest in the subject matter of the recovery, cannot be joined with the party who is entitled to the lien, and, if there is such an unauthorized joinder, a judgment cannot be rendered in favor of the former,³⁶ but, if there is no objection to the form of the petition, the judgment may be rendered for the party entitled to the lien under the contract³⁷. Where a contractor is a proper party in an equitable suit by a subcontractor, it has been held immaterial whether he is joined as plaintiff or defendant, under the general equity rule³⁸

Partnership. Where work is done or materials are furnished by copartners, the partners must join in an action to enforce the lien,³⁹ and, where the contract is made in the name of one partner, but for the benefit of both, and they jointly perform the contract, it has been held that they may maintain a joint action to enforce the lien⁴⁰. The nonjoinder of a partner is not, however, available in a suit by

the member in whose name the contract was made, the firm doing business in his name, where the answer admitted the making of the contract alleged and there was no amendment of the answer.⁴¹

§ 284. Parties Defendant

- a In general
- b Owner generally
- c Husband and wife
- d Other lienors and encumbrancers in general
- e Mortgages; trust deeds
- f. Persons personally liable for debt secured in general
- g General contractor
- h Effect of failure to join parties

a. In General

All persons who have an interest in the property on which the mechanic's lien is claimed or in the subject matter of the controversy are proper, and, under some statutes, necessary parties to an action to enforce the lien.

All persons who have an interest in the property on which the mechanic's lien is claimed or in the subject matter of the controversy,⁴² or whose presence may be necessary for a complete determination of the matters involved in the action or suit,⁴³ may properly be made parties defendant in an action to enforce a mechanic's lien, and are necessary parties under some statutes,⁴⁴ as well as under the rules in

32. N Y—Berry v Gavin, 34 N Y S 505, 88 Hun 1

33. Conn—Hooker v McGlone, 43 Conn 95

34. Pa—Howard v McKowen, 2 Browne 150

Tex—Ricker v Schadt, 23 S W 907, 5 Tex Civ App 460

35. Ill—Lombard v Johnson, 76 Ill 599

Mass—Rockwood v Walcott, 3 Allen 458

36. Ill—Roberts v Gates, 64 Ill 374

Pa—Barker v Maxwell, 8 Watts 478.

37. Mass—Moore v Dugan, 60 N E 488, 179 Mass 153

38. N Y—Freese v Avery, 69 N Y S 150, 57 App Div 633

39. Mo—Hammersmith v Hilton, 8 Mo App 664

Pa—Howard v McKowen, 2 Browne 150

Dissolution

(1) Where partners, on a dissolution and transfer of assets, retain as individuals a firm debt secured by mechanic's lien, such individuals may sue as such to enforce the lien

—Soule v Borelli, 68 A 979, 80 Conn 392

(2) It has been held that, when the debt and the lien for its security accrue to a copartnership, all proceedings for enforcement of the claim must be had in the name of the copartnership, notwithstanding its dissolution and the assignment of his interest by one copartner to the other. The remaining partner takes all the rights of the firm, and may exercise them in the name of the firm, for all purposes necessary for their enforcement and for closing up the joint business.—Busfield v Wheeler, 14 Allen, Mass, 139—40 C J p 396 note 56

(3) On the other hand, it has been held that on the death of one partner, the suit may and should be prosecuted by the survivor in his own name.—Davis v Church, 1 Watts & S, Pa., 210

40. Ill—Lombard v Johnson, 76 Ill 599

40 C J p 396 note 54

41. Mass—Gilbert v. Fowler, 116 Mass 375

42. Wis—Milwaukee Structural

Steel Co v Borun, 159 NW 811, 164 Wis 502, rehearing denied 162 NW 424, 164 Wis 502

40 C J p 396 note 53, p 397 note 64 [a]

43. Ala—Richardson Lumber Co v Howell, 122 So 343, 219 Ala 328 40 C J p 397 note 59

44. Ill—Leffers v Hayes, 64 N E 2d 768, 327 Ill App 440—Bingaman v Dahm, 30 N E 2d 509, 307 Ill App 432

40 C J p 397 note 60

The statute contemplates but one suit for enforcement of mechanic's lien and that all persons who are known to have any interest, either legal or equitable, in the land shall be joined as parties.—Leffers v Hayes, 64 N E 2d 768, 327 Ill App 440—Bingaman v Dahm, 30 N E 2d 509, 307 Ill App 432

Interests disclosed by proper records

Where there is no notice of other interests, only those whose interests are disclosed by records are necessary parties to mechanic's lien foreclosure suit.—Evans v Dockins, Mo App, 40 S W 2d 508.

equity governing the subject of parties,⁴⁵ at least in so far as their joinder is necessary for the purpose of concluding them by the proceedings and judgment.⁴⁶ On the other hand, one who is not interested or who cannot be prejudicially affected by the proceedings and judgment is not a necessary party.⁴⁷ The lien statute sometimes designates the particular classes of persons who must be made parties to the proceeding.⁴⁸

In suit by assignee Under the rule requiring all parties in interest to be before the court, the assignor of the claim is a proper, if not a necessary, party to a proceeding by the assignee.⁴⁹ An assignee who assigns all of his rights and interests is not, it has been held, a necessary party in a suit by his assignee,⁵⁰ but, in an action by an assignee of the builder's claim under an assignment made expressly subject to a prior assignment, it seems that the omission of the prior assignee creates a defect of parties.⁵¹

b. Owner Generally

The owner of the property or interest against which the lien is claimed is a necessary party to a suit to enforce a mechanic's lien.

The owner of the property or of the interest

sought to be charged is a necessary party to a suit to enforce a mechanic's lien,⁵² and under statutory provisions requiring the owner to be made a party, the word "owner" has been held to mean the person for whom, as the owner of the land, the building is constructed, etc.,⁵³ or the person on whose interest in the property the lien is claimed.⁵⁴ Where a contract is made by trustees vested with the legal estate and full management of the property involved, the beneficiaries are not necessary parties to a proceeding to enforce the lien.⁵⁵ The holders of the legal title and of an equitable reversionary title must be joined where the contract is made with holders of the equitable title and adopted as its own by the holder of the legal title.⁵⁶

Joint owners A joint owner of the land is a necessary party under a statute requiring all parties in interest to be joined,⁵⁷ but, where a contract made with one of two joint owners creates a lien on the whole property and a personal liability only on the party to the contract, the lien may be enforced in a suit against the latter alone,⁵⁸ and it has also been held that, on the theory that the interest of an omitted owner cannot be bound by any judgment in the suit from which he was omitted, a

45. Fla.—Sandquist & Snow v Kellogg, 133 So 65, 101 Fla 568, affirmed 136 So 235, 101 Fla 579
Mont—Corpus Juris cited in Sunburst Oil & Refining Co v Callender, 274 P 834, 837, 84 Mont 178
40 CJ p 397 note 61

Agent who procured loan

Lumber company's manager, who obtained money on owner's notes and mortgage to pay mechanics' liens, and then applied it to other debts, was a necessary party in suit to enforce materialman's lien—Builders' Supply Co v Smith, 133 So 721, 223 Ala 554, followed in Builders' Supply Co v Phillips, 133 So 723, 223 Ala 556, and Smith v Chestnut, 133 So 723, 222 Ala 556

46. Fla.—Sandquist & Snow v Kellogg, 133 So 65, 101 Fla 568, affirmed 136 So 235, 101 Fla 579
40 CJ p 397 note 62

Persons concluded by judgment see *infra* § 334

47. Cal.—Western Electric Co v Cooley, 251 P 331, 79 Cal App 770
40 CJ p 397 note 65

48. N.Y.—Gass v Souther, 61 N.Y.S 305, 46 App Div 258, affirmed 60 N.E 1111, 167 N.Y 604
40 CJ p 397 note 63

49. Va.—Pauo v Bethell, 75 Va 825
40 CJ p 397 note 68

50. U.S.—Batesville Inst v Kauff-

man, Ark, 18 Wall 151, 21 L Ed 775

51. N.Y.—Lawrence v Greenfield Cong Church, 58 N.E 24, 164 N.Y 115

52. Mo.—Harrison v Creason, App. 176 S.W 2d 849

N.Y.—John Comolli & Co v Margolies, 224 N.Y.S 626, 130 Misc 894

Tenn.—East Lake Lumber Box Co v Simpson, 5 Tenn App 51

Tex.—Fairrell v Jowell, Civ App, 76 S.W 2d 546—McGranahan Lumber Co v Pyramid Asbestos & Roofing Co, Civ App, 18 S.W 2d 224, error refused

Wyo.—Corpus Juris cited in Peters v Dona, 54 P 2d 817, 822, 49 Wyo 306

40 CJ p 399 note 5, p 400 note 6

Owner a proper party

Ala.—David Lupton's Sons Const Co v Hugger Bros Const Co, 143 So 610, 137 Ala 25

Holder of record title

Mechanic's lien claimant is not required to proceed against holder of record title, but against owner of property—Albert S Eastwood Lumber Co v Britto, 155 A 354, 51 R.I 406

Mortgagor

(1) Mortgagors who were true owners were proper parties defendant in suit to foreclose mechanic's lien—Huebner v Lashley, 214 N.W 107, 239 Mich 50

(2) Where mortgagor's equity of redemption expired before bankruptcy, trustee in bankruptcy was not necessary party to mechanics' lien foreclosure—Vander Horst v Kalamazoo Apartments Corporation, 215 N.W 57, 239 Mich 593

53. Colo.—Cornell v Conine-Eaton Lumber Co, 47 P 912, 9 Colo App 225

40 CJ p 400 note 7

54. Colo.—Hoin v Clark Hardware Co, 131 P 405, 54 Colo 322, 45 L.R.A.N.S. 100

55. Ill.—Lipavsky v 16th St Bldg Corporation, 267 Ill App 85

Okl.—Browne v Rowsey, 75 P 3d 432, 181 Okl 602

N.C.—Cheatham v Rowland, 92 N.C 340

56. Ga.—Williams v Chatham Real Est & Improvement Co, 78 S.E 869, 13 Ga App 42

57. Ill.—La Crosse Lumber Co v Grace M E Church, 183 Ill App 584—Race v Sullivan, 1 Ill App 94

"Owner" as "owners"

Under a statute requiring the action to be against the owner, the word "owner" must be construed to mean "owners" where the title to the premises is held by more than one person—Herbert Boiler Co v Lewis, 185 Ill App 334

58. La.—Johnson v. Weinstock, 31 La Ann 698

coowner is not a necessary party to an action to foreclose a lien⁵⁹ Where the lien is sought to be enforced only against the interest of one of the joint owners, the other owners are not necessary parties⁶⁰

Lessor and lessee. In proceedings to establish a lien on a building erected on leased premises,⁶¹ or on the building and the leasehold interest,⁶² the lessor has been held by some decisions to be a necessary party However, under the view that the person whose interest it is sought to charge is the person intended by a statute requiring the owner to be made a party, it has been held that the lessor is not a necessary party where it is sought to reach a leasehold interest only⁶³ The owner of a leasehold interest in the premises has been held a necessary party⁶⁴

Change in, or transfer of, title Where there has been a change of ownership in the premises against which it is sought to enforce the lien, it has generally been held that the proceedings are properly brought against the owner at the time they are instituted,⁶⁵ and in some cases he has been held to be a necessary or indispensable party,⁶⁶ at least if the judgment is to be effective as against his inter-

est or he is to be bound thereby,⁶⁷ although the judgment may be valid except for his right to impeach the proceedings⁶⁸ and as to the interest of the parties before the court⁶⁹ Under this view, the original owner who has parted with his interest need not be joined,⁷⁰ at least where no personal judgment is demanded⁷¹ Under some statutes, the owner at the time the lien was acquired is a necessary party, even though he transferred the title before the action was commenced,⁷² and a purchaser subsequent to the time the lien was acquired is not a necessary party⁷³ In any event, when there has been a change of ownership, the owner at the time the lien was acquired⁷⁴ and the owner at the commencement of the action⁷⁵ are proper parties

Where the contract on which the lien is claimed is made by one in possession under a contract of sale, the vendor has been held not a proper party to an action to enforce the lien against the interest of his vendee⁷⁶ It has been held that an intermediate transferee against whom no relief is sought is not a necessary party⁷⁷

Death of owner If the owner dies, having made the contract while living, and a suit is commenced to foreclose a lien, his legal heirs are proper parties defendant⁷⁸ If the owner dies intestate before

59. Alaska.—Turner v Enstrom, 5 Alaska 118

60. Fla.—Browne v Park, 198 So 463, 144 Fla 696

61. Ala.—Taylor v McGill, 88 So 564, 205 Ala 458

Ky.—Walter v Wooley, 8 Kv Op 337

62. Ala.—Taylor v McGill, 88 So 564, 205 Ala 458

63. Colo.—Horn v Clark Hardware Co, 131 P 405, 54 Colo 522, 45 L R.A.N.S., 100

Mont.—Corpus Juris cited in Sunburst Oil & Refining Co v Callender, 274 P 834, 837, 84 Mont 178

64. Ala.—Woodson v Wilson, 144 So 122, 25 Ala App 241
40 C J p 400 note 20

Assignor of lease

(1) Assignor of lease is not a necessary party—Sunburst Oil & Refining Co v Callender, 274 P 834, 84 Mont 178—40 C J p 401 note 31 [a]

(2) He may be a proper party as where a lease provided that all repairs should be done at the expense of the lessee, and the lessee assigned such lease—Maxim v Thibault, 126 A 569, 124 Me 201

65. Tenn.—Fischer Lime & Cement Co v Kaucher, 51 SW 2d 492, 164 Tenn 657
40 C J p 400 note 21

66. Tenn.—Fischer Lime & Cement Co v Kaucher, supra.
40 C J p 400 note 23.

67. Neb.—Monroe v Hanson, 66 N W 12, 47 Neb 30
40 C J p 400 note 24
Persons bound by judgment generally see infra § 334

Where only former owner is male party, materialmen's lien judgment was void of any real substance or force—Hervey v Commercial Bank of Clarksdale, 120 So 463, 153 Miss 894

68. Mo.—Schaeffer v Lohman, 31 Mo 68
40 C J p 401 note 25

69. Ark.—White v Chaffin, 32 Ark 59

70. Mo.—Reese v Cibulka, App, 68 SW 2d 902

Okl.—Corpus Juris cited in Hatten v Intercocean Oil Co, 78 P 2d 392, 402, 182 Okl 465
40 C J p 401 note 29

Assumption of debt

(1) Where the original debt must be established, the original debtor is a necessary party where the grantee of the property had not assumed the debt—Walter v Dearing, Tex Civ App, 65 SW 380

(2) Where the purchaser assumed the debt, the lien could be enforced against him without joining the original owner—Cullers v Greenville First Nat Bank, Tex Civ App, 29 S W 72

71. Okl.—Corpus Juris cited in Hatten v Intercocean Oil Co, 78 P 2d 392, 402, 182 Okl 465
40 C J p 401 note 30

72. Del.—Carswell v Patzowski, 55 A 342, 1013, 20 Del 403

73. Ga.—Oglethorpe Sav & Trust Co v Morgan, 102 SE 528, 149 Ga 787.
40 C J p 401 note 27

74. Ala.—Sturdavant v First Ave Coal & Lumber Co, 128 So 178, 219 Ala 303
40 C J p 401 note 31

75. Del.—Carswell v Patzowski, 55 A 342, 20 Del 403
40 C J p 400 note 22

76. Cal.—Worden v Hammond, 37 Cal 61
Pa.—O'Kane v Murray, 25 Pa Dist 87, affirmed 97 A 94, 252 Pa 60

77. Tex.—Butler v Tyer, Civ App, 244 SW 1059
40 C J p 401 note 23

78. NH.—Russell v Howell, 69 A 886, 74 NH 551
40 C J p 401 note 34

Creditors of deceased property owner are not proper parties to mechanics' lien suit, since personal representative is to protect creditors' interests—Fleming v Kirkland, 146 So 384, 236 Ala 222.

suit is brought to enforce the lien, then, under the rule that a lien cannot be declared in a proceeding to which the owner of the property is not a party, it is held that his heirs must be made parties to the suit,⁷⁹ and the statutory provision for reviving suits against the personal representatives alone would apply only where the suit is begun in the lifetime of the owner.⁸⁰ However, in the proceeding in which the heirs are parties, the personal representative may be joined.⁸¹ On the other hand where the personal estate is liable to the payment of the judgment and the lien is but an additional security, both the heirs and the administrator are necessary parties.⁸² In other cases, turning on the terms of the statutes, it has been held that the heirs need not be made parties but that it is sufficient to make the administrator a party.⁸³ Where the lien attaches to the extent of the interest of the owner and does not create a personal claim against such owner, if the executors have no interest in the land by devise or otherwise the proceeding cannot be maintained against them.⁸⁴ Where the interest of decedent had ceased and no personal liability exists as against his estate, his heirs or representatives need not be made parties.⁸⁵

c. Husband and Wife

The owner's spouse may be a proper party to a proceeding to enforce a mechanic's lien where it is sought to affect any interest the spouse may have in the property.

Except as the rule may be modified by statutes removing disabilities of married women,⁸⁶ where the contract is the sole act of the husband, the wife is not a proper party to proceedings to foreclose a lien on land held by the husband and wife in fee,⁸⁷ and, if a married woman having no power to con-

tract so as to bind her estate joins with her husband in a contract, she does not create a lien on her estate and she is not properly joined in a suit to foreclose the lien, but the suit may be continued against the husband for the purpose of selling his interest to satisfy the lien.⁸⁸ Where the contract may give rise to a valid lien on the married woman's estate, she is a necessary party to a proceeding to enforce the lien,⁸⁹ although the husband may be a proper person to be joined as a party in interest under the statute,⁹⁰ or in order to answer to any interest or right of redemption which he may claim in the property,⁹¹ and for this last purpose he is a necessary party under an allegation in the petition that he has some interest in the property.⁹² Under the common-law rule requiring the joinder of the husband in actions against the wife, a husband must be joined in an action to enforce a mechanic's lien as against her,⁹³ but under statutes with respect to contracts of married women, the husband has been held not to be a necessary party in a proceeding to enforce a lien against the wife's separate property on a contract made with her.⁹⁴

Homestead, dower, and curtesy A wife having a homestead in her husband's land which may be divested by a decree and sale is properly joined as a defendant, although she is not a party to the contract,⁹⁵ as she has an adverse interest which makes her a proper party for a complete determination of the questions involved, although it may turn out that the land is not a homestead and the inchoate right of dower cannot be divested in the action.⁹⁶ The wife is not, however, a necessary party where the lien attaches before the land became a homestead,⁹⁷ or where the homestead right is otherwise inferior to that of the mechanic's lien.⁹⁸ The wife

79. Ala.—Hughes v Torgerson, 11 So 209, 96 Ala 346, 38 Am SR 105, 16 L R A 600
40 C J p 401 note 35

80. Ala.—Hughes v Torgerson, supra.

81. NH.—Russell v Howell, 69 A 886, 74 NH 551
40 C J p 402 note 37

82. Miss.—Guerrant v Dawson, 34 Miss 149
40 C J p 402 note 38

83. Iowa.—Welch v McGrath, 10 NW 810, 59 Iowa 519, reheard 13 NW 638, 59 Iowa 519
40 C J p 402 note 39

84. NY.—Crystal v Flannelly, 2 E D Smith 583

85. Mass.—Holmes v Humphreys, 73 NE 668, 187 Mass 513
40 C J p 402 note 41.

86. Estate by entirety
Contractor was not entitled to foreclose mechanic's lien against property held by husband and wife by entirety where wife was not made party.—Peters v Dona, 54 P 2d 817, 49 Wyo 306

87. NJ.—Washburn v Burns, 34 N J Law 18
40 C J p 398 note 74

88. Mass.—Kirby v Tead, 13 Metc 149

89. Ala.—Roman v Thorn, 3 So 759, 83 Ala 443
40 C J p 398 note 76

90. Ala.—Roman v. Thorn, supra.

91. Ind.—Scott v Goldinghorst, 24 NE 333, 123 Ind 268
40 C J p 398 note 78

92. Ill.—Greenleaf v Beebe, 80 Ill 520

93. Md.—Clark v Boalman, 43 A 926, 89 Md 428
40 C J p 398 note 81

94. Mass.—Whitney v Joslin, 102 Mass 103
Pa.—Shannon v Broadbent, 2 Pa Dist 230

95. Wis.—Hausmann Bros Mfg Co v Kempfert, 67 NW 1136, 93 Wis 587—Weston v Weston, 49 NW 834, 46 Wis 130

Wife a necessary party
Ill.—Leffers v Hayes, 64 NE 2d 768, 327 Ill App 440

96. Wis.—Hausmann Bros Mfg Co v Kempfert, 67 NW 1136, 93 Wis 587

97. Tex.—Watkins v Spoull, 28 S W 356, 8 Tex Civ App 437

98. Tex.—Cooley v Miller, Com App, 228 S W 1085

of the owner⁹⁹ and of the owner's contractual vendor¹ should be made parties if it is desired to divest them of a potential right of dower, but the failure to make them parties is not fatal since the purchaser under a judgment of foreclosure can take title only subject to such right of dower,² and it has been held that, where the wife's dower is in all of the land of which a husband is seized during coverture and cannot be affected except by lien as prescribed by law, she is not a proper party to a lien suit where her only interest is the dower.³ A wife is not a necessary party to a suit to enforce a lien on an estate by the curtesy.⁴

Community property Under the community property system, the wife is properly joined where it is alleged that the husband in contracting for the improvement was acting for the benefit of the community,⁵ and it has been held that the wife is a necessary party to a proceeding to foreclose a lien on community property, notwithstanding the husband individually incurred the debt which the lien secures,⁶ except perhaps in a case where the husband holds the record title and claimant had no knowledge that the debtor had a wife.⁷ However, it has also been held that the wife is not a necessary party to an action against the husband to foreclose

a lien on the community real estate.⁸

Partnership property In an action to enforce a lien on partnership real estate, the wives of the partners are not necessary parties.⁹

d. Other Lienors and Encumbrancers in General

Other lienors and encumbrancers are proper parties to a proceeding to enforce a mechanic's lien, but are not necessary parties unless required by statute.

The statutes frequently contemplate the determination of the rights of all lienors, encumbrancers, or other parties interested in the property in one proceeding, and, under such statutes, such persons are proper parties in order that they may be bound,¹⁰ and the same is true under the rules governing the equity practice.¹¹ However, unless otherwise provided by statute, other lienors and encumbrancers are not necessary parties to a proceeding to enforce a mechanic's lien,¹² at least where complainant does not seek priority over such other liens,¹³ but if they are not made parties they are not bound by the decree or proceedings thereunder.¹⁴ The statutes, however, may make other lienors necessary parties,¹⁵ as where they expressly declare that all lienors shall be joined,¹⁶ and, under some statutes, this applies as to subsequent lienors and encumbrancers.¹⁷ Similarly, in the absence

99. Ky—Estes v Bowman, 206 S W 304, 182 Ky 172

Absent allegation of ownership in fee
In action to enforce a materialman's lien, where there was no allegation that defendant husband was seized in fee of the lands in controversy or another was seized in fee to his use or that husband had a perfect equity therein, defendant's wife was neither a necessary nor proper party to the bill—Polakow v Weldon 7 So 2d 85, 242 Ala 505

1. Ky—Estes v Bowman, 206 S W 304, 182 Ky 172

2. Ky—Estes v Bowman, supra

3. Ill—Shaeffer v Weed, 8 Ill 511

4. Ill—Schnell v Celements, 73 Ill 613

5. Wash—Rasmussen v Liming, 96 P 1044, 50 Wash 184

6. Wash—Luttell & Smythe Mfg Co v Miller, 28 P 1035, 3 Wash 480

40 C J p 398 note 94

7. Wash—Washington Rock Plaster Co v Johnson, 39 P 115, 10 Wash 445

8. Tex—Cooley v Miller, Com App, 228 S W 1085—Brown v Rice, Civ App, 290 S W 784, affirmed Com App, Rice v Brown, 296 S W 495

9. Wash—Harrington v. Johnson, 39 P 141, 10 Wash 543

10. Ala—Richardson Lumber Co v. Howell, 122 So 343, 219 Ala 828
Idaho—Brown v Hawkins, 158 P 2d 840, 66 Idaho 351

Md—Bounds v Nuttle, 30 A 2d 263, 181 Md 400

Mont—Corpus Juris cited in Continental Supply Co v White, 12 P 2d 569, 572, 92 Mont 254

40 C J p 402 note 41

11. Ky—Dallas v Gardner, 268 S W 847, 207 Ky 93

40 C J p 402 note 45

12. La—Conservative Homestead Ass'n v Boyle, 185 So 663, 172 La 878

Md—Bounds v Nuttle, 30 A 2d 263, 181 Md 400

N J—Channel Lumber Co of Belleville v Trotta, 25 A 2d 19, 20 N J Misc 72

Tex—Parker v Chambers, Civ App, 159 S W 3d 945

40 C J p 403 notes 58, 59

In suit for a personal judgment by the subcontractor, only the owner and the general contractor may be joined and trustees under senior and junior encumbrances and unknown owners are not proper parties defendant—Lord Lumber & Fuel Co v Hancock, 278 Ill App 497

13. U S—Continental & Commercial Trust & Savings Bank v Corey Bros Constr Co, Idaho, 208 F 976, 126 C C A 64

40 C J p 402 note 46

14. U S—Case Mfg Co v Smith, C C Tenn, 40 F 339, 5 L R A 231
40 C J p 403 note 47

15. Wis—Fulton v First Volunteer Co of Oconto, 236 N W 120, 204 Wis 355

40 C J p 403 note 48, p 403 note 56

Unenforceable liens

In suit to foreclose mechanic's lien, defendants' objection as to nonjoinder of necessary parties because there were other unpaid claimants who were not made parties to the suit could not be maintained, where record showed that claims for lien, on which defendants based their contention of omission of necessary parties, were unenforceable at time objection was first raised by defendants—Bingaman v Dahm, 30 NE 2d 509, 307 Ill App 432

General creditors

Under lien law, creditors whose claims were not recorded were not required to be joined as parties or entitled to share in any fund—Williamson & Adams v McMahon-McEntegart, Inc, 10 N Y S 2d 37, 256 App Div 313

16. Ill—Mehrle v Dunne, 75 Ill 239
40 C J p 403 note 49

17. Colo—Hawkins v Grisham, 170 P 187, 69 Colo 156
40 C J p 403 note 53.

of a statute requiring it, subsequent encumbrancers¹⁸ or claimants of mechanics' liens¹⁹ are not necessary parties unless it is sought to determine their rights.²⁰ A statute providing that other lienors and encumbrancers may be joined and that those not joined shall not be bound by the judgment does not make such persons necessary parties to a proceeding to enforce a mechanic's lien.²¹

It has been held that a statutory provision requiring that persons having liens subsequent to that of plaintiff shall be made parties defendant does not require the joinder of such parties as indispensable to the entry of a decree binding the parties before the court, but the intent of it is only that such parties shall be joined in order that a decree may be rendered which will bind all parties interested in the land and under which a sale may be effected which will transfer the title to the purchaser free from all liens and encumbrances.²²

Purchaser or encumbrancer pendente lite Persons acquiring liens other than mechanics' liens, after the commencement of a suit to foreclose a mechanic's lien, are not necessary parties to the latter,²³ and a purchaser pendente lite need not be made a party to the mechanic's lien proceeding.²⁴

e. Mortgages; Trust Deeds

In the absence of a statute to the contrary, a mortgagee is a proper, but not a necessary, party to a pro-

ceeding to enforce a mechanic's lien unless it is sought to subject his interest to the lien.

In the absence of a statute otherwise providing,²⁵ a mortgagee is not a necessary party to a proceeding to enforce a mechanic's lien,²⁶ but one seeking to establish a mechanic's lien must make a mortgagee of the premises a party if he desires to bind the interest of the mortgagee.²⁷ The rule that the mortgagee is a necessary party where his interest is sought to be subjected to the lien is followed even in the absence of a statute requiring it,²⁸ and it is expressly required by the provisions of some lien laws.²⁹ It is generally held that a mortgagee is a proper party,³⁰ but on the ground that the mechanic's lien is subject to the prior encumbrance, it has been held that a prior mortgagee is improperly made a party.³¹ Where the statute specifically designates who shall be parties and mortgagees are not included, it has been held that by construction they are excluded,³² but a mechanics' lien statute by expressly requiring all mechanics' lien claimants to be joined does not impliedly exclude the propriety of joining a mortgagee.³³ A prior mortgagee of record is not a proper party under a statute requiring that every person holding a mortgage of record which would be cut off should be made a party.³⁴ Further, where the jurisdiction of the lien proceedings is conferred on a court of limited powers and jurisdiction, mortgagees may not be proper parties for the reason that such a court cannot fully adjudicate the rights and claims of different classes of

18. Fla.—Sandquist & Snow v Kellogg, 133 So 65, 101 Fla 568, affirmed 136 So 335, 101 Fla 579
40 C J p 403 note 50

19. N Y—Kaylor v O'Connor, 1 ED Smith 672

20. Mont—Solari v Fasso, 185 P 322, 56 Mont 400
40 C J p 403 note 52

21. Ala.—Vesuvius Lumber Co v Alabama Fidelity Mortg & Bond Co, 82 So 107, 203 Ala 93
40 C J p 403 note 55

22. Or—Gaines v Childers, 63 P 487, 38 Or 200

23. Neb—Colpus Juris quoted in Johnson v Olson, 273 NW 201, 203, 132 Neb 778
40 C J p 405 note 94
Intervention see infra § 285

24. Neb—Johnson v Olson, 273 N W 201, 132 Neb 778
40 C J p 405 note 95

25. Kan—Bell v Hernandez, 80 P 2d 1101, 139 Kan 216
Miss—Parsons v Foster, 122 So 387, 154 Miss 363

N J—Samuel Cohen & Son v Tudor Apartments, 145 A 6, 7 N J Misc 199

Wis—Fulton v First Volunteer Co of Oconto, 236 NW 120, 204 Wis 355

26. Ala.—Polakow v Weldon, 7 So 2d 85, 242 Ala 505—Lary v Jones, 187 So 714, 237 Ala 575

N D—Bovey, Shute & Jackson v Odegaard, 208 NW 111, 53 ND 871, followed in American State Bank of Balfour v Odegaard, 208 NW 114, 53 ND 878

27. Cal—Holman v Toten, 128 P 2d 808, 54 Cal App 2d 309

Kan—Bell v Hernandez, 80 P 2d 1101, 139 Kan 216
40 C J p 403 note 60

28. Mo—Redlon v Badger Lumber Co, 189 SW 589, 194 Mo App 650

29. Neb—Burns v Sholl, 197 NW 393, 111 Neb 628
40 C J p 404 note 62

30. Ala.—Polakow v Weldon, 7 So 2d 85, 242 Ala 505—Lary v Jones, 187 So 714, 237 Ala 575

Wis—Fulton v First Volunteer Co of Oconto, 236 NW 120, 204 Wis 355

40 C J p 404 note 63

Where lien waived in favor of mortgagees, mortgagees were proper

parties to proceeding to enforce mechanic's lien for hotel furnishings—In re Danville Hotel Co, CCA Ill, 38 F 2d 10

31. Md—Smith v Shaffer, 46 Md 573

32. Colo—Cornell v Conine-Eaton Lumber Co, 47 P 912, 9 Colo App 225
40 C J p 404 note 68

Subsequent mortgagees listed

Under a statute providing that those who have subsequent liens by judgment, mortgage, or conveyance must be made parties defendant, it has been held that only persons who are subsequent encumbrancers by mortgage or otherwise may be made parties—Brown v Danforth, 55 N. Y S 825, 37 App Div 321—Alyea v Citizens' Sav Bank, 43 N Y S 185, 13 App Div 574, affirmed 163 N Y. 597, 57 NE 1103

33. Wash—Davis v. Bartz, 118 P. 334, 65 Wash 395.

34. N.J.—Conlan v Leonard, 81 A. 492, 82 N J Law 108—New York Cent Trust Co v Bartlett, 30 A. 583, 57 N J Law 206

lienholders³⁵

Record. It has been held that a statute providing that the holders of unrecorded mortgages and liens need not be made parties to a mortgage foreclosure does not apply to an action to enforce a mechanic's lien³⁶ Where the statute requires all persons holding mortgages of record which will be cut off to be made parties, only a mortgagee of record need be made a party,³⁷ notwithstanding the lien claimant may have had notice of the existence of the mortgage at the time he commences his suit³⁸ Where the property is misdescribed in the mortgage, so that the record does not constitute constructive notice, the mortgagee need not be made a party in the absence of actual notice³⁹

Junior mortgagees A subsequent mortgagee is not in the absence of statute a necessary party,⁴⁰ although he may be joined,⁴¹ and if not joined his rights, whatever they may be, are not affected⁴² By statute, however, subsequent mortgagees may be required to be joined,⁴³ and under a statute requiring all parties claiming of record any right, title, interest, or equity whose title or interests are to be charged with, or affected by, the lien to be made parties, a subsequent mortgagee is a necessary party where his rights are in any manner to be affected⁴⁴ Where the statute contemplates notice to be

given to one party only as owner to answer the suit, a subsequent mortgagee is not entitled to notice,⁴⁵ particularly where he has not taken possession⁴⁶

Trust deed Under some statutes, the holder of a deed of trust on the property sought to be subjected to the lien has been held to be a necessary party⁴⁷ Under the equity rule that all persons interested should be made parties in a chancery proceeding to enforce a mechanic's lien, and under statutes in effect adopting such rule, where a trust deed has been given to secure a debt, the trustee and the cestui que trust should be made parties to the proceeding to enforce a mechanic's lien,⁴⁸ if it is sought to bind them⁴⁹ However, it has been held that a trustee under a subsequent deed of trust is not a necessary party,⁵⁰ and that, where the petitioner subordinates his lien to that of a prior trust deed, the holder of the note secured is not a necessary party,⁵¹ and, where a sale is ordered subject to the trust deed and there has been no timely objection to the omission of the holder of the note, it cannot be complained of by the owner⁵² The cestui que trust is an indispensable party where plaintiff seeks a decree establishing the priority of his right as against the title represented by the trust deed, and a decree cannot be rendered establishing such priority in the absence of such party,⁵³ although the decree may be

35. Cal—Van Winkle v. Stow, 23 Cal 457

40 C J p 404 note 69

36. Cal—Holman v Toten, 128 P 2d 808, 54 Cal App 2d 309

37. NJ—Conlan v Leonard, 81 A 492, 82 NJ Law 108

Assignee was held bound by foreclosure decree, even though he was not a party thereto, where his assignment was not recorded—First Nat Bank v Paris, 193 NE 207, 358 Ill 378

38. NJ—Conlan v Leonard, 81 A 492, 82 NJ Law 108

39. Wash—Zurfluh v Hartman, 174 P 963, 103 Wash 452
40 C J p 404 note 72

40. La.—Corpus Juris quoted in Conservative Homestead Ass'n v Boyle, 135 So 663, 665, 172 La 878
NC—Kornegay v Farmers' & Merchants' Steamboat Co, 12 SE 123, 107 NC 115

41. Iowa—Shields v Keys, 24 Iowa 298

La.—Corpus Juris quoted in Conservative Homestead Ass'n v Boyle, 135 So 663, 665, 172 La 878

42. Fla.—Corpus Juris cited in Sandquist & Snow v Kellogg, 136 So 235, 236, 101 Fla 579

La.—Corpus Juris quoted in Conserv-

ative Homestead Ass'n v Boyle, 135 So 663, 665, 172 La 878

40 C J p 404 note 75

Right to question priority of lien judgment

Subsequent mortgagee is not entitled to assert that mere failure to make him party to former lien foreclosure suit gave him right, in absence of fraud, to question priority of statutory lien judgment obtained—Sandquist & Snow v Kellogg, 136 So 235, 101 Fla 579

43. NY—Schillinger Fire-Proof Cement & Asphalt Co v. Arnott, 14 NYS 326

40 C J p 404 note 76.

44. Colo—Howard v Fisher, 283 P 1042, 86 Colo 493—Hawkins v Grisham, 170 P 187, 69 Colo 156
Fla.—Corpus Juris cited in Sandquist & Snow v Kellogg, 133 So 65, 69, 101 Fla 568

45. NJ—Tompkins v Horton, 25 N J Eq 384
40 C J p 404 note 78

46. Mass—Howard v Robinson, 5 Cush 119

47. Miss—Parsons v Foster, 122 So 387, 154 Miss 363

Intervention

Fact that holder of trust deed could have intervened does not excuse failure to join him as party—

Stark Lumber Co v Keystone Inv Co, 20 P 2d 306, 92 Colo 259, followed in 20 P 2d 308, 92 Colo 266

Estoppel

Assignee of note secured by trust deed although knowing of filing of mechanics' liens and owning practically entire stock of certain company, was not estopped to assign note to company as regards necessity of lienors' making company party to lien foreclosure proceeding—Stark Lumber Co v Keystone Inv Co, supra

Defendant named as trustee only

It was no objection to mechanic's lien foreclosure suits that holder of trust deed was named as trustee only and that nominal payee of notes was not joined—Rust v Indiana Flooring Co, 145 SE 321, 151 Va 845

48. Ill—Bennett v Wilmington Star Min Co, 7 NE 498, 119 Ill 9

40 C J p 405 note 80

49. Mo—Coe v Ritter, 86 Mo 277

40 C J p 405 note 81

50. Ark—Arkansas Foundry Co v American Portland Cement Co, 75 SW 2d 387, 189 Ark 779

51. Ill—Portones v Badenoch, 23 NE 349, 132 Ill 377.

52. Ill—Portones v Badenoch, supra

53. Colo.—McClair v. Huddart, 41 P.

binding on the other parties to the suit in so far as it passes only on the rights and obligations as between themselves⁵⁴ While it may be better that the trustee should be made a party with a view to conclude him and those whom he represents, he is not an indispensable party to the statutory foreclosure of a lien which cannot be affected by the trust deed, there being nothing in the statute requiring it⁵⁵

Assignee of mortgage or debt The assignee of record of a prior mortgage must be made a party in order to charge him with any default of the assignor⁵⁶ Where, however, the parties to the mortgage as shown by the record and of whom the lien claimant has knowledge or notice are joined, the judgment cannot be regarded as a nullity as to an unknown and undisclosed assignee of the mortgage note,⁵⁷ and this is more particularly true where the mortgage is not given of record until after the lien claimant's rights had attached to the property.⁵⁸

Termination of interest The mortgagee of a prior mortgage who has foreclosed it pending the mechanic's lien proceeding is without further interest and the proceeding should be dismissed as to him⁵⁹ So, where, after the action is brought and before trial and judgment, the mortgage is foreclosed and a defendant becomes a purchaser, the interest of the mortgagee having ceased, it is immaterial whether or not he is a party⁶⁰ A mortgagee who has conveyed all of his interest in the property before the bill to enforce the lien is filed is not a proper or necessary party where no attempt is made to obtain any personal decree against him⁶¹ However, if the answer admits the ownership, a defect in the complaint, in that such ownership was not sufficiently alleged, will be cured⁶² General allegations

as to the interests of third persons made defendants will be sufficient if enough appears to disclose the rights of such parties,⁶³ and it has been held sufficient to allege merely that such persons claim some right or interest in the property in question so as to require them to set up their interests or claims,⁶⁴ and that the rule requiring complainant to state a cause of action against all who are made defendants does not apply to one who was made a party to answer to his supposed or possible but unknown or undefined interest in the property to be affected⁶⁵

On the other hand, it has been held that a mere allegation that a defendant claims an interest in and to the property is insufficient to support a default decree foreclosing all the interest of defendant in the premises,⁶⁶ since such an allegation does not show that the claim of such defendant was inferior to that of the mechanic's lienor,⁶⁷ and that a decree subjecting the interest of a particular defendant cannot be sustained in the absence of allegations showing the liability of such interest⁶⁸ So notwithstanding a statute providing that all parties claiming of record any right, title, interest, or equity in the property may be made parties, plaintiff must state a cause of action against those whom he makes parties,⁶⁹ and a mere allegation that plaintiff is informed that defendant claims some interest of record in the property is insufficient⁷⁰ An allegation that certain parties other than the owner have or claim to have some interest in the premises is not an admission that they had any interest⁷¹

Special judgment In an action in which the judgment and execution are special, the latter being directed to be levied on defendant's interest in the land, the declaration properly concludes with an

833, 6 Colo App 493—Johnston v Bennett, 40 P 847, 6 Colo App 382

54. Colo—McClair v Huddart, 41 P 833, 6 Colo App 493

55. NC—Lookout Lumber Co v Mansion Hotel & B Co, 14 SE 35, 109 NC 658

56. Iowa—Nashua Trust Co v W S Edwards Mfg Co, 68 NW 587, 99 Iowa 109, 61 Am SR 226 40 C J p 405 note 87

57. Ill—First Nat Bank v Paris, 193 NE 207, 358 Ill 378

Mo—Redlon v Badger Lumber Co, 189 SW 589, 194 Mo App 650

58. Mo—Redlon v. Badger Lumber Co, supra

59. Mo—Hunter v Masner, App, 202 SW 261

60. Mo—Badger Lumber Co v Balentine, 54 Mo App 172.

61. Ala—Sorsby v Woodlawn Lumber Co, 81 So 68, 202 Ala 566

62. Tex—Lyon v Logan, 5 SW 72, 68 Tex 521, 2 Am SR 511. 40 C J p 423 note 38

63. Ill—Henderson v Connelly, 14 NE 1, 123 Ill 98, 5 Am SR 490

64. Mich—Steel Brick Siding Co v Muskegon Mach & Foundry Co, 57 NW 817, 98 Mich 616 40 C J p 423 note 30

Petition held sufficient

Where petition in suit to enforce a mechanic's lien alleged that defendants named were owners of leasehold interest in property described, fact that proof showed that certain of defendants, who were named as defendants in order to bring into case all the parties who might claim an interest, were not owners of property, did not establish failure of petition to state a cause of action—

Miners Lumber Co v Miller, Mo App, 117 SW 2d 711

65. Ind—Scott v Goldinghorst, 24 NE 333, 123 Ind 263—Woollen v Wishmier, 70 Ind 108

66. Or—Oregon Lumber & Fuel Co v Hall, 148 P 61, 76 Or 138 40 C J p 423 note 33

67. Kan—Delahay v. Goldie, 17 Kan 263 40 C J p 423 note 33

68. RI—Long Island Brick Co. v. Arnold, 28 A. 801, 18 RI 455.

69. Colo—Clark Hardware Co v Centennial Tunnel Min Co, 123 P 322, 23 Colo App 174

70. Colo—Clark Hardware Co v Centennial Tunnel Min. Co, supra

71. Ill—Orr & Lockett Hardware Co. v Needham Co, 51 Ill App 57

avermert that the debt is a lien on defendant's interest in the land without describing that interest ⁷²

Action for personal judgment. Where the complaint alleges facts which show a personal liability and the lien and its foreclosure is collateral thereto, a personal judgment may be sustained, although there is no allegation that defendant is the owner of, or is asserting any interest in, the land ⁷³ A complaint which does not allege that defendant, against whom the lien was sought to be enforced, was the owner or proprietor of the property, and not alleging who such owner or proprietor was, cannot be sustained under a statute allowing one who has furnished material to a contractor to give notice to the owner to answer under oath as to the amount of indebtedness to the contractor on his contract where such complaint has been amended by striking out the contractor as a party ⁷⁴

f. Persons Personally Liable for Debt Secured in General

Persons personally liable for the debt secured by the lien are proper, and under some statutes necessary, parties to a proceeding to enforce a mechanic's lien.

Where the lien statute provides for a personal deficiency judgment, as discussed *infra* § 330, one who is personally liable on the indebtedness secured is a proper party, ⁷⁵ and, under the view that the existence of the lien depends on the existence of the debt for which the lien stands as security and that

the fact of indebtedness can be determined only in a proper judicial proceeding to which the debtor is made a party, the person personally liable for the debt is a necessary party. ⁷⁶ However, the fact that a personal judgment cannot be rendered will not defeat the enforcement of the lien ⁷⁷

Parties to the contract. Parties to the contract on which the lien is based are proper parties, ⁷⁸ and under some statutes are necessary parties ⁷⁹ The parties intended are the parties to the particular contract which is the subject of inquiry ⁸⁰

Sureties In a suit by a materialman or subcontractor, the surety on the general contractor's bond to the owner is a proper party ⁸¹ A surety on a bond conditioned for the protection of a vendee in the event of the determination of the vendor's liability is a proper, although not a necessary, party to a suit in which the vendor is joined as a defendant ⁸²

g. General Contractor

In a proceeding to enforce the lien of a subcontractor or materialman, the general contractor is a proper party, and under some, but not other, statutes a necessary party.

In a proceeding against the owner by a subcontractor or materialman to enforce his lien, the contractor is a proper party, ⁸³ even under circumstances which render him an unnecessary party, ⁸⁴ for the purpose of avoiding a multiplicity of suits ⁸⁵ How-

72. N J—Cornell v Matthews, 27 N J Law 522.

73. Ind—Clark v Maxwell, 40 N E 274, 12 Ind App 199

74. Ala—Sanitary Plumbing Co v Simpson, 76 So 948, 200 Ala 590.

75. N Y—Seary v Wegenaar, 104 N Y S 1055, 120 App Div 419 40 C J p 398 note 1

76. Mont—Missoula Mercantile Co v O'Donnell, 60 P 591, 24 Mont 65 40 C J p 399 note 2

77. Mo—Holland v Cunliff, 69 S W 737, 96 Mo App 67 40 C J p 399 note 3

Dissolved corporation

If the party with whom the contract was made was a corporation, which has since become disorganized and gone out of existence, it need not be made a party, and its omission in a suit against one claiming title to the property will not defeat the enforcement of the lien—Jennings v Hinkle, 81 Ill 183.

78. Ala—Buettner Bros v Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala 553

Other than immediate parties to the contract are sometimes expressly made proper but not necessary par-

ties to the proceeding, while the immediate parties to the contract are made necessary parties to the proceeding—Rumsey & Sikemier Co v Pieffer, 83 S W 1027, 108 Mo App 486

79. Mo—Hughes Bros Paint & Hardware Co v Prewitt, 157 S W 130, 170 Mo App 594

80. Mo—Harrison v Creason, 176 S W 2d 849, 238 Mo App 118 40 C J p 407 note 13

81. Ala—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 237 Ala 25 Mich—Morman v Ryskamp, 209 N. W 52, 235 Mich 140 40 C J p 398 note 1 [c].

Bondsman

In action to foreclose materialman's lien, bondsmen, although not good and sufficient sureties, were properly joined as defendants—Sudden Lumber Co v Singer, 284 P 477, 108 Cal App 386

Guarantor of contract under a separate instrument may be joined—Whistler v Kellogg, 100 N Y S 526, 50 Misc 409

82. Tex—Haberzettler v. Dearing, Civ App, 80 S W 539. 40 C J p 397 note 72

83. Ala—David Lupton's Sons Const Co v Hugger Bros Const Co, 148 So 610, 237 Ala 25—Richardson Lumber Co v Howell, 122 So 343, 219 Ala 328

Conn—Pierce, Butler & Pierce Mfg Corporation v Enders, 174 A 169, 118 Conn 610

Ga—Herb v Wolfe, 41 S E 2d 817, 75 Ga App 20

Md—Caltrider v Isberg, 130 A 53, 148 Md 657

40 C J p 405 note 96

Material furnished subcontractor

Where materialmen furnishing subcontractor disclaimed any intention to assert money judgment against general contractor, the latter was not a proper party—National Radiator Co v Chelsea Housing Corporation, 37 A 2d 279, 22 N J Misc. 193

84. Cal—Wood v Oakland & B Rapid Transit Co, 40 P 806, 107 Cal 500

40 C J p 405 note 97

85. Cal—Wood v Oakland & B Rapid Transit Co, *supra*—Giant

ever, in some jurisdictions it has been held that, at least in so far as the rights of the owner are concerned, the contractor is not, in the absence of a statutory requirement, a necessary party,⁸⁶ but in many other jurisdictions, sometimes by reason of statutory provision, the contractor has been held to be a necessary party.⁸⁷ Under a statute requiring that the parties to the contract be parties to the proceeding, the original contractor is a necessary party where the materialman seeks to enforce his lien through the privity arising from the agreement between the original contractor and the owner,⁸⁸ but a lien claimant complies with the statute by making a subcontractor with whom he dealt a party.⁸⁹

Where, under the statute, there can be no valid judgment of foreclosure of a materialman's lien in the absence of a valid judgment in favor of the materialman against the contractor, the contractor is a necessary party to a proceeding by the materialman unless plaintiff has a judgment against the

contractor.⁹⁰ Under a statute requiring the parties to the controversy to be made parties, it has been held that, while the contractor is a necessary party to a suit by the subcontractor or materialman in the sense that the owner may require that he be made a party,⁹¹ he is not an indispensable party.⁹² A provision of the statute requiring the contractor to defend actions brought by a subcontractor or persons other than the original contractor at his own expense has been held by some courts to make the original contractor a necessary party,⁹³ but it has also been held that such a provision makes him merely a proper, and not a necessary, party.⁹⁴

Under a statute providing that all persons whose liens are filed and other encumbrancers shall be made parties, where the action is brought by a subcontractor, the principal contractor has been held to be an indispensable party.⁹⁵ Where the right of a subcontractor to foreclose a mechanic's lien depends on the fact that payments were made by the

Powder Co v San Diego Flume Co, 20 P 419, 78 Cal 193

86. La—Thompson v Michelli, App, 148 So 287

Me—Andrew v Bishop, 172 A 752, 132 Me 447, 100 A L R 121

Md—Caltrider v Isberg, 130 A 58, 148 Md 657

Or—Corpus Juris cited in George v Oregon, C & E Ry Co, 247 P 780, 781, 118 Or 502

Vt—Goodro v Tarkey, 22 A 2d 509, 112 Vt 212

Wash—Standard Lumber Co v Fields, 187 P 2d 283

40 C J p 405 note 99

87. Ala—Security Federal Savings & Loan Ass'n v Underwood Coal & Supply Co, 16 So 2d 100, 245 Ala 56—Emanuel v Underwood Coal & Supply Co, 14 So 2d 151, 244 Ala 436

Ark—People's Building & Loan Ass'n v Leslie Lumber Co, 38 SW 2d 759, 183 Ark 800

Del—Westinghouse Electric Supply Co v Franklin Institute of State of Pennsylvania for Promotion of Mechanic Arts, 21 A 2d 204, 2 Terry 319—Corpus Juris cited in Iannotti v Kalmbacher, 156 A 366, 368, 4 W W Harr 600

Fla—Anderson v Dade Lumber Co, 133 So 321, 101 Fla 38

Mo—Reis-Moran Lumber Co v Putney Roofing Co, App, 147 SW 2d 172—Quigley v William M Rideout & Co, App, 127 SW 2d 37—Watkins v Mayer, App, 103 SW 2d 569—Watkins v Mayer, App, 103 SW 2d 566

Tenn—East Lake Lumber Box Co v Simpson, 5 Tenn App 51—Brantingham v Beasley, 2 Tenn App 598

Tex—Judd v Wyche, Civ App, 80 S W 2d 808

40 C J p 406 note 1, p 407 notes 8, 9, 20

In absence of some special circumstance, general rule requires principal contractor under mechanic's lien laws to be necessary party to suit to enforce such lien—Judd v Wyche, Tex Civ App, 80 SW 2d 808

Subcontractors are necessary parties defendant in action by one who furnished material to subcontractor—Harris v Spurrier Lumber Co, 265 P 637, 130 Okl 99—40 C J p 407 note 9 [b]

Contractor abandoning work was not necessary party to materialmen's suit to enforce liens against owner and surety—Gay v Acme Brick Co, Tex Civ App, 15 SW 2d 725, error refused

Caption of statement of claim

The fact that general contractor was not made a party defendant under caption of subcontractor's statement of claim for mechanic's lien was not material, since the creation of essential parties does not originate until praecipe is filed, on which writ of scire facias is duly issued.—Westinghouse Electric Supply Co v Franklin Institute of State of Pennsylvania for Promotion of Mechanic Arts, 21 A 2d 204, 2 Terry, Del, 319

Partnership

Where contractor was a partnership, it was properly made a defendant in materialman's lien foreclosure suit without making its members parties—McGill v Cooper Supply Co, 165 P 2d 829, 196 Okl 362

Default judgment on writ of scire facias, to which original contractor

was not party, in mechanic's lien proceeding, must be vacated—Iannotti v Kalmbacher, 156 A 366, 4 W W Harr, Del, 600

In Oklahoma

(1) The text rule has been followed—Sutherland Lumber Co v. Gale, 277 P 242, 136 Okl 233, 65 A L R 1186

(2) However, there is also some authority to the contrary—Hatten v Interocean Oil Co, 78 P 2d 392, 182 Okl 465

88. Mo—O'Neil Lumber Co v Grefet, 133 SW 113, 154 Mo App 33—McLundie v Mount, 123 SW 966, 145 Mo App 660—Bombeck v Devors, 19 Mo App 38

89. Mo—Hughes Bros. Paint & Hardware Co v Prewitt, 157 SW 120, 170 Mo App 594

40 C J p 407 note 15

90. Ga—Chambers Lumber Co v Gilmer, 5 SE 2d 84, 60 Ga App 833

40 C J p 408 note 22
Necessity of judgment or concurrent suit see supra § 269

91. Wyo—Becker v Hopper, 147 P 1085, 23 Wyo 209, Ann Cas 1918B 35

40 C J p 407 note 16

92. Wyo—Becker v Hopper, supra

93. Kan—Tracy v Kerr, 28 P 707, 47 Kan 656

40 C J p 407 note 18

94. Mo—American Radiator Co v. Conner Plumbing & Heating Co, 211 SW 56, 277 Mo 548

40 C J p 407 note 19

95. Okl.—Union Bond & Investment Co v Bernstein, 139 P 974, 44 Okl 527.

owner to the general contractor to whom they were due under the contract, the contractor is a necessary party in order that the owner may be protected as against such contractor by the judgment concluding the facts on which the right of the subcontractor to recover depends.⁹⁶ Where the statute under which the action is brought creates a duty directly on the part of the owner to the materialman or laborer, the action for a breach of such duty is not for the enforcement of a lien and the general contractor has been held not to be a necessary party;⁹⁷ nor, it has been held, is the contractor a necessary party under a statute confining the subcontractor's lien to the amount due from the owner to the principal contractor at the time of the service of notice on the owner.⁹⁸ Where the statute does not expressly or by implication require the principal contractor to be a party and the subcontractor is not required to exhaust his remedy against the principal contractor before proceeding against the property, and in an action by the subcontractor the owner may interpose any defense which would be available to the contractor, it has been held that, while the contractor is a proper, he is not a necessary, party, so as to require a stay of proceedings until service of process on the nonresident contractor.⁹⁹ The contractor has been held not united in interest with the owner within the meaning of a statute requiring persons so united to be joined.¹

The contractor is a necessary party where it is sought to obtain a personal judgment against him,² as where the lien may have been declared invalid.³

It is sometimes provided that, although the contractor is a necessary party, the court may adjudicate the lien in case the sheriff shall return that he is unable to find the original contractor.⁴

After assignment of interest If the contractor has assigned his interest to the subcontractor the former is not a necessary party.⁵

Several general contractors Where the joinder of the principal contract is regarded as necessary, it has been held that, if there are several contractors by whom the subcontractor or materialman is employed, they should all be joined,⁶ although it has been held that a failure to make a prompt objection to the nonjoinder of one of the contractors waives the objection,⁷ and that, where there are several joined in the contract, one may be sued alone, and if the owner desires the other joint contractors to be made defendants the court may in its discretion have them brought in.⁸ It has been held that, where but one of two contractors was served, the court may by statutory permission render judgment against both, enforceable against the joint property of both and the separate property of the one served.⁹ Under a statute requiring the parties to the contract to be made parties, it has been held that, where several contractors jointly undertake the contract, they being jointly and severally liable, it is sufficient if either or only one of them is made a party defendant.¹⁰

h. Effect of Failure to Join Parties

A failure to join a proper party may be waived, but failure to join a necessary party may not.

If the issues between those who are present can be tried notwithstanding the absence of others who may not be concluded by the proceeding, or if the establishment of the lien does not depend on the presence of such omitted parties, the rule that an objection for a defect of parties will be waived if not made properly or in time has been applied.¹¹

96. NY—Hilton Bridge Constr Co v New York Cent & H R R Co, 40 NE 88, 145 NY 390.

97. Ga—R C Wilder's Sons Co v Walker, 25 SE 571, 98 Ga 508 40 CJ p 406 note 3

98. Iowa—W D. Jenkins Lumber Co v Cramer, 160 NW 42, 182 Iowa 161 40 CJ p 407 note 4

99. SD—Burgi v Rudgers, 108 N W 253, 20 SD 646

1. NY—Martens v O'Neill, 115 NY S 260, 131 App Div 123, 1 NY Civ Proc NS 293, reargument denied 118 NYS 1133, 134 App Div 924

2. Cal—Wood v Oakland & B Rapid Transit Co, 40 P 806, 107 Cal 500 40 CJ p 407 note 6

Community obligation

Where a materialman seeks a personal judgment against the contrac-

tor and asks that it be declared a community obligation of the contractor and wife, the wife of the contractor is properly joined—Rasmussen v Laming, 96 P 1044, 50 Wash 184

3. Cal—Los Angeles Pressed Brick Co v Higgins, 97 P 414, 8 Cal App 514

4. Okl—McGill v Cooper Supply Co, 165 P 2d 829, 196 Okl 362—General Sports Co v Leslie & Walter Coombs Lumber Co, 288 P 949, 148 Okl 297—Harris v Spurrier Lumber Co, 265 P 637, 130 Okl 99 40 CJ p 407 note 10

5. Ohio—Kloppinger v Grasser, 25 Ohio Cir Ct 90

6. Cal—McDonald v Backus, 45 Cal 262

Wis—Harbeck v Southwell, 18 Wis 418

7. Wis—Harbeck v Southwell, supra

8. Colo—Barnes v Colorado Springs & Cripple Creek Dist R Co, 94 P 570, 42 Colo 461 40 CJ p 408 note 28

9. Minn—Julius v Callahan, 65 N W 267, 63 Minn 151

10. Mo—Hassett v Rust, 64 Mo 325 40 CJ p 408 note 30

11. Nev—Zasucha v Allen, 51 P 2d 1029, 56 Nev 339 40 CJ p 408 note 31

Other objection

In proceedings by a subcontractor to enforce a mechanic's lien, fact that defendant contended that the contract was not his contract was not a waiver of the objection that the proper parties were not before the court—Godfrey Lumber Co v. Kline, 125 N W 682, 160 Mich 565.

However, where a necessary party has not been joined, his nonjoinder cannot be waived¹³ It has been held that the omission of a necessary party is fatal¹³ and warrants a dismissal of the proceeding,¹⁴ but it has been held that a court will not dismiss because of such defect unless it appears that a decree will have the effect of depriving the omitted party of his property rights or of unnecessarily burdening the owner with a multiplicity of suits¹⁵ It has been held that it is the duty of a complainant to see and know that he has before the court all necessary parties, or his decree will not be binding, and, where he takes a decree without making the necessary parties defendant to his bill and the necessity of their presence is disclosed, the decree will be reversed¹⁶

§ 285. Intervention, Addition, or Substitution of Parties

As a general rule the court may permit parties to be added or to intervene where their presence is necessary to a complete determination of all of the issues.

While the addition or substitution of parties rests largely on the law and practice of the forum in which the lien action is pending, generally the court

has power in the equitable proceeding through which the lien is enforced, and, under the statutory provisions in that respect, to add other parties if their presence is necessary to a complete determination of the matters involved as between all persons interested¹⁷ For example, the general contractor may be brought in,¹⁸ a mortgagee may be brought in by a supplemental bill,¹⁹ and it has been held that the court of its own motion should order parties brought in who by the statute are made necessary parties to the proceeding²⁰ The assignee of the lienor's claim may be substituted as plaintiff²¹ So the statute may provide for the substitution of the representatives of a decedent²² or of a defendant for whom a guardian has been appointed²³

A party may be added as a defendant although the relief asked is in the alternative,²⁴ but plaintiff cannot bring in or the court add parties, unless plaintiff has a cause of action against defendant or some person originally made a defendant,²⁵ and if the matter has already been submitted, and the party is not a necessary party, the trial will not be opened.²⁶ Where the property against which the lien is sought to be enforced is destroyed by fire, the insurance company, it has been held, may be

12. Mo—Harrison v Creason, 176 S W 2d 849, 238 Mo App 118.
40 C J p 408 note 32

Time objection raised

(1) An objection to a petition to enforce a mechanic's lien that it does not implead necessary parties may be taken in the answer thereto or at the hearing—Prather Engineering Co v Detroit, etc., R. Co., 116 N W 376, 162 Mich 582

(2) In proceedings by a subcontractor to enforce a mechanic's lien, the objection that the contractor was not made a party defendant can be taken at the hearing—Godfrey Lumber Co v Kline, 125 N W 682, 160 Mich 565

13. N Y—Gass v Souther, 61 N Y S 305, 46 App Div 256, affirmed 60 N E 1111, 167 N Y 604
40 C J p 397 note 64

14. Ala.—Builders' Supply Co v Smith, 133 So 721, 222 Ala 554, followed in Builders' Supply Co v Phillips, 133 So 723, 222 Ala 556, and Smith v Chestnut, 133 So 723, 222 Ala 556

15. Ill.—Bingaman v Dahm, 30 N E 3d 509, 307 Ill App 432

Stay proceeding

The lack of a necessary party in a suit to foreclose a mechanic's lien, if objection is properly raised, will operate to deprive a foreclosing lien claimant of his right to proceed until he makes omitted necessary party

a party to his proceeding—Bingaman v Dahm, supra

16. Ill.—Race v Sullivan, 1 Ill App 94
40 C J p 397 note 65

17. Minn.—Wheaton v Berg, 52 N W 926, 50 Minn 525

Pa.—Magazine v Albenzi, Com Pl, 25 Wash Co 127
40 C J p 408 notes 35, 36

Joining party after time to institute proceeding has expired see supra § 282 h

Lienor's creditors

In suit to foreclose mechanic's lien, general contractor, if he saw fit to do so, could have impleaded alleged subcontractor's creditors who filed no notice of their claims and were not parties to the action—Williamson & Adams v McMahon-McEntegart, Inc., 10 N Y S 2d 37, 256 App Div 313

Laches

Defendant held not guilty of laches in making motion to bring in additional parties—Hilton Bridge Const Co v New York Cent & H R R Co., 32 N Y S 514, 84 Hun, 235, modified on other grounds 40 N E 86, 145 N Y 390

18. W Va.—Augir v Warder, 81 S E 708, 74 W Va 103
40 C J p 409 note 37

19. Tenn.—Ragon v Howard, 37 S W 136, 97 Tenn 334

20. N Y—Gass v Souther, 61 N Y S

305, 46 App Div 256, affirmed 60 N E 1111, 167 N Y 604

40 C J p 409 note 39

21. Ill.—H G Wolff Co v Gwynne, 2 N E 2d 585, 284 Ill App 646

Supplemental pleadings

Under a statute providing that, where any interest in an action has been transferred, the court may at any time within one year thereafter, on motion, allow the action to be continued by or against the successors in interest, where a pendente lite assignee of a mechanic's lien, within one year after such assignment, made the required motion, but failed to file and serve supplemental pleadings as required by statute, the irregularity was such as might be cured by afterward filing and serving such pleadings—Powell v Nolan, 67 P 712, 27 Wash 318

22. Ill.—Sorg v Crandall, 84 N E 181, 233 Ill 79.

23. Me.—Pratt v. Seavey, 41 Me. 370

24. N Y—Williams v Edison Electric Illumin Co, 16 N Y S 857

25. Neb.—Corpus Juris quoted in Johnson v Olson, 273 N.W 201, 205, 132 Neb 778
40 C J p 409 note 43

26. Neb.—Corpus Juris quoted in Johnson v Olson, 273 N.W 201, 205, 132 Neb 778

N Y—Mulligan v Vreeland, 34 N Y S 990, 88 Hun 183.

brought in as a party²⁷ Where the proceeding is in the nature of a proceeding in rem by a bill in equity on behalf of the complainant and all other lien claimants, in which all lien claimants must appear and file their claims, if any refuse so to appear the decree and sale thereunder will extinguish all mechanics' liens and there is no necessity to bring in such refusing party as a defendant²⁸ One who disputes the amount of his liability cannot have another substituted to bear the expense of the litigation²⁹

Intervention. Under the various statutory provisions persons having liens on the property or interests in the controversy or whose presence may be proper or necessary to a complete determination of the entire litigation ordinarily are permitted to come in and be made parties as though they had been originally joined³⁰ So one having an interest as an owner,³¹ or purchaser,³² or mortgagee,³³ or assignee of a mortgage,³⁴ or purchaser at a mortgage foreclosure,³⁵ or an original contractor who has assigned the notes given by the owner to complainant,³⁶ or other mechanics' lien claimants, whose rights and priorities should be settled,³⁷ may come in However, it has been held that, since the proceedings on a lien and the right of parties to intervene to protect their interests are regulated by statute, one seeking to intervene cannot do so where the statute does not authorize intervention or provide the manner therefor.³⁸

One seeking to intervene must show some title or interest in the property³⁹ The surety on a contractor's bond may not intervene where the lien claimed

is not of a class for which he may be liable⁴⁰ Where, after institution of proceedings to foreclose a mechanic's lien, the lienor begins an action at law against the guarantors of the owner's contract and favorable judgments are rendered in both proceedings, the guarantors after payment of the judgment against them have no absolute right to intervene in the lien proceedings,⁴¹ and they will not be permitted to intervene where the judgment directs that from the proceeds of sale the amount of the liens of the single defendant lienors be first paid, then the amount of plaintiff's lien, less the sums so first directed to be paid and that the surplus, if any, be paid into court⁴²

Necessity for intervention In the absence of a statute so requiring, one lien claimant is not required to intervene in the proceeding of another claimant⁴³ notwithstanding he may have actual knowledge of its pendency⁴⁴ However, by force of statute in some jurisdictions other lien claimants are connected with the proceeding from the time the action is begun and notice is published, and the proceeding is one to enforce not only the lien of plaintiffs, but all recorded liens so that the holders of other liens are obliged to prove their claims therein or be held to have waived them⁴⁵ A statute providing that every creditor having a lien under a statute on the property may appear and prove his claim does not require other lienors to come in, but they may bring individual suits for the enforcement of their liens⁴⁶

A statute requiring that lien claimants who file their liens after the action is begun shall apply to

27. NY—R Prescott & Son v Nye, 228 NYS 156, 228 App Div 356

28. Md—Kelly v Gilbert, 28 A 274, 78 Md 431

29. NY—Chamberlain v O'Connor, 1 ED Smith 665, 8 How Pr 45

Ohio—Busse v Voss, 9 Ohio Dec, Reprint, 441, 13 Cinc L Bul 542

30. Ill—Svela v Bloch, 14 NE 2d 299, 294 Ill App 515.

40 CJ p 409 note 49
Petition for intervention see *infra* § 302

31. Ill—Svela v Bloch, *supra*
La—St Landry Lumber Co v Aggers, App, 147 So 569
40 CJ p 410 note 50

32. Kan—E W Hamson Lumber Co v Galligan, 235 P 94, 118 Kan 293

Nev—Nellis v Johnson, 57 P 2d 392, 57 Nev 17

Or—E J Struntz Planing Mill Co v Paget, 262 P 263, 123 Or 651, rehearing denied 263 P 389, 123 Or 651

40 CJ p 410 note 51.

Discretion of court

Whether purchaser pendente lite could intervene in action to foreclose mechanic's lien was for discretion of trial court—Howard v Fisher, 283 P 1042, 86 Colo 493

33. Tex—Continental Supply Co v Forrest E Gilmore Co of Texas, Civ App, 55 SW 2d 622, error dismissed
40 CJ p 410 note 52

34. Kan—Erving v Phelps & Bigelow Windmill Co, 35 P 800, 53 Kan 787
40 CJ p 410 note 53

35. Mo—Kling v. Railway Construction Co, 4 Mo App 574
40 CJ p 410 note 54

36. Va—Pauo v Bethell, 75 Va 825

37. Ill—Stankiewicz v Irvine, 35 NE 2d 433, 310 Ill App 673—U S Gypsum Co v Randall, 21 NE 2d 327, 300 Ill App 610.
40 CJ p 410 note 56.

38. Pa—Pagnacco v Faber, 73 A 172, 234 Pa 18
40 CJ p 410 note 57

39. Ga—Arnold v West Lumber Co, 31 SE 2d 410, 198 Ga. 207
40 CJ p 410 note 60

40. Ala—Central Lumber Co v Schilleci, 148 So 614, 227 Ala 29

41. NY—Van Etten v Sphinx Holding Corp, 186 NYS 595, 114 Misc 436, affirmed 188 NYS 955, 197 App Div 929

42. NY—Van Etten v. Sphinx Holding Corp, *supra*
40 CJ p 410 note 59

43. Neb—Wakefield v Van Dorn, 73 NW 226, 53 Neb 28

44. Neb—Wakefield v Van Dorn, *supra*

45. Nev—Hunter v Truckee Lodge No 14 I O O F, 14 Nev. 24
40 CJ p 411 note 63

46. Mass—Sexton v Weaver, 6 NE 367, 141 Mass 273.

be joined as parties in intervention has been held to preclude the making of such lienor a party by motion where he has not applied to be made a party.⁴⁷ A provision in a mechanics' lien law giving any person interested the right to intervene to contest the validity of the lien is not exclusive and does not preclude other lien creditors from contesting the validity of the lien in another court on distribution of the proceeds of a foreclosure sale in that court.⁴⁸ Where a record of a mortgage by reason of a mistake in the description of the property of the mortgage does not afford constructive notice, the mortgagee must set up his mortgage by intervention in a proceeding to foreclose a materialman's lien.⁴⁹

Joinder either as defendant or plaintiff Where the proceeding is in effect a suit in chancery, the general rule which obtains in courts of equity controls and all parties in interest should be before the court either as plaintiffs or defendants and they may be introduced in either capacity.⁵⁰

§ 286. Process in General

In the absence of waiver or appearance, service of process on the necessary parties is essential to the validity of a proceeding to enforce a mechanic's lien.

In the absence of a waiver or appearance,⁵¹ service of process or the giving of notice in the manner prescribed by law on the necessary parties is essential to the validity of a proceeding to enforce a mechanic's lien,⁵² and it is not sufficient merely to name one as a party in the pleadings in order to conclude him.⁵³ Actual or constructive notice must be given, although the proceeding is regarded as strictly in rem⁵⁴ or in the nature of a proceeding in

rem.⁵⁵ Where, as far as disclosed by the record, certain persons are not necessary parties, it is immaterial whether process was served on them.⁵⁶

As against original contractor Where the contractor is a necessary party in a suit by a subcontractor in that the claim against him must be established before the lien can be enforced, he must be brought in by process if he does not appear,⁵⁷ although, as stated supra § 284 g, in some jurisdictions the court may proceed to adjudicate the lien where the contractor cannot be served, and it has been held that, where there is no objection on the ground of the absence of proof of service of process, the court is not precluded from rendering a decree as between the subcontractor and the owner.⁵⁸ Although under the statute a materialman seeking to enforce a lien must either obtain a judgment against the contractor or sue him concurrently with the owner, the owner of the premises after undertaking to bring the contractor before the court and procuring an order enjoining materialmen from instituting any suit looking to the foreclosure of their liens cannot object that the contractor is not personally served.⁵⁹ Where the contractor and owner are made parties defendant and the owner only is served, the contractor may be brought in, as in cases where only one of two defendants is served.⁶⁰

By defendant or intervening lienor. It has been held that, as the court has jurisdiction to determine all liens set up, a separate summons to the owner by each of the defendant lienors is not necessary,⁶¹ although service on the cross complaint on the parties affected by the allegations setting up the lien is required if a summons is not served,⁶² and it has been held that a personal judgment against the

47. Wash.—Lavanway v Cannon, 75 P 1117, 37 Wash 593

48. U.S.—Pusey & Jones v Pennsylvania Paper Mills, CCPa, 173 F 634, affirmed 185 F 481, 107 C CA 551

49. Wash.—Zurfluh v Hartman, 174 P 963, 103 Wash 452, reheard 178 P 454, 105 Wash 700

50. S.D.—Burgi v Rudgers, 108 N W 253, 20 S.D. 646
40 C.J. p 411 note 68

51. Mo.—Badger Lumber Co v Goodrich, 184 S.W.2d 435, 353 Mo 769

Ohio—Crandall v Irwin, 39 N.E.2d 608, 139 Ohio St 253, 139 A.L.R. 895, adhered to 40 N.E.2d 938, 139 Ohio St 463, 139 A.L.R. 900
40 C.J. p 411 note 70

52. Mo.—Badger Lumber Co v Goodrich, 184 S.W.2d 435, 353 Mo 769—Coerver v Crescent Lead &

Zinc Corporation, 286 S.W. 3, 315 Mo 276

40 C.J. p 411 note 71

Parties named in bill in lien proceeding are the only ones against whom summons can be issued or publication had—Alexander Lumber Co v Kellerman, 193 N.E. 913, 358 Ill 207

53. Minn.—Hokanson v Gunderson, 56 N.W. 172, 51 Minn 499, 40 Am S.R. 354
40 C.J. p 412 note 73

54. Md.—McKim v Mason, 3 Md Ch 186

55. Neb.—Meyers v Le Poidevin, 4 N.W. 319, 9 Neb 535

56. Colo.—Branham v Nye, 47 P 402, 9 Colo App 19

57. Okl.—General Sports Co v Leslie & Walter Coombs Lumber Co, 288 P 949, 143 Okl 297

40 C.J. p 412 note 77

58. Mich.—Peninsular Stove Co v Crane, 197 N.W. 693, 236 Mich 130

59. Ark.—Corpus Juris cited in People's Building & Loan Ass'n v Leslie Lumber Co, 38 S.W.2d 759, 762, 183 Ark 800
40 C.J. p 412 note 79

60. N.Y.—Lowber v Childs, 2 E.D. Smith 577, 1 Abb Pr 415

61. Utah—Culmer v Caine, 61 P 1008, 22 Utah 216
40 C.J. p 412 note 81

Party served under assumed name
Lien claimant, served as individual doing business under assumed name, who filed cross complaint stating he was real creditor, was entitled to foreclosure, even though return showed service on him as managing agent—Shea v Peters, 268 P 989, 126 Or 76.

62. Mo.—Badger Lumber Co v

employer or owner is not authorized without service of summons on the cross petition, although he is bound to take notice of all claims asserted against the property by persons who are made parties under the original petition under a statute providing that all defendants having liens may set them up in their answers.⁶³ According to the practice in some jurisdictions, where a general contractor is made a party to a suit by a subcontractor, he is not bound by a decree entered on a petition filed by another subcontractor to enforce his lien in the same proceeding where he is not served with summons to answer such petition.⁶⁴

Sufficiency The character of process or notice in a proceeding to foreclose a mechanic's lien is sometimes fixed by the particular statutes with reference to the character of the parties or interests represented,⁶⁵ and express provisions in the statute conferring jurisdiction must be followed with respect to essential elements of form,⁶⁶ as well as in respect of the substance,⁶⁷ and the issue and service⁶⁸ of the summons, notice, or other process prescribed, although defects in the process or the service thereof may be waived by a general appearance.⁶⁹ Where the summons conforms to the express terms of the statute under which the lien is

sought, it is sufficient.⁷⁰ Where the statute provides that the action shall proceed according to the chancery practice as far as it may be applicable, the summons is not objectionable because it refers to the petition as on the chancery side of the court, notwithstanding the cause is required to be placed on the common-law docket.⁷¹

Process running into another county. Since the proceeding is in rem or in the nature of a proceeding in rem, it has been held in some jurisdictions that personal service on defendant anywhere within the state is sufficient if the suit is instituted in the county where the property is located.⁷² So under a statute permitting process to be issued to a county other than the one in which suit is brought, where defendant residing in such other county can with propriety be joined as a codefendant if the owner resides and is served in the county where the property is situated and where the suit is brought, the summons may be issued to another county for the contractor,⁷³ but, where the pleading did not show on its face that materials were furnished under a contract with the owner which was necessary in order to show a lien under the particular statute, service on the contractor in another county was held insufficient to support a judgment against him for the

Goodrich, 184 S.W.2d 435, 353 Mo 769

40 C.J. p 412 note 82

Notice of claim insufficient

The fact that owner, as defendant in mechanics' lien suit was apprised by petition that a codefendant was also a lien claimant and had previously been apprised of codefendant's claim by service of a petition in a separate suit, did not cure codefendant's omission to serve owner or his attorneys with a copy of cross petition—*Badger Lumber Co. v. Goodrich*, supra.

63. Ky—*Seiglestyle v. Diesenroth*, 12 Bush 296

64. Va—*Keys Planing Mill Co. v. Kirkbride*, 75 S.E. 778, 114 Va. 58

65. Mass—*Holmes v. Humphreys*, 78 N.E. 668, 187 Mass. 513
40 C.J. p 412 note 85

66. N.J.—*Arlington Realty Co. v. Gluck*, 130 A. 809, 98 N.J.Eq. 62
40 C.J. p 412 note 86

Failure to indorse on the claim the date of the issuance of the summons as required by statute is fatal—*Arlington Realty Co. v. Gluck*, 130 A. 809, 98 N.J.Eq. 62—40 C.J. p 412 note 86 [a]

Nonprejudicial defects

(1) Summons in action to foreclose mechanic's lien will not be set aside for defects which do not af-

fect or prejudice substantial rights of defendant, as failure to state amount of lien or improvement out of which it arose, in view of fact that all facts relating to claim were readily ascertainable from complaint which was on file—*Dressel v. Brill*, 209 N.W. 868, 168 Minn. 99

(2) Failure of summons in mechanic's lien action to require answers to be filed with clerk of court might be disregarded—*Melvey v. Bowman*, 212 N.W. 194, 169 Minn. 504

Misnomer of plaintiff is no ground for nonsuit if he identifies himself as real lien claimant and shows that he is party enforcing proceedings—*Shea v. Peters*, 268 P. 989, 126 Or. 76

67. Tenn—*Warner v. Yates*, 102 S.W. 92, 118 Tenn. 548
40 C.J. p 412 note 87.

68. Iowa—*Jones & Magee Lumber Co. v. Boggs*, 19 N.W. 678, 63 Iowa 589

Commencement of suit

(1) In lien proceeding, summons cannot issue and publication cannot be made against anyone until suit is commenced by filing of bill—*Alexander Lumber Co. v. Kellerman*, 192 N.E. 913, 358 Ill. 307

(2) Commencement of suit for purpose of limitations see supra § 282 g

69. S.C.—*Olver v. Fowler*, 22 S.C. 534

4 C.J. p 1359 note 94—40 C.J. p 411 note 70 [a]

Special appearance

In proceeding to foreclose mechanic's lien on realty, the entry of a special appearance by owners of premises after the lapse of six years from date lien was perfected operated as a waiver of service by publication—*Crandall v. Irwin*, 40 N.E.2d 983, 139 Ohio St. 463, 139 A.L.R. 900

Failure to raise objection

Owner waived irregular service of summons where he failed by appropriate proceedings to question irregular service of summons and it affirmatively appeared that he was not deprived of full period of time within which to pay claim or show cause why he should not—*State ex rel Gore v. Chillingworth*, 171 So. 649, 136 Fla. 645

70. N.J.—*Booth v. Glasser*, 99 A. 933, 90 N.J.Law 91

40 C.J. p 413 note 89

71. Ill.—*Reed v. Boyd*, 84 Ill. 66
40 C.J. p 413 note 90

72. Ark.—*Robins v. East Arkansas Builders Supply Co.*, 137 S.W.2d 924, 199 Ark. 1174—*Carr v. Hahn*, 191 S.W. 232, 126 Ark. 609

73. Mo.—*Mathews v. Haisler*, 58 Mo.App. 145

40 C.J. p 413 note 92.

amount of the claim, no judgment being recovered for the enforcement of the lien⁷⁴

Publication A personal judgment for the amount of the claim which will bind the general estate of a defendant must be supported by personal service⁷⁵ in the absence of an appearance,⁷⁶ but a constructive service is permitted, as by posting⁷⁷ or by publication⁷⁸ in proper cases, for the purpose of sustaining a judgment against the property, under particular statutes or under provisions relating generally to process appropriate to the remedies for the enforcement of mechanics' liens; but where the mechanics' lien law makes no provision for publication, and this method of service is not permitted except in special cases provided for by statute, an order of publication to bring in the owner is unauthorized⁷⁹ The provisions of a statute as to service by publication have been held to be mandatory, and there must be a compliance with the statutory requirements⁸⁰ Where plaintiff has obtained an order for service by publication and has made publication and proof thereof, a defendant lien claimant filing an answer seeking to enforce his

lien is not required to sue out a new order of publication⁸¹ The issuance of summons against a contractor, as is required in case of resident defendants, is not required where it appears by affidavit filed with the clerk that he is a nonresident.⁸²

§ 287. Attachment

Under some statutes proceedings for enforcement of a mechanic's lien are initiated by attachment of the property against which the lien is claimed

Actual seizure or attachment of the property is not necessary in order to acquire jurisdiction in a proceeding to enforce a mechanic's lien,⁸³ and attachment is not a proper remedy⁸⁴ without a statute authorizing it, except for the causes enumerated in the general attachment laws⁸⁵ Further, it has been held that a proceeding by attachment is inconsistent with a proceeding to enforce a materialman's lien for the same property⁸⁶

Under some statutory provisions mechanics' liens are enforced by attachment followed by judgment and execution for the amount secured,⁸⁷ or by attachment based on a sworn bill or petition⁸⁸ or affi-

74. Ohio—Chapman v Bolton Steel Co, 4 Ohio Cir Ct 242, 2 Ohio Cir Dec 523

75. Colo—Davis v John Mout Lumber Co, 31 P 187, 2 Colo App 381

40 C J p 413 note 94

76. Ill—Weidle v Elgin, Joliet & Eastern R Co, 152 Ill App 292

77. Iowa—Colcord v Funck, Morr p 178

40 C J p 413 note 96

78. Mo—Holland v Cunliff, 69 SW 737, 96 Mo App 67

Ohio—Crandall v Irwin, 39 NE 2d 608, 139 Ohio St 253, 139 ALR 895, adhered to 40 NE 2d 933, 139 Ohio St 463, 139 ALR 900

Wash—Neukirch v Wong, 81 P 2d 499, 195 Wash 451

40 C J p 413 note 97

Unknown owners

(1) Order of publication in suit to foreclose mechanic's lien was not necessary to secure service on unknown holders of notes secured by trust deed on property where service was had on all parties having an interest in the notes and trust deed as disclosed by the proper public records—Uhrig v Hill-Behan Lumber Co, 110 SW 2d 412, 341 Mo 851

(2) In materialman's lien proceeding, fact that summons against unknown owners was issued before filing of affidavit as to them did not invalidate service of process on unknown owners by publication—Alexander Lumber Co v Kellerman, 193 NE 913, 358 Ill 207.

(3) Where affidavit as to unknown owners was attached to complaint for mechanic's lien, there was filing of affidavit in compliance with statute—Burgoyne v Pyle, 261 Ill App 356

Attachment or sequestration

In action to foreclose mechanic's lien, service by publication on non-resident owners was authorized without attachment or sequestration of the property—Neukirch v Wong, 81 P 2d 499, 195 Wash 451

79. Miss—Falconer v Frazier, 15 Miss 235

80. Ill—Burgoyne v Pyle, 261 Ill App 356

40 C J p 414 note 99

81. Mo—Hydraulic Press Brick Co v Lane, 200 SW 306, 198 Mo App 438

82. W Va—Augir v Warder, 81 SE 708, 74 W Va 103

83. NC—Bernhardt v Brown, 34 SE 527, 118 NC 700, 36 LRA 402 40 C J p 414 note 3

84. Tex—Aiken v Kennedy, 1 White & W Civ Cas, Ct App § 1321

85. Kan—Gillespie v Lovell, 7 Kan 419

Tenn—Hillman v Anthony, 4 Baxt 444

86. Ark—Pratt v Nakdimen, 138 SW 974, 99 Ark 293, Ann Cas 1913A 873

87. Miss—Beeson-Moore Motor Co v Catlett, 91 So 564, 138 Miss 865 40 C J p 414 note 7

Attachment is a necessary incident to the action to enforce the lien—Goodro v Tarkey, 22 A 2d 509, 113 Vt 213

On trial of claimant's issue for property levied on in a proceeding to satisfy a mechanic's lien, plaintiff cannot recover where it does not appear from the record that a judgment condemning the property for the satisfaction of the lien has been rendered—Beeson-Moore Motor Co v Catlett, 91 So 564, 138 Miss 865

88. Tenn—Reed v Fuller, 65 SW 2d 841, 16 Tenn App 47

40 C J p 414 note 8

Auxiliary and collateral process

Attachment in mechanic's lien suit is not leading process, but auxiliary and collateral to original process, by which suit is commenced, and may be incorporated with such process—Reed v Fuller, supra

Property in custody of court

(1) In an action to enforce a mechanic's lien where the property was in the custody of the court, because of an insolvency proceeding, it was not necessary that the attachment be actually levied in order that the lien be established—Nicely v Nicely, 8 Tenn App 134

(2) Attachment, granted and levied on petition of intervening mechanic's lien claimant, was sufficient to support enforcement of lien of original claimant, who filed bill, containing all essentials of petition, with bond and security, but did not sue out attachment—Reed v Fuller, 65 SW 2d 841, 16 Tenn App 47.

davit showing the necessary facts entitling the party to the relief,⁸⁹ and under such provisions the attachment must be issued and levied within the limitation period, and the mere commencement of a suit without such issue and levy of attachment is not sufficient⁹⁰ even though the attachment is issued and levied subsequently.⁹¹ Under a statute authorizing enforcement of mechanics' and furnishers' liens by attachment either at law or in equity, the attachment authorized cannot be used as the leading process to bring defendants before the court.⁹² Since the proceeding is statutory, the party resorting to it must allege in his affidavit the facts which entitle him to the relief under the statute,⁹³ but an affidavit which states the facts required by the statute in order to secure the lien and complies with the statute in other respects is sufficient,⁹⁴ and the grounds for attachment under the general attachment laws need not be set out,⁹⁵ and other requirements relating to attachments under the general attachment laws are not applicable⁹⁶ except as provided by the mechanics' lien statute.⁹⁷

§ 288. Scire Facias

Under some statutes scire facias is used as a proceeding to enforce a mechanic's lien.

While scire facias was known to the common law, its application to the enforcement of mechanics' liens is statutory,⁹⁸ and the statutes in some jurisdictions provide for the use of scire facias as a proceeding to enforce mechanics' liens.⁹⁹ Such statutes govern as to the form of the writ,¹ the mode of service,² and the defenses which may be made.³ The proceeding is regarded as in rem.⁴ It must be based on a subsisting lien⁵ and the ascertainment of the amount of the debt is incidental.⁶ Hence, it will not lie where the lien has been divested by a judicial sale.⁷

The scire facias notifies the party and gives him an opportunity to show cause against enforcing the lien⁸ and amounts to the institution of suit.⁹ The writ discloses the facts on which it is founded, it is in the nature of a declaration and the plea is properly directed to it,¹⁰ and it must be issued¹¹ and served¹² in strict compliance with the requirements of the statute.

Title and possession of property otherwise acquired

Where mechanic's lienor bringing suit has previously acquired title to and possession of property, attachment process is unnecessary—*Arnstein Realty Co v Williams*, 40 S W 2d 1007, 163 Tenn 69.

Remedy by judgment and execution

(1) Restriction to remedy by attachment in enforcing mechanic's lien applies to subcontractor only—*Arnstein Realty Co v Williams*, supra.

(2) Remedy by judgment and execution see supra § 263.

89. Fla.—*Summerlin v Thompson*, 12 So 667, 31 Fla 369.

90. Tenn.—*Read v Fuller*, 65 S W 2d 841, 16 Tenn App 47, 40 C J p 414 note 10.

Commencement of action

(1) The time within which the action must be commenced is determined by the date on which the attachment is made—*Goodro v Tarkley*, 23 A 2d 509, 112 Vt 212.

(2) When proceedings deemed instituted for purposes of limitations generally see supra § 282 g.

91. Tenn.—*Ragon v Howard*, 37 S W 186, 97 Tenn 334.

92. Tenn.—*Warner v Yates*, 102 S W 92, 118 Tenn 548, 40 C J p 414 note 13.

93. Fla.—*Stearns v Jaudon*, 8 So 640, 27 Fla 469, 40 C J p 414 note 14.

94. Fla.—*Summerlin v Thompson*, 12 So 667, 31 Fla 369.

95. Fla.—*Strong v Lake Weir Chautauqua & Lyceum Ass'n*, 6 So 882, 25 Fla 765.

Tenn.—*Hillman v Anthony*, 4 Raxt 444.

96. Tenn.—*McLeod v. Capell*, 7 Raxt 196.

40 C J p 415 note 17.

97. Fla.—*Strong v Lake Weir Chautauqua & Lyceum Ass'n*, 6 So 882, 25 Fla 765.

40 C J p 415 note 18.

98. Mo.—*Doellner v Rogers*, 16 Mo 340.

40 C J p 415 note 19.

99. Pa.—*Berlin v Harvey*, 26 Pa Dist & Co 609, 20 West Co L J 43—*Kempter v Buckley*, Com Pl, 40 Lack Jur 117—*Diem v Whirt*, Com Pl, 50 Lanc L Rev 259, 13 Som Leg J 163.

40 C J p 415 note 20.

Essential parties to mechanic's lien proceeding, including original contractor, must be made on issuance of writ of scire facias—*Iannotti v Kalmbacher*, 156 A 366, 4 W W Harr Del, 600.

Where mechanic's lien has been stricken from record, writ of scire facias sur mechanic's lien is properly quashed—*Johnson Service Co v Fayette Title & Trust Bldg*, 96 Pa Super 543.

1. Pa.—*Burger v S R Moss Cigar Co*, 74 A 219, 235 Pa. 400.

40 C J p 415 note 21.

2. Pa.—*Burger v S R Moss Cigar Co*, supra—*Atlantic Terra Cotta Co v Carson*, 53 Pa Super 91.

3. Pa.—*Burger v S R Moss Cigar Co*, 74 A 219, 235 Pa. 400.

Contract against liens is available as a defense—*Hudak v Falasa*, 12 Pa Dist & Co 485.

4. Ark.—*McCullough v. Caldwell*, 5 Ark 237.

40 C J p 415 note 24.

Proceedings to enforce mechanic's lien as generally in rem see supra § 265.

5. Pa.—*Anshutz v McClelland*, 5 Watts 487.

40 C J p 415 note 25.

6. Pa.—*Anshutz v. McClelland*, supra.

7. Pa.—*Rosenberg v Cupersmith*, 37 A 570, 240 Pa 162, 47 L R A N S, 708.

40 C J p 415 note 27.

8. Md.—*Kees v Kerney*, 5 Md 419.

9. Ark.—*Brackney v Turrentine*, 14 Ark 416.

10. Md.—*Wilson v. Merryman*, 48 Md 328.

40 C J p 415 note 30.

11. Pa.—*Davis v Mt Olivet A M E Church*, 15 Pa Dist 946, 33 Pa Co 111—*Schoser v Chapin*, Com Pl, 33 Luz Leg Reg 51.

40 C J p 415 note 31.

12. Del.—*Carswell v. Patzowski*, 53 A 54, 19 Del 593.

40 C J p 415 note 32.

Persons interested who are not notified as required by the statute cannot be prejudiced by any consent agreement between the mechanic filing the lien and the parties against whom the writ issues by which notice is waived¹³ Under a statute providing for two writs of scire facias, one to recover and the other to continue the lien, the scire facias to continue the lien may issue pending a scire facias to recover¹⁴

§ 289. Notice of Pendency of Action

Mechanic's lien statutes sometimes require the filing of notice of lis pendens and some general lis pendens statutes have been held to apply to proceedings to enforce mechanic's liens

It has been held that, where the requirements of the mechanics' lien statute are complied with, all persons dealing with the property must take notice of the mechanic's lien although no lis pendens notice is filed,¹⁵ and in the absence of a statutory requirement a notice of the pendency of the action need not be filed in order to hold the property as against purchasers pendente lite,¹⁶ nor in the absence of statutory requirement is the owner bound to notify assignees of the contractor of the institution of a lien suit by a subcontractor¹⁷ However, a statute of general application requiring no-

tice of lis pendens in actions affecting the title to real estate has been held to be applicable to mechanics' liens,¹⁸ and, where lis pendens is not filed, the lien is ineffective as against a bona fide purchaser or mortgagee¹⁹ although the notice of lis pendens is not essential to the protection of the lien as against a purchaser taking with actual knowledge of the claim²⁰

Under some mechanic's lien statutes the lienor is required to file or serve a notice of lis pendens²¹ Under some statutes the lien is lost unless the lis pendens is filed within the time prescribed,²² although the debt may be enforced,²³ and, where the lien on the property is discharged by depositing the money in court and the lien is shifted to the fund, the filing of a lis pendens is unnecessary²⁴ On the other hand, it has been held that the purpose of requiring lis pendens is to give constructive notice²⁵ and that a failure in that respect may not be availed of by persons who have actual notice²⁶ Thus a notice of lis pendens is not a condition to the enforcement of the lien as against the owner²⁷ So, where the lien claimant is required at the time of filing the complaint and issuing summons to publish a notice of his claim for a certain time in a newspaper notifying all persons holding or claiming liens

13. Md—McKim v Mason, 3 Md Ch 186

14. Pa—Worrlow v Chester Land Co, 5 Pa Dist 641
40 C J p 416 note 34

15. Ark—Arkansas Foundry Co v American Portland Cement Co, 75 SW 2d 387, 189 Ark 779

Assignee of mortgage

Assignee failing to file mortgage assignment for over year after commencement of action to foreclose mechanic's lien was subsequent encumbrancer bound by all proceedings therein—Wilson v Hayes-Lucas Lumber Co, 226 NW 343, 55 SD 331

Where transfer was made "subject to encumbrances of record" at a time when a proceeding to enforce a duly recorded mechanic's lien was pending, the transferees were charged with notice of all facts pending in mechanic's lien suit—Johnson v Olson, 273 NW 201, 132 Neb 778

16. Cal—Tulloh v Boyce, 174 P 680, 177 P 847, 37 Cal App 761

17. US—Woodward & Lothrop, Inc v Union Trust Co of Rochester, N Y, CCDC, 262 F 627

18. Ala—First Ave Coal & Lumber Co v Rimer, 133 So 589, 232 Ala 545—Reeder v Cox, 118 So 338, 218 Ala 182

Wis—Glass v Zachow, 145 NW 236, 156 Wis. 21.

What constitutes lis pendens is governed by general statute—Alexander Lumber Co v Kellerman, 192 NE 913, 358 Ill 207

19. Ala—Federal Land Bank of New Orleans v First Nat Bank, 185 So 414, 237 Ala 84—First Ave Coal & Lumber Co v Rimer, 133 So 589, 232 Ala 545

Miss—Hamilton Bros Co v Baxter, 195 So 335, 188 Miss 610—McKenzie v Fellows, 52 So 638, 97 Miss 31

Wis—Glass v Zachow, 145 NW 236, 156 Wis 21

20. Idaho—Smith v Faris-Kesl Constr Co, 150 P 25, 27 Idaho 407

21. Iowa—Joyce Lumber Co v Wick, 205 NW 476, 200 Iowa 796
Mich—Washtenaw Lumber Co v Belding, 208 NW 152, 233 Mich 608

Persons affected

Notice of lis pendens in mechanic's lien proceeding should set forth, either in title or body, persons affected by bill—Whitehead & Kales Co v Taan, 208 NW 148, 233 Mich 597

22. NY—Syracusa v Inch Corporation, 298 NYS 878, 164 Misc 820
40 C J p 416 note 43

Requirement jurisdictional

NY—Johnson v Waldo Griffiths, Inc, 259 NYS 386, 144 Misc 773

Nunc pro tunc

Filing of notice of pendency of action cannot be supplied nunc pro tunc—Johnson v Waldo Griffiths, Inc, supra

Filing by another lien claimant

Where no lis pendens was filed by any lien claimants within year following filing of claimant's notice of lien, claimant's lien failed, notwithstanding suit to foreclose lien was commenced within a year following filing of notice of lien and notwithstanding a lis pendens was filed by another lien claimant after expiration of year following claimant's filing of notice of lien—Syracusa v Inch Corporation, 298 NYS 878, 164 Misc 820

23. NY—Ward v Kilpatrick, 85 NY 413, 39 Am R 674

24. NY—Ward v Kilpatrick, supra—Sheffield v Robinson, 25 NYS 1078, 73 Hun 173

25. Mich—Vander Horst v Kalamazoo Apartments Corporation, 215 NW 57, 239 Mich 593—Washtenaw Lumber Co v Belding, 208 NW 152, 233 Mich 608

26. Mich—Hart v Reid, 219 NW 692, 243 Mich 175—Vander Horst v Kalamazoo Apartments Corporation, 215 NW 57, 239 Mich 593

27. Minn—Julius v Callahan, 65 NW 267, 63 Minn 154.
40 C J. p 416 note 49.

on the premises to appear and exhibit them,²⁸ it has been held that the failure to publish such a notice does not defeat claimant's right of action where it does not appear that there are any other liens, as in such case defendant is not prejudiced.²⁹ The requirement is intended for the protection of third persons who may deal with the property without notice.³⁰

Lienors made defendant Where other lienholders have been made defendants and a notice of lis pendens has been filed, it has been held that they need not file further notice of lis pendens,³¹ although it has also been held that a lienholder setting up his lien by way of cross bill must also file his notice of lis pendens,³² and that, where the notice is required to contain the names of the parties, one whose lien subsequently matures must amend a lis pendens already filed by plaintiff so as to include his name therein as a party or serve a lis pendens on his own behalf.³³

An intervenor claiming a mechanic's lien is re-

quired to file a lis pendens³⁴ unless the lis pendens already filed by the other parties lists him as a person affected by the proceeding.³⁵

Cancellation or vacation of notice Under a statute providing for the cancellation of a notice of lis pendens after settlement, discontinuance, abatement, or final judgment in an action, a notice of lis pendens should be canceled where the lien is discharged by failure to begin the action to foreclose within the time prescribed by statute.³⁶

§ 290. Dismissal before Hearing

General grounds for dismissal, such as want of prosecution, apply to proceedings to enforce a mechanic's lien.

The courts have a general control over lien actions pending therein and may direct their discontinuance on grounds applicable to the dismissal of other actions.³⁷ For example, the proceeding may be dismissed because of a want of diligent prosecution,³⁸ or the proceeding may be dismissed be-

28. Nev—Lonkey v Wells, 16 Nev 371

Utah—Sandberg v Victor Gold & Silver Min Co, 66 P 360, 24 Utah 1

29. Nev—Lonkey v Wells, 16 Nev 271—Elliott v Ivers, 6 Nev 287
Utah—Sandberg v Victor Gold & Silver Min Co, 66 P 360, 24 Utah 1

30. Colo—Laverentz v Craig, 219 P 779, 235 P 250, 74 Colo 297
Or—J W Copeland Yards v Sheridan, 296 P 838, 136 Or 37, rehearing denied 297 P 837, 136 Or 37

Bona fide purchaser

In order to defeat mechanics' liens, notwithstanding failure to file lis pendens notice, alleged purchaser must prove he is bona fide purchaser for value without notice—Jurgens v Sheridan, 296 P 840, 136 Or 45

31. Mich.—Whitehead & Kales Co v Taan, 208 NW 148, 233 Mich 597

NY—O'Neill v Seglin Const Co, 286 NYS 849, 158 Misc 742, affirmed 288 NYS 798, 248 App Div 684
40 C J p 416 note 46

32. Mich—L J Mueller Furnace Co v Wayne Cir Judge, 198 NW 248, 226 Mich 672

33. NY—Charles M Gray Marble & Slate Co v Schaefer, 200 NYS 610, 206 App Div 167, affirmed 143 NE 749, 237 NY 576

Clerk's failure to make amendment

Subsequent mechanic's lienor, made defendant in action to foreclose mechanic's lien by order directing amendment of notice of lis

pendens, was entitled to have action continued until determination of his claim, notwithstanding clerk's failure to make amendment—Maas v Olmstead, 215 NYS 335, 127 Misc 158

34. Mich—Vander Horst v Kalamazoo Apartments Corporation, 215 NW 57, 239 Mich 593—Whitehead & Kales Co v Taan, 208 NW 148, 233 Mich 597

35. Mich—Whitehead & Kales Co v Taan, supra.

36. NY—Martens v O'Neill, 115 NYS 260, 131 App Div. 123, 1 NY Civ Proc 293, rehearing denied 118 NYS 1123, 134 App Div 924
40 C J p 417 notes 54, 55

37. Cal—Holt v Miller, 6 P 2d 937, 214 Cal 558, 79 A L R 844

Ill—Busca v Gasiorowski, 10 NE 2d 681, 293 Ill App 167
40 C J p 478 note 79

Padded accounts

Contractor's bill of complaint to enforce lien for material and labor furnished was properly dismissed under clean hands doctrine where contractor padded material and labor accounts—Alzheimer v Palmer, 181 So 559, 119 Fla 335

38. Cal—Hayward Lumber & Investment Co v Greenwalt, 12 P 2d 445, 215 Cal 656—Holt v Miller, 6 P 2d 937, 214 Cal 558, 79 A L R 844—Bronger v Polytechnic School of Beauty Culture, 141 P 2d 480, 60 Cal App 2d 656

Mo—Wiles-Chipman Lumber Co v Pieper, App, 176 SW 2d 50—Hill-Behan Lumber Co v Sellers, App, 149 SW 2d 465

NJ—Gluck v Ruiz-Urrutia, 129 A. 130, 101 NJ Law 558

Wis—Wisconsin Lumber & Supply Co v Dahl, 252 NW 714, 214 Wis 137

Statutory duty

(1) It is not necessary to resort to inherent power of court to dismiss a suit to enforce a mechanic's or materialman's lien for failure to prosecute without unnecessary delay, since duty is cast on plaintiff to prosecute such action without unnecessary delay by an express statute—Wiles-Chipman Lumber Co v Pieper, Mo App, 176 SW 2d 50

(2) Statutory provision respecting discharge of mechanic's lien for lack of diligent prosecution of claim was held not automatic—Zanzonica v. Miller, 155 A. 10, 9 NJ Misc 597

Excuse for delay

(1) In general—Joseph Harris & Sons v Delaware, L & W R Co, 154 A. 822, 108 NJ Law 141

(2) Pendency of mortgage foreclosure suit, wherein mechanic's lien claimant was made party defendant—Wisconsin Lumber & Supply Co v Dahl, 252 NW 714, 214 Wis 137

Special demurrer

A motion to dismiss materialman's lien action because of unnecessary delay was in nature of a special demurrer and was a proper method of calling to court's attention the long delay in prosecution of the case—Wiles-Chipman Lumber Co v Pieper, Mo App, 176 SW 2d 50

Trial court of own motion and without notice may dismiss action to foreclose mechanic's lien not pros-

cause it was not brought in time,³⁹ or because of failure to show reasonable diligence as to service of summons,⁴⁰ or a failure to serve necessary parties,⁴¹ or for failure to serve a notice of lien in time, or because of insufficient notice.⁴² If a personal judgment can be recovered in the lien proceeding the waiver of the lien is no ground for dismissal of the complaint.⁴³

The motion to dismiss may be made by one who is the legal or equitable owner of the property⁴⁴ or by other lien claimants,⁴⁵ but an action to enforce a lien which is apparently regular on its face cannot be dismissed on motion of a person who is not a party and who does not seek to be made a party with the result of summarily disposing of an issue regularly made between plaintiff and one defendant, the other defendant being in default.⁴⁶

Time for motion A motion by complainant to dismiss his bill without prejudice is properly denied where made after the cause has been heard on the pleadings and the master's report of the evidence, and it is apparent to claimant that the decree will necessarily be against him,⁴⁷ but, where the answer merely affects the validity of the lien and there is no affirmative relief demanded, the case may be dismissed on plaintiff's application after the trial has begun and part of plaintiff's evidence has been introduced.⁴⁸

Affirmative claims by defendants Where the statute contemplates a disposition of the entire matter of liens in one proceeding, and other lien claimants are made defendants and appear, the original plaintiff by dismissal of his proceedings

cannot preclude an adjudication of the rights of the other lienors,⁴⁹ nor does the fact that the original complainant fails to sustain his lien affect the right of defendant and other lien claimants to enforce their liens in that proceeding.⁵⁰ A proceeding by the owner who has filed a petition for a general settlement will not be dismissed on the owner's motion after the time has elapsed within which a defendant lienor might have asserted his claim for a lien in another proceeding,⁵¹ and this is true although the answer of the lienor when filed contained a prayer that the petition be dismissed.⁵² After complainant has become a nominal party by an assignment to a defendant who by answer and cross bill has asserted his claim, his motion to dismiss is properly denied.⁵³ It has been held that a cross bill to quiet title survives a dismissal of the lien claim.⁵⁴

Effect A nonsuit taken on a scire facias does not destroy the claim or its lien⁵⁵ nor does it bar a subsequent action on the debt.⁵⁶ Where the proceeding to enforce a mechanic's lien is brought against joint owners if the bill is properly dismissed on a demurrer of one of the alleged owners the proceeding is at an end regardless of any defect in the petition of codefendant seeking permission to come in and answer after a default.⁵⁷ Where, in an action to enforce a mechanic's lien, tried by the court without a jury, the evidence as to whether a certain sum paid to the contractor was in full of the contract price was conflicting, and the court dismissed the complaint, such judgment was equivalent to a finding that the sum paid was all plaintiff was entitled to under the contract, and hence a dismissal

executed to trial within two years—*Hayward Lumber & Investment Co v Greenwalt*, 12 P 2d 445, 215 Cal 655

Mere delay will not in itself forfeit right to mechanic's lien, and only unnecessary delay is prohibited by statute, such delay must be established by evidence to be a fact and the lapse of ten years between date of instituting suit to enforce mechanics' lien and rendition of final decree did not require dismissal of the suit, where there was procrastination by all parties but no proof of unnecessary delay by claimants and party opposing enforcement of lien did not attempt to exercise statutory right to hasten movement of the case—*Fuhler v Gohman & Levine Const. Co.*, 142 S W 2d 482, 346 Mo 582

39. Ill.—*Philip Gollner Co v Gillette*, 216 Ill App 25, 40 C J. p 478 note 81.

40. Idaho—*Shaw v. Martin*, 117 P 853, 20 Idaho 168
40 C J. p 478 note 82.

41. N Y—*Furze v New York City*, 154 N Y S 912
40 C J. p 478 note 83

42. Ill.—*Rittenhouse & Embree Co v Smolinski*, 177 Ill App 396
Pa.—*Mansfield v. Ocipa*, 28 Pa Dist 121

43. N Y—*Snaith v Smith*, 27 N Y S 379, 7 Misc 37

44. Cal—*Holt v Miller*, 6 P 2d 937, 214 Cal 558, 79 A L R 844

45. N Y—*Siracusa v Inch Corporation*, 298 N Y S 878, 164 Misc 620

46. Kan.—*Deatherage Lumber Co v Miles*, 116 P 505, 85 Kan 363
40 C J. p 478 note 67

47. Ill.—*Menke v Barnhart*, 137 Ill App 59

48. Minn.—*Althen v Tarbox*, 50 N W 828, 48 Minn 1
40 C J. p 478 note 96

49. N Y—*Hinkle v Sullivan*, 95 N. Y S 788, 108 App Div 316

40 C J. p 478 note 91, p 378 note 37

50. N Y—*Hill v Flatbush Consumers' Ice Co*, 127 N Y S 961, 142 App Div 559—*Neuchatel Asphalte Co v New York*, 33 N Y S 64, 12 Misc 26, affirmed 49 N E 1043, 155 N Y 373

40 C J. p 378 note 37, p 389 notes 55, 56

51. Ill.—*Geweke v. Hilsinger*, 177 Ill App 467.

52. Ill.—*Geweke v Hilsinger*, supra

53. Ill.—*Major v Collins*, 11 Ill App 658

54. Mo.—*Dezino v William S Drozda Realty Co.*, App, 13 S W 2d 659

55. Pa.—*Berger v. Long*, 1 Walk. 143

56. Pa.—*Commercial Sash & Door Co v Thompson*, 17 Pa Dist 996.

57. Ill.—*Philip Gollner Co v. Gillette*, 216 Ill App 25.

al on the merits, and not a nonsuit merely ⁵⁸

Reinstatement Where an action to foreclose a mechanic's lien is dismissed without prejudice, a reinstatement at the same term is within the discretion of the court,⁵⁹ and the discretion of the court in allowing such reinstatement will not be interfered with where the grounds alleged against reinstatement go only to the merits of the case and to the right of plaintiff to maintain the action ⁶⁰

§ 291. Receiver

Under general equity powers or statutory authorization the court may appoint a receiver of the property against which the mechanic's lien is sought to be enforced

In the absence of statutory authority or equitable considerations, a mechanic's lienor is not entitled to the appointment of a receiver of the property pendente lite,⁶¹ but under general statutes authorizing the appointment of a receiver, or under its general equity powers, a court may appoint a receiver for the purpose of conserving the property pending the action ⁶² Statutes authorizing or governing the appointment of receivers in mortgage foreclosure actions are sometimes held to apply to proceedings to enforce a mechanic's lien ⁶³

The appointment of a receiver rests largely in the

discretion of the court,⁶⁴ but it has been held that a receiver should be appointed only under circumstances requiring summary relief or where the court is satisfied that there is imminent danger of loss and where there is no remedy at law,⁶⁵ or where the debtor is insolvent and that the property on which the lien is sought to be enforced is meager and scant security for the debt ⁶⁶ The burden is on the lien claimant to make a strong showing of equities entitling him to the appointment of a receiver ⁶⁷

Appointment and order Where the statute authorizes the appointment of a receiver, where a sale has been had and confirmation thereof has been denied, to lease or otherwise handle the property in the interests of all concerned, a receiver may be properly appointed with such powers, although the moving papers ask for relief which the statute does not authorize ⁶⁸ An order appointing a receiver is not fatally defective because of a slight variance in the description of the property of which it requires the receiver to take possession from the description contained in the lien notice ⁶⁹

Receiver's powers The court may authorize the receiver to borrow money to complete the improvement⁷⁰ and to remove from the property an im-

58. N.Y.—Doll v Coogan, 62 N.Y.S. 627, 48 App Div 121, affirmed 61 NE 1129, 163 N.Y. 656

59. Kan.—Barney v Ferguson, 114 P 1055, 84 Kan 537

60. Kan.—Barney v Ferguson, supra

61. N.Y.—Bloch v Kucker, 235 N.Y.S. 184, 134 Misc 303 40 C.J. p 477 note 66

62. Ind.—Flanders v Ostrom, 187 NE 673, 206 Ind 87

Minn.—Northland Pine Co v Melin, 161 NW 407, 136 Minn 236, 1 A.L.R. 1463

Tex.—Turner v Groves Lumber Co., Civ App, 146 S.W.2d 422—Scott v Jones, Civ App, 129 S.W.2d 323, error dismissed

Vacation of premises by owner

Where legally appointed receiver was ordered to take possession of property for benefit of creditors in mechanic's lien foreclosure suit, court could order premises vacated by owner—Flanders v Ostrom, 187 NE 673, 206 Ind 87

Where the owner is a defunct association, the lienor, who is a judgment creditor, is entitled to relief in equity to have a receiver appointed for the collection and preservation of the assets of the owner, particularly where the collection of such assets would involve a multiplicity

of suits—Oglethorpe Savings & Trust Co v Morgan, 102 SE 528, 149 Ga 787

Refusal to vacate receivership was held to be error under the circumstances—Langlois v Martin, Tex Civ App, 105 S.W.2d 440

Receiver's report

In mechanic's lien foreclosure suit, receiver's final report could not be questioned by property owners who filed no exception thereto—Flanders v Ostrom, 187 NE 673, 206 Ind 87

63. Ill.—Pittsburgh Plate Glass Co v Kransz, 125 NE 730, 391 Ill 84

Tex.—Scott v Jones, Civ App, 129 S.W.2d 332, error dismissed

Failure to follow strict letter of statute was an irregularity which defendant could waive—Scott v Jones, supra

64. Minn.—Northland Pine Co v Melin, 161 NW 407, 136 Minn 236, 1 A.L.R. 1463

Tex.—Turner v Groves Lumber Co., Civ App, 146 S.W.2d 422

Discretion not abused

Tex.—Turner v Groves Lumber Co., supra

65. Minn.—Northland Pine Co v Melin, 161 NW 407, 136 Minn 236, 1 A.L.R. 1463

Petition held insufficient to authorize appointment of receiver—Lang-

lois v Martin, Tex Civ App, 105 S.W.2d 440

66. Ill.—Glennon v Wilcox, 159 Ill App 42

Iowa.—Des Moines Marble & Mantel Co v McConn, 227 NW 531, 210 Iowa 266

67. Tex.—Langlois v Martin, Civ App, 105 S.W.2d 440

Application of rents to lien

In suit to foreclose mechanic's liens on property consisting of apartments, allegation of petition that defendants were failing to apply rents on liens, verified on information and belief, was insufficient to authorize order refusing to vacate appointment of receiver of rents, where defendants filed verified denial of such allegation—Langlois v Martin, supra

68. Minn.—Dezurik v Ibhags, 167 NW 116, 139 Minn 450

69. Wash.—Seymour v Landon, 224 P 3, 128 Wash 683 40 C.J. p 478 note 78

70. Ind.—Flanders v. Ostrom, 187 NE 673, 206 Ind 87

Estoppel

In mechanic's lien foreclosure proceeding, owners could not challenge order authorizing receiver to borrow money to complete building, where owners were in court and consented

provement which lessened its value.⁷¹ The receiver's certificate may be made a first lien,⁷² although this power will be exercised in cases of individuals and private corporations with great caution.⁷³

Establishment of claims It has been held that, where a receiver is appointed, the mode of estab-

lishing lien claims by suit or presentation to the receiver rests within the discretion of the court.⁷⁴

Disposition of funds A court in possession of rents collected by a receiver may make such application thereof as justice and equity require.⁷⁵

B. PLEADING

§ 292. Declaration, Bill, Complaint, or Petition

The nature of the pleadings required to enforce a mechanic's lien depends on the nature of the proceeding and the terms of the statutes.

The nature of the pleadings required to enforce a mechanic's lien depends on the nature of the proceeding and the terms of the statutes.⁷⁶ Thus, where the statute requires an adjudication of all recorded claims in one action, it is sometimes held that formal pleadings on the part of claimants who may come into the proceeding and prove their liens are not necessary.⁷⁷ It is a matter for the sound discretion of the court whether, under the circumstances of the case, it shall grant leave to file a complaint nunc pro tunc.⁷⁸

As discussed supra § 288, where the remedy is by

scire facias, no declaration is necessary.

§ 293. — Form, Requisites, and Sufficiency in General

The facts on which a mechanic's lien arises and which authorize its enforcement under the statute must be alleged, and a pleading which does this is sufficient.

The rules governing plaintiffs' pleadings in civil actions generally, as considered in the CJS title Pleading §§ 63-98, also 49 C.J. p 128 note 29-p 179 note 56, generally apply to plaintiff's pleadings in an action to foreclose a mechanic's lien.⁷⁹ The right to a mechanic's lien, being entirely dependent on statute, the facts on which such lien arises and which authorize its enforcement under the statute must be alleged,⁸⁰ and the pleading which does this is sufficient,⁸¹ at least if it conforms in other re-

to borrowing of money—*Flanders v Ostrom*, supra.

71. Ind—*Flanders v Ostrom*, supra.

72. Ill—*Pittsburgh Plate Glass Co v Kransz*, 125 NE 730, 291 Ill 84.

73. Ill—*Pittsburgh Plate Glass Co v Kransz*, supra.

40 C.J. p 477 note 73.

74. U.S.—*Haskell v McClintic-Marshall Co*, CCA Wash., 289 F 405.

75. Conn—*City Lumber Co of Bridgeport v Murphy*, 179 A 839, 120 Conn 16.

76. Nev—*Hunter v Truckee Lodge No 14 I O O F*, 14 Nev 24.

77. Nev—*Hunter v Truckee Lodge No 14 I O O F*, supra.

78. Minn—*Thornton Bros v Johnson-Schaffer Drug Co*, 263 NW 108, 195 Minn 385.

Denial of leave to file held proper

Evidence sustaining finding that mechanic's lien claimant had not filed his complaint in clerk's office and that complaint had not been lost or mislaid by clerk's office, order denying leave to file copy of complaint nunc pro tunc and dismissing action was held proper—*Thornton Bros v Johnson-Schaffer Drug Co*, supra.

79. Ala—*Dennett Realty Co v Isbell*, 123 So 337, 219 Ala 318.

Mont—*Smith v Gunniss*, 144 P 2d 186, 115 Mont 363.

NY—*Duffy v McManus*, 8 ED Smith 657, 4 Abb Pr 432.

Pleadings in actions on bonds given in connection with mechanics' liens see supra §§ 239, 263.

80. Ala—*Foster v Prince*, 141 So 248, 224 Ala 523.

Ariz—*American Coarse Gold Corporation v Young*, 52 P 2d 1181, 46 Ariz 511.

Cal—*Asnon v Foley*, 288 P 792, 105 Cal App 624.

Fla—*Baker v Webster*, 191 So 835, 140 Fla 471—*Southern Paint Mfg Co v Crump*, 182 So 291, 132 Fla 799—*Ft Meade Hotel Co v Knoxville Iron Co*, 127 So 896, 99 Fla 917—*Curtiss-Bright Ranch Co v Selden Cypress Door Co*, 107 So 679, 91 Fla 354.

Ky—*Minter Homes Corporation v Forsythe*, 178 SW 2d 829, 297 Ky 11.

Or—*Andersen v Turpin*, 142 P 2d 999, 172 Or 420.

Tex—*John F Grant Lumber Co v Bell*, Civ App, 96 SW 2d 666, error dismissed—*Trout v Wichita State Bank & Trust Co*, Civ App, 23 SW 2d 671.

40 C.J. p 417 note 63.

Pleadings held insufficient

Fla—*American Welding & Tank Co v De Soto Brewing Co*, 175 So 803, 129 Fla 89—*Spinney v Live Oaks Manor*, 162 So 864, 120 Fla 465.

Ind—*National Brick Co v Russell*, 190 NE 614, 99 Ind App 33.

Conditions precedent

A materialman could not maintain action to enforce a mechanic's lien against property of owner who had paid contractor after completion of the work in absence of allegations in complaint that the materialman had complied with conditions precedent to the acquiring of a lien on the property—*Southern Paint Mfg Co v Crump*, 182 So 291, 132 Fla 799.

81. U.S.—*In re Danville Hotel Co*, DC Ill, 33 F 2d 162, affirmed in part and reversed in part on other grounds, CCA, 38 F 2d 10.

Ala—*Hancock v Taylor*, 21 So 2d 308, 246 Ala 521—*Richardson Lumber Co v Howell*, 122 So 343, 219 Ala 328.

Fla—*Florida New Deal Co v Crane Co*, 194 So 865, 142 Fla 471—*Paxton v Foley Lumber Co*, 193 So 715, 141 Fla 662—*Atkins v Kendrick*, 190 So 248, 138 Fla 776—*Hendry Lumber Co v Bryant*, 189 So 710, 138 Fla 485—*Bjoraaas v South Florida Co*, 111 So 254, 93 Fla 1052.

Ga—*Kreutz v Dublin Sash & Door Co*, 184 SE 908, 53 Ga App 50.

La—*Glassell, Taylor & Robinson v John W Harris Associates*, 26 So 2d 1, 209 La 957.

Me—*Otis Elevator Co v Finks*

spects to the general rules governing the sufficiency of pleading in a particular forum⁸² Aside from this, it has been said that there is no peculiar rule of pleading which is especially and only applicable to petitions for the enforcement of mechanics' liens⁸³ Matters which cannot affect the lienor's right to a lien need not be alleged⁸⁴

While it has been held that plaintiff's bill should show that the suit was begun before the statutory period of limitation expired,⁸⁵ where the record shows that the suit was instituted in time the bill need not allege the fact affirmatively, since the court will take notice of the record⁸⁶

Technical errors The absence of fine technique in pleading is not fatal to a complaint in a mechanic's lien foreclosure suit,⁸⁷ and mere technical er-

rors are immaterial in determining the sufficiency of the pleading⁸⁸

Construction The pleadings in a mechanics' lien case should be liberally construed,⁸⁹ and all parts of the pleading should be read together⁹⁰ Where lien actions have been consolidated for trial, the allegations of the various complaints may be taken together and treated as one pleading, the allegations in one complaint remedying the defects or omissions in another⁹¹

Proceeding by assignee Where the suit is brought by the assignee of the lien, the pleading must show when and how plaintiff acquired title to the lien⁹² Under a statute providing that the lien claimant may assign his claim in writing, it is not necessary in a proceeding by the assignee to allege

Clothing Co., 159 A 563, 131 Me 95

Mont—Doney v Ellison, 64 P 2d 348, 103 Mont 591

Okl—Coleman v Missouri Valley Electric Co., 36 P 2d 730, 169 Okl 264

Tex—Tucker v Dougherty Roofing Co., Civ App, 137 S W 2d 884, error dismissed, judgment correct—Hagan v White, Civ App, 1 S W 2d 661

40 C J p 418 note 64

Language of statute as not essential

Complaint need not aver existence of essential requirements of statute in precise terms of statute itself—Stone v Serimian, 246 P 45, 198 Cal 530—40 C J p 418 note 64 [a]

Jurisdictional facts

Complaint to enforce materialman's lien being in personam and in rem was held not demurrable on ground that facts averred did not show jurisdiction of res, where description of property complied with statute and court had acquired jurisdiction of defendant's person—Jones v Fields, 150 So 914, 25 Ala App 570

Omission of name cured by testimony

La—Julius Aaron & Son v Keyser, 2 La App 649

Particular pleadings held sufficient

(1) Complaint alleging agreement of defendant to pay plaintiff specified rate per foot for drilling, that plaintiff drilled well for water and furnished pipe, and that lien notice was filed, was held sufficient—Koch v Fishburn, 164 N E 721, 90 Ind App 287

(2) Petition alleging sum charged for materials furnished represented market value and contract price and alleging demand and service of notice was held to state cause of action for enforcement of mechanic's lien—

Dierks & Sons Lumber Co v Taylor, Mo App, 296 S W 176

(3) A bill to enforce a mechanics' and materialmen's lien, aided by exhibits, alleging sale, delivery, and use of material, is sufficient to show that the materialman contracted with the owner of the improved property and that the materials were furnished and debt was incurred by the contract with the owner as required by statute granting a mechanic's lien—Sherrod v Crane Co., 183 So 48, 236 Ala 344

(1) Other complaints

Ga—Georgia State Sav Ass'n v Wilson, 5 S E 2d 14, 159 Ga 21

Mont—Smith v Gunniss, 144 P 2d 186, 115 Mont 363

Or—Andersen v Turpin, 142 P 2d 999, 172 Or 420

82. Idaho—Robertson v Moore, 77 P 218, 10 Idaho 115

83. Ill—Benner v Schmidt, 44 Ill App 804

84. Conn—Waterbury Lumber & Coal Co v Coogan, 48 A. 204, 73 Conn 519

40 C J p 418 note 69

85. Alaska—Rutherford v Mak, 9 Alaska 350

Fla—Bowery v Babbit, 128 So 801, 99 Fla 1151

40 C J p 418 note 67

Petition held sufficient

Miss—Hamilton Bros Co v Baxter, 195 So 335, 188 Miss 610

Bill held to show lien had expired.

Md—Hayes v Armstrong, 125 A 610, 145 Md 268

Mich—Fox v Martin, 283 N W 9, 287 Mich 147

86. Va—Sands v Stagg, 52 S E 633, 105 Va. 444, rehearing denied 54 S E 21, 105 Va. 444

40 C J p 418 note 68

87. Or—Birkemeier v Knobel, 40 P 2d 694, 149 Or 292

88. SC—Atlantic Coast Lumber Corporation v Morrison, 149 S E 243, 152 S C 305

Particular technical errors

Fact that the moving party was designated "petitioner" rather than "plaintiff," and that pleading was designated "petition" instead of "complaint" was immaterial in determining the question whether petition to foreclose lien stated facts constituting cause of action—Atlantic Coast Lumber Corporation v Morrison, supra

89. Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159

90. Nev—Friendly v Larsen, 144 P 2d 747, 63 Nev 135

Lien made part of complaint

The complaint, in action to foreclose mechanic's lien, and the lien which was made a part of the complaint should be read together—Friendly v Larsen, supra

Omissions supplied by attached statement of claim

Ill—Beaudry v Bell, 350 Ill App 468

91. Cal—Tyler v J I Mitrovich Bldg Co, 190 P 208, 47 Cal App 59—Olson-Mahoney Lumber Co v Dunne Inv Co, 159 P 178, 30 Cal App 332

92. Ala—Gorr Lumber Co v McMillan, 143 So 173, 235 Ala 303.

Pleading held sufficient

Bill alleging that claimant acquired mechanic's lien from original contractor before commencement of suit was held not demurrable as failing to show when or how complainant acquired title to lien—Gorr Lumber Co. v. McMillan, supra

that the assignment was in writing⁹³ A complaint which alleges an assignment of the claim and demand of the person entitled to perfect the lien is sufficient without an allegation that the right to file a lien has been assigned⁹⁴

^L *Petition for general settlement* Under a statute authorizing the owner to file a bill for a general settlement, the primary inquiry being directed to the ascertainment of the amount due from the owner to the contractor and the amount due each of the persons having liens, it has been held that the same strict formality in pleading is not required as in other proceedings in law or equity⁹⁵

§ 294. — Particular Averments in General

- a Description of premises and improvements
- b Ownership or interest
- c Services or materials furnished and purpose thereof
- d Contract with, or consent of, owner
- e Time of furnishing work or material
- f Completion of work or performance of contract
- g Amount and maturity of indebtedness
- h Itemized account or bill of particulars
- i Notice to owner

- j Filing lien claim or statement
- k Other averments

a. Description of Premises and Improvements

Claimant's pleading should describe the premises to be subjected to his lien and the building or improvement for which material was furnished

Claimant's pleading should describe the premises which he seeks to subject to his lien,⁹⁶ and, where the statute limits a particular lien to a prescribed amount of land, the description in the pleading should conform thereto,⁹⁷ and, where claimant seeks an enlargement of the statutory quantity of land, he should by averment and proof advance facts in support of his demand.⁹⁸ However, while it is said that a building or improvement for which the material was furnished should be described also,⁹⁹ a complaint is not bad which does not state the nature of the alterations or repairs made,¹ or which does not allege specifically what was constructed,² unless a description of an improvement may be necessary under the provisions of the statute in order to show the right to a lien³

Sufficiency in general The description of the premises must be sufficient to identify the property on which the lien attaches,⁴ and must be sufficiently accurate to enable the court to decree the

93. Cal—Patent Brick Co v Moore, 16 P 890, 75 Cal 205
 Colo—Small v Foley, 47 P 64, 8 Colo App 435

94. Colo—Eagle Gold Min Co v Bryarly, 65 P 52, 28 Colo 262
 40 C J p 418 note 72

95. Ill—Geweke v. Hilsinger, 177 Ill App 467
 40 C J p 417 note 58
 Proceeding for general settlement see supra § 270

96. Ala—Jefferson Mortg Co v Estes Lumber Co, 133 So 267, 232 Ala 559

Tex—John F Grant Lumber Co v Bell, Civ App, 96 SW 2d 666, error dismissed
 40 C J p 420 note 6

97. Ala—Montgomery Iron Works v Doiman, 78 Ala 218
 40 C J p 421 note 11.

Selection of acre of land
 Mechanic's lien claimant, not having, in petition seeking to enforce lien, properly selected acre of land on which house stood, was held not entitled to lien against land—Federal Land Bank of New Orleans v Thames Lumber & Supply Co, 134 So 154, 160 Miss 335—40 C J p 421 note 11 [a]

98. Mich—Adams v. Central City Granite Brick & Block Co, 117 N

W 932, 154 Mich 448, 129 Am S R 484

99. Wis—Dewey v Field, 2 Wis 73

1. Cal—Jewell v McKay, 33 P 139, 82 Cal 114

2. Ind—Parker Land & Improvement Co v Reddick, 47 NE 848, 18 Ind App 616
 40 C J p 421 note 9

3. Mo—Marshall v. Archie Bank, 76 Mo App 92
 40 C J p 421 note 10

4. Ala—Jefferson Mortg Co v Estes Lumber Co, 133 So 267, 232 Ala 559

Tex—John F Grant Lumber Co v Bell, Civ App, 96 SW 2d 666, error dismissed
 40 C J p 421 note 13

Contiguous or adjacent city lots

Allegation of bill to enforce materialman's lien that property improved was specified city lots, which were "contiguous" or "adjacent," was held sufficient, under statute permitting one lien to cover "contiguous" or "adjacent" city lots—Grimsley v First Ave Coal & Lumber Co, 115 So 90, 217 Ala 159

Location within or outside of town

(1) A bill to enforce materialman's lien, which was equivocal as to the question whether realty improved

was located within town or outside thereof, and as to whether there was a single entire contract, was demurrable, since if realty was within town and work and labor were covered by single contract statutory lien attached to lots covered by the building, and if lands were not within corporate limits of town lien was limited to one acre—Polakow v General Roofing & Supply Co, 7 So 2d 73, 24 Ala 497

(3) While pleading in materialman's lien action should expressly aver that lots are in city, town, or village, when lien is claimed on them as such, overruling demurrer to pleading containing no such averment was held not reversible error, where description reasonably imported city or town lots, with street numbers, and fully identified property—City Realty & Mortgage Co v Tallapoosa Lumber Co, 164 So 55, 231 Ala 338

Same description as in deed

Description of property contained in mechanics' lien petition, which was same as description in deed to owner and in opposing defendant's deed of trust, was held sufficient to entitle mechanic lienor to enforce lien—Joplin Cement Co v Greene County Building & Loan Ass'n, 74 SW 2d 250, 228 Mo App 832—40 C J p 421 note 13 [c].

sale and the purchaser to find the land.⁵ It is sufficient if the description points out and indicates the premises so that by applying the description to the land it can be found and identified,⁶ and the same rule has been applied to the description of the building or improvement because of which the lien is sought to be enforced.⁷ Where the statute provides that the land subject to the lien is that on which the building is constructed, together with a sufficient space about it required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, the amount of land so required need not be pleaded, since it is the duty of the court to make a finding of such fact,⁸ but it has also been held that, if the lien is claimed on more than that occupied by the building for its convenient use, the allegations of the complaint must embrace such claim.⁹

Reference to claim of lien or other exhibit. Sometimes the pleading may be rendered sufficiently certain in respect of the description of the property by reference to the claim of lien filed which contains a sufficient description,¹⁰ or other instrument attached as an exhibit to the pleading.¹¹ On the other hand, it has been held that a reference to the notice or claim of lien, although the claim is annexed to the complaint, will not supply a defect in the description.¹²

Immaterial mistake. The use of a term in the description of land which the context shows was a

mere mistake will not vitiate the description if the substitution of the proper term will complete it.¹³ So, if the property is described by particulars which, in a deed, would be sufficient to pass the title, the addition of other descriptive matter which is incorrect will not invalidate the complaint or render an amendment necessary.¹⁴ The fact that the lien is claimed on more land than it can lawfully apply to will not vitiate it in its application to as much of the land described as it may properly apply to in the absence of fraud or injury to the owner or some third person,¹⁵ but, where the statute confines the particular lien to a specific amount of land, a description of a larger tract will not justify an enforcement of a lien on any part of the tract so described without evidence to locate the lien on such part.¹⁶ If the lot is sufficiently described to identify it, the lien will not be defeated merely because the lot is of greater area than that designated in the description.¹⁷ Where claimant is entitled to enforce his lien against buildings only, the sufficiency of the description of the land becomes immaterial.¹⁸

b. Ownership or Interest

Claimant's pleading must allege who is the owner of the property or interest to be affected, and must allege that defendant has an adverse interest in the premises or the controversy.

Claimant's pleading must allege who is the owner of the property or the interest therein to be affected,¹⁹ and it must be alleged that the person who

5. Minn.—McCarty v Van Etten, 4 Minn 461—Knox v Starks, 4 Minn 20

N Y—Duffy v McManus, 3 E D Smith 657, 4 Abb Fr 432

6. Ala.—Heady v Pool, 130 So 339, 231 Ala 619—Richardson Lumber Co v Howell, 123 So 343, 219 Ala 328—Jones v Fields, 150 So 911, 25 Ala App 570—Woodson v Wilson, 144 So 122, 25 Ala App 241 40 C J p 421 note 16

Particular descriptions held sufficient

(1) In suit to enforce materialman's lien, description in bill describing property as certain lots in specified block according to designated survey and also giving street numbers was held sufficient—City Realty & Mortgage Co v Tallapoosa Lumber Co, 164 So 55, 231 Ala 238

(2) Other descriptions—Chance v Franke, 105 S W 2d 678, 350 Mo 162—40 C J p 421 note 16 [a]—[c]

7. Ala.—Salter v Goldberg, 43 So 571, 150 Ala 511 40 C J p 421 note 17

Particular description held sufficient

(1) Description of land on which building stood on which lien was

sought giving county quartersection, naming owner, and describing mortgage was held sufficient—Jones Lumber Co v Snyder, 300 S W 850, 221 Mo App 1327

(2) Other descriptions see 40 C J p 421 note 17 [a]

8. Idaho—Dybvig v Willis, 82 P 2d 95, 59 Idaho 160
Or.—Andersen v Turpin, 142 P 2d 999, 172 Or. 420

9. Cal.—Kern v San Francisco Co, 124 P 862, 19 Cal App 157 40 C J p 421 note 15

10. Nev.—Friendly v Larsen, 144 P 2d 747, 62 Nev 135 40 C J p 421 note 18

11. Va.—Richlands Flint-Glass Co v Hildebrandt, 22 S E 806, 92 Va 91 40 C J p 423 note 19

12. Wis.—Shaw v. Allen, 24 Wis 563

13. Mo.—Sawyer & Austin Lumber Co v Clark, 73 S W 137, 172 Mo 588 40 C J p 423 note 21

14. Wis.—Brown v La Crosse City Gas Light & Coke Co, 16 Wis. 555

15. Tex.—Carter Lumber Co v Simpson, 18 S W 813, 83 Tex 370 40 C J p 422 note 23

16. Wis.—McAuliffe v Joergenson, 82 NW 706, 107 Wis 132

17. D C.—Smith v Johnson, 9 D C 481 40 C J p 422 note 25

18. Mo.—Joplin Supply Co v West, 130 S W 156, 149 Mo App 73

19. Ind.—Portland v Indianapolis Mortar & Fuel Co, 108 NE 735, 57 Ind App 166 40 C J p 422 note 27

Allegations held sufficient

(1) Allegation in complaint in mechanic's lien foreclosure suit that defendant was owner of property was held sufficient, as equivalent to allegation of ownership in fee simple—Zasucha v. Allen, 51 P 2d 1029, 56 Nev 339

(2) Petition alleging that defendants named were owners of leasehold interest in property described, that, being owners thereof, they entered into contract with plaintiff for purchase of building material, and that plaintiff furnished material by virtue of such contract, stated a

is made defendant has some interest in the premises or in the controversy adverse to the complainant²⁰

c. Services or Materials Furnished and Purpose Thereof

In an action to enforce a mechanic's lien, claimant's pleading must show that the liability sought to be enforced is for labor or material furnished, and should describe such labor or material. The purpose for which material was furnished, and the use of such material, may also be required to be alleged.

In an action to enforce a mechanic's lien, claimant's pleading should clearly show that the liability sought to be enforced is for labor or material furnished.²¹ The pleading should describe the labor performed or material furnished so that from

the allegation it may be ascertained whether the work or material is of the sort which entitles claimant to a lien,²² and, if a lien is sought for extra work, it should be shown by plaintiff's allegations of what such extra work consisted.²³ However, where there is no difficulty in ascertaining with certainty the nature of the claims on which plaintiff is to recover and for which he is to have a lien, the complaint is sufficient.²⁴

Use in particular building Plaintiff's pleading must show by proper allegations that the materials for which the lien is claimed were furnished to be used in the construction of the building on which the lien is claimed,²⁵ and it is not sufficient to state that such materials actually entered into and be-

cause of action under statute authorizing lien in case of leased property, notwithstanding ambiguous averment that defendants owned or had some interest in property—*Miners Lumber Co v Miller*, Mo App, 117 S W 2d 711

(3) The allegation in bill to foreclose a materialman's lien against husband and wife that they were record title owners of the property, showed that property was held by them as an estate by the entireties—*Rieck & Fleece v Cunniff*, 190 So 8, 138 Fla 742

(4) Other allegations
Mo—*Early v Smallwood*, 256 S W 1053, 302 Mo 92
Ok—*Whitfield v Frensley Bros Lumber Co*, 283 P 985, 141 Okl 44
Or—*Bartholdi v Baldwin*, 253 P 6, 121 Or 360

Allegations held insufficient

(1) Defendant's ownership must be clearly alleged, and interlineation of word "owner" following defendant's name in prayer is not sufficient—*Babat Co v Julian*, 3 La App 351

(2) Where mechanics' liens were filed jointly against corporate and individual buyers of supplies as owners of property, and it was not averred that corporation leased property or that property was operated by a lessee, the seller was not entitled to a lien on corporation's property on account of articles sold a lessee—*Home Lumber & Coal Co v Hartford Mining Co*, 81 P 2d 1063, 58 Nev. 361, rehearing 83 P 2d 1049, 58 Nev 361

(3) Petition in mechanic's lien holder's action was held insufficient to support judgment against mortgagee on theory that mortgagee was undisclosed principal of owner—*Boward v Owen*, Mo App, 30 S W 2d 154

(4) Other allegations—*Security Finance Co v Gardener*, 114 So 232, 94 Fla. 549—40 CJ p 423 note 27 [h].

Pleading held sufficient as against leasehold

Mich—*Sarar v Andrews*, 332 N W 254, 251 Mich 376

Registration of title appearing indirectly

Failure directly to allege registration of title to lots involved and ownership of certificate in otherwise good bill by subcontractor to foreclose mechanic's lien was held to render bill merely defective where registration of title appeared indirectly—*Charles A Hohmeier Lumber Co v Knight*, 182 NE 715, 350 Ill 248

Joint interest

Bill to enforce a materialman's lien was held to show a joint interest of defendants as to the materials furnished and used in the improvements, the contract being executed by their co-operation for one of them who was the owner of the property—*Fowler v Mackentepe*, 173 So 266, 233 Ala 458

Wife's interest in property

(1) Although conveyance to husband and wife transferred no interest to wife as against materialman who had right to lien under contract made with husband while he was sole equitable owner, fact that materialman's lien claim and petition stated that husband and wife were owners was held not to bar enforcement of lien—*Dierks & Sons Lumber Co v Runnalls*, Mo App, 54 S W 2d 447

(2) Pleading in action to enforce mechanic's lien against property of wife see *Husband and Wife* § 432 b (1)

20. NY—*Tobenkin v Piermont*, 114 N Y S 948

Validity or priority of mortgage

If plaintiff, in an action to foreclose a mechanic's lien, desires to challenge the validity of a prior recorded, unmaturing mortgage, or the right of mortgagee therein to a superior lien, it is incumbent on such

plaintiff to allege facts from which it would appear that the mortgage was invalid or that it would be inequitable for such mortgagee's lien to be made superior to the plaintiff's lien—*Burns v Sholl*, 197 N W 393, 111 Neb 628

21. Fla—*Lovingood v Butler Const Co*, 131 So 126, 100 Fla. 1252, 74 A L R 513

Agreement to advance money

Allegations of bill to enforce laborers' and materialmen's lien should exclude idea complainant advanced or agreed to advance money to pay for labor and materials—*Lovingood v Butler Const Co*, 131 So 126, 100 Fla 1252, 74 A L R 513

22. Fla—*Velazquez v Suarez*, 153 So 708, 113 Fla. 856
40 CJ p 423 note 42

23. Cal—*Sweeney v Meyer*, 57 P. 479, 124 Cal 512
40 CJ p 424 note 43

24. Tex—*Bryant-Link Co v W H Norris Lumber Co*, Civ App, 61 S W 2d 160, error dismissed
40 CJ p 424 note 44

Allegations held sufficient

(1) Mechanic's lien claimant's complaint, alleging that he constructed race track on described realty, was held sufficient on demurrer—*Smith v McCoy*, 235 N W 661, 58 S D 256

(2) Other allegations see 40 CJ p 424 note 44 [b]

25. Fla—*Pinellas Lumber Co v Clements*, 195 So. 162, 142 Fla. 553
40 CJ p 424 note 45.

On and for realty for which furnished

A complaint to foreclose a mechanic's lien must disclose that the work allegedly performed and materials allegedly furnished were on and for the realty against which the lien is asserted—*McTurnan v Dailley*, 14 NE 2d 913, 214 Ind 159.

ame a part of the building²⁶ On the other hand, under some provisions the complaint must show not only the purpose for which the material was furnished but also that it was used in the construction of the particular building²⁷ At least this is so in a suit by a materialman furnishing materials to a contractor,²⁸ although, where the contract is with the owner, the averment of actual use in the building has been held not to be required²⁹ If the fact that materials were furnished to be used in the particular building can be inferred from the allegations as made in the pleading, it will be sufficient, notwithstanding more certainty could be required on a motion for that purpose³⁰

d. Contract with, or Consent of, Owner

- (1) Necessity of allegation
- (2) Sufficiency of allegation

(1) Necessity of Allegation

Claimant's pleading must show that the work was done or the material was furnished in pursuance of a contract with the owner of the property or with his consent

Since, in order to support a mechanic's lien, the work must have been done or the materials furnished in pursuance of a contract with the owner of the property or interest sought to be charged or with his consent, as discussed supra §§ 52-55 it is essential that such fact shall appear from the pleadings of claimant seeking to enforce a lien.³¹ Hence, plaintiff's pleading should allege the contract under which a lien is claimed³² So, where it is sought to foreclose a lien for improvements or re-

pairs made by a stranger to the title, it must at least allege knowledge on the part of the owner,³³ unless the lack of such allegation is cured by the owner's complaint in intervention³⁴ It has been held that, in an action to foreclose a mechanic's lien, the complaint need not allege a promise to pay in order to state a cause of action in the form of a common count for work, labor, and materials³⁵

Property of married woman Where it is sought to charge the property of a married woman, there must be some averment of a contract or agreement with her,³⁶ or contractual liability based on the acts of the husband as her agent whose acts she authorized, or ratified, or is estopped to repudiate³⁷ It has been held that a bill to enforce a lien against an estate by the entireties must allege the knowledge or assent of the husband and wife or a written contract with them³⁸

(2) Sufficiency of Allegation

- (a) In general
- (b) Actions by materialmen or subcontractors

(a) In General

In a proceeding to enforce a mechanic's lien, where, under a fair interpretation of its language, claimant's pleading alleges the agreement or consent of the owner, it is sufficient.

Where, under a fair interpretation of its language, claimant's pleading alleges the agreement or consent of the owner, it is in general sufficient³⁹ However, the pleading should not leave such aver-

26. Cal—Holmes v Rickett, 56 Cal 307, 38 Am R 54
40 C J p 424 note 46

27. US—Colonial Oil Co v U S Guarantee Co, D C Ga., 56 F Supp 545, affirmed, CCA., 145 F 2d 496
Ark—Lyle v Latourette, 192 SW 2d 521, 209 Ark 721
SC—National Loan & Exchange Bank of Columbia v Argo Development Co, 139 SE 183, 141 SC 72
40 C J p 424 note 47

Language of statute as not essential

(1) The allegation need not aver use of the material in the particular building in the precise terms of the statute itself—Stone v Serimian, 246 P 45, 193 Cal 520—Ensele v Jolley, 204 P 1085, 188 Cal 397

(2) Complaint, although omitting direct averment of statute, was held sufficient, in absence of special demurrer for uncertainty, where it enabled proof to be made that materials were furnished and used in designated building—Stone v Serimian, supra.

28. Mo—Rall v McCrary, 45 Mo App 365
40 C J p 424 note 47

29. Ind—Fry v P Bannon Sewer Pipe Co, 101 NE 10, 179 Ind 309
Mo—Rall v McCrary, 45 Mo App 365

30. Ark—McFadden v Stark, 22 SW 884, 58 Ark 7
40 C J p 424 note 49

31. Ala—Buettner Bros v Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala 553—Walker v Scott Lumber Co, 133 So 695, 222 Ala 604
40 C J p 424 note 51

32. Ohio—Becker Plumbing Supply Co v Rialto Improvement Co, 172 NE 700, 36 Ohio App 102
40 C J p 425 note 52

33. Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159
Pa—Mohrkern v Pivrotto, 20 Pa Dist & Co 218
40 C J p 425 note 53

Lack of knowledge need not be alleged, since it is a matter of de-

fense—Dixon v Fredericks, 19 P 3d 272, 129 Cal App 708

34. Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159

35. Minn—Sallblad v Buiman, 29 NW 2d 673

36. Pa—Dearie v Martin, 78 Pa 55
40 C J p 425 note 54

37. Ala—Griffin Lumber Co v O'Gara, 160 So 685, 230 Ala 267
Mo—Badger Lumber & Coal Co v Pugsley, 61 SW 2d 425, 227 Mo App 1203

38. Fla—Velasquez v Suarez, 153 So 708, 113 Fla 856—Logan Moore Lumber Co v Legato, 131 So 381, 100 Fla 1451—Allardice & Allardice v Weatherlow, 124 So 38, 98 Fla 475—Ferdon v Hendry Lumber Co, 130 So 335, 97 Fla 283

Pleading held sufficient

Fla—Gore v Tagarelli, 144 So 661, 107 Fla 297

39. Ala—Buettner Bros v Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala 553—Corpus Juris cited in Roobin v Grindie,

ment to inference⁴⁰ A mere allegation that repairs were made and materials furnished with the knowledge and consent of defendant is not sufficient without other allegations,⁴¹ although, where under the statute it is sufficient if the work was done with the consent of the owner, it is not necessary to show whether the work was performed under a written or other special contract⁴² A complaint which alleges a contract to do particular work and the performance of the contract by plaintiff is sufficiently specific⁴³

A special contract must be averred and full performance alleged in order to render a more specific statement of claim unnecessary,⁴⁴ and, under particular statutes, it has been held that the petition or complaint must contain a statement of the contract,⁴⁵ or that the contract must be set out in the pleading,⁴⁶ and that, where the statute makes restrictions as to the character of the contract under which the lien can attach, a general allegation of the contract is insufficient, the terms of the contract must be set up to show the right to the lien⁴⁷ The terms are sufficiently set up when they are alleged as fully as the contract itself permits,⁴⁸ and

the petition need not show facts relating to the contract which under the particular statutes are not essential to support the lien⁴⁹ Mere uncertainty in the allegation must be reached by a motion to make more definite and certain where a demurrer does not raise such objection,⁵⁰ although under the practice in some jurisdictions the objection may be raised by demurrer⁵¹ Under a statute containing such requirement, the pleading must contain an allegation to the effect that the materials were furnished under one continuous contract⁵²

Joint contract Allegations in the petition that the materials are furnished at the instance and request of two persons do not necessarily amount to an allegation of a joint contract,⁵³ and an allegation that one assisted and advised the owner in the construction of a building has been held not to allege a joint adventure by such person with the owner⁵⁴ In order to enforce a lien on several lots in one suit, it is necessary to aver that the material was furnished and went therein under one contract⁵⁵ An allegation that labor or material was furnished on two lots under a joint contract with the persons owning the several lots is a sufficient

122 So 408, 409, 219 Ala 417—
Grimsley v First Ave Coal &
Lumber Co, 115 So 90, 217 Ala
159

Tex—Kelley v C D Shamburger
Lumber Co, Civ App, 23 SW 2d
883

40 C J p 425 note 56

Authority to contract

(1) Allegation that the improvement contract was with the owner dispensed with further allegation as to capacity in which the parties contracted—Sherrod v Crane Co, 182 So 48, 236 Ala 344

(2) A petition in suit to enforce a mechanic's lien alleging that defendants named were owners of leasehold interest in property described, and that, being owners, they contracted with plaintiff for purchase of building material, was not required to allege also by what authority defendants contracted with plaintiff—Miners Lumber Co v Miller, Mo App, 117 SW 2d 711

(3) Under a statute providing that every person for whose use, benefit, or enjoyment any building or improvement shall be made is embraced within the words "owner or proprietor," as used in the statute, a bill to enforce liens against purchaser holding under executory contract was held not defective because not alleging that purchaser was acting as vendor's agent—Sims v Taylor, 135 So 580, 223 Ala 280

Joint or several contract

Mo—Lee & Boutell Co v C A

Brockett Cement Co, 106 SW 2d
451, 341 Mo 95

40 C J p 425 note 56 [c]

Allegations held insufficient

In suit against religious organization and others to establish lien for materials furnished in construction of church, allegations of payments by church through its officers, agents, and trustees or members thereof were surplusage and were not within themselves allegations that a contract had been made—Buettnier Bros v Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala 553

40. Ala—Walker v Scott Lumber
Co, 133 So 695, 222 Ala 604

41. NY—Plattsburgh Gas & Elec-
tric Co v Miller, 207 NYS 335,
211 App Div 623

40 C J p 425 note 57

42. Mass—Parker v Bell, 7 Gray
429

43. Ill—McKeown Bros Co v Og-
den Kennel Club, 269 Ill App 623
40 C J p 425 note 59

44. Ind—Stephenson v Ballard, 50
Ind 176

Iowa—Bangs v Berg, 48 NW 90, 82
Iowa 350

45. Mass—Simpson v Dalrymple,
11 Cush 308

46. Ill—Logan v Dunlap, 4 Ill 188

47. Ill—Pelanger v Hersey, 90 Ill
70

40 C J p 426 note 63

48. Iowa—Mix v Ely, 3 Greene 513
40 C J p 426 note 64

49. Tex—Gillespie v Remington, 18
SW 338, 66 Tex 108
40 C J p 426 note 65

50. Ark—McFadden v Stark, 22 S
W 884, 58 Ark 7.

51. Cal—Palmer v Lavigne, 37 P
775, 104 Cal 30

Questions presented by demurrer
generally see *infra* § 305

52. Mo—Cleary v Siemers-Marsh-
all Electric Co, App, 296 SW. 448

Pleading held sufficient

Petition alleging that materials were furnished "under one arrangement and constituted one continuous running account" stated cause of action to establish lien—Cleary v Siemers-Marshall Electric Co, *supra*

53. Mo—Berkshire Lumber Co v
J S Chick Inv Co, 155 SW 904,
170 Mo App 1—Coen v Bettman,
150 SW 1137, 166 Mo App 671

54. Cal—Heinsbergen v Jenking,
298 P 104, 113 Cal App 394

Beneficiary under trust deed

Complaint in mechanics' lien foreclosure suit was held not to allege joint adventure in construction of building by owners of property and beneficiary under trust deed—Heinsbergen v Jenking, *supra*

55. Ala—Polakow v Rumsey, 6 So
2d 477, 242 Ala 365

basis for a lien on both lots ⁵⁶

Original or subcontract An allegation that defendant entered into a contract with plaintiff whereby plaintiff agreed to employ him to perform work and furnish material sufficiently alleges that he was an original contractor ⁵⁷

Contract by lessee. Where enforcement of a lien against a lessor is sought on the basis of labor and material furnished to the lessee, the complaint should aver the authority of the lessee to make improvements and repairs, ⁵⁸ and should aver facts putting the lessor on notice ⁵⁹

Contracts by agents Where the contract is relied on as having been made by an agent, the agency must be alleged as in other cases, ⁶⁰ and, while the authority of the agent need not be alleged, ⁶¹ the name of the agent should be stated ⁶² A complaint against two defendants showing that in making the contract one was acting as the agent for the other should be dismissed as to the alleged agent in the absence of an allegation that plaintiff extended credit to him and that he agreed individually to pay for the material furnished ⁶³ Although the contract does not mention the name of the true

owner but refers to the alleged agent as the owner of the premises, there is a sufficient allegation that the person designated as the true owner made the contract where it alleges that in making the contract he acted through a designated person as agent ⁶⁴

Incorporation or reference to lien statement The allegations of the pleading as to a contract may be aided by reference to, and incorporation of, the statement or claim for a lien, ⁶⁵ and, where the allegation of the contract varies from the contract shown in a lien claim made a part of the complaint, the complaint may be rendered bad for uncertainty, ⁶⁶ but an immaterial variance between the complaint and lien claim and the contract itself, as to the character of the work covered by the contract, by which variance no one could be misled or injured, is not fatal ⁶⁷

Character of contract A complaint is indefinite and uncertain where it cannot be determined from it whether claimant is relying on an implied or an express contract ⁶⁸ Claimant cannot be required to state whether the contract was written or oral, since it will be presumed to have been oral in the absence of an allegation to the contrary, ⁶⁹

56 Fla.—West Coast Builders' Supply Co v Spears, 117 So 794, 96 Fla 178

57 Ala.—Guarenire v Bessemer Lumber Co, 106 So 49, 214 Ala. 8 40 C.J. p 426 note 69

58 Ill.—National Theater Supply Co v Blum, 276 Ill App 123

Pleading of facts, not conclusions Where the contract is with a lessee obligated under his lease to make improvements, if it is desired to charge the lessor as owner, facts and not conclusions of law must be pleaded.—Mitchell v Dunmore Realty Co, 111 NYS 322, 126 App Div 329—40 C.J. p 426 note 70

59 Nev.—Home Lumber & Coal Co v Hartford Mining Co, 81 P 2d 1063, 58 Nev 361, rehearing 83 P 2d 1049, 58 Nev 361

60 Ala.—Murray v Bessemer Lumber Co, 104 So 649, 213 Ala. 232 40 C.J. p 426 note 71

Allegations held sufficient

(1) Bill alleging that complainant installed sprinkler system in hotel under agreement with hotel corporation's agent, and that corporation ratified contract, was held sufficient, in suit to foreclose mechanic's lien.—Smith v Loftis, 150 So 645, 112 Fla 383

(2) In suit to establish and enforce lien for materials furnished in construction of church, allegation that contract to furnish materials

and supplies was made between complainants and defendant church and defendant members of church and trustees of church was sufficient to show a contract between the complainants and the church and others, and did not indicate that those who executed the contract for the church acted in their individual capacity.—Buettner Bros v Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala 553

Allegations held insufficient

(1) Complaint in mechanic's lien foreclosure suit was held not to show that mortgagors were mortgagee's agents, so as to bind him by their contracts as to any future interest obtained by sale under trust deed.—Heinsbergen v Jenking, 298 P 104, 113 Cal App 394

(2) In suit to establish and enforce lien for materials furnished in construction of a church, allegations of purchase and payment by an individual and allegations of payment by check signed by an individual were surplusage and did not in themselves show a contract between complainants and church or a ratification equivalent thereto, and allegations that acts regarding purchase of materials were so public that it was gross negligence on part of church to remain silent and permit purchase of materials and construction of building without giving notice or expressing dissent were insufficient

to show contract or ratification.—Buettner Bros v Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala 553

61 Ala.—Thomasson v Benson Hardware Co, 131 So 563, 222 Ala. 176

62 Ala.—Thomasson v Benson Hardware Co, supra—Murray v Bessemer Lumber Co, 104 So 649, 213 Ala 232

63 Ga.—Burton v Meinert, 71 SE 870, 136 Ga 430

64 Ga.—Logue v Walker, 81 SE 849, 141 Ga 644

65 Cal.—Webb v Kuns, 54 P. 78, 6 Cal Unrep Cas 97 40 C.J. p 426 note 75

Notice of lien as controlling

Allegations of notice of lien, which prevailed over those of the complaint proper, showed that plaintiff claimed as a subcontractor under the original contractor.—Andersen v Turpin, 142 P 2d 999, 172 Or 420

66 Cal.—Palmer v Lavigne, 37 P 775, 104 Cal 30 40 C.J. p 427 note 76.

67 Cal.—Newell v Brill, 83 P 76, 2 Cal App 61

Variance between complaint and lien claim generally see infra § 307 b (2)

68 Ind.—Yawger v Joseph, 108 N E 774, 184 Ind 228

69 Ind.—Yawger v Joseph, supra

and an allegation that the contract was oral is sufficient where a statute expressly authorizes oral contracts as bases for mechanics' liens.⁷⁰ Where there has been a written contract for particular work and alleged verbal orders for changes or extras, the fact that the contract was in writing should be set forth and the claim for extras under the subsequent verbal agreements or orders should be set out separately.⁷¹ However, it has been held to be immaterial that modifications were described as written instead of oral.⁷²

(b) Actions by Materialmen or Subcontractors

In general, the complaint of a laborer or materialman should show that the material or labor was furnished at the instance of the owner or someone properly acting for him; and a subcontractor's pleading should show that the work was done under a contract between the principal contractor and the owner.

In a proceeding by a laborer or materialman, the complaint must set out that the materials or labor for which the lien is claimed were furnished either at the instance of the owner or owner's agent or some person bearing the statutory relationship to the owner.⁷³ Where the statute confers a lien for work done at the instance of the owner or of his agent and provides that every contractor, subcontractor, or other person having charge of construction shall be held to be the agent of the owner, it is not material whether the agency of the person employing claimant was a principal contractor or subcontractor, and, hence, his relationship with the owner at the various times during which the labor was performed need not be alleged.⁷⁴

It has been held sufficient that a subcontractor allege that the work was done under a contract between the principal contractor and the owner without alleging a request by the owner,⁷⁵ and also that it is unnecessary to allege in direct terms that materials were furnished or work performed under a

contract with the contractor, and that it is enough if the facts alleged show the contract.⁷⁶ Under some statutes, a subcontractor should aver and show that by the terms of his contract with the principal contractor he is within the terms of the principal contract,⁷⁷ and the terms of the contract between the original contractor and the owner must be so alleged that it may be seen from the facts set forth in the complaint that some amount was due from the owner to the contractor where that is necessary to support the claim of a subcontractor,⁷⁸ although on the other hand it is held that, under a provision that the lien shall not be enforced for an amount in excess of the original contract price, it is a matter of defense if the claim is greater than the contract price and the original contract price need not be alleged by the subcontractor.⁷⁹

Statutory contract with owner Where, under the statute, a difference exists in cases in which the work was done under a valid statutory contract and those in which it was not, the lien claimant must show by his pleadings under which theory he claims,⁸⁰ but it has been held that plaintiff may allege the actual facts as one cause of action,⁸¹ and, where the statute provides that, when the contract is void for any of the reasons enumerated in the statute, materials shall be deemed to have been furnished at the special request of the owner, a materialman may plead that the goods were sold at the special request of the owner and need not plead the construction and validity of the contract.⁸² Where the statute requires that the contract between the owner and the contractor to whom material is furnished must be in writing, the fact that it is in writing must be alleged.⁸³ Where the written consent of the record owner of real estate in possession of a purchaser under an executory contract is required, such consent, or a copy thereof, must be attached to the petition to foreclose a materialman's lien.⁸⁴

70. *Okl.—Lewis v Red*, 152 P 2d 690, 194 Okl 432

71. *Pa.—O'Kane v Murray*, 25 Pa Dist 87, affirmed 97 A 94, 253 Pa 60

72. *Mass.—Lampasona v Capriotti*, 4 NE2d 621, 296 Mass 34, 108 ALR 480

73. *Ala.—Walker v Scott Lumber Co*, 133 So 695, 222 Ala 604—*Whitfield v Howard*, 128 So 137, 221 Ala 171

Ga.—Morris v West, 153 SE 361, 170 Ga 550
40 CJ p 427 note 81.

74. *Colo.—Kennicott - Patterson Transfer Co v Modern Smelting*

& Refining Co, 141 P 144, 26 Colo App 135

40 CJ p 427 note 82

75. *Ind.—Waverly Co v Moran Electric Service*, 26 NE2d 55, 108 Ind App 75

Mo.—McLaughlin v Schawacker, 31 Mo App 365

76. *Ala.—Tisdale v Alabama & G Lumber Co*, 31 So 729, 131 Ala 456

77. *Ill.—Thomas v Illinois Industrial Univ*, 71 Ill 310

40 CJ p 427 note 85

78. *Ill.—Thomas v Illinois Industrial Univ*, supra

40 CJ p 427 note 86

79. *Utah.—Morrison v Inter-Moun-*

tain Salt Co 46 P 1104, 14 Utah 201

40 CJ p 427 note 87

80. *Cal.—Pacific Portland Cement Co v Hopkins*, 162 P 1016, 174 Cal 251

40 CJ p 427 note 89

81. *Cal.—Anderson v Blean*, 128 P 859, 19 Cal App 581

40 CJ p 428 note 90

82. *Cal.—Yancy v Morton*, 29 P 1111, 94 Cal 558

40 CJ p 428 note 91

83. *N.J.—Summerman v Knowles*, 33 NJ Law 202

84. *Okl.—Etna Life Ins Co v S H Weakley Lumber Co*, 245 P 560, 117 Okl 70.

e. Time of Furnishing Work or Material

Claimant's pleading should show when the labor was performed or the material furnished, but it is sufficient if from the facts alleged such time may be fairly inferred

Since, under various statutory provisions the fixing of a lien depends on the filing of a statement of claim within a prescribed period after the labor is performed or the material furnished, as discussed supra §§ 139-144, or the right to enforce such lien depends on the commencement of proceedings within a time limited after the labor is performed and the materials furnished or after the filing of the lien claim, as considered supra § 282, in order to show a valid lien or a present right to enforce it plaintiff's pleading should show when the labor was performed or the material furnished,⁸⁵ but the pleading will be sufficient if from the facts alleged such time may be fairly inferred, as where it is alleged that materials were furnished between specified dates⁸⁶ If one item is shown to have been furnished within the time prescribed by the statute, the complaint will be good at least as to that item.⁸⁷

Under the rule that the alienation of the property before any labor was performed or material furnished defeats the right to subject the property in the hands of the purchaser for such labor or ma-

terials as were furnished after such alienation, the complaint must show the commencement of the work or the furnishing of the materials before the alienation⁸⁸

f. Completion of Work or Performance of Contract

In a proceeding to enforce a mechanic's lien, claimant's pleading must allege performance of the contract or set up an excuse for failure to perform

The pleading for the enforcement of a mechanic's lien for work and materials furnished under a contract must allege the performance of the contract,⁸⁹ or set up a sufficient legal excuse for failure to perform⁹⁰ This is essential where the obligation to pay does not mature until the contract has been performed,⁹¹ and so, where the time for the completion of the work or performance of the contract is material as furnishing the point from which the limitation period for perfecting the lien or commencing suit to enforce it begins to run, it must be alleged⁹² It has been held, however, that an allegation that the work was completed in accordance with the contract sufficiently alleges performance⁹³ In an action to foreclose a contract lien, plaintiff's failure to plead and prove a compliance with the contract will not render a judgment of foreclosure

85. Ga.—Logue v Walker, 81 SE 849, 141 Ga 644

40 C J p 428 note 95

Pleading that suit was begun within limitations period see supra § 293
Pleading time of commencement of furnishing labor or material as affecting priority of lien see infra subdivision k of this section

86. SC—Matthews v Monts, 39 S E 575, 61 SC 385
40 C J p 428 note 96

87. Ind.—Indiana Mut Bldg & Loan Ass'n v Paxton, 47 NE 1082, 18 Ind App 304

88. Ind.—Jeffersonville Water Supply Co v Riter, 37 NE 652, 138 Ind 170
40 C J p 428 note 1

Ownership by contracting party as essential to creation of lien see supra § 57

89. Ill.—Gottschalk Const. Co v Carlson, 253 Ill App 520
Or—Graf v Petry, 247 P 315, 118 Or 511

Tex.—Kelsay Lumber Co v Crowell, Civ App, 19 S W 2d 388, error dismissed
40 C J p 428 note 2

Statement as to payment of subcontractors and employees

A contractor's suit to foreclose mechanic's lien was properly dismissed for failure to allege that con-

tractor had given owner a sworn statement as required by statute regarding full payment of subcontractors and contractor's employees or names and amounts due those not so paid—Fred Howland, Inc, v Gore, 13 So 2d 303, 152 Fla 781

Allegations held sufficient

(1) Complaint alleging that sole ground on which owner refused to pay was that a marquee was defective was not generally demurrable on ground that it was admitted that the marquee was defective where it was apparent from whole complaint that defendants contended that marquee was defective and not that such was actual fact—Lidral Const Co v Parker, 113 P 2d 1032, 9 Wash 2d 128

(2) The fact that plaintiffs in bill and in statement of account filed with registry of deeds alleged performance of written contract, except for items eliminated by oral modification, was held not improper, even though certain parts of work specified in written contract had been done by different mode of performance under oral agreement—Lampson v Capriotti, 4 NE 2d 621, 296 Mass 34, 108 A L R 430.

(3) Other allegations—Birkemeier v Knobel, 40 P 2d 694, 149 Or 292—Eastern & Western Lumber Co v Henderson, 275 P 677, 129 Or 102—40 C J p 428 note 3 [a]

Allegation by inference held insufficient

Ala.—Gorr Lumber Co v McMillan, 143 So 173, 225 Ala 303.

90. Ill.—Gottschalk Const Co v Carlson, 253 Ill App 520
Or—Graf v Petry, 247 P 315, 118 Or 511
40 C J p 429 note 3

Waiver held alleged

Wash.—Lidral Const. Co v Parker, 113 P 2d 1032, 9 Wash 2d 128

91. Cal.—Harmon v Ashmead, 60 Cal 439
40 C J p 429 note 4

92. Or.—Lorenz Co v Gray, 298 P 232, 136 Or 605, rehearing denied and opinion adhered to Lorenz Co v Day & Co, 300 P 949, 136 Or 605
40 C J p 429 note 5.

Allegation held insufficient

Complaint alleging that materials were furnished between certain dates was held insufficient—Lorenz Co v Gray, 298 P 222, 136 Or 605, rehearing denied and opinion adhered to Lorenz Co v Day & Co, 300 P 949, 136 Or 605

93. Iowa.—Bangs v Berg, 48 N W. 90, 82 Iowa 350
40 C J p 429 note 6.

invalid, since noncompliance with the contract is a matter of defense.⁹¹

Where the subcontractor's lien depends on the fact, he must aver that the work or materials were such as come within the terms of the original contract between the owner and the original contractor,⁹⁵ but it is otherwise when the right does not depend on such fact,⁹⁶ and it is not necessary to allege that the contractor had completed his contract where plaintiff states all that is necessary to show his right *prima facie* under the statute.⁹⁷

Architect's certificate Where, by the terms of the contract, the obtaining and presentation of an architect's certificate is a condition precedent to the maturing of the final payment, it has been held that the complaint must state that such certificate was given or demanded, and, if refused, the reasons why it should have been given, or, if waived, a statement of the facts,⁹⁸ although there is also authority to the contrary.⁹⁹

g. Amount and Maturity of Indebtedness

- (1) In general
- (2) Actions by materialmen or subcontractors

(1) In General

Claimant's pleading should show the amount or value of services or material furnished, the amount due, and the fact that it is payable.

Plaintiff's pleading should show the amount or value of the services performed or materials furnished,¹ and the amount that is due,² as well as that it is payable.³ An allegation of demand for

payment is not necessary.⁴

Nonpayment Since nonpayment of plaintiff's claim is of the gist of the action to enforce a mechanic's lien, nonpayment must be alleged,⁵ and, under the general rule that an exhibit cannot be referred to for the purpose of supplying the omission of a material allegation, a statement in the notice of lien filed as an exhibit with the complaint and made a part of it cannot supply the omission.⁶

Apportionment Where several houses are built on different lots under a single contract, a materialman need not specify the amount of material used in each of the houses.⁷

Unrecorded contract Where work is done or materials furnished under a written contract which is void because not recorded as required by statute, the complaint must allege the value of the material or of the work,⁸ and an allegation of the agreed price under such a contract may be sufficient in the absence of a proper objection on the ground of uncertainty, although it is an allegation of *prima facie* evidence of value and not of the ultimate facts.⁹

Penalties. Where claimant seeks to include in the amount protected by the lien the amount of a penalty provided by statute for nonpayment of wages, the complaint must contain a clear statement of such intention.¹⁰

(2) Actions by Materialmen or Subcontractors

The question whether, in an action by a subcontractor or materialman to enforce a lien, it is necessary to allege the indebtedness of the owner to the principal contractor or of the principal contractor to the subcon-

94. Tex.—Johnson v Barker, Civ App, 215 SW 348
40 C J p 439 note 10

95. NY—Broderick v Poillon, 2 E D Smith 554, 1 AbbPr 319—
Doughty v Devlin, 1 E D Smith 625

96. Ind—Gilman v Gard, 29 Ind 291
40 C J p 429 note 8

97. Ga—Arnold v Farmers' Exch, 51 SE 754, 123 Ga 731
40 C J p 429 note 9

98. Ill—Michaelis v Wolf, 26 NE 384, 136 Ill 68
40 C J p 429 note 12

General averments held sufficient
Ill—McKeown Bros Co v Ogden Kennel Club, 269 Ill App 622
40 C J p 429 note 12 [a]

99. W Va—Lunsford v Wren, 63 SE 308, 64 W Va 458

1. Ga—Morris v West, 153 SE 361, 170 Ga 550
40 C J p 430 note 15.

Amount of statutory lien must be definitely alleged—Thompson v Wyles, 149 So 769, 111 Fla 513

2. Fla—Thompson v Wyles, supra 40 C J p 430 note 16

Right of vendor of property to object
In a bill to enforce liens against the purchaser of the property holding under an executory contract, vendor could not complain that bill to enforce liens contained no averment of separate amounts due each complainant where complainants tendered to vendor unpaid purchase money—Sims v Taylor, 135 So 580, 223 Ala. 280

3. NY—Doughty v. Devlin, 1 E D Smith 625

4. Ind—Rhodes v. Webb-Jameson Co, 49 NE 283, 19 Ind App 195
Mich—Steel Brick Siding Co v Muskegon Mach & Foundry Co, 57 NW 817, 98 Mich 616

5. Ariz—McPherson v. Hattich, 85 P. 781, 10 Ariz 104.

Cal—Burke v Dittus, 96 P 330, 8 Cal App 175

6. Ariz—McPherson v Hattich, 85 P 781, 10 Ariz 104
40 C J p 430 note 25

7. Fla—Skipper v Thomas, 76 So 779, 74 Fla 255
40 C J p 430 note 19

8. Cal—Booth v Pendola, 23 P 200, 88 Cal 36, reheard 25 P 1101, 88 Cal 36

9. Cal—Bringham v Knox, 59 P 198, 127 Cal 40—Coghlan v Quarataro, 115 P 664, 15 Cal App 662

10. Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159.

Complaint held sufficient

Complaint alleging that there was due lien claimant certain amount as penalty in addition to amount due for labor performed and material furnished was held sufficiently to show intention to exact penalty prescribed by statute.—Milner v. Shuey, supra.

tractor depends on the provisions of the statutes and the facts of the particular case.

Where, under the statute, the right of a subcontractor or materialman to a lien depends on the liability of the owner to the contractor for some amount under the original contract at the time of the filing of the lien, or the bringing of the suit, or the service of notice on the owner, a subcontractor or materialman is required to allege in his pleading that the owner was indebted to the principal contractor under the terms of the contract between those parties at the time contemplated by the statutory provision,¹¹ or set up some fact which would entitle the petitioner to the lien, such as a premature payment by the owner to the contractor.¹² This rule is not universal but is denied in a number of cases which hold that plaintiff need not allege more than what the statute requires him to do in order to acquire a prima facie right to a lien and that, although payment by the owner to the original contractor may under particular circumstances defeat the subcontractor, this is purely a matter of defense.¹³

Some of the cases in announcing the general rule use language which implies that it is necessary to state the amount which is due the original contractor,¹⁴ but it has been held otherwise where the point was directly involved,¹⁵ and the allegation of indebtedness will be sufficient which shows that there is sufficient to meet the lienor's claim.¹⁶ Moreover, the entire failure to allege an indebtedness from the owner to the contractor will be cured by an admission of an indebtedness by the owner in his answer,¹⁷ or by the introduction of evidence at the trial, since the pleadings will be deemed amended to conform to the proof.¹⁸

Contract price Where the lien of a materialman is limited to the contract price, as discussed supra § 174, in a proceeding by him it should be alleged

that the price was equal to, or greater than, the amount of the lien which it is sought to enforce.¹⁹

Primary liability of owner An allegation of indebtedness from the owner to the principal contractor is not necessary where the owner has made himself responsible directly to plaintiff for the amount of his claim.²⁰ So, where a primary liability on the part of the owner is alleged, it is not necessary to allege an indebtedness to the contractor.²¹

Unrecorded contract Where, under the statute, the building contract is void because not recorded as required by the statute and the material is for that reason deemed to have been furnished at the instance of the owner, it is not necessary to allege that at the time of the filing of the notice of lien any sum was due from the owner to the contractor.²²

Failure to file bond Where, under the statute, the lien claimant is entitled to foreclose his lien on the land of the owner irrespective of the amount due from the owner to the contractor, if the owner has not filed the contractor's bond as provided by the statute, the lien claimant, in order to be entitled to foreclose irrespective of the amount due from the owner to the contractor, must allege that the terms of the statute as to such bond have not been met.²³

Owner's duty to retain part of contract price Where, under the statute, the owner is required to withhold a specified portion of the contract price for the purpose of meeting claims of materialmen and others, as provided by the statute, a materialman is not required to allege that anything is due from the owner to the contractor,²⁴ or from the contractor to the subcontractor to whom he furnished materials,²⁵ and a materialman who alleges that such portion of the contract price is due from the owner to the contractor need not allege that

11. Fla.—Pines School Ass'n v

Brewer, 128 So 858, 99 Fla 1336

NY—Mayer v Delson Holding Cor-

poration, 247 NYS 346, 139 Misc

410, affirmed 252 NYS 930, 234

App Div 671

NC—Dixon v Ipock, 193 SE 392,

212 NC 363

40 CJ p 430 note 30

12. Fla.—Hawthorne v Panama

Park Co, 32 So 812, 44 Fla 194,

103 Am SR 138

40 CJ p 431 note 31

13. Ga.—Arnold v Farmers' Exch.,

51 SE 754, 123 Ga 731

40 CJ p 431 note 32

14. Ill.—Thomas v Illinois Indus-

trial Univ, 71 Ill 310,

NY—Freese v Avery, 69 NYS 150,

57 App Div 633

15. Kan.—Rankin v Rankin, 122 P

1120, 86 Kan 899

40 CJ p 431 note 34

16. Cal.—Green v Clifford, 29 P

331, 94 Cal 49

40 CJ p 431 note 35

17. Colo.—Spangler v Green, 42 P

674, 21 Colo 505, 52 Am SR 259

Tex.—Mills v. Paul, Civ App, 30 S

W 558

18. NY—Mayer v Delson Holding

Corporation, 247 NYS 346, 139

Misc 410, affirmed 252 NYS 930,

234 App Div 671

19. Ga.—Methodist Episcopal Church

South v Dudley Sash, Door &

Lumber Co, 72 SE 480, 137 Ga 68

20. Colo.—Harris v Harris, 69 P

309, 18 Colo App 34

Ill.—Doyle v Munster, 27 Ill App

130

40 CJ p 431 note 39

21. NY—Ranieri v Brandenburg,

194 NYS 616, 201 App Div 749

40 CJ p 431 note 40

22. Cal.—Lucas v Gobbi, 103 P 157,

10 Cal App 648

23. Cal.—Tyler v J. I. Mitrovich

Bldg Co, 190 P. 208, 47 Cal App

59

24. Cal.—United Materials Co v

Loughery, 133 P 18, 22 Cal App 1

25. Cal.—United Materials Co. v.

Loughery, supra

40 CJ p 432 note 53.

anything was owing to plaintiff by the owner ²⁶

Contractor's indebtedness to subcontractor Except in so far as the rule may be affected by the owner's statutory duty to retain part of the contract price, it has been held that a laborer's claim which fails to allege that any sum is due or remains unpaid from the contractor to the subcontractor is fatally defective ²⁷ In an action by subcontractors to which they have joined the contractor as a plaintiff, an allegation that certain amounts specified are due from the owner to plaintiffs other than the contractor is sufficient without an allegation that such amounts have not been paid by the contractor ²⁸

Judgment against contractor In those jurisdictions in which a materialman seeking to enforce his lien against the owner must first have secured a judgment against the contractor or join him as a party defendant, a materialman in an action against the owner alone must allege that he has a judgment against the contractor ²⁹

h. Itemized Account or Bill of Particulars

Except where required by statute, an itemized account or bill of particulars need not be filed with claimant's pleading, and it is generally within the court's discretion whether such a bill should be ordered

In the absence of a statute requiring it, it has been held that an itemized account or bill of particulars need not be filed with claimant's pleading to enforce his lien, ³⁰ and it has generally been held that it is within the inherent power of the court in

the exercise of sound discretion to order such a bill in a proper case, ³¹ or that such power may exist under general statutes with respect to pleadings ³² If plaintiff pleads a special contract and alleges full and complete performance on his part, a bill of particulars is not necessary ³³ However, where the complaint merely sets up that, under a contract for the furnishing of materials and the erection of a building, claimant furnished material or did work, the nature of the claim is not sufficiently stated without a bill of particulars ³⁴ In a direct proceeding between the owner and the contractor, the same detailed statement is not required as would be required in a proceeding between the owner and the subcontractor ³⁵

Since a bill of particulars is required only to set forth in detail the items which make up the general charge in the pleading, ³⁶ it is sufficient if, when taken in connection with the statements contained in the petition, it advises defendant with reasonable certainty of the petitioner's claim, ³⁷ and, where there is but a single item of account, no bill is necessary ³⁸

Where required by statute In jurisdictions where mechanics' lien statutes require claimant's pleading to be accompanied by an itemized statement or bill of particulars, there must be compliance with the provisions of such statute, ³⁹ including the requirements, if any, as to verification ⁴⁰ Where the filing of an account or bill of particulars is required in order to perfect the right to enforce

26. Cal—United Materials Co v Loughery, supra

27. N Y—Gribben v Hoare, 104 N Y S 445, 54 Misc 245

28. N Y—Freese v Avery, 69 N Y S 150, 57 App Div 633

29. Ga—Shippen Bros Lumber Co v Walker, 81 SE 1119, 141 Ga 682

40 C J p 432 note 55

30. Ark—Wood v King, 21 SW 471, 57 Ark 284

Ga—Collins v Nicolson, 51 Ga 560

Established practice

Although mechanics' lien statute requires bill of particulars only when materials are furnished, established practice of filing bill covering both work and materials cannot well be abandoned—Thomas v Goldhahn, 156 A 363, 4 WW Harr, Del, 595

31. Del—Armstrong v Wilmington Sugar Refining Co, 120 A 94, 2 W W Harr 125

Pa—Leiby Co v Erdman, Com Pl, 30 Lehigh Co LJ 153, 57 York Co 51

40 C J p 432 note 58

Bill properly denied

N J—Decker Building Material Co v Meyer, 162 A 531, 109 NJ Law 408

40 C J p 432 note 58 [a]

32. Colo—Chicago State Bank v Plummer, 129 P 819, 54 Colo 144

40 C J p 432 note 59

33. N J—Solotaroff v Candalupa, 140 A 305, 6 NJ Misc 201

Tex—Sprowls v Youngblood, Civ App, 23 SW2d 879, reversed on other grounds Harveson v Youngblood, Com App, 38 SW2d 761

40 C J p 432 note 60

34. Ind—Stevenson v Ballard, 50 Ind 176

Ohio—Brennemann v Brown, 163 N E 921, 30 Ohio App 84

35. Pa—Johnson v Kusminsky, 135 A 220, 287 Pa 425

In suit by contractor

Statement of hours of labor in aggregate was held not to prevent recovery on mechanic's lien by contractors against owner—Johnson v Kusminsky, 135 A 220, 287 Pa 425

36. Minn—Menzel v Tubbs, 53 N

W 653, 1017, 51 Minn 364, 17 L RA 815

Sufficient particularity to preclude doubt

Bill of particulars amplifying mechanics' lien statement should state facts regarding both labor and materials with sufficient particularity to preclude any doubt by interested parties—Thomas v Goldhahn, 156 A 363, 4 WW Harr, Del, 595

Bill held not sufficiently specific Del—Thomas v Goldhahn, supra

37. Del—Thomas v Goldhahn, supra

40 C J p 432 note 63

38. Minn—Steele v Vernes, 3 NW 2d 425, 213 Minn 281—Jandrich v Svabek, 211 NW 957, 170 Minn 24—Menzel v Tubbs, 53 NW 653, 1017, 51 Minn 364, 17 L RA 815

39. RI—Murphy v Guisti, 48 A 944, 22 RI 588

40 C J p 432 note 66.

40. Minn—Behrens v Kruse, 140 NW 339, 121 Minn. 90

40 C J p 432 note 67.

the lien, claimant's pleading should show a compliance with the statute ⁴¹

Several buildings or improvements. It has been held that, where a materialman has furnished material for the erection of more than one building under a single contract, he cannot be required to file a bill of particulars showing the material furnished for each building separately, ⁴² but it has also been held that in such case defendant has the right to demand a list of the items composing the sum sought to be collected, so as to be protected from surprise when the proof is offered ⁴³

Defects and objections Where the bill of particulars is not intelligible or sufficient, the opposing party may, on application, obtain greater particularity as in ordinary actions ⁴⁴ It has been held, however, that the meagerness of the statement of items filed is not a ground for striking the entire complaint, ⁴⁵ and a declaration is no more demurrable after the filing of a bill of particulars than it was before such filing ⁴⁶ If the account sued on is set out in the pleading, it is not necessary to file a more particular statement as an exhibit unless called for by a special motion ⁴⁷ The fact that the bill of particulars furnished on the trial exceeds the amount of labor and materials alleged in the certificate of lien does not invalidate the lien claim ⁴⁸ An amendment of the bill of particulars does not amend the

pleading with which it is connected ⁴⁹

It has been held that, while a bill of particulars filed in a mechanic's lien proceeding is a part of the pleading with which it is connected, to the extent that it must relate thereto and be construed with respect thereto, it is in no sense such a component part of the record that subsequent pleadings may be directed to it alone, ⁵⁰ and it has been held that a demurrer will not lie to a bill of particulars ⁵¹ However, it has also been held that an irregularity in connection with a bill of particulars may be raised by a demurrer or motion to strike, ⁵² and that defects or objections respecting a bill of particulars will be regarded as waived if defendant interposes an answer to the merits instead of raising the objection by motion or demurrer. ⁵³ An objection that the bill of particulars in a scire facias on a mechanic's lien includes items not properly the subject of a lien must be made at the trial, and not by exception to the statement of claim ⁵⁴

i. Notice to Owner

Where notice to the owner is required, claimant's pleading must show compliance with such condition; but it is sufficient if compliance is shown with substantial certainty

Where statutory provisions require a particular notice to the owner, claimant's petition or complaint must allege a performance of this condition and show a sufficient notice under the statute. ⁵⁵ If a

41. Tex—Sedgwick v Patterson, 2 Tex Unrep Cas 353
40 C J p 433 note 79

Necessity and sufficiency of account or bill of particulars to perfect right to enforce lien see supra § 165

Insistence on itemized account

While the account filed with the claim need not be itemized, when it comes to enforcement of the claim by suit, then, for the purposes of defense, the owner may insist on the presentation of an itemized claim—Standard Lumber Co of Pine Bluff v. Wilson, 396 S W 27, 173 Ark 1034

42. ND—Meyers Lumber Co v Tompkins, 149 N W 955, 29 ND 76
40 C J p 433 note 68

Pleading held sufficient

RI—Albert S Eastwood Lumber Co v Britto, 155 A 354 51 RI 406

43. Ala—Richardson Lumber Co v Howell, 123 So 343, 219 Ala 328

44. Del—Thomas v Goldhahn, 156 A 363, 4 W W Harr 595
40 C J p 433 note 69

45. Minn—Behrens v Kruse, 140 N W 339, 121 Minn 90
40 C J p 433 note 70

46. Del—Armstrong v Wilmington Sugar Refining Co, 120 A 94, 2 W W Harr 125

47. Ind—Adamson v Shaver, 29 N E 944, 3 Ind App 448
40 C J p 433 note 73

48. Conn—Nichols v Culver, 51 Conn 177
40 C J p 433 note 75

49. Del—Armstrong v Wilmington Sugar Refining Co, 120 A 94, 2 W W Harr 125

50. Del—Armstrong v Wilmington Sugar Refining Co, supra
40 C J p 433 note 71

51. Del—Armstrong v Wilmington Sugar Refining Co, supra

52. Pa—Johnson v Kusminsky, 135 A 220, 287 Pa 425

53. Pa—Johnson v Kusminsky, supra

Failure to serve with notice of suit
If plaintiff fails to serve with the notice of suit the bill of particulars required by the statute, by answering defendant waives the defect and cannot take advantage of it at the trial—Norcott v First Baptist Church, 8 Hun, N Y, 639

54. Del—Perkins v Wilson, 40 A 950, 15 Del 196

55. Ala—Avondale Lumber Co v Hudson, 106 So 803, 214 Ala 128

Fla—Pines School Ass'n v Brewer, 128 So 858, 99 Fla 1336—Harvey v Fisher, 112 So 560, 93 Fla 587.
Kan—Cobb v Burford, 246 P 1009, 121 Kan 199

Ky—Minter Homes Corporation v Forsythe, 178 S W 2d 829, 297 Ky 11

La—Meriwether Supply Co v Baugh, 6 La App 730—Burkes v Kennedy, 5 La App 338

Pa—Wolfe v Gibbs, Com Pl, 46 Dauph Co 369
40 C J p 434 note 81

Notice to trustee under trust deed

Complaint of assignee of labor and materials claim stated no cause of action against trustee under trust deed selling property, there being no allegation that notice was given trustee before fund was disbursed—Horne-Wilson, Inc, v Wiggins Bros, 164 S E 365, 203 N C 85

Notice that material would be furnished

(1) In suit to establish and enforce lien for materials furnished in construction of church, allegations that acts regarding purchase of materials were so public that it was gross negligence on part of church

compliance with the statute is shown with substantial and reasonable certainty, however, the pleading will be sufficient,⁵⁶ and, where several claims are properly united in one lien statement, it is not necessary that the complaint should allege service of notice in each separate cause of action set out, but one allegation in the complaint of the service of the required notice will be sufficient.⁵⁷

J. Filing Lien Claim or Statement

In general, claimant's pleading must allege compliance with statutory requirements as to the lien claim, statement, or notice, and the filing thereof.

to remain silent and permit purchase of materials and construction of building without giving notice or expressing dissent were insufficient to show the giving of statutory notice to owner of property before materials were furnished—Buettner Bros v Good Hope Missionary Baptist Church, 18 So 2d 75, 245 Ala 553

(2) But, where one claims as original contractor, pleading of statutory notice to defendants that materials would be furnished was unnecessary—Guarenire v Bessemer Lumber Co., 106 So 49, 214 Ala 8

Statement as to subcontractors and employees

In suit to foreclose lien of contractor making improvements on realty bill of complaint, not alleging that complainant gave owner sworn statement required by statute as to full payment of subcontractors and contractor's employees or names of and amounts due those not so paid, stated no cause of action—Dodson v Florida Nursery & Landscape Co., 190 So 695, 138 Fla 887—Buker v Webster, 191 So 835, 140 Fla 471

Filing of notice and service of duplicate

Ariz—American Coarse Gold Corporation v Young, 52 P 2d 1181, 46 Ariz 511

Affidavit of attorney held insufficient

Affidavit of attorney that personal service of notice of filing mechanic's lien on owner could not be made, and of posting notice on premises attached as exhibit, is not sufficient in pleading to enforce lien for labor or materials—Baker v Griffin, 243 P 1057, 120 Kan 448

Failure to plead filing held not fatal

The fact that bill, which was filed on Oct 26, 1937, did not show that notice of claim of materialman's lien had been filed in office of clerk of the circuit court within three months after furnishing of last materials did not make the bill fatally defective—Pinellas Lumber Co v Lynch, 192 So 475, 140 Fla 559.

55. Fla—Pines School Ass'n v Brewer, 128 So 858, 99 Fla 1336
40 C J p 434 note 82

Allegations held sufficient

La—Petty v Jones, 121 So 372, 10 La App 409
40 C J p 434 note 82 [a]

57. Colo—Rialto Min & Milling Co v Lowell, 44 P 263, 33 Colo 253

58. Ala—Emanuel v Underwood Coal & Supply Co., 14 So 2d 151, 244 Ala 436—Ingram v Howard, 128 So 893, 221 Ala 328
40 C J p 434 note 84

By whom filed

In suit to foreclose materialman's lien, allegations of amended complaint that corporation filed claim were improperly struck as inconsistent with lien notice attached to amended complaint, where lien notice did not state that individual rather than corporation claimed the lien, but presented an ambiguity as to whether corporation or president of corporation as an individual claimed the lien—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402

59. Ala—Emanuel v Underwood Coal & Supply Co., 14 So 2d 151, 244 Ala 436—Gorr Lumber Co v McMillan, 143 So 173, 225 Ala 303—Ingram v Howard, 128 So 893, 221 Ala 328

Ky—Minter Homes Corporation v Forsythe, 178 S W 2d 829, 297 Ky 11

40 C J p 434 note 85

Substantial compliance

Affidavits by corporate materialman's manager, verifying account for lumber sold, without stating his official title, will be deemed amended to conform to proof, substantial compliance with statute being sufficient—Kull v Dierks Lumber & Coal Co., 293 S W 695, 173 Ark 445

60. Ala—Emanuel v Underwood Coal & Supply Co., 14 So 2d 151, 244 Ala 436—Ingram v Howard, 128 So 893, 221 Ala 328

Among other facts which a mechanic's lien claimant must allege because they are essential to the existence of the lien are the filing of a statutory lien claim, statement, or notice,⁵⁸ that it was verified by affidavit as required by the lien act,⁵⁹ was filed in the proper office,⁶⁰ within the statutory period limited for the filing of such claims,⁶¹ and that it contains the matters of substance which the statute prescribes.⁶² However, where a failure to file a lien within a specified time does not defeat the right to a lien, but merely postpones it to the rights of other creditors and encumbrancers, a complaint

La—Babst Co v. Julian, 3 La App.

351

40 C J p 434 note 86

Averments held insufficient

Ala—Whitfield v Howard, 128 So. 137, 231 Ala 171
40 C J p 434 note 86 [a].

61. Ala—Emanuel v Underwood Coal & Supply Co., 14 So 2d 151, 244 Ala 436

Cal—Remington v Mulholland, 5 P. 2d 667, 118 Cal App 479

Fla—St Petersburg Lumber Co v. Riskey, 173 So 832, 127 Fla 658

Tex—Sammons v Local No 65, Musicians Protective Ass'n of A. F. of M of Houston, Civ App., 106 S. W 2d 785

40 C J p 435 note 87

Where noncompliance is shown by pleading, it is bad

Alaska—Bloom v McCluskey, 7 Alaska, 349

Ill—Rittenhouse v Sable, 43 Ill App. 558.

Allegations held sufficient

(1) In general

Ala—Burton v Meeks, 134 So 28, 222 Ala 681—Richardson Lumber Co v Howell, 122 So 343, 219 Ala 328—Powers v Grayson, 109 So 164, 215 Ala 33

Ky—Theatre Realty Co v P H Meyer Co., 48 S W 2d 1, 243 Ky 346

Or—Birkemeier v Knobel, 40 P 2d 694, 149 Or 292—Randolph v Christensen, 265 P 797, 134 Or 661

(2) Cross petition alleging that materialman filed lien accounts and on same day filed suit to enforce lien claim was held not fatally defective for failure to allege that suit was begun after filing of account—Waters v Gallemore, Mo App., 41 S.W 2d 870

62. Cal—Karlik v Peters, 288 P 863, 106 Cal App 126—Asnon v Foley, 288 P 792, 105 Cal App 624—Norton v Bedell Engineering Co., 264 P 811, 88 Cal App 777.

40 C J p 435 note 88

will not be held bad for failure to allege such filing.⁶³

A general allegation that the claim was duly made out and filed is not sufficient to show that it contained the essential provisions required by the statute,⁶⁴ or that it was verified as required,⁶⁵ or was filed in time;⁶⁶ but the pleading will be sufficient if it is made to appear therein with reasonable certainty that the legal requirements have been complied with in these respects.⁶⁷ Where the pleading shows that the statement of lien was filed before the indebtedness accrued, the pleading is fatally defective.⁶⁸

Effect of setting out or attaching Where the notice of lien as filed is set out in the pleading or a copy is annexed to, and made a part of, the pleading as an exhibit, it is held that this is a sufficient compliance with the rule that it must affirmatively appear from the complaint that the notice was in proper form and contained all the essential provisions.⁶⁹ On the other hand, it has also been held that the averments of the pleading must show a compliance with the law without reference to the statements filed with the pleading, under the rule that an exhibit cannot aid or destroy a material averment.⁷⁰ However, even where an exhibit cannot be used to supply a material allegation or cure a vital defect, it may be used to make the allegations definite and certain,⁷¹ as where the exhibit shows that the property intended to be covered by the lien is sufficiently described in the statement filed and recorded.⁷²

Where several claims are properly united in one

statement of lien, the complaint need not allege the filing of the statement in each separate cause of action set out, but one allegation of such fact referring to all of the lien claims will be sufficient.⁷³

k. Other Averments

The courts have adjudicated the necessity and sufficiency in claimant's pleading containing averments as to various matters, such as the existence or priority of other liens or claims, and whether claimant has brought any other action to recover his debt.

While it has been held that the claimant's pleading must allege whether there are any other unsatisfied liens on the property on which he seeks to enforce a lien,⁷⁴ it has also been held unnecessary to allege that there are no other lien claimants.⁷⁵ However, where, under the statute, a materialman's lien is given priority as to the land over mortgages subsequent to the commencement of work, and as to the building or improvement over all mortgages, a complaint seeking a lien on the land and improvements must contain a definite allegation as to when the work of improving the realty was commenced and whether a mortgage was executed prior or subsequent thereto,⁷⁶ and, under a statute providing that a mechanic's lien is superior to prior encumbrances only to the extent that the added repairs enhanced the market value of the property, a bill to foreclose a mechanic's lien must allege the condition and value of the property before and after the repairs, so as to permit the determination of the priority and extent of the various liens.⁷⁷ Where plaintiff claims that the beneficiary under a prior trust deed is estopped to set up title under a foreclosure of the trust deed, the complaint must allege facts substantiating such claim.⁷⁸

63. Ill.—Lyle v. Rosenberg, 192 Ill App 378

64. Mo.—Fay v Adams, 8 Mo App 566
40 C J p 435 note 91

65. Or.—Pitz v Killingsworth, 26 P 305, 20 Or. 432

66. Or.—Pitz v Killingsworth, supra
40 C J p 435 note 93

67. Wis.—W H Pipkorn Co v Evangelical Lutheran St Jacobi Soc, 129 NW 516, 144 Wis 501
40 C J p 435 note 94

68. Ala.—Snelling Lumber Co v Porter, 142 So 560, 225 Ala 164
Effect of premature filing see supra § 139

No election to accelerate payment
Amended bill to foreclose mechanic's lien, expressly alleging no election to accelerate payment of notes representing debt before their due date, was held demurrable, since showing that declaration was filed in probate office before claim matured

—Gorr Lumber Co v McMillan, 143 So 173, 225 Ala 303

69. Cal.—Norton v Bedell Engineering Co, 264 P 311, 88 Cal App 777
40 C J p 436 note 95

70. Ky.—Minter Homes Corporation v Forsythe, 178 SW 2d 829, 297 Ky 11
40 C J p 436 note 96

71. SC.—Matthews v Monts, 39 S E 575, 61 SC 385
40 C J p 436 note 97

72. SC.—Matthews v Monts, supra

73. Colo.—Rialto Min & Milling Co v Lowell, 47 P 263, 23 Colo 353

74. Wash.—Lidral Const Co v Parker, 113 P 2d 1023, 9 Wash 2d 138

Allegation held sufficient
Wash.—Lidral Const Co v. Parker, supra

75. Wis.—Fredrickson v Riebsam, 40 NW 501, 72 Wis 587,
40 C J p 436 note 4

76. Ala.—Polakow v Weldon, 7 So 2d 85, 242 Ala 505—Polakow v General Roofing & Supply Co, 7 So 2d 78, 242 Ala 497—King v Woodlaw Lumber Co, 78 So 893, 201 Ala 539

77. Ala.—Becker Roofing Co v. Jones, 144 So 865, 225 Ala 638

Statute held inapplicable

Where a lessor knowingly permits materialmen to furnish his lessee with building material and a building permanent in character to be erected on the leased premises with such material, the materialmen are not required to allege on their claim of a lien that the improvement enhanced the property's value.—Westphal v Berthold, 273 Ill App 266

78. Cal.—Heinsbergen v Jenking, 298 P 104, 113 Cal App 394

Complaint held insufficient

Cal.—Heinsbergen v Jenking, supra

Resort to other actions By provision of the statute, claimant may be required to state whether any other action has been brought to recover any part of the debt and, if so, whether any part thereof has been collected, and a complaint which does not comply with this requirement is defective.⁷⁹ Such a provision has been held not to apply to a proceeding in a court which can make no judgment of foreclosure and sale.⁸⁰

Estoppel of owner. Where, under the statute, the owner, having failed to file a notice of completion, is estopped from maintaining a defense based on the ground that the lien was not filed within the time provided, claimant, if his pleadings show that his claim was not filed within the statutory period, must allege the facts showing the estoppel of the owner,⁸¹ and must allege that the statutory notice by the owner was not filed.⁸²

Notice of lis pendens The notice of pendency is of the existence of the action, and, therefore, the complaint is not required to state the filing of a notice which follows the complaint.⁸³

Personal liability In order to support a personal judgment against any defendant, the complaint must allege facts which establish the liability of defendant against whom such judgment is sought.⁸⁴

§ 295. — Purpose of Suit

The purpose of the suit must appear from claimant's pleading

In so far as the facts authorizing an enforcement of the lien are to be alleged, the purpose of the suit must appear,⁸⁵ and, although the remedy is by a personal action, it must be adapted to the object to be accomplished.⁸⁶ In an action in which the judgment is purely to enforce the lien, and not generally against defendant, directing execution be levied

on the particular property, the pleading should set up the manner in which defendant is liable in order that the proper form of judgment may be entered.⁸⁷ If there is a prayer for personal judgment by one who is not entitled to such relief in a pleading which is sufficient for the enforcement of the lien, such prayer is of no consequence and cannot affect the right to the enforcement of the lien.⁸⁸

§ 296. — Status of Claimant

Claimant should plead the facts establishing the class of lienors to which he belongs.

The class of lienors to which complainant belongs should not be alleged as a conclusion but the facts establishing it should be pleaded.⁸⁹ So, a bill for a mechanic's lien need not in express terms allege complainant to be either a contractor or a subcontractor if the material facts necessary to establish the capacity in which the right to relief is claimed are alleged.⁹⁰ Under some statutes, claimant must allege that he was a duly licensed contractor during the performance of his contract.⁹¹

§ 297. — Anticipating Defense

Purely defensive matters need not be anticipated and negatived in claimant's pleading

Matters purely of a defensive nature need not be anticipated and negatived in claimant's pleading.⁹²

§ 298. — Joinder of Counts and Causes

It is generally held that the mechanic's lien laws permit determination of all controversies thereunder in a single proceeding. Ordinarily a claimant may seek to enforce his lien and defendant's personal liability in a single proceeding.

It is generally held that, since mechanic's lien laws are of an equitable nature, they permit determination of all controversies thereunder in a single proceeding.⁹³ Thus, no misjoinder results from

79. N.Y.—*Prime v. Hughes*, 159 N.Y.S. 1041, 174 App.Div. 406, 40 C.J. p. 436 note 7.

80. N.Y.—*Boynton Furnace Co. v. Trohn*, 126 N.Y.S. 695, 141 App.Div. 773.

81. Cal.—*Greely v. Noble*, 181 P. 666, 40 Cal.App. 628.

82. Cal.—*Greely v. Noble*, *supra*.

83. Minn.—*John Paul Lumber Co. v. Hormel*, 63 N.W. 718, 61 Minn. 303. N.Y.—*Gass v. Souther*, 61 N.Y.S. 305, 46 App.Div. 256, affirmed 60 N.E. 1111, 167 N.Y. 604.

84. Ga.—*Logue v. Walker*, 81 S.E. 849, 141 Ga. 644, 40 C.J. p. 437 note 9.

Petition held sufficient

Petition against trustees of school

to foreclose mechanic's lien was held to state facts sufficient to constitute cause of action in personam, where petitioner had no lien—*Atlantic Coast Lumber Corporation v. Morrison*, 149 S.E. 243, 153 S.C. 305.

85. N.Y.—*Foster v. Poillon*, 2 E.D. Smith 556, 1 Abb.Pr. 321, 40 C.J. p. 418 note 74.

86. Wis.—*Dewey v. Fifield*, 2 Wis. 78, 40 C.J. p. 418 note 75.

87. Wis.—*Dewey v. Fifield*, *supra*, 40 C.J. p. 418 note 76.

88. Mo.—*Kasper v. St. Louis Terminal R. Co.*, 74 S.W. 145, 101 Mo. App. 323.

89. Ill.—*Salem v. Lane & Bodley Co.*,

60 N.E. 37, 189 Ill. 593, 82 Am.S.R. 481.

40 C.J. p. 419 note 78.

90. Ill.—*Salem v. Lane & Bodley Co.*, *supra*.

91. Cal.—*Siemens v. Meconi*, 112 P. 2d 904, 44 Cal.App. 2d 641.

92. Mont.—*Corpus Juris* cited in *Continental Supply Co. v. White*, 12 P.2d 569, 572, 93 Mont. 254.

40 C.J. p. 419 note 80.

Whether owner filed bond

Cal.—*Hauptenthal v. Bert L. Perry, Inc.*, 31 P.2d 1088, 138 Cal.App. 198.

93. Cal.—*Schulte v. Buben*, 8 P.2d 843, 215 Cal. 172, 81 A.L.R. 764.

Rules governing joinder of causes of action generally see *Actions* §§ 61-101.

the seeking of such relief as is necessary to effect the foreclosure of the lien, as under allegations setting up fraudulent conveyances to defeat the lien⁹⁴ However, a cause of action for enforcement of a lien should not be joined with one for the collection of a debt not included in the lien claim,⁹⁵ and sometimes it is expressly provided by the statute that no other cause of action shall be joined with the equitable action to foreclose the mechanic's lien.⁹⁶

Allegations of the steps taken to obtain a lien do not constitute a separate cause of action, but merely show the right of plaintiff to have the property in controversy subject to the payment of his judgment,⁹⁷ nor is a bill multifarious for making prior mortgagees parties and seeking as against them to subject to complainant's demand that part of the value of the property which resulted from the improvements which complainant put on it in labor and supplies.⁹⁸ Moreover, where claimant's lien applies only to the extent of the amount due from the owner to the principal contractor, allegations of such amount, although appropriate to a cause of action in assumpsit, are equally appropriate to an action in equity to enforce a subcontractor's or materialman's lien, and do not constitute a misjoinder of causes.⁹⁹ Accordingly, separate counts may be joined in an action against the own-

er and his contractor, presenting two theories: (1) That plaintiff's claim is founded on a contract with the owner, in which case the lien is enforceable for the whole amount, by reason of the personal liability of the owner. (2) Setting up the rights of a subcontractor or materialman furnishing the contractor, in which case the lien is worked out by a species of subrogation.¹

Separate statement. Where separate liens may be joined in one complaint, it is sufficient if the facts concerning each are embraced in separate and distinct statements without the formality of numbering and otherwise designating them.²

Enforcement of lien and of personal liability Since the remedies for the enforcement of the debt and the foreclosure of the lien are regarded as cumulative, as discussed supra § 266, it is ordinarily regarded as permissible for claimant in a single proceeding to seek the enforcement of his lien and of the personal liability of defendant,³ and, where the statute contemplates a personal judgment to be enforced by execution on particular property, it is permissible to join a special count for the enforcement of the lien and common counts for work done and material furnished on an account stated.⁴ In such cases the pleading may be bad for the enforcement of the lien and at the same time good for the recovery of a personal judgment.⁵ Where the

Claims for labor and for materials

In a subcontractor's suit against the contractor, owner, and a bank holding the proceeds of foreclosure sales of the premises under security deeds, a petition to foreclose the subcontractor's lien is not subject to general demurrer because combining in a gross sum the claim for materials with a claim for labor, the subcontractor being entitled to a lien at least for the materials—*East Atlanta Bank v. Lambert*, 12 S.E.2d 865, 191 Ga. 486.

94. NY—*Tisdale v. Moore*, 8 Hun 19.
40 C.J. p. 419 notes 84, 85.

95. Minn.—*Corpus Juris cited in Knutson v. Lasher*, 18 N.W.2d 638, 690, 219 Minn. 594.

Pa.—*Dye v. Fryer*, 5 Pa. Dist. & Co. 283, 6 Northumb. Leg. J. 338, 6 Erie Co. 232.
40 C.J. p. 419 note 82.

96. Iowa—*Sweetzer v. Harwick*, 25 N.W. 744, 67 Iowa 488.
40 C.J. p. 419 note 83.

97. Neb.—*Hardy v. Miller*, 9 N.W. 475, 11 Neb. 395.

98. Ala.—*Christian & Craft Grocery v. Kling*, 25 So. 629, 121 Ala. 292.
40 C.J. p. 419 note 87.

99. NY—*Freeze v. Avery*, 69 N.Y.S. 150, 57 App. Div. 633.

1. Ala.—*Trammell v. Hudmon*, 6 So. 4, 86 Ala. 472.
40 C.J. p. 419 note 89.

2. Cal.—*Booth v. Pendola*, 23 P. 200, 88 Cal. 36, reheard 25 P. 1101, 88 Cal. 36.
40 C.J. p. 420 note 91.

3. Ala.—*Gorr Lumber Co. v. McMillan*, 143 So. 173, 225 Ala. 303—*Kilian v. Everett*, 183 So. 684, 28 Ala. App. 334.

Tex.—*Seby v. Craven Lumber Co.*, Civ. App., 259 S.W. 1093.
40 C.J. p. 420 note 93.

Joinder of causes of action for enforcement of debt and foreclosure of lien or mortgage generally see *Actions* § 94 e.

Petition joining contractor and owner

A petition by a lumber company joining a contractor for the construction of a building and the owner on an agreement that the owner of the building would pay, direct to the lumber company for materials furnished, money due the contractor as the work progressed, and for a foreclosure of a mechanics' lien, was held not to constitute a misjoinder of actions—*Atkinson v. Jackson Bros.*,

Tex. Civ. App., 259 S.W. 280, modified on other grounds, Com. App., 270 S.W. 848, 38 A.L.R. 1377.

Joinder of cause for loss of anticipated profits

Where plaintiff had a cause of action for mechanic's lien and for loss of anticipated profits resulting from defendant's breach of the same contract, the two causes of action were properly joined—*Cooper & Evans Co. v. Manhattan Bridge Three-Cent Line*, 149 N.Y.S. 433, 164 App. Div. 64.

Election not required

In a proceeding to enforce mechanic's lien on a building, a count for a personal judgment only may be joined with a count for both a personal judgment and a special order for a sale of the building erected for the payment of the judgment, and plaintiff should not on the trial be compelled to elect on which of the counts he will stand—*Williams & Williams v. Warren*, 99 So. 266, 134 Miss. 899.

4. Fla.—*West v. Grainger*, 35 So. 91, 46 Fla. 257.

5. Okl.—*Ryndak v. Seawell*, 76 P. 170, 13 Okl. 737.
40 C.J. p. 420 note 95.

statutory practice permits the blending together of proceedings in law and equity, both remedies may be pursued in the same action.⁶ In an action by a subcontractor, the contractor may be joined, as discussed supra § 284, and a personal judgment recovered against him.⁷ However, where the statute authorizes a personal judgment only as incident to the main relief, so that, if the lien fails, the action must fall altogether, as discussed infra § 329, it is not permissible to join in a complaint a cause of action on the lien and one for the debt as on a distinct cause,⁸ and, where the statute requires as a condition precedent to a foreclosure proceeding by a subcontractor that he shall have recovered a judgment for his debt against the contractor, a cause of action against the contractor cannot be joined in the proceeding for the enforcement of the lien.⁹

§ 299. — Verification

Plaintiff's pleading must be verified where verification is required by statute, but not otherwise.

A complaint in a statutory action to foreclose the lien need not be verified in the absence of a provision in the statute requiring it.¹⁰ However, plaintiff's pleading must be verified where verification is required by the express provisions of the statutes.¹¹

§ 300. Plea, Answer, or Affidavit of Defense

The defendant is generally required to file a plea or answer in order to form an issue to be tried.

Except as otherwise required by statutory provisions,¹² it has generally been held that defendant,

in order properly to form an issue to be tried, should file a plea or answer,¹³ within the time, if any, specifically prescribed.¹⁴ However, an answer is not required where it would serve no good purpose,¹⁵ and no appearance and pleading are necessary to protect the interest of an owner, although made a party, whose interest the court is not authorized to subject under the law applicable to the facts set up in the petition.¹⁶

Scire facias Where the statute as to enforcement of mechanics' liens by scire facias provides a form of the writ in which defendant is notified to file an affidavit of defense, it would seem that a formal plea need not be entered;¹⁷ and the case is at issue on the scire facias and the affidavit of defense unless defendant rules plaintiff to reply to the affidavit of defense.¹⁸ The affidavit of defense must be filed within the time prescribed by the statute.¹⁹

Motions available to defendant Not only may defendant attack plaintiff's pleading by demurrer, considered infra § 305, but, depending on the practice in the particular jurisdiction and the provisions of the statutes, various motions and other proceedings may be available to defendant.²⁰

§ 301. — Form and Sufficiency

a In general

b Denial or allegation of material facts

a. In General

The ordinary rules of pleading are generally applied with respect to pleas or answers in actions to enforce mechanics' liens.

6. US—Hatcher v Hendrie & Bolt-hoff Mfg & Supply Co, Colo., 133 F 267, 68 CCA 19
40 C.J. p 420 note 96

7. Cal—McMenomy v White, 47 P 109, 115 Cal 339
40 C.J. p 420 note 98

8. NY—Burroughs v. Tostevan, 75 NY 567

9. Minn—Lewis v Williams, 3 Minn 151

10. Cal—Parke & Lacy Co v Inter Nos Oil & Development Co, 82 P 51, 147 Cal 490
40 C.J. p 420 note 3

11. Mich—Knowlton v Gibbons, 178 NW 63, 210 Mich 547—Daschke v Schellenberg, 84 NW 67, 135 Mich 216

NY—Sherman v Freuhaff, 32 N.Y.S. 2d 945, 177 Misc 727.

12. RI—Burlingame v. Emerson, 5 RI 62
40 C.J. p 437 note 11.

13. Ill—Thielmann v Burg, 73 Ill 293

40 C.J. p 437 note 13
Defenses see supra §§ 273-275

14. Ill—Thielmann v Burg, supra.
40 C.J. p 437 note 12

15. Pa—Leiby v Erdman, Com Pl., 20 Lehigh Co L.J. 153, 57 York Leg Rec 51

16. Ill—Judson v Stephens, 75 Ill 255
40 C.J. p 437 note 14

17. Pa—Wyss-Thalman v Beaver Valley Brewing Co, 65 A 811, 216 Pa 485—American Lumber & Manufacturing Co v. O'Keefe, 20 Pa Dist 609

18. Pa—American Lumber & Manufacturing Co v O'Keefe, supra.
40 C.J. p 437 note 16

19. Pa—Atlantic Terra Cotta Co v. Carson, 53 Pa Super 91

Time for filing

(1) It has been held that the affidavit of defense must be filed within fifteen days after service of the writ

—Atlantic Terra Cotta Co v. Carson, supra—40 C.J. p 437 note 17 [a]

(2) However, it has also been held that, notwithstanding the provision of the statute, affidavit of defense to scire facias sur mechanic's lien may be filed any time before judgment; and affidavit should not be stricken because filed more than fifteen days after return day—Rich v Boguszinski, 85 Pa Super 385

20. Pa—Fave v. Merlot, 94 Pa. Super 90

Petition to strike off as not exclusive Statutory procedure under which owner may have validity of mechanic's lien determined by filing petition to strike off is not exclusive—Fave v. Merlot, 94 Pa Super 90

Objection for matter outside record Where defendant objects to plaintiff's pleading for matters dehors the record his objection cannot be made by a motion to strike off the lien, but must be made by a defense to the merits, such as an affidavit of defense—Schoser v Chaplin, 29 Pa. Dist. & Co. 466, 31 Luz Leg Reg. 138.

ing that he does not admit an allegation is held to be of no consequence if it is not denied⁵⁶ On the other hand, where defendant files no pleading whatsoever, it has been held that plaintiff must nevertheless prove the material facts on which the existence of the lien depends and which facts are not admitted,⁵⁷ but it has also been held, where defendant fails to plead and a default judgment is entered, that allegations of the complaint are admitted of record⁵⁸ By merely pleading a fact in opposition to claimant's right, in the absence of a general denial, the material allegations of claimant's pleading are admitted⁵⁹

Unverified answer. Under some statutory provisions, where plaintiff's pleading is sworn to, it constitutes evidence of the matters therein charged unless denied by answer under oath⁶⁰

(3) General and Special Pleading and Issues Raised Thereby

- (a) In general
- (b) Plea as to indebtedness
- (c) Payment and tender

(a) In General

A general denial puts in issue only such facts as are issuable, and matters of defense or avoidance must be specially set up.

A general denial puts in issue only such facts as are issuable⁶¹ On the other hand, matters of defense or in avoidance of the cause of action pleaded must be specially set up and will not be available under a mere general denial of claimant's allegations⁶² Thus defendant must specially plead an estoppel,⁶³ or waiver,⁶⁴ or discharge,⁶⁵ and in an action by subcontractors the defense that plaintiffs guaranteed the contractor's performance and that he failed to perform must be specially pleaded⁶⁶ A denial of an allegation that the claims of defendants are subordinate to plaintiff's lien does not raise a material issue⁶⁷ Matters relied on by way of counterclaim must be sufficiently alleged⁶⁸

In scire facias it has been held that defendant may plead specially matters of which he might avail himself under a general plea⁶⁹ The terre-tenant may plead in bar that the premises on which the lien is claimed have been sold under judicial process, and the lien of the claim, if any, thereby discharged,⁷⁰ and, under a statute allowing defend-

56. Neb.—Irish v Pheby, 44 NW 438, 28 Neb 231

57. Ark.—Hicks v Branton, 21 Ark 186

Mich.—Roberts v Miller, 32 Mich 289

58. Ill.—Construction Finance Corporation v Kawohl, 274 Ill App 541

Ownership

Ill.—Construction Finance Corporation v Kawohl, supra

59. Nev.—Dickson v Corbett, 11 Nev 277

Pa.—Geiss v Rapp, 1 Walk 111.

60. Mich.—Bolhuis Lumber & Mfg Co v Van Tubergen, 230 NW 910, 250 Mich 686—Knowlton v Gibbons, 178 NW 63, 210 Mich 547
Requirement of verification as to plaintiff's pleading see supra § 299

Correctness of account

Where verified mechanic's lien statement is filed in court clerk's office, and copy is attached to petition declaring such account correct and amount shown therein owing plaintiff, correctness of account is incontestable, unless denied under oath—Yale Theatre Co v Majors & Scheer, 251 P 1019, 123 Okl 124

Effect of plea of set-off

Where plaintiff pleads contract, and attaches copy of mechanic's lien statement properly verified, and defendant files unverified general denial, plea of set-off raises no issue

as to terms of contract—Yale Theatre Co v Majors & Scheer, supra

61. Cal.—Elder v Spinks, 53 Cal 293

40 C J p 439 note 47

Issues and proof generally in actions to enforce mechanics' liens see infra § 307 a

Traverses all material averments

Ala.—Foster v Prince, 141 So 248, 224 Ala 523

Matters held in issue

Where petition set forth materialman's lien as well as debt and asked foreclosure of lien as well as debt, general denial put in issue existence and right to foreclosure of lien, as well as debt—Crowell v Mickolasch, Tex Civ App, 297 SW 234.

62. Ala.—Roobin v Grindle, 122 So 408, 219 Ala 417

Cal.—Haupenthal v Bert L Perry, Inc, 31 P 2d 1088, 138 Cal App 198
Pa.—J M Brightbill, Inc, v Lumb, Com Pl, 53 Dauph Co 116—Pennsylvania Supply Co v Lumb, Com Pl, 53 Dauph Co. 110

40 C J p 439 note 49

Defenses of limitations

(1) The defense of limitations is waived if not specially pleaded—Landers Lumber Co v Short, Mo App, 81 SW 2d 375—40 C J p 439 note 49 [b]

(2) In order to raise the defense of statute of limitations, the defense must plead facts, and not mere con-

clusions—Scroggin v National Lumber Co, 59 NW 548, 41 Neb 195

General traverse of account

In suit to enforce materialman's lien, answer traversing account generally, but not raising issue as to any particular item, is bad—Hazard Lumber & Supply Co v Demumbrum, 295 SW 414, 220 Ky 422

63. Wyo.—Big Horn Lumber Co v Davis, 84 P 900, 14 Wyo 455, 7 Ann Cas 940, rehearing denied 86 P 1048, 14 Wyo 455, 7 Ann Cas 940

40 C J p 439 note 50

64. Ind.—Corpus Juris cited in Colberg v Sebastian, 46 NE 2d 716, 717, 113 Ind App 94.

40 C J p 439 note 51

65. Ill.—Coagrove v Farwell, 114 Ill App 491

NY—Hallahan v Herbert, 4 Daly 209, 11 Abb Pr, NS, 326, affirmed 57 NY 409

66. Cal.—Kelley v Plover, 36 P. 1020, 103 Cal 35

67. Cal.—Hartfield v Howard, 181 P 385, 180 Cal 376

68. NY—Fehlinger v Boos, 118 N YS 167

40 C J p 439 note 54

69. Pa.—Johns v Bolton, 12 Pa. 339—Gamon v Winslow, 1 Wkly NC. 432

70. Pa.—Johns v. Bolton, 12 Pa. 339.

ant to alter his plea or defense on or before the trial of the cause, such a plea need not be pleaded puis darrein continuance.⁷¹

(b) Plea as to Indebtedness

A general denial puts in issue an allegation of performance of the contract by the plaintiff or an allegation of indebtedness from the owner to the principal contractor.

In accordance with the rule, stated supra § 301 a, that the plea should conform to the particular form of remedy through which the lien is enforced, where the lien claim shows that the debt was contracted by the owner, the general issue of non assumpsit is proper,⁷² and nil debet has been held sufficient as a general denial to put the mechanic on proof of his claim, where the statute requires such proof in any event, even on the failure of defendant to appear.⁷³ However, under some court rules, pleadings in scire facias to enforce a mechanic's lien must specially set forth the matters of defense,⁷⁴ and, independent of a rule of court, an owner cannot plead non assumpsit where the labor or materials were furnished by a person employed by the contractor and not by the owner.⁷⁵ If defendant wishes to set up another debt to defeat plaintiff's claim, he must show by his allegations that the debt is a subsisting one.⁷⁶

Performance A general denial puts in issue an allegation of performance of the contract by plaintiff,⁷⁷ and nonperformance, as that the work was unskillfully or defectively performed, may be shown in an answer setting up the fact as a ground of defense.⁷⁸ However, in an action by a materialman who furnished material to the contractor, a breach of contract by the contractor must be pleaded in order to raise an issue on such breach.⁷⁹ The fact that defective material was furnished in violation of the contract may be shown as an equitable de-

fense under the general issue.⁸⁰

Indebtedness to principal contractor. A plea of the general issue or general denial puts in issue the allegation of indebtedness from the owner to the general contractor at the time of the service of notice by the subcontractor,⁸¹ and is sufficient to put the materialman on proof of the amount due for materials furnished,⁸² and a plea by the owner, in suit by the materialman, which sets up facts showing that there was no indebtedness from the owner to the contractor, is sufficient.⁸³ However, where the law gives the subcontractor a direct lien, it has been held that the plea denying defendant's indebtedness to plaintiff is a mere conclusion of law and hence defective,⁸⁴ and, in order that the owner may show that in good faith and in pursuance of his contract he has paid all that he agreed to pay before notice of claims, he must allege such facts. Where the lien of a subcontractor attaches to an installment due the contractor at the filing of the former's lien, an answer setting up damages by way of equitable set-off and counterclaim, by reason of the contractor's failure to complete the work, is bad if it fails to allege that the damage arose and existed at the time the lien was filed.⁸⁵

Payment by contractor. An affidavit of defense in a proceeding to enforce a subcontractor's lien that plaintiff had received from the contractor a sum in excess of the amount due for the work done as measured by the contract price, and had abandoned the work, is sufficient.⁸⁷

(c) Payment and Tender

An allegation of payment should be distinct and positive.

An allegation of payment should be distinct and positive,⁸⁸ but, where the pleading shows the manner of payment and alleges a mutual settlement

71. Pa.—Johns v Bolton, supra

72. Pa.—Early v Albertson, 2 Wkly NC 541
40 C J p 439 note 62

73. Ark.—Hicks v Branton, 21 Ark 186
40 C J p 440 note 63

74. Del.—Richards v Naudain, 85 A 559, 27 Del 1

Pleas held bad

Under this rule, pleas of non assumpsit, never indebted, nil debet, and the general issue, are improper, as is also the plea of non est factum, particularly where there is no averment of any contract with defendant.—Richards v. Naudain, supra.

75. Del.—Richards v. Naudain, supra

76. Pa.—Smyth v Armstrong, 2 Wkly NC 383
40 C J p 440 note 72

77. Wis.—Moritz v Larsen, 36 N W 331, 70 Wis 569
40 C J p 440 note 73

78. Pa.—Rockwell Mfg Co v Cambridge Springs Co, 43 A 327, 191 Pa 386
40 C J p 440 note 74

Allegations held sufficient

Cal.—Zachary v Chapman, 284 P 703, 103 Cal App 456

79. Cal.—Blethen v. Blake, 44 Cal 117

80. Pa.—Blessing v Miller, 103 Pa 45

81. NJ.—Culver v Lieberman, 55 812, 69 N J Law 341.

40 C J p 440 note 77

82. Neb.—Lee v Story Brewing Co 106 N W 220, 75 Neb 212

83. Ala.—Cranford Mercantile Co Wells, 70 So 666, 195 Ala 251
40 C J p 440 note 79

84. Mont.—Merrigan v English, P. 454, 9 Mont 113, 5 L R A 8

85. Nev.—Hunter v Truckee Lod No 14 I O O F, 14 Nev 24

86. NY.—Anisansel v Coggeshale 82 N Y S 430, 83 App Div 491

87. Pa.—Kee v Hilt, 33 Wkly. N 104.

88. Pa.—Young v Pulte, 1 Wkly C 38
40 C J p 441 note 84.

account by the parties, it is not necessary to file an itemized account of payments.⁸⁹ There need not be a direct negative of an allegation of nonpayment of an alleged contract price,⁹⁰ and it is, for example, sufficient to deny the existence of the contract on which plaintiff charges the liability.⁹¹ Where a husband and wife are made defendants and answer jointly by a general denial, a separate answer by the husband stating that he made the contract without his wife's knowledge or consent and that plaintiffs accepted and received from him a sum stated as payment is improperly stricken.⁹²

An admission of indebtedness in a sum less than that claimed and a tender of the amount admitted is held to be an admission of the lien to that extent,⁹³ but a plea of tender and payment of the money into court under a special contract set up by defendant will not be construed as an admission of the cause of action set up by claimant but only as an admission of the amount due under the special contract pleaded by defendant.⁹⁴ In *scire facias* under the plea of payment with proper notice, any equity which tends to defeat plaintiff's action may be given in evidence,⁹⁵ but, without notice, defendant may be confined to proof of matters tending to show actual payment.⁹⁶ It has been held that the formal validity of the lien is not put in issue by a plea of payment.⁹⁷

§ 302. Cross Bill or Cross Complaint

a In general

b By principal contractor and other lienors

a. In General

A cross bill or cross complaint in an action to enforce a mechanic's lien must be as complete and perfect as an original bill or complaint.

In accordance with the rules governing cross bills and cross complaints in civil actions generally,

a cross bill or cross complaint in an action to enforce a mechanic's lien must be as complete and perfect as an original bill or complaint.⁹⁸ Where the original bill presents questions of equitable cognizance, defendant may have legal relief against plaintiff,⁹⁹ and the several defendants may cross plead with each other and have all rights between them germane to the subject of the bill determined.¹ The cross complainants are concluded by their claims as set up in their pleadings.²

By owner Matter which does not relate to, or depend on, the contract or transaction on which plaintiff's action for the enforcement of a lien is brought or which does not affect the property to which the action relates cannot be set up by cross complaint but is properly cognizable under a counterclaim.³ Defendant has been permitted to file a cross bill against his codefendant for relief to which he is entitled by reason of transactions between these two parties relating to the property involved.⁴ No cross bill is necessary to set up that there is no indebtedness by reason of damage sustained by defendant from a breach of the contract.⁵ An owner setting up damages for delay in completion by a cross complaint is not required to negative defensive matter.⁶ Under a statute providing that the court may adjust and determine the equities of all the parties to the action and the order of priority of different liens and determine all issues raised by any defense or counterclaim in the action, where a lienor made defendant by answer claims a judgment for a sum alleged to be due under its contract, the owner may by answer assert a counterclaim for damages arising out of his contract with the defendant lienor.⁷

Where the surety on the contractor's bond is made a party, the owner by cross complaint may assert a right to damages against the principal contractor and his surety because of the default of the

89. Miss—Easterling v. Shafer, 38 So 230

90. Cal—Watterson v Owens River Canal Co, 139 P 804, 167 Cal 370

91. Cal—Watterson v Owens River Canal Co, *supra*.

92. Ind—Stephenson v Ballard, 82 Ind 87

93. US—Cameron & Co v Campbell, Ind T, 141 F 32, 72 CCA 620

94. Pa.—Yaukey v Buckman, 18 Pa Super 378

95. Pa.—Smaltz v Ryan, 3 A 772, 112 Pa 423—Clark v Bittle, 19 Pa Dist 933

96. Pa.—Smaltz v Ryan, 3 A. 772, 112 Pa 423

97. Pa.—Klinefelter v Baum, 33 A 582, 172 Pa 652
40 C.J. p 441 note 86

98. Colo—San Juan & St Louis Mining & Smelting Co v Finch, 6 Colo 214

Under code rules of pleading a cross complaint is sufficient if the necessary allegations can be fully gathered from all its averments—Rader v A J Barrett Co, 108 NE 883, 59 Ind App 27—40 C.J. p 442 note 10

99. Wash—Maher v Farnandis, 126 P 542, 70 Wash 250

1. Wash—Maher v Farnandis, *supra*

2. Utah—Culmer v Caine, 61 P. 1008, 22 Utah 216

3. Cal—Clark v Taylor, 27 P 860, 91 Cal 552
Recoupment, set-off and counterclaim see *supra* §§ 276, 277

4. Tex—Haberzettel v Dearing, Civ App, 80 SW 539
40 C.J. p 442 note 16

5. Ill—Julin v Ristow Pothe Mfg Co, 54 Ill App 460

6. Ala—Fike v Stratton, 56 So 929, 174 Ala 541
40 C.J. p 442 note 21

7. NY—Mellen v Athens Hotel Co, 133 NYS 1079, 149 App Div 534, 3 NY Civ Proc, N.S., 204.

principal contractor,⁸ although it has been held that, where a subcontractor brings a suit in equity to enforce a mechanic's lien, the owner has no right to file a cross bill making the sureties on the contractor's bond parties to the suit, for the purpose of enforcing the liability on the bond.⁹ There is, however, authority to the contrary.¹⁰

In proceeding for general settlement In a suit by the owner against all the lienors for the purpose of adjusting or settling all matters between the parties and to prevent the prosecution of separate lien proceedings, the liens of defendants may be enforced by cross bill.¹¹ Since the owner by filing a petition for a general settlement under a statute providing therefor admits the right on the part of a defendant to a lien, defendant does not waive such right by failing to assert it in his answer and by alleging merely such facts as tend to establish the amount due to him from the principal contractor.¹² In an action to settle the rights to a fund in the hands of the owner, the answer of another claimant is required merely to state his right to, or interest in, the fund.¹³

b. By Principal Contractor and Other Lienors

Where the original contractor or some other lienor is made a party defendant he may set up his lien claim by way of answer or cross complaint.

Where the original contractor is joined as a defendant, he may set up by way of answer or cross

complaint his claim for a lien,¹⁴ and whether his pleading is to be regarded as an answer or as a cross complaint depends on the facts set up and not on the designation given to it by the pleader.¹⁵ The fact that the principal contractor is made a defendant does not authorize such principal contractor, who has filed no lien, to maintain against the other parties to the suit a cross bill or an answer in the nature of a cross bill for an accounting with the owner and another subcontractor who has filed no lien.¹⁶

Where the statute contemplates the determination of the rights of all lien claimants in one proceeding, as discussed supra § 272, a lien claimant made defendant may by counterclaim or cross bill have a foreclosure of his lien although he seeks no relief as against plaintiff,¹⁷ and it has been held not essential that a formal cross bill be filed as relief may be demanded in the answer,¹⁸ or the facts constituting defendant's cause of action may be set up in an answer in the nature of a cross complaint.¹⁹ However, defendant should set forth his claim so as to show that he has a lien just as though he were plaintiff in the action.²⁰ The general rule in equity requiring a defendant to make himself complainant either by petition or cross bill, or by transfer in some way from the position of a defendant to that of a complainant, asking affirmative relief, is subject in mechanics' lien suits, as in other cases, to the exception that, where a fund or property is in

8. Wis.—Yawkey-Crowley Lumber Co v De Longe, 147 N W 334, 157 Wis 390

9. Tenn.—McRae v University of South, Ch App, 52 S W 463

10. Tex.—Meyers v Wood, 65 S W 671, 26 Tex Civ App 591
40 C J p 442 note 20

11. Tenn.—Perkins Oil Co v Everhart, 64 S W 760, 107 Tenn 409
40 C J p 443 note 47

Cross bill held sufficient

Ala.—Avondale Lumber Co v Hudson, 106 So 803, 214 Ala 128

12. Ill.—Geweke v Hilsinger, 177 Ill App 467

13. Colo.—Olson v. Model Land & Irrigation Co, 225 P 259, 75 Colo 221

14. Cal.—Holmes v Richet, 56 Cal 307, 38 Am R 54

15. Cal.—Holmes v Richet, supra

16. Va.—Gist v Virginian R Co, 90 SE 554, 79 W Va 167

17. Mo.—Badger Lumber Co v Goodrich, 184 S W 2d 435, 353 Mo 789.

18. N D.—Dakota Sash & Door Co v Brinton, 145 N W 594, 27 N D 39

Cross petition as to adjoining lot

In action to establish mechanic's lien against one lot, materialman's cross petition against adjoining lot was held authorized, where both lots formerly belonged to same owner, and other lienors who had been made defendants had blanket liens against both lots, since all lienors are compelled to assert claims in one proceeding, and, if blanket lienors might recover all their claims against one lot, lienors having claim only against that one lot might be unjustly deprived of their claims.—Lee & Boutell Co v C A Brockett Cement Co, 106 S W 2d 451, 341 Mo 95

18. U S.—In re Danville Hotel Co, D C Ill, 33 F 2d 162, affirmed in part and reversed in part on other grounds, C C A, 38 F 2d 10

Ill.—Hyde Park Inv Co v Hyde Park State Bank, 257 Ill App 539
Iowa.—Dalbey Bros Lumber Co v Crispin, 12 N W 2d 277
40 C J p 442 note 26

19. Wash.—Powell v Nolan, 67 P 712, 27 Wash 318, reheard 68 P 389, 27 Wash 318
40 C J p 443 note 27

20. Ill.—Hyde Park Inv Co v Hyde Park State Bank, 257 Ill App 539
40 C J p 443 note 28

Adoption of allegations of others

In materialman's lien foreclosure suit, subcontractor could not enlarge his cross action against owner by adopting allegations materialman and contractor asserted against owner.—Eldridge v Poirier, Tex Civ App, 50 S W 2d 388, error refused

Answer held insufficient

Answer seeking foreclosure of mechanic's lien was held defective, where it appeared therefrom that statutory time had expired.—In re Danville Hotel Co, D C Ill, 33 F 2d 162, reversed in part on other grounds, C C A, 38 F 2d 10

Cross petition held sufficient

The filing of a mechanic's lien and proceedings by cross petition filed in action instituted by another materialman to foreclose a mechanic's lien on the same property warranted establishment of cross petitioner's lien, although cross petitioner did not expressly allege that he had not been paid.—Dalbey Bros Lumber Co v Crispin, 12 N W 2d 277, 234 Iowa 151.

the control of the court to be administered and distributed among those entitled to it, affirmative action is not necessary but relief is proper under an answer setting up facts on which respondent is entitled to it²¹

Under a statute so providing, where a complaint to enforce a mechanic's lien does not admit the liens of claimants who have been made defendants, a claimant who does not answer or who does not set forth his lien in his answer is deemed to have waived his lien,²² and the admission of proof, without objection, in support of a claim, does not dispense with the necessity of alleging it in the answer²³ Under such a statute, where it is alleged that certain persons made defendants are claiming liens and the validity of their liens is not controverted, they are not required by answer to set forth their liens in issuable form,²⁴ but in the absence of an answer by the owner asking that the liens of defendants be declared invalid they are entitled to introduce their evidence and have their liens declared.²⁵

Where an original contractor had not filed his lien, if he merely answers in a suit by a subcontractor, he cannot recover judgment for the amount of his claim over and above the claim of the subcontractor, not having set it up by pleading in the nature of a cross action but will be left to a personal action against the owner²⁶ However, under a statute requiring all lienholders to prove their claims in one proceeding, it has been held that intervening holders of recorded liens may prove their claims without having pleaded them.²⁷

Filing Under a statute requiring a lien claimant defendant to file his answer with the clerk of

the court and providing that no other notice need be given, the answer is of no effect until so filed.²⁸

Laches. Where laches is not apparent from the face of a cross bill, circumstances constituting it must be availed of by plea or answer²⁹ A lienor made defendant need not allege in his answer or cross bill an excuse for a delay in the prosecution of his suit³⁰

Foreclosure of vendors' or mortgage liens Under a statute providing for the adjudication of all liens and of the rights of all parties interested in the property in one proceeding, considered supra § 272, a defendant may set up and foreclose a vendor's lien as against a codefendant by an intervening petition;³¹ and a mortgagee of property included in the lien may file a cross bill for foreclosure.³²

§ 303. — Answer to Cross Complaint

Rules governing the necessity and sufficiency of answers or motions directed to a cross action generally apply in actions to enforce a mechanic's lien.

General rules have been held to apply to answers or motions directed to a cross action in a proceeding to enforce a mechanic's lien.³³

§ 304. Replication or Reply

Where the defendant's answer sets up new matter the plaintiff may set up in reply facts constituting a defense thereto.

In accordance with general rules, where defendant sets up new matter in his answer, plaintiff may set up in reply facts constituting a defense to the plea or answer³⁴ unless plaintiff has admitted in his complaint what he denies in his replication.³⁵ If the answer does not contain new matter, no reply is

21. D.C.—Emack v Campbell, 14 App DC 186

40 C.J. p 443 note 29.

22. N.Y.—McConologue v Larkins, 66 N.Y.S. 188, 32 Misc. 166.

23. N.Y.—Hondorf v Atwater, 27 N.Y.S. 447, 75 Hun 369

24. N.Y.—Kelley Lumber Co v Otselec Valley R. Co., 120 N.Y.S. 415, 136 App Div 146

25. N.Y.—Kelley Lumber Co v Otselec Valley R. Co., supra

26. N.Y.—Morgan v Stevens, 6 Abb N.Cas. 356

27. Nev.—Hunter v Truckee Lodge No 14 I.O.O.F., 14 Nev. 24
40 C.J. p 443 note 35

28. Minn.—Dauman v Metzger, 176 N.W. 497, 145 Minn. 133

29. Ala.—Pilcher v. E. R. Porter Co., 94 So. 72, 208 Ala. 202.

30. W.Va.—Hough v Watson, 112 S.E. 303, 91 W.Va. 161

31. Mo.—Early v Smallwood, 256 S.W. 1053, 302 Mo. 92
40 C.J. p 443 note 45

32. Ill.—Ellison v Salem Coal & Mining Co., 43 Ill.App. 126

Time of application
Ill.—Fair Play Development Organization v Sarmach, 263 Ill.App. 593

33. N.Y.—John Comolli & Co v Margolies, 224 N.Y.S. 626, 130 Misc. 894

Answer held sufficient

An answer to a cross complaint alleging damages for failure in performance setting up a supplemental contract may assert the contingencies giving rise to such supplemental contract by way of inducement without being objectionable on the ground that such contingencies were not provided for in the original con-

tract—Yawger v Joseph, 108 N.E. 774, 184 Ind. 228

Motion to dismiss cross action denied

The fact that it is not made by the owner would seem in itself to furnish sufficient reason for denial of a motion by the contractors who have given a bond to discharge mechanics' liens, to dismiss a cross action by a defendant lienor against the owner, in an action to foreclose a mechanic's lien—John Comolli & Co v Margolies, 224 N.Y.S. 626, 130 Misc. 894.

34. Neb.—Hibbard v Talmage, 49 N.W. 219, 32 Neb. 147
40 C.J. p 444 note 52

35. Mont.—Helena Lumber Co v Montana Cent. R. Co., 24 P. 702, 10 Mont. 81
40 C.J. p 444 note 53.

necessary.³⁶ Sometimes under special statutory provision applying to these proceedings replications are dispensed with and the allegations in answers are taken to be controverted,³⁷ and the general equity practice under a statute abolishing special replications in chancery controls where the proceeding for the enforcement of the lien is essentially a chancery one³⁸

A replication to a plea setting up a breach of plaintiff's contract must answer such plea completely when the matter of the plea is not intended to be met by a general replication denying it,³⁹ and plaintiff cannot depart from the cause of action originally set up by him, as by pleading in reply a contract different from that declared on⁴⁰ The omission of a vital statement from the lien claim itself cannot be cured by a replication setting up the omitted facts in answer to a plea based on a condition which the lien claim should have anticipated⁴¹

Admission by failure to deny A general statute providing that matter averred in an answer and not denied in a replication by the other party is to be taken as true in all subsequent proceedings in the cause, without the necessity of proof thereof, has been held to apply in proceedings to enforce a mechanic's lien⁴²

§ 305. Demurrer

- a. In general
- b. Grounds of demurrer

a. In General

In mechanic's lien proceedings issues of law may be raised by demurrer as in other cases

In mechanics' lien proceedings issues of law may be raised by demurrer as in other cases, there being nothing in the statute confining the issues to facts,⁴³ and, even where the statute prescribes as a rule of pleading that defendant shall plead that the property is not liable for the debt, he is not precluded thereby from demurring when plaintiff himself shows that the property described is not liable and that the case is not one within the lien act⁴⁴ In the absence of a statutory permission the owner cannot demur to the answer of a codefendant lienor⁴⁵ Where a defense is common to all the parties defendant, it is immaterial by which of them it is urged and a demurrer to the bill interposed by one, if sustained, will inure to the benefit of all⁴⁶ On the other hand, if two or more defendants join in a demurrer and the pleading is good as to one of them the demurrer will be overruled⁴⁷

Form A failure to allege facts entitling claimant to a lien may, it has been held, be reached by general demurrer,⁴⁸ but objections to allegations formally defective must be specifically pointed out⁴⁹ So it has been held that a special demurrer must be resorted to in order to raise the objection of uncertainty,⁵⁰ or a formal objection to a description of the premises,⁵¹ or a failure to allege the time of performance of the labor or the filing of lien claims,⁵² or the absence of a proper defendant,⁵³ and a general demurrer will not reach a failure to state that at the time materials were furnished no payments had been made by the owner to the contractor.⁵⁴

36. W Va—Foutty v Poar, 12 SE 1096, 35 W Va 70
40 C J p 444 note 55

37. Minn—Johnson v Lau, 60 NW 342, 58 Minn 508
40 C J p 444 note 56

38. Ill—Linnemeyer v. Miller, 70 Ill 244
40 C J p 444 note 57

39. Ala—Gates v O'Gara, 39 So 729, 145 Ala 665
40 C J p 444 note 58

40. Ala—Gates v O'Gara, supra

41. Pa—Dearie v. Martin, 78 Pa 55
40 C J p 444 note 54

42. Pa—Dye v Fryer, 5 Pa Dist & Co 283, 6 Northum Leg J 388, 6 Erie Co 232.

43. N Y—Doughty v Devlin, 1 ED Smith 625

Office of demurrer

In mechanic's lien proceedings, as in other civil proceedings, the office of a demurrer is to raise an issue of law—Brannum-Keene Lumber Co v

Cole, 119 NE 721, 67 Ind App 667
44. N J—Coddington v Beebe, 29 N J Law 550

45. N Y—Albright v Trinity Presb Church, 157 NYS 70, 170 App Div 70—Joseph Joseph & Bros Co v Marva Realty Corp, 166 NYS 506

46. Va—Brown v Cornwell, 60 SE 623, 108 Va 139
40 C J p 445 note 64

47. Mich—Burk v Muskegon Mach & Foundry Co, 57 NW 804, 98 Mich 614

Wis—Paine Lumber Co v Douglass County Impr Co, 68 NW 1013, 94 Wis 322

48. Ill—Kinzey v. Thomas, 28 Ill 502

49. Cal—Burke v Dittus, 96 P 330, 8 Cal App 175
40 C J p 446 note 4.

Particular defects within rule

(1) Averment that materialmen filed verified statement with probate judge claiming liens "in compliance

with" statute, although insufficient against special demurrer, was held good against general demurrer—Ingram v Howard, 128 So 893, 221 Ala 328.

(2) Failure to allege that lien claim was supported by affidavit or to correctly describe lien did not render bill to foreclose subject to general demurrer—Drollinger v Cowen, 251 Ill App 215

50. Cal—Anderson v Blean, 126 P 859, 19 Cal App 581
40 C J p 446 note 5

51. Cal—Leibowitz v Berry, 299 P 779, 114 Cal App 5.

Mass—Buck v Hall, 49 NE 658, 170 Mass 419.

52. Ga—Logue v Walker, 81 SE 849, 141 Ga 644.

53. Ill—Portones v. Badenoch, 23 NE 349, 132 Ill 377

54. Colo—Ditto v Jackson, 33 P 81, 3 Colo App 381

An objection that a complaint, on a theory that the contract between the owner and principal contractor is void, which alleges facts entitling plaintiff to recover whether it is void or valid, contains two causes of action not separately stated cannot be urged by general demurrer⁵⁵ Where a demurrer will lie to reach defects in the statement of claim made a part of claimant's pleadings, a defect in the affidavit must be urged by special demurrer⁵⁶

Effect of demurrer For the purpose of determining the questions raised, a demurrer admits all facts which are well pleaded,⁵⁷ but it does not admit the conclusions of the pleader⁵⁸ An allegation that a defendant has some interest in the premises may be admitted by demurrer⁵⁹

Failure to demur, waiver of objections Mere defective allegations must be raised by demurrer or the defects will be deemed to have been waived and cannot be raised on the trial,⁶⁰ and pleading over or abandoning a demurrer is a waiver of mere defects or objections which may be cured by amendment⁶¹ Thus an objection on the ground of want of proper parties defendant is waived where not taken by demurrer,⁶² and a demurrer because of nonjoinder of defendants is waived by answer raising issues of fact,⁶³ and the same is true of a demurrer because of ambiguity and uncertainty as to the time when the improvement was completed⁶⁴ However, where the objection goes to the right to recover, on the application of the law to the facts, the question may be decided after the evidence is in notwithstanding it could have been raised by demurrer,⁶⁵ and, where plaintiff's proceeding is con-

trary to the statute which alone gives him the right to maintain the suit, the objection goes to the foundation of the action and may be taken at the trial⁶⁶ Where an exception may be taken in an answer or at the trial, it cannot be said to have been lost under the application of the rule that an answer overrules a demurrer⁶⁷

b. Grounds of Demurrer

A demurrer will lie to raise objections only to defects appearing on the face of the pleading

Under the general rules controlling the grounds of demurrer in proceedings in equity or at law, a demurrer will not lie unless the defect appears on the face of the pleading⁶⁸ If claimant's pleading shows on its face that he has no lien or fails to show the facts essential to the right, his suit should be dismissed on demurrer,⁶⁹ or on a plea or motion which is in effect a demurrer,⁷⁰ unless he is entitled to recover a personal judgment and his pleading is good for that, in which event the demurrer will be overruled⁷¹ A general demurrer should be overruled if the complaint entitles complainant to any relief⁷² The objection that, the owner having sold a portion of the property, that part retained by him should first be resorted to cannot be raised on a demurrer to the petition on the ground that it fails to state a cause of action⁷³

Partial defense Where a partial defense is not pleaded as such, it is a ground for demurrer⁷⁴

Uncertainty Mere uncertainty or indefiniteness in some of the particulars of the pleading should be raised on a motion to make more certain and not

55. Cal—Anderson v Blean, 126 P 859, 19 Cal App 581

56. Ill—Smith v Adcock, 209 Ill App 277

57. Cal—Slight v Patton, 31 P 248, 96 Cal 384

40 C.J. p 447 note 13

58. Ark—Wood v King, 21 S.W. 471, 57 Ark 284

40 C.J. p 447 note 14

59. Ill—Greenleaf v Beebe, 80 Ill 520

60. Cal—San Joaquin Lumber Co v Welton, 46 P 735, 115 Cal 1

40 C.J. p 447 note 17

61. Neb—Pomeroy v White Lake Lumber Co., 44 N.W. 730, 33 Neb 240, reheard 49 N.W. 1131, 33 Neb 243

N.J.—Johnson v Algor, 47 A. 571, 65 N.J. Law 363

62. Wis—Harbeck v Southwell, 18 Wis 418

63. Nev—Lonkey v. Wells, 16 Nev 271.

64. Nev—Lonkey v Wells, supra

65. Mont—Bardwell v Anderson, 32 P 385, 13 Mont 87

40 C.J. p 447 note 18

66. N.J.—Johnson v Algor, 37 A. 571, 65 N.J. Law 363

40 C.J. p 447 note 19

67. Mich—Kerns v Flynn, 17 N.W. 62, 51 Mich 573

40 C.J. p 447 note 20

68. Mo—Gruner & Bros Lumber Co v Hartshorn-Barber Realty & Building Co., 154 S.W. 846, 171 Mo App 611

40 C.J. p 445 note 69

Nature of proceeding as legal or equitable see supra § 264

69. Pa—Favo v Merlot, 94 Pa.Super 90

40 C.J. p 445 note 72

70. Pa—Favo v Merlot, supra

On scire facias, defect on face of mechanic's lien may be made subject of special plea in effect demurrer—

Favo v Merlot, supra

71. Cal—Sibley Grading & Teaming Co v Crary, 49 P 2d 823, 4 Cal 2d 375.

Wash—Tautakawa v Kumamoto, 102 P 766, 53 Wash 231

40 C.J. p 445 note 73

72. Cal—Sibley Grading & Teaming Co v Crary, 49 P 2d 823, 4 Cal 2d 375

Pa—Arnold Lumber Co. v. Guzik, 24 West Co L.J. 85

40 C.J. p 445 note 74.

Separable items

Bill to foreclose mechanic's lien disclosing claim on contract which included items not lienable was not demurrable where nonlienable items were separable—Drollinger v Cow-

en, 251 Ill App 215

73. Mo—Coen v Hoffman, 175 S.W. 103, 188 Mo App 311

40 C.J. p 445 note 75

74. N.Y.—George F Root Co v New York Cent & H R R R Co., 151 N.Y.S. 702, 166 App Div. 137

by demurrer,⁷⁵ although, where a statute allows a demurrer for uncertainty and ambiguity, such a demurrer may be resorted to in mechanics' lien proceedings.⁷⁶ A general demurrer on the ground that the petition does not state facts entitling plaintiff to relief in equity will not avail to raise the question of indefiniteness in the description of the property sought to be charged.⁷⁷

Want of verification. Under the general equity practice allowing objections to the form of the bill to be taken by demurrer, advantage may be taken by demurrer of a failure to verify the bill as required by statute.⁷⁸ An objection to a plea for the want of verification should be taken by a motion to strike and not by demurrer.⁷⁹

Limitations and laches. Where from the face of complainant's pleadings it appears that the proceeding is not brought within the time required by the statute creating the lien, the objection is properly presented by demurrer.⁸⁰ Laches in filing an intervening petition in chancery to enforce a lien may be urged by demurrer.⁸¹ Where it does not appear from the complaint that the redocketing of the lien essential to its continuance was prevented by some failure of duty on the part of plaintiff, the question cannot be raised by demurrer.⁸²

Defect in parties. An objection for want of proper parties disclosed by the pleading may be taken by demurrer.⁸³ So, where the principal contractor is regarded as a proper and necessary party, a failure to join him may be urged by demurrer.⁸⁴ It has, however, been held that the subcontractor is required only to follow the course pointed out by the statute and that, although the contractor is a proper party, his omission cannot be raised by demurrer.⁸⁵ Under a statute requiring the joinder of all lienors, a complaint cannot be regarded as not stating a cause of action because it fails to allege that there

are no other lienors, and, where the complaint makes no reference to a principal contractor, a demurrer for defect in parties will not lie.⁸⁶

Joinder and statement of causes. An objection that an action to foreclose a lien against the owner and another to recover a personal judgment against a party liable therefor are not separately stated should be raised by motion and not by demurrer,⁸⁷ and does not arise on a demurrer for misjoinder of actions where such actions may properly be joined.⁸⁸ A mechanic's lien which contains a number of items of account constitutes but a single cause of action, and specific items cannot be reached by demurrer.⁸⁹ However, where the statute requires that for labor and materials performed and furnished in the construction of two or more buildings claimant shall apportion to each building such labor or materials as went into it and that the declaration for each shall be in the form in which plaintiff would have declared if the labor and material apportioned for the particular building had been performed and furnished for it alone, a declaration which fails so to proceed is demurrable, the defect appearing on its face.⁹⁰

Objections to Lien Claim. Where the affidavit or statement on which the lien is based is not made a part of the pleading, its sufficiency cannot be questioned on a demurrer to the pleading.⁹¹ On the other hand, where the claim is set out in the pleading or attached as a part thereof, a demurrer will lie if the claim is bad.⁹² Where there is nothing on the face of the pleadings to show that the lien notice incorrectly describes the property, the objection cannot be urged by demurrer.⁹³ The question whether property may be identified from the description in the lien claim will be determined as a question of fact rather than one of law properly presented by demurrer.⁹⁴ In proceedings by scire

75. Ark—McFadden v Stark, 22 S W 884, 58 Ark 7
Wis—Willer v Bergenthal, 7 NW 352, 50 Wis 474

76. Cal—Palmer v Lavigne, 37 P 775, 104 Cal 30—Frazer v Barlow, 63 Cal 71

77. Iowa—Central Lumber & Coal Co v Glass, 203 NW 276, 199 Iowa 1113
40 C J p 445 note 79

78. Mich—Daschke v Schellenberg, 82 NW 665, 124 Mich 16, 84 N W 67, 125 Mich 216

79. Ark—Loring v Flora, 24 Ark 151

80. Alaska—Rutherford v Maki, 9 Alaska 350
40 C J p 446 note 83.

81. Ill—McNicholas v Tinsler, 127 Ill App 381, affirmed 85 NE 593, 235 Ill 493

82. NY—Schneider Co v Aetna Accident & Liability Co, 155 N Y S 471, 169 App Div 584
40 C J p 446 note 85

83. Ill—Portoues v Badenoch, 23 NE 349, 132 Ill 377
40 C J p 446 note 86

84. Mich—Kerns v Flynn, 17 NW 62, 51 Mich 573
W Va—James Sons Co v Farley, 76 SE 169, 71 W Va 173

85. NY—Foster v Skidmore, 1 E D Smith 719
40 C J p 446 note 89

86. Wis—Frederickson v Riebsam, 40 NW 501, 72 Wis 587

87. Cal—San Francisco Paving Co v Fairfield, 66 P 255, 134 Cal 220

88. Cal—San Francisco Paving Co v Fairfield, supra

89. W Va—Gist v Virginian R Co, 90 SE 554, 79 W Va 167

90. NJ—Johnson v Algor, 37 A 571, 65 N J Law 363

91. Ark—McFadden v Stark, 22 S W 884, 58 Ark 7
40 C J p 446 note 97

92. Cal—Palmer v Lavigne, 37 P. 775, 104 Cal 30
40 C J p 446 note 98

93. NY—Krauss v Brunett, 130 N Y S 1086, 73 Misc 428
40 C J p 446 note 99

94. Ind—Biannum-Keene Lumber

facias under some statutes, the question of law involving the validity of the lien should be raised by demurrer or motion to strike off the lien and cannot be raised under a pleading raising an issue of fact⁹⁵

§ 306. Amendments

- a In general
- b Amendments allowable
- c. Plea or answer to amended pleading

a. In General

In general the pleadings in proceedings to enforce a mechanic's lien may be amended as in other civil proceedings.

As a general rule the pleadings in an action, suit, or proceeding for the foreclosure of a mechanic's lien may be amended as in other actions, suits, or proceedings,⁹⁶ either under the general statutes which are held to apply to these proceedings⁹⁷ or under special provisions in the mechanics' lien laws⁹⁸. Thus the grant of leave to a defendant to amend his answer is within the discretion of the court,⁹⁹ and the refusal of permission will not be interfered with¹ unless there has been a plain abuse of discretion².

Verification. Where the original petition is not required to be verified, an amendment need not be verified although the original petition is sworn to³.

Time for amendment. As in other civil cases, an amendment will be allowed after trial in order to make the allegations conform to the proof on

the trial,⁴ at least where no prejudice is shown⁵ or evidence is received without objection,⁶ and, when evidence of a material fact is admitted without objection in conformity with the theory of the case, a defect in the pleading by reason of an omission of allegation to which the evidence is pertinent may be considered as amended to conform to the proof⁷. As appears supra § 282, a mere defect in pleading which does not go to the validity of a lien itself may be cured by amendment even after the expiration of the statutory period limited for the commencement of the proceedings, provided the action was brought and the original pleading filed in time. However, where claimant fails to file an amended petition within the time fixed by the court, it cannot be thereafter filed unless by further order of the court⁸. The arrest of judgment puts an end to the case and the subsequent filing of an amended complaint does not bring the parties back into the court.⁹

b. Amendments Allowable

Such amendments of the pleadings are allowable as will not prejudice or surprise the adversary. While the form of action may be changed by amendment, a new and different cause of action may not thereby be substituted for the original cause of action.

The rule permitting amendments is applied to such amendments as will not prejudice or cause surprise to the adversary of the amending party.¹⁰ In accordance with this rule various amendments have been allowed,¹¹ such as amendments to correct a petition defective for failure to show how

Co v Cole, 119 NE 721, 67 Ind App 667

95. Pa—Klinefelter v Baum, 33 A 582, 172 Pa 652

40 C J p 448 note 2

96. Wis—Union Trust Co of Maryland v Rodeman, 264 NW 508, 220 Wis 453

40 C J p 447 note 25

Amendment of claim or statement of lien see supra § 170

97. NY—Gambling v Haight, 5 Daly 152, affirmed 58 NY 623

40 C J p 447 note 26

98. Pa—Kantor v Herd, 120 A 450, 276 Pa 519

40 C J p 447 note 27.

99. Cal—Schalich v. Bell, 161 P. 983, 173 Cal 773

1. Cal—Schalich v Bell, supra

40 C J p 448 note 29

2. Ill—Konstant v Maggos, 43 NE 2d 137, 315 Ill App 131

3. Ill—Downey v O'Donnell, 92 Ill 559

4. Ark—Kull v. Dierks Lumber &

Coal Co, 292 SW 695, 173 Ark 445

40 C J p 448 note 32

5. Colo—Davis v Johnson, 36 P 837, 4 Colo App 545

40 C J p 448 note 33

6. Colo—Davis v Johnson, supra.

40 C J p 448 note 34

Nunc pro tunc amendment after judgment

Where trial court on first day of trial granted permission to amend pleadings so as to authorize admission in evidence of notice of intention to claim mechanic's lien, permitting amendment actually filed two months after judgment to be filed nunc pro tunc as of date such permission was granted was not error, where defendant acquiesced in continuance of trial on the basis that amendment would be filed and did not object to decision of case as though it had been filed—City Lumber Co of Bridgeport v Borsuk, 41 A 2d 775, 131 Conn 640, 158 A L R 677

7. Okl—Scroggy v Kelley, 122 P. 694, 32 Okl 398

40 C J p 448 note 35

8. Kan—Haight v Schuck, 6 Kan. 193

9. Ind—Crawford v Crockett, 55 Ind 220

10. Mich—Kilby Mfg Co v Menominee Cir Judge, 101 NW 522, 138 Mich 277

40 C J p 448 note 38

Amendment held insufficient for uncertainty

An amendment not clearly indicating in what parts of the pleading the stated changes are to be made is erroneous—Olson v Nilson, 142 Ill App 436

11. RI—Art Metal Const Co v. Knight, 185 A 186, 66 RI 228

Nature of contract

Permitting plaintiff in suit to foreclose mechanic's lien to amend complaint during trial to show a written contract for construction of building and oral contract for construction of beauty shop was not error—Patrick

far the work has progressed and what payments are due,¹² to show performance of the contract,¹³ or to show a modification of the contract instead of performance,¹⁴ to reform allegations setting out the particulars of the account, or to supply such allegations,¹⁵ to correct defects in the prayer as to the property sought to be subjected to the lien,¹⁶ or to amend the prayer so as to ask for a personal judgment,¹⁷ to make a proper statement as to the ownership of the property against which the lien is asserted,¹⁸ to correct an inaccuracy in the lien statement,¹⁹ to include additional items of labor or materials furnished,²⁰ to make the allegations show that the materials were furnished for the particular building,²¹ to supply an allegation of notice to the owner²² or the filing of a lien,²³ to correct allegations as to the sufficiency of such notice or lien claim,²⁴ or to insert a statutory allegation that no other action has been brought on the debt.²⁵ The prayer of the complaint may be amended to include a claim for interest.²⁶ A materialman's petition may be amended by alleging that the contract price was equal to, or greater than, the amount of the lien sought.²⁷

Where the original complaint is so defective as to confer no jurisdiction on the court, the court has no power to allow an amendment conferring jurisdiction.²⁸ An amendment allowed without objec-

tion in an action by a materialman to which the contractor is not a party setting up that plaintiff has a judgment against the contractor may permit the foreclosure to proceed.²⁹

Change in form of action. The proceeding for the enforcement of mechanics' liens may be converted by amendment into an ordinary suit for the collection of the debt for work and material as between the parties respectively liable and entitled to the judgment in such an action.³⁰ Similarly, it has been held that a personal action to recover for material or labor may be changed in form to a proceeding in rem for the enforcement of the mechanic's lien,³¹ and where a special contract is stated the action may be converted into one on the contract.³² However, where, on the statements in the complaint and the conceded facts, no lien can be established, plaintiff cannot be allowed by amendment to convert a proceeding instituted under the mechanics' lien law into an ordinary action for the recovery of money against the contractor.³³

Introduction of new cause of action. Plaintiff may not substitute for the original cause of action a new and different one under the guise of an amendment,³⁴ but an amendment which introduces no new cause of action distinct and complete in itself, but which is merely variant from the original

v Bonthius, 124 P 2d 550, 13 Wash 2d 210

12. RI—McPherson v Greenwell, 61 A 175, 27 RI 178

13. Or—Birkemeier v Knobel, 40 P 2d 694, 149 Or 292

House built in accordance with contract

Or—Birkemeier v Knobel, supra

Date of completion

Amendment of petition, so as to speak truth as to date of completion of contract, held without error—Rose v O'Reilly, 244 P 124, 138 Wash 18

14. NY—Poerschke v Horowitz, 82 NYS 743, 84 App Div 443, affirmed 70 NE 1107, 178 NY 601

15. Mich—Hartwick Lumber Co v Chonoski, 185 NW 774, 216 Mich 424

40 CJ p 448 note 41

16. RI—Spencer v. Doherty, 20 A 232, 17 RI 89

17. SC—Greene v Brown, 19 SE 2d 114, 199 SC 218

40 CJ p 448 note 43

18. Md—Wilhelm v Roe, 149 A 438, 158 Md 615

19. Minn—Botsford Lumber Co v Fuller, 212 NW 22, 170 Minn 130

20. Wash—American Plumbing &

Steam Supply Co v Alavekuu, 282 P 917, 154 Wash 436

21. Ind—Trueblood v Shellhouse, 49 NE 47, 19 Ind App 91

Mo—Meyer v Schmidt, 109 SW 833, 131 Mo App 53

Temporary use in construction

Where complaint in action to foreclose mechanic's lien alleged that plaintiff had furnished material which was used in construction of improvement and became an integral part thereof, and proof showed that lumber furnished was removed after its use in form work for concrete construction, plaintiff was properly permitted to amend complaint to meet the evidence—Douglas Lumber Co v Chicago Home for Incurables, 43 NE 2d 535, 380 Ill 87

22. Okl—Scroggy v Kelley, 122 P 694, 32 Okl 398

RI—Murphy v Guisti, 48 A 944, 22 RI 588

23. SC—Waring v Miller Batting & Mfg Co, 15 SE 132, 36 SC 310

40 CJ p 448 note 46

Filing within prescribed period

RI—Art Metal Const Co v Knight, 185 A 136, 56 RI 228

24. Ill—Fifty-ninth Street Lumber Co v Emery, 237 Ill App 416

40 CJ p 448 note 47.

25. NY—Kalt Lumber Co v Dupignac, 134 NYS 1098, 150 App Div. 400, 2 NY Civ Proc NS. 351

40 CJ p 449 note 48

26. Ind—Merritt v Pearson, 76 Ind. 44

27. Ga—Methodist Episcopal Church South v Dudley Sash, Door & Lumber Co, 72 SE 480, 137 Ga 68

28. NY—Pearce v Knapp, 127 NYS 1100, 71 Misc 324

29. Ga—Weinman v Womack, 109 SE 177, 27 Ga App 502

30. Ga—Reynolds v Randall, 22 SE 577, 97 Ga 231

40 CJ p 449 note 57

31. Miss—Weathersby v Sinclair, 43 Miss 189

40 CJ p 449 note 58.

32. Cal—Castagnino v. Balletta, 23 P 127, 82 Cal 250

40 CJ p 449 note 59.

33. NY—Bailey v Johnson, 1 Daly 61—Quimby v Sloan, 2 ED Smith 594, 2 Abb PR 93

34. Ga—George W Muller Bank Fixture Co v Georgia State Sav Assoc, 85 SE 1018, 143 Ga 840

40 CJ p 449 note 53.

pleading in the statement of facts pertinent to the cause of action originally stated,³⁵ or properly states the cause which was not sufficiently stated in the original pleading,³⁶ is not obnoxious to the rule. Where the petition does not seek a personal judgment, but is merely to foreclose the lien against the property, an amendment to conform to the facts stating that the contract was entered into with both defendants instead of with one of them as originally alleged is not objectionable as setting forth a new cause of action.³⁷

Description of property or improvements Failure to describe particularly the property³⁸ or the building or improvement on which the lien is claimed,³⁹ or a mistake in the description of the property,⁴⁰ may be corrected by amendment, at least as long as the amended description keeps within the bounds included by the original.⁴¹

As to parties An amendment may be allowed to correct a mistake in the name of claimant⁴² or defendant,⁴³ or to add matter of description of the person of defendant.⁴⁴ So also it has been held that new parties may be brought in,⁴⁵ or original parties stricken,⁴⁶ by amendment, but under the guise of an amendment the proceeding cannot be converted into a suit against another person.⁴⁷ An action against a husband cannot be converted into one against the wife by alleging that her husband acted as her agent, the wife not being a party to the original suit.⁴⁸ However, an amendment setting up that a contractor acted as agent of the owner has been permitted,⁴⁹ and, where it appears that the material was furnished and work performed for the benefit of the joint property of the husband and wife, an amendment may be al-

lowed at the close of the evidence that the husband in making the contract was acting not only for himself, but as agent for his wife.⁵⁰ Where the petition attempts to allege a joint liability between defendants, an amendment may be permitted which states the nature of such joint liability.⁵¹

Parties made defendant on the ground that they have an interest in the property should, after they part with their interest in the controversy, amend their answer and set up a disclaimer of interest.⁵²

c. Plea or Answer to Amended Pleading

Where an amendment is made after the issues are formed and the evidence has been heard in whole or in part, time should be given to file an answer to such amended pleading.

When an amendment is made after the issues are formed and the evidence has been heard in whole or in part, time should be given to file an answer to such amended pleading,⁵³ but a general denial pleaded to the original may be sufficient to put in issue the allegations of an amended pleading.⁵⁴

Permission to plead Under an order permitting the withdrawal of original pleas and granting leave to file "further pleas in his behalf," only pleas to the merits can be pleaded and not a plea in abatement because of the dismissal of the suit as to certain defendants.⁵⁵

§ 307. Issues, Proof, and Variance

- a Issues and proof
- b Variance

a. Issues and Proof

In accordance with the general rules, the scope and extent of the issues in actions to enforce mechanics' liens

- 35. Colo.—Davis v Johnson, 36 P 887, 4 Colo App 545
40 C J p 449 note 54
- 36. Okl.—Scroggy v Kelley, 122 P 694, 32 Okl 398
40 C J p 449 note 55
- 37. Ga.—Becker v Kenney, 82 S E 936, 15 Ga App 239
- 38. Mass.—Brcsnan v Trulson, 41 N E 660, 164 Mass 410
- 39. R I.—Murphy v Guisti, 48 A 944, 22 R I 588
- 40. Wis.—Union Trust Co of Maryland v Rodeman, 264 N W 508, 220 Wis 453
40 C J p 449 note 63
- 41. Mo.—Powers & Boyd Cornice & Roofing Co v Muir, 123 S W 490, 146 Mo App 86
- 42. Ind.—Waverly Co v Moran Electric Service, 26 N E 2d 55, 108 Ind App 75
- Wis.—Witte v. Meyer, 11 Wis 295

- 43. Colo.—Clark Hardware Co v Centennial Tunnel Min Co, 123 P 322, 23 Colo App 174
40 C J p 449 note 67
- 44. Mich.—Kleinert v Knoop, 110 N W 941, 147 Mich 587
40 C J p 450 note 68
- 45. Ga.—Gress Lumber Co v Rogers, 11 S E 867, 85 Ga 587
40 C J p 450 note 69
- Addition and substitution of parties see supra § 285
- Introducing parties after expiration of limitation see supra § 282
- 46. N J.—Washburn v Burns, 34 N J Law 18
40 C J p 450 note 70
- 47. N J.—Bartley v Smith, 43 N J Law 321
40 C J p 450 note 71
- 48. Ga.—Jennings v Huggins, 54 S E 169, 125 Ga 338

- 49. Kan.—Southwestern Paint & Wall Paper Co v Perkins, 136 P 324, 90 Kan 725
- 50. Wyo.—Phelan v Cheyenne Brick Co, 188 P 354, 28 Wyo 493, rehearing denied 189 P. 1103, 26 Wyo 493
- 51. Ga.—Becker v Kenney, 82 S E 936, 15 Ga App 239.
40 C J p 450 note 75
- 52. Mo.—Nold v Ozenberger, 133 S. W 349, 152 Mo App 439
- 53. Ind.—Trueblood v Shellhouse, 49 N E 47, 19 Ind App 91
40 C J p 450 note 77
- 54. Kan.—Great Spirit Springs Co. v Chicago Lumber Co, 28 P 714, 47 Kan 672
Wis.—Sherry v Madler, 101 N W. 1095, 123 Wis 631
- 55. Miss.—Bowman v McLaughlin, 45 Miss 461.

are controlled primarily by the pleadings, and no issue can be raised on an unnecessary or immaterial allegation in a complaint or other pleading

In accordance with general rules, the scope and extent of the issues in actions to enforce mechanics' liens are controlled primarily by the pleadings,⁵⁶ and no issue can be raised on an unnecessary or immaterial allegation in a complaint or other pleading.⁵⁷ Thus essential elements, pertinent to a particular theory of claimant's cause, which are not alleged cannot be proved⁵⁸ or established by the

finding.⁵⁹ However, the permission of the introduction of evidence without objection relating to an issue not presented by the pleadings may amount to a consent to try such issue.⁶⁰

In an action to enforce a mechanic's lien all matters which are material or essential to a cause of action or a defense must not only be alleged in the pleadings but must be proved.⁶¹ Thus proof is required as to every material allegation in the peti-

56. Ga.—Neal v Davis Fdy & Machine Works, 63 SE 221, 131 Ga. 701

40 C.J. p 450 note 82

Matters in issue under particular pleadings see supra § 301

Particular issues presented

Ariz.—Raymond v Agren, 36 P 2d 797, 44 Ariz. 327

40 C.J. p 450 note 82 [a]

57. N.Y.—Romeo v Yonkers, 110 N.Y.S. 724, 126 App. Div. 402, affirmed 89 NE 1111, 196 N.Y. 546

40 C.J. p 450 note 80

58. Ala.—Gates v O'Gara, 39 So. 729, 145 Ala. 605

40 C.J. p 450 note 83

59. Conn.—Whiting v Koepke, 40 A. 1053, 71 Conn. 77

60. Iowa.—Beach v Wakefield, 76 NW 688, 107 Iowa 567, reheard 78 NW 197, 107 Iowa 567

61. Ala.—Polakow v General Roofing & Supply Co., 7 So. 2d 73, 242 Ala. 497—Polakow v Rumsey, 6 So. 2d 477, 242 Ala. 365—Thornton v Vines, 106 So. 42, 213 Ala. 646

Alaska.—Howard v Branchaw Mining Co., 7 Alaska 117

Cal.—Patten & Davies Lumber Co v Hayden, 298 P. 129, 113 Cal. App. 103

Fla.—Fred Howland, Inc. v Gore, 13 So. 2d 303, 152 Fla. 781—Baker v Webster, 191 So. 835, 140 Fla. 471—Southern Paint Mfg. Co. v Crump, 182 So. 291, 132 Fla. 799—Thompson v Wyles, 149 So. 769, 111 Fla. 513—Ft. Meade Hotel Co. v Knoxville Iron Co., 127 So. 896, 99 Fla. 947—Curtiss-Bright Ranch Co. v Selden Cypress Door Co., 107 So. 679, 91 Fla. 354

Ill.—Moulding-Brownell Corporation v E. C. Delfosse Const. Co., 26 N.E. 2d 709, 304 Ill. App. 491—Hyde Park Inv. Co. v Hyde Park State Bank, 257 Ill. App. 539

Ind.—Menzenberger v American State Bank, 198 NE 819, 101 Ind. App. 600

Ky.—Southern Brick & Tile Co. v Walker, 288 SW 685, 216 Ky. 760

La.—Hanchey v Kildair, App. 6 So. 2d 203—St. Landry Lumber Co. v Aggers, App. 147 So. 569—Hortman-Salmen Co. v Raymond, 127 So. 452, 13 La. App. 490

Md.—Bounds v Nuttle, 30 A. 2d 263, 181 Md. 400

Miss.—Davis v J. W. Rogers Lumber Co., 178 So. 75, 180 Miss. 612

Mo.—Manchester Iron Works v E. L. Wagner Const. Co., 107 SW 2d 89, 341 Mo. 389—Mansfield Lumber Co. v Johnson, App. 91 SW 2d 239—Sechrist v Hufty Rock Asphalt Co., App. 63 SW 2d 193—Julius Seidel Lumber Co. v Hydraulic Press Brick Co., App. 288 SW 979

N.Y.—Utica Avenue Plumbing Supply Co. v Home Owners' Loan Corporation, 45 N.Y.S. 2d 453, 267 App. Div. 779

Or.—Van Lydegraf v Tyler, 273 P. 719, 128 Or. 336

Tenn.—Variety Fire Door Co. v Hanson-Worden Co., 10 Tenn. App. 254

Tex.—Kelsay Lumber Co. v Crowell, Civ. App., 19 SW 2d 368, error dismissed

40 C.J. p 456 note 54

Matters of defense in general

(1) Matter which may defeat plaintiff by way of defense must be proved—Herbert v Lloyd, 116 NW 718, 139 Iowa 440—40 C.J. p 456 note 58

(2) A limitation on the ostensible authority of an agent has been held a matter of defense to be proved—Colorado Iron Works v Taylor, 55 P. 942, 12 Colo. App. 451

(3) It has been held that materialman suing to foreclose mechanic's lien need not prove nonpayment of claim—San Pedro Lumber Co. v Kreis, 295 P. 890, 111 Cal. App. 466

(4) It has also been held, however, that it is essential to foreclosure of mechanic's lien that claimant prove that money remains unpaid and is due, but lien claimant's failure to prove that money remains unpaid and is due does not necessarily establish that lien was void from its inception—Leibowitz v Berry, 299 P. 779, 114 Cal. App. 5

Particular matters required to be proved

(1) Compliance with statute as to filing of lien notice or statement

Ala.—Ingram v Howard, 128 So. 893, 221 Ala. 328

Ariz.—American Coarse Gold Corpo-

ration v Young, 52 P. 2d 1181, 46 Ariz. 511

Cal.—Remington v Mulholland, 5 P. 2d 687, 118 Cal. App. 479

Or.—Van Lydegraf v Tyler, 273 P. 719, 128 Or. 236

(2) Interest sought to be subjected to lien, particularly if it is an equitable interest—Alfred Richards Brick Co. v Atkinson, 16 App. D.C. 462

(3) That claimant was duly licensed contractor during performance of contract—Siemens v Meconi, 112 P. 2d 904, 44 Cal. App. 3d 641

(4) That material was furnished under contract with owner or proprietor or authorized agent

Mo.—Reese v Cibulka, App. 68 SW. 2d 902—St. Louis Concrete Products Mfg. Co. v Walker, App. 64 SW 2d 131

Or.—Drake Lumber Co. v Lindquist, 170 P. 2d 712, 179 Or. 402

40 C.J. p 458 note 8

(5) Use of material in particular building or improvement

U.S.—Colonial Oil Co. v U.S. Guarantees Co., D.C. Ga., 56 F. Supp. 545, affirmed, C.C.A., 145 F. 2d 496

Ark.—Lyle v Latourette, 192 SW 2d 521, 209 Ark. 721

Cal.—San Pedro Lumber Co. v Kreis, 295 P. 890, 111 Cal. App. 466

Mo.—Hill-Beahan Lumber Co. v Flegle, App. 183 SW 2d 862—Sechrist v Hufty Rock Asphalt Co., App. 63 SW 2d 193

Matters held not required to be proved

(1) Where one claims as original contractor, pleading and proof of statutory notice to defendants that materials would be furnished is unnecessary

Ala.—Guarenire v. Bessemer Lumber Co., 106 So. 49, 214 Ala. 8

Ill.—Westphal v Berthold, 273 Ill. App. 266

(2) Actual use of the material need not be established unless statute so requires—Walker v Collins Const. Co., 236 NW 334, 121 Neb. 157—40 C.J. p 457 note 90.

(3) If first item was furnished within period allowed for filing of lien, date of furnishing last item need not be proved—Berkshire Lumber

tion not admitted of record to be true;⁶² but proof is not required as to matters which are admitted or deemed admitted,⁶³ except those which, under the practice in the particular jurisdiction, may be necessary in order to support a default judgment.⁶⁴ Evidence conforming to the pleadings and the issues raised thereby, and only such evidence, is admissible.⁶⁵

Title. The court may determine whether a deed by the owner was in fact a mortgage where this is necessary to a determination of whether the proceeding was brought in time.⁶⁶ However, where it is contended that improvements were made under a contract with the agent of the owner, a question of title as between the owner and the occupant of the premises has been held immaterial.⁶⁷ On the ground that title cannot be tried, it has been held that a claimant asserting a lien on a structure only cannot in support thereof show that title to the land upon which the structure was located was not acquired until after the lien attached.⁶⁸ Where the complaint alleges that a defendant is the owner and that he took title subject to plaintiff's lien, evidence which tends to show that defendant's title was derived through a foreclosure sale on a first mortgage which was superior to claimant's lien is admissible under the pleadings.⁶⁹

Quantity of land. Under a statute so requiring,

claimant must show the amount of land necessary to satisfy the lien and judgment,⁷⁰ and it would seem that even in the absence of statute claimant is bound to show the amount of land necessary for the building on which the lien is claimed.⁷¹ It is not necessary for a lien claimant to show that the quantity of land on which the lien is claimed is within the statutory limit, since if defendant claims that it exceeds that limit he must show it, and the court must then confine the lien to a tract within the limit.⁷²

Material used in several buildings. It has been held that a materialman claiming a lien on several houses built under one operation need not prove just what material went into any particular house;⁷³ but there is also some authority to the contrary.⁷⁴

Pleading showing no lien. Where the petition states a cause of action for a recovery of sums claimed to be due for labor and materials, evidence may be introduced under it, although the facts stated show that plaintiff is not entitled to a lien.⁷⁵

Issues affecting other lienors or encumbrancers. Under statutes contemplating the determination of all liens and encumbrances in one proceeding, considered *supra* § 272, where other lienors are made defendants, but are in reality plaintiffs as against the owner, their rights may be determined notwithstanding a default in pleading by plaintiff institut-

Co v J S. Chick Inv Co, 155 S W 904, 170 Mo App 1

62. Ala.—Becker Roofing Co v Hanks, 155 So 860, 228 Ala. 685 40 C J p 439 note 48

63. Cal.—Hammond Lumber Co v Henry, 261 P 1037, 87 Cal App 231 40 C J p 456 note 55, p 460 note 50 [a]

Not in issue

Material allegations admitted on the pleadings are not in issue—Robison v Mitchel, 114 P 984, 159 Cal 581—40 C J p 451 note 85

Work done pursuant to original contract

One, by asserting a lien as a subcontractor, admits that what he has done is in pursuance of the original contract—Mayer Ice Machine & Engineering Co v. Van Voorhis, 95 A 735, 88 N J Law 7

Interest subject to lien

Ill.—Lombard v. Johnson, 76 Ill 599 40 C J p 457 note 73

Filing of lien claim or statement

Claimant need not prove the filing of a lien claim or statement where such filing has been admitted—Lewis v Saylor 35 NV 601, 73 Iowa 504—40 C J. p 459 note 34.

64. Ark.—Hicks v Branton, 21 Ark. 186 40 C J p 456 note 56

65. Ill.—Illinois Interior Finish Co v Poenie, 277 Ill App 554—Colp v First Baptist Church of Murphysboro, 260 Ill App 269, affirmed 173 NE 67, 341 Ill 73, 71 A L R 106—Hyde Park Inv Co v Hyde Park State Bank, 257 Ill App 539

La.—Schwartz Supply Co v Breen, App, 179 So. 626—Ruston Brick Works v Heard, App, 177 So 494 N Y—Stokes Bros v Drefs, 279 N Y S 884, 244 App Div 524

Pa.—Russell M Howe, Inc v Beloff, 56 A 2d 353, 163 Pa Super 33

Tex.—Gourley v Iverson Tool Co, Civ App, 186 SW 2d 736, refused for want of merit—Investor's Syndicate v Dallas Plumbing Co, Civ App, 61 S W 2d 1039

40 C J p 456 note 54
Admissibility of evidence in suits to enforce mechanics' liens generally see *infra* § 309

As to persons not parties

Where mortgage was not party, fact that separate mortgages had been given on two parts of lot was held immaterial, in action to foreclose single lien claim for separate buildings erected thereon—Fischer v Meiroff, 213 N W 283, 192 Wis 482

Particular evidence held inadmissible under pleadings

Evidence to prove an alleged prior and superior lien is properly excluded where such a lien is not pleaded—Guarantee Savings Loan & Investment Co v Cash, Tex Civ App, 87 S W 749

66. Ill.—Denkman v Newbanks, 220 Ill App 515

67. Ark.—Daly v Arkadelphia Milling Co, 189 S W 1053, 126 Ark 405

68. Cal.—Williams v Mountaineer Gold Min Co, 34 P 702, 103 Cal 134, reheard 36 P 388, 102 Cal 134

69. Conn.—Weinstein v Montowese Brick Co, 99 A 488, 91 Conn 165

70. Wash.—Dietz v Bartell, 207 P 663, 120 Wash 443

71. Wash.—Dietz v Bartell, *supra*

72. Minn.—Boyd v Blake, 43 N W 485, 42 Minn 1

73. Ga.—Christian v Bremer, 34 S E 2d 40, 199 Ga 285

Ill.—Burgoyne v. Pyle, 261 Ill App 356

74. La.—Crowley Lumber Co. v. Plaffer, 4 La App 606

75. Okl.—Uncle Sam Oil Co v Richards, 158 P. 1187, 60 Okl. 63.

ing the proceedings.⁷⁶ Each lienor is entitled to have his case determined on the facts which he has properly pleaded and proved,⁷⁷ and, at least as against a general objection, evidence may be admitted if it is admissible in support of a claim asserted by any lienholder.⁷⁸ So the fact that the owner has allowed a default judgment to be taken against him will not prevent a mortgagee defendant from proving payment where he may attack the judgment for fraud or collusion.⁷⁹ The consolidation, for the purpose of trial, of actions by contractors, materialmen, etc., against the owner, does not change the issues in the respective cases, or render ineffectual admissions in the pleadings between the contractors and owner.⁸⁰

In an action by the owner for a general settlement, where the petition prays for an accounting and an ascertainment by the court of the amount due from the owner to the contractor, items claimed for extra work may properly be taken into consideration.⁸¹

b. Variance

- (1) In general
- (2) Between lien claim and pleading
- (3) Between lien claim and proof

(1) In General

As in civil actions generally, the proofs must correspond with the allegations; but variances which are not substantial will be disregarded.

In accordance with general rules, in an action to foreclose a mechanic's lien the trial must be conducted and a conclusion reached on the proofs, as well as the allegations, of the parties, and the proofs must correspond with the allegations.⁸² Thus, under an allegation that the owner has funds available in his hands, it cannot be proved that the owner has paid in advance and in bad faith.⁸³ Moreover, claimant must recover, if at all, on the contract as alleged, and proof of another contract or of terms different from those alleged will be fatal,⁸⁴ and if the contract, as stated in the complaint, is too indefinite to support a lien it cannot be shown by the evidence to be more specific and precise.⁸⁵ Similarly, if a claimant alleges performance on his part he can recover only by establishing that fact, and anything short of a substantial performance will not do in the absence of allegations justifying or authorizing such proof.⁸⁶

If the proof follows the allegations in essential particulars, variances which are not substantial should be disregarded,⁸⁷ no one being misled to his

76. NY—Hill v Flatbush Consumers' Ice Co, 127 NYS 961, 143 App Div 559

77. NY—Maltby v Charles P Bolland Co, 137 NYS 470, 152 App Div 596
40 C.J. p 451 note 94

78. Minn—Gale-Gunner Lumber Co v Melin Bros, 161 NW 387, 136 Minn 118

79. Colo—Chicago State Bank v Plummer, 139 P 819, 54 Colo 144

80. Cal—Los Angeles Pressed Brick Co v Higgins, 97 P 414, 8 Cal App 514

81. Ill—Geweke v. Hilsinger, 177 Ill App 467.

82. Ill—Hyde Park Inv Co v Hyde Park State Bank, 257 Ill App 539

NY—Copasso v Apfel, 212 NYS 587, 214 App Div 638
40 C.J. p 451 note 99.

Variance as to notice

Pa—Higgins Lumber Co v Marucca, 48 A 2d 48, 159 Pa Super. 405
40 C.J. p 451 note 99 [a]

Variance as to amount due

(1) Unexplained variance between amount demanded by claimant and lesser amount proved to be due was held fatal—Intili v Bonnet, 143 A 741, 6 N.J. Misc 1043

(2) Subcontractor could not recover in cross action against owner on

building contract, where amount owner had paid under contract was greater than possible amount subcontractor could recover under pleadings—Eldridge v Poirier, Tex Civ App, 50 S.W.2d 888, error refused

Matters held not to constitute variance

Iowa—Dalbey Bros Lumber Co v Crispin, 12 N.W.2d 277, 234 Iowa 151

83. NY—Hudson River Blue Stone Co v Huntington, 128 NYS 25, 143 App Div. 99, 103
40 C.J. p 451 note 1

84. Ky—Phalin v Standard Planing Mill Co, 251 S.W. 635, 199 Ky 495
40 C.J. p 451 note 2

Matters held not to constitute variance

(1) In general—Martin v Della, 293 P 25, 211 Cal 74

(2) Complaint to foreclose mechanic's lien for reasonable value of materials was held not at variance with proof showing estimate of cost of materials but no binding obligation fixing prices—San Pedro Lumber Co v Kreis, 295 P 890, 111 Cal App 466.

85. Mass—Wilder v. French, 9 Gray 393.

86. Cal—Herdal v Sheehy, 159 P 422, 173 Cal 163
40 C.J. p 452 note 4

87. Ill—McKeown Bros. Co v. Og-

den Kennel Club, 269 Ill App 622—Glencoe State Bank v Cole, 265 Ill App 158—Burgoyne v Pyle, 261 Ill App 356
40 C.J. p 452 note 5.

Variances held not fatal

(1) In general

Ill—United Cork Cos v Volland, 7 N.E.2d 801, 865 Ill 564

Mass—Lampasona v Capriotti, 4 N.E.2d 621, 296 Mass 34, 108 A.L.R. 430

N.J.—Solotaroff v. Candalupa, 140 A 305, 6 N.J. Misc 201

Pa.—Blumberger v Marshall, Com Pl, 93 Pittsb Leg J 128.
40 C.J. p 452 note 5 [a]

(2) Right of subcontractor to lien should not be defeated because of inconsistency between pleadings and proof, in that such subcontractor's lien statement and cross complaint in suit for enforcement were against a "brick laying company," where finding was against particular person, where there was evidence that such person was the company named in the pleadings—Fuhler v. Gohman & Levine Const Co, 142 S.W.2d 482, 346 Mo 588

(3) Where petition in mechanic's lien suit, stating cause of action based on mechanic's lien law, alleged that record owner was straw man holding title to defraud plaintiff, proof that record owner was owner in fact and that plaintiff contracted

injury,⁸⁸ and if an allegation of the complaint is admitted by the answer it becomes unnecessary to prove such allegation, and a variance between such admitted allegation and proof offered is immaterial.⁸⁹ A conclusion of the pleader as to the effect of the contract may be disregarded in determining whether there is a variance between the pleading and proof thereof.⁹⁰

Express contract and quantum meruit While it has been held that under an allegation of an express contract plaintiff cannot recover on a quantum meruit,⁹¹ the fact that claimant fails to recover for items for extra work not included in an express contract will not prevent a recovery for the work done under the contract,⁹² and if claimant sues for work and labor performed and materials furnished, as on the common counts, as well as on a special contract, his suit cannot be dismissed for failure to prove a performance of the contract on his part.⁹³ There is no fatal variance between an allegation of an express contract to pay the reasonable value of materials furnished and proof of an implied agreement.⁹⁴ An allegation that plaintiff by doing certain work had acquired a lien on the property is supported by evidence that the lien arose from an indebtedness arising out of a direct or ratified contract.⁹⁵ There is no variance between a pleading in the form of a common count for work, labor, and materials, and proof of an agreement that the charge shall be on a cost-plus basis, since such agreement provides merely a basis for calculating the ultimate price.⁹⁶ However, proof that services and materials were to be furnished at cost

plus has been held not to support a complaint to foreclose a mechanic's lien based on a contract calling for the payment of reasonable value.⁹⁷

With whom contract made generally Where a claimant seeking to enforce his lien alleges that he made a contract with a certain person in a certain capacity, his proof must conform to such allegation.⁹⁸ While it has been held that a subcontractor who alleges that his work was done under an agreement with the contractor cannot establish a lien for work under a contract with the owner,⁹⁹ in a jurisdiction where it is held that, if the contract between the owner and contractor is void because not recorded, a lien may be maintained for materials furnished to the contractor as though they had been furnished at the personal instance of the owner, there is no variance between an allegation that they were so furnished and proof that they were furnished to the contractor,¹ and the fact that a subcontractor is entitled under the statute to enforce his claim against the owner where the original contract is void does not render him an original contractor so as to create a variance from his complaint in which he sues as subcontractor.²

Joint contracts Where it is alleged that defendants contracted jointly, plaintiff must recover according to that theory.³ Under this rule it has been held that, where it is alleged that husband and wife are owners and parties to the contract, evidence that the husband had no interest and was not a party is a fatal variance,⁴ and it has been held, where it is alleged that an agreement was made with both spouses as to property held by the entirety, that it

with him as owner was held not a fatal variance—*Mansfield Lumber Co v Johnson*, Mo App, 91 S W 2d 239

88. Or—*Eastern & Western Lumber Co v Williams*, 276 P 257, 139 Or 1—*Randolph v Christensen*, 365 P 797, 124 Or 681
40 C J p 452 note 6

89. Minn—*Wisconsin Red Pressed Brick Co v St Peter St Imp Co*, 48 N W 1022, 46 Minn 231
40 C J p 452 note 7

90. Ill—*Beck Coal & Lumber Co v H A Peterson Mfg Co*, 86 N E 715, 237 Ill 250

91. Or—*Johnson v Paulson*, 154 P 685, 163 P 435, 83 Or 238

92. Or—*Johnson v Paulson*, supra

93. Ind—*Kealing v. Voss*, 61 Ind 466
40 C J p 452 note 11

94. Ariz—*Harbridge v Six Points Lumber Co*, 152 P. 860, 17 Ariz 339.

95. Fla—*Smith v Loftis*, 150 So 645, 112 Fla 382

96. Minn—*Sallblad v Burman*, 29 N W 2d 673

97. Or—*Graf v Petry*, 247 P 315, 118 Or 511

98. Mo—*Better Roofing Materials Co v Sztukowski*, App, 183 S W 2d 400

N C—*Schnepf v Richardson*, 22 S E 3d 555, 222 N C 228

Effect of controversy between owner and third persons

A subcontractor seeking to enforce his lien who alleged that a certain person was the contractor under whom he worked must stand or fall on such allegation and is not affected by any controversy between owners and third person—*Schnepf v Richardson*, 22 S E 3d 555, 222 N C 228

Variance held not fatal

In materialman's action to foreclose lien for materials furnished for

plumbing work, where complaint alleged that plaintiff furnished materials under agreement with named persons, the contractors, for construction of house, but evidence showed that one of such persons was merely plumbing subcontractor, such variance was immaterial and could be disregarded—*Pierce, Butler & Pierce Mfg Corporation v Enders*, 174 A 169, 118 Conn 610

99. N Y—*La Pasta v Weil*, 46 N Y S 275, 20 Misc 554—*Hauptman v Halsey*, 1 ED Smith 668

1. Cal—*Yancy v Morton*, 29 P 1111, 94 Cal 558
40 C J p 453 note 20

2. Cal—*Coss v MacDonough*, 44 P 325, 111 Cal 662

3. Ala—*Cocciola v Wood-Dickerson Supply Co*, 44 So 541, 152 Ala 283
40 C J p 452 note 13

4. Ill—*Munster v Doyle*, 50 Ill App 672.

is a fatal variance to prove that the contract was signed by the husband only, notwithstanding the wife's knowledge and assent⁵ or evidence of the husband's agency and the wife's ratification or estoppel⁶. It has also been held that evidence that property is owned by a husband and wife will not support a lien where it was alleged that the material was furnished to the husband alone⁷ unless it is shown that the husband alone owned the lot at the time the materials were furnished, or was his wife's agent⁸.

On the other hand, it has been held that the fact that a petition describes land as owned by a man and his wife, whereas they were not joint owners, is not fatally variant from the proof,⁹ and that, where it is alleged that husband and wife, owners by the entirety, contracted for the building to be erected upon the premises, the fact that the wife did not join did not render the petition insufficient,¹⁰ and that, in the case of community realty, an allegation that the husband and wife made the contract was not fatally variant from proof that the husband alone made it, there being no showing of

prejudice to defendant¹¹.

(2) Between Lien Claim and Pleading

A material and substantial variance between the essential allegations of claimant's pleading and the lien claim or notice is fatal.

A material and substantial variance between the essential allegations of claimant's pleading and the lien claim or notice is fatal,¹² as, for example, with reference to the terms of the contract,¹³ or the parties to the contract,¹⁴ or the description of the property,¹⁵ or to whom the material was furnished¹⁶. So a lien claim setting up an express contract and performance is inconsistent with a complaint seeking to enforce a lien for a quantum meruit after abandonment of the contract¹⁷.

Variances which are not material or are merely technical and do not affect the claim or its identity, however, are not fatal,¹⁸ and it has been held that incongruous matter in the lien paper not affecting its validity and which may be rejected as surplusage will not give rise to a variance by reason of its

5. Fla.—Allardice & Allardice v Weatherlow, 124 So 38, 98 Fla 475

6. Fla.—Allardice & Allardice v Weatherlow, *supra*

7. Mo.—H B McCray Lumber Co v Standard Const Co, App, 285 S W 104

8. Mo.—H B McCray Lumber Co v Standard Const Co, *supra*

9. Mass.—Dodge v Hall, 47 N E 110, 168 Mass 435

Or.—Winters v Falls Lumber Co, 31 P 2d 177, 146 Or 592

10. Mo.—C A Brockett Cement Co v Logan, 173 S W 727, 157 Mo App 322

11. Tex.—Dallas Plumbing Co v Harrington, Civ App, 275 S W 190 40 C J p 453 note 17

12. Or.—Graf v Petry, 247 P 315, 118 Or 511

40 C J p 453 note 22

13. Or.—Graf v Petry, *supra*

40 C J p 453 note 23

Time of payment of wages

Variance relative to time of payment of wages between contract set forth in notice of mechanic's lien and contract alleged in complaint to foreclose lien was held fatal—Allen v Roufs, 30 P 2d 766, 146 Or 451

14. Cal.—Palmer v Lavigne, 37 P 775, 104 Cal 30

40 C J p 453 note 24

15. Or.—Joshua-Hendy Mach Works v Pacific Cable Constr Co, 38 P 403, 24 Or 152

40 C J p 453 note 25

16. Ky.—Southern Brick & Tile Co

v Walker, 288 S W 685, 216 Ky 760

Contractor as agent

Petition seeking to enforce mechanic's lien alleging that material was furnished to contractor as agent of owner was held demurrable as being contradictory to statement filed by materialman that material had been furnished to contractor—Whitfield v Kentucky Sales Corporation, 278 S W 105, 211 Ky 809

Contractor and subcontractor

Allegation that brick was furnished to contractor and subcontractor was held not sustained by proof that it was furnished to subcontractor—Southern Brick & Tile Co v Walker, 288 S W 685, 216 Ky 760

17. N Y.—Borkstrom v Ryan, 122 N Y S 878, 138 App Div 183

18. Ind.—Duckwall v Jones, 58 N E 1055, 156 Ind 682, reheard 60 N E 797, 156 Ind 682

40 C J p 453 note 27

Particular variances held not fatal

(1) In action to establish mechanic's and materialmen's liens, that cross petition alleged that woman owning all but two shares of corporation held record title to property on which improvements were constructed, and that contract was with corporation, held not such variance from statement of lien as would defeat lien claims—Lee & Boutell Co v C A Brockett Cement Co, 106 S W 2d 451, 341 Mo 95

(2) Materialman, in action for labor and material, was held not es-

topped to allege that defendant was real owner, because, in mechanic's lien filed against building, materialman recognized another as owner—Nusbaum v Warwick Hotel Co, 170 A 388, 112 Pa Super 277.

(3) Other variances

Cal.—Ingersoll v Chaplin, 15 P 2d 790, 127 Cal App 290.

Or.—James A C Tait & Co v Stryker, 343 P 104, 117 Or 338

40 C J p 453 note 27 [a]

Variance not shown

(1) In subcontractor's suit to foreclose a mechanic's lien for labor performed on defendants' residence, allegations of notice of lien that the contract was entered into between defendants' contractor and subcontractor were not necessarily at variance with allegations of complaint that contract was entered into between defendants and subcontractor, in view of statute making the contractor in charge of the construction the owners' agent—Andersen v Turpin, 142 P 2d 999, 172 Or 420

(2) A lien claimant stating in notice of lien that the materials were furnished to named person and that the named person's wife was the owner of the property, could allege in complaint in suit to foreclose lien that the named person acted on his own behalf and as common-law agent for his wife in purchasing the materials and that wife held legal title in her own name in trust for herself and named person as tenants by the entirety—Drake Lumber Co v Lindquist, 170 P 2d 712, 179 Or 402

omission from the pleading¹⁹ and that a mere mistake in the lien notice may be corrected by the complaint²⁰. There is no material variance between the allegations and the statement where both refer to the same lot, the same building, the same labor, the same indebtedness, and the same contract between the same parties²¹. Where the statute does not require the lien statement to set forth the extent and character of the liability created by the contract, there is no fatal variance between a lien claim stating that a certain individual was the contractor and a petition which states that he is the real owner²² or between a lien claim which states that the contract is made with an individual who is authorized and empowered by the owner to erect the improvement and a petition counting on a joint contract by such individual and the owner²³.

(3) Between Lien Claim and Proof

A material variance between the statement in the lien claim and the proof is fatal; but a variance is not fatal if it is not substantial or misleading or prejudicial to defendant.

A material variance between a statement of the facts required by the statute to be contained in the lien claim and the proof is fatal²⁴. So, where the statute requires the claim to contain a statement of the terms and conditions of the contract, if controverted, the terms of the contract must be proved by la

claimant substantially as set out in his notice of lien²⁵. However, under the rules as to the materiality of variance generally, a recovery will not be defeated because of a variance which is not substantial²⁶ or misleading²⁷ or prejudicial to defendant²⁸ as, for example, in the case of a variance in the date of completion, the statement being filed within the required time in any event²⁹.

So, where under the circumstances the wife in legal effect was a party to the contract, evidence that the contract was executed by the husband alone is not fatally variant from a statement that both husband and wife were parties³⁰ and, if the lien claim states that the material was furnished to the contractor, there is no variance between the statement and proof of facts showing that the contract with the owner was void, and that under the statute the materialman may be deemed to have furnished the material to the owner³¹. Evidence as to work done showing the character of the improvement may be admitted although it is omitted from the lien claim³².

Agreed price Under a statute requiring the claim to contain a statement of the terms and conditions of the contract, it has been held that there is a fatal variance between a lien claim to the effect that there is no express agreement as to price and evidence that materials were furnished for such a

¹⁹ Mo—Stone v Taylor, 72 Mo App 482.

²⁰ Ind—White v Stanton, 13 N E 48, 111 Ind 540
40 C J p 454 note 29

²¹ Ala—Wigfield v Akridge, 93 So 612, 207 Ala 560

²² Mo—Berkshire Lumber Co v J S Chick Inv Co, 155 SW 904, 170 Mo App 1

²³ Mo—Berkshire Lumber Co v. J S Chick Inv Co, supra

²⁴ Okl—Holmes v Dolese Bros Co, 246 P 372, 117 Okl 298

Wis—Appleton State Bank v Nussbaum, 252 NW 281, 213 Wis 662
40 C J p 454 note 34

Form and contents of lien claim see supra §§ 150-171

Variance as to particular matters

(1) Lien claimant, stating in notice amount due for particular lot, could not maintain claim by showing materials furnished for two improvements and estimating amount furnished on particular lot—Rathburn v. Landess, 129 So 738, 100 Fla 507

(2) Variance between notice of lien claim describing labor performed as digging ditches and testimony disclosing alleged carpenter work was held so material as to render notice of lien inadmissible—Lorenz Co. v

Gray, 298 P 222, 136 Or 605, rehearing denied and opinion adhered to Lorenz Co v Day & Co, 300 P 949, 136 Or 605

(3) Proofs must show that dates stated in notice of mechanics lien respecting time when first and last items of work and materials were furnished are substantially correct—Brescia Const Co v Walart Const Co, 264 N Y S 862, 238 App Div 360

²⁵ Cal—Whiting-Mead Commercial Co v Brown, 186 P 386, 44 Cal App 371

40 C J p 454 note 36

²⁶ Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev. 159

40 C J p 454 note 38

Variance held not fatal

Cal—Richmond Sanitary Co v Franklin, 9 P 2d 855, 122 Cal App 229

²⁷ Wash—Statson & Post Lumber Co v W & J Sloane Co, 112 P 248, 61 Wash 180

40 C J p 454 note 39

²⁸ Neb—Corpus Juris quoted in Acme Plumbing & Heating Co v Hirsch, 236 NW 137, 138, 121 Neb 134

40 C J p 454 note 40

Variances held not prejudicial

(1) In action to enforce mechanic's lien, no variance resulted from failure to prove all items as embraced in statement of lien—Heady v Pool, 130 So 329, 221 Ala 619

(2) Statement in mechanics' lien claim that lienor was employed by copartnership instead of by certain member of partnership, as appeared in agreed statement of facts, was held not such variance as to render lien invalid, notwithstanding lien was not amended to conform to facts, provision in statute allowing amendment being directory only—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159

(3) Other variances see 40 C J p 454 note 40 [a]

²⁹ S C—Willard v. Finch, 113 S E 302, 121 S C 1

40 C J p 454 note 41

³⁰ Wyo—Phelan v Cheyenne Brick Co, 188 P 854, 26 Wyo 493, rehearing denied 189 P 1103, 26 Wyo. 493

³¹ Cal—Davies-Henderson Lumber Co v Gottschalk, 22 P 860, 81 Cal 641

³² Cal—Stevenson v Woodward, 86 P 990, 3 Cal App. 754.

price.³³ It has, however, been held that on the contrary there is no material variance between a statement alleging an agreement as to price and proof that material was delivered without such an agreement, but that its actual market value corresponded to the agreed price stated in the claim,³⁴ and that, where the reasonable market price of material and the stipulated price are the same, a variance between the lien claim and the proof as to

whether or not materials were furnished for an agreed price is immaterial.³⁵ There is no variance where the lien claim is on quantum meruit and the proof shows that the prices charged represented the reasonable value of the materials furnished.³⁶

Matters not required to be stated A variance between the proof and the claim as to matters which are not required by the statute to be stated in the claim is not fatal.³⁷

C. EVIDENCE

§ 308. Presumptions and Burden of Proof

- a. In general
- b. Reliance on credit of property
- c. Property or interest subject
- d. Delivery and use of material
- e. Agreement or consent of owner
- f. Performance of contract
- g. Lien claim, statement, or notice
- h. Amount of claim
- i. Indebtedness of owner to contractor
- j. Payment
- k. Fraud and bad faith
- l. Waiver and estoppel
- m. Priorities

a. In General

In a proceeding to enforce a mechanic's lien the claimant has the burden of proving his cause of action.

It is presumed that every mechanic or materialman desires the security given by the mechanics' lien laws.³⁸ The existence of a lien or privilege is not presumed,³⁹ no act necessary to the acquisition of the lien can be presumed to have been performed in the absence of proof that it was performed.⁴⁰ In a proceeding to enforce a mechanic's lien claimant has the same burden of proving his cause of action as rests on complainant in other civil actions,⁴¹ and, where the allegations of his pleadings are properly in issue, the burden of proof is on him to establish his right to a lien,⁴² and to

33. Cal—Consolidated Lumber Co v Bosworth, Inc, 180 P 60, 40 Cal App 80

Evidence held not to show variance

(1) In general—Consolidated Lumber Co v Bosworth, Inc, 180 P 60, 40 Cal App 80—San Pedro Lumber Co v West, 86 P 993, 3 Cal App 757

(2) Mechanic's lien claim was held not at variance with proof on ground that claim called for quantum meruit and proof asked for prices charged, where statement of lien to which was attached itemized account giving dates and prices showed that prices charged were contemplated—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 N M 3

34. Cal—Lucas v Gobbi, 103 P 157, 10 Cal App 648—Lucas v Rea, 102 P 822, 10 Cal App 641

35. Cal—Blanck v Commonwealth Amusement Corp, 127 P 805, 19 Cal App 720

40 C J p 455 note 48

36. N M—Hot Springs Plumbing & Heating Co v Wallace, 27 P 2d 984, 38 N M 3

37. Pa—Philadelphia Fourth Baptist Church v Trout, 28 Pa 153
40 C J p 455 note 49

38. Pa—Clayton v Lienhard, 167 A 321, 312 Pa 433—Schwartz v

Whelan, 145 A 525, 295 Pa 425, 65 A L R 277

Presumption of gratuitous services

Where husband's father, without giving notice in writing of intention to claim a lien, filed a mechanics' lien against property owned by husband and wife as tenants by the entirety, under alleged contract between father and husband consisting of their own special terms which covered entire subject matter, presumption of gratuitous services was excluded—Blenard v Blenard, 45 A 2d 335, 185 Md 548

39. La—St Landry Lumber Co v Aggers, App, 147 So 569

40. Fla—Curtiss-Bright Ranch Co v Selden Cypress Door Co, 107 So 679, 91 Fla 354

41. Mont—Arnold v Genzberger, 31 P 2d 296, 96 Mont 358

Okl—Holmes Oil Co v Rule, 70 P 2d 86, 180 Okl 405

Wash—**Corpus juris** quoted in Westinghouse Electric Supply Co v Hawthorne, 150 P 2d 55, 57, 21 Wash 2d 74

40 C J p 455 note 50

Matters to be proved see supra § 307

Insufficiency of bond

Materialmen seeking to enforce liens had burden of establishing insufficiency of contractor's bond under statute authorizing court to restrict

recovery where bond is given—Simpson v Bergmann, 13 P 2d 531, 125 Cal App 1—Sudden Lumber Co v. Singer, 284 P 477, 103 Cal App 386

Issuance of summons

Brick company would have burden to prove that issuance of summons in equitable mechanic's lien suit filed by lumber company was withheld by lumber company's request, to overcome presumption that petition was filed with intention that summons should be issued in regular course and prevent suit being commenced at time of filing petition within ninety days after brick company filed lien statement, in which event mechanic's lien suit filed by brick company would have been properly dismissed, even though summons was not issued for brick company within such period—Richards Brick Co v Wright, 82 S W 2d 274, 231 Mo App 946

42. U S—In re Friedal Corporation, C C A N Y, 53 F 2d 758

Ala—Mundy v Allison, 187 So 722, 237 Ala 535—Wood Lumber Co v Greathouse, 148 So. 125, 226 Ala. 644—Foster v Prince, 141 So 248, 224 Ala 523

Ark—Fine v Dyke Bros, 300 S W 375, 175 Ark 672, 58 A L R 907

Cal—Hayward Lumber & Investment Co v Starley, 13 P 2d 66, 124 Cal App 283

show that he has complied with all of the essential requirements of the statute under which he claims,⁴³ and, if other parties are permitted to intervene in the action and file denials, as they are entitled to do, this will not relieve claimant of his burden of proof but he still has the affirmative of the issue to maintain⁴⁴

Where claimant has established a prima facie case, the burden of evidence shifts to the owner⁴⁵ Defendant has the burden of proving affirmative defenses⁴⁶ and matters of set-off, counterclaim, and recoupment⁴⁷ As to facts which rest peculiarly within defendant's knowledge the onus of proving them is on him⁴⁸

In the absence of evidence of direct purchases or labor contracts by the owner, it must be presumed that the lien claimants dealt with the contractor⁴⁹ In a proceeding by a subcontractor or materialman, it will be presumed that the owner and the contractors have complied with the provisions of the statute⁵⁰ The rule that, in the absence of evidence to the contrary, the holder of a negotiable note is

presumed to be a good-faith purchaser for value and without notice so that his right to judgment is not affected by undisclosed equities between prior parties prevails only to facilitate the transfer of negotiable paper and applies only to the maker's personal obligation and not to the right to enforce the lien securing the debt, so as to permit the foreclosure of the lien by an assignee of the note and lien asserting a purchase in good faith for value and without notice⁵¹

Under a bill for a general settlement for the purpose of adjusting the claims of all lienors, as considered supra § 302, the burden is on the lienors to prove every fact required by statute to establish their right to a lien on the premises⁵² However, it has been held that, where the owner sues seeking to pay the various lien claims pro rata because the aggregate outstanding claims exceed the contract price, the burden is on the owner to prove not only the contract price but also that after paying all other valid liens there is not enough of the contract price remaining to satisfy a particular claimant⁵³

Colo—Peters v Dove, 263 P 16, 83 Colo 143

Fla—Cooper v Passmore, 138 So 48, 103 Fla 744

La—Griffith v Williams, App, 19 So 2d 277—Barnette v Shuttles, App, 172 So 210

Mich—Equitable Trust Co v Detroit Golf & Recreation Co, 245 NW 531, 260 Mich 606

Mo—Landers Lumber & Cement Co v Short, 37 SW 2d 981, 235 Mo App 416

Mont—Dewey Lumber Co v McQuirk, 30 P 2d 475, 96 Mont 394

NY—Farabella v. Porter, 225 NY S 417, 130 Misc 680

Pa—Intercoastal Lumber Distributors v Derian, 178 A 350, 117 Pa Super 246

Tenn—Brown v Brown & Co, 160 S W 2d 431, 25 Tenn App 509

Wash—Westinghouse Electric Supply Co v Hawthorne, 150 P 2d 55, 21 Wash 2d 74—Petro Paint Mfg Co v Taylor, 265 P 155, 147 Wash 158

40 C J p 455 note 51

Within class entitled to lien

Claimant has burden of showing that he is within class or group entitled to lien under the statute
Mont—Interstate Lumber Co v Rider, 19 P 2d 644, 93 Mont 489
Or—Phillips v Graves, 9 P 2d 490, 139 Or 336, 83 A L R 1.

Assignee

(1) Those claiming under assignment of materialmen's claim had burden of proving valid assignment—Howard v Fisher, 283 P. 1042, 86 Colo 493

(2) Vendor suing to enforce lien assigned to him for making improvements on property sold, which was returned to vendor when purchaser defaulted, had burden of proving his right to foreclose, where his right to do so was denied and was at issue—Downing v Crappen, 138 P 2d 575, 114 Mont 436

43. Fla—Browne v Park, 198 So 462, 144 Fla 696

Ind—Puritan Engineering Corporation v Robinson, 191 NE 141, 207 Ind 58—Menzenger v American State Bank, 198 NE 819, 101 Ind App 600

Kan—Gaudreau v Smith, 40 P 3d 365, 141 Kan 123

Mich—Bezold v Beach Development Co, 244 NW 204, 259 Mich 693—R C Mahon Co v Ford Motor Co, 239 NW 348, 256 Mich 255

Tex—Lewis v Phillips, Civ App, 90 SW 2d 310, affirmed 114 SW 2d 864, 131 Tex 313

Wash—Westinghouse Electric Supply Co v Hawthorne, 150 P 2d 55, 21 Wash 2d 74

40 C J p 455 note 52.

44. Ga—Eastmore v Bunkley, 39 S E 105, 113 Ga 637

45. Mont—Rogers-Templeton Lumber Co v Welch, 184 P. 838, 56 Mont 321

40 C J p 456 note 57

46. Ala—Roobin v Grindie, 122 So 408, 219 Ala 417

Cal—R Barcroft & Sons Co v Culien, 20 P 2d 665, 217 Cal 708

Idaho—Bannock Lumber & Coal Co v Tribune Co, 4 P 2d 662, 51 Idaho 226

Ill—Illinois Interior Finish Co v Poenie, 277 Ill App 554

Pa—Lumber & Millwork Co of Philadelphia v Graham, Com Pl, 80 Montg Co 162

40 C J p 456 note 58

47. Cal—W R Spalding Lumber Co v Fradkin, 156 P 2d 450, 68 Cal App 2d 308—Anson v Foley, 288 P 792, 105 Cal App 624

Ill—Edward Edinger Co v Willis, 260 Ill App 106

Md—Parker v Tilghman V Morgan, Inc, 183 A 224, 170 Md 7

Wash—American Plumbing & Steam Supply Co v Alavakui, 282 P. 917, 154 Wash 436

48. Ala—Leftwich Lumber Co v Florence Mut Bldg Loan & Savings Ass'n, 18 So 48, 104 Ala 584
Iowa—Iowa Brick Co v Des Moines, 82 NW 922, 111 Iowa 273

Effect of peculiar knowledge on burden generally see Evidence § 113

49. US—John Murland, Inc, v Empire Trust Co, CCANJ, 39 F 2d 341

50. Ill—Nelson v Enchius, 212 Ill App 409

51. Tex—Hill v Engel, Civ App, 89 SW 2d 219, error refused

52. Ill—Hacken v Isenberg, 124 N E 306, 288 Ill 589.

40 C J p 456 note 62

53. Tenn—Traylor v. Sims, 5 Tenn App 594.

b. Reliance on Credit of Property

In a proceeding to enforce a mechanic's lien, where such fact is necessary to the existence of a lien, the burden is on the claimant to prove that the material or labor was furnished on the credit of the property.

Where it is necessary to the existence of a mechanic's lien that the labor or material be furnished on the credit of the building or property, as considered supra § 46, the burden of proving such fact is on claimant,⁵⁴ but, where there is nothing in the record in negation of a lien, it will be presumed that material was furnished on the security afforded by the property in which it entered⁵⁵

It is presumed that the credit of the building is relied on where claimant has complied with all of the provisions of the Lien Law,⁵⁶ and, where he shows that the material or labor was furnished on or about the construction of the building and the claim was properly made and filed, defendant must show that the debt was made on the credit of the contractor alone,⁵⁷ but the presumption that the credit of the building was relied on may be rebutted by evidence that the material was not used therein, and by the fact that it was charged to the contractor⁵⁸

c. Property or Interest Subject

In a proceeding to enforce a mechanic's lien, the burden is on the claimant to establish the identity of the property which he seeks to subject to the lien.

The burden is on claimant to establish the identity of the property which he seeks to subject,⁵⁹ and, since the lien attaches only to the interest which the party making the contract has in the property, claimant has the burden, where the right to the lien is controverted, to establish the extent of such interest⁶⁰ and the fact of ownership⁶¹ The burden is on claimant, in the absence of any presumption as to character of defendant's ownership,

to show ownership in a person or persons competent to contract so as to bind the property⁶² If a person is shown to be the owner of property within a short time of the attaching of the lien, he may be presumed still to be the owner⁶³ A person in possession of premises is presumed to have an interest chargeable with a lien until the contrary is made to appear⁶⁴

Where defendant seeks to avoid the lien on a plea of homestead, he has the burden of proving when the claimed homestead character attached to the property⁶⁵ Where the record title is in the community of husband and wife, the burden is on the wife to show that it is her separate property and that claimant had notice thereof before furnishing labor and materials on a purchase by the husband.⁶⁶ Under a statute providing that property subject to a mechanic's lien may be ordered removed to satisfy the lien where the land on which the property is situated cannot be subjected to the lien, claimant has the burden of proving that the property is removable from the land.⁶⁷

In the absence of proof to the contrary, it will be presumed that a small lot in a town is necessary to the reasonable enjoyment of buildings put on it⁶⁸

Appurtenances Where claimant seeks to include in his lien buildings into which his labor or material has not entered, the burden is on him to show that they are appurtenant to the building for whose construction he furnished labor and material.⁶⁹

d. Delivery and Use of Material

In a proceeding to enforce a mechanic's lien, the burden is on claimant to establish that he furnished the labor or materials for which the lien is claimed.

The burden is on claimant to establish that he furnished the labor or materials for which the lien

54. Mo—House Wrecking Salvage & Lumber Co v Gartrell, App, 204 S W 52

40 C J p 456 note 63

55. Mo—Smith-Anthony Stone Co v Spear, 65 Mo App 87

40 C J p 456 note 61

56. Or—Peerless Pac Co v Rogers, 158 P 271, 81 Or 51

40 C J p 456 note 65

57. Pa.—Green v Thompson, 33 A 702, 172 Pa 609

40 C J p 457 note 66

58. Pa.—Green v Thompson, 33 A 702, 172 Pa. 609

59. Iowa—Hutton v Maines, 28 N W 9, 68 Iowa 650

Or—Morehouse v Collins, 31 P. 295, 23 Or 138

Property or interests subject to mechanic's lien see supra §§ 2-19

In contest between lienholders against corporate properties, claimant of materialmen's lien has burden of proving conditions entitling him to fix lien on a particular piece of property—Cisco Banking Co v Keystone Pipe & Supply Co, Tex Com App, 277 S W 1060

60. Iowa—Dierks v Walrod, 23 N. W 751, 66 Iowa 354

Mo—Keller v Carterville Bldg & Loan Ass'n, 71 Mo App 465

40 C J p 457 note 71

61. Iowa—Hutton v Maines, 28 N W 9, 68 Iowa 650

62. Mo—Hadley-Dean Glass Co v Schaefer, App, 11 S W 2d 61

63. Mo—Badger Lumber Co v Muehlebach, 83 S W 546, 109 Mo App 646

64. Fla.—Dunlop v Teagle, 135 So 132, 101 Fla. 721—Service Lumber & Supply Co v. Cox, 123 So 820, 98 Fla 405

65. Tex.—Evans v Galbraith-Foxworth Lumber Co, Civ App, 51 S W 2d 831, error dismissed

66. Tex.—Hord v Owens, 48 S W. 200, 20 Tex Civ App, 21

67. Wash—Pioneer Sand & Gravel Co v Hedlund, 34 P 2d 878, 178 Wash 273

68. Va.—Pairo v Bethell, 75 Va. 825

69. Conn—Peck v Brush, 94 A 981, 39 Conn 554

Right to lien see supra § 187.

is claimed⁷⁰ The burden is also on him to show a compliance with the conditions to a right to a lien imposed under the particular statute under which the lien is sought,⁷¹ such, for example, as that the material is furnished for the building sought to be charged,⁷² or its actual use in such building,⁷³ or that it is furnished under a contract, agreement, or understanding that it is to be used in the erection or repair of the building⁷⁴

A presumption of the use of materials in a building or improvement arises from the fact of their delivery thereto for that purpose⁷⁵ The presumption is rebuttable,⁷⁶ and the burden of showing the contrary is on defendant.⁷⁷ Under a statute requiring the material to be actually used or incorporated in the building, where the evidence shows that some of the material has been diverted, it is incumbent on the materialman to show the part used⁷⁸ Where it is shown that material is placed in a building, it may be presumed that it was furnished for that purpose⁷⁹ So, it has been held that, if a materialman furnishes suitable material to a person who he knows is erecting a building, it will be presumed that the materials are furnished for that building⁸⁰

Material furnished for several buildings Where material is furnished to a defendant engaged in erecting several buildings, if it is of materiality to defendant, the burden is on him to show in which of the buildings the material was used⁸¹ Where, however, claimant seeks a lien on a part only of the buildings, the burden is on him to establish the iden-

tity of material furnished to the property on which the lien is sought⁸²

e. Agreement or Consent of Owner

- (1) In general
- (2) Knowledge and failure to object

(1) In General

In a proceeding to enforce a mechanic's lien, the burden of proving a contract with the owner is on the party asserting it.

The burden of proving a contract with the owner is on the party asserting it,⁸³ but, although there is no evidence that the owner agreed to pay on the completion of the work, it has been held that such terms will be implied, if no others were specified, to support an allegation that labor and materials were to be paid for at that time⁸⁴ Where it is alleged that no contract was recorded in the proper office, there is a presumption that no acceptance of the contract was recorded⁸⁵

Subcontractors and materialmen The burden rests on one furnishing labor or material to show that it was furnished by virtue of a contract with the owner or with his consent⁸⁶ For example, the burden rests on him to establish a contract or agreement between the owner and the person for whom the work is done or to whom the materials are furnished⁸⁷ A presumption as to the consent of the owner to the furnishing of labor or material arises from the fact of the contract between the owner and the general contractor⁸⁸ One furnishing ma-

70. Wash—Kellison v Godfrey, 281 P 733, 154 Wash 219—Petro Paint Mfg Co v Taylor, 265 P 155, 147 Wash 158.

40 C J p 457 note 84.

71. Colo—Olson v Model Land & Irrigation Co, 225 P 259, 75 Colo 321.

40 C J p 457 note 86

72. US—Corpus Juris cited in Maryland Casualty Co v City of South Norfolk, CCA Va., 58 F2d 822, 823

40 C J p 457 note 87

73. Ill—Colp v First Baptist Church of Murphysboro, 360 Ill App 269, affirmed 173 NE 67, 341 Ill 73, 71 A L R 106.

Okl—Kubatzky v Pittsburg Plate Glass Co, 249 P 412, 119 Okl 236 Wash—Standard Lumber Co v Fields, 157 P 2d 333

40 C J p 457 note 88

74. Iowa—Cotes & Davies v Shorey, 8 Iowa 416

75. Ark—Half Moon Gin Co v E C Robinson Lumber Co, 121 SW 2d 239, 207 Ark 483

Ill—Colp v First Baptist Church

of Murphysboro, 173 NE 67, 341 Ill 73, 71 A L R 106

40 C J p 457 note 91

76. Ark—Sebastian Building & Loan Ass'n v Minten, 27 SW 2d 1011, 181 Ark 700

Ill—Colp v First Baptist Church of Murphysboro, 173 NE 67, 341 Ill 73, 71 A L R 106.

77. Ark—Half Moon Gin Co v E C Robinson Lumber Co, 121 SW 2d 239, 207 Ark 483—Standard Lumber Co of Pine Bluff v Wilson, 296 SW 27, 173 Ark 1024

La—Hortman-Salmen Co v Raymond, 127 So 453, 13 La App 490 Or—Northwest Lumber & Fuel Co v Plantz, 268 P 763, 126 Or 69

40 C J p 457 note 92

78. Okl—De Bolt v Farmers' Exch Bank, 151 P 686, 51 Okl 13

79. Ill—Martin v Eversal, 36 Ill 223

40 C J p 457 note 95

80. Ohio—Kunkle v Reeser, 5 Ohio S & CP 422, 5 Ohio NP 401

81. Iowa—Lewis v Saylor, 35 N W 601, 73 Iowa 501

40 C J p 457 note 97

82. Mo—Wilson, Reheis, Rolfe Lumber Co v Ware, 130 SW 822, 150 Mo App 61

Apportionment of lien see supra § 189

83. Iowa—Cedar Rapids Sash & Door Co v Dubuque Realty Co, 193 NW 801, 195 Iowa 679

40 C J p 458 note 1

Contract with, or consent of, owner generally see supra §§ 52-85

84. Ill—Claycomb v Cecil, 27 Ill 497

40 C J p 458 note 2

85. La—Petty v Jones, 121 So 372, 10 La App 409

86. Okl—Birmingham v Houston-McCune Lumber Co, 41 P 2d 856, 171 Okl 88

40 C J p 458 note 3

87. Cal—McDowell v Perry, 51 P. 2d 117, 9 Cal App 2d 555

40 C J p 458 note 4

88. Me—Norton v Clark, 27 A 252, 85 Me 357

terial who desires the benefit accruing to an original contractor has the burden of establishing that he is such a contractor⁸⁹

Agency Where the contract is claimed to have been entered into with an agent of the owner, claimant has the burden of proving the fact of such agency⁹⁰ and also his authority⁹¹ In an action to foreclose a lien for costs of improvements erected by a lessee, claimant has the burden of proving that an agency was created by the lessor so as to subject the leased realty to the lien⁹²

Consent of equitable owner. It will be presumed that the equitable owners consented to the erection of a building at the instance of those holding the legal title and who had authority to charge the property with debts⁹³

Validity It will not be presumed that a contract between the owner and the contractor has not been recorded as required by statute⁹⁴

Cancellation of contract. The owner has the burden of establishing a defensive averment of cancellation of a contract for materials⁹⁵

(2) Knowledge and Failure to Object

In a proceeding to enforce a mechanic's lien, the burden is on the claimant, where his work is not done under a contract with the owner, to establish the owner's knowledge so as to bind him for his failure to give the required statutory notice of nonliability.

Where under the statute a building or improvement constructed on land with the knowledge of

the owner is to be deemed as having been constructed at his instance, unless he shall, after obtaining knowledge, give notice of nonliability, as considered supra § 84, the burden is on the lien claimant, where his work is not done under a contract with the owner, to establish his knowledge,⁹⁶ since without such knowledge the statutory presumption does not arise⁹⁷ Where the knowledge of the owner is shown, the burden rests on him to establish that he has given the statutory notice of nonliability⁹⁸ The burden rests on him to excuse a failure to give notice,⁹⁹ or to show, if such is the case, that the time therefor was extended by intervening holidays,¹ and that formal objection was made within the time so extended² Where the owner posts a notice, under the statute, that he will not be liable for repairs on the property, a presumption arises that it remained a sufficient length of time to impart knowledge to the persons it is intended to affect³

Apart from statute, a presumption of agency arising from ownership and knowledge of the work which is being done under a contract with another may be rebutted.⁴

f. Performance of Contract

The burden is on claimant in a proceeding to enforce a mechanic's lien to show performance of his contract.

The burden is on claimant to show performance of his contract,⁵ if his performance thereof is in

89. Cal—Ferber v Gearhart, 186 P 376, 44 Cal App 245

90. Ark—Daly v Arkadelphia Milling Co., 189 SW 1053, 126 Ark 405

40 C J p 458 note 8

To excuse omission to give notice of intention to file lien for materials, ordered by husband for building on wife's premises, burden of showing husband's agency was on materialman—Adkins & Douglas Co v Webb, 154 A 259, 160 Md 571

91. Ark—Daly v Arkadelphia Milling Co., 189 SW 1053, 126 Ark 405

92. Iowa—Perkins Supply & Fuel Service v Rosenberg, 282 NW 371, 226 Iowa 27

93. Or—Harrisburg Lumber Co v Washburn, 44 P 390, 39 Or 150 40 C J p 458 note 11

94. Cal—Pacific Portland Cement Co v Hopkins, 162 P 1016, 174 Cal 251

95. Ala—Wahouma Drug Co v Kirkpatrick Sand & Cement Co, 65 So 825, 187 Ala 818

96. Or—Gabriel Powder & Supply

Co v Thompson, 97 P 2d 182, 163 Or 623

40 C J p 458 note 15

97. Or—Hunter v Cordon, 52 P 182, 32 Or 413

40 C J p 458 note 16

98. Or—Gabriel Powder & Supply Co v Thompson, 97 P 2d 182, 163 Or 623

40 C J p 458 note 17

Where prima facie proof of posting is established, burden is on lien claimant to show that such notice was not posted in conformity with statute—Reno Plumbing & Heating Co v Bickel, 35 P 2d 302, 55 Nev. 367

99. Minn—Wheaton v. Berg, 52 N W 926, 50 Minn 525

1. Cal—Gentile v Britton, 111 P 9, 158 Cal 328

2. Cal—Gentile v Britton, supra

3. Or—Marshall v Cardinell, 80 P 652, 46 Or 410

4. Ill—Shinn v Matheny, 48 Ill App 135

5. Tex—Kelsay Lumber Co v

Crowell, Civ App, 19 SW 2d 368, error dismissed

40 C J p 458 note 23

Substantial performance

Contractor claiming lien on theory of substantial performance had burden of proving such performance, and such burden never shifted—Parker v Tilghman V Morgan, Inc, 183 A 224, 170 Md 7.

Subcontractor

(1) For subcontractor to recover for work, he must show performance or that work was accepted by owner as full performance—Dallas Nat Bank v Peaslee-Gaulbert Co, Tex Civ App, 35 SW 2d 221, error dismissed

(2) Subagent suing for painting building was not required to show what caused "hot spots" to appear in paint—Dallas Nat Bank v Peaslee-Gaulbert Co, supra

Contractual right to recover for partial performance

In suit by assignee of mechanic's lien to recover balance due on note given for contract price and to foreclose the lien, burden was on assignee to introduce evidence to show

Under a statute allowing a lien to the extent of the enhanced value of the property where the owner or claimant of the property against which the lien is asserted holds under an executory contract which is rescinded or set aside, the burden rests on claimant of the lien after the contract or purchase is rescinded to show the extent to which the actual value of the property has been enhanced³⁵ Where defendant has shown that there are certain omissions and defects in the work, the burden rests on plaintiff to establish the reasonable cost of remedying them³⁶ Where plaintiff under a quantum meruit complaint proves the full value of his services to defendant, if there should be any deductions therefrom by way of mitigation of the amount of recovery, the burden is on defendant to show the amount thereof³⁷

i. Indebtedness of Owner to Contractor

Where the lien of a subcontractor, laborer, or materialman attaches only to sums due or which become due from the owner to the principal contractor at or after the filing of a claim or notice, the burden in a proceeding to enforce the lien generally is on the lienor to establish the amount then due or which is to become due.

Where the lien of a subcontractor, laborer, or materialman attaches only to sums due or which become due from the owner to the principal contractor at or after the filing or service of a claim or notice, as considered supra § 174, it is generally held that the burden is on the lienor to establish the amount then due or which is to become due³⁸ Where the statute creating a lien in favor of materialmen for material furnished a contractor provides that in no event shall the aggregate amount of liens exceed the contract price of the improvements made, in a proceeding to foreclose a materialman's lien, it is incumbent on plaintiff to show that the amount for which he asserts a lien comes, in whole or in part, within the contract price agreed on between the contractor and the owner of the property improved³⁹

Where the statute requires the owner before payment to the contractor to procure from the contractor a verified statement of the persons furnishing material and labor and the amounts due or to become due to them, it will be presumed, where the subcontractor shows that he has complied with the provisions of the act and that his claim is unpaid, that the owner has not paid the contractor,⁴⁰ and the burden is on the owner to show, if he can, that he has rightfully paid the contractor⁴¹ Under a statute providing that, when work done or material furnished is done or furnished on the employment of the contractor or some person other than the owner, the lien shall attach unless the owner shall produce the sworn statement of the contractor or other person at whose instance the work was done or material was furnished that the agreed price or reasonable value has been paid, a materialman suing to foreclose his lien has the burden of overcoming the prima facie validity of the contractor's affidavit showing that the agreed price or reasonable value thereof has been paid⁴²

In case of a change in statute whereby the owner is made liable if he makes payment to the contractor before the lapse of the period given to subcontractors to file their liens, the burden is on the owner, if he desires to assert that the new statute cannot affect payments before it went into effect, to show the amounts paid by him before and after such time⁴³

Collusion. Where claimant's right to recover depends on the fact that payments by the owner have been made to the contractor in bad faith⁴⁴ or in advance,⁴⁵ the burden of establishing such fact rests on claimant.

Deductions for faulty performance or for cost of completion. The owner has the burden of establishing a counterclaim against the contractor,⁴⁶ or a right to an allowance for damages⁴⁷ Where the contract is abandoned by the principal contractor, complainant is bound to show that a part of

35. Ky—Riehm v Hyman, 170 S W 1189, 161 Ky 519

36. Ill—Industrial Roofing Co. v Meek, 39 N E 2d 57, 313 Ill App 653

NY—Cawley v Weiner, 140 N E 724, 236 NY 357

37. Ind—Central Dredging Co v F G Proudfoot Co, 158 N E 229, 87 Ind App 171.

38. NY—Thomas F Reilly & Co v Scheer, 211 N Y S 615, 125 Misc 833

40 C J p 460 note 61

39. Ga—Young v Harley-Mitchell

Hardware Co, 159 S E 567, 173 Ga 35—Stevens v Georgia Land Co, 50 S E 100, 132 Ga 317

40. Ill—Nielson v Enchius, 212 Ill App 409

41. Ill—Nielson v Enchius, supra—Verhoeven v Ingebrutsen, 205 Ill App 317

42. Ga—Chambers Lumber Co v Gilmer, 5 S E 2d 84, 60 Ga App 832

43. Iowa—Mason City Brick & Tile Co v Lamson, 180 N W 314, 190 Iowa 365

40 C J p 460 note 66.

44. NY—J W Van Cott & Son v

Gallon, 298 N Y S 67, 163 Misc 914

40 C J p 460 note 67

45. NY—J W Van Cott & Son v Gallon, 298 N Y S 67, 163 Misc 914—Thomas F Reilly & Co v Scheer, 211 N Y S 615, 125 Misc 833

46. Mo—Johannes v St Regis Realty & Investment Co, 188 S W 1138, 196 Mo App 43

40 C J p 461 note 69

47. Ill—Kleinschnittger v Dorsey, 152 Ill App 598

40 C J p 461 note 70.

the contract price equal to the amount of his claim remains in the owner's hands in excess of the cost of completion,⁴⁸ and, where the owner has completed the contract under a provision allowing him to do so on default of the contractor, claimant must show that there has been negligence in the manner of completion in order to prevent the owner from deducting the actual cost thereof from the money due under the contract.⁴⁹ Where the statute provides that, in case of abandonment by the original contractor, the amount that the work and materials furnished by subcontractors and materialmen are shown to be reasonably worth according to the original contract price less the amount rightfully paid on the original contract and the damages occasioned to the owner by reason of its nonperformance may be applied to the liens of such subcontractors or materialmen, the burden is on the owner to establish his damages, including his right to stipulated damages for delay.⁵⁰

Where the owner has settled with the contractor, it will be presumed in an action by a subcontractor that the owner was allowed at such time whatever he was entitled to because of delay in completion.⁵¹

j. Payment

The burden of establishing payment in a proceeding to enforce a mechanic's lien generally is on the defendant.

Defendant is usually held to have the burden of establishing a defense of payment in a proceeding to enforce a mechanic's lien.⁵² However, it has

been held that a materialman has the burden of showing a contention that a check given by the owner to the contractor and delivered to the materialman by the contractor was issued to meet the contractor's pay roll rather than to pay for the materials furnished.⁵³

k. Fraud and Bad Faith

In a proceeding to enforce a mechanic's lien, the burden is on the party alleging fraud to establish it.

The burden is on the party alleging fraud to establish it,⁵⁴ as where the owner alleges that claimant in bad faith has included in his statement items which are nonlienable,⁵⁵ or where he asserts a willful intention on the part of claimant to claim for an item known not to have been furnished,⁵⁶ or for an amount known to be in excess of what is justly due.⁵⁷ Fraud will not be presumed.⁵⁸ A fraudulent intent by a subcontractor to manufacture an item of account to extend the time for filing the lien will not be presumed.⁵⁹

It has been held, however, that the burden to establish good faith is on claimant,⁶⁰ as where a particular item is improperly included in the claim or the claim is for an excessive amount.⁶¹

l. Waiver and Estoppel

In a proceeding to enforce a mechanic's lien, the burden rests on the party asserting a waiver of the lien to establish such fact.

Where there has been a compliance with the statutory requirements for the procurement of a lien, the burden rests on one asserting a waiver to establish such fact.⁶² Likewise, the burden of proving

48. NY—Beardsley v Cook, 38 N E 109, 143 NY 143, 150 40 C.J. p 461 note 71

49. NY—Riley v Kenney, 67 NY S 584, 33 Misc 381

50. Ill.—Miller v Calumet Lumber & Manufacturing Co, 121 Ill App 56

51. Cal.—Mannix v Wilson, 123 P 981, 18 Cal App 595

40 C.J. p 461 note 76

52. Md.—Schneider v. Menaquale, 49 A 2d 330

NC—Andrews-Cooper Lumber Co v Hayworth, 172 SE 194, 205 NC 585

Tenn.—Richmond Screw Anchor Co v E W Minter Co, 300 SW. 574, 156 Tenn 19

40 C.J. p 461 note 77

Burden of proving payment generally see the C.J.S. title Payment § 93, also 48 C.J. p 680 note 21 et seq

In Oregon

(1) In suit to foreclose materialman's lien, burden is on landowners to establish payment—Livesay v

Lee Hing, 9 P 2d 133, 139 Or 450, 84 ALR 118

(2) Burden of proving that claim has not been paid is on the party asserting the lien, particularly where the contract is made with one other than the owner of the property which it is sought to charge—Bartels v McCulloch, 201 P 733, 102 Or 66

53. La.—Schwartz Supply Co v. Breen, App, 184 So 228

54. Iowa—Stephenson v. Svenson, 174 NW 570, 187 Iowa 802

Fraud or bad faith in payment to principal contractor see supra subdivision 1 of this section

55. Iowa—Stephenson v. Svenson, supra

Mont.—Ekestrand v Wunder, 20 P. 2d 622, 94 Mont 57

56. Ala.—Fleming v McDade, 93 So 618, 207 Ala 650

57. Ala.—Fleming v McDade, supra

Mich.—McLean v Lisowski, 221 N.W. 159, 244 Mich 93

NY—Schenectady Homes Corporation v Greenside Painting Corporation, 37 NY S 2d 53

58. US—John Murland, Inc v. Empire Trust Co, C C A N.J., 39 F. 2d 341

Filing insufficient bond

It was presumed that none of parties to construction contract intended to commit fraud by filing insufficient bond—Simpson v Bergmann, 13 P 2d 531, 125 Cal App 1

59. Iowa—A E Shorthill Co v Aetna Indemnity Co, 124 NW 613

60. Mich.—Currier Lumber Co v Ruoff, 299 NW 163, 298 Mich 505

61. Mich.—Sacchetti v. Recreation Co, 7 NW 2d 265, 304 Mich 185—Currier Lumber Co v Ruoff, 299 NW. 163, 298 Mich 505

62. Pa.—Schwartz v Whelan, 145 A 525, 295 Pa 425, 65 ALR 277

40 C.J. p 461 note 87.

an agreement to waive liens is on the person asserting it.⁶³ Where it is claimed that material was furnished to certain houses after they were released from lien, the burden of proof rests on the owner or person seeking to avoid the lien.⁶⁴ Claimant has the burden of showing acts of estoppel whereby a mechanic's lien may attach to property otherwise exempt as a homestead,⁶⁵ and a subcontractor who has failed to file his claim in time must establish an estoppel which he relies on as precluding the owner from taking advantage of his default.⁶⁶ So, where under the statute the owner may be estopped to assert that the lien was not filed within a specified time by his failure to file a statutory notice of completion, claimant to avail himself of such estoppel must prove the facts constituting it.⁶⁷

Claimant ordinarily has the burden of proving that his waiver of the lien was invalid⁶⁸ or inoperative.⁶⁹

m. Priorities

In a proceeding to enforce a mechanic's lien, a claimant who asserts facts to overcome the apparent priority of a mortgage or other encumbrance over his lien has the burden of proof.

A claimant asserting facts overcoming the apparent priority of a mortgage or other encumbrance over his lien has as a general rule the burden of proof,⁷⁰ as, for example, the burden of negating good faith,⁷¹ or of showing actual notice,⁷² although the question may be controlled by the character of the pleadings.⁷³ In a suit to have a mortgage lien declared superior to a mechanic's lien, the burden is on the mechanic's lienor, although a defendant, to prove the commencement of his work prior to the execution of the mortgage.⁷⁴

Subsequent encumbrancers. One who asserts the priority of a mortgage given after work has been begun and material furnished by the lienor to the mortgagee's knowledge on the ground that it was given for the purchase price of the property has the burden of establishing such fact.⁷⁵ One who relies for protection against the mechanic's lien on a proviso withdrawing purchasers for value from the operation thereof, where the lien is not filed within a required time, has the burden of bringing himself within the proviso.⁷⁶

*A waiver of the priority of a mechanic's lien over a subsequently executed deed of trust will not be presumed from a failure to make the assignee of the note secured a party defendant where the lienor was ignorant of the assignment of the note.*⁷⁷

§ 309. Admissibility

- a. In general
- b. Reliance on credit of property
- c. Property or interest subject
- d. Delivery and use of material
- e. Agreement or consent of the owner
- f. Performance of contract
- g. Lien claim, statement, or notice
- h. Amount of claim
- i. Indebtedness of owner to contractor
- j. Payment; waiver and estoppel
- k. Fraud and bad faith
- l. Priorities

a. In General

In a proceeding to enforce a mechanic's lien, the general rules regulating the admissibility of evidence in civil actions ordinarily are applicable.

The general rules governing the admissibility of

63. Wash.—Pacific Lumber & Timber Co v Dailey, 111 P. 868, 40 Wash 566

64. Md.—Maryland Brick Co v Dunkerly, 36 A. 761, 85 Md 199.

65. S.D.—Jensen v. Griffin, 188 N.W. 761, 41 S.D. 30

66. Iowa.—Cedar Rapids Sash & Door Co v Heinbaugh, 168 N.W. 170, 188 Iowa 1286.

67. Cal.—Greely v Noble, 181 P. 666, 40 Cal App 628

68. Fraud

Subcontractors, seeking to avoid contract by which they waived liens on ground that it was obtained by fraud and to foreclose materialman's lien notwithstanding such waiver, had burden of proving such fraud.—Baird v Lasey, 161 P.2d 996, 71 Cal App 3d 142

69. Mich.—Gottesman v. United

Sav. Bank, 289 N.W. 250, 291 Mich 551.

70. Ala.—Wahouma Sav. Bank v Southern Plumbing & Heating Co, 134 So 388, 220 Ala 140

Cal.—Owens-Parks Lumber Co. v McCarty, 9 P.2d 310, 121 Cal App 633

Pa.—Roman Catholic High School v. McCann, 91 A. 1051, 246 Pa 28

71. Iowa.—Denniston & Partridge Co v Luther, 188 N.W. 664, 194 Iowa 464.

72. Iowa.—Hoskins v. Carter, 24 N.W. 249, 66 Iowa 638

Ky.—Scheas v Boston, 101 S.W. 442, 125 Ky 535, 31 Ky L. 157

73. Cal.—Hartfield v. Howard, 181 P. 385, 180 Cal 376
40 C.J. p 462 note 97.

Priority between conditional seller and lienor

Mechanic's lien claimant's failure

to offer evidence that it had no notice or knowledge of conditional sale contract, providing that service and comfort stations, erected by seller on land leased by buyer, should not become fixtures, was not fatal to cause of action to foreclose lien, since burden of showing such notice as an affirmative defense was on defendant seller.—R. Barcroft & Sons Co v. Cullen, 20 P.2d 665, 217 Cal. 708.

74. Ala.—Leftwich Lumber Co v. Florence Mut Bldg Loan & Savings Ass'n, 13 So 48, 104 Ala 584

75. N.D.—Robertson Lumber Co v Clarke, 138 N.W. 984, 24 N.D. 134

76. N.C.—Raeford Lumber Co v Rockfish Trading Co, 79 S.E. 627, 183 N.C. 314

77. Mo.—Langdon v Kleeman, 211 S.W. 877, 278 Mo 236.

evidence in civil actions ordinarily are applicable in proceedings to enforce a mechanic's lien.⁷⁸ Any evidence which is otherwise competent is admissible where it tends to establish claimant's cause of action⁷⁹ or defendant's defense,⁸⁰ but it must not be irrelevant or immaterial.⁸¹ Where the statute requires that an action to enforce the lien must be brought within a certain time after the filing of the claim or, if credit is given, within a certain time after the expiration of such credit, evidence concerning the time for payment is admissible to show that credit was given to the materialman.⁸²

Right to sue. A deed of assignment for the benefit of creditors from the lienor to plaintiff is admissible to show the right of plaintiff to sue, although there is a discrepancy between the amount stated therein and the amount claimed by the assignee.⁸³

b. Reliance on Credit of Property

Evidence bearing on the question whether work was performed or materials furnished in reliance on the credit of the property is admissible in an action to enforce a mechanic's lien.

In a proceeding to enforce a mechanic's lien, evidence bearing on the question whether work was performed or materials furnished by claimant in reliance on a lien or on the credit of the building or improvement is admissible.⁸⁴ Where defendant denies that the work has been done and materials furnished on the credit of the building, claimant's books of original entry are admissible for the purpose of showing that the charges had been made against the particular building which is the subject of the lien.⁸⁵ On the other hand, declarations of the contractor that materials are purchased for a

certain building, although made at the time when they are obtained, are not competent to show as against the owner that the material was sold on the credit of the building.⁸⁶ The fact that a materialman delivered a part of the material on the premises sought to be charged with a lien is not in itself evidence that it was sold to the contractor on the credit of the building.⁸⁷

c. Property or Interest Subject

In a proceeding for the enforcement of a mechanic's lien, evidence bearing on the question of the property or interest subject to the lien is admissible.

In a proceeding to enforce a mechanic's lien, evidence tending to show the quantity of property to which the lien may attach is admissible.⁸⁸ On the question whether a tract of land has been subdivided into lots, the testimony of the owner as to his intention may be considered,⁸⁹ as may evidence of his acts in staking off the lots, or in laying out a street, or conveyances of other lots in the tract.⁹⁰ The deed of conveyance to defendant may be introduced as evidence of ownership,⁹¹ and other evidence bearing on the question which is raised by the pleading and is properly an issue in the proceeding is admissible,⁹² but the ownership involved being that which existed at the time the lien attached, evidence of ownership at time of trial is irrelevant.⁹³

On the other hand, where the title is not in issue under the complaint, defendant's interest only, whatever that may be, being affected by the sale, evidence of an outstanding or paramount title is inadmissible.⁹⁴ If the property has been fraudulently conveyed, the petitioner may treat either the grantor or the grantee as the owner in the foreclo-

78. Pa.—Church v Davis, 9 Watts 304

Evidence admissible under pleadings see supra § 307

79. Ala.—Wood Lumber Co v Greathouse, 148 So 125, 226 Ala 644

Tex.—Sloan Lumber Co v Davis, Civ App, 19 SW 2d 355, error refused

40 C J p 462 note 6

80. Mont.—Rogers-Templeton Lumber Co v Welch, 184 P. 838, 56 Mont 321

40 C J p 462 note 7.

81. Cal.—Mitchell v Shoreridge Oil Co, 75 P 2d 110, 24 Cal App 2d 382, hearing denied 77 P 2d 221, 24 Cal App 2d 382—Interstate Lumber Co v Loop Bldg Co, 275 P 262, 97 Cal App 64

Mo.—Masterson v Roberts, 78 SW 2d 856, 336 Mo 158, 97 A L R 862

N.C.—Grier-Lowrance Const Co. v.

Winston-Salem Journal Co, 151 S E 631, 198 NC 273

Okl.—Pepin v W R Thompson & Sons Lumber Co, 1 P 3d 714, 150 Okl 295.

Pa.—Moss & Blakeley Plumbing Co v Schauer, 28 A.2d 323, 150 Pa. Super 318

Tex.—Continental Supply Co v Forrest El Gilmora Co of Texas, Civ App, 55 SW 2d 622, error dismissed—Lancaster v Whaley Lumber Co, Civ App, 18 SW 2d 796, error dismissed—Galbraith-Foxworth Lumber Co v Long, Civ App, 5 SW 2d 162, error refused 40 C J p 462 note 8

82. Wash.—Edwards & Bradford Lumber Co v Matthews, 294 P 964, 160 Wash 58

83. DC.—Mazza v Russell, 47 App DC 87.

84. Pa.—Garrison v Van Luven, 67 Pa Super 413

Necessity of reliance on credit of property see supra § 46.

85. Pa.—Garrison v Van Luven, supra.

86. Mo.—Crane Co v Neel, 77 SW 766, 104 Mo App 177

87. Mo.—Crane Co v Neel, supra

88. Mass.—Pollock v Morrison, 57 NE 326, 176 Mass 83

40 C J p 462 note 22

89. Mass.—Donnelly v. Butler, 102 NE 917, 216 Mass 41

90. Mass.—Donnelly v. Butler, supra

91. Ala.—Heady v. Pool, 130 So 329, 221 Ala 619

Mo.—Badger Lumber Co v Muehlebach, 83 SW 546, 109 Mo App 646.

92. Md.—Wilson v. Merryman, 43 Md 328

40 C J p 462 note 28

93. NY.—Coats v Dickenson, 5 Alb. L J 333

94. Wis.—Cook v Goodyear, 48 N. W 860, 79 Wis 606.

sure of his lien, and, if the former, then claimant assumes the burden of showing that the conveyance was fraudulent, and evidence in this behalf is admissible.⁹⁵ As bearing on the question whether the ownership of property is in the wife, a husband may be asked whether he had conveyed the property to her,⁹⁶ but a question as to who prepared the deed is irrelevant.⁹⁷ Where a proper acknowledgment by the husband and wife to the original contract is required by statute before any lien can be established against the homestead, it is error to refuse to permit the husband and wife to introduce evidence that they had not acknowledged the original contract.⁹⁸

d. Delivery and Use of Material

In a proceeding to enforce a mechanic's lien, evidence is admissible to prove the amount, value, and kind of material furnished by the claimant.

In a proceeding for the enforcement of a mechanic's lien, claimant may establish the amount, value, and kind of material furnished by him,⁹⁹ and prove that material was purchased for, and was used in, the construction of improvements on the land described.¹ The contractor's receipt for materials is admissible in a suit by the materialman to enforce his lien which arises under the statute merely on furnishing to one who is building for the owner.²

A charge in claimant's book which shows merely a delivery of material to its employee for delivery to defendant at another point is not competent to establish such delivery.³ The declaration of the contractor that materials are purchased for a particular building, although made when they are ob-

tained, is not evidence against the owner of the land of the use of the materials therein.⁴

Material furnished for several buildings Unless there is evidence to show for which one of several buildings materials sold and charged in a joint account were furnished, such account is inadmissible.⁵

e. Agreement or Consent of the Owner

Evidence as to the nature and terms of the contract under which the work was done or materials furnished is admissible in a proceeding to enforce a mechanic's lien.

In a proceeding to enforce a mechanic's lien, evidence as to the nature and terms of the contract under which the work was done or materials furnished is admissible.⁶ As in other cases evidence is not admissible to contradict or vary the terms of a written contract,⁷ and, where a written contract is not merely collateral and incidental to the issues, but is the basis of the right set up, it must be produced or its absence must be accounted for before secondary evidence of its terms may be received.⁸

Evidence which tends to show that work was done at the request of the owner is admissible,⁹ and, if it appears that the account on plaintiff's books is against the contractor, plaintiff may introduce evidence to explain how this was so consistently with the theory of the owner's direct liability.¹⁰ Bills rendered to one charged with materials may be introduced in evidence as bearing on the issue as to whom the credit was extended, on behalf of defendant to whom such materials were not charged.¹¹ Evidence as to the doing of other work is inadmissible to show employment by defendant to do the

95. Mass—Amidon v Benjamin, 128 Mass 276

96. Ala—Saunders v Tuscumbia Roofing & Plumbing Co., 41 So 932, 148 Ala. 519

97. Ala—Saunders v Tuscumbia Roofing & Plumbing Co., supra

98. Tex—Hicks v Wallis Lumber Co., Civ App., 70 SW 2d 440

99. Ala—Wood Lumber Co v Greathouse, 148 So 125, 236 Ala 644—Guarenire v Bessemer Lumber Co., 106 So 49, 214 Ala 8
40 C J p 463 note 34

1. Kan—Fairbanks v Simmons, 173 P 277, 103 Kan 302
40 C J p 463 note 35

Railroad's records showing date of shipment and delivery of materials were competent—Atlas Supply Co v McCurry, 156 S.E. 91, 199 NC 799.

2. Md—Treusch v Shryock, 51 Md 162

40 C J p 463 note 36

Delivery tickets are admissible—Wood Lumber Co v Greathouse, 148 So 125, 236 Ala 644—40 C J p 463 note 36 [a]

3. Idaho—Valley Lumber & Mfg Co v Nickerson, 93 P 24, 13 Idaho 682

4. Mo—Deardorff v Everhart, 74 Mo 37—Crane Co v Neel, 77 SW 766, 104 Mo App 177

5. Pa—Chambers v. Yarnall, 15 Pa 265

6. Ala—Guarenire v Bessemer Lumber Co., 106 So 49, 214 Ala 8
Tex—Baker v. Powell, Civ App., 105 SW 2d 289

40 C J p 463 note 42

As to mortgages provisions of roofing contract regarding attorney's

fees and price of work and material were res inter alios acta—Becker Roofing Co v Jones, 144 So 865, 225 Ala 638

7. Minn—Justus v Myers, 71 NW 667, 68 Minn 481
40 C J p 464 note 43
Parol or extrinsic evidence affecting writings generally see Evidence §§ 851-1015

8. Ala—Trammell v Hudmon, 6 So 4, 86 Ala 472
40 C J p 464 note 44
Secondary evidence generally see Evidence §§ 776-850

9. Md—Miller v. Barroll, 14 Md 173
40 C J p 464 note 45.

10. Ala—Trammell v Hudmon, 6 So 4, 86 Ala 472
40 C J p 464 note 46

11. Wis—Wright v Hood, 5 NW 488, 49 Wis 235.

particular work for which the recovery is sought ¹²

In an action by a subcontractor or materialman, the contract with the general contractor is admissible in evidence,¹³ and, although a materialman has a direct lien, irrespective of any contract between him and the owner, which arises on furnishing to one having a contract with the owner, evidence of the nature of the contract between the owner and contractor is admissible ¹⁴ The specifications of a contract for the erection of a building are immaterial on the question of whether or not certain work was included, where a materialman dealt directly with the owner who could enlarge or alter the plans as he saw fit ¹⁵ Under an answer denying that a codefendant was contractor or agent, the owner may show that plaintiff was the contractor.¹⁶

Where the contract is with a lessee, claimant is entitled to show that the materials for which he makes a claim of lien were either in whole or in part for the specific work for which the owners had given consent under the terms of the lease ¹⁷ Where the case is tried on the theory that the owner's agent orally authorized the tenant to have the work done, the original contract between the agent and tenant for the lease of the premises is immaterial.¹⁸

Contract with agent. While, as in other cases, the declarations of an alleged agent are not competent to prove his agency,¹⁹ his testimony is competent as to the fact and extent of his agency.²⁰ Where the agency is conceded, the fact of orders by the agent for delivery of material may be shown ²¹ Proof that a defendant contracted as an undisclosed agent for his codefendant has been held inadmissible under an allegation of a joint contract.²²

Contracts as to married woman's property. Evi-

dence as to the acts and conduct of the husband may be admitted to show his agency in making a contract for repairs on the wife's property.²³

Knowledge and failure to object. If the owner is to be charged by his consent to the work being done, all matters tending to prove his knowledge of the erection of the building are admissible ²⁴

f. Performance of Contract

In a proceeding for the enforcement of a mechanic's lien, evidence is admissible which tends to establish or disprove performance of the contract alleged as the foundation of the lien.

In a proceeding to enforce a mechanic's lien, evidence is admissible which tends to establish²⁵ or to disprove²⁶ performance of the contract alleged as the foundation of the lien ²⁷ On the other hand, evidence is not admissible to show that certain materials used were more suitable than others which the contract required.²⁸ A default judgment in favor of the materialman against the owner is admissible in proceedings to establish a mechanic's lien as against a mortgagee ²⁹

Architect's certificate In an action by a subcontractor, the issuing by the architect to the principal contractor of a certificate as to the completion of certain work, including the work for which the lien was filed by the subcontractor, in order to enable the principal contractor to make a settlement with the owner of the premises, is relevant on the question of performance by the subcontractor, and may be regarded as an admission by the principal contractor and the architect that the contract of the subcontractor has been substantially performed.³⁰

g. Lien Claim, Statement, or Notice

In a proceeding for the enforcement of a mechanic's lien, a notice or claim of lien as required by statute is admissible to show compliance with such requirement.

12. Md—Miller v Barroll, 14 Md 173

13. Ill—Universal Portland Cement Co v Sisters of Charity, 216 Ill App 163

14. Md—Treusch v Shryock, 51 Md 162
40 C J p 464 note 50

15. Pa—Porter Screen Mfg Co v Hunter, 69 Pa Super 22

16. Or—Peerless Pac Co v Manning, 175 P 429, 89 Or 691

17. N Y—McNulty v Offerman, 137 N Y S 27, 152 App Div 181.

18. Mont—Arnold v Genzberger, 31 P 2d 296, 96 Mont 358

19. Ark—Arkmo Lumber Co v Cantrell, 252 S W. 901, 159 Ark 445.

20. Ark—Arkmo Lumber Co. v. Cantrell, supra

21. Cal—Linck v Johnson, 66 P 674, 6 Cal Unrep Cas 817
40 C J p 464 note 58

22. Mo—Coen v Battman, 150 S W 1137, 166 Mo App 671

23. Ala—Saunders v Tuscumbia Roofing & Plumbing Co, 41 So 982, 148 Ala 519
40 C J p 465 note 60

Indebtedness of claimant to husband
Rejection of paper writing showing that materialman suing to establish lien against wife's property was indebted to husband was proper—Herrin v Burnett, 114 So 406, 217 Ala 23

24. Minn—Althen v Tarbox, 50 N.

W 1018, 48 Minn 18, 31 Am S R 616

40 C J. p 465 note 61.

25. Wis—Williams v Lane, 58 N. W 77, 87 Wis 152

40 C J. p 465 note 63

26. Cal—Hagman v Williams, 35 P 1111, 88 Cal 146
40 C J p 465 note 64

27. N J—Adamski v Naurot, 138 A. 305, 5 N J Misc 762.

28. N Y—Schultze v Goodstein, 73 N E 21, 180 N Y 248

29. Colo—Chicago State Bank v. Plummer, 129 P 819, 54 Colo 144.

30. N Y—Schillinger Fire-Proof Cement & Asphalt Co v Arnott, 46 N E 956, 152 N Y 534.

In a proceeding to enforce a mechanic's lien, a notice or claim of lien as required by the statute is admissible in evidence to show compliance with such requirement³¹. The statement itself is held to be at most only evidence of its filing and of its own contents as touching its own sufficiency³²; it is not in itself competent evidence of the facts required to be stated therein³³ and cannot amount to prima facie proof of such facts³⁴. Under a statute providing that in all suits on account a verified itemized statement of the account may be competent evidence of its correctness, a lien statement cannot be evidence of the value or contract price of the materials furnished or of the value of the building erected where it is not itemized.³⁵

A memorandum not recorded with the lien is not of itself evidence.³⁶ Where there is no issue as to the validity and sufficiency of the lien claim, the original claim is properly excluded from evidence³⁷. The lien claim is not inadmissible because of a defect which merely affects the priority of the lien³⁸.

Record. Where the signature and verification of a lien claim are sufficient to entitle it to be filed with a public officer as required by statute, it becomes a public record and entitled to be received in evidence under the rules relating to such records.³⁹ The record, however, is not competent to prove anything other than could be proved by the claim itself⁴⁰.

Extrinsic evidence. Evidence may be introduced for the purpose of determining the sufficiency of description in the lien claim, including the purpose

for which the description is required, and the persons who are to be affected by it.⁴¹ Where, under the statute, a description of the premises in a notice of lien is sufficient if the property can be identified therefrom, an imperfect or improper description of property in a mechanic's lien notice may be aided by extrinsic evidence where proper averments are found in the complaint.⁴² The character of the building and its intended use may be shown to identify the land mentioned in the lien notice.⁴³

Extrinsic evidence cannot be resorted to in order to supply a description omitted from the notice of lien,⁴⁴ and the omission of a statement in the notice of lien of the value or agreed price of the labor performed or materials furnished as required by statute cannot be supplied by extrinsic evidence.⁴⁵ Where an inspection of the lien claim itself presents a doubt as to whether or not it was sworn to by claimant, it is proper to produce proof aliunde that the statement was in fact sworn to.⁴⁶

Service of notice of intention. Claimant is entitled to prove the facts showing or tending to show that notice by a subcontractor of an intention to file a lien was served,⁴⁷ and was served on a person in possession.⁴⁸

Proof of notice. In a suit to establish a lien against a married woman's separate property, her testimony that she received notice of the lien and that her husband acted as her agent respecting it is admissible.⁴⁹

31. Cal.—*Corpus Juris* cited in *San Pedro Lumber Co v Kreis*, 295 P. 890, 891, 111 Cal App 466
Wash.—*Ogilvy v. Peck*, 93 P 2d 289, 200 Wash 122
40 C J p 466 note 68.

Where there was no denial of averments in mechanic's lien of sale and delivery of material by subcontractor to the contractor, it was proper to permit lien to be read into evidence, and such reading dispensed with proof of the sales and deliveries—*F W. Wint Co v Snyder*, 7 Pa. Dist & Co 684, 11 Lehigh Co.L.J. 349

Proof by other evidence

It is proper to introduce in evidence lien statements filed by plaintiff as required by law, but everything for which such statements are evidence may be proved by other evidence—*Lewis v. Red*, 152 P 2d 690, 194 Okl 432

32. Iowa.—*Hutton v. Maines*, 28 N. W. 9, 68 Iowa 650
40 C J p 466 note 69

For purpose of proving date of its filing and its proper form lien statement was admissible—*Claude Ricker*

Lumber & Paint Co v. Barger, 158 P 2d 1021, 195 Okl 504

33. Pa.—*Mohnkern v Pivrotto*, 20 Pa Dist & Co 218
40 C J p 466 note 70

34. Neb.—*Nebraska Material Co v Seelig*, 125 NW 608, 86 Neb 387
40 C J p 466 note 71

35. Ala.—*Lavergne v Evans Bros Constr Co*, 52 So 318, 166 Ala 289

36. Ga.—*Lawson v Coates*, 56 Ga. 379.

40 C J p 466 note 73

37. Cal.—*Schalich v Bell*, 161 P 983, 173 Cal. 773

38. Cal.—*Pugh v Moxley*, 128 P. 1087, 164 Cal 371

39. Cal.—*D I Nofziger Lumber Co v Solomon*, 110 P 474, 13 Cal App. 621

40 C J p 466 note 76
Admissibility of public records generally see evidence § 626 et seq.

40. Neb.—*Sabin v Cameron*, 117 N. W. 95, 82 Neb 106.
40 C J p 466 note 77.

41. Cal.—*Union Lumber Co v Simon*, 89 P 1077, 150 Cal 751.

42. Ind.—*Isbell Lumber & Coal Co v Marchesseau Plumbing Co*, 11 NE 2d 518, 104 Ind App. 373
40 C J p 466 note 82

43. Ind.—*Brannum-Keene Lumber Co v Cole*, 119 NE 721, 67 Ind App 667.

44. Ind.—*McNamee v. Rauck*, 27 N E 423, 128 Ind 59—*Windfall Natural Gas, Mining & Oil Co v. Roe*, 84 NE 996, 41 Ind App. 687

45. N.Y.—*Pascual v Greenleaf Park Land Co*, 157 NE 144, 245 NY 294, followed in *Goldberger-Raabin, Inc. v 74 Second Ave Corp*, 284 NYS 802, 226 App Div. 787, reversed on other grounds 169 NE 405, 252 N.Y. 336

46. Ill.—*Glencoe State Bank v. Cole*, 285 Ill App 158

47. Pa.—*Merritt v. Poll*, 80 A. 1116, 231 Pa 611.

48. Pa.—*Merritt v. Poll*, supra.
40 C J p 466 note 86

49. Tex.—*Johnson v Griffiths*, Civ App, 135 S.W. 683.

Completion of work or furnishing of material
Evidence as to the time of completion of the work or the furnishing of material is admissible on the question of the timely filing of the lien.⁵⁰ Receipts given by the materialman pending delivery of material are admissible on the question whether a debt accrued on the delivery of each item or whether the understanding was that there should be no debt until the entire quantity was delivered.⁵¹ Although a contract may be void under the statute because it is not recorded, it may still be used as evidence to determine the character of the building to be erected and thereby furnish the test by which it can be ascertained when the building was completed.⁵² A statement of account which is not shown to have been rendered to the owner is not admissible to establish the date of completion.⁵³ The itemized lien account is not admissible to show when the last material was furnished.⁵⁴ Where an affidavit for a lien fails to state either the date when the last labor was performed or material furnished, or that it was performed or furnished within the required number of days, the deficiency cannot be supplied by parol evidence.⁵⁵

h. Amount of Claim

Any competent evidence bearing on the proper amount of the claimant's recovery is admissible in a proceeding to enforce a mechanic's lien.

In a proceeding for the enforcement of a mechanic's lien, any evidence which is otherwise competent is admissible which bears on the proper amount of claimant's recovery.⁵⁶ Where, under the contract, that part of the work and material which is lienable may be definitely distinguished from the rest and the value or price thereof definitely fixed, evidence is admissible for that purpose.⁵⁷ Where,

the owner having gone into possession and retained and used the fruit of plaintiff's labor and material, plaintiff is entitled to recover the contract price less the value of the work omitted, he may introduce evidence tending to show the relative proportions and value of the work done and the work omitted.⁵⁸ Estimates of the amount of work done, made by one person, cannot be proved by another person.⁵⁹ In a proceeding against the owner and the contractor, the contract between plaintiff and the contractor is admissible as evidence of the contract price between those parties.⁶⁰ Defendant may show that plaintiff's charges embraced a greater quantity of material than could have been used in the building, where there is a duty on the materialman to inquire into the nature of the building on the credit of which he undertakes to furnish material.⁶¹

Settlement Evidence of a settlement made between the parties is admissible to show the balance due.⁶²

Quantum meruit Evidence as to the reasonable value of materials furnished is properly excluded where such value is a matter of special contract provision,⁶³ but, if no more than the contract price is allowed, the admission of such evidence is at most harmless error.⁶⁴ Where the contract is abandoned, defendant may show the value of the work, taking into consideration the contract price, and the sum required to complete the contract.⁶⁵

Book accounts and explanations thereof Claimant's books of original entry are competent evidence of the items and the amount of the debt claimed, and he may show by evidence the other facts which entitle him to recover.⁶⁶ The account as it appears on claimant's books may be ex-

50. Cal.—Barker v. Doherty, 31 P 1117, 97 Cal 10

51. Pa.—Pratt v Campbell, 24 Pa 184

52. Cal.—Barker v Doherty, 31 P 1117, 97 Cal 10.

53. Ga.—Young v Landers, 119 S E 464, 31 Ga App 59

54. Mo.—House Wrecking Salvage & Lumber Co v Gattrell, App, 304 SW 52

55. Ohio—Ulmer v Portage Const & Finance Co, 26 Ohio N P, NS, 257

56. Tex.—Uvalde Paving Co v Townsend, Civ App, 92 SW 2d 1128 40 C J p 467 note 96

Ex parte affidavit

In suit to foreclose materialman's lien, wherein defendants claimed that there was due them from plaintiff additional sums paid by them which

under contract of construction were to be paid by plaintiff, an ex parte affidavit of one of defendants itemizing extra costs was improperly admitted and could not be considered in determining extra costs for which defendants were entitled to recover—Renuart Lumber Yards v Finn, 198 So 828, 145 Fla 256

57. Ill.—Fehr Const Co v Postl System of Health Bldg, 124 NE 315, 288 Ill 634

58. Pa.—Garrison v Van Luven, 57 Pa Super 418

59. Mont.—Cook v. Gallatin R Co, 72 P 678, 28 Mont 340 40 C J p 467 note 1

60. Mo.—Hilliker v Francisco, 65 Mo 598

Pa.—Cattianach v Ingersoll, 1 Phila. 285

61. Pa.—Dickinson College v Church, 1 Walts & S 462 40 C J p 467 note 3

62. Wash.—Powell v Nolan, 67 P 712, 68 P 389, 27 Wash 318 40 C J p 467 note 4

63. Mass.—Reid v Berry, 59 NE 760, 178 Mass 260 40 C J p 467 note 5

64. NY.—Horgan v. McKenzie, 17 NYS 174

65. Cal.—McDonald v Hayes, 64 P 850, 132 Cal. 490

66. Mo.—Leach v Bopp, 12 SW 2d 512, 223 Mo App 254 40 C J p 467 note 8

Fully verified itemized statements of account were properly admitted, notwithstanding discrepancy as to year of sale and delivery between statement proved and bill of particulars furnished by plaintiff, there

plained⁶⁷ Such books of entry are admissible on the question of the application of moneys to an unsecured debt, where the debtor and creditor have not made the application, to show the existence of such debt⁶⁸

i. Indebtedness of Owner to Contractor

Evidence of the condition of accounts between the owner and contractor is admissible in a proceeding to enforce a mechanic's lien where the claimant's lien rights depend on the fact that something is due the contractor from the owner.

In a proceeding to foreclose a mechanic's lien, where plaintiff's lien rights depend on the fact that something is due the contractor from the owner at the time it is sought to have the lien attach, as considered supra § 174, the condition of the accounts between the owner and contractor is material, and evidence relating thereto is admissible⁶⁹ Likewise, where under the statute materialmen and subcontractors have a lien only to the extent of the contract price, the owner may show that the contract price has been paid and that plaintiff materialman received his pro rata portion⁷⁰ So, evidence tending to prove other valid liens is admissible as bearing on the amount recoverable by claimant,⁷¹ and, as bearing on the amount for which the owner may be held, he may prove what he has paid to other subcontractors during the time within which they were entitled to file liens⁷² Evidence on the part of the owner that a sum paid by him directly to the principal contractor was used in paying for

labor and material is admissible⁷³

In a proceeding by a subcontractor the owner may state that payments made by him were not larger in amount than could properly be considered fair payments for work and materials then actually furnished⁷⁴ In order to defeat an assignment by the contractor made before the notice of liens of subcontractor, it may be shown that there was a partnership between the contractor and his alleged assignee.⁷⁵ Notwithstanding the contract is in writing, parol evidence of what was actually paid the contractor is admissible⁷⁶

Where the lien of a subcontractor, materialman, or laborer is not affected by any payment to the contractor, in an action by a materialman, or the like, to enforce his lien, evidence of payment by the owner to the contractor is inadmissible⁷⁷

Deductions for faulty performance or for cost of completion. Where the contractor has abandoned the work before completion, it is competent, in an action by the subcontractors, for the owner to prove how much of the work the contractor left undone, and what it had cost to complete it in the manner provided by the contract⁷⁸ Where the owner claims damages for defective construction, evidence as to the cost of remedying defects is admissible on the issue of substantial performance⁷⁹ Where it is conceded that the principal contractor has not performed, proof of the negligence of the contractor and the consequent destruction of the building

being no dispute as to true date of delivery—Guarenne v Bessemer Lumber Co, 106 So 49, 214 Ala 8

Ledger sheets showing debits and credits of account against defendants were relevant to issue of owners' personal liability—Guarenne v. Bessemer Lumber Co, supra

Time book, kept by timekeeper who entered in time book from day to day number of hours of labor each man performed, was admissible for whatever it showed in relation to number of hours of labor performed by such workers, as against contention that book was inadmissible on ground that it did not show contractors time or material furnished—Dybvig v Willis, 82 P 2d 95, 59 Idaho 160

What constitutes book of original entry

Where mechanic's lien claimant alleged that he delivered, to building, materials described and furnished labor as set forth in exhibit consisting of true and correct copies of claimant's books of original entry, but exhibit did not state days when respective materials were delivered or on which laborers worked, exhibit

showed that it was not a copy of "book of original entry" within legal meaning of that term such as could be admitted on trial without other proof of sale and delivery of materials or performance of labor—Hamilton v Means, 38 A 2d 528, 155 Pa Super. 245

67. Iowa—Green Bay Lumber Co v Thomas, 76 NW 749, 106 Iowa 420

40 C J p 467 note 9.

68. Pa—McQuaide v. Stewart, 48 Pa 198.

69. NC—Parsley v. David, 10 SE 1028, 106 NC 225

40 C J p 468 note 11

70. Okl—Treece v Carpenter, 222 P 230, 93 Okl 21

40 C J p 468 note 13

Payment by contractor to subcontractor

In action against owner to enforce subcontractor's lien, evidence of owner's payments to contractor, who in turn paid money to subcontractors, etc, during the sixty days within which they otherwise would have been entitled to file liens, was admissible—Uhrich Millwork, Limited,

v McGuire, 289 P 264, 143 Okl 16—J. B Klein Iron & Foundry Co v A B Mays & Co, 184 P 577, 76 Okl 177.

71. Ark—Marianna Hotel Co v. Livermore Fly & Machine Co, 154 SW 952, 107 Ark 245

72. Kan—Fossett v Rock Island Lumber & Mfg Co, 92 P 833, 76 Kan 428, 14 L R A, N S, 918

73. Ark—Cost v Newport Builders' Supply Hardware Co, 108 SW 509, 85 Ark 407, 14 Ann Cas 112

74. Conn—Kelly v. Alling, 80 A 782, 84 Conn 487

40 C J p 468 note 17

75. Miss—Jake Strickland Lumber Co v Rheinhardt, 76 So 642, 115 Miss 749

76. Ga—Burton v Meinert, 71 SE 870, 136 Ga 420

77. Mo—Better Roofing Materials Co v Sztukowski, App, 183 SW 2d 400

78. NY—Lind v Braender, 7 NYS 664, 15 Daly 370

40 C J p 468 note 20

79. Mass—Pelatowski v Black, 100 NE 831, 213 Mass 428.

may be material as showing that the destruction was not due to the fault of the owner⁸⁰

Evidence that the original contractor after a partial destruction by fire of the building before its completion carried away nearly all of the material on the lot is not admissible as against a materialman, since it does not tend to show the fault of the original contractor in abandoning the contract or that less than the amount claimed by the materialman was due to him⁸¹ Evidence that by plaintiff's delay defendant had lost a tenant is properly excluded where there is no evidence of notice to plaintiff that the building was to be completed by a specified time for occupation by any particular tenant⁸²

j. Payment; Waiver and Estoppel

In a proceeding to enforce a mechanic's lien, any evidence otherwise competent is admissible to show a payment of the claim or a waiver of, or an estoppel to assert, the lien.

In a proceeding for the enforcement of a mechanic's lien, any evidence otherwise competent tending to show a payment of the claim asserted may be admitted⁸³ Evidence may also be admitted to show a waiver⁸⁴ or estoppel to assert⁸⁵ a mechanic's lien The owner's declarations to the lien claimant as to whether the building has been completed are admissible as a foundation of an estoppel to deny the timely filing of the lien⁸⁶ In the absence of an allegation of fraud or mistake, proof of what is said before signature of an absolute and unconditional release of a lien is not admissible⁸⁷ Evidence as to the failure of consideration for an

agreement to release and waive a mechanic's lien is admissible notwithstanding the agreement was under seal⁸⁸

k. Fraud and Bad Faith

Evidence bearing on the question of fraud or bad faith is admissible in a proceeding to enforce a mechanic's lien.

In a proceeding to enforce a mechanic's lien, evidence may be admitted to show fraud or bad faith⁸⁹ or the absence thereof⁹⁰

l. Priorities

Evidence bearing on the question of priorities as between a mechanic's lien and other liens and encumbrances is admissible in a proceeding to enforce the mechanic's lien.

In a proceeding to enforce a mechanic's lien, evidence, which is otherwise competent, is admissible as bearing on the question of priorities as between the mechanic's lien and other liens and encumbrances⁹¹ Where the complaint alleges that defendant took title subject to plaintiff's lien, evidence that defendant's title is derived through foreclosure of a prior mortgage is admissible⁹²

§ 310. Weight and Sufficiency

- a In general
- b Reliance on credit of property
- c Property or interest subject to lien
- d Delivery and use of material
- e Agreement or consent of owner
- f Performance of contract

80. Iowa—Kawneer Mfg Co v Renfro, 173 NW 599, 186 Iowa 1344

81. Cal—Butler v Ng Chung, 117 P 512, 160 Cal 435, Ann Cas 1913A 940

82. Pa—Murphy v Bear, 87 A 854, 240 Pa 448

83. Tex—Kelsay Lumber Co v Crowell, Civ App, 19 SW 2d 368, error dismissed
40 CJ p 468 note 26½

Purpose of payment

In action by materialman to recover for materials, where owner of property pleaded payment, and at trial materialman admitted receiving a check of owner payable to contractor, materialman's evidence that he had merely cashed the check for contractor, and that check was for meeting contractor's pay roll, should have been admitted, as against contention that materialman would thereby be permitted to recover for balance due for cash advanced, instead of balance

due for materials—Schwartz Supply Co v Breen, La App, 179 So 626

84. Tex—De Bruin v Santo Domingo Land & Irrigation Co, Civ App, 194 SW 654
40 CJ p 469 note 31

85. Wis—McGillivray v Cremer, 103 NW 250, 125 Wis 74
40 CJ p 469 note 32

86. Cal—Hubbard v Lee, 92 P 744, 6 Cal App 602

87. Conn—Townsend v Barlow, 134 A 832, 101 Conn 86

88. NY—Carroll McCreary Co v People, 195 NE 675, 267 NY 37

89. NY—Ottwell v Watkins, 6 N YS 518, 15 Daly 308, affirmed 26 NE 752, 125 NY 706,
40 CJ p 468 note 28

90. Mass—Monaghan v Goddard, 53 NE 895, 173 Mass 468
40 CJ p 469 note 29

91. Ill—Fair Play Development Organization v Sarmach, 263 Ill App 598.

Priorities generally see supra §§ 197–215

Evidence held admissible

In action to foreclose materialmen's liens, where trust deed put materialmen on inquiry as to whether beneficiary was obliged to make future advances secured thereby, evidence of oral agreement to make certain future advance was admissible—Lumber & Builders' Supply Co v Ritz, 25 P 2d 1002, 134 Cal App 607

Evidence held inadmissible

In action by holder of mechanic's lien to have liens declared superior to interest of one claiming through sheriff's sale resulting from foreclosure of corporation employees' liens, over which mechanics' liens had priority, trial court properly excluded evidence relating to value of improvements placed on realty after foreclosure of mechanics' liens—Watson v Strohl, 46 NE 2d 204, 220 Ind 672

92. Conn—Weinstein v Montowese Brick Co, 99 A 488, 91 Conn 165.

- g Lien claim, statement, or notice
- h. Amount of claim
- i. Indebtedness of owner to contractor
- j. Payment
- k. Fraud or bad faith
- l. Waiver and estoppel
- m. Priorities

a. In General

in a proceeding to enforce a mechanic's lien the bur-

den of proof on the issues involved must be supported by a preponderance of the evidence

As in other civil actions, the burden of proof on the issues involved in a proceeding for the enforcement of a mechanic's lien must be supported by a preponderance of the evidence⁹³ Doubtful questions must be resolved in favor of defendant⁹⁴

In various cases the weight and sufficiency of the evidence have been considered with respect to sundry matters,⁹⁵ such as the right to a lien in general⁹⁶ or have been considered with respect

93. Ill—Mallinger v Shapiro, 161 N E 104, 229 Ill 629

La.—Weeks Supply Co v Gulf Refining Co, App, 180 So 883

Or—Prouty Lumber & Box Co v McGuirk, 66 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418

40 C J p 469 note 44

94. Wash—Westinghouse Electric Supply Co v Hawthorne, 150 P 2d 65, 21 Wash 2d 74

95. Ill—Lord Lumber & Fuel Co v. Hancock, 278 Ill App 497

Ky—Whitaker v Howell & Goins, 143 S W 2d 179, 283 Ky 738

La.—Brown v Berry, 129 So 137, 170 La 706

Nev—Friendly v Larsen, 144 P 2d 747, 82 Nev 135

Tex—Rifkin v Overbey, Civ App, 171 S W 2d 175, error refused

Assignment

Evidence held insufficient

Mo—Gill v Harris, 24 S W 2d 673, 224 Mo App 717

Tex—Hill v Engel, Civ App, 89 S. W 2d 219, error refused

Insufficiency of bond

Evidence supported court's finding that neither bondsman on building contractor's bond was good and sufficient surety—Sudden Lumber Co v Singer, 284 P 477, 103 Cal App 386

Intervention

In action against partners to foreclose mechanic's lien growing out of drilling of oil well, evidence sustained judgment for intervener against one of partners for casing rent and expense of removal—Thompson v. Matthews, 183 P 2d 216, 163 Kan 484

Personal judgment against contractor

Evidence held sufficient—Wood Lumber Co v Greathouse, 148 So 125, 236 Ala 644

Removability

Evidence held sufficient to show that improvement was removable

Iowa—Anfinson v Cook, 276 N W 762, 224 Iowa 833

Tex—Wallace Gin Co v Burton-Lingo Co, Civ App, 104 S W 2d 891

Status of claimant

In lumber company's action to foreclose lien for materials used in

construction of defendants' dwelling house, evidence failed to show that plaintiff was general contractor, but that plaintiff merely agreed to assist defendants in their building program and supervise construction details—Columbia Lumber Co v Bush, 126 P 2d 534, 18 Wash 2d 657

96. Certainty of proof required

Ill—Hyde Park Inv Co v Hyde Park State Bank, 257 Ill App 539

Existence of lien must be clearly established by proof of facts necessary to constitute the lien—Variety Fire Door Co v Hanson-Worden Co, 10 Tenn App 254

Necessary evidence to warrant lien must be adduced—Sol Abrahams & Son Const Co v Osterholm, Mo App, 136 S W 2d 86

Prima facie case held established

Cal—Hauptenthal v Bert L. Perry, Inc, 31 P 2d 1088, 138 Cal App 198 40 C J p 469 note 46 [c]

Prima facie case held not established Ga—Georgia Steel Co v White, 71 S E 890, 136 Ga 492

Verified lien statement is not prima facie proof—Preut v. Lal, 243 P. 927, 116 Okl 184

Evidence held sufficient

(1) To show, or to sustain finding of, right to lien

Ala—Hanna v Bear, 164 So 120, 26 Ala App 572

Ariz—Watson v Murphey, 285 P 1037, 36 Ariz 377

Ark—Ward v Nix, 204 S W 2d 182

—Brannan v Paul Sanders & Son, 144 S W 2d 474, 201 Ark 306—Morrilton Ice & Fuel Co v. Montgomery, 25 S W 2d 15, 181 Ark 180

Ga—Farham v Kennedy, 2 S E 2d 785, 60 Ga App 52—Poythress v Hucks, 193 S E 475, 56 Ga App 657

Ill—Bingaman v Dahm, 30 N E 2d 509, 307 Ill App 432—Lipavsky v 16th St Bldg Corporation, 267 Ill App 85—Klaub v Vokoun, 169 Ill App 434.

Ind—Morris v Pierson & Bro, 168 N E 878, 91 Ind App 288

Ky—Vogt v. Cannon Electric Co, 54 S W 2d 338, 245 Ky 766

La—Madison Lumber Co v Picheloup, 125 So 175, 12 La App 196

Mich—Allard v Swaine, 226 N W. 659, 247 Mich 642

Minn—Lampert Lumber Co v Jepsen, 307 N W 22, 166 Minn 84

Mo—Better Roofing Materials Co v Sztukowski, App, 183 S W 2d 400—Moller-Vandenboom Lumber Co v Boudreau, 85 S W 2d 141, 231 Mo App 1127—Cleary v Siemers-Marshall Electric Co, App, 296 S W 448

Neb—Toews v Schlitt, 253 N W 648, 126 Neb 506—Parler v Sutton, 307 N W 927, 114 Neb 450

Ohio—Lance v Slusher, 59 N E 2d 57, 74 Ohio App 361

Okla—Cowen v T J Stewart Lumber Co, 58 P 2d 573, 177 Okl 266

—Adwon v Ketcham, 37 P 2d 432, 169 Okl 428—Goff v Long-Bell Lumber Co, 286 P 1, 142 Okl 194

Or—Eena Co v Zosel, 99 P 2d 1022, 164 Or 99

Tex—Park Presbyterian Church of Italy v Wm Cameron & Co, Civ App, 38 S W 2d 901, reversed on other grounds Com App, 58 S W 2d 63—Kelsay Lumber Co v Crowell, Civ App, 19 S W 2d 368, error dismissed—Dillard v McGinty, Civ App, 17 S W 2d 167—Mantel v. Mitchell, Civ App, 293 S W. 835—40 C J p 469 note 46 [a]

(3) To show, or to sustain finding, that claimant was not entitled to lien

Ill—Joseph Lumber Co v Tree, 43 N E 2d 885, 315 Ill App 212

Kan—Amsden Lumber Co v Arnsperger, 281 P. 931, 129 Kan 143

Evidence held insufficient

Fla—Chapman v St Stephens Protestant Episcopal Church, 10 So 2d 324, 151 Fla 641

Idaho—Dybvig v. Willis, 82 P 2d 95, 59 Idaho 160

Ind—McTurnan v Dailey, 14 N E 2d 913, 214 Ind 159

Ky—Henry Koehler & Co v Anderson, 289 S W 314, 217 Ky 368—Woods v Constantine, 289 S W 282, 217 Ky. 195

La—Griffith v. Williams, App, 19 So 2d 277

Miss—Deluxe Foods Corporation v Johnson, 174 So 245

Mo—Sol Abrahams & Son Const Co v. Osterholm, App, 136 S W 2d 86

to the timely institution of suit⁹⁷ The filing of the lien claim or statement with the proper officer does not establish the lien, but only establishes the fact that a lien is claimed⁹⁸ In some jurisdictions a claimant who has contracted directly with the owner is not required to prove his claim with the same particularity that would be required to sustain a lien filed by a subcontractor,⁹⁹ but in other jurisdictions the contrary has been held¹

Where the proper steps to establish a lien have been taken, a failure of proof as to certain divisible items claimed will not prevent a recovery as to other items²

b. Reliance on Credit of Property

In a proceeding to enforce a mechanic's lien the evidence must be sufficient to prove that the work was done or the materials furnished in reliance on the credit of the property, where such reliance is an essential basis for the lien

Where, as a basis for a mechanic's lien, it is necessary that the work have been done or materials furnished in reliance on the credit of the property, as considered supra § 46, the evidence in a proceed-

ing to enforce the lien must be sufficient to prove such fact³ The fact that materials are charged to the contractor alone is slight evidence that they are furnished on his credit, but is not prima facie evidence that only the credit of the contractor was relied on⁴ The facts of demand and receipt of a large cash payment, and that certain of the goods have been replevied after delivery to the vendee, are of weight in determining whether the goods were sold on the credit of the building⁵

The method of bookkeeping used by a materialman is not conclusive as showing that credit was given on a general account so as to preclude the assertion of a lien.⁶

c. Property or Interest Subject to Lien

In a proceeding to enforce a mechanic's lien, the evidence must be sufficient to establish the title or interest which it is sought to charge and to show that the premises are such as are subject to the lien.

In a proceeding to enforce a mechanic's lien, the evidence must be sufficient to establish the title or interest which it is sought to charge⁷ and to show

—Holekamp Lumber Co v Skay, App, 65 SW 2d 669—Gill v Harris, 24 SW 2d 673, 224 Mo App 717

NY—Charles S Utterson, Inc, v Snyder, 231 NY S 110, 224 App Div 471—Bay Ridge Plastering Corporation v John B Sweeney & Son Corporation, 44 NY S 2d 166

Tex—Ball v Davis, 18 SW 2d 1063, 118 Tex 534—Dunham v Foust, Civ App, 64 SW 2d 1027, 40 CJ p 469 note 46 [b]

Improvements Lienable

(1) Intent of owner of property as to whether materials furnished became part of freehold as fixture is determined from his conduct and surrounding circumstances, and not alone by his undisclosed purpose or his testimony—Security Stove & Mfg Co v Stevens, 9 SW 2d 808, 222 Mo App 1029.

(2) Fact that owner of premises gave chattel mortgage on gas ranges did not conclusively prevent enforcement of mechanics' liens thereon as fixtures, where owner subsequently gave real estate mortgage covering same property—Security Stove & Mfg Co v Stevens, supra.

(3) Evidence held sufficient to show that improvement was lienable—Willcox Boiler Co v Messier, 1 NW 2d 180, 211 Minn 304

(4) Evidence held sufficient to show that improvement was not lienable—Chicago Title & Trust Co v Swimmer, 6 NE 2d 479, 288 Ill App 618

(5) Evidence held insufficient to show that improvements were lienable—Westinghouse Electric Supply Co v Hawthorne, 150 P 2d 55, 21 Wash 2d 74

97. Timely institution shown
Ill—See Verhoeven v. Ingebrutsen, 205 Ill App 317

Minn—Steele v Vernes, 3 NW 2d 425, 212 Minn 281—Dotsford Lumber Co v Fuller, 212 NW 23, 170 Minn 130

Wash—Edwards & Bradford Lumber Co v Matthews, 294 P 964, 160 Wash 58

Timely institution not shown

Ga—Young v Landers, 119 SE 464, 31 Ga App 59
40 CJ p 469 note 47 [b]

98. Okl—Preuit v Lail, 243 P 927, 116 Okl 184

99. Pa—Murphy v Bear, 87 A 854, 210 Pa 448

1. Mo—Rust Sash & Door Co v Bryant, App, 124 SW 2d 544

2. US—Feick v Stephens, Ohio, 250 F 185, 162 CCA 321, certiorari denied 39 S Ct 8, 248 US 562, 63 L Ed 422

40 CJ p 469 note 49

3. Iowa—Western Electric Co v Iowa Falls Electric Co, 193 NW 556, 196 Iowa 19

40 CJ p 470 note 50.

Evidence held sufficient

(1) To show, or sustain finding, that materials were furnished or work was done on credit of property Minn—A Y McDonald Mfg Co v Luna, 244 NW 804, 187 Minn 240

Mo—Moller-Vandenboom Lumber Co v Boudreau, 85 SW 2d 141, 231 Mo App 1137

Tex—Ross v Fort Worth Nat Bank, Civ App, 30 SW 2d 518, error refused—40 CJ p 470 note 50 [a]
40 CJ p 470 note 50 [a]

(2) To sustain findings and decree that materialman furnishing materials for use of another's land was entitled to judgment against person ordering materials and denying lien against land—Boise-Payette Lumber Co v Bickel, 245 P 92, 42 Idaho 245, 45 ALR 575

(3) To justify finding that labor was performed on sole credit of contractor—Heald v Hodder, 32 P 728, 5 Wash 677

(4) To authorize finding that contractor authorized mechanic's employment and was primarily liable for his labor—Miller v Harmon, Tex Civ App, 46 SW 2d 343

4. Pa—Hommel v. Lewis, 104 Pa. 465

5. Del—McCartney v Buck, 12 A. 717, 13 Del 34

6. RI—Cook, Borden & Co v R Z L Realty Corporation, 147 A. 891, 50 RI 375

7. Evidence held sufficient

(1) To show, or sustain finding of, title or ownership in defendant

Ark—McGehee Realty & Lumber Co v Kennedy, 141 SW 2d 524, 200 Ark 926

Cal—MacQuidy v Rice, 118 P 2d 853, 47 Cal App 2d 755

Colo—Jones v. Mawson-Petersor

that the premises are such as are subject to the lien.⁸ It is not necessary that ownership should be proved by the best evidence, or by such evidence as would be admissible in an action to try title.⁹ Inferential proof may be sufficient.¹⁰ A deed conveying the property to defendant a short time before the date of the transaction out of which the lien claim arises, together with a recital in the contract that defendant is the owner, is sufficient evidence of such ownership at the time the contract was made,¹¹ and, if it is shown that the person for whom the work was done is in possession claiming ownership of the property described,¹² or occupies the house as a residence,¹³ or, in the absence of any controversy as to the ownership, that he took possession of the property on completion of the improvements, together with the testimony of wit-

nesses that he owned the property,¹⁴ it will be sufficient evidence of ownership to support a judgment in favor of the lien claimant.

Evidence showing that the lien was not filed against property of defendant, but against other property, supports a judgment for defendant.¹⁵

d. Delivery and Use of Material

In a proceeding to enforce a mechanic's lien, the evidence must sufficiently establish a furnishing or use of the labor or material in a building or improvement as required by statute.

In a proceeding for the enforcement of a mechanic's lien, the evidence must be sufficient to show a furnishing or use of the labor or material for or in a building or improvement as required by statute,¹⁶ although circumstantial evidence may be suffi-

Lumber Co., 150 P 2d 795, 112 Colo. 493

Mo—Voelpel v Wuensche, 74 S W 2d 14—Waters v Gallemore, App., 41 S W 2d 870

Nev—Zasucha v Allen, 51 P 2d 1029, 56 Nev 339

Utah—Burton Walker Lumber Co v Howard, 66 P 2d 134, 92 Utah 92 40 C J p 470 note 55 [a]

(2) To justify denial of foreclosure of mechanic's liens on realty, on ground that plaintiff was in fact real owner of improvements—McHenry v McHenry, 95 P 2d 261, 150 Kan 498

(3) To support judgment denying recovery against husband based on finding that wife was owner of property against which liens were asserted—Panhandle Const Co v Flesher, Tex Civ App, 87 S W 2d 278, error dismissed

Evidence held insufficient

(1) To show, or to sustain finding of, title or ownership in defendant Iowa—Eclipse Lumber Co v Murphy Co., 221 N W 930, 206 Iowa 1280

Mo—Hidley-Dean Glass Co v Schaefer, App., 11 S W 2d 61, 40 C J p 470 note 55 [b].

(2) To sustain finding that conveyances of vendor's interest in lots were made subject to liens of materialman and laborers who improved property under contract with purchaser—Burton Walker Lumber Co v Howard, 66 P 2d 134, 92 Utah 92

8. Mich—McAllister v Des Rochers, 93 N W 887, 132 Mich 381 40 C J p 470 note 56

Property or interests subject to mechanic's lien see supra §§ 8-19

Evidence held sufficient

Ky—Evans v Thomas, 106 S W 2d 1006, 269 Ky 295

Miss—M L Virden Lumber Co v Sherrod, 139 So 813, 167 Miss 297, amended 142 So 508

N M—Dysart v Youngblood, 102 P 2d 664, 44 N M 351

40 C J p 470 note 56 [a]

Homestead property

Tex—Atwood v Guaranty Const Co, Com App, 63 S W 2d 685—Shepherd v Woodson Lumber Co, Civ App, 63 S W 2d 581—Burton v Schwartz, Civ App, 36 S W 2d 1066, error dismissed—Bernstein v Hibbs, Civ App, 284 S W 234

40 C J p 470 note 56 [e]

Farm

Wash—Standard Lumber Co. v Fields, 187 P 2d 283

Land required for convenient use of building

Cal—California Corrugated Culvert Co v Stewart, 29 P 2d 412, 220 Cal 104—Anselmo v Sebastiani, 26 P 2d 1, 219 Cal 292

Idaho—Idaho Lumber & Hardware Co v DiGiacomo, 102 P 2d 637, 61 Idaho 383

Nev—Friendly v Larsen, 144 P 2d 747, 62 Nev 135

Or—Livesay v Lee Hing, 9 P 2d 133, 139 Or 450, 84 A L R 118—Drake v Riley, 9 P 2d 130, 139 Or 172

9. Mo—Rohan Bros Boiler Mfg Co v St Louis Malleable Iron Co, 24 Mo App 157, 40 C J p 470 note 57

10. Mo—Rohan Bros. Boiler Mfg Co v St Louis Malleable Iron Co, supra.

11. Mo—Badger Lumber Co v Mushlebad, 83 S W 546, 109 Mo App 646

12. Ill—Chisholm v. Williams, 21 N E 215, 128 Ill 115

N Y—Coats v. Dickenson, 5 Alb L J 333 40 C J p 470 note 60

13. Iowa—Lewis v Saylor, 85 N W 601, 73 Iowa 504

14. Mo—Cole v Barron, 3 Mo App 509

40 C J p 470 note 62

15. Okl—Hudson-Houston Lumber Co v McPherson, 244 P. 166, 119 Okl 4

16. Okl—De Bolt v Farmers' Exch Bank, 151 P 686, 51 Okl. 12

40 C J p 470 note 63
Requirements as to furnishing or use to support lien see supra §§ 42-44

Evidence held sufficient

(1) In general—Johns-Manville Corporation of Delaware v La Tour D'Argent Corporation, 277 Ill App 503—40 C J. p 470 note 63 [a]

(2) To show, or to sustain finding, that material was furnished for and to be used in structure on which lien was asserted

Cal—Patten & Davies Lumber Co v Hayden, 298 P. 129, 113 Cal App 103

Minn—Moorhead Lumber Co v Remington Packing Co, 206 N W 653, 165 Minn 411

N Y—Owens v. Ebner, 74 N Y S 2d 169

Okl—Georgia State Sav Ass'n v. Sun Lumber Co, 280 P 281, 138 Okl. 11

(3) To show, or to sustain finding, that material was not furnished for structure on which lien was asserted—Lake St Sash & Door Co v D H Evans Co, 243 N W. 110, 186 Minn 316

(4) To show that material was delivered

Minn—Crandall-Kath Lumber Co v Kroening, 210 N W 637, 169 Minn 120

N J—W. J. Donnell Lumber Co v Connor, 156 A 27, 9 N J Misc 869
Tenn—A. J Cook & Co v Seaton, 6 Tenn App 81

(5) To show, or to sustain finding, that materials or labor were deliv-

cient for this purpose¹⁷ A prima facie case is made out by a showing that material was contracted for to be used in a proposed building, that it was delivered in pursuance of the contract, and that the building is completed,¹⁸ or by proof that materials were ordered for, furnished for, and delivered at, the building¹⁹ So evidence that material of the same character was used in the building may constitute prima facie proof that the material furnished was used²⁰ The fact that materials sold were of the kind used in a structure such as that on which the materialman claims a lien is insufficient to prove that the materials were used therein,²¹ nor is it sufficient to show that the materialman shipped the materials to the contractor²² The fact that certain witnesses describe a building by the

name by which it is sometimes known will not preclude its identity being sufficiently established by other evidence²³

Material furnished for several buildings. Where the materials sold are charged to the contractor in a general account and delivered to different houses, the evidence must be sufficient to identify the material used in the premises against which the lien is sought²⁴

e. Agreement or Consent of Owner

In a proceeding for the enforcement of a mechanic's lien, the evidence must be sufficient to establish the contract or consent of the owner.

In a proceeding to enforce a mechanic's lien, the evidence must be sufficient to establish the contract of the owner,²⁵ or the evidence must be suffi-

ered or furnished and used in work or structure

Ark—Lyle v Latourette, 192 S W 2d 521, 209 Ark 721

Cal—Consolidated Pipe Co v Wol-ski, 296 P 277, 211 Cal 563—Golden Gate B'dg Materials Co v Fireman, 270 P 214, 205 Cal 174—Hayward Lumber & Investment Co v Orondo Mines, 94 P 2d 380, 34 Cal App 2d 697—Bay Lumber Co v Eaton, 6 P 2d 289, 119 Cal App 362 Ky—Hodges v Quire, 174 S W 2d 9, 295 Ky 78

La—Hortman-Salmen Co v Tartt, App, 148 So 266—Madison Lumber Co v Rossi, 137 So 221, 18 La App 461

Mo—Arthur Maier Plumbing Co v Dieckmann, App, 74 S W 2d 495—Cleary v Siemens-Marshall Electric Co, App, 296 S W 448

Okl—Lively v Evans-Howard Fire Brick Co, 242 P 773, 115 Okl 359

Wash—Standard Lumber Co v Fields, 187 P 2d 283—Thompson v O'Leary, 30 P 2d 661, 176 Wash 606, opinion corrected and rehearing denied 33 P 2d 90, 176 Wash 606

Evidence held insufficient

(1) In general—Puritan Engineering Corporation v Robinson, 191 N E 141, 207 Ind 58—40 C J p 470 note 63 [b]

(2) To show, or to sustain finding, that there was a furnishing or delivery—W O Sloan Lumber Co v Hall, Iowa, 207 N W 573—40 C J p 470 note 63 [b] (1)

(3) To show, or sustain finding, that material was used in building or on premises

Cal—San Pedro Lumber Co v Kreis, 295 P 890, 111 Cal App 466—Artel v Riboli, 267 P 517, 91 Cal App 757

Ohio—Superior Lumber & Millwork Co v Bradley, 31 Ohio NP, NS, 438

(4) To show that all material furnished was not used in building—Northwest Lumber & Fuel Co v Plantz, 263 P 763, 126 Or 69

(5) To show that any materials were diverted—Mingo Lime & Lumber Co v Stanley, 79 S W 2d 4, 257 Ky 687

Materialman's sale tickets and ledger entries were entitled to considerable weight—Standard Lumber Co v Fields, Wash, 187 P 2d 283

17. Cal—Consolidated Lumber Co v Bosworth, Inc, 180 P 60, 40 Cal App 80

Iowa—Lovell-Scholfield Lumber Co v Carter, 199 N W 405, 198 Iowa 238

18. Mont—Rogers-Templeton Lumber Co v Welch, 184 P. 833, 56 Mont 321

40 C J p 471 note 65

19. Hawaii—Allen v. Lincoln, 12 Hawaii 356

20. Kan—David v Doughty, 152 P 660, 96 Kan 556

21. Cal—Roebing Sons Co v Bear Valley Irrigation Co, 34 P 80, 99 Cal 488—San Pedro Lumber Co v Kreis, 295 P. 890, 111 Cal App 466

22. Cal—San Pedro Lumber Co v Kreis, supra—W. P Fuller & Co v Fleisher, 218 P 53, 63 Cal App 78

23. Cal—Holden v Mensinger, 165 P 950, 175 Cal 300

24. Wash—Knudson-Jacob Co v Brandt, 87 P 43, 44 Wash 68 40 C J p 471 note 69

Approximation is insufficient

Neb—Byrd v Cochran, 58 N W 127, 39 Neb 109

40 C J. p 471 note 70

25. Iowa—Thompson Yards v Haakinson & Beatty Co, 229 N W 266, 209 Iowa 985

10 C J p 471 note 71

Contract or consent of owner to support lien see supra §§ 52-55

Evidence held sufficient

(1) In general—Comley Lumber Co v Mid-Co Petroleum Co, 225 P 744, 116 Kan 78—40 C J p 471 note 71 [a]

(2) To show, or to sustain finding of, existence of contract

Cal—Haupenthal v. Bert L Perry, Inc, 31 P 2d 1088, 138 Cal App 198 Colo—Smith v. Stroehle Machinery & Supply Co, 126 P 2d 341, 109 Colo 460

Ind—Cairo v Fishman, 140 N E 66, 80 Ind App 436

Iowa—Crane Co v. Westerman, 8 N W 2d 412, 232 Iowa 1394

Mich—Neely v International Corn Products Corporation, 205 N W 96, 232 Mich 81

Mo—St Louis Concrete Products Mfg Co v Walker, App, 64 S W. 2d 131

Nev—Zasucha v Allen, 51 P 2d 1029, 56 Nev 339

NC—King v Elliott, 147 S E 701, 197 NC 93

Tex—Aston v Allison, Civ App, 91 S W 2d 852

(3) To show that work was done under an oral rather than the written contract—Robinson Tile & Marble Co v Samuels, 266 P 701, 147 Wash 445

(4) To sustain finding that no contract existed—Vanover v Roach, 195 N E 579, 101 Ind App 138

(5) To sustain finding that construction of improvements for which lien was claimed was not caused by owners, so as to subject lands to lien—Boise-Payette Lumber Co v Bickel, 245 P 92, 43 Idaho 245, 45 A L R 575

Evidence held insufficient

To show existence of contract with owner

Cal—Artel v Riboli, 267 P 517, 91 Cal App 757

Iowa—Nolan v Wick, 254 N W 80, 218 Iowa 660—Thompson Yards v

cient to establish his consent to the improvement,²⁶ relied on as the basis of the lien, and the facts essential to establish his personal liability, if such liability is asserted.²⁷ In an action by a subcontractor or materialman, the evidence must establish that the work or material for which the lien is claimed was done or furnished in pursuance of the original contract with the owner,²⁸ and evidence which does not show what the relation was between

the one with whom claimant says he contracted and the owner is insufficient.²⁹ Where the work is done under a contract with a lessee, the evidence must be sufficient to show the consent of the owner to his authorization in order to bind his interest.³⁰

Where it is contended that the contract or consent was by an agent of the owner, the evidence must be sufficient to establish such fact³¹ and to

Haakinson & Beaty Co., 229 N W 266, 209 Iowa 985

Mo—Wilhelm v Roe, 149 A 438, 158 Md 615

Mich—Johnson v Russell, 319 N.W. 604, 243 Mich 64

Minn—Rudd Lumber Co v Anderson, 201 N W 548, 161 Minn 353

Neb—York Brick & Tile Co v Ude Motor Co, 242 N.W. 361, 123 Neb 154

26. Evidence held sufficient

Ill—Cooper v Palais Royal Theatre Co, 242 Ill App 184

Ind—Snelling v Wortman, 24 N E 2d 791, 107 Ind App 422

N.Y.—Weinheimer v Hutzler, 256 N Y S 7, 234 App Div 566, affirmed 184 N E 146, 260 N Y. 687—Majestic Tile Co v Nicholls, 291 N Y S 551, 161 Misc 231

40 C J p 471 note 72 [a]

Evidence held insufficient

N.Y.—Allison & Ver Valen Co v McNee, 9 N Y S 2d 708, 170 Misc 144—Syracusa v Inch Corporation, 398 N Y S 878, 164 Misc 820

40 C J p 471 note 72 [b]

27. Evidence held sufficient

Tex—Yates v Home Building & Loan Co, Civ App, 103 S W 2d 1081

Wash—Flint v Bronson, 86 P 2d 218, 197 Wash 686

40 C J p 471 note 74 [a].

Evidence held insufficient

Ark—People's Building & Loan Ass'n v Leslie Lumber Co, 38 S W 2d 759, 183 Ark 800

Mo—Construction Materials Co v. Grund, App, 192 S W 2d 45

N.Y.—Owens v. Ebner, 74 N Y S 2d 169

40 C J p 471 note 74 [b]

Consent sufficient to give lien

Evidence which warrants inference of consent sufficient to give a lien is not necessarily sufficient to warrant inference of agreement, express or implied, to pay—Weinheimer v. Hutzler, 256 N.Y.S. 7, 234 App Div 566, affirmed 184 N E 146, 260 N Y 687

Statutory penalty for nonpayment of wages

In action to foreclose mechanic's lien, evidence did not show that defendant owners were employers of lien claimant so as to authorize exaction of statutory penalty for non-

payment of wages—Milner v Shuey, 69 P 2d 771, 57 Nev 159

28. Ill—Olson v Burns, 8 N E 2d 323, 290 Ill App 599

40 C J p 471 note 75

Liability of owner to subcontractors and materialmen see Contracts § 370 b (2)

Contract direct with owner

(1) Held established

Cal—Sinnock v Young, 142 P 2d 85, 61 Cal App 2d 130

Kan—Isbell v Payne, 147 P 2d 718, 158 Kan 298

Mo—Hill-Behan Lumber Co v Flegle, App, 183 S W 2d 862

Okl—Grisom v Frensley Bros Lumber Co, 136 P 2d 887, 192 Okl 413

40 C J p 471 note 75 [c] (1)

(2) Held not established

Fla—Fagg Mill Work & Lumber Co v Greer, 136 So 679, 102 Fla 955

Miss—McNair v M L Virden Lumber Co, 4 So 2d 684, 193 Miss 232

40 C J p 471 note 75 [c] (2)

Privity held established

Fla—First Nat Bank v Southern Lumber & Supply Co, 145 So 594, 106 Fla 821

Tenn—Variety Fire Door Co v Hanson-Worden Co, 10 Tenn App 254

Notice of no-lien provision

Evidence was insufficient to prove that materialman had the required statutory notice of a no-lien provision in the contract between the owner and general contractor—Illinois Interior Finish Co v Poenia, 277 Ill App. 554

29. Mich—Brennan v Miller, 56 N W 354, 97 Mich 182

40 C J. p 471 note 76

30. Iowa—Thompson Yards v Haakinson & Beaty Co, 229 N W 266, 209 Iowa 985

40 C J p 472 note 77.

Evidence held sufficient

(1) To show, or to sustain finding, that lessee was agent or authorized to bind owner

Cal—Ott Hardware Co v Yost, 159 P 2d 663, 69 Cal App 2d 593

Iowa—Iowa Builders' Supply Co v Petersen, 267 N W 716, 221 Iowa 978.

(2) To support conclusion that lessee was statutory agent of owner

—Thompson v O'Leary, 30 P 2d 661,

176 Wash 606, opinion corrected and rehearing denied 33 P 2d 90, 176 Wash 606

(3) To show that land was leased and vacant and unimproved so as to authorize materialman's lien on improvements for material furnished lessee without owner's written consent—Whitfield v Frensley Bros Lumber Co, 283 P. 985, 141 Okl 44

(4) To show, or to sustain finding, that lessee was not agent or authorized to bind owner—Shelley Electrical Co. v. Ross, 14 P 2d 638, 136 Kan 244

(5) To justify finding that claimant knew or was charged with knowledge of terms of lease where claimant knew of landlord and tenant relationship and examined lease—Johnson v. Grady, 244 N W 409, 187 Minn 104.

(6) To establish that laborer under contract with tenant, who was required by lease to make improvements at own expense, did not intend to claim lien on owner's interest—Deka Development Co. v. Fox, 39 P 2d 143, 170 Okl 228

(7) To support finding that contracts were made with lessee in possession and work and material were for improvements to building—Martin-Welch Hardware & Plumbing Co v Moor, Mo App., 16 S W 2d 667

(8) To show other matters see 40 C J p 472 note 77 [a]

Evidence held insufficient

(1) To show, or to sustain finding, that lessee was agent or authorized to bind owner—Thompson Yards v Haakinson & Beaty Co, 229 N.W. 266, 209 Iowa 985

(2) To support finding that lessee was obligated to construct permanent and substantial improvements on property beneficial to reversionary interests of lessors—Sol Abrahams & Son Const Co v. Osterholm, Mo App, 136 S.W.2d 86.

(3) To show other matters see 40 C J p 472 note 77 [b]

31. Improvement in street

In order to establish lien for labor in improving street adjacent to property, clear proof of employer's implied agency is required—Ferguson v Guy, 276 P. 855, 151 Wash. 550.

show the authority of the agent,³³ but evidence of a contract with the duly authorized agent of the owner may be sufficient.³³

The evidence must be sufficient to establish a contention that the husband of a married woman acted as her agent.³⁴ Proof of the relationship of husband and wife, and that work was done and material furnished to improve real estate belonging to the wife, without more, is not sufficient evidence to establish the fact that she is an undisclosed principal and the husband merely her agent,³⁵ but only slight evidence of the husband's agency is required

to charge the wife.³⁶ Where the husband and wife own realty jointly or as tenants by the entireties, any act affecting the title must be by joint act, and the evidence should be strong and persuasive that at the time of the making of the contract by the husband he was acting not only for himself individually, but as agent for his wife.³⁷

The general rules as to weight and sufficiency of evidence in civil actions have been applied in determining the nature³⁸ and terms of the contract,³⁹ ratification by the owner,⁴⁰ the parties to the con-

Evidence held sufficient

(1) To show, or to sustain finding of, agency

US—Franklinville Realty Co v Arnold Const Co, CCA Fla, 120 F 2d 144

Cal—George H Tay Co v Bremser, 272 P 1051, 205 Cal 784—Charles R McCormick Lumber Co v O'Brien, 266 P 594, 90 Cal App 776
Kan—Kastner v Security Savings & Loan Ass'n, 256 P 989, 123 Kan 632

Mo—Major v McVey, App, 128 S W 2d 347

Okl—Leonard & Braniff v Price-Few Lumber Co, 247 P 671, 118 Okl 174

40 C J p 472 note 78 [a]

(2) To authorize auditor's finding that alleged contractor was actually owner's agent, and acted as such in purchasing materials from plaintiffs—Robinson v Reese, 165 SE 744, 175 Ga 574

(3) To sustain finding that person acting for owners in renting premises was not general agent, whose knowledge of repairs would charge owners—Williams v Sharpe, 265 P 793, 125 Or 379

Evidence held insufficient

(1) To show, or sustain finding of, agency

Ky—Phalin v Standard Planing Mill Co, 251 S W 635, 199 Ky 195

Mo—Reese v Cibulka, App, 68 S W 2d 902

(2) To show agency of contractor improving street so as to entitle laborers to lien on adjacent property—Fergusson v Guy, 276 P 855, 151 Wash 550

Agency of purchaser for vendor

Cal—McDowell v Perry, 51 P 2d 117, 9 Cal App 2d 555

Ill—Runells v Mueller, 2 NE 2d 577, 284 Ill App 658

Iowa—Nolan v Wick, 254 NW 80, 218 Iowa 680—Schoeneman Lumber Co v Davis, 295 NW 502, 200 Iowa 873

Kan—Kennedy v Atchison, 178 P 2d 987, 162 Kan 694

40 C J p 472 note 78 [c].

32. Ark—Daly v Arkadelphia Milling Co, 189 S W 1053, 126 Ark 405

40 C J p 472 note 79

Evidence held sufficient

(1) In general

Fla—G & L Roofing Co v Thomas, 196 So 414, 143 Fla 223

Okl—Pepin v W R Thompson & Sons Lumber Co, 1 P 2d 714, 150 Okl 295

40 C J p 472 note 79 [a]

(2) To warrant finding that college trustees never authorized president to execute mortgage or materialman's lien—R B Spencer & Co v Thorp Springs Christian College, Tex Civ App, 41 S W 2d 482, error dismissed

33. NY—Farmilo v Stiles, 5 NY S 579, 52 Hun 450

40 C J p 472 note 80

34. Ala—Womack v Myrick Lumber Co, 76 So 949, 200 Ala 591

40 C J p 472 note 81

Proof of agency should be satisfactory and convincing—Adkins & Douglas Co v Webb, 154 A 259, 160 Md 571

Evidence held sufficient

Ala—Mundy v Alhson, 187 So 722, 237 Ala 535

Ky—Andrews v Wilson, 69 S W 2d 343, 253 Ky 237

Mo—Henry Evers Mfg Co v Grant, App, 284 S W. 525

Okl—Caldwell v Overall, 99 P 2d 496, 186 Okl 615—Swetnam v Hale, 280 P 437, 138 Okl 69

40 C J p 472 note 81 [a]

35. Ga—Gibbs v Carolina Portland Cement Co, 177 SE 760, 50 Ga App 229—Porter v Terrell, 58 SE 493, 2 Ga App 269

36. Ga—Gibbs v Carolina Portland Cement Co, 177 SE 760, 50 Ga App 229

37. Mo—Wilson v Fower, 155 S W 2d 502, 236 Mo App 532

Evidence held sufficient

To show, or to sustain finding, that husband acted for wife as well as for himself

Ind—Shea v People's Coal & Cement Co, 161 NE 849, 93 Ind App 302

Mo—Hill-Behan Lumber Co v Flegle, App, 183 S W 2d 362—Magidson v Stern, 148 S W 2d 144, 235 Mo App 1039

Evidence held insufficient

To show, or to sustain finding, that husband was agent for wife—Wilson v Fower, 155 S W 2d 502, 236 Mo App 532—La Crosse Lumber Co v Goddard, Mo App, 151 S W 2d 455—Badger Lumber & Coal Co v Pugaley, 61 S W 2d 425, 227 Mo App 1203

38. Ark—Burel v East Arkansas Lumber Co, 195 S W 378, 129 Ark 58, 10 ALR 1017

40 C J p 472 note 83

39. Ill—Grove v Grant, 22 NE 2d 968, 301 Ill App 630

Evidence held sufficient

US—Franklinville Realty Co v Arnold Const Co, CCA Fla, 120 F 2d 144

Mich—Morley Bros v F R Patterson Const Co, 253 NW 213, 266 Mich 52

Tex—Postal Savings & Loan Ass'n v Powell, Civ App, 47 S W 2d 343, error refused

40 C J p 472 note 84 [a]

Evidence held insufficient

US—Weber-Squires Corporation v Firestone Tire & Rubber Co, CCA Fla, 76 F 2d 711

Minn—Bossenmaier v Brown, 234 NW 303, 182 Minn 200

NY—Schmitz v Hohenstein, 264 NY S 596, 238 App Div 429

40 C J p 472 note 84 [b]

Circumstances of making contract must be considered in order to determine whether items claimed by subcontractor as extras were not included in original contract—Morley Bros v F R Patterson Const Co, 253 NW 213, 266 Mich 52

40. Evidence held sufficient

To establish that owner ratified letting of subcontracts by contractor even though it was not authorized by contract—Franklinville Realty Co v Arnold Const Co, CCA Fla, 120 F 2d 144.

tract,⁴¹ or a modification⁴² or termination⁴³ of the contract

Knowledge and failure to object. Where the lien is based on the knowledge of the owner to the furnishing of the material or the making of improvements and his failure to object, such facts must be established by the evidence⁴⁴. Consent of the owner may be shown, however, by his acts and declarations,⁴⁵ or by his knowledge without objection on his part that the improvements are being made, from which his consent may be inferred,⁴⁶ but the facts from which the inference of a consent is to be drawn must be such as to indicate at least a willingness on the part of the owner to have the improvements made, or an acquiescence on his part

in the means adopted for that purpose, with knowledge of the object for which they are employed⁴⁷

f. Performance of Contract

The performance of the contract to the extent required to support a mechanic's lien must be sufficiently established in a proceeding to enforce the lien.

The evidence in a proceeding to enforce a mechanic's lien must be sufficient to show performance of the contract to the extent required to support the lien⁴⁸. The general rules as to the weight and sufficiency of evidence have been applied with respect to proof of such matters as substantial performance,⁴⁹ performance to the satisfaction of defendant,⁵⁰ acceptance of work,⁵¹ defective materials or work,⁵² and such general rules have been applied with

41. Ill.—United Cork Cos v Volland, 7 NE 2d 301, 365 Ill 564
40 C.J. p 472 note 85

Evidence held sufficient

Idaho—Idaho Lumber & Hardware Co v DiGiacomo, 102 P 2d 637, 81 Idaho 383

Ill.—United Cork Cos v Volland, 7 NE 2d 301, 365 Ill 564

Mo.—Moller-Vandenboom Lumber Co v Boudreau, 85 SW 2d 141, 231 Mo App 1137

Mont.—Federal Land Bank of Spokane v Green, 90 P 2d 489, 108 Mont 56

Wash.—Monroe St Lumber Co v Garvey, 17 P 2d 904, 171 Wash 181

40 C.J. p 472 note 85 [a]

Co-owners

In suit by materialman against co-owners of house for materials furnished for its repair, evidence established that materialman sold material for repair of house to one of the several co-owners, and relied on that one for payment, so as to preclude claim against others, either personally or against their interest in property—Boutte & Courge v Derokay, La App, 168 So 39

42. Evidence held sufficient

Cal.—Sexton v Bollinger, 2 P 2d 189, 116 Cal App 9

40 C.J. p 472 note 86 [a]

Evidence held insufficient

Minn.—Yljarvi v Brockphaler, 7 N W 2d 314, 213 Minn 385

40 C.J. p 472 note 86 [b]

43. Cal.—Eureka Mill & Lumber Co v Andres, 144 P. 970, 25 Cal App 618

40 C.J. p 472 note 87

44. La.—Price v Lee, 123 So 458, 11 La App 391

Tenn.—Wittichen v Muller, 166 S.W. 2d 612, 179 Tenn 353

40 C.J. p 472 note 89

Knowledge and failure to object see supra § 73

Evidence held sufficient

(1) To show, or to sustain finding, that owner was without notice of work being done—Alderman v McCordia, 6 P 2d 388, 119 Cal App 290—Martin v Standley, 265 P 1021, 90 Cal App 429—Lorenz v Rousseau, 258 P 690, 85 Cal App 1

(2) To show, or to sustain finding, that person having notice was not owner's agent—Lorenz v Rousseau, supra

(3) To show other matters see 40 C.J. p 473 note 89 [b]

Evidence held insufficient

La.—Price v Lee, 123 So 458, 11 La App 291.

Or.—Dyer v Thrift, 264 P 428, 124 Or 249

40 C.J. p 472 note 89 [c]

Statutory notice of nonliability

(1) Held shown

Cal.—Hayward Lumber & Investment Co v Ford, 148 F 2d 689, 64 Cal App 2d 346

Or.—Marshall v. Cardinell, 80 P 652, 46 Or 410

(2) Held not shown

Cal.—Hayward Lumber & Investment Co v Orondo Mines, 94 P 2d 380, 34 Cal App 2d 697—Coombs v Green Mill, 290 P 620, 107 Cal App 204

Minn.—Snell Sash & Door Co v Florsheim, 13 NW 2d 776, 217 Minn 21—Knoff Woodwork Co v Zotalis, 6 NW 2d 264, 213 Minn 204—Interior Lumber Co v Appleby, 228 N.W. 934, 179 Minn 280—Fausser v McElroy, 195 NW 786, 157 Minn 116

Nev.—Reno Plumbing & Heating Co v Bickel, 35 P 2d 302, 55 Nev 367

(3) Evidence authorized finding that digging of test hole and hauling of lumber on premises constituted commencement of work within statute sufficient to sustain landowner's subsequent posting of notice of nonresponsibility—English v Olympic Auditorium, 20 P 2d 946, 217 Cal. 631, 87 A.L.R. 1281.

45. N.Y.—Brunold v Glasser, 53 N YS 1021, 25 Misc 385

40 C.J. p 473 note 90

46. N.Y.—Miller v Mead, 28 NE 387, 127 NY 544, 13 L.R.A. 701

40 C.J. p 473 note 91

47. N.Y.—Cowen v Paddock, 33 N E 154, 137 NY 188

48. N.Y.—MacKnight Flintic Stone Co. v New York, 79 NYS 521, 78 App Div 641, affirmed 68 NE 1119, 176 NY 586

40 C.J. p 473 note 93

Necessity and sufficiency of performance by lienor see supra §§ 113, 113

49. Substantial performance shown

Cal.—Shumway v Woolwine, 257 P 898, 84 Cal App 220

Ill.—Industrial Roofing Co v Meek, 39 NE 2d 57, 312 Ill App 653

N.Y.—Servidone v Hirschmann, 51 NYS 2d 917, 268 App Div 347, reargument denied 52 NYS 2d 434, 268 App Div 1075, affirmed 62 NE 2d 232, 294 NY 786

40 C.J. p 473 note 95 [a]

Substantial performance not shown

Cal.—Morel v Simonian, 284 P 694, 103 Cal App 490

Minn.—Yljarvi v Brockphaler, 7 N W 2d 314, 213 Minn 385

Or.—Bradfield v Bollier, 128 P 2d 942, 169 Or 425

40 C.J. p 473 note 95 [b]

50. Iowa.—Griffin v Staszewsky, 261 NW 438

51. Ark.—Lyle v Latourette, 192 S. W 2d 521, 209 Ark 721

40 C.J. p 473 note 96

52. Ill.—Advance Heating Co v Catholic Bishop of Chicago, 5 NE 2d 102, 287 Ill App 622

Evidence held sufficient

Ark.—McCann v Dyke, 60 SW 2d 918, 187 Ark 507

Cal.—Busset v California Builders Co, 12 P 2d 36, 123 Cal App 657

Ind.—Jose-Balz Co v De Witt, 176 NE 864, 93 Ind App 672.

respect to the trivial character of imperfections,⁵³ failure to perform,⁵⁴ to show prevention of completion,⁵⁵ delay in performance,⁵⁶ damages for faulty performance,⁵⁷ breach by subcontractor justifying termination,⁵⁸ cost of completion,⁵⁹ waiver of stipulation for time of completion,⁶⁰ and abandonment⁶¹

g. Lien Claim, Statement, or Notice

In a proceeding to enforce a mechanic's lien, the evidence must be sufficient to support a finding that the lien claim, statement, or notice was filed or served within the time prescribed by statute.

In a proceeding to enforce a mechanic's lien, the

evidence must be sufficient to support a finding that a lien notice was given or claim or statement filed such as the statute requires⁶² or that it was served as the statute provides⁶³. Where the statute requires that a notice be given to the owner by persons other than the contractor as a preliminary step in the perfection of a lien, as considered supra §§ 120-129, the evidence must be sufficient to show that the required notice was given⁶⁴. An officer's return indorsed upon the notice showing service is prima facie⁶⁵ and sufficient⁶⁶ proof of service unless impeached for fraud or mistake⁶⁷.

Mo—Bickel v Argyle Inv Co, 121 S W 2d 803, 343 Mo 456
Or—Davis v Bertschinger, 241 P 53, 116 Or 127

53. Cal—Schindler v Green, 87 P 626, 149 Cal 752—Shumway v Woolwine, 257 P 898, 84 Cal App 220

54. Cal—Morel v Simonian, 284 P. 694, 103 Cal App 490
40 C J p 473 note 98

Performance held shown

US—Pulaski Nat Bank v Tilghman Moyer Co, CCA Va., 104 F 2d 471

Cal—Busset v California Builders Co, 12 P 2d 36, 123 Cal App 657—Monarch Metal Weather Strip Co v Clynick, 3 P 2d 593, 117 Cal App 270

Fla—Budd v J Y Gooch Co, 9 So 2d 633 151 Fla 262

Ill—Beaudry v Bell, 250 Ill App 468

Minn—Jandrich v Svabek, 211 NW 957, 170 Minn 24

Mo—Concrete Engineering Co v Grande Bldg Co, 86 S W 2d 595, 230 Mo App 443

NY—Tisdale Lumber Co v Medtradco Realty Co, 212 NYS 583, 214 App Div 685

40 C J p 473 note 98 [a]

Nonperformance held shown

Cal—Morel v Simonian, 284 P 694, 103 Cal App 490

Ill—Mallinger v. Shapiro, 161 NE 104, 329 Ill 629

NY—Tannenbaum v Slevin, 229 NYS 185, 224 App Div 44
40 C J p 473 note 98 [b]

55. Wash—Wolk v Bonthus, 124 P 2d 553, 13 Wash 2d 217—Cochran v Yoho, 75 P 815, 34 Wash 238

56. Cal—Mannix v Wilson, 123 P 981, 18 Cal App 595
40 C J p 473 note 1

57. Iowa—Hatch v Kula, 190 NW 969, 195 Iowa 619
40 C J p 473 note 2

58. Mass—McLoughlin v Sayle, 77 NE 639, 190 Mass 583

59. Conn—Daly v New Haven Hotel Co, 99 A 853, 91 Conn 280

60. Neb—Wentz v Frickel, 196 N W 639, 111 Neb 439
40 C J p 473 note 5

61. Cal—Smoll v Webb, 130 P 2d 773, 55 Cal App 2d 456

Minn—Ylyjarvi v Brockphaler, 7 N W 2d 314, 213 Minn 385

NY—Dealers' Lumber Corp v Wright, 209 NYS 320, 212 App Div 429

62. Cal—Reed v Norton, 26 P 767, 90 Cal 590, reheard 27 P. 426, 90 Cal 590

40 C J p 473 note 8

Requirements as to notice or claim see supra §§ 119-171

Evidence held sufficient

(1) In general—Lazenby v Wright, 239 NW 437, 250 Mich 203—40 C J p 473 note 8 [a]

(2) To show, or to sustain finding, that claim or notice was properly filed

Ala—Burton v Meeks, 134 So 28, 222 Ala 681

Mont—Interstate Lumber Co v Rider, 19 P 2d 644, 93 Mont 489

NM—Hedrick v Jagger, 129 P 2d 340, 46 NM 379

(3) To warrant finding that materials were furnished to owner of premises and not to lessee so as to dispense with notice—Kull v Dierks Lumber & Coal Co, 292 S W 695, 173 Ark 445

Evidence held insufficient

La—Weaks Supply Co v McClanahan, App, 142 So 340

Or—Van Lydegraf v Tyler, 273 P 719, 128 Or 236

40 C J p 473 note 8 [b]

Signature of recorder

Proof of filing of mechanic's lien was insufficient where certificate of filing and recording was not signed by recorder—Howard v Branchaw Mining Co, 7 Alaska 117.

63. Ohio—Kocher v Ricketts, App, 49 NE 2d 85
40 C J p 474 note 9

Service held established

Ill—McKeown Bros Co v Ogden Kennel Club, 269 Ill App 622

Mich—Zilz v Wilcox, 157 NW 77, 190 Mich 436

Pa—Strayer & Co v Gaines, 100 Pa Super 203

Service held not established

Ariz—American Coarse Gold Corporation v Young, 52 P 2d 1181, 46 Ariz 511

40 C J p 474 note 9 [f]

64. Ky—Hazard Lumber & Supply Co v South, 7 S W 2d 206, 224 Ky 737

40 C J p 474 notes 8, 9

Evidence held sufficient

(1) To show, or to sustain finding, that notice was properly given owner

Or—Drake v Riley, 9 P 2d 130, 139 Or 172—Mokler v Doum, 268 P 55, 125 Or 595

Tex—Compton v Jennings Lumber Co, C.v App, 295 S W 308

Wash—Building Supplies v Gillingham, 135 P 2d 832, 17 Wash 2d 489

(2) To establish, or to sustain finding, that notice was not given as required by statute—Hazard Lumber & Supply Co v. South, 7 S W 2d 206, 224 Ky 737.

(3) To warrant finding that material was furnished directly to owner, so as not to require statutory notice

Md—Wilhelm v Roe, 149 A 438, 158 Md 615

Or—Nicolai-Neppach Co v Poore, 251 P 268, 120 Or 163

Evidence held insufficient

To establish that owner waived notice required of materialman on furnishing materials to contractor—Cloud v Greenwood Logging Co, 288 P 910, 157 Wash 261

65. W Va—Virginia Supply Co v. Calfee, 76 SE 669, 71 W Va 300

66. Tenn—Cary-Lombard Lumber Co v Thomas, 22 S W. 743, 92 Tenn 587

W Va—Pittsburgh Steel Products Co v Huntington Masonic Temple Assoc, 94 SE 127, 81 W Va 222

67. W Va—Pittsburgh Steel Products Co v Huntington Masonic Temple Assoc, supra

Time of filing or service. The evidence must be sufficient to show that the lien claim, statement, or notice was filed within the time prescribed by statute,⁶⁸ which, however, may sufficiently appear from an attached certificate of the custodian of the record⁶⁹ or from the indorsement of the clerk of the filing⁷⁰

The evidence must be sufficient to show that the lien claim or notice was filed within the time required by statute after the completion of the work or the performance of the labor or furnishing of the material,⁷¹ and, as bearing on this question, the evidence must be sufficient to show when the work was completed or material furnished⁷² So, where

68. La.—Weeks Supply Co v Gulf Refining Co, App. 180 So 883
Or—Prouty Lumber & Box Co v McGuirk, 68 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418

40 C J p 474 note 13

Time for filing or service see supra §§ 139-144

Evidence held sufficient

(1) To show, or to sustain finding, that claim or notice was filed within time

US—McDonald Amusement Co. v. Fleming Bros Lumber Co, CCA Wyo, 35 F 2d 638

Ala.—Tallapoosa Lumber Co v. Copeland, 134 So 653, 223 Ala. 41, 75 A L R 1325

Colo.—Smith v Stroeble Machinery & Supply Co., 126 P 2d 341, 109 Colo 460

Fla.—Service Lumber & Supply Co v Cox, 123 So 820, 98 Fla 405

Ill.—United Cork Cos v Volland, 7 NE 2d 301, 365 Ill 564—McKeown Bros Co v Ogden Kennel Club, 359 Ill App 622

(2) To establish, or to sustain finding, that claim or notice was not filed within statutory period

Ky.—Hazard Lumber & Supply Co v South, 7 SW 2d 206, 224 Ky 737.

La.—General Lumber & Supply Co v McLellan, App. 200 So 501

Mich.—Silverstein v Berman, 236 N. W 840, 254 Mich 478

Mo.—Huttig Sash & Door Co v Ray R Rosemond Co, App. 65 SW 2d 180

NC.—Atlas Supply Co v McCurry, 156 SE 91, 199 NC 799

Tex.—Foley v Currie, Civ App., 139 SW 2d 349

Evidence held insufficient

To show claim or notice filed within time—McDonald Amusement Co. v Fleming Bros Lumber Co, CCA Wyo, 35 F 2d 638

69. Wash.—Fairhaven Land Co. v. Jordan, 32 P 729, 5 Wash. 729. 40 C J p 474 note 14

70. Mo.—Bruce v Hoos, 48 Mo App 161

40 C J p 474 note 15

71. Timely filing or notice established

US—McDonald Amusement Co v Fleming Bros Lumber Co, CCA Wyo, 35 F 2d 638

Ark.—Twist v Roane, 294 SW 62, 174 Ark 35—Kull v Diciks Lum-

ber & Coal Co, 292 SW 695, 173 Ark 445

Cal—Union Supply Co v. Morris, 30 P 2d 394, 230 Cal 331

Ill.—Builders Supply & Lumber Co v Calto, 49 NE 2d 876, 320 Ill App 1

Ky.—Whitaker v Howell & Goins, 143 SW 2d 179, 283 Ky 733—Will B Miller Co v Laval, 140 SW 2d 376, 283 Ky 65

La.—Central Lumber Co v Schroeder, 114 So 644, 164 La 759—Madison Lumber Co v Rossi, 137 So 221, 18 La App 461

Mich.—Sacchetti v Recreation Co, 7 NW 2d 265, 304 Mich 185—Netting Co v Berke, 219 NW 663, 243 Mich 81—Frohlich v Crows, 205 NW 90, 233 Mich 378

Minn.—Steele v Bernes, 3 NW 2d 425, 212 Minn 281—Botsford Lumber Co v Fuller, 212 NW 22, 170 Minn 130

NY—Pike v Naylor Securities Co, 351 NYS 659, 140 Misc 734

Pa.—Houser v Matsinger, 156 A 738, 102 Pa Super 192

Wash.—Wolk v Bonthius, 124 P 2d 553, 13 Wash 2d 217—Lofthus v Cumming, 67 P 2d 283, 198 Wash 115

W Va.—Pfaff & Smith Builders' Supply Co v Mason, 137 SE 356, 103 W Va 318

Wis.—Fischer v Meiroff, 213 NW 283, 192 Wis 482

40 C J p 474 note 17 [a].

Timely filing or notice not established

Ariz.—Intermountain Building & Loan Ass'n v. Albert Steinfeld & Co., 14 P 2d 742, 40 Ariz 545

Cal.—Grettenberg v Collman, 5 P 2d 944, 119 Cal App 7—Remington v Mulholland, 5 P.2d 667, 118 Cal App 479

Ill.—Erickson v. Levin, 236 Ill App 245

Iowa.—Nielson v Buser, 222 NW. 856, 207 Iowa 288, following Sheldon v Chicago Bonding & Surety Co., 181 NW 282, 190 Iowa 945

Ky.—Whitfield v Kentucky Sales Corporation, 278 SW 105, 211 Ky 809

La.—Weeks Supply Co v Gulf Refining Co, App. 180 So 883

Mich.—Neely v International Corn Products Corporation, 205 NW. 96, 232 Mich 81

Mo.—La Crosse Lumber Co v Goddard, App. 151 SW 2d 455

NY—Parabella v Porter, 226 NYS 417, 130 Misc 680

Ohio—J & F Harig Co v Fountain Square Bldg., 187 NE 872, 46 Ohio App 157—Garrett v Lishawa, 172 NE 845, 36 Ohio App 129

Or—Spaeth v Becktell, 41 P 2d 1064, 150 Or 111, 97 A L R 771

Pa.—Duplex Electric Co v Simons, Brittain & English, 172 A 159, 113 Pa Super 163

SD.—Dicks v Orchard & Wilhelm Co., 256 NW 723, 63 SD 99

Wyo—Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 538, 59 Wyo 334, 147 A L R 1089

40 C J p 474 note 17 [b]

Lien paper, showing date of filing in office of clerk of circuit court, etc., must be introduced—Landers Lumber & Cement Co v Short, 37 SW 2d 931, 235 Mo App 410—Doland v Webster, 105 SW 34, 126 Mo App 591

72. Ill.—Elmhurst Lumber & Coal Co v Alke, 53 NE 2d 139, 321 Ill App 364

Wis—Layne-Bowler Chicago Co v Peshtigo Paper Co., 217 NW. 312, 194 Wis 631

40 C J p 474 note 18

If verified itemized statement does not show date on which any of material was furnished or labor performed, it does not furnish prima facie proof that such was furnished within four months of filing lien statement—Preut v. Lail, 243 P 927, 116 Okl 184

Evidence held sufficient

Cal.—Baird v Havas, 164 P 2d 952, 72 Cal App 2d 520—Davis v Bortveit, 16 P 2d 327, 127 Cal App 675

Colo.—Farmers' Life Ins Co v Connor, 257 P 260, 83 Colo 81.

La.—National Homestead Ass'n v. Graham, 147 So 348, 176 La 1062

Minn.—Jandrich v Svabek, 211 NW 957, 170 Minn 24

NM—Allison v. Schuler, 36 P 2d 519, 38 NM 506.

Or—Bennett v Bruchou, 96 P 2d 762, 163 Or. 175—Prouty Lumber & Box Co v McGuirk, 66 P 2d 481, 156 Or 418, rehearing denied 68 P 2d 473, 156 Or 418—Drake v Riley, 9 P 2d 130, 139 Or 172—Block v Love, 1 P 2d 588, 136 Or 685

Wash.—Patrick v Bonthius, 124 P 2d 550, 13 Wash 2d 210

40 C J p 474 note 18 [a]

Evidence held insufficient

(1) To show completion or furnishing of material or labor on a date within prescribed period for filing lien.

as bearing on the question of the timely notice or filing of the lien it is important to determine whether work was done or material furnished under distinct contracts, the evidence must be sufficient to support the finding.⁷³

h. Amount of Claim

In a proceeding to enforce a mechanic's lien, the evidence must be sufficient to establish the amount of the claim for which a lien may be enforced.

In a proceeding for the enforcement of a mechanic's lien, there must be sufficient competent evidence as to the amount of the claim for which a lien may be enforced,⁷⁴ and the rules ordinarily applicable with reference to the weight and sufficiency of evidence have been applied in the determination of the amount due under particular contracts,⁷⁵ as to the existence of a specific contract price,⁷⁶ as to the reasonable value of work or materials,⁷⁷ as to ex-

La.—Texas Lumber Co v E D Green Realty Co, 140 So 828, 19 La App 585

Wash.—Columbia Lumber Co v Bush, 126 P 2d 584, 13 Wash 2d 657—**Kellison v Godfrey**, 281 P 733, 154 Wash 219

Wis.—Layne-Bowler Chicago Co v Peshtigo Paper Co, 217 NW 312, 191 Wis 631

40 C J p 474 note 18 [b] (1)

(2) To show other matters
Cal.—Western Elaterite Roofing Co. v Fisher, 273 P 19, 85 Colo 5
Or.—Eastern & Western Lumber Co v Williams, 276 P 257, 129 Or 1.
40 C J p 474 note 18 [b]

Occupation as conclusive evidence

Under statute providing that occupation or use by owner or agent shall be conclusive evidence of completion, contractor's continuance in performing contract prevented owner's occupation from constituting conclusive evidence of completion—**Mortgage Brokerage Co v W B Barr Lumber Co**, 16 P 2d 32, 91 Colo 445

73. Mich.—Sandusky Grain Co v Borden's Condensed Milk Co, 183 NW 218, 214 Mich 806
40 C J p 475 note 19

Evidence held sufficient

(1) To show, or support finding, that labor or materials were furnished under separate contracts
Ind.—Kendallville Lumber Co v Adams, 176 NE 555, 93 Ind App 141

La.—General Lumber & Supply Co v McLellan, App, 200 So 501

Okl.—Donaldson & Yahn v Stillwater Building & Loan Ass'n, 45 P 2d 65, 172 Okl 258

Or.—Spaeth v Beckett, 41 P 2d 1064, 150 Or 111, 97 ALR 771

Wis.—Prince v Clubine Co, 234 N W 699, 203 Wis 504

(2) To show, or sustain finding, that labor or material was furnished under a single or continuous contract

Colo.—Smith v. Strohle Machinery & Supply Co, 126 P 2d 341, 109 Colo 460

Idaho.—Bannock Lumber & Coal Co v Tribune Co, 4 P 2d 662, 51 Idaho 226

40 C J p 475 note 19 [a] (1).

(3) To show other matters see 40 C J p 475 note 19 [a]

Evidence held insufficient

Wash.—Standard Lumber Co v Fields, 187 P 2d 283
40 C J p 475 note 19 [b]

74. Mo.—Marshall v Hall, App, 200 SW 770

40 C J p 475 note 20

Evidence held sufficient

Ark.—Brannan v Paul Sanders & Son, 144 SW 2d 174, 201 Ark 306

Ill.—Donkle & Webber Lumber Co v Rehmann, 33 NE 2d 709, 310 Ill App 17

Kan.—Thompson v Matthews, 183 P 2d 216, 163 Kan 434—**Isbell v Payne**, 147 P 2d 718, 158 Kan 298

La.—Krause & Managan v Tracy, App, 155 So 283

Nev.—Friendly v Larsen, 144 P 2d 747, 63 Nev 135

NJ.—Tile Wholesalers & Importers v Ruppert, 17 A 2d 607, 125 NJ Law 597

NY.—Owens v Ebner, 74 NYS 2d 169

Or.—Bradfield v Bolher, 128 P 2d 942, 169 Or 425

40 C J p 475 note 20 [a]

Evidence held insufficient

Ill.—Paul v Shukes, 47 NE 2d 374, 317 Ill App 650

Ky.—Stidham v Little's Adm'r, 65 SW 2d 1028, 251 Ky 707

Mo.—Hill-Behan Lumber Co v Flegle, App, 183 SW 2d 862

Nev.—Home Lumber & Coal Co v Hartford Mining Co, 83 P 2d 1049, 58 Nev 361

Or.—Laughlin v Connois, 102 P 793, 54 Or 184

Wash.—Seattle Lighting Fixture Co v Broadway Central Market, 286 P 43, 156 Wash 189, corrected 286 P 1110, 156 Wash 189

Introduction in evidence of lien statement and account would not necessarily show that the account was an account stated—Rust Sash & Door Co v Bryant, Mo App, 124 SW 2d 544.

75. Ill.—Fischer v Queen Hedwig's Polish Nat Church of Chicago, 63 NE 2d 675, 327 Ill App 215

Nev.—Friendly v. Larsen, 144 P 2d 747, 62 Nev 135

40 C J p 475 note 22.

Evidence held sufficient

Cal.—W R Spalding Lumber Co v Fradkin, 156 P 2d 450, 68 Cal App 2d 308

Pa.—Hopkins v German Beneficial Union, Dist No 321 of Ambridge, 153 A 312, 103 Pa Super 124

Tex.—Switzer v Mills, Civ App, 47 SW 2d 334, error refused

40 C J p 475 note 22 [a]

Evidence held insufficient

Cal.—Interstate Lumber Co v Rightman, 297 P 579, 112 Cal App 718

Mo.—Holekamp Lumber Co v Skay, App, 65 SW 2d 669

76. Evidence held sufficient

Ill.—Kiefer v Reis, 163 NE 157, 331 Ill 38

Ky.—Mays v Stegeman, 230 SW 464, 213 Ky 60

La.—Krause & Managan v Tracy, App, 155 So 283

Mo.—Tual v Martin, 66 SW 2d 969, 228 Mo App 30

40 C J p 475 note 23 [a]

77. Neb.—Byrd v Cochran, 58 NW 127, 39 Neb 109

40 C J p 475 note 24

Evidence held sufficient

Idaho.—Bannock Lumber & Coal Co v Tribune Co, 4 P 2d 662, 51 Idaho 226

Ill.—McKeown Bros Co v Ogden Kennel Club, 269 Ill App 632

Ind.—Central Dredging Co v F G Proudfoot Co, 158 NE 229, 87 Ind App 171

Tex.—Bryant-Link Co v W H Norris Lumber Co, Civ App, 61 SW 2d 160, error dismissed

40 C J p 475 note 24 [a]

Evidence held insufficient

Cal.—Stone v Serimian, 246 P 45, 198 Cal 520

40 C J p 475 note 24 [b]

Amount paid by claimant

In enforcing lien claim based on quantum meruit, building contractor is entitled to benefit of his bargain, and is only required to show the reasonable value, although proof of what he paid is admissible without being conclusive on question of reasonable value—**Fuhler v Gohman & Levine Const Co**, 142 SW 2d 482, 346 Mo 588

Contract price

Mo.—Cabool School Dist v. U S Fr-

tras,⁷⁸ as to the amount of materials delivered,⁷⁹ as to the work done and its classification,⁸⁰ and as to deductions and offsets⁸¹

1. Indebtedness of Owner to Contractor

In a proceeding by a subcontractor or materialman to enforce a mechanic's lien based on the existence of an indebtedness on the part of the owner to the principal contractor, the evidence must be sufficient to show the existence of such indebtedness.

In a proceeding by a subcontractor or materialman to enforce a mechanic's lien based on the existence of an indebtedness on the part of the owner

to the principal contractor, as considered supra § 174, the evidence must be sufficient to show the existence of such indebtedness,⁸² and the general rules as to the weight and sufficiency of evidence in civil actions have been applied in the determination of such fact,⁸³ and in the determination of such questions as that of good faith in a settlement,⁸⁴ or in payments to the contractor,⁸⁵ or of payment before due⁸⁶ or without knowledge that claimant was furnishing material,⁸⁷ as to the withholding of money for the payment of claimant,⁸⁸ as to the amount due on abandonment by the principal contractor,⁸⁹ or

delity & Guaranty Co., App. 9 SW 2d 103
40 C J p 475 note 24 [c]

More proof of costs of repairs was insufficient to fix enhancement in value of property in workman's action against owner to recover for repairing premises—Price v Lee, 123 So 458, 11 La App 291.

78. Evidence held sufficient

(1) In general—Friendly v Larsen, 144 P 2d 747, 62 Nev 185—40 C J p 475 note 25 [a]

(2) To sustain recovery for extras Ill—Chicago Art Marble Co v A Smith & Co, 26 NE 2d 703, 304 Ill App 583

NY—Zaretsky v Schenectady Homes Corporation, 38 NYS 2d 666

Okl—Leland v Oklahoma Const Co, 55 P 2d 1013, 176 Okl 216

(3) To support referee's findings allowing and disallowing certain claims of plaintiff for extras in connection with construction of residence—Stern v Schlafer, 11 N.W 2d 640, 244 Wis 183, rehearing denied 12 NW 2d 678, 244 Wis 183

Evidence held insufficient

NY—Stokes Bros v Drefs, 279 NYS 884, 244 App Div 524

Waiver of provision requiring written order

Where it is contended that defendant owners orally waived provision of contract requiring written orders for extra items, evidence should show with reasonable clearness that defendants consented to regard them as extra and to pay therefor—Stokes Bros v Drefs, supra.

79. Ala—Wood Lumber Co v Greathouse, 148 So 125, 226 Ala 644

40 C J p 475 note 26

80. NY—Monks v West St Impr Co, 134 NYS. 39, 149 App Div 604

40 C J p 475 note 27

Amount of time devoted to property

Where only part of employee's time was devoted to working on cer-

tain property which was being operated by his employer at same time that employer was also operating other property, in order to be entitled to mechanic's lien for unpaid wages it was incumbent on employee to show with reasonable degree of certainty amount of time which he devoted to property involved—Holmes Oil Co v Rule, 70 P 2d 86, 180 Okl 405

81. Evidence held sufficient

(1) In general

Ark—Edmonson v Hammerschmidt Lumber Co, 108 SW 2d 1075, 194 Ark 612

Ill—Baker v Palmer, 75 NE 2d 60, 333 Ill App 284

Ky—Morgan v Hazard Lumber & Supply Co, 15 SW 2d 292, 228 Ky 669

Mo—Reis v Taylor, App, 108 SW 2d 892

40 C J p 475 note 28 [a]

(2) To show, or to sustain finding, that owner was entitled to deduction or offset

Cal—Morel v Simonian, 284 P. 694, 103 Cal App 490

Ind—Goodwin v Schwartz, 59 NE 2d 363, 115 Ind App 422

Iowa—Hagen v Reid, 222 NW 377, 207 Iowa 39

Md—Parker v Tilghman V Morgan, Inc, 183 A 224, 170 Md 7

Minn—Knutson v Lasher, 18 NW 2d 688, 219 Minn 594

(3) To show that damages to furniture and paintings were due to conditions for which contractor, claiming lien, was not responsible, and to owners' voluntary assumption of known risk, and hence owners were not entitled to deduction from amount claimed by contractor—Parker v Tilghman V Morgan, Inc, supra.

(4) To sustain finding that contractor's defaults counterbalanced his claim, except for admitted extras for which trial court gave contractor credit—Bradfield v Bollier, 128 P 2d 942, 169 Or 425

Evidence held insufficient

Wash—American Plumbing & Steam

Supply Co v Alavekuu, 282 P 917, 154 Wash 436

40 C J p 475 note 28 [b]

Failure of owner to prove cost of repairs

Where contractor claiming lien on theory of substantial performance made out prima facie case, and owner filing crossbill to recoup damages for breach of contract failed to prove cost of making minor repairs or to offer any relevant testimony touching true measure of damages, owner was not entitled to claimed deduction—Parker v Tilghman V Morgan, Inc, 183 A 224, 170 Md 7

82. NY—Smith v Coe, 29 NY 666

83. Ala—Butler v Hawk, 128 So 451, 221 Ala 347

40 C J p 476 note 32

Evidence held sufficient

Cal—Santa Cruz Portland Cement Co v Snow Mountain Water & Power Co, 274 P 617, 96 Cal App 615

40 C J p 476 note 32 [a].

Evidence held insufficient

Ala—Butler v Hawk, 128 So 451, 221 Ala 347

84. NY—American Clay & Cement Corp v Rochester Folding Box Co, 171 NYS 720

85. NY—Drall v Gordon, 101 NYS 171, 51 Misc 618

40 C J p 476 note 34

Evidence held insufficient

DC—Merrill v B R Acker Co, 142 F 2d 102, 79 US App DC 51

40 C J p 476 note 34 [b]

86. NY—Tommasi v Archibald, 100 NYS 367, 114 App Div 338

40 C J p 476 note 35

87. Iowa—Chicago Lumber & Coal Co v Garmer, 109 NW 780, 132 Iowa 282

88. Ill—I Lurya Lumber Co v Goldberg, 198 Ill App 374

89. Cal—G Ganahl Lumber Co v Weinsveig, 143 P 1025, 168 Cal 664

40 C J p 476 note 38

the amount of the contract price lienable where the contractor failed to complete the work,⁹⁰ or as to the difference between the cost of completion and the contract price,⁹¹ or as to receipt by the owner of money due the subcontractor from the contractor's surety.⁹² An architect's certificate under the provisions of the principal contract is conclusive as to the existence of an indebtedness in the absence of fraud.⁹³

Deductions for faulty performance or for cost of completion Rules ordinarily applicable in determining the weight and sufficiency of evidence in civil actions, have been applied in determining the amount which the owner is entitled to be allowed for faulty performance by the principal contractor⁹⁴ or for his failure to complete the work.⁹⁵

j. Payment

In a proceeding to enforce a mechanic's lien, the general rules as to the weight and sufficiency of evidence with respect to payment ordinarily apply.

The general rules as to the weight and sufficiency

of evidence with respect to payment ordinarily apply in actions to enforce a mechanic's lien.⁹⁶ Such rules have been applied in the determination of a controverted question of payment to a contractor,⁹⁷ subcontractor or materialman,⁹⁸ or laborer,⁹⁹ as to the application of payments made to the contractor to the payments of subcontractors or materialmen,¹ as to the application of payments made to a materialman,² or as to the duty of a mortgagee under a building loan mortgage to see that the property was protected from liens in making application of the mortgage funds to the payment of a building contractor.³

k. Fraud or Bad Faith

In a proceeding to enforce a mechanic's lien, the general rules regulating the weight and sufficiency of evidence ordinarily control in determining controverted questions of fraud or bad faith.

The general rules as to weight and sufficiency of evidence have been applied in determining controverted questions of fraud or bad faith,⁴ as, for ex-

90. Cal—Olson-Mahoney Lumber Co v Dunne Inv Co, 159 P 178, 30 Cal App 332

91. N Y—Dennison Constr Co v Manneschildt, 97 NE 859, 204 NY 404

40 CJ p 476 note 40

92. Wis—Pietsch v Sangor, 181 NW 312, 173 Wis 301

93. Va—Maddux v Buchanan, 92 SE 830, 121 Va 102

40 CJ p 476 note 42

94. Ill—Sorg v. Crandall, 84 NE 181, 233 Ill 79

40 CJ p 476 note 44

95. Mich—Halpin v Garman, 158 NW 29, 193 Mich 71

96. Cal—Sourich v Barich, 279 P 842, 100 Cal App 289

Weight and sufficiency of evidence of payment generally see the CJS title Payment §§ 120-124, also 48 CJ p 725 note 43 et seq

97. Cal—Albertson v Brooks, 1 P. 2d 982, 213 Cal 117

40 CJ p 476 note 47

Evidence held sufficient

(1) In general

Ala—Builders' Supply Co v Smith, 133 So 721, 222 Ala 554, followed in Builders' Supply Co v Phillips, 133 So 723, 222 Ala 556, and Smith v Chestnut, 133 So 723, 222 Ala 556

Tex—Uvalde Paving Co v Townsend, Civ App, 92 SW 2d 1128

40 CJ p 476 note 47 [a]

(3) To show, or to sustain finding that contractor had been paid in full Cal—Smoll v Webb, 130 P 2d 773, 55 Cal App 2d 456—Albertson v Brooks, 1 P 2d 982, 213 Cal 117

Wash—Eddy v Fern Hill Lumber Co, 247 P 466, 139 Wash 373

98. Evidence held sufficient

Cal—Giant Powder Co Consolidated v Fidelity & Deposit Co of Maryland, 7 P 2d 1023, 214 Cal 639—Llewellyn Iron Works v Reed, 11 P 2d 657, 123 Cal App 607

Conn—Portland Building & Loan Ass'n v Peck, 149 A 214, 110 Conn 670

La—Ruston Brick Works v Heard, App, 177 So 494

Wash—Stewart Lumber Co v Unique Home Builders, 291 P 988, 160 Wash 273

40 CJ p 476 note 48 [a]

Evidence held insufficient

Ky—Hodges v Quire, 174 SW 2d 9, 295 Ky 78

Tex—Spiowls v Youngblood, Civ App, 23 SW 2d 879, reversed on other grounds Harveson v Youngblood, Com App, 38 SW 2d 781.

40 CJ p 476 note 48 [b]

99. Evidence held insufficient

To show that labor claim was unpaid—Nellis v Johnson, 57 P 2d 393, 57 Nev 17

1. Evidence held sufficient

Minn—A Y McDonald Mfg Co v Lima, 244 NW 804, 157 Minn 240

40 CJ p 476 note 49

Evidence held insufficient

Tenn—Richmond Screw Anchor Co v E W Minter Co, 300 SW 574, 156 Tenn 19

2. Mich—Slater v Christenson, 198 NW 224, 226 Mich 621.

40 CJ p 476 note 50.

Evidence held sufficient

Conn—Ford Bros v Frederick M Ward Co, 140 A 754, 107 Conn 425

Idaho—Idaho Lumber & Hardware Co v DiGacomo, 102 P 2d 637, 61 Idaho 383

Tex—Investor's Syndicate v Dallas Plumbing Co, Civ App, 81 SW 2d 1039

40 CJ p 476 note 50 [a]

3. Minn—Jefferson v Lone, 132 NW 299, 115 Minn 314

4. Clear and convincing evidence is required to establish fraud—Monroe St Lumber Co v Garvey, 17 P 2d 904, 171 Wash 181

Evidence held sufficient

Conn—J L Purcell, Inc, v Libbey, 149 A 235, 111 Conn 132, 68 ALR 1258

Fraud between owner and contractor

(1) Evidence in suit on mechanic's lien claim failed to establish that contract between owner and general contractor filed for record was fraudulent for purpose of defeating claims of subcontractors and materialmen—Ewart v Johnson, 166 A 716, 11 NJ Misc 472

(2) Fact that there was considerable difference between bids of contractor and next lowest bidder did not indicate fraud between owner and contractor as regards liability to claimants in concursus—Cook v Ruston Oil Mills & Fertilizer Co, 127 So 347, 170 La 10

(3) Fact that owner through architect exercised authority in selecting material and directing construction

ample, in the placing of title in the name of another,⁵ in the making of overcharges in a lien statement,⁶ in the inclusion of nonlienable items,⁷ in delivery of an item of material at a considerable time after other material was furnished,⁸ in the construction of the building,⁹ in the furnishing of material,¹⁰ in inducing claimant not to file a lien,¹¹ or in conspiring to defraud the contractor¹²

L. Waiver and Estoppel

In a proceeding to enforce a mechanic's lien, the evidence must be sufficient to establish an alleged waiver of, or an estoppel to assert, the lien

In a proceeding to enforce a mechanic's lien, the evidence must be sufficient to establish an alleged waiver of the lien,¹³ or waiver of rights under a notice by a materialman to the owner,¹⁴ or facts on which an estoppel is claimed¹⁵

m. Priorities

In a proceeding for the enforcement of a mechanic's lien, a contention as to the priority between the mechanic's lien and other liens and encumbrances must be established by sufficient evidence.

In a proceeding to enforce a mechanic's lien, a contention as to the priority or want of priority be-

of building did not indicate fraud, with respect to liability to claimants in concursus—Cook v Ruston Oil Mills & Fertilizer Co., supra

(4) Evidence established good faith of contractor in making contract with owner to build residence in determining issue whether amount due under judgment on contract against owner belonged to contractor or his creditors—Brown v Berry, 129 So 137, 170 La 706

5. NY—Curtis Bros Lumber Co v Madansky, 125 NYS 443, 141 App Div 883

6. NY—Schenectady Homes Corporation v Greenside Painting Corporation, 37 NYS 2d 53
40 C J p 476 note 55

Evidence held sufficient

(1) To justify finding that lien claimants filed excessive claim through unintentional mistake—Moran v Ryekamp, 209 NW 52, 235 Mich 140—40 C J p 476 note 55 [a]
(2)

(2) To show intentional exaggeration of claim

Minn—Standard Lumber Co v. Al-saker, 289 NW 827, 207 Minn 63
NY—Parsons v Dura Realty Corporation, 240 NYS 542, 136 Misc 700

(3) To support finding of falsity of statement of material and labor furnished—Martin v Standley, 265 P 1021, 90 Cal App. 429—40 C J. p 476 note 55 [a] (1)

Evidence held insufficient

NY—Clemente Const Corporation v P T Cox Contracting Co, 16 NY S 2d 483, 173 Misc 904

Or—Davis v Bertschinger, 241 P 53, 116 Or 137

Wash—Westinghouse Electric Supply Co v Hawthorne, 150 P 2d 55, 31 Wash 2d 74

40 C J p 476 note 55 [b]

7. Mo—Gull v Harris, 34 S W 2d 673, 234 Mo App 717

Or—Stewart v Spalding, 141 P 1127, 71 Or 310

8. Mich—Neely v International Corn Products Corporation, 205 N W 96, 232 Mich 81—Ypsilanti

Lumber & Coal Co v Leslie, 188 NW 395, 218 Mich 664

Wash—Petro Paint Mfg Co v Taylor, 265 P. 155, 147 Wash 158

3. Mich—Zilz v Wilcox, 157 NW 77, 190 Mich 186

Evidence held insufficient

Cal—Union Supply Co v Morris, 30 P 2d 394, 220 Cal 331

10. Neb—Watkins v Kobiela, 121 NW 448, 84 Neb 433

11. NY—Dinkel v St Teresa Roman Catholic Church, 135 NYS 221, 150 App Div 848

12. Pa—O'Kane v Murray, 97 A 94, 252 Pa 60

13. Mich—Gottesman v United Sav Bank, 389 NW 250, 291 Mich 551

Proof must be clear, unequivocal and satisfactory

Iowa—Joyce Lumber Co v Marshalltown Const League, 283 NW 912, 226 Iowa 274

Pa—Clayton v Lienhard, 167 A 321, 312 Pa 433

Wash—Pacific Lumber & Timber Co v Dailey, 111 P 869, 60 Wash 566

Evidence held sufficient

(1) In general

Cal—W R. Spalding Lumber Co v Fradkin, 156 P 2d 450, 68 Cal App 2d 308

Kan—Augusta Building & Loan Ass'n v Speck, 285 P 516, 130 Kan 45

40 C J p 477 note 62 [a]

(2) To show, or sustain finding, that lien was waived

Ala—Grayson v George, 145 So 427, 226 Ala 106.

Cal—Reinhart Lumber & Planing Mill Co v Hladik, 259 P 363

Minn—Thompson Lumber Co v Gruesner, 224 NW 849, 177 Minn 111

(3) To show, or to sustain finding, that lien was not waived—Saginaw Lumber Co v Wilkinson, 254 NW 240, 266 Mich 661—40 C J p 477 note 53 [a] (1)

Evidence held insufficient

Cal—Baird v Ocoquedda, 67 P 2d 1055, 8 Cal 2d 700

10 C J p 477 note 62 [b]

Fraud in obtaining waiver

Subcontractors, seeking to avoid contract by which they waived liens on ground it was obtained by fraud and to foreclose materialman's lien notwithstanding such waiver, failed to sustain burden of proving such fraud—Baird v Lascy, 161 P 2d 996, 71 Cal App 3d 142

Mistake in waiving lien

In contractor's action to cancel waiver of lien and to recover amount claimed to be due for repairing defendants' house, evidence sustained jury's finding that plaintiff accepted certificate of building and savings association stock as payment to the extent of its face value rather than to the extent of its then fair market value, and that the parties were not mutually mistaken regarding the then market value of the stock—Better Properties v Kocher, 1 NW 2d 157, 239 Wis 294.

14. Mich—Hartwick Lumber Co v Chonoski, 185 NW 774, 216 Mich 434

15. Mich—Saginaw Lumber Co v Wilkinson, 254 NW 240, 266 Mich 661

40 C J p 477 note 64.

Evidence held sufficient

Fla—Roughan v Rogers, 199 So 572, 145 Fla 421

40 C J p 477 note 64 [a]

Evidence held insufficient

Cal—Mabrey v McCormick, 272 P 289, 205 Cal 667—Baird v Havas, 164 P 2d 952, 72 Cal App 2d 530—Hammond Lumber Co v Weeks, 287 P 573, 105 Cal App 315

Md—Bounds v Nuttle, 30 A 2d 263, 181 Md 400

Mich—Saginaw Lumber Co v Wilkinson, 254 NW 240, 266 Mich 661.

Wash—Standard Lumber Co v Fields, 187 P 2d 283

40 C J p 477 note 64 [b]

tween the mechanic's lien and other liens or encumbrances must be established by a sufficiency of the evidence.¹⁶ In various cases the evidence has been held sufficient or insufficient with respect to priority between a mechanic's lien and other liens, claims, and encumbrances,¹⁷ such as other mechanic's liens,¹⁸ mortgages,¹⁹ security²⁰ or trust²¹ deeds, or vendor's liens.²²

Clear and positive evidence by a purchaser at a mortgage foreclosure sale that he had no knowledge of any unrecorded materialman's claims outweighs uncertain and indefinite testimony that such information was given to him by claimant's agent and supports a judgment denying priority of the mechanic's lien.²³

D TRIAL OR HEARING

§ 311. In General

The trial or hearing in an action to enforce a mechanic's lien should be confined to the issues, and no hearing need be had on matters not in issue.

General rules as to trial apply in an action to enforce a mechanic's lien,²⁴ and where the proceeding is regarded as an equitable one, as discussed supra § 264, the course of procedure as far as it relates to the mode of trial is in accordance with the

practice in equity except in so far as modified by statute.²⁵ Where legal and equitable jurisdiction is exercised by the same tribunal, the issues, whether of fact or at law, are tried by the court as an issue in the action.²⁶ A notice of trial required by a local statute is necessary in order to bring the issues involved regularly to trial.²⁷

Ordinarily, the trial or hearing extends and is confined to the issues,²⁸ and no hearing need be had

16. Pa—McCready-Rodgers Co v Dunlap, Com Pl, 89 Pittsb Leg J 537

RI—Placella v Pineli, 158 A 372, 52 RI 121

40 C J p 477 note 65

Priorities generally see supra §§ 197-215

17. Ark—Middleton v Watkins Hardware Co, 116 S W 2d 1043, 196 Ark 133

40 C J p 477 note 65

Other creditors

Iowa—Joyce Lumber Co v Marshalltown Const League, 283 N W 912, 226 Iowa 274

Purchaser

Evidence showed that alleged purchaser, notwithstanding absence of statutory lis pendens notice, had knowledge of mechanics' lien suit, and therefore could not prevail as against lienholders—Jurgens v Sheridan, 296 P 840, 136 Or 45

18. Evidence held sufficient

Iowa—Joyce Lumber Co v Marshalltown Const League, 283 N W 912, 226 Iowa 274

19. Pa—McCready-Rodgers Co v Dunlap, Com Pl, 89 Pittsb Leg J 537

RI—Placella v Pineli, 158 A 372, 52 RI 121

Evidence held sufficient

Cal—Bank of Italy v MacGill, 269 P 568, 98 Cal App 238

Ill—Moulding-Brownell Corporation v E C Delfosse Const Co, 26 N E 2d 709, 304 Ill App 491

Iowa—Queal Lumber Co v McNeal, 284 N W 479, 226 Iowa 631

Minn—Anderson v Iverson Outdoor Life, 245 N W 365, 187 Minn 308—Thompson Lumber Co v Gruessner, 224 N W 849, 177 Minn 111

Mont—Downing v Crippen, 138 P 2d 575, 114 Mont 136—Federal Land Bank of Spokane v Green, 90 P 2d 489, 108 Mont 56

Okl—Sutherland v Lombard-Hirt Loan Co, 66 P 2d 523, 179 Okl 486—Yarhola v Long-Bell Lumber Co, 249 P 723, 120 Okl 10

Utah—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

Wash—Stoneway Lumber Co v Universal Mortg Corporation, 286 P 62, 156 Wash 91

Wis—A Lentz Co v Dougherty, 261 N W 218, 218 Wis 493

40 C J p 477 note 65 [a] (1) [b]

Evidence held insufficient

US—Frank T Budge Co v Horitt, CCA Fla, 32 F 2d 157

Ala—Tallapoosa Lumber Co v Copeland, 134 So 658, 223 Ala 41, 75 A LR 1325

Iowa—First State Bank of Frederickburg v Westendorf, 239 N W 73, 215 Iowa 475

RI—Placella v Pineli, 158 A 372, 52 RI 121

Utah—Wilcox v Cloward, 56 P 2d 1, 88 Utah 503

40 C J p 477 note 65 [c] (1)

20. Evidence held insufficient

Ga—Georgia State Sav Ass'n v Wilson, 5 SE 2d 14, 189 Ga 21

21. Evidence held sufficient

Cal—Hayward Lumber & Investment Co v Corbett, 33 P 2d 41, 138 Cal App 644—Hammond Lumber Co v Roubian, 30 P 2d 440, 137 Cal App 155—Hayward Lumber & Investment Co v Naslund, 13 P 2d 775, 125 Cal App 34

Minn—Lenders-Morrison-Christenson Co v Ambassador Holding Co, 214 N W 503, 171 Minn 445, 53 A LR 573

Mo—Gardner v North Kansas City Alfalfa Mills, App, 61 S W 2d 374 10 C J p 477 note 65 [a] (2), (3)

22. Tex—King v Hampton, 113 S W 2d 173, 131 Tex 85

Evidence held sufficient

Ky—T W Spinks Co v Patchoud Bros, 92 S W 2d 50, 263 Ky 119

Tex—Dallas Plumbing Co v Harrington, Civ App, 275 S W 190 10 C J p 477 note 65 [a] (4)

23 Iowa—Magnesite Products Co v Benmiller, 224 N W 511, 207 Iowa 303

24. Ga—West Lumber Co v McPherson, 159 SE 868, 173 Ga 53

Necessity of particular proof held waived

Ill—Donkle & Webber Lumber Co v Rehrmann, 33 NE 2d 709, 310 Ill App 17

25 Kan—Thompson v Matthews, 183 P 2d 216, 163 Kan 431

NY—Hubbell v Schreyer, 4 Daly 362, 14 Abb Pr NS 281, reversed on other grounds 15 Abb Pr NS 300, 56 N Y 604

26. NY—Hubbell v Schreyer, supra

27. NY—Hinkle v Sullivan, 95 N YS 788, 108 App Div 316—Mahoney v McWalters, 36 NYS 149, 91 Hun 217

28. Conn—Lampson Lumber Co v Chiarelli, 123 A 909, 100 Conn 301, 40 C J p 479 note 5

Time for removal of building

Question of what constitutes reasonable time for removal of building on sale to satisfy mechanic's lien depends on particular circumstances as to which parties have right to be heard—English v Olympic Auditorium, 52 P 2d 267, 10 Cal App 2d 196

as to matters not in issue²⁹ A trial on an issue of fact may not be had while no disposition has been made of an issue of law presented by a demurrer to the complaint³⁰ Where there is an issue of fact involved, the court may not enter a decree without having testimony, even though defendant should not contest³¹ It is sufficient that the judge tries and disposes of all questions necessary to be tried to enable him to dispose of the action³² A contractor suing the owner may waive his mechanic's lien at the trial and rely on the common-law right to a general judgment³³

Time of trial and continuance It is substantial error to force a defendant, over his objection, into a trial at a term prior to that at which the action first becomes triable³⁴ The hearing may be postponed from time to time,³⁵ and the court may grant a continuance for the purpose of bringing in parties not served³⁶

Submission of issues to jury. Some statutes specifically authorize a trial by jury of issues of fact arising in the action³⁷ Under such a statute, either party may demand the submission of issues of fact to a jury,³⁸ but, in the absence of such demand, the court may determine the issues,³⁹ or may refer such issues of fact to a jury as it may deem proper.⁴⁰

Reception of evidence and objections thereto Evidence that is proper to be received may be introduced out of its regular order, at the discretion of the trial judge,⁴¹ but incompetent evidence is properly excluded⁴² A motion to reopen a case to

permit the introduction of further evidence in the cause is addressed to the sound discretion of the court⁴³ So, it is within the discretion of the trial court to permit plaintiff to offer additional evidence after defendant has moved for a nonsuit,⁴⁴ or to permit plaintiffs to testify in rebuttal contradicting defendant's contention that plaintiffs had waived their right to a lien⁴⁵ After verdict finding the amount of indebtedness, it is not error to admit evidence as to the lien, etc., since the existence of the lien and priorities of the lienholders are questions for the court⁴⁶ The general rule is applied that in order to show error objections to evidence must be made when it is offered, and must be specific⁴⁷ An alleged variance between the evidence and claim must be specifically pointed out in the trial court⁴⁸

§ 312. References

Ordinarily, in a proceeding to enforce a mechanic's lien, a reference will not be ordered of the main issue in the case, but a reference may usually be had to take proofs, state accounts, and ascertain and report particular facts.

Under the rules applicable to equitable actions generally, a reference will not ordinarily be ordered for the trial of the main issue in an action to enforce a mechanic's lien,⁴⁹ and, where the answer substantially denies every material allegation of the bill and no proof is taken thereafter to sustain the bill, it is improper to refer the cause to a commissioner to enable plaintiff to make out his case⁵⁰ Also, in jurisdictions where an action to foreclose

Another pending suit held not to preclude ascertainment of amount of contract price remaining unpaid—*Pierce, Butler & Pierce Mfg Corporation v Enders*, 174 A 169, 118 Conn 610

29. Conn—*Lampson Lumber Co v Chiarelli*, 123 A 909, 100 Conn 301 40 C J p 479 note 6

30. Ind—*Waldo v Richter*, 17 Ind 634

31. Ga—*McConnell v Bryant*, 38 Ga 639

32. Mo—*La Crosse Lumber Co v Goddard*, App., 151 SW 2d 455 40 C J p 479 note 14

33. N.J.—*Booye v Ries*, 134 A 86, 102 N.J. Law 322

34. Kan—*Rice v. Simpson*, 26 Kan 113 40 C J p 479 note 23

35. Va—*Lester v Pedigo*, 4 SE 703, 84 Va 309 40 C J p 479 note 24

36. Mo—*Schulenburg v Werner*, 6 Mo App 292 40 C J p 479 note 25

37. Wis—*Bartlett v Clough*, 68 N W 875, 94 Wis 196 40 C J p 480 note 37

Right of trial by jury in mechanic's lien proceedings generally see *Juries* § 28

Right to jury trial in compulsory references generally see *Juries* § 94

View of jury

Under a statute providing that, where a jury is called in a mechanic's lien suit, their verdict is as conclusive as in other cases, the jury may view the premises without the judge's presence, in the absence of a request by either party—*Moritz v Larsen*, 36 NW 331, 70 Wis 569

38. Wis—*Bartlett v Clough*, 68 N W 875, 94 Wis 196—*Willer v Bergenthal*, 7 NW 352, 50 Wis 474

39. Wis—*Willer v Bergenthal*, supra

40. Wis—*Bartlett v Clough*, 68 N W 875, 94 Wis 196—*Huse v Washburn*, 18 NW 341, 59 Wis 414

41. Mont—*Bardwell v Anderson*, 32 P 385, 13 Mont 87

42. Ga—*West Lumber Co v McPherson*, 159 SE 868, 173 Ga 53

43. Ky—*Hoosier Bldg Tile & Silo Co v Peet*, 47 SW 2d 1066, 243 Ky 290

44. Pa—*Hastings v Thompson*, 47 Pa Super 424

45. Pa—*Woy v McCann*, 47 Pa Super 458

46. Kan—*Carr v. Hooper*, 29 P 398, 48 Kan 253

47. Cal—*Georges v. Kessler*, 63 P 466, 131 Cal 183 40 C J p 479 note 31

48. Ill—*Bonner, etc., Co v Hansell*, 189 Ill App 474

49. NY—*O'Brien v New York Butchers' Dressed Meat Co*, 105 NYS 950, 54 Misc 297 40 C J p 480 note 43

50. W Va—*Gist v Virginian R Co*, 90 SE 554, 79 W Va 167

a mechanic's lien is regarded as an action at law, a compulsory order of reference to determine issues of law and fact may not be made.⁵¹ As in other cases, however, reference may be had in mechanics' lien proceedings to referees, auditors, masters, and the like, to take proofs, state accounts, and ascertain and report particular facts.⁵² Under a statute conforming the practice in mechanics' lien proceedings to that in actions on contract, a provision of a practice act authorizing the reference of an account is applicable.⁵³ After submission to a referee to hear and determine an issue, the lien cannot be discharged on an application based on ex parte affidavits touching the merits.⁵⁴ The fact that an order of reference is excessively broad in its terms is not necessarily fatal to the validity of the proceeding where the court amplified the referee's findings by findings of its own.⁵⁵

Powers and duties of referee, fees A referee in a proceeding to enforce a mechanic's lien ordinarily has no powers except those conferred on him by the appointment.⁵⁶ He cannot delegate any of his powers to others,⁵⁷ and his authority terminates when he makes and files his decision.⁵⁸ Accordingly, after signing his decision he has no jurisdiction to take any further action,⁵⁹ and his acts of signing the final judgment of foreclosure⁶⁰ and appointing a referee to sell the property⁶¹ are superfluous and unauthorized. The allowance and pay-

ment of a referee's fee before his duties are completed and his report is made have been held premature.⁶²

Hearing and notice. On a reference to ascertain claims and report on liens and their priorities, the parties are entitled to notice of the time and place for the hearing of proofs,⁶³ but one who suffers a petition to be taken as confessed is not entitled to notice of the taking of testimony before the master.⁶⁴

Report and findings General rules applicable to a master's report or findings, as discussed in Equity §§ 539-543, or to the report or findings of a referee, as considered in the C J S title References §§ 111-149, also 53 C J p 743 note 72-p 768 note 41, govern the report or findings of referees and the like in mechanic's lien proceedings.⁶⁵ It has been held that a referee's report in compliance with the statute is prima facie evidence of the facts therein found and reported.⁶⁶ Where the complaint alleges that claimant was prevented by certain causes from full performance of his contract, a referee's report finding that plaintiff did not complete his contract should find also the ultimate facts as to whether the failure to complete was due to the causes alleged.⁶⁷ Where the finding clearly indicates the amount due on the lienor's contract, a failure to find such amount in terms is not necessarily fatal.⁶⁸

51. SC—Miles v Clyde, 141 SE 107, 142 SC 475

52. Cal—Darker Bros v Coates, 297 P 8, 211 Cal 756
40 C J p 480 note 41

Validity and priority of liens

Equity court may refer mechanic's liens sued on to commissioner to determine their validity and priority—Rust v Indiana Flooring Co, 145 SE 321, 151 Va 845

Failure of clerk to order reference

Under a statute requiring the clerk to enter an order referring such a cause of action to a master commissioner, the fact that this was not done, did not affect jurisdiction or touch validity of proceedings—Lorton v Ashbrook, 295 SW 1027, 220 Ky 830

53. NJ—Taylor v Thornton, 79 A. 330, 81 NJ Law 7—New York Metal Ceiling Co v Kiernan, 65 A 444, 73 NJ Law 763

54. NY—McGuckin v Coulter, 33 NY Super 324, 10 Abb Pr. NS 128

55. Cal—Barker Bros v Coates, 297 P 8, 211 Cal 756

56. NY—Addazio v Kalbfleisch, 265 NYS 710, 148 Misc 335

57. NY—Addazio v. Kalbfleisch, supra

58. NY—Decker v Canzoneri, 9 NYS 3d 210, 256 App Div 68—Addazio v Kalbfleisch, 265 NYS 710, 148 Misc 335

59. NY—Decker v Canzoneri, 9 NYS 3d 210, 256 App Div 68

60. NY—Decker v Canzoneri, supra

61. NY—Addazio v Kalbfleisch, 265 NYS 710, 148 Misc 335

Judicial function

The appointment of a referee is a judicial function and can be exercised only by the court or a judge thereof, and such function cannot be delegated by the court to an official referee—Decker v Canzoneri, 9 NYS 3d 210, 256 App Div 68

62. Okl—Consolidated Cut Stone Co v Seidenbach, 75 P 2d 442, 181 Okl 578

63. Ky—Carl v Grosse, 65 SW 604, 23 Ky L 1586

64. Ill—Fergus v Chicago Sash & Door Co, 61 Ill App 364

65. Ga—Robinson v Reese, 165 SE 744, 175 Ga 574

Findings held not invalid

In suit to establish and enforce materialmen's and laborers' liens, mere fact that auditor, to whom

case was referred, found that plaintiffs' liens, which were authorized to be, and were actually, set up as statutory liens were equitable liens did not vitiate them—Christian v Bremer 34 SE2d 40, 199 Ga 285

Omission of irrelevant findings

Ill—Fischer v Queen Hedwig's Polish Nat Church of Chicago, 63 NE 2d 676, 327 Ill App 215

Motion to suppress testimony taken before commissioner was properly denied, where irregularities in proceedings were waived or corrected by court, and testimony considered by court was correct transcript—Allard v Swaine, 226 NW 659, 247 Mich 642

Confirmation of referee's report, without first submitting appropriate issues to the jury, was held improper—Brown v Broadhurst, 150 SE 355, 197 NC 738

66. NJ—New York Metal Ceiling Co v Kiernan, 65 A 444, 73 NJ Law 763

67. Wis—Whalen v. Eagle Lime Products Co, 143 NW 689, 155 Wis 26

68. Conn—Persky v Puglisi, 127 A 351, 101 Conn 658

Exceptions A party desiring to except to the report must do so at the proper time.⁶⁹ A general exception that the report is contrary to evidence is sufficient in a case where the report itself is general.⁷⁰ One who allows the petition to be taken as confessed must except to the master's report if he desires to question the master's conclusions of fact contained therein.⁷¹ It has been held that a court rule requiring exceptions to a referee's report to be made in the first instance at special term does not apply to a reference in mechanics' lien proceedings.⁷² Where the decree is in effect a ruling on the exceptions to the master's report, the failure to make a formal order disposing of them is not harmful.⁷³ Where exceptions have been filed to the referee's report awarding payments to certain lienholders, the owner makes payment before confirmation of the report at his own risk.⁷⁴

Resubmission Where otherwise proper, the granting of a motion to recommit for further proof is discretionary with the court.⁷⁵ A resubmission will not be granted because of a dispute as to an item as to which evidence was completely available at the time of the original hearing before the referee.⁷⁶ Advantage may not be taken of the failure of the referee to find whether an overstatement was innocent or with an intent to deceive in the absence of a motion to recommit.⁷⁷ This, also, is true of a failure to apportion damages for defective work and materials between several subcontractors whose work is found to be improperly done.⁷⁸

Conclusiveness and effect Where an order of reference is properly made, findings of the referee, it has been held, stand as the findings of the court,⁷⁹ and the referee's decision as to a mixed question of law and fact will not be disturbed in the absence of

a misapplication of the law.⁸⁰ Where a reference by agreement is entered into by the parties, in which they submit all matters in controversy, a question of law and fact not raised by proper plea or before the referee cannot be raised thereafter.⁸¹ Where interveners have stipulated in an order of reference that the amount due from defendants under the contract shall constitute the fund to be divided, they cannot object to a deduction of damages for delay as provided for in the contract.⁸²

§ 313. Survey

In a proper case a commissioner may be appointed by the court to survey or ascertain the boundaries of the premises on which a lien is claimed.

In a proper case a commissioner may be appointed by the court to survey or ascertain the boundaries of the premises on which a lien is claimed.⁸³

§ 314. Questions of Law and Fact

- a In general
- b Particular questions

a. In General

In proceedings to enforce mechanics' liens, questions of law are for the determination of the court, while issues of fact are to be determined by the jury or the trial court sitting without a jury.

In a proceeding to enforce a mechanic's lien, as in other civil actions, questions of law are for the determination of the court,⁸⁴ while questions of fact are to be determined by the jury,⁸⁵ or, where the case is tried without a jury, by the court.⁸⁶ Accordingly where there is evidence tending to support claimants' cause, notwithstanding there may be evidence to the contrary, the questions so raised must be left to the triers of the facts,⁸⁷ and this is

69. Va.—First Nat Bank v Wright, 150 S.E. 255, 153 Va. 429

70. N.J.—New York Metal Ceiling Co v Kiernan, 65 A. 444, 73 N.J. Law 763

71. Ill.—Fergus v Chicago Sash & Door Co., 64 Ill. App. 364

72. N.Y.—Schaeffler v Gardiner, 4 Daly 56, 41 How. Pr. 243, appeal dismissed 47 N.Y. 404

73. Ill.—Gilbert v Croshaw, 178 Ill. App. 10

74. N.C.—West v. Laughinghouse, 93 S.E. 719, 147 N.C. 214

75. Ky.—Hoosier Bldg Tile & Silo Co v Peet, 47 S.W.2d 1066, 243 Ky. 290

76. N.Y.—Western Sash, Door & Lumber Co v Gaul Constr Co., 126 N.Y.S. 1110

77. Conn.—Persky v Puglisi, 127 A. 351, 101 Conn. 658
40 C.J. p. 481 note 63

78. Conn.—Capitol City Lumber Co v Sudarsky, 111 A. 349, 95 Conn. 336

40 C.J. p. 481 note 64

79. Cal.—Barker Bros v Coates, 297 P. 8, 211 Cal. 756

80. N.H.—Kent v Brown, 59 N.H. 236

81. Pa.—Scott v Roberts, 7 Pa. Dist. 606, 21 Pa. Co. 491

82. N.C.—West v Laughinghouse, 93 S.E. 719, 147 N.C. 214

83. Pa.—Menner v Nichols, 8 A. 647, 5 Pa. Cas. 356
40 C.J. p. 481 note 68

84. Okl.—Waken v Gensman Bros & Co., 243 P. 324, 116 Okl. 106

85. Mo.—Henry Evers Mfg Co v Grant, App., 284 S.W. 525

Okl.—Union Bond & Investment Co v Bernstein, 139 P. 974, 40 Okl. 527

Pa.—Moss & Blakeley Plumbing Co v Schauer, Com. Pl., 91 Pittsb. Leg. J. 519

Probative force of the evidence is for the jury—Atlas Supply Co v McCurry, 156 S.E. 91, 199 N.C. 799

86. Conn.—Portland Building & Loan Ass'n v Peck, 149 A. 214, 110 Conn. 670

Mo.—Moller-Vandenboom Lumber Co v Boudreau, 85 S.W.2d 141, 231 Mo. App. 1127

Okl.—Union Bond & Investment Co v Bernstein, 139 P. 974, 40 Okl. 527

87. Mo.—Quigley v. William M. Rideout & Co., App., 127 S.W.2d 37

Pa.—Nusbaum v Warwick Hotel Co., 170 A. 388, 112 Pa. Super. 277—Val-

true, even though the evidence preponderates in favor of defendant ⁸⁸

If, on the other hand, the particular facts are undisputed or ascertained, it is for the court to determine the ultimate fact,⁸⁹ and, if there is no evidence of an essential fact without proof of which claimant is not entitled to a lien, a demurrer to the evidence should be sustained⁹⁰ or a dismissal⁹¹ or nonsuit⁹² granted

b. Particular Questions

- (1) In general
- (2) Lienable character of claim
- (3) Agreement or consent of owner
- (4) Performance of contract
- (5) Lien, claim, statement, or notice
- (6) Amount and payment

(1) In General

In proceedings to enforce mechanics' liens, questions relating to the existence of the debt or lien and other particular questions have been held to be questions of fact for the triers thereof, but the question whether respondents are proper parties has been held to be one of law.

Under the rule discussed supra subdivision a of this section that questions of law are for the determination of the court and questions of fact are for

the jury in proceedings for the enforcement of mechanics' liens, numerous particular questions have been held to be questions of fact for the triers thereof,⁹³ such as questions relating to the existence of the debt⁹⁴ or lien,⁹⁵ the correctness of an account for material furnished,⁹⁶ whether or not claimant has performed those things that bring him within the statutory provisions creating a lien,⁹⁷ the terms of an oral agreement,⁹⁸ whether contractors guaranteed the total cost of the construction,⁹⁹ or whether notice of nonresponsibility had been properly posted.¹ The question whether respondents are proper parties is one of law,² but it is a question of fact whether they are nonresidents who may be served by publication.³

Reliance on credit of property On conflicting evidence, the question whether materials were furnished on the credit of the contractor or of the improvement is one of fact.⁴ Accordingly, it has been held that a sale of materials to a contractor on the usual terms of credit does not, as a matter of law, prevent the lien from attaching.⁵

Property or interest subject to lien Where the lien extends to the land necessary for the convenient use and occupation of the buildings and improvements made, the question of the extent of such

lino v Klein, Com Pl, 87 Pittsb Leg J 227

SC—W L Brissey Lumber Co v Crowther, 133 SE 208, 135 SC 131

Tex—Baker v Powell, Civ App, 105 SW 2d 289
40 C J p 481 note 69

Nonsuit properly denied

Idaho—Finlayson v Waller, 134 P 2d 1069, 64 Idaho 618

NJ—P E Guerin, Inc, v Parson, 169 A 810, 113 NJ Law 56

88. Ala—Herrin v Burnett, 114 So 406, 217 Ala 23

89. Tex—Weimhold v Hyde, Civ App, 294 SW 899

40 C J p 481 note 72

Evidence held insufficient for jury

NJ—Kelly v Cummings, 148 A 607, 106 NJ Law 224—Duchatkiewicz v Cohen, 136 A 910, 5 NJ Misc 438

Tex—Black, Sivalis & Bryson v Operators' Oil & Gas Co, Civ App, 37 SW 2d 313, error dismissed

90. Okl—Waken v Gensman Bros & Co, 243 P 224, 116 Okl 106

40 C J p 481 note 73

Proof held sufficient

(1) Proof consisting of original lien statement with account and testimony that plaintiff had fulfilled contract and had not been paid was good against demurrer, where answer was unverified general denial

and plea of set-off—Yale Theatre Co v Majors & Scheer, 251 P. 1019, 123 Okl 124

(2) Failure of mechanic's lien claimant to introduce lien statement in evidence did not prevent recovery, on demurrer to plaintiff's evidence, where lien statement was marked as exhibit and furnishing of materials sufficiently shown—Pepin v W R Thompson & Sons Lumber Co, 1 P 2d 714, 150 Okl 295

91. Ala—Becker Roofing Co v Little, 156 So 842, 229 Ala 317.

Mich—Silverstein v Berman, 236 N W 840, 254 Mich 478

Form of dismissal

Demand against contractors in action for recognition of lien on courthouse, predicated solely on lien, should have been dismissed as in case of nonsuit, and not in its entirety—Decatur Cornice & Roofing Co v Caldwell Bros, 138 So 511, 173 La 694

92. NC—Dixon v Ipock, 193 SE 392, 212 NC 363

40 C J p 481 note 74

93. Miss—Davis v J W. Rogers Lumber Co, 178 So 75, 180 Miss 612

Mo—Kierns v Gibson, App, 289 S. W 358

Pa.—Moss & Blakeley Plumbing Co.

v Schauer, Com Pl, 91 Pittsb Leg J 519

Defense of set-off or reconpmnt

Ala—Kilian v Everett, 153 So 684, 28 Ala App 334

SC—W L Brissey Lumber Co v Crowther, 133 SE 208, 135 SC 131

94. Ala—Foster v Prince, 141 So 248, 224 Ala 523

95. Ala—Foster v Prince, supra.
40 C J p 481 note 70

96. Tex—Boozar v Smith, Civ App, 36 SW 2d 1064, error dismissed

97. Mo—Williams v Porter, 51 Mo 441

40 C J p 481 note 71

98. Okl—Seldon Const Co v Dowell, 102 P 2d 599, 187 Okl 312

99. Pa—Johnson v Kusminsky, 135 A 220, 287 Pa 425

1. Cal—English v Olympic Auditorium, 20 P 2d 946, 217 Cal 631, 87 A L R 1281

2. Pa—Van Billard v. Nace, 1 Grant 233

3. Neb—Louis Bradford Lumber Co. v Creel, 141 NW 145, 93 Neb 573.

4. Me.—J W White Co v Griffith, 145 A 134, 127 Me 518

40 C J p 482 note 83

5. Me—J. W. White Co. v. Griffith, supra.

land is one of fact,⁶ but the question whether a particular building is such as is subject to a mechanic's lien is one of law.⁷ Whether a structure is a single or a double building, or one building or two, is a mixed question of law and fact.⁸

Delivery and use of material On conflicting evidence, it is a question of fact whether material furnished by claimant was used in the work,⁹ as is the question of what materials could have been used in the building.¹⁰

Fraud and bad faith An issue as to good faith¹¹ or fraud¹² ordinarily presents a question of fact, as does the question whether an omission of a credit was willful or fraudulent,¹³ or knowing or willful.¹⁴

Waiver and estoppel A question of waiver¹⁵ or estoppel¹⁶ is ordinarily one of fact, as for example, a question whether an owner agreed that the lien should be filed, although a general contractor had agreed that no lien should be filed.¹⁷

Priorities Where there is a dispute as to the facts, the question of priority in mechanic's lien proceedings is one of fact for the jury.¹⁸ On the other hand, in the absence of a dispute as to the facts, it is a question of law whether a mortgage has priority over a mechanic's lien.¹⁹

(2) Lienable Character of Claim

In an action to enforce a mechanic's lien, the ques-

tion whether the claim is one for which a lien may be had is one of fact, where the evidence is conflicting as to the character of the claim.

In a proceeding to enforce a mechanic's lien, on conflicting evidence as to the character of the claim, the question whether the claim is one for which a lien may be had is one of fact.²⁰ So it is a question of fact whether there was a substantially new construction or mere repair of an old building,²¹ or whether a particular improvement is or is not a constituent part of a building where it is not admittedly or palpably so,²² but, if the facts are ascertained or admitted, the question whether the improvement constitutes a new structure is for the court.²³ Whether the materials are so applied to a building as to become a part thereof,²⁴ or whether under particular circumstances a machine became a permanent addition to the freehold so as to be a fixture for manufacturing purposes within the meaning of the lien law,²⁵ is a question of fact for the jury.

(3) Agreement or Consent of Owner

In an action for foreclosure of a mechanic's lien, the question of agreement or consent on the part of the owner ordinarily presents a question of fact, where the evidence is conflicting.

In an action to foreclose a mechanic's lien, the question of agreement or consent on the part of the owner ordinarily presents on conflicting evidence a question of fact,²⁶ as, for example, in the

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| 6. Cal.—California Corrugated Culvert Co v Stewart, 8 P 2d 1013, 215 Cal 120 | NJ.—Guerber Engineering Co v Stafford, 114 A 747, 96 NJ Law 280 | 22. Pa.—Porter Screen Mfg Co v Hunter, 69 Pa Super 22
40 C J p 482 note 79 |
| Tex.—Farrell v Ertel, Civ App, 100 SW 2d 1084, error dismissed
40 C J p 482 note 85 | 13. NJ.—Buchanan & Smock Lumber Co v Einstein, 93 A 716, 87 NJ Law 307 | 23. Pa.—Warren v Freeman, 41 A 290, 187 Pa 455, 67 Am SR 583
40 C J p 482 note 80 |
| 7. Pa.—McNulty Bros Co v Pennsylvania R Co, 116 A 362, 272 Pa 442 | 14. Mass.—Burrell v Way, 57 NE 335, 176 Mass 164
40 C J p 483 note 31 | 24. Cal.—Moses v Pacific Bldg Co, 207 P 946, 58 Cal App 90—Stevenson v Woodward, 86 P 990, 3 Cal App 754 |
| 8. Pa.—Munger v Silabee, 64 Pa 454 | 15. NY.—Storick v M E Realty Co, 233 NYS 194, 226 App Div 674 | Gas ranges
Question whether gas ranges furnished by subcontractor and installed in kitchenette apartments were lienable as fixtures was issue of fact for trial court—Security Stove & Mfg Co v Stevens, 9 SW 2d 808, 222 Mo App 1029 |
| 9. Ark.—Half Moon Gin Co v E C Robinson Lumber Co, 181 SW 2d 239, 207 Ark 483 | Wis.—Roseliep v Herro, 239 NW 413, 206 Wis 256
40 C J p 483 note 35 | Sinks
Whether sinks and necessary pipes installed in building so that it could be used as apartment building could be removed without substantial injury to premises was a question of fact—Arnold v Genzberger, 31 P 2d 296, 96 Mont 358 |
| Ill.—Colp v First Baptist Church of Murphysboro, 260 Ill App 369, affirmed 173 NE 67, 341 Ill 73, 71 ALR 106 | 16. NY.—Cawley v Weiner, 140 NE 724, 236 NY 357 | 25. NJ.—American Brick & Tile Co v Drinkhouse, 36 A 1034, 59 NJ Law 462 |
| Mo.—Tallman Co v Villmer, 133 SW 2d 1085—Crane Co v Smith, 173 SW 691, 187 Mo App 259 | 17. Pa.—Loasby v Irvin, 65 Pa Super 231 | 26. Cal.—English v Olympic Auditorium, 20 P 2d 946, 217 Cal 681, 87 ALR 1281—McDowell v Perry, 51 P 2d 117, 9 Cal App 2d 555 |
| 10. Pa.—Coverdill v. Heath, 12 Pa Super 15 | 18. Miss.—Davis v J W Rogers Lumber Co, 178 So 75, 180 Miss 612 | |
| 11. Mich.—Neely v International Corn Products Corporation, 205 NW 96, 232 Mich 81 | 19. Mass.—Sprague v Brown, 59 NE 631, 178 Mass 220
40 C J p 483 note 38 | |
| Pa.—Brennan v Kennedy, 69 Pa Super 77 | 20. Mo.—Security Stove & Mfg Co v Stevens, 9 SW 2d 808, 222 Mo App 1029
40 C J p 482 note 77 | |
| 12. Ala.—Corpus Juris cited in Heady v Pool, 130 So 329, 331, 221 Ala 619 | 21. Pa.—Gerry v Painter, 9 Pa Super 150, 43 Wkly NC 275—Grable v Helman, 5 Pa Super. 324 | |
| Mich.—McLean v Lisowski, 231 NW 159, 244 Mich 93 | | |

case of a controverted agency of a husband for a wife,²⁷ or of assent by the owner to an improvement by a contractual vendee²⁸ or by a tenant,²⁹ but, where the question of agency depends on the construction of undisputed writings, it is a question of law for the court³⁰

It is a question of fact whether the owner agreed to pay the materialman,³¹ whether the original contract has been waived and a new one substituted,³² whether a contract between the owner and builder was at an end when the materials for which the lien is claimed were furnished the latter,³³ or in what kind of pay, cash, or property the contractor was to be paid³⁴ In an action by a materialman a denial by the contractor of the contract raises an issue of fact³⁵

(4) Performance of Contract

Ordinarily the question whether there has been a performance of the contract is one of fact in a suit to enforce a mechanic's lien

Ordinarily, in an action to enforce a mechanic's lien, it is a question of fact whether there has been a substantial performance of the contract,³⁶ or whether it has been performed according to its

terms,³⁷ or whether imperfections are trivial,³⁸ or whether contractual provisions have been waived.³⁹ It is also a question of fact whether work has been accepted,⁴⁰ or whether performance was abandoned,⁴¹ or whether discontinuance or withdrawal was caused by acts of defendant⁴² However, the facts may show as a matter of law that performance was not substantial⁴³ or that the owner is not entitled to counterclaim for damages because of faulty performance⁴⁴ Whether an assignee who is also surety on the contractor's bond is finishing the building as assignee or on his individual credit presents a question of fact⁴⁵

(5) Lien, Claim, Statement, or Notice

In a proceeding to enforce a mechanic's lien, it is a question of fact whether the lien has been perfected within the time required by law, where the evidence is conflicting on such issue

In a suit to enforce a mechanic's lien, it is a question of fact whether a lien has been perfected within the time required by law where the evidence is conflicting or there is some evidence tending to support this issue⁴⁶ Questions of fact are also presented by conflicting evidence as to matters entering into timeliness of the filing,⁴⁷ as, for exam-

Pa.—Johnson v Kusminsky, 135 A. 220, 287 Pa 425

Agency for defendant

Mo.—Kierns v Gibson, App., 289 SW 358

27. Ala.—Herrin v Burnett, 114 So 406, 217 Ala 23

Okl.—Swetnam v Hale, 280 P 437, 138 Okl 69

40 C.J. p 482 note 91

Evidence held insufficient to raise question for jury

Mo.—Wilson v Fower, 155 SW 2d 503, 236 Mo App 532

28. Cal.—McDowell v Perry, 51 P 2d 117, 9 Cal App 3d 555

NY.—Conklin v Bauer, 63 NY 620

29. Cal.—Ott Hardware Co v Yost, 159 P 2d 663, 69 Cal App 2d 593

Pa.—Fiske v Lang, 128 A 663, 283 Pa 54

30. Cal.—Ott Hardware Co v Yost, 159 P 2d 663, 69 Cal App 2d 593

NC.—North Carolina Lumber Co v Spear Motor Co, 135 SE 115, 192 NC 377

31. Miss.—Delta Lumber Co v Wall, 80 So 782, 119 Miss 350

32. Mass.—Wahlstrom v Trulson, 43 NE 183, 165 Mass 429

Pa.—Lumber & Millwork Co of Philadelphia v Graham, Com Pl., 60 Montg Co 162

Substitution of parcel for written contract

Okl.—Producers Pipe & Supply Co

v Ledger, 112 P 2d 359, 188 Okl 644

40 C.J. p 482 note 95 [a]

33. Md.—Treusch v Shryock, 51 Md 162

34. Pa.—Pierce v Marple, 23 A 1008, 148 Pa 69, 33 Am SR 808

35. Ill.—Ramming v Roland, 198 Ill App 91

36. Cal.—Fontaine v. Storrie, 45 P. 2d 361, 7 Cal App 104

NM.—Allison v Schuler, 36 P 2d 519, 38 NM 506

Tex.—Standard Lumber & Mfg Co v Looper, Civ App, 4 SW 2d 180

40 C.J. p 482 note 99

37. Mo.—Wirtel v Nuelle, App., 27 SW 2d 501

40 C.J. p 482 note 1

33. Cal.—Shumway v Woolwine, 257 P 898, 84 Cal App 220

Colo.—Farmers' Life Ins Co v. Connor, 257 P 260, 82 Colo 81

40 C.J. p 182 note 2

39. Pa.—Moore v Carter, 23 A 243, 146 Pa 492

40. N.J.—Conlan v. Leonard, 81 A 492, 82 NJ Law 108

41. Md.—Philadelphia, Baltimore & Washington Marble & Tile Co v John Hiltz & Sons, 133 A 721, 150 Md 619

Mich.—Sacchetti v Recreation Co, 7 NW 2d 265, 304 Mich 185

42. Md.—Philadelphia, Baltimore & Washington Marble & Tile Co. v

John Hiltz & Sons, 133 A 721, 150 Md 619

Mich.—Sacchetti v Recreation Co, 7 NW 2d 265, 304 Mich 185

43. NY.—Rochkind v Jacobson, 110 NYS 583, 126 App Div 357

44. Iowa.—Hatch v Kula, 190 NW 969, 195 Iowa 619

45. NY.—McChesney v Syracuse, 27 NYS 508, 75 Hun 503

46. NC.—Atlas Supply Co v McCurry, 156 SE 91, 199 NC 799

Okl.—Donaldson & Yahn v Stillwater Building & Loan Association, 45 P. 2d 65, 172 Okl 258

40 C.J. p 482 note 9

Acknowledgment of lien

Tex.—Marinick v Continental Southland Savings & Loan Ass'n, Civ App 97 SW 2d 480—Robertson v Vernon, Civ App, 3 SW 2d 573, affirmed Com App, 12 SW 2d 991

Determination of what is reasonable time for service of subcontractor's notice to owner of filing of lien after statutory sixty-day period is fact question, depending on circumstances—Thacher v International Supply Co, 54 P 2d 378, 176 Okl 14

—Union Bond & Investment Co v. Bernstein, 139 P 974, 40 Okl 527

Evidence held sufficient to go to jury

Mo.—Goodfellow Lumber Co v. Blanke, App., 41 SW 2d 959

47. Pa.—Fabian Goodman Co. v. Pussey, 85 Pa Super 70

ple, the time when the work was commenced,⁴⁸ the date of the completion of the work⁴⁹ or the final furnishing of the materials,⁵⁰ whether all the materials furnished by claimant were used in the work,⁵¹ whether work was done or material furnished under one contract or under separate contracts,⁵² whether items were furnished as an independent transaction,⁵³ or whether the work last done or materials last furnished were under the original contract,⁵⁴ or were done or furnished in good faith for the purpose of completing the contract,⁵⁵ or colorably to revive the lien or to extend the time for filing⁵⁶ On the other hand, where the evidence is undisputed, the timeliness of the filing of the lien is a matter of law for the court⁵⁷

By statute it is sometimes provided that it shall be a question of fact whether the lien account as filed is sufficient to charge the owner or his agent with knowledge of the amount for which, and the work and labor done or materials furnished for which, a lien is claimed⁵⁸ Such a statute is not retroac-

tive⁵⁹

Description or identity of property. What land is covered by the lien claim,⁶⁰ the identification of the property from the description given,⁶¹ and the sufficiency of the description to identify the property⁶² ordinarily are questions of fact for the jury

(6) Amount and Payment

In a suit to enforce a mechanic's lien, on conflicting evidence, the amount and payment of the claim are questions of fact.

Where the evidence concerning the amount of the claim is conflicting, the question is one of fact, in a proceeding to enforce a mechanic's lien⁶³ The same is true as to controverted questions as to the amount due the principal contractor,⁶⁴ or whether there has been an equitable distribution of the lien claim among several buildings,⁶⁵ or whether an architect's certificate for enough to pay a materialman was given⁶⁶ or was unreasonably withheld⁶⁷ So, where the contract is uncertain, the question

48. Md—Kelly v Rosenstock, 45 Md 389

Pa—Lumber & Millwork Co of Philadelphia v Graham, Com Pl, 60 Montg Co 162

49. Del—Breeding v Nelson, 143 A 23, 4 W V Harr. 9, 60 A L R 1252

Mo—Haynes-Langenberg Mfg Co v Houser, 121 SW 1078, 142 Mo App 714

NJ—P E Guerin, Inc, v Parson, 169 A 810, 112 NJ Law 56
40 C J p 483 note 11

Cessation of work equivalent to completion

Cal—Baird v Havas, 164 P 2d 952, 72 Cal App 2d 520—Hundley v Marinkovich, 127 P 2d 600, 53 Cal App 3d 288—Nevada County Lumber Co v Janiss, 78 P 2d 200, 25 Cal App 2d 579

Colo—Farmers' Life Ins Co v Connor, 257 P 260, 82 Colo 81

50. NC—Atlas Supply Co v McCurry, 156 SE 91, 199 NC 799

51. Mo—Laitner Plumbing & Heating Co v Platt Land Co, App, 67 SW 2d 524—Goodfellow Lumber Co v Blanke, App, 41 SW 2d 959

Intention of purchaser

Question whether last item of supplies furnished by lien claimant, filing statement over six months after furnishing other items, was obtained for use in construction of building or purchased subsequently for convenience and needs of those using it, was for jury—Laitner Plumbing & Heating Co v Platt Land Co, Mo App, 67 SW 2d 524

52. Ind—Kendallville Lumber Co v Adams, 176 NE 555, 93 Ind App 141,

Mo—Laitner Plumbing & Heating Co v Platt Land Co, App, 67 SW 2d 524

Mont—Bartholomew v James, 246 P 771, 76 Mont 359

NJ—P E Guerin, Inc, v Parson, 169 A 810, 112 NJ Law 56

Pa—Fabian Goodman Co v Pussey, 85 Pa Super 70
40 C J p 483 note 13

Evidence held sufficient to go to jury
NC—Sides v Tidwell, 5 SE 2d 316, 216 NC 480

53. Pa—Fabian Goodman Co v Pussey, 85 Pa Super 70
40 C J p 483 note 14

54. Pa—Fabian Goodman Co v Pussey, supra
40 C J p 483 note 15

Evidence held sufficient to go to jury
Mo—Goodfellow Lumber Co v Blanke, App, 41 SW 2d 959

55. Mass—Turner v. Wentworth, 119 Mass 459

Mich—Sacchetti v Recreation Co, 7 NW 2d 265, 304 Mich 185

Neb—Bankers' Bldg, etc, Assoc v Williams, 96 NW 655, 4 Neb. 795

56. Mass—Turner v. Wentworth, 119 Mass 459

Mich—Sacchetti v Recreation Co, 7 NW 2d 265, 304 Mich 185

Neb—Bankers' Bldg, etc, Assoc v Williams, 96 NW 655, 4 Neb. 795

57. Tex—Black Sivals & Bryson v Operators' Oil & Gas Co, Civ App, 37 SW 2d 313, error dismissed

Directed verdict held proper or not erroneous

NJ—Kelly v Cummings, 148 A 607, 106 NJ Law 224

58. Wyo—Becker v Hopper, 138 P

179, 23 Wyo 237, Ann Cas 1916D 1011, reheard 147 P 1085, 23 Wyo 209, Ann Cas 1918B 35

59. Wyo—Becker v Hopper, supra

60. NJ—James v Van Horn, 39 N J Law 353

40 C J p 483 note 18

61. Pa—Kennedy v House, 41 Pa 39, 80 Am D 594

40 C J p 483 note 19

62. Mass—Driscoll v Floyd, 104 N E 473, 217 Mass 33

40 C J p 483 note 20

63. Cal—W R Spalding Lumber Co v Fradkin, 156 P 2d 450, 68 Cal App 2d 308

Tex—Ferrell v Birtel, Civ App, 100 SW 2d 1084, error dismissed—Mills v Faul, Civ App, 30 SW 558, modified on other grounds 34 SW 93, 89 Tex. 162.

64. NJ—Kaighn v Friday, 78 A 540, 77 NJ Law 709—F Bowden Co, Inc, v Center Amusement Co, Inc, Sup, 128 A 860

At time of stop notice

Evidence was held to present fact question for jury whether any money was due contractor from owner when stop notice was served—Passaic-Bergen Lumber Co v Peterson, 147 A 198, 105 NJ Law 537

65. NJ—Crane v Brighton Mills, 120 A 677, 98 NJ Law 308—W J Donnell Lumber Co v Connor, 156 A. 27, 9 NJ Misc 869

66. NJ—F Bowden Co, Inc, v Center Amusement Co, Inc, Sup, 128 A 860

67. NJ—F Bowden Co, Inc v Center Amusement Co, Inc, supra.

whether certain work or materials are extras is one of fact ⁶⁸

Payment Where the evidence is conflicting, it is a question of fact whether payment has been made ⁶⁹ However, if the evidence discloses no submissible issue, the question of payment is one of law for the court ⁷⁰ Particular questions in connection with payment have been held to be questions of fact, ⁷¹ such as credits claimed by defendant, ⁷² whether payments made should have been applied to the lien account, ⁷³ and whether a note ⁷⁴ and mortgage ⁷⁵ were given and accepted in payment of the debt Likewise, it has been held a question of fact whether a certificate of stock was accepted in payment at its face or fair market value ⁷⁶

§ 315. Instructions

Instructions in an action to enforce a mechanic's lien must not be misleading or inconsistent, and must enunciate the principles of law applicable to the issues under the pleadings and the evidence

The rules applicable to instructions in civil actions generally apply where a jury trial is, under the practice prevailing in the particular jurisdiction, had in mechanics' lien proceedings ⁷⁷ Instructions must not be misleading ⁷⁸ or inconsistent, ⁷⁹ and must enunciate the principles of law applicable to the issues under the pleadings and the evidence, ⁸⁰ and governing the whole case so presented ⁸¹ The instruction should not proceed on a theory or submit issues not warranted by the pleadings and the evidence, ⁸² nor should they exclude issues supported by the pleadings and evidence, ⁸³ but it has been held that a correct statement of law embraced in a charge to the jury is not erroneous, because the court failed in the same connection to give to the jury other appropriate instructions ⁸⁴

An instruction assuming a material fact which it is the province of the jury to find is erroneous, ⁸⁵ as well as an instruction which authorizes a finding without reference to a material fact as to which there is competent evidence in the record, ⁸⁶ or an instruction which ignores a statutory requirement

68. Tex.—Mills v Paul, Civ App, 30 SW 558, modified on other grounds 34 SW 93, 89 Tex 162

69. Tex.—Booser v Smith, Civ App, 36 SW 2d 1064, error dismissed 40 C.J. p 483 note 28

Whether mechanic's lien note was entirely paid was for jury—Long Bell Lumber Co v Futch, Tex Civ App, 20 SW 2d 1076, error refused

70. Mo.—Harry Cooper Supply Co v Gilloz, App, 107 SW 2d 798

Evidence held insufficient for jury on question whether agreement existed extending time for payment subsequent to time articles on which lien was claimed were delivered—Black Sivalis & Bryson v Operators' Oil & Gas Co, Tex Civ App, 37 SW 2d 313, error dismissed

71. Wis.—Better Properties v Kocher, 1 NW 2d 157, 239 Wis 294.

72. Cal.—W R Spalding Lumber Co v Fradkin, 156 P 2d 450, 68 Cal App 2d 308—Cowan v Herman, 293 P 175, 109 Cal App 503

73. N.J.—Otis El Co v Stafford, 111 A 695, 95 N.J. Law 79.

74. Conn.—Portland Building & Loan Ass'n v Peck, 149 A 214, 110 Conn 670

Miss.—Walker v Macon Creamery Co, 146 So 442, 165 Miss 121
N.J.—P E Guerin, Inc, v Parson, 169 A 810, 112 N.J. Law 56

75. Conn.—Portland Building & Loan Ass'n v Peck, 149 A 214, 110 Conn 670

76. Wis.—Better Properties v Kocher, 1 NW 2d 157, 239 Wis. 294.

77. Ala.—Goldstein v Leake, 36 So 458, 138 Ala 573
40 C.J. p 484 note 40

78. Ala.—Herrin v Burnett, 114 So 406, 217 Ala 23
40 C.J. p 484 note 42

Instructions held misleading
Ala.—Herrin v Burnett, 114 So 406, 217 Ala 23
40 C.J. p 484 note 42 [a]

Instructions held not misleading
Ill.—Heiman v Schroeder, 74 Ill 158
40 C.J. p 484 note 42 [b]

79. Ill.—Phillips v Stone, 208 Ill App 478

80. Ga.—Spirides v Victory Lumber Co, App, 45 SE 2d 65
Pa.—Zussman v Yeagle, Com Pl, 58 Montg Co 262
40 C.J. p 484 note 44

Instructions held sufficient or not erroneous

Ga.—Spirides v Victory Lumber Co, App, 45 SE 2d 65

Mo.—Harry Cooper Supply Co. v. Gilloz, App, 107 SW 2d 798

Tex.—Mantel v Mitchell, Civ.App., 293 SW 835

40 C.J. p 484 note 44 [a]

Instructions held erroneous
(1) Generally

Ala.—Thornton v Vines, 106 So 42, 213 Ala 646

Pa.—Deeds v Imperial Brick Co, 69 A 78, 219 Pa 579—Moss & Blakeley Plumbing Co v Schauer, Com Pl, 91 Pittsb Leg J 519

Tex.—Interstate Trust & Banking Co v West Texas Utilities Co, Civ App, 88 SW 2d 1110

(2) Where defendant claimed that

plaintiff was employee of independent contractor, charge to foreclose laborer's lien on lumber, if plaintiff was laborer, was error—Standard Lumber Co v Clifton, 143 SE 784, 38 Ga App 291

(3) In subcontractors' action to enforce laborers' liens against owner, instruction that, if owner had benefit of work, and nothing else appeared, subcontractors were entitled to value of work on quantum meruit basis was erroneous—Price v Asheville Gas Co, 178 SE 567, 207 NC 796

81. Ill.—Heiman v Schroeder, 74 Ill 158

82. NC.—Price v Asheville Gas Co., 178 SE 567, 207 NC 796
40 C.J. p 484 note 46

Instruction held properly refused

Instruction to effect that, if plaintiff filed claim for materials not used in building, plaintiff did not have lien was properly refused under evidence—Heady v Pool, 130 So 329, 221 Ala 619

83. Mo.—Kelly v Rowane, 83 Mo. App 440
40 C.J. p 484 note 47

84. Ga.—Hembree & Johnson v. Hawkins, 107 SE 376, 28 Ga.App. 797

85. Mo.—Kierns v. Gibson, App, 289 SW 358

Pa.—Nusbaum v Warwick Hotel Co., 170 A 388, 112 Pa Super. 277
40 C.J. p 484 note 48

86. Tex.—Williamson v Smith, Civ App, 79 SW. 51.

for the acquisition of a lien and permits a recovery on a finding of facts which falls short of those necessary to the lien right.⁸⁷ However, the instructions need not submit to the consideration of the jury matters about which there is no controversy,⁸⁸ and, if the evidence on a material issue is uncontradicted, it is proper to instruct the jury to find the issue in accordance with such evidence if they believe it.⁸⁹ An instruction which places the burden of proof on the wrong party,⁹⁰ or which imposes too great a burden of proof on a party,⁹¹ is erroneous.

§ 316. Verdict and Findings

- a In general
- b Sufficiency
- c Conclusiveness

a. In General

Where the proceeding to enforce a mechanic's lien is in equity, the court must make findings of fact and conclusions of law as a basis for the judgment to be entered.

Where the proceeding to enforce a mechanic's lien is in equity as discussed supra § 264, the court must make findings of fact and conclusions of law as a basis for the judgment to be entered.⁹² While it may be discretionary with the court to submit to the jury proper interrogatories from which the jury may make special findings of fact, such findings are advisory only to the court, as considered infra subdivision c of this section, and, if the jury fail to find on each material issue raised in the pleadings, it is the duty of the court to make findings of fact covering such issues and thereafter to make conclusions of law supported by the findings of fact.⁹³ Accordingly, it has been held that a judgment cannot be entered on a general verdict found by the jury.⁹⁴ However, where there is a trial by jury as in ordinary actions, and the statute does not require special findings in such cases, a general verdict has been held sufficient.⁹⁵

Where the purpose of a suit to foreclose a ma-

terialman's lien is merely to establish absolutely a special lien against the property involved, and the suit is not one in personam, no general verdict may be obtained against the owner.⁹⁶ Where the proceeding is in form an action for the debt and to establish a lien for the amount claimed to be due, a general verdict for plaintiff, finding the amount of the debt, will not support a judgment awarding a lien where the existence of the lien is in issue.⁹⁷ Where the statute provides that, if the lien is allowed, the verdict shall set it forth, a verdict finding for plaintiffs in a specified sum without reference to any lien cannot stand where the petition prays for no relief except that the petitioners' lien be set up and established,⁹⁸ although, where the complaint contains a prayer for general judgment as well as for the declaration of a lien, a general verdict against defendant may be had.⁹⁹

Resubmission After a hearing has been had and the court has disposed of the findings and requests to find, a motion to reopen the case in order to submit further findings for the purpose of recovering judgment on notes given by the owner to the contractor may properly be denied.¹

b. Sufficiency

- (1) In general
- (2) Conformity to evidence and issues
- (3) Definiteness and certainty
- (4) Contradictory findings
- (5) Construction and interpretation

(1) In General

The findings in an action to enforce a mechanic's lien must establish the facts necessary to the support of the judgment.

General rules apply to the sufficiency of the verdict and findings in an action to enforce a mechanic's lien.² Facts must be found as such, as in other cases, and, if cast among conclusions of law, the finding cannot be considered to supply any defect in the special findings of facts.³ Findings which

87. Mo—Hall v Johnson, 57 Mo 521—Marshall v. Hall, App, 200 SW 770

88. Mo—Kelly v Rowane, 32 Mo App 140
40 C J p 484 note 51

89. NC—Wood v Atlantic & N C R Co, 42 SE 462, 131 NC 48
40 C J p 484 note 52

90. Ala—Thornton v Vines, 108 So 42, 213 Ala 646

91. Tex—Moreno v Spencer, Civ App, 82 SW 1054
40 C J p 484 note 53

92. Idaho—Jensen v Bumgarner, 137 P 529, 25 Idaho 355

Findings in equity generally see Equity § 493

Report and findings of referee see supra § 312

93. Idaho—Jensen v Bumgarner, supra

94. Idaho—Jensen v Bumgarner, supra

95. Dak—McCormack v Phillips, 34 NW 29, 4 Dak 506
40 C J p 485 note 59

96. Ga—Sprides v Victory Lumber Co, App, 45 SE 2d 65

97. Ala—Goldstein v Leake, 36 So 458, 138 Ala 573

40 C J p 485 note 60

98. Ga—Ryals v Smith, 29 SE 968, 102 Ga 768

99. Ga—Few v Adams, 117 SE 335, 30 Ga.App 197

1. NY—Case & Son Mfg Co v Young Impr Corp, 168 NYS 1025, 131 App Div 740
40 C J p 488 note 20

2. Cal—Hammond Lumber Co v Gordon, 258 P 612, 84 Cal App 701
Idaho—Jensen v Bumgarner, 137 P. 529, 25 Idaho 355

3. Ind—Minnich v Darling, 36 NE 173, 8 Ind App 539

establish the facts necessary to the support of the judgment are sufficient⁴ The court must ascertain such facts as the particular statute requires,⁵ and the findings must show the existence of the conditions which, under the statute, justify the conclusion of the validity of the lien claimed,⁶ such, for example, as that the work or material was furnished under a contract with the owner,⁷ that the owner had knowledge or notice of improvements being made,⁸ that materials were furnished for the purpose of being used in the particular building,⁹ or that they were so used,¹⁰ that the statutory notice was given,¹¹ and the price or value of the work or material¹²

It is not necessary or proper that the finding should narrate the evidence on which the result is based,¹³ and, where the facts on which a lien is claimed are found by the jury, the verdict need not find that claimant is entitled to a lien¹⁴ It has been held, however, that it is the better practice for the verdict to show a distinct finding by the jury that plaintiff is entitled to a lien and to a given amount¹⁵ Special findings must cover all the facts essential to plaintiff's recovery under the issues tendered by his complaint.¹⁶ For example, they must find that defendants are the owners of the

property which it is sought to reach¹⁷ Where defendant's contention is that claimant agreed to take his pay in property, the jury, if they find in favor of such contention, should find the fact specially¹⁸ The cost of completion after abandonment by the contractor, being merely evidentiary of the value of work done and material furnished at the time of abandonment, need not be specifically found¹⁹ A verdict finding a lien need not direct a foreclosure²⁰

Priority In order to give a mechanic's lien priority over an unrecorded mortgage it must be found as a fact that claimants had no notice of its existence at the time when they performed the labor or began to furnish material²¹ Under a statute giving the mechanic a lien superior to a prior mortgage as to the improvements and second as to the land, the court must find the value of the land and of the improvements separately.²²

(2) Conformity to Evidence and Issues

The verdict and findings in an action to enforce a mechanic's lien must be supported by the evidence and must respond to the issues made in the case

The verdict or findings in an action to enforce a mechanic's lien must be supported by the evidence,²³

4. Cal—Hammond Lumber Co v Gordon, 258 P 612, 84 Cal App 701

40 C J p 485 note 65

Findings held sufficient

(1) In general

Cal—Baird v Havas, 151 P 2d 10, 65 Cal App 2d 533—Fontaine v Storrie, 45 P 2d 361, 7 Cal App 2d 104—Hammond Lumber Co v Gordon, 258 P 612, 84 Cal App 701

Minn—Bauer Lumber Co v Kenyon, 208 N W 10, 166 Minn 357

Tex—Bankers Life Co v John E Quarles Co, Civ App, 88 S W 2d 613, affirmed 112 S W 2d 1044, 131 Tex 65

40 C J p 485 note 65 [a]

(2) Where facts found showed that plaintiff was original contractor, it was not necessary to make finding expressly stating that fact—Rapp v Horgan, 281 P 1034, 101 Cal App 605

Findings held insufficient

Ind—Morgan v Henry Brick Co, 176 N E 237, 92 Ind App 478
40 C J p 485 note 65 [b]

Findings held unnecessary or immaterial

Cal—Los Angeles Board of Adjusters v Independent Automatic Sprinkler Co, 8 P 2d 892, 131 Cal App 279—Zachary v Chapman, 284 P 703, 108 Cal App 456—Rapp v Horgan, 281 P 1034, 101 Cal App 605
40 C J p 485 note 65 [c]

5. Idaho—Dybvig v Willis, 82 P 2d 95, 59 Idaho 160

In absence of request to have facts specially found in actions foreclosing mechanics' liens, it was not necessary for court to state findings of fact on which judgments of foreclosure were based—Watson v Stiohl, 46 N E 2d 201, 220 Ind 673

Amount of land

In suit to foreclose mechanic's lien, failure of trial court to determine amount of land around structure required for the convenient use and occupation thereof as required by statute was error—Dybvig v Willis, 82 P 2d 95, 59 Idaho 160—Robertson v Moore, 77 P 218, 10 Idaho 115

6. ND—McCaull-Webster El Co v Adams, 167 N W 330, 39 ND 259, L R A 1918D 1036

40 C J p 485 note 67

7. Ind—Minnich v Darling, 36 N E 173, 8 Ind App 539
40 C J p 485 note 68

8. Minn—Schreiber v Scott, 204 N W 575

9. Ind—Miller v Fosdick, 59 N E 488, 26 Ind App 293
40 C J p 485 note 70

10. Cal—Wilson v Nugent, 57 P 1008, 125 Cal 280

11. Ind—Young v Beiger, 32 N E 318, 132 Ind 530
40 C J p 485 note 72

12. Cal—Booth v Pendola, 25 P. 1101, 88 Cal 36

40 C J p 485 note 73

13. Cal—Cleverdon v Gray, 145 P 2d 95, 62 Cal App 2d 612

40 C J p 486 note 74

14. Mo—Miner v Sever, App, 255 S W 578

15. Ga—Hawkins v Chambliss, 48 S E 169, 120 Ga 614—Spindes v Victory Lumber Co, App, 45 S E 2d 65

16. Ind—Judah v F H Cheyne Electric Co, 101 N E 1039, 53 Ind App 476

17. Ind—Judah v F H Cheyne Electric Co, supra

18. Pa—Pierce v Marple, 23 A. 1003, 148 Pa 69, 23 Am S R 808

19. Cal—Olson-Mahoney Lumber Co v Dunne Inv Co, 159 P. 178, 30 Cal App 333
40 C J p 486 note 79

20. Tex—Warner v Scottish Mortg & Land Inv Co, Civ App, 27 S W 817

21. Cal—Root v Bryant, 57 Cal 48

22. Ill—Miller v Ticknor, 7 Ill App. 393

23. Cal—Fontaine v Storrie, 45 P. 2d 361, 7 Cal App 2d 104

Ill—Salomon-Waterton Co v Union Asbestos & Rubber Co, 263 Ill App 583.

and must respond to the issues made in the case,²⁴ and a request by defendant for a finding which is not within any of the issues made by the pleadings may properly be refused.²⁵ Where several lien claims are consolidated, the decision is made as if the cause of action was presented in a single complaint,²⁶ and is to be embodied in a single set of findings in which all the facts in issue in the consolidated action are to be incorporated.²⁷ In such case an issue as to the extent of land essential for the convenient use and occupation of the building affects the rights of each of claimants,²⁸ and its presentation in any of the original complaints brings it in issue in the consolidated action, so that the finding operates in favor of all plaintiffs, although some may not have tendered the particular issue in their complaints.²⁹ A variance between the findings and the complaint is not fatal where it is not of a character to show that the party has been misled.³⁰

A verdict in excess of the amount authorized by the evidence cannot be sustained.³¹ The findings must not permit a double recovery.³²

(3) Definiteness and Certainty

The verdict or findings in an action to enforce a mechanic's lien, must be reasonably certain and definite in the finding of particular facts.

The verdict or findings in an action to enforce a

mechanic's lien must be reasonably certain and definite in the finding of particular facts.³³ However, the general rule that uncertainties in the findings will be resolved if reasonably possible so as to support the judgment has been applied with respect to uncertainty in the findings as to the use of the materials in the premises on which the lien is claimed,³⁴ or as to fraud or dishonesty on the part of defendant's engineer in making estimates and classifications,³⁵ or as to when the owner obtained knowledge of improvements being made on his premises,³⁶ or as to the present ownership of the property sought to be subjected.³⁷ Where the right to the lien depends on the doing of a particular thing within a definite number of days after a certain event, a finding that it was done "on or about" a certain day has been held to be insufficient.³⁸

(4) Contradictory Findings

The findings of fact on which foreclosure of a mechanic's lien is decreed must be consistent with themselves and with the theory of the case as made by the pleadings.

The findings of fact on which foreclosure of a mechanic's lien is decreed must be consistent with themselves and with the theory of the case as made by the pleadings.³⁹ However, findings which show merely a substantial performance are not inconsis-

Ind.—Shea v People's Coal & Cement Co., 161 N E 849, 93 Ind App 302

Kan—Amsden Lumber Co v Arnspiger, 281 P 931, 129 Kan 143

Minn—Bruer Lumber Co v Kenyon, 208 N W 10, 166 Minn 357

Mont—Rogers-Templeton Lumber Co v Welch, 208 P 600, 63 Mont 287

N Y—Schenectady Homes Corporation v Greenside Painting Corporation, 37 N Y S 2d 53.

Or—Bradfield v Bollier, 128 P 2d 942, 169 Or 425

Finding held not error

Cal—Shumway v Woolwine, 257 P. 898, 84 Cal App 220

Minn—Botsford Lumber Co v Fuller, 212 N W. 22, 170 Minn 130

Finding held not supported by evidence

Cal—Leibowitz v Berry, 299 P. 779, 114 Cal App 5

Mo—Gill v Harris, 24 S W 2d 673, 224 Mo App 717

24. Cal—Zachary v Chapman, 284 P 703, 103 Cal App 456

Ill—Salomon-Waterton Co v. Union Asbestos & Rubber Co., 263 Ill App 583

Kan—Amsden Lumber Co v Arnspiger, 281 P 931, 129 Kan 143
40 C J. p 486 note 84

Finding held not within issues

Where action to foreclose mechan-

ic's lien was tried on theory and stipulation that lien was valid, finding of insufficiency of description was improper—Leibowitz v Berry, 299 P 779, 114 Cal App 5

25. Minn—Fergestad v Gjerlsen, 49 N W 127, 46 Minn 369

26. Cal—Union Lumber Co v Simon, 89 P 1077, 150 Cal 751

27. Cal—Union Lumber Co v Simon, supra

28. Cal—Union Lumber Co v Simon, supra

29. Cal—Union Lumber Co v Simon, supra

30. Cal—Holden v Mensinger, 165 P 950, 175 Cal 300
40 C J. p 486 note 90

31. Ga—Doerun Ice & Cold Storage Co v Adams, 129 S E 30, 34 Ga App 195

32. Ill—Boyer v Keller, 101 N E 237, 253 Ill 106, Ann Cas 1916B 628.
40 C J p 487 note 91

33. Ind—Morgan v Henry Brick Co., 176 N E 237, 92 Ind App. 478
40 C J p 487 note 93

Finding held sufficiently specific
N M—Allison v Schuler, 36 P 2d 519, 38 N M 506

40 C J p 487 note 93 [a].

Findings held ambiguous or uncertain

Ind—Morgan v Henry Brick Co., 176 N E 237, 92 Ind App 478

34. Cal—Ensele v Jolley, 204 P. 1035, 188 Cal 297

35. Idaho—Nelson Bennett Co v Twin Falls Land & Water Co., 93 P 789, 14 Idaho 5

36. Cal—Pacific Lumber Co v Wilson, 92 P 654, 6 Cal App 561.

37. Ind—Judah v. F. H Cheyne Electric Co., 101 N E 1039, 53 Ind App 476

38. Cal—Cohn v Wright, 26 P 643, 89 Cal 86
40 C J p 487 note 99.

39. Cal—Reinhart Lumber & Planing Mill Co v. Hladik, App, 259 P 363
10 C J p 487 note 1

Date of completion

Finding that building was completed before June 1 was held in conflict with finding that electrical work required to obtain inspector's certificate was finished on June 17 following—Hammond Lumber Co v Barth Inv. Corporation, 262 P. 29, 202 Cal 603,

ent with a finding of performance,⁴⁰ and, where the statute provides that certain acts by the owner shall be deemed the equivalent of completion of the building, findings that there have been a deemed completion and an actual completion of the same building are not inconsistent.⁴¹ The finding by the court of the ultimate fact that the work was completed within the time required by the statute for the filing of a lien controls an error in a specific date in the finding.⁴²

(5) Construction and Interpretation

Findings of fact in an action to enforce a mechanic's lien will be reasonably interpreted and construed according to their evident import.

The general rules applicable to construction and interpretation of verdicts and findings apply in proceedings to enforce mechanic's liens.⁴³ Findings of facts made by the trial court must be construed together in determining their sufficiency.⁴⁴ A finding will be reasonably interpreted and construed according to its evident import, although it may be informal,⁴⁵ and the answer of a jury to an issue will be considered in connection with the instruction submitting it⁴⁶ or with other findings and the conceded facts,⁴⁷ and, if the finding as made is to all intents and purposes equivalent to that required, it will be sufficient.⁴⁸

Under the general rule that, where a verdict is

susceptible of two constructions, it will be given the one which will uphold it, a finding in a verdict as to the date from which interest runs will not be allowed to overcome a finding that the suit was commenced in time.⁴⁹ It will be presumed in support of a judgment in the absence of evidence as to the size of the lot on which a building is located that all of it is necessary for the convenient use and occupation of the building.⁵⁰ A finding that a lot is not susceptible of division is not an indirect finding that an older building on the lot is appurtenant to the one on which the lien is claimed.⁵¹ Where no issue is submitted to the jury as to the abandonment of the contract by claimant, a finding that a specific amount was due is inconsistent with an abandonment.⁵²

c. Conclusiveness

Where a proceeding to enforce a mechanic's lien is tried by the court without a jury as an action at law, the findings, if supported by the evidence, are conclusive, but in an equitable proceeding the verdict on issues submitted is advisory only.

As a general rule, verdicts and findings of fact are of the same effect in mechanic's lien foreclosure proceedings as in other cases.⁵³ In actions at law tried by the court, sitting as a jury, the court's findings, if supported by substantial evidence, are conclusive,⁵⁴ but in an equitable proceeding the verdict

Findings held not conflicting, contradictory, or inconsistent

(1) In general

Cal—Reinhart Lumber & Planing Mill Co v Hladik, App, 259 P 363
Tex—Dallas Nat Bank v Peaslee-Gaulbert Co, Civ App, 35 SW2d 221, error dismissed
40 C J p 487 note 1 [a]

(2) A finding that mechanic's lien claimant was entitled to personal judgment against owner of building was not inconsistent with finding that claimant's lien statement was not a just and true account of demand due to claimant and was insufficient to support lien—Rust Sash & Door Co v Bryant, Mo App, 124 SW2d 544

40. Cal—Musto Sons-Keenan Co v Pacific States Corp, 192 P 138, 48 Cal App 452

41. Cal—Heberling v. Day, 209 P 908, 59 Cal App 13

42. Ind—Judah v F H Cheyney Electric Co, 101 NE 1039, 53 Ind App 476

43. Mo—Rust Sash & Door Co v Bryant, App, 124 SW2d 544
NM—Albuquerque Lumber Co v Tomei, 250 P 21, 32 NM 5
NY—P. Grassi & Bro v City of

New York, 247 NYS 574, 139 Misc 78

Pa—Schwartz v Whelan, 145 A 525, 295 Pa 425, 65 ALR 277

Tex—Gourley v Iverson Tool Co, Civ App, 156 SW2d 726, refusal for want of merit—E L Wilson Hardware Co v American Indemnity Co, Civ App, 10 SW2d 218

44. Cal—Hammond Lumber Co v Darr Inv Corporation, 262 P 31, 202 Cal 606—Combs v Eberhard, 7 P2d 338, 130 Cal App 25

Okl—El Reno Electric Light & Telephone Co v Jennison, 50 P 144, 5 Okl 759

Tex—Hogan v W H Norris Lumber Co, Civ App, 90 SW2d 585

45. Cal—Bianchi v Hughes, 56 P 610, 124 Cal 24

40 C J p 487 note 6

46. Mass—Burke v Coyne, 74 NE 942, 188 Mass 401.

40 C J p 487 note 7

47. Mass—Moore v Dugan, 60 NE 488, 179 Mass 153

48. Wyo—Big Horn Lumber Co v Davis, 84 P. 900, 14 Wyo 455, rehearing denied 85 P 1048, 14 Wyo. 455

40 C J p 488 note 9

49. Ga—David v Marbut-Williams

Lumber Co, 122 SE 906, 32 Ga. App 157

50. Cal—Ward v Crane, 50 P 839, 118 Cal 676

51. Conn—Peck v Brush, 94 A 981, 89 Conn. 551

52. Mass—Rochford v Rochford, 78 NE 451, 192 Mass 231

53. Mo—La Crosse Lumber Co v. Goddard, App, 151 SW2d 455

Probate homestead

In suit to foreclose a mechanic's lien for improvements on land set apart to defendant as a probate homestead, defendant's conclusion that she had no interest in land, which was part of her husband's estate, on date of commencement of work of making improvements could not overcome specific finding that plaintiff had a valid lien upon property, which finding was supported by statutory rule that defendant, as husband's widow, on day of death of husband took title to land either under husband's will or by operation of law—MacQuiddy v Rice, 118 P 2d 853, 47 Cal App 2d 755

54. Mass—Turner v. Wentworth, 119 Mass 459

Mo—La Crosse Lumber Co v. Goddard, App, 151 SW2d 455.

on issues submitted is advisory only as in other chancery cases.⁵⁵ Where the finding is by a jury in a court of equity, although it may be irregular, the court may award judgment as justice and the facts determine, as discussed *infra* § 323, and may put the

verdict in form.⁵⁶ A statute conferring on the judge power to submit to a jury the question whether the amount alleged was due claimant does not authorize the entry of judgment on the verdict or make the verdict final as to the amount due.⁵⁷

E. JUDGMENT OR DECREE

§ 317. Nature as in Rem or in Personam

A judgment or decree in a mechanic's lien proceeding, in so far as it declares and authorizes the enforcement of a lien on the property involved, is to be regarded as a judgment in rem against the specific property; a judgment in personam only, and not in rem, is not sufficient to establish the lien.

A judgment or decree in a mechanic's lien proceeding, in so far as it declares and authorizes the enforcement of a lien on the property involved, is to be regarded as a judgment in rem⁵⁸ against the specific property,⁵⁹ a judgment in personam only, and not in rem, is not sufficient to establish the lien.⁶⁰ Although the decree must be in rem, and not in personam, it may direct a sale unless the amount found due is paid on or before a day named,⁶¹ or the statement of the amount due may be in the form of a personal judgment, where the judgment proceeds to declare a lien and direct the taking of the proper steps to make the amount out of the property subject thereto.⁶² Likewise, a provision for the entry of a deficiency judgment, in case the proceeds of sale are not sufficient to pay the claims for which judgment is rendered, does not alter the character of the judgment to a purely personal one.⁶³

It has been held that the judgment must be special⁶⁴ even though the claim arises directly on an

original contract between plaintiff and the owner of the property.⁶⁵ However, there is also authority for the view that the judgment may be either general or special or both.⁶⁶ Under some statutory provisions a judgment enforcing a mechanic's lien must be against the debtor, as in ordinary cases, with the addition that, if no sufficient property of the debtor can be found to satisfy such judgment and costs of suit, then the residue thereof shall be levied on the property charged with the lien,⁶⁷ and under these provisions, where such addition is not embodied in the judgment, it is fatally defective.⁶⁸

§ 318. Judgment by Default

- a. In general
- b. Proof
- c. Opening

a. In General

A default judgment may be entered in an action to enforce a mechanic's lien on the failure of the defendant to appear or answer within the time limited by statute, but a judgment by default against the defendant while his demurrer to the complaint is undisposed of is erroneous.

A default judgment may be entered in an action to enforce a mechanic's lien on the failure of defendant to appear or answer within the time limited by statute.⁶⁹ However, a mechanic's lien proceed-

55. Colo.—Stewart v Breckenridge, 169 P 543, 69 Colo 108

40 C.J. p 488 note 16

56. Ill.—Schnell v Clements, 73 Ill 613

40 C.J. p 488 note 18

57. S.C.—Metz v Critcher, 65 S.E 394, 83 SC 396

58. Ala.—Porter v Miles, 67 Ala 130

40 C.J. p 488 note 22.

Nature of proceeding as in rem or in personam see *supra* § 265

59. Vt.—Goodra v Tarkey, 22 A.2d 509, 112 Vt 212

40 C.J. p 488 note 23

60. Md.—Treusch v Shryock, 55 Md 330

40 C.J. p 488 note 24

61. Ill.—Rubendall v Tarbox, 200 Ill App 260

Md.—Smith v Shaffer, 46 Md 578

62. S.D.—Cole v Custer County Agricultural, Mineral & Stock Ass'n, 53 NW 1086, 3 SD 272

40 C.J. p 488 note 26

63. Cal.—Blanck v Commonwealth Amusement Corp., 127 P 805, 19 Cal App 720

64. N.Y.—Lenox v Yorkville Baptist Church, 2 ED Smith 673—Althause v Warren, 2 ED Smith 657

65. Ill.—Culver v Elwell, 73 Ill 536

N.Y.—Althause v. Warren, 2 ED Smith 657

66. Wis.—Dean v. Pyncheon, 3 Pinn 17, 3 Chandel 9

40 C.J. p 488 note 30

67. Mo.—Horskotte v Menier, 50 Mo 158

40 C.J. p 489 note 31

68. Mo.—Farley v Cammann, 43 Mo App 168

69. Pa.—Gedrich v Yarosz, 156 A 575, 102 Pa Super 127

40 C.J. p 500 note 9

Judgments by default generally see Judgments §§ 187-303

Jurisdiction of court

Where there has not been a strict compliance with a statutory requirement as to notice of the commencement of an action to enforce a mechanic's lien, it has been held that the court has no jurisdiction to enter a default in the action—Jones & Magee Lumber Co v Boggs, 19 NW 678, 63 Iowa 589

Insufficient affidavit of defense

Under a statute so providing, a judgment may be entered because of an insufficient affidavit of defense to scire facias sur mechanic's lien, but the court alone, and not plaintiff's attorney, may direct entry of judgment on precept or rule for judgment because of insufficient affidavit

ing is not an action for the recovery of money or damages only within the meaning of a statute permitting the entry of a default judgment by the clerk ⁷⁰

A judgment by default against defendant while his demurrer to the complaint is undisposed of is erroneous ⁷¹ So, where an affidavit of defense is on file, judgment may not be entered for plaintiff in disregard of such affidavit on the ground that it was improperly filed, ⁷² and, under the practice in a particular jurisdiction, a lienor who has answered but has not appeared at the trial may not be regarded as in default where a trial notice has not been served ⁷³ It has been held that a judgment by default, for want of an affidavit of defense against the owner, should be interlocutory only where the contractor defends on the ground that the work was done and materials furnished on his credit and not on the credit of the building, and judgment entered in such case against the owner for the debt will be opened ⁷⁴

Amount of judgment Where a statute so authorizes, an assessment of damages on default may be made by the clerk ⁷⁵ Where a contractor makes a default, judgment against him should be for the amount prayed, notwithstanding as against the owner no judgment may be rendered for the claim by reason of the fact that the materialman has applied payment from a fund coming from the owner to material furnished for other buildings ⁷⁶

b. Proof

The plaintiff must make such proof as is required by the statutes and rules of practice on default in a mechanic's lien proceeding.

In the absence of a specific statutory provision, it would seem that, on a default, plaintiff need make such proof only as is required in other cases on default, ⁷⁷ and a general statute providing that plain-

tiff may take a verdict on default as though the allegations of the complaint were established by testimony has been held to apply to a mechanic's lien proceeding ⁷⁸ Where the chancery practice is established in lien cases, the court may proceed to a decree on bill confessed, with or without evidence to support the bill, as the court shall in its discretion deem best, as provided by a statute relating to chancery practice ⁷⁹ Where answers are filed denying the allegations of the complaint, defendants are entitled to a trial of the issues presented by the pleadings, even though they fail to appear when the case is regularly called for trial, and the court may give judgment in such case only on proof of the facts alleged in the complaint and denied by the answers ⁸⁰

c. Opening

Where a statute so provides, a default entered in a mechanic's lien proceeding may be opened and the defendant permitted to defend

A general statute under which the court may permit defendant to defend within a stated time after judgment, where the summons is not personally served on him, has been held to apply to suits to foreclose mechanics' liens, ⁸¹ and under such a statute the court may impose terms incident to permitting defendant to defend, ⁸² but the terms should not be unreasonable and harsh ⁸³ Under such a statute, where the court imposes unreasonable and harsh terms, in an order permitting defendant to file an answer and defend the suit the terms will be regarded as surplusage and without legal effect. ⁸⁴ Also, under such a statute the court may not make the order opening the default conditional on such unknown terms as another court, at the time of the trial of the suit on the merits, may fix ⁸⁵ Under a general provision of a statute relating to proceedings in chancery allowing defendant to appear and answer within a certain time after default and de-

of defense—Cedrich v Yarosz, 156 A 575, 102 Pa Super 127

70. Mont—Solari v Fasso, 185 P 323, 56 Mont 400

71. Or—Willamette Falls Transp & Milling Co v Smith, 1 Or 181

72. Pa—Wilkinson v. Brice, 23 A 982, 148 Pa 153

73. N Y—Reedy El Co v Monok Co, 178 N Y S 594, 189 App Div 458

74. Pa—Wethered v Garrett, 7 Pa Co 535

75. N Y—Weide v Henderson, 8 N Y S 176

76. Iowa—Sioux City Fdy & Mfg Co v Merten, 156 N W. 367, 174 Iowa 332, L R A 1916D 1247

77. Tex—Schultze v Alama Ice & Brewing Co, 21 SW 160, 2 Tex Civ App 236

40 C J p 501 note 15
Proof in case of default generally see Judgments §§ 210-213

78. Ga—Methodist Episcopal Church South v Dudley Sash, Door & Lumber Co, 72 SE 480, 137 Ga. 68

Tex—Herring v Herring, Civ App., 189 SW 1105

79. Colo—Clear Creek, Colorado, Gold & Silver Min Co v Root, 1 Colo 371

80. S D—Schlachter v St Bernard's Roman Catholic Church, 105 NW 279, 20 S D 186

81. Minn—W E Suhring Co. v.

Stafford, 208 NW. 136, 166 Minn. 430

One, served by publication, in suit to foreclose mechanics' liens, who did not appear, applying within one year after judgment, not being guilty of laches, and tendering answer stating good defense, has been held entitled to have judgment vacated and to serve and file answer—W E Suhring Co v Stafford, supra

82. Minn—W E. Suhring Co v. Stafford, supra

83. Minn—W E Suhring Co v. Stafford, supra

84. Minn—W E Suhring Co v. Stafford, supra

85. Minn—W E Suhring Co v. Stafford, supra

cree pro confesso, the defaulted party after he has appeared may demur.⁸⁶

§ 319. Requisites and Essentials in General

- a. In general
- b. Definiteness and certainty
- c. Parties generally
- d. Scope and extent of relief

a. In General

A judgment or decree in a proceeding to enforce a mechanic's lien must conform to such requirements as are imposed by the statutory provisions on which the proceeding is based.

A judgment or decree in a proceeding to enforce a mechanic's lien must conform to such requirements as are imposed by the statutory provisions on which the proceeding is based,⁸⁷ since the lien is dependent for operation and effect on the rendition of a judgment such as the statute directs.⁸⁸ An order foreclosing a mechanic's lien without finding that the party who contracted with the lien claimant for the improvement represented the owner of the fee,⁸⁹ or not finding whether a copy of a notice claimed to have been posted on the premises by the owner of the fee was served on the lien claimant,⁹⁰ has been held incomplete. Under some statutory provisions, where a referee has completed the performance of his duties and filed his decision, judgment may be entered on his decision without further warrant by the clerk as a ministerial act.⁹¹ A judgment for plaintiff in a mechanic's lien proceeding, where the record shows that the proceeding was not filed within the statutory time therefor, has been held void on its face.⁹²

Time of entry of judgment. Under a general act declaring a jury's verdict for a specific sum of mon-

ey a lien on the realty of the party against whom it was rendered for a stated period, a judgment may be entered on a verdict for claimant in a mechanic's lien action at any time within the period of limitations without loss of the lien,⁹³ and where plaintiff in a scire facias on a mechanic's lien has obtained a verdict within the period of limitations from the issuing of the writ, but is prevented from entering judgment until after the expiration of that period, by reason of the pending of a rule for a new trial or a motion in arrest of judgment, he is entitled to judgment on the discharge of the rule or motion.⁹⁴ A statutory provision requiring diligence in the prosecution of the proceeding within a prescribed time after the issuance of the summons does not prescribe a time after which a judgment may not be entered,⁹⁵ and a provision limiting the period during which the lien may remain in force before action brought does not require that the action shall be prosecuted to final judgment within the time so limited, and if the action is brought within the time the judgment may be taken after the time has expired.⁹⁶

b. Definiteness and Certainty

A judgment or decree in an action to enforce a mechanic's lien must be specific and certain or capable of being made such by proper construction.

A judgment or decree in an action to enforce a mechanic's lien must be specific and certain or capable of being made such by proper construction, it should be definite as to the amount of recovery allowed.⁹⁷ However, a judgment, in substance, that plaintiff has a valid lien on the property for the sum found due him, and that the sheriff sell the property and from the proceeds pay plaintiff the sum found due him and bring the surplus money in-

86. Ill.—Philip Gollner Co v Gillette, 216 Ill App 25

87. Fla.—Manatee Light & Traction Co. v. Tampa Plumbing & Supply Co., 42 So 703, 53 Fla. 533

40 C.J. p 489 note 33

Judgment held not erroneous

Tex.—Aston v Allison, Civ App, 91 S.W.2d 852

Judgment on cross complaint

Where realty was conveyed under contract granting permission to purchaser to erect building on realty, which should be security for purchase price, materialman sought to foreclose lien which attached by reason of erection of the building, and vendor recovered judgment on cross complaint establishing superiority of his vendor's lien, judgment properly followed statutory provisions for actions for strict foreclosure of a ven-

dor's lien, as against contention that judgment should have been as in an action to foreclose a mechanic's lien—F C Krotter Co v Harbaugh, 280 N.W.211, 66 S.D. 178

88. Ala.—Porter v Miles, 67 Ala. 130

89. Minn.—Couture v Hennessy, 208 N.W. 545, 167 Minn. 90.

90. Minn.—Couture v Hennessy, supra

91. N.Y.—Decker v Canzoneri, 9 N.Y.S.2d 210, 256 App Div. 68

92. Del.—Hendrix v Kelley, 143 A.460, 4 W.W. Harr. 120

93. Pa.—Rosenheck v Stape, 3 A.2d 678, 332 Pa. 287

94. Pa.—Howes v Dolan, 9 Pa. Super 586, 44 Wkly.N.C. 62

Rule to strike off judgment

The trial court properly dis-

charged defendant's rule to strike off judgment on verdict for plaintiff in mechanic's lien action because of its entry over five years after issuance of scire facias, in view of general act declaring jury's verdict for specific sum of money a lien on realty of party against whom rendered until court grants new trial or arrests judgment—Rosenheck v Stape, 3 A.2d 678, 332 Pa. 287

95. N.J.—Buohanon & Smock Lumber Co v Dougherty, 96 A. 663, 88 N.J. Law 356
40 C.J. p 393 note 12.

96. Wash.—Pacific Mfg Co v Brown, 36 P. 273, 6 Wash. 347
40 C.J. p 394 note 13

97. Ill.—Miller v Calumet Lumber & Mfg Co, 121 Ill App 56
40 C.J. p 489 note 40.

to court to abide its further order, is not unintelligible and incapable of being carried out by the sheriff because it is not stated which of the defendants shall pay the amount found due plaintiff⁹⁸ A judgment in an action to foreclose a mechanic's lien need not adjudge that the land directed to be sold is necessary for the convenient use and occupation of the building where the complaint alleges that all of the land is necessary for such purpose and the court finds the allegation to be true⁹⁹

The failure of a judgment to adjudge that at the commencement of the action the land belonged to the person who caused the building to be constructed or that it was erected with his knowledge does not render the judgment erroneous where it is alleged and found that defendant at whose instance the building was erected was at all times mentioned the owner and entitled to the possession of the property and that the interest of the other defendants who claimed to have some interest therein was subsequent to plaintiff's lien¹ Where there is a finding showing the amount due for work and materials, a repetition of the statement that the sum for which the judgment is rendered is the amount due for such work and materials is unnecessary²

c. Parties Generally

A judgment in a proceeding to enforce a mechanic's lien must be rendered against some person as defendant and may not be against the land alone, and a valid judgment may not be entered against or in favor of one who is not brought within the jurisdiction of the court

A judgment in a proceeding to enforce a mechanic's lien must be rendered against some person as defendant and may not be against the land alone³ A valid judgment may not be entered against or in favor of one who is not brought within the jurisdiction of the court.⁴ Where, prior to the filing of plaintiff's lien, the property in question is conveyed to one not a party to the action at the time of the judgment by a deed containing a statutory covenant

giving it precedence over subsequently filed mechanics' liens, and there is no finding of fraud in the execution and delivery of the deed, and the deed is not set aside, it has been held that the court has no jurisdiction to direct a foreclosure of the lien against the premises⁵

The rights of a necessary party to the action should be found and adjudicated in the decree,⁶ and, where defendant's wife is a necessary party, the proper procedure is to find and adjudicate her rights in the decree, not to dismiss her, even on her own objection or motion⁷ However, it has been held that a judgment against a husband only for the foreclosure of a mechanic's lien on a homestead is not void as to the husband's interest, although the wife's interest is not foreclosed thereby⁸

Where a lienor dealt directly with the owner and the lien was entitled to priority over a mortgage, the rights of the parties would not be affected by the fact that the judgment for the sum claimed on the mechanic's lien was rendered against the owner of the house alone where its recital embraced all parties, describing their interests and providing that if no sufficient property was found the residue should be levied out of the premises⁹ A surety on a contractor's bond to an owner, conditioned for the payment of labor and material claims, may be made a party and a decree may be rendered against him, in a suit by an unpaid materialman¹⁰

d. Scope and Extent of Relief

- (1) In general
- (2) Amount of recovery

(1) In General

Under a statute contemplating that the rights of all parties interested in the property shall be determined in one proceeding, a judgment or decree in a proceeding to enforce a mechanic's lien may be framed accordingly,

98. Cal—Neilhaus v Morgan, 45 P 253

99. Cal—Dusy v Prudom, 80 P 798, 95 Cal 646

1. Cal—Dusy v Prudom, supra.

2. Ind—Duckwall v Jones, 58 NE 1055, 156 Ind 682, reheard 60 NE 797, 156 Ind 682

3. Iowa—Redman v Williamson, 2 Iowa 488

4. Mich—Huebner v Winskowski, 224 NW 340, 246 Mich 77

Mo—Burgess v Joplin Lumber Co, App, 145 SW 2d 1001—Croatian-American Building & Loan Ass'n Balkan v Casper, App, 54 SW 2d 778.

Tex—Judd v Wyche, Civ App, 80 SW 2d 808

40 C J p 489 note 46

Absence of jurisdiction not shown

(1) In general—Roscoe Black Co v Ar-Eu Co, 205 NW 438, 164 Minn 440—40 C J p 489 note 46 [b]

(2) A decree for foreclosure of materialman's lien referring to finding of personal service against owner not appearing, although not reciting personal service, has been held not objectionable as made without jurisdiction—Edwards & Bradford Lumber Co v Matthews, 294 P 964, 160 Wash 58

5. NY—Servidone v Hirschmann,

51 NYS 2d 917, 268 App Div 347, reargument denied 52 NYS 2d 434, 268 App Div 1075, affirmed 62 NE 2d 232, 294 NY 786

6. Ill—Leffers v Hayes, 64 NE 2d 768, 327 Ill App 440

7. Ill—Leffers v Hayes, supra.

8. Kan—Kansas Loan & Trust Co. v. Phelps & Bigelow Windmill Co., 54 P. 136, 7 Kan App 469

9. Mo.—Rally v Hudson, 62 Mo. 333.

10. Mich—Morman v. Ryskamp, 209 N.W. 52, 295 Mich. 140.

so that a court having jurisdiction of the parties may determine the validity of claims interfering with the enforcement of the lien.

Under a statute contemplating that the rights of all parties interested in the property shall be determined in one proceeding, a judgment or decree, in a proceeding to enforce a mechanic's lien, may be framed accordingly, so as to adjust and determine the equities of all the parties to the action,¹¹ and a court having jurisdiction of the parties may determine the validity of claims interfering with the enforcement of the lien.¹² Under such a statute the court may render a decree against the sureties on a bond given to release liens,¹³ determine the rights of all parties on a subcontractor's bill against the contractor and owner in which the owner has filed a cross bill against the contractor's surety,¹⁴ or award judgments in favor of a general contractor or of subcontractors on determining the validity of their liens in a subcontractor's action,¹⁵ or award a contractor an affirmative judgment on a counterclaim against a subcontractor.¹⁶ In an action against partners for the foreclosure of a mechanic's lien, a provision in the judgment for an adjustment between the partners if one should pay more than his share of the judgment has been held proper.¹⁷ No affirmative relief, however, may be granted a defendant subcontractor, in an action to foreclose a lien, as against a defendant contractor on whom the subcontractor failed to serve an answer.¹⁸

Issues between an owner and contractor may be adjudicated in a subcontractor's suit,¹⁹ and an own-

er who has paid the contract price may be awarded a judgment against the contractor for the amount recovered by subcontractors or materialmen.²⁰ On foreclosure of a contractor's lien for the balance due him, a subcontractor who has filed a lien is entitled to a judgment directing payment out of the moneys due the contractor under his lien.²¹ Where suits on several lien claims are tried together, the judgment as to one claim may be valid, although on another claim the judgment may be wrong.²² Under a statute not granting a lien against a public work itself, the court should not enforce an asserted lien against such a structure,²³ but it should not order a materialman's claim entirely erased from the mortgage records,²⁴ and should restrict its judgment to ordering the cancellation of plaintiff's recorded claim as a lien and privilege, leaving the inscription to remain in effect for whatever it may be worth in all other respects.²⁵

(2) Amount of Recovery

The judgment or decree in a proceeding to enforce a mechanic's lien should allow the claimant the amount due him.

A judgment or decree in a proceeding to enforce a mechanic's lien should allow the amount due claimant,²⁶ but it should not allow more than is due²⁷ and it must not grant a double recovery.²⁸ Under some statutory provisions the court should, on entering judgment for plaintiff, allow as part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount for

11. Ill.—Decatur Lumber & Manufacturing Co v Clark, 270 Ill App 33

NY—John S Lane & Son v Westchester County, 163 NE 86, 248 NY 298

12. NY—Concord Constr Co v Plante, 116 NYS 153, 63 Misc 130, affirmed 121 NYS 1026, 137 App Div 243

13. Mich—Grace Harbor Lumber Co v Ortman, 157 NW 96, 190 Mich 429

14. Mich—C H Little Co v L P Hazen Co, 152 NW 95, 185 Mich 316

40 C J p 492 note 99

15. Wis—Neil & Co, Inc v Wisconsin Tel Co, 175 NW 89, 170 Wis 298

40 C J p 492 note 1

16. NY—Richman v New York City, 151 NYS 714, 89 Misc 213

17. Kan—Thompson v Matthews, 183 P2d 216, 163 Kan 434

18. NY—Rockaway Sash & Door Co v Soman, 261 NYS 106, 146 Misc 327.

19. Okl—Scroggy v Kelley, 122 P 694, 32 Okl 398

20. Okl—Albert v Moore, 93 P 543, 20 Okl 78, 14 L.R.A.N.S. 1036

21. NY—Holl v Long, 68 NYS 522, 34 Misc 1

22. Mass—Dahlborg v Wyzanski, 58 NE 593, 175 Mass 34

23. La—Decatur Cornice & Roofing Co v Caldwell Bros, 138 So 511, 173 La 694

24. La—Decatur Cornice & Roofing Co v Caldwell Bros, supra

25. La—Decatur Cornice & Roofing Co v Caldwell Bros, supra

26. NY—Carroll McCreary Co v People, 274 NYS 585, 243 App Div 775, modified on other grounds 195 NE 675, 267 NY 37

Judgment obtained in attachment

In a suit to foreclose a lien for labor and materials against owner, original contractor, who filed a cross complaint, and other lien claimants, it was proper to include in decree amount of judgment obtained by original contractor against owner in

an attachment action against the property in question, which was not included in original contractor's lien, leaving distribution of proceeds of sale between different claimants to be made in accordance with law—James A C Tait & Co v Stryker, 243 P 104, 117 Or 838

27. Utah—Garland v Bear Lake & River Waterworks & Irrigation Co, 34 P 368, 9 Utah 350, affirmed 17 S Ct 7, 164 US 1, 41 L Ed 327

Judgment held not excessive

Ind—Central Dredging Co v F G Proudfoot Co, 158 NE 229, 87 Ind App 171

Mont—Smith v Gunniss, 144 P2d 186, 115 Mont 862

Tex—Bryant-Lunk Co v W H Norris Lumber Co, Civ App, 61 SW 2d 160, error dismissed

28. Utah—Garland v Bear Lake & River Waterworks & Irrigation Co, 34 P 368, 9 Utah 350, affirmed 17 S Ct 7, 164 US 1, 41 L Ed 327.

40 C J p 492 note 7

Claims of subcontractors

(1) Where a subcontractor's claim

attorney's fees,²⁹ but to permit defendant to recover attorney's fees in an action in which it is determined that he is liable would be to assist him in taking advantage of his own wrong³⁰

Where the demand is unliquidated it has been held discretionary with the chancellor whether or not interest should be awarded in a judgment enforcing a mechanic's lien³¹ The court, in its decree, may include an allowance of interest on an encumbrance covering the property in suit, together with a solicitor's fees to the legal holders of the encumbrance, where such decree is in accordance with the provisions of a trust deed with respect to interest and solicitors' fees³² A judgment showing on its face that the court allowed interest has been held not invalid for failing to set out the interest separately³³ The mere fact that the judgment on the lien is taken for too much, by including interest not properly recoverable, is not of itself conclusive proof of fraud, but it cannot be sustained for this amount as against a subsequent mortgage³⁴ Where demands due at separate times were included in a mechanic's lien, and parts were due and parts not due when the action was brought, the court may render judgment for an amount which was not due when the action was brought but subsequently fell due and is unpaid when the judgment is rendered³⁵ Where foreclosure proceedings are begun before the maturity of notes given for the contract price, the contractor may have a judgment for the amount due on the notes at the time of trial.³⁶

Under a statute which provides that the contractor may recover only such sum as may be due after

deducting the claims of other parties for work and materials included by his contract, only claims for which valid liens have been filed should be deducted³⁷ Under a statute providing that no owner of a building on which a mechanic's lien of a subcontractor may be filed shall be required to pay the original contractor, unless furnished receipts and waivers of claim for mechanics' liens or good and sufficient bond, the amounts due subcontractors must be considered in determining the recovery of a contractor failing to furnish receipts and waivers of claims for liens³⁸

§ 320. Description of Property

If it is to operate otherwise than as in personam, a judgment or decree in a proceeding to enforce a mechanic's lien must contain a description of the property involved, with the certainty ordinarily required of a conveyance, or it must at least embody a general description of the property, the judgment must be complete in itself and not depend on other record recitals

If it is to operate otherwise than as in personam,³⁹ a judgment or decree in a proceeding to enforce a mechanic's lien must contain a description of the property involved,⁴⁰ with the certainty ordinarily required of a conveyance,⁴¹ or it must at least embody a general description of the property⁴² The judgment must be complete in itself and not depend on other record recitals⁴³ Where a lien is claimed on a building with such land around it "as may be required for the convenient use and occupation thereof," the decree should define the extent of the land subject to the lien,⁴⁴ and, while a failure to do so will not invalidate the decree,⁴⁵ a purchaser thereunder will probably acquire no land beyond that covered by the building⁴⁶ Where

is disallowed to the extent that the contractor's claim for materials used by the subcontractor in the building in question is allowed, there is no duplication of claim in allowing the contractor's and subcontractor's claim—*Paterson v Condos*, 28 P 2d 499, 55 Nev 134, rehearing denied 30 P 2d 283, 55 Nev 260

(2) It has been held that in an original contractor's suit to foreclose a lien, where the court decrees a lien in favor of a subcontractor, the amount received by the subcontractor should be credited both on the subcontractor's judgment against the owner and on his judgment against the contractor—*Bradfield v Bollier*, 128 P 2d 942, 169 Or 425

29. Or—*Dimitre Electric Co v Paget*, 151 P 2d 630, 175 Or 72

30. Cal—*Kennedy v Dutton*, 2 P 2d 856, 116 Cal App 510

31. Ky—*Mays v Stegeman*, 280 S W. 464, 213 Ky. 60.

Discretion held not abused

Ky—*Mays v Stegeman*, supra

32. Ill—*McNulty v White*, 242 Ill App 37

33. Tenn—*D M Rose & Co v Dy-sart*, 8 Tenn App 325

34. Cal—*Gamble v Voll*, 15 Cal 507

35. Okl—*El Reno Electric Light & Telephone Co v. Jennison*, 60 P 144, 5 Okl 759

40 C J p 492 note 10

36. N Y—*Margulies v Seigel*, 178 N Y S 544, 108 Misc 483.

37. Cal—*Holden v Mensinger*, 165 P 950, 175 Cal 300

38. Iowa—*Newell Const. Co v Fy-ler*, 230 N W. 322.

39. Ala—*Porter v Miles*, 67 Ala 130

40. Utah—*Park City Meat Co. v. Comstock Silver King Min. Co.*, 103 P 254, 36 Utah 145.

40 C J p 491 note 79.

41. Utah—*Park City Meat Co v. Comstock Silver King Min Co.*, supra

42. Cal—*Hollenbeck-Bush Planing Mill Co v Roman Catholic Bishop*, 176 P 166, 179 Cal 229

40 C J p 491 note 82

Descriptions held sufficient

(1) A decree awarding a lien on an acre of land of which the improved building constitutes the geographical center has been held proper under some statutory provisions—*Federal Land Bank of Spokane v. Green*, 90 P 2d 489, 108 Mont 56

(2) Other descriptions see 40 C J. p 491 note 82 [a]

43. Ala—*Salter v Goldberg*, 43 So 571, 150 Ala 511.

44. Idaho—*Robertson v Moore*, 77 P 218, 10 Idaho 116
40 C J p 491 note 84

45. Cal—*Sidlinger v Kerkow*, 22 P. 932, 82 Cal 42

46. Cal—*Sidlinger v. Kerkow*, su-

a lien is claimed against two or more buildings the judgment should designate each building and the amount due on it ⁴⁷

§ 321. Conformity to Lien Statement

Ordinarily a judgment or decree in a proceeding to enforce a mechanic's lien should conform to the statement of claim of lien, but small variances will not defeat the lien in the absence of bad faith

Ordinarily a judgment or decree in a proceeding to enforce a mechanic's lien should conform to the statement of claim of lien as to the property covered⁴⁸ and usually may not be rendered for more than the amount claimed in the lien statement⁴⁹ So also, plaintiff may recover only for what was done or furnished between the dates stated in the lien statement, although the evidence shows that work was done or materials furnished at other times⁵⁰ However, small variances between the lien as filed and as allowed will not defeat the lien in the absence of bad faith,⁵¹ and it has been held that, where plaintiff has recovered a judgment for more than claimed in his notice, he may be allowed to re-

mit the excess⁵² It has further been held that, where the judgment is generally against defendants and is not special against the lands, the fact that the judgment is greater than the lien claim does not constitute error ⁵³

§ 322. Conformity to Pleadings, Issues, and Proof

A judgment or decree in a proceeding to enforce a mechanic's lien must be supported by the pleadings and the evidence, it must be within, and dispose of, all the issues made by the pleadings, but should not be broader than the averments thereof or grant relief not thereby demanded

A judgment or decree in a proceeding to enforce a mechanic's lien must be supported by the pleadings⁵⁴ and the evidence⁵⁵ It must be within the issues made in the case⁵⁶ and should dispose of all the issues made by the pleadings,⁵⁷ but should not be broader than the averments of the pleadings⁵⁸ While, in some instances, the court may declare a lien in favor of one who does not specifically pray for such relief,⁵⁹ ordinarily the judgment or de-

pra—Tibbets v Moore, 23 Cal 208

47. Md—Treusch v Shryock, 55 Md 330—Plummer v Eckenrode, 50 Md 225

"Lump-sum" contract

Where the materials were delivered for the construction of improvements on several lots under a "lump-sum" contract, it has been held that the court in an action to foreclose mechanics' liens has jurisdiction to apportion the amount of the liens decreed among the lots—Hendrickson v Bertelson, 35 P 2d 318, 1 Cal 2d 430

48. Dak—McCormack v. Phillips, 24 NW 39, 4 Dak 506
40 C J p 490 note 58

49. Cal—Olson-Mahoney Lumber Co v Dunne Inv Co, 159 P. 178, 30 Cal App 332
40 C J p 490 note 59

50. Cal—Santa Monica Lumber & Mill Co v Hege, 48 P 69, 5 Cal Unrep Cas 628—Goss v. Strelitz, 54 Cal 640

51. Mich—Grace Harbor Lumber Co v Ortman, 157 N.W 96, 190 Mich 429

52. N Y—Protective Union v Nixon, 1 E D Smith 671

53. N J—Zanzonica v. Miller, 155 A. 10, 9 N J Misc 597.

54. Mo—Croatian-American Building & Loan Ass'n Balkan v Casper, App, 54 S W 2d 773

Tex—Mathes v Williams, Civ App, 124 S W 2d 853—Trout v. Wichita

State Bank & Trust Co, Civ App, 23 S W 2d 871
40 C J p 490 note 63.

Alternative relief not warranted

Cal—Busset v California Builders Co, 13 P 2d 36, 123 Cal App 657

In action against owners of different lots, no mechanics' liens may be declared against particular landowners where no specific liens are pleaded—Cook v Cappellino, 281 P 412, 101 Cal App 77

Judgment on demurrer

Where an affidavit of defense in the nature of a demurrer is filed in scire facias on a mechanics lien, the proper order has been held to be judgment on demurrer, not an order striking off the lien—Favo v Merlot, 94 Pa Super 90

Decrees sustained

Fla—London Operating Co v Continental Const Co, 159 So 33, 118 Fla 15

Tex—Aston v Allison, Civ App, 91 S W 2d 852—Moody-Seagraves Ranch v Brown, Civ App, 69 S W 2d 840, error refused
40 C J p 490 note 63 [b]

55. Ind—Morgan v Henry Brick Co, 176 NE 237, 92 Ind App 478
Nev—Reno Plumbing & Heating Co v Bickel, 35 P 2d 302, 55 Nev 367
Tex—Aston v Allison, Civ App, 91 S W 2d 852—Trout v Wichita State Bank & Trust Co, Civ App, 23 S W 2d 871

Wash—Wilhite v. Ludwig, 282 P 847, 154 Wash 541
40 C J p 490 note 64

Judgment held supported

Mo—Manchester Iron Works v. E. L.

Wagner Const Co, 107 S W 2d 69, 341 Mo 389

Removable structure

Under a statute providing that the property subject to a mechanic's lien may be ordered removed to satisfy the lien where the land upon which the property is situated cannot be subjected to the lien, a mechanic's lien claimant which does not plead or prove that the structure subject to the lien is removable from the land is not entitled to an order of removal—Pioneer Sand & Gravel Co v Hedlund, 34 P 2d 878, 178 Wash 273
56. Iowa—Weir & Russell Lumber Co v Kempf, 12 N W 2d 857, 234 Iowa 450

40 C J p 490 note 65

Decree held not outside issues

Iowa—Weir & Russell Lumber Co v Kempf, supra

57. Tex—Parker v Chambers, Civ App, 159 S W 2d 945

58. Tex—Investor's Syndicate v Dallas Plumbing Co, Civ App, 61 S W 2d 1039

40 C J p 490 note 66

59. Ark—Union Indemnity Co v Covington, 12 S W 2d 884, 178 Ark 533

Prayer for judgment against contractor's bond

One complying with a statute by filing a verified account with the clerk of the court has been held entitled to have a lien declared in his favor, although he does not pray for such relief, but seeks judgment against a contractor's bond, on the assumption that the filing of a bond

cree should not grant relief not demanded by the pleadings⁶⁰ Although a complaint expressly or impliedly alleges completion of the building, it has been held that a judgment of foreclosure on the basis of substantial performance may be sustained,⁶¹ but a petition failing to allege a provision of a contract for the foreclosure of a lien on partial performance of the contract, or an amount reasonably necessary to complete improvements, has been held not to invoke the court's jurisdiction to grant foreclosure on such performance under a prayer for general relief⁶² A direction for a deficiency judgment has been held not erroneous although the complaint did not pray for such relief⁶³ A decree in a suit to foreclose a mechanic's lien may be for less than the amount claimed where there is substantial evidence in the record to support the decree⁶⁴

The court has no power to order a sale of property other than that mentioned in the petition and on which a lien has been decreed,⁶⁵ and, where the bill

claims a lien on a particular lot, it is error for the decree to extend the lien over other lots not mentioned in the bill⁶⁶ Ordinarily the judgment is erroneous where the description of the land contained therein does not correspond to the description in the petition and the exhibit made a part thereof⁶⁷

§ 323. Conformity to Findings or Verdict

A judgment or decree in a proceeding to enforce a mechanic's lien must conform to the findings or verdict

A judgment or decree in a proceeding to enforce a mechanic's lien must conform to the findings⁶⁸ or verdict⁶⁹ Findings showing a right to a lien are inconsistent with a judgment dismissing the claim⁷⁰ A finding that claimant had been paid for materials furnished precludes a judgment against defendant for the amount of the claim⁷¹ Complainant may, after a verdict declaring a lien on a building and land, relinquish his right to proceed against the land and take a judgment against the building only⁷²

displaced the lien—Union Indemnity Co v Covington, *supra*

Petition for amount due for repairs

Under some constitutional provisions a petition for an amount due for repairs to a building has been held sufficient to support a judgment declaring a mechanic's lien although it does not specifically pray that a lien be declared and foreclosed—Aston v Allison, Tex Civ App, 91 S W 2d 852

60. Mo—Croatian-American Building & Loan Ass'n Balkan v. Casper, App, 54 S W 2d 773
40 C J p 490 note 67

Relief warranted

(1) In general
Utah—Burton Walker Lumber Co v v Howard, 66 P 2d 134, 92 Utah 92 Wis—Erickson v Patterson, 211 N W 775, 191 Wis 628

(2) A petition for the balance due under a contract with defendant to repair defendant's building, praying for judgment for the amount of the debt and "all other and proper relief" authorizes a judgment of foreclosure and all other relief called for by the petition—Aston v Allison, Tex Civ App, 91 S W 2d 853

(3) In a mechanic's lien action, where the owner and the lessee of the premises are notified of the action, and the bill prays for general relief, it has been held that the pleading is sufficient to warrant a decree of a lien against the leasehold estate—Variety Fire Door Co v Hanson-Worden Co, 10 Tenn App 254

(4) In an action to foreclose a lien in which plaintiff prays for both special and general relief, if any of

the items placed by plaintiff in the building are lienable plaintiff is entitled to have its lien established and foreclosed—Westinghouse Electric Supply Co v Hawthorne, 150 P 2d 55, 31 Wash 2d 74

Relief not warranted

(1) In general
Mo—Croatian-American Building & Loan Ass'n Balkan v Casper, App, 54 S W 2d 773

Tenn—Richmond Screw Anchor Co v E W Minter Co, 300 S W 571, 156 Tenn 19
40 C J p 490 note 67 [a]

(2) Allowance of interest generally—Walsh v North American Cold Storage Co, 103 N E 185, 260 Ill 322—40 C J p 490 note 67 [b]

61. Conn—Daly v New Haven Hotel Co, 99 A 853, 91 Conn 280

62. Tex—Mathes v Williams, Civ App, 134 S W 2d 853

63. Wis—Eldeman v Kidd, 26 N.W 116, 65 Wis 18
40 C J p 491 note 72

64. Fla—London Operating Co v Continental Const Co, 159 So 33, 118 Fla 15

65. Colo—Dassick Min Co v Schofield, 14 P 65, 10 Colo 46
40 C J p 491 note 68

66. Ark—Roberts v Wilcoxson, 36 Ark 355
40 C J p 491 note 69

67. Tex—Adams v Cook, 55 Tex 161

68. N Y—Lawson v Yeo, 292 N Y S 550, 249 App Div 889
40 C J p 491 note 74

Inconsistent theories

In action to foreclose material-

man's lien, finding that allegations of complaint as amended, seeking recovery of reasonable value of materials furnished, were true has been held not to preclude judgment foreclosing lien, even though effect of finding was to permit materialman to recover on asserted inconsistent theories of express and implied contract, where there was evidence to support a recovery on either theory, notwithstanding claim of lien was based solely on an express contract—Baird v Ocequeda, 67 P 2d 1055, 8 Cal 2d 700

Judgment sustained

N Y—Lawson v Yeo, 292 N Y S 550, 249 App Div 889
40 C J p 491 note 74 [a]

Two tracts

Where plaintiffs sought a mechanic's lien against two tracts of land and relief was denied as to one of the tracts, such a finding did not bar the court from adjusting the equities and granting any lesser relief to which plaintiffs might be entitled—Donkle & Webber Lumber Co v. Rehmann, 33 N E 2d 709, 310 Ill App 17

69. Tex—Roof Maintenance Service v Rabe, Civ App, 147 S W 2d 891
40 C J p 491 note 75

Judgment sustained

Okl—Main v Strong, 276 P 185, 135 Okl 134
40 C J p 491 note 75 [b]

70. N Y—McNulty v Offerman, 137 N Y S 27, 151 App Div 181

71. Cal—Contractors & Builders Supply Co v Klay, 217 P 103, 63 Cal App 380

72. Miss—Sharpe v. Spengler, 48 Miss 360

§ 324. Direction for Sale and Distribution of Proceeds

- a In general
- b Prior claims and outstanding interests
- c Sale of improvement apart from land

a. In General

Ordinarily a judgment or decree foreclosing a mechanic's lien may and should provide for or authorize a sale of the property subject to the lien, or of the owner's interest therein, after allowing a reasonable time for the payment of the amount found due, and should also provide for the proper distribution of the proceeds of the sale.

While, where a money decree is entered in a proceeding to enforce a lien there is apparently no objection to allowing complainant an execution to collect it,⁷³ usually a judgment or decree foreclosing a mechanic's lien may and should, unless such a judgment is beyond the jurisdiction of the particular court,⁷⁴ provide for or authorize a sale of the property, or of the owner's interest therein,⁷⁵ after allowing a reasonable time for the payment of the amount found due,⁷⁶ although it has been held that the allowance of such opportunity for prevention of a sale is unnecessary where the statute provides for a redemption.⁷⁷ A federal court, it has been held, will order a sale of the property and franchises of an irrigation corporation as a whole and without the right of redemption where under existing circumstances the equity of the case requires it.⁷⁸

The judgment should direct the payment of costs and of the liens out of the proceeds of sale.⁷⁹ A statute applicable to suits for the enforcement of judgment liens requiring an account of the rents and profits to determine whether they will be suffi-

cient to pay off the liens within a stipulated time has been held inapplicable to a proceeding to enforce a mechanic's lien.⁸⁰

It has been held that the court should provide for the disposition of surplus proceeds of the sale, if any, in accordance with the parties' respective rights.⁸¹ A judgment in favor of a general contractor for an amount including a subcontractor's claim is not incompatible with a judgment in favor of the subcontractor in an independent proceeding; the several judgments may remain, and the court by a proper order should provide for the application of the proceeds arising from the sale of the property so as to protect the rights of all the parties, but should not reduce the amount of the contractor's judgment.⁸² However, it has also been held that the court need not direct to whom the surplus money, if any, arising from the sale should be paid, that may remain subject to a future order of the court.⁸³ The order of sale and the order of distribution are so far separate and distinct that the order of sale may be valid and effective even though the order of distribution may be invalid.⁸⁴

Property subject to lien In a suit to foreclose a mechanic's lien, it has been held that the court may not direct a sale before defining the land to which the lien attaches.⁸⁵ While the area to be included in an order of sale, on the foreclosure of a lien, has been held to be a question largely within the trial court's discretion,⁸⁶ the court may not decree a sale of more than the amount of land to which the lien attaches under the statute.⁸⁷ Where there is a lien against two or more properties by reason of the failure of the owner of one of the properties to make payment due, the decree should direct that the

73. Mich.—Scott v Keeth, 116 NW 183 152 Mich 647

40 C J p 492 note 14

Execution and enforcement of judgment or decree, and sale and review see infra §§ 336-349

Necessity of judgment in rem see supra § 317

74. N Y—Pearce v Knapp, 127 N Y S 1100, 71 Misc 324

75. Ind—Flanders v Ostrom, 187 NE 673, 206 Ind 87

40 C J p 492 note 16

Sale subject to contract

Where the contract under which the improvement is erected confers certain continuing rights on the parties, the decree may provide for a sale subject thereto—Carland v United Engineering Co, 176 NW 564, 209 Mich 244—40 C J p 493 note 32

76. Ill—James v Hambleton, 42 Ill 308

40 C J p 492 note 17.

77. Ill—Freibroth v Mann, 70 Ill 523

Redemption from sale see infra § 347.

78. US—Continental & Commercial Trust & Savings Bank v Corey Bros Constr Co, Idaho, 208 F 976, 126 CCA 64

79. Utah—Bingham Coal & Lumber Co v Blom, 137 P 630, 43 Utah 584

40 C J p 493 note 19

Distribution of proceeds of sale see infra § 348

Subcontractor's claim

Where the lien of an original contractor is a valid and existing lien against the property, and the court finds that a sufficient sum remains unappropriated to pay a subcontractor's claim, the court may decree the payment of such claim—Grant v McAuliffe, Tex Civ App, 6 SW 2d 226, error dismissed

80. W Va—Phipps v Lopinsky, 125 SE 250, 97 W Va 457

81. Cal—Withington v Shay, 117 P 2d 415, 47 Cal App 2d 68 hearing denied 119 P 2d 1, 47 Cal App 2d 68.

82. Wis—Hill v La Crosse & M R Co, 11 Wis 223

40 C J p 369 note 93

83. Wash—Randall v Molesworth, 211 P 279, 122 Wash. 639

40 C J p 493 note 20

84. Mass—Dahlborg v Wyzanski, 58 NE 593, 175 Mass 34

85. W Va—Farley v Arbogast, 176 SE 709, 115 W Va 432

86. Cal—Anselmo v Sebastiani, 26 P 2d 1, 219 Cal 292

87. Wash—Hoagland v Magarrell, 197 P 20, 115 Wash. 259.

40 C J p 494 note 37.

property of the defaulting owner be the first sold to satisfy the claim, if the amount found to be due is not paid by a given date⁸⁸

On denial of lien Where certain plaintiffs are denied a lien, the judgment should not direct that they be paid out of the money arising out of the sale of the property, since such a judgment is, in effect, an ordering of the foreclosure of the lien, such plaintiffs should be relegated to the usual remedy of a levy of execution⁸⁹ Creditors of the contractor who have no lien on the property are entitled only to a money judgment against the contractor, and not to a judgment providing that the remainder of the fund due from the owner to the contractor after payment of liens shall be distributed between them⁹⁰

b. Prior Claims and Outstanding Interests

Ordinarily provision should be made for a prior lien in a judgment directing a sale, and the rights of junior lienors should not be cut off

A judgment directing a sale which makes no provision for a prior lien⁹¹ or which cuts off the rights, if any, of junior lienors⁹² has been held erroneous Where there are prior liens⁹³ or outstanding interests not subject to the lien foreclosed,⁹⁴ it has been held that the sale should be ordered subject to such interests or liens. Where a prior lien is for an unmatured indebtedness, the decree should, it has been held, not order a sale of the premises and the application of the proceeds to the payment of such indebtedness, thereby hastening its maturity,⁹⁵ and, where a statute provides simply for a sale subject to prior encumbrances, the court is without authority to direct a sale and the payment of prior encumbrances from the proceeds where such prior en-

cumbrances are not yet due⁹⁶ However, it has also been held that the court may order the property sold free of all mechanics' and mortgage liens of the parties to the suit and transfer the liens to the proceeds of the sale,⁹⁷ and that the prior lienholders, being made parties, may not complain that they are not seeking to foreclose their liens and that no judgment should be rendered which in effect compels them to accept the results of such a foreclosure⁹⁸

Where certain liens are superior to a mortgage and also to other liens and the rest are inferior to the mortgage, the decree should provide that prior claims should be paid as though there were no mortgage and the residue apply first to the mortgage and then to the inferior liens⁹⁹ If the lien attaches to a part only of lands covered by a mortgage, the court cannot apportion the mortgage debt so as to fix only a certain amount thereof on the part charged with the lien¹

c. Sale of Improvement Apart from Land

Ordinarily, in the absence of a statutory requirement, the judgment or decree should not provide for a sale of the structure or improvement as distinct from the land upon which it is erected

Ordinarily the judgment or decree should not, in the absence of a statutory requirement, provide for a sale of the structure or improvement as distinct from the land upon which it is erected² However, where the lien attaches to the erection and improvement for which material is furnished, a judgment ordering the sale of the structure may be valid although the structure cannot be removed from the land³ Under a statute giving authority to the court on foreclosure to apportion the amount of the

88. Md.—Caltrider v. Isberg, 130 A. 53, 118 Md 657

89. Cal.—Diamond Match Co v Silberstein, 131 P 874, 165 Cal 282

90. Wash.—Larkin v Pederson, 127 P 844, 71 Wash 116
40 C J p 494 note 40

91. Ky.—Estes v Bowman, 206 SW. 304, 182 Ky 172

Ascertainment of rights

Under a statute so providing, the court should ascertain the amount due each lien creditor and direct application of the proceeds of the sale in proportion to their several amounts according to the provisions of the statute—Fair Play Development Organization v Sarmach, 283 Ill App 593

Sale of improvements

Where improvements are erected on land covered by a prior mortgage

and they cannot be removed without destroying their value, it has been held that the court may properly order the sale of the land and improvements together, as a whole, if it seems that more can be realized than if each is sold separately, provided the court orders the prior mortgage paid in full out of the proceeds, but that the court may not do so if the mechanics' lien claimants insist on the right to have the improvement sold separately so as to have their statutory right of removal—Fleming-Gilchrist Const Co v McGonigle, 89 SW 2d 15, 338 Mo 56, 107 A. L R 1003

92. Utah—Badger Coal & Lumber Co v Olsen, 167 P 680, 50 Utah 307
40 C J p 493 note 24

93. Cal.—Barrett-Hicks Co v Glas, 111 P 760, 14 Cal App 289

94. Minn.—Brown v. Jones, 55 NW. 54, 52 Minn 484
40 C J p 493 note 26

95. Cal.—Barrett-Hicks Co v Glas, 111 P 760, 14 Cal App 289

96. Ky.—Estes v Bowman, 206 SW 304, 182 Ky 172

97. Ind.—Flanders v Ostrom, 187 NE 673, 206 Ind 87

98. Colo.—Jorammon v McPhee, 71 P 419, 31 Colo 26

99. Cal.—Burnett v Glas, 97 P 428, 154 Cal 249

1. Minn.—Morrison County Lumber Co v Duclos, 163 NW 734, 138 Minn 20

2. Or.—Barr v World Keepfresh Co, 150 P 749, 77 Or 102

3. Wyo.—Clarke v Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205,

claim in proportion to the enhanced value of the tract if necessary to protect the rights of third persons, the court may direct a sale of the building with the privilege of removal before resorting to the land.⁴ Under a statute so providing, when the title or interest in the land upon which the improvement is made cannot be subject to the lien, the court may,⁵ in the exercise of its sound discretion,⁶ order the sale and removal from the land of the property subject to the lien. Whether a house may be sold and removed must be determined from the evidence in the particular case.⁷ It has been held that the court has inherent power, on a proper showing, to grant a reasonable time within which a building may be removed on sale to satisfy a lien, as a necessary incident to the fulfillment of a judgment.⁸ Where the decree provides for the sale and removal of a structure within a stated time after the remittitur if the case is appealed, and defendant's appeal is dismissed because defective, the case has been held appealed within the meaning of the decree.⁹

§ 325. Determination as to Priorities

Where there are several mechanics' liens or other encumbrances on the property, it is proper for the court to fix the order of priority and direct payment accordingly, but a decree adjudicating the priority of a lien or interest must be justified by the pleadings and evidence.

Where there are several mechanics' liens or other encumbrances on the property, it is proper for the court to fix the order of priority and direct payment accordingly,¹⁰ and it has been held that the court should determine the priorities before decreeing a sale, and not merely decree a sale and direct that the proceeds be brought into court.¹¹ A decree adjudicating the priority of a lien or interest is improper where not justified by the pleadings and evi-

dence.¹² The fact that a petition to foreclose a mechanic's lien makes unknown owners of deeds of trust to the property defendants has been held not to render a decree holding plaintiff's lien superior to liens of the deeds of trust erroneous, where, at the trial, plaintiff dismissed as to such unknown owners.¹³

§ 326. Judgment against Both Owner and Contractor

Under some statutes, in an action to enforce a mechanic's lien by a subcontractor, where a lien is established there must be a finding and a decree against both the owner of the property involved and the contractor.

Under statutes providing that all suits by subcontractors shall be against both the owner and the contractor jointly and that all judgments where a lien is established shall be against both jointly, in an action to enforce a mechanic's lien by a subcontractor there must be a finding and a decree against both the owner of the property involved and the contractor.¹⁴ Under such a statute judgment is recoverable against the owner only for the amount recoverable from the contractor,¹⁵ and a decree in favor of a subcontractor is defective where it does not find any amount to be due the contractor from the owner,¹⁶ but, where the contractor is made a defendant and is served by publication, a decree in rem for the sale of the premises may be authorized although he does not appear.¹⁷ Where insolvency proceedings have been begun against a contractor, a general judgment may be had against the contractor and a special judgment against the owner.¹⁸ The court may give a judgment for the sum actually due against the contractor and in favor of the defendant owner where there has been a failure to prosecute the lien claim within the statutory period.

error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722, 40 C.J. p. 493 note 35.

4. ND—State Loan Co. v. White Earth Coal Mining Brick & Tile Co., 157 N.W. 834, 34 N.D. 101.

5. Wash.—Blossom Province Lumber Co. v. Schumacher, 266 P. 167, 147 Wash. 369.

6. Wash.—Pioneer Sand & Gravel Co. v. Hedlund, 84 P.2d 878, 178 Wash. 273.

Injury to freehold

In determining whether property subject to mechanic's lien should be ordered removed from land to satisfy lien, court would consider whether structure is removable without injury to freehold—Pioneer Sand & Gravel Co. v. Hedlund, *supra*.

7. Iowa—Anfson v. Cook, 276 N.W. 762, 224 Iowa 833.

8. Cal.—English v. Olympic Auditorium, 52 P.2d 267, 10 Cal.App.2d 196.

9. Wash.—State ex rel. Schmidt v. Superior Court for King County, 56 P.2d 1008, 186 Wash. 87.

10. Ky.—Ward v. Butcher, 92 S.W.2d 741, 263 Ky. 585.

Mo.—Schroeter Bros. Hardware Co. v. Croatian "Sokol" Gymnastic Ass'n, 58 S.W.2d 995, 332 Mo. 440, 40 C.J. p. 494 note 42—41 C.J. p. 598 note 10.

Decree held proper

Ala.—Jefferson Mortg. Co. v. Estes Lumber Co., 133 So. 267, 222 Ala. 559.

11. Ill.—Lunt v. Stephens, 75 Ill. 507—Tracy v. Rogers, 69 Ill. 662.

Va.—Jaeger v. Bossieux, 15 Gratt. 83, 56 Va. 83, 76 Am.D. 189.

12. Cal.—Hartfield v. Howard, 181 P. 385, 180 Cal. 376, 40 C.J. p. 494 note 44.

13. Mo.—Evans v. Dockins, App. 40 S.W.2d 508.

14. Ill.—Levin v. Sylvan Metal Products Co., 252 Ill.App. 140, 40 C.J. p. 489 note 50.

15. N.J.—Mayer Ice Machine & Engineering Co. v. Van Voorhis, 95 A. 735, 88 N.J.Law 7.

16. Ill.—Julin v. Ristow Poths Mfg. Co., 54 Ill.App. 460, 40 C.J. p. 490 note 52.

17. Ill.—Mueller Lumber Co. v. Bolinger, 160 Ill.App. 402—Miller v. Calumet Lumber & Mfg. Co., 121 Ill.App. 56.

18. N.J.—Crane v. Brighton Mills, 120 A. 677, 98 N.J.Law 308.

of limitations¹⁹ On dismissing a bill as to the owner for want of equity, it is not necessary to enter a judgment for the amount of the claim against the contractor who has defaulted where the bill is left pending as to the contractor.²⁰

§ 327. Single or Separate Judgments

Where several lien claimants are authorized by statute to join in the same action, a single judgment against a contractor may properly be made and entered, and it has been held that there should be but one judgment in such an action covering all the issues.

Where several lien claimants are authorized by statute to join in the same action, as discussed supra § 272, a single judgment against the contractor may be properly made and entered,²¹ and it has been held generally that there should be but one judgment in such an action covering all the issues.²² The rendition of a separate judgment and award of execution for the amount found due each claimant is not erroneous where the judgment provides that the proceeds of sale under any execution in favor of any of the parties shall be distributed and paid out on all the judgments as directed in the decree.²³

§ 328. Personal Judgment

Ordinarily, in an action to enforce a mechanic's lien, there may be both a judgment establishing the lien and providing for the foreclosure thereof, and also a personal judgment in favor of claimant against the party directly liable to him, but a personal judgment is not necessary to support a lien or a judgment or decree foreclosing a lien.

As discussed supra § 266, the remedy by way of enforcement of a mechanic's lien is ordinarily regarded as cumulative, and, as a rule in an action to enforce a lien, there may be both a judgment establishing the lien and providing for the foreclosure thereof and also a personal judgment in favor of claimant against the party directly liable to him.²⁴ In order that the court may render a personal judgment it must have acquired jurisdiction of the person of defendant,²⁵ and the judgment must be supported by the pleadings,²⁶ evidence,²⁷ and findings.²⁸ A judgment, in a proceeding to enforce a mechanic's lien, must, in fact, be a personal judgment, in order to be considered as such.²⁹

Where the statutory proceeding is wholly in rem,³⁰ as where the purpose of the suit is only to establish and foreclose a lien,³¹ a personal judgment

19. N.J.—Boehm v Brion, 88 A 1024, 85 N.J. Law 330

20. Ill.—South Side Lumber Co v Date, 156 Ill. App. 430

21. Cal.—Nordstrom v Corona City Water Co, 100 P. 212, 155 Cal. 206, 132 Am. S.R. 81

22. Miss.—Falconer v. Frazier, 15 Miss. 235
40 C.J. p. 491 note 90

23. Mo.—Early v Smallwood, 256 S.W. 1053, 302 Mo. 92.

24. Ala.—Morris v Bessemer Lumber Co, 116 So. 523, 217 Ala. 441—*Corpus Juris* quoted in *Ex parte R. H. Byrd Contracting Co*, 156 So. 679, 581, 26 Ala. App. 171, certiorari denied 156 So. 582, 229 Ala. 248

Cal.—Wm. J. Bettingen Lumber Co v Kerrin, 279 P. 163, 99 Cal. App. 686

Ga.—Brown v. Marbut-Williams Lumber Co, 129 S.E. 575, 34 Ga. App. 348

Minn.—Smude v Amidon, 7 N.W. 2d 776, 214 Minn. 266

Neb.—*Corpus Juris* cited in *Gibson v Koutsky-Brennan-Vana Co*, 9 N.W. 2d 298, 301, 143 Neb. 326

N.Y.—Sherwin v Benevolent & Protective Order of Elks, Brooklyn Lodge No. 22, 265 N.Y.S. 14, 148 Misc. 452

40 C.J. p. 494 note 46

Against whom personal judgment rendered see *infra* § 331

Deficiency judgment see *infra* § 330

Joint Liability

A separate personal money judgment may not be entered by default against one of two defendants who are jointly liable—*Lowe v Turner*, 1 Idaho 107

Abandonment of right

On foreclosing a mechanic's lien a personal judgment may be taken against the party personally liable for the debt and the fact that claimant is forced into an equitable action seeking to compel the discharge of the lien does not result in abandonment of claimant's right to such personal judgment—*Gibson v Koutsky-Brennan-Vana Co*, 9 N.W. 2d 298, 143 Neb. 326

25. Ky.—Lorton v Ashbrook, 295 S.W. 1027, 220 Ky. 830

Wash.—*Cascade Lumber Co v Hargis*, 9 P. 2d 366, 167 Wash. 409
40 C.J. p. 494 note 48

Notwithstanding prayer for personal judgments in cross petitions, where no summons was executed on defendant in cross actions to enforce mechanics' liens, a decree giving liens only has been held valid—*Lorton v Ashbrook*, 295 S.W. 1027, 220 Ky. 830

26. Utah—*Volker-Scowcroft Lumber Co v Vance*, 103 P. 970, 86 Utah 348, 24 L.R.A.N.S. 321, Ann. Cas. 1912A 124
40 C.J. p. 495 note 49

Although there is a general prayer for relief, where a proceeding is in equity to establish a lien for materials and its priority to a mortgage ex-

ecuted by a builder on the premises, a personal judgment against the builder may not be had based on a general indebtedness of the builder—*Redd v Todd*, 95 So. 276, 209 Ala. 56

27. La.—*Folse v Maryland Casualty Co*, App. 193 So. 385
40 C.J. p. 495 note 50

28. Minn.—*Meehan v Zeh*, 79 N.W. 655, 77 Minn. 63
Mo.—*Hunt v Owen Bldg. & Inv. Co.*, App. 219 S.W. 138

29. Ind.—*Jackson v J. A. Franklin & Son*, 23 N.E. 2d 23, 107 Ind. App. 38

What constitutes personal judgment

In a mechanic's lien suit, a judgment, reciting that plaintiffs "recover from the defendants" a certain sum and that judgment attach to the sum theretofore deposited with the clerk of court as an undertaking to pay any judgment rendered in the cause, has been held not, in fact, a personal judgment against property owner—*Jackson v J. A. Franklin & Son*, *supra*

30. N.J.—*Norton v Sinkhorn*, 48 A. 823, 61 N.J. Eq. 508, modified on other grounds 50 A. 506, 63 N.J. Eq. 313

S.C.—*Metz v Cletcher*, 65 S.E. 394, 63 S.C. 396
40 C.J. p. 495 note 52

31. Ga.—*Spirides v Victory Lumber Co*, App. 45 S.E. 2d 65—*Chambers Lumber Co v Gilmer*, 6 S.E. 2d 84, 60 Ga. App. 332—*Middle*

may not be rendered, and in some jurisdictions the general rule is that there may be no personal judgment or decree with execution until after the foreclosure sale.³² A personal judgment against the owner for damages for a breach of the contract may not be recovered in an action to enforce a mechanic's lien³³ unless expressly authorized by the statute,³⁴ nor may a judgment be rendered against the owner requiring the specific performance on his part of an agreement to convey certain real estate in part payment for the work done.³⁵ A judgment in an action to foreclose a lien which merely eliminates plaintiff's further lien rights has been held not to restrict him from applying for the entry of a personal judgment against defendant who was held personally liable by the judgment.³⁶

Necessity A personal judgment against the party personally liable for the labor or materials is not necessary to support a lien,³⁷ and a personal judgment is not requisite to a judgment or decree foreclosing a lien.³⁸ However, it has been held that where claimant does not take a personal judgment against his debtors, who are parties to the suit and within the jurisdiction of the court, he may not prosecute another and separate suit for the same demand.³⁹

§ 329. — Failure to Establish Lien

Ordinarily a personal judgment in favor of claimant against his debtor may be rendered although claimant fails to establish or maintain his alleged lien.

Ordinarily a personal judgment in favor of claimant against his debtor may be rendered although claimant fails to establish or maintain his alleged lien.⁴⁰ However, in some jurisdictions,⁴¹ such as those in which the distinction between law and equity is retained and the lien proceeding is in equity,⁴² it has been held that a personal judgment may not be entered in such a case. It has also been held that claimant is not entitled to have any personal judgment in his favor unless he has established his right to enforce his lien as to at least part of the amount claimed.⁴³

Although the jurisdiction of the court rests on the fact that the proceeding is for the foreclosure of a lien, the amount in controversy being such that jurisdiction of a mere money demand therefor would not exist, it has been held that the court is not deprived of the power to enter a personal judgment because of the failure of the lien proceeding,⁴⁴ but the contrary has also been held.⁴⁵ Where the lien claim exceeds the court's jurisdiction but the claim for personal judgment does not, it has been held that the personal judgment may be valid al-

Georgia—Lumber Co v Hunt, 186 SE 714, 53 Ga App 578

32. Minn—Smude v Amidon, 7 N W 2d 776, 214 Minn 266
40 C J p 495 note 53

Waiver of worthless lien rights

It has been held that the court may, after the entry of judgment and after the time to appeal therefrom has expired, permit a lien claimant to waive completely worthless lien rights included in such judgment and order the entry of a personal judgment against defendant personally liable for the debt, without first requiring a foreclosure sale—Smude v Amidon, supra

Decree held not objectionable

Ill—Beaudry v Bell, 250 Ill App 468

33. N Y—Paturzo v Shuldiner, 110 N Y S 137, 125 App Div 636—Doll v Coogan, 62 N Y S 627, 48 App Div 121, affirmed 61 NE 1129, 168 N Y 656

Lien for damages see supra § 54

34. Ill—Marsh v Mick, 159 Ill App 399

35. N Y—Dowdney v McCullom, 69 N Y 367
40 C J p 495 note 56

36. Minn—Smude v Amidon, 7 N W 2d 776, 214 Minn 266

37. Wyo—Mawson-Peterson Lum-

ber Co v Sprinkle, 140 P 2d 588, 59 Wyo 334, 147 A L R 1089
40 C J p 495 note 57

38. Colo—Howard v Fisher, 283 P 1042, 86 Colo 493

Ga—Robinson v Reese, 165 SE 744, 175 Ga 574

Wyo—Mawson-Peterson Lumber Co v Sprinkle, 140 P 2d 588, 59 Wyo 334, 147 A L R 1089

39. Mo—Hill v Chowning, 67 SW 750, 93 Mo App 620

40. Ala—Morris v Bessemer Lumber Co, 116 So 528 217 Ala 441

Alaska—Corpus Juris quoted in Mitchell v Beaver Dredging Co, 8 Alaska 566, 574

Ark—McGehee Realty & Lumber Co v Kennedy, 141 SW 2d 524, 200 Ark 326

Iowa—Consolidated Const Co v Begunck, 9 NW 2d 390, 233 Iowa 463

Minn—Minnesota Lumber & Coal Co v Roimstad, 208 NW 548, 167 Minn 111

Mo—Richards Brick Co v Wright, 82 SW 2d 271, 231 Mo App 946

N Y—Carroll McCreary Co v People, 195 NE 675, 267 N Y 37—Brigham v Duacy, 150 NE 507, 241 N Y 435—Strunin v Har Realty Co, 242 N Y S 712, 137 Misc 539

Or—Dimitre Electric Co v Paget, 151 P.2d 630, 175 Or 72—Van

Lvdegraf v Tyler, 273 P 719, 128 Or 236

SC—Atlantic Coast Lumber Corporation v Morrison, 149 SE 243, 152 SC 305

Wash—Pioneer Sand & Gravel Co v Hedlund, 34 P 2d 878, 178 Wash 273

Wis—Warnke v Braasch, 289 NW 598, 233 Wis 398—Augustine v Congregation of Holy Rosary of Pompei, 253 NW 271, 213 Wis 517

40 C J p 495 note 62

41. Miss—Federal Land Bank of New Orleans v Thames Lumber & Supply Co, 134 So 154, 160 Miss 335

Tex—Owen v Griffin, Civ App, 34 S W 2d 333

40 C J p 496 note 63

42. W Va—Atlantic Terra Cotta Co v Moore Constr Co, 80 SE 924, 78 W Va 449

40 C J p 496 note 64

43. Fla—Shad v Arnow, 19 So 2d 612, 155 Fla 164

44. Cal—Robnett v Brown, 141 P 368, 167 Cal 735

40 C J p 496 note 65

45. Tex—Cameron v. Marshall, 65 Tex 7

40 C J p 496 note 66

though the judgment foreclosing the lien is void ⁴⁶

Plaintiff must, of course, establish his claim in order to be entitled to a personal judgment,⁴⁷ and a judgment rendered on failure to establish a lien may not include any amount for attorney's fees or costs incident to the preparation and filing of a lien notice ⁴⁸ A statute providing that a lienor failing for any reason "to establish a valid lien" in an action to enforce a mechanic's lien may recover judgment in such action for such sums as are due him against any party to the action does not authorize the entry of a personal judgment in proceedings to enforce a mechanic's lien in favor of one who never could have had a lien⁴⁹ or in favor of one who never filed a lien and made no demand for a personal judgment ⁵⁰

In an action against the contractor and the owner, a subcontractor or materialman may have a personal judgment against the contractor although he may fail as to a lien ⁵¹

In the exercise of its equitable powers it has been held that the court may direct the owner to pay the claim of a subcontractor or materialman from a balance of the contract price in his hands, where the subcontractor or materialman has given notice of his claim to the owner but fails to perfect his lien ⁵²

§ 330. — Deficiency Judgment

Ordinarily, in an action to foreclose a mechanic's lien, the court may enter a personal judgment against the person directly liable to the claimant for the balance of the claim remaining unpaid after a sale of the property and distribution of the proceeds

While it has been held that, in an action to foreclose a mechanic's lien, the court may not enter a deficiency judgment unless provided for by statute,⁵³ ordinarily in such an action the court may enter a personal judgment against the person directly liable to claimant for the balance of the claim remaining unpaid after a sale of the property and distribution of the proceeds ⁵⁴ A judgment in a mechanic's lien action need not specifically provide for a deficiency judgment in order to authorize a later entry of a personal judgment against defendant found personally liable for the balance due after the foreclosure sale ⁵⁵ Under some statutory provisions one furnishing materials to a subcontractor for the construction of a building who has foreclosed his lien against the owner thereof may not be entitled to a deficiency judgment against the contractor where there is no finding that the contractor's bond had been given as required by statute ⁵⁶

Direction for execution It has been held proper to order that, in case of a deficiency on a sale of the property, the sheriff certify the amount and plaintiff have execution therefor ⁵⁷

§ 331. — Against Whom Judgment Rendered

When personal judgment is rendered, it goes against the person who is directly liable to the claimant apart from the lien and against such person only

When personal judgment is rendered, it goes against the person who is directly liable to claimant apart from the lien and against such person only ⁵⁸ So a subcontractor, materialman, or other person

46. Mo—Clark Williams Realty Co v Briggs, 148 S W. 147, 164 Mo App 101

47. N Y—Strunin v Har Realty Co, 242 N Y S 712, 137 Misc 539 40 C J p 497 note 68

48. Or—Dimitre Electric Co v Paget, 151 P 2d 630, 175 Or 72 Wash—Spaulding v Burke, 74 P 829, 33 Wash 679

49. N Y—Mowbray v Levy, 82 N Y S 959, 85 App Div 68, 69 10 C J p 497 note 70

50. N Y—Maneely v New York City, 105 N Y S 976, 119 App Div 376 40 C J p 497 note 71

51. Mo—Quigley v William M Rideout & Co, App, 127 S W 2d 37 —Richards Brick Co v Wright, 82 S W 2d 274, 231 Mo App 946 40 C J p 497 note 73

52. Cal—Frey v San Diego County Super Ct, 134 P 733, 22 Cal App 421 40 C J p 497 note 74

53. S C—Tenney v Anderson Wa-

ter, Light & Power Co, 45 S E 111, 67 S C 11—Johnson v Frazer, 20 S C 500

54. Cal—Ingersoll v Chaplin, 15 P 2d 790, 127 Cal App 290—Ridens v Economy Home Builders, 286 P 481, 104 Cal App 677

Ill—Runells v Mueller, 2 N E 2d 577, 284 Ill App 658 40 C J p 497 note 76

55. Minn—Simude v. Amidon, 7 N. W 2d 776, 214 Minn 266

56. Cal—Associated Wholesale Electric Co v S H Kress & Co, 51 P 2d 38, 11 Cal App 2d 592

57. N Y—Decker v O'Brien, 36 N Y S 1079, 1 App Div 81, affirmed 54 N E 1090, 159 N Y 553—Althaus v Warren, 2 E D Smith 657

58. Cal—Mortgage Guarantees Co v Hammond Lumber Co, 57 P 2d 164, 13 Cal App 2d 538—Ridens v Economy Home Builders, 286 P. 481, 104 Cal App 677

Ill—Runells v Mueller, 2 N E 2d 577, 284 Ill App 658

Mo—Lowry-Miller Lumber Co. v

Dean, 47 S W 2d 164, 226 Mo App 783

Neb—Corpus Juris cited in Gibson v Koutsky-Brennan-Vana Co, 9 N W 2d 298, 301, 143 Neb 326

Nev—Corpus Juris cited in Eldorado-Rand Mining Co v Thompson, 65 P 2d 878 880, 57 Nev 407—Milner v Shuey, 69 P 2d 771, 57 Nev 159

Or—Corpus Juris cited in Schram v Manary, 262 P 263, 123 Or 351

S D—Corpus Juris cited in Velten v McDonald, 234 N W. 23, 57 S D 524

40 C J p 498 note 81

Any party liable to plaintiff, in an action to enforce a mechanic's lien, may be held liable to a personal judgment—Cascadia Lumber Co v Hargis, 9 P 2d 366, 167 Wash 409.

Lessor

(1) In general—McConnell v Frost, Tex Civ App, 45 S W 2d 777, error refused—40 C J. p 498 note 81 [a]

(2) Where there is no contractual relationship between a materialman

contracting with a contractor may be entitled to judgment against the contractor,⁵⁹ or judgment may be entered against an owner in favor of persons who contracted directly with him or to whom he has become personally liable⁶⁰

The failure of a materialman to file separate statements of lien against separate tracts of land has been held not to defeat his right to secure a personal judgment against an owner who sold the property without protecting him before the expiration of the time for filing his lien as required by statute,⁶¹ but under some statutory provisions the failure of a materialman to record his lien or claim

against the premises within a specified time after the last delivery of all material upon the premises may prevent him from obtaining a personal judgment against the owner.⁶² A subcontractor, materialman, or workman between whom and the owner there is no privity of contract, and in whose favor no direct liability has been imposed on the owner, is not entitled to a personal judgment against the owner,⁶³ and an analogous rule applies with reference to the liability of a general contractor to those dealing with a subcontractor⁶⁴

The personal liability of an owner to claimant must be pleaded in order to warrant a personal

and a lessor, or any agency of a tenant to contract for his lessor, no personal judgment may be rendered, in an action to enforce the materialman's lien for materials furnished to the tenant, against the lessor—Brigham v Duany, 150 NE 507, 311 NY 435

(3) The fact that a lessor knew of improvements made on the premises by a mechanic's lien claimant, under a contract with the lessee, has been held not to authorize a personal judgment against the lessor—Velten v McDonald, 234 NW 23, 57 SD 534

Lessee

(1) In an action against a lessor and his lessee to establish a mechanic's lien for work done at the instance of the lessee, a judgment against the lessor establishing the lien, without declaring a personal judgment against the lessee as the principal debtor has been held defective—Gill v Harris, 24 SW 2d 673, 224 Mo App 717

(2) It has been held that a personal judgment may be rendered against a tenant and prospective purchaser of property who remodeled the property without the landlord's consent—Klema Realty Co v Fauria, 130 So 569, 15 La App 7

Partners

Where there is no express assumption of liability, a materialman has been held not entitled to a personal judgment against partners for materials furnished to the partnership, where the contract for delivery of the materials and the delivery of a substantial portion thereof were made prior to such partners' connection with the partnership—Elm Oil Co v Clark Lumber Co, 65 P.2d 1221, 179 Okl 341

59. Ala—Wood Lumber Co v Greathouse, 148 So 125, 226 Ala 644

Cal—Golden Gate Bldg Materials Co v Fireman, 270 P 214, 205 Cal 174

La.—Toomer v. Price, 122 So 656,

168 La 578—Ruston Lumber & Supply Co v Beckham, 128 So 534, 14 La App 204

NY—Carroll McCreary Co v People, 195 NE 675, 267 NY 37—Sherwin v Benevolent & Protective Order of Elks, Brooklyn Lodge No 23, 265 NYS 14, 148 Misc 453

Tenn—A J Cook & Co v. Seaton, 6 Tenn App 81

Wis—A Lentz Co v Dougherty, 261 NW 218, 218 Wis 493
40 C.J. p 498 note 83

Judgment held not personal judgment

Del—Westinghouse Electric Supply Co v Franklin Institute of State of Pennsylvania for Promotion of Mechanic Arts, 21 A 2d 204, 2 Terry 319

60. Cal—Wood v Nelson, 29 P 2d 854, 220 Cal 139—Sinnock v Young, 143 P 2d 85, 61 Cal App 2d 130—Ingersoll v Chaplin, 15 P 2d 790, 127 Cal App 290

Ky—Mingo Lime & Lumber Co v Stanley, 79 SW 2d 4, 257 Ky 687
Mo—Hill-Behan Lumber Co v Fiegle, App, 183 SW 3d 863

Nev—Paterson v Condos, 23 P 2d 499, 55 Nev 134, rehearing denied 30 P 2d 283, 55 Nev 260

Tenn—A J Cook & Co v Seaton, 6 Tenn App 81

Wis—Fraser Lumber & Manufacturing Co v Laeyendecker, 9 NW 2d 97, 343 Wis 25—Augustine v Congregation of Holy Rosary of Pompeii, 252 NW 271, 213 Wis 617
40 C.J. p 498 note 83

Owner contracting through agent

Cal—Shelley v Casa De Oro, Limited, 24 P 2d 900, 133 Cal 720—Ridens v. Economy Home Builders, 286 P 481, 104 Cal App 677

61. Ky—Will B Miller Co v Peerless Lumber Co, 143 SW 3d 735, 284 Ky 93

62. La—Markel v C W M Const Co, App, 6 So 2d 768—Markel v Walker, App, 4 So 2d 448.

Absence of written contract

Where no written contract was entered into by materialman and none was recorded in mortgage office, and last item of material making up account sued on by materialman was delivered to premises about eighty days before affidavit supporting claim was filed in mortgage office, the materialman could not recover personal judgment against owner of premises—Markel v C W M Const. Co, La App, 6 So 2d 768

63. Cal—Golden Gate Bldg Materials Co v Fireman, 270 P 214, 205 Cal 174

N.M.—Corpus Juris cited in Allison v Schuler, 36 P 2d 519, 524, 38 N M 506

NY—Mayer v Delson Holding Corporation, 247 NYS 316, 139 Misc. 410, affirmed 252 NYS 930, 234 App Div 671

Okla—Newman v Kuik, 23 P 2d 163, 164 Okl 147

Or—Corpus Juris cited in Schram v Manary, 262 P 263, 133 Or 354

Tenn—Fischer Lime & Cement Co v Kaucher, 51 SW 2d 492, 164 Tenn 657

Wash—Blossom Province Lumber Co v Schumacher, 266 P 167, 147 Wash 369

W Va—Bailey Lumber Co v General Const Co, 133 SE 135, 101 W Va 567

Wyo—Corpus Juris quoted in Peters v Dona, 54 P 2d 817, 826, 49 Wyo 306

40 C.J. p 499 note 64

Estoppel

Where complaint to foreclose mechanic's lien alleged, and court found, that plaintiff contracted with one owner to install sprinkling system on land, second owner was not estopped to deny validity of personal judgment against it, whether its appearance was special or general—Shelley v Casa De Oro, Limited, 24 P 2d 900, 133 Cal 720

64. N.C.—Borden Brick & Tile Co v Pulley, 84 SE 513, 168 N.C. 371.
40 C.J. p 499 note 85

judgment against him⁶⁵ Plaintiff suing for a money judgment and foreclosure of a mechanic's lien, based on an account against certain defendants only, may, in the absence of fraud, waive his lien and take personal judgment against other defendants without amending his complaint⁶⁶

Where an action by mechanics' lien claimants against the owner is founded on the theory that all the claimants were subcontractors, a recovery may not be had on the ground that some of the materials furnished were sold directly to the owner or that he promised to pay therefor⁶⁷ A subcontractor may not obtain a personal judgment against the owner where he fails to prove that anything was due from the owner to the contractor either before or after the lien notice was filed⁶⁸ However, where the owner admits that he has in his hands and due the contractor an amount sufficient to pay off a subcontractor's lien, holding such amount to be paid the contractor or otherwise as the court may direct, it has been held proper to enter a personal judgment against both the contractor and the owner⁶⁹ So too, where it appears that a contractor abandoned the work before completion of the building and that there remains in the owner's hands a part of the contract price more than sufficient to pay the lien claims of subcontractors, a personal judgment against the owner in favor of the subcontractors has been held proper⁷⁰ Where, as discussed supra § 114, service of a notice by a materialman to withhold payment operates, in effect, as a garnishment or equitable assignment of the amounts due or thereafter becoming due under the contract, materialmen have been held entitled to a personal judgment against the owner, there being an indebtedness due from him to the original contractor.⁷¹

A personal judgment may not be rendered against

a grantee of the owner, who neither promised to pay for the labor or materials nor assumed the obligations of his grantor,⁷² or against heirs of an owner who are in possession of the land⁷³ It has also been held that a person performing labor and furnishing materials at the direction of an agent of a purchaser of premises under a contract of sale, without direct dealings with the seller, may not recover a personal judgment against the seller for such materials and labor,⁷⁴ and that one who has contracted to sell land, and put the purchaser in possession, may not be subjected to a personal judgment for building materials furnished his vendee, when the latter subsequently forfeits his contract of purchase⁷⁵ A personal judgment may not be rendered for work done or materials furnished against an agent of an owner who has acted within the scope of his authority in authorizing or ordering the work or materials and who has not assumed personal liability therefor⁷⁶

Husband or wife. A married woman may be rendered liable to a personal judgment through a contract made by her husband as her agent⁷⁷ However, where a husband has no authority to bind his wife personally for work and materials furnished, no personal judgment may be rendered against her therefor.⁷⁸ It has also been held that a personal judgment may not be rendered against a wife for material and labor furnished at her request to be used on her husband's property with the knowledge and consent of the husband⁷⁹ A statute allowing a lien against the property of a married woman, when material purchased by her husband is used in the improvement of her property, does not authorize a personal judgment against her unless she adopts her husband's contract as her own or makes herself responsible for the debt as in other cases⁸⁰

65. Cal.—Wm J. Bettingen Lumber Co v Kerrin, 279 P 163, 99 Cal App 686

N Y—Kane v. Hutkoff, 81 N Y S 85, 81 App Div 105

Allegations sufficient to show owner's liability

Cal.—Wm J Bettingen Lumber Co v Kerrin, 279 P 163, 99 Cal App 686

Wis.—Security Nat Bank v St Croix Power Co, 94 NW. 74, 117 Wis 211

Trustee

In order to warrant a personal judgment against the trustees for a corporate owner, the pleadings must authorize such a judgment—Milner v Shuey, 69 P 2d 771, 57 Nev. 159

68. Mont.—Bullard v Zimmerman, 263 P. 512, 82 Mont. 434.

67. Iowa—Page v Grant, 103 NW 124, 127 Iowa 219

68. N Y—Gilmour v Colcord, 76 N. E 273, 183 N Y 343

40 C J p 499 note 88

69. Va.—Taylor v Netherwood, 20 SE 888, 91 Va 88

70. D C—Emack v Rushenberger, 8 App DC 249

71. Cal.—Butler v Ng Chung, 117 P 513, 160 Cal 425, Ann Cas 1913A 940

40 C J p 500 note 92

72. Iowa—Webster City Steel Radiator Co v Chamberlain, 115 N. W 504, 137 Iowa 717.

40 C J p 500 note 93

73. Ind.—McGrew v. McCarty, 78 Ind 496.

74. Or.—Barr v Lynch, 97 P 2d 185, 163 Or 607.

75. Ohio—Sunbeam Heating Co v Dukes, 27 Ohio N P, N S, 103 Wash—Mentzer v Peters, 33 P 1078, 6 Wash 540

76. Mont.—Arnold v Gensberger, 31 P 2d 396, 96 Mont 353

Factor of church

Mo.—Construction Materials Co v. Grund, App, 192 SW 2d 45

77. Mo.—J H. Magill Lumber Co. v Carter, App, 17 SW 2d 581 40 C J p 500 note 96

78. Mo.—Magidson v Stern, 143 S. W 2d 144, 235 Mo App 1039

79. Or.—Beach v. Cooper, 266 P 633, 125 Or 266

80. Kan.—Robert Garrett Lumber Co v. Loftus, 109 P. 179, 82 Kan 556

Where the wife knows of improvements being made on her property and in person exercises superintendence over the construction of the improvement, she may be liable for a personal judgment although she may not have expressly authorized her husband to contract for the material.⁸¹

A personal judgment may be rendered against a husband for material and labor furnished at his wife's request to be used on the husband's property, with the knowledge and consent of the husband.⁸² Also a personal judgment may be granted against a husband for an account owed by him personally where the wife is the owner of the property.⁸³ Where material is furnished for property belonging to a community existing between a husband and wife, judgment may be granted against the husband the master of the community.⁸⁴ However, where material is not ordered by the husband, it has been held that judgment may not be rendered against him for material used on the wife's property.⁸⁵

§ 332. Imposing Conditions Precedent to Entry of Judgment

Where justice requires it, the court may impose conditions precedent to the entry of judgment.

Where justice requires it, the court may impose conditions precedent to the entry of judgment.⁸⁶ So the court may require the delivery up of notes given for the amount for which a lien is claimed⁸⁷ or the production and deposit of outstanding pay checks.⁸⁸

§ 333. Amendment or Vacation

Subject to constitutional and statutory limitations, the court may open or vacate its judgment or decree in a mechanic's lien proceeding or may permit its amendment.

Subject to constitutional and statutory restrictions,⁸⁹ under its general power over its judgments and decrees the court may open or vacate its judgment or decree in a mechanic's lien proceeding⁹⁰ or may permit its amendment.⁹¹ Thus a judgment may be amended for the purpose of supplying an inadvertent omission,⁹² for the purpose of correcting a clerical error,⁹³ or to make it conform to the report of a referee.⁹⁴ A judgment improper in form should be modified by the court,⁹⁵ and a decree which should contain a provision for the disposition of surplus proceeds of sale, but does not do so, should be modified to make such provision.⁹⁶

Where, in an action to foreclose a mechanic's lien, a judgment of another court establishing plaintiff's claim is given in evidence, and judgment is rendered for plaintiff, and afterward the judgment so given in evidence is reversed on appeal, it has been held that defendant is not entitled to have the judgment of foreclosure annulled; his only relief is to have such judgment opened and a new trial granted.⁹⁷ An application to the court to modify the lien decreed so that it should apply only to the premises claimed by defendant to be liable thereto, supported by affidavits, has been held proper as it does not ask a rehearing on the merits, which requires an open-

81. Ky—Forbes v Broadbuss, 2 S W 2d 403, 222 Ky 478—Mingo Lime & Lumber Co v Parsley, 248 S W 169, 197 Ky 740

82. Or—Beach v Cooper, 266 P 633, 125 Or 256

83. Ky—Tackett v Pikeville Supply & Planing Mill Co, 61 S W 2d 881, 249 Ky 835

84. La—Ruston Lumber & Supply Co v Beckham, 128 So 534, 14 La App 204

85. Ky—Tackett v Pikeville Supply & Planing Mill Co, 61 S W 2d 881, 249 Ky 835

86. Iowa—Nichols v Roberts, 122 N W 842, 144 Iowa 212, 40 C J p 500 note 1

87. Mich—Knowlton v Gibbons, 178 N W 63, 210 Mich 547

88. N Y—Gates v National Fair & Exposition Ass'n, 158 N Y S 1070, 172 App Div 581

89. Mo—State ex rel Maple v Mulloy, 15 S W 2d 809, 322 Mo 281

90. Kan—Wichita Sash & Door Co v Weil, 103 P 1003, 80 Kan 606, 40 C J p 501 note 26.

Motion to strike
Pa—Wolfe v Gibbs, Com Pl, 46 Dauph Co 369

91. N Y—Glickerose Co v C & C Estates, 12 N Y S 2d 534, 257 App Div 224, reargument denied 15 N Y S 2d 139, 258 App Div 721

Notice

(1) An amendment altering and correcting the description of the land in the lien statement, the complaint, and the judgment should not be made on an ex parte application—Schmidt v Gilson, 14 Wis 514—40 C J p 502 note 37

(2) However, where such amendment has been made, an appellate court will assume, the record being silent on the subject, that due notice was given to the adverse party—Schmidt v Gilson, supra.

Order of sale

A court authorized to order a sale of realty in a mechanic's lien foreclosure suit is empowered to modify such order when necessary—Flanders v Ostrom, 187 N E 673, 206 Ind 87.

92. La—Du Bos v Sanders, 139 So 651, 174 La 27

To recognize lien or privilege

Where there is no dispute as to the lien or privilege claimed and the omission to allow it in the original judgment was purely inadvertent, the court may order the original judgment to be amended so as to recognize the lien or privilege—Du Bos v Sanders, supra.

93. Iowa—Monroe v West, 79 Am D 524, 12 Iowa 119, 40 C J p 501 note 27

94. N Y—Moran v Chase, 52 N Y 346

95. N Y—Louis J Sigl, Inc. v Wertheimer, 228 N Y S 103, 233 App Div 806, affirmed 166 N E 341, 250 N Y 605

Judgment held improper

N Y—Louis J Sigl, Inc. v Wertheimer, supra.

96. Cal—Withington v Shay, 117 P 2d 415, 47 Cal App 3d 68, hearing denied 119 P 2d 1, 47 Cal App 3d 68

97. N Y—Raven v Smith, 27 N Y S 611, 76 Hun 60, affirmed 43 N E 63, 148 N Y, 415.

ing of the judgment and a trial, but only such a change as shall make the judgment to be entered conform to law⁹⁸

Admission of new parties Where a judgment to establish and enforce a mechanic's lien has been taken without making the person who owned the property at the commencement of the action a party, it has been held that the court by which the lien judgment is rendered may, on motion of such owner and on a proper showing of facts, set aside the judgment within a year after its entry and admit the moving party to defend against the claim for a lien.⁹⁹ Where a judgment has been entered on a scire facias to which a third person having a lien has not been made a party, such person, although entitled to intervene, has been held not entitled to have the lien stricken¹

An additional judgment after the term has elapsed at which a judgment was taken for the amount of the lien costs and attorney's fees has been held not void as beyond the court's jurisdiction² Where in an action on an account and to foreclose a mechanic's lien there was a general finding for plaintiff, on which a personal judgment only was entered against defendant, and after the rendition of the judgment and at the same term of court defendant filed a motion for a new trial, which at the next term was overruled, and at a later day in the term on motion of plaintiff without notice to de-

fendant the court set aside its former judgment and entered a like personal judgment and a decree foreclosing the lien, it has been held that this action was within the power of the court, and not erroneous³

Writ of review A final judgment on a petition to enforce a mechanic's lien may, at least when the petition was inserted in a writ of original summons, be the subject of a writ of review, or may without the forms of granting and suing out a writ of review be ordered to be vacated and the case brought forward on the docket for trial under a statute allowing final judgments in civil actions, when the execution has not been satisfied to be more summarily reviewed in this manner⁴

§ 334. Operation and Effect

A judgment or decree in a mechanic's lien suit concludes the interests of the parties to the suit, their privies, and persons whose interests accrue after the commencement of the suit, as to any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of the action; ordinarily it is not open to collateral attack.

A judgment or decree in a mechanic's lien suit concludes the interest of the parties to the suit,⁵ their privies,⁶ and persons whose interests accrued after the commencement of the suit,⁷ as to, and only as to, any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of the action⁸ The judgment may not

98. Wis—Hill v La Crosse & M R Co, 11 Wis 214

99. Wis—Lampson v Bowen, 41 Wis 484—Etna Ins Co v Aldrich, 38 Wis 107

1. Pa—Crane Co v Rogers, 60 Pa Super 305

2. NM—Crichton v Stoitz, 147 P 916, 20 NM 195

3. Ind—McClellan v Dinkley, 78 Ind 503

4. Mass—Hubon v Bousley, 123 Mass 368

5. Idaho—Karlson v National Park Lumber Co, 269 P 591, 46 Idaho 595

Ind—Watson v Strohl, 46 NE 2d 204, 230 Ind 673

Iowa—Weir & Russell Lumber Co v Kempf, 12 NW 2d 857, 234 Iowa 450—Ebinger v Wahrer, 238 NW 587, 213 Iowa 84

Md—Bounds v Nuttle, 30 A 2d 263, 181 Md 400

Mo—Chance v Franke, 165 SW 2d 678, 350 Mo 162

40 CJ p 502 note 41
Conclusiveness of judgment in action to enforce lien generally see Judgments § 745.

6. Kan—Smith v De Pontia, 54 P 514 8 Kan App 459

Purchaser pendente lite

(1) Where unknown owners and holders of a note are named in a bill to foreclose a mechanic's lien and are duly served with process by publication, it has been held that a purchaser of the note pendente lite is bound by the proceeding as though he were a party when the bill was filed—Alexander Lumber Co v Kellerman, 192 NE 913, 358 Ill 207

(2) Where notice of a suit to foreclose a mechanic's lien is not recorded and plaintiff has actual notice of an unrecorded deed to the property, the unrecorded deed takes precedence over the foreclosure judgment—Holman v Toten, 128 P 3d 808, 54 Cal App 2d 309

7. Ind—Watson v Strohl, 46 NE 2d 204, 230 Ind 673
40 CJ p 502 note 43

8. Cal—Barrow v Santa Monica Builders Supply Co, 71 P 2d 1108, 9 Cal 2d 601—Metropolis Trust & Savings Bank v Barnet, 132 P 833, 165 Cal 449

Fla—Sandquist & Snow v Kellogg, 136 So 235, 101 Fla 579.

Idaho—Karlson v National Park Lumber Co, 269 P 591, 46 Idaho 595

Ind—Watson v Strohl, 46 NE 2d 204, 230 Ind 673

Iowa—Ebinger v Wahrer, 238 NW 587, 213 Iowa 84

Md—Bounds v Nuttle, 30 A 2d 263, 181 Md 400

Mo—Chance v Franke, 165 SW 2d 678, 350 Mo 162

NY—Paris v Hubbard, 235 NY S 230, 226 App Div 250

Tenn—Holland v Forcum-Lum's Cooperage & Lumber Co, 235 SW 569, 154 Tenn 174

Construction and effect of decree generally

(1) In construing a decree, the intent of the court must be determined as gathered from all parts of the instrument, and effect must be given to that which is clearly implied as well as to that which is expressed—Weir & Russell Lumber Co v Kempf, 12 NW 2d 857, 234 Iowa 450

(2) It has been held that a decree establishing a mechanic's lien which orders that, in default of the payment of its amount by the lessee or the owner to whom he has surrendered, the interest of all the parties

operate against the interest of a person not served with process,⁹ and parties who are interested in the property or subject matter and between whom and the parties to the proceeding there is no privity are not bound by the judgment in such proceeding if they are not parties before the court¹⁰ A judgment is not conclusive as to strangers to the action, and persons who have an interest in the property at the time the proceedings are commenced and are not made parties are not bound or affected thereby¹¹ but may go behind the foreclosure and contest the validity of the lien as well as proceedings thereon leading up to the execution of the sheriff's deed¹²

Where a subcontractor who has performed work or furnished material prosecutes his claim to judgment against his debtor, and then proceeds by scire facias against the owner, the judgment recovered is binding, as far as the amount of indebtedness is concerned, on such owner¹³ Where a judgment, in an action to enforce a lien, must necessarily determine the location and ownership of a building, defendants are estopped thereafter to make any claim to the building on the theory that the location is other than as described in the judgment¹⁴ A judg-

ment against claimant on the ground that his action is prematurely brought is not a bar to a second proceeding subsequently instituted when the right of action becomes complete¹⁵

A judgment or decree establishing a mechanic's lien on the building alone, separate from the land, and ordering it sold to satisfy the lien, necessarily adjudicates the question of the nature of the improvement and in effect decrees it to be personal property¹⁶ A decree in a mechanic's lien foreclosure suit has the effect of quieting title as to one purchasing the premises after the lien attached where he is joined to foreclose the right of redemption.¹⁷ If the judgment creditor, or his assignee, becomes the owner of the land on which the judgment is a lien, the lien has been held to merge into the legal title unless, because of inferior liens, a merger would be productive of injustice¹⁸

Transition of title. A mechanic's lienor has been held to obtain title only when his decree foreclosing his lien becomes absolute¹⁹ A decree of sale does not vest in plaintiff either the title or the right of possession²⁰

Cure of defects A judgment on a mechanic's lien claim may cure defects which without the judgment

therein shall be sold will be construed as applying to the interest of the parties in the leasehold estate, including the improvements for which the lien is established—*Dobschuetz v Holliday*, 82 Ill 371

(3) A judgment that realty be sold to satisfy materialman's lien and that excess be distributed among defendants has been held an implied finding that given defendant had interest in realty—*McDaniel v Belt*, Tex Civ App, 54 S W 2d 592

(4) A final decree in mechanic's lien foreclosure suit against owner of fee, without joining other lien holders, has been held at least prima facie good as determination of all facts to be implied as true from fact of rendition of final decree—*Kurz v Pappas*, 146 So 100, 107 Fla 861, motion granted 147 So 271, 107 Fla 861, and followed in *Mediterranean Corporation v Pappas*, 146 So 106, 107 Fla 876, motion granted 147 So 270, 107 Fla 876

9. Tenn—*Variety Fire Door Co v. Hanson-Worden Co*, 10 Tenn App 354

Interest of lessee

No mechanics' lien can be foreclosed as against interest of lessee of premises who was not served with process—*Demund Lumber Co v. Franke*, 14 P 2d 256, 40 Ariz 461

10. Fla—*Sandquist & Snow v. Kel-*

logg, 133 So 66, 101 Fla 568, reheard 136 So 235, 101 Fla 579
40 C J p 408 note 33

11. Ala—*Lary v Jones*, 187 So 714, 237 Ala 575

Cal—*Chapman v Title Guaranties & Trust Co*, 78 P 2d 268, 25 Cal App 3d 567

Fla—*Myers v Harkins*, 136 So 382, 102 Fla 577

Mo—*Burgess v Joplin Lumber Co*, App, 145 S W 2d 1004

NJ—*Practical Building & Loan Ass'n of City of Newark v Meisol*, 139 A 338, 101 N J Eq 636

Okl—*Pepin v W R Thompson & Sons Lumber Co*, 1 P 2d 714, 150 Okl 295

Vt—*Goodro v Tarkey*, 22 A 2d 509, 113 Vt 212

40 C J p 502 note 44—34 C J. p 1047 note 61

Subordinate encumbrancer's rights will not be enlarged, diminished, or affected by decree in mechanic's lien foreclosure suit, and will remain same as before suit was filed, and he may assert any right as against prior mechanics' lien in subsequent suit to foreclose mortgage which he may have asserted in earlier suit to enforce prior mechanics' lien—*Kurz v Pappas*, 146 So 100, 107 Fla 861, motion granted 147 So 271, 107 Fla 861, and followed in *Mediterranean Corporation v Pappas*, 146 So 106, 107 Fla 876, motion granted 147 So 270, 107 Fla 876—*Sandquist*

& *Snow v Kellogg*, 136 So 235, 101 Fla 579

12. Fla—*Kurz v Pappas*, 146 So 100, 107 Fla 861, motion granted 147 So 271, 107 Fla 861, and followed in *Mediterranean Corporation v Pappas*, 146 So 106, 107 Fla 876, motion granted 147 So 270, 107 Fla 876—*Sandquist & Snow v Kellogg*, 136 So 235, 101 Fla 579

40 C J p 502 note 45.

13. Minn—*Emmet v. Rotary Mill Co*, 2 Minn 286

14. Idaho—*Karlson v. National Park Lumber Co*, 269 P. 591, 46 Idaho 595

15. Kan—*Seaton v. Hixon*, 12 P 22, 35 Kan 663

Judgment where action prematurely brought as bar generally see Judgments § 628

16. Neb—*Shull v Best*, 93 NW 753, 4 Neb (Unoff.) 212.

17. US—*Brace v. Gauger-Korsmo Const Co*, CCA Ark, 36 F 2d 661, certiorari denied 50 S Ct. 333, 281 US 738, 74 L Ed 1153.

18. Idaho—*Brown v Hawkins*, 158 P 2d 840, 66 Idaho 351.

19. Conn—*City Lumber Co of Bridgeport v Murphy*, 179 A. 339, 120 Conn 16.

20. Ala—*Merchants' Ins. Co v. Mazange*, 22 Ala. 168.

would be fatal,²¹ but where the petition is not sufficient to justify the entry of a decree fixing a lien on the premises, the deficiency is not cured by a recital in the decree that complainants gave evidence to sustain every allegation of the petition²²

Collateral attack. A judgment or decree in a mechanic's lien proceeding ordinarily is not open to collateral attack²³ except on the ground of lack of jurisdiction²⁴ or fraud and collusion²⁵. The question whether the court erred in refusing a continuance may not be determined on a collateral attack on the judgment²⁶. All presumptions are in favor of the judgment,²⁷ and the presumption is in favor of the jurisdiction of a court of general original jurisdiction²⁸.

§ 335. — Lien

A decree in a mechanic's lien proceeding has been held to perfect and perpetuate the lien created by statute and not to bring the lien into existence.

A decree in a mechanic's lien proceeding has been held to perfect and perpetuate the lien created by statute; the decree itself, it has been held, does not bring the lien into existence²⁹. Where no personal judgment is entered against the alleged owners of realty in a mechanic's lien proceeding, it has been held that no lien exists against any of the alleged owners' realty except as provided for in the decree perfecting the mechanic's lien³⁰. A mechanic's lien does not merge into the judgment unless the judgment is valid and enforceable³¹.

The judgment should declare the claim to be a lien on the specific premises from the proper date³². If it nowhere appears in the judgment roll when the lien attached to the building the judgment will operate as a lien on the premises from the time it was docketed³³. A decree giving a lien from too early a date is erroneous if the rights of third persons are affected by it, but otherwise the decree will not be reversed on that ground³⁴. Where separate liens on distinct parcels of land are foreclosed in one proceeding, the judgment becomes a lien on all of the tracts when rendered and does not relate back to the filing of the lien statement³⁵.

A judgment, although it is a special lien on specific property, may nevertheless be regarded as a lien of general character as distinguished from a mortgage lien³⁶. If, when the proceedings to enforce a mechanic's lien are against the same person as builder and owner, the minutes of the court show a general and special judgment, which would give a lien prior to a mortgage, but the record shows a general judgment only, the court of chancery, in the absence of fraud or imposition, may not impose the debt involved therein as a lien on the lands in question, on the ground that it ought to have been recorded as a special judgment³⁷.

Under some statutes the judgment lien is limited to the amount of land found to be required for the convenient use and occupation of the premises³⁸. Under other statutes, however, a personal judgment in a mechanic's lien proceeding becomes a lien on

21. Pa.—Holland v Garland, 13 Phila. 544

22. Ill.—Leslie v Reed, 107 Ill App 248
40 C J p 503 note 52

23. ND.—Bovey, Shute & Jackson v Odegaard, 208 NW 111, 53 ND 871, followed in American State Bank of Balfour v Odegaard, 208 NW 114, 53 ND 878

Okla.—Mitchell Drilling Co v Robert L Kinkaid, Inc, 105 P 2d 764, 188 Okl 25
10 C J p 503 note 54

Collateral attack upon judgments generally see Judgments §§ 401-435

Although irregular on its face, and even if illegally recovered, a mechanic's lien, after judgment, ordinarily may not be attacked collaterally by third persons—Kessler v Mandel, 40 A 2d 926, 156 Pa Super 505

Proceedings held collateral attack

Idaho.—Karlson v National Park Lumber Co., 269 P. 591, 46 Idaho 595.

Iowa.—Weir & Russell Lumber Co v Kempf, 12 NW 2d 857, 234 Iowa 450

24. Mo.—Allen v Sales, 56 Mo 28
Jurisdiction held not lacking
US—U S Nat Bank of Portland v Humphrey, 285 P 416, 49 Idaho 363

Okla.—Mitchell Drilling Co v Robert L Kinkaid, Inc, 105 P 2d 764, 188 Okl 25

25. Pa.—Kessler v Mandel, 40 A 2d 926, 156 Pa Super 505
40 C J p 503 note 56

26. Nev.—Daly v Lahontan Mines Co., 151 P 514, 39 Nev. 14, reheard 158 P 285, 39 Nev 14

27. Idaho.—Karlson v National Park Lumber Co., 269 P 591, 46 Idaho 595

28. Ill.—Cigler v Keinath, 167 Ill App 65

29. Mo.—Rosenzweig v Ferguson, 158 SW 2d 124, 348 Mo 1144

Estate held by entireties

A mechanic's lien prosecuted to final judgment has the same stand-

ing and right against real estate held by the entireties as would be accorded a judgment entered against one of two owners so holding real estate—Hamilton v LeSueur, 46 Pa. Dist & Co 516, 24 Erie Co 311

30. Mo.—Rosenzweig v Ferguson, 158 SW 2d 124, 348 Mo 1144

31. Mo.—Dutton v Herman, 23 Mo App 458

32. Minn.—Mason v Heyward, 5 Minn 74

33. Or.—Kendall v McFarland, 4 Or 292
40 C J p 503 note 61

34. Ill.—Nibbe v Brauhn, 24 Ill 263

35. Iowa.—Curie v Wright, 119 N. W 74, 140 Iowa 651.
40 C J p 503 note 63

36. Del.—In re Elder, 139 A 510, 3 WW Harr 11.

37. N J.—Cutter v Kline, 35 N J Eq. 534

38. Idaho.—Brown v Hawkins, 158 P 2d 840, 66 Idaho 351.

all of the debtor's real estate and may be enforced as are other judgment liens.³⁹ A mechanic's lien judgment has been held not to constitute a lien on personal property.⁴⁰

When a mechanic's lien foreclosure judgment ceases to be a lien or cloud on the real property of the judgment debtor depends on statutory provisions and the construction placed thereon.⁴¹

F. EXECUTION AND ENFORCEMENT OF JUDGMENT OR DECREE, AND SALE AND REVIEW

§ 336. In General

Execution may ordinarily issue to enforce a final money judgment in an action to enforce a mechanic's lien.

While, as discussed *infra* § 337, a sale of the property is the ordinary method of enforcing a mechanic's lien, an execution may issue to enforce a final money judgment rendered in an action brought to enforce a mechanic's lien,⁴² notwithstanding the judgment also contains a provision for sale of the property in satisfaction of part of the claim,⁴³ if the judgment is valid and in full force and effect,⁴⁴ has not been paid,⁴⁵ and the judgment creditor has not waived his right to an execution.⁴⁶ Indeed, in some local, inferior courts not possessing jurisdiction to decree a foreclosure sale, execution is the only means of enforcing the judgment.⁴⁷ A compliance with statutes relating to the recording of a transcript of the judgment is essential before execution may properly issue from a court other than the one in which the judgment was rendered.⁴⁸ Ordinarily the execution to be issued is a special one against the property subject to the lien,⁴⁹ unless claimant chooses to waive and abandon his special

lien,⁵⁰ or the proceeding is a personal one,⁵¹ a general execution is not authorized in the first instance,⁵² but only after the property subject to the lien has been first exhausted without yielding an amount sufficient to satisfy the lien.⁵³ Under some statutes, a lien claimant, other than the contractor, has a right to the issuance of a special execution against the property subject to the lien without first having attempted to collect by execution a general judgment against the contractor,⁵⁴ but under other statutes the property subject to the lien may be levied on only after it appears that sufficient property of the contractor to satisfy the judgment against him cannot be found.⁵⁵ The special execution must conform to the judgment establishing the lien,⁵⁶ and specify the property to be levied on.⁵⁷ In connection with other provisions of the judgment, a separate award of execution for the amount found due each one of several claimants may be proper.⁵⁸ Where judgment has been rendered followed by a seizure on execution before the appointment of an assignee in insolvency of the owner, no further judgment is required to make the property available to satisfy the execution.⁵⁹

39. Ohio—Knauber v Fritz, 5 Ohio Dec (Reprint) 410, 5 Am L Rec 432, 1 Cinc L Bul 362
40 C J p 503 note 66

40. Del—Clough v Superior Equipment Corporation, 157 A 306, 18 Del Ch 202

41. Idaho—Brown v Hawkins, 158 P 2d 840, 66 Idaho 351

42. NY—Belfer v Ludlow, 136 N Y S 130, 69 Misc 486, affirmed 127 N Y S 623, 143 App Div 147, appeal dismissed 95 NE 1123, 202 NY 539
40 C J p 503 note 68

43. NY—Belfer v. Ludlow, *supra*

44. Ga—Carter-Moss Lumber Co v. Short, 18 SE 2d 61, 66 Ga App 30
Dormant judgment

Execution may not be levied if the judgment creditor has permitted the judgment to become dormant and ineffective by his failure to take proper steps to keep it in force—Carter-Moss Lumber Co v Short, *supra*

Misdescription of property

Execution is properly quashed where the judgment is rendered on a statement misdescribing the property on which it is sought, since the court

is without jurisdiction in such a case—Independent Plumbing & Heating Supply Co v Glennon, Mo App, 287 SW 824

45. NY—Belfer v Ludlow, 126 N Y S 130, 69 Misc 486, affirmed 127 N Y S 623, 143 App Div 147, appeal dismissed 95 NE 1123, 202 NY 539

46. NJ—Fusakowski v Woodward Lumber & Supply Co, 103 A 194, 87 NJ Eq 665

47. NY—Pearce v Knapp, 127 NY S 1100, 71 Misc 324—Daxe v Hayek, 107 N Y S 601, 56 Misc 673

48. Ill—Swanson v Kohout, 136 N E 656, 304 Ill 606

49. Ill—Swanson v Kohout, *supra*
40 C J p 504 note 74

50. Miss—Kirk v Tahaferro, 16 Miss 754—Richardson v Warwick, 8 Miss 131

51. Ill—Chicago First Baptist Church v Andrews, 87 Ill 172

52. Ill—Chicago First Baptist Church v Andrews, *supra*, followed in Stone v Tyler, 50 NE 688, 173 Ill 147

Wash—Marks v Pence, 71 P. 1096, 31 Wash 426

53. Wash—Marks v Pence, *supra*
40 C J p 504 note 78

Necessity of first exhausting property subject to lien generally see *infra* § 338

54. NJ—Tanner v Boynton Lumber Co, 129 A 617, 98 NJ Eq 85.

55. Mo—Fink v Remick, 33 Mo App. 624

40 C J p 504 note 80

Property subject to mortgage

Where mortgagee is entitled to value of salvage from old, entering into reconstructed, house, mechanics' lienor's judgment should be made leviable against debtor's goods, and, if insufficient, against property subject to lien—Lowry-Miller Lumber Co v Dean, 47 SW 2d 164, 226 Mo App 783

56. Iowa—Wilson v. Reuter, 29 Iowa 176

40 C J p 504 note 81

57. NH—Sly v Pattee, 58 NH 102

58. Mo—Early v Smallwood, 256 S. W 1053, 302 Mo 92
40 C J p 504 note 83

59. Me—Laughlin v. Reed, 36 A. 131, 89 Me. 226.

Venditioni exponas or fieri facias Under some statutes on rendition of the judgment under an attachment to enforce a mechanic's lien, the lienor has an election to resort to the enforcement of his recovery by *venditioni exponas*, or to rely simply on a *fieri facias*⁶⁰ If he relies on a *fieri facias*, he waives the lien of his attachment⁶¹

Levy of execution A levy of the execution in order to be effective must be made in the time and manner prescribed by the statute⁶²

Stay of, or injunction against, execution Defendant is not entitled to a stay of execution on mere request, where the statute requires the filing of a bond with security⁶³ Prosecution of the execution will not be enjoined unless sufficient grounds therefor exist⁶⁴ In an action to enjoin the execution on the ground that the affidavits in the mechanic's lien suit on which the judgment was based were false and fraudulent, complainant has the burden of proving that the affidavits were actually false to the knowledge of the affiant when made⁶⁵

Action on judgment It has been held that an action on a judgment in a mechanic's lien suit ordering a sale of the property to satisfy the lien cannot be maintained against a defendant in such suit who was adjudged to have an interest in the property, before a sale of the property and determination of

the deficiency⁶⁶

§ 337. Sale in General

The ordinary method of enforcing a mechanic's lien is by sale under the judgment of foreclosure or under an execution.

The ordinary method of enforcing a mechanic's lien is by a sale of the property, interest, or estate subject to the lien,⁶⁷ but under some statutes this is not the only method⁶⁸ It is usually held that, except in local, inferior courts without jurisdiction to decree a foreclosure sale,⁶⁹ the sale may be either under the judgment, as in cases of mortgage foreclosure,⁷⁰ or under an execution⁷¹ However, under a few statutes it is held that a sale can be had only under execution⁷² The jurisdiction of a court possessing power generally to decree a sale of land is dependent, in a particular case, on the allegations of the bill⁷³

Effect of prior encumbrances. The fact that the property is subject to a prior encumbrance does not prevent a sale on foreclosure of a mechanic's lien,⁷⁴ subject to the prior encumbrance⁷⁵ Under some statutes the sale must be made subject to the prior encumbrance,⁷⁶ unless the encumbrancer comes in and consents to be made a party,⁷⁷ but under other statutes the sale is made free of encumbrances⁷⁸ and prior encumbrancers must look to the proceeds

60. Tenn—Brantingham v Beasley, 2 Tenn App 598

61. Tenn—Brantingham v Beasley, supra

62. Ga—Carter-Moss Lumber Co v Short, 18 SE 2d 61, 66 Ga App 330

Dormant execution justifies dismissal of levy—Carter-Moss Lumber Co v Short, supra

63. Neb—Paine v Putnam, 7 NW 336, 10 Neb 588

64. N J—Tanner v Boynton Lumber Co, 146 A 332, 104 N J Eq 614

65. N J—Tanner v Boynton Lumber Co, supra

Presumption against fraud

Presumption against taking of knowingly false affidavit must be overcome by convincing proof—Tanner v Boynton Lumber Co, supra

Evidence held insufficient to prove falsity—Tanner v Boynton Lumber Co, supra

66. Tex—McDaniel v Belt, Civ App, 54 SW 2d 592

67. Ill—Armstrong v Obucino, 133 NE 53, 300 Ill 140
40 C J p 504 note 87

Sale for debt is permitted—Schwartz v Whelan, 145 A 525, 295 Pa 425, 65 A L R 277.

Reference

An official referee to whom mechanic's lien foreclosure action was referred has no power to appoint a referee to sell realty affected by lien, plaintiff should apply to court for appointment of a referee to carry judgment of foreclosure into effect—Decker v Canzoneri, 9 N Y S 2d 210, 256 App Div 68

68. Cal—Withington v Shay, 119 P 2d 1, 47 Cal App 3d 68

69. N Y—Boynton Furnace Co v Trohn, 126 N Y S 695, 141 App Div. 773—Pearce v Knapp, 127 N Y S 1100, 71 Misc 324

70. Neb—Jarrett v Hoover, 74 N W 429, 54 Neb 65

40 C J p 504 note 90

Mortgage foreclosures see the C J S title Mortgages §§ 713-773, also 42 C J p 181 note 68—p 284 note 51

71. N J—Tanner v Boynton Lumber Co, 129 A 617, 93 N J Eq 85
40 C J p 504 note 92

72. Wis—Bailey v Hull, 11 Wis 269, 78 Am D 706

73. Md—Hayes v Armstrong, 125 A 610, 145 Md 268.
40 C J p 505 note 94

Prayer for relief

Where complaint merely sought to establish existence and rank of la-

bor liens, sale made pursuant to attempt to foreclose liens would be void—Sonleitner v McLaren, 20 P 2d 1011, 52 Idaho 791

74. Colo—Seely v Neill, 86 P 334, 37 Colo 198

Tenn—Hughes Bros Mfg Co v Conyers, 36 SW 1093, 97 Tenn 274

Sale under

Mechanic's lien

As discharging mortgage lien see infra § 346

For less than amount of mortgage see infra § 341

Where priority over mortgage limited to building see infra § 339

Mortgage, as divesting mechanic's lien see supra § 244

75. Iowa—Eagle Iron Works v Des Moines Suburban R Co, 70 NW 193, 101 Iowa 289
10 C J p 505 note 98

76. Md—Smith v Shaffer, 46 Md. 573

77. Md—Smith v Shaffer, supra

Effect of sale where prior encumbrancer not made party see infra § 346.

78. Ill—Topping v Brown, 63 Ill 348—Croskey v Northwestern Mfg. Co, 48 Ill 481.

for satisfaction of their debts, as discussed *infra* § 348, and, where, in a mechanic's lien foreclosure, it appears that the liens can be satisfied only by a sale of the property, mortgagees who have been made parties cannot object that they are not seeking foreclosure and should not be compelled to accept the results thereof.⁷⁹

It has been held that, where there is doubt as to the priority of the liens, the property should be sold, although it will not bring its full value, and the contest be made over the proceeds of the sale.⁸⁰ However, it has also been held that a sale should not be made until the relative rights of the lienholders have been definitely settled.⁸¹

§ 338. Property or Interest to Be Sold in General

As a general rule the sale should be of no more property or of no greater interest therein than that ordered sold by the judgment or decree.

The sale should not be of more property⁸² or of a larger interest therein⁸³ than the judgment or decree orders to be sold; but it may be of less property than that directed to be sold where, after the judgment was rendered, a part of the property was released from the lien.⁸⁴ Only the estate or interest to which the lien attaches should be sold,⁸⁵ and under some statutes no greater estate can be sold

than is vested in the person in possession.⁸⁶ The property subject to the lien must be exhausted before other property of the owner can be subjected to the payment of the judgment in favor of the lienor.⁸⁷

Where part of the property can be separated from the remainder without injury to the whole and sold for an amount sufficient to satisfy the liens, such part only should be sold.⁸⁸ Where, however, a division would be injurious, a sale of a part only should not be made,⁸⁹ the court should order the property sold as a whole, adjusting priorities in the proceeds on equitable principles,⁹⁰ where it has jurisdiction of all the parties in interest and the subject matter of the suit.⁹¹ If the property exceeds the area which the statute allows to be subjected to the lien, the court will divide it in the way best suited to the interests of both parties.⁹²

§ 339. Where Priority over Mortgage Limited to Building or Improvement

Where a mechanic's lien has priority as to the building but not as to the land, a sale of the building separate from the land is permitted under some statutes.

Where a mechanic's lien arising out of the improvement of mortgaged or otherwise encumbered property is entitled to priority as to the building or improvement but not as to the land, the rights of

Statute held to authorize sale free of encumbrances if the circumstances warrant—*Doan v Britto*, 161 A 141, 52 RI 425

79. Colo.—*Jorlman v. McPhee*, 71 P 419, 31 Colo 26

80. Ga.—*Winn v Henderson*, 63 Ga 365

81. Iowa.—*Phelps v. Pope*, 6 NW 42, 53 Iowa 691

Va.—*Jaeger v. Bossieux*, 15 Gratt, 56 Va 83, 76 AmD 189

82. Iowa.—*Wilson v Reuter*, 29 Iowa 176

Ky.—*Dallas v. Gardner*, 268 SW 847, 207 Ky 93

83. NY.—*Smith v Corey*, 3 ED Smith 642, 4 AbbPr 208

84. Wis.—*Carney v La Crosse & M. R. Co.*, 15 Wis 503

85. NY.—*Hauptman v. Catlin*, 20 NY 247
40 CJ p 505 note 13.

Interest of party causing improvement

Only interest of party who causes building to be erected or materials to be furnished can be ordered sold to satisfy mechanics' liens—*Demund Lumber Co v. Franke*, 14 P.2d 256, 40 Ariz 461.

Leased property

(1) A court of equity has power

to sell freehold when administering statute governing priority of mechanic's or materialman's lien only where lien is on the freehold, and where lessee not prohibited by lease makes improvement, court of equity cannot sell freehold to enforce lien unless freeholder consents—*Harden v Wood Lumber Co*, 178 So 540, 235 Ala 310

(2) Thus, where lessee not prohibited by lease made improvement and lessor did not consent to sale of freehold to satisfy materialman's lien, court of equity properly ordered sale of improvement only, preserving statutory right of lessor to prevent sale by paying off lien—*Harden v Wood Lumber Co*, *supra*

(3) Where, however, the lessee not prohibited by lease makes improvement, freeholder consents to sale of freehold to satisfy mechanic's or materialman's lien, and it appears that rights and interests of all parties will be promoted by the sale, it is discretionary with court of equity to sell the freehold—*Harden v. Wood Lumber Co*, *supra*

86. Pa.—*Schenley's Appeal*, 70 Pa 98

87. Ill.—*Swanson v Kohout*, 136 NE 656, 304 Ill 606.

40 C.J. p 505 note 16.

88. NC.—*Broyhill v. Gaither*, 26 SE 31, 119 NC 443.
40 C.J. p 505 note 17.

89. Ala.—*Corpus Juris* cited in *Baker Sand & Gravel Co v Rogers Plumbing & Heating Co*, 154 So 591, 597, 228 Ala 612, 102 ALR 346—*Byrum Hardware Co v Jenkins Bldg Supply Co*, 147 So. 411, 226 Ala 448
40 C.J. p 506 note 18.

90. Ala.—*Baker Sand & Gravel Co v Rogers Plumbing & Heating Co*, 154 So 591, 228 Ala 612, 102 ALR 346—*Wood Lumber Co v Great-house*, 148 So 125, 226 Ala 644

Lien for debt not due

Where land is subject to mechanic's lien and other liens, sale of entire property affected by lien indebtedness, although some may not be due, is not error if payment of part of purchase price is deferred to meet undue debts as they mature—*Farley v Arbogast*, 176 SE 709, 115 W.Va. 432

91. Ala.—*Baker Sand & Gravel Co v Rogers Plumbing & Heating Co*, 154 So 591, 228 Ala 612, 102 ALR 346

92. Wis.—*Hill v La Crosse & M. R. Co.*, 11 Wis. 214

the lienor, under some statutes, are enforced by a sale of the building or improvement as distinct from the land,⁹³ the purchaser having the right of removal, as discussed infra § 345, or by a sale of the property as an entirety,⁹⁴ and an apportionment of the proceeds corresponding to separate valuations of the land and the building or improvement,⁹⁵ and application of the proceeds to the payment of the liens according to priorities,⁹⁶ or a distribution of the proceeds in such manner as is directed by statute.⁹⁷ Under some of the statutes a materialman's lien in such a case can be enforced as superior to the prior lien on the land only by a sale of the building separate from the land.⁹⁸ A few statutes, on the other hand, do not authorize the sale of a building erected on land which is subject to a prior mortgage.⁹⁹

Under some of the statutes permitting a separate sale of the building with a right of removal, the

court may, in its discretion, order such a sale if the building is removable without substantial damage or injury to either the building or the realty.¹ The practice of selling the property as a whole and thereafter adjusting the equities and priorities in the proceeds is followed where in the best interests of all concerned,² as the court in its discretion may determine,³ as where it is impracticable to remove the building or improvement,⁴ or where such removal would greatly destroy the security,⁵ provided the court has jurisdiction of all the parties in interest and of the subject matter of the suit.⁶ Under other statutes, it is held that the practice of selling the building separately may be pursued, even though the building cannot be removed without great loss.⁷

§ 340. Stay of, or Injunction against, Sale

A sale may be stayed under some statutes on the giving of a bond with security

93. Ala.—Lary v Jones, 187 So 714, 237 Ala 575—City Realty & Mortgage Co v Tallapoosa Lumber Co, 164 So 55, 211 Ala 238

Mo.—Fleming-Gilchrist Const Co v McGonigle, 89 SW2d 15, 338 Mo 56, 107 ALR 1003
40 C.J. p 506 note 23

Construction of statute

Statute regulating priority between materialman's lien and other liens does not contemplate decrees directly vesting lands in one party having superior lien, and building in another, but right to remove buildings is in purchaser at sale under decree—City Realty & Mortgage Co v Tallapoosa Lumber Co, 164 So 55, 231 Ala 238

94. Ala.—City Realty & Mortgage Co v Tallapoosa Lumber Co, supra
40 C.J. p 506 note 24

95. Ala.—City Realty & Mortgage Co v Tallapoosa Lumber Co, supra—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 102 ALR 346

40 C.J. p 506 notes 24, 25

Equities are adjusted by the court in such a case—Clark v Ingram, 160 So 229, 230 Ala 160

96. Ala.—City Realty & Mortgage Co v Tallapoosa Lumber Co, 164 So 55, 231 Ala 238

97. Va.—Fidelity L & T Co v Dennis, 35 SE 546, 93 Va 504
40 C.J. p 506 note 26

98. Ark.—Morilton Lumber Co v Groom, 3 SW2d 293, 176 Ark 520

Garage constructed by defaulting purchaser is subject to sale and removal under materialman's lien after vendor retakes property—Judd v Rieff, 295 SW 370, 174 Ark 362

Lien on building and necessary land

Under statute providing for mechanic's lien upon building and so much land as shall be necessary for the convenient use and enjoyment thereof, where materialmen furnished materials for building upon lot covered by first-lien mortgage, building and land on which it stood should have been sold on foreclosure of lien subject to mortgage lien, and decree authorizing sale of building and land on which it stood with right of way leading from building to public road free and clear of lien of mortgage was erroneous—Federal Land Bank of Baltimore v Clinchfield Lumber & Supply Co, 198 SE 437, 171 Va 118

99. Wash.—Cutler v Keller, 153 P 15, 88 Wash 331, LRA 1917C 1116, followed in Gile Inv Co v Fisher, 177 P 710, 104 Wash 613

40 C.J. p 506 note 29

Remodeled building

Where building, covered by pre-existing recorded mortgage, was remodeled with materials which became integral part of existing structure, order directing sale of building, in action to foreclose mechanic's lien, with right to remove building, was held error—Interstate Lumber Co v Rider, 19 P2d 644, 93 Mont 489

1. Iowa.—Lincoln Nat Life Ins Co v McSpadden, 232 NW. 824, 211 Iowa 97

Tex.—Wallace Gin Co v Burton-Lingo Co, Civ App, 104 SW2d 891—J D McCollom Lumber Co v Whitfield, Civ App, 59 SW2d 1106, error refused

Statute and circumstances as factors
Discretion in matter of sale and removal of building erected on mort-

gaged premises must be exercised in light of statute and circumstances—Lincoln Nat Life Ins Co v McSpadden, 232 NW 824, 211 Iowa 97

2. Ala.—Clark v Ingram, 160 So 229, 230 Ala 160

3. SD.—F C Krotter Co v Harbaugh, 280 NW 211, 66 SD 178
Discretion held not abused

Iowa.—First State Bank of Fredricksburg v Westendorf, 239 NW 73, 213 Iowa 475

SD.—F C Krotter Co v Harbaugh, 280 NW 211, 66 SD 178.

4. Iowa.—First State Bank of Fredricksburg v Westendorf, 239 NW 73, 213 Iowa 475

Ky.—Miller v Johnson, 281 SW 467, 213 Ky 473

Tex.—H J McMullen & Co v Hammann, Civ App, 31 SW2d 909, modified on other grounds Hammann v H J McMullen & Co, 62 SW2d 59, 122 Tex 176

40 C.J. p 506 note 27

5. Ala.—City Realty & Mortgage Co v Tallapoosa Lumber Co, 164 So 55, 231 Ala 218—Baker Sand & Gravel Co v Rogers Plumbing & Heating Co, 154 So 591, 228 Ala 612, 102 ALR 346—Byrum Hardware Co v Jenkins Bldg Supply Co, 147 So 411, 226 Ala 418—Grayson v Goolsby, 139 So 106, 221 Ala 75

Tex.—Brown v Webb, Civ App, 1 SW2d 1103

6. Ala.—Byrum Hardware Co v Jenkins Bldg Supply Co, 147 So 411, 226 Ala 448

7. Mo.—Fleming-Gilchrist Const Co v McGonigle, 89 SW2d 15, 338 Mo 56, 107 ALR 1003.

40 C.J. p 506 note 28

Under some statutes, the sale may be stayed for a limited time by the giving of a bond with security.⁸ It has been held in some cases that persons who are interested, but who are not made parties, may bring a bill to restrain the sale ordered under a decree foreclosing the lien,⁹ and on such a bill are entitled to have their interests determined by the court,¹⁰ but in other cases the courts have refused to enjoin the sale at the instance of such a person.¹¹ A provision of the statute requiring a sale of the property subject to the lien before a personal judgment for a deficiency may be entered has been held to apply only where the personal judgment is to be entered against the owner.¹² Hence, it does not preclude an injunction against a sale where no personal judgment is sought against the owner.¹³ A mere allegation that from the condition of the times the property will not bring its full value is not an equitable ground for an injunction against the sale,¹⁴ nor is it a ground for enjoining a sale that the judgment of foreclosure failed to give an opportunity for redemption of the property from the lien, where no attempt to redeem has been made.¹⁵

§ 341. Notice and Terms of Sale

There must be a compliance with statutory requirements with respect to the notice and terms of sale.

Provisions of statutes providing for public notice of the sale have been held to be mandatory, not merely directory, at least as far as the sheriff is

concerned.¹⁶ Notice of the sale by advertisement or otherwise must cover the property which is subsequently sold¹⁷ and be given for the time¹⁸ and in the manner¹⁹ prescribed by statute. Where defendants have no interest in certain real estate, an advertisement of the sale of their interest cannot prejudice the rights of the true owner.²⁰

Property of value should ordinarily be sold on reasonable credit,²¹ but, where the lien claim is but a small proportion of the value of the whole property, it has been held to be proper to decree a sale for a cash payment sufficient to pay the debt.²² It has been held that, where the property is subject to a prior mortgage, it cannot be sold for less than the full amount thereof.²³

Default by purchaser On failure of a purchaser to complete the contract of sale, the receiver in the lien suit may sue to forfeit the earnest money put up by such purchaser.²⁴

§ 342. Confirming or Setting Aside Sale

A sale will be confirmed if no valid ground for refusal exists. The sale may be set aside if adequate ground is timely presented by a person prejudiced by the sale.

It is proper practice for the court or judge possessing authority in the premises to confirm the sale where there are no valid grounds for a refusal to confirm,²⁵ but not where the court rendering the

8. Neb.—Paine v Putnam, 7 NW 336, 10 Neb 588

9. Ill.—Raymond v Ewing, 26 Ill 329

10. Ill.—Raymond v Ewing, supra

11. Wash.—Turner v Bellingham Bay Lumber & Manuf'g Co., 37 P 874, 9 Wash 484
40 C J p 507 note 33

12. Cal.—Metropolis Trust & Savings Bank v Barnet, 133 P 833, 165 Cal 449

13. Cal.—Metropolis Trust & Savings Bank v Barnet, supra

14. Ga.—Winn v Henderson, 63 Ga 365

15. Okl.—Wheeler v Ridpath, 259 P 217, 126 Okl 290

16. Kan.—John Hancock Mutual Life Ins Co v Heinze, 41 P 2d 1046, 141 Kan 540

17. Del.—In re Long, 81 A 1030, 26 Del 447
40 C J p 507 note 37

18. Mich.—Wagar v Briscoe, 38 Mich 587
40 C J p 507 note 38

Objection to length of notice of sale on foreclosure of mechanic's lien can only be made by defendant

in foreclosure action, who must proceed without unnecessary delay—Coerver v Crescent Lead & Zinc Corporation, 286 S W 3, 315 Mo 276

Notice of levy

Under statute providing that when execution shall be levied on realty not then charged with lien of judgment on which execution issued, it is duty of officer making levy to file a notice of levy, where liens on certain described lots were perfected by decrees in mechanics' lien proceedings, it was not necessary for sheriff to file a notice of levy upon lots prior to sale, since such notice is required only where judgment is not already a lien on the property—Rosenzweig v Ferguson, 158 S W 2d 124, 348 Mo 1144

19. General statute

Statute providing for public notice of sale of lands and tenements taken on execution by sheriff was held applicable to order of sale under foreclosure of mechanic's lien—John Hancock Mut Life Ins Co v Heinze, 41 P 2d 1046, 141 Kan 540

Designation of newspapers

Kan.—John Hancock Mutual Life Ins Co v Heinze, supra

Contents of notice

Execution sale notices complying with statute were held not defective because omitting statement that property, after foreclosure of mechanics' liens, was sold free from right, title, interest, liens, or claims of purchasers or vendors' heirs—Ebinger v Wahler, 238 NW 587, 213 Iowa 84

Failure to read notice prior to sale

Pa.—McCrary-Rodgers Co v Dunlap, Com Pl., 89 Pittsb Leg J 537

20. Mo.—Fink v Remick, 33 Mo App 624

21. Va.—Pairo v Bethell, 75 Va 325

22. Va.—Lester v Pedigo, 4 SE 703, 84 Va 309

23. La.—Robinson-Slagle Lumber Co. v Rudy, 100 So 296, 156 La 174

24. Ind.—Flanders v Ostrom, 187 N E 673, 206 Ind 87

25. Minn.—Arendt v Vossen, 191 N. W 830, 154 Minn 368

40 C J p 507 note 46
"Whether the court will confirm the sale must in great measure depend upon the circumstances of each particular case"—First Nat Bank v Wright, 150 SE 255, 256, 153 Va 429.

decree of sale was without jurisdiction²⁶ or exceeded its jurisdiction.²⁷

The sale will not be set aside, unless adequate grounds therefor are presented²⁸ by a person prejudiced by the sale,²⁹ and the motion made or action brought for this purpose is timely,³⁰ and notice thereof is given to lienors who have become the purchasers of the property.³¹

§ 343. Conveyance to Purchaser and Recovery of Purchase Money

A deed conveying the owner's interest in the property to the purchaser should be executed by the officer making the sale. Such officer may sue to recover the purchase money.

Where the sale is made by the sheriff, he is bound to execute to the purchaser a deed of conveyance of the owner's interest in the premises.³² The officer who made the sale can maintain an action against the purchaser for the purchase money,³³

but in jurisdictions where a vendor's implied lien is not recognized without a special agreement therefor, as discussed in the C.J.S. title Vendor and Purchaser § 377, also 66 C.J. p 1214 notes 82, 83, the claim for the purchase money does not necessarily follow the land,³⁴ and a judgment therefor should not be made a special lien on the land.³⁵

§ 344. Title and Rights of Purchaser

- a In general
- b Effect of errors or defects in proceedings

a. In General

A sale of the property in a mechanic's lien proceeding vests the purchaser with all of the title and interest of the defendant owner.

The sale of the property to enforce a mechanic's lien vests in the purchaser all the title and interest of defendant owner.³⁶ While the sale conveys only

Acceptance of upset price

(1) In proceedings to have upset bid accepted following judicial sale, court should have permitted examination of one offering upset bid as to whether he was aided by lien creditors—*First Nat Bank v Wright*, supra.

(2) Where evidence showed price received for property at original sale was fair, and commissioners recommended confirmation, order for resale on filing upset bid for larger amount was held erroneous—*First Nat Bank v Wright*, supra.

26. Md—*Hayes v Armstrong*, 125 A 610, 145 Md 268.

27. Ill—*Armstrong v Obucino*, 133 NE 58, 300 Ill 140.

28. Mo—*Rosenzweig v Ferguson*, 158 SW 2d 124, 348 Mo 1144—*Uhrig v Hill-Behan Lumber Co*, 110 SW 2d 412, 341 Mo 851.

Okl—*Baldwin v Mayor*, 108 P 2d 132, 188 Okl 272.

40 C.J. p 507 note 49.

Conspiracy

Bill to set aside deed under mechanic's lien foreclosure, alleging conspiracy to deprive complainant's lien of priority, was held to show equity—*Republic Fireproofing Co v Mo-Ray Realty Co*, 136 A 385, 5 NJ Misc 205.

Facts held not to vitiate sale

(1) In general—*United Sav Bank of Detroit v Frazier*, Tex Civ App, 116 SW 2d 933, error dismissed.

(2) Facts held not to show fraud or misconduct.

Mo—*Uhrig v Hill-Behan Lumber Co*, 110 SW 2d 412, 341 Mo 851.

Okl—*Baldwin v Mayor*, 108 P 2d 132, 188 Okl 272.

Default by purchaser

Mo—*Fleming-Gilchrist Const Co v McGonigle*, 89 SW 2d 15, 338 Mo 56, 107 ALR 1003.

Inadequacy of price

(1) Whether a sale should be set aside for inadequacy of price is a matter for the sound discretion of the court—*Baldwin v Mayor*, 108 P 2d 132, 188 Okl 272.

(2) By itself inadequacy of price does not justify setting aside the sale—*Sikes v Dade Lumber Co*, 123 So 918, 98 Fla 451—40 C.J. p 507 note 49 [a] (1).

(3) This is true where the inadequacy is not so gross as to shock the conscience of the court.

Mo—*Uhrig v Hill-Behan Lumber Co*, 110 SW 2d 412, 341 Mo 851.
Okl—*Baldwin v Mayor*, 108 P 2d 132, 188 Okl 272.

(4) The sale should not be set aside for inadequacy of price, although the value was said to be over three times the amount realized, where there was no evidence on which such value was based, no fraud or unfairness practiced, and no one present at the sale ready to purchase at a greater price—*Sikes v Dade Lumber Co*, 123 So 918, 98 Fla 451.

(5) Inadequacy of price obtained at judicial sale is not conclusively shown by fact that resale brought sum substantially larger—*First Nat Bank v Wright*, 150 SE 255, 153 Va 439.

(6) However, when such inadequacy is very great, slight circumstances tending to show that interested parties were misled or prevented by mistake or accident from

attending or preventing the sale may suffice to set it aside—*Rogers & Baldwin Hardware Co v Cleveland Bldg Co*, 34 NW 57, 32 SW 1, 132 Mo 442, 31 LRA 335.

Mistake in bid held to warrant setting sale aside—*Gordon v Doss*, 52 P 2d 376, 142 Kan 860.

Refusal of tender of amount due by junior lienor does not justify setting aside sale and deed thereunder, where there is no right of redemption—*Uhrig v Hill-Behan Lumber Co*, 110 SW 2d 412, 341 Mo 851.

29. NY—*Inglehart v Thousand Island Hotel Co*, 17 NE 358, 109 NY 454.

40 C.J. p 507 note 50.

30. Ky—*Randall v Rodd*, 7 Ky L 672, 13 Ky Op 1026.

40 C.J. p 507 note 51.

31. Ill—*Turney v Saunders*, 8 Ill 239.

32. NY—*Randolph v Leary*, 3 ED Smith 637, 4 Abb Pr 205 followed in *Smith v Corey*, 3 ED Smith 642, 4 Abb Pr 208.

40 C.J. p 507 note 53.

33. Kan—*Trustees', Executors' & Securities' Ins Corp v Bowling*, 44 P 42, 2 Kan A 770.

40 C.J. p 508 note 54.

34. Kan—*Trustees', Executors' & Securities' Ins Corp v Bowling*, supra.

35. Kan—*Trustees', Executors' & Securities' Ins Corp v Bowling*, supra.

36. Mo—*Mutual Press Brick & Quarry Co v Tomaselli*, App, 154 SW 2d 370.

NJ—*Poznak & Turkish v Newart Realty Co*, 156 A 484, 108 NJ Law 126.

the title and interest of defendant owner,³⁷ the title of the purchaser relates back to the time when the lien attached,³⁸ so that he takes all the title or interest held by the owner at that time³⁹ or which he subsequently acquired,⁴⁰ and any interest acquired thereafter by a person claiming under the owner⁴¹

A sale to one of the lien claimants, unredeemed from by the owner, frees the property of the lien, and from the date of the sale the purchaser's rights are those of purchaser only, independent of the lien⁴² However, where the sole lienor is the purchaser, he acquires only the interest to which his lien attached⁴³ Under some statutes, where there are several concurrent mechanics' liens, a sale of the premises under one of such liens frees the premises of all⁴⁴

The purchaser takes title free of equities of

which he had no notice,⁴⁵ but not of rights or equities of which he was charged with notice⁴⁶ He has the right to defend against a mortgage on the property on the ground of its invalidity⁴⁷ Also, he is subrogated to the rights of the lienors, under the statute, to have improvements contributed to by them sold to pay their claims, as against a mortgagee not a party to the foreclosure⁴⁸ The title of the purchaser may be impeached by a person not a party to the suit,⁴⁹ but on the sale being set aside the purchaser should be placed in statu quo⁵⁰

Possession In a proper case for such relief, the purchaser may be put into possession⁵¹ or relieved from completing his purchase⁵² according to the rules governing judicial sales generally, as discussed in Judicial Sales §§ 43, 48 The purchaser may seek possession by summary proceedings,⁵³ ejectment,⁵⁴ or a writ of assistance⁵⁵ Where the sale

Tex—Tyler v Henderson, Civ App 162 S W 2d 170, error refused
40 C J p 508 note 58

37. **Ariz**—Ernst v Deister, 26 P 2d 648, 42 Ariz 379

ND—Bovey, Shute & Jackson v Odegaard, 208 N W 111, 53 ND 871, followed in American State Bank of Balfour v Odegaard, 208 N W 114, 53 ND 878
40 C J p 508 note 59

Subsequent tax lien

On sale of property to enforce laborers' and materialman's liens based on contract with vendee and lien of vendor for balance due for purchase price of lot, purchase would be subject to paying assessment lien established subsequently to contract and to completion of building—Clark v Ingram, 160 So 229, 230 Ala 160

38. **NJ**—Republic Fireproofing Co v Mo-Ray Realty Co, 136 A 335, 5 N J Misc 205
40 C J p 508 note 60

When lien attaches see supra §§ 177-182.

39. **NJ**—Posnak & Turkish v New-sit Realty Co, 156 A 484, 108 N J Law 126
40 C J p 508 note 61.

40. **NJ**—Posnak & Turkish v New-sit Realty Co, supra

41. **Wis**—Connecticut Mut Life Ins Co v Goldsmith, 111 N W 208, 131 Wis 116

42. **Ind**—Van Buskirk v Summit-ville Min Co, 78 N E 208, 38 Ind App 198

43. **Iowa**—Sax v McCormick, 162 N W 26, 179 Iowa 764

Option to purchase

Mechanic's lienor, who furnished labor and materials to one holding a mere option to purchase the property which the optionee lost by failing to exercise it in the required

time, was held to have no greater rights than the optionee when such lienor became the purchaser at the mechanic's lien foreclosure sale, and hence could not exercise the option—Ernst v Deister, 26 P 2d 648, 42 Ariz 379

44. **NJ**—Posnak & Turkish v New-sit Realty Co, 156 A 484, 108 N J Law 126—Harris v Neswit, 146 A 309, 104 N J Eq 465

Effect of prior mortgage

Sale of premises under lien claim judgment extinguished mechanic's liens, preventing claimant from asserting right to restrain payment of mortgage—Harris v Neswit, supra

Right to contest lien

Purchaser of premises at sale to satisfy mechanics' liens may not defend against lien claim thereafter, the premises being free of such lien—Peplak v Halbert, 137 A 834, 5 N J Law 471

45. **Ga**—Fahn v. Bleckley, 55 Ga 81

Ill—First Nat Bank v Paris, 193 N E 307, 358 Ill 378

Subsequent mechanic's lien

Subsequent purchaser of property sold at lien foreclosure did not take subject to second lien against same owner filed before her purchase—Soltow v Roth, Iowa, 215 N W 705

Undisclosed judgment liens

Where, at time of foreclosure of prior mechanic's liens, judgment liens were not discovered because of negligent search of record by complainant, the purchaser at the sale is entitled to the benefit of the prior lien as against judgment creditors—American Savings & Loan Ass'n v Barry, 243 N W 628, 123 Neb 523

46. **Cal**—Withington v Shay, 117 P 2d 415, 47 Cal App 2d 68

Iowa—Sax v McCormick, 162 N W 26, 179 Iowa 764

40 C J p 508 note 68

Building erected by third person

Purchaser at foreclosure sale under building liens was held not entitled to claim building erected by third person with owner's permission and purchaser's knowledge—Grant v Alonzo, Tex Civ App, 27 S W 2d 871, error dismissed

Prior unrecorded deed

The provisions of a statute giving effect to a deed which is subsequent in execution but prior in recording, are limited to purchasers for a valuable consideration and in good faith but were not available to a purchaser of realty at mechanic's lien foreclosure sale who had both actual and constructive notice of plaintiff's deed thereto—Holman v Totten, 128 P 2d 808, 54 Cal App 2d 309

47. **Conn**—Stein v Davidson, 147 A 1, 110 Conn 4

40 C J p 508 note 69

48. **Tex**—Owens v Heidbreder, Civ App, 44 S W 1079

49. **Mo**—Horton v St Louis K C & N Ry Co, 84 Mo 603

50. **W Va**—Charleston Lumber & Manufacturing Co v Brockmeyer, 23 W Va 635

40 C J p 508 note 78

51. **NY**—Suydam v Holden, 11 Abb Pr NS, 329

40 C J p 508 note 71

52. **NY**—Suydam v Holden, supra

53. **Pa**—Walbridge's Appeal, 95 Pa 466

54. **Mo**—Mutual Press Brick & Quarry Co v Tomaselli, App, 154 S W 2d 370

55. **Mo**—Mutual Press Brick & Quarry Co v Tomaselli, supra

is null and void, it is proper to quash a writ of assistance previously granted⁵⁶ and to order the restoration of the premises to the owner⁵⁷

b. Effect of Errors or Defects in Proceedings

Under some statutes a purchaser does not obtain a good title unless every essential statutory step in the mechanic's lien proceedings has been duly taken. Under other statutes, a purchaser who is a stranger to the record is not, as a general rule, charged with errors in the proceedings of which he has no knowledge.

In some cases it is stated generally that the title of a purchaser at a sale under a mechanic's lien is purely statutory,⁵⁸ and its validity depends on every essential statutory step in the creation, continuance, or enforcement of the lien having been duly taken.⁵⁹ However, in other cases the rules laid down are not so broadly stated.⁶⁰ According to such authorities, where the lien claimant is the purchaser, a subsequent reversal or vacation of the judgment defeats his title⁶¹ without giving him a claim for improvements made by him after the purchase,⁶² but, where the purchaser is a stranger to the record, he is not chargeable with any error which may exist in the decree under which he purchases,⁶³ particu-

larly nonjurisdictional defects of which he has no actual knowledge,⁶⁴ and his title is not affected by the granting of a new trial after the sale,⁶⁵ or by a subsequent reversal or vacation of the judgment directing the sale,⁶⁶ where no order for the restitution of the property was made.⁶⁷

Where, because of real or alleged defects in the proceedings, the title is doubtful and the purchaser might be compelled to defend it by litigation, he will not be compelled to take it,⁶⁸ but the mere fact that one defendant has appealed does not entitle the purchaser to be relieved from the purchase.⁶⁹

§ 345. — Purchaser of Building Alone

As a general rule the purchaser of a building, separate from the land, sold to enforce a mechanic's lien on the building, may remove it within a reasonable time.

Where the judgment or decree establishes a lien on the building alone, separate from the land, and orders it sold, the purchaser has a right to remove it⁷⁰ within a reasonable time,⁷¹ and, if he cannot obtain possession otherwise, he may maintain replevin therefor.⁷² It has been held that the building

NY—Connor v Schaeffel, 11 NYS 737, 19 NY Civ Proc 378, 35 Abb N Cas 314

Purchaser as real party in interest
Purchaser is real party in interest entitled to invoke issuance of writ of assistance—Mutual Press Brick & Quarry Co v Tomaselli, Mo App, 154 SW2d 370

Remedy held concurrent
Mo—Mutual Press Brick & Quarry Co v Tomaselli, supra

56. Ill—Armstrong v Obucino, 133 NE 58, 300 Ill 140

57. Ill—Armstrong v Obucino, supra

58. Del—E J Hollingsworth Co v Continental-Diamond Fiber Co, 175 A 266, 8 WW Har 303
40 CJ p 508 note 79

59. Del—E J Hollingsworth Co v Continental-Diamond Fiber Co, supra
40 CJ p 508 note 80

Defect in process

The proceedings were held void and the sale set aside where process in the action to foreclose was served personally by the attorney for the mechanic's lienor—Horne v Osborne, 175 SE 898, 163 Va 235

Invalid contract

Pa—Clothier v Kniffen, Com Pl, 36 Luz L Reg Rep 241

60. Okl—Baldwin v Mayor, 108 P 2d 132, 188 Okl 272
40 CJ p 508 notes 82-89

61. Tenn—Sexton v Alberti, 10 Lea 452

40 CJ p 508 note 82

62. Ill—Powell v Rogers, 11 Ill App 98, affirmed 105 Ill 318

63. Ill—Dingledine v Hershman, 53 Ill 280

40 CJ p 509 note 84

64. Okl—Baldwin v Mayor, 108 P 2d 132, 188 Okl 272

Defects in service

Where it was not claimed that alleged defects in service were fatal to court's jurisdiction in proceeding to foreclose laborer's and materialman's lien, and the time had expired for reversing the decision as to the sufficiency of the service, purchasers of the realty at execution sale to satisfy the lien, who were strangers to the foreclosure proceedings and without actual notice of falsity or error of recital concerning service, had right to rely thereon in purchasing for a valuable consideration a title based thereon—Baldwin v Mayor, supra

Insufficient notice of sale on foreclosure of mechanic's lien does not invalidate sale as to innocent purchaser for value—Coerver v Crescent Lead & Zinc Corporation, 286 SW 3, 315 Mo 276

65. Iowa—Bartlett v Bilger, 61 N W 233, 92 Iowa 732

40 CJ p 509 note 85

66. Cal—Purser v Cady, 49 P 180, 5 Cal Unrep Cas 707

67. Cal—Purser v Cady, supra

Tender of payment of debt

Where intervenor in judgment debtor's action to set aside judgment was in lawful possession of property under sale made by virtue of proceedings to foreclose mechanics' lien, irrespective of validity of sale made by substituted trustee, intervenor was entitled to retain title and possession as against judgment debtors, in absence of tender of payment of admittedly valid debt and lien under which sale the intervenor also claimed—Tyler v Henderson, Tex Civ App, 162 SW2d 170, error refused

68. NY—Spickerhoff v Gordon, 105 NYS 586, 130 App Div 718, affirmed 88 NE 1132, 194 NY 577

69. NY—Hill v Flatbush Consumers' Ice Co, 127 NYS 961, 143 App Div 559

70. Ala—City Realty & Mortgage Co v Tallapoosa Lumber Co, 164 So 55, 231 Ala 238

Ark—Judd v Rieff, 295 SW 370, 174 Ark 362

Mo—Fleming-Gilchrist Const Co v McGonigle, 89 SW2d 15, 338 Mo 56, 107 ALR 1003

Mont—Wyman v Hall, 276 P 944, 84 Mont 571
40 CJ p 509 note 90

71. Mont—Midland Coal & Lumber Co v Ferguson, 202 P. 389, 61 Mont 402
40 CJ p 509 note 91

72. Neb—Shull v Best, 93 NW 753, 4 Neb (Unoff) 212.
40 CJ p 509 note 92

cannot be removed before the expiration of the time 'of redemption'⁷³ According to some,⁷⁴ but not other,⁷⁵ authorities the right of removal exists regardless of whether or not injury may result from its exercise. It is held that, where the building is on leased premises, and the lessee's right of removal is conditional or limited, the purchaser's right is likewise so;⁷⁶ but it has also been held that a statutory right of removal may properly be exercised notwithstanding the expiration of the lease⁷⁷ and the passing of the premises into the possession of the owner of the fee or another lessee⁷⁸

The purchaser acquires the building free from a prior encumbrance on the land,⁷⁹ and he does not, by remaining in possession of the land until a prior mortgage is foreclosed, lose his right to remove the building or improvement from the land⁸⁰ The real purchaser of the building cannot be prejudiced by the erroneous recital of the sheriff in his return of sale that the building was sold to another person⁸¹

§ 346. Title and Rights of Third Persons

As a general rule, a sale under a mechanic's lien

does not affect the title or interest of persons not parties to the foreclosure proceedings

As a general rule, a sale under a mechanic's lien does not affect the title or interest of persons not parties to the foreclosure proceedings⁸² In some cases it has been held generally that the sale discharges the lien of a subsequent,⁸³ but not of a prior,⁸⁴ mortgage In other cases, however, it has been held, in accordance with the general rule as to persons not made parties, that the sale does not affect the rights or equities of a subsequent mortgagee not made a party to the foreclosure proceedings,⁸⁵ but that it divests the lien of a prior mortgage where the mortgagee was made a party to the suit,⁸⁶ even though the decree makes no reference to the mortgage⁸⁷ and is silent as to the proceeds of the sale⁸⁸

§ 347. Redemption

A right to redeem from a sale in a mechanic's lien proceeding may exist by force of statute or agreement of the parties

Except where the parties agree thereto,⁸⁹ there is generally no right of redemption from a sale in proceedings to enforce a mechanic's lien⁹⁰ unless

73. Mont—Grand Opera House Co v Maguire, 37 P 607, 14 Mont 558

74. Mont—Stritzel-Spaberg Lumber Co v Edwards, 144 P 772, 50 Mont 49

75. Mo—Orear v Dierks Lumber Co, 176 S W 467, 188 Mo App 729

Where removal will not injure land, building may be removed—J D McCollom Lumber Co v Whitfield, Tex Civ App, 59 S W 2d 1106, error refused

76. Iowa—Oswald v Buckholz, 13 Iowa 506

77. Ala—Wildman v Evans Bros Construction Co, 57 So 831, 175 Ala 333

40 C J p 509 note 97

78. Ala—Wildman v Evans Bros Construction Co, supra

79. Miss—Big Three Lumber Co, Inc v Curtis, 93 So 487, 130 Miss 74

80. Mont—Grand Opera House Co v Maguire, 37 P 607, 14 Mont 558

81. Mont—Midland Coal & Lumber Co v Ferguson, 202 P 389, 61 Mont 403

82. Okl—Sanders v Texas Producing Co, 218 P 807, 92 Okl 141
40 C J p 509 note 3

Concurrent liens

Ind—Hochstetler v A Allen Wilkenson Lumber Co, 24 N E 3d 432, 107 Ind App 336.

83. Pa—Harbach v Kurth, 18 A 1063, 131 Pa 177

10 C J p 509 note 4

84. Pa—Gill v Weston, 1 A 917, 110 Pa 305

Purchaser takes subject to prior recorded mortgages

Conn—Stein v Davidson, 147 A 1, 110 Conn 4

N J—Republic Fireproofing Co v Mo-Ray Realty Co, 136 A 335, 5 N J Misc 205

N D—Bovey, Shute & Jackson v Odegaard, 208 N W 111, 53 N D 871, followed in American State Bank of Balfour v Odegaard, 208 N W 114, 5 N D 878

Sale free of encumbrances

(1) Where mortgages were prior to mechanic's lien purchase under lien foreclosure stated to be clear of incumbrances was clear of such incumbrances only as were affected by foreclosure—Stein v Davidson, 147 A 1, 110 Conn 4

(3) On petitions to establish mechanics' liens, where court ordered property sold free of encumbrances, a mortgagee to whom the curtesy interest was released by the mortgage was held entitled to lien against such curtesy interest for materials furnished by the mortgagee—Doran v Britto, 161 A 141, 53 R I 425

85. Ala—Jackson v Farley, 103 So 882, 212 Ala 594

Ind—Deming-Colborn Lumber Co v Union Nat Sav & Loan Ass'n, 51 N E 936 151 Ind 463

86. Ill—Topping v Brown, 63 Ill 348

87. Ill—Topping v Brown, supra

88. Ill—Topping v Brown, supra

89. Ark—Barton-Mansfield Co v Collins, 42 S W 2d 563, 184 Ark 424

90. Mo—Uhrig v Hill-Behan Lumber Co, 110 S W 2d 412, 341 Mo 851

Equity of redemption closed

A sale by special master in suit to foreclose materialman's liens closed all equity of redemption of the owners, and deed executed by owners to purchaser at foreclosure sale was of no effect further than an estoppel to thereafter claiming an interest in the land—Meyer v Bricklayers, Masons & Plasterers Union, Local No 7, 198 So 78, 144 Fla 401

Order granting owner right to redeem realty from mechanic's lien foreclosure sale within specified time was held erroneous, in absence of agreement between parties—Barton-Mansfield Co v Collins, 42 S W 2d 563, 184 Ark 424

Holders of notes secured by subordinate trust deed, who foreclosed trust deed and bought property in after suit to foreclose mechanic's lien had been filed, but before sale in mechanic's lien foreclosure, had no right, while sale stands, to redeem property from subsidiary of mechanic's lien claimant which had acquired property at sale in pro-

such right is conferred or created by statute⁹¹

Where created by statute, the right of redemption must be exercised in substantial conformity with the statute,⁹² and, where so exercised, cannot be denied by the court⁹³. In order to be effective the statutory right of redemption must be exercised within the time⁹⁴ and in the mode or manner⁹⁵ provided by law, and the person exercising, or attempting to exercise, the right must be within the class of persons to whom the statute accords the right⁹⁶. Payment of the proper amount is necessary to effect a redemption,⁹⁷ but a tender of the amount necessary

to redeem is not always a necessary condition precedent to the institution of a suit in equity to redeem⁹⁸. If under a decree of strict foreclosure on a mechanic's lien, with judgment for possession and stay of execution until after the day limited for redemption by the last in order of several junior encumbrancers, the latter redeems within the time limited, he cannot take any benefit from the judgment for possession⁹⁹.

Persons entitled to redeem Generally the right of redemption exists only in favor of a person who has an interest in the land sold,¹ the security and

ceeding to foreclose mechanic's lien, nor could holders require mechanic's lien claimant or subsidiary to compensate them for their loss—Uhrig v Hill-Behan Lumber Co., 110 S W 2d 412, 341 Mo 851

91 Cal—Corpus Juris cited in Wilde v M J Murphy, Inc., 154 P 2d 470, 471, 67 Cal App 2d 431
Conn—City Lumber Co of Bridgeport v Murphy, 179 A 389, 130 Conn 16

Mo—Uhrig v Hill-Behan Lumber Co., 110 S W 2d 412, 341 Mo 851
40 C J p 510 note 12

Redemption from mortgage by holder of mechanic's lien see the C J S title Mortgages § 834, also 42 C J p 368 notes 97, 98

92 Cal—Wilde v M J Murphy, Inc., 154 P 2d 470, 67 Cal App 2d 431

Iowa—Green Bay Lumber Co v Leitzen, 215 N W 639, 204 Iowa 594

93. Minn—Milner v. Norris, 13 Minn 455

94. Ala—Wachter v Leeth Nat Bank, 200 So 422, 240 Ala 604
Colo—Twogood v Ocsay, 49 P 2d 437, 97 Colo 300

Iowa—Murray v Kelroy, 275 N W 21, 223 Iowa 1331
40 C J p 510 note 13

Power of court to fix time

(1) In the absence of statutory provision, the court cannot extend the statutory time within which real property must be redeemed from a sale made in proceedings to foreclose a mechanic's lien—State v Kerr, 53 N W 719, 51 Minn 417

(2) Some statutes give the court power to fix a time to redeem other than that specified—Saginaw Lumber Co v Wilkinson, 254 N W 240, 266 Mich 661

(3) Under such a statute, where defendant appealed from decree foreclosing mechanic's lien before beginning of period fixed by the court in which sale might be held, defendant was given reasonable time to redeem after affirmance of decree on appeal, though time fixed by trial

court for redemption had passed—Saginaw Lumber Co v Wilkinson, supra

Good faith occupancy

(1) Under some statutes, the time within which defendant owner of the property must redeem depends on his good faith occupancy of the premises—J B Ehrsam & Sons Mfg Co v Rice, 112 P 2d 95, 153 Kan 483

(2) Evidence that lessor had given notice of cancellation of the lease did not establish "abandonment" of the property or that defendant tenant was not occupying it in good faith, so as to authorize court to limit period of redemption—J B Ehrsam & Sons Mfg Co v Rice, supra

95. Cal—Corpus Juris cited in Wilde v M J Murphy, Inc., Cal App, 154 P 2d 470, 471, 67 Cal App 2d 431

Iowa—Green Bay Lumber Co v Leitzen, 215 N W 639, 204 Iowa 594

40 C J p 510 note 14

Affidavit of redemptioner

Redemption from mechanic's lien foreclosure sale by mortgage assignee, whose affidavit overstated amount due, was held invalid against assignee of later judgment—Green Day Lumber Co v Leitzen, supra

96. Ala—Wildman v Evans Bros Construction Co., 57 So 831, 175 Ala 333

40 C J p 510 note 15

97. Kan—Lampe v Star Lumber Co., 155 P 918, 97 Kan 376

40 C J p 511 note 31

Rejection of proper tender

Where plaintiff, whose tender was wrongfully refused by clerk, sued to enforce right to redeem and secured temporary injunction, portion of judgment making payment of defendant's attorneys' fees condition precedent to right to redeem on theory that injunction had been dissolved was held error, where temporary injunction issued was merely collateral to main proceedings, and trial court in its judgment did not dissolve temporary injunction in

event that plaintiff redeemed—Werner v Hammill, 257 N W 792, 219 Iowa 314

Insufficient tender

A tender of less than what the purchaser is entitled to receive in redemption under the statute is insufficient and ineffectual—Wilde v M J Murphy, Inc., 154 P 2d 470, 67 Cal App 2d 431

Rents and profits of purchaser

(1) Successor of purchaser of premises at foreclosure sale thereof under senior mechanic's lien was held not accountable for rents and profits to junior mortgagee when junior mortgagee, who was not made party to mechanic's lien foreclosure suit, sought to redeem—Kurz v Pappas, 156 So 737, 116 Fla 324

(2) However, the junior encumbrancer was held entitled to deduct from the prior lien claim the amount of taxes accruing and unpaid during time when prior lienholder and his successors had possession—Kurz v Pappas, supra

98. Iowa—Jones v Hartssock, 42 Iowa 147

40 C J p 511 note 33

99. Conn—Throckmorton v Shelton, 36 A 805, 68 Conn 413

1. Ind—Buser v Shepard, 8 N E 280, 107 Ind 417

Assignee of contract

An assignee of a contract for sale of realty who had taken without notice, either actual or constructive, of forfeiture of contract by vendor's grantee, was entitled to redeem after sale of property under first mechanic's lien as against contention that conveyance from purchaser to purchaser's assignee was ineffective to convey title—Murray v Kelroy, 275 N W 21, 223 Iowa 1331

Lessee or tenant

(1) The lessee has no right, under some statutes, to redeem from the sale of a building—Wildman v Evans Bros Construction Co., 57 So 831, 175 Ala 333—40 C J p 510 note 15 [a]

(2) Under other statutes, however, a tenant occupying the premises sold

protection of which render the right of redemption necessary,³ and his bill to redeem must show on its face that he possesses the proper interest³

Under some statutes, the judgment debtor⁴ or his assignee or transferee⁵ has a prior right to redeem from the sale, which is not cut off by the existence of a mortgage, the holder of which is given a secondary right to redeem⁶ Foreclosure of the mortgage, however, does cut off the judgment debtor's right to redeem from the mechanic's lien sale after expiration of the time to redeem from the mortgage foreclosure sale⁷

A junior mechanic's lienholder may redeem from a sale under the senior lien,⁸ provided, under some statutes, he has reduced his lien to judgment,⁹ and exercises his right within the time specified,¹⁰ and, where a sale is made under one of two coordinate mechanics' liens, the other lienholder has the right to redeem¹¹

A junior mortgagee who was not made a party to the suit to foreclose a mechanic's lien has the right to redeem the premises from the sale,¹² and such right extends also to his assignee¹³ or the purchaser at a foreclosure sale under his mortgage¹⁴ However, a mortgagee not made a party to the

foreclosure proceedings need not file a bill to redeem from the sale in order to enforce his rights,¹⁵ he may file a bill to foreclose his mortgage as if no mechanics' lien proceedings had been taken,¹⁶ and the facts that he does so and obtains a decree of sale do not prevent him from subsequently redeeming from the mechanic's lien¹⁷

It has been held that a simple judgment creditor has no right, after the execution of a sheriff's deed under a sale on foreclosure of a prior mechanic's lien, to redeem from the sale,¹⁸ but under some statutes judgment creditors have a right to redeem after the expiration of a certain time during which the judgment debtor has not redeemed,¹⁹ although, even in jurisdictions where such statutes exist, where a sale to foreclose a mechanic's lien is void for want of jurisdiction, judgment creditors cannot obtain any rights by redeeming from such sale²⁰

It has been held that a party to the foreclosure proceedings cannot redeem from his own sale²¹ However, under a statute permitting redemption by the owner of the senior lien subsequent to the mechanic's lien on which the sale was held, the mechanic's lienor, whose judgment has been only partially satisfied by the sale, can redeem where he records a

in good faith may redeem from the sale—*J B Ehlram & Sons Mfg Co v Rice*, 112 P 2d 95, 153 Kan 488

(3) A tenant whose interest in the land and in a structure placed thereon by him was sold to enforce a mechanic's lien may redeem from the sale as a sale of realty, notwithstanding his right to remove the structure from the premises on termination of the lease and the sheriff's return stated that he had sold personal property—*J B Ehlram & Sons Mfg Co v Rice*, supra

Life tenant and remainderman

Where as a result of a conspiracy between a remainderman and others the life tenant was disabled from redeeming property sold under a lien against the life estate and remainder, redemption being accomplished by the other conspirators under a sham mortgage, the redemption was held to be one by the remainderman as owner, having the effect of annulling the foreclosure sale and reinstating the former estate, both for life and remainder—*Hall v Hall*, 216 NW 798, 173 Minn 128

2. Iowa—*Sheppard v Messenger*, 77 NW 515, 107 Iowa 717
40 C J p 510 note 17

3. Ind—*Buser v Shepard*, 8 NE 380, 107 Ind 417
40 C J p 510 note 18

4. Ala—*Wachter v Leeth Nat Bank*, 200 So 423, 240 Ala 604.

5. Iowa—*Murray v Kelroy*, 275 N W 21, 233 Iowa 1331

Extinction of junior lien

Where the holder of junior mechanics' liens did not redeem within required time after his foreclosure of prior mechanic's lien but brought proceedings to foreclose such junior liens after expiration of his time to redeem and before expiration of the debtor's period of redemption, the right of judgment debtor to redeem and his right of possession were not affected, and hence an assignee of the debtor had same rights and, on redeeming from sale under proceedings to foreclose prior lien, obtained property clear of junior liens—*Murray v Kelroy*, supra

6. Ala—*Wachter v Leeth Nat Bank*, 200 So 423, 240 Ala 604

7. Ala—*Wachter v Leeth Nat Bank*, supra

8. Iowa—*Phelps v Pope*, 6 NW 42, 53 Iowa 691—*Jones v Hartsock*, 42 Iowa 147

Several liens in same person

A person holding three mechanics' liens, by failing to redeem the two junior liens on foreclosing first mechanic's lien, conceded that the debt-paying power of the debtor's property in the land had been exhausted—*Murray v Kelroy*, 275 NW 21, 233 Iowa 1331

9. Iowa—*Murray v Kelroy*, supra

10. Iowa—*Murray v Kelroy*, supra

11. Iowa—*Phelps v Pope*, 6 NW 42, 53 Iowa 691

12. Fla—*Kurz v Pappas*, 156 So 737, 116 Fla 321—*Kurz v Pappas*, 146 So 100, 107 Fla 861, motion granted 147 So 371, 107 Fla 861
40 C J p 510 note 21

13. Cal—*Whitney v Higgins*, 10 Cal 547, 70 Am D 748

14. Cal—*Whitney v Higgins*, supra

15. Ill—*Becker v Fink*, 206 Ill App 218

16. Ill—*Becker v Fink*, supra

17. SD—*American Banking & Trust Co v Lynch*, 73 NW 908, 10 SD 410

18. Iowa—*Diddy v Russar*, 8 NW 655, 55 Iowa 699
40 C J p 510 note 27

19. Ill—*Boynton v Pierce*, 49 Ill App 497, affirmed 37 NE 1024, 151 Ill 197
40 C J p 510 note 28

20. Ill—*Holcomb v Boynton*, 37 NE 1031, 151 Ill 294

21. Ill—*McCullough v Rosa*, 4 Ill App 149
10 C J p 510 note 30.

transcript of his judgment after the sale but before the sheriff's deed has been issued ²²

Loss of right Under some statutes, a party appealing from the judgment of foreclosure loses his right of redemption,²³ and, under other statutes, an unexcused failure of the debtor to surrender possession of the property to the purchaser within a specified time after demand will forfeit his right to redeem ²⁴

§ 348. Distribution of Proceeds

As a general rule, the proceeds of the sale in proceed-

ings to enforce a mechanic's lien are applied to the payment of costs and to the liens and other encumbrances in order of their priority

Statutes regulating the distribution of the proceeds of a sale among mechanics' lien claimants control and should be followed ²⁵ Generally, the proceeds of the sale in such a proceeding are to be applied to the payment of costs properly chargeable to the fund,²⁶ and the liens and other encumbrances, if any, in the order of their priority,²⁷ and the surplus, if any, paid over to the persons entitled thereto ²⁸

Surplus funds remaining in the sheriff's hands

22. Colo—*Twogood v Ocsay*, 49 P 2d 437, 97 Colo 300

Reason for rule

Recordation of transcript of judgment while owner had record title and right of redemption and possession created a senior lien within meaning of statute—*Twogood v Ocsay*, supra

23. Iowa—*Ebinger v Wahrer*, 238 NW 587, 213 Iowa 84

24. Ala—*Wachter v Leeth Nat Bank* 200 So 423, 240 Ala 604

Bill to redeem must allege compliance with statute or show facts relieving complainant of duty to comply—*Wachter v Leeth Nat Bank*, supra

Married woman debtor is not excused from complying with the statutory provision requiring the debtor to deliver land to purchaser on foreclosure after written demand for possession has been made to preserve right to redeem—*Wachter v Leeth Nat Bank*, supra

Possession with purchaser's consent

Under the statute, if debtor remains in possession of property sold after the expiration of ten days after written demand for possession has been made by purchaser on foreclosure of materialman's lien, debtor must show that possession was with consent of purchaser so as to make him a tenant of some sort and preserve right of redemption—*Wachter v Leeth Nat Bank*, supra

Recognition of purchaser as landlord

Where demand was made on debtor for possession after register's sale on foreclosure of materialman's lien and debtor failed to deliver possession and did not deliver paper recognizing purchaser as landlord by virtue of sale under decree of the circuit court until more than ten days had expired from date of notice, debtor's right of redemption was forfeited—*Wachter v Leeth Nat Bank*, supra

25. Del—*In re Elder*, 129 A. 510, 3 Harr 11
40 C J p 512 note 43.

Claims which participate

(1) Under some statutes, holders of mechanics' lien judgments are entitled to participate in the proceeds of a sale of the property under another mechanic's lien, where rendered before the sale—*In re Republic Engineering Co*, 130 A 498, 3 Harr, Del, 81

(2) Such judgments may also participate, although rendered after the sale, where the proceedings to enforce the liens were instituted before the sale—*In re Republic Engineering Co*, supra

(3) On the other hand, lien judgments rendered after the sale of the property under another mechanic's lien on proceedings begun after such sale do not participate in the proceeds—*In re Republic Engineering Co*, supra

26. Minn—*Erickson v Ireland*, 158 NW 918, 134 Minn 156
40 C J p 511 note 35

27. Ala—*City Realty & Mortgage Co v Tallapoosa Lumber Co*, 164 So 55, 231 Ala 338—*Baker Sand & Gravel Co v Rogers Plumbing & Heating Co*, 164 So 591, 228 Ala 612, 103 A L R 346

Ark—*Lyle v Latourette*, 192 SW 2d 521, 209 Ark 721

Pa—*In re Baker's Estate*, 47 Pa Dist & Co 444, 18 Lanc Rev 365
RI—*Doran v Britto*, 161 A 141, 52 RI 425

40 C J p 511 note 36

Disposition of money withheld after stop notice see supra § 117

Right to fund deposited in court to discharge lien see supra § 233
Priorities see supra §§ 197-215

Lienors not joined in sale may file claims against proceeds with the auditor—*Bounds v Nuttle*, 30 A 2d 263, 181 Md 400

Proportion

(1) Where proceeds of foreclosure sale are substituted for land and building, mortgagee and mechanic's lien claimants are entitled to the same proportionate interest in such proceeds that they had in the property before it was sold.—*Moulding-*

Brownell Corporation v E C Delfosse Const Co, 26 NE 2d 709, 304 Ill App 491

(2) The decree usually divides the proceeds of the sale into two funds, of which mortgagees have priority over one and lienors over the other, bearing the same ratio to each other as do the value of the land and whatever was on it immediately before installation of the improvement, and the value of the enhancement created by the improvement under the contract

Ala—*Protective Life Ins Co v Holland Furnace Co*, 173 So 379, 234 Ala 38

Ill—*Moulding-Brownell Corporation v E C Delfosse Construction Co*, supra

Rights of lessor

Fact that court in materialman's action to enforce lien on improvements made by lessee denied lessor benefits of forfeiture clause for non-payment of rent and directed sale of improvements with application of proceeds to payment of rents and then materialman's lien was held not to prejudice materialman's substantial rights—*Mayfield Planing Mills v Jackson Purchase Stock Yards Co*, 58 SW 2d 617, 248 Ky 449

Vendor's lien

(1) Grantor, with lien for equity for unpaid purchase price, can participate in proceeds from sale of house under lien for labor and materials therein, where construction was unauthorized by grantor—*Miller v Johnson*, 281 SW 467, 213 Ky 473

(2) Where only interest of purchaser under executory contract and not interest of vendor and his successors could be subjected to mechanic's and materialman's liens, but vendor's successor was made party to proceeding to foreclose such liens, principal indebtedness owing to vendor's successor and interest thereon was payable out of proceeds of sale before mechanic's and materialman's liens—*Burton Walker Lumber Co v Howard*, 66 P 2d 134, 92 Utah 92

28. Utah—*Badger Coal & Lumber*

after discharging the lien are in custodia legis,²⁹ and the sheriff holds such funds subject to the orders of the court³⁰ which determines the proper distribution thereof³¹ While in such custody the funds are not subject to an independent attachment or writ of execution³² Where part of the proceeds belonging to the legal owner is, pursuant to the decree, deposited in court to await its further orders, the court has power to order taxes due on the property before sale paid out of such proceeds³³

An auditor, appointed to distribute the fund arising from the sale of the property described in the mechanics' liens on which judgments have been recovered, cannot restrict the liens to a portion of such property, on the ground that the curtilage des-

ignated by claimants is more than sufficient for the necessary uses of the building³⁴

It has been held that claimants to the fund realized from a sale of the premises may contest a lien claim not reduced to judgment³⁵ Some courts hold generally that a contesting creditor may, after the judgment and in the proceedings for distribution of the proceeds of sale, attack the validity of a mechanic's lien,³⁶ but other courts hold that it is too late for him to raise the issue unless for special cause shown³⁷

§ 349. Review

Questions as to appellate practice are discussed in Appeal and Error.

G. COSTS AND FEES

§ 350. In General

- a. Right to costs generally
- b. Tender, payment into court, or offer of judgment

a. Right to Costs Generally

The prevailing party in an action to enforce a mechanic's lien is generally entitled to costs, either under the mechanics' lien statutes or under general statutes relating to costs.

Although the mechanics' lien statutes ordinarily expressly provide for a recovery of costs in an action to enforce a mechanic's lien, the right to a recovery of costs may rest on the mechanics' lien statute or on the statutes relating generally to the form of remedy through which the lien is enforced,³⁸ and the amount and items of costs are controlled by general statutes, in the absence of a specification to the contrary.³⁹ A statutory limit on the

Co v. Olsen, 187 P 680, 50 Utah 307
40 C J p 511 note 37

Who entitled

One claiming the surplus or part thereof must either own the equity of redemption at the time of the sale or be one then holding a lien or vested right in the property—Meyer v Bricklayers, Masons & Plasterers Union, Local No 7, 198 So 78, 144 Fla 401

Assignment of surplus

(1) If defendant in suit to foreclose materialman's liens was sole owner of property, he was vested with legal right to assign or dispose of his right to any surplus which might remain in hands of court after sale by special master, and such assignment might be effectively made either before or after sale of property under foreclosure—Meyer v Bricklayers, Masons & Plasterers Union, Local No 7, 198 So 78, 144 Fla 401

(2) The purchaser at the foreclosure sale to whom the original owner executed a deed to the property after the sale, without any consideration being paid therefor, is not entitled to the surplus as against a prior assignee for value—Meyer v Bricklayers, Masons & Plasterers Union, Local No. 7, supra.

29. Cal—Withington v Shay, 117 P 2d 415, 47 Cal App 2d 68, hearing denied 119 P 2d 1, 47 Cal App 2d 68

30. Cal—Withington v Shay, supra

31. Cal—Withington v Shay, supra

32. Cal—Withington v Shay, supra

33. Tex—Kahler v Betterton, Civ App, 51 SW 289

34. Pa—Sicardi v Keystone Oil Co, 24 A 161, 149 Pa 139
40 C J p 512 note 41

35. NJ—Peplak v Halbert, 137 A 834, 5 NJ Law 471

36. Pa—Prudential Trust Co v Hildebrand, 34 Pa Super 249

37. Ga—Yarborough v Lumpkin, 52 Ga 280

38. Mont—Neuman v Grant, 92 P 43, 36 Mont 77

Wis—George v Everhart, 15 NW 337, 57 Wis 397
40 C J p 517 note 48

Notice of intention to foreclose

Under a statute making notice of intention to foreclose to the owner or reputed owner a condition for the allowance of costs, notice to the record owner satisfies the requirement, although he is not the actual owner—Block v Love, 1 P 2d 588 138 Or 685.

Statement of claim

(1) Under some statutes, a materialman furnishing materials to a contractor is deprived of his right to costs, disbursements, and attorney's fees if, prior to the action, he failed to furnish the owner, on demand, a statement of his claim—Paget v. Peters, 286 P 983, 133 Or 608, rehearing denied 289 P 1119, 133 Or 608

(2) Failure of lien claimant to furnish statement of claim to party purchasing property after commencement of suit was held not to defeat claimant's right to recover such fees, costs, and disbursements—Paget v. Peters, supra

39. Tex—Switzer v Mills, Civ App, 47 SW 2d 334, error refused
40 C J p 518 note 49

Cost of reference to master

Ill—Chicago Art Marble Co v A Smith & Co, 26 NE 2d 703, 304 Ill App 582

Lien for public improvement

On foreclosure of mechanic's lien for public improvement, items allowed plaintiff on mortgage foreclosure were held not allowable as costs, as in the case of an ordinary mechanic's lien—Wilson v Moon, 73 NYS 775, 152 Misc 485

Extra allowance

(1) The language of a statute au-

amount of costs may not be exceeded⁴⁰ Costs will not be taxed for unnecessary expenses, unless the court is required to tax them by an affirmative provision of the law⁴¹

In accordance with general rules, the prevailing party is ordinarily entitled to his costs,⁴² although the proceedings may be equitable in nature, since the statute as to costs controls and the rule which would otherwise prevail in equity does not apply⁴³ The statutes sometimes make the costs in mechanics' lien cases a matter for the discretion of the court,⁴⁴ in the exercise of which the costs are also ordinarily assessed against the losing party⁴⁵

In equity in a proper case the costs may be apportioned⁴⁶ between necessary parties,⁴⁷ and the court in adjusting costs will consider the reasonableness or good faith of the claim where it is filed for

a larger amount than is found due⁴⁸

The costs which may be taxed against a party to a proceeding are those only which are incident to the particular contest in which he is engaged⁴⁹ Where one is not liable on the issue of debt raised in a foreclosure suit, but is a proper party to the contest in respect of the right to foreclose, as one claiming an interest in the property under a lien for purchase money, it is proper to adjudge costs against him and his codefendant on a judgment for foreclosure,⁵⁰ but prior encumbrancers are not liable for costs,⁵¹ and, being summoned in as required by statute and purchasing the property at the master's sale for less than the mortgage debt, a prior encumbrancer is entitled to the proceeds without deduction for any costs except the expenses of the sale⁵² Where claimant recovers, one who defends in the place of the owner is not entitled to be re-

thorizing an extra allowance in an action to compel determination of a claim to real property is given a restricted meaning and held not to apply to an action to foreclose a mechanic's lien—Wright v Reusens, 15 NYS 504, 60 Hun 585

(2) Other allowances see 40 C J p 517 note 48 [c]

40. NY—Carroll McCreary Co v People, 274 NYS 585, 242 App Div 775, modified on other grounds 195 NE 675, 267 NY 37

On reduction of costs to proper amounts, the excessive amounts from each allowance is deducted in proportion to the sums allowed—Carroll McCreary Co v People, supra

41. NM—Neher v Crawford, 65 P 156, 10 NM 725
40 C J p 518 note 50

Fee for service of notice

Fee for personal service of notice of mechanic's lien is not taxable disbursement where statute permits service by mail—Hesse-Schnitt v Brahe, 234 NYS 535, 134 Misc 67

42. Ky—Mays v Stegeman, 280 S W 464, 213 Ky 60

Tenn—Richmond Screw Anchor Co v E W Minter Co, 300 SW 574, 156 Tenn 19

Tex—Switzer v Mills, Civ App, 47 SW 2d 334, error refused
40 C J p 518 note 52

Who is prevailing party

(1) Where plaintiff sued to foreclose a mechanic's lien, and defendant relied upon an account stated for a lesser amount as a defense, and plaintiff recovered a money judgment for only the amount agreed to in account stated, defendant was the prevailing party and entitled to costs—Luebben v Metlen, 100 P 2d 935, 110 Mont 350

(2) In such a case the suit did not

become an "action for the recovery of money or damages" within meaning of statute concerning costs—Luebben v Metlen, supra

Judgment for less than claim

(1) The rule allowing costs to the successful party may be applied though the judgment recovered is less than the amount claimed, where there was no offer of judgment by defendant, but a general denial by him and a demand for dismissal, with costs, and the litigation was severe and protracted—Valk v McKeize, 16 NYS 741, 62 Hun 620

(2) Although plumbing contractor was entitled to deduct from balance due manufacturer cost of repairing defects in material furnished by manufacturer, manufacturer was entitled to cost of recording its lien—John Douglas Co v Cabirac, La App, 170 So 381

Costs divided equally on dismissal
La—Derbes v Marshall, App, 183 So 74

43. Ill—Kalina v Steinmeyer, 103 Ill App 502

40 C J p 519 note 54

44. Iowa—Perkins Supply & Fuel Service v Rosenberg, 282 NW 371, 226 Iowa 27

NM—Hobbs v Morrison Supply Co, 73 P 2d 325, 41 NM 644

NY—Servidone v Hirschmann, 52 NYS 2d 434, 268 App Div 1075
40 C J p 518 note 53

Limits applicable to actions at law on contracts do not apply to an equitable action to foreclose a mechanic's lien—Rustles v Christensen, 241 NW. 635, 207 Wis 326

45. NM—Hobbs v Morrison Supply Co., 73 P 2d 325, 41 NM 644

46. Cal—Lasky v American In-

demnity Co, 282 P 974, 102 Cal App 192

40 C J p 519 note 55

47. Cal—Lasky v American Indemnity Co, supra

Costs against surety on bond

Where subcontractor had a cause of action on a contractor's bond and might, by amendment, have joined the surety thereon in the action to enforce his lien, had he not been misled by the consolidation of his action with the owner's action on such bond at the surety's insistence and the trial of the case on such theory, an award of costs to the subcontractor, not suing the surety or seeking recovery on the bond, was not a denial of substantial justice to the surety—Lasky v American Indemnity Co, supra.

48. US—Schmubach v Caldwell, WV Va., 196 F 16, 115 CCA 650

Half costs

An award to contractors, seeking to enforce contractors' lien on defendants' premises, of only one half the costs, where contractors prevailed with respect to less than half of their claim for repair work done on defendants' premises and defendants were allowed damages caused by unworkmanlike performance of repair work was held not an abuse of discretion—Baker v Palmer, 75 NE 2d 50, 332 Ill App 284

49. NY—Condon v St Augustine Church, 98 NYS 253, 112 App Div 168

40 C J p 519 note 57

50. Tex—Lindsley v Parks, 43 S W 277, 17 Tex Civ App 527.

51. Ind—Close v Hunt, 8 Blackf 254

52. RI—Jepherson v. Green, 52 A. 808, 24 RI 83.

imbursed for his costs, expenses, and attorney's fees⁵³

Where the amount of the recovery is a factor in determining the right to costs, interest awarded in the foreclosure proceedings constitutes a part of the recovery for such purpose⁵⁴

Personal judgment. The lienor who succeeds may recover costs against the owner of the property, since the liability of the owner personally is subject to his liability for a personal judgment in any event⁵⁵ Where plaintiff fails to establish his lien but recovers a personal judgment, it has been held that the rule of costs should be the same as if the action had originally been one for a money judgment⁵⁶

Prayer Where claimant shows himself to be entitled to a decree for the relief prayed, he may have a decree for costs, although they may not have been specifically demanded⁵⁷

Payment The court may direct that the costs be paid out of the fund held for distribution⁵⁸

b. Tender, Payment into Court, or Offer of Judgment

In a proceeding to enforce a mechanic's lien the right to costs may be affected by a tender, an offer of judgment, or a payment into court.

Where a good tender of the full amount has been made prior to the filing of the lien and has been refused, plaintiff cannot recover costs⁵⁹ or attorney's fees,⁶⁰ but costs will be awarded to defendant⁶¹ However, where a defense of tender is not disposed of, neither plaintiff nor defendant has any right to have his costs taxed as against the other⁶²

Where defendant offers judgment, if the judgment recovered by plaintiff is more favorable than

that offered, defendant is liable for costs⁶³ An offer of judgment is equivalent to an offer that the lien may be enforced for the sum specified, and, if less is recovered, defendant will recover costs accruing after the offer⁶⁴

A subcontractor cannot recover costs as against the owner where the owner has at all times been ready and willing to pay the amount due the contractor, and the subcontractor's recovery cannot exceed such amount.⁶⁵

Payment into court Where the mechanic's lien statute makes a provision for a deposit of money by the owner in court to take the place of the property and to be subjected to the lien, such a provision supplants a general statute as to offer of judgment in actions generally⁶⁶ An offer of judgment not in the form prescribed by the Lien Law may be presumed to have been under a general statute⁶⁷

§ 351. Consolidation of Proceedings; Joinder of All Lienholders

Where the statute requires all liens to be disposed of in one action, only the lienholder who instituted the action has been held entitled to costs

Where it is the intention of the statute that there shall be but one action brought, to which all the lienholders shall be made parties, it has been held that only the lienholder who brings the action is entitled to costs⁶⁸ Where independent suits are brought by separate claimants through the same attorney, all the costs made in the suit which is consolidated with the action as prosecuted should be awarded against both claimants,⁶⁹ and the owner should not be charged with the costs in both suits.⁷⁰ A claimant should not be deprived of his right to a hearing in court on the question of the settlement of the legal costs which he has incurred,⁷¹ and,

53. Wis—Neil & Co, Inc v Wisconsin Tel Co, 175 NW 89, 170 Wis 298

54. NY—Servidone v Hirschmann, 51 NYS 2d 917, 268 App Div 347, reargument denied 53 NYS 2d 434, 268 App Div 1076, affirmed 62 N E 2d 232, 294 NY 786

55. NY—Holler v Apa, 18 NYS 588
40 CJ p 519 note 62

56. NY—Eastern Wood-Working Co v Bisgeier, 181 NYS 215, 111 Misc 346

57. Ill—Walsh v North American Cold Storage Co, 103 NE 185, 260 Ill 322

58. NC—Bond v Pickett Cotton Mills, 81 SE 936, 166 NC 20
40 CJ p 519 note 65

Payment of costs out of proceeds of sale see supra § 348

59. Idaho—Boise Lumber Co v Boise City Independent School Dist, 214 P 143, 36 Idaho 778

Wash—Hughes v Flint, 112 P 633, 61 Wash 460

60. Ind—Romona Oolitic Stone Co v Weaver, 97 NE 441, 49 Ind App 368

Wash—Hughes v Flint, 112 P 633, 61 Wash 460

61. Idaho—Boise Lumber Co v Boise City Independent School Dist, 214 P 143, 36 Idaho 778

62. Man—Nixon v Betsworth, 16 Man 1, 2 West LR 570

63. Ill—Hess v Peck, 111 Ill App 111

NY—Fargo v Hamlin, 5 NY St 297

64. NY—Lumbard v Syracuse, B & N Y R Co, 62 NY 290

65. Utah—West v Pinkston, 138 P

1152, 44 Utah 123, Ann Cas 1916D 1065

66. NY—Ball v Doherty, 138 NYS 1014, 144 App Div 277

67. NY—Salerno v Vogt, 138 NYS 664, 78 Misc 64

68. SD—Peter Mintener Lumber Co v Janisch, 181 NW 914, 44 SD 42

Joinder and splitting of liens in proceedings for enforcement see supra § 272

69. Ill—Kleinschnittger v Dorsey, 152 Ill App 598

70. Ill—Kleinschnittger v Dorsey, supra.

71. Cal—Martin v Becker, 146 P 665, 169 Cal 301, Ann Cas 1916D 171

where several lien suits are consolidated and, on the motion of one claimant who was not given notice of the setting of the case for trial, a new trial is granted conditionally, unless the amount due such claimant is deposited in court, such claimant should be allowed to file a cross bill and establish the amount to which it is entitled in addition to its claim of lien.⁷² Where a materialman brings his action on behalf of himself and such other lienors as contribute to the expense of the action, costs to such lienors as prevail in the actions are borne equally by the defendant owner and the materialman who failed to establish his lien.⁷³ Fees for filing accounts allowed to subcontractors should be deducted from the amount found due from the owner to the contractor.⁷⁴

Dismissal as to owner. All those subcontractors, parties defendant, who, after appearance and proof of their claims, there being no contest between themselves, without objection by the contractor, have allowed their liens to expire during the pendency of the action without an order of the court continuing them, should be dismissed as to the owners, with costs, as for want of prosecution, but should have judgment against the contractor for their claim, and costs as on failure to answer.⁷⁵

Separate bills. Where different claimants fail to establish their liens in the action or to recover personal judgments, costs may be awarded against all, but the owner will not be entitled to a separate bill against each claimant.⁷⁶

§ 352. Filing and Recording Fees; Abstract

The cost of filing and recording the lien is allowable under some statutes

Where the statute so provides, the lienor may recover the costs incurred by him for filing and recording his lien,⁷⁷ but, where the statute does not cover such items, the court may not allow any sum for the preparation and verification of the lien,⁷⁸ or for the abstract of title to the property covered by the lien.⁷⁹ Under some of the statutes the allowance of the cost of filing and recording the lien is a matter for the discretion of the court.⁸⁰ The lienor may recover the costs of filing his lien only if he succeeds in its enforcement.⁸¹ Where under the circumstances no lien could be acquired, an allowance may not be made of a filing fee.⁸²

§ 353. Attorney's Fees

Attorney's fees may be allowed to the prevailing party where the contract or statute provides therefor.

In the absence of an agreement of the parties therefor,⁸³ the allowance of an attorney's fee depends entirely on statutory authority without which such an item forms no part of the proper recovery in these proceedings.⁸⁴ A mechanic's lien holder, however, may recover attorney's fees from his obligor where the contract between them provides therefor,⁸⁵ but one not a party to such a contract may not be held liable for attorney's fees thereunder.⁸⁶

72. Cal—Martin v Decker, *supra*

73. SC—Greene v Brown, 19 SE 2d 114, 199 SC 218

74. Neb—Campbell v Kimball, 137 NW 142, 87 Neb 309

75. NY—Morgan v Stevens, 6 Abb NCas 356

76. NY—Woolf v Schaefer, 93 NY 184, 103 App Div 567

77. Cal—Mulcahy v Buckley, 35 P 144, 100 Cal 481
40 CJ p 520 note 90

78. Mont—Neuman v Grant, 92 P 43, 36 Mont 77
40 CJ p 520 note 91

79. Mont—Newman v Grant, 92 P 43, 36 Mont 77

80. NM—Montgomery v Karavas, 114 P 2d 776, 45 NM 287

81. Wash—Young v Borzone, 66 P 135, 28 Wash 4, rehearing denied 66 P 421, 26 Wash 4
40 CJ p 520 note 93

82. Cal—Bates v. Santa Barbara County, 27 P 433, 90 Cal 543

83. Tex—Ross v. Fort Worth Nat Bank, Civ App, 30 SW 2d 518, error refused.

84. Tex—Switzer v Mills, Civ App, 47 SW 2d 334, error refused—Ross v Fort Worth Nat Bank, Civ App, 30 SW 2d 518, error refused
40 CJ p 521-522 note 5

Preparation of lien notice

Before bringing action to foreclose, holder of mechanic's lien was held not entitled to demand attorney's fee for preparation of lien notice—Generaux v Petit, 19 P 2d 911, 172 Wash 132

Against homestead

(1) In proceedings to foreclose a mechanic's lien against a homestead, the lien does not secure that part of the judgment allowing attorney's fees—Anderron v Hirsch, Tex Civ App, 112 SW 2d 535, error refused—Middleton v Dozier Const Co, Tex Civ App, 70 SW 2d 243—Harrop v Detroit Nat Loan & Investment Co, Tex Civ App, 204 SW 878

(2) Attorney's fees may not be included in amount for which homestead is sold in mechanic's lien foreclosure suit, notwithstanding lien note authorizes a personal judgment for attorney's fees—Guaranty Const Co v Atwood, Tex Civ App, 43 SW

2d 159, reversed on other grounds Atwood v Guaranty Const Co, Com App, 63 SW 2d 685

(3) It is otherwise where property involved was not owner's homestead when improvements were made or lien contract was executed—Summerville v King, 83 SW 680, 98 Tex 332—White v Dorier Const Co, Tex Civ App, 70 SW 2d 210

(4) Where a portion of the homestead has been abandoned, in foreclosing a materialman's lien on such portion there is no legal objection to including the amount of attorney's fees provided for in a contractual lien in the foreclosure—Lipacomb v Adamson Lumber Co, Tex Civ App, 217 SW 238

(5) Attorney's fees as not constituting part of improvement of homestead see Homesteads § 105

85. Ill—Fair Play Development Organization v Sarmach, 283 Ill App 593

Provision in note

Tex—Galbraith-Foxworth Lumber Co v Long, Civ App, 5 SW 2d 162, error refused

86. Ill—Fair Play Development Or-

An award of attorney's fees may also be made where provision therefor is made by a valid enactment,⁸⁷ and, while the validity of statutes authorizing the recovery of attorney's fees by a successful lien claimant has frequently been denied,⁸⁸ such statutes have also been upheld,⁸⁹ more particularly where they allow a recovery by either party if successful.⁹⁰ Under a statute which permits the court to allow costs and disbursements to a prevailing lien holder, it has been held that an allowance of attorney's fees may be made,⁹¹ and the statute as so

construed has been held valid.⁹² In any event a statute providing for attorney's fees will not be given a retroactive effect as to contracts entered into before its enactment,⁹³ or as to proceedings arising under earlier statutes.⁹⁴

Under some of the statutes, the allowance of attorney's fees as part of the costs is a matter for the discretion of the court, the statute not being considered mandatory.⁹⁵ Ordinarily attorney's fees cannot be recovered by a lien claimant, unless he is successful in his suit,⁹⁶ and under some statutes

ganization v Sarmach, 263 Ill App 593

87. Ind—Flanders v Ostrom, 187 N E 673, 206 Ind 87—Robertson v Sertell, 161 NE 669, 88 Ind App 591

Mont—Luebben v Metten, 100 P 2d 935, 110 Mont 350

NM—Montgomery v Karavas, 114 P 2d 776, 45 NM 287

Okl—Grisson v Frensley Bros Lumber Co, 136 P 2d 887, 192 Okl 413—Chaffin Bros Lumber Co v White, 86 P 2d 982, 164 Okl 253—Morley v McCaskey, 272 P 850, 134 Okl 54—Morley v. McCaskey, 270 P 1107, 134 Okl 50

Wash—Standard Lumber Co v Fields, 187 P 2d 233

40 C J p 520 note 95

In what court

Under some statutes, attorney's fees are allowable in some courts but not in others—Hendrix v Gold Ridge Mines, 54 P 2d 254, 56 Idaho 328—40 C J p 520 note 95 [c]

Transfer of lien to proceeds of sale
in mechanic's lien foreclosure does not defeat right to recover attorney's fees on judgment against property owners—Flanders v Ostrom, 187 NE 673, 206 Ind 87

Allowance out of fund

(1) Under some statutes, attorney's fees for mechanic's lien claimants are allowable only out of fund for claimants, which is sum applicable to payment of valid claims—Matzinger v Harvard Lumber Co, 155 NE 131, 115 Ohio St 555

(3) An award of attorney's fees to plaintiff in mechanic's lien foreclosure is improper, where fund realized on judgment and sale was insufficient to pay prior mortgage liens—Casey v Gaffney, 153 NE 232, 32 Ohio App 73

Action against fund

Action under mechanic's lien law to realize on lien claim against fund deposited by owner pending determination of claim is an action to enforce a lien, and hence comes within terms of statute providing attorney's fees—Detroit Graphite Co v Carney, 53 P 2d 584, 175 Okl 583

As against contractor's surety

Wash—Lent's, Inc v Strawhun, 83 P 2d 342, 196 Wash 457

Fee held reasonable

Wash—Standard Lumber Co v Fields, 187 P 2d 233

88. Fla—Security Finance Co v Gardener, 114 So 232, 94 Fla 549—Marlin v Walking Lumber & Supply Co, 113 So 714, 94 Fla 208—Martin v Wilson, 113 So 713, 94 Fla 207—Martin v Rothar, 113 So 713, 94 Fla 205

40 C J p 520 note 96

Attorney's fees are not allowable
under such a statute—Franklin Savings & Loan Co v Fisk, 124 So 42, 94 Fla 683—Martin v Walking Lumber & Supply Co, 113 So 714, 94 Fla 208—Martin v Wilson, 113 So 713, 94 Fla 207—Martin v Rothar, 113 So 713, 94 Fla 205

89. Nev—Hobart Estate Co v Jones, 274 P 921, 51 Nev 315
Wash—Generaux v Petit, 19 P 2d 911, 173 Wash 132
40 C J p 521-523 note 97

90. Mich—Grace Harbor Lumber Co v Ortman, 157 NW 96, 190 Mich 429

40 C J p 521-523 note 98

Successful party

(1) In action to enforce materialman's lien commenced after lien had been discharged by making cash deposit and posting of bond, successful party, whether lien claimant, owner, or contractor, should be allowed reasonable attorney's fees—Detroit Graphite Co v Carney, 53 P 2d 584, 175 Okl 583

(2) In an action for the enforcement of a materialman's lien, where the materialman recovered a judgment for a greater amount than that admitted due by the contractor and the owner, it was error to deny the materialman a reasonable attorney's fee and to award the owner an attorney's fee as against the materialman—Hutchinson Lumber Co v Scrivener, 217 P 854, 91 Okl 293

91. Minn—Behrens v Kruse, 140 N W 339, 121 Minn 90
40 C J p 521 note 1

92. Minn—Behrens v Kruse, supra, 42

—Lindquist v Young, 138 NW 28, 119 Minn 219

93. Neb—Nye-Schneider-Fowler Co v Bridges, Hoye Co, 151 NW 942, 98 Neb 27

94. Fla—McCarthy v Havis, 2 So 819, 23 Fla 508

Ill—Kendall v Fader, 65 NE 318, 199 Ill 294

95. NM—Montgomery v Karavas, 114 P 2d 776, 45 NM 287

Discretion not abused

NM—Montgomery v Karavas, supra.

96. Cal—McIntyre v Trautner, 21 P 15, 78 Cal 449

40 C J p 521-523 note 6

Partial success

(1) Under some statutes attorney's fees can be recovered only if the amount recovered is not less than that demanded—Templeman Bros v Merritt, Chapman & Williams Corporation, 147 So 51, 176 La 975—John Douglas Co v Cabirac, La App, 170 So 381

(2) Where contractor was entitled to deduct from balance due manufacturer amount required to repair defects in material obtained from manufacturer, manufacturer was not entitled to attorney's fees—John Douglas Co v Cabirac, supra.

(3) Under other statutes partial success as by reducing the claim will only reduce the sum to be allowed as attorney's fees—Hess v Peck, 111 Ill App 111

Settlement

(1) Fee cannot be based on claims settled pending suit—Los Angeles Gold Mine Co v Campbell, 56 P 246, 13 Colo App 1

(2) Where, pending suit to foreclose mechanic's lien, materialman's manager gave receipt in full on payment of principal, thereby waiving interest, materialman was not entitled to any judgment, and hence was not entitled to attorney's fees, although at time receipt was given neither manager nor material buyers knew anything about foreclosure suit—Grant County Lumber Co v Marley, 192 NE 110, 100 Ind App. 42

an award may be made to the owner or other defendant where he is a prevailing party⁹⁷

The attorney's fees need not have been actually paid by the party to whom the allowance is to be made, nor need there be any express agreement for its payment,⁹⁸ but it is fixed by the court⁹⁹ without regard to any averment in the complaint as to such fees, inasmuch as such averment is not necessary,¹ and independently of any agreement between the parties, the statute requiring the court to fix a reasonable fee,² and it is not necessary to show that the person appearing is an attorney³ The amount which may be allowed as attorney's fees rests in the sound discretion of the trial court⁴ In determining what are reasonable attorney's fees there must be taken into account the amount involved, the character of the services rendered, and the time employed⁵ If there is evidence to support the allowance, it will not be disturbed,⁶ and the statutory discretion in fixing the allowance will not be interfered with if it does not appear to have been abused⁷ Under a statute allowing the recovery of reasonable attorney's fees, such a recovery cannot be supported in the absence of evidence from which the reasonable amount may be determined,⁸ if the allegation of reasonableness of the attorney's fees demanded has been denied;⁹ but the contrary has

also been held.¹⁰ Where the foreclosure of a mortgage and the foreclosure of a mechanic's lien are united in one suit, the amount provided in the mortgage for attorney's fees may be allowed in addition to attorney's fees for a mechanic's lien¹¹ Where the trial court has made an allowance for attorney's fees, an additional allowance will not be made on appeal.¹²

Interpleader or common fund An owner is not entitled to an allowance of counsel fees on the theory that the case is essentially one of interpleader where the issues involve the existence and extent of the owner's personal interest and responsibility¹³ A proceeding to which other claimants and mortgagees are made parties is not one in which a fee may be allowed as from a common fund to the attorney of claimant instituting the proceeding, where defendants are antagonistic to plaintiff and are represented by other attorneys¹⁴

In case of personal judgment. A statute authorizing the recovery of reasonable attorney's fees in proceedings to enforce a lien does not authorize a personal judgment for such fees as against a defendant who disclaims interest in the premises,¹⁵ although a personal judgment may have been properly rendered against him for the amount of the

Waiver of Lien

Where contractor was not entitled to foreclose mechanic's lien because he waived right, he was not entitled to recover attorney's fees—Hammond Hotel & Improvement Co v Williams, 176 NE 154, 95 Ind App 506, rehearing denied 178 NE 177, 95 Ind App 506

97. Okl—Chaffin Bros Lumber Co v White, 86 P 2d 982, 184 Okl 253 —Morley v McCaskey, 272 P 850, 134 Okl 54—Morley v McCaskey, 270 P 1107, 134 Okl 50

Fault of defendant

In suit by contractor's assignee on mechanic's lien note, refusal to charge against plaintiff attorney's fees expended by defendants in defending suit was held not error—Galbraith-Foxworth Lumber Co v Long, Tex Civ App, 5 SW 2d 162, error refused

98. Cal—Rapp v Spring Valley Gold Co, 16 P 325, 74 Cal 532

99. Cal—Williams v Gaston, 60 P 427, 127 Cal 611
40 C J pp 521-623 note 8

1. NM—Armijo v Mountain Electric Co, 67 P 726, 11 NM 235
40 C J p 521 note 9

2. Cal—Rapp v Spring Valley Gold Co, 16 P 325, 74 Cal 532

3. Minn—L Lamb Lumber Co v Benson, 97 NW 143, 90 Minn 403

4. Mont—Luebben v Metlen, 100 P 2d 935, 110 Mont 850

NM—Montgomery v Karavas, 114 P 2d 776, 45 NM 287—Hobbs v Morrison Supply Co, 73 P 2d 325, 41 NM 644

Or—Sparhawk v Stevens, 91 P 2d 1116, 162 Or 375
40 C J pp 521-623 note 12

Allowances sustained

Nev—Friendly v Larsen, 144 P 2d 747, 62 Nev 135

Wash—Globe Electric Co v Union Leasehold Co, 6 P 2d 304, 166 Wash 45—Caine-Grimshaw Co v White, 238 P 980, 136 Wash 98
40 C J pp 521-623 note 12 [a]

Excessive fees

Nev—Milner v Shuey, 60 P 2d 604, 57 Nev 159, modified on other grounds 69 P 2d 771, 57 Nev 159
40 C J pp 521-623 note 12 [c]

5. Nev—Milner v Shuey, supra

6. Or—Title Guarantee & Trust Co v Wrenn, 56 P 271, 35 Or 62, 76 Am SR 454
40 C J p 624 note 13

7. NM—Montgomery v Karavas, 114 P 2d 776, 45 NM 287—Hobbs v Morrison Supply Co, 73 P 2d 325, 41 NM 644
40 C J p 624 note 14

Court will modify judgment for reasonable attorney's fees to conform to proof as to value of services

—Cogswell Lumber Co v Foltz, 275 P 333, 135 Okl 242

8. Ind—Waverly Co v Moran Electric Service, 26 NE 2d 55, 108 Ind App 75—Jackson v J A Franklin & Son, 23 NE 2d 23, 107 Ind App 38

Okl—Cowan v T J Stewart Lumber Co, 58 P 2d 573, 177 Okl 266
—L S Cogswell Lumber Co v Foltz, 275 P 333, 135 Okl 242.
10 C J p 624 note 15

9. Or—Livesay v Lee Hing, 9 P 2d 133, 139 Or 150, 81 ALR 118

10. NM—Pearce v Albright, 76 P 286, 12 NM 202—Armijo v Mountain Electric Co, 67 P 726, 11 NM 235

11. Wash—James v Brainard, 116 P 633, 64 Wash 175

12. Wash—Flint v Bronson, 86 P 2d 218, 197 Wash 686
40 C J p 624 note 18

13. Conn—Stone v Moomjian, 103 A 635, 92 Conn 476
40 C J p 624 note 19

14. Md—Title Guarantee & Trust Co v Burdette, 65 A 341, 104 Md 666

15. Ind—Hubbard v Burnet-Lewis Lumber Co, 98 NE 1011, 51 Ind App 97.

claim¹⁶ So, where a contractor is entitled to a personal judgment and not to a lien, it is error to render a judgment for attorney's fees¹⁷ However, reasonable attorney's fees may be allowed to defendant as the prevailing party, where the lienor's claim to a lien was disallowed as discharged, although a personal judgment was allowed for the amount of the debt¹⁸

Liability of contractor When the contractor is made a party to a proceeding against the owner by the subcontractor, a judgment for attorney's fees may be rendered against the contractor under a statute allowing a successful lien claimant to recover reasonable attorney's fees as costs¹⁹

Nature and enforcement of recovery Attorney's fees are not strictly costs but are incidental to the lien and the judgment for which the lien is enforced as for the principal debt²⁰ A statute providing attorney's fees confers a lien for such fees²¹

§ 354. Costs on Appeal

In the absence of a statute to the contrary, costs on appeal in proceedings to enforce mechanics' liens are controlled by the rules generally applicable in civil actions

Costs on appeal are, in the absence of express statutes, controlled by the rules generally applicable in civil actions²²

MECHANISM. The arrangement and relation of the parts in a machine.¹

MECHANOTHERAPY. See the C J S title Physicians and Surgeons § 1, also 40 C J. p 625 note 2

MECH'S. See Abbreviations 1 C J S p 276 note 5

MED. See Abbreviations 1 C J S p 276 note 5.

MEDAL. A piece of metal, usually in the form of a coin, struck with a device, etc, intended to preserve the remembrance of a notable event or of an illustrious person, or to serve as a reward²

MEDDLER. One who interferes or busies himself with things in which he has no concern³

MEDEOR. A Latin word meaning to heal⁴

MEDIA. The middle coat of the aorta, about one eighth of an inch in thickness, made up of muscle

tissue and elastic fibers of a character to give strength to the artery It is the really important one of the three coats of the aorta⁵

MEDIA ANNATA. In Spanish law, half yearly profits of land,⁶ the sum paid for "lanzas"⁷

MEDIA CONCLUDENDI. The steps of an argument.⁸

MEDIAN. In mathematics or statistics, designating a point so chosen in a series that half of the individuals in the series are on one side of it, and half on the other,⁹ of or pertaining to that number of a series which has as many numbers preceding as following it,¹⁰ the middle measurement, or, if there is no middle one, then the one interpolated between the two middle ones,¹¹ median of a group of measurements¹² Various other definitions and illustrations of the term, and, particularly, illustrations of the distinction between median and average, are set out in the note¹³

16. Ind—Hubbard v Burnet-Lewis Lumber Co, supra

17. Ind—Todd v Howell, 95 NE 279, 47 Ind App 665

18. Mont—Luebben v Metlen, 100 P 3d 935, 110 Mont 350

19. Idaho—Smith v Faris-Kesl Constr Co, 150 P 25, 27 Idaho 407

20. Cal—Williams v Gaston, 60 P 427, 127 Cal 641

40 C J p 624 note 25

21. Idaho—Shaw v Johnston, 107 P 399, 17 Idaho 676

22. Wash—Brace & Hergert Mill Co v Burbank, 151 P 805, 87 Wash 356, Ann Cas 1917E 739

40 C J p 624 note 27

1. US—Frederick R Stearns & Co v Russell, Mich, 85 F 218, 225, 29 C C A. 131

2. Webster New Int D

40 C J p 625 note 5

3. Pa—Kozak v Joseph Reilly Coal Co, 15 A 2d 531, 533, 534, 141 Pa Super 413

4. Ala—Bragg v State, 32 So 767, 770, 134 Ala 165, 58 L R A 925

5. Mo—Woelfle v Connecticut Mut Life Ins Co of Hartford, Conn, App, 112 SW 2d 865, 870

"Aorta" defined see 3 C J S p 1422 notes 60, 61

6. Tex—McMullen v Hodge, 5 Tex 34, 79

40 C J p 625 note 7.

7. Tex—Trevino v. Fernandez, 13 Tex 630, 660

8. Black L D

40 C J p 625 note 9.

9. US—In re Flint, Cust & Pat App, 150 F 2d 126, 130, 131

10. US—In re Flint, supra

11. US—In re Flint, supra

12. US—In re Flint, supra

13. Definitions and illustrations

(1) "Median, the point on a statistical scale of the distribution of cases, above which and below which lie exactly 50% of the cases The median is thus a measure of 'central tendency' It has the advantage over the arithmetical mean or 'average' that it is not affected by unusually high or low values of the variable For instance, given the values of 3, 4, 5, 6, 7, 8, 100, the median is 6, and the arithmetic mean is 19 For some purposes the median value better describes the central tendency of such a series"—In re Flint, supra.

MEDIASTINITIS. An inflammation of the cell tissue lining the area in the middle of the chest between the pleurae ¹⁴

MEDIATE. Acting by means, or by an intervening cause or instrument; acting or suffering through an intervening agent or condition, not direct or immediate ¹⁵

MEDIATION. Intervention; interposition; the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute ¹⁶

Mediation in international law see International Law § 22; in labor relation controversies see Master and Servant § 28 (2), § 28 (73).

MEDIATOR. One who interposes between parties at variance for the purpose of reconciling them ¹⁷

MEDICAL. Of, pertaining to, or dealing with, the

healing art, or the science of medicine, especially in the narrower sense ¹⁸

The word "medical" is treated in various connections throughout this work, particular reference being made to the indexes to the titles Criminal Law, Food, Evidence, and Insurance. For other references consult the Descriptive-Word Index and see Medicine post

Phrases employing the word are set out in the note, ¹⁹ and for other phrases as to which more recent adjudications have not been found see 40 C.J. p 625 note 27—p 626 note 32

MEDICINA. A Latin word meaning medicine ²⁰

MEDICINAL. Curative or alleviative; used for the cure or alleviation of bodily disorders ²¹

Medicinal preparations may be put in various forms, such as liquids, tablets, capsules, or powders.

(2) "The median. The median measure may be defined as the middle or central item when the values are arranged in order of magnitude. If there is an odd number of items it is definitely determined. But if the group has an even number of items an additional convention is needed, if the two centrally placed items are distinguishable, a value half-way between them is usually taken as the median. This measure can often be found without resort to arithmetic. For example, the median height of a class may be found by proceeding as follows: Arrange the students according to height, then march them off by twos, the tallest with the shortest, the next to the tallest with the next to the shortest, and so on. The last person or pair of persons will have the median height, which can then be marked on the blackboard. Unlike the arithmetic mean, the median is clearly unaffected by extreme variations at the ends of the range. If the tallest student in the room were replaced by a giant, or the shortest by a midget, no change would result in the median. For problems pertaining to wages, gifts, taxes, etc., it is usually more informative to use medians than arithmetic means. If a class of one thousand alumni gave a total of \$14,997 to their Alma Mater, the class contributed \$15 each 'on the average'. But if one person gave \$12,000 and the other 999 gave \$3 each, the median donation (\$3) would be more descriptive of individual contributions than the arithmetic mean."—In re Flint, supra.

(3) "In addition to the arithmetic mean, which has been discussed, two other statistical constants are some-

times used to describe the characteristics of a distribution. If a number of individuals differ with respect to a measurable characteristic, they can be arranged in order corresponding to the order of magnitude of the characteristic observed. The median can then be defined as the value of the characteristic which corresponds to the individual in the middle of the series. There will thus be equal numbers of individuals having forms of characteristics higher and lower than the median. Where the individuals are so numerous that they are grouped in classes, the position of the midmost individual can generally be found by interpolation, if the limits of the characteristic for the group are known. When there is an even number of individuals, the value of the median is taken to be half-way between the values of the characteristic pertaining to the two individuals who stand nearest to the middle of the series."—In re Flint, supra.

14. N.J.—Glanton v Shaflo, 41 A 2d 200, 201, 132 N.J. Law 474

15. Webster New Int D
Phrases

(1) "Mediate datum" is a fact from whose existence may be rationally inferred the existence of ultimate facts.—The Evergreens v Nunan, CCA 2, 141 F 2d 927, 928

(2) "Mediate descent" see Descent and Distribution § 1

(3) "Mediate powers" are those incident to primary powers, given by a principal to his agent.—Black L.D.—40 C.J. p 625 note 12

16. Black L.D.

17. Colo.—People v Lindsey, 283 P. 539, 541, 86 Colo 458

Mediators of questions

Six persons authorized, under statute in the reign of Edw III, to certify and settle, before the mayor and officers of the staple, questions arising among merchants, relating to the wool trade.—Black L.D.

18. N.J.—Kahn v Metropolitan Life Ins Co, 41 A 2d 329, 331, 132 N.J. Law 503

19. Phrases

(1) "Medical aid" see 3 C.J.S. p 502 in Pocket Parts

(2) "Medical attendant" see the C.J.S. title Physicians and Surgeons § 1, also 40 C.J. p 633 note 21

(3) "Medical certificate" in cases of death see Health § 26

(4) "Medical examiners" as public officials see Coroners § 1 et seq

(5) "Medical herb" distinguished from "physical herb"—In re Hunter, 60 N.C. 372, 373

(6) "Medical insanity" see Insane Persons § 2 b (5)

(7) "Medical jurisprudence" also called forensic medicine see 50 C.J.S. p 1093 note 60, and so defined see 86 C.J.S. p 1250 note 97

(8) "Medical soap" is a soap used for remedial purposes and distinguishable from a toilet soap in that the latter is used as a detergent for cleansing purposes only.—Park v U. S., CCNY, 66 F 731

20. Ala.—Bragg v State, 32 So. 767, 770, 134 Ala 165, 58 L.R.A. 925.

21. U.S.—Vitab Corporation v Knox Co, Cust. & Pat App, 143 F 2d 883, 888
40 C.J. p 636 note 45

and a medicinal preparation is none the less a medicinal preparation because it is sold over the counter to the public generally rather than to druggists, physicians, and medical institutions to be administered hypodermically by physicians.²² Such preparations may be subject to customs duties see Customs Duties § 32, but have been held not taxable as toilet preparations under the internal revenue code see Internal Revenue § 526.

MEDICINE. A technical²³ and generic²⁴ term, derived from "medeor"²⁵ It has frequently been defined by eminent lexicographers of medical words and terms,²⁶ and is susceptible of two distinct meanings.²⁷

In one sense the word signifies a science or profession, and this meaning is treated in the CJS title Physicians and Surgeons § 1, also 40 C.J. p 627 notes 69-89

In its other distinctive sense, the word signifies a drug,²⁸ indicating nothing more than a remedial agent that has the property of curing or mitigating diseases, or is used for that purpose,²⁹ and in its ordinary sense, as applied to human ailments, it means something which is administered, either in-

ternally or externally, in the treatment of disease or the relief of sickness.³⁰ In this sense the word "medicine" is variously defined as a remedial agent,³¹ a remedy,³² a physic,³³ a medicament;³⁴ any substance or preparation used in treating disease,³⁵ articles intended for use in the diagnosis, cure, medication, treatment, or prevention of disease in man or other animals,³⁶ a substance supposed to possess curative or remedial properties,³⁷ a combination of drugs in largely varying proportions.³⁸

There are many things, not in themselves medicines, but which may be put to a medicinal use, and when so used they may become medicines.³⁹ Thus electricity, conveyed by instruments or by human hands, may be a medicine.⁴⁰ The fact that the substance employed as a remedial agent may have value as a food, and a tendency to build up and restore wasted or diseased tissue, will not deprive it of its character as a "medicine," if it is administered and employed for that purpose.⁴¹ On the other hand, there are a great many articles which, under certain circumstances and conditions, may possess some medicinal properties, but they are not classed as "medicine," as the word is generally used and

22. US—Vital Corporation v Knox Co, supra

23. Ala.—Bragg v State, 32 So 767, 770, 134 Ala 165, 58 L.R.A. 935

24. NY—People v Bernstein, 261 N.Y.S. 381, 384, 237 App Div 270

25. Ala.—Bragg v State, 32 So 767, 770, 134 Ala 165, 58 L.R.A. 935
40 C.J. p 626 note 49

26. Ala.—Bragg v State, supra.

27. ND—State v Miller, 229 N.W. 569, 572, 59 ND 286
40 C.J. p 626 note 50

28. ND—State v Miller, supra.
Pa.—Commonwealth v Seibert, 105 A 507, 508, 262 Pa 345

29. ND—State v Miller, 229 N.W. 569, 572, 59 ND 286

Pa.—Commonwealth v Seibert, 105 A 507, 508, 262 Pa 345

30. Mo.—Kansas City v Baird, 92 Mo App 204, 208

31. Cal.—Corpus Juris cited in People v Garcia, 32 P.2d 445, 447, 1 Cal App 2d 761
40 C.J. p 626 note 56

32. Cal.—Corpus Juris cited in People v Garcia, 32 P.2d 445, 447, 1 Cal App 2d 761
40 C.J. p 626 note 58

In the popular sense, medicine is a remedial substance—State v Heffernan, 65 A 284, 287, 28 R.I. 20—State v Mylod, 40 A 753, 755, 20 R.I. 632, 41 L.R.A. 428

33. Cal.—Corpus Juris cited in

People v Garcia, 32 P.2d 445, 447, 1 Cal App 2d 761

Ga.—Justice v State, 42 S.E. 1013, 1014, 116 Ga 605, 59 L.R.A. 601

34. Cal.—People v Garcia, 32 P.2d 445, 447, 1 Cal App 2d 761

35. Ariz.—Stewart v Robertson, 40 P.2d 979, 983, 45 Ariz 143

Cal.—Corpus Juris cited in People v Garcia, 32 P.2d 445, 447, 1 Cal App 2d 761

Hawaii—Territory v Takamine, 21 Hawaii 465, 469

Similarly defined

Any substance administered in the treatment of disease

Ga.—Justice v State, 42 S.E. 1013, 1014, 116 Ga 605, 59 L.R.A. 601

Iowa.—State v Bresee, 114 N.W. 45, 47, 137 Iowa 673, 24 L.R.A.N.S. 103

Substances used in a certain manner

"This definition applies only to substances used in a certain manner, and obviously when so used all substances should be handled only by those skilled in the treatment of disease. But it is notorious that almost every physical substance known to man has been used at one time or another in the treatment of disease"—Stewart v Robertson, 40 P.2d 979, 983, 45 Ariz 143

36. N.J.—Board of Pharmacy v Quackenbush & Co, 39 A.2d 28, 29, 22 N.J.Misc 334

37. Ill.—People v Kabana, 52 N.E. 2d 320, 321 Ill App 158

Utah—Shober v Industrial Commission, 68 P.2d 756, 758, 92 Utah 399

Similarly defined

Any substance, liquid or solid, that has the property of curing or mitigating diseases or that is used for that purpose—Regina v Stewart, 17 Ont 4, 5.

38. Pa.—Stagger's Estate, 8 Pa Super 260, 264

39. Mass.—Commonwealth v Marzynski, 21 N.E. 228, 229, 149 Mass 68
40 C.J. p 627 note 66

40. Mo.—Kansas City v Baird, 92 Mo App 204, 208

41. Iowa.—State v Bresee, 114 N.W. 45, 47, 137 Iowa 673, 24 L.R.A.N.S. 103

ND—State v Miller, 229 N.W. 569, 572, 59 ND 286

Food not transformed into medicine

"It is common knowledge that certain foods are prescribed in the dietary treatment of disease, and while the article thus falls within the broad limit of the definition, I cannot conceive that it thus is transformed into a medicine ipso facto. Nor can I agree that a substance becomes a medicine as a fact merely because of the form, in this case, capsules, in which it is marketed"—Board of Pharmacy v Quackenbush & Co, 39 A.2d 28, 29, 22 N.J.Misc 334.

understood,⁴² so tobacco or cigars are not classed as medicine.⁴³ While medicine may be something which is applied externally, it need not necessarily be a substance which may be seen and handled.⁴⁴

"Medicine" has been distinguished from "food" see Food § 1, and "sustenance."⁴⁵

In many jurisdictions statutes exist regulating the practice of pharmacy by permitting sales of drugs and medicines to be made only by registered or licensed pharmacists, and for the meaning that is attributed to the word "medicine" as used in statutes of this nature, and for substances that are included or excluded, see Druggists § 3 a. Sales of intoxicating liquor for use as medicine as subject to, or as exempt from, statutes prohibiting the sale of intoxicating liquors generally see Intoxicating Liquors § 246 b. The statutory requirement that a person selling medicine belonging to a class known as poisonous mark the package with the word "poison" is discussed in the C J S. title Poisons § 4, also 49 C J p 1044 note 36—p 1045 note 38. The sale of medicines as subject to, or as exempt from, Sunday sales laws is treated in the C J S. title Sunday § 14, also 60 C J p 1064 note 32—p 1065 note 45. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

Phrases employing the word are set out in the note.⁴⁶

MEDICO. In Spanish law, a physician.⁴⁷

MEDICO-LEGAL. Relating to the law concerning medical questions.⁴⁸

MEDIDA. In Spanish law, an instrument of measurement.⁴⁹

MEDIO ACQUIETANDO. A judicial writ to restrain a lord for the acquitting of a mesne lord from a rent, which he had acknowledged in court not to belong to him.⁵⁰

MEDITATE. A verb meaning to keep the mind in a state of contemplation; to dwell on anything in thought, to think seriously; to muse, to cogitate, to reflect.⁵¹ Also, to contemplate, to keep the mind fixed on, to study; to purpose, to intend, to design, to plan by revolving in the mind,⁵² to deliberate.⁵³

"*Meditated*" refers to something not yet done, something in a state of incubation, yet to discover itself, something brooded over and perhaps talked about.⁵⁴ It has been distinguished from "actual" see 1 C J S p 1433 note 61.

MEDIUM. That which lies in the middle, or between things; middle or intervening quantity, etc.⁵⁵ Employed in this sense, the term has been compared with, or distinguished from, "cause" see 14 C J S. p 42 note 5.

The term also denotes a person whose organism is sensitive to vibration from the spirit world and through whose instrumentality intelligences in that world are able to convey messages and produce the phenomena of spiritualism.⁵⁶

MEDLEY. An affray.⁵⁷

MEEMA. In Jewish, aunt.⁵⁸

MELT.

As a verb. The word "meet" has been defined as meaning to come upon or against, front to front, as distinguished from contact by following and overtaking;⁵⁹ and it has been said that this is the ordi-

42. Mo—State v Ohmer, 34 Mo App 115, 125.

A truss, while not medicine in the strict sense of the term, yet is a remedial measure—Karagas v Union Pac R Co, Mo App, 232 SW 1100, 1101.

43. Ga—Penniston v Newnan, 45 SE 65, 66, 117 Ga 700.
40 C J p 627 note 68.

44. Mo—Kansas City v. Baird, 92 Mo App 204, 208.

45. Ga—Justice v State, 42 SE 1013, 1014, 116 Ga 605, 59 L R A 601.

46. *Phrases*

(1) "Patent medicine" defined see Druggists § 1 e.

(2) "Proprietary medicine" defined see Druggists § 1 e.

(3) "Quack medicine" is a remedy

or specific whose composition is kept secret, and which is sold to be used by the purchasers without the advice of regular or licensed physicians—World's Dispensary Medical Assoc v Collier, 148 NYS 405, 410, 86 Misc 217—51 C J p 108 note 13.

(4) "Veterinary medicine" see the C J S. title Physicians and Surgeons § 1, also 67 C J p 240 notes 3-5.

47. Escriche Diccionario

48. Black L D

49. Escriche Diccionario

50. Black L D

51. Fla—Cook v State, 35 So 665, 681, 46 Fla 20.

52. Fla—Cook v State, supra.

53. Tex—Stanley v State, Cr. 199 SW 2d 518.

54. Ala—State v McDonald, 4 Port 449, 455.

55. Webster New Int D

56. Neb—Dill v Hamilton, 291 N W 62, 65, 137 Neb 723.

40 C J p 628 note 98.

"Spiritualism" as a religious belief see the C J S. title Religious Societies § 1, also 58 C J p 1302 note 10.

Similarly expressed

A person through whom departed spirits communicate with the living—Chicago v Payne, 160 Ill App 611, 642.

57. Black L D

58. NY—Kopit v Zilberszmidt, 35 NYS 2d 558, 563.

59. Ga—Stripling v State, 40 SE 733, 114 Ga 538.

Strict signification

The terms "meet" and "pass" are used in their strict signification, and are intended to apply only where travelers are approaching each other.

nary and popular meaning of the word ⁶⁰ The term has been similarly defined to mean to come together by mutual approach; to fall in with another, to come face to face, to converge,⁶¹ and, with a slightly different shade of meaning, to come together with hostile purpose, to have an encounter or conflict ⁶² In a different sense, the word means to come into conformity to; to be or act in agreement with ⁶³ When used with reference to financial obligation, to pay.⁶⁴

As an adjective. Fit or suitable ⁶⁵

Meeting

As a noun A number of people having a common duty or function who have come together for any legal purpose, or the transaction of business of a common interest; an assemblage ⁶⁶

The word "meeting" may be used as synonymous with "session,"⁶⁷ but when the word "session" is used in its literal sense of "sitting" as discussed in the C J S. definition Session, the terms are distinguishable ⁶⁸ In distinguishing between the meaning of the word "meeting" and the literal meaning of the word "session" it has been said that a meeting may run for a day with a morning session, an adjournment for lunch, an afternoon session, an adjournment for dinner, and then an evening session, or it may run for several days with one or more sessions each day, such sessions clearly being but sittings of the meeting ⁶⁹ On the other hand, the meeting may embrace but one session, or the meeting, though extending over several days, may be called the session of the body which is meeting ⁷⁰

As a participle "Meeting" is the present participle of "meet" ⁷¹

Particular applications Parliamentary procedure

at meetings of deliberative bodies generally is treated in the C J S. title Parliamentary Law § 4, also 46 C J. p 1377 note 34—p 1378 note 44. For reference to the treatment of meetings of particular deliberative bodies such as county boards see Counties § 88; governing bodies of municipal corporations see the C J S title Municipal Corporations §§ 391–394, also 43 C J. p 497 note 14—p 499 note 53, and town meetings see the C J S title Towns §§ 39–52, also 63 C J p 119 note 58—p 128 note 67. Meetings of highway viewers or commissioners are discussed in Highways § 59, and meetings of highway boards or commissions are treated in Highways § 156 The meetings of other deliberative bodies, such as school boards and districts, taxing and assessing boards and bodies, social security boards, and unemployment compensation commissions, are treated in such titles as Schools and School Districts, Taxation, Social Security and Public Welfare, and Public Administrative Bodies and Procedure, and reference is made to the various title indexes and to the Descriptive-Word Index With reference to private corporations, meetings of boards of directors are discussed generally in Corporations §§ 744–751, and stockholders' meetings are treated generally in Corporations §§ 539–579. See also the title index to this title

The law of the road with reference to the meeting of vehicles generally on highways is treated in Highways § 237, in connection with the meeting of vehicles generally on city streets see the C J S title Municipal Corporations § 1779, also 44 C J p 1050 notes 39–43, and in connection with the meeting of motor vehicles generally see the C J S. title Motor Vehicles §§ 305–320, also 42 C J. p 939 note 30—p 948 note 37

Phrases employing the word "meeting" are set out in the note,⁷² and other phrases as to which

from different directions, intending to pass on the same road—Lovejoy v Dolan, 10 Cush (Mass) 495, 497

60. Ga.—Stripling v State, 40 SE 733, 114 Ga 538

61. Tex.—Pitts v State, 16 SW 189, 190, 29 Tex App 474

62. Tex.—Pitts v State, supra

63. Century D

64. Hawaii.—Davis v Mills, 21 Hawaii 167, 169

65. N Y.—Woodburn v Mosher, 9 Barb 255, 257

66. Cal.—People v Mintz, 290 P 93, 100, 106 Cal App 725

67. Ky.—Town of Hodgenville v Kentucky Utilities Co, 61 SW 2d 1047, 1048, 250 Ky 195
57 C J p 287 note 32

68. Ky.—Town of Hodgenville v Kentucky Utilities Co, supra

69. Ky.—Town of Hodgenville v Kentucky Utilities Co, supra

70. Ky.—Town of Hodgenville v Kentucky Utilities Co, supra

71. Webster New Int D

72. Regular meeting

(1) A "regular meeting" is one fixed by law to be held on a certain day—Molynaux v Grimes, 98 P 278, 280, 78 Kan 830

(3) A "regular meeting" is such meeting as the law requires to be held at a stated time and place—State v Wilkesville Tp, 20 Ohio St 288, 293—53 C J p 1169 note 89

(3) "Regular meeting" is sometimes called a "stated meeting"—

Shenandoah Borough's Petition, 42 Pa Co 24, 27

Other phrases

(1) "Annual meeting" as synonymous with "regular session" see 3 C J S p 1371 note 10

(2) "Meeting end on" as a maritime term see Collision §§ 41, 47

(3) "Meeting head on" or "nearly head on," as a maritime term see Collision § 2 b

(4) "Meeting of the minds" as an essential element of contracts generally see Contracts § 31

(5) "Primary meeting" see Elections § 97

(6) "Race meeting" defined see Gaming § 11

more recent adjudications have not been found see 40 C J p 628 notes 5, 6, 17-39

MEETINGHOUSE. A house to meet in for religious worship ⁷³

MEGALOMANIA. See Insane Persons § 2 c.

MEGIDDO. A Hebrew word signifying God is in this place with a band of soldiers, or, a true soldier of God ⁷⁴ As the name of a church or cult see the C J S title Religious Societies § 1

MEIDEN, MITE, and MITING. A German verb expressive of a rule of the Old Order Amish Mennonite Church for the enforcement of church discipline among its members, having reference to the doctrine of literal "shunning," "muting," or "boycotting" members of the church by withdrawing all business and social intercourse from a "muted" member, ⁷⁵ and defined as meaning a ban; a boycott, an excommunication, an enforced separation or spiritual punishment by the church for the amendment of offenders so that what is pure may be separated from that which is impure ⁷⁶

The word has been compared with "boycott" see 11 C J S p 763 note 62

MELICKE SYSTEM. Defined see Interest § 63 Considered in connection with usury laws see the C J S title Usury § 39

MELANCHOLIA. See Insane Persons § 2 d.

MELIORATING WASTE. Defined generally see the C J S title Waste § 1, also 67 C J p 612 notes 31-33; discussed in connection with the landlord and tenant relationship see Landlord and Tenant § 263

MELIORATIONS. Valuable and lasting improvements, made on land by one lawfully in the occupation thereof at his expense, and which he is allowed to set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession. ⁷⁷

MELIOR, MELIOREM, and MELIUS. As the first

words of maxims as to which there have been no recent applications see 40 C.J. p 629 note 54-p 630 note 72

Melius inquirendum. To be better inquired in- to ⁷⁸ In old English law, the name of a writ commanding a further inquiry respecting a matter. ⁷⁹

MELROSE. A word meaning sweet rose, or honey rose, being derived from the Latin words "mel" for honey and "rosa" for rose. It is also a geographical name ⁸⁰

MELT. To be changed from a solid to a liquid state, usually by heat; to dissolve or disintegrate; to liquefy; to fuse ⁸¹

"Melt" has been held to be synonymous with "affect" see 2 C J S p 918 note 671, and has been compared with, or distinguished from, "cut" see 25 C J S p 434 note 23

Melting. The present participle of the verb "melt" ⁸² As used in connection with mining see Mines and Minerals § 3

MEM. As an abbreviation for several words see 1 C J S p 276 note 5.

MEMBER. A person considered with relation to any aggregate of individuals to which he belongs, ⁸³ particularly one who has united with, or has been formally chosen as a corporate part of, an association or public body of any kind ⁸⁴ The word "member," when used with reference to a corporation, has been held to be synonymous with "stockholder" see Corporations § 475 a

The admission of members to voluntary associations is treated in Associations § 23, to social clubs see Clubs § 16, to exchanges in Exchanges § 5 b, to building and loan associations see Building and Loan Associations § 16, and to mutual benefit associations see Insurance § 1440 a For other references to the treatment of the law with reference to members of organizations see the title indexes to the various titles and consult the Descriptive-Word Index See also the cross references set out in the definition of Membership post.

73. Vt.—Howe v Jericho School Dist No 3, 48 Vt 282, 283 40 C J p 629 note 40

74. N Y—People ex rel Sisson v Sisson, 281 N Y S 559, 560, 156 Misc 236

75. Ohio—Generich v Swartzen-truber, 22 Ohio N P, N S, 1, 3, 13

76. Ohio—Generich v. Swartzen-truber, supra

77. US—Green v Biddle, Ky, 8 Wheat 1, 82, 5 L Ed 547

78. Black L D

79. Black L D 40 C J p 630 note 78

80. US—Kasko Distillers Products Corporation v Records & Golds-borough, Cust & Pat App, 109 F 2d 823, 824

81. Webster New Int D

"Melt into one" as synonymous with, or belonging to the same class as, "combine" see 15 C J S p 241 note 64.

82. Webster New Int D

83. Cal—People v Hurley, 58 P 814, 815, 126 Cal 351 40 C J p 630 note 78

84. Cal—People v Hurley, supra 40 C J p 630 note 79.

In anatomy. A member is a part or organ of the animal body,⁸⁵ a part appurtenant to the body,⁸⁶ a subordinate part of the main body,⁸⁷ a limb⁸⁸ or other separable part⁸⁹ or other functional organ of an animal body,⁹⁰ as an arm, a leg, or a private part.⁹¹ It has been said that in common usage the term "member," as applied to the human body, means the extremities of the body and particularly the arms and legs.⁹²

What constitutes a member of the body with reference to the crime of mayhem is treated in Mayhem § 3. The loss of members of the body with reference to policies of accident insurance is treated in Insurance §§ 898 d, 900 b. The compensation scheduled under the various workmen's compensation acts for total or partial loss of members of the body, or for loss of use of members of the body, is treated in the C.J.S. title Workmen's Compensation Acts §§ 311-314 also 71 C.J. p 839 note 13-p 847 note 12.

Phrases employing the word "member" are set out in the note⁹³

MEMBERSHIP. State or status of being a mem-

ber; the collective body of members, as of a society.⁹⁴ A membership in any body implies, not only the enjoyment of its privileges, but subjection to the rules governing it.⁹⁵

Membership in cemetery corporations is discussed in Cemeteries § 7; in joint stock companies see Joint Stock Companies §§ 13-25, in masters' and employers' associations see Masters' and Employers' Associations § 5, in religious societies see the C.J.S. title Religious Societies §§ 11-15, also 54 C.J. p 15 note 33-p 19 note 32, and in trade unions see the C.J.S. title Trade Unions §§ 32-41, also 63 C.J. p 679 note 85-p 695 note 2. For other particular applications and specific uses of the term see the title indexes to the various titles and consult the Descriptive-Word Index. See also the cross references set out in the definition of Member ante.

Phrases employing the word are set out in the note⁹⁶

MEMBRANE. A thin sheetlike structure, usually fibrous, connecting other structures or serving to cover or line some part or organ, a piece of parchment or vellum.⁹⁷

85. Cal—California Casualty Indemnity Exchange v Industrial Accident Commission of California, 90 P 2d 289, 13 Cal 2d 529

86. N.Y.—Godfrey v People, 5 Hun 369, 380

87. N.Y.—Godfrey v People, supra

88. Cal—California Casualty Indemnity Exchange v Industrial Accident Commission of California, 90 P 2d 289, 13 Cal 2d 529

Ga.—Travelers' Ins Co v Albin, 137 S.E. 804, 805, 33 Ga.App. 666
40 C.J. p 630 note 81

89. Cal—California Casualty Indemnity Exchange v Industrial Accident Commission of California, 90 P 2d 289, 13 Cal 2d 529

Ga.—Travelers' Ins Co v Albin, 137 S.E. 804, 805, 33 Ga.App. 666

90. Ga.—Travelers' Ins Co v Albin, supra

91. Ga.—Travelers' Ins Co v Albin, supra

Field included

(1) Ear—Bednar v Ingersoll Rand Co, 17 N.E.2d 777, 778, 279 N.Y. 80—Godfrey v People, 5 Hun (N.Y.) 369, 380

(2) Eye—Chiovitte v Zenith Furnace Co, 181 N.W. 643, 645, 148 Minn. 277

(3) Testicles

Ill.—People v Kopke, 33 N.E.2d 216, 217, 376 Ill. 171

Mont.—State v Sheldon, 169 P. 37, 38, 54 Mont. 185

(4) Tooth—Keith v State, 232 S.

W. 321, 322, 89 Tex. Cr. 264, 16 A.L.R. 949—High v State, 10 S.W. 238, 241, 26 Tex. A. 545, 8 Am.S.R. 488

92. Ga.—Travelers' Ins Co v Albin, 137 S.E. 804, 805, 33 Ga.App. 666
Minn.—Zinken v Melrose Granite Co., 173 N.W. 857, 859, 143 Minn. 397

93. Phrases

(1) "Artificial member" see 6 C.J.S. p 778 in Pocket Parts

(2) "Member of a crew" and other phrases of similar import discussed generally see Crew 21 C.J.S. p 1150 notes 48, 49. For treatment of the phrase as used in the Federal Unemployment Tax Act, 26 U.S.C.A. Internal Revenue Code § 1607 (c), the Social Security Act, 42 U.S.C.A. § 1107 (c) (3), and the various state unemployment compensation acts see the C.J.S. title Social Security and Public Welfare. For the general meaning of the phrase "member of a crew" as used in the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C.A. § 902, see the C.J.S. title Workmen's Compensation Acts § 89, also 71 C.J. p 518 notes 29-40. The phrase, as used in the Longshoremen's Act, has been compared with, and distinguished from, the word "seaman" as this word is employed in the Fair Labor Standards Act, 29 U.S.C.A. § 213 (a) (3), see Master and Servant § 151 (15), and with the word "seaman" as this word is used in the Jones Act, 46 U.S.C.A. § 688, see the C.J.S. title Seamen § 191. For a general discussion of the distinction between a "mem-

ber of a crew" and a "seaman" see the C.J.S. title Seamen § 1

(3) "Member of congress" see the C.J.S. title United States § 10, also 65 C.J. p 1259 notes 33-35

(4) Other phrases as to which more recent adjudications have not been found see 40 C.J. p 630 note 84-p 631 note 6

94. Webster New Int. D.

95. U.S.—Field v Drew Theological Seminary, C.C. Del., 41 F. 871, 875

96. Phrases

(1) "Membership corporation" see Corporations §§ 19, 22c

(2) "Membership fees" as subject to taxation see Internal Revenue § 531

(3) "Membership ticket"—People v Johnson, 49 N.Y.S. 382, 22 Misc. 150

(4) "Real membership"—Colyer v Skeffington, D.C. Mass., 265 F. 17, 22

(5) Other phrases as to which more recent adjudications have not been found see 40 C.J. p 631 note 9

97. U.S.—Guaranty Trust Co. of New York v Johns-Manville Corporation, D.C.N.Y., 14 F.Supp. 792, 797

"Membrane waterproofing" has a well-known trade meaning and denotes fabric or felt, alternating with asphalt or pitch—N.E. Redlon Co. v Franklin Square Corporation, 195 A. 348, 352, 89 N.H. 137.

MEMORANDUM. A brief note in writing of some transaction, or an outline of some intended instrument,⁹⁸ an informal record of something which it is desired to remember⁹⁹ or to preserve for future use,¹ as an outline of an intended instrument,² an instrument drawn up in brief and compendious form,³ a note to help the memory,⁴ a memorial, a record⁵

"Memorandum" has been compared with, and distinguished from, "entry" see 30 C.J.S. p 268 note 23.

Notes or memoranda as competent to prove former testimony see Evidence § 399, refreshing memory of witness with memoranda or other writings see the C.J.S. title Witnesses § 358, also 70 C.J. p 580 note 79—p 593 note 75. Alteration of instruments as to memoranda see Alteration of Instruments § 29. Memorandum sufficient to comply with the statute of frauds see Frauds, Statute of §§ 170–215, and consult the title index to this title. See also the Descriptive-Word Index.

MEMORIAL. In one sense the term may mean anything by which the memory of a person, thing, idea, art, science, or event is preserved or perpetuated⁶ In this sense the word is sometimes used synonymously with "monument"⁷

In a different sense, a document presented to a legislative body, or to the executive, by one or more individuals, containing a petition or a representation of facts.⁸

In practice A short note, abstract, memorandum, or rough draft of the orders of the court, from which the records thereof may at any time be fully made.⁹

In Spanish law, a book or document for certain entries; also a petition for certain relief and the reasons therefor.¹⁰

MEMORIA TESTAMENTARIA. In Spanish law, an instrument separate from a will but containing matter which may make it a part thereof.¹¹

MEMORIZATION. Committing anything to memory.¹²

MEMORY. It has been said that the word "memory" has apparently acquired a more restricted use in modern times than as used by Blackstone and other ancient authorities.¹³ They used the word as synonymous with "mind,"¹⁴ but in modern use, and as used in modern dictionaries, "memory" is employed in a more restricted sense of recollection of past events rather than the general state of one's mental powers¹⁵

"Memory" has been defined as meaning the mental power of recognizing past knowledge,¹⁶ the power of retaining knowledge in the mind.¹⁷

In another sense, a living continuously in the minds of men,¹⁸ commemoration;¹⁹ posthumous fame;²⁰ the state of being remembered.²¹

Phrases employing the word are set out in the note.²²

98. ND—Plott v Kittelson, 228 N W 217, 221, 58 ND 881
40 C.J. p 631 note 11

Phrases

(1) "Memorandum check" see Bills and Notes § 5 a (3)

(2) "Memorandum clause" or "memorandum articles" in marine insurance see Insurance § 952

99. Iowa—Patterson v Beard, 288 NW 414, 416, 227 Iowa 401, 125 A LR 393

Mo—Miller v John Hancock Mut Life Ins Co, App, 155 SW 2d 324, 327

Meaning in common speech

ND—Plott v Kittelson, 228 NW 217, 221, 58 ND 881

1. Iowa—Patterson v Beard, 288 NW 414, 416, 227 Iowa 401, 125 A LR 393

ND—Plott v Kittelson, 228 NW 217, 221, 58 ND 881

2. ND—Plott v Kittelson, supra

3. ND—Plott v Kittelson, supra
40 C.J. p 631 note 12

4. Wyo—Hay v. Peterson, 45 P

1073, 1080, 6 Wyo 419, 34 L.R.A. 581

40 C.J. p 631 note 13

5. Conn—Bissell v Beckwith, 32 Conn 509, 517

6. Mo—Odom v Langston, 195 SW 2d 466, 470

Memorial park cemetery see Cemeteries § 1

7. Mo—Odom v Langston, supra

8. Black L D

9. Vt—State v Shaw, 50 A 863, 868, 73 Vt 149

40 C.J. p 631 note 19

10. Escriche Diccionario

Memorial ajustado

In Spanish law, the record of a litigated cause—Escriche Diccionario

11. Escriche Diccionario.

12. Black L D

13. US—U S v Boylen, D.C.Or., 41 F.Supp 724, 726

14. US—U S v Boylen, supra

"Mind" and "memory" as convertible terms

NY—In re Forman, 54 Barb 274, 286

40 C.J. p 631 note 26 [a]

15. US—U S v Boylen, D.C.Or., 41 F.Supp 724, 726

16. Mo—State v Coyne, 114 SW 8, 12, 214 Mo 341, 21 L.R.A.N.S., 993

40 C.J. p 631 note 25

17. Mo—State v Coyne, supra

40 C.J. p 631 note 26

18. Wash—State v Haffer, 162 P 45, 47, 94 Wash 136, L.R.A.1917C 610, Ann Cas 1917E, 229

19. Wash—State v Haffer, supra

20. Wash—State v Haffer, supra

21. Wash—State v Haffer, supra

22. Phrases

(1) "Impairment of memory" as affecting capacity to make a will see the C.J.S. title Wills § 28, also 68 C.J. p 442 note 87—p 443 note 92

(2) "Legal memory" see 52 C.J.S. p 1044 note 15

(3) "Refreshing memory" of a witness see the C.J.S. title Witness-

MEN. See Man or Men 54 C.J.S. p 1112—note 42—p 1113 note 78

MENACE. While the word “menace” is generally regarded as synonymous with “threat,” and is sometimes used as synonymous with “threat by word of mouth” as discussed in the C.J.S. title Threats and Unlawful Communications § 1, also 40 C.J. p 631 notes 33, 35, it may have other meanings,²³ and it may signify something more than mere words²⁴

As a noun The word “menace” has been defined as meaning a threat²⁵ or something that threatens or has the effect of threatening to cause evil or harm;²⁶ an impending evil,²⁷ that which menaces,²⁸ the indication of probable evil or catastrophe to come,²⁹ the show of an intention to inflict evil³⁰ Any overt act of a threatening character, short of an actual assault, is a menace³¹

In several jurisdictions “menace” is defined by statute as consisting in a threat of duress or the threat of injury to the character of particular persons,³² and a threat of imprisonment for an unlawful purpose constitutes a menace within the meaning of such statutes³³ Under such statutes menace arises by virtue of some unlawful action on the part of some person,³⁴ and the threat which is necessary to constitute menace must be more than some statement or act from which a guilty person becomes apprehensive of prosecution,³⁵ since it is the

threat and not the apprehension which makes out the menace, and that threat must be an unlawful and invalid one³⁶

Menace in the law of contracts see Contracts § 175, and as grounds for divorce see Divorce § 17 As insufficient to constitute an assault see Assault and Battery § 60

As a verb To act in a threatening manner³⁷

Menacing An adjective meaning that menaces³⁸

MENAGE. A domestic establishment; a household, domestic management, housekeeping³⁹

MENAGERIE. See the C.J.S. title Theaters and Shows § 1

MEND. To free from faults or defects; to set right; to correct⁴⁰ “Mend” has been held synonymous with “repair”⁴¹

“Mending” has a less comprehensive meaning than “repair”⁴²

MENDIGO. In Spanish law, mendicant, beggar⁴³

MENESTRAL. In Spanish law, a mechanic⁴⁴

MENIAL. It has been said that the word “menial” is derived from the old French “meiny” or “many,” “mesnie,”⁴⁵ and that in its true sense it relates to domestic servants⁴⁶

es §§ 357-368 also 70 C.J. p 577 note 43—p 600 note 62

(4) “Sound mind and memory” see Insane Persons § 2 d

(5) “Time for the commencement of memory” see Easements § 6

23. Colo—Lynch v People, 79 P 1015, 33 Colo 128

24. Ga—Worley v State, 71 S.E. 153, 155, 136 Ga 231

25. Ga—Bryant v Bryant, 14 S.E.2d 735, 737, 192 Ga 114.

La—Miller v White, App, 163 So 777, 779

Pa—Brown v Bahl, 170 A 346, 348, 11 Pa Super 598
40 C.J. p 632 note 37

26. La—Miller v White, App, 163 So 777, 779

27. Ga—Bryant v Bryant, 14 S.E. 2d 725, 727, 192 Ga 114—Worley v State, 71 S.E. 153, 155, 136 Ga 231

28. Ga—Bryant v Bryant, 14 S.E. 2d 725, 727, 192 Ga 114—Worley v State, 71 S.E. 153, 155, 136 Ga 231

To call a man a liar and raise a stick to strike him, if in anger, is a menace of violence—Rumser v Bul-lard, 63 S.E. 921, 5 Ga App 803

29. Ga—Bryant v Bryant, 14 S.E. 2d 725, 727, 192 Ga 114
40 C.J. p 632 note 41

Similarly defined

(1) A declaration or indication of a hostile intention or of a probable evil to come—Miller v White, La App, 163 So 777, 779

(2) A declaration of an intention to cause evil to happen to another, or a threatening attitude—Brown v Bahl, 170 A 346, 348, 11 Pa Super 598

(3) The declaration or indication of a disposition or determination to inflict an evil—Regina v Tomlinson, [1895] 1 Q.B. 706, 709

33. Ga—Bryant v Bryant, 14 S.E.2d 725, 727, 192 Ga 114
40 C.J. p 632 note 42

31. Ga—Bryant v Bryant, supra.
40 C.J. p 632 note 43

32. Cal—Miller v Walden, 127 P.2d 952, 957, 53 Cal App 2d 353

Mont—Clifford v Great Falls Gas Co, 216 P 1114, 1115, 68 Mont 300

33. Mont—Clifford v Great Falls Gas Co, supra

34. Cal—Miller v Walden, 127 P.2d 952, 957, 53 Cal App 2d 353

35. Cal—Miller v Walden, supra

36. Cal—Miller v Walden, supra

37. Ga—Cumming v State, 27 S.E. 177, 178, 99 Ga 662
40 C.J. p 632 note 43

38. Webster New Int D

Menacing manner means the showing of an intention to inflict evil, a threat, an indication of probable evil or hurt to come—State v Moherman, 23 N.E.2d 651, 652, 62 Ohio App. 258

39. Webster New Int D
Que—See Blouin v Cantin, 49 Que. Super 154, 155

40. Webster New Int D

41. W Va—Mozingo v Wellsburg Electric Light, Heat & Power Co, 131 S.E. 717, 718, 101 W Va 79
54 C.J. p 398 note 37 [a]

42. Pa—Thompson v Allegheny Valley St Ry Co, 194 A 921, 922, 328 Pa 118

43. Escriche Diccionario

44. Escriche Diccionario

45. Eng—Nicol v Greaves, 17 C.B. NS 27, 38 note, 112 E.C.L. 27, 144 Reprint 11

40 C.J. p 632 note 48

46. Minn—Becker v Northland Transp Co, 274 N.W. 180, 183, 200 Minn 272.

As a noun, the word is said to mean a domestic servant, one of the train of servants, also a company or retinue, the company or collected number of a household or family ⁴⁷

As an adjective the word is defined as meaning belonging to the retinue of servants, belonging to the retinue or train of servants ⁴⁸

MENIERE'S DISEASE. See 27 CJS p 145 note 321.

MENINGES. The coverings of the brain ⁴⁹

MENINGITIS. The inflammation of the meninges, or coverings of the brain ⁵⁰

MENOR. In Spanish law, a minor ⁵¹

MENORIA or **MINORIDAD.** Minority ⁵²

MENOSCABO. In Spanish law, gain lost through the fault of another. ⁵³

MENSA ET THORO. From bed and board ⁵⁴

MENS REA. See Criminal Law § 29

MENS TESTATORIS IN TESTAMENTIS SPIC-TANDA EST. See 40 C.J. p 633 note 63

MENSURATION. As a branch of pure mathematics with which the court is presumed to be acquainted see Evidence § 102

MENTAL. As used to describe the condition of a person, a word which refers to his senses, percep-

tions, consciousness, and ideas ⁵⁵ It has been contrasted with "bodily" see 11 CJS p 375 note 24.

Various terms in which the word "mental" occurs, such as "mental alienation," "mental defect," "mental defective," "mental defectiveness," "mental deficiency," "mental derangement," "mental disease," "mental disorder," "mental illness," "mental imbecility," "mental incapacity," "mental incompetency," "mental infirmity," and "mental unsoundness" are treated etymologically and lexically in Insane Persons § 2 d, and reference is made in Insane Persons § 1 to some of the titles throughout this work where such terms are specifically applied. Such terms as "mental suffering" or "mental pain and suffering" are frequently employed with reference to the recovery of damages and are treated in this connection in Damages §§ 65-70. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

Other phrases employing the word "mental" are set out in the note ⁵⁶

MENTALITY. Mental power; state of mind ⁵⁷

MENTALLY. In the mind; in thought or meditation, intellectually, in idea ⁵⁸

MENTE CAPTUS. See Insane Persons § 2 d

MENTECATO. In Spanish law, imbecility. ⁵⁹

MENTION. Not a legal term, ⁶⁰ but a term having a broad colloquial meaning. ⁶¹

Employed as a noun, the word signifies a brief re-

47. Eng—Nicoll v Greaves, 17 CB NS 27, 38 note, 112 ECL 27, 117 Reprint 11

40 C.J. p 632 notes 51, 52

48. Eng—Nicoll v Greaves, supra. "Mental labor" distinguished from "executive capacity" see Executive 33 CJS p 818 note 12

49. Ala—First Nat Bank v Equitable Life Assur Soc of U S, 144 So 451, 452, 225 Ala 586

50. Ala—First Nat Bank v Equitable Life Assur Soc of U S, supra

"Encephalo meningitis" see 30 CJS p 239 note 34

51. Escriche Diccionario

52. Escriche Diccionario

53. Escriche Diccionario

54. Black L D

Divorce a mensa et thoro see Divorce § 1

55. Ga—Corpus Juris cited in Wilson v Ray, 13 SE2d 848, 852, 64 Ga App 540

40 C.J. p 633 note 65.

56. Phrases

(1) "Mental agony" see 3 CJS p 354 note 49 in Pocket Parts

(2) "Mental and physical disabilities" in connection with testamentary capacity see the CJS title Wills §§ 15-30, also 68 C.J. p 424 note 10—p 444 note 17

(3) "Mental anguish" see 3 CJS p 1075 note 17

(4) "Mental approach" is the equivalent of "attitude of mind" see 7 CJS p 693 note 87

(5) "Mental capacity or competence" see 12 CJS p 1117 notes 62-65

(6) "Mental cruelty" defined and discussed in connection with divorce see Divorce § 28

(7) "Mental disease" compared with "bodily disease or illness" see 11 CJS p 378 note 4

(8) "Mental incapacity" as ground for divorce see Divorce §§ 20, 49

(9) "Mental irresponsibility" in criminal law see Criminal Law § 56

(10) "Mental shock"—Provident Life & Accident Ins Co v Campbell, 79 SW2d 292, 298, 18 Tenn App 452

57. Ga—Wilson v Ray, 13 SE2d 848, 852, 61 Ga App 540

"Loss of her mentality" has been used as meaning "loss of her state of mind" which is considered as synonymous with "not possessed of mind"—Wilson v Ray, supra

58. Webster New Int D Phrases

(1) "Mentally and physically capable of contracting" distinguished from "capable of contracting" see Capable 12 CJS p 1115 note 31

(2) "Mentally incompetent" see Insane Persons § 2 d

59. Escriche Diccionario

60. US—U S v One Blue Taffeta Evening Coat, etc, DCNY, 237 F 703, 706

61. US—U S v One Blue Taffeta Evening Coat, etc, supra.

mark or statement about a person or thing,⁶² allusion,⁶³ notice,⁶⁴ the act of mentioning⁶⁵

As a verb, "mention" means to direct attention to,⁶⁶ to make slight allusion to,⁶⁷ to name casually or incidentally,⁶⁸ to notice,⁶⁹ to refer to,⁷⁰ to speak briefly of⁷¹ The verb "to mention" is applied to something thrown in or added incidentally in a discourse or writing⁷²

"Mention" has been held synonymous with "ad-duce" see 1 C J S p 1461 note 79, and "mentioned" has been held not synonymous with "described" see 26 C J S p 1234 note 7.

The word "mention" is frequently employed in statutes providing for children not mentioned in a will and such statutes are considered in Descent and Distribution § 45. The word is also used in statutes dealing with the abrogation of the common-law rule relative to the revocation of a will by a subsequent marriage, and such statutes are treated in the C. J. S. title Wills § 291, also 68 C J. p 833 note 97

MENTIRI EST CONTRA MENTEM IRE. See 40 C J p 634 note 98

MENUDOS. In Spanish law, the tithe (tenth part) of the less important products, as honey, wax, etc⁷³

MENU, LAWS OF. A collection or institute of the earliest laws of ancient India⁷⁴

MERCADER. In Spanish law, merchant; trader⁷⁵

MERCADERIA. In Spanish law, merchandise⁷⁶

MERCADO. In Spanish law, a market; place of trade⁷⁷ It has been distinguished from "feria" see 36 C J S p 674 note 29.

MERCANTILE. The word "mercantile" has been variously defined as meaning of or pertaining to merchants or the traffic carried on by merchants,⁷⁸ of, or pertaining to, or characteristic of merchants, or the business of buying and selling merchandise,⁷⁹ pertaining to merchants or the business of merchants;⁸⁰ having to do with trade or the buying and selling of commodities,⁸¹ having to do with trade or commerce,⁸² trading,⁸³ commercial,⁸⁴ conducted or acting on business principles⁸⁵ In its ordinary acceptance the word "mercantile" means per-

62. Tex—Pearce v Carrington, Civ App, 124 S W 469, 473

63. Tex—Pearce v Carrington, supra.

64. Tex—Pearce v Carrington, supra.

65. Tex—Pearce v Carrington, supra.

66. NY—Toerge v Toerge, 41 NY S 244, 246, 9 App Div 194

67. Ont—Re Miles, 8 Ont W R 817, 818

68. NY—Toerge v Toerge, 41 NY S 244, 246, 9 App Div 194

69. NC—State v Bryan, 89 NC 531, 533

70. NC—State v Bryan, supra

71. NY—Toerge v Toerge, 41 NY S 244, 246, 9 App Div 194

Similarly expressed
To speak of briefly or cursorily—
Re Miles, 8 Ont W R 817, 818

72. Ont—Re Miles, supra.
40 C J p 634 note 97

73. Escriche Diccionario.

74. Black L D

75. Escriche Diccionario

Mercadera

Female trader—Escriche Diccionario

76. Escriche Diccionario

77. Escriche Diccionario

78. US—Toxaway Hotel Co v J L Smathers & Co, 30 S Ct 263, 265,

216 US 439, 54 L Ed 558—In re Kingston Realty Co, NY, 160 F 445, 417, 87 CCA 406—In re New York & W Water Co, DCNY, 98 F 711, 713

Okl—Continental Baking Co v Campbell, 55 P 2d 114, 116, 176 Okl 218—Veazey Drug Co v Bruza, 37 P 2d 294, 296, 169 Okl 418

Pa—In re Wanamaker's Estate, 167 A 592, 594, 312 Pa 362

40 C J p 634 note 9

79. Pa—In re Wanamaker's Estate, 167 A 592, 594, 312 Pa 362

Similarly defined

(1) Characteristic of, or befitting, a merchant—Atlantic Ice & Coal Co v Maxwell, 188 SE 381, 383, 210 NC 723

(2) Characteristic of the business of merchants—In re Wanamaker's Estate, 167 A 592, 594, 312 Pa 362

80. NC—Swift v Tempelos, 101 SE 8, 9, 178 NC 487, 7 ALR 1581
40 C J p 634 note 11

81. US—In re Cameron Town Mut Fire, Lightning & Windstorm Ins Co, DC Mo, 96 F 756, 757

40 C J p 634 note 8

Similarly defined

(1) Having to do with, or engaged in, trade—Atlantic Ice & Coal Co v Maxwell, 188 SE 381, 383, 210 NC 723

(2) Having to do with, or engaged in, trade, or the buying and selling of commodities—Kohlsaat v O'Connell, 99 NE 689, 690, 255 Ill 271

82. US—Toxaway Hotel Co v J L

Smathers & Co, 30 S Ct 263, 265, 216 US 439, 54 L Ed 558—In re Kingston Realty Co, NY, 160 F 445, 447, 87 CCA 406—In re New York & W Water Co, DCNY, 98 F 711, 713

Okl—Continental Baking Co v Campbell, 55 P 2d 114, 116, 176 Okl 218—Veazey Drug Co v Bruza, 37 P 2d 294, 296, 169 Okl 418

Pa—In re Wanamaker's Estate, 167 A 592, 594, 312 Pa 362

40 C J p 634 note 7

83. US—In re Kingston Realty Co, NY, 160 F 445, 447, 87 CCA 406—In re Pacific Coast Warehouse Co, DCCal, 123 F 749, 750—In re New York & W Water Co, DC NY, 98 F 711, 713

Okl—Continental Baking Co v Campbell, 55 P 2d 114, 116, 176 Okl 218—Veazey Drug Co v Bruza, 37 P 2d 294, 296, 169 Okl 418

Pa—In re Wanamaker's Estate, 167 A 592, 594, 312 Pa 362

84. US—In re Kingston Realty Co, NY, 160 F 445, 447, 87 CCA 406—In re New York & W Water Co, DCNY, 98 F 711, 713

Okl—Continental Baking Co v Campbell, 55 P 2d 114, 116, 176 Okl 218—Veazey Drug Co v Bruza, 37 P 2d 294, 296, 169 Okl 418

Pa—In re Wanamaker's Estate, 167 A 592, 594, 312 Pa 362

40 C J p 634 note 6

85. Pa—In re Wanamaker's Estate, 137 A 592, 594, 312 Pa 362.

taining to the business of merchants, and is concerned with trade or buying and selling of merchandise⁸⁶

The word "mercantile" signifies the same thing as "trading,"⁸⁷ and has been compared with "trade"⁸⁸

Mercantile purpose The term "mercantile purpose" has been held to cover the sale of liquors,⁸⁹ but not to include the operation of a restaurant⁹⁰

Mercantile pursuits. A term with a well-defined meaning in law⁹¹ It necessarily carries with it the idea of traffic, the buying of something from another, or the selling of something to another, and is allied to trade.⁹² It implies operations conducted with a view of realizing the profits which come from a skillful purchase, barter, speculation, and sale,⁹³ and refers to the buying and selling of goods or merchandise, or dealing in the purchase and sale of commodities, and that, too, not occasionally or incidentally, but habitually as a business⁹⁴ The term

is restricted to dealings in merchandise, goods, or chattels, the ordinary subjects of commerce⁹⁵ To be principally engaged in a mercantile pursuit one must be carrying on commerce in some of its branches⁹⁶ A mercantile pursuit is trading in the larger sense,⁹⁷ but generally the term has a slightly broader significance than the term "trading,"⁹⁸ since it has been said that trading is a mercantile pursuit, but all mercantile pursuits may not involve trading⁹⁹

For particular businesses, activities, or occupations which have been held not to be mercantile pursuits see 40 C J p 635 note 24 [a]-[c]

The term "mercantile pursuits" as used in an early bankruptcy statute allowing involuntary proceedings against corporations engaged principally in such pursuits is treated in Bankruptcy § 96

Other phrases employing the word "mercantile" are set out in the note.¹

98. Okl—Continental Baking Co v Campbell, 55 P 2d 114, 116, 176 Okl 218—Veazey Drug Co v Bruza, 37 P 2d 294, 296, 169 Okl 418

Similarly expressed

(1) The word "mercantile" in its ordinary acceptation pertains to the business of merchants and has to do with trade, or the buying or selling of commodities—People v Cantor, 196 NYS 514, 515, 119 Misc 355

(2) The word "mercantile," in its ordinary acceptation, means pertaining to the business of merchants, and is concerned with trade or the buying and selling of commodities—People v Federal Sec Co, 99 NE 668, 669, 255 Ill 561

87. US—In re Kingston Realty Co, NY, 160 F 445, 447, 87 CCA 406 63 C J p 241-299 note 60

88. US—In re Wentworth Lunch Co, NY, 159 F 413, 415, 86 CCA 393 40 C J p 634 note 10 [a]

89. NY—Duryea v Hendrickson, 161 NYS 999, 1001, 175 App Div 188

90. Iowa—Garretson v Merchants' & Bankers' Ins Co, 45 NW 1047, 81 Iowa 727

Kan—Farmers' & Drovers' Nat Bank v Hannaman, 223 P 478, 480, 115 Kan 370

Held a "mercantile purpose"

"We are of opinion that the business carried on by the defendants was a use of the premises for mercantile purposes. It consisted of a

sale of food and beverages to be consumed on the premises"—Merrymount Co v Edwardes, 160 NE 831, 832, 263 Mass 282, 57 ALR 409

91. US—In re Pacific Coast Warehouse Co, DCCal, 133 F 749, 750

92. US—In re Cameron Town Mut Fire, Lightning & Windstorm Ins Co, DCMo, 98 F 756, 757, 758

93. La—Graham v Hendricks, 22 La Ann 523, 524

94. US—In re Kingston Realty Co, NY, 160 F 445, 447, 87 CCA 406 40 C J p 625 note 23

95. US—In re Kingston Realty Co, supra—In re New York & W Water Co, DCNY, 98 F 711, 714

96. US—Toxaway Hotel Co v J L Smathers & Co, 30 SCt 263, 265, 216 US 439, 54 LEd 558

97. US—Toxaway Hotel Co v J L Smathers & Co, 30 SCt 263, 265, 216 US 439, 54 LEd 558—In re Imperial Film Exchange, NY, 198 F 80, 81, 117 CCA 188

98. US—In re Kingston Realty Co, NY, 160 F 445, 447, 87 CCA 406 —In re New York & W Water Co, DCNY, 98 F 711, 713

99. US—In re Kingston Realty Co, NY, 160 F 445, 447, 87 CCA 406 63 C J p 240 note 46 [c]

1. Phrases

(1) "Mercantile business" see 12 CJS p 800 note 21

(2) "Mercantile character" generally see 14 CJS p 401 note 811, and

compared with, or distinguished from, "credit" see 21 CJS p 1044 note 99

(3) "Mercantile contracts" see Contracts § 10

(4) "Mercantile corporation" generally see Corporations § 22 c, as subject to taxation generally see the CJS title Taxation § 169, also 61 C J p 314 notes 39-45, and treated in connection with statutes dealing with the discriminatory taxation of national bank stock see the CJS title Taxation § 154

(5) "Mercantile establishment" see 30 CJS p 1234 note 87-p 1235 note 88

(6) "Mercantile law" see 52 CJS p 1028 notes 92-94

(7) "Mercantile lease" as a term applied to a charter party see the CJS title Shipping § 26, also 58 C J p 106 note 76

(8) "Mercantile marine" see Collision § 2 a

(9) "Mercantile partnership" see the CJS title Partnership § 1, also 40 C J p 635 notes 20, 21

(10) "Mercantile rule" as to the application of partial payments with respect to interest see Interest § 66, and in connection with a partnership accounting see the CJS title Partnership § 457

(11) Other phrases as to which more recent adjudications have not been found see 40 C J p 635 notes 26, 27, 33.

MERCANTILE AGENCIES

This Title includes the regulation and conduct of the business of procuring and furnishing information as to the pecuniary condition, credit, and character of persons engaged in business, and mutual rights, duties, and liabilities of those engaged therein, their agents and employees, and their subscribers or customers.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1. Definition and nature—p 1052
- 2 Regulation and control—p 1052
- 3 Creation and effect of relation as between agency and its subscribers—p 1053
- 4 — Duty to exercise care and diligence—p 1053
- 5 — Scope of use of information—p 1054
- 6 Effect of relation as between subscribers and third persons—p 1054
- 7 Effect of relation as between agency and third persons—p 1055
- 8 Actions by or against agencies—p 1055

See also descriptive word index in the back of this Volume

§ 1. Definition and Nature

A commercial or mercantile agency is a person, firm, or corporation engaged in the business of collecting information as to the financial standing, ability, and credit of persons engaged in business, and reporting such information to subscribers or customers applying and paying therefor.

The terms "commercial agency" and "mercantile agency" mean the same thing¹ A "commercial agency" or "mercantile agency" may be defined as a person, firm, or corporation engaged in the business of collecting information as to the financial standing, ability, and credit of persons engaged in business, and reporting such information to subscribers or customers applying and paying therefor.² Special commercial or mercantile agencies are those which confine themselves to reporting a particular

business, such as furniture, stationery, jewelry, and hardware³

A mercantile agency is the agent of the subscribers⁴ The agency is not a common carrier⁵

"Mercantile agent" has been distinguished from "commercial agency" or "mercantile agency"⁶

§ 2. Regulation and Control

Generally a mercantile agency may be required to take out a license and to pay a license tax

Generally the requirement of obtaining a license and payment of a license tax may be imposed on a mercantile agency⁷

Furnishing commercial credit reports and sending

1. NY—In re U S Mercantile Reporting & Collecting Ass'n, 4 N YS 916

Tex—Corpus Juris cited in Merchants Red Book Co v State, 125 SW2d 279, 281, 132 Tex 470, answer to certified question conformed to, Civ App, 126 SW2d 705

2. US—Zugalla v International Mercantile Agency, NJ, 142 F 927, 930, 74 CCA 97

Tex—Corpus Juris quoted in Merchants Red Book Co v State, 125 SW2d 279, 281, 132 Tex 470, answer to certified question conformed to, Civ App, 126 SW2d 705

40 C J p 636 note 2.

Similar definitions

"Establishments which make a business of collecting information relating to the credit, character, re-

sponsibility and reputation of merchants for the purpose of furnishing the information to subscribers"

Mo—Brookfield v Kitchen, 63 SW 825, 826, 163 Mo 546

Tex—Corpus Juris quoted in Merchants Red Book Co v State, 125 SW2d 279, 281, 132 Tex 470, answer to certified question conformed to, Civ App, 126 SW2d 705

40 C J p 636 note 2 [a]

3. SD—State v. Morgan, 48 NW 314, 2 SD 32

4. Pa—Ralph v Fon Deramith, 3 Pa Super 618

SD—State v Morgan, 48 NW 314, 2 SD 32

40 C J p 637 note 4.

5. SD—State v Morgan, supra, 40 C J. p 637 note 10

6. Mo—Brookfield v Kitchen, 63 S W 825, 163 Mo 546

7. Ga—Assets Realization Co v Lewis, 103 SE 463, 150 Ga 301
37 C J p 217 note 20—40 C J p 637 note 13

Entity not subject to tax

(1) Brokerage company investigating credit of persons applying for loans from certain company and not reporting on credit for any one other than loan company was not subject to tax as "commercial agency"—Gully v Gulfport Loan & Brokerage Co, 151 So 721, 168 Miss 449

(2) A credit reporting agency, organized for purpose of investigating credit of retail customers, was not subject to gross receipts tax as "commercial agency," notwithstanding agency was organized for private gain, where agency acted solely in cooperation with retail merchants' as-

them through the mails do not constitute interstate commerce, and such business is subject to state regulation, as discussed in Commerce § 31.

§ 3. Creation and Effect of Relation as between Agency and Its Subscribers

Generally the contract between a mercantile agency and the subscriber is construed strictly against the party who prepares it. The agency must comply with a contract provision for delivery of a credit guide or book in order to render the subscriber liable under the contract.

As in the case of contracts, generally, under rules stated in Contracts § 324, the contract between the agency and the subscriber is usually construed strictly against the party who prepares it.⁸ It has been held that a contract whereby the subscribers pay a money consideration must be given a construction which will entitle the subscribers to receive something which may be of assistance to them in determining whether or not to extend credit.⁹ Generally there must be due compliance by the agency with the provision of the contract for the delivery to the subscriber of a credit guide or book, in order to render the subscriber liable under the contract.¹⁰

§ 4. — Duty to Exercise Care and Diligence

In the absence of contractual obligation therefor, a mercantile agency does not guarantee the reliability of information furnished. While the agency may be liable for negligence in securing and communicating information it may limit its liability by contract provision, subject to the rule, sometimes recognized, that such provision is construed strictly against the agency.

In the absence of contractual obligation therefor, the agency by its contract to furnish the information does not guarantee the reliability of the infor-

mation,¹¹ all that is required of the agency is that it make due and diligent inquiries in regard to the financial standing of the customer.¹² It has been stated broadly that, in the absence of fraud or deceit, the agency is answerable to the subscriber, with respect to information furnished, according to the terms of the contracts and to such terms only.¹³

According to some cases, unless exempted by contract, the agency may be liable for negligence in securing and communicating information.¹⁴

A mercantile agency may by contract protect itself from the consequence of errors in the collection and transmission of information by its officers or agents,¹⁵ but, according to some cases, such a limitation is construed strictly against the agency,¹⁶ and the rule that a contract by which the subscribers pay a money consideration must be given a construction which will entitle them to receive something which may be of assistance to them in determining whether or not to extend credit, as considered supra § 3, applies to the construction of the clause of a contract so limiting the liability of the agency as not to include wrongful information furnished through negligence.¹⁷ While it has been held that, where the contract stipulates that the agency shall not be responsible for any loss caused by the neglect of its agents, attorneys, clerks, or employees, in procuring, collecting, and communicating the information, the agency is not liable, whether the negligence of the agent or attorney, etc., is merely ordinary negligence¹⁸ or gross negligence,¹⁹ according to some cases, notwithstanding a contract provision that the agency shall not be liable for loss or injury caused by it or by any of its officers or agents in procuring, collecting, and communicating infor-

sociation, in that association contributed information to agency and in turn obtained service from agency on basis of charges fixed or approved by themselves—*Merchants Red Book Co v State*, 125 S W 2d 279, 132 Tex 470, answer to certified question conformed to, Civ App, 126 S W 2d 705

8. NY—*Munro v Bradstreet Co*, 155 NYS 833, 170 App Div 294

9. NY—*Munro v Bradstreet Co*, supra

10. Mo—*Barr & Widen Mercantile Agency Co v Rodick*, 47 Mo App 298

40 C J p 637 note 18 [a]—[c]

11. NY—*Xiques v Bradstreet Co*, 24 NYS 48, 70 Hun 334, 344, affirmed 36 NE 740, 141 NY 605

40 C J p 638 note 25

Express provision that accuracy not guaranteed

Credit bureau was not liable to

client for negligently omitting mortgage from credit report, in absence of fraud or deceit, where contract with client provided that accuracy of such report was not guaranteed and bureau was independent contractor—*Globe Home Improvement Co v Perth Amboy Chamber of Commerce Credit Rating Bureau*, 182 A 641, 116 NJ Law 168, 102 ALR 1068

12. NY—*Xiques v Bradstreet Co*, 24 NYS 48, 70 Hun 334, affirmed 36 NE 740, 141 NY 605

13. NJ—*Globe Home Improvement Co v Perth Amboy Chamber of Commerce Credit Rating Bureau*, 182 A 641, 116 NJ Law 168, 102 ALR 1068

14. NY—*People v May*, 147 NYS 487, 162 App Div 215, affirmed 106 NE 1039, 212 NY 561

40 C J p 638 note 27

15. US—*Duncan v Dunn*, C C Pa, 8 F Cas No 4,131, 7 Wkly NC 246

NJ—*Corpus Juris* cited in *Globe Home Improvement Co v Perth Amboy Chamber of Commerce Credit Rating Bureau*, 182 A 641, 116 NJ Law 168, 102 ALR 1068

NY—*Xiques v Bradstreet Co*, 24 NYS 48, 70 Hun 334, affirmed 36 NE 740, 141 NY 605

16. Pa—*Crew v Bradstreet Co*, 19 A 500, 134 Pa 161, 19 Am SR 681, 7 L R A 661

17. NY—*Munro v Bradstreet Co*, 155 NYS 833, 170 App Div 294

18. US—*Duncan v Dunn*, C C Pa, 8 F Cas No 4,134, 7 Wkly NC 246

19. US—*Duncan v Dunn*, supra

40 C J p 639 note 39.

mation, the agency may be liable for false reports made knowingly²⁰ or as the result of gross mistakes or negligence²¹. It has been held that a contract stipulating for exemption from liability because of the negligence, etc., of the agency's agents, servants, etc., but not including the negligence of the agency itself, will not protect such an agency from liability for a loss occasioned by issuing its printed report with a gross error therein, where the information furnished by its agents was correct and the error occurred in the printing of the report, such error being regarded as that of the agency itself²². When it is stipulated that a mercantile agency shall not be liable for any loss or injury caused by neglect or other act of its officers or agents, in procuring, collecting, and communicating information, the agency cannot be held liable to subscribers for the consequences of misrepresentation, unless it is so grossly negligent in acquiring or communicating such information that its conduct in effect amounts to a fraud,²³ and a like rule has been recognized with respect to such a provision exempting from liability, which includes the neglect or act of the agency as well as that of its officers or agents²⁴.

Guaranteeing reliability of information The agency may guarantee the accuracy of its information,²⁵ agreeing to pay a fixed sum, up to the amount of any loss which should be sustained by reason of the inaccuracy of the information,²⁶ the damages to be paid not to exceed the amount of loss actually sustained by its subscriber²⁷.

§ 5. — Scope of Use of Information

A mercantile agency is not liable for an injury suffered by a subscriber from a use of the information outside his legitimate business, where the contract limits the

use of the information to the subscriber's legitimate business.

If the contract confines or limits the use that may be made of the information by the subscriber to that of his legitimate business, the agency is not liable for damages suffered by the subscriber from a use of the information foreign to his legitimate business²⁸.

§ 6. Effect of Relation as between Subscribers and Third Persons

Under some circumstances, patrons of a mercantile agency may be entitled to relief and redress with respect to statements and representations of others made to the agency, and may claim an estoppel in that regard.

Since statements and representations made to a mercantile agency are intended as much for the patrons of the agency as for the agency,²⁹ the patrons will be entitled to relief and redress when they rely and act on such statements and representations to their injury.³⁰ When such statements and representations are communicated to a patron or the agency as being the statements and representations of the person making them, the patron relying and acting on them is in a position to claim an estoppel³¹. It has been held that the person making the statements to the agency is liable not merely for his own statements, but also for the rating assigned by the agency, based on such statements³².

It has been held that the right to rely and act on statements and representations made to a mercantile agency is not general or common to all persons who may have patronized the agency,³³ and that the right is limited and confined to the persons for whom such statements and representations are intended,³⁴ namely, those who have occasion to ap-

20. NY—Munro v Bradstreet Co., 155 NYS 833, 170 App Div 294.

21. NY—Munro v Bradstreet Co., supra.

22. Pa.—Crew v Bradstreet Co., 19 A 500, 134 Pa 161, 19 Am SR 681, 7 LRA 661.
40 CJ p 638 note 36.

23. NY—Xiques v Bradstreet Co., 24 NYS 48, 70 Hun 334, affirmed 36 NE 740, 141 NY 605.
40 CJ p 638 note 37.

24. NY—Bauman v Bradstreet Co., 265 NYS 169, 238 App Div 617.

Gross negligence not shown

Mercantile agency furnishing credit report summarizing its records was not grossly negligent because not searching for outstanding judgments against subscriber's prospective customer—Bauman v. Bradstreet Co., supra.

25. NY—People v May, 147 NYS 487, 162 App Div 215, affirmed 106 NE 1039, 212 NY 561.

26. NY—People v May, supra.

27. NY—People v May, supra.

28. Pa.—Sprague v Dun, 12 Phila 310.

29. Minn.—Irish-American Bank v Ludlum, 51 NW 1046, 49 Minn 344—Stevens v Ludlum, 48 NW 771, 46 Minn 160, 24 Am SR 210, 13 LRA 270.
40 CJ p 640 note 55.

30. NY—Tindle v Birkett, 64 NE 210, 171 NY 520, 89 Am SR 822.
40 CJ p 640 note 56.

False statement to agency as

Affecting validity of sale of personal property see the CJS title Sales § 49, also 55 CJ p 158 note 2-p 160 note 31.

Basis of action for deceit see Fraud § 47 b.

31. Minn.—Stevens v Ludlum, 48 NW 771, 46 Minn 160, 24 Am SR 210, 13 LRA 270.

Tex.—Thomas v Fitts-Smith Dry Goods Co., Civ App, 151 SW 2d 243.

Persons affected by equitable estoppel generally see Estoppel §§ 130-147.

32. NY—Tindle v Birkett, 64 NE 210, 171 NY 520, 89 Am SR 822.
40 CJ p 640 note 59.

33. Minn.—Irish-American Bank v Ludlum, 51 NW 1046, 49 Minn 344.

34. Minn.—Irish-American Bank v Ludlum, supra.

ply and who have applied and received a report relative to the person or concern in question³⁵

§ 7. Effect of Relation as between Agency and Third Persons

A mercantile agency may be entitled to redress with respect to the wrongful use by a nonsubscriber of information furnished to subscribers by the agency

Since the information supplied by a mercantile agency is confidential between it and its subscribers, the agency may be entitled to redress with respect to the unauthorized use thereof by a nonsubscriber.³⁶

The question whether a communication relating to financial standing constitutes actionable defamatory matter is discussed in Libel and Slander §§ 23, 52, and whether such communication published by

a mercantile agency is privileged in Libel and Slander § 119

§ 8. Actions by or against Agencies

A subscriber who has extended credit to a third person on the faith of erroneous information furnished by a mercantile agency need not sue such third person before bringing an action against the agency, where such third person is insolvent.

It is not essential that a subscriber, who has extended credit to a third person on the faith of erroneous information furnished by the agency, should bring an action against such third person before bringing an action against the agency where such third person is insolvent³⁷

Where the evidence is such as to justify a finding of gross negligence and of constructive fraud on the part of defendant agency, plaintiff subscriber is entitled to have the issues submitted to the jury.³⁸

MERCAPTANS. Mercaptans may be broadly described as organic compounds having sulfide atoms. They are divided into two broad classes which are commonly spoken of as simple mercaptans and substituted mercaptans¹

MERCENARY. One who is hired or paid for his work; a hireling, now only a soldier hired into foreign service.²

MERCEN-LAGE. The law of the Mercians, one of the three principal systems of laws which pre-

vailed in England about the beginning of the eleventh century³

MERCHANDISE.

In General

The word "merchandise" is derived from the Latin "merx,"⁴ and came into use as a term to designate the goods and wares exposed to sale in fairs and markets.⁵ It is a very broad⁶ and comprehensive⁷ term, having a wide,⁸ well-defined,⁹ and very extended¹⁰ meaning, and, in common understand-

35. Minn.—Irish-American Bank v Ludlum, supra.
40 C J p 640 note 62

36. N Y—Jewelers' Agency v Rothschild, 39 N Y S 700, 6 App Div 499.
Injunction to restrain Publication of false reports see Injunctions § 135.
Use or publication of information by nonsubscriber see Injunctions § 149 c.

37. Pa.—Crew v Bradstreet Co, 19 A 500, 134 Pa. 161, 19 Am SR 681, 7 L R A 661.
40 C J p 638 note 27 [a.]

38. N Y—Munro v Bradstreet, 155 N Y S 833, 170 App Div 294.
40 C J p 638 note 35 [a.] (1)
Evidence held insufficient to authorize submission to jury of question as to gross negligence—Xiques v Bradstreet Co, 24 N Y S 48, 70 Hun 334, affirmed 36 N E 740, 141 N Y 605.

1. U S—Sales Affiliates v Hutzler Bros Co, D C Md, 71 F Supp 287, 291.

Simple mercaptan

A simple mercaptan is an organic substance stemming from an alcohol, in which the hydroxyl group has been replaced by one hydrogen sulphide group (HS)—Sales Affiliates v Hutzler Bros Co, supra.

Substituted mercaptan

A substituted mercaptan is a simple mercaptan in which one or more of the hydrogen atoms have been replaced by some other atom or groups of atoms. Substituted mercaptans are again divisible into those of the nonpolar group which in solution do not ionize, that is, do not, when put in solution, break down into electrically charged particles, both positive and negative, known as ions, and those of the polar group which do ionize in solution. This latter group includes both those of the acid-acting kind and those of the basic-acting kind—Sales Affiliates v Hutzler Bros Co, supra.

2. Webster New Int D

Mercenaries are those who have been hired to fight—Stephens v

State Civil Service Commission, 127 A 808, 812, 101 N J Law 192.

3. Black L D

4. U S—In re Hudson River Electric Power Co, D C N Y, 173 F 934, 952

5. N Y—Passaic Mfg Co v Hoffman, 3 Daly 495, 512

N C—Raleigh Tire & Rubber Co v Morris, 106 S E 562, 564, 181 N C 184

6. Ariz.—Russell v Central Commercial Co, 264 P 1081, 1082, 33 Ariz 349

7. U S—Groves v Slaughter, La, 15 Pet 449, 506, 10 L Ed 800.
Mass—Sullivan v Ashfield, 116 N E 565, 567, 227 Mass 24.
N Y—Mott v Reeves, 211 N Y S 375, 378, 125 Misc 511.
40 C J p 641 note 11

8. Wash—Allen Lubricating Co v Phoenix Indemnity Co, 288 P 906, 909, 157 Wash 295

9. Iowa—Jewell v Sumner Tp, 84 N W 973, 975, 113 Iowa 47.
40 C J p 641 note 16

10. Ky—W E Gunn & Co v Mon-

ing,¹¹ of large¹² and distinct¹³ signification While it is said that it has no fixed and technical legal signification,¹⁴ it is also said that it has an appropriate meaning in law and that it should be construed accordingly¹⁵ The term may be difficult of precise and comprehensive definition,¹⁶ and it is recognized that it is impossible to give a definition which will be a proper test under all conditions¹⁷ The meaning of the term must be gathered from the context

and subject.¹⁸

As a Noun

The word "merchandise," employed as a noun, is defined as meaning the objects of commerce,¹⁹ the subjects of commerce and traffic,²⁰ whatever is usually bought and sold in trade, or market, or by merchants,²¹ goods,²² wares,²³ commodities,²⁴ commodities, goods, or wares bought and sold for gain,²⁵ commodities or goods to trade with,²⁶ a

arch Coal & Coke Co., 267 S W 166, 167, 206 Ky 412
Mo—State v Jeffords, 64 S W 2d 241, 242
Wash—Allen Lubricating Co v Phoenix Indemnity Co, 288 P 906, 909, 157 Wash 295
40 C J p 641 note 13
11. US—U S v Mattio, CCA Cal, 17 F 2d 879, 880
12. Mass—Empire Laboratories, Inc., v Golden Distributing Corporation, 164 NE 772, 773, 266 Mass 418—Tupper v Barrett, 134 NE 427, 438, 233 Mass 565
Mich—Patmos v Grand Rapids Dairy Co, 220 NW 724, 725, 243 Mich 417
Very large signification
Mass—New England & S S S Co v Commonwealth, 81 NE 286, 289, 195 Mass 385, 11 Ann Cas 678
13. US—U S v Mattio, CCA Cal, 17 F 2d 879, 880
14. Ind—Kent v Liverpool & London Ins Co, 26 Ind 294, 297, 89 Am D 463
NY—Mott v Reeves, 211 NYS 375, 378, 125 Misc 511
15. Iowa—Jewell v Sumner Tp, 84 NW 973, 975, 113 Iowa 47
16. US—U S v Mattio, CCA Cal, 17 F 2d 879, 880
17. Tenn—Morelock v Hail, 200 S W 519, 520, 138 Tenn 657
18. Mass—New England & S S S Co v Commonwealth, 81 NE 286, 288, 289, 195 Mass 385, 11 Ann Cas 678
Tenn—Moreland v Hail, 200 S W 519, 520, 138 Tenn 657
19. US—Branch v Federal Trade Commission, CCA Ill, 141 F 3d 31, 36—In re Miller Land & Livestock Co, DCMont, 56 FSupp 34, 35
Ariz—Corpus Juris quoted in Russell v Central Commercial Co, 264 P 1081, 1082, 33 Ariz 349
Cal—Ex parte Holmes, 203 P 398, 399, 187 Cal 640
Mich—Frederick v Dettary Engineering Co, 28 NW 2d 94, 96, 318 Mich 253
Mo—State v Jeffords, 64 S W 2d 241, 242
NY—Davignon v Raquette River Paper Co, 56 NYS 2d 249, 250,

269 App Div 889—Mott v Reeves, 211 NYS 375, 378, 125 Misc 511
SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750
Tenn—Britt v Cook, 6 S W 2d 322, 157 Tenn 54
Tex—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 S W 2d 185, 188
40 C J p 642 note 31
Similarly expressed
The objects of business intercourse—Davignon v Raquette River Paper Co, 56 NYS 2d 249, 250, 269 App Div 889
20. Ariz—Corpus Juris quoted in Russell v Central Commercial Co, 264 P 1081, 1082, 33 Ariz 349
40 C J p 642 note 33
21. Ariz—Corpus Juris quoted in Russell v Central Commercial Co, 264 P 1081, 1082, 33 Ariz 349
Cal—Ex parte Holmes, 203 P 398, 399, 187 Cal 640
Mich—Frederick v Dettary Engineering Co, 28 NW 2d 94, 96, 318 Mich 253
Mo—State v Jeffords, 64 S W 2d 241, 242
NY—Mott v Reeves, 211 NYS 375, 378, 125 Misc 511
SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750
Tex—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 S W 2d 185, 188
40 C J p 642 note 36
Similarly defined
(1) Whatever is usually bought or sold in trade—Branch v Federal Trade Commission, CCA Ill, 141 F 2d 31, 36—In re Miller Land & Livestock Co, DCMont, 56 FSupp 34, 35
(2) Such things as are usually bought and sold in trade by merchants—Frederick v Dettary Engineering Co, 28 NW 2d 94, 96, 318 Mich 252—McPartin v Clarkson, 215 NW 338, 339, 240 Mich 390
(3) Whatever is usually bought and sold in trade or market—Britt v Cook, 6 S W 2d 322, 157 Tenn 54
22. US—In re Miller Land & Livestock Co, DCMont, 56 FSupp 34, 35
Ariz—Corpus Juris quoted in Rus-

sell v Central Commercial Co, 264 P 1081, 1082, 33 Ariz 349
Cal—Ex parte Holmes, 203 P 398, 399, 187 Cal 640
Mo—State v Jeffords, 64 S W 2d 241, 242
NY—Mott v Reeves, 211 NYS 375, 378, 125 Misc 511
SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750
Tex—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 S W 2d 185, 188
40 C J p 641 note 29
23. US—In re Miller Land & Livestock Co, DCMont, 56 FSupp 34, 35
Ariz—Corpus Juris quoted in Russell v Central Commercial Co, 264 P 1081, 1082, 33 Ariz 349
Cal—Ex parte Holmes, 203 P 398, 399, 187 Cal 640
NY—Mott v Reeves, 211 NYS 375, 378, 125 Misc 511
SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750
Tex—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 S W 2d 185, 188
40 C J p 642 note 35
24. Ariz—Corpus Juris quoted in Russell v Central Commercial Co, 264 P 1081, 1082, 33 Ariz 349
Cal—Ex parte Holmes, 203 P 398, 399, 187 Cal 640
Mo—State v Jeffords, 64 S W 2d 241, 242
NY—Mott v Reeves, 211 NYS 375, 378, 125 Misc 511
SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750
Tex—Hobart Mfg Co v Joyce & Mitchell, Civ App 4 S W 2d 185, 188
40 C J p 641 note 26
25. Ariz—Corpus Juris quoted in Russell v Central Commercial Co, 264 P 1081, 1082, 33 Ariz 349
40 C J p 641 note 27
26. Ariz—Corpus Juris quoted in Russell v Central Commercial Co, 264 P 1081, 1082, 33 Ariz 349
40 C J p 641 note 28.

commercial commodity or commercial commodities in general²⁷

The term is also defined as meaning things which are ordinarily bought and sold,²⁸ anything movable,²⁹ anything customarily bought and sold for profit,³⁰ any movable object of trade or traffic,³¹ any article which is the object of commerce, or which may be bought or sold in trade;³² the staple of a mercantile business,³³ that which is passed from hand to hand by purchase and sale³⁴

In a more restricted sense the term is defined as meaning something that is sold every day, and is constantly going out of the store and being replaced by other goods,³⁵ goods which are kept in stock for sale and, on being sold, are replaced by other goods³⁶

At one time the word "merchandise" was applicable only to those articles kept in stock and sold by people generally known as merchants³⁷ The term is still used to denote all those things which merchants sell,³⁸ either at wholesale³⁹ or retail,⁴⁰ as dry goods, hardware, groceries, drugs, etc.⁴¹

However, in modern usage the word has a broader meaning,⁴² and now covers all kinds of personal property which is bought and sold in the market⁴³ Thus it embraces all articles of commerce,⁴⁴ every article of traffic,⁴⁵ which is properly embraced in a commercial regulation,⁴⁶ foreign or domestic⁴⁷

While, as stated in the previous subdivision, the word "merchandise" is broad and comprehensive, it is subject to certain limitations and restrictions.⁴⁸ Although it is sufficiently comprehensive to include

27. Ariz.—*Corpus Juris* quoted in Russell v Central Commercial Co., 264 P 1081, 1082, 33 Ariz 349 40 C J p 641 note 22

28. Ariz.—*Corpus Juris* quoted in Russell v Central Commercial Co., 264 P 1081, 1082, 33 Ariz 349 40 C J p 642 note 34

29. Ill.—Kohlsaat v O'Connell, 99 NE 689, 690, 255 Ill 271

Ky.—W E Gunn & Co v Monarch Coal & Coke Co, 267 SW 166, 167, 206 Ky 412

NY—Utica Trust & Deposit Co v Decker, 215 NYS 669, 671, 217 App Div 137

Tex.—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 SW 2d 185, 188

30. Ariz.—*Corpus Juris* quoted in Russell v Central Commercial Co., 264 P 1081, 1082, 33 Ariz 349

Ky.—W E Gunn & Co v Monarch Coal & Coke Co, 267 SW 166, 167, 206 Ky 412

NY—Utica Trust & Deposit Co v Decker, 215 NYS 669, 671, 217 App Div 137

Tex.—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 SW 2d 185, 188

40 C J p 641 note 25

Similarly defined

Every article of traffic customarily bought and sold for a profit—Mellitz v Sunfield Co, 129 A 228, 231, 103 Conn 177

31. Ariz.—*Corpus Juris* quoted in Russell v Central Commercial Co., 264 P 1081, 1082, 33 Ariz 349

40 C J p 641 note 24

Similarly defined

Anything movable customarily traded in by merchants—In re Laureate Co, Inc, CCA NY, 294 F 668, 670.

32. Ariz.—*Corpus Juris* quoted in

Russell v Central Commercial Co., 264 P 1081, 1082, 33 Ariz 349

40 C J p 641 note 23

33. Ariz.—*Corpus Juris* quoted in Russell v Central Commercial Co., 264 P 1081, 1082, 33 Ariz 349

40 C J p 642 note 33

34. Ariz.—*Corpus Juris* quoted in Russell v Central Commercial Co., 264 P 1081, 1082, 33 Ariz 349

40 C J p 642 note 30

35. Ark.—Gretzinger v Wynne Wholesale Grocery Co, 35 SW 2d 604, 606, 183 Ark 303—Root Refineries v Gay Oil Co, 284 SW 26, 27, 171 Ark 129, 46 ALR 979

Idaho—Boise Ass'n of Credit Men v Ellis, 141 P 6, 9, 26 Idaho 438, LRA 1915E 917

Mich.—Patmos v Grand Rapids Dairy Co, 220 NW 724, 725, 243 Mich 417

36. RI.—Gaspee Cab v McGovern, 153 A 870, 871, 51 RI 247.

37. NY—Utica Trust & Deposit Co v Decker, 215 NYS 669, 672, 217 App Div 137

38. NY—Mott v Reeves, 211 NY S 375, 378, 125 Misc 511

SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750

Tex.—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 SW 2d 185, 188

40 C J p 642 note 42

39. NY—Mott v Reeves, 211 NY S 375, 378, 125 Misc 511

SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750

Tex.—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 SW 2d 185, 188

40 C J p 642 note 43

40. NY—Mott v Reeves, 211 NY S 375, 378, 125 Misc 511

SC—Charleston Oil Co v Poulnot,

141 SE 454, 457, 143 SC 283, 60 ALR 750

Tex.—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 SW 2d 185, 188

40 C J p 642 note 44

41. NY—Utica Trust & Deposit Co v Decker, 215 NYS 669, 672, 217 App Div 137—Mott v Reeves, 211 NYS 375, 378, 125 Misc 511

SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750

Tex.—Hobart Mfg Co v Joyce & Mitchell, Civ App, 4 SW 2d 185, 188

40 C J p 642 note 45

42. NY—Utica Trust & Deposit Co v Decker, 215 NYS 669, 672, 217 App Div 137

43. NY—Utica Trust & Deposit Co v Decker, supra

40 C J p 642 note 41

44. La.—State v Holmes, 28 La. Ann 765, 767, 26 AmR 110

45. US—Groves v Slaughter, La., 15 Pet 449, 506, 10 L Ed 800

Ky.—W E Gunn & Co v Monarch Coal & Coke Co, 267 SW 166, 167, 206 Ky 412

NY—Mott v Reeves, 211 NYS 375, 378, 125 Misc 511

40 C J p 642 note 38

46. US—Groves v Slaughter, La., 15 Pet 449, 506, 10 L Ed 800

NY—Mott v Reeves, 211 NYS 375, 378, 125 Misc 511

Tex.—Harris v Willis, Civ App, 187 SW 753

47. NY—Mott v Reeves, 211 NY S 375, 378, 125 Misc 511

40 C J p 642 note 40

48. US.—Citizens' Bank v Nantucket Steamboat Co, CCMass, 5 F Cas No 2,730, 2 Story 16, 53

Mass.—Empire Laboratories, Inc, v. Golden Distributing Corporation, 164 NE 772, 773, 266 Mass 418.

every tangible species of personal property,⁴⁹ it is usually applied to personal chattels only,⁵⁰ and to those which are not required for food or immediate support,⁵¹ but such as remain after having been used⁵² or which are used only by a slow consumption⁵³ The term is also limited to subjects of commerce, goods, wares, and commodities, having a sensible intrinsic value,⁵⁴ and ordinarily is applied only to articles having an intrinsic value in bulk, weight, or measure, and which are bought and sold⁵⁵ The fact that a thing is sometimes bought and sold does not make it merchandise,⁵⁶ the term being usually if not universally limited to things that are ordinarily bought and sold, the subjects of commerce and traffic.⁵⁷ When not otherwise limited the word "merchandise" includes commercial commodities in general, whatever their nature.⁵⁸ It usually conveys the idea of personalty used by mer-

chants in the course of trade,⁵⁹ and is usually, if not universally, applied to property which has not yet reached the hands of the consumer⁶⁰ Under some circumstances, when the term is employed to describe the goods of a merchant, it may properly be limited to goods intended for sale⁶¹ On the other hand, the word may cover property intended for use and not for sale,⁶² particularly where it is used to describe the goods of some person other than a merchant⁶³

Literally, the word "merchandise" connotes something tangible,⁶⁴ such as goods, wares, commodities,⁶⁵ as distinguished from intangibles, such as choses in action, credits, rights, services⁶⁶ As usually defined, the word refers to tangible physical objects⁶⁷ or articles,⁶⁸ and is limited to tangible property which may be the subject of sale⁶⁹ Thus, as a general rule, mere evidences of value⁷⁰ such as an-

49. Ky—Cincinnati Times Star Co v. Clay, 243 SW 16, 17, 195 Ky 465

50. Mich—Corpus Juris cited in Patmos v Grand Rapids Dairy Co., 220 NW 724, 726, 243 Mich 417
SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750
40 CJ p 642 note 50

51. Mich—Corpus Juris cited in Patmos v Grand Rapids Dairy Co., 220 NW 724, 726, 243 Mich 417
SC—Charleston Oil Co v Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750
40 CJ p 642 note 51

52. SC—Charleston Oil Co v. Poulnot, supra
40 CJ p 642 note 52

53. SC—Charleston Oil Co v Poulnot, supra
40 CJ p 642 note 53

54. Mass—Empire Laboratories, Inc. v Golden Distributing Corporation, 164 NE 772, 773, 266 Mass 418

55. Ind—Indiana Bond Co v Ogle, 54 NE 407, 408, 22 Ind App 593, 72 Am SR 328
40 CJ p 642 note 47

56. Mich—Patmos v Grand Rapids Dairy Co., 220 NW 724, 725, 243 Mich 417
40 CJ p 642 note 57

57. Iowa—Van Patten v Leonard, 8 N.W. 334, 336, 55 Iowa 520

58. Wash—Allen Lubricating Co v Phoenix Indemnity Co, 288 P 906, 909, 157 Wash. 295

Article in luggage or on person

"Undoubtedly, even in the common meaning of the word, an article may be merchandise, though carried in a trunk or handbag, or upon the person"—U S v Mattio, CCA Cal., 17 F 2d 879, 880

59. Ky—W E Gunn & Co v Monarch Coal & Coke Co., 267 SW 166, 167, 206 Ky 412
Mo—State v Jeffords, 64 SW 2d 241, 242
40 CJ p 642 note 48

Similarly expressed

"That which, if sold by a merchant, in the course of his business as such, may, with propriety, be termed merchandise, could not be truly so styled, if sold by a farmer. The linsey or linen of a farmer, which he sells, are not merchandise

But should a merchant buy them, and again vend them, or keep them for sale, in the course of his mercantile pursuits, they would be merchandise"—W E Gunn & Co v Monarch Coal & Coke Co., 267 SW 166, 167, 206 Ky 412—Dyott v Letcher, 6 JJ Marsh (Ky) 541, 543

60. US—The Marine City, DC Mich., 6 F 413, 415
40 CJ p 642 note 49

61. Me—Hartwell v California Ins Co, 24 A 954, 84 Me 524
Tenn—Morelock v Hail, 200 SW 519, 520, 138 Tenn 657
Tex—Hobart Mfg Co v Joyce & Mitchell, Civ App., 4 SW 2d 185, 188

62. Me—Hartwell v California Ins Co, 24 A 954, 84 Me 524
Tenn—Morelock v Hail, 200 SW 519, 520, 138 Tenn 657
Tex—Hobart Mfg Co v Joyce &

Mitchell, Civ App., 4 SW 2d 185, 188

63. Me—Hartwell v California Ins Co, 24 A 954, 84 Me 524
Tenn—Morelock v Hail, 200 SW 519, 520, 138 Tenn 657
Tex—Hobart Mfg Co v Joyce & Mitchell, Civ App., 4 SW 2d 185, 188

64. US—Green-Fulton-Cunningham Co v Security Trust Co, CCA Mich., 4 F 2d 313, 315
Mo—State v Jeffords, 64 SW 2d 241, 242

65. US—Green-Fulton-Cunningham Co v Security Trust Co, CCA Mich., 4 F 2d 313, 315

66. US—Green-Fulton-Cunningham Co v Security Trust Co, supra

67. Ariz—Garrison v Luke, 78 P. 2d 1120, 1124, 52 Ariz 50

68. Cal—Gayer v Whelan, 138 P 2d 763, 767, 59 Cal App 2d 255

69. Mass—Empire Laboratories, Inc. v Golden Distributing Corporation, 164 NE 772, 773, 266 Mass 418

Similarly expressed

It has been held to be synonymous with tangible property which could be sold

Mass—Tupper v Barrett, 124 NE 427, 428, 233 Mass 565
Mich—Patmos v Grand Rapids Dairy Co., 220 NW 724, 725, 243 Mich 417

70. US—In re Hudson River Electric Power Co, DC NY, 173 F. 934, 952
40 CJ p 642 note 54.

nuries,⁷¹ bills,⁷² bonds,⁷³ checks,⁷⁴ credits,⁷⁵ debts due on account,⁷⁶ legacies,⁷⁷ mere bookkeeping assets which are not tangible assets and could not be sold,⁷⁸ money,⁷⁹ notes,⁸⁰ policies of insurance,⁸¹ stocks,⁸² or other mere representations or measures of actual commodities or values⁸³ are not merchandise. However, gold coin has been held to be merchandise see 14 C.J.S. p 1314 note 88, and it has been indicated that the term is broad enough to include stocks or shares in incorporated companies.⁸⁴

Live stock does not usually come within the term "merchandise," yet sometimes it may,⁸⁵ and the same is true of a turbine⁸⁶ and a truck.⁸⁷ The following notes contain examples of other property which has been held to be⁸⁸ or not to be⁸⁹ merchandise;

for other examples see 40 C.J. p 643 notes 62-83.

"Merchandise" has been held equivalent to, or synonymous with, "goods, wares, and merchandise" see 38 C.J.S. p 945 note 35, and "wares;"⁹⁰ and has been compared with, or distinguished from, "commodity" generally see 15 C.J.S. p 588 note 18, and "commodity" as that word is used in statutes dealing with monopolies see the C.J.S. title Monopolies § 29, also 41 C.J. p 122 note 79½, and "stock"⁹¹

As a Verb

To trade or traffic in whatever is usually bought or sold in trade or market, or by merchants,⁹² to trade, buy, and sell articles of commerce.⁹³

71. US—Citizens' Bank v Nantucket Steamboat Co, CCMass, 5 F Cas No 2,730, 2 Story 16, 53

72. US—Citizens' Bank v Nantucket Steamboat Co, supra
Ind—Indiana Bond Co v Ogle, 54 NE 407, 408, 22 Ind App 593, 72 Am SR 326

Puerto Rico—U S v Birieux, 5 Puerto Rico Fed 515, 518

Bank bills

US—In re Hudson River Electric Power Co, DCNY, 173 F 934, 952

40 C.J. p 643 note 55

Bills of lading

US—Citizens' Bank v. Nantucket Steamboat Co, CCMass, 5 F Cas No 2,730, 2 Story 16, 53

Ind—Indiana Bond Co v Ogle, 54 NE 407, 408, 22 Ind App 593, 72 Am SR 326

Puerto Rico—U S v Birieux, 5 Puerto Rico Fed 515, 518

73. US—Citizens' Bank v Nantucket Steamboat Co, CCMass, 5 F Cas No 2,730, 2 Story 16, 53

Ind—Indiana Bond Co v Ogle, 54 NE 407, 408, 22 Ind App 593, 72 Am SR 326

Puerto Rico—U S v Birieux, 5 Puerto Rico Fed 515, 518

74. US—Citizens' Bank v Nantucket Steamboat Co, CCMass, 5 F Cas No 2,730, 2 Story 16, 53.

Ind—Indiana Bond Co v Ogle, 54 NE 407, 408, 22 Ind App 593, 72 Am SR 326

Puerto Rico—U S v Birieux, 5 Puerto Rico Fed 515, 518

75. US—Green-Fulton-Cunningham Co v Security Trust Co, CCA Mich, 4 F 2d 313, 315

76. US—Citizens' Bank v Nantucket Steamboat Co, CCMass, 5 F Cas No 2,730, 2 Story 16, 53

77. US—Citizens' Bank v Nantucket Steamboat Co, supra.

78. Mass—Empire Laboratories, Inc. v. Golden Distributing Cor-

poration, 164 NE 772, 773, 266 Mass 418

79. US—Kuter v Michigan Cent R Co, CCIll, 14 F Cas No 7,955, 1 Biss. 35, 38

Puerto Rico—U S v Birieux, 5 Puerto Rico Fed 515, 518

80. US—Citizens' Bank v Nantucket Steamboat Co, CCMass, 5 F Cas No 2,730, 2 Story 16, 53

Ind—Indiana Bond Co v Ogle, 54 NE 407, 408, 22 Ind App 593, 72 Am SR 326

Puerto Rico—U S v Birieux, 5 Puerto Rico Fed 515, 518

81. US—Citizens' Bank v Nantucket Steamboat Co, CCMass, 5 F Cas No 2,730, 2 Story 16, 53

Ind—Indiana Bond Co v Ogle, 54 NE 407, 408, 22 Ind App 593, 72 Am SR 326

Puerto Rico—U S v Birieux, 5 Puerto Rico Fed 515, 518

82. Puerto Rico—U S v. Birieux, supra

83. US—U S v Birieux, supra.

84. Mass—Tisdale v Harris, 20 Pick 9, 13

85. US—Brown v U S, DC Ill, 298 F 177.

40 C.J. p 643 notes 59, 60

Horses in charge of drivers

"Horses and trucks may, indeed, be merchandise. They are so, in a mercantile sense, when shipped or put aboard a vessel as merchandise, but when they are driven aboard in charge of their drivers, who are passengers, and remain in their charge upon the trip, they are not shipped, taken in, or put on board as 'merchandise.'"—The Garden City, DC NY, 26 F 766, 770

86. Turbine

"While a turbine would not be regarded as merchandise, if handled by a country store, we think it may very properly be described as merchandise when handled and shipped by the General Electric Company"

—Johnson Transfer & Freight Lines v American Nat Fire Ins. Co., 79 SW 2d 587, 589, 168 Tenn 514, 99 ALR 277

87. US—The Garden City, DCNY, 26 F 766, 770

88. Held merchandise

(1) Alcoholic beverages—Commonwealth v Moriarty, 40 NE 2d 307, 309, 311 Mass 116

(3) Automobile—Discount Corporation v C E Fay Co, 30 NE 2d 876, 880, 307 Mass 577, 132 ALR 519

(3) Gunny sack containing furs.—Lang v Illinois Greyhound Lines, 28 NE 2d 345, 306 Ill App 269.

(4) Petroleum products, including gasoline, oil, and grease Conn—Mellitz v Sunfield Co, 129 A 228, 231, 103 Conn 177.

SC—Charleston Oil Co v. Poulnot, 141 SE 454, 457, 143 SC 283, 60 ALR 750

Wash—Allen Lubricating Co v Phoenix Indemnity Co, 288 P 906, 909, 157 Wash 295

89. Held not merchandise

(1) Abstract of land title—Dugan Abstract Co v Moore, Tex Civ. App, 139 SW 2d 198, 201

(2) Free game on pin ball machine—Gayer v Whelan, 138 P 2d 763, 767, 59 Cal App 2d 255

(3) Lottery tickets—U S v. Birieux, 5 Puerto Rico Fed 515, 518, 519

(4) Real property—U S v. Birieux, supra.

(5) Ships—U S v Birieux, supra
90. Cal—Ex parte Holmes, 203 P. 398, 399, 187 Cal 640

91. Iowa—Jewell v Sumner Tp, 84 NW 973, 975, 113 Iowa 47

92. Ky—Ellis v Commonwealth, 217 SW 368, 186 Ky 494

93. Tex.—Central Power & Light Co v. State, Civ App., 165 S.W. 2d 920, 925.

Cross References and Phrases

The word "merchandise" has perhaps been most frequently considered in connection with its use in the statute of frauds see *Frauds, Statute of*, § 142, the Bulk Sales Act see *Fraudulent Conveyances* § 480, and tariff acts see *Customs Duties* § 19. The term is also treated, as employed in the Trade-Mark Act, in the CJS title *Trade-Marks, Trade-Names, and Unfair Competition* § 150, also 63 C.J. p 480 note 40—p 487 note 76, and as used in statutes regulating Sunday observance see the CJS title *Sunday* § 15, also 60 C.J. p 1059 note 40—p 1060 note 72.

In addition to its statutory use, the term "merchandise" is also treated in connection with policies of insurance generally in *Insurance* § 309, and with reference to policies covering loss by fire in *Insurance* § 319; and in connection with policies covering loss by theft or burglary in *Insurance* § 886 b. The sufficiency of indictments which describe property as merchandise is treated with reference to the crime of larceny in *Larceny* § 77 f, and in connection with the crime of burglary in *Burglary* § 39. As used with reference to a common carrier's responsibility for the baggage of a passenger see *Car-*

riers § 861. For other particular applications and specific uses of the term consult the *Descriptive-Word Index*.

Phrases employing the word are set out in the note.⁹⁴

MERCHANT.

In General

The word "merchant," while somewhat general⁹⁵ and comprehensive,⁹⁶ is neither vague nor uncertain.⁹⁷ Although the word has a definite⁹⁸ and well defined meaning,⁹⁹ it is difficult to define it.¹

As a Noun

"Merchant" has been defined to be strictly a buyer,² but by extension³ it includes one who sells,⁴ and is generally employed to designate a person engaged in the business of buying and selling merchandise or other personal property in the usual course of trade.⁵

The term is broadly defined as meaning one whose business is to buy and sell merchandise;⁶ a trader;⁷ a trafficker,⁸ a dealer in merchandise,⁹ one who carries on trade¹⁰ or who trafficks,¹¹ or who buys or

94. Phrases

(1) "Merchandise broker" see *Brokers* § 1 a

(2) "Merchandise of the same descriptive properties" as the equivalent of "goods of the same class" see 38 CJS p 947 note 59.

(3) "Merchandise script" as interchangeable with "coupon books" see 11 CJS p 520 note 66

(4) "Retailer of merchandise" is described as one who deals in merchandise by selling it in smaller quantities than he buys, generally with a view to profit.
US—U S v Mickle, CCDC, 26 F Cas No 15,763, 1 Cranch CC 268
Tenn—State v Lowenhaught, 11 Lea 13, 14

(5) Other phrases as to which more recent adjudications have not been found see 40 C.J. p 643 notes 85—96

95. Iowa—Waukon v. Fisk, 100 N W. 475, 477, 124 Iowa 464

96. Mo—Automobile Gasoline Co v. City of St Louis, 32 SW 2d 281, 287, 326 Mo 435

97. Iowa—Waukon v. Fisk, 100 N W 475, 477, 124 Iowa 464

98. US—Ex parte Chan Hai, DC Wash, 11 F 2d 667, 668

99. Iowa—Jewell v Sumner Tp, 84 N W 973, 975, 113 Iowa 47

1. Va—Commonwealth v Meyer, 23 SE 2d 353, 355, 356, 180 Va 466.

2. US—Ex parte Chan Hai, DC Wash, 11 F 2d 667, 668

Mo—Kansas City v Lorber, 64 Mo App 604, 608

3. US—Ex parte Chan Hai, DC Wash, 11 F 2d 667, 668

Mo—Kansas City v. Lorber, 64 Mo App 604, 608

4. US—Ex parte Chan Hai, DC Wash, 11 F 2d 667, 668

5. US—Union County Nat Bank v Ozan Lumber Co, Ark, 179 F 710, 714, 103 CCA 584

La—Charles Lob's Sons v Karnofsky, App. 144 So 164, 167

6. Ill—City of Joliet v O'Sullivan, 24 NE 2d 751, 754, 303 Ill App 108

La—Charles Lob's Sons v Karnofsky, App. 144 So. 164, 168.

40 C.J. p 644 note 33

7. Mo—Ward Baking Co v City of Ste. Genevieve, 119 SW 2d 292, 293, 342 Mo 1011—City of Ozark v Hammond, 49 SW 2d 129, 131, 329 Mo. 1118—Viquesney v Kansas City, 266 SW. 700, 703, 305 Mo 488—Fischbach Brewing Co v City of St Louis, 95 SW 2d 335, 340, 231 Mo App 793

Tenn—Britt v Cook, 6 SW 2d 322, 157 Tenn 54

40 C.J. p 644 note 18

Similarly expressed

(1) One who is really engaged in the business of a trader—Commonwealth v. McGeorge, 9 B Mon, Ky, 3, 4

(2) One who buys and trades in

anything—Lansdale v. Brashear, 3 TB Mon, Ky, 330, 334—40 C.J. p 644 note 22

8. Mo—Ward Baking Co v City of Ste Genevieve, 119 SW 2d 292, 293, 342 Mo 1011—City of Ozark v Hammond, 49 SW 2d 129, 131, 329 Mo 1118—Viquesney v Kansas City, 266 SW 700, 703, 305 Mo 488—Fischbach Brewing Co v City of St Louis, 95 SW 2d 335, 340, 231 Mo App 793

Tenn—Britt v. Cook, 6 SW 2d 322, 157 Tenn 54

40 C.J. p 644 note 19.

9. Mo—Kansas City v. Lorber, 64 Mo App 604, 608.

Similarly defined

(1) Any dealer or trader—Merchant Banking Co v. Merchants' Joint Stock Bank, 9 Ch D 560, 565

(2) One who deals in the purchase of goods—Kansas City v Lorber, 64 Mo App. 604, 608

10. Ky—Hetterman v Oil Well Supply Co, 214 SW. 923, 924, 185 Ky 290

40 C.J. p 644 note 37.

11. US—In re Cameron Town Mut Fire, Lightning & Windstorm Ins Co, DCMo, 96 F 756, 757

Ky—Hetterman v Oil Well Supply Co, 214 SW. 923, 924, 185 Ky 290
NY—People v Cantor, 198 NYS 514, 515, 119 Misc 355.

40 C.J. p 644 note 37

Similarly defined

(1) A merchant is one who traf-

sells goods or commodities;¹² one who is engaged in the purchase and sale of goods,¹³ one who buys goods to sell again,¹⁴ a person who buys and sells commodities as a business and for profit,¹⁵ one who is engaged in the business of buying commercial commodities, and selling them again, for the sake of profit¹⁶

The term "merchant" is more comprehensively defined as a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.¹⁷ This statutory definition, which is contained in the Chinese Exclusion Acts and is considered and construed as used in the acts in Aliens § 41, has been adopted and treated as a general definition of the word "merchant"¹⁸

The word "merchant" may be applied to a retailer, and the term has been defined as meaning one who carries on a retail business¹⁹ On the other hand,

the term is equally applicable to a wholesaler, and, expressing this idea, is defined as one who buys and sells in quantity or by wholesale,²⁰ one who trafficks or carries on trade, especially on a large scale²¹ To the concept of wholesale or large scale dealing there is sometimes added the element of foreign trading, and the term is defined as meaning one who trafficks or carries on trade with foreign countries, or who exports and imports goods and sells them by wholesale,²² one who trafficks on a large scale, especially with foreign countries²³

With reference to the keeping of a store or shop or fixed place of business, the term "merchant" is defined as meaning one who buys to sell, or buys and sells, goods or merchandise in a store or shop,²⁴ one who keeps a store or shop for the sale of goods,²⁵ a shopkeeper,²⁶ a storekeeper,²⁷ one who has a place of sale and stock of goods²⁸

The term "merchant" has also been defined in a restrictive sense as meaning one engaged in the purchase and sale of commodities daily offered to the public,²⁹ a person who is engaged in a business

ficks by way of buying and selling or bartering of goods, or any merchandise—*Cole v Commonwealth*, 8 Dana (Ky) 31, 32

(2) One who carries on trade, or traffic—*In re Jupp*, D C Wash., 274 F 494, 495

12. N Y—*People v Cantor*, 196 N Y S 514, 515, 119 Misc 355
40 C J p 644 note 36

13. Mo—*Ward Baking Co v City of Ste Genevieve*, 119 SW 2d 292, 293, 342 Mo 1011—*City of Ozark v Hammond*, 49 SW 2d 129, 131, 329 Mo 1118—*Fischbach Brewing Co v City of St Louis*, 95 SW 2d 335, 340, 231 Mo App 793
40 C J p 644 note 31

14. Iowa—*Jewell v Sumner Tp*, 84 NW 973, 974, 113 Iowa 47
40 C J p 644 notes 18, 23.

Similarly defined

(1) One who buys to sell, or buys and sells—*Kansas City v Lorber*, 64 Mo App 604, 608

(2) One engaged in the business of buying commodities to sell them again—*City of Richmond v Richmond Dairy Co*, 157 SE 728, 732, 733, 158 Va 63

15. Cal—*Phillips v Byers*, 209 P 557, 559, 189 Cal 665.
40 C J p 644 note 20

Similarly defined

(1) Any one making a business of buying and selling commodities
Mo—*Viquesney v Kansas City*, 266 SW 700, 703, 305 Mo 488

Tenn—*Britt v Cook*, 6 SW 2d 322, 157 Tenn 54.

(2) One who is engaged in buying and selling goods, wares, or merchandise for gain or profit—*Bacon v Cannady*, 86 SE 1083, 1085, 144 Ga 293

(3) One who buys and sells goods, wares, and merchandise of all or any kind and character—*Commonwealth v Payne Medicine Co*, 127 SW 760, 763, 138 Ky 164

(4) A person engaged in the sale, barter, or exchange of personal property of whatever character—*Molina v Rafferty*, 37 Philippine 545, 549

16. Ill—*City of Joliet v O'Sullivan*, 24 NE 2d 751, 754, 303 Ill App 108

Va—*Commonwealth v Meyer*, 23 SE 2d 353, 356, 180 Va 466
40 C J p 644 note 30

17. US—*Ex parte Chan Hai*, D C Wash., 11 F 2d 687, 688

La—*Charles Lob's Sons v Karnofsky*, App., 144 So 164, 168

18. La—*Charles Lob's Sons v Karnofsky*, supra

19. Mo—*Viquesney v Kansas City*, 266 SW 700, 703, 305 Mo 488
ND—*State v Fleming* 140 NW 674, 675, 24 ND 593

20. Mass—*Carr v Riley*, 84 NE 426, 428, 198 Mass 70
40 C J p 644 note 40

Otherwise defined

Generally a trader in a large way—*Rex v Wells*, 24 Ont L 77, 80, 2 Ont WN. 1232, 19 Ont WR 452, 18 Can Cr Cas 377

21. Iowa—*Cedar Falls v Gentzer*, 99 NW 561, 563, 123 Iowa 670

22. US—*Ex parte Chan Hai*, D C Wash., 11 F 2d 687, 688

23. Iowa—*Waukon v Fisk*, 100 NW 475, 476, 124 Iowa 164
40 C J p 644 note 43

24. ND—*State v Fleming*, 140 NW 674, 24 ND 593

Okla—*Magnolia Petroleum Co v City of Broken Bow*, 87 P 2d 319, 321, 181 Okl 362—*Cain's Coffee Co v City of Muskogee*, 14 P 2d 50, 52, 171 Okl 635—*Grantham v City of Chickasha*, 9 P 2d 747, 751, 158 Okl 56

25. Iowa—*Waukon v Fisk*, 100 NW 475, 476, 124 Iowa 164

26. ND—*State v Fleming*, 140 NW 674, 675, 24 ND 593
40 C J p 645 note 47

27. Mass—*Carr v Riley*, 84 NE 426, 428, 198 Mass 70

28. Cal—*Phillips v Byers*, 209 P 557, 559, 189 Cal 665
40 C J p 644 note 28

Similarly defined

(1) A person engaged in buying and selling merchandise at a fixed place of business—*Singh v Insular Collector of Customs*, 38 Philippine 867, 874

(2) A dealer in goods, wares, and merchandise, who has them on hand for sale and present delivery—*White v Commonwealth*, 78 Va 484, 485

29. Ohio—*Oberlin v Harokapas*, 184 NE 267, 268, 44 Ohio App. 111.

requiring the purchase of articles to be sold again, either in the same or in an improved state³⁰

—Particular Elements.

Buying and selling There is considerable conflict in the decisions with respect to whether, in order to be a merchant, a person must buy as well as sell. From the usual dictionary definitions of the term and those from many other authorities it would seem that two essentials are necessary to constitute one a merchant in the ordinary meaning of the word,³¹ namely, that he must buy³² and sell,³³ and that he must keep a shop or store for that purpose, as is discussed in the following subdivision. However, not every one who buys and sells is a merchant,³⁴ and one who simply manufactures an article and sells it is not a merchant,³⁵ and one who buys without selling again,³⁶ or who sells without having bought,³⁷ as where one sells products of his own labor,³⁸ is not usually termed a merchant.

There are cases which indicate that buying and selling are not essential to constitute a person a merchant, and, while ordinarily a merchant buys as well as sells,³⁹ it has been said that one would be a merchant if his business consisted in buying without selling,⁴⁰ and he might be a merchant by simple selling,⁴¹ since instead of buying he could manufacture or compound the commodity he sells.⁴²

In determining whether a person who sells a commodity which he manufactures is or is not a mer-

chant regard must be had to the distinction between the terms "merchant" and "manufacturer" treated in Manufactures § 1 b (2), where it is said that a person may be both a manufacturer and a merchant, and a manufacturer may be a merchant if he buys and sells goods, or if he buys the raw material and works it into a finished form, or if he pursues any course of business by which a dealer's profit is added to that of the manufacturer

A merchant, ordinarily at least, does not resell to the same class of persons from whom he buys; he is a middleman in distributing the goods.⁴³

Store, shop, or fixed place of dealing. There is some conflict with reference to the necessity of a person keeping a shop or store or having a fixed place of business in order to be considered a merchant. In the preceding subdivision it is stated that from the usual definitions given to the term it would seem that two essentials are necessary to constitute a person a merchant in the ordinary meaning of the word, and one of these essentials is that he must buy and sell. What is said to be the second essential is that he must keep a shop or store for that purpose.⁴⁴ Thus there is the view that a merchant must have a store, stand, or other place to keep and sell his goods,⁴⁵ and that the term ordinarily contemplates that the merchant is to have a fixed place of business⁴⁶ at which he usually sells his merchandise.⁴⁷ However, it is recognized that a merchant

30. US—Wakeman v Hoyt, CC Conn., 28 F Cas No 17,051

31. ND—State v Fleming, 140 N W 674, 675, 24 ND 593
Okl—Magnolia Petroleum Co v City of Broken Bow, 87 P 2d 319, 321, 184 Okl 362—Cain's Coffee Co v City of Muskogee, 44 P 2d 50, 52, 171 Okl 635—Grantham v City of Chickasha, 9 P 2d 747, 751, 156 Okl 56

32. ND—State v Fleming, 140 N W 674, 675, 24 ND 593
Okl—Magnolia Petroleum Co v City of Broken Bow, 87 P 2d 319, 321, 184 Okl 362—Cain's Coffee Co v City of Muskogee, 44 P 2d 50, 52, 171 Okl 635—Grantham v City of Chickasha, 9 P 2d 747, 751, 156 Okl 56

33. Okl—Magnolia Petroleum Co v City of Broken Bow, 87 P 2d 319, 321, 184 Okl 362—Cain's Coffee Co v City of Muskogee, 44 P 2d 50, 52, 171 Okl 635—Grantham v City of Chickasha, 9 P 2d 747, 751, 156 Okl 56
40 C J p 645 note 54

34. Okl—Cain's Coffee Co v. City

of Muskogee, 44 P 2d 50, 52, 54, 171 Okl 635
40 C J p 645 note 56

35. Cal—Phillips v Byers, 209 P 557, 559, 189 Cal 665
Okl—Magnolia Petroleum Co v City of Broken Bow, 87 P 2d 319, 321, 184 Okl 362—Cain's Coffee Co v City of Muskogee, 44 P 2d 50, 52, 171 Okl 635—Grantham v City of Chickasha, 9 P 2d 747, 751, 156 Okl 56

36. US—In re Hudson River Electric Power Co, DCNY, 173 F. 934, 953

37. US—In re Hudson River Electric Power Co, supra.
ND—State v Fleming, 140 N W. 674, 675, 24 ND 353

38. US—In re Hudson River Electric Power Co, DCNY, 173 F. 934, 953
40 C J p 646 note 63

39. Ill—City of Joliet v O'Sullivan, 24 NE 2d 751, 754, 303 Ill App 108

40. US—In re Cameron Town Mut. Fire, Lightning & Windstorm Ins Co, DCMo, 96 F 756, 757
Philippine—U S v Laxa, 36 Philippine 670, 678

41. Philippine—Molina v Rafferty, 37 Philippine 545, 551.
40 C J p 645 note 50

42. Ill—City of Joliet v O'Sullivan, 24 NE 2d 751, 754, 303 Ill App 108

43. US—Sealey v Helvering, CCA. 2, 77 F 2d 323, 324

44. ND—State v Fleming, 140 N W 674, 675, 24 ND 593
Okl—Magnolia Petroleum Co v City of Broken Bow, 87 P 2d 319, 321, 184 Okl 362—Cain's Coffee Co v City of Muskogee, 44 P 2d 50, 52, 171 Okl 635—Grantham v City of Chickasha, 9 P 2d 747, 751, 156 Okl 56

45. Cal—Phillips v Byers, 209 P. 557, 559, 189 Cal 665
Mo—Kansas City v Ferd Heim Brewing Co, 73 SW 302, 303, 98 Mo App 590

Okl—Grantham v City of Chickasha, 9 P 2d 747, 751, 156 Okl 56

46. Va—City of Richmond v Richmond Dairy Co, 157 SE 728, 732, 733, 156 Va 63—Brown v Commonwealth, 36 SE 485, 486, 98 Va. 366, 369.

47. Va—City of Richmond v Rich-

may buy in one place and sell in another.⁴⁸

On the other hand, it has been said that there is a class of merchants who have no fixed place of business from which they distribute their goods directly to their customers,⁴⁹ and a peddler, who is a merchant, does not have any fixed place of dealing, as stated in *Hawkers and Peddlers* § 1.

Wholesale or retail Formerly the term "merchant" was applied to wholesalers only, but this was with reference to the conduct of business in England and in the early days of this country.⁵⁰ In modern usage in this country the term is applicable to either a retailer⁵¹ or to a wholesaler.⁵²

Other elements The word "merchant" involves the idea of dealing with merchandise in some form or other,⁵³ of buying and selling exclusively articles which are the subject of ordinary commerce,⁵⁴ and it has been said that a merchant must be in the business of buying and selling commodities.⁵⁵ Thus one who buys and sells exclusively articles not the subject of ordinary commerce⁵⁶ or who sells only his skill⁵⁷ is not a merchant.

The term "merchant" is applicable to all persons who habitually trade in merchandise,⁵⁸ and, since a merchant buys and sells not incidentally or occasionally, but habitually, as a business,⁵⁹ one isolated sale does not constitute a man a merchant.⁶⁰

A merchant is one who sells to earn a profit,⁶¹ and one who buys and sells commercial articles on salary,⁶² and not for profit,⁶³ is not usually termed a "merchant."

In order to come within the scope of one of the accepted definitions of the term "merchant" it is necessary that the person "does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant," and it has been said that these words refer to the labor of opening boxes and bales, placing goods on shelves, waiting on customers, and doing such thing as are usual in the conduct of a mercantile business.⁶⁴ Any labor which goes further and converts the form of the article sold from its raw state into a finished product changes him, who otherwise would have been a merchant, into a manufacturer or an artisan, as stated in *Manufactures* § 1 b (2).

Inclusions and Exclusions. The term "merchant" embraces all who buy and sell any species of movable goods for gain or profit,⁶⁵ and many different things are dealt in by merchants.⁶⁶ However, the nature of the commodity handled does not necessarily determine whether a person is or is not a merchant, for the proprietor of a department store and the owner of a peanut stand are both consid-

mond Dairy Co., 157 S E 728, 732, 733, 156 Va 63

48. Okl.—*Grantham v City of Chickasha*, 9 P 2d 747, 751, 156 Okl 56

40 C J p 646 note 62

49. Va.—*City of Richmond v Richmond Dairy Co.*, 157 S E 728, 732, 733, 156 Va 63

50. ND.—*State v Fleming*, 140 N W 674, 675, 24 ND 593

51. ND.—*State v Fleming*, supra. 40 C J p 644 note 44

52. Okl.—*Cain's Coffee Co v City of Muskogee*, 44 P 2d 50, 53, 171 Okl 635

53. US.—*In re Woodward*, D C N Y, 30 F Cas No 18,001, 8 Ben 563, 565 40 C J p 646 note 59

54. US.—*In re Hudson River Electric Power Co.*, D C N Y, 173 F. 934, 953

55. Okl.—*Cain's Coffee Co v City of Muskogee*, 44 P 2d 50, 54, 171 Okl 635

56. US.—*In re Hudson River Electric Power Co.*, D C N Y, 173 F. 934, 953

57. Miss.—*Sayers v Doak*, 89 So 917, 918, 137 Miss 216 40 C J p 645 note 54 [c].

Similarly expressed

"A tailor makes his profit out of the skill which he exhibits in the design and manufacture of clothing. The difference in value between raw materials in the shape of piece goods, thread, buttons, etc., and the manufactured suits, represents the labor, art, or skill of the tailor. It is that which represents his profit. A person who sells his skill is not a merchant. An artist buys canvas and paint and converts them into a picture. If he sells the picture for more than he paid for the canvas and the paint that does not make him a merchant, because the profit represents not any increased worth in the intrinsic value of the canvas, or the paint, but it represents, rather, the skill of the painter."—*Charles Lob's Sons v Karnofsky*, La App., 144 So 164, 167, 168

58. La.—*Charles Lob's Sons v Karnofsky*, supra

59. Va.—*Morris v Commonwealth*, 83 S E 408, 411, 116 Va 912 40 C J p 645 note 57

60. Okl.—*Cain's Coffee Co v City of Muskogee*, 44 P 2d 50, 54, 171 Okl 635

61. Ala.—*State v Coastal Petroleum Corporation*, 198 So 610, 612, 240 Ala. 254—*State v. Downs*, 197

So 379, 381, 29 Ala App 442—*J R Raible Co v State Tax Commission*, 194 So 556, 559, 29 Ala App 184

Cal.—*People v Stevens*, 51 P 2d 1179, 1180, 10 Cal App 2d Supp 763

Mo.—*Ward Daking Co v City of Ste Genevieve*, 119 S W 2d 292, 293, 342 Mo 1011—*City of Ozark v Hammond*, 49 S W 2d 129, 131, 329 Mo 1113—*City of Bolivar v Ozark Utilities Co.*, 191 S W 2d 368, 370, 371, 238 Mo App 560

Ohio.—*Nickles v Echeiberger*, App., 31 NE 3d 474, 477

Tenn.—*United Biscuit Co v Stokes*, 124 S W 2d 230, 231, 174 Tenn 111. Va.—*Commonwealth v Meyer*, 23 S E 2d 353, 355, 180 Va 466

38 C J p 969 note 36—40 C J. p 645 note 68

62. US.—*In re Hudson River Electric Power Co.*, D C N Y, 173 F. 934, 953

63. US.—*In re Hudson River Electric Power Co.*, supra

64. La.—*Charles Lob's Sons v Karnofsky*, App., 144 So 164, 167

65. US.—*In re Jupp*, D C Wash., 274 F. 494, 495. 40 C J. p 646 note 70

66. Mo.—*Automobile Gasoline Co v. City of St Louis*, 32 S W 2d 281, 287, 326 Mo 435.

ered to be merchants.⁶⁷ Set out in the notes are examples of persons who have been held to be merchants,⁶⁸ and other persons who have been held not to be merchants.⁶⁹

—**Comparisons and Distinctions.** "Merchant" has been held to be substantially equivalent to "cavasser" see 12 C.J.S. p 1114 note 10, and has been compared with, or distinguished from, "attifier" see 6 C.J.S. p 778 note 71, "broker" see Brokers § 2, "dealer" see 25 C.J.S. p 1043 note 5, "laborer" see 51 C.J.S. p 480 note 68, "manufacturer" see Manufactures § 1 b (2), "peddler" see Hawkers and Peddlers § 5, "restaurant keeper" see Innkeepers § 2 b, "salesman,"⁷⁰ "shopkeeper,"⁷¹ and "tradesman"⁷²

—**Kinds of Merchants.** There are various kinds of merchants,⁷³ and they have been compared with

hawkers and peddlers, see Hawkers and Peddlers § 5 Reference to other kinds of merchants is made in the following note⁷⁴

—**Cross References.** The term "merchant" is defined in connection with the imposition of license and excise taxes in Licenses § 30 d (1). Taxes levied on the stock in trade of a merchant are discussed in the C.J.S. title Taxation § 88, also 61 C.J. p 201 note 78—p 203 note 18. Reference has been made in preceding subdivisions to other places in this work where the term "merchant" is treated. For additional references consult the Descriptive-Word Index and see the title indexes to the various titles.

As an Adjective

Of, pertaining to, or employed in, trade or mer-

67. Mo—Automobile Gasoline Co v City of St. Louis, supra.

68. Held merchants

(1) Butchers
Tenn—Corpus Juris cited in Britt v Cook, 6 S W 2d 322, 157 Tenn 54
Tex—Hein v O'Connor, App. 15 S W 414

(2) Druggists—Britt v. Cook, 6 S W 2d 322, 157 Tenn 54

(3) Hotel keepers see Innkeepers § 2 b

(4) Ice dealers
Mo—Kansas City v Vindquest, 36 Mo App 584, 588

Tenn—Corpus Juris cited in Britt v. Cook, 6 S W 2d 322, 157 Tenn 54

(5) Person engaged in buying and selling gasoline—Automobile Gasoline Co v City of St. Louis, 32 S W. 2d 281, 284, 326 Mo 435.

(6) Produce dealer.
Mo—Kansas City v. Lorber, 64 Mo App 604, 608

Tenn—Corpus Juris cited in Britt v Cook, 6 S W 2d 322, 157 Tenn 54

(7) Saloon keepers
US—In re Sherwood, D.C.N.Y., 21 F Cas No 12,773, 9 Ben 66, 67

Tenn—Corpus Juris cited in Britt v. Cook, 6 S W 2d 322, 157 Tenn 54

(8) Other persons held to be merchants see 40 C.J. p 646 notes 71–91.

69. Held not merchants

(1) Apothecary—Anderson v Commonwealth, 9 Bush, Ky, 569, 571

(2) Dealer in land—In re Kingston Realty Co, N.Y., 160 F 445, 448, 87 C.C.A. 406

(3) Oil company which distributed and marketed only oil and gasoline products of its own mining, production, and refining—Magnolia Petroleum Co v City of Broken Bow, 87 P 2d 319, 321, 184 Okl 362

(4) Person engaged in running a

roominghouse or boardinghouse see Innkeepers § 2 b

(5) Person who retails apples of his own production—Dell Rapids v McShane, 156 N W 789, 790, 37 S D 86—40 C.J. p 645 note 54 [b]

(6) Surgeon specialist who treats deformities of the body by the use of straps and braces which he supplies to his patients and receives payment therefor, as stated in the C.J.S. title Physicians and Surgeons § 1, also 40 C.J. p 645 note 56 [d]

(7) Undertaker—Sayers v Doak, 89 So 917, 918, 127 Miss. 216—40 C.J. p 645 note 54 [c]

(8) Utilities company, selling electricity generated at its plant to general public—City of Bolivar v Ozark Utilities Co, 191 S W 2d 368, 370, 371, 238 Mo App 360

(9) Vendor of produce from a wagon—Brown v Commonwealth, 36 S E 485, 486, 487, 98 Va 366

(10) Other persons held not to be merchants see 40 C.J. p 646 notes 93–4

70. US—Tulidas v Insular Collector of Customs, Philippine, 43 S Ct 586, 588, 262 US 258, 67 L Ed 969.

40 C.J. p 646 note 62 [a]—55 C.J. p 1343 note 6

71. Ala—Sparrenberger v. State, 53 Ala 481, 484, 25 Am R 643

NH—State v Cohen, 63 A. 928, 929, 73 NH 643

40 C.J. p 645 note 47 [b].

72. US—In re United States Hotel Co, Ohio, 134 F 225, 227, 67 C.C.A. 153, 68 L.R.A. 588

63 C.J. p 604 note 39

73. Pa—Commonwealth v Edson, 2 Pa Co 377, 380

74. Wholesale and retail merchants

(1) As a general rule, wholesale merchants deal only with persons

who buy to sell again—State v Scampini, 59 A 201, 306, 77 Vt 92—40 C.J. p 647 note 14

(2) Retail merchants usually deal with consumers—State v Scampini, supra

Other kinds of merchants

(1) "Commission merchant" generally see 15 C.J.S. p 533 note 26

(2) "Forwarding merchant" see 37 C.J.S. p 133 note 7

(3) "Lumber merchants," in the ordinary conversation of business men, men dealing in lumber and keeping lumberyards, where lumber is bought and sold—Mitchell v. Plover, 11 NW 27, 28, 53 Wis 548

(4) "Merchants dormant" see the C.J.S. title Partnership § 1, also 40 C.J. p 646 note 7

(5) "Merchant resident," one who maintains a "stand," as it is called, a permanent place of business—Commonwealth v Edson, 2 Pa Co 377, 380

(6) "Public merchant" as used in statutes dealing with the right of a wife to engage in trade see Husband and Wife § 522

(7) "Sample merchant," one who sells, or offers to sell, any description of goods, wares, or merchandise by sample, card, description, or other representation, verbal or otherwise, or who acts as agent for the sale or collection of orders by sample or description list—White v. Commonwealth, 78 Va 484, 485—Webber v Commonwealth, 33 Gratt 898, 904, 74 Va 398, 904

(8) "Stock merchant or buyer" described as a person who trades and trafficks in live stock in the same way that he would if it were ordinary merchandise—Jewell v Sumner Tp., 84 NW 973, 975, 113 Iowa 47 Distinguished from "stock feeder" see 36 C.J.S. p 631 note 52.

chandise, of or pertaining to the mercantile marine; commercial, composed of merchants⁷⁵

Phrases employing the word "merchant" adjectively are set out in the note.⁷⁶

MERCHANTABILITY. The warranty of merchantability is treated in the C.J.S. title Sales § 327, also 55 C.J. p 758 note 8—p 762 note 51

MERCHANTABLE. The term "merchantable" has many meanings,⁷⁷ and is difficult, if not impossible, of inflexible definition⁷⁸ It is a relative term,⁷⁹ to be defined in the light of the subject matter of the contract,⁸⁰ and its meaning depends on the conditions and circumstances surrounding each case,⁸¹ and also on whether the article to be dealt in is susceptible of a fixed and uniform standard or is of a variable nature⁸²

The term is generally used in describing the grade

or quality of an article,⁸³ and it signifies ordinary quality⁸⁴ or medium quality of goodness,⁸⁵ indicating at least medium quality or goodness,⁸⁶ the word being well adapted to convey the idea of mediocrity in quality, or something just above that⁸⁷ In order that an article of commerce may be said to be merchantable it must be salable, and in order to be this it must possess an ordinary or medium quality of goodness.⁸⁸ The word "merchantable" therefore denotes salableness⁸⁹ or salability⁹⁰ of merchandise with regard to quality,⁹¹ and it may include the quality of being reasonably fit for the general purpose for which an article is manufactured and sold.⁹² In itself, and etymologically, the word "merchantable" has no necessary connection with quantity,⁹³ and as applied, for example, to the capacity of a machine it has no meaning⁹⁴

The term is variously defined as meaning salable⁹⁵ and fit for the market,⁹⁶ such as is generally⁹⁷

75. Webster New Int D

76. Phrases

(1) "Merchant adventurers" are such who engage in hazardous enterprises, as risks at sea—Commonwealth v Edson, 2 Pa Co 377, 380

(2) "Merchant appraisers" see Customs Duties § 87

(3) "Merchant certificate" as necessary under the Chinese Exclusion Acts see Aliens § 46

(4) "Merchant seaman" defined see the C.J.S. title Seamen § 1, also 56 C.J. p 923 note 23

(5) "Merchant service" see Collision § 2 a

(6) "Merchant ship," a ship that is engaged in carrying trade in connection with trade and commerce—In re Jupp, DC Wash, 274 F 494, 495—40 C.J. p 647 note 23

(7) "Merchant-tailor"—London v Wilks, 2 Salk 445, 91 Reprint 386

(8) "Merchant vessel," a steamboat for the transportation of passengers with their baggage, and for carrying small freight, is a merchant vessel—Denison v Seymour, 9 Wend, NY, 9, 15 As used in statutes dealing with the naturalization of seamen see Aliens § 131, and as used in the Shipping Act of 1916 with respect to the liability of the United States see the C.J.S. title United States § 135, also 65 C.J. p 1413 note 98—p 1414 note 10

77. Mich—Corpus Juris cited in Outhwaite v A B Knowlson Co, 242 NW 895, 896, 259 Mich 224 40 C.J. p 648 notes 31—41.

78. Del—Darby v. Hall, 50 A 64, 19 Del 25

Neb—Adolph Goldmark & Sons, Inc v Simon Bros Co, 194 NW. 686, 688, 110 Neb 614

79. US—Mathieu v George A Moore & Co, D C Cal, 4 F 2d 251, 254

80. US—Mathieu v George A Moore & Co, supra

81. Neb—Adolph Goldmark & Sons, Inc v Simon Bros Co, 194 NW. 686, 688, 110 Neb 614 40 C.J. p 647 note 27

82. Del—Darby v Hall, 50 A 64, 19 Del 25

Neb—Adolph Goldmark & Sons, Inc v Simon Bros Co, 194 NW 686, 688, 110 Neb 614

83. La—Lee Lumber Co v Hotard, 48 So 286, 287, 122 La 350, 129 Am SR 368

40 C.J. p 647 note 30

84. US—Martin's Fork Coal Co v Harlan-Wallins Coal Corporation, D C Ky, 14 F Supp 902, 907

Me—Warner v Arctic Ice Co, 74 Me 475, 478

40 C.J. p 647 note 30 [c]

85. US—Martin's Fork Coal Co v Harlan-Wallins Coal Corporation, D C Ky, 14 F Supp 902, 907

Cal—Agnew v Nelson, 148 P. 619, 821, 27 Cal App 39

40 C.J. p 647 note 30 [c]

86. US—Martin's Fork Coal Co v Harlan-Wallins Coal Corporation, D C Ky, 14 F Supp 902, 907

NY—Empire Cream Separator Co v Quinn, 171 NYS 413, 416, 184 App Div 302

40 C.J. p 647 note 26 [a].

87. US—Martin's Fork Coal Co v Harlan-Wallins Coal Corporation, D C Ky, 14 F Supp 902, 907

Me—Warner v Arctic Ice Co, 74 Me 475, 478.

88. US—Martin's Fork Coal Co v Harlan-Wallins Coal Corporation, D C Ky, 14 F Supp 902, 907

Text statement qualified or explained

"These statements have reference to articles of commerce which are salable in good condition They do not have special reference to an article of commerce which, as in the case of coal, has to be mined in order to be placed on the market As used in this connection, it certainly includes the idea of workability. It cannot be merchantable if it is not workable"—Martin's Fork Coal Co v Harlan-Wallins Coal Corporation, D C Ky, supra

89. US—Martin's Fork Coal Co v Harlan-Wallins Coal Corporation, supra

40 C.J. p 647 note 30 [c]

90. Wash—Pacific Coast El Co v Bravinder, 44 P 544, 546, 14 Wash. 315

40 C.J. p 647 note 30 [c].

91. Cal—Agnew v Nelson, 148 P. 819, 821, 27 Cal App 39.

92. Mich—Outhwaite v. A B. Knowlson Co, 242 N.W. 895, 896, 259 Mich 224

93. Md—Poole Engineering & Machine Co v Swindell, 157 A 763, 774, 161 Md 571

94. Md—Poole Engineering & Machine Co v Swindell, supra

95. Ala—Nettles v. Lichtman, 152 So 450, 453, 228 Ala. 52, 91 A.L.R. 1455

40 C.J. p 648 note 34.

Similarly defined

Fit for sale—Ely v. Wichita Natural Gas Co, 161 P. 649, 653, 99 Kan. 236

96. Ala—Nettles v Lichtman, 152 So 450, 453, 228 Ala. 52, 91 A.L.R. 1455

40 C.J. p 648 notes 31, 35

97. Ala—Nettles v. Lichtman, supra.

or usually⁹⁸ sold in the market; vendible in market;⁹⁹ vendible because of its fitness to serve its proper purpose;¹ sound and undamaged,² such as could be sold in the market at the usual and ordinary price³

"Merchantable" has been held to be synonymous with "marketable" see 55 C.J.S. p 801 note 36

The word "merchantable," used in contracts of sale as descriptive of the quality of the goods or merchandise sold is discussed in the C.J.S. title Sales § 183, also 55 C.J. p 413 notes 47-60, and the warranty that goods will be merchantable is treated in Sales § 327, also 55 C.J. p 758 note 8-p 762 note 51.

Phrases employing the word are set out in the note⁴

MERCHANTMAN. A ship or vessel employed in foreign or domestic commerce and in the merchant service⁵

MERCHANT'S ACCOUNTS. Defined generally see 1 C.J.S. p 574 note 95 1; and as exempt from the operation of statutes of limitations see Limitations of Actions § 166

MERCHET. 'In feudal law, a fine or composition paid by inferior tenants to the lord for liberty to dispose of their daughters in marriage.⁶

MERCIAMENT. An amerciamment, penalty, or fine⁷

MERCIFUL. Disposed to pity and spare offenders, compassionate⁸

"Merciful" has been distinguished from "humane" see 41 C.J.S. p 372 note 50.1

MERCIMONIA. In old writs, wares⁹

MERCIS. As the first word of maxims as to which there have been no recent applications see 40 C.J. p 649 notes 76, 77.

MERCURY. In chemistry, a heavy silver-white liquid metallic element.¹⁰

Mercurial In medicine, caused by, or exhibiting the effect of, the use of mercury.¹¹

MERCY. In practice, the arbitrament of the king or judge in punishing offenses not directly censured by law.¹²

In criminal law, the discretion of a judge within the limits prescribed by positive law, to remit altogether the punishment to which a convicted person is liable, or to mitigate the severity of his sentence, as when a jury recommends the prisoner to the mercy of the court¹³

MERE. An adjective¹⁴ which suggests diminution.¹⁵ It is defined as meaning only this, and nothing else,¹⁶ nothing more than;¹⁷ such, and no more;¹⁸

98. Kan—Ely v. Wichita Natural Gas Co., 161 P. 649, 653, 99 Kan 236

99. Ala—Nettles v. Lichtman, 152 So. 450, 453, 228 Ala. 53, 91 A.L.R. 1455

40 C.J. p 648 note 41

1. Neb—McLaughlin v. Nelson, 202 N.W. 871, 872, 113 Neb. 308

2. Ala—Nettles v. Lichtman, 152 So. 450, 453, 228 Ala. 53, 91 A.L.R. 1455

40 C.J. p 648 note 36

3. Del—Walton v. Black, 10 Del. 149, 151

Kan—Ely v. Wichita Natural Gas Co., 161 P. 649, 653, 99 Kan. 236

Similarly defined

(1) Of a quality such as will bring the ordinary market price—Ely v. Wichita Natural Gas Co., supra.

(2) Such as will bring the ordinary price—Ely v. Wichita Natural Gas Co., supra.

4. Phrases

(1) "Merchantable coal" see Mines and Minerals § 2

(2) "Merchantable corn" see 18 C.J.S. p 283 note 62.

(3) "Merchantable glass" see 38 C.J.S. p 930 note 12

(4) "Merchantable iron ore" see Mines and Minerals § 2

(5) "Merchantable timber," "merchantable logs," "merchantable lumber" see Logs and Logging § 17 a

(6) "Merchantable title" defined in connection with exchanges of property see Exchange of Property § 12 b (2), defined and discussed with reference to sales of real property see the C.J.S. title Vendor and Purchaser §§ 189-191, also 66 C.J. p 860 note 72-p 870 note 48

(7) Other phrases as to which more recent adjudications have not been found see 40 C.J. p 648 notes 42-56

5. Wash—Heino v. Libby, 205 P. 854, 857, 116 Wash. 148

6. Black L. D.

7. Black L. D.

8. Webster New Int. D.

9. Black L. D.

Mercimonia et merchandizas, wares and merchandises—Black L. D.

10. Webster New Int. D.

11. Webster New Int. D.

"Mercurial preparation"

U.S.—Boving v. Lawrence, C.C.N.Y., 3 F.Cas. No. 1,711, 1 Blatchf. 607, 608

12. Black L. D.

13. Black L. D.

See Criminal Law § 1407

14. Ga.—Davis v. State, 6 S.E.2d 736, 740, 61 Ga. App. 379

15. Or.—Grant County v. Sels, 5 Or. 243, 251

16. Ala.—Murphree v. State, 120 So. 305, 306, 23 Ala. App. 39

Ind.—Armstrong v. Binzer, 199 N.E. 863, 866, 102 Ind. App. 497

Or.—Grant County v. Sels, 5 Or. 243, 251

In the sense of "only"

Ga.—Marshall v. State, 74 Ga. 26, 33

17. Ala.—Murphree v. State, 120 So. 305, 306, 23 Ala. App. 39

Ind.—Armstrong v. Binzer, 199 N.E. 863, 866, 102 Ind. App. 497.

Similarly defined

Nothing but—In re Plymouth Motor Corporation, Cust. & Pat. App. 46 F.2d 211, 212

18. Ala.—Murphree v. State, 120 So. 305, 306, 23 Ala. App. 39.

absolute, entire, unqualified;¹⁹ sheer,²⁰ simply,²¹ bare,²² pure, unumixed²³ In law, executed by specified persons, entirely, unaided²⁴

"Mere" has been held to be synonymous with "simple"²⁵

Phrases employing the word are set out in the note²⁶

MERELY. An adverb²⁷ defined as meaning without including anything else,²⁸ only;²⁹ purely,³⁰ solely,³¹ absolutely, wholly.³² The term should be given a reasonable construction according to the subject matter.³³ "Merely" is often misused for "simply"³⁴

Phrases employing the word are set out in the note³⁵

MERETRICIOUS. Of the nature of unlawful sexual connection; a term descriptive of the relation sustained by persons who contract a marriage that is void by reason of legal incapacity.³⁶

MERGE; MERGER.

Merge

The verb "to merge" has been defined as meaning to sink or disappear in something else,³⁷ to be lost to view or absorbed into something else;³⁸ to become absorbed or extinguished;³⁹ to be combined⁴⁰ or be swallowed up,⁴¹ to lose identity or individu-

Or—Grant County v Sels, 6 Or 243, 251

Similarly defined

Such (as is mentioned) and no more—In re Plymouth Motor Corporation, Cust & Pat App, 46 F 2d 211, 212

19. US—In re Plymouth Motor Corporation, *supra*

20. US—In re Plymouth Motor Corporation, *supra*

21. US—In re Plymouth Motor Corporation, *supra*

Simple

Or—Grant County v Sels, 5 Or 243, 251

22. Or—Grant County v Sels, *supra*

23. US—In re Plymouth Motor Corporation, Cust & Pat App, 46 F 2d 211, 212.

24. US—In re Plymouth Motor Corporation, *supra*

25. Ind—Johnson v Pedicord, 10 NE 2d 295, 296, 105 Ind App 71

26. Phrases

(1) "Mere accident" considered generally see 1 CJS p 417 note 4, and with reference to negligence generally see the CJS, title Negligence § 1

(2) "Mere discretion" distinguished from "rule"—Merchants' Exch v Knott, 111 SW 565, 571, 212 Mo 616

(3) "Mere licensee" distinguished from "licensee by invitation" in the law of negligence see the CJS title Negligence § 32, also 45 CJ p 790 note 85

(4) "Mere right," the mere right of property in land, the *jus proprietatis*, without either possession or even the right of possession, the abstract right of property—Black L D

(5) "Mere wantonness," the adjective "mere" in the expression "mere wantonness" is not intended to qualify the degree of wantonness—

Davis v State, 6 SE 2d 736, 740, 61 Ga App 379

(6) "Mere will" see the CJS title Wills § 1, also 40 CJ p 649 note 10½

(7) Other phrases as to which more recent adjudications have not been found see 40 CJ p 649 notes 84-94

27. US—In re Sawyer Electrical Mfg Co, Cust & Pat App, 144 F 2d 893, 895—In re Plymouth Motor Corporation, Cust & Pat App, 46 F 2d 211, 212—Hercules Powder Co v Newton, CCANY, 266 F 169, 172.

28. US—In re Sawyer Electrical Mfg Co, Cust & Pat App, 141 F 2d 893, 895—In re Plymouth Motor Corporation, Cust & Pat App, 46 F 3d 211, 212

29. US—In re Sawyer Electrical Mfg Co, Cust & Pat App, 144 F 2d 893, 895—In re Plymouth Motor Corporation, Cust & Pat App, 46 F 3d 211, 213
40 CJ p 649 note 97

30. US—In re Sawyer Electrical Mfg Co, Cust & Pat App, 144 F 2d 893, 895—In re Plymouth Motor Corporation, Cust & Pat App, 46 F 2d 211, 212

Ark—Twist v Mullinix, 190 SW 851, 855, 126 Ark 427, 441

31. US—In re Sawyer Electrical Mfg Co, Cust & Pat App, 144 F 2d 893, 895—In re Plymouth Motor Corporation, Cust & Pat App, 46 F 2d 211, 213

Ark—Twist v Mullinix, 190 SW 851, 855, 126 Ark 427

32. US—In re Plymouth Motor Corporation, Cust & Pat App, 46 F 2d 211, 212

33. US—Campbell Mach Co v Epler Welt Mach Co, CC Mass, 83 F 208, 212

40 CJ p 649 note 2

34. Ark—Twist v Mullinix, 190 SW 851, 855, 126 Ark 427

35. Phrases

(1) "Merely assemble" distinguished from "forthwith collect" see 14 CJS p 1321 note 52

(2) "Merely descriptive" means only descriptive, or nothing more than descriptive—In re Pierce Arrow Motor Car Co, Cust & Pat App, 55 F 2d 434, 436—In re Plymouth Motor Corporation, Cust & Pat App, 46 F 2d 211, 212—Hercules Powder Co v Newton, CCANY, 266 F 169, 172—R W Eldridge Co v Southern Handkerchief Mfg Co, DCSC, 23 F Supp 179, 185

(3) "Merely descriptive terms or marks" as not properly the subject of a trade-mark see the CJS title Trade-Marks, Trade-Names, and Unfair Competition § 33, also 63 CJ p 346 note 89-p 351 note 19

(4) "Merely geographic" means only geographic or nothing more than geographic—R W Eldridge Co v Southern Handkerchief Mfg Co, DCSC, 23 F Supp 179, 185

(5) Other phrases as to which more recent adjudications have not been found see 40 CJ p 649 notes 3-7

36. Black L D

37. NY—In re Barmier's Estate, 282 NYS 695, 698, 699, 156 Misc 657

Ohio—Marfield v Cincinnati, D & T Traction Co, 144 NE 689, 696, 111 Ohio St 139

38. NY—In re Barmier's Estate, 282 NYS 695, 698, 699, 156 Misc 657

39. Mo—Hill v. Arnold, 177 S.W. 343, 345

40. NY—In re Barmier's Estate, 282 NYS 695, 698, 699, 156 Misc 657

41. NY—In re Barmier's Estate, *supra*
Ohio—Marfield v Cincinnati, D & T Traction Co, 144 NE 689, 696, 111 Ohio St 139.

ality.⁴² It has also been defined as meaning to sink the identity or individuality of;⁴³ to cause to disappear,⁴⁴ to make to disappear in something else,⁴⁵ to cause to be absorbed or engrossed,⁴⁶ to swallow up.⁴⁷ It is frequently used with the words "in" or "into."⁴⁸

Nowhere in the various definitions of the word is an extinction suggested, but, rather a joining together, an addition, a combining of the qualities of one with another; not a death but rather a marriage.⁴⁹

"Merge" has been held to be synonymous with, or belonging to the same class as, "combine" see 15 C.J.S. p 241 note 64, and "incorporate" see 42 C.J.S. p 543 note 51 2

Merger

"Merger" is defined generally as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased,⁵⁰ an absorption or swallowing up so as to involve a loss of identity and individuality.⁵¹

In law it is the absorption or extinguishment of one estate or contract in another.⁵² It is said that merger is an operation of law not depending on the intention of the parties.⁵³ However, it has also been stated that it is the law⁵⁴ that merger is largely a question of intention⁵⁵ to a great extent depending on the circumstances surrounding each particular case,⁵⁶ and it is said that the courts will always presume against it whenever it will operate to the disadvantage of a party.⁵⁷ In merger there is a carrying on of the substance of the thing, except that the substance is merged into, and becomes a part of, a separate thing with a new identity.⁵⁸

"Merger" has been held synonymous with, or equivalent to, "confusion" see 15 C.J.S. p 958 note 30, "consolidation" see 15 C.J.S. p 992 note 6, and "extinguishment" see 35 C.J.S. p 294 note 40.

"Merger" has been compared with, or distinguished from, "consolidation" see 15 C.J.S. p 992 note 6, "extinguishment" see 35 C.J.S. p 294 note 42, "surrender,"⁵⁹ and "union."⁶⁰

42. NY—In re Barmier's Estate, 282 N.Y.S. 695, 698, 699, 156 Misc 657

Ohio—Marfield v Cincinnati, D & T Traction Co., 144 N.E. 689, 696, 111 Ohio St. 139

43. NY—In re Barmier's Estate, 282 N.Y.S. 695, 698, 699, 156 Misc 657

44. NY—In re Barmier's Estate, supra

45. NY—In re Barmier's Estate, supra

46. NY—In re Barmier's Estate, supra

47. Ind.—Ramsey v Hicks, 87 N.E. 1091, 1099, 89 N.E. 597, 44 Ind. App. 490

48. NY—In re Barmier's Estate, 282 N.Y.S. 695, 698, 699, 156 Misc 657

49. NY—In re Barmier's Estate, supra

50. Cal.—Corpus Juris quoted in Pacific States Savings & Loan Co v Strobeck, 33 P.2d 1063, 1066, 1067, 139 Cal. App. 427

DC—Alabama Power Co v McNinch, 94 F.2d 601, 611, 612, 68 App. DC 132

NC—Corpus Juris cited in Braak v Hobbs, 186 S.E. 500, 504, 210 N.C. 379—Carolina Coach Co v Hartness, 152 S.E. 489, 491, 198 N.C. 524

Utah—Corpus Juris quoted in Adams v Davies, 156 P.2d 207, 210, 107 Utah 579, 158 A.L.R. 852 40 C.J. p 649 note 13

51. NY—Irvine v New York Edison Co., 128 N.Y.S. 297, 303, 143 App. Div. 344.

52. Cal.—Corpus Juris quoted in Pacific States Savings & Loan Co v Strobeck, 33 P.2d 1063, 1066, 1067, 139 Cal. App. 427

Fla.—Sugar Bowl Drainage Dist v Miller, 162 So. 707, 708, 120 Fla. 436

Tex.—Corpus Juris cited in Bates v Leforge, Com. App., 63 S.W.2d 360, 363—Caprito v Grisham-Hunter Corporation, Civ. App., 128 S.W.2d 149, 154—Hampton v King, Civ. App., 87 S.W.2d 319, 321

Utah—Corpus Juris quoted in Adams v Davies, 156 P.2d 207, 210, 107 Utah 579, 158 A.L.R. 852 40 C.J. p 649 note 15

53. Ont.—Gore Bank v McWhirter, 18 U.C.C.P. 293, 296

54. Cal.—Pacific States Savings & Loan Co v Strobeck, 33 P.2d 1063, 1066, 1067, 139 Cal. App. 427 Utah—Adams v Davies, 156 P.2d 207, 210, 107 Utah 579, 158 A.L.R. 852

55. Cal.—Corpus Juris quoted in Pacific States Savings & Loan Co v Strobeck, 33 P.2d 1063, 1066, 1067, 139 Cal. App. 427

Mich.—Shedd v Krushinski, 298 N.W. 490, 493, 298 Mich. 160

Mo.—Toebe v Wulffing, App., 140 S.W.2d 1116, 1118

Pa.—Naffah v City Deposit Bank, 23 A.2d 340, 342, 343 Pa. 348

Tex.—Corpus Juris cited in Bates v Leforge, Com. App., 63 S.W.2d 360, 363—Caprito v Grisham-Hunter Corporation, Civ. App., 128 S.W.2d 149, 154—Hampton v King, Civ. App., 87 S.W.2d 319, 321

Utah—Corpus Juris quoted in Ad-

ams v Davies, 156 P.2d 207, 210, 107 Utah 579, 158 A.L.R. 852 40 C.J. p 650 note 20

Similarly expressed

Merger is always a matter of intention—Corpus Juris cited in Chappell v Chappell, 60 N.Y.S.2d 447, 449, 186 Misc. 968

56. Cal.—Corpus Juris quoted in Pacific States Savings & Loan Co v Strobeck, 33 P.2d 1063, 1066, 1067, 139 Cal. App. 427

Tex.—Corpus Juris cited in Bates v Leforge, Com. App., 63 S.W.2d 360, 363—Hampton v King, Civ. App., 87 S.W.2d 319, 321

Utah—Corpus Juris quoted in Adams v Davies, 156 P.2d 207, 210, 107 Utah 579, 158 A.L.R. 852 40 C.J. p 650 note 21

57. Cal.—Corpus Juris quoted in Pacific States Savings & Loan Co v Strobeck, 33 P.2d 1063, 1066, 1067, 139 Cal. App. 427

Neb.—Sanford v Scott, 181 N.W. 148, 149, 105 Neb. 479

Utah—Corpus Juris quoted in Adams v Davies, 156 P.2d 207, 210, 107 Utah 579, 158 A.L.R. 852

Similarly expressed

Mergers are not favored and will not be decreed when inconsistent with the evident intention of the parties—Caprito v Grisham-Hunter Corporation, Tex. Civ. App., 128 S.W.2d 149, 154

58. Okl.—McRoberts v McRoberts, 57 P.2d 1175, 1177, 177 Okl. 156

59. Tenn.—Harrison v Johnston, 70 S.W. 414, 417, 109 Tenn. 245

60. Ind.—Ramsey v Hicks, 87 N.E.

Merger of rights. Rights are said to be merged when the same person who is bound to pay is also entitled to receive.⁶¹ This is more properly called a confusion of rights or extinguishment.⁶² When there is confusion of rights and the debtor and creditor become the same person, there can be no right to be put in execution;⁶³ but there is an immediate merger.⁶⁴

"Merger," as that term is used in the common law, is said to be synonymous with "confusion" in the civil or Roman law see 15 C. J. S. p. 958 note 30, and, when used with reference to demands, indicates that, where the qualities of debtor and creditor become united in the same individual, there arises a confusion of rights, which extinguishes both qualities;⁶⁵ whence merger is often called "extinguishment,"⁶⁶ the terms "merger" and "extinguishment" being regarded as equivalents or synonymous see 35 C. J. S. p. 294 note 40.

Merger of prior and contemporaneous negotiations into a written instrument. It has been stated generally that all prior and contemporaneous negotiations are merged in a written instrument.⁶⁷ This rule is frequently applied to contracts see Contracts §§ 380-384, particular reference being made to § 381 where it is said that this is in effect a statement, in different form, of the rule excluding evidence of prior or contemporaneous oral agreements to contradict or to modify a written contract, which is treated in Evidence § 901.

For the discussion of the rule that all prior and contemporaneous negotiations are merged in the written instrument as applied to deeds see Deeds § 91 c; in connection with insurance policies see Insurance §§ 250 a, 266 b; and with reference to leases see Landlord and Tenant § 232 m. For reference to other applications of the rule consult the Descriptive-Word Index.

Merger of estates. The merger of estates is treated and discussed generally in Estates §§ 123-131. In connection with trusts, the merger of legal and equitable estates is treated in the C. J. S. title Trusts §§ 176, 203, also 65 C. J. p. 519 notes 34-38 and p. 567 note 58-p. 569 note 79. For other places throughout this work where the merger of estates is treated see the cross references in Estates § 123.

Merger of corporations. The merger of corporations is treated generally in Corporations §§ 1603-1637, and with reference to internal revenue provisions see the title index to the title Internal Revenue. For the treatment of the merger or consolidation of particular kinds of corporations see the cross references in Corporations § 1605.

Other particular applications. The merger of offenses is treated in Criminal Law § 10; the merger of judgments is discussed in Judgments §§ 561, 599. For reference to other particular mergers in addition to those set out in the preceding paragraphs consult the Descriptive-Word Index.

MERIDIAN. In geology, a great circle on the surface of the earth, passing through the poles and any given place; also, and now usually, the half of such a circle included between the poles.⁶⁸

MERINO. As a noun, fine fabric made originally of merino wool, but later of fine wool mixed with cotton; a fine woolen yarn used in hosiery, underwear, etc.⁶⁹

In Spanish law, a former Spanish functionary appointed by the king over a certain territory; also a flock or herd.⁷⁰

As an adjective, designating, or pertaining to, a breed of fine-wooled white sheep originating in Spain and afterward widely popular, especially in America and Australia.⁷¹ As applied to wool, the term means primarily and popularly a fine long-

1091, 1099, 89 NE 597, 44 Ind App 490
40 C. J. p. 649 note 13 [a]

61. Ill.—*Corpus Juris* quoted in Home Bldg & Loan Ass'n of Paris, Ill v Gaumer, 269 Ill App 196, 205
40 C. J. p. 650 note 23

62. Ill.—*Corpus Juris* quoted in Home Bldg & Loan Ass'n of Paris, Ill v Gaumer, 269 Ill App 196, 205
40 C. J. p. 650 note 24

63. Ill.—*Corpus Juris* quoted in Home Bldg & Loan Ass'n of Paris, Ill v Gaumer, 269 Ill App 196, 205
40 C. J. p. 650 note 25

64. Ill.—*Corpus Juris* quoted in

Home Bldg & Loan Ass'n of Paris, Ill v Gaumer, 269 Ill App 196, 205
40 C. J. p. 650 note 25

65. Ill.—Donk v Alexander, 7 NE 672, 676, 117 Ill 330—*Corpus Juris* quoted in Home Bldg & Loan Ass'n of Paris, Ill v Gaumer, 269 Ill App 196, 205

66. Ill.—Donk v Alexander, 7 NE 672, 676, 117 Ill 330—*Corpus Juris* quoted in Home Bldg & Loan Ass'n of Paris, Ill v Gaumer, 269 Ill App 196, 205

67. Cal.—Paratore v. Scharetz, 128 P 2d 560, 562, 53 Cal App 2d 710
Md.—Markoff v Kreiner, 23 A 2d 19, 23, 180 Md 150

Minn.—Haglin v. Ashley, 4 NW 2d 109, 112, 212 Minn 445

68. Webster New Int. D. See Vance v. Marshall, 3 Bibb (Ky) 148, 150, 151.

69. Webster New Int. D.

As applied to underwear

A substantial part of the consuming public, and also some buyers for retailers and sales people, understand the word "Merino," as applied to underwear, to mean that the underwear is all wool.—Federal Trade Commission v. Winsted Hosiery Co., N. Y., 42 S. Ct. 384, 385, 258 U. S. 482, 66 L. Ed. 729

70. Escribiche Diccionario.

71. Webster New Int. D.

staple wool, which commands the highest price⁷²

MERIT. The original significance of the Latin root of the word "merit" was to get a share,⁷³ and it has been said that the present meaning of "merit" is deserving well.⁷⁴

As a noun, the word is defined as meaning due reward or punishment;⁷⁵ the quality of deserving well or ill,⁷⁶ desert⁷⁷

As a verb, the word "merit" means to earn by service or performance,⁷⁸ to have a right to claim as a reward.⁷⁹

"Merit" has been distinguished from "fitness" see 36 C.J.S. p 884 note 41.

Merits

It is said that the word "merits" is not very clearly defined,⁸⁰ and, as a legal term, it has acquired no precise technical meaning, and so admits of some latitude of interpretation,⁸¹ but it is also said that it has a settled legal meaning.⁸²

If taken in its ordinary acceptance, the word "merits" would mean the abstract justice of the case,⁸³ without regard to any technical or arbitrary rules of law.⁸⁴ However, it has been said that a better definition would be to consider it as meaning the combined questions of law and fact presented by the pleadings of the case.⁸⁵

As a legal term, the word "merits" is to be regarded as referring to the strict legal rights of the parties, as contradistinguished from those mere

questions of practice which every court regulates for itself, and from all matters which depend on the discretion or favor of the court,⁸⁶ and it implies a consideration of substance, not of form; of legal rights, not of mere defects of procedure or the technicalities thereof⁸⁷

As a technical legal term,⁸⁸ "merits" is defined as meaning the various elements which enter into or qualify the plaintiff's right to the relief sought,⁸⁹ matter of substance, as distinguished from matter of form⁹⁰ or technicality;⁹¹ the real or substantial grounds of action or defense, in contradistinction to some technical or collateral matter raised in the course of the suit,⁹² the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction, or form,⁹³ the intrinsic rights and wrongs of a case as determined by matters of substance, in distinction from matters of form,⁹⁴ the strict legal rights of the parties, as distinguished from those depending on questions of practice, jurisdiction, competence, discretion, favor, or the like⁹⁵

"Merits" has been distinguished from "jurisdiction" see Courts § 15 c.

Phrases

Merit system The term "merit system" has a well-defined and well-understood meaning.⁹⁶ It is defined as the system of appointing employees to office in the civil service, and of promoting them for competency only,⁹⁷ a system whereby selection for appointments in certain branches of the public serv-

72. US—Federal Trade Commission v Winsted Hosiery Co, N.Y., 42 S Ct 384, 385, 258 US 483, 66 L Ed 729

Merino yarn is yarn which is made by carding together wool and cotton, and spinning—Greenleaf v Worthington, C C Mass., 26 F 303

73. Ohio—State ex rel King v Emmons, 190 N E 468, 470, 472, 128 Ohio St 216

74. Ohio—State ex rel King v Emmons, supra

75. Ohio—State ex rel King v Emmons, supra

76. Ohio—State ex rel King v Emmons, supra

77. Ohio—State ex rel King v Emmons, supra

78. Ohio—State ex rel King v Emmons, supra

79. Ohio—State ex rel King v Emmons, supra

80. S C—Bolin v Southern R Co, 43 S E 665, 666, 65 S C 222
10 C J p 650 note 42.

81. N.Y.—Mink v Keim, 41 N.Y.S. 2d 769, 771, 266 App Div 184—Hirshbach v Ketchum, 80 N.Y.S. 143, 145, 79 App Div 561—St John v West, 4 How Pr 329, 332

82. Wis—Rahn v Gunnison, 12 Wis 528, 531

83. N.Y.—Hirshbach v Ketchum, 80 N.Y.S. 143, 145, 79 App Div 561—St John v West, 4 How Pr 329, 332

84. N.Y.—St John v West, supra

85. N.Y.—Hirshbach v Ketchum, 80 N.Y.S. 143, 145, 79 App Div 561—St John v West, 4 How Pr. 329, 332

86. Ind—**Corpus Juris** cited in Brodt v Duthie, 186 N E 893, 895, 97 Ind App 692

N.Y.—Mink v Keim, 41 N.Y.S. 2d 769, 771, 266 App Div 184
40 C J p 651 note 45 [b]

Similarly defined in connection with filing of briefs on appeal see Appeal and Error § 1341

87. Ohio—Kimberlin v Stoley, 194 N E 885, 886, 49 Ohio App 1
40 C J p 651 note 46 [a]

88. Or—Haney v Neace-Stark Co, 219 P 190, 191, 109 Or 93
40 C J p 651 note 44

89. US—General Inv Co v New York Cent R Co, Ohio, 46 S Ct 496, 497, 271 US 228, 70 L Ed 920—Walling v Miller, CCA Minn, 158 F 2d 629, 632—Dyer v Stauffer, CCA Ohio, 19 F 2d 922

90. Ga—Wolfe v Georgia R & Electric Co, 65 S E 62, 63, 6 Ga App 410
40 C J p 651 note 45

91. Or—Haney v Neace-Stark Co, 219 P 190, 191, 109 Or 93

92. N H—Ordway v Boston & M R. R., 45 A 243, 244, 69 N H 429
40 C J p 651 note 47

93. US—Clegg v U S, CCA Utah, 112 F 2d 886, 887, 888

94. Or—Haney v Neace-Stark Co, 219 P 190, 191, 109 Or 93

95. Or—Haney v Neace-Stark Co, supra

96. Ala—Heck v Hall, 190 So 280, 285, 238 Ala. 274.

97. Ala—Heck v Hall, supra.

ice may be made on the basis of demonstrated relative fitness, without regard to political considerations⁹⁸ Such a system would necessarily include a fair and impartial selection and appointment of all personnel on the basis of open and competitive merit examinations, specific reasons for removal, and a reasonable hearing⁹⁹ The purpose and effect of the merit system is to take from the appointing officer the right of arbitrary removal, either directly or indirectly, of an appointee which he otherwise would have.¹ The system is sometimes referred to as a "non-partisan merit system."² In the United States it is opposed to the "spoils system"³

The merit system is treated with respect to county officers and agents in Counties § 101 a.

Other phrases employing the words "merit" or "merits" are set out in the note.⁴

MERITO. As the first word of a maxim as to which there have been no recent applications see 40 C.J. p 651 note 66

MERITORIOUS. That earns, or entitles to, reward, as virtue; productive of merit.⁵

MERITOS DE PROCESO. In Spanish law, the questions involved in a cause.⁶

MERO MOTU. See Ex 32 C.J.S. p 1142 note 48

MERRY-GO-ROUND. Any of various revolving

contrivances for affording amusement, especially to children, as a ring of seats, often in the forms of horses and other animals, etc., on a revolving platform; a carrousel.⁷ It has been distinguished from a scenic railway.⁸

MERTON, STATUTE OF. An old English statute relating to dower, legitimacy, wardships, procedure, inclosure of common, and usury.⁹

MERX EST QUICQUID VENDI POTEST. See 40 C.J. p 652 note 77.

MES. In Spanish law, month.¹⁰

MESENTERY. A membrane made of folds of peritoneum, a strong, colorless, shiny membrane with a smooth surface, which lines the inner abdominal walls and covers the organs of the abdomen. It extends from the lower end of the duodenum to the beginning of the large intestine. It supports and covers the ileum and jejunum, two divisions of the small intestines.¹¹

MESH. As a noun, one of the openings or spaces enclosed by the threads of a net between knot and knot¹²

As a verb, to engage with each other, as the teeth of wheels¹³ It has been compared with, or distinguished from, "engage" see 30 C.J.S. p 247 note 68.

98. Ohio—Curtis v State, 140 NE 522, 523, 108 Ohio St 292—State ex rel Kipker v City of Lima, App, 32 NE2d 488, 496

99. Ariz—Donaldson v Sisk, 113 P 2d 860, 865, 57 Ariz 318—Welch v State Board of Social Security and Welfare, 87 P 2d 109, 112, 53 Ariz 167

1. Ariz—Donaldson v Sisk, 113 P 2d 860, 865, 57 Ariz 318

2. Ariz—Donaldson v Sisk, supra—Taylor v McSwain, 95 P 2d 415, 421, 54 Ariz 295

3. Ala—Heck v Hall, 190 So 280, 285, 238 Ala 274

Origin

"Merit systems in American government are of comparatively recent development. The federal government began about 1886 in a tentative way to make certain appointments based at least upon an effort to ascertain the ability of the appointee to perform properly the services of his position, rather than his contributions to the success of the party which happened to be in power, and this system has spread to a greater or less extent in all parts of the country, although it is by no

means universal"—Taylor v McSwain, 95 P 2d 415, 421, 54 Ariz 295

4. Phrases

(1) "Affidavit of merits," one setting forth that defendant has a meritorious defense (substantial and not technical) and stating the facts constituting it—Black LD In pleadings, referred to as an affidavit of defense or merits, see the C.J.S. title Pleading § 177-183, also 49 C.J. p 296 note 50-p 309 note 13, and as sometimes required to vacate a judgment entered by default see Judgments § 336

(2) "Decision on the merits" with reference to the doctrine of res judicata see Judgments § 627.

(3) "Merit and fitness" as the basis for the appointment of officers generally see the C.J.S. title Officers § 34, also 46 C.J. p 954 note 4, p 955 note 17

(4) Other phrases as to which more recent adjudications have not been found see 40 C.J. p 651 notes 50-63

5. Webster New Int D

Phrases

(1) "Meritorious acts" as equiva-

lent to "ascertained merit" see 6 C.J.S. p 788 note 28

(2) "Meritorious consideration" with reference to the reforming of instruments see the C.J.S. title Reformation of Instruments § 10, also 53 C.J. p 914 note 97-p 915 note 13

(3) "Meritorious defense" in connection with the opening or setting aside of judgments obtained by default see Judgments § 336

(4) "Meritorious public service"—Uhte v. Rosenthal, 174 P 83, 84, 37 Cal App 519

6. Escriche Diccionario

7. Webster New Int D.

8. Idaho—In re Hull, 110 P 256, 257, 18 Idaho 475, 30 L.R.A.N.S. 465

40 C.J. p 652 note 75

9. Black LD

40 C.J. p 652 note 76.

10. Escriche Diccionario

11. La—Arrington v Singer Sewing Mach Co, App, 16 So 2d 145, 148

12. Webster New Int D.

See Fish § 1.

13. Webster New Int D.

MESIAL. A term which, when applied to a tooth, refers to the side of the tooth toward the center of the mouth ¹⁴

MESNALT or **MESNALITY.** A manor held under a superior lord; the estate of a mesne ¹⁵

MESNE. Intermediate; intervening, ¹⁶ the middle between two extremes ¹⁷

Mesne profits. An ancient technical term, ¹⁸ meaning intermediate profits; that is, profits which have been accruing between two given periods ¹⁹

The term is defined in Ejectment § 128, and is treated in connection with actions for damages for detention of dower in Dower § 78. The right to recover mesne profits in a writ of entry is discussed in Entry, Writ of § 24, and the action for mesne profits is treated in the CJS title Trespass § 120, also 63 C.J. p 1053 notes 21-27. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

Other phrases, employing the word are set out in the note. ²⁰

MESNE, WRIT OF. An ancient and abolished writ, which lay when the lord paramount distrained on the tenant paravail. The latter had a writ of mesne against the mesne lord ²¹

MESON. In Spanish law, a hostelry. ²²

MESQUITE. An important leguminous tree, or often shrub, "*prosopis juliflora*," growing from Tex-

as to southern California, and thence southward to Chile. ²³

MESSAGE. Any notice, word, or communication, written or oral, sent from one person to another ²⁴

The term is frequently used in the CJS title Telegraphs and Telephones, particular reference being made to § 106, also 62 C.J. p 127 notes 34, 35, where the word is discussed as used in statutes imposing penalties on telephone and telegraph companies for violation of their public duties.

MESSENGER. One who bears a message or an errand, the bearer of a verbal or written communication, notice, or invitation from one person to another or to a public body; an office servant. ²⁵

The term, by its fair import and significance, does not apply to a public officer acting in an original capacity in the discharge of duties imposed on him by law, but presupposes a superior in authority whose servant the messenger is and whose mandate he executes, not as a deputy, with power to discriminate and judge, or to bind his superior, but as a mere bearer and communicator of the will of his superior. ²⁶

MESSIS SEMENTEM SEQUITUR. See 40 C.J. p 653 note 5.

MESS PORK. A term which has a precise meaning in trade, and comprises only that pork which is taken from the sides of the hog, between the shoulder and hams, and no other part of the animal ²⁷

14. US—Swenson v Boos, CCA Minn., 156 F 2d 338, 339—Swenson v Boos, DCMinn., 61 F Supp. 704, 706

15. Black LD

A proper feudal word

Pa—Brown v Butler, 4 Phila 71

16. Ala.—Birmingham Dry-Goods Co v Bledsoe, 21 So 403, 113 Ala 418

Miss—L N Dantzler Lumber Co v Texas & P R Co, 80 So 770, 775, 119 Miss 328, 4 ALR 1669

17. Miss—L N Dantzler Lumber Co v Texas & P R Co, supra

18. NY—Dime Sav. Bank of Brooklyn v Altman, 9 NE 2d 778, 781, 275 NY 62

19. Black LD.

20. Phrases

(1) "Mesne assignment" see Landlord and Tenant § 37

(2) "Mesne conveyance" see 18 C.J. S. p 94 note 13

(3) "Mesne encumbrance or incumbrance" see 42 CJS p 552 note 72

(4) "Mesne lord" see 54 CJS p 797 note 74

(5) "Mesne process" defined see the CJS title Process § 1, also 50 C.J. p 445 note 49—p 446 note 62

21. Black LD

22. Escriche Diccionario

23. Ariz—U S v Soto, 64 P 419, 420, 7 Ariz 230

24. Webster New Int.D

Phrases

(1) "Day message" and "night message" see the CJS title Telegraphs and Telephones § 4, also 17 C.J. p 1134 note 65

(2) "Obscure message" compared with "cipher" see 14 CJS p 1120 note 97

(3) "X U R message" see the CJS title Telegraphs and Telephones § 141, also 71 C.J. p 1646 note 83

25. Ala.—Corpus Juris cited in Life & Casualty Ins Co of Tennessee v Bottoms, 143 So 574, 575, 225 Ala 382

Cal—Pfister v Central Pac R Co.,

11 P 686, 690, 70 Cal 169, 59 Am R 404

Phrases

(1) "Messenger association" see the CJS title Telegraphs and Telephones § 277, also 40 C.J. p 653 note 1.

(2) "Messenger cable" or "messenger wire" see the CJS titles Street Railroads § 1 and Telegraphs and Telephones § 4, also 40 C.J. p 653 note 3

(3) "Messenger service" distinguished from "delivery business" see 26 CJS p 698 note 82.

26. Ala.—Corpus Juris cited in Life & Casualty Ins Co of Tennessee v Bottoms, 143 So 574, 575, 225 Ala. 382

Cal—Pfister v Central Pac R. Co., 11 P 686, 690, 70 Cal. 169, 59 Am R. 404.

27. Vt.—Hoadley v. House, 32 Vt. 179, 181, 67 Am D 167.
40 C.J. p 653 note 6.

MESSAGE. A term used in conveyancing²⁸ of large signification,²⁹ defined as a house;³⁰ in legal acceptance, a dwelling house with the adjacent buildings and curtilage,³¹ a dwelling house with some adjacent land assigned to the use of it;³² a dwelling house with adjacent buildings and curtilage.³³

"Message" has been held equivalent to, and interchangeable or synonymous with, "house" see 41 C J S p 365 note 67, and nearly synonymous with "dwelling house" see 28 C J S. p 604 note 15. It has been distinguished from the term "land adjoining" see 2 C J S p 3 note 16.

MESSUAGIUM. A dwelling house with land.³⁴

MESTA. The body of shepherds, drovers, and live stock owners represented by a council which meets twice a year in Spain under the presidency of a government official to consider matters of importance to the live-stock industry.³⁵

MESTIZO. A mongrel or person of mixed blood; sometimes used as equivalent to "octoroon," that is, the child of a white person and a quadroon, sometimes as denoting a person one of whose parents

was a Spaniard and the other an American Indian.³⁶

METABOLISM. The sum of the processes concerned in the building up of protoplasm and its destruction incidental to the manifestation of vital phenomena,³⁷ the chemical changes proceeding continually in living cells.³⁸ It denotes the sum total of all processes of the human body by which food is transformed into chemicals and in turn absorbed into the blood stream and lymphatic system for the purpose of so nourishing the body that it can continue to function.³⁹ In other words, it is the aggregate of all processes whereby food is digested, heat and energy created, the body built up or repaired, and waste matter excreted.⁴⁰ Metabolism may be constructive or destructive.⁴¹

Rate of metabolism. The rate of metabolism is measured by the rate at which the body produces or gives off heat, and the "basal metabolic rate" is defined as the least rate of chemical activity which will maintain the absolutely essential functions of the body sufficiently to keep an individual alive.⁴²

METACARPAL BONES. The metacarpal bones constitute the framework of the palm.⁴³ The joints between the metacarpal bones and the first three

28. Pa.—*Waver v Henninger*, 1 Pa. Dist. & Co. 167, 169.

29. NH.—*Riddle v Littlefield*, 53 N. H. 503, 509, 16 Am. R. 388.

40. C J p 653 note 9.

30. Ind.—*Grimes v Wilson*, 4 Blackf. 331, 333.

40. C J p 653 note 11.

31. W Va.—*Marmet Co v Archibald*, 17 S. E. 299, 300, 37 W Va. 778.

40. C J p 653 note 12.

32. N J.—*Applegate v Applegate*, 16 N. J. Law 321, 322.

40. C J p 653 note 13.

33. Mo.—*State v Cooper*, 246 S. W. 892, 893.

40. C J p 653 note 14.

34. Eng.—*Fenn v Grafton*, 2 Bing. N. Cas. 617, 619, 29 E. C. L. 688, 132 Reprint 238.

35. *Escrache Diccionario* 1288, Suplemento 324.

36. Black L. D.

37. Iowa.—*Almquist v Shenandoah Nurseries*, 254 N. W. 35, 39, 218 Iowa 724, 94 A. L. R. 573.

38. Iowa.—*Almquist v Shenandoah Nurseries*, supra.

39. U. S.—*U. S. v 62 Packages, More or Less, of Marmola Prescription Tablets*, C. C. A. W. 142 F. 2d 107, 109, 110.

Similarly expressed.

"By metabolism is meant the total of the various processes by which

food is transformed in the body into the chemicals which are absorbed into the blood stream and lymphatic system for the purpose of nourishing the body so that it can carry on its work. The health of the body depends upon the well-balanced use of the body chemicals. Metabolism denotes all the processes of the body by which food is used, body heat and energy created, and the body built up or repaired, and by which the tissues of the body are destroyed and waste matter excreted."—*U. S. v 62 Packages, More or Less, of Marmola Prescription Tablets*, D. C. W. 142 F. Supp. 878, 885.

40. U. S.—*U. S. v 62 Packages, More or Less, of Marmola Prescription Tablets*, C. C. A. W. 142 F. 2d 107, 109, 110.

41. Iowa.—*Almquist v Shenandoah Nurseries*, 254 N. W. 35, 39, 218 Iowa 724, 94 A. L. R. 573.

42. U. S.—*U. S. v 62 Packages, More or Less, of Marmola Prescription Tablets*, D. C. W. 142 F. Supp. 878, 885.

Further discussed.

(1) "Every activity of the body increases the amount of energy consumed. Having found the basal requirements of an individual, the physician can, by the addition of the demands of the individual's other activities, compute what his total needs will be. Average normal standard rates have been established

by tests, and the results are expressed in terms of either plus or minus variations from the standard. In the same classification normal healthy people vary one from another in the normal basal metabolic rate. The great majority vary only to the extent of 10% more or 10% less in the amount of heat produced, represented by the average normal standard. Normal healthy people may vary from the average standard normal rate to even a greater extent, but seldom more than 15% more or less than standard, which means that the individual is consuming 15% more or 15% less energy than the average among normal people."—*U. S. v 62 Packages, More or Less, of Marmola Prescription Tablets*, D. C. W. 142 F. Supp. 878, 885.

(2) "By examination of the rates at which normal persons give off heat, scientists have established the normal rate of metabolism from which, experience has revealed, most persons deviate by not more than 10 per cent. To enjoy good health, one's body must maintain a proper balance of essential chemicals; the thyroid gland is the primary agency in achievement of this end."—*U. S. v 62 Packages, More or Less, of Marmola Prescription Tablets*, C. C. A. W. 142 F. 2d 107, 110.

43. Wash.—*Cady v Department of Labor and Industries*, 162 P. 2d 813, 817, 23 Wash. 2d 851.

phalanges of each finger are the proximal joints, and are termed "metacarpophalangeal" or "phalangeometacarpal" joints⁴⁴ A displacement of a metacarpal bone may occur at either end of the bone and may cause injury to the hand, or to the fingers, or to both.⁴⁵

METAL. Any member of the class of substances represented by gold, silver, copper, iron, lead, and tin⁴⁶ In popular language the term is not applied to a metallic element when in such a state of combination that its identity is disguised⁴⁷

Phrases employing the words "metal" or "metals" are set out in the note.⁴⁸ Other phrases as to which more recent adjudications have not been found see 40 C.J. p 654 notes 23-28

44. Wash—Cady v Department of Labor and Industries, *supra*

45. Wash—Cady v Department of Labor and Industries, *supra*

46. US—U S v Wells, Fargo & Co, 1 Ct Cust App 158, 164

Further discussed

"Originally this class was regarded as including only these bodies together with certain alloys (as brass and bronze), and hence as definable by their common properties, viz, high specific gravity and density, fusibility, malleability, opacity, and a peculiar luster (known specifically as 'metallic') In process of time other substances were discovered to have most but not all of these properties, the class was thus gradually extended, the properties viewed as essential to its definition becoming fewer From the point of view of modern chemistry the 'metals' are a division (including by far the greater number) of the 'elements' or simple substances Among them are all the original (simple) 'metals', of the latter additions to the list some possess all the properties formerly viewed as characteristic of a metal, while others possess hardly any of them, the 'metallic luster' is perhaps the most constant By some chemists the radical ammonium (NH⁺) and derivatives thereof have been designated as 'metals' on account of the analogy of their compounds with those of the metals potassium and sodium"—U S v Wells, Fargo & Co, *supra*

As not including precious metals

Eng—Casher v Holmes, 2 B & Ad 592, 596, 22 ECL 249, 109 Reprint 1263

47. US—U S v Wells, Fargo & Co, 1 Ct Cust App 158, 164.
40 C.J. p 653 note 19

48. Phrases

(1) "Cutting metal" see 25 C.J.S. p 435 note 50

(2) "Metal aluminium" is the basis of common clay—Meyer v Arthur, N.Y., 91 U.S. 570, 577, 23 L. Ed. 455

(3) "Metal calcium" is the basis of lime—Meyer v Arthur, *supra*

(4) "Metal knuckles" as a weapon the carrying or possession of which is prohibited see the C.J.S. title Weapons § 6

(5) "Metals and manufactures thereof" see Customs Duties §§ 34, 64

(6) "Old metals" is a term used in the junk trade, in which it has acquired a broader meaning than belongs to the words as commonly used, and includes various articles such as rubber and glass—Mooney v Howard Ins Co, 138 Mass 375, 52 Am R 277

(7) "Precious metals" is a term which in popular language is applied to gold and silver—Casher v Holmes, 2 B & Ad 592, 596, 22 ECL 249, 109 Reprint 1263

(8) "Soft-metal" in the spark plug art as applied to a bushing does not refer solely to the metals sometimes or frequently classified as soft, but refers to a particular bushing which possesses the qualities of a soft, yielding material, one that would upset under pressure and thereby accomplish certain results—Rajah Auto Supply Co v Belvidere Screw & Mach Co, CCA Ill, 275 F 761, 763

(9) "Unwrought metal"—U S v Wells, Fargo & Co, 1 Ct Cust App 158, 161—40 C.J. p 654 note 29 See Customs Duties § 34

(10) "White metal," in the Bessemerizing process, copper sulphide, the matter left after the iron and

METALIZE. To treat with, especially to coat with, a metal; to impregnate with a metal or metallic compound.⁴⁹

METALLIC. Being, containing, or having characteristics of a metal,⁵⁰ consisting of or having the characters of a metal;⁵¹ having one or more properties resembling those of metals.⁵² The word "metallic" does not necessarily mean constructed of metal⁵³

Phrases employing the word are set out in the note⁵⁴

METALLIFEROUS. Producing or containing metal, yielding metals⁵⁵

METALLOPHONE. An instrument like the xylophone, but having metallic instead of wooden bars⁵⁶

part of the sulphur are eliminated from the matte after addition of the silicious flux in the slagging process—United Verde Copper Co v Pearce-Smith Converter Co, CCA Del, 7 F2d 13, 14

49. Webster New Int D

"Metalized"

US—In re International Resistance Co, Cust & Pat App, 69 F2d 566, 567

50. US—Alpha Lux Co v U S, 27 CCA Customs, 162, 164
40 C.J. p 654 note 34

51. US—Trussell Mfg Co v S E & M Vernon, Inc, DCNY, 11 F2d 289, 290, 291

52. US—Trussell Mfg Co v S E & M Vernon, Inc, *supra*

53. US—Trussell Mfg Co v S E & M Vernon, Inc, *supra*

54. Phrases

(1) "Metallic circuit" see Electricity § 1 b

(2) "Metallic inks" see 43 C.J.S. p 1123 note 14

(3) "Metallic mineral substances in a crude state" as subject to customs duties see Customs Duties § 31

(4) "Metallic oxide" is an oxide composed of oxygen and a metal, as a base—Jenkins v Johnson, CCNY, 13 F Cas No 7,271, 9 Blatchf 516, 519

(5) "Mineral or metallic compound" see 15 C.J.S. p 700 note 19 1

55. Webster New Int D See Morgan v U S, Colo, 169 F 242, 248, 94 CCA 518
40 C.J. p 654 note 39

56. US—U S v F W Woolworth Co, 28 CCA Customs, 234, 236
40 C.J. p 654 note 40

Classified as toys under tariff act see Customs Duties § 45 a.

METALLURGY. The science of extracting metals from their ores ⁵⁷ It is not an exact science ⁵⁸ The term, used in the broader sense, includes not only the production of the raw material but its refinement as well. ⁵⁹

Metallurgical Relating to, or connected with, metallurgy; belonging to the working of metals ⁶⁰

Metallurgist One who is versed in the science of metallurgy, one who scientifically studies the operations of the smelter ⁶¹

METAPHYSICS. The systematic study or science of the first principles of being and of knowledge, the reasoned doctrine of the essential nature and fundamental relation of all that is real ⁶² The term has been judicially defined as the science of being, the science which deals with ultimate reality, the philosophy of mind; the science beyond experience, the realm of transcendental ruminations and of speculation of the philosopher ⁶³ Metaphysics is speculative philosophy in the looser and wider sense, and, specifically, it is the principles of philosophy as applied to the principles and methods of any particular science; as the metaphysics of geometry, metaphysics of theology; also, mental science in general; psychology; especially in the Scottish School ⁶⁴

In a slightly different sense, indefinitely abstruse confused, and bewildering discussions; a popular use suggested by the character of many works in philosophy ⁶⁵

57. Century D

58. US—American Stainless Steel Co v Rustless Iron Corporation of America, DC Md., 2 F Supp 712, 751

59. US—American Stainless Steel Co v Rustless Iron Corporation of America, *supra*

60. Century D
"Metallurgical coke" see 11 CJS p 1315 note 29

61. Century D

"The province of the metallurgist is to extract the pure metal from the concentrates by chemical means with or without the aid of heat"—The Santa Clara, CCA N.Y., 281 F 725, 729

62. NY—Application of Peace Haven, The House of the New Commandment, R F M M Retreat, 25 NYS 2d 974, 976, 175 Misc 753

63. NJ—Vineland Trust Co v Westendorf, 98 A 814, 86 NJ Eq 343

NY—Application of Peace Haven, The House of the New Command-

ment, R F M M Retreat, 25 NYS 2d 974, 976, 175 Misc 753

64. NY—Application of Peace Haven, The House of the New Commandment, R F M M Retreat, *supra*

Archaic meaning

The science of supernatural or magical beings and agencies—Application of Peace Haven, The House of the New Commandment, R F M M Retreat, *supra*

65. NY—Application of Peace Haven, The House of the New Commandment, R F M M Retreat, *supra*

66. Webster New Int D

Phrases

(1) "Metaphysical healing" see the CJS title Physicians and Surgeons § 1, also 40 CJS p 651 note 45 [a]

(2) "Metaphysical thought"—Vineland Trust Co v Westendorf, 98 A 814, 86 NJ Eq 343

67. US—In re Hill, 129 F 2d 717, 720, 29 CCPA, Patents, 1269

"Meta stable zone"

In the crystallizing art, the "meta-

Metaphysical Of or pertaining to metaphysics; according to rules or principles of metaphysics ⁶⁶

METASTABLE. In chemistry, an unstable condition which changes readily, either to a more stable form, or to a less stable condition ⁶⁷

METASTASIS. A medical term meaning the transfer by lymphatic channels or blood vessels, of diseased tissue, especially cells of malignant tumors from one part of the body to another ⁶⁸

METASYPHILIS. As a term sometimes used to describe "syphilitic insanity" see Insane Persons § 2 b (5).

METAYER SYSTEM. A system of agricultural holdings prevailing in some parts of France and Italy ⁶⁹

METEGAVEL. A tribute or rent paid in victuals ⁷⁰

METEORITE. A stony or metallic body that has fallen to the earth from outer space; an aerolite ⁷¹

METER. An instrument for measuring, and usually for recording automatically, the quantity measured. ⁷²

The right of an electric company to discontinue service to a consumer because of tampering with the meter is treated in Electricity § 25 b, and offenses connected with electric meters are discussed in Electricity § 76. The statutory duty of gas companies

"stable zone" is a zone or range of conditions where no new crystal nuclei are formed but where those already formed grow—In re Hill, *supra*

68. Pa.—Stauffer v Hubley Mfg Co, 30 A 2d 370, 371, 151 Pa Super 332

69. Black L D
40 CJS p 654 note 19.

70. Black L D

71. Webster New Int D See Goddard v Winchell, 53 NW 1124, 86 Iowa 71, 84, 41 AmSR 181, 17 L R A 788

72. Kan.—Stockman v Parsons Pipe Line Corporation, 14 P 2d 653, 654, 136 Kan 340

Meter contract

A contract whereby the customer takes what power he wants, as and when he wants it, and pays on the basis of the exact number of kilowatt hours, or the horse-power hours taken—Attorney General v Canadian Niagara Power Co, 1913, AC 852, 1913, AC, Can., 317, 9 Dom LR 191, 198.

to install gas meters on the premises of consumers is treated in Gas § 23 Gas meters for the purpose of measuring the flow of gas in pipe lines are discussed in Mines and Minerals § 3 Parking meters are defined in the C.J.S. title Motor Vehicles § 8, and water meters in the C.J.S. title Waters § 280, also 67 C.J. p 1227 note 83—p 1228 note 94 and 40 C.J. p 654 note 53.

METES AND BOUNDS. See Boundaries § 4.

METHEGLIN. As an intoxicating liquor see Intoxicating Liquors § 13.

METHOD. Properly speaking, the act of placing and performing several operations in the most convenient order, but it may signify a contrivance or device.⁷³

"Method" has been held to be equivalent to, or synonymous with, "art" see 6 C.J.S. p 772 note 12, and "process"⁷⁴ The word "engine" in the patent law of England has been held synonymous with "method" see 30 C.J.S. p 250 note 2.

In ascertaining depreciation of property of public utilities, various methods are employed, such as the "straight line" and the "sinking-fund" methods, and these are treated and discussed in the C.J.S. title Public Utilities § 18, also 51 C.J. p 19 notes 29—31, 58 C.J. p 738 notes 53, 54, and 60 C.J. p 131 notes 73—78 The word "method" as used in the Internal Revenue Code with reference to income taxation is treated in Internal Revenue § 620.

Phrases employing the word are set out in the note.⁷⁵

METHODIST CHURCH. See the C.J.S. title Religious Societies § 1.

METHOMANIA. See Insane Persons § 2 c.

METHYL ALCOHOL. A volatile liquid⁷⁶ obtained by the distillation of wood,⁷⁷ and commonly known as wood spirit or wood alcohol.⁷⁸ It is not a beverage⁷⁹ but is ranked as a poison, as stated in the C.J.S. title Poisons § 1, also 70 C.J. p 1193 note 4, and has been held not included within the term "intoxicating liquor," as stated in Intoxicating Liquors § 13.

METRE and METRIC SYSTEM. See the C.J.S. title Weights and Measures § 1, also 40 C.J. p 655 notes 62, 63.

METTESHEP or METTENSCHEP. An acknowledgment paid in a certain measure of corn; or a fine or penalty imposed on tenants for default in not doing their customary service in cutting the lord's corn.⁸⁰

METUS and MEUM. As the first words of maxims as to which there have been no recent applications see 40 C.J. p 655 notes 65, 66.

MEXICAN. As a noun, a native or inhabitant of Mexico.⁸¹ The Mexicans comprise a dominant white population of Spanish descent, Mestizos, and Indian tribes, ranging in culture from the primitive Seris to the civilized Mayas.⁸²

As an adjective, of or pertaining to Mexico or its people.⁸³

Phrases employing the word are set out in the note.⁸⁴

73. Eng—Hornblower v Boulton, 8 TR 95, 106, 101 Reprint 1285

74. Eng—Rex v Wheeler, 2 B & Ald 345, 350, 106 Reprint 392

75. *Phrases*

(1) "Base stock" method," also called the "cushion" or "minimum method" see 9 C.J.S. p 1553 notes 26, 27

(2) "Conversion method" see 18 C.J.S. p 42 note 82

(3) "Minimum method" see 9 C.J.S. p 1553 note 27

(4) "Snubbing in method" see Mines and Minerals § 3

(5) "Unfair methods of competition" as used in the Federal Trade Commission Act see the C.J.S. title Trade-Marks, Trade-Names, and Unfair Competition § 228, also 63 C.J. p 587 note 83—p 590 note 28

76. Kan—Campbell v Brown, 117 P. 1010, 1012, 85 Kan 527

77. Kan—Campbell v. Brown, supra

70 C.J. p 1193 note 3

78. Vt—Fabor v. Green, 47 A. 391, 72 Vt 117

70 C.J. p 1193 note 1

79. Vt—Fabor v Green, supra

70 C.J. p 1193 note 5

80. Black LD

81. Nev—State v Mendez, 61 P 2d 300, 302, 57 Nev 192

The term may include either a citizen, subject, or native of Mexico—Baldwin v Goldfrank, 31 SW 1064, 1067, 88 Tex 249—40 C.J. p 655 note 67.

82. Nev—State v Mendez, 61 P 2d 300, 302, 57 Nev 192

83. Webster New Int D

84. *Phrases*

(1) "Mexican asphalt" see 6 C.J.S. p 790 note 89 1

(2) "Mexican grants" discussed with reference to public lands generally see the C.J.S. title Public Lands § 280, also 50 C.J. p 1204 note 28—p 1206 note 94, and with reference to mining rights see Mines and Minerals §§ 6, 18

(3) "Mexican league" as a measure of distance see the C.J.S. title Weights and Measures § 1, also 36 C.J. p 972 note 58 [d]

(4) "Mexican onyx" as included within the meaning of the term "marble" see 55 C.J.S. p 708 note 46; and as distinguished from "building stone" see 12 C.J.S. p 390 note 2

(5) "Mexican pirate-knife" see 51 C.J.S. p 460 note 83.

(6) "Mexican pueblo;" settlement or town under the control of the Mexican government, with alcaldes and other officers, for the administration of municipal affairs—City and

MEZCLA. In Spanish law, mixture.⁸⁵

MEZZANINE. A low story between two higher ones, especially between the ground floor and the story above.⁸⁶

M.F.B.M. See Abbreviations 1 C.J.S. p 276 note 5

MFG. See Abbreviations 1 C.J.S. p 276 note 5

MICA. Any group of minerals, silicates of aluminum with other bases, that separate readily into thin, tough, often transparent, and usually elastic laminae.⁸⁷

MICANITE See Electricity § 1 b

MICHAEL. See the C.J.S. title Names § 1, also 40 C.J. p 655 note 80

MICHAELMAS. There are two Michaelmasses, one, the old Michaelmas, which falls on October 11, and the other, the new Michaelmas, which falls on September 29.⁸⁸

Michaelmas term In England, one of the four terms of the courts of common law, beginning on the second and ending on the twenty-fifth day of November of each year.⁸⁹

MICHEL-GEMOT. One of the names of the general council immemorably held in England; one of the great councils of king and noblemen in Saxon times.⁹⁰

MICHEL-SYNOTH. Great council; one of the names of the general council of the kingdom in the times of the Saxons.⁹¹

MICHIGAN. The name of one of the states of the

United States of America.⁹²

MICROBE. A very minute organism; a micro-organism; a germ.⁹³ Also a germ of disease so infinitesimal that it derives its name from the powerful glass by the aid of which it is claimed the germ may be detected.⁹⁴

MICROPHONE. As an instrument used to intensify sounds for transmission see the C.J.S. title Telegraphs and Telephones § 4, also 40 C.J. p 656 note 87.

MID. A combining form of the adjective "mid," used with nouns to denote the middle or middle part of the thing named, also, to denote that the thing named is in the middle, or in a central or intermediate position. It is used with adjectives to denote belonging to or situated in the middle part of the thing implied by the adjective.⁹⁵

"Mid-West" A geographical term, relating to an area within the United States, which area has no definite boundaries. There is no official or statutory designation of the area and so, strictly speaking, it is not a legally recognized name, but in common usage it is a term which has no meaning or significance other than geographical.⁹⁶ It is defined as that part of the United States occupying the northern half of the Mississippi River basin, roughly, the section extending from the Rocky Mountains to the Alleghenies, north of the Ohio River and the southern boundaries of Missouri and Kansas; the North Central States.⁹⁷ It is equivalent to the term "Middle West,"⁹⁸ which is defined post page 1078 note 2.

Phrases employing the form "mid" are set out in the note.⁹⁹

County of San Francisco v Le Roy, Cal., 11 S.Ct. 364, 366, 138 U.S. 656, 34 L.Ed. 1096

(7) "Mexican shore," in the civil law as applied in Mexico, a term used to designate the shore line of extraordinary high tides—Valentine v Sloos, 37 P. 326, 410, 103 Cal. 215

85. Escriche Diccionario

86. Webster New Int D

Mezzanine floor

A story of diminished height introduced between two higher stories—Biber v O'Brien, 32 P.2d 425, 429, 138 Cal.App. 353

Mezzanine story

A partial low story introduced in the height of a main story—Madden v. Zoning Board of Review, 136 A. 493, 494, 48 R.I. 175

87. U.S.—Edwin L. Wiegand Co v

Harold B Trent Co, C.C.A.Pa., 123 F.2d 920, 922

Nature and qualities discussed

U.S.—Mica Insulator Co v Union Mica Co, C.C.N.Y., 137 F. 928, 931 40 C.J. p 655 note 77

88. Eng.—Doe v Lea, 11 East 312, 313, 103 Reprint 1021 See Smith v Walton, 8 Bing 235, 21 E.C.L. 521, 131 Reprint 391

89. Black L.D.

40 C.J. p 656 note 83

90. Black L.D.

91. Black L.D.

92. Bouvier L.D.

Historical note

Michigan was admitted into the Union by act of congress of January 26, 1837, and the first constitution of the state was adopted June 24, 1835—Bouvier L.D.

93. Webster New Int D

94. N.J.—Newark Aqueduct Bd v Pascaic, 18 A. 106, 111, 45 N.J.Eq. 393

"Microbe killer"

Tex.—Radam v Capital Microbe Destroyer Co, 16 S.W. 990, 993, 81 Tex. 122, 26 Am.S.R. 783—Alff v Radam, 14 S.W. 164, 77 Tex. 530, 19 Am.S.R. 792, 9 L.R.A. 145

95. Webster New Int D

96. U.S.—In re Mid-West Abrasive Co, Cust. & Pat.App., 146 F.2d 1011, 1013

97. U.S.—In re Mid-West Abrasive Co, supra.

98. U.S.—In re Mid-West Abrasive Co, supra.

99. **"Midwest society"**

"A map of American Sociological Society in the Division of Maps, Li-

MIDDLE. Of a member or part, equally distant, as reckoned by numbers, space, or other particular, from the extremes either of a number of things or of one thing; mean, medial.¹

Middle West The northern portion of the central United States and more specifically the States of Ohio, Indiana, Illinois, Michigan, Iowa, Wisconsin, and Minnesota, the north central portion of the United States embracing approximately the area north of the Ohio River and its latitude from the Rocky Mountains to the Alleghenies.² It is the equivalent of "Mid-West" as stated ante p 1077 note 98.

Other phrases employing the word "middle" are set out in the note³

MIDDLEMAN. A person employed to bring two or more parties together;⁴ one who merely brings the parties together in order to enable them to make their own contracts;⁵ an agent who merely brings the parties to the sale together, and on whom does not devolve the duty of negotiating for either, and who may contract for and receive commissions from both.⁶ In order to be a mere middleman, the agent must not be invested with the least discretion, and the first employer must have no right to rely on obtaining the benefit of his judgment.⁷ A middleman is in no fiduciary relation to his principal⁸ and sustains no confidential relation to either party.⁹ He is the agent of both,¹⁰ and neither negotiates for, nor is employed to negotiate by, either side,¹¹ since the parties when they meet do their

own negotiating and make their own bargains.¹² He is not under any obligation not to receive compensation from the opposite party to the transaction,¹³ but may contract for and receive a commission from both.¹⁴

The distinction between a middleman and an agent is treated in Agency § 2 a, and between a middleman and a broker in Brokers § 2. However, brokers may act as middlemen, as discussed in Brokers § 6.

A jobber is a sort of middleman, and this is particularly true in the gasoline industry as discussed in 48 C J S p 795 note 46, p 796 note 48.

MIDDLESEX, BILL OF. See 10 C J S p 383 notes 58, 59.

MIDDLING. In milling, the parts of a kernel of grain next the skin of the berry, largely composed of gluten and considered the most nutritious part; also, the coarser particles resulting from milling intermingled with a certain quantity of foreign matters, used as feed for farm stock.¹⁵

MIDSHIPMAN. See Army and Navy § 16.

MIDWAY. The middle course.¹⁶

MIDWIFE. See the C J S. title Physicians and Surgeons § 1, also 40 C J. p 657 notes 22-25.

MIEDO. In Spanish law, fear, perturbation of mind.¹⁷

brary of Congress, shows a 'Midwest society' covering numerous states, some of them east and some of them west of the Mississippi River"—In re Mid-West Abrasive Co, supra.

Other phrases

(1) "Mid-channel" see 14 C J S p 398 note 19.

(2) "Midwestern area" see 6 C J S p 332 note 431.

1. Webster New Int D.

2. U S—In re Mid-West Abrasive Co, supra.

3. Phrases

(1) "Middle lord" see 54 C J S p 797 note 74.

(2) "Middle name or initial" see the C J S title Names § 4, also 45 C J p 369 note 34—p 371 note 53 and 40 C J p 656 note 89 [a].

(3) Additional phrases as to which more recent adjudications have not been found see 40 C J p 656 notes 91-1.

4. N Y—Southack v Lane, 65 N Y S 629, 631, 32 Misc 141.

5 D—Langford v Issenhuth, 134 N W 889, 893, 28 S D 451.

Similarly expressed

A middleman is employed merely to bring the parties together, when each desires to exchange his property for that of the other, or where one desires to sell and the other to purchase property—Tracey v Blake, 118 N E 271, 272, 229 Mass 57.

5. Mass—Tracey v Blake, supra. Tex—Crane v Colonial Holding Corporation, Civ App, 57 S W 2d 316, 320.

6. S D—Langford v Issenhuth, 134 N W 889, 893, 28 S D 451. 40 C J p 656 note 5.

7. Tex—Crane v Colonial Holding Corporation, Civ App, 57 S W 2d 316, 320.

8. Cal—King v Reed, 141 P 41, 48, 24 Cal App 229.

9. N Y—Southack v Lane, 65 N Y S 629, 631, 32 Misc 141. 40 C J p 656 note 9.

10. Iowa—Stapp v Godfrey, 139 N W 893, 894, 158 Iowa 376.

Similarly expressed

The services of a middleman are not rendered by one acting as the

agent of either party—Tracey v Blake, 118 N E 271, 272, 229 Mass 57.

11. Colo—Jenkins v Mabey, 215 P 924, 926, 73 Colo 366. 40 C J p 656 note 12.

Similarly expressed

A middleman is under no duty of negotiating for either party—Stapp v Godfrey, 139 N W 893, 894, 158 Iowa 376.

12. Ga—Arthur v Georgia Cotton Co, 96 S E 232, 22 Ga App 131. 40 C J p 657 note 14.

13. Cal—King v Reed, 141 P 41, 48, 24 Cal App 229.

14. Iowa—Stapp v Godfrey, 139 N W 893, 894, 158 Iowa 376. Mass—Tracey v Blake, 118 N E 271, 272, 229 Mass 57.

15. Ind—State v Weller, 85 N E 761, 762, 171 Ind 53. 40 C J p 657 note 19.

16. Standard D. See State of Louisiana v State of Mississippi, 26 S Ct 408, 202 US 1, 49, 50 L Ed. 913.

17. Escriche Diccionario.

MIERS THEORY. A supersolubility theory dealing with the extent of the supersaturation possible for a given solution ¹⁸

MIGHT. Power of a person (to do something); force or power of any kind, whether of body or mind, strength, force, power, ability; capacity, efficacy ¹⁹

MIGHTY. Possessing might; potent, efficacious, now implying a very high or transcendent degree of power.²⁰

MIGRANS. As the first word of a maxim as to which there have been no recent applications see 40 C J p 657 note 30.

MIGRATE. To go from one place to another, especially, to move from one country, region, or place of abode or sojourn to another, with a view to residence; to change one's place of residence, to move, as, the Moors who migrated from Africa to Spain, to migrate to the West ²¹ Also, to pass periodically from one region or climate to another for feeding or breeding, as do various birds and animals.²²

Migration Act or instance of migrating, as of persons, tribes, animals, plants, etc., also, collectively, the individuals taking part in a migratory movement, or those migrating during a given period ²³ "Migration" has been compared with, or distinguished from, "importation" see 42 C J S p 408 note 55

Migratory Making a migration or migrations, moving habitually or occasionally from one region or climate to another; disposed to migration; roving; wandering; nomad, as, migratory habits; of or pertaining to migration.²⁴ The descriptive term "migratory" applies especially to animals whose instincts prompt them to make seasonal changes of habitat, and such animals often move, as does live stock, from place to place during recurring seasons in search of their natural means of subsistence ²⁵

MIKE. The term "Mike" is not universally recognized as an abbreviation of "Michael," but, strictly speaking, is a mere diminutive or nickname as discussed in the C J S title Names §§ 1, 7, also 40 C J. p 657 notes 33, 34 It is sometimes used flippantly to designate anyone ²⁶

MILCH. An adjective meaning giving milk ²⁷

MILE. As a measure of length, whether referring to the land or statute mile or to the geographical or marine mile, see the C J S title Weights and Measures § 1, also 40 C J p 658 notes 42-48

MILEAGE. An allowance for traveling expenses at a certain rate per mile ²⁸ It is a well-established method, widely used in public and private business, of reimbursing an officer or employee for the expense necessarily sustained by him in traveling to perform his duties. It is merely a substitute for actual expenses, and, theoretically, covers only the cost of transportation of the individual officer or employee, and the rate is set on that basis, unless otherwise indicated by circumstances.²⁹

The term is defined with reference to public officers generally in the C J S. title Officers § 91, also 46 C J. p 1018 notes 78, 79, and 40 C J p 658 notes 49-51. The right of particular public officers to receive mileage is treated in various titles throughout this work, particular reference being made to the C J S titles District and Prosecuting Attorneys § 21, Judges § 36 b, and Sheriffs and Constables §§ 248, 251, also 57 C J. p 1125 notes 73-78, p 1129 note 51-p 1131 note 98. The right of army and navy personnel to receive mileage is treated in Army and Navy § 20 e (4), § 31 i (5), and § 33 d Mileage for grand jurors is discussed in Grand Jurors § 47, for petit jurors in Jurors § 207, and for witnesses in the C J S title Witnesses § 43, also 70 C J p 77 note 77-p 79 note 30 The necessity of paying or tendering mileage to witnesses in advance of their appearance is treated in the C J S title Witnesses §

18. US—In re Hill, 129 F2d 717, 720, 29 C C P A, Patents, 1269

19. Webster New Int D As part of the verb "may" see supra p 459 note 35

20. Webster New Int D "Mighty fast!" see 35 C J S p 753 note 61

21. Cal—Di Giulio v Rice, Super, 70 P 2d 717, 730

22. Cal—Di Giulio v Rice, supra 40 C J p 657 note 31

23. Webster New Int D

24. Cal—Di Giulio v Rice, supra.

Phrases

(1) "Migratory Bird Treaty Act" see Game § 10 b

(2) "Migratory corporations" see Corporations § 1793

25. Cal—Di Giulio v Rice, supra

26. Mo—Ohlmann v Clarkson Saw Mill Co, 120 SW 1155, 1158, 222 Mo 62, 133 Am SR 506, 28 L R A, NS, 432

40 C J p 657 note 35

27. Tex—Patterson v English, Civ App, 142 SW 18, 19

"Milch cow" see 21 C J S p 1033 note 53-p 1034 note 54

28. Idaho—Reed v Gallet, 299 P 337, 338, 50 Idaho 678

Kan—Strenson v Wallace, 62 P 2d 907, 909, 144 Kan 730 Wash—State v Clausen, 253 P 805, 807, 142 Wash 450

Phrases

(1) "Mileage book" see Carriers § 603

(2) "Mileage tax" see the C J S title Motor Vehicles § 140

29. Mich—Caswell v New York Cent R Co, 248 NW 611, 612, 263 Mich 18.

26, also 70 C J. p 55 note 72—p 57 note 90. Mileage for members of congress is discussed in the C J S. title United States § 17, also 65 C.J. p 1264 notes 21–30, and for members of state legislatures in the C J. S. title States § 36, also 59 C J. p 89 notes 68–73.

MILICIA. In Spanish law, the art of waging war and drilling soldiers, also, the military profession ³⁰

MILITANT. Engaged in warfare, warring ³¹

MILITAR. In Spanish law, anyone in the army or navy.³²

MILITARY. Of or pertaining to soldiers, arms, or warfare,³³ soldierly, warlike, martial, done, supported, or carried on by force of arms, assigned to, or occupied by, troops,³⁴ belonging to, engaged in, or appropriate to, the affairs of war; according to the methods and customs of war or of armies,³⁵ anything pertaining to war or to the army,³⁶ concerned with war ³⁷

Phrases employing the word "military" are set out in the note ³⁸ For other phrases employing the term see the title index to the title Army and Navy and consult the Descriptive-Word Index and see 40 C J p 659 notes 70–78

30. Escriche Diccionario.

Milicias provinciales

Bodies of troops drawn from particular districts or cities—Escriche Diccionario

31. US—Gitlow v Kieley, D C N Y, 44 F 2d 237, 233

32. Escriche Diccionario
40 C J p 658 notes 55, 56

33. US—Southern Pac Co v Defense Supplies Corp, D C Cal, 64 F Supp 605, 608—Northern Pac Ry Co v U S, D C Wis, 64 F Supp 1, 4—Powell v U. S, D C Va, 60 F Supp 433, 439

34. US—Powell v U S, supra

Similarly defined

Warlike, martial—Southern Pac v Defense Supplies Corp, D C Cal, 64 F Supp 605, 608

35. US—Northern Pac Ry Co v U S, D C Wis, 64 F Supp 1, 4

36. US—Southern Pac v Defense Supplies Corp, D C Cal, 64 F Supp 605, 608—Northern Pac Ry Co v U S, D C Wis, 64 F Supp 1, 5

37. US—Northern Pac Ry Co v U S, supra

38. Phrases

(1) "Military causes," in English law, causes of action or injuries cognizable in the court military, or court of chivalry—Black L D

(2) "Military commissions" see the C J S title War § 41, also 67 C J p 428 notes 2–8

(3) "Military enterprise" as a martial undertaking involving a bold and hazardous attempt see the C J S titles Neutrality Laws § 3, also 46 C J p 7 note 57—p 8 note 70, and Treason § 5, also 63 C J p 815 note 29—p 816 note 39

(4) "Military expedition" see generally the C J S titles Neutrality Laws § 3, also 46 C J p 7 note 57—p 8 note 70, and Treason § 5, also 63 C J p 815 note 29—p 816 note 39

(5) "Military feuds" see 36 C J S p 733 note 27

(6) "Military government" see the C J S title War § 39, also 67 C J p 421 note 86—p 425 note 49

(7) "Military lands" see the C J S title Property § 7, also 40 C J p 658 note 61

(8) "Military law" defined see Army and Navy § 1 d

(9) "Military offenses," those offenses which are cognizable by the courts military, as insubordination, sleeping on guard, desertion, etc—Black L D

(10) "Military service" see Army and Navy § 5

(11) "Military state," the soldiery of the Kingdom of Great Britain—Black L D

(12) "Military station or post" see Army and Navy § 104

(13) "Military tenures," the various tenures by knight-service, grand-serjeanty, cornage, etc, are frequently called "military tenures," from the nature of the services which they involved—Black L D

(14) "Military testament," in English law, a noncupative will, that is, one made by word of mouth, by which a soldier may dispose of his goods, pay, and other personal chattels, without the forms and solemnities which the law requires in other cases—Black L D. See the C J S title Wills § 219, also 68 C J p 736 note 12—p 738 note 36.

MILITIA

This Title includes soldiers enrolled by authority of the state for discipline and for service in emergencies, constitutional and statutory provisions relating to such bodies, liability to service in the militia and exemptions therefrom, enrollment, organization, and discipline of the militia, rights, powers, duties, and liabilities of its officers and other members, control and employment of the militia in actual service, and offenses against laws governing the militia, and courts-martial and other military courts administering such laws

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

- § 1 Definitions, nature, and distinctions—p 1082
- 2 Power to organize, regulate, and control generally—p 1082
- 3 Relation of militia to civil government—p 1083
- 4 Obligation to render military service—p 1083
- 5 Exemptions from service—p 1084
- 6 Privileges of members of militia—p 1084
- 7 Composition and organization in general—p 1084
- 8 National guard or organized militia—p 1085
- 9 — Naval militia—p 1086
- 10 Government and command generally; commander in chief—p 1086
- 11 Officers—p 1087
- 12 Enlistment or enrollment of members, and qualifications therefor—p 1091
- 13 — Term of service and discharge—p 1093
- 14 — Pay and allowances—p 1093
- 15 Disbandment and consolidation of organization—p 1094
- 16 Unauthorized military organizations—p 1094
- 17 Arms, equipments, and other supplies—p 1094
- 18 Armories, drill or camp grounds, and rifle ranges—p 1095
- 19 Discipline and training—p 1096
- 20 — Military offenses—p 1097
- 21 Service—p 1098
- 22 — Liability of state or political divisions for injuries—p 1100
- 23 Expense of maintenance—p 1100
- 24 Military courts—p 1103
- 25 — Courts-martial—p 1104
- 26 Incorporation, organization, property, and civil rights and liabilities of organization—p 1108
- 27 Civil status and liability of members of militia—p 1109
- 28 Aid to militiamen and their dependents—p 1112
- 29 Offenses by persons not in service—p 1113

See also descriptive word index in the back of this Volume

§ 1. Definitions, Nature, and Distinctions

"Militia" may be defined as a body of citizen soldiers organized and trained for call to temporary military duty in time of emergency.

"Militia" has been defined as a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into the field for temporary military service when the exigencies of the country require it,¹ as that portion of the people who are capable of bearing arms, that is, the arms-bearing population,² and as citizen soldiers.³ The term is also defined as all persons by law liable to do duty in the militia,⁴ a body of citizens enrolled for military discipline,⁵ or troops furnished on call of the president by the state.⁶

Distinguished from other terms or organizations "Militia" as a term or an organization has been distinguished from "troops,"⁷ "standing army,"⁸ and "posse comitatus."⁹

Captain of militia is an officer commanding a company.¹⁰

"Quarter," as the term is used in connection with militia, has been said to be the usual term applied to stations, buildings, lodgings, and the like in the regular occupation of military troops.¹¹ "Quartering" has been defined in connection with militia as meaning, in the military sense, to shelter, or furnish with shelter or entertainment, to supply with lodging, especially, to assign to a certain place of shelter, as soldiers.¹²

§ 2. Power to Organize, Regulate, and Control Generally

The power to organize, regulate, and control the militia rests in the United States and the several states, although the power of the United States is paramount where it has been exercised to the exclusion of the individual states.

The Constitution of the United States provides in article 1 section 8, that congress may make provision "for organizing, aiming, and disciplining, the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress." There is authority for the view that the power over the militia so conferred on congress is restricted to the specific matters enumerated,¹³ and that the power of congress to provide for "governing" the militia may be exercised only when the militia is employed in the service of the United States.¹⁴

Federal legislation A valid federal statute enacted pursuant to the power given by the constitution is operative in the several states and binding on the civil and military officers of the state government, independent of, or notwithstanding, any state legislation on the subject.¹⁵ Provisions of federal law regulating the receipt, by persons convicted of crime, of arms or ammunition transported in interstate commerce do not affect the rights of the states.

1. Va.—Burroughs v Peyton, 16 Gratt, 470, 475, 57 Va 470, 475 40 C J p 662 note 2

Historically the terms "militia" or "militiamen" have been held to comprehend every temporary citizen-soldier who in time of war or emergency forsakes his civilian pursuits to enter, for the duration, the active military service of his country Mo—State ex rel McGaughey v Grayston, 163 SW2d 335, 337, 349 Mo 700

NC—In re Advisory Opinion to Governor, 28 SE2d 567, 571, 223 NC 845

Utah—Critchlow v Monson, 131 P 2d 794, 798, 102 Utah 378

2. US—Alabama Great Southern R Co v U. S., 49 Ct Cl 522, 530, 531

Ala—Ex parte McCants, 39 Ala 107, 113

Similar definition

The militia has been held to comprise all males physically capable of acting in concert for the common defense—United States v. Miller,

Ark, 59 S Ct 816, 818, 307 US 174, 83 L Ed 1206

Early usage of the term "militia" applied it to every able-bodied citizen between the ages of eighteen and forty-five

Mo—State ex rel McGaughey v Grayston, 163 SW2d 335, 337, 349 Mo 700

Utah—Critchlow v. Monson, 131 P 2d 794, 798, 102 Utah 378

3. US—Alabama Great Southern R Co v. U. S., 49 Ct Cl 522, 530, 531.

4. NJ—State v. Newark, 29 NJ Law 232

5. US—United States v. Miller, Ark, 59 S Ct 816, 818, 307 US 174, 83 L Ed 1206

6. NJ—State v. Newark, 29 NJ Law 232

Militia in service of United States as part of military establishment of United States see Army and Navy § 8

7. Ill—Dunne v People, 94 Ill 120, 138, 34 Am R 213.

40 C J p 663 note 7

8. Minn—State v Wagener, 77 N W 424, 74 Minn 518, 73 Am SR 369, 42 L R A 749

9. NC—Worth v Craven County, 24 SE 778, 118 NC 112, 122 40 C J p 663 note 9

10. NJ—Campbell v Gilkyson, 75 A 160, 161, 78 NJ Law 327

11. NM—State ex rel Charlton v French, 99 P 2d 715, 722, 44 NM 169

12. NM—State ex rel Charlton v. French, supra

13. Ill—Dunne v People, 94 Ill 120, 34 Am R 213

SC—Ansley v. Timmons, 14 SCL 329

14. NY—People v Hill, 13 NYS 637, affirmed 27 NE 789, 126 NY. 497

40 C J p 663 note 27

15. Mass—In re Opinion of Justices, 14 Gray 614

History of federal legislation on militia

US—Alabama Great Southern R. Co v U. S., 49 Ct Cl 522

40 C J p 663 notes 30-34.

to maintain their militia¹⁶ Under a statute authorizing the president to make all necessary rules and regulations for the organization and government of the militia, the acts of the secretary of war in issuing National Guard regulations are nonjudicial and are the acts of the president¹⁷

States The authority which a state may exercise over its own militia is not derived from the Constitution of the United States,¹⁸ and the reservation therein to the states of the power to appoint officers and the authority to train the militia is not regarded as an enumeration of all the powers which belong to the states¹⁹ Except with respect to the matters enumerated in the constitutional provision conferring authority on congress, and with respect to the power to raise armies conferred on congress,²⁰ the militia remains subject to the state authorities²¹

The federal Constitution does not, either directly or by implication, prevent all state legislation in respect of the militia,²² and by statutory and constitutional provisions various states have provided for the regulation of the militia²³ Such regulations have been upheld where conflict with valid federal regulation on the subject involved is avoided,²⁴ and where there has been a compliance with other requirements governing the validity of statutes,²⁵ but a statute regulating the militia which is violative of provisions of the state constitution is invalid²⁶

Concurrent and exclusive power The power

over the militia given to congress is not exclusive,²⁷ and in this respect there may be concurrent legislation by the states and by congress,²⁸ but the right of the state must yield to the superior right of congress acting within the limitations imposed by the Constitution²⁹

§ 3. Relation of Militia to Civil Government

In times of peace the militia is subordinate to the civil government

The subordination of the military to the civil authority in times of peace is generally recognized under constitutional and statutory provisions for such subordination;³⁰ and, hence, it has been held that military aid to civil authorities when given by the militia must be within and in accordance with the civil law, as discussed *infra* § 21 Subject to such considerations, however, it has been held that the militia ordinarily is governed by laws relative to military affairs rather than by laws regulating civil matters.³¹ It has also been held that the civil courts ordinarily have no jurisdiction over, and hence cannot interfere with, the management of the military forces of the state³²

§ 4. Obligation to Render Military Service

Every citizen of sufficient age and capacity to bear arms is under obligation to render military service in the militia when lawfully required to do so.

Every citizen is under obligation to serve and defend the constituted authorities of the state and for that purpose to bear arms, when of sufficient age

16. US—U S v Tot, DCNJ, 28 F Supp 900

17. DC—Gaston v U S, Mun App, 31 A 2d 353, affirmed 143 F 2d 10, 79 US App DC 37, certiorari denied 61 S Ct 1286, 322 US 761, 88 L Ed 1591.

18. Ill—Dunne v People, 94 Ill 120, 136, 34 Am R 213. 40 CJ p 663 note 35

19. Ill—Dunne v People, *supra* SC—Ansley v Timmons, 14 SCL 329

20. US—Selective Draft Law Cases, Minn., 38 S Ct. 159, 245 US 366, 62 L Ed 349.

21. US—Hamilton v. Regents of University of California, Cal., 55 S Ct 197, 293 US 245, 79 L Ed 343, rehearing denied 55 S Ct 345, 293 US 633, 79 L Ed 717 DC—U S ex rel Gillett v Dern, 74 F 2d 485, 61 App DC. 81 40 CJ p 663 note 40

22. US—Alabama Great Southern R Co v U S, 49 Ct Cl 523 Ill—Dunne v People, 94 Ill 120, 34 Am R 213.

23. Ala—Detty v State, 66 So 457, 188 Ala 211 40 CJ p 664 note 44

24. Ala—Betty v State, 66 So 457, 188 Ala 211 40 CJ p 664 note 44

25. NM—State ex rel Charlton v French, 99 P 2d 715, 41 NM 169

Special and extraordinary duties

Under statute directing governor to issue such orders as may be necessary to conform National Guard to that prescribed by war department, the duty imposed on the governor is an "emergent special duty," and the fact that the duty imposed may be special and extraordinary does not render the statute invalid—State ex rel Charlton v French, *supra*

State of insurrection

Statute authorizing governor to call into service all or any part of active members of state guard and all or a portion of reserve forces when he has by proclamation declared a state of insurrection to exist is not unconstitutional as en-

croaching on constitutional power of governor to call forth the militia to execute the laws of the state, suppress insurrections, and repel invasions, since the act does not deprive the governor of any of his powers as commander-in-chief of the militia which includes the state guard—Marlin v. Riley, 123 P 2d 488, 20 Cal 2d 28

26. US—Joyner v Browning, DC Tenn., 30 F Supp 512

27. Ill—Dunne v People, 94 Ill 120, 34 Am R 213

28. Ill—Dunne v People, *supra* 40 CJ p 664 note 17

29. Mass—In re Opinion of Justices, 14 Gray 614 40 CJ p 661 note 48

30. Ky—Franks v Smith, 134 S W. 181, 142 Ky 232, L R A 1915 A 1141, Ann Cas 1912D 319 40 CJ p 664 note 49.

31. Cal—Martin v. Riley, 123 P.2d 488, 20 Cal 2d 28

32. NY—People ex rel Gillett v. De Lamater, 287 NYS 979, 247 App Div. 246.

and capacity to do so, and when such service is lawfully required of him,³³ and a member of the militia renders services pursuant to an underlying duty which he constitutionally owes to support his government³⁴ The power to enforce this obligation, as far as the necessities of the state may require, is an incident of state sovereignty, and the subject of state constitutional and statutory regulation³⁵

§ 5. Exemptions from Service

Persons may be exempted from militia duty on grounds specified in state or federal statutes

Federal statutes relating to the militia have provided for the exemption of certain persons from militia duty,³⁶ such as those engaged in certain occupations or holding certain offices,³⁷ and early provisions contained an exemption in favor of persons exempt by the laws of the respective states or territories³⁸ Under various state statutes or constitutional provisions exemption has been accorded to persons engaged in certain occupations or holding certain offices,³⁹ and to those holding a religious belief opposed to war or the bearing of arms,⁴⁰ or suffering from physical disability⁴¹ In case of conflict between federal and state statutes with respect to exemptions, the federal statute will control⁴²

Where only the state authority is concerned, the legislature has power to revoke an exemption from serving in the militia granted to a certain class of persons and to require them to do military duty⁴³ Although it has been held that certain exemptions may not be waived by one who comes within the exempt class,⁴⁴ it has also been held that an exemption may be waived by a voluntary enlistment⁴⁵

§ 6. Privileges of Members of Militia

Members of the militia may in certain cases be granted immunity from arrest

Under some constitutional or statutory provisions, members of the militia while on duty or while going to, or returning from, the place where they have been ordered to report for service may be accorded immunity from arrest in certain cases,⁴⁶ as from arrest on civil process⁴⁷ It has been held, however, that persons who are not members of the active militia may not claim the benefit of a statute providing for immunity from arrest,⁴⁸ and that the immunity may not be claimed unless the conditions contemplated by the statute actually exist⁴⁹ The right of members of military companies to exemption from jury service is considered in *Juries* § 153, and their exemption from service of civil process or prosecution of civil suits is discussed *infra* § 27.

§ 7. Composition and Organization in General

The militia generally consists of that of the United States and that of the separate states and is composed of organized and unorganized elements.

The power to provide for "organizing" the militia conferred on congress by the constitution includes the power of deciding who shall compose the militia,⁵⁰ and, where congress makes such decision, the states may not legally make conflicting provisions⁵¹ The Federal Militia Act of 1792 was based on the theory of universal service,⁵² but it never became fully effective,⁵³ and, thereafter, in general, congress confined itself to providing for the organization of a specified number of the militia distributed among the states according to their quota to be trained as directed by congress.⁵⁴

33. Conn—*Lanahan v. Birge*, 30 Conn 438

34. NY—*Goldstein v. State*, 9 NYS 2d 799, 256 AppDiv 141

35. Conn—*Lanahan v. Birge*, 30 Conn 438

36. Mass—*Commonwealth v. Douglas*, 17 Mass 497
40 C.J. p 665 notes 60-62.

37. Mass—*Commonwealth v. Douglas*, *supra*
40 C.J. p 664 note 54

38. Mass—*In re Opinion of Justices*, 22 Pick 571
40 C.J. p 664 note 56

39. Mass—*Edgar v. Dodge*, 4 Mass 670
40 C.J. p 664 note 57

40. Me—*Dole v. Allen*, 4 Me 527.
40 C.J. p 665 note 58.

41. Me—*Hume v. Vance*, 7 Me 158
40 C.J. p 665 note 59

42. Mass—*Commonwealth v. Douglas*, 17 Mass 49
40 C.J. p 665 note 64

43. Mass—*Commonwealth v. Bird*, 12 Mass 443

44. Pa—*Reese v. Officers of Thirtieth Regiment*, 11 PaDist 647
40 C.J. p 665 note 66

45. NY—*Matter of Scheel*, 54 How Pr 478
40 C.J. p 665 note 67

46. SC—*Gregg v. Summers*, 12 SC L 461
40 C.J. p 665 note 71.

47. NC—*Murphy v. McCombs*, 33 NC 274
40 C.J. p 665 note 72.

48. NY—*Andrews v. Gardiner*, 173 NYS 1, 185 AppDiv 477.
40 C.J. p 665 note 73

49. NY—*Andrews v. Gardiner*, 166 NYS 933, 100 Misc 622
40 C.J. p 665 note 74

50. Mass—*Tyler v. Pomeroy*, 8 Allen 480—*In re Opinion of Justices*, 14 Gray 614.

51. Mass—*In re Opinion of Justices*, *supra*

52. US—*Selective Draft Law Cases*, Minn., 38 SCt 159, 245 US 366, 62 LEd 349
40 C.J. p 666 note 82

53. US—*Selective Draft Law Cases*, *supra*

54. US—*Selective Draft Law Cases*, *supra*

Individual states have organized systems of militia based on local constitutional or statutory provisions differing from each other in many respects,⁵⁵ and the validity of such constitutional or statutory provisions when not in conflict with validly enacted federal statutes has been recognized.⁵⁶ Such a state statutory provision must comply with state constitutional provisions.⁵⁷

Militia of the United States Under the National Defense Act, 32 U.S.C.A. § 1, the militia of the United States consists of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, and who are between specified ages,⁵⁸ and under such act, as amended June 28, 1947 c 162 § 7, the militia is divided into three classes, the National Guard, as discussed infra § 8, the Naval Militia, as considered infra § 9, and the Unorganized Militia.

State militia The state militia is constituted similarly to the militia of the United States,⁵⁹ according to the constitution and laws of the several states, and is generally divided into an active or organized body, and a reserve or unorganized body,⁶⁰ the latter being composed of all persons liable to military duty not enlisted in the active or organized body.⁶¹ Under some statutes, provision is made for the organization of the reserve or theretofore unorganized militia when necessary.⁶² Members of an organization who were never enlisted by the state may not be regarded as troops or soldiers subject to state authority.⁶³

A statutory provision that persons desirous to organize themselves into a militia company shall first obtain the written consent of the county judge has been construed as merely directory,⁶⁴ and, if the governor approves the application without the

certificate of the county judge, the company may be lawfully enrolled as a part of the organized militia.⁶⁵

§ 8. National Guard or Organized Militia

- a In general
- b Plan of organization, composition, and distribution
- c Relation to state and federal governments

a. In General

The National Guard is an organization of the state militia subject to call for federal duty in an emergency, there may also be a state guard or militia organized under provisions of state law.

The National Guard is an organization of the state militia,⁶⁶ which does not become a part of the United States army until congress declares an emergency to exist which demands its services in behalf of the nation.⁶⁷ Provisions of state statutes conferring on the governor the power to organize the militia and to meet emergencies give to the chief executive of the state authority to reorganize the National Guard and to call to his assistance in any contingency that may arise a force sufficient in numbers to safeguard the welfare of the people and provide for their defense.⁶⁸ There is authority for the view that the National Guard of a state does not lose its status as a state organization by a failure of the state to comply with the requirements of congress and of federal executive officials.⁶⁹

Units of the state militia have been organized under special acts.⁷⁰ In some states the organized state militia is regarded as exclusively a state institution when considered in relation to the political divisions of the state,⁷¹ and none of the duties to be performed by it can be regarded as those of the country.⁷²

55. N.Y.—*People v. Hill*, 27 N.E. 789, 126 N.Y. 497.

40 C.J. p. 666 note 85.

56. Ill.—*Dunne v. People*, 94 Ill. 120, 34 Am.R. 213.

40 C.J. p. 666 note 86.

57. N.J.—*Smith v. Wanser*, 52 A. 309, 68 N.J.Law 249.

40 C.J. p. 666 note 87.

58. U.S.—*In re D—*, D.C. Ohio, 290 F. 863.

40 C.J. p. 667 note 94.

59. Fla.—*In re Advisory Op. to Governor*, 77 So. 87, 74 Fla. 92.

40 C.J. p. 667 note 98.

60. N.J.—*Smith v. Wanser*, 52 A. 309, 68 N.J.Law 249.

40 C.J. p. 667 note 1.

61. N.J.—*Smith v. Wanser*, supra. 40 C.J. p. 667 note 1.

62. N.Y.—*Matter of Long Beach Defense Guards, Inc.*, 166 N.Y.S. 459, 100 Misc. 584, 585.

40 C.J. p. 670 notes 60, 61.

63. U.S.—*West Virginia v. U.S.*, 45 Ct.Cl. 576.

64. Ky.—*Haley v. Cochran*, 102 S.W. 852, 31 Ky.L. 505.

65. Ky.—*Haley v. Cochran*, supra.

66. N.C.—*Baker v. State*, 156 S.E. 917, 200 N.C. 232.

Wis.—*State v. Johnson*, 202 N.W. 191, 186 Wis. 1.

40 C.J. p. 670 note 47.

67. N.C.—*Baker v. State*, 156 S.E. 917, 200 N.C. 232.

40 C.J. p. 670 note 46.

Potential part of United States army
The National Guard is only a potential part of the United States

army, and does not in fact become a part thereof until congress has made the requisite declaration of the existence of an emergency—*Blanco v. Austin*, 197 N.Y.S. 328, 204 App.Div. 34—40 C.J. p. 669 note 45.

68. N.M.—*State ex rel. Charlton v. French*, 99 P.2d 715, 44 N.M. 169.

69. Wis.—*State v. Johnson*, 202 N.W. 191, 186 Wis. 1.

70. Ohio—*Witt v. Madigan*, 24 Ohio Cir.Ct. 263.

40 C.J. p. 668 note 20.

71. Fla.—*State v. Dickenson*, 33 So. 514, 44 Fla. 623, 60 L.R.A. 539, 1 Ann.Cas. 122.

Ky.—*Commonwealth v. Sparks*, 255 S.W. 859, 201 Ky. 5.

72. Ky.—*Commonwealth v. Sparks*, supra.

b. Plan of Organization, Composition, and Distribution

The statutes usually fix the plan of organization, composition, and distribution of militia, including the National Guard

Under the terms of the National Defense Act, 32 USCA § 4, it is provided that the National Guard shall consist of regularly enlisted men who on original enlistment shall be within a specified age group, or who in subsequent enlistments shall not be more than a specified age, organized, armed, and equipped as provided in the statute, and of commissioned officers and warrant officers between certain ages⁷³ Under the act distinct classes of the organized militia have been recognized, namely, those members of the organized militia who compose the National Guard, which is subject to full liability for federal service on the call of the president,⁷⁴ and those who, although members of the organized militia when the act became operative, did not take the oath which is a condition precedent to admission to the National Guard under such act,⁷⁵ the members of the last mentioned class remained subject to the obligations to the United States assumed under earlier statutes⁷⁶

Statutory provisions, varying somewhat in phraseology, but to the general effect that the organization, armament, and discipline of the organized militia in the several states shall be the same as that prescribed for the regular army of the United States, have been enacted from time to time and have received judicial construction,⁷⁷ and, under such statutes, the word "organization" has been construed as referring to distribution of personnel into different branches of the service, such as infantry, cavalry, and artillery, the distribution of personnel within such branches into different units, such as brigades, regiments, and the like, and the distribution of personnel within such branches or units into different ranks,⁷⁸ and the term does not

refer to the enlistment of a soldier⁷⁹ Under some statutes the "active militia" may consist of the National Guard and the naval militia⁸⁰

c. Relation to State and Federal Governments

Individuals or units of the National Guard are usually regarded as in the service of the state at all times prior to their formal federalization.

While a member of the National Guard of a particular state has been regarded as a member of the organized militia of the United States,⁸¹ individuals or units of the National Guard are not, generally speaking, regarded as in the service of the United States when in encampment for training purposes,⁸² or when being transported to and from the place of maneuvers with the regular army⁸³ When not in the actual service of the United States members of the militia are not "troops" of the United States⁸⁴

§ 9. — Naval Militia

Naval forces organized pursuant to state statutes have been regarded as part of the state militia.

Naval forces provided for by state statutes have been regarded as part of the state militia,⁸⁵ and, under some state statutes, the naval forces of the state are expressly constituted a part of the organized or active militia.⁸⁶

§ 10. Government and Command Generally; Commander in Chief

The governors of the respective states are commanders-in-chief of the militia at times when the militia is not in the service of the United States, but their authority depends on, and is subject to, limitation by constitutional and statutory provisions.

Although the president of the United States is the commander in chief of the militia of the several states when it is called into the actual service of the United States, as discussed in Army and Navy § 12, at other times the command of the militia in the several states or territories devolves on the gov-

73. US—Ex parte Foley, DCKy, 243 F 470
40 C J p 668 note 21

74. US—Sweetser v Emerson, Mass, 236 F 161, 149 CCA 351, Ann Cas 1917B 244, certiorari dismissed 37 S Ct 476, 243 US 660, 61 L Ed 950
40 C J p 668 note 22

75. US—Sweetser v Emerson, supra

76. US—Sweetser v Emerson, supra

77. Fla—Acker v Bell, 57 So 356, 62 Fla 108, 39 LRA, NS, 454, Ann Cas 1913C 1269
40 C J p 668 notes 25-27.

78. Fla—Acker v Bell, supra.

79. Fla—Acker v Bell, supra.

80. NY—Andrews v Gardiner, 173 NYS 1, 185 App Div 477
40 C J p 668 note 28

81. Ohio—McGorray v. Murphy, 88 NE 881, 80 Ohio St 413, 17 Ann Cas 444

Militia called into federal service see Army and Navy § 8

82. Neb—Lind v Nebraska National Guard, 12 NW 2d 652, 144 Neb 122, 150 A LR 1449
40 C J p 669 note 40

Guardsmen in service of state
An enlisted member of the National Guard when called for training by

governor through order of adjutant general under National Defense Act 18, during his period of service, in service of the state—Lind v Nebraska National Guard, supra

83. US—Alabama Great Southern R Co v U S, 49 Ct Cl 523
40 C J p 669 note 41

84. US—Alabama Great Southern R Co v U S, supra
40 C J p 669 note 44

85. NC—Winslow v Morton, 24 S. E 417, 118 NC 486.

86. NY—Andrews v Gardiner, 173 NYS 1, 185 App Div 477—Andrews v Gardiner, 166 NYS 933, 100 Misc 623.

ernor as commander in chief,⁸⁷ and the officers of the militia duly authorized or commissioned⁸⁸ The governor's authority over the militia depends on the constitutional and statutory provisions pertaining thereto,⁸⁹ and the extent of the governor's control over the militia in matters with which the states have authority to deal is subject to curtailment by statutes duly enacted by the legislature under the authority of the state constitution⁹⁰ However, the civil courts will not attempt to control the action of the governor as commander in chief in a matter within his discretion⁹¹

§ 11. Officers

- a. In general
- b Appointment and election; oath
- c. Term of office, resignation and retirement
- d Relief from command, transfer, and dismissal
- e. Powers and duties
- f Pay and allowances

a. In General

Militia officers have been regarded as public officers, and the word "office," as used in this connection, has been construed as equivalent to "commission."

While there is authority for the view that a militia officer is a public officer,⁹² the contrary view has also been taken⁹³ The word "office," as used in

connection with the position of a militia officer, has been construed as synonymous with "commission,"⁹⁴ but there is likewise authority to the contrary⁹⁵ The term "militia officers" has in some instances been regarded as synonymous with "volunteer officers"⁹⁶

Adjutant general It has been held that an adjutant general as such is not a commissioned officer, or member, of the National Guard either under the National Defense Act⁹⁷ or under a state statute,⁹⁸ but it has also been held that an adjutant general is an "officer" of the National Guard within the meaning of some statutes⁹⁹ In the absence of constitutional restrictions, the legislature has plenary power to fix the qualifications of the adjutant general.¹

b. Appointment and Election; Oath

Authority to appoint or elect officers of the National Guard or other militia units is reserved to the states, and both commissioned and noncommissioned officers may and should be appointed in compliance with constitutional and statutory provisions.

Under the federal Constitution the authority to appoint officers for the militia is reserved to the states² Under constitutional or statutory provisions of the several states certain officers may be appointed by the governor,³ with the consent of the senate,⁴ and, where the consent of the senate is required, such consent is necessary in order to render

87. Ark—Baker v Harris, 13 SW 2d 33, 178 Ark 1001
40 C.J. p 671 notes 79, 80

Supreme head

Governor as commander in chief of militia is the supreme head of military forces in state—People ex rel Gillett v. De Lamater, 287 NYS 979, 247 App Div 246

88. NJ—State v Mott, 46 NJ Law 328, 50 Am R 424
40 C.J. p 671 note 81

89. Ark—Baker v Harris, 13 SW 2d 33, 178 Ark 1001

Inquiries

Under some statutes the governor has authority to make inquiry into movements and activities or nonactivities of militia under his command—Begley v Louisville Times Co, 115 SW2d 345, 272 Ky 805

Transfer of officers

Under provision of state and federal statutes, the governor has discretionary authority to create National Guard detached officers' list, and may transfer National Guard officers from one command to another, or to detached officers' list without trial by court martial or

efficiency board—Baker v Harris, 13 SW 2d 33, 178 Ark 1001

90. NC—Winslow v Morton, 24 S E 417, 118 NC 486

91. NY—People ex rel Gillett v De Lamater, 287 NYS 979, 247 App Div 246
40 C.J. p 671 note 83

92. NJ—Campbell v Gilkyson, 75 A 160, 78 NJ Law 327

93. Ohio—State v Coit, 8 Ohio S & CP 62

94. NY—People v Hill, 27 NE 789, 126 NY 497

95. NJ—Campbell v Gilkyson, 75 A 160, 78 NJ Law 327

96. US—Deming v McLaughry, Kan, 113 F 639, 51 CCA 349, affirmed 22 S Ct 786, 186 US 49, 46 L Ed 1019.

97. Ariz—State v Ingalls, 189 P. 430, 21 Ariz 411
40 C.J. p 672 note 96

98. Ariz—State v Ingalls, supra

99. Colo—People v Nowlon, 238 P. 44, 77 Colo 516

1. Colo—People v Nowlon, supra
40 C.J. p 672 notes 98, 99.

2. NJ—State v Mott, 46 NJ Law 328, 50 Am R 424
40 C.J. p 674 note 41

3. NY—People ex rel Gillett v De Lamater, 287 NYS 979, 250 App Div 795
40 C.J. p 674 note 42

Additional officer

Under provision of military law authorizing governor to conform organization of national guard to that prescribed by the federal government, and permitting for that purpose increase or decrease in number of officers, governor was empowered to appoint an additional brigadier general—People ex rel Gillett v De Lamater, 287 NYS 979, 247 App Div 246

Action to test title to office

In action by brigadier general of National Guard who had been relieved of his command by governor to test title of brigadier general who succeeded him in his former command, sole issue was validity of successor's appointment as brigadier general—People ex rel Gillett v De Lamater, supra

4. Ala—Clark v. State, 59 So 259, 177 Ala 188
40 C.J. p 674 note 43.

the appointment valid⁵ It has been held that an attempted appointment is ineffective while there is no vacancy in the office to which the attempted appointment related⁶ Recognition of a state guard organization as a unit of the National Guard of the state does not automatically adopt its officers, or confer on them the status of commissioned officers in the National Guard⁷ Under the provisions of some constitutions or statutes militia officers may in some instances be selected by election⁸

Appointment of adjutant general Under some state statutes or constitutions the adjutant general may be appointed by the governor⁹ with the consent of the senate¹⁰ It has been held, however, that the governor's assignment of the adjutant general to duty is not such an official act as must be entered in the executive journal¹¹

Warrant, noncommissioned, and petty officers may and should be appointed in compliance with constitutional and statutory provisions relating thereto¹² Under some statutes it has been held that a minor could be selected as a noncommissioned officer.¹³ A warrant is the proper evidence of the official character of the person holding it¹⁴

Issuance of commission. Ordinarily provision is made that the officers of the National Guard shall be commissioned by the governor,¹⁵ and such a commission is a condition precedent to the right or duty to act as an officer.¹⁶ There is authority for the view that the right to an office, acquired under a valid commission and qualification, cannot be affected by the erroneous issuance of another commission which is void¹⁷ The commission in due form is evidence,¹⁸ prima facie at least,¹⁹ that there has

been a compliance with all statutory or constitutional requirements as to the selection of the officer designated The mere fact that there was no indorsement on the commission that the person designated had taken the required oath does not conclusively show that such person was not an officer²⁰

Vacancies Statutes have been enacted providing for the method of filling certain offices in case of vacancies therein²¹ A statutory provision for appointments to fill vacancies for an unexpired term has no application where the office in the state militia becomes vacant on the expiration of a complete term²² On promotion from the ranks to fill a vacancy in a grade higher than that of other officers, no officer is superseded except the one who should normally have been promoted to such higher grade²³

Oath Ordinarily under constitutional or statutory provisions so providing, persons accepting commissions or warrants in the militia are obligated to take an oath of office²⁴ It has been held that a person who is commissioned, and assumes the duties of an officer, but fails to take the oath becomes an officer de facto, and that his authority cannot be questioned by third persons.²⁵

c. Term of Office; Resignation and Retirement

Constitutional or statutory provisions sometimes fix the terms or tenure of militia officers; the commission of a militia officer may be vacated by resignation.

There have been constitutional provisions giving the legislature authority to establish by general law the terms of office of all in the military service of the state,²⁶ and a statute regulating the tenure of officers of the National Guard does not violate a

5. Ala.—Clark v State, supra
40 C J p 674 note 44

6. NH.—Bixby v. Harris, 26 NH
125

7. DC.—Gaston v U S, Mun App,
34 A 2d 353, affirmed 143 F 2d 10,
79 US App DC 37, certiorari de-
nied 64 S Ct 1286, 322 U.S. 764, 83
L Ed 1591

8. NJ.—Campbell v Gilkyson, 75 A
160, 78 NJ Law 327.
40 C J p 674 note 47

Eligibility to election
NY.—People v Smith, 23 NY. 53
40 C J p 674 note 36 [a.]

9. Ariz.—State v Ingalls, 189 P
430, 21 Ariz 411
40 C J p 672 note 2

10. Md.—McBlair v Bond, 41 Md
137
40 C J p 672 note 3

11. Colo.—MacGinnis v. Newlon, 257
P. 1085, 82 Colo 238.

12. Me.—Folsom v Perkins, 21 Me
166
40 C J p 673 notes 18-21

13. Mass.—In re Dewey, 11 Pick
265
40 C J p 673 note 25

14. NH.—Shattuck v Gilson, 19 N
H 296—State v Leonard, 6 NH
435

15. Conn.—Monson v Hunt, 17 Conn
566
40 C J p 675 note 56

16. Mass.—Gleason v. Sloper, 24
Pick 181

17. Ohio.—Gage v. Payne, Wright
678

18. NH.—State v. Wilson, 7 NH
543

Derivation of authority

There is early authority to the ef-
fect that the commission of a militia
officer is merely evidence of his au-
thority, and that the authority itself
is derived from the choice of the

company and not conferred by the
commission—Schofield v Lounsbury,
8 Conn 109

19. Conn.—Gray v Mossman, 99 A
1062, 91 Conn 430

20. Ohio.—Gage v. Payne, Wright
678

21. RI.—In re Opinion of Justices,
5 RI 598

22. Ala.—Clark v. State, 59 So 259,
177 Ala 188

23. Mass.—Ex parte Hall, 1 Pick
261

24. Nev.—State v. Ross, 14 P 827,
20 Nev 61

40 C J p 675 notes 62-65

25. NH.—Bixby v. Harris, 26 NH
125

26. Mass.—In re Opinion of Justices,
104 NE 847, 216 Mass 605
40 C J p 675 note 68

Term of service and discharge of
enlisted men see infra § 12.

constitutional provision making the governor commander in chief of the military forces of the state²⁷ Fixed terms of years for which commissions or offices are to be held have at times been provided for by constitutions²⁸ or statutes²⁹ The validity of legislation regulating the tenure of office of the adjutant general has been recognized³⁰ Sometimes no fixed term is provided for,³¹ and, under some statutes, officers hold commissions until they reach a specified age³²

Resignation Generally, the commission of an officer in the militia may be vacated by resignation³³ The acceptance of a second commission usually operates as a resignation of the former commission³⁴ An officer who has resigned retains all his powers, and his duties continue until the acceptance of his resignation is in due form communicated to him³⁵ Under early statutes resignation as a method of vacating the office of a noncommissioned officer was recognized, and it was held that a commissioned officer who appointed the noncommissioned officer had the power to accept his resignation³⁶

Retirement Provision is sometimes made by statute for the retirement of an officer of the active militia on reaching a specified age,³⁷ and some statutes so providing are regarded as mandatory³⁸ The validity of such a statute has been upheld,³⁹ but there is also authority for the view that such a statute is violative of a constitutional provision that no commissioned officer shall be removed from

office except by the sentence of a court-martial.⁴⁰

d. Relief from Command, Transfer, and Dismissal

The governor may relieve an officer from command or order his transfer but this does not in itself effect his dismissal from his grade or office, the discharge or dismissal of an officer may and should be effected by depriving him of his commission in accordance with statutory provisions.

The governor may in the exercise of the discretion vested in him relieve an officer from command⁴¹ However, deprivation of his command does not constitute removal from office,⁴² nor does the transfer of an officer from his command to a detached officer's list have such effect,⁴³ and an officer retains his grade or office as long as he retains his commission⁴⁴ Withdrawal of federal recognition from an officer of the National Guard of a state does not cancel his commission,⁴⁵ or terminate his status as an officer of state militia,⁴⁶ but it does in substance and effect terminate the status of an officer of the National Guard of the District of Columbia⁴⁷ On induction into the federal army an officer of the National Guard ceases to be a member of the militia⁴⁸ Provisions in the National Defense Act, 32 USCA § 15, relative to inspection of the National Guard have been construed as not contemplating trial of an officer in the ordinary sense as a condition precedent to his elimination⁴⁹

State constitutions and statutes have sometimes imposed limitations on the right of superior author-

27. Colo—*People v Newlon*, 238 P 44, 77 Colo 516.

28. Ala—*Clark v State*, 59 So 259, 177 Ala 188
40 C J p 675 note 70

Provision as inapplicable to militia

The word "officers" as used in section of constitution limiting the term of state officers, except members of railroad commission and officers whose terms are otherwise fixed by the constitution, to terms of not more than two years, and section stipulating that legislature may provide by law that members of boards may hold their offices for a term of six years, relates to civil offices, and not to military offices—*Texas Nat Guard Armory Board v McCraw*, 126 SW 2d 627, 132 Tex 613

29. Mass—*In re Opinion of Justices*, 132 Mass 600
40 C J p 675 note 71

30. Colo—*People v. Newlon*, 238 P 44, 77 Colo 516

Public policy

Fact that from the beginning and by successive laws the legislature fixed the term of the adjutant gen-

eral's office at two years did not establish a public policy in respect thereto, which was to be read into statute fixing the tenure of officers generally or to be considered in interpreting such act—*People v Newlon*, supra

31. Tex—*Texas Nat Guard Armory Board v McCraw*, 126 SW 2d 627, 132 Tex 613

40 C J p 675 note 73

32. Colo—*People v Newlon*, 238 P 44, 77 Colo 516

40 C J p 675 note 74

33. RI—*State v Brown*, 5 RI 1
40 C J p 676 notes 82, 84-87

34. RI—*State v Brown*, supra

40 C J p 676 note 83

35. NH—*Bixby v Harris*, 26 NH 125

36. Mass—*In re Field*, 9 Pick 41
40 C J p 673 note 24

37. NY—*Matter of Kirby*, 134 N YS 905, 76 Misc 313

40 C J p 676 note 89

38. NY—*Matter of Kirby*, supra

39. NY—*Matter of Kirby*, supra

40 C J p 676 note 91

40. NJ—*Campbell v Gilkysen*, 75 A 160, 78 NJ Law 327

40 C J p 676 note 92

41. NY—*People ex rel Gillett v De Lamater*, 287 NYS 979, 247 App Div 246

40 C J p 676 note 77

42. NY—*People ex rel Gillett v. De Lamater*, supra

43. Ark—*Baker v Harris*, 13 SW. 2d 33, 178 Ark 1001

44. NY—*People ex rel Gillett v. De Lamater*, 287 NYS 979, 247 App Div 216

45. NY—*People ex rel Gillett v. De Lamater*, supra

46. DC—*Hurley v U S ex rel Gladman*, 47 F 2d 431, 60 App DC. 69

47. DC—*Hurley v U. S ex rel. Gladman*, supra.

48. Ill—*Eckete v City of East St. Louis*, 145 NE. 692, 315 Ill. 58, 40 ALR. 650

49. DC—*Hurley v U S ex rel. Gladman*, 47 F 2d 431, 60 App DC. 69

ities to dismiss commissioned officers,⁵⁰ but there is authority for the view that, except as his power is limited by valid legislation, the governor has the power to revoke a commission.⁵¹ Some statutes have made provision for the discharge or dismissal of a commissioned officer of the National Guard who has been absent without leave for a specified period.⁵² Under some enactments, a commissioned officer may be discharged or dismissed on the recommendation of a board appointed to pass on his fitness.⁵³ It has been held that such a board is not judicial in character,⁵⁴ and that its findings may not be reviewed by the courts.⁵⁵ There is, however, authority for the view that the functions of such a board, at least when acting solely under authority of a state statute, is judicial in character,⁵⁶ and that the determinations of the board are reviewable by the courts in times of peace.⁵⁷

Adjutant general. Removal of the adjutant general may and should be effected in compliance with provisions of positive law.⁵⁸

Warrant or noncommissioned officers. Under some state statutes and military regulations promulgated pursuant thereto it has been held that the officer issuing a warrant may return a noncommissioned officer to the ranks on request of the latter's immediate commanding officer without giving the noncommissioned officer notice of the proceedings or affording him a chance to be heard.⁵⁹

e. Powers and Duties

In the exercise of military power an officer may do only what is necessary for the proper performance of his duty. Subordinates must obey all lawful orders of superiors.

In the exercise of military power an officer may do only what is necessary for the proper performance of his duty.⁶⁰ It is the duty of subordinate officers to obey the lawful orders of their superiors,⁶¹ and also, according to some authorities, orders which are lawful on their face.⁶² However, there is authority for the view that a subordinate officer is not bound to obey an order which is clearly illegal or unauthorized.⁶³ An adjutant general may not delegate his official duties, involving the exercise of discretion and judgment for the common weal, to the state quartermaster,⁶⁴ and he is not responsible for the governor's omission of duty.⁶⁵

f. Pay and Allowances

An officer of the National Guard or state militia is entitled to such pay and allowances as may be provided for by statute.

An officer is not entitled to pay and allowances where no provision therefor is made by law.⁶⁶ Some constitutional and statutory provisions authorize payment of officers in certain cases,⁶⁷ as where they are in active or actual service,⁶⁸ in aid of the civil authorities,⁶⁹ or during encampments, maneuvers, or other exercises,⁷⁰ and under some

50. N.Y.—*People v Hoffman*, 60 N E 187, 166 N.Y. 462, 54 L.R.A. 597 40 C.J. p 677 notes 95, 97

51. N.C.—*Winslow v Morton*, 24 S E 417, 118 N.C. 486 40 C.J. p 677 note 96

52. N.Y.—*People v Hoffman*, 60 N E 187, 166 N.Y. 462, 54 L.R.A. 597 40 C.J. p 677 notes 99, 1

53. Mass.—*Devlin v Dalton*, 50 N E 632, 171 Mass. 338, 41 L.R.A. 379 40 C.J. p 677 notes 2, 3

54. Mass.—*Devlin v Dalton*, supra

55. Mass.—*Devlin v Dalton*, supra

56. N.Y.—*People v Hoffman*, 60 N E 187, 166 N.Y. 462, 54 L.R.A. 597 40 C.J. p 677 note 6

57. N.Y.—*People v Hoffman*, supra 40 C.J. p 677 note 7

Review of decisions of military board or officer by

Certiorari see *Certiorari* § 46

Prohibition see the C.J.S. title Prohibition § 6, also 40 C.J. p 677 note 6

58. Mass.—In re Opinion of Justices, 104 N.E. 817, 216 Mass. 605 40 C.J. p 672 note 5

59. N.Y.—*People v Fackner*, 14 Hun 360 40 C.J. p 673 note 22

60. N.C.—*Allen v Gardner*, 109 S.E. 260, 182 N.C. 425 40 C.J. p 677 note 11

61. Mass.—*Ela v Smith*, 5 Gray 121, 66 Am.D. 356

W.Va.—*Hatfield v Graham*, 81 S.E. 533, 73 W.Va. 759, L.R.A. 1915A 175, Ann.Cas. 1917C 1

Duties of company clerk

Mass.—*Spaulding v Bancroft*, 23 Pick. 54

40 C.J. p 677 note 10 [a]

62. U.S.—*Despan v Olney*, C.C.R.I., 7 F.Cas. No. 3,822, 1 Curt. 306

Mont.—*Herlihy v Donohue*, 161 P. 164, 53 Mont. 601, L.R.A. 1917B 703, Ann.Cas. 1917C 29

63. Ala.—*Betty v State*, 66 So. 457, 188 Ala. 211

Mont.—*Herlihy v Donohue*, 161 P. 164, 53 Mont. 601, L.R.A. 1917B 703, Ann.Cas. 1917C 29

64. Mass.—*Sheils v Commonwealth*, 29 N.E.2d 12, 306 Mass. 535

65. Colo.—*MacGinnis v Newlon*, 257 P. 1085, 33 Colo. 228

66. Ky.—*Bryant v Brown*, 32 S.W. 741, 98 Ky. 211, 17 Ky.L. 801 40 C.J. p 677 note 16

Pay and allowances of enlisted men see *infra* § 14

67. Ala.—*Betty v State*, 66 So. 457, 188 Ala. 211 40 C.J. p 678 notes 17, 26–29, p 679 notes 30, 32–34, p 680 notes 35–45

68. Ohio.—*State v Donahey*, 117 N.E. 318, 96 Ohio St. 247 40 C.J. p 678 note 18

69. N.Y.—*People v Bard*, 103 N.E. 140, 209 N.Y. 304

70. Wyo.—*State v Carter*, 226 P. 690, 31 Wyo. 101 40 C.J. p 679 note 31

Longevity pay Under federal statutes providing that the organized militia of a state which shall engage in actual field or camp service for instruction shall be entitled to receive the same pay to which officers and enlisted men of the regular army are entitled by law, service of a militia officer with a part of the regular army during encampments, maneuvers, and field instruction did not entitle him to longevity pay—*Bowie v U.S.*, 45 Ct. Cl. 42.

provisions the right arises only when the officer is in active service.⁷¹ The rate of pay is usually fixed by law,⁷² or, under statutory authority, by the governor,⁷³ and provision is frequently made in substance that the pay of officers of the militia shall be the same as that of officers of corresponding grades in the regular army.⁷⁴

Under statutes providing for compensation of officers when on duty by order of the governor, appointment of one as colonel and adjutant general of the state by the governor is itself an assignment to duty such as to entitle him to draw the salary of his office without a specific order of the governor placing him on duty,⁷⁵ and the failure of the governor to enter the item in the executive journal, even if that is required by statute, does not deprive the relator of his right to compensation.⁷⁶ Under some statutes the right to compensation from federal funds depended on the calling of the militia into the service of the United States.⁷⁷ Provisions of federal law making certain members of the National Guard ineligible for federal pay except on surrender of government pensions have been construed as not repealed by a subsequent general act relating to militia organization,⁷⁸ and, under the statutory prohibition, it has been held that an officer in the National Guard receiving a pension from the United States cannot, without surrendering his pension, receive benefits extended by the federal government to members of the state militia.⁷⁹

Regimental funds Under some early statutes the regimental paymaster was the custodian of regimental funds.⁸⁰

§ 12. Enlistment or Enrollment of Members, and Qualifications Therefor

- a In general
- b Oath, signature, and contract
- c Age, citizenship, and residence

a. In General

The usual method of joining the militia is by voluntary enlistment

The usual method of becoming a member of the organized militia or National Guard is by voluntary enlistment.⁸¹ Early federal statutes and state statutes conforming thereto provided for the enrollment of citizens liable to the performance of military service, and a legal enrollment was a condition precedent to such liability,⁸² although defects in the enrollment did not necessarily render it invalid.⁸³

Evidence of enlistment or enrollment While the signature of the person whose enlistment is in question is the best evidence of such enlistment,⁸⁴ the enlistment may also be proved by showing that he performed service as an enlisted man.⁸⁵ Under early statutes relative to the enrollment of persons subject to military service the insertion of the name of a particular person in any company order or its annexation thereto was evidence of the due enrollment of such person.⁸⁶ The officer who prepared the rolls was presumed to have done his duty,⁸⁷ and the burden of proof to the contrary was imposed on a person who sought to show that he had been enrolled improperly.⁸⁸ The fact that an applicant is a member of the United States Naval Reserve at the time of his enlistment in the National Guard has been held not to render the latter enlistment void.⁸⁹

b. Oath, Signature, and Contract

Enlistment in the militia is contractual in character, and an applicant should sign enlistment papers and take the prescribed oath in compliance with statutory provisions

Provision is generally made for the signing of the enlistment papers or application by the person seeking to become an enlisted man in the militia,⁹⁰ and for the taking of an enlistment oath,⁹¹ and sim-

71. Ala.—Betty v State, 66 So 457 188 Ala 211
40 C J p 678 note 21

72. Ky.—James v Walker, 132 SW 149, 141 Ky 88
40 C J p 678 note 22

73. Ky.—Bryant v Brown, 32 SW 741, 98 Ky 211, 17 Ky L 801

74. Ind.—State v Dudley, 91 NE 228, 173 Ind 633
40 C J p 678 note 24

75. Colo.—MacGinnis v Newlon, 257 P 1085, 82 Colo 228

76. Colo.—MacGinnis v Newlon, supra.

77. US—West Virginia v. U. S., 45 Ct Cl 576.

78. DC—U S ex rel Gillett v Dern, 74 F 2d 485, 64 App DC 81

79. DC—U S ex rel Gillett v Dern, supra.

80. Ky.—Blackwell v Irvin, 4 Dana 187
40 C J p 673 note 16

81. La.—State v Long, 66 So 377, 136 La 1, L R A 1915E 235, Ann Cas 1917B 240
40 C J p 681 note 50

82. Me.—Whitmore v. Sanborn, 8 Me 310
Mass.—In re Giddings, 22 Pick 406
40 C J p 680 note 47, p 681 note 48

83. Mass.—In re Giddings, supra.
NH—Wood v Fletcher, 3 NH 61.
40 C J p 681 note 49

84. Me.—Bullen v Baker, 8 Me 390

85. Me.—Bullen v Baker, supra.

86. NH.—Shattuck v Gilson, 19 N H 296

87. Me.—Thorn v Case, 21 Me 393

88. Me.—Thorn v Case, supra.

89. Minn.—State v Fisher, 218 N W 542, 174 Minn 82, certiorari denied Klinge v State of Minnesota, 49 S Ct 32, 278 US 636, 173 L Ed 552.

90. La.—State v Long, 66 So 377, 136 La 1, L R A 1915E 235, Ann Cas 1917B 240
40 C J p 681 note 53

91. Nev.—State v Ross, 14 P. 827, 20 Nev 61
40 C J p 681 note 54.

lar requirements are imposed by the National Defense Act, 32 U.S.C.A. § 123, governing the National Guard.⁹² Ordinarily the taking of the prescribed oath is determinative of the question whether there has been an enlistment,⁹³ but there may be circumstances under which an applicant becomes a militiaman without taking the prescribed oath.⁹⁴

Contract Enlistment in the National Guard or active militia is a contract⁹⁵ and it has been held that the state has no power, by the repeal of the law under which it was entered into and the substitution of another law in its stead, to impose on the other contracting party under the enlistment more onerous conditions and obligations to which he has not given his assent.⁹⁶ An enlistment is regarded as a contract which effects a change of status.⁹⁷

c. Age, Citizenship, and Residence

Constitutional and statutory provisions usually determine the extent to which age, citizenship, and residence affect eligibility to enlist in the militia.

Statutory provisions usually fix the ages for enlistment in the militia,⁹⁸ and there is authority for the view that under the National Defense Act the minimum age for enlistment is eighteen years.⁹⁹ Where the consent of the parent or guardian to the enlistment of a minor above the minimum age is not required, as under the National Defense Act, the enlistment, if otherwise regular, is valid and binding without such consent,¹ even as against the parent or guardian.² Under a statute providing that no person under a specified age shall be enlisted without the consent of his parent or guardian, the con-

sent has been regarded as an essential element of a valid enlistment;³ but there is authority for the view that the want of consent merely renders the enlistment voidable by the parent or guardian,⁴ and not void as to the latter.⁵

Where no statutory provision relative to the consent of the parent or guardian is involved and the question turns on a statutory provision that the militia shall consist of persons between specified ages, it has been held that the enlistment of a minor under the minimum age is void as to such minor,⁶ but there is authority for the view that, while such an enlistment is not binding on the parent or guardian,⁷ it is binding on the minor himself.⁸ Under some early statutes the consent of the parent or guardian to the enrollment of a minor above the minimum age for militia duty was not required.⁹

Discharge of minor. There is authority for the view that even since the enactment of the National Defense Act a state court has jurisdiction in times of peace of a proceeding to secure the discharge of a minor from the National Guard of the state,¹⁰ notwithstanding such minor has been enlisted and taken the oath of enlistment in accordance with the provisions of such act.¹¹ A person who has fraudulently misstated his age when enlisting in the National Guard is estopped from obtaining his discharge on his own application.¹² Under early regulations, in the case of the enlistment of a person under eighteen years of age, the governor could order his discharge from a unit of the National Guard to which federal recognition had been extended,¹³ but the commanding officer of such unit had no power to order the discharge.¹⁴ If the mi-

92. Ariz.—*Andrews v. State*, 90 P.2d 995, 53 Ariz. 475.
40 C.J. p. 681 notes 55, 56.

93. La.—*State v. Long*, 66 So. 377, 136 La. 1, 11, L.R.A.1915E 235, Ann. Cas. 1917B 240.
40 C.J. p. 681 note 58.

94. Minn.—*State v. Fisher*, 218 N.W. 542, 174 Minn. 82, certiorari denied *Kling v. State of Minnesota*, 49 S.Ct. 32, 278 U.S. 636, 173 L.Ed. 552.

Status of soldier

National Guardsman, signing enlistment contract and oath, attending drill, and receiving pay, acquired the status of a "soldier," even though he may never have been sworn or actually taken the oath.—*State v. Fisher*, 218 N.W. 542, 174 Minn. 82, certiorari denied *Kling v. State of Minnesota*, 49 S.Ct. 32, 278 U.S. 636, 173 L.Ed. 552.

95. La.—*State v. Long*, 66 So. 377,

136 La. 1, L.R.A.1915E 235, Ann. Cas. 1917B 240.
40 C.J. p. 681 notes 60, 63–65.

Employment by state

The act of enlisting in the National Guard is of a contractual nature, resulting in employment of the enlisted man by the state.—*Andrews v. State*, 90 P.2d 995, 53 Ariz. 475.

96. La.—*State v. Long*, 66 So. 377, 136 La. 1, L.R.A.1915E 235, Ann. Cas. 1917B 240.

40 C.J. p. 681 note 61.

97. N.Y.—*Bianco v. Austin*, 197 N.Y.S. 328, 204 App. Div. 34.

98. U.S.—*Ex parte Dostal*, D.C. Ohio, 243 F. 664.

99. U.S.—*Ex parte Dostal*, supra.
40 C.J. p. 682 note 83.

1. U.S.—*Ex parte Dostal*, supra.
40 C.J. p. 682 notes 84–86.

2. Miss.—*Birdsong v. Blackman*, 90 So. 441, 127 Miss. 693.
40 C.J. p. 682 note 87.

3. N.Y.—*People v. New York County Jail*, 2 N.E. 870, 100 N.Y. 20, 3 N.Y.Cr. 545.

4. U.S.—*Reed v. Cushman*, Me., 251 F. 872, 164 C.C.A. 88.

5. U.S.—*Reed v. Cushman*, supra.

6. Me.—*Whitcomb v. Higgins*, 18 Me. 21.

7. Ohio.—*In re Kuchta*, 8 Ohio N.P. NS, 613.
40 C.J. p. 682 note 93.

8. Ohio.—*In re Kuchta*, supra.

9. Me.—*Stevens v. Foss*, 18 Me. 19.

10. N.Y.—*Bianco v. Austin*, 197 N.Y.S. 328, 204 App. Div. 34.

11. N.Y.—*Bianco v. Austin*, supra.

12. N.Y.—*Bianco v. Austin*, supra.
40 C.J. p. 682 note 98.

13. N.Y.—*Bianco v. Austin*, supra.
40 C.J. p. 682 note 99.

14. N.Y.—*Bianco v. Austin*, supra.
40 C.J. p. 682 note 1.

nor is under arrest for some military offense the right of the military authorities to hold him is recognized¹⁵

Citizenship In the absence of any statutory authorization an alien is not subject to militia duty,¹⁶ but it has been held that a statute which requires aliens to do militia duty is valid¹⁷

Residence or domicile Under statutes providing that the militia shall consist of United States male citizens "resident within the state" the quoted words are equivalent to "residing within the state,"¹⁸ and do not make domicile within the state a prerequisite to enlistment¹⁹

§ 13. — Term of Service and Discharge

The statutes usually fix the term of enlistment in the militia, and service ordinarily is terminated by the expiration of such enlistment term

The statutes usually fix the term of enlistment in the militia,²⁰ and, in determining whether such term has been served, it has been held, under some provisions, that an enlisted man is not entitled to credit for time other than that during which he renders actual service²¹ The enlistment ordinarily is terminated by the expiration of the enlistment term,²² and the right of the military authorities to give an honorable discharge at the termination of the enlistment period, without the consent of the enlisted man, has been recognized²³ An enlisted man can-

not terminate his service at will,²⁴ although the right of the state to put an end to the term of enlistment before it regularly expires has been recognized²⁵

Under some early statutes questions as to the discharge, or the termination of the enlistment, of an enlisted man turned on the matter of residence,²⁶ and the duty or authority to discharge an enlisted man because he was subject to duty in a different organization was recognized²⁷ Under early provisions relating to final discharge and furlough to the reserve, it has been held that a federalized National Guardsman is not on the expiration of his enlistment automatically furloughed to the reserve,²⁸ and that no act or acts done by a company captain, or by the captain and the man, without approval of the war department, can operate as a furlough to the reserve,²⁹ or as a discharge of such enlisted man³⁰

§ 14. — Pay and Allowances

An enlisted man in the militia is entitled only to such pay and allowances as may be prescribed by constitutional and statutory provisions.

An enlisted militiaman has no right to compensation except as payment thereof may be authorized under constitutional or statutory provisions³¹ Under such provisions, however, authorization ordinarily is made for pay and allowances for enlisted members of the militia,³² as when in active serv-

15. Ohio—In re Kuchta, 8 Ohio NP, NS, 613

NY—Wilber v Grace, 12 Johns 68
40 CJ p 682 note 2

16. US—Slade v Minor, DC, 22
F Cas No 12,937, 2 Cranch CC 139
40 CJ p 682 notes 4, 6, 7

17. SC—Ansley v Timmons, 14 S
CL 329
40 CJ p 683 note 5

18. US—Owens v Huntington, CCA
Or, 115 F2d 160

Residence or domicile under early statutes

Me—Richardson v Bachelder, 19 Me
82
40 CJ p 680 note 47 [a]

19. US—Owens v Huntington, CCA
Or, 115 F2d 160

College residence

Under statute providing that militia shall consist of United States male citizens "resident within the state," enlistment in National Guard of nineteen-year-old boy whose domicile was in another state but who had temporary residence in state while attending university therein during school year, was valid, since statute required only "residence" within

state, as distinguished from "domicile"—Owens v Huntington, supra

20. NY—People v Turner, 10 Hun
146
40 CJ p 683 notes 9, 10, 12.

21. NY—People v Turner, supra.
40 CJ p 683 note 11

22. Mass—Howard v Harrington, 4
Pick 123—Commonwealth v Cut-
ter, 8 Mass 279

40 CJ p 683 note 16
Termination of service of officer see
supra § 11

23. NY—North v Appleton, 12 N
YS 72, 25 Abb NCas 389

24. Ill—Hays v Illinois Terminal
Transp Co, 2 NE2d 309, 363 Ill.
397

Differs from civil employment

Military service is based on duty owed by citizen to sovereign and, even where voluntary, differs from ordinary employment in that enlisted man cannot terminate his service at will—Hays v Illinois Terminal Transp Co, 2 NE2d 309, 363 Ill 397

25. Kan—Lewis v Lewelling, 36 P.
351, 53 Kan 201, 23 LRA 510
40 CJ p 683 note 19 [a]

26. Mass—Commonwealth v. Cum-
mings, 16 Mass 194
40 CJ p 683 note 14

27. Mass—Ex parte Gallup, 1 Pick
(Mass) 463—Commonwealth v
Walker, 4 Mass 556

28. US—Ex parte Roach, DCA Ala,
244 F 625

29. US—Ex parte Roach, supra

30. US—Ex parte Roach, supra

31. Ariz—Andrews v. State, 90 P
2d 995, 53 Ariz 475

General appropriation

Where statute prescribed rate of pay for officers and enlisted men of National Guard while under orders on local or state duty but failed to provide for payment of per diem for time spent in field training outside the state, mere appropriation in general appropriation bill of sum for payment of "enlisted men, field training," did not authorize payment of per diem to enlisted men attending annual encampment outside of state, as statute could not be thus amended in the appropriation bill—Andrews v State, supra

32. Me—Williamsburg v. Gilman,
24 Me 206

40 CJ p 683 note 26, p 684 notes 33-40

Pay and allowances of officers see
supra § 11

ice³³ in aid of the civil authorities,³⁴ or during encampments, maneuvers, or other exercises³⁵ The rate of pay is usually fixed by law,³⁶ and it is sometimes provided that the pay shall be the same as that of an enlisted man of corresponding grade in the regular army.³⁷

§ 15. Disbandment and Consolidation of Organization

Within limitations imposed by federal law, state authorities have power to disband or consolidate militia organizations.

Within such limitations, if any, as may be imposed by provisions of federal law,³⁸ the right of the governor³⁹ or some other duly empowered state authority⁴⁰ to disband militia organizations has been recognized, although the right of the governor has sometimes been limited to specific cases⁴¹ Similarly the right to consolidate and reorganize departments, corps, regiments,⁴² and companies⁴³ in the military service of the state has been recognized in the case of the governor or some other duly empowered state authority⁴⁴ However, even the legislature has no power to disband the complete militia organization formed pursuant to an act of congress.⁴⁵

Effect of disbandment Under some statutes, where his organization is disbanded, a commissioned officer does not lose his rank or commission⁴⁶

Withdrawal of federal recognition Provisions of the National Defense Act of June 3, 1916, 32 U S C A § 15, relative to inspection with a view to determining what units and individuals should be retained as components of the National Guard should be accorded a liberal construction,⁴⁷ and

under such provisions the war department has power summarily to withdraw federal recognition⁴⁸

§ 16. Unauthorized Military Organizations

Within limitations imposed by federal law, the state may forbid the organization as military companies of any bodies other than the regularly organized militia

Unless restrained by their own constitutions, state legislatures may forbid any body of men other than the regularly organized militia to associate themselves together as a military company, or to drill or parade with arms within the limits of the state,⁴⁹ except where such bodies or associations are authorized by acts of congress⁵⁰ Formation of privately organized armed forces has been held invalid even if attempted for the purpose of suppressing subversive elements⁵¹

§ 17. Arms, Equipments, and Other Supplies

The arms and equipment of the National Guard should conform to those of the regular army, and under state statutes the governor may be authorized to issue necessary orders providing for the arming and equipping of the militia.

Under statutes conferring on the governor the power to organize the militia and to meet emergencies, he has full authority to provide for the proper equipment of the militia,⁵² but under early statutes a member of the militia was required to furnish his own arms and equipments⁵³ Under provisions of federal law, now embodied in 32 U S C A § 31, the National Guard must conform in respect of arms and equipment to the regular army, and state statutes have been enacted to carry out such provisions of federal law⁵⁴ The governor is under a duty to obey a state legislative mandate to issue such orders as may be necessary to make the equipment of the

33. Wash—Chapin v Ferry, 28 P 754, 3 Wash 386, 15 L R A 116

40 C J p 683 note 27

34. N Y—People v Bard, 103 N E 140, 209 N Y 304

35. Wyo—State v. Carter, 226 P 690, 31 Wyo 401

40 C J p 684 note 34

36. Ky—Cochran v Beckham, 89 S W 262, 28 Ky L 370

40 C J p 684 note 30

37. Wyo—State v Carter, 226 P 690, 31 Wyo 401

38. N Y—People v Hill, 27 N E 789, 126 N Y 497, 505

40 C J p 685 notes 43, 50

39. Kan—Lewis v Lewelling, 36 P 351, 53 Kan 201, 23 L R A 510

40 C J p 685 note 44

40. N J—State v Mott, 46 N J Law 328, 50 Am R 424

40 C J p 685 note 45

41. Me—Gould v Hutchins, 10 Me 145

40 C J p 685 note 46

42. N Y—People ex rel Gillett v De Lamater, 287 N Y S 979, 247 App Div 246

43. N Y—People v Ewen, 17 How Pr 375

44. Me—Gould v Hutchins, 10 Me 145

40 C J p 685 note 48

45. Vt—Gilman v. Morse, 12 Vt 544

46. N Y—People v Hill, 27 N E 789, 126 N Y 497.

40 C J p 685 notes 51, 52

47. DC—Hurley v U S ex rel Gladman, 47 F 2d 431, 60 App DC 69

48. DC—Hurley v. U S ex rel Gladman, supra

49. U S.—Presser v State of Il-

linois, Ill, 6 S Ct 580, 116 U S 252, 29 L Ed 615

Mass—Commonwealth v Murphy, 44 N E 138, 166 Mass 171, 32 L R A 606

50. U S.—Presser v State of Illinois, Ill, 6 S Ct 580, 116 U S 252, 29 L Ed 615

51. N Y—Application of Cassidy, 51 N Y S 2d 202, 268 App Div 282, reargument denied 63 N Y S 2d 840, 270 App Div 1046

52. N M—State ex rel Charlton v. French, 99 P 2d 715, 44 N M 169 Procurement and issue of supplies under federal statutes see 40 C J p 685 note 57, p 686 notes 58–65

53. Mass—Commonwealth v Annis, 9 Mass 31

40 C J p 686 note 63

54. Fla.—Acker v Bell, 57 So 356, 62 Fla 108, 39 L R A, NS, 454

40 C J p 685 note 56.

National Guard conform to that prescribed for the regular army,⁵⁵ and consequently also has power to provide for the housing and protection of such equipment⁵⁶

Some statutory provisions impose accountability for supplies and equipment furnished the militia,⁵⁷ such as on the counties in which the property was issued,⁵⁸ or provide for relief to the states, under some circumstances, from accountability for property issued by the United States which has been lost, damaged, destroyed, or become unserviceable.⁵⁹ Statutes have frequently specified the person or officer who is to have the custody and control of arms and other property intended for use by the militia,⁶⁰ and a captain or other commanding officer of a company has been held personally liable for arms and other property issued to his company belonging to the state and to the United States,⁶¹ but under some statutes an officer is not liable where the loss results from casualties of the service in the absence of a finding of liability by a board of survey duly appointed whose findings are approved by the governor.⁶²

The measure of damages in an action on the official bond of an officer of the organized militia who has been made responsible for property of the United States in the possession of a state is the invoice value of arms and equipments lost,⁶³ and in case of injury the amount necessary to restore the injured

property to good condition so that it may be used for military purposes.⁶⁴

§ 18. Armories, Drill or Camp Grounds, and Rifle Ranges

- a In general
- b Control and use

a. In General

Statutory provision has been made for obtaining armories for use of the militia, and for selection of officers and employees whose services are required in this connection.

Under state statutes provision may be made for securing buildings for use as armories,⁶⁵ as by renting or taking a lease of such buildings.⁶⁶ Authority is generally conferred on particular officers or boards to act in this connection.⁶⁷

Officers and employees Statutes limiting the terms of office of an armory board need not comply with provisions of the organic law regulating terms of state officers generally, since such provisions are confined to civil offices, and members of an armory board occupy military, rather than civil, office.⁶⁸ Under some statutes the appointment of an armorer is invalid unless approved by the major general or commanding officer of the brigade within whose command the armory is located.⁶⁹ Janitors and armorers are in the military, and not in the civil, service.⁷⁰ It has been held that an armor-

55. NM—State ex rel Charlton v French, 99 P 2d 715, 44 NM 169

56. NM—State ex rel Charlton v French, supra

57. Or—Vincent v Umatilla County, 12 P 732, 14 Or 375.

58. Or—Vincent v. Umatilla County, supra

40 C J p 686 note 69

59. Ala—State v Stoddard, 69 So 980, 13 Ala App 560

40 C J p 686 notes 67, 68

60. NY—State v Buffalo, 2 Hill 434.

40 C J p 686 note 75, p 672 notes 8-14, p 673 note 15

61. Ind—State v Dudley, 91 NE 228, 173 Ind 633

62. Ala—State v Stoddard, 69 So 980, 13 Ala App 560

40 C J p 686 note 72

63. Ala—State v Stoddard, supra

40 C J p 686 note 73

64. Ala—State v Stoddard, supra

65. Ohio—State v Turner, 113 NE 327, 93 Ohio St 379

40 C J p 687 note 77

Statutes relating to drill grounds and rifle ranges furnished by United States see 40 C J. p 687 note 80, p 688 note 92.

66. NY—Ford v New York, 63 NY 610

40 C J p 687 note 78

Subletting

The National Guard armory board can lease to the state any buildings it might erect on sites held by the board under long term leases, if the board obtains written consent of the lessor before subletting the premises—Texas Nat Guard Armory Board v McCraw, 126 SW 2d 627, 132 Tex 613

67. Mont—Geboski v Montana Armory Board, 103 P 2d 679, 110 Mont 487

40 C J p 687 note 79

Statute creating state armory board held valid

Mont—Geboski v Montana Armory Board, supra

Effect of enactment

The legislature by enacting the act creating the state armory board determined need of armory facilities and created board to perform such acts as might be necessary to accomplish the purpose—Geboski v Montana Armory Board, supra

Duty of adjutant general

It was adjutant general's duty to enter into lease reasonably neces-

sary to provide National Guard armory for which legislature appropriated funds—Appeal from State Auditor of Public Accounts, 226 N. W. 911, 119 Neb 29

68. Tex—Texas Nat Guard Armory Board v McCraw, 126 SW 2d 627, 132 Tex 613

Purpose of act

(1) The purpose of the National Guard Armory Board Act is to give stability to the military arm of the state—Texas Nat Guard Armory Board v McCraw, supra

(2) The dominant object of the part of the National Guard Armory Board Act providing that those who constitute the board shall be the three ranking members of the National Guard is to have continuity of service on the board of men of military training, who have been selected for their experience and merit, in order that board's efficiency may not be impaired—Texas Nat Guard Armory Board v McCraw, supra

69. NY—Gibbons v. Prandergerast, 136 NY S 267, 75 Misc. 512.

70. NY—Bryant v Palmer, 46 NE 851, 152 NY 412.

er is not entitled to the benefit of certain statutes affording protection to veterans in the public service with respect to their tenure of office.⁷¹

Lessee Certain military organizations incorporated as civic bodies have held as lessees municipal property for armory purposes.⁷²

b. Control and Use

Control of armories ordinarily is vested in particular officers or boards, and the use made thereof must comply with statutory provisions

Under some statutes particular officers or boards are given the power and duty to care for, regulate, and control the armories used for the militia.⁷³ By statute detailed provision is sometimes made as to the use to which armories may be put, and an armory may not be used for a purpose not contemplated by the statute.⁷⁴ In some states under proper regulation by the board in charge, an armory may be used for civic purposes when such use will not interfere with the proper use of the building by the militia,⁷⁵ and the rule has been laid down that the use of an armory for amusement purposes is lawful when it can reasonably be said that the amusements for which it is used are conducive to the efficiency and esprit de corps of the military organization,⁷⁶ even though the general public is permitted to participate⁷⁷ and an admission fee is charged, not for the purpose of making money but of meeting the expenses of the undertaking.⁷⁸

A corporation executing to the state a mortgage on property in behalf of a militia company and obtaining an appropriation from the state in such company's behalf thereby assents to a law making the property subject to the authority of a state board of armory supervisors,⁷⁹ title to armory property conveyed to the state may not be reconveyed by

deed of the governor,⁸⁰ and the legal title to such property remains in the state for the use and benefit of the militia.⁸¹

Interference by civil courts. A court of equity will not interfere with the exercise of the duties of the board in charge of armories where the necessity for interference is not clearly apparent,⁸² as where the use to which an armory is being put is not clearly one for nonmilitary purposes.⁸³ However, there is authority for the view that a court may prevent by injunction the use of an armory for nonmilitary purposes,⁸⁴ and may even prevent the use in such a manner as to cause unnecessary injury to the property, although in its general aspects the use is a proper one.⁸⁵

§ 19. Discipline and Training

a In general

b Forms and methods of training

a. In General

Generally speaking, the discipline of the militia should conform to that of the regular army

By article 1 section 8 of the Constitution of the United States congress is authorized to provide for disciplining the militia, but the authority to train the militia according to the discipline prescribed by congress is reserved to the states.⁸⁶ The National Defense Act, 32 USCA § 61, provides, as earlier federal statutes provided, for the conformity of the discipline of the National Guard to the system prescribed for the regular army.⁸⁷ The laws of many of the states have been revised with the view of effecting conformity in discipline to that of the regular army.⁸⁸ Thus, the articles of war have been made applicable to the militia by certain statutes,⁸⁹ but by some statutes they apply to the militia only on

71. NY—*People v Martin*, 65 NY S 457, 53 App Div 19 40 CJ p 687 note 84

72. Pa—*Mihlbauer v Infantry Battalion State Fencibles*, 10 Pa Dist 585

73. Pa—*In re State Armory Board*, 33 Pa Co 144

Wash—*State v Burch*, 204 P 785, 119 Wash 1 40 CJ p 687 note 85

74. NY—*Seventh Regiment Veterans v Seventh Regiment Field Officers*, 14 NYS 811 40 CJ p 687 notes 86, 87.

75. Ohio—*State v Turner*, 113 NE 327, 93 Ohio St 379

76. NJ—*McCarter v Dungan*, Ch, 71 A 537—*Hamill v Dungan*, 68 A 1096, 74 NJ Eq 251. 40 CJ p 687 note 89.

77. NJ—*McCarter v Dungan*, Ch, 71 A 537—*Hamill v Dungan*, 68 A 1096, 74 NJ Eq 251

78. NJ—*McCarter v Dungan*, Ch, 71 A 537—*Hamill v Dungan*, 68 A 1096, 74 NJ Eq 251

79. ND—*Company A First Regiment, National Guard Training School v State*, 224 NW 661, 53 ND 66

80. ND—*Company A First Regiment, National Guard Training School v State*, supra

81. ND—*Company A First Regiment, National Guard Training School v State*, supra

82. NJ—*Hamill v Dungan*, 68 A 1096, 74 NJ Eq 251

83. NJ—*McCarter v Dungan*, Ch,

71 A 537—*Hamill v Dungan*, 68 A 1096, 74 NJ Eq 251 40 CJ p 688 note 94

84. NJ—*McCarter v Dungan*, Ch, 71 A 537 40 CJ p 688 note 95

85. NJ—*Hamill v Dungan*, 68 A 1096, 74 NJ Eq 251

86. NJ—*State v Mott*, 46 NJ Law 328, 50 Am R 421.

87. Fla—*Acker v Bell*, 57 So 356, 62 Fla 108, 39 LRA, NS, 454, Ann Cas 1913C 1269 40 CJ p 688 note 99

88. Ohio—*McGorray v Murphy*, 88 NE 881, 80 Ohio St 413, 17 Ann Cas 444 40 CJ p 688 note 3

89. Ariz—*Ex parte Altman*, 239 P 388, 26 Ariz 635 40 CJ p 688 note 4.

certain occasions⁹⁰ Under some statutes the effectiveness of regulations for the government of the militia has been made to depend on the promulgation or the approval of such regulations by a specified officer⁹¹

b Forms and Methods of Training

The forms and methods of training the militia are those prescribed by statute.

Under various statutory provisions, the members of the militia are liable to service for instruction, which may take the form of drills, parades, schools, inspections, encampments, maneuvers, marches, or other exercises⁹² Some statutes prescribe a minimum period for participation by the National Guard in encampments, maneuvers, or other exercises,⁹³ and provide for participation of the militia with the regular army in training exercises⁹⁴

Notice or warning Under the old system involving universal service, it was required that a notice or warning of each meeting or parade should be served on the members of the company.⁹⁵ Since liability to military duty has been restricted to a select and volunteer body of organized militia, standing orders or regulations usually prescribe the periods of duty and notices are issued only for special meetings or service.⁹⁶

Regulations. Under some statutes commanding officers are given authority to suppress certain occupations carried on within prescribed limits surrounding encampments,⁹⁷ but under such a statute it has been held that the commanding officer is not authorized to suppress a lawful and harmless business when the same business is permitted within

the limits of the encampment⁹⁸

§ 20. — Military Offenses

Military offenses include the various violations of the laws and regulations governing the militia, and are punishable as prescribed by law.

Military offenses within the meaning of some militia laws include the various violations of the laws, rules, regulations, or orders governing the National Guard or organized militia,⁹⁹ and some acts or omissions of members of the militia which are, or have been, regarded as military offenses subject to punishment, are neglect of duty,¹ conduct unbecoming an officer,² insubordination or disobedience,³ nonattendance at drills, parades, and other training exercises,⁴ deficiency in equipment,⁵ and inciting disorders.⁶ Members of the militia have been held free from liability to punishment as for a military offense where the alleged act or omission occurred when they were not on duty or were not subject to military orders⁷ It has been held that military offenses are not criminal offenses⁸

Prosecution and punishment Military offenses are usually triable by military courts, as discussed infra §§ 24, 25, and are not indictable offenses⁹ A state legislature usually has power to provide for the imposition of fines and penalties as a means of enforcing the performance of militia duty¹⁰ On order of the proper authorities the sheriff may, it has been held, detain a militiaman in custody pending his trial on charges by a military court¹¹ Under some early statutes a person who failed to appear at a military drill, review, or muster when duly notified, or who was guilty of some other viola-

90. ND—State v Peake, 135 NW. 197, 22 ND 457, 40 L.R.A., NS, 354

40 C.J. p 688 note 5

91. Tex—Manley v State, 137 SW. 1137, 62 Tex Cr 392.

40 C.J. p 688 note 6.

Governor

Statutes conferring on the governor the power from time to time to make the National Guard conform in organization, discipline, and otherwise to the regular army are designed to enable such official to meet special occasions out of the ordinary without waiting on sessions of the legislature—State ex rel Charlton v. French, 99 P 2d 715, 44 N.M. 169

92. Ala—Betty v State, 66 So. 457, 188 Ala 211
40 C.J. p 688 note 8, p 689 notes 9, 10

93. Wyo—State v Carter, 226 P 690, 31 Wyo 401
40 C.J. p 689 note 17

94. Ohio—Klaussen v. Purcell, 18 Ohio NP, NS, 91
40 C.J. p 689 notes 19–22

95. Me—Wood v Bolton, 23 Me 115
40 C.J. p 689 notes 12, 13.

96. NY—People v Crane, 26 NE 736, 125 NY 535

97. La—O'Shee v Stafford, 47 So 764, 122 La 444, 16 Ann Cas 1163

98. La—O'Shee v Stafford, supra

99. Minn—State v Wagener, 77 N W 424, 74 Minn 518, 73 Am SR 369, 42 L.R.A. 749

1. SC—Ex parte Biggers, 26 SCL 69
40 C.J. p 690 note 30

2. NY—People v Porter, 3 NYS 35, 50 Hun 161.
40 C.J. p 690 note 31

3. NH—State v Dwinell, 6 NH 167
40 C.J. p 690 note 32

4. Mass—Draper v Bicknell, Quincy 164
40 C.J. p 690 note 33

5. Mass—Spaulding v. Bancroft, 23 Pick 54

6. NY—Rathbun v. Sawyer, 18 Wend 451
40 C.J. p 690 note 36

7. Me—Anderson v. Swett, 23 Me 440
40 C.J. p 690 note 37

8. Minn—State v Wagener, 77 N W 424, 74 Minn 518, 73 Am SR 369, 42 L.R.A. 749
40 C.J. p 690 note 38.

9. Minn—State v Wagener, supra.
40 C.J. p 690 note 41

10. Ohio—Houston v. Wright, 15 Ohio St 318
40 C.J. p 690 note 42

11. Ala—Harbin v State, 131 So. 547, 24 Ala.App 143

tion of the law in respect of the performance of militia duty, was liable to a fine, or penalty recoverable in a proceeding in the civil courts,¹² and this proceeding was generally regarded as in the nature of a civil action or proceeding¹³

Some earlier statutes made the military offenses of members of the organized militia while not in actual military service misdemeanors triable in a court of competent jurisdiction,¹⁴ and this method of determining liability was exclusive¹⁵ Statutory provision was sometimes made for the imposition of a fine by a commanding officer¹⁶ The fact that one was a member of the Naval Reserve at the time of his enlistment in the National Guard has been held not to relieve him from liability for violation of military law¹⁷

21. Service

- a. In general
- b. Calling out militia
- c. Command and civilian control

a. In General

State legislatures may prescribe the service to be rendered by the militia when not in the service of the United States.

It is competent for the legislature to prescribe the services to be rendered by the state militia when not in the service of the United States¹⁸ Some state statutes do not authorize service for the state militia, purely as such, beyond the limits of the

state.¹⁹ Federal statutes, forbidding a member of the Naval Reserve to be a member of any other military organization except the Naval Militia, do not automatically deprive a member of the State Guard of his status as such by virtue of the fact that he is assigned to active duty with the navy,²⁰ but such assignment merely suspends his status as a state guardsman²¹

b. Calling Out Militia

Generally, the authorities in a state may use the militia in times of public disorder or danger and to aid in the enforcement of the laws.

The right of the authorities in a state to use the militia in times of public disorder or danger and to aid in the enforcement of the laws is recognized,²² as to preserve order in times of natural catastrophe, such as floods,²³ to suppress insurrection, as discussed in Insurrection and Sedition § 4, or to put down riots, as considered in the C J S. title Riot, §§ 30-32, also 54 C J p 842 notes 64-73, 82-85. Although ordered out by the governor in aid of the civil authorities in a particular part of the state, the militia has been regarded as being in the service of the state²⁴

Ordinarily the governor has the power and duty to call out the militia in times of public disorder or danger,²⁵ or when there is imminent danger thereof,²⁶ or to aid the civil authorities in the enforcement of law,²⁷ and he may act even without a request from local civil officers in the place where

12. Iowa—State v Ryan, 69 NW 1123, 101 Iowa 18

40 C J p 690 note 43

13. NH—Cate v Nutter, 27 NH 515

40 C J p 691 note 44

14. Minn—Nixon v Reeves, 67 N W 989, 65 Minn 159, 33 L R A 506

40 C J p 691 note 45

15. Minn—Nixon v Reeves, supra. 40 C J p 691 note 46

16. Vt—Walner v Stockwell, 9 Vt 9

40 C J p 691 note 47.

17. Minn—State v Fisher, 218 N W 542, 174 Minn 82, certiorari denied Klingbe v State of Minnesota, 49 S Ct 32, 278 US 636, 173 L Ed 552

18. Ala—Betty v State, 66 So 457, 188 Ala 211

40 C J p 691 note 49

19. Ala—Betty v State, supra

20. NJ—Adams v Atlantic County, Cir Ct, 53 A 2d 168

21. NJ—Adams v Atlantic County, supra

22. Mo—McKittrick, for and in Be-

half of Donaldson v Brown, 85 S W 2d 385, 337 Mo 281

40 C J p 691 notes 54, 55

23. Mo—McKittrick, for and in Be-half of Donaldson v Brown, supra

24. Wash—Chapin v Ferry, 28 P 754, 3 Wash 386, 15 L R A 116

40 C J p 691 note 56

25. Miss—Seaney v State, 194 So. 913, 188 Miss 387

SC—Hearon v Calus, 183 SE 13, 178 SC 381

40 C J p 691 note 57

Construction of statutes

The statute making it obligatory on the governor to call out the militia when the state is threatened with invasion or insurrection or when there exists a riot, mob, unlawful assembly, breach of the peace, or resistance of the execution of laws of the state or imminent danger thereof if in governor's opinion the civil authorities are unable to cope with the situation is inapplicable, in the main, to constitutional and statutory sections which deal with the particular and separate subject of execution of the laws—State v McPhail, 180 So 387, 182 Miss 360.

26. US—U S v Walters, D C Tex, 268 F 69

Reports of lawlessness

The governor had power to send troops or military officers into county for purpose of inquiring into reports of lawlessness prevailing therein—Begley v Louisville Times Co, 115 S W 2d 345, 272 Ky 805

27. Miss—State v McPhail, 180 So 387, 182 Miss 360

40 C J p 692 note 59

Breakdown of local enforcement

Where governor unsuccessfully seeks, by representations to, and request of, the local authorities, to secure law enforcement and the condition exists and persists for that length of time which makes it clearly apparent that no dependence is to be placed on the local executive officers and that they either cannot or will not enforce the laws, so that there has been a substantial breakdown of local enforcement, the power and duty of governor arise to send militia, not to supersede the law, but to enforce it—State v McPhail, supra.

the disturbance exists²⁸ The power of the governor in this respect extends to calling out either the organized or the unorganized militia²⁹ The decision of the governor that the condition exists which demands the exercise of his authority is conclusive³⁰ and is not subject to review by the courts³¹ The governor's proclamation calling out the militia need not contain any particular recitals,³² and it is sufficient if it is an order and the facts de hors justify its issuance and execution³³

Authority has sometimes been given to certain civil officers other than the governor to call on the militia to suppress public disorder or to aid in the enforcement of law,³⁴ and the view has been taken that this authority may be exercised when such disorder is threatened³⁵ The decision of an officer duly authorized that a condition which requires the calling out of the militia exists is ordinarily regarded as conclusive as to the existence of such condition³⁶ Some statutes do not recognize the right of local civil officers to issue the call.³⁷

c. Command and Civilian Control

Ordinarily the governor retains command of the militia after it has been called into the service of the state, and usually the militia remains subject to civilian control

Ordinarily, where the governor as commander in chief calls out the militia, he retains command,³⁸ and is not required to place them under the orders of local civil authorities in the territory into which the militia is sent³⁹ However, where local civil

officers have exercised the power, sometimes given by statute, to call out the militia, the view has been taken that such officers have exclusive control and direction as to the specific duty or service which is to be performed,⁴⁰ which authority may not be delegated to the officers of the militia,⁴¹ but the officers of the militia have authority to direct the movements of its members in the execution of the orders given by such civil officers⁴²

In time of peace while the civil power is functioning, the military power is subordinate to the civil power, as discussed supra § 3, and military aid to the civil authorities must act within, and in accordance with, the civil law,⁴³ and there is authority for the view that even the governor may not suspend the civil laws or supplant civil authority with military rule at such time⁴⁴ The broad rule has been laid down that the state militia while in active service and in every emergency which arises is subject to the control of the civil authority,⁴⁵ and must act under the civil law⁴⁶

Moreover, the authority of a member of the militia has been defined and limited by the statement that he may exercise such authority as that which a peace officer may exercise,⁴⁷ and only such authority,⁴⁸ and in the performance of his duties a member of the militia may use only such force as is necessary⁴⁹ There is authority for the view that, although martial law has not been declared, a commanding officer may establish reasonable regulations for the protection of life or property.⁵⁰

28. Ky—Franks v Smith, 134 S W 484, 142 Ky 232, L R A 1915A 1141, Ann Cas 1912D 319

Miss—Seaney v State, 194 So 913, 188 Miss 367

29. Fla.—In re Advisory Opinion to Governor, 77 So 87, 74 Fla 92

Mont.—In re McDonald, 143 P 947, 49 Mont 454, L R A 1915B 988, Ann Cas 1916A 1166

30. Mo—Corpus Juris cited in McKittrick, for and in Behalf of Donaldson v Brown, 85 S W 2d 385, 388, 337 Mo 281
40 C J p 692 note 62

31. U S—U S v Wolters, D C Tex, 268 F 69
40 C J p 692 note 63

32. Miss—State v McPhail, 180 So. 387, 182 Miss 360.

33. Miss—State v McPhail, supra.

34. Mass—Ela v Smith, 5 Gray 121, 66 Am D 356
40 C J p 692 notes 64, 68

35. Mass—Ela v Smith, supra.

36. N Y—Welch v Bard, 142 N Y. S 26, 81 Misc 262, 30 N Y Cr 92
40 C J p 692 note 66.

37. Wash—Chapin v Ferry, 28 P 751, 3 Wash 386, 15 L R A 116
40 C J p 692 note 67

38. Ky—Franks v Smith, 134 S W 484, 142 Ky 232, L R A 1915A 1141, Ann Cas 1912D 319

39. Ky—Franks v Smith, supra

40. Mass—Ela v Smith, 5 Gray 121, 66 Am D 356
40 C J p 692 note 72

41. Mass—Ela v Smith, supra
Ohio—State v Coit, 8 Ohio S & C P. 62

42. Mass—Ela v Smith, 5 Gray 121, 66 Am D 356
Ohio—State v Coit, 8 Ohio S. & C P 62

43. Mich—Bishop v. Vandercook, 200 N W. 278, 228 Mich 299
N C—Allen v Gardner, 109 S E 260, 182 N C 425

44. Mich—Bishop v. Vandercook, 200 N W 278, 228 Mich 299.

Strict subordination

The constitutional and statutory provisions regarding enforcement of laws by governor, when taken to-

gether, mean that whatever the governor does in the execution of the laws or whatever members of the militia do, under such authority must be as civil officers, and in strict subordination to the general law of the land—State v McPhail, 180 So 387, 182 Miss 360

45. Ky—Franks v Smith, 134 S W 484, 142 Ky 232, L R A 1915A 1141, Ann Cas 1912D 319
40 C J p 693 note 79

46. Ky—Franks v Smith, 134 S W. 484, 142 Ky 232, L R A 1915A 1141, Ann Cas 1912D 319

47. Ky—Franks v Smith, supra.
40 C J p 693 note 81.

48. Ky—Franks v Smith, supra.
40 C J p 693 note 82.

49. N C—Allen v. Gardner, 109 S E 260, 182 N C. 425
40 C J. p 693 note 93

50. Ohio—In re Smith, 14 Ohio N P.N S, 497
40 C J p 693 note 84.

Making arrest. The authority of a member of the militia to make an arrest in connection with the performance of his duty is recognized,⁵¹ but after the prisoner has been turned over to the civil authorities the militia authorities have no further power over him.⁵²

Seizure, destruction, or use of private property While members of the militia may be authorized under certain circumstances to destroy private property,⁵³ authority to destroy⁵⁴ or to seize⁵⁵ such property does not exist in the absence of an imminent and overwhelming necessity. The right of an officer of the militia to use private property as a muster ground without the consent of the owner has been denied,⁵⁶ but it was held that an inclosed field might be used as a muster ground in the absence of objection on the part of the owner.⁵⁷

§ 22. — Liability of State or Political Divisions for Injuries

Ordinarily neither the state nor a subdivision thereof is liable for injuries caused by the state militia.

It has been held that the state⁵⁸ or a political subdivision thereof in which the militia is employed⁵⁹ is not answerable for injuries to person or property occasioned by the torts or trespasses of the officers or privates of the militia, and that it is for the state, in its sovereign capacity, to determine whether compensation will be made out of its treasury.⁶⁰ Statutes by which the state waives immunity and assumes liability for injuries caused by its officers and agents generally have been construed as not effecting such a waiver and assumption in respect of injuries caused by the state militia.⁶¹

§ 23. Expense of Maintenance

- a. In general
- b. Armories
- c. Arms, equipment, and other supplies
- d. Training, mobilization, and actual service

a. In General

The cost of maintaining the militia is primarily a state charge, although provision may be made for requiring political subdivisions of the state to share the expense, and, under certain conditions, federal aid may be extended.

The cost of maintaining the militia is primarily a state charge,⁶² to be defrayed out of state funds as a necessary expense of government in compliance with statutory provisions.⁶³ Political divisions of the state may also be allowed or required to share in the expense of quartering or maintaining state troops stationed within their respective boundaries,⁶⁴ as where special benefits accrue from the presence of the troops in the political division involved.⁶⁵ Under some statutes the expense of the maintenance of the militia within a county constitutes a charge on the county in the first instance, but the amount paid should be refunded by the state.⁶⁶

Federal statutes have made provision for the use of federal funds for the payment of certain expenses of organizations in the several states, territories, and the District of Columbia, which have become part of the organized militia or National Guard of the United States.⁶⁷ In this connection, it has been held that congress has authority to determine the extent of the aid, support, and assistance which

51. Ohio—In re Smith, *supra*.
Liability of member of militia for false imprisonment see False Imprisonment § 20.

52. Ohio—In re Smith, *supra*.

53. Mont—Herlihy v Donohue, 161 P 164, 52 Mont 601, L.R.A.1917B 702, Ann Cas 1917C 29.

Liability to civilians for seizure or destruction of private property and for trespass see *infra* § 27.

54. Ky—Hogue v. Penn, 3 Bush 663, 96 Am D 274.

Mont—Herlihy v Donohue, 161 P 164, 52 Mont 601, L.R.A.1917B 702, Ann Cas 1917C 29.

55. Ky—Hogue v Penn, 3 Bush 663, 96 Am D 274.

40 C.J. p 693 note 90.

56. Mass—Brigham v Edmands, 7 Gray 359.

57. S.C.—Law v Nettles, 18 S.C.L. 447.

58. N.Y.—Dembrod v State, 58 N.Y. S.2d 490, 185 Misc 1061.

59. Ill.—Chicago v Chicago League Ball Club, 63 N.E. 695, 196 Ill. 54, 89 Am.S.R. 243.

60. Ill.—Chicago v Chicago League Ball Club, *supra*.

61. N.Y.—Dembrod v State, 58 N.Y.S.2d 490, 185 Misc 1061.

Liability of state for injuries to members of militia see *infra* § 28.

Accidental shooting of civilian.

Where claimant, a member of the public, was accidentally shot by a State Guard soldier in a demonstration as part of a recruiting drive, the state was not liable for the injury sustained and no liability was created by enactment of the statute waiving the state's immunity from liability—Dembrod v State, *supra*.

62. Ky—Commonwealth v. Sparks, 255 S.W. 859, 201 Ky 5.

40 C.J. p 693 note 97.

63. Ark—State v Moore, 88 S.W. 881, 76 Ark 197, 70 L.R.A. 671.

40 C.J. p 693 note 98.

Aid as restricted to military organization.

Aid under law authorizing legislative appropriation to militia companies under certain conditions is not available to corporations formed under different law—Company A First Regiment, National Guard Training School v State, 234 N.W. 661, 58 N.D. 66.

64. N.Y.—Bryant v Palmer, 46 N.E. 851, 152 N.Y. 412.

40 C.J. p 694 note 99.

65. Mass—Hodgdon v. Haverhill, 79 N.E. 830, 193 Mass 406.

N.Y.—Bryant v Palmer, 46 N.E. 851, 152 N.Y. 412.

40 C.J. p 694 note 1.

66. Cal.—People v San Joaquin County, 28 Cal 228.

67. D.C.—U.S. ex rel. Gillett v Dern, 74 F.2d 485, 64 App.D.C. 81.

40 C.J. p 694 notes 3, 5-8.

shall be given the National Guard of the various states,⁶⁸ and the terms on which it shall be granted,⁶⁹ and that the right of any state to enjoy such pecuniary aid depends on its compliance with the requirements imposed by the federal statutes and with the regulations issued thereunder⁷⁰

b. Armories

The expense of providing and maintaining armories may be borne by the state or a political subdivision thereof under differing statutory provisions, and the financing of such matters may be intrusted to an armory board or commission

Under some statutes the cost of providing⁷¹ or maintaining⁷² armories for the several organizations of the organized militia or National Guard is placed initially or otherwise on political divisions of the state in which the armories are maintained, or such divisions are authorized to apply their funds to such purposes⁷³. Such allocation of the cost of armories may be made notwithstanding a constitutional provision that taxes shall be equalized and uniform through the state⁷⁴. However, under other statutes or constitutions it has been held that such charges must be borne by the state,⁷⁵ although, even in a state in which legislative power to impose on a political division the duty of maintaining an armory, where merely incidental advantages result to such division, is denied, it has been held that a municipality may donate a site for an armory where part of the building is used for purely municipal

purposes⁷⁶

In some jurisdictions, while it has been held that the legislature has no authority to enact a general statute which requires counties to provide armories for the state militia and which makes no provision for a special fund from which the expense may be met,⁷⁷ a local and special statute authorizing a county to issue bonds and to levy a tax to cover the expense of providing an armory, if duly approved by the qualified voters, has been upheld⁷⁸. Under statutes permitting cities to donate land or buildings for armories, it has been held that there is no authority for a lease by a city to a military board of an armory to be used by a National Guard unit for which rent is charged⁷⁹

Under some statutory provisions the financing of construction and maintenance of armories may be handled through armory boards or commissions⁸⁰. So discretion may be conferred on the trustees of an armory to determine within prescribed limits how much should be appropriated toward its maintenance by a municipal board of estimate and apportionment,⁸¹ and the municipal board has no power to refuse to grant the amount requested, within the prescribed limits, if it appears that the money is required for lawful purposes,⁸² although the board may in the first instance pass on the propriety of including certain items in the request,⁸³ and it has authority to refuse appropriations which are

68. DC—U S ex rel Gillett v Dern, supra.

69. DC—U S ex rel Gillett v Dern, supra.

70. Wis—State v State Industrial Commission, 202 NW 191, 186 Wis 1
40 CJ p 694 note 4

71. Pa.—Pittsburgh v Biggart, 85 Pa 425
40 CJ p 694 note 10

72. NY—Moriarty v New York, 127 NYS 524, 142 App Div. 717
40 CJ p 691 note 11

City charge not changed by state military law

Statutory provisions imposing on a city an annual charge for preservation and maintenance of an armory not in excess of a stated amount were not repealed by implication by subsequent enactment of a state military law making general provision for maintenance of the National Guard as state charges—Tobin v La Guardia, 11 NE2d 340, 276 NY 34—Tobin v O'Dwyer, 62 NYS2d 462, 187 Misc 476, affirmed 63 NY S2d 826, 270 App Div 994, affirmed 70 NE2d 544, 296 NY 733

73. Minn—State v Rogers, 100 N W 659, 93 Minn 55
40 CJ p 694 note 13

74. NY—Bryant v Palmer, 46 NE 851, 152 NY 412
Or—Rankin v Yoran, 143 P 894, 72 Or 224

75. Ohio—Hubbard v Fitzsimmons, 49 NE 477, 57 Ohio St 436
40 CJ p 695 note 14

76. Ohio—State v Turner, 113 N E 327, 93 Ohio St 379
40 CJ p 695 note 15

77. Fla—State v Dickenson, 33 So 514, 44 Fla 623, 60 LRA 539

78. Fla—Jordan v Duval County, 66 So 298, 68 Fla 48

79. Kan—State ex rel Parker v City of Lawrence, 92 P 2d 31, 150 Kan 353

80. Ky—Keith v Richards, 294 S W 1057, 220 Ky 201.

Method of handling funds
The act creating state armory board as a public corporation separate from state to control armory facilities, which provides that money raised by board by the sale of bonds shall become a special fund to be disbursed for the erection of

proposed armory buildings, does not violate constitutional provision relating to method of handling deposits of state moneys since money is not derived by taxation and consequently need not be handled in manner provided by constitution—Geboski v Montana Armory Board, 103 P 2d 679, 110 Mont 487

81. NY—Tobin v La Guardia, 11 NE2d 340, 276 NY 34

Statute held not repealed
NY—Tobin v La Guardia, 18 NY S2d 267, 259 App Div 191, affirmed 28 NE2d 403, 283 NY 678

Appropriation held insufficient
NY—Tobin v La Guardia, 11 NE2d 340, 276 NY 34

Expenditure in excess of limits held discretionary with armory board and municipal body—Tobin v La Guardia, 11 NE2d 340, 276 NY 34

82. NY—Tobin v La Guardia, 11 NE2d 340, 276 NY 34

83. NY—Tobin v La Guardia, 11 NE2d 340, 276 NY 34

Insurance and telephone charges
NY—Tobin v La Guardia, 11 NE2d 340, 276 NY 34

excessive or unreasonable in amount for the purposes specified⁸⁴ The fact that the armory trustees erroneously include certain items does not justify rejection of their report in its entirety⁸⁵

In the case of a state armory and the real property connected therewith, title to which is vested in the state, no person or body has authority to incur any expense therefor or in connection therewith except the state itself acting through its duly authorized agent, such as the adjutant general,⁸⁶ and the fact that the county may be obligated by law to reimburse the state for its expenditures does not make the county directly responsible to the creditor,⁸⁷ or render it liable for damages suffered in performance of the contract and allegedly caused by negligence of the agents of the state⁸⁸ A legislative appropriation for service of the militia adjutant general is not broad enough to cover extraordinary repairs to an armory made under direction of the state quartermaster⁸⁹ Under some statutes the amount required for the insurance of armories should be paid out of the general appropriation at the disposal of the state armory board.⁹⁰

Conditions precedent to liability for expenses of providing and maintaining In order to render a political division of the state liable for the expense of providing and maintaining armories there must be a compliance with the conditions or requirements of applicable statutes.⁹¹ A county is not obliged to pay the rent of an armory for an organization whose members have not taken the steps necessary to make it a legal military organization⁹²

c. Arms, Equipment, and Other Supplies

Various statutes have made provision for supplying the militia with arms and other equipment The liability for certain expenses as between the state and its political divisions is fixed in accordance with the provisions of state law.

Various statutes have made provision for supplying the militia with arms and other equipment⁹³ Under some statutes, supplies and equipment furnished the militia while it is on duty on the request of a political subdivision of the state such as a municipality is a charge on the state, rather than on the municipality⁹⁴ Under other statutes, the municipality must bear such expense,⁹⁵ and it is for the military officers rather than the city officials to determine when and how expenses shall be incurred by them in aiding the civil authorities of the city⁹⁶ The liability of the municipality for supplies furnished under an order of the military authorities is to be determined by the provisions of the military law or statutes of the state,⁹⁷ rather than by the provisions of the city charter relating to the power of its officers,⁹⁸ and in order to secure payment for supplies furnished it is essential that claimant present a voucher complying with the statutory requirements of the state,⁹⁹ and the fact that the voucher fails to comply with provisions of the city charter affords the municipality no defense¹ Where a complaint seeking collection of such a claim has been dismissed for lack of a proper voucher, plaintiff may subsequently procure a proper voucher and recover thereon.²

d. Training, Mobilization, and Actual Service

Various statutes provide for the payment of the mili-

84. N.Y.—*Tobin v La Guardia*, 11 N.E.2d 340, 276 N.Y. 34

Amounts not needed for purposes specified

Under statute entitling board of trustees of armory building owned by National Guard to appropriation of not exceeding a certain amount a year for preservation, maintenance, and improvement of building, the board of estimate and apportionment is vested with power to refuse such amounts as trustees report necessary for such purpose unless it appears on face of request that amount requested is needed for purposes specified in statute—*Tobin v La Guardia*, 11 N.E.2d 340, 276 N.Y. 34

85. N.Y.—*Tobin v La Guardia*, 11 N.E.2d 340, 276 N.Y. 34

86. N.Y.—*Johnson v State*, 16 N.Y.S.2d 292, 172 Misc. 776

Purchase by county board for state
As respects purchases of real estate by county boards of supervisors for the site of an armory when re-

quested to do so by state authority, title to such property is vested in the state and not in the county, and the boards have no discretion—*Johnson v State*, supra

87. N.Y.—*Johnson v State*, supra

88. N.Y.—*Johnson v State*, supra

89. Mass.—*Sheils v Commonwealth*, 29 N.E.2d 12, 306 Mass. 535

90. Pa.—*In re State Armory Board*, 33 Pa.Co. 144

91. Or.—*Vincent v Umatilla County*, 12 P. 732, 14 Or. 375

40 C.J. p. 695 note 19

92. Nev.—*State v Ross*, 14 P. 827, 20 Nev. 61

40 C.J. p. 695 note 20

93. D.C.—*U.S. ex rel Gillett v Dern*, 74 F.2d 485, 64 App.D.C. 81
40 C.J. p. 695 notes 21-24

94. Ill.—*Chicago v Chicago League Ball Club*, 63 N.E. 695, 196 Ill. 54,
89 Am.S.R. 243

40 C.J. p. 695 note 25

95. N.Y.—*Lord & Burnham Co v City of New York*, 167 N.E. 220, 251 N.Y. 198, reargument denied 170 N.E. 126, 252 N.Y. 517

96. N.Y.—*Lord & Burnham Co v City of New York*, supra

97. N.Y.—*Lord & Burnham Co v City of New York*, supra

98. N.Y.—*Lord & Burnham Co v City of New York*, supra

99. N.Y.—*Lord & Burnham Co v City of New York*, supra.

Waiver or estoppel unavailable

Until voucher for supplies furnished militia complies with statute, no city officer may make payment or bind city by estoppel or waiver—*Lord & Burnham Co v City of New York*, supra

1. N.Y.—*Lord & Burnham Co v City of New York*, supra

2. N.Y.—*Lord & Burnham Co v City of New York*, supra.

tia while in encampments or during maneuvers, or while on actual service for local or state duties

Various statutes provide for the payment of officers and enlisted men while in encampments or during maneuvers.³ It has been held that the expense of a militia contingent during encampment for training purposes may be paid as an "ordinary expense" of the executive department of the state,⁴ but that an appropriation for members of the militia while in federal service does not cover their pay during an encampment when they are not in federal service, but are engaged in training under state auspices.⁵ It has been held within the power of the governor to expend money to quarter men and equipment not on active duty where reasonably necessary as a matter of preparedness.⁶

It has been held that the cost of maintaining the militia while in active service in aid of the civil authorities,⁷ including the pay and subsistence of the members of the militia,⁸ is a charge against the state. Some statutes make the expense a state charge where the militia is called out in aid of the civil authorities by the governor acting in pursuance of his discretionary power,⁹ and this includes the expense of compensation and subsistence of the members of the militia.¹⁰ Under some statutes, where the militia is called out on the order or request of local authorities, the political division concerned is liable for the expense involved.¹¹

After mobilization and pending mustering into the federal service the expense of transportation, maintenance, equipment, pay of troops, etc., may under some statutes be met in the first instance by the state,¹² but the state may recover from the federal government the reasonable expenses of mobilizing the National Guard when ordered to camp for federal service.¹³ The United States is not liable

for the payment of persons who are not in the organized service of the state or of the federal government.¹⁴ Under a state statute providing for compensation additional to allowances by the United States army to be paid members of the National Guard under "orders on duty," the latter phrase refers to duties of a local or state character, as in the enforcement of the law or suppression of insurrection,¹⁵ and does not cover services rendered while attending a military school to receive instruction, or a rifle meet, or an encampment for routine practical instructions at or near an army post during a period of field training under authority from the president of the United States.¹⁶ Such state statutes have been construed as limiting use of state funds for payment of National Guardsmen to occasions when the Guard is ordered out for local or state duties,¹⁷ and as prohibiting payment of claims for services rendered at the president's orders and for which congress has provided payment from the federal treasury.¹⁸

§ 24. Military Courts

Violations of military law or regulations by the militia are ordinarily dealt with in military courts; courts of inquiry may be ordered to examine into the nature of any transaction of, or accusation against, any officer or soldier.

Violations of military laws or regulations are now generally dealt with by military courts.¹⁹ Under earlier law there were so-called delinquency courts,²⁰ which were distinguishable from courts-martial.²¹

Assessment of fines. Provision has frequently been made for the assessment by military courts of fines for military offenses,²² and for the collection of such fines by the sheriff or other designated officer.²³

Courts of inquiry Under some statutes, provi-

3. Wyo—State v Carter, 226 P 690 31 Wyo 401

40 C J p 695 note 28—p 696 note 31

4. Wyo—State v. Carter, supra

5. Wyo—State v Carter, supra

6. NM—State ex rel Charlton v French, 99 P 2d 715, 44 NM 169

Expense incurred in converting cavalry into a regiment of anti-aircraft artillery is properly payable from state funds—State ex rel Charlton v French, supra

7. Wash—Chapin v Ferry, 28 P 754, 3 Wash 386, 15 L R A 116 40 C J p 696 note 32

8. Ky—Sweeney v Commonwealth, 82 SW 639, 118 Ky 912, 26 Ky L 877 40 C J p 696 note 33.

9. Iowa—Prime v McCarthy, 61 N W 220, 92 Iowa 569 40 C J p 696 note 34

10. Iowa—Prime v McCarthy, supra

11. Fla—Rushton v State, 78 So 345, 75 Fla 423 40 C J p 696 note 36

12. Pa—In re National Guard Expenses, 20 Pa Co 558 40 C J p 697 note 40

13. US—Commonwealth of Massachusetts v U S, 64 Ct Cl 337

14. US—State of West Virginia v U S, 45 Ct Cl 576 40 C J p 696 note 37

15. Ariz—Croaff v. Harris, 247 P 126, 30 Ariz 357

16. Ariz—Croaff v Harris, supra

17. Ariz—Croaff v. Harris, supra

18. Ariz—Croaff v Harris, supra

19. ND—State v Peake, 135 NW 197, 22 ND 457, 40 L R A, N S, 354 40 C J p 697 note 42

20. NY—People v New York County Jail, 2 NE 870, 100 NY 20, 3 NY Cr 545 40 C J p 704 note 33

21. NY—People v Crane, 26 NE 736, 125 NY 535

22. NJ—State v Atkinson, 9 NJ Law 271 40 C J p 697 note 46

23. Ky—Bell v. Allen, 2 A K Marsh 117. 40 C J p 697 note 47.

sion is made for courts of inquiry²⁴ which may be ordered to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier²⁵ The court of inquiry is to the militia what the grand jury is to the court for the trial of criminal cases²⁶ Under some statutes a court of inquiry may take evidence, make findings of fact, and, when required, may express an opinion on such findings²⁷ Under some early statutes a court known as a court of inquiry was the proper tribunal for assessing fines, or for the trial of privates of the militia not in actual service,²⁸ and also for the determination of the question whether a captain had been properly elected and commissioned²⁹

§ 25. — Courts-Martial

- a In general
- b Convening authority
- c Composition
- d Jurisdiction
- e Proceedings
- f Conviction, sentence, and punishment
- g. Review
- h. Conclusiveness of adjudication

a. In General

A court-martial is a military or naval tribunal having jurisdiction of offenses against the service in which the offender is engaged, and the court exists only temporarily and until the particular object of its creation has been accomplished.

Statutes which have been held valid provide for

a system of courts-martial for the state militia³⁰ A court-martial is a military or naval tribunal which has jurisdiction of offenses against the laws of the service, military or naval, in which the offender is engaged³¹ While these tribunals are regarded as courts in certain respects,³² there is authority for the view that they are part of the executive, and not of the judicial, branch of the government,³³ and that they are not affected by state constitutions making provision for certain courts³⁴ or for the creation of other courts by the legislature³⁵ The term "court-martial" does not include a board of officers directed to try a contested election to office in the militia³⁶ The court exists only temporarily, and, when the particular object of its creation has been accomplished, it is dissolved.³⁷

b. Convening Authority

A court-martial should be duly convened by the proper authorities.

A court-martial should be duly convened by the proper authorities³⁸ Under some statutes, a general court-martial may be convened only by orders of the president or the governor,³⁹ but, under early provisions, it was held that a court-martial could not be organized by the sole authority of the governor without an act of the assembly authorizing it,⁴⁰ and, under an early statute which did not contain an express provision as to who should order the court, it was held that the captain of a militia company did not have the authority to order it⁴¹ The order for the court-martial should comply with statutory requirements⁴² It has been held within

24. N.Y.—*People v Hoffman*, 60 N E 187, 166 NY 462, 54 L.R.A. 597
Courts of inquiry in the army or navy see *Army and Navy* §§ 48-50

25. N.Y.—*People v Hoffman*, supra.

26. S.C.—*In re Contested Election*, 32 S.C.L. 190

27. N.Y.—*People v Hoffman*, 60 N E 187, 166 NY 462, 54 L.R.A. 597

28. Ohio—*Wright v. Munger*, Wright 814

40 C.J. p 697 note 58

29. S.C.—*State v Wadkins*, 30 S.C.L. 42

30. Mo.—*Corpus Juris* cited in *McKittrick* for and in Behalf of *Donaldson v Brown*, 85 S.W.2d 385, 388, 337 Mo 281

40 C.J. p 697 note 61—p 698 notes 66, 76

31. N.Y.—*People v Van Allen*, 55 N Y 31

40 C.J. p 698 note 67

Courts-martial in army or navy see *Army and Navy* §§ 51-59

History

Courts-martial were instituted for

the trial of naval and military offenses, and existed as early as the reign of James II, and probably had their origin in the ancient court of chivalry—*People v Van Allen*, 55 NY 31

32. N.Y.—*People v. Van Allen*, supra.

40 C.J. p 698 note 68

33. Minn.—*State v Wagener*, 77 N W 424, 74 Minn 518, 73 Am.S.R. 369, 42 L.R.A. 749

ND—*State v Nuchols*, 119 NW 633, 18 ND 233, 20 L.R.A., NS, 413

34. La.—*State v Long*, 66 So 377, 136 La. 1, L.R.A. 1915D 235, Ann Cas 1917B 240

ND—*State v Peake*, 135 NW 197, 22 ND 457, 40 L.R.A., NS, 354
12 C.J. p 816 note 98

35. N.Y.—*People v. Daniell*, 50 N Y 274—*State v Peake*, 135 NW 197, 22 ND 457, 40 L.R.A., NS, 354

36. S.C.—*In re Contested Election*, 32 S.C.L. 190

37. N.C.—*Bell v. Tooley*, 33 NC 605

40 C.J. p 698 note 74

38. Or.—*Wright v White*, 110 P.2d 948, 166 Or 136, 135 A.L.R. 1

40 C.J. p 698 notes 79, 81, 83-85

39. Or.—*Wright v White*, supra

40 C.J. p 698 notes 78, 80, 82

40. Pa.—*Duffield v. Smith*, 3 Serg & R 590

5 C.J. p 346 note 17.

41. S.C.—*State v Wakely*, 11 S.C.L. 412

42. Or.—*Wright v White*, 110 P.2d 948, 166 Or 136, 135 A.L.R. 1.

Compliance shown

An order signed by the adjutant general of state National Guard reciting the appointment of a general court-martial, and stating, among other things, the names of the trial judge advocate and defense counsel, complied with statutory requirement for appointment of a trial judge advocate, and a defense counsel—*Wright v White*, supra.

the scope of the authority of the adjutant general to prefer charges against a militiaman.⁴³ A court-martial may be convened under state authority for the trial and punishment, in accordance with the federal statutes, of militiamen of the state who refuse or neglect to serve when called into actual service by the governor in pursuance of an order or requisition of the president.⁴⁴

c. Composition

The composition of a court-martial should conform to statutory requirements and it will ordinarily consist of commissioned officers.

Courts-martial are usually composed of commissioned officers.⁴⁵ Where a statute specifies the officers who are to be detailed for service on a court-martial,⁴⁶ the violation of such statute by the detailing of an officer other than as specified will, in the absence of a waiver by accused, render the sentence ineffective.⁴⁷ The statutes usually fix the number of members of a court-martial,⁴⁸ and, when less than the legal number act, the sentence of a court-martial is ineffective.⁴⁹ The right of the appointing officer to relieve a member and to detail another to membership has been recognized.⁵⁰ A temporary disability of one of the members of the court does not, it was held, create a vacancy within the meaning of a statute which authorized the filling of a vacancy in the court.⁵¹

d. Jurisdiction

- (1) In general
- (2) Of offenses

(1) In General

The jurisdiction of courts-martial is special and limited, and they may not assume the functions of the civil courts; courts-martial ordinarily have jurisdiction over the persons of militiamen while in service.

The jurisdiction of courts-martial is special and limited,⁵² and they cannot assume the functions or jurisdiction properly belonging to the civil courts.⁵³ The jurisdiction of a court-martial to try charges against a militia officer is not affected or lost because the reprimand imposed by the sentence of the court is published without notice.⁵⁴

Of persons Ordinarily courts-martial have jurisdiction of members of the militia⁵⁵ while in active service in times of war or public danger,⁵⁶ but the court has no jurisdiction of a person who is not subject to militia duty,⁵⁷ or of a member of the organized militia when he is not actually engaged in military duties, or in acts connected with such duties, and when he is not in uniform.⁵⁸ There is authority for the view that both a court-martial convened under the authority of the United States⁵⁹ and also a court-martial convened under state authority,⁶⁰ may take jurisdiction of the trial of a member of the militia who failed to comply with

43. Or—Wright v White, *supra*.

44. US—Martin v Mott, N.Y., 12 Wheat 19, 6 L.Ed 537.
5 C.J. p 346 note 16.

45. NC—Bell v Tooley, 33 NC 605.

46. Mass—Brooks v Davis, 17 Pick 148.
40 C.J. p 699 notes 93-98.

Some early statutes designated the officers who could meet as a court-martial—Bell v Tooley, 33 NC 605.

47. Mass—Brooks v Daniels, 22 Pick 498.

40 C.J. p 698 note 92.

Court of militia or regular army officers.

(1) Under early statutes, courts-martial for the trial of the militia were to be composed of militia officers—Vanderheyden v Young, 11 Johns, N.Y., 150—5 C.J. p 348 note 53.

(2) Regular army officers were ineligible to sit on such courts, but there was no provision that secured to a militiaman a trial by militia officers of his own state, and he could be tried anywhere and by militia officers of any of the states—Mills v Martin, 19 Johns, N.Y., 7.
48. NC—Bell v Tooley, 33 NC 605.

40 C.J. p 699 notes 99-4.

49. NC—Bell v Tooley, *supra*.
40 C.J. p 699 note 5.

50. N.Y.—Van Orsdall v Hazard, 3 Hill 243.

51. N.Y.—Van Orsdall v Hazard, *supra*.

52. ND—State v Peake, 135 NW 197, 22 ND 457, 40 L.R.A., N.S. 351.
40 C.J. p 699 note 8.

53. La.—O'Shee v Stafford, 47 So 764, 122 La 444, 16 Ann Cas 1163.

54. Wash—State v Mead, 100 P 1033, 52 Wash 533.

55. Minn—State v Fisher, 218 NW 542, 174 Minn 82, certiorari denied Klinge v State of Minnesota, 49 S.Ct 32, 278 US 636, 173 L.Ed 552.
40 C.J. p 699 note 11.

Military authorities do not lose jurisdiction over a National Guardsman under arrest for a military offense because they refrained from further action during habeas corpus proceedings—State v Fisher, 218 NW 542, 174 Minn 82, certiorari denied Klinge v State of Minnesota, 49 S.Ct 32, 278 US 636, 173 L.Ed 552.

56. Mo—McKittrick for and in Be-

half of Donaldson v Brown, 85 S W 2d 385, 337 Mo 281.

"Public danger"

Whenever any portion of National Guard is called or is on duty pursuant to authority of the governor, a "public danger," within meaning of Constitution exists and, by statute, articles of war governing army of the United States shall under such circumstances be enforced and as to offenses committed during that time courts-martial possess jurisdiction exercised by like courts under articles of war—McKittrick for and in Behalf of Donaldson v Brown, *supra*.

57. Vt—Barrett v Crane, 16 Vt 246.
40 C.J. p 699 note 12.

58. N.Y.—People v Townsend, 10 Abb N.Cas 169, affirmed 25 Hun 313.
40 C.J. p 699 note 13.

59. US—Martin v Mott, N.Y., 12 Wheat 19, 6 L.Ed 537.
40 C.J. p 699 note 18—5 C.J. p 307 note 2, p 349 note 68 [a] (1).

60. US—Houston v Moore, Pa., 5 Wheat 1, 5 L.Ed 19.
40 C.J. p 699 note 19—5 C.J. p 307 note 3, p 349 note 68 [a] (2).

the call of the president to enter the service of the United States. The fact that a National Guardsman was at the time of his enlistment a member of the United States Naval Reserve does not deprive a military tribunal of power to punish him for a violation of military law committed as a guardsman.⁶¹

(2) Of Offenses

The jurisdiction of courts-martial in times of peace may be limited to military offenses or to criminal offenses noncapital in nature.

A court-martial has jurisdiction of offenses of a military nature,⁶² such as neglect of duty,⁶³ conduct unbecoming an officer and a gentleman,⁶⁴ and violations of the articles of war, where such articles have been adopted as part of the disciplinary system.⁶⁵ The jurisdiction of a court-martial may be limited in times of peace to offenses of a military nature,⁶⁶ or may exclude capital offenses,⁶⁷ even though embracing serious offenses which are noncapital in character.⁶⁸ Where an offense charged is one cognizable by the civil courts, and a court-martial also has jurisdiction, the jurisdiction of the latter is not exclusive but concurrent.⁶⁹

Where a homicide is committed by a militiaman while on duty in time of public danger in an area not declared to be under martial law, the military authorities may, it has been held, detain the prisoner instead of delivering him to the civil authorities,

even though the latter may accuse him of murder in the first degree, a capital offense beyond the jurisdiction of a court-martial,⁷⁰ and a court-martial retaining jurisdiction to try the prisoner for manslaughter, an offense within their jurisdiction, may bar further prosecution in the civil courts for the more aggravated offense of first degree murder growing out of the same act.⁷¹ The military authorities do not lose jurisdiction of the prisoner and his offense merely because the exigency occasioning the calling out of the militia passes before he is brought to trial by court-martial.⁷²

e. Proceedings

The proceedings of a court-martial are regulated by law, and by the rules and customs of the service.

The proceedings of courts-martial are regulated by law, and by the rules and customs of the service.⁷³ A statute requiring publicity of trials has been held inapplicable to trials by courts-martial.⁷⁴

Organization of court The court must be organized in accordance with the law governing it,⁷⁵ and there is authority for the view that no presumption that it has been legally organized will be indulged.⁷⁶ Members of a court-martial ordered for the trial of several complaints against several officers must be sworn for the trial of each complaint.⁷⁷ It has been held that, where the oath to

61. Minn.—*State v. Fisher*, 218 N W 542, 174 Minn 82, certiorari denied *Klingbe v. State of Minnesota*, 49 S Ct 32, 278 U S 636, 173 L Ed 552.

62. Mo.—*Corpus Juris* cited in *McKittrick for and in Behalf of Donaldson v. Brown*, 85 S W 2d 385, 388, 337 Mo 281.

40 C J p 700 notes 22, 24, 25.

63. SC.—*Ex parte Biggers*, 26 S C L 89.

40 C J p 700 note 26.

64. NY.—*People v. Porter*, 3 N Y S 35, 50 Hun 161.

40 C J p 700 note 27.

65. Ohio.—*McGorray v. Murphy*, 88 N E 881, 80 Ohio St 413, 17 Ann Cas 444.

40 C J p 700 note 28.

66. NY.—*People v. New York County Jail*, 2 N E 870, 100 N Y 20, 3 N Y Cr 545.

Criminal libel committed by a militia officer in writing his superior officer concerning a civilian was not a military offense but a civil offense triable in the civil courts as distinguished from courts-martial.—*State v. Whitmore*, 116 So 819, 166 La 195.

67. Mo.—*McKittrick for and in Behalf of Donaldson v. Brown*, 85 S W 2d 385, 337 Mo 281.

First degree murder

Court-martial was held to have no jurisdiction to try prisoner on charge of deliberately committing a homicide while prisoner was on duty as member of state militia in flood area, since the charge was murder in the first degree, a capital offense, and not punishable by court-martial in time of peace.—*McKittrick for and in Behalf of Donaldson v. Brown*, 85 S W 2d 385, 337 Mo 281.

68. Mo.—*McKittrick for and in Behalf of Donaldson v. Brown*, 85 S W 2d 385, 337 Mo 281.

Manslaughter

Court-martial was held to have jurisdiction to try prisoner for willfully but without deliberation committing a homicide while prisoner was on duty as member of state militia in flood area, since the charge was manslaughter, not a capital crime, and thus was not barred from punishment by court-martial, even though committed in time of peace.—*McKittrick for and in Behalf of Donaldson v. Brown*, 85 S W 2d 385, 337 Mo 281.

69. Mo.—*McKittrick for and in Behalf of Donaldson v. Brown*, 85 S W 2d 385, 337 Mo 281.

70. Mo.—*McKittrick for and in Be-*

half of Donaldson v. Brown, 85 S W 2d 385, 337 Mo 281.

71. Mo.—*McKittrick for and in Behalf of Donaldson v. Brown*, 85 S W 2d 385, 337 Mo 281.

72. Mo.—*McKittrick for and in Behalf of Donaldson v. Brown*, 85 S W 2d 385, 337 Mo 281.

73. NY.—*Schuneman v. Diblee*, 14 Johns 235.

40 C J p 700 notes 36-40, p 701 notes 60, 63-65.

Process

NY.—*People v. Peck*, 26 N E 736, 125 N Y 535.

40 C J p 700 notes 30-34.

Evidence

NY.—*People v. Garling*, 6 Alb L J. 324.

40 C J p 701 notes 66-74.

74. NY.—*People v. Daniell*, 6 Lans 44, affirmed 50 N Y 274.

75. NC.—*Bell v. Tooley*, 33 N C 605, 40 C J p 700 notes 44-46, p 701 notes 52, 53.

Composition of courts-martial see *supra* subdivision c of this section.

76. NC.—*Bell v. Tooley*, *supra*, 40 C J p 700 note 43.

77. Mass.—*Coffin v. Wilbourn*, 7 Pick 149.

the designated members of a court-martial was administered by a judge advocate who himself had not duly qualified for the duties of his office by taking the required oath, the proceedings and decisions of the court were illegal and invalid ⁷⁸

A judge advocate is usually detailed with a court-martial as an officer whose presence and services are essential to the exercise of its functions ⁷⁹ Accused is entitled to counsel ⁸⁰

Charges and specifications It has been held that the charge, or formal written accusation in court-martial proceedings, need not be drawn with the same degree of particularity as is required in the case of an indictment,⁸¹ although it must be sufficiently clear to inform accused of the offense for which he is to be tried ⁸²

f. Conviction, Sentence, and Punishment

A conviction which includes one recognized offense is sufficient, and the court-martial may impose such punishments as are authorized by the statute, the sentence may be enforced by civil officers or others authorized under the law.

Under a statute it has been held that a formal conviction which includes two alleged offenses, only one of which is actually an offense against the state, is a sufficient conviction on which to hold accused ⁸³ The sentence must be approved as required by law,⁸⁴ and, under some statutes, the officer who ordered the court-martial is the proper officer to approve the sentence ⁸⁵

Punishment. Under some statutes courts-martial may be authorized to sentence offenders to sundry punishments,⁸⁶ such as a fine,⁸⁷ or imprisonment in case of nonpayment of a fine ⁸⁸ Authority to com-

bine two or more forms of punishment in one sentence may be given under statute ⁸⁹

Disposition of fines or forfeitures Fines and forfeitures must be disposed of as provided by statute,⁹⁰ and under some provisions, it has been held that fines collected shall be paid into, or credited to, the military fund of the organization of which the person on whom the fine was imposed is a member ⁹¹

Enforcement of sentence Under some statutes, the sentence of a court-martial, when approved, is ordinarily carried out by the sheriff or other civil officer designated by law on an execution or a warrant issued by the president of the court or some other militia officer ⁹² Some early statutes provided for an action in the civil courts to recover fines imposed by courts-martial⁹³ but under other statutes governing the militia it was held that such an action would not lie ⁹⁴ When judgment of removal is pronounced by a court-martial, it takes effect on the approval of the governor, without further action on his part ⁹⁵

It is the duty of the designated officer to carry out the lawful mandates of courts-martial, and defaults in this respect may render him pecuniarily liable,⁹⁶ but he is not liable for failure to collect fines which the court-martial had no authority to impose ⁹⁷ Under statutes which provide for the execution of a bond by a person appointed to execute the mandates or orders of the court, a voluntary bond given by one designated as collector of fines has been held enforceable ⁹⁸ Where the court was without jurisdiction, its decision does not protect the civil officer who attempts to give it effect ⁹⁹

78. Mass.—In re Opinion of Justices, 3 Cush 586

79. Mass.—In re Opinion of Justices, supra
40 C.J. p 701 note 48

80. Nev.—State v Crosby, 50 P 127, 24 Nev 115, 77 Am SR 786
40 C.J. p 701 note 54

81. NY—People v Porter, 3 NYS 35, 50 Hun 161
40 C.J. p 701 notes 55, 58, 59

82. NY—People v Porter, supra

83. Fla.—Dowling v. Lee, 66 So 142, 68 Fla 23

84. SC—State v Wakely, 11 SCL 412
40 C.J. p 702 notes 80, 81.

85. SC—State v Wakely, supra
40 C.J. p 702 note 82

86. Mass.—Coffin v Wilbour, 7 Pick 149
40 C.J. p 702 notes 83, 86–89

87. Minn.—State v. Wagener, 77 N

W 434, 74 Minn 518, 73 Am SR 369, 42 LRA 749

40 C.J. p 702 note 84

Statutes held valid

Ariz.—Ex parte Altman, 229 P. 388, 26 Ariz 635

40 C.J. p 702 note 94

88. Ariz.—Ex parte Altman, supra
40 C.J. p 702 notes 85, 90, 91.

Statutes held valid

Ariz.—Ex parte Altman, supra.
40 C.J. p 702 note 95

89. Mass.—Coffin v Wilbour, 7 Pick 149

40 C.J. p 702 notes 92, 93

90. SC—State v Stevens, 13 SCL 32

40 C.J. p 703 notes 15–17

91. SC—State v Stevens, supra

92. SC—Cair v Scott, 22 SCL 193

40 C.J. p 702, notes 98, 99, p 703 notes 1–4

93. Me.—Vose v Manly, 19 Me 331
40 C.J. p 703 note 5

94. NY—People v Hazard, 4 Hill 207.

95. NY—People v Hoffman, 60 N E 187, 166 N.Y. 462, 54 LRA 597

96. SC—Carr v. Scott, 22 SCL 193

97. Ala.—Nowlin v McCalley, 31 Ala 678

98. SC.—Cross v Gabeau, 17 SCL 211

Procedure

US—Legionary Paymaster v Spalding, DC, 15 FCas No. 8,212, 1 Cranch CC 387
40 C.J. p 703 note 11 [b]

99. US—Wise v Withers, DC, 3 Cranch 331, 2 L Ed 457
40 C.J. p 703 note 12

Under an early statute it was held that a collecting officer was not bound to know the persons who were exempt from militia duty.¹

g. Review

Ordinarily a sentence of a militia court-martial acting within its jurisdiction and approved by the proper authorities is not open to review by the civil courts

While there is authority for the view that the proceedings and judgment of a court-martial acting within its jurisdiction when approved by competent authority cannot be reviewed by a civil court,² in some jurisdictions, although not in others, such proceedings may be reviewed by certiorari, as discussed in Certiorari § 46. The question whether a court-martial had jurisdiction of the subject matter and of the person of accused is usually determinable by the civil courts.³

h. Conclusiveness of Adjudication

The adjudication of a court-martial may be collaterally attacked where it lacks jurisdiction

Where a court-martial has jurisdiction both of the subject matter and of the person of accused, its adjudication cannot be impeached collaterally for irregularities in the proceedings either before or at the time of trial.⁴ However, as courts-martial are courts of special and limited jurisdiction, as discussed supra subdivision d of this section, their judgments may be attacked in collateral proceedings for want of jurisdiction,⁵ and, in order to give a judgment effect, jurisdictional facts must be shown.⁶

§ 26. Incorporation, Organization, Property, and Civil Rights and Liabilities of Organization

Creation of militia districts or incorporation of militia bodies should conform to statutory and constitutional requirements. The funds of a militia organization may be raised by voluntary assessment or otherwise, and in a proper case actions may be brought for or against such organizations.

Under some statutes the right of military or militia organizations to incorporate or to form associations has been recognized.⁷ Incorporation for military purposes has been refused in the case of organizations which are not units of the National Guard or organized militia,⁸ but in the case of an organization which is recognized by the legislature as a military organization authorized to receive arms from the military authorities of the state, incorporation has been allowed.⁹

Under statutes authorizing creation of militia districts, the proper county authority has been held to be vested with discretionary power to determine whether a new district should be created,¹⁰ and, if so, to determine what citizens of the district should be appointed to act as commissioners,¹¹ and, if the territory embraced in the new district otherwise meets the requirements of the law, to decide where its boundary lines should be established.¹² Where proceedings for creation of a new district conform to statutory requirements, they lie within the discretion of the proper county authorities,¹³ such proceedings are regarded as political or legislative rather than legal,¹⁴ and, in the absence of fraud or abuse of discretion in determining questions arising in connection with creation of a militia district in conformity to statute, the determination of the county authorities is final and not open to judicial review.¹⁵ However, the discretion of the county authorities in no way grants them any power to create a militia district failing to conform to statutory requirements,¹⁶ and, where the authorities seek to establish a new district out of part of the territory of an existing district, it is essential that both the territory comprising the new district and that part remaining in the old district shall include within their respective limits the number of male persons liable to militia duty prescribed by statute as essential for a militia district.¹⁷

Property and funds Organization funds are sometimes raised by voluntary assessments, dues,

1. Pa.—Fox v Wood, 1 Rawle 143

2. SC—State v Stevens, 13 SCL 32

40 C J p 703 note 26

Review of courts-martial by prohibition see Prohibition § 12, also 40 C J p 704 note 32

3. ND—State v Peake, 135 NW 197, 22 ND 457, 40 L R A, NS, 354 40 C J p 704 note 30

4. Vt—Brown v Wadsworth, 15 Vt 170, 40 Am D 674

5. NY—People v New York County Jail, 2 NE 870, 100 N.Y. 20 40 C J p 703 note 22.

6. Me—Crawford v Howard, 30 Me 422

NY—People v New York County Jail, 2 NE 870, 100 NY 20

7. Pa.—In re Armory Ass'n Troop A, 25 Pa Dist 224

40 C J p 704 note 35

8. NY—Matter of Long Beach Defense Guards, Inc., 166 NYS 459, 100 Misc 584

40 C J p 704 note 36

9. Pa.—In re Armory Ass'n, Troop A, 25 Pa Dist 224

40 C J p 705 note 37

10. Ga.—Johnson v Chappell, 30 S E 2d 909, 198 Ga 162

11. Ga.—Johnson v Chappell, supra.

12. Ga.—Johnson v Chappell, supra.

13. Ga.—Johnson v. Chappell, supra

14. Ga.—Johnson v. Chappell, supra.

15. Ga.—Johnson v Chappell, supra.

16. Ga.—Johnson v. Chappell, supra.

17. Ga.—Johnson v. Chappell, supra.

and fines imposed under local by-laws¹⁸ It has been held that members of an incorporated military organization which has no capital stock are not entitled on dissolution to share in the distribution of the corporate property acquired by donations and held only for military purposes¹⁹

Actions There is authority for the view that an unincorporated militia company may be sued as a voluntary association,²⁰ but in order to authorize an action against the treasurer of such a company under a statute authorizing such an action in the case of voluntary associations, it must appear that all the members of the company are liable²¹ Members of an existing incorporated military organization which has no capital stock may not maintain an action for the appointment of a receiver to sell and distribute the proceeds of property acquired by the corporation by donations for military purposes,²² and persons who have ceased to be members of the corporation may not maintain an action to obtain control and management of the affairs and property of such corporation,²³ but it seems that on the refusal or failure of the officials who have control of the property to preserve it, after they have been duly requested, members of the corporation may, under proper allegations, bring an action for the preservation of the property²⁴

§ 27. Civil Status and Liability of Members of Militia

- a In general
- b Liability to civilians
- c Actions
- d Criminal responsibility

a In General

Militiamen may be exempt from civil suit under statute, and, when acting within the limits of their authority, are ordinarily granted immunity from liability for injuries to other militiamen resulting from acts in the performance of military duty

Under some statutes members of the militia are relieved from liability in civil courts for acts while in active service²⁵ Under such a statute it is only a member who is in active service in the sense of having been ordered into active service by the governor who may claim immunity²⁶ A statutory exemption of officers and soldiers of the militia from arrest on civil process does not confer an exemption from suit²⁷

Liability inter se The existence of the military status does not necessarily relieve a member of the militia from liability for injuries to another member arising out of acts in connection with the service,²⁸ although exemption from liability for such acts is sometimes granted by statute.²⁹ If a military officer transcends the limit of his authority, and assumes cognizance of matters not within his jurisdiction, his acts are void and afford no justification to him³⁰ or to those acting under his authority³¹ Moreover, an officer has been held liable for acts done by others pursuant to a void warrant issued by him³² Where, however, a member of the militia has acted within his authority and in good faith, no action against him based on his acts will lie³³ An officer of the organized militia is not liable for a personal injury to another member of the militia where the alleged wrongful act of such officer is not the proximate cause of the injury³⁴

Where, by statute, the duties of a surgeon in the militia have been assimilated to the duties of officers of similar rank in the United States army, such surgeon may not recover from another member of the militia for medical services in connection with injuries sustained by such other member in the line of duty³⁵ Moreover, a member of the volunteer militia cannot maintain an action against an officer for services performed pursuant to a military order given by the latter by direction of a superior officer³⁶ The right of a tort-feasor to rely on his military status as a defense has been denied when nei-

18. N.Y.—*People v Crane*, 26 N.E. 736, 125 N.Y. 535

Expense of providing or maintaining armories and other property used by militia see *supra* § 23

19. Ga.—*Clarke v Armstrong*, 106 S.E. 289, 151 Ga. 105
40 C.J. p. 705 note 39

20. Conn.—*Fox v Naramore*, 36 Conn. 376
40 C.J. p. 705 note 40

21. N.Y.—*Stikeman v Flack*, 67 N.E. 1090, 175 N.Y. 512
40 C.J. p. 705 note 41

22. Ga.—*Clarke v Armstrong*, 106 S.E. 289, 151 Ga. 105

23. Ga.—*Cummings v Hollis*, 33 S.E. 919, 108 Ga. 402

24. Ga.—*Clarke v Armstrong*, 106 S.E. 289, 151 Ga. 105

25. La.—*State v Josephson*, 45 So. 381, 120 La. 433

26. La.—*State v Josephson*, *supra*.

27. Pa.—*Land Title & Trust Co v Rambo*, 34 A. 207, 174 Pa. 566

28. Minn.—*Nixon v Reeves*, 67 N.W. 989, 65 Minn. 159, 33 L.R.A. 506

40 C.J. p. 705 note 48

29. Conn.—*Merriman v Bryant*, 14 Conn. 200
40 C.J. p. 705 note 49

30. Minn.—*Nixon v Reeves*, 67 N.W. 989, 65 Minn. 159, 33 L.R.A. 506

40 C.J. p. 705 note 50

31. Vt.—*Darling v Bowen*, 10 Vt. 148

32. Conn.—*Hall v Howd*, 10 Conn. 514, 27 Am. D. 696

33. Conn.—*Loomis v Simons*, 2 Root 454
40 C.J. p. 705 note 53

34. D.C.—*Cleveland v Harries*, 32 App. (D.C.) 300
40 C.J. p. 706 note 59

35. La.—*Harral v Vanorsten*, 18 La. 545

36. Mass.—*Savage v Gibbs*, 4 Gray 601.

ther of the parties involved was at the time in active service ³⁷

Where a military court has jurisdiction of the person and the subject matter, it is not answerable for its sentence in an action at the suit of a person who claims to have been injured thereby,³⁸ unless it acted corruptly or maliciously,³⁹ and the officers carrying out the sentence of the court are likewise protected.⁴⁰ If, however, the court is without jurisdiction, its members⁴¹ and the officer executing the warrant⁴² are liable to a civil action. National Guard officers have been held immune from suit for exercising their authority to order courts-martial for trial of their inferiors,⁴³ and for putting them under arrest preliminary to trial.⁴⁴

b. Liability to Civilians

- (1) In general
- (2) For execution of orders

(1) In General

The mere status of a militiaman does not exempt one from civil liability in tort or contract toward the general public; but a militiaman is not personally liable on contracts duly executed in his official capacity; nor may he be held in tort for acts lawful for a peace officer.

Generally speaking, the military status of a member of the militia does not exempt him from liability for torts committed by him.⁴⁵ It has been held that a member of the militia is entitled to the immunity afforded peace officers in the performance of their duties,⁴⁶ and to such immunity only,⁴⁷ at

least in time of peace while the civil power is functioning.⁴⁸ It has been held that in time of peace the legislature may not confer on the governor power to render members of the militia immune from civil responsibility for wrongs done to citizens,⁴⁹ or grant to them security beyond that accorded the civil officers in whose aid they act.⁵⁰

Where tortious acts of members of the militia were wanton and willful, it has been held that they cannot rely on the defense that plaintiff's violation of a statute regulating the use of roads by motor vehicles was a contributing cause,⁵¹ or that plaintiff is chargeable with contributory negligence.⁵² A person who is injured as the result of the firing of guns at militia exercises is not chargeable with contributory negligence in attending as a spectator where he had no knowledge that it was intended to fire.⁵³

For acts of subordinates Where subordinates act on an order of their superior officer, the superior officer is usually answerable for all acts within the fair scope of the order,⁵⁴ but not for acts unauthorized by the order.⁵⁵ An officer is not liable for acts of members of the militia who are not under his command.⁵⁶

Seizure or destruction of property and trespass. While circumstances may exist which will be a legal justification for the act of a member of the militia in destroying private property,⁵⁷ in the absence of an imminent and overwhelming necessity there is

37. La.—State v Josephson, 45 So 381, 120 La 438
40 C J p 706 note 63

38. Vt.—Barrett v Crane, 16 Vt 246
40 C J p 705 note 54.

39. SC.—Macon v Cook, 11 SCL 379

40. Pa.—Shoemaker v Nesbit, 2 Rawle 201
Vt.—Barrett v Crane, 16 Vt 246

41. NY.—Capron v Austin, 7 Johns 96
40 C J p 705 note 57

42. Vt.—Barrett v Crane, 16 Vt 246.

43. Or.—Wright v White, 110 P 2d 948, 166 Or 136, 135 A L R. 1

Reason for rule

It is as essential to the fearless and independent exercise of authority, conferred on officers of the National Guard, to enforce military discipline, that they be free from the apprehension of vexatious suits grounded on their official acts, as it is that a like immunity should be enjoyed by judges of the civil courts.—Wright v White, supra

Different measure of redress

The provision of the articles of war governing National Guard that, if any officer or soldier is refused redress for any wrong by his commanding officer, he may complain to the commanding general in locality and that the general shall examine into complaint and take proper measures for redressing the wrong complained of, prescribes the measure and mode of redress to which an officer is entitled for a wrong done him by his commanding officer, and precludes maintenance of action for malicious prosecution by injured officer against his superiors who instigated and prosecuted a general court-martial against the officer for violation of the articles of war.—Wright v White, supra

44. Or.—Wright v White, supra

45. Ky.—Franks v Smith, 134 SW 484, 142 Ky 232, L R A 1915A 1141, Ann Cas 1912D 319
40 C J p 706 note 66

46. Ky.—Franks v Smith, 134 S.W. 484, 142 Ky 232, L R A 1915A 1141, Ann Cas 1912D 319

47. Ky.—Franks v Smith, supra

48. Mich.—Bishop v Vandercook, 200 N W. 278, 228 Mich 299

49. Mich.—Bishop v. Vandercook, supra
40 C J p 706 note 70

50. Mich.—Bishop v Vandercook, supra

51. Mich.—Bishop v. Vandercook, supra
40 C J p 706 note 72

52. Mich.—Bishop v Vandercook, supra

53. NY.—Castle v Duryee, 1 Abb Dec 327, 2 Keyes 169, 30 How Pr. 591 note

54. La.—O'Shee v Stafford, 47 So. 764, 122 La 444, 16 Ann Cas 1163.
40 C J p 706 note 75

55. Mass.—Ela v Smith, 5 Gray 121, 66 Am D 356

56. Mass.—Moody v Ward, 13 Mass. 299

57. Mont.—Herlihy v Donohue, 161 P. 164, 52 Mont 601, L R A 1917B 702, Ann Cas 1917C 29
40 C J p 706 note 79

no legal justification for the destruction⁵⁸ or seizure⁵⁹ of such property. Moreover, there is authority for the view that an officer of the militia is liable for trespasses on private property by members of his command under his orders,⁶⁰ but in the case of uninclosed land it has been held that until the owner forbade its use for militia purposes he could not hold an officer liable for acts of the members of such officer's command, although such acts would have constituted actionable trespass if they had been forbidden.⁶¹

Contracts Where an officer of the militia makes a contract without authority,⁶² or where he makes a contract without holding himself out expressly or ostensibly as agent,⁶³ his contract imposes on him a personal liability. Ordinarily, however, a member of the militia is not liable personally where he acts in his official capacity.⁶⁴

(2) For Execution of Orders

Generally, a militiaman is not personally liable for acts committed in obedience to orders of his superiors unless such orders are clearly illegal, but some authorities hold that the order of a superior officer does not necessarily constitute legal justification for acts of a militiaman.

The view has been taken that, since it is the duty of a member of the militia to obey the lawful orders of his superiors, he cannot be held personally liable in any civil action for acts done pursuant to such orders, but may set up his superiors' commands in justification thereof and as a complete defense to actions for damages,⁶⁵ and the rule has also been laid down that an order given by a superior officer, which does not expressly and clearly show on its face its own illegality and want of authority, will be a protection against civil actions for acts done in accordance therewith.⁶⁶ However, there is au-

thority for the view that the order of a superior officer does not necessarily constitute legal justification for acts of a member of the militia done pursuant to such order,⁶⁷ as where such order is unlawful in that it attempts to confer greater authority than a member of the militia may lawfully exercise.⁶⁸

If an order is so clearly illegal or unauthorized that any reasonably prudent man ought to recognize the fact, obedience thereto furnishes no excuse for a wrongful act,⁶⁹ even though disobedience may subject the offender to punishment at the hands of a military tribunal.⁷⁰ An officer of the militia who called out his company in violation of a statute, prohibiting the calling out of the militia at certain times, may not avoid liability in an action for the penalty imposed by the statute by showing that he acted by command of a superior officer.⁷¹

c Actions

Under statute militiamen may be immune from civil suit during periods of active service, but where suit may be brought, general rules as to actions may be applicable.

Under some statutes exemption from service of process in civil suits may be extended to persons engaged in the military service of the state,⁷² or prosecution of suits may be stayed while defendant is in the actual military service of the state,⁷³ and, even in the absence of statute, it has been held that public policy demands the recognition of such exemption.⁷⁴ Where such statutes are ambiguous, they should be construed in favor of the party to whom the law has extended the privilege.⁷⁵ "Civil process," within the meaning of the statutes, has been held to extend to bail writs.⁷⁶

Where there is no immunity from suit, ordinarily the rules governing civil actions generally apply to actions brought against members of the militia.⁷⁷

58. Mont—Herlihy v Donohue, supra.

40 C J p 706 note 80

59. Ky—Hogue v Penn, 3 Bush 663, 96 Am D 274—Mercer v Humphrey, 7 Ky Op 141

60. Mass—Brigham v. Edmonds, 7 Gray 359

40 C J p 706 note 82

61. S C—Law v Nettles, 18 S C L 447

40 C J p 706 note 83

62. Ala—Gillespie v Wesson, 7 Port 454, 31 Am D 715

63. N Y—Swift v Hopkins, 13 Johns 313

40 C J p 707 note 94

64. Ohio—Smurr v. Forman, 1 Ohio 272

40 C J p 707 note 95

65. Cal—Corpus Juris cited in Arm-

strong v Sengo, 61 P 2d 1188, 1191, 17 Cal App 2d 300

40 C J p 707 note 85

66. Mont—Herlihy v Donohue, 161 P 164, 52 Mont 601, L R A 1917B 702, Ann Cas 1917C 29

40 C J p 707 note 86

67. N C—Allen v Gardner, 109 S E 260, 182 N C 425

40 C J p 707 note 87

68. Ky—Franks v Smith, 134 S W 484, 142 Ky 232, L R A 1915A 1141, Ann Cas 1912D 319

40 C J p 707 note 88

69. Cal—Corpus Juris cited in Armstrong v Sengo, 61 P 2d 1188, 1191, 17 Cal App 2d 300

Mont—Herlihy v Donohue, 161 P 164, 52 Mont 602, L R A 1917B 702, Ann Cas 1917C 29

70. Mont—Herlihy v Donohue, supra

71. N Y—Hyde v Melvin, 11 Johns 521

40 C J p 707 note 91

72. Ala—Greening v Sheffield, 1 Minor 276

50 C J p 538 note 14

Immunity from arrest see supra § 6

73. Mo—Donnell v Stephens, 35 Mo 411

40 C J p 707 note 96

74. Pa—Land Title & Trust Co v Rambo, 34 A 207, 174 Pa 566

75. Ala—Greening v Sheffield, Minor, 276

76. S C—Gregg v Summers, 12 S C L 461

77. Mont—Herlihy v Donohue, 161 P 164, 52 Mont 601, L R A 1917B 702, Ann Cas 1917C 29

Jurisdiction

Actions in district court against

as in respect of pleading,⁷⁸ evidence,⁷⁹ and trial.⁸⁰

d. Criminal Responsibility

Militiamen are not criminally responsible for acts committed pursuant to a lawful order of a superior, but may be held for unlawful acts

In general, a member of the militia is criminally liable for an act which is not necessary for the carrying out of his orders or the performance of his duty, where the elements of a criminal offense are present,⁸¹ but it has been held that he is not liable for an act done pursuant to, and within, an order of a superior officer which is fair and lawful on its face.⁸² A statute making it a penal offense for a member of the militia to fire a musket on days of exercise or review except by order of his commanding officer does not render liable a person who, after his organization has been dismissed, fires his musket by order of his commanding officer.⁸³

Jurisdiction and venue When a member of the militia, in time of peace, commits an offense against the laws of a state, the civil courts of the state in which the offense is committed have jurisdiction of the offense,⁸⁴ as where the offense charged is a capital one,⁸⁵ and, in the case of a capital offense where the court has first obtained jurisdiction, it may not be deprived thereof.⁸⁶ Some statutes specifically provide for a change of venue where the application therefor is supported by the required affidavits to the effect that accused member of the militia cannot have a fair and impartial trial in

the court in which the prosecution is first begun.⁸⁷

§ 28. Aid to Militiamen and Their Dependents

Militiamen and their dependents are entitled only to such benefits for injuries sustained in service as may be accorded under provisions of law

In the absence of constitutional or statutory provision therefor, a militiaman or his representatives may not recover from the state for his injuries sustained in line of duty,⁸⁸ and statutes providing benefits for militiamen injured or contracting disease in line of duty have been construed as not retroactive so as to permit recovery for injuries occurring before their enactment.⁸⁹ However, under some statutes, provision is made to aid a member of the National Guard who is incapacitated while on duty,⁹⁰ and suitable proceedings will lie to compel the payment of an amount duly appropriated by the legislature for the purpose.⁹¹ Some statutes have been passed for relieving the dependents of those members of the militia who were mustered into the active service of the state.⁹²

Statutes providing that every member of the military forces of the state who shall be wounded or disabled while in its service shall be taken care of, and provided for, at the expense of the state may constitute sufficient authority to empower a proper officer of the state to supply benefits on timely application,⁹³ but they do not, it has been held, evidence a legislative intent to allow those entitled to

militia officers for false arrest were within court's jurisdiction even if liability should be contested by answers alleging that defendant officers were acting under orders of governor and under proclamation of martial law—State ex rel O'Connor v District Court in and for Shelby County, 260 N.W. 73, 219 Iowa 1165, 99 A.L.R. 967

78. Mont—Herlihy v Donohue, 161 P. 164, 52 Mont 601, L.R.A. 1917B 702, Ann Cas 1917C 29

Facts to be specially pleaded

Facts relied on by a member of the militia as a justification for the destruction of property must be specially pleaded—Herlihy v Donohue, supra

79. Mont—Herlihy v Donohue, supra
40 C.J. p 707 notes 1-3

80. Mich—Bishop v Vandercook, 200 N.W. 278, 238 Mich 299
40 C.J. p 707 note 7

81. Tex—Manley v State, 137 S.W. 1137, 62 Tex Cr 393
40 C.J. p 708 note 8

82. Pa.—Commonwealth v Shortall,

55 A 952, 206 Pa 165, 98 Am S.R. 759, 65 L.R.A. 193

83. Conn—State v Hungerford, 4 Day 383

84. Tex—Manley v State, 154 S.W. 1008, 69 Tex Cr 502

85. Tex—Manley v State, supra—Manley v State, 137 S.W. 1137, 62 Tex Cr 392

86. Tex—Manley v State, 154 S.W. 1008, 69 Tex Cr 502

87. Tex—Manley v State, 137 S.W. 1137, 62 Tex Cr 392

88. Okl—Mountcastle v State, 145 P.2d 392, 193 Okl 506

Tex—State v Dickerson, 174 S.W.2d 244, 141 Tex 475

89. Okl—Mountcastle v State, 145 P.2d 392, 193 Okl 506

90. N.J.—Kurnath v State, 31 A.2d 777, 130 N.J. Law 87, affirmed 85 A.2d 880, 131 N.J. Law 161
40 C.J. p 708 notes 15, 18-21

91. W.Va.—Woodall v Darst, 77 S.E. 264, 71 W.Va. 350, 44 L.R.A., N.S., 83, Ann Cas 1914B 1278, concurring opinion 80 S.E. 367, 71 W.Va. 350, 44 L.R.A., N.S., 83, Ann Cas 1914B 1278

92. N.J.—State v. Newark, 29 N.J. Law 232

93. Tex—State v Dickerson, 174 S.W.2d 244, 141 Tex 475

Nature and extent of benefits

(1) The phrase "taken care of and provided for" as used in article under which state assumes liability to take care of, and provide for, militiamen, who are wounded or become injured in such service, includes only such reasonably appropriate means and facilities which fall within commonly accepted meaning of phrase such as food, clothing, housing, medicine, medical care, nursing, hospitalization and the like during disability, and excludes loss of time, decreased capacity or total incapacity to earn money, physical or mental pain, or other damage resulting from disability—Dickerson v State, Civ App. 169 S.W.2d 1005, reversed on other grounds State v Dickerson, 174 S.W.2d 244, 141 Tex. 475

(2) The expressions "taken care of" and "provided for" are complementary, the first expression importing actual doing of requisite things and other importing supplying means

such benefits to supply the benefits themselves, or to contract with others therefor, and thereafter hold the state liable for the cost or value thereof.⁹⁴ Under some statutes, medical service and compensation may be obtained by members of the National Guard only for injuries sustained while at drill or in the performance of duty ordered by competent authority,⁹⁵ and under such provisions militiamen injured while returning to camp from an authorized leave were not injured in line of duty so as to be entitled to the benefits of the statute.⁹⁶

Under statutes providing for leave of absence for state and municipal employees who are members of the National Guard, Naval Militia, or State Guard without loss of pay, and statutes providing that the salary of such employees shall equal the loss suffered by them while on active duty with the army or navy of the United States, members of the State Guard should, when serving with federal forces,

receive the same benefits as members of the National Guard or Naval Militia, even though a member of the State Guard may not as such be ordered into the federal service.⁹⁷ Under such statutes a state guardsman who enlisted in the United States Naval Reserve and was a member of the State Guard at the time when he was called to active duty with the Naval Reserve was entitled to the difference in pay between his county salary and his navy pay, even though he subsequently tendered a resignation from the State Guard which was accepted *nunc pro tunc* as of the date of call to active duty.⁹⁸

§ 29. Offenses by Persons Not in Service

Offenses by persons not in the military or naval service of the United States are discussed in Army and Navy §§ 42-47

Examine Pocket Parts for later cases.

MILK A white fluid secreted by female mammals for the nourishment of their young.¹ The term "milk," when used to indicate the milk that is ordinarily sold in this country for human consumption, generally refers to the milk that comes from cows,² but there are other kinds of milk and the term is remotely defined as meaning the white juice of plants, or the milk in the cocoanut, or that in the Milky-Way.³ "Milk" has been compared with "cream" see 21 C J S p 1037 note 10. Milk has been the subject of many regulatory measures and for specific references see the index to the title Food.

Skimmed milk A generic term⁴ too well understood to admit of any confounding or misunderstanding of its meaning⁵ defined as milk with the cream, or butter fat, extracted,⁶ milk from which its natural cream has been taken in whole or in part.⁷

Other phrases employing the word are set out in the note.⁸

MILL Defined see Mills § 1. Phrases in which the word "mill" occurs see Mills § 2

MILLET. Any of various small seeded cereal and forage grasses, specifically, an annual grass extensively cultivated in Europe and Asia for its grain, which is used both as an article of diet for man and as a food for birds.⁹

MILLINER. In common usage, a woman who makes and sells bonnets and other headgear for women.¹⁰

MILLONES Y CIENTOS. Literally, millions and hundreds, a form of tribute enjoyed by the Spanish crown.¹¹

or facilities for their doing—Dickerson v State, Civ App, 169 SW 2d 1005, reversed on other grounds State v Dickerson, 174 SW 2d 244, 141 Tex 475

94. Tex—State v Dickerson, 174 SW 2d 244, 141 Tex 475

95. N.J.—Kurnath v State, 31 A 2d 777, 130 N.J. Law 87, affirmed 35 A 2d 880, 131 N.J. Law 161

96. N.J.—Kurnath v State, supra

97. N.J.—Adams v Atlantic County, Cir Ct, 53 A 2d 168

98. N.J.—Adams v Atlantic County, supra

1. Or—State v Carmody, 91 P 446, 448, 50 Or 1, 12 L.R.A.N.S., 828 40 C.J. p 708 note 2.

2. Ala.—Fuqua v Birmingham, 82 So 626, 17 Ala App 142

40 C.J. p 708 note 4

3. Or—State v Carmody, 91 P 446, 448, 50 Or 1, 12 L.R.A.N.S., 828

Wis.—Briffitt v State, 16 NW 39, 40, 41, 58 Wis 39, 46 Am R 621

4. Pa.—Commonwealth v Hufnagel, 39 A 1052, 1053, 185 Pa 376

5. Ala.—Fuqua v Birmingham, 82 So 626, 627, 17 Ala App 112

6. Ala.—Fuqua v Birmingham, supra

7. U.S.—Hebe Co v Culvert, DC Ohio, 246 F 711, 716

Pa.—Commonwealth v Hufnagel, 39 A 1052, 1053, 185 Pa 376

8. Phrases

(1) "Certified milk" see 14 C.J.S. p 115 note 491

(2) "Concentrated milk" see 15 C.J.S. p 793 note 6

(3) "Condensed milk" and "condensed skimmed milk" see 15 C.J.S. p 807 notes 24, 25

(4) "Handling of milk" see 39 C.J.S. p 771 note 82

(5) "Whole milk" as the equivalent of "butter fats" see 12 C.J.S. p 862 note 7

9. Webster New Int. D "Grain" as including "millet" see 38 C.J.S. p 976 note 75

10. Ala.—Tuscaloosa v Holcstein, 32 So 1007, 1008, 134 Ala 636 40 C.J. p 709 note 12

11. Escriche Diccionario

WORDS AND PHRASES

AND

MAXIMS

IN THIS VOLUME

	Page		Page
Lawful matrimony	453	Matrimony	453
Master builder	443	Matrix	453
Master commissioner	443	Matriz	454
Master plumber	443	Matron	454
Masters in chancery	448	Matrons, jury of	454
Mastery	448	Matte	454
Masthead	448	Matte	454
Mastitis	448	Matte	454
Mast selling	448	Mature	455
Masturbation	448	Maturely	455
Mat	448	Maturity	455
Matamos	448	Matutiora sunt vota mulierum quam virorum	455
Match	448	Matzoon	455
Mate	448	Mauka	455
Materia	448	Mausoleum	455
Material	448	Maxim	455
Materiality	451	Maxima	455
Materially	452	Maxime	455
Materialman	452	Maximum	455
Materialmen	452	Maximus	455
Materia medica	448	May	456
Maternal	452	Maybe	460
Materna maternis	452	Mayor	474
Maternity	452	Mayorazgo	474
Mathematical	452	Mayor de edad	474
Mathematics	452	Mayordomo	474
Matricide	453	Mayor's court	474
Matricula	453	Maza	474
Matricula clericorum	453	M D.	474
Matricula de commercio	453	Me	474
Matricula pauperum	453	Meadow	474
Matriculate	453	Meal	474
Matriculated	453	Mean	475
Matriculation	453	Meander	477
Matrimonia debent esse libera	453	Meantime	477
Matrimonial	453	Meanwhile	477
Matrimonio	453	Measure	477
Matrimonium	453	Measurement	478
		Meat	478

WORDS AND PHRASES

	Page		Page
Mechanic	478	Membrane	1046
Mechanical	480	Memorandum	1047
Mechanical pursuit	481	Memorial	1047
Mechanician	481	Memoria testamentaria	1047
Mechanics	481	Memorization	1047
Mechanism	1040	Memory	1047
Mechanotherapy	1040	Men	1048
Mech's	1040	Menace	1048
Med	1040	Menacing	1048
Medal	1040	Menage	1048
Meddler	1040	Menagerie	1048
Medcor	1040	Mend	1048
Media	1040	Mendigo	1048
Media annata	1040	Mending	1048
Media concludendi	1040	Menestral	1048
Median	1040	Menial	1048
Mediastinitis	1041	Meniere's disease	1049
Mediate	1041	Meninges	1049
Mediation	1041	Meningitis	1049
Mediator	1041	Menor	1049
Medical	1041	Menoria	1049
Medicina	1041	Menoscabo	1049
Medicinal	1041	Mensa et thoro	1049
Medicinal preparations	1041	Mens rea	1049
Medicine	1042	Mens testatoris in testamentis spectanda est	1049
Medico	1043	Mensuration	1049
Medico-legal	1043	Mental	1049
Medida	1043	Mentality	1049
Medio acquietando	1043	Mentally	1049
Meditate	1043	Mente captus	1049
Meditated	1043	Mentecato	1049
Medium	1043	Mention	1049
Medley	1043	Mentiri est contra mentem ire	1050
Meema	1043	Menudos	1050
Meet	1043	Menu, laws of	1050
Meeting	1044	Mercader	1050
Meetinghouse	1045	Mercaderia	1050
Megalomania	1045	Mercado	1050
Megiddo	1045	Mercantile	1050
Meiden	1045	Mercantile purpose	1051
Mellicke system	1045	Mercantile pursuits	1051
Melancholia	1045	Mercaptans	1055
Melior	1045	Mercenary	1055
Meliorating waste	1045	Mercen-lage	1055
Meliorations	1045	Merchandise	1055
Meliorem	1045	Merchant	1060
Melius	1045	Merchantability	1065
Melius inquirendum	1045	Merchantable	1065
Melrose	1045	Merchantman	1066
Melt	1045	Merchant's accounts	1066
Melting	1045	Merchet	1066
Mem.	1045	Merciament	1066
Member	1045	Merciful	1066
Membership	1046	Mercimonia	1066

WORDS AND PHRASES

	Page		Page
Mercis	1066	Metallurgy	1075
Mercurial	1066	Metaphysical	1075
Mercury	1066	Metaphysics	1075
Mercy	1066	Metastable	1075
Mere ...	1066	Metastasis	1075
Merely	1067	Metasyphus	1075
Meretricious	1067	Metayer system	1075
Merge	1067	Metegavel	1075
Merger	1067, 1068	Meteorite	1075
Merger of corporations	1069	Meter	1075
Merger of estates	1069	Metes and bounds	1076
Merger of prior and contemporaneous nego- tiations into a written instrument	1069	Methcglin	1076
Merger of rights.	1069	Method	1076
Meridian	1069	Methodist church	1076
Merino	1069	Methomania	1076
Merit	1070	Methyl alcohol	1076
Merito	1071	Metre	1076
Meritorious	1071	Metric system	1076
Meritos de proceso	1071	Metteschap	1076
Merits	1070	Metteshep	1076
Merit system	1070	Metus	1076
Mero motu	1071	Mcum	1076
Merry-go-round	1071	Mexican	1076
Merton, statute of	1071	Mezcla	1077
Merx est quicquid vendi potest	1071	Mezzanine	1077
Mes	1071	M F B M	1077
Mescentery	1071	Mfg	1077
Mesh	1071	Mica	1077
Mesial	1072	Micanite	1077
Mesnality	1072	Michael	1077
Mesnalty	1072	Michaelmas	1077
Mesne	1072	Michaelmas term	1077
Mesne profits	1072	Michel-gemot	1077
Mesne, writ of	1072	Michel-Synoth	1077
Meson	1072	Michigan	1077
Mesquite	1072	Microbe	1077
Message	1072	Microphone	1077
Messenger	1072	Mid	1077
Messis sementem sequitur	1072	Middle	1078
Mess pork	1072	Middleman	1078
Messuage	1073	Middlesex, Bill of	1078
Messuagium	1073	Middle West	1078
Mesta	1073	Middling	1078
Mestizo	1073	Midshipman	1078
Metabolism	1073	Midway	1078
Metacarpal bones	1073	Mid-West	1077
Metal	1074	Midwife	1078
Metalize	1074	Miedo	1078
Metallic	1074	Miers theory	1079
Metalliferous	1074	Might	1079
Metallophone	1074	Mighty	1079
Metallurgical	1075	Migrans	1079
Metallurgist	1075	Migrate	1079
		Migration	1079

WORDS AND PHRASES

	Page		Page
Migratory	1079	Mill	1113
Mike	1079	Millet ..	1113
Milch ..	1079	Milliner	1113
Mile	1079	Millones y cientos	1113
Mileage	1079	Minoridad	1049
Milicia	1080	Mite	1045
Militant	1080	Miting	1045
Militar	1080	Rate of metabolism	1073
Military	1080	Skimmed milk	1113
Milk	1113	Unlawful matrimony	453

INDEX TO MASTER AND SERVANT

Abandonment,

Employment contract, termination of relation, §§ 33, 40

Settlement of labor disputes, proceedings for, § 28(79)

Abandonment of employment,

Bonus, right to as affected, § 98, p 530

Enticing servant to leave employment, liability as affected, § 626

Evidence as to in action to recover compensation, § 129, p 586

Independent contractor, liability for negligence as affected, § 595

Injuries to third persons, liability of master under doctrine of respondent superior as affected, § 568

Liability of employee, § 78

Termination of employment contract, abandonment of employment by servant, §§ 33, 40

Wages or other remuneration, post

Abnormal risks or hazards, warning and instructing servant, § 284

Delegation of duty, § 285

Experienced employee, § 305

Absence from work, discharge of employee on ground of, § 42, p 429, n 22

Abusive conduct, discharge of employee as warranted, § 42, p 429, n 28

Acceptance, contract of employment, necessity, § 6, p 65

Accepted orders, commissions, construction of contracts allowing, § 90, p 520

Accidental injuries. Injuries to servants, post

Accord and satisfaction,

Fair Labor Standards Act, release of liability, § 151(35), pp. 736-741

Wages,

Minimum wages and overtime pay, release of liability, § 151(35), pp 736-741

Statute as precluding, § 157, p 766

Accounting,

Fair Labor Standards Act, power of administrator over, § 151(33)

Wages, actions for, § 122

Judgment, § 134

Pleading, § 128, p 571, n 40

Time of bringing, § 124, n 86

Accrued cause of action for injury to servant, repeal of statute affecting right, § 173, p 845

Acquiescence, nonperformance of contract by employee, liability as affected, § 77

Act of God,

Hours of labor, excuse for violation of Federal Hours of Service Act, § 22

Injury to servant due to, liability of master, § 188

Termination of employment contract, incapacity of servant as result of, § 38

Actions,

Breach of employment contract, § 11, pp 84-90

Rules governing, § 77

Clearance card or letter, failure of employer to furnish discharged employee with, § 45

Collective bargaining, breach of contract, § 28 (71), p 251

Actions for breach of contract between employer and bargaining representative, § 28(120)

Employment contract, breach of, § 11, pp 84-90

Enticing servant to leave employment, § 627

Fair Labor Standards Act, post

Hours of labor, penalty for violation of law, recovery, § 23

Injuries to servant, §§ 482-554, pp 7-267

Injuries to third persons, §§ 611-621, pp 383-424

Interference with employment relation, § 624

Interference with relation by third persons, malicious procurement of discharge, § 631

Invention by employees, actions relating to, § 73, p 495

Labor unions, employer's right to maintain action for damages against, § 28(84)

Leaving employment in violation of contract, § 78

Malicious procurement of discharge of servant, § 631

Medical services, breach of contract to furnish, § 163, p 818

Minimum wages, public employees or employees on public works, § 153, p 753

National Labor Relations Board, capacity to sue and be sued, § 28(65)

Negligence of employee resulting in loss to employer, damages recoverable, § 79, pp 502-505

Relief and benefit departments or associations, recovery of benefit, § 169, p 835

Service letter, discharged employee, right of action for, § 44 p 437

Wages and other remuneration, post

Wrongful discharge, post

Actors, independent contractors, § 3(9)

Adamson Act,

Construction, § 15, p 100

Eight hour day, limitation to members of train crew, § 153, n 27

Minimum wages, contract employing trainman subsequent to, § 151(25)

Standard of wages, workmen coming within Act, § 151(5)

Additional compensation. Wages and other remuneration, post

Adjustment boards. National Railroad Adjustment Board, generally, post

Adjustment of labor disputes. Settlement of labor disputes, generally, post

INDEX TO MASTER AND SERVANT

- Administrative employees, Fair Labor Standards Act, exemption, § 151(12), pp 664-672
 - Evidence, § 160(8), p 801
- Administrative proceedings Settlement of labor disputes, post
- Administrator Fair Labor Standards Act, post
- Admiralty, injuries to servant, jurisdiction of, § 172
- Admissibility of evidence Evidence, post
- Admissions,
 - Injuries to servants, actions for,
 - Plea or answer, § 494 p 37
 - Proof, § 498
 - Wages, actions to recover, § 128, p 573
- Advances,
 - Commission account, employee's right to, § 91
 - Labor contract statutes,
 - Admissibility of evidence in prosecution of employee for violation, § 80, p 509
 - Indictment against employee for violation as required to specify, § 80, p 507
 - Profit sharing agreement, repayment of excess, § 95
 - Reimbursement of employee for advances made to employer, § 100
 - Relationship as arising between employees and one making, § 2, p 31
 - Wages and other remuneration, post
- Adverse interest,
 - Discharge of employee because of, § 42, p 430
 - Implied obligation of employee in respect of, § 70
- Advice of counsel, malicious discharge of employee procured under, liability for damages, § 630, p 435
- Affidavits,
 - Enticing servant to leave employment, prosecution for, § 635
 - Wage lien, enforcement, § 149, p 614
- Affiliated corporations, interstate commerce, National Labor Relations Act as applying, § 28(9), p 132
- Affiliation, labor unions, compelling, § 28(15), p 146
- Affirmative defenses in action for injuries to servant,
 - Assumption of risk, § 492
 - Contributory negligence, § 493
 - Special pleading, § 494, p 37
- After-acquired property, lien for wages as extending to, § 145
- Age,
 - Contributory negligence, consideration in determining, § 427
 - Fellow servants, competency as affected, § 313
 - Infants, generally, post
 - Misrepresentation in contract of employment, validity as affected, § 6, p 67
 - Misrepresentation or concealment, defense in action for injuries to minor employed in violation of statute, § 194, p 890
 - Right to enter into relationship as affected, § 2, p 31
 - Warning or instructing servant,
 - Duty as affected, § 284
 - Liability as affected, §§ 304-306, pp 1063-1068
 - Sufficiency of warning as affected, § 289
- Agents Principal and agent, generally, post
- Aggravation, illness or injury, damages as recoverable on breach of contract to furnish medical services, § 163, p 818
- Agreements,
 - Closed shop, post
 - Collective bargaining, post
 - Contracts of employment, generally, post
 - Wages and other remuneration, post
- Agricultural laborers,
 - Assumption of risk, ordinary risks, § 375
 - Fair Labor Standards Act, exemption of employees, § 151(17)
 - Lien for wages, § 143, p 608
 - National Labor Relations Act, exclusion from team employee, § 28(12)
 - Safe place to work, statute requiring employer to furnish as applicable, § 210, p 930
 - Servant or employee, § 2, p 30, n 71
- Agricultural machinery, safety appliances, § 232, pp. 983, 984
- Agricultural products,
 - Fair Labor Standards Act, exemption of employees engaged in processing, § 151(10), pp 685-689
 - Processors and packers engaged in interstate commerce, National Labor Relations Act as applying, § 28(9), p 133
- Agriculture, Fair Labor Standards Act, exemption of employees engaged in, § 151(17)
- Air carriers, Fair Labor Standards Act, exemption of employee of carrier subject to Railway Labor Act, § 151(23)
- Aliens, public work, validity of statutes forbidding employment on, § 14, p 96
- Alighting from moving cars or locomotives, contributory negligence, violation of rule or order, § 459, p 1300
- Allurements,
 - Employee organizations, interference accomplished through, § 28(25), p. 163, n 59
 - Unfair labor practice, interference accomplished through, § 28(45), p 210
- Alterations after injuries to servant, admissibility of evidence, § 509, n 29
- Alterations of contract, independent contractor relationship as affected by reservation of right to make, § 3(4)
- Ambiguity, employment contracts,
 - Collective bargaining in respect of, § 28(22)
 - Construction, § 7, p 72
 - Commencement and duration of employment, § 8, p 75
 - Independent contractors, determination of relationship, § 3(2), p 48
- Amendments,
 - Pleadings,
 - Action for injuries to servant, § 496
 - Actions to recover wages, § 128, p 574
 - Fair Labor Standards Act, actions to enforce, § 160(7), p 788
 - Labor Relations Boards and Commissions, proceedings before, § 23(80), p 278
 - Relation back, Federal Employers' Liability Act, § 487
 - Statutory provisions, labor relations, § 28(4)
- Amount Wages and other remuneration, post

INDEX TO MASTER AND SERVANT

Animals,

- Assumption of risk,
 - Knowledge of vicious character, § 390, p 1207
 - Latent dangers, § 392, p 1220
- Killing or injuring by servant, liability of master under respondeat superior doctrine, § 332

Answer Plea or answer, generally, post

Antedating, collective bargaining contract, § 28(41), p 197

Anticipation of work, injury to servant on premises of master in, liability of master, § 180, p 868

Anti-union bias, unfair labor practice, showing on part of employer as sufficient proof, § 28(90), p 290

Anti-union campaign, unfair labor practice by employer participating, § 28(46)

Apparent dangers, contributory negligence, precautions against, §§ 454-456, pp 1283-1293

Appeal and error,

- Discharged employee, appeal to designated tribunals, right of action under contract provision, § 28(75)

Hours of labor, action to recover penalty for violation of law, § 23

Injuries to servants, actions for, § 353

Injuries to third persons, actions for, § 620

Inventions by employees, actions relating to, § 73, p 497

Labor relations boards or commissions, post

Minimum wages, review of order fixing, § 151 (32), p 731

Women and minors, § 152, p. 745

National Labor Relations Board, post

Wages,

Actions to recover, § 135

Lien, proceedings to enforce, § 149, p 617

Wrongful discharge, review in actions for, § 56

Appearance, settlements of labor disputes, proceedings for, § 28(87)

Appliances Tools, machinery and appliances, generally, post

Apprentices,

Collective bargaining, eligibility to vote on bargaining unit, § 28(33), p 180

Fair Labor Standards Act, § 151(10)

Hours of labor, maximum hour provisions of statute as applying to, § 15, p 101, n 23

Minimum wages, § 151(10)

Servant as including, § 1, p 26, n. 15

Union membership, adoption of system excluding apprentices, § 28(17)

Approach of trains, fellow employees, warning of, § 333, p 1123

Aquatic animal and vegetable life, Fair Labor Standards Act, exemption of employees engaged in catching, etc., § 151(16)

Arbitration,

Collective bargaining, post

Conciliation, mediation and arbitration, generally, post

Railway Labor Act, post

Architects, independent contractors, § 3(9)

Armed forces,

- Back pay award to reinstated employee serving in, exclusion of period served, § 28(110), p 343

Armed forces—Continued,

Termination of employment contract by voluntarily enlisting in, § 39

Arm's length, collective bargaining, § 28(23)

Ash Pan Act, injuries to servants alleged to have been caused by violation of, presumptions, § 501, p 62

Assault and battery,

Employee assaulting employer, recovery of wages as precluded, § 105

Exoneration of servant as absolving master from liability, § 619, p 422

Fellow servants,

Liability for injuries resulting, railroad employees, § 355, p 1146

Liability of master, § 325

Injuries to third person,

Liability of master to third person for wrongful assault by servant, § 575, p 339

Intention, § 537, n 74

Scope of employment, jury question, § 617, p 412, n 52

Assent to relationship, § 2, p 31

Assignment for benefit of creditors, unfair labor practices, back pay award as binding on employer's assignee, § 28(100), p. 319, n 56

Assignments,

Inventions by employee, suit to rescind or cancel, § 73, p 495

Patent for invention by employee, contract providing for, § 73, p 489

Patent obtained by employee, § 73, p 487

Performance of services, independent contractor relationship as indicated by right, § 3(2), p 49

Wages,

Back pay award in labor dispute, validity, § 28(119), p 339, n 62

Discharge of employee occurring on filing with employer, liability of assignee, § 630, p 435

Fair Labor Standards Act, deduction pursuant to, § 151(27), p 714

Lien for wages, § 146

Penalty for failure to pay within prescribed time, right to, § 156, p 763

Security for store account, § 157, p. 766

Assistant board of adjustment,

Carriers, exclusive jurisdiction over labor disputes, § 28(74), p 201

Railway Labor Act, notice of hearing before, § 28(87)

Assistants, implied authority of servant to employ, § 7, p. 74

Associations. Relief and benefit departments or associations, generally, post

Assumed name,

Contract of employment under, validity, § 6, p 67

Wages, defense of obtaining employment under assumed name in action to recover, § 125

Assumption of risk, §§ 357-420, pp. 1148-1242

Abrogation of defense,

Federal Employers' Liability Act, § 339, pp. 1154-1159

State Employers' Liability Act, § 360

INDEX TO MASTER AND SERVANT

Assumption of risk—Continued,

Abrogation of defense—Continued,

Statutory provisions, § 360, p 1170

Admissibility of evidence as to, actions for injury to servant, § 518

Affirmative defense, burden of proof, § 501, p 82

Agents, compliance with command or order by, § 400

Alteration of place of work, employee engaged in, § 373

Animals,

Knowledge of vicious character, § 390, p 1207

Latent dangers, § 392, p 220

Appliances Tools, machinery and appliances, post this head

Appreciation of danger, jury question, § 536, p. 217

Assurances of master, §§ 404-409, pp 1235-1238

Repairs having been made, § 406

Requisites and sufficiency, § 405

Attempt to save master's property, knowledge of danger as affecting, § 386

Automobiles, knowledge of danger, § 390, p 1206

Axes, knowledge of danger, § 390, p. 1209

Bar to recovery, § 358

Barges, latent defects or dangers, § 392, p. 1220

Basis of doctrine, § 357, p. 1152

Bells,

Knowledge of danger, § 390, p 1206

Guarding or covering, § 390, p 1208

Latent defects or dangers, § 392, p. 1220

Bits, latent defects or dangers, § 392, p 1220

Blasting appliances, knowledge of danger, § 390, p. 1206

Blasting operations, jury questions, § 536, p 215

Blocks and tackles, simple tool doctrine, § 390, p 1209

Boiler Inspection Act, § 369, p 1160

Boilers, latent defects or dangers, § 392, p. 1220

Brakemen, ordinary risks, § 378, p 1181

Bulkheads, knowledge of danger, § 390, p. 1206

Burden of proof, § 501, p 81

Instructions on, § 540

Cables, knowledge of danger, § 390, p 1206

Carpenter's helper, ordinary risk, § 375

Cars, knowledge of danger, § 310, p. 1210

Latent defects or dangers, § 392, p 1220

Cattle guards, failure of railroad to maintain, § 370

Chains, knowledge of danger, § 390, p 1206

Latent defects or dangers, § 392, p 1220

Changing condition of place as work progresses, § 373

Chisels,

Knowledge of danger, § 390, p 1206

Latent defects or dangers, § 392, p 1220

Simple tool doctrine, § 390, p. 1209

Choice of dangerous method of doing work, instructions to jury, § 540, p. 255

Circumstantial evidence, § 526

Clamps, simple tool doctrine, § 390, p. 1209

Claw bars,

Knowledge of danger, § 390, p. 1206

Simple tool doctrine, § 390, p 1209

Cogwheels, knowledge of danger, § 390, p. 1208

Assumption of risk—Continued,

Commands or threats, compliance with, §§ 398-403, pp 1229-1235

Absence of knowledge and appreciation of danger, § 398

Discharge, admissibility of evidence as to working under threat of, § 518

Equal or superior knowledge of danger, § 403

Inexperienced or youthful servant, § 417

Jury question, § 536, p 221

Knowledge of danger,

Absence of, § 398

Effect of, § 401

Negligence of master, § 398

Remaining in service after notice of complaint, §§ 399, 402

Requisite and sufficiency of command, § 400

Risks outside scope of employment, § 409

Vice principals or authorized agents, § 400

Complaint, knowledge of danger, continuing work after, §§ 393-397, pp. 1223-1229

Complaint by servant of defect or danger, instructions on law applicable § 549, p 257

Complaint of employer, admissibility of evidence on issue of, § 518

Compliance with negligent order, jury question, § 536, p 221

Concurrent negligence,

Master, instruction of jury on, § 549, p 255

Master and fellow servant, § 368

Conduct of business, knowledge of danger, § 390, p 1198

Conductors, ordinary risks, § 378, p. 1181

Constitutional provisions,

Actions for injuries to servant, § 536, p 212

Knowledge of danger, § 383, p 1193

Method of conducting business, § 390, p 1198

Construction of place of work by servant, § 363

Construction work, ordinary risk incident to, § 373

Continuing work after knowledge of danger, §§ 393-397, pp 1220-1229

Burden of proof, § 501, p 82

Jury question, § 536, p 220

Notice or complaint, §§ 393, 394, pp. 1220-1223

Promise to remedy defect or remove danger, § 396, pp 1223-1229

Continuing work on promise to repair defect, presumptions, § 501, p 65

Constructive knowledge Knowledge of danger, generally, post, this head

Contract, doctrine as based on, § 357, p. 1152

Contracts of employment, ordinary risks, § 372, pp 1173-1176

Contributory negligence,

Distinguished, § 357, p 1150; § 421

Instructions to jury, § 549, p 253

Statute abrogating defense of assumption of risk as affecting, § 423, p. 1245

Cotton gin, knowledge of danger, § 390, p 1206

Cranes,

Knowledge of danger, § 390, p. 1210

Latent defects or dangers, § 392, p. 1220

INDEX TO MASTER AND SERVANT

Assumption of risk—Continued,

- Dangerous machinery, occupations or places,
 - Compliance with command or threat, § 398
- Evidence, § 526
- Inexperienced or youthful servants, generally, post this head
- Instruction to jury, § 549, p 255
- Jury question, § 536, pp 213, 215
- Knowledge of danger, § 390, p 1205
 - Continuing work after, § 393, pp 1221, 1222
 - Compliance with command, § 401
 - Electrical appliances, § 390, p 1212
 - Jury questions, § 536, p 219
 - Promise to remove, § 396, p 1225
 - Latent defects or dangers, § 392, p 1219
 - Negligence of master, § 364
 - Ordinary risks incident to, § 372, p 1175
 - Risk incident to duty of discovering or remedying defects, § 374
 - Unnecessary occupation of dangerous position, § 390, p 1214
- Defects in place of work, risk incident to duty of discovering or remedying, § 374
- Defense in general, § 358-360, pp 1153-1160
- Defined, § 357, p 1148
- Demolition of building, jury questions, § 536, p 215
- Derrick gearing, knowledge of danger, § 390, p 1208
- Derricks,
 - Knowledge of danger, § 390, p 1210
 - Latent defects or dangers, § 392, p 1220
- Disobedience of rules, orders, etc., § 410
- Distinctions, contributory negligence, § 357, p 1150
- Doctrine as not favored, § 358
- Dough mixers, knowledge of danger, § 390, p 1208
- Due care, risks remaining after exercise of, § 371
- Edges, knowledge of danger, § 390, p 1206
- Elbow of steam pipe, latent defects or dangers, § 392, p 1220
- Electrical apparatus,
 - Instruction relating to, § 549, p 256
 - Knowledge of danger, § 390, p 1212
 - Latent defects or dangers, § 392, p 1220
- Elevators,
 - Instructions relating to, § 459, p 256
 - Knowledge of danger, § 390, pp 1208, 1211
 - Latent defects or dangers, § 392, p 1220
- Emergency, overexertion in, compliance with order, § 401
- Emergency work, knowledge of danger, § 393, p 1222
- Emery wheels, simple tool doctrine, § 390, p 1209
- Employers' Liability Act, doctrine as affected, § 360
- Employment contract, § 372, p 1173
 - Ordinary risks, § 372, pp. 1173-1176
- Equal means of knowledge of defects or dangers, continuing work with, § 391
- Equal or better means of knowledge of danger, continuing work in compliance with command, § 403
- Equal or greater knowledge of danger, assurances or representations of master, § 404

Assumption of risk—Continued,

- Evidence,
 - Admissibility in action for injuries to servants, § 518
 - Weight and sufficiency, § 526
- Excavation,
 - Evidence, § 526
 - Jury question, § 536, pp 214, 215
 - Knowledge of danger, § 390, p 1205
 - Latent defects or dangers, § 392, p 1218
 - Ordinary risks incident to, § 376
 - Risks due to master's negligence, § 365
- Experience of employees as affecting, ordinary risks, § 372, p 1176
- Express agreement, validity, § 197
- Extra hazardous employment, ordinary risks incident to, § 372, p 1175
- Extraordinary risks, § 361
 - Express or implied contract, § 357, p 1153
 - Knowledge of danger, § 379, p 1184
- Failure to furnish appliances or sufficient force for work, knowledge of danger, § 390, p 1199
- Farm worker, ordinary risks, § 375
- Fear of losing employment, continuing work with knowledge of danger, § 401
- Federal Employers' Liability Act, post
- Fellow servants,
 - Concurrent negligence, § 368
 - Failure to furnish sufficient force, knowledge of danger, § 390, p 1199
 - Incompetency, §§ 311, 362
 - Knowledge of danger, § 388
 - Negligence of, §§ 311, 362
 - Concurrent negligence, § 368
 - Jury question, § 536, p 221
 - Knowledge of danger, § 379, p 1186; § 390, p 1212
 - Railroad employees, § 366, p 1167
 - Reliance on care of master in selection, § 380
- Nonliability for injuries by, based on doctrine of, § 321
- Promise to repair known defects made to, § 396, p 1227
- Railroad employees, § 366, p 1167
- Reliance on care of, § 390, p 1212
- Risks assumed, § 322
- Fire damp, assumption of risks, § 369, p 1172
- Firemen, ordinary risk, § 375, § 378, p 1181
- Flagman, ordinary risk, § 378, p 1182
- Floors,
 - Defective or dangerous floors, knowledge of danger, § 390, p 1203
 - Jury questions, knowledge of danger, § 536, p 219
- Flying switches, railroad employees, § 378, p 1181
- Flywheels, knowledge of danger, § 390, p 1208
- Forgetfulness of known dangers or defects, § 385
- Gallows flames, latent defects or dangers, § 392, p 1220
- Gearing, knowledge of danger, § 390, p 1208
- General denial, defense as available under, § 499, p 48
- General knowledge of defects as charging servant with knowledge of danger, § 389
- Gunner, ordinary risk, § 375

INDEX TO MASTER AND SERVANT

Assumption of risk—Continued,

Greater means of knowledge than master of defects or dangers, § 391

Hammers,

Knowledge of danger, § 390, p 1206
Latent defects or dangers, § 392, p 1220
Simple tool doctrine, § 390, p 1209

Hand cars,

Knowledge of danger, § 390, p 1210
Latent defects or dangers, § 392, p 1220

Hatchets, simple tool doctrine, § 390, p 1209

Hazardous methods of work or ways of passage, selection of, § 390, p. 1214

Headlights, noncompliance with statutory requirement to equip locomotive with, § 369, p 1171

Hidden defects or dangers, § 392, p. 1217

Hoists,

Instructions relating to, § 549, p 256
Knowledge of danger, § 390, p. 1211

Hooks,

Knowledge of danger, § 390, p 1206
Simple tool doctrine, § 390, p 1209

Implied contract, doctrine as based on, § 357, p 1152

Incompetency of fellow servants, §§ 311, 362

Increase in wages, continuing work after knowledge of danger in consideration of, § 397

Increased hazard after commencement of service, § 392, p 1217

Independent contractors, servants of, § 601

Inexperienced or youthful servants, §§ 412-420, pp 1239-1242

Burden of proof, § 501, p. 82

Comparative knowledge of master and servant, § 416

Compliance with commands or threats, § 417

Instructions to jury, § 549, p 255

Knowledge of defects or dangers, § 414

Jury question, § 536, p 218

Master's knowledge of age or experience, § 413

Negative averments, § 492

Obvious dangers, § 415

Ordinary risk, § 412

Place of work, § 418

Pleading in action for injuries, § 492

Presumption, § 501, p. 64

Risks outside scope of employment, § 420

Violation of statutes, § 419

Warnings and instructions, § 414

Infants,

Burden of proof, § 501, p 82

Master's knowledge of age or experience, § 413

Obvious dangers, § 415

Ordinary risk, § 412

Presumptions, § 501, p 64

Risks outside scope of employment, § 420

Statutory provisions, § 419

Infirmity of employee as affecting, ordinary risks, § 372, p 1176

Injuries to servants, negating in action for, § 492

Inspection,

Latent defects or dangers, duty of servant, § 381

Assumption of risk—Continued,

Inspection—Continued,

Risks incident to, § 374

Instructions, disobedience of, § 410

Instructions to jury, action for injuries to servant, § 549, pp 253-257

Iron rods, simple tool doctrine, § 390, p 1209

Jacks, knowledge of danger, § 390, p 1206

Jury question, actions for injuries of servants, § 536, pp 211-222

Keelsons, knowledge of danger, § 390, p 1206

Knives, knowledge of danger, § 390, p 1208

Knowledge of danger, §§ 379-392, pp 1183-1220

Appreciation of dangers, § 389

Attempt to save master's property, effect of, § 386

Character of knowledge, § 388

Complaint,

Continuing work after, compliance with commands, § 399

Continuing work without, §§ 393, 394, pp 1220-1223

Compliance with command in absence of, § 398

Conduct of business in general, § 390, p 1198

Constitutional provisions, methods of conducting business, § 390, p 1198

Constructive knowledge, §§ 382-390, pp 1189-1215

Continuing work after, §§ 393-397, pp 1220-1229

Compliance with commands or threats, §§ 399, 401

Consideration of increase in wages, § 397

Form and sufficiency of promise to remedy defects, § 396, p 1227

Negligence of master, § 393, p 1221

Notice or complaint to master, §§ 395-397, pp 1223-1229

Promise to remedy defect or remove danger, § 396, pp 1223-1229

Reliance on promise to remedy defect, § 396, p 1223

Statutory provisions, § 394

Without notice or complaint, §§ 393, 394, pp. 1220-1223

Emergency, work under, § 393, p 1222

Equal or greater means of knowledge than master, § 391

Assurances or representations of master, § 404

Compliance with commands or order, § 403

Evidence as to, § 526

Extent of knowledge, § 389

Extraordinary risk, § 379, p 1184

Failure to furnish appliances or sufficient force for work, § 390, p. 1199

Failure to give notice of dangerous position, § 390, p 1215

Fear of losing employment, continuing work because of, § 401

Federal Employers' Liability Act, effect of, § 383, p 1191

Fellow servants, § 388

Promise to repair made to, § 396, p. 1227

Forgetfulness, § 385

INDEX TO MASTER AND SERVANT

Assumption of risk—Continued,

Knowledge of danger—Continued,

- General knowledge of defects as sufficient, § 389
- Increase in wages, continuance in employment in consideration of, § 397
- Inexperienced or youthful servants, § 414
- Instructions to jury in respect of, § 549, p 256
- Jury question, § 536, p 217
- Latent defects and dangers, § 381; § 392, pp 1210-1220
- Means of knowledge, § 389
- Methods of acquiring as affecting, § 382
- Methods of work, § 390, p 1193
- Moving or operating machinery or trains, § 390, p 1200
- Necessity, § 379, pp 1183-1187
 - Work under, § 393, p 1222
- Negligence of master, § 379, p 1185, § 384
 - Continuing work after, § 393, p 1221
 - Equal or greater means of knowledge, § 391
 - Statutory provisions, § 383, p 1192
- Notice or complaint,
 - Continuing work after, §§ 395-397, pp 1223-1229
 - Compliance with command, § 399
 - Continuing work without, §§ 393, 394, pp 1220-1223
- Obvious defects or dangers, § 383
- Opportunity to acquire, § 388
- Ordinary risk, § 379, p 1184
- Physical force to compel servant to do work, § 401
- Place of work, § 390, p 1200
- Presumption, § 501, p 64
- Promise to remedy defect or remove danger, continuing work after, § 395, pp 1223-1229
- Remaining in service after notice of complaint, compliance with order, § 402
- Rescue of master's property, § 386
- Right at place of work, § 390, p. 1202
- Right to rely on care of master, § 380
- Risks arising after commencement of service, § 387
- Rules for conduct of work, failure to promulgate, § 390, p 1200
- Simple tools or appliances, promise to remedy defect, § 296, p 1226
- Statutory provisions, § 383, pp 1191-1194
 - Continuing work after knowledge, § 394
 - Method of conducting business, § 390, p 1198
- Temporary forgetfulness, § 385
- Time acquired, § 389
- Time for notice or complaint, § 393, p 1222
- Tools, machinery and appliances, § 390, p 1205
 - Continuing work after knowledge in compliance with command, § 401
- Uncovered or unguarded places, § 390, p. 1202
- Understanding of nature and extent of danger, § 389
- Knowledge of injury, admissibility of evidence on issue of, § 518

Assumption of risk—Continued,

- Knowledge of risk, continuance of work with, jury question, § 536, p 220
- Ladders,
 - Knowledge of danger, § 390, p 1211
 - Latent defects or dangers, § 392, p 1220
 - Simple tool doctrine, § 390, p 1210
- Lamps or lanterns, knowledge of danger, § 390, p 1206
- Latent defects or dangers, § 392, pp 1216-1220
 - Duty to inspect for, § 381
 - Evidence, § 526
 - Instructions to jury on, § 549, p 257
 - Jury question, § 536, p 217
- Levers, knowledge of danger, § 390, p. 1206
- Linemen, ordinary risk, § 375
- Loading and unloading, jury question, § 536, p 215
- Locomotives, post
- Machinery Tools, machinery and appliances, post this head
- Mangles,
 - Knowledge of danger, § 390, p 1206
 - Covering or guarding, § 390, p 1208
- Maturity of employee as affecting, ordinary risk, § 372, p 1176
- Meat grinders, knowledge of danger, § 390, p 1206
- Methods of work,
 - Instructions to jury, § 549, p 255
 - Jury questions, § 536, p 215
 - Knowledge of danger, § 390, p 1198
 - Continuing work after, § 393, p 1221
 - Latent defects or dangers, § 392, p 1217
 - Selection of more hazardous method, § 390, p 1213
 - Selection of own method by servant acting in obedience to command of master, § 398
- Mining,
 - Evidence, § 526
 - Instructions relating to, § 549, p 256
 - Jury questions, § 536, pp. 214, 215
 - Knowledge of danger, § 390, p 1205
 - Latent defects or danger, § 392, p 1218
 - Ordinary risk, § 376
 - Risk due to master's negligence, § 365
- Minors Infants, ante this head
- Moving or operating machinery or trains without warnings, knowledge of danger, § 390, p 1200
- Municipal employees, knowledge of danger, jury question, § 536, p 219
- Nature of,
 - Doctrine, § 358
 - Risks assumed, §§ 361-378, pp 1160-1183
- Necessity, work under, knowledge of danger, § 393, p 1222
- Negligence,
 - Element of, § 357, p 1149, n 83
 - Fellow servant, jury question, § 536, p. 221
- Master,
 - Burden of proof, § 501, p. 82
 - Directing servant to do work, § 398
 - Knowledge of danger, § 379, p. 1185; § 384
 - Continuing work after, § 393, p 1221
 - Equal or greater means of, § 391

INDEX TO MASTER AND SERVANT

Assumption of risk—Continued,
 Negligence—Continued,
 Master—Continued,
 Knowledge of danger—Continued,
 Statutory provisions, § 383, p 1192
 Presumption, § 501, p 64
 Risks arising from, §§ 362-370, pp 1161-1172
 Negligence or wrongful act of employee causing loss to employer, defense in action for damages, § 79, p 503,
Nightwatchman, ordinary risk, § 375
Notice, knowledge of danger, continuing work after, §§ 395-397, pp 1223-1229
Notice by servant of defect or danger, instructions relating to, § 549, p 257
Notice to employer, admissibility of evidence on issue of, § 518
Obedience to commands of master, §§ 398-403, pp. 1229-1235
 Inexperienced or youthful servants, § 417
 Risks outside scope of employment, § 409
Obstructions on railroad track or roadbeds, knowledge of danger, § 392, p. 1219
Obvious dangers, § 388
 Assurances or representations of master, § 404
 Attempt to save master's property, § 386
 Compliance with commands of master, § 398
 Continuing work regardless, § 393, p 1221
 Inexperienced or youthful servant, § 415
 Infants, § 415
 Instructions to jury relating to, § 549, p 257
 Jury question, § 536, p 217
 Presumptions, § 501, p 64
 Risks arising after commencement of service, § 387
 Use of ways, works, etc., § 390, p. 1198
Occupational diseases, § 369, p. 1172
 Ordinary risk, § 375
Oil burners, latent defects or dangers, § 392, p. 1220
Opinions, knowledge of danger, § 390, p 1208
Opportunity to acquire knowledge of danger, § 388
Orders of master,
 Compliance with, jury question, § 536, p. 221
 Disobedience of, § 410
Ordinances, violation of, § 370
Ordinary risks, § 371-378 pp 1172-1183
 Inexperienced or youthful servant, § 412
 Knowledge of danger, § 379, p 1184
 Presumptions, § 501, p. 64
Overexertion,
 Compliance with order or command of master, § 401
 Injuries sustained by, § 390, p 1213
Paint brushes, simple tool doctrine, § 390, p. 1209
Patent defects or dangers, § 382
Personal direction of work by master, negligence in respect of, § 367
Physical infirmity of employee as affecting, ordinary risk, § 372, p 1176
Physicians, ordinary risk, § 375
Picks, simple tool doctrine, § 390, p 1209
Pile drivers, knowledge of danger, § 390, p 1206

Assumption of risk—Continued,
 Place of work,
 Assurances or representations of master, § 404
 Changing condition as work progresses, § 373
 Exercise of ordinary care and furnishing, § 375
 Instructions relating to, § 549, p 255
 Knowledge of danger, § 390, p 1200
 Continuing work in compliance with command, § 401
 Promise to remove, § 396, p 1225
 Statutory provisions, § 383, p 1193
 Latent defects and dangers, § 392, p 1218
 Negligence of master in respect to, § 363
 Reliance on care of master, § 390, p 1202
 Risk incident to duty of discovering or remedying defects, § 374
 Railroad employees, § 378, p 1180
 Youthful or inexperienced employees, § 418
 Planers, knowledge of danger, § 390, p 1208
Platforms,
 Instructions relating to, § 549, p 245
 Jury question, knowledge of danger, § 536, p 219
 Knowledge of danger, § 390, p 1211
 Latent defects or dangers, § 392, p 1220
Pleading,
 Avoidance of defense, § 495
 Negative averments, § 492
 Plea or answer, § 494, p 37
Precaution for protection of employees, noncompliance with statute recurring, § 369, p 1170
Precautions for safety, evidence as to, § 526
Presumptions, § 501, p 64
 Instructions in actions for injuries to servants, § 540
Progress of work, risks caused by changing conditions of place, § 373
Promise to remedy defect or remove danger,
 Admissibility of evidence as to, § 518
 Continuing work after knowledge of danger, § 393, pp 1223-1229
Promise to repair, continuing work in accordance with,
 Evidence, § 526
 Jury question, § 536, p. 220
Proof, defense of, § 498
Public policy, § 357, p 1153
 Violation of statute or rule having effect of law, § 370
Pulleys, latent defects or dangers, § 392, p 1220
Punches, knowledge of danger, § 390, p 1206
Quarrying,
 Instructions relating to, § 549, p. 256
 Jury questions, § 536, p 214
 Knowledge of danger, § 390, p. 1205
 Ordinary risk incident to, § 376
 Risk due to master's negligence, § 365
Question of law and fact, actions for injuries to servants, § 536, pp. 211-222
Rail cutters, simple tool doctrine, § 390, p. 1209
Railroad employees,
 Evidence, § 526
 Fellow servants, negligence of, § 368, p. 1167
 Instructions relating to, § 549, p. 256

INDEX TO MASTER AND SERVANT

Assumption of risk—Continued,

Railroad employees—Continued,

- Jury questions, § 536, p 214
- Knowledge of danger,
 - Statutory provisions, § 383, p 1193
 - Tracks, roadbeds and yards, § 390, p 1203
- Known defects and dangers in tracks, etc., § 390, p 1203
- Latent defects or dangers, § 392, p 1218
- Negligence of master, § 366, pp 1166-1169
- Ordinary risks incident to operation, § 378, pp 1180-1183
- Overexertion, § 390, p 1213

Reliance on,

- Assurances of master, § 404
- Continuing work on, jury question, § 536, p 220
- Care of master, § 380
- Place of work, § 390, p 1202

Replication or reply avoiding defense, action for injuries of servant, § 495

Representations of master, §§ 404-409, pp 1235-1238

- Repairs having been made, § 406
- Requisites and sufficiency, § 405

Rescue of master's property, knowledge of danger, § 386

Revolving shafts, knowledge of danger, § 390, p 1207

Right at place of work, knowledge of danger, § 390, p 1202

Risks arising after commencement of service, § 392, p 1217

Risks arising from negligence, § 362-370, pp 1161-1172

Rollers, knowledge of danger, § 390, p 1208

Ropes,

- Knowledge of danger, § 390, p 1207
- Latent defects or dangers, § 392, p 1220

Rule of employer, relieving from liability for injury, § 273

Rules and regulations, disobedience of, § 410

Rules for conduct of work, failure to promulgate, knowledge of danger, § 390, p 1200

Safety Appliance Act, § 369, p 1170

Safety of employees, noncompliance with statutory requirements, § 369, pp 1169-1172

Saws, knowledge of danger, § 390, p 1207

- Covering or guarding, § 390, p 1208

Scaffolds,

- Instructions relating to, § 459, p 255
- Knowledge of danger, § 390, p 1211
- Latent defects or dangers, § 392, p 1220

Scope of employment, risks outside of, §§ 407-409

- Compliance with commands, § 407

- Voluntarily exposing to, § 408

- Youthful or inexperienced employees, § 420

Scrapers, knowledge of danger, § 390, p 1207

Selection of more hazardous method of work, § 390, p 1213; § 392, p 1218

Selection of more hazardous ways of passage, § 390, p 1214

Self-starting machinery, latent defects or dangers, § 392, p 1220

Set screws, knowledge of danger, covering or guarding, § 390, p 1208

Assumption of risk—Continued,

Shafts,

- Knowledge of danger, covering or guarding, § 390, p 1208

- Latent defects or dangers, § 392, p 1220

Shipping, ordinary risks incident to, § 377

Shovels, simple tool doctrine, § 390, p 1209

Simple tools and appliances,

- Assurances or representation of master, § 404

- Knowledge of danger, § 390, p 1208

Skids, knowledge of danger, § 390, p 1207

Special statutory provisions, effect of, § 383, pp 1191-1194

Spikes and spike mauls, simple tool doctrine, § 390, p 1209

Spings, knowledge of danger, § 390, p 1207

Stairways, jury question, knowledge of danger, § 536, p 219

State Employers' Liability Act, doctrine as effected, § 360

State hospital or sanitarium, physician or nurse in, § 375

Statutory provisions,

- Actions for injuries to servants, § 536, p 212

- Disobedience of, § 410

- Instructions to jury in accordance with, § 549, p 256

- Jury question, § 536, p 212

- Knowledge of danger, § 383, pp 1191-1194

- Continuing work after, § 394

- Methods of conducting business, § 390, p 1198

- Noncompliance with requirement for safety of servants, § 369, pp 1169-1172

- Safety of servant, noncompliance with, § 369, pp 1169-1172

- Simple tools and appliances, § 390, p 1209

- Youthful or inexperienced employees, § 419

Stepping boards, knowledge of danger, § 390, p 1207

Subsequent alterations or improvements, right of servant to demand, § 390, p 1198

Sudden emergency, evidence as to, § 526

Switches, knowledge of danger, § 390, p 1207

"T" rails, simple tool doctrine, § 390, p 1209

Tables, knowledge of danger, § 390, p 1207

Telltails,

- Latent defects or dangers, § 392, p 1220

- Noncompliance with statutory requirements, § 369, p 1171

Temporary forgetfulness of dangers or defects, effect of, § 385

Threats Commands or threats, generally, ante this head

The picks, simple tool doctrine, § 390, p 1209

Time, knowledge of danger, § 389

Tongs, simple tool doctrine, § 390, p 1209

Tools, machinery and appliances, § 201

- Assurances or representations of master, § 404

- Compliance with commands or threats, § 398

- Exercise of ordinary care in furnishing appliances, § 375

- Instructions relating to, § 549, p 255

INDEX TO MASTER AND SERVANT

Assumption of risk—Continued,

Tools, machinery and appliances—Continued,

Knowledge of danger, § 390, p 1205

Continuing work after, § 393, p 1222

Compliance with command, § 401

Failure to furnish, § 390, p 1199

Promise to remove, § 396, p 1225

Statutory provisions, § 383, p. 1193

Knowledge of risk, failure to furnish appliances, § 390, p 1199

Latent defects and dangers, § 392, p 1219

Negligent failure to furnish, § 394

Noncompliance with statute relating to, § 369, p 1171

Reliance on care of master, § 390, p. 1207

Risks incident to duty of discovering or remedying defects, § 374

Railroad employees, § 378, p 1180

Use for purposes not intended, §§ 410, 411

Track laborers, railroads, § 378, p 1182

Trestles, knowledge of danger, § 390, p 1207

Trolley wires, knowledge of danger, § 390, p 1208

Trucks, knowledge of danger, § 390, p 1207

Turntables, knowledge of danger, § 390, p. 1207

Uncovered or unguarded machinery or appliances, knowledge of danger, § 390, p 1208

Uncovered or unguarded places, knowledge of danger, § 390, p 1203

Unnecessary occupation of dangerous position, § 390, p 1214

Use of appliances for purposes not intended, §§ 410, 411

Ventilation, § 369, p. 1172

Vice principal, command or threat given by, compliance with, § 400

Violation of rules, evidence as to, § 526

Voluntarily exposing self to risks outside scope of employment, § 408

Voluntary adoption of unsafe methods of work, evidence, § 526

Voluntary nature of contract § 357, p 1149

Wagon seat springs, simple tool doctrine, § 390, p 1209

Wagons, knowledge of danger, § 390, p 1207

Walks, knowledge of danger, § 390, p 1207

Warning of danger, § 382

Continuing in service after, § 234

Ways of passage, selection of more hazardous ways, § 390, p 1213

Wheels, knowledge of danger, § 390, p 1207

Winches and windlasses, knowledge of danger, § 390, p 1211

Wrenches,

Knowledge of danger, § 390, p 1207

Simple tool doctrine, § 200, p 1200

Youthful servant. Inexperienced or youthful servant, ante, this head

Assurances of master,

Assumption of risk, ante

Contributory negligence, reliance on, § 429

Attorney General, Fair Labor Standards Act, litigation subject to control of, § 151(30)

Attorney's fees,

Fair Labor Standards Act, actions under, § 160 (11), pp. 804-808

Wages and other remuneration, post

Wrongful discharge, actions for, § 57

Attorneys,

Labor relations, statement by attorney for employer as properly considered in determining coercion, § 28(14), p 142, n 85

National Labor Relations Board, power to employ, § 28(66)

Authoritative control, relationship as dependent on, § 2, p 36

Authority, fellow servants, distinctions in as affecting relation, § 332, pp 1098-1108

Automatic couplers,

Locomotives, duty to equip with, § 227, p 954, n 93

Railroad cars,

Assumption of risks, § 369, p 1171

Proximate cause of injuries, defect, § 258

Statutory requirements, § 228, p 939

Automobiles Motor vehicles, generally, post

Average earnings, wrongful discharge, admissibility of evidence on issue of damages, § 53, p 458

Aviation, Fair Labor Standards Act, application to employers engaged in, § 151(7), p 642

Aviators, independent contractors, § 3(9)

Avoidable injury,

Contributory negligence, effect of, § 423

Evidence in action for injuries to servants, pleading as affecting, § 499, p 43

Awnings, independent contractors, inherent danger in erecting as respects liability for injuries, § 590, p 362

Axes, assumption of risk, simple tool doctrine, § 390, p 1209

Back pay,

Actions for, statutory provisions, § 160(1)

Agreement fixing rate until development of business, § 110, p 543

Arbitration of labor disputes, § 28(121), p 347

Labor Relations Boards, remand to board in respect of issues involving, § 28(138)

National Labor Relations Board,

Discretion as to ordering, § 28(133), p. 377, n 28

Modification of order granting, § 28(133), p 380, n 47

Power to order, § 28(119), pp 335-345

Reinstatement of employees discharged because of union activities with, evidence justifying order, § 28(100), p 308

Unfair labor practices, order requiring, state board, § 28(100), p 319

Baggage truck, injuries to servant, negligence of master, jury question, § 534, p 176

Bailiffs, term servant as including, § 1, p 26, n. 15

Ballots, collective bargaining, election of bargaining representative, § 28(33), p 180

Banisters, stairways, negligence of master, failing to provide, jury question, § 534, p 187

Bankruptcy, breach of employment contract arising from nonemployment because of, § 35

Banks,

Cashier, lien for salary, § 143, p 607

Employees, labor relations, statute dealing with as including, § 28(11)

Fair Labor Standards Act, application to employers engaged in, § 151(7), p 642

Labor Relations, statutes regulating as applying to, § 28(5)

INDEX TO MASTER AND SERVANT

- Baibei shops,
 - Fair Labor Standards Act, exemption from provision, § 151(14), p 078
 - Respondent superior, liability of owner under doctrine of, § 575, p 332
- Bargaining representative Collective bargaining, post
- Bargaining units, collective bargaining purposes, § 28(28), pp 171-174
- Barges,
 - Assumption of risk, latent defects or dangers, § 302, p 1220
 - Fair Labor Standards Act, exemption of employees on, § 151(15)
- Barrels, contributory negligence, inspection for latent defects or dangers, § 447, p 1270
- Barriers, dangerous machinery or appliances, § 231
- Bartenders, lien for wages, § 143, p 608
- Baseball players,
 - Compensation, contract fixing, § 110, p 543
 - Sale of, § 64
- Beauty culture, minimum wages, operators, § 152, p 743, n 85
- Beauty shops, negligence of servants, liability to customer under doctrine of respondent superior, § 575, p 332
- Bees, Fair Labor Standards Act, exemption of employees of those engaged in raising, § 151(17)
- Belts,
 - Assumption of risk,
 - Knowledge of danger, § 390, p 1206
 - Guarding or covering, § 390, p 1208
 - Latent defects or dangers, § 302, p 1220
 - Contributory negligence, jury questions, § 537, p 231, n 45
 - Covering or guarding, negligence of master, jury question, § 534, p 187
 - Negligence of master in respect of, questions of law or fact, § 534, p 175
- Beneficiaries, death benefit certificate issued by relief or benefit associations, § 109, p 832
- Benefit departments or associations Relief and benefit departments or associations, generally, post
- Best method of work, use of as required, § 260
- Bias,
 - National Labor Relations Board, order as invalidated by, § 28(120), p 367
 - Settlement of labor disputes, person conducting hearing, § 28(104)
- Bill of particulars, National Labor Relations Board, harmless error in denial of request for, § 28(129), p 368
- Bills of lading, Fair Labor Standards Act, goods as including within meaning of, § 151(7), p 641
- Bits, assumption of risk, latent defects or dangers, § 302, p 1220
- Bituminous Coal Conservation Act,
 - Hours of labor, validity of provision fixing, § 15, p 101
 - Minimum wages, validity of provisions relating to, § 151(2)
- Blacklisting, discharged employee, § 45
 - Breach of contract between employer and employee's representative, damages as recoverable for, § 28(120)
- Blank ballots, collective bargaining, election of bargaining representative, § 28(33), p 181
- Blanket arbitration clause, collective bargaining contract, § 28(72)
- Blanket orders, National Labor Relations Board, § 28(111), p 325
- Blasting,
 - Assumption of risk,
 - Jury questions, § 536, p 215
 - Knowledge of danger, § 390, p 1206
 - Care required of master employing others in conducting operations, § 222, p 943
 - Contributory negligence,
 - Jury question, § 537, p 236
 - Precautions, § 454
 - Fellow servants,
 - Negligence with regard to, jury question, § 535, p 209
 - Warning of, § 333, p 1124
 - Independent contractor, § 3(9)
 - Inspection after, duty of employer, § 235, p 990
 - Statutory provisions, violations of, admissibility of evidence, § 508
- Block signal system, railroads,
 - Assumption of risk for failure to maintain, knowledge of danger, § 390, p 1204
 - Warning of stalled train as essential in case of, § 261, p 1020
- Blocks and tackles, assumption of risk, simple tool doctrine, § 390, p 1209
- Board, wages and other remuneration, furnishing in addition to, § 99
- Boarding moving cars or locomotives, contributory negligence, violation of rule or orders, § 459, p 1300
- Boarding trains, duty of railroad to employees boarding, § 261, p 1018
- Boards,
 - Labor relations boards or commissions, generally, post
 - National Labor Relations Board, generally, post
 - National Mediation Board, generally, post
 - National Railroad Adjustment Board, post
 - Public commissions, boards and officers, post
- Boiler Inspection Act. Federal Boiler Inspection Act, generally, post
- Boilers, latent defects or dangers,
 - Assumption of risk, § 302, p 1220
 - Duty of servant to inspect for, § 381
- Bonds, Fair Labor Standards Act, goods as included within Act, § 151(7), p. 641
- Bonus,
 - Employment contract providing conditions in respect of, validity, § 6, p 63
 - Overtime compensation,
 - Deduction from amount due, § 151(26), p 702
 - Fair Labor Standards Act, § 151(26), p 700, n. 9
 - Liability for additional compensation as chargeable against, § 160(12)
 - Regular rate of pay for purpose of as including, § 151(26), p 705
 - Right of employee in respect of, § 98, pp 528-531
 - Wages and other remuneration, post
 - Wrongful discharge, rights of employee to as element of damage, § 58, p 465, n. 68
- Booking agent, Fair Labor Standards Act, coverage, § 151(9), p 658, n 41

INDEX TO MASTER AND SERVANT

- Bookkeepers,**
 Labor relations, responsibility of employer for conduct of, § 28(14), p 142, n. 83
 Lien for wages, § 143, p. 607
- Booth renting, unfair labor practice, adoption of plan as alternative to going out of business, § 28(46), n 10**
- Boycott,**
 Damages sustained as result of, action for damages against union, § 28(71)
 Unfair labor practice, § 28(63)
 Calling strike without following law, order forbidding, § 28(109), p. 320
- Brakemen,**
 Assumption of risk, ordinary risk, § 378, p 1181
 Attempting repairs as within statute relating to liability for injuries while engaged in coupling, § 228, p 905
 Contributory negligence,
 Boarding or alighting from moving cars or locomotives, § 453, p 1282
 Coupling and uncoupling cars, § 456, p 1287
 Disobedience of rules or order, § 459, p 1298
 Guarding against obstruction on or near track, § 456, p. 1287
 Fellow servants, § 327, p 1088; § 332, pp. 1104, 1106
 Statutory provisions, § 348
 Warning of danger, § 263, p 1023
- Brakes,**
 Contributory negligence, inspection for latent defects or dangers, § 447, p 1270
 Railroad cars, requirements of Federal Safety Appliance Act, § 228, p. 966
- Breach of contract,**
 Collective bargaining agreement, § 28(41), p 198
 Actions for breach of contract between employer and representative, § 28(120)
 Contracts of employment, post
 Wrongful discharge, generally, post
- Breach of duty,**
 Burden of proof in action for injuries to servants, § 501 p 68
 Pleading in action for, § 490, pp 17, 26
- Breakage, machines dangerous by reason of, guarding, § 232, p 985**
- Bribery, criminal liability for bribing servant with intent to influence relation, § 630**
- Bricklayers, independent contractors, liability for injuries to others, § 590, p. 362**
- Bridges,**
 Contributory negligence, inspection for latent defects or dangers, § 447, p. 1270
 Fair Labor Standards Act, application to,
 Employers engaged in construction, § 151(7), p. 643
 Employees engaged in repairs, § 151(9), p 659
 Railroads, post
- Briefs, labor relations boards, proceedings to enforce order, § 28(127)**
- Buildings,**
 Construction.
 Assumption of risk, jury question, § 536, p. 215
 Fair Labor Standards Act, application to employers engaged in, § 151(7), p 643
- Buildings—Continued,**
 Construction—Continued,
 Fellow servants,
 Different department rules, § 331, p 1096
 Employees engaged in, § 327, p 1090
 Independent contractors,
 Inherent danger as respects liability for injuries to others, § 590, p 363
 Persons engaged in, § 3(9)
 Contractors, Fair Labor Standards Act, employees as within coverage, § 151(9), p 658
 Injuries to servants,
 Negligence of master, jury question, § 534, p 182
 Result of defect, proximate cause, § 253
 Operations, instructing and warning servants engaged in, inexperienced or youthful servants, § 306, p 1067
 Safe place to work, duty of master to furnish, § 219, pp 928-934
 Superintendent, labor relations, employees within statute relating to, § 28(12), n 62
- Bulkheads, assumption of risk, knowledge of danger, § 390, p 1206**
- Bulls, injuries to servant, evidence as to vicious propensity, § 524, p 125, n 21**
- Bumps, railroad trains, liability for injuries to trainmen caused by, § 261, p 1018**
- Burden of proof,**
 Assumption of risk, § 501, p 81
 Instruction upon in action for injuries to servant, § 540
 Constitutional provisions, actions for injuries to servants, § 502
 Contributory negligence, § 501, p 83
 Instruction on in actions for injuries to servant, § 540
 Statutory provisions, § 502
- Criminal prosecutions, violation of statute regulating relation, § 14, p 96**
- Employment contracts. Contracts of employment, post**
- Employment relationship, § 12**
- Enticing servant to leave employment,**
 Action for damages, § 627
 Prosecution for, § 636
- Fair Labor Standards Act, actions under, § 160 (8), p 790**
- Federal Boiler Inspection Act, actions under, § 501, p 77**
- Federal Employers' Liability Act, post**
- Hours of labor, actions to recover penalty for violation of law, § 23**
- Injuries to servants, actions for, § 501, 502, pp 32-86**
 Instructions on, § 540
 Master against third person, § 622, p 426
 Injuries to third persons, actions for, § 615, p 394
 Interference with relation by third persons, prosecutions for, § 636
 Inventions by employees, actions relating to, § 73, p. 498, n. 12
- Labor contract statute, prosecution of employee for violation, § 80, p 508**
- Labor relations boards,**
 Contempt proceedings for failure to comply with order, § 28(142)

INDEX TO MASTER AND SERVANT

- Burden of proof**—Continued,
Labor relations boards—Continued,
 Proceedings for enforcement or renewal of orders, § 28(135)
Malicious procurement of discharge, actions for, § 631
Medical attention, action for breach of contract to furnish, § 163, p 818
Negligence or wrongful act of employee causing loss to employer, action by employer for damages, § 79, p 304
Relationship of master and servant, § 12
 Actions for injuries to third persons, § 615, p 394
Relief and benefit departments or associations, actions for benefit, § 169, p 836
Statutory provisions, actions for injuries to servants, § 502
Unfair labor practices, proceedings to prevent, § 28(93), pp 280-283
Wages and other remuneration, post
Wrongful discharge, actions for, § 53, p 454
- Business, existence of relationship while performing service without pay,** § 2, p 39
Business advances, relationship as arising between employees and one making, § 2, p 31
Business codes, disclosure by employee on termination of employment, § 72, p 485
Business depreciation, retrenchment during as excuse for failure of employer to furnish work, § 61
Business development, commissions on, construction of contracts allowing, § 90, p 520
Butcher shops, dangerous machinery, statute requiring guarding as applicable to, § 232, p 982
By-law, labor organizations, necessity, § 28(15), p 148
Bystanders, injuries to bystander requested to aid in starting automobile, liability, § 177, n 74
Cable ties, contributory negligence, inspection for latent defects or dangers, § 447, p 1270
Cable, assumption of risk, knowledge of danger, § 390, p 1208
Calcuttining, independent contractors, inherent danger as respects liability for injuries to others, § 500, p 362
Cant hooks, contributory negligence, inspection for latent defects or dangers, § 447, p 1270
Carbon bisulphide poisoning, employee's right of action for, § 482 n. 7
- Care,**
 Contributory negligence, post
 Master to protect servants from injuries, §§ 183-185, pp 877-883
 Inexperienced or minor servants, § 185
 Pleading degree of care required as to servant in action for servant's injuries, § 490, p 17
Caretakers, overtime pay, time spent in standby capacity as included in working time, § 151(28), p 716
Carpenter's helpers,
 Assumption of risk, ordinary risk, § 375
 Warning or instruction of danger, necessity, § 295
- Carriers,**
 Application of,
 Hours of Service Act, § 19
- Carriers**—Continued,
 Application of—Continued,
 Railway Labor Act, § 28(5)
 Federal Employers' Liability Act, generally, post
 Federal Safety Appliance Acts, absolute and continuing duty to provide and keep in safe condition appliances specified, § 227, p 933
Hours of labor,
 Action to recover penalty for violation of law, § 23
 Application of Hours of Service Act, § 19
 Emergencies and other happenings excusing violations, § 22
 Hours of Service Act, §§ 18, 19
 Interruption of continuity of service, § 20
 Penalty for violating law, § 23
 Report of excessive hours, § 21
 Penalty for failure to make, § 23
Labor disputes,
 Jurisdiction,
 National Railroad Adjustment Board, § 28(74), p 261
 State courts, § 28(71)
 Settlement,
 Administrative proceedings, § 28(69)
 Conditions precedent to proceedings before Mediation Board, § 28(75)
 Submission to arbitration, § 28(73)
 Safe instrumentalities and places for work, duty to furnish, § 212, pp 919-922
- Cars,**
 Contributory negligence, post
 Coupling and uncoupling Railroad cars, post
 Railroad cars, generally, post
- Case, injuries to third persons, action on as proper remedy,** § 611
Cash, minimum wage and overtime pay, payment in, § 151(27), p 712
Casual workers, wages, prompt payment on discharge, statutory provisions, § 156, p. 763
Cattle guards, railroads, duty to employees to provide, § 220, p 975
Causal connection between negligent act and injury to servant, liability of master as dependent on, § 187
Cause, employment contract, rescission for, § 9, p. 82
Cause of injury to servant,
 Admissibility of evidence, § 505
 Similar facts and occurrences, § 511
 Burden of proof, § 501, pp 66, 71; § 540
 Instructions in actions for, § 544
 Presumptions, § 501, p 55
 Instruction on, § 540
 Pleading, § 490, p 26
 Questions of law and fact, § 533, pp. 152-164
 Weight and sufficiency of evidence, § 522, pp 116-121
- Cease and desist orders,**
 National Labor Relations Board, post
 Status of order of labor relations board as injunction when sustained by court, § 28(140)
 Unfair labor practices, post
- Certainty,**
 Employment contract, § 6, p 68
 Commissions, § 90, p. 519

INDEX TO MASTER AND SERVANT

- Certainty—Continued,**
 Employment contract—Continued,
 Defense of uncertainty in action for breach,
 § 11, p 85
 Pleading, action for injuries to servant, § 489, p 15
- Certification, collective bargaining, representative for,**
 § 28(34)
- Cessation from work for brief period, liability of employers for injuries during,** § 181, p 877
- Chain store system, Fair Labor Standards Act, employees as within coverage,** § 151(14), p 676
- Chains,**
 Assumption of risk,
 Knowledge of danger, § 390, p 1206
 Latent defects or dangers, § 392, p 1220
 Contributory negligence, inspection for latent defects or dangers, § 447, p 1271
- Chairs,**
 Assumption of risk, latent defects or dangers, § 392, p 1220
 Latent defects or dangers, duty of employee to inspect for, § 381
- Challenge of right to vote, collective bargaining, election of bargaining representative,** § 28(33), p 180
- Change in business, termination of employment,** § 34
- Change of,**
 Beneficiary, death benefit certificate issued employee by relief or benefit associations, § 169, p 832
 Employment, solicitation of customers of former employer, § 72, p 483
 Relation as between master and third persons, liability for injuries to servants affected by, § 180, p 871
- Character, wrongful discharge, damages as recoverable for injuries to,** § 58, p 469
- Charges, Labor Relations Board,**
 Condition precedent to issuance of complaint, §§ 28(75), 28(80)
 Persons authorized to file, § 28(83)
- Charitable enterprises, labor relations, statutes dealing with as applying,** § 28(6)
- Charitable work, injuries to third persons, liability of master under doctrine of respondeat superior,** § 571, p 319
- Charter, labor organizations, necessity,** § 28(15), p 148
- Charterers, independent contractors, liability for injury as result of work done under,** § 591, p 368
- Chastisement, right of employer to chastise employee,** § 76
- Chauffeurs, negligence or wrongful act resulting in loss to employer, liability,** § 79, p 502
- Check, wages, payment by, penalty for refusal to pay,** § 156, p. 764
- Check-off,**
 Collective bargaining,
 Designation of bargaining representative by signing check-off card, § 28(27)
 Validity of contract provisions for check-off of union dues, § 28(40), p 103
 Deduction from wages of union dues and assessments, § 103; § 157, p 766
 Preference, paying to organization representing majority as, § 28(52), n 73
- Check-off—Continued,**
 Unfair labor practice, closed shop contract, § 28(62)
- Checkweighman,**
 Statutory provisions, employment by miners, § 158
 Union employee, status as within statute regulating labor relations, § 28(11) n 28
- Chemicals, warning and instructing servants as to dangers in handling,** § 303
- Chicken ladder, safe appliances, simple appliance as respects liability to furnish,** § 216, n 97
- Child Labor Laws** Infants, post
- Childbirth, abandonment of work because of confinement in, right to recover compensation earned as affected,** § 85
- Children** Infants, generally, post
- Chisels,**
 Assumption of risk,
 Knowledge of danger, § 390, p 1206
 Latent defects or dangers, § 392, p 1220
 Simple tool,
 Assumption of risk, § 390, p 1209
 Liability of master to furnish safe tools and appliances, § 216, n 97
 Status as respects duty of employer to inspect, § 235, p 991, n. 78
- Choses in action, lien for wages as attaching to,** § 145
- Christmas bonus, separation from employment prior to payment, rights as to,** § 98, p. 529, n 98
- Chutes,**
 Guarding to protect servants, § 234
 Jury question, injuries to servant, § 534, p 184
- Circuit Court of Appeals, minimum wages, review of order fixing,** § 151(32), p. 731
- Circumstantial evidence,**
 Assumption of risk, § 526
 Cause of injury to servant shown by, § 522, p 117
 Contributory negligence, § 527
 Dangerous machinery or places, knowledge of defects or danger, § 524, p 124
 Employment contract, fraud inducing, § 6, p. 68
 Injuries to servant,
 Cause of injury, § 522, p 117
 Knowledge of defects or danger shown by, § 524, p 124
 Negligence of,
 Fellow servant, § 525
 Master, § 524, p 123
 Sufficiency, § 520
 Injuries to third persons,
 Cause of employment, tortious act committed in, § 615, p 406
 Relationship of master and servant, § 615, p 405
- Labor Relations Board's reliance on,** § 28(95), p 285
- National Labor Relations Board,**
 Conclusiveness of findings based on, § 28(136), p 396
- Safe place to work,** § 524, p 125
- Tools, machinery and appliances, negligence of master,** § 524, p 125
- Unfair labor practices,** § 28(96) p 290
 Discharge because of union activities, § 28(100), p 307

INDEX TO MASTER AND SERVANT

- Circumstantial evidence—Continued,
 - Unfair labor practices—Continued,
 - Domination of and interference with labor organization, § 28(98), p 299
- Civil engineers, lien for wages, § 143, p 608
- Civil law, federal civil rule, recognition, § 321
- Civil Rights Law, respondeat superior, doctrine as applicable with respect to violation of, § 575, p 371
- Clamps, assumption of risk, simple tool doctrine, § 300, p 1209
- Class actions, Fair Labor Standards Act, actions for wages and penalties, § 160(6), p 781
- Claw bars, assumption of risk,
 - Knowledge of danger, § 300, p. 1206
 - Simple tool doctrine, § 300, p 1209
- Clean hands, reinstatement of striking employees, principal as applicable, § 28(119), p 342, n 92
- Cleanse card or letter, discharged employee, duty of employer to give, § 45
- Cleaning land, independent contractor, § 3(9)
- Clerks and clerical employees,
 - Fair Labor Standards Act, § 151(9), p 656
 - Lien for wages, § 142, § 143, p 607
 - Term servant as embracing, § 1 p 26, n 15
- Climatic conditions, railroads, liability for injuries to employees resulting from, § 226, p 946, n 32
- Closed shop,
 - Agreement or contract,
 - Action as maintainable by union to prevent breach, § 28(71), p 252
 - Collective bargaining,
 - Binding effect of provisions, § 28(41), p 199
 - Necessity of agreeing with union on issue, § 28(38), p 191, n 69
 - Validity of provision, § 28(40), p 193
 - Concerted activities of labor union with object of gaining, legality, § 28(19), p 152
 - Discharge of employee because of or pursuant to agreement,
 - Burden of proof, § 28(93), p 282
 - Reinstatement order, § 28(100), p. 319, n. 58
 - Unfair labor practice, § 28(49), p 223
 - Encouragement by employer of membership in union with which he has agreement, § 28(25), p 166
 - Evidence, § 28(95), p 286
 - Jurisdictional dispute between unions, right of employer to support union having contract, § 28(52)
 - Parties of proceeding to declare illegal, § 28(85)
 - Validity, § 2, p 32, n. 88
- Collective bargaining,
 - Binding effect of provisions, § 28(41), p 199
 - Employer dominated unions, closed shop agreement with, § 28(40), p 194
 - Necessity of reaching agreement on issue, § 28(38), n 69
 - Subject for collective bargaining, § 28(22)
 - Validity of contract provisions, § 28(40), p 193
- Unfair labor practice,
 - Discharge of employee in accordance with contract, § 28(49), p 223
- Closed shop—Continued,
 - Unfair labor practice—Continued,
 - Statement of views in opposition to, § 28(55)
 - Closing out business, termination of employment, § 34
 - Clothing shops, Fair Labor Standards Act, exemption from provisions, § 151(14), p 675
 - Clothing, wages and other remuneration, furnishing as part of, § 99
 - Coal holes, respondeat superior, doctrine as applicable, § 575, p 321
 - Coal mines and mining,
 - Fair Labor Standards Act, application to employers, § 151(7), p 642
 - Gas accumulation, inspection, § 235, p 903
- Coercion,
 - Labor unions, § 28(19), p 154
 - Prevent continuing in employment,
 - Civil liability, § 629
 - Criminal liability, § 638
 - Statutory provisions as to coercion of employees, § 27
 - Unfair labor practice, § 28(45), p 209
 - Evidence, § 28(97), pp 292-296
 - Joining specific union, § 28(56)
- Cogs, negligence of master, covering or guarding, jury questions, § 534, p 187
- Cogwheels,
 - Assumption of risk, knowledge of danger, § 300, p 1208
 - Contributory negligence, inspection for latent defects or dangers, § 447, p 1271
- Cold office, contributory negligence, servant working in without complaint, § 440, n 77
- Collaboration, evidence admissible in action for injuries to servants, § 510
- Collateral benefits, back pay award to reinstated employees as affected by benefits received, § 28(119), p 345
- Collection agencies, independent contractor, § 3(9)
 - Liability for torts of, § 584, p 356
- Collective bargaining, §§ 28(20)-28(42), pp 155-207
 - Administrative determination of unit representation, §§ 28(29)-28(34), pp 175-184
 - Ambiguous provisions of contract, interpretation, § 28(22)
 - Antedated contract, § 28(41), p. 107
 - Apprentices, eligibility to vote on bargaining representative, § 28(33), p. 180
- Arbitration,
 - Award, enforcement, § 28(122), p 351
 - Blanket arbitration clause and contract, § 28(72)
 - Condition precedent to action for wages, § 123
 - Construction of provisions for, § 28(41), p. 199
 - Provision in contract as precluding resort to courts for enforcement of rights, § 28(71), p 251, n. 25
 - Stay of arbitration under clause, § 28(78)
 - Unfair labor practices, refusal to arbitrate in accordance with contract, § 28(46)
 - Validity of provisions of contract for arbitration of disputes, § 28(40), p. 192
- Arm's length, § 28(23)
- Automatic renewal of agreement § 28(41), p. 198

INDEX TO MASTER AND SERVANT

Collective bargaining—Continued,

- Ballots on election of bargaining representative, § 28(33), pp 180, 181
- Bargaining agents, Representative, generally, post this head
- Bargaining units, § 28(28), pp 171-174
 - Modification of agreements, power, § 28(35) p 185
- Binding effect of,
 - Contract, § 28(41), p 196
 - Election of bargaining representative, § 28(33), p 182
- Blank ballots, election of bargaining representative, § 28(33), p 181
- Blanket arbitration clause in contract, § 28(72)
- Campaigning by employees or unions prior to election of bargaining representatives, § 28(33), p 179
- Certification of bargaining representative, §§ 28(31), 28(32), 28(34)
- Challenge of vote, election of bargaining representative, § 28(33), p 180
- Check-off card, designation of bargaining representative by signing, § 28(27)
- Check off of union dues
 - Appropriate matter to be governed by agreement, § 103
 - Validity of provisions for, § 28(40), p 193
- Class, negotiation with respect to matters affecting employees as, § 28(22)
- Closed shop, ante
- Coercion of employees in exercise of right as unfair labor practice, § 28(45), p 200
- Common agent for negotiation, employers uniting in designating, § 28(24)
- Compelling entering into contract or agreement, §§ 28(38), 28(141)
- Conclusiveness of order certifying bargaining representative, § 28(34)
- Conditions of employment, § 28(22)
 - Employer as authorized to fix conditions not covered by agreement, § 28(42), p 205
- Conduct of,
 - Election for bargaining representative, § 28(33), p 180
 - Inquiry as to proper bargaining representative, § 28(32)
 - Negotiations, § 28(23)
 - Person authorized to conduct, § 28(20), p 168
 - Proceeding for selection of bargaining representative, § 28(32)
- Confidential information, employees with as properly included in bargaining unit, § 28(28), p. 174
- Consideration, contract, § 28(37)
- Constitutional provisions, § 28(20)
- Construction,
 - Contract or agreement, § 28(41), pp 195-204
 - Railroads and employees, § 28(133), p. 383
 - Statutory provisions, § 28(4)
- Contest of election of bargaining representative, § 28(33), p 181
- Continuing observance after expiration of agreement, § 28(41), p 198
- Continuing right, § 28(20)

Collective bargaining—Continued,

- Contracts or agreements, §§ 28(37)-28(42), pp 189-207
- Action for breach or enforcement, §§ 28(71), 28(89), 28(120)
- Arbitration,
 - Clause in contract, § 28(72)
 - Construction of provisions of contract, § 28(41), p 190
 - Enforcement of arbitration award, § 28(122), p. 351
 - Provision in contract as precluding resort to courts for enforcement of rights, § 28(71), p. 251, n 25
 - Unfair labor practices, refusal to arbitrate in accordance with contract, § 28(46)
 - Validity of provisions of contract for arbitration of disputes, § 28(40), p 192
- Authority of bargaining agent to make, § 28(35), p 185
- Checkoff of union dues as appropriate matter to be governed by agreement, § 103
- Closed shop,
 - Agreement with employer dominated unions, § 28(40), p 194
 - Necessity of reaching agreement on issue, § 28(38), p. 191, n 60
 - Validity of provisions of contract, § 28(40), p 193
- Compelling entering into, §§ 28(38), 28(141)
- Courts,
 - Arbitration, provision in contract as precluding resort to courts for enforcement of rights, § 28(71), p 251, n 25
 - Power to make contract for parties, § 28(37)
- Existing contracts, condition to making change in, § 28(22)
- Hours of labor, compelling employer to enter written agreement covering, § 28(141)
- Illegal agreement, insistence on as indicating lack of good faith, § 28(23)
- Interpretation, § 28(22); § 28(41), pp. 195-204
- Parties to proceedings involving contract, § 28(85)
- Performance or breach, § 28(41), p. 198
 - Action for breach, § 28(71)
 - Contract between employer and bargaining representative, § 28(120)
 - Discharge of employee in breach of contract, damages, § 28(120)
 - Pleading in action for damages, § 28(89), p. 278
- Railroads and employees bargaining agreement, construction, § 28(133), p 383
- Seniority rights,
 - Contract as providing for arbitration, § 28(72), n 76
 - Exclusive authority of bargaining agent to contract, § 28(35), p 184, n. 84
 - Individual contracts as affected, § 28(42), p 205, n 19
- Unfair labor practice, refusal to sign written contract, § 28(60)

INDEX TO MASTER AND SERVANT

Collective bargaining—Continued.

Contracts or agreements—Continued.

Unilateral draft of contemplated agreement,
offer of, § 28(23)

Controversies in respect of as labor dispute, § 28
(16)

Counter proposal, duty to furnish pursuant to re-
quest, § 28(23)

Courts,

Arbitration, provision in contract as preclud-
ing resort to courts for enforcement of
rights, § 28(71), p 251, n 25

Power to make contract for parties, § 28(37)

Craft unions, separate bargaining unit, § 28(28),
p 171

Determination of result of election for bargain-
ing representative, § 28(33), p 181

Discharge of employee,

Agreement as affecting right of employer to
discharge, § 28(41), p 200

Breach of contract, damages, § 28(120)

Unfair labor practice, discharge for agita-
tion, § 28(49), p 221

Nomination of labor organization by employer, §
28(25), p 165

Duration of authority of bargaining representa-
tive, § 28(36)

Duties,

Bargaining representative, § 28(35), pp 184-
187

Employer to bargain or enter into contract,
§§ 28(21), 28(38)

Duration of agreement, § 28(41), p 197

Economic hardships as excusing employer from
compliance with statute, § 28(21)

Election,

Delaying bargaining process pending, § 28
(27)

National Labor Relations Board, control of, §
28(133), p 382

Representative, § 28(33), pp 177-182

Review of orders of labor relations board, §
28(124)

Eligibility to vote on election of bargaining repre-
sentative, § 28(33), p 179

Employer dominated unions,

Closed shop or union shop agreement with, §
28(40), p 194

Contract with as invalid, § 28(37)

Disestablishment of union recognized for,
power of National Labor Relations
Board, § 28(118), p 333

Encouraging, § 28(1)

Enforcement,

Arbitration award, § 28(122), p 351

Contract, § 28(41), p 197

Individual rights to recover pay, action for,
§ 122

Existing contracts, condition to making changes
in, § 28(22)

Extension of agreement in absence of notice, §
28(41), p 198

Fair Labor Standards Act,

Application to override policy, § 151(24), p
606

Exemption of persons employed pursuant to
agreement, § 151(23)

Collective bargaining—Continued.

Form of contract, § 28(39)

Fraud, certification of bargaining agent induced
by, § 28(34)

Freedom in choice of representative, § 28(25), pp.
163-166, § 28(26), p 166

Fundamental rights, § 28(20)

Globe doctrine, § 28(28), p 174, n 53

Good faith,

Compliance with decree requiring, § 28(141)

Lack of, § 28(22)

Necessity of bargaining in, § 28(23)

Unfair labor practice, refusal to bargain in,
evidence, § 28(101)

Grievances, § 28(20)

Individual grievances,

Arbitration, § 28(72)

Duty of negotiating concerning, § 28(24)

Negotiation for settlement, § 28(35), p
186

Power of bargaining agent to handle, § 28
(35), p 186

Presenting to employer, § 28(20)

Unfair labor practice, refusal to discuss with
employee representatives, § 28(46)

Guards, bargaining unit as properly including, §
28(28), p 174

Hearing, certification of bargaining representa-
tive, § 28(32)

Hours of labor, § 28(22)

Compelling employer to enter written agree-
ment covering, § 28(141)

Individual claim, negotiation for settlement, §
28(35), p 186

Individual contracts as affected by agreement, §
28(42), pp 204-207

Individual members of labor union as bound by
contract, § 28(41), p 197

Infants, eligibility to vote on bargaining unit, §
28(33), p 180

Inquiry as to proper bargaining representative,
conduct of, § 28(32)

Inspectors, bargaining unit consisting of, § 28
(28), p 174, n 60

Interpretation of contract, § 28(22), § 28(41), pp
195-204

Intoxicants, construction of provision authorizing
discharge of employee for use of, § 28(41),
p 201, n 81

Invalid contract, § 28(41), p 197

Joint and several nature of contract, § 28(37)

Justifiable acts of labor unions in connection with
right of, § 28(19), p 152

Labor relations boards or commissions, generally,
post

Labor unions as authorized to maintain action to
enforce contract, § 28(71)

Lay off, agreement as affecting right of employer,
§ 28(41), p 200

Liberal construction of statutes providing for, §
28(4)

Living standards, consideration, § 28(21), n. 72

Maintenance of membership provision, § 28(41),
p 197

Majority,

Designation of bargaining representative, §
28(27)

INDEX TO MASTER AND SERVANT

Collective bargaining—Continued,

Majority—Continued,

- Election of bargaining representative, § 28 (33), p. 181
- Loss of, as terminating authority of bargaining representative, § 28(36)
- Notice, dispute between groups of employees as to majority representation, § 28(32)
- Organization representing free choice as proper representative, § 28(26), p. 166
- Status, bargaining representative, § 28(27)
- Membership card, designation of representative by signing, § 28(27)
- Membership dues, waiver by union for period prior to election of bargaining representative, § 28(33), p. 179
- Minorities, representation of own members, § 28(26), p. 166
- Minority union, authority to represent members in negotiations with employer, § 28(35), p. 184
- Modification of contract or agreement, § 28(37)
 - Power of bargaining unit, § 28(35), p. 185
 - Seniority rights as affected, § 28(41), p. 204
- Mutuality, want of as affecting validity, § 28(37)
- National Labor Relations Act, post
- National Labor Relations Board, generally, post
- National Mediation Board, selection of bargaining representatives, discretion, § 28(133), p. 382
- National organization, union affiliated with as proper representative, § 28(26), p. 167
- Nature of,
 - Contract, § 28(37)
 - Proceeding, § 28(20)
- New election of representative on charge former bargaining agent no longer represents majority, § 28(33), p. 179
- Nonunion labor, validity of provisions of contract respecting, § 28(40), p. 192
- Norris-LaGuardia Act, § 28(20), p. 156, n. 60
- Notice,
 - Abrogation of agreement after, § 28(41), p. 198
 - Dispute between groups of employees as to majority representation, § 28(32)
 - Election of bargaining representative, § 28 (33), p. 178
 - Employee as entitled to notice of negotiation of contract by representative, § 28(37)
- Number of employees, validity of provisions of contract respecting, § 28(40)
- Observers at polls at election of bargaining representative, § 28(33), p. 181
- Open and fair mind, duty of entering discussion with, § 28(23)
- Open shop, labor relations statutes as precluding, § 28(42), p. 205
- Operation and effect,
 - Certification of bargaining representative, § 28(34)
 - Contract, § 28(41), pp. 195–204
 - Election of bargaining representative, § 28 (33), p. 182
- Peaceful picketing, employment prior to election of bargaining representative, § 28(33), p. 179
- Permanent status, agreement as creating, § 28 (41), p. 198

Collective bargaining—Continued,

Person authorized to conduct negotiations, § 28 (26), p. 168

Petition,

Certification as representative of employees, § 28(31)

Condition precedent to ordering election on choice of bargaining representative, § 28(33), p. 178

Preferential shop, proposal for as excusing employer from bargaining, § 28(21)

Procedure, § 28(20)

Profit-sharing contract as affected by agreement, § 28(42), p. 205, n. 19

Proof of authority of representative, § 28(27)

Propriety of terms of contract, § 28(40), pp. 192–195

Public employment, National Labor Relations Act, § 28(7)

Race or color, power of bargaining representative to discriminate against employees in units on ground of, § 28(35), p. 185

Railway employment, presumption, § 28(93), p. 281

Railway Labor Act, § 28(2), p. 118; § 28(20)

Ratification of contract, § 28(37)

Recognition of right, § 28(20)

Refusal to bargain except on unreasonable condition, § 28(21)

Remedies available for violation of right, § 28 (69)

Renewal of proposal to bargain, § 28(21)

Representative, § 28(24)

Acceptance or rejection of proposed wages, § 110, p. 542

Actions for breach of contract between employer and representative, § 28(120)

Administrative determination of unit representation, §§ 28(29)–28(34), pp. 175–184

Authority to make contracts, § 28(35), p. 185

Ballots on election, § 28(33), pp. 180, 181

Binding effect of election, § 28(33), p. 182

Certification, § 28(26), p. 167, § 28(31), 28 (32), 28(34)

Check-off card, designation by signing, § 28 (27)

Conduct of,

Election for bargaining representative, § 28(33), p. 180

Inquiry as to proper bargaining representative, § 28(32)

Contest of election, § 28(33), p. 181

Contract with improper representative as invalid, § 28(37)

Controversy over as labor dispute, § 28(16)

Determination of result of election, § 28(33), p. 181

Duration of authority, § 28(36)

Duties, § 28(35), pp. 184–187

Election, § 28(33), pp. 177–182

Eligibility to vote at election, § 28(33), p. 179

Employer favored organizations, representation by, § 28(26), p. 167

Employer representative, § 28(24)

Evidence, sufficiency, § 28(95), p. 287

Exclusive authority, § 28(35), p. 184

INDEX TO MASTER AND SERVANT

Collective bargaining—Continued,

Representative—Continued,

- Extent of authority, § 28(35), pp 184-187
- Freedom of choice, § 28(25), pp 163-166; § 28(26), p 166
- Government seizure, proceedings to determine bargaining representative after, § 28(30), n 79
- Grievances, power to handle, § 28(35), p. 186
- Independent union, § 28(26), p 167
- Interferences with employees in choice, § 28(25), p 163
- Majority status, § 28(27)
- Membership card, designation by signing, § 28(27)
- Membership dues, waiver by union for period prior to election of bargaining representative, § 28(33), p 179
- Minority union, authority to represent members in negotiations with employer, § 28(35), p 184
- National Labor Relations Act, § 28(2), p 115, n 20
- National Labor Relations Boards,
 - Labor organization filing charges as required to be capable of acting as, § 28(83)
 - Weight given decision of, § 28(133), p 381
- National organization, union affiliated with, § 28(26), p 167
- New election, § 28(33), p 179
- Notice,
 - Dispute between groups of employees as to majority representation, § 28(32)
 - Election of bargaining representative, § 28(33), p 178
 - Employee as entitled to notice of negotiation of contract by representative, § 28(37)
- Operation and effect of,
 - Certification, § 28(34)
 - Election, § 28(33), p 182
- Organization authorized to act as, § 28(26), pp 166-169
- Permanent status, § 28(36)
- Presumption as to continuing authority, § 28(33), p 281
- Proceeding for,
 - Determination, § 28(30)
 - Selection, § 28(32)
- Proof of authority, § 28(27)
- Race or color, power of representative to discriminate against employees on ground of, § 28(35), p 185
- Recognition of chosen representative of employees, § 28(24)
- Request by statutory bargaining representative, § 28(21)
- Review of orders of labor relations board involving, § 28(124)
- Revocation of designation, § 28(36)
- Rival union, selection as representative, § 28(27), p 169, n 14
- Seniority rights, exclusive authority to contract with reference to, § 28(35), p 184, n 84

Collective bargaining—Continued,

Representative—Continued,

- Setting aside election, § 28(33), p 182
- Strike breakers, employment as affecting authority of representative for striking employees after reinstatement, § 28(30), n 42
- Successor to favored union, § 28(26), p 168
- Temporary status, § 28(36)
- Termination of authority, § 28(36)
- Unfair labor practices,
 - Loss of majority caused by, as affecting representative's authority, § 28(36)
 - Refusal to recognize union as sole bargaining agent, § 28(59)
- Union membership, designation of bargaining agency without, § 28(27)
- Restraint of employees in exercise of right as unfair labor practice, § 28(45), p 209
- Retroactive operation of contract, § 28(41), p 197
- Review of orders involving representation for, National Labor Relations Boards, § 28(124)
- Revocation of designation of bargaining representative, § 28(36)
- Rival unions,
 - Negative duty of employer not to bargain with, § 28(24)
 - Neutrality of employer in contest between, § 28(25), p 164
 - Selection as bargaining representative, § 28(27), p 169, n 14
- Rules governing employees not covered by agreement, employer as authorized to make, § 28(42), p 205
- Run-off election, selection of bargaining representative, § 28(33), p 181
- Secret ballot, election of bargaining representative, § 28(33), p. 180
- Seniority rights,
 - Construction of provisions, § 28(41), p. 202
 - Contract as providing for arbitration, § 28(72), p 255, n 76
 - Exclusive authority of bargaining agent to contract with reference to, § 28(35), p 184, n 84
 - Individual contracts as affected, § 28(42), p 205, n 19
 - Modification of contract, § 28(41), p 204
 - Termination of rights under contract, § 28(41), p 204
 - Validity of provisions, § 28(40), p 192
- Separate groups of employees, § 28(24)
- Setting aside election of bargaining representative, § 28(33), p. 182
- Signing of contract, § 28(39)
- Statutory provisions, §§ 28(2)-28(4), 28(20)
- Stay of arbitration under clause, § 28(78)
- Strikes,
 - Breach of agreement not to strike, § 28(41), p 198
 - Employment of strikebreakers as affecting authority of bargaining representative for striking employees after reinstatement, § 28(36), p 180, n 42
 - Negotiation with union during, § 28(24)

INDEX TO MASTER AND SERVANT

Collective bargaining—Continued,

Strikes—Continued,

Persons terminating employment during as eligible to vote for bargaining representative, § 28(33), p 180

Result of refusal to bargain, burden of proof, § 28(93), p 283

Validity of provisions of contract giving union right to call, § 28(40), p 192

Subjects of, § 28(22)

Successor to favored union as bargaining representative, § 28(26), p 168

Supervisory employees, bargaining unit as properly including, § 28(28), p 174

Supplemental agreement, reading in connection with principal agreement, § 28(41), p 196

Suspension of,

Charter of local union as terminating employer's obligation under agreement, § 28(41), p 198

Negotiations, request for further negotiations as essential, § 28(21)

Term of employment, bargaining agreement as fixing, § 28(41) p. 197

Termination,

Agreement, § 28(41), p. 197

Representative's authority, § 28(36)

Seniority rights under contract, § 28(41), p 204

Terms of contract, § 28(40), pp. 192-195

Uncertified union, validity of contract entered into by employer, § 28(37)

Unfair labor practices,

Admissibility in evidence as to refusal of employers to bargain, § 28(94)

Application to Labor Relations Board for relief pending negotiations, § 28(70)

Discharge of employee for agitation, § 28(49), p 221

Encouraging membership in labor union by signing contract, § 28(56)

Interference with employees in exercise of right, § 28(45), p 209

Loss of majority caused by as affecting bargaining representative, § 28(36)

Refusal to,

Arbitrate in accordance with contract, § 28(46)

Bargain, § 28(45), p. 212, § 28(101)

Recognize union as sole bargaining agent, § 28(50)

Sign written contract, § 28(60)

Restraint or coercion of employee in exercise of right, § 28(45), p 209

Union dues,

Check-off,

Government by agreement, § 103

Validity of provisions for, § 28(40), p 193

Collection of, § 28(22)

Union membership, designation of bargaining agency without, § 28(27)

Union shops,

Agreement with employer dominated unions, § 28(40), p 194

Binding effect of provisions, § 28(41), p. 199

Collective bargaining—Continued,

Union shops—Continued,

Validity of provision of contract, § 28(40), p 193

Validity,

Contract, § 28(40), pp 192-195

Statutory provisions, § 28(3), p 120

Violation of contracts, action as maintainable as against union for, § 28(71)

Voluntary agreement, § 28(37)

Wages, § 28(22)

Compelling employer to enter into written agreement covering, § 28(141)

Representatives for, acceptance or rejection of proposed wages, § 110, p 542

Waiver of terms of contract, § 28(41), p 198

Walk out, implied agreement respecting, § 28(41), p 198

War Labor Disputes Act, § 28(20)

Working conditions, compelling employer to enter into written agreement, § 28(141)

Write-in votes, election of bargaining representative, § 28(33), p. 181

Written contract as essential, § 28(39)

Collectors, assault to enforce payment of money, liability of master, § 575, p 343

Collisions, term servant as embracing persons working in, § 1, p 26, n 15

Collisions, railroads, care required to avoid, § 261, p 1019

Color, collective bargaining, power of bargaining representative to discriminate against employees in unit on ground of, § 28(35), p 185

Comfort of employees, constitutional provisions authorizing laws providing for, § 14, p 93

Commands. Assumption of risk, ante

Commencement of action as notice of injury to servant, § 485

Commencement of relation,

Contract of employment, § 8, pp 74-79

Determining liability for injuries, § 180, pp 868-873

Inventions by employee prior to, ownership, § 73, p. 492

Commercial paper, Fair Labor Standards Act, goods as including within meaning of, § 151(7), p 641

Commissions,

Labor relations boards or commissions, generally, post

Wages and other remuneration, post

Common agent, collective bargaining, employers uniting in designating, § 28(24)

Common counts, wrongful discharge, declaration on as sufficient, § 52, p 448

Common employment, fellow servants, element of, § 331, pp. 1094-1098

Common knowledge, warning and instructing servant respecting dangers arising from matters of, § 295

Common law,

Arbitration of labor disputes, § 28(73)

Federal Employers' Liability Act, negligence as determinable according to, § 173, p. 838

Fellow servants,

Competency, § 312

Liability of master for injuries by, §§ 321-333, pp 1078-1128

INDEX TO MASTER AND SERVANT

- Common law—Continued,
 - Fellow servants—Continued,
 - Statutes declaratory, § 338
 - Right of action in case of injuries to servant, § 173, p 847, § 482
 - Right to terminate employment, § 29
 - Servant under, § 1, p 26
- Common master, fellow servants,
 - Employees serving as, § 327, p 1085
 - Necessity, § 330
- Common service statutes, fellow servants, railroad sections, § 349
- Common tools and appliances, inspection or repair,
 - Duty of employer, § 235, p 990
 - Purchase from reputable manufacturer, § 237
 - Manner and extent, § 239
- Communications, Fair Labor Standards Act, application to employers engaged in, § 151(7), p 642
- Communications Act, remedies of employees under, § 28(69)
- Company unions. Employer dominated unions, generally, post
- Company store, statute prohibiting employers from requiring employees to trade at, § 27, p 113, n 15
- Comparative negligence,
 - Injuries to third persons, application of rule, § 619, p 424
 - Statutory provisions, § 425, p 1248
 - Federal Employers' Liability Act, admissibility of evidence, § 519, p 108
- Compensation. Wages and other remuneration, generally, post
- Competency,
 - Evidence in actions for injuries to servants, § 503
 - Fellow servants, post
- Competing business, discharge of employees secretly engaged in, § 42, p 430
- Complaint, declaration or petition,
 - Employment contracts, actions for breach, § 11, p 86
 - Fair Labor Standards Act, actions for wages and penalties, § 160(7), p 784
 - Federal Employers' Liability Act, action under, § 490, p 29
 - Injuries to servants, actions for, §§ 489-493, pp 14-36
 - Agents, averments as to acts or omissions to, § 490, p 25
 - Assumption of risk, negating, § 492
 - Breach of duty, allegations as to, § 490, pp 17, 26
 - Consistent allegations, § 489, p 14
 - Contributory negligence, negating, § 493
 - Dangerous machinery or places, averments as to, § 490, p 18
 - Demurrer, § 489
 - Duty owed to servant, showing as to, § 490, p 17
 - Essential allegations, § 489, p 14-17
 - Federal Employers' Liability Act, allegations under, § 490, p 29
 - Insufficient force, averments as to negligence, § 490, p 25
 - Knowledge of danger, averment as to, § 490, p 20
 - Complaint, declaration or petition—Continued,
 - Injuries to servants, actions for—Continued,
 - Negative averments, Workmen's Compensation Act, § 189, p 10
 - Negligence,
 - Employment or retention of fellow servants, averments, as to, § 490, p 24
 - Fellow servants, averments as to, § 491
 - Insufficient force, § 490, p 25
 - Master, allegations as to, § 490, pp 17-30
 - Proximate cause, averments as to, § 490, p 25
 - Representatives, averments as to acts or omissions through, § 490, p 25
 - Repugnancy, § 489, p 4
 - Statement of cause of action, § 489, p 15
 - Violation of statutory duty, averments as to, § 490, p 26
 - Warning or instructing, averments as to failure, § 490, p 23
 - Willful or wanton injury, § 490, p 30
 - Injuries to third persons, actions for, § 614, pp 384-389
 - Labor contract statutes, prosecution of employees for violation, § 80, p 507
 - Labor Relations Board, issuance of complaint, § 28(89), p 276
 - Conditions precedent to issuance, § 28(75)
 - Overtime pay, actions to recover, § 160(7), p 783
 - Wage lien, enforcement, § 149, p 614
 - Wages, action to recover, § 128, p 570, § 160(7), pp 783, 784
 - Wrongful discharge, actions for, § 52, pp 447-451
 - Wrongful interference with employment relation, actions for, § 624
- Complete control, relationship as dependent on, § 2, p 36
- Compressed air drills, independent contractors operating, inherent danger as respects liability for injuries to others, § 590, p 362
- Compromise and settlement,
 - Fair Labor Standards Act, release of liability, § 151(35), pp 736-741
 - Federal Employers' Liability Act, application to agreement for, § 197
 - Minimum wages and overtime pay, release of liability, § 151(35), pp 736-741
- Wages,
 - Burden of proof in action to recover, § 129, p 579
 - Offer of compromise as defense to actions for, § 125, p 568, n. 2
 - Pleading as defense in action to recover, § 128, p 573
- Compulsory arbitration, labor disputes, validity of statute requiring, § 28(3), p 123
- Compulsory service,
 - Fellow servant, doctrine as applying to persons in, § 322
 - Injuries to servant as result of acts or omissions, liability of master, § 190
- Conciliation, mediation and arbitration,
 - Appointment and removal of arbitrator, § 28(73)
 - Collective bargaining, ante
 - Compulsory arbitration, validity of statute requiring, § 28(3), p 123

INDEX TO MASTER AND SERVANT

- Conciliation, mediation and arbitration—Continued,**
 Construction of collective bargaining contract provisions, § 28(41), p 199
 Contract of employment, reference to arbitration, § 32, p 417
 Disputes under collective bargaining contract, § 28(72)
 Encouraging, § 28(1)
 Enforcement,
 Arbitration award under collective bargaining agreement, § 28(122), p 351
 Award of arbitrator, § 28(133), p 375
 Evidence, § 28(92)
 Fair Labor Standards Act, agreement as affecting rights under, § 151(35), p 737, n 27
 Hearing, rules applicable to arbitration proceedings, § 28(121), pp 347-350
 Jurisdiction,
 National Mediation Board, § 28(74), p 262
 Review of arbitration, § 28(122), p 351
 Labor unions, § 28(15), p 146
 Agreement to arbitrate as disqualifying from acting as bargaining agent, § 28(26), p 167
 Modification or correction of award of arbitrator, § 28(133), p 375
 Municipally operated power plants, § 28(7)
 Notice of proceeding, § 28(87)
 Parties to proceedings, necessary and proper parties, § 28(85)
 Procedure in, settlement of labor disputes, §§ 28(72), 28(73)
 Provision in contract as precluding resort to courts for enforcement of rights, § 28(71), p 251, n 25
 Railway labor act, generally, post
 Settlement of labor disputes in general, §§ 28(72) 28(73)
 Sick leave, contract as providing for arbitration of matters respecting, § 28(72), p 255, n. 70
 Statutory provisions, § 28(2), pp 114-120
 Construction, § 28(4)
 Validity, § 28(3), p 122
 Stay of proceedings pending arbitrations in accordance with agreements, § 28(78)
 Submission in accordance with contract before resort to courts, § 28(71), p 250
 Subpoenas by Board of Mediation, § 28(81)
 Unfair labor practice by employer refusing to arbitrate, § 28(46)
 Validity of collective bargaining contract provisions for arbitration, § 28(40), p 192
 Wages,
 Condition precedent to action for, § 123
 Rules applying, § 138
 Witnesses, compelling attendance before Board of Mediation, § 28(81)
- Conclusions of fact, National Labor Relations Board, conclusiveness, § 28(136), p. 389**
Conclusiveness,
 Arbitration award, labor disputes, § 28(121), p 347
 National Labor Relations Board,
 Findings and conclusions, § 28(136), p 384
 Orders, § 28(116)
- Concurrent negligence,**
 Fellow servants,
 Assumption of risk, § 368
 Instructions on, § 548
 Liability of master as affected, § 356
 Independent contractors, liability for injuries caused by or resulting, §§ 586, 597
 Injuries to servant,
 Joint and several liability, § 195
 Liability of master, §§ 189, 252, § 533, p 164
 Third persons, liability of employer as affected, § 189
 Jury questions, § 533, p 164
 Conditional acceptance, contract of employment, § 6, p 65, n 3
 Condition of equipment or place of work, burden of proof in action for injury to servant, § 501 p 73
Conditions,
 Before and after injury, evidence in action for injuries to servants, § 509
 Employment, collective bargaining, § 628(20), 28(22)
 Employment contracts, § 6, p. 68
 Waiver, § 9, p. 80
 Condition precedent,
 Action for injury to servant, § 483-485
 Pleading, § 489, p 16
 Bonus, payment as dependent on fulfillment, § 98, p 530
 Commissions, employee's right to, § 90, p 521
 Injuries to servants, actions for, §§ 483-485
 Pleading performance, § 489, p 16
 Settlement of labor disputes, proceeding or actions for, § 28(75)
 Wages,
 Actions for, §§ 123, 160(3)
 Payment on, § 119
 Condonation, discharge of employee, waiver of right, § 43
 Conduct of trial of actions for injuries to servants, § 528
Conductors,
 Contributory negligence, guarding against obstruction on or near track, § 456, p 1287
 Fellow servants, § 327, p. 1038
Confidential information,
 Collective bargaining, employees with as properly included in bargaining unit, § 28(28), p 174
 Employees forming corporation for purpose of utilizing, liability of corporation, § 77
 Implied agreement on part of employee not to disclose, § 72, p 484
Confidential relationship,
 Invention of employee occupying, rights as to, § 73, p. 488
 Trade secrets imported to employee by reason of, duty not to divulge, § 72, p. 483
Conflict of laws,
 Contracts of employment, § 5
 Contributory negligence, § 426
 Federal Employers' Liability Act, burden of proof, § 501, p 67
 Fellow servants, liability of master for injuries by, § 326
 Injuries to servant, liability, § 172
 Contracts affecting liability, § 198

INDEX TO MASTER AND SERVANT

- Conflict of laws—Continued,
 - Injuries to servant, liability—Continued,
 - Instructions on, in actions to recover for, § 541
 - Presumptions, § 501, p 54
 - Relief and benefit departments or associations, right to benefit, § 170, p 838
- Confusing instructions, injuries to servants, § 538, p 237
- Conjecture,
 - Injuries to servant, evidence leaving cause of injury to, jury question, § 533, p 154
 - National Labor Relations Board, conclusiveness of findings resting on, § 28(136), p 394
- Connecting carriers, injuries to servants from defective cars received, liability of receiving company, § 212, p 919
- Consecutive hours of service, train order operatives, 24-hour period, § 20
- Consent,
 - Contract of employment, § 5
 - Modification, § 9, p 80
 - Rescission, § 9, p 81
 - Termination, § 33
 - Loaning or hiring servant to another, § 2, p 38
 - National Labor Relations Board, entry of order on, § 28(110)
 - Nonperformance of contract by employee, liability as affected, § 77
 - Parents, employment of minor in dangerous occupation, failure to secure as negligence, § 185
- Consent decree, labor relations board, enforcement of order, compliance with, § 28(141)
- Consideration,
 - Benefit plan offered by employer and accepted by employee, § 169, p 828
 - Bonus, promise as required to be based on, § 98, p 528
 - Collective bargaining contract, § 28(37)
 - Contract of employment, § 6, p 66
 - Inventions by employee belonging to employer under provisions of, § 73, p 488
 - Life employment, § 6, p 70
 - Modification, § 9, p 79
 - Permanent employment, § 6, p 70
 - Retroactive modification, § 9, p 80, n 62
 - Contract releasing employer from liability for servant's injury, § 197
 - Extra work, agreement to pay compensation for, § 97
 - Injuries to servants, contracts releasing employer from liability, § 197
 - Retirement plan, rights of employees under, § 169, p 830
 - Sharing in profits, contract obligation of employer based on, § 93
 - Termination of,
 - Employment, § 31, p. 415
 - Relation, surrender of employment contract for consideration, § 33
- Wages,
 - Agreement for future increase as required to be based on, § 110, p 545
 - Forfeited wages, promise to pay as required to be supported by, § 106
- Consociation doctrine, fellow servants, § 331, p 1097
- Consolidation of companies, seniority rights of employees, § 28(41), p 203, n 93
- Conspiracy, Fair Labor Standards Act, resort to in order to preclude payment of compensation guaranteed, § 151(35), p 736
- Constitutional provisions,
 - Assumption of risk,
 - Jury question, § 536, p 212
 - Knowledge of danger, § 383, p 1193
- Collective bargaining, right of, § 28(20)
- Contributory negligence, jury questions, § 537, p 223
- Fellow servants,
 - Federal fellow servants, railroad employees, § 346
 - Master's liability for injuries by, §§ 334-356, pp 1126-1146
 - Railroad employees, §§ 346-356, pp 1143-1146
- Hours of labor, public employees or employees on public works, § 17
- Injuries to servants,
 - Exempting master from liability, § 197
 - Presumptions and burden of proof, § 502
 - Questions of law and fact, § 529
 - Negligence of master, § 534, p 166
- Labor practices, § 28(2), p 120
- Labor relations, § 28(3), p 122
- Questions of law and fact,
 - Assumption of risk, § 536, p. 212
 - Contributory negligence, § 537, p 223
 - Master's negligence, § 531, p 166
- Regulations on relation, purpose of provision authorizing, § 14, p 93
- Relief and benefit departments or associations, agreements as affected, § 170, p 840
- Self-organization of employees, guaranty, § 28(15), p. 146
- Wages,
 - Medium of payment, § 157, pp 767-768
 - Minimum wages,
 - Public employees or employees on public works, § 153, p. 747
 - Women and minors, § 152, p 745
- Construction,
 - Ambiguity, employment contract, § 7, p 72; § 8, p. 75
 - Bonus, instrument embodying offer or promise, § 98, p 529
 - Buildings, ante
 - Collective bargaining,
 - Contract, § 28(41), pp 195-204
 - Statutory provisions, § 28(20)
 - Commissions, provisions for, employment contract, § 90, p 519
 - Contract affecting liability for injuries to servant, § 199
 - Contract to furnish medical services for employees, § 163, p 817
 - Contracts of employment, post
 - Deduction from, or forfeiture of, wages provided for, employment contract, § 103
 - Injuries to servants, contracts affecting liability, § 199
 - Nature and extent of services, contract of employment, § 63
 - Pleadings, Fair Labor Standards Act, actions under, § 160(7), p. 785

INDEX TO MASTER AND SERVANT

Construction—Continued,

Questions of law or fact

Contract of employment, § 131, p 591

Rules promulgated by master, § 534, p 200

Rules and regulations, methods of work, § 276

Rules promulgated by master, question of law or fact, § 534, p 200

Statutory provisions,

Child labor laws, § 14, p. 96; § 194, p. 892

Collective bargaining, § 28(20)

Dangerous machinery, statutes requiring employer to cover or guard, § 232, p 981

Employment agencies, penal provisions, § 26

Fair Labor Standards Act, post

Federal Boiler Inspection Act, § 227, p 955

Federal Employers' Liability Act, § 173, p. 849

Federal Safety Appliance Acts, § 173, § 227, p 954, § 228, p 960

Fellow servants, § 335

Hours of labor, § 15, p. 98

Federal Hours of Service Act, § 18

Labor Contract statutes imposing criminal liability on employee for breach, § 80, p. 505

Labor relations, § 28(4)

Occupational Diseases Act, § 173, p. 859

Place for work, § 24

Wages, § 156, p. 759

Construction work,

Fair Labor Standards Act, application to employers engaged in, § 151(7), p 643

Independent contractor, persons engaged in, § 3(9)

Constructive employment, liability of master for injuries during, § 180, p 868

Constructive knowledge or notice,

Assumption of risk, defects or dangers of which servant has, §§ 382-390, pp 1189-1215

Contributory negligence,

Continuing work with constructive knowledge, § 434

Effect of constructive knowledge, §§ 431, 433

Dangerous or defective places or appliances, liability for injuries to servant as affected, § 248

Warning and instructing servant, liability as dependent on, § 286

Constructive service doctrine, wrongful discharge,

Accrual of right of action, § 49

Recovery of wages for unexpired term, § 50

Contact, machines dangerous from, guarding, § 232, p 985

Contempt,

Labor relations board,

Disobedience of decree enforcing order, § 28(142)

Violation of orders, § 28(111), p. 824

National Labor Relations Act, refusal to obey order of court requiring appearance before board and production of evidence, § 28(81)

Contest of election, collective bargaining, election of bargaining representative, § 28(33), p. 181

Contingency, wages,

Burden of proof in action to recover wages, § 120, p 577

Contingency, wages—Continued,

Evidence as to happening, § 129, pp 582, 587

Jury question as to happening, § 131, p 592

Payment on contingency, § 119

Pleading in action to recover remuneration, § 128, p 571

Continual service, bonus for, rights of employee as to, § 98, p 531

Continuance,

Labor disputes, proceedings for settlements, § 28(77)

Labor Relations Board, proceedings before, § 28(77)

Continuing duty, safe place to work, employer required to furnish, § 219, p 929, n 25

Continuing right, collective bargaining, § 28(20)

Continuity of service, relationship as dependent on, § 2, p 40

Continuous service, word employee as importing, § 1, p 27

Contracts,

Assumption of risk, doctrine as based on, § 357, p 1152

Benefit plan offered by employer and accepted by employees, § 169, p 828

Breach of contract, generally, ante

Closed shop, ante

Collective bargaining, ante

Consideration, generally, ante

Construction, generally, ante

Employment. Contracts of employment, generally, post

Independent contractors,

Existence as test of relationship, § 3(2), p 46

Payment, § 3(1), p 44

Relationship as presupposing, § 3(2), p. 47

Liability for injuries to servants, §§ 196-200, pp. 897-900

Construction, § 199

Form and sufficiency, § 197

Instructions to jury on, § 547

Law governing, § 198

Validity, § 197

Waiver, § 200

Medical attention, furnishing employees with, § 163, pp 816-819

Sharing profits and losses, relationship as created, § 2, p 30, n. 72

Wrongful discharge, right of action for as founded on, § 48

Contracts of employment, §§ 5-11, pp 63-90

Actions for breach, § 11, pp 84-90, § 28(71) p 251; § 28(80), p 278, § 28(95), p 288; § 77; § 129, p 578

Anticipatory breach, right of union to sue, § 28(76)

Rules governing actions for breach by employee, § 77

Ambiguity construction, § 7, p 72, § 8, p 75

Arbitration clause, stay of arbitration under, § 28(78)

Assumption of risk,

Ordinary risks, § 372, pp 1173-1176

Voluntary nature, § 357, p 1149

Bankruptcy of employer as breach of, § 35

Basis of relation, § 2, p 31

INDEX TO MASTER AND SERVANT

Contracts of employment—Continued,

Breach,

Actions for breach, § 11, pp 84-90; § 28(71), p 251; § 28(89), p 278; § 28(95), p 288; § 77, § 129, p 578

Anticipatory breach, right of union to sue for, § 28(76)

Bankruptcy of employer, § 35

Change in business of employer, § 34

Contract between,

Employer and employee's bargaining representative, damages, § 28(120)

Employer and labor union, employee's right of action as third party beneficiary, § 28(83)

Criminal offense, § 80, pp 505-511

Damages, § 11, pp 84, 89, 90; § 28(89), p 278, § 58, p 468, § 77, § 129, p 578, § 137

Discharge of employee on ground of, § 42, p. 428

Embezzlement as breach, § 77

Evidence in action for breach, § 11, pp. 87, 88, § 28(94); § 28(95), p 288

Justification for inducing, § 630, p 437

Liability of employee breaching contract, §§ 77, 78

Maliciously inducing, fraud as element, § 624

Obligation of employer to initiate negotiations for new contract, § 28(22)

Penalties imposed on employer violating obligation, § 107

Pleading in action for damages, § 28(89), p 278

Receivership as breach, § 35

Recovery of wages, §§ 105, 122

Rescission on ground of, § 9, p 82

Resort to court by discharged employees, § 28(75)

Retention in employment with knowledge of as waiver of forfeiture of, or deduction from, wages, § 106

Wrongful discharge, generally, post

Burden of proof,

Actions for breach, § 11, p 87; § 129, p 578

Compensation of employee, § 129, p 577

Fraud and misrepresentation inducing contract, § 6, p 68

Modification, § 9, p 79, n 61

Cause, rescission for, § 9, p 82

Certainty, § 6, p 68

Defense of uncertainty as available in action for breach, § 11, p 85

Change in,

Business of employer, breach of contract, § 34

Collective bargaining before making changes in contracts, § 28(22)

Nature of relationship, modification, § 9, p 81

Position to which employee is entitled under, right of employer to make, § 63

Commencement of employment, § 8, pp 74-79

Commissions of employees,

Construction of provisions for, § 91

Provisions as controlling, § 111

Contracts of employment—Continued,

Commissions of employees—Continued,

Right, as dependent on contract, § 90, pp. 518-521

Compensation of employee,

Burden of proof, § 129, p 577

Commissions, contract as controlling, § 90, pp 518-521

Conformity of contract to statute regulating, § 6, p 68

Construction of provisions, § 91, § 160, p 831

Deductions from wages, provisions for, § 103

Extra compensation for overtime, § 97

Failure to fix, § 109

Forfeiture of wages, provision for, § 103

Jury questions, § 131, p 590

Part performance, § 113

Pleading in action to recover, § 128, p 571

Provisions as controlling, §§ 110-113, pp 542-556

Part of service only covered, § 115

Profits as basis, § 112, pp 547-555

Rate of pay for purpose of overtime as established by contract, § 151(20), p 706

Right to commissions, § 90, pp 518-521

Time of payment, § 119

Avoidance of statutory provisions, § 156, p 759

Conditions, § 6, p 68

Waiver, § 9, p 80

Consent, § 5

Modification, § 9, p 80

Rescission, § 9, p 81

Termination, § 33

Consideration, ante

Construction, § 7, pp 71-74

Commissions, provisions for, § 90, p 519

Deduction from, or forfeiture of, wages provided for, § 103

Law question, § 131, p 591

Nature and extent of services, § 63

Ownership of inventions by employee, § 73, p 489

Retirement pay, provisions for, § 160, p 831

Statute imposing criminal liability on employee for breach, § 80, p 505

Continuance, § 10

Correspondence, establishment by, § 12

Criminal liability for breach, § 80, pp 505-511

Customs and usages,

Construction in light of customs of trade, § 7, p 72

Prevailing usages or customs as part of, § 7, p. 73

Damages,

Breach of contract, § 11, pp. 84, 89, 90; § 28(89), p 278; § 58, p 468, § 77; § 129, p. 578; § 137

Leaving employment in violation of contract, § 77

Death or disability of,

Employee, termination by, § 38

Master, termination by, § 37

Declaration or complaint in action for breach, § 11, p 86

Deductions from wages, provisions for, § 103

Defenses, action for breach, § 11, p 85

INDEX TO MASTER AND SERVANT

Contracts of employment—Continued,

- Definite terms, construction establishing contract for, § 8, p 76
- Destruction of employer's property as terminating, § 36
- Discharge of employees,
 - Appeal to designated tribunals, right of action under provision for, § 28(75)
 - Right as dependent on terms, § 41
- Duration,
 - Employment, § 8, pp. 74-79
 - Failure to designate as affecting validity, § 6, p 69
- Embezzlement as breach of contract by employee, § 77
- Estoppel, breach of contract, right to sue for, § 11, p 86
- Evidence,
 - Actions for breach, § 11, pp 87, 88; § 28(95), p 288
 - Union contract, § 28(94)
 - Actions for injuries to servants, § 504
 - Fraud and misrepresentation inducing, § 6, p 67
 - Modification, § 9, p 79
 - Pleading in action for breach, § 11, p 86
- Extension of term, option or privilege, § 10
- Fair Labor Standards Act, obligations as part of, § 151(24), p 696
- Food, clothing or lodging, furnishing in addition to wages, § 99
- Forfeitures of wages, provisions for, § 103
- Form, § 6, pp 64-71
- Fraud,
 - Rescission on ground of, § 9, p 82
 - Validity as affected, § 6, p 67
- Hiring at will, indefinite hiring as presumed to be, § 8, p 75
- Holding over, contract implied from, § 12
- Implied agreement, modification, § 9, p. 80
- Implied renewal, § 10
- Implied terms, § 7, p 73
- Indefinite hiring, presumption of hiring at will, § 8, p 75
- Indictment or complaint for violation of labor contract statute as required to set forth, § 80, p 507
- Injuries to servant,
 - Liability of master dependent on, § 174
 - Notice of injury, § 485
- Injuries to third persons, liability of master under doctrine of respondeat superior as dependent on, § 563, p 279
- Insolvency of employer causing nonemployment with breach of, § 35
- Intention,
 - Commencement and duration of employment as controlled by, § 8, p. 75
 - Construction with regard to intention of parties, § 7, p. 71
- Interference with relation by third persons, generally, post
- Inventions or discoveries by employee, ownership as determined by, § 73, p 488
- Issues in action for breach, § 11, p 87
- Joint or several contracts, § 7, p 74

Contracts of employment—Continued,

- Jury questions,
 - Action for breach, § 11, p 86
 - Compensation of employee, § 131, p 590
 - Modification, action for wages, § 131, p 591
- Labor contract statutes, admissibility in evidence in prosecution of employee for violation, § 80, p 509
- Labor relations statutes, construction so as to include applicable terms, § 28(42), p 206
- Law governing, § 5
- Leaving employment in violation of,
 - Damages, § 77
 - Liability of employee, § 78
- Life employment,
 - Duration of contract, § 8, p 78
 - Mutuality, § 6, p 70
 - Validity, § 6, p 69
- Liquidated damages, termination on payment of, § 11, p 90
- Living expenses of employee, liability of employer, § 100
- Measure of damages for breach, § 11, p 80, § 137
- Merger, oral in written contract, § 9, p 81
- Minimum payment clauses, validity, § 110, p 543
- Misrepresentations,
 - Modification as affected, § 9, p 80, n. 63
 - Validity as affected, § 6, p 67
- Modification, § 9, pp 79-82
 - Jury question in action to recover wages, § 131, p 591
- Mutual consent,
 - Modification, § 9, p 80
 - Rescission, § 9, p 81
 - Termination, § 33
- Mutuality, § 6, p 66
 - Permanent or life employment, § 6, p 70
- Nature and extent of services to be performed ascertained from, § 63
- Negotiations, expenses incidental to as recoverable from employer, § 100
- Obligation of employer to furnish employment in conformity to, § 61
- Operation and effect, modification, § 9, p 81
- Option of renewal, § 10
- Overtime,
 - Extra compensation, § 97
 - Regular rate of pay for purpose of as established by contract, § 151(26), p 706
- Parol modification, § 9, p 81
- Part performance,
 - Breach of contract after as preventing recovery of wages, § 105
 - Compensation of employee, § 113
- Parties, § 7, p 74
 - Proceedings putting in issue validity of contract of labor union with employer, § 28(85)
- Partnership, formation or dissolution as terminating, § 34
- Penalties imposed on employer for violating obligation, § 107
- Performance of services, generally, post
- Permanent employment,
 - Duration of contract, § 8, p 78
 - Mutuality, § 6, p 70

INDEX TO MASTER AND SERVANT

Contracts of employment—Continued,
Permanent employment—Continued,
 Validity, § 6, p 69
 Personal representative of deceased master, enforcement against, § 37
 Physical wants of employee, duty to provide imposed by, § 171
 Pleading,
 Action for compensation of employee, § 128, p 571
 Actions for breach, § 11, p. 86; § 28(89), p 278
 Judgment on pleading, § 11, p 87
 Practical construction of parties, effect given to, § 7, p 72
 Presumptions,
 Actions for breach, § 11, p 87
 Actions for injuries to servants, § 501, p 53
 Commencement of employment, § 8, p 75
 Continuance, § 10
 Fraud and misrepresentation, § 6, p. 67
 Unusual contracts, § 120, p 576
 Privilege of renewal, § 10
 Probationary period, duration of contract as affected by provision, § 8, p. 75
 Property right in, § 624
 Punitive damages as recoverable for breach, § 11, p 90
 Receivership as breach, § 35
 Reimbursement for expenditures made by employee in connection with work, § 100
 Relation as arising out of, § 1, p 24
 Renewal, § 10
 Repudiation, damages as recoverable by employee, § 11, p 84
 Rescission, § 9, p 81
 Breach as ground, § 9, p 82
 Defense in action for breach, § 11, p 85
 Retirement pay, construction of provisions for, § 109, p 831
 Retroactive modification, consideration, § 9, p 80, n 62
 Right to enter into, § 2, p 32
 Rules and regulations,
 Employer's rules and regulations as part of contract, § 7, p 73
 Statutory provisions, § 14, p 95
 Stipulation that employee would obey, § 273
 Seniority in service, right based on, § 5
 Sharing in profits, employees right founded on, § 93
 Statutory provisions,
 Governing, conformity, § 6, p. 68
 Regulations, § 14, p 95
 Validity of statute penalizing breach, § 80, p. 505
 Substitutes employed by servant, binding effect on, § 4
 Tender of services, condition precedent to action against employer for breach, § 11, p 85
 Termination of relation, generally, post
 Terms, § 6, p. 68
 Unemployment, breach of contract,
 Action for, § 28(71), p 251
 Bankruptcy, etc., unemployment because of, § 35

Contracts of employment—Continued,
 Validity, § 6, pp 64-71
 Defense of invalidity in action for breach, § 11, p 85
 Statute penalizing breach of, § 80, p 505
 Variance in action for breach, § 11, p 87
 Wages and other remuneration Compensation of employee, ante this head
 Waiver,
 Breach of contract, right to sue for, § 11, p 86
 Condition, § 9, p 80
 Writing,
 Modification as requiring, § 9, p 81
 Rescission of written contract by oral agreement, § 9, p. 82
 Written addition to printed provisions, controlling effect, § 7, p 73
 Wrongful discharge, generally, post
Contractors,
 Convict labor, liability for injuries suffered, § 176
 Defined, § 3(1), p 44
 Lien for wages, payment to contractor as affecting right of laborer, § 144
 Public works, hours of labor of employees, power to regulate, § 17
 Wages, laborer's lien for work done by others hired, § 143, p 607
 Contradictory instructions, injuries to servant, actions for, § 538, p 237
 Contradictory signals, contributory negligence, proceeding with work regardless, § 460
 Contributory negligence, §§ 421-481, pp 1242-1314
 Abrogation of defense, statutory provisions, § 425, p 1246
 Absence from post of duty, injuries sustained, §§ 430, 440
 Admissibility of evidence in actions for injuries to servants, § 519, pp 108-113
 Pleading as affecting, § 499, p 49
 Admissions by plea of, § 422
 Adoption,
 Customary methods of work, § 452
 Unsafe methods of work, § 450, pp. 1276, 1277
 Proximate cause, § 443
 Affirmative act, § 421
 Affirmative defense, burden of proof, § 501, p 83
 Age of employee,
 Consideration, § 427
 Inexperienced or youthful servants, generally, post this head
 Alighting from moving cars or locomotives, § 453, p 1282
 Violation of rule or orders, § 450, p 1300
 Anticipation of dangers, § 454
 Apparent dangers, precautions against, §§ 454-456, pp 1283-1293
 Appliances. Tools, machinery and appliances, generally, post this head
 Appreciation of,
 Danger or defect, jury question, § 537, p 226
 Risk, § 432
 Apprehension of danger, element of, § 431
 Assumption of risk,
 Distinguished, § 357, p. 1150; § 421
 Instruction to jury, § 549, p 253

INDEX TO MASTER AND SERVANT

Contributory negligence—Continued,

Assumption of risk—Continued,

Statute abrogating defense, § 425, p 1245

Assumption that rules will be observed, § 454

Assurances of master,

Attempting work with insufficient help, § 471

Reliance on, § 429

Automobiles, inspection for latent defects or dangers, § 447, p 1270

Avoidable injury, § 423

Instruction on, § 549, p 259

Jury questions, § 537, p 230

Avoidance of injury, care required, § 427

Barrels, inspection for latent defects or dangers, § 447, p 1270

Belts, jury questions, § 537, p 231, n 45

Blasting,

Jury question, § 537, p 236

Precautions against dangers, § 454

Boarding moving cars or locomotives, § 453, p 1282

Violation of rule or orders, § 459, p 1300

Brakemen,

Boarding or alighting from moving cars or locomotives, § 453, p 1282

Coupling and uncoupling cars, § 456, p 1287

Disobedience of rules or orders, § 459, p 1298

Guarding against obstruction on or near track, § 456, p 1287

Brakes, inspection for latent defects or dangers, § 447, p 1270

Bridges, inspection for latent defects or dangers, § 447, p 1270

Building construction, jury question, § 537, p 236

Burden of proof, § 501, p 83

Federal Employers' Liability Act, § 501, p 84

Instruction on, § 540

Statutory provisions, § 502

Cable ties, inspection for latent defects or dangers, § 447, p 1270

Cant hooks, inspection for latent defects or dangers, § 447, p 1270

Care,

Avoid injury, § 427

Compliance with command or order, § 467

Degree of care required, § 427

Selection of method of work, § 450, p 1278

Failure to exercise care to avoid known danger, § 431

Inexperienced or youthful employee, § 471

Injury avoidable by care of master, instruction on, § 549, p 259

Reliance on care of,

Fellow servants, §§ 311, 430

Master, § 428

Cars,

Boarding or alighting from moving cars, § 453, p 1282; § 459, p 1300

Coupling or uncoupling cars, § 453, p 1281, § 456, p 1287; § 459, p 1299

Going between or under, precautions against danger, § 456, p 1287

Handcars, railroad employees operating, § 456, p 1288; § 459, p 1302

Inspection for latent defects or dangers, § 447, p 1271

Contributory negligence—Continued,

Cars—Continued,

Precautions against dangers, § 456, pp 1283, 1287

Riding on violation of rules or orders, § 459, p 1299

Switching cars, method of work, § 453, p 1282

Chains, inspection for latent defects or dangers, § 447, p 1271

Character of command or order, servant justified in obeying, § 466

Choice of,

Appliances or materials furnished, § 446, p 1265

Avoiding or exposing self to danger, § 421

Places for work, § 446, p 1266

Unsafe appliance, etc, jury question, § 537, p 225

Ways of passage, § 446, p 1207

Circumstances considered in determining, § 427

Circumstantial evidence, § 527

Cogwheels, inspection for latent defects or dangers, § 447, p 1271

Cold office, servant working in without complaint, § 449, n 77

Commands or orders,

Compliance, §§ 403-470, pp 1304-1310

Instructions relating to, § 549, p 259

Jury question, § 537, p 230

Use of machinery or appliances, § 446, p 1266

Youthful or inexperienced servant, § 478

Disobedience, § 444; §§ 457-459, pp 1293-1502

Choice of place to work, § 446, p 1266

Instructions to jury, § 549, p 261

Jury question, § 537, p 2230

Youthful or inexperienced servant, § 477

Common passage or thoroughfare, use of way kept open as, § 446, p 1207

Comparative knowledge of danger, § 435

Comparative negligence, statutory provisions, § 425, p 1248

Complaint to master of danger,

Continuing work after, § 434

Failure to complain, § 437

Concurrent negligence of master and servant, § 468

Conductors, guarding against obstructions on or near track, § 456, p 1287

Conflict of law, § 426

Constitutional provisions, jury question, § 537, p 223

Constructive knowledge of danger, §§ 431, 433

Continuing work with, § 434

Youthful or inexperienced servant, § 474

Continuing duty on part of employee to exercise care, § 427

Continuing work with knowledge of danger, § 434

Jury question, § 537, p 228

Contradictory signals, proceeding with work regardless, § 460

Control of cause or subject of danger, failure to exercise care, § 449

Convict labor, § 422, p 1243, n 62

INDEX TO MASTER AND SERVANT

Contributory negligence—Continued,

- Coupling or uncoupling cars,
 - Disobedience of rules or orders, § 459, p 1299
 - Going between cars to make, § 456, p 1287
 - Method of work, § 453, p 1281
- Crossing tracks or yards, railroad employees, precautions against danger, § 456, p 1292
- Culpability, § 421
- Customary methods of work,
 - Adoption, § 452
 - Evidence, § 519, p 112
 - Mines, § 519 p 112
- Customary violation of rules, § 458
- Danger not obvious and eminent, compliance with commands or orders, § 461
- Dangerous occupation,
 - Evidence, § 519, p 108, § 527
 - Inexperienced or youthful employee, § 475
 - Jury question, § 537, p 231
 - Reliance on care of master, § 428
- Dangerous operations and methods of work, §§ 449-453, pp 1275-1283
 - Proximate cause of injury, adopting dangerous methods, § 443
 - Selection of dangerous methods of work, jury question, § 549, p 260
- Dangerous or defective machinery, appliances or places,
 - Choice of ways of passage, § 446, p 1267
 - Covering or guarding, jury question, § 537, p 231
 - Discovery or remedying defects, § 447, pp 1268-1275
 - Disobedience of warnings or signals, §§ 461, 462
 - Evidence, § 519, p 108; § 527
 - Guarding, § 232, p 986
 - Jury questions, § 537, pp 231, 234
 - Knowledge of danger, § 432
 - Obedience to commands or orders, § 464
 - Precautions against known or apparent dangers, § 454
 - Reliance on,
 - Assurances of master, § 429
 - Care of master, § 428
 - Report of defects rendering dangerous, § 447, p 1274
 - Riding in dangerous position, § 446, p 1268
 - Selection of defective or dangerous appliance, etc., § 446, p 1265
 - Jury question, § 537, p 234
 - Unnecessary occupation of dangerous position, § 445; § 446, p 1267
 - Youthful and inexperienced servants, § 475
- Defenses generally, §§ 422-426, pp. 1243-1252
 - Action by employer against employees for negligence for wrongful act, § 79, p 503
- Defined, § 421
- Degree of care,
 - Required, § 427
 - Selecting method of work, § 450, p 1278
- Demand for appliances to avoid danger, § 446, p 1265
- Demolition of building or structure, jury question, § 537, p 236
- Derricks, servants injured by, jury question, § 537, p 235

Contributory negligence—Continued,

- Discovered peril, § 423, § 519, p 259
- Discovery of defects,
 - Machinery and appliances, § 447, pp 1268-1275
 - Youthful or inexperienced servants, § 475
- Disease, injury resulting from, § 438
- Disobedience of rules, orders or statutes, § 444, §§ 457-459, pp 1293-1402
 - Adoption of unsafe method of work, § 450, p 1277
 - Choice of place to work, § 446, p 1266
 - Instructions to jury, § 549, p 261
 - Jury question, § 537, p 230
 - Youthful or inexperienced servants, § 477
- Disregarding warnings or signals, §§ 460-462
 - Jury question, § 537, p 224
- Drunkenness, proximate cause of injury, § 440
- Duty to discover and remedy defect, instructions to jury, § 549, p 261
- Effort to save,
 - Life or prevent injury to others, acts in, § 469
 - Master's property, compliance with command or order, § 470
- Electrical appliances,
 - Inspection for latent defects or dangers, § 447, p 1271
 - Jury question, § 537, p 234
- Electricity, customary methods of work, evidence, § 519, p 112
- Elements, §§ 427-438, pp 1252-1261
- Elevators,
 - Evidence, § 527
 - Grain elevators, customary methods of work, § 519, p 112
 - Falling into shaft, jury questions, § 537, p 234
 - Inspection for latent defects or dangers, § 447, p 1271
 - Precaution by servants working on or about, § 456, p 1292
- Emergencies,
 - Acts in emergency, §§ 468-470, pp 1307-1310
 - Compliance with commands or orders, § 468
 - Instructions on, § 549, p 259
 - Jury question, § 537, p 225
 - Momentary forgetfulness, § 436
 - Youthful or inexperienced servants, § 470; § 537, p 225
 - Negligence of master, servant placing self in dangerous position, § 527
- Eminent danger, compliance with command or order, § 465
- Eminent peril doctrine, § 470
- Employer, jury question in action to recover for damages as result of negligence of wrongful act of employee, § 79, p 504
- Employers' Liability Act,
 - Federal Employers' Liability Act, post
 - Mitigation of damages, § 554
- Engineers,
 - Disobedience of rules or orders, § 459, p. 1298
 - Guarding against obstructions on or near track, § 456, p. 1287

INDEX TO MASTER AND SERVANT

Contributory negligence—Continued,

- Equal means of ascertaining defects, § 437
- Evidence, § 498; § 499, p 40; § 519, pp 108-113, § 527
- Injuries to third person, § 615, p 403
- Excavating, weight and sufficiency of evidence, § 527
- Excavations, servant injured in, jury question, § 537, p 235
- Excuses for disobedience of rules, orders or statutes, § 458
- Experience,
 - Consideration, § 427
 - Inexperienced or youthful servants, generally, post this head
- Failure to,
 - Act, § 421
 - Exercise care to avoid known danger, § 431
 - Heed warnings or signals, proximate cause, § 444
 - Make place of work safe as required, § 449
 - Report defects rendering work dangerous, § 447, p 1274
 - Use appliances furnished, § 446, p 1264
- Fear of discharge, compliance with command or order, § 465
- Federal Boiler Inspection Act, defense, § 425, p. 1247
- Federal Employers' Liability Act, post
- Federal Safety Appliance Act,
 - Defense, § 425, p 1247
 - Effect, § 228, p 964
- Fellow servants,
 - Doctrine as affecting defense, § 425, p. 1245
 - Knowledge of danger, § 431
 - Reliance on care of, §§ 311, 430
- Fences along railroad right of way, inspection for latent defects or dangers, § 447, p 1271
- Firemen,
 - Disobedience of rules or order, § 459, p 1298
 - Guarding against obstructions on track, § 456, p 1287
- Flagmen, precaution against danger, § 456, p. 1292
- Floors, inspection for latent defects or dangers, § 447, p 1271
- Flying switches, § 453, p. 1282
- Forgetfulness of danger, § 436
- Foundries, customary methods, evidence, § 519, p 112
- Freight train, voluntarily riding on top of, § 446, p 1268
- Gangway, use of, jury question, § 537, p 236
- Gateways, railroads, precautions against danger, § 450, p 1292
- General denial, defenses available under, § 499, p 48
- Going between or under cars or engines, precautions against danger, § 456, p 1287
- Grab irons, inspection for latent defects or dangers, § 447, p 1271
- Grain elevators, customary methods of work, evidence, § 519, p 112
- Guy wires, inspection for latent defects or dangers, § 447, p 1271
- Handcars, railroad employees operating, § 456, p 1288
- Violation of rules, § 459, p 1302

Contributory negligence—Continued,

- Handholds, inspection for latent defects or dangers, § 447, p 1271
- Harness, inspection for latent defects or dangers, § 447, p 1271
- Hatchways, jury questions, § 537, p 234
- Hoisting apparatus or appliances,
 - Inspection for latent defects or dangers, § 447, p 1271
 - Jury question, § 537, p. 235
- Hoists, evidence, § 527
- Hours of Service Act, defense of, § 425, p 1248
- Humanitarian doctrine, § 423
- Illness, injury resulting from, § 438
- Improper use of machinery or appliances, § 446, p. 1266
- Imputed knowledge of danger, § 433
- Inadvertent acts, jury question, § 537, p 225
- Inexperienced or youthful servants, §§ 471-481, pp 1310-1314
 - Appreciation of danger, jury questions, § 537, p 228
 - Care required, § 471
 - Compliance with commands or orders, § 478
 - Concealment of fact, § 472
 - Constructive knowledge of danger, § 474
 - Dangerous occupation, § 475
 - Discovering or remedying defects, § 475
 - Disobedience of rules or order, § 477
 - Emergency, § 479
 - Jury question, § 537, p 225
 - Hiring under prohibited age as affecting, § 480
 - Instructions to jury relating to, § 549, p 261
 - Knowledge of danger, § 474
 - Jury question, § 537, p 228
 - Misrepresentations of facts, § 472
 - Negative pleading, § 493
 - Precautions against known dangers, § 476
 - Presumptions, § 501, p 65
 - Representations as to age and experience, § 472
 - Scope of employment, § 473
 - Violation of,
 - Agreement with parent, § 481
 - Statutes for protection of minors, § 480
- Infants inexperienced or youthful servants, generally, ante this head
- Injuries to third persons,
 - Evidence, § 615, p 403
 - Jury questions, § 617, p 414
 - Liability of master under doctrine of respondeat superior, § 571, p. 320
- Injury avoidable by care or effort of master
 - Instruction on, § 549, p 259
 - Jury questions, § 537, p 230
- Inspection,
 - Disobedience of rule or order requiring, § 459, p 1301
 - Elevators for latent defects or dangers, § 447, p 1271
 - Machinery, appliances or places of work, § 447, pp 1271, 1272
 - Roofs for latent defects or dangers, § 447, p. 1271
- Instructing, reliance on care of master, § 428

INDEX TO MASTER AND SERVANT

Contributory negligence—Continued,

- Instructions to jury, § 549, pp 258-261
 - Avoidable injury, § 549, p 259
 - Burden of proof and presumptions, § 549
 - Compliance with orders or commands, § 549, p 259
 - Discovered peril, § 549, p 259
 - Duty to discover and remedy defect, § 549, p 261
 - Emergencies, acts in, § 549, p 259
 - Inexperienced or youthful servants, § 549, p 261
 - Knowledge of danger, § 549, p 258
 - Methods of work, § 549, p 259
 - Mitigation of damages, § 549, p 260
 - Selection of dangerous methods of work, § 549, p 260
 - Statutory provisions, instructions in accordance with, § 549, p 260
 - Sudden peril, § 549, p 259
 - Violation of rules or orders, § 549, p 261
- Insufficient help, attempting work with, § 451
- Intoxication of servant, § 438
 - Proximate cause, § 440
- Jacks, inspection for latent defects or dangers, § 447, p 1271
- Knowledge of danger, § 421
 - Comparative knowledge, § 435
 - Constructive knowledge, §§ 431, 433, 434, 474
 - Continuing work with, § 434
 - Extent, § 432
 - Failure to exercise care to avoid known danger, § 431
 - Instructions to jury, § 549, p. 258
 - Jury question, § 537, pp 226, 227
 - Precautions against known danger, §§ 454-456, pp 1283-1293
 - Jury question, § 537, p 229
 - Proximate cause of injury, § 442
 - Youthful or inexperienced servants, § 476
 - Tools, machinery or appliances, § 432, § 446, p 1265
 - Youthful or inexperienced servants, § 474
 - Jury question, § 537, p 228
- Ladders,
 - Inspection for latent defects or dangers, § 447, p 1271
 - Selection or use of, jury question, § 537, p 235
- Lanterns, inspection for latent defects or dangers, § 447, p. 1271
- Last clear chance, § 423
 - Dangerous operations and methods of work, § 448
 - Precautions for own safety, § 454
 - Unnecessary occupation of dangerous position, § 446, p 1268
- Latent defects or dangers,
 - Examination for, inexperienced servant, § 475
 - Knowledge of, jury question, § 537, p 227
 - Tools, machinery, appliances or places of work, § 447, p 1269
- Laundry press machine, operation of, jury question, § 537, p 231
- Law governing, § 428

Contributory negligence—Continued,

- Life saving act, § 460
- Loading and unloading, jury question, § 537, p 236
- Locomotives, post
- Logging operations, jury question, § 537, p 238
- Lumber yards, customary methods of work, evidence, § 519, p 112
- Machinery Tools, machinery and appliances, generally, post this head
- Manholes, servant injured in, jury question, § 537, p 235
- Mauls, inspection for latent defects or danger, § 447, p 1271
- Method of compliance with command or order, method, § 467
- Method of operation of tools, machinery or appliances, § 453, p 1283
- Methods of work,
 - Adoption of,
 - Customary methods, § 452
 - Unsafe methods, § 443, § 450, pp 1276, 1277
 - Attempting work with insufficient help, § 451
 - Dangerous methods, §§ 448-453, pp 1275-1283
 - Selection of, jury question, § 540, p 260
 - Degree of care required on selecting, § 450, p 1278
 - Disobedience of,
 - Rules or orders, § 450, p 1300
 - Warnings or signals, § 461
 - Evidence, § 519, p 111
 - Federal Employers' Liability Act, § 453, p 1280
 - Instructions relating to, § 549, p. 259
 - Last clear chance doctrine, § 448
 - Obedience to commands or orders, § 464
 - Operation of,
 - Machinery, § 453, p 1283
 - Railroads, § 453, pp 1279-1284
 - Proximate cause of injury, § 443
 - Railroad employees, § 453, pp 1279-1283
 - Selection of unsafe methods, § 450, p. 1276-1279
 - Switching cars, § 453, p. 1282
 - Undertaking dangerous work, § 449
 - Voluntary exposure to danger, § 449
- Mills, customary methods of work, evidence, § 519, p 112
- Mines and mining,
 - Customary methods of work, § 519, p 112
 - Disobedience of rules, orders or statutes, mining employee, § 459, p 1300
 - Evidence, § 527
 - Inspection for latent dangers, § 447, p 1271
 - Jury question, § 537, pp 235, 236
 - Methods of work, § 453, p 1283
 - Precautions by servants working in or about, § 450, p 1293
 - Tracks, inspection for latent defects or dangers, § 447, p 1271
 - Violation of rules or orders, § 459, p 1300
- Mistake of judgment, § 436
- Mitigation of damages, instructions to jury, § 549, p. 260

INDEX TO MASTER AND SERVANT

Contributory negligence—Continued.

- Mixed question of law and fact, actions for injuries to servants, § 537, p. 222
- Momentary,
 - Forgetfulness of danger, § 436
 - Inattention, jury question, § 537, p. 225
- Moorings lines, inspection for latent defects or dangers, § 447, p. 1271
- Moving cars, coupling, § 453, p. 1281
- Negative averments in pleading in action for injuries to servants, negative averments, § 493
- Negligence of master,
 - Adoption of unsafe method of work caused by, § 450, p. 1277
 - Willful or wanton negligence, § 424
- New and superseding cause of injury, effect of, § 425, p. 1251, n. 33
- Notice of defects rendering work dangerous, failure to report, § 447, p. 1274
- Notice to master of danger, continuing work after, § 434
- Obedience to commands or orders, § 444; §§ 463-470, pp. 1304-1310
 - Disobedience of rules, orders or statutes, generally, ante this head
 - Instructions relating to, § 549, p. 259
 - Jury question, § 537, p. 230
 - Use of machinery or appliances, § 446, p. 1266
- Youthful or inexperienced servant, § 478
- Obstructions on or near tracks, precautions against danger, § 456, p. 1287
- Obvious dangers,
 - Attempting work with insufficient help, § 451
 - Comparative knowledge, § 435
 - Compliance with command or order, § 465
 - Continuing work with knowledge of, § 434
 - Duty to discover or remedy, § 447, p. 1268
 - Improper use of machinery or appliances, § 446, p. 1266
 - Jury question, § 537, p. 227
 - Methods of work, mining, § 453, p. 1283
 - Precautions against, §§ 453-456, pp. 1283-1293
 - Reliance on assurances of master, § 429
 - Undertaking dangerous work required by nature of employment, § 449
 - Violation of rules of employment, § 458
- Opportunity to discover or remedy defects or dangers, § 447, p. 1273
- Orders Commands or orders, generally, ante this head
- Ordinary care to avoid injury, § 427
- Other occurrences or acts of injured employee, evidence, § 519, p. 109
- Overhead structures, inspection for latent defects or dangers, § 447, p. 1270
- Particular applications of doctrine, §§ 446-470, pp. 1264-1310
- Passageways,
 - Dangerous machinery or places, choice of ways, § 446, p. 1267
 - Servant injured in, jury questions, § 537, p. 235
 - Voluntary selection of unsafe way, § 446, p. 1267

Contributory negligence—Continued.

- Physical condition, injury resulting from, § 438
- Pilot of engine, unnecessarily riding on, § 446, p. 1268
- Pinch bars, inspection for latent defects or dangers, § 447, p. 1271
- Pits, servant injured in, jury question, § 537, p. 235
- Places Dangerous machinery or places, generally, ante
- Places of work,
 - Anticipation of dangers, § 454
 - Choice of,
 - Place of work, § 446, p. 1266
 - Ways of passage, § 446, p. 1267
- Continuing work after knowledge of danger, § 434
- Discovery or remedying defects, § 447, pp. 1268-1275
- Failure to make place safe as required, § 449
- Inspection and repair, § 447, p. 1272
- Latent defects, § 447, p. 1269
- Obedience to commands or orders, § 464
- Precautions against known or apparent dangers, § 454
- Reliance on,
 - Assurances of master, § 429
 - Care of master, § 428
- Voluntary use of unsafe place, § 446, p. 1266
- Platforms,
 - Inspection for latent defects or dangers, § 447, p. 1271
 - Selection or use of, jury question, § 537, p. 235
- Pleading, action for injuries to servant, § 494, p. 39; § 499, p. 49
- Admissions by plea, § 422
- Defense in action under Federal Employers' Liability Act, § 494, p. 40
- Evidence admissible under, § 499, p. 49
- Negating, § 493
- Replication or reply setting up contributory negligence, § 495
- Precautions against known or apparent dangers, §§ 454-456, pp. 1283-1293
- Jury question, § 537, p. 229
- Proximate cause of injury, § 442
- Youthful or inexperienced servants, § 476
- Preponderance of evidence, showing by, § 501, p. 83; § 527
- Presumptions, § 501, p. 65
- Instructions, § 540
- Prima facie liability of master as displaced by, § 422
- Promise to,
 - Remedy defect, continuing work after, § 434
 - Repair, reliance on, jury question, § 537, p. 229
- Proof of defense of, § 498
- Property of master, efforts to save, § 470
- Props or supports, inspection for latent defects or dangers, § 447, p. 1271
- Protection of others from death or injury, acts for purpose of, § 469

INDEX TO MASTER AND SERVANT

Contributory negligence—Continued,

- Proximate cause of injury, §§ 440-445, pp 1261-1264, § 494, p 40
- Avoidable injury, § 423
- Comparative negligence, § 425, p 1240
- Disobedience of rules, orders or statutes, § 444
- Jury question, § 537, p. 227
- Punch press, operation of, jury question, § 537, p 231
- Quarries, servant injured in, jury question, § 537, p 235
- Questions of law and fact,
 - Action for damages by negligence or wrongful act of employee, § 79, p 504
 - Actions for injuries to servant, § 537, pp 222-237
 - Injuries to third persons, § 617, p 414
- Railings, inspection for latent defects or dangers, § 447, p 1271
- Railroads,
 - Cars, etc., inspection for latent defects or dangers, § 447, p 1271
 - Customary methods of work, evidence, § 519, p 112
 - Defense, § 425, p 1247
 - Disobedience of rules, orders or statutes, § 459, pp 1297, 1298
 - Emergencies, § 468
 - Evidence, § 527
 - Customary methods of work, § 519, p 112
 - Handcars, speeders, tricycles or velocipedes, operating, § 456, p 1288; § 459, p. 1302
 - Jury question, § 537, p. 232
 - Locomotives, post
 - Method of operation, § 453, pp 1279-1284
 - Precautions against known or obvious dangers, § 456, p 1286-1292
- Reasonable care to avoid injury, § 427
- Reliance on,
 - Assurances or representations by master, § 429
 - Jury question, § 537, p 228
 - Care of,
 - Fellow servants, §§ 311, 430
 - Master, § 428
 - Promise to repair, jury question, § 537, p 229
 - Superior knowledge or ability of master, § 428
- Remedying defects,
 - Machinery and appliances, § 447, pp 1268-1275
 - Youthful or inexperienced servants, § 475
- Remonstrances by servant, § 437
- Repair,
 - Disobedience of rule or order requiring, § 459, p 1301
 - Machinery, appliances or place of work, § 447, pp 1271, 1272
- Report of defects rendering work dangerous, failure to report, § 447, p 1274
- Representation by master, reliance on, § 429
- Riding in dangerous position, § 446, p. 1268

Contributory negligence—Continued,

- Riding on,
 - Cars or locomotives, violation of rules or orders, § 459, p 1299
 - Tender of engine, § 446, p 1268
- Riveters, inspection for latent defects or dangers, § 447, p 1271
- Roofs of mines, inspection for latent defects or dangers, § 447, p 1271
- Ropes, inspection for latent defects or dangers, § 447, p 1271
- Rules and regulations,
 - Assumption that rules will be observed, § 454
 - Compliance,
 - Commands involving violation of rules or regulations, § 466
 - Rules or orders of master, jury question, § 537, p 229
 - Disobedience, § 444, §§ 457-459, pp 1293-1302
 - Adoption of unsafe method of work, § 450, p 1277
 - Expenses, § 458
 - Instructions of jury as to, § 549, p 261
 - Jury question, § 537, p 229
 - Youthful and inexperienced servants, § 477
- Running boards, inspection for latent defects or dangers, § 447, p. 1271
- Safe place of work. Places of work, generally, ante this head
- Safety of employees, statutory provisions as affecting defense, § 425, p 1246
- Saw mills, customary methods of work, evidence, § 519, p. 112
- Saws, operation of, jury question, § 537, p 231, n 45
- Scaffolds,
 - Inspection for latent defects or dangers, § 447, p 1271
 - Jury questions, § 537, p 235
- Scope of employment,
 - Acts outside of, youthful inexperienced servants, § 473
 - Discovery of defects and dangers within, § 447, p 1274
 - Injury during
 - Evidence, § 519, p 109
 - Jury questions, § 537, p 224
 - Injury occurring outside of, § 439
- Section hands, precautions against dangers, § 456, p 1290
- Selection of,
 - Appliances or materials furnished, § 446, p 1265
 - Dangerous or unsafe method of work, § 450, p 1276-1279
 - Instruction on, § 549, p 260
 - Defective or dangerous appliances or improper materials, § 446, p 1265
 - Jury questions, § 537, p 234
 - Scaffolds, jury question, § 537, p 235
 - Stanways, jury questions, § 537, p. 236
- Set screws, inspection for latent defects or dangers, § 447, p. 1271
- Shaft timbers, inspection for latent defects or dangers, § 447, p 1272

INDEX TO MASTER AND SERVANT

Contributory negligence—Continued,

- Shearing machines, operation, jury question, § 537, p 231
- Sheds, inspection for latent defects or dangers, § 447, p 1272
- Shipping, customary method of work, admissibility of evidence, § 519, p. 112
- Signals,
 - Disobedience of rule requiring, § 459, p 1301
 - Disregarding, §§ 460-462
 - Duty to give, § 455
 - Failure to heed, proximate cause, § 444
- Simple tools, negligent use of, § 449
- Sleeping in dangerous position, § 438
- Speeders, railroad employees operating, § 456, p 1288
- Stagings, inspection for latent defects or dangers, § 447, p 1271
- Stairways, selection or use of, jury questions, § 537, p 236
- Statutory provisions, § 425, pp. 1245-1251
 - Commands involving violation of, § 466
 - Disobedience of, § 444
 - Evidence, § 519, p 108
 - Federal Border Inspection Act, defense, § 425, p 1247
 - Federal Employers' Liability Act, generally, ante this head
 - Federal Safety Appliance Act,
 - Defense, § 425, p 1247
 - Effect, § 228, p. 964
 - Hours of Service Act, defense, § 425, p 1248
 - Infants, violation of statute of protection of, § 480
 - Instructions to jury in accordance with, § 549, p. 260
 - Jury questions, § 537, p 223
 - Knowledge of danger, § 431
 - Last clear chance doctrine, § 423
 - Safety of employees, statutory provisions as affecting defense, § 425, p 1246
 - Violation of, § 444, §§ 457-459, pp 1293-1302
 - Statute for protection of infants, § 480
- Sudden peril,
 - Acts or conduct of servants in, § 468
 - Jury questions, § 537, p 225
 - Instructions on doctrine, § 549, p 259
- Suggestions to employer respecting danger, § 437
- Superior employee, compliance with command or order, § 466
- Superior knowledge and ability of master, reliance on, § 428
- Switching cars, method of work, § 453, p 1282
- Tanks, inspection for latent defects or dangers, § 447, p. 1272
- Telegraph and telephone poles, inspection for latent defects or dangers, § 447, p 1272
- Temporary forgetfulness of danger, § 436
- Tenders,
 - Inspection for latent defects or dangers, § 447, p 1272
 - Unnecessarily riding on tender of engine, § 446, p. 1268
- Tongs, inspection for latent defects or dangers, § 447, p. 1272

Contributory negligence—Continued,

- Tools, machinery and appliances, §§ 446-453, pp. 1264-1283
 - Anticipation of dangers, § 454
 - Continuing work after knowledge of danger, § 434
 - Dangerous or defective machinery, appliances or places, ante this head
 - Disobedience,
 - Rules and orders in handling, § 459, p 1300
 - Warnings or signals, §§ 461, 462
 - Evidence, § 519, p 108, § 527
 - Guarding against dangerous machinery, § 232, p 986
 - Jury question, § 537, pp 231, 234, 235
 - Knowledge of danger or defects, § 432; § 446, p 1265
 - Obedience to commands or order, § 461
 - Precautions against known or apparent dangers, § 454
 - Proximate cause of injury, § 441
 - Reliance on,
 - Assurances of master, § 429
 - Care of master, § 428
 - Selection of appliances or materials, § 446, p 1265
 - Jury questions, § 537, p 234
 - Unnecessary occupation of dangerous position, § 445, § 446, p 1267
 - Youthful and inexperienced servants, § 475
- Trackmen, precautions against injury, § 456, p 1290
- Tractors, operation, jury question, § 537, p 231, n 44
- Tracks,
 - Crossing tracks, railroad employees, precautions against danger, § 456, p 1292
 - Mining tracks, inspection for latent defects or dangers, § 447, p 1271
 - Obstructions on or near, precautions against danger, § 456, p. 1287
 - Railroad employees working on or near, § 456, p 1289
- Trap doors, inspection for latent defects or dangers, § 447, p 1272
- Trenches, servant injured in, jury question, § 537, p. 235
- Trestles, inspection for latent defects or dangers, § 447, p 1272
- Tricycles, railroad employees operating, § 456, p 1288
- Trucks, inspection for latent defects or dangers, § 447, p 1272
- Tunnels,
 - Inspection for latent defects or dangers, § 447, p 1272
 - Jury question, § 537, p 235
- Unauthorized use of machinery or appliances, § 446, p 1266
- Undertaking dangerous work required by nature of employment, § 449
- Unguarded holes, precautions by servants working about, § 456, p 1293
- Unnecessary occupation of dangerous position, § 445, § 446, p. 1267

INDEX TO MASTER AND SERVANT

Contributory negligence—Continued,

Unnecessary riding on tender of engine, § 446, p 1268

Use,

Defective or dangerous appliance or implement,

Jury questions, § 537, p 234

Proximate cause, § 441

Failure to use appliances furnished, § 446, p 1264

Improper use of tools, machinery or appliances, § 446, p 1266

Scaffolds, jury question, § 537, p 235

Simple tools, § 449

Stairways, jury questions, § 537, p 236

Unauthorized use of machinery or appliances, § 446, p 1266

Voluntary use of unsafe place of work, § 446, p 1266

Velocipedes, railroad employees operating, § 456, p 1288

Violation of rule, § 459, p 1302

Vice principal, reliance on assurances or representations by, § 429

Voluntary,

Exposure to danger, § 449

Selection of unsafe way of passage, § 446, p 1267

Use of unsafe place of work, § 446, p 1266

Wagons, inspection for latent defects or dangers, § 447, p 1272

Walls, inspection for latent defects or dangers, § 447, p 1272

Warning, §§ 460-462

Disobedience of rule requiring, § 459, p 1301

Disregarding, §§ 460-462

Jury questions, § 537, p 234

Duty to give, § 455

Failure to heed, proximate cause, § 444

Reliance on care of master, § 428

Washing machines, operation, jury question, § 537, p 231, n 44

Watchmen, railroads, precautions against injuries, § 456, p 1292

Winches, inspection for latent defects or dangers, § 447, p 1272

Wood working machine, operation, jury question, § 537, p 231, n 44

Wrenches, inspection for latent defects or dangers, § 447, p 1272

Yardmen, precautions against danger, § 456, p 1290

Youthful servant. Inexperienced or youthful servants, generally, ante this head

Control Direction or control, generally, post

Convenience, wages, payment when convenient, § 119

Conversion,

Burden of proof in action against servant for, § 615, p 395

Respondent superior, liability of master under doctrine of, § 575, p 332

Convict labor,

Contributory negligence, § 422, p 1243, n 62

Liability of contractor employing in case of injuries, § 178

Convict labor—Continued,

Safe instrumentalities and places to work, duty to furnish by persons employing, § 201, p. 900, n 9

Cook house, operator as independent contractor, § 3 (9)

Corporal punishment, rights of employer to inflict on employee, § 76

Corporations,

Contractors, liability for wages of employees of, § 154

Discharge of employees,

Payment of wages on, statute requiring, § 156, p 761

Resolution directing officers to discharge employees as constituting, § 41

Service letter, § 44, p 436

Dissolution,

Labor relations board, dissolution of corporate employer as affecting right to enforcement of order, § 28(132), p 374

Liability for wages of individual operating business after, § 34

Employer as including corporation employing workmen, § 1, p 27

Fair Labor Standards Act, criminal liability for violation, § 151(34)

Fellow servants,

Doctrine as applying to employee, § 322

Representatives of corporations, § 332, p. 1101

Statutory provisions, § 335

Insurance plan for protection of employees, authority to maintain, § 168, p 825

Lien of employees for wages, § 130

Officers and managers as servants or employees, § 2, p 30, n 71

Pension plans for employees, validity, § 168, p. 825

Period payment, wages, validity of statute requiring, § 156, p 759

Stockholders constituting employees of, relationship as existing, § 2, p 40

Correspondence,

Contract of employment by, § 12

Fair Labor Standards Act, goods as including within meaning of, § 151(7), p. 641

Costs,

Actions for wages, § 136; § 160(11), pp 804-808

Fair Labor Standards Act, actions under, § 160 (11), pp 804-808

Injuries to third persons, actions for, § 621

Wage lien, proceedings to enforce, § 149, p 617

Cotton gins, assumption of risk, knowledge of danger, § 390, p 1206

Cotton pickers, fellow servants, truck driver transporting as, § 327, p 1087, n 2

Cotton picking, independent contractors, persons employed for, § 3(9)

Counsel fees Attorney's fees, generally, ante

Counter affidavits, wage lien, enforcement, § 149, p. 614

Counter proposal, collective bargaining, duty to furnish pursuant to request, § 28(23)

Counterclaim Wages and other remuneration, post

Coupling and uncoupling. Railroad cars, post

INDEX TO MASTER AND SERVANT

- Coupons, wages, issuance against wages not yet earned, § 157, p 766
- Course of employment,
 - See, also, Scope of employment, generally, post
 - Distinctions, § 570, p 298
 - Fellow servants, liability of master for assault within, § 325
 - Liability of master for injuries to servant, §§ 171, 187, 325
 - Medical services rendered employee injured in, liability of employer for payment, § 166
 - Occupational disease contracted in, liability of master for injury caused by, § 187
 - Proximate cause as affecting liability for injuries, § 187
- Courts,
 - Collective bargaining contracts, power to make for parties, § 28(37)
 - Disputes between carrier and employees not involving labor disputes, jurisdiction, § 28(74), p 261
 - Labor disputes,
 - Enforcement of orders of labor relations board, § 28(122), pp 350-355
 - Exhaustion of administrative remedies before resort to court, § 28(69), § 28(71), p 250
 - Jurisdiction,
 - Contract adjusting controversy over charges of unfair labor practices, § 28(78), p. 258
 - Jurisdictional disputes, § 28(74), p 260
 - Labor relations boards or commissions, post
 - Medical services, action for breach of contract to furnish, § 163, p 818
 - National Labor Relations Act,
 - Exhaustion of administrative remedies before resort to court for violations, § 28(71), p. 253
 - Subpoenas issued under act, order compelling appearance and production of evidence, § 28(81)
 - Railway Labor Act, enforcement of award, § 28(122), p 353
 - Review of orders of labor relations boards Labor relations boards or commissions, post
- Covering,
 - Dangerous occupations or places, post
 - Dangerous or defective machinery or appliances, post
- Craft unions, collective bargaining, separate bargaining unit, § 28(28), p 171
- Cranes,
 - Assumption of risk,
 - Knowledge of danger, § 390, p 1210
 - Latent defects or dangers, § 392, p 1220
 - Jury question, injuries to servant, § 534, p 183
- Credibility of witnesses,
 - Federal Employers' Liability Act, jury questions, § 520
 - Labor Relations Board,
 - Determination, § 28(136), p 398
 - Exclusive power to determine, § 28(136), p. 387
 - Wages, actions to recover, jury question, § 131, p 580
- Creditors, back pay award in labor dispute, rights of employee's creditors in, § 28(119), p 339
- Criminal business, relation as predicated on employment for prosecution of, § 2, p 41
- Crimes and offenses,
 - Breach of contract of employment, § 80, pp 505-511
 - Bribing servant with intent to influence relation with master, § 639
 - Coercion of servant to prevent continuing work or refrain from working, § 638
 - Deductions on account of wages, § 114
 - Enticing servant to leave employment, §§ 633-639, pp. 439-443
 - Failure to pay wages, § 154, § 156, p 760
 - Fair Labor Standards Act violations, § 151(34)
 - Hours of labor, violation of statute limiting or regulating, § 15, p 99, § 16
 - Injuries to third persons resulting, liability of master under doctrine of respondeat superior, § 573
 - Interference with relation by third persons, §§ 633-639, pp 439-443
 - Intimidation of servant to prevent continuing in work or refrain from working, § 638
 - Kick-backs, wages, § 150, p 771
 - Labor contract statute, violations by employee, § 80, p 507
 - Minimum wages, violation of law, public employees or employees on public works, § 153, p 754
 - Peaceful picketing, § 638
 - Prosecution for statutory provisions regulating relation, § 14, p 96
 - Refusal to redeem scrip issued in payment of wages, § 157, p 768
 - Reinstatement,
 - Employee having committed crime, power of National Labor Relations Board to order, § 28(119), p 342
 - Employee wrongfully discharged, conviction as justification for refusal, § 28(51), p 226
 - Relation, violation of statute regulating relation, § 14, p 96
 - Hours of employment, § 15, p 99
 - Validity of statute penalizing breach of employment contract, § 80, p 505
 - Wages and other remuneration, post
- Croppers,
 - Enticing servant to leave employment, status as servant within,
 - Rule, § 625, p 430; § 626
 - Statute imposing criminal liability, § 634
 - Independent contractor, § 3(9)
 - Labor contract statutes imposing criminal liability for breach of employment contract, applicability, § 80, p 506
- Cross-examination, National Labor Relations Board,
 - Harmless error in refusal to permit, § 28(129), p 368
 - Right in proceeding before board, § 28(80)
- Cross-petition, labor relations boards, enforcement of order, § 28(127)
- Crossing signals, railroads, duty to give as applying to employees, § 263, p. 1025

INDEX TO MASTER AND SERVANT

- Crustacea, minimum wages and overtime pay, exemption from requirements of employees engaged in harvesting, § 151(16)
- Culinary workers, Fair Labor Standards Act, § 151 (C), p 456
- Culverts,
 - Independent contractor constructing, inherent danger as respects liability for injuries to others, § 590 p 362
 - Railroads, liability to servant for injuries caused by failure to safely maintain, § 229, p 975
- Cumulative remedies, injuries to servants, employers' liability acts, § 173, p 847
- Custody of court, lien for wages as attaching to property in, § 145
- Custody of property, employee's possession as without right of ownership, § 69
- Customers,
 - Disclosure of information as to by employee on termination of relation, § 72, p 485
 - Employers' Liability Act, protection as extending to employee of, § 555 n 66
- Customs and usages,
 - Burden of proving violation of, actions for injuries to servants, § 501, p 78
- Contributory negligence,
 - Adopting customary methods of work, § 452
 - Violation of rules or orders, § 458
- Dangerous machinery, safe-guarding § 232, p 986
- Discharge of employee, letter of clearance, § 45
- Employment contract,
 - Construction in light of customs or usages, § 7, p 72
 - Prevailing usages or customs as part of, § 7, p 73
- Evidence,
 - Injuries to servants, § 499, p 47; § 512, p 97, § 513, p 101; § 519, p 112
 - Term of employment, § 12
- Extra work, compensation for, § 97
- Fair Labor Standards Act, inconsistent custom as required to yield, § 151(24), p 696
- Fellow servants, negligence in following customary methods, § 336
- Guarding dangerous machinery, conclusiveness on question of duty of employer, § 232, p 980
- Inspection or test to discover defects or dangers in machinery or place of work, § 240
- Methods of work,
 - Contributory negligence, adopting customary methods, § 452
 - Liability for injuries by master employing customary methods, § 267
 - Rules and regulations, §§ 271, 276
- Pleading, injuries to servants,
 - Evidence admissible under pleadings, § 499, p 47
 - Violation of custom, § 490, p 22
- Railroads, violation as negligence as respects liability for injury to employee, § 261, p 1016
- Standard of conduct required of employer for protection against injuries to servant, § 183, p 879
- Substitute employed by servant, protection to which entitled, § 4
- Termination of relation,
 - Periodic employment, § 30
- Customs and usages—Continued,
 - Termination of relation—Continued,
 - Refusal of employee to exceed custom as justifying discharge, § 42, p 429
 - Tools, machinery and appliances,
 - Furnishing in accordance with custom or usage as sufficient, § 208
 - Proof of use of customary appliances showing due care, § 524, p 128
 - Wages, deductions, § 114
 - Warning or instructing servant, duty as dependent on, § 284
- Cutting trees,
 - Independent contractors, inherent danger as respects liability for injuries to others, § 590, p 362
 - Statutory penalty, liability of master for trespass of servants, § 575, p 339
- Dairy employees,
 - Fair Labor Standards Act, exemption, § 151(17)
 - Employees engaged in processing dairy products, § 151(19), p 687
 - Lien for wages, § 143, p 608
- Damages,
 - Breach of employment contract. Contracts of employment, ante
 - Contracts of employment, ante
 - Discharge of employee, post
 - Enticing servant to leave employment, § 628
 - Injuries to servants, recovery of, § 554
 - Inventions by employees, recovery in actions relating to, § 73, p 497
 - Labor unions, employer's right to maintain action against, § 28(84)
 - Leaving employment in violation of contract, liability of employee, § 78
 - Measure of damages, generally, post
 - Medical or surgical attention, breach of contract to furnish employee with, § 163, pp 816, 818
 - Mitigation of damages, generally, post
 - Negligence or wrongful act of employee causing loss to employer, liability for, § 79, p. 504
 - Action as lying, § 79, pp 502-505
 - Wages, actions for, statutory provisions, § 160(12)
 - Wrongful discharge, post
- Dangerous occupations or places,
 - See also safe place to work, generally, post
 - Agents, notice to as notice to master, § 248
 - Assumption of risk, ante
 - Blasting, generally, ante
 - Buildings, negligence of master, jury questions, § 534, p. 182
 - Burden of proof, actions for injuries to servants, § 501, p 73
 - Changing conditions during progress of work resulting in, duty of master, § 219, p 930
 - Chutes, guarding, § 234
 - Constructive notice, liability for injuries to servant, as affecting, § 248
 - Contributory negligence, ante
 - Covering or Guarding, §§ 231-234, pp 979-988
 - Admissibility of evidence, § 508
 - Assumption of risks, § 369, p 1172
 - Knowledge of danger, § 300, pp. 1203, 1208
 - Chutes, § 234

INDEX TO MASTER AND SERVANT

Dangerous occupations or places—Continued,

Covering or Guarding—Continued,

Construction of statute requiring, § 232, p. 981

Contributory negligence, jury question, § 537, p 231

Elevators, § 233

Farm machinery, § 232, p 984

Fellow servants,

Hatchways on vessels, § 333, p 1115

Negligence as affecting master's liability for injuries, § 333, p 1112

Hatchways, § 234

Fellow servant rule, § 333, p 1115

Hoistways, § 233

Instructions to jury in actions for injuries to servants, § 546, p 247

Negligence,

As to guarding, § 232, p 979

Jury questions as to master's negligence, § 534, p 186

Persons entitled to protection of statutes requiring, § 232, p 983

Shafts, § 233

Elevators, generally, post

Employment for purpose of making dangerous place safe, liability for injuries occurring, § 222, p 939

Enhancement of natural risk of employment, avoidance, § 214, p 922

Evidence,

Admissibility in action for injuries to servant, § 512, pp 98-100

Similar facts or occurrences, § 511

Sufficiency in action for injuries to servant, § 522, p 118

Fellow servants,

Negligence in covering or guarding as affecting master's liability for injuries, § 333, p. 1112

Notice to as notice to master, § 248

Floor openings, guarding, § 234

Guarding Covering or guarding, generally, ante this head

Hatchways, guarding, § 234

Hidden dangers, knowledge of master as affecting liability for injuries, § 246

Hoistways, guarding, § 233

Illness or disease incident to, protection of employee from danger, § 214, p 923

Improbable dangers, knowledge of master as affecting liability for injuries, § 246

Improper use or test, liability of employer for injuries in case of, § 251

Independent contractors,

Duty of keeping premises in reasonably safe condition for servants of, § 603

Liability in respect to work dangerous unless precautions observed, § 500, pp 359-365

Infants,

Negligence in employment in, § 185

Pleading employment in action for injuries, § 490, p 20

Injuries to third persons, liability of master under doctrine of respondeat superior, § 570, p 314

Dangerous occupations or places—Continued,

Inspection,

Mines, § 235, p 993

Negligence of master, jury question, § 534, p 187

Jury questions, § 529

Actions for injuries to servant, § 533, p 156

Negligence in failing to cover or guard, § 534, p 186

Pleading in action for injuries to servants, § 490, p 18

Sufficiency of evidence as to, § 524, p 123

Knowledge of master, §§ 244-248, pp 1000-1004

Constructive notice, § 248

Hidden or improbable dangers, § 246

Latent defects, § 247

Liability for injuries to servant as dependent on, § 244

Structural defects, § 245

Time and opportunity for discovery as affected, § 248

Latent defects, .

Instructions to jury as to, actions for injuries to servant, § 546, p 249

Knowledge of master as affecting liability for injuries, § 247

Liability of master for injuries, jury question, § 534, p 189

Law questions, actions for injuries to servant, § 533, p 156

Lights, negligence of master, jury question, § 534, p 171

Making dangerous place safe, duty of master in respect to employee engaged in, § 250

Mines, liability for injuries to employees engaged in making dangerous place safe, § 222, p 939

Nature of work rendering place temporarily insecure, § 249

Negligence as imputable to master furnishing, § 214, pp 922-925

Negligence of master, covering or guarding, jury questions, § 534, p. 186

Obvious dangers,

Admissibility of evidence as to, § 512, p 100

Instructions to jury as to, action for injuries to servant, § 546, p 249

Liability of master for injuries, jury question, § 534, p 189

Opportunity for discovery, constructive knowledge of master as affected, § 248

Order directing work, liability for injuries by servant acting under, § 280

Pleading in action for injuries to servant, § 490, p 18

Precautions to protect servant, § 262

Progress of work enhancing danger, care required of employer, § 219, p 930

Protection of employee, duty of master, § 214, p 922

Proximate cause of injury,

Building defects, § 253

Liability of master as dependent on, § 252

Mines and excavations, § 259

Railroads, §§ 255-258, pp. 1009-1013

INDEX TO MASTER AND SERVANT

Dangerous occupations or places—Continued,

- Questions of law and fact, actions for injuries to servant, § 533, p 156
- Rules and regulation, duty of employer to promulgate, § 271
- Sending servant into place of danger, liability for injury resulting, § 268
- Shafts, guarding, § 233
- Structural defects, knowledge of master as respects liability for injuries to servant, § 245
- Tests, negligence of master, jury questions, § 534, p 187
- Time for discovery, constructive knowledge of employer as affected, § 248
- Unusual use or test, liability for injuries resulting, § 251
- Vice principal, notice to as constructive notice to master, § 248
- Warning and instructing servant, generally, post
- Dangerous or defective machinery or appliances,**
 - Agents, notice to as notice to master, § 248
 - Assumption of risk, ante
 - Barriers or railings, § 231
 - Breakage, guarding machines dangerous by reason of, § 232, p 985
 - Burden of proof, actions for injuries to servants, § 501, p 73
 - Care required of master requiring servant to work on, § 215
 - Circumstantial evidence, knowledge of defect or danger as shown by, § 534, p 124
 - Constructive notice, liability for injuries to servant as affected, § 248
 - Contact, guarding machines dangerous from, § 232, p 985
 - Contributory negligence, ante
 - Covering or guarding, §§ 231-234, pp 979-988
 - Admissibility of evidence, § 508
 - Assumption of risks, § 369, p 1172
 - Knowledge of danger, § 390, pp 1203, 1208
 - Burden of proof, § 502
 - Chutes, § 234
 - Construction of statutes requiring, § 232, p 981
 - Elevators, § 233
 - Farm machinery, § 232, p 984
 - Fellow servants, negligence as affecting master's liability for injuries, § 333, p 1112
 - Hatchways, § 234
 - Fellow servant rule, § 33, p 1115
 - Hoistways, § 233
 - Instruction to jury, actions for injuries to servant, § 546, p 247
 - Negligence in respect of, § 232, p 979
 - Jury question, § 534, p. 186
 - Particular machines or machinery, § 232, p 984
 - Persons entitled to protection of statutes requiring, § 232, p. 983
 - Shafts, § 233
 - Statutory provisions, § 232, p 980
- Customs or usages, safe guarding in accordance with, § 232, p 986
- Ejusdem generis, application of rule in determining necessity of guarding, § 232, p. 985

Dangerous or defective machinery or appliances—Continued,

- Electric appliances, assumption of risk, knowledge, § 390, p. 1212
- Evidence,
 - Admissibility in action for injuries to servant, § 512, pp 96-100
 - Similar facts or occurrences, § 511
- Sufficiency in action for injuries to servant, § 522, p 118
- Factories, statute requiring guarding as applying to, § 232, p 982
- Fellow servants,
 - Guarding against negligence of, § 232, p 986
 - Liability of employer for injuries resulting, statutory provisions, § 344
 - Negligence in respect of as affecting master's liability for injuries, § 333, p 1113
 - Notice to as constructive notice to master, § 248
- Flying particles, safeguarding machines dangerous from, § 232, p 985
- Guarding Covering or guarding, generally, ante, this head
- Hidden dangers, knowledge of master affecting liability for injuries, § 246
- Improbable dangers, knowledge of master as affecting liability for injuries, § 246
- Improper use or tests, liability for injuries resulting, § 251
- Independent contractors, warning employees of, § 606
- Industrial plants, statute requiring guarding as limited to, § 232, p 982
- Injuries to third persons, liability of master under doctrine of respondeat superior, § 570, p 314
- Inspection, negligence of master, jury question, § 534, p 187
- Inspection and repair, duty owed to servant engaged in making repair, § 250
- Jury questions,
 - Actions for injuries to servant, § 533, p 156
 - Negligence in failing to cover or guard, § 534, p 186
 - Negligence of master, § 534, p. 174
- Knowledge of defect or danger,
 - Admissibility of evidence, § 512, p 99
 - Assumption of risk, jury question, § 536, p 219
 - Burden of proof, § 501, pp 74, 80
 - Instructions to jury as to, actions for injuries to servants, § 546, p 247
 - Jury question, § 534, § 189
 - Pleading in action for injuries, § 490, p. 18
 - Sufficiency of evidence as to, § 524, p 123
- Knowledge of master, §§ 244-248, pp 1000-1004
 - Constructive notice, § 248
 - Hidden or improbable dangers, § 246
 - Improper or unusual use, § 251
 - Latent defects, § 247
 - Liability for injuries to servant as dependent on, § 244
 - Structural defects, § 245
- Latent defects or dangers,
 - Instructions to jury, actions for injuries to servants, § 546, p 249

INDEX TO MASTER AND SERVANT

Dangerous or defective machinery or appliances—
 Continued,
 Latent defects or dangers—Continued,
 Knowledge of master as affecting liability for injuries, § 247
 Negligence of master, jury questions, § 534, p 189
 Law questions, actions for injuries to servants, § 533, p 156
 Liability of master for injuries to servant required to work on, § 215
 Manufacturing, statutes requiring guarding as applying to, § 232, p 982
 Mercantile establishments, statutes requiring guarding as applying to, § 232, p 982
 Mills, statutes requiring guarding as applying to, § 232, p 982
 Negligence as imputable to master furnishing, § 214, pp 922-925
 Negligence of master in respect of, jury question, § 534, pp 174, 186
 Notice,
 Failure to give employer as precluding recovery for injuries caused by unguarded condition, § 232, p 984
 Guarding, effect of duty of inspector to give, § 232, p 981
 Obvious dangers,
 Admissibility of evidence as to, § 512, p 100
 Assumption of risks, § 369, p 1171
 Instructions to jury, actions for injuries to servants, § 546, p 249
 Negligence of master, jury question, § 534, p 189
 Opportunity for discovery, constructive knowledge of employer as affected, § 248
 Pleading in action for injuries to servant, § 490, p 18
 Proximate cause of injury,
 Liability of master as dependent on, §§ 252, 254
 Railroads, § 255
 Questions of law and fact,
 Actions for injuries to servants, § 533, p 156
 Negligence of master, § 534, p 174
 Repairs, absence of guard during, § 232, p 982
 Respondeat superior, doctrine as applicable in respect of, § 575, p 331
 Signals or warnings, contributory negligence, § 462
 Simple tools and appliances, generally, post
 Statutory provisions,
 Care of employer requiring employee to work on, § 215
 Covering, guarding or otherwise protecting § 232, p 980
 Failure to comply with as proximate cause of injury, § 252
 Fellow servants, liability of employer for, injuries resulting, § 344
 Knowledge of master, § 244
 Liability of master for,
 Negligence of fellow servants, § 333, p 1118
 Persons entitled to protection of statutes requiring guarding, § 222, p 983

Dangerous or defective machinery or appliances—
 Continued,
 Statutory provisions—Continued,
 Protection of employees, § 214, p 923
 Proximate cause of injuries in failure to comply with, § 252
 Structural defects, knowledge of master as respects liability for injuries to servant, § 245
 Tests,
 Guarding during operation for purpose of, § 232, p 984
 Negligence of master, jury questions, § 534, p 187
 Time for discovery, constructive knowledge of employer as affecting, § 248
 Unusual use or tests, liability for injuries resulting, § 251
 Vice principal, notice to as constructive notice to master, § 248
 Waiver, duty imposed on master to guard, § 232, p 981
 Warning and instructing servant, generally, post
 Workshops, guarding, § 232, p 982
 Youthful and inexperienced employees, warning of danger, burden of proof, § 501, p 81
Dangers,
 Care required of employer to prevent employees being subjected to, § 183, p 878
 Warning or instructing servant, post
Day independent contractor paid by, § 3(8)
Day to day employment,
 Termination of relation, § 30
 Will of either party, § 31, p 413
Wages,
 Action to recover, § 122
 Jury question, § 131, p. 591
 Time for payment, § 119
Death of,
 Employee,
 Beneficiaries under death benefit certificate issued by relief or benefit association, § 169, p 832
 Deductions from wages, § 104
 Termination of employment contract, § 38
 Wages and other remuneration, right to recover as affected, § 85
 Employer, termination of employment contract, § 37
Deceit Fraud, generally, post
Declaration Complaint, declaration or petition, generally, ante
Decrease Wages and other remuneration, post
Decrees Judgments or decrees, generally, post
Deductions Wages and other remuneration, post
Defective machinery Dangerous or defective machinery or appliances, generally, ante
Defective workmanship, deduction in wages for, statute prohibiting, § 159, p 769
Defenses,
 Assumption of risk, §§ 358-360, pp. 1153-1160
 Burden of proof, § 501, p 66
 Employers' liability acts as limiting or modifying defenses, § 173, pp 846, 848
 Employment contract, action for breach, § 11, p 85
 Federal Employers' Liability Act as modifying, § 173, p. 848

INDEX TO MASTER AND SERVANT

Defenses—Continued,

- Labor contract statute, prosecution of employee for violation, § 80, p 507
- Leaving employment in violation of contract, action for, § 78
- Minors employed in violation of statute, actions for injuries, § 104, p 805
- Negligence or wrongful act of employee causing loss to employer, actions for, § 79, p 503
- Wages and other remuneration, post
- Wrongful discharge, actions for, § 51

Deferred salary payments, discharge of employee as affecting right, § 87

Definite term, employment contract, construction establishing, § 8, p 70

Definitions, § 1, pp 24-29

- Assumption of risks, § 357, p 1148
- Clearance card, § 45, p 439, n 51
- Collective bargaining, § 28(20)
- Commerce, § 151(7), p 635
- Competency, § 313
- Constructive knowledge, § 248, p 1002, n 40
- Contractor, § 5(1), p 44
- Contributory negligence, § 421
- Control, § 3(3), p 54
- Drawing account, § 91, n 88
- Earnings, § 28(119), p 345
- Emergency, § 22
- Emergency employee, § 177, n 78
- Employees, § 28(11); § 143, p 608; § 151(4), p 631
- Employer, § 1, p 26; § 28(10); § 151(4), p 629
- Statutory provision, limited effect, § 14, p 95

Engaged in commerce, § 151(9), p 649, n 48

Establishment, § 151(14), p 674

Executive, § 151(12), p 669

Extraordinary risks, § 361

Fair Labor Standards Act, post

Fellow servants, § 339

Goods, § 151(7), p 640

Handling, § 151(9), p 652

Independent contractors, § 3(1), p 41

Industry, § 28(5), § 151(32), p 729

Jurisdictional disputes, § 28(18)

Labor disputes, § 28(16)

Labor organization, § 28(15), p 148

Labor separations, § 29

Latent defects, § 143, p 608

Latent defects, § 238, n 54

Layoff, § 29

Minimum wage, § 152, p 743

Net profit, § 112, p 548

Occupational disease, § 187

Operative, § 143, p 609

Ordinary risks, § 371

Pensions, § 169, p 830

Permanent employment, § 8, p 78

Produce, § 151(7), p 638

Production for commerce, § 151(7), p 639

Profits, § 112, p 548

Proximate cause, § 252

Quit, § 40

Retail establishment, § 151(14), p 675

Sales, § 90, p 520

Salesmen, § 143, p 609

Sanctioning right, § 48

Definitions—Continued,

Seniority, § 28(41), p 202

Seniority right, § 5, p 64, n 97

Service establishments, § 151(14), p 678

Simple tools, § 235, p 901

Statutory provisions, limited effect, § 14, p 95

Strikes, § 28(18)

Substantial evidence, § 28(130), pp 394, 400

Tradesmen, § 143, p 609

Train, § 354

Transporting, § 151(9), p 652

Unfair labor practices, § 28(43)

Employer, § 28(45), pp 209-213

Vice principles, § 332, p 1100; § 330

Voluntary agreement, collective bargaining, § 28(37)

Waiting time, § 151(28), p 717, n 49

Working conditions, § 28(22), p 159, n 92

Degree of care required as to servant,

Pleading in action for servant's injuries, § 490, p 17

Protect by master against injuries to servants, § 183, p 877

Delegation of duty,

Fellow servants, furnishing sufficient number, § 307

Independent contractors, liability for injury as result of nondelegable duties, § 501, pp 385-368

Methods of work,

Enforcement of safety rules, § 272

Providing safe method, § 266

Safe place to work, fellow servants, § 333, p 1111

Safe tools, etc., and places for work, § 204, pp 900-912

Safety of employees, duty of master, § 186

Warning and instructing servant, § 285

Delegation of power, chastisement of minor employee, right to delegate, § 70

Delivery employees, Fair Labor Standards Act, coverage, § 151(9), p 658

Demand Wages and other remuneration, post

Demolition of building,

Assumption of risk, jury questions, § 536, p 215

Contributory negligence, jury questions, § 537, p 230

Safe place to work, duty to furnish as extending to, § 219, p 933

Demotion of employees,

Damages for, action as maintainable by employees, § 28(71), p 251

Unfair labor practices, § 28(58)

Demotion because of union activities, evidence, § 28(90)

Demurrer, injuries to servants, actions for, § 49, p 14

Demurrer to evidence, injuries to servant, actions for, § 529

Department heads, fellow servants, § 332, p 1102

Department rule, fellow servants, § 331, p 1006

Departure,

Injuries to servant, departure from ordinary manner of performance of duties, liability as affected, § 181, p 876

Injuries to third persons, liability of master under doctrine of respondeat superior, § 574, p 327

INDEX TO MASTER AND SERVANT

- Depositions, National Labor Relations Board, review of order for award by court, § 28(122), p 353
- Depreciation, allowance under profit sharing contract, § 112, p 551
- Deputies, term employee as including, § 1, p 28
- Derrick gearing, assumption of risk, knowledge of danger, § 390, p 1208
- Derricks,
 - Assumption of risk,
 - Knowledge of danger, § 390, p 1210
 - Latent defects or dangers, § 392, p 1220
 - Contributory negligence of servant injured as jury question, § 537, p 235
 - Negligence of master,
 - Evidence, § 524, p 129
 - Jury question, § 534, p 183
 - Safety devices, duty of master, § 221
- Destruction of employer's property, contract of employment as terminated by, § 30
- Destruction of place of work, wages, right to recover as affected, § 86
- Detectives,
 - Assault by, liability of master, § 575, p 342
 - Unfair labor practices in employment of, § 28(53)
 - Evidence, § 28(93), p 292
- Detonating caps, warning and instructing servant as to dangerous properties, § 303
- Deviations,
 - Independent contractor relationship as affected by reservation of right to make, § 3(4)
 - Injuries to third persons, liability of master under doctrine of respondeat superior, § 574, p 327
- Different department rule, fellow servants,
 - Common employment, § 331, p 1096
 - Statutory provisions, § 342
 - Railroads, § 350
- Dimout regulations, compliance as negligence in failing to furnish sufficient lights, § 219, p. 932, n 52
- Direction of verdict,
 - Injuries to servants, actions for, § 529
 - Negligence of master, § 534, p. 167
 - Injuries to third persons, actions for, § 616
 - Wages, action to recover, § 131, p 589
 - Wrongful discharge, actions for, § 54, p. 460
- Direction or control,
 - Defined, § 3(3), p 54
 - Element of relationship, § 2, p 32
 - Failure to assert right, relationship as affected, § 3(3), p 55
 - Fellow servants, post
 - Independent contractors, post
 - Injuries to third person,
 - Liability of master under doctrine of respondeat superior, servant loaned or hired to another, § 566, pp 284-292
 - Right of direction as essential to liability of master, § 563, p 276
 - Manner of performance, independent contractor, § 3(1), p 43
 - Place of work, relationship as affected by right of, § 3(2), p 49
 - Relation as determined by, § 1, p 25
 - Servant loaned to another, § 2, p 38
- Director of research, labor relations, employees with-in statute dealing with, § 28(12), n 62
- Disability of employee,
 - Termination of employment contract, § 38
 - Wages, right to recover as affected, § 85
- Disability of employer, termination of employment contract, § 37
- Disabled vehicles, independent contractors, persons employed to move, § 3(9)
- Discharge of employee, §§ 41-59, pp 426-476
 - Absence from work as ground, § 42, p 429, n 22
 - Abusive conduct as warranting, § 42, p 429, n 28
 - Adverse interest or acts as justifying, § 42, p 430
 - Appeal to designated tribunal, right of action under contract provisions, § 28(75)
 - Arbitrary discharge, § 42, p 428
 - Assigning of reason, § 44, p 435
 - Assignment of wages resulting in, liability of assignee, § 630, p 435
 - Blacklist by employer, § 45
 - Bonus, arbitrary discharge as defeating rights, § 98, p 529
 - Breach of contract as ground, § 42, p 428
 - Liability of employer for consequences, § 46
 - Breach of contract between employer and bargaining representative, action for damages, § 28(120)
 - Clearance card or letter, duty of employer to give, § 45
 - Collective bargaining agreement, right of employer as affected, § 28(41), p 200
 - Compensation Wages, generally, post
 - Competing business, secretly engaging in as ground, § 42, p 430
 - Condemnation of offense authorizing discharge, § 43
 - Conduct constituting, § 41
 - Continuing to accept services after breach of contract or duty, waiver of right, § 43
 - Contract of employment, right as dependent on terms of, § 41
 - Corporations, payment of wages on, statutes requiring, § 156, p 761
 - Custom of employer, refusal to accede to as justifying, § 42, p 429
 - Customs and usage, letter of clearance, § 45
- Damages,
 - Breach of contract between employer and employee's bargaining representative, § 28 (120)
 - Breach of duty to issue service letter, § 44, pp 437, 438
 - Failure of employer to furnish clearance card or letter, § 45
 - Malicious procurement, § 632
 - Mitigation of damages,
 - Discharge as breach of contract between employer and employee's representative, § 28(120)
 - Failure to issue service letter as required by statute, § 44, p 439
 - Malicious procurement, § 632
 - Nominal damages, failure to furnish service letter, § 44, p 438
 - Resort to court, § 28(75)
- Deferred salary payments, right as affecting, § 87

INDEX TO MASTER AND SERVANT

Discharge of employee—Continued,

Discrimination,

- Charge as sufficient to justify complaint by Labor Relations Board, § 28(59), p 276
- Union activities, admissibility of evidence in proceeding to prevent unfair labor practice, § 28(94)

Dishonesty warranting, § 42, p 420, n 28

Disloyal interest or acts as justification, § 42, p 430

Disobedience or insubordination, § 42, p 432

- Jury question in action for wrongful discharge, § 54, p 462

Effective date, § 46

Ejection of employee failing to leave premises peaceably, § 46

Evidence,

- Actions for malicious procurement, § 631

- Actions for wrongful discharge, § 53, pp 454-460

- Sufficiency in action against employer, § 28(95), p 288

- Discharge of employee causing injuries to servant, § 516

Unfair labor practices,

- Discrimination because of union activities, § 28(100), pp 303-309

- Dismissal because of union activities, § 28(100), p 303

False representation inducing contract as ground, § 42, p 428

Fellow servants, power to discharge as affecting relations, § 332, p 1101

Future wages or compensation, right to recover, § 87

Garnishment, tender as arresting running of penalty for failure to pay wages due, § 156, p 765

Good cause, right to discharge for, § 42, p 428

Grounds, § 42, pp 427-433

Incompetency as ground, § 42, p 430

- Waiver of rights, § 43

Indefinite term of services, wages as recoverable, § 89

Independent contractors, power of discharge as determinative of relation, § 3(2), p 46, § 3 (6)

Injuries to third persons, liability of master under doctrine of respondeat superior as dependent on right of discharge, § 563, p 276

Insolence as ground, § 42, p 430

Insubordination as ground, § 42, p 432

- Jury question in action for wrongful discharge, § 54, p 462

Intemperance as justifying, § 42, p 433

Intention, element of, § 41

Intoxication as justification, § 42, p 433

Jury question, action for malicious procurement, § 631

Justification,

- Burden of proof in action for wrongful discharge, § 53, p 454

- Instructions to jury in action for wrongful discharge, § 55

- Pleading in action for wrongful discharge, § 52, p 451

Discharge of employee—Continued,

Letter of recommendation, duty of employer to give, § 45

Loss of right to discharge for breach of contract or duty, § 43

Malicious procurement, §§ 630-632, pp 431-439

Actions for, § 631

Damages, § 632

Evidence in action for, § 631

Justification, § 630, p 437

Liability for resulting damages, § 630

Mental anguish, § 632

Motive as affecting liability, § 630, p 436

Pleading in action for, § 631

Questions of law and fact in actions for, § 631

Misconduct justifying, § 42, p 420

Mitigation of damages Damages, ante, this head Moral turpitude as ground, § 42, p 430

Motive, materiality, § 44, p 435

Nature of employment, right to discharge as dependent on, § 41

Neglect of duty as justification, § 42, p 431

Notice, violation of rule of which employee had no notice, § 42, p 433

Operation and effect, § 46

Payment of wages due, statute requiring, § 156, p 761

Peaceable withdrawal from premises, § 46

Penalty wages, § 156, p 762

Pleading,

- Actions for malicious procurement, § 631

- Actions for wrongful discharge, § 52, pp 447-454

Political affiliation, discrimination, § 28(2), p. 114, n 21

Power to discharge in general, § 41

- Essential to relationship, § 2, p 35

Presumptions,

- Fidelity, § 28(93), p 281

- Waiver of breach of contract or duty warranting discharge, § 43

Punitive damages, failure to issue service letter as required by statute, § 44, p 438

Reasons, employer as required to assign, § 44, p 435

Reinstatement of employees, generally, post

Reparation for mistakes, effect of, § 43

Right of employer, § 28(47); § 28(49), p 219

Service letter, requirements as to, § 44, p 435

Strikes,

- Labor union's strike to secure discharge of objectionable persons, § 28(19), p 154

- Participation in as ground, reinstatement, § 28(119), p 341

Tender of wages due, termination of further accumulation of penalty, § 156, p 764

Testimonial as to character, duty of employer to give, § 45

Threat to terminate contract of employment as amounting to, § 41

Trade union wrongfully causing, liability in damages, § 630, p 430

Trespasser, servant failing to leave peaceably, § 46

Trustees of railroad, action for damages as maintainable against, § 28(84), n. 99

INDEX TO MASTER AND SERVANT

Discharge of employee—Continued,

- Unemployment compensation, mitigation of damages for failure to issue service letter as required by statute, § 44, p 439
- Unfair labor practices, § 28(47); § 28(49), pp 219-225
 - Discrimination because of union activities, evidence, § 28(100), pp. 303-309
 - Dismissal because of union activities, evidence, § 28(100), p. 303
 - Inducing employer to discharge employee, § 28(63), n 84
 - Threat of, § 28(55)
- Union activities, discharge because of participating, burden of proof, § 28(93), p 282
- Vacation pay, wrongful discharge as affecting right, § 87
- Wages or other remuneration,
 - Actions for, § 122
 - Jury question, § 131, p 592
 - Contract provisions as governing, § 113
 - Failure to pay as constituting discharge, § 41
 - Reasonable value as recoverable, § 113
 - Refusal to pay as constituting discharge, § 41
 - Right to recover future wages, § 87
 - Statute requiring payment on discharge, § 156, p. 761
 - Termination of relation pursuant to contract terminable at option, § 88
 - Withholding, statutory penalty, § 156, p. 761
- Waiver of right, breach of contract or duty, § 43
- Willful disobedience as ground, § 42, p 433
- Words or acts showing, § 41
- Wrongful discharge, generally, post
- Discontinuance of business, excuse for failure to furnish work, § 61
- Discounts, wages, statute regulating assignment of future wages as precluding, § 157, p 766
- Discovered peril Last Clear Chance, generally, post
- Discoveries of employee, ownership, § 73, pp 486-499
- Discovery,
 - Defect, evidence as to duty of employee in action for injuries, § 519, p 110
- Fair Labor Standards Act, actions under, § 160 (1)
- Discretion,
 - Court,
 - Amendments of pleadings, action for injuries to servant, § 496
 - Fair Labor Standards Act,
 - Attorney's fees in action under, § 160 (11), p 805
 - Enforcement of subpoena issued by administrator, § 151(31), p. 725
- Employee,
 - Bonus for satisfactory services, § 98, p 530
 - Wages and other remuneration,
 - Burden of proof in action to recover, § 129, p 578
 - Forfeiture of wages under provisions of contract, § 103
- Independent contractors, mode and manner of doing work, § 3(3), p 49
- Labor Relations Boards and Commissions, post
- National Labor Relations Board, post
- Settlement of labor disputes, person conducting hearing, § 28(105)

Discretion—Continued,

- Termination of relation, contract providing for, § 32, p. 416
- Discrimination,
 - Discharge of employee,
 - Political affiliation, § 28(2), p 114, n 21
 - Union activities, presumptions, § 28(93), p 282
 - Unfair labor practices, post
 - Union membership,
 - Admissibility of evidence in proceeding involving unfair labor practice, § 28(94)
 - Presumptions, § 28(93), p 281
- Disease,
 - Contributory negligence, injury resulting from, § 438
 - Occupational diseases, post
- Dishonesty, discharge of employee as warranted because of, § 42, p 429, n 28
- Disinfection, independent contractors engaged in, inherent danger as respects liability for injuries to others, § 590, p. 362
- Disloyalty,
 - Discharge of employee on ground of, § 42, p 430
 - Recovery of wages as precluded, § 105
- Dismissal and nonsuit,
 - Injuries to servant, actions for, § 529
 - Injuries to third persons, actions for, § 616
 - Labor Relations Board, right to dismiss own complaint, § 28(89), p 277
 - Settlement of labor disputes, proceedings for, § 28 (79)
 - Wages, actions to recover, § 131, p. 501
 - Wrongful discharge, actions for, § 54, p 460
- Disobedience of orders or rules,
 - Admissibility of evidence, injuries to servants, § 519, p 110
 - Assumption of risk, § 410
 - Burden of proof in actions for injuries to servants, § 501, p 78
 - Contributory negligence, ante
 - Discharge of employee on ground of, § 42, p. 432
 - Jury question in action for wrongful discharge, § 54, p 462
 - Presumptions in actions for injuries to servants, § 501, p 63
- Disparagement of union, unfair labor practice, § 28 (55)
- Dissolution,
 - Corporation, operation of business by individual, liability for wages of those continuing to work, § 34
 - Relief and benefit departments or associations, § 168, p. 826
- Distinctions,
 - Contractor and employees, § 3(1), p 44
 - Relationship, § 1, p 24
- Distributors, interstate commerce, National Labor Relations Act as applying, § 28(9), p 133
- District of Columbia,
 - Fair Labor Standards Act, principal office of administrator in, § 151(30)
 - Hours of labor on public works, power to regulate, § 17
 - National Labor Relations Board, principal office located in, § 28(67)

INDEX TO MASTER AND SERVANT

- Divisible contract, wrongful discharge of employees employed under, accrual of cause of action, § 49
 Division superintendent, railroads, fellow servants relationship, § 332, p 1102
 Divisional jurisdiction, labor disputes, railway labor act, § 28(74), p 261
 Divorce, death benefit certificate issued employee by relief or benefit association, right of divorced wife under, § 169, p 832
 Dolly, simple appliance as respects liability to furnish safe appliances, § 216, n 97
 Domestic servants,
 National Labor Relations Act, exclusion, § 28(12)
 Negligence or wrongful acts resulting in loss to employer, liability, § 79, p 502
 Wages, presumption of payment, § 121
 Domestic services,
 Independent contractors, persons employed to perform, § 3(9)
 Servant as limited to persons engaged in, § 1, p 26
 Domination of labor organization, unfair labor practice, evidence, § 28(98), pp 296-301
 Double damages,
 Enticing servant to leave employment, § 628
 Injuries to infant employed in violation of Child Labor Law, § 554
 Double header, train run, accident as actionable because of, § 261, p 1017
 Dough mixers, assumption of risk, knowledge of danger, § 390, p 1208
 Draftsmen, lien for wages or other remuneration, § 143, p 608
 Drawing account,
 Contract of employment providing for, § 91, n. 88
 Sharing in profits in addition, § 95
 Wrongful discharge of employee on commission basis allowed, damages recoverable, § 58, p 470
 Drayman,
 Independent contractor, § 3(9)
 Liability for torts, § 584, p 358
 Lien for wages, § 143, p 609
 Dredges, Fair Labor Standards Act, exemption of employees on dredges, § 151(15)
 Driver and team, injuries to third person by driver and team hired to another, liability of master under doctrine of respondent superior, § 566, p. 291
 Drivers, independent contractors, § 3(9)
 Drug stores, Fair Labor Standards Act, exemption from provisions, § 151(14), p 675
 Drunkenness, contributory negligence, proximate cause of injury, § 440
 Dry dock companies, labor relations, validity of statutes regulating, § 28(3), p 121, n 85
 Dual capacity doctrine,
 Fellow servants, § 332, p. 1106; § 333, p 1110
 Negligence of employee acting in, liability for injuries, § 356
 Person performing services for himself while in employ of another, § 2, p 40
 Due process of law, National Labor Relations Board, setting aside or refusal to enforce order issued without, § 28(129), p 366
 Dues, labor organizations, requirements, § 28(15), p. 148
 Dumb-waiters, injuries to servant, jury question, § 534, p 184
 Dump cars, injuries to servant, negligence of master, questions of law and fact, § 534, p 178
 Duplicity, pleading in actions for injuries to servant, § 489, p 14
 Pleas or answers, § 404, p 37
 Duration of relation,
 Collective bargaining agreement, § 28(41), p 197
 Customs, admissibility of evidence to show, § 12
 Employment contracts, § 8, pp 74-79
 Failure to specify as affecting validity, § 6, p 60
 Independent contractors,
 Relationship, consideration on determining, § 3(2), p 49
 Tests of, § 3(2), p 46
 Jury question, actions for wages, § 131, p 501
 Relationship as dependent on duration of employment, § 2, p 40
 Statutory provisions, § 14, p 95
 Termination of relation, generally, post
 Wrongful discharge, complaint in action for as required to show, § 52, p 449
 Duress,
 Kick-back payments, recovery as payments under, § 159, p 772
 Recovery against employer on theory of, § 27
 Wages, agreement in respect of, § 110, p. 543, n. 20
 Dust,
 Injuries to employees, evidence, § 524, p 130
 Warning and instructing employees as to presence of, § 303
 Dynamic,
 Independent contractors, inherent danger as respects liability for injuries, § 590, p 363
 Injuries to employee using in violation of law, liability of master, § 264
 Injuries to third persons, liability of master under doctrine of respondent superior, § 570, p 315
 Knowledge of danger,
 Admissibility of evidence, § 512, p 99
 Assumption of risk, jury questions, § 536, p. 219
 Burden of proof, § 501, pp 74, 80
 Instruction to jury, actions for injuries to servants, § 540, p 247
 Jury questions, § 534, p 189
 Safety of employee, care required of master using, § 214, p 924
 Warning and instructing servant as to dangerous properties, § 303
 Duty, § 262, n. 17
 Inexperienced or youthful servants, § 306, p 1067
 Earnings from third persons, employee receiving in connection with work, employer's right to, § 71
 Economic hardships, collective bargaining, excuse for employer, § 28(21)
 Edgers, assumption of risk, knowledge of danger, § 390, p 1206
 Education, wages and other remuneration, furnishing as part of, § 99
 Educational enterprises, labor relations, statute dealing with as applying, § 28(9)

INDEX TO MASTER AND SERVANT

- Egress Ingress and egress, post
- Eight hour day, train crews, statute fixing as limited to members, § 155, n 27
- Ejectment, discharged employee, § 46
- Ejusdem generis, dangerous machinery, application of rule in determining necessity of guarding, § 232, p 985
- Elbow of steam pipe, assumption of risk, latent defect or danger, § 392, p 1220
- Election of remedy,
 - Federal Employers' Liability Act, § 482
 - Injuries to servants, § 482
 - Relief and benefit departments or associations, benefits in actions for injuries or death, § 170, pp 837-841
- Elections, collective bargaining,
 - Delaying bargaining process, pending, § 28(27)
 - Representative for, § 28(33), pp 177-182
- Electric railways, Fair Labor Standards Act, exemption of employees from provision, § 151(18)
- Electric sausage grinder, safe tools and appliances, simple tool as respects liability to furnish, § 216, n 97
- Electrical apparatus,
 - Negligence of master, jury questions, § 534, p 185
 - Precaution to protect servants, § 223
- Electrical structures, precaution to protect servants, § 223
- Electricians, independent contractors, § 3(9)
- Electricity,
 - Assumption of risk,
 - Instructions relating to, § 549, p 256
 - Jury question, § 536, p 214
 - Knowledge of danger, § 390, p 1212
 - Latent defects or dangers, § 392, p 1220
 - Contributory negligence,
 - Customary methods of work, admissibility of evidence, § 519, p 112
 - Inspection of appliances for latent defects or dangers, § 447, p 1271
 - Jury question, § 537, p 234
 - Fair Labor Standards Act,
 - Application to employers engaged in power generation and transmission, § 151(7), p. 642
 - Employees engaged in generation of power and transmission thereof as within, § 151 (9), p 656
 - Exemption of employees of utilities furnishing, § 151(14), p 678
 - Fellow servants,
 - Delegation of duty to handle and control, § 333, p. 1110, n 46
 - Negligence in respect of, jury question, § 535, p 209
 - Injuries to third persons, liability of master under doctrine of respondeat superior, § 570, p 315
 - Instructions as to in action for injuries to servants, § 546, p 247
 - Negligence of master, jury questions, § 534, p 185
 - Poles and wires, inspection to keep in safe condition, § 235, p 990
 - Presumption of negligence, § 501, p 56
 - Protection of servants by master employing in business, § 223
- Electricity—Continued,
 - Res ipsa loquitur, doctrine as applicable in respect of injuries to servants, § 501, p 58, n 20
 - Safety of appliances or apparatus, evidence, § 524, p. 129
 - Warning and instructing servant,
 - Danger of contact with wires, etc., § 303
 - Inexperienced or youthful servant, § 306, p 1067
- Eleemosynary associations, labor relations, statutes dealing with as applying, § 28(6)
- Elevated trains, fellow servants doctrine, statutory provisions, § 347
- Elevators,
 - Assumption of risk,
 - Instructions relating to, § 549, p. 256
 - Knowledge of danger, § 390, pp 1208, 1211
 - Latent defects or dangers, § 392, p 1220
 - Contributory negligence, ante
 - Fellow servants,
 - Negligence in operating, jury question, § 535, p 209
 - Operators, § 327, p 1089
 - Guarding to protect servants, § 233
 - Independent contractors, persons employed to install, § 3(9)
 - Interlocking device for gates, ordinance requiring, admissibility in evidence in actions for injuries, § 509, n. 94
 - Jury question incident to servant's injuries, § 534, p 183
 - Latent defects or dangers, assumption of risk, § 392, p 1220
 - Mines, care required in furnishing and maintaining, § 222, p 941
 - Negligence of master in construction or maintenance,
 - Evidence, § 524, p 129
 - Jury question, § 534, p 183
 - Precautions to prevent employees using dangerous elevator, § 262, n. 14
 - Repair, precautions to prevent employees using during, § 262, n 14
 - Res ipsa loquitur, doctrine as applicable in respect of injury to employees resulting from fall of elevator, § 501, p 58, n 20
 - Safety devices, duty of master in respect of, § 221
 - Warning and instructing employees operating, inexperienced or youthful servants, § 306, p 1067
- Embezzlement by employee,
 - Breach of contract of employment by guilty employee, § 77
 - Recovery of wages as precluded, § 105
- Emergencies,
 - Acts in emergency as within scope of employment as respects liability in case of injuries to servant, § 181, p 876
 - Assistants, implied authority of servant to employ, § 7, p 74
 - Assumption of risk,
 - Knowledge of danger, § 393, p 1222
 - Overexertion, compliance with order of master, § 401

INDEX TO MASTER AND SERVANT

Emergencies—Continued,

- Care required of employer in case of, § 183, p 879
- Contributory negligence, ante
- Hours of labor, excuse for violation of Hours of Service Act by carriers, § 22
- Injuries to person assisting servant pursuant to request, liability of master, § 177
- Medical or surgical assistance, duty of employer, § 162
- Emergency servants, fellow servants, rules as applying, § 328
- Emergency wheels, assumption of risk, simple tool doctrine, § 300, p 1200
- Employee, defined, § 1, p 24
 - Statutory provision, limited effect, § 14, p 95
- Employee organizations,
 - Actions,
 - Breach of contract between employer and bargaining representative, § 28(120)
 - Damages against, employer's right to maintain, § 28(84)
 - Enforce contract with employer, § 28(71), p 252
 - Allurements, interference accomplished through, § 28(25), p 165, n 59
 - Anticipatory breach of employment contract, right of action for, § 28(76)
 - Anti-union bias on part of employer, showing as sufficient proof of unfair labor practice, § 28(96), p 290
 - Appeal to higher officers, member as required to exhaust remedies by, § 28(75)
 - Appearance in proceeding involving labor disputes, § 28(87)
 - Apprentices, adoption of system excluding membership, § 28(47)
 - Assistance to union by employer as unfair labor practice, § 28(52)
 - Bargaining agency, binding act, § 28(26), p 168, n 71
 - Bargaining representatives, organization filing charges with Labor Relations Board as required to be capable of acting as, § 28(83)
 - Breach of contract between employer and bargaining representative,
 - Actions for, § 28(120)
 - Employee's right of action as third party beneficiary, § 28(83)
 - Breach of union contract, admissibility of evidence in action for, § 28(84)
 - Campaigning before election of bargaining representative, § 28(33), p 179
 - Chase and desist order, unfair labor practices, § 28(100), p 320
 - Checkoff orders, deduction from wages of union dues and assessments, § 157, p 706
 - Coercion of other employees, unfair labor practice, evidence, § 28(97), p 294
 - Collective bargaining, generally, ante
 - Concerted activities for mutual aid or protection, § 28(17)
 - Right to strike or engage in secondary boycott as included, § 28(18)
 - Constitutional provisions guaranteeing right to organize, § 28(15), p 146

Employee organizations—Continued,

- Contracts of union with employer,
 - Action for breach, evidence, § 28(95), p 288
 - Anticipatory breach, § 28(76)
 - Parties to proceeding to determine validity, § 29(85)
- Damages,
 - Breach of collective bargaining contract, § 28(120)
 - Action against organization, § 28(71)
 - Pleadings in actions for, § 28(89), p 278
 - Employer's right to maintain action against organization, § 28(84)
- Deduction of union dues from wages, § 103
- Discharge of employee
 - Caused by organization, liability in damages, § 630, p 436
 - Non-membership, resort to courts, § 28(75)
 - Right of employer to discharge, § 28(42), p 206
- Union activities,
 - Burden of proof, § 28(93), p 282
 - Unfair labor practice, § 28(49), p 221
- Discouraging union membership as unfair labor practice, § 28(46)
- Discrimination against employees because of affiliation as unfair labor practice, § 28(45), p 211
- Discrimination against union members, presumption, § 28(93), p 281
- Discrimination because of union activities,
 - Admissibility of evidence, § 28(94)
 - Unfair labor practice, evidence, § 28(96)
- Dues, collective bargaining respecting, § 28(22)
- Employer, classification as under statutes dealing with labor relations, § 28(8)
- Employer dominated unions, generally, post
- Employment on condition of joining, unfair labor practice, evidence, § 28(97), p 295
- Evidence,
 - Sufficiency on question of whether organization is labor organization, § 28(95), p 287
 - Unfair labor practices, § 28(96), p 290
- Extortion from workman not union member, statutory provision, § 159, p 772
- Fair Labor Standards Act, exemption from provisions of organization when acting as employers, § 151(23)
- Financial or other support by employer, unfair labor practice, evidence, § 28(98), p 298
- Grievances, pursuit of methods of presenting as condition precedent to action for wages, § 123
- Illegal acts, § 28(19), p 152
- Individual claims or grievances, negotiation for settlement, § 28(35), p 186
- Individual members, right of action for breach of agreement between employer and union, § 28(83)
- Interference by employer, § 28(25), p 165
 - Formation or administration of organization, burden of proof, § 28(93), p 282
 - Lawful means, § 28(19) pp 151-155
 - Unfair labor practices, § 28(97), p 295
 - Evidence, § 28(98), pp 290-301

INDEX TO MASTER AND SERVANT

Employee organizations—Continued,

- Interference with right to organization,
 - Charge as justifying issuance of complaints by Labor Relations Board, § 28(89), p 276
 - Labor dispute, § 28(16)
 - Omnibus order restraining employer, § 28 (111), p 326
- Intimidation of other employees, unfair labor practice, evidence, § 28(97), p 294
- Jurisdictional disputes, settlement of, § 28(74), p 259
- Layoff for union activities, unfair labor practice, § 28(50), p 225, n 21
- Membership, encouraging or discouraging as unfair practice, § 28(56)
- Minority, representation of own members for collective bargaining, § 28(20), p 106
- Misconduct of union filing charges with Labor Relations Board, jurisdiction as affected, § 28(83)
- Mutual assistance and cooperation between employer and organization, § 28(52)
- National Labor Relations Act, § 28(2), pp 115, 116
- Negro members, discrimination against, § 28(121), p 349, n 72
- Non-interference with, Railway Labor Act, § 28(2), p 117
- Nonunion employees, strikes for purpose of organizing, § 28(19), p 153
- Order running against, unfair labor practices, § 28(109), p 320
- Parent organizations, determination of which union has right to organize employees, § 28 (27)
- Parties to proceedings to determine validity of contracts between union and employer, § 28 (85)
- Payment of representative by employer, § 28(25), p 166
- Payroll deductions for union dues, validity, § 28(62)
- Pressure to join specific union, unfair labor practice, § 28(56)
- Prohibiting union solicitation activity as unfair labor practice, § 28(57)
- Protection of right of self organization, power of National Labor Relations Board, § 28(110), p 321
- Refusal to employ person because of union membership, unfair labor practice, § 28(48)
- Refusal to join,
 - Protection of rights, § 28(15), p 148
 - Right of employees to refuse to join, § 2, p 32, n 84
- Refusal to work, uniting of members in, § 28(10), p 153
- Representative of employees for collective bargaining, § 28(26), pp 168-169
- Representatives sued by members, breach of contract between employer and union, § 28(83)
- Responsibility for injuries by union in obtaining unlawful objective, § 28(19), p 152
- Restraint or coercion of employees in exercise of right of self-organization as unfair labor practice, § 28(45), p. 209

Employee organizations—Continued,

- Right of employees to join or refuse to join labor unions, § 2, p 32, n 84
- Rival unions, generally, post
- Secondary boycott, § 28(19), p 152, n 95
- Soliciting membership during working hours, permission by employer, § 28(25), p 166
- Specified acts constituting unfair labor practices, § 28(63)
- Statutory provisions,
 - Protection of right to organize, § 28(15), pp 145-148
 - Right to organize, § 28(2), p 118
 - Validity, § 28(3), pp 120-124
- Strikes, recognition of right, § 28(19), p 153
- Suspension of charter of local union, obligation of employer under collective bargaining agreement as terminated, § 28(41), p 193
- Third party beneficiary, employee's right of action for breach of contract with employer and union, § 28(83)
- Violation of collective bargaining contract, action as maintainable against organization for damages, § 28(71)
- Wages,
 - Organization for purpose of advancing or maintaining, § 81
 - Organization of trade unions for purpose of fixing rate, § 110, p 543
 - Refusal to pay union wages, § 110, p. 542, n. 17
 - Scale fixed in contract with employer, recovery by employee in accordance with, § 137
- Employer dominated unions,
 - Burden of proof as to, § 28(93), p 282
- Cease and desist orders, National Labor Relations Board, § 28(118), p. 332
- Collective bargaining,
 - Closed shop or union shop agreement with, § 28(40), p 194
 - Contract with, validity, § 28(37)
 - Determination as to in request for certification of bargaining representative, § 28 (32)
 - Representation by, § 28(26), p. 167
- Disestablishment,
 - Evidence, § 28(98), p. 300
 - Order of National Labor Relations Board, § 28(118), pp 332-335
 - Posting notice of, § 28(117)
 - Review of order of Labor Relations Board requiring, § 28(133), p. 277, n 27
- Elements constituting domination, § 28(25), p 165
- Intervention and proceedings to settle disputes, § 28(86)
- Participation of representatives in organization of subsequent labor organization as establishing subsequent organization as employer dominated, § 28(98), p. 290
- Reimbursement of employees for dues, power of National Labor Relations Board to order, § 28(118), p 335
- Unfair labor practices, § 28(45), p 210; § 28(52)
 - Blanket order forbidding, § 28(111), p 326
 - Disestablishment of union, evidence, § 28(98) p. 300

INDEX TO MASTER AND SERVANT

Employer dominated unions—Continued,
 Unfair labor practices—Continued,
 Evidence, § 28(98), pp 296-301
 Admissibility of evidence in proceeding to prevent, § 28(94)
 Execution of contract with, § 28(54)
 Notice to in proceeding against employer, § 28(87)
 Parity to proceeding against employer for, § 28(85)
 Withdrawal of recognition, posting notice of, § 28(117)

Employer organizations, unfair labor practices, statutory regulations, § 28(8)

Employers' liability acts, § 173, p 845
 Assumption of risks, defense as effected, § 36(1)
 Commencement of action,
 Notice of injury, § 485
 Time for, § 487

Construction of buildings or other structure, safety appliances, § 221

Contributory negligence,
 Federal Employers Liability Act, post
 Mitigation of damages, § 554

Customers as within protection of Act, § 355, p 268, n 66

Degree of care required of employer under, § 183, p 878

Federal Employers' Liability Act, generally, post
 Injuries to third persons, liability for, § 555
 Joinder of parties, actions under, § 488
 Liability for injuries to servant covered by, § 173, p 846

Mine foreman, servants of owners in contemplation of, § 190

Negligence,
 Liability of master for servant's injuries dependent on, § 173, p 846
 Right of action by servant, § 482

Notice of injury, condition precedent to action for, § 485

Platforms, scaffolds, etc, care required of master furnishing for use of servant, § 220, p 935

Proximate cause of injury, burden of proof, § 501, p 72

Relationship of master and servant, existence as essential to charge master, § 175

Rules and regulations, duty of employer to promulgate, § 271, p 1035, n 57

Variance, actions under, § 500, p 50, n 43

Waiver, time limits for commencement of action under, § 487

Employment,
 Complaint in action for wrongful discharge, as required to allege hiring, § 52, p 449
 Contracts of employment, generally, ante
 Defined, § 1, p 28
 Evidence, § 12
 Actions for injuries to servants, § 504
 Incompetent employees, employment of, § 516

Fellow servants,
 Pleading negligence in action for injuries to servants, § 490, p 24
 Power affecting relations, § 332, p 1101

Employment—Continued,
 Hiring at will,
 Employment contract, indefinite hiring as presumed to be, § 8, p 75
 Permanent employment, contracts for, § 8, p 78
 Incompetent employees evidence in action for servants' injuries, § 516
 Independent contractors, powers and duties with respect to hiring as test of relation, § 3(2), p 46

Labor unions,
 Forming for purpose of obtaining employment for members, § 28(15), p 146
 Strike to procure employment for members, § 28(19), p 154

Unfair labor practices,
 Admissibility of evidence as to discrimination in proceedings to prevent, § 28(94)
 Respect of employment, § 28(48)

Employment certificates, minors, defense of relied on in action to recover for injuries to minor employed in violation of statute, § 194, p 896

Employment agencies,
 Contracts of employment made through, parties, § 7, p 74
 Statutory regulations, § 26

End of year, bonus at, promise to pay as enforceable, § 98, p 529

Enforcement,
 Collective bargaining contract, § 28(41), p 197
 Lien for wages, § 149, p 613-618

Engagement to perform work or services as prerequisite to liability of employer, § 174

Engineers,
 Contributory negligence,
 Disobedience of rules or orders, § 459, p. 1298
 Guarding against obstructions on or near track, § 456, p 1287

Independent contractors, § 3(9)

Railroads, fellow servants, § 327, p 1088

Enticing servant to leave employment,
 Abandonment of contract, liability as affected, § 626

Absence of just cause, element of, § 625, p 430

Actions for, § 627

Affidavit in prosecution for, § 635

Burden of proof in,
 Action, § 627
 Prosecution, § 636

Civil liabilities, §§ 625-628, pp 428-434

Commencement of work, hiring before, § 626

Complaint in prosecution for, § 635

Consent of master to employment of servant, § 625, p. 429

Criminal liability, §§ 633-639, pp 439-443

Damages, § 628

Elements of offense, § 634

Enforceable contract of employment as essential to maintenance of action for, § 625, p. 430

Evidence,
 Actions, § 627
 Prosecution, § 636

Excuse, § 625, p 430

Exemplary damages, § 628

Indictment in prosecution for, § 635

Infants, criminal liability, § 634

INDEX TO MASTER AND SERVANT

Enticing servant to leave employment—Continued,
 Instructions to jury in action for damages, § 627
 Intent, right of action as dependent on, § 625, p 430
 Issues, proof and variance in,
 Actions, § 627
 Prosecution, § 635
 Knowledge of relationship as necessary to create liability, § 626
 Liability for resulting damage, § 625, p 428
 Malice, right of action as dependent on, § 625, p 430
 Measure of damages, § 628
 Nature of offense, § 634
 Pleadings in action for, § 627
 Questions of law and fact in actions for, § 627
 Relationship of master and servant as essential to maintain action for, § 625, p. 429
 Remedies of employer, § 627
 Statutory provisions, § 626
 Criminal liability, § 633
 Termination of relation,
 Criminal liability for hiring servant after, § 634
 Liability for damages as affected, § 625, p 429

Entries, mines, care required in keeping in safe condition, § 222, p. 939

Equipment,
 Ownership as determinative of relationship, § 2, p. 40
 Presumptions as to due care, § 501, p 61

Equitable title, inventions by employee in course of employment, § 73, p 493

Equity,
 Unfair labor practice, maintenance of employee in position pending disposition of labor relations board charge, § 28(71), p 230
 Wage liens, enforcement in, § 149, p 616

Escapements, mines, duty of operator to provide, § 222, p. 942

Espionage, unfair labor practices, evidence as to, § 28(90)

Essentials of relation, § 2, pp. 20-41

Estoppel,
 Employment contracts, breach, right to sue for, § 11, p 86
 Fair Labor Standards Act, avoidance of liability by, § 151(35), pp 736-741
 Inventions by employee,
 Defense of in action by employer to compel assignment, § 73, p. 407
 Hired for experimental work, § 73, p. 491, n 47
 Labor relations board,
 Ordering or supervising election of bargaining representative, § 28(33), p 182
 Principle as applying to, § 28(70)
 National Labor Relations Board,
 Doctrine as available to preclude ordering cessation of unfair labor practices, § 28 (112)
 Ground of attack on order, asserting, § 28 (120), p 366
 Notice of injury to servant, § 485

Estoppel—Continued,
 Overtime pay,
 Avoidance of liability by, § 151(35), pp 736-741
 Claim for, § 108
 Falsification of record by employee, § 100 (5)
 Jury questions, § 160(9)
 Relationship, denial of, § 580
 Relief and benefit departments or associations, denial of membership, § 168, p 826
 Wages, post
 Warning and instructing servant, misrepresentation of age by minor, § 306, p 1066

Evidence,
 Accidents resulting in injuries to others, § 511
 Actions for injuries to servants in general, §§ 501-527, pp 52-146
 Admissibility under pleadings, § 499, pp 45-50
 Instruction to conform to, § 539
 Instructions supported by evidence, § 538, p. 239
 Master's action against third person, § 622
 Admissibility in action for injuries to servants in general, § 503-519, pp 80-113
 Pleadings, admissibility under, § 499, pp 45-50
 Assumption of risk,
 Admissibility in action for injuries to servant, § 518
 Weight and sufficiency, § 525
 Breach of contract of employment, § 28(95), p. 288
 Burden of proof, generally, ante
 Cause of injury, § 505
 Circumstantial evidence, generally, ante
 Closed shop agreements, § 28(65), p. 286
 Conditions before and after injuries, § 509
 Contributory negligence,
 Admissibility in action for injuries to servant, § 519
 Weight and sufficiency, § 527
 Customary methods of work, § 512, p 97; § 513, p 101, § 519, p 112
 Dangerous or defective machinery, appliances or places, admissibility in action for injuries to servants, § 512, pp 93-100
 Discharge of employee, ante
 Discovering and remedying defects, § 519, p. 110
 Disregard of orders, rules, regulations or warnings, § 519, p 110
 Duty to discover or remedy defects, § 519, p 110
 Employment, § 12
 Actions for injuries to servants, § 504
 Incompetent employees, employment of, § 516
 Employment contracts. Contracts of employment, ante
 Enticing servant to leave employment,
 Actions for damages, § 627
 Prosecution for, § 636
 Extent of injury to servant, § 505
 Fair Labor Standards Act,
 Hearing on report of industry committee, § 151(32), p. 728

INDEX TO MASTER AND SERVANT

Evidence—Continued,

- Fair Labor Standards Act—Continued,
 - Prosecution for violation of Act, § 160(13), p 813
- Federal Employers' Liability Act,
 - Admissibility, § 503
 - Sufficiency in actions under, § 520
- Fellow servants,
 - Knowledge of danger, incompetency of fellow servants, § 516
 - Negligence of fellow servants, § 517
- General practice or custom, § 512, p 97
- Habits,
 - Employee causing injuries, § 516
 - Injured employee, § 519, p 109
- Hours of labor, action to recover penalty for violation of law, § 23
- Inexperienced or youthful servant's injuries, action for, § 507
- Injuries to third persons, actions for, § 615, pp 301-407
- Inspection, § 512, p 98
- Instruction to conform to evidence in action for servant's injuries, § 539
- Instructions supported by evidence in action for servant's injuries, § 538, p 239
- Insufficient force for work, § 514
- Interference with employment relation, action for, § 624
- Interference with relation of third persons, prosecutions for, § 636
- Intimidation or coercion of servant to prevent or hinder continuing work, prosecution for, § 638
- Inventions by employees, actions relating to, § 73, p 496
 - Action by employer to compel assignment, § 73, p 498
- Knowledge, post
- Labor contract statute, prosecution of employee for violation, § 80, p 508
- Labor relations boards or commissions, post
- Last clear chance, recovery under doctrine of, § 527
- Leaving employment in violation of contract, action for, § 78
- Liability insurance, § 503
- Malicious procurement of discharge, actions for, § 631
- Master's action against third person for servant's injuries, § 622
- Medical attention, action for breach of contract to furnish, § 163, p 818
- Methods of work, § 513, pp 100-103; § 519, p 111
 - Customary methods of work, § 512, p. 97; § 513, p 101, § 519, p 112
- Minimum wages,
 - Hearing on order fixing for women and children, § 152, p. 745
 - Prevailing rates, public employees and employees on public works, § 153, p 752
- National Labor Relations Board, post
- National Mediation Board, sufficiency to sustain findings, § 28(95), p 288
- National Railroad Adjustment Board, sufficiency to sustain findings, § 28(95), p 288
- Nature of injury to servant, § 505

Evidence—Continued,

- Negligence of,
 - Employee resulting in loss to employer, action for, § 79, p 504
 - Employer, § 506
 - Fellow servants, § 517
- Obedience or disregard of orders, rules, regulations or warnings, § 519, p 110
- Orders, § 513, pp 100-103
 - Obedience or disregard, § 519, p 110
- Pleadings, admissibility under,
 - Actions for injuries to servants, § 499, pp 45-50
 - Wrongful discharge, actions for, § 52, p 452
- Precautions,
 - Against recurrence of injuries, § 510
 - Taken, § 519, p 109
- Preponderance of evidence, generally, post
- Presumptions, generally, post
- Profit sharing agreements, computation of profits in accordance with, § 94
- Relation of master and servant, actions for injuries to servant, §§ 504, 521
- Relief and benefit departments or associations, actions for benefits, § 169, p 836
- Repairs, action for injuries to servant, § 512, p. 98
- Reputation,
 - Employee causing injuries, § 516
 - Injured employee, § 519, p 109
- Retention of incompetent employees, § 516
- Rules and regulations, obedience or disregard, § 519, p 110
- Rules governing evidence in actions for injuries to servants, § 503
- Rules of employment, § 513, pp 100-103
- Safe place to work, actions for injuries by servant, § 524, p 125
 - Admissibility of evidence, § 512, pp 96-100
- Service letter to discharged employee, action for damages for failure to give, § 44, p 437
- Settlement of labor disputes,
 - Administrative proceedings, reception and recodation, § 28(105)
 - Proceedings for, § 28(92)
 - Weight and sufficiency, § 28(95), pp 285-288
- Similar facts and occurrences, § 511
- Tests, § 512, p 98
- Unfair labor practices, post
- Violation of statutes or ordinances, § 508
- Wages, post
- Warning and instructing servant, admissibility in action for injury, § 514
- Warnings, disregard of, § 519, p 110
- Weight and sufficiency,
 - Assumption of risk, § 525
 - Breach of contract of employment, § 28(95), p 288
 - Closed shop agreements, § 28(95), p 286
 - Contributory negligence, § 527
 - Federal Employers' Liability Act, action under, § 520
 - Injuries to servant, §§ 520-527, pp 113-146
 - Assumption of risk, § 526
 - Cause of injury, § 522, pp 116-121
 - Contributory negligence, § 527

INDEX TO MASTER AND SERVANT

Evidence—Continued,

Weight and sufficiency—Continued,

Injuries to servant—Continued,

Existence of relation of master and servant, § 521

Knowledge of defect or danger, § 524, p 123

Negligence of fellow servant, § 525

Negligence of master, § 524, pp 121-139

Preponderance of evidence as essential, § 520

Scope of employment, § 523

National Mediation Board, sufficiency to sustain findings, § 28(95), p 288

National Railroad Adjustment Board, sufficiency to sustain findings, § 28(95), p 288

Settlement of labor disputes, proceedings for, § 28(95), pp 285-288

Wrongful act of employee resulting in loss to employer, action for, § 79, p 504

Wrongful discharge, actions for, § 53, pp 454-460

Admissibility under pleading, § 52, p 452

Excavations,

Assumption of risk, ante

Contributory negligence,

Servant injured in, jury question, § 537, p 235

Weight and sufficiency of evidence, § 527

Fellow servants,

Employees engaged in excavating, § 332, p 1103

Employees working in or about, § 327, p 1090

Safe place to work, § 333, p 1115

Vice principals, § 332, p 1101

Independent contractors,

Inherent danger as respects liability for injuries to others, § 590, p 302

Liability for acts or omissions of, § 584, p 356

Persons employed to make, § 340

Instructing and warning employees, inexperienced or youthful servants, § 306, p 1067

Negligence of master, injuries to servant, jury questions, § 534, p 184

Proximate cause of injuries to servant,

Jury questions, § 533, p 160

Liability as dependent on, § 259

Safe place to work,

Care required of master, § 222, pp 938-944

Evidence, § 524, p 130

Fellow servant rules, § 333, p 1115

Warning and instructing employees, § 303

Exclusive bargaining agent, refusal to recognize union representing majority of employees as unfair labor practice, § 28(59)

Exclusive jurisdiction, labor disputes,

Labor Relations Boards or Commissions, § 28 (74), p 258

National Labor Relations Board, § 28(74), p 259

Exclusive use, invention by employee, right of employer under license, § 73, p 494

Exclusiveness, performance of services for employer, § 70

Executive employees,

Defined, § 1, p 23, n 45

Fair Labor Standards Act, exemption, § 151(12), pp 664-672

Evidence, § 160(8), p 801

Executive officers, Fair Labor Standards Act,

Application, § 151(4), p 632

Exemption from provision, § 151(12), pp 664-672

Exemplary damages,

Breach of contract of employment, § 11, p 90

Discharge of employee,

Failure to issue service letter as required by statute, § 44, p 438

Malicious procurement, § 632

Enticing servant to leave employment, § 628

Injuries to servants, § 554

Wrongful discharge, § 58, p 471

Pleading as essential to recovery, § 52, p 451

Exemptions Fair Labor Standards Act, post

Exhaustion of remedies, discharged employees, appeal to designated tribunals, § 28(75)

Existence of,

Defect, presumption of negligence in actions for injuries to servants, § 501, p 55

Relationship,

As essential to liability of master for injuries to servants, § 175

Question of law and fact, § 530

Existing contracts, collective bargaining before making changes in, § 28(22)

Expeditors, Fair Labor Standards Act, exemption as administrative employee, § 151(12), p 670, n 37

Expenditures and expenses,

Employees making in connection with work, reimbursement for, § 100

Wages and other remuneration, post

Wrongful discharge, damages for breach of contract as including, § 58, p 468

Experience.

See, also, Inexperienced servants, generally, post

Contributory negligence, consideration in determining, § 427

Employees, warning and instructing, duty of employer, § 305

Fellow servants, lack of experience as rendering incompetent, § 313

Experimental work, inventions by employee hired for purpose of, rights as to, § 73, p 491

Expert accountant as servant or employee, § 2, p 30, n 71

Expiration of term, termination of employment contract, § 30

Explosives,

Fellow servants, negligence in handling, jury question, § 535, p 209

Infants, respondeat superior, liability of master under doctrine for selling to, § 575, p 333

Injuries to servant, evidence, § 524, p 130

Inspection after blasting, duty of employer using, § 235, p 990

Instructions to jury as to, actions for injuries to servants, § 546, p 247

Safety of employees, care required of master manufacturing, storing or using, § 214, p 924

INDEX TO MASTER AND SERVANT

Explosives—Continued,

Warning and instructing servant as to dangers,
§ 303

Inexperienced or youthful servant, § 306, p
1067

Express companies, injuries to employees, liability in
respect of, § 179

Express contract, relation arising out of, § 1, p 24

Expression of views, unfair labor practice by em-
ployer, § 28(57)

Expressman, independent contractors, § 3(9)

Extent of injury to servant, admissibility of evidence
as to, § 505

Extra compensation Wages and other remuneration,
post

Extrahazardous employment,

Assumption of risk or ordinary risk incident to,
§ 372, p 1175

Warning and instructing servant ignorance of
risks involved, § 295

Extraneous causes, warning and instructing servant
as to dangers from, § 301

Extraordinary risks,

Assumption by employees, § 371

Contract as basis, § 377, p 1153

Knowledge of danger, § 379, p 1184

Duty of master to protect servant from, § 183,
p 879

Implied agreement of employer not to subject
servant to, § 183, p 878

Warning and instructing servant in respect of,
§ 284

Delegation of duty, § 285

Extraterritorial effect, lien for wages, statutes giv-
ing, § 139

Extraterritorial operations, fellow servants, statutes
relating to, § 345

Fact questions Questions of law and fact, generally,
post

Factories,

See, also, manufacturers and manufacturing,
post

Fair Labor Standards Act, application to, § 151
(9), p 656

Fire escapes, statutes requiring equipping with,
§ 219, p 934

Safeguards for workers,

Rules or regulations, § 25

Statutes requiring as applying to, § 219, p
934, § 232, p 942

Term servant as embracing persons working in,
§ 1, p 26, n 15

Ventilation,

Assumption of risks, § 369, p 1172

Validity of statute requiring, § 24

Factors, term servant as embracing, § 1, p 26, n 15

Fair hearing, National Labor Relations Board, in-
quiry into on review of order, § 28(120), p 366

Fair Labor Standards Act,

Accord and satisfaction, release of liability, §
151(35), pp 736-741

Accounting practices, power of administrator
over, § 151(33)

Actions for wages, damages or penalties, § 160
(1)

Admissibility of evidence, § 160(8), p 794

Fair Labor Standards Act—Continued,

Actions for wages, damages or penalties—Cont'd,

Amount of recovery, § 160(12)

Answer, § 160(7), p 788

Attorney's fees, § 160(11), pp 804-808

Burden of proof, § 160(8), p 790

Class actions, § 160(6), p 781

Conditions precedent, § 160(3)

Costs, § 160(11), pp 804-808

Defenses, § 160(5)

Burden of proof, § 160(8), p 793

Intervention, § 160(6), p 782

Joinder of parties, § 160(6), p 781

Jurisdiction, § 160(2)

Jury question, § 160(9)

Laches, § 160(4)

Limitations, § 160(4)

Nature, § 160(1)

Parties, § 160(6), p 780

Pleading, § 160(7), p 784

Representative actions, § 160(6), p 780

Time to sue, § 160(4)

Trial § 160(9)

Weight and sufficiency of evidence, § 160(8),
p 795

Administration of Act, § 151(30)

Administrative employees, exemption, sufficiency
of evidence, § 160(8), p 801

Administrative procedure for establishing mini-
mum wage, § 151(32), p 727

Administrator,

Actions for wages of employees, § 160(1)

Arbitrary exercise of power, § 151(31), p
724

Conduct of litigation, § 151(30)

Construction of regulations promulgated by,
§ 151(3)

Enforcement of provisions, § 151(30)

Exemptions as determinable by, § 151(11)

Investigations and inspections, § 151(31), pp
723-727

Judicial supervision, § 151(31), p 724

Minimum wage directive, § 151(25)

Modification of standards in collaboration
with industry committees, § 151(1), p
619

Powers and duties, §§ 151(30)-151(32), pp 722
732

Principal office, § 151(30)

Promulgation of wage order fixing wages for
industry, § 151(32), p 729

Regulations,

Accounting practices, § 151(33)

Force and effect, § 151(30)

Reasonable cost of facilities furnished
employee, § 151(27), p 713

Validity of regulations promulgated, §
151(2)

Reports, § 151(30)

Review of wage order, § 151(32), p 731

Special certificates for employment of learn-
ers, etc., § 151(10)

Subpoena, § 151(31), pp 723-727

Wage orders, § 151(25)

Fixing minimum wage by, § 152(32), pp
727-732

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued,

- Agents, actions by on behalf of employees, § 160 (6), p 782
- Agreements as to rate of pay, § 151(26), p 707
- Agricultural products, exemption of employees engaged in processing, § 151(19), pp 685-689
- Agriculture, exemption of employees engaged in, § 151(17)
- Air carriers, exemption from provisions of employees subject to Railway Labor Act, § 151 (23)
- Aircraft and aviation, application to employers engaged in, § 151(7, 23)
- Amendment of pleadings, actions to enforce, § 160(7), p 788
- Amount of employer's business in interstate commerce as determinative of coverage, § 151(8)
- Answer, action under, § 160(7), p 788
- Apprentices, application to, § 151(10)
- Aquatic animal and vegetable life, exemption of employees engaged in catching, etc., § 151 (16)
- Arbitration,
 - Agreement for as affecting rights under, § 151(35), p 737, n 27
 - Claim for extra compensation under, § 138
- Assignment of wages, deductions pursuant to, § 151(27), p 714
- Attorney-General, litigation subject to control of, § 151(30)
- Attorney's fees, actions under, § 160(11), pp 804-808
 - Violation of law as authorizing recovery, § 151(34)
- Avoidance by act or omission of parties, § 151 (24), p 696
- Banking, application to employers engaged in, § 151(7), p 642
- Barbershops, exemption from provision, § 151 (14), p 678
- Barges, exemption of employees on, § 151(15)
- Bees, exemption of employees of those engaged in raising, § 151(17)
- Bills of lading, goods as including within meaning of, § 151(7), p 641
- Bonds, goods as including within meaning of, § 151(7), p 641
- Bonuses, overtime compensation by, § 151(26), p 700, n 9
- Booking agent for motion picture film company as within coverage, § 151(9), p 658, n 41
- Books, employer as required to keep, § 151(33)
- Validity of provision requiring, § 151(2)
- Bridges,
 - Application to employers engaged in construction, § 151(7), p 643
 - Employees engaged in repair of as within, § 151(9), p 659
- Building contractors, employees of as within coverage, § 151(9) p 658
- Building work, application to employers engaged in, § 151(7), p 643
- Burden of proof, actions for wages and penalties, § 160(8), p. 790
- Businesses subject to regulations, § 151(7), p 641

Fair Labor Standards Act—Continued,

- Buying and selling, application to employers engaged in, § 151(7), p 642
- Cash, payment of wages in, § 151(27), p 712
- Chain store system, employees as within coverage, § 151(14), p 676
- Character of activity rather than size as determinative in determining engagement in commerce or in production of goods for commerce, § 151(8)
- Character of work performed rather than character of business as determinative of coverage, § 151(9), pp 646-662
- Civil liability for violation of act, § 151(31)
- Class actions under, § 160(6), p 781
- Classification of industry, § 151(32), p 729
- Clerical employees, application to, § 151(9), p 656
- Clothing shops, exemption from provisions, § 151(14), p 676
- Coal mining, application to employers engaged in, § 151(7), p. 642
- Collective bargaining, application to override policy of, § 151(24), p 606
- Collective bargaining agreement, exemption of persons employed pursuant to, § 151(23)
- Commercial paper, goods as including within meaning of, § 151(7), p 641
- Communications, application to employers engaged in, § 151(7), p 642
- Compensable time under, § 151(28), pp. 715-721
- Comprehensive legislative scheme, § 151(1), pp 618-623
- Computation of regular and overtime rates, § 151(26), p 702
- Conditions, wage order authorized subject to, § 151(32), p 730
- Conditions precedent to action for wages, damages or penalties, § 160(3)
- Conduct of litigation under, § 151(30)
- Conspiracy, resort to in order to preclude payment of compensation guaranteed, § 151(35), p 736
- Construction, § 151(3)
 - Administrator, § 151(30)
 - Exemption, § 151(11)
 - Agricultural employees, § 151(17)
 - Executive, administrative or professional employees, § 151(12), p 665
 - Seamen, § 151(15)
 - Overtime provisions, § 151(26), p 700
- Construction work, application, § 151(7), p 643, § 151(9), p 658
- Contract, limiting scope and effect by, § 151(24), p 696
- Corporations, criminal liability for violation of Act, § 151(34)
- Correspondence, goods as including within meaning of, § 151(7), p 641
- Costs, actions under, § 160(11), pp. 804-808
- Coverage,
 - Burden of proof, § 160(8), p. 791
 - Weight and sufficiency of evidence as to, § 160(8), p 800
- Criminal liability for violation, § 151(34)
- Criminal prosecution for violation of, § 160(13), p 811

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued,

- Crustacea, exemption from requirements of employees engaged in catching, etc., § 151(16)
- Culinary workers, application to, § 151(9), p. 656
- Custom inconsistent with requirements as required to yield, § 151(24), p. 606
- Dairy employees, exemption, § 151(17)
- Dairy products, exemption of employees engaged in processing, § 151(19), p. 687
- Damages Liquidated damages, post, this head
- Declaration of public policy respecting hours of labor and wages, § 151(1), p. 620
- Defenses, actions for wages and penalties, § 160(5)
- Burden of proof, § 160(8), p. 793
- Definitions,
 - Agriculture, § 151(17)
 - Commerce, § 151(7), p. 635
 - Employ, § 151(1), p. 629
 - Employee, § 151(4), p. 631
 - Employer, § 151(4), p. 628
 - Engagement in commerce, § 151(9), p. 650
 - Goods, § 151(7), p. 640
 - Industry, § 151(32), p. 729
 - Produce, § 151(7), p. 638
 - Production for commerce, § 151(7), p. 639
 - Reasonable cost, § 151(27), p. 714
 - Retail establishment, § 151(14), p. 675
 - Service establishments, § 151(14), p. 678
 - Wages, § 151(27), p. 711
 - Waiting time, § 151(28), p. 717, n. 49
- Delegation of authority to administrator, § 151(30)
- Delivery employees, coverage, § 151(9), p. 658
- Discovery, actions under, § 160(1)
- Discretion of administrator, classification of business within industry, § 151(32), p. 730
- Discretion of court,
 - Attorney's fees in actions under, § 160(11), p. 805
 - Enforcement of subpoena issued by administrator, § 151(31), p. 725
- District of Columbia, principal office of administrator in, § 151(30)
- Double time for Sunday work, § 151(26), p. 703
- Dredge workers, exemption, § 151(15)
- Drug stores, exemption from provisions, § 151(14), p. 675
- Effective date, § 151(3)
- Electric power generation and transmission, application to,
 - Employees engaged in, § 151(9), p. 656
 - Employers engaged in, § 151(7), p. 642
- Electric railway employees, exemption from provisions, § 151(18)
- Employees within meaning of Act, § 151(4), p. 631
- Employer and employee relationship as essential to application, § 151(4), pp. 627-635
- Employers within meaning of Act, § 151(4), p. 628
- Employment contract, provisions as part of, § 151(24), p. 696
- Employment records, requirements as to, § 151(33)
- Employments included, generally, § 151(5)
- Enforcement of provisions, § 151(30)

Fair Labor Standards Act—Continued,

- Engagement in commerce,
 - Activities constituting, § 151(9), p. 649
 - Application to employees engaging in, § 151(5)
 - Burden of proof, § 160(8), p. 791
 - Character of work rather than character of business as determinative, § 151(9), p. 646
 - Employment constituting, § 151(7), pp. 635-644
 - Jury question, § 160(9)
 - Operation as extending to employees engaged in, § 151(6)
 - Pleading in action to recover wages and penalties, § 160(7), p. 786
 - Sufficiency of evidence as to, § 160(8), p. 800
 - Volume of interstate business as determinative, § 151(8)
- Estoppel, avoidance of liability by, § 151(35), pp. 736-741
- Evidence in actions under act, § 160(8)
 - Additional compensation and damages, recovery, § 160(7), p. 788
 - Hearing on report of industry committee, § 151(32), p. 728
 - Prosecution for violation of act, § 160(13), p. 813
- Excessive hours, protection of certain groups from, § 151(1), p. 620
- Executive employees, exemption, § 151(12), pp. 664-672
 - Sufficiency of evidence, § 160(8), p. 801
- Executive officers as within Act, § 151(4), p. 632
- Exemption from provisions, §§ 151(11)-151(23), pp. 662-695
 - Administrative employees, § 151(12), pp. 664-672
 - Agricultural products, employees engaged in processing, § 151(19), pp. 685-689
 - Agriculture, employees engaged in, § 151(17)
 - Aquatic animal and vegetable life, employees engaged in catching, etc., § 151(16)
 - Burden of proof, § 160(8), p. 793
 - Collective bargaining agreement, persons employed pursuant to, § 151(23)
 - Electric railway employees, § 151(18)
 - Executive employees, § 151(12), pp. 664-672
 - Government employees, § 151(22)
 - Interstate Commerce Act, employees or employers subject to, § 151(20), pp. 689-693
 - Jury question, § 160(9)
 - Labor organizations acting as employer, § 151(23)
 - Local retailing capacity, employees engaged in, § 151(13)
 - Local trolley employees, § 151(18)
 - Motor carriers, employees of, § 151(18); § 151(20), p. 690
 - Outside salesmen, § 151(13)
 - Pleading in action under, § 160(7), p. 787
 - Presumptions, § 160(8), p. 794
 - Professional employees, § 151(12), pp. 664-672
 - Retail establishments engaged mainly in interstate commerce, § 151(14), pp. 673-678
 - Seamen, § 151(15)
 - Seasonal industries, employees in, § 151(21)

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued,

Exemption from provisions—Continued,

- Service establishments, § 151(14), p 678
- Switchboard operators of small public telephone exchanges, § 151(23)
- Weight and sufficiency of evidence, § 160(8), p 800
- Wholesalers, § 151(14), p 677
- Existence of employment relationship as essential to application, § 151(4), pp 627-632
- Expeditors as exempt as administrative employees, § 151(12), p 670, n 37
- Factory employees, application to, § 151(9), p 650
- Farming operations, exemption of employees performing, § 151(17)
- Fish, exemption of employees engaged in catching, etc., § 151(16)
- Forestry operations by farmer, exemption of employees performing, § 151(17)
- 40-hour week, overtime compensation for hours in excess, § 151(26), p 700
- Furbearing animals, exemption of employees of those engaged in raising, § 151(17)
- Garages, exemption from provision, § 151(14), p 678
- Gas, exemption of employees of utilities furnishing, § 151(14), p 678
- Good faith of employer, defense of in action for additional compensation and liquidated damages, § 160(5)
- Government employees, exemption from provision, § 151(22)
- Greenhouse employees, exemption from provisions, § 151(17)
- Grocery stores, exemption from provisions, § 151(14), p 675
- Guards,
 - Coverage, § 151(9), p 659
 - Furnished by independent contractors as employees, § 151(4), p 630
- Handicapped persons, application to, § 151(10)
- Handling, production of goods for commerce within coverage, § 151(9), p 651
- Hardware stores, exemptions from provision, § 151(14), p 675
- Hearing, report of industry committee, § 151(32), p 728
- Highway construction, application to employers engaged in, § 151(7), p 643
- Home work, wage order prohibiting, § 151(32), p 731
- Home workers, application to, § 151(4), p 632
- Horticultural commodities, exemption of employees engaged in processing, § 151(19), p 686
- Hotels, exemption from provision, § 151(14), p 678
- Hours of labor,
 - Conformity to standards, § 151(1), p 619
 - Validity of provisions regulating, § 15, p 100
- Ice production workers, application to, § 151(9), p 656
- Imprisonment under, § 160(13), p 814
- Incidental work in production of goods for commerce bringing employees within coverage, § 151(9), p 654
- Increase of wages, requirements as to, § 151(29)

Fair Labor Standards Act—Continued,

- Incrimination, production of books tending to incriminate employer, § 151(31), p 727
- Independent contractors, application to, § 151(4), pp 630, 632
- Indictment or information, prosecution for violation of, § 160(13), p 811
- Industries subject to regulations, § 151(7), p 641
- Industry committees, appointment and duties, § 151(32), p 727
- Inspections, administrator, § 151(31), pp 723-727
- Instrumentalities of commerce, persons engaged in maintaining, etc., as engaged in commerce, § 151(7), p 638
- Insurance, application to employers dealing in, § 151(7), p 642
- Intangibles, goods as including within meaning of, § 151(7), p 641
- Intention, construction in accordance with, § 151(3)
- Interpretive rulings of wage orders, weight given to, § 151(32), p 730
- Interstate commerce, application as limited to employments involving, § 151(5); §§ 151(6)-151(9), pp 634-662
- Interstate Commerce Act, exemption from provision of employees or employers subject to, § 151(20)
- Intervention, actions for wages and penalties, § 160(6), p 782
- Investigations,
 - Administrator, § 151(31), pp 723-727
 - Industry committee, § 151(32), p 728
- Issues, actions under, § 160(7), p 788
- Joinder of parties, actions for wages and penalties, § 160(6), p 781
- Judicial question, coverage under Act as, § 151(11)
- Judicial supervision, administrator's right of investigation as subject to, § 151(31), p 724
- Jurisdiction, action for wages, damages or penalties, § 160(2)
- Jury questions, actions under, § 160(9)
- Labor organizations, exemption from provisions of organization when acting as employers, § 151(23)
- Laborers generally, application to, § 151(9), p 656
- Laches, actions for wages and penalties, § 160(4)
- Laundries,
 - Application to, § 151(7), p 642
 - Exemption from provision, § 151(14), p 678
- Learners, application to, § 151(10)
- Leased bases, application to, § 151(3), p 627, n 46
- Liberal construction, § 151(3)
- Exemption, § 151(11)
- Overtime provisions, § 151(26), p 700
- Limitations, actions for wages, damages or penalties, § 160(4)
- Liquidated damages, violation of Act, § 151(34)
- Actions for,
 - Admissibility of evidence, § 160(8), p 794
 - Attorney's fees, § 160(11), p 804
 - Burden of proof, § 160(8), p 790
 - Conditions precedent, § 160(3)
 - Costs, § 160(11), p 804
 - Defenses, § 160(5)

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued,
Liquidated damages, violation of Act—Continued,
Actions for—Continued,
 Interest, § 160(12)
 Issues, proof and variance, § 160(7), p 788
 Pleading, § 160(7), p 784
 Time to sue, § 160(4)
 Weight and sufficiency of evidence, § 160(8), p 795
 Waiver or release of right, § 151(35), p 739
Livestock raisers, exemption of employees of, § 151(17)
Local retailing capacity, exemption of employees engaged in, § 151(13)
Local transactions merely affecting interstate commerce as within, § 151(6)
Local trolley employees, exemption from provisions, § 151(18)
Lumber dealers, application to, § 151(7), p 642
Lumber workers, application to, § 151(9), p 656
Lumbering operations by farmer, exemption of employees performing, § 151(17)
Maintenance employees, coverage, § 151(9), p 600
Mandatory requirements, § 151(24), p 695
Manufacturer of goods,
 Commerce within, § 151(7), p 638
 Production of goods for commerce within, § 157(7), p 640
Manufacturing,
 Application to, § 151(7), p 642
 Production of goods for commerce within coverage, § 151(9), p 651
Maritime operations, application to, § 151(7), p 642, § 151(9), p 657
Mechanics, application to, § 151(9), p 657
Medium for payment of wages due under, § 151(27), p 712
Messages in interstate commerce, employees engaged in transmission as within, § 151(9), p 657
Millworkers, application to, § 151(9), p 657
Minimum wages, §§ 151(1)–153, pp 618–756
 Ability to pay wage rate fixed, element of, § 151(32), p 729
 Accord and satisfaction, avoidance of liability by, § 151(35), pp 736–741
 Actions for, public employees or employees on public works, § 153, p 753
 Adamson Act, contract employing trainman subsequent to, § 151(25)
 Additional compensation, violation of law authorizing, § 151(34)
 Administrative bodies, establishment for women and minors, § 152, p 744
 Administrative employees, exemption from provisions requiring, § 151(12), pp 664–672
 Administrative procedure for establishing, § 151(32), p 727
Agreement,
 Evasion of statutory requirements by, § 151(24), p 697
 Fixing, statutory requirement, § 151(26), p 708

Fair Labor Standards Act—Continued,
Minimum wages—Continued,
 Agricultural products, exemption from requirements of employees engaged in processing, § 151(19), pp 685–689
 Agriculture, exemption from requirements of employees engaged in, § 151(17)
 Apprentices, § 151(10)
 Aquatic animal and vegetable life, exemption from requirements of employees engaged in catching, etc., § 151(16)
 Assignment of wages, deduction pursuant to, § 151(27), p 714
 Attorney's fees, violation of law as authorizing recovery, § 151(34)
 Women and minors, requirements, § 152, p 746
 Back pay, acceptance of as release or settlement of claim for liquidated damages, § 151(35), p 740
 Beauty culture operators, § 152, p 743, n 85
 Bituminous Coal Conservation Act, validity, § 151(2)
 Board, lodging, etc., furnished by employer, inclusion of reasonable cost, § 151(27), p 713
 Cash, payment in, § 151(27), p 712
 Checking in, time spent in as compensable working time, § 151(28), p 720
 Circuit Court of Appeals, review of administrator's fixing, § 151(32), p 731
 Circumvention of wage orders, terms and conditions to prevent, § 151(32), p 730
 Classification of,
 Employees or employment, public employees or employees on public work, § 153, p 750
 Industry, § 151(32), p 729
 Commission, establishment of wages for women and minors, § 152, p 744
 Compensable time, determination of, § 151(28), pp 715–721
 Competitive conditions, consideration in fixing, § 151(32), p 728
 Compromise in respect of, § 151(35), p 738
 Conclusiveness of time records for purpose of, § 151(28), p 720
 Conditions, wage order authorized subject to, § 151(32), p 730
 Construction of statute requiring,
 Public employees, § 153, p 747
 Women and minors, § 152, p 742
 County employees, statutory provisions relating to, § 153, p 749
 Criminal liability for violation of law, § 151(34)
 Public employees or employees on public works, § 153, p 754
 Curtailment of employment, consideration of possibility in fixing, § 151(32), p 728
 Damages, violation of law requirements as to women and minors, § 152, p 746
 Deductions,
 Payment clear of, § 151(27), p 713
 Public employees or employees on public work, § 153, p 754

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued,

Minimum wages—Continued,

- Determination of prevailing rate, public employees and employees on public works, § 153, p 750
- Double payment, violation of law authorizing, § 151(34)
- Economic conditions, consideration of in fixing, § 151(32), p 728
- Electric railway employees, exemption from requirements, § 151(18)
- Emergency, public employees performing work in, § 153, p 750, n 51
- Estoppel, avoidance of liability by, § 151(35), pp 736-741
 - Public employees or employees on public works, § 153, p 753
- Evasion of wage orders, prevention of, § 151(32), p 730
- Evidence,
 - Hearing on order fixing for women and children, § 152, p 745
 - Prevailing rate, public employees and employees on public works, § 153, p 752
- Executive employees, exemption from provisions as to, § 151(12), pp 664-672
- Executive or supervisory officers as within statute regulating, § 151(4), p 632
- Facilities furnished employee, inclusion of reasonable cost, § 151(27), p 713
- Fair trade practices, power to fix under statute relating to, § 151(25)
- Firemen,
 - Persons included within statutes relating to, § 153, p 749, n 43
 - Validity of statute relating to, § 153, p 747, n. 25
- Fixing of by wage order, § 151(32), pp 727-732
- Government contracts, prevailing wage, § 153, p. 754
- Handicapped persons, § 151(10)
- Hearings, determination of prevailing rate, public employees and employees on public works, § 153, p 751
- Hearings order fixing for women and minors, § 152, p. 745
- Home work, wage order prohibiting, § 151(32), p. 731
- Housing furnished employee, deductions in reasonable amount, § 151(27), p 713
- Increase to those already receiving, statute as requiring, § 151(29)
- Independent contractors performing public work, prevailing rate, § 153, p 750
- Infants, § 152, pp 741-746
- Interstate commerce,
 - Character of work performed by employee as determinative as to coverage of law, § 151(9), pp 646-662
 - Comprehensive legislative scheme, § 151(1), pp 618-623
 - Validity of statute providing, § 151(2)
- Investigations,
 - Prevailing wage, public employees and employees on public works, § 153, p 751

Fair Labor Standards Act—Continued,

Minimum wages—Continued,

- Investigations—Continued,
 - Secretary of Labor, prevailing wage in respect of government contracts, § 153, p 755
- Judicial review of order fixing, § 151(32), p 731
- Jury questions, working time, § 151(28), p. 715
- Learners, § 151(10)
- Legislative power to establish, § 151(2)
- Liberal construction of statutes requiring, public employees and employees on public works, § 153, p 747
- Liquidated damages, violation of law, § 151(34)
 - Government contracts, § 153, p 755
 - Waiver of right, § 151(35), p 739
- Local retailing capacity, employees engaged in, § 151(13)
- Local trolley carriers, exemption of employees from requirements, § 151(18)
- Medium of payment, § 151(27), p 712
- Minors, § 152, pp 741-746
- Motor bus carriers, exemption of employees from requirements, § 151(18)
- Municipalities, laborers employed by city or contractors in city work, § 153, p 747
- National Industrial Recovery Act, § 151(25)
 - Validity of provisions regulating, § 151(2)
- Newspaper employees, exemption from requirements of employees of small weekly or semi-weekly newspapers, § 151(23)
- Operation and effect of statute requiring, § 151(25)
 - Public employees and employees on public works, § 153, p 748
- Outside salesmen, § 151(13)
- Penalties for violation of law relating to, § 151(34)
 - Women and minors, § 152, p 746
- Policemen,
 - Persons included within statute relating to, § 153, p 749, n 43
 - Validity of statute relating to, § 153, p. 747, n. 25
- Preparatory activities, time spent in as compensable working time, § 151(28), p 720
- Presumptions, prevailing rate, public employees or employees on public works, § 153, p 752
- Prevailing rate, public employees and employees on public works, § 153, pp 749, 750
- Professional employees, exemption from requirements, § 151(12), pp 664-672
- Public employees, § 153, pp 746-753
- Public housekeeping establishments, women employees, § 152, p 743, n. 85
- Reasonable cost of facilities furnished employee, deductions, § 151(27), p. 713
- Rebates, agreement for as valid, § 151(35), p. 737, n 27
- Reduction of wages in excess of, justification, § 151(29)

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued,

Minimum wages—Continued,

- Regional differentials based on competitive conditions, § 151(32), p 729
- Release, avoidance of liability by, § 151(35), pp 730-741
- Remedies, public employees or employees on public works, § 153, p 753
- Restaurants, minor employees, § 152, p 743, n 85
- Resting time, compensable working time as including, § 151(28), p 716
- Retail establishments engaged mainly in interstate commerce, exemption from requirements, § 151(14), pp 673-678
- Review of order fixing, § 151(32), p 731
 - Women and minors, § 152, p 745
- Seamen, exemption from requirement, § 151(15)
- Secretary of Labor, prevailing wage determined by in respect of government contracts, § 153, p 754
- Services, payment by furnishing, § 151(27), p 712
- Settlement, release of liability by, § 151(35), pp 736-741
- Several employers, employment by, § 151(26), p 703
- Sleeping time, compensable working time as including, § 151(28), p 716
- Split second absurdities in computing work week, § 151(28), p 715, n 35
- Standby capacity, time spent in as included in compensable working time, § 151(28), p 716
- State employees, statutory provisions relating to, § 153, p 749
- State statutes, § 151(25)
 - Judicial review of orders fixing, § 151(32), p 732
 - Public employees and employees on public works, § 153, pp 746-756
- Sweatshop occupation, statutory provision, § 151(1), p 623
- Switchboard operators of small public telephone exchanges, exemptions from requirements as to, § 151(23)
- Terms, wage order authorized subject to, § 151(32), p 730
- Time for payment, § 151(24), p 698
- Time sheets, conclusiveness for purpose of, § 151(28), p 720
- Tips, consideration as part of wage, § 151(27), p 712
- Travel or transportation time, liability for, § 151(28), p 719
- Unit of measurement, § 151(25)
- Unit of time, women and minors, § 152, p 744
- Universal minimum wage as statutory objective, § 151(25)
- Validity of statute requiring,
 - Public employees or employees on public works, § 153, p 746
 - Women and minors, § 152, p 741

Fair Labor Standards Act—Continued,

Minimum wages—Continued,

- Violation of law,
 - Criminal liability, public employees or employees on public works, § 153, p 754
 - Penalty, §§ 151(25), 151(34); § 152, p 746
 - Women and minors, § 152, p 746
- Wage order, fixing time, § 151(32), pp 727-732
- Waiting time, compensable working time as including, § 151(28), p 716
- Waiver,
 - Avoidance of liability by, public employees or employees on public works, § 153, p 753
 - Liability for payment, § 151(35), pp 736-741
- Women, § 152, pp 741-746
- Working time, determination, § 151(28), pp 715-721
- Workman to which applicable, § 151(5)
- Mining,
 - Application to,
 - Employees engaged in, § 151(9), p 657
 - Employers engaged in, § 151(7), p 642
 - Production of goods for commerce as within coverage, § 151(9), p 651
- Money, wages as limited to, § 151(27), p 711
- Motor bus carriers, exemption of employees from provision, § 151(18); § 151(20), p 690
- Multiplicity of suits, representative actions to avoid, § 160(6), p 780
- Necessary work in production of goods for commerce bringing employee within coverage, § 151(9), p 653
- Negating defenses, complaint in action under, § 160(7), p 787
- Newspapers,
 - Application to,
 - Employers, § 151(9), p 657
 - Employers publishing, § 151(7), p 642
 - Exemption from requirements of employees of small weekly or semi-weekly newspapers, § 151(23)
- Nursery employees, exemption from provision, § 151(17)
- Offer of payment, defense of in action for additional compensation, § 160(5)
- Office employees, application to, § 151(9), p 656
- Oil production and distribution, application to in, § 151(7), p 642, § 151(9), p 657
- Omission of parties, avoidance by, § 151(24), p 676
- Operation and effect, § 151(24)
 - Minimum wages, § 151(25)
 - Overtime pay, § 151(26), pp 699-711
- Outside salesmen, exemption from provisions, § 151(13)
- Overtime,
 - Accord and satisfaction, release of liability, § 151(35), pp 736-741
 - Additional compensation, violation of law authorizing, § 151(34)
 - Administrative employees as exempt from provisions, § 151(12), pp 664-672

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued, Overtime—Continued,

Agreement,
Evasion of statutory requirements by, § 151(24), p 607
Rate of pay, statutory requirements, § 151(26), p 708
Agricultural products, exemption from requirements of employees engaged in processing, § 151(19)
Agriculture, exemption from requirements of employees engaged in, § 151(17)
Aquatic animal and vegetable life, exemption of employees engaged in catching, etc., § 151(16)
Arbitration, agreement for as affecting right, § 151(35), p 737, n 27
Attorney's fees, violation of law as authorizing recovery, § 151(34)
Back pay, acceptance of as release of claim for liquidated damages, § 151(35), p 740
Basic hourly rate, agreement for payment in case of fluctuating employment as compliance with requirement, § 151(26), p 709
Bonuses,
Compensation by, § 151(26), p 700, n 9
Deduction of amount due, § 151(26), p 702
Regular rate of pay for purpose of as including, § 151(26), p 705
Caretakers, standby capacity, time spent in, § 151(28), p 716
Cash, payment in, § 151(27), p 712
Checking in, time spent by employee as compensable working time, § 151(28), p 720
Collective bargaining agreement, exemption from requirements of persons employed pursuant to, § 151(23)
Compensable time, determination, § 151(28), pp 713-721
Compromise in respect of, § 151(35), p. 738
Computation, § 151(26), p. 702
Regular and overtime rates, § 151(26), p 702
Conclusiveness of time records for purpose of, § 151(28), p 720
Criminal liability for violation of law, § 151(34)
Daily products, exemption from requirements of employees engaged in processing, § 151(19), p 687
Deductions, payment clear of, § 151(27), p 713
Differential payments, inclusion in determining regular rate of pay for purpose of computing, § 151(26), p 705
Double payment, violation of law, § 151(34)
Double time for Sunday work, § 151(26), p 703
Electric railway employees, exemption from requirements, § 151(18)
Employment contract, regular rate of pay for purpose of as established by, § 151(26), p 706
Estoppel, avoidance of liability by, § 151(35), pp 736-741

Fair Labor Standards Act—Continued, Overtime—Continued,

Executive employees as exempt from provisions, § 151(12), pp 664-672
Firemen, standby capacity, time spent in as working time, § 151(28), p 718, n 55
Fixed salary, payment of as satisfying requirement, § 151(26), p 708
Fluctuating hours as affecting right, § 151(26), p 701
40-hour week, excess of, § 151(26), p 700
Hourly wage, computation in accordance with, § 151(26), p 706
Incentive bonus, regular rate of pay for purpose of computing as including, § 151(26), p 705
Interstate commerce, character of work of employees as determinative as to coverage, § 151(9), pp 646-662
Interstate Commerce Act, exemption from requirements of employees or employers subject to, § 151(20), p 689
Joint employment by several employers, § 151(26), p 703
Jury questions, working time, § 151(28), p 715
Laundries, women employees, § 152, p 743, n 85
Liquidated damages, violation of law, § 151(34)
Waiver of right, § 151(35), p. 740
Local retailing capacity, employees engaged in, § 151(13)
Local trolley employees, exemption from requirements, § 151(18)
Lunch period as working time for purpose of, § 151(28), p 718
Medium of payment, § 151(27), p 712
Messengers, time spent standing by on call as working time, § 151(28), p 718, n 55
Motor carriers,
Exemption of employees, § 151(18); § 151(20), p 690
Waiting periods between trips as working time, § 151(28), p. 718, n 55
Newspapers, exemption from requirements of employees of small weekly or semi-weekly newspapers, § 151(23)
Operation and effect of statute requiring, § 151(26), pp 699-711
Outside salesmen, § 151(13)
Penalties for violation of law relating to, § 151(26), p. 700; § 151(34)
Penalty on overtime work, § 151(26), p 701
Pieceworkers, computation, § 151(26), p 702
Wages included in computing regular rate of pay for purpose of, § 151(26), p 704
Preparatory activities, time spent in as compensable working time, § 151(28), p 720
Professional employees, § 151(12), pp. 664-672
Profit-sharing payments, regular rate of pay as including for purpose of computing, § 151(26), p. 705
Purpose of requirements for, § 151(1), p. 621

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued,

Overtime—Continued,

- Rebates, agreement for, § 151(35), p 737, n 27
- Reduction of wages within minimum requirements as affecting, § 151(29)
- Regular rate of pay for purpose of computing, § 151(26), p 703
- Release, avoidance of liability by, § 151(35), pp 736-741
- Resting time, compensable working time as including, § 151(28), p 716
- Retail establishments engaged mainly in interstate commerce, exemption from requirements, § 151(14), pp 673-678
- Rule or policy of employer prohibiting overtime work, § 151(26), p 701
- Seamens, exemption from requirements, § 151(15)
- Seasonal industries, exemption from requirements of employees in, § 151(21)
- Services, payment by furnishing, § 151(27), p 712
- Settlement, release of liability by, § 151(35), pp 736-741
- Several employers, employment by, § 151(26), p 703
- Sleeping time, compensable working time as including, § 151(28), p 716
- Split second absurdities in computing work week, § 151(28), p 715, n 35
- Staggered shifts, § 151(26), p 702, n 31
- Standby capacity, time spent in as included in compensable working time, § 151(28), p 716
- Sunday work, double time, § 151(26), p 703
- Switchboard operators of small telephone exchanges, exemption from requirements, § 151(23)
- Time for payment, § 151(24), p 698
- Time sheets, conclusiveness for purpose of, § 151(28), p 720
- Travel or transportation time, liability for, § 151(28), p 719
- Vacation, recording for weeks during which employee was on, § 151(28), p 715, n 36
- Violation of law, penalty, § 151(26), p 700; § 151(34)
- Wage agreements, § 151(26), p 708
- Waiting time, compensable working time as including, § 151(28), p 716
- Waiver, § 151(35), pp 736-741
- Watchmen, standby capacity, time spent in, § 151(28), p 716
- Weekly salary, regular rate of pay for purpose of computing, § 151(26), p 706
- Work week for purpose of computation, § 151(26), p 703
- Working time, determination of, § 151(28), pp 715-721
- Packing house employees as within coverage, § 151(9), p 657
- Particular employees within coverage, § 151(9), p 656
- Parties, actions for wages and penalties, § 160(6), p 780

Fair Labor Standards Act—Continued,

- Partnership, managing partner as employee for purpose of, § 151(4), p 629
- Part of work in interstate commerce, employee as within coverage, § 151(9), p 654
- Payment or offer of, defense of in action for additional compensation due, § 160(5)
- Penalties, violation of Act, § 151(34)
- Piece work, employees as within Act, § 151(4), p 631 § 151(5)
- Pleading, actions for wages and penalties, § 160(7), p 784
- Postal-to-postal pay, generally, post
- Porters, coverage, § 151(9), p 657, n 33
- Poultry, exemption of employees of those engaged in raising, § 151(17)
- Powers and duties of administrator, §§ 151(30) to 151(32), pp 722-732
- Preparation for shipment, production of goods for commerce within coverage, § 151(9), p 652
- Preparatory activities, time spent in as compensable working time, § 151(28), p 720
- Presumptions, exemption from provision, § 151(11), p 663, n 78
- Principal office of administrator, § 151(30)
- Processing agricultural products, exemption of employees engaged in, § 151(19), pp 685-689
- Processing of goods as commerce within, § 151(7), p 638
- Production of books and documents, investigations, § 151(31), p 724
- Production of goods for commerce,
 - Activities constituting, § 151(9), p 649
 - Burden of proof, § 160(8), p 791
 - Character of work rather than character of business as determinative, § 151(9), pp 646-662
 - Employees engaged in within coverage, § 151(9), p 651
 - Employment constituting, § 151(7), pp 635-644
 - Inclusion of employees engaged in, § 151(5)
 - Jury question, § 160(9)
 - Operation as extending to employers engaged in, § 151(6)
 - Part time work as bringing employee within coverage, § 151(9), p 654
 - Pleading in action to recover wages and penalties, § 160(7), p 786
 - Sufficiency of evidence as to, § 160(8), p 800
 - Volume of interstate business as determinative, § 151(8)
- Professional employees, exemption, § 151(12), pp 664-672
 - Sufficiency of evidence, § 160(8), p 801
- Public utilities, exemption of employees, § 151(14), p 678
- Punishment for violation, § 160(13), p 814
- Purpose of, § 151(1), p 621
- Radio broadcasting, application to employers engaged in, § 151(7), p 642, n 98
- Railroad terminals, porters serving in as employees of company, § 151(4), p 631
- Railroads, application to, § 151(7), p. 643; § 151(9), p 657

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued,

Railway Labor Act, exemption from provisions of employee of carrier by air subject to, § 151 (23)
 Reasonable cost of facilities furnished employee, deduction from wages, § 151(27), p 713
 Records, employer, § 151(23)
 Redcaps, coverage, § 151(9), p 657, n 33
 Reduction of wages exceeding minimum, justification, § 151(29)
 Registered nurse, exemption, § 151(14), p 665, n 10
 Regulations by Administrator,
 Construction, § 151(3)
 Force and effect, § 151(30)
 Validity, § 151(2)
 Relationship of employer and employee as essential to application, § 151(4), pp 627-632
 Release, avoidance of liability by, § 151(35), pp 736-741
 Remedial nature of statute, § 151(1), p 619
 Repairmen, application to, § 151(9), p 657
 Repeal, § 151(3)
 Reports,
 Administrator, § 151(30)
 Employer, § 151(33)
 Industry committee, § 151(32), p 727
 Representative suits, § 160(6), p 780
 Pleadings, § 160(7), p 787
 Resting time, compensable working time as including, § 151(28), p 716
 Retail distributors, application to, § 151(7), p 643
 Retailers,
 Employees as within coverage, § 151(9), p 658
 Exemption of retail establishments engaged mainly in intrastate commerce, § 151(14), pp 673-678
 Review of order fixing minimum wage, § 151(32), p 731
 Road construction employees, coverage, § 151(9), p 659
 Sale in commerce as violation of act, § 151(24), p 698
 Salesmen, coverage, § 151(9), p 657
 Scrap metal operations, application to, § 151(7), p 643; § 151(9), p 657
 Seamen, exemption from provision, § 151(15)
 Seasonal industries, exemption from provisions of employees in, § 151(21)
 Seaweeds, exemption from requirements of employees engaged in harvesting, § 151(10)
 Semi-weekly newspapers, exemption from provisions of employees of, § 151(23)
 Service establishments, exemption from provisions, § 151(14), p 678
 Services, payment for wages by furnishing, § 151(27), p 712
 Settlement, release of liability by, § 151(35), pp 736-741
 Shares of stock, goods as including, § 151(7), p 641
 Shipbuilding and repair workers, coverage, § 151(9), p 637
 Shipment in commerce in violation of, § 151(24), p 698

Fair Labor Standards Act—Continued,

Sleeping time, compensable working time as including, § 151(28), p 716
 Spasmodic activity in interstate commerce as bringing employee within Act, § 151(9), p 649, n 52
 Sponges, exemption from requirements of employees engaged in harvesting, § 151(10)
 Standby capacity, time spent in as included in compensable working time, § 151(28), p 716
 Stockyards business, application to, § 151(7), p 643, n 12
 Storing, application to employers engaged in, § 151(7), p 643
 Subpoenas, administrator, § 151(31), pp 723-727
 Substandard wages, protection of certain groups from, § 151(1), p 620
 Substantial employment in part in interstate commerce as bringing employee within coverage, § 151(9), p 655
 Subterfuge, resort to in order to preclude payment of compensation guaranteed, § 151(35), p 736
 Sunday work, double time, § 151(26), p 703
 Supervisor of production as administrative employee within exemption, § 151(12), p 670, n 37
 Supervisory employees as within Act, § 151(4), p 632
 Switchboard operators of small telephone exchanges, exemption from requirements, § 151(23)
 Tailor shops, exemption from provisions, § 151(14), p 678
 Telegraphic messages, goods as including within meaning of, § 151(7), p 641
 Terminal employees, coverage, § 151(9), p 657
 Terms, wage orders authorized subject to, § 151(32), p 730
 Territorial application, § 151(3)
 Time for payment of wages under, § 151(24), p 698
 Tips, consideration as part of wage, § 151(27), p 712
 Employees receiving compensation from as within Act, § 151(4), p 631
 Transportation,
 Application to employers engaged in, § 151(7), p 643
 Production of goods for commerce within coverage, § 151(9), p 651
 Travel or transportation time, liability for, § 151(28), p 719
 Trucking employees, coverage, § 151(9), p 658
 Tug boats, exemption of employees on, § 151(15)
 Unit of time, employees compensation by as covered, § 151(5)
 Utilities, exemption of employees, § 151(14), p 678
 Validity, § 14, p 96; § 151(2)
 Variance, actions for wages and penalties, § 160(7), p 788
 Vested property rights, claims for minimum wages, etc., as, § 151(2)
 Violation of act,
 Criminal prosecution, § 160(13), p 811
 Failure to keep records, § 151(33)

INDEX TO MASTER AND SERVANT

Fair Labor Standards Act—Continued,

- Violation of act—Continued,
 - Penalty, § 151(34)
 - Wage agreements, § 151(2), p 707
 - Wage orders, § 151(25)
 - Fixing of minimum wage by administrator, § 151(32), pp 727-732
 - Waiting time, compensable working time as including, § 151(28), p 716
 - Waiver, liability for payment of compensation required, § 151(35), pp 730-741
 - Warehousing, application to, § 151(7), p 643, § 151(9), p 678
 - War plants, application to employees of plant operated by private contractors, § 151(22)
 - Watchmen, coverage, § 151(9), p 659
 - Independent contractor furnishing, § 151(4), p 630
 - Weekly newspapers, exemption from provisions of employees of, § 151(23)
 - Weekly wage, application to workman employed at, § 151(5)
 - Wholesale distributors, application to, § 151(7), p 643
 - Wholesalers,
 - Employees as within, § 151(9), p 658
 - Exemption from provisions, § 151(14), p. 677
 - Working time under, determination, § 151(28), pp 715-721
 - Work week under, § 151(26), p 703
- Fair trade practices, minimum wages under statute relating to, § 151(25)
- Faithfulness, performance of services, § 67
 - Compensation of employee as dependent on, § 81
- Falling objects,
 - Covers or guards to protect servants, negligence of master, jury question, § 534, p 187
 - Warning servant of dangers from, § 303
- False impersonation, wages, defense of obtaining employment by in action to recover, § 127
- False imprisonment,
 - Exonerated of servant as absolving master from liability, § 619, p 422
 - Scope of employment, jury question, § 617, p 412, n 52
- False representations, contracts of employment procured by, classification for discharge, § 42, p 428
- Falsification of accounts, employee, recovery of wages as precluded, § 105
- Farm Laborers. Agricultural Laborers, generally, ante
- Farm machinery, safety appliances, § 232, pp 983, 984
- Farms, independent contractor, operator as, § 3(9)
- Favors to employees, unfair labor practice by bestowing in order to forestall union movement, § 28(46)
- Federal Ash Pan Act, burden of proof, action for injury based on failure to comply with, § 501 p 76
- Federal Boiler Inspection Act,
 - Absolute duty to comply with requirements, § 227, p. 955
 - Assumption of risk, § 369, p 1169
 - Burden of proof, actions under, § 501, p 77
 - Proximate cause of injury, § 501, p. 73
 - Construction and operation, § 173, p. 859; § 227, p 957
 - Continuing duty of carrier to comply with requirements, § 227, p. 958

Federal Boiler Inspection Act—Continued,

- Contributory negligence, defense of, § 425, p 1247
- Inspection and repair, duty of employer, § 235, p 992
- Injuries alleged to have been caused by violation of, presumption § 501, p 62
- Locomotives, compliance with, § 227, p 954
- Presumptions as to injuries alleged to have resulted in violation, § 501, p 62
- Questions of law and fact, § 534, p 177
- Federal Employers' Liability Act,
 - Admissibility of evidence in action under, § 503
 - Amendment of pleadings in action under, § 496, p 42, n. 59
 - Relations back, § 488
 - Application, § 173, p 848, § 228, p 965
 - Assumption of risk, § 359, pp 1154 to 1159, § 369, p 1169
 - Burden of proof, § 501, p 82
 - Jury question, § 536, p. 213
 - Knowledge of danger, § 370, p 1187; § 383, p 1191
 - Equal or greater means of knowledge, § 391
 - Negligence of fellow servants, § 360, p 1167
 - Presumptions, § 501, p 65
 - Automatic couplers, violation of statute relating to as negligence, § 228, p 970
 - Boiler Inspection Act, construction and application in connection with, § 227, p 955
 - Burden of proof, action under, § 501, pp 66, 70
 - Law governing action brought in state court, § 173, p 854
 - Proximate cause of injury, § 501, p 72
 - Unsafe place of work, § 501, p 75
 - Care required of employer to protect against injuries, § 183, p 880
 - Cars, liability for injuries to employee caused by defect, § 228, p 959, n 46
 - Cause of injury, evidence, § 522, p 116, n 64
 - Burden of proof, § 501, p. 73
 - Commencement of action within limitation period, § 487
 - Common law, negligence as determinable according to, § 173, p 857
 - Comparative negligence, admissibility of evidence, § 519, p 108
 - Conflict of laws, burden of proof, § 501, p 67
 - Construction, § 173, p. 849
 - Constructive knowledge of danger, burden of proof, § 501, p 80
 - Contract exempting carrier from liability, § 197
 - Contributory negligence,
 - Burden of proof, § 501, p 84
 - Controlling effect, § 426
 - Defense of, § 425, p 1247; § 494, p 40
 - Jury question, § 537, p 223
 - Last clear chance doctrine, § 423
 - Methods of work, § 453, p. 1230
 - Pleading as defense, § 494, p 40
 - Presumptions, § 501, p. 65
 - Reduction of damages, § 554
 - Special verdict solely to reduction of damages, § 550
 - Violation of cautionary rule or order, § 457, p 1294; § 459, pp 1297, 1298
 - Controlling of limitation of, provisions, § 487

INDEX TO MASTER AND SERVANT

Federal Employers' Liability Act—Continued,
 Credibility of witnesses, jury questions, § 529
 Declarations petition or complaint under, § 490, p 29
 Direction of verdict, § 529
 Disobedience of orders, admissibility of evidence as to, § 519, p 111
 Election of remedy, § 482
 Evidence,
 Burden of proof ante, this head
 Presumptions, etc, post, this head
 Scintilla of evidence, § 520, p. 113, n 39; § 529
 Weight and sufficiency, § 520
 Exclusiveness of federal remedies, § 173, p 857
 Exemption of carrier from liability, contracts for, § 197
 Exercise of due care, presumption, § 501, p 54
 Federal Safety Appliance Act, construction and application with, § 228, p 901
 Fellow servant,
 Abrogation of doctrine, § 347, § 355, p 1144
 Burden of proof in action under, § 501, p. 79
 Personal liability of servant for injuries to as affected, § 578
 Happening of accident, presumption of negligence as arising from, § 501, p 56
 Inspection and repair, simple tools, § 235, p 992, n 4
 Instructions to jury, request as essential, § 538, p 238 n 23
 Insider, railroad as, § 173, p 849
 Interstate character of employment,
 Evidence as to, § 520
 Question of law or fact, § 531
 Joint action against master and servant under, § 579
 Jurisdiction, action under, § 486
 Jury questions in action under, § 529
 Assumption of risk, § 536, p 213
 Interstate employment, § 531
 Knowledge of danger, burden of proof, § 501, p 80
 Last clear chance doctrine, effect on, § 423
 Limitation of action under, § 487
 Law governing action brought in state court, § 173, p 854
 Locomotives, liability for injuries to railroad employees resulting from defects, § 227, p 959
 Negligence of employer under, § 183, p. 881
 Burden of proof, § 501 pp 70, 72
 Determination, § 183, p 881
 Liability as dependent on, § 173, p. 849
 Presumptions, § 501, p 56
 Nonsuit in action under, § 520
 Ordinance regulating speed, admissibility in action under, § 509, p 97
 Pleading in action under, § 490, p 29
 Presumptions, actions under,
 Defect of machinery etc, § 501, p 62
 Existence of master and servants relations, § 501, p. 53
 Interstate or intrastate commerce, § 501, p 54
 Negligence, § 501, p 56

Federal Employers' Liability Act—Continued,
 Proximate cause of injury,
 Burden of proof, § 501, p 72
 Evidence as to, § 501, p. 72; § 524, p 123
 Liability as dependent on, §§ 187, 257
 Questions of law and fact in actions under, § 529
 Negligence of master, § 534, p 106
 Scope of employment, § 531
 Reasonably safe place for work, duty to provide under, § 226, p 948
 Relation of master and servant,
 Burden of proof, § 501, p 68
 Existence as essential to liability of master, § 175
 Presumption as to existence, § 501, p 53
 Releases, application to agreements for, § 197
 Relief and benefit departments or associations, contracts as affected, § 170, p 841
 Res ipsa loquitur doctrine as applicable in action under, § 501, p 59
 Revival of actions brought under, § 487
 Rules and regulations,
 Burden of proving violation of, § 501, p 78
 Presumption respecting, § 501, p 63
 Safe equipment, duty of railroad to provide, § 212, p 919, § 226, p 947
 Safe place to work,
 Burden of proof, § 501, p 75
 Railroad's duty to furnish, § 212, p. 919; § 226, p 947
 Scintilla of evidence, § 520, n. 39; § 529
 Scope of Act, § 228, p 903
 Scope of employment, liability for injuries in, § 181, p 874, n 74
 Service of process commencement of action by, § 487
 Service of process, commencement of action with-in limitation provision by, § 487
 Settlement, application to agreements for, § 197
 Simple tools, inspection, § 235, p 992, n 4
 Speed, ordinance regulating, admissibility in action under, § 508, p 90, n. 97
 State court, law governing action brought in, § 173, p 851
 Trespass, liability for injury to employee as result of, § 180, p 889, n 40
 Unexpected and improbable dangers, anticipating and guarding against, § 188, p 888, n 34
 Validity, § 173, p 848
 Variance, actions under, § 500
 Venue of action under, § 486
 Verdict, actions under, § 550
 Violation of state statutes imposing duty on employer, liability for injuries resulting, § 191, p 891, n 70
 Wanton misconduct in running down employee as negligence, § 261, p 1017
 Warning employee, failure to warn as negligence, § 263, p 1022
Federal Employment Inspection Act, limitations, commencement of period, § 487
Federal Hours of Service Act, §§ 18-23, pp 104-110
 Actions to recover penalty for violations, § 23
 Application of statute, § 19
 Emergencies and other happenings, excusing violations, § 22
 Interruption of continuity of service, § 20

INDEX TO MASTER AND SERVANT

Federal Hours of Service Act—Continued,

- Penalties for violation, § 23
- Public works, power to regulate, § 17
- Report of excessive hours, § 21
 - Penalty for failure to make, § 23
 - Validity, § 15, p 100

Federal Safety Appliance Acts,

- Absolute duty to comply with, § 227, p 953, § 228, p 960
- Automatic couplers, requirements as to, § 228, p 960
- Brakes on railroad cars, requirements as to, § 228, p 966
- Burden of proof, action under, § 501, p 71
 - Violation of, § 501, p 76
- Car as used or in use within, § 228, p 964
- Cause of injury, proof required, § 522, p 116, n 64
- Construction and operation, § 173, p 858
- Contributory negligence,
 - Defense of, § 425, p 1247
 - Effect of, § 228, p 964
- Couplers, requirements as to, § 228, p 968
- Hand brakes on railroad cars, § 228, p 966
- Inspection and repair, duty of employer, § 235, p 962
- Liberal construction, § 228, p 960
- Locomotives, duty to provide and keep in safe condition, § 227, p 953
- Negligence, burden of proof, § 501, p 71
- Negligence per se, violation as, § 202, p 908, n 40
- Power brakes on trains, requirements, § 228, p 968
- Proximate cause of injury, liability as dependent on, § 181, p 874; § 258
- Relation of master and servant, existence of as essential to charge master, § 175
- Scope of, § 228, p 965
- Scope of employment, question of law or fact, § 531

Federal Transportation Act, settlement of labor dispute, administrative proceeding before labor board created by act, § 28(69)

Fees,

- Attorney's fees, generally, ante
- Employment agencies, statutory regulations, § 26

Fellow servants, §§ 307-355, pp 1060-1148

- Abrogation of common law rule, § 331
- Age, competency as affecting, § 313
- Agents, assumption of risks of act of 119 as agent of master, § 322
- Apparent scope of authority, liability for negligence within, § 332, p 1108
- Appliances Tools, Machinery and Appliances, post
- Approach of trains, warning of, § 333, p 1123
- Assault,
 - Injured employee, exemplary damages as recoverable, § 554
 - Liability of master, § 325
 - Railroad employees, § 355, p 1140
- Assignment of work, employee representing master in, § 333, p 1126
- Assumption of authority as creating vice principal of relations, § 332, p 1101

Fellow servants—Continued,

- Assumption of risk, ante
- Authority, distinction in as affecting relations, § 332, pp 1098-1108
- Blasting,
 - Negligence with regard to, jury question, § 535, p 209
 - Warning, § 333, p 1124
- Brakemen, railroads, § 327, p 1088
- Bridge gang, § 327, p 1088
- Building construction, employee employed in, § 327, p 1090
- Burden of proof, incompetency or negligence, actions for injuries as servant, § 501, p 78
- Care required,
 - Furnishing required number, § 308
 - Statutory provisions as affecting, § 336
- Carelessness, competency as affected, § 312
- Character of acts or omission relation as affected, § 332, pp 1108-1126
- Circumstantial evidence, negligence shown by, actions for injuries to servants, § 525
- Civil law, fellow servant rule as not generally recognized, § 321
- Common construction enterprise, negligence as affecting master's liability for injuries, § 333, p 1114
- Common employment by element of, § 331, pp 1094-1098
- Common law,
 - Competency, § 312
 - Liability for injuries by, §§ 321-333, pp. 1078-1126
 - Statutes declaratory of, § 338
- Common master,
 - Employees serving as, § 327, p. 1085
 - Necessity, § 330
- Common service statutes, railroads, § 340
- Competency, §§ 311-319, pp 1072-1077
 - Admissibility of evidence as to, action for injuries to servants, § 409, p 40; §§ 516, 517
 - Approximate cause of injury, § 318
 - Assumptions of risk, § 362
 - Jury question, § 537, p 222
 - Burden of proof, § 501, p 78
 - Instruction on, § 540
 - Care required of master, § 312
 - Concurrent negligence,
 - Competent fellow servants, § 319
 - Failing to furnish competent co-employees, liability of masters, § 356
 - Constructive knowledge of incompetency, § 317
 - Duty to employ competent fellow servants, § 311
 - Evidence in action for injuries, § 409, p. 49, § 501, p 78, §§ 516, 517; § 524, p 137
 - Insurer of, § 314
 - Jury question, actions for injury to servant, § 535, pp 205-211
 - Knowledge of incompetency master as chargeable as, § 317
 - Liability of master for injuries by incompetent servants, § 324
 - Negligence in employing incompetent servant, evidence, § 524, p 137

INDEX TO MASTER AND SERVANT

Fellow servants—Continued,
 Competency—Continued,
 Pleading in action for injuries to servants,
 § 490, p 24, § 494, p 38
 Presumptions, § 501, p 63
 Instructions on, § 540
 Retention of incompetent servant, § 316
 Statutory requirements, § 314
 Substituted servant, § 315
 Temporary substitution, § 315
 Tests, § 313
 Compulsory service, doctrine as applying to persons in, § 322
 Concurrent negligence,
 Competent and incompetent fellow servants, § 319
 Liability of master for injury affected, § 356
 Master or vice principal, jury question, § 535, p 211
 Conformity to orders by injured employee, liability of masters, § 341
 Consociation doctrine, § 331, p 1097
 Constitutional provisions,
 Liability of master for injuries, §§ 334-355, pp 1126-1146
 Rule of employees, § 346
 Construction,
 Appliances for use in work, liability of master for negligence in respect of, § 333, p 1118
 Statutes relating to, § 335
 Constructive knowledge of incompetency, § 317
 Contributory negligence, ante
 Control, direction and control, post, this head
 Corporations,
 Doctrine as applying to employees of, § 322
 Statutes relating to, § 335
 Vice principals, § 332, p 1101
 Cotton pickers, truck driver transporting as, § 327, p 1087, n 2
 Course of employment, liability of master for assault, within, § 325
 Covering dangerous places, negligence affecting master's liability for injuries, § 333, p 1112
 Customary methods, negligence in following, § 336
 Dangerous agencies or appliances,
 Delegation of duty to care for, § 333, p 1110
 Guarding against negligence, § 232, p 986
 Notice to master, § 248
 Dangerous occupation or places,
 Negligence in guarding as affecting master's liability for injuries, § 333, p 1112
 Notice to as notice to master, § 248
 Dangerous servant, negligence in employing or retaining, § 312
 Defects in ways, etc, liability of employer for injuries resulting, statutory provisions, § 344
 Defined, § 327, pp 1085-1090; § 339
 Delegation of duty,
 Employment of competent fellow servants, § 311
 Furnish sufficient number, § 307
 Safe place to work, § 333, p 1111
 Supervision, § 320
 Department heads, § 332, p. 1102

Fellow servants—Continued,
 Determination of who are fellow servants, § 327, pp 1085-1090
 Different department rules, § 331, p 1096
 Common employment, § 331, p 1096
 Statutory provisions, § 342
 Railroads, § 350
 Direction or control, § 320; § 327, p 1085, § 331, p 1096
 Employee entrusted with, § 333, p 1121
 Employees subject to, § 332, p 1098
 Servant of one master controlled by another, § 330
 Discharge of employee, power to discharge as affecting relations, § 332, p 1101
 Distinctions in rank or authority, effect of, § 332, pp 1098-1108
 Dual-capacity, negligence of employee acting in, liability of master for injury due to, § 356
 Dual-capacity doctrine, § 332, p 1106, § 333, p 1110
 Electricity,
 Delegation to duty of handling and controlling, § 333, p 1110, n 46
 Negligence in performance of, jury question, § 535, p 209
 Elevated trains, statutory provisions, § 347
 Elevator operators, § 327, p 1089
 Negligence with regard to starting or operating, jury questions, § 535, p. 209
 Emergencies servants, § 328
 Engineers, railroad, § 327, p 1088
 Safe place to work, § 333, p 1115
 Excavations, employees engaged in, § 327, p 1090, § 332, p 1106
 Vice principals, § 332, p 1101
 Excuse for failure to employ sufficient number, want of funds, § 307
 Existence of relationship, jury question, actions for injuries to servant, § 535, p 206
 Experience, lack of as rendering incompetent, § 313
 Explosives, negligence in handling, jury question, § 535, p 209
 Exposure to risk of injury, element of, § 331, p 1095
 Extraterritorial effects of statutes relating to, § 345
 Federal Employers' Liability Act,
 Abrogation of doctrine, § 347; § 355, p 1144
 Burden of proof in action under, § 501, p 79
 Personal liability of servant for injuries to as affected, § 578
 Firemen, railroads, § 327, p 1089
 Foremen, § 332, p 1102
 Dual-capacity doctrine, § 332, p 1107
 Railroads, § 332, p 1104
 Statutory provisions relating to injuries caused by negligence of, § 340
 General managers as, § 332, p 1102
 Going to and from work, liability of master for injuries, § 329
 Government employees, doctrine as applicable, § 322
 Grade of employment, distinctions in as affecting relation, § 332, p. 1098-1108

INDEX TO MASTER AND SERVANT

Fellow servants—Continued,

- Gross negligence,
 - Evidence, actions for injuries to servants, § 525
 - Jury question, § 535, p 210
 - Liability of master for injuries, cause by, § 325
- Guarding dangerous places, negligence in respect of, as affecting master's liability for injuries, § 333, p 1112
- Guests of driver of vehicle as, § 327, p 1087
- Habits, competency as affected, § 313
- Hazardous occupations,
 - Liability of master for injuries, § 334
 - Superior servant rule, § 340
- Heads of departments, § 332, p 1102
- Hiring and firing, power of as affecting relations, § 332, p 1101
- Hoisting, negligence with regard to, jury question, § 535, p 209
- Horseplay, liability of master for injury occasioned by, § 325; § 355, p 1146
- Railroad employees, § 355
- Imputed knowledge of incompetency, § 317
- Incidental inspection and repair, liability of master for negligence, § 333, p 1120
- Independent contractor, § 330
- Infants,
 - Competency, § 313
 - Doctrine as applicable to, § 322
- Injuries to,
 - Joint and several liability, §§ 578, 579
 - Liability of master, jury questions, § 535, pp 205-211
 - Negligence in employment of retention, pleading, § 490, p 24
 - Not on duty, liability of master, § 320
 - Personal liability of servant, § 578
- Inspection, liability negligence, § 333, p 1119
- Jury question, § 535, pp 208, 210
- Intoxicating liquor, excessive use as rendering incompetent, § 313
- Intoxication, inadmissibility of evidence as to, action for injuries to servant, § 516
- Joint employers, liability for wrongful acts, § 325
- Joint liability of servants for injuries to, § 578
- Liability of master for injuries by,
 - Common law, §§ 321-333, pp 1078-1126
 - Jury questions, actions for injuries to servant, § 535, p 206
 - Law governing liability, § 326
- Liberal construction of law relating to, § 335
- Loading or unloading, negligence with regard to, jury question, § 535, p 209
- Loan of servant for particular employment, § 330
- Logging operations, § 331, p 1096
- Negligence with regard to, jury question, § 535, p 209
- Logging railroads, statutory provisions, § 347
- Longshoremen, § 327, p 1089, § 332, p 1106
- Machinery. Tools, Machinery and Appliances, post
- Maintaining proper force, duty of master, § 309
- Maintenance work, liability of master for negligence in respect of, § 333, p 1119

Fellow servants—Continued,

- Malicious acts, liability of master for injuries caused by, 325
- Management, liability for acts of employee authorized to manage, § 332, p 1099
- Managers, statutory provisions relating to injuries caused by negligence of, § 340
- Masters of vessels, § 332, p 1106
- Mates on vessels, superior servant rule, § 332, p 1105
- Methods of work,
 - Absence of negligence of master in respect of, statutory provisions as affected, § 337
 - Concurring negligence in adoption of rules and regulations, affect of, § 356
 - Liability of master for negligence of servants in respect of, § 333, p 1110
 - Negligence with regard to, jury question, § 535, p 209
- Mines,
 - Consociation doctrine, § 331, p 1098
 - Different department rule, § 331, p 1096
 - Employees working in or about, § 327, p 1090; § 332, p 1106
 - Foremen, liability of master for injuries to employees on theory of, § 190
 - Negligence with regard to mining, jury questions, § 535, p 209
 - Safe place to work, § 333, p 1115
 - Superior servant rule, repudiation, § 332, p 1106
 - Vice principals, § 332, p 1101
- Mining railroads, statutory provisions, § 347
- Minors,
 - Competency, § 313
 - Doctrine as applicable, § 322
- Motor vehicles, negligence in operating, jury question, § 535, p 209
- Moving cars, warning of, § 333, p 1123
- Municipal corporations, doctrine as applicable to employees of, § 322
- Negligence,
 - Admissibility of evidence in action for injuries to servant, § 517
 - Incompetency, § 490, p 40
 - Pleading as affecting, § 490, p 40.
 - Assumption of risks, injury due to, § 362
 - Burden of proof in actions for injuries to servants, § 501, p 78
 - Contributing to loss, defense in action by employer for damages, § 79, p 503
 - Employment or retention, pleading, § 490, p 24
 - Failure to furnish required number, § 308
 - Instructions to jury respecting in actions for injuries to servant, § 548
 - Jury question, actions for injuries to servant, § 535, p 207
 - Liability of master for injuries caused by, §§ 321-333, pp 1078-1126
 - Place of work rendered on, unsafe by, liability of master, § 333, p 1111
 - Pleading, in actions for injuries to servants, § 491, § 494, p 38
 - General denial, negligence as provable under plea of, § 499, p 49
 - Proof, § 498, p 43, n. 69

INDEX TO MASTER AND SERVANT

Fellow servants—Continued,

Negligence—Continued,

- Questions of law and fact, in actions for injuries to servant, § 535, pp. 205-211
- Retention of incompetent servant, § 316
- Sufficiency of evidence in action for injuries to servant, § 525

Nondelegable duties, breach of as affecting liability of master for injuries, § 333, p 1109

Number, §§ 307-310

- Absolute duty to furnish sufficient number, § 307

- Admissibility of evidence as to, action for injuries to servant, § 515

- Assumption of risk because of insufficiency, jury questions, § 536, p 222

- Concurring, negligence in failing to furnish sufficient number, liability of master for injury resulting, § 356

- Degree of care required, § 308

- Employee representing master as to, § 333, p 1126

- Jury questions, actions for injuries to servant, § 533, p 163; § 535, p 205

- Maintaining force, § 309

- Negligence in failing to furnish sufficient force,

- Evidence, § 524, p 137

- Pleading in action for injury, § 490, p 25

- Proximate cause of injury, failure to furnish sufficient number, § 310

Obedience to rules, liability for injuries resulting, statutory provisions, § 343

- Railroad employees, § 352

Obvious danger, duty of supervision of as extending to, § 320

Off duty, liability of master for injuries to, § 329

Orders,

- Directing work, liability of master for injuries resulting, § 333, p 1124

- Negligence of person whose orders injured employee was bound to conform, § 341

Overtime work, rule as applying to, § 323

Personal acquaintance, relation as dependent on, § 331, p 1098

Personal duty, breach of as affecting liability of master, § 332, p 1109

Personal liability of servant for injuries to, § 578

Physical disability, competency as affected, § 313

Piling material, negligence with regard to, jury question, § 535, p. 209

Platforms, liability of master for negligence in constructing, § 333, p 1119

Franks, liability of master for injuries resulting, § 311

Precautions, ability to take as element, § 331, p 1095

Preparation,

- Appliance for use in work, liability of master for negligence in respect of, § 333, p 1118

- Leave place of employment, liability for injury, § 329

Fellow servants—Continued,

Presumptions, competency, § 316

- Selection and retention, § 501, p 63

Prior negligence, assumption of risk, § 322

Property damage, liability of masters, § 322

Proximate cause of injury,

- Incompetency, § 313

- Jury question, § 535, p 210

- Liability of master for injuries by, §§ 322, 356

- Negligence of fellow servant, evidence, § 525
- Number, failure to furnish sufficient number, § 310

- Recovery predicated negligence of fellow servant, § 336

Public policy, fellow servant veteran of based on, § 321, p 1079

Purpose of statutes relating to, § 335

Quarries, employees working in or about, § 327, p 1090; § 332, p 1106

- Consociation doctrine, § 331, p 1098

- Negligence with regard to, jury question, § 535, p 209

- Safe place to work, § 333, p 1115

Railroad employees, § 327, pp 1087, 1088; § 35, pp 1141-1146

- Assault, liability for injuries as result of, § 355, p 1146

- Assumption of risks, negligence of, § 366, p 1167

- Brakemen, statutory provisions, § 348

- Common service statutes, § 349

- Conductors, statutory provisions, §§ 348, 354

- Conformity to orders, negligence of persons as order injured employees bound to conform, § 351

- Connecting negligence with use and operation of railroads, statutory provisions, § 355, p 1141

- Consociation doctrine, § 331, p 1097

- Constitutional provisions, §§ 346-355, pp 1143-1146

- Different department rule, § 331, p 1096

- Statutory provisions, § 350

- Dispatchers, § 333, p 1125

- Statutory provisions, § 348

- Duty of those in charge of train to fellow employees working on or near track, § 261, p 1017

- Employees included statutory provisions, § 355, pp 1141-1146

- Employees of, § 327, p 1087

- Employers affected, statutory provisions, § 347

- Engineers, statutory provisions, § 354

- Federal Employers' Liability Act, effect, § 355, p. 1144

- Foremen, statutory provisions, § 355, p 1142

- Horseplay, liability for injuries resulting, § 355, p 1140

- Inspection and repair, liability and negligence in respect of, § 333, p 1121

- Laborers, statutory provisions, § 355, p. 1142

- Logging or mining road, statutory provisions, § 347

INDEX TO MASTER AND SERVANT

Fellow servants—Continued,

Railroad employees—Continued,

Negligence,

Employee acting in place of corporation,
statutory provisions, § 353

Jury question, § 535, p 200

Particular employees, statutory provisions, § 354

Person whose orders injured employee
bound to conform to statutory provisions, § 351

Obedience to rules, liability for injuries resulting, statutory provisions, § 352

Operating employees, statutory provisions, § 355, p 1143

Orders, negligence of person whose orders injured employees bound to conform, § 351

Receivers or trustees, railroads in hands of, § 347

Safe place to work, liability for negligence in respect of, § 333, p 1114

Sectionmen, statutory provisions, § 355, p 1142

Servants of different railroads making traffic arrangements, § 330

Skylarking, liability for injuries resulting from, § 355, p 1146

Superior servant doctrine, § 332, pp 1104, 1105, § 348

Repudiation, § 332, p 1105

Towermen, statutory provisions, § 354

Validity of statutory provisions, § 346

Vice principals, § 332, pp 1101, 1102

Warning before starting train, § 203, p 1022

Rank, distinctions in as effecting relations, § 332, pp 208-1108

Reckless acts, liability of master for injuries caused by, § 325

Relation of master and servant,
Existence of as essential, § 328

Jury question as to, actions for injuries to servant, § 535, p 206

Repairs,

Liability of master for negligence in respect of, § 333, p 1119

Negligence, jury questions, § 535, p 208

Repudiation of servant rule, § 332, p 1105

Retention,

Incompetent employees,

Admissibility of evidence as to in action for injuries to servants, § 516

Negligence of master, jury question, § 535, p 206

Presumption as to proper care, § 501, p. 63

Representation of master, § 333, p 1126

Retroactive statutes relating to, § 345

Rules and regulations,

Concurring negligence in respect of adoption, § 350

Delegation of duty to promulgate, § 333, p 1124

Liability for injuries as result of obedience, statutory provision, § 349

Runways, liability of master for negligence in constructing, § 333, p 1119

Fellow servants—Continued,

Safe place to work,

Concurring negligence in failure to furnish, § 350

Delegation of duty by master to avoid liability, § 333, p 1111

Negligence affecting master's liability for injuries, § 333, pp 1111, 1113

Jury question, § 535, p 210

Personal liability for injuries to servant because of failure of master to furnish, § 578

Scaffolds, liability of master for negligence constructing, § 220, p 936, § 333, p 1119

Scope of authority, liability for negligence, within apparent scope, § 332, p 1108

Scope of employment,

Jury question, actions for injuries to servant, § 535, p 207

Liability of master as dependent on injury being in, § 323

Place of work rendered unsafe by acts in, liability of master, § 333, p 1112

Seamen, rule as applying to, § 322

Selection,

Presumption as to due care in, § 501, p 63

Reliance on care of master, § 380

Representation, of master in, § 333, p 1126

Separate masters, employees of, § 330

Shipping,

Members of crew or employees working on or about ship, § 322, § 327, p 1080

Superior servant rule, § 332, pp 1105, 1106

Vice principals, § 332, p 1101

Signals,

Employee having duty of giving, § 333, p 1125

Negligence with regard to, jury question, § 535, pp 208, 210

Skill, element of competency, § 313

Skylarking, liability for injuries resulting, § 325
Railroad employees, § 355, p 1146

Sole cause of injury, liability of master as dependent upon, § 356

Spontive acts, liability of master for injury occasioned by, § 325, § 355, p 1146

State employees, doctrine as applicable to, § 322

Statutory provisions,

Abrogations of common law rule, § 334

Absence of negligence of master in respect of methods as affected, § 337

Care required of fellow servant as affected, § 336

Competency, § 314

Conformity to orders, negligence of person whose orders injured employee bound to conform, railroad employee, § 351

Construction and operation, § 335

Declaratory of common law, § 338

Defects in ways, works, etc., liability of employer for injuries resulting, §§ 343, 344

Definitions, § 330

Different department rules, § 342

Due care of master in respect of methods of work as affecting liability, § 337

Extraterritorial effect, § 345

Hazardous occupations, § 334

INDEX TO MASTER AND SERVANT

Fellow servants—Continued,

Statutory provisions—Continued,

- Logging railroads, § 347
- Mining road, § 347
- Negligence of persons orders injured employee was bound to conform, § 341
- Railroad employee, § 351
- Obedience to rules, liability for injuries resulting, § 343
- Railroad employees, § 352
- Primary and secondary liability of master for injuries, § 334
- Protected employee, § 355, pp 1141-1146
- Retroactive effects, § 345
- Rules, acts or omissions in obedience to, § 343
- Superior servant rule, § 340
- Validity, § 335
- Violation of statutory duty imposed on master, proximate cause of injury, § 322
- Stevedores, members of crew, § 327, p 1089
- Street railroads, statutory provisions, § 347
- Student employees, rule as applicable to, § 328
- Substitute servants, § 328
- Subways, statutory provisions, § 347
- Sunday, liability for injury by servant illegally employed on, § 322
- Superintendents, statutory provisions relating to injuries caused by negligence of, § 340
- Superior servant rule, § 332, pp 1103, 1105
- Assumption of risk of negligence of, § 322
- Contributory negligence, compliance with command or order, § 466
- Evidence as to negligence, in actions for injury to servants, § 525
- Instructions to jury, liability of master for acts, § 548
- Liability for injuries as result of negligence of subordinate, § 332, p 1098
- Personal liability for injuries to servant, § 578
- Railroads, § 348
- Repudiation, § 332, p 1105
- Statutory provision, § 340
- Straw boss as superior employee, § 1, p 28
- Superiority in rank and employment as affecting relation, § 332, p 1098
- Supervision, § 320
- Employee trusted with, § 333, p 1121
- Supervisory employee, liability of master for accident, § 332, p 1099
- Telegraph operators, judging orders, § 333, p 1125
- Temporary absence as justifying undertaking work with insufficient number, § 300
- Temporary authority, employee vested with as vice principal, § 332, p 1101
- Temporary substitution, competency, § 315
- Tools, machinery and appliances, post
- Track inspectors, § 327, p 1088
- Train men Railroad employees, generally, ante, this head
- Transportation to or from work, rule as applicable to, § 327, p 1066
- Vessels. Shipping, generally, ante, this head
- Vice principals,
 - Dual-capacity doctrine, § 332, p 1107

Fellow servants—Continued ,

Vice principals—Continued,

- Rule as applying to, § 332, p 1090
- Vicious servant, negligence in employing or retaining, §§ 312, 316
- Evidence, § 524, p 137
- Volunteer, § 328
- Wantonness, jury question, § 535, p 210
- Warning and instructing,
 - Concurring negligence with reference to, effect of, § 356
 - Dangers from negligence of, § 294
 - Delegation of duty, § 333, p 1122
 - Negligence in respect of, § 289
 - Jury question, § 535, pp 208, 210
 - Vice principal, acting as, § 333, p 1122
- Wilful acts,
 - Evidence, actions for injuries to servants, § 525
 - Liability of master for injuries caused by, § 325
 - Statutory provisions as affecting liability for injuries, § 335
 - Youthful servants, competency, § 313
- Females. Women, generally, post
- Fences, railroad right of way,
 - Contributory negligence, inspection for latent defects or dangers, § 447, p 1271
 - Duty to employees to fence tracks, § 229, p 975
- Fictitious name, injuries to third persons, actions under, § 613
- Fiduciary relationship, invention of employee occupying, rights as to, § 73, p 488
- Filling stations, independent contractors, lessee of, § 3(9)
- Financial aid,
 - Employee as one performing services for, § 1, p 27
 - Labor organization, unfair labor practice by employer contributing, § 28(45), p 210
- Financial institutions, interstate commerce, National Labor Relations Act as applying, § 28(9), p 134
- Findings,
 - Injuries to servants, actions for, § 550
 - Judgment in conformity with, § 552
 - Injuries to third persons, actions for, § 610, pp 421-424
 - Labor relations boards or commissions, § 28(108)
 - Conclusiveness on court, § 28(136), p 307
 - National Labor Relations Board, post
 - Presumptions favoring, § 28(134)
 - Remand for correction, § 28(137)
 - Wages, actions to recover, § 133
 - Judgment conforming to, § 134
 - Statutory provisions, § 160(9)
- Fines and penalties,
 - Contract of employment, employer violating obligation, § 107
 - Contributory negligence, customary method, § 519, p 112
 - Discharge of employees, failure to pay wages due within time, § 156, p 702
 - Employment agencies, construction of penal provision of statute regulating, § 26
 - Fair Labor Standards Act, violation of, § 160 (13), p 814, § 151(34)

INDEX TO MASTER AND SERVANT

- Fines and penalties—Continued,**
 Hours of labor, violation of Federal Hours of Service Act, § 23
 Imperfection in work, validity of statute forbidding, § 159, p 769
 Wages and other remunerations, post
- Fingerprinting, statutory requirement as condition of securing or continuing employment, § 27**
- Fire dump, coal mines generating, inspection, § 235, p 993**
- Fire escapes, duty of master to provide, § 219, p 934**
- Firearms,**
 Injuries to third persons, liability of master intrusting to servant, § 575, p 345
 Respondeat superior, doctrine as applicable in respect of discharge, § 575, p 331
- Firemen,**
 Assumption of risk, ordinary risk, § 375
 Minimum wages,
 Persons included within statute relating to, § 153, p 749, n 43
 Validity of acts relating to, § 153, p 747, n 25
 Overtime pay, standby capacity, time spent in as working time, § 151(28), p 718, n 55
 Railroad,
 Contributory negligence, disobedience of rules or orders, § 459, p 1298
 Fellow servant relationship, § 327, p 1089
- Fires,**
 Destruction of employer's property by, contract of employment, § 36
 Independent contractors setting, inherent danger as respects liability for injuries, § 590, p 363
 Respondeat superior, liability of master with respect to fires started by servant, § 575, p 333
- Fireworks, independent contractors setting off, inherent danger as respects liability for injuries, § 590, p 362**
- Firing, fellow servants, power of in respect of as affecting relations, § 332, p 1101**
- First aid, injuries to servant, duty to furnish, § 162**
- Fish,**
 Fair Labor Standards Act, exemption of employees engaged in catching, etc., § 151(16)
- Fixed salary, overtime pay, payment of as satisfying requirement, § 151(26), p 708**
- Fixed term, employment for, payment of wages at end of, § 119**
- Flagmen, railroads, contributory negligence, precautions against danger, § 456, p 1292**
- Floors,**
 Assumption of risk, jury question, § 536, p 214
 Knowledge of danger, § 536, p 219
 Knowledge of defective or dangerous floors, § 390, p 1203
 Contributory negligence, inspection for latent defects or dangers, § 447, p 1271
 Drainage, place of work, statutory requirement, § 214, p 923, n. 70
 Negligence of master, jury question, § 534, p 182
 Openings, guarding to protect servants, § 234
 Respondeat superior, doctrine as applicable in respect of negligence in maintenance, § 575, p 331
- Flying particles, machines dangerous from, guarding, § 232, p 985**
- Flying switches, railroads,**
 Assumption of risk, § 378, p 1181
 Contributory negligence, § 453, p 1282
- Flywheels, assumption of risk, knowledge of danger, § 300, p 1208**
- Food, wages and other remuneration, furnishing as part of, § 90**
- Footboards, railroad locomotive tender, requirements as to, § 227, p 954, n 93**
- Foot stirrups, railroad locomotives, statutory requirements, § 227, p 953, n 80**
- Force, labor controversies, use of, § 28(2), p 114, n. 24, § 28(19), p 154**
- Foreclosure, wage lien, § 140, pp 613-618**
- Foreign commerce, unfair labor practices, jurisdiction of National Labor Relations Board, § 28(64); § 28(74), p 278, n 25**
- Foreign jurisdiction, existence or remedy for injuries to servants, presumptions, § 501, p 54**
- Foreign laws, wages, burden of proving laws governing contract, § 129, p 577**
- Foreign state, lien for labor performed in, enforcement, § 140, p 610**
- Foremen,**
 Competency and care required of, in performance of services, § 69, p 481, n 41
 Fellow servants, § 332, p 1102
 Dual-capacity doctrine, § 332, p 1107
 Railroads, § 332, p 1104
 Statutory provisions relating to injuries caused by negligence of, § 340
 Labor relations, responsibility of employer for acts of, § 28(14), pp 141-145
 Medical or surgical attention, power to bind master by statements as to benefits, § 163, p 816
 Methods of work, liability for injuries resulting from methods adopted, § 266
- Mines,**
 Liability for injury to servant as result of acts or omissions of, § 190
 Statutory provisions as absolving operator from duty to provide safe place to work, § 222, p 940
 National Labor Relations Act, application, § 28 (12)
 Railroads, fellow servants relations, § 332, p. 1105
 Statutory provisions, § 348
 Scaffold, etc., constructed under supervision of fellow servant rule, § 333, p 1119
 Unfair labor practices, § 28(44)
- Forfeitures Wages and other remunerations, post**
- Forgery, salary check stolen from employee, liability of employer, § 120, p 501**
- Forgetfulness of danger, contributory negligence, § 436**
- Forma pauperis, National Labor Relations Board, review of proceedings in, § 28(128)**
- Form, contracts of employment, § 6, pp. 64-71**
- Forty-hour week, Fair Labor Standards Act, overtime compensation for hours in excess of, § 151(26), p 700**
- Foundries,**
 Contributory negligence, customary methods, admissibility of evidence, § 519, p 112

INDEX TO MASTER AND SERVANT

- Foundries—Continued,**
Welding rooms for employees, validity of statute requiring, § 24
- Franchise, independent contractors, liability for injury caused by work done under, § 501, p. 368**
- Fraud,**
Bonus, withdrawal of offer, § 98, p. 529
Collective bargaining, certification of bargaining agent induced by, § 28(34)
Employment contract,
Obtaining money or property on strength of, criminal liability, § 80, p. 505
Rescission for, § 9, p. 82
Validity as affected, § 0, p. 67
Injuries to employee obtaining employment by means of, liability as affected, § 180, p. 872
Injuries to third persons, exoneration of servant as absolving master from liability, § 619, p. 422
Inventions or discoveries by employees, contracts relating to as vitiated by fraud of employer, § 73, p. 488
Labor contract statute,
Burden of proof as to in prosecution of employer for violation, § 80, p. 508
Sufficiency of evidence as to in prosecution of employer for violation, § 80, p. 509
Obtaining employment, liability for injuries as affected, § 180, p. 872
Relief and benefit departments or associations, election to accept benefits induced by, § 170, p. 839
Respondent superior, liability of master under doctrine of, § 575, p. 331
Wages and other remuneration,
Fraud of employee precluding recovery, § 105
Overpayment secured through, recovery back, § 120, p. 561
- Free speech,**
Balancing right as between employer and employee, judicial termination, § 28(133), p. 376, n. 21
National Labor Relations Act as affecting employer's right, § 28(55)
- Freight train,**
Contributory negligence, voluntarily riding on top of, § 446, p. 1268
Full crew statute, application, § 14, p. 95
- Frogs, railroad, negligence in leaving unblocked, § 229, p. 974**
- Full crew, statutory provisions, application, § 14, p. 95**
- Full time employment, duty to serve employer exclusively, § 70**
- Fumigation,**
Cargoes, independent contractors, § 3(9)
Independent contractors, inherent danger as respects liability for injuries, § 590, p. 362
- Furbearing animals, Fair Labor Standards Act, exemption of employees of those engaged in raising, § 151(17)**
- Future wages or compensation, discharge of employee as affecting right to recover, § 87**
- Gallows frames, assumption of risk, latent defects or dangers, § 392, p. 1220**
- Gangways,**
Contributory negligence, use of, jury questions, § 537, p. 230
Negligence in failing to furnish safe gangway, evidence, § 524, p. 129
- Garages, Fair Labor Standards Act, exemption from provision, § 151(14), p. 678**
- Garnishment, discharge of employee, pendency of proceeding as arresting running of penalty for failure to pay wages due, § 156, p. 765**
- Gas, Fair Labor Standards Act, exemption of employees of utilities furnishing, § 151(14), p. 678**
- Gas pipes, independent contractors laying, liability for acts or omissions, § 584, p. 356**
- Gas stations, independent contractors, lessee of, § 3(9)**
- Gasoline, independent contractor delivering, liability for damages from fire arising from negligence, § 590, p. 364**
- Gate men, railroads, contributory negligence, precautions against danger, § 456, p. 1292**
- Gates, latent defects or dangers, duty of employee to inspect for, § 381**
- Gearing,**
Assumption of risk, knowledge of danger, § 300, p. 1208
Negligence of master, covering or guarding, jury question, § 534, p. 187
- General demal,**
Injuries to servant, evidence admissible under, § 499, p. 48
Injuries to third persons, actions for, evidence admissible under, § 614, p. 391
Wrongful discharge, matters admissible under in action for, § 52, p. 453
- General issue, wages, evidence admissible under action to recover, § 128, p. 574**
- General managers, fellow servants, § 332, p. 1102**
- General verdict, injuries to servants, actions for, § 550**
- General welfare of employees, statutory provisions, § 14, p. 93**
- Gifts,**
Reinstated employee discharged as unfair labor practice, back pay awarded as affected by gifts received, § 28(119), p. 345
Unfair labor practices, evidence, § 28(97), p. 206
- Ginners, assumption of risk, ordinary risk, § 375**
- Goggles, railroad shop machinist, duty of furnishing with, § 226, p. 947, n. 46**
- Going to and from work,**
Fellow servants, liability of master for injuries, § 329
Safe place to work, rule requiring employer to furnish as applying, § 219, p. 932
Third persons, liability of master for injuries to under doctrine of respondent superior, § 570, p. 309
- Good faith,**
Collective bargaining, § 28(22)
Compliance with decree requiring, § 28(141)
Necessity of bargaining in, § 28(23)
Unfair labor practice by refusal to bargain in, evidence, § 28(101)
- Profit sharing agreements with employees, requirements as to, § 93**
- Termination of relation,**
Contract provision, § 32, p. 416

INDEX TO MASTER AND SERVANT

- Good faith—Continued,
Termination of relation—Continued,
Dissatisfaction of services, § 32, p 418
- Good will, wrongful discharge, damages as recoverable for injury to, § 58, p 460
- Government contracts, minimum wages, prevailing wage, § 153, p 754
- Government employees,
Fair Labor Standards Act, exemption from provisions, § 151(22)
- Fellow servants, doctrine as applicable to, § 322
- Inventions by,
License or shop right, § 73, p 493
Ownership, § 73, p 487
- Government seizure, collective bargaining, proceeding to determine bargaining representative after, § 28(30), p 176, n 79
- Grab irons and handholds. Railroads, *this index*
- Grades, fellow servants, distinctions in as affecting relation, § 332, pp 1098-1108
- Grain elevators, contributory negligence, customary methods of work, admissibility of evidence, § 519, p 112
- Grandstand, independent contractor erecting, inherent danger as respects liability for injuries to others, § 590, p 362
- Gratuities,
Bonus paid employees, as, § 98, p 520, n 89
Burden of proving defense of gratuitous service in action to recover for services, § 129, p. 578
- Gratuities. Wages and other remuneration, *post*
- Gravel plants,
Independent contractor, operator as, § 3(9)
Negligence of master, jury questions, § 534, p 185
- Greenhouse employees, Fair Labor Standards Act, exemption from provisions, § 151(17)
- Grievances. Collective bargaining, *ante*
- Grocery stores, Fair Labor Standards Act, exemption from provisions, § 151(14), p. 675
- Gross negligence,
Exemplary damages, injuries to servant, § 554
- Fellow servants,
Jury question, § 535, p 210
Liability of master for injuries caused by, § 325
- Group bargaining, employers as having right to bargain as group with employee organizations, § 28(20)
- Group Board of Adjustment, Railway Labor Act, notice of hearing before, § 28(87)
- Group insurance, employment contract requiring participation in plan, validity, § 6, p 68
- Group of employers bargaining with employee organization, § 28(20)
- Guaranty, wages and other remuneration, advances or drawing account, § 91
- Guard rails, railroads, negligence in leaving unblocked, § 229, p 974
- Guarding,
Dangerous occupations or places, *ante*
Dangerous or defective machinery or appliances, *ante*
- Guards,
Collective bargaining, bargaining unit as properly including, § 28(28), p. 174
- Guards—Continued,
Fair Labor Standards Act, coverage, § 151(9), p. 650
Independent contractor, guards furnished by, § 151(4), p 630
- Gunpowder, infants, respondent superior, liability of master under doctrine for selling to, § 575, p 333
- Guy wires, contributory negligence, inspection for latent defects or dangers, § 447, p 1271
- Habits,
Fellow servants, competency as affected, § 313
Injured employee, evidence as to, § 519, p 109
Servants causing injuries, evidence as to, § 516
- Habitual drunkards, fellow servants, competency, § 313
- Habitual negligence, discharge of employee on ground of, § 42, p. 431
- Hammers,
Assumption of risk,
Knowledge of danger, § 390, p 1206
Latent defects or dangers, § 392, p 1220
Simple tool doctrine, § 390, p 1209
Simple tool as respects liability of master to furnish safe tools and appliances, § 216, p. 925, n 97, § 235, p 990, n 78; § 390, p 1209
- Hand brakes, railroad cars, requirements of Federal Safety Appliance Act, § 228, p. 966
- Handcars,
Assumption of risk, § 378, p 1183
Jury question, § 536, p. 214
Duty to provide safe cars, § 228, p 959
Negligence of master, jury questions, § 534, p 178
- Handholds. Railroads, *post*
- Handicapped persons, Fair Labor Standards Act, application to, § 151(10)
Minimum wages, § 151(10)
- Handling, Fair Labor Standards Act, production of goods for commerce within coverage, § 151(9), p. 651
- Happening of accident to servant,
Presumption of negligence as arising from, § 501, p 55
Questions of law and fact, § 533, p 155
- Hardware stores, Fair Labor Standards Act, exemption from provisions, § 151(14), p 675
- Harmless error,
Labor relations boards, review of order, § 28(129), p 368
National Labor Relations Board, enforcement of order as precluded, § 28(129), p 367
- Harness, contributory negligence, inspection for latent defects or dangers, § 447, p. 1271
- Hatchets, assumption of risk, simple tool doctrine, § 390, p 1209
- Hatchways,
Contributory negligence in falling into, jury question, § 537, p. 234
Fellow servant rule, § 333, p. 1115
Guarding to protect servants from dangers, § 234
Negligence of master, jury question, § 534, p. 187
- Hazardous employments,
Compulsory employees under statute relating to safety of workmen, liability of master for injuries as result of acts or omissions, § 190

INDEX TO MASTER AND SERVANT

Hazardous employments—Continued,

Fellow servants,

Liability of master for injuries, § 334

Superior servant rule, § 340

Medical or surgical attention, duty of employer to furnish, § 162

Method of work to secure safety of employees, § 200

Minors employed in, liability of master for injury, § 194, p 802

Safe place to work, exception to rule requiring employer to furnish, § 219, p 930

Simple tool used in, duty of inspection, § 235, p 991, n 90

Third persons, injury to employee assisting in, liability of employer, § 189

Hazards, employer not to expose employees to, § 183, p. 878

Headlights, locomotives,

Assumption of risks, noncompliance with statute requiring, § 369, p 1171

Liability for injury to employees as result of failure to have, § 227, p 953, n 90

Heads of departments, fellow servants, § 332, p. 1102

Health of employees,

Constitutional provisions authorizing laws providing, § 14, p 93

Hours of labor, regulation for purpose of protecting, § 15, p 98

Justifiable acts of labor unions in connection with, § 28(19), p 152

Place of work, duty to furnish healthful and sanitary place, § 214, p 923

Violation of statutes intended to protect, liability of master, § 191

Hearing,

Collective bargaining, certification of bargaining representative, § 28(32)

Fair Labor Standards Act, report of industry committee, § 151(32), p 728

Labor Relations Board,

Powers in labor disputes, § 28(66)

Proceedings to enforce or review orders, § 28(133), pp 274 to 383

Minimum wages,

Determination of prevailing rate, public employees and employees on public works, § 153, p 751

Order fixing for women and minors, § 152, p 745

Settlement of labor disputes, §§ 28(102)–28(106); § 28(121), p. 347

Termination of relation, contract providing for, § 32, p 416

Hearsay,

Labor Relations Board, conclusiveness of findings based on, § 28(136), pp. 394, 400

Unfair labor practices, admissibility in proceedings to prevent, § 28(94)

Heavy objects, warning and instructing servant, dangers involved in handling, §§ 296, 303

Hidden dangers,

Assumption of risk, § 392, p. 1217

Knowledge of master as affecting liability for injuries to servant, § 246

Hidden dangers—Continued,

Warning and instructing servant, sufficiency of warning, § 290, p 1052, n. 47

Hidden defects,

Assumption of risk, § 392, p. 1217

Inspection to discover, railroad cars, § 236

Highways,

Brick wall abutting, independent contract for building, inherent danger as respects liability for injury, § 590, p 362

Crossings, railroads, signals on approaching, statutory requirements, § 264

Fair Labor Standards Act,

Application to employers engaged in construction, § 151(7), p 643

Road construction employees as within, § 151(9), p. 659

Independent contractors,

Liability for acts or omissions of, § 584, p. 356

Persons engaged in construction, § 3(9)

Third persons injured by obstruction, liability of master for negligence of servant, § 575, p. 338

Hired help, servant as, § 1, p 26

Hiring. Employment, generally, ante

Hiring servant to another, § 2, p 38

Hoboes, protection of employee from assault by, duty of employer, § 189

Hoists,

Assumption of risk,

Instructions relating to, § 549, p 256

Jury question, § 536, p 213

Knowledge of danger, § 300, p 1211

Care required of master furnishing and maintaining, § 220, p 936, § 222, p 941

Contributory negligence,

Inspection for latent defects or dangers, § 447, p 1271

Use of appliances, jury questions, § 537, p. 235

Weight and sufficiency of evidence, § 527

Fellow servants, negligence with regard to, jury question, § 535, p 209

Negligence of master,

Evidence, § 524, p 129

Jury question, § 534, pp 175, 183

Hoistways,

Guarding to protect servants, § 233

Safety devices, duty of master in respect of, § 221

Holding over,

Employment contract, continuance in employment, § 12

Wages, burden of proof in action to recover, § 129, p 577

Holidays,

Controversy over working on as labor dispute, § 28(16)

Overtime work on, compensation, § 97

Home work,

Fair Labor Standards Act, application to, § 151(4), p 632

Minimum wages, wage order prohibiting, § 151(32), p. 731

INDEX TO MASTER AND SERVANT

Home work—Continued,

Powers of Industrial Commission with regard to permitting, validity of statute relating to, §§ 24, 110, n 74

Honesty, performance of services, § 67

Wages and other remuneration, right as dependent on, § 81

Hooks, assumption of risk,

Knowledge of danger, § 390, p 1206

Simple tool doctrine, § 390, p. 1209

Hop pickers, measure of compensation, statutory provisions, § 158

Houseplay, fellow servants, liability of master for injuries occasioned by, § 325

Railroad employees, § 355, p 1146

Horses,

Injuries to servant,

Negligence of master, jury question, § 534, p 175

Safe instrumentalities, rule requiring master to furnish, § 218

Injuries to third persons, liability of master for negligence of servant with respect to, § 575, p. 336

Horticultural commodities, Fair Labor Standards Act, exemption of employees engaged in processing, § 151(10), p 686

Hospitalization,

See, also, Medical or Surgical Attention, generally, post

Contract to furnish, damages for breach, § 163, p 816

Municipal corporations, duty to provide for injured employee, § 162, n 30

Negligence in equipping hospital, burden of proof, § 501, p 60

Negligence of physicians, etc., serving in hospital, liability of employer, § 165, p 822

Transportation in accordance with contract, due diligence, § 163, p 817

Tuberculosis, exception of employee suffering from, § 163, p 816, n 48

Hospitals, labor relations,

Employees as within statute dealing with, § 28(12)

Statutes dealing with as applying, § 28(6, 11)

Hostility to union, unfair labor practice, expression by employer as, § 28(55)

Hotels, Fair Labor Standards Act, exemption from provision, § 151(14), p 678

Hot foot, patron injured, liability of master under doctrine of respondeat superior, § 574, p 327, n 7

Hours of labor,

Act of God, excuse for violation of Hours of Service Act by carriers, § 22

Arbitration board, ruling of as conclusive, § 28(121), p 349, n 62

Carriers, ante

Collective bargaining, § 28(20, 22)

Compelling employer to enter into written agreement, § 28(141)

Consecutive hours of service, train order operatives, § 20

Emergency,

Excuse for violation of Hours of Service Act by carriers, § 22

Public employees performing work in, § 153, p. 750, n. 51

Hours of labor—Continued,

Employment contract, conformity to statutes, § 6, p. 68

Fair Labor Standards Act, § 15, p 100; § 151(1), p 619

Federal Hours of Service Act, ante

Infants,

Liability of master for injuries to minors employed in violation of law regulating,

§ 194, p 894

Validity of statute regulating, § 16

Injuries to servants after, liability of master, § 180, p 870

Justifiable acts of labor unions in connection with, § 28(19), p 152

Maximum allowed by statute, compensation for hours in excess, § 155

Number, statutory provisions, § 155

Organizing labor unions for purpose of fixing, § 28(15), p 146

Overtime, generally,

Fair Labor Standards Act, ante

Overtime pay, generally, post

Penalties, violation of Federal Hours of Service Act, § 23

Railroad employees, post

Report of excessive hours, carriers, § 21

Right of employers to fix, § 63

Soliciting membership in labor union during working hours,

Permission of employer, § 28(25), p 166

Power of employer to enforce rule prohibiting, § 28(57)

Statutory provisions, §§ 15-17, pp 98-104

Compensation for hours in excess of maximum allowed, § 155

Contributory negligence, defense, § 425, p. 1248

Federal Hours of Service Act, generally, ante

Number of hours of service, § 155

Public employees, § 17

Violation by interstate carrier, liability for injury to employee, § 264

Women and children, § 16

Strikes of members of union to compel reduction, § 28(19), p. 153

Train order operatives, interruption of continuity of service, § 20

Women, validity of statute regulating, § 16

Wrecking train, Hours of Service Act as applying to crew, § 19

Yardmaster, Hours of Labor Act as applying to, § 19

Humanitarian doctrine. Last Clear Chance, generally, post

Humiliation, wrongful discharge, damages as recoverable for, § 58, p 469, n 10

Ice, railroads,

Care required to prevent injury to employees, § 220, p. 973

Liability for injuries to employees resulting from, § 226, p. 946, n 32

Ice production employees, Fair Labor Standards Act, application to, § 151(9), p 656

Illegal agreement, collective bargaining, insistence on as indication of lack of good faith, § 28(23)

Illegal purpose, strike for, § 28(19), p. 153

INDEX TO MASTER AND SERVANT

Illness,

- Contributory negligence, injury resulting from, § 438
- Hospitalization, generally, ante
- Medical or surgical attention to employees, duty to provide, § 162
- Performance of services, excuse for nonperformance, § 62
- Relief and benefit departments or associations, generally, post
- Wages and other remuneration, § 85
 - Deductions, § 104
- Wrongful discharge, reduction of damages by other employment as affected, § 50, p 474
- Immorality, discharge of employee because of, § 42, p 429, n 28
- Impersonation, injuries to employee obtaining contract through, liability, § 180, p 873
- Implied acceptance, contract of employment, § 6, p. 66, n 8
- Implied contract,
 - Assumption or risk, doctrine as based on, § 357, p 1152
 - Employment contract, § 7, p. 73
 - Modification, § 9, p 80
 - Payment for services rendered on, § 119
 - Relation arising out of, § 1, p 24
 - Renewal, § 10
- Imprisonment, Fair Labor Standards Act, violation of, § 100(13), p 814
- Improbable dangers,
 - Knowledge of master as affecting liability for injuries to servant, § 246
 - Warning servant of, § 298
- Improbable injuries to servants, liability of master, § 188
 - Instructions to jury as to, § 545
 - Questions of law and fact, § 533, p 156
- Improvements, independent contractors, liability for acts or omissions of, § 584, p 350
- Imputed knowledge,
 - Fellow servants, incompetency, § 317
 - Warning and instructing servant, dangers and hazards of employment, § 288
- Incentive bonus, overtime pay, regular rate of pay as including for purpose of, § 151(26), p. 705
- Incidental interruptions in work, injuries to servant, relationship for purpose of liability as affected, § 180, p. 870
- Incidental work, extra compensation as recoverable for, § 97
- Incompetency
 - See also Competency, generally, ante
 - Discharge of employee on ground of, § 42, p. 431
 - Waiver of right, § 43
 - Evidence in action for injury to servant, § 516
 - Fellow servants, competency generally. Fellow Servants, ante
- Increase, Wages and other remuneration, post
- Incrimination, Fair Labor Standards Act, production of books tending to incriminate employer, § 151 (31), p 727
- Indefinite hiring, employment contract, presumption of hiring at will, § 8, p. 75

Indefinite term of employment,

- Termination of employment for, § 31, pp 412-415
- Wages, recovery by employee quitting or discharged, § 89
- Wrongful discharge under contract of employment for, damages, § 58, p 467
- Indemnity insurance, placing before jury in action for servant's injury fact that master carries, § 528
- Independent contractors, §§ 580-610, pp 352-383
 - Abandonment of work, liability for negligence, § 595
 - Abatement of nuisance, liability for failure, § 590
 - Acceptance of work, liability for injuries arising from defect, § 595
 - Appliances for work, duty of furnishing employees with safe appliance, §§ 604, 607
 - Assumption of control of work by employer,
 - Liability for injuries to servants of contractor, § 602
 - Relationship as affected, § 3(3), p. 55
 - Assumption of risk, injured servants of, § 601
 - Awnings, inherent danger in erection as respects liability for injuries resulting, § 590, p 362
 - Binding contract, relationship as presupposing, § 580
 - Building construction, inherent danger as respects liability for injuries to others, § 590, p. 363
 - Burden of proof, actions for injuries to third person, § 615, p 396
 - Charters, liability for injury as result of work done under, § 591, p 368
 - Competency, liability for injuries as result of employment of incompetent contractor, § 592
 - Completion of work, liability for injuries arising from defects, § 595
 - Concurrent negligence, liability for injuries caused by, § 586, 597
 - Control of premises, right of, as test of relationship, § 3(2), p 49
 - Control of servants of contractor, test of relationship, § 3(6)
 - Control of work, right as determinative of relationship, § 3(3), pp 49-55
 - Controversy involving as labor dispute, § 28(16)
 - Dangerous work requiring precautions, liability for injuries resulting, § 590, pp. 359-365; § 603
 - Defective plan or specification, liability for injury caused by, § 580
 - Defined, § 3(1), p 41
 - Delegation of duty, liability for injury in respect of non-delegable duty, § 591, pp 365-368
 - Deviations, reservation of right to make as affecting relation, § 3(4)
 - Direction or control, § 3(1), p 42
 - Relationship, right to control as determinative, § 3(3), pp 49-55
 - Reservation of right of supervision as destroying relation, § 3(4)
 - Servants of contractor as just, § 3(6)
 - Test of relationship, § 3(2), p. 46
 - Dual capacity, § 583

INDEX TO MASTER AND SERVANT

Independent contractors—Continued,

- Dynamiting, inherent danger as respects liability for injuries resulting, § 500, p 363
- Employee,
 - Distinguished, § 3(1), p 44
 - Status as within statute dealing with labor relations, § 28(11)
- Employer within statute dealing with labor relations, § 28(10)
- Estoppel, denial of master and servant relationship, § 580
- Existence of relationship, jury question, actions for injuries to third persons, § 617, p 415
- Fair Labor Standards Act, application to, § 151 (4), pp 630, 632
- Fellow servants, § 330
- Fires, inherent danger in setting as respects liability for injuries, § 500, p 363
- Fireworks, inherent danger in setting off as respects liability for injuries resulting, § 500, p 362
- Franchise, liability for injury as result of work done under, § 501, p 368
- Fumigation by gas, inherent danger as respects liability for injuries, § 500, p 362
- Gasoline, liability for damages for fires arising from negligence in delivering, § 500, p 363
- General contractors, liability for personal injuries sustained by, § 608
- Guarding of dangerous machinery, statute requiring as covering, § 232, p 983, n 76
- Identity of interest, liability for torts as affected, § 598
- Incompetent contractor, liability for injury as result of employment of, § 592
- Inherently dangerous work, liability for injuries resulting, § 590, p 361
- Injuries to, liability of,
 - Contractee for, § 607
 - Employer, jury question, § 617, p 417
 - General contractor, § 608
- Injuries to servants,
 - Admissibility of evidence as to in actions for, § 504
 - Burden of proving defense of, § 501, p 68
 - Liability of contractee, §§ 600-606, pp 371-379
 - Defective or unsafe appliance for work furnished by, § 604
 - Materials furnished by, § 605
 - Negligence of contractee or his servants, § 601
 - Retention or assumption of control of work, § 602
 - Safety of place to work, § 603
 - Liability of contractors for injuries by employee of another contractor or subcontractor, § 610
 - Liability of employer, § 175
 - Jury question, § 617, p 417
 - Questions for jury, § 530, § 617, p 417
- Injuries to third persons,
 - Burden of proof in action for, § 615, p 396
 - Declaration in action against employer for, § 614, p 390
 - Injury necessarily resulting from work, liability of employer for, § 587

Independent contractors—Continued,

- Injuries to third persons—Continued,
 - Jury question as to relationship at time of, § 617, p 414
 - Negligence of contractee, § 586
 - Sufficiency of evidence as to relationship, § 615, p 404
- Insecticides, inherent danger in depositing as respects liability for injury, § 590, p 362
- Inspection, reservation of right of as affecting relation, § 3(4)
- Instructions to jury, actions for injuries resulting from acts of, § 618, pp 418-421
- Interference with work, liability for injuries as affected, § 593
- Invitees, premises dangerous to, liability for injuries, § 590, p 361
- Joint wrongful act, liability for injuries caused by, § 597
- Jury questions, actions for injuries to servant, § 530
- Latent dangers, duty of warning employees of, § 606
- Liability for acts or omissions of, § 584, pp 353-356
 - Abandonment of work, § 595
 - Acceptance of work, § 595
 - Assumption of control or direction of method of work, § 593
 - Completion of work, § 595
 - Concurrent negligence, §§ 586, 597
 - Defective plans or specifications causing injury, § 589
 - Employment of incompetent contractor, § 592
 - Exceptions to rule, §§ 585-598, pp 357-371
 - Findings and verdict in action for, § 619, pp 421-424
 - Incompetent contractor, § 592
 - Injury necessarily resulting from work, § 587
 - Instructions to jury, § 618, pp 418-421
 - Interference with work, § 593
 - Joint wrongful act, § 597
 - Judgment in action for, § 619, pp 421-424
 - Jury question, § 617, p 415
 - Nondelegable duties of employer, § 591, pp 365-368
 - Nuisance, failure to remedy, § 596
 - Ratification of act, § 594
 - Removal of property from premises after performance, § 595
 - Stipulations as exempting employer, § 599
 - Subcontractors, § 600
 - Subterfuge, employment of, § 598
 - Unlawful work, § 588
 - Work dangerous unless precautions observed, § 590, pp 359-365
- Liability of contractee for injuries to contractor, § 607
- Liability of contractee for injuries to servants of contractor, §§ 600-606, pp 371-379
 - Assumption of control of work, § 602
 - Furnishing defective or unsafe appliances, § 604
 - Latent dangers, § 606
 - Materials furnished by contractee, § 605

INDEX TO MASTER AND SERVANT

Independent contractors—Continued,

- Liability of contractee for injuries to servants of contractor—Continued,
 - Negligence of contractee or his servant, § 601
 - Potential dangers, § 606
 - Retention of control of work, § 602
 - Safety of place to work, § 603
- License, liability for injury as result of work done under, § 501, p. 368
- Materials and appliances, furnishing as indicative of relationship, § 3(7)
- Materials furnished by contractee, liability for injuries to servants of contractor as result of negligence in respect of, § 605
- Mines, duty of keeping in reasonably safe condition for employees of, § 603
- Minimum wages by independent contractors performing public works, prevailing rate, § 153, p. 750
- Mode of doing work, right to control as element, § 3(3), p. 51
- Mode of payment as element to be considered in determining relationship, § 3(8)
- Negligence, liability for, § 584, p. 353
- Negligence of contractee, liability for injuries to third persons resulting, § 586
- Nominal employment as, liability of master for torts as affected, § 598
- Nuisance, liability for creation of, § 587
- Failure to remedy, § 506
- Obstructions, liability for injuries caused by, § 590, p. 364
- Partial reservation of control over work as affecting relation, § 3(4), p. 55, n. 46
- Particular persons or entities constituting, § 3(9)
- Payment, mode of as element to be considered in determining relationship, § 3(8)
- Permanent employment, contract for, § 8, p. 78
- Personal injuries suffered by, liability of contractee as master, § 175
- Plans or specifications, liability for injury caused by defective plan, § 589
- Poisonous dust or spray, inherent danger in depositing on field as respects liability for injuries, § 590, p. 362
- Potential dangers, duty of giving warning to employees of, § 606
- Presumptions, relationship, § 615, p. 391
- Railroads, liability for negligence of, § 584, p. 355
- Ratification of acts, liability for negligent or wrongful acts, § 594
- Relationship as existing as to and their employees, §§ 3(1) to 3(9), pp. 41-62
- Removal of property from premises after performance of contract, liability for negligence, § 595
- Respondeat superior, doctrine as applicable to, § 584, p. 353
- Retention of control of work by employer, liability for injuries to servants of contractor, § 602
- Round sum payment for work, § 3(8)
- Safe place to work,
 - Contractee's duty to furnish, § 607
 - Liability as result of failure to provide, § 603

Independent contractors—Continued,

- Safe place to work—Continued,
 - Employee of another independent contractor, duty to provide, § 610
 - Services rendered by, § 3(1), p. 41
 - State or agencies of, employees of as exempt from statute regulating labor relations, § 28 (7)
 - Statutory provisions, liability for negligence, § 584, p. 355
 - Stipulations as exempting employer for liability for negligence, § 599
 - Subcontractors, § 582
 - Subterfuge, liability for wrongful acts of servant employed under, § 598
 - Supervision,
 - Liability for negligence as affected, § 593
 - Reservation of right as affecting relation, § 3(4)
 - Termination of relationship, power to terminate as element, § 3(5)
 - Tests of relationship, § 3(2), pp. 45-49, § 581
 - Time for doing work, reservation of right to fix as affecting relation, § 3(4)
 - Trespass, liability where work involves commission of, § 587
 - Unlawful work, liability for injuries caused by, § 588
 - Warning and instructing servants,
 - Employees of other subcontractor, § 610
 - Latent dangers, § 606
 - Window washer furnishing own tools, § 3(7), p. 58, n. 73
- ### Independent unions,
- Collective bargaining, representation for members, § 28(26), p. 167
 - National Labor Relations Act, protection of rights, § 28(15), p. 147
 - Recognition by employer as sustaining finding of interference, domination and support of labor organization, § 28(98), p. 300
- ### Indictment or information,
- Enticing servant to leave employment, § 635
 - Fair Labor Standards Act, prosecution for violation, § 160(13), p. 811
 - Labor contract statute, violation of, § 80, p. 507
 - Wages, prosecution for violation of statute, § 160 (13), p. 811
- ### Indignity, wrongful discharge, damages, § 58, p. 469, n. 10
- ### Individual grievances, arbitration, collective bargaining contracts, § 28(72)
- ### Industrial boards or commissions, rules and regulations, § 14, p. 95
- ### Industrial plants, guarding machinery, statute requiring as limited to, § 232, p. 982
- ### Industry, statutory provisions regulating labor relations as limited to relations in, § 28(5)
- ### Industry committees, Fair Labor Standards Act, appointment and duties, § 151(32), p. 727
- ### Inexperienced servants,
- Assumption of risk, ante
 - Care required, § 185
 - Evidence in action for injuries, § 507
 - Instruction in actions for injuries to servants, § 546, p. 249
 - Contributory negligence, ante

INDEX TO MASTER AND SERVANT

Inexperienced servants—Continued,

Jury question as to master's negligence, § 534, p 167

Liability for injuries in general, § 182

Knowledge of danger,

Burden of proof, § 501, p 80

Evidence in action for injuries to, § 507

Methods of work, §§ 260, 282

Warning and instructing servant, post

Infants,

Assumption of risk, ante

Care required,

Evidence in action for injuries, § 507

Instructions in action for injuries to servant, § 546, p 249

Child labor laws,

Construction, § 14, p 90, § 194, p 892

Double damages, injuries to servants employed in violation of, § 554

Employment certificates, defense of reliance on in action for injuries to minor employed in violation of statute, § 194, p 896

Fair Labor Standards Act, § 14, p 97

Hours of labor, § 16

Collective bargaining, eligibility to vote on bargaining unit, § 28(33), p 180

Concealment of age, defense in action for injuries to minor employed in violation of statute, § 194, p 896

Contributory negligence,

Instructions to jury on, § 549, p 261

Presumptions, § 501, p 65

Dangerous occupation or place,

Employment in as negligence, § 185

Liability of master for injuries to minors employed in, § 194, p 892

Pleading in action for injuries, § 490, p 20

Employment in violation of statute, liability for injuries, § 194, pp 892-897, § 508

Enticing to leave employment, criminal liability, § 634

Evidence of violation of statute relating to employment in action for injuries, § 508

Explosives, respondeat superior, liability of master under doctrine for selling to, § 575, p 333

Fellow servants,

Competency, § 313

Veteran as applicable to, § 322

Gunpowder, respondeat superior, liability of master under doctrine for selling to, § 575, p 333

Hours of labor, validity of statute regulating, § 16

Invitees, liability of master for injuries caused by negligence of servant, § 575, p 333

Knowledge of danger,

Burden of proof, § 501, p 80

Evidence in action for injuries to youthful servant, § 507

Labor contract law, criminal liability under, § 80, p 506

Liability of master in case of personal injuries, § 182

Methods of work, § 260

Duty toward, § 282

Infants—Continued,

Minimum wages, § 152, pp 741-746

Burden of proof in actions involving, § 160 (8), p 789, n 9

Misrepresentation of age in securing employment,

Care required in protecting from injury as affected, § 185

Defense in action for injuries to minor employed in violation of statute, § 194, p 896

Mitigation of damages, injuries received by, § 554

Negligence of master in employing, jury question, § 534, p 167

Oppressive child labor, shipment in interstate commerce of goods produced by use of, § 154

Protection of minor employees from injuries, care required of master, § 185

Union member, validity of authorization of union to bargain for, § 28(27)

Volunteer, liability of master for injuries, § 177

Wages, criminal liability for failure to pay under contract providing for, § 154, p. 756, n. 17

Warning and instructing servant, generally, post

Inferences, National Labor Relations Board, conclusiveness of findings based on, § 28(136) p 389

Infringement of patent, invention by employees, suits for, § 73, p 495

Ingress and egress,

Employees forcibly preventing, § 28(18)

Forcible prevention by picketing, statutory regulations, § 28(2), p 120

Safe place to work, duty of employer to furnish as including means of, § 219, p 931

Shipping, duty of furnishing safe place to work as extending to means of, § 224

Inherent danger, independent contractors, liability for injuries, § 590, p 361

Injunction,

Labor relations board, cease and desist order of board as when sustained by court, § 28(140)

Performance of services, compelling by, § 68

Trade secrets, preventing threatened or continued disclosure, § 72, p 484

Unfair labor practices, power of National Labor Relations Board to restrain, § 28(111), p 324

Injuries to servants in general, §§ 171-554

Inquisitorial powers, Labor Relations Boards or Commissions, § 28(65)

Insanity,

Employment contract terminated by insanity of, Employee, § 38

Master, § 37

Injuries to third persons, liability of master under doctrine of respondeat superior, § 570, p. 306

Insecticides, independent contractors, inherent danger in depositing as respects liability for injuries, § 590, p 362

Insolence, discharge of employee because of, § 42, p. 430

Insolvency, employment contract as terminated by insolvency of master, § 35

INDEX TO MASTER AND SERVANT

Inspection,

- Appliances. Tools, machinery and appliances, post
- Assumption of risk incident to, § 374
- Blasting, duty of employee to inspect after, § 235, p 990
- Boilers Federal Boiler Inspection Act, ante
- Contributory negligence, disobedience of rule or order requiring, § 459, p 1301
- Evidence in action for injuries to servants, § 512, p 98
- Fellow servants,
 - Liability of master for negligence, § 333, p 1119
 - Negligence in respect of, jury question, § 535, pp 208, 210
- Independent contractor-relationship as affected by reservation of right of, § 3(4)
- Instructions to jury in actions for injuries to servants, § 546, p 247
- Jury question in action for injury to servant, § 534, p 187
- Machinery and appliances. Tools, machinery and appliances, post
- Mines, statutory requirements, § 235, p. 993
- Place of work, post
- Railroad cars,
 - Adequacy of test, § 239
 - Hidden defects, § 236
- Reservation of right of as determinative of relationship, § 2, p 37
- Simple tools and appliances, duty of employer, § 235, p 990
 - Purchased from reputable manufacturer, § 237
- Stevedores, duty of, § 236
- Third persons, equipment furnished by, duty of employer, § 236

Inspectors,

- Collective bargaining unit, § 28(28), p 174, n 60
- National Labor Relations Act, employees within, 28(12), p 139, n 62

Instructing servant Warning and instructing servant, generally, post

Instructions to jury,

- Enticing servant to leave employment, actions for damages, § 627
- Federal Employers' Liability Act, request as essential, § 538, p 238 n 23
- Injuries to servants, §§ 538-550, pp 237-264
 - Accidental injury, § 545
 - Assumption as to facts, § 538, p 239
 - Assumption of risk, § 549, pp 253-257
 - Burden of proof, § 540
 - Cause of injury, § 544
 - Certainty, § 538, p 237
 - Concurrent negligence with master and fellow servants, § 548
 - Conflict of law, § 541
 - Conformity to pleadings in evidence, § 539
 - Contracts affecting liability, § 547
 - Contributory negligence, § 549, pp 257-262
 - Distinction between assumption of risk and contributory negligence, § 549, p. 253
 - Evidence supporting, § 538, p 239
 - Improbable injuries, § 545

Instructions to jury—Continued,

Injuries to servants—Continued,

- Invading province of jury, § 538, p. 239
 - Assumption of risk, § 549, p 255
 - Contributory negligence, § 549, p 258
 - Negligence of master, § 546, p 245
- Law governing, § 541
- Negligence of fellow servant, § 548
- Negligence of master, § 546, pp 245-252
- Pleadings supporting, contributory negligence, § 549, p 258
- Presumptions, § 540
- Relation of parties, § 542
- Request, § 538, p 238
- Responsiveness of findings to, § 550
- Restrictions on right of recovery, § 546, p. 251
 - Scope of employment, § 543
 - Statutory liability, § 546, p 251
 - Submission of issues, § 538, p 239
 - Theory of case, § 539
 - Various hypotheses on negligence, § 546, p 251
- Injuries to third persons, actions for, § 618, pp. 418-421
- Interference with relation by third persons, prosecutions for, § 637
- Inventions by employee, actions for compensation for use of, § 73, p 497, n 4
- Labor contract statutes, prosecutions of employees for violation, § 80, p 511
- Malicious procurement of discharge, actions for, § 631
- Wages, actions to recover, § 132
 - Statutory provision, § 160(9)
- Wrongful discharge, actions for, § 55
- Instrumentalities of work. Tools, machinery and appliances, generally, post
- Insubordination,
 - Discharge of employee on ground of, § 42, p. 432
 - Jury question, § 54, p 462
 - Unfair labor practice, discharge of employees because of, § 28(49), p 225
- Insufficient force for work. Number of employees, post
- Insurance,
 - Fair Labor Standards Act, application to employers dealing in, § 151(7), p 642
 - Insurable interest, beneficiary in death benefit certificate issued employee by relief or benefit association, § 160, p 832
 - Labor relations statutes applying to insurance companies, § 28(5), § 28(9), p 134
 - Medical services, contract by employer to furnish as having characteristics of, § 163, p 817
 - Profit sharing wage contract, deduction for, § 112, p 551
- Insurance agents,
 - Independent contractors, § 3(9)
 - Labor relations statutes as including, § 28(11)
- Intemperance, discharge of employee on ground of, § 42, p 433
- Intent,
 - Discharge of employee, § 41
 - Employment contracts, construction, § 7, p 71, § 8, p 75

INDEX TO MASTER AND SERVANT

Intent—Continued,

- Enticing servant to leave employment, § 625, p 430
- Injuries to third persons, liability of master under doctrine of respondeat superior, § 570, p 309, § 572
- Interference with relation by third persons, § 624
- Interchangeable railroad tracks, mere use as negligence, § 261, p. 1016
- Interest,
 - Fair Labor Standards Act, liquidated damages, actions for, § 160(12)
 - Minimum wages, actions for, § 160(12)
 - Overtime pay, actions for, § 160(12)
 - Profit sharing wage contract, deductions for, § 112, p 551
 - Profits belonging to employee as compensation, § 112, p 548
 - Relief and benefit departments or associations, unpaid pension installments, § 169, p 837
 - Wages and other remuneration, post
 - Wrongful discharge, damages as including allowance for, § 58, p. 470
- Interference with employees, unfair labor practices, evidence as to, § 28(97), pp 292-296
- Interference with relation by third persons, §§ 624-630, pp 427-443
 - Actions for, §§ 624, 631
 - Bribing servant, criminal liability, § 639
 - Burden of proof, actions for, § 636
 - Civil liability, §§ 624-632, pp 427-439
 - Coercion to prevent servant continuing in employment,
 - Civil liability, § 629
 - Criminal liability, § 638
 - Criminal liability, §§ 633-639, pp 439-443
 - Damages, liability of wrongdoer to action for, § 624
 - Enticing servant to leave employment, generally, ante
 - Evidence, actions for, §§ 631, 636
 - Exemplary damages, malicious procurement of discharge, § 632
 - Formation of employment contract, preventing, § 624
 - Instructions to jury, prosecution for, § 637
 - Intent, § 624
 - Intimidation to prevent servant continuing in employ,
 - Civil liability, § 629
 - Criminal liability, § 638
 - Justification, absence of, § 624
 - Knowledge of relation as essential to create liability, § 626
 - Malicious procurement of discharge, §§ 630-632, pp 434-439
 - Limitation of actions for, § 631
 - Motive, § 630, p 436
 - Pleading in actions for, § 631
 - Questions of law and fact, § 631
 - Questions of law and fact,
 - Prosecutions for, § 637
 - Secret information, bribing servant to give, criminal liability, § 639
 - Statutory provisions, § 626
 - Trade unions maliciously procuring, § 630, p. 436
 - Trial, prosecution for, § 637

Interference with relation by third persons—Continued,

- Unlawful means, § 624
- Violence to prevent servant continuing employment, civil liability, § 620
- Interlocking devices for elevator gates, evidence of ordinance requiring in action for injuries, § 509, p 90, n 94
- Interlocutory orders, labor relations board, review, § 28(123)
- Intermittent work, wages, recovery in accordance with contract, § 110, p 544
- Interpleader, relief and benefit departments or associations, actions for benefit, § 169, p 836
- Interrogatories, National Labor Relations Board, review of order or award by court, § 28(122), p 353
- Intersessional labor disputes, administrative proceedings, proper remedy for settlement, § 28(69)
- Interstate commerce,
 - Avoidance of interruption, Railway Labor Act, § 28(2), p 117
 - Books and records for employers engaged in, validity of statutory requirement, § 151(2)
 - Child labor, statute prohibiting shipment of goods produced by use of, § 154
 - Fair Labor Standards Act, generally, ante
 - Federal Employers' Liability Act,
 - Application to railroad engaged in, § 228, p 965
 - Evidence of employment in, § 520
 - Federal legislation regulating relation, § 14, p 96
 - Hours of labor, § 15, p 100; § 151, p 619
 - Labor disputes involving,
 - Administrative proceedings, § 28(69); § 28(71), p 254
 - Jurisdiction of National Labor Relations Board, § 28(74), p 258
 - Validity of state statutory provisions regulating labor relations, § 28(3), pp 120, 123
 - Lockouts, jurisdiction of National Labor Relations Board, § 28(74), p 259
 - Motor transportation, Railway Labor Act as applying, § 28(5)
 - National Labor Relations Act, confinement and application to disputes interfering with, § 28(9), pp 128-134
 - Police power, state statutes regulating labor relations involving in exercise of, § 28(3), p 123
 - Presumption servant injured while engaged in, § 501, p 53
 - Strikes,
 - Jurisdiction of National Labor Relations Board, § 28(74), p 279
 - National Labor Relations Act, § 28(2), p 115
 - Unfair labor practices,
 - Jurisdiction of National Labor Relations Board, § 28(74), p 258, n 25
 - Powers of National Labor Relations Board, § 28(64)
- Interstate Commerce Commission,
 - Appliances on railroad cars, compliance with regulation, § 228, p 966
 - Federal Boiler Inspection Act, rules adopted as becoming part of Act, § 227, p 958

INDEX TO MASTER AND SERVANT

Interstate Commerce Commission—Continued,

Hand brakes on railroad cars, compliance with orders as compliance with statutory requirements, § 228, p 968

Interurban railways, Railway Labor Act as applying to labor relations, § 28(5)

Intervening agency as sole cause of injury to servant, recovery as precluded, § 522, p 118

Intervening co-operative cause as affecting liability of master for negligence, § 187

Intervention,

Fair Labor Standards Act, action for wages and penalties, § 160(6), p 782

Labor disputes, proceedings for settlement, § 28 (86)

Intimidation,

Labor controversies, use of, § 28(2), p 114, n 24

Labor unions, resort to, § 28(19), p 154

Preventing continuing employment, §§ 629, 638

Unfair labor practice by employer, § 28(45), p 200

Evidence, § 28(97), p 294

Intoxicating liquors,

Discharge for use of, contract between railway and employees authorizing, § 28(41), p 201, n. 81

Fellow servants, excessive use as rendering incompetent, § 313

Intoxication,

Discharge of employee on ground of, § 42, p 433

Injuries to servant,

Contributory negligence, §§ 438, 440

Duty to protect servant from dangers arising from condition, § 183, p 880

Evidence of intoxication, § 516, § 615, p 400

Injuries to third persons, liability of master under doctrine of respondeat superior, § 570, p 306

Reinstatement of employee habitually intoxicated after discharge as part of unfair labor practice, § 28(119), p 342

Intrastate commerce, presumptions in action for injuries to servants, § 501, p. 53

Invalid contract, collective bargaining, § 28(41), p 197

Inventions, employee making in course of employment, ownership, § 73, pp 486-490

Investigations,

Fair Labor Standards Act, § 151(31), pp 723-727

Industry committee, § 151(32), p 728

Labor Relations Board, mandatory duty to institute on request, § 28(83)

Minimum wages, prevailing wage, government contract, § 153, p 755

Invitees,

Independent contractors, premises dangerous to, liability for injuries, § 590, p 361

Respondeat superior, liability for injury under doctrine of, § 575, p 334

Iron rods, assumption of risk, simple tool doctrine, § 390, p 1200

Issues, proof and variance,

Employment contracts, actions for breach, § 11, p. 87

Issues, proof and variance—Continued,

Enticing servant to leave employment,

Actions for damages, § 627

Prosecution for, § 635

Fair Labor Standards Act, actions under, § 160(7), p 788

Federal Employers' Liability Act, actions under, § 500

Hours of labor, action to recover penalty for violation of law, § 23

Injuries to servants, action for, §§ 494-500, pp 43-52

Amendment of pleadings to conform to, § 496

Matters to be proved, § 498

Injuries to third persons, actions for, § 614, p 390

Labor contract statute, prosecution of employees for violation, § 80, p 508

Malicious procurement of discharge of employee, actions for, § 631

National Labor Relations Board, order limited to disposition of, § 28(111), p 327

Notice of injury to servant, condition precedent to action, § 485

Relief and benefit departments or associations, action for benefits, § 169, p 835

Settlement of labor disputes, proceedings for, § 28(91)

Wages,

Actions to recover, § 128, p 374, § 160(7), p 783, n 45

Criminal prosecution for violation of statute regulating, § 160(13), p 812

Wrongful discharge, actions for, § 52, p 452

Jacks,

Assumption of risk, knowledge of danger, § 390, p 1206

Contributory negligence, inspection for latent defects or dangers, § 447, p 1271

Negligence of master, injuries to servant, jury question, § 534, p. 183

Simple tool, status as, duty of employer to inspect, § 235, p 990, n 78

Jerks, railroad trains, liability for injuries to trainman caused by, § 261, p 1018

Job, independent contractors, payment by as creating relation, § 3(8)

Joinder of counts, wrongful discharge, petition in action for, § 52, p 448

Joinder of parties,

Fair Labor Standards Act, actions for wages and penalties, § 160(6), p 781

Injuries to servants, action for, § 488

Labor relations boards, enforcement of orders, § 28(126)

Joint and several liability, injuries to servants, concurrent negligence of employer and others, § 195

Joint defendants, instructions respecting liability for injuries to servants, § 542

Joint employers,

Fellow servants, liability for wrongful acts, § 323

Injuries to third persons, liability of master under doctrine of respondeat superior, § 567

Joint enterprise, interstate commerce, National Labor Relations Act as applying, § 28(9), p 132

INDEX TO MASTER AND SERVANT

- Joint liability, injuries to third person, master and servant, § 579
- Joint negligence, independent contractors, liability for injury caused by, § 597
- Joint or several contracts of employment, § 7, p 74
- Joint work, servants of separate masters engaging in, § 2, p. 37, n 9
- Jokes, injuries to third persons as result of attempt to perpetrate, liability of master under doctrine of respondent superior, § 574, p 327
- Judgments or decrees,
 - Employment contracts, judgment on pleadings in actions for breach, § 11, p 87
 - Injuries to servants, actions for, § 552
 - Injuries to third persons, actions for, § 619, pp 421-424
 - Labor relations boards or commissions, post National Labor Relations Board, enforcement of order, § 28(133), p 380
 - Overtime pay, actions for, § 160(10)
 - Penalties, actions for, statutory provisions, § 160(10)
 - Relief and benefit departments or associations, action for benefit, § 160, p 837
 - Wages,
 - Actions for, § 134
 - Lien, proceedings to enforce, § 140, p 617
- Judicial remedies, settlement of labor disputes, § 28(71), pp 250-254
- Junk, independent contractors, persons employed to remove, § 3(9)
- Jurisdiction,
 - Injuries to servant, actions for, § 486
 - Labor disputes,
 - Jurisdictional labor disputes, generally, post National Mediation Board, § 28(74), p 262
 - Proceedings to adjust, § 28(74)
 - Labor Relations Board, complaint as required to show, § 28(89), p 277
 - Minimum wages, actions for, § 160(2)
 - National Labor Relations Board, post
 - National Railroad Adjustment Board, refusal to enforce award entered without, § 28(120), p 368
 - Wages, actions for, statutory provisions, § 160(2)
- Jurisdictional labor disputes,
 - Courts, jurisdiction over, Railway Labor Act, § 28(71), p 254
 - Employee organization, § 28(18)
 - Railroads and unions, jurisdiction over, § 28(74), p 261
 - Settlement of, § 28(74), p 250
 - Stay of proceedings for settlement of labor disputes pending determination, § 28(78)
 - Unfair labor practices by employer,
 - Excuse because of economic pressure, § 28(44)
 - Favoring one union over another, § 28(52)
- Jury questions.
 - See, also, Questions of law and fact, generally, post
 - Discharge of employee,
 - Breach of contract between employer and employee's bargaining representative, § 28(120)
 - Punitive damages for failure to issue service letter, § 44, p 430
- Jury questions—Continued,
 - Employment contracts, actions for breach, § 11, p 86
 - Hours of labor, action to recover penalty for violation of law, § 23
 - Relationship,
 - Existence of, § 13
 - Termination, waiver of notice, § 32, p 419
 - Justification,
 - Abandonment of employment, termination of relation as affected, § 40
 - Discharge of employee,
 - Admissibility under general denial in action for wrongful discharge, § 52, p 452
 - Burden of proof in action for wrongful discharge, § 53, p 454
 - Instructions to jury on issue of wrongful discharge, § 55
 - Pleading in action for wrongful discharge, § 52, p 451
 - Interference with relation by third persons, absence of, § 624
 - Keelsons, assumption of risk, knowledge of danger, § 390, p 1206
 - Kick-backs,
 - Criminal liability, § 159, p 771
 - Prosecution for violation of statute prohibiting,
 - Evidence, § 160(13), p 813
 - Proof, § 160(13), p 812, n 10
 - Recoverable as made under duress, § 159, p 772
 - Statutory provisions, § 159, p 770
 - Knives, assumption of risk, knowledge of danger, § 390, p 1208
 - Knowledge
 - See, also, Notice, generally, post
 - Assumption of risk, ante
 - Burden of proving knowledge of danger, injury to servant, § 501, p 80
 - Contributory negligence, ante
 - Dangerous occupations or places, ante
 - Dangerous or defective machinery or appliances, ante
 - Defect or danger in obeying order directing work, liability for injuries as dependent on, § 281
 - Evidence as to knowledge of danger in case of injuries to servant, § 512, p 99, § 519, p 109, § 524, p 123
 - Incompetency of fellow servants, § 516
 - Pleading as affecting, § 499, p 47
 - Fellow servants, incompetency, master as chargeable with, § 317
 - Incompetency,
 - Fellow servants, evidence, § 516
 - Master chargeable, § 317
 - Injuries to third persons, liability of master under doctrine of respondent superior as affected, § 570, p 311
 - Jury questions, injuries to servants, knowledge of danger, § 534, p 189
 - Method of work, liability of master for injuries caused by unsafe method, § 268
 - Pleading as to knowledge of danger in action for servant's injuries, § 490, pp 18, 21
 - Admissibility of evidence as affected by pleading, § 499, p. 47
 - Negative averments, § 492

INDEX TO MASTER AND SERVANT

Knowledge—Continued,

- Res ipsa loquitur doctrine, knowledge of danger, injuries to servant, § 501, p 59
- Rules and regulations, forfeiture of wages for violation as requiring, § 103
- Time, knowledge of danger, pleading, injuries to servant, § 490, p 21
- Warning and instructing servant, post
- Known dangers, warning and instructing servant as to, § 284
- Labor contract statutes,
 - Criminal liability for breach, construction, § 80, p 505
 - Prosecution of employee for violations, § 80, pp 507-511
- Labor disputes,
 - Carriers, ante
 - Cessation of employment in connection with, status as employee affected, § 28(13)
 - Collective bargaining, generally, ante
 - Conciliation, mediation and arbitration, generally, ante
 - Controversies included, § 28(16)
 - Courts, ante
 - Force, use of, § 28(2), p 114, n 24
 - Free speech, balancing right as between employer and employee in matters of self organization, § 28(133), p 376, n 21
 - Hearing and determination, power of Labor Relations Board, § 28(66)
 - Interstate commerce affected, National Labor Relations Act, § 28(2), p 115
 - Intimidation, use of, § 28(2), p 114, n 24
 - Jurisdictional labor disputes, generally, ante
 - Living standards, consideration, § 28(21), n 73
 - National Labor Relations Board, generally, post
 - National Railroad Adjustment Board, jurisdiction, § 28(74), p 260
 - Public policy, peaceful settlement, § 28(1)
 - Reference, Railway Labor Act, § 28(2), p 117
 - Settlement of labor disputes, generally, post
 - Threats, use of, § 28(2), p 114, n 24
 - Unfair labor practices, generally, post
- Labor legislation, object of, § 14, p 94
- Labor Management Relations Act,
 - Amendment and repeal, § 28(4)
 - Employees as included within statute dealing with, § 28(12)
 - Purpose, § 28(2), p 116
 - Unfair labor practices, § 28(64)
- Labor relations,
 - Attorney for employer, statements by as properly considered by board in determining coercion, § 28(14), p 142, n 85
 - Boards Labor Relations boards or commissions, generally, post
 - Bookkeeper, responsibility of employer for conduct of, § 28(14), p 142, n 83
 - Charitable enterprises as included within statutes dealing with, § 28(6)
 - Collective bargaining, generally, ante
 - Commissions Labor relations boards or commissions, generally, post
 - Constitutional provisions, § 28(2, 3), pp. 120, 122
 - Educational enterprises as included within statutes dealing with, § 28(6)

Labor relations—Continued,

- Eleemosynary associations, statutes dealing with as applying, § 28(6)
- Employee organizations acting as employers, § 28(8)
- Employers within statute regulating, § 28(10)
- Employers within statutory provisions regulating, § 28(10, 11)
- Exceptions, § 28(12)
- Termination or cessation of employment, § 28(13)
- Federal statutes regulating, validity, § 28(3), p 120
- Foremen, responsibility of employer for acts of, § 28(14), pp 141-145
- Hospitals, statutes dealing with as applicable, § 28(6)
- Independent contractor as employer within statutes dealing with, § 28(10)
- Interstate commerce, businesses affecting as within regulatory provisions, § 28(9), p 128
- Labor Management Relations Act, purpose, § 28(2), p 116
- Merger of corporate employer, obligations as affected, § 28(10)
- National Labor Relations Act, generally, post
- National Labor Relations Board, generally, post
- Nonprofit enterprises as included within statutes dealing with, § 28(6)
- Open shop, statutes as precluding, § 28(42), p. 205
- Organization of employees for purpose of improving, § 28(15), p 146
- Personnel committee, responsibility of employer for acts of, § 28(14), p. 142, n. 83
- Private hospitals,
 - Employees within statutes dealing with, § 28(12)
 - Statutes dealing with as applying, § 28(6)
- Railway Labor Act, generally, post
- Receivership of employer as affecting, § 28(10)
- Responsibility of employer for acts of supervisory employees, § 28(14), pp 141-145
- Salvation Army, statute dealing with as applying, § 28(6), p 126, n 39
- Settlement of labor disputes, generally, post
- State, power to regulate, § 28(3), p. 122
- State employees as within statutes dealing with, § 28(12)
- Statutory provisions, § 28(2), pp 114-120
 - Concerted activities of employees for mutual aid or protection, § 28(17)
 - Construction, amendment and repeal, § 28(4)
 - Controversies constituting labor disputes, § 28(16)
 - Employee organizations acting as employers, § 28(8)
 - Employees within meaning of, § 28(10, 11)
 - Exceptions from operation of statute, § 28(12)
 - Termination or cessation of employment, § 28(13)
- Employments included, §§ 28(5)-28(9), pp 125-134
- General superintendent, acts of as binding on employer, § 28(14), p. 142, n. 83

INDEX TO MASTER AND SERVANT

Labor relations—Continued,

Statutory provisions—Continued,

Independent contractor as employer within, § 28(10)

Jurisdiction, enforcement of right, § 28(74)

Limited application, § 28(5)

Remedial statutes, § 28(2), p 119

Responsibility of employer for acts of agent, § 28(14), pp. 141-145

State employees as within, § 28(12)

Termination of employment for purpose of, § 28(13)

Validity, § 28(3), pp 120-123

Subsidiary corporations, liability of parent corporations, § 28(10)

Unfair labor practices, generally, post

Validity of statutes regulating, § 28(3), pp 120-123

Labor relations boards or commissions, §§ 28(65)-28(68), pp 242-246

See, also, National Labor Relations Board, generally, post

Abandonment proceedings before, § 28(79)

Adjustment of labor disputes, administrative proceeding before, § 28(60)

Administrative powers and duties, § 28(65)

Amendment of complaint in proceeding before, § 28(89), p 278

Amendment or vacation of order certifying bargaining representative, § 28(34)

Amicable settlement between employer and employee, enforcement of order as precluded by, § 28(132), p 373

Answer in proceeding before, § 28(90)

Appeal Review of orders, generally, post, this head

Back pay, remand to board in respect to issues, § 28(138)

Bargaining representative,

Ballots on election of, direction as to names, § 28(33), p 180

Certification of, § 28(74)

Petition filed with, § 28(31)

Determination,

Conclusive on courts, § 28(133), p. 374

Period of service, § 28(30)

Bargaining units, exclusive jurisdiction to determine disputes concerning, § 28(29)

Briefs, proceedings to enforce order, § 28(127)

Burden of,

Contempt proceedings for disobedience of orders, § 28(142)

Proceedings for enforcement and renewal of order, § 28(135)

Cease and desist order, injunction status when sustained by court, § 28(140)

Change in circumstances as affecting right to enforcement or order, § 28(132), p 372

Character of evidence required to support findings, § 28(136), p 309

Charges, filing as condition precedent to issuance of complaint, § 28(80)

Circumstantial evidence, reliance on, § 28(95), p 285

Labor relations boards or commissions—Continued,

Collective bargaining,

Power to make contracts or reform contracts made under its supervision, § 28(37)

Power to resolve difference as to meaning, § 28(41), p 196

Commissioner in contempt proceedings, findings as reviewable by court, § 28(142)

Complaint, § 28(89), p 277

Compliance with decree enforcing order, § 28(141)

Contempt for failure to comply, § 28(142)

Conclusiveness of,

Findings, § 28(136), p 397

Order certifying bargaining representative, § 28(34)

Condition precedent to proceedings before, § 28(75)

Conduct of election for bargaining representative, § 28(33), p 180

Conflicting jurisdiction with National Labor Relations Board, § 28(74), p 260

Consent decree, enforcement of order, compliance with, § 28(141)

Consolidations of charges made by separate unions against same employer, § 28(89), p 278

Contempt, disobedience of enforcement decree, § 28(142)

Continuance proceeding before, § 28(77)

Correction of irregularities in findings, remand for, § 28(137)

Courts Review of orders, generally, post this head

Craft unions, designation of group for bargaining purposes, § 28(28), p 171

Credibility of witnesses, determination of, § 28(136), p 393

Cross-petition for enforcement of order, § 28(127)

Determination of,

Group of employees, § 28(28), p 171

Issues, § 28(107)

Conclusive on courts, § 28(133), p 374

Disclosure of deliberations in reaching decision, § 28(107)

Discontinuance of business by employer as affecting right to enforcement of order, § 28(132), p. 373

Discretion,

Abandonment proceeding before, § 28(79)

Back pay order, § 28(109), p. 319

Examination of witnesses, § 28(80)

Exercise of power, § 28(67)

Issuance of complaint, § 28(89), p 276

Procedural details, § 28(69)

Reconsideration of issues determined in prior proceeding, § 28(103)

Resubmission of arbitration on remand to board, § 28(137)

Timeliness of charge, § 28(76)

Unfair labor practices, relief awarded, § 28(109), p. 318

Dismissal proceedings before, § 28(79)

Right to dismiss own complaint, § 28(89), p 277

Dissolution of corporate employer as affecting right to enforcement of order, § 28(132), p. 374

INDEX TO MASTER AND SERVANT

Labor relations boards or commissions—Continued,

- Election of bargaining representative,
 - Disregarding results of, § 28(33), p. 182
 - Ordering, § 28(33), p. 178
- Enforcement of orders or award, § 28(122), pp 350-355
 - Briefs as equivalent of pleading, § 28(127)
 - Burden of proof in proceeding for, § 28(135)
 - Change of circumstances as affecting right, § 28(132), p. 372
 - Complaint, actions on, § 28(89), p. 276
 - Contempt, disobedience of enforcement decree, § 28(142)
 - Cross petition, § 28(127)
 - Determination on record presented, § 28(130)
 - Discontinuance of business by employer as precluding, § 28(132), p. 373
 - Dissolution of corporate employer as affecting right, § 28(132), p. 374
 - Harmless error as precluding, § 28(120), p. 368
 - Hearing and determination in proceeding for, § 28(133), pp 374-383
 - Judgment or decree, post, this head
 - Jurisdiction of proceeding to enforce order, § 28(122), p. 351
 - Limitations and laches, § 28(125)
 - Moot questions in proceedings for, § 28(132), pp 371-374
 - Parties to proceeding, § 28(126)
 - Pleadings, § 28(127)
 - Petition, jurisdiction granted on filing of, § 28(122), p. 351
 - Presentation of objection for first time in proceedings for, § 28(131)
 - Presumptions of proceedings for, § 28(134)
 - Questions presented in proceeding for, § 28(129), pp 361-369
 - Remand to board, 28(137) 28(139), pp 400-405
 - Duty to act on issues recommitted, § 28(137)
 - Reinstatement or back pay issues, § 28(138)
 - Taking of additional evidence, § 28(139)
- Errors of judgment by arbitrator, interference with award on ground of, § 28(129), p. 362
- Estoppel,
 - Ordering or supervising election of bargaining representative, § 28(33), p. 182
 - Principle as applying to, § 28(70)
- Evidence in proceedings before, § 28(92)
 - Remand to Board for taking additional evidence, § 28(139)
 - Unfair labor practices, § 28(94); § 28(96), pp 288-292
 - Weight and sufficiency, § 28(95), pp 285-288, § 28(136), pp 397, 398, 399
- Examiner, amendment of complaint and discretion of, § 28(89), p. 278
- Exclusive jurisdiction in respect of labor disputes, § 28(74), pp 257-262
- Exercise powers, § 28(67)
- Federal Transportation Act, settlement of labor disputes by administrative proceedings before court created by, § 28(69)
- Findings of fact, § 28(65, 108)
 - Conclusiveness, § 28(136), p. 397

Labor relations boards or commissions—Continued,

- Findings of fact—Continued,
 - Presumptions of regularity, § 28(134)
 - Remand for correction of irregularities, § 28(137)
- Good faith compliance with decree enforcing order, § 28(141)
- Harmless error, review of orders, § 28(120), p. 368
- Hearing,
 - Contempt proceedings for failure to comply with orders, § 28(142)
 - Proceeding for enforcement or review of order, § 28(133), pp 374-383
 - Scope of inquiry, § 28(103)
- Hearsay, conclusiveness of findings based on, § 28(136), p. 400
- Hiring and discharge of employees, interference with rights of employer, § 28(47)
- Impossibility of performing order, determination in contempt proceedings, after rendition of enforcement decree, § 28(142)
- Injunction, cease and desist order as injunction when sustained by court, § 28(140)
- Inquisitorial powers, § 28(65)
- Interlocutory determinations, judicial review, § 28(123)
- Intervention in proceedings before, § 28(86)
- Investigations, mandatory duty to institute on request, § 28(83)
- Joinder of charges in one proceeding, § 28(89), p. 278
- Judgment or decree, enforcement of order, § 28(133), p. 375, § 28(140)
 - Compliance with decree,
 - Contempt for failure, § 28(142)
 - Good faith, § 28(141)
 - Consent decree,
 - Compliance with, § 28(141)
 - Disobedience of, § 28(142)
 - Contempt, disobedience of, § 28(142)
 - Modification or vacation, § 28(143)
 - Review, § 28(144)
- Judicial enforcement of orders, § 28(122), pp 350-355
- Jurisdiction,
 - Complaint as required to show, § 28(89), p. 277
 - Labor disputes, § 28(74)
- Laches,
 - Enforcement of orders, § 28(125)
 - Proceeding before, § 28(76)
- Limitation of actions, enforcement of orders, § 28(125)
- Limitation on time for proceedings for, § 28(70)
- Managerial powers, § 28(66)
- Mandatory duty, institution to investigation on request, § 28(83)
- Modification of,
 - Decree for enforcement of orders, § 28(143)
 - Order certifying bargaining representative, § 28(34)
- Moot questions,
 - Laches presenting, § 28(76)
 - Proceedings to enforce or review orders, § 28(132), pp 371-374
- National Labor Relations Board, generally, post

INDEX TO MASTER AND SERVANT

Labor relations boards or commissions—Continued,

- Notice to parties of proceeding before, § 28(87)
- Number required to act, § 28(67)
- Objections, presentation in proceedings before board as condition precedent to review, § 28(131)
- Orders,
 - Enforcement of orders, ante, this head
 - Impossibility of performance, determination in contempt proceedings, § 28(142)
 - Presumptions of regularity, § 28(134)
 - Unfair labor practices, § 28(109), p 318
- Parties to litigation, § 28(83)
- Enforce order, § 28(126)
- Necessary and proper parties, § 28(85)
- Partnership, death of partner as affecting enforcement of order directed against partnership, § 28(132), p 374
- Pleadings, enforcement of orders, § 28(127)
- Powers and duties, § 28(66)
- Presentation of objection in proceedings before board as condition precedent to review of order, § 28(131)
- Presumptions proceedings for enforcements or renew of order, § 28(134)
- Privies, enforcement decree as binding on officers and agents as, § 28(140)
- Quasi-judicial character, § 28(65)
- Receivership, appointment for respondent employer as affecting right to file complaint, § 28(89), p 277
- Record,
 - Proceedings for enforcement or review of order decided on, § 28(130)
 - Remand for supplying of deficiencies in, § 28(137)
- Reinstatement of employee,
 - Power to order, § 28(47)
 - Remand of issues involving, § 28(138)
- Reinstatement of proceedings after dismissal, § 28(79)
- Remand to board, § 28(137)—28(139), pp 400—405
- Duty to act on issues recommitted, § 28(137)
- Evidence taking of additional evidence, § 28(139)
- Reinstatement or back pay issues, § 28(138)
- Representation proceedings, review of orders entered in, § 28(124)
- Res judicata, principle as applying to, § 28(70)
- Resubmission of arbitration, remand to board, § 28(137)
- Review of decrees for enforcement of orders, § 28(144)
- Review of orders,
 - Burden of proof, § 28(135)
 - Conclusiveness of findings on, § 28(136), p 397
 - Decisions reviewable, § 28(123)
 - Orders entered in representation proceedings, § 28(124)
 - Dismissal of petition, § 28(132), p 371
 - Enforcement of orders of labor relations board, § 28(122), pp 350—355
 - Final order, § 28(123)
 - Grounds of attack, § 28(120), pp 361—369
 - Harmless error, § 28(129), p 368
 - Hearing and determination, § 28(133), pp 374—383

Labor relations boards or commissions—Continued,

- Review of orders—Continued,
 - Interlocutory determinations as subject to review, § 28(123)
 - Jurisdiction, § 28(122), p 351
 - Limitation by scope of record, § 28(130)
 - Moot question, § 28(132), pp 371—374
 - Parties, § 28(126)
 - Presentation of objection in proceedings before board, § 28(131)
 - Presumptions on, § 28(134)
 - Questions presented, § 28(129), pp 361—369
 - Remand to board, §§ 28(137)—28(139), pp 400—405
 - Duty to act on issues recommitted, § 28(137)
 - Reinstatement for back pay issues, § 28(138)
 - Taking of additional evidence, § 28(139)
 - Representation proceedings, § 28(124)
 - Transcript of record, § 28(130)
 - Rules and regulations, § 28(68)
 - Rumor, conclusiveness of findings resting on, § 28(136), p 400
 - Selection of bargaining unit, conduct of, § 28(32)
 - Special master in contempt proceedings, review of findings, § 28(142)
 - Subpoenas, contempt proceedings for failure to comply with order, § 28(142)
 - Subpoenas, power to issue, § 28(81)
 - Substantial evidence, conclusiveness of findings supported by, § 28(136), p 399
 - Successor, to employers, enforcement decree out of binding on, § 28(140)
 - Supervisory powers, § 28(66)
 - Surmise, conclusiveness of findings resting on, § 28(136), p 400
 - Suspicion, conclusiveness of findings based on, § 28(136), p 400
 - Termination of proceedings before, § 28(79)
 - Timeliness of charge, § 28(76)
 - Transcript on review, preparation on record, § 28(130)
 - Unfair labor practices, generally, post
 - Vacation of decree enforcing orders, § 28(143)
 - Vested right, order as giving, § 28(122), p 350
 - Witnesses in proceedings before, § 28(80)
 - Creditability, determination, § 28(136), p 398
 - Crediting own witnesses to exclusion of others, § 28(95), p 286
- ### Labor unions Employee organizations, generally, ante
- ### Laboreis,
- Contractor distinguished, § 3(1), p 44
 - Lien Wages and other remuneration, post
 - Servants as including, § 1, p 26, n 15
 - Term compared and distinguished from employee and servant, § 1, p 29
- ### Laches,
- Fair Labor Standards Act, action for wages or penalties, § 160(4)
 - Invention by employees, defense of in action, Employee for compensation, § 73, p 496
 - Employer to compel assignment, § 73, p 497
 - Labor relations boards, enforcement of order, § 28(125)
 - Settlement of labor disputes, proceedings for, § 28(76)

INDEX TO MASTER AND SERVANT

Laches—Continued,

- Wages, actions for, § 124
- Statutory provisions, § 100(4)

Ladders,

- Assumption of risk,
 - Jury questions, § 536, p 214
 - Knowledge of danger, § 390, p 1211
 - Latent defects or dangers, § 392, p 1220
 - Simple tool doctrine, § 390, p 1210
- Care required of master furnishing for use by servant, § 220, p 936
- Contributory negligence,
 - Inspection for latent defects or dangers, § 447, p 1271
 - Selection or use of, § 537, p 236
- Instructions to jury as to, actions for injuries to servants, § 546, p 247
- Jury question as to negligence of master, § 534, p 182
- Negligence in failing to furnish safe ladder,
 - Evidence, § 524, p 129
 - Jury question, § 534, p 182
- Reasonably safe ladders, duty of master to furnish, § 390, p 1207
- Simple appliance as respects liability of master to,
 - Furnish safe appliances, § 216, p 925, n 97
 - Inspect, § 235, p 990, n. 78

Lamps or lanterns,

- Assumption of risk, knowledge of danger, § 300, p 1206

- Contributory negligence, inspection for latent defects or dangers, § 447, p. 1271

Landlord and tenant,

- Independent contractors, lessee of land and machinery, § 3(9)
- Lessor as servant or employee, § 2, p 30, n 71
- National Labor Relations Board, jurisdiction over relationship, § 28(74), p. 258, n 16

Larceny, conviction for as justification for refusal to reinstate employee wrongfully discharged, § 28 (51), p 226

Last clear chance,

- Burden of proof in respect of doctrine, § 501, p 84
- Contributory negligence, § 423
 - Dangerous operations and methods of work, § 448
 - Instruction on doctrine, § 549, p. 259
 - Precautions for own safety, § 454
 - Unnecessary occupation of dangerous position, § 446, p 1268
- Evidence, recovery under doctrine of, § 527
- Section hands or trackmen, application to, § 456, p 1201

Latent defects or dangers,

- Assumption of risk, ante
- Contributory negligence, § 447, p. 1269
- Independent contractors, duty of warning servants of, § 606
- Jury questions, injuries to servants, § 534, p 189
- Knowledge of master as affecting liability, § 247
- Place of work,
 - Contributory negligence, § 447, p 1269
 - Tools and appliances, inspection to discover, § 238

Latent defects or dangers—Continued,

- Servant as charged with duty of inspecting for, § 381
- Warning and instructing servant, duty of master, § 284, p 1046, n 76
- Experienced employee, § 305

Laundries,

- Fair Labor Standards Act,
 - Application, § 151(7), p 642
 - Exemption from provisions, § 151(14), p 678
- Mangle, warning and instructing servant operating, inexperienced or youthful servant, § 306, p 1067
- Overtime pay, women employees, § 152, p 743, n 85
- Press machine, contributory negligence in operation, jury question, § 537, p 231, n 44

Law governing Conflict of Laws, generally, ante

Law questions Questions of law and fact, generally, post

Lay-offs,

- Collective bargaining agreement as affecting right of employer, § 28(41), p 200
- Reinstatement of employee lawfully laid off, damages for breach of obligation to re-employ, action for, § 28(71), p 252
- Termination of employment, § 29
- Unfair labor practice, § 28(50)
- Layoffs because of union activities, evidence, § 28(99)

Learners,

- Fair Labor Standards Act, application to, § 151 (10)
- Hours of labor, maximum hour provisions of statute as applying to, § 15, p 101, n 23
- Minimum wages, § 151(10)

Leased bases, Fair Labor Standards Act, application to, § 151(3), p 627, n 46

Leased railroad properties, liability for injury to servant as result of negligence of lessee, § 178

Leaseholds, lien for wages as attaching to, § 145

Leave of absence, wages or other remuneration, recovery during, § 84

Leaving employment,

- Abandonment of employment, generally, ante
- Enticing servant to leave employment, generally, ante

Legal capacity, right to enter into relationship, § 2, p 31

Legality,

- See, also, Validity, generally, post
- Employment contract, § 6, p 68
- Work, relationship as affected, § 2, p 41

Legislative power to require protection against injuries to servants, § 25

Letter of recommendation, discharged employee, duty of employer to give, § 45

Lever, assumption of risk, knowledge of danger, § 390, p 1206

Liability insurance, injuries to servants, admissibility of evidence as to, in actions for, § 503

Libel and slander, scope of employment, jury question, § 617, p 413, n. 52

Liberal construction,

- Child labor statute, § 194, p 892
- Collective bargaining, statute providing for, § 28 (4)

INDEX TO MASTER AND SERVANT

- Liberal construction**—Continued,
 - Dangerous machinery, statute requiring employer to cover or guard, § 232, p. 981
 - Fair Labor Standards Act, § 151(3)
 - Coverage under, § 151(11)
 - Overtime provisions, § 151(26), p. 700
 - Federal Safety Appliance Acts, § 228, p. 960
 - Fellow servants, law relating to, § 335
 - Retirement pay, employment contracts providing for, § 169, p. 831
- Licensees**, respondent superior, liability for injury under doctrine of, § 575, p. 334
- Licenses**,
 - Independent contractor, liability for injury as result of work done under license, § 591, p. 368
 - Invention of employee, right of employer to, § 73, p. 492
- Liens** Wages and other remuneration, post
- Life employment**, contract for,
 - Duration, § 8, p. 78
 - Termination of relation, § 31, p. 414
 - Validity of contracts for, § 6, p. 69
- Life expectancy**, wrongful discharge, admissibility of evidence as to on issue of damages, § 53, p. 458
- Lights**,
 - Dangerous places, negligence of master in furnishing, jury question, § 534, p. 171
 - Railroad locomotives, liability for injuries to employees as result of failure to have, § 227, p. 953, n. 90
 - Safe place of work, duty to furnish as including, § 219, p. 932
- Limitation of actions**,
 - Fair Labor Standards Act, actions for damages and penalties, § 160(4)
 - Federal Employers' Liability Act, law governing action brought in state court, § 173, p. 854
 - Injuries to servants, § 487
 - Demurrer raising defense, § 489, p. 16
 - Labor relations boards, enforcement of order, § 28(125)
 - Labourer's lien, foreclosure, § 149, p. 616
 - Malicious procurement of discharge of employee, § 631
 - National Labor Relations Board, enforcement of order, § 28(125)
 - National Railway Adjustment Board, enforcement of award, § 28(125)
 - Overtime pay, actions to recover, § 160(4)
 - Settlement of labor disputes, proceedings for, § 28(76)
 - Wages, actions to recover, §§ 124, 160(4)
 - Wrongful discharge, § 49
- Line of duty**, liability of master for injuries to servants as dependent on being in, § 181, p. 873
- Linemen**,
 - Assumption of risk, ordinary risk, § 375
 - Warning and instructing,
 - Inexperienced or youthful servant, § 306, p. 1067
 - Various operations connected with employment, § 299
- Liquidated damages**,
 - Employment contract, termination on payment, § 11, p. 90
 - Fair Labor Standards Act, ante
- Liquidated damages**—Continued,
 - Minimum wages, violation of law, government contracts, § 153, p. 755
 - Last of customers, use of by employee after termination of relation, § 72, p. 486
 - Litigation expenses, profit sharing wage contract, allowance for, § 112, p. 553
 - Living expenses, employees, liability of employer for, § 100
 - Living standards, labor controversy, consideration, § 28(21), n. 73
 - Loading and unloading,
 - Assumption of risk, jury questions, § 534, p. 215
 - Consignor's or consignee's liability for injuries to servants, loading or unloading freight, § 212, p. 922
 - Contributory negligence, jury question, § 537, p. 236
 - Fellow servants, negligence with regard to, jury question, § 535, p. 209
 - Negligence, method of work, § 260, p. 1013, n. 39
 - Railroad cars,
 - Care required so as not to cause injury to employees, § 228, p. 972
 - Inspection to determine proper loading, § 230
 - Safe appliances for, liability of master for failure to furnish, § 218
 - Safe place of work, duty owed by shipper to employee, § 226, p. 947
 - Loan of servant, § 2, p. 38
 - Local retailing capacity, Fair Labor Standards Act, exemption of employees engaged in, § 171(13)
 - Local trolley carriers, Fair Labor Standards Act, exemption of employees from provisions, § 151(18)
 - Lockers, civil liability of employer for value of wearing apparel deposited in and destroyed by fire, § 24
 - Lockouts**,
 - Collective bargaining agreement, implied agreement, § 28(41), p. 198
 - Interstate commerce affected, jurisdiction of National Labor Relations Board, § 28(74), p. 259
 - Unfair labor practice, § 28(61)
 - Evidence, § 28(97), p. 295
 - Locomotives**,
 - Assumption of risk,
 - Jury question, § 536, pp. 214, 219
 - Knowledge of danger, § 390, p. 1210
 - Latent defects or dangers, § 392, p. 1220
 - Ordinary risks, § 378, p. 1180
 - Care required in providing and maintaining safe locomotive, § 227, pp. 952-959
 - Contributory negligence,
 - Alighting from moving locomotives, § 453, p. 1282, § 459, p. 1300
 - Inspection for latent defects or dangers, § 447, p. 1271
 - Jury question, § 537, p. 232
 - Method of operations, § 453, p. 1280
 - Operation of, jury question, § 537, p. 232
 - Precautions against known or obvious dangers, § 456
 - Riding on, violation of rules or orders, § 459, p. 1299
 - Delegation of duty to furnish safe locomotives, § 333, p. 1118

INDEX TO MASTER AND SERVANT

Locomotives—Continued,

Negligence,

Condition, evidence, § 524, p 129

Jury question, § 534, p 176

Operation of, jury question, § 534, p 193

Proximate cause of injury to employee, defective condition, § 257

Reasonably safe locomotives, duty of master to furnish, § 390, p 1207

Statutory requirements of safe provision and maintenance, § 227, p 953

Warnings to employees working on or about, § 263, p 1023

Lodging, wages and other remuneration, furnishing as part of, § 99

Logging,

See, also, Lumbering, post

Contributory negligence, servant injured in, jury question, § 537, p 236

Fellow servants, engaged in, § 331, p 1006

Negligence with regard to, § 535, p 209

Independent contractors, § 3(9)

Liability for acts or omissions of, § 584, p 356

Log drivers, § 3(9)

Negligence, jury question, § 534, p 193

Warning or instruction as to hazards of trade, § 299

Logging railroads, fellow servants, statutory provisions, § 347

Longshoremen, fellow servants, § 327, p 1089, § 332, p 1106

Lookouts,

Instructions to jury as to, actions for injuries to servant, § 546, p 243

Railroads,

Duty to keep before moving trains or cars, § 263, p 1023

Negligence of failing to maintain,

Evidence, § 524, p 136

Jury question, § 534, p 197

Lost chattels, finding by employee, rights as to, § 74

Lost time, wages and other remuneration, right to recover for, § 84

Burden of proof as to contract obligating payment for, § 129, p 578

Low bridges, railroads, liability to employee for injuries caused by, § 230, p 978

Warning to brakeman, § 263, p 1023

Loyalty, compensation, right of employee as dependent on, § 81

Lumber dealers,

Contributory negligence, customary methods of work, admissibility of evidence, § 519, p 112

Fair Labor Standards Act, application to, § 151(7), p 642

Lumbering,

See, also, Logging, generally, ante

Fair Labor Standards Act, application to, § 151(9), p 656

Independent contractors piling, liability for acts or omissions, § 584, p 356

Wages of employees engaged in, lien, § 142

Lumping, defined, § 1, p. 28

Lunch period,

Injury to employee on premises during, liability of master, § 180, p 870

Overtime pay, § 151(28), p 718

Machinery Tools, machinery and appliances, generally, post

Machinists, warning or instruction as to use of appliances, § 295

Mail cranes, railroad's negligence in permitting unnecessarily near track, § 230, p 977, n 92

Mail trucks, negligence of master, jury question, § 534, p 176

Mails, contractor for interstate transportation as employer within statute regulating labor relations, § 28(7)

Maintenance, fellow servants, liability of master for negligence, § 333, p 1119

Maintenance employees,

Fair Labor Standards Act, § 151(9), p 660

Labor relations, statutes dealing with as including, § 28(11)

Maintenance of membership, collective bargaining contract, § 28(41), p 197

Majority. Collective bargaining, ante

Malice,

Discharge of employee, ante

Enticing servant to leave employment, right of action as dependent on, § 625, p 430

Fellow servants, liability of master for injuries caused by, § 325

Third person injuries, liability under respondent superior doctrine, § 572

Malpractice, medical treatment furnished employee, liability of employer for injury caused by, § 165, p 820

Management, fellow servants, liability for acts of employee authorized to manage others, § 332, p 1009

Managerial powers, Labor Relations Boards or Commissions, § 28(66)

Managers, fellow servants, statutory provisions relating to injuries caused by negligence of, § 340

Mangles, assumption of risk, knowledge of danger, § 390, pp 1206, 1208

Manholes, contributory negligence, servants injured in, jury question, § 537, p 235

Manner of injury to servant,

Burden of proof, § 501, pp 66, 71

Presumptions, § 501, p 55

Manner of performance Method of work, generally, post

Manual laborers, labor relations, term employee as used in statutes dealing with as restricted to manual laborers, § 28(11)

Manual service, servant as included among those rendering, § 1, p 26

Manufacturers and manufacturing,

See, also, Factories, ante

Fair Labor Standards Act,

Application to employers engaged in, § 151(7), p 642

Commerce within meaning of, § 151(7), pp 638, 640; § 151(9), p 651

Guarding machinery, statutes requiring as applying to, § 232, p 982

National Labor Relations Act as applying to, § 28(9), p 132

Safeguards for workers, § 25

INDEX TO MASTER AND SERVANT

Manufacturers and manufacturing—Continued,

Secret processes, disclosure by employee on termination of relation, § 72, p 485

Maps, working of mines, validity of statute requiring, § 24

Maritime safety laws, National Labor Relations Act as subordinate to, § 28(4)

Maritime workers,

Fair Labor Standards Act, § 151(7), p 642, § 151 (9), p 657

Injuries to servant, liability under maritime law, § 172

Mass picketing, state statute interfering with as contravening National Labor Relations Act, § 28(3), p 123, n 5

Master of vessel, fellow servant relations, § 332, pp 1105, 1106

Materials,

Duty of employer to furnish, § 61

Independent contractors, duty to supply as test of relation, § 3(2), p 46; § 3(7)

Mates of vessels,

Fellow servants, superior servant rule, § 332, p 1105

National Labor Relations Act, employees within, § 28(12), p 139, n 62

Matters to be proved in actions for injuries to servants, § 498

Mauls, contributory negligence, inspection for latent defects or dangers, § 447, p 1271

Maximum hours Overtime pay, generally, post

Means of performance Method of work, generally, ante

Measure of damages,

Breach of employment contract, § 11, p 80

Enticing servant to leave employment, § 628

Injuries to servants, § 554

Leaving employment in violation of contract, § 78

Medical services, breach of contract to furnish, § 163, p 818

Wrongful discharge, post

Meat grinders, assumption of risk, knowledge of danger, § 390, p 1206

Mechanics,

Fair Labor Standards Act, application to, § 151 (9), p 657

Independent contractors, § 3(9)

Mechanic's lien, priority of laborer's lien over, § 147

Mediation Board National Mediation Board, generally, post

Mediation of labor disputes Conciliation, mediation and arbitration, generally, ante

Medical or surgical attention, §§ 161-166, pp 814-824
See, also, Hospitalization, generally, ante

Company physician, deduction from pay of employee for purpose of payment, § 166

Compensation for services rendered to employee, liability of employer, § 166

Contract to furnish, § 163, pp 816-819

Liability of employer for payment of services rendered to employee, § 166

Course of employment, liability of employer for payment of medical services involving injuries in, § 166

Damages for breach of contract to furnish employee with, § 163, pp 816, 818

Medical or surgical attention—Continued,

Deduction from wages for, liability of employer for negligent treatment, § 165, p 821

Duty of employer in general, § 164

Emergency, duty of employer, § 162

Evidence, action for breach of contract to furnish, § 163, p 818

First aid, duty of employer, § 162

Foreman, authority to bind master by statements as to benefits, § 163, p 816

Gratuitous treatment, liability of employer for negligence, § 165, pp 820-823

Instructions to jury, actions for injuries to servants, § 546, p 249

Jury questions,

Breach of contract to furnish, § 163, p 818

Negligence of employer, jury question, § 534, p 167

Negligence of physician employed by master, § 165, p 821

Negligent treatment, liability for, § 165, pp 820-823

Burden of proof, § 501, p 69

Jury question, § 534, p 167

Notice, condition precedent to liability for failure to furnish, § 163, p 817

Nurses, liability of employer for negligence of, § 165, p 820

Payment of medical services rendered to employee, liability of employer, § 166

Reasonable care in discharge of duty to furnish, § 162

Respondent superior, liability of employer for negligence of physician under rule of, § 165, p 821

Specialist, duty to furnish under contract, § 163, p 817

Third persons, contract with to furnish, § 163, p 819

Transportation of injured servant on master's time, liability for injuries during, § 180, p 869

Tuberculosis, exception of employee suffering from, § 163, p 816, n 48

Vaccination, assent to in order to retain job as duty, § 164, n 6

Voluntary assumption of duties to furnish to employee, § 164

Medium of payment Wages and other remuneration, post

Membership card, collective bargaining, designation of bargaining representative by signing, § 28(27)

Menial service, service as included in those rendering, § 1, p 26

Mental anguish,

Discharge of employee, damages as recoverable for malicious procurement, § 632

Wrongful discharge, damages as recoverable for, § 58, p 460

Mercantile establishments,

Fire escapes, statutory requirements, § 219, p 934

Guarding machinery, statutes requiring as applying to, § 232, p 982

Merchant seamen, term servant as embracing, § 1, p 26, n 15

Meager, oral in written employment contract, § 9, p 81

INDEX TO MASTER AND SERVANT

- Messengers, overtime pay, time spent standing by on call as working time, § 151(28), p 718, n 55**
- Methods of work, §§ 260-283, pp 1013-1085**
- Acquiescence in dangerous customs, liability of employer for injury to servant, § 267
- Agent,**
- Delegation of duty to provide safe method, § 266
- Master bound by orders given by, § 279
- Assumption of risks, ante
- Best method, use of as required, § 260
- Burden of proving negligence, § 501, p 77
- Complex work,
- Precautions to protect servant, § 262
- Rules and regulations, § 271
- Continuing duty to establish, § 271
- Contributory negligence, ante
- Customary methods,
- Liability for injuries by master employing, § 267
- Questions of law and fact, § 534, p 168
- Customary warning and signals, right of servant to rely on, § 262
- Dangerous employment,**
- Precautions to protect servant, § 262
- Rules and regulations, § 271
- Degree of care required in adopting, § 265
- Delegation of duty,
- Enforcement of safety rules, § 272
- Provide safe method, § 266
- Employee using own judgment, liability for injury resulting, § 260**
- Evidence in action for injuries, § 511; § 513, pp. 100-103, § 524, p 134
- Failure to use reasonably safe methods, § 260
- Fellow servants, ante
- Foreman, liability for injuries resulting from methods adopted by, § 268
- Hazardous employment, § 260
- Independent contractors, § 3(1), p 43; § 3(3), p 51
- Inexperienced servants, §§ 260, 282
- Instructions to jury as to, actions for injuries of servants, § 546, p. 248
- Knowledge of danger, liability of master for injuries caused by unsafe method, § 268
- Latent dangers, assumption of risk, § 392, p 1217
- Pleading in action for, § 490, p 21
- Precautions against injury, § 262
- Railroads, § 263, pp 1022-1029
- Presumptions, action for injuries to servants, § 501, p 63
- Proximate cause of injury, § 269
- Liability for injuries in obeying order, § 283
- Liability for injuries on ground of failure to adopt or enforce rules, § 277
- Questions of law and fact, negligence of master, § 533, p. 161, § 534, p 191
- Railroad's liability for injuries as affected by, § 261, pp 1015-1020; § 265
- Reasonably safe and suitable methods as required, § 260
- Rules and regulations, post
- Sending employee into place of danger, liability for injury, § 268
- Signals, protection from injury, § 262
- Methods of work—Continued,**
- Statutory regulations, § 264
- Unusual dangers, precautions to protect servants, § 262
- Warning and instructing employees,
- Changes in, § 293
- Dangerous position, § 262
- Liability of master for injury as result of failure to warn, § 268
- Youthful servant, § 260
- Duty in ordering work, § 282
- Military service,**
- Seniority, effect on, § 28(41), p 202
- Termination of employment by employee entering, § 39
- Milk wagon drivers,**
- Independent contractors, § 3(9)
- Lien for wages, § 143, p 608
- Mills,**
- See, also, Factories, ante
- Contributory negligence, customary methods of work, admissibility of evidence, § 519, p 112
- Fair Labor Standards Act, application to mill workers, § 151(9), p 657
- Guarding machinery, statutes requiring as applying to, § 232, p 982
- Independent contractor, operator as, § 3(9)
- Servant as embracing persons working in, § 1, p 26, n 15
- Washrooms, validity of statute requiring, § 24
- Mines and mining,**
- Agents, notice to of dangerous condition as notice to master, § 248
- Assumption of risk, ante
- Blasting operations, care required in regulating time and manner, § 222, p 943
- Checkweighman, statute authorizing miners to employ, § 158
- Compulsory employees under statute relating to safety of miners, liability for injuries as result of acts or omissions of, § 190
- Construction of statute enacted for protection of miners respecting place of work, § 222, p. 939
- Contributory negligence, ante
- Elevators, care required in furnishing and maintaining, § 222, p 941
- Entries and passageways, care required in keeping in safe condition, § 222, p 939
- Escapements, duty of operator to provide, § 222, p 942
- Fair Labor Standards Act,
- Application to employers engaged in, § 151(7), p 642; § 151(9), p 657
- Production of goods for commerce within coverage, § 151(9), p 651
- Fellow servants, ante
- Fire boss, notice to of dangerous condition as notice to master, § 248
- Foremen, statutory provisions as absolving operator from duty to furnish safe place to work, § 222, p. 940
- Gas accumulation, inspection against, § 235, p. 993
- Hoists, care required in furnishing and maintaining, § 222, p 941

INDEX TO MASTER AND SERVANT

Mines and mining—Continued,

- Independent contractors,
 - Duty of keeping in reasonably safe condition for employee of, § 603
 - Liability for acts or omissions of, § 584, p 350
 - Operator as, § 3(9)
- Inspection, statutory requirements, § 235, p 993
- Jury question, § 533, pp 160, 161, § 534, pp 184, 185
- Latent defects or dangers in roofs of, duty of employees to inspect for, § 381
- Noxious gases, duty of operator to keep free from, § 222, p 942
- Ownership rights in as between employer and employee, § 74
- Propping or timbering roof,
 - Duty of master, § 222, p 940
 - Negligence of master, jury question, § 534, p 185
- Proximate cause of injury to servant, § 239
 - Jury questions, § 533, p 160
- Refuge places, duty of operator to provide, § 222, p 942
- Rules and regulations for protection of servants, assumption of observance, § 456, p 1293
- Safe place to work,
 - Care required of master, § 222, pp 938-944
 - Evidence, § 524, p 130
 - Fellow servant rules, § 333, p 1115
 - Jury question, § 534, p 185
- Signalling system, statutory provision, § 264
- Smoke, statutory provisions requiring elimination, § 222, p 942
- Statutory provisions regulating employment, § 14, p 96
 - Inspection, § 235, p 993
 - Protection of employees in, § 222, p 938
 - Safe condition of roofs of passageways, § 222, p 941
 - Signalling system, § 264
 - Ventilation, § 222, p 942
- Term servant as embracing persons working in, § 1, p 26, n 15
- Ventilation,
 - Assumption of risks, § 369, p 1172; § 390, p 1205
 - Duty of operator to furnish, § 222, p 942
- Violation of statute, proximate cause of injury to servant, jury question, § 533, p 161
- Wages of employees of lessee, bond to secure, construction of statute, § 154
- Warning and instructing servant,
 - Dangers from fall of walls or roof, § 303
 - Experienced workers, § 295
 - Inexperienced or youthful servants, § 306, p 1067
 - Statutory provisions, § 289
- Washrooms, validity of statute requiring, § 24
- Minimum payment clauses, contracts of employment, validity, § 110, p 543
- Minimum wages,
 - Actions for, §§ 160(1), 160(2), 160(3), 160(5); § 160(8), pp 790, 794, 795, § 160(12)
 - Amount of recovery, § 160(12)
 - Back wages, actions to recover, § 160(1)

Minimum wages—Continued,

- Bonus, liability for additional compensation as chargeable against, § 160(12)
- Burden of proof, actions for, § 129, p 578; § 160(8), p 790
- Conditions precedent to action for, § 160(3)
- Defenses, actions for, § 160(7)
- Evidence in action for, § 160(8), pp 794, 795
- Fair Labor Standards Act, ante
- Federal government contracts, prevailing wage, § 155, p 754
- Good faith, defense of in action for, § 160(5)
- Infants, burden of proof in action involving, § 160(8), p 789, n 9
- Inquiry respecting prevailing rates, public employees or employees on public works, § 1753, p 751
- Interest, § 160(12)
- Jurisdiction of action for, § 160(2)
- Legislative power to establish, § 151(2)
- Minor employees, § 152, pp 741-746
- Nature of actions for, § 160(1)
- Overtime pay, generally, post
- Portal-to-portal pay, generally, post
- Prevailing wage, public employees and employees on public works, actions for, § 160(1)
- Sweatshop occupation, § 151(1), p 623
- Women, burden of proof in action involving, § 160(8), p 789, n 9
- Mining Mines and mining, ante
- Mining railroads, fellow servants, statutory provisions, § 347
- Minority unions,
 - Peaceful picketing plant and employer entering into closed shop agreement with union, § 28(19), p 155
 - Representation for collective bargaining, § 28(26), p 166; § 28(35), p 184
 - Strikes, § 28(18)
- Minors Infants, generally, ante
- Mischiefous acts, injuries to third persons, liability of master under respondeat superior doctrine, § 574, p 327
- Misconduct of servant,
 - Discharge on ground of, § 42, p 429
- Wages,
 - Deductions on account of, § 114
 - Forfeiture, evidence, § 129, p 587
- Misfeasance, injuries to third persons, personal liability of servant for acts of, § 577, p 347
- Misjoinder of parties, action for injuries to servants, § 488
- Misleading instructions, action for injuries to servants, § 538, p 237
- Misrepresentations, employment contract,
 - Modification as affected, § 9, p 80, n 63
 - Validity, § 6, p 67
- Mistake,
 - Discharge of employee, defense of in action for wrongful discharge, § 51
 - Relief and benefit departments or associations, acceptance of benefits under, § 170, p 839
 - Wages, overpayment secured through, recovery back, § 120, p 561
- Mistake of judgment, contributory negligence, § 436

INDEX TO MASTER AND SERVANT

- Mitigation of damages,
 - Back pay award to reinstated employees, § 28 (119), p 344
 - Contributory negligence, instruction as to jury, § 540, p 260
 - Discharge of employee,
 - Breach of contract between employer and employee's representative, § 28(120)
 - Failure to issue service letter required by statute, § 44, p 439
 - Malicious procurement, § 632
 - Wages, doctrine as applicable in action for, § 137
 - Wrongful discharge, post
- Mixed questions of law and fact, jury questions in actions for injuries to servants, § 529
- Mobs, protection of employee from violence, duty of employer, § 189
- Modification,
 - Employment contracts, § 9, pp 79-82
 - Judgments of decree, labor relations boards, enforcements of order, § 28(143)
- Momentary forgetfulness, contributory negligence, § 436
- Money had and received, relief and benefit departments or associations, action for to recover benefit, § 169, p 835
- Money, wages,
 - Constitutional and statutory provisions, § 157, p 765
 - Right to payment in, § 120, p 561
- Month, independent contractor paid by, § 3(8)
- Month to month employment,
 - Termination of employment, § 30; § 31, p. 413
- Wages,
 - Actions to recover, § 122
 - Jury question, § 131, p 591
 - Time for payment, § 119
- Mooring lines, contributory negligence, inspection for latent defects or dangers, § 447, p 1271
- Moot orders, National Labor Relations Board, § 28 (113)
- Moot questions, Labor Relations Boards and Commissions,
 - Laches, § 28(76)
 - Proceedings to enforce or review orders of, § 28 (132), pp 371-374
- Moral turpitude, discharge of employee on ground of, § 42, p 430
- Mortgages, laborer's lien, priority, § 148
- Motive,
 - Discharge of employee, § 44, p 435
 - Injuries to third persons, liability of master under respondeat superior doctrine for willful or malicious acts, § 572
- Motor transportation,
 - Fair Labor Standards Act,
 - Exemption from overtime requirements of employees, § 151(20), p 690
 - Exemption of employees of bus carriers, § 151(18)
 - Federal Employers' Liability Act, application, § 173, p 848, n 52
 - Interstate commerce, Railway Labor Act as applying to labor relations, § 28(5)
 - Overtime pay of bus drivers, waiting period between trips, § 151(28), p. 718, n 55
- Motor vehicles,
 - Assumption of risk,
 - Knowledge of danger, § 390, p 1206
 - Jury question, § 536, p 214
 - Contributory negligence, inspection for latent defects or dangers, § 447, p 1270
 - Fellow servants, negligence in operating, jury questions, § 535, p 209
 - Jury question, § 534, p 176; § 535, p 209, § 536, p 214
 - Motor transportation, ante
 - Safety appliances, duty to equip, § 218
 - Truckmen, generally, post
- Moving cars,
 - Contributory negligence, coupling, § 453, p 1281
 - Fellow employees, warning of, § 333, p 1123
- Moving machinery, warning or instructing servant, obvious danger coming into contact with, § 296
- Mules, contributory negligence, inspection for latent danger, § 447, p 1271
- Multiplicity of suits, Fair Labor Standards Act, representative suits to avoid, § 160(6), p 780
- Municipal corporations,
 - Fellow servants, doctrine as applicable to employees of, § 322
 - Hospitalization for injured employees, § 162, n 30
 - Minimum wages, laborers employed by city or contractors in city work, § 153, p 747
- Mutiny, discharge of employees because of participation in strike on board ship, reinstatement, § 28 (119), p 342
- Mutual agreements, termination of relation by, § 33
- Mutual aid or protection, concerted activities of employees for purpose of, § 28(17)
- Mutual benefit associations, medical and surgical treatment, hospital associations formed to provide as, § 163, p 817
- Mutual consent, employment contracts,
 - Modification, § 9, p 80
 - Rescission, § 9, p 81
- Mutuality,
 - Collective bargaining contract, want of as affecting validity, § 28(37)
 - Employment contract, § 2, p 32, § 6, p 66
 - Permanent or life employment, § 6, p 70
- National Industrial Recovery Act,
 - Hours of labor, validity of provisions relating to, § 15, p 101
 - Minimum wages, § 151(25)
 - Validity, § 14, p 97; § 15, p 101; § 151(2)
 - Wages, §§ 151(2), 151(25)
- National Labor Relations Act, § 28(2), p 114
 - Administrative remedy, exhaustion before resort to court, § 28(71), p 253
 - Agents, responsibility of employer for acts, § 28 (14), pp 141-145
 - Agricultural laborers, exclusion from term employee, § 28(12)
 - Amendment or repeal, § 28(4)
 - Board National Labor Relations Board, generally, post
 - Burden of proof, proceedings to prevent unfair labor practices, § 28(93), p 281
 - Certification of bargaining representative, § 28 (34)

INDEX TO MASTER AND SERVANT

National Labor Relations Act—Continued,

Closed shop agreement, § 28(40), p 194
 Concerted activities of union for purpose of gaining, § 28(19), p 152, n 6
 Discharges under agreement with company dominated union as violation of, § 28(41), p 199
 Collective bargaining, § 28(2), p 115, § 28(20)
 Conduct of proceedings, §§ 28(23), 28(32)
 Duty of employer to bargain, § 28(21)
 Persons authorized to conduct negotiations, § 28(26), p 168
 Proof of authority of representative, § 28(27)
 Recognition of chosen representative of employees, § 28(24)
 Representative for, § 28(24)
 Securing right, § 28(15), p 145
 Complaint under, function, § 28(89), p 277
 Concerted activities of employees for mutual aid or protection, §§ 28(17), 28(18)
 Contempt, refusal to obey order of court requiring appearance before board and production of evidence, § 28(81)
 Courts, exhaustion of administrative remedy before resort to, § 28(71), p 253
 Discharge of employee,
 Refusal to reinstate as unfair labor practice, § 28(51), p 226
 Right of employer, § 28(49), p 219
 Domestic service, exclusion of persons engaged in, § 28(12)
 Employee organizations, protection of right to organize, § 28(15), p 145
 Employees within meaning of, §§ 28(11), 28(12)
 Termination or cessation of employment, § 28(13)
 Employer within meaning of, § 28(10)
 Enforcement of subpoena issued pursuant to, § 28(81)
 Farm employees, exclusion, § 28(12)
 Foremen,
 Application, § 28(12)
 Responsibility of employer for acts of, § 28(14), pp 141-145
 Freedom of speech as affected, § 28(55)
 Grievances, power of bargaining agent to handle, § 28(35), p 186
 Hearing and determination of proceedings for enforcement or review of orders of Board, § 28(133), p 375
 Hearings under, § 28(102)
 Independent unions, protection of rights, § 28(15), p 147
 Inspectors as employees within, § 28(12), p 130, n 62
 Interstate commerce, confinement and application to disputes interfering with, § 28(9), pp 128-134
 Labor disputes, controversies included, § 28(16)
 Limitation of actions, enforcement of order, § 28(125)
 Mates on vessels as employees within, § 28(12)
 Omnibus order of board enjoining violation, § 28(129), p 365
 Peaceful picketing, § 28(19), p 155
 Production of books and records, § 28(81)

National Labor Relations Act—Continued,

Promotion or demotion of employees, regulation of, § 28(58)
 Public employment, exception, § 28(7)
 Regulatory provisions, § 28(2), p 114
 Reinstatement of employees, authority to order under, § 28(119), p 335
 Remedy for violation, exclusive initial remedy, § 28(69)
 Report and recommendations of trial examiner, § 28(106)
 Self-organization of employees, protection of rights, § 28(15), p 145
 Shutdown, prohibition against, § 28(61)
 State statutes as superseded by, § 28(3), p 123
 Strikes,
 Participating in as termination of employment, § 28(13)
 Right of employees to engage in, § 28(18)
 Subpoenas, power to issue under, § 28(81)
 Supervisory personnel, § 28(12)
 Responsibility of employer for acts of, § 28(14), pp 141-145
 Trial examiner, conduct of hearing by, § 28(104)
 Unfair labor practices, generally, post
 Validity, § 28(3), p 120
 National Labor Relations Board,
 See, also, Labor relations boards or commissions, generally, ante
 Abandonment of proceedings before, § 28(79)
 Actions, capacity to sue and be sued, § 28(65)
 Adjustment of labor disputes, § 28(69)
 Administrative function, § 28(65)
 Administrative remedies,
 Exclusive and initial remedies for violation of act, § 28(69)
 Exhaustion before resort to court, § 28(71), p 253
 Advisory recommendations by trial examiner, § 28(106)
 Affirmative relief, discretion as to, § 28(110), p 321, n 82
 Agents or assistants, § 28(66)
 Conduct of hearings by, § 28(104)
 Amendment,
 Order and findings, § 28(116)
 Rules and regulations, § 28(68)
 Answer to petition for enforcement of order, § 28(127)
 Appeal Review of orders, post, this head
 Assigns of employer, orders as running against, § 28(114)
 Attorneys, power to employ such employees, § 28(66)
 Authority to shape or control course of negotiations, § 28(23)
 Back pay, power to determine amount, § 28(119), p 343
 Back pay orders,
 Discretion, § 28(133), p 377
 Modification, § 28(133), p 380, n 47
 Power to enter, § 28(119), pp 335-345
 Ballots on election of bargaining representative, directions as to names on, § 28(33), p 180
 Bargaining representative,
 Determination of choice, § 28(25), p 165

INDEX TO MASTER AND SERVANT

National Labor Relations Board—Continued,

Bargaining representative—Continued,

Labor organization filing charges as required to be capable of acting as, § 28(83)

Bargaining unit, decision in respect of entitled to weight, § 28(133), p 381

Bias of trial examiner,

Conclusiveness of findings as to, § 28(136), p 389

Order as invalidated by, § 28(120), p 367

Remand to board on ground of, § 28(137), p 401, n 77

Bill of particulars, harmless error in denial of, § 28(120), p 368

Blanket order, § 28(111), p 325

Body corporate, § 28(65)

Capacity to sue or be sued, § 28(65)

Cease and desist orders, unfair labor practices, § 28(110), pp 321-324

Cessation of practices as precluding order, § 28(113)

Employer dominated unions, § 28(118), pp 332-335

Findings as basis for, § 28(111), p 328

Persons against whom order runs, § 28(114)

Posting notice of, § 28(117)

Scope of, § 28(111), p 325

Subject to review, § 28(133), p 377, n 28

Charges,

Condition precedent to issuance of complaint, § 28(75)

Persons authorized to file, § 28(83)

Circumstantial evidence, exclusive power to pass on weight of, § 28(136)

Collective bargaining,

Certification as bargaining representative, petition for, § 28(31)

Disregarding results of election of representative, § 28(33), p 182

Election of representative, ordering, § 28(33), p 178

Jurisdiction to determine disputes concerning authority to represent employees, § 28(29)

Order requiring employer to engage in, findings as basis, § 28(111), p 328

Petition for certification as representative, § 28(31)

Power to,

Designate person to conduct negotiation, § 28(26), p 168

Determine appropriate bargaining unit, § 28(28), p 171

Enter order protecting right, § 28(110), p 321

Order employer to engage in, § 28(110), p 322

Place contracts, § 28(66)

Proceeding for determination of bargaining representative, § 28(30)

Communications of, remedies of employees under, § 28(69)

Compelling production of evidence, § 28(81)

Competency of evidence, enforcement of orders affected, § 28(136), p 396

Complaint,

Condition precedent to issuance, § 28(75)

National Labor Relations Board—Continued,

Complaint—Continued,

Persons who may lodge with, § 28(83)

Conclusions of fact, conclusiveness, § 28(136), p 389

Conclusiveness of findings of fact, proceedings to enforce or review order of, § 28(136), p 384

Conclusiveness of order, § 28(116)

Condition precedent to issuance of complaints, § 28(75)

Conflicting evidence, exclusive power to pass on weight of, § 28(136)

Conflicting jurisdiction of labor disputes, § 28(74), p 260

Conjecture, conclusiveness of findings resting on, § 28(136), p 394

Consent, entry of order on, § 28(116)

Construction of orders, § 28(115)

Reinstatement orders, § 28(119), p 336

Construction of own rule, § 28(68)

Contempt, violation of orders, § 28(111), p 324

Continuance, proceeding before, § 28(77)

Continuing effect of orders, presumption, § 28(116)

Controverted questions of fact, determination of, § 28(136), p 387

Correcting record filed in court, § 28(128)

Costs, review of order, § 28(128)

Crafts and classes of railroad employees as unions for collective bargaining, discretion as to, § 28(28), p 171

Creditability of witnesses, power to determine, § 28(136), p 387

Cross-examination of witnesses, § 28(80)

Harmless error in refusal to permit, § 28(120), p 368

Delegation of power, selection of appropriate collective bargaining units, § 28(28), p 172

Depositions, review of order or award by court, § 28(122), p 353

Determination of issues, § 28(107)

Disagreements of within board, conclusiveness of findings, § 28(136), p 389

Disclosure of deliberations in reaching decision, § 28(107)

Discontinuance of oppressive acts against employees, power to order, § 28(110), p 322

Discretion,

Abandonment of proceeding before, § 28(79)

Amount of back pay award, § 28(119), p 343

Continuance of proceedings, § 28(77)

Disestablishment of employer dominated union, § 28(118), p 333

Examination of witnesses, § 28(80)

Interference with exercise by courts, § 28(133), p 376

Intervention and proceeding before, § 28(86)

Orders issued and relief directed, § 28(110), p 321

Procedure for choosing bargaining representatives by employees, § 28(29)

Reinstatement of employees, § 28(119), pp 336, 340

Selection of appropriate collective bargaining unit, § 28(28), p 172

Finding of court, § 28(133), p 381

INDEX TO MASTER AND SERVANT

National Labor Relations Board—Continued,

- Disestablishment of employer dominated unions, § 28(118), pp 332-335; § 28(133), p 377, n 27
- Dismissal of charges, § 28(79)
- Due process, setting aside or refusal to enforce order issued without, § 28(120), p 366
- Election of bargaining representative, ordering, § 28(33), p 178
- Employer dominated unions,
 - Determination on request for certification of bargaining representative, § 28(32)
 - Orders in respect of, § 28(118), pp 332-335
- Enforcement of orders, § 28(122), p 351
- Answer to petition, § 28(127)
- Bias or prejudice as precluding, § 28(129), p 367
- Conclusiveness of findings and proceedings for, § 28(136), p 384
- Dismissal of petition as res judicata, § 28(120), p 365
- Grounds for refusal, § 28(133), p 379
- Harmless error as precluding, § 28(129), p 367
- Hearing and determination of proceedings for, § 28(133), p 375
- Judgment or decrees of enforcement, § 28(133), p 380
- Modification of vacation, § 28(143)
- Jurisdiction of proceedings, § 28(122), p 352
- Limitations and laches, § 28(125)
- Parties to proceedings, § 28(126)
- Pleadings, § 28(127)
- Presentation of objection to order for first time in proceedings for, § 28(131)
- Questions presented in proceeding for, § 28(129), p 362
- Remand to board, §§ 28(137)-28(139), pp 400-405
- Establishment, § 28(2), p 115
- Estoppel,
 - Grounds of attack on order, estoppel to assert, § 28(129), p 366
 - Precluding ordering cessation of unfair labor practices, § 28(112)
- Evidence,
 - Charges filed with as proof, § 28(75)
 - Compelling production of, § 28(81)
 - Finding supported by, § 28(108)
 - Harmless error in admission or exclusion, enforcement of order as precluded, § 28(129), p 367
 - Order in conformity with and supported by, § 28(111), p 327
 - Remand to board for taking of additional evidence, § 28(130)
 - Review by courts, § 28(136)
 - Weight and sufficiency, § 28(95), p. 286; § 28(107); § 28(136), p 391
- Examination of witnesses, right of, § 28(80)
- Examiner. Trial Examiner, post, this head
- Exclusive jurisdiction,
 - Proceedings to enforce or review order, § 28(122), p 352
 - Settlement of labor disputes, § 28(74), p 259
- Fact questions, power to determine, § 28(107)

National Labor Relations Board—Continued,

- Fair hearing, § 28(102)
- Back pay award, § 28(119), p 343
- Inquiry into on review of order, § 28(129), p. 366
- Filing of charge of unfair labor practices as condition precedent to issuance of complaint, § 28(75)
- Final orders, review, § 28(124)
- Findings of fact,
 - Conclusiveness in proceedings to enforce a review order of, § 28(136), p 384
 - Delegation of duty to trial examiner, §§ 28(106), 28(108)
 - Duty of making, § 28(108)
 - Enforcement of order not based on proper findings, § 28(133), p 379
 - Examination in proceedings for enforcement or review of order, § 28(129), p 363
 - Orders in conformity with, § 28(111), p 327
 - Refusal to enforce order not based on, § 28(133), p 379
 - Setting aside as without support in evidence, § 28(136), p 391
- Foreign commerce, unfair labor practices affecting, jurisdiction, § 28(74), p 258, n 25
- Form of orders, § 28(110), p 323
- Forma pauperis, review of proceedings in, § 28(128)
- Formal findings of fact, § 28(108)
- Functions, § 28(65)
- Good faith of employer, authority to determine, § 28(23)
- Harmless error, enforcement of order as precluded, § 28(129), p. 367
- Hearings,
 - Officials or agents authorized to conduct, § 28(104)
 - Prerequisite to certification of bargaining representative, § 28(32)
 - Proceedings for enforcement of review of orders, § 28(133), p 375
 - Right of parties, § 28(102)
- Hearsay, conclusiveness of findings based on, § 28(136), p 394
- Hiring, power to require employer to hire in accordance with reinstatement order, § 28(119), p 338
- Incompetent evidence, conclusiveness of finding resting on, § 28(136), p 396
- Inferences, conclusiveness of findings based on, § 28(136), p 389
- Injunction, power to restrain unlawful labor practices, § 28(111), p 324
- Interrogatories, review by court, § 28(122), p 353
- Interstate commerce,
 - Jurisdiction of labor disputes affecting, § 28(74), p 258
 - Unfair labor practices affecting jurisdiction, § 28(74), p 258, n 25
- Intervention in proceedings before, § 28(86)
- Investigations, determination of bargaining representative, § 28(30)
- Issues presented, order limited to disposition of, § 28(111), p 327
- Judicial enforcement of orders or awards, § 28(122), p 351

INDEX TO MASTER AND SERVANT

National Labor Relations Board—Continued,

Judicial functions, § 28(65)
 Jurisdiction, § 28(74), pp 258, 262
 Determination in proceedings for enforcement or review of orders, § 28(129), p 362
 Proceedings for enforcement of order, § 28(122), p 352
 Review of order or award, § 28(122), p 353
 Settlement of labor disputes, § 28(74), p 258
 Laches, enforcement of order, § 28(125)
 Landlord and tenant, jurisdiction over relationship, § 28(74), p 258, n 17
 Layoff, interference in case of discrimination, § 28(30)
 Limitation of actions, enforcement of orders, § 28(125)
 Limitation on proceedings before, § 28(76)
 Loss of jurisdiction, § 28(74), p 260
 Managerial powers, § 28(60)
 Mental process in reaching conclusions, inquiry into by court, § 28(129), p 364
 Modification of decree of enforcement of orders, § 28(143)
 Modification of orders,
 Parties to proceeding, § 28(126)
 Power of courts, § 28(133), p 380
 Review by court, § 28(122), p 351
 Moot orders, § 28(113)
 Nature of orders, § 28(110), p 323
 Negative relief, discretion, § 28(110), p 321, n 82
 Objections, presentation in proceedings before board as condition precedent to review of order, § 28(131)
 Omnibus order,
 Restraining employer from interfering with rights of employees, § 28(111), p 326
 Review, § 28(129), p 365
 Orders,
 Construction, § 28(115)
 Reinstatement orders, § 28(119), p 336
 Employer dominated unions, disestablishment, § 28(118), pp 332-335
 Enforcement of orders, ante, this head
 Modification by court, § 28(133), p 380
 Modification or setting aside, § 28(122), p 351; § 28(133), p 380
 Moot order, § 28(113)
 Nature and form, § 28(110), p 323
 Operation and effect, § 28(116)
 Persons against whom order runs, § 28(114)
 Posting by employer, § 28(117)
 Power to enter order protecting right, § 28(110), p 321
 Review by court, § 28(122), p 351
 Scope of, § 28(111), pp 324-328
 Service of, § 28(110), p 324
 Setting aside by court, § 28(133), p 380
 Supervisory power or control by court, § 28(129), p 363
 Time for, § 28(110), p 323
 Parties,
 Enforcement or review of orders, § 28(126)
 Proceedings before, §§ 28(83)-28(86), pp 269-274
 Review of orders, parties in proceedings, § 28(126)

National Labor Relations Board—Continued,

Petition to enforce review order, jurisdiction of court, § 28(122), p 353
 Place of hearing, § 28(102)
 Pleadings,
 Enforcement of orders, § 28(127)
 Findings conforming to, § 28(108)
 Order conforming to, § 28(111), p 327
 Reinstatement and back pay, § 28(119), p 337
 Posting of order by employer, § 28(117)
 Powers and duties, § 28(66)
 Preferential hiring risk, power to require employees entitled to reinstatement to be placed on, § 28(119), p 338
 Preferential list,
 Discretion in placing employees participating in strike on, § 28(133), p 377, n 27
 Prejudice as invalidating order, § 28(129), p 367
 Preliminary investigation, subpoenas, § 28(81)
 Presentation of objection in proceedings before board as condition precedent to review of order, § 28(131)
 Principal office, § 28(67)
 Proof, charge of unfair labor practice filed as, § 28(75)
 Public reparation orders, awards as, § 28(110), p 323
 Punishment for past wrongs or errors, § 28(110), p 322
 Question of fact, power to pass on and determine controverted question, § 28(136), p 387
 Questions of law,
 Decision on as conclusive on court, § 28(129), p 364
 Weight given to judgment of, § 28(133), p 378
 Reimbursement of employees,
 Discretion, § 28(133), p 377, n 27
 Dues of company dominated union, power to order, § 28(118), p 335
 Reinstatement of dismissed proceedings, § 28(79)
 Reinstatement of employees, § 28(119), pp 335-345
 Discretion, § 28(133), p 377, n 27
 Remand to board, §§ 28(137)-28(139), pp 400-405
 Remedial powers, § 28(110), p 322
 Reopening case, § 28(102)
 Res judicata,
 Dismissal of petition for enforcement of order, § 28(129), p 365
 Order for cessation of unfair labor practices, § 28(112)
 Restitution, back pay award confined to, § 28(119), p 343
 Retribution for past wrongs or errors, power to order, § 28(110), p 322
 Review of orders, § 28(122), p 351
 Conclusiveness of findings on, § 28(130), p 384
 Cost, § 28(128)
 Estoppel to assert particular grounds, § 28(129), p 366
 Forma pauperis, § 28(128)
 Hearing and determination, § 28(133), p 375
 Jurisdiction, § 28(122), p 353
 Parties, § 28(126)

INDEX TO MASTER AND SERVANT

National Labor Relations Board—Continued,

Review of orders—Continued,

Presentation of objection in proceeding before board, § 28(131)

Questions presented, § 28(120), p 362

Record of proceedings before board to be filed in court, § 28(128)

Remand to board, § 28(137)–28(139), pp 400–405

Representation proceedings, § 28(124)

Several grounds as basis for decision, § 28(129)

Waiver of grounds, § 28(129), p 366

Rules and regulations,

Power to interpret and amend or set aside, § 28(68)

Power to make, § 28(68)

Rumor, conclusiveness of findings based on evidence consisting of, § 28(136)

Selection of bargaining agent, discretion as binding of courts, § 28(133), p 381

Self-organization of employees,

Power to enter order protecting right, § 28(110), p 321

Prevention of employer from dominating or interfering, § 28(114)

Service of orders, § 28(110), p 324

Setting aside,

Decree for enforcement of orders, § 28(143)

Order and findings, § 28(116), § 28(133), p 380

Parties to proceedings, § 28(126)

Review by court, § 28(122), p 351

Speculation, findings based on, conclusiveness, § 28(136), p 391

Stipulation, entry of order on, § 28(116)

Enforcement of order entered on, § 28(133), p 378, n 29

Strikes,

Jurisdiction over labor disputes as affected by continued strike, § 28(74), p. 258, n 22

Pending proceedings before State Board charging illegality as precluding proceeding against employer, § 28(70)

Power to order employer to reinstate striker, § 28(119), p 338

Subpoena,

Harmless error in denial of request for, § 28(129), p 368

Power to issue, § 28(81)

Review of order or award by court, § 28(122), p 353

Substantial evidence as sufficient to make findings conclusive, § 28(136), p 393

Successors of employer, orders as running against, § 28(114)

Supervisory powers, § 28(66)

Court over orders, § 28(129), p 363

Supplementing record filed in court, § 28(128)

Suppression of oppressive acts against employees, power to order, § 28(110), p 322

Surmise, findings of fact based on, conclusiveness, § 28(136), pp 391, 394

Suspension of rules, power to suspend, § 28(68)

Suspicion, findings based on, conclusiveness, § 28(136), p 391

National Labor Relations Board—Continued,

Termination of proceedings before, § 28(79)

Time for order, § 28(110), p 323

Transcript of record, certification and filing in court, § 28(128)

Trial examiner,

Bias or prejudice, § 28(105)

Conclusiveness of findings, § 28(136), p. 387

Invalidating order of board, § 28(129), p. 367

Remand to board on ground of, § 28(137) p 477

Conduct of hearing, § 28(104)

Delegation of duty of making findings of fact, § 28(106)

Disagreement with as affecting conclusiveness of findings, § 28(136), p 380

Discretion as to conduct of hearing, § 28(105)

Discretion as to examination of witnesses, § 28(80)

Production of books and records before, § 28(81)

Report and recommendation, § 28(106)

Unfair labor practices, generally, post

Waiver,

Findings of fact, § 28(108)

Grounds of attack on order of, § 28(129), p 366

Weight and sufficiency of evidence,

Exclusive power to pass on, § 28(136), p 386

Findings supported by sufficient evidence, § 28(136), p 391

Witnesses,

Examination and proceedings before, § 28(80)

Exclusive power to determine creditability, § 28(136), p 387

Harmless error in examination of, § 28(129), p 368

Written charges of unfair labor practices, conditions precedent to issuance of complaint, § 28(75)

National mediation board, § 28(2), p 117

Bargaining representatives discretion in selection of, § 28(133), p 382

Certification of bargaining representative, § 28(34)

Conclusiveness of findings supported by evidence, § 28(136), p 397

Condition precedent to proceedings before, § 28(75)

Eligibility for participation in election of bargaining representative, § 28(33), p 179

Evidence, sufficiency to sustain findings, § 28(95), p 288

Jurisdiction, § 28(74), p 262

Parties to proceedings before, § 28(85)

Reduction of wages pending controversy before, § 138

Review of orders, § 28(124)

National Railroad Adjustment Board,

Action to enforce award, § 28(122), p. 353; §§ 28(127), 28(135)

Arbitration award, binding effect, § 28(121), pp. 348, 349

Burden of proof, action to enforce award, § 28(135)

INDEX TO MASTER AND SERVANT

National Railroad Adjustment Board—Continued,

- Collective bargaining agreements, weight given to determination on construction of, § 28(133), p 383
 - Complaint in action to enforce order of, § 28(127)
 - Conclusiveness of decisions and findings, § 28(136), pp 306, 397
 - Condition precedent to proceeding before, § 28(75)
 - Enforcement of award by, § 28(122), p 353
 - Burden of proof in action for, § 28(135)
 - Hearing and determination in action for, § 28(133), p 382
 - Judgment enforcing or setting aside order, § 28(133), p 382
 - Limitations, § 28(125)
 - Presentation of objection for first time in proceedings for, § 28(131)
 - Prima facie evidence, action to enforce, § 28(136), p 397
 - Enforcement of order, complaint in action to enforce, § 28(127)
 - Evidence, sufficiency to sustain findings, § 28(95), p 288
 - Findings, conclusiveness, § 28(136), p 397
 - Intervention in proceeding before, § 28(86)
 - Notice of hearing as waived by, § 28(87)
 - Jurisdiction, refusal to enforce award granted without, § 28(129), p 368
 - Limitation of actions, enforcement of award, § 28(125)
 - Notice of hearing before, § 28(87)
 - Parties to proceedings before, §§ 28(83), 28(85)
 - Powers, §§ 28(60), 28(69)
 - Reference of labor disputes to, § 28(2), p 117
 - Setting aside orders of, § 28(129), p 368
 - Judgment setting aside, § 28(133), p 382
 - Waiver of notice of hearing for, intervention as, § 28(87)
 - Withdrawal of dispute submitted to, § 28(121), p 348
- Nature of injury to servant,
- Evidence, § 505
 - Questions of law and fact, § 533, pp 152-164
- Negating defenses,
- Assumption of risk, § 492
 - Fair Labor Standards Act, complaint in action under, § 160(7), p 787
 - Wrongful discharge, declaration, petition or complaint in action for, § 52, p 450
- Negligence,
- Assumption of risk, ante
 - Basis of action for injuries to servants against master, §§ 171, 482
 - Burden of proof in action for injuries to servants, § 501, p 68
 - Concurrent negligence, generally, ante
 - Contributory negligence, ante
 - Customary methods and appliances, questions of law and fact, § 534, p 168
 - Discharge of employee on ground of, § 42, p 431
 - Evidence of master's negligence in action for injuries to servants, § 506, § 524, pp 121-139
 - Federal Employees' Liability Act, ante
 - Fellow servants, ante

Negligence—Continued,

- Independent contractors, liability for, § 584, p 353
 - Injuries to third person, generally, ante
 - Instructions in actions for, § 546, pp 245-252
 - Instrumentality belonging to or provided by third person, jury question, § 534, p 174
 - Insufficient force for work, evidence, § 524, p 137
 - Last Clear Chance, ante
 - Loss from negligence of employee, liability to employer for, § 79, pp 502-505
 - Medical treatment of employee, liability of employer for, § 165, pp 820-823
 - Burden of proof, § 501, p 69
 - Questions of law and fact, § 534, p 167
 - Methods of work, ante
 - Places of work, generally, post
 - Pleading negligence of master, § 490, p 17-30
 - Presumptions in action for injuries to servants, § 501, p 54
 - Proximate cause, generally, post
 - Railroads, post
 - Questions of law and fact, § 534, pp 164-205
 - Rules and regulations, post
 - Safe place to work, post
 - Tools, machinery and appliances, post
 - Wages,
 - Deductions for negligence of employees, § 114
 - Set-off of damages in action to recover, § 126
 - Warning and instructing servant, post
 - Wearing apparel deposited in lockers and destroyed by fire, civil liability of employer, § 24
 - Youthful servants, questions of law and fact in action for injuries, § 534, p 167
- Negotiations for contracts of employment, expenses incidental to as recoverable from employer, § 100
- Negroes,
- Complaint respecting limitations placed on union membership, § 28(15), p 148
 - Discrimination by union against Negro members, § 28(121), p 349, n 72
- Net sales, commissions on, construction of contracts allowing, § 90, p 520
- New agreement, contract of employment as terminated by, § 33
- New trial, injuries to servants, actions for, § 551
- Newsboys, labor relations, statutes dealing with as including, § 28(11)
- Newspapers,
- Fair Labor Standards Act,
 - Application to, § 151(9), pp 642, 657
 - Exemption from requirements of employees of small weekly or semi-weekly newspapers, § 151(23)
 - Independent contractors, persons employed to deliver, § 3(9); § 584, p 350
 - National Labor Relations Act as applying, § 28(9), p 134
- Nominal damages,
- Discharge of employee, failure to issue service letter, § 44, p 438
 - Wages, actions to recover, § 137
 - Wrongful discharge, § 58, p 471
- Nonperformance of services, deductions from wages, § 104

INDEX TO MASTER AND SERVANT

- Nonprofit enterprises, labor relations, statutes dealing with as applying, § 28(6)
- Nonsuit. Dismissal and nonsuit, generally, post
- Nonunion laborer, collective bargaining contracts, validity of provisions respecting, § 28(40), p 192
- Noon hour, injuries to employee leaving premises during, liability of employer, § 180, p 870
- Notius-LaGuardia Act, collective bargaining, § 28(20), p 156, n 60
- Notice,
 See also Knowledge, generally, ante
 Arbitration, labor disputes, § 28(87)
 Collective bargaining,
 Abrogation of agreement, § 28(41), p 198
 Election of representative, § 28(33), p 178
 Employee as entitled to notice of negotiation of contract by representative, § 28(37)
 Condition precedent, to action for injuries to servants, § 485
 Discharge of employee, violation of rule of which employee had no notice, § 42, p 433
 Intention, forfeiture of wages for failure to give, § 156, p 759
 Labor Relations Board, parties as entitled to notice of proceeding before, § 28(84)
 Medical attention, condition precedent to liability of employer for failure to furnish, § 163, p 817
 Rules and regulations,
 Forfeiture of wages for violation as requiring notice, § 103
 Liability for injuries to employee as affected, § 274
 Settlements of labor disputes, notice to parties in proceeding before, § 28(87)
 Termination of relation,
 Contract of employment providing for, § 32, p 418
 Indefinite term of employment, § 31, p 415
 Periodic employment, § 30
 Sickness of employee as affecting duties giving, § 38
 Unfair labor practices, order of labor relations board respecting, employer required to post, § 28(100), p 318
 Wages and other remuneration, post
 Waiver of Defects in notice of injury to servant, § 485
 Warning and instructing servant, notice of risk as affecting duty, § 285
 Wrongful discharge under contract terminable on, measure of damages, § 58, p 407
- Noxious fumes, warning employees, duty of employer, § 244, p 1000, n 20
- Noxious gases, mines, duty of operator to keep free from, § 222, p 942
- Nuisance,
 Independent contractors, liability for creation of, §§ 586, 587
 Respondent superior, doctrine as applicable in respect of creation of, § 575, p 332
- Number of employees,
 Collective bargaining contracts, validity of provisions, § 28(40), p 192
 Fellow servants, ante
- Number of employees—Continued,
 Insufficient force for work,
 Evidence, § 514
 Pleading negligence in employment of, § 490, p 25
 Questions of law and fact, § 533, p 164
 Nursery employees, Fair Labor Standards Act, exemption from provisions, § 151(17)
- Nurses,
 Assumption of risk, state hospital or sanitarium, § 375
 Safety and health department maintained by employer, liability for negligence of, § 165, p 820
- Obedience,
 Compensation, right of employee as dependent on, § 81
 Contributory negligence, ante
 Evidence of obedience to rules in actions for injuries to servants, § 519, p 110
 Fellow servants, liability for injuries to railroad employees, statutory provisions, § 352
 Injuries to third persons, liability of master, § 537
 Order of master, liability for injuries to servant resulting, § 181, p 874
- Obstructions,
 Independent contractors, liability for injuries caused by, § 590, p 364
 Injuries to third persons, liability of master for negligence of servant, § 575, p 338
 Tracks Railroads, post
- Obvious dangers,
 Assumption of risk, ante
 Contributory negligence, ante
 Fellow servants, duty of supervision as extending to, § 320
 Jury question, § 534, p 189
 Warning or instructing servant, § 296
 Inexperienced or youthful servant, § 306, p 1000
- Occupational diseases,
 Assumption of risks, § 360, p 1172, § 375
 Care required of master in respect of injuries preventable by exercise of diligence, § 183, p 880
 Evidence, action for disability caused by, § 511
 Healthful and sanitary place of work, failure to furnish as authorizing recovery, § 214, p 923
 Legislative power to provide for protection against, § 25
 Liability of employer for injuries to servant caused by, § 187
 Limitation of actions, commencement of periods, § 487
 Protection of employee against possibility, § 188
 Proximate cause, liability of employer for injury as dependent on, § 187
 Question of law or fact, § 533, p 153, n 60
 Recovery under occupational Diseases Acts, § 173, p 859
 Right of action for, § 482, p. 7, n 7
 Warning and instructing employees of, § 303
- Occurrence of accident to servant, presumption of negligence as arising from, § 501, p. 55

INDEX TO MASTER AND SERVANT

- Odd jobs, independent contractors, persons employed for, § 3(9)
- Offenses Crimes and offenses, generally, ante
- Offer and acceptance, contract of employment, § 6, p 64
- Office employees, Fair Labor Standards Act, application to, § 151(9), p 656
- Officers Public commissions, boards and officers, post
- Oil burners, assumption of risk, latent defects or dangers, § 392, p 1220
- Oil Inspection Act, proximate cause of injury, burden of proof in action under, § 501, p 73
- Oil production, Fair Labor Standards Act, application to, § 151(7), p 642, § 151(9), p 657
- Oil wells,
 - Independent contractors, persons employed to drill, § 3(9), § 584, p 356
 - Injuries to servants, negligence of master, jury question, § 534, p 184
- Omnibus order, National Labor Relations Board, review, § 28(129), p 365
- Open shop,
 - Right of employer to maintain, § 2, p 32, n 88, § 28(42), p 207
 - Statutes as precluding, § 28(42), p 205
- Options,
 - Contract for work to be furnished at, refusal of employer of further work, § 61
 - Employment contracts, renewal, § 10
 - Termination of relation, right to recover compensation for services rendered as affected, § 88
- Oral contract of employment, validity, § 6, p 66
- Order of proof, settlement of labor disputes, administrative proceedings, § 28(105)
- Orders of master,
 - Adoption of rules and regulations, § 271
 - Failure to adopt rules, § 271
 - Assumption of risk,
 - Compliance with negligent order, jury question, § 536, p 221
 - Disobedience of, § 410
 - Authority to give, § 279
 - Burden of proving negligence in action for injuries to servant, § 501, p 77
 - Contributory negligence, disobedience of, § 444, §§ 457-459, pp 1293-1302
 - Instructions to jury, § 549, p 261
 - Customary methods followed in giving, § 280
 - Disobedience of rules as precluding recovery for injuries sustained, § 276
 - Evidence in action for injuries to servants, § 513, pp 100-103; § 519, p 110, § 524, p 134
 - Fellow servants,
 - Liability of master for injuries, § 333, p 1124
 - Railroads, § 332, p 1104
 - General and special rules, § 276
 - Habitual disobedience of rules, § 275
 - Inexperienced servants, § 282
 - Injuries to third person as result of obedience to, liability of master, § 557
 - Instructions to jury in actions for injuries to servant, § 546, p 248
 - Jury question, action for injuries to servant, § 533, p 161, § 534, p 202; § 536, p 221
- Orders of master—Continued,
 - Knowledge of defect or danger in obeying as affecting liability for injuries, § 281
 - Method of work, §§ 278-283, pp 1042-1045
 - Negligence in giving, § 280
 - Notice to servant of rules, liability for injuries as affected, § 274
 - Obedience to rules, duty to enforce, § 272
 - Pleading in action for injuries to servant based on negligence orders, § 490, p 21
 - Posting of rules, constructive notice to employee, § 274
 - Presumption in actions for injuries to servants, § 501, p 63
 - Promulgation of rules and regulations, duty of employer, § 271
 - Protection of servants in execution of, § 280
 - Proximate cause of injury in obeying, § 283
 - Special orders prevailing over general rule, § 278
 - Youthful servants, § 282
- Ordinances,
 - Assumption of risk, violation of, § 370
 - Evidence of violation in action for injuries to servants, § 508
 - Jury question as to violation by master, § 534, p 167
 - Pleading in action for injuries to servants, § 490, p 48
 - Railroads, violation as basis of action for injury by employee, § 264
- Ordinary risks, assumption of, §§ 371-378, pp 1172-1183
- Organizations Employee organizations, generally, ante
- Original Board of Adjustments, Railway Labor Act, notice of hearing before, § 28(87)
- Other purposes, relationship between parties for, § 2, p 31
- Outside salesmen, Fair Labor Standards Act, exemption from provision, § 151(13)
- Overexertion, assumption of risk, injuries as result of, § 390, p 1213, § 401
- Overhead, wages, deduction for under profit sharing contract, § 112, p 550
- Overhead bridges, liability for injuries to railroad employees caused by, § 230, p 978
- Overhead structures, contributory negligence, inspection for latent defects or dangers, § 447, p 1270
- Overloading tenders, railway employee injured by fall of coal, § 227, p 952
- Overtime pay,
 - Actions for, §§ 160(1)-160(12)
 - Administrative orders prescribing maximum hours of employment, § 15, p. 100
 - Agreement, § 97
 - Amount of recovery, § 160(12)
 - Bonus, liability for additional compensation as chargeable against, § 160(12)
 - Burden of proof in actions for, § 160(8), p 790
 - Cause of action for, § 160(1)
 - Conditions precedent to action for, § 160(3)
 - Defenses, § 160(5)
 - Estoppel to claim compensation for, § 108
 - Falsification of record by employee, § 160(5)
 - Jury questions, § 160(9)

INDEX TO MASTER AND SERVANT

- Overtime pay—Continued,**
 Evidence in action for, § 129, pp 581, 587; § 160 (8), pp 791, 795, 797
 Fair Labor Standards Act, ante
 Federal government contracts, employees of contractors, § 153, p 756
 Good faith, defense of in action to recover, § 160 (5)
 Interest, § 101, § 160(12)
 Judgment in actions for, § 160(10)
 Jury questions, actions for, § 160(9)
 Limitation of actions, § 160(4)
 Maximum hours of service, compensation for hours worked in excess, § 155
 Pleading in action for, § 160(7), p 783
 Portal-to-portal pay, generally, post
 Record of by employee, failure to keep as defense in action to recover, § 160(5)
 Recovery for under agreement, § 97
 Setoff against claim for, § 160(5)
 Sunday, construction of statute relating to, § 154
- Overtime work,**
 Fellow servant rule, application, § 323
- Ownership,**
 Instrumentalities of places, pleading in action to recover for injury to servant, § 490, p 21
 Inventions and discoveries of employee, § 73, pp 483-499
- Packers, interstate commerce, National Labor Relations Act as applying, § 28(9), p 133**
- Packing house employees, Fair Labor Standards Act, § 151(9), p 657**
- Pain and suffering, wrongful discharge, damages for, § 58, p 469**
- Paint brushes, assumption of risk, simple tool doctrine, § 390, p 1200**
- Painters,**
 Independent contractors, § 3(9), § 584, p. 356
 Warning or instruction as to use of ladder, § 295
- Paperhangers, independent contractors, § 3(9), § 584, p 356**
- Paper profits, computation of compensation based on, § 112, p 548**
- Parent organization, labor unions affiliated with, determination as to which union has right to organize employees, § 28(27)**
- Parents, consent to employment of minor in dangerous occupation, failure to secure as negligence, § 185**
- Parol modification, employment contract, § 9, p 81**
- Part performance of services,**
 Bonus for continual service, proportionate amount as recoverable, § 98, pp 530, 531
 Breach of contract after as preventing recovery of wages, § 105
 Compensation, §§ 82, 113
- Part time employee, wrongful discharge, mitigation of damages, § 59, p 474**
- Parties to actions and proceedings,**
 Injuries to servants, § 488
 Injuries to third persons, § 613
 Labor relations boards, proceedings to enforce orders, § 28(126)
 Settlement of labor disputes, § 28(82)-28(86), pp 269-274
 Wages, § 127
 Statutory provisions, § 160(6), pp 779-783
- Parties to employment contract, § 7, p 74**
- Partnership,**
 Death of partner, contract of employment terminated by, § 34
 Fair Labor Standards Act, managing partner as employer for purpose of, § 151(4), p 629
 Labor relations boards, death of partner affecting right to enforce order directed against partnership, § 28(132), p 374
 Profit sharing agreement with employee as creating, § 93
 Termination of employment, formation or dissolution as resulting in, § 34
 Working members as employees, § 2, p 30
- Passageways,**
 Contributory negligence, servants injured in, jury question, § 537, p 235
 Mines, care required in keeping in safe condition, § 222, § 939
 Safe place to work, duty to furnish, § 219, p 931
- Patents, invention by employee, ownership, § 73, pp 486-499**
- Patriotism engaged by city to guard railway as within Railway Labor Act, § 28(11), p 137, n 47**
- Pause for rest, injury to employee during, § 181, p. 876**
- Payment,**
 Independent contractors, mode of as element to be considered in determining relation, § 3(8)
 Wages and other remuneration, post
- Payroll deductions, union dues, § 28(62)**
- Peaceful picketing,**
 Collective bargaining, employment prior to election of bargaining representative, § 28(33), p 179
 National Labor Relations Act, § 28(19), p 155
 Offense, § 638
 Order forbidding, § 28(100), p 320
- Peaceful settlement of labor disputes,**
 Construction of statutes encouraging, § 28(4)
 National Labor Relations Act, § 28(2), p 115
 Public policy, § 28(1)
 Railway Labor Act, § 28(2), p 117
 Statutory provisions, § 28(2), p 118
- Pedestrians, negligent pedestrianism by servant, liability of master under doctrine of respondent superior § 575, p. 333**
- Penalties Fines and penalties, generally, ante**
- Pensions,**
 Corporate plan, validity, § 168, p. 825
 Employees' pension fund committee, personal liability for distributing fund on dissolution, § 108, p 827
 Relief and benefit departments or associations, § 169, p 830
- Performance of collective bargaining contract, § 28 (41), p 198**
- Performance of conditions precedent to action for injury to servant, pleading, § 480, p 16**
- Performance of services, §§ 60-76, pp 476-500**
 Adverse interest of employee, § 70
 Baseball players, sale of, § 64
 Bonus for continual service, part performance as entitling employee to proportionate amount, § 98, p. 531
 Care required of employee, § 69

INDEX TO MASTER AND SERVANT

Performance of services—Continued,

- Change of conditions rendering performance unprofitable, excuse for nonperformance, § 61
- Compelling performance, § 68
- Competency, implied agreement as to, § 69
- Discoveries of employee in course of, ownership, § 73, pp 486-489
- Duty of employee to render services, § 62
- Earnings of employee in course of or in connection with as belonging to employer, § 71
- Exclusive service for employer, § 70
- Excuse for nonperformance by employee, §§ 61, 62
- Extent of services to be performed, § 63
- Faithfulness, § 67
- Finding lost chattels by employee engaged in, rights as to, § 74
- Foremen, competency and care required of, § 69, n 41
- Full time to employer, § 70
- Furnishing work and appliances, duty of employer, § 61
- Honesty, § 67
- Hours of labor, right of employer to fix, § 63
- Impossibility to perform by acts of employer, § 61
- Injunction, compelling by, § 68
- Inventions in course of, ownership, § 73, pp 486-490
- Labor contract statute, defense of in prosecution of employee for violation, § 80, p 507
- Mineral claims arising from, title as to, § 74
- Nature of services to be performed, § 63
- Obligation of employer to furnish employment in conformity with contract, § 61
- Outside work, acquiescence by employer as affecting right to earnings, § 71
- Past performance of services, ante
- Place of rendering services, § 63
- Presumptions, injury to servants during, § 501, p 53
- Readiness of employee to perform, § 62
- Rules and regulations, obligation to obey, § 75
- Skill required of employee, § 69
- Substantial performance by servant, § 66
- Substitution of parties, § 64
- Sufficiency, § 66
- Temporary placement in work other than that for which hired, § 63
- Tender, § 65
- Tips in connection with, § 71
- Trade secrets acquired in course of, duty not to divulge after termination of employment, § 72, pp 483-486
- Transportation, duty of employer to furnish, § 61
- Wages and other remuneration, post
- Willingness of employee to perform, §§ 62, 65
- Wrongful discharge, post
- Perils, duty of employer not to expose employees to, § 183, p 878
- Period of employment Duration of relation, generally, ante
- Periodic employment, termination of relation, § 30
- Permanent employment,
 - Discharge of servant engaged for, grounds, § 42, pp 430, 431
 - Duration of contract, § 8, p 78

Permanent employment—Continued,

- Termination of relation under contract providing for, § 31, p 414
- Validity of contracts for, § 6, p 69
- Wrongful discharge,
 - Action for breach of contract to give, § 48
 - Damages recoverable, § 58, p 467
- Permissive use, safe place to work, rule requiring employer to furnish as extending to, § 219, p 931
- Personal acquaintance, fellow servants, relation as dependent on, § 331, p 1008
- Personal authority, servant as including person over whom exercised, § 1, p 25
- Personal injuries,
 - Injuries to servants, generally, ante
 - Third persons, injuries to, generally, post
- Personal liability of servant, injuries to third persons, § 577, pp 345-348
- Personal representatives, contract of employment, enforcement against, § 37
- Personal service, essential characteristic of relationship, § 2, p 40, n 38
- Personnel committee, labor relations, responsibility of employer for acts of, § 28(14), p. 142, n 83
- Persuasion,
 - Resignation from union, employer inducing as guilty of unfair labor practice, § 28(55)
 - Strikes, right to strike as including right of, § 28(19), p 154
- Petition,
 - Collective bargaining,
 - Certification as bargaining representative, § 28(31)
 - Condition precedent to ordering election on choice of bargaining representative, § 28(33), p. 178
 - Complaint, declaration or petition, generally, ante
- Pharmacists, lien for wages or other remuneration, § 143, p 608
- Photographers, independent contractors, § 3(9)
- Physical condition,
 - Contributory negligence, injury resulting from, § 438
 - Injury to servant aware of unfitness for work, negligence of master in allowing in continuing employment, § 183, p 880
- Physical disability, fellow servants, competency as affected, § 313
- Physical incapacity to give notice of injury to servant, § 485
- Physical wants of employee, duty of employer to provide, § 171
- Physicians and surgeons,
 - Assumption of risk, state hospital or sanatorium, § 375
 - Independent contractors, § 3(9)
 - Medical and surgical attention, ante
 - Status as employee, § 2, p 30, n. 71
- Picketing,
 - Damages as result of unlawful picketing, action against union, § 28(71)
 - Peaceful picketing, generally, ante
 - Statutory provisions, § 28(2), p 120
 - Strikes, picketing in aid as lawful, § 28(19), p 154
 - Trade war maneuver, labor dispute as resulting, § 28(10), p 148, n 55

INDEX TO MASTER AND SERVANT

Picketing—Continued,

Unfair labor practice, § 28(63)

Calling strikes without following law, order forbidding, § 28(109), p 320

Unlawful picketing, § 28(51), p 228, n 63

Picks, assumption of risk, simple tool doctrine, § 390, p 1209

Piece work,

Discharge of employee paid by piece, prompt payment of wages, § 156, p 762, n 81

Fair Labor Standards Act, employees as within Act, § 151(4), p 631, § 151(7)

Independent contractor paid by, § 3(8)

Overtime compensation, computation, § 151(26), p 702

Servants or employees, § 2, p. 30, n 71

Pile drivers, assumption of risk, knowledge of danger, § 390, p 1206

Piling material, fellow servants, negligence with regard to, jury questions, § 535, p 209

Pilot of engine, contributory negligence, unnecessarily riding on, § 446, p 1268

Pinch bars, contributory negligence, inspection for latent defects or dangers, § 447, p 1271

Pinnous, assumption of risk, knowledge of danger, § 390, p 1208

Pipe lines, independent contractors laying, inherent danger as respects liability for injuries to others, § 500, p 362

Pits,

Contributory negligence, servant injured in, jury question, § 537, p 235

Safe place to work, care required of master employing servant in, § 222, p 938

Place,

Employment contract,

Acceptance, § 6, p 65, n 3

Law of place as governing, § 5

Injuries to third persons, liability of master under doctrine of respondent superior as affected, § 570, p 309

Injury to servant, jury question, § 533, p 151

Settlement of labor disputes, hearing for purpose of, § 28(102)

Place of work,

Assumption of risk, ante

Burden of proof, actions for injuries to servants, § 501, p 73

Condition before and after injury to servant, evidence, § 509

Contributory negligence, ante

Distraction affecting right to wages, § 86

Disease prevention, § 214, p 923

Duty of employer to furnish, § 61

Evidence, actions for injuries to servant, § 509; § 512, pp 96-100, § 524, p 124

Floor damage, statutory requirements, § 214, p 923, n 70

Healthful and sanitary place, duty of employer to furnish, § 214, p 923

Independent contractor relationship, existence affected by right to control, § 3(2), p 49

Inexperienced servants, assumption of risk, § 418

Inspection and repair, §§ 235-243, pp 988-999

Continuing duty of employer, § 241

Customary method, § 240

Place of work—Continued,

Inspection and repair—Continued,

Evidence in action for injuries to servant, § 512, p 98

Jury question, negligence, § 534, p 187

Latent defects, § 238

Legislative power to provide for, § 24

Liability for injuries to employees as result of failure, § 235, pp. 988-993

Manner and extent, § 239

Mines, § 235, p 993

Negligence as shown by mere failure to inspect, § 235, p 988

Notice of probable existence of defects as affecting duty, § 239

Operation and effect, § 243

Opportunity for, § 241

Public authority, § 242

Statutory regulations, § 235, p 992

Stevadores, § 236

Third persons owning or controlling, § 236

Time, § 241

Instructions to jury in actions for injuries to servants, § 546, p 246

Insurer of safety, employer as, § 202, p 902

Jury questions, actions for injuries to servant, § 533, p 157; § 534, pp 124, 168

Latent defects and dangers,

Assumption of risk, § 392, p 1218

Inspection to determine, § 238

Servant's duty of inspecting for, § 381

Notice of probable defect, inspection to determine, § 239

Obligation to perform services as specified in contract, § 63

Presumptions, actions for injuries to servants, § 501, p 61

Questions of law and fact, actions for injury to servant, § 533, p 157, § 534, p 168

Relationship as affected, § 2, p 40

Repair Inspection and repair, ante, this head

Safe place to work, generally, post

Statutory provisions, § 24

Transportation to or from, reimbursement of employee for expenses, § 100

Unfair labor practice in assigning employee to, § 28(46), p 214, n 16

Ventilation, statutory requirement, § 214, p. 923, n 70

Violation of statute, evidence in action for injuries to servant, § 524, p. 127

Youthful servants, assumption of risk, § 418

Planers,

Assumption of risk, knowledge of danger, § 390, p. 1208

Warning and instructing inexperienced or youthful servant, § 306, p 1067

Independent contractors, liability for injury caused by defective plan, § 589

Working of mines, validity of statute requiring, § 24

Plant guards, labor relations, statutes dealing with as including, § 28(11)

Platforms,

Assumption of risk,

Instruction, § 549, p 255

Jury questions, § 536, pp 214, 219

INDEX TO MASTER AND SERVANT

Platforms—Continued,

Assumption of risk—Continued,

Knowledge of danger, § 390, p 1211

Latent defects or dangers, § 392, p 1220

Care required of master furnishing for use by servant, § 220, pp 934-937

Contributory negligence,

Inspection for latent defects or dangers, § 447, p 1271

Selection or use of, jury question, § 537, p 235

Evidence, negligence in failing to furnish safe platform, § 524, p 129

Fellow servants, liability of master for negligence constructing, § 333, p 1119

Instructions to jury in actions for injuries to servants, § 540, p 246

Jury question in action for injury to servant, § 534, p 182

Latent defects or dangers, duty of employee to inspect for, § 381

Plea or answer,

Fair Labor Standards Act, actions under, § 160(7), p 788

Injuries to servants, actions for, § 494, pp 30-41

Injuries to third persons, actions for, § 614, p 389

Labor disputes, administrative proceeding for settlement, § 28(30)

National Labor Relations Board, petition for enforcement of order, § 28(127)

Wages, actions to recover, § 128, p 573

Wrongful discharge, action for, § 52, p 451

Pleading,

Complaint, declaration or petition, generally, ante

Contributory negligence, ante

Employment contracts, actions for breach, § 11, p 86

Judgment on pleadings, § 11, p 87

Enticing servants to leave employment, actions for damages, § 627

Fair Labor Standards Act, actions for wages and penalties, § 160(7), p 784

Injuries to servants, §§ 480-500, pp 14-52

Admission, § 494, p 37

Agents, acts or omissions, § 490, p 25

Amendment, § 496

Answer, § 494, pp 30-41

Assumption of risk, § 494, p 37

Negative averments, § 492

Breach of duty owed to servants, § 490, p 17

Breach of statutory duty, § 490, p 26

Certainty, plea or answer, § 494, p 37

Conclusion, § 489, p 14

Connection between negligence charged and injuries sustained, § 490, p 25

Contributory negligence, § 494, p 39

Dangerous machinery or places, § 490, p 18

Demurrer to complaint, § 489, p 14

Duplicity, plea or answer, § 494, p 37

Evidence admissible under, § 499, pp 45-50

Federal Employers' Liability Act, § 490, p 29

Fellow servant's negligence, § 491; § 494, p 38

Instructions,

Conforming to pleadings, § 539

Pleading—Continued,

Injuries to servants—Continued,

Instructions—Continued,

Supported by, contributory negligence, § 540, p 238

Insufficient force, negligence in employment of, § 490, p 25

Issues, proof and variance, §§ 497-500, pp. 43-52

Knowledge of master, § 490, p 20

Master against third person, § 622

Methods of work, § 490, p 21

Negative averments,

Assumption of risk, § 492

Contributory negligence, § 493

Negligence of master, § 490, pp 17-30

Ownership or control of instrumentalities or places, § 490, p 21

Proof, amendment to conform to, § 496

Proximate cause of injury, § 490, p 25

Contributory negligence, § 494, p 40

Replication or reply, § 495

Representatives, acts or omissions, § 490, p 25

Rules and orders, § 490, p 21

Statement of cause of action, § 489

Violation of statutory duty, § 490, p 26

Warning for instructing servant, failure, § 490, p 23

Willful or wanton injury, § 490, p 30

Workmen's Compensation Act, § 494, p 38

Injuries to third persons, actions for, § 614, pp 384-391

Inventions by employee, actions relating to, § 73, p 406

Labor relations boards, enforcement of orders, § 28(127)

Malicious procurement of discharge of employee, § 631

National Labor Relations Board,

Findings conforming to, § 28(108)

Order in conformity with, § 28(111), p. 327

Reinstatement and back pay, necessity to raise issue, § 28(119), p 337

Negligence or wrongful act of employee causing loss to employer, actions by employer for, § 79, p 503

Overtime pay, actions to recover, § 160(7), p 783

Plea or answer, ante

Portal-to-portal pay, action to recover overtime, § 160(7), p 785

Prevailing wages, public employees or employees of public works, actions to recover, § 160(7), p 783

Relief and benefit departments or associations, action for benefits, § 169, p 835

Service letter to discharged employee, action for failure to give, § 44, p 437

Settlement of labor disputes, proceedings for, §§ 28(88)-28(91), pp 276-280

Wages and other remuneration, post

Wrongful discharge, actions for, § 52, pp 447-454

Evidence admissible under, § 52, p 452

Plumbers, independent contractors, § 3(9)

Liability for acts or omissions of, § 584, p 356

INDEX TO MASTER AND SERVANT

- Poisonous dust or spray, independent contractors depositing on field, inherent danger as respects liability, § 590, p 362
- Poisonous fumes, warning and instructing employee, § 303
- Poisonous gases, injuries to servant, evidence, § 524, p 130
- Poles,
 - Assumption of risk, jury question, § 536, p 214
 - Contributory negligence, inspection for latent defects or dangers, § 447, p 1272
 - Inspection of telegraph and telephone poles, etc, duty of employer, § 235, p 990
- Police power, regulations in exercise of, § 14, p 93
 - Employment agencies, § 26
 - Hours of labor, § 15, p 98
 - State statutes regulating labor relations in exercise of, federal legislation as superseding, § 28(3), p 123
- Policemen,
 - Minimum wages,
 - Included within statute, § 153, p 749, n 43
 - Validity of acts, § 153, p 747, n 25
 - Plant guards deputized as employees within National Labor Relations Act, § 28(11), p 137, n 43
- Political activities, statutes providing employer from forbidding or preventing employees engaging in, § 27
- Political subdivisions, collective bargaining, exception from statute, § 28(7)
- Pollution of milk delivered to customers, respondeat superior doctrine as applicable to, § 575, p 331
- Portal-to-portal pay,
 - Compensable working time, § 151(28), p 716
 - Liquidated damages, § 151(34)
 - Pleading in action to recover, § 160(7), p 785
 - Purpose of statute relating to, § 151(1), p 623
 - Travel or transportation time, liability for, § 151(28), p 719
 - Validity of statute, § 151(2)
- Porters, Fair Labor Standards Act, § 151(9), p 657, n 33
- Posting rules of employer, constructive notice to employee, § 274
- Poultry raisers, Fair Labor Standards Act, exemption of employees, § 151(17)
- Powder, injuries to third persons, liability of master under doctrine of respondeat superior, § 570, p 315
- Power brakes, railroad cars, statutory requirements, § 228, p 969
- Practical construction, employment contracts, § 7, p 72
- Pranks, fellow servants, liability of master for injuries, § 311
- Prayer for relief, wages, actions to recover, § 128, p 572
- Precautions,
 - Fellow servants, ability to take as element, § 331, p 1095
 - Recurrence of injuries to servants evidence as to, § 509
- Preferences. Wages and other remuneration, post
- Preferential shop, collective bargaining, proposal for as excusing employer from bargaining, § 28(21)
- Preparation for work, injury to servant on premises in, § 180, p 808
- Preponderance of evidence in action for injuries to servants, § 520
 - Burden of establishing cause of action by, § 501, p 60
 - Cause of injury, § 522, pp 116, 121
 - Contributory negligence, § 501, p 83; § 527
 - Negligence of master, § 524, p 121
- Prescriptions, respondeat superior doctrine as applicable to mistake in filling, § 575, p 331
- Press machine, warning and instructing servant, obvious danger of putting hands under die or plunger, § 296
- Presumptions,
 - Assumption of risk, § 501, p 64
 - Instruction in action for injuries to servant, § 540
 - Bargaining representatives, continuing authority, § 28(93), p 281
 - Constitutional provisions, action for injuries of servants, § 502
 - Contracts of employment, ante
 - Contributory negligence, § 501, p 65
 - Instruction in action for injuries to servant, § 540
 - Discharge of employee, waiver of breach of contract or duty, § 43
 - Fair Labor Standards Act, exemption from provisions, § 151(11), n 78
 - Federal Employers' Liability Act, actions under, § 501, pp 54, 62
 - Fellow servants, competency, etc, § 316, § 501, p 63
 - Independent contractor, relationship, § 615, p 391
 - Injuries to servants, actions in general, §§ 501, 502, pp 52-86
 - Injuries to third persons, actions for, § 615, p 301
 - Instructions in action for injuries, § 540
 - Invention by employee, actions involving, § 73, p 498, n 12
 - Jury questions in action for injuries, § 532
 - Labor contract statute, prosecution of employee for violation, § 80, p 508
 - Labor Relations Boards, proceedings for enforcement or review of orders, § 28(134)
 - Methods of work, § 501, p 63
 - Minimum wages, prevailing rate, public employees or employees on public works, § 153, p 752
 - Negligence or wrongful act of employee causing loss to employer, contributory negligence, § 70, p 504
 - Relationship, existence of, § 12
 - Rules and regulations, § 501, p 63
 - Service letter to discharged employee, damages because of failure to issue, § 44, p 439
 - Statutory provisions, § 502
 - Termination of relation, good faith of employer, § 32, p 416
 - Unfair labor practices, proceedings to prevent, § 28(93), pp 280-283
 - Wages and other remuneration, post
 - Wrongful discharge, actions for, § 53, p 454

INDEX TO MASTER AND SERVANT

- Prevailing wage, public employees and employees on public works,
 Actions to recover, § 160(1); § 160(3), § 160(6), p 779, § 160(7), p 783; § 160(8), p 789, n 8, p 795; § 160(12)
 Amount of recovery, § 160(12)
 Burden of proof in action to recover, § 160(8), p 789, n. 8
 Conditions precedent to action for recovery, § 160(3)
 Evidence in action to recover, § 160(8), p 795
 Minimum wages, § 153, pp 749, 750
 Parties in action to recover, § 160(6), p 79
 Pleading in action to recover, § 160(7), p 783
 Prosecution for violation of statute providing for, § 160(13), p 813
 Prima facie evidence in actions for injuries to servants,
 Res ipsa loquitur doctrine, § 501, p 59
 Shifting burden of proof, § 501, p 72
 Principal and agent,
 Assumption of risk, compliance with command or order by agent, § 400
 Contract of employment by agent as employer, § 6, p. 65, n 2
 Dangerous places or appliances, notice to agent as chargeable to master, § 248
 Delegation to agent of duty to provide safe methods of work, § 286
 Discharge of employees, purported discharge by agents operating as, § 41
 Fair Labor Standards Act, action by agent on behalf of employees, § 160(6), p 782
 Fellow servants, assumption of risks of acts of persons acting as agent of master, § 322
 Independent contractor as agent for principal, § 3(1), p 45, n 73
 Injuries to third persons, liability of master under doctrine of agency, § 535
 Master as principal, § 1, p 24
 National Labor Relations Board, conduct of hearing by agent, § 28(104)
 Orders given by agent, master bound by, § 279
 Pleading acts or omissions to agents in action for injuries to servant, § 400, p 25
 Relation as species of agency, § 1, p 24, n 1
 Relationship as existing as to one employed as agent to supervise work, § 2, p 40
 Printed provisions, employment contract, written addition as controlling, § 7, p. 73
 Printing, interstate commerce, National Labor Relations Act as applying, § 28(9), p 134
 Priorities Wages and other remuneration, post
 Private detective agency, unfair labor practices, evidence as to employment, § 28(96), p 292
 Private employment agencies, statutory regulations, § 26
 Privies, labor relations board, orders as binding on employers, officers and agents as, § 28(140)
 Probationary employment,
 Compensation, § 109
 Duration affected by contract, § 8, p 75
 Processors,
 Agricultural products, Fair Labor Standards Act, exemption from provisions of employees engaged in, § 151(19), pp 685-689
 Interstate commerce, National Labor Relations Act as applying, § 28(9), p. 133
 Producers, interstate commerce, National Labor Relations Act as applying, § 28(9), p 133
 Production of books and documents, Fair Labor Standards Act, investigations under, § 151(31), p. 724
 Professional chemists, lien for wages, § 143, p 608
 Professional employees, Fair Labor Standards Act, exemption, § 151(12), pp. 664-672
 Evidence, § 160(8), p 801
 Profits,
 Sharing profits and losses, generally, post
 Wages and other remuneration, post
 Wrongful discharge, recovery as damages in action for, § 58, p. 470.
 Progress of work,
 Assumption of risk caused by changing condition of place, § 373
 Fellow employees, warning of danger arising during, § 333, p 1122
 Warning by employee of danger arising during, § 333, p 1122
 Promotion of employees, unfair labor practice in respect of, § 28(38)
 Proof. Issues, proof and variance, generally, ante
 Propping mine roof, § 222, p 940
 Props, contributory negligence, inspection for latent defects or dangers, § 447, p 1271
 Prosecutions Crimes and offenses, generally, ante
 Prospective operation of labor relations statutes, § 28(4)
 Protection of servants from injuries,
 Delegation of duty, § 186
 Duty of master, § 171; §§ 183-185, pp 877-883
 Proximate cause,
 Boiler Inspection Act, burden of proof in action under, § 501, p 73
 Building defects, § 253
 Burden of proof, § 501, pp 71, 75
 Concurring proximate cause, § 252
 Contributory negligence, ante
 Defective or dangerous machinery, § 254
 Evidence, pleading affecting in action for injury to servant, § 499, p 48
 Federal Employers' Liability Act, §§ 187, 257
 Burden of proof, § 501, p 72
 Federal Safety Appliance Act, § 258
 Fellow servants, ante
 Injuries to servants in general, § 187; §§ 252-259, pp 1006-1013
 Injuries to third persons, liability of master under doctrine of respondent superior, § 570, p. 204
 Instructions in actions for injuries to servant, § 514
 Methods of work, § 269
 Mines and excavations, § 259
 Minors employed in violation of statute, § 194, p 893
 Obedience to negligent order, § 283
 Pleading in action for injuries to servants, § 490, p 25, § 499, p 48
 Railroad, § 255
 Rules of employment, failure to adopt or enforce, § 277
 Questions of law and fact in action for injury to servant, § 533, pp 152-164
 Violation of statute, § 191

INDEX TO MASTER AND SERVANT

- Proximate cause—Continued,**
 Warning and instructing servant, failure to warn, § 201
- Public commissions, boards or officers,**
 Employees as including deputies and assistants, § 1, p 28
 Hours of labor, power to regulate, § 15, p 99
 Place for work, validity of orders, § 24
 Rules regulating relation, § 14, p 95
- Public employees,**
 Collective bargaining, National Labor Relations Act, § 28(7)
 Wages,
 Actions for, § 160(1)
 Conditions precedent, § 160(3)
 Minimum wages, § 153, pp 746-756
 Prevailing wage, ante
- Public entertainment, independent contractors, persons employed to assist in, § 3(9)**
- Public housekeeping establishments, minimum wages, women employees, § 152, p 743, n 85**
- Public interest, statutory provisions regulating labor relations, application as limited to business affected with, § 28(5)**
- Public policy,**
 Arbitration of labor disputes, § 28(72)
 Assumption of risk, § 357, p 1153
 Violation of statute or rule having effect of law, § 370
 Contracts exempting employer from liability for injuries, § 197
 Fair Labor Standards Act as constituting declaration of, § 151(1), p 620
 Fellow servant doctrine as based on, § 321, p 1079
 Settlement of labor disputes, § 28(1)
 Strikes contrary to, § 28(19), p 154
- Public utilities, Fair Labor Standards Act, exemption of employees, § 151(14), p 678**
- Public works,**
 Aliens, validity of statute forbidding employment, § 14, p 96
 Hours of labor of persons employed on, § 17
 Wages of employees on,
 Actions for, § 160(1)
 Conditions precedent, § 160(3)
 Minimum wages, § 153, pp 746-756
 Prevailing wage, ante
- Pulleys,**
 Assumption of risk, latent defects or dangers, § 302, p 1220
 Covering or guarding, jury questions, § 534, p 187
- Pullman company, injuries to employees, § 179**
- Punch press, contributory negligence in operation, jury question, § 537, p 231**
- Punches, assumption of risk, knowledge of danger, § 390, p 1206**
- Punchouts, wages, issuance in payment, § 157, p 766**
- Punitive damages Exemplary damages, generally, ante**
- Punitive powers, National Labor Relations Board, § 28(110), p 322**
- Punishment. Fines and penalties, ante**
- Purchase money mortgages, laborer's lien, priority, § 148**
- Quantum meruit,**
 Wages, recovery on, § 122
 Abandonment of service as affecting right, § 83
 Breach of contract of employment affecting recovery, § 105
 Defenses in action to recover on, § 125
 Discharged employee, § 122
 Wrongful discharge, recovery in action on, § 50
 Allegations authorizing recovery on, § 52, p 454
 Damages recoverable, § 58, p 468
- Quarries,**
 Assumption of risk, ante
 Contributory negligence, servant injured in, jury question, § 537, p 235
 Fellow Servants, ante
 Jury questions, § 533, p 160; § 534, p 184; § 537, p 235
 Proximate cause of injuries to servant, § 533, p 160
 Safe place to work, § 222, pp 938-944
 Evidence, § 524, p 130
 Fellow servant rules, § 333, p 1115
 Wages of employees of lessee, bond to secure, construction of statute requiring, § 154
 Warning and instructing employee, dangers involved, § 303
- Quasi contract, wages, actions for recovery based on, § 122**
- Questions of law and fact,**
 Accidental injury to servants, § 533, p 156
 Assumption of risk, actions for injuries to servant, § 536, pp 211-222
 Constitutional provisions, § 536, p 212
 Cause of injury to servant, § 533, pp 152-164
 Concurrent negligence of employer and third persons, § 533, p 164
 Constitutional provisions, negligence of master, § 529; § 534, p 166
 Contributory negligence action for injuries to servants, § 537, pp 222-237
 Customary methods and appliances, negligence of master, § 534, p 168
 Dangerous or defective machinery or appliances, negligence of master, § 533, p 156, § 534, pp 174, 186
 Dangerous nature of work, § 529
 Employment contracts, action for breach, § 11, p 86
 Engineering questions, railroads, § 534, p 181
 Enticing servant to leave employment, action for damages, § 627
 Existence of relationship in action for injuries to servants, § 530
 Fair Labor Standards Act,
 Actions under, § 160(9)
 Exemption, § 151(11)
 Federal Boiler Inspection Act, § 534, p 177
 Federal Employers' Liability Act, actions under, § 529; § 534, p 166
 Fellow servants, negligence of, § 535, pp. 205-211
 Happening of accident to servant, § 533, p 155
 Improbable injury to servant, § 533, p 156
 Inexperienced or youthful servants, negligence of master, § 534, p 167
 Injuries to servants in general, §§ 529-537, pp. 146-237

INDEX TO MASTER AND SERVANT

Questions of law and fact—Continued,

- Injuries to third persons, actions for, § 617, pp 408-418
- Instructing servant, § 533, p 163
- Insufficient force for work, § 533, p 163
- Interference with employment relation,
 - Actions for, § 624
 - Prosecutions for, § 637
- Knowledge of defects or dangers, § 534, p 180, § 536, p 217
- Labor contract statutes, prosecution of employee for violation, § 80, p 511
- Malicious procurement of discharge, actions for, § 631
- Medical attention,
 - Action for breach of contract to furnish, § 163, p 818
 - Negligence of employer, § 534, p 167
 - Negligence of physician employed by master, § 165, p 821
- Methods of work in action for injuries to servant, § 533, p 161; § 534, p 191
- Minimum wages, working time, § 151(28), p. 715
- Mixed questions in action for injuries to servants, § 520
- National Labor Relations Board,
 - Conclusiveness of decision on fact questions, § 28(120), p 364
 - Determination of controverted questions, § 28 (136), p 387
 - Power to determine, § 28(107)
 - Weight given to judgments of, § 28(133), p. 378
- Nature of servant's injury, § 533, pp 152-164
- Negligence of master, actions for injuries to servants, § 534, pp 164-205
- Negligence or wrongful act of employee causing loss to employer, action for damages, § 79, p 504
- Occupational diseases, § 533, p 153, n 60
- Orders of master,
 - Construction of, § 534, p 202
 - Negligence, § 533, p 161
- Overtime pay, § 151(28), p 715, § 160(9)
- Places for work, negligence of master, § 534, p 108
- Presumptions in action for injuries to servants, § 532
- Relation of parties, § 2, p 30, §§ 13, 530
- Relief and benefit departments or associations, actions for benefit, § 160, p 837
- Rules and regulations,
 - Construction thereof, § 534, p 200
 - Negligence, § 533, p 161
- Scope of employment, actions for injuries to servant, § 531
- Shipping, negligence of master, § 534, p 186
- Statutory provisions, § 520
 - Assumption of risk, § 536, p 212
- Tools, machinery and appliances, negligence of master, § 534, p 168
- Ventilation, negligence of master, § 534, p 171
- Wages,
 - Actions to recover, § 131, pp 589-595, § 160(9)
 - Lien, proceedings to enforce, § 140, p. 617
 - Prosecution for violation of statute regulating, § 160(13), p 814

Questions of law and fact—Continued,

- Warning and instructing servant, action for injuries to servant, § 533, p 163, § 534, p 203
- Wrongful discharge, actions for, § 54, pp 460-463
- Quit, termination of employment, definition as, § 40
- Race,
 - Collective bargaining, power of bargaining representatives to discriminate against employees on ground of, § 28(35), p 185
 - Discharge of employee on ground of, complaint alleging as sufficient in action for wrongful discharge, § 52, p 449, n 70
- Radio broadcasting, Fair Labor Standards Act, application to employers engaged in, § 151(7), p 642, n 98
- Rail cutters, assumption of risk, simple tool doctrine, § 390, p 1209
- Railings,
 - Contributory negligence, inspection for latent defects or dangers, § 447, p 1271
 - Dangerous machinery or appliances, § 231
- Railroad Adjustment Board, powers, § 28(66)
- Railroad cars,
 - Assumption of risk,
 - Jury question, § 536, p 214
 - Knowledge of danger, § 390 p 1210
 - Latent defects or dangers, § 392, p 1220
 - Ordinary risks incident to employees working on, § 378, p 1180
 - Care required in providing safe cars, § 228, pp 959-972
 - Contributory negligence,
 - Inspection for latent defects or dangers, § 447, p 1271
 - Method of operation, § 453, p 1280
 - Precautions against known or obvious dangers, § 456, p 1286
 - Coupling and uncoupling,
 - Assumption of risk, § 378, p 1182
 - Burden of proof in actions for resulting injuries, § 501, p 76
 - Contributory negligence, § 453, p 1281
 - Going between cars to make, § 456, p 1287
 - Methods adopted, § 453, p 1281
 - Violation of rules or ordinances, § 450, p 1209
 - Liability for injuries as result of defective appliances when not engaged in, § 228, p 964
 - Proximate cause of injury to employee engaged in, § 258
 - Statutory requirements, § 228, p 968
 - Warning of approach of train to employees engaged in, § 263, p 1027
- Delegation of duty to furnish safe cars, § 333, p 1118
- Duty of master to furnish reasonably safe cars, § 390, p 1207
- Duty to provide safe and suitable cars, § 228, pp 959-972
- Inspection to determine safe condition, § 230
- Inspectors, fellow servant rule, § 333, p 1121
- Latent defects or dangers,
 - Duty of employee to inspect for, § 381
 - Liability for injuries to employees, § 212, p 919

INDEX TO MASTER AND SERVANT

Railroad cars—Continued,

- Negligence in respect of condition, evidence, § 524, p 129
- Negligence of master in respect of, questions of law and fact, § 534, p 177
- Proximate cause of injury, defects, § 258
- Warnings to employees working on or about, § 263, p 1023

Railroads,

- Accidental injuries to employees, liability, § 188
- Alighting from moving cars or locomotives contributory negligence, violation of rules, § 459, p 1300
- Alighting from train, duty to employees alighting, § 261, p 1018
- Assault by special police officer, liability of master, § 505, n 93
- Assumption of risk, ante
- Automatic couplers,
 - Assumption of risk, failure to provide, § 369 p 1171
 - Proximate cause of injury, defect in, § 258
 - Statutory requirements, § 228, p 969
- Block signal system,
 - Assumption of risk for failure to maintain, knowledge of danger, § 390, p 1204
 - Warning of stalled train as essential in case of, § 261, p 1020
- Blocking frogs, switches, etc., negligence in leaving unblocked, § 229, p 974
- Boarding moving cars or locomotives, contributory negligence, violation of rule, § 459, p 1300
- Boarding trains, duty to employees boarding, § 261, p 1018
- Brakemen, generally, ante
- Brakes on cars, requirement as to, § 228, p 966
- Bridges,
 - Assumption of risks, ordinary risks of employees working on, § 378, p 1180
 - Bridge gang, fellow servants, § 327, p 1088
 - Liability to servants for injuries caused by failure to safely maintain, § 229, p 975
- Low bridges,
 - Liability for injuries to employee caused by, § 230, p 978
 - Warning to brakeman, § 263, p 1023
 - Negligence of master in respect of, questions of law or fact, § 534, p 180
 - Overhead bridges, liability for injuries to employee caused by, § 230, p 978
 - Walkway on bridge, duty to employees to safely maintain, § 229, p 976, n 84
- Bumping of trains, assumption of risk, § 378, p 1181
- Bumps, liability for injuries to trainman caused by, § 261, p 1018
- Cars Railroad cars, generally, ante
- Cattle guards,
 - Assumption of risks of failure to maintain, § 370
 - Duty to employees to provide, § 229, p 975
- Clearance space between tracks, negligence as respects liability for injuries to employee, § 230, p 977
- Climatic conditions, liability for injuries to employees due to, § 226, p 946, n 32
- Collisions, care required to avoid, § 261, p 1010

Railroads—Continued,

- Common servants liability, § 178
- Conductors,
 - Assumption of risks, ordinary risks, § 378, p 1181
- Fellow servants, § 332, pp 1104, 1106
- Statutory provisions, §§ 348, 354
- Contributory negligence, ante
- Coupling and uncoupling Railroad cars, ante
- Crossing signals,
 - Duty to give as applying to employees, § 263, p 1025
 - Violation of statutes or ordinances as basis of action for injuries by employee, § 264
- Crossing tracks or yards, contributory negligence of servants, precautions against injuries, § 456, p 1292
- Culverts, liability to servants for injuries caused by failure to safely maintain, § 229, p 975
- Customs, violation of as negligence as respects liability for injury to employees, § 261, p 1016
- Defective roadbeds, liability for injuries to employees resulting, § 229, p 973
- Department heads, fellow servant relation, § 332, p 1102
- Division superintendent, fellow servants relationship, § 332, p 1102
- Double headers, accident as actionable because train is run as, § 261, p 1017
- Eligibility to vote on bargaining representative, § 28(33), p 180, n 26, 27
- Engineering questions, questions of law or fact, § 534, p 181
- Engineers, fellow servants, § 332, pp 1104, 1106
- Statutory provisions, §§ 348, 354
- Express company employees, liability in respect of injuries to, § 179
- Fair Labor Standards Act,
 - Application to employers engaged in construction, § 151(7), p 613
 - Coverage, § 151(9), p 657
- Federal Boiler Inspection Act, duty to comply with, § 227, p 975
- Federal Employers' Liability Act, generally, ante
- Federal Safety Appliance Acts, generally, ante
- Fellow Servants, ante
- Fences, duty to employees, § 229, p 975
- Fencing of tracks, violation of statute or ordinance as basis of action for injuries by employees, § 264
- Firemen,
 - Assumption of risk, § 378, p 1181
 - Contributory negligence, guarding against obstructions on track, § 456, p 1287
 - Degree of care in watching track, § 265
 - Fellow servants, § 332, pp 1104, 1106
 - Statutory provisions, §§ 348, 354
- Flagman,
 - Assumption of risk, ordinary risk, § 378, p 1182
 - Contributory negligence, precautions against injuries, § 456, p 1292
 - Lookout for and signals to of approach of train, § 263, p 1024
- Flying switches,
 - Assumption of risk, § 378, p 1181
 - Contributory negligence, § 453, p 1282

INDEX TO MASTER AND SERVANT

Railroads—Continued,

- Foreign rolling stock, inspection to discover defects, § 236
- Foreman,
 - Fellow servants, § 332, p 1105
 - Statutory provision, § 348; § 355, p 1142
 - Section foreman, generally, post this head
- Frogs, negligence in leaving unblocked, § 229, p 974
- Gatemen, contributory negligence, precautions against danger, § 456, p 1292
- Goggles, duty of furnishing shop machinists with, § 226, p 947, n 46
- Grab irons and handholds,
 - Contributory negligence, inspection for latent defects or dangers, § 447, p 1271
 - Inspection to determine condition, § 239
 - Liability for injury as result of failure to maintain, § 228, p 962, n 66, § 228, p 964
 - Negligence of master, questions of law and fact, § 534, p 177
 - Statutory requirements, § 227, p 953, n 89
- Guard rails, negligence in leaving unblocked, § 229, p 974
- Handcars and trucks,
 - Assumption of risk by employees using, § 378, p 1183
 - Jury question, § 536, p 214
 - Knowledge of danger, § 300, p 1210
 - Latent defects or dangers, § 392, p 1220
 - Care required in furnishing safe cars, § 228, p 959
 - Contributory negligence, § 456, p 1288, § 459, p 1302
 - Duty to provide safe cars, § 228, p 959
 - Jury question, § 534, p 178
- Handholds Grab irons and handholds, ante, this head
- Highway crossings, signals on approaching, statutory requirement, § 264
- Hostlers, statutory provisions, § 354
- Hours of labor,
 - Actions to recover penalties for violation of law, § 23
 - Eight hour day, statute fixing as limited to members of train crew, § 155, n 27
 - Federal Hours of Service Act, §§ 18, 19
 - Interruption of continuity of service, § 20
 - Penalty for violation of law, § 23
 - Report of excessive hours, §§ 21, 23
 - Penalty for failure to make, § 23
 - Statutory regulations, § 15, p 100
- Ice,
 - Liability for injuries to employees due to, § 226, p 946, n 32
 - Yard limits, care required to prevent injury to employees, § 229, p 973
- Illumination of low bridge on tracks, negligence in failure, § 230, p 978
- Improper loading of car by third person, liability for injuries to servant as result of, § 212, p 920
- Independent contractors, liability for acts or omissions of, § 584, p 355
- Injuries to employees,
 - Employee returning home on company time after discharge, liability, § 180, p 869

Railroads—Continued,

- Injuries to employees—Continued,
 - Joint and several liability, § 195
 - Proximate cause as essential to liability, §§ 255-258, pp 1009-1013
 - Traffic arrangements and other contracts between railroads as affecting liability, § 178
- Inspection of,
 - Foreign rolling stock, duty of, § 236
 - Railroad equipment, fellow servant rule, § 333, p 1121
- Instructions to jury dealing with negligence, actions for injuries to servants, § 546, p 250
- Interchangeable tracks, mere use of as negligence, § 261, p 1016
- Interstate commerce, injury to servants, presumptions, § 501, p 53
- Jerking of trains,
 - Assumption of risk, § 378, p 1181
 - Liability for injuries to trainman as result of, § 261, p 1018
- Joint traffic agreements, injuries to employees of railroad operating, joint and several liability, § 195
- Latent defects or dangers in track or roadbed, assumption of risk, § 392, p 1218
- Lease of lands, liability for injury to employee as result of negligence of lessee, § 178
- Lights, low bridge, negligence in failing to eliminate, § 230, p 978
- Loading cars, care required so as not to cause injury to employee, § 228, p 972
- Loading or unloading freight, liability of consignor or consignee for injuries to servant, § 212, p 922
- Locomotives, generally, ante
- Lookout,
 - Duty to keep before moving trains or cars, § 263, p 1023
- Negligence in respect of,
 - Evidence, § 524, p 136
 - Jury question, § 534, p 197
 - Violation of statutes or ordinance as basis of action for injuries by employee, § 264
- Mail cranes, negligence in permitting unnecessarily near track, § 230, p 977, n. 92
- Managers, fellow servant relationships, § 332, p. 1102
- Medical or surgical attention, duty to furnish, § 162
- Methods of operation,
 - Assumption of risk, jury question, § 536, p 215
 - Knowledge of danger, § 536, p. 219
 - Custom of providing rules, § 271
 - Degree of care required, § 265
 - Instructions to jury, actions for injuries to servants, § 546, p 250
 - Liability for injuries to employees as affected, § 261, pp 1015-1020
 - Negligence, evidence as to, § 524, p 135
 - Rules of precedence, § 273
- Movements of trains, warnings to employees, § 263, p 1023
- National Railroad Adjustment Board, generally, ante

INDEX TO MASTER AND SERVANT

Railroads—Continued,

Negligence,

- Automatic couplers, violation of statute relating to, § 228, p 970
- Equipment, evidence, actions for injuries to employee, § 524, p 120
- Liability for injuries to employees as dependent on, § 226, p 945
- Licensee using tracks, liability for injuries to employee resulting, § 178
- Master, operation of, jury questions, § 534, p 193

Obstructions on or near tracks,

Assumption of risk,

- Jury question, § 536, p 215
- Knowledge of danger, § 390, p 1204, § 392, p 1219

Contributory negligence, precautions against danger, § 456, p 1287

Evidence, actions for injuries to employee, § 524, p 130

Fellow servant,

Negligence, liability for injuries resulting, § 333, p 1114.

Statutory provisions, § 355, p 1143

Liability for injuries to employees, § 212, p 921

Caused by failure to prevent, § 230, pp 976-979

Negligence of master, questions of law and fact, § 534, p 180

Orders, fellow servant relations, § 332, p 1104

Ordinances, violation as basis of action for injuries by employee, § 264

Ordinary risks incident to employment assumption by servant, § 378, pp 1180-1183

Overloading tenders, liability for injuries to employee as result by fall of coal, § 227, p 952

Permanent structures, duty of placing reasonably safe distance from track, § 230, p 977

Police, liability for unlawful acts within scope of employment, § 505, n 93

Power brakes on trains, statutory requirements, § 228, p 968

Precautions to protect employees, § 263, pp 1022-1029

Proximate cause of injury to servant, liability as dependent on, §§ 255-258, pp 1009-1013

Pullman company employees, liability in respect of injuries to, § 179

Questions of law and fact in action for injuries to servants, § 533, p 158

Rails Tracks and roadbeds, generally, post this head

Railway Labor Act, generally, post

Receivership, fellow servant rule as applicable to railroads in hands of, § 347

Relief departments, formation of as within power, § 168, p 825

Remedial statutes, Safety Appliance Acts, § 228, p 960

Repairs,

Liability for injuries to employees while car is being hauled to nearest available point, § 228, p 964

Warning of approach of train to employees engaged in making, § 263, p 1026

Railroads—Continued,

Riding on cars or locomotives,

Disobedience of rules, contributory negligence, § 459, p. 1299

Duty to employees, § 261, p 1018

Roadbeds Tracks and roadbeds, generally, post this head

Roadmasters, fellow servant relationship, § 332, pp 1102, 1105

Rolling stock, duty to provide safe appliances, § 228, p 959

Rules and regulations,

Contributory negligence, disobedience, § 459, p 1297

Methods of operation, § 273

Protection of employees, § 261, p 1015

Safe appliances Tools, machinery and appliances, post

Safe place to work,

Assumption of risk, negligence of master, § 366, p 1166

Degree of care required, § 226, p 946

Duty to furnish, § 212, pp 919-922, §§ 225-230, pp 945-979

Cars, § 228, pp 959-972

Locomotives, § 227, pp 952-959

Fellow employees, liability for negligence in respect of, § 333, p 1114

Insurer of, § 226, p 947

Jury question, § 534, p 181

Obstructions or erections on, or near tracks, § 230, pp 976-979

Proximate cause of accident, § 228, p 964

Tracks and roadbeds, duty in respect of, § 212, p 821, § 229, pp 972-976

Safety of employees, §§ 225-230, pp 945-979

Degree of care required, § 226, pp 945-952

Insurer of, § 226, p 945

Section foreman, fellow servants relations, § 332, pp 1104, 1105

Statutory provision, § 355, p 1142; § 348

Section men, lookout and signals of approach of trains, § 263, p 1024

Servants in common, liability for injury to, § 178

Sidetracks, liability for injuries to servant caused by defect, § 229, p 973

Signals,

Duty to prevent collision, § 261, p 1019

Negligence in failing to give jury question, § 534, p 197

Town or village, statutory requirements, § 264

Single track, mere use as negligence, § 261, p 1016

Snow,

Accumulation in yard limits, care required to prevent injuries to employee, § 229, p 973

Liability for injuries to employees resulting from, § 226, p 946, n 32

Speed of train,

Liability for injury to employee as result of, § 261, p 1017

Violation of statute or ordinance as basis of action for injuries by employee, § 264

Standard methods or systems, adoption as discharge of duty to employees, § 261, p 1015

INDEX TO MASTER AND SERVANT

Railroads—Continued,

- Station engines, fellow servant rule, statutory provisions, § 334
- Station platform, injuries to employees as result of defect, liability, § 226, p 948, n 59
- Statutory provisions, admissibility of evidence as to violation in action for injuries, § 508
- Sudden stopping of train, liability for injuries to trainman resulting, § 261, p 1019
- Superintendents, fellow servants, relationships, § 332, p 1102
- Switches and switching,
 - Assumption of risk,
 - Knowledge of danger, § 300, p 1207
 - Ordinary risk, § 378, pp 1180, 1181
 - Care required to prevent injuries to employees because of defect, § 220, p 974
 - Contributory negligence, method adopted, § 453, p 1282
 - Fellow servant relation of switching crew foreman, § 332, p 1104
 - Negligence in leaving switches unblocked, § 220, p 974
 - Switch engines, safe appliances, duty of providing with, § 227, p 954, n 93
 - Warning of approach of trains to employees engaged in, § 263, p 1027
- Telltails, negligence in failing to maintain, § 280, p 978
- Tender of engine, footboards at rear of, § 227, p 974, n 93
- Third persons, improper loading of car by, liability for injuries to servant resulting, § 212, p 920
- Trains, liability for injuries to employees caused by defects, § 229, p 974
- Tools, machinery and appliances, post
- Towerman, fellow servant rule, statutory provision, § 334
- Tracks and roadbeds,
 - Assumption of risk by servants working on or near, § 378, p 1182
 - Jury question, § 536, p 214
 - Known defects and dangers, § 300, p 1203
 - Care required in putting in safe condition, § 220, pp 972-976
 - Contributory negligence of servants working on or near, § 456, p 1289
 - Inspection for latent defects or dangers, § 447, p 1271
 - Jury questions, § 537, p 232
 - Precautions against injuries, § 456, p 1290
 - Duty to make safe for employees, § 212, p 921
 - Erections on or near tracks, liability to employee for injuries caused by failure to prevent, § 230, p 976
 - Liability for injuries to employees caused by defects, § 229, p 974
 - Lookout and signals to employees on or near, § 263, p 1024
 - Negligence in respect of, questions of law and fact, § 533, p 159, § 534, p 179
 - Proximate cause of injury to servants, defective condition, § 256

Railroads—Continued,

Tracks and roadbeds—Continued,

- Repairs or inspectors, fellow servant rule, § 333, p 1121
- Safe condition to prevent injury to employees, § 220, pp 972-976
- Trackwalkers, lookout and signals to of approaching train, § 263, p 1024
- Traffic arrangements,
 - Injury to employees, liability, § 178
 - Operating train on track of another, safe instrumentalities and place to work, § 212, p 919
- Train dispatches, fellow servants, statutory provisions, § 348
- Trestles,
 - Liability to servant for injuries caused by failure to safely maintain, § 229, p 975
 - Negligence of master in respect of, questions of law or fact, § 534, p 180
- Tunnels, assumption of risks, ordinary risks incident to working on, § 378, p 1180
- Velocipedes, assumption of risk by employees using, § 378, p 1183
- Viaducts, negligence in failing to maintain whipping straps, telltales, etc., § 230, p 978
- Violation of statutory provision, § 370
- Wanton misconduct in running down employees, § 261, p 1017
- Warning devices,
 - Maintenance to prevent collision, § 261, p 1019
 - Overhead bridges, § 230, p 978
- Warning employee of danger, failure to warn as negligence, § 263, p 1022
- Watchmen, contributory negligence, precautions against danger, § 456, p 1292
- Whipping straps, negligence in failure to maintain, § 230, p 978
- Willful injury to employees, liability, § 192
- Work trains, duty owed employee riding on, § 261, p 1018
- Wreck masters, fellow servants relations, § 332, pp 1102, 1105
- Yard foreman, servant's relations, § 332, p 1104
- Yard limits,
 - Rules, partial supersession by adoption of inconsistent order, § 278
 - Snow or ice accumulation, care required to prevent injury to employees, § 229, p 973
- Yard masters, fellow servants relations, § 332, p 1106
- Yardmen, contributory negligence, precautions against danger, § 456, p 1290
- Yards,
 - Independent contractors, persons employed to maintain and operate, § 3(9)
 - Warning of approach of train to employees working in, § 263, p 1027
- Railway Labor Act,
 - Actions to enforce award under, § 28(122), p 353
 - Adjustment board National Railroad Adjustment Board, generally, ante
 - Administrative remedies, exhaustion before resort to courts, § 28(71), p 253
 - Aggrieved employees, right to participate in proceeding before Adjustment Board, § 28(83)
 - Application, § 28(5)

INDEX TO MASTER AND SERVANT

Railway Labor Act—Continued,

- Arbitration, § 28(2), p 117
 - Advisory nature of award, § 138
 - Binding effect of award, § 28(121), pp 348, 349
 - Disposal of issues by award, § 28(121), p 349
 - Representation of employees, § 28(83)
 - Setting aside of award, § 28(133), p 382
 - Submission of labor disputes, § 28(73)
- Burden of proof, action to enforce award under, § 28(135)
- Certification of bargaining representatives, § 28(34)
- Collective bargaining,
 - Crafts and classes of employees as units for, § 28(28), p 171
 - Presumption, § 28(93), p 281
 - Right of, § 28(20)
- Condition precedent to proceeding before Adjustment Board, § 28(75)
- Conditions precedent to action to enforce award under, § 28(122), p 354
- County, exhaustion of administrative remedies before resort to, § 28(71), p 253
- Crafts and classes of employees, preservation as units for collective bargaining, § 28(28), p 171
- Divisional jurisdiction of Adjustment Board, § 28(74), p 261
- Employees within meaning of, § 28(11)
- Enforcement of award under, § 28(122), p 353
 - Burden of proof in action for, § 28(135)
 - Grounds for refusal, § 28(129), p 368
 - Hearing and determination in action for, § 28(133), p 382
 - Limitations, § 28(125)
 - Parties to proceeding, § 28(126)
 - Pleading, § 28(127)
 - Presentation of objections for first time in proceeding for, § 28(131)
 - Prima facie evidence, § 28(130), p 306
- Evidence, sufficiency to sustain findings of Mediation and Adjustment Board, § 28(95), p 288
- Fair Labor Standards Act, exemptions from provisions of employee of carrier by all subject to, § 151(23)
- Furloughed employees, eligibility to vote on question of bargaining representative, § 28(33), p 180, n 26, 27
- Grievances, power of bargaining agent to handle, § 28(35), p 186
- Jurisdiction, settlement of labor disputes, § 28(74), p 260
- Jurisdictional labor disputes, jurisdiction over, § 28(71), p 254
- Labor dispute within, § 28(16)
- Labor unions, performance of functions of bargaining agent, § 28(15), p 147
- Limitation of actions, enforcement of award of National Railway Adjustment Board, § 28(125)
- Limitation on time in which jurisdiction of Board of Adjustment may be invoked, § 28(76)
- National Mediation Board, generally, ante
- National Railroad Adjustment Board, generally, ante

Railway Labor Act—Continued,

- Purpose of, § 28(2), p 117
- Strikes, right to engage in, § 28(18)
- Subpoenas, enforcement of subpoena issued by, § 28(31), p 207, n 50
- Validity, § 28(3), p 121
- Wage cuts, § 28(62)
- Rank, fellow servants, distinctions in as affecting relation, § 332, pp 1098-1108
- Ratification,
 - Independent contractors, liability for negligent or wrongful acts as affected, § 504
 - Third persons, injuries to, post
- Razing structures, safe place of work, duty to guard against dangers incident to, § 219 p 934
- Reasonable care required by employer to protect against injuries, § 133, p 877
- Rebates wages,
 - Minimum wages and overtime, agreement for, § 151(35), p 737, n 27
 - Profit sharing wage contract, allowance for, § 112, p 553
 - Prosecution for violation of statute prohibiting, evidence, § 160(13), p 813
- Rebuttal evidence, wrongful discharge, admissibility in action for, § 53, p 457
- Receipt, wages, waiver or release as resulting, § 108
- Receivers,
 - Breach of employment contract arising from non-employment because of receivership, § 35
 - Employer's receivership as affecting labor relations under statute, § 28(10)
 - Labor disputes, appointment of receiver for employer as affecting right of Labor Relations Board to file complaint, § 28(80), p 277
 - Railroads, fellow servant rule, applicability to railroads in receivership, § 347
- Reckless acts, fellow servants, liability of master of injuries caused by, § 325
- Records,
 - Fair Labor Standards Act, employers, § 151(33)
 - Labor relations boards,
 - Proceedings for enforcement or review of order decided on, § 28(130)
 - Remand for supplying deficiencies, § 28(137)
- Redcaps, Fair Labor Standards Act, coverage, § 151(9), p 657, n 33
- Reduction Wages and other remuneration, post
- Reference, labor disputes, Railway Labor Act, § 28(2), p 117
- Refuge places, mines, duty of operator to provide, § 222, p 942
- Refunds, relief and benefit departments or associations, contributions or deductions from wages, § 168, p 827
- Regional Board of Adjustments, carriers, jurisdiction over labor disputes, § 28(74), p 261
- Registered nurses, Fair Labor Standards Act, exemption from provisions, § 151(12), p 666, n 10
- Reinstatement of employees,
 - Labor relations boards,
 - Power to order, § 28(47); § 28(109), p 319
 - Remand to board in respect of issues involving, § 28(138)
- National Labor Relations Board, § 28(119), pp 335-345

INDEX TO MASTER AND SERVANT

Reinstatement of employees—Continued,

- Unfair labor practice,
 - Discrimination because of union activities, evidence, § 28(100), pp 303-309
 - Refusal because of union activities, evidence, § 28(99)
 - Refusal to reinstate employee wrongfully discharged, § 28(51), p 226
- Wrongfully discharged employee, § 46
- Relationship, §§ 1-13, pp 24-94
 - Burden of proof, § 12
 - Actions for injuries to third persons, § 615, p. 394
 - Change in nature of, employment contract, § 9, p 81
 - Compensation to be considered in determining existence, § 2, p 38
 - Contracts of employment, generally, ante
 - Defined, § 1, p 24
 - Designation by parties as determinative, § 2, p 29, n 68
 - Determination of for purpose of liability for injury to servant, § 174
 - Direction and control of work, element of, § 2, p 32, § 3(3), p. 49
 - Discharge, power to discharge as essential, § 2, p 35
 - Enticing servant to leave employment, necessity in order to maintain action for, § 625, p. 429
 - Essentials, § 2, pp 29-41
 - Estoppel, denial of, § 580
 - Evidence,
 - Actions for injuries to servant, § 521
 - Actions for injuries to third persons,
 - Admissibility of evidence, § 615, p 397
 - Circumstantial evidence, § 615, p 405
 - Employment, § 12
 - Existence of as prerequisite to liability for injuries to minors employed in violation of law, § 104, p 895
 - Federal Employers' Liability Act, burden of proof in action under, § 501, p 68
 - Fellow servants, existence as essential to defense of, § 328
 - Independent contractors and their employees, §§ 3(1)-3(9), pp 41-62
 - Tests, § 3(2), pp 45-49
 - Injuries to servants,
 - Burden of proof in action for, § 501, p 68
 - Commencement, suspension, etc., for purpose of determining liability, § 180, pp 868-873
 - Evidence, §§ 504, 521
 - Instructions to jury, § 542
 - Liability of master as dependent on, § 175
 - Employers' liability acts, § 173, p 846
 - Federal Employers' Liability Act, § 173, p 849
 - Pleading in actions for, § 489, p. 15
 - Presumptions, § 501, p 53
 - Question of law or fact, § 530
 - Interference with relationship by third persons, generally, ante
 - Jury question, § 13
 - Actions for injuries to third persons, § 617, p 409

Relationship—Continued,

- Presumption, § 12
 - Actions for injuries to servant, § 501, p 53
 - Existence of, § 615, p 391
- Profit sharing agreement as affecting, § 93
- Question of fact, § 2, p 30
- Questions of law and fact, § 13
 - Actions for injuries to servants, § 530
- Services rendered as foundation, § 2, p 40
- Social security tax, payment of as indicative of existence, § 3(2), p 47
- Statutory regulations, §§ 14-27, pp 93-113
- Strikes, participating in as terminating, § 28(13)
- Substitute employed by servant, § 4
- Releases,
 - Federal Employers' Liability Act, application to agreements for, § 197
 - Minimum wages and overtime pay, avoidance of liability by, § 151(35), pp 736-741
 - Relief and benefit departments or associations,
 - Agreement that acceptance of benefits shall release employer from liability, § 170, p 838
 - Execution as condition to payment of benefits, § 169, p 834
 - Execution on consideration of benefits received, § 170, p 839
- Relief and benefit departments or associations, §§ 167-170, pp 824-841
 - Acceptance of benefits under plan as bar to action for injuries or death, § 170, p 838
 - Actions for benefit, § 169, p 835
 - Actions for injuries, right to benefit as affected, § 170, p 839
 - Administration of fund, regulation, § 169, p. 830
 - Amount of pension, § 169, p 831
 - Appeal from decision of administrative officers, § 169, p 833
 - Beneficiaries, § 169, p. 832
 - Benefits, § 169, pp 828-837
 - Elections between benefits and actions for injuries or death, § 170, pp 837-841
 - Burden of proof, actions for benefit, § 169, p 836
 - Change of beneficiary in death benefit certificate, § 169, p 832
 - Conclusiveness of determination of organization in respect to benefits, § 169, p 834
 - Conflict of laws, right to benefit, § 170, p 838
 - Consideration,
 - Benefit plan offered by employer and accepted by employee, § 169, p 828
 - Retirement plan, § 169, p 830
 - Constitutional provisions invalidating agreement, § 170, p 840
 - Construction of provisions for benefits, § 169, p 829
 - Contract, benefit plan offered and accepted as, § 169, p 828
 - Contributions,
 - Benefit or insurance funds, validity of statute, § 168, p 825
 - Refund or recovery back, § 168, p 827
 - Corporations, authority to maintain, § 168, p. 825
 - Courts, resort to, § 169, p 833
 - Death benefits, actions to recover, § 169, p. 835

INDEX TO MASTER AND SERVANT

Relief and benefit departments or associations—Continued,
 Deductions from wages, refund or recovery back, § 168, p 827
 Discharge of employee, withdrawal of contributions, § 168, p 827
 Discretion of trustees, amount of pension, § 109, p 831
 Dissolution, § 168, p 826
 Division and partial distribution of assets without, § 168, p 827
 Divorced wife, right to benefits under death benefit certificate, § 169, p 832
 Election between benefits and actions for injuries or death, § 170, pp 837-841
 Eligibility for membership, § 168, p 825
 Estoppel, denial of membership, § 168, p 826
 Evidence, actions for benefit, § 169, p 836
 Execution of releases, condition to payment of benefits, § 169, p 834
 False warranties as to material matter by member in application, § 168, p 826
 Federal Employers' Liability Act, contracts as affected, § 170, p 841
 Fraud, election to obtain benefits induced by, § 170, p 839
 Gratuitous benefits, § 169, p 830
 Insurable interest, beneficiary in death benefit certificate issued employee, § 169, p 832
 Interest, unpaid pension installments, § 169, p 837
 Interpleader, actions for benefit, § 169, p 836
 Issues, actions for benefits, § 169, p 835
 Judgment, actions for benefit, § 169, p 837
 Jury questions, actions for benefit, § 169, p 837
 Law governing contract, § 170, p 838
 Liberal construction, retirement provisions, § 169, p 831
 Membership, § 168, p 825
 Mistake, acceptance of benefits under, § 170, p 839
 Money had and received, actions to recover benefits, § 169, p 835
 Organizations, § 168, pp 824-828
 Payment of benefits, execution of release as condition, § 169, p 834
 Pensions, § 169, p 830
 Pleadings, actions for benefits, § 169, p 835
 Procedure within organization, § 169, p 833
 Proof, actions for benefit, § 169, p 835
 Questions of law and fact, actions for benefit, § 169, p 837
 Railroad employees, Federal Employers' Liability Act as affecting, § 170, p 841
 Refund or recovery back of contributions or deductions from wages, § 168, p 827
 Release,
 Agreement that acceptance of benefits shall release employer from liability, § 170, p 838
 Execution of conditions to payment of benefits, § 169, p 834
 Execution on consideration of benefits received, § 170, p 839
 Remedies within organization, § 169, p 833

Relief and benefit departments or associations—Continued,
 Resulting trusts, funds on dissolution held for benefit of contributors and donors as, § 168, p 826
 Retirement benefits, § 169, p 830
 Rules and regulations, § 167
 Administration of funds and right to benefit, § 169, p 833
 Benefits in accordance with, § 169, p 828
 Statutory provisions invalidating agreement, § 170, p 840
 Termination of employment, return or refund of contributions or deductions from wages, § 168, p 827
 Termination of membership, § 168, p 826
 Trial, actions for benefit, § 169, p 837
 Trustees, funds held by on dissolution, § 168, p 826
 Undue influence, election to accept benefits induced by, § 170, p 839
 Variance, actions for benefits, § 169, p 835
 Voluntary discontinuance of plans, rights of parties, § 168, p 1827
 Widow, right of action on death benefit certificate, § 169, p 832
 Winding up, § 168, p 826
 Withdrawal of contributions, discharged employee, § 168, p 827
 Wrongful death, prosecution of action for as precluding claim as beneficiary under benefit certificate, § 170, p 839
 Relief trains, Hours of Service Act, exception of crew, § 19
 Remand, Labor Relations Board, § 28(137)-28(139), pp 400-405
 Duty to act on issues recommitted, § 28(137)
 Reinstatement or back pay issues, § 28(138)
 Taking of additional evidence, § 28(139)
 Remedial statutes, labor relations, § 28(2), p 119
 Remedies,
 Actions, generally, ante
 Labor disputes, settlement of, § 28(60)
 Judicial remedies, § 28(71), pp 250-254
 Wrongful discharge, nature and form of remedies available, § 50
 Remedying defect, evidence as to duty of employee in action for injuries, § 519, p 110
 Remote cause, instructions in actions for injuries to servants, § 544
 Remuneration Wages or other remuneration, generally, post
 Renewal, employment contract, § 10
 Rent, profit sharing wage contract, deduction for, § 112, p 551
 Repairs,
 Contributory negligence, disobedience of rule or order relating to, § 459, p. 1301
 Dangerous machinery, absence of guard during, § 232, p 982
 Evidence in action for injuries to servants, § 512, p 98
 Fair Labor Standards Act, application to repairmen, § 151(9), p. 657
 Fellow servants,
 Liability of master for negligence, § 333, p. 1119

INDEX TO MASTER AND SERVANT

- Repairs—Continued,
 - Fellow servants—Continued,
 - Negligence in respect of, jury question, § 535, p 208
 - Independent contractors, liability for acts or omissions, § 584, p 356
 - Injuries to servants,
 - Admissibility of evidence in action for, § 512, p 98
 - Repairs after injuries, § 509, n 29, § 510
 - Instruction to jury, § 546, p. 247
 - Negligence of master, jury question, § 534, p 189
 - Place of work, ante
 - Railroad cars being transported for, liability for injuries to employee, § 228, p 965
 - Safe place to work, employees engaged in making, § 250
 - Tools, machinery and appliances, post
 - Warning and instructing servant engaged in making, § 286
- Reparation, discharge of employee, effect of, § 43
- Repayment, labor contract statute, defense of in prosecution of employee for violation, § 80, p. 507
- Repeal,
 - Fair Labor Standards Act, § 151(3)
 - Statutory provisions, labor relations, § 28(4)
- Replication or reply,
 - Injuries to servants, actions for, § 495
 - Wages, actions to recover, § 128, p 573
- Reports,
 - Accident, injuries to servants, admissibility in actions for, § 503
 - Fair Labor Standards Act,
 - Administrator, § 151(30)
 - Employers, § 151(33)
 - Industry committee, § 151(32), p 727
 - Hours of labor, report of excessive hours, carriers, § 21
- Representations of master,
 - Assumption of risk,
 - Effect of, §§ 404–409, pp 1235–1238
 - Repairs having been made, § 406
 - Requisites and sufficiency, § 405
 - Contributory negligence, reliance on, § 429
- Representative Collective bargaining, ante
- Representative actions, Fair Labor Standards Act, pleading, § 160(7), p 787
- Representatives, pleading acts or omissions in action for injury to servant, § 490, p 25
- Repudiation, employment contract,
 - Damages as recoverable by employee, § 11, p. 84
 - Rescission on ground of, § 9, p. 82
- Repugnancy, pleading, action for injuries to servant, § 489, p 14
- Reputation,
 - Discharge of employee for acts tending to injure employer in, § 42, p. 428
 - Evidence of reputation of,
 - Fellow servant causing injuries, § 516
 - Injured employee, § 519, p. 109
 - Wrongful discharge, damages as recoverable for injury to, § 58, p 469
- Request for instructions in actions for injuries to servants, § 538, p 238
- Rescission, employment contract, § 9, p 81
 - Defense in action for breach, § 11, p 85
- Reservation of powers, relationship as inferred from, § 2, p 37
- Resignation,
 - Termination of employment, acceptance as essential, § 33
 - Unfair labor practice, forced resignation because of union activities, evidence, § 28(99)
- Res ipsa loquitur,
 - Federal Employers' Liability Act, doctrine as applicable in action under, § 501, p 59
 - Injuries to servant, § 501, p 50
 - Instruction, § 540
 - Question for jury, § 524, p 126
 - Injuries to third persons, doctrine as applicable, § 615, p 394
- Res judicata,
 - Collective bargaining, certification of bargaining representative, § 28(34)
 - Labor Relations Boards, principle as applying to, § 28(70)
 - National Labor Relations Board,
 - Dismissal of petition for enforcement of order, § 128(129), p 305
 - Doctrine as available to preclude ordering cessation of unfair labor practice, § 28 (112)
- Respondeat superior,
 - Criminal acts of servant, liability of master under doctrine, § 573
 - Independent contractors, doctrine as applicable to, § 584, p 353
 - Injuries to servant, liability of employer under doctrine of, § 525
 - Assistants employed by servant, § 564, pp 280–283
 - Control of servant as essential, servants loaned or hired to another, § 560, pp 284–292
 - Knowledge of master as affecting, § 570, p 311
 - Invitees, liability for injuries under doctrine of, § 575, p 334
 - Liberal application of rules, § 575, p. 331
 - Licensees, liability for injury under doctrine of, § 575, p 334
 - Medical attention furnished employee, liability of employer under rule of, § 103, p 821
 - Particular application of doctrine, § 575, pp 331–345
 - Personal liability of servant for tort as affected by doctrine, § 577, p 346
 - Smoking, liability of master under doctrine with respect to fires started by, § 575, p. 334
 - Third persons, injury to, ante
 - Trespassers, liability for injury under doctrine of, § 575, p 334
 - Willful or malicious acts of servant, liability of master under doctrine of, § 572
- Rest days, statutory provisions, § 15, p 99
- Rest periods,
 - Injuries to employee during, liability of employer, § 180, p 870
 - Minimum wages and overtime pay, compensable working time as including, § 151(28), p 716

INDEX TO MASTER AND SERVANT

Rest periods—Continued,

- Safeguarding machinery, statutes requiring as applying during, § 232, p 984
- Restaurants, minimum wages, minor employees, § 152, p 743, n 83
- Restitution, back pay award, National Labor Relations Board as confined to, § 28(119), p 343
- Restraint of employees, unfair labor practices, evidence as to, § 28(97), pp 292-296
- Result, independent contractor relationship,
 - Reservation of right to supervise as to as affecting, § 3(4)
 - Subject to control of employer as to, § 3(1), p 42
- Resulting trust, relief and benefit departments or associations, funds on dissolution held for benefit of contributors and donors as, § 168, p 826
- Retail business, labor relations, statutes regulating as applying to, § 28(5)
- Retail stores, National Labor Relations Act as covering, § 28(5), p 123, n 30
- Retailers,
 - Fair Labor Standards Act,
 - Application to, § 151(7), p 643
 - Employees as within coverage, § 151(9), p 658
 - Exemption of retail establishments engaged mainly in intrastate commerce, § 151(14), pp 673-678
 - Interstate commerce, National Labor Relations Act as applying, § 28(9), p 133
- Retention,
 - Fellow servants, pleading negligence in actions for injuries to servants, § 490, p 24
 - Incompetent employees, admissibility of evidence as to in action for injuries, § 516
- Retirement, employment contracts containing provisions for, liberal construction, § 169, p 831
- Retirement benefits, relief and benefit departments or associations, § 169, p 830
- Retrenchment, business depression, excuse for employer's failure to furnish work, § 61
- Retroactive modification, employment contract, consideration, § 9, p. 80, n. 62
- Retroactive operation,
 - Collective bargaining contract, § 28(41), p 197
 - Fellow servants, statutes relating to, § 345
 - Labor relations, statute regulating, § 28(4)
 - Lien for wages, statutes giving, § 139
 - Wage increase agreement, § 110, p 545, n 61
 - Unfair labor practice, employer announcing as guilty of, § 28(97), p 294, n 33
- Return of money received after injury as condition precedent to action for injuries to servant, § 484
- Revolving shafts,
 - Assumption of risk, knowledge of danger, § 390, p 1207
 - Negligence of master, covering or guarding, § 534, p. 187
 - Warning or instructing servant, obvious danger coming into contact with, § 296
- Riding, dangerous machinery or appliances, burden of proof, § 502
- Riggers, warning or instruction as to dangers, § 295
- Right of action for injuries to servants, jury question, § 529

Rival unions,

- Collective bargaining,
 - Jurisdiction to determine disputes concerning authority to represent employees, § 28(29)
 - Negative duty of employer not to bargain with, § 28(24)
 - Neutrality of employer in contest between, § 28(23), p 164
 - Selection as bargaining representative, § 28(27), p 169, n 14
- Employer as required to defend complaints of, § 28(83)
- Intervention in proceeding before National Labor Relations for, § 28(86)
- Jurisdictional labor disputes, generally, ante
- Payroll deduction, for union dues as unfair labor practice, § 28(62)
- Railroad employees, jurisdiction of disputes between, § 28(74), p 261
- Riveters, contributory negligence, inspection for latent defects or dangers, § 447, p 1271
- Roadbeds Railroads, ante
- Roadmasters, railroads, fellow servant relationship, § 332, pp 1102, 1105
- Roads Highways, generally, ante
- Robbers, injuries to servants by, liability of employer, § 189
- Rollers,
 - Assumption of risk, knowledge of danger, § 390, p 1208
 - Negligence of master, covering or guarding, jury questions, § 524, p. 187
- Rolling stock, railroads,
 - Duty to provide safe appliances, § 228, p 959
 - Inspection to discover defects, § 236
- Roofers, independent contractors, § 3(9)
- Ropes,
 - Assumption of risk,
 - Knowledge of danger, § 390, p 1207
 - Latent defects or dangers, § 302, p 1220
 - Contributory negligence, inspection for latent defects or dangers, § 447, p 1271
 - Simple appliance as respects liability to furnish safe appliance, § 216, n. 97
- Round sum payment, independent contractor, § 3(8)
- Royalties, inventions by employee, use of by employer, § 73, p 494
- Run-off election, collective bargaining, selection of bargaining representative, § 28(33), p 181
- Running boards, contributory negligence, inspection for latent defects or dangers, § 447, p. 1271
- Runways,
 - Assumption of risk, jury questions, § 536, p 214
 - Fellow servants, liability of master for negligence in constructing, § 333, p. 1119
 - Injuries to servant, negligence of master, jury question, § 534, p 182
 - Safety devices, duty of master in respect of, § 221
- Rules and regulations,
 - Admissibility in evidence of book containing rules of master, actions for injuries to third persons, § 615, p 400
 - Admissibility of evidence as to regulations in action for injuries to servants, § 499, p. 47, § 513, p 100-103

INDEX TO MASTER AND SERVANT

Rules and regulations—Continued,

- Admissibility of evidence as to regulations in action for injuries to servants—Continued,
 - Obedience or disregard, § 519, p 110
 - Pleading as affecting, § 499, p 47
- Assumption of risk,
 - Disobedience of, § 410
 - Failure to promulgate, knowledge of danger, § 390, p 1200
 - Violations of rules, § 536, p. 212
 - Jury question, § 536, p. 212
- Burden of proving negligence in respect of, actions for injuries to servants, § 501, p. 77
- Construction, question of law or fact, § 534, p. 200
- Contributory negligence, ante
- Employee as under obligation to obey, § 75
- Existence and applicability, questions of law and fact, actions for injuries to servants, § 534, p 201
- Federal Employers' Liability Act,
 - Burden of proving violation in action under, § 501, p 78
 - Presumptions in action under, § 501, p. 63
- Fellow servants,
 - Concurring negligence in respect of adoption, effect of, § 356
 - Delegation of duty to promulgate, § 333, p 1124
 - Liability for injuries as result of obedience, statutory provisions, § 343
- Forfeiture of wages for violation, notice as essential, § 103
- Instructions to jury as to, actions for injuries to servants, § 546, p 243
- Labor Relations Boards, powers to establish, § 28(68)
- Method of work, §§ 270-277, pp 1035-1042
 - Adoption as exempting master from liability for negligence, § 276
 - Application, § 275
 - Construction, § 276
 - Customs,
 - Construction in accordance with, § 276
 - Others as affecting obligation to adopt, § 271
 - Customary violation, § 275
 - Disobedience as precluding recovery for injuries sustained, § 276
 - Duty to adopt and promulgate, § 271
 - Enforcing obedience, § 272
- Fellow servants, delegation of duty to promulgate, § 333, p 1124
 - General and special rules, § 276
 - Habitual disobedience as affecting liability for injuries, § 275
 - Knowledge of habitual violation as affecting liability for injury, § 272
 - Notice to servant, § 274
 - Operation and effect, § 276
 - Proximate cause of injury, § 277
 - Reasonableness and sufficiency, § 273
 - Special order as prevailing over, § 278
 - Special rule superseding general rule, § 276
 - Waiver, § 275
- Negligence of master in respect of,
 - Evidence, § 524, p. 134

Rules and regulations—Continued,

- Negligence of master in respect of—Continued,
 - Questions of law and fact, § 534, p 200, § 533, p 161
- Pleading in action for injuries to servants, § 490, p 21
- Presumptions and actions for injuries to servants, § 501, p 63
- Reasonableness, jury question, actions for injuries to servant, § 534, p 201
- Relief and benefit departments or associations,
 - Administration of funds and right to benefit, § 169, p 833
 - Benefit in accordance with, § 169, p 828
- Relieving employer from liability for negligence, § 197
- Waiver,
 - Jury questions, actions for injuries to servant, § 534, p 202
 - Sufficiency of evidence, actions for injuries to third persons, § 615, p 403
- Runways, negligence of master, jury question, § 534, p. 182
- Safe place to work,
 - Absolutely safe place as required to be furnished, § 206
 - Alteration of buildings and other structures, duty to furnish as extending to, § 219, p 933
 - Assumption of risks, § 363
 - Barriers for machinery or appliances, § 231
 - Best places required to be furnished, § 207
 - Blasting operations, § 222, p 943
 - Breach of duty to provide, burden of proof, § 501, p 74
 - Buildings, § 219, pp 928-934
 - Burden of proof, action for injuries to servants, § 501, p 73
 - Care required of master in furnishing, § 203, §§ 213-230, pp 922-979
 - Carriers, duty of furnishing employees with, § 212, pp 919-922
 - Changing conditions as work progresses, § 219, p 930
 - Circumstantial evidence, § 524, p 125
 - Concealed defects or dangers, inspection to discover, § 238
 - Construction of buildings, duty to furnish as applying to, § 219, p 933
 - Continuing duty of employer to furnish, § 219, p. 929, n. 25
 - Contributory negligence, ante
 - Covering dangerous machinery or places, §§ 231-234, pp 979-988
 - Dangerous operations, servants engaged in, § 249
 - Degree of care required of employer, § 202, pp 902-908; § 203; § 204, pp 909-912
 - Delegation of master's duty, § 186; § 204, pp 909-912
 - Demolition of buildings, duty to furnish as extending to, § 219, p 933
 - Derricks, care required of master using, § 221
 - Duty of master to furnish, § 201
 - Egress, duty to furnish as extending to means of, § 219, p 931
 - Electricity, protection of servants by master employing, § 223

INDEX TO MASTER AND SERVANT

Safe place to work—Continued,

Elevators, § 221
 Evidence, actions for injuries to servants, § 512, p. 96, § 522, p. 118, § 524, pp. 125, 128
 Excavations, § 222, pp. 938-944
 Fellow servant rule, § 333, p. 1115
 Experience of servant affecting care required of employer, § 203
 Farm labor as within statute requiring employer to furnish, § 219, p. 930
 Federal Employers' Liability Act, § 226, p. 947
 Burden of proof, § 501, p. 75
 Fellow servants, ante
 Fire escape, duty of master to provide, § 219, p. 934
 Going to and from work, duty to furnish as including, § 219, p. 932
 Guarding dangerous machinery or places, §§ 231-234, pp. 979-988
 Hoists, § 220, p. 936
 Hoistways, § 221
 Independent contractors,
 Duty of contractee to furnish, § 607
 Duty of providing for employee of other independent contractors, § 610
 Liability of contractee for injuries to servants as result of failure to provide, § 603
 Ingress, duty to furnish as including means of, § 219, p. 931
 Inspection and repair. Place of work, ante
 Insurer, employer as, § 202, p. 902
 Jury questions, actions for injuries to servant, § 533, p. 157, § 534, p. 160
 Knowledge of servant respecting care required of employer to furnish, § 203
 Ladders, § 220, p. 936
 Latent defects, inspection to discover, § 238
 Liability for injuries occasioned by, § 219, p. 929
 Lights, duty to furnish safe place as including duty of furnishing, § 219, p. 932
 Mines, § 222, pp. 938-944
 Fellow servant rule, § 333, p. 1115
 Nature and kind of place required to be furnished, §§ 206-209, pp. 913-917
 Nature of danger, degree of care required of master as determinable with reference to, § 202, p. 906
 Nature of work rendering place temporarily insecure, § 240
 Negligence, employer as liable only for, § 202, p. 904
 Newest places as required to be furnished, § 207
 Obvious dangers, duty of master in respect of, § 203
 Ordinary care, § 202, p. 904
 Passage ways, § 219, p. 931
 Lights in, § 219, p. 932
 Permissive use of premises, rule requiring employer to furnish as extending to, § 219, p. 931
 Pits, § 222, p. 938
 Platforms, § 220, pp. 934-937
 Pleading failure to furnish in action for injuries to servants, § 490, p. 20

Safe place to work—Continued,

Preparation of one place to work liability of master for injury as result of negligence, § 333, p. 1113
 Presumptions, actions for injury to servant, § 501, p. 61
 Progress of work enhancing danger, § 219, p. 930
 Proximate cause of injury, failure to comply with requirements of statute, § 252
 Quarries, § 222, pp. 938-944
 Fellow servant rule, § 333, p. 1115
 Questions of law and fact, actions for injuries to servants, § 533, p. 157; § 534, p. 160
 Railings for machinery or appliances, § 231
 Railroads, ante
 Razing structures, duty to guard against dangers incident to, § 219, p. 934
 Reasonable care by employer, § 202, p. 905
 Reasonably safe place only required to be furnished, § 206
 Repairs, employees engaged in making, § 219, p. 933, § 250
 Runways, § 221
 Scaffolds, § 220, pp. 934-937
 Scope of employment, liability for injuries arising out of failure to furnish, § 201
 Shafts, § 221
 Shipping, § 224
 Fellow servants rule, § 333, p. 1115
 Shoring mines, etc., as work progresses, duty of master, § 222, p. 938
 Staging, § 220, pp. 934-937
 Stairways, lights, § 219, p. 932
 Statutory provisions, § 202, p. 908
 Delegation of duty to fellow servant to avoid liability, § 333, p. 1112
 Duty of employer to furnish as affected, § 202, p. 908
 Liability for injuries as result of failure to comply with, § 252
 Liability of master where place is furnished by or in control of third persons, § 211
 Railroads, tracks and roadbed, § 220, p. 972
 Street railroads, control over street as respects duty to provide, § 229, p. 973
 Subcontractors, liability of contractee for injuries to servants as result of failure to provide, § 603
 Supports, § 220, pp. 934-937
 Swinging platforms, § 220, p. 936
 Temporary structures, § 217
 Fellow servant negligence as affecting master's liability for injuries, § 333, p. 1113
 Third persons, duty and liabilities of employer with respect to places furnished by or in control of, §§ 210-212, pp. 918-922
 Trenches, § 222, p. 938
 Tunnels, § 222, p. 939
 Vessels, fellow servant rule, § 333, p. 1115
 War-time dimout regulations, compliance with as negligence in failing to furnish lights, § 219, p. 932, n. 52
 Youthful employees, care required of master in furnishing, § 203
 Safety Appliance Act,
 Assumption of risk, § 369, p. 1170
 Federal Safety Appliance Acts, generally, ante

INDEX TO MASTER AND SERVANT

Safety Appliance Act—Continued,

Validity, § 25

Safety of employees,

Assumption of risks, noncompliance as statutory requirements, § 369, p 1169-1172

Care required of master, § 171; §§ 183-185, pp 877-883

Inexperienced or minor servant, § 185

Compulsory employees under statute relating to, liability for injury as result of acts or omissions of, § 190

Constitutional provisions authorizing laws providing for, § 14, p 93

Contributory negligence, statutory requirements affecting defense, § 423, p 1246

Customs and usages, standard of conduct required of employee governed by, § 183, p 879

Dangerous or defective machinery, generally, ante

Delegation of duty required of master, § 186

Explosives, care required of master in manufacturing, storing or using, § 214, p 924

Hours of labor, regulation for purpose of protecting, § 15, p 98

Inexperienced servants, care required of master, § 185

Minor servants, care required of master, § 185

Railroads, ante

Rules and regulations, post

Statutory provisions, safety devices, § 214, p 924

Trespassers, care required of master, § 184

Violation of statute intended for, liability of master for injuries resulting, § 101; § 524, p 127

Volunteers, care required of master, § 184

Salaries Wages and other remuneration, generally, post

Sale of business, profit sharing agreements with employees, profits from sale included, § 93

Salesmen,

Fair Labor Standards Act, coverage, § 151(9), p 657

Full time employment, breach of contract for, § 70

Independent contractors, § 3(9)

Wages or other remuneration, post

Wrongful discharge,

Mitigation of damages, § 59, p 474

Salesman employed on commission basis, measure of damages, § 58, p 470

Salvation Army, Labor Relations Act as applying to, § 28(6), p 126, n 39

Sanctioning right, wrongful discharge, recovery of damages, § 48

Sanctions, National Labor Relations Act, § 28(2), p 117

Satisfactory services,

Bonus for, discretion of employer as to, § 98, p 530

Determinative of relationship, § 2, p 37, n 4

Termination of employment because of dissatisfaction, contract providing for, § 32, p 417

Saw mills, contributory negligence, evidence of customary method of work, § 519, p 112

Saws.

Assumption of risk, knowledge of danger, § 390, pp 1207, 1208

Contributory negligence, jury question, § 537, p 231, n 44

Covering or guarding, § 390, p 1208

Jury question, § 534, p 187

Duty to furnish reasonably safe saws, § 390, p 1207

Warning and instructing inexperienced or youthful servant, § 306, p 1067

Sawyers, independent contractor, § 3(9)

Scaffolds,

Assumption of risks,

Instructions relating to, § 450, p 255

Jury questions, § 536, p 214

Knowledge of danger, § 390, p 1211

Latent defects or dangers, § 392, p 1220

Care required of master furnishing for use of servant, § 220, pp 934-937

Contributory negligence,

Inspection for latent defects or dangers, § 447, p 1271

Selection and use of, jury question, § 537, p. 235

Duty of master to furnish reasonably safe scaffolds, § 390, p 1207

Evidence, negligence in failing to furnish safe scaffold, § 524, p 120

Faulty construction, liability for injuries due to, § 204, p 912, n 75

Fellow servants, liability for master for negligence in constructing, § 333, p 1119

Instructions to jury in actions for injuries to servant, § 546, p 246

Jury question in action for injuries to servant, § 534, pp 182, 214; § 537, p 235

Latent defects or dangers, duty of employee to inspect for, § 341

Res ipsa loquitur doctrine applicable to injuries caused by sagging or falling, § 501, p 58, n 20

Scintilla of evidence, Federal Employers' Liability Act, § 520, p 113, n 39; § 529

Scope of employment,

Assumption of risks outside of, §§ 407-409

Compliance with command of master, § 409

Voluntary acts of servant, § 408

Youthful or inexperienced employees, § 420

Burden of proof in action for injuries to servant, § 501, p 68

Contributory negligence, ante

Conversion by servant acting within, liability of master, § 575, p. 332

Distinction, § 570, p 298

Evidence in action for injuries to servant, § 523

Fellow servants,

Jury question, actions for injuries to servants, § 535, p 207

Liability for negligence within apparent scope, § 332, p 1108

Liability of master as dependent on injury being in, § 323

Place of work rendered unsafe by acts in, liability of master, § 333, p. 1112

Injuries to third persons, ante

INDEX TO MASTER AND SERVANT

Scope of employment—Continued,

- Instructions in actions for injuries to servant, § 543
- Liability of master for injuries to servants as dependent on being in, § 181, pp 873-877; § 182
- Pause for rest as taking employee outside of, § 181, p 876
- Question of law or fact, action for injuries to servant, § 531
- Tools, machinery and appliances, liability for injuries arising out of failure to furnish, § 201
- Warning and instructing servant as to dangers from work outside, § 502
- Inexperienced or youthful servant, § 306, p 1067
- Scrap metal workers, Fair Labor Standards Act, § 151(7), p 643, § 151(9), p 637
- Scrapers, assumption of risk, knowledge of danger, § 390, p 1207
- Scrap issued in payment of wages,
 - Presumptions in actions, § 160(8), p 780, n 7
 - Statute prohibiting, § 157, p 765
- Seamen,
 - Defective appliances aboard ship navigating state waters causing injuries, recovery under state law, § 173, p 845
 - Fair Labor Standards Act, exemption from provision, § 151(15)
 - Fellow servant rule, application, § 322
 - Minimum or overtime wages, exemption from requirements, § 151(15)
 - State statute authorizing recovery for injuries, § 173, p 845
- Seasonal employees,
 - Fair Labor Standards Act, exemptions from, § 151(21)
 - Slack seasons, relationship as existing during, § 2, p 40, n 46
 - Strikes, exemptions from statute prohibiting without notice, § 28(5), n 22
 - Wages, renewal of service after period of unemployment, § 118
- Seaweed, minimum wages and overtime pay, exemption from requirements of employees engaged in harvesting, § 151(16)
- Second foreman, straw boss as, § 1, p 28
- Second offense, violation of statute regulating relation, § 14, p 96
- Secondary boycott,
 - Regulation of, § 28(19), p 152, n 95
 - Right of employees to engage in, § 28(18)
- Secret Ballot, election of bargaining representative, § 28(23), p 180
- Secret dangers, warning and instructing servant, § 200
- Secret information, bribing servant to give, criminal liability, § 629
- Secret processes,
 - Disclosure by employee leaving employer, § 72, p 483
 - Employees forming corporation for purpose of utilizing, liability of corporation for profits, § 77
- Secretary of Labor, minimum wages, prevailing wage determined by in respect of government contracts, § 153, p 754

- Section foreman, railroads, fellow servants' relations, § 332, pp 1104, 1105, § 348
- Section men,
 - Contributory negligence, precautions against injury, § 456, p 1290
 - Lookout and signals to of approach of trains, § 263, p 1024
- Selection of employees, fellow servants, employee representing master, § 333, p 1126
- Selection or construction of appliance, liability of master for improper selection by servant, § 524, p 126
- Selective Service Act, National Labor Relations Act as amended or repealed by, § 28(d), n 19
- Self-defense, assault by servant in resulting in injuries to another, liability of master, § 575, p 342
- Self employment, wrongfully discharged employee, consideration in assessing damages, § 59, p 476
- Self-executing awards, National Railroad Adjustment Board, arbitration, § 28(121), p 349
- Self-incrimination, Fair Labor Standards Act, production of books tending to incriminate employer, § 151(31), p 727
- Self-organization Employee organizations, generally, ante
- Self-starting machinery, assumption of risk, latent defects or dangers, § 392, p 1230
- Semi-weekly newspapers, Fair Labor Standards Act, exemption from provisions of employees of, § 151(23)
- Seniority rights,
 - Collective bargaining, ante
 - Contract of employment as controlling right, § 5
 - Damages for failure to respect, action for, § 28(71), p 251
 - Discharge of employee and breach of contract between employer and employee's representative, damages for loss of, § 28(120)
 - Labor dispute as existing in case of controversy over, § 28(10)
 - National Railroad Adjustment Board, parties to proceedings involving, § 28(85)
 - Unfair labor practice,
 - Discrimination as to, § 28(46)
 - Refusal to reinstate striking employees unless giving up, § 28(51), p 228
 - Reinstatement with, § 28(119), p 337
- Separate masters, fellow servants, employees of, § 330
- Separate purposes, relationship between parties, § 2, p 31
- Separation of witnesses, settlement of labor disputes, administrative proceedings, § 28(105)
- Servant defined, § 1, p 24
- Service employees, labor relations, statutes dealing with as including, § 28(11)
- Service establishments, Fair Labor Standards Act, exemption from provisions, § 151(14), p 678
- Service letter, discharge of employees, § 44, p 435
- Service of notice of injury to servant, condition precedent to action, § 485
- Service of process, Federal Employers' Liability Act, commencement of action for limitation purposes, § 487

INDEX TO MASTER AND SERVANT

Services,

- Assignment of performance, independent contractor relationship as indicated by right of, § 3(2), p 49
- Foundation of relationship, § 2, p 40
- Independent contractor rendering, § 3(1), n 41
- Performance of services, generally, ante

Set-off Wages and other remuneration, post

Set screws,

- Assumption of risk, knowledge of danger, § 390, p 1208
- Contributory negligence, inspection for latent defects or dangers, § 447, p 1271
- Latent defects or dangers, duty of employee to inspect for, § 381

Settlement Compromise and settlement, generally, ante

Settlement of labor disputes,

- Abandonment of proceedings, § 28(79)
- Administrative proceeding, §§ 28(69)-28(70), pp 247-250
- Advisory recommendations by trial examiner, § 28(106)
- Agreement affected by other litigation, § 28(70)
- Agreements between employer and employees affecting administrative proceeding, § 28(70)
- Amount of back pay, arbitration award, § 28(121), p 347
- Answer, administrative proceedings, § 28(90)
- Appearance in proceedings for, § 28(87)
- Appointment and removal of arbitrator, § 28(73)
- Arbitration, § 28(72), 28(73), pp 254-257; § 28(121), pp 347-351
- Back pay orders, National Labor Relations Board, § 28(119), pp 335-345
- Bias of person conducting hearing, § 28(104)
- Burden of proof, § 28(93), p 280-283
- Clean hands, reinstatement of striking employees, § 28(119), p 342, n 92
- Collective bargaining, generally, ante
- Common law of arbitration, § 28(73)
- Communications Act, procedure, § 28(69)
- Conciliation, mediation and arbitration, generally, ante
- Conclusiveness of arbitration award, § 28(121), p 347
- Conditions precedent to administrative proceedings or actions at law, § 28(73)
- Conduct of hearing, § 28(105)
- Construction of statutes encouraging, § 28(4)
- Continuance of proceedings, § 28(77)
- Courts,
 - Exhaustion of administrative remedies before resort to, § 28(71), p 250
 - Question of administrative remedies before resort to, § 28(60)
- Determination of issues or proceedings, §§ 28(79), 28(107), 28(108)
- Discretion of person conducting hearing, § 28(105)
- Dismissal of proceedings, § 28(79)
- Evidence, §§ 28(92), 28(94); § 28(95), pp 285-288, § 28(105)
- Exhaustion of administrative remedies before resort to court, § 28(69)
- Fair hearings, right of parties to, § 28(102)

Settlement of labor disputes—Continued,

- Federal Transportation Act, administrative proceeding before labor board created by, § 28(69)
- Findings of facts, proceedings before National Labor Relations Board, § 28(108)
- Hearings, §§ 28(102)-28(106)
- Arbitration proceedings, rules applicable, § 28(121), p 347
- Initial remedy, § 28(69)
- Interstate commerce, jurisdiction over labor disputes affecting, § 28(74), p 258
- Intervention in proceedings for, § 28(86)
- Issues in proceeding for, § 28(91)
- Judicial remedies, § 28(71), pp 250-254
- Jurisdiction,
 - National Mediation Board, § 28(74), p 262
 - Proceeding to adjust, § 28(74)
- Jurisdictional disputes, § 28(74), p 259
- Labor Relations Boards or Commissions, administrative powers, § 28(65)
- Laches, § 28(76)
- Limitation of actions, § 28(76)
- National Labor Relations Act, § 28(2), p 115; § 28(79), § 28(74), p 258
- National Mediation Board, jurisdiction, § 28(74), p 262
- National Railway Adjustment Board
 - Jurisdiction, § 28(74), p 260
 - Withdrawal of dispute submitted to, § 28(121), p 348
- Notice to parties, § 28(87)
- Order of proof, § 28(105)
- Orders of federal administrative bodies,
 - Back pay orders, § 28(119), pp 335-345
 - Construction, § 28(115)
 - Employee dominated union, § 28(118), pp 332-335
 - Moot or unnecessary orders, § 28(113)
 - Operation and effect, § 28(116)
 - Person against whom order runs, § 28(114)
 - Posting of order by employer, § 28(117)
 - Power to enter, § 28(110), pp 321-324
 - Reinstatement of employees, § 28(119), pp 335-345
 - Res judicata, § 28(112)
 - Scope of order, § 28(111), pp 324-328
- Orders of state administrative bodies, § 28(109), pp 318-321
- Parties to proceedings for, §§ 28(82)-28(86), pp 269-274
- Peaceful settlement, public policy, § 28(1)
- Persons who may conduct hearings, § 28(104)
- Place of hearing, § 28(102)
- Pleading, proceedings, for §§ 28(88)-28(91), pp 270-280
- Posting order of National Labor Relations Board, § 28(117)
- Prejudice of person conducting hearing, § 28(104)
- Presumptions, 28(93), p 280-283
- Procedure for, §§ 28(69)-28(121), pp 247-350
- Proof, § 28(90)
- Public policy, § 28(1)
- Railway Labor Act, generally, ante
- Reception of evidence, § 28(105)
- Reinstatement of employees, National Labor Relations Board, § 28(119), pp 335-345

INDEX TO MASTER AND SERVANT

- Settlement of labor disputes—Continued,**
 Reinstatement of proceedings, § 28(79)
 Remedies, judicial remedies, § 28(71), pp 250-254
 Reopening case, National Labor Relations Board, § 28(102)
 Report and recommendations of trial examiner, § 28(106)
 Separation of witnesses, § 28(105)
 Scope of inquiry at hearings, § 28(103)
 Statutory provisions, § 28(2), pp 114-120
 Stay of proceedings, 28(78)
 Subpoenas, issuance of, § 28(81)
 Time to sue, § 28(76)
 Unfair Labor Practices, generally, post
 Variance in proceedings for, § 28(91)
 Witnesses and proceedings for, § 28(80)
- Several masters or employers, § 2, p 37**
- Sewers, independent contractors,**
 Liability for acts or omissions of, § 584, p 356
 Persons employed to install, § 3(9)
- Shafts,**
 Assumption of risk,
 Knowledge of danger, covering or guarding, § 390, p 1208
 Latent defects or dangers, § 302, p 1220
 Contributory negligence, inspection of timbers for latent defects or dangers, § 447, p 1272
 Guarding to protect servants, § 233
 Jury question, negligence of master, § 534, p 183
 Safety devices, duty of master in respect of, § 221
- Sharecroppers as servants or employees, § 2, p 30, n 71**
- Shame, wrongful discharge, damages for, § 58, p 469, n 10**
- Sharing profits and losses,**
 Contract providing for as creating relation, § 2, p 30, n 72
 Employees right, §§ 93-95, pp 523-526
 Existence of relationship as negated by, § 2, p 39
 Interest on share due employee, § 101
 Labor relations statutes as affecting, § 28(42), p. 205, n 19
- Shearing machine, contributory negligence in operation, jury question, § 537, p 231, n 44**
- Sheds, contributory negligence, inspection for latent defects or dangers, § 447, p 1272**
- Shipbuilding,**
 Fair Labor Standards Act, coverage of workers, § 151(9), p 657
 Interstate commerce, National Labor Relations Act as applying, § 28(9), p 134
 Labor relations, validity of statutes regulating, § 28(3), p 121, n. 85
- Shipping Vessels, generally, post**
- Shooting by servant, liability of master, § 575, p 344**
- Shooting gallery, independent contractor, operator as, § 3(9)**
- Shop right, invention by employee, use of by employer, § 73, p. 492**
- Shopmen, term servant as embracing, § 1, p 26, n 15**
- Shoring, mines, etc., as work progresses, duty of master, § 222, p. 988**
- Shovels, assumption of risk, simple tool doctrine, § 390, p. 1209**
- Shutdowns, unfair labor practices, § 28(61)**
- Sick leave, arbitration, contract between employer and union as providing for, § 28(72), n. 70**
- Sickness illness, generally, ante**
- Sidetracks, defect causing injuries to servants, § 229, p 973**
- Sidewalks, independent contractors, liability for torts of, § 584, p 356**
- Signals,**
 Contributory negligence
 Disobedience of rule requiring, § 459, p 1301
 Disregarding, §§ 460-462
 Duty of servant to give, § 455
 Failure to give, liability of master, § 262
 Evidence, § 524, pp 138, 139
 Jury question, § 534, p 197
- Fellow servants,**
 Employee having duty of giving, § 333, p. 1125
 Negligence with respect to, § 535, p 210
- Railroads,**
 Maintenance to prevent collision, § 261, p. 1019
 Negligence in failing to give, jury question, § 534, p 197
- Signature, notice of injury to servant, condition precedent to action, § 485**
- Signs, independent contractors,**
 Liability for acts or omissions in erection of, § 584, p 356
 Persons employed to erect, § 3(9)
- Silicosis, ventilating devices to prevent, liability for failure to comply with statute requiring, § 232 p 980, n 29**
- Sill steps, railroad locomotives, requirement as to, § 227, p 954, n 93**
- Similar facts and occurrences, evidence in action for, injuries to servants, § 511**
- Simple tools and appliances,**
 Assumption of risk,
 Assurance of master, § 404
 Knowledge of danger, § 390, p 1208
 Promise to repair, § 306, p 1226
 Contributory negligence, negligent use of, § 449
 Duty of master to furnish, § 216
 Fellow servants, liability of master for negligence in use of, § 333, p 1120
 Inspection, § 235, p 990; § 239; § 534, p. 188, n 21
 Jury question, negligence of master, § 534, p 173
 Purchase from reputable manufacturer, § 237
 Repair, § 239
 Warning and instructing servant using, § 300
 Inexperienced or youthful servant, § 306, p 1067
- Single track, railroads, mere use of as negligence, § 261, p 1016**
- Sit-down strikes,**
 Discharge of strikers, changed situation by reason of as affecting authority of bargaining representative, § 28(36), p. 188, n. 40
 Tacit coercion of employer by means of, § 28(19), p 154
 Termination of relation by participation in, § 28(13)

INDEX TO MASTER AND SERVANT

Sit-down strikes—Continued,

Unfair labor practice discharge of employees engaging in, § 28(49), p 224

Six day week, statutory provisions, § 15, p 99

Skid chains, motor vehicles, liability for injuries to servant as result of failure to furnish, § 218, p 928, n. 20

Skids,

Assumption of risk, knowledge of danger, § 390, p. 1207

Negligence of master, jury question, § 534, p 162

Skill,

Degree required on part of employee in performance of duty, § 69

Fellow servants, element of competency, § 313

Independent contractors, skill required as test of relationship, § 3(2), p 46

Rules and regulations of employer, obligations to comply with in use, § 75

Skilled profession, member of as employee, § 2, p 30, n 68

Skylarking, fellow servants, liability for injuries resulting, railroad employees, § 355, p 1146

Slack periods,

Back pay award to reinstated employee as applying to, § 28(119), p 343

Relationship as existing during, § 2, p 40, n 46

Slating, independent contractors, liability for acts or omission of, § 584, p 356

Sledge hammers,

Contributory negligence, inspection for latent defects or dangers, § 447, p 1272

Duty of master to furnish reasonably sledge hammer, § 390, p 1207

Sleeping, contributory negligence, sleeping in dangerous position, § 438

Sleeping time, minimum wages and overtime pay, compensable working time as including, § 151 (28), p 716

Slow-down strike, unfair labor practice, order against, § 28(100), p 320, n 66

Smoke, mines, statutory provisions requiring elimination, § 222, p 942

Smoking,

Fines started by, liability of master for injuries under doctrine of respondeat superior, § 575, p 334

Injuries to third persons as result of employee smoking while delivering gasoline, liability of master, § 560, p 272, n 7

Snow, railroads, liability for injuries to employees resulting from, § 220, p 946, n 32; § 229, p 973

Social security tax, relationship as shown by payment of, § 3(2), p 47

Sole bargaining agent, unfair labor practice, refusal to grant recognition to union as, § 28(59)

Spark arresters, railroad locomotives, statutory requirement, § 227, p 953, n 89

Special damages, wrongful discharge, pleading, § 52, p. 450

Special employer controlling employee and appliances furnished by general employer, liability for injuries to servants, § 180, p 872

Special police officers, injuries to third persons, liability of master, § 565

Special verdicts or findings, actions for injuries to servants, § 550

Specialist, medical or surgical attention, duty to furnish under contract providing for, § 163, p 817

Speed of, railroad trains, liability for injury to employee as result of, § 261, p 1017

Violation of statute or ordinance by employee, § 264

Speeders, contributory negligence, railroad employees operating, § 456, p 1288

Spikes and spike mauls, assumption of risk, simple tool doctrine, § 390, p 1209

Sponges, minimum wages and overtime pay, exemption from requirements of employees engaged in harvesting, § 151(10)

Sportive acts, fellow servants liability of master for injury caused by, § 325

Sprags, assumption of risk, knowledge of danger, § 390, p 1207

Spring guns,

Employee injured by gun concealed on premises by employer, § 238, n 55

Injuries to servant for discharge of, evidence as to negligence, § 524, p 124, n 16

Spying on employees, unfair labor practice, § 28(53)

Evidence as to employer hiring, § 28(93), p 292

Stages, instructions to jury as to, actions for injuries to servant, § 546, p 247

Staggered shifts, overtime compensation, § 151(26), p. 702, n 31

Staging,

Assumption of risk, jury questions, § 536, p 214

Care required of master furnishing for use by employees, § 220, pp 934-937

Contributory negligence, inspection for latent defects or dangers, § 447, p 1271

Stairways,

Assumption of risk, jury questions, § 536, pp 214, 219

Contributory negligence, jury question, § 537, p 236

Evidence of master's negligence, § 524, p 120

Respondeat superior, doctrine as applicable in respect of negligence in maintenance, § 575, p. 331

Safe place to work, duty to furnish as including lights, § 219, p 932

Starting machinery, fellow employees, warning of, § 333, p 1123

State Board of Adjustments, carriers, jurisdiction of labor disputes, § 28(74), p 261

State courts,

Federal Employers' Liability Act, law governing action brought in, § 173, p 851

National Labor Relations Act, apportionment against labor union of right as are consistent with provisions, § 28(71)

State employees, fellow servants, doctrine as applicable to, § 322

State Employers' Liability Acts Employers' liability acts, generally, ante

State hospital or sanatorium, assumption of risk, physician or nurse in, § 375

State Labor Relations Board or Commissions. Labor Relations Boards or Commissions, generally, ante

States, collective bargaining, exception from statute, § 28(7)

Station platform, injuries to employees resulting from defects, liability of railroad, § 226, p 948, n 59

INDEX TO MASTER AND SERVANT

Statutory provisions,

Aliens, validity of statute forbidding employment on public work, § 14, p 96
 Arbitration of labor disputes, § 28(2), p 118; § 28(72), § 28(121), p 318
 Assumption of risk, ante
 Basis of compensation, § 158
 Blasting, violation, admissibility of evidence, § 508
 Blocking frogs, switches, etc., railroads, § 239, p 974
 Bribing servant with intent to influence relation, criminal liability, § 630
 Burden of proof, actions for injuries to servants, § 501, p 67, § 502
 Child Labor Law, Infants, ante
 Coercion of employees, § 27
 Collective bargaining, generally, ante
 Comparative negligence, § 425, p 1248
 Concerted activities of employees for mutual aid or protection, § 28(17)
 Right to strike or engage in secondary boycott, § 28(18)
 Conciliation, mediation and arbitration, § 28(2), pp 114-120
 Construction, ante
 Contributory negligence, ante
 Dangerous and defective machinery, ante
 Definitions of employer and employee, limited effect, § 14, p 95
 Dericks, safety devices, § 221
 Discharge of employee, statement as to cause, § 44, p 435
 Elevators,
 Safeguarding, § 233
 Safety devices, § 221
 Employee organizations, protection of right to organize, § 28(15), pp 145-148
 Employers' Liability Acts, generally, ante
 Employment contract, § 6, p 68; § 10, § 14, p 95, § 26
 Enticing servant to leave employment, § 626
 Criminal liability, § 633
 Evidence as to violation, § 508
 Excavations, protection of servants employed in, § 222, p 938
 Exempting employer from liability for injuries to servant, § 197
 Fellow servants, ante
 Fingerprinting as condition of securing or continuing employment, § 27
 Fire escapes, factories and mercantile establishments, § 219, p 934
 First aid of injured employee, § 162
 Full crew, § 14, p 95
 Hoistways, §§ 221, 233
 Hours of labor, ante
 Independent contractors, liability for negligence, § 584, p 355
 Infants, assumption of risk, § 419
 Injuries to servant, § 173, pp 845-850
 Burden of proof, § 501, p 67; § 502
 Compliance with as evidence for due care, § 524, p 123
 Exemption of employer for liability, § 197
 First aid, § 162
 Instruction on liability under, § 546, p 251

Statutory provisions—Continued,

Injuries to servant—Continued,
 Questions of law and fact, negligence of master, § 534, p 106
 Right of action by negligence, § 482
 Submission of issues to jury, § 520
 Violation, admissibility of evidence, § 508
 Inspection and repair, machinery, appliances and places of work, § 235, p 912
 Instrumentalities for work, liability of master when furnished by or in control of third persons, § 211
 Interference with relation by third persons, § 626
 Intimidation to prevent or hinder persons from continuing work, criminal liability, § 633
 Invention by employee, license to use, § 73, p 494
 Kick-backs, wages, § 159, p 770
 Labor contract statutes imposing criminal liability for breach, construction, § 80, p 505
 Labor disputes,
 Controversies constituting, § 27(16)
 Peaceful settlement, § 28(2), p 118
 Labor relations, ante
 Lien for wages, § 139
 Locomotives, provision and maintenance of safe locomotive, § 227, p 953
 Machinery, appliances, and safeguards, § 25
 Maximum hours of service, compensation for excess, § 155
 Measure of compensation, § 158
 Mediation of labor disputes, § 28(2), p 118; § 28(4)
 Methods of work, § 264
 Mines and mining, ante
 Minimum wages, generally, ante
 National Labor Relations Act, generally, ante
 Offenses and prosecutions for, § 14, p 96
 Hours of employment, violation of law, § 15, p 99
 Penalty for cutting trees, liability of master for trespass of servant, § 575, p 339
 Penalty wages, commencement by, § 156, p. 765
 Picketing, § 28(2), p 120
 Place for work, § 24
 Inspection and repair, § 235, p 902
 Platforms, care required of master furnishing for use by servant, § 220, p 935
 Pleading in action for injuries to servants, violation of statutory duty, § 490, p 26
 Political affiliations or activities, forbidding or preventing employees from engaging in, § 27
 Preference for wages, § 139
 Presumptions, action for injuries to servants, § 502
 Proof of violation as evidence of negligence of master, § 524, p 123
 Protection of safety of employees, liability of master for violation, § 101
 Public employees or employees on public works, hours of labor, § 17
 Quarries, protection of servants employed in, § 222, p 938
 Questions of law and fact, assumption of risk, § 536, p 212
 Railroad cars, duty to provide safe and suitable cars, § 228, p 959

INDEX TO MASTER AND SERVANT

Statutory provisions—Continued,

- Regulations on relation in general, §§ 14-28, pp. 93-410
- Relief and benefit departments or associations, agreement as affected, § 170, p 840
- Rest days, § 15, p 99
- Rolling stock, duty of railroad to provide safe stock, § 228, p 959
- Runways, safety devices, § 221
- Safe place to work, ante
- Safeguards for workers, validity of requirement, § 25
- Safety devices, compliance, § 214, p 924
- Scaffolds,
 - Care required of master furnishing for use by servant, § 220, p 935
 - Fellow servant rule, § 333, p 1119
- Self-organization of employees, § 28(15), p 146
- Seniority right, § 5
- Service letter, discharge of employee or termination of employment, § 44, p 435
- Settlement of labor disputes, jurisdiction conferred, § 28(71), p. 250
- Shafts,
 - Safeguarding, § 233
 - Safety devices, § 221
- Simple tools and appliances, assumption of risk, § 390, p 1209
- Strikes, right of employees to engage in, § 28(18)
- Submission of issues to jury, § 529
- Sweatshop occupation, minimum wages, § 151(1), p 623
- Swinging platforms, care required of master furnishing for use of servant, § 220, p 936
- Term of employment, § 14, p 93
- Termination of employment, statement as to cause, § 44, p 435
- Threats to prevent or hinder persons from continuing work, criminal liability, § 638
- Tools, machinery and appliances,
 - Duty of master to furnish suitable instrumentalities as affected, § 202, p 908
 - Inspection and repair, § 235, p 992
- Unfair labor practices, generally, ante
- Validity of regulatory legislation, § 14, p 96
- Ventilation of factories, workrooms, etc., validity, § 24
- Wages and other remuneration, generally, post
- Warning and instructing servant, duty as affected, § 289
- Washrooms for employees, validity of statute requiring, § 24
- Women employees, minimum wages, § 152, pp 741-746
- Wrongful discharge,
 - Accrual of right of action for, § 49
 - Mitigation of damages, § 59, p. 474
- Stay of proceedings, arbitration or settlement of labor disputes, § 28(78)
- Steam shovels, warning servant of apparent dangers in connection with operation, § 296
- Stepping boards, assumption of risk, knowledge of danger, § 390, p 1207
- Stevedores,
 - Fellow servants, members of crew, § 327, p. 1089

Stevedores—Continued,

- Independent contractors, § 3(9)
 - Liability for acts or omissions, § 584, p 350
- Inspection, duty of, § 236
- Stewards, term servant as embracing, § 1, p 26, n 15
- Stipulations, National Labor Relations Board,
 - Enforcement of orders entered on, § 28(133), p 378
 - Entry of order on, § 28(116)
- Stock,
 - Fair Labor Standards Act, goods as including within meaning of, § 151(7), p 641
 - Wages, payment in, measure of recovery in action for wages, § 137
- Stock dividends, profit sharing agreement, sharing in pursuant to, § 94
- Stockholders, relationship as existing as to employees consisting of, § 2, p 40
- Stockyards, Fair Labor Standards Act, application to business, § 151(7), p 643, n 12
- Storage, Fair Labor Standards Act, application to employees engaged in storing, § 151(7), p. 643
- Storekeepers,
 - Injuries to third persons, liability for injuries inflicted by employee, § 570, p 314
 - Liability for injuries to customers, § 575, p 335
- Straw boss defined, § 1, p 29
- Streams, obstructions, liability of master for injuries caused by negligence of servants in respect of, § 575, p 338
- Street railroads,
 - Fellow servant doctrine, statutory provisions, § 347
 - Safe place of employment, control over street, § 220, p 973
 - Statutory provisions, § 347
 - Vestibules for employees, validity of statute requiring, § 24
- Strikebreakers, collective bargaining, employment affecting authority of bargaining representative of striking employees after reinstatement, § 28(36), n. 42
- Strikes,
 - Accumulation of fund for lawful conduct, organizing labor unions for purpose of, § 28(15), p 146
 - Agreement to protect employee against violence, § 197
 - Arbitration award, payment under protest to avoid, § 138
 - Back pay in case of employees on, limitation in respect of, § 28(119), p 343
 - Collective bargaining, ante
 - Damages resulting from, action for against union, § 28(71)
 - Discharge of employee because of participation,
 - Reinstatement order, § 28(119), p 341
 - Unfair labor practice, § 28(49), p. 223
 - Discrimination in reinstatement of striking employees, unfair labor practice, evidence, § 28(99)
 - Increase of salary of employees not striking as unfair labor practice, § 28(62)

INDEX TO MASTER AND SERVANT

Strikes—Continued,

- Injuries to servants,
 - Agreement to protect employee against violence, § 197
 - Duty to protect employee from violence, § 189
- Interstate commerce,
 - Jurisdiction of National Labor Relations Board, § 28(74), p 259
 - National Labor Relations Act, § 28(2), p 115
 - Statutory provisions to prevent interruption by, § 28(3), p 121
- National Labor Relations Board,
 - Jurisdiction of labor disputes notwithstanding continued strike, § 28(74), p 258, n. 22
 - Pending proceedings before state board judging illegality of strike as precluding proceeding against employer, § 28(70)
- Preferential list for employees participating in, discretion on National Labor Relations Board, § 28(133), p 377, n 27
- Protection of employer from mob violence or assault by strikers, § 189
- Railway Labor Act, encouraging settlement without, § 28(2), p 117
- Recognition of rights of members of union, § 28(19), p 153
- Reinstatement of striking employees,
 - Power of National Labor Relations Board to order, § 28(119), p 338
 - Refusal as unfair labor practice, § 28(51), p 226
- Replacement employees, counting in determining majority representation for bargaining purposes, § 28(27)
- Right of employee to engage in, § 28(18)
- Seasonal industries, exemption from operation of statute prohibiting, § 28(5), p 125, n. 22
- Sit-down strikes, generally, ante
- Termination of employment by withdrawing from job in participating in, § 28(13)
- Trespass or violence, reinstatement of employees committing unwarranted acts of, § 28(51), p. 228
- Unfair labor practices,
 - Calling unlawfully, order forbidding picketing and boycotting, § 28(100), p 320
 - Discharge of employees on, § 28(40), p 223
 - Discrimination in rehiring or reinstatement strikers, § 28(90)
 - Employees on strike as protected against, § 28(44)
 - Employment of others to fill places of strikers, § 28(48)
 - Evidence as to strikes caused or prolonged by, § 28(96), p 290
 - Refusal to reinstate employees on strike, § 28(51), p 226
 - Terminating relationship by strikes on ground of, § 28(13)
- Wages, retroactive operation of labor board decision as rate rendered after return to work, § 118
- Wildcat strike,
 - Discharge of strikers as, § 28(49), p. 224, n. 7

Strikes—Continued,

- Wages, retroactive operation of labor board decision as rate rendered after return to work—Continued,
- Wildcat strike—Continued,
 - Refusal to reinstate strikers as, § 28(51), p 228
- Wildcat strikes, generally, post
- Structural defects, injuries to servant as result of, knowledge of master as affecting liability, § 245
- Student employees, fellow servants, rule as applicable to, § 328
- Subcontractors,
 - Dual capacity, § 583
 - Independent contractor, relationship, § 582
 - Independent contractors' liability for acts or omissions of, § 609
- Injuries to servants of,
 - Liability for injuries to employee of another contractor or subcontractor, § 610
 - Liability of contractee, §§ 600-606, pp 371-379
- Injuries to third persons, liability for, § 609
- Joint liability for injuries to third persons, § 609
- Jury question, liability of employer for injuries to servants of, § 617, p 418
- Latent dangers, duty of giving warning to servants of, § 606
- Negligence of, liability for, § 584, p 354
- Potential dangers, duty of giving warning to servants of, § 606
- Relation as existing between independent contractor and servant of, § 3(1), p 45
- Safe place to work, liability of contractee for injuries to servant as result of failure to provide, § 603
- Third persons, liability for injuries to, § 609
- Torts, liability for, § 584, p 354
- Warning and instructing servants, latent dangers, § 606
- Subforeman, straw boss as, § 1, p 28
- Submission of controversy, arbitration of labor disputes, binding effect of award, § 28(121), p 348
- Submission of issues,
 - Constitutional and statutory provisions, § 529
 - Instruction in actions for injuries to servant, § 538, p 239
- Subpoenas,
 - Fair Labor Standards Act, administrator, § 151 (31), pp 723-727
- Labor Relations Boards,
 - Contempt proceedings for failure to comply with order, § 28(142)
 - Power to issue, § 28(81)
- National Labor Relations Board,
 - Harmless error in denial of request for, § 28(120), p 368
 - Review of order or award by court, § 28(122), p. 353
- Subsidiary corporations, labor relations, responsibility of parent corporation, § 28(10)
- Substantial evidence, Labor Relations Boards, conclusiveness of findings supported by, § 28(136), pp 393, 399
- Substitutes employed by servant, protection to which entitled, § 4

INDEX TO MASTER AND SERVANT

- Substitution of parties, performance of services under contract of employment, § 64
- Subterfuge,
 - Fair Labor Standards Act, resort to in order to preclude payment or compensation guaranteed, § 151(35), p 736
 - Independent contractors, liability for acts of one employed as, § 598
- Subways, fellow servant doctrine, statutory provision, § 347
- Successors, National Labor Relations Board's orders running against employer's successors, § 28(114)
- Sudden emergency, assumption of risk, evidence, § 526
- Sudden peril, contributory negligence, acts of servants placed in, § 468
 - Instruction on doctrine of, § 549, p 259
 - Jury question, § 537, p 225
- Sudden stop, railroad trains, liability for injuries to trainman as result of, § 261, p 1019
- Sufficiency of evidence Evidence, ante
- Sunday,
 - Fellow servants, liability of master for injury by servant illegally employed on, § 322
 - Overtime work on, § 97
 - Construction of statute relating to, § 154
 - Wages payable for in accordance with contract, § 110, p 544
 - Work on as required under contract calling for all of employee's time, § 63
- Superintendents,
 - Fellow servants,
 - Railroads, § 332, p 1102
 - Statutory provisions relating to injuries caused by negligence of, § 340
 - Inferior position, requiring person engaged as superintendent to take, § 63
- Superior Servant rule. Fellow Servants, ante
- Supervision,
 - Fellow servants,
 - Employees entrusted with, § 333, p 1121
 - Liability for acts of employee authorized to supervise, § 332, p 1099
 - Independent contractor relationship as affected by reservation of right of, § 3(4)
- Supervisory employees,
 - Collective bargaining, bargaining unit as properly including, § 28(2b), p 174
 - Employers within statutes regulating labor relations, § 28(10)
 - Fair Labor Standards Act, application to, § 151(4), p 632
 - National Labor Relations Act, responsibility of employer for acts of, § 28(14), pp 141-145
 - Unfair labor practices, § 28(14)
 - Finding against employer, § 28(90), p 201
- Supervisory personnel, National Labor Relations Act, application, § 28(12)
- Supervisory powers, Labor Relations Boards or Commissions, § 28(66)
- Supplementary agreements, termination of employment contract by, § 33
- Surgeons,
 - Medical or surgical attention, generally, ante
 - Physicians and surgeons, ante
- Surmise, Labor Relations Boards, conclusiveness of findings resting on, § 28(13b), p 400
- Surveillance of union activities, unfair labor practice, § 28(53)
- Suspension of relation for purpose of determining liability for injuries to servants, § 180, pp 863-873
- Suspension of relationship, warning and instructing servant, duty, § 284
- Sweatshop, minimum wages, statutory provisions, § 151(1), p 623
- Swinging platforms, care required of master furnishing for use by servant, § 220, p 930
- Switchboard operators, Fair Labor Standards Act, exemption from provisions of operators of small public telephone exchanges, § 151(23)
- Switches and switching Railroads, ante
- Syndicate, employee employed by sales manager before organization as employee of syndicate, § 7, p 74, n 9
- Synonymous terms, servant and employee, § 1, p 28
- Tables, assumption of risks, knowledge of danger, § 390, p 1207
- Taft-Hartley Act, unfair labor practices, § 28(64)
- Tailor shops, Fair Labor Standards Act, exemption from provisions, § 151(14), p 678
- Tank cars, injuries to servant, negligence of master, questions of law and fact, § 534, p 178
- Tanks, contributory negligence, inspection for latent defects or dangers, § 447, p 1272
- Tardiness, wages, recovery for full days worked, § 110, p 544
- Tax consultant, compensation for services, § 100, p 542, n 7
- Taxes, profit sharing wage contract, allowance as expense, § 112, p 553
- Teams, injuries to third person,
 - Driver and team hired to another, liability of master under doctrine of respondeat superior, § 560, p 291
 - Liability of master for negligence of servant in driving, § 575, p 336
- Tear gas system, res ipsa loquitur, doctrine as applicable in respect of injuries to servants as result of explosion, § 501, p 58, n 20
- Telegraph operators, fellow servants, operator transmitting orders as, § 333, p 1125
- Telegraphic messages, Fair Labor Standards Act, goods as included within meaning of, § 151(7), p 641
- Telegraphs and telephones,
 - Honors of Service Act, application to employees receiving or delivering orders pertaining to train movement, § 19
 - Independent contractors constructing telephone lines, independent danger as respects liability for injuries to others, § 500, p 362
 - Inspection of poles and lines to keep in safe condition for employees, § 235, p 900
- Telltales,
 - Assumption of risk, latent defects or dangers, § 392, p 1220
 - Negligence of master, jury question, § 534, p 181
 - Railroads, negligence in failure to maintain, § 230, p 978
- Temporary authority, fellow servants, employee vested with as vice principal, § 332, p 1101
- Temporary employment, injuries to servant, liability of master, § 171, p 842, n 3

INDEX TO MASTER AND SERVANT

- Temporary forgetfulness, contributory negligence, § 436
- Temporary layoff, injury to servant going on premises during, liability, § 180, p 870
- Temporary service, relationship as existing, § 2, p 40
- Temporary structures, safe place to work, rule requiring master to furnish as applying to, § 217
- Tender,
 - Discharge of employee, tender of wages due as terminating further accumulation of penalty, § 156, p 764
 - Employment contract, condition precedent to right of action against employer for breach, § 11, p 85
 - Performance of contract, condition precedent to action for wrongful discharge, § 48
 - Performance of services, § 65
 - Wages,
 - Defense of tender in action to recover, § 125
 - Sufficiency of evidence, § 129, p 588
 - Liability for failure to pay as affected, § 156, p 764
- Tender of engine, contributory negligence, unnecessarily riding on, § 446, p 1268
- Term of employment. Duration of relation, generally, ante
- Terminal companies, Federal Employers' Liability Act, application, § 173, p 848, n 52
- Terminal employees, Fair Labor Standards Act, coverage, § 151(9), p 657
- Termination of relation, §§ 29-59, pp 411-476
 - See, also, Duration of Relation, generally, ante
 - Abandonment of employment by servant, § 40
 - Consent to, § 33
 - Arbitrary termination under contract providing for termination at discretion of employer, § 32, p 416
 - Arbitration, contract providing for, § 32, p 417
 - Armed service, voluntarily enlisting in, § 39
 - Bankruptcy proceedings against master, § 35
 - Benefit associations, rights as affected, § 168, p 826
 - Bonus, promise to pay as without consideration, § 98, p 528, n 89
 - Cause,
 - Definite term, § 29
 - Indefinite term, employment for, § 31, p 413
 - Statement of, § 44, pp 435-439
 - Change in business, § 34
 - Clearance card or letter, duty of employer to give, § 45
 - Closing out business, § 34
 - Commissions earned, forfeiture of right, § 92
 - Common law, right to terminate, § 29
 - Compensation, neglect or refusal to pay as justification for abandonment by worker, § 40
 - Consent, § 33
 - Consideration,
 - Employment based on, § 31, p 415
 - Surrender of employment contract for, § 33
 - Contract provisions, § 32, pp. 415-419
 - Customs and usages,
 - Periodic employment, § 30
 - Refusal to accede to custom of employer as justifying discharge, § 42, p. 429
- Termination of relation—Continued,
 - Death or disability of,
 - Master, § 37
 - Servant, § 38
 - Destruction of employer's property, § 36
 - Discharge of employee, generally, ante
 - Discontinuing use of property of former employer, § 29
 - Discretion of employer, contract providing for, § 32, p 416
 - Discretionary term of service, § 31, p 414
 - Dishonorable requirement, justification for abandonment of employment, § 40
 - Dismissal pay, § 87
 - Dissatisfaction of services, contract providing for termination, § 32, p 417
 - Enticing servant to leave employment after, § 625, p 429
 - Criminal liability, § 634
 - Expiration of term, § 30
 - Failure to furnish work, continuing employment after, § 29
 - Failure to pay wages due, action to enforce penalty, conditions precedent, § 160(3)
 - Good faith,
 - Contract providing for, § 32, p 416
 - Dissatisfaction of services, § 32, p 418
 - Immoral requirements, justification for abandonment of employment, § 40
 - Incompetency, contract requiring satisfactory services, § 32, p. 417
 - Indefinite time, employment for, § 31, pp 412-415
 - Independent contractors, power to terminate as test of relation, § 3(2), p 46; § 3(5)
 - Injuries to servants, termination of relation for purpose of determining liability, § 180, pp. 868-873
 - Injuries to third persons, liability of master under doctrine of respondeat superior as affected, § 508
 - Insanity of,
 - Employee, § 38
 - Master during term of contract, § 37
 - Insolvency of master, § 35
 - Interest, employment coupled with, § 31, p 415
 - Interest on unpaid wages as allowable from date of, § 101
 - Invention by employees after, ownership, § 73, p. 492
 - Jury question,
 - Action for wages, § 131, p 591
 - Waiver of notice, § 32, p 419
 - Justification for abandoning employment, § 40
 - Labor separation, § 29
 - Layoffs, § 29
 - Legality of contract provision permitting, § 6, p. 68
 - Letter of recommendation, duty of employer to give, § 45
 - Lien for wages as vesting on, § 144
 - Life employment, contract, § 31, p 414
 - Mild illness of employee, § 38
 - Military service of employee, § 39
 - Misconduct of employee, § 42, p 429
 - Modification of employment contract in respect of, § 9, p 80
 - Mutual agreements, § 33

INDEX TO MASTER AND SERVANT

Termination of relation—Continued,

- New agreement, contract as terminated by, § 33
- Notice,
 - Contract of employment providing for, § 32, p 418
 - Indefinite time, § 31, p 415
 - Periodic employment, § 30
 - Sickness of employee as affecting necessity of giving, § 38
- Partnership, formation or dissolution of, § 34
- Payment of wages earned, statute requiring, § 156, p 761
- Periodic employment, § 30
- Permanent employment contract, § 31, p 414
- Presumptions, good faith of employer, § 32, p 416
- Profit sharing agreements, effect on, § 93
- Quit defined, § 40
- Receivership proceedings against master, § 35
- Reference to arbitration, contract providing for, § 32, p 417
- Relief and benefit departments or associations, refunds of contributions or deductions from wages, § 168, p 827
- Resignation, acceptances as essential, § 33
- Right of employer to terminate, § 28(47)
- Satisfactory services, contract requiring, § 31, p 415; § 32(417)
- Service letter stating cause, necessity, § 44, p 435
- Severance pay, § 87
- Sickness of employees, § 39
- Solicitation of customers on change of employment, § 72, p 485
- Statement of cause, § 44, pp. 435-439
- Statutory provisions, statements as to cause, § 44, p 435
- Stipulations in contract of employment, § 32, p 415
- Strikes, withdrawal from job in participating in, § 28(13)
- Supplementary agreements, § 33
- Temporary financial embarrassment of employer, justification for abandoning employment, § 40
- Tenure determinable at will, § 20
- Testimonials as to character, duty of employer to give, § 45
- Trade secrets, duty of employee not to divulge after, § 72, pp 483-486
- Trial, contract providing for discharge as requiring, § 32, p 416
- Unit period, § 30
- Validity of employment contract as affected by right to terminate, § 6, p 67
- Voluntary abandonment of service, § 40
- Wages and other remuneration, post
- Waiver,
 - Abandonment of employment, § 40
 - Right to abandon, § 40
 - Contract provisions relating to termination, § 32, p 417
 - Notice, right to, § 32, p 419
- Will, indefinite term, § 31, pp 412-415
- Withholding wages, statutory penalty, § 156, p 761
- Terms, employment contract, § 6, p 68

- Territorial application, Fair Labor Standards Act, § 151(3)
- Testimonials, discharged employee, duty of employer to give, § 45
- Tests,
 - Dangerous machinery, guarding during operation for purpose of, § 232, p 984
- Injuries to servants,
 - Admissibility of evidence as to in action for, § 512, p. 98
 - Negligence of master, jury questions, § 534, p 187
- Theft by employee from employer, recovery of wages as precluded, § 105
- Thieves, liability of master for injuries caused by, § 189
- Third party beneficiary, breach of contract between employer and labor union, employee's right of action, § 28(83)
- Third persons,
 - Assault on by servant, liability of master, § 575, p 330
 - Change in relationship whereby work is to be done for third party, liability of master for injuries, § 180, p 871
 - Compensation paid by as affecting relationship, § 2, p 39
 - Earnings of employee from, employer's right to, § 71
 - Injuries to servant,
 - Liability for, §§ 622, 623
 - Liability of master for injuries caused by acts or omissions of, § 180
 - Master's right of action for, § 622
 - Negligence of master in respect of instrumentalities provided by, jury questions, § 534, p 174
 - Servant's right of action for, § 623
 - Injuries to third persons Third persons, injuries to, generally, post
 - Inspection of places of work and instrumentalities belonging to or provided by, duty of employer, § 230
 - Instrumentalities for work furnished by, duties and liabilities of employer with respect to, §§ 210-212, pp. 918-922
 - Interference with relation by third persons, generally, ante
 - Liability for injuries to servant, §§ 622, 623
 - Medical services, contract with to furnish, § 163, p 819
 - Place of work furnished by or under control of, duties and liabilities of employer with respect to, §§ 210-212, pp 918-922
 - Relationship as affected by servant's agreement with, § 2, p 31
 - Subcontractors, liability for injuries to, § 609
 - Wages, payment to as defense in action to recover, § 125
- Third persons, injuries to, §§ 555-621, pp. 266-424
 - Abandonment of employment, respondeat superior doctrine, § 568
 - Abuse of authority by servant, respondeat superior doctrine, § 570, p 311
 - Acquittal of servant as exonerating master from liability, § 619, p 423
 - Actions for, §§ 611-621, pp 383-424

INDEX TO MASTER AND SERVANT

Third persons, injuries to—Continued,

- Acts or omissions of servant, liability for, §§ 555-570, pp 266-352
- Affirmative defenses, burden of proof, § 615, p 306
- Agency, liability of master under doctrine of, § 555
- Amusement, respondeat superior doctrine, § 574, p 327
- Answer, actions for, § 614, p 380
- Appeal and error, actions for, § 620
- Area of service, respondeat superior doctrine, § 570, p 309
- Assault and battery by servant, liability of master, § 575, p 339, § 577, n 74
 - Exoneration of servant as absolving master, § 619, p 422
 - Jury question, § 617, p 412, n 52
- Assent of acquiescence,
 - Liability of master for torts committed in his presence with, § 557
 - Respondeat superior doctrine, § 570, p 311
- Assistants employed by servant, respondeat superior doctrine, § 564, pp 280-283
- Basis of liability of master under respondeat superior doctrine, § 570, p 290
- Burden of proof, actions for, § 615, p 394
- Case, action on as proper remedy, § 611
- Cause of injury,
 - Evidence, § 615, p. 403
 - Jury questions, § 617, p 409
- Cessation of work for eating, drinking, etc., respondeat superior doctrine, § 570, p 308
- Charitable work, respondeat superior doctrine, § 571, p 319
- Circumstantial evidence, course of employment, proof that tortious act was committed in, § 615, p 406
- Collection of costs of injury, liability for hiring incompetent or unfit servants, § 550
- Combining business of servant with that of master, respondeat superior doctrine, § 574, p 329
- Command, liability of master for torts in obedience to, § 557
- Comparative negligence, application of rule, § 619, p. 424
- Competency of servant or contractor, pleading incompetency, § 614, p. 387
- Complaint, actions for, § 614, pp 384-380
- Concurrent negligence of master and servant, joint and several liability, § 579
- Conduct within scope of authority, respondeat superior doctrine, § 570, p 303
- Connection of master, pleading, § 614, p 386
- Contract of employment, respondeat superior doctrine, § 563, p 279
- Contractual relation with person injured essential to liability under doctrine of respondeat superior, § 570, p 306
- Contribution of master, liability based on, §§ 556-560, pp 268-272
- Contributory negligence,
 - Evidence, § 615, p 403
 - Jury question, § 617, p 414
 - Respondeat superior doctrine, § 571, p 320

Third persons, injuries to—Continued,

- Control of servant,
 - Liability under respondeat superior doctrine, servant loaned or hired to another, § 566, pp 284-292
 - Right of as essential to liability under doctrine of respondeat superior, § 563, p 276
- Costs, actions for, § 621
- Course of employment,
 - Burden of proof, § 615, p 395
 - Liability of master, §§ 555, 572
 - Nature of liability, § 570, p. 299
 - Presumptions, § 615, p 393
 - Willful or malicious acts, § 572
- Criminal acts, respondeat superior doctrine, § 573
- Dangerous instrumentality or agency intrusted to servant, respondeat superior doctrine, § 570, p 314
- Declaration in actions for, § 614, pp 384-380
- Derivative liability, respondeat superior doctrine, § 570, p 299
- Detectives, assault by, liability of master, § 575, p 342
- Deviation from course of employment,
 - Jury question, § 617, p 414
 - Respondeat superior doctrine, § 574, p 327
- Direction of verdict in actions for, § 616
- Discharge of servant, right as essential to liability under doctrine of respondeat superior, § 563, p 276
- Dismissal of action for, § 616
- Disobedience by servant of orders or instructions, respondeat superior doctrine, § 570, p. 312; § 572
- Doubt as to servant acting within scope of authority, respondeat superior doctrine, § 570, p 307
- Driver and team hired to another, respondeat superior doctrine, § 566, p 291
- Dynamite, respondeat superior doctrine, § 570, p 315
- Electricity, respondeat superior doctrine, § 570, p 315
- Emergency, assistants employed by servant, respondeat superior doctrine, § 564, p 281
- Employers' Liability Act, liability of employer, § 555
- Evidence, actions for, § 615, pp 391-407
- Exceeding authority, respondeat superior doctrine, § 570, p 311
- Existence of relationship,
 - Burden of proof in actions for, § 615, p 394
 - Evidence, § 615, pp 397, 405
 - Jury question, § 617, p 409
 - Pleading, § 614, p 386
- Exoneration of master, verdict exonerating as absolving servant, § 619, p. 421
- Express command, liability of master for acts done by, § 557
- Failure to instruct servant or enforce obedience to instructions, liability of master, § 560
- False imprisonment,
 - Exoneration of servant as absolving master, § 619, p. 422
 - Scope of employment, jury question, § 617, p. 412, n 52
- Fictitious party in action for, § 618

INDEX TO MASTER AND SERVANT

Third persons, injuries to—Continued,

Findings in action for, § 619, pp 421-424
 Firearms, liability of master intrusting to servant, § 575, p 345
 Fires started by servant, respondeat superior doctrine, § 575, p 333
 Form of action for, § 611
 General denial, evidence admissible under, § 614, p. 391
 Going to and from work, respondeat superior doctrine, § 570, p 309
 Ground of actions for, § 612
 Hiring of servant, jury question, § 617, p 410
 Hiring servant to another,
 Presumptions, § 615, p 393
 Respondeat superior doctrine, § 566, pp. 284-292
 Horses, liability of master for negligence of servant in driving or handling, § 575, p 336
 Implied authority to do unlawful act, respondeat superior doctrine, § 570, p 306
 Incompetency of servant,
 Burden of proof, § 615, p 395
 Evidence, § 615, pp. 397, 402, 403
 Jury question, § 617, p. 409
 Negligence in selecting as affecting liability of master, § 559
 Independent contractors, generally, ante
 Insanity of servant, respondeat superior doctrine, § 570, p 306
 Instructing servant, liability for failure to instruct, § 560
 Instructions to jury in actions for, § 618, pp 418-421
 Intent of servant, respondeat superior doctrine, § 570, p 309; § 572
 Intoxication of servant,
 Evidence, § 615, p 400
 Respondeat superior doctrine, § 570, p. 306
 Invitees, respondeat superior doctrine, § 560; § 575, p 334
 Issues in actions for, § 614, p 300
 Joint action against master and servant, verdict against master only, § 619, p 421
 Joint and several liability of master and servant, § 579
 Joint employment, respondeat superior doctrine, § 567
 Jokes, respondeat superior doctrine, § 574, p 327
 Judgment in action for, § 619, pp 421-424
 Jury questions, actions for, § 617, pp 408-418
 Knowledge of incompetency of servant, § 559
 Knowledge of master, respondeat superior doctrine, § 570, p. 311
 Lack of authority of servant, respondeat superior doctrine, § 570, p 306
 Law questions, actions for, § 617, pp 408-418
 Lawful employment, respondeat superior doctrine, § 563, p 276
 Label and slander, scope of employment, jury question, § 617, p 413, n 52
 Licensees, respondeat superior doctrine, § 575, p 334
 Loan of servant to another,
 Jury question, § 617, p. 410
 Respondeat superior, § 566, pp. 284-292
 Malicious acts, respondeat superior, § 572

Third persons, injuries to—Continued,

Meal time, respondeat superior, § 570, p. 308
 Mischievous acts of servant, respondeat superior, § 574, p 327
 Misfeasance, personal liability of servant for acts of, § 577, p 347
 Misleading instructions, actions for, § 618, p 420
 Motive of servant, respondeat superior, § 570, p. 309, § 572
 Nature of action for, § 611
 Nature of liability of master under doctrine of respondeat superior, § 570, p 290
 Nonsuit in action for, § 616
 Obedience to commands of master,
 Joint liability, § 579
 Personal liability of servant, § 577, p. 348
 Obedience to orders,
 Failure to enforce, § 560
 Liability of master for injuries resulting, § 557
 Obstruction of highways and streams, liability of master for negligence of servant, § 575, p 338
 Omissions of servant, liability of master, §§ 555-579, pp 268-352
 Orders, liability of master for injuries resulting in obedience to, § 557
 Participation of master, liability, §§ 556-560, pp 268-272
 Particular servant guilty of negligence, designation in complaint, § 614, p 386
 Parties, actions for, § 613
 Payment for services, liability of master under doctrine of respondeat superior, § 503, p. 279
 Servants loaned or hired to another, § 566, p 290
 Payment of money, assault to enforce, liability of master, § 575, p 343
 Personal liability of servant, §§ 576-578, pp 345-350
 Jury question, § 617, p 418
 Persons to whom master liable under doctrine of respondeat superior, § 569
 Petition, action for, § 614, pp 384-389
 Place of, liability of master under doctrine of respondeat superior, § 570, p 309
 Pleading, actions for, § 614, pp 384-391
 Powder, respondeat superior, § 570, p 315
 Preponderance of evidence, actions for, § 615, p. 400
 Presumptions, actions for, § 615, p 391
 Prima facie showing in action for, § 615, p 400
 Primary liability, respondeat superior, § 570, p 290
 Proof in actions for, § 614, p 390
 Proximate cause of injury, § 570, p. 294
 Evidence, § 615, p. 402
 Questions of law and fact in actions for, § 617, pp 408-418
 Ratification of wrongful act of servant, liability of master, § 558
 Burden of proof, § 615, p. 395
 Employment of assistants by servants, § 564, p 282
 Evidence, § 615, pp. 397, 402
 Jury question as to ratification, § 617, p. 409

INDEX TO MASTER AND SERVANT

Third persons, injuries to—Continued,

- Ratification of wrongful act of servant, liability of master—Continued,
 - Pleading ratification of act, § 614, p. 388
- Relationship of master and servant,
 - Burden of proof, § 615, p. 394
 - Evidence, § 615, pp. 397, 400, 405
 - Jury question, § 617, p. 400
 - Pleading existence of, § 614, p. 386
 - Respondeat superior, § 562
- Request for instructions in actions for, § 618, p. 420
- Res ipsa loquitur, § 615, p. 394
- Respondeat superior, §§ 561-575, pp. 272-346
 - Abandonment of employment, § 568
 - Absence of authority to do particular act, § 570, p. 306
 - Abuse of authority by servant, § 570, p. 311
 - Acts of servant in his own behalf, § 574, pp. 323-330
 - Acts or omissions imposing liability, § 570, pp. 294-315
 - Area of service, § 570, p. 309
 - Assent of master as affected, § 570, p. 311
 - Cessation of work for eating, drinking, etc., § 570, p. 308
 - Charitable work, § 571, p. 310
 - Combining own business with that of master, § 574, p. 329
 - Conduct within scope of employment, § 570, p. 303
 - Contract of employment as essential, § 563, p. 279
 - Contractual relation with person injured as essential, § 570, p. 306
 - Contributory negligence, § 571, p. 320
 - Course of employment, willful or malicious acts in, § 572
 - Criminal acts, § 573
 - Derivative nature of liability, § 570, p. 299
 - Deviation or departure from service, § 574, p. 327
 - Disobedience of orders or instructions, § 570, p. 312
 - Willful or malicious acts in, § 572
 - Doubt as to servant acting within scope of authority, § 570, p. 307
 - Driver and team hired to third person, § 566, p. 291
 - Employment of assistants by servant, § 563, pp. 280-283
 - Exceeding authority by servant causing injury, § 570, p. 311
 - Existence of relationship, § 563, pp. 275-280
 - Exoneration of servant affecting liability, § 610, p. 423
 - Going to and from work, § 570, p. 309
 - Hiring servants to another, § 566, pp. 284-292
 - Implied authority to do unlawful act, § 570, p. 306
 - Independent acts of servants, § 574, p. 323
 - Insanity or intoxication of servant, § 570, p. 306
 - Intent, § 570, p. 309, § 572
 - Intrusting instrumentality to unfit person, § 570, p. 307
 - Invitees, § 569

Third persons, injuries to—Continued,

- Respondeat superior—Continued,
 - Joint and several liability, § 579
 - Joint employment, § 567
 - Jokes perpetrated by servant, § 574, p. 327
 - Loan or hiring of servant to another, § 566, pp. 284-292
 - Malicious acts, § 572
 - Mealtime, § 570, p. 308
 - Mischievous acts, § 574, p. 327
 - Motive of servant, § 570, p. 309; § 572
 - Nature of liability, § 570, p. 299
 - Negligence of servant, § 571, pp. 315-320
 - Particular application, § 575, pp. 331-345
 - Persons to whom liable, § 569
 - Place of injury as affecting, § 570, p. 309
 - Power to prevent act causing damage, § 570, p. 306
 - Primary liability, § 570, p. 299
 - Proximate cause of injury, § 570, p. 294
 - Ratification, acts of assistants employed by servant, § 564, p. 282
 - Relation of master and servant, § 562
 - Resumption of master's work after deviation, § 574, p. 329
 - Scope of employment, § 570, p. 294
 - Assault by servant, § 575, p. 340
 - Conduct within, § 570, p. 303
 - Distinction, § 570, p. 298
 - Negligence of servant within, § 571, pp. 315-320
 - Servants hired or loaned to another, § 566, p. 289
 - Tests of liability, § 570, p. 301
 - Willful or malicious acts in, § 572
- Secondary nature, § 570, p. 299
- Special police officers, § 565
- Surrender of instrumentality to another, § 570, p. 307
- Temporary termination of relation, § 568
- Termination of relation, § 568
- Tests of liability, § 570, pp. 300-314
- Time of service, § 570, p. 308
- Unlawfulness of employment, § 563, p. 276
- Unnecessary acts, § 570, p. 311
- Unnecessary injury, § 570, p. 306
- Use by servant of facilities supplied by master for own purposes, § 574, p. 326
- Use of instrumentality, § 570, p. 307
- Violation of orders or instructions by servant, § 570, p. 312
- Willful acts, § 572
- Responsibility of master, pleading, § 614, p. 386
- Resumption of master's work after deviation therefrom, respondeat superior, § 574, p. 329
- Retaking master's property, assault for purpose of, liability of master, § 575, p. 343
- Retention in employment of servants guilty of wrongful acts, ratification, § 558
- Retention of incompetent servant or contractor, pleading, § 614, p. 387
- Review, actions for, § 620
- Rules of master, evidence of book containing in actions for, § 615, p. 400
- Safe tool or appliance, liability of master failing to furnish, § 556

INDEX TO MASTER AND SERVANT

Third persons, injuries to—Continued,

Scope of employment,

- Assault by servant, § 575, p 339
- Burden of proof, § 615, p 305
- Conduct within scope, § 570, p. 303
- Distinction, § 570, p 298
- Evidence, § 615, pp 399, 406
- Instructions to jury, § 618, p 419, n 88
- Jury question, § 617, p 411
- Law question, § 617, p 411
- Negligence of servant, § 571, pp 315-320
- Pleading, § 614, p 387
- Presumptions, § 615, p 392
- Respondent superior, § 566, p 289, § 570, pp 294, 298, 301, 303, § 571, pp 315-322, § 572; § 575, p 339
- Servants hired or loaned to another, § 566, p 289
- Tests of liability, § 570, p 301
- Willful or malicious acts, § 572

Secondary nature of liability of master under doctrine of respondent superior, § 570, p 299

- Selection of incompetent servant or contractor, pleading, § 614, p 387
- Selection of servants, § 559; § 563, p 276
- Self-defense, assault by servant in, liability of master, § 575, p 342

Several liability, § 579

- Shooting by servant, liability of master, § 575, p 343
- Smoking resulting in fire, § 500, n 7, § 575, p. 334

Special police officers, liability of master, § 565

Storekeepers, liability of master for injuries inflicted by servant, § 570, p 314

Surrender of instrumentality to another, liability under doctrine of respondent superior, § 570, p 307

Team hired to another, liability of master under doctrine of respondent superior, § 566, p 291

Teams, liability of master for negligence of servant in driving, § 575, p 336

Temporary termination of relation, respondent superior, § 568

Termination of relation, respondent superior, § 568

Tests of liability under doctrine of respondent superior, § 570, pp. 300-314

Time of service, respondent superior, § 570, p 308

Tools or appliances, liability of master for failure to furnish safe appliance, § 556

Torpedoes, respondent superior, § 570, p 315

Trespass, remedy by way of, § 611

Trespass of servant, liability of master for, § 575, p 338

Trespassers,

Respondent superior, § 575, p 334

Shooting by servant, § 575, p 344

Trial of actions for, §§ 616-619, pp 407-424

Unlawful employment, respondent superior, § 563, p 276

Unnecessary acts, respondent superior, § 570, p 311

Unnecessary injury, respondent superior, § 570, p 306

Third persons, injuries to—Continued,

Use by servant of facilities supplied by master for own purposes, respondeat superior, § 574 p 326

Use of instrumentality, respondeat superior, § 570, p 307

Variance in actions for, § 611, p 390

Vehicles, liability of master for negligence of servant in handling, § 575, p 336

Verdict, actions for, § 619, pp 421-424

Violation of orders or instructions by servants, respondent superior, § 570, p 312

Wages, liability of master under doctrine of respondent superior as dependent on payment of, § 563, p 280

Waiver of rules or orders, evidence, § 615, p 403

Wanton acts of servant, evidence, § 615, p 402

Watchmen, assault by, liability of master, § 575, p 342

Weight and sufficiency of evidence, actions for, § 615, p 400

Willful acts of servant,

Evidence as to, § 615, p 402

Respondent superior, § 572

Wrongful acts of servant, pleading, § 614, p 385

Third rails, guarding, negligence of master, jury question, § 534, p 187

Threats,

Assumption of risk, ante

Discharge of employee, threat to terminate employment as amounting to, § 41

Labor controversies, use of, § 28(2), p 114, n 24

Labor unions, resort to, § 28(19), p 154

Unfair labor practices, § 28(35)

The picks, assumption of risk, simple tool doctrine, § 300, p 1209

The tongs, simple tools as respects duty of employer to inspect, § 235, p 991, n 78

Ties, railroads, liability for injuries to employees caused by defects, § 229, p 974

Tif miners, labor relations, employees within statutes regulating, § 28(11), p 136, n 26

Timber,

Independent contractors, persons employed to cut and deliver, § 3(9)

Wrongful cutting by servant on land of another, liability of master, § 575, p. 339

Timbering, mines, duty of master, § 222, p 940

Time,

Assumption of risk, knowledge of danger, § 389

Bonus, contract provisions for payment, § 98, p. 530

Contract of employment, acceptance, § 6, p. 65, n 3

Dangerous places or appliances, time for discovery of affecting constructive knowledge, § 248

Injuries to servant,

Actions for, § 487

Jury question, § 533, p. 154

Knowledge of danger, pleading, § 490, p 21

Inspection and repair, machinery, appliances and place of work, § 241

Minimum wages, payment of, § 151(24), p. 698

Overtime compensation, payment of, § 151(24), p 698

Penalty wages, commencement of, § 150, p 765

INDEX TO MASTER AND SERVANT

Time—Continued,

- Performance of work, independent contractor relationship as affected by reservation of right to fix, § 3(4)
- Settlement of labor disputes, proceedings for, § 28(76)
- Wages and other remuneration, post
- Warning and instructing servant, § 290
- Time checks, wages, issuance in payment, § 157, p 765
- Time laborers, wages, presumption of payment, § 121
- Time sheets, minimum wages and overtime pay, conclusiveness for purpose of, § 151(28), p 720
- Tips,
 - Compensation consisting of or including, § 81
 - Criminal liability for violation of anti-tipping statute, § 160(13), p 811, n 98
 - Fair Labor Standards Act, employees receiving compensation from tips as within Act, § 151(4), p 631
 - Minimum wages, consideration as part of wage, § 151(27), p 712
 - Receipts by employee in connection with employment, rights as to, § 71
- Tokens, wages, issuance in payment, § 157, p 766
- Presumptions in actions involving, § 160(8), p 789, n 7
- Tongs,
 - Assumption of risk, simple tool doctrine, § 390, p 1209
 - Contributory negligence, inspection for latent defects or dangers, § 447, p 1272
 - Latent defects or dangers, duty of employee to inspect for, § 381
- Tools, machinery and appliances, §§ 201–259, pp 900–1013
 - Absolute safe instrumentalities as required to be furnished, § 206
 - Assumption of risk, ante
 - Barriers, duty to provide, § 231
 - Best appliances as required to be furnished, § 207
 - Breach of duty in respect of, burden of proof, § 501, p. 74
 - Burden of proof, actions for injuries to servants, § 501, p 73
 - Butcher shops, guarding machinery used in, § 232, p 982
 - Care required of employer furnishing, § 202, pp 902–908
 - Delegation of duty, § 204, pp 909–912
 - Knowledge and experience of servant as affecting, § 203
 - Particular appliances, §§ 213–230, pp 922–979
 - Carriers, duty of furnishing employees with safe instrumentalities, § 212, pp 919–922
 - Chicken ladder as simple appliance as respects liability to furnish safe appliances, § 216, n 97
 - Chisels, generally, ante
 - Circumstantial evidence, negligence of master in connection with, § 524, p 125
 - Condition before and after injury to servant, admissibility of evidence as to, § 509
 - Continuing duty to furnish suitable and safe instrumentalities, § 201

Tools, machinery and appliances—Continued.

- Contributory negligence, ante
- Covering or guarding,
 - Assumption of risk, § 360, p 1172
- Dangerous machinery, §§ 231, 232, pp 979–987
- Customary appliances,
 - Negligence of master in respect of, questions of law or fact, § 534, p 168
 - Proof of use of as showing due care, § 524, p. 128
- Customs and usages, furnishing in accordance with, § 208
- Dangerous or defective machinery, generally, ante
- Degree of care required of master furnishing, § 204, pp 902–908
 - Delegation of duty, § 204, pp 909–912
 - Knowledge and experience of servant as affecting, § 203
- Delegation of duty, burden of proof, § 501, p 75
- Delegation of duty to provide safe instrumentality, § 204, pp 909–912
- Dolly as simple appliance within rule relating to furnishing safe appliances, § 216, n 97
- Duty of master to furnish safe instrumentality, § 201
- Duty to use appliances furnished, contributory negligence, § 446, p 1264
- Electric sausage grinder as simple tool as respects liability to furnish safe tools, § 216, n 97
- Evidence, action for injuries to servants, § 524, p 125
- Examination, delegation of burden to servant, § 204, p 911
- Experience of servant as affecting care required of employer furnishing, § 203
- Factories, guarding machinery used in, § 232, p 982
- Failure of master to furnish, § 205
- Farm machinery, safety appliances, § 232, p 982
- Federal Employers' Liability Act, duty to provide safe equipment under, § 226, p 947
- Fellow servants,
 - Concurring negligence in respect of, § 356
 - Liability of master for injury, § 356
 - Liability of master for negligence, § 333, pp. 1113, 1117, 1120
 - Statutory provisions, § 344
- Jury question, § 535, p 209
- Negligence in starting etc., as affecting master's liability for injuries, § 333, p. 1113
- Simple tools, liability of master for negligence in use of, § 333, p 1120
- Starting machinery, warning of, § 333, p 1123
- Hammer as simple tool within rule relating to safe tools and appliances, § 216, n 97
- Hoses, rule requiring master to furnish servant with same instrumentalities as extending to, § 218
- Hospital kitchens, guarding machinery in, § 232, p 982
- Implied obligation to furnish suitable and safe instrumentalities, § 201

INDEX TO MASTER AND SERVANT

Tools, machinery and appliances—Continued,

Independent contractors,

Duty of furnishing employees with safe appliance, § 604

Duty to supply as test of relation, § 3(2), p 46, § 3(7)

Persons employed to move, § 3(9)

Statute requiring guarding and covering, § 232, p 983, n 76

Injuries to third persons, liability of master failing to furnish safe appliance, § 556

Inspection and repair, §§ 235-243, pp 988-990

Admissibility of evidence as to in action for injuries to servant, § 512, p 98

Continuing duty of employer, § 241

Customary methods as sufficient, § 240

Delegation of duty to servant, § 204, pp 911, 912

Employee as to whom duty of employer exists, § 235, p 992

Fellow servants, liability of master for negligence, § 333, p 1119

Hidden defects, railroad cars, § 236

Known defects or dangers, § 235, p 989

Latent defects, § 238

Simple tools and appliances, § 237

Liability for injuries to employee as result of failure, § 235, pp 988-993

Manner and extent of, § 239

Mines, § 235, p 993

Negligence as shown by mere failure to inspect, § 235, p 988

Negligence of master, jury questions, § 534, pp 187, 189

Notice of probable defect as affecting duty, § 239

Opportunity, § 241

Operation and effect, § 243

Progress of work resulting in tools becoming unsuitable, § 235, p 989

Public authorities, § 242

Purchases from reputable manufacturers, § 237

Degree of care, § 239

Railroad rolling stock, § 236

Simple or common tools, § 235, p 990

Degree of care in, § 239

Purchase from reputable manufacturer, § 237

Statutory regulations, § 235, p 992

Stevedores, § 236

Third persons owning or controlling, § 236

Time for, § 241

Trivial defects, § 235, p 989

Instructions to jury as to, action for injuries to servant, § 546, p 246

Insurer of safety, employer as, § 202, p. 902

Jury questions, negligence of master in respect of, § 534, p. 168

Knowledge of servant as affecting care required of employer furnishing, § 203

Ladder as simple appliance as respects liability to furnish safe appliances, § 216

Latent defects and dangers,

Assumption of risk, § 392, p 1219

Duty of servant to inspect for, § 381

Inspection to determine, § 238

Tools, machinery and appliances—Continued,

Maintenance, delegation of burden of to servant, § 204, p 911

Mills, guarding machinery used in, § 232, p 982

Motor vehicle operated by servant, safety appliances, § 218

Nature and kind required to be furnished, §§ 206-209, pp 913-917

Nature of danger of work, degree of care required of master as determinable with reference to, § 202, p 906

Negligence of master, § 202, p 904; § 205

Failure to furnish, § 205

Furnishing defective appliances, evidence, § 524, p. 128

Questions of law and fact, § 534, p. 168

Newest appliances as required to be furnished, § 207

Notice of probable defect, inspection to determine, § 239

Ordinary care of master furnishing as sufficient, § 202, p 904

Ordinary use, furnishing in conformity with as sufficient, § 208

Ownership as indicative of relationship, § 2, p 40

Presumptions, actions for injuries to servant, § 501, p 61

Proximate cause of injury, burden of proof, § 501, p. 75

Questions of law and fact, negligence of master in respect of, § 534, p. 168

Railings, duty to provide, § 231

Railroads,

Degree of care required in furnishing, § 226, p 947

Delegation of duty to furnish, § 333, p 1118

Duty of furnishing employees with safe instrumentalities, § 212, pp 919-922, §§ 225-230, pp 945-970

Cars, § 228, pp 959-972

Locomotives, § 227, pp 952-959

Reasonable care on part of employer furnishing as sufficient, § 202, p. 905

Reasonably safe instrumentalities only as required to be furnished, § 206

Reliance on care of master to furnish reasonably safe tools, § 390, p 1207

Repairs Inspection and repair, generally, ante, this head

Rest period, statute requiring safeguarding machines as applying during, § 232, p 984

Rope as simple appliance as respects liability to furnish safe appliances, § 216

Safeguarding machinery, § 232, pp 979-987

Scope of employment, liability for injuries as dependent on being received within, § 201

Servants furnishing own tools, etc, liability for injuries resulting from defects, § 201

Shipping, duty of furnishing safe tools and appliances, § 224

Simple tools and appliances, generally, ante Statutory provisions,

Duty of employer to furnish safe instrumentalities as affected, § 202, p 908

Liability of master for injuries where instrumentalities are furnished by or in control of third persons, § 211

INDEX TO MASTER AND SERVANT

Tools, machinery and appliances—Continued,

- Temporary appliances, rule requiring master to furnish safe appliances as applying to, § 217
- Testing of machines after installation, statute requiring safeguards as applying to, § 232, p 983
- Tests, negligence of master, jury question, § 534, p 187
- Third persons, duty and liabilities of employer with respect to appliances furnished by, §§ 210-212, pp 918-922
- Trivial defects, duty of master to inspect for, § 235, p 980
- Uniform machinery and appliances as required to be furnished, § 209
- Unloading vehicles, safe appliances for, § 218
- Vehicles, rule requiring master to furnish safe instrumentalities as including, § 218
- Vice principal liability of master for negligence in respect of, § 333, p 1117
- Violation of statute, evidence of as sufficient in action for injuries to servant, § 524, p 126
- Waiver, duty of master to guard machinery, § 232, p 981
- Workshops, guarding machinery used in, § 232, p 982
- Youthful employees, care required of master in furnishing, § 203
- Torpedoes, injuries to third persons, liability of master under doctrine of respondeat superior, § 570, p 315
- Torts,
 - Independent contractors, generally, ante
 - Injuries to third persons, generally, ante
 - Subcontractors, liability for, § 584, p 354
 - Wrongful discharge, pleading in action in, § 52, p 448
- Towage, independent contractors, liability for acts or omissions of, § 584, p 356
- Track inspectors, railroads, fellow servant rule, § 327, p 1088
- Tracks Railroads, ante.
- Tractors,
 - Assumption of risk, jury questions, § 536, p. 214
 - Contributory negligence, operation of, jury question, § 537, p 231, n 44
 - Injuries to servants, negligence of master, jury question, § 534, p 176
 - Warning and instructing servant operating, inexperienced or youthful servant, § 306, p 1067
- Trade checks, wages, issuance in payment, statutes prohibiting, § 157, p 765
- Trade secrets, duty of employee not to divulge after termination of employment, § 72, pp 483-486
- Trade unions. Employee organizations, generally, ante
- Trade war maneuver, picketing in conduct of as labor dispute, § 28(16), n 55
- Tradesmen, lien for wages or other remuneration, § 143, p 609
- Traffic arrangement,
 - Railroad operating train on track of another under, safe instrumentalities and place to work, duty of furnishing, § 212, p. 919

Traffic arrangement—Continued,

- Railroads operating under, injuries to employees, joint and several liability, § 195
- Train dispatchers,
 - Fellow servants, § 333, p 1125
 - Statutory provisions, § 348
 - Hours of Service Act, application, § 19
- Train order operatives, hours of labor, interruption of continuity of service, § 20
- Train service, seniority in, § 28(41), p 202, n. 87
- Train service employees, carriers, jurisdiction over disputes involving, § 28(74), p 201
- Trainmen, fellow servants, § 327, p 1088
- Transfer of business, liability for injuries to servants as affected, § 180, p 872
- Transfer of employees, unfair labor practices in respect of, § 28(58)
- Transitory action, injuries to servant, § 486
- Transitory dangers, warning servant of, § 284, n. 76
- Transportation,
 - Duty of employer to furnish, § 61
 - Employee furnishing as affecting status, § 2, p. 30, n 68
 - Employer transporting employees to and from work, care required to avoid injury, § 180, p 869, § 183, p 880
 - Fair Labor Standards Act,
 - Application to employers engaged in, § 151 (7), p 643
 - Production of goods for commerce within coverage, § 151(9), p 651
 - Fellow servants, rule as applicable to, § 327, p. 1086
 - Independent contractors, liability for acts or omissions of, § 584, p 356
 - Injury to servant being transported by master, liability, § 180, p 868
 - Place of work, reimbursement of employee for expenses in connection with, § 100
 - Resignation of employee as affecting right to recover cost of, § 83, n. 74
- Transportation Act, arbitration award under, advisory character, § 28(121), p 350
- Transportation time, minimum wages or overtime pay for, § 151(28), p 719
- Trap doors,
 - Latent defects or dangers, duty of employee to inspect for, § 381
 - Contributory negligence, § 447, p. 1272
 - Respondeat superior, doctrine as applicable in respect of, § 575, p 331
- Travel time,
 - Minimum wages or overtime pay for, § 151(28), p 719
 - Pay, resignation of employee as affecting right to recover, § 83, n 74
 - To and from work, compensation for time spent in, § 96
- Tree trimmers, independent contractors, § 3(9)
- Trenches,
 - Contributory negligence, servant injured in, jury question, § 537, p 235
 - Safe place to work,
 - Care required of master employing servant in, § 222, p 938
 - Negligence in providing, evidence, § 524, p. 121

INDEX TO MASTER AND SERVANT

- Trespass,**
 Discharged employee, servant failing to leave peaceably, § 46
 Independent contractors, liability where work involves commission of, § 587
 Injuries to servants caused by trespassers, liability of master, § 189
 Injuries to third persons,
 Liability of master for trespass of servant resulting in, § 575, p 338
 Remedy by way of, § 611
 Protection from injury, care required of employer, § 184
 Respondent superior, liability for injury under doctrine of, § 575, p 334
 Shooting by servant, liability of master, § 575, p 344
 Striking employees committing, right to reinstatement, § 28(51), p 228
- Trespass on the case, enticing servant to leave employment, action for as maintainable, § 627**
- Trestles,**
 Assumption of risk, knowledge of danger, § 390, p 1207
 Latent defects or dangers, duty of employee to inspect for, § 381
 Contributory negligence, § 447, p 1272
 Railroads, liability to servants for injuries caused by failure to safely maintain, § 229, p 975
- Trial,**
 Injuries to servants, actions for, §§ 528-550, pp 146-264
 Injuries to third persons, actions for, §§ 616-619, pp 407-424
 Instructions to jury, generally, ante
 Inventions by employees, actions relating to, § 73, p 497
 Labor contract statutes, prosecution against employee for violation, § 80, p 511
 Negligence or wrongful act of employee, action by employer for damages, § 79, p 504
 Questions of law and fact, generally, ante
 Relief and benefit departments or associations, actions for benefit, § 169, p 837
 Service letter to discharged employee, action for failure to give, § 44, p 437
 Wages, actions to recover, § 130
 Statutory provisions, § 160(9)
 Prosecution for violation of, § 160(18), p 813
- Trial examiner. National Labor Relations Board, ante**
- Tricycles, contributory negligence, railroad employees operating, § 456, p 1288**
- Trolley wires, assumption of risk, knowledge of danger, § 390, p 1208**
- Truckmen,**
 Assumption of risk, knowledge of danger, § 390, p 1207
 Contributory negligence, inspection for latent defects or dangers, § 447, p 1272
 Fair Labor Standards Act, coverage, § 151(9), p 658
 Independent contractors, § 3(9)
 Liability for torts of, § 584, p 356
- Trust deeds, laborer's lien, priority as between, § 148**
- Trust estates, lien for wages as attaching to, § 145**
- Trustees,**
 Discharge of employees, action for damages as maintainable against trustees of railroads, § 28(84), n 99
 Relief and benefit departments or associations, funds held by on dissolution, § 168, p 826
 Tuberculosis, medical treatment and hospitalization, exception of employee suffering from, § 163, p 816, n 48
 Tug boats, Fair Labor Standards Act, exemption of employees on, § 151(15)
- Tunnels,**
 Injuries to servants,
 Contributory negligence,
 Inspection for latent defects or dangers, § 447, p 1272
 Jury question, § 537, p 235
 Negligence of master, jury question, § 534, p 184
 Safe place to work,
 Care required of master employing servant in, § 222, p 938
 Negligence in providing, evidence, § 524, p 131
- Turntables, assumption of risk, knowledge of danger, § 390, p 1207**
- Ultra vires, relief department, formation by railroad company as, § 168, p 825**
- Unavoidable accident, hours of labor, excuse for violation of Hours of Service Act, § 22**
- Uncertain term, wrongful discharge under contract of employment for, measure of damages, § 58, p 467**
- Uncoupling Railroad cars, generally, ante**
- Undercover operatives, unfair labor practices, employment of, § 28(53)**
- Understanding by servant of danger, burden of proof, § 501, p 80**
- Undue influence, relief and benefit departments or associations, election to accept benefits induced by, § 170, p 839**
- Unemployment compensation, mitigation of damages, failure to issue service letter to discharged employee, § 44, p 439**
- Unemployment insurance,**
 Back pay award to reinstated employee discharged as unfair labor practice, effect of, § 28(119), p 345
 Wrongful discharge, funds received as deductible in mitigation of damages, § 59, p 473, n 46
- Unfair labor practices, §§ 28(43)-28(81), pp. 207-269**
 See, also, Settlement of Labor Disputes, generally, ante
 Admissibility of evidence in proceeding to prevent, § 28(64)
 Answer by employer charged with, § 28(90)
 Anti-union bias on part of employer,
 Showing as sufficient proof, § 28(96), p 290
 Anti-union campaign, participation in, § 28(46)
 Application for relief pending association between parties, § 28(70)
 Arbitration, refusal, § 28(46)
 Assignment for benefit of creditors, back pay award as binding on employer's assignee, § 28(109), p. 319, n. 56

INDEX TO MASTER AND SERVANT

Unfair labor practices—Continued,

- Assistance to union, § 28(52)
- Association of employees acting in concert, employer within statute relating to, § 28(8)
- Attempted unfair practices by labor union, labor relations board as authorized to act against, § 28(100), p 320
- Back pay orders,
 - Modification, § 28(133), p 380, n 47
 - Purpose of, § 28(119), p 337
 - Reinstatement of employee with, evidence justifying order, § 28(100), p 308
 - State labor relations board, § 28(100)
- Blanket order forbidding, National Labor Relations Board, § 28(111), p 325
- Booth running, adoption of plan as alternative to going out of business, § 28(46), n 10
- Boycotting, § 28(63)
- Burden of proof, proceedings to prevent, § 28(93), pp 280-283
- Cease and desist order, § 28(62)
 - National Labor Relations Board, § 28(110), pp 321-324
 - Scope of, § 28(111), p 325. § 28(133), p 377
 - Termination of practice as precluding order, § 28(113)
- Checkoff,
 - Closed shop contract, § 28(62)
 - Paying to organization representing majority, § 28(52), n 73
- Circulation of petition relating to union matters, § 28(46)
- Closed shop,
 - Discharge of employee in accordance with contract, § 28(49), p 223
 - Statement of views in opposition to, § 28(55)
- Coercion of employees, § 28(45), p 209
 - Evidence as to, § 28(97), pp 292-296
 - Joining specific union, § 28(56)
- Collective bargaining ante
- Company dominated unions Employer dominated unions, ante
- Deductions from wages, § 28(62)
- Demerits on employee because of union activities, evidence, § 28(99)
- Demotion of employees, § 28(58)
 - Union activities, evidence, § 28(99)
- Detectives, employment, § 28(53)
 - Evidence, § 28(96), p 292
- Determination of issues, power of labor relations boards, § 28(107), p 315, n 11
- Discharge of employee, ante
- Discontinuance as affecting right of labor relations board to take action with respect to, § 28(103)
- Discontinuance of operations to discourage union membership, § 28(46)
- Discretion as to relief awarded, state labor relations board, § 28(109), p 318
- Discrimination,
 - Discharge of employee, § 28(40), p 219
 - Filing charges or giving testimony, § 28(45), p 212
 - Layoff, § 28(50)
 - Reinstating striking employees, § 28(51), p 229

Unfair labor practices—Continued,

Discrimination—Continued,

- Threat of, § 28(55)
- Union activities,
 - Evidence, § 28(99)
 - Discharge and reinstatement, § 28(100), pp 303-309
 - General order forbidding as warranted, § 28(111), p 326
 - Reinstatement order, § 28(119), p 340
 - Union affiliation, § 28(45), p 211
- Disparagement of union as, § 28(55)
- Display of union insignia and uniforms while on duty, enforcement of pre-existing rule prohibiting, § 28(46)
- Distribution of union literature, denial of right, § 28(57)
- Domination of labor organization, § 28(45), p 210
 - Blanket order forbidding as warranted, § 28(111), p 326
 - Evidence, § 28(98), pp 296-301
- Economic pressure, excuse of, § 28(44)
- Employee organizations, generally, ante
- Employer dominated unions, ante
- Employment, § 28(48)
 - Undercover operatives, detectives, etc., § 28(53)
- Employment contracts, conformity to statute, § 6, p 68
- Encouraging or discouraging membership in labor organization, § 28(47), § 28(56)
- Enforcement of law by labor relations board, § 28(64)
- Equity, maintenance of employee in position pending disposition of charge by Labor Relations Board, § 28(71), p 250
- Espionage, evidence as to, § 28(96), p 292
- Estoppel, National Labor Relations Board, § 28(112)
 - Evidence, § 28(96), p 292
- Circumstantial evidence,
 - Discharge because of union activities, establishment by, § 28(100), p 307
 - Domination of and interference with labor organization established by, § 28(98), p 290
 - Proof by, § 28(96), p 290
- Hearsay evidence, admissibility in proceedings to prevent, § 28(94)
- Proceedings to prevent, § 28(92)
 - Admissibility, § 28(94)
 - Weight and sufficiency, § 28(95), p 286, § 28(96), pp 286-292
- Weight and sufficiency,
 - Discrimination because of union activities, § 28(99)
 - Domination of or interference with labor organizations, § 28(98), p 296
 - Interference with restraint or coercion of employees, § 28(97), pp 292-296
 - Refusal to bargain collectively, § 28(101)
- Exclusive bargaining agent, refusal to recognize union representing majority as, § 28(59)
- Expression of views by employer, § 28(55)

INDEX TO MASTER AND SERVANT

Unfair labor practices—Continued,

- Filing of charge of National Labor Relations Board, conditions precedent to issuance of complaint, § 28(75)
- Favoring one union over another in jurisdictional dispute, § 28(52)
- Favoritism of employees, evidence as to, § 28(97), p 295
- Federal statute, § 28(43)
- Filing of charge as condition precedent to issuance of complaint, § 28(75)
- Financial or other support to labor organizations, evidence, § 28(98), p 298
- Findings of fact, proceedings before National Labor Relations Boards, § 28(108)
- Forced resignation because of union activities, evidence, § 28(99)
- Foreign commerce, jurisdiction of National Labor Relations Board, § 28(74), p 258, n 25
- Free speech, balancing right of as between employer and employee, § 28(133), p. 376, n 21
- Gifts and favors to employees, Evidence, § 28(97), p 295
- Fore stall union movement, § 28(46)
- Grievances, refusal to discuss with employee representatives, § 28(46)
- Hearing, scope of inquiry, § 28(103)
- Hiring employees, § 28(47, 48)
- Hostility to union, expression by employer, § 28(55)
- Independent contractors' liability, § 28(10)
- Independent unions, recognition as sustaining finding of interference, domination, and support of labor organization, § 28(93), p 300
- Individual treatment of grievances contrary to agreement with union, § 28(46), p 214, n 16
- Injunction, power of National Labor Relations Board to restrain, § 28(111), p 324
- Inquiry as to union affiliation, § 28(46)
- Insubordination, discharge of employees for, § 28(49), p 225
- Insurance rights, reinstatement of employees with, § 28(119), p 337
- Interference with,
 - Employees, evidence, § 28(97), pp 292-296
 - Labor organizations, Evidence, § 28(98), pp 296-301
 - General order as warranted, § 28(111), p 326
- Interstate commerce, jurisdiction of National Labor Relations Board, § 28(74), p 258, n 25
- Intervention in proceeding involving, § 28(86)
- Intimidation of employees, evidence as to, § 28(97), p 294
- Issues, proceedings involving, § 28(1)
- Jurisdiction, contract adjusting controversy over charges of, § 28(74), p 258
- Jurisdictional disputes favoring one union over another in, § 28(52)
- Labor espionage, evidence as to, § 28(96), p 292
- Labor organizations or their agents, § 28(63)
- Layoff, § 28(50)
 - Union activities, § 28(50), p 225, n 21
 - Evidence, § 28(99)
- Lockouts, § 28(61)
 - Evidence, § 28(97), p. 295

Unfair labor practices—Continued,

- Majority representation ousted employees as employees for purpose of determining, § 28(27)
- Membership in union, refusal to employ person solely because of, § 28(48)
- Motive, inquiry into in proceeding to enforce or review order of National Labor Relations Board, § 28(120), p 364
- Notice of,
 - Order nullifying effects of practices, employer as required to post, § 28(109), p 318
 - Proceedings against employer, company formed union as entitled to notice, § 28(87)
- Omnibus order restraining employer from interfering with rights of employees, § 28(111), p 326
 - Validity, § 28(129), p 365
- Order nullifying effects,
 - Federal administrative bodies, §§ 28(110)-28(119), pp 321-345
 - National Labor Relations Board, scope of order, § 28(111), pp 324-328
 - State administrative bodies, § 28(109), pp 318-321
- Organization of employees, interference with by employer, § 28(97), p 295
- Particular acts constituting, §§ 28(46)-28(62), pp. 213-239
- Payroll deductions for union dues as, § 28(62)
- Picketing, § 28(63)
- Place of work, assigning employees to, § 28(46), p 214, n 16
- Pleading, reinstatement and back pay, necessity of raising issue, § 28(119), p 337
- Posting notice of order of labor relations board in respect of, § 28(109), p 318
- Power of National Labor Relations Board, § 28(64)
- Predecessor, continuance of proceedings against successor in privity with, § 28(84)
- Preference for one union over another, expression by employer, § 28(55)
- Pressure to join specific union, § 28(56)
- Presumptions, proceedings to prevent, § 28(93), pp 280-283
- Prevention, § 28(64)
- Private detective agency, evidence as to employment, § 28(96), p 292
- Prohibiting union solicitation or activity, § 28(57)
- Promotion of employees, § 28(58)
- Promotion of other employees because of union activities of fellow employees, evidence, § 28(99)
- Protection of public against, statutory provisions, § 28(2), p 119
- Railway Labor Act, § 28(2), p 118
- Recognition of union as sole bargaining agent, refusal, § 28(59)
- Redress, § 28(64)
- Reduction in wages because of union activities, evidence, § 28(99)
- Refusal to,
 - Bargain collectively, § 28(45), p. 212
 - Evidence, § 28(101)
 - Join union, discharge of employee for, § 28(49), p 223

INDEX TO MASTER AND SERVANT

Unfair labor practices—Continued,

Refusal to—Continued,

- Reinstate employees, § 28(51), pp 226-229
- Sign written contract, § 28(60)
- Reinstatement of employees, § 28(51), pp 226-229
- National Labor Relations Act, § 28(2), p 117
- Orders,

Purpose of, § 28(119), p 337

State administrative board, § 28(109), p 318

Power of National Labor Relations Board to order, § 28(119), p 339

Power of state board to order, § 28(109), p 319

Refusal because of union activities, evidence, § 28(99); § 28(100), pp 303-309

Review of order of Labor Relations Board, § 28(133), p 377, n 27

Report and recommendations by trial examiner, § 28(106)

Res judicata, doctrine as applicable to orders of National Labor Relations Board, § 28(112)

Restraint of employees, evidence, as to, § 28(97), pp 292-296

Retroactive wage increase, employer announcing as guilty of, § 28(97), p 294, n 33

Review of orders, National Labor Relations Board, § 28(124)

Scope of inquiry, hearing on, § 28(103)

Self-organization, restraint or coercion of employees in exercise of right, § 28(45), p 209

Seniority rights,

Discrimination as to, § 28(46)

Refusal to reinstate striking employees unless giving up, § 28(51), p 228

Reinstatement order including, § 28(119), p 337

Shutdown, § 28(61)

Sitdown strike, discharge of employees engaging in, § 28(49), p 224

Slow down strikes, § 28(100), p 320, n 66

Sole bargaining agent, refusal to grant recognition to union as, § 28(59)

Solicitation of union membership during working hours, discharge of employee for breach of rule forbidding, § 28(49), p 222

Spying on employees,

Employment of undercover operatives, § 28(53)

Evidence as to employer hiring, § 28(90), p 292

State statutes, § 28(43)

Statutory definition, § 28(45), pp 209-213

Stipulations, enforcement of order entered on, § 28(133), p 378, n 29

Strikes, ante

Successor employers, enforcement decree as binding on, § 28(140)

Supervisory employees, § 28(44)

Acts as justifying finding against employer, § 28(90), p 291

Responsibility of employer for conduct with respect to, § 28(14), p 142

Surveillance of union activities, § 28(53)

Termination of relationship, § 28(47)

Threats, expression of views by employer, § 28(55)

Unfair labor practices—Continued,

Transfer of employees, § 28(58)

Union activities, § 28(99)

Trial examiner. National Labor Relations Board, ante

Undercover operatives, employment, § 28(53)

Variance, pleadings and proof in action involving, § 28(91)

Vote of confidence, circulation by employer, § 28(97), p 294, n 33

Wage increases or cuts, § 28(62)

General increase during organizational activities as evidence of unfair practice, § 28(97), p 295

Written contract, refusal to sign, § 28(60)

Unforeseeable accidents, liability of master for failure to guard against, § 188

Unguarded holes, contributory negligence, precautions by servants working about, § 450, p 1293

Uniform national policy, Fair Labor Standards Act, establishment, § 151(1), p 621

Unilateral contract of employment, validity, § 6, p 67

Unilateral draft of contemplated agreement, collective bargaining, offer of, § 28(23)

Union dues, collective bargaining, collection of, § 28(22)

Union shop,

Collective bargaining contract,

Binding effect of provisions, § 28(41), p 199

Validity of provision for, § 28(40), p 193

Unauthorized contract, unfair labor practice of employer standing on performance, § 28(52), p. 229, n 76

Unionization of labor. Employee organizations, generally, ante

Unions,

Employee organizations, generally, ante

Rival unions, generally, ante

Unfair labor practices, generally, ante

Wages or other remuneration, post

Unit period, termination of relation at end of, § 30

United States,

Collective bargaining, exception from National Labor Relations Act, § 28(7)

Hours of labor on public works of, power to limit, § 17

Unjust enrichment, wages, action for recovery based on, § 122

Unlawful act or employment, liability of master for injury in, § 193

Unlawful business, relation as predicated on employment for prosecution of, § 2, p 41

Unlawful work, independent contractors, liability for injuries resulting, § 588

Unloading Loading and Unloading, ante

Unqualified control, relationship as dependent on, § 2, p 36

Unusual dangers,

Implied agreement of employer not to subject servant to, § 183, p 878

Warning servant of, § 298

Experienced employee, § 305

Usages. Customs and Usages, generally, ante

Utilities, Fair Labor Standards Act, exemption of employees, § 151(14), p. 678

INDEX TO MASTER AND SERVANT

Vacation,

- Discharge of employee as affecting right to recover vacation pay, § 87
- Overtime pay for time spent by employee on, § 151(28), p 715, n 36
- Overtime work during vacation period, compensation, § 97
- Vacation with pay, § 84
 - Overtime work during, § 97,
 - Additional wages, § 96
- Wrongful discharge, deduction of time spent by employee in computing damages recoverable, § 59, p 474, n. 47

Vaccination, assent by employee in order to retain job as duress, § 164, p 819, n. 6

Validity.

- See, also, Legality, generally, ante
- Contracts of employment, § 6, pp 64-71
 - Construction rendering valid, § 7, p 72
 - Defense of invalidity in action for breach, § 11, p 85
- Deductions from or forfeitures of wages, contract provisions, § 103
- Labor contract statutes imposing criminal liability on employee for breach, § 80, p 505

Variance, issues, proof and variance, generally, ante

Vats, covering or guarding, negligence of master, jury questions, § 534, p 187

Vehicles,

- Injuries to servants, negligence of master, jury question, § 534, p. 175
- Injuries to third persons, liability of master for negligence of servant, § 575, p 336
- Motor vehicles, generally, ante
- Safe instrumentalities, rule requiring master to furnish as including, § 218

Velocipedes, railroads,

- Assumption of risk by employees suing, § 378, p 1183
- Contributory negligence, railroad employees operating, § 456, p 1288
- Violation of rule, § 459, p 1302

Vendor's lien, priority of lien for wages over, § 147

Ventilation,

- Assumption of risks, § 369, p 1172
- Factories, workrooms, etc.,
 - Assumption of risks, § 369, p 1172
 - Validity of statute requiring ventilation, § 24
- Independent contractors installing ventilator, inherent danger as respects liability for injuries to others, § 590, p 362

Mines,

- Assumption of risks, § 369, p 1172
- Knowledge of danger, § 390, p 1205
- Duty of operator to furnish, § 222, p 942

Negligence of master,

- Evidence, § 524, p 130
- Jury question, § 534, p. 171
- Place of work, statutory requirement, § 214, p 923, n. 70
- Silicosis, liability for failure to comply with statute requiring ventilating devices, § 232, p 980, n. 29

Venue, injuries to servant, actions for, § 480

Verdict,

- Injuries to servant, actions for, § 550

Verdict—Continued,

- Injuries to third persons, actions for, § 619, pp 421-424
- Wages, actions to recover, § 133
- Statutory provision, § 160⁽⁹⁾

Vessels,

- Assumption of risk, ordinary risks, § 377
- Contributory negligence, customary method of work, evidence, § 519, p 112
- Fellow servants,
 - Application to employee on, § 322
 - Crew or employees working on or about, § 327, p 1089
 - Superior servant rules, § 332, p 1105
 - Vice principals, § 332, p 1101

Jury questions as to master's negligence, § 534, p 180

Safe place to work, fellow servant rules, § 333, p 1115

Safe tools and appliances, duty of furnishing servants with, § 224

Shipbuilding, generally, ante

Vested rights, labor relations boards, orders as giving, § 28(122), p 350

Vestibules, street railway employees, validity of statute requiring, § 24

Viaducts, railroads, negligence in failing to maintain whipping straps, telltales, etc., § 230, p 978

Vice principals,

- Assumption of risk, compliance with orders or commands of, § 400
- Contributory negligence, reliance on assurances or representations by, § 429
- Dangerous places or appliances, notice to as notice to master, § 248
- Defined, statutory provisions, § 339
- Fellow servants,
 - Dual-capacity doctrine, § 332, p 1107
 - Rule as applying to, § 332, p 1099
 - Warning and instructing servant, § 333, p 1122

Liability of master for acts of, instructions to jury, § 548

Negligence, evidence, actions for injury to servant, § 525

Tools and appliances, liability of master for negligence in respect of, § 333, p 1117

Vicious animals,

- Injuries to servants,
 - Allegations as to viciousness in action for, § 490, p. 19, n 67
 - Knowledge of vicious propensity as essential to liability, § 214
 - Liability of master, § 218
- Warning and instructing servants as to, § 303

Vicious servants,

- Evidence of negligence in employing, § 524, p 137
- Fellow servants, retention as negligence creating liability for injuries resulting, § 316

Violence,

- Fellow servants, statutory provisions, §§ 346-355, pp 1133-1146
- Prevent servant from continuing employment, civil liability, § 629

INDEX TO MASTER AND SERVANT

Violence—Continued,

Strikes and concerted activities involving, § 28 (18)

Reinstatement of striking employees, § 28(51), p 228

Void contract, independent contractor relationship, effect of, § 3(2), p 48

Voidable contracts of employment, § 6, p 67

Voluntary agreement, collective bargaining, § 28(37)

Voluntary performance of unlawful act, liability of master, § 193

Volunteers,

Care required of master in protecting from, § 184

Fellow servants, rule as applying to, § 328

Injuries to servants volunteering, liability for, § 177

Vote of confidence, unfair labor practice, employer circulating as guilty of, § 28(97), p 294, n 33

Voyages, transportation to and from place of work, reimbursement for expenses, § 100

Wage and Hour Law Fair Labor Standards Act, generally, ante

Wages and other remuneration, §§ 81-160(13), pp 511-814

Abandonment of employment or service,

Deductions or forfeiture, § 104

Evidence, § 129, p 586

Jury question in action for compensation, § 131, p. 592

Neglect or refusal to pay, as justification, § 40

Recovery in case of, § 113

Right to compensation, § 83

Absence temporarily,

As affecting right to compensation, § 84

Forfeiture, § 104

Acceleration of payment, § 119

Accepted orders, commissions, contracts allowing, § 90, p 520

Accord and satisfaction, statutes as precluding, § 157, p 766

Accounting, actions for, § 122

Judgment, § 134

Pleading, § 128, p 571, n 40

Time of bringing, § 124, p 567, n 86

Actions for, §§ 122-137, pp 564-600

Accounting, § 122

Judgment, § 134

Pleading, § 128, p 571, n 40

Time of bringing, § 124, p 567, n 86

Admissibility of evidence, § 129, pp 580-582; § 160(8), p. 794

Bonus, evidence in action to recover, § 129, pp 581, 587

Burden of proof, § 129, pp 576-579, § 160(8), p 789

Instructions on, § 132

Commissions, § 122

Amount of recovery, § 137

Computation, § 137

Evidence, § 129, p 581

Defenses, § 125; § 160(5); § 160(8), p 789

Available under general denial, § 128, p 575

Burden of proof, § 129, p 578; § 160(8), p. 789

Special defenses, pleading, § 128, p 573

Wages and other remuneration—Continued,

Actions for—Continued,

Evidence, § 128, p 574; § 129, pp 575-589

Instructions to conform, § 132

Judgment to conform, § 134

Jury questions in case of paid testimony, § 131, p 589

Set-off, § 129, p 588

Statutory provisions, § 160(8), pp 789-801

Excessive recovery, § 137

Fair Labor Standards Act, ante

Findings, §§ 133, 160(9)

Judgment conforming to, § 134

Form of action, §§ 122, 160(1)

General denial, § 128, pp 574, 575

General issue, evidence admissible under, § 128, p 574

Inadequate allowance, § 137

Instructions to jury, §§ 132, 160(9)

Issues, § 128, p 574

Judgment, §§ 134, 160(10)

Jurisdiction, § 160(2)

Jury questions, § 131, pp 589-595

Laches, §§ 124, 160(4)

Limitation,

Actions for compensation, §§ 124, 160(4)

Foreclosure of lien, § 149, p 616

Minimum wages, ante

Mitigation of damages, doctrine as applicable, § 137

Nature of action, §§ 122, 160(1)

Nominal recovery, § 137

Nonsuit, § 131, p 591

Parties, § 127; § 160(6), pp. 779-783

Payment,

As defense, § 125

Burden of proof, § 129, p. 579

General denial as authorizing, § 128, pp. 574, 575

Evidence, § 129, pp. 582, 588

Penalties, § 160(1)

Damages, § 160(12)

Judgment, § 160(12)

Withholding wages, § 137

Performance of services,

Burden of proof, § 129, p 577

Evidence, § 129, pp 582, 587

Jury question, § 131, p. 592

Pleading, § 128, p. 572

Prevention by employer, § 122

Pleading, § 128, pp 570-575; § 160(7), pp. 783-789

Instructions to conform, § 132

Judgment to conform, § 134

Prayer for relief, § 128, p 572

Presumptions, § 129, pp 575, 576, § 160(8), p 789

Actual profits, compensation based on, § 112, p. 548

Additional compensation and charges, §§ 96-98, pp 526-531, § 116

Discounts on advance payment, § 120, p 500

Dismissal pay on termination of employment, § 87

Evidence in action for remuneration, § 129, pp 582, 588

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Additional compensation and charges—Continued,

Extra work, § 116

Burden of proof, § 129, p 578

Evidence, § 129, p 587

Jury question, § 131, p 593

Presumption, § 129, p 576

Failure to pay as offense, § 154

Implied agreement to pay customary charges, § 109

Independent contractors,

Mode of payment as affecting relation, § 3(8)

Payment as test of relation, § 3(2), p 46

Injuries to third persons, liability under doctrine of respondeat superior as dependent on payment of, § 563, p. 280

Interest, § 101

Scrip issued in payment, § 157, p. 768

Invention by employee or use thereof, § 73, p 494

Jury question, § 131, p 594

Kick-back payments recoverable as made under duress, § 150, p 772

Laborer's right to lien as affected by payment to contractor, § 144

Medium of, § 120, pp 560, 561; § 131, p. 593, § 137; § 156, p. 764; § 157, pp. 765-768, § 160(8), p 789, n. 7

Money, payment in, § 120, p. 561, § 157, p 765

Periods,

Abandonment of work as affecting right to recover for prior period, § 83

Discharge of employee during fractional part of period, § 87

Recovery of wages as dependent on services for full term, § 82

Piece workers, prompt payment on discharge, § 156, p 762, n 81

Presumption, § 121; § 160(8), p 789, n. 7

Promise to pay,

Employment as connoting, § 174

Forfeited wages as required to be supported by consideration, § 106

Prompt payment on discharge or termination of employment, § 156, pp 761-763

Recovery back of compensation voluntarily paid, § 120, p 561

Scrip, issuance in payment, § 157, pp. 765, 767, 768; § 160(8), p 789, n 7

Statute requiring payment on discharge of employee, § 156, p 761

Stock, payment in, § 120, p 561

Tender, liability for statutory penalty for failure to pay as affected, § 156, p 764

Third persons, payment to as defense in action for compensation, § 125

Tickets, issuance in payment, § 157, p 766

Time, § 90, p 519, § 119; § 131, p 593, § 156, p 758-765

Time checks, issuance in payment, § 157, p 765

Tokens, issuance in payment, § 157, p. 766, § 160(8), p 789, n. 7

Wages and other remuneration—Continued,

Additional compensation and charges—Continued,

Union wages, refusal to pay, § 110, p 542, n. Trade checks, issuance in payment, § 157, p. 765

17

Voluntary payment after knowledge of employer's breach of contract as precluding right to deduct therefor on final settlement, § 106

Waiver of right to claim, § 108

Waiver of right to declare forfeiture of wages, § 106

Admissibility of evidence in action to recover, § 129, pp 580-582, § 160(8), p 794

Admissions, actions for, § 128, p 573

Advances and advance payment, § 110

Commission account, § 91

Discounts on, § 120, p 560

Leaving service in order to compel advance, § 81

Nontransferable scrip or tokens representing advancement, constitutional prohibition, § 157, p 767

Recovery back of advances against commissions, § 120, p 561

Reimbursement of employee for advances to employer, § 100

Sharing in profits in addition, § 95

Affidavit, enforcement of lien, § 140, p 614

Affirmative defenses in action to recover, burden of proof, § 129, p 578

After-acquired property, lien as extending to, § 145

Agreements,

See, also, Contract provisions, generally, post this head

Amount, §§ 109-118, pp 541-558; § 129, p 576

Collective bargaining, compelling employer to enter into written agreement, § 28(141)

Deductions, fines during following week, § 156, p 759

Definite agreement as to amount as required, § 81

Express agreement respecting right to compensation as controlling, § 81

Good faith, profit sharing agreements, § 93

Implied agreement to pay customary charges, § 109

Losses of business, profit sharing agreements providing for sharing, § 93

Part of service only covered, § 115

Provisional time for payment, § 156, p. 759

Sale of business, profits from as written profit sharing agreement, § 93

Stock dividend, sharing in under profit sharing agreement, § 94

Union agreements, action by individual employees to recover wages as affected, § 122

Amendment of pleading in actions to recover, § 128 p. 574

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

- Amount, §§ 109-118, pp 541-558
 - Additional compensation in case of extra work, § 116
 - Claim as affecting lien or preference for compensation, § 140
 - Contract provisions, §§ 109-118, pp 541-558, § 129, p 576
 - Definite agreement as to amount as required, § 81
 - Dispute as to amount, payment within time specified of amount conceded to be due, § 150, p 759
 - Evidence, § 129, pp 580, 582, 588
 - Expenses, reimbursement for, § 117
 - Fines and forfeitures affecting, § 114
 - Intention of parties as governing, § 109
 - Intermittent work, § 110, p 544
 - Jury question, § 131, pp 592, 593
 - Negotiations restricting, § 110, p 542
 - Optional fixing by contract, § 110, p 544
 - Pleading in action to recover, § 128, p 571
 - Presumptions, § 129, p 576
 - Probationary period, § 109
 - Reasonable value
 - Burden of proof in action for compensation, § 129, p 577
 - Contract fails to fix amount of compensation, § 109
 - Recovery in action for compensation, § 137
 - Statutory provision, § 160(12)
 - Renewal of employment, § 118
 - Seasonal employee renewing service after period of unemployment, § 118
 - Standard of reasonable value generally as governing, § 109
- Answer in action for, § 128, p 573
- Appeal, actions for, § 135
- Arbitration,
 - Condition precedent to action for compensation, § 123
 - Disputes, rules applying, § 138
- Assault on employer precluding recovery, § 105
- Assignments, ante
- Assumed name defense of obtaining employment under in action to recover, § 125
- Assumption of risk continuing employment in consideration of increase after knowledge of danger, § 397
- Attorneys' fees,
 - Actions to recover remuneration, § 136
 - Jury question, § 131, p 594
 - Statutory provisions, § 160(11), pp 804-808
 - Minimum wages and overtime pay, violation of law as authorizing recovery, § 151(34)
 - Requirements as to women and minors, § 152, p 746
 - Proceedings to enforce lien, § 149, p 617
 - Recovery of judgment in suit for redemption of scrip, § 157, p 768
- Averaging profits and losses under profit sharing contracts, § 112, p 554
- Back pay, generally, ante
- Bank cashier, lien for, § 143, p 607
- Bartenders, lien for, § 143, p 608

Wages and other remuneration—Continued,

- Baseball players, contract fixing, § 110, p 543
- Basis of compensation,
 - Per cent of fund or income, § 110, p 543
 - Profits, § 112, pp 547-555
 - Statutory provision, § 158
 - Unit of time basis, § 110, p 543
- Benefits to employer,
 - Consideration in determining amount, § 109
 - Right to compensation as affected, § 81
- Board, furnishing in addition to, § 99
- Bond to secure payment, lessee in mining, or quarrying, construction of statute requiring, § 154
- Bonus, § 98, pp 528-531
 - Amount and computation, § 116
 - Evidence, § 129, pp 581, 587
 - Jury question, § 131, p 593
 - Lien or preference, § 140
 - Recovery of unearned portion where employee quits position, § 120, p 561
- Bookkeepers, lien for, § 143, p 607
- Breach of contract,
 - Failure to pay agreed wage, § 137
 - Precluding recovery, § 105
 - Set-off of damages for, in action for wages, § 126
 - Waiver of rights to deductions or forfeitures, § 106
- Burden of proof,
 - Actions for remuneration, § 129, pp 570-579
 - Instructions, § 132
 - Minimum wages, § 160(8), p 790
 - Overtime pay, § 160(8), p 790
 - Statutory provisions, § 160(8), p 789
 - Additional compensation, extra work, § 129, p 578
 - Lien, enforcement, § 149, p 616
 - Prosecution for violation of regulatory statute, § 100(13), p 813
- Business developed, commissions on, construction of contracts allowing, § 90, p 520
- Cancellation of,
 - Contract affecting right to prospective commissions, § 111
 - Order affecting right to commissions, § 90, p 519
- Cancelled sales, profits as basis for compensation as affected, § 112, p 549
- Casual workers, prompt payments on discharge, statutory provisions, § 156, p 763
- Certainty in respect of contract as to commissions, § 90, p 519
- Change in amount by mutual agreement, § 110, p 545
- Character of,
 - Business in which service is performed as affecting lien, § 142
 - Service as affecting lien, § 141
- Check, payment by, § 120, p 561
 - Penalty for refusal to pay, § 156, p 764
- Checkoff, deduction of union dues and assessments, § 103; § 157, p 766
- Checkweighmen, statutes authorizing miners to employ, § 158
- Choses in action, lien as attaching to, § 145

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

- Christmas bonus, separation from service prior to payment as affecting right, § 98, p 529, n. 98
- Civil engineers, lien for, § 143, p. 608
- Claim,
 - Amount of claim, lien for wages, § 140
 - Enforcement of lien as requiring, § 149, p 614
 - Forfeitures or deductions, right of employer to claim, § 102
 - Limitation of time of accrual of wages forming basis of claim for lien or preference, § 140
 - Nature and form of remedy to enforce, § 122
 - Notice of claim as affecting lien, § 140
 - Right of employer to claim deductions or forfeitures, § 102
- Clerks, lien or preference, § 142, § 143, p 607
- Clothing, furnishing as part of, § 99
- Collective bargaining, §§ 28(20), 28(22)
 - Compelling employer to enter into written agreement, § 28(141)
- Coming late and going early, recovery for full days worked, § 110, p 544
- Commissions, §§ 90-92, pp 518-523
 - Actions for, § 122
 - Amount of recovery, § 137
 - Computation, § 137
 - Evidence, § 129, p 581
 - Amount, § 111
 - Cancellation of order affecting right, § 90, p 519
 - Computation, §§ 111, 137
 - Contracts, § 90, p 519; § 111
 - Independent contractor, payment by way of as creating relation, § 3(8)
 - Jury question, § 131, p. 593
 - Nominal recovery in actions for, § 137
 - Recovery back payments as advances against, § 120, p 561
 - Right to prospective commissions on cancellation of contract, § 111
 - Time when due, § 119, p. 560, n. 80
 - Waiver of claim, § 108
 - Wrongful discharge, recovery as damages in action for, § 58, p 470
- Competency of employee, evidence in action to recover, § 129, p. 587
- Complaint,
 - Action to recover, § 128, p 570
 - Enforcement of lien, § 149, p 614
- Compromise, offer of as defense to action for, § 125, p 568, n. 2
- Computation, § 116
 - Commissions, §§ 111, 137
 - Profits, § 137
 - Agreement including as basis for compensation, § 112, p. 548
- Conditions,
 - Affecting payment, § 110, p. 543
 - Payment on, § 119
- Conditions precedent,
 - Actions for remuneration, § 123
 - Statutory provisions, § 160(3)

Wages and other remuneration—Continued,

- Consent,
 - Change in amount, § 110, p 545
 - Commissions, § 90, p 521
 - Termination of relation by as affecting right, § 88
- Consideration,
 - Determining existence of relationship, § 2, p 38
 - Promise to pay forfeited wages as required to be supported by, § 106
 - Release without as creating estoppel, § 108
- Constitutional provisions as to medium of payment, § 157, pp 765-768
- Construction,
 - Contract for commissions, § 90, pp 519, 520
 - Statutory provisions, § 156, p 759
- Contingency, ante
- Continuance of employment,
 - Amount, § 118
 - Assumption of risk, continuance in consideration of increase after knowledge of danger, § 397
 - Jury question in action to recover, § 131, p 591
- Contract not fixing amount, § 109
- Contract provisions,
 - See, also, Agreements, generally, ante this head
- Actions for recovery based on, § 122
- Actions under profit sharing contracts, § 122
- Allowance of expenses under profit sharing contract, § 112, pp 551, 553
- Amount, §§ 109-118, pp 541-558; § 129, p. 576
- Averaging profits and losses under profit sharing contract, § 112, p 554
- Burden of proof, § 120, p 577
- Business developed, commissions on, construction of contracts allowing, § 90, p 520
- Commissions, § 90, pp 519, 520, § 111
- Computation of profits in action under profit-sharing contract, § 137
- Construction of contract for commissions, § 90, pp 519, 520
- Deductions, § 108
 - Profit sharing contract, § 112, pp 549, 551
- Drawing accounts and advances in case of profit sharing contract, § 95
- Evidence,
 - Action based on profit sharing contract, § 129, p. 581
 - Action for compensation, § 129, p. 584
- Forfeitures, § 103
- Furnish food, clothing or lodging in addition to wages, § 90
- Implied contract for services, time for payment, § 119
- Jury questions, § 131, pp 590, 593
- Labor unions, wage scale fixed in contract with employer, recovery in accordance with, § 137
- Lost time, burden of proof of contract obligating payment for, § 129, p. 578

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Contract provisions—Continued,

Modification,

Continuance of employment after attempt, § 118

Jury question, § 131, p 591

Part of service only, § 115

Part performance, § 113

Penalties imposed on employer violating contract obligations, § 107

Pleading in action to recover, § 128, p 571

Presumption, § 120, p 576

Renewal of employment, § 118

Statements of profits and losses by employer as conclusive under profit sharing contract, § 112, p 553

Time of payment, § 119

Statutory provisions as avoided by, § 156, p 759

War profits, limitations on as affecting profit sharing contracts, § 112, p 553

Contractors,

Corporations, liability for wages of employees of its contractors, § 154

Lien for work done by others hired by, § 143, p 607

Payment to contractor as affecting rights of laborer to lien, § 144

Contracts of employment, ante

Contributions to employer, statute prohibiting rebate as forbidding, § 159, p 772

Convenient payment plan, § 119

Corporations,

Dissolution of, liability of individual operating business after, § 34

Liability for wages of employees of its contractors, § 154

Liens accorded employees, § 139

Period payment, validity of statutes requiring, § 156, p 759

Costs,

Actions to recover, § 136

Statutory provisions, § 160(11), pp 804-808

Enforcement of lien, § 149, p 617

Counter-affidavits, enforcement of lien, § 140, p 615

Counterclaim, action for remuneration, § 126

Burden of proof, § 129, p 579

Evidence, § 129, p 588

Reliance on under general denial, § 128, p 575

Coupons, issuance against wages not yet earned, § 157, p 766

Credibility of witnesses in action to recover, jury question, § 151, p. 589

Crimes and offenses,

Failure to pay, § 154

Within prescribed time, § 156, p 760

Kick-back, § 159, p 771

Minimum wages, violation of law, public employees or employees on public works, § 153, p 754

Refusal to redeem scrip issued in payment, § 157, p 768

Violation of statutes regulating, § 160(13), pp 811-814

Wages and other remuneration—Continued,

Customary charges, § 109

Customs and usages,

Deduction in accordance with, § 114

Extra work, § 97

Daily employment,

Action to recover wages due, § 122

Jury question, § 131, p 591

Reduction within term, § 110, p 545

Time of payment, § 119

Dairy workers, lien for, § 143, p 608

Damages

Actions for remuneration, § 137

Set-off of damages for breach of employment contract, § 126

Statutory provision, § 160(12)

Breach of contract by failure to pay agreed wage, § 137

Deductions, leaving without notice, damages for, § 104

Death of employee,

As affecting right to recover, § 85

Deduction on account of, § 104

Decrease Reduction, generally, post, this head

Deductions, §§ 102-106, pp 533-539, § 114

Commissions, § 90, p. 519

Fines during following week, agreements for, § 156, p 759

Jury question, § 131, p 593

Medical services, implied contract to furnish arising from, § 163, p 816

Minimum wages, § 151(27), p 713

Public employees or employees on public works, § 153, p 754

Negligence or misconduct of employee as grounds, § 105

Profit sharing contract, § 112, pp 549-551

Relief plan,

Estoppel to deny membership, § 108, p 826

Recovery back, § 168, p 827

Sickness or other disability, § 104

Statutory provisions, § 159, pp 769-772

Unfair labor practices, § 28(62)

Union dues and assessments, § 103, § 157, p 766

Voluntary payment after knowledge of employer's breach of contract as precluding right to deduct therefor on final settlement, § 106

Waiver of right, § 106

Defective workmanship, deductions, statutory provisions, § 159, p 769

Defenses, actions for remuneration, § 125

Burden of proof, § 129, p. 578, § 160(8), p. 789

Payment, defense as available under general denial, § 128, p 575

Special defenses, pleading, § 128, p 573

Statutory provisions, § 160(5); § 160(8), p. 789

Deferred salary payments, discharge of employee as affecting right, § 87

Definite agreement as to amount as required, § 81

Demand, § 119

Condition precedent to action, § 123

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Demand—Continued,

Interest as recoverable after demand for payment, § 101

Liability for failure to pay within prescribed time as determined on, § 156, p 763

Pleading in action to recover, § 128, p 572

Waiver of right by neglecting to make, § 108

Depreciation, allowance for under profit sharing contract, § 112, p 551

Destruction of place of work as affecting right to compensation, § 86

Diligence, right to compensation as dependent on, § 81

Direction of verdict, action to recover, § 131, p 589

Disability,

Deductions, § 104

Employer or employee as affecting right to recover, § 85

Discharge of employee, ante

Discounts,

Advanced payment, § 120, p 560

Statute regulating assignment of wages as precluding, § 157, p 766

Discretion of employer,

Burden of proof, § 129, p 578

Deductions, § 103

Forfeitures under provisions of contract, § 103

Modification or changes in contract, § 110, p 546

Disloyalty of employee precluding recovery, § 105

Dismissal pay on termination of employment, § 87

Disputes,

Arbitration, § 138

Payment within time specified of amount conceded to be due, § 156, p 759

Share of profits, arbitration, § 138, n 70

Dissolution of corporation, liability of individual operating business after, § 34

Domestic servants, presumption of payment, § 121

Draftsmen, lien for, § 143, p 608

Drawing account, § 91, p 521, n 88

Recovery back of excess of advances pursuant to, § 120, p 563

Sharing in profits in addition, § 95

Draymen, lien for, § 143, p 609

Duration of,

Employment, jury question, § 131, p 591

Lien, § 144

Duress,

Agreement obtained by, § 110, p 543, n 20

Kick-back payments recoverable as made under, § 159, p 772

Education, furnishing as part of, § 99

Embezzlement by employer precluding recovery, § 105

Emergency employment, prompt payment on discharge, § 156, p 763

Employee as person working for, § 1, p 27

Employees protected by lien, § 143, pp 606-609

Enforcement of,

Agreement for increases, § 110, p 545

Wages and other remuneration—Continued,

Enforcement of—Continued,

Claim, nature and form of remedy, § 122

Lien, § 149, pp 613-618

Equity, enforcement of lien in, § 140, p 616

Estimates of financial condition, profits as basis, § 112, p 549

Estoppel, § 108

Deductions, relief plan, estoppel to deny membership, § 168, p 826

Denial of lien, § 149, p 610

Jury question, § 131, p 594

Minimum wages, avoidance of liability, § 151 (35), pp 730-741

Public employees or employees on public works, § 153, p 753

Right to compensation, § 108

Evidence,

Action for remuneration, § 128, p 574; § 120, pp 575-589

Instructions to conform, § 132

Judgment to conform, § 134

Jury questions in case of parol testimony, § 131, p 589

Set-off, § 129, p 588

Statutory provisions, § 160(8), pp 789-801

Criminal prosecution for violation of regulatory statute, § 160(13), p 813

Proceedings to enforce lien, § 149, p 616

Profit sharing agreements as affected, § 94

Unfair labor practices, reduction in wages because of union activities, § 28(99)

Excessive recovery in actions for, § 137

Expenditures,

Deductions in computing compensation under profit-sharing contract, § 112, p 549

Reimbursement for expenditures by employee in connection with work, § 100

Expenses,

Allowance or deduction under profit sharing contract, § 12, pp. 551, 553

Evidence in action for remuneration, § 120, p 581

Living expenses, employer's liability, § 100

Reimbursement of employee, § 117; § 131, p. 593

Express agreement as to compensation as controlling, § 81

Extent of service as affecting lien, § 141

Extra compensation Additional compensation, generally, ante, this head

Extraterritorial effect, statutes giving lien for, § 139

Failure to give notice of intention to leave employ, forfeitures, § 156, p 769

Failure to pay,

As constituting discharge of employee, § 41

Criminal liability for failure to pay within prescribed time, § 156, p 760

Damages for breach of contract, § 137

Liability for failure to pay within prescribed time as determined on demand, § 156, p 763

Offense, § 154

Fair Labor Standards Act, generally, ante

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

- Faithfulness, right to compensation as dependent on, § 81
- False impersonation, in obtaining employment, defense in action to recover, § 125
- Falsification of accounts precluding recovery, § 105
- Farm laborers, lien for, § 143, p 606
- Findings, actions for remuneration, §§ 133, 160(9)
- Judgment conforming, § 134
- Fines,
 - Amount, fines as affecting, § 114
 - Deductions, § 114
 - Fines during following week, agreement for, § 150, p 759
 - Imperfections in work, validity of statute forbidding, § 169, p 769
 - Violation of regulatory statute, § 160(13), p 814
- Fixed term of hiring, payment at end of, § 119
- Food, furnishing as part of, § 90
- Foreclosure of lien for, § 149, pp 613-618
- Foreign laws governing, burden of proof, § 129, p 577
- Foreign state, lien for labor performed in, enforcement, § 149, p 614
- Forfeitures, §§ 102-106, pp 533-539, § 114
 - Abandonment of employment, § 104
 - Breach of contract, waiver of rights, § 106
 - Commissions, right to, § 92
 - Deductions on account of, § 114
 - Discretion of employer, § 103
 - Lien, § 150
 - Negligence or misconduct, § 105
 - Evidence, § 129, p 587
 - Statutory provisions, § 159, pp 769-772
 - Waiver of right by employer, § 106
- Forged indorsement of salary check stolen from employee, liability of employer, § 120, p 561
- Form of,
 - Payment, § 120, p 560
- Remedy,
 - Action for remuneration, §§ 122, 160(1)
 - Enforce claim, § 122
- Fraud,
 - Employee's fraud precluding recovery, § 105
 - Overpayment secured through, recovery back, § 120, p. 561
- Full payment, presumption thereof, § 121
- Full performance as essential to recovery, § 82
- Future increases, enforceability of agreement for, § 110, p 545
- Garnishment, discharge of employee, proceeding as arresting running of penalty, § 150, p 765
- General creditors, priority of lienholder, § 147
- General denial in action for remuneration, § 128, pp 574, 575
- General increase during organizational activities by employees as evidence of unfair labor practice, § 28(97), p. 295
- General issue, evidence admissible under in action to recover, § 128, p 574
- General manager, lien for, § 143, p 607
- Good faith, profit sharing agreements, § 93

Wages and other remuneration—Continued,

- Gratuities,
 - Allowance for under profit sharing contract, § 112, p 563
 - Compensation consisting of or including, § 81
 - Donations to employer, statute prohibiting rebate as forbidding, § 159, p 772
 - Statutes prohibiting receipt or acceptance, § 154
- Gratuitous services, burden of proving defense in action to recover, § 129, p 578
- Grievances, agreement between employer and union, resort to method of presenting as condition precedent to action for, § 123
- Guaranty, advances or drawing account as, § 91
- Holding over, burden of proof in action to recover, § 129, p 577
- Holidays, overtime work on, § 97
- Hop pickers, statute providing measure of compensation, § 158
- Hours of labor,
 - Extra compensation, excess hours over maximum allowed by statute, § 155
 - Fair Labor Standards Act, ante
 - Recovery in accordance with, § 110, p 544
- Imperfection in work, deductions on account of, § 114
- Implied contract for services, time for payment, § 119
- Inadequate recovery in actions for, § 137
- Inception of lien, § 144
- Incidental work, extra compensation, § 97
- Incompetency,
 - Burden of proving defense in action to recover, § 129, p. 579
 - Defense in action to recover, § 125
- Increases,
 - Enforceability of agreement for, § 110, p 545
 - Evidence in action to recover compensation, § 129, p. 580
 - Retroactive increases, § 110, p 545, n 61
 - Unfair labor practices, § 28(62); § 28(97), p 295
- Indefinite term of employment, recovery by employee quitting or discharged, § 89
- Independent contractor,
 - Employees of, § 3(1), p 45
 - Mode of payment as affecting relation, § 3 (8)
 - Payment as test of relation, § 3(2), p 46
- Indictment or information, prosecution for violation of regulatory statute, § 160(13), p 811
- Injuries to third persons, liability under doctrine of respondeat superior as dependent on payment, § 563, p 280
- Instructions to jury, actions to recover, §§ 132, 160(9)
- Insurance, deduction for under profit sharing contract, § 112, p. 551
- Intention of parties,
 - Amount recoverable in accordance with, § 109
 - Forfeitures, failure to give notice of intention to leave employ, § 156, p. 759
 - Profits as basis, § 112, p. 547

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Interest,

- Actions for remuneration, §§ 137, 160(12)
- Deductions for interest on capital, under profit sharing contract, § 112, p 551
- Liability in respect of, § 101
- Scrap issued in payment, § 157, p 768
- Share of profits, § 101, § 112, p 548

Intermittent work, recovery in accordance with contract, § 110, p 544

Intoxication of employee, forfeiture of wages, waiver of rights, § 106

Invention by employee,

- Action to recover compensation for use or assignment, § 73, p 496
- Additional compensation for invention or use thereof, § 73, p. 494

Issues,

- Action to recover, § 128, p 574
- Criminal prosecution for violation of statutes regulating, § 160(13), p 812

Judgment,

- Action for remuneration, §§ 134, 160(10)
- Proceedings to enforce lien, § 149, p 617

Jurisdiction, action for wages, § 160(2)

Jury questions,

- Actions to recover, § 131, pp 589-595
- Proceedings to enforce lien, § 149, p 617
- Prosecution for violation of statute regulating, § 160(13), p 814

Justifiable acts of labor union in connection with, § 28(19), p 152

Kick-backs, generally, ante

Labor dispute as existing in case of controversy over, § 28(16)

Labor unions Unions, generally, post this head

Laborer's lien, §§ 130-150, pp 602-618

Burden of proof, § 194, p 616

Laches, action for remuneration, §§ 124, 160(4)

Leaseholds, lien as attaching to, § 145

Leave of absence, recovery during, § 84

Leaving employment without notice, § 104, § 156, p 759

Leaving service to compel advance, § 81

Liens, §§ 130-150, pp. 602-618

Attorney's fees in proceedings to enforce, § 149, p 617

Bonus, § 140

Burden of proof, § 194, p 616

Contractors, § 143, p 607

Corporate employees, § 139

Costs in proceedings to enforce, § 149, p 617

Enforcement, § 140, pp 613-618

Estoppel, denial of lien, § 149, p. 616

Evidence, § 149, p 616

Foreclosure, § 149, pp. 613-618

Forfeiture, § 150

Judgment in proceedings to enforce, § 149, p 617

Jury question, § 149, p 617

Leasehold as subject, § 145

Lumbering employees, § 142

Personal labor, § 141

Priorities, §§ 147, 148

Statutory provisions, §§ 139, 140

Trial of proceedings to enforce, § 149, p. 617

Wages and other remuneration—Continued,

Liens—Continued,

Trust estate as subject, § 145

Waiver, §§ 146, 150

Limitation,

Actions,

Foreclosure of lien, § 149, p 616

Wages and other remuneration, §§ 124, 160(4)

Time of accrual of wages forming basis of claim for lien or preference, § 140

War profits as affecting profit sharing contracts, § 112, p 553

Litigation, expenses, allowance for under profit sharing contract, § 112, p 553

Living expenses, liability of employer, § 100

Loan repaid out of commissions, § 91

Lodging, furnishing as part of, § 90

Losses,

Averaging profits of losses under profit sharing contracts, § 112, p 554

Profit sharing contracts providing for sharing, § 93

Statements of profits and losses by employer as conclusive under profit sharing contract, § 112, p 553

Lost time,

Burden of proof of contract obligating payment for, § 129, p. 578

Misconduct of employee, evidence, § 129, p. 587

Right to recover for, § 84

Loyalty, right to compensation as dependent on, § 81

Lumbering employees, lien or preference, § 142

Maximum compensation, burden of proof under contract fixing, § 129, p 578

Maximum hours of service, compensation for hours worked in excess, § 155

Measure of compensation, statutory provisions, § 158

Mechanic's lien, priority of lien for wages, § 147

Mediation of disputes, rules applying, § 138

Medium of payment, § 120, pp 560, 561; § 131, p. 593; § 137; § 160(8), p 780, n 7

Constitutional and statutory provisions, § 157, pp 765-768

Jury question, § 131, p. 593

Waiver, § 157, p 765

Milk wagon drivers, lien for, § 143, p 608

Minimum wages, generally, ante

Fair Labor Standards Act, ante

Misconduct,

Deductions or forfeitures on ground of, §§ 105, 114

Lost time, evidence, § 129, p 587

Precluding recovery, § 105

Mistake, overpayment secured through, recovery back, § 120, p 561

Mitigation of damages, doctrine as applicable in action to recover, § 137

Modification of contract,

Continuance of employment after attempt, § 118

Jury question, § 131, p. 591

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Money,

Passage money, reimbursement of employee, § 100

Payment in, § 120, p 561, § 157, p 765

Theft from employer precluding recovery, § 105

Monthly employment,

Action to recover wages due, § 122

Jury question, § 131, p 591

Reduction within term, § 110, p 545

Time for payment, § 119

Mortgages, priority of lien over, § 148

Mutual agreement, change in amount, § 110, p 545

Nature of claim as affecting lien, § 140

Nature of remedy to recover, §§ 122, 160(1)

Nature of services, complaint in action to recover as required to show, § 121

Negligence of employee,

Deductions or forfeitures on account of, §§ 105, 114

Precluding recovery, § 105

Set-off of damages in action for wages, § 126

Negotiations concerning, § 110, p 542

Net profits, computation of compensation based on, § 112, p 548

Net sales, commissions, construction of contract allowing, § 90, p. 520

Nominal recovery in actions for, § 137

Nonsuit in action for, § 131, p 591

Nontransferable scrip or tokens representing advancement, constitutional prohibition, § 157, p 767

Notice,

Condition precedent to actions for remuneration, § 123

Enforcement of lien, § 149, p 614

Leaving employment without notice, § 104; § 156, p 759

Reduction, § 110, p 545

Obedience, right to compensation as dependent on, § 81

Operatives, lien for, § 143, p 609

Option, termination of relation under, § 113

Optional,

Employment contract, termination of relation pursuant to as affecting right, § 88

Fixing of rate, contract provision, § 110, p. 544

Orders,

Cancellation of order affecting right with respect to commissions, § 90, p 519

Commissions on, construction of contracts allowing, § 90, p. 520

Redemption of store orders issued against wages, § 157, p 767

Organization of labor unions for purpose of advancing or maintaining, § 81

Outstanding characteristics affecting quality of work, customary charges to employee having, § 109

Overhead, deduction for under profit sharing contract, § 112, p 550

Overpayment, recovery back payments secured through fraud, § 120, p 561

Wages and other remuneration—Continued,

Overtime pay, generally, ante

Fair Labor Standards Act, ante

Paper profits, compensation as based on, § 112, p 548

Parol testimony in action to recover, jury question, § 131, p 589

Part of service only, contract fixing amount, § 115

Part performance,

Recovery pursuant to contract, § 113

Right to compensation, § 82

Particular occupations, wage lien, § 143, p 607

Particular services, right to compensation limited to, § 81

Parties to actions for, § 127, § 160(6), pp 779-783

Passage money, reimbursement of employee, § 100

Payment, §§ 119-121

Action for penalty, failure to pay wages due, termination of relation, § 160(3)

Arbitration award to avoid strike, § 138

Bond to secure payment, lessee in mining or quarrying, construction of statute requiring, § 154

Burden of proof,

Contract obligating payment for lost time, § 129, p 578

Defense in action for remuneration, § 129, p 579

Casual workers, prompt payment on discharge, statutory provisions, § 156, p. 763

Check, payment by, § 120, p 561

Penalty for refusal to pay, § 156, p 764

Conditioning,

Amount, conditions affecting payment, § 110, p 543

Payment on, § 119

Criminal liability,

Failure to pay within prescribed time, § 156, p 760

Refusal to redeem scrip issued in payment, § 157, p 768

Damages for breach of contract on failure to pay agreed salary, § 137

Defense of in for remuneration, § 125

Available under general denial, § 128, pp 574, 575

Deferred salary payments, discharge of employee as affecting right, § 87

Discharge of employee by failure to pay, § 41

Prevention of performance by employer, § 122

Profits, § 122

Proof, § 128, p. 574

Reply, § 128, p 573

Set-off and counterclaim, § 126

Burden of proof, § 129, p 579

Evidence, § 129, p. 588

Special defenses, pleading, § 128, p 573

Statutory provisions, §§ 160(1)-160(12), pp 772-811

Sufficiency of evidence, § 129, pp 583, 587, 588; § 160(8), p. 795

Time to sue, §§ 124, 160(4)

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Payment—Continued,

- Trial, §§ 130, 160(9)
- Variance, § 128, p 574
- Verdict, §§ 133, 160(9)
- Waiver,
 - Conditions precedent, § 123
 - Jurisdiction, § 160(2)
- Weight of evidence, § 120, p 583, § 160(8), p 795
- Wrongful discharge, remedy by way of action for wages due, § 50

Penalties,

- Actions, § 160(1)
 - Damages, § 160(12)
 - Judgment, § 160(10)
 - Penalty for withholding wages, § 137
- Check, payment by, penalty for refusal to pay, § 156, p 764
- Deductions from wages in violation of statute, § 159, p 770
- Employer violating contract obligations, § 107
- Failure to pay within required time, § 156, p 760
- Garnishment, discharge of employee, proceeding as arresting running of penalty, § 156, p 765
- Minimum wages, violation of law, requirements as to women and minors, § 152, p 746
- Refusal to redeem scrip issued in payment, § 157, p 768
- Violation of regulatory statute, § 160(13), p 814
- Withholding remuneration, § 137; § 156, p 761
 - Recovery in actions for wages, § 137

Per cent of fund or income as basis, § 110, p 543

Performance of services,

- Burden of proof in action for compensation, § 129, p 577
- Deductions on nonperformance, § 104
- Evidence in action for compensation, § 129, pp 581, 582, 587
- Full performance as essential to recovery, § 82
- Jury question in action for compensation, § 131, p 592
- Part performance,
 - Recovery pursuant to contract, § 113
 - Right to compensation for, § 82
- Pleading in action for wages, § 128, p 572
- Prevention by employer, action for wages, § 122
- Right to compensation as dependent on, § 81
- Willingness to perform during period during which no services are rendered, § 81

Periodic payment, statutes, § 156, pp 758, 759

Personal labor, lien for, § 141

Persons liable, § 81

Pharmacists, lien for, § 143, p 608

Piece workers, prompt payment on discharge, § 156, p 762, n 81

Wages and other remuneration—Continued,

Pleading,

- Actions to recover compensation, § 128, pp 570-575
 - Instructions to conform, § 132
 - Judgment to conform, § 134
 - Statutory provisions, § 160(7), pp 783-789
- Enforcement of lien, § 149, p. 614
- Portal-to-portal pay, generally, ante
- Possession of property as conferring right to lien, § 140
- Prayer for relief in action for, § 128, p. 572
- Priorities, generally, post
- Preponderance of evidence, proof by in action to recover, § 129, p 583
- Presumptions,
 - Actions to recover compensation, § 129, pp 575, 576; § 160(8), p 789
 - Payment, § 121; § 160(8), p 789, n 7
 - Prosecution for violation of regulatory statute, § 160(13), p 813
 - Renewal or continuance of employment, § 118
 - Scrip, issuance in payment, presumption in action involving, § 160(8), p. 789, n. 7
- Prevailing wage, generally, ante
- Prevention of performance by employer, § 122
- Priorities,
 - Bonus, § 140
 - Character and extent of service as affecting, § 141
 - Contractor, § 143, p. 607
 - Lien, §§ 147, 148
 - Lumbering employees, § 142
 - Nature and amount of claim, § 140
 - Statutory provisions, § 139
- Probationary period, amount of compensation, § 109
- Products of business, employee's right to share, §§ 93-95, pp 523-526
- Professional chemists, lien for, § 143, p 608
- Profits,
 - Actions under profit sharing contract, § 122
 - Arbitration of dispute as to share, § 138, n 70
 - Averaging profits and losses, under profit sharing contract, § 112, p 554
 - Basis of compensation, § 112, pp 547-555
 - Computation, § 112, p 548, § 137
 - Deductions, profit sharing contract, § 112, pp 549, 551
 - Depreciation, allowance for under profit sharing contract, § 112, p 551
 - Drawing accounts and advances, contract for sharing in profits, § 95
 - Employee's right to share, §§ 93-95, pp 523-526
 - Evidence in action based on profit sharing contract, § 129, p. 581
 - Good faith, profit sharing agreements, § 93
 - Intention of parties, profits as basis, § 112, p 547
 - Interest on share belonging to, or due, employee, § 101; § 112, p 548
 - Jury question under profit sharing contract, § 131, p. 593

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Profits—Continued,

- Losses of business, profit sharing agreements providing for sharing, § 93
- Sale of business, profits from as within profit sharing agreement, § 93
- Sharing in, §§ 93-95, pp 523-526, § 101
- Statements of profits and losses by employer as conclusive under profit sharing contract, § 112, p 553
- Stock dividend, sharing in under profit sharing agreements, § 94

Promise to pay,

- Employment as connoting, § 174
- Forfeited wages as required to be supported by consideration, § 106

Prompt payment on discharge, § 156, pp 761-763

Proof Evidence, generally, ante this head

Property,

- After-acquired property, lien as extending to, § 145
- Custody of court, lien as attaching to, § 145
- Possession as affecting right to lien, § 140

Protest,

- Payment of arbitration award under, § 138
- Presumption in respect of payment accepted without, § 121

Provisional time for payment, agreement for, § 156, p 759

Public employees and employees on public works,

- Actions for compensation, § 160(1)
- Conditions precedent, § 160(3)
- Minimum wages, § 153, pp 753, 754

Punchouts, issuance in payment, § 157, p. 766

Purchase money mortgage, priority of lien over, § 148

Purchasers, priority of lien over claim of, § 147

Quantum meruit, ante

Quasi contract, action for recovery based on, § 122

Questions of law and fact,

- Actions to recover, § 131, pp. 589-595
- Proceedings to enforce lien, § 149, p 617
- Prosecution for violation of statute regulating, § 160(13)

Quitting service, payment of wages due, penalty for failure, § 156, p 763

Readiness to perform, pleading in action to recover, § 128, p. 572

Reasonable value of services,

- Burden of proof in action to recover, § 129, p 577

- Recovery where contract fails to fix amount of compensation, § 109

Rebates,

- Allowance for under profit sharing contract, § 112, p 551

- Contributions to employer, statute prohibiting rebate as forbidding, § 159, p 772

- Prosecution for violation of statute prohibiting, evidence, § 160(13), p 813

Rebuttal presumption of payment, § 121

Receipt,

- As waiver or release, § 108
- Essential to create relationship, § 2, p 39
- Presumption of payment following receipt in full, § 121

Wages and other remuneration—Continued,

Recovery back,

- Compensation voluntarily paid, § 120, p 561
- Deductions, relief plan, § 168, p 827

Recovery during leave of absence, § 84

Redemption,

- Attorney's fees, recovery of judgment in suit for redemption of scrip, § 157, p 768
- Refusal to redeem scrip issued in payment of remuneration, § 157, p 768
- Trade checks or store orders issued against, § 157, p 767

Reduction, § 110, p 545

- Consent, § 110, p 545

- Controversy pending before National Mediation Board, § 138

Evidence,

- Action for compensation, § 129, p 580
- Unfair labor practices, reduction in wages because of union activities, § 28 (99)

Jury question, § 131, p 592

- Temporary reduction, restoration to old wages, § 110, p 546

- Unfair labor practices, §§ 28(62), 28(99)

- Weekly employment, reduction within term, § 110, p 545

Refusal to redeem scrip issued in payment of, § 157, p. 768

Reimbursement,

- Employee for expenses, § 117, § 131, p 593
- Expenditures made by employee, § 100

Release,

- Estoppel by release without consideration, § 108

- Receipt for compensation as, § 108

Relief awarded, actions for remuneration, § 137

Relief plan, deductions,

- Estoppel to deny membership, § 168, p 826
- Recovery back, § 168, p 827

Remedy,

- Enforcement of claim, § 122
- Recovery of compensation, §§ 50, 122, 100(1)

Renewal of,

- Contract, jury question, § 131, p 591
- Employment, amount, § 118

Rent, deduction for under profit sharing contract, § 112, p 551

Repair, deduction of expenses under profit sharing contract, § 112, p 551

Reply in action for, § 128, p 573

Retroactive operation,

- Increases, § 110, p 545, n. 61
- Labor board decision on return of striking employees to work, § 118
- Statute giving lien, § 139

Review,

- Actions for remuneration, § 135
- Proceedings to enforce lien, § 149, p. 617

Right of employer to claim deductions or forfeitures, § 102

Right to compensation, §§ 81-108, pp 511-541

- Abandonment of service as affecting, § 83
- Additional compensation and charges, §§ 96-98, pp 526-531; § 108
- Bonus, § 98, pp 528-531
- Clothing as part of, § 99

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Right to compensation—Continued,

Commissions, §§ 90-92, pp 518-523

Death of employee as affecting, § 85

Definite agreement as to amount as required, § 81

Dependent on performance of services, § 81

Destruction of place of work as affecting, § 86

Education as part of, § 99

Express agreement respecting as controlling, § 81

Food as part of, § 99

Full performance as essential, § 82

Jury question, § 131, p 592

Lodging as part of, § 99

Part performance, § 82

Performance of services as essential element, § 81

Profits or products of business, §§ 93-95, pp 523-526

Reimbursement of expenditures by employee, § 100

Sickness or other disability as affecting, § 85

Stand and wait employees, § 81

Waiver, § 108

Willingness to perform services during period during which no services were rendered, § 81

Work and rate scale, recovery in accordance with, § 110, p 544

Right to lien, § 139

Sales,

Commissions on, construction of contracts allowing, § 90, p 520

Profits from sale of business, as within profit sharing agreements, § 93

Salesmen,

Cancellation of order affecting right to commission, § 90, p 519

Commissions, generally, ante this head

Lien, § 143, p 607

Right to prospective commissions on cancellation of contract, § 111

Scope,

Actions for wages, § 160(1)

Employment, extra work within or without, § 97

Scrip,

Issuance in payment, § 157, pp. 765, 767, 768, § 160(8), p 780, n 7

Nontransferable scrip representing advancement, constitutional prohibition, § 157, p 767

Seasonal employee renewing service after period of unemployment, amount, § 118

Separate contract for commissions, § 90, p 519

Set-off,

Action for compensation, § 126

Burden of proof, § 129, p. 579

Evidence, § 129, p 588

General denial, § 128, p 575

Overtime compensation, claim for, § 160 (5)

Profits and losses under profit sharing contract, § 112, p 554

Wages and other remuneration—Continued,

Settlement,

Burden of proving defense in action to recover, § 129, p 579

Pleading as defense in action to recover, § 128, p 573

Voluntary payment after knowledge of employer's breach of contract as precluding right to deduct therefor on final settlement, § 100

Severance pay, termination of employment, § 87

Sharing in, profits, §§ 93-95, pp 523-526, § 101

Sickness,

As affecting right to recover, § 85

Deductions on account of, § 101

Special defenses in actions to recover, pleading, § 128, p 573

Stand and wait employees, right to compensation, § 81

Standard of reasonable value governing amount recoverable, § 109

Statements of profits and losses by employer as conclusive under profit sharing contract, § 112, p 553

Statutory provisions

Accord and satisfaction, statutes as precluding, § 157, p 706

Actions for compensation, §§ 160(1) to 160(12), pp 772-811

Admissibility of evidence, action for wages, § 160(8), p 794

Attorney's fees, action for wages, § 160(11), pp 804-808

Burden of proof,

Action for wages, § 160(8), p 789

Prosecution for violation of regulatory statute, § 160(13), p 813

Checkweighman, authorizing miners to employ, § 158

Condition precedent to action for wages, § 160(3)

Construction of statutory provisions relating to wages, § 156, p 759

Contributions to employer, statute prohibiting rebate as forbidding, § 159, p. 772

Costs, actions for wages, § 160(11), pp 804-808

Criminal liability, violation of statutes regulating wages, § 160(13), pp 811-814

Damages, actions for wages, § 160(12)

Deductions, § 159, pp 760-772

Defenses, actions for wages, § 160(5); § 160 (8), p 789

Discounts, statute regulating assignment of wages as precluding, § 157, p 766

Donations to employer, statute prohibiting rebate as forbidding, § 159, p 772

Evidence,

Actions for wages, § 160(8), pp 789-801

Criminal prosecutions for violation of statutes regulating, § 160(13), pp 812, 813

Extraterritorial effect of statutes giving lien, § 139

Findings, action for wages, § 160(9)

Fines, imperfections in work, validity of statute forbidding, § 169, p. 769

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Statutory provisions—Continued,

- Forfeitures, § 159, pp 769-772
- Form of action for wages, § 160(1)
- Gratuities, statutes prohibiting receipt or acceptance, § 154
- Hop pickers, statute providing measure of compensation, § 158
- Indictment or information, prosecution for violation of statute regulating, § 160(13), p 811
- Instructions to jury, action for wages, § 160(9)
- Interest, action for wages, § 160(12)
- Issues, criminal prosecution for violation of statutes regulating, § 160(13), p 812
- Judgment, action for wages, § 160(10)
- Jurisdiction, action for wages, § 160(2)
- Jury questions, prosecution for violation of statute regulating, § 160(13), p 814
- Kick-backs, § 159, p 770
- Prosecution for violation of statute, § 160(13), pp 812, 813
- Laches, action for wages, § 160(4)
- Liens, § 139
 - Employees protected, § 143, pp 606-609
 - Enforcement, § 149, p 614
 - Inception and duration, § 144
 - Limitation of time, § 140
- Limitation of actions for wages, § 160(4)
- Measure of compensation, § 158
- Medium of payment, § 157, pp 765-768
- Money, payment in, § 157, p 765
- Nature of action for wages, § 160(1)
- Net sales, commissions on, construction of contracts allowing, § 90, p 520
- Parties to action for wages, § 160(6), pp 779-783
- Penalties,
 - Deductions in violation of statute, § 159, p 770
 - Violation of statute regulating, § 160(13), p 814
 - Withholding wages, § 156, p 761
- Pleading, actions for wages, § 160(7), pp 783-789
- Presumptions,
 - Actions for wages, § 160(8), p 789
 - Prosecution for violation of statute regulating, § 160(13), p 813
- Priorities, § 139
- Public employees and employees on public works, actions for wages to, § 160(1)
- Rebates, § 159, p 772; § 160(13), p 813
- Retroactive operation, statute giving lien for, § 139
- Scope, actions for wages, § 160(1)
- Scrp, issuance in payment, § 157, p 765
- Sufficiency of evidence, actions for wages, § 160(8), p 795
- Termination of employment, prompt payment on, § 156, p 761
- Time of payment, § 156, pp 758-765
- Time to sue for wages, § 160(4)
- Trade checks, issuance in payment, § 157, p 765
- Trial, actions for wages, § 160(9)

Wages and other remuneration—Continued,

Statutory provisions—Continued,

- Validity of statute fixing wages, § 151(2)
- Variance, criminal prosecution for violation of statute regulating, § 160(13), p 812
- Verdict, action for wages, § 160(9)
- Waiver, medium of payment, § 157, p 765
- Weight of evidence, action for wages, § 160(8), p 795
- Withholding,
 - Imperfection in work, validity of statute forbidding, § 159
 - Penalties, § 156, p 761
- Stock,
 - Payment in, § 120, p 561
 - Amount of recovery in action for wages, § 137
 - Sharing in stock dividend under profit sharing agreements, § 94
- Strikes, payment of arbitration award to avoid, § 138
- Striking employees, retroactive operation of labor board decision by reason of return to work, § 118
- Subject matter to which lien attaches, § 145
- Sufficiency of evidence,
 - Action for compensation, § 129, pp 583, 587, 588, § 160(8), p 795
 - Amount, § 129, p 588
 - Contingency, § 129, p 587
- Sundays,
 - Contract provisions, § 110, p 544
 - Overtime work on, § 97
- Tardiness as affecting right to recover for full days worked, § 110, p 544
- Tax consultant, amount recoverable, § 100, p 542, n 7
- Taxes, allowance as expense under profit sharing contract, § 112, p 563
- Temporary absence,
 - As affecting right to recover, § 84
 - Forfeiture, § 104
- Temporary reduction, restoration to old wage, § 110, p 546
- Tender,
 - Defense in action for compensation, § 125
 - Evidence in action for compensation, § 129, p 589
 - Liability for statutory penalty for failure to pay as affected, § 153, p 764
 - Waiver of right to declare forfeiture of wages, § 106
- Termination of employment or relation,
 - Consent, termination by, as affecting right, § 88
 - Dismissal pay, § 87
 - Failure to pay wages due, action for penalty, § 160(3)
 - Forfeiture,
 - Failure to give, notice of intention, § 156, p 759
 - Right to commissions earned, § 92
 - Jury question in action for compensation, § 131, p 591
 - Lien as vesting on, § 144
 - Option, termination by, as affecting right, § 88

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,
 Termination of employment or relation—Continued
 Payment on, § 119, § 156, p 761
 Recovery in case of, § 113
 Recovery of share of profits under profit sharing contract, § 112, p 554
 Severance pay, § 87
 Theft of money from employer precluding recovery, § 105
 Third persons,
 Injuries to, liability under doctrine of respondent superior as dependent on payment, § 563, p 280
 Payment to as defense in action to recover, § 125
 Tickets, issuance in payment, § 157, p 766
 Time,
 Action for accounting, § 124, p 567, n 86
 Computation of profits on which based, § 112, p 549
 Contract provisions, time of payment, statutory provisions as avoided by, § 156, p 759
 Payment, § 90, p 519; § 119
 Jury question, § 131, p 593
 Unit of time basis, § 110, p 543
 Statutory provisions, § 156, pp 758-765
 Time checks, issuance in payment, § 157, p 765
 Arbitration award, § 138
 Actions for compensation, §§ 124, 160(4)
 Time laboreers, presumption of payment, § 121
 Tips, compensation consisting of or including, § 81
 Tokens,
 Issuance in payment, § 157, p. 766, § 160(8), p 789, n 7
 Nontransferable tokens representing advancement, constitutional prohibition, § 157, p 767
 Trade checks,
 Issuance in payment, § 157, p 765
 Redemption of trade checks issued against wages, § 157, p 767
 Trade unions Unions, generally, post this head
 Tradesmen, lien for, § 143, p. 609
 Transferability of scrip issued in payment of, § 157, p 767
 Traveling to and from work, right to recover compensation for time spent in, § 96
 Trial,
 Actions for compensation, §§ 130, 160(9)
 Proceedings to enforce lien, § 149, p 617
 Prosecution for violation of statutes regulating, § 160(13), p 813
 Trust deeds, priority of lien over, § 148
 Trust estates, lien for wages as attaching to, § 145
 Unfair labor practice,
 Evidence,
 General increase during organizational activities by employees, § 28(97), p 295
 Reduction in wages because of union activities, § 28(99)
 Increases, cuts or deductions, § 28(62)

Wages and other remuneration—Continued,
 Unions,
 Action by individual employees to recover wages as affected by union agreements, § 122
 Deduction of union dues and assessments, § 103; § 157, p 768
 Justifiable acts of unions in connection with wages, § 28(19), p 152
 Organization for purpose of,
 Advancing or maintaining, § 81
 Fixing rate, § 110, p 543
 Refusal to pay union wages, § 110, p. 542, n 17
 Unfair labor practices, reduction in wages because of union activities, evidence, § 28(99)
 Wage scale fixed in contract with employer, recovery in accordance with, § 137
 Unit of time,
 Basis, § 110, p. 543
 Contract fixing amount, § 110, p 544
 Unjust enrichment, actions for recovery based on, § 122
 Upkeep, deduction of expenses for under profit sharing contract, § 112, p 551
 Use or benefit to employer, right to compensation as affected, § 81
 Vacation, generally, ante
 Variance,
 Actions to recover, § 128, p 574
 Criminal prosecution for violation of regulatory statutes, § 160(13), p 812
 Vendor's lien, priority of lien for wages, § 147
 Verdict in action for remuneration, §§ 133, 160(9)
 Voluntary payment,
 After knowledge of employee's breach of contract as precluding right to deduct therefor on final settlement, § 106
 Recovery back of compensation voluntarily paid, § 120, p 561
 Voluntary resignation as waiver of right to continuance of pay, § 108
 Waiver,
 Arbitration award, time of, § 138
 Claim for commissions, § 108
 Conditions precedent to actions for compensation, § 123
 Employer's waiver of right to deductions or forfeitures, § 106
 Fair Labor Standards Act, liability for full compensation required, § 151(35), pp 736-741
 Jurisdiction in action for compensation, § 160 (2)
 Jury question, § 131, p 594
 Lien, §§ 146, 150
 Medium of payment, § 157, p. 765
 Minimum wages,
 Avoidance of liability, public employees or employees on public work, § 153, p 753
 Liability for payment, § 151(35), pp 736-741
 Overtime pay, right to, § 151(35), pp 736-741
 Prompt payment on discharge of employee, § 156, p. 761

INDEX TO MASTER AND SERVANT

Wages and other remuneration—Continued,

Waiver—Continued,

Receipt for compensation as, § 108

Right to compensation, § 108

War profits, limitations on as affecting profit sharing contracts, § 112, p 553

Weekly employment,

Actions to recover wages due, § 122

Fair Labor Standards Act, application to workman employed at weekly wage, § 151(5)

Jury question, § 131, p 591

Overtime time, regular rate of pay for purpose of computing, § 151(26), p 706

Recovery for days of actual services, § 110, p 544

Reduction within term, § 110, p 545

Time for payment, § 119

Weight of evidence in action to recover, § 129, p 583, § 160(8), p 795

Wholesale business obtained, commissions on, construction of contracts allowing, § 90, p 520

Willingness to perform services during period during which no services were rendered, right to compensation, § 81

Withholding,

Imperfection in work, validity of statute forbidding, § 159

Penalties, § 137, § 156, p 761

Work and rate scale, § 110, p 544

Wrongful discharge,

Acceleration of payment, § 119

Evidence on issue of value of services, § 53, p 457

Recovery under profit sharing contract, § 112, p 554

Remedy by way of action for wages due, § 50

Stipulated wage as measure of damage, § 58, p 466, n 70

Yearly employment, reduction within term, § 110, p 545

Yearly income from commissions, contract of employment guaranteeing, § 91

Wagner Act National Labor Relations Act, generally, ante

Wagons,

Assumption of risk, knowledge of danger, § 390, p 1207

Contributory negligence, inspection for latent defects or dangers, § 447, p 1272

Seat springs, assumption of risk, simple tool doctrine, § 390, p 1209

Waiting time, minimum wages and overtime pay, compensable working time as including, § 151 (28), p 716

Waiver,

Breach of employment,

Employee's breach, § 77

Right to sue for, § 11, p 86

Claim for commissions, § 108

Collective bargaining contract, terms of, § 28(41), p. 198

Conditions precedent to action for wages, § 123

Contract against liability for injuries to servant, § 200

Waiver—Continued,

Dangerous machinery, duty of master to guard, § 232, p 981

Deductions from wages, employer's right to make, § 106

Discharge of employee, right of employer to for breach of contract or duty, § 43

Employers' Liability Act, time limits for commencing action under, § 487

Fair Labor Standards Act, liability for full compensation required, § 151(35), pp 736-741

Forfeiture of wages, employer's right to claim, § 106

Hours of labor, statutory provision regulating, § 15, p 98

Jurisdiction, action for wages, § 160(2)

Jury questions in action for compensation, § 131, p 594

Lien for wages, §§ 140, 150

Medium of payment of wages, constitutional and statutory provisions, § 157, p. 765

Minimum wages,

Avoidance of liability, public employees or employees on public work, § 153, p. 753

Liability for payment, § 151(35), pp. 736-741

National Labor Relations Boards,

Findings of fact, § 28(108)

Grounds of attack on order, § 28(120), p 366

National Railroad Adjustment Board, notice of hearing before, § 28(87)

Nonperformance of contract by employee, § 77

Notice,

Hearing before National Railroad Adjustment Board, § 28(87)

Injuries to servant, § 485

Termination of relation, § 32, p 419

Overtime pay, right to, § 151(35), pp 736-741

Prompt payment of wages on discharge of employee, § 156, p 761

Right to compensation, § 108

Rules or regulations,

Evidence, actions for injuries to third persons, § 615, p 403

Jury question, actions for injuries to servant, § 534, p 202

Methods of work, § 275

Term of employment, statutory provisions regulating, § 14, p 95

Termination of relation,

Abandonment of employment, § 40

Contract provisions relating to, § 32, p. 417

Notice, right to, § 32, p 419

Wages and other remuneration, ante

Walks, assumption of risk, knowledge of danger, § 390, p 1207

Walls, contributory negligence, inspection for latent defects or dangers, § 447, p 1272

Wanton injuries, allegation, § 490, p 30

Wanton negligence,

Contributory negligence as defense in case of, § 424

Exemplary damages, injuries to servants, § 554

Jury questions,

Fellow servants, § 535, p. 210

Injuries to servant, § 534, p 166

War Labor Disputes Act, collective bargaining, § 28 (20), p 156, n. 60

INDEX TO MASTER AND SERVANT

- War plants, Fair Labor Standards Act, application to employees of plant operated by private contractor, § 151(23)
- War profits, profit sharing wage contracts, limitations as affecting, § 112, p 553
- War-time dimout regulations, safe place to work, compliance with regulations as negligence in failing to furnish sufficient light, § 219, p 932
- Warehouses and warehousing, Fair Labor Standards Act, coverage, § 151(7), p 643, § 151(9), p 658
- Warning and instructing servant, §§ 284-306, pp 1045-1068
- Abnormal or unreasonable risks or dangers, § 284
 - Delegation of duty, § 285
 - Experienced employee, § 305
 - Absolute nature of duty, § 285
 - Age,
 - Liability as affected, § 284, §§ 304-306, pp 1033-1068
 - Sufficiency of warning as affected by, § 290
 - Agreement of master to give warning, § 288
 - Ascertainable risks, master as chargeable with knowledge of, § 286
 - Assumption of knowledge or experience of employees, § 306, p 1065
 - Assumption of risk,
 - Disobedience of instruction, § 410
 - Effect, § 382
 - Inexperienced or youthful employee, § 414
 - Burden of proof, actions for injuries to servants, § 501, p 81
 - Carelessness of youthful employee, precautions against, § 306, p. 1008
 - Changes in appliances or methods of work, § 293
 - Constructive knowledge of defect or danger requiring, § 286
 - Contributory negligence, ante
 - Custom, duty as dependent on, § 284
 - Dangers from,
 - Extraneous causes, § 301
 - Matters of common knowledge, § 295
 - Negligence of fellow servants, § 294
 - Work outside scope of employment, § 302, § 306, p 1067
 - Dangers known, §§ 284, 295
 - Inexperienced or youthful employee, § 306, p 1066
 - Dangers naturally incident to employment, inexperienced or youthful servant, § 306, p 1065
 - Delegation of duty, § 285
 - Fellow servants, § 333, p 1122
 - Descending pile, obvious danger, § 296
 - Disobedience or disregard, § 290
 - Assumption of risk, § 410
 - Contributory negligence, § 444; § 537, p 224
 - Evidence, § 519, p 110
 - Warning of dangers arising through, § 297
 - Duty and liability in general, §§ 284-291, pp 1045-1054
 - Dangerous places or appliances, § 244
 - Independent contractors, duty of warning employees of other subcontractors, § 610
 - Dynamite, dangerous propensity, § 303
 - Employment of youthful or inexperienced servant in violation of statute, § 289
 - Estoppel, misrepresentation of age by minor, § 306, p 1066
- Warning and instructing servant—Continued,
- Evidence,
 - Admissibility,
 - Action for injuries, § 514
 - Obedience or disregard, § 519, p 110
 - Negligence of master in failure, § 524, p 138
 - Experienced employee, § 305
 - Extraordinary employment, ignorance of risks involved, § 295
 - Extraneous causes, dangers from, § 301
 - Extraordinary risks or hazards, § 284
 - Delegation of duty, § 285
 - Federal Employers' Liability Act, failure to warn as negligence under, § 263, p 1022
 - Fellow servants, ante
 - Forgetfulness of youthful employee, precautions against, § 306, p 1068
 - Heavy objects, obvious dangers connected with handling, § 290
 - Hidden danger, sufficiency of warning, § 290, p 1052, n 47
 - Improbable danger, § 298
 - Imputed knowledge of dangers as respects duty, § 286
 - Increased dangers by change in appliances or methods of work, § 293
 - Independent contractors,
 - Duty of warning employees of other subcontractors, § 610
 - Latent dangers, § 606
 - Inexperienced or youthful servant, § 306, pp. 1064-1068
 - Assumption of experience or knowledge, § 306, p 1065
 - Assumption of risk, § 414
 - Burden of proof, § 501, p 81
 - Carelessness of youthful employee, precautions against, § 306, p 1068
 - Dangers naturally incident to employment, § 306, p 1065
 - Delegation of duty, § 285
 - Employment in violation of statute, § 289
 - Forgetfulness of youthful employee, precautions against, § 306, p 1068
 - Known dangers, § 306, p 1066
 - Obvious dangers, § 306, p 1066
 - Pleading in action for injuries, § 490, p. 23
 - Proximate cause of injury, § 291
 - Repeated warnings, § 306, p 1068
 - Representation of servant as to age and capacity, effect, § 306, p 1066
 - Scope of employment, dangers from work outside, inexperienced or youthful servant, § 306, p 1067
 - Sufficiency and effect, § 306, p 1068
 - Volunteering to undertake perilous work, § 306, p 1066
 - Injuries to third persons, liability for failure to instruct, § 560
 - Instructions to jury in action for injuries to servant, § 546, p 248
 - Jury questions, negligence,
 - Fellow servants, § 535, pp 208, 210
 - Master, § 534, p 203
 - Knowledge,
 - Dangers arising from matters of common knowledge, § 295

INDEX TO MASTER AND SERVANT

Warning and instructing servant—Continued,

Knowledge—Continued,

Defect or danger,

Constructive knowledge of, as requiring, § 286

Liability as dependent on, § 286

Negligence of fellow servant, § 294

Premises owned by another, § 287

Known danger, §§ 284, 295

Inexperienced or youthful servant, § 306, p 1067

Latent dangers, § 284, p 1046, n 76

Experienced employee, § 305

Independent contractors, § 606

Master's liability in case of injuries as result of failure to warn, §§ 262, 268

Methods of work,

Changes in, § 293

Liability of master for injuries as result of failure to warn, § 268

Proper methods, § 297

Mining employees, statutory provisions, § 289

Misrepresentation of age by minor, estoppel, § 306, p 1066

Moving machinery, obvious danger coming in contact with, § 296

Negligence,

Evidence of failure to warn, § 524, p 138

Federal Employers' Liability Act, failure to warn, § 263, p 1022

Fellow servants,

Concurring negligence of, liability of master affected, § 356

Dangers from negligence of, § 294

Evidence, § 524, p 138

Failure to warn as negligence, § 289

Jury question, § 535, pp 208, 210; § 534, p 203

Knowledge of defects or dangers, liability as dependent on, negligence of fellow servant, § 294

Railroads, failure to warn, § 263, p 1022

New dangers caused by change in appliances or methods of work, § 293

Notice of general risks and dangers as affecting duty, § 285

Obvious dangers, § 296

Inexperienced or youthful servant, § 306, p 1066

Opportunity for knowledge of danger as affecting liability, § 286

Ownership of premises as affecting duty, § 287

Particular defects and dangers, §§ 292-303, pp 1055-1063

Person by whom given, § 290

Pleading in actions for injuries, § 400, p 23

Precautions against,

Forgetfulness of youthful employee, § 306, p 1068

Injury, § 262

Premises owned by another, servants performing work on, § 287

Press machine, obvious danger of putting hands under die or plunger, § 296

Primary duty of master, § 285

Proper methods of doing work, § 297

Warning and instructing servant—Continued,

Proximate cause of injury,

Inexperienced or youthful servant, § 291

Liability for failure to warn as dependent on, § 291

Questions of law and fact, actions for injuries to servant, § 533, p 163, § 534, p 203; § 535, pp 208, 210

Railroads, failure to warn as negligence, § 263, p 1022

Repairs, servants engaged in making, § 286

Repeated warnings, youthful servants, § 306, p 1068

Representation of servant as to,

Age and capacity, effect, infant employee, § 306, p 1066

Experience and capacity, effect, § 305

Revolving shafting, obvious danger of coming into contact with, § 296

Risks naturally incident to service, § 299

School boy working during vacation, assumption of experience, § 306, p 1065

Scope of employment, dangers from work outside, § 302

Inexperienced or youthful employee, § 306, p 1067

Secret danger, § 299

Simple methods and appliances, § 300

Statutory provisions, duty as affected, § 289

Steam shovels, apparent dangers in connection with operation, § 296

Sufficiency and effect, § 290

Inexperienced or youthful employee, § 306, p 1068

Suspension of relationship, duty as affected, § 284

Tearing down structures, apparent dangers connected with, § 296

Time of, § 290

Transitory danger, § 284, p 1046, n 76

Unusual danger, § 298

Experienced employee, § 305

Sufficiency of warning, § 290, p 1032, n 47

Vice principal, fellow employee acting as, § 333, p 1122

Work done in improper manner, § 297

Work outside scope of employment, § 302, § 306, p 1067

Youthful servant. Inexperienced or youthful servant, generally, ante, this head

Warning by servant to master or other employee, contributory negligence,

Disobedience of rule requiring, § 450, p 1301

Duty of servant to give, § 455

Warning devices, railroads,

Maintenance to prevent collision, § 261, p 1019

Overhead bridges, § 230, p 978

Washing machines, contributory negligence in operation, jury question, § 537, p 231, n 44

Washrooms, mills, foundries, etc., validity of statute requiring, § 24

Waste, respondeat superior, doctrine as applicable with respect to, § 575, p 332

Watchmen,

Assault by, liability of master, § 575, p 342

Fair Labor Standards Act,

Coverage, § 151(9), p 659

INDEX TO MASTER AND SERVANT

Watchmen—Continued,

Fair Labor Standards Act—Continued,

Watchman furnished by independent contractor as employee, § 151(4), p 630

Overtime pay, time spent in standby capacity as included in working time, § 151(28), p 716

Railroads, contributory negligence, precautions against dangers, § 456, p 1292

Railway Labor Act, watchmen engaged by city to guard property as covered by, § 28(11), p 137, n. 47

Way to and from work, injuries to servant on, liability of master, § 180, p 868

Week, independent contractor paid by, § 3(8)

Week to week employment,

Fair Labor Standards Act, application to workman employed at weekly wage, § 151(5)

Overtime pay, regular rate of pay for purpose of computing, § 151(26), p 706

Termination of employment or relation, § 30

Will of either party, § 31, p 413

Wages and other remuneration, ante

Weekly newspapers, Fair Labor Standards Act, exemption from provisions of employees of, § 151(23)

Weight of evidence Evidence, ante

Welfare of employees,

Constitutional provisions authorizing laws providing for, § 14, p. 93

Hours of labor, regulation for purpose of protecting, § 15, p 98

Well diggers, independent contractors, § 3(9)

Wheels, assumption of risk, knowledge of danger, § 390, p. 1207

Whipping straps, railroads, negligence in failing to maintain, § 230, p. 978

White collar workers, labor relations, statutes dealing with as including, § 28(11)

Wholesale business obtained, commissions on, construction of contracts allowing, § 90, p. 520

Wholesalers,

Fair Labor Standards Act,

Application, § 151(7), p 643

Employees as within coverage, § 151(9), p. 638

Exemption from provisions, § 151(14), p. 677

Interstate commerce, National Labor Relations Act as applying, § 28(9), p 133

Widow, death benefit certificate issued employee by relief or benefit association, right of action on, § 169, p 832

Wildcat strikes,

Right of employees to engage in, § 28(18)

Unfair labor practice,

Discharge of strikers as, § 28(49), p. 224, n. 7

Refusal to reinstate employees participating, § 28(51), p 228

Will, termination of relation at, § 29

Indefinite term, § 31, pp 412-415

Willfulness,

Allegation as to, § 490, p. 30

Contributory negligence as defense in respect of willful negligence, § 424

Discharge of employee on ground of willful disobedience, § 42, p 433

Willfulness—Continued,

Fellow servants, liability for injuries caused by willful acts of, §§ 325, 335

Injuries to third persons, liability of master under doctrine of respondeat superior, § 572

Jury question as to willful negligence as to servant, § 534, p 186

Liability of master for willful injury to servant, § 192

Winches,

Assumption of risk, knowledge of danger, § 390, p 1211

Contributory negligence, inspection for latent defects or dangers, § 447, p 1272

Winding up affairs, relief and benefit departments or associations, § 168, p 826

Windlasses, assumption of risk, knowledge of danger, § 390, p 1211

Window cleaners and cleaning, independent contractors, § 3(9)

Furnishing own tools, § 3(7), n 73

Liability for acts or omissions, § 584, p. 356

Wires, telephone, telegraph, etc., inspection by employer, § 235, p 900

Withdrawal, bonus, offer of, § 98, p 529

Witnesses,

Labor Relations Board,

Crediting own witnesses to exclusion of others, § 28(9b), p 286

Determination of credibility, § 28(136), pp 387, 398

Harmless error in examination, § 28(129), p 368

Proceedings before, § 28(80)

Mediation Board, compelling attendance before, § 28(81)

National Labor Relations Board,

Determination of credibility, § 28(136), p 387

Examination proceedings before, § 28(80)

Harmless error in examination of, § 28(129), p 368

Settlement of labor disputes, proceedings, § 28 (80)

Administrative proceedings, separation of witnesses, § 28(105)

Women,

Hours of labor, validity of statute regulating, § 16

Minimum wages, burden of proof in action involving, § 160(8), p. 789, n 9

Wood working machine, contributory negligence, jury question, § 537, p 231

Words and phrases Definitions, generally, ante

Work stoppages, statutes relating to strikes as authorizing, § 28(18)

Work trains, employees on,

Duty of railroad to safeguard, § 261, p 1018

Hours of Service Act, applicability, § 19

Working conditions,

Collective bargaining, § 28(22), p 159, n 92

Compelling employer to enter into written agreement, § 28(141)

Employment contracts, conformity to statute, § 6, p 68

Labor unions, organization for purpose of bettering, § 28(15), p. 146

INDEX TO MASTER AND SERVANT

Working time,
Federal Hours of Service Act, generally, ante
Hours of labor, generally, ante
Overtime pay, generally, ante

Workmen,
Independent contractor distinguished, § 3(1), p 44
Term compared with and distinguished from employee and servant, § 1, p 29

Workmen's Compensation Act, pleading, action for injuries to servant, § 494, p 38
Negating applicability in action for, § 489, p 16

Workrooms, ventilation, validity of statute requiring, § 24

Workshops, guarding machinery, statutes requiring as applicable to, § 232, p 982

Wreckers, injuries to servants, jury questions, § 534, p 178

Wrecking structures, warning servant as to apparent dangers connected with, § 296

Wrecking train, Hours of Service Act, exception of crew, § 19

Wreckmasters, railroads, fellow servant relationship, § 332, pp 1102, 1105

Wrenches,
Assumption of risk,
Knowledge of danger, § 390, p 1207
Simple tool doctrine, § 300, p 1209
Contributory negligence, inspection for latent defects or dangers, § 447, p 1272
Simple tool as respects duty of employer to inspect, § 235, p 991, n 78

Write-in votes, collective bargaining, election of bargaining representative, § 28(33), p 181

Writing,
Arbitration of labor disputes, submission as required to be in, § 28(73)
Collective bargaining agreement, § 28(30)
Contract of employment,
Controlling effect of written additions to printed provision, § 7, p 73
Modification as requiring, § 9, p 81
Necessity, § 6, p 66
Rescission by oral agreement, § 9, p 82
Unfair labor practices, charges in as condition precedent to issuance of complaint of National Labor Relations Board, § 28(75)

Wrongful discharge,
Ability to perform,
Burden of proof, § 53, p 454
Evidence as to, § 53, p 459

Acceptance,
New employment for unexpired term as waiver of claim for damages, § 50
Other employment in reduction of damages, § 59, p 475

Accrual of right of action for, § 49

Actions, §§ 47-59, pp 441-476
Accrual of right, § 49
Admissibility of evidence, § 52, p 452, § 53, pp. 456, 457
Answer, § 52, p 451
Attorney's fees, § 57
Averments as to breach of contract by, § 52, p 449
Burden of proof, § 53, p 454

Wrongful discharge—Continued,
Actions—Continued,
Complaint, § 52, pp 447-451
Condition precedent, § 48
Damages, § 58, pp 465-472
Declaration, § 52, pp 447-451
Defenses, § 51
Inconsistent defenses, reliance on, § 52, p 451
Misconduct of employee, pleading, § 52, p 451
Release from liability executed by employee, pleading as essential to be available as defense, § 52, p 451
Direction of verdict, § 54, p 460
Dismissal, § 54, p 460
Elements of damages, § 58, pp 468-471
Evidence, § 52, pp 449, 452, § 53, pp 454-460
Admissibility under pleading, § 52, pp 452, 453
Form of remedy, § 50
General denial, matters admissible under, § 52, pp 452, 453
Instructions, § 55
Interest as element of damages, § 58, p. 470
Issues, § 52, p 452
Joinder of courts, § 52, p 448
Jury questions, § 54, pp 460-463
Law questions, § 54, pp 460-463
Limitation, § 40
Measure of damages, § 58, p 465
Nature of remedy, § 50
Nominal damages, § 58, p 471
Other employment as ground for mitigation of damages, § 59, pp 472-476
Petition, § 52, pp 447-451
Plea, § 52, p 451
Pleading, § 28(80), p 278, § 52, pp 447-454
Presumption, § 53, p 454
Proof, § 52, pp 449, 452
Punitive damages, § 58, p 471
Quantum meruit, § 50
Measure of damages recoverable in action on, § 58, p 468
Questions of law and fact, § 54, pp 460-463
Remedy by way of action for damages for breach of contract, § 50
Review, § 56
Right of action, § 48
Damages from breach of contract, § 50
Employee as having right of action for damages on contract between employer and union, § 28(71), p 251
Sufficiency of evidence for, § 53, pp 459, 460
Variance, § 52, p 452
Weight of evidence, § 53, p. 459

Admissibility of evidence,
Action for wrongful discharge, § 52, p 452; § 53, pp. 456, 457
Cause, § 53, p 454
Damages, § 53, pp 457, 458
Mitigation of damages, § 53, p 458
Answer in action for, § 52, p 451
Attorney's fees in actions for, § 57
Availability of other employment, defense of in action for, § 51

INDEX TO MASTER AND SERVANT

Wrongful discharge—Continued,

Average earnings, admissibility of evidence as to on issue of damages, § 53, p 458

Bonus,

Right as defeated by, § 98, p 520
Right to as element of damage, § 58, p 465, n 68

Burden of proof,

Actions for wrongful discharge, § 53, pp 454, 455
Consent to cancellation of contract, § 53, p 454
Damages, § 53, p 455
Matters in mitigation of damages, § 53, p 456

Cause,

Admissibility of evidence on issue, § 53, p 457
Burden of proof, § 53, p 455
Defense in action for wrongful discharge, § 51
Question of law, § 54, p 461

Character, damages as recoverable for injury to, § 58, p 469

Commissions, damages as including, § 58, p 470

Common counts, declaration on as sufficient, § 52, p 448

Competing business, defense of servant having engaged in subsequent to discharge, § 51

Complaint in action for, § 52, pp 447-451

Computation of damages, time, § 58, p 471
Vacation trip by employee, deduction, § 59, p 474, n 47

Condition precedent to action for, § 48

Condonation by employer with respect to employee's breach of contract, jury question, § 54, p 461

Consent to cancellation of contract, burden of proof on issue of, § 53, p 454

Constructive service doctrine,

Accrual of right of action under, § 49
Recovery of wages for unexpired term under, § 50

Contract,

Allegations as to damages in action for breach, § 52, p 450

Complaint as required to set forth essential elements, § 52, p 448

Condonation by employer with respect to employer's breach, jury question, § 54, p 461

Consent to cancellation, burden of proof on action of, § 53, p 454

Employee as having right of action for damages on contract between employer and union, § 28(71), p 251

Estoppel with respect to employee's breach, jury question, § 54, p 461

Expenses incurred as included within damages for breach, § 58, p 468

Indefinite term of employment, measure of damages for breach, § 58, p 467

Indemnity provided for in case of dismissal as included in damages for breach, § 58, p 469

Measure of damages for breach of contract terminable on notice, § 58, p 467

Wrongful discharge—Continued,

Contract—Continued,

Proof of damages resulting from breach of contract under general allegations, § 52, p 453

Remedy available to employee by action in, § 50

Right of action,

As founded on contract, § 48

Damages from breach, § 50

Satisfactory performance of duties in accordance with burden of proof, § 53, p 455

Satisfactory services in accordance with contract, jury question, § 54, p 462

Uncertain term of employment, measure of damages, breach of contract, § 58, p 467

Waiver with respect to employee's breach, jury question, § 54, p 461

Damages, § 58, pp 465-472

Actions for wrongful discharge, § 58, pp 465-472

Allegations in action for breach of contract, § 52, p 450

Bonus, right to, as element, § 58, p 465, n 68

Burden of proof, § 53, p 455

Matters in mitigation of damages, § 53, p 456

Character, injury to, § 58, p 469

Commissions, damages as including, § 58, p 470

Complaint in action for damages, as required to allege date of discharge, § 52, p 450

Diligence in obtaining other employment to reduce damages, § 59, pp 473-475

Efforts to obtain other employment in reduction of, § 59, p 474

Elements, § 58, pp 468-471

Evidence, § 52, p 453; § 53, pp 457, 458, 460

Mitigation of damages, § 53, pp 458, 460

Exemplary damages, § 58, p 471

Expenses incurred as included within damages for breach of contract, § 58, p 468

Expiration of term, computation of damages in respect to suits brought before and after, § 58, p 471

Good will, injury to, § 58, p 469

Humiliation, § 58, p 469, n 10

Illness or incapacitation preventing other employment as affecting reduction, § 59, p 474

Indignity, § 58, p 469, n 10

Instructions to jury, § 55

Interest as element, § 58, p 470

Jury question, § 54, p 463

Measure of, § 58, p 465

Damages for breach of contract terminable on notice, § 58, p 467

Indefinite term of employment, measure of damages for breach of contract for, § 58, p 467

Quantum meruit, damages recoverable in action on, § 58, p 468

Stipulated wage as prima facie measure, § 58, p 466, n 70

INDEX TO MASTER AND SERVANT

Wrongful discharge—Continued,

Damages—Continued,

Measure of—Continued,

Uncertain term of employment, damages in breach of contract, § 58, p 467

Negating matters available to employer in mitigation of damages, § 52, p 450

Nominal damages, § 58, p 471

Offer of reemployment as affecting right, § 59, pp. 475, 476

Other employment as ground of mitigation, § 59, pp 472-476

Pain and suffering, § 58, p 469

Part time employee, mitigation, § 59, p 474

Permanent employment, damages recoverable under contract for, § 58, p 467

Pleading,

Action for wrongful discharge, § 28(89), p 278

Essential to recovery of punitive damages, § 52, p 451

Matters in mitigation of damages, § 52, p 452

Profits as recoverable as damages, § 58, p 470

Proof of damages resulting from breach of contract under general allegations, § 52, p 453

Punitive damages, § 58, p 471

Pleading as essential to recovery, § 52, p 451

Questions of law and fact, § 54, p 462

Reasonable diligence in obtaining other employment to reduce damages, § 59, p. 475

Rejection of other employment as affecting right, § 59, p 475, n. 66

Reputation, injury to, § 58, p 469

Right of action for damages, § 50

Employee as having right of action for damages on contract between employer and union, § 28(71), p 251

Salesman,

Employed on commission basis, § 58, p. 470

Mitigation of damages, § 59, p 474

Self employment, consideration in assessing damages, § 59, p. 476

Shame, § 58, p 469, n 10

Special damage, pleading of, as essential, § 52, p 450

Time from which damages are computed, § 58, p 471

Transportation expenses, damages as including, § 58, p 468, n 94

Unemployment insurance, funds received as deductible in mitigation, § 59, p 473, n 46

Vacation trip by employee, deduction in computing, § 59, p 474, n 47

Date of discharge, complaint in action for damages as required to allege, § 52, p 450

Declaration in action for, § 52, pp 447-451

Defenses in actions for, § 51

Misconduct of employee, pleading, § 52, p. 451

Wrongful discharge—Continued,

Defenses in actions for—Continued,

Release from liability executed by employee, pleading as essential to be available as defense, § 52, p 451

Reliance on inconsistent defenses, § 52, p. 451

Diligence in obtaining other employment as affecting damages, § 59, pp 473-475

Direction of verdict in action for, § 54, p. 460

Dismissal of actions for, § 54, p 430

Drawing account, damages recoverable by employee on commission basis allowed definite drawing account, § 58, p 470

Efforts to obtain other employment in reduction of damages, § 59, p. 474

Elements of damages in action for, § 58, pp 468-471

Employee as having right of action for damages on contract between employer and union, § 28 (71), p 251

Estoppel with respect to employee's breach of contract, jury question, § 54, p 461

Evidence,

Actions for wrongful discharge, § 52, pp 449, 452; § 53, pp 454-460

Admissibility under pleading, § 52, pp 452, 453

Damages, § 52, p 453; § 53, pp 457, 458, 460

Mitigation of damages, § 53, pp 458, 460

Exemplary damages, § 58, p 471

Expenses incurred as included within damages for breach of contract, § 58, p 468

Expiration of term, computation of damages in respect to suits brought before and after, § 58, p 471

Form of remedy for, § 50

Formal dismissal, allegation or proof of as essential, § 52, p 449

General denial, matters admissible under, § 52, pp 452, 453

Good will, damages recoverable for injury to, § 58, p 469

Grounds,

Admissibility of evidence in action for wrongful discharge, § 53, p 457

Complaint in action for wrongful discharge as required to allege, § 52, p 449

Insubordination as ground, jury question, § 54, p. 462

Question of law in action for, § 54, p 461

Hiring, allegations as to in complaint in action for, § 52, p 449

Humiliation, damages as recoverable for, § 58, p 469, n 10

Illness preventing other employment as effecting reduction of damages, § 59, p 474

Incapacitation precluding other employment as affecting reduction of damages, § 59, p 474

Inconsistent defenses, reliance on in action for, § 52, p 451

Indefinite term of employment, measure of damages for breach of contract for, § 58, p 467

Indemnity provided for in case of dismissal as included in damages for breach of contract, § 58, p 469

INDEX TO MASTER AND SERVANT

Wrongful discharge—Continued,

- Indignity, damages as recoverable for, § 58, p 460, n. 10
- Insolvency of employer as defense to action for, § 51
- Instructions in actions for, § 55
- Insubordination as ground, jury question in action for, § 54, p 462
- Interest as element of damages in action for, § 58, p. 470
- Issues in action for, § 52, p 452
- Joinder of counts, petition in action for, § 52, p 448
- Jury questions in action for, § 54, pp 460-463
- Justification,
 - Burden of proof in action for wrongful discharge, § 53, p 454
 - Instructions to jury on issue, § 55
 - Matters in as admissible under general denial, § 52, p 452
 - Pleading in action for wrongful discharge, § 52, p 451
- Law questions in actions for, § 54, pp 460-463
- Life expectancy, admissibility of evidence as to on issue of damages, § 53, p 458
- Limitation of action for, § 49
- Measure of damages, § 58, p 465
 - Damages for breach of contract terminable on notice, § 58, p 467
 - Indefinite or uncertain term of employment, damages for breach of contract for, § 58, p. 467
 - Quantum meruit, damages recoverable in action on, § 58, p 468
 - Stipulated wage as prima facie measure, § 58, p. 466, n 70
- Mental pain and suffering, damages as recoverable for, § 58, p 460
- Misconduct of employee, pleading as defense to action for, § 52, p 451
- Mistake, defense of in action for, § 51
- Mitigation of damages,
 - Burden of proving matters in, § 53, p 450
 - Diligence in securing other employment, § 50, pp 473, 474
 - Efforts to obtain other employment, § 50, p 474
 - Evidence, § 53, pp 458, 460
 - Illness or incapacitation preventing other employment, § 50, p 474
 - Instructions to jury, § 55
 - Jury question, § 54, p. 463
 - Negating matters available to employer in, § 52, p 450
 - Other employment as ground, § 50, pp 472-476
 - Part time employee, § 50, p 474
 - Pleading matters in, § 52, p. 452
 - Reasonable diligence in obtaining other employment to reduce damages, § 50, p 475
 - Salesmen, § 50, p 474
 - Statutory provisions, § 50, p 474
 - Tender of performance as condition precedent to action for wrongful discharge, § 48
 - Unemployment insurance, funds received as deductible in, § 59, p 473, n. 46
- Nature of remedy for, § 50

Wrongful discharge—Continued,

- Negating defenses, declaration, petition or complaint in action for, § 52, p 450
- Nominal damages, § 58, p 471
- Nonpayment for services, allegations as to as essential, § 52, p 450
- Notice, measure of damages for breach of contract terminable on, § 58, p 467
- Offer of,
 - Performance as condition precedent to action for wrongful discharge, § 48
 - Reemployment as affecting right to damages, § 59, pp 475, 476
- Other employment as ground for reduction of damages, § 50, pp 472-476
- Pain and suffering, damages as recoverable for, § 58, p 460
- Part time employee, mitigation of damages, § 59, p 474
- Performance,
 - Allegations in action for wrongful discharge, § 52, p 450
 - Burden of proof,
 - Issue of performance of services, § 53, p 454
 - Satisfactory performance of duties in accordance with contract, § 53, p 455
 - Evidence as to performance of services in action for discharge, § 53, p 450
 - Jury question as to satisfactory services in accordance with contract, § 54, p 462
 - Offer of performance as condition precedent to action for wrongful discharge, § 48
 - Tender as condition precedent to action for wrongful discharge, § 48
 - Willingness to perform,
 - Allegations as to, § 52, p 450
 - Burden of proof, § 53, p 454
 - Evidence in action for wrongful discharge, § 53, p 450
- Period of hiring, complaint in action for as required to show, § 52, p 440
- Permanent employment, damages recoverable under contract for, § 58, p 467
- Petition in action for, § 52, pp 447-451
- Plea in action for, § 52, p 451
- Pleading in action for, § 28(89), p 278, § 52, pp 447-454
 - Evidence admissible under, § 52, pp 452, 453
- Presumptions in actions for, § 53, p 454
- Profits as recoverable as damages in action for, § 58, p 470
- Proof,
 - Actions for wrongful discharge, § 52, pp 449, 452
 - Damages resulting from breach of contract under general allegations, § 52, p 453
- Punitive damages, § 58, p 471
 - Pleading as essential to recovery, § 52, p. 451
- Quantum meruit,
 - Allegations authorizing recovery on, § 52, p 454
 - Measure of damages recoverable in action on, § 58, p. 468
 - Recovery in action on, § 50

INDEX TO MASTER AND SERVANT

Wrongful discharge—Continued,

- Questions of law and fact in actions for, § 54, pp 460-463
- Race as ground, complaint alleging as sufficient, § 52, p 449, n 70
- Readiness to perform,
 - Allegations as to, § 52, p 450
 - Evidence in action for wrongful discharge, § 53, p 459
- Reasonable diligence in obtaining other employment to reduce damages, § 59, p 475
- Rebuttal evidence, admissibility in action for, § 53, p 457
- Reconciliation and return to service, defense of in action for, § 51
- Reduction of damages Mitigation of damages, ante, this head
- Re-employment, offer of as affecting right to damages, § 59, pp 475, 476
- Reinstatement of employee wrongfully discharged, § 46
- Rejection of other employment as affecting right to damages, § 59, p 475, n 66
- Release from liability executed by employee, pleading as essential to be available as defense, § 52, p 451
- Remedies available to employee, § 50
- Reputation, damages as recoverable for injury to, § 58, p 469
- Review in actions for, § 56
- Right of action,
 - Damages from breach of contract, § 50
 - Employee as having right of action for damages on contract between employer and union, § 28(71), p 251
 - Wrongful discharge, action for, § 48
- Salesman,
 - Employed on commission basis, damages recoverable, § 58, p. 470
 - Mitigation of damages, § 59, p 474
- Sanctioning right, § 48
- Satisfactory duties or services in accordance with contract,
 - Burden of proof, § 53, p 455
 - Jury question, § 54, p 462
- Self employment by discharged servant, consideration in assessing damages, § 59, p 476
- Shame, damages as recoverable for, § 58, p 469, n 10
- Special damage, pleading of as essential, § 52, p 450
- Statutory provisions,
 - Accrual of right of action, § 49
 - Mitigation of damages, § 59, p 474
- Stipulated wage as prima facie measure of damage, § 58, p 466, n 70

Wrongful discharge—Continued,

- Sufficiency of evidence,
 - Action for wrongful discharge, § 53, pp 459, 460
 - Mitigation of damages, § 53, p 460
- Tender of performance as condition precedent to action for, § 48
- Time damages are computed from, § 58, p 471
- Tort, pleading in action in, § 52, p 448
- Transportation expenses, damages as including, § 58, p 468, n 94
- Uncertain term of employment, measure of damages in breach of contract for, § 58, p. 467
- Unemployment insurance, funds received as deductible in mitigation of damages, § 59, p 473, n 46
- Unexpired term, recovery of stipulated wages for, § 50
- Vacation trip by employee, deduction in computing damages recoverable, § 59, p 474, n 47
- Vacation with pay, right of employee, § 87
- Value of services, admissibility of evidence on issue of damages, § 53, p 457
- Variance in actions for, § 52, p 452
- Voluntary resignation,
 - Defense in action for wrongful discharge, § 51
 - Jury question, § 54, p 461
- Wages and other remuneration, ante
- Waiver,
 - Claim for damages, acceptance of new employment for unexpired term, § 50
 - Jury question as to waiver with respect to employee's breach of contract, § 54, p 461
- Weight of evidence in action for, § 53, p 459
- Willingness to perform,
 - Allegations as to, § 52, p 450
 - Burden of showing in action for wrongful discharge, § 53, p 454
 - Evidence in action for wrongful discharge, § 53, p 459
- Yard foreman, railroads, fellow servant relation, § 332, p 1104
- Yard service employees, carriers, jurisdiction over disputes involving, § 28(74), p 261
- Yardmasters,
 - Fellow servant relation, § 332, p. 1106
 - Hours of Service Act, application, § 19
- Year to year employment, termination of relation, § 30
- Will of either party, § 31, p 413
- Youthful servant,
 - Assumption of risk, ante
 - Infants, generally, ante
 - Warning and instructing servant, ante

INDEX TO

MASTERS' AND EMPLOYERS' ASSOCIATIONS

- | | |
|--|---|
| <ul style="list-style-type: none"> Actions, § 8 Admission to membership, § 5 Boycott, co-operation resulting in, § 2, n 7 By-laws, § 4 <ul style="list-style-type: none"> Obligation to conform to, § 5 Constitution, § 4 <ul style="list-style-type: none"> Obligation of member to conform to, § 5 Corporations, membership in association, § 5 Definitions, § 1 Directors, actions by, § 8 Directors or governors, § 6 Dissolution, § 3 Dues, § 5 Duties of members, § 5 Eligibility to membership, § 5 Expulsion, § 5 Fines, § 5 <ul style="list-style-type: none"> By-laws providing for, § 4 Incorporation, § 2 International associations, § 2 Labor unions, agreement with, § 4 Liabilities of members, § 5 Local associations, § 2 Manner of organization, § 2 Means adopted to accomplish object, § 4 Meetings, § 7 | <ul style="list-style-type: none"> Membership, § 5 National associations, § 2 Nature, § 1 Officers, § 6 Open shops, power to order members to maintain, § 4 Parties, actions by, § 8 Partnership, <ul style="list-style-type: none"> Membership in association, § 5 Status as, § 1 Powers and liabilities, § 4 President, action in name of, § 8 Property, accumulation for promotion of purpose, § 1 Purpose, § 1 Resignation of membership, § 5 Restraint of trade, co-operation resulting in, § 2, n 7 Right of organization, § 2 Shutdowns, by-laws giving right to order, § 4 Status, § 1 Surety bond, liability on for violation of rule of association, § 5 Termination of membership, § 5 Treasurer, action in name of, § 8 Unincorporated associations, § 2 Withdrawal of members, dissolution as effected by, § 3 Words and phrases, § 1 |
|--|---|

INDEX TO MAYHEM

- Admissibility of evidence, prosecutions for, § 10
- Adventure, liability for acts as result of, § 3, p 462
- Aggravated affray, statutory provisions, § 3, p 462
- Altercation, defense of injury occurring in course of, § 6
- Appeal of mayhem, remedy by, § 7
- Assault with intent to maim, § 4
 - Evidence in prosecution for, § 10
 - Instructions to jury in prosecution for, § 11
 - Presumption, § 10
- Attempt to maim, § 5
 - Indictment for, § 9
- Biting, offense committed by, § 3, p 465
- Burden of proof, prosecutions for, § 10
- Castration,
 - Admissibility of evidence as to affairs with other women in prosecution for, § 10, n 6
 - Mayhem by, felony, § 3, p 462
 - Offense as including, § 3, p 464, n 64
- Chance medley, liability for acts done by, § 3, p 462
- Common law,
 - Definition under, § 1
 - Nature of offense, § 3, p 462
- Comparisons, § 1
- Conflict, injury inflicted in, § 3, p 464
- Conjunctive allegations, indictment or information, § 7
- Conspiracy,
 - Jury question, § 11
 - Proof of as essential to charge of maiming, § 3, p 462
 - Responsibility for offense on theory of, § 2
- Construction, statutory provisions, § 3, p 466
- Corporal abilities, offense as limited to injury diminishing, § 3, p 464
- Crippling, mayhem as implying, § 3, p 466
- Cutting,
 - Indictment, designation of instrument used, § 9
 - Offense committed by, § 3, p 465
- Defenses, § 6
 - Jury question, § 11
- Definitions, § 1
- Deliberation, element of, § 3, p 463
- Disfigurement,
 - Element of, § 1
 - Indictment or information, allegations as to, § 9
 - Statutory provisions, § 3, p 464
- Distinctions, § 1
- Ears, biting off part of, § 3, p 464, n 64
- Elements of offense, § 3, pp 462-466
- Equivalents, § 1
- Evidence, prosecutions for, § 10
- Extent of injury,
 - Indictment or information, allegations as to, § 9
 - Materiality, § 3, p 465
 - Presumption, § 10
 - Weight and sufficiency of evidence, § 10
- Eyes, putting out or destroying, § 3, p 464, n 64
- Feloniousness, indictment, allegations as to, § 9
- Felony,
 - Assault with intent to maim, § 4
 - Common law, crime as, § 3, p 462
- Female internal organs, statute as applying to injury to, § 2
- Fight, offense committed by, § 3, p 462
- Fine, punishment by, § 12
- General verdict, sufficiency, § 11
- Greater offense, acquittal of on finding of guilty of lesser, § 11
- High misdemeanor, statutory provisions, § 3, p 462
- Imprisonment, punishment by, § 12
- Indictment and information, §§ 7-9, pp 467-470
 - Language of statute, charging offense in, § 8
- Instructions to jury, prosecutions for, § 11
- Instrument employed,
 - Indictment, allegations as to, § 9
 - Materiality, § 3, p 465
- Intent,
 - Assault with intent to maim, § 4
 - Indictment charging offense in language of statute, § 8
 - Attempt to maim, § 5
 - Element of, § 3, p 462
 - Indictment, allegations as to, § 9
 - Jury question, § 11
 - Presumptions, § 10
 - Weight and sufficiency of evidence, § 10
- Issues, prosecution for, § 7
- Joinder of offenses, prosecution for, § 7
- Jury questions, prosecutions for, § 11
- Language of statute, indictment charging offense in language of, § 8
- Law question, prosecutions for, § 11
- Lesser offense, verdict on finding of guilty of, § 11
- Loco parentis,
 - Offense by one standing in, § 2
 - Right of one standing in to chastise as defense, § 6
- Lying in wait,
 - Element of, § 3, p 463
 - Indictment, allegations as to, § 9
 - Presumption, § 10
- Male organs, statutes as applying to injury to, § 2
- Malice,
 - Admissibility of evidence as to, § 10
 - Element of, § 3, p 462
 - Indictment, allegations as to, § 9
 - Jury question, § 11
 - Presumption, § 10
 - Weight and sufficiency of evidence, § 10
- Manslaughter, death ensuing, indictment in case of, § 9
- Means employed,
 - Indictment, allegations as to, § 9
 - Jury question, § 11
 - Materiality, § 3, p 465
 - Attempt to maim, § 5
 - Presumptions arising from, § 10

INDEX TO MAYHEM

- Member of body, depriving human being of, § 3, p 464
- Misdemeanor, offense as, § 3, p 462
- Motive, admissibility of evidence as to, § 10
- Murder, death ensuing, indictment, § 9
- Mutilation, statutory provisions, § 3, p 464
- Mutual consent, liability for injury in fight by, § 3, p 462
- Nature of injury, indictment, allegations as to, § 9
- Nature of offense, § 3, pp 462-466
- Negative averments, indictment or information, § 7
- Overt act, attempt to maim, § 5
- Permanent injury,
 - Indictment or information, allegations as to, § 9
 - Mayhem as implying, § 3, p 466
 - Presumption, § 10
- Persons by and upon whom committed, § 2
- Premeditation,
 - Element of, § 3, p 463
 - Indictment, allegations as to, § 9
 - Jury question, § 11
 - Presumption, § 10
- Presumptions, prosecutions for, § 10
- Proof, prosecution for, § 7
- Punishment, § 12
- Questions of law and fact, prosecutions for, § 11
- Self-defense,
 - As defense to indictment for, § 6
 - Burden of proof, § 10
 - Jury question, § 11
 - Weight and sufficiency of evidence, § 10
- Sentence, § 12
- Severance of member, necessity, § 3, p 465
- Slaves, commission by white man on body of, § 2
- Slitting, offense committed by, § 3, p 465
- Statutory provisions,
 - Assault with intent to maim, § 4
 - Attempt to maim, § 5
 - Construction, § 3, p 466
 - Indictment or information, charging offense in language of statute, § 8
 - Nature of offense, § 3, p 462
 - Punishment, § 12
 - Scope of offense extended by, § 1
 - Self-defense, § 6
- Sudden affray, liability for acts as result of, § 3, p 462
- Surplusage, indictment or information, § 7
- Testicles, assault with intent to disable, § 4, p 466, n 99
- Trial, prosecution for, § 11
- Unlawfulness,
 - Indictment, allegations as to, § 9
 - Presumption, § 10
- Variance, prosecution for, § 7
- Verdict, prosecutions for, § 11
- Weapons, indictment, alternative allegations as to weapon used, § 9
- Weight and sufficiency of evidence in prosecutions for, § 10
- Willfulness,
 - Admissibility of evidence as to, § 10
 - Indictment, allegations as to, § 9
 - Presumption, § 10
- Wounds, indictment, designation of instrument used, § 9

INDEX TO MECHANICS' LIENS

Abandonment, Contract,

- Abandonment of independent contract as defense to enforcement of lien, § 273
- Amount secured by lien, § 175
- Laborers, rights as affected, § 112
- Presumptions and burden of proof in action to enforce lien where contract abandoned by principal contractor, § 308, p 906
- Priority between different liens in case of abandonment by contractor, § 198, p 748
- Right to lien, § 96
- Subcontractors, laborers or materialmen, rights as affected, § 112
- Time for filing statement or claim, § 144, p 658
- Performance of contract, question of fact in action to enforce lien, § 314, p 995
- Relation back of lien in case of abandonment of work, § 180
- Right, abandonment of, § 241
- Work by contractor,
 - Evidence in action to enforce lien, § 310, p 986
 - Deductions for cost of completion, § 309, p 974
 - Findings in action to enforce lien, § 316, p 990
 - Liability of sureties on contractor's bond, § 259, p 847
 - Limitation of action to enforce lien, § 282, p 891
 - Party defendant in action to enforce lien, § 284, p 909, n 87
 - Personal judgment against owner in favor of subcontractor, § 331, p 1017
 - Presumptions and burden of proof in action to enforce lien, § 308, p 904
 - Priority between different mechanics' liens, § 198, p 748
 - Right to lien as affected, § 96
 - Subcontractors, post
 - Subsequent contract, § 73, p 577
 - Sureties on contractor's bond completing liability of, § 260
 - Taking possession by owner affecting time for filing claim or statement, § 142, p 655
 - Time for filing claim or statement, § 142, p 654
- Work by owner, credit against materialman's lien for amount required to complete work, § 277, n 51
- Work by subcontractor,
 - Priority of claim of contractor for work completed at a loss, § 198, p. 751

Abatement,

- Enforcement of lien,
 - Cancellation or vacation of notice of lis pendens, § 289

Abatement—Continued,

- Enforcement of lien—Continued,
 - Death of party, § 273
 - Identity of plaintiffs in both suits, § 296, p. 875, n 90
 - Suit to recover balance due on contract by pendency of mechanics' lien suit, § 266, p 874, n. 85
- Abbreviations, claim or statement of lien,
 - Signature for corporation, § 166
 - Use of abbreviation, § 165, p 707
- Absence, owner from jurisdiction, lapse of time as extinguishing right to enforce lien, § 282, p 890, n 7
- Acceleration clause in contract, default as maturing debt to start time running for filing claim of lien, § 141
- Acceptance of work,
 - Completion of work affecting time for filing claim or statement, § 144, p 660
 - Time for filing claim or statement, § 144, p 660
 - Owner's acceptance of building, § 142, p 655
- Accommodation paper, contractor to subcontractor, priority as to rights of lienors, § 213
- Accounts and accounting,
 - Bond of contractor, owner and surety, § 262, p 855
 - Claim or statement, generally, post
 - Conditions precedent to enforcement of lien, § 268
 - Contractor seeking to acquire lien to owner, § 130
 - Correctness as question for jury in action to enforce lien, § 314, p. 903
 - Evidence in action to enforce lien, § 309, p 973
 - Itemized account, post
 - Padded accounts of contractor, dismissal of bill to enforce lien, § 290, p 918, n 37
 - Reference to state accounts in action to enforce lien, § 312
 - Subcontractor's suit for, limitation, § 282, p 890, n. 5
- Accrual, §§ 177-182, pp 730-734
 - Advances for materials before and after accrual, priority of mortgage securing, § 205, p 773
 - Commencement of lien, acquisition of land after commencement of construction, § 177
 - Indebtedness, time for,
 - Commencement of action to enforce lien, § 282, p 894
 - Filing notice or claim of lien, § 141
 - Statement in claim or statement, § 152
- Acknowledgment,
 - Contract,
 - Creating lien, § 81
 - Evidence in action to enforce lien, § 309, p. 970
 - Necessity in order to record, § 82, p 587

INDEX TO MECHANICS' LIENS

- Acknowledgment—Continued,**
Contract—Continued,
 Waiver, contract concerning provisions for,
 § 222, p 793, n 82
Mortgage, effect on priority over mechanic's lien,
 § 200, p 758
- Acquiescence,**
 Consent of owner as established by, § 73, p 578
 Lessor, improvements by lessee, § 65, p 561
- Actions,**
 Assumpsit, enforcement of lien, § 203, p 870
 Bonds or undertakings,
 Contractor's bond, § 202, pp 851-868
 Prevention or discharge of lien, § 239
 Commencement of action, generally, post
 Compelling discharge of record, § 240
 Consolidation of actions to enforce liens, post
 Conveyance of premises before or after commencement, § 243, p 816
 Covenant to indemnify contractor against loss by waiver of lien, § 235
 Declaratory judgment, preservation of lien, § 183, p 735, n 14
 Deposit in court, determination of right to share in, § 233
 Determination of priority between mechanic's lien and mortgage, § 206
 Enforcement, generally, post
 Estoppel, bringing of, § 229
 Judgment in mechanics' lien suit, § 336
 Subcontractor, establishment of claim by judgment as condition precedent in enforcement of lien, § 209
 Waiver of lien by bringing action on claim, § 225
 Addition of parties in action to enforce lien, § 285
 Additional work, labor or materials Extras, generally, post
- Additions,**
 Claim or statement to show
 Building for which furnished, § 165, p 701
 Nature of improvement, § 160
 Filing of one or more claims or statements by same claimant, § 133, p 644, n 87
 Priority of lien,
 Building or improvement alone, § 205, p. 776
 Enhanced value of property, § 205, p. 777
 Right to lien, § 23
 Separate contracts, time for filing claim or statement, § 144, p 664, n 52
- Address,**
 Claim or statement setting forth, § 156
 Owner's address, § 162, p. 690
 Necessity that claim or statement be addressed to particular person, § 150
- Adequacy of remedy at law, injunction against sale and foreclosure, § 271**
- Administrators Executors and administrators, generally, post**
- Admissibility of evidence. Evidence, generally, post**
- Admissions,**
 Claim or statement of lien by owner by reading, § 160
 Enforcement of lien, actions for,
 Demurrer, § 305, p 948
 Failure to deny, § 301, p 941
- Advances and advancements—**
 Effect of advance payments on other lien, § 251, p 831
 Money, § 47
 Pleading in action to enforce lien, § 204, p 925, n. 21
 Priority,
 Lien as to second mortgage subject to first mortgage providing for advancement, § 201, p 761
 Mortgage over mechanic's lien, advances by mortgagee, § 205, p 772
 Mortgage to secure future advances, § 205, p 773
 Surety on contractor's bond as released by, advance payments, § 259, p. 851
- Adverse possession, interest of persons claiming title by as subject to lien, § 15**
- Advertisement, sale of property to enforce lien, notice of, § 341**
- Aerial tramways, lien as attaching to, § 21, p 517**
- Affidavits,**
 Attachment to enforce lien, § 287
 Claim or statement, generally, post
 Contractor as paying agreed price or reasonable value, presumptions and burden of proof in action to enforce lien, § 308, p 966
 Defense, affidavit of,
 Bond of contractor, action on, § 262, p 865
 Enforcement of lien, action for, §§ 300, 301, pp 939-944
 Default judgment in disregard of, § 318
 Form and sufficiency, § 301, pp 939-944
- Ex parte affidavit,**
 Discharge of lien after submission of issue to referee, § 312
 Evidence in action to enforce lien, § 309, p 973, n 56
 False affidavit by owner as to payment, personal liability for unpaid claim, § 263, p 871, n 40
 Notice to owner of intent to claim lien, § 126, p 633
 Service of notice, removal of affidavit, § 128
 Verification, § 127
 Parol evidence to supply deficiency in affidavit for lien, § 309, p 973
 Proof of execution of claim or statement of lien, § 168
 Service of,
 Notice or copy of claim or statement, § 146
 Notice to owner of intent to claim lien, removal of affidavit, § 128
 Signature, claim or statement of lien, § 160
 Verification, generally, post
- After-acquired title or interest,**
 Application of lien, § 193
 Consent of owner, § 57, p 545
 Mortgage of after-acquired property, priority of mechanic's lien, § 201, p 759
- Agents,**
 Claim or statement of lien, verification, § 167, pp 700, 712
 Consent of agent, evidence in action to enforce lien, § 310, p 980
 Contract with agent,
 Creation of lien, § 59

INDEX TO MECHANICS' LIENS

Agents—Continued,

Contract with agent—Continued,

Evidence in action to enforce lien, § 309, p. 971

Pleading in action to enforce lien based on, § 294, p 928

Contractors employed by, § 90

Husband and wife,

Contract for improvement on separate property, § 63, p 555

Judgment against husband as prerequisite to foreclosure against wife, § 269, p 877, n 25

Questions of law and fact in action to enforce lien, § 314, p 995

Infants, power to contract for improvements, § 64

Joint owner as agent, service of notice of claim or statement, § 146, p 660, n 90

Knowledge of improvement, notice by owner of nonresponsibility, § 84, p 594

Lessee,

Lessor's agent under statute requiring notice of claim to owner, § 121, p 626, n 72

Lien as created against property of lessor, § 65, p 559

Necessity of notice to owner when lien claimant deals with agent of owner, § 121, pp 625, 626

Notice of intent to claim lien, § 124, pp 628-630, § 126, p 636

Place of service, § 128

Signature, § 127

Waiver of notice, § 122

Owner, personal liability for labor, § 263, p 871, n. 40

Personal judgment against, § 331, p 1017

Presumptions and burden of proof in action to enforce lien, § 308, p 963

Ratification of contract, § 52

Request for further work or materials as extending time for filing, § 149, p 660, n 34, § 149, p 671

Service on owner of copy of claim or statement, § 146

Signature,

Claim or statement of lien, § 166

Notice to owner of intent to claim lien, § 127

Undisclosed principal, party plaintiff in action to enforce lien, § 283

Vendee, improvements by as agent for vendor, § 71, p 575

Waiver by, § 223

Notice of intent to claim lien, § 122

Agreement,

Extension of time for filing notice or claim of lien, § 148

Owner, post

Parties as to completion of work, time for filing claim or statement, § 144, p 659

Reference by agreement of parties in action to enforce lien, § 312

Waiver of right by, § 224

Alterations or repairs, § 22

Additional work extending time for filing claim or statement, § 149, p 669, n 39

Application of lien to building or improvement alone, § 188

Alterations or repairs—Continued,

Change of plans, relation back of lien, § 180

Completion of work, extension of time for filing claim or statement, § 149, p. 670, n 49

Consent of owner,

Amount as affecting, § 52

Lessor, § 65, p 560

Damage caused by other persons, extension of time for filing claim or statement, § 149, p. 672

Filing claim,

Necessity, § 131, p 640, n 18

One or more claims or statements, §§ 133, 134

Gratuitous work, extension of time for filing claim or statement, § 149, p 670

Guaranty, work pursuant to as extending time for filing claim or statement, § 149, p 672

Insurance loss sustained, application of lien to insurance fund, agreed to be used for repairs, § 196, p 747, n 97

Lessee making, lien for, § 65, p 559

Machinery, lien as attaching with respect to, § 28

Materials furnished for, § 40

Nature of improvement, claim or statement to show, § 160

Planning work, lien for services in, § 35

Priority of lien,

Building or improvement alone, § 205, p 776

Enhanced value of property, § 205, p 777

Protection of persons contributing labor or materials, § 3, p 496

Question of fact in action to enforce lien, § 314, p 994

Right to lien, § 23

Separate contracts, time for filing claim or statement, § 144, p 663, n 44

Two or more buildings, filing one or more claims or statements, § 134

Ambiguities,

Claim or statement, § 152

Findings in action to enforce lien, § 316, p 1000, n 33

Amendment,

Bill of particulars, action to enforce lien, § 294, p 934

Claim or statement, post

Cure of defect by amendment after time limited for commencing action to enforce lien, § 282, p 896

Judgment or decree, proceedings to enforce lien, § 333

Lis pendens, enforcement of lien, § 280

Notice,

Filing of claim or statement, § 146

Owner, intent to claim lien, § 129

Parties, expiration of period for commencement of action to enforce lien, § 282, p 898

Pleading in, action to enforce lien, § 306

Bill of particulars, § 294, p 934

Verification of claim or statement of lien, § 70, p 718

Amount,

Bond or undertaking, prevention or discharge of lien, § 236

INDEX TO MECHANICS' LIENS

Amount—Continued, Claim,

- Consent of owner, effect, § 52
- Contract for improvement, fixing of as essential, § 78
- Evidence in action to enforce lien, § 309, pp 973, 985
- Notice to owner of intent to claim lien to set forth, § 126, p 634
- Presumptions and burden of proof in action to enforce lien, § 308, p 965
- Question of fact in action to enforce lien, § 314, p 966
- Requisite amount, § 51

Claim or statement of lien,

- Amendment, § 170, p 718
- Amount due or to become due, §§ 153, 154, pp 675-679
- Limitation by claim or statement of amount secured, § 172

Indebtedness of owner to contractor, presumptions and burden of proof in action to enforce lien, § 308, p 966

Judgment or decree, action to enforce lien, § 319, p 1006

Conformity to lien statement, § 321

Land, application of lien, § 186

Secured, §§ 172-176, pp 721-730

- Abandonment of contract, § 175
- Amount fixed or due under contract or sub-contract, § 174, pp 722-726
- Filing lien before completion of contract, § 174, p 723
- Guarantee of payment by owner to subcontractor or materialmen, § 174, p 725
- Interest, § 175
- Limitation by owner's contract with contractor, § 174, pp 722-726

Materialmen,

- Abandonment of contract by contractors, § 175
- Contract with contractor fixing amount, § 174, p 725

Part performance of contract, § 175

- Payment by owner to contractor, § 174, p 724

Persons,

- Contracting directly with owner, § 174, p 722
- Employed by or contracting with subcontractors, § 174, p 726
- Not contracting directly with owner, § 174, p 723

Subcontractors,

- Abandonment of contract by contractor, § 175
- Contract with contractor fixing amount, § 174, p 725

Value of labor and materials, § 173

Amphitheaters, lien as attaching to, § 21, p 517

Annulment, actions for, § 240

Another action pending, precluding finding of amount unpaid in action to enforce lien, § 311, p 989, n 28

Answer Plea or answer, generally, post

Anticipating defenses, pleading, action to enforce lien, § 297

Appeal and error, § 349

Costs on, § 354

Appearance,

- Foreclosure as waiver of defect in claim or statement of lien, § 160

Other proceeding to enforce lien, commencement of suit within statutory time, § 282, p 896

Application of service in action to enforce lien, § 286

Apportioned lien, filing against properties of different owners, § 136

Apportionment,

- Buildings or improvements in claim or statement as to amounts due, § 155

Claim for improvements on property of different owners, § 180

Costs, proceeding to enforce lien, § 350

Approval,

- Bond or undertaking, prevention or discharge of lien, § 236

Work, time for filing claim or statement, § 144, p 660

Appurtenances,

- Burden of proof in action to enforce lien, § 308, p 961

Fences constructed as, lien as attaching, § 21, p 516

Statutory provisions, § 21, p 514

Aqueducts, lien for construction of, § 21, p 516

Arbitration,

- Amendment of claim or statement of lien after award, § 170, p 718, n 79

Bond of contractor, provision for as preventing suit on, § 262, p 855

Condition precedent to enforcement of lien, § 268

Waiver,

- Lien by clause in contract providing for arbitration, § 224, p 797, n 40

Revocation of agreement to arbitrate affecting waiver of priority of mechanic's lien, § 204, p 765, n 23

Right by submission to arbitration, § 223

Architects,

- Certificate of architect, generally, post

Completion of work affecting time for filing claim or statement, § 144, p 660

Discharged before completion of building, amount secured by lien, § 175

Notice to owner of intent to claim lien, place of service, § 128

Performance to satisfaction of, § 95

Request for further work or materials after completion of contract, extension of time for filing claim or statement, § 149, p 671

Service on owner of intent to claim lien, § 124, p 629

Services rendered as lienable, § 36

Time for commencement of suit to enforce architect's lien, § 282, p 894, n 55

Artisans, statutory enumeration, § 86

Ashes, storage or removal, lien as allowable, § 32

Assessments, priority of lien over mechanic's lien, § 207, p 779, n 97

INDEX TO MECHANICS' LIENS

Assignment, §§ 216-221, pp 787-792

Building contract,

Filing and enforcement of lien in name of assignee, § 218

Novation, § 217

Collateral security, inchoate lien, § 217

Name in which enforced, § 218

Completion of contract, duty of assignee, § 221

Contract for improvements, § 85

Right of assignee to lien, § 90

Debt,

Assignee as party defendant in action to enforce lien, § 284, p 907

Due contractor, priority of right of assignee, § 211

Enforcement of lien,

Assignee, §§ 221, 278

Inchoate lien, §§ 216, 217

Party defendant in action to enforce, § 284, p 901, p 906, n 37, p 907

Pleading in proceedings to enforce, § 293

Evidence in action to enforce, § 310, p 976, n 95

Interest by contractor, parties defendant in action to enforce, § 284, p 910

Lease, assignor as necessary party to suit to enforce, § 294, p 902, n 64

Name in which enforced, §§ 218, 220

Redemption from sale in proceedings to enforce, rights of assignee, § 347, p 1032

Equitable assignment, § 219, p 790, n 48

Estoppel of assignor to assert lien, effect, § 221

Evidence in action to enforce lien, § 310, p 976, n 95

Funds due from contractor, priority of assignee over mechanics' lien, § 211

Inchoate lien, post

Interest by contractor, parties defendant in action to enforce lien, § 284, p 910

Laborers, assignee's right of action on bond of contractor, § 262, p 856, n 73

Lease,

Assignor as necessary party to suit to enforce lien, § 294, p 902, n 64

Lien as attaching to interest of assignee, § 17

Priority of mechanics' lien claimant, § 210

Lien claim for wages, priority over other lien claimants, § 198, p 749, n 37

Materialmen, assignee's right of action on bond of contractor, § 262, p 856, n 73

Mortgage,

Assignee as party defendant in action to enforce lien, § 284, p. 906, n. 37, p. 907

Intervention by assignee in action to enforce lien, § 285

Notice of pendency of action to enforce lien to assignee, § 289, n 15

Priority of mortgage in hands of assignee, over mechanic's lien, § 200, p 753, n 71

Note taken by contractor for amount due, filing notice of lien after, § 217

Parties to suit to enforce lien, assignee as party defendant, § 284, p 901, p 906, n 37, p 907

Payment by owner to assignor in good faith after, § 221

Assignment—Continued,

Perfected lien,

Name in which enforced, §§ 218, 220

Right to assign, § 219

Security, § 219, p 700, n 40

Pleadings in proceedings to enforce lien by assignee, § 293

Principal contractor's assignment, § 85

Priority of assignee of contractor over mechanics' lien, § 211

Property capable of, as subject to lien, § 15

Redemption from sale in proceedings to enforce lien, rights of assignee, § 347, p 1032

Rights of assignee, § 221

Contract for improvement, right to lien, § 90

Security,

Name in which enforced, § 220

Perfected lien, § 219, n 40

Simulated lien on homestead, enforcement by assignee, § 221

Undertaking for payment of judgment as affecting right to assign, § 219, p 700, n. 40

Waiver of right by assignee prior to, effect of, § 221

Writing as essential, § 219

Assignment for benefit of creditors,

Enforcement of lien,

Evidence of right to sue in action to enforce, § 309, p 969

Right of assignee for benefit of creditor, § 278

Owner, description in claim or statement of lien, § 102, p 691

Associations, acquisition of lien of property by member of, § 7

Assumed name, service of process on party under assumed name in action to enforce, § 286, p 913, n 61

Assumpsit, enforcement of lien, § 203, p. 870

Assumption of debt, parties to suit to enforce lien, § 284, p 902, n 69

Attachment,

Conveyance of premises after attachment of lien, § 243, p 815

Enforcement of lien, § 287

Foreclosure of lien by attachment followed by judgment and execution, § 263, p. 869

Subcontractor's remedy, § 263, p 869, n 17

Suit, filing, affecting necessity for filing claim or statement, § 131, p 642, n 54

Waiver of lien by issuance, § 225

Attestation of notice to owner of intent to claim lien, § 127

Attorneys,

Claim or statement of lien,

Signature, § 166

Verification, § 167, p 709

Corporation, notice to owner of intent to claim lien, § 124, p 630, n 37

Notice of intent to claim lien,

Service on owner, § 124, p 629

Signature, § 127

Attorney's fees,

Amount secured by lien, § 174, p 722

Bond of contractor, recovery against surety, § 201

INDEX TO MECHANICS' LIENS

Attorney's fees—Continued,

- Bond to cover, deposit in court to secure discharge of lien, § 235
- Enforcement, § 353, pp. 1037-1040
- Extent of priority of lien, § 205, p 772
- Judgment or decree,
 - Allowance, § 319, p 1007
 - Personal judgment, failure to establish lien, § 329
- Payment to subcontractors, etc., set off against contractor, § 252
- Proceedings to enforce lien, § 350
- Retention of contract price or part thereof until payment of claims, actions to enforce contract, § 255
- Auditors, reference in action to enforce lien, § 312
- Authentication,
 - Contract creating lien, § 81
 - Signature to verification of claim or statement of lien, § 167, p. 713
- Bad faith,
 - Evidence in action to enforce lien, § 309, p 975, § 310, p 987
 - Question of fact in action to enforce lien, § 314, p 994
- Bankruptcy,
 - Materials furnished, lien for as affected, § 43
 - Owner, description in claim or statement of lien, § 162, p 691
 - Time for giving notice to owner of intent to claim lien, § 125
- Bathubs, lien as allowable with respect to, § 27
- Beneficial deviation, deduction in action to enforce lien for failure to construct according to contract, § 277, p 885, n 42
- Benefits, improvements, benefits to owner as entitling claimant to lien, § 57, p 547
- Bill,
 - Declaration, bill, petition or complaint, generally, post
 - Evidence as to whom credit extended in action to enforce lien, § 309, p 970
- Bill of exchange by contractor on owner, equitable assignment affecting priority of claim, § 211
- Bill of particulars,
 - Pleading in action to enforce lien, filing with, § 294, p 933
 - Reference to in claim or statement of lien as to services or materials furnished, § 165, p 700
- Blank form, contract prepared on, construction, § 83
- Block of buildings, application and coverage of lien, § 189
- Blocks, description of property in claim or statement of lien, § 161, p 687
- Board, lien as allowable, § 48
- Bona fide purchasers,
 - Amendment of claim or statement of lien affecting right, § 170, p 717
 - Failure to file notice or claim of lien within time, § 139, p 649
 - Filing of statement as necessary to preserve lien against, § 131, p 642
 - Loss pending, notice in action to enforce, failure to file, § 289, p 918, n. 30

Bona fide purchasers—Continued,

- Mortgage securing advances before and after accrual of mechanic's lien, priority, § 205, p 774
- Rights of lienholder as against, § 243, p 817
- Bonds or undertakings,
 - See, also, Security, generally, post
- Action on,
 - Bond to prevent or discharge lien, § 239
 - Contractor's bond, § 262
- Assignment of lien, undertaking for payment of judgment as affecting right, § 219, p 790, n 40
- Attorney's fees, filing to cover on deposit in court to secure discharge of lien, § 233
- Contractors' bonds or undertakings, post
- Costs, filing bond to cover on deposit in court to secure discharge of lien, § 235
- Delivery of construction notes, release of surety as destroying lien, § 241
- Discharge of lien
 - Prevention or discharge of lien, generally, post this head
- Estoppel,
 - Bond for payment of claims, estoppel to deny mistake, § 257
 - Defense in nature of estoppel in action on contractor's bond, § 262, p 865
 - Deny validity of bond to prevent or discharge lien, § 236
 - Parties to indemnity bond, § 231
- Indemnity against loss or damage in general, §§ 256-262
- Insufficiency of bond, evidence in action to enforce lien, § 310, p 976, n 95
- Limitation of actions,
 - Contractor's bond, action on, § 262, p 862
 - Enforcement of lien, as inapplicable on discharge of lien by bond, § 282, p 892
- Parties,
 - Action on contractor's bond, § 262, p. 863
 - Contractors' bonds, § 257
 - Defendant in action to enforce lien, bondsmen, § 284, p 908, n 81
 - Estoppel, parties to indemnity bond, § 231
- Payment of claim, §§ 256-262, pp 838-838
 - Action on, § 262, pp 854-868
 - Amount, § 257
 - Claims covered, § 259, p 847
 - Conditions, § 257
 - Conditions precedent to action on, § 262, p. 855
 - Consideration, § 257
 - Construction, § 258
 - Discharge of surety, § 259, p 848
 - Dissolution of contracting firm, liability as affected, § 259, p 848
 - Effect, § 258
 - Estoppel to deny mistake, § 257
 - Execution, § 257
 - Failure to exact, § 256
 - Filing or recording, § 257
 - Law governing, § 258
 - Liabilities on, § 259, pp 845-851
 - Parties, § 257
 - Release of sureties, § 259
 - Requisites and validity, § 257
 - Retroactive construction, § 258

INDEX TO MECHANICS' LIENS

Bonds or undertakings—Continued,
Payment of claim—Continued,
 Right of action on, § 262, p 854
 Voluntary payments by owner as covered, § 259, p 847
Performance of contract, §§ 256-262
 Validity of statute requiring, § 3, p. 497, n 89
Prevention or discharge of lien, §§ 232-239, pp 806-812
 Action on, § 239
 Amendment to lien claim as affecting liability of surety, § 238
 Amount, § 236
 Approval, § 236
 Attorney's fees, filing to cover on deposit in court to secure discharge of lien, § 233
 Cancellation, § 238
 Condition, § 236
 Condition precedent to action on, § 239
 Consideration, § 230
 Costs, filing to cover on deposit in court to secure discharge of lien, § 235
 Effect, § 237
 Actions to foreclose lien, § 263, p 808, n 12
 Estoppel to deny validity, § 236
 Evidence in actions on, § 239
 Filing, § 236
 Form, § 236
 Further or other security, § 232
 Judgment or decree,
 Action on bond or undertaking, § 239
 Against surety, § 319, p 1006
 Justification on approval of surety, § 236
 Liability on, § 239
 Limitation of actions to enforce lien, § 282, pp 801, 802
 Persons entitled to give, § 234
 Pleading in action on, § 239
 Requisites and validity, § 230
 Statutory provisions, § 232
 Substitution of security, § 237
 Time for giving, § 235
Sale of property, stay by giving, § 340
Set-off of judgment on bond against lien, § 276
Waiver of lien, reliance of bondholders on, § 228
Bonuses, deduction in determining priority of deed of trust, § 205, p 771, n 3
Book accounts, evidence in action to enforce lien, § 309, p 973
Bookkeeper, verification of claim or statement of lien, § 167, p 709
Bookkeeping abbreviations, use in claim or statement of lien, § 165, p 707
Bookkeeping method, evidence of reliance on credit of property in action to enforce lien, § 310, p. 977
Books, recording of claim or statements, § 145
Boundaries of premises, appointment of commissioner to make survey in action to enforce lien, § 313
Breach of contract, damages for as included within lien, § 54
Break in transaction, time for filing claim or statement, § 144, p 663, n. 48
Breaking land for cultivation, lien as allowable for, § 30
Bridges, lien for construction of, § 21, p 516

Builders, statutory enumeration, § 86
Building and loan association, mortgage, priority as to mechanic's lien, § 201, p 761
Building committee, service of notice on owner of intent to claim lien, § 124, p 629
Buildings or structures,
 Acceptance, time for filing claim or statement, § 142, p. 655
 Additions, generally, ante
 Alterations or repairs, generally, ante
 Application and coverage of lien, §§ 185-190
 Apportionment in claim or statement of amount due as between buildings or improvements, § 155
 Block of buildings, application and coverage of lien, § 189
 Cessation of work, extension of time for filing claim or statement, § 149, p 670, n 48
 Commencement, § 22
 Priority of lien over mortgage, § 200, p 764
 Relation back of lien, § 179
 Completion, § 22
 Time for filing claim or statement, § 142, pp 652-656
 Construction or erection, § 22
 Extent of priority of mortgage in case of several buildings being constructed, § 205, p. 772
 Mistake in erection on land of another, application of lien to building alone, § 188
 Services as required to be performed in, § 34
 Several buildings under same contract, claim or statement of lien to show building for which materials furnished, § 165, p 701
 Contract affecting priority of mechanics' liens as against mortgages, § 202
 Defined, § 21, p 514
 Description,
 Claim of statement, § 161, pp 688, 689
 Pleading in proceedings to enforce lien, § 294, p. 923
 Destruction, § 24
 Attachment of lien to proceeds of insurance, § 196
 Loss of lien, § 242
 Distinct or separate from land, application of lien, § 188
 Double building, question for jury in action to enforce lien, § 314, p. 904
 Excavation, right to lien, § 25
 Existence in favor of persons furnishing materials, § 1, p 491
 Foundations, § 25
 Lessee erecting, lien on, § 65, p. 558
 Lien limited to, subsequent lien on land, § 244
 Lien separate from land, validity of statute creating, § 3, p. 498
 Loan contract, filing affecting priority of mortgage, § 204, p. 770
 Machinery, application of lien, § 190
 Mistake in erection on land of another, application of lien to building alone, § 188
 Nature, § 21, pp. 513-517

INDEX TO MECHANICS' LIENS

Buildings or structures—Continued,

- New structure, claim or statement to show nature of improvement, § 160
- Occupancy, time for filing claim or statement, § 142, p 655
 - Occupancy by owner as constructive completion of contract, § 144, p 660
- One or more structures, claim or statement of lien to show buildings where furnished or used, § 165, p 701
- Partial destruction, lien as defeated by, § 242
- Partition placed in, lien as attaching to, § 26
- Planning reconstruction, lien for services in, § 35
- Plans and specifications for, lien of architect, § 36
- Priority,
 - Lien as to building only, § 205, p 775
 - Mortgage, § 200, p 754, § 202, § 204, p 770; § 205, pp 772, 776
 - Sale, enforcement of lien, § 330
- Questions of law and fact in action to enforce lien, § 314, pp 993, 994
- Removal,
 - Loss of lien, § 242
 - Right to lien, § 24
- Right to lien,
 - Alterations, additions or repairs, § 23
 - Excavation, § 25
 - Removal, § 24
- Sale, enforcement of lien,
 - Judgment or decree, provision for sale apart from land, § 324
 - Priority, § 330
 - Title and rights of purchaser, § 345
- Same lot or parcel, filing of single claim, § 134
- Separate lots or parcels, filing of single claim, § 134
- Services as required to be performed in construction or erection of, § 34
- Services rendered, generally, post
- Several buildings,
 - Application and coverage of lien, § 189
 - As single structure, application of lien, § 189, p 743, n 42
 - Burden of proof of showing building where materials used in action to enforce lien, § 308, p 962
 - Erected under same contract, claim or statement of lien to show building for which materials furnished, § 165, p 701
 - Extent of priority of mortgage, § 205, p 772
 - Filing one or more claims or statements, § 134
 - Materials furnished for, evidence in action to enforce lien, § 300, p 970, § 310, p 970
 - Single tract of land, time for filing claim or statement, § 144, p 661
- Several structures,
 - Claim or statement of lien to show buildings where furnished or used, § 165, p 701
 - Filing of single claim against, § 134
- Single building,
 - Question for jury in action to enforce lien, § 314, p 994

Buildings or structures—Continued,

- Single building—Continued,
 - Two or more lots, application of lien, § 189
- Specification of building in claim or statement, § 160
- Statement of claim of lien in claim or statement, § 151
- Superintendence, lien for services in, § 37
 - Architects, § 36
- Two or more buildings. Several buildings, ante this head
 - Uncertainty as to owner of land on which erected, filing of one or more claims, § 133
- Burden of proof. Presumptions and burden of proof, generally, post
- Business address, setting forth in claim or statement, § 156
- Canals, application and coverage of lien, § 187
- Cancellation,
 - Claim or statement of lien, § 171
- Contract,
 - Presumptions and burden of proof in action to enforce lien, § 308, p 963
 - Time for filing of claim or statement, § 144, p 659
- Lease, application of lien to lessor's interest, § 185, p 740, n 95
- Mortgage, surrender for cancellation without limitation affecting priority, § 204, p 771
- Notice of lis pendens, § 289
- Partly performed building contract, right of contractor to lien, § 94
- Release of lien, § 246
- Undertaking to discharge lien, termination of lien by lapse of time, § 238
- Capacity to obtain lien, § 7
- Caption, claim or statement of lien, § 150
 - Name of contractor, § 164, p 698, n 17
 - Ownership, showing in, § 162, p 692
- Cauling machines, lien, § 28
- Carpenters, statutory enumeration, § 86
- Carimen, statutory enumeration, § 86
- Cash on delivery, time for filing claim or statement, § 141, p 652, n 4
- Casualty, destruction of building or improvement, § 242
- Caveat of right to lien, notice to prospective purchaser, § 139, p 640
- Cement sacks, charge for as included in lien, § 44
- Cemeteries,
 - Lien attaching to structures, § 13
- Roads within, lien as allowable with respect to, § 31
- Certainty,
 - Claim or statement, post
 - Judgment or decree, action to enforce lien, § 319, p 1004
 - Description of property, § 320
- Certificate of acknowledgment, verification of claim or statement of lien required by statute, § 167, p 711
- Certificates of architects, engineers or others,
 - Condition of payment, burden of proof as to demand and refusal in action to enforce lien, § 308, p 964
 - Condition precedent to enforcement of lien, § 208

INDEX TO MECHANICS' LIENS

Certificates of architects, engineers or others—Continued,
 Contract providing for, waiver by owner, § 95
 Delivery of materials, date from which interest computed, § 176
 Evidence in action to enforce lien, § 309, p 971, § 310, p 987
 Payment to contractor before giving, premature payment, § 251, p 831
 Pleading, actions to enforce lien, § 294, p 931
 Question of fact as to giving certificate in action to enforce lien, § 314, p 990
 Subcontractors, compliance with requirement as condition precedent to lien, § 113

Cessation of work or furnishing material,
 Completion of contract, time for filing claim or statement, § 144, p 660
 Relation back of lien, § 180
 Time for filing claim or statement, § 144, pp 650-664

Change in personnel of contracting firm, computation of time for filing notice of claim of lien, § 140

Change of interest in property,
 Application of lien, § 193
 Claim or statement of lien, description of owner, § 162, p 694
 Notice to owner of intent to claim lien, § 124, p 628
 Parties to suit to enforce lien, § 284, pp 902, 907

Change of plans,
 Relation back of lien, § 180
 Time for filing claim or statement, § 144, p 662, n 31

Charges for services and materials, showing in claim or statement of lien, § 165, pp 690-708

Charitable organizations, property subject to lien, § 12

Chattel mortgages,
 Priority as to mechanic's lien, § 201, p 759
 Waiver of lien by taking, § 227, p 802

Checks, payment, presumptions and burden of proof in action to enforce lien, § 308, p 967

Christian name unknown, description of owner in claim or statement of lien, § 162, p 693

Church buildings, § 12, § 21, p 513

Civil law, recognition of lien, § 1, p 495

Claim or statement, § 130; §§ 150-171, pp 672-721
 Abbreviations, use, § 165, p 707
 Acceptance of building, time for filing claim or statement, § 142, p 655
 Accrual of lien, § 152
 Additions, generally, ante
 Address, §§ 150, 156, § 162, p 690
 Agents,
 Signing, § 166
 Verification, § 167, pp 700, 712
 Aid to description, § 161, p 685
 Alternative description of land, § 161, p 687, n 7
 Alternative statement of ownership, § 162, p 692
 Ambiguities, § 152
 Amendment, § 170, pp 715-719
 Excessive amount claimed, § 153, p 677, n 61
 Notice of filing, § 146
 Statutory provisions, § 4, p 504
 Retroactive operation of statute authorizing, § 5
 Validity, § 3, p 498

Claim or statement—Continued,
 Amount of claim,
 Amendment as to amount, § 170, p 718
 Due or to become due, §§ 153, 154, pp 675-679
 Amount secured as limited by claim or statement, § 172
 Apportionment of amount due between buildings or improvements, § 155
 Assignment of lien as depriving claimant of right to file, § 217
 Attorneys,
 Signing, § 166
 Verification, § 167, p 709
 Authentication of signature to verification, § 167, p 713
 Bookkeeper, verification, § 167, p 700
 Bookkeeping abbreviations, use, § 165, p 707
 Business address, § 156
 Cancellation, § 171
 Caption, § 150
 Name of contractor, § 164, p 698, n 17
 Ownership, showing in, § 162, p 692
 Certainty—Definiteness and certainty, post, this heading
 Certificate of acknowledgment, verification required by statute, § 167, p 711
 Cessation of work, extension of time for filing claim or statement, § 149, p 670, n 48
 Change of ownership, description of owner, § 162, p 694
 Charge for services or materials, § 165, pp 690-708
 Classification of claims due and not due, § 152
 Commission of notary, failure to add date of expiration after signature, § 167, p 713
 Completeness, § 150
 Computation of claim, § 165, p 705
 Condition precedent to enforcement of claim, statement of persons having claims furnished to owner, § 268
 Conformity of judgment or decree in proceeding to enforce lien, § 321
 Conjunctive statement as to ownership, § 162, p 692
 Construction, § 150
 On motion to strike, § 171, p 720, n 4
 Contents, statutory provisions, § 4, p 504
 Contract, showing labor performed or material furnished under contract, § 163
 Corporations,
 Signature, § 166
 Verification, § 167, p 709
 Costs of proceedings to enforce lien, failure to furnish as depriving of right, § 350, p 1034, n 38
 Credits,
 Erroneous statement of amount due, § 153
 Itemization, § 165, p 707
 Setting forth, § 154
 Date,
 Amendment to supply omission, § 170, p 717
 Filing, §§ 140, 159
 Evidence in action to enforce lien, § 300, p 972, n 32
 One or more claims or statements, § 133
 Mistake, § 169

INDEX TO MECHANICS' LIENS

Claim or statement—Continued,

Date—Continued,

Rendering or furnishing labor or materials,
§ 165, p 702

Defects Errors and defects, post, this heading
Delinquent and certainty, § 150

Amount due or to become due, § 153

Averments to aid claim or notice void for
uncertainty as to description, § 161, p
685

Making more specific, § 170, p 717

Time of rendering or furnishing labor or
materials, § 165, p 702

Demurrer, sufficiency question in action to en-
force lien, § 205, p 949

Description of items, trade terms and abbrevia-
tions, § 165, p 707

Description of property or improvement, § 161,
pp 682-689

Amendment to correct, § 170, p 717

Application of lien to property not described,
§ 184

Extrinsic evidence in action to enforce lien,
§ 309, p 972

Jurisdiction of court, § 281

Misdescription affecting application of lien, §
185, p 736, n 31

Misdescription affecting jurisdiction of court
to enforce, § 281

Questions of fact in action to enforce lien,
§ 314, p 996

Description of services or materials furnished,
§ 165, pp 699-708

Discharge of, § 171

Discretion of court, striking off claim or state-
ment, § 171

Double house, apportionment of amount due, §
155

Employer, showing name, residence and status
of employer, § 164

Encumbrancers, setting forth names, § 157

Errors or defects, §§ 153, 169

Amendment of claim or statement, § 170,
pp 715-719

Amount due or to become due, § 153

Credits and offsets, § 154

Description of owner, § 162, p 693

Description of property, § 161, p 684

Filing second claim within time limit, § 133

Jurat to verification of claim or statement
of lien, § 167, p 712

Status of claimant, § 156

Striking off claim or statement, § 171

Time of rendering labor or furnishing ma-
terial, § 165, p 702

Evidence in action to enforce lien, § 309, p. 971;
§ 310, p. 983

Exception to, § 171, p 720, n 1

Excessive amount, presumptions and burden of
proof as to fraud or bad faith in action to
enforce lien, § 308, p 967

Exclusion of portions of land covered by lien,
§ 161, p 686

Exhibit as part, § 150

Extra charges, evidence in action to enforce lien,
§ 310, p 983

Claim or statement—Continued,

Extra labor, showing structure on which work
performed, § 165, p 701

Extras, itemization, § 165, p 705

Failure to furnish on demand, forfeiture of lien,
§ 241

Failure to include all land subject to lien, §
161, p 686

Filing and recording, §§ 131-171, pp 639-721

Abandonment of contract, time for filing
statement or claim, § 144, p 658

Acceptance of work, time for filing claim or
statement, § 144, p 660

Acceptance or occupation of building, time
for filing, § 142, p 655

Accrual or commencement of lien, § 177

Accrual or maturity of indebtedness, § 141

Addres, § 156

Alternative requirements, § 131, p 642

Amendment,

Claim prior to expiration of time for
filing, § 170, p 716

Notice of filing, § 146

Amount due, necessity of setting forth in
claim, § 153

Amount secured by lien on filing of lien be-
fore completion of contract, § 174, p 723

Assignment of inchoate lien as depriving of
right, § 217

Before or after certain date, § 140

Cessation of work or furnishing of mate-
rials, affecting time for filing, § 144, pp
656-664

Commencement of limitation of action for
enforcement of lien, § 282, p 893

Commencement of suit for enforcement of
lien making filing and recording unnec-
essary, § 131, p 642

Commencement of work or of furnishing ma-
terials affecting time for filing, § 143

Completion of contract, time for filing claim
or statement, § 142, pp 652-656, § 144,
pp 656-664

Constructive notice to purchaser, § 243, p.
817, n. 13

Contiguous lots, one or more claims or state-
ments by same claimant, § 134

Continuing contracts, time for filing claim
or statement, § 144, p 661

Continuance of lien, § 183

Contract as essential when not timely filed,
§ 52

Contract or copy, filing with claim or state-
ment, § 163

Conveyance of premises after filing, § 243,
p 816

Copy of notice of lien instead of original, §
145

Creating and fixing lien, § 131, p 639

Credits, setting forth in claim, § 154

Date, evidence in action to enforce lien, §
309, p 972, n 32

Defective record as notice, § 145, n 74

Delay in completion of work, time for filing
claim or statement, § 144, p 661

Description of property or improvements in
claim or statement, § 161, pp 682-689

INDEX TO MECHANICS' LIENS

Claim or statement—Continued,

Filing and recording—Continued,

- Doing or furnishing further work or materials, renewal or extension of period for filing, § 149, pp 668-672
- Double house, filing one or more claim or statement, § 135
- Due and payable, filing before money payable, § 141
- Entire or separate contracts, time for filing, § 144, p 661
- Estoppel of owner,
 - On failure to file claim or notice of lien within time, § 139, p 649
 - To assert lien not filed in time, presumptions and burden of proof, § 308, p 968
- Evidence in action to enforce lien, § 300, pp 971, 972
- Excuses, § 131, p 642
- Extension of period, §§ 148, 149, pp 668-672
- Fee, failure to collect filing or recording fee in advance, § 145
- Form and contents of claim or statement, §§ 150-171, pp 672-721
- Furnishing last material or labor, time for filing claim or statement, § 144, p 658
- Index, § 145
- Indorsing date and time of filing, omission by officer, § 145
- Interest, allowance from date of filing, § 170
- Joint notice or claim, § 137
- Last work performed, time for filing claim, § 144, p 658
- Loss of priority by failure to file, § 204, p 766
- Minutes of filing, failure to enter by officer, § 145
- Mistake of recording officer, § 145
- Mode and sufficiency of, § 145
- Necessity, § 131, pp 639-643
- Notice of completion, time for filing claim or statement, § 142, p 656, § 144, p 660
- Notice of filing or service of copy of claim, § 146
- Notice of intention to file distinguished from notice of filing of lien, § 146
- Notice to owner, setting forth in claim or statement that notice was given, § 158
- Object of requirement, § 131, pp 639-643
- Offsets, setting forth in claim, § 154
- One or more claims or statements by same claimant, §§ 133-136, pp 643-647
- One or more claims or statements by two or more claimants, § 137
- Particular persons, necessity as against, § 131, p 641
- Penalty for failure or refusal to discharge record, § 240
- Place for filing, § 138
- Pleading in action to enforce lien, § 204, p 935
- Premature filing, § 139, p 648
 - Substantial completion of contract, § 144, p 659
- Presumptions and burden of proof in action to enforce lien, § 308, p 964

Claim or statement—Continued,

Filing and recording—Continued,

Priority,

- Creditor, § 210
- Improper filing of mechanics' lien, § 208
- Lien for purchase price, § 208
- Loss of priority by failure to file, § 204, p 766
- Receivership, priority as to rights or claims asserted in, § 214
- Promissory note filed instead of claim or statement, § 131, p 643
- Proof of execution, § 167, p 713, n 91
- Properties of different owners, filing one or more claims or statements by same claimant, § 136
- Public authorities, additional work to meet requirements of as extending time for filing, § 149, p 672
- Receivership, priority as to rights or claims asserted in, § 214
- Retroactive effect as against mortgages previously recorded, § 200, p 753, n 75
- Refiling, § 131, p 641
- Reinscribing lien, § 131, p 641
- Renewal of period, §§ 148, 149, pp 668-672
- Repair of damage caused by other persons, extension of time for filing claim or statement, § 149, p 672
- Seal or signature of officer to verification, § 167, p 713
- Second lien within time allowed for filing, § 133
- Separate claims against two or more buildings or improvements, § 134
- Separate contracts, time for filing claim or statement, § 144, p 663
- Service of statement or notice on owner, filing before serving, § 139, p 649
- Status of claimant, § 131, p 641, § 150
 - Time for filing, § 139, p 649
- Single claim against two or more buildings or improvements, § 134
- Striking off claim or statement, § 171
- Subcontractors, § 131, p 641
- Succession in interest of owner or contractor, § 133
- Time, § 139, pp 647-651
 - Contract as essential when not timely filed, § 52
- Evidence in action to enforce lien, § 310, p 984
- Presumptions and burden of proof in action to enforce lien, § 308, p 964
- Questions of law and fact in action to enforce lien, § 314, p 995
- Recording by officer after time for filing expired, § 145
- Renewal or extension of period, §§ 148, 149, pp 668-672
- Showing in claim or statement, § 159
- Statutory provisions, § 4, p 504
- Two or more buildings or improvements, filing of one or more claims, § 134
- Withdrawal after filing, § 147
- Writing, oath of verification to claim or statement, § 167, p 711

INDEX TO MECHANICS' LIENS

Claim or statement—Continued,

- First and last item of work performed and materials furnished, showing, § 165, p 706
- Foreign affidavit, § 167, p 713
- Form and contents, §§ 150-171, pp 672-721
- Statutory provisions, § 4, p 504
- Fraud,
 - Misdescription of property, § 161, p 684
 - Nonlienable items included, § 165, p 707
 - General rules as to form and contents, § 170
 - Gross sum, contract for, itemization in claim or statement, § 165, p 705
 - Improvement, description, § 161, p 688
 - Inclusion of too much land in description, § 161, p 685
 - Indorsement on claim of date of issuance of summons, § 286, p 914, n 66
 - Information and belief, verification on, § 167, p 712
 - Information to be furnished to persons interested, § 150
 - Interest, § 153
 - Interest of person named, application of lien, § 192
 - Itemization of work done or materials furnished, § 165, p 703
 - Amendment to state items of claim, § 170, p 717, n 56
 - Joint owners, description, § 162, p 693
 - Judgment or decree in proceeding to enforce lien, conformity to, § 321
 - Jurat, § 167, p 712
 - Language of statute, § 150
 - Verification, § 167, p 711
 - Leased property,
 - Description of owner, § 162, p 695
 - Showing of ownership, § 162, p 692
 - Liberal construction, § 150
 - Lien as evidenced by, § 1, p 493
 - Location of property with respect to streets or other property, § 161, p 686
 - Loss,
 - Account not itemized, § 165, p 704
 - Failure to file or record, § 131, p. 640, n 24
 - Failure to state whether credit was given, § 152
 - Omission of credits and offsets, § 154
 - Reputed owner described in claim or statement of lien, § 162, p 693
 - Lot or tract, inclusion of too much land in description, § 161, p 685
 - Married women, description of owner, § 162, p 694
 - Material furnished, statement, § 165, pp 699-708
 - Materials and materialmen, post
 - Matters to be stated in, § 150
 - Measurement of amount of claim, § 165, p 705
 - Mistakes,
 - Amount due to become due, § 153
 - Credits and offsets, § 154
 - Date, § 169
 - Description of property, § 161, p 684
 - Filing of claim or statement on partial performance of contract, § 144, p 660
 - Name of owner, § 162, p 693
 - Name of person with whom contract made, § 164

Claim or statement—Continued,

Mistakes—Continued,

- Nonlienable items included, § 165, p 707
- Omission of credits and offsets, § 154
- Recording officer in filing or recording, § 145
- Use of materials in building, description in claim or statement, § 161, p. 680

Mortgages,

- Amendment of claim or statement of lien affecting right of mortgagee, § 170, p 717
- Description of owner, § 162, p 691
- Misdescription as to character of improvement, § 160, p 682, n 48
- Name of mortgagee, § 157
- Ownership of mortgaged property shown in, § 162, p 691
- Strictness of compliance with statutory requirements, § 150

Name,

- Amendment to strike name improperly appearing, § 70, p 718
- Application of lien to person named, § 192
- Buildings, description, § 161, p 688
- Christian name of owner unknown, description in claim or statement of lien, § 162, p 693
- Employer or contractor, showing, § 164
- Encumbrances or other lienors, setting forth, § 157
- Form of statement as to ownership, § 162, p 692
- Index of filing and recording of claims or statements, § 145
- Mortgagees, § 157
- Owner of property, § 162, pp 689, 693
- Political subdivision, description of property, § 161, p 688
- Setting forth, § 156, § 162, p 689

Nature,

- Amendment, § 170, p 716
- Improvement, § 160

New structure, claim or statement to show nature of improvement, § 160

Nonlienable items included, § 165, p 707

- Evidence in action to enforce lien, § 310, p 988

Notary, jurat, § 167, p 713

Notice,

- Actual notice by purchasers, etc., as cure of defects, § 169
- Application to amend claim or statement, § 170, p 719
- Completion of work, time for filing affected by, § 142, p 656, § 144, pp 660, 661
- Exhibit attached to notice as part of claim or statement, § 165, p. 704, n 17
- Failure to state claim is due as impairing notice, § 153
- Omission, amendment of claim or statement of lien to supply omission, § 170, p. 717
- Payments to contractor after, § 251, p 830
- Service of copy, § 146
- Setting forth that notice was given to owner, § 158

Number of days of labor performed to be shown, § 163

INDEX TO MECHANICS' LIENS

Claim or statement—Continued,

- Number of lot and block or government subdivision, description of property, § 161, p 687
- Oath, evidence in action to enforce lien, § 309, p 972
- Objection to defect or irregularities, waiver by failure to object, § 169
- Occupation of building, time for filing claim or statement, § 142, p 655, § 144, p 660
- Offset, setting forth, § 154
- Omissions, § 169
 - Amendment to supply, § 170, p 717
 - Credits and offsets, § 154
 - Dollar mark showing value or price of work or material, § 165, p 703
 - Extrinsic evidence in action to enforce lien, § 309, p. 972
 - Items of lien account, § 165, p 704
 - Jurat to verification, § 167, p 712
 - Material thing required by contract, further work or material as extending time of filing, § 149, p 671
 - Statement of ownership, § 162, p 692
 - Year in claim or statement for materials furnished, § 165, p 702
- One lot or tract, apportionment of amount due from two or more buildings or improvements, § 155
- One or more structures, claim or statement of lien to show buildings where furnished or used, § 165, p 701
- Other lienors, names of, § 157
- Other lienors, setting forth names, § 157
- Ownership of property, § 162, pp 689-695
- Partial inclusion of land subject to lien, § 161, p 686
- Particularity as to work done and material furnished, § 165, p 703
- Partnership,
 - Signature, § 166
 - Verification before partner who is notary, § 167, p 710
- Persons before whom verification made, § 167, p 710
- Persons claiming lien, necessity of showing, § 156
- Persons entitled to verify, § 709
- Pleading,
 - Action to enforce lien, amendment, § 306
 - Aid to description in claim or statement of lien, § 161, p 685
- Political subdivision, description of property, § 161, p. 688
- Preliminary statement of intention to perform labor, etc, filing, § 133
- Presumptions and burden of proof in action to enforce lien, § 308, p 964
- Price, showing price of materials furnished, § 165, pp 702, 706
- Procedure for amendment, § 170, p 718
- Proof of execution, § 168
 - Registry law requirements, § 167, p 713, n 91
- Questions of law and fact in action to enforce lien, § 314, p 995
- Recording, filing and recording, ante, this heading.

Claim or statement—Continued,

- Residence, § 156
 - Employer or contractor, § 164
- Revivor, amendment after discharge for failure to issue summons within time, § 170, p 717
- Sale of property, showing of ownership, § 162, p 691
- Same lot or parcel, filing of single claim, § 134
- Seal, signature to verification, § 167, p 713
- Separate contracts, statement of amounts due under each, § 165, p 703
- Separate lots or tracts,
 - Apportionment of amount due from two or more buildings or improvements, § 155
 - Single claim, § 134
- Separate or entire buildings, description, § 161, p 689
- Separation of items for labor and material furnished, § 165, p 703
- Separation of value of labor and material, § 165, p 707
- Service of notice on owner, striking off claim for failure to serve, § 171
- Services performed, § 165, pp 699-708
 - Evidence in action to enforce lien, § 310, pp 983, 984
- Several buildings on single tract of land, time for filing claim or statement, § 144, p 661
- Several structures, filing of single claim against, § 134, § 165, p. 701
- Signature, § 166; § 167, p 712
 - Jurat to verification, § 167, p 713
 - Verification to claim or statement of lien, § 167, p 712
- Single claim against two or more buildings or improvements, apportionment of amount due, § 155
- Status,
 - Claimant, § 131, p 641; § 139, p 640; § 156
 - Employer or contractor, § 164
- Statutory provisions, § 3, p 498, § 4, p 504, § 5
- Streets, location of property in respect of streets, § 161, p 686
- Striking off, § 171
- Striking out, motion for amendment in answer to rule to strike off, § 170, p. 716
- Subscription, § 166
- Surplusage, § 150
- Technical amendment, time for, § 170, p. 716, n 37
- Technical objections, § 150
- Time,
 - Amendment, § 170, p 716
 - Date on which each item was furnished, § 165, p 706
 - Filing and recording, ante, this heading
 - Objection to verification, § 167, p. 709
 - Rendering or furnishing labor or materials, statement, § 165, p 701
 - Statutory provisions, construction, § 4, p 504
- Trade terms, use of, § 165, p 707
- Two or more buildings on premises,
 - Description, § 161, p 689
 - Filing one or more claims or statements, § 134

INDEX TO MECHANICS' LIENS

Claim or statement—Continued,

- Uncertainty as to owner of land on which erected, filing of one or more claims, § 133
- Understatement of amount due, § 153
- Unliquidated credit, omission, § 154
- Unnecessary recitals, errors in, § 169
- Use or furnishing for use, necessity of statement, § 165, p 701
- Vacation, § 171
- Value, showing value of,
 - Items furnished, § 165, p 706
 - Labor performed or materials furnished, § 165, p 702
- Variance, pleading in action to enforce lien, § 307, p 957
- Venue, statement in jurat, § 167, p 713
- Verification, § 167, pp 709-713
 - Affidavit deemed part of claim or statement, § 150
 - Amendment, § 170, p 718
 - Pleading in action to enforce lien, § 204, p 935
 - Signature by affiant, § 166, § 167, p 712
 - Waiver of defects or irregularities, § 169
 - Willful and intentional overstatement of amount due, § 153
 - Withdrawal after filing, § 147
- Classes entitled to lien, § 86
 - Money due contractor, § 115
 - Pleading, action to enforce lien, § 206
- Clean hands doctrine, enforcement of lien, § 204, n 55
- Clerical error, verification of claim or statement of lien, § 167, p 711
- Clerks,
 - Laborer, term as including, § 88
 - Service on owner of intent to claim lien, § 124, p 629
- Clerks of courts,
 - Filing of notice or claim, § 138
 - Service of notice to owner of intent to claim lien by filing in clerk's office, § 128
- Cloud on title,
 - Enforcement of lien, judgment or decree, § 335
 - Injunction against foreclosure sale to prevent, § 271
- Coal, generation of power for operation of machinery used in construction or improvement work, § 44
- Cofferdams, materials entering into, § 44
- Coke ovens, lien on, § 21, p 517
- Collateral attack, judgment or decree, enforcement of lien, § 334
- Collateral security Security, generally, post
- College buildings, lien on, § 12
- Collusion,
 - Delivery to revive lien lost by failure to give notice to owner within specified time, § 125
 - Judgment or decree enforcing lien, collateral attack on ground of, § 334
 - Payments to contractor,
 - Lien of others as affected, § 251, p 832
 - Presumptions and burden of proof in action to enforce lien, § 308, p 966
- Commencement of action to enforce liens, §§ 177-182, pp 730-734
 - Accrual or commencement of lien, § 177

Commencement of action to enforce liens—Continued,

- Conveyance of premises before or after, § 243, p 816
- Date of attachment as determining time for, § 287, p 916, n 90
- Filing of claim unnecessary after commencement, § 131, p 642
- Interest allowed from time of commencement, § 176
- Issuance of summons, § 286, p 914, n 68
- Loss of priority by failure to commence in time, § 204, p 707
- Notice to owner of intent to claim lien dispensing with by commencing, § 121, p 627
- Preservation of lien, § 183
- Revival or continuance of lien, § 183
- Commencement of work or furnishing of material,
 - Commencement of lien, § 179, p 731, n 53
 - Commencement of limitations for action to enforce lien, § 282, p 893
 - Priority of lien over mortgage, § 200, p 754
 - Relation back of lien, § 179
 - Right to lien, § 22
 - Time,
 - Filing claim or statement, § 143
 - Notice to owner of intent to claim lien, § 125
- Commission,
 - Lien as allowable for, § 40
 - Notary, failure to add date of expiration after signature of notary to claim or statement of lien, § 107, p 713
- Common enterprise, mortgage given to complete building, priority of lien and mortgage, § 201, p 760
- Common law, lien as in derogation of, § 1, p 404
- Community interest, description of owner in claim or statement of lien, § 162, p 694
- Community property,
 - Material furnished for, judgment against husband, § 331, p 1018
 - Parties defendant in suit to enforce lien, § 284, pp 904, 910, n 2
 - Power to subject to lien for improvement, § 63, p 553
- Compelling enforcement, § 270
- Compensation, security for to persons contributing labor or material, § 3, p 406
- Complaint Declaration, bill, petition or complaint, generally, post
- Completion of work or contract,
 - Assignment of lien, duty of assignee, § 221
 - Commencement of period within which action to enforce lien must be instituted, § 282, p 894
- Contradictory findings in action to enforce lien, § 316, p 1001
- Declarations of owner as evidence of estoppel in action to enforce lien, § 309, p 975
- Deductions for, evidence in action to enforce lien, § 309, p 974
- Delay affecting time for filing claim or statement, § 144, p 661
- Delivery of materials after, lien as allowable, § 43, p 534, n 87

INDEX TO MECHANICS' LIENS

Completion of work or contract—Continued,

- Evidence in action to enforce lien, § 309, p 973, § 310, p 983
- Deductions for completion, § 310, p 987
- Indebtedness of owner to contractor, § 310, p 986
- Filing of claim within time, presumptions and burden of proof, § 308, p 964
- Pleading, action to enforce lien, § 294, p 930
- Presumptions and burden of proof as to deductions for in action to enforce lien, § 308, p 966
- Separate contract, time for filing claim or statement, § 144, p 604
- Surety on contractor's bond, liability of, § 260
- Time,
 - Filing claim or statement, § 144, p 656-664
 - Notice to owner of intent to claim lien, § 125
- Compromise and settlement General settlement, generally, post
- Compulsory order of reference, enforcement of lien, § 312
- Concealment, estoppel as to priority against mortgagee, § 204, p 760
- Conclusiveness,
 - Findings in action to enforce lien, § 316, p 1001
 - Judgment or decree enforcing lien, § 334
- Concrete forms or molds, materials furnished and used in making, § 44
- Concurrent remedies for enforcement, § 266
- Conditional consent of owner, § 73, p 579
- Conditional sales,
 - Priority between conditional seller and lienor, presumptions and burden of proof in action to enforce lien, § 308, p 968, n 73
 - Property sold under as subject to lien, § 15
 - Seller's right to lien, § 89, p 600, n 75
- Conditions, bond given to discharge lien, § 236
- Conditions precedent,
 - Enforcement of lien, § 268
 - Judgment in action to enforce lien, entry of, § 332
- Confession of judgment, proceeding to enforce lien, § 318
- Confirmation, sale in proceeding to enforce lien, § 342
- Conflict of laws, § 2
 - Bond of contractor, § 258
 - Right of action on, § 262, p 860
 - Enforcement of lien, § 263, p 870
- Consent of defendant to amendment of complaint obviating necessity of amending claim or statement of lien, § 170, p 717
- Consent of owners, §§ 52-85, pp 541-597
 - Acquiescence as sufficient to establish, § 73, p 578
 - After-acquired title, § 57, p 545
 - Amount of claim, § 52
 - Burden of proof in action to enforce lien, § 308, pp 962, 963
 - Claim or statement of lien to show, § 163
 - Conditional consent, § 73, p 579
 - Contract as essential in respect of improvement made with, § 52
 - Cotenant, § 69
 - Denial of, answer in action to enforce lien, § 301, p 941
 - Effect, §§ 52-55, pp 541-544

Consent of owners—Continued,

- Equitable owner, § 70
 - Presumptions and burden of proof in action to enforce lien, § 308, p 963
- Establishment of lien, § 57, pp 545-548
- Estate or interest required, § 57, p 545
- Estoppel, § 57, p 548
 - Failure to give notice of nonresponsibility, § 84, p 591
- Evidence in action to enforce lien, § 309, p 970; § 310, p 979
 - Presumptions and burden of proof, § 308, p 963
- Form, § 73, pp 577-580
- Homestead, § 73, p 579
- Husband or wife, § 63, pp 552-557
- Implied consent, § 73, p 578
- Infants, § 64
- Knowledge of improvement, § 73, p 578
 - Notice of nonresponsibility, § 84, p 593
- Lease provisions, compliance with, § 65, p 566
- Lessee making improvements, notice by owner of nonresponsibility, § 84, p 592
- Lessor, § 65, p 559
- Meeting of minds, § 73, p 578
- Mortgagees, § 68
- Necessity, §§ 52-55, pp 541-544
- Notice of nonresponsibility, § 84, pp 590-596
- Personal liability, § 52
- Persons authorized to consent, §§ 56-72, pp 544-576
- Pleading, proceedings to enforce lien, § 204, p 926
 - Denial of, § 301, p 941
- Presumptions and burden of proof in action to enforce lien, § 308, pp 962, 963
 - Failure to give notice of nonresponsibility, § 84, p 591
- Qualified consent, § 73, p 579
- Question of fact in action to enforce lien, § 314, p 994
- Request, § 73, p 579
- Requisites and sufficiency, § 73, pp 577-580
- Simple or dry trust, § 70
- Statutory notice of nonresponsibility, § 84, pp 590-596
- Statutory restriction, § 56
- Trespasser, acquisition of lien, § 57, p 545, n. 55
- Vendor, § 71, p 560
 - Improvements by vendee, § 71, p 574
- Waiver, lease provisions, § 65, p 566
- Writing, § 75
 - Notice by owner of nonresponsibility, § 84, p 594

Consideration,

- Bond by owner to dissolve lien, seal as importing, § 236
- Bond of contractor, § 257
 - Pleading want of as defense, § 262, p 865
- Failure of consideration affecting priority of mechanic's lien and mortgage, § 203, p 764, n 10
- Mortgage failing to state true consideration, priority as to mechanic's lien, § 201, p 759, n 35
- Personal liability for lien, § 263, p. 871, n. 47
- Release of lien, § 246

INDEX TO MECHANICS' LIENS

Consideration—Continued,

Waiver, § 223

Right to priority of mechanics' liens as to mortgage, § 204, p 765, n 21

Consolidation, of actions to enforce lien, § 272

Construction of pleading, § 293

Costs, § 351

Issues, § 307, p 955

Consolidation of lien claims, verdict and findings in action to enforce lien, § 316, p 1000

Conspiracy to defraud contractor, evidence in action to enforce lien, § 310, p 988

Constitutional provisions, §§ 3-6, pp 495-506

Construction, § 4, p 502

Creation of lien, § 1, pp 491, 493

Extension of right to lien created by, power of legislature, § 3, p 498

Homestead,

Acquisition of lien against, § 33

Contract creating lien, § 63, p 553

Exemption from lien, § 14

Married women, contract for improvement as subjecting to lien, § 63, p 554

Origin in, § 1, p 493

Persons entitled to lien, § 86

Public service corporations, lien as attaching to property of, § 11

Waiver, § 222

Construction,

Contract for improvement, § 83

Stipulation against lien, § 109

Pleading, enforcement proceeding, § 293

Release of lien, § 246

Statutory provisions, § 4, pp 499-505

Construction loan, prioritizing proceeds affecting priority between mortgages and mechanics' liens, § 199, p 751, n 62

Constructive completion of building or improvement, time for filing of claim or statement, § 142, p 654

Constructive knowledge,

Lease provisions, person contracting with lessee as charged with, § 65, p 563

Notice of nonresponsibility by owner having, § 84, p 593

Constructive notice,

Claim or statement of lien, description of property, § 161, p 683, n 64

Contract, filing, § 132

Enforcement of lien, *lis pendens*, § 289

Mortgagee acquiring lien during progress of construction, § 200, p 755

Priority between mechanic's lien and other lien or encumbrance, §§ 202, 207

Purchasers, lien as affected, § 243, p 817

Withdrawal of claim or statement after filing, § 147

Constructive possession, contract creating lien, person making, § 58

Constructive service of notice to owner of intent to claim lien, § 128

Contest, enforcement of lien, persons entitled, §§ 279, 280

Lienholders, presumptions and burden of proof in action to enforce lien, § 308, p 961, n 59

Contiguous lots, filing one or more claims or statements, §§ 134, 136

Continuance of action to enforce lien, § 311

Continuance of lien, § 183

Scire facias to continue, § 288

Continuing contract or transaction,

Labor or material furnished under, time of attachment of lien, § 181

Separate contracts, time for filing claim or statement, § 144, p 663

Time for filing claim or statement, § 144, p 661

Contractors,

Abandonment of contract or work Abandonment, generally, ante

Acceptance of building by owner, time for filing claim or statement, § 142, p 656, n 52

Advances to, § 47

Surety on contractor's bond as released by, § 259, p 851

Amount due from owner, presumptions and burden of proof in action to enforce lien, § 308, p 966

Amount secured by lien as amount fixed or due under contract, § 174, pp 722-726

Assignments, generally, ante

Attorney's fees, liability for, § 353, p 1040

Balance due to, lien of subcontractors, materialmen and laborers, §§ 114-117, p 619-622

Bankruptcy, time for giving notice to owner of intent to claim lien, § 125

Bonds or undertakings Contractors' bonds or undertakings, post

Claim or statement, generally ante

Co-contractors, naming in claim or statement of lien, § 164

Completion at loss of work abandoned by subcontractor, priority of lien, § 198, p 751

Completion of work by owner, right to lien, § 96

Conspiracy to defraud contractor, evidence in action to enforce lien, § 310, p 988

Contest of enforcement of lien of subcontractor, § 280

Cross-complaint in action to enforce lien, § 302

Day labor, term as including, § 90

Death after completion of work, right of subcontractors, etc., to lien, § 97

Default, set-off against claim of subcontractor, laborer, or materialman in enforcement of lien, § 277

Defective work, right to lien as affected, § 95

Defendant in action to enforce lien, cross bill or cross-complaint, § 302

Defined, § 93

Departure from terms of contract, right to lien, § 95

Designation of liens of, § 1, p 491

Discontinuance of work, § 96

Division of materials to another project, lien as affected, § 43

Employees of, right to lien, § 100

Estoppel to assert lien, § 229

Forfeiture of right to lien, abandonment of work, § 96

Guaranty,

Amount secured by lien on nonfulfillment of guaranty, § 175

Question for jury in action to enforce lien, § 311, p 993

Guaranty bonds Contractors' bonds or undertakings, generally, post

INDEX TO MECHANICS' LIENS

Contractors—Continued,

Incorporation during performance of contract, right to lien as affected, § 85
 Indebtedness of owner to contractor, evidence in action to enforce lien, § 300, p 974, § 310, p 986
 Indemnity bond Contractors' bonds or undertakings, ante
 Journeyman, term as including, § 90
 Judgment against, action by subcontractor to enforce lien, § 326
 Labor furnished by, right to lien, § 91
 Labor, persons furnishing as entitled to lien, § 104
 Laborer, right to lien as, § 88
 Laborers employed by, right to lien, § 97
 Lessee, term as including, § 90
 Limiting lien to, contract providing, § 81
 Materials and materialmen, post
 Mechanic, term as including, § 87
 Modification of contract as affecting right to lien, § 93
 Money due to, lien of subcontractors, materialmen, or laborers, §§ 114-117, pp 619-622
 Mortgage given to, priority of mechanic's lien, § 201, p. 760
 Notice to owner, § 121, p. 626
 Original contractor,
 Defined, § 90
 Notice of intent to claim lien, § 121, p 626, n 72, § 124, p. 628
 Process in action to enforce lien, § 286
 Time for filing claim or statement, § 139, p 650
 Part performance, amount secured by lien, § 173
 Parties,
 Action to enforce lien, § 284, p 908
 Compelling enforcement of liens, § 270
 Payment, generally, post
 Performance of contract, right to lien, as dependent on, § 95
 Personal judgment against, § 331, p. 1016
 Failure to establish lien, § 329
 Personal liability for payment of claim, § 263, p 871, 872
 Planning work, lien for services in, § 35
 Postponement of rights of principal contractors to those of other claimants, § 198, p 749
 Principal contractor defined, § 90
 Priority of liens on amount or money due contractor, § 198, p 750; § 210
 Process on in action to enforce lien, § 286
 Profit on labor and material furnished by, right to lien, § 91
 Promise to pay lien claims, personal liability, § 263, p 872, n. 50
 Purchaser, term as including, § 90
 Reduction of claim of, payment to subcontractors, etc., § 252
 Release, waiver of own lien by agreement to furnish, § 224
 Reliance on credit of, question for jury in action to enforce lien, § 314, p 993
 Rescission of contract as affecting right to lien, § 94
 Right to lien, §§ 90-96, pp 602-607

Contractors—Continued,

Several general contractors, parties defendant in enforcement of lien, § 284, p 910
 Statement or account to owner by one seeking to acquire lien, § 130
 Stipulation of contract as to lien, § 92
 Subcontractors, generally, post
 Succession in interest, filing one or more claims or statements, § 133
 Successors in interest, § 85
 Supervision, lien for services in, § 37
 Time,
 Filing claim or statement, § 139, pp 649, 650
 Notice to owner of intent to claim lien, § 125
 Performance, right to lien as affected, § 95
 Trust funds, application of payment, § 248
 Vendor, term as including, § 90
 Waiver of lien, §§ 222-224
 Work shop or yard of, lien as allowable for work done in, § 39
 Contractors' bonds or undertakings, §§ 250-262, pp 838-868
 Absolute obligation, § 258
 Accounting between owner and surety, § 262, p 855
 Action on, § 262, pp 854-868
 Advance payments by owner as releasing surety, § 259, p 851
 Alteration of building contract, discharge or release of surety, § 259, p 850
 Amount, § 257
 Answer in action on, § 262, p 865
 Arbitration provision, § 262, p 855
 Benefits limited to owner, § 262, p 859
 Burden of proof in actions on, § 262, p 867
 Change in personnel of contracting firm, liability as affected, § 259, p 848
 Claimants as necessary parties to action on, § 262, p 863
 Claims covered by, § 259, p 847
 Complaint in action on, § 262, p 865
 Conditions, § 257
 Conditions precedent to action on, § 262, p 855
 Consideration, § 257
 Pleading want of as defense, § 262, p 805
 Construction, § 258
 Cross-complaint by surety lien, §§ 270, 302
 Declaration in action on, § 262, p 865
 Defenses in action on, § 262, p 863
 Departure from contract, discharge or release of surety, § 259 p 850
 Direct payment by owner to claimant as relieving surety to extent thereof, § 259, p 851
 Discharge of surety, § 259, pp. 848, 850, 851
 Dissolution of contracting firm, liability as affected, § 259, p 848
 Duration of surety's responsibility, § 259, p 849
 Effect of, § 258
 Enforcement of liability, § 262, p 862
 Estoppel, § 262, p. 865
 Deny mistake, § 257
 Pleading, § 262, p 865
 Evidence in action on, § 262, p 866
 Execution, § 257
 Failure to exact, § 256

INDEX TO MECHANICS' LIENS

Contractors' bonds or undertakings—Continued,
 Filing or recording, § 257
 Failure to file, pleading in action to foreclose lien § 294, p 932
 Findings in action on, § 262, p 867
 Form of action on, § 262, p 862
 Function of, § 258
 Instructions to jury in actions on, § 262, p 867
 Intervention in action on, § 262, p 863
 Surety, § 285
 Issues in action on, § 262, p 866
 Joinder of parties in action on, § 262, p 863
 Judgment in action on, § 262, p 868
 Jury questions in action on, § 262, p 867
Laborers,
 Parties to action on, § 262, p 863
 Right of action on, § 262, p 855
Laches as defense in action on, § 262, p 863
Law governing, § 258
 Remedy of materialman on bond given in other state, § 263, p 870
Liabilities on, § 259, pp 845-852; § 260
 Limit of recovery, § 261
 Limitation of action, § 262, p 862
 Loss of rental by reason of delay, recovery against surety, § 261
Materials and materialmen, post
 Measure of recovery on, § 261
 New trial in action on, § 262, p 868
 Notice to surety, effect of failure to give, § 259, p 840
 Parties to action on, § 257; § 262, p 863
 Sureties, § 284, p 908
Payment to contractor by owner as releasing surety, § 259, p 850
 Pleading in action on, § 262, p 865
 Presumptions in action on, § 262, p 867
 Prevention or discharge of lien, § 234
 Priority, rights of sureties completing contract, § 215
 Privity between materialman and surety, § 262, p 859
 Proof in action on, § 262, p 866
 Release of sureties, § 259, p 848
 Requisites and validity, § 257
 Retroactive construction, § 258
 Right of action on, § 262, p 854
 Set off in action on, § 262, p 860
Subcontractors,
 Complaint in action by, § 262, p 865
 Parties to action on, § 262, p 863
 Right of action on, § 262, p 855
Surety completing work, liability of, § 260
 Time to sue on, § 262, p 862
 Trial of actions on, § 262, p 867
 Variance in action on, § 262, p 866
 Verdict in action on, § 262, p 867
 Voluntary payment by owner as covered, § 259, p 847
 Waiver of claims against owner, liability of sureties as to materialmen as affected, § 259, p 848
Contracts, §§ 52-85, pp 541-597
 Abandonment, ante
 Absence of contract, time for filing claim or statement, § 144, p 657, n. 64

Contracts—Continued,
 Acceleration clause, default under as maturing debt affecting time for filing claim of lien, § 141
 Acknowledgment, § 81; § 82, p 587
 Actual possession, person making, § 78
 Administrators, power to enter into, § 61
 After-acquired title, creation of lien, § 57, p 557
Agents,
 Creation of lien by, § 59
 Evidence in action to enforce lien, § 309, p 971
 Husband contracting for improvement on property of wife, § 63, p 555
 Amount of claim, fixing of as essential, § 78
 Amount of lien as limited by price fixed in contract, § 174, p 722
 Architects, lien for services under, § 36
Assignment, § 85
 Filing and enforcement of lien in name of assignee, § 218
 Novation, § 217
 Right of assignee to lien, § 90
Assumpsit on contract for enforcement of lien, § 263, p 870
 Attachment of copy to notice to owner of intent to claim lien, § 126, p 635
 Authentication, § 81
 Blank form, construction of contract prepared on, § 83
 Bond of contractor, construction in connection with, § 258
 Breach of, damages for as included within lien, § 54
Cancellation,
 Presumptions and burden of proof in action to enforce lien, § 308, p 963
 Time for filing claim or statement, § 144, p 659
 Capacity of owner, § 56
 Cestus que trust, § 70
Claim or statement of lien,
 Date on which each particular item was furnished, showing, § 165, p 706
 Necessity of filing and recording where contract not recorded, § 131, p 641
 Showing labor performed or material furnished under contract, § 163
Community property, § 63, p 553
Completion of contract Completion of work or contract, ante
Consent of owner, contracts made with, § 52
Construction, § 83
 Stipulation against lien, § 109
Constructive possession, person making, § 58
Continuance of lien on relation back to date of contract, § 183
Continuing contract,
 Extent of priority of lien, § 205, p 771
 Labor or material furnished under, time of commencement of lien, § 181
 Time for filing claim or statement, § 144, p 661
Corporations, power to enter into, § 60
Cost of improvements, lease provisions, § 65, p 564
Cost plus contracts, post

INDEX TO MECHANICS' LIENS

Contracts—Continued,

Creation of lien by, § 1, p 495
 Damages for breach, § 54
 Death of owner before record, § 82, p 589
 Defined, § 144, p 659, n 82
 Delay in performance, evidence in action to enforce lien, § 309, p 975
 Denial of, answer in action to enforce lien, § 301, p 941
 Description of improvement, labor and materials, § 77
 Description of land, § 76
 Dissolution of corporation, contract after, § 60
 Dry trust, equitable owner of property, § 70
 Duplicate, filing or recording, § 82, p 587
 Effect of, §§ 52-55, pp 541-544
 Entire and separate contracts, time for filing claims or statements, § 144, p 661
 Entire contract for improvements on separate buildings, application of lien, § 189
 Equitable title, creation of lien by contract with owner of, § 57, p 547
 Estate or interest required, § 57, p 545
 Estoppel,
 Agency, § 59
 Creation of lien by, § 57, p 548
 Evidence in action to enforce lien, § 309, pp 970, 971, 973
 Executors, power to enter into, § 61
 Exhaustion of power of owner to enter into, § 56
 Extras as included in, § 53
 Failure to file or record, effect of, § 82, p 589
 Filing, § 82, pp 586-589; §§ 107, 132
 Copy with claim or statement of lien, § 163
 Failure to file, § 85
 Lien before completion of contract, amount secured, § 174, p 723
 With statement or claim of lien, § 163
 Foreign state, contract made in, § 74
 Form, § 73, p 576
 General agency, § 59
 Gross sum, itemization in claim or statement of lien, § 165, p 705
 Guaranty,
 Amount secured by lien of subcontractors or others, § 174, p 724
 Parties in action to enforce lien, § 284, p 908, n 81
 Guardians, power to enter into, § 61
 Heirs, power to enter into, § 62
 Homestead, post
 Husband and wife, post
 Identification of property, § 76
 Implied agency, § 59
 Improper filing, effect of, § 82, p 588
 Inclusion of nonlienable items, effect of, § 80
 Independent agreements between lien claimants and mortgagees affecting priority, § 203
 Infants, power to contract, § 64
 Inquiry as to ownership, duty in respect of, § 57, p 547
 Installment payment, § 79
 Intention of parties, construction according to, § 83
 Interest rate fixed by, amount secured by lien, § 176

Contracts—Continued,

Joint contracts,
 Application of lien to several lots or buildings, § 189, p 742, n 30
 Claim or statement of lien, setting forth status of joint contractors, § 156, p 680, n 23
 Creation of lien, § 73, p 577
 Person owning two or more lots in severalty, § 57, p 546
 Pleading, proceedings to enforce lien, § 294, p 927
 Joint owners, § 69
 Judicial sale, purchaser as having ownership supporting lien under, § 72
 Knowledge on part of owner, § 73, p 577
 Lessors and lessees, § 65, pp 557-566
 Evidence in action to enforce lien, § 309, p 971
 Notice by owner of nonresponsibility, § 84, p 592
 Licensees, § 66
 Life tenants, § 67
 Machinery, time for filing claim or statement, § 144, p 660
 Married women Husband and wife, post
 Materials,
 Lien as created by contract for, § 42
 Time for filing claim or statement, § 144, p 660
 Memorandum, filing or recording, § 82, p 587
 Modification, right of contractor to lien as affected, § 93
 Mortgagors and mortgagees, subjecting interest to lien, § 68
 Nature and terms, evidence in action to enforce lien, § 309, p 970
 Nature of improvements, lease provision, § 65, p 563
 Necessity, §§ 52-55, pp 541-544
 Nonlienable items, effect of inclusion, § 80
 Notice,
 Filing of, § 82, p 588
 Ownership, § 57, p 547
 Obligation of parties, statement in claim or statement of lien, § 163
 Occupant of lien, creation of lien by, § 59
 Ownership, right to make as dependent on, § 57, pp 545-549
 Ownership of improvements, lease provisions, § 65, p 563
 Part owner, § 69
 Part performance,
 Amount secured by lien, § 175
 Presumptions and burden of proof in action to enforce lien, § 308, p 963, n 5
 Parties to contract as parties defendant in action to enforce lien, § 284, p 908
 Partnership property, § 69
 Payment,
 Amount secured by lien of subcontractors and others, § 174, p 724
 Protection of owner, § 255
 Time or method as affecting, § 79
 Performance,
 Bond conditioned on, §§ 256-262, pp 838-868
 Claim or statement of lien to show, § 163

INDEX TO MECHANICS' LIENS

Contracts—Continued,

Performance—Continued,

- Default, rights of subcontractors, workmen, or materialmen, as affected, § 112
- Evidence in action to enforce lien, § 309, p 971; § 310, p 982
- Further work or materials as extending time for filing claim or statement, § 149, p 670
- Pleading, actions to enforce lien, § 294, p 930
 - Amendment, § 306
 - General denial, § 301, p 943
 - Variance, § 307, p 955
- Presumptions and burden of proof in action to enforce lien, § 308, pp 963, 966
- Question of fact in action to enforce lien, § 314, p 995
- Right of contractor to lien as dependent on, § 95
- Subcontractors, lien as dependent on, § 113
- Persons entitled, §§ 56–72, pp 544–576
- Place of filing or recording, § 82, p 587
- Place of making, § 74
- Plans and specifications, filing of, § 82, p 588
- Pleading, proceedings to enforce lien, § 294, p 926
 - Denial of, § 301, p 941
- Possession as sufficient to subject realty to lien, § 58
- Presumptions and burden of proof in action to enforce lien, § 308, p 962
- Principal contractor, limiting lien to, § 81
- Priority of lien as against mortgages affected by building contract, § 202
- Privity between owner and claimant, § 73, p 580
- Promoters of corporation, power to enter into, § 60
- Provisions against lien, § 52, § 65, p 565
- Public property, subjecting to lien by, § 10
- Purchasers in possession, § 71, p 570
- Quantum meruit, lien for, § 78
- Ratification, § 52
 - Failure of owner to give notice of nonresponsibility, § 84, p 591
 - Unauthorized contract, § 59
- Receivers, power to enter into, § 61
- Recording, § 82, pp 586–589, § 132
 - Evidence in action to enforce lien of contract void because not recorded, § 300, p 973
 - Failure to record affecting personal liability to subcontractor, § 203, p 871, n 37
 - Priority of lien over mortgages, § 202; § 204, p 767
 - Relation back of lien for time when contract recorded, § 178
 - Time for filing claim or statement affected by absence of recordation, § 144, p 657, n. 64
- Relation back of lien to time when contract made or recorded, § 178
- Reputed owner, creation of lien by, § 57, p 545, n 52
- Request to furnish materials, § 73, p. 577
- Request to make improvement, § 52
- Requisites, § 73, p 576
- Rescission as affecting right of contractor to lien, § 94

Contracts—Continued,

- Revision of improvements, lease provisions, § 65, p 564
- Sale, post
- Separate contract,
 - Claim or statement of lien to state separate amounts under each, § 145, p 703
 - Presumptions and burden of proof in enforcement of lien, § 308, p 965
 - Time for filing claim or statement, § 144, p 663
- Severable contract, application and coverage of lien, § 189
- Several contracts between same parties, filing one or more claims or statements, § 133
- Signature, § 81
- Simple trusts, equitable owner of property, § 70
- Single claim, improvement on separate lots or parcels under single contract, § 134
- Specifications accompanying, filing of, § 82, p 588
- Statutory restriction, § 56
- Stipulations against liens, subcontractors, materialmen, and laborers as affected, § 100
- Stipulations as to lien, right of contractor, § 92
- Subcontractors, filing or recording, § 82, p 586
- Sublessee, § 65, p 558
- Subscribers of proposed corporation, power to enter into, § 60
- Subsequent contract on failure of original contractor to complete work, § 73, p. 577
- Substantial completion, time for filing claim or statement, § 144, p 659
- Substantial performance,
 - Amount secured by lien, § 179
 - Evidence in action to enforce lien, § 310, p. 982
 - Presumptions and burden of proof in action to enforce lien, § 308, pp 963, 964
- Sufficiency, § 73, p 576
- Sureties completing contract, rights, § 215
- Tenants by entirety, land held as, § 63, p 552
- Tenants in common, § 69
- Terms,
 - Setting forth, § 79
 - Showing in claim or statement of lien, § 163
- Time,
 - Filing or recording, § 82, p 587
 - Furnishing materials as affecting limitation for enforcement of lien, § 282, p 894, n. 55
 - Making, § 74
 - Notice to owner of intent to claim lien, § 125
 - Payment or performance, § 79
 - Priority of lien over mortgage affected by contract between owner and mechanic over, § 200, p 753
- Trade-name, contractor doing business under, § 73, p 577
- Trespasser, creation of lien by, § 57, p 545, n 53
- Trustees, § 70
- Undisclosed principal, application of doctrine, § 59, p 549, n. 13
- Validity, presumptions and burden of proof in action to enforce lien, § 308, p 963
- Vendors and vendees, § 71 pp 560–573

INDEX TO MECHANICS' LIENS

- Contracts—Continued,
Widow, power to enter into, § 62
Writing, § 75
- Conversion,
Firm into corporation, filing of one or more claims or statements, § 133
Personal property into real property by filing of notice of lien, § 131, p 641
Trust funds received by contractor or subcontractor, § 249, p 826
- Conveyances Deeds and conveyances, post
Cooking apparatus, lien on, § 27
Co-owner's liability for work contracted for by another co-owner, § 263, p 871
- Copies,
Claim or statement, service on owner, § 146
Contract,
Claim or statement of lien referring to copy attached, § 163
Filing with claim or statement of lien, § 163
Notice,
Lien, filing instead of original, § 145
Owner of nonresponsibility, filing or recording, § 84, p. 596
- Corporations,
Acquisition of lien by, § 7
Claim or statement of lien,
Signature, § 166
Verification, § 167, p 709
Commencement of suit to enforce lien by stockholder insuring to benefit of corporation, § 282, p 893, n. 14
Contract creating lien, power to enter into, § 60
Conversion of firm into corporation, filing of one or more claims or statements, § 133
Dissolution, parties defendant in action to enforce lien, § 284, p 908, n. 77
Fixing lien on particular piece of property, burden of proof in action to enforce lien, § 308, p 961, n 50
Foreign corporations, setting forth principal place of business in claim or statement, § 156, p 680, n. 26
Knowledge of improvement, officers or agents, § 84, p 594
Name, description of owner in claim or statement of lien, § 162, p 693
Notice to owner of intent to claim lien, § 124, p 630
Signature, § 127
Notice to owner where lien is claimed for labor under contract with corporation, § 121, p 626
Owners of property, description by name in claim or statement of lien, § 162, p. 691
Property as subject to lien, § 9
Service on corporate owner of statement of claim of lien, § 146, p. 666, n 89
- Cost plus contracts,
Amount of lien, § 174, p 722, n 23, 24
Completion of contract affecting time for filing claim or statement, § 144, p 660
Lien of contractor, § 90
Variance, pleading common count and proof of cost plus, § 307, p 956
- Costs,
Attorney's fees, generally, ante
Bond, deposit in court to secure discharge of lien, § 235
Bond of contractor, recovery against surety, § 261
Enforcement of lien, § 350
Appeal, § 354
Consolidation of causes, § 351
Filing and recording fees, recovery as, § 352
Judgment or decree,
Allowance for, § 319, p 1006
Direction for payment out of proceeds of sale, § 324
Payment to subcontractors, etc., set off against contractor, § 252
- Cotenants,
Contracts, § 69
Notice to owner of claim of lien, § 121, p 626, n. 72
- Counsel Attorneys, ante
Counsel fees Attorney's fees, generally, ante
Counterclaim. Set-off and counterclaim, generally, post
- Counties,
Place of filing notice or claim, § 138
Process running into another county in enforcement of lien, § 286
- County clerk, place of filing notice or claim, § 138
County recorder's, verification of claim or statement of lien before, § 167, p 710, n 17
Coupon bonds secured by mortgage, priority of mortgage securing advances, § 205, p 774
Court orders. Orders of court, post
Court's own motion, dismissal of action to enforce lien, § 290, p. 918, n 38
Covenants, release from liens, contractor covenanting to furnish, § 92
- Creation of lien, § 1, p. 493
Construction of statutes, § 4, p 503
- Credit,
Evidence in action to enforce lien, § 309, pp 960, 970, § 310, p 977
Reliance on credit or property, § 46
Evidence in action to enforce lien, § 309, p 969; § 310, p 977
Presumptions and burden of proof, § 308, p 961
Questions for jury in action to enforce lien, § 314, p 993
Time for bringing action to enforce lien, evidence, § 309, p 969
Waiver of lien by stipulations in contract for, § 224
- Creditors,
Accrual or commencement of lien, § 177
Defendants in suit to enforce lien, § 284, p 904, n 15
Estoppel as against, § 229
Impleading in action to enforce lien, § 285, p 911, n 17
Interrupting work, time for filing claim or statement, § 144, p. 657, n 63
Parties to suit to enforce lien, § 284, p 902, n. 78, p. 904, n. 15

INDEX TO MECHANICS' LIENS

Creditors—Continued,

- Priority of mechanics' lien and claims of creditors, § 210
- Evidence in action to enforce lien, § 310, p 980, n 17
- Time for commencement of action for enforcement of lien, § 282, p 892
- Credits, claim or statement of lien, § 154
- Itemization of credit, § 165, p 707
- Cross bill or cross-complaint, enforcement of lien, action for, § 302
- Answer, § 303
- Commencement of suit, § 282, p 896
- Continuance of lien, § 183
- Crude material, lien as allowable for, § 41
- Cultivating, lien as allowable for, § 30
- Cumulative remedies for enforcement, § 260
- Curb ing, lien as allowable, § 31
- Curtains, theaters, lien as allowable, § 29
- Curtsey,
 - Joinder of defendants in suit to enforce lien, § 284, p 903
 - Subject to lien, § 15; § 63, p 537
- Curtilage, extension of lien to, § 186, p 737, n 39
- Custom of repairing work necessitated by others, extension of time for filing claim or statement, § 140, p. 672
- Damages,
 - Bond of contractor, limit of recovery, § 261
 - Counterclaim in action to enforce lien, § 277
 - Deductions for delay, conclusiveness of reference in action for enforcement of lien, § 312
 - Default of contractor, deduction as against claims of subcontractors, laborers, etc., § 277
 - Other persons causing, repairs as extending time for filing claim or statement, § 140, p 672
 - Owner, presumptions and burden of proof in action to enforce lien, § 308, p 906
- Dams, lien for construction of, § 21, p 516
- Accrual or commencement of lien, §§ 177-182, pp 730-734
 - Statement in claim or statement, § 152
- Amount secured as fixed by date lien attaches, § 172
- Attachment, determination of time for commencement of action to enforce lien, § 287, p. 916, n 89
- Claim or statement, ante
- Contract, necessity of showing in claim or statement of lien, § 163
- Furnishing labor and materials,
 - Amendment of claim or statement of lien to show, § 170, p 717, n 58
 - Time for filing claim or statement, § 144, p 658
- Interest, date from which computed, § 176
- Master's report, interest allowed from date, § 176
- Notice to owner,
 - Accrual or commencement of lien, § 182
 - Sufficiency of notice, § 126, p 633
- Particular items furnished, showing in claim or statement of lien, § 165, p. 703
- Dealers, statement to contractor, duty to furnish, § 130
- Death of owner,
 - Notice of intent to claim lien, § 124, p. 629

Death of owner—Continued,

- Parties to suit to enforce lien, § 284, p 902
- Subsequent to improvements as affecting right to lien, § 55
- Death of party in action to enforce lien, § 284, p 902
- Defense to action to enforce lien, § 273
- Debtor and creditor relationship, right to lien as dependent on, § 33
- Debts Indebtedness, post
- Decedent's estate,
 - Claims against, priority of mechanics' lien, § 212
 - Executors and administrators, generally, post
 - Owning property, description in claim or statement of lien, § 162, p 691
- Deceit. Fraud, generally, post
- Declaration and establishment of liens, courts of limited and inferior jurisdiction, § 281
- Declaration, bill, petition or complaint,
 - Assignment of liens, proceedings by assignee to enforce, § 293
 - Bond of contractor, action on, § 262, p 865
 - Enforcement of lien, § 264, §§ 292-299, pp. 921-939
 - Advances, averments as to, § 204, p 925, n 21
 - Agents, contracts by, § 294, p 928
 - Amendment, § 306
 - Curing defect after expiration of time for commencement of suit, § 282, p 898, n 8
 - Amount of indebtedness, allegations as to, § 294, p 931
 - Anticipating defenses, § 297
 - Bill of particulars, § 294, p 933
 - Certificate of architect, presentation, § 294, p 931
 - Claim or statement, allegation of filing, § 294, p 935
 - Completion of work, allegations as to, § 294, p 930
 - Construction, § 293
 - Contract with or consent of owner, allegations as to, § 294, p 926
 - Description of property and improvements, § 294, p 923
 - Amendment respecting, § 306
 - Variance, § 307, p 957
 - Discretion of court, nunc pro tunc filing, § 292
 - Exhibits, reference to for description of property, § 294, p 924
 - Extra work, § 294, p 925
 - Filing as commencement of action as respects limitation, § 282, p 897
 - Filing lien claim or statement, showing as to, § 294, p 935
 - Form, § 293
 - General settlement, § 293
 - Compelling enforcement of lien, § 270
 - Identification of property, § 294, p 923
 - Itemized account, § 294, p 933
 - Joinder of counts and causes, § 298
 - Joint contract, § 294, p 927
 - Knowledge, § 294, p 926
 - Lessor, contract by lessee, § 294, p 928
 - Lis pendens notice, § 294, p 937
 - Materialmen, actions by, § 294, p 926

INDEX TO MECHANICS' LIENS

Declaration, bill, petition or complaint—Continued, Enforcement of lien—Continued,

Materials furnished and purpose thereof, allegations as to, § 294, p 925
Maturity of indebtedness, allegation as to, § 294, p 931
Misjoinder of causes, § 298
Multifariousness, § 298
Necessity allegation, § 293
Necessity, § 292
Negating defenses, § 297
Nonpayment, allegations as to, § 294, p 931
Notice to owner, showing as to, § 294, p. 934
Nunc pro tunc filing, § 292
Ownership or interest, allegations as to, § 294, p 924
Particular averments, § 294, pp 923-937
Penalties, allegations as to, § 294, p 931
Performance of contract, allegations as to, § 294, p 930
Priority, showing as to, § 294, p 936
Purpose of suit as required to be shown, § 295
Reference to claim or other exhibit or description of premises, § 294, p 924
Requisites and sufficiency, § 293
Services furnished and purpose thereof, allegations as to, § 294, p 925
Setting out, § 294, p 936
Status of claimant as required to be shown, § 296
Subcontractors, actions by, § 294, p 929
Technical errors, § 293
Time of furnishing work or material, averments as to, § 294, p 930
Use of materials, averments as to, § 294, p 925
Variance, § 294, p 928
Verification, § 299
Demurrer for want of, § 305, p 949
Declaratory judgment action, preservation of lien, § 183, n 14
Decorating, right to lien as improvement to building, § 26
Decrees Judgments or decrees, generally, post
Deductions for faulty performance or cost of completion, evidence in action to enforce lien, § 300, p. 974, § 310, p 987
Deeds and conveyances,
See, also, Mortgages, generally, post
Bond of contractor, release of surety, § 259, p 840
Claim, statement, etc., as not conveyance, § 131, p 641
Construction of term with respect to priority of mechanic's lien over mortgage, § 200, p 755, n. 92
Evidence in action to enforce lien, § 310, p 978
Extent of priority, § 205, p 771, n 3
Independent agreements affecting priority, § 203
Judicial sales, lien as affected, § 244
Lien as affected, § 243, pp 815-818
Merger of estates affecting priority of lien over trust deed, § 201, p 750
Merger of lien in legal title as result of conveyance to lienor, § 245
Notice of nonresponsibility by holder of, § 84, p 593

Deeds and conveyances—Continued,

Parties defendant in suit to enforce lien, § 284, pp 905, 906
Personal judgment against grantee of owner, § 331, p 1017
Priority, § 199, § 200, p 752, § 201, p 760
Deed given after making of contract between owner and mechanic, § 200, p 753
Foreclosure affecting judgment of lien claimant, § 208
Sale in proceedings to enforce lien, § 343
Sale of land under, subsequently attaching lien as lost by, § 244
Security, description of owner in claim or statement of lien, § 162, p 693, n 17
Time of attachment affecting priority over mechanic's lien, § 200, p 758
Trustee's right to assert defenses of owner in suit to enforce lien, § 277
Trustor as owner for purpose of lien, § 70
Default,
Lienor, time for enforcement of lien, § 282, p 895
Performance of principal contract, rights of subcontractors, workmen, or materialmen as affected, § 112
Purchaser on sale of property to enforce lien, § 341
Subcontractor, completion by contractor, § 113
Default judgment or decree, enforcement of lien, § 318
Materialman against owner, evidence in action to enforce lien against mortgagee, § 309, p 971
Original contractor as party defendant, § 284, p 909, n 87
Pleading to sustain, § 284, p 907
Defects Errors or defects, post
Defendants in suit to enforce, § 284, pp 900-911
Affirmative claims of, effect of dismissal of action, § 290
Defenses,
Bond of contractor, actions on, § 262, p 863
Bond or undertaking for prevention or discharge of lien, action on, § 230
Enforcement of lien, § 273
Deficiency judgment in action to enforce lien, § 263, p 869
Personal judgment against person liable, § 330
Prayer as essential, § 322
Provision for entry of as altering character of judgment to personal, § 317
Definiteness and certainty,
Claim or statement, ante
Judgment or decree, action to enforce lien, § 319, p 1004
Ownership of property, description of claim or statement of lien, § 162, p 692
Verdict or findings in action to enforce lien, § 316, p 1000
Verification of claim or statement of lien, § 167, p 711
Definitions, § 1, pp 491-495
Any one, § 124, p 628, n 4
Buildings, § 21, p 513
Consent, § 73, p 577
Contract, § 144, p 659, n. 82
Contractor, § 90
Double house, § 155

INDEX TO MECHANICS' LIENS

Definitions—Continued,

- Furnishing materials, § 42
- Improvements, § 21, p 514
- Knowingly suffer or permit, § 73, p. 580
- Laborer, § 88
- Lot, § 186
- Material, § 44
- Materialmen, § 89, p 600
- Mechanic, § 87
- Month, § 140, n 86
- New construction, § 144, p 659, n 82
- Original contractor, § 90
- Other improvements, § 21, p. 515
- Other structure, § 21, p 514
- Person, § 7
- Personal judgment, § 328, p 1013, n 29
- Principal contractor, § 90
- Privity, § 73, p 580
- Structure, § 21, p 514
- Subcontractor, §§ 90, 98; § 121, p 625, n 60
- Delay in performance, subcontractors or materialmen, rights as affected, § 112
- Time for filing claim or statement, § 144, p 661
- Time for notice to owner of intent to claim lien, § 125
- Delivery,
 - Contractor's statement to owner as service on owner, § 130, p 638, n 6
 - Materials, post
 - Release of liens, necessity, § 246
- Delivery tickets, evidence of delivery of materials in action to enforce lien, § 309, p 970, n 2
- Demand,
 - Compelling enforcement of lien, § 270
 - Condition precedent to enforcement of lien, § 268
- Demurrer in action to enforce of lien, § 305, pp 947-950
 - Argumentative denial as sufficient against, § 301, p 941
 - Objections raised on, § 301, p 940
 - Irregularity as raised by, § 294, p 934
 - Special demurrer, § 305, p 947
- Demurrer to evidence, enforcement of lien, § 314, p 993
- Departure, performance of contract,
 - Contractor's right to lien as affected, § 95
 - Discharge or release of surety on bond of contractor, § 259, p 850
- Deposits,
 - Discharge of lien, limitation of actions to enforce lien, § 282, p 891
 - Waiver of lien by deposit of money as security, § 227, p 801
- Deposits in court,
 - Costs of proceeding to enforce, effect of, § 350
 - Discharge of lien, § 233
 - Necessity of filing lis pendens, § 289
- Depositions, striking off claim or statement of lien, § 171, p. 720, n 7
- Deputy clerk, filing claim or statement, § 145
- Description of action to foreclose, effect of misdescription, § 263, p 869, n 13
- Description of property, improvement, or materials,
 - Claim or statement, ante
 - Contract creating lien, §§ 76, 77
 - Judgment or decree, actions to enforce lien, § 320

Description of property—Continued,

- Notice to owner of intent to claim lien, § 126, p 636
- Waiver, contract providing for, § 222, p 793, n 82
- Destruction of building or improvement, § 242
 - Acquisition of lien, § 24
 - Application of lien to new building, § 187
- Destruction of lien Discharge of lien, generally, post
- Diligence in prosecution of proceedings to enforce lien, § 282, p 899
- Dismissal for want of, § 290
- Direct lien, subcontractors, laborers, or materialmen, § 105
- Direct sale to owner, necessity of notice to owner of intent to claim lien, § 121, p 626, n 71
- Directors, corporations, knowledge of improvement as knowledge of corporation, § 84, p 594
- Discharge,
 - Claim or statement of lien, § 171
 - Objections to, § 169
 - Subcontractor before completion of work, time for enforcement of lien, § 282, p 895
 - Summons not issued within time, amendment of claim by statement of lien, § 170, p. 717
 - Sureties on bond of contractor, § 259, p 848
- Discharge of lien, §§ 240-254, pp 812-836
 - See, also, Extinguishment, generally, post
 - Bonds or undertakings, ante
 - Compelling discharge of record, § 240
 - Conveyance of premises, merger of lien on legal title, § 245
 - Deposit in court, § 233
 - Necessity of filing lis pendens, § 289
 - Deposit or undertaking to discharge lien, limitation of action to enforce lien, § 282, p 891
 - Extinguishment of interest or estate to which lien attached, § 245
 - Judicial sale of property, § 244
 - Merger of interest or estate to which lien attached, § 245
 - Payment, generally, post
 - Penalty, failure or refusal, § 240
 - Pleading, proceeding to enforce, § 301, p 942
 - Reference of issue as precluding, § 312
 - Tender of amount due, § 254
 - Transfer of title, § 243, pp 815-818
 - Withdrawal of claim or statement after filing, § 147
- Discontinuance of work, question of fact in action to enforce lien, § 314
- Discount, agreement to discount as affecting amount of lien, § 174, p. 722, n 23
- Discretion of court,
 - Admission of additional evidence after motion for nonsuit in action to enforce, § 311
 - Amendment of claim or statement of lien, § 170, p 716, n 26
 - Appointment of receiver, § 291
 - Attorney's fees, allowance as part of costs, § 353, p 1038
 - Costs in proceeding to enforce, § 350; § 353, p 1038
 - Interest, allowance or disallowance, § 176
 - Interrogatories to jury to make special findings in action to enforce lien, § 316, p 998
 - Intervention in action to foreclose lien, § 285, p 912, n 32

INDEX TO MECHANICS' LIENS

Discretion of court—Continued,

- Reception of evidence in enforcement of lien, § 311
- Reinstatement of action to enforce after dismissal without prejudice, § 290
- Reopening case for further evidence in action to enforce lien, § 311
- Striking off claim or statement of lien, § 171
- Dismissal of action to enforcement of lien, § 314, p 993
 - Before hearing, § 290
 - Filing of bond after bringing of action, § 237
 - Omission of necessary parties, § 284, p 911
- Dismissal of other claims, right to adjudication of rights, § 270
- Display, notice by owner of nonresponsibility, § 84, p 505
- Dissolution of corporation, contract creating lien after, § 60
- Distinctions, § 1, p 492
- Ditches, lien as allowable in respect of, § 30
- Division of materials, lien as affected, § 43
- Docket, statement or claim not to be aided by clerk's docket, § 150
- Doors, lien as allowable with respect to, § 26
- Double houses,
 - Apportionment of amount due in claim or statement, § 155
 - Filing one or more claims or statements for improvements, § 135
- Double recovery,
 - Findings not to permit in action to enforce lien, § 316, p 1000
 - Notice of intention to claim lien to prevent, § 120, p 624, n 63
- Dower,
 - Claim or statement of lien, description of owner, § 162, p 694
 - Joinder of defendant in suit to enforce lien, § 284, p. 903
 - Subject to lien, § 63, p 557
- Draft,
 - Contractor on owner, assignment affecting priority of claim, § 211
 - Waiver of lien by taking, § 226
- Dredging, lien as allowable for, § 30
- Dry trust, contract with or consent of equitable owner, § 70
- Dual capacity, person entitled to lien in, § 86
- Due date of claim, allowance of interest from, § 176
- Duplicates,
 - Claim or statement, service, § 146, p 666, n 92
 - Contract for improvement, filing or recording of, § 82, p 587
 - Notice by owner of nonresponsibility, filing or recording, § 84, p. 596
- Duration, §§ 177-183, pp. 730-735
 - Accrual of commencement, §§ 177-182, pp 730-734
 - Cancellation of undertaking given to discharge lien on termination of, § 238
 - Change of plans, § 180
 - Commencement of building or improvements, § 179
 - Continuance of lien, § 183
 - Contract, relation back to time when contract made, § 178

Duration—Continued,

- Date of notice to owner, accrual or commencement of lien, § 182
- Expiration of lien, § 183
- Furnishing of material, attachment of lien, § 181
- Interruption of work, § 180
- Lands acquired after commencement of construction, § 177, p 731
- Performance of labor, attachment of lien, § 181
- Recording of contract, relation back to, § 178
- Retention of title by materialmen, § 177
- Revival, § 183
- Duress, bond for prevention or discharge of lien, defense, to action on, § 239
- Earthwork, railroad, structure within lien statute, § 25
- Educational organizations, property of as subject to lien, § 12
- Ejectment, purchaser at sale in proceedings to enforce lien, recovery of possession, § 344
- Electric fans, trade fixtures, § 28
- Electric light or power lines, lien as attaching to, § 21, p 516
- Electricity, fixtures, lien as allowable for, §§ 27, 28
- Employees Work and labor, generally, post
- Encumbrances,
 - Amendment joining encumbrancer after expiration of period for enforcement of lien, § 282, p 898
 - Attachment of lien to incumbered property, § 18
 - Claim or statement of lien,
 - Amendment affecting rights of encumbrancers, § 170, p 717
 - Burden of proof as to absence of prejudice, § 170, p 719
 - Filing to preserve lien against, § 131, p. 642
 - Form and contents, § 157
 - Setting forth names of encumbrancers, § 157
 - Time for filing, § 139, p 650; § 142, p 653, n. 7
 - Commencement of building or improvement affecting priority of lien over encumbrance, § 200, p. 754
 - Completion of building or improvement, time for filing of claim or statement, § 142, p 653, n 7
 - Contest of enforcement of lien by encumbrancer, § 279
 - Deeds of trust, generally, ante
 - Intervention in action to enforce lien, § 285
 - Land, application of lien to building or improvement alone, § 188
 - Lien as, § 1, p 492
 - Mortgages, generally, post
 - Parties defendant in suit to enforce lien, § 284, pp. 904, 909
 - Pendente lite, parties defendant in enforcement of lien, § 284, p 905
 - Priorities, generally, post
 - Redemption by holder of mechanic's lien, § 206
 - Stipulation of contractor to transfer property to owner free of, § 92
 - Subsequent encumbrances, presumptions and burden of proof as to priorities in action to enforce lien, § 308, p 968

INDEX TO MECHANICS' LIENS

Encumbrances—Continued,

- Time,
 - Attachment affecting priority over mechanic's lien, § 200, p 757
 - Commencement of action to enforce lien, § 282, p. 892
- Trust deeds Deeds of Trust, generally, ante
- Value of property enhanced by improvements, priority of lien, § 205, p 776
- Enforcement, §§ 263-354, pp 868-1040
- Abatement of proceeding,
 - Cancellation or vacation of notice of lis pendens, § 289
 - Death of party, § 273
- Admissibility of evidence. Evidence, generally, post
- Admissions, actions for,
 - Demurrer, § 305, p 948
 - Failure to deny, § 301, p 941
- Affidavit of defense in action for, §§ 300, 301, pp 939-944
 - Default on disregard of, § 318
 - Form and sufficiency, § 301, pp 939-944
- Affirmative claims by defendants, effect of dismissal, § 290
- Agents, parties plaintiff, § 283
- Agreement of lien claimant and property owner, § 263, p 868, n 12
- Amendment of pleading in action for, § 306
- Answer Plea or answer, post
- Anticipating defenses, pleading, § 297
- Appearance by defendant as waiver of defects in claim or notice of lien, § 169
- Application of general statute of limitation, § 282, p. 891
- Apportionment of costs, § 350
- Arbitration as condition precedent, § 268
- Assignment, ante
- Assumpsit, § 263, p 870
- Attachment, § 287
- Attorney's fees, action for, § 350; § 353, pp. 1037-1040
 - Defense of, recovery against surety on contractor's bond, § 261
- Bill for general settlement for compelling enforcement, § 270
- Bonding of liens, allowing of expense, § 276, p. 884, n 27
- Building or improvement alone, enforcement against, § 188
- Burden of proof. Presumptions and burden of proof, post
- Cancellation of lien because action not commenced within prescribed time, § 171
- Cancellation or vacation of notice of lis pendens, § 289
- Change in or transfer of title, parties to suit, § 284, p. 902
- Commencement of action to enforce liens, ante
- Community property, parties defendant, § 284, p. 904
- Compelling, § 270
- Concurrent remedy, § 266
- Conditions precedent, § 268
 - Action on bond for prevention or discharge of lien, § 239

Enforcement—Continued,

- Consolidation of action, § 272
- Construction of pleading, § 293
- Issues as affected, § 307, p 955
- Construction of statutory provisions limiting period for enforcement, § 282, p 891
- Contest, persons entitled to contest, §§ 279, 280
- Contractor, contest of lien of subcontractor, § 280
- Conveyance of property before or after commencement of action, § 243, p. 816
- Costs, § 350
 - Filing and recording fees as included, § 352
 - Recovery of surety on bond of contractor, § 261
- Counterclaim, pleading, § 301, p. 942
- Cross bill or cross-complaint in action for, § 302
- Answer to, § 303
- Commencement of suit to enforce lien, § 282, p 896
- Cumulative remedy, § 266
- Curtesy, joinder of parties defendant, § 284, p. 903
- Damages, counterclaim, § 277
- Dealings with different contracts relative to same buildings, § 272
- Death,
 - Owner as affecting right, § 55
 - Party as defense, § 273
- Declaration, bill, petition or complaint, ante
- Default in performance, set-off, § 277
- Default judgment in action for, § 318
- Defective work or material, estoppel to set up defense, § 275, p 883, n. 22
- Defenses, § 273
 - Burden of proof, § 308, p. 960
- Delay in enforcing judgment of, loss or extinguishment of lien, § 241
- Demand as condition precedent, § 268
- Demurrer in action to enforce lien, ante
- Denial, argumentative denial of lien as sufficient against, § 301, p 941
- Deposit or undertaking to discharge lien, limitation, § 282, p 891
- Description of premises and improvements, pleading, § 294, p 923
- Diligence, dismissal for want of diligence, § 290
- Discharge, special pleading, § 301, p 942
- Discontinuance, cancellation or vacation of notice of lis pendens, § 289
- Discretion of court, generally, ante
- Dismissal of action to enforce lien, ante
- Dower, joinder of parties defendant, § 284, p 903
- Equity, post
- Establishment of lien,
 - Courts of limited jurisdiction, § 281
 - Failure to establish, personal judgment in favor of claimant, § 329
- Estoppel,
 - Defense, § 275
 - Special pleading, § 301, p 942
- Evidence, post
- Exclusive remedy, § 266
- Execution on judgment in action to enforce lien, § 336
- Exhibits, reference to for description of property, § 294, p 924
- Existence of other liens as defense, § 273

INDEX TO MECHANICS' LIENS

Enforcement—Continued.

Fees for filing and recording, § 352
 Filing,
 Fees, § 352
 Prescribed statement as essential, § 131, p. 641
 Form and nature of proceedings, post
 General settlement, petition for, § 293
 Homestead, joinder of parties defendant, § 284, p. 903
 Identification of property, pleading, § 294, p. 923
 In rem proceedings, § 265
 Actual or constructive notice to parties, § 286
 Scire facias proceedings, § 288
 Injunction against sale on foreclosure, § 271
 Insurance proceeds, injunction against payment by one suing to foreclose lien, § 271
 Intervention, post
 Issues in action for, § 307, pp. 952-959
 Joinder of counts and causes, § 298
 Demurrer on ground of, § 305, p. 949
 Joinder of lien, § 272
 Joint contract, pleading in action for, § 294, p. 927
 Joint owners, dismissal on demurrer of one of owners, § 290
 Judgment or decree, post
 Jurisdiction of enforcement of lien, post
 Laches, demurrer raising objections, § 305, p. 949
 Law governing, § 263, p. 870
 Time for enforcement of lien, § 282, p. 891
 Legal or equitable proceedings, § 264
 Lessor and lessee, parties to suit, § 284, p. 902
 Liberal construction of statutes, § 4, p. 503
 Limitation of actions, post
 Misjoinder of causes, pleading, § 298
 Motions, availability in proceedings for, § 300
 Multiplicity of suits, contractor as party defendant to avoid multiplicity, § 284, p. 908
 Nature and form of proceeding. Form and nature of proceedings, post
 Nonsuit. Dismissal of action to enforce, generally, ante
 Notice of pendency of action, § 289
 Number of defenses, § 273
 Objections to lien claim, demurrer on ground of, § 305, p. 949
 Operation of statute, § 263, p. 870
 Owner, commencement of action against owner to stop running of limitations, § 282, p. 892
 Ownership, pleading in proceeding to enforce, § 294, p. 924
 Part of land, § 186
 Partial defense, pleading, § 301, p. 940
 Parties, post
 Partnership, parties,
 Defendant, § 284, p. 904
 Plaintiff, § 283
 Payment of other liens as defense, § 273
 Personal actions or proceedings in rem, § 265
 Personal judgment, generally, post
 Personal liability, § 263, p. 870
 Persons against whom action instituted to stop running of limitations, § 282, p. 892
 Persons entitled to enforce, § 278
 Pleading, post

Enforcement—Continued.

Power of legislature to prescribe means for, § 3, p. 498
 Premature commencement of action, § 282, p. 889
 Presumptions and burden of proof, post
 Prevailing party as entitled to costs, § 350
 Process, commencement of proceeding within limitation statute, § 282, p. 897
 Proof. Evidence, generally, ante
 Purpose of suit, pleading, § 295
 Quasi in rem proceedings, § 265
 Receiver, § 291
 Recording fee, § 352
 Recoupment, § 276
 Burden of proof, § 308, p. 960
 Reference, judgment on decision of referee, § 319, p. 1004
 Refusal because of claim for amount larger than is due, § 153
 Reinstatement of action, § 290
 Release of liens,
 Condition precedent, § 268
 Precluding, § 246
 Removal of improvements from premises, § 267
 Replication or reply, action for, § 304
 Restraining or staying, § 271
 Sales, post
 Scire facias to enforce lien, post
 Seizure of property, § 287
 Separate actions to enforce lien, § 272
 Set-off and counterclaim, post
 Settlement,
 Cancellation or vacation of notice of lis pendens, § 289
 General settlement, petition for, § 293
 Several owners, claim under contracts with, § 272
 Special appearance, waiver of service by publication, § 286, p. 914, n. 69
 Special demurrer, actions for, § 305, p. 947
 Special proceeding, § 263, p. 870
 Equitable action, § 264, p. 873, n. 66
 Splitting of liens, § 272
 Striking out irrelevant plea, § 301, p. 940
 Subcontractor's lien,
 Contest by contractor, § 280
 Judgment establishing lien as condition precedent, § 269
 Summary remedy, demand as condition precedent, § 268
 Summons, issuance as commencement of actions as respects limitation, § 282, p. 897
 Tender, costs as affected by, § 350
 Time, § 282, pp. 889-899
 Evidence, § 309, p. 969
 Limitation of actions, generally, post
 Motion to dismiss, § 290
 Title in defendant or debtor, want of as defense, § 274
 Trial or hearing, generally, post
 Unnecessary expenses, costs as taxable for, § 350
 Unsuccessful attempt to commence action as preservation of lien, § 282, p. 898
 Variance in action for, § 307, pp. 952-959
 Venue, § 281

INDEX TO MECHANICS' LIENS

Enforcement—Continued,

- Waiver,
 - Defense, § 275
 - Special pleading, § 301, p. 942
- Engineers,
 - Certificate as condition precedent to enforcement of lien, § 268
 - Services rendered in designing machinery or appliance for installation in buildings, § 36
- Enhancement in value Value, post
- Entire or separate contracts, time for filing claim or statement, § 144, p. 661
- Entireties, estate by Estate by entirety, post
- Entity, perfection of every materialman's lien as entity, § 119
- Equipment. Tools, machinery and equipment, generally, post
- Equitable assignment, § 219, p. 790, n. 43
- Priority of lien claimant, § 211
- Equitable character, § 1, p. 492
- Statute creating lien, § 3, p. 497
- Equitable estates or interests,
 - Contract with owner of, creation of lien, § 57, p. 547
 - Lien as attaching to, § 16
 - Purchaser, application of lien, § 194
- Equitable lien, failure of claimant to file notice, § 131, p. 640, n. 18
- Equitable owner,
 - Notice of intent to claim lien, § 124, p. 628
 - Presumptions and burden of proof as to consent to erection of building, § 308, p. 963
- Equity,
 - Allowance in, § 1, p. 494
 - Bond or undertaking for prevention of discharge of lien, recovery in, § 239
 - Determination of priority between mechanic's lien and mortgage, § 206
 - Enforcement of lien, § 203, p. 869; § 264
 - Findings of fact and conclusions of law, § 316, p. 998
 - Jurisdiction of suit, § 281, p. 888, n. 79
 - Refusal of enforcement for filing claim for larger amount than is due, § 153
 - Time for commencement, § 282, p. 893
 - Establishment of lien, time for commencement of actions, § 282, p. 893
- Erection of buildings or structures. Buildings or structures, ante
- Erroneous statements in claim or statement of lien, credits and offsets, § 154
- Errors or defects,
 - Bill of particulars, pleading in action to enforce lien, § 294, p. 934
 - Claim or statement, ante
 - Complaint in foreclosure suit, technical errors, § 293
 - Contract, construction to effectuate intention, § 83, p. 589, n. 1
 - Judgment or decree enforcing lien, amendment to correct, § 333
 - Notice to owner of intent to claim lien, § 126, p. 633; § 129
 - Waiver, § 126, p. 634
 - Order appointing receiver, § 291
 - Perfection of lien, contest by mortgagee of enforcement of lien, § 279

Errors or defects—Continued,

- Pleading, demurrer to raise objections, § 305, p. 948
- Process in action to enforce lien, waiver, § 286
- Recording officer affecting priority of lien and mortgage, § 204, p. 767
- Sale in proceedings to enforce lien, effect of, § 344
- Verification of claim or statement of lien, § 167, p. 711, 712
- Work or materials,
 - Amount secured by lien on substantial performance of contract, § 175
 - Contractor's right to lien as affected, § 95
 - Evidence in action to enforce lien, § 310, p. 982
 - Deductions for, § 309, p. 974, § 310, p. 987
 - Gratuitous work in replacing, extension of time for filing claim or statement, § 149, p. 670
 - Removal of material because of, right to lien as affected, § 43, p. 535, n. 7
 - Right of subcontractor to lien as affected, § 113
 - Surety completing work, liability of, § 260
 - Time for filing claim or statement, § 142, p. 654
 - Time for notice to owner of intent to claim lien, § 125
- Escrow, person in possession of deed as owner for purpose of lien, § 71, p. 569
- Essence of contract, time of performance as, right to lien as affected, § 95
- Establishment of lien. Enforcement, generally, ante
- Estate by entirety,
 - Accrual or commencement of lien, § 177, p. 730, n. 32
- Application of lien to building or improvement alone, § 188
- Claim or statement of lien, description of owner, § 162, p. 694
- Contract creating lien, § 63, p. 552
- Enforcement of lien against, § 263, p. 869, n. 12
- Parties defendant in suit to enforce, § 284, p. 903, n. 86
- Notice to owner of intent to claim lien, § 124, p. 629
- Filing, § 131, p. 642, n. 49
- Strict compliance with statute to impress lien, § 119, p. 623, n. 57
- Subject to lien, § 15
- Estate for years, leasehold as subject to lien, § 17
- Estates,
 - Affected by liens, §§ 184-196, pp. 735-747
 - Application and coverage of lien, §§ 191-195
 - Claim or statement of lien to set forth estate of owner, § 162, p. 695
 - Subject to lien, §§ 15-19, pp. 510-513
 - Tenancy in common, generally, post
- Estoppel, §§ 229-231, pp. 803-806
- Acts and conduct constituting, § 229
- Additional work, extension of time for filing claim or statement, § 149, p. 671
- Assignor of lien, rights of assignee as affected, § 221

INDEX TO MECHANICS' LIENS

Estoppel—Continued,

- Bar by limitations, assertion, § 282, p 891, n 10
- Bond of contractor,
 - Defense in action on, § 262, p 865
 - Failure to require, § 256
 - Mistake, § 257
 - Pleading defense of, § 262, p 865
- Bonds to prevent or discharge lien, denial of validity, § 236
- Claim or statement,
 - Asserting lien attached earlier than date stated, § 152
 - Misinformation by owner in giving name, § 162, p 694, n 40
 - Not filed within time, § 139, p 649
 - Reading of claim by owner, § 169
- Completion of building or improvement, time for filing claim or statement, § 142, p 654
- Consent of owner, § 57, p 548
- Contract creating lien, agency, § 59
- Defense to enforcement of lien, assertion, § 275
- Directions as to payment, § 230
- Equitable estoppel against contractor's offset as damages for delay, § 277, p 887, n 58
- Evidence in action to enforce lien, § 309, p 975, § 310, p 988
- Homestead, creation of lien by, § 63, p 554
- Indemnity bond, party to, § 231
- Knowledge, § 230
- Legal proceedings, bringing of, § 229
- Lessor, § 65, p 558
- Married women, pleading in action to enforce lien, § 294, p 926
- Mortgagee to claim priority, § 204, p 768
- Notice by owner of nonresponsibility, failure to give, § 84, p 591
- Notice of filing of claim or statement, estoppel of owner, § 146
- Owner,
 - Claim failure to give notice, § 122, p 687, n 84
 - Pleading in action to enforce lien, § 294, p 937
 - Set up contractor's default in action to enforce lien, § 277
- Ownership, assertion to defeat lien, § 57, p 548
- Parties defendant in action to enforce lien, § 284, p 906, n 47
- Payments to contractor, objection as to, § 251, p 829
- Permitting delivery of materials under agreement extending time for filing claim or statement, § 148
- Pleading, action to enforce lien, § 294, p 936; § 301, p 942
- Presumptions and burden of proof in action to enforce lien, § 308, p 967
- Priority of lien, § 204, pp 765-771
 - Mortgage, extent, § 205, p 772
 - Purchase price, § 208
- Purchaser, setting up lack of possession, § 71, p 571
- Question of fact in action to enforce lien, § 314, p 994
- Release, § 246
- Representations, § 230

Estoppel—Continued,

- Vendors, denial of validity of lien pursuant to contract with purchaser, § 71, p 572
- Evidence,
 - Appointment of receiver, § 291
 - Bond of contractor, actions on, § 262, p 866
 - Bond or undertaking for prevention or discharge of lien, action on, § 230
 - Burden of proof Presumptions and burden of proof, generally, post
 - Claim or statement,
 - Amendment, § 170, p 719
 - Conform to proof, § 170, p 716, n 36
 - Execution, § 168
 - Extrinsic proof to supplement deficiencies, § 150
 - Depositions, striking off claim or statement of lien, § 171, p 720, n 7
 - Discharge or cancellation of claim or statement of lien, § 171, p 719, n 91
 - Enforcement of lien, §§ 307-310, pp 952-989
 - Admissibility, § 309, pp 968-975
 - Agent, contract with, § 309, p 971
 - Agreement or consent of owner, § 309, p 970; § 310, p 979
 - Amount of claim, § 309, p 973; § 310, p 985
 - Architect's certificate as to performance, § 309, p 971
 - Book accounts and explanations thereof, § 309, p 973
 - Claim, statement or notice of lien, § 309, p 971; § 310, p 983
 - Completion of work, § 309, p 973
 - Conflicting evidence presenting questions for jury, § 314, pp 992-997
 - Conformity of verdict and findings to evidence, § 316, p 999
 - Contract with general contractor in action by subcontractor materialman, § 309, p 971
 - Deductions for faulty performance or costs of completion, § 310, p 987
 - Default, § 318
 - Delivery of material, § 309, p 970; § 310, p 978
 - Estoppel to assert lien, § 309, p 975; § 310, p 988
 - Extrinsic evidence of lien claim, statement or notice, § 309, p 972
 - Fraud and bad faith, § 309, p 975; § 310, p 987
 - Furnishing of materials, § 309, p 973
 - General rules as to admissibility applicable, § 309, p 968
 - Indebtedness of owner to contractor, § 309, p 974; § 310, p 986
 - Instructions on evidence, § 315
 - Interest subject to lien, § 309, p 969; § 310, p 977
 - Knowledge of owner and failure to object to work, § 309, p 971; § 310, p 982
 - Lessee, contract with, § 309, p 971
 - Married woman's property, contract as to, § 309, p 971
 - Payment, § 309, p 975; § 310, p 987

INDEX TO MECHANICS' LIENS

Evidence—Continued,

Enforcement of lien—Continued,

Performance of contract, § 309, p 971; § 310, p 982

Presumptions and burden of proof, post

Priorities, § 309, p 975; § 310, p 988

Property subject to lien, § 309, p 969, § 310, p 977

Quantum meruit, § 309, p 973

Questions for jury, § 314, p 992

Reception at trial, § 311

Reference to take proof, § 312

Reliance on credit of property, § 309, p 969, § 310, p 977

Reopening case to permit introduction of further evidence, § 311

Right to lien, § 310, p 976

Right to sue, § 309, p 969

Service of notice of intention to file lien, § 309, p 972

Settlement, § 309, p 973

Several buildings, material furnished for, § 310, p 979

Use of material, § 309, p 970; § 310, p 978

Waiver of lien, § 309, p 975, § 310, p 988

Weight and sufficiency, § 310, pp 975-980

Judgment or decree in proceedings to enforce lien, conformity, § 322

Marriage as evidence of agency for service on owner of intent to claim lien, § 124, p 629

Notice to owner of intent to claim lien, inability to make personal service, § 128

Personal judgment, support by as essential, § 328

Presumptions and burden of proof, generally, post
Prima facie evidence, post

Priority, determination of priority of mechanic's lien and mortgage, § 206

Reasonable value of services and materials, § 173

Use of building by owner as evidence of completion, time for filing claim or statement, § 142, p. 655

Excavations,

Commencement of work, relation back of lien, § 179

Right to lien, § 25

Exceptions to report of referee in action to enforce lien, § 312

Exclusive remedies for enforcement, § 266

Excuse for failure to give notice to owner of intent to claim lien, § 122

Execution,

Enforcement of judgment in action to enforce lien, §§ 336, 337

Foreclosure of lien by attachment followed by execution, § 203, p. 869

Sale,

Affecting lien, § 244

Enforcement of judgment in proceeding to enforce lien, § 337

Leasehold, application of lien to proceeds, § 196, p 747, n 96

Property that may be sold under as subject to lien, § 15

Executors and administrators,

Contract creating lien, power to enter into, § 61

Enforcement of lien,

Against personal representative, § 273, p 883
n 16

Waiver of limitations by personal representative, § 282, p 891, n 10

Filing of one or more claims or statements, § 133

Notice to owner of intent to claim lien, § 124, p 629

Revival of suit against personal representative for enforcement of lien, § 284, p 903

Executory contract of sale,

Description of owner in claim or statement of lien, § 162, pp 691, 695

Rescission affecting application of lien, § 194, p 746, n 94

Exhibits,

Claim or statement of lien,

Construction as part of, § 150

Referring to exhibit as to nature of claims, § 163, p 700, p 704, n 17

Enforcement of lien, reference to for description of property, § 294, p 924

Notice to owner of intent to claim lien, § 126, p. 633

Existence of lien,

Depending on statute rather than on equitable principles, § 119

Evidence in action to enforce lien, § 310, p. 976, n 93

Statutory provisions, strict construction, § 4, p. 503

Expenditures by mortgagee, priority over mechanic's lien, § 205, pp. 772, 774

Expiration of lien, § 183

Exploration, excavation for purpose of, lien as attaching, § 25

Explosives, lien as allowable for, § 44

Extension of lien, § 183, p 734, n 7

Extension of time Time, post

Extension to and coverage of land by lien, §§ 185, 186

Extent of lien, statute creating as determinative, § 4, p 504

Extinguishment, § 241

See, also, Discharge of lien, generally, ante

Acceptance of deed as payment for debt, § 247, p. 822, n 10

Compelling discharge of record on, § 240

Destruction of building or improvement, § 242

Interest or estate to which lien attached, lien as affected, § 245

Payment, § 247

Release of lien, revival or restoration, § 246

Removal of building or improvement, § 242

Tender of amount due, § 254

Transfer of title operating as, § 243, pp 815-818

Extras,

Amount secured by lien, § 174, p 722; § 175, p 725, n 74

Abandonment by contractor, § 175

Subcontractors, § 174, pp 724, 725

Arbitration of claim, condition precedent to enforcement of lien, § 268

INDEX TO MECHANICS' LIENS

Extras—Continued,

- Bond indemnifying owner against lien, right to recover for as affected, § 258
- Claim or statement of lien,
 - Itemization of extras, § 165, p 705
 - Showing of structure on which performed, § 165, p 701
 - Time for filing, § 144, p 664, n 52
 - Extension of time, § 149, pp 668-672
- Contract
 - Completion of original contract, extension of time for filing claim or statement, § 149, p 670
 - Including extras, § 53
 - Separate contracts, time for filing claim or statement, § 144, p 664, n 52
 - Pleading in action to enforce lien, averments as to, § 294, p 925
 - Priority between different liens, § 198, p 748
 - Stop notice claims as including money due for, § 114, p 619, n. 93
 - Surety on bond of contractor, setting off against claim of owner, § 261
 - Time for notice to owner of intent to claim lien, § 125
- Extraterritorial effect, statutory provisions, § 3, p 497
- Factories, lien as attaching to, § 21, p 517
- Failing circumstances of owner, necessity of filing claim or notice, § 131, p 642
- Fair grounds, swings and seats erected in, lien as attaching to, § 21, p 517
- False representations Fraud, generally, post
- Farms, extension of lien to entire farm, § 186
- Faulty performance,
 - Evidence of deductions for in action to enforce lien, § 309, p 974, § 310, p 987
 - Questions of law and fact in action to enforce lien, § 314
- Federal courts, equitable proceedings to enforce lien, § 264, p 872, n 54
- Feed, teams employed in construction or improvement, lien as allowable for, § 44
- Fee, estate in as subject to lien, § 15
- Fees,
 - Filing and recording, § 352
 - Referee in action to enforce lien, § 312
- Fences, lien for construction of, § 21, pp 514, 516
- Fictitious claims of mortgagee, priority, § 205, p 773
- Fidelity bond, priority of lien of surety as against mechanics' lien, § 207, p 779, n 1
- Fieri facias, enforcement of judgment by, § 336
- Filing,
 - Answer, actions to enforce lien, § 302
 - Bonds for prevention or discharge of lien, § 236
 - Bonds of contractors, § 257
 - Pleading failure to file in action to foreclose lien, § 294, p 932
 - Building loan contract affecting priority of mortgage, § 204, p 770
 - Claim or statement, ante
 - Contracts, ante
 - Fees, § 352
 - Lien, time for giving notice of intent to file, § 125
 - Lis pendens in action to enforce lien, § 289
 - Mortgage, priority as to mechanic's lien, § 204, p 769

Filing—Continued,

- Notice, post
- Plans and specifications, contracts for improvements, § 82, p 588
- Refiling lien, § 131, p 641
- Findings,
 - Bond of contractor, actions on, § 262, p 867
 - Enforcement of lien, § 316, pp 998-1002
 - Conformity of judgment, § 323
 - Personal judgment, support by as essential, § 328
 - Referee in action to foreclose lien, § 312
- Fire, destruction of building or improvement by, lien as affected, § 242
- Firm Partnership, generally, post
- Fixtures, §§ 26-29, pp 520-524
 - Application of lien, § 190
 - Attachment to building, lien as dependent on, § 26
 - Enforcement of lien, removal of improvements, § 257
 - Priority of lien over mortgage, § 200, p 750
 - Right to lien, §§ 26-29, pp 520-524
 - Tenant's right to receive payment from landlord for as subject to lien, § 15
- Floating wharf or dock, lien as allowable under statutes relating to buildings, § 21, p 517
- Flowers, lien as allowable for planting, § 30
- Flumes, lien for construction of, § 21, p 516
- Fluorescent fixtures, lien as attaching to, § 27
- F o b See Free on board, post
- Foreclosure,
 - Enforcement, generally, ante
 - Mortgages, post
- Foreign affidavit to claim or statement of lien, § 167, p 713
- Foreign corporations,
 - Acquisition of lien, § 7
 - Claim or statement, setting forth principal place of business, § 156, p. 680, n 26
- Foreign state, contract creating lien made in, § 74
- Forfeitures,
 - Claim or statement, failure to furnish on demand, § 241
 - Contractor abandoning contract, § 96
 - Release of lien, failure to release, § 246
 - Willful misstatement of matters in claim, statutory provisions, strict construction, § 4, p. 504
- Form and nature of proceedings,
 - Enforcement of lien, § 263, p 808
 - Bill in equity, parties, § 285
 - General verdict to support judgment, § 316, p 998
 - Scire facias, § 288
 - Tolling running of limitations, § 282, p 895
 - Perfection of lien, § 118
- Forms,
 - Bond or undertaking, prevention or discharge of lien, § 236
 - Claim or statement, §§ 150-171, pp. 672-721
 - Lumber and other material used in making, § 44
 - Notice to owner of intent to claim lien, § 126, pp. 632-636
- Foundations, right to lien, § 25
- Founders, statutory enumeration, § 86

INDEX TO MECHANICS' LIENS

Fraud,

- Advances by mortgagee induced by fraud, priority, § 205, p 773
- Certainty of findings in action to enforce lien, § 316, p 1000
- Claim or statement of lien,
 - Claim of amount due, § 153
 - Nonlienable items included, § 165, p 707
- Contractor attempting enforcement of judgment in fraud of workman or materialman, injunction, § 271
- Counterclaim in action to enforce lien, § 277
- Deed of trust, subrogation of person paying consideration for fraudulent mechanic's lien given by purchaser, § 206, p 778, n 80
- Evidence in action to enforce lien, § 309, p 975, § 310, p 987
- Judgment or decree enforcing lien, collateral attack on ground of, § 334
- Misdescription of property in claim or statement of lien, § 161
- Mortgagor, priority of mortgage over mechanic's lien, § 205, p 774, n 33
- Owner, notice of intent to claim, § 124, p 628
- Payments to contractor, lien of others as affected, § 251, p 832
- Presumptions and burden of proof in action to enforce lien, § 308, p. 967; § 309, p 970
- Price fixed in contract as limiting liens of persons other than contractor, § 174, p 724
- Question of fact in action to enforce lien, § 314, p 994
- Release obtained by, § 246
- Statement of amount due or to become due in claim of lien, § 153
- Waiver of lien,
 - Avoidance by, § 222
 - Evidence in action to enforce lien, § 310, p 988, n 13
 - Presumptions and burden of proof in action to enforce lien, § 308, p 968, n 68
 - Waiver of priority of lien, § 204, p 765, n 22
- Fraudulent conveyances, evidence of ownership in action to enforce lien, § 309, pp 969, 970
- Free on board,
 - Materials delivered, lien as allowable, § 42
 - Time for filing claim or statement, § 144, p 658
- Fuel, lien for fuel used to generate power used in construction or improvement work, § 44
- Funds, disposition of funds collected by receiver, § 291
- Furnaces,
 - Application and coverage of lien, § 190, p 743, n. 63
 - Lien as allowable for, § 27
- Furniture, priority between mechanic's lien and mortgage, § 199, p 751, n. 64
- Future advances, mortgage securing, priority, § 205, p. 773
- Garnishment, incident to common law action by materialman suing to foreclose lien, § 266, p 874, n. 84
- Gas plants, lien as attaching to, § 21, p 515
- Gas ranges, lienable fixtures, § 27
- Gates, building within lien law as including, § 21, p 514

- General agency, contract creating lien, sufficiency, § 59
- General demurrer Demurrer in action to enforce lien, generally, ante
- General denial, enforcement of lien, actions for, § 301, p 942
- General settlement, actions for,
 - Cross bill, § 302
 - Issues, § 307, p 955
 - Loss or extinguishment of lien as result of attempt, § 241
- Good faith,
 - Bona fide purchasers, generally, ante
 - Materials, delivery in as sufficient, § 43
- Governing law Conflict of law, generally, ante
- Government subdivision, description of property in claim or statement of lien, § 161, p 687
- Grading, lien as allowable for, § 30
- Gratuitous work,
 - Completion of contract, extension of time for filing claim or statement, § 149, p 671
 - Extension of time for filing claim or statement, § 149, p 670
 - Presumption, § 308, p 959, n 38
 - Repair of damage caused by other persons, extending time for filing claim or statement, § 149, p 672
- Gravestones, lien as attaching to, § 13
- Grease, machinery used in construction or improvement work, § 44
- Groceries, furnishing to subcontractor for boarding house for workmen, § 48
- Guaranty,
 - Amount secured by lien of subcontractors and others, § 174, p 724
 - Contractor, amount secured by lien on nonprocurement of guaranty, § 175
 - Materials, breach of as preventing acquisition of lien, § 41
 - Owner's contract, intervention by guarantor in action to enforce lien, § 285
 - Payment, amount secured by lien of subcontractor, etc., § 174, p 725
 - Work or repairs pursuant to as extending time for filing claim or statement, § 149, p 672
- Guaranty bonds Contractors, ante
- Guardians, contract creating lien, power to enter into, § 61
- Hardship and injustice, application of lien to entire lot or tract, § 186
- Hauling charge, material, § 50
- Hearing Trial or hearing, post
- Heating apparatus, lien as attaching to, § 27
- Hedges, lien as allowable for planting, § 30
- Heirs of owner,
 - Application of lien to rents received, § 196
 - Description in claim or statement of lien, § 162, p 691
 - Ownership as sufficient to support lien, § 62
 - Parties to suit to enforce lien, § 284, p 902
- Homestead,
 - Acknowledgment of contract by husband and wife to bind homestead, evidence in action to enforce lien, § 309, p 970
 - Acquisition of lien against, § 14; § 21, p. 515; § 33

INDEX TO MECHANICS' LIENS

Homestead—Continued,

- Application of lien to land outside homestead, § 185, p 735, n 31, 32
- Burden of proof of estoppel permitting lien to attach to exempt property, § 308, p 968
- Claim or statement, necessity of filing, § 131, p 640, n 18, p 641
- Consent of owner, requisite, § 73, p 579
- Contract, lien arising under, § 14, n 63, § 52, § 63, p 553
 - Evidence in action to enforce lien, § 300, p 971
 - Filing or recording, § 82, p 580
 - Form and sufficiency, § 73, p 577
 - Pleading in action to enforce lien, § 204, p 926
 - Power of husband to enter into, § 63, p 555
 - Signature, § 81
 - Time of making, § 74
 - Writing as essential, § 75
- Estoppel
 - Creation of lien by, § 63, p 554
 - Defense in suits for enforcement, § 275, p 883, n 22
 - Evidence of property subject to lien in action to enforce lien, § 310, p 978, n 8
 - Extension of lien to entire tract of land, § 186
 - Extras, lien on as extending to, § 53
 - Joinder of parties defendant in suit to enforce lien, § 284, p 903
 - Judgment foreclosing lien against husband only, § 319, p 1005
 - Priority of claim, § 211
 - Priority of purchase money lien, § 208
 - Simulated lien, assignee as entitled to enforce, § 221
 - Simulated lien contract, § 52, p 542, n 10
 - Subsequent mortgage on, priority over mechanic's lien, § 201, p 759
- Homestead or building and loan association,
 - Priority of mortgage over mechanic's lien, § 200, p 753, n 71
- Hospitals, buildings as exempt from lien, § 12
- Houses, building within meaning of lien laws, § 21, p 513
- Husband and wife,
 - Acknowledgment of contract to establish lien against homestead, evidence in action to enforce lien, § 309, p 970
- Agency,
 - Evidence in action to enforce lien, § 310, p 981
 - Questions of law and fact in action to enforce lien, § 314, p 995
- Application of lien to building or improvement alone, § 188
- Claim or statement,
 - Contract or consent of owner to be shown, § 163
 - Description of owner, § 162, p 694
 - Form of statement as to ownership, § 162, p 692
 - Matters to be stated in, § 150
- Separate property of married woman, setting forth amount due or to become due, § 153, p. 676, n. 43

Husband and wife—Continued,

- Contracts creating lien by, § 52, § 63, pp. 552-557
 - Signature, § 81
 - Writing as essential, § 75
- Estoppel, pleading in action to enforce lien, § 294, p 926
- Homestead, judgment foreclosing lien against husband only, § 319, p. 1005
- Judgment against husband as agent, prerequisite to foreclosure against wife, § 269, p 877, n 25
- Knowledge of improvement by husband of owner, notice of nonresponsibility as essential, § 84, p 594
- Notice by noncontracting spouse of objections to improvement, § 84, p. 592
- Parties defendant in suit to enforce lien, § 284, p 903
- Personal action for enforcement of lien, § 265
- Personal judgment against married woman, § 331, p 1017
- Ratification, pleading in action to enforce lien, § 294, p 926
- Separate property of married woman,
 - Application of lien to building or improvement alone, § 188
- Claim or statement of lien, § 150
 - Amount due or to become due, setting forth, § 153, p 676, n 43
 - Description of owner, § 162, p 690, n 60, p 694
 - Description of property or improvements, § 161, p 682, n 56
 - Name of owner, § 162, p 600, n 60
- Contract creating lien, § 52
 - Evidence in action to enforce lien, § 309, p 971
- Enforcement of lien against, § 263, p. 869, n. 12
 - Evidence, § 309, p 971
 - Party defendant, § 284, p 903
- Notice of lien, evidence in action to enforce lien, § 309, p 972
- Time for commencement of suit to enforce lien, § 282, p 803, n 41
- Title to property as defense to enforcement, § 274
- Validity of statute creating lien claim, § 3, p 497, n 80
- Service on owner of intent to claim lien, § 124, p 620
- Variance, actions to enforce lien, § 307, p 956
- Ice houses, lien as attaching to, § 21, p 517
- Identity of property subject to lien, burden of proof in action to enforce, § 308, p 961
- Imperfect lien on real property by doing work or furnishing materials, § 119
- Implied agency, contract creating lien, sufficiency, § 59
- Implied contract,
 - Claim or statement setting forth amount due or to become due, § 153, p 676, n 51
 - Creation of lien, § 73, p 577
- Implied waiver, § 223
- Improvements,
 - Additions, lien acquired under statute relating to, § 23

INDEX TO MECHANICS' LIENS

Improvements—Continued,

- Application and coverage of lien, §§ 185, 186, §§ 187, 188, pp 738-741
- Apportionment in claim or statement of amount due as between buildings or improvements, § 155
- Authorization by owner, necessity, § 52
- Benefits to owner as entitling claimant to lien, § 57, p. 547
- Claim or statement of lien,
 - Completion of improvement, time for filing claim or statement, § 144, p. 664
 - Description of improvement, § 160, § 161, pp 682-689
- Commencement,
 - Priority of lien over mortgage, § 200, p. 754
 - Relation back of lien, § 179
- Community property, subjecting to lien, § 63, p. 553
- Completion, time for filing claim or statement, § 142, pp 652-656; § 144, p. 664
- Consent of owner, generally, ante
- Construction of term with respect to priority of lien over mortgage, § 200, p. 755
- Contract, generally, ante
- Corporations, power to contract for, § 60
- Defined, § 21, p. 514
- Description of,
 - Claim or statement of lien, § 160, § 161, pp. 682-689
 - Contract creating lien, § 77
 - Pleadings in proceedings to enforce lien, § 294, p. 923
- Destruction or removal, loss of lien, § 242
- Different improvements, priority of lien, § 198, p. 749
- Distinct or separate from land, application of lien, § 188
- Executors and administrators, power to contract for, § 61
- Guardians, power to contract for, § 61
- Interest of owner to which lien attaches, § 15
- Knowledge of owner,
 - Estoppel as resulting, § 57, p. 548
 - Necessity, § 52
- Lessees, lien for, § 65, p. 558
 - Application of lien to reversion of landlord, § 105
- Lienable improvement, evidence in action to enforce lien, § 310, p. 977, n. 96
- Materials furnished for, § 40
- Nature of, § 21, pp 513-517
- New structure, question for court in action to enforce lien, § 314, p. 994
- Partial destruction, lien as defeated, § 242
- Priority of lien as to improvement only, § 205, p. 775
- Protection of persons contributing labor or materials, § 3, p. 496
- Purchase money mortgage, priority as affected by improvement before acquisition of title, § 201, p. 763
- Purchaser,
 - Application of lien to interest of vendor, § 194
 - Sale in proceedings to enforce lien, reversal or vacation of judgment, § 344

Improvements—Continued,

- Receivers, power to contract for, § 61
- Removal from premises, remedy for enforcement of lien, § 257
- Right to lien, §§ 21-25, pp 513-520
 - Interior improvements, §§ 26-29, pp 520-524
 - Outside building, §§ 30-32, pp 524-527
- Sale,
 - Apart from land, provision for in judgment or decree enforcing lien, § 324
 - Enforcement of lien, priority, § 339
 - Same lot or parcel, filing of single claim, § 134
 - Second improvement extending lien, § 183, p. 734, n. 7
- Separate lots or parcels, filing of single claim, § 134
- Two or more improvements,
 - Application and coverage of lien, § 189
 - Filing one or more claims or statements, § 134
- Two or more lots,
 - Application of lien, § 189
 - Filing single lien, § 189
- Uncertainty of owner of land on which erected, filing of one or more claims or statements, § 133
- Vendee, lien as attaching to, § 71, p. 575
- In rem,
 - Enforcement of lien, § 265
 - Actual or constructive notice to parties, § 286
 - Scire facias proceedings, § 288
 - Operation of lien, § 263, p. 870
- Inadequate price, sale in proceeding to enforce lien, setting aside for, § 342, p. 1027, n. 28
- Inchoate lien,
 - Assignment, §§ 216-218, pp 787-790
 - Loss of right of claimant to file lien statement, § 217
 - Name in which lien perfected and enforced, § 218
 - Perfection or enforcement by assignee, §§ 216, 217
 - Name in which done, § 218
 - Purpose of, § 217
 - Failure of claimant to file notice, § 131, p. 640, n. 18
 - Filing claim as necessary, § 131, p. 640, n. 23
 - Real property, § 119
- Increase in value Value, post
- Incumbrances Encumbrances, generally, ante
- Indebtedness,
 - Debtor and creditor relationship as essential to right to lien, § 33
 - Existence as question for jury in action to enforce lien, § 314, p. 993
 - Owner to contractor, evidence in action to enforce lien, § 300, p. 974; § 310, p. 986
 - Presumptions and burden of proof in action to enforce lien, § 308, p. 966
 - Pleading, actions to enforce, general denial, § 301, p. 943
 - Right to lien dependent on relation of debtor and creditor, § 33

INDEX TO MECHANICS' LIENS

- Indemnity bonds,
 - Bonds on undertakings, generally, ante
 - Contractor's bonds or undertakings, ante
- Index,
 - Error or mistake of recording officer affecting priority of lien claimant and mortgage, § 204, p 767
 - Filing and recording of claims or statements, § 145
- Indispensable parties to suit to enforce, §§ 283-285, pp 809-913
- Infants, contract for improvement, power to enter into, § 64, p 557
- Information and belief, verification of claim or statement of lien, § 167, p 712
- Initials, description of owner in claim or statement of lien, § 162, p 693
- Injunction,
 - Enforcement, § 271
 - Execution on judgment in proceeding to enforce lien, § 336
 - Sale of property, § 340
- Insolvency of debtor, appointment of receiver, § 291
- Installment payments, contract for improvement, § 79
- Instructions to jury,
 - Bond of contractor, actions on, § 262, p 867
 - Enforcement of lien, § 315
- Insulators, electric light or power lines, lien as attaching to, § 21, p 516
- Insurance,
 - Attachment of lien to proceeds on destruction of building, § 196
 - Destruction of property by fire, insurance company as party in action to enforce lien, § 285
 - Injunction against payment of proceeds by lienors suing to foreclose lien, § 271
 - Priority of lien over mortgage where insurance proceeds used for erection of new building, § 205, p 776
- Intent,
 - Bond of contractor, construction in accordance with, § 258
 - Contract for improvement, construction according to, § 83
 - Furnishing of labor and materials, § 45
 - Knowledge of intention to construct, notice of nonresponsibility by owner as essential, § 84, p. 594
 - Waiver as question of, § 223
- Interest,
 - Amount secured by lien, § 176
 - Subcontractor, etc., § 174, p 725
 - Bond of contractor, recovery against surety, § 261
 - Claim or statement of lien, setting forth, § 153
 - Judgment or decree in action for, allowance, § 319, p 1007
 - Payments to subcontractor, etc., set off against contractor, § 252
- Interest in property,
 - Claim or statement of lien to show interest of owner, § 162, pp. 690, 695
 - Contest of enforcement of lien by persons interested, § 279
- Interest in property—Continued,
 - Duty of intervenor in action to enforce lien to show interest, § 285
 - Lien as, § 1, p 492
 - Mortgagee, termination of interest affecting parties defendant in action to enforce lien, § 284, p 907
 - Operation and effect of lien, §§ 191-195
 - Subject to lien, §§ 15-19, pp 510-513
 - Claim or statement,
 - Name of owner, § 162, p 690
 - Naming person without interest in property, § 162, p 604
 - Evidence in action to enforce lien, § 309, p 909; § 310, p 977
 - Priority of mechanic's lien, § 205, p 775
 - Questions for jury in action to enforce lien, § 314, p 693
- Interior improvements, right to lien, §§ 26-29, pp 520-524
- Interrogatories to jury for special findings in action to enforce lien, § 316, p 998
- Interruption of work, relation back of lien, § 180
- Intervening petition, filing as dispensing with notice to owner of intent to claim lien, § 121, p 627
- Intervening incumbrances, time for filing notice of claim of lien, § 139, p 648
- Intervention,
 - Bond of contractor, actions on, § 262, p 863
 - Enforcement of lien, § 284, p 906, n 47, § 285
 - Complaint in intervention in action by contractor against owner, § 263, p 870
 - Evidence, § 310, p 70, n. 95
 - Burden of proof, § 308, p 960
 - Foreclosure of vendor's lien by, § 302
 - Laches, demurrer raising question, § 305, p 949
 - Las pendens required to be filed by intervenor, § 289
 - Other proceeding to enforce lien, commencement of action to enforce within statutory time, § 282, pp 895, 896
 - Process on intervenor, § 286
 - Stipulations in order of reference, § 312
 - Trust deed holder, § 284, p 906, n 47
 - Vendor's lien, foreclosure by, § 302
- Irrigation system, § 21, p 516
 - Application and coverage of lien, § 187
- Irrigation well, application of lien to land necessary for protection, § 186, p 736, n. 38
- Issues, proof and variance,
 - Bond of contractor, actions on, § 262, p. 866
 - Determination on application to vacate or cancel claim or statement of lien, § 171, p 720, n 98
 - Discharge or cancellation of claim or statement of lien, § 171, p 719, n 91
 - Enforcement of lien, actions for, § 307, pp 952-959
 - Immaterial variance, § 294, p. 928
 - Judgment or decree in proceeding to enforce lien, conformity, § 322
 - Trial or hearing in action to enforce lien, § 311
- Itemized account,
 - Claim or statement of lien, § 165, p 703
 - Amendment to permit, § 170, p 717, n 56
 - Evidence in action to enforce lien, § 309, p. 973

INDEX TO MECHANICS' LIENS

Itemized account—Continued,

- Notice to owner of intent to claim lien to contain, § 126, p. 635
- Pleading in action to enforce lien, filing with, § 294, p. 933
- Job number, claim or statement describing property by reference to job number, § 161, p. 688, n. 41
- Joinder of causes, enforcement of lien, § 299
 - Demurrer on ground of, § 305, p. 949
- Joinder of liens and enforcement, § 272
- Joinder of parties,
 - Bond of contractor, action on, § 262, p. 863
- Enforcement of lien,
 - After period for commencement of action has expired, § 282, p. 898
 - Defendants, § 284, pp. 900-911; § 285
 - Failure to join, § 284, p. 910
 - Either as defendant or plaintiff, § 285
 - Plaintiff, §§ 283, 285
- Joint contracts Contracts, ante
- Joint owners Owners, post
- Joint tenancy, realty held in as subject to lien, § 15
- Journeymen,
 - Original contractor, term as including, § 90
 - Statutory enumeration, § 86
- Judgment debtor, redemption from sale in proceedings to enforce lien, § 347, p. 1032
- Judgments or decrees,
 - Bonds of contractors, actions on, § 262, p. 863
 - Bonds or undertakings for prevention or discharge of lien, actions on, § 239
 - Claim, statement, etc., as not judgment, § 131, p. 641
 - Deficiency judgment in action to foreclose lien, § 203, p. 869
 - Duration of lien, § 183, p. 734, n. 4
 - Enforcement of lien, §§ 317-335, pp. 1002-1022
 - Additional judgment after term, § 333
 - Amendment, § 333
 - Amount of recovery, § 319, p. 1006
 - Conformity to lien statement, § 321
 - Default judgment, § 318
 - Attachment followed by judgment, § 287
 - Attorney's fees, allowance for, § 319, p. 1007
 - Cancellation or vacation of notice of lis pendens, § 289
 - Certainty, § 319, p. 1004
 - Description of property, § 320
 - Character of lien, § 335
 - Clerical errors, § 333
 - Cloud on title, § 335
 - Collateral attack, § 334
 - Conclusiveness, § 334
 - Conditions precedent to entry, imposition of, § 332
 - Confession of judgment, § 318
 - Conformity to,
 - Findings or verdict, § 323
 - Lien statement, § 321
 - Pleadings, issues and proof, § 322
 - Statutory provisions, § 319, p. 1004
 - Costs,
 - Allowance for, § 319, p. 1006
 - Direction for payment out of proceeds of sale, § 324
 - Default, § 318

Judgments or decrees—Continued,

Enforcement of lien—Continued,

- Deficiency judgment, prayer as essential, § 322
- Definiteness, § 319, p. 1004
- Description of property, § 320
- Determination as to priorities, § 325
- Direction for sale and distribution of proceeds, § 324
- Distribution of proceeds from sale, direction for, § 324
- Evidence, conformity, § 322
- Execution on, § 336
 - Sale of property, § 337
- Extent of relief, § 319, p. 1005
- Findings,
 - Conformity, § 323
 - Establish facts to support judgment, § 316, p. 998
- Findings of fact and conclusions of law as basis for judgment, § 316, p. 998
- General verdict by jury as basis, § 316, p. 998
- Imposition of conditions precedent to entry, § 332
- Interest, § 319, p. 1007
- Issues, conformity, § 322
- Judgment by subcontractor against contractor before instituting action to enforce, limitation, § 282, p. 891
- Junior liens, provision for, § 324
- Lien of judgment, § 335
- Materialmen, pleading judgment against contractor in action to enforce lien against owner, § 294, p. 933
- Merger of lien into judgment, § 335
- Modification, § 333
- Nature, § 317
- Opening default judgment, § 318
- Operation and effect, § 334
- Outstanding interest, provision for, § 324
- Parties, § 319, p. 1005, § 326
- Perfection of lien by, § 335
- Personal judgment, generally, post
- Pleadings, conformity, § 322
- Presumptions, § 334
- Prior claims, provisions as to, § 324
- Priorities, determination as to, § 325
- Proof, conformity, § 322
- Requisites and essentials in general, § 319, pp. 1004-1007
- Sale, direction for, § 324
- Scope of relief, § 319, p. 1005
- Signature by referee, § 312
- Single or separate judgment, § 327
- Special judgment in action to enforce lien, parties defendant, § 284, p. 907
- Subcontractor, action by, § 326
 - Condition precedent to enforcement of lien, § 269
- Time of entry, § 319, p. 1004
- Two or more contractors defendant where one was served, § 284, p. 910
- Vacation, § 333
- Venditioni exponas, § 336
- Verdict, conformity, § 323
- Writ of review, § 333

INDEX TO MECHANICS' LIENS

Judgments or decrees—Continued,

- Establishment of lien, conclusive against sureties on contractor's bond, § 259, p 847
- Injunction against enforcement in fraud of workman or materialman, § 271
- Loss of priority by failure to have date of attaching of lien determined by judgment, § 201, p 767
- Personal judgment, generally, post
- Priority,
 - Fixing, § 206
 - Full amount of judgment as to lien in preference to mortgage, § 206, p 777, n 74
 - Lien after judgment on lien, § 193, p. 748
- Relation back on establishment by judgment, § 177
- Release by lienor of rights under personal judgment affecting priority of mechanic's lien over mortgage, § 204, p 766
- Unliquidated demand, amount secured as including interest, § 176
- Waiver of lien by recovering personal judgment on, § 225
- Judicial districts, place of filing of notice or claim, § 138
- Judicial sale,
 - Amendment of claim or statement of lien affecting rights of purchaser at sale, § 170, p 717
 - Lien as affected, § 244
 - Purchaser at as having ownership supporting lien under contract with, § 72
- Junior lienors,
 - Judgment or decree in proceedings to enforce lien, provision for, § 324
 - Parties defendant in suit to enforce mechanics' lien, § 284, p 906
 - Redemption from sale under senior lien, § 347, p 1032
- Jurat,
 - Claim or statement of lien, § 167, p 712
 - Notice to owner of intent to claim lien, § 127
- Jurisdiction of enforcement of lien, § 281
 - Attachment to acquire jurisdiction, § 287
 - Equity jurisdiction, § 284
 - Judgment as not preventing running of limitations where without jurisdiction to render decree, § 282, p 895
- Jury questions,
 - Bond of contractor, actions on, § 262, p. 867
 - Declaration of priority over trust deed, § 206, p 778, n 91
 - Enforcement of lien, § 311, § 314, pp 992-997
- Justification, bond, prevention or discharge of lien, § 236
- Kilns, lien as attaching to, § 21, p. 517
- Knowledge,
 - See, also, Notice, generally, post
 - Constructive knowledge, generally, ante
 - Consent of owner as established by, § 73, p 578
 - Contract creating lien as created by showing of, § 73, p 577
 - Estoppel resulting, § 57, p 548; § 230
 - Intention to construct, notice of nonresponsibility by owner as essential, § 84, p 594
 - Lessor, improvements by lessee, § 65, p 561
 - Notice by owner of nonresponsibility in case of, § 84, pp 590, 593

Knowledge—Continued,

- Owner,
 - Necessity, § 52
 - Necessity of filing claim or statement, § 131, p. 640, n 23
 - Performance of work or furnishing materials as taking place of notice of intent to claim lien, § 122
- Payment, application as dependent on knowledge or absence thereof of source of funds, § 240
- Pleading, proceedings to enforce lien, § 294, p. 926
- Purchasers, lien as affected, § 243, p 816
- Purchasers or lienors of construction as taking place of compliance with statutory requirements, § 119
- Vendor, improvements by vendee, § 71, p 573
- Verification of claim or statement of lien to be based on knowledge, § 167, p 712
- Wife's knowledge of improvement made under contract with husband, § 63, p 556
- Labor and laborers Work and Labor, generally, post
- Laches,
 - Bond of contractor, defense in action on, § 262, p. 863
 - Enforcement of lien, § 282, pp 889-899
 - Bringing in additional parties, § 285, p 911, n 17
 - Demurrer raising objections, § 305, p 949
 - Pleading in action to enforce, § 302
- Land,
 - Lot or tract, generally, post
 - Real property, generally, post
- Landlord and tenant,
 - See, also, Leases, generally, post
 - Acquisition of leasehold estate by lessor, lien as surviving, § 245
 - Contract, § 65, pp 557-566
 - Pleading, enforcement of lien against lessor based on contract by lessee, § 294, p 928
 - Contractor,
 - Dealing with lessee, necessity of notice to owner, § 121, p 624, n 68
 - Term as including lessee, § 90
 - Fixtures,
 - Attachment of lien, § 190
 - Fixtures removable by tenant, § 26
 - Tenant's right to receive payment as subject to lien, § 15
 - Improvements by lessee,
 - Application of lien to reversion of landlord, § 195
 - Notice by owner of nonresponsibility, § 84, p. 592
 - Notice to lessee as notice to owner of intent to claim lien, § 124, p 628, n 94
 - Owner's liability for work done at request of tenant, § 263, p 871
 - Payment by lessor, discharge of lien by, § 247
 - Sale of buildings on leased premises in proceedings to enforce lien, removal of building, § 345
- Last material furnished or work or labor performed, time for filing claim or statement, § 144, p. 658
- Laundry apparatus, lien as attaching to, § 27
- Law governing. Conflict of law, generally, ante

INDEX TO MECHANICS' LIENS

Lawns, lien as allowable for making, § 30

Leaseholds,

Acquisition by lessor, lien as surviving, § 245

Application of lien to,

Improvement of leasehold, § 101, p 744, n 60

Subsequent leasehold, § 103, 740, n 84

Lien as attaching to leasehold estates, § 17

Priority of mechanics' lien, § 210

Leases,

See, also, Landlord and tenant, generally, ante

Application and coverage of lien, § 187

Building or improvement alone, § 188

Cancellation, application of lien to lessor's interest, § 195, p 746, n 95

Improvement covering lease and other property, § 189, p 742, n 41

Reversion of landlord for improvements by tenant, § 195

Consent or agreement of owner,

Evidence in action to enforce lien, § 309, p 971; § 310, p 980

Questions of law and fact in action to enforce lien, § 314, p 995

Contractor,

Dealing with lessee, necessity of notice to owner, § 121, p 624, n 68

Term as including lessee, § 90

Description of owner in claim or statement of lien, § 162, pp 692, 695

Fixtures,

Attachment of lien, § 190

Fixtures removable by tenant, § 26

Tenant's right to receive payment as subject to lien, § 15

Notice by owner of nonresponsibility in case of improvements by lessee, § 84, p 502

Notice to lessee as notice to owner of intent to claim lien, § 124, p 628, n 94

Owner's liability for improvement at request of tenant, § 263, p 871

Parties to suit to enforce lien, § 284, p 902

Priority of lien and lease, § 207, p 780, n 5

Sale of buildings on leased premises in proceedings to enforce lien, removal of building, § 345

Leave of court, amendment of claim or statement of lien, § 170, p 719

Ledge entries, evidence of delivery of material in action to enforce lien, § 310, p 979, n 16

Ledger sheets, evidence in action to enforce lien, § 309, p 974, n 66

Legal nature, § 1, p 492

Levy, execution on judgment in proceeding to enforce lien, § 336

Liberal construction,

Constitutional provisions, § 4, p 502

Statutory provisions, § 4, p 501

Licenses,

Contract with licensee, § 66

Lien as attaching to, § 15

Want of license as precluding enforcement of mechanics' lien, § 273, p 881, n 92

Lienors' names in claim or statement, § 157

Life estates,

Application of lien to improvements by life tenants, § 191, p 744, n 71

Life estates—Continued,

Contract by life tenant as subjecting to lien, § 67

Lien as attaching to, § 15

Lighting equipment, installation in building, lien as attaching to, § 27

Lightning rods, lien for construction and erection, § 21, p 517

Lime barrels, charge for as included in lien for material, § 44

Limitation of actions,

Bond of contractor, recovery on, § 262, p 862

Enforcement of lien, § 282, pp 889-890

Amendment after expiration of period, § 282, p 898

Application of general statutes, § 282, p 891

Assertion of lien in other proceedings, § 282, p 895

Attachment, § 287

Cancellation of notice of lis pendens on failure to begin action to foreclose in time, § 289

Commencement of work or delivery of materials affecting commencement of limitation, § 282, p 893

Construction of provisions, § 282, p 891

Continuing of lien under statutory provision, § 282, p 896

Demurrer raising question, § 305, p 949

Deposit or undertaking to discharge lien, § 282, p 891

Diligence in prosecution of proceeding, § 282, p 899

Filing of lien claim or statement affecting commencement of period, § 282, p 893

Law governing, § 282, p 891

Maturity of claim or accrual of indebtedness, § 282, p 894

Nature of proceedings required to toll limitations, § 282, p 895

Other lien claimants and parties in interest, as parties, § 282, p 892

Owner,

Commencement of action against to stop running of limitations, § 282, p 892

Suit to determine validity of liens, § 282, p 896

Persons against whom action must be instituted to stop running of statute, § 282, p 892

Point from which statutory period begins to run, § 282, p 893

Subcontractor, § 269, p 877, n 22

Time when period begins to run, § 282, p 893

Lis pendens,

Cancellation or vacation of notice, § 289

Enforcement of lien, § 289

Discharge of lien by bond affecting necessity, § 282, p 892

Pleading notice of lis pendens in action to enforce, § 294, p 937

Striking out plea in suit to enforce subcontractor's lien, § 266, p 875, n 90

Loan contract, filing affecting priority of mortgage, § 204, p 770

INDEX TO MECHANICS' LIENS

- Lodging, lien as allowable in respect of lodging of workmen, § 48
- Loss,**
 Account not itemized, claim or statement, § 165, p. 704
 Claim or statement of lien, ante
 Destruction or removal of building or improvement, § 242
 Failure to,
 File or record, claim or statement, § 131, p. 640, n. 24
 Give notice to owner of intent to claim lien within specified time, § 125
 Perfect within time and manner prescribed by statute, § 119
 State whether credit was given, claim or statement, § 152
 Loan, counterclaim in action to enforce lien, § 276, p. 884, n. 27
 Omission of credits and offsets, claim or statement, § 154
 Priority, § 204, pp. 765-771, §§ 207, 208
 Reputed owner described in claim or statement of lien, § 162, p. 693
 Right, § 241
- Lot or parcel,**
 Accrual of commencement of lien, acquisition of land after commencement of construction, § 177
 Amount or area of land,
 Application of lien, § 186
 Statutory limitation, § 186
 Application of lien, § 185, p. 736, n. 32; § 186, 189
 Buildings constructed at same time, priority of lien over mortgage, § 200, p. 756
 Claim or statement,
 Apportionment of amount due from two or more buildings or improvements, § 155
 Inclusion of too much land in description, § 161, p. 685
 Partial inclusion of land subject to lien, § 161, p. 686
 Single or separate claim on improvements on same or separate lots or parcels, § 134
 Entire lot or tract, application of lien, § 186
 Several houses erected on distinct lots, enforcement of lien on all houses in single proceeding, § 272
 Several lots or tracts, application and coverage of lien, § 189
- Lubricants, machinery used in construction or improvement work, § 44**
- Lump sum,**
 Claims for amount due under separate contract, claim or statement of lien, § 165, p. 703
 Contract, materials delivered for improvements on several lots, enforcement of lien, § 320, p. 1008, n. 47
- Machinery. Tools, machinery and equipment, generally, post**
- Machinists, statutory enumeration, § 86**
- Magazines, premises, description in notice to owner of intent to claim lien, § 126, p. 636**
- Mail,**
 Notice to owner of intent to claim lien, § 128
 Service of notice or copy of claim, § 146
- Maintenance contract, time for filing claim or statement, § 144, p. 663, n. 44**
- Malicious claim, claim or statement of lien including too much land, § 161, p. 685, n. 91**
- Market value of improved land consideration in establishing extent of lien, § 186**
- Marriage,**
 Evidence of agency for notice to owner of intent to claim lien, § 124, p. 629
 Right to lien as affected by marriage of owner subsequent to improvement, § 55
- Married women Husband and wife, generally, ante**
- Masons, statutory enumeration, § 86**
- Master,**
 Amendment of claim or statement of lien, § 170, p. 719, n. 77
 Reference in action to enforce lien, § 312
 Report, interest allowed from date of master's report, § 176
- Materials and materialmen, §§ 40-44, pp. 531-537**
- Abandonment,**
 Amount secured by lien, abandonment by contractor, § 175
 Contract by contractor, time for filing claim or statement, § 142, p. 654
 Original contract, rights as affected, § 112
- Accounts,**
 Service of attested account on owner, statute requiring strict construction, § 4, p. 504
 To owners, § 130
- Accrual of lien on performance of labor or furnishing of material, § 181**
- Actual use as essential to lien, § 43**
- Additional materials, furnishing after completion of original contract as extending time for filing claim or statement, § 149, p. 670**
- Time for notice to owner of intent to claim lien, § 125**
- Advance payment to contractor with knowledge of unpaid claim of materialmen, § 251, p. 831**
- Advances of money, § 47**
- Agreement,**
 Delivery pursuant to agreement to extend time for filing lien as extending time, § 148, p. 668, n. 21
 Delivery under agreement for extending time for claim or statement, § 148
 Owner, presumptions and burden of proof in action to enforce lien, § 308, p. 962
- Amount,**
 Claim, § 51
 Furnished, presumptions and burden of proof in action to enforce lien, § 308, p. 965
 Lien fixed by contract with contractor, § 174, p. 725
 Secured by lien,
 Furnishing of materials after abandonment of contract, § 175
 Guarantee of payment by owner to materialmen, § 174, p. 725
 Persons not dealing directing with owner, § 174, p. 723
- Application and coverage of lien, § 190**
- Assignment by contractor, priority of lien over, § 211**

INDEX TO MECHANICS' LIENS

Materials and materialmen—Continued,

Assignment of claim, assignee's right of action on contractor's bond, § 262, p. 856, n. 73

Attachment of lien, § 181

Bonds,

Contractor,

Acceptance, note of contractor, as releasing surety on bond, § 250, p. 851

Extension of time to contractor, surety on bond as released by, § 250, p. 852

Liability of owner for claim because of failure to exact, § 256

Parties to action on, § 262, p. 863

Right of action on, § 262, pp. 855, 856, n. 78

Personal liability of owner, failure to exact bond for performance of contract, § 256

Buildings or parts thereof as materials, § 41

Claim and statement of lien,

Abandonment of contract by contractor, time for filing, § 142, p. 654

Additional materials, furnishing after completion of original contract as extending time for filing, § 140, p. 670

Contract or consent of owner to furnishing, showing, § 163

Delivery,

Agreement for extending time for claim or statement, § 146

Completion of contract affecting time for filing claim or statement, § 144, p. 660

Date affecting time for filing claim or statement, § 144, p. 658

Extension of time for filing claim or statement by furnishing material, § 140, pp. 668-672

Furnishing last material, time for filing claim or statement, § 144, p. 658

Materials furnished, showing, § 165, pp. 600-708

Necessity,

Filing and recording, § 181, p. 641

Statement as to use or furnishing for use, § 165, p. 701

Payments by owner to contractor before expiration of time for filing or notice of claim, § 251, p. 831

Statement by contractor seeking to acquire lien, § 130

Claims,

Additional material, time for notice to owner of intent to claim lien, § 125

Amount of claim, § 51

Assignment of claim, assignee's right of action on bond of contractor, § 262, p. 856, n. 73

Bond taken by owner from contractor, owner's liability for claim because of failure to protect, § 256

Form of notice to owner of intent to claim lien, § 126, p. 633

Notice to owner by lien claimant on failure to furnish statement of names of materialmen, § 121, p. 626

Materials and materialmen—Continued,

Claims—Continued,

One notice to owner of intent to claim lien for materials furnished under more than one contract, § 121, p. 627

Collusive payments to principal contractor as affecting materialman's lien, § 251, p. 832

Commencement of,

Lien,

As soon as material is in evidence on land, § 179, p. 731, n. 53

Performance of labor or furnishing of material, § 181

Limitations of action to enforce lien, § 282, p. 803

Period for institution of action to enforce lien, § 282, p. 804

Commissions as lienable items, § 46

Common law remedies for enforcement of contract, § 266

Complaint in action to enforce lien, § 204, p. 929

Completion,

Contract affecting time for filing claim or statement, § 144, p. 660

Structure, delivery after, § 43, n. 87

Consent of owner,

Claim or statement of lien to show, § 163

Presumptions and burden of proof in action to enforce lien, § 308, p. 962

Continuance of lien, § 183

Contracts and contractors,

Abandonment of contract,

Amount secured by lien, § 175

Rights as affected, § 112

Time for filing claim or statement, § 142, p. 654

Acceptance of contractor's note as releasing surety on contractor's bond, § 250, p. 851

Additional materials, furnishing after completion of original contract as extending time for filing claim or statement, § 140, p. 670

Advance payment to contractor with knowledge of unpaid claim of materialmen, § 251, p. 831

Amount of lien fixed by contract with contractor, § 174, p. 725

Application of moneys received by contractor from owner or other interested person, § 240

Assignment of claim, assignee's right of action on contractor's bond, § 262, p. 856, n. 73

Claim or statement of lien to show contract of owner, § 163

Collusive payments to principal contractor as affecting lien of materialman, § 251, p. 832

Common law remedies for enforcement of contract, § 266

Completion of contract affecting time for filing claim or statement, § 144, p. 660

Contract with contractor, §§ 97, 113

Contractor's right to lien as materialman, §§ 89, 91

INDEX TO MECHANICS' LIENS

Materials and materialmen—Continued,
Contracts and contractors—Continued,
 Creation of lien by contract for materials, § 42
 Death of contractor after completion of work as affecting right to lien, § 97
 Defect in performance of original contract, rights as affected, § 112
 Delay in performance of original contract, rights as affected, § 112
 Description of materials, contract creating lien, § 77
 Extension,
 Surety on bond of contractor as released by extension of time to contractor, § 259, p. 852
 Time for filing claim or statement by furnishing additional materials after completion of original contract, § 149, p. 670
 Filing of principal contract by owner, effect, § 107
 Fraudulent payment to principal contractor as affecting lien of materialmen, § 251, p. 832
 Implied contract with contractor, § 113
 Judgment against contractor,
 Personal judgment, § 331, p. 1015
 Pleading in action to enforce lien against owner, § 294, p. 933
 Liability of owner,
 Failure to exact bond from contractor, § 256
 Pleading in action to enforce lien, § 294, p. 932
 Lien as affected by payment to contractor, § 251, p. 828
 Materialmen and contractors distinguished, § 89, p. 601
 Mode and terms of payment as controlled by original contract, § 110
 Modification of principal contract, rights as affected, § 111
 Money due contractor,
 Lien on, §§ 114-117, pp. 619-622
 Retention by owner of portion, reliance on contract provision, § 255
 Nature of contract with contractor, § 113
 Notice, stipulations against liens in contract, § 109
 One notice to owner of intent to claim lien for materials furnished under more than one contract, § 121, p. 627
 Parties to action on contractor's bond, § 262, p. 863
 Payments by owner to contractor before expiration of time for filing or notice of claim, § 251, p. 831
 Personal judgment against contractor, § 331, p. 1015
 Personal liability of owner, failure to exact bond for performance of contract, § 256
 Persons furnishing material to contractor as entitled to lien, § 101
 Priority of lien over assignment by contractor, § 211

Materials and materialmen—Continued,
Contracts and contractors—Continued,
 Release of lien by contractor, rights as affected, § 246
 Rescission of principal contract, rights as affected, § 111
 Retention by owner of portion of money due contractor, reliance on contract provision, § 255
 Right of action on contractor's bond, § 262, pp. 855, 856, n. 73
 Right to lien,
 Contractors, §§ 89, 91
 Death of contractor after completion of work, § 97
 Materialmen under contract with contractors, § 97
 Persons furnishing material to contractors, § 101
 Statement by contractor seeking to acquire lien, § 130
 Stipulations,
 Principal contract, effect, §§ 108-110
 Waiver, stipulation in contract as binding on materialmen, § 222
 Waiver,
 Rights against contractor's surety, § 259, p. 848
 Stipulations in contract as binding on materialmen, § 222
 Death of contractor after completion of work as affecting right to lien, § 97
 Declaration or petition in action to enforce lien, § 294, p. 929
 Default in performance of principal contract, rights as affected, § 112
 Defective installation, right to lien as affected, § 43, p. 535, n. 7
 Defined, § 89, p. 600
 Delay in performance of original contract, rights as affected, § 112
 Delivery
 Agreement for extending time for claim or statement, § 148
 Commencement of limitations of action to enforce lien, § 282, p. 893
 Completion of,
 Contract affecting time for filing claim or statement, § 144, p. 600
 Structure, delivery after, § 43, p. 534, n. 87
 Date affecting time for filing claim or statement, § 144, p. 658
 Evidence in action to enforce lien, § 300, p. 970; § 310, p. 978
 Good faith, delivery in as sufficient, § 43
 Ignorance affecting priority of lien and purchase money mortgage, § 201, p. 763, n. 94
 Place of delivery, right to lien as affected, § 42
 Presumptions and burden of proof in action to enforce lien, § 308, p. 961
 Pursuant to agreement to extend time for filing lien as extending time, § 148, p. 668, n. 21

INDEX TO MECHANICS' LIENS

Materials and materialmen—Continued,

Delivery—Continued,

Question for jury in action to enforce lien, § 314, p 994

Right to lien as affected, § 42

Statement in notice to owner of intent to claim lien, § 126, p 635

Description of materials, contract creating lien, § 77

Designation of liens of materialmen, § 1, p. 491

Direct lien, § 105

Diversion to other uses, effect, § 43

Employees of materialmen, right to lien, § 100

Employment by contractor, § 97

Enforcement of lien, generally Enforcement, ante

Enhancement in value, necessity, § 20

Estoppel to assert lien, §§ 229, 230

Evidence in action to enforce lien, § 309, pp 970, 973; § 310, p 978

Existence of lien in favor of person furnishing, § 1, p 491

Extension of time,

Delivery under agreement for extending time for claim or statement, § 148

Filing claim or statement by furnishing material, § 149, pp 668-672

Surety on contractor's bond as released by extension of time to contractor, § 259, p. 852

Filing, generally, ante

Form of notice to owner of intent to claim lien, § 126, p 633

Fraudulent payment to principal contractor as affecting lien of materialmen, § 251, p 832

Furnishing, § 42

Accrual or commencement of lien on, § 181

Amount secured by lien, furnishing of materials after abandonment of contract, § 175

Attachment of lien, § 181

Claim or statement of lien to show contract or consent of owner to furnishing, § 163

Commencement of period for institution of action to enforce lien, § 282, p 894

Continuance of lien, § 183

Contractor furnishing materials as entitled to lien, §§ 89, 91

Evidence in action to enforce lien, § 309, pp 970, 973

Existence of lien in favor of persons furnishing materials, § 1, p 491

Extension of time for filing claim or statement by furnishing material, § 149, pp 668-672

Inchoate or imperfect lien by furnishing, § 119

Intent in furnishing, § 45

Last material or labor, time for filing claim or statement, § 144, p 658

Mistake, right to lien for materials furnished through, § 52, n 99

Necessity of statement in claim or statement of lien, § 165, p 701

One notice to owner for materials furnished under more than one contract, § 121, p 627

Materials and materialmen—Continued,

Furnishing—Continued,

Persons furnishing to,

Another materialman, § 103

Contractors as entitled to lien, § 101

Subcontractor, § 102

Pleading time of furnishing in action to enforce lien, § 294, p 930

Presumptions and burden of proof as to filing claim within time, § 308, p 964

Priority of lien over mortgage, § 200, p 756

Purpose in furnishing, § 45

Showing materials furnished in claim or statement of lien, § 165, pp. 699-708

Statutory provisions, § 40

Time for notice to owner of intent to claim lien for materials furnished at different times, § 125

Good faith, delivery in as sufficient, § 43

Guarantee of payment by owner to materialmen, amount secured by lien, § 174, p 725

Hauling charge, § 50

Implied contract with contractor, § 113

Inchoate or imperfect lien by furnishing materials, § 119

Incorporation in building or improvement, necessity, § 44

Indebtedness, pleading in action to enforce lien, § 294, p 931

Intent in furnishing, § 45

Judgment,

Against contractor,

Personal judgment, § 331, p 1015

Pleading in action to enforce lien against owner, § 294, p 933

Personal judgment in favor of materialmen, failure to establish lien, § 329

Kinds of material covered by lien statute, § 41

Laborer, term as including, § 88

Last material furnished, time for filing claim or statement, § 144, p. 658

Liability of owner to contractor, pleading in action to enforce lien, § 294, p 932

Literal construction of statute to protect materialmen, § 4, p. 501

Mistake, right to lien for materials furnished through, § 52, p. 541, n 99

Modification of principal contract, rights as affected, § 111

Money due contractor,

Lien on, §§ 114-117, pp 619-622

Classes entitled, § 115

Demand and notice, § 116

Retention by owner of portion, reliance on contract provision, § 255

Nature of,

Contract with contractor, § 113

Lien, § 105

Materials, § 41

Necessity,

Enhancement in value, § 20

Filing and recording claim or statement, § 131, p 641

Incorporation in building or improvement, § 44

Notice to owner of intention to claim lien, § 121, p. 624

INDEX TO MECHANICS' LIENS

Materials and materialmen—Continued,

Necessity—Continued,

Statement as to use or furnishing for use in claim or statement of lien, § 165, p. 701

Note of contractor, acceptance as releasing surety on contractor's bond, § 259, p. 851

Notice,

Money due contractor, lien on, § 116

Owner by lien claimant on failure to furnish statement of names of materialmen, § 121, p. 626

Owner of intent to claim lien,

Delivery of material, statement in notice, § 126, p. 635

Form of notice, § 126, p. 633

Necessity of notice, § 121, p. 624

One notice for materials furnished under more than one contract, § 121, p. 627

Particularity of notice, § 126, p. 634

Time for notice, § 125

Payment by owner to contractor before expiration of time for notice of claim, § 251, p. 831

Stipulations against liens in contract, § 100

Stop notice,

Service on owner, §§ 114, 117

To owner distinguished from notice to owner of intention to claim lien, § 120

Owners,

Accounts to owners, § 130

Application of moneys received by contractor from owner, § 240

Filing of principal contract by owner, effect, § 107

Guarantee of payment by owner to materialmen, amount secured by lien, § 174, p. 725

Judgment against contractor, pleading in action to enforce lien against owner, § 294, p. 933

Liability on failure to exact bond for performance of contract, § 256

Liability to contractor, pleading in action to enforce lien, p. 932

Notice to owner by lien claimant on failure to furnish statement of names of materialmen, § 121, p. 626

Notice to owner of intent to claim lien,

Delivery of material, statement in notice, § 126, p. 635

Form, § 126, p. 633

Necessity, § 121, p. 624

One notice for materials furnished under more than one contract, § 121, p. 627

Particularity, § 126, p. 634

Time, § 125

Presumptions and burden of proof in action to enforce lien as to agreement or consent of owner, § 308, p. 962

Primary liability of, pleading in action to enforce lien, § 294, p. 932

Retention by owner of portion of money due contractor, reliance on contract provision, § 255

Materials and materialmen—Continued,

Owners—Continued,

Service of attested account on owner, statute requiring, strict construction, § 4, p. 504

Statements to owner, § 130

Stop notice to owner distinguished from notice to owner of intention to claim lien, § 120

Particularity of notice to owner of intent to claim lien, § 126, p. 634

Party to action on bond of contractor, § 262, p. 863

Payment,

Advance payment to contractor with knowledge of unpaid claim of materialmen, § 251, p. 831

Application, § 248, p. 824

Moneys received by contractor from owner or other interested person, § 249

Payments by subcontractor with money received from contractor, § 250

Collusive or fraudulent payments to principal contractor as affecting lien of materialmen, § 251, p. 832

Guarantee of payment by owner to materialmen, amount secured by lien, § 174, p. 725

Lien as affected by payment to contractor, § 251, pp. 828, 832

Lien of others as affected by payments to materialmen, §§ 252, 253

Owner to contractor before expiration of time for filing or notice of claim, § 251, p. 831

Terms of original contract as controlling, § 110

Personal,

Judgment against contractor, § 331, p. 1015

Judgment in favor of materialmen on failure to establish lien, § 329

Liability of owner, failure to exact bond for performance of contract, § 256

Persons furnishing to,

Another materialman, § 103

Contractors, § 101

Subcontractor, § 102

Place of delivery, right to lien as affected, § 42

Pleading in action to enforce lien, § 294, pp. 925, 929

Indebtedness, § 294, p. 931

Judgment against contractor, § 294, p. 933

Liability of owner to contractor, § 294, p. 932

Time of furnishing, § 294, p. 930

Preparatory work, lien as allowable for, § 35

Presumptions and burden of proof in action to enforce, § 308, pp. 961, 962, 964-966

Agreement or consent of owner, § 308, p. 962

Amount due from owner to contractor, § 308, p. 966

Filing of claim within time, § 308, p. 964

Use of material, § 308, p. 961

Primary liability of owner, pleading in action to enforce lien, § 294, p. 932

Priority of lien over,
Assignment by contractor, § 211

INDEX TO MECHANICS' LIENS

Materials and materialmen—Continued,

Priority of lien over—Continued,

Mortgage, § 200, p 756

Delivery of materials, ignorance affecting priority of lien and purchase money mortgage, § 201, p 763, n 94

Prior recorded mortgage, § 200, p 753

Profits as lienable item, § 49

Protection of persons contributing materials, § 3, p. 496

Purchase of materials as sufficient to create lien, § 42

Purpose in furnishing, § 45

Quality and quantity, § 41

Questions for jury in action to enforce lien, § 314, p 994

Recording claim or statement, necessity, § 131, p 641

Release,

Lien by contractor, rights as affected, § 246

Surety on contractor's bond,

Acceptance of contractor's note, § 259

Extension of time to contractor, § 259, p 852

Reliance on credit of building or property, § 46

Removal after rise in construction or building as affecting lien, § 43

Rescission of principal contract, rights as affected, § 111

Retention by owner of portion of money due contractor, reliance on contract provision, § 255

Retroactive operation of law creating lien, § 5

Right of action on bond of contractor, § 262, pp 855, 856, n 73

Right to lien, § 89, pp 590-602

Contractor furnishing materials, §§ 89, 91

Death of contractor after completion of work, § 97

Defective installation, § 43, p 535, n. 7

Delivery of materials, § 42

Employees of materialmen, § 100

Materialmen under contract with contractors, § 97

Materials furnished through mistake, § 52, p 541, n. 99

Money due contractor, §§ 114-117, pp 619-622

Persons furnishing to contractors, § 101

Place of delivery, § 42

Separate liens, filing, § 131, p 642

Service,

Attested account on owner, statute requiring, strict construction, § 4, p 504

Stop notice on owner, §§ 114, 117

Several buildings,

Application of lien, § 189

Evidence in action to enforce lien, § 309, p 970

Species of lien, § 1, p. 491

Statements to owner, § 130

Stipulations,

Effect of stipulations in principal contract, §§ 108-110

Waiver, stipulation in contract as binding on materialmen, § 222

Materials and materialmen—Continued,

Stop notice,

Service on owner, § 114

Satisfaction and disposition of balance, § 117

To owner distinguished from notice to owner of intention to claim lien, § 120

Subcontractors,

Application, payments by subcontractor with money received from contractor, § 250

Distinguished, § 89, p 601

Furnishing material, § 98

Persons furnishing to subcontractor, § 102

Subrogation, lien by, § 106

Time,

Delivery of material under agreement for extending time for claim or statement, § 148

Filing claim or statement,

Abandonment of contract by contractor, § 142, p 654

Delivery of materials,

Completion of contract, § 144, p. 660

Date, § 144, p 658

Extension of time by furnishing material, § 149, pp 668-672

Furnishing last material, § 144, p 658

Furnishing materials after completion of original contract as extending time, § 149, p 670

Payments by owner to contractor before expiration of time, § 251, p 831

Notice of claim, payment by owner to contractor before expiration of time, § 251, p 831

Notice to owner of intent to claim lien, § 125

Pleading time of furnishing in action to enforce lien, § 294, p 930

Transportation, lien as allowable for, § 50

Use,

Certainty of findings in action to enforce lien, § 316, p 1000

Essential to lien, § 43

Evidence in action to enforce lien, § 309, p 970, § 310, p 978

Necessity of statement in claim or statement of lien, § 165, p. 701

Pleading in action to enforce lien, averments as to, § 294, p 925

Presumptions and burden of proof in action to enforce lien, § 308, p. 961

Question for jury in action to enforce lien, § 314, p. 994

Removal after use in construction of building as affecting lien, § 43

Value, § 51

Waiver,

Contingency, § 224

Rights against contractor's surety, § 259, p. 848

Stipulation in contract as binding on, § 222

Worthless improvements, rights as affected, § 112

Maturity of,

Claim,

Statement in claim or statement, § 153

INDEX TO MECHANICS' LIENS

Maturity of—Continued,

Claim—Continued,

Time for commencement of action to enforce lien, § 282, p 804

Indebtedness, time for filing notice or claim of lien, § 141

Mausoleums, lien statute as including, § 21, p 517

Memoirandum,

Contract for improvement, filing or recording, § 82, p 587

Evidence in action to enforce lien, § 300, p 972

Merchants, statement to contractor, duty to furnish, § 130

Merger,

Estates affecting priority of lien over mortgage, § 201, p 730

Interest or estate to which lien attached, lien as affected, § 245

Judgment, lien as merging into, § 335

Mills, lien as attaching to, § 21, p 517

Mines and mining,

Amendment of claim or statement of lien to conform to proof, § 170, p 716, n 36

Lien as attaching to mining property, § 21, p 515

Separate or entire buildings, description in claim or statement, § 161, p 680

Mirrors, lien as allowable with respect to, § 26

Misrepresentation,

Estoppel against mortgagee as to priority, § 204, p 760

Waiver, avoidance by, § 222

Mistake,

Amount due or to become due in claim or statement, § 153

Claim or statement, ante

Credits and offsets in claim or statement of lien, § 154

Date in claim or statement of lien, § 169

Description in claim or statement,

Property, § 161, p 684

Use of materials in building, § 161, p 689

Erection of building on land of another, application of lien to building alone, § 188

Filing of claim or statement on partial performance of contract, § 144, p 660

Materials furnished through, right to lien, § 52, p 541, n 99

Mortgage, priority over mechanic's lien, § 201, p 759

Name,

Claim or statement of lien,

Owner, § 162, p. 693

Person with whom contract made, § 164

Owner's name in charging for materials affecting owner's personal liability, § 263, p 872, n 49

Nonlienable items included in claim or statement, § 165, p 707

Omission of credits and offsets in claim or statement of lien, § 154

Recording officer,

Filing or recording claim or statement, § 145

Priority of lien and mortgage as affected, § 204, p 767

Use of materials in building, description in claim or statement, § 161, p 689

Mistake—Continued,

Waiver of lien, evidence in action to enforce lien, § 310, p 988, n. 13

Modification,

Contract,

Right of contractor to lien as affected, § 93

Set-off in action to enforce lien, § 277, p 885, n 42

Subcontractors, materialmen and workmen, rights as affected, § 111

Judgment or decree in action to enforce lien, § 333

Molds, lumber and other materials used in making, § 44

Money due contractor,

Lien of subcontractors, materialmen or laborers, §§ 114-117, pp 619-622

Retention by owner of portion, reliance on contract provision, § 235

Money judgment, action to enforce lien, execution on, § 336

Month to month tenancy, leasehold as subject to lien, § 17

Monuments, lien as attaching to, § 13

Moratorium laws, application to enforcement of lien, § 282, p. 889, n. 89

Mortgages,

Advances after as well as before accrual of mechanic's lien, priority, § 205, p 773

Advances by mortgagee, priority, § 205, pp 772, 773

After-acquired property, mortgage of, priority, § 201, p 759

Amendment,

Bringing in receiver as party after expiration of time for enforcement of mechanics' lien, § 282, p 899

Claim or statement affecting right of mortgagee, § 170, p 717

Joining parties after expiration of time for enforcing lien, § 282, p 898, n 16

Application of lien to mortgage, § 190

Assignment of future rents by mortgagor to satisfy lien on premises, § 255

Attorney's fees, priority over lien of mortgage, § 205, p 772

Bill to separate interests of lien claimant and those of prior mortgagee, application of limitation, § 282, p. 893, n. 37

Bond to protect mortgagee against mechanics' liens, § 256

Building contract affecting priority of lien as against mortgages, § 202

Building purpose mortgage, priority, § 201, p. 759

Character of mortgage as purchase money mortgage, priority, § 201, p. 763

Claim or statement, ante

Commencement of building or improvement affecting priority, § 200, p 754

Common enterprise, priority of lien and mortgage, § 201, p 760

Compliance with statutory requirements,

Priority as affected, § 201, p. 761

Strictness of compliance, claim or statement of lien, § 150

Contest of enforcement of lien by mortgagee, § 279

INDEX TO MECHANICS' LIENS

Mortgages—Continued,

- Contract of sale authorizing for improvements, precedence over vendor's lien, § 71, p. 575
- Contract subjecting interest to lien, § 68
- Contractor, mortgage given to, priority, § 201, p. 760
- Contracts, filing as constructive notice, § 132
- Cross-bill foreclosure for in action to enforce lien, § 302
- Deeds of trust, generally, ante
- Description of owner, claim or statement of lien, § 162, p. 691
- Destruction of priority of lien by subordination to subsequent mortgage, § 198, p. 749
- Discharge of prior mortgage with funds obtained under later mortgage affecting priority, § 204, p. 770
- Distinguished, § 1, p. 492
- Effect of,
 - Intervening encumbrance as to priority, § 198, p. 750
 - Priority, § 206
- Equitable interest of mortgagor, application of lien, § 191, p. 744, n. 67
- Estoppel to claim priority,
 - Mechanic's lien claimant, § 204, pp. 765-771
 - Mortgagee, § 204, p. 768
- Expenditures by mortgagee, priority, § 205, pp. 772, 774
- Extent of priority, § 205, pp. 771-777
- Extinguishment,
 - Existing priority, § 204, p. 770
 - Lien, payment of encumbrance by owner, § 241
 - Loss of priority, § 204, p. 770
- Filing affecting priority, § 204, p. 769
- Foreclosure,
 - Cross-bill for in action to enforce lien, § 302
 - Improvements on property pending action, § 244
 - Intervenor's lien claims defeated on failure to obtain judgment against contractor, § 260, p. 877, n. 26
 - Mortgage cutting off lien, extension of lien to other building, § 189, p. 741, n. 16
 - Redemption,
 - Lien as attaching to right of, § 18
 - Sale in proceedings to enforce lien by purchaser, § 347, p. 1032
 - Waiver of lien by bringing action, § 227, p. 802
- Furnishing materials affecting priority, § 200, p. 756
- Given after contract between owner and mechanic, priority, § 200, p. 753
- Improvement mortgage, priority, § 201, pp. 759, 760
- Improvements before acquisition of title affecting priority of purchase money mortgage, § 201, p. 763
- Independent agreements affecting priority, § 203
- Intervening encumbrance as affecting priority, § 198, p. 750
- Intervention by mortgagee in action to enforce lien, § 285
- Lien as attaching to mortgaged property, § 18

Mortgages—Continued,

- Lienor, mortgage given to lienor, priority, § 201, p. 760
- Loss,
 - Lien, payment of encumbrance by owner, § 241
 - Priority, § 204, pp. 765-771
- Merger of estates affecting priority, § 201, p. 759
- Mistake in description affecting notice by record, intervention by mortgagee in action to enforce lien, § 285
- Mortgagee as party defendant in suit to enforce mechanics' lien, § 284, pp. 905, 906
- Name of mortgagee, claim or statement of lien, setting forth, § 157
- Nature and provisions of mortgage affecting priority, § 201, pp. 758-764
- Nonresident mortgagee, time for action to enforce lien, § 282, p. 893, n. 41
- Notice, post
- Ownership, mortgaged property, claim or statement, showing, § 162, p. 691
- Partial release of land from mortgage affecting priority, § 204, p. 771
- Parties,
 - Amendment joining parties after expiration of time for enforcing lien, § 282, p. 898, n. 16
 - Defendant in suit to enforce lien, § 284, p. 901, n. 52, pp. 905, 906
- Payment of encumbrance by owner, loss or extinguishment of lien, § 241
- Performance of labor affecting priority of lien over mortgage, § 200, p. 756
- Persons to whom mortgage given, priority of purchase money mortgage, § 201, p. 762
- Presumptions and burden of proof in action to enforce mechanics' lien, priority, § 308, p. 968
- Priority, generally, post
- Proceedings for determination of priority, § 206
- Property capable of being mortgaged as subject to lien, § 15
- Property or interest covered as respects priority, § 205, p. 775
- Purchase money mortgage,
 - Character of mortgage as purchase money mortgage, priority, § 201, p. 763
 - Extent of priority, § 205, p. 772
 - Improvements before acquisition of title affecting priority of, § 201, p. 763
 - Notice and recording of purchase money mortgage, priority, § 201, p. 763
 - Persons to whom mortgage given, priority of purchase money mortgage, § 201, p. 762
 - Priority as to,
 - Improvement by purchaser prior to acquiring title, § 201, p. 763
 - Mechanic's lien in general, § 201, p. 761
- Receiver, amendment bringing in receiver as party after expiration of time for enforcement of mechanics' lien, § 282, p. 899
- Record,
 - Mortgagee as party defendant in action to enforce lien, § 284, pp. 905, 906

INDEX TO MECHANICS' LIENS

Mortgages—Continued,

Record—Continued,

Priority, § 200, pp 757, 758; § 204, p 769

Advances after as well as before accrual of mechanic's lien, § 205, p 773

Purchase money mortgage, § 201, p 763

Redemption,

Lien as attaching to right of redemption on foreclosure, § 18

Sale in proceeding to enforce lien, rights of purchaser at foreclosure under mortgage, § 347, p 1032

Release affecting priority, § 204, pp 770, 771

Remedies as respects priority, § 206

Renewal affecting priority, § 204, p 770

Sale,

Land under mortgage, subsequently attaching lien as affected, § 244

Proceedings to enforce lien, rights of mortgagee, § 346

Second mortgage subject to first mortgage providing for advancement, § 201, p 761

Stipulation in mortgage for priority, § 201, p 759

Subordination of lien by claimant to lien of mortgage, § 207

Subrogation of mortgagee to rights as mechanic's lien holder, § 206

Subsequent mortgagee's right to question priority of lien judgment on failure to make him party to lien foreclosure suit, § 284, p 906, n 42

Substitution of security affecting priority, § 204, p 770

Surrender without limitation or reservation affecting priority, § 204, p 771

Termination of interest of mortgagee, party defendant in action to enforce mechanics' lien, § 284, p 907

Time as affecting priority between mechanic's lien and mortgage, § 200, pp 752, 757

Trustee, bringing in as party to enforce lien after expiration of limitation, § 282, p 899

Validity affecting priority, § 201, pp 758-764

Voluntary advances after accrual of mechanic's lien, priority, § 205, p 773

Waiver,

Lien,

Foreclosure, mortgages, waiver by bringing action, § 227, p 802

Reliance on by holder of mortgage lien, § 228

Taking mortgage, § 227, p 802

Priority over mortgage, § 204, pp 765-771; § 207

Motions, proceedings for enforcement of lien,

Availability, § 300

Reopen case for introduction of further evidence, § 311

Multifariousness,

Multifarious proceeding to enforce lien, § 272

Pleading in action to enforce lien, § 298

Multiplicity of suits, enforcement of lien,

Contractor as party defendant in action to enforce lien to avoid multiplicity, § 284, p 908

Dismissal because of defects of parties defendant, § 284, p 911

Injunction against enforcement of lien, § 271

Names,

Amendment,

Claim or statement to cover inaccuracy or to strike name improperly appearing, § 70, p 718

Lis pendens to include name of party, § 289

Application of lien to person named in claim or statement, § 161, p 688

Buildings, description in claim or statement of lien, § 161, p 688

Christian name of owner unknown, description in claim or statement of lien, § 162, p 693

Claim or statement, ante

Contractor, showing in claim or statement of lien, § 164

Description of parties in notice to owner of intent to claim lien, § 126, p 635

Employer, showing in claim or statement of lien, § 164

Encumbrancers or other lienors, setting forth in claim or statement, § 157

Form of statement as to ownership, § 162, p 692

Index of filing and recording of claims or statements, § 145

Mortgagees, setting forth in claim or statement, § 157

Necessity of notice to owner by claimant of lien on failure to furnish statement of names of subcontractors, employees and materialmen, § 121, p 626

Owner,

Claim or statement to set forth name of owner of property, § 162, p 689

Omission, error or mistake in claim or statement of lien, § 162, p 693

Political subdivision, description of property in claim or statement, § 161, p 688

Process in action to enforce lien,

Misnomer of plaintiff, § 286, p 914, n 66

Service on party under assumed name, § 286, p 913, n 61

Setting forth in claim or statement in general, §§ 156, 157; § 161, p 688; § 162, pp 689, 693; § 164

Statement to owner by contractor seeking to acquire lien, duty to furnish, § 130

Nature of proceedings. Form and nature of proceedings, generally, ante

Necessary parties to enforcement of lien, §§ 283-285, pp 899-913

Negating defenses,

Action to enforce lien, pleading in, § 297

Bond of contractor, pleading in action on, § 262, p 865

Negligence, completion of work, presumptions and burden of proof in action to enforce lien, § 308, p 967

Negotiable instruments Notes, generally, post

New building, questions of law and fact in actions to enforce lien, § 314, p 994

New trial,

Bond of contractor, actions on, § 262, p 868

Sale in proceedings to enforce lien, title of purchaser as affected by grant of new trial after, § 344

New York system, § 105

INDEX TO MECHANICS' LIENS

- Nonlienable items, inclusion in claim or statement of lien, § 165, p 707
- Nonresidents,
 Acquisition of lien by, § 7
 Owner, necessity of refileing or reinscribing lien, § 131, p 641
 Summons against in action to enforce lien, § 286
- Nonresponsibility,
 Posting notice as jury question in action to enforce lien, § 314, p 993
 Presumptions and burden of proof as to notice in action to enforce lien, § 308, p 963
 Statutory notice by owner, § 84, pp 590-596
- Nonsuit, enforcement of lien, § 314, p 993
 Admission of additional evidence after defendant's motion for nonsuit, § 311
 Effect, § 290
- Notaries, claim or statement of lien,
 Date of expiration of commission, failure to add after signature, § 167, p 713
 Jurat, § 167, p 713
 Persons before whom verification made, § 167, p 710
- Notes,
 Filing in place of claim or statement, § 131, p 643
 Materialman accepting from contractor, surety on bond of contractor as released by, § 259, p 851
 Maturing before expiration of lien, extension of lien, § 183, p 735, n 13
 Payment, question for jury in action to enforce lien, § 314, p 997, n 69
 Presumption of good faith purchase by holder in action to enforce lien, § 308, p 960
 Priority, § 213
 Waiver of lien,
 Acceptance of note of third person, § 227, p 802
 Negotiation of note taken by claimant, § 226
 Taking or transfer of note, § 226
- Notice,
 See, also, Knowledge, generally, ante
- Actual notice,
 Materialman affecting priority of mortgage over lien, § 200, p 757, n 14
 Owner, excusing performance of duty imposed by statute, § 131, p 642
 Purchasers, etc., as cure of defects in claim or statement, § 169
- Agents, ante
- Amendment,
 Claim or statement,
 Application to amend, § 170, p 719
 Notice of filing claim or statement, § 146
 Supply omission, § 170, p 717
 Notice to owner, § 129
 Application to amend claim or statement of lien, § 170, p 719
- Claim or statement, ante
- Commencement of building or improvement, priority of mechanic's lien over mortgage, § 200, p 755, n 92
- Completion of work, time for filing claim or statement, § 142, p 656; § 144, pp 660, 661
- Constructive notice, generally, ante
- Notice—Continued,
 Contract,
 Failure to file as defeating lien as against persons charged with notice, § 132
 Filing, § 82, p 588
 Corporate owner, § 124, p 630
 Discontinue furnishing of materials, extent of priority of lien, § 205, p 771, n 4
 Dismissal of action to enforce for insufficient notice, § 290
 Evidence of service in action to enforce lien, § 300, p 972
 Exhibit attached to notice as part of claim or statement of lien, § 165, p 704, n 17
 Filing or recording,
 Claim or statement,
 Amendment of notice of filing, § 146
 Copy of notice of lien instead of original, § 145
 Defective record as notice, § 145, p 665, n 74
 Estoppel of owner in failure to file claim or notice of lien within time, § 139, p 649
 Joint notice or claim, § 137
- Notice,
 Completion, time for filing claim or statement, § 142, p 656, § 144, p 660
 Filing or service of copy of claim, § 146
 Intention to file distinguished from notice of filing of lien, § 146
 Service of statement or notice on owner, filing before serving, § 139
 Setting forth in claim or statement that notice to owner was given, § 158
- Contract,
 Failure to file as defeating lien as against persons charged with notice, § 132
 Improvement contract, § 82, p 588
 Lien distinguished from notice of intention to file lien, § 146
- Notice,
 Intention to claim lien, §§ 120, 128
 Filing of lien before giving notice, § 125
 Necessity, § 120; § 121, p 626, n 73
 Intention to sue, condition precedent to enforcement of lien, § 268
 Owner's notice of nonresponsibility, § 84, p 596
 Priority over mortgage, notice to owner, § 200, p 752
- Nunc pro tunc filing of notice of pendency of action to enforce lien, § 289, n 22
- Husband and wife,
 Notice to owner, spouse of owner or part owner, § 124, p 629
 Objection to improvement by noncontracting spouse, § 84, p 592
- Intention to,
 Claim lien in general, §§ 120-129
 File lien distinguished from notice of filing of lien, § 146
 Foreclose, condition for allowance of costs, § 350, p. 1034, n. 38

INDEX TO MECHANICS' LIENS

Notice—Continued,

Intention to—Continued,

Sue, filing as condition precedent to enforcement of lien, § 268

Laborers. Work and labor, post

Lease provisions,

Compliance with as essential, § 65, p 565

Waiver, § 65, p 566

Materials and materialmen, ante

Mortgages,

Commencement of building or improvement, priority of mechanic's lien over mortgage, § 200, p 755, n 92

Knowledge of performance of labor, etc., as affecting priority, § 205, p 774

Notice of nonresponsibility by mortgagee, § 84, p 593

Notice to mortgagee of intent to claim lien, § 124, p 628

Notice to owner, filing and recording, priority over mortgage, § 200, p 752, n 67

Purchase money mortgage, priority, § 201, p 763

Waiver of priority by mortgagee by failing to post notice, etc., § 204, p 769

Nonresponsibility,

Posting as question for jury in action to enforce lien, § 314, p 993

Presumption and burden of proof in action to enforce lien, § 308, p 963

Statutory notice by owner, § 84, pp 590-596

Nunc pro tunc filing of notice of pendency of action to enforce lien, § 289, p 917, n 22

Owner,

Actual notice, excusing nonperformance of duty imposed by statute, § 131, p 642

Alternative provisions as to time for giving notice, § 125

Amendment, § 129

Claim or statement of lien to supply omission, § 170, p 717

Amount and particulars of claim, necessity of setting forth, § 126, p 634

At or before time of furnishing labor or materials, § 125

Attorney of claimant, signature, § 127

Cautionary notice, contents, § 126, p 635

Change of ownership, § 124, p 628

Claim or statement of lien failing to state claim is due as impairing notice, § 153

Constructive service, § 128

Contents, § 126, pp 632-636

Corporate owner, § 124, p. 630

Date, accrual or commencement of lien, § 182

Defects, § 129

Waiver of defects, § 126, p 634

Description,

Materials furnished, § 126, p 635

Parties and property, § 126, pp 635, 636

Direct dealing by claimant of lien with owner, § 121

Distinction between stop notice and notice to owner of intention to claim lien, § 120

Equitable owner, § 124, p 628

Evidence in action to enforce lien,

Service, § 309, p 972

Notice—Continued,

Owner—Continued,

Evidence in action to enforce lien—Continued,

Waiver of rights, § 310, p 988

Excuse for failure to give notice of intent to claim lien, § 122

Executor, § 124, p. 629

Exhibit attached to notice as part of claim or statement of lien, § 165, p 704, n 17

Failure of claim or statement of lien to state claim is due as impairing notice, § 153

Filing or recording,

Necessity, § 120; § 121, p 626, n 73

Notice by owner of nonresponsibility, § 84, p 596

Notice of intention to claim lien, §§ 120, 128

Filing of lien before giving notice, § 125

Necessity, § 120; § 121, p 626, n 73

Notice to owner of record, § 124, p 628

Priority over mortgage, § 200, p 752

Setting forth in claim or statement that notice was given, § 158

Form, § 126, pp 632-636

Identity of parties and property, description, § 126, p 635

Joint owners,

Notice of filing of claim or statement, § 146, n 89, 90

Notice to owner of intent to claim lien, § 124, p 628

Mail, § 126, p 634, n 7; § 128

Material furnished at different times, § 125

Necessity, § 121, pp 624-627

Indication of intent to claim lien, § 126, p 634

Showing in claim or statement,

Amount and particulars of claim, § 126, p 634

Lien that notice to owner was given, § 158

Nonresponsibility, § 84, pp. 590-596

Posting as jury question in action to enforce lien, § 314, p 993

Presumptions and burden of proof in action to enforce lien, § 308, p 963

Omission, amendment of claim or statement of lien to supply omission, § 170, p. 717

Oral notice, § 126, p 634

Perfection of lien in general, §§ 120-129, pp 624-638

Personal service, § 128

Persons by whom given, §§ 123, 128

Persons to whom given, § 124, pp 627-630

Persons who may serve, § 128

Place of service, § 128

Plans and specifications, attachment of copy to notice, § 126, p 634

Pleading, action to enforce lien, § 294, p 934

Presumptions and burden of proof in action to enforce lien, § 308, p 963

Registered mail, § 126, p 634, n. 7

Representative of owner, § 124, pp. 628-630; § 126, p. 636

Seal, amendment on failure of notary to affix, § 129

INDEX TO MECHANICS' LIENS

Notice—Continued,

Owner—Continued,

Service, § 128

Notice of filing claim or statement, § 146

Stop notice by contractors, laborers or materialmen, §§ 114, 117

Several notices not considered together for sufficiency, § 126, p 633

Signature, § 127

Spouse of owner or part owner, § 124, p 629

Statement of particular matters, § 126, pp 634-636

Statutory notice of nonresponsibility, § 84, pp 590-596

Statutory provisions, liberal construction, § 4, p 504

Stop notice, generally, post

Substituted service, § 128

Sufficiency,

Determination in proceeding to amend claim or statement of lien, § 170, p 718, n 75

Representative of owner, § 126, p 636

Several notices not considered together for sufficiency, § 126, p 633

Surety on contractor's bond, release by owner's failure to give, § 259, p 849

Time for giving, § 125

Trustee, § 124, p 629

Two or more owners, § 124, p 628

Verification, § 127

Amendment to supply, § 129

Waiver, § 122

Defects, § 126, p 634

Rights, evidence in action to enforce lien, § 310, p 988

Within prescribed period after furnishing labor or materials, § 125

Work furnished at different times, § 125

Writing, § 126, p 634

Payments to contractor after claim of lien, § 251, p 830

Pendency of action to enforce lien, § 289

Commencement of action as to preserving lien, § 183

Perfection of lien, §§ 120-129, pp 624-638

Statutory provisions, liberal construction, § 4, p 504

Posting,

Notice of nonresponsibility, jury question in action to enforce lien, § 314, p 993

Notice to owner on premises, § 128

Waiver of priority by mortgagee by failing to post notice, § 204, p 769

Priority,

Commencement of building or improvement, priority of mechanic's lien over mortgage, § 200, p. 755, n 92

Discontinue furnishing of materials, extent of priority of lien, § 205, p. 771, n 4

Filing and recording notice to owner, priority over mortgage, § 200, p. 752, n 67

Knowledge of performance of labor, etc., as affecting priority of mortgage § 205, p 774

Loss of priority of lien by failure to give notice to owner, § 204, p. 766

Notice—Continued,

Priority—Continued,

Mechanic's lien and other lien or encumbrance in general, § 207

Purchase money mortgage, § 201

Waiver of priority by mortgagee by failing to post notice, etc., § 204, p. 769

Process, generally, post

Purchase money mortgage, priority, § 201, p 763

Purchasers, conveyance of property after attachment of lien, § 243, p. 817

Reference in action to foreclose lien, § 312

Sale of property, § 311

Service of copy of claim or statement, § 146

Setting forth in claim or statement that notice was given to owner, § 158

Stipulation against lien in contract, laborers, § 109

Stop notice, generally, post

Subcontractors, stipulation against lien in contract, § 109

Surety on contractor's bond, release by failure of owner to give, § 259, p 849

Trial in action to enforce lien, § 311

Waiver

Lapse provisions, § 65, p 566

Notice of filing of claim or statement, § 146

Notice to owner, § 122

Defects, § 126, p 634

Rights, evidence in action to enforce lien, § 310, p. 988

Priority by mortgagee by failing to post notice, etc., § 204, p 769

Novation, assignment of building contract, assignee continuing work under, § 217

Number,

Days of labor performed to be shown in claim or statement of lien, § 163

Lot and block or government subdivision, description in claim or statement of lien, § 161, p 687

Nunc pro tunc,

Complaint in proceeding to enforce lien, discretion of court, § 292

Filing,

Lien after time allowed by statute expired, § 148

Notice of pendency of action to enforce lien, § 289, p 917, n. 22

Oaths,

Bill or petition basis of attachment to enforce lien, § 287

Claim or statement of lien,

Amendment, § 170, p 719

Evidence in action to enforce lien, § 309, p. 972

Verification,

Jurat, § 167, p 712

Persons before whom made, § 167, p 710

Statement or account by contractor seeking to acquire lien, § 130

Objections,

Bond given to discharge lien, estoppel to assert, § 236

Consent of owner as established by failure to object, § 73, p. 578

INDEX TO MECHANICS' LIENS

Objections—Continued,

- Defect or irregularity in claim or statement of lien, waiver by failure to object, § 169
- Lessor, failure to object to improvements by lessee, § 65, p. 561
- Owner, failure to object to furnishing of materials to contractor, § 120, n 66
- Vendor, failure to object to improvements by vendee, § 71, p 573

Occupation,

- Building by owner, time for filing claim or statement, § 142, p 655
- Creation of lien by contract with occupant, § 53
- Owner's occupancy as evidence of completion of work in action to enforce lien, § 310, p 985, n 72

Offer of judgment, costs of proceedings to enforce as affected, § 350

Officers,

- Notice to corporate owner of intent to claim lien, § 124, p 630
- Place for filing of notice or claim of lien on public improvement, § 138
- Recording claim or statement, § 145
- Service of notice to owner of intent claim, § 128

Offsets, claim or statement of lien, setting forth, § 154

Oil,

- Machinery used in construction or improvement work, § 44
- Property, lien as attaching to, § 21, p 516
- Wells, lien for drilling, § 30

Omissions,

- Claim or statement of lien, § 169
- Amendment to supply, § 170, p. 717
- Credits and offsets, § 154
- Dollar mark showing value or price of work or material, § 165, p 703
- Extrinsic evidence in action to enforce lien, § 309, p 972
- Items of lien account, § 165, p 704
- Jurat to verification, § 167, p 712
- Material thing required by contract, further work or material as extending time of filing, § 149, p 671
- Showing of ownership, § 162, p 692
- Year in claim or statement for materials furnished, § 165, p 702
- Owner as party in suit to foreclose, § 284, p 901
- Work, amount secured by lien on substantial performance of contract, § 175

Open account, loss or extinguishment of lien by conversion into account stated, § 241

Opening default judgment, enforcement of lien, § 318

Operation and effect, §§ 172-215, pp 721-787

- Contract for improvements, filing or recording, § 82, p. 588
- Judgment or decree, enforcement of lien, § 334
- Release of lien, § 246
- Statute creating lien as determinative, § 4, p. 504
- Waiver of lien, § 222

Operation of law, lien attaching by, § 1, p 495

Option to purchase,

- Holder of lease with, lien as attaching to interest of, § 17

Option to purchase—Continued,

- Lessee in possession under as owner within lien statute, § 71, p. 569

Oral contract,

- Amendment of claim or statement of lien to supply terms and conditions of contract, § 170, p. 717
- Claim or statement of lien inadvertently alleging contract was in writing, § 163
- Purchaser in possession under oral contract of sale, contract creating lien, § 71, p. 571

Oral notice to owner of intent to claim lien, § 126, p. 634

Orchards, lien as allowable for cultivating and caring for, § 30

Order by contractor as assignment of funds due from owner, priority of claim, § 211

Orders, waiver of lien by taking, § 226

Orders of court,

- Amendment of claim or statement of lien, § 170, p 719
- Appointment of receiver, § 291
- Continuance of lien, § 183
- Prevent bar or discharge, § 282, pp 890-892
- Discharge of claim or statement of lien, § 171
- Reference in action to enforce lien, § 312

Origin, § 1, p 493

Original claim or statement, withdrawal from file, § 147

Original contractor,

- Contractors, generally, ante
- Defined, § 90

Orphanage, lien as attaching to, § 12

Ostensible contract price greater than real contract price, amount secured by lien, § 174, p 723

Other improvements, defined, § 21, p 515

Other structure, defined, § 21, p 514

Outstanding interest, judgment or decree in proceeding to enforce lien, provisions respecting, § 324

Owner,

- Admissions affecting rights of mortgagee, § 204, p 767
- Advance payments to contractor, validity as against other lien claimants, § 251, p 831
- Agreement,
 - Evidence in action to enforce lien, § 309, p. 970, § 310, p 979
 - Presumptions and burden of proof, § 308, p 962
 - Question of fact in action to enforce lien, § 314, p. 994

Assignment of contractor of funds due from owner, priority of mechanics' lien, § 211

Authorization of improvement, necessity, § 52

Bonds or undertakings, generally, ante

Breach of contract, personal judgment for damages against, § 328

Cestui que trust as, § 70

Change of ownership, description of owner in claim or statement of lien, § 162, p 691

Claim or statement of lien, statement of ownership of property, § 162, pp 689-695

Commencement of action to enforce against owner to stop running of limitations, § 282, p. 802

Compelling enforcement of lien, § 270

INDEX TO MECHANICS' LIENS

Owner—Continued,

- Completion of work,
 - Right of contractor to lien, § 96
 - Time for commencement of suit to enforce lien, § 282, p 895
- Consent of owner, generally, ante
- Constructive knowledge of improvement, notice of nonresponsibility, § 84, p 593
- Contract, generally, ante
- Cross-complaint in action to enforce lien, § 302
- Death,
 - Parties to suit to enforce lien, § 284, p 902
 - Subsequent to improvements, right to lien as affected, § 55
- Discharge of record, compelling, § 240
- Disclaimer of responsibility for improvements,
 - validity of statute requiring, § 3, p 498
- Enforcement of lien in favor of himself, § 7
- Equitable owner, presumptions and burden of proof as to consent in election of building, § 308, p 963
- Estoppel, pleading in action to enforce lien, § 294, p. 937
- Evidence of ownership in action to enforce lien, § 309, p 969; § 310, p 978
- Guaranteeing account of subcontractor, § 255
 - Priority of judgment of subcontractor on guaranty, § 210, p 784, n 56
- Heir as, § 62
- Indebtedness to contractor, evidence in action to enforce lien, § 309, p 974, § 310, p 986
 - Presumptions and burden of proof, § 308, p 966
- Intervention in action to enforce lien, § 285
- Joint owners,
 - Contract as subjecting property to lien, § 69
 - Defendant in suit to enforce lien, § 284, p 901
 - Description in claim or statement of lien, § 162, p 693
 - Dismissal on demurrer of one of owners in case of enforcement against, § 290
 - Notice of filing of claim or statement, § 146, p 666, n 89, 90
 - Notice to owner of intent to claim lien, § 124, p 628
 - Service on of copy of claim or statement, § 146
- Judgment against, action by subcontractor to enforce lien, § 326
- Judicial sale, purchaser at, § 72
- Knowledge and failure to object to work and furnishing of material, evidence in action to enforce lien, § 310, p 982
 - Presumptions and burden of proof, § 308, p. 963
- Knowledge of improvement, § 52
 - Notice of nonresponsibility, § 84, p 593
- Liability for more than original price by failure to follow law as to subcontractors, § 174, p. 723
- Lien as attaching to any right, title or interest of, § 15
- Limitation of liability, liability of owner for more than original price, § 174, pp 723, 724
- Marriage subsequent to improvements, right to lien as affected, § 55

Owner—Continued,

- Materials and materialmen, ante
- Mortgagee as within lien statute, § 68
- Naming in claim or statement, application of lien to interest, § 192
- New owner, furnishing additional material to former owner as extending time for filing claim or statement, § 149, p 669, n 34
- Notice, ante
- Part owner as within meaning of lien statute, § 69
- Party defendant in suit to enforce lien, § 284, p 901
- Payment to subcontractors, etc, lien of others as affected, §§ 252, 253
- Performance to satisfaction of, § 95
- Personal judgment against, § 331, p 1016
 - Damages for breach of contract, § 328
 - Failure to establish lien, § 329
- Personal liability,
 - Failure to exact bond for performance of contract in payment of claims, § 256
 - One contracting for improvement on land he does not own, § 263, p 871
- Pleading ownership, proceedings to enforce lien, § 294, p 924
- Privy, labor or material acquired by persons in, § 73, p 580
- Property of different owners,
 - Application of lien to several lots or buildings, § 189
 - Filing one or more claims or statements, § 136
- Purchaser in possession as, § 71, p 570
- Release of surety on contractor's bond, unauthorized act sufficient for, § 259, p 849
- Retention of contract price or part thereof until claims are paid or lien discharged,
 - Contract provisions, § 255
 - Pleading in action on lien by materialman, § 294, p 932
- Retention of funds to meet claim of subcontractors, § 251, p 834
- Sale and assignment of lien to, merger in legal title, § 245
- Service
 - Joint owners, copy of claim or statement, § 146
 - Notice of filing claim of lien, § 146
 - Stipulation respecting payment of claim, § 255
- Succession in interest, filing one or more claims or statements, § 133
- Transfer of ownership, computation of time for filing notice or claim of lien, § 140
- Uncertainty as owner, filing of two or more liens, § 133
- Unknown owners, publication of service in action to enforce lien, § 286, p 915, n 78
- Vacation of premises, appointment of receiver, § 201, p 920, n. 62
- Vendor's lien, person holding as, § 71, p 569
- Waiver of,
 - Compliance with statutory requirements as to affect rights of mortgagee, § 204, p. 767
- Lien, reliance on, § 228
- Packages, material delivered in, § 44

INDEX TO MECHANICS' LIENS

- Padding of accounts by contractor, dismissal of bill to enforce lien, § 290, p 918, n 37
- Papering, right to lien as improvement of building, § 26
- Parcels Lot or tract, generally, ante
- Parks, swings and seats erected in, lien on, § 21, p 517
- Parol assignment, § 219
- Parol evidence,
 - Affidavit for lien, supplying deficiency, § 309, p 973
 - Payment to contractor, evidence in action to enforce lien, § 309, p 974
- Part owner,
 - Claim or statement of lien, § 162, p 690
 - Contract for improvements as subjecting property to lien, § 69
 - Notice of intent to claim lien, § 121, p 626, n 71
- Part performance,
 - Cancellation of building contract by mutual consent after, right of contractor to lien, § 94
 - Claim, "credit" extending time for commencement of action to enforce lien, § 282, p 894, n 47
 - Reduction pro tanto, § 247
- Partial destruction of structure or improvement, lien as defeated by, § 242
- Partial failure of consideration for mortgage, priority over mechanic's lien, § 200, p 757, n 14
- Particular lien, nature as, § 1, p 491
- Particularity of claim or statement of lien as to work performed or materials furnished, § 165, p 703
- Parties,
 - Amendment to claim or statement of lien introducing new parties, § 170, p 718
 - Bond of contractor, § 257
 - Actions on, § 262, p 863
 - Enforcement of lien, § 283-285, pp 899-913
 - Addition, § 285
 - Amendment, § 306
 - After expiration of period for commencement of action, § 282, p 898
 - Answer pointing out defects, § 301, p 940
 - Assignee of claim as party defendant, § 284, p 901
 - Assignee of contractor's interest, § 284, p 910
 - Assignee of mortgage or debt as defendant, § 284, p 907
 - Bill for general settlement for enforcement, § 270
 - Continuance of lien by making claimant party defendant in action to enforce another lien, § 183
 - Change in or transfer of title, § 284, pp. 902, 907
 - Community property, parties defendant, § 284, p 904
 - Continuance of lien by lienor made party in action to enforce, § 282, p. 896
 - Contract, parties to contract as parties defendant, § 284, p 908
 - Contractor, party defendant, § 284, p 908
 - Curtsey, joinder of parties, § 284, p 903
 - Defects as required to be pointed out in defenses, § 301, p 940
 - Defendant, § 284, pp. 900-911
 - Joinder either as defendant or plaintiff, § 285
- Parties—Continued,
 - Enforcement of lien—Continued,
 - Demurrer on ground of defect, § 305, p 949
 - Dismissal of action for failure to serve, § 290
 - Dower, joinder of parties, § 284, p 903
 - Encumbrancers, parties defendant, § 284, pp 904, 909
 - Encumbrancers pendente lite, § 284, p 905
 - Homestead, joinder of parties, § 284, p 903
 - Husband and wife as parties defendant, § 284, p 903
 - Intervention, ante
 - Joinder of parties, ante
 - Joint owners as defendant, § 284, p 901
 - Junior mortgagees as parties defendant, § 284, p 906
 - Lessor and lessee as defendant, § 284, p 902
 - Lienors made defendant, filing of notice of lis pendens, § 289
 - Mortgagees as parties defendant, § 284, p 905
 - Necessary parties, §§ 283-285, pp 899-913
 - Nominal party, motion for dismissal, § 290
 - Object of requirement of filing of statement, § 131, p 643
 - Owners as parties defendant, § 284, p 901
 - Partners as parties plaintiff, § 283, § 284, p. 904
 - Personal judgment, parties defendant in action for, § 284, p 908
 - Persons entitled to enforce, § 278
 - Persons personally liable for debt secured as parties defendant, § 284, p 908
 - Plaintiff, § 283
 - Joinder either as defendant or plaintiff, § 285
 - Preventing bar of limitations to enforce lien by being made party to another proceeding, § 282, p 895
 - Process on necessary parties, § 286
 - Purchaser or encumbrancer pendente lite as defendant, § 284, p 905
 - Questions of law and fact, § 314, p 903
 - Several general contractors, parties defendant, § 284, p 910
 - Special judgment, parties defendant in action for, § 284, p 907
 - Stopping of limitations as to persons made parties to action, § 282, p 892
 - Substitution, § 285
 - Sureties as parties defendant, § 284, p 908
 - Trust deeds, parties defendant, § 284, p 906
 - Unknown owners, publication of service, § 286, p. 915, n 78
 - Variance, § 307, p 957
 - Waiver of objections by failure to demur, § 305, p 948
- Injunction against foreclosure sale by one not joined as party, § 271
- Intervention, generally, ante
- Joinder of liens and enforcement, § 272
- Judgment or decree, proceeding to enforce lien, § 319, p 1005
- Lien claimant made party defendant to suit of another lien claimant, time for commencement of suit to enforce lien, § 282, p 895
- Loss of priority by failure to make mortgagee party in suit to enforce lien, § 204, p. 768

INDEX TO MECHANICS' LIENS

Partition walls in double houses, filing two or more claims or statements, § 135

Partitions, lien on, § 26

Partnership,
 Acquisition of lien by, § 7
 Claim or statement,
 Setting forth status, § 156, n 23
 Signature, § 166
 Verification before partner who is notary, § 167, p 710
 Contract as subjecting property to lien, § 69
 Contractor, parties defendant in action to enforce lien, § 284, p 909, n. 87
 Dissolution, parties plaintiff in suit to enforce lien, § 283, p. 900, n 39
 Evidence in action to enforce lien, § 309, p 974
 Notice,
 Claim of lien to owner, § 121, p. 626, n 72
 Nonresponsibility by objecting partner, § 84, p 593
 Owner of intent to claim lien, § 124, p 628
 Signature where partnership is claimant, § 127

Parties,
 Defendant in action to enforce lien, § 284, p. 904
 Plaintiff in suit to enforce lien, § 283
 Personal judgment against member, § 331, p 1016, n 58

Patterns, lien as allowable for use of, § 44

Paving, lien as allowable, § 31

Payment, §§ 247-254, pp. 822-836
 Advance payment to contractor, § 251, p 831
 Application of payment, § 248, pp 823-826
 Moneys received by contractor from owner or other interested person, § 249
 Owner as to payments made to contractor, § 251, p 832

Attorney's fees, allowance as costs in proceeding to enforce lien as dependent on, § 353, p. 1039

Bonds or undertakings, ante

Claimant, sureties on contractor's bond as relieved to extent thereof, § 259, p 851

Collusive payments to principal contractor, lien of others as affected, § 251, p 832

Commencement of suit to enforce lien when debt secured is due and payable, § 282, p 889

Commencement of work, lien of claimant as respects payment to contractor after, § 251, p. 830

Continuance of lien after payment becomes due, § 183

Costs of proceeding to enforce, § 350

Estoppel to assert lien by directions as to, § 230

Evidence in action to enforce lien, § 309, p. 975; § 310, p. 987

Extension of time for suit to enforce lien, § 282, p 894, n. 46, 47

Extinguishment by, § 247

Fraudulent payments to principal contractor, lien of others as affected, § 251, p 832

Guaranty of payment by owner to subcontractor or materialmen, amount secured by lien, § 174, p 725

Interest computed from time when payment demanded, § 176

Payment—Continued,
 Knowledge of claim of subcontractors, etc., payment to contractor after, § 251, p 832
 Knowledge of source of funds, application dependent on, § 249
 Laborers, ante
 Liens of others affected by payment to contractor, § 251, pp 828-834

Materialmen,
 Application of payments,
 Contractor of money received from owner or other interested person, § 249
 Subcontractor with money received from contractor, § 250
 Lien affected by payment to contractor, § 251, p 828

Misapplication of payments, § 248, p 823, n 13

Moneys received from owner or other interested person, application, § 249

Notice of claim from subcontractors, etc., payment to contractor after, § 251, p 832

Other liens, defense to enforcement of lien, § 273

Owner by contractor, amount secured by lien of subcontractor, etc., § 174, p 724

Pleading, actions to enforce lien, § 294, p. 931; § 301, p 943

Amendment, § 306

Presumptions and burden of proof in action to enforce lien, § 308, pp 966, 967

Pro rata application, § 248, p 825

Question of fact in action to enforce lien, § 314, pp 996, 997

Redemption from sale in proceedings to enforce lien, § 347, p 1031

Reduction of amount by, § 247

Release of claims, duty of owner to obtain, § 251, p 832

Set-off in action to enforce lien, § 276

Source of funds, application as dependent on knowledge or absence of, § 249

Statement or release of claim, § 251, p 832

Subcontractors, post

Surety on bond of contractor as release, § 259, p 850

Tender of amount due, extinguishment of lien, § 254

Time,
 Evidence in action to enforce lien, § 309, p 969
 Principal contractor, § 251, p. 829

Waiver of lien by,
 Agreements as to, § 224
 Taking note, § 226

Penalties, failure to,
 Release lien, § 246
 Satisfaction or discharge of record, § 240

Pending suit *Lis pendens*, generally, ante

Pennsylvania system, § 105

Perfection, §§ 118-171, pp 622-721
 Assignee of inchoate lien, §§ 216, 217
 Claim or statement, generally, ante
 Commencement of action to enforce lien, compliance with statute essential to perfecting lien, § 282, p 890, n. 9
 Compliance with statutory requirements, § 119
 Conveyance of premises, lien as affected, § 243, p. 816

INDEX TO MECHANICS' LIENS

Perfection—Continued,

- Death of owner as affecting right, § 55
 - Defects, contest of enforcement of lien by mortgagee, § 279
 - Entity, perfection as, § 119
 - Filing, claim, statement and contract, §§ 131-171, pp 639-721
 - Judgment or decree in proceeding to enforce, § 335
 - Legislative power to prescribe means for, § 3, p 498
 - Loss of,
 - Liens not perfected in time and manner prescribed by statute, § 119
 - Priority by failure of lien claimant to comply with statutory requirements, § 204, p. 766
 - Nature and form of proceedings, § 118
 - Notice,
 - Claim or statement, generally, ante
 - Owner Notice, ante
 - Oath to statement or account to owner by contractor seeking to acquire lien, § 130
 - Question of law and fact in action to enforce lien, § 314, p. 995
 - Recording, claim, statement and contract, §§ 131-171, pp. 639-721
 - Refiling, § 131, p. 641
 - Reinscribing lien, § 131, p. 641
 - Statement of names of subcontractors, employees and materialmen, notice to owner by claimant of lien on failure to furnish statement, § 121, p. 626
 - Statement or account to owner, § 130
 - Stop notice distinguished from notice to owner of intention to claim lien, § 120
 - Time, question of law and fact in action to enforce lien, § 314, p. 995
 - Two or more liens, separate compliance with statutory requirements, § 119
- Performance of contracts.** Contracts, ante
- Permission,**
- Lessor, improvements by lessee, § 65, p. 561
 - Vendor, improvements by vendee, § 71, p. 573
- Personal actions to enforce lien, § 265**
- Personal judgment in action to enforce lien, § 266, n. 84, §§ 328-331, pp 1013-1018**
- Attorney's fees, § 353, p. 1039
 - Failure to establish lien, § 329
 - Bond for prevention or discharge of lien, giving as precluding, § 237
 - Costs, § 350
 - Deficiency, § 330
 - Enforcement, § 335
 - Evidence, support by, § 328
 - Failure to establish lien, § 329
 - Findings, support by, § 328
 - Jurisdiction of defendant, § 328
 - Lien of, § 335
 - Materialmen against contractor, § 331, p. 1015
 - Parties defendant in action to enforce lien, § 284, p. 908
 - Person against whom rendered, § 331, pp 1015-1018
 - Pleadings, support by, § 328
 - Subcontractor against contractor, § 331, p. 1015
 - Waiver of lien, § 225; § 331, p. 1017

Personal liability,

- Consent of owner, § 52
 - Enforcement of lien, § 263, p. 870
 - Pleading, § 294, p. 937
- Personal property,**
- Application and coverage of lien, § 190
 - Conversion into real property by filing notice of lien, § 131, p. 641
 - Judgment as lien on, § 335
 - Lien for purchase price, § 208
- Personal representative,**
- Enforcement of lien, waiver of statute of limitations, § 282, p. 891, n. 10
 - Executors and Administrators, generally, ante
- Personam judgment sufficient to establish lien, § 317**
- Persons entitled to lien, §§ 86-117, pp 597-622**
- Persons who may obtain lien, § 7**
- Petition.** Declaration, bill, petition, or complaint, generally, ante
- Piecemeal delivery of items purchased at one time,** claim or statement of lien, § 165, p. 706
- Piers, liens as allowable on, § 21, p. 516**
- Pipes, lien as allowable, § 30**
- Place,**
- Business, claim or statement, setting forth in, § 156
 - Contract creating lien, making of, § 74
 - Contract for improvements, filing or recording, § 82, p. 587
 - Delivery of materials, right to lien as affected, § 42
 - Filing notice or claim, § 138
- Plaintiff, enforcement of lien, § 283**
- Plans and specifications,**
- Architect preparing, § 36
 - Attachment of copy to notice to owner of intent to claim, § 126, p. 634
 - Bond of contractor, construction with reference to, § 258
 - Change of plans,
 - Priority of mechanic's lien and mortgage, § 203, p. 764, n. 10
 - Relation back of lien, § 180
 - Time for filing claim or statement, § 144, p. 662, n. 31
 - Claim or statement of lien referring to plans and specifications, § 163
 - Contract for improvement, filing of, § 82, p. 588
 - Evidence in action to enforce lien, § 309, p. 971
- Planting, lien as allowable for, § 30**
- Plasterers, laborer within statute creating lien, § 88**
- Plea or answer,**
- Bond of contractor, action on, § 262, p. 865
 - Enforcement of liens, §§ 300, 301, pp. 939-944
 - Amended pleading, § 306
 - Cross-complaint, § 303
 - Filing, § 302
 - Form and sufficiency, § 301, pp. 939-944
 - General denial, § 301, p. 942
 - Indebtedness, § 301, p. 943
 - Replication or reply, § 304
- Pleading,**
- Answer Plea or answer, ante
 - Appearance in suit and filing answer or cross bill, independent proceedings begun to enforce demand as bar to recovery, § 272
 - Bill Declaration, bill, petition or complaint, generally, ante

INDEX TO MECHANICS LIENS

Pleading—Continued,

- Bond or undertaking for prevention of discharge of lien, action on, § 239
- Claim or statement of lien, pleading to aid imperfect description, § 161, p 685
- Claim or statement of lien failing to designate contractor, aided by petition to enforce, § 104, p 698, n 11
- Claim, statement, etc., as not pleading, § 131, p 641
- Complaint. Declaration, bill, petition or complaint, generally, ante
- Consent of defendant to amendment of complaint, obviating necessity of amendment of claim or statement of lien, § 170, p 717
- Declaration, bill, petition or complaint, generally, ante
- Demurrer in action to enforce lien, generally, ante
- Enforcement of lien, §§ 292-307, pp 921-959
 - Admissions, failure to deny, § 301, p 941
 - Affidavit of defense, §§ 300, 301, pp 939-944
 - Amendment, § 306
 - Limitation affected by, § 282, p 806, n 79
 - Amount of indebtedness, § 294, p 931
 - Answer, §§ 300, 301, pp 939-944
 - Anticipating defenses, § 297
 - Bill of particulars, § 294, p 933
 - Certificate of architect, § 294, p 931
 - Claim or statement,
 - Amendment in respect of, § 306
 - Filing of, § 294, p 935
 - Completion of work, § 294, p 930
 - Conformity of verdict and findings to issues, § 316, p 1000
 - Consent of owner, denial of, § 301, p 941
 - Construction, § 293
 - Contract, denial of, § 301, p 941
 - Contract with or consent of owner, § 294, p 926
 - Controverting cause of action set up, § 301, p 940
 - Counterclaim, § 301, p 942
 - Cross bill or cross-complaint, § 302
 - Answer to, § 303
 - Declaration, bill, petition or complaint, ante
 - Defects, demurrer raising objections, § 305, p 948
 - Demurrer, § 305, pp 947-950
 - Denial in answer, § 301, p 940
 - Description of premises and improvements, § 294, p 923
 - Amendment, § 306
 - Variance, § 307, p 957
 - Estoppel, § 294, p 936
 - Filing as commencement of action as respects limitation, § 282, p 897
 - Filing of lien claim or statement, § 294, p 935
 - Form, requisites and sufficiency, § 293
 - General demurrer, § 305, p 947
 - General denial, § 301, pp 942, 943
 - Indebtedness, general denial, § 301, p 943
 - Issues, proof and variance, § 307, pp 952-959
 - Itemized account, § 294, p 933
 - Joinder of counts and causes, § 298

Pleading—Continued,

Enforcement of lien—Continued,

- Joint contract, § 294, p 927
- Jurisdiction to determine priority and validity of liens, § 281
- Knowledge, § 294, p 926
- Laborers, actions by, § 294, p 929
- Laches, § 302
- Limitations, general denial, § 282, p 891, n 10
- Lis pendens notice, § 294, p 937
- Materialmen, actions by, § 294, p 929
- Materials furnished and purpose thereof, § 294, p 925
- Maturity of indebtedness, § 294, p 931
- Misjoinder of causes, § 298
- Multifariousness, § 298
- Necessity, § 292
- Negating defenses, § 297
- Nonpayment of claim, § 294, p 931
- Notice to owner, § 294, p 934
- Nunc pro tunc filing, discretion of court, § 292
- Ownership or interest, § 294, p 924
- Partial defense, § 301, p 940
- Payment, § 301, p 943
 - Amendment, § 306
- Penalties, § 294, p 931
- Performance of contract, § 294, p 930
 - Amendment, § 306
 - General denial, § 301, p 943
 - Variance, § 307, p 955
- Personal liability, § 294, p 937
- Prayer, amendment, § 306
- Primary liability of owner, actions by materialmen or subcontractors, § 294, p 932
- Priority of lien, § 294, p 936
- Purpose of suit, § 295
- Recoupment, § 276
- Replication or reply, § 304
- Scire facias to enforce lien, waiver of defense of noncompliance with conditions of right to file lien, § 275
- Services furnished and purpose thereof, § 294, p 925
- Set-off and counterclaim, § 276
- Special demurrer, § 305, p 947
- Statement of cause of action against those made parties, § 284, p 907
- Status of claimant, § 296
- Subcontractors, actions by, § 294, p 929
- Supplemental pleadings, substitution of parties, § 285, n 21
- Tender, § 301, p 943
- Time,
 - Amendment, § 306
 - Furnishing work or material, § 294, p 930
- Uncertainty, motion raising objection, § 305, p 948
- Variance, § 307, pp 952-959
- Verification, § 299
 - Amendment, § 306
 - Complaint, § 299
 - Denial for want of, § 305, p 949

INDEX TO MECHANICS' LIENS

Pleading—Continued,

Enforcement of lien—Continued,

Waiver of failure to institute action to enforce lien within time, § 282, p 890

Issues, proof and variance, generally, ante

Loss of priority by failure to claim priority of lien, § 204, p 767

Personal judgment, support by, § 328

Petition Declaration, bill, petition or complaint, generally, ante

Plea or answer, ante

Priority, determination of priority of mechanic's lien and mortgage, § 206

Statement or claim not to be aided by bill, complaint or petition, § 150

Statutory provisions, nature as dependent on terms of, § 292

Waiver of defects in notice to owner of intent to claim lien, § 126, p 634

Pledges, waiver of lien by taking, § 227, p 803

Plumbing,

Lien as attaching to appliances and fixtures, § 27

Separate contract, time for filing claim or statement, § 144, p 664, n 52

Poles, liens for structures or improvements as applying to, § 21, p 516

Political subdivision, description of property in claim or statement of lien, § 131, p 638

Portable stoves, lien on, § 27

Possession,

Building by owner, time for filing claim or statement, § 142, p 635

Contract creating lien, § 58

Purchaser at sale in proceeding to enforce lien, § 344

Posting,

Notice,

Intent to claim lien, § 128

Nonresponsibility, § 84, p 595

Presumptions and burden of proof in action to enforce lien, § 308, p 963, n 98

Service of copy of claim or statement on joint owner, § 146, p 666, n 89

Postponement, trial or hearing to enforce lien, § 311

Power lines, liens for structures or improvements, § 21, p 516

Prayer, enforcement of lien, action for, amendment, § 306

Precedents, construction of statute creating lien, § 4, p 499

Preference,

Lien as, § 1, p 492

Priorities, generally, post

Premature action,

Enforcement of lien, § 268, n 97; § 282, p 889

Loss or extinguishment of lien by, § 241

Premature filing of notice or claim of lien, § 139, p 648

Premature payments, contractors, lien of others as affected, § 251, p 831

Premises, posting of notice to owner of intent to claim lien, § 128

Preparatory work, materialmen, § 35

Present property right, inchoate mechanic's lien as, § 1, p 492

Presumptions and burden of proof,

Agency, action to enforce lien, § 308, p 963

Presumptions and burden of proof—Continued,

Agreement or consent of owner, § 308, p 962

Amendment of claim or statement of lien, § 170, p 719

Amount of claim, § 308, p 965

Appurtenances to building, § 308, p 961

Architect's certificate as condition of payment, § 308, p 964

Bad faith, § 308, pp 966, 967

Bill for general settlement, § 308, p 960

Bond of contractor, actions on, § 262, p 867

Cancellation of contract, § 308, p 963

Cause of action by claimant, § 308, p 959

Claim, statement or notice of claim, § 308, p 964

Collusion, § 308, p 966

Completion of work or furnishing of material, § 308, p 964

Consent of owner, failure to give notice of non-responsibility, § 84, p 591

Deductions for faulty performance or cost of completion, § 308, p 966

Delivery and use of material, § 308, p 961

Diligence in prosecution of proceeding to enforce lien, § 282, p 890

Establish right to lien, § 308, p 959

Estoppel, § 308, p 967

Equitable owner, consent of, § 308, p 963

Fraud, § 308, p 967

Indebtedness of owner to contractor, § 308, p 966

Instructions on burden of proof in action to enforce lien, § 315

Judgment or decree, enforcement of lien, § 334

Knowledge and failure to object, § 308, p 963

Materialmen, agreement or consent of owner, § 308, p 962

Payment, § 308, p 967

Note taken by person entitled to lien, § 226

Performance of contract, § 308, p 963

Preponderance of evidence to support burden of proof, § 310, p 976

Priorities, § 308, p 968

Property or interest subject to lien, § 308, p 961

Receiver, appointment, § 291

Reliance on credit of property, § 308, p 961

Subsequent encumbrances, priority, § 308, p 968

Validity of contract, § 308, p 963

Waiver, § 223

Lien, § 308, pp 959-968

Priority, § 308, p 968

Pretended owner, notice of intent to claim lien, § 124, p 628

Prevailing party, costs in proceeding to enforce, § 350

Prevention of lien Bonds or undertakings, ante

Price,

Amount of claim, evidence in action to enforce lien, § 310, p 985

Amount secured by lien, § 173

Abandonment by contractor, § 175

Part performance of contract, § 175

Persons not dealing directly with owner, § 174, p 723

Claim or statement of lien, showing price of materials furnished, § 165, pp 702, 706

Claims exceeding contract price, burden of proof by owner seeking pro rata payment of claim, § 308, p 960

INDEX TO MECHANICS' LIENS

Price—Continued,

- Deed of trust given to contractor to secure payment of contractor's price, priority as to lien, § 201, p. 760
- Excessive charge, contest of lien of subcontractor by contractor, § 280
- Evidence,
 - Amount of claim in action to enforce lien, § 309, p. 973
 - Indebtedness of owner to contractor in action to enforce lien, § 310, p. 987
 - Ostensible price greater than real contract price, amount secured by lien, § 174, p. 723
 - Payable in realty, application of lien to interest in realty, § 184, p. 735, n. 22
 - Prima facie evidence of reasonable value, § 308, p. 965
 - Priority of lien for purchase price, § 208
 - Reduction by offset, counterclaim, etc., in enforcement of lien, § 277
- Prima facie case,
 - Claim or statement to show on its face, § 150, p. 674, n. 7
 - Establishment by claimant as shifting burden of evidence to owner, § 308, p. 960
- Prima facie evidence,
 - Agreed value as evidence of value or reasonable value of services or materials, § 173
 - Claim or statement of lien as prima facie proof of facts stated therein, § 309, p. 972
 - Delivery and use of materials, § 310, p. 979
 - Officer's return indorsed on notice of claim showing service, § 310, p. 983
 - Posting notice, burden of proof in action to enforce lien, § 308, p. 963, n. 98
 - Price as prima facie evidence of reasonable value, § 308, p. 965
 - Report of referee in action to enforce lien, § 312
- Primarily or incidentally affected property, application of lien, § 184
- Principal contractors Contractors, generally, ante
- Prior encumbrances,
 - Judgment or decree in proceeding to enforce lien, § 324
 - Sale and foreclosure of lien, effect of, § 337
- Prior owners, notice of intent to claim lien, § 124, p. 628
- Priorities, §§ 197-215, pp. 747-787
 - Additions, priority of lien as to enhanced value of property, § 205, p. 777
 - Advances by mortgagee, § 205, pp. 772, 773
 - After-acquired property, mortgage of, § 201, p. 759
 - Amount due contractor or subcontractor, § 198, p. 750
 - Assignment or transfer, § 211
 - Attorney's fees, § 205, p. 772
 - Beneficiaries of subcontractor's estate, rights, § 198, p. 751
 - Bill for determination, time for commencement, § 282, p. 803
 - Building contracts affecting priority as to mortgages, § 202
 - Building purpose mortgage, § 201, p. 759
 - Buildings or structures, ante
 - Claim or statement, ante

Priorities—Continued,

- Commencement of building or improvement affecting priority as to mortgage, § 200, p. 754
- Common enterprise, priority of lien and mortgage, § 201, p. 760
- Compliance with statutory provisions, § 201, p. 761
- Contract between owner and mechanic, mortgage given after, § 200, p. 753
- Contractor, mortgage given to, § 201, p. 760
- Creditors and mechanics' lien claimant, § 210
- Decedent's estate, claims against, § 212
- Different mechanics' liens, § 198, pp. 747-751
- Effect, § 206
- Encumbrances and mechanics' liens, §§ 199-204, pp. 751-779
 - Validity of statutes conferring, § 3, p. 498
- Enforcement of lien, loss of priority by failure to commence proceedings to enforce lien, § 204, p. 767
- Enhanced value of property, § 205, p. 776
- Equitable ownership of property subject to mortgage, § 201, p. 759
- Estoppel,
 - Lien claimant as to mortgages and other encumbrances, § 204, pp. 765-771
 - Lien for purchase price, § 208
- Evidence in action to enforce lien, § 309, p. 975, § 310, pp. 988, 989
- Expenditures by mortgagee, § 205, pp. 772, 774
- Extent, § 205, pp. 771-777
 - Mechanics' lien and other lien or encumbrance, § 207
 - Purchase money lien, § 208
- Extinguishment of mortgage affecting, § 204, p. 770
- Filing affecting priority of mortgage, § 204, p. 769
- Findings in action to enforce lien, § 316, p. 999
- Furnishing materials affecting priority over mortgage, § 200, p. 756
- Homestead,
 - Knowledge of mechanics' lien claimants as to intended to use, § 211
 - Purchase money lien, § 208
- Improvement mortgage, § 201, pp. 759, 760
- Improvements before acquisition of title affecting priority of purchase money mortgage, § 201, p. 763
- Independent agreements affecting priority as to mortgages, § 203
- Intervening encumbrance, § 198, p. 750
- Intervenors in action to enforce liens, § 285
- Judgment or decree in proceedings to enforce lien, determination as to, § 325
- Jurisdiction in proceedings to foreclose lien to determine priority of lien, § 281
- Junior, mortgage given to lienor, § 201, p. 760
- Loss of priority,
 - Lien for purchase price, § 208
 - Mechanics' lien and other lien or encumbrance, § 207
 - Mortgage, etc., § 204, pp. 765-771
- Merger of estates affecting priority as to mortgage, § 201, p. 759
- Mortgage as party defendant in suit to enforce mechanics' lien, § 284, p. 905

INDEX TO MECHANICS' LIENS

Priorities—Continued,

- Mortgages or like encumbrances, §§ 199-206, pp 751-779
 - Contract of sale authorizing for improvements, precedence over vendor's lien, § 71, p 375
 - Discharge of prior mortgage with funds obtained under later mortgage affecting priority, § 204, p 770
 - Destruction of priority of lien by subordination to subsequent mortgage, § 198, p 749
- Nature, validity and provisions of mortgage affecting priority, § 201, pp 758-764
- Notice and recording of purchase money mortgage, § 201, p 763
- Other claims, interests, or rights, §§ 210-215, pp 784-787
- Other lienors, § 207
 - Evidence in action to enforce lien, § 309, p 975, § 310, p 989
- Partial release of land from mortgage affecting priority, § 204, p 771
- Performance of labor affecting priority of lien over mortgage, § 200, p 756
- Pleading, action to enforce lien, § 294, p 936
- Preference or postponement of particular classes of claimant, § 198, p 749
- Presumptions and burden of proof in action to enforce lien, § 308, p 968
- Proceedings to determine, § 206
- Promissory note, § 213
- Property or interest covered, § 205, p 775
- Purchase money mortgage, § 201, pp 761-763
 - Character of mortgage as purchase money mortgage, § 201, p 763
 - Extent of priority, § 205, p 772
 - Improvement by purchaser prior to acquiring title, § 201, p 763
 - Improvements before acquisition of title affecting priority, § 201, p 763
 - Notice and recording, § 201, p 763
 - Persons to whom mortgage given, § 201, p 762
- Purchase price lien, § 208
- Question of fact in action to enforce lien, § 314, p 994
- Receivership, rights or claims asserted in, § 214
- Recording affecting priority, § 200, pp 757, 758, § 204, p 769
 - Advances after as well as before accrual of mechanic's lien in case of mortgage, § 205, p 773
- Purchase money mortgage, § 201, p 763
- Redemption by holder of lien from prior encumbrances, § 206
- Reference for determination, § 312, p 991, n 52
- Release of mortgage affecting, § 204, pp 770, 771
- Remedies, § 206
- Renewal of mortgage affecting, § 204, p 770
- Repairs, priority as to enhanced value of property, § 205, p 777
- Sale of property to enforce lien, building or improvement, § 339
- Second mortgage subject to first mortgage providing for advancement, § 201, p 761

Priorities—Continued,

- Single contract or improvement, necessity, § 200, p 756
- Stipulation in mortgage for priority, § 201, p 759
- Subordination of lien by claimant to lien of mortgage, etc., § 207
- Subrogation, mortgagee to rights of mechanics' lien holders, § 206
- Subsequent mortgagee's right to question on failure to make him party to lien foreclosure suit, § 284, p 906, n 42
- Substitution of security affecting, § 204, p 770
- Supplies, lien for, § 209
- Sureties, rights of sureties completing contract, § 215
- Surrender of mortgage for cancellation without limitation or reservation, § 204, p 771
- Time, § 198, p 749, § 200, pp 752-758, § 207
 - Attachment of mortgage affecting priority, § 200, p 757
 - Improvement mortgage and mechanic's lien, § 201, p 760
- Trust deed given to lienor or contractor, § 201, p 760
- Validity of mortgages affecting priority, § 201, pp 758-764
- Validity of statutes conferring, § 3, p 408
- Voluntary advances after accrual of mechanic's lien, § 205, p 773
- Waiver of, § 207
 - Lien for purchase price, § 208
 - Mortgage, etc., priority of mechanic's lien over, § 204, pp 765-771, § 207
 - Presumptions and burden of proof in action to enforce lien, § 308, p 968
- Private property, lien as limited to, § 8
- Privilege, lien as, § 1, p 492
- Privity,
 - Absence of privity with owner, necessity of recording notice of lien, § 131, p 642, n 49
 - Bond of contractor, materialman and surety, § 262, p 859
 - Contract for improvement, personal liability for work, § 263, p 871
 - Notice to owner of intent to claim lien, § 121, p 626, n 71
 - Owner, labor or material acquired by persons in, § 73, p 580
- Proceeds of property, application and coverage of lien, § 196
- Proceeds of sale, direction for distribution in judgment in proceeding to enforce lien, § 324
- Process,
 - Claim, statement, etc., as not process, § 131, p 641
- Enforcement of lien, proceedings for, §§ 286-288, pp 913-917
 - Attachment, § 287
 - Commencement of proceeding within period of limitation, § 282, p 897
 - Defendant, § 286
 - Dismissal for diligence in service, § 290
 - Intervening lienors, § 286
 - Publication, § 286
 - Running into another county, § 286
 - Scire facias, § 288

INDEX TO MECHANICS' LIENS

Process—Continued,

- Enforcement of lien, proceedings for—Continued,
- Service of process as commencement of action as respects limitation, § 282, p 897
- Sufficiency, § 286

Profits,

- Application to reduction of obligation secured by deed of trust, § 206, p 777, n 74
- Labor and material furnished by contractor at profit, right to lien, § 91
- Lien as allowable for, § 49
- Sale in proceedings to enforce liens, accounting by purchaser, § 347, p 1041, n 97

Promissory note. Notes, generally, ante

- Promoters, contract creating lien, power to enter into, § 60

Proof,

- Evidence, generally, ante
- Execution of claim or statement of lien, § 168
- Issues, proof and variance, generally, ante

Property, lien as, § 1, p 492

- Pro rata payment of claim exceeding contract price, burden of proof, § 308, p 960

Pro rata sharing,

- Amount secured by lien of subcontractors, etc., limited by contract between owner and contractor, § 174, pp 724, 725
- Claimants where liens exceed contract price, § 174, p 723
- Different mechanics' liens, § 198, p 748

Protection of owner, contract provisions, § 255

Protective nature, statutes creating lien, § 3, p 496

Provisions, lien for, § 48

- Public authorities, additional work done to meet requirements of public authorities, extending time for filing claim or statement, § 149, p 672

Public buildings, validity of statute authorizing lien on, § 3, p 498, n 93

Public corporations, private property acquired by, existing lien as affected, § 10

Public improvements,

- Place for filing notice or claim, § 138
- Recording claim, necessity, § 131, p 640, n 18

Public lands, homestead as subject to lien, § 14

Public property, lien as attaching to, § 10

Public service corporations, property as subject to lien, § 11

Publication,

- Notice of claim, failure to publish as defeating right of action, § 289

Process in action to enforce lien, § 286

Pumps, fixtures, lien as attaching to, § 27

Purchase money, lien as attaching to equitable lien of vendor for, § 16

Purchase money mortgages Mortgages, ante

Purchase price, priority of lien, § 208

Purchasers,

Accrual of lien, § 177

- Amendment joining purchaser after expiration of period for foreclosure of lien, § 282, p 898, n 16

Amendment of claim or statement of lien affecting rights of purchaser, § 170, p 717

- Burden of proof as to absence of prejudice, § 170, p 719

Application of lien to building or improvement alone, § 188

Purchasers—Continued,

Assumption of liens, § 191

Commencement of lien, § 177

Completion of building or improvement, time for filing claim or statement, § 142, p 653, n 7

Consent of owner as question of law and fact in action to enforce lien, § 314, p 995

Contest of enforcement of lien by subsequent purchaser, § 279

Contract,

Filing as constructive notice, § 132

With as subjecting property to lien, § 71, p 570

Contractor, term as including, § 90

Estoppel against, § 229

Extension of time for filing claim or statement, purchaser not party to agreement, § 148

Filing of statement necessary to preserve lien against, § 131, p 642

Intervention in action to enforce lien, § 285

Knowledge,

Construction of building as taking place of compliance with statutory requirements, § 119

Lien as affected, § 243, p 816

Mortgagee purchasing property, loss of priority, § 204, p 771

Notice of nonresponsibility, § 84, p 593

Notice of sale or conveyance of property after attachment of lien, § 243, p 817

Notice to purchaser of intent to claim lien, § 124, p 628, n 96

Owner within statute, § 71, p 570

Requiring notice of intent to claim lien, § 124, p 628, n 96

Parties defendant to enforcement of lien, § 284, p 905

Payment, acts in respect of, § 247

Pendente lite, compliance with statutory requirements as to claim or statement, § 150

Possession under contract of purchase, interest as subject to lien, § 16

Priority, evidence in action to enforce lien, § 310, p 980, n 17

Sale in proceeding to enforce lien, conveyances, § 313

Service in construction of buildings on lots of different owners, application of lien, § 189, p 742, n 41

Time for filing claim or statement, § 139, p 650

Uncompleted option, acquisition of lien from date of furnishing materials at request of purchaser, § 181, p 734, n 93

Unrecorded contract purchasers, description in claim or statement of lien, § 102, p 693, n 19

Purpose, furnishing of labor or materials, § 45

Qualified consent of owner, § 73, p 579

Quantum meruit,

Contract for improvements, lien for, § 78

Evidence in action to enforce lien, § 309, p 973

Pleading, recovery on under allegation of express contract, § 307, p 956

Quasi-public corporations, property as subject to lien, § 11

Questions of law and fact,

Bond of contractor, actions on, § 262, p 867

INDEX TO MECHANICS' LIENS

Questions of law and fact—Continued,

- Declaration of priority of mechanic's lien over trust deed, § 206, p 778, n 91
- Enforcement of lien, § 311, § 314, pp 992-997
- Quitclaim deed, merger of estates affecting priority of lien over mortgage, § 201, p 759
- Railroad property, lien attaching to, § 21, p 515
- Railroad records, evidence of delivery of materials in action to enforce lien, § 309, p 970, n. 1
- Ranges, lien on, § 27
- Ratification,
 - Contract, § 52
 - Creating lien,
 - Husband or wife, § 63, p 553
 - Unauthorized contract, § 59
 - Failure of owner to give notice of nonresponsibility, § 84, p 591
 - Corporation of verification, § 167, p 710, n 12
 - Lessor, acts of lessee, § 65, p 500
 - Married women, pleading in action to enforce lien, § 294, p 926
- Raw material, lien for, § 41
- Real property Lot or tract, generally, ante
- Reasonable construction of statutes creating lien, § 4, p 499
- Reasonable time, notice to owner of intent to claim lien, § 125, n 53
- Reasonable value Value, post
- Receipts,
 - Conclusiveness, § 248, p 825
 - Pending delivery of material, evidence in action to enforce lien, § 309, p 973
- Receivers,
 - Appointment as excuse for failure to file and record statement, § 131, p. 642
 - Certificates, § 291
 - Priority of claims of laborers employed by receiver, § 214
 - Claims, establishment against receiver, § 291
 - Contract creating lien, power to enter into, § 61
 - Enforcement, § 291
 - Intervening petition affecting time for enforcement of lien, § 282, p 894
 - Materials furnished prior to, lien as allowable, § 43
 - Mortgage foreclosure, amendment bringing in receiver as party after expiration of time for enforcement of mechanics' lien, § 282, p. 890
 - Notice to owner of intent to claim lien, § 124, p. 630, n 37
 - Priority of rights or claims asserted in receivership, § 214
- Rent,
 - Application to lien, § 144, p 659, n 87
 - Disposition of rents collected, § 291
 - Report of receiver, conclusiveness in action to foreclose, § 291, p 920, n 62
 - Time for filing claim or statement, § 144, p. 659, n. 87
- Reception of evidence at trial, § 311
- Reconstruction, amount secured by lien, § 175, n 74
- Recorder, place for filing of notice or claim, § 138
- Records,
 - Assignment of money due or to become due under contract, § 85
 - Bond of contractor, § 257

Records—Continued,

- Claim or statement, ante
- Contracts, ante
- Creditors' unrecorded claims as defense to action to enforce lien, § 273, p 882, n 1
- Evidence in action to enforce lien, § 309, p 972
- Fees, § 332
- Mortgages, ante
- Naming owner shown to be such by public records in claim or statement, § 162, p 690
- Notice by owner of nonresponsibility, § 84, p 596
- Notice to owner of intention to claim lien, § 120
- Notice to owner of record, § 124, p 628
- Orders for payment of money against funds in hands of owner, § 85
- Priority of lien over mortgage, etc., § 200, p 757
- Title to property, right of lien claimant to rely on, § 192, p 745, n 74
- Vendor's lien, priority, § 208
- Waiver, contract providing for, § 222, p 793, n. 82
- Recoupment, action to enforce lien, § 276
- Burden of proof, § 308, p 960
- Redemption,
 - Holder of lien from prior encumbrances, § 206
 - Right of after foreclosure sale, lien attaching to, § 18
 - Sale in proceedings to enforce lien, § 347, pp. 1030-1033
 - Removal of buildings before expiration of time, § 345
- Reference, enforcement of lien, § 312
- Judgment on decision of referee, § 319, p. 1004
- Refiling, § 131, p 641
- Refuse, storage or removal, lien for, § 32
- Registered mail, notice to owner of intent to claim lien, § 126, p. 634, n 7
- Registrar of titles, place of filing of notice or claim, § 138
- Reinscribing lien, § 131, p 641
- Reinstatement of action to enforce, § 290
- Relation back of lien,
 - Commencement of building or improvement, § 179
 - Date of contract between contractor and owner to give priority over mortgage, § 200, p. 754
 - Establishment by judgment, § 177
 - Furnishing of materials, § 181
 - Lands acquired after commencement of construction, § 177
 - Performance of labor, § 181
 - Time when contract was made or recorded, § 178
- Relation back of title of purchaser at sale in proceedings to enforce lien, § 344
- Release, § 246
 - Condition precedent to commencement of action to enforce lien, § 268
 - Consideration, evidence of failure of consideration in action to enforce lien, § 309, p. 975
 - Covenant of contractor to furnish, § 92
 - Evidence of failure of consideration for agreement in action to enforce lien, § 309, p 975
 - Lienor of rights against owner under personal judgment, effect on priority of lien over mortgage, § 204, p. 766
 - Mortgage affecting priority, § 204, p 770
 - Payment to contractor, duty of owner to obtain, § 251, p. 832

INDEX TO MECHANICS' LIENS

Release—Continued,

- Request by owner for release of lien affecting personal liability, § 263, p. 871, n 48
- Sureties on bond of contractor, § 250, p 848
- Waiver of lien by agreement to furnish, § 224
- Reliance on credit of building or property. Credit, ante
- Religious organizations' property as subject to lien, § 12
- Rem,
 - Judgment in rem, enforcement of lien, § 317
 - Personal judgment in proceeding in, § 328
- Remainders,
 - Creation of lien on interest of life tenant, § 67
 - Lien as attaching to estate in, § 15
- Remittitur, judgment for more than amount claimed in notice, § 321
- Remodeling Alterations or repairs, generally, ante
- Removability of improvement, evidence in action to enforce lien, § 310, p 970, n 95
- Removal of ashes and refuse, lien for, § 32
- Removal of buildings or improvements,
 - Acquisition of lien, § 24
 - Lien as affected, § 242
 - Remedy for enforcement of lien, § 257
- Renewal of mortgage affecting priority, § 204, p 770
- Renewal of period for filing claim or statement, §§ 148, 149, pp 668-672
- Rents,
 - Application and coverage of lien, § 196
 - Application to reduction of obligation secured by deed of trust, § 206, p. 777, n 74
 - Loss of rental by reason of delay, liability of surety on contractor's bond, § 261
- Receiver,
 - Application to lien, § 201, p 920, n 67
 - Disposition of rents collected, § 201
 - Sale in proceedings to enforce lien, accounting by purchaser, § 347, p 1041, n 97
- Repairs Alteration or repairs, generally, ante
- Repeal of statute creating lien, § 6
- Replacement of defective work or article, gratuitous work as extending time for filing claim or statement, § 149, p 670
- Replevin, purchaser at sale in proceedings to enforce lien, § 345
- Replication or reply, enforcement of lien, action for, § 304
- Reports,
 - Receiver, conclusiveness in action to foreclose, § 201, p 920, n 62
 - Referee in action to foreclose lien, § 312
- Representations, estoppel to assert lien, § 230
- Representative of owner, notice of intent to claim lien, § 124, pp 628-630
- Reputed owner,
 - Claim or statement of lien, § 162, pp 690, 693
 - Contract, creation of lien by, § 57, p 545, n 51
- Request,
 - File lien as excuse for failure to give notice of intent to claim, § 122
 - Further work or materials after substantial completion of contract, extension of time for filing claim or statement, § 149, p 670
 - Material furnished or labor performed at, § 73, p 579
 - Statement from subcontractor, § 130

Rescission of contract,

- Contractor's right to lien as affected, § 94
- Subcontractor's rights as affected, § 111
- Reservation of lien, agreement between parties, § 1, p 495
- Residence,
 - Claim or statement of lien to show, §§ 156, 164
 - Service of notice of intent to claim lien by leaving copy at owner's residence, § 128
- Residuary legatee, application of lien to estate or interest, § 191, p 744, n 65
- Retrospective operation,
 - Bond of contractor, § 258
 - Statutory provisions, § 5
- Reversion,
 - Application of lien for improvements by tenant, § 195
 - Improvements, lease providing for, right to lien, § 65, p 564
- Review Appeal and error, generally, ante
- Revival, § 183
 - Collusive delivery of materials on failure to give timely notice of claim of lien, § 125
 - Waiver precluding, § 222
- Rights affected by liens, §§ 184-196, pp 735-747
- Right to lien, §§ 20-117, pp 513-622
- Riparian rights, application of lien, § 191, p 744, n 68
- Roads, lien as attaching for construction of, § 31
- Running account, materials furnished and labor performed under,
 - Application of lien to several buildings, § 189, p 742, n 27
 - Time of commencement of lien, § 181
- Sales,
 - Claim or statement of lien, description of owner, § 162, pp 691, 694
 - Contest of enforcement of lien by purchaser who takes property subject to lien, § 279
 - Interest of vendor subject to lien, § 71, p 573
 - Lien as affected by sale of premises, § 243, pp 815-818
 - Loss of interest in land to which lien is attached, § 245
 - Parties to sale as owners within meaning of lien statute, § 71, p 569
 - Possession of purchaser, contract creating lien, § 71, p 570
 - Proceedings to enforce lien, §§ 337-349, pp 1024-1034
 - Advertisement, § 341
 - Bond or stay, § 340
 - Claimant purchasing as freeing property from lien, § 344
 - Confirmation, § 342
 - Conveyance to purchaser, § 343
 - Default by purchaser, § 341
 - Direction for in judgment or decree foreclosing lien, § 324
 - Distribution of proceeds, § 348
 - Estate or interest subject to, § 338
 - Exhaustion of property subject to lien, § 338
 - Inadequacy of price, setting aside for, § 342, p 1027, n 28
 - Injunction against, §§ 271, 340
 - Method of, § 337
 - Mortgagee's rights as affected, § 346
 - Notice, § 341

INDEX TO MECHANICS' LIENS

Sales—Continued,

- Proceedings to enforce lien—Continued,
 - Part only of property subject to lien, § 338
 - Payment as prerequisite to redemption, § 317, p 1031
 - Possession of purchaser, § 344
 - Prior encumbrances, § 337
 - Purchaser acquiring building free from, § 345
 - Priorities, building or improvement, § 330
 - Property or interest to be sold, § 338
 - Recovery of purchase money, § 343
 - Redemption, § 317, pp 1030-1033
 - Removal of building before expiration of time § 345
 - Relation back of title of purchaser, § 344
 - Removal of building, §§ 339, 345
 - Setting aside, § 342
 - Stay, § 340
 - Subrogation of purchaser to rights of lienor, § 341
 - Surplus, § 348
 - Tender as condition precedent to redemption, § 347, p 1031
 - Terms, § 341
 - Time for redemption, § 347, p 1031
 - Title and rights,
 - Purchaser, §§ 344, 345, pp 1027-1030
 - Third persons, § 346
- Purchasers, generally, ante
- Sales slips, amount secured by lien fixed by, § 174, p 722, n 23
- Sales tickets, evidence of delivery of materials in action to enforce lien, § 310, p 979, n 16
- Salvage of materials,
 - Lien for regardless of value, § 44
 - Old building, priority of mortgage over mechanic's lien, § 205, p 776
- Satisfaction,
 - Compelling discharge of record on, § 240
 - Payment, generally, ante
 - Penalty for failure or refusal, § 240
- Scaffolds, lumber used for, § 44
- Scenery for theaters, lien on, § 29
- School buildings, validity of statute authorizing lien on, § 3, p 498, n 93
- Scire facias to enforce lien, § 288
 - Non-suit on, § 290
 - Resulting in loss or extinguishment of lien, § 241
 - Plen or answer, § 300
 - Special pleading, § 301, p 942
- Waiver,
 - Defects in notice of intent to claim lien by pleading, § 126, p 634
 - Objection to defect or inaccuracy of claim or statement of lien, § 160
- Scire facias to revive lien, continuance of lien, § 183
- Seals,
 - Bond to dissolve lien given under, consideration as imported, § 236
 - Notice to owner of intent to claim lien,
 - Amendment, § 120
 - Corporation, § 127
 - Release under, lien as affected, § 240
 - Verification of claim or statement of lien, § 167, p. 713

Secret lien, nature as, § 1, p 492

Security,

- See, also, Bonds or undertakings, generally, ante
- Assignment,
 - Claim for security, inchoate lien, §§ 217, 218
 - Demand for which lien stands as security, § 219
 - Lien as security,
 - Name in which enforced, § 220
 - Perfected lien, § 219, n 40
 - Debt for which lien is made and held as security, foreclosure when debt becomes payable, § 268
 - Substitution of one mortgage for another affecting priority, § 204, p 770
 - Waiver of lien by taking, § 227, pp 800-803
- Seizure of property to acquire jurisdiction to enforce lien, § 287
- Semi-public property, lien on, § 8
- Senior lienor, redemption from sale under junior lien, § 347, p 1032
- Separate estate of married woman,
 - Claim or statement, § 150
 - Contract for improvement, lien arising under, § 63, p. 554
 - Validity of statute creating lien claim against, § 3, p 497, n 89
- Separate judgment, action to enforce lien, § 327
- Separation,
 - Items for labor and material, priority of lien over mortgage, § 200, p 754, n 90
 - Value of labor and materials, claim or statement of lien, § 165, p 707
- Service,
 - Claim or statement of lien,
 - Evidence in action to enforce lien, § 310, p 983
 - Striking off claim for failure to serve, § 171
 - Contractors, judgment against both where one is served, enforcement of lien, § 284, p 910
- Copy,
 - Claim or statement, notice, § 146
 - Petition for enforcement of lien, § 270
- Notice,
 - Intent to claim lien, § 124, p. 628, § 128
 - Attaching proof to claim or statement, § 158, p 681, n 35
 - Lis pendens, enforcement of lien, § 289
 - Process in suit to enforce lien, § 286
 - Commencement of action as respects limitation, § 282, p 897
 - Return showing service cannot be had on original contractor, enforcement of lien by subcontractor, § 269, p 877, n 23
 - Scire facias writ for enforcement of lien, § 288
 - Statement of contractor on owner, § 130
 - Stop notice on owner, § 114
- Services rendered,
 - See, also, Work and labor, generally, post
 - Amount secured by lien, furnishing services after abandonment of contract, § 175
 - Architect, § 36
 - Claim or statement of lien, showing services performed and charges therefor, § 165, pp. 699-708
 - Intent, § 45
 - Nature of work, § 34

INDEX TO MECHANICS' LIENS

Services rendered—Continued,

- Performance on premises, necessity, § 39
- Plans and specifications, architect, § 36
- Pleading, actions to enforce lien, § 294, p 925
- Preparatory work, § 35
- Purposes, § 45
- Reliance on credit of building or property, § 46
- Superintendence, § 37
- Work other than construction, § 38
- Set-off and counterclaim,**
 - Assignment, payment by owner to assignor in good faith after, § 221
 - Enforcement of lien, § 276
 - Claimant made defendant by counterclaim, relief to, § 302
 - Default in performance, § 277
 - Pleading, § 301, p 942
 - Presumptions and burden of proof, § 308, p 960, p 964, n 4, p 966
 - Question for jury, § 314, p 993, n 93
 - Injunction against prosecution of separate liens to avail of defense by way of counterclaim, § 271
 - Subcontractors, judgment on counterclaim against, § 319, p 1006
- Setting aside, sale in proceeding to enforce lien, § 342**
- Settlement,**
 - Bill for general settlement, burden of proof, § 308, p 960
 - Cancellation or vacation of notice of lis pendens in proceeding to enforce lien, § 289
 - Evidence in action to enforce lien, § 309, p 973
 - Petition for general settlement, dismissal, § 290
 - Smaller amount than claimed, amount secured by lien of subcontractor or materialmen, § 174, p 725, n 50
 - Time for notice to owner of intent to claim lien, § 125
- Several buildings or structures** Buildings or structures, ante
- Sewer pipes, lien on, § 27**
- Sewers, acquisition of lien, § 31**
- Sheds, protection of materials, construction of, § 44**
- Shelter houses,**
 - Lien on, § 21, p 517
 - Materials used for construction of shelter for workmen and animals, § 44
- Shops, building within meaning of lien law, § 21, p 513**
- Shoring, lumber used as, § 44**
- Shrubbery, lien for planting, § 30**
- Sidewalks, lien for construction, § 31**
- Signatures,**
 - Claim or statement of lien, § 166; § 167, pp. 712, 713
 - Contract creating lien, § 81
 - Jurat to verification of claim or statement of lien, § 167, p. 713
 - Notice to owner of intent to claim, § 127
 - Verification of claim or statement of lien, § 167, p 712
- Simple trust, contract with or consent of equitable owner, § 70**
- Simulated lien, homestead, § 52, n 10**
 - Assignment, § 221
- Single judgments, actions to enforce lien, § 327**
- Sinks, lien, § 27**

- Smelters, lien on, § 21, p 515**
- Special appearance in action to enforce lien,**
 - Bar of limitation, § 282, p 891, n 10
 - Waiver of service by publication, § 286, p 914, n 69
- Special demurrer, enforcement of lien, actions for, § 305, p 947**
 - Dismissal of action, § 290, p 918, n 38
- Special execution, enforcement of judgment in proceeding to enforce lien, § 336**
- Special fabrication, materials, lien as acquired for, § 43**
- Special findings, enforcement of lien, § 316, p 990**
- Special judgment, parties defendant in action to enforce lien, § 284, p 907**
- Special proceedings, enforcement of lien, § 263, p 870, § 264, p 873, n 66**
- Specific performance, judgment against owner for, § 328**
- Specifications. Plans and specifications, generally, ante**
- Spendthrift trusts,**
 - Application of lien to revenue, § 196
 - Income of property as subject to lien, § 19
- Splitting of liens and enforcement, § 272**
- Spouse Husband and wife, generally, ante**
- Sprinkler system, lien for, § 27**
- Stage fittings for theaters, lien on, § 29**
- State, description by name in claim or statement of lien, § 162, p 690**
- Statement. Claim or statement, generally, ante**
- Stationary machinery, lien on, § 28**
- Status of claimant, evidence in action to enforce lien, § 310, p 976, n 95**
- Statutory provisions, §§ 3-6, pp 495-506**
 - Additional remedy, § 3, p 496
 - Amendment of claim or statement of lien, § 170, pp 715-719
 - Amount of claim, § 51
 - Architects, lien for services, § 36
- Assignment,**
 - Claim, § 219
 - Inchoate lien, § 216
- Attachment to enforce lien, § 287**
- Attorney's fees, recovery in proceedings to enforce lien, § 353, p 1038**
- Bond of contractor,**
 - Contractors' bonds and undertakings, ante
 - Prevention or discharge of lien, § 232
- Buildings or structures, nature of, § 21, p. 513**
- Change in as affecting lien, § 6**
- Claim or statement,**
 - Construction, § 4, p 504
 - Form and contents, §§ 150-171, pp 672-721
- Completion of building or improvement, time for filing of claim or statement, § 142, pp 652-656**
- Consent of owner, writing, § 75**
- Constitutionality, § 3, p 497**
- Construction, § 4, pp 490-505; § 119, p 623, n 54**
 - Contract, writing, § 75
- Contractors' bonds and undertakings, ante**
- Creation of lien, § 1, pp 491, 493**
- Deposit in court, discharge of lien, § 233**
- Discharge of lien, §§ 233, 240**
- Enforcement of lien, §§ 263-354, pp 868-1040**

INDEX TO MECHANICS' LIENS

Statutory provisions—Continued,

- Extraterritorial effect, § 3, p 497
- Filing and recording claim, statement and contract, §§ 131-171, pp 639-721
- Homestead,
 - Acquisition of lien against, § 33
 - Contract creating lien, § 63, p 353
 - Exemption from lien, § 14
- Improvements, nature of, § 21, p 513
- Inchoate lien, assignment, § 216
- Joint notice or claim of lien, filing, § 137
- Judgment or decree, conformity, § 319, p 1004
- Labor, lien for furnishing, § 34
- Limitation,
 - Actions for enforcement of lien, § 282, pp 889-899
 - Area to which lien applies, § 186
 - Limited application, § 3, p 495
 - Loss of priority of lien by failure to comply with statutes, § 204, p 766
 - Married women, contract for improvement as subjecting to lien, § 63, p 554
 - Materials, generally, ante
 - Notice by owner of nonresponsibility, § 84, pp 590-596
 - Notice to owner for perfection of lien, §§ 120-129, pp 624-635
 - Operation and effect of lien as determined by, § 4, p 504
 - Origin, § 1, p 493
 - Payment, apportionment, § 248, p 824
 - Perfection of lien, compliance with statutory requirements, § 119
 - Persons entitled to lien, § 86
 - Place for filing of notice or claim, § 138
 - Pleading,
 - Itemized statement or bill of particulars accompanying, § 294, p 933
 - Required to enforce lien, nature as dependent on, § 292
 - Precedents in construing, § 4, p 499
 - Priorities, §§ 197-215, pp 747-787
 - Protective nature, § 3, p 496
 - Public property, expressly making subject to, § 10
 - Public service corporations, lien on property of, § 11
 - Reasonable construction, § 4, p 499
 - Redemption, sale in proceedings to enforce lien, § 347, p 1031
 - Release of lien, § 246
 - Repeal, effect of, § 6
 - Retroactive operation, § 5
 - Right to lien, § 4, p 504
 - Sale in proceedings to enforce lien, distribution of proceedings, § 348
 - Scire facias for enforcement of lien, § 288
 - Statement or account to owner by contractor etc., seeking lien, § 130
 - Stop notice, money due contractor, § 114
 - Striking off claim or statement of lien, § 171
 - Substantive right as created, § 3, p 495
 - Theory and purpose of, § 3, p 495, § 4, p 499
 - Time,
 - Filing notice or claim of lien, § 139, pp 647-651

Statutory provisions—Continued,

- Time—Continued,
 - Notice to owner of intent to claim lien, § 125
 - Validity, § 3, p 497
 - Waiver, § 222
- Stay of proceedings to enforce, § 271
- Execution on judgment in proceeding to enforce lien, § 336
- Foreclosure of lien, lack of necessary party, § 284, p 911, n 15
- Sale of property, § 340
- Stipulations,
 - Contractor's right to lien, § 92
 - Leases, protection of lessor, § 65, p 565
 - Payment of claims, protection of owner, § 235
 - Subcontractors, materialmen and laborers as affected by stipulations in principal contract, §§ 108-110
 - Waiver of lien, § 224
- Stock, consideration for assignment of deed of trust, priority of lien of deed of trust, § 205, p 771, n 3
- Stockholders,
 - Commencement of suit to foreclose lien as inuring to benefit of corporation, § 282, p 898, n 14
 - Notice to owner of intent to claim lien, § 124, p 630
- Stop notice,
 - Defense to enforcement of lien, § 273, p 882, n 4
 - Distinguished from notice to owner of intention to claim lien, § 120
 - Extras, money due for as included, § 114, p 619, n 93
 - Jurisdiction to try suit on stop notice, § 281, p 888, n 79
 - Money due contractor, service on owner by subcontractor, workmen or materialmen, § 114
 - Note, acceptance of as restoring lien of claimant, § 226, p 798, n 68
 - Operation as assignment of money due contractor, remedy by action at law, § 264, p 873, n 66
 - Owner's right to dispute correctness of claim of subcontractor giving stop notice, § 279, p 887, n 67
 - Priority of labor claims over materialmen, § 198, p 751
 - Priority of lien and other claim, § 210
 - Question for jury as to money due in action to enforce lien, § 314, p. 996, n. 64
 - Service on by subcontractors, laborers or materialmen, satisfaction and disposition of balance, § 117
 - Signature to contract, remedy by way of as requiring, § 81, p 585, n 36
 - Subcontractors, laborers or materialmen, service on owner, satisfaction and disposition of balance, § 117
- Stoppage of work, agreement between owner and contractor, right to lien, § 96
- Storage of ashes and refuse, lien for, § 32
- Stoves, lien on, § 27
- Street improvements, lien for, § 31

INDEX TO MECHANICS' LIENS

Streets and numbers,

- Claim or statement of lien locating property with respect to streets, § 161, p 686
- Description of property,
 - Claim or statement of lien, § 161, p 687
 - Notice to owner of intent to claim lien, § 126, p 636, n 59
- Strict foreclosure, judgment or possession, redemption, § 347, p 1031
- Striking off claim or statement, § 171
 - Motion for amendment in answer to rule to strike off, § 170, p 716
- Structures Buildings or structures, generally, ante
- Subcontractors,
 - Abandonment of work by subcontractor, priority of claim of contractor for work completed at a loss, § 198, p 751
 - Abandonment of work or contract by contractor affecting rights, § 112
 - Amount secured by lien, § 175
 - Personal judgment against owner, § 331, p 1017
 - Time for filing of claim or statement, § 142, p 654
 - Accounts to owner, § 130
 - Accrual or commencement of lien on performance of labor or furnishing material, § 181
 - Adjudication of issues between owner and contractor in action to enforce lien, § 319, p 1006
 - Advance payment to contractor with knowledge of unpaid claim of, § 251, p 831
 - Agreement or consent of owner, presumptions and burden of proof in action to enforce lien, § 308, p 962
 - Amount due from owner to contractor, presumptions and burden of proof in action to enforce lien, § 308, p 966
 - Amount secured by lien, § 174, pp 723, 725
 - Abandonment by contractor, § 175
 - Architect's certificate, compliance with requirement for, as condition precedent to lien, § 113
 - Attachment to enforce lien, § 263, p 869, n 17
 - Beneficiaries of estate, priority as to rights of beneficiary, § 198, p 751
 - Bond of contractor,
 - Complaint in action on, § 262, p 865
 - Measure of recovery on, § 261
 - Party to action on, § 262, p 863
 - Right of action on, § 262, p 855
 - Bonds indemnifying owner against liens of other subcontractors, consideration, § 257
 - Breach of contract, lien for damages, § 54
 - Cancellation of subcontract, lien as affected, § 113
 - Claim or statement of lien, showing person with whom contract made, § 164
 - Collusive payment to principal contractor as affecting lien of, § 251, p 832
 - Complaint in action to enforce lien, § 294, p 929
 - Completion of work, time for filing claim or statement, § 144, p 660
 - Consolidation of claim for labor with others, loss of lien by failure, § 241
 - Contest of lien by contractor, § 280
 - Contract with or employment by contractor, § 97
 - Contractors distinguished, § 90

Subcontractors—Continued,

- Costs, recovery as against owner, § 350
- Counterclaim against, judgment on, § 319, p 1006
- Death of contractor after completion of work affecting right to lien, § 97
- Declaration or petition in action to enforce lien, § 294, p 929
- Default of principal,
 - Lien for damages and expense resulting, § 54
 - Rights affected, § 112
- Default of subcontractor, completion by contractor, § 113
- Defects in work, right to lien, § 113
- Defined, § 98, § 121, p 625, n 69
- Delay in performance of original contract, rights as affected, § 112
- Designation of liens of, § 1, p 491
- Direct lien, § 105
- Employees of, right to lien, § 100
- Estoppel to assert lien, § 230
- Exclusive, cumulative and concurrent remedies for enforcement of lien, § 266
- Extras, amount secured by lien, § 174, p 723
- Filing claims or statements, § 131, p 641; § 133
 - Payments by owner to contractor before expiration of time for, § 251, p 831
- Filing contract for improvement, statutory requirements as applying to, § 82, p 586
- Filing principal contract by owner, effect of, § 107
- Fraud,
 - Payment to contractor as affecting lien of, § 251, p 832
 - Presumptions and burden of proof in action to enforce lien, § 308, p 967
- Groceries furnished to for maintenance of boarding house for workmen, § 48
- Guaranty of,
 - Account, agreement of owner, § 255
 - Payment by owner to subcontractor, amount secured by lien, § 174, p 725
- Idleness, lien as allowable for damages and expense incurred through, § 54
- Implied contract with contractor, § 113
- Indebtedness, pleading in action to enforce lien, § 294, p 931
- Judgment establishing claim as condition precedent to enforcement of lien, § 269
- Judgment in action to enforce lien by, § 326
- Labor,
 - Furnished to, right of action on bond of contractor, § 262, p 861
 - Statement of claim essential before paying general contractor, § 251, p 833
- Laborer,
 - Lien for, § 98
 - Term as including, § 88
- Materialmen distinguished, § 80, p 601
- Materials furnished by subcontractor, lien for, § 98
- Materials furnished to subcontractor,
 - Right of action on bond of contractor, § 262, p 861
 - Right to lien, § 102
- Mechanic, term as including, § 87

INDEX TO MECHANICS' LIENS

Subcontractors—Continued,

- Modification of principal contract, lien as affecting, § 111
- Money due contractor, lien on, §§ 114-117, pp 619-622
 - Classes entitled, § 115
 - Demand and notice, § 116
 - Satisfaction and disposition of balance, § 117
- Names, statement by contractor seeking to acquire lien required to furnish to owner, § 130
- Nature of,
 - Lien, § 105
 - Subcontract, § 113
- New York system, § 105
- Note in payment, acceptance from contractor, § 226
- Notice,
 - Claim, payments by owner to contractor before expiration of time for, § 251, p 831
 - Owner of intent to claim lien, § 126, p 635
 - Stipulations against lien in contracts, § 109
- Owner's liability to contractor, pleading in action to enforce lien, § 294, p 932
- Parties plaintiff in suit to enforce lien, § 283
- Payment,
 - Advance payment to contractor with knowledge of unpaid claim of subcontractor, § 251, p 831
 - Application, § 248, p 824, § 250
 - Lien affected by payment to contractor, § 251, p 828
 - Lien of others as affected, §§ 252, 253
 - Mode and terms of original contract as controlling, § 110
- Pennsylvania system, § 105
- Performance of contract, presumptions and burden of proof in action to enforce lien, § 378, p 963, n 5
- Performance of subcontract, lien as dependent on, § 113
- Personal judgment against contractor, § 331, p 1015
 - Failure to establish lien, § 329
- Persons employed by or contracting with, amount secured by lien, § 174, p 726
- Persons furnishing materials to, § 102
- Pleadings, actions to enforce lien, § 294, p. 920
- Postponement of right to those of laborers and materialmen, § 198, p 750
- Premiums due, lien of others as affected, §§ 252, 253
- Price fixed between owner and contractor as limitation on amount of lien of subcontractor, § 174, p 724
- Primary liability of owner, pleading in action on lien, § 294, p 932
- Priority of liens,
 - Amount due subcontractor, § 198, p 750
 - Assignment by contractor, § 211
 - Different liens, § 198, p 748
- Reasonable value, amount secured by lien on substantial performance by contractor, § 174
- Recording contract for improvement, statutory requirements, § 82, p 536
- Release of lien, liability for labor and materials furnished by as affected, § 246

Subcontractors—Continued,

- Request by contractor for work or material after completion of contract, extension of time for filing claim or statement, § 149, p 671
- Rescission of principal contract, rights as affected, § 111
- Retention by owner of portion of money due contractor, reliance on contract provisions, § 255
- Retention of funds by owner to meet claims of, § 251, p 834
- Right of action on bond of contractor, § 262, p 855
- Right to lien, § 98
 - Contract with or employment by contractor, § 97
 - Employees of, § 100
 - Money due contractor, §§ 114-117, pp 619-622
 - Subcontractors of, § 99
- Service on owner of copy of claim or statement, § 146
- Set-off against in action to enforce lien, § 276
- Specially designed materials furnished by, suspension of work as affecting lien, § 43
- Statement of names furnished to owner, notice to owner by claimant of lien, § 121, p 626
- Statement or account to owner by one seeking to acquire lien, § 130
- Stipulations in principal contract, §§ 108-110
- Stop notice,
 - Distinguished from notice to owner of intention to claim lien, § 120
 - Service on owner, § 114
 - Satisfaction and disposition of balance, § 117
- Subrogation, lien by, § 106
- Substantial compliance with subcontract as sufficient for lien, § 112
- Superintendence, lien for, § 37, p 531, n 35
- Time,
 - Enforcement of lien, § 282, p 880
 - Filing claim or statement, § 139, p 649
 - Notice to owner of intent to claim lien, § 125
- Tools and machinery furnished to, right of action on bond of contractor, § 262, p 862
- Trust funds, application of payment, § 248
- Venue of action to enforce lien, § 281
- Waiver,
 - Breach of contract by contractor as affecting, § 224
 - Lien, availability to owner and contractor, § 228
 - Rights affected by waiver of principal, § 222
 - Rights against contractor's surety, § 250, p 848
- Withholding funds to meet claims of, § 251, p 834
- Worthless improvement, lien as affected, § 112
- Subleases,
 - Contract for improvements by sublessee, § 65, p 558
 - Lien as attaching to interest of sublessee, § 17
- Subordination of lien, waiver as result of agreement for, § 224, p 795, n 22

INDEX TO MECHANICS' LIENS

- Subrogation,
 - Lien of subcontractors, laborers, or materialmen by subrogation, § 106
 - Amount secured by lien, § 174, p 724
 - Substantial performance by contractor, § 175
 - Mortgagee to rights of mechanics' lien holders, § 206
 - Purchaser at sale in proceedings to enforce lien, § 344
- Subsequent lien on land, prior lien on building as affected, § 244
- Subsequent owners, notice of intent to claim lien, § 124, p 628
- Subsequent purchasers, filing of statement as necessary against, § 131, p 642
- Substantial performance, contradictory findings in action to enforce lien, § 316, p 1000
- Substituted service of notice to owner of intent to claim lien, § 128
- Substitution,
 - Mortgage affecting priority, § 204, p 770
 - Parties in action to enforce lien, § 285
- Summary proceedings,
 - Enforcement of lien, § 263, p 870
 - Demand as condition precedent, § 268
 - Purchaser at sale in proceedings to enforce lien, recovery of possession, § 344
- Summons, enforcement of lien,
 - Filing of second claim as avoiding obligation to issue summons within certain time, § 270
 - Issuance as commencement of actions as respects limitations for enforcement of lien, § 282, p 897
- Limitation, § 282, p. 896, n 79
- Sunday, time for filing notice or claim of lien, § 140, p 651, n. 86
- Superintendence, lien for services in, § 37
 - Architects, § 36
- Superintendents, laborer, term as including, § 88
- Supplemental pleadings, substitution of parties in enforcement of lien, § 285, p 911, n. 21
- Supplies, lien for, § 48
 - Priority of lien for, § 209
- Sureties,
 - Bonds or undertakings, generally, ante
 - Contractors' bonds or undertakings, generally, ante
- Surplus, sale in proceedings to enforce lien, disposition, § 348
- Surplusage,
 - Claim or statement of lien, § 150
 - Interest claim, § 153
 - Reference in claim to time of performance when claim is for lien for materials only, § 165, p 702
 - Setting forth ownership, § 162, p 692, n 95
 - Notice to owner of intent to claim lien, § 126, p. 633
- Survey, appointment of commission to make, § 313
- Swings, fair grounds and parks, lien on, § 21, p 517
- Systems adopted, § 105
- Tax sale, mortgagee purchasing, loss of priority, § 204, p 771
- Teamsters, laborer within statute creating lien, § 88
- Technical amendment of claim or statement of lien, time, § 170, p 716, n 37
- Technical defects in notice to owner of intent to claim lien, § 129
- Temporary suspension of work, time for filing claim or statement, § 142, p 635
- Temporarily withdrawal of claim or statement after filing, § 147
- Tenancy by entirety Estate by entirety, ante
- Tenancy in common,
 - Application of lien to interest, § 191, p 744, n. 65
 - Contracts as subjecting property to lien, § 69
 - Lien as attaching to property held in, § 15
 - Notice to owner of intent to claim lien, § 121, p 626, n 72, § 124, pp 628, 629
 - Priority of lien of tenant in common as against materialman's lien, § 207, p. 779, n 97
- Tender,
 - Costs in proceedings to enforce as affected, § 350
 - Extinguishment by, § 254
 - Pleading, action to enforce lien, § 301, p 943
 - Redemption from sale in proceedings to enforce lien, condition precedent, § 347, p 1031
- Termination,
 - Discharge of lien, generally, ante
 - Duration, generally, ante
 - Interest of mortgagee, parties defendant in action to enforce lien, § 284, p 907
 - Referee's authority in action to enforce lien, § 312
- Terms,
 - Contract, necessity of setting forth, § 79
 - Sale of property to enforce lien, § 341
- Test of work or materials, time for filing claim or statement, § 144, p 657, n 62
- Testamentary trustee, attachment of lien to rents, § 196
- Theaters,
 - Electric sign attached to, lien as allowable, § 27
 - Fixtures, lien as allowable for, § 29
- Third persons,
 - Claim or statement of lien, strictness of compliance with statutory requirements, § 150
 - Filing and recording lien to preserve lien as against third persons, § 131, p 641
 - Intervening rights or interest of, strict construction of statute creating lien, § 4, p 501
 - Judgment or decree enforcing lien, conclusiveness as to, § 334
 - Parties defendant in action to enforce lien, § 284, p 907
 - Purchase money mortgage, priority, § 201, p. 762
 - Sale in proceedings to enforce lien, title and rights as affected, § 346
- Time,
 - Accrual or commencement of lien, §§ 177-182, pp. 730-734
 - Amendment of notice of intent to claim lien, § 129
 - Bond for prevention or discharge of lien, § 235
 - Bond of contractor, action on, § 262, p 862
 - Claim or statement, ante
 - Continuance of lien, § 183
 - Contracts, ante
 - Duration of lien, §§ 177-183, pp 730-735
 - Enforcement of lien, § 282, pp 889-899
 - Expiration of lien, § 183

INDEX TO MECHANICS' LIENS

Time—Continued,

- Extension of time,
 - Filing claim or statement of lien, §§ 148, 149, pp 668-672
 - Delay in completion of contract, § 144, p 661
 - Materialman to contractor, surety on contractor's bond as released by, § 259, p 872
 - Notice to owner of intent to claim lien, § 125
 - Payment, extension of time for,
 - Filing claim or statement, § 148
 - Suit to enforce lien, § 282, p 894, n 40
 - Performance of contract, presumptions and burden of proof in action to enforce lien, § 308, p 964, n 5
 - Waiver of lien by, agreement for, § 224
 - Filing and recording Claim or statement, ante
 - Interest owned by person at time of improvement, application of lien, § 193
 - Judgment or decree, enforcement of lien, § 319, p 1004
 - Materials or materialmen, ante
 - Motion to dismiss action to enforce lien, § 200
 - Notice by owner of nonresponsibility, posting of, § 84, p 595
 - Notice to owner of intent to claim lien, § 125
 - Payment, principal contractor, § 251, p 829
 - Performance of contract, right of contractor to lien as affected, § 95
 - Pleading,
 - Enforcement of lien, amendment, § 306
 - Furnishing work or material, actions to enforce lien, § 294, p 930
 - Priority between mechanic's lien or other lien or encumbrance, § 207
 - Redemption from sale in proceedings to enforce lien, § 347, p 1031
 - Rendering or furnishing labor or materials, statement in claim or statement of lien, § 165, p 701
 - Sale in proceedings to enforce lien, redemption, § 347, p 1031
 - Service of copy of claim or statement, § 146
 - Service of statement of contractor on owner, § 130
 - Trial of action to enforce lien, § 311
 - Work or material, pleading time of furnishing, § 294, p 930
- Time book, evidence in action to enforce lien, § 309, p 974, n 66
- Time keepers, lien for salary, § 37, p 531, n 32
- Title to materials,
 - Filing of notice of lien as transfer of title, § 131, p 611
 - Passing of as essential to creation of lien, § 42
- Title to property,
 - After-acquired title, application of lien, § 193
 - Change in or transfer of title, parties to suit to enforce lien, § 284, p 902
 - Contract with or consent of owner, necessity, § 57, p. 545
 - Defective title, priority of lien over mortgage, § 205, p 770, n 51
 - Defense in action to enforce lien, § 274
 - Intervenor in action to enforce lien, duty to show title, § 285

Title to property—Continued,

- Personal liability of one contracting for improvement on land he does not own, § 203, p 871
 - Purchase money mortgage, priority as to improvements before acquisition of title, § 201, p 763
 - Record owner, enforcement of lien against, § 284, p 901, n 52
 - Record title, claimant's right to rely on, § 192, p 745, n 74
 - Sale in proceeding to enforce lien,
 - Purchaser, §§ 344, 345, pp 1027-1030
 - Third persons, § 346
 - Service on owner of intent to claim lien, trustee holding record title, § 124, p. 620
 - Torrens system, filing notice of claim or lien, § 138, § 139, p 649
 - Transfer as affecting lien, § 243, pp 815-818
- Tool house, materials furnished for construction of, § 44
- Tools, machinery, and equipment,
 - Application and coverage of lien, §§ 28, 190
 - Engineers, services rendered in designing machinery for installation, § 36
- Extension of time for filing claim or statement by furnishing work or material, § 149, p. 669, n 31
- Furnishing or lending for purpose of facilitating work, § 44
- Lien for labor as extending to use of, § 34
- Loss of priority by person furnishing material and taking machinery in payment, § 204, p. 765, n 18
- Subcontractors, right of action on bond of contractor by person furnishing, § 262, p 802
- Two separate plans, application of lien, § 189, p. 742, n. 32
- Unintentional omission to deliver, extension of time for filing claim or statement, § 148
- Torrens system,
 - Place of filing of notice or claim, § 138
 - Time for filing notice or claim of lien, § 139, p 649
- Towns, place of filing of notice or claim, § 138
- Trade fixtures,
 - Electric fans fastened to building as, § 28
 - Lien as attaching to, § 26
- Trade-name,
 - Contract by contractor doing business under, § 73, p 577
 - Owner doing business under, description in claim or statement of lien, § 162, p 691
- Trade terms, use in claim or statement of lien, § 165, p 707
- Transfer, property capable of as subject to lien, § 15
- Transfer of title,
 - Bond of contractor, surety on as release, § 259, p 849
 - Lien as affected, § 243, pp 815-818
- Transportation,
 - Lien as allowable for, materials, § 50
 - Lien for labor as including cost or expense of, § 34
- Trees, lien as allowable for planting, § 30
- Trespasser, contract with or consent as creating lien, § 57, p 545, n 55

INDEX TO MECHANICS' LIENS

- Trial or hearing,
 - Amendment of defect in notice of intent to claim lien, § 129
 - Bond of contractor, actions on, § 262, p 867
 - Conclusiveness and effect of report of referee, § 312
 - Continuance, § 311
 - Enforcement of lien, §§ 311-316, pp 989-1002
 - Agreement or consent of owner as question of fact, § 314, p 994
 - Amount of claim, question of fact, § 314, p 996
 - Claim, statement, or notice of lien as question of fact, § 314, p 995
 - Conclusiveness of findings, § 316, p 1001
 - Conformity of verdict and findings to evidence and issues, § 316, p 999
 - Construction of findings, § 316, p 1001
 - Continuance, § 311
 - Contradictory findings, § 316, p 1000
 - Definiteness and certainty of verdict or findings, § 316, p 1000
 - Delivery and use of material, questions of law and fact, § 314, p 994
 - Demurres to evidence, § 314, p 993
 - Dismissal of action to enforce lien, generally, ante
 - Equitable procedure, §§ 311, 312
 - Findings and conclusions of law, § 316, p 998
 - Estoppel as question of fact, § 314, p 994
 - Exceptions to report of referee, § 312
 - Findings, generally, ante
 - Fraud and bad faith, questions of fact, § 314, p 994
 - Instruction, § 315
 - Issues, § 311
 - Conformity of verdict and findings to issues, § 316, p 999
 - Findings of fact by court on failure of jury to find, § 316, p 998
 - Jury trial, § 311
 - Lienable claims, questions of fact, § 314, p 994
 - Motion to reopen case to permit further evidence, § 311
 - Notice,
 - Reference, § 312
 - Trial, § 311
 - Objections to evidence, § 311
 - Part performance of contract as question of fact, § 314, p. 994
 - Payment as question of fact, § 314, pp 996, 997
 - Postponement, § 311
 - Powers and duties of referee, § 312
 - Priority,
 - Findings, § 316, p 999
 - Question of fact, § 314, p 994
 - Property or interest subject to lien, question of fact, § 314, pp 993, 994
 - Questions of law and fact, § 314, pp. 992-997
 - Reference, § 312
 - Reception of evidence, § 311
 - Reference, § 312
 - Reliance on credit of contractor or property, as question of fact, § 314, p 993
- Trial or hearing—Continued,
 - Enforcement of lien—Continued,
 - Reopening case for,
 - Further evidence, § 311
 - Further findings, § 316, p 998
 - Report of referee, § 312
 - Resubmission to permit further findings, § 316, p 998
 - Resubmission to referee, § 312
 - Special findings, § 316, p 999
 - Sufficiency of verdict and findings, § 316, p 998
 - Survey, § 313
 - Time of trial, § 311
 - Trial by court, § 314, p 992
 - Variance between findings and complaint, § 316, p 1000
 - Verdict, generally, post
 - View of jury, § 311, p 990, n 37
 - Waiver, question of fact, § 314, p 994
- Trifling defects, right of contractor to lien as affected, § 95
- Trust deeds Deeds of trust, generally, ante
- Trust estates, lien as attaching to, § 19
- Trust funds, payment, application, § 248, p 825
- Trustees,
 - Contract as creating lien, § 70
 - Description of owner in claim or statement of lien, § 162, p 601
 - Mortgagee, bringing in as parties to enforce mechanics' lien after expiration of period for limitation, § 282, p 899
 - Notice to owner of intent to claim lien, § 124, p. 629
 - Service on owner of intent to claim lien, § 124, p 629
- Tunnels, railways, lien as attaching to, § 21, p 515
- Two or more buildings Buildings or structures, ante
- Two or more owners, notice to owner of intent to claim lien, § 124, p 628
- Undertakers, statutory enumeration, § 86
- Undertakings. Bonds or undertakings, generally, ante
- Undisclosed principal,
 - Agent as party plaintiff in suit to enforce lien, § 283
 - Contract creating lien, application of doctrine, § 59, p 549, n 13
 - Defenses available against in enforcement of lien, § 273
 - Evidence of contract with agent in action to enforce lien, § 309, p 971
- Unincorporated association,
 - Owner of property, description in claim or statement of lien, § 162, p 601
 - Service on owner on intent to claim lien, § 124, p. 629
- Unknown contractor, claim or statement of lien to state fact, § 164
- Unknown owners, claim or statement of lien, § 162, p. 600
- Unliquidated credits, omission in claim or statement of lien, § 154
- Unliquidated damages, breach of contract, lien as allowable for, § 54
- Unliquidated demands, interest, § 176
- Use of materials. Materials and materialmen, ante

INDEX TO MECHANICS' LIENS

Vacation,

- Claim or statement of lien, § 171
- Discharge of lien, § 240
- Judgment or decree, proceedings to enforce lien, § 333
- Notice of lis pendens, § 280
- Premises by owner, appointment of receiver, § 201, p 920, n 62

Valid claim, lien as required to be predicated on, § 33

- Value,
 - Claim or statement of lien, showing value of labor performed or materials furnished, § 167, pp 702, 706
- Enhancement of value,
 - Co-owner, personal liability of co-owner, § 263, p 871, n 43
 - Presumptions and burden of proof in action to enforce lien, § 308, p 966
 - Priority of lien as to enhanced value of property, § 205, p 776
 - Time for commencement of proceeding for enforcement of lien against increase in value, § 282, p 803, n 38

Labor and materials,

- Amount secured, § 173
- Enhancement of value to, § 20
- Market value of improved land, consideration in establishing extent of lien, § 186
- Presumptions and burden of proof in action to enforce lien, § 308, pp 965, 966
- Reasonable value,
 - Amount secured by lien,
 - Abandonment by contractor, § 175
 - Substantial performance of contract, § 175
 - Evidence in action to enforce lien, § 310, p 985
 - Presumptions and burden of proof, § 308, p 965
 - Services or materials as measure of amount of lien, § 173

Variance,

- Claim or statement of lien as to terms of contract and actual contract proved, § 163, p 696, n 80
- Evidence and claim, objections at trial, § 311
- Findings and complaint in action to enforce, § 316, p 1000
- Issues, proof and variance, generally, ante

Vendee's Purchasers, generally, ante

Venditioni exponas, enforcement of judgment by, § 336

Vendors,

- Application of lien to improvements by purchaser, § 194
- Contract with or consent of, § 71, p 569
- Contractor, term as including, § 90
- Knowledge of improvements by vendee, right to lien as affected, § 71, p 573
- Lien on interest, contract of purchaser as creating, § 71, p 571
- Notice of nonresponsibility, § 84, p 593
- Party to action to enforce lien against interest of vendee, § 284, p 902
- Permission to vendee to make improvements, right to lien, § 71, p 573

Vendors—Continued,

- Purchase money mortgage, priority, § 201, p 762
- Repurchase or surrender of vendee's interest, lien as affected, § 245

Vendor's lien,

- Attachment of lien to equitable lien for purchase money, § 16
- Distinguished, § 1, p 493
- Intervention, foreclosure by, § 302
- Notice of nonresponsibility by owner of, § 84, p 503
- Priority over mechanics' lien, § 208

Venue,

- Enforcement of lien, § 281
- Jurat to claim or statement of lien, statement, § 167, p 713

Verdict,

- Bond of contractor, actions on, § 262, p 807
- Enforcement of lien, § 316, pp 998-1002
- Admission of evidence after verdict finding amount of indebtedness, § 311
- Conformity of judgment, § 323

Verification,

- Claim or statement, ante
- Copy of notice by owner of nonresponsibility, filing or recording, § 84, p 596
- Notice to owner of intent to claim lien, § 127
- Amendment to supply, § 129
- Pleading, action to enforce lien, § 299
- Amendment, § 306
- Statement of persons furnishing material and labor, presumptions of procuring by owner from contractor in action to enforce lien, § 308, p 966

Vessels, liens as allowable with respect to, § 21, p 516

Vested rights, repeal of law authorizing lien as affecting, § 6

View of jury, enforcement of lien, § 311, p 990, n 37

Vines, lien as allowable for planting, § 30

Vineyards, lien as allowable for cultivating and caring for, § 30

Visible commencement of work, commencement of lien, § 179, p 732

Volunteer, mortgage making loan used to pay off prior mortgage, priority, § 204, p 770, n 93

Waiver, §§ 222-228, pp. 792-803

- Acknowledgment, contract concerning provisions for, § 222, p 793, n 82
- Action on claim as, § 225
- Acts or conduct constituting, § 223
- Agent, § 223
- Agreements, § 224
- Assignor, right to lien, effect of, § 221
- Avoidance for fraud or misrepresentation, § 222
- Bill of particulars in action to enforce lien, defects or objections, § 294, p 934
- Bondholders, reliance on, § 228
- Bonds,
 - Indemnity bond, giving of, § 231
 - Performance of contract and payment of claim, § 256
- Certificate of architect, provision in contract for, § 95
- Chattel mortgage, taking of, § 227, p 802

INDEX TO MECHANICS' LIENS

Waiver—Continued,

- Claim or statement of lien, defects or irregularities, § 169
- Collateral security, taking as, § 227, pp 800-803
- Commencement of action to enforce lien within time limited by statute, § 282, p 800
- Consent of owner, provisions in lease, § 65, p 566
- Consideration, necessity, § 223
- Constitutional provisions, § 222
- Contingency, materialmen, § 224
- Contract provisions, questions of fact in action to enforce lien, § 314, p 993
- Contractor, operation and effect, § 222
- Date, right to have lien operate from particular date, § 177
- Default of contractor,
 - Estoppel to set up in action to enforce lien, § 277
 - Set-off and counterclaim in suit to enforce lien, § 277
- Default of principal in note, extension of time to sue to enforce lien, § 282, p 804, n 53
- Defense to enforcement, § 275
- Deposit in court as waiver of defenses, § 233
- Deposit of money as security of, § 227, p 801
- Draft, taking of, § 226
- Enforcement of lien, special pleading, § 301, p 942
- Evidence in action to enforce lien, § 309, p 975, § 310, p 988
- Express agreement, § 246
- Extension of time of payment as, § 224
- Fraud, avoidance by, § 222
- Implied agreement, § 224
- Implied waiver, § 223
- Intention as determinative, § 223
- Lessor's interest, right to lien against, § 195, p 746, n 95
- Materialman, rights against contractor's surety, § 259, p 848
- Misrepresentation, avoidance for, § 222
- Mortgages, ante
- Note,
 - Acceptance of note of third person, § 227, p 802
 - Maturity of note accepted in payment, time of, as affecting, § 226
 - Negotiations of note taken in payment, § 226
 - Taking or transfer of, § 226
- Notice, ante
- Operation and effect, § 222
- Order, taking of, § 226
- Owner,
 - Consent of, lease provision, § 65, p 566
 - Reliance on, § 228
- Parties in action to enforce lien, defects, § 284, p. 910
- Payment,
 - Agreements as to, § 224
 - Taking of note in, § 226
- Personal judgment on waiver of lien, § 331, p. 1017
- Persons entitled to set up, § 228
- Pleading, actions to enforce, § 301, p 942
 - Defective allegations, failure to demur, § 305, p 948
- Pledge, taking of, § 227, p. 803

Waiver—Continued,

- Presumption and burden of proof, § 223
- Enforcement of lien, § 308, p 907
- Priority, § 204, pp 765-771, § 207
- Lien for purchase price, § 208
- Presumptions and burden of proof in action to enforce lien, § 308, p 908
- Process, defects in action to enforce lien, § 286
- Question of fact in action to enforce lien, § 314, p 994
- Recording of contract providing for, § 222, p 793, n 82
- Reservation of lien on taking note in payment, § 226
- Retention of funds to meet claims of subcontractors, provision in contract for, § 251, p 834
- Retention of title to materials furnished, § 227, p 802
- Revival after, § 222
- Security, taking as, § 227, pp 800-803
- Statement or account to owner by contractor, § 130, p 638, n 6
- Statutory provisions, § 222
- Stipulation against lien in contract, § 109, p 613, n 96
- Subcontractor,
 - Availability to owner and contractor, § 228
 - Contractor's surety, rights against, § 259, p 848
 - Waiver of principal contractor affecting rights, § 222
- Trial, reliance on common law right to general judgment, § 311
- Verification of claim or statement of lien, § 167, p 709, n 97
- Walls, lien as allowable for construction of, § 31
- Waste materials, right to lien as affected, § 44
- Water supply system, application and coverage of lien, §§ 27, 187
- Weight and sufficiency of evidence Evidence, generally, ante
- Wells, lien for constructing, § 30
 - Amount secured by lien on nonfulfillment of guaranty by contractor, § 175, p 728, n 89
 - Irrigation well, application of lien to land necessary for protection, § 186, p 736, n. 38
- Wharves, lien as allowable with respect to, § 21, p 516
- Widow, ownership as sufficient to support lien, § 62
- Wife Husband and wife, generally, ante
- Willful or malicious claim in, claim or statement of lien,
 - Inclusion of too much land, § 161, p 685, n 91
 - Overstatement of amount due, § 153
- Windmills, lien as allowable as improvement or appurtenance, § 21, p 516
- Windows, lien as allowable with respect to, § 26
- Wires, liens for structures or improvements applying to, § 21, p. 516
- Withdrawal,
 - Claim or statement after filing, § 147
 - Deposit in court, effect of, § 233
- Without notice, construction of term with respect to priority of lien over mortgage, § 200, p 754, n. 91
- Witnesses, affidavit of subscribing witness to prove execution of claim or statement of lien, § 168

INDEX TO MECHANICS' LIENS

Words and phrases Definitions, generally, ante

Work and labor,

See, also, Services rendered, generally, ante

Abandonment, ante

Accounts to owner, § 130

Advances to pay for, § 47

Amount due from owner to contractor, presumptions and burden of proof in action to enforce lien, § 308, p 966

Amount secured by lien, nonfulfillment of guaranty by contractor, § 175

Architects, statute conferring lien for as including services of, § 36

Assignment of claim, assignee's right of action on bond of contractor, § 202, p 856, n 73

Board and lodging of workmen, § 48

Bond of contractor,

Parties to action on, § 262, p 803

Right of action on, § 262, p 855

Claim or statement, number of days of labor to be set forth, § 163

Collusive or fraudulent payments to principal contractor as affecting lien of laborers, § 251, p 832

Commissions as lienable items, § 49

Complaint in action to enforce lien, § 294, p. 929

Completion, evidence in action to enforce lien, § 310, p 983

Computation of amount of claim, claim or statement of lien, § 165, p 705

Consent of owner to performance, claim or statement of lien to show, § 163

Construction, lien as allowable for work other than, § 38

Death of contractor after completion of work as affecting right to lien, § 97

Declaration or petition in action to enforce lien, § 294, p 929

Default in performance of principal contract, rights as affected, § 112

Delay in performance of original contract, rights as affected, § 112

Description in,

Claim or statement of lien, § 165, pp 699-708

Contract creating lien, § 77

Designation of liens of, § 1, p 491

Direct lien, § 105

Employment by contractor, right to lien, § 97

Enforcement of lien, generally. Enforcement, ante

Enhancement in value, necessity, § 20

Estoppel to assert lien, § 230

Evidenced on land, commencement of lien, § 179, p 731, n. 53

Extra work or labor,

Claim or statement of claim of lien to show structure on which performed, § 165, p 701

Extension of time for filing claim or statement, § 149, pp 668-672

Time for notice to owner of intent to claim lien, § 125

Filing of principal contract by owner, effect, § 107

Fraudulent payments to principal contractor as affecting lien of, § 251, p 832

Work and labor—Continued.

Furnishing, § 34

Contractors, persons furnishing as entitled to lien, §§ 91, 104

Different times, time for notice to owner of intent to claim lien, § 125

Gratuitous performance, extension of time for filing claim or statement, § 149, p 670

Intent in furnishing, § 45

Last material or labor furnished, time for filing claim or statement, § 144, p 658

Liberal construction of statute creating lien in favor of, § 4, p 501

Mechanics,

Laborer within statute creating lien, § 88

Right to lien, § 87

Modification of principal contract, right as affected, § 111

Money due contractor, lien on, §§ 114-117, pp 619-622

Classes entitled, § 115

Demand and notice, § 116

Satisfaction and disposition of balance, § 117

Nature of lien, § 1, p. 491, § 105

Notice,

Money due contractor, lien on, § 116

Owner of intention to claim lien,

Necessity, § 121, pp 624-626

Particularity of notice of intent to claim lien, § 126, pp 634, 635

Stipulations against liens in contract, § 109

Stop notice,

Distinguished from notice to owner of intention to claim lien, § 120

Service on owner, §§ 114, 117

Original contractor, term as including, § 90

Payments,

Application, § 248, p. 824

Lien as affected by payment to contractor, § 251, pp 828, 832

Lien of others as affected, §§ 252, 253

Mode in terms of original contract as controlling, § 110

Performance,

Attachment of lien, § 181

Continuance of lien, § 183

On premises as essential, § 39

Priority of lien over mortgage, § 200, p 756

Person performing as entitled to lien, § 88

Personal judgment against owner, § 331, p 1016

Personal liability of owner, failure to exact bonds for performance of contract, § 256

Pleading in action to enforce lien, § 294, pp 925, 929

Priority of lien,

Assignment by contractor, § 211

Mortgage, § 200, pp. 753, 756

Other claimants, § 108, p 749

Profits as lienable items, § 49

Protection of persons contributing, § 3, p 498

Purchase money mortgage, recording affecting priority, § 201, p 763

Purpose in furnishing, § 45

Reliance on credit of building or property, § 46

Rescission of principal contract, rights as affected, § 111

INDEX TO MECHANICS' LIENS

Work and labor—Continued,

- Retention by owner of portion of money due contractor, reliance on contract provision, § 255
- Right to lien, § 88
 - Contractor furnishing, §§ 91, 104
 - Employment by contractor, § 97
 - Money due contractor, §§ 114–117, pp 619–622
- Separate liens, filing, § 131, p 642
- Several buildings, application and coverage of lien, § 189
- Statement,
 - Contractor seeking to acquire lien required to furnish, § 130
 - Names to owner, necessity of notice to owner by lien claimant, § 121, p 626
 - Owner, § 130
- Stipulations in principal contract, effect, §§ 108–110
- Stop notice,
 - Distinguished from notice to owner of intention to claim lien, § 120
 - Service on owner, § 114
 - Satisfaction and disposition of balance, § 117
- Subcontractors, lien for, § 98
 - Amount secured by lien, § 174, p 726
 - Statement of claims as essential before paying principal contractor, § 251, p 833
 - Status within lien law, § 98
- Subrogation, lien by, § 106
- Superintendence, § 37
- Time,
 - Enforcement of lien, § 282, p 893, n 40
 - Furnishing, pleading in action to enforce lien, § 204, p 930
 - Notice to owner of intent to claim lien, § 125
- Tools or equipment as included in lien for, § 34
- Waiver, stipulations in contract as binding on, § 222

Workmen Work and Labor, generally, ante

- World's Fair Corporation, property of as subject to lien, § 10, p 507, n 31
- Worthless improvements, subcontractors or materialmen, right to lien, § 112
- Wrecking buildings, acquisition of lien, § 24
- Writ of assistance, purchaser at sale in proceedings to enforce lien, § 344
- Writ of review, judgment on petition to enforce lien, § 333
- Writing,
 - Amendment of claim or statement of lien, § 170, p 719
 - Assignment of lien, § 219
 - Consent of owner, necessity, § 75
- Contract,
 - Creating lien, necessity, § 75
 - Filing of copy with claim or statement of lien, § 163
 - Limitation of liability of owner, § 174, p 724
 - Necessity of showing in claim or statement of lien, § 163
- Notice,
 - Filing of claim or statement, § 146
 - Owner of,
 - Intent to claim lien, § 126, p 634
 - Nonresponsibility, necessity, § 84, p 594
 - Oath of verification of claim or statement of lien, § 167, p 711
- Wrongful refusal of owner to allow contractor to complete performance, amount secured by lien, § 175
- Year, omission in claim or statement of lien, § 165, p 702
- Zoning regulations, materialmen as charged with knowledge of as affects rights to lien, § 21, p 514

INDEX TO MERCANTILE AGENCIES

- Accuracy of information, guaranty, § 4
- Actions by or against, § 8
- Agents and subscribers, § 1
- Attorneys, liability for loss caused by neglect of, § 4
- Care required, § 4
- Clerks, liability for loss caused by neglect of, § 4
- Commercial agency, synonymous term, § 1
- Common carrier, agency as, § 1
- Confidential nature of information, § 7
- Construction, contract between agency and subscriber, § 3
- Constructive fraud, jury question, § 8
- Contract, duty to subscriber as governed by, § 4
- Creation of relation, §§ 3-5
- Credit extended on face of erroneous information, remedy of subscriber, § 8
- Credit guide or book, delivery to subscriber, § 3
- Definition, § 1
- Diligence, § 4
- Effect of relation,
 - Agency and subscribers, §§ 3-5
 - Agency and third persons, § 7
 - Subscribers and third persons, § 6
- Employees, liability for loss caused by neglect of, § 4
- Erroneous information, credit extended on face of, remedy of subscriber, § 8
- Estoppel, reliance on information, § 6
- Exemption from liability contract stipulating, § 4
- Gross negligence,
 - Jury question, § 8
 - Liability for loss as result of, § 4
- Guaranty, reliability of information, § 4
- Interstate commerce, mailing commercial credit reports of, § 2
- Jury questions, gross negligence and constructive fraud on part of agency, § 8
- Libel and slander, § 7
- Licenses, § 2
- Limitation of liability, contract provision, §
- Lost reports, liability of agency, § 4
- Mercantile agent, distinguished, § 1
- Misrepresentation, liability to subscribers for consequences, § 4
- Nature, § 1
- Negligence, liability of agency, § 4
- Nonsubscriber, unauthorized use of information, redress with respect to, § 7
- Regulation and control, § 2
- Reliability of information, guaranty, § 4
- Reliance on information, persons entitled, § 6
- Remedies, subscriber extending credit on face of erroneous information, § 8
- Scope of information, § 5
- Subscribers,
 - Actions against agencies, § 8
 - Agency for, § 1
 - Creation and effect of relation, §§ 3-5
- Third persons, effect of relation as between,
 - Agency and, § 7
 - Subscribers and, § 6
- Unauthorized use of information, redress with respect to, § 7
- Use of information, contract limiting, § 5
- Words and phrases, § 1

INDEX TO MILITIA

- Absence without leave, discharge or dismissal of commissioned officer, § 11, p 1090
- Accusation, court-martial proceedings, § 25, p 1107
- Actions,
 - Exemption from suits, § 27, p 1109
 - Immunity from suit while in military service, § 27, p 1111
 - Rules governing civil actions as applying to actions against members, § 27, p 1111
 - Unincorporated militia companies, right to sue, § 26
- Adjutant general, § 11, p 1087
 - Preferring charges against militiamen, authority, § 25, p 1105
 - Removal from office, § 11, p 1090
- Age,
 - Enlistment, § 12
 - National Guard, § 8
 - Retirement of officer, § 11, p 1089
- Aid to militiamen and dependents, § 28
- Aliens, militia duty, § 12
- Allowances,
 - Enlisted men, § 14
 - Officers, § 11, p 1090
- Amusement purposes, armories used for, § 18
- Appointment, officers, § 11, p 1087
- Armories, § 18
 - Expense of maintenance, § 23, p 1101
- Armory boards or commissions, financing, construction and maintenance of armories through, § 23, p. 1101
- Arms, § 17
 - Expense of furnishing, § 23, p 1102
- Arrest,
 - Authority of member to make, § 21
 - Immunity of members, § 6
- Articles of war,
 - Applicability, § 19
 - Violations of, court-martial as having jurisdiction, § 25, p. 1106
- Assessments, incorporated organizations, funds raised by, § 26
- Breakdown of local enforcement, calling out to enforce law in case of, § 21, n 27
- Calling out, § 21
- Camp grounds, § 18
- Capital offenses,
 - Courts-martial, jurisdiction, § 25, p 1106
 - Jurisdiction and venue of prosecutions for, § 27, p 1112
- Captains,
 - Arms and equipment, personal liability, § 17
 - Court-martial, authority to order, § 25, p 1104
 - Defined, § 1
- Certiorari, courts-martial, review by, § 25, p 1108
- Change of venue, criminal prosecution, § 27, p 1112
- Charges, court-martial proceedings, § 25, p 1107
- Citizen soldiers, status as, § 1
- Citizenship, members, § 12
- Civil authorities, cost of maintaining militia in active service in aid of, § 23, p 1103
- Civil courts,
 - Court-martial, review of sentence, § 25, p 1108
 - Jurisdiction over, § 3
- Civil government, subordination to, § 3
- Civil process, immunity from arrest on, § 6
- Civil purposes, armories used for, § 18
- Civil status and liability of members, § 27, pp 1109-1112
- Civilian control, calling out to enforce laws, § 21
- Collateral attack, court-martial, adjudication of, § 25, p 1108
- Command, calling into service of state, § 21
- Commander in chief, § 10
 - Governor, retention of command when calling out, § 21
- Commanding officer,
 - Armorer, approval of appointment, § 18
 - Arms and equipment, personal liability, § 17
 - Fines, imposition of, § 20
 - Suppression of certain occupation within prescribed limits surrounding encampment, § 19
- Commissioned officers,
 - National Guard, § 11, p 1088
 - Officers, generally, post
- Compensation,
 - Enlisted men, § 14
 - Officers on duty by order of Governor, § 11, p. 1091
- Composition, § 7
 - Court-martial, § 25, p 1105
- Conclusiveness, courts-martial, adjudication of, § 25, p 1108
- Concurrent jurisdiction, courts-martial, § 25, p 1106
- Concurrent power over, § 2
- Conduct unbecoming an officer,
 - Court-martial, jurisdiction of offense, § 25, p 1106
 - Punishment, § 20
- Congress, superior right within constitutional limitations, § 2
- Consent, enlistment, § 12
- Consolidation of organizations, § 15
- Constitutional provisions, § 2
 - Appointment of officer, § 11, p 1087
 - Compensation of enlisted men, § 14
 - Composition, § 7
 - Creation of militia districts, § 26
 - Exemption from service, § 5
 - Immunity from arrest, § 6
 - Incorporation of militia bodies, § 26
 - Obligation to serve in, § 4
 - Pay and allowances, officers, § 11, p 1090.
 - Subordination to civil authority, § 3

INDEX TO MILITIA

Contracts,

- Civil liability of members under, § 27, p 1110
- Enlistment as, § 12
- Contributory negligence, defense of in civil action against members, § 27, p 1110
- Control, power of, § 2
- Convening authority, courts-martial, § 25, p 1104
- Conviction, courts-martial, § 25, p 1107
- Counties,
 - Armories, duty to provide, § 23, p 1101
 - Expense of maintenance within as charge against, § 23, p 1100
 - Supplies and equipment, accountability, § 17
- Courts-martial, § 25, pp 1104-1108
 - National Guard officers, immunity from suit for exercising authority to order, § 27, p. 1110
- Courts of inquiry, § 24
- Creation of militia districts, § 26
- Criminal responsibility, § 27, p 1112
- Custody, arms and other property, § 17
- Definitions, § 1
 - Court-martial, § 25, p. 1104
 - National Guard, § 8
 - Office, § 11, p 1087
 - Organization, § 8
- Dependents, aid to, § 28
- Destruction of private property,
 - Civil liability of members, § 27, p 1110
 - Right of member, § 21
- Differential pay, public employees, leave of absence, § 28
- Disability while in service, benefits, § 28
- Disbandment, § 15
- Discharge, enlisted men, § 13
- Discipline, § 10
 - Organization for, § 1
- Disease contracted in line of duty, liability of state, § 28
- Dismissal of officer, § 11, p 1089
- Disobedience, punishment, § 20
- Distinctions, § 1
- Domicile, prerequisite to enlistment, § 12
- Drill,
 - Instructions in form of, § 10
 - Nonattendance, punishment, § 20
 - Organization for, § 1
 - Unauthorized organization, § 16
- Drill grounds, § 18
- Dues, incorporated organizations, funds raised by, § 26
- Emergency, National Guard, services on behalf of nation, § 8
- Encampment, § 19
 - Expense of, § 23, p 1103
 - Pay and allowances, enlisted men, § 14
 - Pay and allowances, officers, § 11, p 1090
- Enforcement of laws, right of state to use in, § 21
- Enforcement of sentence, court-martial, § 25, p 1107
- Enlistment,
 - Discharge of enlisted men, § 13
 - Members, § 12
 - Pay and allowances, § 14
 - Term of service, § 13
- Equipments, § 17
 - Deficiency in, punishment, § 20
 - Expense of furnishing, § 23, p 1102

Evidence,

- Civil actions against members, rules governing, § 27, p 1112
- Courts of inquiry, § 24
- Enlistment or enrollment of members, § 12
- Exclusive power over, § 2
- Execution of orders, civil liability of militia men for acts committed in, § 27, p 1111
- Exemption from suits, § 27, p 1109
- Exemptions from service, § 5
- Exercises, instruction in form of, § 19
- Expense of maintenance, § 23, pp. 1100-1103
- Federal army, induction into, officer as ceasing to be member of militia, § 11, p 1089
- Federal funds, expenses of organizations, use for payment of, § 23, p 1100
- Federal legislation, binding effect, § 2
- Federal service,
 - Expense of mobilizing National Guard ordered to camp for, § 23, p. 1103
 - National Guard, § 8
- Findings, courts of inquiry, § 24
- Fines and penalties,
 - Courts-martial, punishment by, § 25, p 1107
 - Enforcement of performance of military duty by way of, § 20
 - Military offenses, § 24
- Floods, right of state to use to preserve order in case of, § 21
- Forfeiture, courts-martial, disposition of, § 25, p 1107
- Governor,
 - Adjutant general, appointment, § 11, p 1088
 - Appointment of officers, § 11, p 1087
 - Commander in chief, § 10
 - Court-martial, convening on order of, § 25, p 1104
 - Disbandment, § 15
 - National Guard, power to organize and use, § 8
 - Ordering out in aid of civil authorities, § 21
 - Relieving officer from command, § 11, p 1089
- Guardian, consent to enlistment, § 12
- Homicide, court-martial, jurisdiction, § 25, p 1106
- Honorable discharge, termination of enlistment period, § 13
- Housing, equipments, § 17
- Immunity from arrest, members of, § 6
- Imprisonment, courts-martial, punishment by, § 25, p. 1107
- Inciting disorders, punishment, § 20
- Incorporation of militia bodies, § 26
- Infants, enlistment, § 12
- Injuries caused by, liability of state or political division, § 22
- Injuries in line of duty, recovery from state, § 28
- Injuries to members, liability inter sese, § 27
- Inspection, § 19
- Insubordination, punishment, § 20
- Insurrection,
 - Calling into service in state of, § 3, n 25
 - Right of state to use to suppress, § 21
- Janitors, armories, nature of service, § 18
- Judge advocate, court-martial, detail as officer, § 25, p. 1107
- Jurisdiction,
 - Courts-martial, § 25, pp 1104, 1105
 - Criminal offenses, § 27, p 1112
- Jury service, exemption from, § 6

INDEX TO MILITIA

- Leases,
 - Armories, municipalities, § 23, p 1101
 - Army purposes, municipal property, § 18
- Leave of absence, state and municipal employees, differential pay, § 28
- Legislature, disbandment, power in respect of, § 15
- Limited jurisdiction, courts-martial, § 25, p 1105
- Local enforcement, breakdown, use to enforce law, § 21, n 27
- Maintenance, expense of, § 23, pp. 1100-1103
- Maneuvers, § 19
 - Expense of, § 23, p 1103
 - Pay and allowances,
 - Enlisted men, § 14
 - Officers, § 11, p 1090
- Manslaughter, court-martial, jurisdiction, § 25, p 1106
- Marches, § 19
- Medical services, injuries sustained in line of duty, § 28
- Military courts, §§ 24, 25, pp 1103-1108
 - Liability for claimed injury as result of sentence, § 27, p 1110
 - Military offenses as triable by, § 20
- Military offenses, § 20
 - Fines, § 24
- Minors, enlistment, § 12
- Misdemeanors, military offenses by members not in actual military service, § 20
- Mobilization, expense of, § 23, p. 1102
- Municipal employees, leave of absence, differential pay, § 28
- Municipalities, armories, donation of site for, § 23, p 1101
- Muster grounds, private property used for, § 21
- National Defense Act,
 - Age for enlistment, § 12
 - Militia of United States, § 7
 - Withdrawal of federal regulations, § 15
- National guard, § 8
 - Adjutant general as member of, § 11, p 1087
 - Aid to member incapacitated while on duty, § 28
 - Armories, expense of providing and maintaining, § 23, p 1101
 - Arms and equipments, § 17
 - Courts-martial, immunity from suit for exercising authority to order, § 27, p 1110
 - Federal funds, payment of expenses, § 23, p 1100
 - Military offenses, § 20
 - Tenure of officers, § 11, p 1088
 - Voluntary enlistment, § 12
- Natural catastrophe, right of state to use to preserve order in times of, § 21
- Nature, § 1
- Naval militia, states, § 9
- Neglect of duty,
 - Court-martial, jurisdiction of offense, § 25, p 1105
 - Punishment, § 20
- Noncommissioned officers,
 - Appointment, § 11, p 1088
 - Return to rank, § 11, p 1090
- Notice, meeting or parade, § 19
- Number, court-martial, members of, § 25, p 1105
- Oath,
 - Commissioned or warrant officer, § 11, p 1088
 - Courts-martial, members of, § 25, p 1106
 - Enlistment, § 12
- Obedience to orders, personal liability of militia men for acts committed in, § 27, p 1111
- Obligation to serve in, § 4
- Occupations, exemption from service of person engaged in certain occupation, § 5
- Offenses,
 - Courts-martial, jurisdiction of, § 25, p. 1106
 - Military offenses, § 20
 - Persons not in service, § 29
- Officers, § 11, pp 1087-1091
 - Court-martial as usually composed of commissioned officers, § 25, p 1105
 - Disbandment of organization, rank as affected, § 15
 - Pay and allowances, § 1090
- Opinions, courts of inquiry, § 24
- Orders, criminal liability for acts in carrying out, § 27, p 1112
- Organization, § 7
 - Courts-martial, § 25, p 1106
 - Power to organize, § 2
- Organized militia, § 8
 - Armories, expense of maintenance, § 23, p 1101
 - Calling out by Governor, § 21
 - Federal funds, payment of expenses, § 23, p 1100
 - Federal funds, use for payment of expenses, § 23, p 1100
 - Military offenses, § 20
 - Voluntary enlistment, § 12
- Parades,
 - Instruction in form of, § 19
 - Nonattendance, punishment, § 20
 - Unauthorized organization, § 16
- Parents, consent to enlistment, § 12
- Pay and allowances,
 - Enlisted men, § 14
 - Officers, § 11, p 1090
- Peacetime, courts-martial, jurisdiction of offenses, § 25, p 1106
- Petty officers, appointment, § 11, p 1088
- Pleading, civil action against members, rules governing, § 27, p 1112
- Political divisions, expense of maintenance, sharing in, § 23, p 1100
- Posse comitatus, distinguished, § 1
- Power to organize, regulate, and control, § 2
- Powers, officer, § 11, p 1090
- President,
 - Commander in chief when called into actual service of United States, § 10
 - Court-martial, convening on orders of, § 25, p 1104
 - National Guard, federal service on call of, § 8
 - Rules and regulations for organization and government, § 2
- Presumptions, courts-martial, legal organization, § 25, p 1106
- Privileges of members, § 6
- Procedure, courts-martial, § 25, p 1106
- Process, exemption from service in civil suits, § 27, p 1111
- Public disorder, right of state to use in times of, § 21
- Public employees, leave of absence, differential pay, § 28
- Public officer, militia officer as, § 11, p 1087
- Publicity, courts-martial, trial by, § 25, p 1106
- Punishment, courts-martial, § 25, p. 1107

INDEX TO MILITIA

- Quarter, defined, § 1
- Receivers, incorporated military organizations, action for appointment, § 26
- Regimental funds, custodian of, § 11, p 1091
- Regular army, discipline conforming to that of, § 19
- Regulation, power to regulate, § 2
- Relief from command, officers, § 11, p 1089
- Reserves, state militia, § 7
- Residence, prerequisite to enlistment, § 12
- Resignation, officers, commission vacated by, § 11, p 1089
- Retirement, officers, § 11, p 1089
- Review, courts-martial, sentence of, § 25, p 1108
- Revocation, exemption from service, § 5
- Rifle ranges, § 18
- Schools, § 19
- Secretary of War, regulations by as acts of President, § 2
- Seizure of private property,
 - Civil liability of member, § 27, p 1111
 - Right of member, § 21
- Senate, appointment of officers by Governor with consent of, § 11, p 1087
- Sentence, courts-martial, § 25, p 1107
- Service, §§ 21, 22
 - Expense of maintaining in, § 23, p 1103
 - Loss of arms or equipments from casualty of, liability, § 17
- Sheriffs,
 - Court-martial, enforcement of sentence, § 25, p 1107
 - Detention of militiaman pending trial by military court, § 20
- Signature, enlistment papers, § 12
- Special jurisdiction, courts-martial, § 25, p 1105
- Spectators, injury to at military exercises, contributory negligence as defense in action against member, § 27, p. 1110
- Standing army, distinguished, § 1
- State,
 - Appointment of officers reserved to, § 11, p 1087
 - Authority over, § 2
 - Expense of maintenance as charge, against, § 23, p 1100
 - Injuries caused by members, liability for, § 22
 - Naval militia, § 9
 - Organized militia, § 8
- State militia, composition, § 7
- Statutory provisions,
 - Ages for enlistment, § 12
 - Appointment of officers, § 11, p 1087
 - Articles of war made applicable by, § 19
 - Compensation of enlisted men, § 14
 - Courts-martial, § 25, p 1104
 - Courts of inquiry, § 24
 - Creation of militia districts, § 26
 - Exemptions from service, § 5
 - Immunity from arrest, § 6
 - Incorporation of militia bodies, § 26
 - Obligation to serve in, § 4
- Statutory provisions—Continued,
 - Organization of organized militia, § 8
 - Pay and allowances, officers, § 11, p 1090
 - Plan of organization, etc., § 8
 - Reserve, § 7
 - Subordination to civil authority, § 3
 - Training, methods of, § 19
- Subordinate officers, obedience to orders of superiors, § 11, p 1090
- Subordinates, civil liability of superior officers for injuries as result of orders, § 27, p 1110
- Subordination to civil government, § 3
- Superior officers, civil liability for injuries as result of acts of subordinate under orders, § 27, p. 1110
- Supplies, § 17
 - Expense of furnishing, § 23, p. 1102
- Temporary service, calling into field for, § 1
- Term,
 - Enlisted personnel, § 13
 - Officers, § 11, p 1088
- Termination of service, enlisted men, § 13
- Torts,
 - Civil liability of members in, § 27, p 1110
 - Liability of states for, § 22
- Training, § 19
 - Expense of, § 23, p 1102
 - National Guard in encampment for, services as for United States, § 8
 - Nonattendance at exercises, punishment, § 20
- Transfer of officers, § 11, p. 1089
- Trespass,
 - Civil liability of member, § 27, p 1111
 - Liability of state for, § 22
- Trial, civil actions against members, rules governing, § 27, p 1112
- Troops, distinguished, § 1
- Unauthorized organizations, § 16
- United States, National Guard as in service of, § 8
- Unorganized bodies, state militia, § 7
- Vacancies,
 - Court-martial, temporary disability of member, § 25, p 1105
 - Officers, filling of, § 11, p. 1088
- Venue, criminal prosecutions, § 27, p 1112
- Violation of military law or regulations, military courts dealing with, § 24
- Voluntary enlistment, § 12
 - Waiver of exemption from service by, § 5
- Waiver, exemptions from service, § 5
- Wanton acts, civil liability of members for, § 27, p 1110
- Warning, meeting or parade, § 19
- Warrant officers,
 - Appointment, § 11, p 1088
 - Return to rank, § 11, p 1090
- Withdrawal of federal recognition, § 15
- Words and phrases, § 1
- Written accusation, court-martial proceedings, § 25, p. 1107

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For discussion concerning the federal pension reform law see Master and Servant § 169.1.

§ 482. In General

Library References

Employers' Liability ⇨170

page 7

98. US—Ringhiser v Chesapeake & O Ry Co, D C Ohio, 148 F Supp 529, affd, C.A., 241 F 2d 416, cert gr 77 S Ct 1093, 354 US 901, 1 L Ed 2d 1268
- Ala—Louisville & N R Co v Vickery, 263 So 2d 656, 288 Ala 555
- Pa—Sumski v Sauquet Silk Co, 66 Lack Jur 118
- Tex—Matthews v University of Tex., Civ App, 295 S W 2d 270
99. Ariz—Jeune v Del E Webb Const Co, 269 P 2d 723, 77 Ariz 226
1. Pa—Benscoter v B G Coon Const Co, 7 D & C 2d 84, 46 Luz L Reg 105, 70 York 61
6. US—Chicago & NW Ry Co v Chicago, R I & P R Co, D C Iowa, 179 F Supp 33, affd, C.A., 280 F 2d 110, cert den 81 S Ct 378, 364 US 931, 5 L Ed 2d 364
7. US—Planters Mfg Co v Protection Mut Ins Co, C A Miss, 380 F 2d 869, cert den 88 S Ct 293, 389 US 930, 19 L Ed 2d 282—Boeing Co v Shipman, C A Ala, 411 F 2d 365
- Cal—McGuigan v Southern Pac Co, 247 P 2d 415, 112 C A 2d 704
- Ga—Seaboard Airline R Co v Stoddard, 62 S E 2d 620, 82 Ga App 743
- Ill—Lee v Louisville & N R Co, 110 N E 2d 691, 349 Ill App 276
- Remedy a part of the right under Federal Employers' Liability Act
- US—Burnett v New York Cent R Co, C A Ohio, 332 F 2d 529, revd on oth grds 85 S Ct 1050, 380 US 424, 13 L Ed 2d 941
12. Ga—Southern Ry Co v Smalley, 145 S E 2d 708, 112 Ga App 471, cert den 86 S Ct 1342, 384 US 906, 16 L Ed 2d 359, reh den 86 S Ct 1568, 384 US 958, 16 L Ed 2d 553

page 8

It has been held that the Federal Employers' Liability Act provides the exclusive remedy for the death of a railroad company employee within coverage of the statute ¹³⁵

- 13.5. US—Phillips v Houston Fire & Cas Ins Co, D C La, 219 F Supp 420

Special statutory tort liability action

- Cal—Aguirre v Southern Pac Co, 43 Cal Rptr 73, 232 C A 2d 636.

Action neither tort action nor workmen's compensation action

- La—Shaw v Texas & Pac Ry Co, App, 170 So 2d 874, application den 172 So 2d 703, 247 La 621

§ 484. — Return of Money Received after Injury

Library References

Employers' Liability ⇨178

14. US—Haberern v Lehigh & N E Ry Co, C A Pa, 554 F 2d 581
- Ill—Johnson v Elgin, J & E Ry Co, 87 N E 2d 567, 338 Ill App 316

- NY—Yearke v Zarcone, 395 N Y S 2d 322, 57 A D 2d 457

Agreement to reimburse

- N H—Johnson v National Biscuit Co, 69 A 2d 703, 96 N H 44

§ 485 — Notice of Injury

Library References

Employers' Liability ⇨174

18 Construction and operation of particular statute

(3) Other cases

- Mass—Smith v Hiatt, 109 N E 2d 133, 329 Mass 488

page 9

25. Mo—Chambers v Missouri Pac R Co, 356 S W 2d 64

§ 486. Jurisdiction and Venue

Library References

Employers' Liability ⇨175

page 10

62. US—Gower v Chestnut Ridge Ry Co, D C Pa, 166 F Supp 661
- Cal—Schultz v Union Pac R Co, 257 P 2d 1003, 118 C A 2d 169
- Fla—Atlantic Coast Line R Co v Ganey, App, 125 So 2d 576
- Ill—Cotton v Louisville and Nashville Railroad Co, 144 N E 2d 789, 15 Ill App 2d 53, affd 152 N E 2d 385, 14 Ill 2d 144—Cotton v Louisville & N R Co, 152 N E 2d 385, 14 Ill 2d 144
- Mo—Hayman v Southern Pac Co, 278 S W 2d 749
- S C—Smith v Atlantic Coast Line R Co, 63 S E 2d 311, 218 S C 418
- Tex—Missouri Pac R Co v Cross, 501 S W 2d 868
- Protection of rights
- US—Sherman v Pere Marquette Ry Co, 62 F Supp 590

Right as substantial

- US—Boyd v Grand Trunk Western R Co, Mich, 70 S Ct 26, 338 US 263, 94 L Ed 55—Hoehler v Pennsylvania R Co, D C Pa, 140 F Supp 487

Statutory provision held venue provision

- US—Imm v Union R Co, C A Pa, 289 F 2d 858, cert den 82 S Ct 55, 368 US 833, 7 L Ed 2d 35

Procedural rules of forum state control

- Ill—Castro v Chicago, R I and P R Co, 415 N E 2d 365, 47 Ill Dec 360, 83 Ill 2d 358, cert den 101 S Ct 3086, 452 US 941, 69 L Ed 2d 956

63. Tex—Texas & N O R Co v Pool, Civ App, 263 S W 2d 582

page 11

66. Cal—Great Northern Ry Co v Superior Court, Alameda County, 90 Cal Rptr 461, 12 C A 3d 105, cert den 91 S Ct 1254, 401 US 1013, 28 L Ed 2d 550

- Fla—Adams v Seaboard Coast Line R Co, App, 224 So 2d 797—Shaw v Seaboard Coast Line R Co, App, 229 So 2d 275

- Ill—Baltimore & O R Co v Mosele, 368 N E 2d 88, 10 Ill Dec 602, 67 Ill 2d 321

- NY—Jacobs v Central Vermont Ry Co, 228 N Y S 705, 132 Misc 144, affd 231 N Y S 630, 225 App Div 145, revd on oth grds 165 N E 275, 250 N Y 233

- Ohio—Penrod v Baltimore and O R Co, 412 N E 2d 949, 64 Ohio App 2d 216, 18 O O 3d 164

- S C—Brunner v Seaboard Air Line R Co, 84 S E 2d 557, 226 S C 177

67. NY—Williams v Seaboard Air Line R Co, 193 N Y S 2d 588, 9 A D 2d 268

- Okla—St Louis-San Francisco Ry Co v Superior Court, Creek County, 276 P 2d 773, op app 290 P 2d 118

68. NM—Bourguet v Atchison, T & S F R R, 334 P 2d 1107, 65 NM 200

The doctrine of forum non conveniens, etc

- Cal—Price v Seaboard, T & S F Ry Co, 268 P 2d 457, 42 C 2d 577, 43 A L R 2d 756, cert den 75 S Ct 44, 348 US 839, 99 L Ed 661

- Fla—Adams v Seaboard Coast Line R Co, App, 224 So 2d 797

(2) Applicability of doctrine

- Cal—Great Northern Ry Co v Superior Court, Alameda County, 90 Cal Rptr 461, 12 C A 3d 105, cert den 91 S Ct 1254, 401 US 1013, 28 L Ed 2d 550

(3) Other statements

- Pa—White v Norfolk & W Ry Co, 323 A 2d 68, 229 Pa Super 331

70. Ark—Ledbetter v Sanford, 205 S W 2d 464, 212 Ark 277

- Cal—Schultz v Union Pac R Co, supra, n 62.

- Ky—James v Nashville, C & St L Ry, 221 S W 2d 449, 310 Ky 616—Tufts v Chesapeake & O Ry Co, 401 S W 2d 58

- S C—Smith v Atlantic Coast Line R Co, 63 S E 2d 311, 218 S C 418

- Tex—Hopmann v Southern Pacific Transp Co, Civ App, 581 S W 2d 532, cert den 100 S Ct 146, 444 US 870, 62 L Ed 2d 94

Statute held to contemplate only one residence of carrier within state

- Ky—Tufts v Chesapeake & O Ry Co, 401 S W 2d 58

Where employee elects to sue in the state court, railroad may be entitled to change of venue under state statutes ⁷⁰⁵

- 70.5. Tex—Missouri Pac R Co v Little, Civ App, 319 S W 2d 785, cert den 80 S Ct 69, 361 US 823, 4 L Ed 2d 67, reh den 80 S Ct 194, 361 US 898, 4 L Ed 2d 153

§ 487. Time to Sue and Limitations

Library References

Employers' Liability ⇨176

71. US—Ferguson v Ringbly Truck Line, C A Colo, 174 F 2d 744—Conan v New York Cent R Co, C A Ohio, 184 F 2d 841—Burnett v New York Cent R Co, C A Ohio, 332 F 2d 529, revd on oth grds 85 S Ct 1050, 380 US 424, 13 L Ed 2d 941

- Ala—C F Halstead Contractor, Inc v Lowery, Civ, 282 So 2d 909, 51 Ala App 86, cert den 282 So 2d 913, 291 Ala 775

- La—Traylor v Shell Oil Co, App, 400 So 2d 342, writ den, Sup, 405 So 2d 530

- W Va—Jordan v Baltimore & O R Co, 62 S E 2d 806, 134 W Va 183

Federal Employers' Liability Act construed

- (1) Damiano v Pennsylvania R Co, C C A Pa, 161 F 2d 534, cert den 68 S Ct 65, two cases, 332 US 762, 92 L Ed 348

(3) Other cases

Page 11

- US—Fravel v Pennsylvania R Co DCMd, 104 F Supp 84—Rodzik v New York Cent R Co, DCMich, 169 F Supp 801—Burnett v New York Cent R Co, Ohio, 85 SCt 1050, 380 US 424, 13 L Ed 2d 941—Gull, C & S F Ry Co v McClintock, CA Tex, 355 F 2d 196
- Ga—Southern Ry Co v Smalley, 145 SE2d 708, 112 Ga App 471, cert den 86 SCt 1342, 384 US 906, 16 L Ed 2d 359, reh den 86 SCt 1568, 384 US 958, 16 L Ed 2d 553
- Ill—Rest v Illinois Cent R Co, 197 NE2d 860, 47 Ill App 2d 267
- Ohio—Wade v Franklin, 200 NE 644, 51 Ohio App 318
72. US—Damiano v Pennsylvania R Co, supra, n 71—Frabutt v New York, C & St L R Co, DCPa, 84 F Supp 460—Dixon v Martin, CA Fla, 260 F 2d 809—Adkins v Kelly's Creek R Co, CA W Va, 458 F 2d 26, cert den, 93 SCt 224, 409 US 926, 34 L Ed 2d 184
- Ill—Herb v Pitcairn, 51 NE2d 277, 384 Ill 237, revd on oth grds 65 SCt 954, 325 US 77, 89 L Ed 1483, reh den 65 SCt 1188, 325 US 893, 89 L Ed 2005, op sup 64 NE2d 318, 392 Ill 151
- W Va—Jordan v Baltimore & O R Co, supra, n 71

page 12

73. US—Osbourne v US, CCANY, 164 F 2d 767
74. US—Frabutt v New York, C & St L R Co, supra, n 72
- NY—Abern v South Buffalo Ry Co, 104 NE2d 898, 303 NY 545, affd 73 SCt 340, 344 US 367, 97 L Ed 395
- W Va—Jordan v Baltimore & O R Co, supra, n 71
77. US—Hukill v Pacific & Arctic Ry & Nav Co, DCMich, 159 F Supp 571, 17 Alaska 498
81. US—Brassard v Boston & Maine R R, CA NH, 240 F 2d 138—Rodzik v New York Cent R Co, DCMich, 169 F Supp 803
- Ill—Rest v Illinois Cent R Co, 197 NE2d 860, 47 Ill App 2d 267
- NY—Meschem v New York Cent R Co, 182 NY 2d 501, 7 AD 2d 253, Revd on oth grds 206 NY 2d 569, 8 NY 2d 293, 169 NE2d 913
82. Ill—Rest v Illinois Cent R Co, 197 NE2d 860, 47 Ill App 2d 267
- Mo—Farrar v St Louis-San Francisco Ry Co, 235 SW 2d 391, 361 Mo 408
83. US—Line v Thompson, Mo, 69 SCt 1018, 137 US 163, 93 L Ed 1282, 11 ALR 2d 252
84. Fla—Seaboard Air Line R Co v Ford, 92 So 2d 160—Seaboard Air Line R Co v Holt, 92 So 2d 169

However, it has been broadly held that the limitations in the Federal Employers' Liability Act is not applicable to a claim for damages resulting from an occupational disease until the injured employee has some reason to discover the existence of such disease⁸⁴

- 84.5. US—McGhee v Chesapeake & O R Co, DCMich, 173 F Supp 587—Young v Clinchfield R Co, CANC, 288 F 2d 499
- NY—Imiola v Erie-Lackawanna R Co, 257 NY 2d 195, 45 Misc 2d 502
85. US—Osbourne v US, supra, n 73—Damiano v Pennsylvania R Co, supra, n 71

Fraud held to toll statute

- US—Scarborough v Atlantic Coast Line R Co, CA Va, 178 F 2d 253, 15 ALR 2d 491, cert den 70 SCt 621, 339 US 919, 94 L Ed 1343—Fravel v Pennsylvania R Co, supra, n 71
- (2) Degree of reliance considered
- US—Scarborough v Atlantic Coast Line R Co, CA Va, 190 F 2d 935
86. US—Damiano v Pennsylvania R Co, supra, n 71

89. Mental disabilities held to toll statute
- Ariz—Brooks v Southern Pac Co, 466 P 2d 736, 105 Ariz 442

The limitation provision is not tolled by the death of the employee⁸⁹

- 89.5. US—Rodzik v New York Cent R Co DCMich, 169 F Supp 803

page 13

92. US—Damiano v Pennsylvania R Co, supra, n 71
95. Ala—Ex parte Godfrey, 158 So 2d 107, 275 Ala 668

§ 488 Parties

Library References

Employers' Liability §=177

97. Or—Myers v Staub, 272 P 2d 203, 201 Or 663
- Pa—Bennett v B G Coon Const Co, 7 D & C 2d 84, 46 Luz L Reg 105, 70 York 61

Substitution

- Tex—Gillette Motor Transport Co v Whitfield, Civ App, 160 SW 2d 290

99. Statutory employers

- Pa—Luz v Davis, 36 North 205

1. Pa—Bennett v B G Coon Const Co, 7 D & C 2d 84, 46 Luz L Reg 105, 70 York 61

page 14

Other matters relating to parties have been adjudicated⁹¹

5.1. Railroad in receivership held real party in action under Federal Employers' Liability Act

- Tex—Thompson v Keene, Civ App, 281 SW 2d 167, err ref no rev err
6. Ga—Nashville, C & St L Ry Co v Edwards, 16 SE 347 91 Ga 24

§ 489. Declaration, Petition, or Complaint

Library References

Employers' Liability §=178, 179

8. La—Spell v Executive Officers, Directors and/or Shareholders of P & W Industries, Inc, App, 316 So 2d 474, writ den, Sup, 320 So 2d 911
19. US—Streeter v Erie R Co, DCNY, 25 FRD 272

page 15

22. US—US v DeParco, CCA Ill, 164 F 2d 124
- Ga—Tufts v Threlkeld, 121 SE 120, 31 Ga App 452, foll 121 SE 125, 31 Ga App 462—Woods v Simpson, 109 SE 2d 72, 99 Ga App 538
- Kan—Morris v Dines Min Co, 256 P 2d 129, 174 Kan 216
- La—Spell v Executive Officers, Directors and/or Shareholders of P & W Industries, Inc, App, 316 So 2d 474, writ den, Sup, 320 So 2d 911
- Pa—Luz v Davis, 36 North 205

Allegations held sufficient

- US—Sanders v Atlantic Coast Line R Co, DCS C, 33 F 2d 1010—Kelly v Delaware River Joint Commission, DCPa, 85 F Supp 15—Slaughter v Atlantic Coast Line R Co, CA, 302 F 2d 912, 112 US App DC 327, 8 ALR 3d 436, cert den 83 SCt 48, 371 US 827, 9 L Ed 2d 65—Bowlin v Pittsburgh & LER Co, C A Pa, 310 F 2d 372
- Cal—McMillan v Western Pac R Co, 9 Cal Rptr 161, 357 P 2d 449, 54 C 2d 841
- Fla—Prieb v Aiken, App, 184 So 2d 720
- Ga—Central of Georgia Ry Co v Jeffers, 128 SE 202, 34 Ga App 35—Atlantic Coast Line R Co v Godard, 86 SE 2d 311, 211 Ga 373—Miss Geor-

- gia Daines Inc v McLarty, 150 SE 2d 725, 114 Ga App 259

- Ky—Johnson v Thom Oil Magic Benzol Gas Stations Inc, 467 SW 2d 772, app after remand 488 SW 2d 155

- Mo—Sparks v Schmitz, 246 SW 2d 399, 241 Mo App 879

Allegations held insufficient

- (1) US—Ransom v Haner, DCMich, 25 FRD 84—Johnson v Chicago, M, St P & P R Co DCMich, 169 F Supp 95
- Ga—Carter v Callaway, 75 SE 2d 187, 87 Ga App 754—Howell v Whitaker, 75 SE 2d 472, 87 Ga App 850
- Miss—Fields v Johnson, 171 So 2d 428, 252 Miss 705
- NY—Herron v City Wide Scrap Metal Co, 230 NY 2d 264, 33 Misc 2d 108
- Okla—Lewis v Childers, 376 P 2d 583
- Pa—Patterson v Southwark Mgmt Mnt Corp, 202 A 2d 102, 415 Pa 129

Action against municipality under employers' liability act

- Ala—Hillis v City of Huntsville, 151 So 2d 240, 274 Ala 663

25. Nev—Puck v Woomack, 192 P 2d 874, 65 Nev 184

- Pa—Lukart v Irwin Laundry and Mnt Co, 38 West 199

Relationship held sufficiently alleged

- (1) La—Blackburn v Chenet, App, 42 So 2d 288
- Pa—Wagner v City of Johnstown, 17 Cambria 11
- SC—Pittsant v Mathias, 145 SE 2d 680, 247 SC 124

Relation held insufficiently alleged

- US—Kelly v Delaware River Joint Commission DCPa, 85 F Supp 15
- Or—Myers v Staub, 272 P 2d 203, 201 Or 663
- Pa—Soley v Nelson, 7 D & C 2d 12, 51 Sch L R 51
29. US—Gilbert v Pittsburgh & LER Co, DCMich, 9 FRD 562
- Pa—Truitt v Hays, 33 D & C 2d 453

Allegations held sufficient

- Ga—Pappadua v Clinton, 99 SE 2d 455, 96 Ga App 115

Date of injury; under Federal Employees' Liability Act

- (1) The specific date or month of injury need not be specifically alleged
- Mo—Faught v St Louis-San Francisco Ry Co, 325 SW 2d 776
- (2) However, there must be some legitimate excuse for employee's lack of knowledge and failure to state time of negligence and injury
- Mo—Faught v St Louis-San Francisco Ry Co, 325 SW 2d 776

page 16

32. Allegations held sufficient

- Ala—Alabama Great Southern R Co v Smith, 54 So 2d 453, 256 Ala 220
33. Mo—Whiteley v Eagle-Picher Lead Co, 115 SW 2d 536, 232 Mo App 178
34. Mo—Duncan v Thompson, App, 146 SW 2d 112, revd on oth grds 62 SCt 422, 315 US 1, 86 L Ed 575
35. Ga—Southern Ry Co v Smalley, 145 SE 2d 708, 112 Ga App 471, cert den 86 SCt 1342, 384 US 906, 16 L Ed 2d 359, reh den 86 SCt 1568, 384 US 958, 16 L Ed 2d 553
36. Ala—Foreman v Dorsey Trailers, 54 So 2d 499, 256 Ala 253
41. US—Brassard v Boston & Maine R R, CA NH, 240 F 2d 138
43. Ill—Rest v Illinois Cent R Co, 197 NE 2d 860, 47 Ill App 2d 267
44. Action under Federal Employers' Liability Act
- (2) Denial held proper

US—Dixon v Martin, CA Fla, 260 F2d 809

page 17

Ala—Stanton v Marsh, 150 So2d 363, 274 Ala 501

§ 490 — Negligence of Master

Library References

Employers' Liability ⇐180

53 Allegations held sufficient

La—Abshire v Hartford Acc. & Indem Ins Co, App, 289 So2d 545, writ den, Sup, 293 So2d 170

page 18

61 US—Harris v Railway Exp Agency, CA Kan, 178 F2d 8

62 Cal—Roberts v U S O Camp Shows, 205 P2d 1116, 91 Cal App2d 884

Ga—Elrod v Ogles, 50 SE2d 791, 78 Ga App 376
Ind—Sanitary Can Co v Lindley, 105 NE 585, 56 Ind App 480

Kan—Shuck v Hendershot, 347 P2d 362, 185 Kan 673

Mo—Adams v Atchison, T & SF Ry Co, 280 SW2d 84

Vt—Grenier v Alta Crest Farms, 58 A2d 884

63 Allegations held insufficient

(1) US—Bumash v Grace & Compania, Puerto Rico, CA Puerto Rico, 396 F2d 233

Ga—Medlock v McAdoo, 105 SE 643, 26 Ga App 92—Selph v Central of Georgia R Co, 141 SE 913, 37 Ga App 724—Carter v Callaway, supra, n 22

Ind—Pan v Mizner, 84 NE 981, 170 Ind 659
Ky—S K Jones Const Co v Hendley, 5 SW2d 482, 224 Ky 83

La—Lott v Haley, 370 So2d 521

Mass—Berry v Stone, 189 NE2d 852, 345 Mass 752

Mo—Kramer v Kansas City Power & Light Co, 279 SW 43, 311 Mo 369

Or—Bottig v Polsky, 201 P 188, 101 Or 530—Olson v River View Cemetery Ass'n of Portland, 349 P2d 279, 220 Or 220

Tex—Bowe v City of Houston, 259 SW2d 765, err ref no rev err 261 SW2d 450, 152 Tex 533
Wash—McGillivray v Montgomery Ward & Co, 143 P2d 550, 19 Wash2d 582

Motion to make more definite and certain

SC—Covington v Atlantic Coast Line R Co, 155 SE 438, 158 SC 194, cert den 51 SCt 33, 282 US 858, 75 L Ed 759

64. Kan—Morris v Dunes Min Co, supra, n 22

Allegations held sufficient

US—Swartz v Eberly, DCPa, 212 F Supp 32

Mo—Keith v American Car & Foundry Co, Mo App, 9 SW2d 644

page 19

67. Ala—Lipscomb v Paul, 168 So2d 214, 277 Ala 182

Ga—Thigpen v Executive Committee of Baptist Convention of State of Ga, 152 SE2d 920, 114 Ga App 839

Or—Peltier v Dahlke, 471 P2d 434, 256 Or 84

Pa—Price v Pennsylvania R Co, 17 D & C2d 518, 72 Dauph 336

Allegations held sufficient

US—Lillie v Thompson, Tenn, 68 SCt 140, 332 US 459, 92 L Ed 73

Ala—Hinton & Sons v Strahan, 96 So2d 426, 266 Ala 307

Fla—Callahan v Bryce, 47 So2d 517—Preston v Grant Advertising, Inc, App, 166 So2d 219

Ga—Atlantic Coast Line R Co v Singletary, 55 SE2d 827, 80 Ga App 297—Evans v Carroll, 68 SE2d 608, 85 Ga App 227—Wood v Southern Ry Co, 88 SE2d 459, 92 Ga App 433—Genesco, Inc v Oreecon, 125 SE2d 786, 105 Ga App 798—A F King & Son v Simmons, 131 SE2d

214, 107 Ga App 628—Vaughn v McDaniel, 163 SE2d 844, 118 Ga App 408

Ill—Virgil v New York, C & St L R Co, 118 NE2d 61, 2 Ill App2d 46

La—Wiltz v Esso Standard Oil Co, App, 126 So2d 649—Samson v Southern Bell Tel & Tel Co, App, 205 So2d 496

Mont—Manning v Zeiler, 261 P2d 807, 127 Mont 248

Nev—Smith v Garude, 355 P2d 849, 76 Nev 377
Okla—Missouri—Kansas—Texas R Co v Brown, 348 P2d 1069

SC—Pleasant v Mathias, 145 SE2d 680, 247 SC 124

Allegations held insufficient

(1) US—Adair v Pope & Talbot, Inc, DCO, 190 F Supp 184

Fla—Murray v Osenton, App, 126 So2d 603

Ga—Central of Georgia R Co v Goens, 119 SE 669, 30 Ga App 770

Kan—Gabbard v Sharp, 205 P2d 960, 167 Kan 354

NC—Battley v Seaboard Airline Ry Co, 161 SE2d 750, 1 NC App 384

Okla—Savage v Woods, 268 P2d 858

RI—Gentile v Vecchio, 179 A2d 851, 94 RI 272

Tex—Harbin v City of Beaumont, Civ App, 146 SW2d 297, err dism judg correct

Wis—Baker v Janesville Traction Co, 234 NW 912, 204 Wis 452

69. Not necessary when pleading common-law negligence

Or—Skeeters v Skeeters, 391 P2d 386, 237 Or 204

page 20

72. Mo—Lawley v Kansas City, App, 516 SW2d 829

76. Ga—Elrod v Ogles, supra, n 62

Ky—Jump v Ashland Oil Co, 259 SW2d 12

Allegations held sufficient

Ga—Central of Georgia Ry Co v Clark, 98 SE2d 85, 95 Ga App 325

La—Cacibauda v Gasennie, App, 222 So2d 632, application den 226 So2d 524, 254 La 766

Miss—Goff v Randall, 39 So2d 881, 206 Miss 178

Mont—Rutchie v Northern Pac Ry Co, 272 P2d 728, 128 Mont 218

Allegations held insufficient

(1) Ala—Thompson Tractor Co v Cobb, 214 So2d 558, 283 Ala 100

Mont—Boyle v Chicago, M & St P Ry Co, 199 P 283, 60 Mont 453

78. Ga—Elrod v Ogles, supra, n 62

91. NC—Shives v Sample, 79 SE2d 193, 238 NC 724

page 21

94. Allegations held sufficient

(1) Ga—Wood v Southern Ry Co, 88 SE2d 459, 92 Ga App 433

Kan—Giltner v Stephens, 200 P2d 290, 166 Kan 172

Allegations held insufficient

Idaho—Shirts v Shultz, 285 P2d 479, 76 Idaho 463

W Va—Pritt v West Virginia Northern R Co, 51 SE2d 105, 132 W Va 184, 6 ALR2d 562, cert den 69 SCt 891, 336 US 961, 93 L Ed 1113

page 22

5. Ga—Medlock v McAdoo, 105 SE 643, 26 Ga App 92

page 23

19. Allegations held sufficient

Ga—Vaughn v McDaniel, 163 SE2d 844, 118 Ga App 408

Mont—Manning v Zeiler, 261 P2d 807, 127 Mont 248

Nev—Peck v Woomack, 192 P2d 874, 65 Nev 184

Okla—H F Wilcox Oil & Gas Co v Jamison, 190 P2d 807, 199 Okla 691

27. Mont—Manning v Zeiler, supra, n 19

page 24

32 Allegations held sufficient

US—Cuddy v Western Maryland Ry, DCPa, 210 F Supp 750

Ga—Elrod v Ogles, 50 SE2d 791, 78 Ga App 376

page 25

43 Allegations held insufficient

Or—Klerk v Tektronix, Inc, 415 P2d 510, 244 Or 10
W Va—Pritt v West Virginia Northern R Co, 51 SE2d 105, 6 ALR2d 562, cert den 69 SCt 891, 336 US 961, 93 L Ed 1113

51 W Va—Pritt v West Virginia Northern R Co, supra, n 43

53 Ala—Sloes-Sheffield Steel & Iron Co v Smith, 52 So 38, 166 Ala 437

page 26

59 Ga—Coe v Hewett, 104 SE2d 129, 97 Ga App 625

Mo—Adams v Atchison, T & SF Ry Co, 280 SW2d 84

W Va—Pitzer v M D Tomkies & Sons, 67 SE2d 437, 136 W Va 268

Causal connection sufficiently shown

Ala—Louisville & NR Co v Butler, 55 So 262, 1 Ala App 279—Atlantic Coast Line R Co v Winn, 66 So2d 184, 259 Ala 184

Ga—Atlantic Coast Line R Co v Singletary, 55 SE2d 827, 80 Ga App 297—Gregory v Taylor, 67 SE2d 192, 84 Ga App 717—Goldsmith v Hazelwood, 92 SE2d 48, 93 Ga App 466—Thigpen v Executive Committee of Baptist Convention of State of Ga, 152 SE2d 920, 114 Ga App 839

SC—Pleasant v Mathias, 145 SE2d 680, 247 SC 124

Wash—Riste v General Elec Co, 289 P2d 338, 47 Wash2d 680

Causal connection not sufficiently shown

Ala—Nashville, C & St L Ry v Nance, 101 So 825, 212 Ala 22

Ga—Hill v Atlantic Coast Line R Co, 63 SE2d 284, 83 Ga App 193

NC—Battley v Seaboard Airline Ry Co, 161 SE2d 750, 1 NC App 384

60. Kan—Bortzfeld v Sutton, 299 P2d 584, 180 Kan 46

Tex—Texas & NOR Co v Pool, Civ App, 263 SW2d 582

Negligence

(4) Other matters

Tex—Texas & P Ry Co v Younger, 262 SW2d 557, err ref no rev err

Allegations held sufficient

Ala—Alabama Great Southern R Co v Smith, 54 So2d 453, 256 Ala 220—Bayles v Louisville & NR Co, 129 So2d 679, 272 Ala 188

Nev—Smith v Garude, 355 P2d 849, 76 Nev 377

Tex—Texas & P Ry Co v Younger, supra

Allegations held insufficient

Ga—Wood v Southern Ry Co, 88 SE2d 459, 92 Ga App 433

page 27

63 Ala—Reynolds v Atlantic Coast Line R Co, 36 So2d 102, 251 Ala 27, affd 69 SCt 507, 336 US 207, 93 L Ed 618

Or—Arnold v Gardner Hill Timber Co, 263 P2d 403, 199 Or 517—Blane v Ross Lumber Co, 355 P2d 461

Wis—Paykel v Rose, 61 NW2d 909, 265 Wis 471

Allegations held sufficient

(1) Schnoor v Meinecke, 33 NW2d 66, 75 ND 768

(8) US—Rickett v Jones, CA Ala, 495 F2d 185
Ga—Roberts v Bowman Transp, Inc, 107 SE2d 901, 99 Ga App 61

Page 27

Allegations held insufficient

(1) *Mo—Buffum v F W Woolworth Co*, Mo App, 273 S W 176

(3) *Ala—Reynolds v Atlantic Coast Line R Co*, supra

Ind—*S W Little Coal Co v O'Brien*, 113 NE 465 reh den 114 NE 96, 61 Ind App 504

NY—*Cifolo v General Elec Co*, 110 NYS2d 759, 279 App Div 884, affd 112 NE2d 197, 305 NY 209, cert den 74 SCt 124, 346 US 874, 98 L Ed 382—*Cope v General Elec Co*, 111 NYS2d 16, 279 App Div 884, affd 112 NE2d 197, 305 NY 209, cert den 74 SCt 124, 346 US 874, 98 L Ed 382

Wis—*Paykel v Rose*, supra, n 63

page 28

70. Ariz—*Fetter v Bowman*, 365 P 2d 472, 90 Ariz 48

82. Cal—*Knox v Atchison, T & S F Ry Co*, 214 P 2d 589, 95 Cal App 2d 896

Allegations held sufficient

(1) *Mo—Abernathy v St Louis-San Francisco Ry Co*, 237 S W 2d 161

(2) *US—St Louis Southwestern Ry Co v Ferguson*, CA Mo, 182 F 2d 949

Ala—Atlantic Coast Line R Co v Dumvant, 91 So 2d 670, 265 Ala 420

83. Allegations held sufficient

(1) *Urre v Thompson*, Mo, 69 SCt 1018, 337 US 163, 93 L Ed 1282, 11 ALR 2d 252

page 29

86. *Ala—Atlantic Coast Line R Co v Dumvant*, 91 So 2d 670, 265 Ala 420

Cal—*Knox v Atchison, T & S F Ry Co*, supra, n 82

87. *Ala—Southern Cotton Oil Co v Woods*, 78 So 907, 201 Ala 553—*Louisville & N R Co v Grizzard*, 189 So 203, 238 Ala 49, cert den 60 SCt 140, 308 US 603, 84 L Ed 504

Allegations held sufficient

(1) *US—Dull v New York Cent R R, D C Mich*, 196 F Supp 120

Ga—Southern Ry Co v Hamilton, 149 SE 2d 842, 113 Ga App 778—*Seaboard Airline R Co v Stoddard*, 62 SE 2d 620, 82 Ga App 743—*Atlantic Coast Line R Co v Strickland*, 74 SE 2d 897, 87 Ga App 596—*Southern Ry Co v Smalley*, 145 SE 2d 708, 112 Ga App 471, cert den 86 SCt 1342, 384 US 906, 16 L Ed 2d 359, reh den 86 SCt 1568, 384 US 958, 16 L Ed 2d 553—*Seaboard Air Line R Co v Haupt*, 147 SE 2d 331, 113 Ga App 66—*Atlantic Coast Line R Co v Gause*, 156 SE 2d 476, 116 Ga App 216—*Atlantic Coast Line R Co v Daugherty*, 157 SE 2d 880, 116 Ga App 438

III—*Tatham v Wabash R Co*, 107 NE 2d 735, 412 Ill 568, 33 ALR 2d 1287

Ind—*Davis v Louisville & N R Co*, 173 NE 2d 749, 132 Ind App 419, cert den 82 SCt 828, 369 US 820, 7 L Ed 2d 786

Mo—*Urre v Thompson*, supra, n 83

Tex—*Texas & P Ry Co v Younger*, Civ App, 262 S W 2d 557, err ref no rev err

Allegations held insufficient

(1) *US—Reynolds v Atlantic Coast Line R Co*, Ala, 69 SCt 507, 336 US 207, 93 L Ed 618

Ga—Towns v Southern Ry Co, 51 SE 2d 562, 78 Ga App 510

Reasonable construction required

Ga—Seaboard Air Line R Co v Haupt, 147 SE 2d 331, 113 Ga App 66

88. Plaintiff's employment by defendant

US—Pearce v Pennsylvania R Co, D C Pa, 7 FRD 420, affd 162 F 2d 524, cert den 68 SCt 71, 332 US 765, 92 L Ed 350—*Matusiak v Pennsylvania R Co, D C N J*, 134 F Supp 681—*Porter v St Louis-San Francisco Ry Co, CA Miss*, 354 F 2d 840

89. *US—Pearce v Pennsylvania R Co*, supra, n 88

Allegations held insufficient

(1) *US—Hetman v Fruit Growers Exp Co, D C N J*, 200 F Supp 234

page 30

93. *Ga—Southern Ry Co v Snider*, 137 SE 2d 752, 110 Ga App 1

94. Allegations held sufficient

US—Anderson v Atchison, T & S F Ry Co, Cal, 68 SCt 854, 333 US 821, 92 L Ed 1108—*Brown v Western Ry of Alabama*, Ga, 70 SCt 105, 338 US 294, 94 L Ed 100, conf to 57 SE 2d 454, 80 Ga App 770

Ala—Alabama Great Southern R Co v Smith, 54 So 2d 453, 256 Ala 220—*Bayles v Louisville & N R Co*, 129 So 2d 679, 272 Ala 188

Fla—Atlantic Coast Line R Co v Cameron, App, 190 So 2d 34

Ga—Southern Ry Co v Bradshaw, 37 SE 2d 150, 73 Ga App 438—*Atlantic Coast Line R Co v Edge*, 59 SE 2d 533, 81 Ga App 606—*Georgia, S & F Ry Co v Williamson*, 65 SE 2d 444, 84 Ga App 167—*Atlantic Coast Line R Co v Strickland*, supra, n 87—*Southern Ry Co v Snider*, 137 SE 2d 752, 110 Ga App 1—*Atlantic Coast Line R Co v Gause*, App, 156 SE 2d 476, 116 Ga App 216

Tex—*Texas & N O R Co v Arnold*, Civ App, 381 S W 2d 388, app dism, Sup, 388 S W 2d 181

Allegations held insufficient

Ala—Lipscomb v Paul, 168 So 2d 214, 277 Ala 182

Fla—Seaboard Air Line R Co v Gentry, 46 So 2d 485, cert den 71 SCt 82, 340 US 853, 95 L Ed 625

Ga—Atlantic Coast Line R Co v Anderson, 36 SE 2d 435, 73 Ga App 343

Rule of liberality under Federal Employers' Liability Act

Ga—Southern Ry Co v Hamilton, 149 SE 2d 842, 113 Ga App 778

96. *Ga—Atlantic Coast Line R Co v Singletary*, 55 SE 2d 827, 80 Ga App 297

98. *Ga—Atlantic Coast Line R Co v Daugherty*, 157 SE 2d 880, 116 Ga App 438

1. *Ala—Foreman v Dorsey Trailers* 54 So 2d 499, 256 Ala 253

Allegations held sufficient

Ala—Dorsey Trailers, Inc v Foreman, 69 So 2d 459, 260 Ala 141

§ 491. — Negligence of Fellow Servants

Library References

Employers' Liability ⇐181

3. *Ga—Atlantic Coast Line R Co v Anderson*, 36 SE 2d 435, 73 Ga App 343

5. Allegations held sufficient to negative fellow service

page 31

2. *Mo—Burd v Larabee Flour Mills Corp*, 220 S W 988, 203 Mo App 432

(1) *Ga—Roberts v Bowman Transp, Inc*, 107 SE 2d 901, 99 Ga App 61

La—Grubb v Employers Mut Liability Ins Co of Wisconsin, App, 289 So 2d 885

7. *Mo—Mitchell v Westport Hotel Operating Co*, 19 S W 2d 528, 225 Mo App 181

9. *Ala—Foreman v Dorsey Trailers*, supra, n 1

page 32

13. *Ga—Lumpkin v Western & Atlantic R R*, 9 SE 2d 188, 62 Ga App 597

Pa—Price v Pennsylvania R Co, 17 D & C 2d 518, 72 Dauph 336

Allegations held sufficient

US—Cales v Chesapeake & O Ry Co, D C Va, 300 F Supp 155

Ala—Atlantic Coast Line R Co v Winn, 66 So 2d 184, 259 Ala 184

Ga—Atlantic Coast Line R R v Anderson, 38 SE 2d 610, 200 Ga 801

Wyo—Vorsler v Peterson, 480 P 2d 391

Allegations held insufficient

Ala—Foreman v Dorsey Trailers, supra, n 1

Ga—Atlantic Coast Line R Co v Anderson, 36 SE 2d 435, 73 Ga App 343—*Bray v Westinghouse Elec Corp*, 117 SE 2d 919, 102 Ga App 803

22 Allegation implied

Ala—Atlantic Coast Line R Co v Winn, supra, n 13

25. *Ala—Atlantic Coast Line R Co v Winn*, supra, n 13

§ 492. — Negating Assumption of Risk

Library References

Employers' Liability ⇐182.

page 33

30. *Ga—Borochoff v Fowler*, 105 SE 2d 764, 98 Ga App 411

31 Allegations held insufficient

RI—Gentile v Vecchio, 166 A 2d 126, 92 RI 38

34. *Ga—Mobley v Durham Iron Co*, 64 SE 2d 469, 83 Ga App 690

Idaho—Shirts v Shultz, 285 P 2d 479, 76 Idaho 463

Pleadings held to show assumption of risk

Ga—Self v West, 62 SE 2d 424, 82 Ga App 708

35. *SC—Pleasant v Mathias*, 145 SE 2d 680, 247 SC 124

Pleadings held not to show assumption of risk

Cal—Erde v City of Los Angeles, 254 P 2d 110, 116 CA 2d 565

Ordinarily disclaimer does not lie on the ground of the affirmative defense of assumption of risk

SC—Steinmeyer v Marine Hotel Corporation, 140 SE 695, 142 SC 358—*Pleasant v Mathias*, 145 SE 2d 680

36. *Ga—Self v West*, supra, n 34

Ky—Jump v Ashland Oil Co, 259 S W 2d 12

page 34

42. *Ga—Harrell v Mayfield*, 160 SE 2d 213, 117 Ga App 194

47. *US—Urre v Thompson*, Mo, 69 SCt 1018, 337 US 163, 93 L Ed 1282, 11 ALR 2d 252

§ 493. — Negating Contributory Negligence

Library References

Employers' Liability ⇐183

page 35

58. *Iowa—Erickson v Erickson*, 94 NW 2d 728, 250 Iowa 491—*Frederick v Goff*, 100 NW 2d 624, 251 Iowa 290

59. Allegations held not to raise inference

Ga—Evans v Carroll, 68 SE 2d 608, 85 Ga App 227

60. *Ga—Roadway Exp v Jackson*, 48 SE 2d 691, 77 Ga App 341—*Elrod v Ogles*, 50 SE 2d 761, 78 Ga App 376—*A F King & Son v Simmons*, 131 SE 2d 214, 107 Ga App 628.

III—*Prater v Bell*, 84 NE 2d 676, 336 Ill App 533
NY—*Corley v Stern*, 295 NYS2d 191, 31 AD 2d 516

Allegations held insufficient

Ga—Harrell v Mayfield, 160 SE 2d 213, 117 Ga App 194

62. *Ga—Hill v Atlantic Coast Line R Co*, 63 SE 2d 284, 83 Ga App 193—*Mobley v Durham Iron Co*, supra, n 34

Idaho—Shirts v Shultz, 285 P 2d 479, 76 Idaho 463

Allegations held not to show contributory negligence

Ga—Goldsmith v Hazelwood, 92 S E 2d 48, 93 Ga App 466

66 Ga—Charleston & W C Ry Co v Lyons, 63 S E 862, 5 Ga App 668

page 36

68 Ga—A F King & Son v Simmons, 131 S E 2d 214, 107 Ga App 628

Tex—Snipes v Bomar Cotton Oil Co, Civ App, 137 S W 428, aff'd 161 S W 1, 106 Tex 181

§ 494. Plea or Answer

Library References

Employers' Liability ⇐184

page 37

83. Kan—Bortzfeld v Sutton, 299 P 2d 584, 180 Kan 46

Pleadings held insufficient

(1) Ala—South Coal Co v Crayton, 86 So 148, 17 Ala App 449

Kan—White v Thompson, 325 P 2d 28, 183 Kan 133

Or—Andrew v Oregon—Washington R & Nav Co, 178 P 181, 90 Or 611

85. U S—Amend v Great Western Ry Co, D C Colo, 158 F Supp 499, app dism, C A, 261 F 2d 112

86. Applicability of Federal Employers' Liability Act, etc.

Or—Bartley v Doherty 357 P 2d 521, 225 Or 15

Asserting as affirmative defense matter available under denial held proper

N Y—Overton v Gerard, 156 N Y S 2d 759, 2 A D 2d 410

Fraud in procuring employment

(1) It has been held that under certain circumstances fraud need not be specially pleaded

Ill—Powers v Michigan Central R Co, 268 Ill App 493

(2) Causal relation between misrepresentations and injury must be alleged

Ill—Taylor v Elgin, J & E Ry Co, 178 N E 2d 704, 33 Ill App 2d 64

Kan—White v Thompson, 312 P 2d 612, 181 Kan 485

(4) The defense is properly refused after commencement of the trial

Va—Vargusman Ry Co v Calhoun, 108 S E 2d 239, 200 Va 908

93. Mo—Pierce v New York Cent R Co, 257 S W 2d 84

Wash—Grant v Lobby, McNeill & Lobby, 295 P 139, 160 Wash 138

page 38

99. N Y—Camacho v Innersprings, Inc., 142 N Y S 2d 886

Tex—City of San Antonio v Mendoza, Civ App, 532 S W 2d 353, err ref no rev err

5. Ala—Louisville & N R Co v Parker, 138 So 2d 231, 223 Ala 626, cert dism 53 S Ct 94, 287 U S 569, 77 L Ed 501

Ill—Burnett v Cahoe, 285 N E 2d 619, 7 Ill App 3d 266

Iowa—Erickson v Erickson, 94 N W 2d 728, 250 Iowa 491

Okl—Reyn v Patton, 257 P 2d 280, 208 Okl 442

Under Federal Employers' Liability Act
(1) N M—Padilla v Atchison, T & S F Ry Co, 295 P 2d 1023, 61 N M 115

8. Conn—Balla v Lonergan, 120 A 2d 705, 143 Conn 197

page 39

20. Ill—Lee v Louisville & N R Co, 110 N E 2d 691, 349 Ill App 276

Plea is unnecessary in action for assault by employee against corporate employer and other employees

N Y—Camacho v Innersprings, Inc., 142 N Y S 2d 886

21 Ala—Dwight Mfg Co v Holmes, 73 So 933, 198 Ala 590

Ill—Butner v Central Illinois Light Co, 394 N E 2d 492, 31 Ill Dec 290, 75 Ill App 3d 715

N Y—Kopetz v Bierman, 207 N Y S 2d 540

Ohio—Bergfeld v New York, C & St L R Co, 144 N E 2d 483, 103 Ohio App 87

page 40

22. Mo—Sheehan v Terminal R Ass'n of St Louis, 127 S W 2d 657, 344 Mo 586, cert den 60 S Ct 102, 308 U S 581, 84 L Ed 487

26. Mo—CJS quoted in Carnes v Kansas City Southern Ry Co, 328 S W 2d 615, 621

29. Pleas held sufficient

Ga—Atlantic Coast Line R Co v Shed, 84 S E 2d 212, 90 Ga App 766

31. Pleas held sufficient

Ala—Lockhart v Sloss-Sheffield S & I Co, 51 So 627, 165 Ala 516—Bice v Stevenson, 88 So 753, 205 Ala 576

Mo—Bird v St Louis-San Francisco Ry Co, 78 S W 2d 389, 336 Mo 316

Or—Ritter v Beals, 358 P 2d 1082, 225 Or 504

Pleas held insufficient

Ala—Choctaw Coal & Mining Co v Moore, 63 So 558, 184 Ala 449—Bice v Stevenson, supra

32 N Y—Robinson v Ocean S S Co of Savannah, Ga, 147 N Y S 310, 162 App Div 169

41. Ala—Reid v Sloss-Sheffield Steel & Iron Co, 58 So 301, 177 Ala 262

§ 495. Replication or Reply

Library References

Employers' Liability ⇐185

page 41

45. Sticking reply

U S—Collett v Louisville & N R Co, D C Ill, 81 F Supp 428

§ 496. Amendment of Pleadings

Library References

Employers' Liability ⇐178.

52. Cal—Knox v Atchison, T & S F Ry Co, 214 P 2d 589, 95 Cal App 2d 896

Okl—Atchison, T & S F Ry Co v Perryman, 192 P 2d 670, 200 Okl 266

Amendment held proper or allowable

(1) Ga—Southern Ry Co v Snider, 137 S E 2d 752, 110 Ga App 1

Mont—Palmer v Great Northern Ry Co, 170 P 2d 768, 119 Mont 68

Va—Lough v Lyon, Inc., 190 S E 290, 168 Va 136

Laches not bar

N Y—Mitchell v A A Truck Renting Corp, 191 N Y S 2d 534, 9 A D 2d 682, app den 193 N Y S 2d 1020, 9 A D 2d 783

53 Ga—Nashville, C & St L Ry Co v Edwards, 16 S E 347, 91 Ga 24

Amendments held not to set up new cause of action

(1) Tenn—Funk v Weiden, 292 S W 2d 207, 40 Tenn App 425

New defense

La—Smith v Rock Island, A & L R Co, 44 So 2d 290, 119 La 537

49 C J p 538 note 40[a](4)

page 42

55. Pa—Truitt v Hays, 33 D & C 2d 453

56. Pa—Price v Pennsylvania R Co, 17 D & C 2d 518, 72 Dauph 336

59. Ill—Gilmore v Toledo, P & W R Co, 212 N E 2d 117, 64 Ill App 2d 218 Aff'd 224 N E 2d 228, 36 Ill 2d 510

60. Discretion held not abused

Mo—Whitehead v Schrick, App, 328 S W 2d 170

Neb—Anderson v Moser, 98 N W 2d 703, 169 Neb 134, 81 A L R 2d 956

61 Ill—Donnelly v Pennsylvania R Co, 97 N E 2d 846, 342 Ill App 556, aff'd 105 N E 2d 730, 412 Ill 115, cert den 73 S Ct 93, 344 U S 855, 97 L Ed 663

§ 498. — Matters to be Proved

Library References

Employers' Liability ⇐187

page 43

65. U S—Carter v Atlanta & St A B Ry Co, Ala, 70 S Ct 226, 338 U S 430, 94 L Ed 236—Campbell v Pittsburgh & W Va R Co, D C Pa, 122 F Supp 749

Ind—Central Indiana Ry Co v Anderson Banking Co, 240 N E 2d 840, 143 Ind App 396

Mont—Wolfe v Northern Pac Ry Co, 409 P 2d 528, 147 Mont 29

66 Mo—Pheips v Missouri-Kansas-Texas R Co, 438 S W 2d 181, gr 89 S Ct 720, 393 U S 1061, 21 L Ed 2d 705

67 U S—DiPaola v Penn Central Transp Co, C A Ohio, 442 F 2d 442

69 U S—Wendell v Chicago, R I & P R Co, C A Ill, 184 F 2d 868—Guegan v New York Cent R Co, C A N Y, 243 F 2d 524

Ark—Chicago, R I & P Ry Co v Lockwood, 424 S W 2d 158, 244 Ark 122

Fla—Seaboard Air Line R Co v Gentry, 46 So 2d 485, cert den 71 S Ct 82, 340 U S 853, 95 L Ed 625

Ill—Allendorf v Elgin, J & E Ry Co, 133 N E 2d 288, 8 Ill 2d 164, 79 A L R 2d 241, cert den 77 S Ct 49, 352 U S 833, 1 L Ed 2d 53, reh den 77 S Ct 219, 352 U S 937, 1 L Ed 2d 170—Mensen v Baltimore & O R Co, 250 N E 2d 303, 111 Ill App 2d 362

Okl—Patrick's Inc v Mosseriano, 292 P 2d 1003

Vt—Greiner v Alta Crest Farms, 58 A 2d 884

page 44

70. U S—Sivert v Pennsylvania R Co, C A Ill, 197 F 2d 371—Chesapeake & O Ry Co v Thomas, C A Va, 198 F 2d 783, cert den 73 S Ct 387, 344 U S 921, 97 L Ed 709

Ala—Reynolds v Atlantic Coast Line R Co, 36 So 2d 102, 251 Ala 27, aff'd 69 S Ct 507, 336 U S 207, 93 L Ed 618—Atlantic Coast Line R Co v Barnes, 75 So 2d 91, 261 Ala 496

Fla—Seaboard Air Line R Co v Strickland, 80 So 2d 914, rev'd on oth grds 76 S Ct 157, 350 U S 893, 100 L Ed 786

Ill—Allendorf v Elgin, J & E Ry Co, 133 N E 2d 288, 8 Ill 2d 164, 79 A L R 2d 241, cert den 77 S Ct 49, 352 U S 833, 1 L Ed 2d 53, reh den 77 S Ct 219, 352 U S 937, 1 L Ed 2d 170

Kan—Bortzfeld v Sutton, 299 P 2d 584, 180 Kan 46

N C—Muldrow v Wenstem, 68 S E 2d 249, 234 N C 587

It is not necessary to prove negligence on the part of the employer under some state employers' liability acts 705

70.5. Ariz—Feffer v Bowman, 365 P 2d 472, 90 Ariz 48

71 To bring action within the Federal Employers' Liability Act, etc.

U S—St Louis Southwestern Ry Co v Ferguson, C A Mo, 182 F 2d 949—Crane v Cedar Rapids &

Page 44

1 C Ry Co, Iowa, 89 S Ct 1706, 395 U.S. 164, 23 L Ed 2d 176

III—Robson v Pennsylvania R Co, 86 NE 2d 403, 337 Ill App 557

73. Iowa—Friedrich v Goff, 100 NW 2d 624, 251 Iowa 290

NY—Mathieson v Adrian, 110 NYS 2d 830, aff'd 118 NYS 2d 560, 281 App Div 715

74. Ala—Bailey v Tennessee Coal, Iron & R Co, 75 So 2d 117, 261 Ala 526

Matters not necessary to prove

(1) US—Southern Pac Co v Mahl, C.A. La., 406 F 2d 1201, reh den 409 F 2d 229

Mo—Waser v Missouri Pac R Co, 301 SW 2d 37—Hunter v St Louis Southwestern Ry Co, 315 SW 2d 689

(3) US—Byler v Wabash R Co, C.A. Mo., 196 F 2d 9, reh den 73 S Ct 27, 344 U.S. 826, 97 L Ed 643

§ 499. — Issues Raised by, and Evidence Admissible under, Pleadings

Library References

Employers' Liability ¶188

page 45

84. US—O'Donnell v Elgin, J & E Ry Co, Ill, 70 S Ct 200, 338 U.S. 384, 94 L Ed 187, 16 A.L.R. 2d 646, reh den 70 S Ct 427, 338 U.S. 945, 94 L Ed 427—Byler v Wabash R Co, supra, n 74

Me—Lyle v Bangor & A.R. Co, 110 A 2d 584, 150 Me 327

Md—Baltimore & O.R. Co v Rodeheaver, 81 A 2d 63, 197 Md 632

Or—Arnold v Gardner Hill Timber Co, 263 P 2d 403, 199 Or 517

Under Federal Employers' Liability Act

US—Lloy v Pacific Elec Ry Co, C.A. Cal., 207 F 2d 662

(2) Other cases

US—Porter v St Louis-San Francisco Ry Co, C.A. Miss., 354 F 2d 840

Fla—Butler v Smith, App., 104 So 2d 868

III—Pinkstaff v Pennsylvania R Co, 170 NE 2d 139, 20 Ill 2d 193, cert den 81 S Ct 1029, 365 U.S. 878, 6 L Ed 2d 191

Ohio—O'Leary v Pennsylvania R Co, 127 NE 2d 877, 163 Ohio St 597—Evans v Union Depot Co, 199 NE 2d 891, 119 Ohio App 318

page 46

85. US—Chicago & NW Ry Co v Green, C.C.A. Minn., 164 F 2d 55

N.J.—Budd v Erie Lackawanna R Co, 236 A 2d 143, 98 N.J. Super 47

Particular evidence held admissible

(1) Iowa—Parks v Figgard, 163 NW 2d 385

Ky.—Beck Elec Repair Co v Browning, 214 SW 2d 1007, 308 Ky 503

Mo—Honeycutt v Wabash R Co, 313 SW 2d 214, trans' to, Sup., 337 SW 2d 50

86. Tex.—Loud v Sears, Roebuck & Co, Civ App, 262 SW 2d 548

Evidence of condition of passageway, etc.

(2) Other matters

US—Kenton v Atchison, T & S.F. Ry Co, C.A. Ill., 321 F 2d 317

page 47

88. US—Long v Union R Co, C.A. Pa., 175 F 2d 198—St Louis Southwestern Ry Co v Ferguson, supra, n. 71

94. Under Federal Employers' Liability Act N.M.—Abeyta v Atchison, T. & S.F. Ry Co, 336 P.2d 1051, 65 N.M. 291

96 US—Brown v Western Ry of Alabama, Ga., 70 S Ct 105, 338 U.S. 294, 94 L Ed 100, conf' to 57 S E 2d 454, 80 Ga App 770

Ga—Atlantic Coast Line R Co v Singletary, 65 S E 2d 827, 80 Ga App 297

Ky.—Beck Elec Repair Co v Browning, supra, n 85

Mo—Marquardt v Kansas City Southern Ry Co 358 SW 2d 49, 2 A.L.R. 3d 1311

Okla.—Patrick's Inc v Mosserano, 292 P 2d 1003

99. N.J.—Budd v Erie Lackawanna R Co, 225 A 2d 171, 93 N.J. Super 166, aff'd 236 A 2d 143, 98 N.J. Super 47

Utah—King v Denver & Rio Grande Western R Co., 211 P 2d 833, 116 Utah 488

page 48

9. Neb—Brackman v Brackman, 100 NW 2d 774, 169 Neb 650

page 49

21 N.M.—Sena v Sanders, 214 P 2d 226, 54 N.M. 83

22 N.M.—Sena v Sanders, supra, n 21

24 Tex—Great Atlantic & Pac Tea Co v Smith, Civ App, 253 SW 2d 58, err ref no rev err

26. Mo—Tatum v Gulf, M & O.R. Co., 223 SW 2d 418, 359 Mo 709

28 Ky—Blair v Louisville & N.R. Co., 390 SW 2d 178

30 Mo—Tatum v Gulf, M & O.R. Co., supra, n 26

page 50

40 Mo—Carnes v Kansas City Southern Ry Co., 328 SW 2d 615

§ 500. — Variance

Library References

Employers' Liability ¶189.

42 Mo—Ortley v St Louis-San Francisco Ry Co., 232 SW 2d 966, 360 Mo 1189, cert den 71 S Ct 533, 340 U.S. 948, 95 L Ed 683, reh den 71 S Ct 621, 341 U.S. 912, 95 L Ed 1349

N.H.—Wilkinson v Achter, 131 A 2d 51, 101 N.H. 7

43 Variance held material

(4) Mass—Cavanaugh v Crocker, 140 NE 2d 167, 335 Mass 765

45. Ohio—Evans v Union Depot Co., 199 NE 2d 891, 119 Ohio App 318

Variance held immaterial

(4) Conn—Schaller v Roadside Inn, Inc., 221 A 2d 263, 154 Conn 61

N.J.—Budd v Erie Lackawanna R Co., 225 A 2d 171, 93 N.J. Super 166, aff'd 236 A 2d 143, 98 N.J. Super 47

§ 501. Presumptions and Burden of Proof

Library References

Employers' Liability ¶190-197

page 52

65. US—Healy v Pennsylvania R Co, C.A. Pa., 184 F 2d 209, cert den 71 S Ct 490, 340 U.S. 935, 95 L Ed 674, reh den 71 S Ct 620, 341 U.S. 912, 95 L Ed 1348

Nev—Peck v Woomack, 192 P 2d 874, 65 Nev 184

Employer's knowledge of risks

(3) Other matters

III—Dei Raso v Elgin, J & E Ry Co, 228 NE 2d 470, 84 Ill App 2d 344, 30 A.L.R. 3d 708, cert den 88 S Ct 1036, 390 U.S. 948, 19 L Ed 2d 1138

page 53

66. N.Y.—Battistella v Society of New York Hospital, 191 NYS 2d 626, 9 A.D. 2d 75

67. Cal—Kasper v Northwestern Pac R Co., 286 P 2d 47, 134 C.A. 2d 702, hearing den 288 P 2d

262, 134 C.A. 2d 702, cert den 76 S Ct 323 350 US 948, 100 L Ed 826

69. Tenn—D.M. Rose & Co v Snyder, 206 SW 2d 897, 185 Tenn 499

71. US—Silvestri v New York, C & St L.R. Co., D.C. Pa., 180 F Supp 491, aff'd, C.A., 274 F 2d 666

73. Cal—Blunk v Atchison, T & S.F. Ry Co., 217 P 2d 494, 97 Cal App 2d 229

74 US—Frabutt v New York C & St L.R. Co D.C. Pa., 88 F Supp 821

75 Presumption subject to rebuttal

Mo—Toole v Buchtel Corp., 291 SW 2d 874

page 54

89 Presumption that master has performed his duty to servant not true presumption

Ark—Cokerham v Barnes, 321 SW 2d 385, 210 Ark 197

Res ipsa loquitur

US—Miller v Cincinnati, N.O. & T.P. Ry Co, C.A. Tenn., 317 F 2d 693

Wash—Tabert v Zier, 368 P 2d 685, 59 Wash 2d 524

90 US—Emig v Erie Lackawanna Ry Co, D.C. Pa., 350 F Supp 986, aff'd, C.A., 485 F 2d 679

Ala—Louisville & N.R. Co v Steel, 59 So 2d 664, 257 Ala 474—Atlantic Coast Line R Co v Barnes, 75 So 2d 91, 261 Ala 496—Parker v Kellum 228 So 2d 16, 284 Ala 701

Cal—Spencer v Atchison, T & S.F. Ry Co., 207 P 2d 126, 92 Cal App 2d 490—Kesper v Northwestern Pac R Co., 286 P 2d 47, 134 C.A. 2d 702, rehearing den 288 P 2d 262, 134 C.A. 2d 702, cert den 76 S Ct 323, 350 U.S. 948, 100 L Ed 826

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92 Ala—Roberts v Alabama Great Southern Ry Co, 46 So 2d 213, 253 Ala 636, cert den 71 S Ct 66, 340 U.S. 829, 95 L Ed 609

Okla—Service Pipe Line Co v Donahue, 283 P 2d 844 Or—Mansco v Barclay, 218 P 2d 469, 189 Or 109

93 US—Daulton v Southern Pac Co, C.A. Or., 237 F 2d 710, cert den 77 S Ct 564, 352 U.S. 1005, 1 L Ed 2d 349

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page 55

95 Ohio—Bergfeld v New York, C & St L.R. Co., 144 NE 2d 483, 103 Ohio App 87

Statutory presumption

Cal—Gretz v Sivachenko, 299 P 2d 374, 143 C.A. 2d 146

96. US—Healy v Pennsylvania R Co, supra, n 65 Ga—Maxwell v Harrell, 153 S E 2d 653, 115 Ga App 97

Nev—Richard Matthews, Jr, Inc v Vaughn, 540 P 2d 1062, 91 Nev 583

98 Statutory presumption

Cal—Gretz v Sivachenko, 299 P 2d 374, 143 C.A. 2d 146

1 US—Emig v Erie Lackawanna Ry Co, D.C. Pa., 350 F Supp 986, aff'd, C.A., 485 F 2d 679

N.Y.—Dellamorga v Wenberg, 104 N.Y.S. 2d 209, 278 App Div 828

N.C.—Muldrow v Weinstein, 68 S E 2d 249, 234 N.C. 587

Okla—Sheridan v Deep Rock Oil Corp., 205 P 2d 276, 201 Okl 312—Sears, Roebuck & Co v Skeen, 248 P 2d 582, 207 Okl 180—Speed v Whalan, 386 P 2d 772

Or—Meyers v Ooms Sanitarium, Inc, 356 P.2d 159, 224 Or 414

SC—Bellamy v Hardee, 129 S E 2d 905, 242 S C 71

page 56

5. SC—Bellamy v Hardee, 129 S E 2d 905, 242 S C 71

8. US—Desu v Pennsylvania R Co, C A Pa, 251 F 2d 149, cert den 78 S Ct 1006, 356 U S 967, 2 L Ed 2d 1073—Baum v Baltimore & O R Co, C A Ind, 256 F 2d 753, cert den 79 S Ct 121, 358 U S 881, 3 L Ed 2d 111—Kubenski v New York Cent R Co, C A N Y, 359 F 2d 90—Cert den 87 S Ct 1475, 386 U S 1036, 18 L Ed 2d 600—Sligh v Columbus, N & L R Co, D C S C, 250 F Supp 490, affd, C A, 370 F 2d 979, cert den 87 S Ct 1349, 386 U S 1007, 18 L Ed 2d 434—Nivens v St Louis Southwestern Ry Co, C A Tex, 425 F 2d 114, cert den 91 S Ct 121, 400 U S 879, 27 L Ed 2d 116

Ala—Atlantic Coast Line R Co v Barnes, 75 So 2d 91, 261 Ala 496

Va—Southern Ry Co v Mays, 63 S E 2d 720, 192 Va 68, cert den 72 S Ct 60, 342 U S 836, 96 L Ed 632

Evidence of negligence required

US—Eaton v Long Island R Co, C A N Y, 398 F 2d 738

11. NC—Bame v Palmer Stone Works, 59 S E 2d 812, 232 N C 267

Okla—Sanders v McMichael, 197 P 2d 280, 200 Okl 501

page 57

14. Me—Bartley v Couture, 55 A 2d 438, 143 Me 69

Mo—Cruce v Gulf, Mobile & O R Co, 216 S W 2d 78, 358 Mo 589—McClintock v Terminal R R Ass'n of St Louis, App, 257 S W 2d 180

In federal courts

(2) Johnson v U S, Cal, 68 S Ct 391, 333 U S 46, 92 L Ed 468, motion den 68 S Ct 788, 333 U S 865, 92 L Ed 1143—Whalen v Phoenix Indem Co, C A La, 222 F 2d 121

15. Mo—Jones v Terminal R R Ass'n of St Louis, 242 S W 2d 473

17. Ga—Jackson v Thompson, 48 S E 2d 903, 77 Ga App 367—A F King & Son v Simmons, 131 S E 2d 214, 107 Ga App 628

Mo—Littlefield v Laughlin, 327 S W 2d 863

18. Mo—Wills v Terminal R R Ass'n of St Louis, 421 S W 2d 220

NY—Mercantile v City of New York, 142 N Y S 2d 473, 286 App Div 265, rearg and app den 144 N Y S 2d 914, 286 App Div 964

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19. US—Smith v Baltimore & O R Co, C A Ohio, 204 F 2d 162, cert den 74 S Ct 61, 346 U S 838, 98 L Ed 360—Whalen v Phoenix Indem Co, C A La, 220 F 2d 78, reh den 222 F 2d 121

Ga—Jackson v Thompson, supra, n 17

La—Lockwood v Kennedy, App, 44 So 2d 176

Mass—Rice v De Avilla, 155 N E 2d 768, 338 Mass 793

Mo—Cruce v Gulf, Mobile & O R Co, supra, n 14—Jones v Terminal R R Ass'n of St Louis, supra, n 15—Marquardt v Kansas City Southern Ry Co, 358 S W 2d 49, 2 A L R 3d 1311

Pa—Stewart v Morow, 170 A 2d 338, 403 Pa 459

Control by employee

(2) Other cases—Giltner v Stephens, 200 P 2d 290, 166 Kan 172

Express approval of use of instrumentalities
Mont—Pollard v Todd, 418 P 2d 869, 148 Mont 171

page 58

24. La—Lee v Moellenkamp, App, 106 So 2d 795
Mo—C.J.S. cited in Frazier v Ford Motor Co, 276 S W 2d 95, 99, 365 Mo 62

Mont—Jackson v William Druggall Co, 399 P 2d 236, 145 Mont 127

NY—Dickinson v Delaware, L & W R Co, 158 N Y S 2d 127, 3 A D 2d 629

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Tenn—Stoker v Hicks, 419 S W 2d 626, 57 Tenn App 443

W Va—State ex rel Bennett v Sims, 48 S E 2d 13, 131 W Va 312

Doctrine held inapplicable, etc.

(3) La—Traban v Liberty Mut Ins Co, App, 273 So 2d 331, writ den, Sup, 275 So 2d 791

(4) Other cases

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Tex—McClintock v R C Young Feed & Seed Co, 225 S W 2d 910, err ref—Worth Steel Corp v Garman, Civ App, 361 S W 2d 426, err ref no rev
err—Byrd v Trevino-Bermea, Civ App, 366 S W 2d 632

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page 59

25. Mo—C.J.S. cited in Frazier v Ford Motor Co, 276 S W 2d 95, 99, 365 Mo 62

33. La—American Emp Ins Co v International Harvester Co, App, 158 So 2d 477

34. Ga—A F King & Son v Simmons, 131 S E 2d 214, 107 Ga App 628

38. US—Ringhiser v Chesapeake & O Ry Co, D C Ohio, 148 F Supp 529, affd, C A, 241 F 2d 416, cert gr 77 S Ct 1093, 354 U S 901, 1 L Ed 2d 1268—Zegan v Central R Co of N J, D C Pa, 164 F Supp 347, affd, C A, 266 F 2d 101, 77 A L R 2d 768

Ark—Purnell v Missouri Pac Ry Co, 362 S W 2d 674, 235 Ark 957, cert den 83 S Ct 1292, 373 U S 904, 10 L Ed 2d 199

Mo—Pauley v Baltimore & Ohio R Co, App, 215 S W 2d 78

39. US—McKee v New York Cent R Co, C A Ohio, 355 F 2d 165

41. Mass—Labonte v New York, N H & H R Co, 131 N E 2d 203, 333 Mass 420, cert den 76 S Ct 1033, 351 U S 974, 100 L Ed 1492

page 60

42. US—Ruddy v New York Cent R Co, C A N Y, 224 F 2d 96, cert den 76 S Ct 137, 350 U S 884, 100 L Ed 779—Hunt v Atlantic Coast Line R Co, D C S C, 144 F Supp 877—Weigand v Pennsylvania R Co, C A Pa, 267 F 2d 281—Wiles v New York, C A Pa, C & St L R Co, 283 F 2d 328, cert den 81 S Ct 232, 364 U S 900, 5 L Ed 2d 193—Miller v Cincinnati, N O & T P Ry Co, D C Tenn, 203 F Supp 107, affd, C A, 317 F 2d 693—Fasbinder v Pennsylvania R Co, C A Pa, 322 F 2d 859

III—Chesnut v Louisville & N R Co, 81 N E 2d 660, 335 Ill App 254—Moore v Atchison, T & S F Ry Co, 171 N E 2d 393, 28 Ill App 2d 340, 97 A L R 2d 511

Mo—Maxie v Gulf, M & O R Co, 219 S W 2d 322, 358 Mo 1100, 10 A L R 2d 1273, cert den 70 S Ct 69, 338 U S 823, 94 L Ed 499—McClintock v Terminal R R Ass'n of St Louis, supra, n 14—Allen v St Louis-San Francisco R R, 297 S W 2d 483—Chambers v Missouri Pac R Co, 356 S W 2d 64

43. US—Miller v Elgin, Joliet & Eastern Ry Co, C A Ind, 177 F 2d 224—Fasbinder v Pennsylvania R Co, C A Pa, 322 F 2d 859

Tex—Thompson v Jason, Civ App, 265 S W 2d 920, err ref no rev

44. US—Long v Union Pac R Co, C A Kan, 192 F 2d 788—Texas & Pac Ry Co v Buckles, C A La, 232 F 2d 257, cert den 76 S Ct 1052, 351

US 984, 100 L Ed 1498—Fasbinder v Pennsylvania R Co, C A Pa, 322 F 2d 859

Mo—Cruce v Gulf, M & O R Co, 238 S W 2d 674, 361 Mo 1138

45. Ill—Chesnut v Louisville & N R Co, supra, n 42

46. US—Long v Union Pac R Co, supra, n 44—Lewin v Pennsylvania R Co, D C Pa, 100 F Supp 291—Hall v Atlantic Nav Co, C A Va, 218 F 2d 654—Fasbinder v Pennsylvania R Co, C A Pa, 322 F 2d 859

Ky—Chesapeake & O Ry Co v Beliter, 413 S W 2d 894

Mo—Warner v Terminal R Ass'n of St Louis, 257 S W 2d 75—McClintock v Terminal R R Ass'n of St Louis, supra, n 14—Allen v St Louis-San Francisco R R, 297 S W 2d 483—Heppner v Atchison, T & S F Ry Co, 297 S W 2d 497

page 61

47. Mo—Allen v St Louis-San Francisco R R, 297 S W 2d 483

Doctrine held not barred notwithstanding allegation of specific act of negligence

US—Weigand v Pennsylvania R Co, C A Pa, 267 F 2d 281

48. US—Weigand v Pennsylvania R Co, D C Pa, 166 F Supp 843, rev'd on oth grds, C A, 267 F 2d 281

Mo—Rea v St Louis-San Francisco Ry Co, 411 S W 2d 96

Doctrine held not barred

(2) Notwithstanding evidence tending to prove specific acts of negligence

US—Weigand v Pennsylvania R Co, C A Pa, 267 F 2d 281

49. US—Long v Union Pac R Co, supra, n 44—Texas & Pac Ry Co v Buckles, C A La, 232 F 2d 257, cert den 76 S Ct 1052, 351 U S 984, 100 L Ed 1498

Mo—Schwartz v Kansas City Southern Ry Co, 275 S W 2d 236, 365 Mo 17, cert den 75 S Ct 773, 349 U S 931, 99 L Ed 1261, reh den 76 S Ct 39, 350 U S 855, 100 L Ed 760

Ohio—Grande v Erie R Co, App, 172 N E 2d 161

50. US—Fasbinder v Pennsylvania R Co, C A Pa, 322 F 2d 859

51. US—Texas & Pac Ry Co v Buckles, C A La, 232 F 2d 257, cert den 76 S Ct 1052, 351 U S 984, 100 L Ed 1498—Kansas City Southern Ry Co v Justis, C A La, 232 F 2d 267, 60 A L R 2d 628, cert den 77 S Ct 49, 352 U S 833, 1 L Ed 2d 53—Fasbinder v Pennsylvania R Co, C A Pa, 322 F 2d 859

54. US—Wadick v Illinois Cent R Co, C A Ill, 208 F 2d 925

56. US—Marcades v New Orleans Terminal Co, D C La, 111 F Supp 650

Cal—Blank v Atchison, T & S F Ry Co, 217 P 2d 494, 97 Cal App 2d 229

Neb—Anderson v Moser, 98 N W 2d 703, 169 Neb 134, 81 A L R 2d 956

Tenn—Watson v Borg-Warner Corp, 228 S W 2d 1011, 190 Tenn 209

page 62

57. Mo—Searcy v Neal, App, 509 S W 2d 755, app after remand 549 S W 2d 602

59. Ga—Genesee, Inc v Green, 125 S E 2d 786, 105 Ga App 798

66. Mo—Van Norman v Illinois Cent R Co, 320 S W 2d 512

Tenn—Hawkins v Cimchfield R Co, 266 S W 2d 840, 37 Tenn App 529

68. Utah—Wilkinson v McCarthy, 187 P 2d 188, 112 Utah 300, rev'd on oth grds 69 S Ct 413, 336 U S 53, 93 L Ed 497, reh den 69 S Ct 744, 336 U S 940, 93 L Ed 1098

Failure to function

(3) Other matters

Page 62

US—Southern Ry Co v Bryan, C A Ga, 375 F 2d 155, cert den 88 S Ct 82

Res ipsa loquitur

(1) US—Hunt v Atlantic Coast Line R Co, D C S C, 144 F Supp 877

page 64

93 Conclusively presumed

Pa—Stepp v Renn, 5 Lycoming 204, affd 135 A 2d 794, 184 Pa Super 634

Natural laws

Neb—Runge v Travis, 134 NW 2d 291, 178 Neb 562

Risks obvious to person of plaintiff's age and experience

Ill—Chicago & E R Co v Heerey, 68 NE 74, 203 Ill 492—Mack v Davis, 221 NE 2d 121, 76 Ill App 2d 88

3. Mo—Cathy v De Wesse, 289 S W 2d 51

page 65

13. Cal—Devens v Goldberg, App, 189 P 2d 859, subs op 199 P 2d 943, 33 Cal 2d 173

Conclusive presumption where violation of safety law contributed to injury

Cal—Alber v Owens, 59 Cal Rptr 117, 427 P 2d 781, 66 C 2d 790

15. Md—Petrol Corp v Curtis, 59 A 2d 329, 190 Md 652

21. US—Frabutt v New York, C & St L R Co, D C Pa, 88 F Supp 821

Ohio—Bergfeld v New York, C & St L R Co, 144 NE 2d 483, 103 Ohio App 87

page 66

22. US—Stanford v Pennsylvania R Co, C A Ill, 171 F 2d 632—Pitt v Pennsylvania R Co, D C Pa, 66 F Supp 443, affd, C C A, 161 F 2d 733—Thomas v Conemaugh Black Lick R R, D C Pa, 133 F Supp 533, affd, C A, 234 F 2d 429—Sunderland v Pittsburgh & L E R Co, C A Pa, 319 F 2d 809

Cal—Parga v Pacific Elec Ry Co, 230 P 2d 364, 103 Cal App 2d 840

Ill—Moore v Atchison T & S F Ry Co, 171 NE 2d 393, 28 Ill App 2d 340, 97 A L R 2d 511

24. Cal—Towt v Pope, 336 P 2d 276, 168 C A 2d 520

Iowa—Kregal v Kana, 152 NW 2d 534, 260 Iowa 1330—Kandison v Swenson, 155 NW 2d 756, 261 Iowa 929

La—James v Lykes Bros SS Co, App, 175 So 2d 444, application den 178 So 2d 653, 248 La 358

Or—Barker v Portland Traction Co, 173 P 2d 288, 180 Or 586, reh den 178 P 2d 706, 180 Or 586—Williams v Clemens' Forest Products, 216 P 2d 241, 188 Or 572, reh den 217 P 2d 252, 188 Or 572

25. La—James v Lykes Bros SS Co, App, 175 So 2d 444, application den 178 So 2d 653, 248 La 358—Duplach v Pittsburgh Plate Glass Co, App, 265 So 2d 787

page 67

34. Mo—Pheps v Missouri-Kansas-Texas R Co, 438 S W 2d 181, 89 S Ct 720, 393 US 1061, 21 L Ed 2d 705

Ohio—Young v New York Cent. R Co, 88 NE 2d 220, 88 Ohio App 352, cert den 70 S Ct 1008, 339 US 986, 94 L Ed 1388

36. US—Robinson v Pennsylvania R Co, D C Pa, 113 F Supp 863, revd on oth grds, C A, 214 F 2d 798

37. Mo—Hatfield v Thompson, 252 S W 2d 534
Tex—Hallway v Thompson, 226 S W 2d 816, 148 Tex 471

page 68

38. US—Webb v Illinois Cent R Co, Ill, 77 S Ct 451, 352 US 512, 1 L Ed 2d 503, reh den 77 S Ct 809, 353 US 943, 1 L Ed 2d 764—Rogers v

Missouri Pac R Co, Ill, 77 S Ct 459, 352 US 521, 1 L Ed 2d 515—New York, N H & H R Co v Henagen, C A Mass, 272 F 2d 153, revd on oth grds 81 S Ct 198, 364 US 441, 5 L Ed 2d 183—Miller v Cincinnati, N O & T P Ry Co, D C Tenn, 203 F Supp 107, affd, C A, 317 F 2d 693

Or—Mildenberger v Cargill, Inc, 350 P 2d 413, 220 Or 629—Bartley v Doherty, 357 P 2d 521, 225 Or 15

Circumstantial proof

Ga—Southern Ry Co v Hamilton, 149 SE 2d 842, 113 Ga App 778

It has been held that plaintiff need not introduce into evidence the prevailing legal rate of interest^{19 5}

39.5. Tex—Missouri-Pacific R Co v Prejean, Civ App, 307 S W 2d 284

40. Iowa—Parks v Figgard, 163 NW 2d 385

Mo—C J S cited in Bonenberger v Sears Roebuck & Co, 449 S W 2d 385, 388

N Y—Davis v Fitch, 165 NY S 2d 271, 6 Misc 2d 938

Or—Cowan v Pearson, 354 P 2d 194

Or—Rich v Tite-Knot Pine Mill, 421 P 2d 370, 245 Or 185

W Va—Ferguson v Pinson, 50 SE 2d 476, 131 W Va 691

41. Ala—Johnson v Brinker, 266 So 2d 851, 289 Ala 240

43. Mo—C J S cited in Gardner v Simmons, Mo, 370 S W 2d 359, 361

Tenn—D M Rose & Co v Snyder, 206 S W 2d 897, 185 Tenn 499

Tex—Davis v Mendlowitz, Civ App, 252 S W 2d 996

44. Mo—Turpin v Chicago, B & Q R Co, 401 S W 2d 233, cert den 86 S Ct 1925, 384 US 1003, 16 L Ed 2d 1015

Tenn—Atlantic Coast Line R R, v Weeks, 208 S W 2d 355, 30 Tenn App 520

Tex—Missouri Pac R Co v Sparks, Civ App, 424 S W 2d 12, err ref no rev err

49. US—Moore v Chesapeake & O Ry Co, Va, 71 S Ct 428, 340 US 573, 95 L Ed 547—Collins v Monongahela Ry Co, D C Pa, 235 F Supp 127

Ala—Parker v Kellum, 228 So 2d 16, 284 Ala 701

Cal—Crowder v Atchison, T & S F Ry Co, 256 P 2d 85, 117 C A 2d 568

D C—Fitzpatrick v Fowler, 168 F 2d 172, 83 US App D C 229

Ga—Hill v Davison-Paxon Co, 57 SE 2d 680, 80 Ga App 840—Mobley v Durham Iron Co, 64 SE 2d 469, 83 Ga App 690—Owensby v Jones, 136 SE 2d 451, 109 Ga App 398—Atlantic Coast Line R Co v Daugherty, 157 SE 2d 880, 116 Ga App 438

Kan—Giltner v Stephens, 200 P 2d 290, 166 Kan 172

La—Berry v Astra Cas & Sur Co, App, 240 So 2d 243, writ ref 240 So 2d 374, 256 La 914, app dum cert den 91 S Ct 1255, 401 US 1005, 28 L Ed 2d 541

Me—Merrill v Wallingford, 148 A 2d 97, 154 Me 345

Minn—Albertson v Chicago, M, St P & P R Co, 64 NW 2d 175, 242 Minn 50 42 A L R 2d 1044

Okla—Laffoon Oil Co v Flanagan, 330 P 2d 194

Or—Funkhauser v Goodrich, 210 P 2d 487, 187 Or 220—Larson v Papet, 286 P 2d 123, 205 Or 126

S C—Atlantic Coast Line R Co v Whetstone, 132 SE 2d 172, 243 S C 61

S D—Stoner v Eggers, 92 NW 2d 528, 77 S D 395—Ecklund v Barneck, 144 NW 2d 605, 82 S D 280

Tenn—Watson v Borg-Warner Corp, 228 S W 2d 1011, 190 Tenn 209

page 69

50. US—Harris v Railway Exp. Agency, C A Kan., 178 F 2d 8

Knowledge of danger

(3) Other cases

Tex—Robb v Gilmore, Civ App 302 S W 2d 719, err ref no rev err

52 US—McCracken v Richmond, F & P R Co, C A Va, 240 F 2d 484

Mo—Warner v Terminal R Awn of St Louis, 257 S W 2d 75

54 Burden to prove injury caused by plaintiff's doctor

US—Collins v Monongahela Ry Co, D C Pa 235 F Supp 127

page 70

56 US—Heater v Chesapeake & O Ry Co, C A Ill, 497 F 2d 1243, cert den 95 S Ct 131 419 US 1013, 42 L Ed 2d 287

Ala—Atlanta, B & C R Co v Cary, 15 So 2d 559, 250 Ala 675—Louisville & N R Co v Green 53 So 2d 358, 255 Ala 642—Waldrep v Southern R Co 98 So 2d 614, 266 Ala 652

Ark—Reddell v Missouri Pac R Co 384 S W 2d 486, 238 Ark 753

Cal—Lewis v Union Pac R Co, 271 P 2d 706, 127 C A 2d 280—Herron v Pacific Elec Ry Co, 285 P 2d 77, 134 C A 2d 199—Minchatt v Southern Pac Co, 288 P 2d 999, 136 C A 2d 486—Rasmus v Southern Pac Co, 301 P 2d 21, 144 C A 2d 264

Fla—Seaboard Air Line R Co v Strickland, 80 So 2d 914, revd on oth grds 76 S Ct 157, 150 US 893, 100 L Ed 786—Florida East Coast Ry Co v Pollack, App, 154 So 2d 346

Ill—Abrahamson v Nickel Plate R Co, 99 NE 2d 153, 343 Ill App 351—Hall v Chicago & NW Ry Co, 118 NE 2d 29, 1 Ill App 2d 552, revd on oth grds 125 NE 2d 77, 5 Ill 2d 135, 50 A L R 2d 661—Dowler v New York, C & St L R Co, 118 NE 2d 608, 2 Ill App 2d 1, revd on oth grds 125 NE 2d 41, 5 Ill 2d 125

Ind—Pennsylvania R Co v Martin, 102 NE 2d 194, 122 Ind App 28

Mass—Labonte v New York, N H & H R Co, 131 NE 2d 203, 331 Mass 420, cert den 76 S Ct 1033, 351 US 974, 100 L Ed 1492

Mo—Hughes v Terminal R Awn of St Louis, 296 S W 2d 79—Ferguson v St Louis-San Francisco Ry Co, 307 S W 2d 385, cert den 78 S Ct 671, 356 US 41, 2 L Ed 2d 571

N J—Bascho v Pennsylvania R Co, 65 A 2d 611 3 NJ Super 86—Jarczewski v Central R Co of N J, 87 A 2d 705, 9 NJ 231, cert den 73 S Ct 26, 344 US 839, 97 L Ed 651—Shellhammer v Lehigh Valley R Co, 102 A 2d 602 14 NJ 141, cert den 74 S Ct 852, 347 US 990, 98 L Ed 1124, reh den 75 S Ct 20 148 US 842, 98 L Ed 672

N C—Graham v Atlantic Coast Line R Co 82 SE 2d 348, 240 NC 318—Keith v Norfolk Southern Ry Co, 175 SE 2d 778, 9 NC App 198

Okla—Atchison T & S F Ry Co v Hukst, 258 P 2d 672, 208 Okl 689—Missouri-Kansas Texas R Co v Brown, 348 P 2d 1069—Kansas City Southern Ry Co v Norwood, 367 P 2d 722

Tenn—Atlantic Coast Line R R v Weeks, supra, n 44

Tex—Texas & N O R Co v Hayes, 293 S W 2d 484, 156 Tex 148—Missouri Pac R Co v Sparks, Civ App, 424 S W 2d 12, err ref no rev err

Utah—Wilkerson v McCarthy, 187 P 2d 188, 122 Utah 300, revd on oth grds 69 S Ct 411, 136 US 57, 93 L Ed 497, reh den 69 S Ct 744, 136 US 940, 93 L Ed 1098—Siciliano v Denver & R G W R Co, 364 P 2d 413, 12 Utah 2d 183, cert dum 82 S Ct 476, 368 US 979, 7 L Ed 2d 521

Burden of proof much less than burden required in ordinary negligence actions

US—Boeing Co v Shipman, C A Ala, 411 F 2d 365

57. US—Nivens v St Louis Southwestern Ry Co, C A Tex, 425 F 2d 114, cert den. 91 S Ct 121, 400 US 879, 27 L Ed 2d 116

page 71

58. US—Fore v Southern Ry Co, C A Va, 178 F 2d 349—Missouri-Kansas-Texas Ry Co v Hearson, C A Kan, 422 F 2d 1037—Nivens v St Louis Southwestern Ry Co, C A Tex, 425 F 2d

114, cert den 91 S Ct 121, 400 U.S. 879, 27 L Ed 2d 116—Randall v Reading Co, D C Pa, 344 F Supp 879—Baker v Baltimore & Ohio R Co, C A Ohio, 502 F 2d 638

Ala—Seaboard Coast Line R Co v McDaniel, Civ, 321 So 2d 664, 56 Ala App 322, cert den 321 So 2d 670, 295 Ala 416

Fla—Loftin v Howard, 82 So 2d 125, 57 A L R 2d 488

Ill—Dowler v New York, C & St L R Co, supra, n 56—Hack v New York, C & St L R Co, 169 N E 2d 372, 27 Ill App 2d 206

Mo—Taylor v Missouri Pac R Co, App, 510 S W 2d 735

N C—Battley v Seaboard Airline Ry Co, 161 S E 2d 750, 1 N C App 384

Tex—Missouri Pac R Co v Sparks, Civ App, 424 S W 2d 12, err ref no rev err

59. Cal—Spencer v Atchison, T & S F Ry Co, 207 P 2d 126, 92 Cal App 2d 490

Ga—Georgia, S & F Ry Co v Meeks, 134 S E 2d 555, 108 Ga App 808, revd on oth grds 84 S Ct 1628, 377 U.S. 405, 12 L Ed 2d 495, on remand 137 S E 2d 919, 110 Ga App 143

Tex—Panhandle & S F Ry Co v Arnold, Civ App, 283 S W 2d 303, err ref no rev err Revd on oth grds 77 S Ct 840, 353 U.S. 360, 1 L Ed 2d 889, reh den 77 S Ct 1375, 354 U.S. 927, 1 L Ed 2d 1441, conf to 305 S W 2d 207

60. Ark—Chicago, R I & P Ry Co v Lockwood, 424 S W 2d 158, 244 Ark 122

61. U.S.—St Louis Southwestern Ry Co of Tex v Richardson, C A Tex, 218 F 2d 283—Nivens v St Louis Southwestern Ry Co, C A Tex, 425 F 2d 114, cert den 91 S Ct 121, 400 U.S. 879, 27 L Ed 2d 116

Ill—Donnelly v Pennsylvania R Co, 105 N E 2d 730, 412 Ill. 115, cert den 73 S Ct 93, 344 U.S. 855, 97 L Ed 663

Tex—Hesl v Rudd, Civ App, 291 S W 2d 351, err ref no rev err

64. Burden not on employer

Wash—Schmidt v Pioneer United Dairies, 373 P 2d 764, 60 Wash 2d 271

65. U.S.—Larson v Chicago & NW Ry Co, C A Ill, 171 F 2d 841—Rose v Atlantic Coast Line R Co, D C S C, 277 F Supp 913, affd C A, 403 F 2d 204

Ala—Reynolds v Atlantic Coast Line R Co, 36 So 2d 102, 251 Ala. 27, affd 69 S Ct 507, 336 U.S. 207, 93 L Ed 618

Cal—Mangrum v Union Pac R Co, 41 Cal Rptr 536, 230 C A 2d 960, 16 A L R 3d 543

Colo—Gordon v Clatsworth, 257 P 2d 410, 127 Colo 377, 49 A L R 2d 314

Ga—Warren v Georgia Southern & F Ry Co, 50 S E 2d 128, 77 Ga App 886

La—Berry v Aetna Cas & Sur Co, App, 240 So 2d 243, writ ref 240 So 2d 374, 256 La 914, app dism cert den 91 S Ct 1255, 401 U.S. 1005, 28 L Ed 2d 541

Mass—Costa v Krivitsky, 123 N E 2d 515, 332 Mass 98—Buckner v Sugarman, 89 N E 2d 207, 325 Mass 82

Minn—Albertson v Chicago, M, St P & P R Co, supra, n 49

Neb—Wertz v Lincoln Liberty Life Ins Co, 41 N W 2d 740, 152 Neb 451, 17 A L R 2d 629

Or—Funkhouser v Goodrich, 210 P 2d 487, 187 Or 220—Larson v Papst, 286 P 2d 123, 205 Or 126—Davis v Weyerhaeuser Co, 373 P 2d 985, 231 Or 596

5 C—Atlantic Coast Line R Co v Whetstone, 132 S E 2d 172, 243 S C 61

Tex—Texas & N O R Co v Pool, Civ App, 263 S W 2d 582—Robb v Gilmore, Civ App, 302 S W 2d 739, err ref no rev err—Huffman v Saenz, Civ App, 447 S W 2d 508, err ref no rev err

Vt—Norton v Lumbra, 238 A 2d 628, 127 Vt 64

Burden of proof as to cause of injury on employer under statute

Cal—Greitz v Svachenko, 299 P 2d 374, 143 C A 2d 146

page 72

66. U.S.—Chicago Great Western Ry Co v Casura, C A Minn, 234 F 2d 441

67. Tex—City of San Antonio v Mendoza, Civ App, 532 S W 2d 353, err ref no rev err

68. Mass—Campbell v Leach, 225 N E 2d 594, 352 Mass 367

70. Nev—Richard Matthews, Jr, Inc v Vaughn, 540 P 2d 1062, 91 Nev 583

71. Mo—Warner v Terminal R Ass'n of St Louis, supra, n 52

74. U.S.—Wolfe v Henwood, 162 F 2d 998, supra, n 56—Schnee v Southern Pac Co, C A Ariz, 186 F 2d 745—Fort Worth & Denver City Ry Co v Smith, C A Tex, 206 F 2d 667—Barnett v Terminal R Ass'n of St Louis, C A Mo, 228 F 2d 756, cert den 76 S Ct 850, 351 U.S. 953, 100 L Ed 1476—Parrah v Atchison, T & S F Ry Co, D C Cal, 152 F Supp 158—Collins v Monongahela Ry Co, D C Pa, 235 F Supp 127—Boston & M R R v Talbert, C A N H, 360 F 2d 286—Randall v Reading Co, D C Pa, 344 F Supp 879—Black v Penn Central Co, C A Ohio, 507 F 2d 269

Ala—Seaboard Coast Line R Co v Gills, 321 So 2d 202, 294 Ala 726

Cal—Smith v Southern Pac Co, 292 P 2d 66, 138 C A 2d 459—Torres v Southern Pac Co, 67 Cal Rptr 428, 260 C A 2d 757

Ill—Hall v Chicago & NW Ry Co, 118 N E 2d 29, 1 Ill App 2d 552, revd on oth grds 125 N E 2d 77, 5 Ill 2d 135, 50 A L R 2d 661—Dowler v New York, C & St L R Co, 125 N E 2d 41, 5 Ill 2d 125

N C—Graham v Atlantic Coast Line R Co, 82 S E 2d 346, 240 N C 338

Okla—Chicago, R I & P R Co v Kinsey, 372 P 2d 863

75. U.S.—Olmaki v New York Cent R Co, D C N Y, 162 F Supp 23—Rice v Louisville & N R Co, C A Ky, 344 F 2d 776—Nivens v St Louis Southwestern Ry Co, C A Tex, 425 F 2d 114, cert den 91 S Ct 121, 400 U.S. 879, 27 L Ed 2d 116—Heater v Chesapeake & O Ry Co, C A Ill, 497 F 2d 1243, cert den 95 S Ct 333, 419 U.S. 1013, 42 L Ed 2d 287

Ala—Atlanta, B & C R Co v Cary, supra, n 56—Louisville & N R Co v Green, 53 So 2d 358, 255 Ala 642

Ariz—Holbert v Southern Pac Co, 472 P 2d 91, 12 Ariz App 480

Cal—Spencer v Atchison, T & S F Ry Co, supra, n 59—Stout v Union Pac R Co, 218 F 2d 1001, 98 Cal App 2d 99—Crowder v Atchison, T & S F Ry Co, supra, n 49—Lewis v Union Pac R Co, 273 P 2d 706, 127 C A 2d 280—Herron v Pacific Elec Ry Co, 285 P 2d 77, 134 C A 2d 199—Van Horn v Southern Pac Co, 297 P 2d 479, 141 C A 2d 528—Parker v Atchison, T & S F Ry Co, 70 Cal Rptr 8, 263 C A 2d 675

Ga—Atlantic Coast Line R Co v Heyward, 60 S E 2d 641, 82 Ga App 337—Georgia, S & F Ry Co v Meeks, 134 S E 2d 555, 108 Ga App 808, revd on oth grds 84 S Ct 1628, 377 U.S. 405, 12 L Ed 2d 495, on remand 137 S E 2d 919, 110 Ga App 143

Ill—Margevich v Chicago & NW Ry Co, 116 N E 2d 914, 1 Ill App 2d 162, cert den 75 S Ct 84, 348 U.S. 861, 99 L Ed 678—Dowler v New York, C & St L R Co, 118 N E 2d 608, 2 Ill App 2d 1, revd on oth grds 125 N E 2d 41, 5 Ill 2d 125—Dowler v New York, C & St L R Co, 125 N E 2d 41, 5 Ill 2d 125—Biggerstaff v New York, C & St L R Co, 141 N E 2d 72, 13 Ill App 2d 85

Ind—Pennsylvania R Co v Martin, supra, n 56

Mo—Kneflick v Terminal R Ass'n of St Louis, 207 S W 2d 294—Nance v Atchison, T & S F Ry Co, supra, n 56—Otley v St Louis-San Francisco Ry Co, supra, n 56—Stone v New York, C & St L R Co, supra, n 56—Adams v Atchison, T

& S F Ry Co, 280 S W 2d 84—Cleghorn v Terminal R Ass'n of St Louis, 289 S W 2d 13

N J—Shellhammer v Lehigh Valley R Co, 102 A 2d 602, 14 N J 341, cert den 74 S Ct 852, 347 U.S. 990, 98 L Ed 1124, reh den 75 S Ct 20, 348 U.S. 852, 99 L Ed 672

N C—Camp v Southern Ry Co, 61 S E 2d 358, 232 N C 487

Okla—Atchison, T & S F Ry Co v Hicks, 258 P 2d 672, 208 Okl 689—Missouri-Kansas-Texas R Co v Brown, 348 P 2d 1069—Kansas City Southern Ry Co v Norwood, 367 P 2d 722

Tenn—Atlantic Coast Line R R v Meeks, supra, n 44

page 73

76. U.S.—Moore v Chesapeake & O Ry Co, supra, n 49—Chicago Great Western Ry Co v Scovel, C A Minn, 232 F 2d 952, cert den 77 S Ct 53, 352 U.S. 835, 1 L Ed 2d 54—Black v Penn Central Co, C A Ohio, 507 F 2d 269

Ill—Dowler v New York, C & St L R Co, supra, n 75—Hack v New York, C & St L R Co, 169 N E 2d 372, 27 Ill App 2d 206

Mo—Hartgrove v Chicago, B & Q R Co, supra, n 56—Ferguson v St Louis-San Francisco Ry Co, 307 S W 2d 385, cert den 78 S Ct 671, 356 U.S. 41, 2 L Ed 2d 571

77. Not required to exclude every possible cause for which defendant not liable

Mo—Headrick v Kansas City Southern Ry Co, 305 S W 2d 478

79. Mo—Adams v Atchison, T & S F Ry Co, 280 S W 2d 84

80. Tex—Missouri-Kansas-Texas R Co v Wright, Civ App, 311 S W 2d 440, err dism by agreement

82. Mass—Cavanaugh v Crocker, 140 N E 2d 167, 335 Mass 765

Mo—Green v Sutton, 452 S W 2d 200

Okla—Stout v Schell, 241 P 2d 1109, 206 Okl 153

Tex—Robb v Gilmore, Civ App, 302 S W 2d 739, err ref no rev err

Particulars of defect

(2) However, the exact nature of the defect need not be shown—Arnold v U.S. Gypsum Co, 267 P 2d 689, 44 Wash 2d 412

page 74

84. Miss—Harper v Armstrong Tire & Rubber Co, 84 So 2d 682, 226 Miss 522

85. Or—Baldassarre v West Oregon Lumber Co, 239 P 2d 839, 193 Or 556

86. Ky—Batzel v Brown, 221 S W 2d 78, 310 Ky 524

Mass—Beekes v Cutler, 77 N E 2d 402, 322 Mass 392—Cavanaugh v Crocker, 140 N E 2d 167, 335 Mass 765

N J—Canonica v Celanese Corp of America, Plastics Division, 78 A 2d 411, 11 N J Super 445

Wis—Paykel v Rose, 61 N W 2d 909, 265 Wm 471

88. Cal—Devens v Goldberg, supra, n 13

90. Okla—Stout v Schell, supra, n 82

page 75

92. U.S.—Kaminaki v Chicago River & Ind R Co, supra, n 56

Mo—Thompson v Thompson, 240 S W 2d 137, 362 Mo 73

1. U.S.—Inman v Baltimore & O R Co, Ohio, 80 S Ct 242, 361 U.S. 138, 4 L Ed 2d 198—Rice v Louisville & N R Co, C A Ky, 344 F 2d 776—Arnold v Seaboard Air Line R Co, C A Va, 345 F 2d 30, cert den 86 S Ct 70, 382 U.S. 831, 15 L Ed 2d 75

Fla—Loftin v Howard, 82 So 2d 125, 57 A L R 2d 488

Mo—Nance v Atchison, T & S F Ry Co, 232 S W 2d 547, 360 Mo 980

Or—Warner v Mitchell Bros Truck Lines, 352 P 2d 156, 221 Or 544

Pa—Finnegan v Monongahela Connecting R Co, 108 A 2d 321, 379 Pa 63

Page 75

Tenn—Turner v Clinchfield R Co, App, 489 SW 2d 257, cert den 93 SCt 2168, 411 US 973, 36 LEd 2d 696

Notice of condition

(4) Other instances

Mo—Evinger v Thompson, 265 SW 2d 726, 364 Mo 658
Tex—Great Atlantic & Pac Tea Co v Coleman, Civ App, 259 SW 2d 319

Evidence of practices of other railroads unnecessary

US—Eaton v Long Island R Co, CANY, 398 F2d 738

page 76

2. US—Parrish v Atchison, T & SF Ry Co DCCal, 152 F Supp 158

4 Knowledge

Cal—Spencer v Atchison, T & SF Ry Co, 207 P2d 126, 92 Cal App 2d 490

Tenn—Turner v Clinchfield R Co, App, 489 SW 2d 257, cert den 93 SCt 2168, 411 US 973, 36 LEd 2d 696

10. US—O'Donnell v Elgin, J & E Ry Co, C.A. III, 171 F2d 973, revd on oth grds 70 SCt 200, 338 US 384, 94 LEd 187, 16 ALR 2d 646, reh den 70 SCt 427, 338 US 945, 94 LEd 583

Utah—McGowan v Denver & RGRW Co, 244 P2d 628, 121 Utah 587, cert den 73 SCt 346, 344 US 918, 9 LEd 707

11. US—Campbell v Pittsburgh & W Va R Co, DCPa, 122 F Supp 749

14. Ill—Ernhart v Elgin, J & E Ry Co, 84 NE 2d 868, 337 Ill App 56, transf 78 NE 2d 257, 199 Ill 512, affd 92 NE 2d 96, 405 Ill 577

15. US—Long v Union R Co, C.A. Pa, 175 F2d 198—Southern Ry Co v Bryan, C.A. Ga, 175 F2d 155, cert den 88 SCt 82

Ala—Atlantic Coast Line R Co v Dunvant, 91 So 2d 670, 265 Ala 420

16. US—O'Donnell v Elgin, J & E Ry Co, supra, n 10

page 77

22. Wyo—Sayre v Allemand, 418 P2d 1006

27. Okl—Broome v Atchison, T & SF Ry Co, 271 P2d 1099

General practice of industry as not reasonably prudent practice

US—Kuberski v New York Cent R Co, CANY, 359 F2d 90, cert den 87 SCt 1475, 386 US 1036, 18 LEd 2d 600

page 78

37. Ill—Hack v New York, C & St L R Co, 169 NE 2d 372, 27 Ill App 2d 206

40. US—Kuberski v New York Cent R Co, C.A. N.Y., 359 F2d 90, cert den 87 SCt 1475, 386 US 1036, 18 LEd 2d 600

43. Proof of being forced to do work not required

Cal—Waller v Southern Pac Co, 57 Cal Rptr 353, 424 P2d 937, 66 C2d 201

page 79

45. Insufficient help

Tex—Great Atlantic & Pacific Tea Co v Lang, Civ App, 291 SW 2d 366, err ref no rev err

50. Ill—Harrison v Missouri Pac R Co, 181 NE 2d 737, 35 Ill App 2d 66 Revd on oth grds 83 SCt 690, 372 US 248, 9 LEd 2d 711

58. Ala—Atlantic Coast Line R Co v Barnes, 75 So 2d 91, 261 Ala 496

Ill—Eggenshoff v New York, C & St L R Co, 141 NE 2d 72, 13 Ill App 2d 85

Mo—Winters v Terminal R Ass'n of St. Louis, 252 S.W.2d 380

99. US—Smith v Leigh Valley R Co, CANY, 174 F2d 592

Ga—Atlantic Coast Line R Co v Heyward, 60 SE 2d 641, 82 Ga App 337

page 80

61. Malpractice against railroad's examining physician not required

US—Dunn v Conemaugh & Black Lick RR D.C. Pa, 162 F Supp 124, affd C.A., 267 F2d 571

65. Ill—Burnett v Caho, 285 NE 2d 619, 7 Ill App 3d 266

Vt—Norton v Lumbra, 218 A2d 628, 127 Vt 64

66. Ga—Mobley v Durham Iron Co, 64 SE 2d 469, 83 Ga App 690—Palmer v Webb, 135 SE 2d 71, 109 Ga App 44—Owensby v Jones, 136 SE 2d 451, 109 Ga App 398

Mo—Crandall v McGilvray, 270 SW 2d 793

67. Ga—Mobley v Durham Iron Co, 64 SE 2d 469, 83 Ga App 690—Owensby v Jones, 136 SE 2d 451, 109 Ga App 398

70. Ga—Hill v Dawson-Paton Co, 57 SE 2d 680, 80 Ga App 840

74. Neb—Ellis v Union Pac. R Co, 19 NW 2d 641, 146 Neb 397, adhered to 22 NW 2d 305, 147 Neb 18, revd on oth grds 67 SCt 598, 129 US 649, 9 LEd 572

page 81

79. US—Kaminski v Chicago River & Ind R Co, C.A. Ill, 200 F2d 1

83. Ark—Holbert v Slaughter, 296 SW 2d 402, 227 Ark 144

86. Iowa—Erickson v Erickson, 94 NW 2d 728, 250 Iowa 491—Van Aernam v Nielsen, 157 NW 2d 138, 261 Iowa 1115

Pa—Sarns v Baltimore & O R Co, 87 A2d 264, 370 Pa 82

Elements to be proven

Mont—D'Hooge v McCann, 443 P2d 747, 151 Mont 151

page 82

87. Iowa—Van Aernam v Nielsen, 157 NW 2d 138, 261 Iowa 1115

88. Vt—Painter v Nichols, 108 A2d 384, 118 Vt 306

89. Mont—Wollan v Lord, 185 P2d 102, 142 Mont 498

page 83

2. NY—Petro v Paterno, 101 NYS 2d 391, 277 App Div 496, revd on oth grds 100 NE 2d 176, 302 NY 884

page 84

5. Mass—Brooks v Eliot Sav Bank, 89 NE 2d 508, 325 Mass 159

NY—Kopeck v Berman, 207 NYS 2d 140

Pa—Sarns v Baltimore & O R Co, 87 A2d 264, 370 Pa 82

13. US—Page v St. Louis Southwestern Ry Co, C.A. Tex, 312 F2d 84, 98 ALR 2d 639—Mumma v Reading Co, DCPa, 247 F Supp 252—Paluch v Erie Lackawanna R Co, C.A. N.J., 387 F2d 996

Cal—Torres v Southern Pac Co, 67 Cal Rptr 428, 260 CA 2d 757

Ill—Moore v Atchison, T & SF Ry Co, 171 NE 2d 393, 28 Ill App 2d 340, 97 ALR 2d 511

NY—Martin v Pennsylvania R Co, 246 NYS 2d 264, 20 AD 2d 636

Ohio—Bergfeld v New York, C & St L R Co, 144 NE 2d 483, 103 Ohio App 87

Tex—Missouri-Kansas-Texas R Co v Wright, Civ App, 311 SW 2d 440, err dem by agreement

§ 502. — Effect of Constitutional and Statutory Provisions

Library References

Employers' Liability ⇨190.

page 85

17. Cal—Souza v Pratico, 54 Cal Rptr 159, 245 C 2d 651

Ill—Hylak v Mutual, Inc., 80 NE 2d 411, 335 Ill App 48

Okla—St. Louis San Francisco Ry Co v McBride, 376 P2d 214

Tex—Hallaway v Thompson, 226 SW 2d 816, 185 Tex 471

Presumption rebutted

Cal—Judd v Chabot, 328 P2d 245, 162 CA 2d 574

20. Utah—King v Denver & Rio Grande Western R Co, 211 P2d 433, 116 Utah 488

22 Proof of violation of statute

Cal—Harris v Chromore, 85 Cal Rptr 223, 5 CA 3d 494

23. US—Kautz v Delaware L & W R Co, D.C. Pa, 129 F Supp 777

Ill—Woods v New York C & St L R Co, 88 NE 2d 740, 339 Ill App 132, cert den 71 SCt 48, 340 US 830, 95 F2d 610

§ 503. Admissibility

Library References

Employers' Liability ⇨198

page 86

33. US—Terminal R Ass'n of St. Louis v Fitzjohn, CCA Mo, 165 F2d 473, 1 ALR 2d 290—Bridge v Union Ry Co, C.A. Tenn, 155 F2d 382

Ky—Taylor v Blackburn, 356 SW 2d 767

Or—Davis v Angell, 345 P2d 405, 218 Or 443

Evidence held admissible

(1) US—Casso v Pennsylvania R Co, DCPa, 128 F Supp 909—Nuttall v Reading Co, C.A. Pa, 215 F2d 546

Cal—Atherley v MacDonald, Young & Nelson, Inc., 298 P2d 700, 142 CA 2d 575

Fla—Alford v Meyer, App, 201 So 2d 489

Ill—Washburn v Terminal R R Ass'n of St. Louis, 252 NE 2d 189, 114 Ill App 2d 95

N.J.—Budd v Erie Lackawanna R Co, 236 A2d 143, 98 NJ Super 47

Wash—Currie v Union Oil Co of Cal, 307 P2d 1056, 49 Wash 2d 898—Sage v Northern Pac Ry Co, 380 P2d 856, 62 Wash 2d 6

Evidence held inadmissible

(1) US—Rothwell v Pennsylvania R Co, DCPa, 87 F Supp 706—Southern Pac Co v Ibbey, C.A. Cal, 199 F2d 141—Texas & Pac Ry Co v Buckles, C.A. La, 212 F2d 257, cert den 76 SCt 1052, 351 US 984, 100 LEd 1498—Kelly v New York, N.H. & H.R. Co, D.C. Mass, 138 F Supp 82—Rice v Louisville & N.R. Co, C.A. Ky, 309 F2d 930—Dixon v Pennsylvania R Co, C.A. Pa, 378 F2d 392

Ga—Bennett v Southern Ry Co, 160 SE 2d 677, 117 Ga App 414

Mo—Shepherd v St. Louis-San Francisco R Co, 510 SW 2d 432

Or—McLean v Golden Gate Hop Ranch of Or, 244 P2d 611, 194 Or 26

35. US—Sears v Southern Pac Co, C.A. Cal, 313 F2d 498

36. US—Ceresite v New York, N.H. & H.R. Co, CANY, 231 F2d 30, cert den 76 SCt 848, 351 US 951, 100 LEd 1475—Sears v Southern Pac Co, C.A. Cal, 313 F2d 498

Ill—LeMaster v Chicago R I & P R Co, 343 NE 2d 65, 35 Ill App 3d 1001

39. Ky—Louisville & N.R. Co v Stephens, 182 SW 2d 447, 298 Ky 328

45 Evidence held inadmissible

(1) US—Farmer v Pennsylvania R Co, DCPa, 311 F Supp 1074

Ill—Foster v New York, C & St L R Co, 168 NE 2d 61, 26 Ill App 2d 337

Evidence held inadmissible

(1) *US—Southern Pac Co v Libbey*, C A Cal, 199 F 2d 341—*Knutrim v Erne Lackawanna R Co*, C A N Y, 424 F 2d 745

Tex—Atchison, T & S F R Co v Ham, Civ App, 454 S W 2d 451, err ref no rev err

§ 504. — Employment or Relation of Master and Servant

Library References**Employers' Liability** ¶198, 199**page 87**

46 *Ala—Stephens v Central of Georgia R Co*, 367 So 2d 192

Evidence held not admissible

US—Terminal R Ass'n of St Louis v Fitzjohn, supra, n 11

Mo—Amon v Southern Ry Co, 273 S W 2d 155
Or—Galer v Weyerhaeuser Timber Co, 344 P 2d 544, 218 Or 152

Tex—Baker v Texas & P Ry Co, Civ App, App, 309 S W 2d 92, err ref no rev err Revd on oth grds, 79 S Ct 664, 359 U S 227, 3 L Ed 2d 756

56. *Ill—Lees v Chicago & N W Ry Co*, 89 N E 2d 418, 139 Ill App 227, remd 100 N E 2d 653, 409 Ill 536

§ 505. — Nature, Cause, and Extent of Injury

Library References**Employers' Liability** ¶198, 200**page 88**

66 *US—Stanczak v Pennsylvania R Co*, C A III, 174 F 2d 43

Evidence held not admissible

Or—Downey v Traveler's Inn, 412 P 2d 359, 243 Or 206

Evidence held inadmissible

Mo—Harp v Illinois Cent R Co, 370 S W 2d 387

74. *Ga—Atlantic Coast Line R Co v McDonald*, 119 S E 2d 356, 103 Ga App 328

§ 506. — Negligence of Employer in General

Library References**Employers' Liability** ¶201**page 89**

78. *US—Boston & M R P v Talbert*, C A N H, 360 F 2d 246

NH—Descoiteau v Boston & M R R, 140 A 2d 579, 101 N H 271

Tex—Harmon v Sears, Roebuck & Co, Civ App, 324 S W 2d 92, err ref no rev err

Evidence held admissible

(1) *US—Dunn v Conemaugh & Black Lick R R*, C A Pa, 267 F 2d 571

Ohio—Wright v Cincinnati, N O & T P Ry Co, 152 N E 2d 421, 107 Ohio App 310, cert den 79 S Ct 897, 359 U S 979, 3 L Ed 2d 928

Okla—Kansas City Southern Ry Co v Johnston, 429 P 2d 720, cert den 88 S Ct 481, 389 U S 985, 19 L Ed 2d 471

Tex—Missouri-Kansas-Texas R Co of Tex v Bush, Civ App, 310 S W 2d 404, err ref no rev err Cert den 79 S Ct 45, 358 U S 827, 3 L Ed 2d 67

Evidence held inadmissible

Mont—Jackson v William Dugwall Co, 399 P 2d 236, 145 Mont 127

§ 507. — Care of Inexperienced or Youthful Employee

Library References**Employers' Liability** ¶201

79 *Tenn—Duncan v Dickie Rector Lumber Co*, 212 S W 2d 908, 31 Tenn App 155

80 Evidence as to employer's knowledge of age held inadmissible

Cal—Blundell v Atchison, T & S F Ry Co, 322 P 2d 66, 157 C A 2d 797

82 *US—CJS cited in Swartz v Eberly*, D C Pa, 212 F Supp 32, 36

page 90**Ordinance regulating speed****(2) Evidence held inadmissible**

Fla—Florida East Coast Ry Co v Pollack, App, 154 So 2d 346

§ 509. — Conditions before or after Injury

Library References**Employers' Liability** ¶201

99 *US—Dobson v Grand Trunk Western R Co*, C A III, 248 F 2d 545

Ky—CJS cited in Happy-Seuddy Coal Co v Combs, 219 S W 2d 968, 970, 310 Ky 52

Mo—Griffith v Gardner, 217 S W 2d 519, 358 Mo 859

page 91

5 *Minn—Woodrow v Chicago, M, St P & P R Co*, 60 N W 2d 49, 239 Minn 530, foli 61 N W 2d 240, 240 Minn 562, cert den 74 S Ct 630, 347 U S 935, 98 L Ed 1085

Miss—St Louis-San Francisco Ry Co v Dyson, 43 So 2d 95, 207 Miss 639

NC—Mintz v Atlantic Coast Line R Co, 72 S E 2d 38, 236 N C 109

Tex—Texas & N O R Co v Pool, Civ App, 263 S W 2d 582

Evidence held admissible as to

(4) *US—Keohane v New York Cent R Co*, C A N Y, 418 F 2d 478

8 Condition of employee

Cal—Mangrum v Union Pac R Co, 41 Cal Rptr 536, 230 C A 2d 960, 16 A L R 3d 543

13. *US—Ceresite v New York, N H & H R Co*, C A N Y, 231 F 2d 50, cert den 76 S Ct 848, 351 U S 951, 100 L Ed 1475

15. *Minn—Woodrow v Chicago, M, St P & P R Co*, supra, n 5

Mo—Reid v Terminal R Ass'n of St Louis, App, 306 S W 2d 630

NY—Simon v Ora Realty Corp, 163 N Y S 2d 39, 1 N Y 2d 388, 135 N E 2d 580

NC—Martin v Curren, 53 S E 2d 447, 230 N C 511

16. *Ala—Atlantic Coast Line R Co v Dunivant*, 91 So 2d 670, 265 Ala 420

19. *NC—Mintz v Atlantic Coast Line R Co*, supra, n 5

page 92

20. *La—Trahan v Liberty Mut Ins Co*, App, 273 So 2d 331, writ den, Sup, 275 So 2d 791

21. *Ga—Atlantic Coast Line R Co v Brown*, 92 S E 2d 874, 93 Ga App 805

§ 510. — Precautions against Recurrence of Injury

Library References**Employers' Liability** ¶201

29. *US—Cagle v McQueen*, C A Tex, 200 F 2d 186, cert den 74 S Ct 25, 346 U S 815, 98 L Ed 342

Ky—Chesapeake & O Ry Co v Jenkins, 227 S W 2d 906, 312 Ky 470

Md—Long v Joestlein, 66 A 2d 407, 193 Md 211

Miss—Chicago Mill & Lumber Co v Carter, 45 So 2d 854, 209 Miss 71

Or—Fields v Fields, 326 P 2d 451, 213 Or 522

page 93

30. *Or—Williams v Portland General Elec Co*, 247 P 2d 494, 195 Or 597

Under Federal Employers' Liability Act

Or—Rich v Tite-Knot Pine Mill, 421 P 2d 370, 245 Or 185

31 Precautions there in use

NY—MacClave v City of New York, 265 N Y S 2d 222, 24 A D 2d 230, affd 227 N E 2d 885, 19 N Y 2d 892, 281 N Y S 2d 86

§ 511. — Similar Facts and Occurrences

Library References**Employers' Liability** ¶201**page 94**

55. *US—Ceresite v New York, N H & H R Co*, C A N Y, 231 F 2d 50, cert den 76 S Ct 848, 351 U S 951, 100 L Ed 1475

Ala—Atlantic Coast Line R Co v Dunivant, 91 So 2d 670, 265 Ala 420

Fla—Railway Exp Agency, Inc v Fulmer, 227 So 2d 870

Ga—Atlantic Coast Line R Co v Godard, 92 S E 2d 626, 93 Ga App 671

Tex—Missouri-Kansas-Texas R Co of Tex v Bush, Civ App, 310 S W 2d 404, err ref no rev err Cert den 79 S Ct 45, 358 U S 827, 3 L Ed 2d 67

59. Evidence of previous occurrences held admissible

(1) *US—Atlantic Coast Line R Co v Gunter*, C A Fla, 229 F 2d 842

Okla—Kansas City Southern Ry Co v Johnston, 429 P 2d 720, cert den 88 S Ct 481, 389 U S 985, 19 L Ed 2d 471

62 *Mo—Warning v Thompson*, 249 S W 2d 335, 30 A L R 2d 1176

67 *Okla—Midland Val R Co v Manos*, 307 P 2d 545

page 95

71. *US—La France v New York, N H & H R Co*, D C Conn, 191 F Supp 164, affd, C A, 292 F 2d 649—*Rice v Louisville & N R Co*, C A Ky, 344 F 2d 776

Ga—Atlantic Coast Line R Co v Brown, 92 S E 2d 874, 93 Ga App 805

Utah—Wilson v Union Pac R Co, 231 P 2d 715, 119 Utah 632

Minn—Albertson v Chicago, M, St P & P R Co, 64 N W 2d 175, 242 Minn 50, 42 A L R 2d 1044

74. *US—Whitley v Texas & Pac Ry Co*, C A La, 328 F 2d 308

78. *US—Bridger v Union Ry Co*, C A Tenn, 355 F 2d 382

78 *Fla—Fulmer v Railway Exp Agency, Inc*, App, 215 So 2d 48, mod on oth grds, Sup, 227 So 2d 870

Iowa—Smith v J C Penney Co, 149 N W 2d 794, 260 Iowa 573

Or—Downey v Traveler's Inn, 412 P 2d 359, 243 Or 206

80. *Fla—Chambers v Loftin*, 67 So 2d 220

81. *Fla—Chambers v Loftin*, supra, n 80

Ga—Chandler v Gately, 167 S E 2d 697, 119 Ga App 513

83. *US—Detroit, T & I R Co v Banning*, C A Mich, 173 F 2d 752, cert den 70 S Ct 54, 338 U S 815, 94 L Ed 493, and 70 S Ct 57, 338 U S 815, 94 L Ed 493—*Hartel v Long Island R Co*, C A N Y, 476 F 2d 462, cert den 94 S Ct 273, 414 U S 980, 38 L Ed 2d 224

Cal—Anderson v Southern Pac Co, 41 Cal Rptr 743, 231 C A 2d 233

Exercise of discretion

Cal—Anderson v Southern Pac Co, 41 Cal Rptr 743, 231 C A 2d 233

Page 95

§ 512. — Defective or Dangerous Machinery, Appliances, and Places

Library References

Employers' Liability ⇐201

page 96

86. US—Boston & M.R.R. v Talbert, C.A.N.H., 360 F.2d 286
Ala—Central of Georgia Ry Co v Steed, 248 So.2d 110, 287 Ala 64
Cal—Trituit v Southern Pac Co, 245 P.2d 1083, 112 C.A.2d 218
Minn—Woodrow v Chicago, M., St. P. & P.R. Co, 60 N.W.2d 49, 239 Minn 530, foll 61 N.W.2d 240, 240 Minn 562, cert den 74 S.Ct. 630, 347 U.S. 935, 98 L.Ed. 1085
Or—Baldassarre v West Oregon Lumber Co, 239 P.2d 839, 193 Or 556

Evidence held admissible

- (1) US—Sleeman v Chesapeake & O.R. Co, D.C. Mich., 290 F.Supp. 817, affd in part, vac in part on oth grds, C.A., 414 F.2d 305, on remand 305 F.Supp. 33, vac on oth grds 424 F.2d 547
87. US—Stanczak v Pennsylvania R. Co, C.A.III, 175 F.2d 43
89. Cal—State Compensation Ins. Fund v Operated Equipment Co, 71 Cal Rptr 531, 265 C.A.2d 759
Ga—Atlanta Joint Terminals v Knight, 106 S.E.2d 417, 98 Ga App 482, 79 A.L.R.2d 539
90. Ind—Central Indiana Ry Co v Anderson Banking Co, 240 N.E.2d 840, 143 Ind App 396

Evidence held admissible

- (1) Fla—Hodge v Jacksonville Terminal Co, App., 222 So.2d 483, decision quashed in part remd, Sup., 234 So.2d 645, cert den 91 S.Ct. 142, 400 U.S. 904, 27 L.Ed.2d 141, app after remand 260 So.2d 521, cert den 93 S.Ct. 311, 409 U.S. 980, 34 L.Ed.2d 243
92. Ill—Woodruff v Pennsylvania R. Co, 202 N.E.2d 113, 52 Ill App.2d 341
93. US—Renaldi v New York, N.H. & H.R. Co, C.A.N.Y., 230 F.2d 841, 59 A.L.R.2d 1371
Ill—Woodruff v Pennsylvania R. Co, 202 N.E.2d 113, 52 Ill App.2d 341

Evidence held admissible

- (2) Ind—Central Indiana Ry Co v Anderson Banking Co, 240 N.E.2d 840, 143 Ind App 396
95. US—Texas & P. Ry Co v Griffith, C.A.Tex., 265 F.2d 489
Ariz—Wright v Demeter, 442 P.2d 888, 8 Ariz App 65
96. Ky—Louisville and Jefferson County Bd of Health v Mulkins, 445 S.W.2d 849
97. US—Dobson v Grand Trunk Western R. Co, C.A.III, 248 F.2d 545
Mich—Jones v New York Cent. R. Co, 155 N.W.2d 216, 8 Mich App 575

Held not prejudicial error

- Ill—Welch v New York, C. & St. L.R. Co, 126 N.E.2d 165, 5 Ill App.2d 568
page 97
6. US—La France v New York, N.H. & H.R. Co, D.C.Conn., 191 F.Supp. 164, affd, C.A., 292 F.2d 649
Ill—Rouse v New York, C. & St. L.R. Co, 110 N.E.2d 266, 349 Ill App 139
Tenn—Overstreet v Norman, 314 S.W.2d 47, 44 Tenn App 343
7. Ky—Louisville and Jefferson County Bd of Health v Mulkins, 445 S.W.2d 849
8. Mo—Elbott v St. Louis Southwestern Ry Co, 487 S.W.2d 7
10. Mo—Gatzke v Terminal R.R. Ass'n of St. Louis, 321 S.W.2d 462
17. US—Schlue v Atchison, T. & S.F. Ry Co, C.A.Mo., 222 F.2d 810

page 98

23 Evidence held inadmissible

- (1) Wash—Good v West Seattle General Hospital Corp., 335 P.2d 590, 53 Wash.2d 617
25 US—Cerase v New York, N.H. & H.R. Co, C.A.N.Y., 231 F.2d 50, cert den 76 S.Ct. 848, 351 U.S. 951, 100 L.Ed. 1475
Mass—Ferrara v Boston & M.R.R., 155 N.E.2d 416, 338 Mass 323
Mo—Timmerman v Terminal R.R. Ass'n of St. Louis, 241 S.W.2d 477, 362 Mo 280
26 Cal—Aranda v Southern Pac Co, 282 P.2d 875, 44 C.2d 543, affd 76 S.Ct. 952, 351 U.S. 493, 100 L.Ed. 1357
Or—Celone v Roberts Bros., Inc., 276 P.2d 416, 202 Or 671

Evidence of customary practice may be admissible even though the practice is not shown to have been adopted for reasons of safety 265

- 265 Or—Robbins v Steve Wilson Co, 463 P.2d 585, 255 Or 4, overruling anything to contrary in Celone v Roberts Bros., Inc., 202 Or 671, 276 P.2d 416
30 Ala—Seaboard Coast Line R. Co v Gillis, 321 So.2d 202, 294 Ala 726
34 Tex—Sternberg v Marshall, Civ App., 257 S.W.2d 312, err ref no rev err

page 99

50. Neb—Brackman v Brackman, 100 N.W.2d 774, 169 Neb 650
61. US—Cahill v New York, N.H. & H.R. Co, C.A.Conn., 236 F.2d 410, cert den 77 S.Ct. 362, 352 U.S. 972, 1 L.Ed.2d 325—La France v New York, N.H. & H.R. Co, D.C.Conn., 191 F.Supp. 164, affd, C.A., 292 F.2d 649
Cal—Trituit v Southern Pac Co, 245 P.2d 1083, 112 C.A.2d 218
Ky—Happy-Scuddy Coal Co v Combs, 219 S.W.2d 968, 310 Ky 52
Length of time unsafe conditions had existed
Minn—Holweger v Great Northern Ry Co, 130 N.W.2d 354, 269 Minn 83
63. Okl—Midland Val. R. Co v Manos, 307 P.2d 545
64. R.I.—Soucy v Alux, 90 A.2d 722, 79 R.I. 499
66. US—Sears v Southern Pac Co, C.A.Cal., 313 F.2d 498

page 100

- 80 N.M.—Torres v Rosenbaum, 248 P.2d 662, 56 N.M. 663

§ 513. — Methods of Work, Rules, and Orders

Library References

Employers' Liability ⇐201

83. Fla—Florida East Coast Ry Co v Hardee, App., 162 So.2d 704
N.J.—Bascho v Pennsylvania R. Co, 65 A.2d 613, 3 N.J. Super 86
88. Ky—Chesapeake & O. Ry Co v Bhter, 413 S.W.2d 894
90. Iowa—Smith v J. C. Penney Co, 149 N.W.2d 794, 260 Iowa 573

page 101

97. Cal—Atherley v MacDonald, Young & Nelson, Inc., 298 P.2d 700, 142 C.A.2d 575
Ill—Gallo v Baltimore & O.C.T.R. Co, 83 N.E.2d 356, 336 Ill App 309
6. Okl—Midland Val. R. Co v Manos, 307 P.2d 545
9. Okl—Missouri-Kansas-Texas R. Co v Miller, 486 P.2d 630

14. Ark—Smith v Aaron, 308 S.W.2d 320, 256 Ark 414

15. Ill—Wawryszyn v Illinois Cent. R. Co, 135 N.E.2d 154, 10 Ill App.2d 394, 61 A.L.R.2d 801

Evidence held admissible

- (1) US—Casso v Pennsylvania R. Co, D.C.Pa., 128 F.Supp. 909
Okl—St. Louis-San Francisco Ry Co v King, 278 P.2d 845
(5) Mo—Schroeck v Terminal R.R. Ass'n of St. Louis, 305 S.W.2d 18, 62 A.L.R.2d 1416
16. Ohio—Schwer v New York, C. & St. L.R. Co, 117 N.E.2d 696, 161 Ohio St. 15, 43 A.L.R.2d 606

Evidence held admissible

- (1) US—Silvestri v New York, C. & St. L.R. Co, D.C.Pa., 180 F.Supp. 491, affd, C.A., 274 F.2d 666
Ill—Campbell v Chesapeake & O. Ry Co, 183 N.E.2d 736, 36 Ill App.2d 276
Mo—Wright v Chicago, B. & Q.R. Co, 392 S.W.2d 401
Tenn—Thurmer v Southern Ry Co, 293 S.W.2d 600, 41 Tenn App 354

Evidence held inadmissible

- (1) Ala—Atlantic Coast Line R. Co v Glass, 50 So.2d 749, 255 Ala 183
Cal—Crowder v Atchison, T. & S.F. Ry Co, 256 P.2d 85, 117 C.A.2d 568

Post operative policy restricting physical activity

- US—Dunn v Conemaugh & Black Lick R.R., D.C. Pa., 162 F.Supp. 324, affd, C.A., 267 F.2d 571
16 US—Panger v Duluth, W. & P. Ry Co, C.A. Minn., 490 F.2d 1112

page 102

- 17 US—Barnes v Norfolk Southern Ry Co, C.A. Va., 333 F.2d 192—Randall v Reading Co, D.C. Pa., 344 F.Supp. 879
Ill—Coleman v Gulf, M. & O.R. Co, 149 N.E.2d 656, 17 Ill App.2d 220
Ohio—Schwer v New York, C. & St. L.R. Co, supra, n 16

Evidence held admissible

- (1) US—Renaldi v New York, N.H. & H.R. Co, C.A.N.Y., 230 F.2d 841, 59 A.L.R.2d 1371
Ill—Welch v New York, C. & St. L.R. Co, 126 N.E.2d 165, 5 Ill App.2d 568—Domer v New York, C. & St. L.R. Co, 157 N.E.2d 280, 21 Ill App.2d 125
Ky—Chesapeake & O. Ry Co v Bhter, 413 S.W.2d 894

- Mont—Callihan v Great Northern Ry Co, 350 P.2d 369, 137 Mont 93

Evidence held inadmissible

- (1) Ill—Donnelly v Pennsylvania R. Co, 97 N.E.2d 846, 342 Ill App 556, affd 105 N.E.2d 730, 412 Ill 115, cert den 73 S.Ct. 93, 344 U.S. 855, 97 L.Ed. 663
(2) Kraus v Reading Co, C.C.A.Pa., 167 F.2d 313

Evidence of interpretation of rules

- (1) Tex—Texas & N.O.R. Co v Arnold, Civ App., 381 S.W.2d 388, app dismissed, Sup., 389 S.W.2d 181

19 Evidence held inadmissible

- (3) Other evidence
US—Zappa v Baltimore & O.R. Co, C.A. Ohio, 312 F.2d 62

§ 514. — Warning and Instructing Employee

Library References

Employers' Liability ⇐201

page 103

26. Ind—Central Indiana Ry Co v Anderson Banking Co, 240 N.E.2d 840, 143 Ind App 396
29 N.Y.—Hefele v City of New York, 267 N.Y.S.2d 946, 25 A.D.2d 142

37. Failure of hospital physicians to warn plaintiff

Cal—Anderson v Southern Pac Co, 41 Cal Rptr 743, 231 C A 2d 233

§ 515. — Insufficient Force for Work

Library References

Employers' Liability ⚡201

page 104

40. Ill—Hollis v Terminal R.R. Ass'n of St. Louis, 218 N E 2d 231, 72 Ill App 2d 13

Mo—CJS cited in Johnson v Missouri-Kansas-Texas Railroad Company, 334 S W 2d 41, 45

Prior request for additional help held inadmissible

US—Shea v New York, N H & H R Co, C A Mass, 316 F 2d 838, 99 A L R 2d 1182

41. Okl—Midland Val R Co v Manion, 307 P 2d 545

§ 516. — Employment or Retention of Incompetent Employees

Library References

Employers' Liability ⚡202

56. Miss—Statham v Blaine, 107 So 2d 93, 234 Miss 649, motion gr to correct 108 So 2d 213, 234 Miss 649

page 105

77. Ill—Fugl v Terminal R.R. Ass'n of St. Louis, 332 N E 2d 416, 30 Ill App 3d 55

§ 517. — Negligence of Fellow Servant

Library References

Employers' Liability ⚡203

page 106

90. Tex—Texas & P Ry Co v Hagenloh, Civ App, 241 S W 2d 669, aff'd, Sup, 247 S W 2d 236, 151 Tex 191

95. Or—Hval v Southern Pac Transp Co, 592 P 2d 1046, 39 Or App 479

96. R I—Furlong v Donahale, Inc, 137 A 2d 734, 87 R I 46

§ 518. — Assumption of Risk

Library References

Employers' Liability ⚡204.

page 107

4. Utah—McGowan v Denver & R G W R Co, 244 P 2d 628, 121 Utah 587, cert den 73 S Ct 346, 344 U S 918, 97 L Ed 707

Application for employment

(2) US—Byler v Wabash R Co, C A Mo, 196 F 2d 9, cert den 73 S Ct 27, 344 U S 826, 97 L Ed 643

§ 519. — Contributory Negligence

Library References

Employers' Liability ⚡205

page 108

23. Ariz—Haines v Southern Pac Co, 436 P 2d 159, 7 Ariz App 65, cert den, 89 S Ct 134, 393 U S 860, 21 L Ed 2d 127

Ill—Bardo v Chicago River & I R Co, 231 N E 2d 713, 87 Ill App 2d 445

26. US—Walsh v Michle-Goss-Dexter, Inc, C A Pa, 378 F 2d 409

33. Ill—March v Hiramman, 137 N E 2d 279, 11 Ill App 2d 245

Utah—McGowan v Denver & R G W R Co, 244 P 2d 628, 121 Utah 587, cert den 73 S Ct 346, 344 U S 918, 97 L Ed 707

34. Evidence too remote to be of probative value

US—Bach v Penn Central Transp Co, C A Ohio, 502 F 2d 1117

page 109

38. Ill—LeMaster v Chicago R I & P R Co, 343 N E 2d 65, 35 Ill App 3d 1001

45. US—Panger v Duluth, W & P Ry Co, C A Minn, 490 F 2d 1112

46. US—Casso v Pennsylvania R Co, D C Pa, 128 F Supp 909

49. US—Casso v Pennsylvania R Co, supra, n 46—Murray v New York, N H & H R Co, C A N Y, 255 F 2d 42

Ga—Atlantic Coast Line R Co v Daugherty, 157 S E 2d 880, 116 Ga App 438

Or—Ritter v Beale, 358 P 2d 1080, 225 Or 504

50. Mich—Funk v General Motors Corp, 220 S W 2d 641, 392 Mich 91

page 110

80. R I—White v Alexson, 87 A 2d 853, 79 R I 297

page 111

82. US—Murray v New York, N H & H R Co, C A N Y, 255 F 2d 42

Ariz—Haines v Southern Pac Co, 436 P 2d 159, 7 Ariz App 65, cert den 89 S Ct 134, 393 U S 860, 21 L Ed 2d 127

Or—Hval v Southern Pac Transp Co, 592 P 2d 1046, 39 Or App 479

83. Tex—Missouri Pac R Co v Cunningham, Civ App, 515 S W 2d 678, err gr

85. Tex—Thompson v Brown, Civ App, 222 S W 2d 442

87. Ill—Nickell v Baltimore & O R Co, 106 N E 2d 738, 347 Ill App 202

92. Ga—Thompson v Atlantic Coast Line R Co, 96 S E 2d 206, 94 Ga App 683, rev'd on oth grds 97 S E 2d 135, 213 Ga App 70, conf to 98 S E 2d 102, 95 Ga App 475

page 112

13. Mo—Spears v Schantz, 246 S W 2d 399, 241 Mo App 879

Under Federal Employers' Liability Act

18. US—Casso v Pennsylvania R Co, D C Pa, 128 F Supp 909

Mo—Cleghorn v Terminal R Ass'n of St. Louis, 289 S W 2d 13

§ 520. Weight and Sufficiency

Library References

Employers' Liability ⚡206

page 113

36. US—Shevlin-Hixon Co v Smith, CCA Or, 165 F 2d 170

Ill—Abrahamson v Nickel Plate R Co, 99 N E 2d 153, 343 Ill App 353

Miss—Collins v McLann, 40 So 2d 183

R I—White v Alexson, 87 A 2d 853, 79 R I 297
Utah—Williamson v Denver & R G W R Co, 487 P 2d 316, 26 Utah 2d 178

Violation of child labor statute

(2) Other cases

La—Cutrer v Southdown Sugars, App, 42 So 2d 314

Evidence held to support verdict for employer
US—Remer v Northern Pac Terminal Co of Or, C A Or, 259 F 2d 438—Loan v Southern Ry Co, C A Va, 344 F 2d 701

Cal—Benson v Brady, 2 Cal Rptr 124, 177 C A 2d 280

Ill—Foster v Union Starch & Refining Co, 137 N E 2d 499, 11 Ill App 2d 346

Mont—Dewar v Great Northern Ry Co, 435 P 2d 887, 150 Mont 367

Okla—Jenkins v Armour & Co, 261 P 2d 584

Or—Williams v Clemens' Forest Products, 216 P 2d 241, 188 Or 572, reh den 217 P 2d 252, 188 Or 572

Tenn—Benson v Fowler, 306 S W 2d 49, 43 Tenn App 147

Tex—Texas & P Ry Co v Hagenloh, 247 S W 2d 236, 151 Tex 191

Utah—Williams v Ogden Union Ry & Depot Co, 230 P 2d 315, 119 Utah 529—Arellano v Western Pac R Co, 298 P 2d 527, 5 Utah 2d 146

Wis—Anderson v Joint School Dist No 3, Village of Luck, 129 N W 2d 545, 24 Wis 2d 580, reh den 130 N W 2d 105, 24 Wis 2d 580

Evidence held sufficient to support verdict for employee

US—Neff v Pennsylvania R Co, D C Pa, 7 FRD 532, aff'd, C A, 173 F 2d 931—Ruddy v New York Cent R Co, D C N Y, 124 F Supp 470, aff'd in part and rev'd in part on oth grds, C A, 224 F 2d 96, cert den 76 S Ct 137—Martin v Black, C A Fla, 221 F 2d 567—Dotson v Pennsylvania R Co, D C Pa, 142 F Supp 509—Cinchfield R Co v Erwin, C A Tenn, 249 F 2d 719
Ark—Cooley v Walther, 291 S W 2d 515, 226 Ark 612

Ga—Atlantic Coast Line R Co v Anderson, 44 S E 2d 576, 75 Ga App 829—Atlantic Coast Line R Co v Brown, 92 S E 2d 874, 93 Ga App 805—Southern Ry Co v Garner, 114 S E 2d 211, 101 Ga App 371—Atlantic Coast Line R Co v McDonald, 119 S E 2d 356, 103 Ga App 2d 328—Seaboard Coast Line R Co v Daugherty, 164 S E 2d 269, 118 Ga App 518, cert den 90 S Ct 930, 397 U S 939, 25 L Ed 2d 120

Ill—Starck v Chicago & N W Ry Co, 123 N E 2d 826, 4 Ill 2d 611

Iowa—Shenhan v Plagge, 121 N W 2d 120, 255 Iowa 182

Ky—Engle Coal Co v Drake, 311 S W 2d 563

N Y—Stauffer v Coca-Cola Bottling Co of New York, 9 N Y S 2d 614, 256 App Div 898—Benjamin v Pennsylvania R Co, 112 N Y S 2d 824

Tenn—Thom v Hayborn, 260 S W 2d 376, 37 Tenn App 56

Tex—Southern Pac Co v Hubbard, Civ App, 280 S W 2d 547, rev'd on oth grds 297 S W 2d 120, 156 Tex 525—Southern Pac Co v Lauderdale, Civ App, 448 S W 2d 800, err ref no rev err
Va—Tyree v Larrew, 158 S E 2d 140, 208 Va 382

Evidence held insufficient to support verdict for employee

Ga—Atlantic Coast Line R Co v Godard, 86 S E 2d 311

Sufficiency determined by common-law concepts

Okla—Atchison, T & S F Ry Co v Hicks, 258 P 2d 672, 208 Okl 689

Rule of liberality applies under Federal Employers' Liability Act

Ga—Southern Ry Co v Hamilton, 149 S E 2d 842, 113 Ga App 778

37. Tex—Southern Pac Co v Lauderdale, Civ App, 448 S W 2d 800, err ref no rev err

38. In Federal Employers' Liability Act cases, railroad employee given benefit of every doubt

US—Ratigan v New York Cent R Co, C A N Y, 291 F 2d 548, cert den 82 S Ct 144, 368 U S 891, 7 L Ed 2d 89

Mo—Kutz v Terminal R R Ass'n of St. Louis, App, 367 S W 2d 55

Judicial appraisal of sufficiency required

US—Shea v New York, N H & H R Co, C A Mass, 316 F 2d 838, 99 A L R 2d 1182

Page 113

Ga—Georgia, S & F Ry Co v Meeks, 134 SE2d 555, 108 Ga App 808, rev'd on oth grds 84 SCt 1628, 377 US 405, 12 L Ed 2d 495, on remand 137 SE2d 919, 110 Ga App 143

Evidence held insufficient to show injury

US—Sligh v Columbia, N & L R Co, D C S C, 250 F Supp 490, aff'd, C A 370 F2d 979, cert den 87 SCt 1349, 386 US 1007, 18 L Ed 2d 434

39. US—Kautz v Delaware, L & W R Co, D C Pa, 129 F Supp 777—Teets v Chicago, South Shore & South Bend R R, D C Ill, 137 F Supp 340, rev'd on oth grds, C A, 238 F2d 223

Scintilla of evidence

US—Kuberski v New York Cent R Co, C A N Y, 359 F2d 90, cert den 87 SCt 1475, 386 US 1036, 18 L Ed 2d 600

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III—Abrahamson v Nickel Plate R Co, supra n 36—Cruz v Gulf, M & O R Co, 129 NE2d 272, 7 Ill App 2d 209

Mo—Wiser v Missouri Pac R Co, 301 SW2d 37 Under Federal Employers' Liability Act it has been held that speculation alone may be sufficient to support a verdict

US—Gibson v Elgin, J & E Ry Co, C A Ind, 246 F2d 834, cert den 78 SCt 270, 355 US 897, 2 L Ed 2d 193

Defendant's evidence

III—Lester v Hennessey, 156 NE2d 247, 20 Ill App 2d 479

43. US—Steele v Louisville & N R Co, C A Ohio, 506 F2d 315

Okla—Midland Val R Co v Manios, 307 P2d 545 page 114

45. NY—Bard v New York Cent R Co, 86 NE2d 567, 299 NY 213

48. US—Atlantic Coast Line R Co v Craven, C A Va, 185 F2d 176, cert den 71 SCt 571, 340 US 952, 95 L Ed 686

49. US—Kelly v General Elec Co, D C Pa, 110 F Supp 4, aff'd, C A, 204 F2d 692, cert den 74 SCt 137, 346 US 886, 98 L Ed 390

Cal—Sullivan v Matt, 278 P2d 499, 130 CA2d 134

§ 521. — Existence of Relation of Master and Servant

Library References

Employers' Liability ⇐206, 207

page 115

51. La—James v Lykes Bros SS Co, App, 175 So 2d 444, application den 178 So 2d 653, 248 La 358

53. La—Woodell v Mansfield Hardwood Lumber Co, App, 110 So 2d 167

Evidence held sufficient to support finding that physician certifying plaintiff fit to work was defendant's employee.

US—Dunn v Conemaugh & Black Lick R R, C A Pa, 267 F2d 571

54. Mo—Benham v McCoy, 213 SW2d 914

W Va—Walls v McKinney, 81 SE2d 901, 139 W Va 866

New employment shown

Iowa—Sheahan v Plagge, 121 NW2d 120, 255 Iowa 182

Nature of occupation

Iowa—Sheahan v Plagge, 121 NW2d 120, 255 Iowa 182

55. US—Southern Ry Co v Crosby, C A S C, 201 F2d 878, 36 ALR2d 1186—Dougall v Spokane, P & S Ry Co, C A Or, 207 F2d 843, cert den 74 SCt 429, 347 US 904, 98 L Ed 1063—Byrme

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III—Downs v Baltimore & O R Co, 102 NE2d 537, 345 Ill App 118, 30 ALR2d 503

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Mass—Wheatley v Kaplan, 136 NE2d 191, 334 Mass 455

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N C—Kientz v Carlton, 96 SE2d 14, 245 NC 236

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Tex—Story v Partridge, Civ App, 298 SW2d 662, err ref no rev err

Wash—Ackerman v Terpema, 445 P2d 19, 74 Wash 2d 209

Evidence held sufficient to show that employment had ceased prior to accident

Ky—Blue Ridge Min Co v Dobson, 310 SW2d 52

Lack of willful falsification inducing defendant to hire plaintiff

Utah—Lemmon v Denver & R G W R Co, 341 P2d 215, 9 Utah 2d 195

56. US—Miles v Pennsylvania R Co, C A Ill, 182 F2d 411—Watson v North Shore Supply Co, D C Pa, 147 F Supp 385—Okolsky v Philadelphia, B & N E R Co, D C Pa, 179 F Supp 801, app dismissed, C A, 282 F2d 70

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III—Taber v Defenbaugh, 132 NE2d 454, 9 Ill App 2d 169

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page 116

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61. Neb—Anderson v Evans, 83 NW2d 59, 164 Neb 599

§ 522. — Cause of Injury

Library References

Employers' Liability ⇐206

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64. Mo—Smith v Thompson, App, 258 SW2d 278, cert dismissed 74 SCt 66—Snyder v Chicago, R I & P R Co, App, 521 SW2d 161

Violation of statutory duty

(1) Or—Henderson v Union Pac R Co, 219 P2d 170, 189 Or 145

(3) Other matters

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page 117

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Mo—Wilmoth v Chicago, R I & P R Co, 486 SW2d 631

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Lay testimony entitled to consideration

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71. US—Trust Co of Chicago v Erie R Co, C C A Ill, 165 F2d 806, cert den 68 SCt 1513, 334 US 845, 92 L Ed 1769

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Under Federal Employers' Liability Act, it is only necessary that conclusion of jury be not outside possibility of reason on facts and circumstances shown 735

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Evidence that any negligence of employer played any part in injury

Cal.—Waller v. Southern Pac. Co., 57 Cal. Rptr. 353, 424 P.2d 937, 66 C.2d 201

Mich.—Johnson v. Chesapeake & O Ry. Co., 150 N.W.2d 178, 6 Mich. App. 611

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page 118

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Okla.—Midland Val. R. Co. v. Manos, 307 P.2d 545 S.C.—Barnwell v. Elliott, 80 S.E.2d 748, 225 S.C. 62

75. **Injury as result of unavoidable accident**
Tex.—Hullum v. St. Louis Southwestern Ry. Co., Civ. App., 384 S.W.2d 163, err. ref. no rev. err., cert. den. 86 S.Ct. 244, 382 U.S. 906, 15 L.Ed.2d 159, reh. den. 86 S.Ct. 387, 382 U.S. 949, 15 L.Ed.2d 357

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III—Amerspohl v. Illinois Cent. R. Co., 150 N.E.2d 212, 17 Ill. App. 2d 416

Ind.—Leader v. Bowley, 178 N.E.2d 445, 132 Ind. App. 528

Mass.—Carolan v. Railway Exp. Agency, 91 N.E.2d 236, 325 Mass. 477

Minn.—Hallada v. Great Northern Ry., 69 N.W.2d 673, 244 Minn. 81, cert. den. 76 S.Ct. 119, 350 U.S. 874, 100 L.Ed. 773, foll. 72 N.W.2d 74, 245 Minn. 581

Miss.—Mississippi Export R. Co. v. Dubose, 221 So.2d 713

Mo.—McClintock v. Terminal R.R. Ass'n of St. Louis, App., 257 S.W.2d 180—Boyd v. Terminal R. Ass'n of St. Louis, 289 S.W.2d 33, 58 A.L.R.2d 1222—Heppner v. Atchison, T. & S.F. Ry. Co., 297 S.W.2d 497—Wesser v. Kansas City, App., 481 S.W.2d 568

Mont.—Wollan v. Lord, 385 P.2d 102, 142 Mont. 498
NH.—Descoteau v. Boston & M.R.R., 140 A.2d 579, 101 NH. 271

N.J.—Budd v. Erie Lackawanna R. Co., 225 A.2d 171, 93 N.J. Super 166, aff'd 236 A.2d 143, 98 N.J. Super 47—Budd v. Erie Lackawanna R. Co., 236 A.2d 143, 98 N.J. Super 47

N.M.—Cinard v. Southern Pac. Co., 475 P.2d 321, 82 N.M. 55

N.Y.—Lazarczyk v. Pennsylvania R. Co., 84 N.Y.S.2d 579, 274 App. Div. 1003, motion den. 85 N.E.2d 62, 298 N.Y. 919, aff'd 87 N.E.2d 124, 299 N.Y. 709—Lyons v. Boston & M.R.R., 180 N.Y.S.2d 985, 7 A.D.2d 825

Okla.—Oklahoma Natural Gas Co. v. Walker, 269 P.2d 327—Dow v. Tarkington, 452 P.2d 135

Pa.—Sumaki v. Sauquoit Silk Co., 66 Lacl. Jur. 118
Tenn.—Freeman v. Loyd, 212 S.W.2d 912, 31 Tenn. App. 164

Tex.—J. Weingarten, Inc. v. Moore, Civ. App., 441 S.W.2d 223, aff'd in part and rev'd in part on oth. grds., Sup., 449 S.W.2d 452

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Ky.—Klingensiefel v. Dunaway, 402 S.W.2d 844

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Mass.—Gordon v. McClure, 75 N.E.2d 656, 322 Mass. 1
Minn.—Hallada v. Great Northern Ry., supra, n. 78

Miss.—Grenada Dam Constructors v. Patterson, 48 So.2d 480—Edmon v. Kochtitzky, 51 So.2d 482, 211 Miss. 301—City of Meridian v. Godwin, 185 So.2d 433

N.Y.—Benjamin v. Pennsylvania R. Co., supra, n. 36—Czerenda v. Wright, 156 N.Y.S.2d 443, 2 A.D.2d 928

Okla.—Magnolia Petroleum Co. v. Angelly, 306 P.2d 309

R.I.—White v. Alexson, supra, n. 36

Tex.—Potter v. Garner, Civ. App., 407 S.W.2d 537, err. ref. no rev. err.—J. Weingarten, Inc. v. Moore, Civ. App., 441 S.W.2d 223, aff'd in part, rev'd in part on oth. grds., Sup., 449 S.W.2d 452

Wis.—Venden v. Meusel, 85 N.W.2d 766, 2 Wis.2d 253

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Cal.—Khan v. Southern Pac. Co., 282 P.2d 78, 132 C.A.2d 410—Atherley v. MacDonald, Young & Nelson, Inc., 298 P.2d 700, 142 C.A.2d 575

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Mich.—Dennis v. Wilford, 61 N.W.2d 154, 338 Mich. 297

Mo.—Curtis v. Atchison, T. & S.F. Ry. Co., 253 S.W.2d 789, 363 Mo. 779—Schwartz v. Kansas City Southern Ry. Co., 275 S.W.2d 236, 365 Mo. 17, cert. den. 75 S.Ct. 773, 349 U.S. 931, 9 L.Ed. 1261, reh. den. 76 S.Ct. 39, 350 U.S. 855, 100 L.Ed. 760

Okla.—Connelly v. Jennings, 252 P.2d 133, 207 Okl. 554, cert. den. 73 S.Ct. 778, 345 U.S. 921, 97 L.Ed. 1353—Taylor v. Hayes, supra, n. 57

Or.—Pond v. Jantzen Knitting Mills, 190 P.2d 141, 183 Or. 256—Ritter v. Beals, 358 P.2d 1080, 225 Or. 504

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Tex.—Missouri Pac. R. Co. v. Sims, Civ. App., 350 S.W.2d 405, err. ref. no rev. err.—Prewitt v. Wal-ler, Civ. App., 423 S.W.2d 641

Wis.—Mennetti v. West Side Businessmen's Ass'n, 18 N.W.2d 487, 246 Wis. 586

page 119

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oth. grds. 89 S.Ct. 331, 393 U.S. 156, 21 L.Ed.2d 309

Miss.—Edmon v. Kochtitzky, supra, n. 79

Wis.—Davis v. Skille, 107 N.W.2d 458, 12 Wis.2d 482

82. U.S.—Brogdon v. Southern Ry. Co., C.A. Tenn., 384 F.2d 220

Ala.—Alabama Great Southern R. Co. v. Smith, 54 So.2d 453, 256 Ala. 220

Cal.—Lewis v. Union Pac. R. Co., 273 P.2d 706, 127 C.A.2d 280

D.C.—Baltimore & O.R. Co. v. Jackson, C.A., 233 F.2d 660, 98 U.S. App. D.C. 169, cert. gr. 77 S.Ct. 130, 352 U.S. 889, 1 L.Ed.2d 84, aff'd 77 S.Ct. 842, 353 U.S. 325, 1 L.Ed.2d 862, reh. den. 77 S.Ct. 1391, 354 U.S. 943, 1 L.Ed.2d 1542

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III—Gilmore v. Toledo, P. & W.R. Co., 212 N.E.2d 117, 64 Ill. App. 2d 218, aff'd 224 N.E.2d 228, 36 Ill.2d 510

Minn.—Clark v. Chicago & N.W. Ry. Co., 33 N.W.2d 484, 226 Minn. 375

Ohio—Bergfeld v. New York, C. & St. L.R. Co., 144 N.E.2d 483, 103 Ohio App. 87

Tex.—Thompson v. Jason, Civ. App., 265 S.W.2d 920, err. ref. no rev. err.

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Fla.—Lofin v. Saxon, 35 So.2d 716, 160 Fla. 496

Mich.—Dennis v. Wilford, supra, n. 80

Minn.—Baumgartner v. Holstin, 52 N.W.2d 763, 236 Minn. 235

Mo.—Hampton v. Wabash R. Co., 204 S.W.2d 708, 356 Mo. 999, cert. den. 68 S.Ct. 460, 333 U.S. 833, 92 L.Ed. 1117—Blew v. Atchison, T. & S.F. Ry. Co., 245 S.W.2d 31

N.D.—Vick v. Fanning, 129 N.W.2d 268

Okla.—Chicago, R.I. & P.R. Co. v. Wright, 278 F.2d 830, cert. den. 75 S.Ct. 581, 349 U.S. 905, 99 L.Ed. 1241—Donahoe v. Moulton, 300 P.2d 655

Pa.—Kurnakly v. Unity Ry. Co., 35 A.2d 378, 357 Pa. 521, cert. den. 68 S.Ct. 734, 333 U.S. 855, 92 L.Ed. 1136

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page 120

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Page 120

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Ala.—*Louville & N.R. Co. v. Green*, 53 So 2d 358, 255 Ala. 642

Cal.—*Lewy v. Atchison, T. & S.F. Ry. Co.*, 194 P 2d 77, 86 Cal App 2d 118

Ill.—*Gray v. Pflanz*, 94 N.E.2d 693, 341 Ill App 527—*Edwards v. Chicago, R.I. & P.R. Co.*, 222 N.E.2d 117, 76 Ill App 2d 210, cert den 87 S Ct 1309, 386 U.S. 993, 18 L Ed 2d 339—*Waters v. Chicago & E.I.R. Co.*, 229 N.E.2d 151, 86 Ill App 2d 48

Ky.—*Chesapeake & O. Ry. Co. v. Yates*, 239 S.W.2d 953

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Mass.—*Machado v. Kaplan*, 96 N.E.2d 239, 326 Mass 615

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N.D.—*Goulet v. O'Keefe*, 83 N.W.2d 889

Okla.—*Patrick's, Inc. v. Mosseriano*, 292 P 2d 1003—*Myers v. Luttrell*, 373 P 2d 22

Or.—*Pelner v. Dahlke*, 434 P 2d 457, 248 Or 512, app after remand 471 P 2d 434, 256 Or 84

Tenn.—*Chaffin v. Nashville, C. & St. L.R. Co.*, 259 S.W.2d 877, 36 Tenn App 580

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Evidence held sufficient to show absence of proximate cause

U.S.—*Simmons v. Union Terminal Co.* C.A.Tex., 290 F 2d 453, cert den 82 S Ct 194, 368 U.S. 913, 7 L Ed 2d 131

87. U.S.—*Boston v. M.R.R. v. Coppellott*, supra, n 41

Cal.—*Mortensen v. Southern Pac. Co.*, 53 Cal Rptr 851, 245 C.A.2d 241

Ga.—*Radford v. Seaboard Coast Line R. Co.*, 178 S.E.2d 774, 122 Ga App 763

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F Supp 158—*Kirby v. Atlantic Coast Line R. Co.*, C.A.S.C., 371 F 2d 402

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90. U.S.—*Wetherbee v. Elgin, J. & E. Ry. Co.*, C.A. Ill., 191 F 2d 302

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Mo.—*Ferguson v. St. Louis-San Francisco Ry. Co.*, 307 S.W.2d 385, cert den 78 S Ct 671, 356 U.S. 41, 2 L Ed 2d 571

page 121

91. U.S.—*Moore v. Chesapeake & O. Ry. Co.*, C.A. Va., 184 F 2d 176, affd 71 S Ct 428, 340 U.S. 573, 95 L Ed 547—*Hartley v. Atlantic Coast Line R. Co.*, C.A. Fla., 194 F 2d 590—*Price v. Atlantic Coast Line R. Co.*, D.C.S.C., 115 F Supp 8, affd, C.A., 313 F 2d 9

Ill.—*McCorkel v. Pennsylvania R. Co.*, 177 N.E.2d 369, 32 Ill App 2d 193

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§ 523. — Action of Servant within Scope of Employment

Library References

Employers' Liability ⇐206

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Evidence held sufficient

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Evidence held insufficient

Ga.—*Southern Ry. Co. v. Smalley*, 145 S.E.2d 708, 112 Ga App 471, cert den 86 S Ct 1342, 384 U.S. 906, 16 L Ed 2d 359, reh den 86 S Ct 1568, 384 U.S. 958, 16 L Ed 2d 553

Utah—*Brown v. Union Pac. R. Co.*, 235 P 2d 506, 120 Utah 436

93. Evidence held sufficient

U.S.—*Shevin-Hixon Co. v. Smith*, supra, n 36—*Healy v. Pennsylvania R. Co.*, C.A. Pa., 184 F 2d 209, cert den 71 S Ct 490, 340 U.S. 935, 95 L Ed 674, reh den 71 S Ct 620, 341 U.S. 912, 95 L Ed 1348

Ariz.—*Greenough v. Reid*, 468 P 2d 618, 12 Ariz App 167

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§ 524. — Negligence of Master

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Employers' Liability ⇐208, 209

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L Ed 2d 609, reh den 93 S Ct 1526, 411 U.S. 910, 36 L Ed 2d 201

Mont.—*Lencioni v. Long*, 361 P 2d 455, 139 Mont 135

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Negligence shown

(1) U.S.—*Caso v. Pennsylvania R. Co.*, D.C. Pa., 128 F Supp 909—*Taormina Corp. v. Escobedo*, C.A.Tex., 254 F 2d 171, cert den 79 S Ct 44, 358 U.S. 827, 3 L Ed 2d 66—*Knobel v. Pennsylvania R. Co.*, D.C. Pa., 192 F Supp 771, affd, C.A., 296 F 2d 737—*Gulf, C. & S.F. Ry. Co. v. King*, C.A.Tex., 303 F 2d 124—*Globig v. Greene & Gust Co.*, D.C.Wis., 201 F Supp 945, affd, C.A., 313 F 2d 202—*Payne v. Baltimore & O.R. Co.*, C.A. Ohio, 309 F 2d 546, cert den 83 S Ct 1865, 374 U.S. 827, 10 L Ed 2d 1051—*Slage v. Pennsylvania R. Co.*, D.C. Pa., 212 F Supp 741, affd, C.A., 328 F 2d 775—*Galloway v. Atlantic Coast Line R. Co.*, D.C.S.C., 242 F Supp 211—*Daniel v. Pittsburgh & L.E.R. Co.*, C.A. Pa., 389 F 2d 922—*Sierman v. Chesapeake & O. Ry. Co.*, C.A. Mich., 414 F 2d 305, on remand, D.C., 305 F Supp 33, vac 424 F 2d 547—*Farmer v. Pennsylvania R. Co.*, D.C. Pa., 311 F Supp 1074

Ala.—*Alabama Great Southern R. Co. v. Smith*, supra, n 82

Cal.—*McGungan v. Southern Pac. Co.*, 277 P 2d 444, 129 C.A.2d 482—*Waller v. Southern Pac. Co.*, 57 Cal Rptr 353, 424 P 2d 937, 66 C 2d 201

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Tex.—*Hawkins v. Collier*, supra, n 78—*Thompson v. Keene*, Civ App., 281 S.W.2d 167, err ref no rev err—*Thompson v. Quarles*, Civ App., 297 S.W.2d 321, err ref no rev err—*Huffman v. Seacrest*, Civ App., 447 S.W.2d 508, err ref no rev err

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Wash.—*Glass v. Carnation Co.*, 400 P 2d 320, 65 Wash 2d 954

(2) U.S.—*Marmo v. Chicago, R.I. & P.R. Co.*, C.A. Ill., 350 F 2d 236, 11 A.L.R.3d 1

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NH.—*Evans v. Foster*, 60 A 2d 130, 95 N.H. 194

Tenn.—*Freeman v. Loyd*, supra, n 78

Negligence not shown

(1) U.S.—*Michael v. Reading Co.*, C.A. Pa., 174 F 2d 828—*Frabun v. New York, C. & St. L.R. Co.*, supra, n 69—*Miles v. Pennsylvania R. Co.*, supra, n 56—*Sanioro v. Lough Vall R. Co.*, D.C.N.J., 148 F Supp 594—*Burpo v. Chesapeake & O. Ry. Co.*, C.A.Ky., 266 F 2d 512—*Swartz v. New York Cent. R. Co.*, C.A. Ind., 323 F 2d 713—*Kuberski v. New York Cent. R. Co.*, C.A. N.Y., 359 F 2d 90. Cert den 87 S Ct 1475, 386 U.S. 1036, 18 L Ed 2d 600

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D.C.—*Howard v. Lightner*, App., 214 A 2d 474, 9 A.L.R.3d 513

Ga—Warren v Georgia Southern & F Ry Co, 30 S E 2d 128, 77 Ga App 886—Atlantic Coast Line R Co v Strickland, 74 S E 2d 897, 87 Ga App 596—Strickland v Thom Oil Magic Benzol Gas Stations Inc, 149 S E 2d 430, 113 Ga App 647

Ill—Gray v Pfanz, supra, n 86

Iowa—Knudson v Swenson, 155 NW 2d 756, 261 Iowa 929

Ky—Estes v Richardson, 331 S W 2d 285

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Okla—Sears, Roebuck & Co v Skeen, 248 P 2d 582, 207 Okl 180—McMillan v Bollenback, 294 P 2d 541

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Utah—Williamson v Denver & R G W R Co, 487 P 2d 316, 26 Utah 2d 178

W Va—Pritt v West Virginia Northern R Co, supra, n 91

More fact of injury as not prima facie showing
Okla—Myers v Luttrell, 373 P 2d 22

page 122

95. Ala—Louisville & N R Co v Green, supra, n 86

Utah—Dennis v Denver & R G W R Co, 372 P 2d 3, 13 Utah 2d 249, cert den 93 S Ct 501, 371 U S 946, 9 L Ed 2d 496

Scientilla of evidence, etc.

Ala—Louisville & N R Co v Steel, 59 So 2d 664, 257 Ala 474

Ohio—Harris v Pennsylvania R Co, 156 NE 2d 822, 168 Ohio St 582, rev'd on oth grds 80 S Ct 22, 361 U S 15, 4 L Ed 2d 1

Active or wilful negligence not shown

Tex—J S Abercrombie Co v Scott, Civ App, 267 S W 2d 206, err ref no rev err

96. U S—Trust Co of Chicago v Erie R Co, supra, n 71—Boston & M R R v Coppellotti, supra, n 41—Frabutt v New York, C & St L R Co, supra, n 69

Ill—Finley v New York Cent R Co, 167 NE 2d 212, 19 Ill 2d 428

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Scientilla of evidence, etc.

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page 123

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Ill—Predovich v New York Cent R Co, 175 NE 2d 580, 31 Ill App 2d 69

Mich—Jones v New York Cent R Co, 155 NW 2d 216, 8 Mich App 575

NC—Keith v Norfolk Southern Ry Co, 175 S E 2d 778, 9 NC App 198

Real evidence

Vt—Norton v Lumbra, 238 A 2d 628, 127 Vt 64

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Ill—Allendorf v Elgin, J & E Ry Co, 133 NE 2d 288, 8 Ill 2d 164, 79 A L R 2d 241, cert den 77 S Ct 49, 352 U S 833, 1 L Ed 2d 53, reh den 77 S Ct 219, 352 U S 937, 1 L Ed 2d 170

Ohio—Grande v Erie R Co, App, 172 NE 2d 161
Okla—Chicago, R I & P R Co v Wright, 278 P 2d 830, cert den 75 S Ct 581, 349 U S 905, 99 L Ed 1241

Tex—Texas & N O R Co v Everole, Civ App, 274 S W 2d 141, err ref no rev err

Under the act very little evidence is required to uphold a jury verdict of negligence 99

99.5 U S—Southern Ry Co v Fox, C A Ga, 339 F 2d 560—Boeing Co v Shipman, C A Ala, 411 F 2d 365

Fla—Seaboard Air Line R Co v Cain, App, 175 So 2d 561—Southern Ry Co v Wood, App, 175 So 2d 812

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Conclusion not outside possibility of reason

U S—Chicago, R I & P R Co v Melcher, C A Minn, 333 F 2d 996

1. U S—O'Donnell v Elgin, J & E Ry Co, Ill, 70 S Ct 200, 338 U S 384, 94 L Ed 187, 16 A L R 2d 646, reh den 70 S Ct 427, 338 U S 945, 94 L Ed 427

Ala—Alabama Great Southern R Co v Smith, 54 So 2d 453, 256 Ala 220

Mo—Banta v Union Pac R Co, 242 S W 2d 34, 362 Mo 421

3. Freedom from being in pari delicto

Mont—Lencioni v Long, 361 P 2d 455, 139 Mont 135

5. U S—Pulen v H E Moss & Co, D C NY, 66 F Supp 78, aff'd in part and rev'd in part on oth grds, CCA, 159 F 2d 842, cert den 67 S Ct 1733, 331 U S 847, 91 L Ed 1857, and 67 S Ct 1736, 331 U S 847, 91 L Ed 1857—Fambunder v Pennsylvania R Co, D C Pa, 193 F Supp 767, rev'd on oth grds, C A, 332 F 2d 859—Panhandle & S F Ry Co v Howard, Civ App, 397 S W 2d 300

La—Blackburn v Chenet, App, 42 So 2d 288

Ohio—Barbour v Baltimore & O R Co, 152 NE 2d 134, 105 Ohio App 191

6. Tex—Texas & N O R Co v Pool, Civ App, 263 S W 2d 582

page 124

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13. NM—Padilla v Atchison, T & S F Ry Co, 295 P 2d 1023, 61 NM 115

14. Cal—Devens v Goldberg, App, 189 P 2d 859, subs op 199 P 2d 943, 33 Cal 2d 173

Tenn—D M Rose & Co v Snyder, 206 S W 2d 897, 185 Tenn 499

Tex—City of Tyler v Kelly, Civ App, 211 S W 2d 768

16. U S—Lilhe v Thompson, C A Tenn, 173 F 2d 481—Korte v New York, N H & H R Co, C A NY, 191 F 2d 86, cert den 72 S Ct 108, 342 U S 868, 96 L Ed 652—O'Day v Chicago River & Indiana R Co, C A Ill, 216 F 2d 79—Whalen v Phoenix Indem Co, C A La, 222 F 2d 121—Nivens v St Louis Southwestern Ry Co, C A Tex, 425 F 2d 114, cert den 91 S Ct 121, 400 U S 879, 27 L Ed 2d 116—Pehowic v Erie Lackawanna R Co, C A NY, 430 P 2d 697

Ga—Atlantic Coast Line R Co v Godard, 92 S E 2d 626, 93 Ga App 671

Mass—Wheatley v Kaplan, 136 NE 2d 191, 334 Mass 455

Minn—Clark v Chicago & N W Ry Co, 33 NW 2d 484, 226 Minn 375—Baumgartner v Holshin, 52 NW 2d 763, 236 Minn 235

Miss—Edmon v Kochitzky, 51 So 2d 482, 211 Miss 301—Grillis v Patrick, 59 So 2d 341, 214 Miss 747—City of Meridian v Godwin, 185 So 2d 433

Mo—Timmerman v Terminal R R Ass'n of St Louis, 241 S W 2d 477, 362 Mo 280—Brook v Gulf, M & O R Co, 270 S W 2d 827

NY—Jones v Schenectady Boys Club, 130 NY S 2d 797, 283 App Div 981

ND—Olson v Kem Temple Ancient Arabic Order of Mystic Shrine, 49 NW 2d 99, 78 ND 263

Ohio—Barbour v Baltimore & O R Co, 152 NE 2d 134, 105 Ohio App 191

Or—Pond v Jantzen Knitting Mills, 190 P 2d 141, 183 Or 256

Tex—Worth Steel Corp v Gartman, Civ App, 361 S W 2d 426, err ref no rev err

W Va—Walls v McKinney, 81 S E 2d 901, 139 W Va. 866

Illness of servant

La—Broussard v Missouri Pac R Co, App, 376 So 2d 332

17. U S—Humphrey v Erie R Co, D C NY, 116 F Supp 680

Cal—Devens v Goldberg, 199 P 2d 943, 33 Cal 2d 173

Ill—Hack v New York, C & St L R Co, 169 NE 2d 372, 27 Ill App 2d 206—Gilmore v Toledo, P & W R Co, 224 NE 2d 228, 36 Ill 2d 510

Or—Pooschke v Union Pac R Co, 426 P 2d 866, 246 Or 633

Tex—Texas & N O R Co v Pool, supra, n 6—Texas & N O R Co v Hayes, 293 S W 2d 484, 156 Tex 148

Wash—Browning v Ward, 422 P 2d 12, 70 Wash 2d 45

18. U S—Kammaku v Chicago River & Ind R Co, C A Ill, 200 F 2d 1—Rose v Atlantic Coast Line R Co, D C SC, 277 F Supp 913, aff'd, C A, 403 F 2d 204

Iowa—In re Howorth's Estate, 94 NW 2d 779, 250 Iowa 752

La—Dykes v North River Ins Co, App, 270 So 2d 329, writ den, Sup, 272 So 2d 375

Mass—Cavanaugh v Crocker, 140 NE 2d 167, 335 Mass 765

Minn—Person v Oakes, 29 NW 2d 360, 224 Minn 541

Miss—Allgood v United Gas Corp, 37 So 2d 12, 204 Miss 94

Mo—Thompson v Thompson, 240 S W 2d 137, 362 Mo 73—Brown v Scullin Steel Co, 260 S W 2d 513, 364 Mo 225

Tex—Davidson Iron & Metal Co v McDonald, Civ App, 279 S W 2d 929—Thompson v Tippet, Civ

Page 124

App, 300 S W 2d 351, err. ref. no rev. err. cert. dsm. 78 S Ct 432, 355 U.S. 943, 2 L Ed 2d 423.
 Va.—Keith v. Clinchfield Coal Corp., 54 S E 2d 126, 189 Va 592, adhered to 57 S E 2d 47, 190 Va 316.
 Wash.—Merrick v. Sears, Roebuck & Co., 407 P 2d 960, 67 Wash 2d 426.
 19 U.S.—Jones v. General Elec. Co., C A Wash, 303 F 2d 76.
 Miss.—Harper v. Armstrong Tire & Rubber Co., 84 So 2d 682, 226 Miss 522.
 N.Y.—Dellamorga v. Weinberg, 104 N.Y.S.2d 209, 278 App Div 828, affd 104 N.E.2d 376, 303 N.Y. 835.
 20 U.S.—Forsman v. Pennsylvania R. Co., D.C.Pa., 180 F Supp 882, affd, C.A., 280 F 2d 315.
 N.J.—Jaroszewski v. Central R. Co. of N.J., 87 A 2d 705, 9 N.J. 231, cert. den. 73 S Ct 26, 344 U.S. 839, 97 L Ed 633.

page 125

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 Mo.—Smith v. Thompson, App., 258 S W 2d 278, cert. dsm. 74 S Ct 66.
 S.C.—Morgan v. Roper, 157 S E 2d 572, 250 S C 280.
 Vt.—Norton v. Lumbra, 238 A 2d 628, 127 Vt. 64.
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 Ky.—Behemoth Coal Co. v. Helton, 222 S W 2d 845, 310 Ky 810.
 La.—Payton v. Travelers Ins. Co., App., 373 So 2d 1324, writ den., Sup., 377 So 2d 119.
 Ohio—Harris v. Pennsylvania R. Co., 146 N.E.2d 744, 108 Ohio App 541, revd. on oth. grds. 156 N.E.2d 822, 168 Ohio St 582, revd. on oth. grds. 80 S Ct 22, 361 U.S. 15, 4 L Ed 2d 1.
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 Wash.—Myers v. Little Church by the Side of the Road, 227 P 2d 165, 37 Wash 2d 897—Arnold v. U.S. Gypsum Co., 267 P 2d 689, 44 Wash 2d 412.

page 126

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 Cal.—Spencer v. Atchison, T. & S.F. Ry. Co., 207 P 2d 126, 92 Cal App 2d 490.
 Ill.—Fennell v. Magnolia, 119 N.E.2d 511, 2 Ill App 2d 290.
 Okl.—Patrick's, Inc. v. Mosserano, 292 P 2d 1003.
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Existence of dust

(2) Other cases
 N.J.—Canonico v. Celanese Corp. of America Plastics Division, 78 A 2d 411, 11 N.J.Super 445.
 29. Mo.—McClintock v. Terminal R.R. Ass'n of St. Louis, App., 257 S W 2d 180.
 30. U.S.—Great Atlantic & Pacific Tea Co. v. Grooms, C.A.S.C., 207 F 2d 718.
 Wis.—Umnus v. Wisconsin Public Service Corp., 51 N.W.2d 42, 260 Wis 433.
 33. U.S.—Nichols v. Skelly Oil Co., C.A.Mo., 175 F 2d 113.
 34. Or.—Concannon v. Oregon Portland Cement Co., 447 P 2d 290, 252 Or 1.

page 127

35. U.S.—Urne v. Thompson, Mo., 69 S Ct 1018, 337 U.S. 163, 93 L Ed 1282, 11 A.L.R.2d 252—Rogers v. Missouri Pac. R. Co., Mo., 77 S Ct 443, 352 U.S. 500, 1 L Ed 2d 493, reh. den. 77 S Ct 808, 353 U.S. 943, 1 L Ed 2d 764—Rogers v. Missouri Pac. R. Co., Mo., 77 S Ct 459, 352 U.S. 521, 1 L Ed 2d 515.
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Compiler

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U.S. 874, 100 L Ed 773, foll. 72 N.W.2d 74, 245 Minn 581.

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Violation of statute shown

U.S.—Weenzen v. Pennsylvania R. Co., D.C.Pa., 143 F Supp 360—Smith v. Pennsylvania—Reading Seashore Lines, D.C.Pa., 355 F Supp 1176, affd, C.A., 487 F 2d 1394, 1395.

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Violation of statute not shown

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 N.Y.—Moran v. Rheinsteinston Co., 201 N.Y.S.2d 881, 10 A.D.2d 976, affd 207 N.Y.S.2d 265, 8 N.Y.2d 1051, 170 N.E.2d 402.

Or.—Entler v. Hamilton, 481 P 2d 85, 258 Or 65.
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Locomotive or car "in use" within statute

U.S.—Holfester v. Long Island R. Co., C.A.N.Y., 360 F 2d 369.

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page 128

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Ill.—Clubb v. Main, 213 N.E.2d 63, 65 Ill App 2d 461.

Miss.—Gatlin v. Allen, 33 So 2d 304, 203 Miss 135.

Mo.—Whitehead v. Schrick, App., 328 S W 2d 170.

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Tex.—Railway Exp. Agency v. Spain, Civ App., 249 S W 2d 644, app. dsm., 255 S W 2d 509, 152 Tex 198—FWA Drilling Co. v. Lambert, Civ App., 418 S W 2d 878, err. dsm.

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Wash.—Williams v. Hofer, 191 P 2d 306, 30 Wash 2d 253.

W.Va.—Walls v. McKinney, 81 S E 2d 901, 139 W Va 866.

49. U.S.—Eaton v. Long Island R. Co., C.A.N.Y., 398 F 2d 738—Sleeman v. Chesapeake & O.R. Co., D.C.Mich., 290 F Supp 817, affd in part, vac. in part on oth. grds., C.A., 414 F 2d 305, on remand 305 F Supp 33, vac. on oth. grds. 424 F 2d 547.

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Cal.—Devens v. Goldberg, supra, n 17—Miller v. Southern Pac. Co., 256 P 2d 603, 117 C.A.2d 492, cert. den. 74 S Ct 239, 346 U.S. 909, 98 L Ed 406—Khan v. Southern Pac. Co., 282 P 2d 78, 132 C.A.2d 410—Atherley v. MacDonald, Young & Nelson, Inc., 298 P 2d 700, 142 C.A.2d 575—Powell v. Vracin, 310 P 2d 27, 150 C.A.2d 454.

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Ga.—Atlantic Coast Line R. Co. v. Godard, 92 S E 2d 626, 93 Ga App 671—Southern Ry. Co. v. Gale, 118 S E 2d 742, 103 Ga App 87.

Ill.—Thorne v. Harris, 105 N.E.2d 778, 346 Ill App 575—Hall v. Chicago & N.W. Ry. Co., 125 N.E.2d 77, 5 Ill 2d 135, 50 A.L.R.2d 661—Deckert v. Chicago & E.I.R. Co., 124 N.E.2d 372, 4 Ill App 2d 483—Ondersan v. Elgin, J. & E. Ry. Co.,

155 N.E.2d 338, 20 Ill App 2d 73—Goodwin v. Wabash R. Co., 179 N.E.2d 430, 33 Ill App 2d 349—Kiddy v. Toledo, P. & W.R. Co., 261 N.E.2d 541, 128 Ill App 2d 200.

Iowa—Erickson v. Erickson, 94 N.W.2d 728, 250 Iowa 491.

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Miss.—Johns-Mansville Products Corp. v. Cather, 44 So 2d 405, 208 Miss 268—Armstrong Tire & Rubber Co. v. Harris, 49 So 2d 727, 210 Miss 422—Ilmo Cent. R. Co. v. Coussens, 77 So 2d 818, 223 Miss 103, cert. dsm. 76 S Ct 36, 350 U.S. 801, 100 L Ed 721.

Mo.—Schonlau v. Terminal R. Ass'n of St. Louis, 212 S W 2d 420, 357 Mo 1108—Schwartz v. Kansas City Southern Ry. Co., 275 S W 2d 236, 365 Mo 17, cert. den. 75 S Ct 773, 349 U.S. 931, 99 L Ed 1261, reh. den. 76 S Ct 39, 350 U.S. 855, 100 L Ed 760.

N.M.—Abeyta v. Pavlitch, 260 P 2d 366, 57 N.M. 454.

N.Y.—Reisinger v. Salmon, 98 N.Y.S.2d 572, 277 App Div 929—Mathiesen v. Adrian, 110 N.Y.S.2d 830, affd 118 N.Y.S.2d 560, 281 App Div 715.

Okla.—King's Van & Storage Co. v. Crmer, 301 P 2d 1015.

Or.—Wood v. Southern Pac. Co., 337 P 2d 779, 216 Or 61—Short v. Federated Livestock Corp., 383 P 2d 1016, 235 Or 81.

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R.I.—Soucy v. Alux, 90 A 2d 722, 79 R.I. 499.

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Wash.—Miller v. St. Regis Paper Co., 374 P 2d 675, 60 Wash 2d 484.

Wis.—Venden v. Messel, 85 N.W.2d 766, 2 Wis 2d 253.

page 129

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Ala.—Louisville & N.R. Co. v. Crm, 136 So 2d 190, 273 Ala 114.

Cal.—Cordova v. Atchison, T. & S.F. Ry. Co., 18 Cal Rptr 144, 198 C.A.2d 161.

Kan.—Riggs v. Missouri-Kansas-Texas R. Co., 508 P 2d 850, 211 Kan 795.

Okla.—Kansas City Southern Ry. Co. v. Norwood, 367 P 2d 722.

Tex.—Leonard v. Hare, Civ App., 325 S W 2d 197, affd, 336 S W 2d 619, 161 Tex 28.

Switch

U.S.—La France v. New York, N.H. & H.R. Co., D.C.Conn., 191 F Supp 164, affd, C.A., 292 F 2d 649.

51. U.S.—Troutman v. International Harvester Co., D.C.Ky., 83 F Supp 501, affd 173 F 2d 895, cert. den. 69 S Ct 1517, 337 U.S. 940, 93 L Ed 1745.

Cal.—Moreno v. Southern Pac. Co., 282 P 2d 877, 44 C 2d 547, affd 76 S Ct 952, 351 U.S. 493, 100 L Ed 1357.

Ill.—Black v. White, 140 N.E.2d 736, 13 Ill App 2d 134.

Iowa—Brandt v. Richter, 159 N.W.2d 471.

Miss.—Edmon v. Kochtitzky, supra, n 16.

52. U.S.—Miller v. Elgin, Joliet & Eastern Ry. Co., C.A.Ind., 177 F 2d 224.

N.Y.—Griffin v. Corporation of Church of Assumption of Mechanicville, 218 N.Y.S.2d 141, 14 A.D.2d 620—Horton v. New York Cent. R. Co., 221 N.Y. 52d 361, 14 A.D.2d 817.

53. U.S.—Wanner v. Long Island R. Co., C.A.N.Y., 238 F 2d 467, cert. den. 77 S Ct 668, 353 U.S. 911, 1 L Ed 2d 665—Basham v. Pennsylvania R. Co., N.Y., 83 S Ct 965, 372 U.S. 699, 10 L Ed 2d 80.

Mo.—Britt v. Terminal R. Ass'n of St. Louis, App., 311 S W 2d 130.

- SC—Johnson v Atlantic Coast Line R. Co., 60 SE 2d 678, 217 SC 347
54. Ark—Walther v Cooley, 279 SW 2d 288, 224 Ark 1027
- Pa—Rupnik v Pennsylvania R. Co., 194 A 2d 906, 412 Pa 460
55. Ga—Henry v Adams, 141 SE 2d 603, 111 Ga App 297
- Ky—Bradshaw v Bradshaw, 435 SW 2d 765
56. US—Kimbler v Pittsburgh & LER Co., C.A. Pa., 331 F 2d 383
- Okla—Connelly v Jennings, 252 P 2d 133, 207 Okl 554, cert den 73 SCt 778, 345 US 921, 97 L Ed 1353
58. US—Chicago Great Western Ry Co v Smith, C.A. Minn., 228 F 2d 180—Harris v Pennsylvania R. Co., Ohio, 80 SCt 22, 361 US 15, 4 L Ed 2d 1
- Cal—Devens v Goldberg, supra, n 17
- Ill—Moore v Baltimore & OCTR Co., 113 NE 2d 481, 351 Ill App 22
- La—Payton v Travelers Ins Co App., 373 So 2d 1324, writ den, Sup., 377 So 2d 119
- Tex—Port Terminal R Ass'n v Ross, Civ App., 278 SW 2d 227, affd 289 SW 2d 220, 155 Tex 447
- Vt—Cota v Rocheleau, 141 A 2d 426, 120 Vt 391
59. Mass—Campbell v Leach, 225 NE 2d 594, 352 Mass 367
- Or—Poonchik v Union Pac R. Co., 426 P 2d 866, 246 Or 633
60. US—Bolan v Lehigh Valley R. Co., CCANY., 167 F 2d 934—Une v Thompson, supra, n 35
- Ga—Atlantic Coast Line R. Co v Singletary, 55 SE 2d 827, 80 Ga App 297
- Mo—Abernathy v St Louis—San Francisco Ry Co., 237 SW 2d 161—Thompson v Thompson, supra, n 18
- Tex—Missouri Pac R. Co v Randall, Civ App., 347 SW 2d 658, err ref no rev err
61. US—Chicago, R.I. & P.R. Co v Speth, C.A. Neb., 404 F 2d 291—Fuhrman v Reading Co., D.C. Pa., 311 F Supp 782, affd in part, revd in part on oth grds, C.A., 439 F 2d 10
- Cal—Nisblack v Atchison, T & S.F. Ry Co., 234 P 2d 208, 105 CA 2d 847
- Fla—Butler v Gay, App., 118 So 2d 572, cert discharged, Sup., 122 So 2d 189
- Ill—Del Raso v Elgin, J & E Ry Co., 228 NE 2d 470, 84 Ill App 2d 344, 30 A.L.R. 3d 708, cert den 88 SCt 1036, 390 US 948, 19 L Ed 2d 1138
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- Ohio—Bartlebaugh v Pennsylvania R. Co., 78 NE 2d 410, app dismissed. 79 NE 2d 912, 149 Ohio St 585, mod on oth grds 82 NE 2d 853, 150 Ohio St 387
- Tex—Texas & P Ry Co v Younger, Civ App., 262 SW 2d 537, err ref no rev err—Thompson v Jason, Civ App., 265 SW 2d 920, err ref no rev err—Texas & N.O.R. Co v Hayes, Civ App., 284 SW 2d 776, affd 293 SW 2d 484, 156 Tex 148—Missouri—Pacific R. Co v Freygan, Civ App., 307 SW 2d 284—Fort Worth & D Ry Co v Coffman, Civ App., 397 SW 2d 544, err dismissed
- Steps of cabooses**
- Tex—Missouri Pac R. Co v Ramirez, Civ App., 326 SW 2d 50, err ref no rev err
- page 130
62. US—US v. New Orleans Public Belt R.R., D.C. La., 78 F Supp 129
- Ga—Atlantic Coast Line R. Co v Chapman, 65 SE 2d 629, 84 Ga App 94—Atlantic Coast Line R. Co v Brown, 92 SE 2d 874, 93 Ga App 805
- Tex—Thompson v Barnes, Civ App., 236 SW 2d 656—Skelly Oil Co v Carter, Civ App., 316 SW 2d 87
- Utah—McGowan v Denver & R.G.W.R. Co., 244 P 2d 628, 121 Utah 587, cert den 73 SCt 346, 344 US 918, 97 L Ed 707
63. US—US v New Orleans Public Belt R.R., supra, n 62—Patton v Baltimore & O.R. Co., D.C. Pa., 99 F Supp 455, revd on oth grds, C.A., 197 F 2d 732—Kleysteuber v Pittsburgh, C & Y Ry Co., supra, n 37—Fassbinder v Pennsylvania R. Co., C.A. Pa., 322 F 2d 839
- Cal—Stout v Union Pac R. Co., 218 P 2d 1001, 98 Cal App 2d 99—Lewis v Union Pac R. Co., 273 P 2d 706, 127 CA 2d 280
- Ga—Southern Ry Co v Jones, 106 SE 2d 298, 98 Ga App 313
- Ill—Hannigan v Elgin, Joliet & Eastern Ry Co., 86 NE 2d 388, 337 Ill App 538—Welch v New York, C & St L.R. Co., 126 NE 2d 165, 5 Ill App 2d 568
- NY—Jeffries v Long Island R. Co., 224 NYS 2d 497, 15 A.D. 2d 356
64. Utah—Lemmon v Denver & R.G.W.R. Co., 341 P 2d 215, 9 Utah 2d 195
65. Ill—Gilmore v Toledo, P & W.R. Co., 212 NE 2d 117, 64 Ill App 2d 218, affd 224 NE 2d 228, 36 Ill 2d 510
- Miss—St Louis—San Francisco Ry Co v Dyson, 43 So 2d 95, 207 Miss 639
- Mont—Wolfe v Northern Pac Ry Co., 409 P 2d 528, 417 Mont 29
- NJ—Wicks v Central R. Co of New Jersey, 296 A 2d 649, 61 NJ 553
- Ohio—Bartlebaugh v Pennsylvania R. Co., supra, n 61
- Okla—Kansas City Southern Ry Co v Haynes, 320 P 2d 404—Sawyer v St Louis—San Francisco Ry Co., 391 P 2d 230
- Tex—Missouri—Kansas—Texas R. Co of Tex v Bruton, Civ App., 290 SW 2d 282, err ref no rev err
66. US—Fleming v Kellelt, CCA Okl., 167 F 2d 265—Webb v Illinois Cent R. Co., Ill., 77 SCt 451, 352 US 512, 1 L Ed 2d 503, reh den 77 SCt 809, 353 US 943, 1 L Ed 2d 764—Rogers v Missouri Pac R. Co., Ill., 77 SCt 459, 352 US 521, 1 L Ed 2d 515—Nivens v St Louis Southwestern Ry Co., C.A. Tex., 425 F 2d 114, cert den 91 SCt 121, 400 US 879, 27 L Ed 2d 116
- Mass—Labonte v New York, N.H. & H.R. Co., 131 NE 2d 203, 333 Mass 420, cert den 76 SCt 1033, 351 US 974, 100 L Ed 1492
- Crossing**
- (2) Other matters
- US—Bridge v Union Ry Co., C.A. Tenn., 355 F 2d 382—Boston & M.R.R. v Talbert, CANH., 360 F 2d 286
66. Ky—Chesapeake & O Ry Co v Buhler, 413 SW 2d 894
67. US—Thompson v Camp, CCA Tenn., 163 F 2d 396, cert den 68 SCt 458, 333 US 831, 92 L Ed 1116, and 68 SCt 459, 333 US 831, 92 L Ed 1116, motion sus 167 F 2d 733, cert den 69 SCt 48, 335 US 824, 93 L Ed 378—Widder v New York, C & St L.R. Co., D.C. Pa., 142 F Supp 830, affd, C.A., 235 F 2d 752—Barrett v Toledo, P & W.R. Co., C.A. Ill., 334 F 2d 803—Harris v Chesapeake & O Ry Co., C.A. Ind., 358 F 2d 11
- Ill—Foster v New York C & St L.R. Co., 168 NE 2d 61, 26 Ill App 2d 337
- Mo—Curtis v Atchison, T & S.F. Ry Co., 253 SW 2d 789, 363 Mo 779
- NM—Rivera v Atchison, T & S.F. Ry Co., 299 P 2d 1090, 61 NM 314
68. US—Lawrence v Great Northern Ry Co., D.C. Minn., 109 F Supp 552, affd, C.A., 201 F 2d 408, 37 A.L.R. 2d 1399
70. US—Atlantic Coast Line R. Co v Gunter, C.A. Fla., 229 F 2d 842—Foreman v Pennsylvania R. Co., D.C. Pa., 180 F Supp 882, affd, C.A., 280 F 2d 315
- Minn—Clark v Chicago & N.W. Ry Co., supra, n 16
- Mo—Howard v Missouri Pac R. Co., 295 SW 2d 68
71. US—Michael v Reading Co., D.C. Pa., 82 F Supp 54, affd, C.A., 174 F 2d 828—Fort Worth & D Ry Co v Harris, C.A. Tex., 230 F 2d 680
- Ill—Gilmore v Toledo, P & W.R. Co., 224 NE 2d 228, 36 Ill 2d 510
- Minn—Holweg v Great Northern Ry Co., 130 NW 2d 354, 269 Minn 83
- Pa—Buffo v Baltimore & O.R. Co., 72 A 2d 593, 364 Pa 437
- Ga—Alford v Atlantic Coast Line R. Co., 54 SE 2d 450, 79 Ga App 616—Atlantic Coast Line R. Co v Singletary, 55 SE 2d 827, 80 Ga App 297
75. US—Becker v Baltimore & O.R. Co., D.C. Pa., 107 F Supp 361, affd, C.A., 203 F 2d 954
- W Va—Jordan v Baltimore & O.R. Co., 62 SE 2d 806, 134 W Va 183
77. US—Woodward Iron Co v Minyard, C.A. Ala., 170 F 2d 508
- page 131
78. Ky—Eagle Coal Co v Drake, 311 SW 2d 563
88. Or—Sleeters v Sleeters, 389 P 2d 313, 237 Or 204, reh den 391 P 2d 386, 237 Or 204
- Saw**
- Tex—Potter v Garner, Civ App., 407 SW 2d 537, err ref no rev err
92. US—Virginia Ry Co v Viars, C.A.W. Va., 193 F 2d 547—Cincinnati, N.O. & T.P.R. Co v Underwood, C.A. Tenn., 262 F 2d 375, 74 A.L.R. 2d 1025
93. US—Rack v Lee & Simmons, Inc., D.C.N.Y., 105 F Supp 79—Milton v New York Cent R. Co., C.A. Ill., 248 F 2d 52, cert den 78 SCt 537, 355 US 953, 2 L Ed 2d 529, reh den 78 SCt 771, 356 US 934, 2 L Ed 2d 764
- Ark—Reddell v Missouri Pac R. Co., 384 SW 2d 486, 238 Ark 753
- Ill—Woodruff v Pennsylvania R. Co., 202 NE 2d 113, 52 Ill App 2d 341
- La—Thibodeaux v Parks Equipment Co., App., 185 So 2d 232, 39 A.L.R. 3d 1392, writ ref 186 So 2d 157, 249 La 193, and 186 So 2d 157, 249 La 194, and 186 So 2d 159, 249 La 200—Anderson v Lathrop, App., 230 So 2d 440
- Neb—Lyons v Wagner, 174 NW 2d 730, 185 Neb 214
- NY—Dellamorga v Weinberg, supra, n 19
- NC—Clark v Roberts, 139 SE 2d 593, 263 NC 336
- Okla—McMillan v Bollenback, 294 P 2d 541
- Pa—Gregory v Safeway Steel Scaffolds Co of Pittsburgh, 187 A 2d 646, 409 Pa 578
- Tex—Armstrong v Missouri—K-T R. Co of Tex., Civ App., 233 SW 2d 942, err ref no rev err, cert den 72 SCt 62, 342 US 837, 96 L Ed 633
94. US—Manhat v US, D.C.N.Y., 113 F Supp 595, op susp 121 F Supp 196, affd, C.A., 220 F 2d 143, cert den 75 SCt 900, 349 US 966, 99 L Ed 1288—Cahill v New York, N.H. & H.R. Co., C.A. Conn., 224 F 2d 637, revd without opinion 76 SCt 180, 350 US 898, 100 L Ed 790, reh den 76 SCt 300, 350 US 943, 100 L Ed 823, motion to recall and amend judg gr 76 SCt 758, 351 US 183, 100 L Ed 1075—Edwards v New York Cent R. Co., D.C.W. Va., 136 F Supp 706—McIntyre v Central R. Co of N.J., C.A.N.J., 251 F 2d 158—Olmick v New York Cent R. Co., D.C.N.Y., 162 F Supp 23—Vidal v New York Cent R. Co., D.C.N.Y., 220 F Supp 922, affd, C.A., 329 F 2d 628
- Cal—Blinkinsop v Weber, 193 F 2d 96, 85 Cal App 2d 276—Edmonds v Southern Pac. Co., 299 P 2d 8, 142 CA 2d 519
- Colo—Perry Lumber Co v Ruybal, 297 P 2d 531, 133 Colo 502
- Ill—Kilian v Pennsylvania R. Co., 82 NE 2d 834, 336 Ill App 152, cert den 70 SCt 63, 338 US 819, 94 L Ed 497—Kloetzer v Louisville & N.R. Co., 95 NE 2d 502, 341 Ill App 478—Perez v Baltimore & O.R. Co., 164 NE 2d 209, 24 Ill App 2d 204
- La—Alana v Burnstein, App., 86 So 2d 401—Fritz v American Universal Ins Co., App., 140 So 2d 901
- Minn—Palmer v Witse, 57 NW 2d 812, 239 Minn 130—DoImage v Chicago, R.I. & P.R. Co., 63 NW 2d 273, 241 Minn 339, cert den 75 SCt 34, 348 US 822, 99 L Ed 648
- Minn—Trunzler v Shanks, 107 So 2d 110, 234 Minn 735—Long v Woollard, 163 So 2d 698, 249 Minn 722

Page 131

Mo—Schwartz v Kansas City Southern Ry Co, 275 S W 2d 236, 365 Mo 17, cert den 75 S Ct 773, 349 U S 931, 99 L Ed 1261, reh den 75 S Ct 39, 350 U S 855, 100 L Ed 760

NJ—Canonica v Celanese Corp of America, Plastics Division, supra, n 28

Okla—Peace v Lowe, 289 P 2d 675—McMillan v Bollenback, 294 P 2d 541

Or—Peltzer v Dahlke, 434 P 2d 457, 248 Or 512, app after remand 471 P 2d 434, 256 Or 84

SD—Ecklund v Barnick, 144 NW 2d 605, 82 SD 280

Tenn—Dunson v Dickie Rector Lumber Co, 212 S W 2d 908, 31 Tenn App 155

Tex—J S Abercrombie Co v Scott, Civ App, 267 S W 2d 206, err ref no rev err—Lofton v Lindsey, Civ App, 290 S W 2d 586

Wash—Garrett v Linden, 234 P 2d 477, 39 Wash 2d 72

W Va—Dahmer v State Fair of W Va 91 S E 2d 453, 141 W Va 517

page 132

95. U S—Vidal v New York Cent R Co, C A N Y, 329 F 2d 628

Ga—Southern Ry Co v Bradshaw, 45 S E 2d 693, 76 Ga App 364

Ill—Perez v Baltimore & O R Co, 164 NE 2d 209, 24 Ill App 2d 204

La—Dykes v North River Ins Co, App, 270 So 2d 329, writ den, Sup, 272 So 2d 375

Minn—McDonald v Fryberger, 46 NW 2d 260, 233 Minn 156

N C—Williamson v Clay, 90 S E 2d 727, 243 NC 337

Or—Meyers v Ossa Sanitarium, Inc, 356 P 2d 159, 224 Or 414—Muskens v Olson, 416 P 2d 5, 244 Or 108

W Va—Crockham v New York Cent R Co, 107 S E 2d 516, 144 W Va 196, cert den 80 S Ct 65, 361 U S 821, 4 L Ed 2d 66, reh den 80 S Ct 204, 361 U S 904, 4 L Ed 2d 159

96. Iowa—Kanderson v Swenson, 155 NW 2d 756, 261 Iowa 929

N C—Kuentz v Carlton, 96 S E 2d 14, 245 NC 236

Okla—Buson Transports v Fraley, 238 P 2d 835, 205 Okl 520

98. Ga—Warren v Georgia Southern & F Ry Co, 50 S E 2d 128, 77 Ga App 886

99. Conn—Phenning v Silansky, 129 A 2d 224, 144 Conn 223

Okla—Speed v Whahn, 386 P 2d 772

1. Conn—Vacca v Camera, 179 A 2d 616, 149 Conn 277

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2. Tex—Shurett v Osborne, Civ App, 408 S W 2d 740

4. Vt—Jarvis v Byrnes, 61 A 2d 543, 115 Vt 346

Wis—Paluch v Baldwin Plywood & Veneer Co, 85 NW 2d 373, 1 Wis 2d 427

6. U S—Burpe v Chesapeake & O Ry Co, C A Ky, 266 F 2d 512

Fla—Atlantic Coast Line R Co v Clarke, 59 So 2d 778

Ill—Quinn v Gulf, M & O R Co, 104 NE 2d 550, 346 Ill App 62

7. U S—Gill v Pennsylvania R Co, C A Pa, 201 F 2d 718, cert den 74 S Ct 27, 346 U S 816, 98 L Ed 343—Quegan v New York Cent R Co, C A N Y, 243 F 2d 524—Rughner v Chesapeake & O Ry Co, D C Ohio, 148 F Supp 529, affd, CA, 241 F 2d 416, cert gr 77 S Ct 1093, 354 U S 901, 1 L Ed 2d 1268—Rose v Atlantic Coast Line R Co, C A S C, 403 F 2d 204

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page 133

9. U S—Beisel v Monessen SW Ry Co, D C Pa, 121 F Supp 604, affd, CA, 218 F 2d 273—Parrish v Atchison, T & S F Ry Co, D C Cal, 152 F Supp 158—Mulligan v Baltimore & O R Co, C A Ohio, 296 F 2d 634

Ill—Woods v New York, C & St L R Co, 88 NE 2d 740, 339 Ill App 132, cert den 71 S Ct 48, 340 U S 830, 95 L Ed 610

Utah—King v Denver & Rio Grande Western R Co, 211 P 2d 833, 116 Utah 488

10. NC—Baker v Atlantic Coast Line R Co, 61 SE 2d 621, 232 NC 523, cert den 71 S Ct 482, 340 U S 939, 95 L Ed 677

11. U S—Kraus v Reading Co, C C A Pa, 167 F 2d 313—Dess v Pennsylvania R Co, C A Pa, 251 F 2d 149, cert den 78 S Ct 1006, 356 U S 967, 2 L Ed 2d 1073

Fla—Seaboard Air Line R Co v Gentry, 46 So 2d 485, cert den 71 S Ct 82, 340 U S 853, 95 L Ed 625

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Tex—Hammon v Texas & NOR Co, Civ App, 382 S W 2d 155, err ref no rev err, cert den 86 S Ct 73, 382 U S 832, 15 L Ed 2d 76

12. U S—Fitzell v Wabash R Co, C A Mo, 199 F 2d 153, cert den 73 S Ct 505, 344 U S 934, 97 L Ed 718

Ill—Payne v Baltimore & O R Co, 114 NE 2d 323, 351 Ill App 186—Stanton v Pennsylvania R Co, 178 NE 2d 121, 32 Ill App 2d 406

13. U S—Mirabile v New York Cent R Co, C A N Y, 230 F 2d 498

15. Fla—Lofton v Howard, 82 So 2d 125, 57 A L R 2d 488

16. Tex—Seymour v Texas & NOR Co, Civ App, 209 S W 2d 814, err ref

30. Elevator shaft

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page 134

33. U S—Lamancusa v Pennsylvania R Co, D C Pa, 104 F Supp 833

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34. —Kuberski v New York Cent R Co, C A N Y, 359 F 2d 90, cert den 87 S Ct 1475, 386 U S 1036, 18 L Ed 2d 600

Evidence held sufficient

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Okla—End Transfer & Storage Co v Mollenhauer, 251 P 2d 1068, 207 Okl 634

35. Evidence held sufficient

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Okla—Kansas City Southern Ry Co v Haynes, 320 P 2d 404

36. Ill—Emmick v Baltimore & O R Co, 88 NE 2d 739, 339 Ill App 148

Evidence held sufficient

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Tex—Gulf, C & S F Ry Co v Ogden, Civ App, 228 S W 2d 569, err ref no rev err—City of Lamesa v Hutchinson, Civ App 336 S W 2d 861, err ref no rev err

Evidence held insufficient

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page 135

38. U S—Healy v Pennsylvania R Co, C A Pa, 184 F 2d 209, cert den 71 S Ct 480, 340 U S 935, 95 L Ed 674, reh den 71 S Ct 620, 341 U S 912, 95 L Ed 1348—Lewis v Pennsylvania R Co, D C Pa, 100 F Supp 291

Vt—Norton v Lumbra, 238 A 2d 628, 127 Vt 64

40. Pa—Davenport v Pennsylvania R Co, 72 A 2d 59, 364 Pa 202

Negligence held shown

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Mo—Hampton v Wabash R Co, 204 S W 2d 708, 356 Mo 999, cert den 68 S Ct 460, 333 U S 833, 92 L Ed 1117

Negligence held not shown

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page 136

41. Negligence held shown

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III—Edem v Chicago, R I & P R Co, 158 Ill App 82—Cook v Chicago, R I & P R Co, 153 Ill App 596—Foster v New York, C & St L R Co, 168 NE 2d 61, 26 Ill App 2d 337

42. Negligence held shown

III—Foster v New York, C & St L R Co, 168 NE 2d 61, 26 Ill App 2d 337—Moore v Atchison, T & S F Ry Co, 171 NE 2d 393, 28 Ill App 2d 340, 97 A L R 2d 511

43. III—Borrero v Elgin, J & E Ry Co, 171 NE 2d 673, 28 Ill App 2d 362. Cert den 82 S Ct 359, 368 U S 936, 7 L Ed 2d 198

Negligence held shown

III—Foster v New York, C & St L R Co, 168 NE 2d 61, 26 Ill App 2d 337

Negligence held not shown

US—Eckenrode v Pennsylvania R Co, CCA Pa, 164 F 2d 996, affd 69 S Ct 91, 335 U S 329, 93 L Ed 41

Ga—Howard v Atlantic Coast Line R Co, 66 S E 2d 87, 84 Ga App 307

Tex—Morris v Texas & N O R Co, Civ App, 269 S W 2d 565, err ref no rev err—Weasner v Texas & P Ry Co, Civ App, 328 S W 2d 457, err ref no rev err

44. Cal—Farnsworth v Western Pac R Co, 50 Cal Rptr 646, 241 C A 2d 476

47. Negligence held shown

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Negligence held not shown

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page 137

48. Negligence held shown

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NY—Walker v Pennsylvania R Co, 85 N Y S 2d 690

49. Ky—Chesapeake & O Ry Co v Jenkins, 227 S W 2d 906, 312 Ky 470

Negligence held shown

III—Dumpter v New York Cent R Co, 118 NE 2d 56, 2 Ill App 2d 47

50. Cal—Helms v Thomas, 260 P 2d 1016, 120 C A 2d 265

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51. US—Shepard v New York NH & H R Co, C A N Y, 300 F 2d 129

Negligence held not shown

US—Southern Ry Co v Roberts, C A Ga., 206 F 2d 308

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Or—Kelley v Oregon Shipbuilding Corp., 189 P 2d 105, 183 Or 1

Tex—Valencia v Western Compress & Storage Co, Civ App, 238 S W 2d 591, err ref no rev err—King v Keystone—Fleming Transport Inc., Civ App, 299 S W 2d 747, err ref no rev err

W Va.—Frist v West Virginia Northern R Co, 51 S E 2d 103, 132 W Va. 184, cert den 69 S Ct 891, 336 U S 961, 93 L Ed 1113

52. Ga—American Oil Co v McCluskey, 167 S E 2d 711, 119 Ga App 475

III—Harrison v Missouri Pac R Co, 181 NE 2d 737, 35 Ill App 2d 66. Revd on oth. grds. 83 S Ct 690, 372 U S 248, 9 L Ed 2d 711

Knowledge held shown

US—Kelly v New York, NH & H R Co, D C Mass., 138 F Supp 82

53. US—Southern Ry Co v Roberts, supra, n 51

56. Evidence held sufficient to sustain finding that employee was forced to return to work prematurely by employer's examining physician

US—Dunn v Conemaugh & Black Lick R R, D C Pa., 162 F Supp 324, affd, C A., 267 F 2d 571

page 138

57. US—Railway Exp Agency v Mallory, CCA Mass., 168 F 2d 426, cert den 69 S Ct 48, 335 U S 824, 93 L Ed 378—Kansas City Stockyards Co of Maine v Anderson, C A Mo., 199 F 2d 91, 36 A L R 2d 1—Great Atlantic & Pac Tea Co v McConnell, C A Fla., 199 F 2d 569—Masglowa v New York, C & St L R Co, D C Ohio, 135 F Supp 816, affd, C A., 237 F 2d 917, cert den 77 S Ct 562, 352 U S 1003, 1 L Ed 2d 548—Constantine v Ahquippa & Southern R Co, D C Pa., 144 F Supp 39

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W Va.—Crookham v New York Cent R Co, 107 S E 2d 516, 144 W Va 196, cert den 80 S Ct 65, 361 U S 821, 4 L Ed 2d 66, reh den 80 S Ct 204, 361 U S 904, 4 L Ed 2d 159

58. US—Kansas City Stockyards Co of Me v Anderson, supra, n 57

Negligence held shown

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59. La—Brown v T J Moss Tie Co, App, 32 So 2d 848

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Cal—Garber v Prudential Ins Co of America, 22 Cal Rptr 123, 203 C A 2d 693

60. US—Troutman v International Harvester Co, D C Ky, 83 F Supp 501, affd 173 F 2d 895, cert den 69 S Ct 1517, 337 U S 940, 93 L Ed 1745—Quinn v Pennsylvania R Co, D C Pa., 106 F Supp 277—Ft Worth & D Ry Co v Frine,

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Negligence held not shown

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Va—Keith v Clinchfield Coal Corp, supra, n 33—Sadler v Lynch, 64 S E 2d 664, 192 Va 344

W Va.—Crookham v New York Cent R Co, 107 S E 2d 516, 144 W Va 196, cert den 80 S Ct 65, 361 U S 821, 4 L Ed 2d 66, reh den 80 S Ct 204, 361 U S 904, 4 L Ed 2d 159

61. Miss—Lung v Bryant, 75 So 2d 643, 222 Miss 192

62. Ark—Holbert v Slaughter, 296 S W 2d 402, 227 Ark 144

65. US—Cahill v New York, NH & H R Co, 224 F 2d 637, revd without opinion 76 S Ct 180, 350 U S 898, 100 L Ed 790, reh den 76 S Ct 300, 350 U S 943, 100 L Ed 823, motion to recall and amend judg gr 76 S Ct 758, 351 U S 183, 100 L Ed 1075

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page 139

71. III—Borrero v Elgin, J & E Ry Co, 171 NE 2d 673, 28 Ill App 2d 362. Cert den 82 S Ct 144, 368 U S 891, 7 L Ed 2d 89, reh den 82 S Ct 359, 368 U S 936, 7 L Ed 2d 198

Negligence held shown

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§ 525. — Negligence of Fellow Servant

Library References

Employers' Liability ¶209

page 140

75. Minn—Palmer v White, 57 NW 2d 812, 239 Minn 130

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Page 140

Evidence held to show fellow-servant relation
Tex—Sandefur v Sandefur, Civ App, 232 S W 2d 111, err ref

Evidence held not to show fellow-servant relation

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77. Miss—Statham v Blaine, 107 So 2d 93, 234 Miss 649, motion gr to correct 108 So 2d 213, 234 Miss 649

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78. Or—Bartley v Doherty, 357 P 2d 521, 225 Or 15

79. Tex—Texas & P Ry Co v Hagenloh, Civ App, 241 S W 2d 669, affd 247 S W 2d 236, 151 Tex 191

Assault

(2) Other cases

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Evidence sufficient to show negligence of physician as employee of defendant

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80. US—Shepard v New York, NH & H R Co, C A N Y, 300 F 2d 129

84. US—Wantland v Illinois Cent R Co, C A Ill., 237 F 2d 921—Dunn v Conemaugh & Black Lick R R, D C Pa., 162 F Supp 324, affd, C A, 267 F 2d 571—Taylor v Canadian Nat Ry Co, C A Vt., 301 F 2d 1, cert den 82 S Ct 1585, 370 US 938, 8 L Ed 2d 807—Texas & Pac Ry Co v Jones, C A Tex., 298 F 2d 188—Grunenthal v Long Island R Co, D C N Y, 292 F Supp 813, affd in part, remd in part on oth grds 388 F 2d 480, revd on oth grds 89 S Ct 331, 393 US 156, 21 L Ed 2d 309

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page 141

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§ 526. — Assumption of Risk

Library References

Employers' Liability ¶=210

page 142

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99. Tex—City of Tyler v Kelly, supra, n 60

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page 143

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§ 527. — Contributory Negligence

Library References

Employers' Liability ¶=211

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page 144

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Servant's Negligence held sole cause of injury

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Waiver of rule

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Servant's negligence held proximate cause of injury

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page 145

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page 146

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page 147

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page 148

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Page 148

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Congressional intent

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§ 530. — Relation of Parties

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Employers' Liability ¶214, 215

page 149

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Whether physician, who certified plaintiff fit for work, was employee of defendant

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page 150

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Whether injured employee was vice principal
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§ 531. — Scope of Employment

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Employers' Liability ⇐214, 216

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Ordinarily it is a question of fact, etc

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page 151

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§ 532. — Presumptions

Library References

Employers' Liability ⇐214

page 152

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§ 533. — Nature and Cause of Injury

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Employers' Liability ⇐217-222

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Gulf, M & O R Co, 149 N E 2d 656, 17 Ill App 2d 220—Lester v Hennessy, 156 N E 2d 247, 20 Ill App 2d 479

Minn—Briggs v Chicago Great Western Ry Co, 80 N W 2d 625, 248 Minn 418—Strobel v Chicago, R I & P R Co, 96 N W 2d 195, 255 Minn 201

Mo—Cummings v Illinois Cent R Co, 269 S W 2d 111, 364 Mo 868, 47 A L R 2d 513—Kane v Chicago, B & O R Co, 271 S W 2d 518, cert den 75 S Ct 365, 348 U S 943, 99 L Ed 738—Snyder v Wabash R Co, 272 S W 2d 198—Boyd v Terminal R Ass'n of St Louis, 289 S W 2d 13, 58 A L R 2d 1222—Chambers v Missouri Pac R Co, 356 S W 2d 64

N J—Bascho v Pennsylvania R Co, 65 A 2d 613, 3 N J Super 86—Shellhammer v Lehigh Valley R Co, 102 A 2d 602, 14 N J 341, cert den 74 S Ct 852, 347 U S 990, 98 L Ed 1124, reh den 75 S Ct 20, 348 U S 852, 99 L Ed 672—Dudley v Victor Lynn Lines, Inc., 138 A 2d 53, 48 N J Super 457, revd on oth grds 161 A 2d 479, 32 N J 479

N M—Chavez v Atchison, T & S F Ry Co, 423 P 2d 34, 77 N M 346

Okla—End Transfer & Storage Co v Mollenhauer, 251 P 2d 1068, 207 Okl 654—Atchison, T & S F Ry Co v Hicks, 258 F 2d 672, 208 Okl 689—Magnolia Petroleum Co v Angelly, 306 P 2d 309—Midland Val R Co v Manios, 307 P 2d 545

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In actions under Federal Employers' Liability Act, etc—Keith v Wheeling & L E Ry Co, C C A Ohio, 160 F 2d 654, cert den 68 S Ct 67, 332 U S 763, 92 L Ed 348

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Cal—Waller v Southern Pac Co, 57 Cal Rptr 353, 424 P 2d 937, 66 C 2d 201

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page 153

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Miss—Allgood v United Gas Corp, 37 So 2d 12, 204 Miss 94

Page 153

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Evidence held insufficient, etc.

U S—Moore v Chesapeake & O Ry Co, Va, 71 S Ct 428, 340 U S 573, 95 L Ed 547

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Injury to child under statutory age of employment

Ark—Clark v Arkansas Democrat Co, 413 S W 2d 629, 242 Ark 133, 497

61 U S—Turchetta v Pennsylvania R Co, C A Pa, 237 F 2d 854—Snyder v Lehigh Val R Co, D C Pa, 143 F Supp 680, rev'd on oth grds, C A, 245 F 2d 112—Padgett v Southern R Co, C A Tenn, 396 F 2d 303

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N J—Baccho v Pennsylvania R Co, supra, n 57

Okla—Kansas O & G Ry Co v McAnally, 257 P 2d 271, 208 Okl 497

Court must appraise facts

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Cal—Marquez v Ortiz, 324 P 2d 720, 159 C A 2d 721

Colo—Colorado & S Ry Co v Lombardi, 400 P 2d 428, 156 Colo 488

Ill—Amerpohl v Illinois Cent R Co, 150 N E 2d 212, 17 Ill App 2d 416

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Evidence held sufficient to go to jury

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Evidence held sufficient to go to jury

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Ala—Bayles v Louisville & N R Co, 129 So 2d 679, 272 Ala 188

Iowa—Mooney v Nagel, 103 N W 2d 76, 251 Iowa 1052

page 154

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Vt—Cota v Rocheleau, 141 A 2d 426, 120 Vt 391

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Ill—Dowler v New York, C & St L R Co, 125 N E 2d 41, 5 Ill 2d 125

Okla—Sheridan v Deep Rock Oil Corp, 205 P 2d 276, 201 Okl 312

S C—Wade v Coplan, 142 S E 2d 201, 246 S C 6

72 Ky—Klingensiefel v Dunaway, 402 S W 2d 844

page 155

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Ala—Southern Ry Co v Reeder, 204 So 2d 808, 281 Ala 458—Louisville & N R Co v Vickery, 263 So 2d 656, 288 Ala 555

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Fla—Conner v Butler, App, 109 So 2d 183, cert den, Sup, 113 So 2d 835, rev'd on oth grds 80 S Ct 21, 361 U S 29, 4 L Ed 2d 10, conf to, App, 116 So 2d 454—McCloskey v Louisville & N R Co, App, 122 So 2d 481

Ill—Chesnut v Louisville & N R Co, 81 N E 2d 660, 335 Ill App 254—Finley v New York Cent R Co, 167 N E 2d 212, 19 Ill 2d 428

Minn—Propper v Chicago, R I & P R Co, 54 N W 2d 840, 237 Minn 386, 35 A L R 2d 459

Mo—Conser v Atchison, T & S F Ry Co, 266 S W 2d 587, cert den 75 S Ct 45—Marquardt v Kansas City Southern Ry Co, 358 S W 2d 49, 2 A L R 3d 1311

N J—Mormelo v Deakman-Well Co, 69 A 2d 212, 5 N J Super 352

Ohio—Alexander v New York Cent R Co, App, 197 N E 2d 822, 1 Ohio App 2d 460

Okla—Service Pipe Line Co v Donahue, 283 P 2d 844

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Evidence held insufficient for jury

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Evidence held sufficient for jury

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page 156

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Or—Mazurek v Raynus, 456 P 2d 83, 253 Or 555

page 157

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Cal—Devens v Goldberg, 199 P 2d 943, 33 Cal 2d 173—Souza v Pratico, 54 Cal Rptr 159, 245 C A 2d 651

Del—Binsau v Garstin, 177 A 2d 636, 4 Storey 423

Idaho—Johnson v Stanger, 510 P 2d 303, 95 Idaho 408

Ind—Conrad v Tomlinson, 279 N E 2d 546, 258 Ind 115

Iowa—Frederick v Goff, 100 N W 2d 624, 251 Iowa 290—Calkins v Sandven, 129 N W 2d 1, 256 Iowa 682

Ky—Beek Elec Repair Co v Browning, 214 S W 2d 1007, 308 Ky 503—Happy-Suddy Coal Co v Combs, 219 S W 2d 968, 310 Ky 52

Miss—Allgood v United Gas Corp, supra, n 59—Thompson v Thomas, supra, n 58

Mo—Higgins v Terminal R R Ass'n of St. Louis, 241 S W 2d 380, 362 Mo 264—Young v New York, C & St L Ry Co, 291 S W 2d 64

Okla—Mid-Continent Pipe Line Co v Price, 225 P 2d 176, 203 Okl 626

Or—Hale v Electric Steel Foundry Co, 191 P 2d 396, 183 Or 275, reh den 192 P 2d 257, 183 Or 275, and 192 P 2d 986—Colone v Roberts Bros, Inc, 276 P 2d 416, 202 Or 671

Tenn—Overstreet v Norman, 314 S W 2d 47, 44 Tenn App 343

Tex—Mender v Bryant, Civ App, 225 S W 2d 877, err ref—Port Terminal R Ass'n v Rosa, 289 S W 2d 220, 155 Tex 447—Robb v Gilmore, Civ App, 302 S W 2d 739, err ref no rev err—Byrd v Trevino-Bermes, Civ App, 366 S W 2d 632

Wash—Myers v Little Church by the Side of the Road, 227 P 2d 165, 37 Wash 2d 897—Hurst v Washington Cannery Co-op, 314 P 2d 651, 50 Wash 2d 729—Tabert v Zier, 368 P 2d 685, 59 Wash 2d 524—Schorzman v Brown, 391 P 2d 987, 64 Wash 2d 398

Violation of statute

Mass—Campbell v Leach, 225 N E 2d 594, 352 Mass 367

Mont—Pollard v Todd, 418 P 2d 869, 148 Mont 171

Or—Richardson v Harris, 395 P 2d 435, 238 Or 474

The causal connection between a disease or illness, etc.—Hercules Powder Co v Bannister, C A Tenn, 171 F 2d 262

Particular tools

(8) S C—Thomas v Atlantic Coast Line R Co, 71 S E 2d 403, 221 S C 462

Particular machinery or appliances

(3) N.J.—Roberts v Geo M Brewster & Son, 80 A 2d 638, 13 N J Super 462

S D.—Wiedner v Lineback, 140 N W 2d 597, 82 S D 8

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(8) Miss.—Grenada Dam Constructors v Patterson, 48 So 2d 480—City of Meridian v Godwin, 185 So 2d 433

(10) Okl.—National Valve & Mfg Co v Wright, 240 P 2d 769, 205 Okl 565

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Iowa.—Von Tersch v Ahrendsen, 99 N W 2d 287, 251 Iowa 115, 79 A L R 2d 267

(19) Ill.—Hall v Chicago & NW Ry Co, 125 NE 2d 77, 5 Ill 2d 135, 50 A L R 2d 661

Iowa.—Mooney v Nagel, 103 N W 2d 76, 251 Iowa 1052

Mo.—Whitehead v Schrick, App, 328 S W 2d 170

Or.—Blaine v Ross Lumber Co, 355 P 2d 461

Wash.—Heinen v Martin Miller Orchards, 242 P 2d 1054, 40 Wash 2d 356—Mason v Turner, 291 P 2d 1023

Failure to provide safe place to work

(1) U.S.—Beattie v Elgin, J & E Ry Co C A Ill., 217 F 2d 863

Fla.—Seaboard Air Line R Co v Hardee, 54 So 2d 809—Westberry v Great Atlantic & Pac Tea Co, App, 191 So 2d 613—Akles v Holland, App, 247 So 2d 720

Ill.—Vandaveer v Norfolk & W Ry Co, 222 N E 2d 897, 78 Ill App 2d 186—Mitchell v Missouri Pac R Co, 244 N E 2d 406, 104 Ill App 2d 142

Mo.—Carver v Missouri-Kansas-Texas R Co, 245 S W 2d 96, 326 Mo 897

Okl.—Menly-Wolfe Drilling Co v Lambert, 256 P 2d 818, 208 Okl 624

(4) Cal.—Chappee v Eichenbaum, 336 P 2d 1045, 169 C A 2d 46

page 158

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Ill.—Wills v Paul, 164 N E 2d 631, 24 Ill App 2d 417

N.C.—Chambers v Edney, 100 S E 2d 343, 247 N C 165

Pa.—Perry v Niedringhaus, 88 Pa Dist & Co 116, 70 Montg Co 182

93. Tex.—McClush v R C Young Feed & Seed Co, Civ App, 225 S W 2d 910, err ref

page 159

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Ala.—Stidham v Southern R Co, 77 So 2d 640, 262 Ala 153

Ga.—Atlantic Coast Line R Co v Daugherty, 157 S E 2d 880, 116 Ga App 438

Ill.—Robson v Pennsylvania R Co, 86 N E 2d 403, 337 Ill App 557—Donnelly v Pennsylvania R Co, 97 N E 2d 846, 342 Ill App 556, affd 105 N E 2d 730, 412 Ill 115, cert den 73 S Ct 93, 344 U S 855, 97 L Ed 663—Amerpohl v Illinois Cent R Co, 150 N E 2d 212, 17 Ill 2d 416—Finley v New York Cent R Co, 167 N E 2d 212, 19 Ill 2d 428

Mo.—Hatfield v Thompson, 252 S W 2d 534—Evinger v Thompson, 265 S W 2d 726, 364 Mo 658—Sederquist v Chicago, R I & P R Co, 268 S W 2d 861, 364 Mo 820—Wehrli v Wabash R Co, 315 S W 2d 765, cert den 79 S Ct 321, 358 U S 932, 3 L Ed 2d 304

Or.—Henderson v Union Pac R Co, 219 P 2d 170, 189 Or 145—Caplinger v Northern Pac Terminal, 418 P 2d 34, 244 Or 289

Tex.—Thompson v Brown, supra, n 57—Missouri-Kansas-Texas R Co v Evans, 250 S W 2d 385, 151 Tex 340—Texas & N O R Co v Arnold, Civ App, 381 S W 2d 388, app dism, Sup, 388 S W 2d 181

Utah.—Wilson v Union Pac R Co, 231 P 2d 715, 119 Utah 632

Particular omissions, defects, or dangers

(2) Cal.—Anderson v Southern Pac Co, 41 Cal Rptr 743, 231 C A 2d 233

Tex.—Hensley v Fort Worth & D Ry Co, Civ App, 408 S W 2d 761, err ref no rev err, cert den 88 S Ct 51

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Ill.—Selby v Chesapeake & O Ry Co, 137 N E 2d 657, 11 Ill App 2d 395

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Ga.—Southern Ry Co v Turner, 76 S E 2d 96, 88 Ga App 49

Ill.—Fredovich v New York Cent R Co, 175 N E 2d 580, 31 Ill App 2d 69

(12) Louisville & N R Co v Botts, supra, n 28

Wash.—Strandberg v Northern Pac Ry Co, 367 P 2d 137, 59 Wash 2d 259

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page 160

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Evidence has been held insufficient, etc

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page 161**97 Pneumoconiosis or silicosis**

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Ind.—Central Indiana Ry Co v Anderson Banking Co, 240 N E 2d 840, 143 Ind App 396

Or.—Bartley v Doherty, 357 P 2d 521, 225 Or 15

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Particular methods, rules, and orders

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Failure to give warning or signal

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Page 161

Other particular methods, rules or orders

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page 163

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Particular matters in operation of railroad

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page 164

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§ 534. — Negligence on Part of Master

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Effect of testimony

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page 165

16 Test

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page 166

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Authority of court restricted

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Evidence insufficient to go to jury

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page 167

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Slightest evidence sufficient

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Viewed most liberally

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Test

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page 168

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page 169

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Ill—Durkin v Elgin, J & E Ry Co, 138 NE 2d 866, 12 Ill App 2d 190—McCray v Illinois Cent R Co, 139 NE 2d 817, 12 Ill App 2d 425—Amerpohl v Illinois Cent R Co, 150 NE 2d 212, 17 Ill App 2d 416

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Mass—Sneed v Lidman, 172 NE 2d 836

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Mo—Schonlau v Terminal R Ass'n of St Louis, 212 SW 2d 420, 357 Mo 1108—Tatum v Gulf, M & O R Co, 223 SW 2d 418, 359 Mo 709—Malone v Gardner, 242 SW 2d 516, 362 Mo 569—Holmes v Terminal R R Ass'n of St Louis, 257 SW 2d 922, 363 Mo 1178—McDill v Terminal R R Ass'n of St Louis, 268 SW 2d 823—Huffman v Terminal R Ass'n of St Louis, 281 SW 2d 863—Zoeller v Terminal R R Ass'n of St Louis, App, 407 SW 2d 73

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NM—Thompson v Dale, 283 P 2d 623, 59 NM 290—Gutierrez v Valley Irr & Livestock Co, 357 P 2d 664, 68 NM 6

NY—Marks v New York City Transit Authority, 187 NY S 2d 693, 17 Misc 2d 583, revd on oth. grds. 205 NY S 2d 642, 11 A D 2d 993, aff'd 191 NE 2d 91, 13 NY 2d 620, 240 NY S 2d 606

Page 169

- Okl—Atchison, T & SF Ry Co v Marzuola, 418 P 2d 625—McClendon v McCall, 489 P 2d 756, 54 A L R 3d 551
- Or—Celone v Roberts Bros Inc, 276 P 2d 416, 202 Or 671—Larson v Papst, 286 P 2d 123, 205 Or 126—Krusse v Coos Head Tumber Co, 432 P 2d 1009, 248 Or 294
- Pa—Wright v Monogahela Ry, 105 P L J 291—Vardzel v Dravo Corp, 165 A 2d 622, 402 Pa 19
- SD—Bartlett v Gregg, 92 NW 2d 654, 77 SD 406
- Tenn—Overstreet v Norman, 314 S W 2d 47, 44 Tenn App 343
- Tex—Kansas City Southern Ry Co v Simmons, Civ App, 350 S W 2d 884, err ref no rev err, cert den 82 S Ct 1553, 370 U S 917, 8 L Ed 2d 497—Bella Napoli, Inc v Valenzuela, Civ App, 431 S W 2d 806
- Utah—Mooney v Denver & R G W R Co, 257 P 2d 947, 123 Utah 224—Bowden v Denver & R G W R Co, 286 P 2d 240, 3 Utah 2d 444
- Wash—Ebding v Foster, 209 P 2d 367, 34 Wash 2d 539—Hurst v Washington Cannery Co-op, 314 P 2d 651, 30 Wash 2d 729—Handler v Osman, 376 P 2d 439, 60 Wash 2d 800
- Particular questions held for jury**
- (10) Other questions
- US—Sears, Roebuck & Co v Wedgeworth, C A Tex, 252 F 2d 759—Chicago & NW Ry Co v Rieger, C A Minn, 326 F 2d 329, cert den 84 S Ct 1182, 377 U S 917, 12 L Ed 2d 186
- Fla—Beebe v Kaplan, App, 177 So 2d 869
- Ill—Del Raso v Elgin, J & E Ry Co, 228 NE 2d 470, 84 Ill App 2d 344, 30 A L R 3d 708, cert den 88 S Ct 1036, 390 U S 948, 19 L Ed 2d 1138
- Mo—Scott v Norman, 391 S W 2d 890
- Wash—Sragusa v Swedish Hospital, 373 P 2d 767, 60 Wash 2d 310

page 171

57. US—Wilkerson v McCarthy, supra, n 15
58. Wash—Greenleaf v Puget Sound Bridge & Dredging Co, 364 P 2d 796, 58 Wash 2d 647
59. Mo—Wann v St Louis-SF Ry Co, 263 S W 2d 376, 364 Mo 492
60. SC—Barawell v Elliott, 80 S E 2d 748, 225 S C 62
61. US—Randenbush v Baltimore & O R R, D C Pa, 63 F Supp 329, new trial den 65 F Supp 6, revd on oth grds, CCA, 160 F 2d 363—Larsen v Chicago & NW Ry Co, C A Ill, 171 F 2d 841—Wergin v Monessen Southwestern Ry Co, C A Pa, 258 F 2d 806
- Fla—Loftin v Joyner, 60 So 2d 154
- Iowa—Sample v Schwenck, 54 NW 2d 527, 243 Iowa 1189
- Minn—Clark v Brungs, 169 NW 2d 407, 284 Minn 73
- Mo—Lamont v Thompson, 303 S W 2d 589
- Evidence held sufficient to raise jury question as to negligence**
- US—Wilkerson v McCarthy, supra, n 15
- Evidence held insufficient to raise jury question as to negligence**
- (1) US—Wolfe v Henwood, supra, n 55—Inman v Baltimore & O R Co, Ohio, 80 S Ct 242, 361 U S 138, 4 L Ed 2d 198
- Cal—Gavel v Jammon, 254 P 2d 47, 116 C A 2d 635
- Iowa—Sample v Schwenck, 54 NW 2d 527, 243 Iowa 1189
- Ky—Le Sage v Pitts, 223 S W 2d 347, 311 Ky 155
- Mo—Cooper v Burnley, 345 S W 2d 74—McTurman v Bell, App, 398 S W 2d 465
- Mont—Allen v Smeding, 357 P 2d 13, 138 Mont 367
- NY—Schmidt v Carper, 61 N Y S 2d 185, 270 App Div 411, affd 71 NE 2d 471, 296 N Y 791
- (3) US—Van Riper v New York Cent R Co, C A Mich, 227 F 2d 823
- Ohio—McDaniel v McDaniel, 107 NE 2d 755, 91 Ohio App 193

page 172

65. US—Southern Pac Co v Carson, C A Cal, 169 F 2d 734—Williams v Atlantic Coast Line R Co, C A Ga, 190 F 2d 744—Picard v Pittsburgh & O V Ry Co, D C Pa, 153 F Supp 583—Trout v Pennsylvania R Co, C A Pa, 300 F 2d 826—Ruble v Louisville & NR Co, D C Tenn, 208 F Supp 798—Marzano v Long Island R Co, C A N Y, 386 F 2d 432—Boeing Co v Shipman, C A Ala, 411 F 2d 365
- Ga—Jackson v Thompson, supra, n 54
- Ill—Wawryszyn v Illinois Cent R Co, 135 NE 2d 154, 10 Ill App 2d 394, 61 A L R 2d 801—Finley v New York Cent R Co, 167 NE 2d 212, 19 Ill 2d 428
- Ind—Leader v Bowles, 178 NE 2d 445, 132 Ind App 528
- Iowa—Livingstone v Morarend, 149 NW 2d 850, 260 Iowa 530
- Mass—Beakes v Cutler, 77 NE 2d 402, 322 Mass 392—Ferrara v Boston & M R R, 155 NE 2d 416, 338 Mass 323
- Miss—Allgood v United Gas Corp, 37 So 2d 12, 204 Miss 94
- Mo—McDill v Terminal R R Ass'n of St Louis 268 S W 2d 823—Jenkins v Terminal R Ass'n of St Louis, App, 285 S W 2d 12
- N M—Bourguet v Atchison, T & SF Ry Co, 334 P 2d 1112, 65 NM 207
- Okl—Gulf, C & SF Ry Co v Blanton, 284 P 2d 736—Midland Val R Co v Manios, 307 P 2d 545—Missouri-Kansas-Texas R Co v Jones, 354 P 2d 415—Atchison, T & SF Ry Co v Marzuola, 418 P 2d 625—St Louis-San Francisco Ry Co v Nes-Smith, 435 P 2d 602
- Or—Henderson v Union Pac R Co, 219 P 2d 170, 189 Or 145—Larson v Papst, 286 P 2d 123, 205 Or 126
- Tex—Port Terminal R Ass'n v Ross, 289 S W 2d 220, 153 Tex 447—Missouri-Pacific R Co v Prejean, Civ App, 307 S W 2d 284
- Wash—Arnold v US Gypsum Co, supra, n 54
- Wyo—Berry v Iowa Mid-West Land & Livestock Co, 424 P 2d 409
- Goggles**
- US—Snyder v Lehigh Val R Co, C A Pa, 245 F 2d 112
- N J—Kulodny v Lehigh Val R Co, 120 A 2d 763, 39 N J Super 268
- Masks or respirators**
- NY—MacClave v City of New York, 265 N Y S 2d 222, 24 A D 2d 230, affd 227 NE 2d 885, 19 N Y 2d 892, 281 N Y S 2d 86
66. US—Butler v New York Cent R Co, C A Ind, 253 F 2d 281—Wong v Sewer, C A Wash, 267 F 2d 749—Wiles v New York, C & St L R Co, C A Pa, 283 F 2d 328, cert den 81 S Ct 232, 364 U S 900, 5 L Ed 2d 193—Wattigney v Southern Pac Co, C A La, 411 F 2d 854
- Ariz—Smith v Goodman, 430 P 2d 922, 6 Ariz App 168
- Ky—Louisville and Jefferson County Bd of Health v Mulkins, 445 S W 2d 849

page 173

67. **Evidence held insufficient for jury**
- N J—Rakowski v Paybestos-Manhattan, Inc, 68 A 2d 641, 5 N J Super 203
73. Cal—Tellez v Schreyer, 322 P 2d 259, 158 C A 2d 248
- Iowa—Wagner v Larson, 136 NW 2d 312, 257 Iowa 1202
- Evidence held insufficient for jury**
- US—Snyder v Lehigh Val R Co, D C Pa, 143 F Supp 680, revd on oth grds, C A, 245 F 2d 112
- Mo—Cooper v Burnley, 345 S W 2d 74
- Mont—Allen v Smeding, 357 P 2d 13, 138 Mont 367
- N C—Chambers v Edney, 100 S E 2d 343, 247 N C 165
- S C—Jackson v Powe, 126 S E 2d 841, 241 S C 35

- Utah—Sciliano v Denver & R G W R Co, 364 P 2d 413, 12 Utah 2d 183, cert dsm 82 S Ct 476, 368 U S 979, 7 L Ed 2d 521

page 174

76. Cal—Rasmus v Southern Pac Co, 301 P 2d 23, 144 C A 2d 264
- Pa—Ludlam v Moore, 21 Beaver 97
- Tenn—CJS quoted in Thurner v Southern Ry Co, 293 S W 2d 600, 603, 41 Tenn App 354
77. Tenn—Watson v Borg-Warner Corp, 228 S W 2d 1011, 190 Tenn 209
- Tex—Ramsey v Coldwater Cattle Co, Civ App, 403 S W 2d 196
80. US—Murnyn v New York Cent R Co, C A N Y, 270 F 2d 645, cert den 80 S Ct 671, 362 U S 918, 4 L Ed 2d 739—Chicago & NW Ry Co v Rieger, C A Minn, 326 F 2d 329, cert den 84 S Ct 1182, 377 U S 917, 12 L Ed 2d 186—Yeager v J R Christ Co, C A Pa, 364 F 2d 96
- Ill—Harsh v Illinois Terminal R Co, 114 NE 2d 901, 351 Ill App 272, revd on oth grds 75 S Ct 362, 348 U S 940, 99 L Ed 736, reh den 75 S Ct 527, 348 U S 977, 99 L Ed 761—Campbell v Chesapeake & O Ry Co, 183 NE 2d 736, 36 Ill App 2d 276—Olson v Pigott, 188 NE 2d 361, 39 Ill App 2d 191—Yanders v Cline, 238 NE 2d 425, 95 Ill App 204
- Iowa—Fredenck v Goff, 100 NW 2d 624, 251 Iowa 290—Van Aernam v Nielsen, 157 NW 2d 138, 261 Iowa 1115
- Ky—Burdette v Thompson, 420 S W 2d 548
- Wash—Hoffman v Gamache, 465 P 2d 203, 1 Wash App 883

page 175

81. Tex—Potter v Garner, Civ App, 407 S W 2d 537, err ref no rev err
- Improper respiratory equipment**
- Cal—Anderson v Southern Pac Co, 41 Cal Rptr 743, 231 C A 2d 233
85. US—Tombigbee Mill & Lumber Co v Hollingsworth, supra, n 2
87. US—Tombigbee Mill & Lumber Co v Hollingsworth, supra, n 2—Glover v Yonce, supra, n 49
88. Iowa—Wagner v Larson, 136 NW 2d 312, 257 Iowa 1202
- Ky—Batsel v Brown, 221 S W 2d 78, 310 Ky 524
- Pa—Giles v Levinson, 114 P L J 214, affd 218 A 2d 722, 421 Pa 128
- Evidence held insufficient to raise jury question**
- Ala—Parker v Kellum, 228 So 2d 16, 284 Ala 701
93. N M—Padilla v Winsor, 354 P 2d 740, 67 N M 267
94. Pa—White v Logan, 10 Pa Dist & Co 383, 42 York Leg Rec 15
- Tex—Robb v Gilmore, Civ App, 302 S W 2d 739, err ref no rev err

page 176

95. Ind—Conrad v Tomlinson, 279 NE 2d 546, 258 Ind 115
- Mo—Moles v Kansas City Stock Yards Co of Me, App, 434 S W 2d 752
- Cart or wagon with handle extended across floor**
- Wash—Mannisto v Boeing Airplane Co, 373 P 2d 496, 60 Wash 2d 304
96. Mo—Holmes v Terminal R R Ass'n of St Louis, 257 S W 2d 922, 363 Mo 1178
97. Minn—Fick v Wolfinger, 198 NW 2d 146, 293 Minn 483
- Pa—Michaels v Tubba, 289 A 2d 738, 221 Pa Super 255
- Evidence held to raise question for jury**
- Cal—Mantonya v Bratie, 240 P 2d 667, 109 C A 2d 244
- Mo—Spears v Schantz, 246 S W 2d 399, 241 Mo App 879
98. Colo—Yager v Skinner, App, 470 P 2d 937

Ga—Evans v Carroll, 68 S E 2d 608, 85 Ga App 227
Wash—Schorzman v Brown, 391 P 2d 987, 64
Wash 2d 398

Evidence held for jury as to

(4) Other matters

Miss—City of Meridian v Godwin, 185 So 2d 433—
Horne v Town of Moorhead, 228 So 2d 369

Evidence held insufficient to raise jury question

Okla—Bacon Transports v Friley, 238 P 2d 835, 205
Okla 520—Stout v Schell, 241 P 2d 1109, 206 Okla
153

Potato truck

Wash—Boley v Larson, 385 P 2d 326, 62 Wash 2d 959

1. U.S.—Louisville & N.R. Co v Botts, C.A. Mo., 173
F 2d 164—Deleve v Reading Co, C.A. Pa., 176
F 2d 496

Cal—Minehart v Southern Pac Co, 288 P 2d 999, 136
C.A. 2d 486

Fla—McCullough v Jacksonville Terminal Co, App.,
176 So 2d 345, affd, Sup., 179 So 2d 850

Mo—White v Atchison, T & S.F. Ry Co, 244 S.W. 2d
26, cert den 72 S.Ct. 648, 343 U.S. 915, 96 L.Ed.
1330—Warming v Thompson, 249 S.W. 2d 335, 30
A.L.R. 2d 1176—Wann v St. Louis S.F. Ry Co,
263 S.W. 2d 376, 364 Mo. 492—Sneider v Wabash
R. Co, 272 S.W. 2d 198—Adams v Atchison, T.
& S.F. Ry. Co, 280 S.W. 2d 84

N.C.—Keith v Norfolk Southern Ry Co, 175 S.E. 2d
778, 9 N.C. App. 198

Pa—McKinney v Union R. Co, 102 Pittsb. Leg. J. 317

Tex—Thompson v Brown, Civ. App., 222 S.W. 2d 442
—Missouri Pac. R. Co v Rhoden, Civ. App., 310
S.W. 2d 607

Evidence held sufficient to go to jury on question

(1) Mo—Sederquist v Chicago, R.I. & P.R. Co, 268
S.W. 2d 861, 364 Mo. 820

(3) Other questions

Ohio—Mills v Pennsylvania New York Cent. Transp.
Co, 243 N.E. 2d 99, 16 Ohio St. 2d 97

page 177

2. U.S.—Scocozza v Erie R. Co, C.A.N.Y., 171 F. 2d
745, cert den 69 S.Ct. 1048, 337 U.S. 907, 93
L.Ed. 1719

Ga—Howard v Atlantic Coast Line R. Co, 66 S.E. 2d
87, 84 Ga. App. 307

Evidence held insufficient to raise jury question

U.S.—Van Riper v New York Cent. R. Co, C.A. Mich.,
227 F. 2d 823

Held not engineering question

(2) Other matters

U.S.—Hoffester v Long Island R. Co, C.A.N.Y., 360
F. 2d 369

5. U.S.—Albergo v Reading Co, C.A. Pa., 372 F. 2d
83, cert den 87 S.Ct. 1284, 386 U.S. 983, 18
L.Ed. 2d 232

Ill.—Glume v New York Cent. R. Co, 126 S.E. 2d 385,
5 Ill. App. 2d 509

Miss.—St. Louis-San Francisco Ry. Co v Vaughn, 115
So. 2d 62, 237 Miss. 371, cert den 80 S.Ct. 807,
362 U.S. 943, 4 L.Ed. 2d 770

Mo.—Raze v St. Louis Southwestern Ry. Co, 227
S.W. 2d 687, 360 Mo. 222

Evidence held insufficient for jury

U.S.—Stanczak v Pennsylvania R. Co, C.A. Ill., 174
F. 2d 43—Raudenbush v Baltimore & O.R.R., D.C.
Pa., 63 F.Supp. 329, new trial den 65 F.Supp. 6,
revd on oth. grds., C.C.A., 160 F. 2d 363—Atlantic
Coast Line R. Co v Craven, C.A. Va., 185 F. 2d
176, cert den 71 S.Ct. 571, 340 U.S. 952, 95 L.Ed.
686

Mo.—Williams v Southern Pac. R. Co, 338 S.W. 2d
882

N.C.—Baker v Atlantic Coast Line R. Co, 61 S.E. 2d
621, 232 N.C. 523, cert den 71 S.Ct. 482, 340 U.S.
939, 95 L.Ed. 677

Or.—Muse v Spokane, P. & S. Ry. Co, 266 P. 2d 412,
200 Or. 463

57 CJS 1866 PP—2

Utah—McGowan v Denver & R.G.W.R. Co, 244 P. 2d
628, 121 Utah 587, cert den 73 S.Ct. 346, 344 U.S.
918, 97 L.Ed. 707

8. U.S.—Allen v Union R. Co, D.C. Pa., 162 F.Supp.
635

Ill.—Knight v Chicago & NW Ry. Co, 123 N.E. 2d
128, 3 Ill. App. 2d 502

9. U.S.—Byler v Wabash R. Co, D.C. Mo., 96
F.Supp. 16, revd on oth. grds., C.A., 196 F. 2d 9,
cert den 73 S.Ct. 27, 344 U.S. 826, 97 L.Ed.
643—Wilson v Pennsylvania R. Co, D.C. Pa., 141
F.Supp. 233, affd, C.A., 239 F. 2d 384—Texas &
P. Ry. Co v Griffith, C.A. Tex., 265 F. 2d 489—
Draper v Erie R. Co, D.C. Pa., 183 F.Supp. 899—
Trout v Pennsylvania R. Co, C.A. Pa., 300 F. 2d
826

N.Y.—Jeffries v Long Island R. Co, 224 N.Y.S. 2d 497,
15 A.D. 2d 356

Questions as to particular defects held for jury

(1) U.S.—Missouri-K-T.R. Co of Tex v Ridgway,
C.A. Mo., 191 F. 2d 363, 29 A.L.R. 2d 984

Ill.—Virgil v New York, C. & St. L.R. Co, 106 N.E. 2d
749, 347 Ill. App. 281—Selby v Chesapeake & O.
Ry. Co, 137 N.E. 2d 657, 11 Ill. App. 2d 395

Mo.—Cassano v Atchison, T. & S.F. Ry. Co, 247
S.W. 2d 786, 362 Mo. 1207

(2) U.S.—Draper v Erie R. Co, C.A. Pa., 285 F. 2d
255

page 178

10. U.S.—Chesapeake & O. Ry. Co v Thomas, C.A.
Va., 198 F. 2d 783, cert den 73 S.Ct. 387, 344
U.S. 921, 27 L.Ed. 709—Fugazzi v Southern Pac.
Co, C.A. Cal., 208 F. 2d 205—New York, N.H. &
H.R. Co v Dox, C.A. Mass., 249 F. 2d 572—New
York Cent. R. Co v Carr, C.A. W. Va., 251 F. 2d
433—Hockathorne v Pennsylvania R. Co, D.C.
Pa., 156 F.Supp. 824—Chicago & NW Ry. Co v
Rieger, C.A. Minn., 326 F. 2d 329, cert den 84
S.Ct. 1182, 377 U.S. 917, 12 L.Ed. 2d 186—Keaton
v Atchison, T. & S.F. Ry. Co, C.A. Ill., 321 F. 2d
317—Missouri-Kansas-Texas Ry. Co v Hearson,
C.A. Kan., 422 F. 2d 1037

Fla.—Martin v Tindell, 98 So. 2d 473, cert den 78
S.Ct. 545, 355 U.S. 959, 2 L.Ed. 2d 534—Lee v
Atlantic Coast Line R. Co, App., 233 So. 2d 865

Mont.—Calihan v Great Northern Ry. Co, 350 P. 2d
369, 137 Mont. 93

Evidence held to raise jury question

(2) U.S.—Kansas City Southern Ry. Co v Cagle,
C.A. Okla., 229 F. 2d 12, cert den 76 S.Ct. 697, 351 U.S.
908, 100 L.Ed. 1443

Ill.—Williams v New York Cent. R. Co, 84 N.E. 2d
399, 402 Ill. 494

11. U.S.—Hartley v Baltimore & O.R. Co, C.A. Pa.,
194 F. 2d 560

12. Ill.—Galloway v Atchison, T. & S.F. Ry. Co, 82
N.E. 2d 372, 335 Ill. App. 572

15. Ala.—Seaboard Coast Line R. Co v Whitehead,
262 So. 2d 752, 288 Ala. 305

Iowa.—Wagner v Larson, 136 N.W. 2d 312, 257 Iowa
1202

16. U.S.—Southern Pac. Co v Guthrie, C.A. Cal., 180
F. 2d 295, adhered to 186 F. 2d 926, cert den 71
S.Ct. 614, 341 U.S. 904, 95 L.Ed. 1343

Ala.—Shepherd v Southern Ry. Co, 256 So. 2d 883,
288 Ala. 50

Cal.—Finley v Southern Pac. Co, 3 Cal. Rptr. 895, 179
C.A. 2d 424

Fla.—McCalley v Seaboard Coast Line R. Co, App.,
252 So. 2d 275

Ill.—Pennell v Baltimore & O.R. Co, 142 N.E. 2d 497,
13 Ill. App. 2d 433

Okla.—St. Louis-San Francisco Ry. Co v McBride, 376
P. 2d 214

Evidence held to raise question for jury

(1) Penn v Chicago & NW Ry. Co, 69 S.Ct. 79,
335 U.S. 849, 93 L.Ed. 398, reh den 69 S.Ct. 164, 335
U.S. 873, 93 L.Ed. 417

(3) Donnelly v Pennsylvania R. Co, 105 N.E. 2d 730,
412 Ill. 115, cert den 73 S.Ct. 93, 344 U.S. 855, 97
L.Ed. 663

page 179

18. U.S.—Stanczak v Pennsylvania R. Co, supra, n.
5—Shiffler v Pennsylvania R. Co, C.A. Pa., 176
F. 2d 368—Webb v Illinois Cent. R. Co, Ill., 77
S.Ct. 451, 352 U.S. 512, 1 L.Ed. 2d 503, reh den
77 S.Ct. 809, 353 U.S. 943, 1 L.Ed. 2d 764—Rogers
v Missouri Pac. R. Co, Ill., 77 S.Ct. 459, 352
U.S. 521, 1 L.Ed. 2d 515—Widder v New York, C.
& St. L.R. Co, C.A. Pa., 235 F. 2d 752—Wantland
v Illinois Cent. R. Co, C.A. Ill., 237 F. 2d 921—
Hoyt v Central R.R., C.A. N.J., 243 F. 2d 840—
Butler v New York Cent. R. Co, C.A. Ind., 253
F. 2d 281—Kooker v Pittsburgh & L.E.R. Co,
C.A. Ohio, 258 F. 2d 876—Denver & R.G.W.R.
Co v Conley, C.A. Colo., 293 F. 2d 612—Chicago
& NW Ry. Co v Rieger, C.A. Minn., 326 F. 2d
329, cert den 84 S.Ct. 1182, 377 U.S. 917, 12
L.Ed. 2d 186—Fuhrman v Reading Co, D.C. Pa.,
311 F.Supp. 782, affd in part, revd in part on oth.
grds., C.A., 439 F. 2d 10

D.C.—Woodington v Pennsylvania R. Co, C.A., 236
F. 2d 760, cert den 77 S.Ct. 362, 352 U.S. 970, 1
L.Ed. 2d 324

Fla.—Lawrence v Florida East Coast Ry. Co, App.,
216 So. 2d 779

Ga.—Southern Ry. Co v Turner, 76 S.E. 2d 96, 88
Ga. App. 49—Southern Ry. Co v Cabe, 136 S.E. 2d
438, 109 Ga. App. 432—Atlantic Coast Line R. Co
v Daugherty, 157 S.E. 2d 880, 116 Ga. App. 438

Idaho—Sinclair v Great Northern Ry. Co, 489 P. 2d
442, 94 Idaho 409

Ill.—Hall v Chicago & NW Ry. Co, 125 N.E. 2d 77, 5
Ill. 2d 135, 50 A.L.R. 2d 661—Glime v New York
Cent. R. Co, 126 N.E. 2d 385, 5 Ill. App. 2d 509—
Predovich v New York Cent. R. Co, 175 N.E. 2d
580, 31 Ill. App. 2d 69

Ind.—Central Indiana Ry. Co v Anderson Banking
Co, 240 N.E. 2d 840, 143 Ind. App. 396

Mass.—Langway v Trustees of New York, N.H. &
H.R. Co, 124 N.E. 2d 519, 332 Mass. 215

Mo.—Hunter v St. Louis Southwestern Ry. Co, 315
S.W. 2d 689

Tex.—Thompson v Brown, supra, n. 1—Thompson v
Gibson, Civ. App., 290 S.W. 2d 305, revd on oth.
grds. Sup., 298 S.W. 2d 97, 156 Tex. 593, revd on
oth. grds. 78 S.Ct. 2, 355 U.S. 18, 2 L.Ed. 2d 1, reh
den 78 S.Ct. 258, 355 U.S. 900, 2 L.Ed. 2d 197,
affd 310 S.W. 2d 564, 158 Tex. 231

Utah—Butz v Union Pac. R. Co, 233 P. 2d 332, 120
Utah 185, reh den 238 P. 2d 1128, 120 Utah 209

19. U.S.—Southern Ry. Co v Neese, C.A. S.C., 216
F. 2d 772, revd on oth. grds. 76 S.Ct. 131, 350
U.S. 77, 100 L.Ed. 60—Snyder v Lehigh Val. R.
Co, D.C. Pa., 143 F.Supp. 680, revd on oth. grds.,
C.A., 245 F. 2d 112

Ill.—Knight v Chicago & NW Ry. Co, 123 N.E. 2d
128, 3 Ill. App. 2d 502

N.Y.—Conkey v New York Cent. R. Co, 136 N.Y.S. 2d
189, 206 Misc. 1077

Evidence held insufficient for jury

U.S.—Detroit, T. & I.R. Co v Banam, C.A. Mich.,
173 F. 2d 752, cert den 70 S.Ct. 54, 338 U.S. 815,
94 L.Ed. 493, and 70 S.Ct. 57, 338 U.S. 815, 94
L.Ed. 493—Perkozki v New York, C. & St. L.R.
Co, C.A. Ohio, 217 F. 2d 642—Amold v Seaboard
Air Line R. Co, C.A. Va., 345 F. 2d 30, cert den
86 S.Ct. 70, 382 U.S. 831, 15 L.Ed. 2d 75

Mo.—Fitzpatrick v St. Louis-San Francisco Ry. Co,
300 S.W. 2d 490

20. Cal.—Lofy v Southern Pac. Co, 277 P. 2d 423,
129 C.A. 2d 459

Mo.—Hill v Terminal R. Ass'n of St. Louis, 216
S.W. 2d 487, 358 Mo. 597, cert den 69 S.Ct. 892,
336 U.S. 962, 93 L.Ed. 114—Brook v Gulf, M. &
O.R. Co, 270 S.W. 2d 827

21. U.S.—Vront v Wheeling & L.E. Ry. Co, D.C.
Ohio, 91 F.Supp. 854—Beattie v Monongahela R.
Co, D.C. Pa., 122 F.Supp. 803—Anderson v El-
gin, J. & E. Ry. Co, C.A. Ill., 227 F. 2d 91—Webb
v Illinois Cent. R. Co, Ill., 77 S.Ct. 451, 352 U.S.
512, 1 L.Ed. 2d 503, reh den 77 S.Ct. 809, 353
U.S. 943, 1 L.Ed. 2d 764—Rogers v Missouri Pac.
R. Co, Ill., 77 S.Ct. 459, 352 U.S. 521, 1 L.Ed. 2d

Page 179

- 515—McCracken v Richmond, F & P R Co, C A Va, 240 F 2d 484
Ok!—Atchison, T & S F Ry Co v Marzuola, 418 P 2d 625
Pa—Bishop v Montour R Co, 109 A 2d 549, 379 Pa 562

page 180

24. Mo—Carver v Missouri-Kansas-Texas R Co, 243 S W 2d 96, 326 Mo 897
25. U S—Southern Pac Co v Guthrie, supra, n 16—Rice v Louisville & N R Co, C A Ky, 344 F 2d 776—Schertf v Missouri-Kansas-Texas R Co, C A Tex, 449 F 2d 23
Ill—Jensen v Elgin, J & E Ry Co, 147 N E 2d 204 15 Ill App 2d 559
Mich—Jones v New York Cent R Co, 155 N W 2d 216, 8 Mich App 575
Miss—St Louis-San Francisco Ry Co v Dyson 43 So 2d 95, 207 Miss 639
Mo—Luthy v Terminal R Ass'n of St Louis 243 S W 2d 332—Cleghorn v Terminal R Ass'n of St Louis, 289 S W 2d 13

Evidence held insufficient for jury

- U S—Atlantic Coast Line R Co v Collins, C A S C, 235 F 2d 805, cert den 77 S Ct 265, 352 U S 942, 1 L Ed 2d 238, reh den 77 S Ct 380, 352 U S 982, 1 L Ed 2d 366
28. Ga—Central of Georgia Ry Co v Clark, 98 S E 2d 85, 93 Ga App 325
30. Cal—Truitt v Southern Pac Co, 245 P 2d 1083, 112 C A 2d 218
Fla—Lofin v Joyner, 60 So 2d 154
Ill—Rouse v New York, C & St L R Co, 110 N E 2d 266, 349 Ill App 139
31. U S—Kraus v Reading Co, C C A Pa, 167 F 2d 313—Schnee v Southern Pac Co, C A Ariz, 186 F 2d 745—Baltimore & O R Co v McAmis, C A Ky, 220 F 2d 683—Murray v Denver & R G W R Co, C A Utah, 229 F 2d 644
Ill—Pitrowski v New York, C & St L R Co, 122 N E 2d 262, 4 Ill 2d 125
Mass—Labonte v New York, N H & H R Co, 131 N E 2d 203, 333 Mass 420, cert den 76 S Ct 1033, 351 U S 974, 100 L Ed 1492
Mo—Sprinkle v Thompson, 243 S W 2d 510—Wiser v Missouri Pac R Co, 301 S W 2d 37

page 181

32. Mo—Sprinkle v Thompson, supra, n 31
Evidence held insufficient for jury
Ohio—Elkins v Wheeling & Lake Erie R Co, 113 N E 2d 233, 160 Ohio St 47
Pa—Finnegan v Monongahela Connecting R Co, 108 A 2d 321, 379 Pa 63
33. U S—Armstrong v Wyer, C A N Y, 210 F 2d 592
36. Ill—Hall v Chicago & N W Ry Co, 125 N E 2d 77, 5 Ill 2d 135, 50 A L R 2d 661
37. Pa—Finnegan v Monongahela Connecting R Co, 108 A 2d 321, 379 Pa 63

page 182

46. U S—McCann v Smith, C A Conn, 370 F 2d 323
Cal—Binkinsop v Weber, 193 P 2d 96, 85 Cal App 2d 276—Devens v Goldberg, 199 P 2d 943, 33 Cal 2d 173
Md—Long v Joestien, 66 A 2d 407, 193 Md 211
Mich—Nastico v Matuszak, 34 N W 2d 506, 322 Mich 644
N C—Mutz v Atlantic Coast Line R Co, 65 S E 2d 120, 233 N C 607
Or—Colone v Roberts Bros, Inc, 276 P 2d 416, 202 Or 671
Evidence held insufficient for jury
Wash—Schmidt v Pioneer United Dairies, 373 P 2d 764, 60 Wash 2d 271
47. Fla—Bertholf v Baker, 71 So 2d 480
48. U S—Kambler v Pittsburgh & L E R Co, C A Pa, 331 F 2d 383

- Ala—Louisville & N R Co v Steel, 59 So 2d 664 257 Ala 474
Cal—Jones v Hotchkiss, 305 P 2d 129, 147 C A 2d 197
Colo—Gordon v Clotworthy, 257 P 2d 410, 127 Colo 377, 49 A L R 2d 314
Mo—Higgins v Terminal R R Ass'n of St Louis, 241 S W 2d 380, 362 Mo 264
Ok!—C J S cited in Patrick's Inc v Mosserano, 292 P 2d 1003, 1008

Evidence held insufficient for jury

- Tex—Great Atlantic & Pac Tea Co v Coleman, Civ App, 259 S W 2d 319
49 Evidence held insufficient for jury
D C—Fitzpatrick v Fowler, 168 F 2d 172 83 U S App D C 229
51 Ga—Rogers v Bragg, 160 S E 2d 217, 117 Ga App 295
52. Miss—Johns-Manville Products Corp v McClure, 46 So 2d 539

Evidence held insufficient for jury

- Mont—Allen v Smeding, 357 P 2d 13, 138 Mont 367
53 Ill—Margovich v Chicago & N W Ry Co, 116 N E 2d 914, 1 Ill App 2d 162, cert den 75 S Ct 84, 348 U S 861, 99 L Ed 678
Iowa—O'Reagan v Daniels, 44 N W 2d 666, 241 Iowa 1199
Mass—Rice v De Avilla, 155 N E 2d 768, 338 Mass 793
N Y—Griffin v Corporation of Church of Assumption of Mechanicville, 218 N Y S 2d 141, 14 A D 2d 620
Va—Lassiter v Jones, 105 S E 2d 849, 200 Va 294

Evidence held insufficient to raise jury question

- Wis—Burmeister v Danrow, 79 N W 2d 87, 273 Wis 568

page 183

54. Ky—Behemoth Coal Co v Helton, 222 S W 2d 845, 310 Ky 810
55. U S—Massey v Chattanooga Station Co, C A Tenn, 210 F 2d 167, cert den 75 S Ct 216, 348 U S 896, 99 L Ed 704—Wong v Swier, C A Wash, 267 F 2d 749
Cal—Springer v Southern Pac Co, 302 P 2d 872, 145 C A 2d 640
Ga—A F King & Son v Simmons, 131 S E 2d 214, 107 Ga App 628
Miss—Letney v Miller, 86 So 2d 458, 227 Miss 352
Pa—Laback v Vicker, 186 A 2d 874, 200 Pa Super 111
Vt—Norton v Lumbra, 238 A 2d 628, 127 Vt 64
Wis—De Keuster v Green Bay & W R Co, 59 N W 2d 452, 264 Wis 476

Evidence held insufficient to raise jury question

- Mo—Green v Sutton, 452 S W 2d 200

Particular questions held for jury

- (3) Other questions
Mich—Willard v Dore, 200 N W 2d 369, 41 Mich App 508
Ohio—Smith v Albert, 168 N E 2d 495, stating Kentucky law, 110 Ohio App 51
56. U S—Chicago, R I & P R Co v Lmt, C A Minn, 217 F 2d 279—Beattie v Elgin, J & E Ry Co, C A Ill, 217 F 2d 863
Cal—Erickson v Southern Pac Co, 246 P 2d 642, 39 C 2d 374, cert den 73 S Ct 277, 344 U S 897, 97 L Ed 693—Hampton v Pacific Elec Ry Co, 257 P 2d 703, 118 C A 2d 263
Fla—Seaboard Air Line R Co v Hardee, 54 So 2d 809

- Mo—Britt v Terminal R Ass'n of St Louis, App, 311 S W 2d 130
58. Mo—Young v New York, C & St L Ry Co, 291 S W 2d 64
60. Mass—Campbell v Leach, 225 N E 2d 594, 352 Mass 367

- Mo—Warner v Terminal R Ass'n of St Louis, 257 S W 2d 75—Littlefield v Laughlin, 327 S W 2d 863
Pa—Carter v United Novelty & Premium Co, 132 A 2d 202, 389 Pa 198
Wash—Myers v Little Church by the Side of the Road, 227 P 2d 165, 37 Wash 2d 897—Tabert v Zier, 368 P 2d 685, 59 Wash 2d 524
61 Kan—Gulmer v Stephens, 200 P 2d 290, 166 Kan 172
62 Cal—State Compensation Ins Fund v Operated Equipment Co, 71 Cal Rptr 531, 265 C A 2d 759
Ky—Louisville & N R Co v Young's Adm't, 253 S W 2d 585
Ok!—Chicago, R I & P R Co v Hawes, 424 P 2d 6

page 184

- 63 U S—Thomas v Conemough & Black Lick R Co, C A Pa, 234 F 2d 429
Ill—Parnham v Carl W Linder Co, 183 N E 2d 744, 36 Ill App 2d 224
67. Or—Krusse v Coos Head Timber Co, 432 P 2d 1009, 248 Or 294
70. Cal—Gavel v Jamison, 254 P 2d 47, 116 C A 2d 635
Evidence held insufficient to raise jury question
S C—Jackson v Powe, 126 S E 2d 841, 241 S C 35
74 Mo—Spicer v Hannah, 247 S W 2d 864, 241 Mo App 1215

page 185

- 85 Ala—Jackson v Eller, App, 112 So 2d 218
90 U S—Franklin v Delgado, C A Tex, 262 F 2d 439
Ark—Hudgins v Maze, 437 S W 2d 467, 246 Ark 21
S C—Cooper v Graham, 98 S E 2d 843, 231 S C 404—Morgan v Roper, 157 S E 2d 572, 250 S C 280

page 186

91. Ok!—Montgomery v Kiwaish Elec Co-op, 245 P 2d 723, 206 Ok! 606
95 Ark—Hudgins v Maze, 437 S W 2d 467, 246 Ark 21
Ok!—National Valve & Mfg Co v Wright, 240 P 2d 769, 205 Ok! 565
97. Or—Hale v Electric Steel Foundry Co, 191 P 2d 396, 183 Or 275, reh den 192 P 2d 257, 183 Or 275, and 192 P 2d 986, 183 Or 275
99. Iowa—Von Terach v Ahrendsen, 99 N W 2d 287, 251 Iowa 115, 79 A L R 2d 267
Mo—Hightower v Edwards, 445 S W 2d 273

page 187

- 1 Miss—Bonelli v Flowers, 33 So 2d 455, 203 Miss 843
2. U S—Glover v Yonce, C A S C, 188 F 2d 870
4 Ark—Hudgins v Maze, 437 S W 2d 467, 246 Ark 21
5 Kan—Harvey v Palmer, 296 P 2d 1053, 179 Kan 472
Mo—Keeney v Callow, 349 S W 2d 75
7 U S—Tombigbee Mill & Lumber Co v Hollingsworth, C A Miss, 162 F 2d 763, cert den 68 S Ct 165, 332 U S 824, 92 L Ed 399
13 Mo—Fitzpatrick v St Louis-San Francisco Ry Co, 300 S W 2d 490
16. N C—Muldrow v Wenstein, 68 S E 2d 249, 234 N C 587
20. Statute held not applicable
Wash—Blanco v Sun Ranches, 234 P 2d 499, 38 Wash 2d 894, motion den 235 P 2d 830, 38 Wash 2d 894
21. U S—Miller v Elgin, Joliet & Eastern Ry Co, C A Ind, 177 F 2d 224—Chicago Great Western Ry Co v Casura, C A Minn, 234 F 2d 441
Ariz—Figueroa v Majors, 338 P 2d 803, 85 Ariz 345
Ga—Elrod v Ogles, 50 S E 2d 791, 78 Ga App 376
Md—Petrol Corp v Curtus, 59 A 2d 329, 190 Md 652

ND—Daminger v Kuhn, 87 N.W.2d 720

Tex—Martin v Commercial Standard Ins Co, Civ App, 350 S.W.2d 664, rev'd on oth. grds., Sup., 363 S.W.2d 228—Commercial Standard Ins Co v Martin, 363 S.W.2d 228

Wash—Henlen v Martin Miller Orchards, 242 P.2d 1054, 40 Wash.2d 356

Simple tools

(5) Other matters

Ohio—Smith v Albert, 168 N.E.2d 495, stating Kentucky law, 110 Ohio App. 51

page 188

22. Cal—Souza v Pratico, 54 Cal.Rptr. 159, 245 C.A.2d 651

23. Cal—Chiappe v Eichenbaum, 336 P.2d 1045, 169 C.A.2d 46

page 189

28. Cal—Devens v Goldberg, 199 P.2d 943, 33 Cal.2d 173

29. Cal—Devens v Goldberg, supra, n. 28

Ill—Hollis v Terminal R.R. Ass'n of St. Louis, 218 N.E.2d 231, 72 Ill.App.2d 13

32. Pa—Perry v Niedringhaus, 88 Pa.Dist. & Co. 116, 70 Montg. Co. 182

33. Cal—Van Horn v Southern Pac. Co., 297 P.2d 479, 141 C.A.2d 528

Mich—Jones v New York Cent. R. Co., 155 N.W.2d 216, 8 Mich.App. 575

Tex—Pittman v Gulf, C. & S.F. Ry. Co., Civ. App., 338 S.W.2d 774, err. ref. no rev. err., cert. den. 82 S.Ct. 49, 368 U.S. 828, 7 L.Ed.2d 31

36. Ill—Virgil v New York, C. & St. L.R. Co., 118 N.E.2d 61, 2 Ill.App.2d 46

Reasonable time after knowledge, etc

Mich—Jones v New York Cent. R. Co., 155 N.W.2d 216, 8 Mich.App. 575

40. U.S.—Gleason v Wood, D.C.Pa., 321 F.Supp. 118

Tenn—C.J.S. cited in Thurner v Southern Ry. Co., 293 S.W.2d 600, 604, 41 Tenn.App. 354

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page 190

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Ga—Elrod v Ogles, supra, n. 21

Mass—Brooks v Ehot Sav. Bank, 89 N.E.2d 508, 325 Mass. 159

Mass—Chicago Mill & Lumber Co v Carter, 45 So.2d 854, 209 Mass. 71

Mo—Evanger v Thompson, 265 S.W.2d 726, 364 Mo. 658—Ricketts v Kansas City Stock Yards Co of Maine, 484 S.W.2d 216

N.J.—Imre v Riegel Paper Corp., 132 A.2d 505, 24 N.J. 438

Or—Alvarez v Great Northern Ry. Co., 491 P.2d 190, 261 Or. 66

Tex—Robb v Gilmore, Civ. App., 302 S.W.2d 739, err. ref. no rev. err.—Lopez v Ely, Civ. App., 302 S.W.2d 957

46. U.S.—Ure v Thompson, Mo., 69 S.Ct. 1018, 337 U.S. 163, 93 L.Ed. 1282, 11 A.L.R.2d 252—Beattie v Elgin, J. & E. Ry. Co., C.A.Ill., 217 F.2d 863—Deaver & R.G.W.R. Co v Conley, C.A. Colo., 293 F.2d 612

Ill—Rogers v Elgin, J. & E. Ry. Co., 123 N.E.2d 592, 4 Ill.App.2d 111

Iowa—Nikolas v Kirner, 73 N.W.2d 7, 247 Iowa 231—Carter v Chicago, R.I. & P.R. Co., 74 N.W.2d 356, 247 Iowa 429

Mo—Spears v Schantz, 246 S.W.2d 399, 241 Mo.App. 879—Wiser v Missouri Pac. R. Co., 301 S.W.2d 37

Physical condition of employee

(1) U.S.—Comiskey v Pennsylvania R. Co., C.A.N.Y., 228 F.2d 687

Ala—Louisville & N.R. Co v Bayles, 153 So.2d 639, 275 Ala. 206

47. U.S.—Miller v Cincinnati, N.O. & T.P. Ry. Co., D.C.Tenn., 203 F.Supp. 107, aff'd, C.A., 317 F.2d 693—McCann v Smith, C.A.Conn., 370 F.2d 323—Almendez v Atchison, T. & S.F. Ry. Co., C.A.Tex., 426 F.2d 1095—Randall v Reading Co., D.C.Pa., 344 F.Supp. 879

Ariz—Vickers v Gercke, 340 P.2d 987, 86 Ariz. 75

Cal—Van Horn v Southern Pac. Co., 297 P.2d 479, 141 C.A.2d 528

Ill—Crowley v Elgin, J. & E. Ry. Co., 117 N.E.2d 843, 1 Ill.App.2d 481, cert. den. 75 S.Ct. 340, 348 U.S. 927, 99 L.Ed. 727

Mo—Higgins v Terminal R.R. Ass'n of St. Louis, 241 S.W.2d 380, 362 Mo. 264—Cummings v Illinois Cent. R. Co., 269 S.W.2d 111, 364 Mo. 868, 47 A.L.R.2d 513—Brock v Gulf, M. & O.R. Co., 270 S.W.2d 827

48. U.S.—Miller v Elgin, Joliet & Eastern Ry. Co., C.A.Ind., 177 F.2d 224—McCann v Smith, C.A.Conn., 370 F.2d 323

Cal—Mortensen v Southern Pac. Co., 53 Cal.Rptr. 851, 245 C.A.2d 241

Ga—Thigpen v Executive Committee of Baptist Convention of State of Ga., 152 S.E.2d 920, 114 Ga.App. 839

Ill—Goodman v Terminal R.R. Ass'n of St. Louis, 215 N.E.2d 457, 68 Ill.App.2d 80

Iowa—Livingston v Morarend, 149 N.W.2d 850, 260 Iowa 530

Mo—Cummings v Illinois Cent. R. Co., 269 S.W.2d 111, 364 Mo. 868, 47 A.L.R.2d 513

Okla—Hayme v Hayme, 426 P.2d 717

S.D.—Daniels v Moser, 71 N.W.2d 739, 76 S.D. 47

Tex—Gulf, C. & S.F. Ry. Co v Ogden, Civ. App., 228 S.W.2d 569, err. ref. no rev. err.

Utah—King v Denver & Rio Grande Western R. Co., 211 P.2d 833, 116 Utah 488—Butz v Union Pac. R. Co., 233 P.2d 332, 120 Utah 185, reh. den. 238 P.2d 1128, 120 Utah 209

50. Ariz—Hinson v Phoenix Pie Co., 416 P.2d 202, 3 Ariz.App. 523

Ill—Crowley v Elgin, J. & E. Ry. Co., supra, n. 47

N.Y.—Hefelev City of New York, 267 N.Y.S.2d 946, 25 A.D.2d 142

R.I.—Dawes v McKenna, 215 A.2d 235, 100 R.I. 317

page 191

51. Ariz—Wright v Demeter, 442 P.2d 888, 8 Ariz.App. 65

Ill—Wills v Paul, 164 N.E.2d 631, 24 Ill.App.2d 417

Ky—Greer's Adm'r v Harrell's Adm'r., 206 S.W.2d 943, 306 Ky. 209

Mass—Green Lumber Co v Sullivan, 45 So.2d 243, 208 Mass. 651

Mo—Piepmeyer v Johnson, 452 S.W.2d 97

Tenn—Hawkins v Clinchfield R. Co., 266 S.W.2d 840, 37 Tenn.App. 529

Evidence held insufficient for jury

Iowa—Wagner v Larson, 136 N.W.2d 312, 257 Iowa 1202

N.Y.—Schmidt v Carper, 61 N.Y.S.2d 185, 270 App.Div. 411, aff'd, 71 N.E.2d 471, 296 N.Y. 791

(2) Other matters

Pa—Dorm v Dutrow, 74 York 41

52. U.S.—Kamirski v Chicago River & Ind. R. Co., C.A.Ill., 200 F.2d 1

Okla—Teel v Gates, 482 P.2d 602

54. Ill—Mueller v 1527-31 Wicker Park Ave Bldg Corp., 77 N.E.2d 555, 333 Ill.App. 385

55. U.S.—Stone v New York, C. & St. L.R. Co., Mo., 73 S.Ct. 358, 344 U.S. 407, 97 L.Ed. 441, reh. den. 73 S.Ct. 639, 345 U.S. 914, 97 L.Ed. 1348

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Ill—Wawryszyn v Illinois Cent. R. Co., 135 N.E.2d 154, 10 Ill.App.2d 394, 61 A.L.R.2d 801

Miss—Lancaster v Lancaster, 57 So.2d 302, 213 Miss. 536

Okla—Midland Val. R. Co v Manos, 307 P.2d 545

Pa—McBride v Hershey Chocolate Corp., 13 Cumb. 33

Tex—Port Terminal R. Ass'n v Ross, 289 S.W.2d 220, 155 Tex. 447

Particular questions held for jury

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(7) Other questions

Mo—Johnson v Missouri-Kansas-Texas R. Co., 334 S.W.2d 41—Wright v Chicago, B. & Q.R. Co., 392 S.W.2d 401

Mont—D'Hooge v McCann, 443 P.2d 747, 151 Mont. 353

page 192

57. N.C.—Williamson v Clay, 90 S.E.2d 727, 243 N.C. 337

page 193

64. N.Y.—Lacitra v New York Cent. R. Co., 271 N.Y.S.2d 549, 26 A.D.2d 539

65. Ill—Lee v Louisville & N.R. Co., 110 N.E.2d 691, 349 Ill.App. 276—Lee v Louisville & N.R. Co., 119 N.E.2d 491, 2 Ill.App.2d 522

69. U.S.—Dunn v Conemaugh & Black Lick R.R., D.C.Pa., 162 F.Supp. 324, aff'd, C.A., 267 F.2d 571—Barnes v Norfolk Southern Ry. Co., C.A.Va., 333 F.2d 192—Casko v Elgin, J. & E. Ry. Co., C.A.Ind., 361 F.2d 748—Laudauer v New York Cent. R. Co., C.A.N.Y., 408 F.2d 638

Ala—Atlanta & St. Andrews Bay Ry. Co v Burnett, 68 So.2d 726, 259 Ala. 688—Atlantic Coast Line R. Co v Dunvant, 91 So.2d 670, 265 Ala. 420—Louisville & N.R. Co v Bayles, 153 So.2d 639, 275 Ala. 206

Fla—Loflin v Wilson, 67 So.2d 185

Ill—Domer v New York, C. & St. L.R. Co., 157 N.E.2d 280, 21 Ill.App.2d 125—Graham v Toledo, P. & W. R. Co., 182 N.E.2d 889, 35 Ill.App.2d 234

Mo—Wehrli v Wabash R. Co., 315 S.W.2d 765, cert. den. 79 S.Ct. 321, 358 U.S. 932, 3 L.Ed.2d 304—Rea v St. Louis-San Francisco Ry. Co., 411 S.W.2d 96

N.C.—Graham v Atlantic Coast Line R. Co., 82 S.E.2d 346, 240 N.C. 338

page 194

70. U.S.—Palum v Lehigh Val. R. Co., C.C.A.N.Y., 165 F.2d 3—Henwood v Coburn, C.C.A.Mo., 165 F.2d 418—Young v Pennsylvania R. Co., C.A.N.Y., 197 F.2d 727—Phillips v Illinois Cent. R. Co., D.C.La., 115 F.Supp. 93, aff'd, C.A., 211 F.2d 86—Miller v New York Cent. R. Co., C.A.Ind., 239 F.2d 10—Fritts v Toledo Terminal R. Co., C.A. Ohio, 293 F.2d 361

Ala—Atlantic Coast Line R. Co v Taylor, 71 So.2d 27, 260 Ala. 401

D.C.—Richmond, F. & P.R. Co v Brooks, C.A., 197 F.2d 404, 91 U.S.App.D.C. 24, cert. den. 73 S.Ct. 31, 344 U.S. 828, 97 L.Ed. 644

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Mo—Fitzpatrick v St. Louis-San Francisco Ry. Co., 327 S.W.2d 801, 80 A.L.R.2d 825

Ohio—Grande v Erie R. Co., App., 172 N.E.2d 161

Tex—Missouri-Kansas-Texas R. Co of Tex v Webb, Civ. App., 229 S.W.2d 204, err. ref. no rev. err.

71. U.S.—Larsen v Chicago & N.W. Ry. Co., C.A.Ill., 171 F.2d 841

73. U.S.—Ross v Chesapeake & O. Ry. Co., C.A. Ohio, 421 F.2d 328

Page 194

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- Ill—Bonner v Chicago, B & Q R Co, 119 N E 2d 254, 2 Ill 2d 606, cert den 75 S Ct 53, 348 US 830, 99 L Ed 655
- Mo—Hartgrove v Chicago, B & Q R Co, 218 S W 2d 557, 358 Mo 971

page 195

74. US—Fritz v Pennsylvania R Co, C A III, 185 F 2d 31—New York, NH & H R Co v Zerna, C A Mass, 200 F 2d 240, cert den 73 S Ct 729, 345 US 917, 97 L Ed 1351—Eastman v Southern Pac Co, C A Or, 233 F 2d 615—Lowejoy v Monongahela Connecting R Co, D C Pa, 137 F Supp 42—Illinois Cent R Co v Andre, C A La, 267 F 2d 372, cert den 80 S Ct 65 361 US 820, 4 L Ed 2d 65—Gans v Baltimore & O R Co, C A Pa, 319 F 2d 802

- Ala—Atlanta, B & C R Co v Cary, 35 So 2d 559, 250 Ala 675

- Ga—Atlantic Coast Line R Co v Plaspohl, 83 S E 2d 240, 90 Ga App 445

- Ill—Chesnut v Louisville & N R Co, 81 NE 2d 660, 335 Ill App 254—Pitrowski v New York, C & St L R Co, 122 NE 2d 262 4 Ill 2d 125—Biggerstaff v New York, C & St L R Co, 141 NE 2d 72, 13 Ill App 2d 85—Hildebrand v Baltimore & O R Co, 190 NE 2d 630, 41 Ill App 2d 217

- Minn—Brabeck v Chicago & NW Ry Co, 117 NW 2d 921, 264 Minn 160

- Mo—White v Atchison, T & S F Ry Co, 244 S W 2d 26, cert den 72 S Ct 648, 343 US 915, 96 L Ed 1330—Jones v Illinois Terminal R Co, 260 S W 2d 487, cert den 74 S Ct 682, 347 US 956, 98 L Ed 1101—Hughes v Terminal R Ass'n of St Louis, 296 S W 2d 59

- SC—Croner v Charleston & W C Ry Co, 71 S E 2d 800, 222 SC 121

75. US—Chicago & NW Ry Co v Garwood, C C A Minn, 167 F 2d 848—Stanford v Pennsylvania R Co, C A III, 171 F 2d 632—Barnett v Terminal R Ass'n of St Louis, C A Mo, 200 F 2d 893, cert den 73 S Ct 938, 345 US 956, 97 L Ed 1339

- Ill—Nickell v Baltimore & O R Co, 106 NE 2d 738, 347 Ill App 202—Wawryszyn v Illinois Cent R Co, 135 NE 2d 154, 10 Ill App 2d 394, 61 A L R 2d 801

- Mo—Hughes v Terminal R Ass'n of St Louis, 265 S W 2d 273

- NJ—Shellhammer v Lehigh Val R Co, 102 A 2d 602, 14 NJ 341, cert den 74 S Ct 852, 347 US 990, 98 L Ed 1124, reh den 75 S Ct 20, 348 US 832, 99 L Ed 672

- Okla—Chicago, R I & P R Co v Wright, 278 P 2d 830, cert den 75 S Ct 581, 349 US 905, 99 L Ed 1241

Particular questions held for jury under evidence

- (7) Other questions
Cal—Finley v Southern Pac Co, 3 Cal Rptr 895, 179 CA 2d 424

page 196

76. US—Armstrong v Wyer, C A NY, 210 F 2d 592
Ala—Atlantic Coast Line R Co v Mangum, 34 So 2d 848, 250 Ala 431

- Cal—Carpenter v Atchison, T & S F Ry Co, 240 P 2d 5, 109 CA 2d 18

- Ill—Wilson v Terminal R Ass'n of St Louis, 77 NE 2d 429, 333 Ill App 256

- Pa—Mhoveas v Pittsburgh & W Va R R, 97 Pttab Leg J 338

- Tenn—Haupt v Cincinnati, N O & T P Ry Co, 232 S W 2d 598, 34 Tenn App 1

- Tex—Chillock v Texas & P Ry Co, Civ App, 302 S W 2d 717

- W Va—Riley v West Virginia Northern R Co, 51 S E 2d 119, 132 W Va 208, cert den 69 S Ct 891, 336 US 961, 93 L Ed 1113

page 197

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- Ga—Alford v Atlantic Coast Line R Co, 54 S E 2d 450 79 Ga App 616

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- NY—Hanley v Erie R Co, 77 NYS 2d 153, 273 App Div 257, affd 83 NE 2d 861, 298 NY 816

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page 198

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- (9) US—Wendell v Chicago, R I & P R Co, C A III, 184 F 2d 868

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- (12) US—Fore v Southern Ry Co, C A Va, 178 F 2d 349

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page 200

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90. US—Thomas v Conemaugh Black Lick R R, D C Pa, 133 F Supp 533, affd, C A, 234 F 2d 429

- Minn—Albertson v Chicago, M, St P & P R Co, 64 NW 2d 175, 242 Minn 50, 42 A L R 2d 1044

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Evidence held insufficient for jury

- Or—Davis v Weyerhaeuser Co, 373 P 2d 985, 231 Or 596

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page 201

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page 202

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- Or—Wilson v Hanley, 356 P 2d 556, 224 Or 570

Evidence held insufficient for jury

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- Or—Muse v Spokane, P & S Ry Co, 266 P 2d 412, 200 Or 463

- Tex—Mercier v Texas & N O R Co, Civ App, 293 S W 2d 80, err ref no rev err

page 203

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- Ill—Starck v Chicago & NW Ry Co, 123 NE 2d 826, 4 Ill 2d 611—Dowler v New York, C & St L R Co, 125 NE 2d 41, 5 Ill 2d 125

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NH—Evans v Foster, 60 A 2d 130, 95 NH 194—
Descoateau v Boston & M R R, 140 A 2d 579, 101
NH 271

ND—Dassinger v Kuhn, 87 N W 2d 720

Ohio—Gardner v Heldman, 80 NE 2d 681, 82 Ohio
App 1

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807, 199 Okl 691—Mid-Continent Pipe Line Co v
Price, 225 P 2d 176, 203 Okl 626—Montgomery v
Kiawah Elec Co-op, 245 P 2d 723, 206 Okl 606—
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ref no rev err—Pittman v Gulf, C & S F Ry Co,
Civ App, 338 S W 2d 774, err ref no rev err, cert
den 82 S Ct 49, 368 US 828, 7 L Ed 2d 31
Wash—Hoffman v Garnache, 465 P 2d 203, 1 Wash
App 883

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S E 2d 105, 132 W Va 184, 6 A L R 2d 562, cert
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Particular questions held for jury under evidence

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S W 2d 7

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197

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discharged, Sup, 189 So 2d 621

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App 2d 11

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25 A D 2d 142

page 204

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88 F Supp 821

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Iowa 115, 79 A L R 2d 267

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235

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S W 2d 7

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311 S W 2d 5

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CA 2d 248

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App 195

Evidence held insufficient for jury

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CA 2d 714

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364, 103 Cal App 2d 840

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Neb 650

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214 S C 495

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§ 535. — Fellow Servants and Co-employees

Library References

Employers' Liability — 248

page 205

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So 2d 556, 208 Miss 506

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C A N Y, 228 F 2d 687

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228 So 2d 610

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17 Ill App 2d 508

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S W 2d 922, 363 Mo 1178

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334 P 2d 1112, 65 NM 207—Chavez v Atchison,
T & S F Ry Co, 423 P 2d 34, 77 NM 346

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60, 214 S C 410, cert den 70 S Ct 73, 338 US
825, 94 L Ed 501

Evidence held sufficient for jury

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F 2d 328

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App, 350 S W 2d 884, err ref no rev err, cert
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Evidence held insufficient for jury

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28. **Evidence held sufficient for jury**

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S W 2d 41

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710, revd on oth grds 204 S W 2d 977, 146 Tex
190

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316 F 2d 838, 99 A L R 2d 1182

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Ala 642

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87, 84 Ga App 307

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233 Or 385

Negligence as to number of employees

Or—Muse v Spokane, P & S R Co, supra, n 12

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30. Ark—Hudgins v Maze, 437 S W 2d 467, 246
Ark 21

Ga—Elrod v Ogles, supra, n 17

32. Ark—Cockerham v Barnes, 321 S W 2d 385, 230
Ark 197

33. Ga—Alterman v Jinks, 179 S E 2d 92, 122 Ga
App 859

Or—Mazurek v Ramus, 456 P 2d 83, 253 Or 555

Evidence of negligence of master, etc

Okl—Stout v Schell, 241 P 2d 1109, 206 Okl 153

page 206

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App 139

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motion gr to correct 108 So 2d 213, 234 Miss 649

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Or—Davis v Weyerhaeuser Co, 373 P 2d 985, 231 Or
596

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Ga App 367

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Tenn, 254 F 2d 40, cert den 79 S Ct 29, 358
US 818, 3 L Ed 2d 60

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App 2d 73

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1142

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197, 50 N J Super 564

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affd 71 N Y S 2d 791, 272 App Div 405, rearg
and app den 73 N Y S 2d 484, 272 App Div 979

Wash—Lozan v Fraternal Order of Eagles, Acme No
3, 335 P 2d 4, 53 Wash 2d 547

page 207

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NM 149, app after remand 469 P 2d 520, 81
NM 541

Evidence held insufficient to go to jury on question
whether employer gave employees authority to invite
plaintiff to ride in automobile

RI—Furlong v Donahue, Inc, 137 A 2d 734, 87 RI
46

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Va, 300 F Supp 155

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P 2d 327

Wash—Rawlins v Nelson, 231 P 2d 281, 38 Wash 2d
570

62. **Sufficiency of evidence**

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Me, App, 434 S W 2d 752

page 208

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Coast Line R Co v Massengill, C A Va, 264
F 2d 726

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50 So 2d 749, 255 Ala 183—Southern Ry Co v
Reeder, 204 So 2d 808, 281 Ala 458

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250 Ark 1094

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230 C A 2d 960, 16 A L R 3d 543

D C—Shreve v Hot Shoppes, Inc, D C, 184 F Supp
436, affd, C A, 292 F 2d 761, 110 US App DC
268

Ga—American Oil Co v McCluskey, 167 S E 2d 711,
119 Ga App 475

Mo—Winters v Terminal R Ass'n of St Louis, 252
S W 2d 380—Heiter v Terminal R Ass'n of St
Louis, App, 275 S W 2d 612

Tex—Najera v Great Atlantic & Pacific Tea Co, 207
S W 2d 365, 146 Tex 367

Wash—Myers v Little Church by the Side of the Road,
227 P 2d 165, 37 Wash 2d 897—Boley v Larson,
419 P 2d 579, 69 Wash 2d 621

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NE 2d 905, 336 Ill App 49

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60

Wash—Poling v Charbonneau Packing Corp, 278 P 2d
375, 45 Wash 2d 845

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S W 2d 552, 228 Ark 31

Mo—Schroeder v Terminal R R Ass'n of St Louis, 305
S W 2d 18, 62 A L R 2d 1416

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Fla—Atlantic Coast Line R Co v Chancey, 76 So 2d
871, cert den 75 S Ct 606, 349 US 916, 99 L Ed
1250

Mass—La Bonte v New York, NH & H R Co, 167
NE 2d 629, 341 Mass 127

NY—Simon v Ora Realty Corp, 153 N Y S 2d 39, 1
N Y 2d 388, 135, N E 2d 580

page 209

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- Evidence held insufficient to go to jury**
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page 210

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- Wash.—Myers v Little Church by the Side of the Road*, 227 P 2d 165, 37 Wash 2d 897
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page 211

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§ 536. — Assumption of Risk

Library References

Employers' Liability ⇐249

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- N.M.—Padilla v Winsor*, 354 P 2d 740, 67 N M 267—*Gutierrez v Valley Irr & Livestock Co*, 357 P 2d 664, 68 N M 6—*Jasper v Lumpee*, App, 465 P 2d 97, 81 N M 214
- S.C.—Stenmeyer v Marine Hotel Corporation*, 140 S E 695, 142 S C 358—*Pleasant v Mathias*, S C, 145 S E 2d 680
- S.D.—Schmeling v Jorgensen*, 84 N W 2d 558, 77 S D 8

page 212

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- Kan.—Hernandez v Bachand*, 427 P 2d 473, 199 Kan 82
- Pa.—Gilkes v Levinson*, 114 P L J 214, affd 218 A 2d 722, 421 Pa 128
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page 213

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- Wash.—Hopper v Gallant*, 282 P 2d 1049, 46 Wash 2d 552—*Currie v Union Oil Co of Cal*, 307 P 2d 1056, 49 Wash 2d 898—*Hammer v Haggard*, 355 P 2d 334, 56 Wash 2d 744

Particular appliances

- (3) *Ariz.—Smith v Goodman*, 430 P 2d 922, 6 Ariz App 168
- Idaho.—Desbazer v Tompkins*, 460 P 2d 402, 93 Idaho 267

- Iowa.—Frederick v Goff*, 100 N W 2d 624, 251 Iowa 290
- Kan.—Harvey v Palmer*, 296 P 2d 1053, 179 Kan 472
- N.D.—Fundt v Huether*, 100 N W 2d 431

Particular places

- (5) *Kan.—Miller v Beech Aircraft Corp*, 460 P 2d 535, 204 Kan 184
- Minn.—Baumgartner v Holalm*, 52 N W 2d 763, 236 Minn 235

page 214

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page 215

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Particular operations

- (5) *Climbing on ensilage cutter to dislodge corn shocks*
- Minn.—Berg v Johnson*, 90 N W 2d 918, 252 Minn 397
59. *S.C.—Haselden v Atlantic Coast Line R Co*, 53 S E 2d 60, 214 S C 410, cert den 70 S Ct 73, 338 U S 825, 94 L Ed 501
- Tex.—Loud v Sears, Roebuck & Co*, Civ App, 262 S W 2d 548

page 217

63. *U.S.—Bastine v Atlantic Coast Line R Co*, C A Fla., 205 F 2d 457
- Ga.—Genesco, Inc v Greeson*, 125 S E 2d 786, 105 Ga App 798
- Ill.—Stone v Guthrie*, 144 N E 2d 165, 14 Ill App 2d 137—*Crawford v Brockhouse*, 169 N E 2d 117, 27 Ill App 2d 13—*Yanders v Cline*, 238 N E 2d 425, 95 Ill App 204
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- Tenn.—Overstreet v Norman*, 314 S W 2d 47, 44 Tenn App 343
- Wash.—Myers v Little Church by the Side of the Road*, supra, n 9—*Blanco v Sun Ranches*, 234 P 2d 499, 38 Wash 2d 894, motion den 235 P 2d 830, 38 Wash 2d 894
64. *Wash.—Blanco v Sun Ranches*, supra, n 63
- Evidence held insufficient to warrant submission of issue to jury**
- Fla.—Sonnenborn v Gartrell*, App, 179 So 2d 385, cert discharged, Sup, 189 So 2d 621
65. *Kan.—Blackmore v Auer*, 357 P 2d 765, 187 Kan 434
66. *Md.—Petrol Corp v Curtis*, 59 A 2d 329, 190 Md 652
- Wash.—Wydenes v Dykstra*, 238 P 2d 1198, 39 Wash 2d 756

page 218

67. ND—Lund v Knoff, 85 NW 2d 676, 67 A L R 2d 1110
68. Neb—Anderson v Evans, 83 NW 2d 59, 164 Neb 599
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- Wash—Tabert v Zier, 368 P 2d 685, 59 Wash 2d 524
69. NH—Avery v Chapman, 63 A 2d 801, 95 NH 350
- NM—Gordon v Hardgrove, 334 P 2d 545, 65 NM 162

page 219

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- III—Stone v Guthrie, 144 NE 2d 165, 14 Ill App 2d 137
- Or—Celone v Roberts Bros, Inc, 276 P 2d 416, 202 Or 671
73. III—Olsen v Pigott, 188 NE 2d 361, 39 Ill App 2d 191
74. Torn stair mat
- Mass—Sneed v Lidman, 172 NE 2d 836

page 220

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- Miss—Buford v O'Neal, 128 So 2d 553, 240 Miss 883
- Neb—Anderson v Evans, 96 NW 2d 44, 168 Neb 373
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- Wyo—Berry v Iowa Mid-West Land & Livestock Co, 424 P 2d 409
85. Fla—Sonnenborn v Gartrell, 189 So 2d 621
- Okl—Mitchell v Haskell, 216 P 2d 311, 202 Okl 478

page 221

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- Wash—Wydenes v Dykstra, 238 P 2d 1198, 39 Wash 2d 756—Poling v Charbonneau Packing Corp, 278 P 2d 373, 45 Wash 2d 845
89. Ark—Hudgins v Maze, 437 S W 2d 467, 246 Ark 21

page 222

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§ 537. —Contributory Negligence

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Employers' Liability ¶250-260

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- Colo—Yager v Skinner, App, 470 P 2d 937
- Fla—Bartholf v Baker, 71 So 2d 480—Campbell v Wiley, App, 213 So 2d 512
- Ga—Southern Ry Co v Cabe, 136 SE 2d 438, 109 Ga App 452—Rogers v Bragg, 160 SE 2d 217, 117 Ga App 295
- Idaho—Deahazer v Tompkins, 460 P 2d 402, 93 Idaho 267
- III—Packard v Kennedy, 124 NE 2d 55, 4 Ill App 2d 177—Crawford v Brockhouse, 169 NE 2d 117, 27 Ill App 2d 13
- Ind—Lamb v York, 247 NE 2d 197, 252 Ind 252
- Iowa—Mooney v Nagel, 103 NW 2d 76, 251 Iowa 1052
- Kan—Blackmore v Auer, 357 P 2d 765, 187 Kan 434

- Ky—Burdette v Thompson, 420 S W 2d 548—McCorrick v Gullett, 460 S W 2d 813
- Me—Savoy v Butler, 97 A 2d 543, 149 Me 7
- Mo—Graham v Thompson, 212 S W 2d 770, 357 Mo 1133, cert den 69 S Ct 166, 335 US 870, 93 L Ed 414—Daniels v Banning, 329 S W 2d 647—Bollman v Kark Rendering Plant, 418 S W 2d 39
- Mont—Dewar v Great Northern Ry Co, 435 P 2d 887, 150 Mont 367
- NH—Evans v Foster, 60 A 2d 130, 95 NH 194
- NJ—Marty v Erie R Co, 163 A 2d 167, 62 N J Super 458
- NM—Thompson v Dale, 283 P 2d 623, 59 NM 290—Padilla v Winsor, 354 P 2d 740, 67 NM 267—Gutierrez v Valley Irr & Livestock Co, 357 P 2d 664, 68 NM 6
- ND—Smith v Knutson, 36 NW 2d 323, 76 ND 375
- Ohio—Gardner v Heldman, 80 NE 2d 681, 82 Ohio App 1
- Or—Ritter v Beals, 358 P 2d 1080, 225 Or 504
- Pa—Vardzel v Dravo Corp, 165 A 2d 622, 402 Pa 19—Windach v Babcock & Wilcox Co, 25 Beaver 179, affd 195 A 2d 369, 412 Pa 369
- Utah—Sprunt v Denver & R G W R Co, 340 P 2d 85, 9 Utah 2d 142, cert den 80 S Ct 207, 361 US 900, 4 L Ed 2d 156
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page 223

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- III—Davis v Gulf, M & O R Co, 272 NE 2d 240, 130 Ill App 2d 988
- NJ—Marty v Erie R Co, 163 A 2d 167, 62 N J Super 458
- N C—Young v Barrier, 150 SE 2d 734, 268 N C 406
- Matters considered
- Wash—Carrico v Country Store of Salem, Inc, 484 P 2d 412, 4 Wash App 567
97. Or—Hon v Moore Timber Products, Inc, 337 P 2d 321, 215 Or 628
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- NM—Padilla v Atchison, T & S F Ry Co, 295 P 2d 1023, 61 NM 115—Vivian v Atchison, T & S F Ry Co, 363 P 2d 620, 69 NM 6—Cimard v Southern Pac Co, 475 P 2d 321, 82 NM 55

Directed verdict held error

- US—Keith v Wheeling & L E Ry Co, CCA Ohio, 160 F 2d 654, cert den 68 S Ct 67, 332 US 763, 92 L Ed 348

Direction of verdict against employer on issue of liability proper

- Ga—Southern Ry Co v Cabe, 136 SE 2d 438, 109 Ga App 432

More than scintilla

- Ariz—Haines v Southern Pac Co, 436 P 2d 159, 7 Ariz App 65, cert den 89 S Ct 134, 393 US 860, 21 L Ed 2d 127

6. Ga—Radford v Seaboard Coast Line R Co, 178 SE 2d 774, 122 Ga App 763
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page 224

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- Md—Baltimore & O R Co v Rodeheaver, 81 A 2d 63, 197 Md 632
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- NH—Descoteau v Boston & M R R, 140 A 2d 579, 101 NH 271
- N C—Graham v Atlantic Coast Line R Co, 82 SE 2d 346, 240 N C 338—Gonnell v Ramsey, 146 SE 2d 476, 266 N C 537
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- Tex—Najera v Great Atlantic & Pacific Tea Co, 207 S W 2d 365, 146 Tex 367—Missouri-Kansas-Texas R Co of Tex v Webb, Civ App, 229 S W 2d 204, err ref no rev err—Lopez v Ely, Civ App, 302 S W 2d 957—Thompson v Gibson, 310 S W 2d 564, 158 Tex 231
- Utah—Wilson v Union Pac R Co, 231 P 2d 715, 119 Utah 632
- Wash—Myers v Little Church by the Side of the Road, 227 P 2d 165, 37 Wash 2d 897—Strandberg v Northern Pac Ry Co, 367 P 2d 137, 59 Wash 2d 259

page 225

12. Tex—Missouri-Kansas-Texas R Co v Wright, Civ App, 311 S W 2d 440, err dam by agreement
16. US—Denny v Montour R Co, D C Pa, 101 F Supp 735
- Ark—Hudgins v Maze, 437 S W 2d 467, 246 Ark 21
- NH—Avery v Chapman, 63 A 2d 801, 95 NH 350
- Wash—Williams v Hofer, 191 P 2d 306, 30 Wash 2d 253
- Attempt to stop moving car
- Ga—Evans v Carroll, 68 SE 2d 608, 85 Ga App 227
17. Ill—Clubb v Mann, 213 NE 2d 63, 65 Ill App 2d 461

Page 225

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Tex—Fisher Const Co v Riggs, Civ App, 320 S W 2d 200, revd on oth grds, 325 S W 2d 126, 160 Tex 23, on remand 326 S W 2d 915
Wash—Hurst v Washington Cannery Co-op, 314 P 2d 631, 50 Wash 2d 729
Wyo—German v Holmes, 459 P 2d 367

Babymitter

- Wash—Tsanadi v Frodile, 505 P 2d 165, 8 Wash App 239

page 226

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Cal—Erickson v Southern Pac Co, 246 P 2d 642, 39 C 2d 374, cert den 73 S Ct 277, 344 US 897, 97 L Ed 693
Or—Caplinger v Northern Pac Terminal, 418 P 2d 34, 244 Or 289
Wash—Browning v Ward, 422 P 2d 12, 70 Wash 2d 45
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Idaho—Johnson v Stanger, 510 P 2d 303, 95 Idaho 408
Ill—Lester v Hennesey, 156 NE 2d 247, 20 Ill App 2d 479
Tenn—Smith v Graves, 405 S W 2d 42, 56 Tenn App 82
Wash—Henlen v Martin Miller Orchards, 242 P 2d 1054, 40 Wash 2d 356
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Ill—Durkin v Elgin, J & E Ry Co, 138 NE 2d 866, 12 Ill App 2d 190—Amerpohl v Illinois Cent R Co, 150 NE 2d 212, 17 Ill App 2d 416—Foster v New York, C & St L R Co, 168 NE 2d 61, 26 Ill App 2d 337
Ind—Lloyd v Weimert, 257 NE 2d 851, 146 Ind App 666
Ky—Bradshaw v Bradshaw, 435 S W 2d 765
Mo—Jenkins v Banks, 87 A 2d 908, 147 Mo 438
Minn—Farness v Economies Laboratory, Inc, 170 NW 2d 554, 284 Minn 381
Mo—Kenefick v Terminal R Ass'n of St Louis, 207 S W 2d 294—Kiger v Terminal R Ass'n of St Louis, 311 S W 2d 5—Hightower v Edwards, 445 S W 2d 273
Neb—Barton v Hobbs, 151 NW 2d 331, 181 Neb 763
Or—Johnson v Field, 456 P 2d 483, 253 Or 654
Tenn—Overstreet v Norman, 314 S W 2d 47, 44 Tenn App 343
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Wash—Williams v Hofer, supra, n 16—Wydenes v Dykstra, 238 P 2d 1198, 39 Wash 2d 756

page 227

23. Ky—Mayse v Martin, 435 S W 2d 71
Mo—Spears v Schantz, 246 S W 2d 399, 241 Mo App 879
Wis—Venden v Menel, 85 NW 2d 766, 2 Wis 2d 253
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Wash—Boley v Larson, 385 P 2d 326, 62 Wash 2d 959
Absence of duty to make inspection as precluding jury question
US—Morran v Pennsylvania R Co, C A Pa, 321 F 2d 402
26. US—Bastine v Atlantic Coast Line R Co, C A Fla, 205 F 2d 457
Ga—Elrod v Ogles, 50 S E 2d 791, 78 Ga App 376
Okl—Hayme v Hayme, 426 P 2d 717
Pa—Gardner v Brownridge, 5 Cumb 101

Failure to repair

(3) Other cases

- Ala—Parkinson v Hudson, 88 So 2d 793, 265 Ala 4
Failure to use flashlight
Tex—Thompson v Gibson, Civ App, 290 S W 2d 305, revd on oth grds, Sup, 298 S W 2d 97, 156 Tex 593, revd on oth grds, 78 S Ct 2, 355 US 18, 2 L Ed 2d 1, reh den 78 S Ct 258, 355 US 900, 2 L Ed 2d 197, affd 310 S W 2d 564, 158 Tex 231

page 228

27. US—Woods v New York Cent R Co, C A Ohio, 222 F 2d 551
Ky—Capps v Pence, 280 S W 2d 168
NC—Chambers v Edney, 100 S E 2d 343, 247 NC 165
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Mo—Wilson v White, App, 272 S W 2d 1—Cathey v De Weese, 289 S W 2d 51
Neb—Anderson v Evans, 83 NW 2d 59, 164 Neb 599
ND—Lund v Knoff, 85 NW 2d 676, 67 A L R 2d 1110
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Colo—Colwell v Oatman, 510 P 2d 464, 32 Colo App 171
Mo—Rodenck v St Louis Southwestern Ry Co, 299 S W 2d 422—Keeney v Callow, 349 S W 2d 75
Wash—Browning v Ward, 422 P 2d 12, 70 Wash 2d 45
31. NY—Czerenda v Wright, 156 NYS 2d 443, 2 AD 2d 928

page 229

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Or—Mazurek v Rajnus, 456 P 2d 83, 253 Or 555
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Ga—Thompson v Atlantic Coast Line R Co, 96 S E 2d 206, 94 Ga App 683, revd on oth grds 97 S E 2d 135, 213 Ga 70, conf to 98 S E 2d 102, 95 Ga App 475
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page 230

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Mich—Nantico v Matuzak, 34 NW 2d 506, 322 Mich 644
NY—Broderick v Caulkwell-Wingate Co, 93 NE 2d 629, 301 NY 182
38. Cal—Morgan v Stubblefield, 100 Cal Rptr 1, 493 P 2d 465, 6 C 3d 606
Wash—Engen v Arnold, 379 P 2d 990
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Ill—Russell v Halyama, 170 NE 2d 8, 27 Ill App 2d 359
Mich—Face v Gibson, 98 NW 2d 654, 357 Mich 315
NY—Adler v Shell Transp Corp, 272 NYS 2d 683, 26 AD 2d 625
ND—Vick v Fanning, 129 NW 2d 268
Okl—Dow v Tarkington, 452 P 2d 135

- Wash—Williams v Hofer, 191 P 2d 306, 30 Wash 2d 253—Browning v Ward, 422 P 2d 12, 70 Wash 2d 45

Evidence held insufficient to take question to jury

- Wash—Boley v Larson, 419 P 2d 579, 69 Wash 2d 621
41. Mo—Kenefick v Terminal R Ass'n of St Louis, supra, n 22

page 231

44. US—Richey v Sumoge, D C Or, 273 F Supp 904
Ky—Burdette v Thompson, 420 S W 2d 548
Tex—Loughry v Hodges, Civ App, 215 S W 2d 669, err ref no rev err

Particular machines

- (4) Ill—Brown v McColl, 183 NE 2d 541, 36 Ill App 2d 215
Wash—Poling v Charbonneau Packing Corp, 278 P 2d 375, 45 Wash 2d 845
(8) Other machines
NC—Keith v Norfolk Southern Ry Co, 175 S E 2d 778, 9 NC App 198
45. Idaho—Williams v Collett, 332 P 2d 1032, 80 Idaho 462
Kan—Harvey v Palmer, 296 P 2d 1053, 179 Kan 472
Mo—Keeney v Callow, 349 S W 2d 75
Saw
Mich—Dennis v Wilford, 61 NW 2d 154, 338 Mich 297
NY—Jones v Schenectady Boys Club, 130 NYS 2d 797, 283 App Div 981

page 232

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Ill—Durkin v Elgin, J & E Ry Co, 138 NE 2d 866, 12 Ill App 2d 190—Amerpohl v Illinois Cent R Co, 150 NE 2d 212, 17 Ill App 2d 416—Justice v Pennsylvania R Co, 191 NE 2d 72, 41 Ill App 2d 352
Iowa—Carter v Chicago, R I & P R Co, 74 NW 2d 356, 247 Iowa 429—Crane v Cedar Rapids & I C Ry Co, 160 NW 2d 838, affd 89 S Ct 1706, 395 US 164, 23 L Ed 2d 176
Mo—Goday v Thompson, 179 S W 2d 44, 352 Mo 681, cert den 65 S Ct 48, 323 US 719, 89 L Ed 681—Fitzpatrick v St Louis-San Francisco Ry Co, 327 S W 2d 801, 80 A L R 2d 825—Stubbs v Kansas City Terminal Ry Co, App, 427 S W 2d 257
NH—Descoteau v Boston & M R R, 140 A 2d 579, 101 NH 271
NJ—Marty v Erie R Co, 163 A 2d 167, 62 NJ Super 458
NY—Audet v New York Cent R Co, 199 NYS 2d 814, 11 AD 2d 561, rearg den 205 NYS 2d 1002, 11 AD 2d 864
Pa—Davenport v Pennsylvania R Co, 72 A 2d 59, 364 Pa 202
Utah—Butz v Union Pac R Co, 233 P 2d 332, 120 Utah 185, reh den 238 P 2d 1128, 120 Utah 209
Evidence insufficient to take case to jury
US—Chicago Great Western Ry Co v Casura, C A Minn, 234 F 2d 441
Colo—Colorado & S Ry Co v Lombardi, 400 P 2d 428, 156 Colo 488

Determination as to railroad's negligence as prerequisite

- US—*Segrist v Delaware, L & W R Co, CANY.*, 263 F2d 616, cert den 79 S Ct 1435, 360 US 917, 3 L Ed 2d 1533
- Ill—*Goodman v Terminal R.R. Ass'n of St. Louis*, 215 NE2d 437, 68 Ill App2d 80
51. US—*Fox v New York Cent. R. Co., CANY.*, 267 F2d 532
52. NY—*Lyons v Boston & M.R.R.*, 180 NYS2d 985, 7 A.D.2d 825
54. Mo—*Hill v Terminal R. Ass'n of St. Louis*, 216 SW2d 487, 358 Mo 597, cert den 69 S Ct 892, 336 US 962, 93 L Ed 1114
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- Tenn—*Haupt v Cincinnati, N.O. & T.P. Ry. Co.*, 232 SW2d 598, 34 Tenn App 1
- Utah—*Coray v Southern Pac. Co.*, 223 P2d 819, 119 Utah 1
56. US—*Lewis v Pennsylvania R. Co., D.C.Pa.*, 100 F Supp 291
57. US—*Atlantic Coast Line R. Co. v Floyd, C.A. S.C.*, 227 F2d 820
- Ala—*Atlanta, B. & C.R. Co. v Cary*, 35 So2d 559, 250 Ala. 675

page 233

58. US—*McGlothlen v Pennsylvania R. Co., C.A. Pa.*, 170 F2d 121—*Southern Pac. Co. v Guthrie, C.A. Cal.*, 180 F2d 295, adhered to 186 F2d 926, cert den 71 S Ct 614, 341 US 904, 95 L Ed 1343—*Franklin v New York, C. & St. L.R. Co., supra*, n 11—*Lovejoy v Monongahela Connecting R. Co., D.C.Pa.*, 137 F Supp 42
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59. Ga—*Southern Ry. Co. v Cabe*, 136 SE2d 438, 109 Ga App 432
61. Ala—*Louisville & N.R. Co. v Cooke*, 103 So2d 791, 267 Ala 424
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page 234

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Questions properly withdrawn from jury

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- Ga—*Howard v Atlantic Coast Line R. Co.*, 66 SE2d 87, 84 Ga App 307
- Ill—*Funk v Illinois Central R. Co.*, 93 NE2d 160, 341 Ill App 251—*Durkin v Elgin, J. & E. Ry. Co.*, 138 NE2d 866, 12 Ill App2d 190—*Moore v Atchison, T. & S.F. Ry. Co.*, 171 NE2d 393, 28 Ill App2d 340, 97 A.L.R.2d 511
- Pa—*Epler v Union R. Co.*, 102 Pittsb Leg J 373
68. US—*Canadian Nat. Ry. Co. v Conley, C.A. N.H.*, 226 F2d 451—*Wattgney v Southern Pac. Co., C.A. La.*, 411 F2d 854—*Sleeman v Chesapeake & O. Ry. Co., C.A. Mich.*, 414 F2d 305, on remand, D.C., 305 F Supp 33, vac 424 F2d 547
- Cal—*Powell v Vracin*, 310 P2d 27, 150 CA2d 454
- Fla—*Akies v Holland, App.*, 247 So2d 720
- Ga—*Henry v Adams*, 141 SE2d 603, 111 Ga App 297
- Mass—*Brooks v Eliot Sav. Bank*, 89 NE2d 508, 325 Mass 159
- Minn—*Baumgartner v Holm*, 52 NW2d 763, 236 Minn 235
- Mo—*McCormick v Smith*, 459 SW2d 272
- Nev—*Dearden v Galt*, 277 P2d 381
- N.D—*Dassinger v Kuhn*, 87 NW2d 720
- Or—*Celoria v Roberts Bros., Inc.*, 276 P2d 416, 202 Or 671—*Felds v Fields*, 326 P2d 451, 213 Or 522
- Wash—*Folden v Robinson*, 364 P2d 924, 58 Wash2d 760
- Question held not one of law under record
- Wash—*Saragusa v Swedish Hospital*, 373 P2d 767, 60 Wash2d 310
70. Ky—*Behemoth Coal Co. v Helton*, 222 SW2d 845, 310 Ky 810
71. US—*Franklin v Delgado, C.A. Tex.*, 262 F2d 439
72. X-ray radiation
- N.J—*Kress v City of Newark*, 86 A2d 185, 8 NJ 562
76. Cal—*Chuspe v Eichenbaum*, 336 P2d 1045, 169 CA2d 46
- Mo—*Votran v Illinois Terminal R. Co.*, 268 SW2d 838

page 235

81. Forklift platform
- Wash—*Carnico v Country Store of Salem, Inc.*, 484 P2d 412, 4 Wash App 567
- Ill—*Rutledge v Chum, Inc.*, 230 NE2d 277, 87 Ill App2d 73
- NY—*Simon v Ora Realty Corp.*, 153 NYS2d 39, 1 NY2d 388, 135 NE2d 580
92. R.I—*Dawson v McKenna*, 215 A2d 235, 100 R.I 317
94. Scaffold removed by other employees
- NY—*Marks v New York City Transit Authority*, 187 NYS2d 693, 17 Misc2d 583, rev'd on oth. grds 205 NYS2d 642, 11 A.D.2d 993, aff'd 191 NE2d 91, 13 NY2d 620, 240 NYS2d 606

page 236

96. US—*Wong v Swier, C.A. Wash.*, 267 F2d 749—*Webb v Standard Oil Co., C.A. Ga.*, 414 F2d 320, app after remand 451 F2d 284
- Mass—*Letney v Miller*, 86 So2d 458, 227 Mass 352
- N.D—*Olson v Kem Temple Ancient Arabic Order of Mystic Shrine*, 49 NW2d 99, 78 N.D. 263
- Ohio—*Smith v Albert*, 168 NE2d 495, 110 Ohio App 51
- Or—*Richardson v Harris*, 395 P2d 435, 238 Or 474
97. Torn stair mat
- Mass—*Sneed v Lidman*, 172 NE2d 836

99. Vt—*Cota v Rocheleau*, 141 A2d 426, 120 Vt 391

7. Ga—*Atlantic Coast Line R. Co. v Shed*, 84 SE2d 212, 90 Ga App 766
9. US—*Ross v Chesapeake & O. Ry. Co., C.A. Ohio*, 421 F2d 328
- Or—*Manasco v Barclay*, 218 P2d 469, 189 Or 109
10. Ill—*Parnham v Carl W. Linder Co.*, 183 NE2d 744, 36 Ill App2d 224
- Kan—*Concannon v Taylor*, 378 P2d 82, 190 Kan 687
- Ky—*Burdette v Thompson*, 420 SW2d 548
- Wash—*Hoffman v Gamache*, 465 P2d 203, 1 Wash App 883
- Climbing on ensilage cutter to dislodge corn shocks
- Minn—*Berg v Johnson*, 90 NW2d 918, 252 Minn 397
- Cleaning machinery with gasoline
- Mont—*D'Hooge v McCann*, 443 P2d 747, 151 Mont 353
- Using acetylene torch
- S.C—*Ruth v Lane*, 175 SE2d 820, 254 S.C. 431

§ 538. Instructions

Library References

Employers' Liability ¶261

page 237

12. Miss—*Horne v Town of Moorhead*, 228 So2d 369
- Mo—*Luthy v Terminal R. Ass'n of St. Louis*, 243 SW2d 332
- Wash—*Duchashev v Northern Pac. Ry. Co.*, 481 P2d 929, 4 Wash App 291
- Instructions held sufficient or not erroneous
- US—*Hite v Western Maryland Ry., C.A. Md.*, 217 F2d 781, cert den 75 S Ct 890, 349 US 960, 99 L Ed 1283
- Ill—*Finkstaff v Pennsylvania R. Co.*, 163 NE2d 728, 23 Ill App2d 507, aff'd 170 NE2d 139, 20 Ill2d 193, cert den 81 S Ct 1029, 365 US 878, 6 L Ed 2d 191
- Mo—*Sharp v Gulf, M. & O.R. Co.*, 332 SW2d 910
- Degree of proof
- Ill—*Finkstaff v Pennsylvania R. Co.*, 163 NE2d 728, 23 Ill App2d 507, aff'd 170 NE2d 139, 20 Ill2d 193, cert den 81 S Ct 1029, 365 US 878, 6 L Ed 2d 191
- Under Federal Employers' Liability Act
- Ga—*Atlantic Coast Line R. Co. v McDonald*, 119 SE2d 356, 103 Ga App 328
18. Mo—*Timmerman v Terminal R.R. Ass'n of St. Louis*, 241 SW2d 477, 362 Mo 280
- Instructions held confusing, misleading, or contradictory
- Ala—*Birmingham Southern R. Co. v Ball*, 126 So2d 206, 271 Ala 563
- Mo—*Cade v Atchison, T. & S.F. Ry. Co.*, 265 SW2d 366, 364 Mo 620—*Terrell v Missouri-Kansas-Texas R. Co.*, 303 SW2d 641
- Or—*Williams v Portland General Elec. Co.*, 247 P2d 494, 195 Or 597
- Instructions held not confusing, misleading, or contradictory
- US—*Terminal R. Ass'n of St. Louis v Fitzjohn, C.C. A. Mo.*, 165 F2d 473, 1 A.L.R.2d 290
- Mo—*Hampton v Washburn R. Co.*, 204 SW2d 708, 356 Mo 999, cert den 68 S Ct 460, 333 US 833, 92 L Ed 1117—*Spears v Schantz*, 246 SW2d 399, 241 Mo App 879—*Young v New York, C. & St. L. Ry. Co.*, 291 SW2d 64—*Sharp v Gulf, M. & O.R. Co.*, 332 SW2d 910

page 238

21. Mo—*Cade v Atchison, T. & S.F. Ry. Co., supra*, n 18

Page 238

22. Ga—Plaspohl v Atlantic Coast Line R Co, 74 S E 2d 491, 87 Ga App 506

page 239

30. Ill—Doner v New York, C & St L R Co, 157 N E 2d 280, 21 Ill App 125

Instructions held proper or not erroneous

US—Gowus v Pennsylvania R Co, C A Ohio, 299 F 2d 431, cert den 83 S Ct 44, 371 US 824, 9 L Ed 2d 64

Mo—Rad v Terminal R Ass'n of St Louis, App, 306 S W 2d 630—Sharp v Gulf, M & O R Co, 332 S W 2d 910

32. Ga—Southern Ry Co v Smalley, 145 S E 2d 708, 112 Ga App 471, cert den 86 S Ct 1342, 384 U S 906, 16 L Ed 2d 359, reh den 86 S Ct 1568, 384 U S 958, 16 L Ed 2d 553

Ohio—Inman v Baltimore & O R Co, 161 N E 2d 60, 108 Ohio App 124, app den 154 N E 2d 442, 168 Ohio St 335, affd 80 S Ct 242, 361 U S 138, 4 L Ed 2d 198

§ 539. — Conformity to Pleadings and Evidence; Theory of Case

Library References

Employers' Liability Ⓔ261-266

page 240

44. US—Northern Pac Ry Co v Mely, C A Idaho, 219 F 2d 199

Ill—Hannigan v Elgin, John & Eastern Ry Co, 86 N E 2d 388, 337 Ill App 538

Mo—Terrell v Missouri-Kansas-Texas R Co, 303 S W 2d 641—Johnson v Missouri-Kansas-Texas R Co, 334 S W 2d 41

ND—Dassinger v Kuhn, 87 N W 2d 720

Tenn—Stoker v Hicks, 419 S W 2d 626, 37 Tenn App 443

Instructions held proper or erroneously refused

US—Terminal R Ass'n of St Louis v Fitzjohn, supra, n. 18—Nuttall v Reading Co, C A Pa, 235 F 2d 546—Paci v New York Cent R Co, C A N Y, 250 F 2d 296—Dixon v Virginian Ry Co, C A Va, 250 F 2d 460—Bowers v Pennsylvania R Co, D C Del, 182 F Supp 756, affd, C A, 281 F 2d 953—Cobb v Union Ry Co, C A Tenn, 318 F 2d 33, cert den 84 S Ct 352, 375 U S 945, 11 L Ed 2d 275—Cobb v Union Ry Co, C A Tenn, 318 F 2d 33, cert den 84 S Ct 352, 375 U S 945, 11 L Ed 2d 275

Ariz—Holbert v Southern Pac Co, 472 P 2d 91, 12 Ariz App 480

Ark—Missouri Pac R Co v Ballard, 469 S W 2d 72, 250 Ark. 1094

Fla—Schumaker v King, App, 141 So 2d 807

Ga—Warren v Georgia Southern & F Ry Co, 50 S E 2d 128, 77 Ga App 886—Seaboard Coast Line R Co v Daugherty, 164 S E 2d 269, 118 Ga App 518, cert den 90 S Ct 950, 397 U S 939, 25 L Ed 2d 120

Ill—Gorczynski v Nugent, 80 N E 2d 418, 335 Ill App 63, affd 83 N E 2d 495, 402 Ill 147—Buggstaff v New York, C & St L R Co, 141 N E 2d 72, 13 Ill App 2d 85—Foster v New York, C & St L R Co, App, 168 N E 2d 61, 26 Ill App 2d 337—Olsen v Pigott, 188 N E 2d 361, 39 Ill App 2d 191—Gilmore v Toledo, F & W R Co, 212 N E 2d 117, 64 Ill App 2d 218, affd 224 N E 2d 228, 36 Ill 2d 510—Goodman v Terminal R R Ass'n of St Louis, 215 N E 2d 457, 68 Ill App 2d 80

Mo—Benham v McCoy, 213 S W 2d 914—Hill v Terminal R Ass'n of St Louis, 216 S W 2d 487, 358 Mo 997, cert den 69 S Ct 892, 336 U S 962, 93 L Ed 1114—Abernathy v St Louis-San Francisco Ry Co, 237 S W 2d 161—Beard v Railway Exp Agency, Inc, 323 S W 2d 732—Chambers v Missouri Pac R Co, 356 S W 2d 64—Miller v Gulf, M & O R Co, 386 S W 2d 97

NJ—Gibson v Kennedy, 128 A 2d 480, 23 NJ 150
NM—Chmard v Southern Pac Co, 475 P 2d 321, 82 NM 55

ND—Smith v Kautson, 47 N W 2d 537, 78 ND 43—Dassinger v Kuhn, 87 N W 2d 720

Ohio—O'Leary v Pennsylvania R Co, 127 N E 2d 877, 163 Ohio St 597

Okla—St Louis-San Francisco Ry Co v King, 368 P 2d 835

Tex—Texas & P Ry Co v Hagenloh, Civ App, 241 S W 2d 669, affd 247 S W 2d 236, 151 Tex 191

Utah—Williams v Ogden Union Ry & Depot Co, 230 P 2d 315, 119 Utah 529

Instructions held erroneous or properly refused

US—Masterson v New York Cent R Co, C A Pa, 266 F 2d 1, cert den 80 S Ct 84, 361 U S 832, 4 L Ed 2d 74—Harris v Chesapeake & O Ry Co, C A Ind, 358 F 2d 11

Alaska—Chugach Elec Ass'n v Lewis, 453 P 2d 345

Cal—Finley v Southern Pac Co, 3 Cal Rptr 895, 179 C A 2d 424—Anderson v Southern Pac Co, 41 Cal Rptr 743, 231 C A 2d 233

Fla—St Johns River Terminal Co v Vaden, App, 190 So 2d 40

Ga—Atlantic Coast Line R Co v Singletary, 55 S E 2d 827, 80 Ga App 297—Southern Ry Co v Gale, 118 S E 2d 742, 103 Ga App 87—A. F. King & Son v Simmons, 131 S E 2d 214, 107 Ga App 628

Iowa—Parks v Figgard, 163 N W 2d 385

Kan—Concannon v Taylor, 378 P 2d 82, 190 Kan 687

Ky—Ruddell's Adm'r v Berry, 298 S W 2d 1

Md—Baltimore & O R Co v Rodeheaver, 81 A 2d 63, 197 Md 632

Mo—Evinger v Thompson, 265 S W 2d 726, 364 Mo 658—Beard v Railway Exp Agency, Inc, 323 S W 2d 732

NH—Watson v Gregg & Son, 79 A 2d 9, 96 NH 487

Or—Arnold v Gardiner Hill Timber Co, 263 P 2d 403, 199 Or 517

Tenn—Benson v Fowler, 306 S W 2d 49, 43 Tenn App 147

Tex—Missouri-Kansas-Texas R Co v Wright, Civ App, 311 S W 2d 440, err den by agreement

45. US—Burch v Reading Co, D C Pa, 140 F Supp 136, affd, C A, 240 F 2d 574, cert den 77 S Ct 1049, 353 U S 965, 1 L Ed 2d 914

Minn—Holweger v Great Northern Ry Co, 130 N W 2d 354, 269 Minn 83

Mo—Johnson v Missouri-Kansas-Texas R Co, 334 S W 2d 41

Instructions held not improper

Ill—Pinkstaff v Pennsylvania R Co, 163 N E 2d 728, 23 Ill App 2d 507, affd 170 N E 2d 139, 20 Ill 2d 193, cert den 81 S Ct 1029, 365 U S 878, 6 L Ed 2d 191

50. Utah—Lemmon v Denver & R G W R Co, 341 P 2d 215, 9 Utah 2d 195

Federal Safety Appliance Act

Colo—Tovrea v Denver and Rio Grande Western R Co, App, 693 P 2d 1016

52. Or—Baldassarre v West Oregon Lumber Co, 239 P 2d 839, 193 Or 556

§ 540. — Presumptions and Burden of Proof

Library References

Employers' Liability Ⓔ261, 267

page 241

56. Instructions held sufficient or not erroneous

US—Burch v Reading Co, D C Pa, 140 F Supp 136, affd, C A, 240 F 2d 574, cert den 77 S Ct 1049, 353 U S 965, 1 L Ed 2d 914—Page v St Louis Southwestern Ry Co, C A Tex, 349 F 2d 820

Instructions held insufficient or erroneous

US—Bach v Penn Central Transp Co, C A Ohio, 502 F 2d 1117

Neb—Brackman v Brackman, 100 N W 2d 774, 169 Neb 630

57. Or—Thomas v Fogho, 358 P 2d 1066, 225 Or 540

58. Mont—Dewar v Great Northern Ry Co, 435 P 2d 887, 150 Mont 367

Instructions held sufficient, not erroneous, or improperly refused

US—Schurra v Delaware, L & W R Co, D C Pa, 103 F Supp 812—Weigand v Pennsylvania R Co, C A Pa, 267 F 2d 281—Southern Pac Co v Villarreal, C A Cal, 307 F 2d 414

Instructions held insufficient, erroneous, or properly refused

US—McCarthy v Pennsylvania R Co, C C A Ind, 156 F 2d 877, cert den 67 S Ct 635, 329 U S 812, 91 L Ed 693—Atlantic Coast Line R Co v Darden, C A Ga, 216 F 2d 125—Hoyt v Central R R, C A N J, 243 F 2d 840

59. Cal—Baez v Southern Pac Co, 26 Cal Rptr 899, 210 C A 2d 714

Mo—Jones v Terminal R R Ass'n of St Louis, 242 S W 2d 473

Ohio—Stevens v Chesapeake & O Ry Co, 183 N E 2d 811, 114 Ohio App 561

Instructions held sufficient, not erroneous, or improperly refused

US—McVay v Cincinnati Union Terminal Co, C A Ohio, 416 F 2d 853

Mo—Conser v Atchison, T & S F Ry Co, 266 S W 2d 587, cert den 75 S Ct 45

Okla—Atchison, T & S F Ry Co v Perryman, 192 P 2d 670, 200 Okl 266

Utah—Bowden v Denver & R G W R Co, 286 P 2d 240, 3 Utah 2d 444

Instructions held insufficient, erroneous or properly refused

US—Long v Union R Co, C A Pa, 175 F 2d 198

Cal—Anderson v Southern Pac Co, 41 Cal Rptr 743, 231 C A 2d 233

NY—Griffin v New York Cent R Co, 98 N Y S 2d 346, 277 App Div 320

page 242

63. Ga—Seaboard Coast Line R Co v Daugherty, 164 S E 2d 269, 118 Ga App 518, cert den 90 S Ct 950, 397 U S 939, 25 L Ed 2d 120

66. US—Texas & Pac Ry Co v Buckles, C A La, 232 F 2d 257, cert den 76 S Ct 1052, 351 U S 984, 100 L Ed 1498

Mo—Jones v Terminal R R Ass'n of St Louis, 258 S W 2d 643—Marquardt v Kansas City Southern Ry Co, 358 S W 2d 49, 2 A L R 3d 1311

68. US—Long v Union R Co, supra, n. 68

An instruction embodying the doctrine of res ipsa loquitur should be given only when consistent with the evidence ^{68.5}

68.5. Instruction held erroneous or properly refused

US—Masterson v New York Cent R Co, D C Pa, 169 F Supp 435, affd, C A, 266 F 2d 1, cert den 80 S Ct 84, 361 U S 832, 4 L Ed 2d 74

Instruction held proper

Mont—Pollard v Todd, 418 P 2d 869, 148 Mont 171

§ 541. — What Law Governs

Library References

Employers' Liability Ⓔ261, 268

72. Instructions held improper

Utah—Moore v Denver & R G W R Co, 292 P 2d 849, 4 Utah 2d 255

Instructions held erroneous

US—Southern Ry Co v Fox, C A Ga, 339 F 2d 560

75. Instructions held improper

Utah—Moore v Denver & R G W R Co, 292 P 2d 849, 4 Utah 2d 255

§ 542. — Relation of Parties; Co-defendants

Library References

Employers' Liability ⇐261, 268

page 243

77. Ark—Sutton v Nowim & Sons Co, 335 S W 2d 292, 232 Ark 223

Instructions held proper

US—Byrne v Pennsylvania R Co, C A Pa, 262 F 2d 906, cert den 79 S Ct 798, 359 US 960, 3 L Ed 2d 766

Miss—Kelley v Sportmen's Speedway, 80 So 2d 785, 224 Miss 632

Mo—Tinsley v Massman Const Co, 270 S W 2d 835

Okl—Miller Const Co v Wenthold, 458 P 2d 637

79. US—Ward v Atlantic Coast Line R Co, Fla, 80 S Ct 789, 362 US 396, 4 L Ed 2d 820

Instructions held sufficient, not erroneous, or improperly refused

Okl—Magnolia Petroleum Co v Angelly, 306 P 2d 309

Future disqualification for service

US—Brown v Pennsylvania R Co, C A Pa, 282 F 2d 522, cert den 81 S Ct 690, 365 US 818, 5 L Ed 2d 696

80. Instructions held proper or improperly refused

Or—Galer v Weyerhaeuser Timber Co, 344 P 2d 544, 218 Or 152

Instructions held improper or properly refused

Ark—Brasacumb v Whitaker, 233 S W 2d 249, 217 Ark 789

Mo—Benham v McCoy, supra, n 44

Okl—Taylor v Hayes, 261 P 2d 599

Instructions held sufficient or not erroneous

Mo—Hilton v Thompson, 227 S W 2d 675, 360 Mo 177

§ 543. — Scope of Employment

Library References

Employers' Liability ⇐261

84. Instructions held sufficient or not erroneous

Mich—Rodgers v Mikolajczak, 105 N W 2d 25, 361 Mich 61

§ 544. — Cause of Injury

Library References

Employers' Liability ⇐261

87. US—Hoyt v Central R.R., C A N.J., 243 F 2d 840—Tyree v New York Cent R Co, C A Ohio, 382 F 2d 524, cert den 88 S Ct 589, 389 US 1014, 19 L Ed 2d 659

Kan—Frazey v Hoar, 492 P 2d 1316, 208 Kan 519

Miss—Kusende & Lofton v Stephens, 50 So 2d 587

Instructions held sufficient or not erroneous

US—St Louis Southwestern Ry Co of Tex v Richardson, C A Tex, 218 F 2d 283

III—Gilmore v Toledo, P & W R Co, 224 N E 2d 228, 36 Ill 2d 510

Mo—Curtis v Atchison, T & S F Ry Co, 253 S W 2d 789, 363 Mo 779—Jones v Illinois Terminal R Co, 260 S W 2d 487, cert den 74 S Ct 682, 347 US 956, 98 L Ed 1101

Wash—Dachshauer v Northern Pac Ry Co, 481 P 2d 929, 4 Wash App 291

Instructions held insufficient, erroneous, or properly refused

Mo—Evenger v Thompson, 265 S W 2d 726, 364 Mo 658

Ohio—Stevens v Chesapeake & O Ry Co, 183 N E 2d 811, 114 Ohio App 561

Or—Galer v Weyerhaeuser Timber Co, 344 P 2d 544, 218 Or 152

88. Instructions held warranted by pleadings or evidence, or both, or improperly refused

US—New York, N H & H R Co v Leary, C A Mass, 204 F 2d 461, cert den 74 S Ct 71, 346 US 856, 98 L Ed 370—Yentzer v Pennsylvania R Co, C A Pa, 239 F 2d 785—Ringshiser v Chesapeake & O Ry Co, D C Ohio, 148 F Supp 529, affd, C A, 241 F 2d 416, cert gr 77 S Ct 1093, 354 US 901, 1 L Ed 2d 1268—Page v St Louis Southwestern Ry Co, C A Tex, 349 F 2d 820

III—Vandaveer v Norfolk & W Ry Co, 222 N E 2d 897, 78 Ill App 2d 186

Ky—Ruddell's Adm'r v Berry, 298 S W 2d 1

Md—Baltimore & O R Co v Rodeheaver, supra, n 44

Instructions held not warranted by pleadings or evidence, or both or properly refused

US—Byler v Wabash R Co, C A Mo, 196 F 2d 9, cert den 73 S Ct 27, 344 US 826, 97 L Ed 643—Rangan v New York Cent R Co, C A NY, 291 F 2d 548, cert den 82 S Ct 144, 368 US 891, 7 L Ed 2d 89

N M—Addison v Tessier, 305 P 2d 1067, 62 N M 120

Or—Kruze v Coos Head Timber Co, 432 P 2d 1009, 248 Or 294

page 244

89. US—Lannaco v Denver & R G W R R, C A Colo, 380 F 2d 1019—Tyree v New York Cent R Co, C A Ohio, 382 F 2d 524, cert den 88 S Ct 589, 389 US 1014, 19 L Ed 2d 659

Minn—Strobel v Chicago, R I & P R Co, 96 N W 2d 195, 255 Minn 201

Instructions held sufficient, not erroneous, or improperly refused

US—Loomana & A Ry Co v Moore, C A La, 229 F 2d 1, 59 A L R 2d 574, cert den 76 S Ct 849, 351 US 952, 100 L Ed 1475—Clark v Pennsylvania R Co, C A N.Y., 328 F 2d 591, cert den 84 S Ct 1943, 377 US 1006, 12 L Ed 2d 1054

III—Pinkstaff v Pennsylvania R Co, 163 N E 2d 728, 23 Ill App 2d 507, affd 170 N E 2d 139, 20 Ill 2d 193, cert den 81 S Ct 1029, 365 US 878, 6 L Ed 2d 191

Ind—Lamb v York, 247 N E 2d 197, 252 Ind 252

Mo—Dunn v Terminal R Ass'n of St Louis, 310 S W 2d 825—Sharp v Gulf, M & O R Co, 332 S W 2d 910

Tex—Thompson v Robbins, 304 S W 2d 111, 157 Tex 463

Utah—Conry v Southern Pac Co, 223 P 2d 819, 119 Utah 1

Instructions held insufficient, erroneous or properly refused

US—Williams v Atlantic Coast Line R Co, C A Ga, 190 F 2d 744—Farmer v Pennsylvania R Co, D C Pa, 311 F Supp 1074

Cal—Parker v Atchison, T & S F Ry Co, 70 Cal Rptr 8, 263 C A 2d 675

90. Or—Brigham v Southern Pac Co, 390 P 2d 669, 237 Or 120

Instructions held sufficient, not erroneous, or improperly refused

US—Morrison v New York Cent R Co, C A Ohio, 361 F 2d 319

Cal—Harness v Pacific Curtainwall Co, 45 Cal Rptr 454, 235 C A 2d 485

Mo—Blew v Atchison, T & S F Ry Co, 245 S W 2d 31

Utah—Arellano v Western Pac R Co, 298 P 2d 527, 5 Utah 2d 146

Instructions held insufficient erroneous, or properly refused

US—Bertrand v Southern Pac Co, C A Cal, 282 F 2d 569, cert den 81 S Ct 697, 365 US 816, 5 L Ed 2d 694—Page v St Louis Southwestern Ry Co, C A Tex, 312 F 2d 84, 98 A L R 2d 639

Mo—Winn v Gulf, Mobile & O R Co, 284 S W 2d 455

96. US—Atchison, T & S F Ry Co v Preston, C A Kan, 257 F 2d 933

§ 545. — Accidental or Improbable Injury

Library References

Employers' Liability ⇐261

97. Instructions held improper or properly refused

US—Franklin v Delgado, C A Tex, 262 F 2d 439

Instructions held proper or erroneously refused

US—Conner v Union Pac R Co, C A Cal, 219 F 2d 799—Williams v Union Pac R R, C A Or, 286 F 2d 50

Instruction on unavoidable accidental accident held ordinarily confusing

US—Page v St Louis Southwestern Ry Co, C A Tex, 312 F 2d 84, 98 A L R 2d 639

Instruction on unavoidable accident authorized

Ky—Hodges v Yarbrough, 374 S W 2d 845

page 245

99. US—Texas & P Ry Co v Griffith, C A Tex, 265 F 2d 489

1. Instructions held erroneous

Mo—Littlefield v Laughlin, 327 S W 2d 863

3. US—Page v St Louis Southwestern Ry Co, C A Tex, 349 F 2d 820

§ 546. — Negligence of Master

Library References

Employers' Liability ⇐261, 269-273

4. Instructions held not warranted by pleadings or evidence, or properly refused

US—Miller v Cincinnati, N O & T P Ry Co, D C Tenn, 203 F Supp 107, Affd, C A, 317 F 2d 693—Faith v Radin, C A N.Y., 310 F 2d 324

5. US—Denny v Montour R Co, D C Pa, 101 F Supp 735

6. III—Johnson v Pennsylvania R Co, 151 N E 2d 125, 17 Ill App 2d 508

Instructions held sufficient or not erroneous

US—Gibson v Lockheed Aircraft Service, Tex, 76 S Ct 366, 350 US 356, 100 L Ed 395, reh den 76 S Ct 656, 350 US 1016, 100 L Ed 875—Schulze v Atchison, T & S F Ry Co, C A Mo, 222 F 2d 810—Yentzer v Pennsylvania R Co, C A Pa, 239 F 2d 785

Miss—Smith v Jones, 220 So 2d 829

Mo—Mavrakos v Mavrakos Candy Co, 223 S W 2d 383, 359 Mo 649

Ohio—Gardner v Heldman, 80 N E 2d 681, 82 Ohio App 1

Instructions held insufficient or erroneous

Ky—Hodges v Yarbrough, 374 S W 2d 845

Mo—Elmore v Missouri Pac R Co, 301 S W 2d 776

N C—Bame v Palmer Stone Works, 59 S E 2d 812, 232 N C 267

Instructions properly refused

Miss—United Novelty Co v Daniels, 42 So 2d 395

Instructions improperly refused

N C—Williamson v Clay, 90 S E 2d 727, 243 N C 337

Wis—Haefer v Batz Seed Farms, 39 N W 2d 386, 235 Wis 438

8. Instructions held improper or erroneous

Ga—Georgia Southern & F Ry Co v Meek, 137 S E 2d 919, 110 Ga App 143

page 246

9. US—Canadian Nat Ry Co v Conley, C A N H, 226 F 2d 451

Miss—Cornish v McCoy, 84 So 2d 391, 226 Miss 366

Page 246

14 US—Burch v Reading Co, DCPa, 140 F Supp 136, affd, CA, 240 F2d 574, cert den 77 S Ct 1049, 353 US 965, 1 L Ed 2d 914

Instructions held sufficient, not erroneous, or improperly refused

US—Tombigbee Mill & Lumber Co v Hollingsworth, CCA Miss, 162 F2d 763, cert den 68 S Ct 165, 332 US 824, 92 L Ed 399

Cal—Baez v Southern Pac Co, 26 Cal Rptr 899, 210 CA 2d 714—Harness v Pacific Curtanwall Co, 45 Cal Rptr 454, 235 CA 2d 485

Ga—Smith v Ammons, 188 SE 2d 866, 228 Ga 855
Ill—Campbell v Chesapeake & O Ry Co, 183 NE 2d 736, 36 Ill App 2d 276

Mo—Leathem v Longenecker, 405 SW 2d 873

Ohio—Inman v Baltimore & O R Co, 161 NE 2d 60, 108 Ohio App 124, app dism 154 NE 2d 442, 168 Ohio St 335, affd 80 S Ct 242, 361 US 138, 4 L Ed 2d 198

Wash—Sage v Northern Pac Ry Co, 380 P 2d 856, 92 Wash 2d 6—Boley v Larson, 419 P 2d 579, 69 Wash 2d 621

Instructions held insufficient, erroneous, or properly refused

US—Chicago & NW Ry Co v Rieger, CA Minn, 326 F2d 329, cert den 84 S Ct 1182, 377 US 917, 12 L Ed 2d 186

Ala—Hinton & Sons v Strahan, 96 So 2d 426, 266 Ala 307

Mo—Fowler v Gulf, M & O R Co, App, 286 SW 2d 404

Or—Galer v Weyerhaeuser Timber Co, 344 P 2d 544, 218 Or 152

Wash—Mannisto v Boeing Airplane Co, 373 P 2d 496, 60 Wash 2d 304

Instructions held not warranted by pleadings or evidence, or both, or improperly refused

Mo—Fowler v Gulf, M & O R Co, App, 286 SW 2d 404

15. US—Wong v Swier, CA Wash, 267 F2d 749

Instructions held sufficient, not erroneous, or improperly refused

US—Tombigbee Mill & Lumber Co v Hollingsworth, supra, n 14

Ind—Lamb v York, 247 NE 2d 197, 252 Ind 252

Ky—Louisville & NR Co v Young's Adm'n, 253 SW 2d 585

Mo—Hines v Continental Baking Co, App, 334 SW 2d 140, 84 ALR 2d 1027

Instructions held insufficient, erroneous, or properly refused

Mo—Elmore v Missouri Pac R Co, 301 SW 2d 776

Or—Williams v Portland General Elec Co, 247 P 2d 494, 195 Or 597—Galer v Weyerhaeuser Timber Co, 344 P 2d 544, 218 Or 152

Pa—Laback v Vicker, 186 A 2d 874, 200 Pa Super 111

Wash—Hoffman v Gamache, 465 P 2d 203, 1 Wash App 883

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—McDill v Terminal R R Ass'n of St Louis, 268 SW 2d 823

Okla—St. Louis—San Francisco Ry Co v NesSmith, 435 P 2d 602

SD—Wendner v Lineback, 140 NW 2d 597, 82 SD 8

Wash—Williams v Hofer, 191 P 2d 306, 30 Wash 2d 253

Instructions held not warranted by pleadings or evidence, or both, or properly refused

US—Long v Union R Co, C.A.Pa., 175 F2d 198—Snyder v Lehigh Val R Co, DCPa, 143 F Supp 680, rev'd on oth grds, CA, 245 F2d 112—Williams v Union Pac R R, CA Or, 286 F2d 30

page 247

18. Okla—Zuckefoose v Franks Mfg Corp, 274 P 2d 776

Wash—Folden v Robinson, 364 P 2d 924, 58 Wash 2d 760

Instructions held sufficient, not erroneous or improperly refused

US—Franklin v Delgado, CA Tex, 262 F2d 439

Instructions held warranted by pleadings or evidence, or both, or improperly refused

SD—Wendner v Lineback, 140 NW 2d 597, 82 SD 8

page 248

22. Mo—Carnes v Kansas City Southern Ry Co, 328 SW 2d 615

NY—Bracchi v James King & Sons, Inc, 232 NY S 2d 136, 35 Misc 2d 177

Instructions held insufficient, erroneous or properly refused

Mo—Leathem v Longenecker, 405 SW 2d 873

Utah—Heywood v Denver & R G W R Co, 307 P 2d 1045, 6 Utah 2d 155

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Okla—Atchison, T & SF Ry Co v Perryman, 192 P 2d 670, 200 Okl 266

23 Ky—McCormick v Gullett, 460 SW 2d 813

Mo—Fowler v Gulf, M & O R Co, App, 286 SW 2d 404

Instructions held sufficient, not erroneous, or improperly refused

Mo—Willis v Wabash R Co, 284 SW 2d 503

Mont—Salvail v Great Northern Ry Co, 473 P 2d 549, 156 Mont 12

Instructions held insufficient, erroneous, or properly refused

Mo—Stone v New York C & St L R Co, 260 SW 2d 532

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo—Willis v Wabash R Co, 284 SW 2d 503

24 US—Lindauer v New York Cent R Co, CA NY, 408 F2d 638

NM—Cinard v Southern Pac Co, 475 P 2d 321, 82 NM 55

Instructions held sufficient, not erroneous, or improperly refused

Mo—Willis v Wabash R Co, 284 SW 2d 503

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Ill—Wells v Gulf, M & O R Co, 226 NE 2d 662, 82 Ill App 2d 30—Wells v Gulf, M & O R Co, 226 NE 2d 662, 82 Ill App 2d 30

Mo—Sandifer v Thompson, 280 SW 2d 412

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Mo—Stone v New York, C & St L R Co, supra, n 23

Wash—Mannisto v Boeing Airplane Co, 373 P 2d 496, 60 Wash 2d 304

25. Fla—Richards Co v Harrison, App, 262 So 2d 258

Ind—Crist, Inc v Whatacre, 258 NE 2d 165, 147 Ind App 16, mand mod on oth grds 260 NE 2d 893, 147 Ind App 16

Mo—Timmerman v Terminal R R Ass'n of St Louis, 241 SW 2d 477, 362 Mo 280

Instructions held sufficient, not erroneous, or improperly refused

Okla—H F Wilcox Oil & Gas Co v Jamson, 190 P 2d 807, 199 Okl 691

Instructions held insufficient, erroneous or properly refused

Ga—Western & Atlantic R Co v Wright, 54 SE 2d 655, 79 Ga App 733

Mo—Spears v Schantz, 246 SW 2d 399, 241 Mo App 879

Instructions held warranted by pleadings or evidence, or both, or improperly refused

US—Chicago & NW Ry Co v Garwood, CCA Minn, 167 F2d 848

Mo—Drescher v Wabash R Co, 270 SW 2d 843, cert den 75 S Ct 288, 348 US 904, 99 L Ed 710

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Mo—Fowler v Gulf, M & O R Co, App, 286 SW 2d 404

page 249

27 US—Robak v Pennsylvania R Co, DCPa, 81 F Supp 841, affd, CA, 178 F2d 485

Cal—McGuigan v Southern Pac Co, 277 P 2d 444, 129 CA 2d 482

28. Ind—Conrad v Tomlinson, 279 NE 2d 546, 258 Ind 115

Instructions held sufficient, not erroneous, or improperly refused

Wash—Kness v Truck Trailer Equipment Co, 501 P 2d 285, 81 Wash 2d 251

33. Instructions held insufficient, erroneous, or properly refused

Mo—Ricketts v Kansas City Stock Yards Co of Maine, 484 SW 2d 216

34 Instructions held sufficient, not erroneous, or improperly refused

Mo—Spicer v Hannah, 247 SW 2d 864, 241 Mo App 1215

35 Instructions held sufficient, not erroneous, or improperly refused

Mo—McClintock v Terminal R R Ass'n of St Louis, App, 257 SW 2d 180

Okla—Mealy-Wolfe Drilling Co v Lambert, 256 P 2d 818, 208 Okl 624

page 250

36 US—Baynum v Chesapeake & O Ry Co, CA Ohio, 436 F2d 658

Ill—Williams v New York Cent R Co, 86 NE 2d 262, 337 Ill App 388

Ind—Central Indiana Ry Co v, Anderson Banking Co, 240 NE 2d 840, 143 Ind App 396

Instructions held sufficient, not erroneous or improperly refused

US—Schurra v Delaware, L & W R Co, DCPa, 103 F Supp 812—Borkovic v Pennsylvania R Co, DCPa, 180 F Supp 495—Ely v Reading Co, C.A.Pa., 424 F2d 758

Cal—Mangrum v Union Pac R Co, 41 Cal Rptr 336, 230 CA 2d 960, 16 ALR 3d 543

Mo—Counts v Thompson, 222 SW 2d 487, 359 Mo 485—Timmerman v Terminal R R Ass'n of St Louis, supra, n 25—Blew v Atchison, T & SF Ry Co, 245 SW 2d 31—Brandock v Atchison, T & SF R Co, 269 SW 2d 93—Terrell v Missouri-Kansas-Texas R Co, 327 SW 2d 230—Sharp v Gulf, M & O R Co, 332 SW 2d 910

Mont—Dewar v Great Northern Ry Co, 435 P 2d 887, 150 Mont 367—Salvail v Great Northern Ry Co, 473 P 2d 549, 156 Mont 12

NY—Berben v New York Cent R, 194 NYS 2d 702, 9 AD 2d 998

Utah—Bills v Denver & R G W R Co, 352 P 2d 222, 10 Utah 2d 294

Instructions held insufficient, erroneous, or properly refused

US—McGlothlin v Pennsylvania R Co, C.A.Pa., 170 F2d 121—Southern Pac Co v Guthrie, CA Cal, 180 F2d 295, adhered to 186 F2d 926, cert den 71 S Ct 614, 341 US 904, 95 L Ed 1343—Wetherbee v Elgin, J & E Ry Co, C.A.Ill, 191 F2d 302—Bessel v Monessen SW Ry Co, DCPa, 121 F Supp 604, affd, CA, 218 F2d 273—Johnson v Erie R Co, C.A.N.Y., 236 F2d 352—Woodington v Pennsylvania R Co, C.A.N.Y., 236 F2d 760, cert den 77 S Ct 362, 352 US 970, 1 L Ed 2d 324—Segrist v Delaware, L & W R Co, C.A.N.Y., 263 F2d 616, cert den 79 S Ct 1435,

360 U.S. 917, 3 L. Ed. 2d 1533—Chicago & NW Ry. Co. v. Rieger, C.A. Minn., 326 F.2d 329, cert. den. 84 S.Ct. 1182, 377 U.S. 917, 12 L. Ed. 2d 186
 Fla.—Florida East Coast Ry. Co. v. Pollack, App. 154 So.2d 346

III—Quinn v. Gulf, M. & O.R. Co., 104 N.E.2d 550, 346 Ill. App. 62

Mo.—Banta v. Union Pac. R. Co., 242 S.W.2d 34, 362 Mo. 421—Malone v. Gardner, 242 S.W.2d 516, 362 Mo. 569—Hughes v. Terminal R. Ass'n of St. Louis, 265 S.W.2d 273

Instructions held warranted by pleadings or evidence, or both, or improperly refused

Mo.—Kenefick v. Terminal R. Ass'n of St. Louis, 207 S.W.2d 294—Rhinelander v. St. Louis—San Francisco Co. Ry. Co., 257 S.W.2d 655—Wilms v. Wabash R. Co., 284 S.W.2d 503

37. U.S.—Afloder v. New York, C. & St. L.R. Co., Mo., 70 S.Ct. 509, 339 U.S. 96, 94 L. Ed. 683—Trout v. Pennsylvania R. Co., C.A. Pa., 300 F.2d 826

III—Ernhart v. Elgin, J. & E. Ry. Co., 84 N.E.2d 868, 337 Ill. App. 56, transf. 78 N.E.2d 257, 399 Ill. 512, aff'd 92 N.E.2d 96, 405 Ill. 577

Miss.—St. Louis—San Francisco Ry. Co. v. Dyson, 43 So.2d 95, 207 Miss. 639

S.C.—Haselden v. Atlantic Coast Line R. Co., 53 S.E.2d 60, 214 S.C. 410, cert. den. 70 S.Ct. 73, 338 U.S. 825, 94 L. Ed. 501

Instructions held sufficient, not erroneous, or improperly refused

U.S.—Rothwell v. Pennsylvania R. Co., D.C. Pa., 87 F. Supp. 706—Atlantic Coast Line R. Co. v. Burkett, C.A. Ga., 192 F.2d 941—Denny v. Montour R. Co., D.C. Pa., 101 F. Supp. 735—McPherson v. Hoffman, C.A. Mich., 275 F.2d 466—Shenker v. Baltimore & O.R. Co., Pa., 83 S.Ct. 1667, 374 U.S. 1, 10 L. Ed. 2d 709—Southern Pac. Co. v. Mahl, C.A. La., 406 F.2d 1201, reh. den. 409 F.2d 229
 Ark.—Missouri Pac. R. Co. v. Ballard, 469 S.W.2d 72, 250 Ark. 1094

Cal.—Minehart v. Southern Pac. Co., 288 P.2d 999, 136 C.A.2d 486—Edmonds v. Southern Pac. Co., 299 P.2d 8, 142 C.A.2d 519—Anderson v. Southern Pac. Co., 41 Cal. Rptr. 743, 231 C.A.2d 233

Fla.—Hodge v. Jacksonville Terminal Co., App., 222 So.2d 483, decision quashed in part, rem'd, Sup., 234 So.2d 645, cert. den. 91 S.Ct. 142, 400 U.S. 904, 27 L. Ed. 2d 141, app. after remand 260 So.2d 521, cert. den. 93 S.Ct. 311, 409 U.S. 980, 34 L. Ed. 2d 243

III—Virgil v. New York, C. & St. L.R. Co., 118 N.E.2d 61, 2 Ill. App. 2d 46

Minn.—Phillips v. Great Northern Ry. Co., 100 N.W.2d 765, 257 Minn. 195

Mo.—Hilton v. Thompson, 227 S.W.2d 675, 360 Mo. 177—Warming v. Thompson, 249 S.W.2d 335, 30 A.L.R.2d 1176—Curtis v. Atchison, T. & S.F. Ry. Co., 253 S.W.2d 789, 363 Mo. 779—Evinger v. Thompson, 265 S.W.2d 726, 364 Mo. 658—Huffman v. Terminal R. Ass'n of St. Louis, 281 S.W.2d 863—Beard v. Railway Exp. Agency, Inc., 323 S.W.2d 732

Utah—Mooney v. Denver & R.G.W.R. Co., 257 P.2d 947, 123 Utah 224

Instructions held insufficient, erroneous, or properly refused

U.S.—McCarthy v. Pennsylvania R. Co., C.C.A. Ind., 156 F.2d 877, cert. den. 67 S.Ct. 635, 329 U.S. 812, 91 L. Ed. 693—Atlantic Coast Line R. Co. v. Dixon, C.A. Ga., 189 F.2d 525, cert. den. 72 S.Ct. 54, 342 U.S. 830, 96 L. Ed. 628—Williams v. Atlantic Coast Line R. Co., C.A. Ga., 190 F.2d 744—Atlantic Coast Line R. Co. v. Burkett, C.A. Ga., 192 F.2d 941—Atlantic Coast Line R. Co. v. Darden, C.A. Ga., 216 F.2d 125—Chicago, R.I. & P.R. Co. v. Lust, C.A. Minn., 217 F.2d 279—St. Louis Southwestern Ry. Co. of Tex. v. Richardson, C.A. Tex., 218 F.2d 283—Canadian Nat. Ry. Co. v. Conley, C.A. N.H., 226 F.2d 451—Fox v. New York Cent. R. Co., C.A. N.Y., 267 F.2d 532—Chicago & NW Ry. Co. v. Rieger, C.A. Minn., 326 F.2d 329, cert. den. 84 S.Ct. 1182, 377 U.S. 917, 12 L. Ed. 2d

186—Schroeder v. Pennsylvania R. Co., C.A. Ill., 397 F.2d 452

Cal.—Finley v. Southern Pac. Co., 3 Cal. Rptr. 895, 179 C.A.2d 424

Ga.—Georgia Southern & F. Ry. Co. v. Meeks, 137 S.E.2d 919, 110 Ga. App. 143

Minn.—Holweger v. Great Northern Ry. Co., 130 N.W.2d 354, 269 Minn. 83

Mo.—Cade v. Atchison, T. & S.F. Ry. Co., 265 S.W.2d 366, 364 Mo. 620—Scneider v. Wabash R. Co., 272 S.W.2d 198

N.Y.—Van Slyke v. New York Cent. R. Co., 249 N.Y.S.2d 462, 21 A.D.2d 147

Instructions held warranted by pleadings or evidence, or both

Minn.—Phillips v. Great Northern Ry. Co., 100 N.W.2d 765, 257 Minn. 195

Instructions held not warranted by pleadings or evidence or both, or properly refused

U.S.—Anderson v. Elgin, J. & E. Ry. Co., C.A. Ill., 227 F.2d 91

Ala.—Atlantic Coast Line R. Co. v. Winn, 66 So.2d 184, 259 Ala. 184

Ohio—Elkins v. Wheeling & Lake Erie Ry. Co., 113 N.E.2d 233, 160 Ohio St. 47

page 251

38. Instructions held sufficient, not erroneous, or improperly refused

Mo.—Howard v. Missouri Pac. R. Co., 295 S.W.2d 68

Instructions held warranted by pleadings or evidence, or both, or improperly refused

U.S.—Hoyt v. Central R.R., C.A. N.J., 243 F.2d 840

Instructions held insufficient, erroneous, or properly refused

Fla.—Florida East Coast Ry. Co. v. Hardee, App., 162 So.2d 704

Mo.—Stone v. New York, C. & St. L.R. Co., 260 S.W.2d 532

39. Instructions held erroneous

Mo.—Sprinkle v. Thompson, 243 S.W.2d 510

40. Joinder of action under Federal Safety Appliance Act and under Federal Employers' Liability Act

III—Pinkstaff v. Pennsylvania R. Co., 170 N.E.2d 139, 20 Ill.2d 193, cert. den. 81 S.Ct. 1029, 365 U.S. 878, 6 L. Ed. 2d 191

Minn.—Hallada v. Great Northern Ry., Minn., 69 N.W.2d 673, 244 Minn. 81, cert. den. 76 S.Ct. 119, 350 U.S. 874, 100 L. Ed. 773, foll. 72 N.W.2d 74, 245 Minn. 581

43. Mo.—Hughes v. Terminal R. Ass'n of St. Louis, supra, n. 36

page 252

47. Ariz.—Hoge v. Southern Pac. Co., 339 P.2d 393, 85 Ariz. 361

Ind.—Conrad v. Tomlinson, 279 N.E.2d 546, 258 Ind. 115

Minn.—Strobel v. Chicago, R.I. & P.R. Co., 96 N.W.2d 195, 255 Minn. 201

Mo.—Beard v. Railway Exp. Agency, Inc., 323 S.W.2d 732

Instructions held sufficient, not erroneous, or improperly refused

U.S.—Terminal R. Ass'n of St. Louis v. Fitzjohn, C.C.A. Mo., 165 F.2d 473, 1 A.L.R.2d 209—Rothwell v. Pennsylvania R. Co., D.C. Pa., 87 F. Supp. 706

Mo.—McClintock v. Terminal R.R. Ass'n of St. Louis, supra, n. 35—Frazier v. Ford Motor Co., 276 S.W.2d 95, 365 Mo. 62—Young v. New York, C. & St. L. Ry. Co., 291 S.W.2d 64

Or.—Baldassarre v. West Oregon Lumber Co., 239 P.2d 839, 193 Or. 556

Tex.—Missouri-Kansas-Texas R. Co. v. Franks, Civ. App., 399 S.W.2d 905

Utah—Wilson v. Union Pac. R. Co., 231 P.2d 715, 119 Utah 632—Arellano v. Western Pac. R. Co., 298 P.2d 527, 5 Utah 2d 146

Wash.—Strandberg v. Northern Pac. Ry. Co., 367 P.2d 137, 59 Wash.2d 259

Instructions held insufficient, erroneous, or properly refused

U.S.—Guegan v. New York Cent. R. Co., C.A. N.Y., 243 F.2d 524

Ga.—Atlantic Coast Line R. Co. v. Strickland, 74 S.E.2d 897, 87 Ga. App. 596—Southern Ry. Co. v. Smalley, 157 S.E.2d 530, 116 Ga. App. 356

III—Braswell v. New York, C. & St. L.R. Co., 208 N.E.2d 358, 60 Ill. App. 2d 120

Mo.—Carnes v. Kansas City Southern Ry. Co., 328 S.W.2d 615—Ricketts v. Kansas City Stock Yards Co. of Maine, 484 S.W.2d 216

Mont.—Pollard v. Todd, 418 P.2d 869, 148 Mont. 171

N.Y.—Jamison v. Henry F. Raab, Inc., 125 N.Y.S.2d 522, 283 App. Div. 884, motion den. 121 N.E.2d 630, 307 N.Y. 807, aff'd 125 N.E.2d 863, 308 N.Y. 802—Gorup v. New York Cent. R. Co., 162 N.Y.S.2d 408, 3 A.D.2d 951—Berben v. New York Cent. R., 194 N.Y.S.2d 702, 9 A.D.2d 998

Or.—Snyder v. Seneca Lumber Co., 298 P.2d 180, 207 Or. 572

48. Utah—McCowan v. Denver & R.G.W.R. Co., 244 P.2d 628, 121 Utah 587, cert. den. 73 S.Ct. 346, 344 U.S. 918, 97 L. Ed. 707

§ 548. — Negligence of Fellow Servants

Library References

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56. Mo.—Heiter v. Terminal R. Ass'n of St. Louis, App., 275 S.W.2d 612

Instructions held sufficient, not erroneous, or improperly refused

Ga.—Atlantic Coast Line R. Co. v. Heyward, 60 S.E.2d 641, 82 Ga. App. 337

Mo.—Rogers v. Thompson, 265 S.W.2d 282, 364 Mo. 605

N.D.—Dassinger v. Kuhn, 87 N.W.2d 720

Utah—Arellano v. Western Pac. R. Co., 298 P.2d 527, 5 Utah 2d 146

Instructions held insufficient, erroneous or properly refused

Fla.—Waldreps Dairy Farm, Inc. v. Robinson, App., 228 So.2d 610

Mo.—Jones v. Terminal R.R. Ass'n of St. Louis, 258 S.W.2d 643—Bartch v. Terminal R. Ass'n of St. Louis, App., 264 S.W.2d 937—Davis v. St. Louis Southwestern R. Co., 444 S.W.2d 485

N.H.—Hardman v. Walsh Bros., 79 A.2d 19, 96 N.H. 456

N.J.—Lawton v. Virginia Stevedoring Co., 143 A.2d 197, 50 N.J. Super. 564

N.Y.—Berben v. New York Cent. R., 194 N.Y.S.2d 702, 9 A.D.2d 998

Okla.—Oklahoma Tire & Supply Co. v. Roland, 331 P.2d 474

Wash.—Rawlins v. Nelson, 231 P.2d 281, 38 Wash.2d 570

page 253

58. Instruction as to right to assume fellow employees would not violate employer's rules held supported by evidence

Mont.—Bracy v. Great Northern Ry. Co., 343 P.2d 818, 136 Mont. 65, cert. den. 80 S.Ct. 403, 361 U.S. 949, 4 L. Ed. 2d 381

61. Instructions held sufficient, not erroneous, or improperly refused

Kan.—Giltner v. Stephens, 200 P.2d 290, 166 Kan. 172

Instructions held insufficient, erroneous, or properly refused

U.S.—Schroeder v. Pennsylvania R. Co., C.A. Ill., 397 F.2d 452

Page 253

§ 549. — Assumption of Risks and Contributory Negligence

Library References

Employers' Liability — 275, 276

page 254

66 Va—Norfolk S Ry Co v Rayburn, 195 SE2d 860, 213 Va 812

72. Instructions held warranted by pleadings or evidence, or both, or improperly refused
Cal—Baez v Southern Pac Co, 26 Cal Rptr 899, 210 CA 2d 714

W Va—Davis v Fire Creek Fuel Co, 109 SE2d 144, 144 W Va 537

Instructions held not warranted by pleadings or evidence, or both, or properly refused

US—Yentzer v Pennsylvania R Co, CA Pa, 239 F2d 785—Clark v Pennsylvania R Co, C.A.N.Y., 328 F2d 591, cert den 84 SCt 1943, 377 US 1006, 12 L Ed 2d 1054

Mo—Kiger v Terminal R Ass'n of St Louis, 311 SW2d 5

Wash—Gabel v Koba, 463 P2d 237, 1 Wash App 684

73. US—Wong v Swier, CA Wash, 267 F2d 749

74. Ill—Graham v Toledo, P & W R Co, 182 NE2d 889, 35 Ill App 2d 234

Mich—Feigner v Anderson, 133 NW2d 136, 375 Mich 23, 26 ALR3d 531

Tenn—Stoker v Hicks, 419 SW2d 626, 57 Tenn App 443

Instructions held sufficient, not erroneous, or improperly refused

US—De Pascale v Pennsylvania R Co, CA Pa, 180 F2d 825

Conn—Balla v Loewergan, 120 A2d 705, 143 Conn 197

Ill—Borero v Elgin, J & E Ry Co, 171 NE2d 673, 28 Ill App 2d 362, cert den 82 SCt 144, 368 US 891, 7 L Ed 89, reh den 82 SCt 359, 368 US 936, 7 L Ed 2d 198

Kan—Giltner v Stephens, supra, n 61

Mo—Abernathy v St Louis-San Francisco Ry Co, 237 SW2d 161

NH—Lundberg v Swenson, 60 A2d 458, 95 NH 184

NM—Jasper v Lumpee, App, 465 P2d 97, 81 NM 214

Instructions held insufficient, erroneous or properly refused

US—Gibson v Lockheed Aircraft Service, Tex, 76 SCt 366, 350 US 356, 100 L Ed 395, reh den 76 SCt 656, 350 US 1016, 100 L Ed 875

Ga—Atlantic Coast Line R Co. v Blount, App, 156 SE2d 409, 116 Ga.App 86

Mae—United Novelty Co v Daniels, 42 So2d 395

NM—Chavez v Atchison, T & S F Ry Co, 444 P2d 586, 79 NM 401

Okl—St Louis-San Francisco Ry Co v King, 368 P2d 835

Term "assumption of risk" should be avoided
US—Klimaszewski v Pacific-Atlantic SS Co, CA Pa, 246 F2d 875

page 255

79. Min—Oakes v Mohon, 44 So2d 551, 208 Min 478

88. R.I.—D Andrea v Sears, Roebuck & Co, 287 A2d 629, 109 RI 479

89. Instructions held sufficient, not erroneous, or improperly refused

Ill—Mack v Davis, 221 NE2d 121, 76 Ill App 2d 88

90. Wash—Hammer v Haggard, 355 P2d 334, 56 Wash 2d 744

91. Instructions held properly refused
US—Schirra v Delaware, L & W R Co, D.C.Pa., 103 F Supp 812

SC—Ruth v Lane, 175 SE2d 820, 254 SC 431

page 256

92. Instructions held insufficient, erroneous, or properly refused

Ark—Walther v Cooley, 279 SW2d 288, 224 Ark 1027

95. Instructions held sufficient, not erroneous, or improperly refused

US—De Pascale v Pennsylvania R Co, supra, n 74

Cal—Crowder v Atchison, T & S F Ry Co, 256 P2d 85, 117 CA 2d 568

Mo—Jones v Illinois Terminal R Co, 260 SW2d 487, cert den 74 SCt 682, 347 US 956, 98 L Ed 1101

Instructions held insufficient, erroneous or properly refused

US—Thomas v Union Ry Co, CA Tenn, 216 F2d 18

Cal—Minehart v Southern Pac Co, 288 P2d 999, 136 CA 2d 486

Mo—Tatum v Gulf, M & O R Co, 223 SW2d 418, 359 Mo 709

97. US—Wantland v Illinois Cent R Co, CA Ill, 237 F2d 921

Okl—St Louis-San Francisco Ry Co v King, 368 P2d 835

Instructions held sufficient, not erroneous, or improperly refused

Cal—Crowder v Atchison, T & S F Ry Co, supra, n 95—Edmonds v Southern Pac Co, 299 P2d 8, 142 CA 2d 519

Minn—Neizer v Northern Pac Ry Co, 57 NW2d 247, 238 Minn 416, cert den 74 SCt 26, 346 US 831, 98 L Ed 355

Instructions held insufficient, erroneous or properly refused

US—Johnson v Erie R Co, C.A.N.Y., 236 F2d 352

Ga—Plaspohl v Atlantic Coast Line R Co, 74 SE2d 491, 87 Ga App 506

Tex—Panhandle & S F Ry Co v Howard, Civ App, 397 SW2d 300

1. US—Lane v Gorman, CA Wyo, 347 F2d 332

Ill—Hack v New York, C & St L R Co, 169 NE2d 372, 27 Ill App 2d 206

Mont—Pollard v Todd, 418 P2d 869, 148 Mont 171

Ohio—Smith v Pennsylvania R Co, App, 99 NE2d 501

5. Ill—Vandaveer v Norfolk & W Ry Co, 222 NE2d 897, 78 Ill App 2d 186

Ky—Kentucky & I T R Co v Martin, 437 SW2d 944

Mo—Holmes v Terminal R R Ass'n of St Louis, 257 SW2d 922, 363 Mo 1178

6. Term "assumption of risk" should not be used

US—Texas & Pac Ry Co v Buckles, CA La, 232 F2d 257, cert den 76 SCt 1052, 351 US 984, 100 L Ed 1498

7. Instructions held sufficient, not erroneous or improperly refused

Cal—Anderson v Southern Pac Co, 41 Cal Rptr 743, 231 CA 2d 233

8. Instructions held sufficient, not erroneous, or improperly refused

ND—Desinger v Kuhn, 87 NW2d 720

Okl—Atchison, T & S F Ry Co v Perryman, 192 P2d 670, 200 Okl 266

Ark—Walther v Cooley, 279 SW2d 288, 224 Ark 1027

Instructions held insufficient, erroneous, or properly refused

Wash—Hoffman v Gamache, 465 P2d 203, 1 Wash App 883

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Ga—Western & Atlantic R Co v Wright, 54 SE2d 655, 79 Ga App 733

page 257

10 ND—Desinger v Kuhn, 87 NW2d 720

Instructions given held erroneous

Idaho—Otto v Mell, 482 P2d 84, 94 Idaho 109

12. Instructions held insufficient, erroneous, or properly refused

Wash—Hammer v Haggard, 355 P2d 334, 56 Wash 2d 744

19 US—Faith v Radin, C.A.N.Y., 310 F2d 324—Zappia v Baltimore & O R Co, CA Ohio, 312 F2d 62

Colo—Colorado & S Ry Co v Lombardi, 400 P2d 428, 156 Colo 488

W Va—Pitzer v M D Tomkies & Sons, 67 SE2d 437, 136 W Va 268

Instructions held warranted by pleadings or evidence, or both, or improperly refused

US—Dille v Chesapeake & O Ry Co, CA Ohio, 327 F2d 249, cert den 85 SCt 47, 379 US 824, 13 L Ed 2d 34

US—Szajna v Bessemer & L R Co, D.C.Pa., 313 F Supp 576

Ill—Pinkstaff v Pennsylvania R Co, 170 NE2d 139, 20 Ill 2d 193, cert den 81 SCt 1029, 365 US 878, 6 L Ed 2d 191

Wash—Tabert v Zier, 368 P2d 685, 59 Wash 2d 524

Instructions held not warranted by pleadings or evidence, or both, or properly refused

Ala—Birmingham Southern R Co v Ball, 126 So2d 206, 271 Ala 563

Wash—Hoffman v Gamache, 465 P2d 203, 1 Wash App 883

page 258

20. Okl—Atchison, T & S F Ry Co v Hicks, 258 P2d 672, 208 Okl 689

Utah—Coray v Southern Pac Co, 223 P2d 819, 119 Utah 1

Instructions held insufficient or erroneous

Ga—Southern Ry Co v Cabe, 136 SE2d 438, 109 Ga App 432

21. Instructions held proper

Mo—Miller v Gulf, M & O R Co, 386 SW2d 97

22. Instructions held proper or improperly refused

Mo—Huffman v Terminal R Ass'n of St Louis, 281 SW2d 863

23. Idaho—Otto v Mell, 482 P2d 84, 94 Idaho 109

Mo—Rhinelander v St Louis-San Francisco Ry Co, 257 SW2d 655

Instructions held proper

Fla—Sonnenborn v Gartrell, App, 179 So2d 385, cert discharged, Sup, 189 So2d 621

Instructions held properly refused

US—James v Pennsylvania R Co, D.C.Pa., 101 F Supp 241, affd, CA, 196 F2d 1021

Instructions held insufficient or erroneous

Mo—Crews v Illinois Terminal R Co, App, 260 SW2d 765

25. Mo—Sandfer v Thompson, 280 SW2d 412

26. Instructions held sufficient, not erroneous, or improperly refused

Mo—Hines v Continental Baking Co, App, 334 SW2d 140, 84 ALR2d 1027

Instructions held insufficient, erroneous, or properly refused

US—Atlantic Coast Line R Co v Burkett, CA Ga, 192 F2d 941

Ky—Hodges v Yarbrow, 374 SW2d 845

27. Fla—Schumaker v King, App, 141 So2d 807

page 259

35 Wash—Tate v Rommel, 478 P 2d 242, 3 Wash App 933

39. US—Atchison, T & S F Ry Co v Seamas, CA Cal, 201 F 2d 140—Franklin v Delgado, CA Tex, 262 F 2d 439

Instructions held insufficient, erroneous, or properly refused

Miss—Oakes v Mohon, 44 So 2d 551, 208 Miss 478

41 **Instructions held insufficient, erroneous, or properly refused**

US—Atlantic Coast Line R Co v Anderson, CA Fla, 267 F 2d 329, cert den 80 S Ct 83, 361 US 841, 4 L Ed 2d 79, reh den 80 S Ct 20, 361 US 904, 4 L Ed 2d 159

Ga—Seaboard Coast Line R Co v Daugherty, 164 S E 2d 269, 118 Ga App 518, cert den 90 S Ct 950, 397 US 939, 25 L Ed 2d 120

43. US—Lockheed Aircraft Service v Gibson, CA Tex, 217 F 2d 730, rev'd on oth grds 76 S Ct 366, 350 US 356, 100 L Ed 395, reh den 76 S Ct 656, 350 US 1016, 100 L Ed 875

page 260

44. Cal—Crowder v Atchison, T & S F Ry Co, 256 P 2d 85, 117 CA 2d 568

Instructions held insufficient, erroneous, or properly refused

NH—Descoteau v Boston & M R R, 140 A 2d 579, 101 NH 271

Instructions held sufficient, not erroneous, or improperly refused

Ky—Louisville & N R Co v Young's Adm'x, 253 S W 2d 585

47. Ala—Johnson v Louisville & N R Co, 52 So 2d 196, 255 Ala 581

Ga—Atlantic Coast Line R Co v Shed, 84 S E 2d 212, 90 Ga App 766—Atlantic Coast Line R Co v McDonald, 119 S E 2d 356, 103 Ga App 328—Seaboard Coast Line R Co v Daugherty, 164 S E 2d 269, 118 Ga App 518. Cert den 90 S Ct 950, 397 US 939, 25 L Ed 2d 120—Seaboard Coast Line R Co v Thomas, 190 S E 2d 898, 229 Ga 301

Ill—Johnson v Pennsylvania R Co, 151 N E 2d 125, 17 Ill App 2d 508

Okl—St Louis-San Francisco Ry Co v King, 368 P 2d 835

Or—Caplinger v Northern Pac Terminal, 418 P 2d 34, 244 Or 289

Instructions held sufficient, not erroneous, or improperly refused

US—Picard v Pittsburgh & O V Ry Co, D C Pa, 153 F Supp 583—Texas & Pac Ry Co v Jones, CA Tex, 298 F 2d 188

Cal—Crowder v Atchison, T & S F Ry Co, supra, n 44—Edmunds v Southern Pac Co, 299 P 2d 8, 142 CA 2d 519

Mo—Rhinelander v St Louis-San Francisco Ry Co, supra, n 23

Ohio—Oliver v Chesapeake & O Ry Co, App, 151 N E 2d 371

Tex—Thompson v Robbins, 304 S W 2d 111, 157 Tex 463

Utah—Arellano v Western Pac R Co, 298 P 2d 527, 5 Utah 2d 146

48. Ill—Punkstaff v Pennsylvania R Co, 170 N E 2d 139, 20 Ill 2d 193, cert den 81 S Ct 1029, 365 US 878, 6 L Ed 2d 191

Minn—Strobel v Chicago, R I & P R Co, 96 NW 2d 195, 255 Minn 201

Neb—Brackman v Brackman, 100 NW 2d 774, 169 Neb 650

49. US—Byler v Wabash R Co, CA Mo, 196 F 2d 9, cert den 73 S Ct 27, 344 US 826, 97 L Ed 643

Mo—Holmes v Terminal R R Ass'n of St Louis, supra, n 5

NY—Meizer v 195 Broadway Corp, 230 N Y S 2d 479, 17 A D 2d 656

Utah—Wilson v Union Pac R Co, 231 P 2d 715, 119 Utah 632—Arellano v Western Pac R Co, 298 P 2d 527, 5 Utah 2d 146

Wash—Schmidt v Great Northern R Co, 497 P 2d 959 7 Wash App 40

50 US—Almendarez v Atchison, T & S F Ry Co, CA Tex, 426 F 2d 1095

Ga—Atlantic Coast Line R Co v McDonald, 119 S E 2d 356, 103 Ga App 328

Ill—Hack v New York, C & St L R Co, 169 N E 2d 372, 27 Ill App 2d 206

Mo—Malone v Gardner, 242 S W 2d 516, 362 Mo 569—Jones v Terminal R R Ass'n of St Louis, 258 S W 2d 643

51 Mo—Abernathy v St Louis-San Francisco Ry Co, 237 S W 2d 161

53 US—McCarthy v Pennsylvania R Co, CCA Ind, 156 F 2d 877, cert den 67 S Ct 635, 329 US 812, 91 L 2d 693—Hausrath v New York Cent R Co, CA Ohio, 401 F 2d 634

Cal—Parker v Atchison, T & S F Ry Co, 70 Cal Rptr 8, 263 CA 2d 675

Fla—Fulmer v Railway Exp Agency, Inc, App, 215 So 2d 48, mod on oth grds, Sup, 227 So 2d 870

Mo—McClintock v Terminal R R Ass'n of St Louis, App, 257 S W 2d 180—Boyd v Terminal R Ass'n of St Louis, 289 S W 2d 33, 58 ALR 2d 1222—Young v New York, C & St L Ry Co, 291 S W 2d 64—Terrell v Missouri-Kansas-Texas R Co, 303 S W 2d 641

54. US—Henwood v Coburn, CCA Mo, 165 F 2d 418

Mo—Kenefick v Terminal R Ass'n of St Louis, 207 S W 2d 294—Rhinelander v St Louis-San Francisco Ry Co, supra, n 23—Young v New York, C & St L Ry Co, 291 S W 2d 64

55. Ga—Atlantic Coast Line R Co v Daugherty, 157 S E 2d 880, 116 Ga App 438

56. **Instructions held sufficient, not erroneous, or improperly refused**

Ill—Punkstaff v Pennsylvania R Co, 170 N E 2d 139, 20 Ill 2d 193, cert den 81 S Ct 1029, 365 US 878, 6 L Ed 2d 191

page 261

66. Minn—Netzer v Northern Pac Ry Co, 57 NW 2d 247, 238 Minn 416, cert den 74 S Ct 26, 346 US 831, 98 L Ed 355

Instructions held sufficient, not erroneous, or improperly refused

Cal—Powell v Vracin, 310 P 2d 27, 150 CA 2d 454

Pa—Labick v Vicker, 186 A 2d 874, 200 Pa Super 111

Instructions held insufficient, erroneous, or properly refused

US—Thomas v Union Ry Co, CA Tenn, 216 F 2d 18—Chicago, R I & P Ry Co v Kifer, CA Okl, 216 F 2d 753, cert den 75 S Ct 299, 348 US 917, 99 L Ed 719

70. In action under the Federal Employers' Liability Act, etc.—Williamson v Wabash R Co, 196 S W 2d 129, 355 Mo 248, cert den 67 S Ct 860, 330 US 824, 91 L Ed 1274

Instruction held insufficient, erroneous, or properly refused

Ala—Atlantic Coast Line R Co v McMoy, 73 So 2d 85, 261 Ala 66

71 **Instructions held insufficient, erroneous, or properly refused**

Mo—Wehrli v Wabash R Co, 315 S W 2d 765, cert den 79 S Ct 321, 358 US 932, 3 L Ed 2d 304

Instructions held sufficient, not erroneous, or improperly refused

Ala—Johnson v Brinker, 266 So 2d 851, 289 Ala 240

§ 550. Verdict and Findings

Library References

Employers' Liability ⇨277.

page 262

79. US—Hausrath v New York Cent R Co, CA Ohio, 401 F 2d 634

80 Tex—Nevarez v Missouri Pac R Co, Civ App, 333 S W 2d 394

79. Particular findings construed

US—Hessmeyer v Pennsylvania R Co, CA Pa, 243 F 2d 773, cert den 78 S Ct 47—Colucci v New York Cent R Co, CA Ohio, 279 F 2d 891, cert den 81 S Ct 807, 365 US 846, 5 L Ed 2d 811—Kimbler v Pittsburgh & L E R Co, CA Pa, 331 F 2d 383

Tex—Port Terminal R Ass'n v Ross, 289 S W 2d 220, 155 Tex 447—Prewitt v Waller, Civ App, 423 S W 2d 641

Particular verdicts construed

US—Fox v New York Cent R Co, C A N Y, 267 F 2d 532

page 263

90. Okl—Oklahoma Natural Gas Co v Walker, 269 P 2d 327

98. US—Gallick v Baltimore & O R Co, Ohio, 83 S Ct 659, 372 US 108, 9 L Ed 2d 618

4. Tex—Great Atlantic & Pac Tea Co v Coleman, Civ App, 259 S W 2d 319

Findings held sufficient

Tex—Fort Worth & D Ry Co v Coffman, Civ App, 397 S W 2d 544, err dam—Grand Leader Dry Goods Co v Caveness, Civ App, 424 S W 2d 270

5. US—Nivens v St Louis Southwestern Ry Co, CA Tex, 425 F 2d 114, cert den 91 S Ct 121, 400 US 879, 27 L Ed 2d 116

Minn—Nicholas v Hennepin Wheel Goods Co, 58 NW 2d 572, 239 Minn 269

Pa—Jerdon v Sruinuk, 47 Del 85—Weish v Kleiderer, 269 A 2d 746, 440 Pa 47

Tex—Texas & N O R Co v Pool, Civ App, 263 S W 2d 582

9 Tex—Panhandle & S F Ry Co v Arnold, Civ App, 283 S W 2d 303, err ref no rev err Rev'd on oth grds 77 S Ct 840, 353 US 360, 1 L Ed 2d 889, reh den 77 S Ct 1375, 354 US 927, 1 L Ed 2d 1441, conf to 305 S W 2d 207

10. US—Zimmerman v Montour R Co, CA Pa, 296 F 2d 97, cert den 82 S Ct 845, 369 US 828, 7 L Ed 2d 793

Mo—Tinsley v Massman Const Co, 270 S W 2d 835—Searcy v Neal, App, 509 S W 2d 755, app after remand 549 S W 2d 602

page 264

12 US—Clark v Seaboard Coast Line R Co, D C Ga, 332 F Supp 380

13 US—Gallick v Baltimore & O R Co, Ohio, 83 S Ct 659, 372 US 108, 9 L Ed 2d 618

16. Kan—Giltner v Stephens, 200 P 2d 290, 166 Kan 172

W Va—Dahmer v State Fair of W Va, 91 S E 2d 453, 141 W Va 517

Findings not irreconcilable with general verdict

US—Bolan v Lehigh Valley R Co, CCA N Y, 167 F 2d 934—Arnold v Panhandle & S F Ry Co, Tex, 77 S Ct 840, 353 US 360, 1 L Ed 2d 889, reh den 77 S Ct 1375, 354 US 927, 1 L Ed 2d 1441, conf to, Civ App, 305 S W 2d 207

Ill—Biggerstaff v New York, C & St L R Co, 141 N E 2d 72, 13 Ill App 2d 85

Mich—Nantco v Matuszak, 34 NW 2d 506, 322 Mich 644

Tex—Benson v Missouri, K & T R Co, Civ App, 200 S W 2d 233, err ref no rev err Cert den 68 S Ct 206, 332 US 830, 92 L Ed 403—Jordan v Collier, Civ App, 223 S W 2d 544, err ref no rev err—Railway Exp Agency v Spain, Civ App, 249 S W 2d 644, app dam, 255 S W 2d 509, 152 Tex 198

18. Tex—Benson v Missouri, K & T R Co, supra, n 16

Page 284

Rule inapplicable under Federal Employer's Liability Act

US—Wattney v Southern Pac Co, C A La, 411 F 2d 854

Ohio—Davis v Pennsylvania R Co, App, 171 NE 2d 752

19 US—Ratigan v New York Cent R Co, C A NY, 291 F 2d 548, cert den 82 SCt 144, 368 US 891 7 L Ed 2d 89

Tex—Armstrong v Missouri-K-T-R Co of Tex, Civ App, 233 SW 2d 942, err ref no rev err, cert den 72 SCt 62, 342 US 837, 96 L Ed 633—Worth Steel Corp v Gartman, Civ App, 361 SW 2d 426, err ref no rev err—Missouri-Kansas-Texas R Co v Shelton, Civ App, 383 SW 2d 842, err ref no rev err, cert den 86 SCt 54, 382 US 845, 15 L Ed 2d 85

Findings not inconsistent

US—Beisel v Monessen Southwestern Ry Co, C A Pa, 218 F 2d 273—Colucci v New York Cent R Co, C A Ohio, 279 F 2d 891, cert den 81 SCt 807, 365 US 846, 5 L Ed 2d 811

Cal—Coffee v McDonnell-Douglas Corp, 105 Cal Rptr 358, 503 P 2d 1366, 8 C 3d 551

Kan—Giltner v Stephens, supra, n 16

Ohio—Davis v Pennsylvania R Co, App, 171 NE 2d 752

Tex—Railway Exp Agency v Bollier, Civ App, 253 SW 2d 669, err ref no rev err—Port Terminal R Ass'n v Ross, 289 SW 2d 220, 155 Tex 447—Nichols v Red Arrow Freight Lines, Civ App, 300 SW 2d 740, err ref no rev err—Gillock v Texas & P Ry Co, Civ App, 302 SW 2d 717—W E Grace Mfg Co v Arp, Civ App, 311 SW 2d 278, err ref no rev err—Skelly Oil Co v Carter, Civ App, 316 SW 2d 87—Missouri Pac R Co v Ramirez, Civ App, 326 SW 2d 50, err ref no rev err—Atchison, T & SFR Co v Ham, Civ App, 454 SW 2d 451, err ref no rev err

Wis—Venden v Messel, 85 NW 2d 766, 2 Wis 2d 253

§ 551. New Trial

24. US—Caldwell v Southern Pac Co, D C Cal, 71 F Supp 955—Robak v Pennsylvania R Co, D C Pa, 81 F Supp 841, affd, C A, 178 F 2d 485
S C—Mulliken v Southern Bleachery & Print Works, 192 SE 665, 184 SC 449

Lack of unanimous verdict as ground for new trial

Mo—Counts v Thompson, 222 SW 2d 487, 359 Mo 485

Federal Employers' Liability Act

Cal—Jehl v Southern Pac Co, 59 Cal Rptr 276, 427 P 2d 988, 66 C 2d 821

25. US—Brown v Alquippa & S R Co, D C Pa, 73 F Supp 726

§ 552. Judgment

Library References

Employers' Liability ⇐277.

page 265

28. Summary judgment

US—Sheaf v Minneapolis, St P & SSMR Co, CCAND, 162 F 2d 110—Mason v New York Cent R Co, D C NY, 8 FRD 637

29. Cal—Harness v Pacific Curtanwall Co, 45 Cal Rptr 454, 235 C A 2d 485

30. Ill—Mitchell v Missouri Pac R Co, App, 244 NE 2d 406, 104 Ill App 2d 142

§ 554. Damages

Library References

Employers' Liability ⇐277

38. US—Minyard v Woodward Iron Co, D C Ala, 81 F Supp 414—Denver & R GWR Co v Conley, C A Colo, 293 F 2d 612—La France v New York, NH & H R Co, C A Conn, 292 F 2d 649

Colo—Bein Farms, Inc v Dale 326 P 2d 72, 137 Colo 424

Fla—Richards Co v Harrison, App, 262 So 2d 258

Ill—York v Grand Trunk Western R Co, 390 NE 2d 116, 28 Ill Dec 134 71 Ill App 3d 800

Mo—Maxwell v Kurn, App, 180 SW 2d 249, revd on oth grds 185 NW 2d 9

Tex—Texas & NOR Co v McGinnis Com App, 109 SW 2d 160, 130 Tex 338—Missouri Pac R Co v Handley, Civ App, 341 SW 2d 203—Missouri-Pacific R Co v Willingham, Civ App, 348 SW 2d 764

Fringe benefits

US—Hall v Minnesota Transfer Ry Co, D C Minn, 322 F Supp 92

41. US—Palum v Lehigh Val R Co, CCANY, 165 F 2d 3—Tracy v Terminal R Ass'n of St Louis, C A Mo, 170 F 2d 635

Ala—Atlanta, B & C R Co v Cary, 35 So 2d 559, 250 Ala 675

Cal—Rasmus v Southern Pac Co, 301 P 2d 23, 144 C A 2d 264

Colo—Denver & R GWR Co v Lloyd, 364 P 2d 873, 148 Colo 1

Ill—Howard v Gulf M & O R Co, 142 NE 2d 825, 13 Ill App 2d 482—Graham v Toledo, P & W R Co, 182 NE 2d 889, 35 Ill App 2d 234—Juance v Pennsylvania R Co, 191 NE 2d 72, 41 Ill App 2d 352—Fogel v Terminal R Ass'n of St Louis 332 NE 2d 416, 30 Ill App 3d 55

Iowa—Sample v Schwenck, 54 NW 2d 527, 243 Iowa 1189

Mo—Hampton v Wabash R Co, 204 SW 2d 708, 356 Mo 999, cert den 68 SCt 460, 333 US 833, 92 L Ed 1117

Okla—Atchison T & S F Ry Co v Hicks, 258 P 2d 672, 208 Okl 689

Or—Lazzari v States Marine Corp of Del, 349 P 2d 857, 220 Or 379

Pa—Schnars v Union R Co, 189 A 2d 884, 410 Pa 538

Rule inapplicable in absence of pleading and proof of contributory negligence

US—La France v New York, NH & H R Co, 191 F Supp 164, affirmed, C A, 292 F 2d 649

Other matters relating to damages in actions under the Federal Employer's Liability Act have been adjudicated

42.5. Jury's determination not restricted to specific evidence

Utah—Sprunt v Denver & R GWR Co, 340 P 2d 85, 9 Utah 2d 142, cert den 80 SCt 207, 361 US 900, 4 L Ed 2d 156

Reduction for collateral compensation not allowed

Fla—Tate v Jacksonville Terminal Co, App, 127 So 2d 702

Present value of damages

US—Pennsylvania R Co v McKinley, 288 F 2d 262

page 266

46. Pa—Sumaki v Sanquost Silk Co 66 Lack Jur 118

Gross or wanton negligence held not shown

US—Missouri-K-T-R Co of Tex v Ridgway, C A Mo, 191 F 2d 363, 29 A L R 2d 984—Heims v Universal Atlas Cement Co, 202 F 2d 421, cert den 74 SCt 74, 346 US 858, 98 L 372—Whitehead v Salyer, C A Okl, 346 F 2d 207

Tex—Valencia v Western Compress & Storage Co, Civ App, 238 SW 2d 591, err ref no rev err—J S Abercrombie Co v Scott, Civ App, 267 SW 2d 206, err ref no rev err—Lloyd Elec Co v DeHoyos, Civ App, 409 SW 2d 893, err ref—Lefebvre v Gulf States Utilities Co, Civ App, 410 SW 2d 44, err ref no rev err

Affirmative proof required

Tex—Lefebvre v Gulf States Utilities Co, Civ App, 410 SW 2d 44, err ref no rev err

47. Tex—Valencia v Western Compress & Storage Co, supra, n 46

Waiver of compensatory damages as bar

Cal—Sasser v Miles & Sons Trucking Service, 259 P 2d 488, 119 C A 2d 239

48. Necessity of showing, status, gross negligence and proximate cause

Tex—Lefebvre v Gulf States Utilities Co, Civ App, 410 SW 2d 44, err ref no rev err

Damages recoverable under the Federal Employers' Liability Act are limited to compensatory damages, and punitive damages are not recoverable

49.5 US—Kozar v Chesapeake & O Ry Co, C A Mich, 449 F 2d 1238

NY—Padilla v Consolidated Rail Corp, 463 NY S 2d 1000, 119 Misc 2d 569

50. Cal—Sullivan v Matt, 278 P 2d 499, 130 C A 2d 134

§ 555. In General

51. US—American Home Assur Co v Sand, D C Ariz, 253 F Supp 942—Parras v St Johnsbury Trucking Co, C A Vt, 395 F 2d 543—Stephenson v College Mercordia, D C Pa, 376 F Supp 1324

Ariz—CJS cited in Hansen v Oakley, 263 P 2d 807, 811, 76 Ariz. 307—Bible v First Nat Bank of Rawlins, 515 P 2d 351, 21 Ariz App 54

Cal—Knell v Morris, 247 P 2d 352, 39 C 2d 450—Kuchta v Allied Builders Corp, 98 Cal Rptr 588, 21 C A 3d 541

Ga—Digby v Carroll Baking Co, 47 SE 2d 203, 76 Ga App 656—Du Pree v Babcock, 112 SE 2d 415, 100 Ga App 767—Butler v Moore, 188 SE 2d 142, 125 Ga App 435

Ill—Smuraki v Hudson, 87 NE 2d 137, 338 Ill App 137—Hulke v International Mfg Co, 142 NE 2d 717, 14 Ill App 2d 5—Gomien v Wear-Ever Aluminum, Inc, 276 NE 2d 336, 30 Ill 2d 19—Burnett v Caho, 285 NE 2d 619, 7 Ill App 3d 266

Iowa—Miller v Woolley, 35 NW 2d 584, 240 Iowa 450—CJS cited in Graham v Worthington, 146 SW 2d 626, 640, 259 Iowa 845

La—CJS cited in Trahan v State, App, 158 So 2d 417, 418—Little v Caterpillar Tractor Co, App, 169 So 2d 634

Mid—Globe Indem Co v Victall Corp, 119 A 2d 423, 208 Md 573

Minn—Lunderberg v Bierman, 63 NW 2d 355, 241 Minn 349, 43 A L R 2d 865

Mo—Blackburn v Katz Drug Co, App, 520 SW 2d 668

Nev—National Convenience Stores, Inc v Fantauzzi, 584 P 2d 689, 94 Nev 655

NJ—Wmans Carter Corp v Jay & Benuch, 247 A 2d 361, 103 NJ Super 389, affd, 258 A 2d 131, 107 NJ Super 268

NY—People v Joseph, 172 NY S 2d 463, 11 Misc 2d 219

NC—Hinson v Virginia-Carolina Chemical Corp, 53 SE 2d 448, 230 NC 476

Or—Stanfield v Laccorace, 588 P 2d 1271, 284 Or 651

Pa—Coles v Sutphen, 75 A 2d 623, 167 Pa Super 457—Clewett v Pummer, 121 A 2d 459, 384 Pa 515

Tenn—Acuff v Commissioner of Tennessee Dept of Labor, 354 SW 2d 627

Tex—Medical Slenderizing, Inc v State, Civ App, 579 SW 2d 569, err ref no rev err

Va—CJS cited in United Broth of Carpenters and Joiners of America, AFL-CIO v Humphreys, 127 SE 2d 98, 102, 203 Va 781, cert den 83 SCt 509, 371 US 954, 9 L Ed 2d 501

Wash—McLean v St Regis Paper Co, 496 P 2d 571, 6 Wash App 727

Wis—Widell v Holy Trinity Catholic Church, 121 N W 2d 249, 19 Wis 2d 648—Mannac v Marquette University, 184 N W 2d 168, 50 Wis 2d 287

Wyo—Combined Ins Co of America v Sinclair, 584 P 2d 1034

Statutory liability

(2) Other matters

Mich—Smith v City of Flint School Dist, 264 N W 2d 368, 80 Mich App 630

Wash—Titus v Tacoma Smeitemen's Union Local No 25, 383 P 2d 504, 62 Wash 2d 461

Wis—Wittka v Hartnell, 175 N W 2d 248, 46 Wis 2d 374

Independent negligence on part of master may impose liability of him apart from his derivative liability for servant's wrongful act

US—Siebrand v Gosnell, C A Ariz, 234 F 2d 81, stating Arizona law

Alaska—Fruit v Schreiner, 502 P 2d 133

Statute as not altering common-law rule

NC—Johnson v Lamb, 161 S E 2d 131, 273 N C 701

Extent of liability

Tenn—Frazier v Byrd, 535 S W 2d 152

Right to reimbursement

Del—Clark v Brooks, Super, 377 A 2d 365, affd, Sup, 391 A 2d 747

Vicarious liability

US—Arceneaux v Texaco, Inc, C A La, 623 F 2d 924, cert den 101 S Ct 1385, 450 U S 928, 67 L Ed 2d 359

Cal—Alma W v Oakland Unified School Dist, 176 Cal Rptr 287, 123 C A 3d 133

NH—Commercial Union Assur Companies v Town of Derry, 387 A 2d 1171, 118 N H 469

Factual considerations

NY—Austin v State, 422 N Y S 2d 512, 73 A D 2d 720

52. Cal—Vezina v Continental Cas Co, 136 Cal Rptr 198, 66 C A 3d 665

Ill—Tobin v Consolidated Freight Co, 79 N E 2d 636, 334 Ill App 394

Ind—Tundall v Enderle, 320 N E 2d 764, 162 Ind App 524

La—Abshire v Hartford Acc & Indem Ins Co, App, 289 So 2d 545, writ den, Sup, 293 So 2d 170

53. La—Thomas v W & W Clarkliff, Inc, 375 So 2d 375

Md—East Coast Freight Lines v Mayor and City Council of Baltimore, 58 A 2d 290, 190 Md 256, 2 A L R 2d 386

What law governs

US—Matonti v Research-Cottrell, Inc, D C Pa, 202 F Supp 527

page 267

55. US—Travelers Ins. Co v Brown, C A La, 338 F 2d 229

Mich—Thomas v Checker Cab Co, Inc, 238 N W 2d 558, 66 Mich App 152

NY—Johnson v Daily News, Inc, 312 N E 2d 148, 34 N Y 2d 33, 356 N Y S 2d 1

56. US—Chuy v Philadelphia Eagles Football Club, D C Pa, 431 F Supp 254, affd C A, 595 F 2d 1265

La—Lyle v National Sur Corp, App, 304 So 2d 743, writ den, Sup, 309 So 2d 341, cert den 96 S Ct 201, 423 U S 898, 46 L Ed 2d 131

57. US—O'Connor v Western Freight Ass'n, D C N Y, 202 F Supp 561

Cal—Campbell v Security Pac Nat Bank, 133 Cal Rptr 77, 62 C A 3d 379

La—Franklin v Houghton Timber Co, App, 377 So 2d 400, writ den, Sup, 380 So 2d 624

NC—Johnson v Lamb, 161 S E 2d 131, 273 N C 701

Tort required

Ga—Jordan v J C Penney Co, 152 S E 2d 786, 114 Ga App 822

Md—Leimbach v Bickford's Inc, 135 A 2d 633, 214 Md 434

Mo—Cacioppo v Kansas City Public Service Co, App, 234 S W 2d 799—Smith v Middlekauff, 359 S W 2d 755

Tenn—Sadler v Draper, 326 S W 2d 148, 46 Tenn App 1

59. US—Cooner v U S, C A S C, 276 F 2d 220—Tucker v U S, D C S C, 385 F Supp 717

Ariz—CJS cited in Scott v Allstate Insurance Company, 553 P 2d 1221, 1224, 27 Ariz App 236

La—Cam v Doe, App, 378 So 2d 549

Mass—Peters v St Aubin, 242 N E 2d 427, 355 Mass 41

Mich—Hamburger v Henry Ford Hospital, 284 N W 2d 155, 91 Mich App 580

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Facts not sufficient to cast employer in liability NY—Ehlenfeld v State, 404 N Y S 2d 175, 62 A D 2d 1151

Doctrine of strict liability not applicable

La—Schaeffer v Duvall, App, 421 So 2d 262, writ gr, Sup, 427 So 2d 1209

Deviation in scope not material in negligent entrustment

Tex—LaRoque v Sanchez, App 8 Dist, 641 S W 2d 298, err ref no rev err

64. Ga—Du Free v Babcock, 112 S E 2d 415, 100 Ga App 767

page 268

66 Contractor's employee

(2) Other cases

NY—MoManus v Board of Ed of City of Rochester, 106 N Y S 2d 51

§ 556. Liability of Master Based on His Contribution or Participation

71. Ariz—Torres v Kennecott Copper Corp, 488 P 2d 477, 15 Ariz App 272

72. Training in use of instrumentality

NY—Titcomb v State, 222 N Y S 2d 596, 30 Misc 2d 902

73. Fla—Marlowe v Food Fair Stores of Florida, Inc, App, 284 So 2d 490

Ill—Sunseri v Puccia, 422 N E 2d 925, 52 Ill Dec 716, 97 Ill App 3d 488

§ 557. — Acts Done by Express Command or Assent

page 269

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§ 558. — Ratification by Master

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page 270

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Page 270

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page 271

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Necessity of knowledge

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§ 560. — Failure to Instruct Servant or to Enforce Obedience to Instructions

page 272

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§ 561. Liability of Master Based on Doctrine of Respondeat Superior

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Social legislation not necessarily authority

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Basic policy of rule

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Not fatal objection that rule lacks sharp contours

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page 273

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Knowledge of master not required

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Under a statute so providing, an employer may be required to defend or indemnify employee who is sued by third person for conduct in the course and scope of his employment¹⁴⁵

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§ 562. —Necessity for Relation of Master and Servant

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That one may not be "employee" for workmen's compensation issues as immaterial

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page 275

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Circumstances showing absence of relation

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§ 563. —When Relation Exists in General

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Page 275

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page 276

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Physicians

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page 277

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page 278

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page 279

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page 280

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§ 564. — Assistants Employed by Servant

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page 281

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page 282

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page 283

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§ 565 — Special Police Officers

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Master and Servant ⇐301(8)

page 284

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§ 566. — Servants Hired or Lent to or under Control of Third Person

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page 285

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Page 285

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Foster Elec Co, 260 N E 2d 174, 357 Mass 684—
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289

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Misc 2d 1076, affd 252 N Y S 2d 253, 21 A D 2d
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N E 2d 506, 26 N Y 2d 13, 308 N Y S 2d 337

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606, 272 Wis 54—Skornia v Highway Pavers, Inc,
159 N W 2d 76, 39 Wis 2d 293

Special servant as to some acts

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Tex—Dealers Nat Ins Co v Jackson, Civ App, 363
S W 2d 297, err ref no rev err—Humphreys v
Texas Power & Light Co, Civ App, 427 S W 2d
324, err ref no rev err

Employees of two masters, not joint masters

U S—Dickerson v American Sugar Refining Co, C A
Pa, 211 F 2d 200

Cal—Strat v Hale Const Co, 103 Cal Rptr 487, 26
C A 3d 941

Kan—Voss v Bredwell, 364 P 2d 955, 188 Kan 643

Mass—Harkins v Paschall, 348 So 2d 1019

Wis—Edwards v Cutler-Hammer, Inc, 74 N W 2d
606, 272 Wis 54

Where both employers severally liable

U S—Lockett v Bethlehem Steel Corp, C A Okl, 618
F 2d 1373

Wis—Edwards v Cutler-Hammer, Inc, 74 N W 2d
606, 272 Wis 54

Rule not applicable where injury caused by
concurrent negligence of two employees

U S—Phoenix Indem Co v Givens, C A La, 263 F 2d
858

Rule based on doctrine of respondent superior

La—Danks v Maher, App, 177 So 2d 412—Owens v
A A A Contracting Co, App, 219 So 2d 226

Special employee as referring to least employee

Kan—Bendure v Great Lakes Pipe Line Co, 433 P 2d
558, 199 Kan 696

page 286

1 U S—Matonts v Research-Cottrell, Inc, D C Pa,
202 F Supp 527—Tidewater Oil Co v Travelers
Ins Co, C A La, 468 F 2d 985—In re Dearborn
Marine Service, Inc, C A Tex, 499 F 2d 263, reh
den 512 F 2d 1061, cert dsm 96 S Ct 163, 423
U S 886, 46 L Ed 2d 118

Mo—Coble v Economy Forms Corp, App, 304
S W 2d 47

Pa—Workmen's Compensation Appeal Bd v Dupes,
353 A 2d 908, 24 Pa Cmwlth 47

Tex—Sanchez v Leggett, Civ App, 463 S W 2d 517,
err ref no rev err, Sup, 468 S W 2d 63, app after
remand, Civ App, 489 S W 2d 383

Indemnity clauses in agreement immaterial

La—Truitt v B & G Crane Service, Inc, App, 165
So 2d 874

2 U S—Standard Oil Co v Ogden & Moffett Co,
C A Mich, 242 F 2d 287

Ky—American Fidelity & Cas Co v Johnson, 336
S W 2d 351

Minn—Ahlsstrom v Minneapolis, St P & S S M R
Co, 68 N W 2d 873, 244 Minn 1—Thall v Modern
Erecting Co, 136 N W 2d 677, 272 Minn 217

3 U S—“Finagran” Compagnie Commerciale Agri-
cole et Financiere, S A v Miller Compressing Co,
D C Wis, 349 F Supp 288—Porche v Gulf Miss-
issippi Marine Corp, D C La, 390 F Supp 624

Ala—Hiller v Goodwin, 65 So 2d 152, 258 Ala 700—
Martin v Anniston Foundry Co, 68 So 2d 323, 259
Ala 633—U S Steel Corp v Mathews, 73 So 2d
239, 261 Ala 120—Alabama Power Co v Smith,
142 So 2d 228, 273 Ala 509

Ariz—Larsen v Arizona Brewing Co, 325 P 2d 829,
84 Ariz 191

Cal—Gavel v Jamison, 254 P 2d 47, 116 C A 2d 635—
Welborn v Dalzell Riggings Co, 5 Cal Rptr 195,
181 C A 2d 268

Colo—Kiefer Concrete, Inc v Hoffman, 562 P 2d 745,
193 Colo 15

D C—Haw v Liberty Mut Ins Co, and to Use of
Giacomo, C A D C, 180 F 2d 18, 86 U S App D C
86

Fla—Tri-City Elec Co v Barrs, App, 201 So 2d 265

Ga—Fleming v E I Du Pont De Nemours & Co, 81
S E 2d 529, 89 Ga App 837—Fulghum Industries,
Inc v Pollard Lumber Co, 126 S E 2d 432, 106
Ga App 49

Idaho—Brown v Arrington Const Co, 262 P 2d 789,
74 Idaho 338

Ill—Gundich v Emerson-Comstock Co, 171 N E 2d
60, 21 Ill 2d 117—Yankey v Oscar Bohlin & Son,
Inc, 186 N E 2d 57, 37 Ill App 2d 457

Iowa—Burr v Apex Concrete Co, 242 N W 2d 272

Ky—Turner Const Co v Garrett, 310 S W 2d 786

La—Commercial Union Ins Co v Brimgol, App, 262
So 2d 532—C.J.S. cited in Guilbeau v Liberty
Mut Ins Co, 338 So 2d 600, 604, on remand 345
So 2d 79, writ den, Sup, 346 So 2d 716

Mass—Harrington v H F Davis Tractor Co, 175
N E 2d 241, 342 Mass 675

Mich—White v Bye, 70 N W 2d 780, 342 Mich 654—
Goodchild v Erickson, 134 N W 2d 191, 375 Mich
289

Minn—Ahlsstrom v Minneapolis, St P & S S M R
Co, 68 N W 2d 873, 244 Minn 1

Miss—Mississippi Export R Co v Temple, 257 So 2d
187

Mo—Wills v Belger, 212 S W 2d 736, 357 Mo 1177—
C.J.S. cited in Patton v Patton, 308 S W 2d 739,
747—Coble v Economy Forms Corp, App, 304
S W 2d 47—C.J.S. cited in Jeffrey v Colley, App,
322 S W 2d 951, 953

Neb—Kessler v Bates & Rogers Const Co, 50
N W 2d 553, 155 Neb 40—Vontress v Ready
Mixed Concrete Co, 104 N W 2d 331, 170 Neb
789—Barton v Hobbs, 151 N W 2d 331, 181 Neb
763

N H—Continental Ins Co v New Hampshire Ins Co,
422 A 2d 1309, 120 N H 713

N J—Larocca v American Chain & Cable Co, 97 A 2d
680, 13 N J 1—Falk v Unger, 111 A 2d 283, 33
N J Super 589

NY—S Naritove & Co v Davis, 77 N Y S 2d 330, 273
App Div 368—Levy v Brandon, Tamargo & Co,
124 N Y S 2d 406, affd 150 N Y S 2d 773, 1
A D 2d 879, rearg and app den 152 N Y S 2d
410, 1 A D 2d 993

N C—C.J.S. cited in Jones v Douglas Aircraft Compa-
ny, 117 S E 2d 496, 502, 253 N C 482—Custom
Craft Furniture, Inc v Goodman, 139 S E 2d 244,
263 N C 220—Lewis v Barnhill, 148 S E 2d 536,
267 N C 457

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- RI—Agostini v W J Halloran Co, 111 A 2d 537, 82 R I 466
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- Vt—Minogue v Rutland Hospital, Inc., 125 A 2d 796, 119 Vt 336
- Va—Coker v Gunter, 63 SE 2d 15, 191 Va 747
- Wa—Edwards v Cutler-Hammer, Inc., 74 NW 2d 606, 272 Wa 54—Skornia v Highway Pavers, Inc., 159 NW 2d 76, 39 Wa 2d 293—Huckstorf v Vince L. Schneider Enterprises, 163 NW 2d 190, 41 Wa 2d 45
- Work of handling materials**
- (2) Other cases
- Ky—Stott v Louisville & N R Co, 270 Ky 787, 110 S W 2d 1086
- Special employer exercising control in negligent manner**
- NJ—J L Querner Truck Lines, Inc v Safeway Truck Lines, Inc, 168 A 2d 216, 65 N J Super 554, affd 174 A 2d 201, 35 N J 564
- Particular indications of continued control by general employer**
- Or—Hall v Corning, 427 P 2d 105, 247 Or 33
- Not conclusive factor**
- Ill—Foster v Englewood Hospital Ass'n, 313 NE 2d 255, 19 Ill App 3d 1055
- "Special employer"**
- Cal—Thomas v Edgington Oil Co, 140 Cal Rptr 635, 73 CA 3d 61
4. NC—C.J.S. cited in Weaver v Bennett, 129 SE 2d 610, 617, 259 NC 16
- page 287
5. **Furthering interest of general employer rather than control by special**
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6. US—Vance Trucking Co v Canal Ins Co, D C S C, 249 F Supp 33, affd, CA, 395 F 2d 391, cert den 89 S Ct 129, 393 U S 841, 21 L Ed 2d 116
- Ala—Southern Cement Co v Patterson, 122 So 2d 386, 271 Ala 128—Alabama Power Co v Smith, 142 So 2d 228, 273 Ala. 509—State Farm Mut Auto Ins Co v Vails, 177 So 2d 821, 278 Ala 266
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- Mo—C.J.S. cited in Patton v Patton, 308 S W 2d 739, 744
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- Utah—Bambrough v Bethers, 552 P 2d 1286
- Wash—Fiehler v Pacific Mechanical Constructors, 462 P 2d 960, 1 Wash App 447
7. US—Du Vaul v Miller, D C Mo, 114 F Supp 317—Aluminum Co of America v Ward, CA Tenn, 231 F 2d 376—Standard Oil Co v Ogden & Moffett Co, CA Mich, 242 F 2d 287—Ware v Cia De Navegacion Andes, S A, D C Va, 180 F Supp 939
- Cal—Doty v Lacey, 249 P 2d 550, 114 CA 2d 73—Welborn v Dalzell Rigging Co, 3 Cal Rptr 195, 181 CA 2d 268—Preston v Hurtt, 16 Cal Rptr 860, 196 CA 2d 781
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- Del—Birmingham v American Dredging Co, 262 A 2d 255
- Ga—City of Brunswick v Taylor, 75 SE 2d 203, 87 Ga App 751—Hotel Storage, Inc v Fesler, 172 SE 2d 174, 120 Ga App 672, 41 A L R 3d 1049—Cooper v Plett, 174 SE 2d 446, 121 Ga App 488, affd in part, revd in part on oth grds, 177 SE 2d 82, 226 Ga 647, vac on oth grds 178 SE 2d 695, 122 Ga App 671
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- Miss—Mississippi Export R Co v Temple, 257 So 2d 187
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- Control as to details and manner of work**
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- Tex—Producers Chemical Co v McKay, Civ App, 348 S W 2d 91, err gr
- Full control**
- US—US v N A Degerstrom, Inc, CA Wash, 408 F 2d 1130
8. US—Peoples Supply, Inc v Vogel-Ritt of Penn-Mar-Va, Inc, D C W Va, 173 F Supp 199, revd on oth grds, CA, 273 F 2d 933—McCollum v Smith, CA Hawaii, 339 F 2d 348
- Ala—Alabama Power Co v Smith, 142 So 2d 228, 273 Ala 509
- Cal—C.J.S. cited in Woodall v Wayne Staffner Productions, Inc., 20 Cal Rptr 572, 579, 201 CA 2d 800
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- Wa—Skornia v Highway Pavers, Inc., 159 NW 2d 76, 39 Wa 2d 293
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- page 288
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- NC—C.J.S. quoted in Hodge v McGuire, 69 SE 2d 227, 230, 235 N C 132
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15. US—Apex Smelting Co v Burns, CA Ill, 175 F 2d 978, cert den 70 S Ct 350, 338 U S 911, 94

Page 288

- L Ed 561—St Johnsbury & Lamouille County R.R. v Canadian Pac Ry Co, D.C.Vt., 341 F Supp 1368, aff'd, C.A., 469 F.2d 1395—In re Dearborn Marine Service, Inc., C.A.Tex., 499 F.2d 263, reh den 512 F.2d 1061, cert diam 96 S.Ct. 163, 423 U.S. 886, 46 L.Ed.2d 118—Maruska v National Railroad Passenger Corp., D.C.Pa., 530 F Supp 26
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- Mo—Coble v Economy Forms Corp., App., 304 S.W.2d 47—Gerfers v Missouri-Illinois Tractor & Equipment Co., App., 372 S.W.2d 503
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- Neb—Barton v Hobbs, 151 N.W.2d 331, 181 Neb 763
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- Okla—Smith v Hall, 418 P.2d 665
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- Wis—Storma v Highway Pavers, Inc., 159 N.W.2d 76, 39 Wis.2d 293—Huckstorf v Vince L. Schneider Enterprises, 163 N.W.2d 190, 41 Wis.2d 455
16. U.S.—U.S. v Nielson, N.Y., 75 S.Ct. 654, 349 U.S. 129, 99 L.Ed. 939—White v Kaufmann, D.C.Va., 131 F.Supp 213—Maryland Gas Co. v Pacific Emp. Ins. Co., C.A.Colo., 227 F.2d 483—Kaff v Travelers Ins. Co., C.A.La., 402 F.2d 129—Columbia Helicopters, Inc. v Transport Indem. Co., C.A.Or., 428 F.2d 1385—U.S. for Use and Benefit of Western Steel Erectors, Inc. v Worcester Corp., D.C.N.D., 337 F.Supp 895
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- Ohio—Redmond v Republic Steel Corp., 131 NE.2d 593, 102 Ohio App 163
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- W.Va.—Burdette v Maust Coal & Coke Corp., 222 S.E.2d 293, 159 W.Va. 335
- Wyo.—Rocky Mountain Trucking Co. v Taylor, 335 P.2d 448, 79 Wyo 461
- page 289
17. Ala.—State Farm Mut. Auto. Ins. Co. v Vails, 177 So.2d 821, 278 Ala 266
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- Mont—Storrusten v Harrison, 549 P.2d 464, 169 Mont 525
- Neb—Kessler v Bates & Rogers Const. Co., supra, n 3
- N.J.—Viggiano v William C. Reppenhagen, Inc., 150 A.2d 40, 55 N.J. Super 114
- N.Y.—Szczepkiewicz v Khelshek Realty Corp., 113 N.Y.S.2d 870, 280 App Div 524, rearg den 115 N.Y.S.2d 818, 280 App Div 915
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18. U.S.—Arrow Transp. Co. v Cooper Stevedoring, D.C.Ala., 184 F.Supp 666—"Finagrain" Compagnie Commerciale Agricole et Financiere, S.A. v Miller Compressing Co., D.C.Wis., 349 F.Supp 288
- Neb—Rogers v Navajo Freight Lines, Inc., 184 N.W.2d 623, 186 Neb 502
- Pa—Klinger v Straw, 74 Dauph 304
19. Mass—Sawtelle v Mystic Val Gas Co., 306 NE.2d 271, 1 Mass App 672
- Va—Broadus v Standard Drug Co., 179 S.E.2d 497, 211 Va 645
21. Ala.—Alabama Power Co. v Smith, 142 So.2d 228, 273 Ala 509
- Tex.—Producers Chemical Co. v McKay, 366 S.W.2d 220
23. U.S.—Halliburton Oil Well Cementing Co. v Paulk, C.A.Tex., 180 F.2d 79, cert den 71 S.Ct. 38, 340 U.S. 812, 95 L.Ed. 596
- Ala.—Dumas v Dumas Bros. Mfg. Co., Inc., 330 So.2d 426, 295 Ala 370
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- La.—Berry Brothers General Contractors, Inc. v Air Marine, Inc., App., 328 So.2d 771
- Mont—Storrusten v Harrison, 549 P.2d 464, 169 Mont 525
26. Ala.—Alabama Power Co. v Smith, 142 So.2d 228, 273 Ala. 509
27. U.S.—Halliburton Oil Well Cementing Co. v Paulk, supra, n 23
- Ala.—Alabama Power Co. v Smith, 142 So.2d 228, 273 Ala. 509
- Iowa—Burr v Apex Concrete Co., 242 N.W.2d 272
- page 290
28. Cal.—Doty v Lacey, 249 P.2d 550, 114 C.A.2d 73
- Del.—Brittingham v American Dredging Co., 262 A.2d 255
- Iowa—Hasebroch v Weaver Const. Co., 67 N.W.2d 549, 246 Iowa 622
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- Retention of control to protect interest in machine
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- Hawaii—Nakagawa v Apana, 477 P.2d 611, 52 Haw 379
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- Teamwork by employee-operator
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- Crane
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Knowledge and causation essential to tort liability

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Ky—Tundall v Perry, 283 S.W.2d 700

page 291

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Exclusive right to discharge

Ga—Fulghum Industries, Inc. v Pollard Lumber Co, 126 S.E.2d 432, 106 Ga App 49—Merry Bros Brick & Tile Co v Jackson, 171 S.E.2d 924, 120 Ga App 716

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page 292

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§ 567. — Joint Employment

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Joint control and direction

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Pa—Lindenmuth v Steffy, 98 A.2d 242, 173 Pa Super 509

Masters not joint employers

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§ 568. — Termination of Relation

Library References

Master and Servant §801(5)

page 293

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§ 569. — Persons to Whom Master Liable

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Ill—Poulson v Poulson, 117 N.E.2d 310, 1 Ill App.2d 201

N.J.—Van Riper v Philip Carey Mfg Co, 69 A.2d 755, 6 N.J. Super 21

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Mich—Poulton v S S Kresge Co, 37 N.W.2d 638, 324 Mich 575

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N.J.—Price v Old Label Liquor Co, 92 A.2d 806, 23 N.J. Super 165

Reasons for rule

(1) U.S.—Jones v Kinney, D.C.Mo., 113 F.Supp. 923

page 294

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Ark—Davis v Kukar, 357 S.W.2d 275, 235 Ark 139—Hurley Pickett Lake Farms, Inc. v Sullivan, 434 S.W.2d 88, 245 Ark 709—Reserve Life Ins Co v Hall, 437 S.W.2d 226, 246 Ark 186

Cal—De Marjan v Ideal Heating Corp, 278 P.2d 114, 129 C.A.2d 758—Bonetti v Double Play Tavern, 274 P.2d 751, 126 C.A.2d Supp 848

Colo—Cooley v Eakridge, 241 P.2d 851, 125 Colo 102—Van Schaeck & Co v Perkma, 272 P.2d 269, 129 Colo 567—Lombardy v Stees, 290 P.2d 1110, 132 Colo 570—McDonald v Lakewood Country Club, 461 P.2d 437, 170 Colo 355

Conn—Thompson v Lypone, 62 A.2d 861, 135 Conn 236—Cardona v Valentini, 273 A.2d 697, 160 Conn 18

Del—Fields v Synthetic Ropes, Inc., 215 A.2d 427, 9 Storey 135, on remand 219 A.2d 374, 9 Storey 302

D.C.—Great A & P Tea Co v Aveline, Mun App, 116 A.2d 162—Lancaster v Canuel, App., 193 A.2d 555

Fla—Jacobi v Claude Nolan, Inc., App., 122 So.2d 783—Thurston v Morrison, App., 141 So.2d 291—Whetzel v Metropolitan Life Ins Co, App., 266 So.2d 89

Ga—Giles v Smith, 56 S.E.2d 860, 80 Ga App 540—Ruff v Gazaway, 60 S.E.2d 467, 82 Ga App 151—Parry v Davison-Paxon Co, 73 S.E.2d 59, 87 Ga App 51—Crane Auto Parts, Stewart Ave Branch v Patterson, 82 S.E.2d 666, 90 Ga App 257—Du Free v Babcock, 112 S.E.2d 415, 100 Ga App 767

Hawai—Nakagawa v Apapa, 477 P.2d 611, 52 Haw 379

Ill—Swanbeck v Hubbard, 84 N.E.2d 159, 336 Ill App 384—Olender v Gottlieb, supra, n 64—Lipscomb v Coppage, 197 N.E.2d 48, 44 Ill App.2d 430—Smith v 601 Liquors, Inc., 243 N.E.2d 367, 101 Ill App.2d 306—Ferrari v Brannock, 270 N.E.2d 281, 133 Ill App.2d 26

Ind—State v Gibbs, 336 N.E.2d 703, 166 Ind App 387

Page 294

Ky.—Nicolesy's Adm v Mattow, 242 S W 2d 608—Frederick v Collins, 378 S W 2d 617—Kiser v Neumann Co Contractors, Inc, 426 S W 2d 935
La.—Benoit v Hunt Tool Co, supra, n 3—Travelers Fire Ins Co v Savoy, App, 82 So 2d 68—Blanchard v Oguma, 215 So 2d 902, 253 La 34—Jefferson v Rose Oil Co of Dixie, App, 232 So 2d 895—Tertio v McAndrew, App, 246 So 2d 235
Md.—Globe Indem Co v Victrol Corp, 119 A 2d 423, 208 Md 573—Embrey v Holly, 442 A 2d 966, 293 Md 128
Mass.—Luz v Stop & Shop, Inc of Peabody, 202 N E 2d 711, 348 Mass 198
Mich.—Stewart v Napuche, 53 N W 2d 676, 334 Mich 76—Anschutz v Michigan Liquor Control Commission, 73 N W 2d 533, 343 Mich 630—Shunaberger v Phillips, 121 N W 2d 693, 370 Mich 135
Minn.—Lyon v Dr Scholl's Foot Comfort Shops, Inc, 87 N W 2d 651, 251 Minn 285
Miss.—Long v Woollard, 163 So 2d 698, 249 Miss 722
Mo.—Linam v Murphy, 232 S W 2d 937, 360 Mo 1140—Truck Leasing Corp v Esquire Laundry & Dry Cleaning Co, App, 252 S W 2d 108—Lendy v Taliaferro, 260 S W 2d 504—Burks v Leap, 413 S W 2d 258
Neb.—Farr v Cambridge Co-op Oil Co, 81 N W 2d 597, 164 Neb 45—Pullen v Novak, 99 N W 2d 16, 169 Neb 211—Niemeyer v Forburger, 112 N W 2d 276, 172 Neb 876—Sperry v Greiner, 122 N W 2d 463, 175 Neb 524—Sandrock v Taylor, 174 N W 2d 186, 185 Neb 106—Rogers v Navajo Freight Lines, Inc, 184 N W 2d 623, 186 Neb 302
Nev.—Mohao v Aaher, 618 P 2d 878, 96 Nev 814
N.J.—Viggiano v William C Reppenhagen, Inc, 150 A 2d 40, 55 N J Super 114—McAndrew v Mularchuk, 162 A 2d 820, 33 N J 172, 88 A L R 2d 1313—J L Querner Truck Lines, Inc, v Safeway Truck Lines, Inc, 168 A 2d 216, 65 N J Super 554, aff'd 174 A 2d 201, 35 N J 564—Wright v Globe Foreman Co, 179 A 2d 11, 72 N J Super 414
N.M.—Nabors v Harwood Homes, Inc, 423 Pa 2d 602, 77 N M 406—McCauley v Ray, 453 P 2d 192, 80 N M 171
N.Y.—Bluestein v Scopanno, 100 N Y S 2d 577, 277 App Div 534—Urbiquart v McEvoy, 126 N Y S 2d 539, 204 Misc 426—Manguso v Thirti-Third Equities, Inc, 142 N Y S 2d 25, 286 App Div 70—Roberts v Gagnon, 149 N Y S 2d 743, 1 A D 2d 297—Getters v Crockels, 151 N Y S 2d 577—Zimmerman v City of New York, 276 N Y S 2d 711, 52 Misc 2d 797—Lundberg v State, 235 N E 2d 177, 25 N Y 2d 467, 306 N Y S 2d 947—Jacobson v State, 329 N Y S 2d 496, 69 Misc 2d 114
N.C.—Hinson v Virginia-Carolina Chemical Corp, 53 S E 2d 448, 230 N C 476—Travis v Duckworth, 75 S E 2d 309, 237 N C 471—Jackson v Mauney, 132 S E 2d 899, 260 N C 388—Wegner v Dolly-Land Debatensis, Inc, 153 S E 2d 804, 270 N C 62
Ohio.—Rhude v Ed G Koehl, Inc, 88 N E 2d 269, 85 Ohio App 223—Combs v Kobacker Stores, Inc, 114 N E 2d 447—American Ins Group v McCowin, 218 N E 2d 746, 7 Ohio App 2d 62
Okla.—C.J.S cited in Mid-Continent Pipeline Co v Crauthers, 267 P 2d 568, 571—Allison v Gilmore, Gardner & Kirk, Inc, 350 P 2d 287—Mistletoe Exp Service, Inc v Culp, 353 P 2d 9—Haco Drilling Co v Burchette, 364 P 2d 674
Or.—United Pac Ins Co v Truck Ins Exchange, 541 P 2d 448, 273 Or 283
Pa.—Luna v Boyd, 169 A 2d 103, 403 Pa 231—Aah v 627 Bar, Inc, 176 A 2d 137, 197 Pa Super 39—Smalish v Westfall, 269 A 2d 476, 440 Pa 409
R.I.—Smith v Raparot, 225 A 2d 666, 101 R I 565—Becker v Beaudom, 261 A 2d 896, 106 R I 562
Tenn.—Southern Bell Tel & Tel Co v Yates, 232 S W 2d 796, 34 Tenn App 98—McKinnon v Michaud, 260 S W 2d 721, 37 Tenn App 148
Tex.—Felder v Houston Transit Co, Civ App, 203 S W 2d 831, aff'd 208 S W 2d 880, 146 Tex 428—Texas & P Ry Co v Hagenlosh, Civ App, 241 S W 2d 669, aff'd 247 S W 2d 236, 151 Tex 191—Marange v Marshall, Civ App, 402 S W 2d 236, err ref no rev err

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Wash.—Marshall v Chapman's Estate, 195 P 2d 656, 31 Wash 2d 137
Wis.—Insurance Co of North America v Kriech Furners, Inc, 153 N W 2d 532, 36 Wis 2d 563, 28 A L R 3d 502
Wyo.—Gill v Schaap, 601 P 2d 545—Sage Club v Hunt, 638 P 2d 161
Regular course of employment
Or.—Eckleberry v Kaiser Foundation Northern Hospitals, 359 P 2d 1090, 226 Or 616, 84 A L R 2d 1327

page 296

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D.C.—Penn Cent Transp Co v Reddick, App, 398 A 2d 27
Fla.—McArthur Jersey Farm Dairy, Inc v Burke, App, 240 So 2d 198
Ga.—Taff v Life Ins Co of Ga, 50 S E 2d 154, 77 Ga App 836—Parry v Davison-Paxon Co, 73 S E 2d 59, 87 Ga App 51—Jones v Dixie Ohio Exp, Inc, 156 S E 2d 388, 116 Ga App 155
Ill.—Swanbeck v Hubbard, supra, n 75
Kan.—Beggerly v Walker, 397 P 2d 395, 194 Kan 61
Ky.—Hunt v Lyons, 233 S W 2d 398, 313 Ky 724
Mo.—C.J.S cited in Hopkins v J I Case Co, 293 S W 2d 402, 405—Sharp v W & W Trucking Co, 421 S W 2d 213—Brannaker v Transamerican Freight Lines, Inc, 428 S W 2d 524
Neb.—Farr v Cambridge Co-op Oil Co, 81 N W 2d 597, 164 Neb 45
Or.—Gossett v Simonson, 411 P 2d 277, 243 Or 16
Wis.—Frew v Dupons Const Co, 155 N W 2d 595, 37 Wis 2d 676
77. Hawaii.—Abraham v S E Onorato Garages, 446 P 2d 821, 50 Haw 628, 639
Wash.—Roletto v Department Stores Garage Co, 191 P 2d 875, 30 Wash 2d 439
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Colo.—Cooley v Eskridge, supra, n 75—Gibbons & Reed Co v Howard, 269 P 2d 701, 129 Colo 262—Hynes v Donaldson, 395 P 2d 221, 155 Colo 456
Fla.—Dreas v Associates Loan Co, 99 So 2d 279—City of Miami v Simpson, 172 So 2d 435
Ga.—Davidson v Harris, Inc, 34 S E 2d 290, 79 Ga App 788—Parry v Davison-Paxon Co, supra, n 75—Ford Motor Co v Williams, 134 S E 2d 32, 219 Ga 505, conf to 134 S E 2d 483, 108 Ga App 723—Lewis v Millwood, 145 S E 2d 602, 112 Ga App 459
Ill.—Klatt v Commonwealth Edison Co, 211 N E 2d 720, 33 Ill 2d 481—Winston v Sears, Roebuck & Co, 233 N E 2d 95, 88 Ill App 2d 358—McDonnell v City of Chicago, 430 N E 2d 169, 58 Ill Dec 227, 102 Ill App 3d 578
Ky.—Wall v Gill, 225 S W 2d 670, 311 Ky 796, 14 A L R 2d 857
La.—Thomas v Enquet & La Blanc, Inc, App, 119 So 2d 129—Beard v Seamon, App, 175 So 2d 671
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N.Y.—Seuter v New York Tribune, 113 N E 2d 790, 305 N Y 442—Seifert v Socony-Vacuum Oil Co, 150 N Y S 2d 229, 1 A D 2d 957—Hacker v City of New York, 275 N Y S 2d 146, 26 A D 2d 400, aff'd 229 N E 2d 613, 20 N Y 2d 722, 283 N Y S 2d 46, cert den 88 S Ct 1436, 390 U S 1036, 20

L Ed 2d 296—Wess v Furniture In The Raw, 306 N Y S 2d 253, 62 Misc 2d 283
N.C.—Hinson v Virginia-Carolina Chemical Corp, supra, n 75—Travis v Duckworth, supra, n 75—Chappell v Dean, 128 S E 2d 830, 258 N C 412
Ohio.—Rogers v Allis Chalmers Mfg Co, 88 N E 2d 234, 85 Ohio App 421, aff'd 92 N E 2d 677, 153 Ohio St 513, 18 A L R 2d 1363—Fisher v Hering, 97 N E 2d 553, 88 Ohio App 107—Combs v Kobacker Stores, Inc, supra, n 75—King v Magaw, 150 N E 2d 91, 104 Ohio App 469
Pa.—Metzger v Downtown Garage Corp, 82 A 2d 507, 169 Pa Super 384—Lunn v Boyd, 169 A 2d 103, 403 Pa 231—First Nat Bank of Altoona v Turchetta, 181 A 2d 285, 407 Pa 511
S.C.—Bolin v Bostic, 111 S E 2d 557, 235 S C 319
S.D.—Alberts v Mutual Service Cas Ins Co, 123 N W 2d 96, 80 S D 303
Tex.—Atchison, T & S F Ry Co v Port of Beaumont Nav Dist of Jefferson County, Civ App, 438 S W 2d 843, err ref no rev err
Va.—McNeill v Spindler, 62 S E 2d 13, 191 Va 685
Wis.—Scott v Min-Aqua Bats Water Ski Club, 255 N W 2d 536, 79 Wis 2d 316

page 298

79. U.S.—Avery v U.S., D.C.Conn., 434 F Supp 937
Colo.—C.J.S quoted at length in Cooley v Eskridge, 241 P 2d 851, 856, 125 Colo 102
Ohio.—Rogers v Allis Chalmers Mfg Co, supra, n 78
Tenn.—Kinnard v Rock City Const Co, 286 S W 2d 352, 39 Tenn App 547
Hiring a helper
Fla.—Higgins v Investors Acceptance Co of Miami, App, 287 So 2d 724
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Tenn.—C.J.S black letter summary quoted in Newark Insurance Company v Seyfert, 392 S W 2d 336, 347, 54 Tenn App 459
Construction
Ark.—Van Dalsen v Inman, 379 S W 2d 261, 238 Ark 237
La.—La Borde v McBride, App, 112 So 2d 319—Wills v Corrae, App, 148 So 2d 822, writ ref, Sup, 150 So 2d 768, 244 La 147—Bradley v Humble Oil & Refining Co, App, 163 So 2d 180, writ ref 165 So 2d 483, 246 La 587—Harris v Hymel Store Co, App, 200 So 2d 84, writ ref 202 So 2d 657, 251 La 47
Nev.—Toureas v Southwest Plumbing & Heating, 587 P 2d 1321, 94 Nev 748
81. Ohio.—Inland Mfg Division, General Motors Corp v Lawson, 232 N E 2d 657, 14 Ohio Misc 129, aff'd 240 N E 2d 100, 15 Ohio Misc 2d 192
82. N.Y.—Carroll v Station Managers, Inc, 429 N Y S 2d 825, 104 Misc 2d 1014
Convenient means of defining unauthorized servant's acts
Del.—Draper v Olivere Paving & Const Co, 181 A 2d 565, 4 Storey 433
83. Ohio.—Calhoun v Middletown Coca-Cola Bottling Co, 332 N E 2d 73, 43 Ohio App 2d 10, 72 O O 2d 158
85. Other terms distinguished
Minn.—Frankle v Twedt, 47 N W 2d 482, 234 Minn 42
86. U.S.—Cantrell v Forest City Pub Co, Ohio, 95 S Ct 465, 419 U S 245, 42 L Ed 2d 419
Ala.—Birmingham Elec Co v Hawkins, 67 So 2d 56, 37 Ala App 282
Va.—Tri-State Coach Corp v Walsh, supra, n 75
88. N.Y.—C.J.S quoted in Burns v City of New York, 141 N Y S 2d 279, 284, 11 Misc 2d 123, rev'd on oth grds 174 N Y S 2d 192, 6 A D 2d 30
91. Neb.—Klause v Nebraska State Bd of Agriculture, 35 N W 2d 104, 150 Neb 466
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Miss—Sander Oil Co v Dew, 71 So 2d 752, 220 Miss 609

SC—Bolin v Bostic, 111 SE 2d 557, 235 SC 319
W Va—Harper v Cook, 82 SE 2d 427, 139 W Va 917

page 299

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page 300

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Master's order

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page 301

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Page 301

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page 302

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page 303

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page 304

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Held incidental to employment

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page 305

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Use of force

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page 306

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Page 315

D C Fla., 187 F Supp 816, affd, C A, 293 F 2d 370—Spanik v Dewe Contracting Corp, D C Md., 226 F Supp 951—Williams v U S, C A Ga., 352 F 2d 477, app after remand 379 F 2d 719, app after remand 405 F 2d 234—C H Leavell & Co v Fireman's Fund Ins Co, C A Ariz., 372 F 2d 784—Raasch v Dulany, D C Wis., 273 F Supp 1015—Ira S Bushey & Sons, Inc v U S, D C N Y, 276 F Supp 518, affd, C A, 398 F 2d 167—Armstrong v Chambers and Kennedy, D C Tex., 340 F Supp 1220 Affid in part, revd in part, C A, 499 F 2d 263, reh den 512 F 2d 1061, cert dism 96 S Ct 163, 423 U S 886, 46 L Ed 2d 118

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Ground of liability

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page 317

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page 318

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page 319

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§ 572. —Willful or Malicious Acts

Library References

Master and Servant ⇐806.

page 320

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- page 321
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page 322

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- No liability for abusive language to one not invitee
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Page 322

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§ 573. — Criminal Acts

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D.C.—Local 1814, Intern Longshoremen's Ass'n, AFL-CIO v N.L.R.B., C.A., 735 F.2d 1384, 236 U.S.App.D.C. 353, cert den 105 S.Ct. 565, 83 L.Ed.2d 506

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page 323

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§ 574. — Acts of Servant in His Own Behalf

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Mass—Barrett v Wood Realty Inc, 135 N.E.2d 660, 334 Mass 370

page 325

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page 326

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page 327

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In terms of time and space

(2) Other matters

US—Tucker v US, DCCSC, 385 FSupp 717 Cal—Trejo v Maciel, 48 CalRptr 765, 239 CA2d 487

page 328

13. US—Christan v US, C A Ky, 184 F2d 523—Burger Chef Systems, Inc v Govro, C A Mo, 407 F2d 921—McGarrah v US, DCMiss, 294 FSupp 669—Mauk v Wright, DCPa, 367 FSupp 961

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Va—Bryant v Bare, supra, n 1

page 329

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DC—M J Ulino Co v Cashdan, C A, 171 F2d 132, 84 US AppDC 58

Ill—Sunseri v Paccia, 422 NE2d 925, 52 Ill Dec 716, 97 Ill App3d 488

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Wash—McNew v Puget Sound Pulp & Timber Co, 224 P2d 627, 37 Wash2d 495

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Page 329

- Cal—Powell v Jones, 284 P 2d 856, 133 C A 2d 601—
Trejo v Maciel, 48 Cal Rptr 765, 239 C A 2d 487
Va—Bryant v Bare, supra, n 1
19 U S—Marquardt v U S, D C Cal, 115 F Supp
160—Williams v U S, D C Cal, 141 F Supp 851,
affid, C A, 248 F 2d 492, cert den 78 S Ct 537,
355 U S 953, 2 L Ed 2d 529—Cobb v U S, D C
Ill, 247 F Supp 505, affid, C A, 367 F 2d 132
Cal—Trejo v Maciel, 48 Cal Rptr 765, 239 C A 2d
487
Va—Bryant v Bare, supra, n 1
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C A 2d 487
Ga—Fulton Bag & Cotton Mills v Eudaly, 98 S E 2d
235, followed in Fulton Bag & Cotton Mills v
Bradley, 98 S E 2d 238, and Fulton Bag & Cotton
Mills v Davidson, 98 S E 2d 238, 95 Ga App 647
Miss—Thresh v Jackson Auto Sales, Inc, 100 So 2d
574, 232 Miss 845
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850, 410 Pa 417

page 330

25. NJ—Krolak v Chicago Exp, 76 A 2d 266 10
NJ Super 60
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680, cert den 73 S Ct 172, 344 U S 877 97
L Ed 679
NY—Hoffman v Ryan, 422 NYS 2d 288, 101
Misc 2d 845
30. Tex—Mosqueda v Albright Transfer & Storage
Co, Civ App, 320 S W 2d 867, err ref no rev
err
Va—C.J.S. quoted at length in Bryant v Bare, 64
S E 2d 741, 746, 192 Va 238
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253 F 2d 254
Ala—Scott v Birmingham Elec Co, 33 So 2d 344, 250
Ala 61
NH—Chalmers v Harris Motors, Inc, 179 A 2d 447,
104 NH 111
32. Ala—Scott v Birmingham Elec Co, supra, n 31
Tex—Mosqueda v Albright Transfer & Storage Co,
Civ App, 320 S W 2d 867, err ref no rev err
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Ala—Scott v Birmingham Elec Co, supra, n 31

§ 575. — Particular Application
of Respondeat Superior
Doctrine

Library References

Master and Servant ⇨302

page 331

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Alaska, 173 F 2d 496, 500, 12 Alaska 267—Ira S
Busbey & Sons, Inc v U S, C A N Y, 398 F 2d
167
Ga—Nordmann v International Folies, Inc, 250
S E 2d 794, 148 Ga App 77
Tex—C.J.S. cited in Dupree v Piggly Wiggly Shop
Rite Foods, Inc, 542 S W 2d 882, 887, err ref no
rev err
Doctrine strictly confined
La—Little v Caterpillar Tractor Co, App, 169 So 2d
654
Md—Gallagher's Estate v Battle, 122 A 2d 93, 209
Md 592, cert den 77 S Ct 133, 352 U S 894, 1
L Ed 2d 87
36. Particular conduct held within scope of
employment
(1) U S—Gulf Oil Corp v Panama Canal Co, D C
Canal Zone, 311 F Supp 1307, affid, C A, 437 F 2d
111, op supp, D C, 335 F Supp 406, mod on oth
grds, C A, 481 F 2d 561
Ark—Phillips v Graves, 245 S W 2d 394, 219 Ark
806
Cal—Pratt v Local 683, Film Technicians of Motion
Picture and Television Industries of Intern Alli-

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Mach Operators of U S and Canada 67 Cal Rptr
483, 260 C A 2d 545
Fla—Olin s Rent-A-Car System, Inc v Royal Conti-
nental Hotel, Inc, App, 187 So 2d 349
Ga—Garner v Mears, 103 S E 2d 610 97 Ga App 506
Ky—Wright & Taylor v Oochs, 208 S W 2d 52, 306
Ky 396
La—Rancatore v Evans, App, 182 So 2d 102—Ray v
South Central Bell Tel Co App, 303 So 2d 877,
affid, Sup, 315 So 2d 759
Mass—Randolph v Five Guys From Boston, Inc, 242
N E 2d 402, 354 Mass 730
Mo—Salmons v Dun & Bradstreet, App, 153 S W 2d
556, mod on oth grds 162 S W 2d 245, 349 Mo
498, 141 A L R 674—Bova v St Louis Public
Service Co, App 316 S W 2d 140
Ohio—Briere v Lathrop Co, 258 N E 2d 597, 22 Ohio
St 2d 166
Tenn—Southern Bell Tel & Tel Co v Yates 232
S W 2d 796, 34 Tenn App 98
37 Minn—Weise v Red Owl Stores, Inc 175
N W 2d 184, 286 Minn 199
Okla—Shiner v Morrison 357 P 2d 196
38 Fla—Winn-Dixie Stores Inc v Manning, App,
143 So 2d 339
Pa—Schwartz v Warwick-Philadelphia Corp, 226
A 2d 484, 424 Pa 185
41 Cleaning gun
Ga—American Oil Co v McCluskey, 167 S E 2d 711,
119 Ga App 475

page 332

- 50 Ariz—Faul v Jelco, Inc, App, 595 P 2d 1035,
122 Ariz 490
Duty to check into background of employee
Mich—Tyus v Booth, 235 N W 2d 69, 64 Mich App
88
51 La—Security Ins Co of Hartford v St Paul Fire
and Marine Ins Co, App, 375 So 2d 687
NJ—Giborgess v Wallace, 396 A 2d 338, 78 NJ 342
NC—Clemmons v Life Ins Co of Georgia, 163
S E 2d 761, 274 N C 416, app after remand 171
S E 2d 87, 6 N C App 708
Okla—Allison v Gilmore, Gardner & Kirk, Inc, 350
P 2d 287
Tenn—Simpson v Allied Van Lines, Inc, App, 612
S W 2d 172
Particular conduct held outside scope of em-
ployment

- (7) U S—Cobb v U S, D C Ill, 247 F Supp 505,
affid, C A, 367 F 2d 132—Higgins v Moore, D C S C,
264 F Supp 635—Baggett v Richardson, D C La, 342
F Supp 1024, affid, C A, 473 F 2d 863—Rabon v
Guardsmark, Inc, C A S C, 571 F 2d 1277, cert den
99 S Ct 191, 439 U S 866, 58 L Ed 2d 176
Ala—Birmingham Elec Co v Hawkins, 67 So 2d 56,
37 Ala App 282
Ariz—Maxwell v Bell, App, 591 P 2d 567, 121 Ariz
475
Ga—Lewis v Millwood, 145 S E 2d 602, 112 Ga App
459
Ill—Wilkinson v Hart's Drive-In, 86 N E 2d 870, 338
Ill App 210—Awe v Stinker, 263 N E 2d 345, 129
Ill App 2d 478
Minn—Laurie v Mueller, 78 N W 2d 434, 248 Minn 1
NY—Montz v Pines Hotel, Inc, 383 NYS 2d 704,
52 A D 2d 1020
NC—Stutts v Duke Power Co, 266 S E 2d 861, 47
N C App 76
Ohio—Knecht v Vandalia Medical Center, Inc, 470
N E 2d 230, 14 Ohio App 3d 129, 14 O B R 145
Pa—Howard v Zaney Bar, 85 A 2d 401, 369 Pa 155
Tenn—Sullivan v Morrow, App, 504 S W 2d 767
Tex—Moore v Texas Co, Civ App, 299 S W 2d 401,
err ref no rev err—Sheffield v Central Freight
Lines, Inc, Civ App, 435 S W 2d 954
Wash—Johnson v Central Bldg Co, 212 P 2d 796, 35
Wash 2d 299

Slander as not normally within scope of employ-
ment

- NY—Maxine Gerard, Inc v William B May & Co,
273 NYS 2d 888, 51 Misc 2d 711, mod on oth
grds 281 NYS 2d 974, 27 A D 2d 922
54 D C—Penn Cent Transp Co v Reddick, App,
398 A 2d 27
55 Iowa—Grant v Younker Bros 58 N W 2d 834,
244 Iowa 958
56 Id—Miller v Long, 131 N E 2d 348, 126 Ind
App 482, reh den 132 N E 2d 272, 126 Ind App
482
57 Neb—C.J.S. cited in Heusser v McAttee, 39
N W 2d 802, 807

page 333

- 62 Selling gasoline
La—Jones v Robbins, 289 So 2d 104, on remand 296
So 2d 361
64 Ind—Parr v McDade, 314 N E 2d 768, 161 Ind
App 106
La—Hardware Dealers Mut Fire Ins Co v Wilha,
App, 179 So 2d 441
65. Miss—Wofford v Johnson, 164 So 2d 458, 250
Miss 1

The employer may be liable where a
fire accidentally results from a negli-
gent act of the employee within the
scope of his employment⁶⁵

- 68 5 Filling gasoline tank of running engine
Or—Madron v Thomson, 419 P 2d 611, 245 Or 513,
27 A L R 3d 953, op clarified, reh den 423 P 2d
496, 245 Or 513

page 334

- 69 Tex—Robert R Walker, Inc v Burgdorf, 244
S W 2d 506, 150 Tex 603
71 Tex—Dobson v Don January Roofing Co, Civ
App, 392 S W 2d 153, 20 A L R 3d 887, err ref
no rev err, Sup, 394 S W 2d 790
Since the publication of Corpus Juris Secundum the
holding of Feeney v Standard Oil Co, 209 P 85, 58
Cal App 587 has been characterized as dictum, and
although such holding was followed in Yore v Pacific
Gas & Electric Co, 277 P 878, 99 Cal App 81, both
cases have been expressly overruled—George v Bekins
Van & Storage Co, 205 P 2d 1037, 33 Cal 2d 834—De
Mirjian v Ideal Heating Co, 278 P 2d 114, 129 C A 2d
758
74 Minn—Edgewater Motels, Inc v Gatzke, 277
N W 2d 11
75 Since the publication of Corpus Juris Secundum the
case of Yore v Pacific Gas & Electric Co, 277
P 878, 99 Cal App 81 has been expressly over-
ruled—De Mirjian v Ideal Heating Co, supra, n
71
76 Cal—C.J.S. cited in De Mirjian v Ideal Heating
Co, 278 P 2d 114, 120, 129 C A 2d 758
77 U S—Chicago Great Western Ry Co v Casura,
C A Minn, 234 F 2d 441
Ga—Davidson v Harris, Inc, 54 S E 2d 290, 79 Ga
App 788—Lowe v Atlanta Masonic Temple Co,
54 S E 2d 677, 79 Ga App 575
Mo—C.J.S. cited in Burke v Shz, Baer & Fuller Co,
264 S W 2d 337, 338
Pa—Ash v 627 Bar, Inc, 176 A 2d 137, 197 Pa Super
39

page 335

78. Ga—Davidson v Harris, Inc, 54 S E 2d 290, 79
Ga App 788—Gerald v Ameron Automotive
Centers, 243 S E 2d 565, 145 Ga App 200
La—Freeman v Lee & Leon Oil Co, Inc, App 4 Cir,
409 So 2d 408
NY—Gardner v Don-Q Motors, Inc, 224 NYS 2d
970, 32 Misc 2d 1008
Ohio—State v Edwards, 361 N E 2d 1083, 50 Ohio
App 2d 63, 4 O O 3d 44
Wyo—Sage Club v Hunt, 638 P 2d 161

80 Ill.—Klatt v Commonwealth Edison Co., 211 N E 2d 720, 33 Ill 2d 481

82 Fla.—Miracle v Kneass, 33 So 2d 644, 160 Fla 48

83. U S.—Cannon v U S, D C Cal, 84 F Supp 820
Mich.—Polston v S S Kresge Co, 37 N W 2d 638, 324 Mich 575

page 336

89 La.—Read v Monticello, App, 33 So 2d 760, remd 40 So 2d 814, 215 La 444, am, App, 44 So 2d 509—Dever v George Thero's, Inc., App, 159 So 2d 602

NJ.—Wollerman v Grand Union Stores, Inc., 221 A 2d 513, 47 N J 426

Assisting customer

La.—Hendricks v Mason Blanche Co., 5 La App 410

Acts of employee within scope of his employment

Ga.—Du Pree v Babcock, 112 S E 2d 415, 100 Ga App 767

Bartender

La.—Borne v Bourg, App, 327 So 2d 607

92. D C.—Great A & P Tea Co v Averill, Mun App, 116 A 2d 162

Neb.—Parr v Cambridge Co-op Oil Co., 81 N W 2d 597, 164 Neb 45

NY.—Martinez v Zoga Rest, Inc., 144 N Y S 2d 540

94. Fla.—Linderman v American Home Assur Co., App 2 Dist, 414 So 2d 1124

Miss.—Horton v Jones, 44 So 2d 397, 208 Miss 257, 15 A L R 2d 824

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page 337

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page 338

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19. La.—CJS quoted in O'Brien v Traders & General Ins Co., App, 136 So 2d 852, 860

20. Leaving spilled oil near sidewalk
Pa.—Gaul v General Utilities Corp., 2 A 2d 533, 133 Pa Super 282

22. Ala.—Sibley v Adams, Civ, 324 So 2d 287, 56 Ala App 572, cert den 324 So 2d 291, 295 Ala 121

Cal.—Loughan v Harger-Haldeman, 7 Cal Rptr 581, 184 C A 2d 493—Covo v Lobue, 33 Cal Rptr 828, 220 C A 2d 218

Fla.—St Petersburg Coca-Cola Bottling Co v Cucinello, 44 So 2d 670

Pa.—Coles v Sutphen, 75 A 2d 623, 167 Pa Super 457

page 339

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Fla.—Lockhart v Friendly Finance Co., App, 110 So 2d 478

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D C.—Neary v Hertz Corp., D C, 231 F Supp 480

Ga.—Gilbert v Progressive Life Ins Co, 53 S E 2d 494, 79 Ga App 219—Garner v Meares, 103 S E 2d 610, 97 Ga App 506—Du Pree v Babcock, 112 S E 2d 415, 100 Ga App 767—Greenfield v Colonial Stores, Inc., 139 S E 2d 403, 110 Ga App 572

Ill.—Bonnem v Harrison, 150 N E 2d 383, 17 Ill App 2d 292—Pascoe v Meadowmoor Dairies, 190 N E 2d 156, 41 Ill App 2d 52

La.—CJS cited in Vallier v Aetna Finance Co., App, 152 So 2d 112, 114—Jefferson v Rose Oil Co of Divue, App, 232 So 2d 895—Taylor v City of Baton Rouge, App, 233 So 2d 325 writ ref 236 So 2d 32 256 La 255—Moore v Smith, App, 303 So 2d 246

Kan.—Murray v Modoc State Bank, 313 P 2d 304, 181 Kan 642

Mass.—Rego v Thomas Bros Corp., 164 N E 2d 144—Suckney v Bert P Williams, Inc., 242 N E 2d 416, 355 Mass 62

Mich.—Guipe v Jones, 30 N W 2d 408, 320 Mich 1

Miss.—Horton v Jones, 44 So 2d 397, 208 Miss 257, 15 A L R 2d 824

Mo.—Panjwani v Star Service & Petroleum Co., 395 S W 2d 129—Smith v Lannert, App, 429 S W 2d 8

NY.—Oneta v Paul Tocci Co., 67 N Y S 2d 795, 271 App Div 681, affd 75 N E 2d 743, 297 N Y 629—Langguth v Buckford's, Inc., 71 N Y S 2d 278, 272 App Div 907, affd 80 N E 2d 363, 297 N Y 982—Sauter v New York Tribune, 113 N E 2d 790, 305 N Y 442—Sims v Bergamo, 169 N Y S 2d 449, 3 N Y 2d 531, 147 N E 2d 1

N C.—Hoppe v Deese, 61 S E 2d 903, 232 N C 698—King v Motley, 62 S E 2d 540, 233 N C 42

Tex.—McCord v Southern Distributing Co., Civ App, 356 S W 2d 350—Kent v Bradley, Civ App, 480 S W 2d 55

Va.—Tri-State Coach Corp v Walsh, 49 S E 2d 363, 188 Va 299

Dispute between drivers

(2) Felder v Houston Transit Co, Tex Civ App, 203 S W 2d 831, affd 208 S W 2d 880, 146 Tex 428

page 340

34. Iowa.—Sandman v Hagan, 154 N W 2d 113, 261 Iowa 560

Kan.—Murray v Modoc State Bank, 313 P 2d 304, 181 Kan 642

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Tex.—Rosaies v American Business, Inc., Civ App, 598 S W 2d 706, err ref no rev err

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Fla.—Columbia By the Sea, Inc v Petty, App, 157 So 2d 190

Kan.—Williams v Community Drive-In Theater, Inc., 520 P 2d 1296, 214 Kan 359

Tex.—Dart v Yellow Cab, Inc., Civ App, 401 S W 2d 874, err ref no rev err

Cal.—Coats v Construction and General Laborers Local No 185, 93 Cal Rptr 639, 15 C A 3d 908

R I.—Labomere v Sousa, 143 A 2d 285, 87 R I 450

Wash.—Langness v Ketonen, 253 P 2d 551, 42 Wash 2d 394

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Or.—Hansen v Cohen, 276 P 2d 391, 203 Or 157, reh den 278 P 2d 898, 203 Or 157

Provocation
Nev.—Prel Hotel Corp v Antonacci, 469 P 2d 399, 86 Nev 390

Contributory negligence not a defense
Wash.—Langness v Ketonen, supra, n 37

Grossly excessive assault may impose liability
Pa.—Stratton v Rosinsky, 133 A 2d 257, 183 Pa Super 545

41. Mo.—Panjwani v Star Service & Petroleum Co., 395 S W 2d 129

page 341

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Mich.—Tyus v Booth, 235 N W 2d 69, 64 Mich App 88

Mo.—Tockstein v P J Hamill Transfer Co., App, 291 S W 2d 624

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Okl.—Hill v McQueen, 230 P 2d 483, 204 Okl 394, 22 A L R 2d 1220—Tulsa General Drivers, Warehousemen, and Helpers Union, Local No 523 v Conley, 288 P 2d 750

Or.—Hansen v Cohen, 276 P 2d 391, 203 Or 157

Pa.—Howard v Zaney Bar, 85 A 2d 401, 369 Pa 155

Tenn.—CJS quoted at length in Averill v Luttrell, 311 S W 2d 812, 814, 815, 44 Tenn App 56

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Cal.—Sullivan v Matt, 278 P 2d 499, 130 C A 2d 134—Rodgers v Kemper Const Co., 124 Cal Rptr 143, 50 C A 3d 608

D C.—Fleming v Bronfin, Mun App, 80 A 2d 915—Fleming v Bronfin, Mun App, 104 A 2d 407

III.—Korhorn v Smith, 278 N E 2d 864, 3 Ill App 3d 532

Iowa.—Sandman v Hagan, 154 N W 2d 113, 261 Iowa 560

Kan.—Hamilton v Neff, 371 P 2d 157, 189 Kan 637—Beggerly v Walker, 397 P 2d 393, 194 Kan 61

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NY.—Oneta v Paul Tocci Co, supra, n 33—Sauter v New York Tribune, supra, n 27—Commorata v 4 East 76th St Garage, Inc, 150 N Y S 2d 828—Gethers v Crolicka, 151 N Y S 2d 577—Gibularo v Lomax Trading Corp., 253 N Y S 2d 888, 22 A D 2d 703, affd 212 N E 2d 61, 16 N Y 2d 898, 264 N Y S 2d 554

Ohio.—Fisher v Hering, 97 N E 2d 553, 88 Ohio App 107

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Pa.—Di Lembo v Owl Cab Co., 103 P L J 225

R I.—Labomere v Sousa, 143 A 2d 285, 87 R I 450

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Dispute between drivers
(2) Other assaults
Okl.—Oklahoma Ry Co v Sandford, supra

Page 341

Considered in mitigation of damages

Ga—Minnesota Min & Mfg Co v Ellington, 87 S E 2d 665, 92 Ga App 24

page 342

49. Iowa—Sandman v Hagan, 154 NW 2d 113, 261 Iowa 560

Utah—Stone v Hurst Lumber Co., 386 P 2d 910, 15 Utah 2d 49

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Bartenders

U.S.—Maddex v Ricca, D.C. Ariz., 258 F Supp 352

55. Assault by bartender in parking lot

U.S.—Maddex v Ricca, D.C. Ariz., 258 F Supp 352

page 343

56. U.S.—Maddex v Ricca, D.C. Ariz., 258 F Supp 352

64. Conn.—Ashley v Ritter Finance Co., Com. Pl., 294 A 2d 83, 29 Conn Sup 503

66. Ky.—Citizens Finance Co v Walton, 239 S W 2d 77

Battery by employee's companion

Fla—Huggins v Investors Acceptance Co of Miami, App, 287 So 2d 724

page 344

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Ill—Manuel v McKimack, 377 NE 2d 219, 18 Ill Dec 66, 60 Ill App 3d 654

Mo—Wellman v Pacer Oil Co., 504 S W 2d 55, cert den 94 S Ct 1981, 416 U.S. 961, 40 L Ed 2d 313

Va—Cary v Hotel Rueger, 81 S E 2d 421, 195 Va 980

Held liable where duty to protect violated

Ill—Lipcomb v Coppage, 197 NE 2d 48, 44 Ill App 2d 430

§ 577. — To Third Persons Generally

page 345

89. U.S.—Valley Forge Golf Club v L. G. De Felice & Son, Inc., D.C. Pa., 124 F Supp 873—Cales v Chesapeake & O Ry Co, D.C. Va., 300 F Supp 155

Cal—McNulty v Southern Pac. Co., 216 P 2d 534, 96 Cal App 2d 841—C.J.S. cited in Craven v Kurtz, App, 26 Cal Rptr 802, 804, 210 CA 2d 810

D.C.—C.J.S. cited in American Pecco Corp v Eastern Foundation Co., App, 264 A 2d 941, 493

Ga—Giles v Smith, 56 S E 2d 860, 80 Ga App 540

Iowa—Sandman v Hagan, 154 NW 2d 113, 261 Iowa 560

Kan—C.J.S. cited in Russell v American Rock Crusher Co., 317 P 2d 847, 830, 181 Kan 891

Ky—Phelps v Brown, 295 S W 2d 804

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Minn—Sula v State, 247 NW 2d 907, 311 Minn 166

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Neb—Pullen v Novak, 99 NW 2d 16, 169 Neb 211

N.J.—Wuerffel v Westinghouse Corp., 372 A 2d 659, 148 N.J. Super 327

Ohio—Shaver v Shurks Motor Exp. Corp., 127 NE 2d 355, 163 Ohio St 484

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S.D.—C.J.S. cited in Loonan Lumber Co v Wannamaker, 131 NW 2d 78, 79, 81 S.D. 51

Tenn—Southern Bell Tel & Tel Co v Yates, 232 S W 2d 796, 34 Tenn App 98

W.Va—Harless v First Nat Bank in Fairmont, 289 S E 2d 692

Wis—Colton v Foulkes, 47 NW 2d 901, 259 Wis 142

page 346

90. U.S.—Smith v Sherwood, D.C. Md., 308 F Supp 895

Del—Clark v Brooks, Super., 377 A 2d 365, aff'd, Sup, 391 A 2d 747

Ga—Stapleton v Stapleton, 70 S E 2d 156, 85 Ga App 728

La—Butcher v Gulf Ins. Co., App, 295 So 2d 45—Lyle v National Sur. Corp., App, 304 So 2d 743, writ den, Sup, 309 So 2d 341, cert den 96 S Ct 201, 423 U.S. 898, 46 L Ed 2d 131

N.J.—Mayfair Fabrics v Henley, 244 A 2d 344, 101 N.J. Super 363

Or—Marchant v Clark, 357 P 2d 541, 225 Or 273

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N.Y.—Bailey v Bakers Air Force Gas Corp., 376 N.Y. S 2d 212, 50 A.D. 2d 129

Ohio—Jeffery v Johnson, 260 NE 2d 627, 23 Ohio Misc 338

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99. Cal—Dillon v Wallace, 306 P 2d 1044, 148 C.A. 2d 447

Ga—McClurd v Reddick, 217 S E 2d 163, 135 Ga App 136

Tex—Cornett v Hardy, Civ App, 241 S W 2d 186—Kirby Lumber Corp v Walters, Civ App, 277 S W 2d 796

W.Va—Stokey v Norfolk & Western Ry. Co., 55 S E 2d 102, 132 W Va 771

1. Okl.—Sutherland v Saint Francis Hospital, Inc., 595 P 2d 780

Various torts

(2) Other matters

U.S.—Harris Diamond Co v Army Times Pub. Co., D.C.N.Y., 280 F Supp 273

page 347

3. U.S.—Scott v Huffman, C.A. Okl., 237 F 2d 396—Killebrew v Atchison, T & S.F. Ry. Co., D.C. Okl., 233 F Supp 250

Tex—Cornett v Hardy, Civ App, 241 S W 2d 186—Kirby Lumber Corp v Walters, Civ App, 277 S W 2d 796

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La—Creppel v Fleming, App, 83 So 2d 132

Me—Meserve v Allen Storage Warehouse Co., 189 A 2d 381, 158 Me 128

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N.C.—Johnson v Lamb, 161 S E 2d 131, 273 N.C. 701

Okla—Cook v Safeway Stores, Inc., 330 P 2d 375

Tex—S.H. Kress & Co v Selph, Civ App, 250 S W 2d 883, err ref no rev err

Wash—Houser v City of Redmond, 559 P 2d 577, 16 Wash App 743, aff'd 586 P 2d 482, 91 Wash 2d 36

Assault

Ga—Minnesota Min & Mfg Co v Ellington, 87 S E 2d 665, 92 Ga App 24

Employee not vicariously liable for negligence of employer

Pa—Lambert v Pittsburgh Bridge and Iron Works, 344 A 2d 810, 463 Pa 237

page 348

7. Cal—Masses v Lettunich, 56 Cal Rptr 232, 248 CA 2d 68

N.Y.—Hoffman v Ryan, 422 N.Y.S. 2d 288, 101 Misc 2d 845

N.C.—Northwestern Distributors, Inc v North Carolina Dept of Transp., 255 S E 2d 203, 41 N.C. App 548, cert den 261 S E 2d 123, 298 N.C. 567

11. Mo—C.J.S. cited in Albertson v Wabash R. Co., 253 S W 2d 184, 191, 363 Mo 696

Pa—Yaneth v F.D. Kemler, Inc., 11 D & C 2d 491, 52 Sch.L.R. 72

13. Fla—Putnam Lumber Co v Berry, 2 So 2d 133, 146 Fla 595

Ohio—Forester v R.L.M., Inc., 397 NE 2d 427, 60 Ohio App 2d 342, 14 O.O.3d 299

S.D.—Loonan Lumber Co v Wannamaker, 131 NW 2d 78, 81 S.D. 51

Procedural "break downs"

La—Brasher v Life Ins. Co of Louisiana, App, 306 So 2d 321, application den, Sup, 310 So 2d 639

14. U.S.—Duvall v Warner Bros. Theatres, D.C. Or., 112 F Supp 496

Minn—Morgan v Eaton's Dude Ranch, 239 NW 2d 761, 307 Minn 280, 90 A.L.R. 3d 912

Or—Hall v Corning, 427 P 2d 105, 247 Or 33

Employee engaging sub-employee held not liable for his actions

La—Little v Caterpillar Tractor Co., App, 169 So 2d 444

Exculpatory clause releasing employer from liability generally extends same relief to employee ¹⁶⁵

16.5 Employee owes no greater duty than employer

NJ—Mayfair Fabrics v Henley, 244 A 2d 344, 101 NJ Super 363

Employee held not liable for negligence

Colo—Employers Cas Co v Wannwright, 473 P 2d 181, 28 Colo App 292

NJ—Mayfair Fabrics v Henley, 244 A 2d 344, 101 NJ Super 363

An employee who is not a party to the contract is not individually liable in contract for inducing his master to breach a contract with a third person, even though, as employee, he participated in the breach ¹⁶⁵

16.5. NY—Pope v Zickendorf Hotels Corp., 252 NYS 2d 975, 22 AD 2d 647

§ 578. — To Fellow Servants

17. US—Walker v Patterson, D C Del., 325 F Supp 1024

Ark—Neal v Oliver, 438 SW 2d 313, 246 Ark 377
Neb—C.J.S. cited in Rehn v Bingham, 36 NW 2d 856, 860, 151 Neb 196, app dismissed 70 S Ct 79, 338 US 806, 94 L Ed 888, reh den 70 S Ct 157, 338 US 882, 94 L Ed 541, motion over 40 NW 2d 673, 152 Neb 171

NY—Connell v Hayden, 443 NYS 2d 383, 83 AD 2d 30

18. US—McSparran v Hanigan, D C Pa., 225 F Supp 628, affd, CA, 356 F 2d 983—Cales v Chesapeake & O Ry Co., D C Va., 300 F Supp 155

Ariz—Orkin Exterminating Co, Inc v Robles, App., 624 P 2d 329, 128 Ariz 132

Cal—Jackson v Georgia-Pacific, Inc., 15 Cal Rptr 680, 195 CA 2d 412

Idaho—C.J.S. cited in Buffat v Schnuck, 316 P 2d 887, 893, 79 Idaho 314

Iowa—C.J.S. quoted in Craven v Oggero, 213 NW 2d 678, 682—C.J.S. cited in Kerrigan v Errett, 256 NW 2d 394, 396

Kan—Murphy v City of Topeka—Shawnee County Dept of Labor Services, 630 P 2d 186, 6 Kan App 2d 488

La—Hadrick v Diaz, App., 302 So 2d 345

Minn—Nepstad v Lambert, 50 NW 2d 614, 235 Minn 1

Mo—C.J.S. cited in Schumacher v Leslie, 232 SW 2d 913, 918, 360 Mo 1238—C.J.S. cited in Logsdon v Duncan, 293 SW 2d 944, 949

NY—Goodman v Kirby, 121 NYS 2d 158, 282 App Div 86, app den 122 NYS 2d 818, 282 App Div 684

Tex—C.J.S. cited in Harris v Cleveland, 294 SW 2d 235, err dismissed—O P Leonard Trust v Hare, Civ App., 305 SW 2d 833, err dismissed

Acquiescence in, or knowledge of, violation of safety statute or rule

Cal—Mason v Case, 33 Cal Rptr 710, 220 CA 2d 170

Gross negligence

Iowa—Moose v Rich, 253 NW 2d 565

Statutory prohibition

Ala—Atchison v Horton, 348 So 2d 1358

page 349

19. Cal—Miner v Superior Court of Fresno County, 106 Cal Rptr 416, 30 CA 3d 597

Fla—Fritz v McBee Co., Fla., 77 So 2d 796

Kan—Roda v Williams, 407 P 2d 471, 195 Kan 507

La—Jolly v Travelers Ins Co., 161 So 2d 354—Canter v Koehring Co., 283 So 2d 716

NJ—Miller v Muscarelle, 170 A 2d 437, 67 NJ Super 305

Wis—Ortman v Jensen & Johnson, Inc., 225 NW 2d 635, 66 Wis 2d 508

Where a professional coemployee is charged with fraud, deceit, and violation of his professional trust, he may be held liable in tort for his wrongdoing to an injured coemployee ²⁰⁵

20.5. Ga—Downey v Bexley, 317 SE 2d 523, 253 Ga 125

25. Neb—In re Bingham's Estate, 50 NW 2d 523, 155 Neb 24—Vontress v Ready Mixed Concrete Co., 104 NW 2d 331, 170 Neb 789

Tex—Loud v Sears, Roebuck & Co., Civ App., 262 SW 2d 548

Misfeasance or nonfeasance

US—Friley v Worthington, D C Wyo., 385 F Supp 605

26. Cal—Jackson v Georgia-Pacific, Inc., 15 Cal Rptr 680, 195 CA 2d 412

La—Canter v Koehring Co., 283 So 2d 716

28. Matters constituting misfeasance

(3) Cal—Miner v Superior Court of Fresno County, 106 Cal Rptr 416, 30 CA 3d 597

30. Ill—Martino v Barra, 215 NE 2d 12, 67 Ill App 2d 328, affd 229 NE 2d 545, 37 Ill 2d 588

Iowa—Kerrigan v Errett, 256 NW 2d 394

La—Sanders v Nugent Steel & Supply Co., Inc., App., 273 So 2d 889—Canter v Koehring Co., 283 So 2d 716

Mo—Logsdon v Duncan, 293 SW 2d 944

Neb—In re Bingham's Estate, supra, n 25

NY—Johnson v Razor Realty Corp., 267 NYS 2d 994, 25 AD 2d 632

SD—Blumhardt v Hartung, 283 NW 2d 229

Tex—J Wengarten Inc v Moore, 449 SW 2d 452

Liability not shown

(3) Other instances

NJ—Miller v Muscarelle, 170 A 2d 437, 67 NJ Super 305

(4) Assumption of risk

La—Allen v Firemen's Fund Ins Co., App., 132 So 2d 662

Personal duty to injured necessary

Minn—Dawley v Thusus, 231 NW 2d 555, 304 Minn 453

page 350

32. US—Kuchenbecker v Northern Wyoming Drilling Co., C A S D., 647 F 2d 836

Cal—Jackson v Georgia-Pacific, Inc., 15 Cal Rptr 680, 195 CA 2d 412

Iowa—Craven v Oggero, 213 NW 2d 678

La—Trahan v Travelers Ins Co., App., 278 So 2d 886—Hadrick v Diaz, App., 302 So 2d 345

Minn—Dawley v Thusus, 231 NW 2d 555, 304 Minn 453

NY—Connell v Hayden, 443 NYS 2d 383, 83 AD 2d 30

Wis—Krusc v Schieve, 213 NW 2d 64, 61 Wis 2d 421, app after remand 240 NW 2d 159, 72 Wis 2d 126

Employee held liable

(7) Other instances

La—Cacibauda v Gasenne, App., 305 So 2d 572

Corporate officer held not "employer" within safety statute

Cal—Towt v Pope, 336 P 2d 276, 168 CA 2d 520

Wis—Wasley v Kosmatka, 184 NW 2d 821, 50 Wis 2d 738

No liability where plaintiff guilty of contributory negligence

La—Jolly v Travelers Ins Co., 161 So 2d 354

Suits against supervisory employees not barred

US—Vega v Southern Scrap Material Co., Inc., C A La., 517 F 2d 254

Wis—Pitrowski v Taylor, 201 NW 2d 52, 55 Wis 2d 615

Duty of proper supervision

La—Miller v Employers Mut Liability Ins Co of Wisconsin, App., 349 So 2d 1353, writ den, Sup., 352 So 2d 235, two cases

Wis—Lupovici v Hunzinger Const Co., 255 NW 2d 590, 79 Wis 2d 491

Affirmative act of negligence

Fla—Desert v Electric Mut Liability Ins Co., App., 392 So 2d 340

33. US—C.J.S. cited in Banks v Liverman, D C Va., 129 F Supp 743, 747, affd, CA, 226 F 2d 524—Kemp v Utah Const & Min Co., D C Or., 225 F Supp 250

Ala—C.J.S. cited in Fontenot v Bramlett, 470 So 2d 669, 673—C.J.S. cited in Welch v Jones, 470 So 2d 1103, 1110

La—Armentor v Fred C Benton Indus Repairs, App., 349 So 2d 367, writ den, Sup., 351 So 2d 178

34. La—Abshire v Hartford Acc & Indem Ins Co., App., 289 So 2d 545, writ den, Sup., 293 So 2d 170—Cacibauda v Gasenne, App., 305 So 2d 572

Wis—Garchek v Norton Co., 226 NW 2d 432, 67 Wis 2d 125

36. Kan—Galvan v McCollister, 580 P 2d 1324, 224 Kan 415

§ 579. Joint or Several Liability of Master and Servant

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37. W Va—State ex rel Bumgarner v Sims, 79 SE 2d 277, 139 W Va 92

Not solidarily liable

La—Moore v Sun Oil Co., App., 357 So 2d 588

38. US—Pacific Emp Ins Co v Hartford Acc & Indem Co., C A Cal., 228 F 2d 365, cert den 77 S Ct 38, 352 US 826, 1 L Ed 2d 49

Fla—Phillips v Hall, App., 297 So 2d 136

La—Little v State Farm Mut Auto Ins Co., App., 177 So 2d 784

Mass—Kabatnick v Hanover-Elm Bldg Corp., 119 NE 2d 169, 331 Mass 366

Ohio—Young v Featherstone Motors, 124 NE 2d 158, 97 Ohio App 158

In Vermont

(3) In a subsequent decision, in which the court cited Corpus Juris Secundum for the proposition that Vermont cases had aligned the state with the views of a very restricted minority, the court held that a joint action may be maintained, and overruled former cases to the contrary—Daniels v Parker, 126 A 2d 85, 119 Vt 348

39. La—C.J.S. cited in Williams v Marconneau, 124 So 2d 919, 922, 240 La 713

Action against master or servant

Ohio—State ex rel Flagg v City of Bedford, 218 NE 2d 601, 7 Ohio St 2d 45

Contractual relations unaffected by statute permitting joinder in same action

Ohio—American Ins Group v McCown, 218 NE 2d 746, 7 Ohio App 2d 62

page 351

41. US—US v First Sec Bank of Utah, N A., C A Utah, 208 F 2d 424, 42 A L R 2d 951—Pacific Emp Ins Co v Hartford Acc. & Indem Co., C A Cal., 228 F 2d 365, cert den 77 S Ct 38, 352 US 826, 1 L Ed 2d 49—Canadian Indem Co v Ohio Farmers' Indem Co., C A Cal., 251 F 2d 563—Simpson v Townsley, C A Kan., 283 F 2d 743, 92 A L R 2d 526—Friley v Worthington, D C Wyo., 385 F Supp 605

Ala—Watson v Anthony, 40 So 2d 316, 252 Ala 244—McMullen v Four Wheels, Inc., 116 So 2d 611, 40 Ala App 408, cert den 116 So 2d 615, 270 Ala 739

Page 351

Cal—Albers v Gehrke, 84 Cal Rptr 846, 4 C A 3d 463

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Ill—Edgar County Bank & Trust Co of Paris v Paris Hospital, Inc, 294 N E 2d 319, 10 Ill App 3d 465, affd in part, revd in part 312 N E 2d 259, 57 Ill 2d 298

Kan—Wendel v Chicago, R I & P R Co, 223 P 2d 993, 170 Kan 68—Feger v Concrete Materials & Const Co, 238 P 2d 708, 172 Kan 75

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NC—Shaw v Barnard, 51 S E 2d 295, 229 NC 713

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Okla—Employers Cas Co v Barnett, 235 P 2d 685, 205 Okl 73

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Tenn—Williams v Pritchard, 306 S W 2d 46, 43 Tenn App 140

Tex—O P Leonard Trust v Hare, Civ App, 305 S W 2d 833, err damn

Vt—Damels v Parker, 126 A 2d 85, 119 Vt 348, 59 A L R 2d 1060

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W Va—Willigerod v Sharafabadi, 158 S E 2d 175, 151 W Va 995

In Illinois

(1) Ill—Laver v Kingston, 137 N E 2d 113, 11 Ill App 2d 323—Stawasz v Aetna Ins Co, 240 N E 2d 702, 99 Ill App 2d 131

(2) Ill—Riley v Unknown Owners of 304 North Oak Park Ave Bldg, Oak Park, 324 N E 2d 78, 25 Ill App 3d 895

In Pennsylvania

(1) Pa—Battistone v Benedetti, 122 A 2d 536, 385 Pa 163

42. U S—Weekley v Pennsylvania R Co, D C Ill, 104 F Supp 899

NJ—Moss v Jones, 225 A 2d 369, 93 N J Super 179

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SD—Melcher v Frank, 98 N W 2d 345, 78 S D 58

Not joint cause of action

Ga—Edwards v Gulf Oil Corp, 24 S E 2d 843, 69 Ga App 140—Fambro v Sparks, 72 S E 2d 473, 86 Ga App 726

43. U S—Alabama Great Southern R Co v Allied Chemical Corp, C A Mass, 501 F 2d 94, reh 509 F 2d 539

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La—Theriot v Crescent Cigarette Service, Inc, App, 145 So 2d 142—Hooper v Wilkinson, App, 252 So 2d 137

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NJ—Moss v Jones, 225 A 2d 369, 93 N J Super 179

SC—Mackey v Frazier, 106 S E 2d 895, 234 S C 81

Tex—Searle-Taylor Machinery Co, Inc v Brown Oil Tools, Inc, Civ App, 512 S W 2d 335, err ref no rev err

W Va—State ex rel Bumgarner v Sims, supra, n 37

Independent negligence of employer

Ark—Chicago, R I & P R Co v Davis, 397 S W 2d 360, 239 Ark 1059

Pa—Pryor v Chambersburg Oil & Gas Co, 103 A 2d 425, 376 Pa 521

Master and servant are primarily liable

Iowa—Wiedefeld v Chicago & N W Transp Co, 252 N W 2d 691

W Va—Freeland v Freeland, 162 S E 2d 922, 152 W Va 332

44. U S—Simpson v Townsley, C A Kan, 283 F 2d 743, 92 A L R 2d 526

Colo—Hamm v Thompson, 353 P 2d 73, 143 Colo 298

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Right of indemnification

U S—Matter of Covington Grain Co, Inc, C A Ala, 638 F 2d 1357

page 352

45. Tex—H L Butler & Son v Walpole, Civ App, 239 S W 2d 653, err ref no rev err

46. Mo—Grace v Smith, App, 270 S W 2d 79, affd, 277 S W 2d 503, 365 Mo 147—Manson v Wabash R Co, 338 S W 2d 54

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48. Cal—Covo v Lobue, 33 Cal Rptr 828, 220 CA 2d 218

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La—C J S cited in Amyx v Henry & Hall, 79 So 2d 483, 486, 227 La 364

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Relationship contractual

(2) Other statements

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Independent contractor relationship not applicable

U S—Walton v Sherwin-Williams Co, C A Ark, 191 F 2d 277

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page 353

63. Ind—Allison v Huber, Hunt & Nichols, Inc, 362 N E 2d 193, 173 Ind App 41

§ 582. Subcontractors

65. U S—Arthur Venners Co v U S, Ct Cl, 340 F 2d 337, 169 Ct Cl 74

Fla—Walter Taft Bradshaw & Associates, P A v Bed-sale, App, 374 So 2d 644

NY—Monarty v W T Grant Co, 155

NC—Richards v Nationwide Homes, 139 N Y S 2d 218 S E 2d 645, 263 NC 295

Tex—Phillips Pipe Line Co v McKown, Civ App, 580 S W 2d 435, err ref no rev err

66. Iowa—Porter v Iowa Power & Light Co, 217 N W 2d 221

Mo—C J S cited in Barkley v Mitchell, App, 411 S W 2d 817, 823

67. U S—Corban v Skelly Oil Co, C A Mass, 256 F 2d 775, stating Arkansas law—South Carolina Natural Gas Co v Phillips, C A S C, 289 F 2d 143—Todd Shipyards Corp v Turbine Service, Inc, C A La, 674 F 2d 401, reh den 680 F 2d 1389, three cases, cert den 103 S Ct 447, 448, 459 U S 1036, 74 L Ed 2d 602, 603, on remand, D C, 592 F Supp 380, affd in part, revd in part on oth grds 763 F 2d 745, reh den 770 F 2d 164

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§ 583. Dual Capacity of Servant and Contractor

68. U S—Helms v Sinclair Refining Co, C A Ga, 170 F 2d 289—Sears, Roebuck & Co v Lea, C A Ky, 198 F 2d 1012—Marcum v U S, D C Ky, 208 F Supp 929, affd, C A, 324 F 2d 787—St Paul Fire & Marine Ins Co v Aetna Cas & Sur Co, D C Pa, 394 F Supp 1274, affd, C A, 532 F 2d 747

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§ 584. General Rule as to Nonliability of Contractee for Acts or Omissions of Contractor or His Servants

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Master and Servant ¶816

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page 354

70. U S—Market Ins Co v U S, C A Miss., 415 F 2d 459—Rogers v U S, D C S C., 302 F Supp 699, affd CA, 426 F 2d 311—Reeves v John A Cooper Co, D C Ark., 304 F Supp 828—Olson v Kilstofte & Vosepka, Inc., D C Minn., 327 F Supp 583—Hixon v Sherwin-Williams Co., C A Ind., 671 F 2d 1005

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Ky—Turner v Lewis, 282 S W 2d 624—Smith v Genett, 385 S W 2d 957—City of Hazard Municipal Housing Commission v Hunch, 411 S W 2d 686

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Md—Leimbach v Beckford's Inc 135 A 2d 633, 214 Md 434—Schmidbauer v Baltimore & Pittsburgh Motor Exp Co., 181 A 2d 325, 228 Md 637

Mass—Whalen v Shivek, 93 N E 2d 393, 326 Mass 142, 33 A L R 2d 74

Mich—CJS cited in Cary v Thomas, 76 N W 2d 817, 824, 345 Mich 616—CJS cited in Minnubs v Milbrand Maintenance Corp., 218 N W 2d 68, 70, 52 Mich App 494

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Mo—Virgil v Ras & Co., App., 241 S W 2d 96—Glynn v M F A Mut Ins Co., 254 S W 2d 623, 363 Mo 896, 36 A L R 2d 256—Hunter v De Luxe Drive-In Theaters, App., 257 S W 2d 253—Williamson v Southwestern Bell Tel Co., 265 S W 2d 354—Southwestern Bell Tel Co v Rawlings Mfg Co., App., 359 S W 2d 393—Martin v First Nat of Independence Co., 372 S W 2d 919

Mont—CJS cited in Storruvsten v Harrison, 549 P 2d 464, 169 Mont 525

Neb—Sullivan v Geo A Hornei and Co., 303 N W 2d 476, 208 Neb 262

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N J—Huber v Serpico, 176 A 2d 805, 71 N J Super 329—Marion v Public Service Elec & Gas Co., 178 A 2d 57, 72 N J Super 146—Gallas v Public Service Elec & Gas Co., 256 A 2d 289, 106 N J Super 527, affd in part, revd in part on oth grds 265 A 2d 377, 56 N J 101

N M—Pendergrass v Lovelace, 262 P 2d 231, 57 N M 661—Southern Cal Petroleum Corp v Royal Indem Co., 369 P 2d 407, 70 N M 24—Scott v Murphy Corp., 448 P 2d 803, 79 N M 697—Clear v Patterson, App., 459 P 2d 358, 80 N M 654

N Y—Gelman v Ford Motor Co., 288 N Y S 2d 11, 56 Misc 2d 209—Horn v State, 297 N Y S 2d 795, 31 A D 2d 364—Reynolds v John T Brady & Co., 317 N Y S 2d 412, 65 Misc 2d 200, affd in part, revd in part 329 N Y S 2d 624, 38 A D 2d 746—Rozner v Resolute Paper Products Corp., 326 N Y S 2d 44, 37 A D 2d 396 Affd 293 N E 2d 94, 31 N Y 2d 934, 340 N Y S 2d 927—Ostrander v Bullie Holm's Village Travel, Inc., 386 N Y S 2d 597, 87 Misc 2d 1049

N C—Brown v Texas Co., 76 S E 2d 45, 237 N C 738—Dockery v World of Murth Shows, Inc., 142 S E 2d 29, 264 N C 406—Hendricks v Leslie Fay, Inc., 159 S E 2d 362, 273 N C 59

N D—Newman v Sears, Roebuck & Co., 43 N W 2d 411, 77 N D 466, 17 A L R 2d 694

Ohio—Van Meter v Public Utilities Commission of Ohio, 135 N E 2d 848, 165 Ohio St 391—Bishop v Penn Central Transp Co., 316 N E 2d 907, 39 Ohio App 2d 185

Okla—Burke v Thomas, 313 P 2d 1082—Allied Hotels, Limited v Barden, 389 P 2d 968

Or—Johnson v Salem Title Co., 425 P 2d 519—Macomber v Cox, 435 P 2d 462, 249 Or 61

Pa—Murrin v Ruffigato, 96 A 2d 865, 373 Pa 561—Townsend v City of Pittsburgh, 119 A 2d 227, 383 Pa 453—Eby v Sidor, 27 Loh L J 160—Polinelli v Union Supply Co., 39 West 59—Hader v Copley Cement Mfg Co., 189 A 2d 271, 410 Pa 139—Green v Independent Oil Co., 201 A 2d 207, 414 Pa 477—Brietch v U S Steel Corp., 285 A 2d 133, 445 Pa 525

R I—Ballet Fabrics, Inc v Four Dee Realty Co., Inc., 314 A 2d 1, 112 R I 612

S D—Blumhardt v Hartung, 283 N W 2d 229

Tenn—Simpton v Allied Van Lines, Inc., App., 612 S W 2d 172

Tex—Evans v Bryant, Civ App., 29 S W 2d 484, err ref—Farmers' Grn Co-op Ass'n v Mitchell, Civ App., 233 S W 2d 948—Weeks v Texas Ill Natural Gas Pipeline Co., Civ App., 276 S W 2d 321—Austin Road Co v Boston, Civ App., 292 S W 2d 373, err ref no rev err—CJS cited in Sarratt v City of River Oaks, Civ App., 305 S W 2d 207, 209, err ref—Cage Bros v Friedman, Civ App., 312 S W 2d 532, err ref no rev err—Woodard v Southwest States, Inc., 384 S W 2d 674—Olson v B W Merchandise, Inc., Civ App., 388 S W 2d 737—J A Robinson Sons, Inc v Ellis, Civ App., 412 S W 2d 728, err ref no rev err—H M R Const Co v Wolco of Houston, Inc., Civ App., 422 S W 2d 214, err ref no rev err

Va—Smith v Grenadier, 127 S E 2d 107, 203 Va 740—Norfolk & W Ry Co v Johnson, 154 S E 2d 134, 204 Va 980, cert den 88 S Ct 498, 389 U S 995, 19 L Ed 2d 491—Broadus v Standard Drug Co., 179 S E 2d 497, 211 Va 645

Wash—Getzenbauer v United Pac Ins Co., 322 P 2d 1089, 52 Wash 2d 61—Murrk v Aronsen, 359 P 2d 816, 57 Wash 2d 785

W Va—CJS cited in Law v Phillips, 68 S E 2d 452, 136 W Va 761, 33 A L R 2d 95—Roush v Johnson, 80 S E 2d 857, 139 W Va. 607—CJS cited in McCoy v Cohen, 140 S E 2d 427, 435, 149 W Va 197—Chenoweth v Sattle Engineers, Inc., 156 S E 2d 297, 151 W Va 830

Wis—Burmester v Damrow, 79 N W 2d 87, 273 Wis 568—CJS cited in Lofy v Joint School Dist No 2, City of Cumberland, 166 N W 2d 809, 813, 42 Wis 2d 253

Injury to animals

Ohio—Mercer v Ohio Fuel Gas Co., App., 79 N E 2d 685—Mercer v Ohio Fuel Gas Co., 80 N E 2d 635—Mercer v Ohio Fuel Gas Co., 80 N E 2d 441

Contract illegal or against public policy unenforceable

Tex—Perez v Hernandez, Civ App., 317 S W 2d 81, err ref no rev err

Contract duty cannot impose liability

Tex—Housing Authority of City of Dallas v Habbell, Civ App., 325 S W 2d 880, err ref no rev err

Rule unaffected by statutory requirement for designation of project contractor

N J—Caranko v Robit, Inc., 226 A 2d 43, 93 N J Super 428

Rule not applicable

U S—Webb v Old Salem, Inc., C A N C., 416 F 2d 223

Rule not altered by safety regulations

U S—Courtney v Island Creek Coal Co., C A Ky., 474 F 2d 468

71. U S—Union Tank & Supply Co v Kelley, supra, n 70—Redman v U S, C A N Y., 176 F 2d 713—Roberts v St Marks Towing Co., D C Fla., 129

Page 355

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Ill—Jones v Tonietto, 250 NE 2d 829, 112 Ill App 2d 79

Ind—Cummings v Hooser Marine Properties, Inc, 363 NE 2d 1266, 173 Ind App 372

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Tex—Frye v Sinclair Oil & Gas Co, Civ App, 249 SW 2d 102—Weeks v Texas Ill Natural Gas Pipeline Co, Civ App, 276 SW 2d 321

Wash—Fardig v Reynolds, 348 P 2d 661, 55 Wash 2d 540

72. Ga—Webb v Wright, 120 SE 2d 806, 103 Ga App 776

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73. La—Landry v News-Star-World Pub Corp, App, 46 So 2d 140

76. Ill—Gannon v Chicago, M, St P & P Ry Co, 167 NE 2d 5, 25 Ill App 2d 272, rem'd 175 NE 2d 785, 22 Ill 2d 305

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77. US—Cochran v International Harvester Co, D C Ky, 408 F Supp 598

78. Cal—C.J.S. quoted at length in Harold A. Newman Co, Inc v Nero, 107 Cal Rptr 464, 467, 31 CA 3d 490

Fla—Fisherman's Paradise, Inc v Greenfield, App 3 Dist, 417 So 2d 306

Mo—Underwood v Crosby, 447 SW 2d 566

ND—Lumpkin v Strafil, 308 NW 2d 878

79. US—Hodge v US, D C Ga, 310 F Supp 1090, aff'd, C A, 424 F 2d 545

Ariz—Citizen's Utility, Inc v Livingston, 515 P 2d 345, 21 Ariz App 48

Ga—Dekle v Southern Bell Tel & Tel Co, supra, n 70

Minn—Daly v Bergstedt, 126 NW 2d 242, 267 Minn 244

80. US—Schmid v US, C A Ill, 273 F 2d 172—Panco v American Export Lines, Inc, D C NY, 213 F Supp 116—Schwartz v US, D C NY, 229 F Supp 485

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Ill—Kuhn v Goedeke, 167 NE 2d 805, 26 Ill App 2d 123—Kubenski v Noonan, 318 NE 2d 677, 23 Ill App 3d 237

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Mass—Doyle v La Croix, 146 NE 2d 506, 336 Mass 484

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Ohio—Schwarz v General Elec Realty Corp, 132 NE 2d 133, 99 Ohio App 191, aff'd 126 NE 2d 906, 163 Ohio St 354

Or—Macomber v Cox, 435 P 2d 462, 249 Or 61

RI—Vandal v Conrad Mfg Co, 138 A 2d 816, 87 RI 112

Tex—Moore v Texas Co, Civ App, 299 SW 2d 401, err ref no rev err

Rule not applicable to property damage

NY—Genovese Drug Stores, Inc v L A Wenger Contracting Co, Inc, 393 NYS 2d 42, 56 AD 2d 908

81. US—Ward v Atlantic Coast Line R Co, C A Fla, 265 F 2d 75, rev'd on oth grds 80 SC Ct 789, 362 US 396, 4 L Ed 2d 820

page 356

82. US—Transit Gas Co v Transamerica Ins Co, C A Mo, 387 F 2d 1011

La—Crutin v Frank, App, 146 So 2d 474

Mo—Johnson v Givens Real Estate, Inc, App, 612 SW 2d 797

Neb—Sullivan v Geo A Hornel and Co, 303 NW 2d 476, 208 Neb 262

88. NY—Campoli v Endicott Const Services, Inc, 251 NYS 2d 347, 21 AD 2d 947

90. Mass—Todd v Wernick, 138 NE 2d 124, 334 Mass 624

Mo—Martin v First Nat of Independence Co, 272 SW 2d 919—Horstman v Glatz, 436 SW 2d 639

93. D C—Lyon v Carey, C A, 533 F 2d 649, 174 US App DC 422

99. US—Kull v Mid-America Pipeline Co, C A Tex, 476 F 2d 271

Tex—Houston Pipe Line Co v Peddy, Civ App, 292 SW 2d 364, err ref no rev err

1. Pa—Tyler v MacFadden Newspapers Corporation, 163 A 79, 107 Pa Super 166

2. Ariz—Hovatter v Shell Oil Co, 529 P 2d 224, 111 Ariz 325

Fla—Drum v Pure Oil Co, App, 184 So 2d 196

NY—Gelman v Ford Motor Co, 288 NYS 2d 11, 56 Misc 2d 209

4. US—Lassiter v US Lines, Inc, D C Va, 370 F Supp 427

5. Pa—Potanko v Sears, Roebuck & Co, 84 A 2d 522, 368 Pa 582

Tex—Evans v Bryant, Civ App, 29 SW 2d 484, err ref

7. Cal—Loughan v Harger-Haldeman, 7 Cal Rptr 581, 184 CA 2d 495

Hawai—Fraser v Morrison, 39 Haw 370

In some jurisdictions a statutory liability is imposed in specified cases on the employer of a contractor for negligence of the contractor or his employees⁹⁵

95. Cal—Williams v Pacific Gas & Elec Co, 5 Cal Rptr 585, 181 CA 2d 691

Ga—Peabody Mfg Co v Smith, 94 SE 2d 156, 94 Ga App 240

Under Structural Work Act

Ill—Quisco v Union Oil Co of California, 374 NE 2d 219, 15 Ill Dec 784, 58 Ill App 3d 87

The rule that an employer is not liable for the negligence of an independent contractor is subject to numerous

exceptions⁹¹⁰ The mere employment of an independent contractor may not relieve the employer of liability for damage done by the contractor⁹¹⁵

9.10 Cal—Courtell v McEachen, 334 P 2d 870, 51 C 2d 448—Van Arsdale v Hollinger, 66 Cal Rptr 20, 437 P 2d 508

Fla—Ross v Hettner, App, 156 So 2d 869

Ga—Harrison & Ellis, Inc v Nashville Milling Co, Inc, 275 SE 2d 374, 156 Ga App 697

Mich—Nash v Sears, Roebuck & Co, 163 NW 2d 471, 12 Mich App 553, rev'd on oth grds 174 NW 2d 818, 383 Mich 136

ND—Foremost Ins Co v Rollohome Corp, 221 NW 2d 722

Nonexclusion of statutory exceptions

Ga—Peachtree-Cann Co v McBea, 327 SE 2d 188, 254 Ga 91 disapproving any statements to the contrary in Robbins Home Improvement Co v Guthrie, 213 Ga 138, and Dekle v Southern Bell Telephone & Telegraph Co, 208 Ga 254

Contractee not relinquishing control of place or structure

Wis—Lofy v Joint School Dist No 2, City of Cumberland, 166 NW 2d 809, 42 Wis 2d 253

N M—Snyder v Pecos Const Co, 378 P 2d 364, 71 NM 320

W Va—Chenoweth v Settle Engineers, Inc, 156 SE 2d 297, 151 W Va 830

9.15. Cal—Castro v State, 170 Cal Rptr 734, 114 CA 3d 503

Md—Samson Const Co v Brusowankin, 147 A 2d 430, 218 Md 438, 69 A L R 2d 1326—Associates Discount Corp v Hillary, 278 A 2d 592, 262 Md 570

§ 586. — Negligence of Contractor

Library References

Master and Servant — 815

page 357

10. US—Bituminous Cas Corp v Hedinger, C A Ind, 407 F 2d 655—Dunn v Brown & Root, Inc, C A Ark, 453 F 2d 717

Ala—Williams v Wise, 51 So 2d 1, 255 Ala 322

Ark—Jackson v Petit Jean Elec Co-op, App, 599 SW 2d 402, 268 Ark 1076, aff'd, 606 SW 2d 66, 270 Ark 506

Cal—Silsen v Moulton-Niguel Water Dist, 98 Cal Rptr 914, 21 CA 3d 928

Fla—City of Mount Dora v Voorhees, App, 115 So 2d 586

Ga—CJS cited in US v Aretz, 280 SE 2d 345, 349, 248 Ga 19

Ill—Hamilton v Family Record Plan, Inc, 217 NE 2d 113, 71 Ill App 2d 39

Ind—Hale v Peabody Coal Co, 343 NE 2d 316, 168 Ind App 336

La—De Cuers v Crane Co, App, 40 So 2d 61

Mass—Ingalls Shipbuilding Corp v McDougald, 228 So 2d 365—Mississippi Power Co v Brooks, 309 So 2d 863

ND—Foremost Ins Co v Rollohome Corp, 221 NW 2d 722

Or—Gordon Creek Tree Farms, Inc, v Layne, 368 P 2d 737, 230 Or 204

Tenn—Dill v Gamble Asphalt Materials, App, 594 SW 2d 719

12. US—Sun Oil Co v Kneten, CCA Tex, 164 F 2d 806

Cal—Barrabee v Crescenta Mut Water Co, 198 P 2d 558, 88 Cal App 2d 192

Pa—Pohnelt v Union Supply Co, 170 A 2d 351, 403 Pa 547

Wis—US Fidelity & Guaranty Co v Frant Industries, Inc, 241 NW 2d 421, 72 Wis 2d 478.

§ 587. — Injury Necessarily Resulting from Work

13. *U.S.—Costello v Smith*, C.A. Conn., 179 F.2d 715, 16 A.L.R.2d 954—*Brown v Commerce Trust Co.*, D.C. Mo., 9 F.R.D. 317—*American Gas Co. v Harrison*, D.C. Ark., 96 F.Supp. 537—*Fitzgerald v Conklin Limestone Co.*, D.C. R.I., 131 F.Supp. 532, stating Massachusetts rule—*Rayonier, Inc. v Bryan*, C.A. Fla., 249 F.2d 405—*South Carolina Natural Gas Co. v Phillips*, C.A.S.C., 289 F.2d 143—*Kuhne v U.S.*, D.C. Tenn., 267 F.Supp. 649—*C.J.S.*, cited in *Blake Const. Co., Inc. v United States*, 585 F.2d 998, 1008, 218 Ct Cl 163
- Ala.—Barber Pure Milk Co. v Young*, 81 So.2d 324, 38 Ala.App. 13, aff'd 81 So.2d 328, 263 Ala. 100
- Ariz.—Crosby v Wilbur-Ellis Co.*, 272 P.2d 352, 77 Ariz. 359—*Hovatter v Shell Oil Co.*, 529 P.2d 224, 111 Ariz. 325
- Ark.—Jackson v Petit Jean Elec. Co-op.*, App., 599 S.W.2d 402, 268 Ark. 1076, aff'd, 606 S.W.2d 66, 270 Ark. 306
- Cal.—Cove v Lobue*, 33 Cal.Rptr. 828, 220 C.A.2d 218
- Colo.—Sumpton v Digallionardo*, 488 P.2d 208, 29 Colo.App. 556
- Conn.—Taylor v Conti*, 177 A.2d 670, 149 Conn. 174
- D.C.—Lindler v District of Columbia*, C.A., 502 F.2d 493, 164 U.S.App.D.C. 35
- Fla.—Maule Industries, Inc. v Messina*, 62 So.2d 737—*National Rating Bureau, Inc. v Florida Power Corp.*, 94 So.2d 809, 64 A.L.R.2d 859—*Fisherman's Paradise, Inc. v Greenfield*, App. 3 Dist., 417 So.2d 306
- Ga.—Dekle v Southern Bell Tel. & Tel. Co.*, 66 S.E.2d 218, 208 Ga. 254—*Ellenberg v Pinkerton's, Inc.*, 188 S.E.2d 911, 125 Ga.App. 648, app. after remand 202 S.E.2d 701, 130 Ga.App. 254
- Ill.—American Tel. & Tel. Co. v Leveque*, 173 N.E.2d 737, 30 Ill.App. 120—*Leatherman v Schueler Bros., Inc.*, 189 N.E.2d 10, 40 Ill.App.2d 56
- Ind.—Smith v P. & B. Corp.*, 386 N.E.2d 1232, 179 Ind.App. 693
- Kan.—Mall v C. & W. Rural Elec. Co-op. Ass'n*, 213 P.2d 993, 168 Kan. 518
- Ky.—Casskey v Hammonds Const., Inc.*, 536 S.W.2d 449
- Mich.—Howard v Park*, 195 N.W.2d 39, 37 Mich.App. 496—*Funk v General Motors Corp.*, 220 N.W.2d 641, 392 Mich. 91
- N.J.—Levine v Bocharo*, 59 A.2d 224, 137 N.J. Law 215
- N.Y.—Kingsland v Erie County Agr. Soc.*, 84 N.E.2d 38, 298 N.Y. 409, 10 A.L.R.2d 1
- N.D.—Forrestum Ins. Co. v Rollhome Corp.*, 221 N.W.2d 722
- Ohio.—Mercer v Ohio Fuel Gas Co.*, Com. Pl., 80 N.E.2d 635, aff'd 79 N.E.2d 685—*Mercer v Ohio Fuel Gas Co.*, 80 N.E.2d 441—*Stites v Atlas Powder Co.*, 133 N.E.2d 671
- Or.—Gordon Creek Tree Farms, Inc. v Layne*, 368 P.2d 737, 230 Or. 204
- Pa.—Zobler v Gmder*, 56 Lane Rev. 529—*McDonough v U.S. Steel Corp.*, 324 A.2d 542, 228 Pa.Super 268
- Tex.—Olson v B. W. Merchandise, Inc.*, App., 388 S.W.2d 737—*Grays v Allen*, Civ.App., 481 S.W.2d 452, err. den.—*Sun Pipe Line Co., Inc. v Kirkpatrick*, Civ.App., 514 S.W.2d 789, err. ref. no rev. err.—*Gesnel v Traweek*, App. 6 Dist., 628 S.W.2d 479, err. ref. no rev. err.
- Va.—Smith v Grenadier*, 127 S.E.2d 107, 203 Va. 740
- W.Va.—C.J.S.*, cited in *Law v Phillips*, 68 S.E.2d 452, 459 136 W.Va. 761, 33 A.L.R.2d 95—*Chenoweth v Settle Engineers, Inc.*, 156 S.E.2d 297, 151 W.Va. 830
- Wis.—Paulson v Madison Newspapers, Inc.*, 80 N.W.2d 421, 274 Wis. 355
- Work necessarily operating to injure or destroy property of third persons**
- D.C.—Washington Metropolitan Area Transit Authority v L'Enfant Plaza Properties, Inc.*, App., 448 A.2d 864

Determination of inherent danger

- U.S.—Wilson v Nooter Corp.*, C.A.N.H., 499 F.2d 705
- Colo.—Western Stock Center, Inc. v Sevit, Inc.*, 578 P.2d 1045, 195 Colo. 372

Duty to warn

- Fla.—McCarty v Dade Division of American Hospital Supply*, App., 360 So.2d 436

"Peculiar risk" doctrine applied

- Cal.—White v Unroyal, Inc.*, 202 Cal.Rptr. 141, 155 C.A.3d 1

14. *U.S.—South Carolina Natural Gas Co. v Phillips*, C.A.S.C., 289 F.2d 143—*Anderson v U.S.*, D.C. Pa., 259 F.Supp. 148

- Cal.—Loughan v Harger-Haldeman*, 7 Cal.Rptr. 581, 184 C.A.2d 495

- Fla.—National Rating Bureau, Inc. v Florida Power Corp.*, 94 So.2d 809, 64 A.L.R.2d 859

- N.Y.—Gerrimg v Gerber*, 219 N.Y.S.2d 558, 28 Misc.2d 271

- Tenn.—First Am. Nat. Bank v Tennessee Gas Transmission Co.*, 428 S.W.2d 35, 58 Tenn.App. 189

15. *U.S.—Fitzgerald v Conklin Limestone Co.*, D.C. R.I., 131 F.Supp. 532, stating Massachusetts rule—*Grogan v U.S.*, D.C. Ky., 225 F.Supp. 821, aff'd, C.A., 341 F.2d 39—*Courtney v Island Creek Coal Co.*, C.A. Ky., 474 F.2d 468

- Ga.—Dekle v Southern Bell Tel. & Tel. Co.*, supra, n 13

- Iowa.—C.J.S.* cited in *Shannon v Missouri Val. Limestone Co.*, 122 N.W.2d 278, 281, 255 Iowa 528

- Mass.—Todd v Wernick*, 138 N.E.2d 124, 334 Mass. 624

- Mich.—Bleeds v Hickman-Williams & Co.*, 205 N.W.2d 85, 44 Mich.App. 29

- N.J.—Levine v Bocharo*, 52 A.2d 528, 135 N.J. Law 423, aff'd 59 A.2d 224, 137 N.J. Law 215—*Majestic Realty Associates, Inc. v Toti Contracting Co.*, 153 A.2d 321, 30 N.J. 425—*Casanko v Robit, Inc.*, 226 A.2d 43, 93 N.J. Super 428

- N.Y.—Bologna v Battisto*, 235 N.Y.S.2d 819, 36 Misc.2d 297

- Va.—Smith v Grenadier*, 127 S.E.2d 107, 203 Va. 740—*Norfolk & W. Ry. Co. v Johnson*, 154 S.E.2d 134, 207 Va. 980, cert. den. 88 S.Ct. 498, 389 U.S. 995, 19 L.Ed.2d 491

page 358

16. *U.S.—C.J.S.* cited in *Olson v Kistofte & Vosepka, Inc.*, D.C. Minn., 327 F.Supp. 583, 587—*Poster v National Starch & Chemical Co.*, C.A. Ill., 300 F.2d 81—*Hixon v Sherwin-Williams Co.*, C.A. Ind., 671 F.2d 1005

- Alaska.—Morris v City of Soldotna*, 553 P.2d 474
- Cal.—Campbell v Security Pac. Nat. Bank*, 133 Cal.Rptr. 77, 62 C.A.3d 379

- Fla.—Patrick v Farcloth Bank Co.*, App., 185 So.2d 522, cert. discharged, Sup., 198 So.2d 825—*Maule Industries, Inc. v Watson*, App., 201 So.2d 631

- Ind.—Jones v Indianapolis Power & Light Co.*, 304 N.E.2d 337, 158 Ind.App. 676

- Iowa.—Thruher v Gerken*, 309 N.W.2d 488
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- W.Va.—Tice v E. I. Du Pont De Nemours & Co.*, 106 S.E.2d 107, 144 W.Va. 24

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- Ga.—City of Cordele v Turton's, Inc.*, 293 S.E.2d 560, 163 Ga.App. 327

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17. *U.S.—South Carolina Natural Gas Co. v Phillips*, C.A.S.C., 289 F.2d 143

- N.Y.—Semon v Chasol Const. Corp.*, 184 N.Y.S.2d 193, 7 A.D.2d 1009

Contractor possessing sewer easement

- Ga.—Fields v B. & B. Pipeline Co., Inc.*, 250 S.E.2d 582, 147 Ga.App. 875

18. *Ark.—Jackson v Pettit Jean Elec. Co-op.*, 606 S.W.2d 66, 270 Ark. 506

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- Md.—Cutlip v Luckey Stores, Inc.*, 325 A.2d 432, 22 Md.App. 673

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- N.J.—Levine v Bocharo*, supra, n 15

Inherent hazard

- Ohio.—St. Julian v Owens-Illinois, Inc.*, 394 N.E.2d 359, 59 Ohio Misc. 66

§ 588. — Injuries Caused by Unlawful Work

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Page 358

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Necessity for employment of architect

Mass—Whitely v Delta Brokerage & Warehouse Co 159 So 2d 634, 248 Mass 416

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page 359

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§ 590. — Work Dangerous unless Precautions Observed

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Readily foreseeable inherent danger

Fla—McCarty v Dade Division of American Hospital Supply, App, 360 So 2d 436

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Imputation of contractor's negligence to employer

(1) Mich—Mulcahy v Argo Steel Const Co, 144 N W 2d 614, 4 Mich App 116

(3) Other statements

Ariz—Bible v First Nat Bank of Rawlins, 515 P 2d 351, 21 Ariz App 54

Matters not affecting exception

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Rule does not obtain in Pennsylvania

Pa—Miller v George C Heagy, Inc, 12 Cumb 95

Liable to employees of independent contractor

Cal—Gettemy v Star House Movers, Inc, App, 37 Cal Rptr 441, 225 CA 2d 636

NY—Sarnoff v Charles Schad, Inc, 269 N Y S 2d 22, 49 Misc 2d 1059

Exception not applicable

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"Peculiar risk doctrine"

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page 360

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Duty of owner and contractor

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Doctrine not applicable to independent contractors and their employees

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Ind—Jones v Indianapolis Power & Light Co, 304 N.E. 2d 337, 158 Ind App 676

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40. N.D.—Peterson v City of Golden Valley, N.D., 308 N.W. 2d 550

Work likely to cause danger

Wa—Mueller v Luther, 142 N.W. 2d 848, 31 Wa 2d 220

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Window washing

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page 361

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Cal—Anderson v Chancellor Western Oil Development Corp., 125 Cal Rptr 640, 53 C.A. 3d 235

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 Ind—Hale v Peabody Coal Co, 343 N.E. 2d 316, 168 Ind App 336

Ky—Simmons v Clark Const Co, 426 S.W. 2d 930
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Mich—Funk v General Motors Corp., 220 N.W. 2d 641, 392 Mich 91

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Casual or collateral negligence

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N.Y.—Tilkina v City of Niagara Falls, 383 N.Y.S. 2d 758, 52 A.D. 2d 306

Rule dependent on control of property

U.S.—South Carolina Natural Gas Co v Phillips, C.A. S.C., 289 F 2d 143

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Wash—Golding v United Homes Corp., 495 P 2d 1040, 6 Wash App 707

page 362

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Page 362

Stringing high tension wires

US—Person v Cauldwell-Wingate Co, supra n 31

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page 363

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Iowa—Lunde v Winnebago Industries, Inc, 299 N W 2d 473

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Ark—Ghem v Williams, 222 S W 2d 800, 215 Ark 705
Cal—Anderson v Chancellor Western Oil Development Corp, 125 Cal Rptr 640, 53 C A 3d 235

Knowledge of contractee as to extrahazardous nature

Cal—Wilson v Rancho Sespe, 24 Cal Rptr 296, 207 C A 2d 10

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page 364

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page 365

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§ 591. —Nondelegable Duties of Contractee

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page 367

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page 368

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page 369

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Page 369

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page 370

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§ 594. — Ratification of Contractor's Acts

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Acceptance as not relieving contractor from liability

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Possession of land resumed

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§ 596. — Failure to Remedy Nuisance

page 371

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§ 597. — Joint Wrongful Act of Contractor and Contractee

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page 372

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page 373

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Page 373

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Master and Servant ¶818

page 374

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§ 603. — Safety of Place to Work

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page 375

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Page 375

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page 376

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§ 604. — Safety of Appliances for Work

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Contributory negligence no defense

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Purpose of statute as imposing liability on person in charge of work rather than on owner

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page 377

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§ 606. — Materials Furnished by Contractee

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§ 606. — Latent or Potential Dangers; Warnings and Instructions

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Master and Servant ¶322

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page 378

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85. US—Littion v Travelers Ins Co, General Acc Fire & Life Assur Corp, Intervenor, supra, n 84—Gulf Oil Corp v Bivins, C A Tex, 276 F 2d 753, cert den 81 S Ct 70, 364 US 835, 5 L Ed 2d 61, reh den 81 S Ct 231, 364 US 906, 5 L Ed 2d 199—CJS cited in *Carey v U S, DC NC*, 183 F Supp 727, 728—Wiseman v U S, C A Pa, 327 F 2d 701—Scott Paper Co v Cooper, C A Ala, 403 F 2d 526

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Pa—Mathis v Lukens Steel Co, 203 A 2d 482, 415 Pa 262—McDonough v U S Steel Corp, 324 A 2d 542, 228 Pa Super 268

Wash—Epperly v City of Seattle, 399 P 2d 591, 65 Wash 2d 777

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86. Ala—US Cast Iron Pipe & Foundry Co v Fuller, 102 So 25, 212 Ala 177

Ariz—Citizen's Utility, Inc v Livingston, 515 P 2d 345, 21 Ariz App 48

87. US—Union Tank & Supply Co v Kelley, supra, n 43—Brown v U S, DCNM, 122 F Supp

166—Gulf Oil Corp v Bivins, C A Tex, 276 F 2d 753, cert den 81 S Ct 70, 364 US 835, 5 L Ed 2d 61, reh den 81 S Ct 231, 364 US 906, 5 L Ed 2d 199—Texaco, Inc v Roscoe, C A Tex, 290 F 2d 389—Hite v Maritime Overseas Corp, DCTex, 380 F Supp 222

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Danger created by employees of contractor

(1) NY—Paul v Staten Island Edison Corp, 155 NYS 2d 427, 2 AD 2d 311

(3) Other statements

Ill—Rodgers v Meyers & Smith, Inc, 206 NE 2d 845, 57 Ill App 2d 200

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88. US—Gulf Oil Corp v Bivins, C A Tex, 276 F 2d 753, cert den 81 S Ct 70, 364 US 835, 5 L Ed 2d 61, reh den 81 S Ct 231, 364 US 906, 5 L Ed 2d 199

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Pa—McDonough v U S Steel Corp, 324 A 2d 542, 228 Pa Super 268

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(2) Other cases

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Page 378

90. Ind—Hoosier Cardinal Corp v Brzius, 199 N E 2d 481, 136 Ind App 363
- Mass—Favereau v Gabele, 159 N E 738, 262 Mass 118
- Mich—Funk v General Motors Corp, 220 N W 2d 641, 392 Mich 91
- NY—Senkbeil v Board of Ed of City of New York, 256 N Y S 2d 831, 23 A D 2d 587, affd 221 N E 2d 813, 18 N Y 2d 789, 275 N Y S 2d 273
91. US—Sun Oil Co v Kneten, supra, n 1—Orogan v US, C A Ky, 341 F 2d 39
- Cal—Dobbs v Pacific Gas & Electric Co, supra, n 84
- Nev—Peck v Woomack, supra, n 1
- Ohio—King v Morrison Motor Freight Lines, 171 N E 2d 173, 111 Ohio App 172
92. US—Lipka v US, D C N Y, 249 F Supp 213, affd, C A, 369 F 2d 288, cert den 87 S Ct 2061, 387 US 935, 18 L Ed 2d 997, reh den 87 S Ct 2129, 388 US 925, 18 L Ed 2d 1381
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- Cal—Morehouse v Taubman Co, 85 Cal Rptr 308, 5 C A 3d 548
- Ohio—Wellman v East Ohio Gas Co, 113 N E 2d 629, 160 Ohio St 103
- Tex—H M R Const Co v Wolco of Houston, Inc, Civ App, 422 S W 2d 214, err ref no rev err—Humphreys v Texas Power & Light Co, Civ App, 427 S W 2d 324, err ref no rev err
93. US—Union Tank & Supply Co v Kelley, C C A Tex, 167 F 2d 811, cert den 69 S Ct 54, 335 US 827, 93 L Ed 381, reh den 69 S Ct 232, 335 US 888, 93 L Ed 427—Barrett v Foster Grant Co, C A N H, 450 F 2d 1146
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page 379

94. Mass—Engel v Boston Ice Co, 4 N E 2d 455, 295 Mass 428
- Wis—US Fidelity & Guaranty Co v Franti Industries, Inc, 241 N W 2d 421, 72 Wis 2d 478

§ 607. Liability of Contractee for Injuries to Contractor

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Master and Servant ⇐315

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99. US—Brooks v US, C A N C, 194 F 2d 185
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- Mass—Campbell v Rockland Trust Co, 42 N E 2d 586, 311 Mass 663
- NY—Baum v Rowland, 120 N Y S 2d 620, 281 App Div 964
- Tex—J A Robinson Sons, Inc v Elha, Civ App, 412 S W 2d 728, err ref no rev err
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5. Ala—Pate v US Steel Corp, 393 So 2d 992
- Assumption of risk doctrine applicable
- 4 Y—Baum v Rowland, 120 N Y S 2d 620, 281 App Div 964
7. NJ—Beck v Monmouth Lumber Co, 59 A 2d 400, 137 N J L 268

- Or—Helzer v Wax, 272 P 556, 127 Or 427
- Assumption of risk doctrine inapplicable
- Tex—Bridwell v Bernard, Civ App, 159 S W 2d 981, err ref
- Duty to warn of dangers not reasonably discoverable by contractor
- Md—Bauman v Woodfield, 223 A 2d 364, 244 Md 207
8. NY—Downey v Austin Co, 149 N Y S 2d 844
- 9 Ky—Owens v Clary, 75 S W 2d 536, 256 Ky 44
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10. Mass—Campbell v Rockland Trust Co, 42 N E 2d 586, 311 Mass 663
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§ 608. Liability of Contractors

13. NY—Crag Erectors, Inc v PPG Industries, Inc, 378 N Y S 2d 174, 51 A D 2d 667

§ 609. — For Acts or Omissions of Subcontractors

page 380

16. US—American Cas Co v Harrison, D C Ark, 96 F Supp 537—C.J.S. quoted at length in Town of Freedom, Okl v Moskogue Bridge Co, Inc, D C Okl, 466 F Supp 75, 79
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- La—Trapani v Jefferson Parish, App, 180 So 2d 850
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- Injury arising from collateral act of subcontractor
- Va—Smith v Grenadier, 127 S E 2d 107, 203 Va 740
- 18 US—Ramsey v Georgia-Pac Corp, D C Miss, 511 F Supp 393, affd 671 F 2d 1376
- Ark—Gordon v Matson, 439 S W 2d 627, 246 Ark 533
- Ga—Peabody Mfg Co v Smith, 94 S E 2d 156, 94 Ga App 240
- Mass—Barrett v Building Patent Scaffolding Co, 40 N E 2d 6, 311 Mass 41
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- Cal—Holaday v Miles, Inc, 72 Cal Rptr 96, 266 C A 2d 396
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- Liability not imposed
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- Owner's right to recover not waived by delay
- Wash—White Pass Co v St John, 427 P 2d 398, 71 Wash 2d 156
- page 381
21. Furnishing defective plans the performance of which caused injury—Gardner v Stonestown Corp, 302 P 2d 674, 145 C A 2d 405
- 22 NY—Lipman v Well-Mix Concrete, 138 N Y S 2d 316
23. Cal—West v Guy F Atkinson Const Co, 59 Cal Rptr 286, 251 C A 2d 296—Caswell v Lynch, 99 Cal Rptr 880, 23 C A 3d 87
- Pa—Philadelphia Elec Co v James, Julian, Inc, 228 A 2d 669, 425 Pa 217
- 24 US—Pastorelli v Associated Engineers, Inc, D C R I, 176 F Supp 159
- Mich—Mulcahy v Argo Steel Const Co, 144 N W 2d 614, 4 Mich App 116
25. Ariz—Fluor Corp v Sykes, 413 P 2d 270, 3 Ariz App 211, reh den 416 P 2d 610, 3 Ariz App 559
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- Or—Waterway Terminals Co v P S Lord Mechanical Contractors, 406 P 2d 556, 242 Or 1, 13 A L R 3d 1

Realization of unlawful and dangerous manner of doing work

US—South Carolina Natural Gas Co v Philips, CA S.C., 289 F 2d 143
 Cal—Gardner v Stonetown Corp., 302 P 2d 674, 145 CA 2d 405

Contractor having general supervision and control over work

US—Pastorelli v Associated Engineers, Inc., D C R I., 176 F Supp 159

27. US—Mooney v Stainless, Inc., CA Tenn., 338 F 2d 127, cert den 85 S Ct 1561, 381 US 925, 14 L Ed 2d 684

Mont—Bridges v Moritz, 425 P 2d 721, 149 Mont 273

28. US—Person v Cauldwell-Wingate Co., CA N.Y., 176 F 2d 237, cert den 70 S Ct 189, 338 US 886, 94 L Ed 544

Ariz—Floor Corp v Sykes, 413 P 2d 270, 3 Ariz App 211, reh den 416 P 2d 610, 3 Ariz App 539

Opportunity to prevent work being done in dangerous way

Cal—Morehouse v Taubman Co., 85 Cal Rptr 308, 5 CA 3d 548

29. NY—De Luca v Fehlhaber Corp., 237 NYS 2d 852, 38 Misc 2d 184—Conway v Marsh & McLennan, Inc., 310 NYS 2d 455, 34 AD 2d 762

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30. NJ—Doloughy v Blanchard Const Co., 352 A 2d 613, 139 NJ Super 110

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§ 610. — For Injuries to Each Other's Servants**page 382**

31. US—Turner v West Tex Utilities Co., 290 F 2d 191, cert den 82 S Ct 242, 368 US 920, 7 L Ed 2d 136

Alaska—Sloan v Atlantic Richfield Co., 552 P 2d 157
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32. US—Turner v West Tex Utilities Co., 290 F 2d 191, cert den 82 S Ct 242, 368 US 920, 7 L Ed 2d 136

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33. US—Turner v West Tex Utilities Co., 290 F 2d 191, cert den 82 S Ct 242, 368 US 920, 7 L Ed 2d 136

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 Cal—Perry v D J & T Sullivan, Inc., 26 P 2d 485, 219 Cal 384—Beacht v Marsh Bros & Gardener, 4 P 2d 585, 118 Cal App 63—Bleser v Thomas Haverly Co., 38 P 2d 873, 3 Cal App 2d 199—Hayden v Paramount Productions, 91 P 2d 231, 33 Cal App 2d 287—Boucher v American Bridge Co., 213 P 2d 537, 95 Cal App 2d 659—Johnson v Nicholson, 324 P 2d 307, 159 CA 2d 395

34. US—Turner v West Tex Utilities Co., 290 F 2d 191, cert den 82 S Ct 242, 368 US 920, 7 L Ed 2d 136

Alaska—Sloan v Atlantic Richfield Co., 552 P 2d 157
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35. US—Turner v West Tex Utilities Co., 290 F 2d 191, cert den 82 S Ct 242, 368 US 920, 7 L Ed 2d 136

Alaska—Sloan v Atlantic Richfield Co., 552 P 2d 157
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36. US—Turner v West Tex Utilities Co., 290 F 2d 191, cert den 82 S Ct 242, 368 US 920, 7 L Ed 2d 136

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37. US—Turner v West Tex Utilities Co., 290 F 2d 191, cert den 82 S Ct 242, 368 US 920, 7 L Ed 2d 136

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38. US—Turner v West Tex Utilities Co., 290 F 2d 191, cert den 82 S Ct 242, 368 US 920, 7 L Ed 2d 136

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39. US—Turner v West Tex Utilities Co., 290 F 2d 191, cert den 82 S Ct 242, 368 US 920, 7 L Ed 2d 136

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NY—Duggan v National Constructors & Engineers, 228 NYS 126, 223 App Div 163—Skibucki v Diesel Const Co., 290 NYS 2d 83, 56 Misc 2d 955, affd 290 NYS 2d 860, 29 AD 2d 1050

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Pa—McDonald v Ferree, 46 Schuyll Leg Reg 169, affd 79 A 2d 232, 366 Pa 543

Assumption of risk doctrine inapplicable

NH—Buttler v King, 106 A 2d 385, 99 NH 150

Tex—Fabens Ice Co v Koninski, Civ App., 339 S W 2d 546, err ref no rev err

Held general contractor

NY—Avesato v Paul Tushman Co., 142 NYS 2d 760

Held not contributory negligence

Cal—Baker v John W Stang Corp., 8 Cal Rptr 673, 186 CA 2d 173

Res ipsa loquitor doctrine inapplicable

NC—Johnson v Guy Frye & Sons, Inc., 116 SE 2d 713, 253 NC 274

33. Cal—Scott v George A Fuller Co., 107 P 2d 55, 41 Cal App 2d 501—West v Guy F Atkinson Const Co., 59 Cal Rptr 286, 251 CA 2d 296

NY—Skibucki v Diesel Const Co., 290 NYS 2d 83, 56 Misc 2d 955, affd 290 NYS 2d 860, 29 AD 2d 1050

Assumption of risk doctrine applicable

US—Sun Oil Co v Pierce, CA Tex., 224 F 2d 580

35. Alaska—Sloan v Atlantic Richfield Co., 552 P 2d 157

Ariz—Chesn Const Co v Epstein, 446 P 2d 11, 8 Ariz App 312

Cal—West v Guy F Atkinson Const Co., 59 Cal Rptr 286, 251 CA 2d 296

NY—Adamo v George A Fuller Co., 263 NYS 2d 642, 47 Misc 2d 1036

No liability under statute as one employing or directing

NY—Deso v Albany Ladder Co., 271 NYS 2d 823, 26 AD 2d 182

36. Alaska—Sloan v Atlantic Richfield Co., 552 P 2d 157

Ariz—Chesn Const Co v Epstein, 446 P 2d 11, 8 Ariz App 312

NY—Ehrlich v CBS Columbia, Inc., 183 NYS 2d 671, 16 Misc 2d 793, affd 195 NYS 2d 822, 9 AD 2d 943, affd 209 NYS 2d 789, 8 NY 2d 1113, 171 NE 2d 876

Provision of contract between state and contractor held not to create liability

Cal—West v Guy F Atkinson Const Co., 59 Cal Rptr 286, 251 CA 2d 296

37. Liability under Structural Work Act

III—Pantaleo v Gamm, 245 NE 2d 618, 106 Ill App 2d 116

38. Ala—Knight v Burns, Kirkley & Williams Const Co., Inc., 331 So 2d 651

Cal—Western Contracting Corp v Southwest Steel Rolling Mills, Inc., 129 Cal Rptr 782, 58 CA 3d 532

While it has been held that the common-law rule exempting a contractee

was not effected by the enactment of a safety code,³⁸ it has also been held that a general contractor could be held for injuries suffered by the employee of a subcontractor under such a safety code^{38 10}

38.5 Ind—Hale v Peabody Coal Co., 343 NE 2d 316, 168 Ind App 336

38.10 US—Katapodis v Koppers Co., Inc., CA 7 (Ind.), 770 F 2d 655, disagreeing with Hale v Peabody Coal Co., 168 Ind App 336, 343 NE 2d 316

41. Ark—Gordon v Matson, 439 S W 2d 627, 246 Ark 533

Cal—Scott v George A Fuller Co., 107 P 2d 55, 41 Cal App 2d 501

Voluntary exposure to risk and contributory negligence

US—Sun Oil Co v Pierce, CA Tex., 224 F 2d 580

In the absence of control over the job location or direction of the manner in which delegated tasks are carried out, the general contractor is not liable for injuries to employees of a subcontractor resulting from condition of premises or manner in which the work is done⁴¹ Nor is the immunity of the general contractor disturbed by the exercise of merely such general superintendence as is necessary to insure that the subcontractor performs his contract^{41 10}

41.5 NJ—Wolczak v National Elec Products Corp., 168 A 2d 412, 66 NJ Super 64

41.10 NJ—Wolczak v National Elec Products Corp., 168 A 2d 412, 66 NJ Super 64

42. Ind—Hale v Peabody Coal Co., 343 NE 2d 316, 168 Ind App 336

NY—Employers Mut Liability Ins Co of Wa v Dr Cesare & Monaco Concrete Const Corp., 194 NY S 2d 103, 9 AD 2d 379

page 383

45. Del—Vadala v Anchor Hocking Corp., 346 A 2d 163

NY—Avesato v Paul Tushman Co., 142 NYS 2d 760—Schwartz v Paul Tushman Co., 147 NYS 2d 71—Cohen v Joann Const Co., 200 NYS 2d 88, 23 Misc 2d 298, affd 234 NYS 2d 147, 17 AD 2d 253, affd 196 NE 2d 736, 13 NY 2d 1161, 247 NYS 2d 387—Sarnoff v Charles Schad, Inc., 239 NE 2d 194, 22 NY 2d 180, 292 NYS 2d 93

Tex—Cantu v Walsh & Burney Co., Civ App., 390 S W 2d 21, err ref no rev err

46. Ohio—Comerford v Jones & Laughlin Steel Corp., 162 NE 2d 861, 170 Ohio St 117

47. US—Carroll v Lanza, supra, n 31, affd in part and revd in part on oth grds, CA, 216 F 2d 808, revd on oth grds 75 S Ct 804, 349 US 408, 99 L Ed 1183—Parsons v Blount Bros Const Co, CA Ohio, 281 F 2d 414—Tyler v Pool Corp., CA Ga., 371 F 2d 788

Cal—Johnson v Nicholson, 324 P 2d 307, 159 CA 2d 395—Gettemy v Star House Movers, Inc., 37 Cal Rptr 441, 225 CA 2d 636—Knight v Contracting Engineering Co., 15 Cal Rptr 194, 194 CA 2d 435—Revels v Southern Cal Edison Co., 248 P 2d 986, 113 CA 2d 673—Slovick v James I Barnes Const Co., 298 P 2d 923, 142 CA 2d 611—Cryle v Alland & Co., 323 P 2d 102, 138 CA 2d 664

Colo—J & K Const Co v Molton, 390 P 2d 68, 154 Colo 214

NY—Employers' Liability Assur Corp v Empire City Iron Works, Inc., 184 NYS 2d 728, 7 AD 2d 1012—Lipman v Well-Max Concrete, 138 NY S 2d 316

Page 383

Tex.—Smith v Henger, 226 S W 2d 425, 148 Tex 456, 20 A L R 2d 853—W R Grimshaw Co v Zoller, Civ App, 396 S W 2d 477, err ref no rev err

Employee of subcontractor of other general contractor

NY—Avesato v Paul Tishman Co, 142 NYS 2d 760—Sarnoff v Charles Schach, Inc, 239 NE 2d 194, 22 NY 2d 180, 292 NYS 2d 93

Not regular working day

NY—Avesato v Paul Tishman Co, 142 NYS 2d 760

Nondelegable duty

NY—Soderman v Stone Bar Associates, 146 NYS 2d 233, 208 Misc 864, affd 159 NYS 2d 50, 3 A D 2d 680, app den 160 NYS 2d 827, 3 A D 2d 755

No requirement beyond bounds of what is practical and reasonable

NY—O'Connell v Metropolitan Life Ins Co, 202 NYS 2d 509, affd 217 NYS 2d 341, 13 A D 2d 820, affd 180 NE 2d 260, 10 NY 2d 998, 224 NYS 2d 679

§ 611. Nature and Form

55. Ala.—C O Osborn Contracting Co v Alabama Gas Corp, 135 So 2d 166, 273 Ala 6

57. Pa.—Delehan v Westinghouse Elec, 112 P L J 114

page 384

Other matters relating to trespass as the nature and form of actions by third person have been adjudicated^{59,5}

59.5. Negligent act in presence of employer
Pa.—Ghezzi v Price, 26 D & C 2d 321, 33 Northumb LJ 203

§ 613. Parties

Library References

Master and Servant ⇐328

61. D C—Reaser v District of Columbia, C A, 563 F 2d 462, 183 US App DC 375, reh 580 F 2d 647, 188 US App DC 384

Ga.—Pembro v Sparks, 72 SE 2d 473, 86 Ga App 726

Iowa—C.J.S. cited in Wiedenfeld v Chicago & NW Transp Co, 252 N W 2d 691, 695

NJ—McFadden v Turner, 388 A 2d 244, 159 NJ Super 360

N C—Adler v Curle, 119 SE 2d 393, 254 N C 502
Or.—Vendrell v School Dist No 26C Malheur County, 360 P 2d 282, 226 Or 263

Held proper party

Tex.—Robertson v Smith, Civ App, 282 S W 2d 99

62. Mass.—Kabatchnick v Hanover-Elm Bldg Corp, 119 NE 2d 169, 331 Mass 366

Ohio—Shaver v Shirts Motor Exp Corp, 127 NE 2d 353, 163 Ohio St 484

Pa.—McElhenry v Jatko, 24 Northumb Leg J 23

However, in an action by a servant against his fellow servant other persons have been held to be proper parties.^{62,5}

62.5. In action by farm laborer against foreman, farm owner, trustee and manager held proper parties
Tex.—O P Leonard Trust v Hare, Civ App, 305 S W 2d 833, err den

64. Cal—Johnson v A. Schilling & Co, 339 P 2d 139, 170 CA 2d 318

§ 614. Pleading

Library References

Master and Servant ⇐329

66. La—Little v Caterpillar Tractor Co, App, 169 So 2d 654—Leblanc v Roy Young, Inc, App, 308 So 2d 443, writ den, Sup, 313 So 2d 240

Pa.—Shippensburg Gas Co v Shippensburg Borough Authority, 7 Cumb 208

Allegations held sufficient

(1) Cal—Handley v Capital Co, 313 P 2d 918, 152 CA 2d 758

Colo—J & K Const Co v Molton, 390 P 2d 68, 154 Colo 214

Ga—Community Gas Co v Williams, 73 SE 2d 119, 87 Ga App 68—American Finance & Loan Corp v Coots, 125 SE 2d 689, 105 Ga App 849—Davemport v South Atlantic Gas Co, 126 SE 2d 480, 106 Ga App 45—Southern Airways Co v Sears, Roebuck & Co, 127 SE 2d 708, 106 Ga App 615—Georgia Elec Co v Smith, 134 SE 2d 840, 108 Ga App 851—Hunter v A-I Bonding Service, Inc, 164 SE 2d 246, 118 Ga App 498

Kan—Stricklin v Parsons Stockyard Co, 388 P 2d 824, 192 Kan 360

Ky—Bingham v Commercial Credit Corp, 330 S W 2d 427

Mass—Yazoo & MVR Co v Denton, 133 So 656, 160 Mass 850, affd 52 S Ct 141, 284 US 305, 76 L Ed 310

NY—Jordan v Levy, 225 NYS 2d 399, 16 A D 2d 64

Or—Jones v Howe-Thompson, Inc, 22 P 2d 502, 143 Or 337—Stubbs v Pancake Corner of Salem, Inc, 458 P 2d 676, 254 Or 220—Reneke v Baker, 474 P 2d 5, 256 Or 475

Pa—Schneer v Morand, 78 York 194

(2) Ga—Ledman v Calvert Iron Works, 89 SE 2d 832, 92 Ga App 733

Kan—Beggery v Walker, 397 P 2d 395, 194 Kan 61

(3) Ga—Georgia Indus Realty Co v Maddox, 86 SE 2d 628, 91 Ga App 565

Allegations held insufficient

(1) Ga—Dekle v Southern Bell Tel & Tel Co, 66 SE 2d 218, 208 Ga 254—Robbins Home Imp Co v Guthrie, 97 SE 2d 153, 213 Ga 138—Greenfield v Colonial Stores, Inc, 139 SE 2d 403, 110 Ga App 572—Brunswick Pulp & Paper Co v Dowling, 140 SE 2d 912, 111 Ga App 123

La—Dixon v Herrin Transp Co, App, 81 So 2d 159—Little v Caterpillar Tractor Co, App, 169 So 2d 654

Okla—Urabazo v Humpty Dumpty Supermarkets, App, 463 P 2d 352

Pa—Winters v Pennsylvania R Co, 155 A 486, 304 Pa 243

(2) U S—Joyce v Southern Bus Lines, C A Miss, 172 F 2d 432

Ga—Clark v Americus Hardware Co, 47 SE 2d 909, 77 Ga App 282

Idaho—Curtis v Siebrand Bros Circus & Carnival Co, 194 P 2d 281, 68 Idaho 285

N C—Hoppe v Deese, 61 SE 2d 903, 232 N C 698

R I—Labossiere v Sousa, 143 A 2d 285, 87 R I 450

page 385

67. Allegations held insufficient

La—Jolly v Travelers Ins Co, App, 161 So 2d 354

68. Ga—Southern Bell Tel & Tel Co v Dekle, 63 SE 2d 275, 83 Ga App 261, affd 66 SE 2d 218, 208 Ga 254

69. U S—Lasseigne v Nigerian Gulf Oil Co, D C Del, 397 F Supp 465

Ga—Rodgers v Styles, 110 SE 2d 582, 100 Ga App 124

70. U S—Reeves v American Brake Shoe Co, D C Mo, 74 F Supp 897

72. NY—Jacoby v Browning, 173 NYS 7, 105 Misc 312

74. Ga—Prince v Brickell, 75 SE 2d 288, 87 Ga App 697

La—Little v Caterpillar Tractor Co, App, 169 So 2d 654

Allegations held sufficient

(2) Other allegations

U S—Bass v Halliburton Oil Well Cementing Co, D C Okl, 131 F Supp 680

Ohio—King v Magaw, 150 NE 2d 91, 104 Ohio App 469

Allegations held insufficient

(1) Easing v Naylon, 160 NYS 845, 96 Misc 565

page 386

75. Iowa—Thyssen v Davenport Ice & Cold Storage Co, 112 NW 177, 134 Iowa 749, 13 L R A, N S, 572

77. U S—Bass v Halliburton Oil Well Cementing Co, D C Okl, 131 F Supp 680

Complaint held insufficient for failure to allege duty owing

U S—Johnson v Weyerhaeuser Co, D C Or, 189 F Supp 735

79. Cal—Hartford Acc & Indem Co v Transport Indem Co, App, 51 Cal Rptr 168

Pa—Hagerty v U S Steel Corp and Union Supply Co, 22 Fay L J 85—Smith v Engineers Limited Pipeline Co, 10 Chest 369

82. U S—Landreth v Phillips Petroleum Co, D C Mo, 74 F Supp 801

Ala—Chambers v Cagle, 123 So 2d 12, 271 Ala 59

Cal—Alvarez v Felker Mfg Co, 41 Cal Rptr 514, 230 CA 2d 987

Ind—C.J.S. quoted in Ralph J Rimer, Inc v Stanz, 101 NE 2d 428, 432, 122 Ind App 178

Allegations held sufficient

Ga—Georgia Elec Co v Smith, 134 SE 2d 840, 108 Ga App 851

R I—Vandal v Contrad Mfg Co, 138 A 2d 816, 87 R I 112

Denial of amendment held not error

Ill—Melvin v Thompson, 188 NE 2d 497, 39 Ill App 2d 413

Allegations held insufficient

Ga—Georgia Elec Co v Smith, 134 SE 2d 840, 108 Ga App 851

83. Ala—Chambers v Cagle, 123 So 2d 12, 271 Ala 59

Cal—C.J.S. quoted in Golceff v Sugarman, 222 P 2d 665, 667, 36 Cal 2d 152—Alvarez v Felker Mfg Co, 41 Cal Rptr 514, 230 CA 2d 987

Ga—Stapleton v Stapleton, 70 SE 2d 156, 85 Ga App 728

84. Ala—Campbell v Jackson, 60 So 2d 252, 257 Ala 618—White Roofing Co v Wheeler, 106 So 2d 658, 39 Ala App 662, cert den 106 So 2d 665, 268 Ala 695—Chambers v Cagle, 123 So 2d 12, 271 Ala 59

Cal—Alvarez v Felker Mfg Co, 41 Cal Rptr 514, 230 CA 2d 987

page 387

86. Ala—Waters v Anthony, 40 So 2d 316, 252 Ala 244

Ga—Rivers v Mathews, 100 SE 2d 637, 96 Ga App 546

La—Moreau v Landry, App, 305 So 2d 671

Nev—Peck v Woomack, 192 P 2d 874, 65 Nev 184

Ohio—Young v Featherstone Motors, 124 NE 2d 158, 97 Ohio App 158

Tex—Anderson Furniture Co v Roden, Civ App, 255 S W 2d 345, err ref no rev err

Allegations held sufficient

(3) Other matter

Fla—Mallory v O'Neil, 69 So 2d 313

Ga—Pope v Seaboard Air Line R Co, 77 SE 2d 55, 88 Ga App 557

Ill—Irving v Rodriguez, 169 NE 2d 145, 27 Ill App 2d 75

NY—Poh v Clarkstown Tp, Rockland County, 300 NYS 2d 206, 59 Misc 780

Allegations held insufficient

Ga—Parry v Dawson-Paxon Co, 73 SE 2d 59, 87 Ga App 51—Brunswick Pulp & Paper Co v Dowling, 140 SE 2d 912, 111 Ga App 123

93 N.C.—Clemmons v Life Ins Co of Georgia, 163 S E 2d 761, 274 N C 416, App after remand 171 S E 2d 87, 6 N C App 708

95. Ga—Gilbert v Progressive Life Ins Co, 53 S E 2d 494, 79 Ga App 219—Colonial Stores v Sasser, 54 S E 2d 719, 79 Ga App 604—Fricks v Knox Corp, 65 S E 2d 423, 84 Ga App 5—Jones v Dixie Ohio Exp, Inc, 156 S E 2d 388, 115 Ga App 155

La—Little v Caterpillar Tractor Co, App, 169 So 2d 654

Ohio—King v Magaw, 150 N E 2d 91, 104 Ohio App 469

Allegations held insufficient

(2) Other cases

Fla—Mallory v O'Neil, supra, n 93

Ga—Bazemore v MacDougald Const Co, 68 S E 2d 163, 85 Ga App 163—Perry v Davison-Paxon Co, supra, n 93—Pope v Seaboard Air Line R Co, 77 S E 2d 55, 88 Ga App 557—Rivers v Mathews, 100 S E 2d 637, 96 Ga App 546—Nechman v Wellington Plaza, Inc, 102 S E 2d 57, 97 Ga App 40

Allegations held sufficient

Ga—Jones v Dixie Ohio Exp, Inc, App, 156 S E 2d 388

page 388

97. Allegations held insufficient

Ga—Perry v Davison—Paxon Co, supra, n 93

98. Ala—Weston v National Mfrs & Stores Corp, 45 So 2d 459, 253 Ala 503—Cobb-Kirkland Motor Co v Rivers, Civ, 248 So 2d 725, 46 Ala App 686, cert den 248 So 2d 730, 287 Ala 727

99. Ala—Weston v National Mfrs & Stores Corp, supra, n 98

Ga—Conney v Atlantic Greyhound Corp, 58 S E 2d 559, 81 Ga App 324

Or—St Clair v Jelmek, 210 P 2d 563, 187 Or 151

2. Fla—Nettles v Thornton, App, 198 So 2d 44

3. Ga—General Motors Corp v Jenkins, 152 S E 2d 796, 114 Ga App 873

6. Allegations held sufficient

(1) N.Y.—Daas v Pearson, 319 N Y S 2d 537, 66 Mac 2d 95, aff'd 325 N Y S 2d 1011

Allegations held insufficient

(1) Fla—Nettles v Thornton, App, 198 So 2d 44

Ga—Community Theatres Co v Bentley, 76 S E 2d 632, 88 Ga App 303—Dantos v Community Theatres Co, 82 S E 2d 260, 90 Ga App 195—Jordan v J C Penney Co, 152 S E 2d 786, 114 Ga App 822

N.Y.—Maxine Gerard, Inc v William B May & Co, 273 N Y S 2d 888, 51 Mac 2d 711, mod on oth grds 281 N Y S 2d 974, 27 A D 2d 922

N.C.—Clemmons v Life Ins Co of Georgia, 163 S E 2d 761, 274 N C 416, app after remand 171 S E 2d 87, 6 N C App 708

page 389

7. N.C.—Clemmons v Life Ins Co of Georgia, 163 S E 2d 761, 274 N C 416, app after remand 171 S E 2d 87, 6 N C App 708

8. Allegations held insufficient to raise inference

Ga—Community Theatres Co v Bentley, supra, n 6

Specific authorization not necessary

N.C.—Clemmons v Life Ins Co of Georgia, 163 S E 2d 761, 274 N C 416, app after remand 171 S E 2d 87, 6 N C App 708

12. Ga—Laughlin v Bon Air Hotel, 68 S E 2d 186, 85 Ga App 43

13. Answer held sufficient

Tenn.—East Volentine Courts, Inc v Foust, 376 S W 2d 320, 52 Tenn App 449

Affirmative defenses

U.S.—Porto Rico Gas & Coke Co v Frank Rullan & Associates, C A Puerto Rico, 189 F 2d 397

Mo—Dunn v General Motors Corp, 466 S W 2d 700

Porto Rico—Rodrigues v National Cash Register Co, 35 Porto Rico 606

15. Pa—Mazza v Berlanti Const Co, 214 A 2d 257, 206 Pa Super 505

page 390

18. Ark—CJS cited in Hutchesson v Clapp, 226 S W 2d 546, 548, 216 Ark 517

May be pleaded

N.Y.—Bologna v Battato, 235 N Y S 2d 819, 36 Mac 2d 297

19. Neb—Umberger v Sankey, 38 N W 2d 21, 151 Neb 488, reh den 38 N W 2d 551, 151 Neb 525

W Va—Sanders v Georgia-Pacific Corp, 225 S E 2d 218, 159 W Va 621, disapproving Chenoweth v Settle Engineers, 151 W Va 830, 156 S E 2d 297

20. Iowa—Livingston v Morarend, 149 N W 2d 850, 260 Iowa 530

Mass—Engel v Boston Ice Co, 4 N E 2d 455, 295 Mass 428

Mo—Coble v Economy Forms Corp, App, 304 S W 2d 47

Wis—Kearney v Massman Const Co, 18 N W 2d 481, 247 Wis 56

Evidence held admissible under pleadings

(5) Other matters

Or—Kuhns v Standard Oil Co of Cal, Western Operations, 478 P 2d 396, 257 Or 482

Variance held fatal

(2) Other cases

Ky—Shafer v Barber, 259 S W 2d 461

Variance held not shown

(2) Other instances

Ohio—Briere v Lathrop Co, 258 N E 2d 597, 22 Ohio St 2d 166

page 391

30. Conn—Banks v Watrous, 59 A 2d 723, 134 Conn 592, 4 A L R 2d 286

Tex—Stone v Whitt, Civ App, 259 S W 2d 923

Statute providing for admissibility held valid

Ala—Aggregate Limestone Co v Robison, 161 So 2d 820, 276 Ala 338

§ 615. Evidence

Library References

Master and Servant ⇨330

40. Mo—Coble v Economy Forms Corp, App, 304 S W 2d 47

Reasonable care in selecting of independent contractor presumed

U.S.—Brown v Moore, C A Pa., 247 F 2d 711, 69 A L R 2d 288, cert den 78 S Ct 148, 355 US 882, 2 L Ed 2d 112

Operation of service station by lessee

N.M.—Shaver v Bell, 397 P 2d 723, 74 N M 700

41. Pa—Pillo v Mohan, 81 Montg 221, aff'd 189 A 2d 850, 410 Pa 417

Tenn—Jarratt v Clinton, 241 S W 2d 941, 34 Tenn App 670

42. Cal—Woodall v Wayne Steffner Productions, Inc, 20 Cal Rptr 572, 201 CA 2d 800

Mo—Garrison v Ryno, 328 S W 2d 557, applying Tex as law

N.J.—Sarna v A A Pruzek & Co, 117 A 2d 305, 37 N J Super 340

Tex—Tracy v King, Civ App, 249 S W 2d 642

Contractor and subcontractor

(2) Other matters

U.S.—Mooney v Stainless, Inc, C A Tenn, 338 F 2d 127, cert den 85 S Ct 1561, 381 US 925, 14 L Ed 2d 684—Wilson v Nooter Corp, C A N H, 475 F 2d 497, cert den 94 S Ct 116, 414 US 865, 38 L Ed 2d 85, app after remand 499 F 2d 705

page 392

43. Md—Ketz v National Paving & Contracting Co, 134 A 2d 296, 214 Md 479

44. Ga—J W Starr & Sons Lumber Co v York, 78 S E 2d 429, 89 Ga App 22—Davis v Childers, 215 S E 2d 297, 134 Ga App 534

45. Ga—Hall v Camell, 52 S E 2d 639, 79 Ga App 7—White v Morris, 152 S E 2d 417, 114 Ga App 618

La—Universal Engineers & Builders, Inc v Lafayette Steel Erector Corp, App, 235 So 2d 612, writ den 239 So 2d 358, 256 La 854, and 239 So 2d 358, 256 La 855

46. Ark—Ozan Lumber Co v McNeely, 217 S E 2d 341, 214 Ark 657, 8 A L R 2d 261

48. U.S.—Gumm v National Homes Acceptance Corp, C A Ill, 339 F 2d 993

Pa—Howard v Zaney Bar, 85 A 2d 401, 369 Pa 155

49. Ga—F E Fortenberry & Sons, Inc v Malmberg, 102 S E 2d 667, 97 Ga App 162

50. D.C.—Kas v Glikerson, C A, 199 F 2d 398, 91 U S App D C 153, stating Maryland law

N.J.—Callahan v National Lead Co Titanium Division, 72 A 2d 187, 4 N J 150

N.Y.—Stone v Bigley Bros, 137 N Y S 2d 924, 285 App Div 457, motion den 127 N E 2d 336, 308 N Y 968, aff'd 127 N E 2d 913, 309 N Y 132

R.I.—Agostini v W J Halloran Co, 111 A 2d 537, 82 R I 466

Tex—Monte Christo Drilling Co v Cromland, Civ App, 477 S W 2d 362

page 393

51. Conn—Fairfield Lease Corp v Radio Shack Corp, Cir A D, 256 A 2d 690, 5 Conn Cr 460

Miss—West v Aetna Ins Co of Hartford, Conn, 45 So 2d 585, 208 Miss 776

Wash—Riello v Department Stores Garage Co, 191 P 2d 875, 30 Wash 2d 439

Employment to operate instrumentality

Tenn—CJS quoted in Jones v Agnew, 274 S W 2d 825, 826, 197 Tenn 499, 274 S W 2d 821, 38 Tenn App 427

52. Tex—Riverbend Country Club v Patterson, Civ App, 399 S W 2d 382, err ref no rev err

54. R.I.—Agostini v W J Halloran Co, 111 A 2d 537, 82 R I 466

Tex—Hudburgh v Palvic, Civ App, 274 S W 2d 94, err ref—Riverbend Country Club v Patterson, Civ App, 399 S W 2d 382, err ref no rev err—Gifford-Hill & Co v Moore, Civ App, 479 S W 2d 711—Continental/Moss-Gordin, Inc v Martinez, Civ App, 480 S W 2d 800

Wash—Nelson v Broderick & Bascom Rope Co, 332 P 2d 460, 53 Wash 2d 239

55. Ohio—Duff v Corn, 87 N E 2d 731, 84 Ohio App 403

56. U.S.—Kelley v Summers, C A Kan, 210 F 2d 665—Arndt v Mitchell Cadillac Rental, Inc, D C N J, 115 F Supp 533—Ware v Cia De Navegacion Andes, S A, D C Va, 180 F Supp 939—Doran v U.S., C A Cal, 460 F 2d 425

Ala—U.S. Steel Corp v Mathews, 73 So 2d 239, 261 Ala 120—State Farm Mut Auto Ins Co v Vash, 177 So 2d 821, 278 Ala 266

Cal—Doty v Lacey, 249 P 2d 550, 114 CA 2d 73

Iowa—Miller v Woolley, 35 N W 2d 584, 240 Iowa 450—roszmagi v Northland Greyhound Lines, 49 N W 2d 501, 242 Iowa 1135

N.J.—Larocca v American Cham & Cable Co, 97 A 2d 680, 13 N J 1

Ohio—Redmond v Republic Steel Corp, 131 N E 2d 593, 102 Ohio App 163

Or—Clifford W Brown v Bonesteel, 344 P 2d 928, 218 Or 312

Pa—Mature v Angelo, 97 A 2d 59, 373 Pa 593—Phoenix Ins Co v McDermott Bros Co, 30 Lehigh 435, aff'd 208 A 2d 245, 416 Pa 569

W Va—American Tel & Tel Co v Ohio Val Sand Co, 50 S E 2d 884, 131 W Va 736

Page 393

Wis—Edwards v Cutler-Hammer, Inc, 74 NW 2d 606, 272 Wis 54—Skornia v Highway Pavers, Inc, 159 N W 2d 76, 39 Wis 2d 293—Huckstorf v Vince L Schneider Enterprises, 163 N W 2d 190, 41 Wis 2d 45

Wyo—Blessing v Pittman, 251 P 2d 243, 70 Wyo 416

57. US—Ware v Cia De Navegacion Andes, S A, D C Va, 180 F Supp 939

NY—Stone v Bigley Bros, Inc, 127 NE 2d 913, 309 NY 132—DeSessa v City of White Plains, 219 NYS 2d 190, 30 Misc 2d 817

58 US—Kelley v Summers, C A Kan, 210 F 2d 665—Pickett v Hawkeye-Security Ins Co, C A Kan, 282 F 2d 294, 83 A L R 2d 1224

Ala—Ridgeway v Sullivan-Long & Hagerty, Inc, 98 So 2d 665, 39 Ala App 341

Cal—Doty v Lacey, supra, n 56

La—Nichols Const Corp v Spell, App, 315 So 2d 801

Mass—Harrington v H F Davis Tractor Co, 175 NE 2d 241, 342 Mass 675

Pa—Pennsylvania Smelting & Refining Co v Duffin, 70 A 2d 270, 363 Pa 564, 17 A L R 2d 1384

Rebuttal by evidence of borrowing employer's control

Pa—Pheps v Paul L Britton, Inc, 192 A 2d 689, 412 Pa 55

59. US—In re Dearborn Marine Service, Inc, C A Tex, 499 F 2d 263, reh den 512 F 2d 1061, cert diam 96 S Ct 163, 423 US 886, 46 L Ed 2d 118

La—McCutchen v Fruge, App, 132 So 2d 917

W Va—Burdette v Maust Coal & Coke Corp, 222 S E 2d 293, 159 W Va 335

60. US—Arndt v Mitchell Cadillac Rental, Inc, D C N J, 115 F Supp 533—Wilson v Nooter Corp, C A N H, 475 F 2d 497, cert den 94 S Ct 116, 414 US 865, 38 L Ed 2d 85, app after remand 499 F 2d 705

Cal—Doty v Lacey, supra, n 56

La—Benox v Hunt Tool Co, 53 So 2d 137, 219 La 380

N J—Larocca v American Cham & Cable Co, supra, n 56

NY—DeSessa v City of White Plains, 219 NYS 2d 190, 30 Misc 2d 817

Pa—Phoenix Ins Co v McDermott Bros Co, 30 Lehigh 435, affd 208 A 2d 245, 416 Pa 569

page 394

61. US—US v Hull, C A Mass, 195 F 2d 64

Cal—Martin v Food Machinery Corp, 223 P 2d 293, 100 Cal App 2d 244

62. US—Lifton v Travelers Ins Co, General Acc Fire & Life Assur Corp, Intervenor, D C La, 88 F Supp 76

Ala—Smith v Kennedy, 195 So 2d 820, 43 Ala App 554, certiorari denied 195 So 2d 829, 280 Ala 718

Alaska—Sloan v Atlantic Richfield Co, 541 P 2d 717, reh gr 546 P 2d 568, Reh 552 P 2d 157

Cal—Raber v Tumun, 226 P 2d 574, 36 Cal 2d 654

Ill—Traylor v The Fair, 243 NE 2d 300, 101 Ill App 2d 268

Iowa—Grant v Younker Bros, 58 NW 2d 834, 244 Iowa 958

Ky—Home Ins Co v Cohen, 357 S W 2d 674

La—Bush v Bookler, App, 47 So 2d 77

Particular circumstances

(1) Mo—Epps v Ragdale, App, 429 S W 2d 798

(4) Other circumstances

Tex—Smith v Koenning, Civ App, 398 S W 2d 411, err ref no rev err

63. Del—Miller v Weinberg, Super, 190 A 2d 27, 6 Storey 87

Tenn—All v John Gerber Co, 252 S W 2d 138, 36 Tenn App 134

Other matters relating to presumptions in actions for injuries to third persons have been adjudicated ⁶³

63 5. Hawaii—Nakagawa v Apana, 477 P 2d 611, 52 Haw 379

Notice of employee's acts

Wash—Schmidt v Pioneer United Dairies, 373 P 2d 764, 60 Wash 2d 271

Compliance with statute

Ala—Smith v Kennedy, 195 So 2d 820, 43 Ala App 554, certiorari denied 195 So 2d 829, 280 Ala 718

Statutory presumptions

Cal—Foss v Anthony Industries, 189 Cal Rptr 31, 139 CA 3d 794

64 US—Mobley v Bethlehem Supply Co, C A Tex, 186 F 2d 23, cert den 71 S Ct 1002, 341 US 941, 95 L Ed 1368—Tipton v Barge, C A N C, 243 F 2d 531

Alaska—Maddocks v Bennett, 456 P 2d 453

Cal—Hale v Farmers Ins Exchange, 117 Cal Rptr 146, 42 CA 3d 681

Fla—McArthur Jersey Farm Dairy, Inc v Burke, App, 240 So 2d 198

Md—Globe Indem Co v Victrol Corp, 119 A 2d 423, 208 Md 573

Mo—Dunn v General Motors Corp, 466 S W 2d 700

NY—Mendes v Caristo Const Corp, 171 NYS 2d 494, 5 A D 2d 268, op clarified 178 NYS 2d 594, 6 A D 2d 673, affd 185 NYS 2d 814, 6 NY 2d 729, 158 NE 2d 207

Okla—McReynolds v Oklahoma Turnpike Authority, 291 P 2d 341

Wash—Hamm v Camerota, 290 P 2d 713, 48 Wash 2d 34—Getzenlander v United Pac Ins Co, 322 P 2d 1089, 52 Wash 2d 61—Davis v Early Const Co, 386 P 2d 958, 63 Wash 2d 252

Wis—Goebel v General Bldg Service Co, 131 N W 2d 852, 26 Wis 2d 129

In action against master and servant jointly

US—Southeastern Greyhound Lines v McCafferty, C A Ky, 169 F 2d 1, cert den 69 S Ct 136, 335 US 861, 93 L Ed 407

Supplying of machine and operator by defendant

NY—Mormio v Alhed Stevedores Corp, 183 NYS 2d 691, 7 A D 2d 966, app den 185 NYS 2d 741, 8 A D 2d 614

Matters not requiring proof

Ala—Smith v Kennedy, 195 So 2d 820, 43 Ala App 554, certiorari denied 195 So 2d 829, 280 Ala 718

65. US—Owen v U S, D C N C, 258 F Supp 121—Guillen v Kuykendall, C A Tex, 470 F 2d 745

Ariz—Larsen v Arizona Brewing Co, 325 P 2d 829, 84 Ariz 191

Ill—Olender v Gottheb, 101 NE 2d 622, 344 Ill App 552—Pascoe v Meadowmoor Dairies, 190 NE 2d 156, 41 Ill App 2d 52

Iowa—Volkswagen Iowa City, Inc v Scott's Inc, 165 N W 2d 789

La—Martin v Brown, App, 117 So 2d 665, affd 124 So 2d 904, 240 La 674

Md—Globe Indem Co v Victrol Corp, 119 A 2d 423, 208 Md 573

Mo—Bonenberger v Sears Roebuck & Co, App, 449 S W 2d 385

NY—Hacker v City of New York, 275 NYS 2d 146, 26 A D 2d 400, affd 229 NE 2d 613, 20 NY 2d 722, 283 NYS 2d 46, cert den 88 S Ct 1436, 390 US 1036, 20 L Ed 2d 296

Ohio—Vencill v Cornwell, 145 NE 2d 136, 103 Ohio App 217—Cruikshank v Frank Sherman Co, App, 153 NE 2d 525

Pa—O'Connell v Roefaro, 137 A 2d 325, 391 Pa 52

Particular circumstances

N J—Falk v Unger, 111 A 2d 283, 33 N J Super 589

Affirmative, rather than negative, proof

Mo—Gardner v Simmon, 370 S W 2d 359

66. Ill—Winston v Sears, Roebuck & Co, 233 NE 2d 95, 88 Ill App 2d 358

Or—Gossett v Simonson, 411 P 2d 277, 243 Or 16

S C—Lane v Modern Music, Inc, 136 S E 2d 713, 244 S C 299

Va—McNeill v Spandler, 62 S E 2d 13, 191 Va 685

Was—Fusland v Phillips Petroleum Co, 204 NW 2d 1, 57 Wa 2d 267

67 US—Owen v U S, D C N C, 258 F Supp 121

Ill—Bolwin v El Kay Mfg Co, 336 NE 2d 502, 32 Ill App 3d 138

N C—Little v Poole, 182 S E 2d 206, 11 N C App 597

Tex—Tunnell v Otis Elevator Co, Civ App, 400 S W 2d 781, err ref no rev err

page 395

68. US—Evans v Hughes, D C N C, 135 F Supp 555—S Birch & Sons v Martin, C A Alaska, 244 F 2d 556, 17 Alaska 230, cert den 78 S Ct 62, 355 US 837, 2 L Ed 2d 49, 17 Alaska 388—Owen v U S, D C N C, 258 F Supp 121

Ala—US Steel Co v Butler, 69 So 2d 685, 260 Ala 190—Solomon of Gulf Coast, Inc v Bragg, 232 So 2d 638, 285 Ala 396

Colo—Cooley v Ekridge, 241 P 2d 851, 125 Colo 102

Conn—Banks v Watrous, 73 A 2d 329, 136 Conn 597

La—Averette v Travelers Ins Co, App, 174 So 2d 881

Mass—Grier v Thomason, 182 So 2d 398, 254 Mass 491

Neb—Watts v Zadina, 139 NW 2d 290, 179 Neb 548

NY—Hacker v City of New York, 275 NYS 2d 146, 26 A D 2d 400, affd 229 NE 2d 613, 20 NY 2d 722, 283 NYS 2d 46, cert den 88 S Ct 1436, 390 US 1036, 20 L Ed 2d 296

Ohio—Vencill v Cornwell, 145 NE 2d 136, 103 Ohio App 217—King v Magaw, 150 NE 2d 91, 104 Ohio App 469—Cruikshank v Frank Sherman Co, App, 153 NE 2d 525

Okla—Oklahoma Ry Co v Sandford, 258 P 2d 604—Elias v Midwest Marble & Tile Co, 302 P 2d 126

Or—Gossett v Simonson, 411 P 2d 277, 243 Or 16—Elliott v Rogers Const, Inc, 479 P 2d 753, 257 Or 421—Wilken v Van Sickle, 507 P 2d 1150, 265 Or 42

Tex—Hudburgh v Palvic, Civ App, 274 S W 2d 94, err ref no rev err—Kelly v Green, Civ App, 296 S W 2d 576, err ref no rev err—Moore v Texas Co, Civ App, 299 S W 2d 401, err ref no rev err—Rugby v Pitner, Civ App, 334 S W 2d 837, err ref no rev err—Sheffield v Central Freight Lines, Inc, Civ App, 435 S W 2d 954

Wa—Brimmous Cas Corp v United Military Supply, Inc, 230 NW 2d 764, 69 Wa 2d 426

69. US—Carroll v Lanza, D C Ark, 116 F Supp 491, affd in part and revd in part on oth grds, C A, 216 F 2d 808, revd on oth grds 75 S Ct 804, 349 US 408, 99 L Ed 1183—McNello v John B Kelly, Inc, C A Pa, 283 F 2d 96, stating Pennsylvania law

Alaska—Sloan v Atlantic Richfield Co, 541 P 2d 717, reh gr 546 P 2d 568, Reh 552 P 2d 157

70. US—Carroll v Lanza, supra, n 69, affd in part and revd in part on oth grds, C A, 216 F 2d 808, revd on oth grds 75 S Ct 804, 349 US 408, 99 L Ed 1183—Owen v U S, D C N C, 258 F Supp 121

72. Hawaii—Abraham v S E Onorato Garages, 446 P 2d 821, 50 Haw 628, 639

Mich—Tys v Booth, 235 NW 2d 69, 64 Mich App 88

75 **To show individual participation by employees**

NY—Pope v Zeckendorf Hotels Corp, 252 NYS 2d 975, 22 A D 2d 647

76. US—Lifton v Travelers Ins Co, General Acc Fire & Life Assur Corp, Intervenor, supra, n 62—Kas v Gulkerson, supra, n 50

Cal—Lewins v Constitution Life Co of America, 215 P 2d 55, 96 Cal App 2d 191—Moeller v De Rose, App, 222 P 2d 107, hearing dismissed

Ga—Davis v Childers, 215 SE 2d 297, 134 Ga App 534

Md—Lewis v Accelerated Transport-Pony Express, Inc, 148 A 2d 783, 219 Md 252

Va—McNeill v Spandler, supra, n 66—Bryant v Bare, 64 SE 2d 741, 192 Va 238—Turner v Burford Buck Corp, 112 SE 2d 911, 201 Va 693

page 396

77. La—Amyx v Henry & Hall, App, 69 So 2d 69, aff'd in part and rev'd in part on oth grds 79 So 2d 483, 227 La 364

Miss—Horton v Jones, 44 So 2d 397, 208 Miss 257, 15 A L R 2d 824—Lovett Motor Co v Walley, 64 So 2d 370, 217 Miss 384

NJ—Kligman v Wilfred Co of Newark, 222 A 2d 31, 91 N J Super 591

Va—Alvey v Butchikavitz, 84 S E 2d 535, 198 Va 447

No burden on contractor to prove subcontractor independent

US—South Carolina Natural Gas Co v Phillips, C A S C, 289 F 2d 143

80. US—Peoples Supply, Inc v Vogel-Ratt of Penn-Mar-Va, Inc, D C W Va, 173 F Supp 199, rev'd on oth grds, C A, 273 F 2d 933—Kiff v Travelers Ins Co, C A La, 402 F 2d 129—In re Dearborn Marine Service, Inc, C A Tex, 499 F 2d 263, reh den 512 F 2d 1061, cert dum 96 S Ct 163, 423 US 886, 46 L Ed 2d 118

Iowa—Miller v Woolsey, supra, n 56

La—Benoit v Hunt Tool Co, supra, n 60—McCutch-en v Fruge, App, 132 So 2d 917—Kezerle v Hardware Mut Cas Co, App, 198 So 2d 119, writ ref 199 So 2d 921, 250 La 918—Universal Engineers & Builders, Inc v Lafayette Steel Erector Corp, App, 235 So 2d 612, writ den 239 So 2d 358, 256 La 854, and 239 So 2d 358, 256 La 855—Nichols Const Corp v Spell, App, 315 So 2d 801

Tex—Producers Chemical Co v McKay, 366 S W 2d 220

Wash—Davis v Early Const Co, 386 P 2d 958, 63 Wash 2d 252

W Va—American Tel & Tel Co v Ohio Val Sand Co, supra, n 56

81. Wash—Fischer v Pacific Mechanical Constructors, 462 P 2d 960, 1 Wash App 447

82. US—Ware v Cia De Navegacion Andes, S A, D C Va, 180 F Supp 939—Kiff v Travelers Ins Co, C A La, 402 F 2d 129

La—Kezerle v Hardware Mut Cas Co, App, 198 So 2d 119, writ ref 199 So 2d 921, 250 La 918—Barrios v Service Drayage Co, App, 250 So 2d 135, application den 253 So 2d 66, 259 La 805, and 253 So 2d 66, 259 La 806

W Va—Burdette v Maust Coal & Coke Corp, 222 S E 2d 293, 159 W Va 335

83. US—Bush Bros & Co v Hickey, C A Tenn, 223 F 2d 425

Ark—Rubby v Arkansas La Gas Co, 245 S W 2d 401, 219 Ark 912—Phillips Coop Gm Co v Toll, 311 S W 2d 171, 228 Ark 891

La—Smith v Markham Brown & L L Sanders, App, 61 So 2d 515

Mo—Garrison v Ryno, 328 S W 2d 557, applying Tex-as law

NJ—Jensen v Slovenc, 69 A 2d 595, 5 N J Super 447

SC—C J S, cited in Norris v Bryant, 60 S E 2d 844, 849, 217 S C 389—Cooper v Graham, 98 S E 2d 843, 231 S C 404

Tenn—Jarratt v Clinton, 241 S W 2d 941, 34 Tenn App 670—Hendrix v City of Maryville, 431 S W 2d 292, 58 Tenn App 457

Tex—Hamilton v Fant, Civ App, 422 S W 2d 495—Roland Associates, Inc v Pierce, Civ App, 476 S W 2d 758

86. Tex—Tracy v King, Civ App, 249 S W 2d 642—Stafford v Thornton, Civ App, 420 S W 2d 153, err ref no rev err

page 397

87. US—Union Tank & Supply Co v Kelley, C C A Tex, 167 F 2d 811, cert den 69 S Ct 54, 335 US 827, 93 L Ed 381, reh den 69 S Ct 232, 335 US 888, 93 L Ed 427—Terry v A P Green Fire Brck Co, D C Ark, 164 F Supp 184

Tex—Brownsville Nav Dist v Valley Ice & Fuel Co, Civ App, 313 S W 2d 104—Allen v Texas Elec Service Co, Civ App, 350 S W 2d 866, err ref no rev err

Other matters relating to the burden of proof on independent contractors have been adjudicated^{88, 5}

88 5 Burden on independent contractor to show he was not chargeable with negligence—Overand v Kramer, 38 West 17

89 US—Reeves v John A Cooper Co, D C Ark, 304 F Supp 828

NJ—Kligman v Wilfred Co of Newark, 222 A 2d 31, 91 N J Super 591

Pa—Di Lembo v Owl Cab Co, 103 P L J 225

Evidence held admissible

(1) US—Quimones v Upper Moreland Tp, C A Pa, 293 F 2d 237, on remand, 199 F Supp 758

Ariz—Welker v Kennecott Copper Co, 403 P 2d 330, 1 Ariz App 395—Welker v Kennecott Copper Co, 403 P 2d 330, 1 Ariz App 395

NJ—Marion v Public Service Elec & Gas Co, 178 A 2d 57, 72 N J Super 146

NY—Regan v Eight Twenty Fifth Corporation, 38 NE 2d 489, 287 NY 179

Pa—Farando v Pittsburgh Rys Co 97 Pittsb Leg J 79

(2) Ala—Thompson v Harvard, 235 So 2d 853, 285 Ala 718

Ohio—Newcomb v Dredge, 152 NE 2d 801, 105 Ohio App 417

Evidence held inadmissible

(1) US—Nelson v Jacksonville Shipyards, Inc, C A Fla, 440 F 2d 668

Cal—Delgado v W C Garcia & Associates, 27 Cal Rptr 613, 212 C A 2d 5

Ind—Tindall v Enderle, 320 NE 2d 764, 162 Ind App 524

La—Galloway v Employers Mut of Wausau, App, 286 So 2d 676, application den, Sup, 290 So 2d 333

Mont—Hackley v Waldorf-Hoerner Paper Products Co, 425 P 2d 712, 149 Mont 286

NJ—Sensale v Applikon Dyeing & Printing Corp, 79 A 2d 316, 12 N J Super 171—Farrell v Diamond Alkali Co, 83 A 2d 900, 16 N J Super 163

NC—Sprivey v Babcock & Wilcox Co, 141 S E 2d 808, 264 N C 387

Ohio—Longo v Tabasco, App, 106 NE 2d 587—Brner v Lathrop Co, 258 NE 2d 597, 22 Ohio St 2d 166

Utah—Employers' Mut Liability Ins Co of Wm v Allen Oil Co, 258 P 2d 445, 123 Utah 253

90. Ariz—Welker v Kennecott Copper Co, 403 P 2d 330, 1 Ariz App 395

(4) Other evidence

Evidence held admissible

(3) Agreement of employer to be responsible for damage

Md—Samson Const Co v Brusowankin, 147 A 2d 430, 218 Md 458, 69 A L R 2d 1326

Mich—Funk v General Motors Corp, 220 NW 2d 641, 392 Mich 91

Pa—McDonough v US Steel Corp, 324 A 2d 542, 228 Pa Super 268

Evidence held inadmissible

US—South Carolina Natural Gas Co v Phillips, C A S C, 289 F 2d 143

91. US—Breeding v Massey, C A Ark, 378 F 2d 171

Ala—Thompson v Harvard, 235 So 2d 853, 285 Ala 718

Cal—Skelton v Fekets, 261 P 2d 339, 120 C A 2d 401

Fla—Forster v Red Top Sedan Service, Inc, App, 257 So 2d 95

Ind—Tindall v Enderle, 320 NE 2d 764, 162 Ind App 524

Mich—Hersh v Kentfield Builders, Inc, 189 NW 2d 286, 385 Mich 410, 48 A L R 3d 353

92. Ill—Fandrich v Allstate Ins Co, Inc, 322 NE 2d 843, 25 Ill App 3d 301

Admissibility of evidence in actions against servants for injury to other servants has been considered^{93, 5}

93.5 Evidence held inadmissible

NJ—Miller v Muscarelle, 170 A 2d 437, 67 N J Super 305

96 Cal—Johnson v A Schilling & Co, 339 P 2d 139, 170 CA 2d 318

Okla—Allison v Gilmore, Gardner & Kirk, Inc, 350 P 2d 287

Evidence held admissible

(1) NY—F & F Embroidery, Inc v Service Window Cleaning Co, 142 NY S 2d 802

page 398

97 US—Shapiro, Bernstein & Co v Royal Plastics Corp, D C N Y, 81 F Supp 555

98. US—Karnowski v Skelly Oil Co, C A Kan, 174 F 2d 770

2. Ill—Larson v Commonwealth Edison Co, 211 NE 2d 247, 33 Ill 2d 316

6. Ala—Alabama Power Co v Smith, 142 So 2d 228, 273 Ala 509

III—Gundich v Emerson-Constock Co, 164 NE 2d 512, 24 Ill App 2d 138, rev'd on oth grds 171 NE 2d 60, 21 Ill 2d 117

8. US—Karnowski v Skelly Oil Co, C A Kan, 174 F 2d 770

Mass—Sherman v Texas Co, 165 NE 2d 916, 340 Mass 606

Mo—Wills v Belger, 212 S W 2d 736, 357 Mo 1177

9 Ala—Ledbetter-Johnson Co v Hawkins, 103 So 2d 748, 267 Ala 458

Ga—Smith v Morning News, Inc, 109 S E 2d 639, 99 Ga App 547

Wis—Barrows v Leath & Co of Janesville, 44 NW 2d 918, 258 Wis 154

Evidence held admissible

(1) NJ—Trecartin v Mahony-Troest Const Co, 87 A 2d 349, 18 N J Super 380

10 Minn—Ahlsstrom v Minneapolis, St P & S S M R Co, 68 NW 2d 873, 244 Minn 1

11. Ga—Smith v Potect, 195 S E 2d 213, 127 Ga App 735, 63 A L R 3d 1243

12 Ga—Morris v Constitution Pub Co, 67 S E 2d 407, 84 Ga App 816

page 399

16. Cal—Caldwell v Farley, 285 P 2d 294, 134 CA 2d 84

Conn—Banks v Watrous, 59 A 2d 723, 134 Conn 592, 4 A L R 2d 286

20 Mo—Peak v W T Grant Co, 408 S W 2d 58, 31 A L R 3d 697

NY—Brown v Great Atlantic & Pac Tea Co, 89 NY S 2d 247, 275 App Div 304

Orders given after act complained of inadmissible

Pa—Potter Title & Trust Co v Knox, 113 A 2d 549, 381 Pa 202, 53 A L R 2d 709

22. Mass—Barrett v Wood Realty Inc, 135 NE 2d 660, 334 Mass 370

24. US—Fegles Const Co v McLaughlin Const Co, C A Mont, 205 F 2d 637

Ariz—MacNeil v Perkins, 324 P 2d 211, 84 Ariz. 74

Cal—Johnson v A Schilling & Co, 14 Cal Rptr 684, 194 CA 2d 123—MacColl v Los Angeles Metropolitan Transit Authority, 48 Cal Rptr 662, 239 CA 2d 302

Iowa—Grant v Younker Bros, 58 NW 2d 834, 244 Iowa 958

Minn—Ahlsstrom v Minneapolis, St P & S S M R Co, 68 NW 2d 873, 244 Minn 1

Mo—Jones v Terminal R R Ass'n of St Louis, 242 S W 2d 473

27. Cal—Corsetto v Pacific Elec Ry, 289 P 2d 116, 136 C A 2d 631
34. U.S.—Tyndall v U.S., DCNC 295 F Supp 448
- Cal—Dillenbeck v City of Los Angeles, 72 Cal Rptr 321, 446 P 2d 129, 69 C 2d 472
- Colo—DeLong v City and County of Denver, 530 P 2d 1308, 34 Colo App 330, affd, 545 P 2d 154, 190 Colo 219, 82 A L R 3d 1278, app after remand 576 P 2d 537

Mass—Brune v Belinkoff, 235 NE 2d 793, 354 Mass 102

39 U.S.—Binney v U.S., C A Or, 460 F 2d 263

Ala—Howell v Birmingham Neha Bottling Co, 101 So 2d 297, 267 Ala 290

Ark—Sinclair Refining Co v Piles, 221 S W 2d 12, 215 Ark 469

Cal—Dillenbeck v City of Los Angeles, 72 Cal Rptr 321, 446 P 2d 129, 69 C 2d 472

Ga—F E Fortenberry & Sons, Inc v Malmberg, 102 S E 2d 667, 97 Ga App 162

La—Station v Travelers Ins Co, App, 236 So 2d 610, writ ref 239 So 2d 359, 256 La 857, app after remand 292 So 2d 289

Okla—McReynolds v Oklahoma Turnpike Authority, 291 P 2d 341

Tex—Pitchfork Land & Cattle Co v Kmg, 346 S W 2d 598, 162 Tex 331

Wash—Smith v Leber, 209 P 2d 297, 34 Wash 2d 611

40. U.S.—Carroll v Lanza, D C Ark, 116 F Supp 491, affd in part and revd in part on oth grds, C A, 216 F 2d 808, revd on oth grds 75 S Ct 804, 349 U S 408, 99 L Ed 1183

La—Bradford v Valley Mills, App, 165 So 2d 503, writ ref 167 So 2d 671, 246 La 851—Pagitt Well Service, Inc v Sam Broussard, Inc, App, 293 So 2d 631, writ ref, Sup, 295 So 2d 817 (two cases)—Nichols Const Corp v Spell, App, 315 So 2d 801

Mo—DeMariano v St Louis Public Service Co, 340 S W 2d 735

Fair preponderance

Mich—Bradley v Stevens, 46 N W 2d 382, 329 Mich 556, 34 A L R 2d 367

43. Public officer

(2) Other cases.

Wash—Hayes v Sears, Roebuck & Co, 209 P 2d 468, 34 Wash 2d 666

Elements which must be shown to invoke respondent superior

U.S.—Owen v U.S., DCNC, 258 F Supp 121

44. Cal—Moeller v De Rose, App, 222 P 2d 107, hearing dum

Fla—CJ S quoted at length in Thoe v Manor Pines Convalescent Center, Inc, 235 So 2d 64, 66

Or—Moe v Jolly Joan, 399 P 2d 25, 239 Or 537

45. Tex—S H Kress & Co v Selph, Civ App, 250 S W 2d 883, err ref no rev err

49. U.S.—Gunn v National Homes Acceptance Corp, C A III, 339 F 2d 993

54. U.S.—Littion v Travelers Ins Co, General Acc Fire & Life Assur Corp, Intervenor, D C La, 88 F Supp 76—Fegles Const Co v McLaughlin Const Co, supra, n 24

Alaska—Maddocks v Bennett, 456 P 2d 453

Cal—McNulty v Southern Pac Co, 216 P 2d 534, 96 Cal App 2d 841—Stoddard v Rheem, 13 Cal Rptr 496, 192 C A 2d 49—Hardin v Elvitsky, 42 Cal Rptr 748, 232 C A 2d 357

Colo—J & K Const Co v Molton, 390 P 2d 68, 154 Colo 214

Fla—Dye v Reschard, App, 183 So 2d 863—Wackenhut Corp v Greene, App, 238 So 2d 431

Ill—Garrett v S N Nielsen Co, App, 200 N E 2d 81, 49 Ill App 2d 422—Traylor v The Fair, App, 243 N E 2d 300, 101 Ill App 2d 268—Pantaleo v Gamm, 245 N E 2d 618, 106 Ill App 2d 116

Ind—Carpenter v Campbell, 271 N E 2d 163, 149 Ind App 189

La—Moore v Blanchard, App 35 So 2d 667, revd on oth grds 43 So 2d 599, 216 La 253

Mo—Dollor v Ozark Engineering Co, App, 500 S W 2d 727

NJ—Tooker v Lonky, 147 A 445, 106 NJ Law 110—Gindin v Baron, 83 A 2d 790, 16 NJ Super 1

NY—Adams v Brill Const Corp, 110 NYS 2d 682—Vos v Fisher 249 NYS 2d 777, 21 A D 2d 663

NC—Sale v James, 189 S E 2d 555, 15 NC App 238

OK—Hodges v Holding, 229 P 2d 555, 204 OK 327

Patron of beauty parlor

Iowa—Grant v Younger Bros, 58 NW 2d 834, 244 Iowa 958

55 U.S.—Garland v Lane-Wells Co, C A Tex, 185 F 2d 857—Mobley v Bethlehem Supply Co, C A Tex, 186 F 2d 23, cert den 71 S Ct 1002, 341 U S 941, 95 L Ed 1368—Alabama Credit Corp v Deas, C A Ala, 417 F 2d 135

Ill—Stevens v Kasten, 96 NE 2d 817, 342 Ill App 421—Fandrich v Allstate Ins Co, Inc, 322 NE 2d 843, 25 Ill App 3d 301

La—Duray v Continental Ins Co, App, 311 So 2d 491

Miss—Bourgeois v Rousseau, 45 So 2d 246

Pa—Bleman v Gold, 246 A 2d 376, 431 Pa 348

Tex—Commerce Realty Co v McElvey, Civ App, 250 S W 2d 931, err ref no rev err

56 U.S.—Carroll v Lanza, supra, n 40, 116 F Supp 491, affd in part and revd in part on oth grds, C A, 216 F 2d 808, revd on oth grds 75 S Ct 804, 349 U S 408, 99 L Ed 1183

Cal—Sullivan v Schellinger, 338 P 2d 462, 170 C A 2d 111—Dillenbeck v City of Los Angeles, 72 Cal Rptr 321, 446 P 2d 129, 69 C 2d 472

Conn—Lemmon v Paterson Const Co, 75 A 2d 385, 137 Conn 158

Ill—McInerney v Hasbrook Const Co, 338 NE 2d 868, 62 Ill 2d 93

La—Spears v Southern Discount of Shreveport, Inc, App, 191 So 2d 751, writ ref 193 So 2d 526, 250 La 12—Katz v Employers Group of Ins Companies, App, 204 So 2d 695

Mo—Stremming v Holskamp Lumber Co, App, 238 S W 2d 31

NY—Orsolita v H Hyman Drum & Barrel Corp, 127 NYS 2d 252, 283 App Div 686—Manguao v Thirty-Third Equities, Inc, 142 NYS 2d 25, 286 App Div 70—Lo Presti v Columbia Stevedoring Co, 142 NYS 2d 260, affd 148 NYS 2d 457, 1 A D 2d 700, rearg and app den 149 NYS 2d 273, 1 A D 2d 784, affd 154 NYS 2d 641, 1 NY 2d 882, 136 NE 2d 714

Pa—Milligan v Reading Automatic Machine Corp, 55 Berks 12

Tex—Fabens Ice Co v Kosinski, Civ App, 339 S W 2d 546, err ref no rev err

Wis—Rochester Am Ins Co v Plumbers Supply Co, 46 N W 2d 765, 258 Wis 519—Bush v Mahlkuch, 75 N W 2d 283, 272 Wis 246

57. Cal—Rodgers v Kemper Const Co, 124 Cal Rptr 143, 50 C A 3d 608

58. U.S.—Carroll v Lanza, D C Ark, 116 F Supp 491, affd in part and revd in part on oth grds, C A, 216 F 2d 808, revd on oth grds 75 S Ct 804, 349 U S 408, 99 L Ed 1183

Colo—Wannwright v Lay, App, 473 P 2d 188

Fla—Florida Crane Service, Inc v Cary, App, 215 So 2d 50

Ga—Ferrence v Lacy, 152 S E 2d 605, 114 Ga App 692

La—Bailey v American Motorists Ins Co, App 189 So 2d 106

Ohio—Phoenix Ins Co v Jonathan Woodner Co, 140 NE 2d 590

Tex—Fabens Ice Co v Kosinski, Civ App, 339 S W 2d 546, err ref no rev err—Chickasha Cotton

Oil Co v Holloway, Civ App, 378 S W 2d 695, err ref no rev err

59 U.S.—Houlihan v Turner Const Co, D C R I, 139 F Supp 88, affd 240 F 2d 435

Ariz—Zevon v Tennebaum, 240 P 2d 548, 73 Ariz 281

La—Liles v Midwest Piping Co, App, 151 So 2d 584, writ ref, Sup, 152 So 2d 564, 244 La 474

60 U.S.—Call Carl, Inc v BP Oil Corp, D C Md, 403 F Supp 568, affd in part, revd in part on oth grds, C A, 554 F 2d 623, cert den 98 S Ct 400, 434 U S 923, 54 L Ed 2d 280

Cal—Caldwell v Farley, 285 P 2d 294, 134 C A 2d 84—Shoopman v Pacific Greyhound Lines, 338 P 2d 3, 169 C A 2d 848—Hale v Farmers Ins Exchange, 117 Cal Rptr 146, 42 C A 3d 681

Ind—Miller v Long, 131 NE 2d 348, 126 Ind App 482, reh den 132 NE 2d 272, 126 Ind App 482

La—Spears v Southern Discount of Shreveport, App, 191 So 2d 751, writ ref 193 So 2d 526, 250 La 12

Pa—Rubin Bros Waste Co v Standard Equipment Co, 81 A 2d 876, 368 Pa 61

62 Ala—Thompson v Havard, 235 So 2d 853, 285 Ala 718

66 Cal—Arata v Tonegato, 314 P 2d 130, 152 C A 2d 837

Pa—Williams v H E Stoudt & Son, Inc, 172 A 2d 278, 404 Pa 377

67 U.S.—Carroll v Lanza, supra, n 58, 116 F Supp 491, affd in part and revd in part on oth grds, C A, 216 F 2d 808, revd on oth grds 75 S Ct 804, 349 U S 408, 99 L Ed 1183—Vandal v Geo T McLaughlin Co, D C Mass, 132 F Supp 279

69 U.S.—Carroll v Lanza, supra, n 58, 116 F Supp 491, affd in part and revd in part on oth grds, C A, 216 F 2d 808, revd on oth grds 75 S Ct 804, 349 U S 408, 99 L Ed 1183—Vandal v Geo T McLaughlin Co, D C Mass, 132 F Supp 279

Cal—Bulow v Dawn Patrol, Truck Ins Exchange, Intervenor, 31 Cal Rptr 132, 216 C A 2d 721—Gettemy v Star House Movers, Inc, 37 Cal Rptr 441, 225 C A 2d 636—Conner v Utah Const & Mtn Co, 41 Cal Rptr 728, 231 C A 2d 263

Ill—Leatherman v Schueler Bros, Inc, 189 NE 2d 10, 40 Ill App 2d 56—Garrett v S N Nielsen Co, 200 NE 2d 81, 49 Ill App 2d 422—Cabb v Robert R Anderson Co, 232 NE 2d 44, 87 Ill App 2d 291—Pantaleo v Gamm, 245 NE 2d 618, 106 Ill App 2d 116

Ky—Ernest v Moore, 254 S W 2d 347

Miss—Billups Petroleum Co v Hardin's Bakeries Corp, 63 So 2d 543, 217 Miss 24, sug err over 64 So 2d 764, 217 Miss 24

Mo—Abel v Campbell 66 Exp, Inc, App, 378 S W 2d 269—Roddy v General Motors Corp, 380 S W 2d 328

Mont—Western Foundry, Inc v Matelich, 433 P 2d 789, 150 Mont 228

NJ—Chilberta v Rosemar Homes, 115 A 2d 553, 19 NJ 166

NY—Lowry v R H Macy & Co, 119 NYS 2d 5

Pa—Overand v Kramer, 38 West 17

Tenn—East Volentine Courts, Inc v Foust, App, 376 S W 2d 320, 52 Tenn App 449—Dempster Bros, Inc v Duncan, 452 S W 2d 902, 61 Tenn App 88

Tex—Anderson Furniture Co v Roden, Civ App, 255 S W 2d 345, err ref no rev err—Fabens Ice Co v Kosinski, Civ App, 339 S W 2d 546, err ref no rev err—Hamilton v Fant, Civ App, 422 S W 2d 495—International Business Machines Corp v Pearall, Civ App, 422 S W 2d 757, err ref no rev err

Particular matters

(2) Mich—McDonough v General Motors Corp, 201 N W 2d 609, 388 Mich 430

(5) Other matters

Cal—Brown v Higbee, 1 Cal Rptr 316, 175 C A 2d Supp 917—Woolen v Aerojet General Corp, 20 Cal Rptr 12, 369 P 2d 708, 57 C 2d 407

Ill—Jackson v John F Beasley Const Co, 222 N E 2d 209, 76 Ill App 2d 282

Iowa—Garratano v Weitz Co, 147 N W 2d 824, 259 Iowa 1292

Ky—Whittenberg Engineering & Const Co v Liberty Mut Ins Co, 390 S W 2d 877

La—Galloway v Employers Mut of Wausau, App, 286 So 2d 676, application den, Sup, 290 So 2d 333

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70. US—Green v Reynolds Metals Co, C A Ala, 328 F 2d 372

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Wis—Denton v Unit Crane & Shovel Corp, 61 N W 2d 552, 265 Wis 349

73. La—Canago v Globe Indem Co of NY, 34 So 2d 290—Bradford v Valley Mills, App, 165 So 2d 503, writ ref 167 So 2d 671, 246 La 851—Blanchard v Boh Bros Const Co, Inc, App, 274 So 2d 852

NY—Bretton v McEvoy, 353 NYS 2d 512, 44 A D 2d 594

74. Mich—Koch v Production Steel Co, 73 N W 2d 323, 344 Mich 161

NY—Raney v Habern Realty Corp, 110 NYS 2d 496, 279 App Div 426

ND—Farmers Home Mut Ins Co of Medela, Minn v Grand Forks Implement Co, 55 N W 2d 315, 79 ND 177

76. US—Rognsky v Richardson-Merrell, Inc, C A NY, 378 F 2d 832

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Colo—Cooley v Eskridge, 241 P 2d 851, 125 Colo 102

77. US—Remington Rand, Inc v U S, DCNY, 98 F Supp 334, aff'd, C A, 202 F 2d 276—McCollum v Smith, C A Hawaii, 339 F 2d 348—Reeves v John A Cooper Co, D C Ark, 304 F Supp 828

Ark—Western Arkansas Tel Co v Cotton, 532 S W 2d 424, 259 Ark 216

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79. US—Heny v Wheelless Drilling Co, C A La, 396 F 2d 503

Tenn—Dempster Bros, Inc v Duncan, 452 S W 2d 902, 61 Tenn App 88

Tex—J A Robinson Sons, Inc v Ellis, Civ App, 412 S W 2d 728, err ref no rev err

80. NY—Skibucki v Diesel Const Co, 290 NYS 2d 83, 56 Misc 2d 955, aff'd 290 NYS 2d 860, 29 A D 2d 1050

page 404

81. US—Dickerson v American Sugar Refining Co, C A Pa, 211 F 2d 200—Doane Agr Service Inc v Coleman, C A Tenn, 254 F 2d 40, cert den 79 S Ct 29—Chamberlin v United Engineers & Constructors, Inc, D C Pa, 213 F Supp 841

Cal—Williams v Fairhaven Cemetery Ass n, 338 P 2d 392, 52 C 2d 135

La—Morse v Jones, 65 So 2d 317, 223 La 212

Mo—Roddy v General Motors Corp, 380 S W 2d 328

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NY—Butler v D M W Contracting Co, 142 NYS 2d 24, 286 App Div 828, aff'd 132 N E 2d 898, 309 NY 990—Davis v Fitch, 142 NYS 2d 801, 286 App Div 949—Avesato v Paul Tushman Co, 142 NYS 2d 760

Tex—Allen v Texas Elec Service Co, Civ App, 350 S W 2d 866, err ref no rev err

Wis—Presser v Sessel Const Co, 119 N W 2d 405, 19 Wis 2d 54—Goebel v General Bldg Service Co, 131 N W 2d 852, 26 Wis 2d 129

Particular matters

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Ind—Reinhart v Ideal Pure Milk Co, 193 N E 2d 655, 135 Ind App 338

La—Hanover Ins Co v Jacobson-Young, Inc, App, 294 So 2d 564—Lyle v National Sur Corp, App, 304 So 2d 743, writ den, Sup, 309 So 2d 341, cert den 96 S Ct 201, 423 US 898, 46 L Ed 2d 131

Mass—Miller v Federated Dept Stores, Inc, 304 N E 2d 573, 364 Mass 340

NY—Francella v 2465 Crotona Ave Corp, 354 NY S 2d 123, 44 A D 2d 660

85. US—Defense Supplies Corp v Lawrence Warehouse Co, D C Cal, 67 F Supp 16, aff'd, CCA, 164 F 2d 773, set aside on oth. grds 168 F 2d 199, vac 69 S Ct 762, 336 US 631, 93 L Ed 931, reh den 69 S Ct 1151, 337 US 921, 93 L Ed 2d 1730—Greenberg v Mobil Oil Corp, D C Tex, 318 F Supp 1025

Ga—Morris v Construction Pub Co, 67 S E 2d 407, 84 Ga App 816

Mass—Luther McGill, Inc v Clark, 146 So 2d 338, 244 Mass 707

Mo—Hunter v De Luxe Drive-In Theaters, App, 257 S W 2d 255

NY—Kingsland v Erie County Agr Soc, 84 N E 2d 38, 298 NY 409, 10 A L R 2d 1—Seavone v State University Const Fund, 362 NYS 2d 22, 46 A D 2d 895

Pa—Super v West Penn Power Co, 140 A 2d 20, 392 Pa 159

Tex—J A Robinson Sons, Inc v Ellis, Civ App, 412 S W 2d 728, err ref no rev err

Wash—Langness v Ketonen, 255 P 2d 551, 42 Wash 2d 394

Wis—Lee v Junkans, 117 N W 2d 614, 18 Wis 2d 56

Evidence sufficient to show contractee liable

Or—Gordon Creek Tree Farms, Inc v Layne, 368 P 2d 737, 230 Or 204

Pa—Byrd v Merwin, 317 A 2d 280, 456 Pa 516

86. US—Fender v General Elec Co, DCNC, 260 F Supp 75, aff'd, C A, 380 F 2d 150

Tex—Fitzgerald v Andrade, Civ App, 402 S W 2d 563, err ref no rev err

87. US—Lawrence Warehouse Co v Defense Supplies Corp, CCA Cal, 164 F 2d 773, set aside, 168 F 2d 199, vac 69 S Ct 762, 336 US 631, 93 L Ed 931, reh den 69 S Ct 1151, 337 US 921, 93 L Ed 1730

Del—Seenev v Dover Country Club Apartments, Inc, Super, 318 A 2d 619

Ga—Smith v Poteet, 195 S E 2d 213, 127 Gr App 735, 63 A L R 3d 1243

N C—Moody v Kersey, 155 S E 2d 215, 270 N C 614

Ohio—Kelly v Ford Motor Co, 139 N E 2d 99, 104 Ohio App 185

Tex—Texas Elec Service Co v Holt, Civ App, 249 S W 2d 662, err ref no rev err—J A Robinson Sons, Inc v Ellis, Civ App, 412 S W 2d 728, err ref no rev err

Wis—Rogers v Valley Outdoor Theater, 56 N W 2d 503, 262 Wis 658

Subcontractor

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Fla—Hemlock v McCarty, App, 213 So 2d 475

Minn—Nicholas v Hennepin Wheel Goods Co, 58 N W 2d 572, 239 Minn 269

Okla—Moran v Lollis, 371 P 2d 473

89. US—Helms v Sinclair Refining Co, C A Ga, 170 F 2d 289

Okla—Mistletoe Exp Service, Inc v Culp, 353 P 2d 9

Wash—Ross v Norton, 221 P 2d 476, 36 Wash 2d 835

Wyo—Brubaker v Glenrock Lodge Intern Order of Odd Fellows, 526 P 2d 52

90. Cal—Welborn v Dalzell Rugs Co, 5 Cal Rptr 195, 181 C A 2d 268—US Industries, Inc v Edmond J Vadnas, General Contractor, 76 Cal Rptr 44, 270 C A 2d 520

Colo—Colwell v Oatman, 510 P 2d 464, 32 Colo App 171

Mo—Bonenberger v Sears Roebuck & Co, App, 449 S W 2d 385

91. Cal—Gettemy v Star House Movers, Inc, 37 Cal Rptr 441, 225 C A 2d 636

La—Landry v News-Star-World Pub Corp, App, 46 So 2d 140

93. US—Sumray Oil Corp v Allbritton, C A Tex, 187 F 2d 475, reh den C A, 188 F 2d 751, cert den 72 S Ct 51, 342 US 828, 96 L Ed 626

NY—Soderman v Stone Bar Associates, 146 NYS 2d 233, 208 Misc 864, aff'd 159 NYS 2d 50, 3 A D 2d 680, App den 160 NYS 2d 827, 3 A D 2d 755

Unsafe place to work

US—Southern Natural Gas Co v Wilson, C A Miss, 304 F 2d 253

Tex—W R Grimshaw Co v Zoller, Civ App, 396 S W 2d 477, err ref no rev err

94. Ill—Jones v Tonnetto, 250 N E 2d 829, 112 Ill App 2d 79

NY—Wolfe v Baroudi, 249 NYS 2d 159, 20 A D 2d 950

95. US—Balchuck v Seart, Roebuck & Co, C A Wis, 324 F 2d 142—Jamison v A M Byers Co, D C Pa, 222 F Supp 475, vac, C A, 330 F 2d 657, cert den 85 S Ct 74, 379 US 839 13 L Ed 2d 45—Scott Paper Co v Cooper, C A Ala, 403 F 2d 526

D C—Snodgrass v Cohen, D C, 96 F Supp 292

NY—Gordon v Project Const Corp, 110 NYS 2d 209—Raney v Habern Realty Corp, 119 NY S 2d 192, 281 App Div 278, aff'd 118 N E 2d 825, 306 NY 820

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Page 404

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- Miss—Mississippi Power Co v Brooks, 309 So 2d 863
- Tenn—East Volentine Courts, Inc v Foust, 376 S W 2d 320, 52 Tenn App 449
- Tex—Houston Natural Gas Corp v Janak, Civ App, 416 S W 2d 484, mod on oth grds 422 S W 2d 159—Stafford v Thornton, Civ App, 420 S W 2d 153, err ref no rev err
97. Tex—Allen v Texas Elec Service Co, Civ App, 350 S W 2d 866, err ref no rev err

page 405

- 99 U S—Defense Supplies Corp v Lawrence Ware house Co, supra, n 85
- SC—Allison v Ideal Laundry & Cleaners, 55 S E 2d 281, 215 SC 344
- 2 NJ—Gibbitera v Rosemawr Homes, 115 A 2d 553, 19 NJ 166—Majestic Realty Associates, Inc v Tou Contracting Co., 149 A 2d 288, 54 NJ Super 419, affd 153 A 2d 321, 30 NJ 425
3. US—Dushon v U S, C A Alaska, 243 F 2d 451, 17 Alaska 245, cert den 78 S Ct 415, 355 US 933, 2 L Ed 2d 416, 17 Alaska 458
- Ariz—Reber v Chandler High School Dist No 202, 474 P 2d 852, 13 Ariz App 133
- Cal—Williams v Fairhaven Cemetery Ass'n, 338 P 2d 392, 52 C 2d 135—Gibbitera v Rosemawr Homes, 115 A 2d 553, 338 P 2d 392, 52 C 2d 135
- NJ—Wolczak v National Elec Products Corp, 168 A 2d 442, 66 NJ Super 64—Manon v Public Service Elec & Gas Co, 178 A 2d 57, 72 NJ Super 146

There are other cases, relating to independent contractors, in which the evidence has been held to be insufficient³⁵

3.5. Evidence held insufficient to sustain verdict for plaintiff

- NY—Politi v Irvmar Realty Corp, 212 N Y S 2d 444, 13 A D 2d 469, motion den 217 N Y S 2d 1016, 13 A D 2d 653

Incompetence of contractor

- Alaska—Matanuska Elec Ass'n v Johnson, 386 P 2d 698

Negligence of contractor

- NY—Foran v Marsh & McLennan, Inc, 288 N Y S 2d 517, 29 A 2d 857
4. US—Sunray Oil Corp v Allbritton, C A Tex, 187 F 2d 475, reh den C A, 188 F 2d 751, cert den 72 S Ct 51, 342 US 828, 96 L Ed 626—Doane Agr Service Inc v Coleman, C A Tenn, 254 F 2d 40, cert den 79 S Ct 29, 358 US 818, 3 L Ed 2d 60
- Colo—Milver Hotels, Inc v Spangler, 321 P 2d 625, 137 Colo 111
- SC—Tinsley v Ervm Co, 216 S E 2d 170, 264 S C 487
- Tex—H L Butler & Son v Walpole, Civ App, 239 S W 2d 653, err ref no rev err
5. US—Lewis v Walston & Co, Inc, C A Fla, 487 F 2d 617
- Mass—Pridden v Boston Housing Authority, 308 N E 2d 467, 364 Mass 696, 70 A L R 3d 1106
6. Miss—C.J.S. cited in Hobbs v International Paper Co, 203 So 2d 488, 490—Powell v Masonite Corp, 214 So 2d 469
- Wash—C.J.S. cited in Smith v Leber, 209 P 2d 297, 301, 34 Wash 2d 611
7. US—Houlahan v Turner Const Co, D C R I, 139 F Supp 88, affd 240 F 2d 435—Watland v Walton, C A Ark, 410 F 2d 1—National Compressor Corp v Carrow, C A Mo, 417 F 2d 97
- Ala—Sibley v Adams, Civ, 324 So 2d 287, 56 Ala App, 572, cert den 324 So 2d 291, 295 Ala 121

- Cal—De La Torre v Valenzuela, 228 P 2d 13, 102 Cal App 2d 586—Williams v Stauffer Chemical Co, 304 P 2d 141, 146 C A 2d 322—De Roster v Crow, 7 Cal Rptr 540, 184 C A 2d 476—Conner v Utah Const & Min Co, 41 Cal Rptr 728, 231 C A 2d 263
- Colo—Wanwright v Lay, App, 473 P 2d 188
- D C—LeGrand v Insurance Co of North America, App, 241 A 2d 734
- Fla—Florida Crane Service, Inc v Cary, App, 215 So 2d 50
- Ill—Hamilton v Family Record Plan, Inc, 217 N E 2d 113, 71 Ill App 2d 39
- Ind—Armstrong Cork Co v Maar, 112 N E 2d 240, 124 Ind App 105
- Ky—Ambrosius Industries, Inc v Adams, 293 S W 2d 230
- La—Lynch v Culpepper, App, 96 So 2d 516—Mah fouz v United Broth of Carpenters and Joiners of America—Local Union No 403, App, 117 So 2d 295
- Minn—Orchard v Northwest Airlines, 51 N W 2d 645 236 Minn 42—Fox v Morse, 96 N W 2d 637, 255 Minn 318
- NJ—Reid v Monmouth Oil Co, 126 A 2d 368, 42 NJ Super 355
- N M—McCauley v Ray, 453 P 2d 192, 80 N M 171
- Ohio—Combs v Kobacker Stores, Inc, 114 N E 2d 447
- Ok—Fletcher v Meadow Gold Co, 472 P 2d 885
- Pa—Lancaster v Reckard, 19 Fay L J 137—George v Nemeth, 233 A 2d 231, 426 Pa 551
- Tex—T G & M Drilling Co v Kersh, Civ App, 295 S W 2d 466
- Va—Stevens v Ford Motor Co, 309 S E 2d 319, 226 Va 415
- Wash—Langness v Ketonen, 255 P 2d 551, 42 Wash 2d 394
- Wis—Skorna v Highway Pavers, Inc, 159 N W 2d 76, 39 Wis 2d 293
8. US—Dugas v National Aircraft Corp, D C Pa, 310 F Supp 21, vac in part on oth grds, C A, 438 F 2d 1386, on remand, D C, 340 F Supp 324
- Cal—Davis v Milligan, 333 P 2d 167, 166 C A 2d 404
- Idaho—Mercer v Shearer, 374 P 2d 716, 84 Idaho 536
- Iowa—Volkswagen Iowa City, Inc v Scott's Inc, 165 N W 2d 789
- La—James v Lykes Bros S S Co, App, 175 So 2d 444, application den 178 So 2d 653, 248 La 358
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- NY—Moriarty v W T Grant Co, 155 N Y S 2d 218—Olesker v Socony Mobil Oil Co, 262 N Y S 2d 181, 24 A D 2d 606
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- 9 US—Nyberg v Montgomery Ward & Co, D C Mich, 125 F Supp 116, motion den, 123 F Supp 999—Guillet v Best Shell Homes, Inc of Tenn, C A Miss, 312 F 2d 58—Greenberg v Mobil Oil Corp, D C Tex, 318 F Supp 1023—Vancouver Plywood Co, Inc v National Auto & Cas Ins Co, D C La, 387 F Supp 311
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- Ok—A K McBride Const Co v Arkhoma Steel Erection Co, 348 P 2d 541
- Wash—Baxter v Morninggude, Inc, 521 P 2d 946, 10 Wash App 893, 82 A L R 3d 1206
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10. US—In re Dearborn Marine Service, Inc, C A Tex, 499 F 2d 263, reh den 512 F 2d 1061, cert den 96 S Ct 163, 423 US 886, 46 L Ed 2d 118

- Colo—Rocky Mountain Bridge Co, Inc v Martin K Eby Const Co, App, 543 P 2d 1288
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page 406

- 11 US—Lebeck v William A Jarvis, Inc, D C Pa, 145 F Supp 706, affd in part and revd in part, on oth grds, C A, 250 F 2d 285
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- N Y—Monell v International Business Machines Corp, 363 N Y S 2d 657, 47 A D 2d 637, motion den 331 N E 2d 699, 36 N Y 2d 868, 370 N Y S 2d 924, affd 346 N E 2d 548, 38 N Y 2d 888, 382 N Y S 2d 747
- Ok—Leach v Hall, 418 P 2d 630
- 13 La—Galloway v Employers Mut of Wausau, App, 286 So 2d 676, application den, Sup, 290 So 2d 333
- 14 Mo—Hopkins v J I Case Co, 293 S W 2d 402—Duke v Thomas, App, 343 S W 2d 656
- Pa—Howard v Zaney Bar, 85 A 2d 401, 369 Pa 135
- Tex—Hudburgh v Palvic, Civ App, 274 S W 2d 94, err ref no rev err
- 17 Mo—C.J.S. cited in Lnam v Murphy, 232 S W 2d 937, 943, 360 Mo 1140—C.J.S. cited in Rosser v Standard Milling Company, 312 S W 2d 106, 110
- 20 US—Paleockrass v Garcia, C A N Y, 183 F 2d 244—White Auto Stores v Reves, C A N M, 223 F 2d 298—Employers' Liability Assur Corp v Butler, C A La, 318 F 2d 67—Norton v Railway Exp Agency, Inc, C A Pa, 412 F 2d 112—Barros v Louissana Const Materials Co, C A La, 465 F 2d 1157
- Ala—Roberson v Harna, Civ, 233 So 2d 96, 45 Ala App 537
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page 407

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§ 616. Trial and Judgment

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page 408

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Ge—Georgia Elec Co v Smith, 134 S E 2d 840, 108 Ga App 851

§ 617. — Questions of Law and Fact

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34. U S—Gulf Refining Co v Atchison, C A La., 196 F 2d 258, cert den 73 S Ct 42, 344 US 833, 97 L Ed 649—De Michel v General Crushed Stone Co., C A Pa., 218 F 2d 186—Breeding v Massey, C A Ark., 378 F 2d 171—Collins v Arkansas Cement Co., C A Ark., 453 F 2d 512

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Instrumentalities under control of defendant

(3) Other matters

Ala—Smith v Kennedy, 195 So 2d 820, 43 Ala App 554, certiorari denied 195 So 2d 829, 280 Ala 718

Ill—Traylor v The Fair, App., 243 NE 2d 300, 101 Ill App 2d 268

page 409

35. Anz—Olson v Staggs-Bilt Homes, Inc., 534 P 2d 1073, 23 Anz App 574

NY—Krauthamer v 443-4th Ave Corp., 152 NY S 2d 539, 2 A D 2d 699

36. U S—Stewart Warner Corp v Burns Intern Sec Services, Inc., D C Ill., 353 F Supp 1387

Ala—Thompson v Havard, 235 So 2d 853, 285 Ala 718

Cal—Monty v Orlando, 337 P 2d 861, 169 C A 2d 620

Okla—Murdette Exp Service, Inc v Culp, 353 P 2d 9

Servant with vicious propensities

(2) Other matters

Alaska—Svacek v Shelley, 359 P 2d 127

Fla—Sixty-Six, Inc v Finley, App., 224 So 2d 381

Utah—Stone v Hurst Lumber Co., 386 P 2d 910, 15 Utah 2d 49

Evidence held insufficient for jury

Ill—Pascoe v Meadowmoor Dames, 190 NE 2d 156, 41 Ill App 2d 52

NY—Stevens v Lankard, 297 NY S 2d 686, 31 A D 2d 602, aff'd 254 NE 2d 339, 25 NY 2d 640, 306 NY S 2d 257

37. U S—Hover v MacDonald Engineering Co, D C Iowa, 183 F Supp 427, aff'd, C A., 290 F 2d 301

Ill—Pantaleo v Gamm, 245 NE 2d 618, 106 Ill App 2d 116

38. Cal—Welborn v Dalzell Rigging Co., 5 Cal Rptr 195, 181 C A 2d 268

Iowa—Grant v Younker Bros., 58 NW 2d 834, 244 Iowa 958

Mass—Marino v Trawler Emil C, Inc., 213 NE 2d 238, 350 Mass 88, cert den 86 S Ct 1587, 384 U S 960, 16 L Ed 2d 673

Mo—Panymann v Star Service & Petroleum Co., 395 S W 2d 129

N C—Crews v Provident Finance Co., 137 SE 2d 381, 271 NC 684

Ohio—Warland v Rothstein, 49 NE 2d 165, 141 Ohio St 501

40. Ill—Lipcomb v Coppage, 197 NE 2d 48, 44 Ill App 2d 430

41. Cal—Hale v Farmers Ins Exchange, 117 Cal Rptr 146, 42 C A 3d 681

N J—Gundin v Baron, 78 A 2d 297, 11 N J Super 215

Tex—King v McGuff, 234 S W 2d 403, 149 Tex 432

Wash—Berndt v Hammer, 363 P 2d 393, 58 Wash 2d 408

Wis—Garcia v Samson's, Inc., 103 NW 2d 565, 10 Wis 2d 515

43. Conn—Cicero v E B K., Inc., 352 A 2d 309, 166 Conn 490

44. N D—C.J.S. cited in Hoffer v Burd, 49 NW 2d 282, 291, 78 ND 278

45. U S—Albany Ins Co v Holberg, C C A Minn., 166 F 2d 311—Myers v Valley Oase Oil Co., C A Tex., 171 F 2d 335—Standard Brands v Bateman, C A Mo., 184 F 2d 1002, cert den 71 S Ct 503, 506, 340 US 942, 95 L Ed 679—Arndt v Mitchell Cadillac Rental, Inc., D C N J., 115 F Supp 533—Burger Chef Systems, Inc v Govro, C A Mo., 407 F 2d 921—Mauk v Wright, D C Pa., 367 F Supp 961

Ala—Hercules Inc v Jones, 228 So 2d 9, 284 Ala 692

Cal—Brownand v Scott Lumber Co., 269 P 2d 891, 125 C A 2d 68—Hardin v Elvitsky, 42 Cal Rptr 748, 232 C A 2d 357

Colo—Esposito v Christopher, App., 485 P 2d 510

Conn—Leary v Johnson, 267 A 2d 658, 159 Conn 101

Fla—Goldie v Dillon, App., 140 So 2d 81

Ga—C.J.S. cited in Lawson Products, Inc v Rowsey, 209 S E 2d 125, 126, 132 Ga App 726

Idaho—Van Vranken v Fence-Craft, 430 P 2d 488, 91 Idaho 742

Ill—Hamilton v Family Record Plan, Inc., 217 NE 2d 113, 71 Ill App 2d 39—Gunterberg v B & M Transp Co., Inc., 327 NE 2d 528, 27 Ill App 3d 732

Iowa—Crum v Walker, 44 NW 2d 701, 241 Iowa 1173

Ky—Dennert v Dee, supra, n 20

La—Barros v Service Drayage Co., App., 250 So 2d 135, application den 253 So 2d 66, 259 La 805, and 253 So 2d 66, 259 La 806

Mid—Globe Indem Co v Victall Corp., 119 A 2d 423, 208 Md 573—Greer Lines Co v Roberts, 139 A 2d 235, 216 Md 69

Mass—Messina v Richard Baird Co., 147 NE 2d 805, 337 Mass 8—Marino v Trawler Emil C, Inc., 213 NE 2d 238, 350 Mass 88, cert den 86 S Ct 1587, 384 U S 960, 16 L Ed 2d 673

Mich—Grenawalt v Nyhus, 55 NW 2d 736, 335 Mich 76

Minn—Burdick v Bongard, 96 NW 2d 868, 256 Minn 24

Miss—McCrory v Hall, 139 So 2d 667, 243 Miss 678—Cook v Chow, 223 So 2d 521

Mo—Dean v Young, 396 S W 2d 549—Price v Sedler, 408 S W 2d 815—Jolsch v Life & Cas Ins Co of Tenn, App., 424 S W 2d 111—Cathright v Pendergraft, 433 S W 2d 299

Neb—Sears v Mid-City Motors, Inc., 136 NW 2d 428, 179 Neb 100

N J—Larocca v American Chan & Cable Co., 92 A 2d 811, 23 N J Super 195, aff'd 97 A 2d 680, 13 N J 1—Larocca v American Chan & Cable Co., 97 A 2d 680, 13 N J 1—Gibbier v Rosenawr Homes, 108 A 2d 293, 32 N J Super 315, aff'd 115

Page 409

A 2d 553, 19 N.J. 166—Sarris v A. A. Pruzick & Co., 117 A 2d 305, 37 N.J. Super 340—Lawton v Virginia Stevedoring Co., 143 A 2d 197, 50 N.J. Super 564

N.Y.—Pape v 2632 Broadway, Inc., 111 N.Y.S.2d 908, 279 App. Div. 1003

Okl.—Flick v Crouch, 434 P.2d 256

Or.—Wallows Valley Stages, Inc. v Oregonian Pub. Co., 386 P.2d 430, 235 Or. 594

Pa.—Landenmuth v Steffy, 98 A 2d 242, 173 Pa. Super 509—Craig v Borough of Ebensburg, 137 A 2d 886, 185 Pa. Super 581—Boutell Driveway Co. v Ladd Motors, Inc., 9 Cumb. 29—Exner v Gangewere, 152 A 2d 458, 397 Pa. 58

S.C.—Fagan v Timmons, 54 S.E.2d 536, 215 S.C. 116, cert. den. 70 S.Ct. 306, 338 U.S. 904, 94 L.Ed. 556, reh. den. 70 S.Ct. 1018, 339 U.S. 992, 94 L.Ed. 1392—Hunter v Hyder, 114 S.E.2d 493, 236 S.C. 378

Tex.—Sears, Roebuck & Co. v Blackburn, Civ. App., 305 S.W.2d 791—C.J.S. cited in Pangborn Corp. v Jacobs, Tex., 368 S.W.2d 852, 858, err. ref. no rev. err.

Va.—Norfolk Union Bus Terminal v Sheldon, 49 S.E.2d 338, 188 Va. 288—Alvey v Butchikawitz, 84 S.E.2d 535, 198 Va. 447

Wash.—Langness v Ketonen, supra, n. 7

W.Va.—Leyme v Peoples Broadcasting Corp., 140 S.E.2d 438, 149 W.Va. 256

Wis.—Thurn v La Crosse Liquor Co., 46 N.W.2d 212, 258 Wis. 448

Wyo.—Barnes v Fernandez, 526 P.2d 983

page 410

46. U.S.—Arndt v Mitchell Cadillac Rental, Inc., supra, n. 45—Sullivan v General Elec. Co., C.A. Ohio, 226 F.2d 290—Meredith v Ringling Bros. Barnum & Bailey Combined Shows, Inc., C.A. Ohio, 321 F.2d 107

Colo.—Peterson v Nevada Motor Rentals, Inc., 470 P.2d 905, 28 Colo. App. 102

Ill.—C.J.S. cited in Guntenberg v B. & M. Transp. Co., Inc., 327 N.E.2d 528, 531, 27 Ill. App. 3d 732

Ky.—C.J.S. cited in Nicley's Adm'x v Mattox, 242 S.W.2d 608, 609

Md.—Globe Indem. Co. v Victrol Corp., 119 A 2d 423, 208 Md. 573—Stem v Nello L. Teer Co., 130 A 2d 769, 213 Md. 132

Mo.—Dean v Young, 396 S.W.2d 549

Neb.—In re Bingham's Estate, 50 N.W.2d 523, 155 Neb. 24—Pestz v Masak Auto Supply Co., 74 N.W.2d 474, 161 Neb. 588

N.J.—Geary v Simon Dairy Products Co., 72 A 2d 214, 7 N.J. Super 88

Ohio—Flaher v Hering, 97 N.E.2d 553, 88 Ohio App. 107

Okl.—Burke v Thomas, 313 P.2d 1082

Or.—Wallows Valley Stages, Inc. v Oregonian Pub. Co., 386 P.2d 430, 235 Or. 594—Jenkins v AAA Heating & Cooling, Inc., 421 P.2d 971, 245 Or. 382

Pa.—Costello v Pennsylvania R. Co., 60 A 2d 28, 359 Pa. 562—Culp v Weiss, 17 Som. 261, 37 West 155—Green v Independent Oil Co., 201 A 2d 207, 414 Pa. 477

S.D.—Alborn v Arms, 52 N.W.2d 101, 74 S.D. 277

Va.—Jacobson v Kira, 64 S.E.2d 755, 192 Va. 352, 25 A.L.R.2d 976

W.Va.—Moore v Burman, 54 S.E.2d 23, 132 W.Va. 757

Wis.—Thurn v La Crosse Liquor Co., 46 N.W.2d 212, 258 Wis. 448—Wittka v Hartnell, 175 N.W.2d 248, 46 Wis.2d 374

Evidence held insufficient

Cal.—Matthews v Sears, Roebuck & Co., 253 P.2d 43, 116 C.A.2d 96

Ill.—Pence v Meadowmoor Dairies, 190 N.E.2d 156, 41 Ill. App. 2d 52

47. U.S.—Matonti v Research-Cottrell, Inc., C.A. Pa., 202 F.Supp. 527

Ill.—Guntenberg v B. & M. Transp. Co., Inc., 327 N.E.2d 528, 27 Ill. App. 3d 732

Md.—Wood v Abell, 300 A 2d 665, 268 Md. 214

Okl.—McReynolds v Oklahoma Turnpike Authority, 291 P.2d 341

W.Va.—Stevens v Frump, 52 S.E.2d 181, 132 W.Va. 66

48. U.S.—Wilson v Nooter Corp., C.A.N.H., 475 F.2d 497, cert. den. 94 S.Ct. 116, 414 U.S. 865, 38 L.Ed.2d 85, app. after remand 499 F.2d 705

Ala.—Ridgeway v Sullivan-Long & Hagerty, Inc., 98 So.2d 665, 39 Ala. App. 341—Southern Cement Co. v Patterson, 122 So.2d 386, 271 Ala. 128

Alaska—Reader v Ghemm Co., 490 P.2d 1200

Ark.—Steel Erectors, Inc. v Lee, 484 S.W.2d 874, 253 Ark. 151

Cal.—Doty v Lacey, 249 P.2d 550, 114 C.A.2d 73

Fla.—C.J.S. quoted in Gordis v DeVilliers, App., 402 So.2d 1313, 1314

Ga.—Fulghum Industries, Inc. v Pollard Lumber Co., 126 S.E.2d 432, 106 Ga. App. 49

Idaho—Brown v Arrington Const. Co., 262 P.2d 789, 74 Idaho 338

Ill.—Gundich v Emerson-Comstock Co., 171 N.E.2d 60, 21 Ill.2d 117

Kan.—Beitz v Hereford, 220 P.2d 135, 169 Kan. 556—Coleman v S. Patti Const. Co., 318 P.2d 1028, 182 Kan. 53

La.—Nichols Const. Corp. v Spell, App., 315 So.2d 801

Mass.—Harrington v H. F. Davis Tractor Co., 175 N.E.2d 241, 342 Mass. 675

Mich.—Henning v Riegler Water Well Drilling, Inc., 103 N.W.2d 429, 360 Mich. 288

Minn.—Nepstad v Lambert, supra, n. 11

N.J.—Russell v East Coast Shipyards, 74 A 2d 335, 9 N.J. Super 1—Roberts v Geo. M. Brewster & Son, 80 A 2d 638, 13 N.J. Super 462—Falk v Unger, 111 A 2d 283, 33 N.J. Super 589—Gibulterra v Rosemawr Homes, 115 A 2d 553, 19 N.J. 166

N.Y.—Lo Presti v Columbia Stevedoring Co., 142 N.Y.S.2d 260, aff'd 148 N.Y.S.2d 457, 1 A.D.2d 700, rearg. and app. den. 149 N.Y.S.2d 273, 1 A.D.2d 784, aff'd 154 N.Y.S.2d 641, 1 N.Y.2d 882, 136 N.E.2d 714

Ohio—Bennett v Wilson, 179 N.E.2d 86, 113 Ohio App. 503

Okl.—Hodges v Holding, 229 P.2d 555, 204 Okl. 327

Pa.—Stine v Borst, 205 A 2d 650, 205 Pa. Super 46

R.I.—Agostini v W. J. Halloran Co., 111 A 2d 537, 82 R.I. 466

Tex.—Zoner v Hertz Equipment Rental Corp. Civ. App., 523 S.W.2d 765, err. ref. no rev. err.

Va.—Smith v Grenadier, 127 S.E.2d 107, 203 Va. 740

Wash.—Anderson v Red & White Const. Co., 483 P.2d 124, 4 Wash. App. 534

W.Va.—American Tel. & Tel. Co. v Ohio Val. Sand Co., 50 S.E.2d 884, 131 W.Va. 736

Wis.—Edwards v Cutler-Hammer, Inc., 74 N.W.2d 606, 272 Wis. 54

Wyo.—Tyler v Jensen, 295 P.2d 742, 75 Wyo. 249

Evidence held sufficient for jury

Ala.—Alabama Power Co. v Smith, 142 So.2d 228, 273 Ala. 509

Hawai—Nakagawa v Apan, 477 P.2d 611, 52 Haw. 379

Wash.—Davis v Early Const. Co., 386 P.2d 958, 63 Wash.2d 252

page 411

49. U.S.—Hahn v Bucyrus-Erie Co., C.A. Pa., 178 F.2d 844—Byrne v Pennsylvania R. Co., D.C. Pa., 169 F.Supp. 655, aff'd, C.A., 262 F.2d 906, cert. den. 79 S.Ct. 798, 359 U.S. 960, 3 L.Ed.2d 766—Vance Trucking Co. v Canal Ins. Co., D.C.S.C., 249 F.Supp. 33, aff'd, C.A., 395 F.2d 391, cert. den. 89 S.Ct. 129, 393 U.S. 841, 21 L.Ed.2d 116—Wilson v Nooter Corp., C.A.N.H., 475 F.2d 497, cert. den. 94 S.Ct. 116, 414 U.S. 865, 38 L.Ed.2d 85, app. after remand 499 F.2d 705

Ala.—Ridgeway v Sullivan-Long & Hagerty, Inc., 98 So.2d 665, 39 Ala. App. 341—Southern Cement Co. v Patterson, 122 So.2d 386, 271 Ala. 128

Ariz.—Williams v Wise, 476 P.2d 145, 106 Ariz. 335

Ill.—Gundich v Emerson-Comstock Co., 171 N.E.2d 60, 21 Ill.2d 117

Ind.—New York Cent. R. Co. v Northern Indiana Public Service Co., 221 N.E.2d 442, 140 Ind. App. 79

Kan.—Coleman v S. Patti Const. Co., 318 P.2d 1028, 182 Kan. 53

Mich.—Nash v Sears, Roebuck & Co., 174 N.W.2d 818, 383 Mich. 136

Neb.—Vontress v Ready Mixed Concrete Co., 104 N.W.2d 331, 170 Neb. 789

Pa.—McConnell v Williams, 65 A 2d 243, 361 Pa. 355—Donnelly v Fred Whittaker Co., 72 A 2d 61, 364 Pa. 387

Wash.—Nyman v MacRae Bros. Const. Co., 418 P.2d 253, 69 Wash.2d 285—Pichler v Pacific Mechanical Constructors, 462 P.2d 960, 1 Wash. App. 447

50. U.S.—Standard Oil Co. v Ogden & Moffett Co., C.A. Mich., 242 F.2d 287

Ala.—Ridgeway v Sullivan-Long & Hagerty, Inc., 98 So.2d 665, 39 Ala. App. 341

Ariz.—Williams v Wise, 476 P.2d 145, 106 Ariz. 335

Cal.—Balding v D. B. Stutman, Inc., 54 Cal. Rptr. 717, 246 C.A.2d 559

Ill.—Yankay v Oscar Bohlin & Son, Inc., 186 N.E.2d 57, 37 Ill. App. 2d 457

Neb.—Kessler v Bates & Rogers Const. Co., 50 N.W.2d 553, 155 Neb. 40—Vontress v Ready Mixed Concrete Co., 104 N.W.2d 331, 170 Neb. 789

Nev.—McDowell Const. Supply Corp. v Williams, 518 P.2d 604, 90 Nev. 75

Pa.—Mature v Angelo, 97 A 2d 59, 373 Pa. 593

Tex.—Producers Chemical Co. v McKay, 366 S.W.2d 220—Tunnell v Ota Elevator Co., Civ. App., 400 S.W.2d 781, err. ref. no rev. err.—Gulf, C. & S.F.R. Co. v Harry Newton, Inc., Civ. App., 430 S.W.2d 223, err. ref. no rev. err.

Wash.—Pichler v Pacific Mechanical Constructors, 462 P.2d 960, 1 Wash. App. 447

Wyo.—C.J.S. cited in Tyler v Jensen, 295 P.2d 742, 749, 75 Wyo. 249

51. U.S.—Frankel v Moody, C.A. Pa., 393 F.2d 279

Cal.—Monty v Orlandi, 337 P.2d 861, 169 C.A.2d 620

D.C.—Presley v Commercial Credit Corp., Mun. App., 177 A 2d 916

Ga.—Gilbert v Progressive Life Ins. Co., 53 S.E.2d 494, 79 Ga. App. 219—West Point Pepperell, Inc. v Knowles, 208 S.E.2d 17, 132 Ga. App. 253

Neb.—Niemyer v Forburger, 112 N.W.2d 276, 172 Neb. 876—Watts v Zadina, 139 N.W.2d 290, 179 Neb. 548

N.Y.—Stone v Bigley Bros., 137 N.Y.S.2d 924, 285 App. Div. 457, motion den. 127 N.E.2d 336 308 N.Y. 968, aff'd 127 N.E.2d 913, 309 N.Y. 132

Tex.—C.J.S. quoted at length in Texas & P. Ry. Co. v Crown, Civ. App., 220 S.W.2d 294, err. ref. no rev. err.

52. U.S.—Cales v Chesapeake & O. Ry. Co., D.C. Va., 300 F.Supp. 155

Ala.—U.S. Steel Co. v Butler, 69 So.2d 685, 260 Ala. 190—Solmics of Gulf Coast, Inc. v Bragg, 232 So.2d 638, 285 Ala. 396

Cal.—Bonetti v Double Play Tavern, 274 P.2d 751, 126 C.A.2d Supp. 848—Eyre v Kafer, Inc., 20 Cal. Rptr. 841, 202 C.A.2d 449

Conn.—Cardona v Valentin, 273 A 2d 697, 160 Conn. 18—Golas v Wilson, 330 A 2d 96, 31 Conn. Sup. 332

D.C.—Great A. & P. Tea Co. v Avelhe, Mun. App., 116 A 2d 162—Ogilby v Eakey, Mun. App., 121 A 2d 265

Fla.—Sands v Ivy Liquors, Inc., App., 192 So.2d 775—Sixty-Six, Inc. v Finley, App., 224 So.2d 381

Ga.—A-1 Bonding Service, Inc. v Hunter, 186 S.E.2d 566, 125 Ga. App. 173, aff'd 189 S.E.2d 392, 229 Ga. 104

Idaho—Van Vranken v Fence-Craft, 430 P.2d 488, 91 Idaho 742

Ill.—Sinlaraki v Hodson, 87 N.E.2d 137, 338 Ill. App. 137—Bonnem v Harrison, 150 N.E.2d 383, 17 Ill. App. 2d 292

Ind—Hollowell v Greenfield, 216 N E 2d 537, 142 Ind App 344

Iowa—Sandman v Hagan, 154 N W 2d 113, 261 Iowa 560

Md—Safeway Stores, Inc v Barrack, 122 A 2d 457, 210 Md 168—Rusack v Giant Food, Inc, 337 A 2d 445, 26 Md App 250

Mass—Wess v Republic Pipe & Supply Corp, 140 N E 2d 657, 335 Mass 422—Dwyer v Hearst Corp, 323 N E 2d 738, 3 Mass App 76

Mich—Shandor v Lucher, 84 N W 2d 810, 349 Mich 556

Minn—Graalum v Radisson Ramp, Inc, 71 N W 2d 904, 245 Minn 54—Boland v Morrill, 132 N W 2d 711, 270 Minn 86—Nelson v Nelson, 166 N W 2d 70, 282 Minn 487

Miss—Eagle Motor Lines v Mitchell, 78 So 2d 482, 223 Miss 398—Jenkins v Cogan, 119 So 2d 363, 238 Miss 543

Mo—Smith v Lannert, App, 429 S W 2d 8

Neb—Klause v Nebraska State Bd of Agriculture, 35 N W 2d 104, 105 Neb 466—Watts v Zadina, 139 N W 2d 290, 179 Neb 548—S M S Trucking Co v Midland Vet, Inc, 185 N W 2d 667, 186 Neb 647

N J—Trecartm v Mahony—Transt Const Co, 87 A 2d 349, 18 N J Super 380—J L Querner Truck Lines, Inc v Safeway Truck Lines, Inc, 168 A 2d 216, 65 N J Super 554, affd 174 A 2d 201, 35 N J 564

N Y—Ernst v State, 245 N Y S 2d 567, 20 A D 2d 608

ND—Hoffer v Burd, 49 N W 2d 282, 78 ND 278

Ohio—Duff v Corn, 87 N E 2d 731, 84 Ohio App 403—Rhude v Ed G Koehl, Inc, 88 N E 2d 269, 85 Ohio App 223—Fisher v Hermg, supra, n 46—Kellerman v J S Dung Co, 199 N E 2d 562, 176 Ohio St 320—Maple v Tennessee Gas Transmission Co, App, 201 N E 2d 299

Okl—Shner v Morrison, 357 P 2d 196

Or—Gossett v Simonson, 411 P 2d 277, 243 Or 16

Pa—Winward v Rhodewalt, 11 Chest 294, revd on oth grds 182 A 2d 111, 198 Pa Super 591, revd on oth grds 198 A 2d 623, 203 Pa Super 369

Tex—Dart v Yellow Cab Inc, Civ App, 401 S W 2d 874, err ref no rev err

Va—Tri-State Coach Corp v Walsh, 49 S E 2d 363, 188 Va 299—McNeill v Spindler, 62 S E 2d 13, 191 Va 685—Turner v Burford Buck Corp, 112 S E 2d 911, 201 Va 693

Wash—Smith v Leber, 209 P 2d 297, 34 Wash 2d 611—McNew v Puget Sound Pulp & Timber Co, 224 P 2d 627, 37 Wash 2d 495

W Va—Levine v Peoples Broadcasting Corp, 140 S E 2d 438, 149 W Va 256

Evidence held sufficient

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Ark—Lanzvler v El Dorado Sports Center, Inc, 343 S W 2d 411, 233 Ark 191

Cal—De Marjan v Ideal Heating Corp, 278 P 2d 114, 129 C A 2d 758

DC—M J Ulme Co v Cashdan, C A, 171 F 2d 132, 84 US App DC 58

Fla—Wess v Jacobson, 62 So 2d 904

Ga—Merry Bros Brick & Tile Co v Jackson, 171 S E 2d 924, 120 Ga App 716

Ky—Dennert v Dee, supra, n 20

Mo—Linsam v Murphy, 232 S W 2d 937, 360 Mo 1140

NC—Crews v Provident Finance Co, 157 S E 2d 381, 271 NC 684

Pa—Bard v Crawford Door Sales Co of Philadelphia, 147 A 2d 399, 394 Pa 512

R I—Bryce v Jackson Diners Corp, 96 A 2d 637, 80 R I 327

Wash—Langness v Ketonen, 255 P 2d 551, 42 Wash 2d 394

Assault and battery

Cal—Monty v Orlando, 337 P 2d 861, 169 C A 2d 620

Conn—Pelletier v Bilbules, 227 A 2d 251, 154 Conn 544

Ga—Clark v Americus Hardware Co, 47 S E 2d 909, 77 Ga App 282

Mass—Rego v Thomas Bros Corp, 164 N E 2d 144

Mo—Barger v Green, supra

N J—Gindin v Baron, supra, n 41—Schiano v Brickseal Refractory Co, 162 A 2d 904, 62 N J Super 269, affd 164 A 2d 602, 33 N J 323

N Y—De Wald v Seidenberg, 79 N E 2d 430, 297 N Y 335—Sims v Bergamo, 169 N Y S 2d 449, 3 N Y 2d 531, 147 N E 2d 1

Ohio—Combs v Kobacker Stores, Inc, App, 114 N E 2d 447

Or—Moe v Jolly Joan, 399 P 2d 25, 239 Or 537

SD—Skow v Steele, 49 N W 2d 24, 74 SD 81

Tex—Houston Transit Co v Felder, supra, n 20

Va—Broadus v Standard Drug Co, 179 S E 2d 497, 211 Va 645

Wash—Langness v Ketonen, supra

Shooting of third person

(1) US—Guillen v Kuykendall, C A Tex, 470 F 2d 745

Ala—US Steel Co v Butler, supra

(2) Va—Alvey v Butchkavitz, 84 S E 2d 535, 196 Va 447

Label and alander

Md—Lewis v Accelerated Transport—Pony Express, Inc, 148 A 2d 783, 219 Md 252

Ohio—C J S cited in State ex rel Flagg v City of Bedford, 218 N E 2d 601, 606, 7 Ohio St 2d 45

Va—Slaughter v Valleydale Packers, Inc, of Bristol, 94 S E 2d 260, 198 Va 339

page 413

53 Ga—J W Starr & Sons Lumber Co v York, 78 S E 2d 429, 89 Ga App 22—F E Fortenberry & Sons, Inc v Malmberg, 102 S E 2d 667, 97 Ga App 162

Tex—Hudburgh v Palvic, Civ App, 274 S W 2d 94, err ref no rev err

54 Me—R I Mitchell, Inc v Belgrade Shoe Co, 125 A 2d 80, 152 Me 100

Ohio—Maple v Tennessee Gas Transmission Co, App, 201 N E 2d 299

Va—Bryant v Bare, 64 S E 2d 741, 192 Va 238

55 US—Kuff v Travelers Ins Co, C A La, 402 F 2d 129

Fla—Whetzel v Metropolitan Life Ins Co, App, 266 So 2d 89—Tuberville v Concrete Const Co, App, 270 So 2d 431

Hawaii—Lucas v Liggett & Myers Tobacco Co, 442 P 2d 460, 50 Haw 477, 506, app after remand 461 P 2d 140, 51 Haw 346

Miss—Lovett v Motor Co v Walley, 64 So 2d 370, 217 Miss 384

Ohio—Fisher v Hering, supra, n 46

Or—Barry v Oregon Trunk Ry, 253 P 2d 260, 197 Or 246—Gossett v Simonson, 411 P 2d 277, 243 Or 16

Pa—Forbes v Eades, 4 Chest Co 72

Tex—Bounty Ballroom v Bam, Civ App, 211 S W 2d 248, err ref no rev err

Va—Alvey v Butchkavitz, 84 S E 2d 535, 196 Va 447

Wyo—Barnes v Hernandez, 526 P 2d 983

Evidence held insufficient

DC—Wright v Crown Co, App, 267 A 2d 347

Assault and battery

US—B F Goodrich Tire Co v Lyster, C A Ala, 328 F 2d 411

Fla—Columbia By the Sea, Inc v Petty, App, 157 So 2d 190

Md—LePore v Gulf Oil Corp, 207 A 2d 451, 237 Md 591

N M—Miera v George, 237 P 2d 102, 55 N M 535

Shooting of third person

(1) Ill—Lipcomb v Coppage, 197 N E 2d 48, 44 Ill App 2d 430

56 Ga—Columbia Drug Co v Cook, 194 S E 2d 286, 127 Ga App 490

page 414

57 Cal—Moeller v De Rose, App, 222 P 2d 107, hearing dismissed

Mo—Spedel v Kellum, App, 340 S W 2d 200

58 Conn—Pelletier v Bilbules, 227 A 2d 251, 154 Conn 544

59 Ga—Davis v Childers, 215 S E 2d 297, 134 Ga App 534

Va—Bryant v Bare, supra, n 54

60 DC—Great A & P Tea Co v Avelthe, Mun App, 116 A 2d 162

N J—Gindin v Baron, supra, n 41

Va—Bryant v Bare, supra, n 54

61 Mo—Brown v Moore, 248 S W 2d 553

Va—McNeill v Spindler, supra, n 52—Bryant v Bare, supra, n 54

62 US—McGarrah v U S, D C Miss, 294 F Supp 669

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Ga—Davis v Childers, 215 S E 2d 297, 134 Ga App 534

Ill—Gundich v Emerson—Comstock Co, 171 N E 2d 60, 21 Ill 2d 117

63 US—Cagle v McQueen, C A Tex, 200 F 2d 186, cert den 74 S Ct 25, 346 US 815, 98 L Ed 342—Chicago Great Western Ry Co v Casura, C A Minn, 234 F 2d 441—S Barch & Sons v Martin, C A Alaska, 244 F 2d 556, 17 Alaska 230, cert den 78 S Ct 62, 355 US 837, 2 L Ed 2d 49, 17 Alaska 388—Arrow Drilling Co v Brooks, C A Tex, 303 F 2d 590—Fullington v Iowa Sheet Metal Contractors, Inc, D C Neb, 319 F Supp 243

Ariz—Ong v Pacific Finance Corp of Cal, 222 P 2d 801, 70 Ariz 426

Cal—Golceff v Sugarman, 222 P 2d 665, 36 Cal 2d 152—Parks v Dexter, 224 P 2d 121, 100 Cal App 2d 521—De La Torre v Valenzuela, supra, n 7—Doty v Lacey, 249 P 2d 550, 114 C A 2d 73—Tesone v Reman, 255 P 2d 48, 117 C A 2d 211

DC—White v Louis Creative Hair Dressers, Inc, C A, 273 F 2d 832, 107 US App DC 18

Fla—Wess v Jacobson, 62 So 2d 904

Ga—Patterson v Carpenter, 107 S E 2d 245, 98 Ga App 889

Idaho—Nissula v Southern Idaho Timber Protective Ass'n, 245 P 2d 400, 73 Idaho 37

Mass—Wess v Republic Pipe & Supply Corp, 140 N E 2d 657, 355 Mass 422

Mich—Totok v Elfstrom, 145 N W 2d 388, 4 Mich App 705

Minn—Ahlstrom v Minneapolis, St P & SSM R Co, 68 N W 2d 873, 244 Minn 1

Miss—Nowell v Harris, 68 So 2d 464, 219 Miss 363

Mo—Stremming v Holskamp Lumber Co, App, 238 S W 2d 31—Logsdon v Duncan, 293 S W 2d 944—Hamilton v Ross, 304 S W 2d 812—Miller v Multiplex Faucet Co, 315 S W 2d 224

N J—J L Querner Truck Lines, Inc v Safeway Truck Lines, Inc, 174 A 2d 201, 35 N J 564

N M—Tapas v Panhandle Steel Erectors Co, 428 P 2d 625, 78 N M 86

N Y—O'Ghlo v Rubin, supra, n 52

Or—Madron v Thomson, 419 P 2d 611, 245 Or 513, 27 A L R 3d 953, op clarified, reh den 423 P 2d 496, 245 Or 513

Wash—Blancher v Bank of California, 286 P 2d 92, 47 Wash 2d 1

Wis—Rochester Am Ins Co v Plumbers Supply Co, 46 N W 2d 765, 258 Wis 519

Res ipsa loquitur

Cal—Raber v Tamm, 226 P 2d 574, 36 Cal 2d 654

Cause of injury

Ohio—Gephart v Rike-Kumler Co, App, 145 N E 2d 197—Brere v Lathrop Co, 258 N E 2d 597, 22 Ohio St 2d 166

Page 419

Instructions as to scope of employment

Tex—Southwestern Inv Co v Alvarez, Civ App, 242 S W 2d 862, mod 453 S W 2d 138

Instructions held proper

Cal—Johnson v Cal-West Const Co, 22 Cal Rptr 492, 204 CA 2d 610—Delgado v W C Garcia & Associates, 27 Cal Rptr 613, 212 CA 2d 5

Iowa—Crum v Walker, supra, n 45

NJ—Della Cerra v Burns, 173 A 2d 564, 69 NJ Super 110

Okla—Great Atlantic & Pacific Tea Co v Mullen, 301 P 2d 217—Moram v Lolhs, 371 P 2d 473

Instructions held improper or erroneous

US—Maryland Cas Co v Figueroa, CA Puerto Rico, 358 F 2d 817

Ariz—Fluor Corp, Limited v Sykes, 416 P 2d 610, 3 Ariz App 559

Ga—Wright v Concrete Co, 129 SE 2d 351, 107 Ga App 190

Ill—Larson v Commonwealth Edison Co, 211 NE 2d 247, 33 Ill 2d 316

Mich—Renda v International Union, United Auto, Aircraft and Agr Implement Workers of America, 114 NW 2d 343, 366 Mich 58

Minn—Laurie v Mueller, 78 NW 2d 434, 248 Minn 1

Mo—Barkley v Mitchell, App, 411 S W 2d 817

NY—Martin v Siegfried Const Co, 228 NYS 2d 251, 16 AD 2d 383

Va—Slaughter v Valleydale Packers, Inc, of Bristol, 94 SE 2d 260, 198 Va 339

W Va—Burdette v Maust Coal & Coke Corp, 222 SE 2d 293, 159 W Va 335

90. US—Hover v MacDonald Engineering Co, D C Iowa, 183 F Supp 427 Affd, CA, 290 F 2d 301

Mich—Hanna v Ivory, 232 NW 2d 366, 61 Mich App 225

91. US—Hover v MacDonald Engineering Co, D C Iowa, 183 F Supp 427 Affd, CA, 290 F 2d 301

Cal—Woolen v Aerojet General Corp, 20 Cal Rptr 12, 369 P 2d 708, 57 C 2d 407

Ky—Turner Const Co v Garrett, 310 S W 2d 786

NY—Olson v George W Walker & Sons, Inc, 166 NYS 2d 323, 4 AD 2d 424, affd 173 NY S 2d 28, 4 NY 2d 793, 149 NE 2d 528

Pa—Greet v Armed Corp, 194 A 2d 343, 412 Pa. 292

Va—Tri-State Coach Corp v Walsh, 49 SE 2d 363, 188 Va. 299—Broadus v Standard Drug Co, 179 SE 2d 497, 211 Va. 645

Wash—Ventosa v Anderson, 545 P 2d 1219, 14 Wash App 882

page 420

91. Okla—Short v Guy Nall Trucking Co, 442 P 2d 497

92. Iowa—Trushchiff v Abell-Howe Co, 239 NW 2d 116

Ky—Baldwin v Wiggins, 289 S W 2d 729

Instruction held inadequate for failure to instruct as to notice under statute

NY—Zanich v Thompsons Square Holding Co, 200 NYS 2d 550, 10 AD 2d 492

93. Cal—Trejo v Maciel, 48 Cal Rptr 765, 239 CA 2d 487

Instructions held not misleading

Wash—Anderson v Red & White Const Co, 483 P 2d 124, 4 Wash App 534

94. US—Union Tank & Supply Co v Kelley, supra, n 88

Cal—Dauer v Aerojet General Corp, 36 Cal Rptr 356, 224 CA 2d 175

Fla—Horn v IBI Sec Service of Florida, Inc, App, 317 So 2d 444

NJ—Reid v Moenmouth Oil Co, 126 A 2d 368, 42 NJ Super 355

NY—Ranney v Habana Realty Corp, 110 NYS 2d 496, 279 App Div 426

Wis—Denton v Unit Crane & Shovel Corp, supra, n 78

Instructions supported by evidence

Cal—Morehouse v Taubman Co, 85 Cal Rptr 308, 5 CA 3d 548

98. NY—Zinsenheim v Congregation Beth David, Inc, 200 NYS 2d 753, 10 AD 2d 501

Instructions held proper

Mo—Barkley v Mitchell, App, 411 S W 2d 817

NH—Christian v Elden, 221 A 2d 784, 107 NH 229

1. Cal—Gaw v McKanna, 39 Cal Rptr 428, 228 CA 2d 348—Graves v William J Nicolson Co, 43 Cal Rptr 885, 233 CA 2d 865

2. Ga—Southern Ry Co v Garland, 47 SE 2d 93, 76 Ga App 729

3. NJ—Devone v Newark Tidewater Terminal, 82 A 2d 425, 14 NJ Super 401

NM—Tipton v Clower, 356 P 2d 46, 67 NM 388

NY—Davis v Caristo Const Corp, 216 NYS 2d 765, 13 AD 2d 382

Wash—Langness v Ketonen, 255 P 2d 551, 42 Wash 2d 394

6. US—Davis v Food Mart, Inc, CA Tex, 334 F 2d 27

Fla—Paris v Bartfield, 33 So 2d 713, 160 Fla 87

Ill—Barber v Finch, 182 NE 2d 895, 35 Ill App 2d 267

Mass—Marino v Trawler Emil C, Inc, 213 NE 2d 238, 350 Mass 88, cert den 86 SCt 1587, 384 US 960, 16 L Ed 2d 673

NJ—Devone v Newark Tidewater Terminal, supra, n 3

Or—Gossett v Simonson, 411 P 2d 277, 243 Or 16

Wash—Blancher v Bank of California, 286 P 2d 92, 47 Wash 2d 1

7. Mass—Banaghan v Dewey, 162 NE 2d 807, 340 Mass 73

Mich—Gupe v Jones, 30 NW 2d 408, 320 Mich 1—Grenawalt v Nyhus, 55 NW 2d 736, 335 Mich 76

Ohio—Gephart v Rike-Kumler Co, App, 145 NE 2d 197

page 421

10. La—Lea v Baumann Surgical Supplies, Inc, App, 321 So 2d 844, writ den, Sup, 325 So 2d 279

Mass—Marino v Trawler Emil C, Inc, 213 NE 2d 238, 350 Mass 88, cert den 86 SCt 1587, 384 US 960, 16 L Ed 2d 673

12. Ala—King, Inc v Thomas, 66 So 2d 602, 37 Ala App 244

Ill—Pantaleo v Gamm, 245 NE 2d 618, 106 Ill App 2d 116

13. Ariz—Fluor Corp, Limited v Sykes, 416 P 2d 610, 3 Ariz App 559

Cal—Atchison, T & S F Ry Co v Superior Oil Co, 52 Cal Rptr 53, 243 CA 2d 289

Ill—Lane v Warren, 190 NE 2d 595, 41 Ill App 2d 377

Wash—Blancher v Bank of California, 286 P 2d 92, 47 Wash 2d 1

§ 619. — Verdict, Findings, and Judgment

Library References

Master and Servant ⇨332(5)

15. US—Southeastern Greyhound Lines, v McCafferty, CCA Ky, 169 F 2d 1, cert den 69 SCt 136, 335 US 861, 93 L Ed 407—Siebrand v Gosnell, CCA Ariz, 234 F 2d 81—Bunney v US, C A Or, 460 F 2d 263

Ariz—MacNeil v Perkins, 324 P 2d 211, 84 Ariz 74

NY—Francella v 2465 Crotona Ave Corp, 354 NY S 2d 123, 44 AD 2d 660

Ohio—Duff v Corn, 87 NE 2d 731, 84 Ohio App 403

Wash—Langness v Ketonen, supra, n 3

Wis—Skornua v Highway Pavers, Inc, 159 NW 2d 76, 39 Wis 2d 293

The liability of a master for punitive or exemplary damages due to the wrongful acts of his servant or employee is considered in CJS Damages § 125(4)

Consistency of special findings with general verdict

Md—Nesbitt v Bethesda Country Club, Inc, 314 A 2d 738, 20 Md App 226

Particular verdict construed

Md—Leimbach v Bickford's, Inc, 135 A 2d 633, 214 Md 434

Ky—Baldwin v Wiggins, 289 S W 2d 729

Hopeless conflict in answers to special issues

Tex—Producers Chemical Co v Goodrich, Civ App, 351 S W 2d 362, mandamus over

Amount recoverable from employer limited to amount recoverable from employee

Mo—State ex rel and to Use of Scarborough v Earley, 219 S W 2d 879, 240 Mo App 868

Ohio—State ex rel Flagg v City of Bedford, 218 NE 2d 601, 7 Ohio St 2d 45

Damages recovered are entire and not severable

NY—Wilson v City of New York, 131 NYS 2d 47

Evidence held sufficient to sustain award of compensatory and punitive damages

Fla—Wackenhut Corp v Greene, App, 238 So 2d 431

Verdict held sufficient

US—Greenberg v Mobil Oil Corp, D C Tex, 318 F Supp 1025

Verdict held not inconsistent

Pa—Shrum v Pennsylvania Elec Co, 269 A 2d 502, 440 Pa 383

Directed verdict after close of evidence

Mich—Thomas v Checker Cab Co, Inc, 238 NW 2d 558, 66 Mich App 152

16. Tex—W R Grimshaw Co v Zoller, Civ App, 396 S W 2d 477, err ref no rev err

19. Recovery against employer barred by statute of limitations

Cal—Winkler v Southern Cal Permanente Medical Group, 297 P 2d 728, 141 CA 2d 738

Exoneration of servant as releasing master

Where both master and servant are joined as defendants a verdict exonerating the servant precludes a verdict against the master,¹⁹ particularly under the doctrine of respondeat superior.^{19 10} However, a verdict exonerating a servant will not preclude a verdict against a master whose own negligence is a proximate cause of the injury.^{19 15}

19.5. Ala—Smith v Birmingham Transit Corp, 238 So 2d 879, 286 Ala 253

Ky—Baldwin v Wiggins, 289 S W 2d 729—Kuer v Neumann Co Contractors, Inc, 426 S W 2d 935

Okla—Missouri, K & T R Co v Stanley, 372 P 2d 852

Or—Eckleberry v Kaiser Foundation Northern Hospitals, 359 P 2d 1090, 226 Or 616, 84 ALR 2d 1327

19 10. NC—Altman v Sanders, 148 SE 2d 21, 267 NC 158

Or—Eckleberry v Kaiser Foundation Northern Hospitals, 359 P 2d 1090, 226 Or 616, 84 ALR 2d 1327

19.15. Cal—Newman v Fox West Coast Theatres, 194 P 2d 706, 86 Cal App 2d 428

Okla—Missouri—Kansas—Texas R Co v Edwards, 361 P 2d 285

20. US—CJS estd in Texaco, Inc v Vaughan, C A Tex, 396 F 2d 663, 666

21. US—CJS estd in S Birch & Sons v Martin, C A Alaska, 244 F 2d 556, 562, 17 Alaska 230, cert den 78 SCt 62, 355 US 837, 2 L Ed 2d 49, 17 Alaska 388—Seaboard Air Line R Co v Coastal Distributing Co, D C SC, 273 F Supp

340—Barnes v West Point Foundry & Mach Co, C A Ala, 441 F 2d 532

Ala—R L Turner Motors v Hilkey, 72 So 2d 75, 260 Ala 577—Gipson v Smith, 75 So 2d 85, 261 Ala 477—McMullen v Four Wheels, Inc, 116 So 2d 611, 40 Ala App 408, cert den 116 So 2d 615, 270 Ala 739—Viking Motor Lodge, Inc v American Tobacco Co, 237 So 2d 632, 286 Ala 112—Alabama Great Southern R. Co v Evans, 256 So 2d 861, 288 Ala 25

Cal—Spruce v Wellman, 219 P 2d 472, 98 Cal App 2d 158—Jensen v Southern Pac Co, 276 P 2d 703, 129 C A 2d 67

Ga—Reliable Transfer Co v Gabriel, 65 S E 2d 679, 84 Ga App 54—Stapleton v Stapleton, 70 S E 2d 156, 85 Ga App 728—Griffin v Ross, 91 S E 2d 815, 93 Ga App 407—Millhollan v Watkins Motor Lines, Inc, 157 S E 2d 901, 116 Ga App 432

Ill—Devore v Toledo, P & W R R, 174 S E 2d 883, 30 Ill App 2d 409—Boston v Lake Shore Mut Ins Co, 294 N E 2d 36, 10 Ill App 3d 137

Ind—Biel, Inc v Kirsch, 153 N E 2d 140, 130 Ind App 46

Iowa—Mead v Scott, 130 N W 2d 641, 256 Iowa 1285

Mo—Williams v Kaestner, App, 332 S W 2d 21

NJ—Batts v Joseph Newman, Inc, 71 A 2d 121, 3 N J 503—Kelley v Curtas, 108 A 2d 431, 16 N J 265

Ohio—CJS cited in State ex rel Flagg v City of Bedford, 218 N E 2d 601, 604, 7 Ohio St 2d 45

Or—CJS, quoted in Kraft v Montgomery Ward & Co, 348 P 2d 239, 246, 220 Or 230, 92 A L R 2d 1—Chance v Ringling Bros Barnum & Bailey, Combined Shows, Inc, 478 P 2d 613, 257 Or 319

Pa—Campbell v Keady, 106 P L J 87

SC—Brown v National Oil Co, 105 S E 2d 81, 233 S C 345

Va—Whitfield v Whittaker Memorial Hospital, 169 S E 2d 563, 210 Va 176—Rakes v Fulcher, 172 S E 2d 751, 210 Va 542

Wash—Brink v Martin, 310 P 2d 870, 50 Wash 2d 256—Greene v Rothschild, 402 P 2d 356, 68 Wash 2d 1, adhered to on reh 414 P 2d 1013, 68 Wash 2d 1

W Va—Humphrey v Virginian Ry Co, 54 S E 2d 204, 132 W Va 250—CJS quoted in Willigerod v Sharafabadi, 158 S E 2d 175, 178, 151 W Va 995

In Kentucky

(1) Ky—Moutardier v Webb, 300 S W 2d 791

(2) Ky—Propane Transport Co v Edelen, 400 S W 2d 697

(3) Other matters—Bowling Green—Hopkinsville Bus Co v Adams, Ky, 261 S W 2d 14—Kiser v Newmann Co Contractors, Inc, 426 S W 2d 935—Breathitt Funeral Home v Neace, 437 S W 2d 490

page 422

23. U.S.—Dixie Ohio Exp Co v Poston, C A Ga, 170 F 2d 446

Ala—Waters v Anthony, 54 So 2d 589, 256 Ala 370 Ariz—Miracle Mile Bottling Distributing Co v Drake, 471 P 2d 741, 12 Ariz App 439

Ill—Leatherman v Schoeller Bros, Inc, 189 N E 2d 10, 40 Ill App 2d 56

Mo—Lynch v Hill, 443 S W 2d 812

N M—CJS, cited in Maxwell v Santa Fe Public Schools, 534 P 2d 307, 312, 87 N M 383

W Va—CJS, cited in Humphrey v Virginian Ry Co, 54 S E 2d 204, 210, 132 W Va 250

24. Ala—Gipson v Smith, 75 So 2d 85, 261 Ala 477—American Southern Ins Co v Dime Taxi Service, Inc, 151 So 2d 783, 275 Ala 51, 4 A L R 3d 611

Ky—Rhodes-Burford Co v Mitchell, 208 S W 2d 946, 306 Ky 624

Mo—Grace v Smith, App, 270 S W 2d 79, aff'd 277 S W 2d 503, 365 Mo 147

page 423

32. Ala—CJS, cited in R L Turner Motors v Hilkey, 72 So 2d 75, 79, 260 Ala 577

34. Ala—Atlantic Coast Line R Co v Kines, 160 So 2d 869, 276 Ala 253

Colo—CJS cited in Sanchez v Rice, 580 P 2d 1261, 1263, 40 Colo App 481

Idaho—Barlow v International Harvester Co, 522 P 2d 1102, 95 Idaho 881

35. U.S.—Dixie Ohio Exp Co v Poston, supra, n 23

Ala—Waters v Anthony, 40 So 2d 316, 252 Ala 244

Ill—Boston v Lake Shore Mut Ins Co, 294 N E 2d 36, 10 Ill App 3d 137

Mo—Quinn v St Louis Public Service Co, 318 S W 2d 316

Neb—Sears v Mid-City Motors, Inc, 136 N W 2d 428, 179 Neb 100

Okla—Great Atlantic & Pacific Tea Co v Muller, 301 P 2d 217

36. Ala—Railway Exp Agency v Burns, 52 So 2d 177, 255 Ala 557—Waters v Anthony, 54 So 2d 589, 256 Ala 370—Atlantic Coast Line R Co v Kines, 160 So 2d 869, 276 Ala 253

Fla—Atlantic Coast Line R Co v Bracewell, App, 110 So 2d 482

Okla—S H Kress & Co v Maddox, 203 P 2d 706, 201 Okl 190—Great Atlantic & Pacific Tea Co v Muller, 301 P 2d 217

Pa—Pryor v Chambersburg Oil & Gas Co, 103 A 2d 425, 376 Pa 521—McAleer v Massanuncios, 48 Del Co 70

SC—Allen v Southern Ry Co, 61 S E 2d 660, 218 S C 63

Tenn—Olson v Sharpe, 259 S W 2d 867, 36 Tenn App 557

Tex—CJS cited in S H Kress & Co v Selph, Civ App, 250 S W 2d 883, 896, err ref no rev err

W Va—Humphrey v Virginian Ry Co, supra, n 21

38. U.S.—Texaco, Inc v Vaughan, C A Tex, 396 F 2d 663

Cal—Jensen v Southern Pac Co, 276 P 2d 703, 129 C A 2d 67

Ga—Reliable Transfer Co v Gabriel, 65 S E 2d 679, 84 Ga App 54

Ill—Rice v Gulf, Mobile & Ohio R Co, 228 N E 2d 162, 84 Ill App 2d 163

Mo—Stafford v Far-Go Van Lines, Inc, App, 485 S W 2d 481

Okla—Tulsa City Lines v Johnston, 226 P 2d 937, 204 Okl 38

Tenn—Olson v Sharpe, supra, n 36

W Va—Humphrey v Virginian Ry Co, supra, n 21

page 424

39. Okla—Mid-Continent Petroleum Corp v Epley, 250 P 2d 861, 207 Okl 577

Tenn—Olson v Sharpe, 259 S W 2d 867, 36 Tenn App 557

40. Fla—Cutchins v Seaboard Air Line R Co, 101 So 2d 857

§ 622. Rights of Master

Library References

Master and Servant ⇨ 836 et seq

45. Cal—Ventura County Emp Retirement Ass'n v Pope, 151 Cal Rptr 695, 87 C A 3d 938

Conn—Steele v J and S Metals, Inc, 335 A 2d 629, 32 Conn Sup 17

Minn—CJS cited in City of St Paul v Sorenson, 167 N W 2d 17, 19, 283 Minn 158

page 425

46. La—Bonfanti Industries, Inc v Teke, Inc, App, 224 So 2d 15, writ ref 226 So 2d 770, 254 La 779

Mo—CJS, cited in Frank Horton & Co, Inc v Diggs, App, 544 S W 2d 313, 314

Independent, not derivative, right

Or—Wolff v Du Pua, 378 P 2d 707, 233 Or 317

48. Ws—Hartidge v State Farm Mut Auto Ins Co, 271 N W 2d 598, 86 Ws 2d 1, 4 A L R 4th 495

49. Mo—Frank Horton & Co, Inc v Diggs, App, 544 S W 2d 313

N Y—Dotoratos v Greentide, 281 N Y S 2d 498, 54 Misc 2d 85—Nyrunga Perfumes, Inc v American Airlines, Inc, 327 N Y S 2d 861, 68 Misc 2d 712

Wis—Hartidge v State Farm Mut Auto Ins Co, 271 N W 2d 598, 86 Ws 2d 1, 4 A L R 4th 495

50. No action for loss of profits

Conn—Steele v J and S Metals, Inc, 335 A 2d 629, 32 Conn Sup 17

54. La—Baughman Surgical Associates, Ltd v Aetna Cas & Sur Co, App, 302 So 2d 316, 74 A L R 3d 1124

Mich—B v Merrow Co v Stephenson, 300 N W 2d 734, 102 Mich App 63

Or—Snow v West, 440 P 2d 864, 250 Or 114

56. No right of action based on negligence

N Y—Ferguson v Rensselaer County Air Park, Inc, 348 N Y S 2d 943, 75 Misc 2d 818

W Va—Nemo Foundations, Inc v New River Co, 181 S E 2d 687, 155 W Va 149, disapproving contrary language in Coal Land Dev Co v Chidester, 103 S E 2d 86, 86 W Va 561

57. U.S.—Zawadzki v Checker Taxi Co, D C Ill, 539 F Supp 207

Fla—Warth Paint Co, Inc v Jackson, App, 368 So 2d 443

N Y—CJS cited in Ferguson v Green Island Contracting Corp, 355 N Y S 2d 196, 198, 44 A D 2d 358, aff'd, 328 N E 2d 792, 36 N Y 2d 742, 368 N Y S 2d 163

page 426

60. La—Bonfanti Industries, Inc v Teke, Inc, App, 224 So 2d 15, writ ref 226 So 2d 770, 254 La 779

Parties

U.S.—Koehler v Cummings, D C Tenn, 380 F Supp 1294

63. N Y—Employers' Liability Assur Corp, Limited, of London, England v Daley, 77 N E 2d 515, 297 N Y 745

67. La—Bonfanti Industries, Inc v Teke, Inc, App, 224 So 2d 15, writ ref 226 So 2d 770, 254 La 779

69. U.S.—Patterson v Pennsylvania R Co, C A N Y, 197 F 2d 252

70. Ga—McCarthy v Hiers, 59 S E 2d 22, 81 Ga App 365

Evidence

(3) Other matters

Wash—Hartman v Port of Seattle, 389 P 2d 669, 63 Wash 2d 879

Parties

NH—Martel v Wallace, 141 A 470, 83 N H 276

No duty to inspect and notify employer of defects in tank car

Tex—Vonderpoltz v Oil & Chemical Products, Inc, Civ App, 280 S W 2d 774, err ref no rev err

Instructions

Mo—Dulley v Berkley, 304 S W 2d 878

Questions of law and fact

Mo—Dulley v Berkley, 304 S W 2d 878

§ 624. In General

page 427

73. U.S.—International Union, United Auto, Aircraft and Agr Implement Workers of America (UAW-CIO) v Russell, Ala, 78 S Ct 932, 356 U S 634, 2 L Ed 2d 1030, reh den 78 S Ct 1379, 357 U S 944, 2 L Ed 2d 1558—Wilson & Co v United Packinghouse Workers of America, D C Iowa, 181 F Supp 809

Ala—Birmingham Broadcasting Co v Bell, 68 So 2d 314, 259 Ala 656

Cal—Hancock v Burns, 323 P 2d 456, 158 C A 2d 785

N J—Kingston Trap Rock Co v International Union of Operating Engineers, Local No 825, 825-A and 825-B, 19 A 2d 661, 129 N J Eq 570

Page 427

NY—Loudin v Mohawk Airlines, Inc, 255 NYS 2d 302, 44 Misc 2d 926, mod on oth grds 260 NY S 2d 899, 24 A D 2d 447

Ohio—Scott Burr Stores Corp v Spector, 1 Ohio App 148, 14 OO 105, 28 OLA 449—Perko v Local No 207 of Intern Ass'n of Bridge, Structural and Ornamental Iron Workers Union, 151 NE 2d 742, 168 Ohio St 161

Okla—Taxicab Drivers' Local Union No 889 v Cook, 327 P 2d 660

Pa—Mische v Kaminski, 193 A 2d 410, 127 Pa Super 66—MacDonald v Feldman, 142 A 2d 1, 393 Pa 274—Greystone Upholstery Corp v Lehigh Shops, Inc, 30 Lehigh 106

Va—M Rosenberg & Sons v Craft, 29 S E 2d 375, 182 Va 512, 151 ALR 1093

Wash—Baun v Lumber and Sawmill Workers Union, Local No 2740 of American Federation of Labor, 284 P 2d 275, 46 Wash 2d 645

Interference held not malicious or unjustified

(2) Other instances

NY—Anthony v George T Bye, Inc, 277 NYS 222, 243 App Div 390

Withholding of wages

(2) Other cases—Bishop v Baird & Baird, 29 N W 2d 201, 238 Iowa 871

Employer not liable for act of employee inducing breach—Allison v American Airlines, DCOkl, 112 F Supp 37

Inherent right

US—Puget Sound Traction, Light & Power Co v Whitley, D C Wash, 243 F 945

Tort

Mo—Frank Horton & Co, Inc v Diggs, App, 544 S W 2d 313

Tenn—Large v Dick, 343 S W 2d 693, 207 Tenn App 664

74. No one has right purposely to disrupt or interfere with such relations by intentional resort to measures which will obviously inflict irreparable injury on employer in ordinary course of events—Blanchard v Golden Age Brewing Co, 63 P 2d 397, 188 Wash 396—Foruli v Auto Mechanics Union, Local No 297 of International Ass'n of Machinists, 93 P 2d 422, 200 Wash 283

75. Ark—Mason v Funderburk, 446 S W 2d 543, 247 Ark 521

Minn—Miller v Monsen, 37 N W 2d 543, 228 Minn 400

Pa—Kraemer Hosiery Co v American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No 10, 157 A 588, 305 Pa 206

63 C J p 664 note 50[b]

Blacklisting

US—Kamara v S Livanos & Co, D C NY, 97 F Supp 435

Employer and union joining to defraud employees

US—Hiller v Liquor Salesmen's Union Local No 2, C A NY, 338 F 2d 778

Knowledge of subsequent employer as prior employment contract obligations

US—Koehring Co v National Automatic Tool Co, D C Ind, 257 F Supp 282, affd, C A, 385 F 2d 414

Contractual relationship necessary

Ind—Stanley v Kelley, App, 422 NE 2d 663

77. Cal—Hughes v Superior Court in and for Contra Costa County, App, 186 P 2d 756, subs op 198 P 2d 885, 32 Cal 2d 850, affd 70 S Ct 718, 339 US 460, 94 L Ed 985

Fla—International Brotherhood of Elec Workers Local Union No 349 v Oklie, 77 So 2d 762

NY—Best Window Co v Better Business Bureau of New York City, 148 NYS 2d 833, 1 A D 2d 1002

Wash—Titus v Tacoma Smeltermen's Union Local No 25, 383 P 2d 504, 62 Wash 2d 461

page 428

79 Ala—CJS cited in Birmingham Broadcasting Co v Bell, 68 So 2d 314, 322, 259 Ala 656

One not a party to the contract is not liable for inducing its breach⁸⁰³

80.5 La—New Orleans Opera Guild, Inc v Local 174, Musicians Mut Protective Union, 134 So 2d 901, 242 La 134

81 Ala—Birmingham Broadcasting Co v Bell, 68 So 2d 314, 259 Ala 656

Complaint held insufficient

Ga—Graham v Hubert, 197 SE 335, 58 Ga App 19 NY—Kaulhausen v Penn Mut Life Ins Co, 87 NY S 2d 571, 275 App Div 753

Complaint held sufficient

US—Colonial Hardwood Flooring Co v International Union United Furniture Workers of America, D C Md, 76 F Supp 493

Fla—Duval Laundry Co v Reif, 177 So 726, 130 Fla 276

Ga—Muse v Connell, 8 SE 2d 100, 67 Ga App 296 NY—Navarro v Fiorita, 62 NYS 2d 730, 271 App Div 62, app gr and rearg den 63 NYS 2d 830, 270 App Div 1015, affd 71 NE 2d 468, 296 NY 783—Ledwith v International Paper Co, 64 NY S 2d 810, affd 66 NYS 2d 625, 271 App Div 864, app den 67 NYS 2d 688, 271 App Div 916

Likewise, general rules have been applied with respect to the admissibility of evidence.⁸¹¹

81.1. Evidence held admissible

Pa—Padden v Local 90 United Ass'n of Journeymen Plumbers, 82 A 2d 327, 168 Pa Super 611

82 NY—Gould v Murray, 3 NYS 2d 660, 253 App Div 646

Evidence held insufficient

Mass—Caverno v Fellows, 15 NE 2d 483, 300 Mass 331

Va—United Const Workers v Laburnum Const Corp, 75 SE 2d 694, 194 Va 872, affd 74 S Ct 833, 347 US 656, 98 L Ed 1025

Evidence held sufficient

Pa—Padden v Local 90 United Ass'n of Journeymen Plumbers, supra, n 811

Va—United Const Workers v Laburnum Const Corp, supra

83. Fla—Duval Laundry Co v Reif, 177 So 726, 130 Fla 276

Nonsuit held improper

NY—Gould v Murray, 3 NYS 2d 660, 253 App Div 646

Question held for jury

Pa—Padden v Local 90 United Ass'n of Journeymen Plumbers, supra, n 811

§ 625. Enticing Servant to Leave Employment

Library References

Master and Servant ⇐ 389, 340, 844

84. US—CJS cited in Maryland Undercoating Co, Inc v Payne, C A Va, 603 F 2d 477, 480

La—National Safe Corp v Benedict & Myrick, Inc, App, 364 So 2d 169, remd, Sup, 371 So 2d 792

85. US—Sarkis Tarzan, Inc v Audio Devices, Inc, D C Cal, 166 F Supp 250, affd, C A, 283 F 2d 695, cert den 81 S Ct 903, 365 US 869, 5 L Ed 2d 859—Nichols—Morris Corp v Morris, D C NY, 174 F Supp 691, app dism, C A 272 F 2d 586—Koehler v Cummings, D C Tenn, 380 F Supp 1294

Ga—Architectural Mfg Co of America v Airotec, Inc, 166 SE 2d 744, 119 Ga App 245—Harrison v Sarah Coventry, Inc, 184 SE 2d 448, 228 Ga 169

III—ABC Trans Nat Transport, Inc v Aeronautics Forwarders, Inc, 379 NE 2d 1228, 20 Ill Dec 160, 62 Ill App 3d 671

NJ—Amatrudi v Watson, 88 A 2d 7, 19 NJ Super 67—Wear—Ever Aluminum, Inc v Towncraft Industries, Inc, 182 A 2d 387, 75 NJ Super 135

NY—A S Rampell, Inc v Hyster Co, 163 NYS 2d 475, 3 NY 2d 369, 144 NE 2d 371—Rayex Corp v Sanchez, 171 NYS 2d 974, 11 Misc 2d 261

Pa—Morgan's Home Equipment Corp v Martucci, 136 A 2d 838, 390 Pa 618

SC—Bradburn v Colonial Stores, Inc, 255 S E 2d 453, 273 SC 186

Tex—Herdner Farms—El Paso, Inc v Craswell, Civ App, 519 S W 2d 473, err ref no rev err

86 Pa—Albee Homes, Inc v Caddie Homes, Inc, 207 A 2d 768, 417 Pa 177

87. Ga—Architectural Mfg Co of America v Airotec, Inc, 166 SE 2d 744, 119 Ga App 245

III—B R Paulsen & Co v Lee, 237 NE 2d 793, 95 Ill App 2d 146

In New York

(1) Herman v First Merrick Corp, 99 NYS 2d 119

(2) Tallier & Cooper, Inc v Neptune Meter Co, 166 NYS 2d 693, 8 Misc 2d 107

(3) Other cases

NY—A S Rampell, Inc, v Hyster Co, 148 NYS 2d 102, 1 Misc 2d 788, mod on oth grds 153 NY S 2d 176, 2 A D 2d 739, app den 159 NYS 2d 961, 2 NY 2d 828, 140 NE 2d 860, affd and revd on oth grds 165 NYS 2d 475, 3 NY 2d 369, 144 NE 2d 371—Tallier & Cooper, Inc v Neptune Meter Co, 166 NYS 2d 693, 8 Misc 2d 107

page 429

92. US—Frederick Chusid & Co v Marshall Leeman & Co, D C NY, 326 F Supp 1043

III—ABC Trans Nat Transport, Inc v Aeronautics Forwarders, Inc, 379 NE 2d 1228, 20 Ill Dec 160, 62 Ill App 3d 671

Tex—Yost v Justin Belt Co, Inc, Civ App, 488 S W 2d 850, err gr

93 US—United Aircraft Corp v Boreen, D C Pa, 284 F Supp 428, affd, C A, 413 F 2d 694—In re Power Swing Partners, Bkrtcy Cal, 9 BR 512

Ga—Orkin Exterminating Co, Inc v Martin Co, 242 SE 2d 135, 240 Ga 662

III—Aircraft Products Co v Universal Oil Products Co, Inc, 405 NE 2d 1162, 40 Ill Dec 70, 84 Ill App 3d 836

Mass—Barry v Waaburn—Garfield Co, 265 NE 2d 378, 358 Mass 810

NY—Coleman & Morris v Pisciotto, 107 NYS 2d 715, 279 App Div 656—A S Rampell, Inc v Hyster Co, 148 NYS 2d 102, 1 Misc 2d 788, mod on oth grds 153 NYS 2d 176, 2 A D 2d 739, app den 159 NYS 2d 961, 2 NY 2d 828, 140 NE 2d 860, affd and revd on oth grds 165 NYS 2d 475, 3 NY 2d 369, 144 NE 2d 371—Anchor Alloys, Inc v Non-Ferrous Processing Corp, 336 NY S 2d 944, 39 A D 2d 504

Pa—Albee Homes, Inc v Caddie Homes, Inc, 207 A 2d 768, 417 Pa 177

94. US—National Oil Co v Phillips Petroleum Co, D C Wis, 265 F Supp 320

Pa—Albee Homes, Inc v Caddie Homes, Inc, 207 A 2d 768, 417 Pa 177

97. US—National Oil Co v Phillips Petroleum Co, D C Wis, 265 F Supp 320

98 Mo—National Rejectors, Inc v Treman, 409 S W 2d 1

1. US—Frederick Chusid & Co v Marshall Leeman & Co, D C NY, 279 F Supp 913

3. US—Standard Brands Inc v US Partition & Packaging Corp, D C Wis 199 F Supp 161—Republic Systems & Programming, Inc v Computer Assistance, Inc, D C Conn, 322 F Supp 619, affd, C A, 440 F 2d 996

4. US—Cudahy Co v American Laboratories, Inc, D C Neb, 313 F Supp 1339

Ind—Stanley v Kelley, App, 422 NE 2d 663

page 430

16. *Mass*—Ryan, Elliott and Co, Inc v Leggat, McCall & Werner, Inc, 396 NE 2d 1009, 8 Mass App 686

NJ—Amatrudi v Watson, 88 A 2d 7, 19 NJ Super 67

19. *US*—Atkinson v Sinclair Refining Co, Ind, 82 S Ct 1318, 370 US 238, 8 L Ed 2d 462

III—Aircraft Products Co v Universal Oil Products Co, Inc, 405 NE 2d 1162, 40 Ill Dec 70, 84 Ill App 3d 836

20. *US*—Sarkes Tarzian, Inc v Audio Devices, Inc, D C Cal, 166 F Supp 250, affd, C A, 283 F 2d 695, cert den 81 S Ct 903, 365 US 869, 5 L Ed 2d 859—Wells v International Union of Operating Engineers, AFL-CIO, Local 181, C A Ky, 303 F 2d 73

Wash—Bunn v Lumber and Sawmill Workers Union, Local No 2740, of American Federation of Labor, 284 P 2d 275, 46 Wash 2d 645

International union privileged to induce breach of contract by local as to employment of business agent—Lawless v Brotherhood of Painters, Decorators and Paperhangers of America, 300 P 2d 159, 143 C A 2d 474

22. *US*—Certified Laboratories of Tex, Inc v Rubinson, D C Pa, 303 F Supp 1014

page 431

23. III—Worrick v Flora, 272 NE 2d 708, 133 Ill App 2d 755

§ 626. — Under Special Statutory Provisions

28. *Tenn*—Stewart v Parker, 232 SW 2d 57, 33 Tenn App 316

29. *US*—International Union, United Auto, Aircraft and Agr Implement Workers of America (UAW-CIO) v Russell, Ala, 78 S Ct 932, 356 US 634, 2 L Ed 2d 1030, reh den 78 S Ct 1379, 357 US 944, 2 L Ed 2d 1558

page 432

43. *Tenn*—Associated Dairies, Inc v Ray Moss Farms, Inc, 326 SW 2d 458, 205 Tenn 268

§ 627. — Actions

Library References

Master and Servant ⇐840

49. *NJ*—Blackman v Hes, 71 A 2d 633, 4 NJ 82
Tex—Houston Belt & Terminal Ry Co v Burmaster, Civ App, 309 SW 2d 271, err ref no rev err

page 433

60. *US*—Koehler v Cummings, D C Tenn, 380 F Supp 1294

NY—A S Rampell, Inc v Hyster Co, 153 NYS 2d 176, 2 AD 2d 739, app den 159 NYS 2d 961, 2 NY 2d 828, 140 NE 2d 860, affd and revd on oth grds 165 NYS 2d 475, 3 NY 2d 369, 144 NE 2d 371

Complaint held sufficient

(1) *NY*—Herman v First Merrick Corp, 99 NY S 2d 119—A S Rampell, Inc v Hyster Co, 165 NYS 2d 475, 3 NY 2d 369, 144 NE 2d 371

Complaint held insufficient

Ga—Spalding v Southeastern Personnel of Atlanta, Inc, 149 SE 2d 794, 222 Ga 339—J & C Ornamental Iron Co v Watkins, 152 SE 2d 613, 114 Ga App 688

NY—A S Rampell, Inc v Hyster Co, 165 NYS 2d 475, 3 NY 2d 369, 144 NE 2d 371

61. *US*—Koehler v Cummings, D C Tenn, 380 F Supp 1294

NY—Anthony v George T Bye, Inc, 277 NYS 222, 243 App Div 390

64 Evidence held sufficient

US—Perthou v Stewart, D C Or, 243 F Supp 655—Koehler v Cummings, D C Tenn, 380 F Supp 1294

Evidence held insufficient

(1) *US*—General Bronze Corp v Cupples Corp, D C Mo, 99 F Supp 924, affd, C A, 189 F 2d 154
Ga—Purcell v Joyner, 200 SE 2d 363, 231 Ga 85
Tenn—Barner v Boggiano, 222 SW 2d 672, 32 Tenn App 351

65 *Ga*—Architectural Mfg Co of America v Aurotec, Inc, 166 SE 2d 744, 119 Ga App 245

NJ—Amatrudi v Watson, supra, n 16

Likewise general rules control as to other matters of procedure ⁶¹

66 1 Findings

Mass—New England Co v Pritchard, 15 NE 2d 440, 300 Mass 362

§ 628. — Damages

- 67 *US*—Frederick Chund & Co v Marshal Leeman & Co, D C NY, 326 F Supp 1043

page 434

71 Punitive damages denied

NY—Anthony v George T Bye, Inc, supra, n 61

§ 629. Intimidation, Coercion, or Violence to Prevent Service

73. *Ga*—Straynar v Jack W Harris Co, 258 SE 2d 248, 150 Ga App 509

Va—United Const Workers v Laburnum Const Corp, 75 SE 2d 694, 194 Va 872, affd 74 S Ct 833, 347 US 656, 98 L Ed 1025

75. Evidence held sufficient

Va—United Const Workers v Laburnum Const Corp, supra, n 73

§ 630. Malicious Procurement of Discharge

Library References

Master and Servant ⇐841.

76. *US*—Tye v Finkelstein, D C Mass, 160 F Supp 666—Elbe v Wausau Hosp Center, D C Wis, 606 F Supp 1491

Ga—CJS quoted in King v Schaeffer, 154 SE 2d 819, 820, 115 Ga App 344, mod on oth grds 155 SE 2d 815, 223 Ga 468, on remand 168 SE 2d 911, 119 Ga App 735, app after remand 181 SE 2d 700, 123 Ga App 531—Wiley v Georgia Power Co, 213 SE 2d 550, 134 Ga App 187
 III—Holmes v Union House Furnishings Co, 149 NE 2d 451, 17 Ill App 2d 288

NC—Smith v Ford Motor Co, 221 SE 2d 282, NC 71, 79 A L R 3d 651

Tenn—CJS, quoted in Dukes v Brotherhood of Painters, Decorators & Paperhangers of America, Local Union No 437, 235 SW 2d 7, 9, 10, 191 Tenn 495, 26 A L R 2d 1223—CJS cited in Ladd v Roane Hosiery, Inc, 556 SW 2d 758, 760

77. *Ga*—CJS quoted in King v Schaeffer, 154 SE 2d 819, 820, 115 Ga App 344, mod on oth grds 155 SE 2d 815, 223 Ga 468, on remand 168 SE 2d 911, 119 Ga App 735, app after remand 181 SE 2d 700, 123 Ga App 531—Wiley v Georgia Power Co, 213 SE 2d 550, 134 Ga App 187

Okla—Taxicab Drivers' Local Union No 889 v Pittman, 322 P 2d 153

Tenn—CJS, quoted in Dukes v Brotherhood of Painters, Decorators & Paperhangers of America, Local Union No 437, 235 SW 2d 7, 10, 191 Tenn 495, 26 A L R 2d 1223

School teacher

(2) Other cases

Mass—Caverno v Fellows, 190 NE 739, 286 Mass 440

page 435

78. *NY*—Felsen v Sol Cafe Mfg Corp, 249 NE 2d 459, 24 NY 2d 682, 301 NYS 2d 610

NC—Smith v Ford Motor Co, 221 SE 2d 282, 289 NC 71, 79 A L R 3d 651

Particular acts held not actionable

(4) *US*—Avins v Moll, D C Pa, 610 F Supp 308, affd 774 F 2d 1150, two cases

III—Feeley v McAuliffe, 80 NE 2d 373, 335 Ill App 99

Mich—Green v Lundquist Agency, Inc, 140 NW 2d 575, 2 Mich App 488

Pa—Angiolillo v Amalgamated Clothing Workers of America, 23 Pa Dist & Co 511

79 *NC*—CJS quoted in Beane v Weiman Co, 168 SE 2d 233, 235, 5 NC App 279

80 *Ark*—Mason v Funderburk, 446 SW 2d 543, 247 Ark 521

Or—Campbell v Ford Industries, Inc, 546 P 2d 141, 274 Or 243, 84 A L R 3d 1093

Contracts terminable at will

(2) Other statements

Ga—King v Schaeffer, 154 SE 2d 819, 115 Ga App 344, mod on oth grds 155 SE 2d 815, 223 Ga 468, on remand 168 SE 2d 911, 119 Ga App 735, app after remand 181 SE 2d 700, 123 Ga App 531

82 *Ark*—Mason v Funderburk, 446 SW 2d 543, 247 Ark 521

87 *Ala*—Knox v Moskins Stores, 2 So 2d 449, 241 Ala 346

88. *Tex*—Askins, Inc, v Sparks, Civ App, 56 SW 2d 279, err ref

page 436

90. *US*—NLRB v International Broth of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 182, Utica, N.Y., and Vicinity, AFL, C A, 228 F 2d 83

Mass—Reeves v Scott, 87 NE 2d 833, 324 Mass 594—Sullivan v Barrows, 21 NE 2d 275, 303 Mass 197

NY—Barile v Fisher, 94 NYS 2d 346, 197 Misc 493

Okla—Taxicab Drivers' Local Union No 889 v Pittman, 322 P 2d 159

However, service of unsigned wage assignment held actionable

III—Holmes v Union House Furnishings Co, 149 NE 2d 451, 17 Ill App 2d 288

93. *US*—McNamar v Baltimore & O C T R Co, C A Ind, 254 F 2d 717—Feeley v Brotherhood of Painters, Decorators and Paper Hangers of America, C A Ala, 308 F 2d 52

Okla—Taxicab Drivers' Local Union No 889 v Pittman, 322 P 2d 153

Union member

Tenn—Dukes v Brotherhood of Painters, Decorators & Paperhangers of America, Local Union No 437, 235 SW 2d 7, 191 Tenn 495, 26 A L R 2d 1223

Wis—Hanson v Grand Lodge of Broth of Locomotive Firemen and Enginemen, 120 NW 2d 716, 19 Wis 2d 480

96. *US*—Tye v Finkelstein, D C Mass, 160 F Supp 666

98. III—Feeley v McAuliffe, 80 NE 2d 373, 335 Ill App 99

NY—Barile v Fisher, supra, n 90

NC—Smith v Ford Motor Co, 221 SE 2d 282, 289 NC 71, 79 A L R 3d 651

page 437

8. *Ga*—Fisher v J C Penney Co, Inc, 219 SE 2d 626, 135 Ga App 913

10. *Tex*—Sakowitz, Inc v Steck, 669 SW 2d 105

§ 631. — Actions

16. *Okla*—Chilton v Oklahoma Tire & Supply Co, 67 P 2d 27, 180 Okl 39

§ 631 MASTER AND SERVANT

Page 437

18. US—CJS cited in *Loughrey v Landon*, D C Pa., 381 F Supp 884, 886
19. Ark—*Mason v Funderburk*, 446 S W 2d 543, 247 Ark 521
22. US—*Hopper v Lennen & Mitchell*, D C Cal., 52 F Supp 319, aff'd in part and rev'd in part on oth grds., CCA, 146 F 2d 364, 161 A L R 282

Complaints held sufficient

- Ga—*Godwin v Westberry*, 202 S E 2d 402, 231 Ga 492, app after remand 224 S E 2d 76, 137 Ga App 394, app after remand 253 S E 2d 804, 149 Ga App 228
- NY—*Barile v Fisher*, 94 N Y S 2d 346, 197 Misc 493
- Tenn—*Dukes v Brotherhood of Painters, Decorators & Paperhangers of America*, Local Union No 437, 235 S W 2d 7, 191 Tenn 495, 26 A L R 2d 1223

Complaint held insufficient

- US—*Foltz v Moore McCormack Lines*, C A N Y, 189 F 2d 537, cert den 72 S Ct 106, 342 U S 871, 96 L Ed 655
- Ga—*Funk v Baldwin*, 55 S E 2d 733, 80 Ga App 177
- NJ—*Miller v U S Rubber Co*, 61 A 2d 241, 137 N J Law 682
- SC—*Bowen v Bricklayers, Masons and Plasterers, Intern Union of America*, 80 S E 2d 343, 225 S C 29

page 438

28. US—*Smith v Ford Motor Co*, 221 S E 2d 282, 289 N C 71, 79 A L R 3d 651

Wrongful discharge

- (2) Other cases—*Yale v J L Hudson*, 14 N W 2d 532, 308 Mich 657

Proof of employment contract

- NY—*Steward v World-Wide Automobiles Corp*, 189 N Y S 2d 540, 20 Misc 2d 188
29. RI—*Savard v Industrial Trades Union of America*, 72 A 2d 660, 76 R I 496

Evidence held admissible

- (1) Pa—*Eddyside Co v Seibel*, 15 A 2d 691, 142 Pa Super 174

Evidence held inadmissible

- Pa—*Eddyside Co v Seibel*, supra

30. RI—*Savard v Industrial Trades Union of America*, supra, n 29

Evidence held sufficient

- (1) US—*American Sur Co v Schottenbauer*, C A Minn., 257 F 2d 6
- Ala—*Long v Newby*, 488 P 2d 719
- Ga—*King v Schaeffer*, 181 S E 2d 700, 123 Ga App 531

- (2) Or—*Campbell v Ford Industries, Inc*, 546 P 2d 141, 274 Or 243, 84 A L R 3d 1093

Evidence held insufficient

- (1) Cal—*Beckner v Sears, Roebuck & Co*, 84 Cal Rptr 315, 4 C A 3d 504
- Okla—*American Federation of Smelter Workers, Federal Labor Union No 21,538*, v *Kyrk*, 187 P 2d 239, 199 Okl 464
- Tex—*Zimmerman v Granello*, Civ App., 206 S W 2d 843

- (3) McGraw v Haah, 51 S E 2d 774, 132 W Va 127

- (4) Other matters

- Mich—*Yale v J L Hudson Co*, 14 N W 2d 532, 308 Mich 657

31. RI—*Savard v Industrial Trades Union of America*, supra, n 29

Questions of fact

- (1) Ga—*King v Schaeffer*, 154 S E 2d 819, 115 Ga App 344, mod on oth grds 155 S E 2d 815, 223 Ga 468, on remand 168 S E 2d 911, 119 Ga App 735, app after remand 181 S E 2d 700, 123 Ga App 531
- Mich—*Yale v J L Hudson Co*, supra, n 30
- Pa—*Eddyside Co v Seibel*, supra, n 29

Evidence held sufficient for jury

- Ala—*Brotherhood of Locomotive Firemen and Enginemen v Hammett*, 140 So 2d 832, 273 Ala 397

§ 632. — Damages

page 439

33. US—*Allison v American Airlines*, D C Okl., 112 F Supp 37
- NJ—*Kuzma v Millinery Workers Union*, Local No 24, 99 A 2d 833, 27 N J Super 579

Interests and costs

- Mass—*Sullivan v Barrows*, 21 N E 2d 275, 303 Mass 197

- Tenn—CJS quoted at length in *Dukes v Brotherhood of Painters, Decorators & Paperhangers of America*, Local Union No 437, 235 S W 2d 7, 10, 191 Tenn 495

35. Mass—*Sullivan v Barrows*, supra, n 33
- RI—*Savard v Industrial Trades Union of America*, supra, n 29

43. RI—*Savard v Industrial Trades Union of America*, supra, n 29

44. Ala—*Brotherhood of Locomotive Firemen and Enginemen v Hammett*, 140 So 2d 832, 273 Ala 397

45. Amount held not excessive

- RI—*Savard v Industrial Trades Union of America*, supra, n 29

§ 636. — Evidence

page 442

98. Evidence held insufficient

- Ill—*People v Lautzenhiser*, 115 N E 2d 552, 351 Ill App 508

§ 638. Intimidation or Coercion of Servant

4. US—*Thornhill v State of Alabama*, U S Ala., 60 S Ct 736, 310 U S 88, 84 L Ed 1093

- Ala—*Russell v International Union, United Auto, Aircraft & Agr Implement Workers of America*, CIO, 64 So 2d 384, 258 Ala 615

Particular statutes construed

- Va—*McWhorter v Com*, 63 S E 2d 20, 191 Va 857

5. Va—*McWhorter v Com*, supra, n 4

8. Va—*McWhorter v Com*, supra, n 4

9. Neb—*Dutiel v State*, 284 N W 321, 135 Neb 811

13. US—*Thornhill v State of Alabama*, supra, n 4

- Or—*State v Smith*, 188 P 2d 998, 182 Or 497

Failure to allege the names of the employees interfered with is fatal¹⁵¹

- 15.1. Ill—*People v Lautzenhiser*, 115 N E 2d 552, 351 Ill App 508

16. Va—*McWhorter v Com*, supra, n 4

17. Evidence held sufficient

- Va—*McWhorter v Com*, supra, n 4

§ 639. Bribing Servant with Intent to Influence His Relation with Master

Library References

Master and Servant §=842 et seq

page 443

19. NY—*People v Jacobs*, 130 N E 2d 636, 309 NY 315

Evidence held insufficient

- NY—*People v Jacobs*, 130 N E 2d 630, 309 NY 315

Statute held inapplicable

- NY—*People v Levy*, 128 N Y S 2d 275, 283 App Div 383—*Schiff v Kirby*, 194 N Y S 2d 695, 22 Misc 2d 786—*People v Seigman*, 313 N Y S 2d 593, 35 A D 2d 591, aff'd 270 N E 2d 721, 28 N Y 2d 788, 321 N Y S 2d 901, rearg den 272

- NE 490, 29 N Y 2d 514, 323 N Y S 2d 982, app after remand 400 N Y S 2d 187, 60 A D 2d 638

20. NC—CJS quoted in *State v Brewer*, 129 S E 2d 262, 283, 258 N C 533, 1 A L R 3d 1323, app dism 84 S Ct 72, 375 U S 9, 11 L Ed 2d 40

21. NY—*June Fabrics v Ten Sue Fashions*, 81 N Y S 2d 877, 194 Misc 267—CJS cited in *Shemura v A Black & Co*, 240 N Y S 2d 622, 624, 19 A D 2d 596

page 448

MASTITIS

5. US—*Kaufman v Van Santen*, C A S D., 696 F 2d 81, 82

5. US—*Kaufman v Van Santen*, C A S D., 696 F 2d 81, 82

MASTURBATION.

7. Pa—CJS quoted in *Commonwealth v Gary*, 163 A 2d 696, 697, 193 Pa Super 111

- As referring to self-defilement, self-degradation or self-pollution—*Commonwealth v Gary*, 163 A 2d 696, 697, 193 Pa Super 111

- Neither masturbation nor solicitation to commit as misdemeanors see *Obscenity* § 3

Similarly defined

- (1) To perform masturbation of (self or passive subject), to practice actual self-gratification, production of an orgasm by excitation of the genital organs, as by manipulation or friction, without heterosexual intercourse—*Commonwealth v Gary*, supra

MATERIA.

Materia medica

- The term is also defined as meaning the study of the properties and uses of drugs¹⁵¹

- 15.1. Ariz—*Kuts-Cheraux v Wilson*, 229 P 2d 713, 716, 71 Ariz 461

MATERIAL.

As a Noun

page 449

26. Similarly defined

- (3) "Materials" is the substance of which anything is composed or may be made, it consists of matter, of a physical nature, component or contributory matter or substance, that of or which any corporeal thing is or may be constituted, made, or done, as, the materials of the soil or of disintegrated rocks. Materials may arise from earthformed substances—*Terteling Bros v Glander*, 85 N E 2d 379, 383, 151 Ohio St 236

- (4) "Materials" are basic matter from which whole or greater part of something physical is made

- Ark—*Allstate Ins Co v Martens*, 633 S W 2d 715, 716, 5 Ark App 157

28. Tex—*Ferrous Products Co v Gulf States Trading Co*, 332 S W 2d 310, 313, 160 Tex 399

30. Similarly defined

- (1) "Material" is something that goes into and becomes a part of the finished structure, such as lumber, nails, glass, and hardware, which is necessary to the completion of the building—*D H Overmyer Warehouse Co v W C Caye & Co*, 157 S E 2d 68, 72, 116 Ga App 128

31. Mich—CJS cited in *KMH Equipment Co v Chas J Rogers, Inc*, 305 N W 2d 266, 267, 104 Mich App 563

page 450

Phrases

48. Phrases

- (6) "Refractory material" is that material which is used for the lining of furnaces and crucibles and for similar purposes where a resistance of high temperature

is required—Quigley Co v Asbestos Limited, 44 A 2d 89, 91, 23 N J Misc 301

As an Adjective

MATERIALITY.

page 451

49. N.Y.—Wanger v Zeh, 256 N.Y.S.2d 227, 231, 45 Misc 2d 93

Tex.—C.J.S. cited in Thompson v Lee Roy Crawford Produce Co, 233 S.W.2d 295, 296, 149 Tex 357—Republic Nat Bank of Dallas v Strelay, Civ App, 343 S.W.2d 284, 286

51. Tex.—C.J.S. cited in Thompson v Lee Roy Crawford Produce Co, supra, n 49

52. Tex.—Republic Nat Bank of Dallas v Strelay, Civ App, 343 S.W.2d 284, 286

53. N.Y.—Wanger v Zeh, 256 N.Y.S.2d 227, 231, 45 Misc 2d 93

Tex.—Republic Nat Bank of Dallas v Strelay, Civ App, 343 S.W.2d 284, 286

54. Tex.—C.J.S. cited in Thompson v Lee Roy Crawford Produce Co, supra, n 49

56. Tex.—Republic Nat Bank of Dallas v Strelay, Civ App, 343 S.W.2d 284, 286

58. N.Y.—Wanger v Zeh, 256 N.Y.S.2d 227, 231, 45 Misc 2d 93

Tex.—Republic Nat Bank of Dallas v Strelay, Civ App, 343 S.W.2d 284, 286

60. Tex.—C.J.S. cited in Thompson v Lee Roy Crawford Produce Co, supra, n 49

Similarly expressed

(1) Relating to matter of substance, rather than form—Wanger v Zeh, 256 N.Y.S.2d 227, 231, 45 Misc 2d 93

In law.

63. Tex.—C.J.S. cited in Thompson v Lee Roy Crawford Produce Co, supra, n 49—C.J.S. quoted at length in Goldsmith v Stephenson, App 5 Dist, 634 S.W.2d 331, 332

Probative weight

To be "material" means to have probative weight—State v Graves, Me, 224 A.2d 57, 60

64. Tex.—C.J.S. cited in Thompson v Lee Roy Crawford Produce Co, supra, n 49

Going to the essence or merit

N.Y.—Wanger v Zeh, 256 N.Y.S.2d 227, 231, 45 Misc 2d 93

65. Tex.—C.J.S. cited in Thompson v Lee Roy Crawford Produce Co, supra, n 49

Similarly defined

"Material" is of much consequence or important, of such significance as to be likely to influence determination of a cause—Board of County Comm'rs of Dona Ana County v Little, 396 P.2d 591, 74 N.M. 605

66. Tex.—C.J.S. cited in Thompson v Lee Roy Crawford Produce Co, supra, n 49

page 452

76. Similarly defined

A fact or omission to which a reasonable man would attach importance in determining his choice of action in the transaction in question

U.S.—Lust v Fashion Park, Inc, 340 F.2d 457, 462, 22 A.L.R.3d 782, cert den 86 S.Ct. 23, 382 U.S. 811, 15 L.Ed.2d 60, reh den 86 S.Ct. 305, 382 U.S. 933, 15 L.Ed.2d 344—Gerstle v Gamble-Skogmo, Inc, D.C.N.Y., 298 F.Supp. 66, 97

MATERIALLY.

Other definitions

"Materially" means to a great extent, substantially, considerably—People v Shung, 371 N.Y.S.2d 322, 326, 83 Misc 2d 462

MATRICULATE.

page 453

Matriculated

4. Similarly expressed

(1) The word "matriculate" is often used to mean to be admitted to membership in a body or society, particularly in school of advanced learning—Long v Dick, 347 P.2d 581, 582, 87 Ariz. 25, 80 A.L.R.2d 949

"Matriculated student" means one who is going to school at time—Saunders v Virginia Polytechnic Institute, D.C.Va., 307 F.Supp. 326, 328

MATRIX.

page 454

The term is also used to denote a frame or block¹⁹³

19.5. U.S.—Soil Builders, Inc v U.S., C.A.Fla., 277 F.2d 570, 571

MATTER.

In judicial sense

The term "matter" is defined as substantial facts forming the basis of claim or defense, facts material to the issue as distinguished from law or opinion—Boucher v Pure Oil Co, Fla App, 101 So.2d 408, 410

Phrases

38. Other phrases

(1) "Plate matter" is reading news matter suited to the general needs of newspapers, supplemental to local items necessary for the several localities, which is set up in type and cast in stereotype plates and then distributed to the various newspapers—Barr v Essex Trades Council, 30 A. 881, 882, 53 N.J.Eq. 101

(2) "Solid matter", in printing parlance means that there shall be no "leading" between the lines, and no "padding" beyond the usual and ordinary spacing between the words—Hobe v Swift, 59 N.W. 831, 832, 58 Minn. 84

MATTOCK. Small hoe-like tool used to dig hole in which seedlings are planted. Also called a grub hoe³⁸⁵

38.5. "Mattock or grub hoe" is small hoe-like tool used to dig hole in Inc, 189 N.W.2d 286, 385 Mich 410, neota Public Research Group v Butz, D.C.Minn., 358 F.Supp. 584, 613

MATURITY.

page 455

42. "Physiological maturity" in timber means that trees have completed maximum rate of growth and annual rate of growth has become less than average preceding annual rate of growth—Menominee Tribe of Indians v U.S., 91 F.Supp. 917, 922, 117 Ct.Cl. 442

MAXIMUM.

56. As not meaning average

Conn.—Garguilo v Moore, 242 A.2d 716, 721, 156 Conn. 359

page 456

58. Similarly defined

(1) The greatest value attained by a quantity which first increases and then begins to decrease, the highest point or degree, the time or period of highest number, greatest brightness, etc.—State v Moore, N.J. Super A.D., 91 A.2d 342, 345, 21 N.J. Super 419

59. Similarly defined

"Maximum" means the greatest time or quantity assignable—Albano v Kirby, 330 N.E.2d 615, 619, 36 N.Y.2d 526, 369 N.Y.S.2d 655

60. N.J.—State v Moore, N.J. Super A.D. 91 A.2d 342, 345, 21 N.J. Super 419

63. U.S.—C.J.S. quoted in Eastmount Const Co v Transport Mfg & Equip Co, C.A.Mo., 301 F.2d 34, 40

N.J.—State v Moore, N.J. Super A.D., supra, n 60

MAY.

As a Verb

—In General.

68. U.S.—In re Master Key, D.C.Conn., 53 F.R.D. 87, 89

N.D.—Chester v Enarson, 34 N.W.2d 418, 428, 76 N.D. 205, reh den 35 N.W.2d 137, 76 N.D. 205

69. U.S.—C.J.S. cited in Filtrrol Corp v Loose, C.A. Utah, 209 F.2d 10, 13

70. N.D.—Chester v Enarson, supra, n 68

72. Ky.—Clark v Riehl, 230 S.W.2d 626, 627, 313 Ky. 142

S.D.—C.J.S. cited in Tubbs v Linn, 70 N.W.2d 372, 373, 75 S.D. 566

74. U.S.—In re Master Key, D.C.Conn., 53 F.R.D. 87, 89

—As Permissive or Mandatory.

page 457

80. U.S.—U.S. v Tapor-Ideal Dairy Co, D.C. Ohio, 175 F.Supp. 678, 682—Lincoln Laboratories, Inc v Savage Laboratories, Inc, D.C. Del., 27 F.R.D. 476, 478—Koch Refining Co v U.S. Dept. of Energy, D.C. Minn., 497 F.Supp. 879, 891

Ark.—Nathan v State, 361 S.W.2d 637, 638, 235 Ark. 704

Cal.—Swall v Anderson, App, 140 P.2d 196, 200, subs op 141 P.2d 912, 60 Cal.App.2d 825—Hollman v Warren, 196 P.2d 562, 566, 32 Cal.2d 351—Southern Cal. Jockey Club v California Horse Racing Bd, 223 P.2d 1, 5, 36 Cal.2d 167—Dean v Kuchel, 230 P.2d 811, 814, 37 C.2d 97—Thompson v Quan, 334 P.2d 1074, 1076, 167 C.A.2d Supp. 825—Hogya v Superior Court, San Diego County, 142 Cal.Rptr. 325, 333, 75 C.A.3d 122

Fla.—Brooks v Anastasia Mosquito Control Dist., App, 148 So.2d 64, 66—Harper v State, Fla App, 217 So.2d 591, 592

Ill.—Myra v Fink, 191 N.E.2d 659, 664, 42 Ill.App.2d 230, 7 A.L.R.3d 619

Ind.—In re Ordinance No. 464 of Common Council of City of Jasper, Dubois County, App, 176 N.E.2d 906, 912

Iowa.—State ex rel Wright v Iowa State Board of Health, 10 N.W.2d 561, 563, 233 Iowa 872—C.J.S. cited in John Deere Waterloo Tractor Works of Deere & Co v Denfield, 110 N.W.2d 560, 562, 252 Iowa 1389

La.—Hibernia Homestead & Sav. Ass'n v Fletcher, La App, 181 So.2d 815, 816—Champ Auto Sales, Inc v Savoy, La App, 207 So.2d 566, 568—In re Tutorship of Woodard, La.App., 216 So.2d 132, 134

Me.—Collins v State, Me., 213 A.2d 835, 839, 161 Me. 445

Mich.—Hungerford v Dearborn Tp., 106 N.W.2d 566, 569, 362 Mich. 126

Miss.—State ex rel Attorney General v School Board of Quitman County, Miss., 181 So. 313, 315, 181 Miss. 818

Mo.—Byers Bros Real Estate & Ins Agency, Inc v Campbell, Mo App, 353 S.W.2d 102, 108—Bloom v Missouri Bd. for Architects, Professional Engineers and Land Surveyors, Mo App, 474 S.W.2d 861, 864

Neb.—Roy v Bladen School Dist. No. R-31 of Webster County, 84 N.W.2d 119, 124, 165 Neb. 170

N.J.—City of East Orange v McCorkle, 238 A.2d 489, 493, 99 N.J. Super 36

N.M.—C.J.S. quoted at length in State v Doe, 597 P.2d 1183, 1188, 93 N.M. 143

N.Y.—Schneider v City of Rome, 83 N.Y.S.2d 18, 19—Lazar v Towne House Restaurant Corp, 142 N.Y.S.2d 313, 322—In re Milholland's Will, 221

NY S 2d 199, 202, 31 Misc 2d 1046—Seiden v Chagoo, 306 NY S 2d 847, 849, 33 A D 2d 951
N C—Vasey v City of Durham, 37 S E 2d 375, 376, 231 NC 354

ND—Harding v City of Dickinson, 33 NW 2d 626, 632, 76 ND 71

Ohio—Cincinnati Traction Co v Public Utilities Commission of Ohio, 130 NE 308, 309, 113 Ohio St 668

Okla—C.J.S. cited in Shea v Shea, Okla, 537 P 2d 417, 418

Or—C.J.S. quoted in Holland v Strawn, 377 P 2d 1, 3, cert den 83 S Ct 1307, 373 US 917, 10 L Ed 2d 417, 233 Or 64

Pa—Com v Garland, 142 A 2d 14, 17, 393 Pa 45
R I—Carlson v McLyman, 74 A 2d 853, 855—Warren Ed Ass'n v Lapan, 235 A 2d 866, 872

Tex—Kleck v Zoning Bd of Adjustment of City of San Antonio, Civ App, 319 S W 2d 406, 408, err ref—Montandon v Colehour, Tex Civ App, 469 S W 2d 222, 228

Va—Masters v Hart, 55 S E 2d 205, 210, 189 Va 969—Board of Sup'rs of Hanover County v Weems, 72 S E 2d 378, 381, 194 Va 10—Price v Com, Va., 164 S E 2d 676, 679, 209 Va 383
Wash—State ex rel Blume v Yelle, 324 P 2d 247, 249, 251, 52 Wash 2d 158

Wis—Scanlon v City of Menasha, 114 NW 2d 791, 795, 16 Wis 2d 437—City of Wauwatosa v Milwaukee County, Wis, 125 NW 2d 386, 389, 390, 22 Wis 2d 184—State v Christopherson, 153 NW 2d 631, 637, 36 Wis 2d 574

Permissive or directory

NJ—Lehmann v Kanane, 201 A 2d 84, 87, 88, 84 NJ Super 117

Permissive verb

Mo—Collier v Roth, Mo App, 468 S W 2d 57, 61

81. Iowa—C.J.S. cited in John Deere Waterloo Tractor Works of Deere & Co v Denfield, 110 NW 2d 560, 562, 252 Iowa 1389

NY—Schneider v City of Rome, supra, n 80
Okla—Shea v Shea, 537 P 2d 417, 418

Or—C.J.S. quoted in Holland v Strawn, Or, 377 P 2d 1, 3, cert den 83 S Ct 1307, 373 US 917, 10 L Ed 2d 417, 233 Or 64

Va—Masters v Hart, supra, n 80
Wis—City of Wauwatosa v Milwaukee County, Wis, 125 NW 2d 386, 389, 390, 22 Wis 2d 184

Optional or discretionary

S C—State v Wilson, 264 S E 2d 414, 416, 274 S C 352

82. Cal—Swall v Anderson, supra, n 80—Dean v Kuchel, supra, n 80

Fla—Harper v State, Fla App, 217 So 2d 591, 592—Fitzel v Clevenger, Fla App, 285 So 2d 687, 688

Iowa—C.J.S. cited in John Deere Waterloo Tractor Works of Deere & Co v Denfield, 110 NW 2d 560, 562, 252 Iowa 1389

Mo—Bloom v Missouri Bd for Architects, Professional Engineers and Land Surveyors, App, 474 S W 2d 861, 864

N C—Vasey v City of Durham, supra, n 80
ND—Harding v City of Dickinson, supra, n 80

Okla—Shea v Shea, 537 P 2d 417, 418

Or—Ash v Kilander, 347 P 2d 1099, 1103, 220 Or 438—C.J.S. quoted in Holland v Strawn, Or, 377 P 2d 1, 3, cert den 83 S Ct 1307, 373 US 917, 10 L Ed 2d 417, 233 Or 64

R I—State v Kilday, 155 A 2d 336, 338, 90 R I 91

Not imperative

(1) The word "may" as a permissive and not an imperative verb which is to be given its natural and ordinary meaning, barring a clear contextual indication of different usage—Leeds v Harrison, 87 A 2d 713, 718, 9 NJ 202.

(2) The word "may" can never be given the imperative meaning—Weener v Hospital Service Plan of Lehigh Val, 144 A 2d 575, 577, 187 Pa Super 244

Not always mandatory

N J—Taffey v New Jersey State Firemen's Ass'n, 192 A. 723, 727, 118 NJ Law 352

Not compulsive

R I—Carlson v McLyman, supra, n 80
Va—Board of Sup'rs of Hanover County v Weems, supra, n 80

83. U S—Wishure Oil Co of Cal v Costello, C A Cal, 348 F 2d 241, 243

Cal—City of Los Angeles v Board of Sup'rs of Mono County, 292 P 539, 543, 108 Cal App 653—Southern Cal Jockey Club v California Horse Racing Bd, 223 P 2d 1, 5, 36 Cal 2d 167—Kropp v Sterling Sav & Loan Ass'n, 88 Cal Rptr 878, 883, 884, 9 C A 3d 1033

D C—Kraft v Board of Ed for Dist of Col, D C, 247 F Supp 21, 24, 25

Iowa—Schultz v Board of Adjustment of Pottawattamie County, 139 NW 2d 448, 451, 452

Ky—Shearer v Hall, Ky, 399 S W 2d 701, 704

Or—C.J.S. quoted in Holland v Strawn, Or, 377 P 2d 1, 3, cert den 83 S Ct 1307, 373 US 917, 10 L Ed 2d 417, 233 Or 64

Similarly stated

(3) The word "may" is usually considered a permissive term, but it is sometimes interpreted as mandatory—Russell v Superior Court In and For Placer County, 59 Cal Rptr 891, 895, 252 C A 2d 1

84. Ark—Arkansas State Racing Commission v Southland Racing Corp, 295 S W 2d 617, 619, 226 Ark 995

Iowa—Lincoln Nat Life Ins Co v Fischer, 17 NW 2d 273, 277, 235 Iowa 506

ND—Chester v Enarson, supra, n 68

Or—Dilger v School Dist, 24 CJ, 352 P 2d 564, 568, 222 Or 108—Local 1724B, Am Federation of State, County and Municipal Emp, AFL-CIO v Board of County Com'rs of Lane County, 482 P 2d 764, 766, 2 Or App 81

Pa—Com ex rel Fox v Swing, 186 A 2d 24, 26, 409 Pa 241—In re Philadelphia Parking Authority, 189 A 2d 746, 748, 410 Pa 270

Tex—American Mtg Corp v Samuel, 108 S W 2d 193, 199, 130 Tex 107

Wyo—Board of County Com'rs of Fremont County v State ex rel Miller, Wyo, 369 P 2d 537, 542

86. Cal—Gipson v Davis Realty Co, 30 Cal Rptr 253, 260, 215 C A 2d 190

ND—Chester v Enarson, supra, n 68

87. NY—In re Tannenbaum, 1 NY S 2d 493, 494, 165 Misc 720—Lazar v Towne House Restaurant Corp, 142 NY S 2d 315, 322

88. D C—Kraft v Board of Ed for Dist of Col, D C, 247 F Supp 21, 24, 25

Me—Collins v State, Me, 213 A 2d 835, 839, 161 Me 445

Vt—In re Cartmell's Estate, 138 A 2d 588, 591, 120 Vt 228

In the role of "must" or "shall" it imposes a duty—State ex rel Wright v Iowa State Board of Health, supra, n 80

Wash—State ex rel Billington v Sinclair, 183 P 2d 813, 816, 28 Wash 2d 575

89. Ohio—Carr v Department of Ins, Ohio Com Pl, 187 NE 2d 649, 650

90. U S—Aime Bellavance & Sons, Inc v U S I C C, D C Vt, 440 F Supp 773, 780

Ohio—In re Kehoe's Estate, 199 NE 2d 29, 31

Similarly expressed

(2) Depends on circumstances—Southern Cal Jockey Club v California Horse Racing Bd, supra, n 80
U S—C.J.S. cited in Filtril Corp v Loose, C A Utah, 209 F 2d 10, 12, 13

Ge—Found v Faulkner, 18 S E 2d 749, 752, 193 Ga 413

Tex—American Mtg Corp v Samuel, supra, n 84

(3) While "may" is usually considered a permissive term, it has been interpreted as mandatory where logic and context so require—Struhm v City Council of City of Berkeley, 40 Cal Rptr 230, 232, 229 C A 2d 278

Context controlling

U S—U S v Cook, C A III, 432 F 2d 1093, 1098

91. Ala—C.J.S. cited in Burgess Mining & Const Corp v City of Bessemer, Ala, 312 So 2d 24, 26, 294 Ala 74

Ohio—Sun Oil Co v Ohio Turnpike Commission, 129 NE 2d 86, 90—Sun Oil Co v Ohio Turnpike Commission, 131 NE 2d 864, 873

92. Tex—Bloom v Texas State Bd of Examiners of Psychologists, Tex Civ App, 473 S W 2d 374, 377

Va—Spindel v Jamison, 103 S E 2d 205, 208, 199 Va 954

93. Tenn—Colella v Whitt, 308 S W 2d 369, 371

94. Ga—Found v Faulkner, supra, n 93

Tex—American Mtg Corp v Samuel, supra, n 84

Similarly stated

(1) "May" is not usually construed as laying down an absolute requirement—In re Williamson, Cal, 276 P 2d 593, 43 C 2d 651

95. Cal—People v MacIntosh, 70 Cal Rptr 667, 673, 264 C A 2d 701

Similarly expressed

(1) The word "may" generally carries the meaning of permission or option—Gaines v O'Connell, 204 S W 2d 425, 429, 305 Ky 397

Permissiveness

Cal—Cannizzo v Guarantee Ins Co, App, 53 Cal Rptr 657, 658, 245 C A 2d 70

96. Ind—Sherrard v Board of Com'rs of Fulton County, Ind App, 278 NE 2d 307, 309, 151 Ind App 127

Iowa—State ex rel Wright v Iowa State Board of Health, supra, n 80

La—In re State in Interest of Elliott, La App, 206 So 2d 802, 805

Mass—Turnpike Amusement Park, Inc v Licensing Commission of Cambridge, 179 NE 2d 322, 324, 343 Mass 435—Com v Gordon, Mass, 242 NE 2d 399, 402, 354 Mass 722

Ohio—Dennison v Dennison, 134 NE 2d 574, 576, 165 Ohio St 146

Similarly expressed

Word "may" ordinarily connotes discretion, but neither in lay nor legal understanding is result memorabile—Thompson v Clifford, 408 F 2d 154, 158, 132 U S App D C 351

Sense of discretion

(1) The word "may" according to general usage and common understanding carries sense of discretion but not of duty, unless context in which it appears indicates with reasonable clarity the opposite meaning of "must"—Central Soya Co v City of Chattanooga, Tenn, 338 S W 2d 576, 578

Grant of discretion

Mo—State ex rel Laffoon v Youngdahl, Mo App, 391 S W 2d 605, 607

Discretion or choice between two alternatives

U S—U S v Cook, C A III, 432 F 2d 1093, 1098

Discretionary action

Cal—Parks v Superior Court of Sacramento County, 96 Cal Rptr 645, 647, 19 C A 3d 188—Sacramento County v Superior Court of Sacramento County, 97 Cal Rptr 771, 773, 20 C A 3d 469

page 458

98. Similarly expressed

(1) Permission or liberty to act—Chester v Enarson, supra, n 68

3. Iowa—C J S. cited in John Deere Waterloo Tractor Works of Deere & Co v Denfield, 110 NW 2d 560, 562, 252 Iowa 1389

5. Cal—Southern Cal Jockey Club v California Horse Racing Bd, 223 P 2d 1, 5, 36 Cal 2d 167

Similarly expressed

(1) To have the power to do—Chester v Enarson, 34 NW 2d 418, 420, 76 ND 205, reh den 35 NW 2d 137, 76 ND 205

6. Vt—Hannon v Myrnc, 111 A 2d 729, 731, 118 Vt 428

8. Ind—Ott v Johnson, Ind., 319 NE 2d 622, 624, 262 Ind 548

11. Imports uncertainty rather than certainty
Utah—Grant v Utah State Land Bd., 485 P 2d 1033, 1036, 26 Utah 2d 100

—As Indicating Possibility, Probability, Potentiality, or Contingency.

15. Reasonable probability, not an ephemeral possibility

US—US v First Nat Bank of Md., D C Md., 310 F Supp 157, 161

16. Similarly expressed

(1) "May", when used as an auxiliary verb, may comprehend a mere possibility, but it also includes the thought of probability, and in its scope is the idea of an expectancy of reasonable certainty—Greyhound Corp v Excess Ins Co of America, C A Fla., 233 F 2d 630, 634

23. US—In re Master Key, D C Conn., 53 FR D 87, 89

—Comparisons and Distinctions.

page 459

26. Ind—Watts v State, 95 NE 2d 570, 582, 229 Ind 80

27. Minn—Cashman v Hedberg, 10 NW 2d 388, 393, 215 Minn 463

As not preclusive of "must" or "should"

The word "may" is not as compelling as "must" or as obligatory as "should" but it is not preclusive of them—Rosomanno v Laclede Cab Co, Mo., 328 SW 2d 677, 680

28. Ohio—Singer Sewing Mach Co v Puckett, 197 NE 2d 353, 356, 176 Ohio St 32

Other terms have been compared or distinguished.³⁴¹

34.1. Equivalent to "possible," "perhaps," or "by chance"

La.—LaBove v American Emp Ins Co, La App, 189 So 2d 315, 317, 25 A L R 3d 1269

Inherently more permissive in character than "shall"

US—Shofus v Boles, D C W Va., 295 F Supp 1347, 1348

—"Might."

36. As not meaning "must"

US—N L R B v Lundy Mfg Corp, C A N Y., 316 F 2d 921, 923

page 460

—Phrases.

May be

53. Similarly expressed

(1) The words "may be" must be construed as meaning in the future, unless contrary appears from context Guerra De Chapa v Allen, D C Tex., 119 F Supp 129, 132

MAYHEM

§ 1. Definitions and Distinctions

page 461

1. Cal—Goodman v Superior Court of Alameda County, 148 Cal Rptr 799, 84 C A 3d 621

Iowa—C.J.S. cited in State v Welton, 300 NW 2d 157, 161

Md—Armstrong v State, 444 A 2d 1049, 51 Md App 308

N M—State v Trujillo, 224 P 2d 151, 54 NM 307

Va—Bryant v Com., 53 S E 2d 54, 189 Va 310

2. Ohio—State v Kuchmak, 112 NE 2d 371, 159 Ohio St 363

3. Cal—People v Newble, 174 Cal Rptr 637, 120 C A 3d 444

Pa—Com v Patterson, 8 D & C 2d 227, 37 Wash Co 76

4. Ala—Pritchett v State, 117 So 2d 345, 40 Ala App 498, cert stricken 117 So 2d 347, 270 Ala 211

Mo—State v Woody, 406 S W 2d 639

5. Mass—C.J.S. cited in Com v LeBlanc, 417 NE 2d 978, 980, 11 Mass App 960

Mo—C.J.S. cited in State v Gillespie, 336 S W 2d 677, 681—State v Woody, 406 S W 2d 639

"To wound" distinguished

N C—State v Malpass, 38 S E 2d 156, 157, 226 N C 403

Castration

Ala—Pritchett v State, 117 So 2d 345, 40 Ala App 498, cert stricken 117 So 2d 347, 270 Ala 211

Vasectomy distinguished

Cal—Jessen v Shasta County, 79 Cal Rptr 359, 274 C A 2d 737, 35 A L R 3d 1433

6. Ala—McCullough v State, 113 So 2d 905, 40 Ala App 309, cert den 113 So 2d 912, 269 Ala 698

Ark—C.J.S. cited in Kennedy v State, 270 SW 2d 912, 913, 223 Ark 915

7. Okl—State v Bates, Cr., 628 P 2d 383

Other definitions

Ohio—State v Benjamin, 132 NE 2d 761, 102 Ohio App 14, app dism 135 NE 2d 765, 165 Ohio St 455, cert den 77 S Ct 238, 352 US 933, 1 L Ed 2d 168

§ 2. By and upon Whom Committed

page 462

9. Cal—People v Von Jentry, 138 Cal Rptr 250, 69 C A 3d 615

11. Ala—Mabry v State, 110 So 2d 250, 40 Ala App 129, cert dism 110 So 2d 260, 288 Ala 660

One aiding and abetting actual assailant commits crime of mayhem.¹³⁵

13.5. Cal—People v Garcia, 85 Cal Rptr 36, 5 C A 3d 15

Participating in jail break

Ky—Smith v Com., 473 S W 2d 829

§ 3. Nature and Elements

Library References

Mayhem ⇐ 1 et seq

19. W Va—State v King, 84 S E 2d 323, 140 W Va 362, 47 A L R 2d 878

page 463

29. D C—Brown v U.S., C A., 171 F 2d 832, 84 US App DC 222

Tex—Babb v State, 297 S W 2d 132, 164 Tex Cr R 45

Culpable negligence

Mo—State v Strubberg, 616 S W 2d 809

30. Specific intent

Alaska—Adams v State, 598 P 2d 503

D C—Perkins v U.S., App., 446 A 2d 19

32. Cal—People v Bryan, 12 Cal Rptr 361, 190 C A 2d 781

33. Cal—People v Bryan, 12 Cal Rptr 361, 190 C A 2d 781

D C—Perkins v U.S., App., 446 A 2d 19

Nev—Ex parte Ralls, 288 P 2d 450, 71 Nev 276

N C—State v Beasley, 164 S E 2d 742, 3 N C App 323

34. Tex—Crocker v State, Cr App., 573 S W 2d 190

35. N C—State v Hauk, 247 S E 2d 798, 38 N C App 357

Tex—Scott v State, 317 S W 2d 734,

37. Va—Banner v Com., 133 S E 2d 305, 204 Va 640

39. Cal—People v Garcia, 85 Cal Rptr 36, 5 C A 3d 15

Tex—Scott v State, 317 S W 2d 734, 167 Tex Cr R 57

40. Ark—Kennedy v State, 270 SW 2d 912, 223 Ark 915

Cal—Goodman v Superior Court of Alameda County, 148 Cal Rptr 799, 84 C A 3d 621

41. N M—State v Hatley, 384 P 2d 252, 72 N M 377

N C—State v Wingard, 177 S E 2d 765, 10 N C App 101, app dism 178 S E 2d 494, 277 N C 727

43. Mass—Com v Hogan, 387 NE 2d 158, 7 Mass App 236, affd 396 NE 2d 978, 379 Mass 190

N Y—People v Faulkner, 302 NY S 2d 602, 32 A D 2d 790

Va—Bryant v Com., supra, n 1—Banovitch v Com., 83 S E 2d 369, 196 Va 210

Wis—Kirby v State, App., 272 NW 2d 113, 86 Wis 2d 292

page 464

62. Va—Bryant v Com., supra, n 1

Military or combative importance

(2) Other statements

D C—US v Cook, C A., 462 F 2d 301, 149 US App DC 197

Purpose of mayhem statute

Va—Banovitch v Com., 83 S E 2d 369, 196 Va 210

Integrity of one's person

Cal—People v Green, 130 Cal Rptr 318, 59 C A 3d 1

64. Cal—People v Montes, 204 P 2d 659, 91 Cal App 2d 222

Particular acts and injuries within the statutes

(1) Ill—People v Pigford, 198 NE 2d 524, 47 Ill App 2d 339

(2) Tex—Crocker v State, Cr App., 573 S W 2d 190

(3) Cal—Goodman v Superior Court of Alameda County, 148 Cal Rptr 799, 84 C A 3d 621

D C—Perkins v U.S., App., 446 A 2d 19

Involuntary tattoo

Cal—People v Page, 163 Cal Rptr 839, 104 C A 3d 569

66. Construed

Mo—State v Wraggs, App., 496 S W 2d 38, cert den 94 S Ct 920, 414 US 1160, 39 L Ed 2d 113

page 465

70. US—US v Bando, C A N Y., 244 F 2d 833, cert den 78 S Ct 67, 355 US 844, 2 L Ed 2d 53

72. Kan—State v Potts, 468 P 2d 74, 205 Kan. 42

Tex—Scott v State, 317 S W 2d 734, 167 Tex Cr R 57

75. Shod foot

Alaska—Adams v State, 598 P 2d 503

76. Nev—Lamb v Cree, 466 P 2d 660, 86 Nev 179

81. Ala—Mabry v State, 110 So 2d 250, 40 Ala App 129, cert dism 110 So 2d 260, 288 Ala 660

84. Tex—Scott v State, 317 S W 2d 734, 167 Tex Cr R 57

85. Tex—Cox v State, 242 S W 2d 369, 156 Tex Cr R 444

86. Cal—People v Carter, 3 Cal Rptr 573, 580, 353 P 2d 53, 60, 54 C 2d 300

87. Nev—Lamb v Cree, 466 P 2d 660, 86 Nev 179

88. Cal—People v Thomas, 158 Cal Rptr 120, 96 C A 3d 507

page 466

91. Alaska—C.J.S. cited in Adams v State, 598 P 2d 503, 508

D C—US v Cook, C A., 462 F 2d 301, 149 US App DC 197

§ 4. — Assault with Intent to Maim

96. Mo—State v Richardson, 460 S W 2d 537

Okl—Smith v State, 211 P 2d 538, 90 Okl Cr 141—
Nelson v State, Cr , 457 P 2d 980

MAZEL TOV In Hebrew, good luck or congratulations ⁴²⁰

4.20. Mich—Applebaum v Wechaler, 87 NW 2d 322, 325, 350 Mich 636

MENABBE DOCTRINE The doctrine that a confession is inadmissible if made during illegal detention due to failure to carry the prisoner before the committing magistrate, whether or not the confession was the result of torture, physical or psychological ⁴³⁰

4.30. U.S.—Mulican v U.S., C.A. Tex., 252 F.2d 398, 400, 70 A.L.R.2d 1217

Similarly expressed

(1) "McNabb Rule" is that there must be reasonable promptness in taking prisoner before committing magistrate, or confession obtained during period between arrest and commitment is inadmissible in prosecution of party arrested, and that rule applies to voluntary as well as involuntary confessions but cannot be an absolute rule—Muldrow v U.S., C.A. Cal., 281 F.2d 903, 906

MDS

MDS. "MDS" stands for Multipoint Distribution Service, MDS signals are transmitted by a microwave transmitter that sends signals to fixed reception points

U.S.—Chartwell Communications Group v Westbrook, C.A. Mich., 637 F.2d 459, 464

MEAL

17. Expressing time concept

"Meal" is defined as any of the times, especially the customary times, for eating, breakfast, lunch, dinner, etc. and as a "portion of food taken at a particular time to satisfy the appetite"—Davar Products, Inc v U.S., Cust Ct., 303 F.Supp. 1058, 1063

22. Change in eating habits attributable in part to advent of "T.V."

U.S.—Davar Products, Inc v U.S., Cust Ct., 303 F.Supp. 1058, 1063

page 475

MEAN.

As a Noun

—Means.

23. Similarly defined

(1) "Mean" means the middle point or that which is at or near the middle point, between the extremes of place, time, number or rate—Conran v Grvin, Mo., 341 S.W.2d 75, 81

27. U.S.—C.J.S. cited in U.S. v Loft on 6th Floor of Bldg at 40 E 12th St., New York, N.Y., D.C. N.Y., 182 F.Supp. 322, 325

28. U.S.—C.J.S. cited in U.S. v Loft on 6th Floor of Bldg at 40 E 12th St., New York, N.Y., D.C. N.Y., 182 F.Supp. 322, 325

As element

A "means" is not necessarily an element but may include several—Phillips v Lynch, 367 F.2d 601, 608, 34 CCPA 781

29. U.S.—C.J.S. cited in U.S. v Loft on 6th Floor of Bldg at 40 E 12th St., New York, N.Y., D.C. N.Y., 182 F.Supp. 322, 325

30. U.S.—C.J.S. cited in U.S. v Loft on 6th Floor of Bldg at 40 E 12th St., New York, N.Y., D.C. N.Y., 182 F.Supp. 322, 325

page 476

35. U.S.—C.J.S. cited in U.S. v Loft on 6th Floor of Bldg at 40 E 12th St., New York, N.Y., D.C. N.Y., 182 F.Supp. 322, 325

MEANDER.

42. N.Y.—People ex rel Greenwald v Greenwald, 314 N.Y.S.2d 859, 861, 64 Misc.2d 346

page 477

56. Fla.—Pasco County v Johnson, 67 So.2d 639, 641

MEASURABLE Capable of being measured ⁴¹⁵

61.5. Mo.—Moore v General Motors Corp., Mo. App., 558 S.W.2d 720, 731

MEASURE.

62. La.—Bierhorst v Prieto, App., 131 So.2d 308, 311

63. La.—Bierhorst v Prieto, App., 131 So.2d 308, 311

64. La.—Bierhorst v Prieto, App., 131 So.2d 308, 311

MEASUREMENT.

page 478

65. Phrases

(1) "Proportionate measurement" is defined as a measurement having the same ratio to that recorded in the original field note as the length of the chain used in the new measurement has to the length of the chain used in the original survey, assuming that the original measurement was correctly made—Cordell v Sanders, 52 S.W.2d 834, 837, 331 Mo. 84, 50 C.J. p. 789 note 59

MEAT.

67. Tex.—C.J.S. cited in Simon v State, Tex., 522 S.W.2d 929, 930

69. Similarly defined

(1) "Meat" is defined as "The flesh of animals" used as food, commercially, in United States, "meat" means the dressed flesh of cattle, swine, sheep or goats, except where used with a qualifying word, as in "reindeer meat", "crab meat"—State v Nugent, 89 S.E.2d 781, 784, 243 N.C. 100

(2) The flesh of animals used as food as distinguished from fish or fowl—Wilson v State, 297 S.W.2d 830, 831, 164 Tex.Cr. 233

MECHANIC.

As a Noun

79. Ariz.—City of Phoenix v Yates, 208 P.2d 1147, 1151, 69 Ariz. 68

86. Ariz.—City of Phoenix v Yates, supra, n. 79

page 479

96. Ariz.—City of Phoenix v Yates, 208 P.2d 1147, 1151, 1152, 69 Ariz. 68

page 480

Phrases.

13. Phrases

(3) "Ordinary mechanic" who is a person having ordinary skill in the art to which the subject matter pertains—Helms Products v Lake Shore Mfg. Co., C.A. Ill., 227 F.2d 677, 683

(4) "Street mechanic" is a slang expression meaning one who may be privately employed to do piecemeal automotive work—People v Moran, 245 N.E.2d 226, 227, 23 N.Y.2d 496, 297 N.Y.S.2d 578

MECHANICAL.

30. Manual operations

Word "mechanical" means, inter alia, of, pertaining to, or connected with manual operations—Illinois Bell Tel. Co. v Mmer, 136 N.E.2d 1, 10, 11 Ill. App.2d 44

MECHANICS' LIENS

§ 1. Definition, Nature, and Distinctions

Library References

Mechanics' Liens §=1 et seq

page 491

2. U.S.—Matter of Lowery Bros., Inc., C.A. Fla., 589 F.2d 851—In re Ribeiro, Blrty Mass., 7 B.R. 359

Ala.—Floyd v Rambo, 33 So.2d 360, 250 Ala. 101
Idaho—Layrite Products Co. v Lux, 416 P.2d 501, 91 Idaho 110

Mo.—Marran-Cooke, Inc. v Purier Excavating, Inc., 585 S.W.2d 38

Similar definitions

(2) Mich.—Canvasser Custom Builders, Inc. v Sea kin, 196 N.W.2d 859, 38 Mich. App. 643

(4) Conn.—City Iron Works, Inc. v Frank Badstueber Post No. 2090, 167 A.2d 462, 22 Conn. Sup. 230

Ga.—Atlanta Jewish Community Center, Inc. v Tom Barrow Co., 203 S.E.2d 921, 130 Ga. App. 608

Mo.—Herbert & Brooner Const. Co. v Golden, App., 499 S.W.2d 541

N.J.—Chesbro-Whitman Co. v Edenboro Apartments, Inc., 207 A.2d 186, 86 N.J. Super 422

Theory under which justified

Iowa—Gollehon, Schenmer & Associates, Inc. v Fair way-Bettendorf Associates, 268 N.W.2d 200

4. Idaho—Chief Industries, Inc. v Schwendiman, 587 P.2d 823, 99 Idaho 682

8. General mechanic's lien

Colo.—American Irr. Co. v Fadenrecht, 489 P.2d 1060, 30 Colo. App. 28

page 492

12. Vt.—Piper v Hoyt, 17 A. 798, 61 Vt. 539—Woodbury Lumber Co. v McIntosh, 211 A.2d 240, 125 Vt. 154

14. Mich.—Canvasser Custom Builders, Inc. v Sea kin, 196 N.W.2d 859, 38 Mich. App. 643

N.Y.—Yarmak v Perry, 43 N.Y.S.2d 304, 182 Misc. 268—Hath Arms, Inc. v Kemler, 141 N.Y.S.2d 257, 207 Misc. 849

15. Ala.—Gray v McKinley, 43 So.2d 421, 34 Ala. App. 630, cert. den. 43 So.2d 424, 253 Ala. 199

N.H.—James Drywall, Inc. v Europa Development Corp., 365 A.2d 1047, 116 N.H. 619

Account as basis

Ohio—Gustafson v Buckley, 121 N.E.2d 280, 96 Ohio App. 115, aff'd 118 N.E.2d 403, 161 Ohio St. 160, app. dismissed 115 N.E.2d 5, 160 Ohio St. 174

16. N.H.—James Drywall, Inc. v Europa Development Corp., 365 A.2d 1047, 116 N.H. 619

17. Pa.—Halowich v Ammitt, 154 A.2d 406, 190 Pa. Super 314

Liens operates against property

Vt.—Woodbury Lumber Co. v McIntosh, 211 A.2d 240, 125 Vt. 154

20. Mo.—C.J.S. cited in Putnam v Heathman, App., 367 S.W.2d 823, 828

N.C.—C.J.S. cited in Miller v Lemon Tree Inn of Wilmington, Inc., 249 S.E.2d 836, 839, 39 N.C. App. 133

23. Mont.—Beck v Hanson, 589 P.2d 141, 180 Mont. 82

25. Ala.—Landay v Rogers, 60 So.2d 445, 260 Ala. 231

Mich.—Canvasser Custom Builders, Inc. v Sea kin, 196 N.W.2d 859, 38 Mich. App. 643

Pa.—Hoffman Lumber Co. v Mitchell, 85 A.2d 664, 170 Pa. Super 326

29. Kan.—Lenza State Bank & Trust Co. v Dixon, 559 P.2d 776, 221 Kan. 238

S.D.—Lytle v Morgan, 270 N.W.2d 359

30. Cal—Laubach v Roberto, 277 P 2d 9, 43 C 2d 702—Mercantile Collection Bureau v Roach, 15 Cal Rptr 710, 195 C A 2d 355
- Kan—CJS cited in Davis-Wellcome Mortg Co v Long-Bell Lumber Co, 336 P 2d 463, 467, 184 Kan 202
- Vt—Piper v Hoyt, 17 A 798, 61 Vt 539—Woodbury Lumber Co v McIntosh, 211 A 2d 240, 125 Vt 154

page 493

- 38 US—Colonial Trust Co v Goggins, C A Cal, 230 F 2d 634
- Cal—Schrader Iron Works, Inc v Lee, 103 Cal Rptr 106, 26 C A 3d 621
- NJ—J T Evans Co v Fanelli, 157 A 2d 36, 59 N J Super 19
- NY—Blackman-Shapiro Co v Salzberg, 168 N Y S 2d 590, 8 Misc 2d 972
- Tex—Newman v Coker, Civ App, 310 S W 2d 354—Wood v Barnes, Civ App, 420 S W 2d 425, err ref no rev err
39. Tex—Continental Radio Co v Continental Bank & Trust Co, Civ App, 369 S W 2d 359, err ref no rev err
40. Fla—Tom Joyce Realty Corp v Popkin, App, 111 So 2d 707
- Kan—Logan-Moore Lumber Co v Black, 347 P 2d 438, 185 Kan 644, 81 A L R 2d 671—Seyb-Tucker Lumber & Implement Co v Hartley, 415 P 2d 217, 197 Kan 58
- Minn—Dunham Associates, Inc v Group Inv, Inc, 223 N W 2d 376
- Mo—Herbert & Brooner Const Co v Golden, App, 499 S W 2d 541
41. US—In re Warren, D C Wash, 192 F Supp 801—Delduca v U S Fidelity & Guaranty Co, C A Fla, 357 F 2d 204, reh den 262 F 2d 1012—In re Romanac, D C Va, 245 F Supp 882, affd, 386 F 2d 225—Lake v Fidelity & Deposit Co of Md, C A Fla, 430 F 2d 1251
- Ala—Burge v Morgan, 59 So 2d 795, 257 Ala 558—Wilkinson v Rowe, 98 So 2d 435, 266 Ala 675—Finney v Story, 123 So 2d 129, 271 Ala 284—Lily Flagg Blug Supply Co v J M Medlin & Co, 232 So 2d 643, 285 Ala 402—Security Transactions, Inc v Nelson Excavating & Paving Co, Inc, Civ, 314 So 2d 297, 55 Ala App 223, cert den 314 So 2d 304, 294 Ala 768
- Ark—Withrow v Wright, 222 S W 2d 809, 215 Ark 654
- Colo—Bishop v Moore, 323 P 2d 897, 137 Colo 263
- Conn—Lampson Lumber Co v Rosadino, 104 A 2d 362, 141 Conn 193
- Fla—Sheffield-Briggs Steel Products, Inc v Ace Concrete Service Co, 63 So 2d 924—Fell v Messeroff, App, 145 So 2d 238—Miller v Duke, App, 155 So 2d 627—Beautyware Plumbing Supply Co v Columbiad Apartments, Inc, App, 215 So 2d 42
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- Iowa—Moffitt Bldg Material Co v U S Lumber & Supply Co, 124 N W 2d 134, 255 Iowa 765
- Kan—Clark Lumber Co v Passag, 339 P 2d 280, 184 Kan 667—Ekstrom United Supply Co v Ash Grove Lume & Portland Cement Co, 400 P 2d 707, 194 Kan 634
- Me—Bangor Roofing & Sheet Metal Co v Robbins Plumbing Co, 116 A 2d 664, 151 Me 145
- Md—U S v Essinger Mill & Lumber Co, 98 A 2d 81, 202 Md 613—Freeform Pools, Inc v Strawbridge

- Home for Boys, Inc, 179 A 2d 683, 228 Md 297, 95 A L R 2d 1365
- Mass—Valentine Lumber & Supply Co v Thibault, 146 N E 2d 349, 336 Mass 411
- Minn—Armco Steel Corp, Metal Products Division v Chicago & N W Ry Co, 149 N W 2d 23, 276 Minn 133—Reuben E Johnson Co v Phelps, 156 N W 2d 247, 279 Minn 107—M E Kraft Excavating & Grading Co v Barac Const Co, 156 N W 2d 748, 279 Minn 278—Anderson v Breezy Point Estates, 168 N W 2d 693, 283 Minn 490, 35 A L R 3d 1383
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- SD—Keeley Lumber & Coal Co v Dunker, 77 N W 2d 689, 76 SD 281
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- Utah—Utah Sav and Loan Ass'n v Mecham, 366 P 2d 598, 12 Utah 2d 335, 15 A L R 3d 63
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- 42 Miss—CJS cited in Chancellor v Melvin, 52 So 2d 360, 364, 211 Miss 590
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- Vt—Woodbury Lumber Co v McIntosh, 211 A 2d 240, 125 Vt 154
43. US—Colonial Trust Co v Goggins, C A Cal, 230 F 2d 634—Delduca v U S Fidelity & Guaranty Co, C A Fla, 357 F 2d 204, reh den 262 F 2d 1012
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page 494

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- Md—CJS cited in Freeform Pools, Inc v Strawbridge Home for Boys, Inc, 179 A 2d 683, 685, 228 Md 297, 95 A L R 2d 1365
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- Wyo—CJS cited in Arch Sellery, Inc v Simpson, 346 P 2d 1068, 1071
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- 44 Ark—Dix v Olds, 415 S W 2d 567, 242 Ark 830
- Ill—Edward Hmes Lumber Co v Dell Corp, 364 N E 2d 368, 7 Ill Dec 207, 49 Ill App 3d 873
- NJ—Wilson v Robert A Stretch, Inc, 129 A 2d 599, 44 N J Super 52—J T Evans Co v Fanelli, 157 A 2d 36, 59 N J Super 19
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page 495

- 48 Ga—Ingalls Iron Works Co v Standard Ace Ins Co, 130 S E 2d 606, 107 Ga App 454
- Wis—City Lumber & Supply Co v Fisher, 41 N W 2d 285, 256 Wis 402
50. Ala—Reaves v Little, 79 So 2d 55, 262 Ala 411
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- ND—Schaffer v Smith, 113 N W 2d 668
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58. US—In re Rhine, D C Colo, 213 F Supp 527—Nuclear Corp of America v Hale, D C Tex, 355 F Supp 193, affd, C A, 479 F 2d 1045

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59 US—In re Romanac, D C Va, 245 F Supp 882, affd 386 F 2d 225—US Nuclear Corp of America v Hale, D C Tex, 355 F Supp 193, affd, C A, 479 F 2d 1045

61. US—US Nuclear Corp of America v Hale, D C Tex, 355 F Supp 193, affd, C A, 479 F 2d 1045

Minn—Albert & Harlow Inc v Great Northern Oil Co, 167 NW 2d 500, 283 Minn 246

The text rules have been applied where the contract was performed in another state by individuals or corporations which do not reside in the state where the property is situated^{61.5}

61.5. US—US Nuclear Corp of America v Hale, D C Tex, 355 F Supp 193, affd, C A, 479 F 2d 1045

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65. Ark—Drum v McDaniel, 222 S W 2d 59, 215 Ark 690

Right in rem

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page 496

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Purpose

(3) Other cases

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page 497

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80. Colo—Jackson v A B Z Lumber Co, 392 P 2d 288, 155 Colo 33

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page 498

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§ 3 MECHANICS' LIENS

Page 498

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§ 4. — Construction, Operation, and Effect in General

page 499

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page 500

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N E 2d 14, 112 Ill App 2d 190—Capital Plumbing & Heating Supply Co v Snyder, 275 N E 2d 663, 2 Ill App 3d 660

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page 501

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 Neb—Rosebud Lumber & Coal Co v Holms, supra, n 35
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 Ohio—Vitale Bros Co v Wurtz, 206 N E 2d 585, 2 Ohio App 2d 99
 Or—Timber Structures v CWS Grinding & Mach Works, 229 P 2d 623, 191 Or 231, 25 A L R 2d 1358—Anderson v Chambliss, 262 P 2d 298, 199 Or 400
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 Cal—Tracy Price Associates v Hebard, 72 Cal Rptr 600, 266 CA 2d 778
 Colo—Darien v Hudson, 302 P 2d 519, 134 Colo 213—3190 Corp v Gould, 431 P 2d 466, 163 Colo 356—Kobayashi v Meekless Steel Co, 472 P 2d 724, 28 Colo App 327
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page 502

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page 503

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Particular provisions strictly construed
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page 504

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page 505

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 Cal—E D McGillicuddy Const Co, Inc v Knoll Recreation Ass'n, Inc, 107 Cal Rptr 899, 31 CA 3d 891

§ 5. — Retroactive Operation

81. Fla—Quality Lime Products, Inc v Acme Paving Co, App, 134 So 2d 42—General Capital Corp v Adobe Brick & Supply Co, App, 138 So 2d 82—Pools By Tropicana, Inc v Swan, App, 167 So 2d 775
 Me—Diamond Intern Corp v Philip L Gadsbos & Sons, Inc, 390 A 2d 1061
 NY—Caristo Const Corp v Diners Financial Corp, 257 N Y S 2d 423, 45 Misc 2d 549
 ND—Spier v Power Concrete, Inc, 304 N W 2d 68
Procedure for causing lien to attach may be retroactive
 Mich—Hansen-Snyder Co v General Motors Corp, 124 N W 2d 286, 371 Mich 480
 83. Fla—Central Elec Supply, Inc v Amazon, App, 172 So 2d 508
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Page 505

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§ 6. — Change or Repeal

92. Ariz—O'Malley Lumber Co v Riley, App, 613 P 2d 629, 126 Ariz 167

Ga—Cherokee Culvert Co, Inc v Gurn, 265 S E 2d 106, 153 Ga App 296

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Pa—Martin, Inc v Kurtz, 14 Ches 150

Amendment held inapplicable

Colo—American Factors Associates, Ltd v Triangle Heating & Sheet Metal Co, 503 P 2d 163, 31 Colo App 240

93. Tex—Gevmson v Stephen-Leedom Carpet Co, Civ App, 368 S W 2d 700

page 506

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2. Statutes held not repealed

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5. Minn—Armco Steel Corp, Metal Products Division v Chicago & N W Ry Co, 149 N W 2d 23, 276 Minn 133

§ 7. Persons Who May Obtain Lien

10. Colo—Damrell v Creagar, 599 P 2d 262, 42 Colo App 281

11. Lessor of equipment to contractor held not entitled to lien

Md—Giles & Ransome, Inc v First Nat Realty Corp, 208 A 2d 582, 238 Md 203

13. Ga—Tallman v Southern Motor Exchange, Inc, 103 S E 2d 640, 97 Ga App 565

Work done prior to incorporation

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page 507

22. Colo—Damrell v Creagar, 599 P 2d 262, 42 Colo App 281

Optionee held not owner

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§ 8. Property Subject to Lien

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Casting

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§ 10. — Public Property

30. Mo—Home Bldg Corp v Ventura Corp, 568 S W 2d 769

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page 508

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page 509

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page 510

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page 511

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page 512

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- 2.5. NY—Matter of Paerdegat Boat and Racquet Club, Inc, 443 N E 2d 477, 57 N Y 2d 966, 457 N Y S 2d 229

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page 513

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page 514

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page 515

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page 516

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page 517

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Requirement of permanency of construction

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page 518

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page 519

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Page 519

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S W 2d 577

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558
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Mont 188
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Inc., App, 116 So 2d 660
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No lien allowed
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NYS 2d 712, 59 A D 2d 368

page 520

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BR 635
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771
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Trust Co, 354 NE 2d 131, 41 Ill App 3d 415
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Nev 360
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254, 13 Utah 2d 339

Permanent fixtures

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Inc v R L Hatcher, Inc, App, 438 NE 2d 26
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CA 3d 126

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1074

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Housing Projects, App, 268 SW 2d 596

Lien held allowable

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BR 383
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Coast Co, 455 P 2d 615, 253 Or 582
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Wall-to-wall carpeting over sub-flooring
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Co, 441 P 2d 430—United Benefit Life Ins Co v
Norman Lumber Co, 484 P 2d 527

Air-conditioner

Ark—Bell v Carver, 431 S W 2d 452, 245 Ark 31, 28
A L R 3d 781

Disposals and dishwashers

Tex—First Nat Bank in Dallas v Whirlpool Corp,
517 S W 2d 262

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174 F Supp 598, affd, CA, 280 F 2d 426—In re
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796
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757, 91 Ill App 3d 847
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Lien held not allowable

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Innkeepers, Ltd, 277 SE 2d 282, 157 Ga App 279
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Blower system

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499

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1074

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P 2d 864, 86 Nev 822

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278 F 2d 488

page 521

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§ 27. — Apparatus for Heating, Cooking, Lighting, or Water Supply

page 522

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Under contract

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Refrigerators and ranges

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517 S W 2d 262

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31, 28 A L R 3d 781

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691

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1074

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842, 87 A D 2d 661

§ 28. — Machinery

page 523

7. Plugging in electrical cord not "incorpora-
tion"

Tex—First Nat Bank in Dallas v Whirlpool Corp,
517 S W 2d 262

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174 F Supp 598, affd, CA, 280 F 2d 426

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& Trust Co, 354 NE 2d 131, 41 Ill App 3d 415

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635

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P 2d 734, 89 Ariz 307

Purpose or intention

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155 SE 2d 413, 115 Ga App 596

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tors, 224 P 2d 146, 124 Mont 370

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174 F Supp 598, affd, CA, 280 F 2d 426

§ 30. Improvements outside Building

page 525

34. Ark—Skipper v Hoskins, 444 S W 2d 875, 247
Ark 235

Cal—Griffs v Squire, 73 Cal Rptr 154, 267 CA 2d
461

Del—Pioneer Nat Title Ins Co v Exten Associates,
Inc, 403 A 2d 283

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Mobile Home Park, 253 NW 2d 646, 400 Mich
184

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Inc, 168 NYS 2d 275, 10 Misc 2d 913

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Montg Co 111

Statute not applicable

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ref no rev err

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Adams L J 17—Sampson—Miller Associated Com-
panies, Inc v Landmark Realty Co, 303 A 2d 43,
224 Pa Super 25

36. Parking area held appurtenant

Pa—Acme Paving Co v Ferguson, 21 D & C 2d 465,
39 Wash 227

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Ark 125

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Inc, 59 Cal Rptr 587, 251 CA 2d 347

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Inc, 373 A 2d 965, 36 Md App 274

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Mobile Home Park, 253 NW 2d 646, 400 Mich
184

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Inc, 418 S W 2d 940

Landscaping

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353 A 2d 212

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850

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I) v Mario Bonito, Inc, 363 NYS 2d 501, 79
Misc 2d 1088

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422

42. Improve lots for future construction

Ala—Mazel v Bain, 133 So 2d 44, 272 Ala 640

Ok—Green v Reese, 261 P 2d 596, 39 A L R 2d 861

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Limited, 83 Cal Rptr 105, 2 CA 3d 742

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NH 315

page 526

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62. Sewer
- Pa—Meehan v Morris Novack, Inc, 28 D & C 2d 143, 78 Montg 215

A person who supplies equipment for use in the construction of an offshore pipeline project may have a lien under appropriate statutory provisions 65

- 65.5. US—Continental Cas Co v Associated Pipe & Supply Co, DCLa, 310 F Supp 1207, affd in part, mod in part on oth grds and vac in part on oth grds, CA, 447 F 2d 1041

§ 31. — Roads, Walks, and Street Improvements

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- Tenn—Britt v McClellon, 373 S W 2d 457, 213 Tenn 232
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Work constituting "improvement"

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§ 33. In General

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Mechanics' Liens ⇐85 et seq

page 527

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- Claims held not lienable**
- (1) Ark.—Dix v Olds, 415 S W 2d 567, 242 Ark 850—John E. Mahaffey & Associates, Inc v Brophy, 462 S W 2d 226, 249 Ark 884
- Ga—Jackson's Mill & Lumber Co v Holliday, 134 S.E.2d 563, 106 Ga.App 663

- La—Hunt v La Chere Maison, Inc, App, 316 So 2d 850

- Me—Bangor Roofing & Sheet Metal Co v Robbins Plumbing Co, 116 A 2d 664, 151 Me 145

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- (5) Okl—Flour Mills of America, Inc v American Steel Bldg Co, 449 P 2d 861

Insurance

- (1) Me—Bangor Roofing & Sheet Metal Co v Robbins Plumbing Co, 116 A 2d 664, 151 Me 145

- (5) Cost of fire insurance held lienable item

- Alaska—Clay v Sandal, 369 P 2d 890

85. NJ—Tolland v Lata, 134 A 2d 601, 46 NJ Super 272

86. Neb—Saum v L R Foy Const Co, Inc, 212 NW 2d 648, 190 Neb 783

- Pa—Murray v Zemon, 167 A 2d 253, 402 Pa 354

89. Pa—Associated Bldg Contractors v Lantz, 59 Dauph Co 217

92. Transaction held not loan of credit

- Mo—Bryant v Bryant Const Co, App, 425 S W 2d 236

§ 34. Services

page 528

95. US—C.J.S. quoted in Goodyear Tire & Rubber Co v Jones, DCKan, 317 F Supp 1285, 1293, affd, CA, 433 F 2d 629

- Ind—Saint Joseph's College v Morrison, Inc, 302 NE 2d 865, 158 Ind App 272

- Mo—Wilson v Berning, App, 293 S W 2d 151

- Or—Johnston v Abbey, Inc, 445 P 2d 596, 251 Or 330

- Wash—Willett v Davis, 193 P 2d 321, 30 Wash 2d 622

- Survey
- NC—Wilbur Smith & Associates, Inc v South Mountain Properties, Inc, 224 S E 2d 692, 29 NC App 447, cert den 226 S E 2d 514, 290 NC 552

- Or—Smith v De Kraay, 342 P 2d 784, 217 Or 436—Clark v Girard, 512 P 2d 993, 266 Or 270

Engineering services

- US—Mittford v Prior, CA Alaska, 353 F 2d 550—In re California Steel Co, Bkrcty III, 21 BR 383

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- Fla—Wardlaw v Pyma, App, 266 So 2d 355

- SD—Weld v Harold J Westin and Associates, Inc, 329 NW 2d 624

- Last not exclusive**
- Del—Wilmington Trust Co v Branmar, Inc, Super, 353 A 2d 212

- Purpose of statute**
- Mich—Rowen & Blair Elec Co v Finishing Operating Corp, 239 NW 2d 633, 66 Mich App 480, affd 250 NW 2d 481, 399 Mich 593

96. US—C.J.S. quoted in Goodyear Tire & Rubber Co v Jones, DCKan, 317 F Supp 1285, 1293, affd, CA, 433 F 2d 629

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- Tex—Cotton Belt State Bank, Impson v Roy H Hatcher, Inc, Civ App, 351 S W 2d 325

- Wash—Wenatchee Federal Sav & Loan Ass'n v Mission Ridge Estates, 498 P 2d 841, 80 Wash 2d 749

- Wis—Knuth v Fidelity & Cas Co of NY, 63 NW 2d 126, 275 Wis 603

- Skilled or unskilled labor**
- (2) Cal—Myers v Alta Const Co, 235 P 2d 1, 37 C 2d 739

- NC—Frank H Conner Co v Spanish Inns Charlotte, Ltd, 242 S E 2d 785, 294 NC 661

- (3) Other statements
- Ga—Dantel Corp v Windby, 105 SE 2d 242, 98 Ga App 119

- Ohio—Manpower, Inc v Phillips, 179 NE 2d 922, 173 Ohio St 45

- Waiting time included**
- US—Prepakt Concrete Co v Fidelity & Deposit Co of Md, CA III, 393 F 2d 187

- Constitutional lien available for articles specially ordered**
- Tex—First Nat Bank in Dallas v Whirlpool Corp, 517 S W 2d 262

97. US—Continental Cas Co v Associated Pipe & Supply Co, DCLa, 310 F Supp 1207, affd in part, mod in part on oth grds and vac in part on oth grds, CA, 447 F 2d 1041

- Me—Morin v H W Maxim Co, supra, n 96

- Minn—Hayle Floor Covering, Inc v First Minnesota Const Co, 253 NW 2d 809

- ND—Glock v Hillestad, 85 NW 2d 568

98. US—Browning v Allied Helicopter Service, Inc, CA Okl, 309 F 2d 712

- Ala—Wilkinson v Rowe, 98 So 2d 435, 266 Ala 675

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- Ohio—Connecticut Gen Life Ins Co v Barzer Bldg Co, 101 NE 2d 408—Manpower, Inc v Phillips, 173 NE 2d 370, revd on oth grds 179 NE 2d 922, 173 Ohio St 45

- Or—Timber Structures v CWS Grndmg & Mach Works, 229 P 2d 623, 191 Cr 231, 25 A LR 2d 1358

- Pa—Dagit v Radnor Convalescent & Nursing Home, Inc, 38 D & C 2d 389, 53 Del Co 225

- Va—F S Bowen Elec Co v Foley, 72 SE 2d 388, 194 Va 92

- Surveying excluded**
- SC—Johnson v Barnhill, 306 S E 2d 216, 279 SC 242

99. Tenn—Hamilton Nat Bank v Long, 226 S W 2d 293, 189 Tenn 562

1. Or—Timber Structures v CWS Grndmg & Mach Works, 229 P 2d 623, 191 Cr 231, 25 A LR 2d 1358

- Rule not applicable to rental equipment without operator**
- US—Continental Cas Co v Associated Pipe & Supply Co, DCLa, 310 F Supp 1207, affd in part, mod in part on oth grds, and vac in part on oth grds, CA, 447 F 2d 1041

- Md—Giles & Ransome, Inc, v First Nat Realty Corp, 208 A 2d 582, 238 Md 203

2. Or—Timber Structures v CWS Grndmg & Mach Works, supra, n 1

Page 528

Crane with operator

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4. U.S.—Goodyear Tire & Rubber Co v Jones, C.A. Kan., 433 F 2d 629

Ind—Mann v Schnarr, 95 N.E.2d 138, 228 Ind 654

Ohio—Mampower, Inc v Phillips, 179 N.E.2d 922, 173 Ohio St 45

5. Or—Timber Structures v CWS Grinding & Mach Works, supra, n 1

Pa—Halowich v Amminitt, 154 A 2d 406, 190 Pa Super 314

6. Ind—Mann v Schnarr, supra, n 4

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7. ND—Glock v Hillestad, 85 N.W.2d 568

Or—Timber Structures v CWS Grinding & Mach Works, supra, n 1

page 529

8. Cal—Cornell v Sennes, 95 Cal Rptr 728, 18 Cal 3d 126

Or—Timber Structures v CWS Grinding & Mach Works, supra, n 1

§ 35. — Preparatory Work in General

10. Tex—Zeller v University Sav Ass'n, Civ App, 580 S.W.2d 658

Wash—Hayes v Gwinn, 307 P 2d 1063, 49 Wash 2d 908, adhered to 317 P 2d 1071, 51 Wash 2d 892

Lien allowed

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11. Or—Abajay v Hill, 601 P 2d 837, 42 Or App 695

§ 36. — Services of Architect

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No distinction from engineer's duties

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No lien attaching

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13. Mo—Henges Co v Doctors' North-Roads Bldg, Inc, App, 409 S.W.2d 489

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page 530

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Preliminary character of plans

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27. U.S.—In re Morrell, D.C. Cal, 42 B.R. 973

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(5) Other matters

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29. Pa—Dagit v Radnor Convalescent & Nursing Home, Inc, 38 D & C 2d 389, 53 Del Co 225

26. Hawai—Nakashima Associates Inc v Pacific Beach Corp, 641 P 2d 337, 3 Haw App 58

§ 37. — Superintendence

31. Alaska—Clay v Sandal, 369 P 2d 890—Urban Development Co v Dekreon, 526 P 2d 325

Ind—Mann v Schnarr, supra, n 4—Marcusz v Osborne, 118 N.E.2d 378, 124 Ind App 574

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page 531

32. Ga—Dante Corp v Whidby, 105 S.E.2d 242, 98 Ga App 119

34. Wash—Willett v Davis, supra, n 31

35. A subcontractor's, etc.

Pa—Stueber v McGraw-Edition Co, 44 Wash Co 130

§ 38. — Work other Than Construction

37. U.S.—Smith v Anderson Bros Corp, D.C. La., 104 F.Supp 117

Ala—Wilkinson v Rowe, 98 So 2d 435, 266 Ala 675, 222

Hauling and reassembling digging equipment not included

Miss—White v Cabot Corp, 194 So 2d 499

Services indirectly related to construction included

Ark—Howell v Worth James Const Co, 535 S.W.2d 826, 299 Ark 627

NJ—J.R. Christ Const Co v Willete Associates, 221 A 2d 538, 47 N.J. 473

§ 39. — Work Not Done on Premises

39. Ind—Mann v Schnarr, supra, n 4

Minn—Dunham Associates, Inc v Group Inv, Inc, 223 N.W.2d 376

NJ—J.R. Christ Const Co v Willete Associates, 221 A 2d 538, 47 N.J. 473

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40. Cal—Scott, Blake and Wynne v Summit Ridge Estates, Inc, 59 Cal Rptr 587, 251 C.A.2d 347

Or—C.J.S. cited in Timber Structures v CWS Grinding & Mach Works, 229 P 2d 623, 630, 191 Or 231, 25 A.L.R.2d 1358

Work on adjoining property within construction program

Mich—G.O. Lewis Co v Erving, 145 N.W.2d 368, 4 Mich App 589

An electrical subcontractor may not assert a mechanic's lien for work he performed on modular homes at the factory and prior to their shipment to the sites for final assembly⁴¹⁵

41.5. Colo—C & W Elec, Inc v Casa Dorado Corp, 523 P 2d 137, 34 Colo App 117

§ 40. Materials

42. Ark—Cooper v Sparrow, 259 S.W.2d 496, 222 Ark 385

Ind—Saint Joseph's College v Morrison, Inc, 302 N.E.2d 865, 158 Ind App 272

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§ 41. — Nature, Quality, and Quantity

page 532

45. Ind—Mann v Schnarr, supra, n 4
 47. Ga—D H Overmyer Warehouse Co v W C Cate & Co, 157 SE2d 68, 116 Ga App 128
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 Mo—Sears, Roebuck & Co v Seven Palms Motor Inn, Inc., 530 S W 2d 695
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Materials need not enhance value

- Ill—Rupperden v Henry Abaker Chevrolet, Inc., 274 NE2d 113, 1 Ill App 3d 712

Materials need not enhance value exception inapplicable

- Ill—DM Foley Co, Inc v North West Federal Sav and Loan Ass'n, 1 Dist, 461 NE2d 500, 77 Ill Dec 877, 122 Ill App 3d 411

48. La—Gresna Glass & Mirror Works, Inc v Crescent City Baptist Church, App., 357 So 2d 836
 Ohio—Clyburn v Reeves, 234 NE2d 613, 13 Ohio App 2d 156

Deviation from substantial compliance not fatal to lien

- NY—Hilderbrand v Quislan, 106 NYS2d 783
 51. La—Broadmoor Lumber Co v Liberto, App., 162 So 2d 800
 54. Tex—Space City Const Co v Gifford-Hill & Co, Civ App., 468 SW2d 897

§ 42. — Furnishing

62. Ala—Howell v Hallett Mfg Co, 178 So 2d 94, 278 Ala. 316
 Fla—Lehigh Structural Steel Co v Joseph Langner, Inc., 43 So 2d 335—Beautyware Plumbing Supply Co v Columbaid Apartments, Inc., App., 215 So 2d 42
 La—Hayes v R J Jones and Sons, 56 So 2d 853
 Mich—Knapp Transit Mix Co v Highland Greens, Inc., 216 NW 2d 84, 51 Mich App 719
 Mo—Boyer Lumber, Inc v Blair, App., 510 S W 2d 738
 63. Iowa—Des Moines Furnace & Stove Repair Co v Lemon, 56 NW 2d 923, 244 Iowa 316
 64. Okl—McGlimphy v Jetero Const Co, Inc., 593 P 2d 76

page 533

67. Fla—United Bonding Ins Co v Dura-Stress, Inc., App., 243 So 2d 244
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 69. Passage of ownership
 Ohio—Connecticut Gen Life Ins Co v Birzer Bldg Co, 101 NE2d 408
 71. That equipment required assembling before shipment insufficient
 Fla—Surf Properties v Markowitz Bros., 75 So 2d 298
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 75. Neb—Rosebud Lumber & Coal Co v Holms, 52 NW 2d 313, 155 Neb 459, reh den 53 NW 2d 82, 155 Neb 688
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 79. Or—Smith v De Krasay, 342 P 2d 784, 217 Or 436
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§ 43. — Actual Use

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page 534

85. La—Hughes v Will, App., 35 So 2d 241
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In Texas

- (1) Tex—Houston Fire & Cas Ins Co v Hales, Civ App., 279 S W 2d 389, err ref no rev err

90. Ill—Hinkle v Creek, 251 NE2d 111, 113 Ill App 2d 454

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page 535

95. Lien held acquired

- (2) Tex—Houston Fire & Cas Ins Co v Hales, Civ App., 279 S W 2d 389, err ref no rev err
 (3) Installation of wall to wall carpeting
 Mo—J R Mende Co v Forward Const Co, App., 526 S W 2d 21

Lien held not acquired

- Neb—Occidental Sav & Loan Ass'n v Cannon, 171 NW 2d 166, 184 Neb 659
 97. Ohio—Connecticut Gen Life Ins Co v Birzer Bldg Co, supra, n 69

§ 44. — Incorporation in Building or Improvement

8. US—US v Westmoreland Manganese Corp, D C Ark., 134 F Supp 898 Affd, C A., 246 F 2d 351, revd on oth grds 246 F 2d 357, cert den 78 S Ct 262, 355 US 890, 2 L Ed 2d 189
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 Air-conditioning and heating systems
 NY—Monroe Sav Bank v First Nat Bank of Waterloo, 377 NYS2d 827, 50 AD 2d 314
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page 536

10. Colo—Beco Equipment Co, Inc v Box, 608 P 2d 850, 44 Colo App 88
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 11. US—In re Rhine, D C Colo., 213 F Supp 527
 Ill—Verplank Concrete & Supply, Inc v Marsh, 353 NE 2d 27, 40 Ill App 3d 742
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 NM—Tabet v Davenport, 260 P 2d 722, 57 N M 540
 Okl—Abel v Bachmann, 400 P 2d 151
 Ranges and refrigerators not especially manufactured
 Tex—First Nat Bank in Dallas v Whirlpool Corp., 517 S W 2d 262

Page 536

12. Ind—Mann v Schnarr, supra, n 8
Iowa—Kern v Maytag Co, 116 N W 2d 430, 254 Iowa 39

Ohio—Connecticut Gen Life Ins Co v Burzer Bldg Co, 101 NE 2d 408—Clyborn v Reeves, 234 NE 2d 613, 13 Ohio App 2d 156

13. Ohio—Connecticut Gen Life Ins Co v Burzer Bldg Co, supra, n 12

Actual incorporation prevented by factors not attributable to materialman

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"Furnisher" of equipment or appliances

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page 537

27. Ind—Mann v Schnarr, supra, n 8

In Illinois

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§ 45. Intent of Purpose in Furnishing

page 538

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page 539

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page 540

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§ 50. Transportation

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91. **Lease of trucks for transportation of fill**

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page 541

§ 51. Requisite Amount or Value

98. **Lienor must add value to structure**

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Materials and labor furnished subsequent to making contract

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Ratification

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page 542

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Technical contract not required

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page 543

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Additional repairs

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Contract unnecessary

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Lease clause as not constituting consent

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§ 53. — Extras

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§ 54. — Damages

page 544

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§ 56. Who May Contract or Consent

46. Stranger

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§ 57. — Ownership

page 545

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Minor not an owner

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Right of redemption as affecting lien

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Page 545

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page 546

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59. Lessor considered "owner"

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page 547

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No continuing duty to search records

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page 548

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§ 58. — Possession

page 549

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§ 59. — Agency

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Circumstances held sufficient to establish agency

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Mass.—Brown v. Gravlee Lumber Co., Inc., 341 So.2d 907

Wash.—Expert Drywall, Inc. v. Brain, 564 P.2d 803, 17 Wash. App. 529

Tenant held not agent of landlord

Iowa—Landas Fertilizer Co. v. Hargreaves, 206 N.W.2d 675

15. Ohio—Price Bros. Co. v. Walters, App., 115 N.E.2d 12

Wash.—Larson v. Duclos, 281 P.2d 458, 46 Wash.2d 334

Wis.—Bourdo v. Preston, 47 N.W.2d 439, 259 Wis. 97—Fullerton Lumber Co. v. Korth, 127 N.W.2d 1, 23 Wis.2d 253

17. D.C.—Moore v. Axelrod, App., 443 A.2d 40
Fla.—Carolina Lumber Co. v. Daniel, App., 97 So.2d 156

page 550

21. Ark.—Gillison Discount Bldg. Materials, Inc. v. Talbot, 488 S.W.2d 317, 253 Ark. 696

Fla.—Lehigh Structural Steel Co. v. Joseph Langner, Inc., supra, n. 13

Ga.—Capital Mechanical, Ltd. v. Dobbs Houses, Inc., 259 S.E.2d 147, 151 Ga. App. 142

Iowa—Stroh Corp. v. K. & S. Development Corp., 247 N.W.2d 750

Mo.—Brasick Const. Co., Inc. v. Taylor, App., 585 S.W.2d 282

Wash.—Bunn v. Bates, 196 P.2d 741, 31 Wash.2d 315

Agent's knowledge imputable to vendor

Ill.—Wanzer v. Smorgas-Brickman Developers, Inc., 264 N.E.2d 435, 130 Ill. App.2d 378

25. Ala.—John Lee Paint Co., Inc. v. Parktowne, Ltd., Civ. App., 367 So.2d 472, writ den., Sup., 367 So.2d 476

Fla.—C.J.S. cited in Armstrong v. Blackadar, App., 118 So.2d 854, 861

Pa.—Gingrich v. Dusinger, 134 A.2d 362, 184 Pa. Super 307

Wis.—Fullerton Lumber Co. v. Korth, 127 N.W.2d 1, 23 Wis.2d 253

Acts held to constitute ratification

(3) Mo.—Stockman v. Shelton's Estate, App., 526 S.W.2d 349

Pa.—Toll-Barkan Co. v. Toll, 76 Montg. 243, app. dismissed in part and sus. in part 164 A.2d 36, 193 Pa. Super 221

Circumstances held not to show ratification

(1) Ga.—Morgan v. May Realty Co., 71 S.E.2d 438, 86 Ga. App. 261

27. Wis.—Fullerton Lumber Co. v. Korth, 127 N.W.2d 1, 23 Wis.2d 253

28. Ga.—Morgan v. May Realty Co., supra, n. 25

31. Ind.—O'Hara v. Architects Hartung and Ass'n, 326 N.E.2d 283, 163 Ind. App. 661

Mo.—Stockman v. Shelton's Estate, App., 526 S.W.2d 349

Okla.—Dieterle Plumbing and Heating v. Green, 605 P.2d 1335

Circumstances held not to show estoppel

Ark.—Arkansas Foundry Co. v. Farrell, 385 S.W.2d 26, 238 Ark. 757

Ariz.—Hayward Lumber & Inv. Co. v. Graham, 449 P.2d 31, 104 Ariz. 103

Ga.—Bowen v. Collins, 217 S.E.2d 193, 135 Ga. App. 221

§ 63. — Husband or Wife

page 552

56. Ala.—Elder v. Stewart, 114 So.2d 263, 269 Ala. 482

Mo.—Dickinson v. Gault, App., 229 S.W.2d 283—Bryant v. Bryant Const. Co., App., 425 S.W.2d 236—Poore v. International Paper Co., App., 455 S.W.2d 13

NC—Leflew v Orrell, 172 SE2d 243, 7 NC App 333

57 Mo—Roper v Clanton, App, 258 SW2d 283—E C Robinson Lumber Co v Lowrey, App, 276 SW2d 636—Leuzinger v Merrill Lynch, Pierce, Fenner & Smith Inc, 396 SW2d 570—Dierks & Sons Lumber Co v Morris, App, 404 SW2d 229—Turner v Hoffmeier, App, 690 SW2d 188
NC—General Air Conditioning Co v Douglass, 84 SE2d 828, 241 NC 170—Duplin County v Jones, 147 SE2d 603, 267 NC 68

Knowledge of title

Mo—Freeman Contracting Co v Lefferdink, App, 419 SW2d 266

page 553

59. Ala—Bice v R L Bains Builders, Inc, 115 So 2d 468, 269 Ala 662
Mo—Poore v International Paper Co, App, 455 SW2d 13
60. Ala—Kyser v Doan, 122 So 2d 764, 271 Ala 229
Ind—Means v Everitt, 167 NE2d 885, 131 Ind App 370

No ratification shown

Mo—Dierks & Sons Lumber Co v Morris, App, 404 SW2d 229

61. Fla—Meadows Southern Const Co v Pezzaniti, App, 108 So 2d 499

Ind—Means v Everitt, 167 NE2d 885, 131 Ind App 370

Mo—Stockman v Shelton's Estate, App, 526 SW2d 349

62. Md—Wohlmuter v Mt Airy Plumbing & Heating, Inc, 223 A 2d 562, 244 Md 321

Mo—Bryant v Bryant Const Co, App, 425 SW2d 236

63. Evidence

Mo—E C Robinson Lumber Co v Lowrey, App, 276 SW2d 636—Freeman Contracting Co v Lefferdink, App, 419 SW2d 266

64. Md—William Penn Supply Corp v Watterson, 146 A 2d 420, 218 Md 291

Mo—E C Robinson Lumber Co v Lowrey, App, 276 SW2d 636

65. Mo—Bryant v Bryant Const Co, App, 425 SW2d 236

66. Kan—Logan-Moore Lumber Co v Black, 347 P 2d 438, 185 Kan 644, 81 ALR 2d 671

70. Tex—Tezel & Cotter v Roark, Civ App, 301 SW2d 179, err ref

page 554

76. Ala—Kyser v Doan, 122 So 2d 764, 271 Ala 229

NC—McGee v Ladford, 77 SE2d 638, 238 NC 269

page 555

85. Ala—Kyser v Doan, 122 So 2d 764, 271 Ala 229

Ky—Sowards v Ashland Lumber Co, 341 SW2d 268

91. Ala—Kyser v Doan, 122 So 2d 764, 271 Ala 229

page 556

94. Utah—C.J.S. cited in Capitol Electric Co v Campbell, 217 P 2d 392, 394, 117 Utah 454

page 557

12. Ala—Elder v Stewart, 114 So 2d 263, 269 Ala 482

13. Ill—Fettes, Love & Sieben, Inc v Simon, 196 NE2d 700, 46 Ill App 2d 232

15. Cal—Lovret v Seyfarth, 101 Cal Rptr 143, 22 CA 3d 841

Ohio—Richland Builders v Thome, 100 NE2d 433, 88 Ohio App 520

Pa—Krendy v Czunkota, 54 Lanc Rev 449

§ 64 — Infants and Their Agents

22 Ala—Wise v Watson, 236 So 2d 681, 286 Ala 22

Cal—C.J.S. cited in Niel v Barton, 239 P 2d 912, 913, 108 CA 2d 781

27 Cal—Niel v Barton, 239 P 2d 912, 108 CA 2d 781

§ 65. — Lessors and Lessees

28 Ill—Miller v Reed, 302 NE2d 131, 13 Ill App 3d 1074

Me—Fuchsbach & Moore, Inc v Prestel Corp, 398 A 2d 397

Lease not enforceable

Miss—Jay Industries v Powell, 71 So 2d 193, 220 Miss 372

29 Hawaii—Media Five Ltd v Yakumetz, 631 P 2d 1211, 2 Haw App 339

La—Sirone v Distefano, App, 67 So 2d 150

Miss—Burwell v Planters Lumber Co, 70 So 2d 71, 220 Miss 79

SD—Schubloom v Donavon & Associates, Inc, 241 NW 2d 710, 90 SD 413

Utah—Intenors Contracting, Inc v Navalco, 648 P 2d 1382

page 558

30. Iowa—C.J.S. cited in Sherwood v Nissen, 179 NW 2d 336, 338

35 Fla—Lehigh Structural Steel Co v Joseph Langner, Inc, 43 So 2d 335

Okla—Gaddis-Walker Elec Co, Inc v Phillips Petroleum Co, App, 526 P 2d 964

36 US—In re Triple A Sugar Corp, Bkrcty Me, 13 BR 969

Mo—Mid-West Engineering & Const Co v Campagna, 397 SW2d 616, app after remand 421 SW2d 229

Nev—Basic Refractories, Inc v Bright, 298 P 2d 810, 72 Nev 183

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Okla—Benton v Hill, 389 P 2d 501

Utah—Buehner Block Co v Glezes, 310 P 2d 517, 6 Utah 2d 226

38 SD—Stoneberger v Davis, 51 NW 2d 873, 74 SD 300

42. Ga—Capital Mechanical, Ltd v Dobbs Houses, Inc, 259 SE2d 147, 151 Ga App 142

page 559

50. Ariz—Hayward Lumber & Inv Co v Graham, 449 P 2d 31, 104 Ariz 103

Ark—Wells v Griffin, App, 586 SW2d 239, 266 Ark 763

Cal—Baker v Hubbard, 161 Cal Rptr 551, 101 CA 3d 226

Colo—Lierz v Cook, 315 P 2d 535, 136 Colo 221

Del—Department of Community Affairs and Economic Development v M Davis & Sons, Inc, 412 A 2d 939

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Ga—Jones v E I Rooks & Son, 52 SE2d 580, 78 Ga App 790

Iowa—Denniston & Partridge Co v Romp, 56 NW 2d 601, 244 Iowa 204

Mich—Sewell v Nu Markets, Inc, 91 NW 2d 861, 353 Mich 553

Mo—Paul A Medley, Inc v Money Town, Inc, App, 581 SW2d 46

Okla—Dieterle Plumbing and Heating v Green, 605 P 2d 1335

Tex—Schneider v Delwood Center, Inc, Civ App, 394 SW2d 671, err ref no rev err

Wis—Fullerton Lumber Co v Korth, 127 NW 2d 1, 23 Wis 2d 253

51. Ariz—DeVry Brick Co v Mordica, 391 P 2d 925, 96 Ariz 70—Hayward Lumber & Inv Co v Graham, 449 P 2d 31, 104 Ariz 103

Mo—Newport v Hedges, App, 358 SW2d 441

Okla—Blalock v Hoshall's A & A Plumbing Co, 318 P 2d 878

Tenn—Knox-Tenn Rental Co v Sarbec Corp, 442 SW2d 652, 59 Tenn App 564

Agency not shown

(3) Other matters

Ga—Longino v Garner, 117 SE2d 259, 102 Ga App 680

La—Früge v Muffoletto, 137 So 2d 336, 242 La 569, conf to, App, 140 So 2d 173

53. Ark—Young v Mobley Const Co, Inc, App, 587 SW2d 837, 266 Ark 935

Colo—Lierz v Cook, 315 P 2d 535, 136 Colo 221

Fla—North Dade Plumbing, Inc v La Salle Bldg Corp, App, 114 So 2d 707

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Neb—Waite Lumber Co v Masd Bros, Inc, 200 NW 2d 119, 189 Neb 10, 74 ALR 3d 320

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Absence of lease

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page 560

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55. Ga—Columbus Square Shopping Center Co v B & H Steel Co, Inc, 258 SE2d 600, 150 Ga App 774

Idaho—C.J.S. cited in Bunt v Roberts, 279 P 2d 629, 630, 26 Idaho 158

Neb—Waite Lumber Co v Masd Bros, Inc, 200 NW 2d 119, 189 Neb 10, 74 ALR 3d 320

Unjust enrichment not shown

Okla—Benton v Hill, 389 P 2d 501

58. Repairs or improvement

(3) Other matters

Ill—Armco Steel Corp v LaSalle Nat Bank, 335 NE2d 93, 31 Ill App 3d 695

NY—Adler Const Co, Inc v County Holding Corp, 410 NY S 2d 907, 66 A D 2d 789

Materialmen held not "lending institution"

Tex—Schneider v Delwood Center, Inc, Civ App, 394 SW2d 671, err ref no rev err

60. Mo—Uiley v Wear, App, 333 SW2d 787

SD—Thorson v Maxwell Hardware Co, 146 NW 2d 739, 82 SD 385

Utah—Zions First Nat Bank v Carlson, 464 P 2d 387, 23 Utah 2d 395

61. SD—Thorson v Maxwell Hardware Co, 146 NW 2d 739, 82 SD 385

62. Mo—Newport v Hedges, App, 358 SW2d 441

63. Fla—Tom Joyce Realty Corp v Popkin, App, 111 So 2d 707

64. Mo—Uiley v Wear, App, 333 SW2d 787

65. Iowa—Casaday v De Jarnette, 101 NW 2d 21, 251 Iowa 391

page 561

71. Mo—Messana Bros Const Co v Willford, App, 630 SW2d 201

Neb—Waite Lumber Co v Masd Bros, Inc, 200 NW 2d 119, 189 Neb 10, 74 ALR 3d 320

74. Fla—Jenkins v Graham, App, 237 So 2d 330

Page 581

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NY—Consolidated Blasting Corp v Colabella Bros, Inc, 168 N Y S 2d 275, 10 Misc 2d 913
Pa—American Seating Co v City of Philadelphia, 256 A 2d 599, 434 Pa 370

"Approval"

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75. NY—Lodato v Alvin Estates, Inc, 182 N Y S 2d 867, 16 Misc 2d 388
Okl—Woods v Levine, 311 P 2d 204

Consent held shown

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Consent held not shown

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77. NY—Esenson Elec Service Co v Wien, 219 N Y S 2d 736, 30 Misc 2d 926—Backstatter v Berry Hill Bldg Corp, 288 N Y S 2d 850, 56 Misc 2d 351

81. Iowa—Cassaday v De Jarnette, 101 N W 2d 21, 251 Iowa 391

La—Abbeville Lumber Co v Richard, App, 350 So 2d 1292

82. La—Frugé v Muffoletto, 137 So 2d 336, 242 La 569, conf to, App, 140 So 2d 173—Frugé v Muffoletto, App, 140 So 2d 173

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83. Pa—Murray v Zemon, 167 A 2d 253, 402 Pa 334

84. Fla—Tom Joyce Realty Corp v Popkin, App, 111 So 2d 707

page 562

86. Conn—Torno & Danaher, Inc v Covino, Com Pl, 109 A 2d 894, 19 Conn Sup 55

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88. Ill—Edward Hines Lumber Co v Deli Corp, 364 N E 2d 368, 7 Ill Dec 207, 49 Ill App 3d 873

90. Mo—Newport v Hedges, App, 358 S W 2d 441

91. U S—In re Fleetwood Motel Corp, C A N J, 335 F 2d 863

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Wash—Bunn v Bates, 196 P 2d 741, 31 Wash 2d 315

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Improvements to be made within reasonable time

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92. U S—CJS cited in In re Fleetwood Motel Corp, C A N J, 335 F 2d 863, 866

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NY—Osborne v McGowan, 149 N Y S 2d 781, 1 A D 2d 924—G & H Plumbing & Heating Co v Kew Management Corp, 240 N Y S 2d 904, 39 Misc 2d 483

93. Ariz—Bobo v John W Lattimore, Contractor, 468 P 2d 404, 12 Ariz App 137

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Mich—Sewell v Nu Markets, Inc, 91 N W 2d 861, 353 Mich 553

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94. Fla—Hefflin v WDM Corp, App, 391 So 2d 357

La—Sinclair v Justice, App 4 Cir, 414 So 2d 826

Utah—Interiors Contracting, Inc v Navalco, 648 P 2d 1382

"Pith of the lease"

Fla—Edward L Nezelek, Inc v Food Fair Properties Agency, Inc, App, 309 So 2d 219

page 563

95. Fla—Budget Elec Co v Strauss, App 5 Dist, 417 So 2d 1143

96. Mo—Mid-West Engineering & Const Co v Campagna, 397 S W 2d 616, app after remand 421 S W 2d 229

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Pa—Herr v Mann, 53 Lanc L Rev 171

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Provision for assumption by tenant of mortgage on existing improvements

Fla—Jennings v Connecticut General Life Ins Co, App, 177 So 2d 66, cert discharged, Sup, 185 So 2d 169

2. Colo—Thirteenth St Corp v A-I Plumbing and Heating Co, Inc, 640 P 2d 1130

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3. Iowa—Stroh Corp v K & S Development Corp, 247 N W 2d 750

5 NY—Esenson Elec Service Co v Wien, 219 N Y S 2d 736, 30 Misc 2d 926

9 Third person not charged with notice of terms of lease

Fla—Anderson v Sokolik, 88 So 2d 511

page 564

11 Mich—Rowen & Blair Elec Co v Finishing Operating Corp, 211 N W 2d 527, 49 Mich App 89, app after remand 239 N W 2d 633, 66 Mich App 480, affd 250 N W 2d 481, 399 Mich 593

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12. Mo—Utey v Wear, App, 333 S W 2d 787

Chemical fertilizer held not "improvement"

Iowa—Landas Fertilizer Co v Hargreaves, 206 N W 2d 675

15 Tex—Schneider v Delwood Center, Inc, Civ App, 394 S W 2d 671, err ref no rev err

17. Fla—Dalla v Tomoka Land Co, App, 108 So 2d 896

18. Del—McHugh Elec Co v Hessler Realty & Development Co, 129 A 2d 654, 11 Terry 296

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page 565

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31 Ga—Seckinger v Silvers, 121 S E 2d 922, 104 Ga App 396

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33. NY—Esenson Elec Service Co v Wien, 219 N Y S 2d 736, 30 Misc 2d 926

35 Ariz—Hayward Lumber & Inv Co v Graham, 449 P 2d 31, 104 Ariz 103

36. Ga—Accurate Const Co, Inc v Dobbs Houses, Inc, 269 S E 2d 494, 154 Ga App 603

37 Iowa—Landas Fertilizer Co v Hargreaves, 206 N W 2d 675

38. Ky—Campbell & Summerhays, Inc v Greene, 381 S W 2d 531

Mo—Utey v Wear, App, 333 S W 2d 787

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Utah—Metals Mfg Co v Bank of Commerce, 395 P 2d 914, 16 Utah 2d 74

page 566

40. Cal—Baker v Hubbard, 161 Cal Rptr 551, 101 C A 3d 226

Fla—Tom Joyce Realty Corp v Popkin, App, 111 So 2d 707

§ 68. — Mortgages and Mortgagees

page 567

However, it has been held that a mortgagee in or out of possession is an "owner" of mortgaged property to the extent of his interest within a mechanics lien statute⁶⁵

65.5. Me—Carey v Bouletts, 182 A 2d 473, 158 Me 204

§ 69. — Part or Joint Owners

66 La—Express Ready-Mix, Inc v Evans, App, 266 So 2d 257

69. N.Y.—Country Village Heights Condominium (Group I) v. Mario Bonito, Inc., 363 N.Y.S.2d 501, 79 Misc.2d 1088

page 568

75. No partnership liability on contract by partner acting as corporation president
N.Y.—Forte v. Roc Hill Associates, Inc., 256 N.Y.S.2d 879, 45 Misc.2d 278

§ 71. — Vendors and Vendees

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page 569

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N.C.—Gentry Bros., Inc. v. Byron Development Corp., App., 192 S.E.2d 100, 16 N.C.App. 336
3. Kan.—Logan-Moore Lumber Co. v. Black, 347 P.2d 438, 185 Kan. 644, 81 A.L.R.2d 671
4. N.D.—Hessinger v. Sorenson, 180 N.W.2d 910
Wis.—Elze v. Cannon, 62 N.W.2d 3, 265 Wis. 510
5. Fla.—Lee v. Sas, 53 So.2d 114

page 570

6. Ohio—Clyborn v. Reeves, 234 N.E.2d 613, 13 Ohio App. 156
7. U.S.—In re Schmidt, D.C. Wis., 210 F.Supp. 106, aff'd, C.A., 320 F.2d 213
8. Iowa—Knudson v. Bland, 113 N.W.2d 242, 250 Iowa 614
9. Iowa—C.J.S. quoted in Home Carpet Inc. v. Bob Antrim Homes, Inc., 210 N.W.2d 652, 655
11. Mich.—Sullivan v. Thomas Organization, 276 N.W.2d 522, 88 Mich.App. 77
14. Ala.—Shepherd Plumbing & Heating Co. v. Bedford, 135 So.2d 160, 273 Ala. 87
Ind.—Potter v. Cline, 316 N.E.2d 422, 161 Ind.App. 349
Iowa—Northwestern Nat. Bank of Sioux City v. Metro Center, Inc., 303 N.W.2d 395
Kan.—Sutherland Lumber Co. v. Due, 512 P.2d 525, 212 Kan. 658
Minn.—C.J.S. cited in C. W. Stark Lbr. Co. v. Sether, 257 N.W.2d 556, 558
Mo.—Wadsworth Homes, Inc. v. Woodridge Corp., App., 358 S.W.2d 288
N.D.—Hessinger v. Sorenson, 180 N.W.2d 910
15. Ala.—Creson v. Mann, 70 So.2d 417, 260 Ala. 318
N.M.—Hill v. Long, 299 P.2d 472, 61 N.M. 299
Pa.—Tilo Roofing Co. v. Abeloff, 75 Pa.Dist. & Co. 534, 12 Monroe L.R. 111
16. U.S.—Callego-Borges v. Rochelle, C.A. Tex., 316 F.2d 812
Ill.—Erich v. O'Mahony, 111 N.E.2d 189, 349 Ill.App. 537
18. Kan.—Toler v. Satterthwaite, 434 P.2d 814, 200 Kan. 103

Vendee under verbal contract held "owner" where deed subsequently received

Tex.—Newman v. Coker, Civ.App., 310 S.W.2d 354

page 571

21. Ala.—Staley v. Woodruff, 60 So.2d 384, 257 Ala. 571
La.—Capital Bank & Trust Co. v. Broussard Paint & Wallpaper Co., App., 198 So.2d 204
22. Or.—Lemire v. McCollum, 425 P.2d 755, 246 Or. 418
24. Kan.—Norris v. Nitsch, 325 P.2d 326, 180 Kan. 86
27. Or.—Lemire v. McCollum, 425 P.2d 755, 246 Or. 418

A vendee's equitable interest which is extinguished deprives a contractor of a lien on improvements not consented to by the vendor²¹⁵

285 Ejectment default judgment against vendee

Neb.—O'Hara Plumbing Co., Inc. v. Roschymalski, 207 N.W.2d 380, 190 Neb. 246

29. Mo.—Wilbur Waggoner Equipment Rental & Excavating Co., Inc. v. Bumiller, App., 542 S.W.2d 32

32. Conn.—Wilbur Smith & Associates, Inc., Super., 382 A.2d 541, 34 Conn.Supp. 638

Fla.—Fichtenbaum v. Bald Eagle Const. Co., App., 131 So.2d 513—Surf Developers, Inc. v. H. E. Nason, Inc., App., 233 So.2d 412

Ind.—Harris v. Mt. Vernon Lumber Co., 173 N.E.2d 672, 131 Ind.App. 593—Woods v. Deckelbaum, 191 N.E.2d 101, 244 Ind. 260

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page 572

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page 573

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page 574

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page 575

78. In Oklahoma

(3) Other instances

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§ 73 Form, Requisites, and Sufficiency

Library References

Mechanics' Liens ¶73

page 576

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Performance in violation of law as not invalidating lien

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Remodeling for advertising purposes

Idaho—Nab v. Hills, 452 P.2d 981, 92 Idaho 877

Cost-plus type of contract

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No lien created by contract

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S.D.—St. John's First Lutheran Church in Milbank v. Storsten, 84 N.W.2d 725, 77 S.D. 33

89. Not rendered invalid by lack of building permit

Ill.—Messner v. Caravello, 124 N.E.2d 615, 4 Ill. App.2d 428

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Several purchase orders as constituting one contract

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page 577

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page 578

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Page 599

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page 600

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Property tortiously incorporated in structure
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Neb.—Muenchau v Swartz, 102 N W 2d 129

Wyo.—American Bldgs Co v Wheelers Stores, 585 P 2d 845

Seller of house removed from land held not materialman

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page 601

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§ 90. Contractors in General

Library References

Mechanics' Liens ¶86 et seq

page 602

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Not precluded by acting as conduit for title

Or.—Lemire v McCollum, 425 P 2d 755, 246 Or 418

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La.—I-10, Inc v Justice, App., 260 So 2d 89

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Supplier of professional services included

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Supplier as original contractor

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Other statement

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General contractor defined

La.—Executive House Bldg, Inc v Demarest, App., 248 So 2d 405

Other definitions

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page 603

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§ 91. — Lien for Labor and Material Furnished

page 604

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Or.—Lakeview Drilling Co v Stark, 310 P 2d 627, 210 Or 306

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§ 92. — Stipulations of Contract as to Lien

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§ 94. — Rescission of Contract

page 605

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U.S.—Mitford v Prior, C A Alaska, 353 F 2d 550

§ 95. — Performance of Contract

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Ga.—MacLeod v Belvedere, Inc., 154 S E 2d 756, 115 Ga App 444

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Performance by another

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Performance not in workmanlike manner

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Remedy for faulty performance

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Or—Shepherd v Gass, 488 P 2d 1180, 260 Or 84

page 606

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§ 96. — Abandonment by Contractor

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page 607

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§ 97. In General

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Mechanics' Liens §94 et seq

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Broker furnishing equipment to contractor

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No connection shown

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page 608

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§ 98. Subcontractors

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Hawaii—Shelton Engineering Contractors, Limited v Hawaiian Pac Industries, Inc, 456 P 2d 222, 51 Haw 242

Idaho—Weber v Eastern Idaho Packing Corp, 496 P 2d 693, 94 Idaho 694

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Mass—Valentine Lumber & Supply Co v Thibault, 130 NE 2d 868, 333 Mass 352

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Conditions

Ill—Gamm Const Co v Townsend, 336 NE 2d 592, 32 Ill App 3d 848

Wis—Visser v Koenders, 95 NW 2d 363, 6 Wis 2d 535

Agreement by owner to pay held requisite

Ill—Dunlop v McAtee, 333 NE 2d 76, 31 Ill App 3d 56

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Effect of failure to assert lien

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Page 608

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Statutory definitions

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Held not subcontractor

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page 609

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Subcontract directly with owner

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29. Cal—Thesen v Los Angeles County, 5 Cal Rptr 161, 352 P 2d 529, 54 C 2d 170

Held subcontractor

- Ohio—Nelson v Malik, 121 NE 2d 687, 96 Ohio App 251

Other definitions

- N Y—Dorn v Arthur A Johnson Corp., 229 N Y S 2d 266, 16 A D 2d 1009
32. Kan—CJS cited in Calvert Western Exploration Co v Shamrock, 675 P 2d 871, 875, 234 Kan 699
34. N C—Wilson Elec Co v Robinson, 189 SE 2d 758, 15 N C App 201

Change of status A materialman who is furnishing henable labor or materials as a principal contractor does not become a subcontractor with respect to labor or materials thereafter supplied to the original owner, who has meanwhile conveyed the premises to a new owner, if the materialman has no actual or constructive knowledge of the conveyance;^{37,5} but if he has actual or constructive knowledge of the conveyance by the owner, his status changes from that of principal contractor to that of subcontractor as to materials or lienable labor thereafter furnished on the premises.^{37,10}

- 37.5. Wis—Dutman v Liebelt, 117 NW 2d 672, 17 Wis 2d 543

- 37.10. Wis—Capital City Lumber Co v Schroeder, 242 NW 489, 208 Wis 157

Recorded deed gives constructive notice

- Wis—Dutman v Liebelt, 117 NW 2d 672, 17 Wis 2d 543

40. Repair of equipment

- N Y—Carafel v City of New York, 380 N Y S 2d 582, 85 Misc 2d 684

41. N Y—R-G-R Const Corp v Duro Crete Cement Co., 100 N Y S 2d 635, 277 App Div 1026

§ 99. Subcontractors of Subcontractors

43. U S—Glen Const Co, Inc v Bank of Vienna, D C Va., 410 F Supp 402
- Cal—Neptune Gunite Co v Monroe Enterprises, Inc., 40 Cal Rptr 367, 229 C A 2d 439
- Colo—Kobayashi v Meshless Steel Co., 472 P 2d 724, 28 Colo App 327
- Conn—Seaman v Climate Control Corp., 436 A 2d 271, 181 Conn 592, 24 ALR 4th 951
- Fla—Coco Corp v Goldberg, 219 So 2d 475, cert discharged, Sup., 230 So 2d 149, app after remand 252 So 2d 849
- Ill—Koenig v McCarthy Const Co., 100 NE 2d 338, 344 Ill App 93
- Ind—Indianapolis Power & Light Co v Southeastern Supply Co., 257 NE 2d 722, 146 Ind App 554
- La—Central Louisiana Elec Co v Giant Enterprises, Inc., App., 371 So 2d 641, writ den., Sup., 375 So 2d 646
- Md—Drener v Cabbage, 270 A 2d 471, 259 Md 555
- Va—Fidelity & Cas Co of New York v First Nat Exchange Bank of Virginia, 193 SE 2d 678, 213 Va 531
44. U S—Washington v Houston Lumber Co., C A Kan., 310 F 2d 881
- Fla—Richard Store Co v Florida Bridge & Iron, Inc., 77 So 2d 632—Sterling Apartments, Inc v Arch Creek Lumber Co., App., 113 So 2d 711—Conway v Sears, Roebuck & Co., 185 So 2d 697—J P Driver Co v Claxton, App., 193 So 2d 440
- Pa—McNeilly v Silvis, 31 West Co 105

§ 100. Employees of Contractor, Subcontractor, or Materialman

45. Tex—Marek v Goyen, Civ App., 346 SW 2d 926

page 610

46. Ill—Malicki v Holiday Hills, Inc., 174 NE 2d 915, 30 Ill App 2d 459
47. Ill—Stepunic v Michalek, 384 NE 2d 526, 23 Ill Dec 732, 67 Ill App 3d 440
- Tex—Austin Bridge Co v Drake, Civ App., 79 SW 2d 677
49. Tex—Austin Bridge Co v Drake, supra, n 47
- Employees in prefabrication factory**
- Ohio—Rehso, Inc v Fnck, 101 NE 2d 15, rev'd on oth grds 108 NE 2d 282, 94 Ohio App 45, aff'd in part and rev'd in part on oth grds 112 NE 2d 651, 159 Ohio St 449

§ 101. Persons Furnishing Materials to Contractors

50. U S—Dupree v Gaubert Industries, Inc., C A La., 403 F 2d 207—Monroe Banking & Trust Co v Allen, D C Miss., 286 F Supp 201
- Ala—Floyd v Rambo, 33 So 2d 360, 250 Ala 101
- Alaska—University of Alaska v Simpson Bldg Supply Co., 530 P 2d 1317
- Cal—Contractors Dump Truck Service, Inc v Gregg Const Co., 46 Cal Rptr 738, 237 C A 2d 1
- Colo—Trane Co v Cherry Hills III Development Corp., 588 P 2d 884, 41 Colo App 335
- Ga—Hill v Dealers Supply Co., 120 SE 2d 879, 103 Ga App 846
- Iowa—Des Moines Furnace & Stove Repair Co v Lemon, 56 NW 2d 923, 244 Iowa 316—Moffitt Bldg Material Co v U S Lumber & Supply Co., 124 NW 2d 134, 255 Iowa 765
- Kan—DJ Fair Lumber Co v Karlin, 430 P 2d 222, 199 Kan 366
- Ky—Woodson Bend, Inc v Masters' Supply, Inc., App., 571 SW 2d 95
- La—Hattiesburg Mfg Co v Pepe, App., 140 So 2d 449

- Minn—W B Martin Lumber Co v Noss, 99 NW 2d 65, 256 Minn 471—Albert & Harlow Inc v Great Northern Oil Co., 167 NW 2d 500, 283 Minn 246
- Neb—Paxton & Vierling Steel Co v Bamore, 187 NW 2d 590, 187 Neb 54
- Okla—Richardson v H E Leonhardt Lumber Co., 389 P 2d 965
- SD—Keeley Lumber & Coal Co v Dunker, 77 NW 2d 689, 76 SD 281
- Tenn—Ban-Nicodemus, Inc v Bethay, 292 SW 2d 234, 40 Tenn App 487
- Utah—Crane Co v Utah Motor Park, Inc., 335 P 2d 837, 8 Utah 2d 413

Status of contractor not changed

- NH—Chagnon Lumber Co v Annis, 102 A 2d 916, 98 NH 467

Lien does not attach

- Ill—Philip S Lindner & Co, Inc v Edwards, 300 NE 2d 283, 13 Ill App 3d 365
- SC—Gantt v Van der Hoeck, 162 SE 2d 267, 251 SC 307
- Tex—Laredo Brck Co v Urdiales, Civ App., 263 SW 2d 332
- Va—Atlantic States Const Co v McCann Steel Co., 171 SE 2d 689, 210 Va 473

Lien precluded by failure to keep separate account

- Ga—Artistic Ornamental Iron Co v Long, 148 SE 2d 478, 113 Ga App 464

Statute construed

- La—Refractory Const., Inc v Cities Service Oil Co., App., 278 So 2d 510
- Ark—Valley Metal Works, Inc v A O Smith—Island, Inc., 372 SW 2d 138, 264 Ark 341
- Ga—Associated Distributors, Inc v De La Torre, 225 SE 2d 462, 138 Ga App 71
- Kan—Murphree v Trinity Universal Ins Co., 269 P 2d 1025, 176 Kan 290
- Ky—US Fidelity & Guaranty Co v Miller, App., 549 SW 2d 316
- Tex—Robert Burns Concrete Contractors, Inc v Norman, Civ App., 561 SW 2d 614, err ref n re

§ 102. Persons Furnishing Material to Subcontractor

52. Alaska—University of Alaska v Simpson Bldg Supply Co., 530 P 2d 1317
- Cal—Neptune Gunite Co v Monroe Enterprises, Inc., 40 Cal Rptr 367, 229 C A 2d 439—Piping Specialties Co v Kentile, Inc., 40 Cal Rptr 537, 229 C A 2d 586—Monroe Banking & Trust Co v Allen, D C Miss., 286 F Supp 201
- Colo—Kobayashi v Meshless Steel Co., 472 P 2d 724, 28 Colo App 327
- Ga—P P G Industries, Inc v Hayes Const Co., 290 SE 2d 347, 162 Ga App 151
- Ky—Woodson Bend, Inc v Masters' Supply, Inc., App., 571 SW 2d 95
- La—Century Nat Bank v Parent, App., 341 So 2d 1371
- Neb—Vince Kess, Inc v Krueger Const Co., 276 NW 2d 669, 202 Neb 673
- N Y—Robert Mfg Co, Inc v South Bay Corp., 368 NY S 2d 413, 82 Misc 2d 250
- N C—Parnell—Martin Supply Co v High Point Motor Lodge, Inc., 177 SE 2d 392, 277 N C 312
- N D—Spier v Power Concrete, Inc., 304 NW 2d 68
- Ohio—Settle Builders Supply Co v Frankel-Shore Partnership, 326 NE 2d 271, 42 Ohio Misc 13

In Louisiana

- (3) Other matters—Jesse F Heard & Sons v South west Steel Products, App 124 So 2d 211

Failure of contractor to file contract

- Colo—American Factors Associates, Ltd v Triangle Hasting & Sheet Metal Co., 503 P 2d 163, 31 Colo App 240

53. U S—Wolters Village Management Co v Merchants and Planters Nat Bank of Sherman, C A Tex., 223 F 2d 793

Fla.—General Capital Corp v Adobe Brick & Supply Co., App., 138 So 2d 82

Ga.—Associated Distributors, Inc v De La Torre, 225 SE 2d 462, 138 Ga App 71

N.J.—Chesbro-Whitman Co v Edenboro Apartments, Inc., 207 A 2d 186, 86 N.J. Super 422

Wis.—Hinter Trucking, Inc v State, 126 NW 2d 52, 21 Wis 2d 431

Materialman of sub-sub-contractor

Fla.—Industrial Supply Corp of Orlando v Sea World of Florida, Inc., App., 314 So 2d 643

N.Y.—Kayfield Const Corp v Glazed Block Corp., 261 NY 82d 202, 46 Misc 2d 880

§ 103. Persons Furnishing Materials to Another Materialman

54. U.S.—Dapree v Gaubert Industries, Inc., C.A. La., 403 F 2d 207—Monroe Banking & Trust Co v Allen, D.C. Miss., 286 F Supp 201

Cal.—Phillips & Edwards Elec Corp v Shintaffer, 299 P 2d 912, 143 C.A. 2d 561—Piping Specialties Co v Kentile, Inc., 40 Cal Rptr 537, 229 C.A. 2d 586

Ga.—Georgia-Pacific Corp v Dan Austin Properties, Inc., 190 SE 2d 131, 126 Ga App 191, aff'd 194 SE 2d 472, 229 Ga 803

Ind.—City of Evansville v Verplank Concrete & Supply, Inc., App., 400 N.E. 2d 812

La.—Refinery Const, Inc v Cities Service Oil Co., App., 278 So 2d 510

Neb.—Ideal Basic Industries, Inc v Jumata Farmers Co-op Ass'n, 289 N.W. 2d 192, 205 Neb 611

N.M.—Ronald A. Coca, Inc v St Paul's Methodist Church of Las Cruces, N.M., Inc., 428 P 2d 636, 78 N.M. 97

N.Y.—Kapston Trust Co v State, 291 N.Y.S. 2d 208, 57 Mac. 2d 55

Ohio—Botzum Bros Co v Brown Lumber Co., 150 N.E. 2d 485, 104 Ohio App 507

Wyo.—C.I.S. cited in American Bldgs Co v Wheelers Store, 585 P 2d 845, 850

Judgment creditor of subcontractor precluded

Fla.—County Nat Bank of North Miami Beach v Pierran, App., 188 So 2d 384

Supplier accepting return of material unused

Colo.—Pateau Supply Co. v Bacon Meadows Corp., 300 P 2d 162, 31 Colo App 205

Supplier held not "claimant" under statute

Wis.—Peabody Seating Co., Inc v Jim Cullen, Inc., 201 N.W. 2d 546, 56 Wis 2d 119

55. N.J.—Chesbro-Whitman Co v Edenboro Apartments, Inc., 207 A 2d 186, 86 N.J. Super 422

Under statute

U.S.—Jordan Co v Bethlehem Steel Corp., D.C. Ga., 309 F Supp 144, aff'd, C.A., 445 F 2d 655

§ 104. Persons Furnishing Labor to Contractor

page 611

56. Ga.—Associated Distributors, Inc v De La Torre, 225 SE 2d 462, 138 Ga App 71

Ohio—Mawpower, Inc v Phillips, 179 N.E. 2d 922, 173 Ohio St 45

§ 105. Nature of Lien

57. Del.—Marten Lumber and Supply Co., Inc v Brown, 405 A 2d 101

64. Wis.—H & M Heating Co v Andrae, 150 N.W. 2d 379, 35 Wis 2d 1

66. Ala.—Friday Lumber Co v Johnston, 180 So 2d 239, 278 Ala 661

Colo.—Kobayashi v Mechies Steel Co 472 P 2d 724, 28 Colo App 327

Iowa—Moffitt Bldg Material Co v U.S. Lumber & Supply Co., 124 NW 2d 134, 255 Iowa 765

La.—Smith v General Contractors, Inc., App., 125 So 2d 637

67. Ala.—Friday Lumber Co v Johnston, 180 So 2d 239, 278 Ala 661

Va.—Knight v Ferrante, 117 S.E. 2d 283, 202 Va 243

68. Va.—Knight v Ferrante, 117 S.E. 2d 283, 202 Va 243

70. Del.—Mauil v Stokes, 68 A 2d 200, 31 Del Ch 188

Wis.—H & M Heating Co v Andrae, 150 NW 2d 379, 35 Wis 2d 1

71. Del.—Mauil v Stokes, supra, n 70

Mont.—Glacier State Elec Supply Co v Hoyt, 451 P 2d 90, 152 Mont 415

Or.—Timber Structures v CWS Grading & Mach Works, supra, n 22

Tex.—Contract Sales Co v Skaggs, Civ App., 612 SW 2d 652

Contractor held agent of owner

(2) Wash.—Expert Drywall, Inc v Brann, 564 P 2d 803, 17 Wash App 529

Contractor held not agent of owner

Okl.—Hall v North Plains Concrete Service, Inc., 425 P 2d 941

Statutory agency

Idaho—Pierson v Sewell, 539 P 2d 590, 97 Idaho 38

(2) Lessor of equipment held not agent of owner

Cal.—Blakemore Equipment Co v Braddock, Logan and Valley, 74 Cal Rptr 484, 269 C.A. 2d 12

Limitations of agency

(1) Mo.—Nelle Plumbing Co v Stefanic, App., 453 SW 2d 636, 48 A.L.R. 3d 145

Statutory agent

Ariz.—Ranch House Supply Corp v Van Slyke, 370 P 2d 661, 91 Ariz 177

Wis.—H & M Heating Co v Andrae, 150 NW 2d 379, 35 Wis 2d 1

§ 106. — Lien by Subrogation

page 612

79. U.S.—Thermo Tech, Inc v Goodyear Tire and Rubber Co., Inc., C.A. Tex., 643 F 2d 1173

Colo.—American Irr Co v Fadenrecht, 489 P 2d 1060, 30 Colo App 28

Conn.—Batter Lumber Co v D'Eramo, Cir A.D., 203 A 2d 679, 2 Conn Cir 619

N.Y.—E.F. Cunnale & Co v Kenray Realty Corp., 202 N.Y.S. 2d 677, 25 Misc 2d 745

N.C.—Widenhouse v Russ, 67 S.E. 2d 287, 234 N.C. 382

Tex.—Ruberoid Co v Scott, Civ App., 249 S.W. 2d 256

Implied agency, ratification and quantum meruit not bars

Fla.—Richard Store Co v Florida Bridge & Iron, Inc., Fla., 77 So 2d 632

80. Conn.—Batter Lumber Co v D'Eramo, Cir A.D., 203 A 2d 679, 2 Conn Cir 619

Miss.—C.J.S. cited in Chancellor v Melvin, 52 So 2d 360, 365, 211 Miss 590

N.C.—Mace v Bryant Const Corp., 269 S.E. 2d 191, 48 N.C. App 297

81. N.Y.—Wynkoop v People, 153 N.Y.S. 2d 836, 1 A.D. 2d 620, motion withdrawn 161 N.Y.S. 2d 142, 2 N.Y. 2d 885, 141 N.E. 2d 627, aff'd 174 N.Y.S. 2d 470, 4 N.Y. 2d 892, 150 N.E. 2d 771

Okl.—Metropolitan Water Co v Hild, 415 P 2d 970

§ 107. Effect of Filing of Principal Contract by Owner

82. N.J.—Suburban Lumber Co v Gerber, 85 A. 2d 275, 17 N.J. Super 33—General Elec Co v E. Fred Sulzer & Co., 207 A 2d 346, 86 N.J. Super 520, aff'd 222 A 2d 655, 92 N.J. Super 210—First Nat State Bank of N.J. v Carlyle House, Inc., 246 A 2d 22, 102 N.J. Super 300, aff'd 258 A 2d 545, 107 N.J. Super 389

Pa.—Associated Lumber and Mfg Co v Aberman, 102 Pittsb Leg J 412

Filing held insufficient

N.J.—Suburban Lumber Co v Gerber, supra

"Stop notice" rights

U.S.—Shore Block Corp v Lakeview Apartments, C.A. N.J., 377 F 2d 835—Jos L. Muscarelle, Inc v Central Iron Mfg Co., C.A.N.J., 379 F 2d 715

§ 108. Effect of Stipulations in Principal Contract

Library References

Mechanics' Liens § 102 et seq
page 613

85. Iowa—Caster Elec Co v Carlsen, 86 NW 2d 682

N.J.—General Elec Co v E. Fred Sulzer & Co., 207 A 2d 346, 86 N.J. Super 520, aff'd 222 A 2d 655, 92 N.J. Super 210

Pa.—Kulp & Co v Kazmar, 73 Montg 315

Tex.—C.J.S. cited in Henderson v Couch, Civ App., 274 S.W. 2d 844, 852

86. Colo.—Sammet v Whelan, 362 P 2d 559, 147 Colo 41

87. Kan.—Berthot v Strohle, 494 P 2d 1133, 208 Kan 839

88. Ga.—Athens Elec Supply Co v Delta Oil, Inc., 114 S.E. 2d 289, 101 Ga App 515

§ 109. — As to Lien

91. Ga.—Melton v Lowe, 161 S.E. 2d 912, 117 Ga App 783

N.Y.—C.H. Heist, Ohio Corp v Bethlehem Steel Co., 246 N.Y.S. 2d 15, 20 A.D. 2d 201

N.C.—Con Co, Inc v Wilson Acres Apartments, Ltd., 289 S.E. 2d 633, 56 N.C. App 661, cert den 294 S.E. 2d 206, 306 N.C. 382

Okl.—M & W Masonry Const, Inc v Head, App., 562 P 2d 957

Va.—VNB Mortg Corp v Lone Star Industries, Inc., 209 S.E. 2d 909, 215 Va 366, 75 A.L.R. 3d 497

92. Va.—VNB Mortg Corp v Lone Star Industries, Inc., 209 S.E. 2d 909, 215 Va 366, 75 A.L.R. 3d 497

Requirement that agreement be unequivocal

N.Y.—C.H. Heist Ohio Corp v Bethlehem Steel Co., 246 N.Y.S. 2d 15, 20 A.D. 2d 201

93. Va.—VNB Mortg Corp v Lone Star Industries, Inc., 209 S.E. 2d 909, 215 Va 366, 75 A.L.R. 3d 497

Purpose of statute

Ariz.—Advanced Living Center v T.J. Bettes Co of Cal., 464 P 2d 656, 11 Ariz App 336

96. Ill.—Ellman v Ianna, 157 N.E. 2d 807, 21 Ill App 2d 353

Ind.—General Elec Co v Fuelling, 232 N.E. 2d 622, 142 Ind App 74

N.J.—General Elec Co v E. Fred Sulzer & Co., 207 A 2d 346, 86 N.J. Super 520, aff'd 222 A 2d 655, 92 N.J. Super 210

Pa.—Deets v Freed, 4 Chest Co 178 A. 2d 159, 165 Pa Super 495—Wood v U.S. Steel Corp., 118 A 2d 199, 383 Pa 158

Tenn.—W.T. Hardison & Co v Harding Court Co., 251 S.W. 2d 829, 36 Tenn App 98

page 614

97. Description of property sufficient

Pa.—Mohr v Derr, 25 Lehigh Co L.J. 252

U.S.—Matter of Hull, Bktry Ind., 19 B.R. 501

99. Pa.—Wood v U.S. Steel Corp., 118 A 2d 199, 383 Pa 158

2. Pa.—Vanzin v Sargo, 106 P.L.J. 151

3. N.J.—General Elec Co v E. Fred Sulzer & Co., 207 A 2d 346, 86 N.J. Super 520, aff'd 222 A 2d 655, 92 N.J. Super 210—General Elec Co v E. Fred Sulzer & Co., 222 A 2d 655, 92 N.J. Super 210

Pa.—Mohr v Derr, 25 Lehigh Co L.J. 252

Page 614

Posting of notice necessary

Ind—General Elec Co v Fueling, 232 N E 2d 622, 142 Ind App 74

6. Pa—Deets v Freed, 69 A 2d 159, 165 Pa Super 495

7. Ill—Ellman v Ianni, 157 N E 2d 807, 21 Ill App 2d 353

Pa—Trustees of C I Mortg Group v Stagg of Huntington, Inc, 399 A 2d 386, 484 Pa 464

8. Pa—Deets v Freed, supra, n 96—Mohr v Derr, supra, n 4

9. Indexing held sufficient

Pa—Mohr v Derr, supra, n 4

20. N.J.—General Elec Co v E Fred Sulzer & Co, 207 A 2d 346, 86 N.J. Super 520, aff'd 222 A 2d 655, 92 N.J. Super 210

21. N.J.—General Elec Co v E Fred Sulzer & Co, 207 A 2d 346, 86 N.J. Super 520, aff'd 222 A 2d 655, 92 N.J. Super 210

§ 110. — As to Payment

page 615

31. Or—Drake Lumber Co v Paget Mortg Co, 274 P 2d 804, 203 Or 66

Other matters with respect to payment have been adjudicated³³¹

33.1. Indefinite completion date in principal contract

Mass—Valentine Lumber & Supply Co v Thibault, 130 N E 2d 868, 333 Mass 352

Statute requiring withholding percentage of payment

Fla—Sinclair Refining Co v J H Cobb, Inc, App, 112 So 2d 582—Broderick v Overhead Door Co of Fort Lauderdale, App, 117 So 2d 240

§ 112. Default in Performance of Principal Contract

page 616

41. Colo—C.J.S. cited in Kobayashi v Meehless Steel Co, 472 P 2d 724, 28 Colo App 327

Fla—Ward v Miami Lock & Hardware Co, App, 119 So 2d 395—Miller v Duke, App, 155 So 2d 627

Ga—Oglethorpe v West Lumber Co, 64 S E 2d 894, 208 Ga. 43—Roberts v Georgia Southern Supply Co, 88 S E 2d 554, 92 Ga.App. 303, transf 86 S E 2d 241, 211 Ga. 402—McCrory v Barber, 110 S E 2d 426, 100 Ga.App. 167—Hall v Dealers Supply Co, 120 S E 2d 879, 103 Ga.App. 846—Scott v Wilhams, 143 S E 2d 16, 111 Ga.App. 735

Ill—Koester v Huron Development Co, 185 N E 2d 196, 25 Ill 2d 337

Okla—Shugart v L. F. Platt Lumber Co, 379 P 2d 698—Knapp v Arko Interstate Elec Co, 448 P 2d 996

S.C.—Wood v Hardy, 110 S E 2d 157, 235 S.C. 131

Wis—C.J.S. cited in H & M Heating Co v Andrae, 150 N W 2d 379, 383, 35 Wis 2d 1

Death of contractor

Ga—Athens Lumber Co v Burton, 66 S E 2d 124, 84 Ga.App. 249

42. Ala—Huffman—East Development Corp v Summers Elec Supply Co, 263 So 2d 677, 288 Ala 579

44. Colo—C.J.S. cited in Lewis v Martin, 492 P 2d 877, 880, 30 Colo.App. 342

Wis—H & M Heating Co v Andrae, 150 N W 2d 379, 35 Wis 2d 1

45. Ill—Koenig v McCarthy Const Co, 100 N E 2d 338, 344 Ill App 93

46. Wis—H & M Heating Co v Andrae, 150 N W 2d 379, 35 Wis 2d 1

47. Deductions from contract price

Fla—Bryan v Owsley Lumber Co, App, 201 So 2d 246

Ark—House v Scott, 429 S W 2d 108, 244 Ark 1075

Conn—Rowley v Salladin, 96 A 2d 219, 139 Conn 642—Batter Lumber Co v D'Eramo, Cir A.D., 203 A 2d 679, 2 Conn Cir 619

Ill—Koenig v McCarthy Const Co, Inc, supra, n 45

Miss—King v Hankins, 209 So 2d 190

N.Y.—Locke v Goode, 174 N Y S 2d 435, 10 Misc 2d 65—Walsh v Boulder Apartments, Inc, 191 N Y S 2d 503

Ohio—Ed A. McCarthy & Sons, Inc v Fleming, App, 170 N E 2d 269

48. Fla—Hawanan Inn of Daytona Beach, Inc v Robert Myers Painting, Inc, App, 363 So 2d 125

Ky—McLean County v Meuth Carpet Supply, 573 S W 2d 340

page 617

56. Colo—Lewis v Martin, 492 P 2d 877, 30 Colo App 342

Wis—C.J.S. cited in H & M Heating Co v Andrae, 150 N W 2d 379, 383, 35 Wis 2d 1

58. N.J.—James Falcone Plumbing & Heating Co v Pasquale, 97 A 2d 720, 26 N.J. Super 285

N.Y.—Abe Schild Stone Corp v Apostie, 246 N Y S 2d 446, 41 Misc 2d 732

60. Ga—Ayers v Baker, 114 S E 2d 847, 216 Ga 132—Crows v Holloway Development Corp, 152 S E 2d 913, 114 Ga App 856

N.Y.—Louis Greenberg, Inc v Pioneer Syndicate, 130 N Y S 2d 622, 283 App Div 294, 284 App Div 1053, rearg den 131 N Y S 2d 883, 283 App Div 1053

Va—Knight v Ferrante, 117 S E 2d 283, 202 Va 243

Matters considered

N.Y.—Abe Schild Stone Corp v Apostie, 246 N Y S 2d 446, 41 Misc 2d 732

§ 113. Subcontract and Performance Thereof

66. La—Gifford Hill & Co, Inc v Harper, App, 262 So 2d 842

page 618

Other matters with respect to subcontracts have been adjudicated⁷³¹

73.1 U.S.—Bumb v Petersmith Controls, Inc, C.A. Cal, 377 F 2d 817

La—Gifford Hill & Co, Inc v Harper, App, 262 So 2d 846

Neb—Omaha Nat. Bank v Continental Western Corp, 274 N W 2d 867, 202 Neb 238, app after remand 278 N W 2d 339, 203 Neb 264

Wyo—American Bldgs Co v Wheelers Stores, 585 P 2d 845

Subcontract requiring definite completion date

Mass—Valentine Lumber & Supply Co v Thibault, 130 N E 2d 868, 333 Mass 352

Essential feature as to who constitutes statutory agent

Colo—Kobayashi v Meehless Steel Co, 472 P 2d 724, 28 Colo App 327

75. Cal—Piping Specialties Co v Kenzie, Inc, 40 Cal Rptr 537, 229 C A 2d 586

Fla—Gory v White, App, 129 So 2d 446

Ill—South Beloit Elec Co v Lar Gar Enterprises, Inc, 224 N E 2d 306, 80 Ill App 2d 367

Mont—C.J.S. cited in Intermountain Elec, Inc v Berndt, 518 P 2d 1168, 1170, 164 Mont 67

N.C.—C.J.S. cited in Michael Flynn Mfg Co v J L Coe Const Co, 131 S E 2d 487, 489, 259 N C 649

Okla—Holloman v Britton, 346 P 2d 941

Wis—H & M Heating Co v Andrae, 150 N W 2d 379, 35 Wis 2d 1

Performance by or through another

Fla—Warren v Bill Ray Const Co, Inc, App, 269 So 2d 25

Material breach precludes foreclosure

Or—Pacific Erectors, Inc v Westinghouse Elec Corp, 655 P 2d 613, 61 Or App 1

80. Ark—Speights v Arkansas Sav & Loan Ass'n, 393 S W 2d 228, 239 Ark 587

Ill—Koester v Huron Development Co, 185 N E 2d 196, 25 Ill 2d 337

85. Ga—McCrory v Barber, 110 S E 2d 426, 100 Ga App 167

§ 114. Lien on Money Due Contractor

Library References

Mechanics' Liens ⇨113

page 619

92. Mo—National Sur Corp v Fisher, Century Indem Co, Intervenor—Respondent, 317 S W 2d 334

Status as general creditor of contractor

Ill—Board of Ed of School Dist No 108, Tazewell County, for Use of A Y McDonald Mfg Co v Collom, 222 N E 2d 804, 77 Ill App 2d 479

93. U.S.—Green v H E Butt Foundation, C.A. Tex., 217 F 2d 553—National Surety Corp v U.S., Ct Cl, 133 F Supp 381, 132 Ct Cl 724, cert den 76 S Ct 181, 350 U S 902, 100 L Ed 793

Ala—Friday Lumber Co v Johnston, 180 So 2d 259, 278 Ala 661—Pacific Ins Co v Wilbanks, 214 So 2d 279, 283 Ala 1

Cal—Rossman Mill & Lumber Co v Fullerton Sav & Loan Ass'n, 34 Cal Rptr 644, 221 C A 2d 705—A-I Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644—Gordon Bldg Corp v Gibraltar Sav & Loan Ass'n, 55 Cal Rptr 884, 247 C A 2d 1—Swinderton & Walberg Co v Union Bank, 101 Cal Rptr 665, 25 C A 3d 239, 54 A L R 3d 839

Fla—Roberts v Lesser, 96 So 2d 222—Flood v Clark, App, 111 So 2d 465—George Harden & Co v Harvey App, 138 So 2d 98—Miller v Duke, App, 155 So 2d 627

Iowa—Beane Plumbing & Heating Co v D-X Sunray Oil Co, 92 N W 2d 638, 249 Iowa 1364

Ky—McLean County v Meuth Carpet Supply, 573 S W 2d 340

N.Y.—Thibault Contracting Corp v O & E Contracting Co, 258 N Y S 2d 400, 15 N Y 2d 324, 206 N E 2d 340—Mid-Island Lumber & Supply Co, Inc v Loening, 356 N Y S 2d 190, 78 Misc 2d 27

N.C.—Love v Snellings, 100 S E 2d 65, 246 N C 674

Tex—Murchison v Caruth Bldg Service, Civ App, 369 S W 2d 380, err ref no rev err—Lennox Industries, Inc v Phi Kappa Sigma Educational and Bldg Ass'n, Civ App, 430 S W 2d 404—University State Bank v Gifford-Hill Concrete Corp, Civ App, 431 S W 2d 561, err ref no rev err—Coleman v Newton, Civ App, 458 S W 2d 688

Contractor or subcontractor

(2) Other matters

Va—Henderson & Russell Associates, Inc v Warwick Shopping Center, Inc, 229 S E 2d 878, 217 Va 486

Tax claimants not favored to detriment of subcontractors

N.Y.—Hartford Acc & Indem Co v Ritter, 331 N Y S 2d 471, 69 Misc 2d 981

94. Cal—Connolly Development Inc v Superior Court of Merced County, 132 Cal Rptr 477, 553 P 2d 637, 17 C 3d 803, app dism 97 S Ct 778, 429 U S 1056, 50 L Ed 2d 773

Statutory notice to holder of construction fund

Cal—Rossman Mill & Lumber Co v Fullerton Sav & Loan Ass'n, 34 Cal Rptr 644, 221 C A 2d 705

Assignment back of construction fund to lender held ineffective

Cal—Rossman Mill & Lumber Co v Fullerton Sav & Loan Ass'n, 34 Cal Rptr 644, 221 C A 2d 705

Burden on subcontractor

N.Y.—Mid-Island Lumber & Supply Co, Inc v Loening, 356 N Y S 2d 190, 78 Misc 2d 27

95. US—Korherr v Bumb, C A Cal, 262 F 2d 157—Glens Falls Ins Co v Murray Plumbing & Heating Corp, C A Cal, 300 F 2d 800—Matter of Valarico, Inc, Bktry N J, 9 B R 289

Cal—A-1 Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644—Bohannon Bros, Inc v Lo Jan Development Co, 82 Cal Rptr 922, 3 C A 2d 200

96. US—Jos L Muscarelle, Inc v Central Iron Mfg Co, C A N J, 379 F 2d 715

Ala—Braswell v Malone, 78 So 2d 631, 262 Ala 323—Friday Lumber Co v Johnston, 180 So 2d 259, 278 Ala 661

Ariz—Advanced Living Center v T J Bettes Co of Cal, 464 P 2d 656, 11 Ariz App 336

Cal—A-1 Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644—Idaco Lumber Co v Northwestern Sav & Loan Ass'n, 71 Cal Rptr 422, 265 C A 2d 490

Fla—Richard Store Co v Florida Bridge & Iron, Inc, 77 So 2d 632—Ludwig & Kibbey Enterprises, Inc v Cox Steel & Supply, Inc, App, 119 So 2d 58

Tex—Hunt Developers, Inc v Western Steel Co, Civ App, 409 S W 2d 443—Lennox Industries, Inc v Phi Kappa Sigma Educational and Bldg Ass'n, Civ App, 430 S W 2d 404

Wash—Berger Engineering Co v Hopkins, 340 P 2d 777, 54 Wash 2d 300

Estoppel of holder of construction fund

Cal—H O Bragg Roofing, Inc v First Federal Sav & Loan Ass'n of Long Beach, 37 Cal Rptr 775, 226 C A 2d 24

page 620

97. Tex—Crockett v Sampson, Civ App, 439 S W 2d 355

98. Cal—A-1 Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728

NY—Mid-Island Lumber & Supply Co, Inc v Loening, 356 N Y S 2d 190, 78 Misc 2d 27

99. Fla—Bill Ader, Inc v Maule Industries, Inc, App, 230 So 2d 182

Tex—Royal Palms Corp v A Minella Plumbing Supplies, Inc, Civ App, 355 S W 2d 585—Lennox Industries, Inc v Phi Kappa Sigma Educational and Bldg Ass'n, Civ App, 430 S W 2d 404

Holder of construction fund

Cal—H O Bragg Roofing, Inc v First Federal Sav & Loan Ass'n of Long Beach, 37 Cal Rptr 775, 226 C A 2d 24

1. Cal—Fredericksen v Harney, 18 Cal Rptr 562, 199 C A 2d 189—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644,

3. Cal—A-1 Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644

4. Cal—A-1 Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728

NJ—First Nat State Bank of N J v Carlyle House, Inc, 246 A 2d 22, 102 N J Super 300, aff'd 258 A 2d 545, 107 N J Super 389

5. Cal—Roseman Mill & Lumber Co v Fullerton Sav & Loan Ass'n, 34 Cal Rptr 644, 221 C A 2d 705—General Elec Co v Central Sur & Ins Corp, App, 43 Cal Rptr 48, 232 C A 2d 590—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644—Idaho Lumber Co v Northwestern Sav & Loan Ass'n, 71 Cal Rptr 422, 265 C A 2d 490

III—Board of Ed of School Dist No 108, Tazewell County, for Use of A Y McDonald Mfg Co v Collom, 222 N E 2d 804, 77 Ill App 2d 479

NJ—Roberts Elec, Inc, v Foundations & Excavations, 73 A 2d 744, 8 N J Super 168, app dism 75 A 2d 858, 5 N J 426

6. US—Glens Falls Ins Co v Murray Plumbing & Heating Corp, C A Cal, 330 F 2d 800—C J S cited in Matter of Hull, Bktry Ind, 19 B R 501, 507

7. Nonlienable claim cannot sustain a stop notice

NJ—Chesebro-Whitman Co v Edenboro Apartments, Inc, 207 A 2d 186, 86 N J Super 422

8. Cal—Roseman Mill & Lumber Co v Fullerton Sav & Loan Ass'n, 34 Cal Rptr 644, 221 C A 2d 705—A-1 Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644

13. La—Carbo v Maillon Jolie, Inc, App, 155 So 2d 238

16. Cal—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644—McBain v Santa Clara Sav & Loan Ass'n, 51 Cal Rptr 78, 241 C A 2d 829

Materialman is not entitled to a lien on the proceeds of a construction loan contrary to a condition attached to the loan by the lender thereof¹⁶⁵

16.5. Va—Phoenix Ins Co v Lester Bros, Inc, 127 S E 2d 432, 203 Va 802

§ 115. — When, and to Whom, Right Available

page 621

17. Cal—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644

Miss—Sherwin-Williams & Co v Smith, 179 So 2d 263, 253 Miss 769

SC—Lowndes Hill Realty Co v Greenville Concrete Co, 93 S E 2d 855, 229 S C 619

Tenn—W T Hardison & Co v Harding Court Co, 251 S W 2d 829, 36 Tenn App 98

W Va—West Virginia Sanitary Engineering Corp v Kurash, 74 S E 2d 596, 137 W Va 856

18. Cal—U S Fidelity & Guaranty Co v Oak Grove Union School Dist of Sonoma County, 22 Cal Rptr 907, 205 C A 2d 226

20. Ind—Indianapolis Power & Light Co v Southeastern Supply Co, 257 N E 2d 722, 146 Ind App 554

21. Miss—Deposit Guaranty Bank & Trust Co v J F Weaver Lumber Co, 60 So 2d 598, 215 Miss 183

22. Tex—Hunt Developers, Inc v Western Steel Co, Civ App, 409 S W 2d 443

23. Miss—Chancellor v Melvin, 52 So 2d 360, 211 Miss 590

NY—Lodato v Alvin Estates, Inc, 182 N Y S 2d 867, 16 Misc 2d 388

24. Miss—Sherwin-Williams Co v Smith, 179 So 2d 263, 253 Miss 769

§ 116. — Demand and Notice

25. US—Korherr v Bumb, C A Cal, 262 F 2d 157—Geo H Jett Drilling Co v Tibbitts, D C La, 234 F Supp 583

Cal—A-1 Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728—Idaco Lumber Co v Northwestern Sav & Loan Ass'n, 71 Cal Rptr 422, 265 C A 2d 490

Fla—Foley Lumber Co v Koester, 61 So 2d 634—Curtis v McCordell, 63 So 2d 60—Shaw v Del-Mar Cabinet Co, 63 So 2d 264

NJ—Solondz Bros Lumber Co v Piperato, 101 A 2d 33, 28 N J Super 414—Union Bldg & Inv Co v Forest Hill Apartments, 103 A 2d 648, 30 N J Super 130

Notice not required

Ala—Friday Lumber Co v Johnston, 180 So 2d 259, 278 Ala 661

Fla—Adams v McDonald, App, 356 So 2d 864

SD—Keeley Lumber & Coal Co v Dunker, 77 N W 2d 689, 76 S D 281

Tex—Hunt Developers, Inc v Western Steel Co, Civ App, 409 S W 2d 443

26. US—Youngstown Sheet & Tube Co v Patterson—Emerson—Comstock of Ind, D C Ind, 227 F Supp 208—Geo H Jett Drilling Co v Tibbitts, D C La, 230 F Supp 58, motion den 234 F Supp 583—Jos L Muscarelle, Inc v Central Iron Mfg Co, C A N J, 379 F 2d 715

Cal—Idaco Lumber Co v Northwestern Sav & Loan Ass'n, 71 Cal Rptr 422, 265 C A 2d 490

Fla—Bensam Corp v Felton, 63 So 2d 278—Trowbridge, Inc v Hathaway, App, 226 So 2d 35, writ discharged, Sup, 233 So 2d 129

Miss—Williams v Taylor, 62 So 2d 883, 216 Miss 563

NJ—International Tel & Tel Corp v Enviroco Services, Inc, 364 A 2d 549, 144 N J Super 31

Tex—Texas & N Ry Co v Logwood, Civ App, 401 S W 2d 886

Amount of claim

(3) Other amounts

NJ—James Falcone Plumbing & Heating Co v Pasquale, 97 A 2d 720, 26 N J Super 285—Solondz Bros Lumber Co v Piperato, supra, n 25

Notice held sufficient

Ariz—Advanced Living Center v T J Bettes Co of Cal, 464 P 2d 656, 11 Ariz App 336

NC—Con Co, Inc v Wilson Acres Apartments, Ltd, 289 S E 2d 633, 56 N C App 661, cert den 294, S E 2d 206, 306 N C 382

Tex—Hunt Developers, Inc v Western Steel Co, Civ App, 409 S W 2d 443

27. US—Shore Block Corp v Lakeview Apartments, C A N J, 377 F 2d 835

Fla—Fine v Crane Co, App, 211 So 2d 219, quashed, Sup, 221 So 2d 145, mand conf to 222 So 2d 36

NC—Love v Snellings, 100 S E 2d 65, 246 N C 674

Tex—Trinity Universal Ins Co v Palmer, Civ App, 412 S W 2d 691, err ref no rev err

Operation of notice as writ of garnishment

Tex—Hunt Developers, Inc v Western Steel Co, Civ App, 409 S W 2d 443

28. Cal—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644

Fla—Crane Co v Fine, 221 So 2d 145, mand conf to 222 So 2d 36—Melnick v Reynolds Metals Co, App, 230 So 2d 490

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Requirement relating to proceedings affecting public property held directory

Cal—Sunlight Elec Supply Co v McKee, 37 Cal Rptr 782, 226 C A 2d 47

29. US—Korherr v Bumb, C A Cal, 262 F 2d 157

30. NJ—Arrow Builders Supply Corp v Hudson Terrace Apartments, 105 A 2d 387, 15 N J 418, reh den 106 A 2d 271, 16 N J 47—Bankers Title & Abstract Co v Ferber Co, 105 A 2d 408, 15 N J 433

33. Cal—A-1 Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728

page 622

36. US—Jos L Muscarelle, Inc v Central Iron Mfg Co, C A N J, 379 F 2d 715

Ind—Zagler Bldg Materials, Inc v Parkinson, App, 398 N E 2d 1330

Miss—Chancellor v Melvin, supra, n 23

§ 117. — Satisfaction and Disposition of Balance

37. US—US v Chapman, C A Okl, 281 F 2d 862
Cal—A-I Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644—Idaco Lumber Co v Northwestern Sav & Loan Ass'n, 71 Cal Rptr 422, 265 C A 2d 490
Minn—Dolder v Griffin, 323 N W 2d 773
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N Y—E F Cunnale & Co v Kenray Realty Corp, 202 N Y S 2d 677, 25 Misc 2d 745
Va—Knight v Ferrante, 117 S E 2d 283, 202 Va 243
38. Cal—A-I Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728
39. Cal—A-I Door & Materials Co v Fresno Guarantee Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728
Mich—Knapp Transit Mix Co v Highland Greens, Inc, 216 N W 2d 84, 51 Mich App 719
40. Fla—Richard Store Co v Florida Bridge & Iron, Inc, 77 So 2d 632
Miss—Chancellor v Melvin, supra, n 23
43. Cal—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644
Tex—W & W Floor Covering Co v Project Acceptance Co, Civ App, 412 S W 2d 379
47. Miss—Chancellor v Melvin, supra, n 23

§ 119. Necessity for Compliance with Statutory Requirements

Library References

Mechanics' Liens ⇨ 116 et seq
page 623

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50. Ala—Gray v McKinley, 43 So 2d 421, 34 Ala App 630, cert den 43 So 2d 424, 253 Ala 199—McCleary v Finney, 130 So 2d 183, 272 Ala 194—US v Costas, 142 So 2d 699, 273 Ala 445
NJ—J T Evans Co v Fanelli, 157 A 2d 36, 59 NJ Super 19
NC—C.J.S. cited in Equitable Life Assur Soc of US v Basnight, 67 S E 2d 390, 394, 234 NC 347
51. US—Perm & Martin, Inc v US, D C Va, 233 F Supp 1016
Ill—Board of Ed of School Dist No 108, Tazewell County, for Use of A Y McDonald Mfg Co v Collom, 222 N E 2d 804, 77 Ill App 2d 479
Miss—Jones Supply Co v Ishee, 163 So 2d 470, 249 Miss 515
NH—Rodd v Titus Const Co, 220 A 2d 768, 107 NH 264
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Pa—Hoffman Lumber Co v Mitchell, 85 A 2d 664, 170 Pa Super 326—S L Shanahan, Inc v Churga, 84 Montg 24
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Reliance on constitutional, instead of statutory, lien
Tex—Rhodes v Miller, Civ App, 414 S W 2d 942
Mo—C.J.S. quoted in Frank Dusscher Basement Builders, Inc v Gwico Builders, Inc, App, 449 S W 2d 865
52. Or—Ward v Town Tavern, 228 P 2d 216, 191 Or 1, 42 A 2d 262

53. La—Frank's Casing Crew & Rental Tools, Inc v Carthy Land Co, App, 212 So 2d 161, application den 214 So 2d 716, 252 La 889
ND—Quality Builders, Inc v Hahn, 134 N W 2d 577
54. US—Lake v Fidelity & Deposit Co of Md, C A Fla, 430 F 2d 1251—Goodyear Tire & Rubber Co v Jones, D C Kan, 317 F Supp 1285, affd, C A, 433 F 2d 629
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Creature of statute
ND—Quality Builders, Inc v Hahn, 134 N W 2d 577
(2) Other cases
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55. Tex—Baumann v Cibolo Lumber Co, Civ App, 226 S W 2d 210
56. Cal—Howell v Gunderson, 58 Cal Rptr 553, 250 C A 2d Super 961—Blakemore Equipment Co v Braddock, Logan and Valley, 74 Cal Rptr 484, 269 C A 2d 12
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Ga—Murphy v Fuller, 100 S E 2d 137, 96 Ga App 403
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Construction sustaining lien preferable

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page 624

60. N D—Glock v Hillestad, 85 N W 2d 568

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61. Tex—National Western Life Ins Co v Acreman, Civ App, 415 S W 2d 265, mod, Sup, 425 S W 2d 815

§ 120. Notice to Owner

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To put owner on inquiry

NY—Application of Lycee Francais De New York, 204 N Y S 2d 490, 26 Misc 2d 374

66. Fla—Sterling Apartments, Inc v Arch Creek Lumber Co, App, 113 So 2d 711

Statute liberally construed in favor of materialman

NJ—Elliot-Farber Roofing & Siding Supply Co v Saitta, 192 A 2d 318, 79 N J Super 568

Statute held not invalid

Cal—Windsor Mills v Richard B Smith, Inc, 77 Cal Rptr 300, 272 C A 2d 336

67. Fla—American Fire & Cas Co v Davis Water & Waste Industries, Inc, App, 338 So 2d 225, approved Sup, 377 So 2d 164

§ 121. — Necessity

68. U S—Continental Cas Co v Allsop Lumber Co, C A Mo, 336 F 2d 445, cert den 86 S Ct 662, 379 U S 968, 13 L Ed 2d 561—Monroe Banking & Trust Co v Allen, D C Miss, 286 F Supp 201

Ala—Gray v McKinley, supra, n 50—McKinley v Finney, 130 So 2d 183, 272 Ala 194

Ark—Ashdown Hardware Co v Hughes, supra, n 54

Colo—First Nat Bank in Fort Collins v Sam McClure & Son, Inc, 431 P 2d 460, 163 Colo 473

Fla—Stern v Perma-Stress, Inc, App, 134 So 2d 509—Fine v Crane Co, App, 211 So 2d 219, quashed, Sup, 221 So 2d 145, mand conf to 222 So 2d 36—Crane Co v Fine, 221 So 2d 145, mand conf to 222 So 2d 36—Trowbridge, Inc v Hathaway, App, 226 So 2d 35, writ discharged, Sup, 233 So 2d 129

Ill—Roth v Lehman, supra, n 54

Ind—William F Steck Co v Springfield, 281 N E 2d 530, 151 Ind App 671

Iowa—Beane Plumbing & Heating Co v D-X Searay Oil Co, 92 N W 2d 638, 249 Iowa 1364

Md—Dente v Bullis, 76 A 2d 158, 196 Md 238—U S Tile & Marble Co v B & M Welding & Iron Works, Inc, 253 A 2d 838, 254 Md 81—Himelfarb

v B & M Welding & Iron Works, Inc, 253 A 2d 842, 254 Md 37

Mo—Hertel Elec Co v Gabriel, App, 292 S W 2d 95

NH—Tolles-Buckford Lumber Co v Tilton School, 94 A 2d 374, 98 NH 55

N D—Ireland's Lumber Yard v Progressive Contractors, Inc, 122 N W 2d 554—Quality Builders, Inc v Hahn, 134 N W 2d 577

Ohio—F W Winstel Co v Johnston, 143 N E 2d 730, 103 Ohio App 525—Suburban Heating Co v Lougher, 212 N E 2d 659, 4 Ohio App 2d 343

Or—J W Copeland Yards v Tarantoff, 392 P 2d 259, 238 Or 167

Pa—Mullooly v Short, 74 A 2d 136, 365 Pa 141—Santiago v Hobbs, 75 A 2d 17, 167 Pa Super 399—Clayton v Bachman, 1 Bucks Co L R 202—Wenck Lumber & Hardware Co v Knopf, 44 West 135

R I—Faraone v Faraone, 413 A 2d 90

S C—Lowndes Hill Realty Co v Greenville Concrete Co, 93 S E 2d 855, 229 S C 619

Wash—Brower Co v Nome Control of Seattle, Inc, 401 P 2d 860, 66 Wash 2d 204

W Va—Kendall v Martin, 67 S E 2d 42, 136 W Va 192, 27 A L R 2d 1163

Status of joint adventure obviating requirement not found

Ky—Drumby v Stern, 269 S W 2d 198

In Pennsylvania

(1) Pa—Leach v Riverview Osteopathic Hospital, 76 Montg 314—Susquehanna Val Bank & Trust Co v Sade, 10 L ycoming 73

(3) Frater v Neff, 72 Montg 133

(4) Other statements

Pa—School Dist of Pittsburgh v Trimble Const Co, 111 P L J 507

Statute held inapplicable

Ariz—Desert Vista Apartments, Inc v O'Malley Lumber Co, 436 P 2d 479, 103 Ariz 23

Failure to comply

Ala—Abell-Howe Co v Industrial Development Bd of City of Irondale, Civ App, 392 So 2d 221

Colo—Amco Elec Co, Inc v First Nat Bank of Denver, App, 622 P 2d 608

Fla—Ringling Bros—Barnum & Bailey Combined Shows, Inc v Hart, App, 390 So 2d 367

Mich—Williams & Works, Inc v Springfield Corp, 257 N W 2d 160, 76 Mich App 541

Neb—Watts Lumber Co, Inc v Carpenter, 290 N W 2d 655, 205 Neb 860

Okla—C & C Tile and Carpet Co, Inc v Aday, App, 697 P 2d 175

R I—Faraone v Faraone, 413 A 2d 90

page 625

69. Fla—Babe's Plumbing, Inc v Maser, App, 194 So 2d 666—Tarrow v Helmholtz, App, 198 So 2d 109—Boux v East Hillsborough, Apartments, Inc, App, 218 So 2d 202—Booth v Joe Lombardi, Inc, App, 309 So 2d 51

Ill—General Tel Co of Ill v American Cas Co of Reading, Pa., D C Ill, 226 F Supp 919—Suddarth v Rosen, 224 N E 2d 602, 81 Ill App 2d 136

Kan—Clark Lumber Co v Passag, 339 P 2d 280, 184 Kan 667

Ky—Hayne v Benton, 258 S W 2d 488

Mass—Valentine Lumber & Supply Co v Thibault, 130 N E 2d 868, 333 Mass 352

Pa—Roth v Olve, supra, n 54—Stiles v Bangor Republican Club, 34 North 348—Jno D Bogar Lumber Co v Seldomridge, 56 Lane Rev 442—Kurtz v Smith, 10 Chest 322—Green Hills Lumber Co v Williams, 198 A 2d 635, 203 Pa Super 3

Va—Mills v Moore's Super Stores, 227 S E 2d 719, 217 Va 276

Wash—R H Freitag Mfg Co v Boeing Airplane Co, 347 P 2d 1074, 55 Wash 2d 334

Notice not required in absence of demand

Ohio—UNECO, Inc v Metropolitan Dev Corp, 296 N E 2d 702, 34 Ohio Misc 58

Page 625

Failure to comply

US—General Fire-Proof Door Corp v Citibank, N.A., D C N.Y., 544 F Supp 191

Fla—Lopez Terrazzo & Tile, Inc v Cooper, App, 302 So 2d 784

70 Ala—Abell-Howe Co v Industrial Development Bd of City of Irondale, Civ App, 392 So 2d 221

Hawaii—Jack Endo Elec, Inc v Lear Siegler, Inc, 585 P 2d 1265, 59 Haw 612

Md—Bukowitz v Maryland Lumber Co, 122 A 2d 486, 210 Md 148

N.J.—Rigberg v Nardus Development Corp, 136 A 2d 444, 47 N.J. Super 588—General Elec Co v E. Fred Sulzer & Co, 207 A 2d 346, 86 N.J. Super 520, aff'd 222 A 2d 655, 92 N.J. Super 210

N.D.—Schaffer v South, 113 N.W. 2d 668—McKechne v Bismarck Lumber Co, 114 N.W. 2d 709—Quality Builders, Inc v Hahn, 134 N.W. 2d 577

Tenn—Fumell v Vowell & Sons, Inc, 447 S.W. 2d 113, 60 Tenn App 397

Tex—Morrison Supply Co v M. W. Hamilton & Co, Civ App, 411 S.W. 2d 790—National Western Life Ins Co v Acreman, Civ App, 415 S.W. 2d 265, mod, Sup, 425 S.W. 2d 815—Herrington v Luce, Civ App, 491 S.W. 2d 478

On contractor's default or abandonment of contract

Ill—Koester v Huron Development Co, 185 N.E. 2d 196, 25 Ill 2d 337

Notice insufficient

Or—Tri-City Bldg Center, Inc v Wagner, 548 P 2d 961, 274 Or 581

Notices not required

Or—Star Rentals, Inc v Seeborg Const Co, Inc, 677 P 2d 708, 66 Or App 822, review den 681 P 2d 134, 297 Or 124

71. Ala—Southern Sash of Huntsville, Inc v Jean, 235 So 2d 842, 285 Ala 705

Colo—First Nat Bank in Fort Collins v Sam McClure & Son, Inc, 431 P 2d 460, 163 Colo 473

Conn—Biller v Harris, 161 A 2d 187, 147 Conn 351

Fla—Maule Industries v Trugman, 59 So 2d 27—Broderick v Overhead Door Co of Fort Lauderdale, App, 117 So 2d 240—Vitro-Spray of Fla, Inc v Gannex, App, 144 So 2d 533—Boux v East Hillsborough Apartments, Inc, App, 218 So 2d 202

Hawaii—Jack Endo Elec, Inc v Lear Siegler, Inc, 585 P 2d 1265, 59 Haw 612

Iowa—Home Carpet Inc v Bob Antrim Homes, Inc, 210 N.W. 2d 652

Md—Wohlmuether v Mt Airy Plumbing & Heating, Inc, 223 A 2d 562, 244 Md 321—Arundel Asphalt Products, Inc v Morrison-Johnson, Inc, 259 A 2d 789, 256 Md 170

Mich—Sadler v Wmshill, 129 N.W. 2d 384, 373 Mich 378—Wallich Lumber Co v Goida, 134 N.W. 2d 722, 375 Mich 323—Rasmussen v Bolyard Lumber Co, 206 N.W. 2d 446, 45 Mich App 377

N.D.—Putwill v Bismarck Lumber Co, 89 N.W. 2d 424—Ireland's Lumber Yard v Progressive Contractors, Inc, 122 N.W. 2d 554

Pa—Steffl v Snaatra Corp, 102 Pittsb.Jeg J 490—Littler v Bennett, 39 West 285—Z. and L. Lumber Co v Booth, 40 West 33—W-B Bldg Supply Co v Cresko, 54 Luz L Reg 275

Tex—Tomlinson v Higginbotham Bros & Co, Civ App, 229 S.W. 2d 920

Wash—Hayes v Gwinn, 307 P 2d 1063, 49 Wash 2d 908, adhered to 317 P 2d 1071, 51 Wash 2d 892

Privacy

(2) Other matters

Fla—Staniel v Gardner, App, 192 So 2d 340—Tarlton v Helmholz, App, 198 So 2d 109

In Kentucky

(1) Ky—Sowards v Williamson Supply Co, 291 S.W. 2d 26

What constitutes "direct dealings"

Mich—Beck v Delta Recreation Corp, 140 N.W. 2d 764, 2 Mich App 518

"Direct contract with owner"

Cal—Benson Elec Co v Hale Bros Associates, Inc, 55 Cal Rptr 73, 246 C.A. 2d 686—Scott, Blake and Wynne v Summit Ridge Estates, Inc, 59 Cal Rptr 587, 251 C.A. 2d 347

page 626

72. Fla—Robert L. Weed, Architect, Inc v Horning, 33 So 2d 648, 159 Fla 847—Buckingham Properties, Inc v E. R. Andersen & Co, App, 125 So 2d 756

S.C.—Andrews v Home Reform Soc, 64 S.E. 2d 17, 219 S.C. 62

Wash—R. H. Freitag Mfg Co v Boeing Airplane Co, 347 P 2d 1074, 55 Wash 2d 334

74. Fla—Beam v Jerome Lumber & Supply Co, 74 So 2d 537

Okla—Joe Brown Co, Inc v Best, App, 601 P 2d 755

75. Ark—Gipson v Tyson Foods, Inc, 615 S.W. 2d 363, 272 Ark 485

Fla—Cincinnati Ins Co v Putnam, App, 335 So 2d 855

N.D.—Putwill v Bismarck Lumber Co, 89 N.W. 2d 424

Wash—Neil F. Lampson Equipment Rental & Sales, Inc v West Pasco Water System, Inc, 412 P 2d 106, 68 Wash 2d 172

Notice held not admissible that laborers are subcontractors

Cal—Borelli v Eichler Homes, Inc, 34 Cal Rptr 648, 221 C.A. 2d 487

76. U.S.—In re Ribeiro, Bkrtcy Mass, 7 B.R. 359

77 Failure of owner to secure statement as not relieving obligation to serve notice

Ill—Suddarth v Rosen, 224 N.E. 2d 602, 81 Ill App 2d 136

page 627

80. Ark—Burks v Sims, 321 S.W. 2d 767, 230 Ark 170

§ 122. — Waiver or Excuse

84 Estoppel

Cal—Scott, Blake and Wynne v Summit Ridge Estates, Inc, 59 Cal Rptr 587, 251 C.A. 2d 347

85. Pa—Wenack Lumber & Hardware Co v Knopf, 44 West 135

86. Md—Welch v Humphrey, 90 A 2d 686, 200 Md 410

89. Subcontractor's right not revived on contractor's default or abandonment of contract

Ill—Koester v Huron Development Co, 185 N.E. 2d 196, 25 Ill 2d 337

91. Ill—Sanaghan v Lawndale Nat Bank, 232 N.E. 2d 546, 90 Ill App 2d 254

Or—C.J. S. et al in Lakeview Drilling Co v Stark, 310 P 2d 627, 631, 210 Or 306

Wash—Hayes v Gwinn, 307 P 2d 1063, 49 Wash 2d 908, adhered to 317 P 2d 1071, 51 Wash 2d 892

§ 123. — By Whom Given

93 Neb—Sherwood v Tucker, 277 N.W. 2d 437, 203 Neb 56

N.Y.—American Cement Corp v Underhill Const Corp, 321 N.Y.S. 2d 402, 36 A.D. 2d 849

Wis—Krusc v Miller Brewing Co, 279 N.W. 2d 198, 89 Wis 2d 522

§ 124. — To Whom Given

94 Conn—Biller v Harris, 161 A 2d 187, 147 Conn 351

Ill—Shaffer v Cullerton Corp, 141 N.E. 2d 77, 13 Ill App 2d 72

Ind—William F. Steck Co v Springfield, 281 N.E. 2d 530, 151 Ind App 671

Mo—Structo Corp v Leverage Inv Enterprises, Ltd, App, 613 S.W. 2d 197

Pa—Long v Bloom, 71 Dauph 331

Married woman

Md—Bukowitz v Maryland Lumber Co, 122 A 2d 486, 210 Md 148

Notice to general contractor held not to constitute notice to owner

Ariz—Williams v A. J. Bayless Markets, Inc, 476 P 2d 869, 13 Ariz App 348

Notice to general contractor held not notice to owner

Tex—Herrington v Luce, Civ App, 491 S.W. 2d 478

Notice to building inspector

R.I.—Farsone v Farsone, 413 A 2d 90

Notice to another owner

U.S.—Matter of Stanfield, Bkrtcy Nev, 6 B.R. 265

page 628

96 Ala—Staley v Woodruff, 60 So 2d 384, 257 Ala 571

Ill—Hill Behan Lumber Co v American Nat Bank & Trust Co of Waukegan, 427 N.E. 2d 1325, 56 Ill Dec 779, 101 Ill App 3d 268

Ind—Bayer v Isenberg, App, 429 N.E. 2d 634

Minn—C. W. Stark Lumber Co v Sether, 257 N.W. 2d 556

Purchaser

(1) Purchaser of registered land under unrecorded purchase agreement not in possession not "owner" under statute

Minn—Mill City Heating & Air Conditioning Co v Nelson, 351 N.W. 2d 362

(2) However, if subcontractor materialman knows of ownership interests of purchaser of registered land under unrecorded purchase agreement, even though purchaser is not in possession, purchaser qualifies as "owner"

Minn—Mill City Heating & Air Conditioning Co v Nelson, 351 N.W. 2d 362

97. Minn—Minnesota Wood Specialties, Inc v Mattison, 274 N.W. 2d 116

Mo—J. R. Meade Co v Forward Const Co, App, 526 S.W. 2d 21

1. Pa—Hosack v Landy Towel & Service, Inc, 7 D & C 2d 39, 55 Lanc Rev 87

4. Ill—Capital Plumbing & Heating Supply Co v Snyder, 275 N.E. 2d 663, 2 Ill App 3d 660

N.D.—Schaffer v Smith, 113 N.W. 2d 668

8 U.S.—Matter of Stanfield, Bkrtcy Nev, 6 B.R. 265

9 Okla—Oklahoma Hardware Co v Townsend, 494 P 2d 326, 50 A.L.R. 3d 936

Tex—Shaw v McPhail Elec Co, Inc, Civ App, 544 S.W. 2d 497, err ref no rev err

10. Ala—Southern Sash of Huntsville, Inc v Jean, 235 So 2d 842, 285 Ala 705

11. Cal—Schrader Iron Works, Inc v Lee, 103 Cal Rptr 106, 26 C.A. 3d 621

Fla—E.V. Const Co v Newman, App 3 Dist, 418 So 2d 291

12. Kan—Schwaller Lumber Co, Inc v Watson, 505 P 2d 640, 211 Kan 141

13. Ark—Shannon Supply Co v Avey, 403 S.W. 2d 87, 240 Ark 997

Ill—Shaffer v Cullerton Corp, 141 N.E. 2d 77, 13 Ill App 2d 72

Or—Drake Lumber Co v Paget Mortg Co, 274 P 2d 804, 203 Or 66

Wis—Fullerton Lumber Co v Korth, 127 N.W. 2d 1, 23 Wis 2d 253

14. Ill—Hollenbeak v National Starch & Chemical Corp, Engineers, Inc, 420 N.E. 2d 172, 50 Ill Dec 855, 95 Ill App 3d 309

page 629

15. Ark—Shannon Supply Co v Avey, 403 S.W. 2d 87, 240 Ark 997

Ohio—Balco Corp v D. H. Overmyer Co, Inc, of Ohio, 334 N.E. 2d 484, 43 Ohio App 2d 157, 72 O.O.D. 364

Wis—Fullerton Lumber Co v Korth, 155 N W 2d 662, 37 Wis 2d 531

19. Ohio—Love Lumber Co v Reaser, 212 N E 2d 653, 4 Ohio App 2d 354

24. Md—William Penn Supply Corp v Watterson, 146 A 2d 420, 218 Md 291

26. Tex—Murchison v Caruth Bldg Service, Civ App, 369 S W 2d 380, err ref no rev err

27. Fla—Branch v McGlynn, 65 So 2d 32

28. Kan—Schwaller Lumber Co, Inc v Watson, 505 P 2d 640, 211 Kan 141

30. Kan—Schwaller Lumber Co, Inc v Watson, 505 P 2d 640, 211 Kan 141

31. Md—Bukowitz v Maryland Lumber Co, 122 A 2d 486, 210 Md 148

34. Notice insufficient

Mo—Boyer Lumber, Inc v Blair, App, 510 S W 2d 738

§ 125. — Time for Giving

page 630

39. Fla—Tuttle/White Constructors, Inc v Hughes Supply, Inc, App, 371 So 2d 559

Md—Riley v Abrams, 412 A 2d 996, 287 Md 348

Mass—Valentine Lumber & Supply Co v Thibault, 146 N E 2d 347, 336 Mass 407

N.J.—Apex Roofing Supply Co v H W Elliot Co, 145 A 2d 823, 52 N J Super 522

Pa—Glenn Lumber and Supply, Inc v Kogler, 41 West 205—Wenak Lumber & Hardware Co v Knopf, 44 West 135—McCarthy v Reed Terrace, Inc, 218 A 2d 229, 420 Pa 534

R.I.—Farnose v Farnose, 413 A 2d 90

Wash—CHG Intern, Inc v Platt Elec Supply, 597 P 2d 412, 23 Wash App 425

Wyo—Schaefer v Lampert Lumber Co, 591 P 2d 1225

Notice held premature

Pa—Scorataw v Henry, 45 Ene 89

Notice held tardy

Fla—Trowbridge, Inc v Hathaway, App, 226 So 2d 35, writ discharged, 233 So 2d 129

Ill—Koeester v Huron Development Co, 177 N E 2d 652, 32 Ill App 2d 265, aff'd 185 N E 2d 196, 25 Ill 2d 337

Or—J W Copeland Yards v Taranoff, 392 P 2d 259, 238 Or 167

Notice held timely

U.S.—In re CH Stuart, Inc, Bkrtcy N.Y., 17 B.R. 400

Fla—Canada Dry Bottling Co of Fla v Meekins, Inc, of Dade County, App, 219 So 2d 439—Daly Aluminum Products, Inc v Stockslager, App, 244 So 2d 528, cert den, 246 So 2d 97

Md—District Heights Apartments, Section D-E v No-land Co, 95 A 2d 90, 202 Md 43, 39 A L R 2d 387—G Edgar Harr Sons v Newton, 155 A 2d 480, 220 Md 618—Brosenne v Warthen, 172 A 2d 485, 226 Md 168—Mt Ary Plumbing & Heating, Inc v Grey Dawn Development Co, 205 A 2d 299, 237 Md 38

Mich—Hansen-Snyder Co v General Motors Corp, 124 N W 2d 286, 371 Mich 480—Georgia-Pacific Corp v Central Park North, Co, 228 N W 2d 380, 394 Mich 59

Vt—Springfield Co-op Freeze Locker Plant v Wiggins, 63 A 2d 182, 115 Vt 445

At least substantial compliance with requirement

Md—Bukowitz v Maryland Lumber Co, 122 A 2d 486, 210 Md 148

40. U.S.—Continental Gas Co v Allsop Lumber Co, C.A.Mo, 336 F 2d 445, cert den 85 S Ct 662, 379 U.S. 968, 13 L Ed 2d 561

Ariz.—Williams v A J Bayless Markets, Inc, 476 P 2d 869, 13 Ariz.App 348

Fla—Tomorrow's Choice, Inc v Bassing Co, Inc, App, 343 So 2d 70, app after remand 364 So 2d 530

Minn—Polivka Logan Designers, Inc v Ende, 251 N W 2d 851, 312 Minn 171

Ohio—A C Scagnetti & Sons, Inc v Plester, 175 N E 2d 81, 172 Ohio St 260

Pa—Better Bilt Supply, Inc v Liberty Hotels, Inc, 103 P L J 445—McCarthy v Reed Terrace, Inc, 218 A 2d 229, 420 Pa 534

Tenn—Eatherly Const Co v DeBoer Const Co, 543 S W 2d 333

Wash—R H Freitag Mfg Co v Boeing Airplane Co, 347 P 2d 1074, 55 Wash 2d 334

W Va—Fisher v Reamer, 118 S E 2d 76, 146 W Va 83

Since the publication of the bound volume Coleman v Pearman, 165 S E 371, 159 Ga 72, has been expressly disapproved the court stating that there is no requirement in code section providing for protection of lien by subcontractor that written notice to owner shall be given within any specified time

Va—Mills v Moore's Super Stores, 227 S E 2d 719, 217 Va 276

Extension of time by statutory amendment

Mich—Hansen-Snyder Co v General Motors Corp, 124 N W 2d 286, 371 Mich 480

No extension permitted

Mo—S & R Builders and Suppliers, Inc v Marler, App, 610 S W 2d 690

42. Mich—P H Const Co v Riverview Commons Associates, 264 N W 2d 50, 80 Mich App 518

S.C.—Lowndes Hill Realty Co v Greenville Concrete Co, 93 S E 2d 855, 229 S C 619

43. Tenn—Eatherly Const Co v DeBoer Const Co, 543 S W 2d 333

44. Ala—Eastman v Nuckols, 38 So 2d 494, 251 Ala 544

Fla—Bard Mfg Co v Albert & Jamerson Bldg Supply Corp, App, 212 So 2d 13

N.J.—Apex Roofing Supply Co v Howell, 158 A 2d 49, 59 N J Super 462

Pa—Marshall v Vikers, 48 Luz L Reg 37—Stiles v Bangor Republican Club, 34 North 348—Scorataw v Henry, 45 Ene 89

47. N.J.—General Elec Co v E Fred Sulzer & Co, 222 A 2d 655, 92 N J Super 210

48. Fla—Ward v Miami Lock & Hardware Co, App, 119 So 2d 395—Westinghouse Elec Supply Co v Midway Shopping Mall, Inc, App, 277 So 2d 809

Okla—Knapp v Arko Interstate Elec Co, 448 P 2d 996

page 631

52. Pa—Grayson v McAnley, 37 Del Co 34—Shoemaker v Zerby, 10 D & C 2d 227, 18 Som 358, 39 West 83—Pancoast v Lovan, 8 Chest 172

54. Ky—Maloney v Waller, 261 S W 2d 418

N.H.—McGrannhan v Standard Const Co, 131 A 2d 631, 101 N H 46

Wash—Anderson v Taylor, 347 P 2d 536, 55 Wash 2d 215, 78 A L R 2d 1161

55. Fla—Sheffield-Briggs Steel Products, Inc v Ace Concrete Service v Albert & Jamerson Bldg Supply Co, 63 So 2d 924—Bard Mfg Co Corp, App, 212 So 2d 13

Md—District Heights Apartments, Section D-E v No-land Co, supra, n 39

Interruption of deliveries for nonpayment

Wis—McCormick v Kuhnly, 131 N W 2d 840, 26 Wis 2d 193

Late service held not absolute bar

Fla—1800 North Federal Corp v Westinghouse Elec Supply Co, App, 224 So 2d 384

Period establishing priority

Fla—Viyella v Jackson, App, 347 So 2d 830

56. U.S.—In re Scherer Hardware and Supply, Inc, Bkrtcy Ill, 9 B.R. 125

Md—G Edgar Harr Sons v Newton, 155 A 2d 480, 220 Md 618

57. Mass—Rheem Mfg Co v Monsanto Co, 382 N E 2d 1100, 6 Mass App 461

Pa—Kerber v Stellato, 77 Pa Dist & Co 314—Houseworth v Weyant, 78 Pa Dist & Co 211, 3 Lebanon

36—Schroock v Keller, 35 Ene Co 23—Dickson v Ness, 8 Chest 422—Schepe v Montone, 27 D & C 2d 519, 52 Luz L Reg 175

60. Pa—Frater v Neff, 72 Montg 133

62. N.H.—Westinghouse Elec Supply Co, Inc v Electromech, Inc, 409 A 2d 1141, 119 N H 833

64. Cal—Brown Co v Superior Court, County of San Bernardino Appellate Dept, 4 Dist, 196 Cal Rptr 258, 148 CA 3d 891

Effect of delay in giving notice

Fla—Bishop v James A Knowles, Inc, App, 292 So 2d 415

67. Pa—A O King, Inc v Schaefer, 81 Montg 58

page 632

70. Pa—Wenak Lumber & Hardware Co v Knopf, 44 West 135

72. Md—Mt Ary Plumbing & Heating, Inc v Grey Dawn Development Co, 205 A 2d 299, 237 Md 38

U.S.—C.J.S. quoted in Wood v Hardy, 110 S E 2d 157, 160, 235 S C 131

73. S.C.—C.J.S. quoted in Wood v Hardy, 110 S E 2d 157, 160, 235 S C 131

Particular Acts from which time for giving notice computed

Ky—Drummy v Stern, 269 S W 2d 198

74. N.C.—C.J.S. cited in Priddy v Kernersville Lumber Company, 129 S E 2d 256, 260

79. Ky—Hayne v Benton, 258 S W 2d 488

§ 126. — Form and Contents

Library References

Mechanics' Liens §=122

Modern Legal Forms Ch 48, Notices.

85. Conn—H & S Torrington Associates v Lutz Engineering Co, Inc, 441 A 2d 171, 185 Conn 549

Ind—Mid America Homes, Inc v Horn, 396 N E 2d 879, 272 Ind 171

Md—Hunelarb v B & M Welding & Iron Works, Inc, 253 A 2d 842, 254 Md 37

Mich—Vorrath v Garrelts, 192 N W 2d 547, 35 Mich App 463, app after remand 211 N W 2d 536, 49 Mich App 142

N.J.—Apex Roofing Supply Co v Howell, 158 A 2d 49, 59 N J Super 462

Ohio—Whitesides v Mason, 352 N E 2d 648, 47 Ohio App 2d 173, 1 O O 3d 260

W Va—Gray Lumber Co v Devore, 112 S E 2d 457, 145 W Va 91

Notices held sufficient

(1) Ark—Bobo v Seebie, 429 S W 2d 95, 244 Ark 915

Iowa—Northwestern Nat Bank of Sioux City v Metro Center, Inc, 303 N W 2d 395

Md—Parkway Estates, Inc v Burnham, 122 A 2d 326, 210 Md 64—G Edgar Harr Sons v Newton, 155 A 2d 480, 220 Md 618—Diener v Cubbage, 270 A 2d 471, 259 Md 555

Nev—Las Vegas Plywood and Lumber, Inc v D & D Enterprises, 649 P 2d 1367, 98 Nev 378

Ohio—Inter-City Equipment Corp v Mardigan, 182 N E 2d 873, 114 Ohio App 401

Pa—Mullooly v Short, 74 A 2d 136, 365 Pa 141—Giannante v Pascuzzo, 206 A 2d 340, 205 Pa Super 28—Pittsburgh Plate Glass Co v Valenti, 112 P L J 466

Tenn—Walker Supply Co, Inc v Corinth Community Development, Inc, App, 509 S W 2d 514

Tex—Nixon Const Co v Rosales, Civ App, 437 S W 2d 52, err ref no rev err

86. Ariz—Lewis v Midway Lumber, Inc, App, 561 P 2d 750, 114 Ariz 426

87. Ala—Harper v J & C Trucking and Excavating, Civ App, 374 So 2d 886, writ quashed, Sup, 374 So 2d 893

Pa—Associated Lumber & Mfg Co v Mastroianni, 98 A 2d 52, 173 Pa Super 310—Shoemaker v Zerby, 10 D & C 2d 227, 18 Som 358, 39 West 83—Kellman v Kobaly, 41 West 139

Notices held insufficient

(1) US—General Fire-Proof Door Corp v Citibank, N.A., D C N.Y., 544 F Supp 191

Cal—Neptune Gunite Co v Monroe Enterprises, Inc, 40 Cal Rptr 367, 229 C A 2d 439

Hawaii—Jack Endo Elec, Inc v Lear Siegler, Inc, 585 P 2d 1265, 59 Haw 612

Idaho—Chief Industries, Inc v Schwendiman, 587 P 2d 823, 99 Idaho 682

Md—U S Tile & Marble Co v B & M Welding & Iron Works, Inc, 253 A 2d 838, 254 Md 81—Himelfarb v B & M Welding & Iron Works, Inc, 253 A 2d 842, 254 Md 37

NJ—Apex Roofing Supply Co v Howell, 158 A 2d 49, 59 NJ Super 462

ND—Quality Builders, Inc v Hahn, 134 N W 2d 577

Pa—Fitzpatrick v Howes, 76 Pa Dist & Co 543

88. Pa—Mullooly-Winter Co v Short, 98 Pittsb Leg J 78, aff 74 A 2d 136, 365 Pa 141

Tenn—Sequatchie Concrete Service, Inc v Cutter Laboratories, App, 616 S W 2d 162

89. Pa—Jeffries v Colotte, 74 Montg 194

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90. W Va—Kendall v Martin, 67 S E 2d 42, 136 W Va 192, 27 A L R 2d 1163

Wyo—Engle v First Nat Bank of Chugwater, 590 P 2d 826

97. S C—Lowndes Hill Realty Co v Greenville Concrete Co, 93 S E 2d 855, 229 S C 619

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2. Ala—C.J.S. cited in McCleskey v Finney, 130 So 2d 183, 185, 272 Ala 194

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Okla—Liberty Plan Co v Francis T Smith Lumber Co, 360 P 2d 500

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Separate notice of intention required for separate contracts

ND—Hemmer v Sorenson, 180 N W 2d 910

15. Md—Welch v Humphrey, supra, n 10

20. Ala—McCleskey v Finney, 130 So 2d 183, 272 Ala 194

21. S C—Lowndes Hill Realty Co v Greenville Concrete Co, 93 S E 2d 855, 229 S C 619

27. Md—Mimco Steel Corp v Holloway Concrete Const Co, 274 A 2d 90, 261 Md 137

29. NY—Application of J D H Builders, Inc, 155 N Y S 2d 121

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30. Nature and kind of materials furnished Md—Welch v Humphrey, supra, n 10

31. W Va—Gray Lumber Co v Devore, 112 S E 2d 457, 145 W Va 91

35. Delivery to owner W Va—Gray Lumber Co v Devore, 112 S E 2d 457, 145 W Va 91

48. NJ—Apex Roofing Supply Co v Howell, 158 A 2d 49, 59 NJ Super 462

Ohio—Suburban Heating Co v Lougher, 212 N E 2d 659, 4 Ohio App 2d 343

49. Owner Ariz—Lewis v Midway Lumber, Inc, App, 561 P 2d 750, 114 Ariz 426

51. Cal—Wand Corp v San Gabriel Valley Lumber Co, 46 Cal Rptr 486, 236 C A 2d 855

NJ—Apex Roofing Supply Co v Howell, 158 A 2d 49, 59 NJ Super 462

54. Or—H D Fowler Co, Inc v Medical Research Foundation, 393 P 2d 657, 238 Or 316

§ 127. — Signature and Verification

57. NJ—Apex Roofing Supply Co v Howell, 158 A 2d 49, 59 NJ Super 462

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58. Cal—Borello v Eichler Homes, Inc, 34 Cal Rptr 648, 221 C A 2d 487

60. Ind—Mann v Schnarr, 95 N E 2d 138, 228 Ind 654

61. Ohio—M J Kelly Co v Haendiges, 397 N E 2d 416, 60 Ohio App 2d 318, affd 391 N E 2d 723, 58 Ohio St 2d 503, 12 O O 3d 409

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71. Pa—Germick & Fnrar v Serling, 46 Luz L Reg 35—Kurtz v Smith, 10 Chest 322

Verification by attorney Pa—Rockwell v Kehl, 62 Pa Dist & Co 560, 1 Lebanon 359

§ 128. — Service

73. US—In re Stanfield, Bkrtcy Nev, 9 B R 790

Ariz—Lewis v Midway Lumber, Inc, App, 561 P 2d 750, 114 Ariz 426

Cal—IGA Aluminum Products, Inc v Manufacturers Bank, 181 Cal Rptr 859, 130 C A 3d 699

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La—Lambert Bros, Inc v Ziegler, App, 361 So 2d 948, writ den, Sup, 364 So 2d 121

Md—Riley v Abrams, 412 A 2d 996, 287 Md 348

Mich—Skyhook Lift-Slab Corp v Huron Towers, Inc, 118 N W 2d 961, 369 Mich 36

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Wash—CHG Intern, Inc v Platt Elec Supply, 597 P 2d 412, 23 Wash App 425

Wa—Kruze v Miller Brewmg Co, 279 N W 2d 198, 89 Wa 2d 522

Proof of service

Pa—Ruggies Lumber Co v Serling, 6 D & C 2d 495, 46 Luz L Reg 33—Hoffmayer v Paster, 6 D & C 2d 512—Montgomery v Piscoglio, 10 Chest 510

—Hoffman Lumber Co v Geesey, 35 D & C 2d 200, 12 Chest 375

Service to one joint owner satisfactory

Kan—Scott v Strickland, 691 P 2d 45, 10 Kan App 2d 14

Service on husband valid

Pa—A D Ross, Inc, v Drew, 4 D & C 2d 589, 102 P L J 293

Handing two copies to one spouse held sufficient

Pa—Pittsburgh Plate Glass Co v Valenti, 112 P L J 466

Service on wife

Ill—Capital Plumbing & Heating Supply Co v Snyder, 275 N E 2d 663, 2 Ill App 3d 660

Compliance shown

Mo—A E Burk & Son Plumbing & Heating, Inc v Malan Const Co, App, 548 S W 2d 611

Kan—Kopp's Rug Co, Inc v Talbot, 620 P 2d 1167, 5 Kan App 2d 565

Service on general partner of joint venture

US—In re Stanfield, Bkrtcy Nev, 9 B R 790

74. Ariz—Peterman-Donnelly Engineers & Contractors Corp v First Nat Bank of Ariz, Phoenix, 408 P 2d 841, 2 Ariz App 321

Md—Jakenyo, Inc v Blizzard, 155 A 2d 661, 221 Md 46

Neb—Sherwood v Tucker, 277 N W 2d 437, 203 Neb 56

Pa—Gumble v Snyder, supra, n 73—McNerny v French Dye Works, 16 Monroe L R 21, 35 West Co 195

Invalid service effected

Ariz—Lewis v Midway Lumber, Inc, App, 561 P 2d 750, 114 Ariz 426

75. Ariz—Peterman-Donnelly Engineers & Contractors Corp v First Nat Bank of Ariz, Phoenix, 408 P 2d 841, 2 Ariz App 321

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Mo—Hertel Elec Co v Gabriel, App, 292 S W 2d 95

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Or—State ex rel Nilsen v Hoff, 474 P 2d 11, 3 Or App 398

Omission not fatal

Ill—Watson v Auburn Iron Works, Inc, 318 N E 2d 508, 23 Ill App 3d 265

78. Service by publication

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80. Mich—River Rouge Sav Bank v S & M Bldg Co, 101 N W 2d 260, 359 Mich 189, 91 A L R 2d 409

NJ—I S Smick Lumber v Hubbschmidt, 425 A 2d 709, 177 N J Super 131, affd 440 A 2d 1160, 182 N J Super 306

Ohio—Whiteheads v Mason, 352 NE 2d 648, 48 Ohio App 2d 173, 1 OO 3d 260

Or—State ex rel Nilsen v Hoff, 474 P 2d 11, 3 Or App 398

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Service on non-resident wife invalid

Pa—A D Ross, Inc., v Drew, 4 D & C 2d 589, 102 P L J 293

Mailed notice effective when received

Fla—Daly Aluminum Products, Inc v Stockslager, App., 244 So 2d 528, cert den 246 So 2d 97

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83. Md—Jakenjo, Inc v Blizzard, 155 A 2d 661, 221 Md 46

Mich—Beck v Delta Recreation Corp., 140 NW 2d 764, 2 Mich App 518

84. Md—Jakenjo, Inc v Blizzard, 155 A 2d 661, 221 Md 46

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85. Ark—Scott v Le Grande, 287 S W 2d 456, 225 Ark 1022

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86. Md—Bukowicz v Maryland Lumber Co., 122 A 2d 486, 210 Md 148

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87. Ark—Shannon Supply Co v Avey, 403 S W 2d 87, 240 Ark 997

89. Mich—Spartan Asphalt Paving Co v Grand Ledge Mobile Home Park, 247 NW 2d 589, 71 Mich App 177, revd on oth grds 253 NW 2d 644, 400 Mich 184

Ohio—Baynes v McKee, App., 119 N E 2d 122

Pa—McNery v French Dye Works, supra, n 74—A D Ross, Inc v Drew, 4 D & C 2d 589, 102 P L J 293

91. Where realty located

Mich—Mohawk Lumber & Supply Co v Petix, 84 NW 2d 467, 349 Mich 323

94. Service by particular person held invalid Conn—Lampson Lumber Co v Rosadino, 104 A 2d 362, 141 Conn 193

95. Pa—Rockwell v Kahl, supra, n 71

§ 129. — Defects and Amendment

page 638

98. Ark—Scott v Le Grande, 287 S W 2d 456, 225 Ark 1022

Colo—First Nat Bank in Fort Collins v Sam McClure & Son, Inc., 431 P 2d 463, 163 Colo 473

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Or—Steel Products Co of Oregon, Inc v Portland General Elec Co., 615 P 2d 344, 47 Or App 597, affd 628 P 2d 1180, 291 Or 41

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99 Pa—Rufe v Neff, 69 Montg Co 352—Peoples First Nat Bank & Trust Co v Lankford, 107 P L J 123

Objections after trial held too late

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1. Fla—Brickell Bay Club, Inc v Usery, App 3 Dist., 417 So 2d 692

Nev—Las Vegas Plywood and Lumber, Inc v D & D Enterprises, 649 P 2d 1367, 98 Nev 378

N Y—Clifton Steel Corp v General Elec Co., 437 N Y S 2d 735, 80 A D 2d 714

Amendment properly denied

N J—Zawaski v Cole Const Corp., 137 A 2d 589, 48 N J Super 390

Pa—Dravo Corp v Ligato, 111 P L J 497

2. Pretrial notice insufficient

Cal—Pacific Const Refrigeration, Inc v Badger, 124 Cal Rptr 786, 52 CA 3d 233

4. Pa—Associated Lumber & Mfg Co v Mastrouani, 98 A 2d 52, 173 Pa Super 310

§ 130. Furnishing Statement or Account to Owner

6. U S—Beacon Const Co, Inc v Matco Elec Co., Inc., C A N Y., 521 F 2d 392

Mich—Bent v Carney, 64 NW 2d 689, 339 Mich 647—Vorrath v Garrelts, 192 NW 2d 547, 35 Mich App 463, app after remand 211 NW 2d 536, 49 Mich App 142

N Y—Application of Gedney Hills, Inc., 190 N Y S 2d 477, 8 A D 2d 843

Plaintiff claiming under direct contract later assigned held not materialman bound by assignee coplaintiff's sworn statement

Fla—Vitro-Spray of Fla., Inc v Gumemick, App., 144 So 2d 533

page 639

9. Substantial compliance

(2) Other matters

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Materialman contracting solely with subcontractor not required to be named

Ohio—Capital City Lumber Co v Ellertrock, 203 N E 2d 244, 177 Ohio St 159

15. Fla—Maule Industries v Trugman, 59 So 2d 27

§ 131. Necessity and Object

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Objection to filing

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Statute construed

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page 640

20. Alaska—Brooks v R & M Consultants, Inc., 613 P 2d 268

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Strict compliance

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Effect of registry

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24. La—I-10, Inc v Justice, App., 260 So 2d 89

25. Ala—Bonner v Barber, 97 So 2d 793, 266 Ala 624

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page 641

28 Munn—Sterling Elec Co v Kent, 45 NW 2d 709, 233 Munn 31

Page 641

Tex.—Trane Co v Wortham, Civ App, 428 S W 2d 417

42. Superior right of owner to immediate possession recognized by filing

D C.—National Brick & Supply Co v Baylor, C.A., 299 F 2d 454, 112 U S App D C 73

43. La.—Harvey v Thomas, 119 So 2d 446, 239 La 510

Not required where property sold by sheriff
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44. Only one re-inscription permitted

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45. La.—Tharpe and Brooks, Inc v Arnott Corp, App, 406 So 2d 1, remd, Sup, 410 So 2d 1145, on remand, App 1 Cr, 411 So 2d 1136

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page 642

49. Fla.—Maule Industries v Trugman, supra, n 15
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54. Ark.—Ras v Lammers, 207 S W 2d 740, 212 Ark 792—Burks v Sims, 321 S W 2d 767, 230 Ark 170

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page 643

68. Fla.—Tompkins Lend Co, Inc v Edge, App, 341 So 2d 206

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69. Cal.—Wand Corp v San Gabriel Valley Lumber Co, 46 Cal Rptr 486, 236 C A 2d 855—Halper, Inc v La-Barthe, 48 Cal Rptr 293, 238 C A 2d 897

§ 132. Filing Contract

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74. Iowa.—Home Carpet Inc v Bob Antrim Homes, Inc, 210 N W 2d 652

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75. Ga.—Southwire Co v Metal Equipment Co, 198 S E 2d 687, 129 Ga App 49, cert den 94 S Ct 723, 414 U S 1092, 38 L Ed 2d 550

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§ 133 Filing One or More Claims or Statements by Same Claimant

77. Ga.—Atlanta Jewish Community Center, Inc v Tom Barrow Co, 203 S E 2d 921, 130 Ga App 608

N J.—Sikkema v Packard, 192 A 2d 334, 79 N J Super 599

page 644

79. Wash.—West v Jarvi, 266 P 2d 1040, 44 Wash 2d 241

80. Conn.—Computaro v Stuart Hardwood Corp, 429 A 2d 796, 180 Conn 545

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83. R I.—Graybar Elec Co v Providence Journal Co, 166 A 2d 885, 92 R I 120

87. Minn.—Ternes v Westberg, 75 N W 2d 415, 246 Minn 485

§ 134. — Two or More Buildings or Improvements

page 645

96. Del.—Paladinetti v Oak Lane Manor, 116 A 2d 173, 10 Terry 324, affd 124 A 2d 725, 11 Terry 123

Ohio.—Litsey v Looker, 153 N E 2d 463

Or.—Consolidated Elec Distributors, Inc v Jepson Elec Contracting, Inc, 537 P 2d 80, 272 Or 376

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Insufficient filing

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page 646

20. Fla.—Maule Industries v Trugman, supra, n 10

21. "Contiguous lots"

(3) La.—McGill Corp v Dolose Concrete Co, App, 201 So 2d 125

Mo.—Stewart Concrete & Material Co v James H Stanton Const Co, App, 433 S W 2d 76—United Lumber Co v Minmar Inv Co, App, 472 S W 2d 630

What constitutes general contract

(3) Mo.—Stewart Concrete & Material Co v James H Stanton Const Co, App, 433 S W 2d 76—United Lumber Co v Minmar Inv Co, App, 472 S W 2d 630

23. Fla.—Kettles v Charter Mortg Co, App, 337 So 2d 1012

La.—American Bank & Trust Co v Phillips, App, 130 So 2d 750

§ 135. — Double House

25. Pa.—Kelso v Hungerford, 8 Chest 93

§ 136. — Properties of Different Owners

26. Utah.—Utah Sav and Loan Ass'n v Mecham, 366 P 2d 598, 12 Utah 2d 335, 15 A L R 3d 63

page 647

29. Not looked on with favor

Or.—Consolidated Elec Distributors, Inc v Jepson Elec Contracting, Inc, 537 P 2d 80, 272 Or 376

32. N D.—Schaffer v Smith, 113 N W 2d 668

§ 137. Filing One or More Claims or Statements by Two or More Claimants

35. Joinder of claims held procedural

Del.—Di Mondri v S & S Builders, Inc, 124 A 2d 725, 11 Terry 123

§ 138. Place for Filing

39. Conn.—Biller v Harris, 161 A 2d 187, 147 Conn 351

40. Mo.—Stowell Elec Co v Blue Val Foundry Co, 467 S W 2d 955

N C.—Equitable Life Assur Soc of U S v Baanight, 67 S E 2d 390, 234 N C 347—Lowery v Haulthook, 79 S E 2d 204, 239 N C 67

45. Ark.—Cone v Jurczyk, 547 S W 2d 108, 261 Ark 251

§ 139. Time for Filing

49. U S.—Randall v Colby, D C Iowa, 190 F Supp 319

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Purpose

Anz—Lewis v Midway Lumber, Inc., App., 561 P 2d 750, 114 Anz 426

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Ala.—Southern Sash of Huntsville, Inc v Jean, 235 So 2d 842, 285 Ala 705

Anz—Lewis v Midway Lumber, Inc., App., 561 P 2d 750, 114 Anz 426

Ark.—Rea v Lammers, 207 S W 2d 740, 212 Ark 792—Southern Lumber Co v Riley, 273 S W 2d 848, 224 Ark 298—Arkansas Louisiana Gas Co v Moffitt, 436 S W 2d 91, 243 Ark 992, 51 A L R 3d 1078

Cal.—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 CA 2d 644—Lovret v Seyfarth, 101 Cal Rptr 143, 22 CA 3d 841

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Ga.—Old Stone Mortg and Realty Trust v New Georgia Plumbing, Inc., 231 S E 2d 785, 140 Ga App 686, affd 236 S E 2d 592, 239 Ga 345

Ill.—Miller Bros Indus Sheet Metal Corp v LaSalle Nat Bank, 255 NE 2d 755, 119 Ill App 2d 23—Hill Behan Lumber Co v Marchese, 275 NE 2d 451, 1 Ill App 3d 789

Kan.—Star Lumber & Supply Co v Mills, 349 P 2d 892, 186 Kan 204

La.—Schwartz Supply Co v Zimmerman, 84 So 2d 438, 228 La 861—National Bank of Commerce in New Orleans v Justice, App., 212 So 2d 711—Gulfo Finance Co of Marrero v Malone, App., 230 So 2d 269, writ not considered 230 So 2d 835, 255 La 341

Me.—Marshall v Mathieu, 57 A 2d 400, 143 Me 167—Morn v H W Maxm Co., 82 A 2d 789, 146 Me 421

Md.—T Dan Kolkner, Inc v Shure, 121 A 2d 223, 209 Md 290—George F Robertson Plastering Co v Altman, 430 S W 2d 169

Mich.—Droulard v Czerwinski, 116 N W 2d 776, 367 Mich 557

Mo.—Vasquez v Village Center, Inc., 362 S W 2d 588—Nelle Plumbing Co v Stefanc, App., 453 S W 2d 636, 48 A L R 3d 145—Trout's Investments, Inc v Davis, App., 482 S W 2d 510

Mont.—CJS quoted in Americana Homes, Inc v Broadmoor, Corp., 455 P 2d 334, 336, 153 Mont 184

N.J.—Stavola Contracting Co v Darvo Const Co, 246 A 2d 477, 102 NJ Super 581

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N.C.—Neal v Whisnant, 145 S E 2d 379, 266 N C 89—Strickland v General Bldg & Masonry Contractors, Inc., 207 S E 2d 399, 22 N C App 729

Ohio.—Falls Lumber Co v Heman, 183 NE 2d 265, affd 181 NE 2d 713, 114 Ohio App 262

Or.—Mathis v Thunderbird Village, Inc., 389 P 2d 343, 236 Or 425

Pa.—Baker v Thounhurst, 34 West Co 51—Littler v Bannett, 39 West 285—Laurello v Caho, 25 D & C 2d 93—Merritt Lumber Yards, Inc., v GEB Enterprises, Inc, 22 D & C 2d 39, 76 Montg 293—Golomb Paint & Glass Co v Murray's 51 Lanes, Inc., 45 West 117

S.D.—F H Pesvey & Co v Whitman, 146 N W 2d 365, 82 S D 367

Tenn.—Southern Blow Pipe & Roofing Co v Grubb, 260 S W 2d 191, 36 Tenn App 641

Tex.—Wesman Hardware Co v R L King Const Co, Civ App., 387 S W 2d 79—Texas & N Ry Co. v Logwood, Civ App., 401 S W 2d 886

Utah.—Harris-Dudley Plumbing Co v Professional United World Travel Ass'n, 592 P 2d 586

Vt.—Springfield Co op Freeze Locker Plant v Wiggins, 63 A 2d 182, 115 Vt 445—T A Haugh Lumber Co v Drunkwine, 287 A 2d 560, 130 Vt 120

Va.—Mills v Moore's Super Stores, 227 S E 2d 719, 217 Va 276

Wash.—Simonson v "U" Dist Office Bldg Corp., 422 P 2d 1, 70 Wash 2d 35

Loan terminates, etc

Kan.—Mack-Welling Lumber & Supply Co v Bedore, 379 P 2d 545, 191 Kan 88

When operating under running account

Mo.—J R Meade Co v Forward Const Co., App., 526 S W 2d 21

page 648

52. U.S.—Randall v Colby, D C Iowa, 190 F Supp 319

56. Tenn.—Southern Blow Pipe & Roofing Co., v Grubb, supra, n 50

After completion of separate units in condominium

Cal.—E D McGillicuddy Const Co, Inc v Knoll Recreation Ass'n, Inc., 107 Cal Rptr 899, 31 CA 3d 891

58. Ga.—Associated Distributors, Inc v De La Torre, 225 S E 2d 462, 138 Ga App 71

Okla.—Palmer v Crouch, 298 P 2d 1041

Or.—Brown v Farrell, 483 P 2d 453, 258 Or 348

Pa.—Locket Lumber Co v Koczwar, 55 Lack Jur 178

Mich.—Hansen-Snyder Co v General Motors Corp., 124 N W 2d 286, 371 Mich 480

Neb.—Denver Wood Products Co v Frye, 275 N W 2d 67, 202 Neb 286

page 649

65. Md.—Accrocco v Fort Washington Lumber Co., 259 A 2d 60, 255 Md 682

Vt.—T A Haugh Lumber Co v Drunkwine, 287 A 2d 560, 130 Vt 120

70. Pa.—Wells v Paul, 32 Erie Co 181

71. Iowa.—Diecke v Lumber Supply, Inc., 149 N W 2d 822, 260 Iowa 470

Mo.—Home Bldg Corp v Ventura Corp., 568 S W 2d 769

72. Ark.—Arkansas Louisiana Gas Co v Moffitt, 436 S W 2d 91, 245 Ark 992, 51 A L R 2d 1078

Cal.—Benson Elec Co v Hale Bros Associates, Inc 55 Cal Rptr 73, 246 CA 2d 686

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La.—Duffy v Lagasse, App., 65 So 2d 337—Louisiana Plumbing & Heating, Inc v Miranne & Harris, Inc., App., 181 So 2d 261—Daigrepoint v Welch, App., 358 So 2d 1302, writ den., Sup., 360 So 2d 1178

page 650

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Kan.—Holiday Development Co, Inc v J A Tobin Const Co., 549 P 2d 1376, 219 Kan 701

Mo.—E C Robinson Lumber Co v Baugher, App., 258 S W 2d 259—Jeff-Cole Quarries, Inc v Bell, 454 S W 2d 5

Neb.—Stoltenberg v Caffrey, 141 N W 2d 458, 180 Neb 113

N.J.—Baldyga Const Co, Inc v Hurff, 417 A 2d 110, 174 N J Super 616

74. Cal.—Benson Elec Co v Hale Bros Associates, Inc., 55 Cal Rptr 73, 246 CA 2d 686—Scott, Blake and Wynne v Summit Ridge Estates, Inc., 59 Cal Rptr 587, 251 CA 2d 347—Howard A Denson & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 CA 3d 742

Mo.—Home Bldg Corp v Ventura Corp., 568 S W 2d 769

Or.—Farrell v Lacey, 507 P 2d 31, 264 Or 505

Utah.—Smith Bros Lumber Co v Johnson, 426 P 2d 811, 19 Utah 2d 107

76. Ohio.—Settle Builders Supply Co v Frankel-Shore Partnership, 326 NE 2d 271, 42 Ohio Misc 13

77. Ariz.—Ray Suter & Son Const Co v Allied Contract Buyers, 476 P 2d 524, 13 Ariz App 318

Nev.—Vaughn Materials Co v Meadowvale Homes, 438 P 2d 822, 84 Nev 227

78. Colo.—Bulow v Ward Terry & Co., 396 P 2d 232, 155 Colo 560

§ 140. — Before or After Certain Date in General**Library References**

Mechanics' Liens ¶132

page 651

82. Ariz.—Lewis v Midway Lumber, Inc., App., 561 P 2d 750, 114 Ariz 426

Colo.—Lierz v Cook, 315 P 2d 535, 136 Colo 221

Ga.—Athens Lumber Co v Burton, 66 S E 2d 124, 84 Ga App 249

Kan.—Logan Moore Lumber Co v Black, 347 P 2d 438, 185 Kan 644, 81 A L R 2d 671

La.—DeFrances Marble & Tile Co v Cox, App., 148 So 2d 83, writ den., Sup., 150 So 2d 583, 244 La 114

Neb.—Muenchau v Swartz, 102 N W 2d 129

Nev.—Pecole v Luce & Goodfellow, 212 P 2d 718, 66 Nev 360

Pa.—Gera v Nicodem, 32 West Co 252—Tage v Cambruzzi, 35 West Co 55

From date of acceptance

Cal.—Clements v T R Bechtel Co., 273 P 2d 5, 43 C 2d 227

Filing held not timely

Colo.—Graham v Brenden, 349 P 2d 702, 142 Colo 88

Ind.—Ellis v Auch, 118 NE 2d 809, 124 Ind App 454

Tex.—Berger Engineering Co v Village Casual, Inc., Civ App., 576 S W 2d 649

83. Minn.—W B Martin Lumber Co v Noss, 99 N W 2d 65, 256 Minn 471

86. Minn.—Sterling Elec Co v Kent, 45 N W 2d 709, 233 Minn 31

§ 141. — Accrual or Maturity of Indebtedness

87. Md.—Brosius Homes Corp v Bennett, 96 A 2d 612, 202 Md 433

Mo.—Vasquez v Village Center, Inc., 362 S W 2d 588

N.M.—Hill v Long, 299 P 2d 472, 61 N M 299

N.Y.—Crislo Bros Petroleum Co v Kyne Realty Corp., 216 N Y S 2d 269, 30 Misc 2d 702

Vt.—Springfield Co-op Freeze Locker Plant v Wiggins, supra, n 50

88. Pa.—Halowich v Ammun, 18 D & C 2d 306, 22 Fay L J 24, affd 154 A 2d 406, 190 Pa Super 314

89. Colo.—Sperry & Mock, Inc v Security Sav and Loan Ass'n, 549 P 2d 412, 37 Colo App 357

page 652

90. W Va.—Southern Erectors, Inc v Olga Coal Co., 223 S E 2d 46, 159 W Va 385

Suit timely

Ind.—Gooch v Hatt, 337 NE 2d 585, 166 Ind App 521

Suit not timely

La.—Pharr Bros, Inc v Today, Inc., App., 323 So 2d 866

91. U.S.—Mullins v. Noland Co., D C Ga., 406 F Supp 206

Ind.—Van Wells v Stanray Corp., 341 NE 2d 198, 168 Ind App 35

Ohio.—Settle Builders Supply Co v Frankel-Shore Partnership, 326 NE 2d 271, 42 Ohio Misc 13

Page 652

Vt.—Springfield Co-op Freeze Locker Plant v Wiggins, supra, n 50

92. Mo.—J R Meade Co v Forward Const Co, App, 526 S W 2d 21

Action held sufficient compliance

Okl.—Acme Glass Co v Owens, 232 P 2d 624, 204 Okl 601

4. Tex.—Royal Palms Corp v A Minella Plumbing Supplies, Inc, Civ App, 355 S W 2d 585

6. N Y.—Application of Delaware Towers, Inc, 245 N Y S 2d 26, 40 Misc 2d 401

§ 142. — Completion of Building or Improvement

7. Alaska.—Frontier Rock & Sand, Inc v Heritage Ventures, Inc, 607 P 2d 364

Del.—Stockman v McKee, 71 A 2d 875, 6 Terry 274

Fla.—Miller Elec Co of Miami, Inc v Sweeney, App, 199 So 2d 734

Ga.—Wall v Mills, 190 S E 2d 146, 126 Ga App 149

Ill.—Dougherty-Janssen Co v Damage Enterprises, Inc, 400 NE 2d 1023, 36 Ill Dec 443, 80 Ill App 3d 1112

La.—Queyda Lumber Yard v Renwald, App, 91 So 2d 39—McChill Corp v Dolese Concrete Co, App, 201 So 2d 123—Chambers v Ziegler, App, 207 So 2d 262—Albert K Newlin, Inc v Weingarten's Markets Realty Co, App, 253 So 2d 594—Keller Bldg Products of Baton Rouge, Inc v Siegen Development, Inc, App 312 So 2d 182, writ den, Sup, 314 So 2d 736

Minn.—Sterling Elec Co v Kent, 45 N W 2d 709, 233 Minn 31

N C.—Equitable Life Assur Soc of U S v Beasight, 67 S E 2d 390, 234 N C 347

Pa.—Herr v Mann, 53 Lanc L Rev 171

Va.—Hadrup v Sale, 111 S E 2d 405, 201 Va 421, 76 A L R 2d 1159—Northern Virginia Sav & Loan Ass'n v J B Kendall Co, 135 S E 2d 178, 205 Va 136

Wash.—Wells v Scott, 454 P 2d 378, 75 Wash 2d 922

Wyo.—Sawyer v Sawyer, 335 P 2d 794, 79 Wyo 489—Frontier Plumbing & Heating Co v Fitch, 480 P 2d 398

Completion of "work of improvement"

Cal.—Scott, Blake and Wynne v Summit Ridge Estates, Inc, 59 Cal Rptr 587, 251 C A 2d 347

Ind.—Gooch v Hiatt, 337 N E 2d 585, 166 Ind App 521

Or.—Tri-City Bldg Center, Inc v Wagner, 548 P 2d 961, 274 Or 581

Statute construed

Ill.—Components, Inc v Walter Kamuba Realty Corp, 381 N E 2d 42, 21 Ill Dec 107, 64 Ill App 3d 140

Or.—State ex rel Nilsen v Hoff, 474 P 2d 11, 3 Or App 398

Tex.—Sixty-Seven Properties v Cuttanger Elec Contractors, Inc, Civ App, 536 S W 2d 268

page 653

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Mont.—Western Plumbing of Bozeman v Garrison, 556 P 2d 520, 171 Mont 85

10. Cal.—Century Superior Gunite, Inc v Rodriguez, 173 Cal Rptr 661, 118 C A 3d Supp 12

11. Requirement as setting outside limit on filing

Hawaii.—State Sav & Loan Ass'n v Kaunian Development Co, 445 P 2d 109, 50 Haw 540

12. N M.—Allsup Lumber Co v Continental Cas Co, 385 P 2d 625, 73 N M 64

18. Cal.—Scott, Blake and Wynne v Summit Ridge Estates, Inc, 59 Cal Rptr 587, 251 C A 2d 347—Howard A Deason & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 C A 3d 742

Wyo.—Sawyer v Sawyer 335 P 2d 794, 79 Wyo 489

Death of contractor

Ga.—Athens Lumber Co v Burton, 66 S E 2d 124, 84 Ga App 249

19. U S.—In re D L Bouldin Const Co, Inc, Bkrtcy Tenn, 6 B R 288

page 654

24. La.—Cain v Central Plumbing & Heating Co, App, 85 So 2d 376

26. U S.—In re D L Bouldin Const Co, Inc, Bkrtcy Tenn, 6 B R 288

N M.—Tabel Lumber Co v Baughman, 439 P 2d 706, 79 N M 57

27. Performance of all essentials

N M.—Tabel Lumber Co v Baughman, 439 P 2d 706, 79 N M 57

28. U S.—In re Hunt, Bkrtcy Tenn, 18 B R 504

La.—Louisiana Plumbing & Heating, Inc v Miranne & Harris, Inc, App, 181 So 2d 261

N M.—Tabel Lumber Co v Baughman, 439 P 2d 706, 79 N M 57

31. Ind.—Walker v Staitzer, 284 N E 2d 127, 152 Ind App 544

32. U S.—In re D L Bouldin Const Co, Inc, Bkrtcy Tenn, 6 B R 288

Ariz.—Hayward Lumber & Inv Co v Graham, 449 P 2d 31, 104 Ariz 103

La.—Louisiana Brick & Tile Corp v Browning, App, 343 So 2d 311

N M.—Tabel Lumber Co v Baughman, 439 P 2d 706, 79 N M 57

Ohio.—United Masonry, Inc v K W F, Inc, 241 N E 2d 912, 16 Ohio App 2d 77

Or.—Tri City Bldg Center, Inc v Wagner, 548 P 2d 961, 274 Or 581

Tenn.—First State Bank v Stacey, 261 S W 2d 245, 37 Tenn App 223, cert den 259 S W 2d 863, 195 Tenn 386

35. La.—Clegg Concrete, Inc v Kel-Bar, Inc, App, 393 So 2d 178, writ ref, Sup, 398 So 2d 531

Filing of lien after furnishing last piece of material

N M.—Skudmore v Eby, 262 P 2d 370, 57 N M 669

36. La.—Jonesboro State Bank v Tucker, App, 381 So 2d 578

page 655

37. Ariz.—Hayward Lumber & Inv Co v Graham, 449 P 2d 31, 104 Ariz 103

38. La.—Jonesboro State Bank v Tucker, App, 381 So 2d 578

39. Wash.—Frus v Brown, 224 P 2d 330, 37 Wash 2d 457

40. Colo.—Medical Arts Bldg v Ervin, 257 P 2d 969, 127 Colo 458

43. Cal.—M Arthur Gensler, Jr & Associates, Inc v Larry Barrett, Inc, 103 Cal Rptr 247, 499 P 2d 503, 7 C 3d 693

Colo.—First Nat Bank in Fort Collins v Sam McClure & Son, Inc, 431 P 2d 460, 163 Colo 473

45. N M.—Tabel Lumber Co v Baughman, 439 P 2d 706, 79 N M 57

Or.—Dallas Lumber & Supply Co v Phillips, 436 P 2d 739, 249 Or 58

Not conclusive

Or.—Consolidated Elec Distributors, Inc v Jepsen, Elec Contracting, Inc, 537 P 2d 80, 272 Or 376

Partial occupation and use sufficient

Ariz.—Union Rock & Materials Corp v Scottsdale Conference Center, App, 678 P 2d 453, 139 Ariz 268

50. Work ordered subsequent to occupation

La.—Albert K Newlin, Inc v Weingarten's Markets Realty Co, App, 253 So 2d 594

52. Cal.—Howard A Deason & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 C A 3d 742

page 656

56. Cal.—Fidelity Sound Systems, Inc v American Bonding Co, 149 Cal Rptr 674, 85 C A 3d Supp 13

58. Cal.—Gary C Tanko Well Drilling, Inc v Dadda, 172 Cal Rptr 829, 117 C A 3d 588

Premature filing of notice of completion

Cal.—Scott, Blake and Wynne v Summit Ridge Estates, Inc, 59 Cal Rptr 587, 251 C A 2d 347—Howard A Deason & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 C A 3d 742

Not exclusive or conclusive test of completion

Or.—Dallas Lumber & Supply Co v Phillips, 436 P 2d 739, 249 Or 58

59. Cal.—Doherty v Carruthers, 340 P 2d 58, 171 C A 2d 214

Cal.—Howell v Gunderson, 58 Cal Rptr 553, 250 C A 2d Supp 961

60. La.—National Sur Corp v Colquitt, App, 246 So 2d 890, application den 249 So 2d 201, 259 La 57

Notice invalid

U S.—In re Just For The Fun of It of Tennessee, Inc, Bkrtcy Tenn, 7 B R 166

§ 143. — Commencement of Work or of Furnishing Material

61. Cal.—Newt Olson Lumber Co v Cue, 232 P 2d 64, 104 Cal App 2d 477

Alternate provision

N C.—Equitable Life Assur Soc of U S v Beasight, supra, n 7

§ 144. — Completion, Abandonment, or Cessation of Contract, Work, or Furnishing of Materials

page 657

62. Ariz.—Lewis v Midway Lumber, Inc, App, 561 P 2d 750, 114 Ariz 426

Colo.—W B Barr Lumber Co v Thompson, 281 P 2d 1016, 131 Colo 347

Del.—Stockman v McKee, supra, n 7

Ga.—Vulcan Materials Co v D H Overmyer Warehouse Co, 156 S E 2d 213, 115 Ga App 792—Sears Roebuck & Co v Superior Rigging & Erecting Co, 170 S E 2d 721, 120 Ga App 412

Iowa.—Pay-N-Taket, Inc v Crooks, 145 N W 2d 621, 259 Iowa 719

La.—McGill Corp v Dolese Concrete Co, App, 201 So 2d 125

Me.—Marshall v Mathuen, 57 A 2d 400, 143 Me 167

Neb.—Lofholm v Stoltenberg, 133 N W 2d 387, 178 Neb 318

N J.—Rugberg v Narduc Development Corp, 136 A 2d 444, 47 N J Super 588

N C.—Lowery v Hathcock, 79 S E 2d 204, 239 N C 67—Mebane Lumber Co v Avery & Ballock Builders, Inc, 154 S E 2d 665, 270 N C 337

Pa.—Grayson v McAuley, 37 Del Co 34—Alan Porter Lee, Inc v Du-rnte Products Co, 43 Berks Co 49, revd on oth grds 79 A 2d 218, 366 Pa 548—South Hills Co v Kelly, 85 Pa Dist & Co 495, 101 Pittsb Leg J 327

Tex.—Reliable Life Ins Co v Brown & Root, Inc, Civ App, 607 S W 2d 621, err ref no rev err

Substantial completion

La.—Jeffer's Trust v Justice, App, 253 So 2d 234

Tenn.—Cooper v Hunter, App, 569 S W 2d 852

63. Cal.—Electric Supplies Distributing Co of San Diego, Inc v Imperial Hot Mineral Spa, 175 Cal Rptr 644, 122 C A 3d 131

Colo.—Lierz v Cook, 315 P 2d 535, 136 Colo 221

64. U S.—In re Mayer Central Bldg Corp, D C Ariz, 275 F Supp 873—York Corp v Brock, C A Fla, 405 F 2d 759

Ala—Home Federal Sav & Loan Ass'n v Williams, 158 So 2d 678, 276 Ala 37—Howell v Hallett Mfg Co., 178 So 2d 94, 278 Ala 316—Southern Sash of Huntsville, Inc v Jean, 235 So 2d 842, 285 Ala 705

Ark—Plant v Cameron Feed Mills, Inc., 309 S W 2d 312, 228 Ark 607

Colo—Kaibab Lumber Co v Osburne, 464 P 2d 294, 171 Colo 49

Del—Di Mond v S & S Builders, Inc., 124 A 2d 725, 11 Terry 123

Fla—Nathan v Chrycy, App., 107 So 2d 782

Ga—Ingram v Barfield, 55 S E 2d 725, 80 Ga App 276—Levy v GEC Corp., 161 S E 2d 339, 117 Ga App 673—Aurthorn Mfg Co v Continental Cas Co., 162 S E 2d 752, 118 Ga App 159—Sears Roebuck & Co v Superior Rugging & Erecting Co., 170 S E 2d 721, 120 Ga App 412

La—Rathborne Lumber & Supply Co v Falgout, 62 So 2d 507, 222 La 345—Cain v Central Plumbing & Heating Co., App., 85 So 2d 376—Hattiesburg Mfg Co v Pepe, App., 140 So 2d 449

Md—Harrison v Stouffer, 65 A 2d 895, 193 Md 46—District Heights Apartments, Section D-E v No-land Co., 95 A 2d 90, 202 Md 43, 39 A L R 2d 387—T Dan Kolker, Inc v Shure, 121 A 2d 223, 209 Md 290—Clark Certified Concrete Co v Lindberg, 141 A 2d 685, 216 Md 576

Mich—Droulard v Czerwinski, 116 N W 2d 776, 367 Mich 557

Minn—Rochester's Suburban Lumber Co v Siocumb, 163 N W 2d 303, 282 Minn 124—Albert & Harlow Inc v Great Northern Oil Co., 167 N W 2d 500, 283 Minn 246

Neb—Gatchell v Henderson, 54 N W 2d 227, 156 Neb 1—Gilest v Wright, 94 N W 2d 476, 167 Neb 767

N J—Rugberg v Nardue Development Corp., 136 A 2d 444, 47 N J Super 588

Ohio—Hoefler & Stocklen Co v Pioneer Bldgs of Ohio, App., 105 N E 2d 467—Clyburn v Reeves, 234 N E 2d 613, 13 Ohio App 2d 156

Okla—Acme Glass Co v Owens, 232 P 2d 624, 204 Okl 601

Pa—Stroke v McClarnan, 45 West 159

S C—Wood v Hardy, 110 S E 2d 157, 235 S C 131

Tex—Marks v Calcasieu Lumber Co, Civ App., 245 S W 2d 749, err ref no rev err—Newman v Coker, Civ App., 310 S W 2d 354

Wash—Anderson v Taylor, 347 P 2d 536, 55 Wash 2d 215, 78 A L R 2d 1161—Boase Cascade Corp v Pence, 394 P 2d 359, 64 Wash 2d 798

Absence of contract or recordation

(3) Hughes v Will, La App., 35 So 2d 241—R F Mestayer Lumber Co v Tessner, App., 101 So 2d 238

(7) Trouard v Calcasieu Bldg Materials, Inc., 62 So 2d 81, 222 La 1

Filing held within time

Ga—Hill v Dealers Supply Co., 120 S E 2d 879, 103 Ga App 846

La—Lard Elec Co, Inc v Miller & Associates Const Co., App., 267 So 2d 616

Mo—J R Meade Co v Forward Const Co., App., 526 S W 2d 21

Neb—Timmons v Nelson, 66 N W 2d 406, 159 Neb 193

Or—Tri-City Bldg Center, Inc v Wagner, 548 P 2d 961, 274 Or 581

Failure to obtain certificate of occupancy held not to effect time for filing

La—W M Bailey & Sons v Western Geophysical Co., App., 66 So 2d 424

Filing held not within time

Fla—Stern v Perma-Stress, Inc., App., 134 So 2d 509

La—Daupre v Welch, App., 358 So 2d 1302, writ den., Sup., 360 So 2d 1178

Ohio—State ex rel Alban v Kauer, 188 N E 2d 434, 116 Ohio App 412

Okla—Palmer v Crouch, 298 P 2d 1041

S D—McLaughlin Elec Supply v American Empire Ins Co., 269 N W 2d 766

Tenn—Cooper v Hunter, App., 569 S W 2d 852

page 658

67 U.S.—C.J.S. black letter summary quoted in U.S. to Use of Engineering & Equipment Co v Wyatt, D C Fla., 174 F Supp 260, 261

Ga—Sasser & Co v Griffin, 210 S E 2d 34, 133 Ga App 83

Kan—Holiday Development Co, Inc v J A Tobin Const Co., 549 P 2d 1376, 219 Kan 701

Md—Clark Certified Concrete Co v Lindberg, 141 A 2d 685, 216 Md 576

Minn—W B Martin Lumber Co v Noss, 99 N W 2d 65, 256 Minn 471

80 Fla—Aronson v Keating, App., 386 So 2d 822

Iowa—Casler Elec Co v Carlsen, 86 N W 2d 682

Kan—Benner-Williams, Inc v Romme, 437 P 2d 312, 200 Kan 483—Stuckney v Murdock Steel & Engineering, Inc., 512 P 2d 339, 212 Kan 653

Or—Mathis v Thunderbird Village, Inc., 389 P 2d 343, 236 Or 425

Mere retouching or correction held not "last labor performed"

La—Taylor Seidenbach, Inc v Healy, App., 90 So 2d 158

Clean up work

Mich—Blackwell v Bornstein, 299 N W 2d 397, 100 Mich App 550

81. Colo—Medical Arts Bldg v Ervin, supra, n 40

La—Electric Contracting Co v Brown, App., 39 So 2d 100

Resumption of work held not to revive right to file lien

Va—Northern Virginia Sav & Loan Ass'n v J B Kendall Co., 135 S E 2d 178, 205 Va 136

page 659

82. U.S.—In re Acco Const Co., D C Ill., 206 F Supp 419—In re California Steel Co., Birtney III, 21 B R 383

Ala—Shepherd Plumbing & Heating Co v Bedford, 135 So 2d 160, 273 Ala 87

Neb—Occidental Sav & Loan Ass'n v Cannon, 171 N W 2d 166, 184 Neb 659

Nev—Pecolce v Luce & Goodfellow, 212 P 2d 718, 66 Nev 360

N Y—Melniker v Grae, 439 N Y S 2d 409, 82 A D 2d 798

Pa—Mohler v Johnston, 51 Lanc Rev 395, 63 York Leg Rec 115, 15 Som Leg J 14—Johnson v Walker, 28 D & C 2d 625, 21 Law L J 177

83. Cal—Munger & Munger v McBratney, 280 P 2d 232, 131 C A 2d Supp 866

84. Ill—Components, Inc v Walter Kasuba Realty Corp., 381 N E 2d 42, 21 Ill Dec 107, 64 Ill App 3d 140

La—Gaston v Stover, App., 126 So 2d 360

85. La—Gaston v Stover, App., 126 So 2d 360

Tenn—Tindell Home Center, Inc v Union Peoples Bank of Anderson County, 543 S W 2d 843

86. Ohio—Settle Builders Supply Co v Frankel-Shore Partnership, 326 N E 2d 271, 42 Ohio Misc 13

87. D C—Malcolm Price, Inc v Sionne, App 308 A 2d 779, app after remand 339 A 2d 43

Iowa—Skemp v Olanusky, 85 N W 2d 580, 249 Iowa 1

La—Gaston v Stover, App., 126 So 2d 360

Mo—Maplewood Planning Mill & Stair Co v Pennant Const Co., App., 344 S W 2d 629

Tenn—Tindell Home Center, Inc v Union Peoples Bank of Anderson County, 543 S W 2d 843

No abandonment shown

Colo—Kahn v Spring Creek Village I, 563 P 2d 969, 38 Colo App 520

89. La—Romero & Sons Lumber Co v Babineaux, App., 151 So 2d 714

91. La—Trouard v Calcasieu Bldg Materials, Inc, supra, n 64—Gaston v Stover, App., 126 So 2d 360

Evidence of abandonment by owner

Va—Northern Virginia Sav & Loan Ass'n v J B Kendall Co., 135 S E 2d 178, 205 Va 136

Intent to abandon project required

La—First Wisconsin Nat Bank of Milwaukee v Novem, Inc., App., 349 So 2d 370

93. La—Romero & Sons Lumber Co v Babineaux, App., 151 So 2d 714

Pa—Merritt Lumber Yards, Inc v GEB Enterprises, Inc., 22 D & C 2d 39, 76 Montg 293

94. Ariz—Gene McVety, Inc v Don Grady Homes, Inc., 581 P 2d 1132, 119 Ariz 482

95. Colo—Kaibab Lumber Co v Osburne, 464 P 2d 294, 171 Colo 49

Mont—Western Plumbing of Bozeman v Garrison, 556 P 2d 520, 171 Mont 85

Neb—Occidental Sav & Loan Ass'n v Cannon, 171 N W 2d 166, 184 Neb 659

What constitutes

Ariz—Gene McVety, Inc v Don Grady Homes, Inc., 581 P 2d 1132, 119 Ariz 482

98. Neb—Occidental Sav & Loan Ass'n v Cannon, 171 N W 2d 166, 184 Neb 659

page 660

2. Ariz—Wahl v Southwest Sav & Loan Ass'n, 467 P 2d 930, 12 Ariz App 90, 52 A L R 3d 779, decision vac in part on oth grds 476 P 2d 836, 106 Ariz 381

Ohio—Quality Heating Supply Co v Buckeye Loan & Bldg Co., 148 N E 2d 88, 105 Ohio App 369

10. Ariz—Gene McVety, Inc v Don Grady Homes, Inc., 581 P 2d 1132, 119 Ariz 482

17. Cal—McGaw v Master Craft Homes, 233 P 2d 185, 105 C A 2d 304—A A Baxter Corp v Home Owners and Lenders, 86 Cal Rptr 854, 7 C A 3d 725

18. Cal—Howard A Deason & Co v Costa Terra Limited, 83 Cal Rptr 105, 2 C A 3d 742

page 661

23. Neb—Gatchell v Henderson, 54 N W 2d 227, 156 Neb 1

24. Conn—Backros, Inc v Davies, Cir A D., 199 A 2d 349, 2 Conn Cir 365

Testing and servicing installation

S D—Thorson v Pfeifer, 145 N W 2d 438, 82 S D 313

25. Pa—Johnson v Walker, 28 D & C 2d 625, 21 Law L J 177

26. Conn—Backros, Inc v Davies, Cir A D., 199 A 2d 349, 2 Conn Cir 365

Ind—Potter v Cline, 316 N E 2d 422, 161 Ind App 349

Kan—Benner-Williams, Inc v Romme, 437 P 2d 312, 200 Kan 483

Md—Goodman v Wmawohn, 241 A 2d 407, 249 Md 546

Or—Christenson v Behrens, 372 P 2d 494, 231 Or 458

Pa—Dahlhausen v Desobehmann, 69 Pa Dist & Co 459, 66 Montg Co 69

28. Minn—Kable v McClary, 96 N W 2d 243, 255 Minn 239

Neb—C.J.S. cited in Chicago Lumber Co of Omaha v Horner, 317 N W 2d 87, 90, 210 Neb 833

29. Minn—Kable v McClary, 96 N W 2d 243, 255 Minn 239

General purpose of contract as determining factor

Minn—New Pragus Lumber & Ready-Mix Co v Bastyr, 117 N W 2d 7, 263 Minn 249

30. Ill—Barker-Luben Co v Unknown Harn or Devens of Barker, 435 N E 2d 493, 61 Ill Dec 796, 106 Ill App 3d 89

31. Ariz—Gene McVety, Inc v Don Grady Homes, Inc., 581 P 2d 1132, 119 Ariz 482

Ga—Cherokee Culvert Co, Inc v Gurn, 265 S E 2d 106, 153 Ga App 296

Page 661

Ill—Arrow Lathing & Plastering, Inc v Schaulat Plumbing Supply Co, 228 N E 2d 209, 83 Ill App 2d 394

La—Jonesboro State Bank v Tucker, App, 381 So 2d 578

Md—District Heights Apartments, Section D-E v Noland Co, 95 A 2d 90, 202 Md 43, 39 A L R 2d 387

Minn—Barrett v Hampe, 53 N W 2d 803, 237 Minn 80—Kahle v McClary, 96 N W 2d 243, 255 Minn 239—New Prague Lumber & Ready-Mix Co v Bastry, 117 N W 2d 7, 263 Minn 249—Rochester's Suburban Lumber Co v Slocumb, 163 N W 2d 303, 282 Minn 124

S C—Hughes v Peel, 70 S E 2d 353, 221 S C 307 Wash—Hopkins v Smith, 276 P 2d 732, 45 Wash 2d 548

Lapse of time

(3) Other instances

Mo—A E Burk & Son Plumbing & Heating, Inc v Malan Const Co, App, 548 S W 2d 611

page 662

32. Ala—Shepherd Plumbing & Heating Co v Bedford, 135 So 2d 160, 273 Ala 87

33. Tex—First Nat Bank in Dallas v Whirlpool Corp, Civ App, 502 S W 2d 185, rev'd on oth grds, Sup, 517 S W 2d 262

Separate residential units of condominium

Cal—E D McOlliscuddy Const Co, Inc v Knoll Recreation Ass'n, Inc, 107 Cal Rptr 899, 31 C A 3d 891

34. Ark—Streuli v Walhn-Dickey & Rich Lumber Co, 302 S W 2d 522, 227 Ark 885

Ga—Sears Roebuck & Co v Superior Rigging & Erecting Co, 170 S E 2d 721, 120 Ga App 412

Mo—Trout's Investments, Inc v Davis, App, 482 S W 2d 510

Last item must be lienable

Ga—Downtown of Atlanta, Inc v Dunham-Bush, Inc, 170 S E 2d 590, 120 Ga App 342

page 663

44. Ariz—Gene McVety, Inc v Don Grady Homes, Inc, 581 P 2d 1132, 119 Ariz 482

Ga—Cherokee Culvert Co, Inc v Gurns, 265 S E 2d 106, 153 Ga App 296

Iowa—Caster Elec Co v Carlson, 86 N W 2d 682—Society Lanes v Wiboss, 113 N W 2d 603, 253 Iowa 953

La—C.J.S. quoted at length in Gaston v Stover, 126 So 2d 360, 362

Mont—Frank J Trunk & Son, Inc v DeHaan, 391 P 2d 353, 143 Mont 442—Tindall v Negard, 507 P 2d 845, 161 Mont 476

Neb—Gathell v Henderson, supra, n 23—Patterson v Spelts Lumber Co, 90 N W 2d 283, 166 Neb 692—LaPuzza v Prom Town House Motor Inn, Inc, 217 N W 2d 472, 191 Neb 687

N Y—Carillo Bros Petroleum Co v Kyne Realty Corp, 216 N Y S 2d 269, 30 Misc 2d 702

Ohio—Seattle Builders Supply Co v Frankel-Shore Partnership, 326 N E 2d 271, 42 Ohio Misc 13

S D—C.J.S. quoted in F H Peavey & Co v Whitman, 146 N W 2d 365, 82 S D 367

Wash—Hopkins v Smith, 276 P 2d 732, 45 Wash 2d 548

45. Ariz—Turf Irr & Water Works Supply Co v Lawyers Title of Phoenix, 535 P 2d 1311, 24 Ariz App 80

Ark—C.J.S. cited in Crump v Rodgers Co v Southern Implement Co, 316 S W 2d 121, 123, 229 Ark 285

Cal—Howard A Dession & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 C A 3d 742

Del—Paladinetti v Oak Lane Manor, 116 A 2d 173, 10 Terry 324, aff'd 124 A 2d 725, 11 Terry 123

Ind—Potter v Cline, 316 N E 2d 422, 161 Ind App 349

Md—District Heights Apartments, Section D-E v Noland Co, supra, n 31—Johnson v Metcalfe, 121 A 2d 825, 209 Md 537

Mo—Davidson v Fisher, App, 258 S W 2d 297 Neb—Stoltenberg v Caffrey, 141 N W 2d 458, 180 Neb 113

S D—C.J.S. quoted in F H Peavey & Co v Whitman, 146 N W 2d 365, 82 S D 367

Wash—King Equipment Co v R N & L Corp, 462 P 2d 973, 1 Wash App 487

46. Or—Farrell v Lacey, 507 P 2d 31, 264 Or 505

Second contract with owner

Nev—Vaughn Materials Co v Meadowvale Homes, 438 P 2d 822, 84 Nev 227

50. Md—Back v Reisterstown Lumber Co, 332 A 2d 30, 24 Md App 415

Okla—Cushing Country Club v Boardman Co, 381 P 2d 856

page 664

52. Ohio—Talco Capital Corp v State Underground Parking Commission, 324 N E 2d 762, 41 Ohio App 2d 171

54. Rule inapplicable

(2) S D—F H Peavey & Co v Whitman, 146 N W 2d 365, 82 S D 367

55. N J—Rugberg v Narduc Development Corp, 136 A 2d 444, 47 N J Super 588

58. Okla—Cushing Country Club v Boardman Co, 381 P 2d 856

Wash—Hopkins v Smith, 276 P 2d 732, 45 Wash 2d 548

§ 145. Mode and Sufficiency of Filing and Recording

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Mechanics' Liens ¶155

59. Nev—S and S Carpets v Valley Bank of Nevada, 576 P 2d 750, 94 Nev 165

Tenn—Chattanooga Lumber & Coal Corp v Phillips, 304 S W 2d 82, 202 Tenn 266

61. Pa—Oyer v Coble, 71 Pa Dist & Co 293, 2 Lebanon 282

page 665

68. N C—Saunders v Woodhouse, 91 S E 2d 701, 243 N C 608

Lien invalid

Or—Pendleton Grain Co, Inc v Sunbest Corp, 530 P 2d 82, 271 Or 82

73. Tex—Rhem Acceptance Corp v Rowe, Civ App, 332 S W 2d 353, err ref no rev err

page 666

86. Pa—Universal Builders Supply Co v Zychowski, 72 Pa Dist & Co 331, 32 West Co 181

Indexing held sufficient compliance

N C—Saunders v Woodhouse, 91 S E 2d 701, 243 N C 608

Inconsistent recitals held immaterial with respect to notice

N C—Saunders v Woodhouse, 91 S E 2d 701, 243 N C 608

87. Pa—Universal Builders Supply Co v Zychowski, supra, n 86—Drummond v Marmo, 107 P L J 12

§ 146. Notice of Filing or Service of Copy of Claim

88. Colo—Bulow v Ward Terry & Co, 396 P 2d 232, 155 Colo 560

Pa—Hosack v Landy Towel and Service, Inc, 7 D & C 2d 39, 55 Lanc Rev 87

89. Kan—Jones v Lustig, 341 P 2d 1018, 185 Kan 208—Toler v Satterthwaite, 434 P 2d 814, 200 Kan 103

Ohio—In re Assignment for the Benefit of Creditors of Don Evans, Inc, 157 N E 2d 766

90. Pa—Montgomery v Pascogio, 11 Chest 50

91. Resident owner

(3) Other instances

Ohio—Edgemont Coal & Cement Co v Gaylor, 133 N E 2d 651, 100 Ohio App 42

92. Pa—Littler v Bennett, 39 West 285—Kauffman v Chapelaki, 33 D & C 2d 16, 36 Northumb L J 29

page 667

93. No prescribed form for demand

Mich—Bob Ryan, Inc v Walker Drywall Co, 236 N W 2d 115, 64 Mich App 497

94. Pa—Sabo v Leonard Development Corp, 36 North 309

Notice held insufficient

Pa—Sabo v Kurland, 22 D & C 2d 221, 29 Leh L J 102

95. Mich—Bob Ryan, Inc v Walker Drywall Co, 236 N W 2d 115, 64 Mich App 497

Pa—Rooney v Alberts, 99 Pittsb Leg J 554—Shoemaker v Zerby, 10 D & C 2d 227, 18 Som 358, 39 West 83—Sabo v Leonard Development Corp, 36 North 309

96. Kan—Don Conroy Contractor, Inc v Jensen, 387 P 2d 187, 192 Kan 300

Okla—Curry v Morgan, 321 P 2d 973

98. Fla—Protection House, Inc v Davenport and Associates, App, 167 So 2d 65—Moretrench Corp v Bronson & Veal Enterprises, Inc, App, 262 So 2d 206

99. Kan—Jones v Lustig, 341 P 2d 1018, 185 Kan 208

Md—William Penn Supply Corp v Watterson, 146 A 2d 420, 218 Md 291

Ohio—In re Assignment for the Benefit of Creditors of Don Evans, Inc, 157 N E 2d 766

Pa—Oyer v Coble, supra, n 61—Clayton v Bachman, 1 Bucks Co L R 202—Menne Lumber Co v Kardon, 105 P L J 30—Montgomery v Pascogio, 11 Chest 50—Winegar v Bente, 39 D & C 2d 558, 48 West 89

8. La—Harding v Watigny, App, 62 So 2d 190

9. Purpose of requirement for registered mail

Fla—Vitro-Spray of Fla, Inc v Gumensack, App, 144 So 2d 533

11. Pa—Day & Zimmermann, Inc v Blocked Iron Corp of America, 147 A 2d 332, 394 Pa 386—Lapides v Wellenbach, 9 D & C 2d 717, 43 Del 405—Laird Lumber Co v Bullock, 13 D & C 2d 236—Curdo v Breuninger, 10 Chest 350—Montgomery v Pascogio, 10 Chest 510

Effect of subsequent statute

Pa—Hoffman Lumber Co v Geesey, 35 D & C 2d 200, 12 Chest 375

page 668

12. Pa—Shoemaker v Zerby, 10 D & C 2d 227, 18 Som 358, 39 West 83—Menne Lumber Co v Kardon, 105 P L J 30—Day & Zimmermann, Inc v Blocked Iron Corp of America, 147 A 2d 332, 394 Pa 386—Shoemaker v Zerby, 10 D & C 2d 227, 18 Som 358, 39 West 83—Day & Zimmermann, Inc v Blocked Iron Corp of America, 15 D & C 2d 251—Montgomery v Pascogio, 10 Chest 510

14. Pa—Sabo v Leonard Development Corp, 36 North 309

Held not permissible under 1963 statute

Pa—Hoffman Lumber Co v Geesey, 35 D & C 2d 200, 12 Chest 375

§ 148. Renewal or Extension of Period in General

20. Colo—Kehn v Spring Creek Village I, 563 P 2d 969, 38 Colo App 550

21. Ind—Saint Joseph's College v Morrison, Inc 302 N E 2d 865, 158 Ind App 272
 NY—Bradley v Kostanowski, 101 N Y S 2d 767
 Tenn—Brunst v Graybeal Glass Co, Inc, App, 609 S W 2d 521

§ 149. —Doing or Furnishing Further Work or Materials

31. Ark—Arkansas Louisiana Gas Co v Moffitt, 436 S W 2d 91, 245 Ark 992, 51 A L R 3d 1078
 Fla—Finney v Barber Block Plant, Inc, App, 183 So 2d 698
 Idaho—Person v Sewell, 539 P 2d 590, 97 Idaho 38
 Ind—Ella v Auch, 118 N E 2d 809, 124 Ind App 454—Display Fixtures Co, a Div of Stenn Industries, Inc v R L Hatcher, Inc, App, 438 N E 2d 26
 Kan—Star Lumber & Supply Co v Mills, 349 P 2d 892, 186 Kan 204
 Ky—Cutanger v King, 240 S W 2d 608
 La—Electric Contracting Co v Brown, App, 39 So 2d 100—Munson v Rusinger, App, 114 So 2d 59—Louisiana Plumbing & Heating, Inc v Miranne & Harris, Inc, App, 181 So 2d 261
 Md—Harrison v Stouffer, 65 A 2d 895, 193 Md 46—District Heights Apartments, Section D-E v Noland Co, 95 A 2d 90, 202 Md 43, 39 A L R 2d 387—T Dan Koller, Inc v Shure, 121 A 2d 223, 209 Md 290—Resterstown Lumber Co v Reeder, 168 A 2d 385, 224 Md 499
 Minn—W B Martin Lumber Co v Noss, 99 N W 2d 65, 256 Minn 471—Rochester's Suburban Lumber Co v Slocumb, 163 N W 2d 303, 282 Minn 124
 NH—Tolles-Bickford Lumber Co v Tilton School, 94 A 2d 374, 98 N H 55
 NC—Priddy v Kernersville Lumber Co, 129 S E 2d 256, 258 N C 653
 Or—Brown v Farrell, 483 P 2d 453, 258 Or 348
 SD—Potter v Anderson, 178 N W 2d 743, 85 S D 142
 Utah—Palomba v D & C Builders, 452 P 2d 325, 22 Utah 2d 297
 Wash—Anderson v Taylor, 347 P 2d 536, 55 Wash 2d 215, 78 A L R 2d 1161

Testing and regulation

- (2) Other matters
 SD—Thornon v Pfeifer, 145 N W 2d 438, 82 S D 313
 No abandonment shown
 Colo—Kohn v Spring Creek Village I, 563 P 2d 969, 38 Colo App 550

page 669

32. Ga—Downtown of Atlanta, Inc v Dunham-Bush, Inc, 170 S E 2d 590, 120 Ga App 342
 Ind—Gooch v Hiatt, 337 N E 2d 585, 166 Ind App 521
 Me—Marshall v Mathieu, 57 A 2d 400, 143 Me 167
 Md—Harrison v Stouffer, supra, n 31
 Minn—Hayle Floor Covering, Inc v First Minnesota Const Co, 253 N W 2d 809
 Neb—Joyce Lumber Co v Djureen, 125 N W 2d 109, 176 Neb 86
 Wyo—Arch Sellers, Inc v Simpson, 360 P 2d 911
 34. La—Louisiana Plumbing & Heating, Inc v Miranne & Harris, Inc, App, 181 So 2d 261
 Md—Harrison v Stouffer, supra, n 31—Resterstown Lumber Co v Reeder, 168 A 2d 385, 224 Md 499
 37. Del—Byler v Suttles, 311 A 2d 872
 Ill—G S Lyon & Sons Lumber & Mfg Co v Ellis, 178 N E 2d 407, 33 Ill App 2d 398
 Md—Resterstown Lumber Co v Reeder, 168 A 2d 385, 224 Md 499
 38. Md—Resterstown Lumber Co v Reeder, 168 A 2d 385, 224 Md 499
 40. Me—Marshall v Mathieu, supra, n 32
 Neb—Lofholm v Stoltenberg, 133 N W 2d 387, 178 Neb 318—Stoltenberg v Caffrey, 141 N W 2d 458, 180 Neb 113
 NJ—Rigberg v Narduc Development Corp, 136 A 2d 444, 47 N J Super 588

- NY—Nelson v Schrank, 75 N Y S 2d 761, 273 App Div 72—Locke v Goode, 174 N Y S 2d 435, 10 Misc 2d 65—Cirillo Bros Petroleum Co v Kyne Realty Corp, 216 N Y S 2d 269, 30 Misc 2d 702
 41. Kan—Seyb-Tucker Lumber & Implement Co v Hartley, 415 P 2d 217, 197 Kan 58
 Utah—Palomba v D & C Builders, 452 P 2d 325, 22 Utah 2d 297

page 670

43. NY—Shehadi v MSA Enterprises, Inc, 399 N Y S 2d 773, 59 A D 2d 1031
 44. Ala—W E Owens Lumber Co v Holmes, 173 So 2d 99, 277 Ala 557
 Ariz—Turf Irr & Water Works Supply Co v Lawyers Title of Phoenix, 535 P 2d 1311, 24 Ariz App 80
 Ark—Southern Lumber Co v Riley, 273 S W 2d 848, 224 Ark 298
 La—Romero & Sons Lumber Co v Babineaux, App, 151 So 2d 714
 Neb—Gatchell v Henderson, 54 N W 2d 227, 156 Neb 1—Lofholm v Stoltenberg, 133 N W 2d 387, 178 Neb 318
 Okl—H E Leonhardt Lumber Co v Ed Wamble Distributing Co, 378 P 2d 771
 46. Md—Resterstown Lumber Co v Reeder, 168 A 2d 385, 224 Md 499
 Mont—Leigland v McGaffick, 338 P 2d 1037, 135 Mont 188
 47. Ark—Turner-McCoy, Inc v Hardy, 323 S W 2d 562, 230 Ark 410
 La—Albert K Newlin, Inc v Weingarten's Markets Realty Co, App, 253 So 2d 594
 48. Compliance shown
 Mo—A E Burk & Son Plumbing & Heating, Inc v Malan Const Co, App, 548 S W 2d 611
 49. Md—Harrison v Stouffer, supra, n 31
 Mich—People for Use and Benefit of Catsman Coal Co v Michigan Sur Co, 83 N W 2d 585, 348 Mich 658
 NJ—Rigberg v Narduc Development Corp, 136 A 2d 444, 47 N J Super 588
 NC—Priddy v Kernersville Lumber Co, 129 S E 2d 256, 258 N C 653

page 671

50. Alaska—Stephenson v Ketchikan Spruce Mills, Inc, 412 P 2d 496
 Kan—Ottawa Plumbing, Heating & Air Conditioning, Inc v Moore, 372 P 2d 1011, 190 Kan 201—Berthot v Strobe, 494 P 2d 1133, 208 Kan 839
 Md—Mt Ary Plumbing & Heating, Inc v Grey Dawn Development Co, 205 A 2d 299, 237 Md 38
 51. Storage of machinery
 Fla—Cross State Development Co v Indepco Const Co, Inc, App, 346 So 2d 127
 52. Del—C J S et al in Jones v Julian, 195 A 2d 388, 390, 6 Storev 587
 Kan—Stuckney v Murdock Steel & Engineering, Inc, 512 P 2d 339, 212 Kan 653
 Mont—Hammond v Knevel, 378 P 2d 388, 141 Mont 433
 53. Or—Farrell v Lacey, 507 P 2d 31, 264 Or 505
 55. Mass—International Tel & Tel Corp v Hartford Acc & Indem Co, 257 N E 2d 787, 357 Mass 282
 56. Kan—Berthot v Strobe, 494 P 2d 1133, 208 Kan 839
 Md—Mt Ary Plumbing & Heating, Inc v Grey Dawn Development Co, 205 A 2d 299, 237 Md 38
 Wash—American Sheet Metal Works, Inc v Haynes, 407 P 2d 429, 67 Wash 2d 153
 57. Alaska—Stephenson v Ketchikan Spruce Mills, Inc, 412 P 2d 496
 Mont—Walsh-Anderson Co v Keller, 362 P 2d 533, 139 Mont 210
 NC—Priddy v Kernersville Lumber Co, 129 S E 2d 256, 258 N C 653

60. Md—Mt Ary Plumbing & Heating, Inc v Grey Dawn Development Co, 205 A 2d 299, 237 Md 38

- Minn—W B Martin Lumber Co v Noss, 99 N W 2d 65, 256 Minn 471

61. La—W M Bailey & Sons v Western Geophysical Co, App, 66 So 2d 424

- Minn—Kable v McClary, 96 N W 2d 243, 255 Minn 239

- Or—Christenson v Behrens, 372 P 2d 494, 231 Or 458—Mercer Steel Co v Park Const Co, 411 P 2d 262, 242 Or 596—Consolidated Elec Distributors, Inc v Jepsen Elec Contracting, Inc, 537 P 2d 83, 272 Or 384

- Pa—Anastasi v Brunet, 90 A 2d 636, 171 Pa Super 464

Work held not trivial or inconsequential

- Idaho—Crug H Hsuw, Inc v Bishop, 504 P 2d 818, 95 Idaho 145

- Nev—Pecolle v Luce & Goodfellow, 212 P 2d 718, 66 Nev 360

62. Or—Christenson v Behrens, 372 P 2d 494, 231 Or 458

63. US—Sandusky Foundry & Machine Co v City of Wickliffe, C A Ky, 483 F 2d 695

- Ind—C J S quoted in Miller Monuments, Inc v Asbestos Insulating & Roofing Co, 185 N E 2d 533, 536, 134 Ind App 48

- Wash—Powell v Kier, 265 P 2d 1059, 44 Wash 2d 174

64. Fla—Adobe Brick & Supply Co v Centex-Winston Corp, App, 270 So 2d 753

- Ind—C J S quoted in Miller Monuments, Inc v Asbestos Insulating & Roofing Co, 185 N E 2d 533, 536, 134 Ind App 48

- Md—Harrison v Stouffer, supra, n 31

page 672

67. Wash—Wells v Scott, 454 P 2d 378, 75 Wash 2d 922

Independent guarantee

- NY—Cirillo Bros Petroleum Co v Kyne Realty Corp, 216 N Y S 2d 269, 30 Misc 2d 702

70. La—Electric Contracting Co v Brown, supra, n 31

71. Del—Van Den Heuvel v Wissluak, Super, 104 A 2d 381, 9 Terry 377

§ 150. General Rules

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- NC—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 S E 2d 665, 270 N C 337

- Pa—Fitzpatrick v Howes, 76 Pa Dist & Co 343—Hanes v Murphey, 105 P L J 453

- Claims, notices, or statements held sufficient
 Ill—Lundy v Boyle Industries, Inc, 361 N E 2d 321, 5 Ill Dec 182, 46 Ill App 3d 809

- La—Paul E Riviere, Inc v Universal Excavators, Inc, App, 358 So 2d 670

- Neb—Vince Kess, Inc v Krueger Const Co, 276 N W 2d 669, 202 Neb 673

- N M—Daughtrey v Carpenter, 477 P 2d 807, 82 N M 173

- Pa—Everts & Overdeer, Inc, v Armstrong Hotel Corp, 57 Lanc Rev 365—Bowden & Northrup v Sobocki, 56 Luz L Reg 129

74. Cal—Lanin v Sargeant, 232 P 2d 878, 105 C A 2d 76

- Fla—Mid-State Contractors, Inc v Halo Development Corp, App, 342 So 2d 1078

- Mo—Hertel Elec Co v Gabriel, App, 292 S W 2d 95

Page 672

NY—Blackman-Shapiro Co v Salzberg, 168 NYS 2d 690, 8 Misc 2d 972—Corina Associates, Inc v McManus, Longe, Brockwehl, Inc, A D, 330 NYS 2d 847, 39 A D 2d 613
Pa—Matland v Bolen, 67 York Leg Rec 174

page 673

75. US—Sullera & Hoss, Inc v Farvour, D C Alaska, 117 F Supp 535, 14 Alaska 492
La—Highland Lumber & Supply Co v Young, App, 38 So 2d 638—I-10, Inc v Justice, App, 260 So 2d 89
Nev—Pecole v Luce & Goodfellow, supra, n 61
Pa—Hedden v Major, 41 Luz Leg Rec 26—Smegel v Seman, 53 Lack Jur 170—Mattholi v Luciw, 4 D & C 2d 387

Substantial compliance exists, etc.

Pa—Marchak v McClure, 108 A 2d 77, 176 Pa Super 381
76. Fla—Yell-For-Pennell, Inc v Joab, Inc, App, 243 So 2d 438
84. Ala—Lindsey v Rogers, 69 So 2d 445, 260 Ala 231

Statements held sufficient

Kan—Houston Lumber Co of Russell v Morris, 297 P 2d 165, 179 Kan 564
Mass—International Tel & Tel Corp v Hartford Acc & Indem Co, 257 NE 2d 787, 357 Mass 282
Mont—Cole v Hunt, 211 P 2d 417, 123 Mont 256
Pa—Riley v Caltagione, 68 York Leg Rec 141

Statement held insufficient

NY—Hizenrad v Brendel, 139 NYS 2d 688
89. Pa—Dickson v Ness, 8 Chest 422
94. La—Hughes v Will, App, 35 So 2d 241
Mont—Cole v Hunt, supra, n 84
95. Ohio—Love Lumber Co v Reaser, 212 NE 2d 635, 4 Ohio App 2d 354

page 674

96. Pa—Root v Olive, 52 Lack Jur 75
6. Pa—Associated Bldg Contractors v Lantz, 59 Dauph Co 217—Fritter v neff, 69 Montg Co 158—Marshall v Vikara, 48 Luz L Reg 37
7. Pa—Marshall v Vikara, 48 Luz L Reg 37
11. Pa—Marchak v McClure, 108 A 2d 77, 176 Pa Super 381

Bill of particulars attached to claim

Pa—Yanko v Donaldson, 31 North Co 169

§ 151. Statement of Claim of Lien in General

page 675

26. Ariz—Phoenix Title & Trust Co v Garrett, 237 P 2d 470, 73 Ariz 55

§ 152. Accrual of Lien

30. Ga—Lowe's of Savannah, Inc v Jarrell, 257 S E 2d 341, 150 Ga App 220
Md—Palmer Park Limited Partnership v Marvate, Inc, 257 A 2d 169, 255 Md 121
31. NY—R-G Equipment Corp v Gursha, 303 NYS 2d 275, 60 Misc 2d 240
34. NY—Application of Koch, 98 NYS 2d 109—Empire Pile Driving Corp v Hylan Sanitary Service, 300 NYS 2d 434, 32 A D 2d 563

§ 153. Amount Due or to Become Due

40. Conn—Howell v DiStasi, Cir A D, 252 A 2d 308, 5 Conn Cir 346
Fla—C.J.S. quoted at length in Mid-State Contractors, Inc v Halo Development Corp, App, 342 So 2d 1078, 1080
Ga—J H Morris Bldg Supplies v Brown, 264 S E 2d 9, 245 Ga. 178, on remand 270 S E 2d 92, 154 Ga App 481

Ind—Saint Joseph's College v Morrison, Inc, 302 NE 2d 865, 158 Ind App 272
NY—Empire Pile Driving Corp v Hylan Sanitary Service, 300 NYS 2d 434, 32 A D 2d 563

Just and true account

(2) Other matters

Mo—Wadsworth Homes, Inc v Wood ridge Corp, App, 358 S W 2d 288

page 676

42. Conn—Howell v DiStasi, Cir A D 252 A 2d 308, 5 Conn Cir 346
46. Iowa—J K & W H Gilcrest Co v A & R Concrete Co, 112 NW 2d 366, 253 Iowa 332
Mich—Superior Products Co v Merucan Bros, Inc, 309 NW 2d 188, 107 Mich App 153
NY—Meo v Skellyway Const Co, 290 NYS 2d 516, 30 A D 2d 606
47. Pa—Stockard v Graham, 6 Chest Co 165—Giansante v Pascuzzo, 34 D & C 2d 554, affd 206 A 2d 340, 205 Pa Super 28
49. Tex—Gevinson v Stephen-Leedom Carpet Co, Civ App, 368 S W 2d 700

The failure to designate the amount due on each building, if two or more buildings are involved in one mechanic's lien claim, does not affect the validity of the lien, but simply affects its priority⁵⁴

54.4 N M—Allsop Lumber Co v Continental Cas Co, 385 P 2d 625, 73 N M 64
57. Ark—Lyman Lamb Co v Arkansas Shell Homes, Inc, 406 S W 2d 708, 241 Ark 83
Minn—Delyea v Turner, 118 NW 2d 436, 264 Minn 169
Mo—Bremer v Mohr, App, 478 S W 2d 14
NY—Application of Upstate Builders Supply Corp, 325 NYS 2d 509, 37 A D 2d 901, app dismissed 280 NE 2d 889, 30 NY 2d 515, 330 NYS 2d 62

page 677

61. Mont—Hammond v Knevel, 378 P 2d 388, 141 Mont 433
Or—J W Copeland Yards v Phillips, 550 P 2d 438, 275 Or 193
Facts held not to show fraud or bad faith
(3) Cal—B & J Const Co v Spacious Homes, Inc, 22 Cal Rptr 41, 204 C A 2d 216
65. Minn—Delyea v Turner, 118 NW 2d 436, 264 Minn 169
Mont—Duval v Fuchs, 375 P 2d 541, 141 Mont 123
NY—Frederick J Fox Const Corp v Hahkman, 88 NYS 2d 156—Roberg v Eryan, Inc, 163 NYS 2d 729, 7 Misc 2d 851

Civil liability of lienor

NY—Durand Realty Co v Stolman, 94 NYS 2d 358, 197 Misc 208, affd 113 NYS 2d 644, 280 App Div 644, Hansen Excavating Co v Benjamin 233 NYS 2d 589, 36 Misc 2d 686

§ 154. — Credits and Offsets

66. Or—J W Copeland Yards v Phillips, 550 P 2d 438, 275 Or 193

page 678

71. Md—Renterstown Lumber Co v Reeder, 168 A 2d 385, 224 Md 499
Pa—Mongelli v Schwartz, 45 Del Co 189
74. Pa—Craspo v Horter Bldg Corp 76 Montg 433
75. Pa—Merritt Lumber Yards, Inc v Gavin, 7 Chest 262
76. Statement required by statute although no credits or offsets exist
(2) Other matters
Tex—Gevinson v Stephen-Leedom Carpet Co, Civ App, 368 S W 2d 700

Tex—Lebo v Dochen, Civ App, 310 S W 2d 715, err ref no rev err

77. Mo—Continental Elec Co v Ebco, Inc, App, 365 S W 2d 746, transf to, Sup, 375 S W 2d 134
82. Under some statutes a finding of actual intent to defraud is required to vitiate lien
Cal—B & J Const Co v Spacious Homes, Inc, 22 Cal Rptr 41, 204 C A 2d 216
83. Facts held not to indicate fraud
Cal—B & J Const Co v Spacious Homes, Inc, 22 Cal Rptr 41, 204 C A 2d 216

§ 155. — Apportionment between Buildings or Improvements

page 679

98. US—Matter of Argonne Const Co, Inc, Bkrtcy III, 10 BR 570
Ill—Condee, Inc v Chrisman, 348 NE 2d 461, 38 Ill App 3d 729
99. Lien invalid
Va—United Masonry, Inc v Jefferson Mews, Inc, 237 S E 2d 171, 218 Va 360
3. Del—Warner Co v Leedom Const Co, Super, 93 A 2d 316, 8 Terry 457, affd, Sup, 97 A 2d 884, 9 Terry 58—Di Mondri v S & S Builders, Inc, 124 A 2d 725, 11 Terry 123

Statute held not complied with

(2) Other cases

Del—Warner Co v Leedom Const Co, supra, n 3—Warner Co v Leedom Const Co, 97 A 2d 884, 9 Terry 58
Pa—Wilke v Chambers, 4 Chest Co 336
5. Utah—Utah Sav and Loan Ass'n v Mecham, 366 P 2d 598, 12 Utah 2d 335, 15 A L R 3d 63
6. Or—Consolidated Elec Distributors, Inc v Jepsen Elec Contracting, Inc, 537 P 2d 80, 272 Or 376
10. Ariz—Michael Weller, Inc v Aetna Cas & Sur Co, App, 614 P 2d 865, 126 Ariz 323
Wis—Stevens Const Corp v Draper Hall, Inc, 242 NW 2d 893, 73 Wis 2d 104
11. Wis—Stevens Const Corp v Draper Hall, Inc, 242 NW 2d 893, 73 Wis 2d 104
16. Pa—Michael Roofing Co v Macrides, 54 Lanc L Rev 79
18. Utah—Utah Sav and Loan Ass'n v Mecham, 366 P 2d 598, 12 Utah 2d 335, 15 A L R 3d 63

§ 156. Name, Address, and Status of Claimant

Library References

Mechanics' Liens ⇨185.

page 680

22. US—In re Johnson, Inc, Bkrtcy Ohio, 19 BR 706, on reconsideration 21 BR 90
Fla—Marion v Comsky, App, 341 So 2d 1040
NY—Agnello v Chaika, 149 NYS 2d 119, 1 Misc 2d 6, affd 150 NYS 2d 581, 1 A D 2d 939
23. Conn—City Iron Works, Inc v Frank Badstuber Post No 2090, 167 A 2d 462, 22 Conn Sup 230
Ind—Kendall Lumber & Coal Co v Roman, 91 NE 2d 187, 120 Ind App 368
N M—C.J.S. cited in Marsh v Coleman, 600 P 2d 271, 273, 93 NM 325
26. Foreign corporation
(1) NY—Application of Edmund J Rappoh Co, 169 NYS 2d 376, 5 A D 2d 758
(5) Other statements
NY—Application of Artcourt Realty Corp, 242 NY S 2d 1, 39 Misc 2d 796, rearg 243 NY S 2d 733, 40 Misc 2d 712—Garden State Brickface Co v Artcourt Realty Corp, 243 NY S 2d 733, 40 Misc 2d 712
27. N M—Marsh v Coleman, 600 P 2d 271, 93 NM 325

- 29 Mont—Cascade Elec Co v Associated Creditors, 224 P 2d 146, 124 Mont 370
Ohio—Rebusco, Inc v Frick, 112 N E 2d 651, 159 Ohio St 449

§ 157. Names of Encumbrancers or Other Lienors

page 681

- 33 Mo—J R Meade Co v Forward Const Co, App, 526 S W 2d 21
Utah—Buehner Block Co v Gleason, 310 P 2d 517, 6 Utah 2d 226

§ 158. Notice to Owner

35. In Pennsylvania

- (1) Pa—Marchak v McClure, 108 A 2d 77, 176 Pa Super 381—Manesiotis, Inc v Holanger, 16 Beaver Co Leg J 48—Mandos v Baptist Church of Phoenixville, 8 Chest 108—Giansante v Pascuzzo, 34 D & C 2d 554, aff'd 206 A 2d 340, 205 Pa Super 28
(2) Pa—Ziegler Lumber & Supply Co v Golden Triangle Development Co, Inc, 326 A 2d 524, 229 Pa Super 548

§ 159. Time of Filing

36. N.Y.—Piston v Lincoln Supply Co, 239 N.Y. S 2d 20, 37 Misc 2d 1003
Pa—S L Shanahan, Inc v Churgas, 84 Montg 24
Tex—Maryland Cas Co v Barron-Britton, Inc, Civ App, 327 S W 2d 769, aff'd, 336 S W 2d 622, 161 Tex 83

38. Mich—Bob Ryan, Inc v Walker Drywall Co, 236 N W 2d 115, 64 Mich App 497

§ 160. Nature of Improvement

page 682

45. Pa—Marchak v McClure, 6 Chest Co 90
51. Pa—Smegal v Seman, 53 Lack Jur 170—Manesiotis, Inc v Holanger, 16 Beaver Co Leg J 48—Pennsylvania Stone, Cement & Supply Co v Zankl, 54 Lanc Rev 345

§ 161. Description of Property or Improvement

55. Ind—Saint Joseph's College v Morrison, Inc, 302 N E 2d 865, 158 Ind App 272
Kan—C.J.S. quoted at length in Sutherland Lumber Co v Due, 512 P 2d 525, 528, 212 Kan 658
Ky—Central Contractors Service v Ohio County Stone Co, 255 S W 2d 17
Neb—Rosebud Lumber & Coal Co v Holms, 52 N W 2d 313, 155 Neb 459, reh den 53 N W 2d 82, 155 Neb 688
56. Pa—Locket Lumber Co v Koczwar, 55 Lack Jur 178
57. Ala—Tanner v Foley Bldg & Mfg Co, 48 So 2d 785, 254 Ala 476
Pa—Marchak v McClure, 108 A 2d 77, 176 Pa Super 381
Tex—Rheem Acceptance Corp v Rowe, Civ App, 332 S W 2d 353, err ref no rev err

page 683

58. W Va—Earp v Vanderpool, 232 S E 2d 513, 160 W Va 113, op concurred 314 S E 2d 390, 160 W Va 113, reh den

A substantial compliance, etc.

- N.Y.—Application of Geal Realty Corp, 171 N.Y.S 2d 551, 11 Misc 2d 274

Descriptions held sufficient

- U.S.—In re Taylor Oak Flooring Co, D.C. Ark, 87 F Supp 6
Ala—Booker v Williams, 87 So 2d 426, 264 Ala 307
Cal—Borello v Echler Homes, Inc, 34 Cal Rptr 648, 221 CA 2d 487

- Del—Mayor and Council of Wilmington v Recony Sales & Engineering Corp, 185 A 2d 68, 5 Storey 129

- Ga—Southwire Co v Metal Equipment Co, 198 S E 2d 687, 129 Ga App 49, cert den 94 S Ct 723, 414 U.S. 1092, 38 L Ed 2d 550

- Ind—Saint Joseph's College v Morrison, Inc, 302 N E 2d 865, 158 Ind App 272

- Pa—Marchak v McClure, supra, n 57

- S.D.—Schubloom v Donovan & Associates, Inc, 241 N W 2d 710, 90 S.D. 413

Descriptions held insufficient

- Ala—Morgan v Stokes, 40 So 2d 425, 252 Ala 335
Idaho—Chief Industries, Inc v Schwendiman, 587 P 2d 823, 99 Idaho 682

- Kan—Sutherland Lumber Co v Due, 512 P 2d 525, 212 Kan 658

- Mo—Kinnear Mfg Co v Myers, App, 452 S W 2d 599

- Tex—Centex Materials, Inc v Dalton, Civ App, 574 S W 2d 621

- 59 S.D.—Ringgenberg v Wilmameyer, 253 N W 2d 197

63. Idaho—Chief Industries, Inc v Schwendiman, 587 P 2d 823, 99 Idaho 682

- 64 U.S.—In re Lurg-Knost, Inc, D.C. La., 380 F Supp 400

- Ala—Morgan v Stokes, supra, n 58

- Ariz—Westinghouse Elec Supply Co v Western Seed Production Corp, App, 580 P 2d 1231, 119 Ariz 377

- Ark—Speights v Arkansas Sav & Loan Ass'n, 393 S W 2d 228, 239 Ark 587

- Md—Scott & Wimbrow, Inc v Waterco Investments, Inc, 373 A 2d 965, 36 Md App 274

- N.Y.—Levie v Cottage Homes, Inc, 124 N.Y.S 2d 118—Application of Geal Realty Corp, 171 N.Y.S 2d 551, 11 Misc 2d 274—Amal Const Corp v A B G Bldg Corp, 231 N.Y.S 2d 138

- Tex—Perkins Const Co v Ten-Fifteen Corp, Civ App, 545 S W 2d 494

Description held inadequate

- Mo—First Florida Bldg, Inc v Safari Systems, Inc, App, 570 S W 2d 728

- Tex—Jones v Mid-State Homes, Inc, 356 S W 2d 923, 163 Tex 229

65. U.S.—C.J.S. cited in Sullivan & Horn, Inc v Favour, D.C. Alaska, 117 F Supp 535, 537, 14 Alaska 492

- N.H.—Wurm v John J Reilly, Inc, 163 A 2d 13, 102 N.H. 558, 86 A.L.R. 2d 286

page 684

- 68 U.S.—In re Taylor Oak Flooring Co, D.C. Ark., 87 F Supp 6

- Ariz—Westinghouse Elec Supply Co v Western Seed Production Corp, App, 580 P 2d 1231, 119 Ariz 377

- Cal—Borello v Echler Homes, Inc, 34 Cal Rptr 648, 221 CA 2d 487—Howard A Deason & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 CA 3d 742

- Del—Pettinaro Const Co v Rago, Super, 269 A 2d 250

- Mo—Hartel Elec Co v Gabriel, App, 292 S W 2d 95

- N.D.—Kuntz v Partridge, 65 N W 2d 681, 52 A.L.R. 2d 1

- Tex—Rheem Acceptance Corp v Rowe, Civ App, 332 S W 2d 353, err ref no rev err

All that is necessary, etc.

- Tenn—Southern Blow Pipe & Roofing Co v Grubb, 260 S W 2d 191, 36 Tenn App 641

71. Neb—Rosebud Lumber & Coal Co v Holms, 52 N W 2d 313, 155 Neb 459, reh den 53 N W 2d 82, 155 Neb 688

72. Land on which structure located not essential

- Mont—Varco-Pruden v Nelson, 593 P 2d 48, 181 Mont 252

- 74 Ala—Southern Sash of Huntsville, Inc v Jean, 235 So 2d 842, 285 Ala 705

- Cal—Borello v Echler Homes, Inc, 34 Cal Rptr 648, 221 CA 2d 487—Howard A Deason & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 CA 3d 742

- Colo—Campbell v Graham, 357 P 2d 366, 144 Colo 532, 94 A.L.R. 2d 1165

- Pa—Merritt Lumber Yards, Inc v Gavin, 7 Chest 262

- 75 U.S.—In re Specialized Installers, Inc, Bkrtcy Colo, 12 B.R. 546

- 78 Pa—Michael Roofing Co v Macrides, 54 Lanc L Rev 79

- 80 Mont—Varco-Pruden v Nelson, 593 P 2d 48, 181 Mont 252

- Tenn—C.J.S. cited in Sequatchie Concrete Service v Cutter Labs, App, 616 S W 2d 162, 165

page 685

81. Ga—King v Rutledge, 65 S E 2d 801, 208 Ga 172

- Wash—Lumber Mart Co v Buchanan, 419 P 2d 1002, 69 Wash 2d 658

87. Ala—C.J.S. cited in Morgan v Stokes, 40 So 2d 425, 426, 252 Ala 335

91. Ariz—Adams Tree Service, Inc v Transamerica Title Ins Co, 511 P 2d 658, 20 Ariz App 214

- N.Y.—Blackman-Shapiro Co v Salzberg, 168 N.Y.S 2d 590, 8 Misc 2d 972

page 686

92. Description insufficient

- N.Y.—Country Village Heights Condominium (Group I) v Mario Bonto, Inc, 363 N.Y.S 2d 501, 79 Misc 2d 1088

94. Ala—Bice v R L Buns Builders, Inc, 115 So 2d 468, 269 Ala 662

95. Ga—Artistic Ornamental Iron Co v Long, 148 S E 2d 478, 113 Ga App 464

- 2 N.Y.—Blackman-Shapiro Co v Salzberg, 168 N.Y.S 2d 590, 8 Misc 2d 972

- 4 Pa—Wombacher v Grndel, 86 Pa Dist & Co 207, 53 Lack Jur 33

- Tenn—Southern Blow Pipe & Roofing Co v Grubb, 260 S W 2d 191, 36 Tenn App 641

page 687

- 7 Del—Pettinaro Const Co v Rago, Super, 269 A 2d 250

- Ga—Love v Hockenhuil, 87 S E 2d 352, 91 Ga App 877

Notice held insufficient

- Cal—H & L Supply, Inc v Ewing, 61 Cal Rptr 289, 253 CA 2d 283

11. Incorrect street address

- Ohio—Buckeye State Hauling, Inc v Troy, 332 N E 2d 776, 43 Ohio Misc 23, 72 O O 2d 221

16. Ala—Wade v Glencoe Lumber Co, 103 So 2d 730, 267 Ala 530

- Pa—Wombacher v Grndel, 86 Pa Dist & Co 207, 53 Lack Jur 33—Maitland v Bolen, 67 York Leg Rec 174

17. Ga—Blanton v Major, 242 S E 2d 360, 144 Ga App 762

20. Cal—American Transit Mix Co v Weber, 234 P 2d 732, 106 CA 2d 74

21. N.Y.—Blackman-Shapiro Co v Salzberg, 168 N.Y.S 2d 590, 8 Misc 2d 972

page 688

27. Pa—Gumble v Snyder, 16 Monroe L.R. 7

28. Pa—Glennon v Shorak, 1 Bucks Co L.R. 251

30. Ala—Drnkard v Hall, 47 So 2d 213, 254 Ala 105

34. U.S.—In re Lurg-Knost, Inc, D.C. La., 380 F Supp 400

35. N.C.—Lowery v Hathcock, 79 S E 2d 204, 239 N.C. 67

Page 688

36 Ala.—Tanner v Foley Bldg & Mfg Co, 48 So 2d 785, 254 Ala 476

Pa.—Pots Bros v Butler, 69 Montg Co 247

Description held sufficient

Ala.—Tanner v Foley Bldg & Mfg Co, 48 So 2d 785, 254 Ala 476

Ariz.—Westinghouse Elec Supply Co v Western Seed Production Corp, App, 580 P 2d 1231, 119 Ariz 377

Pa.—Coppa v Norris, 1 Bucks Co L R 130

Description insufficient

US—In re Lurg-Knost, Inc, D C La, 380 F Supp 400

38. Colo.—Kayell Development Co v Carney, App, 480 P 2d 857

Pa.—Oyer v Coble, 71 Pa Dist & Co 293, 2 Lebanon 282

W Va.—Earp v Vanderpool, 232 S E 2d 513, 160 W Va 113, op concurred 314 S E 2d 390, 160 W Va 113, reh den

39. Idaho.—Chief Industries, Inc v Schwendman, 587 P 2d 823, 99 Idaho 682

41. Md.—Palmer Park Limited Partnership v Marvella, Inc, 257 A 2d 169, 255 Md 121

Pa.—Locket Lumber Co v Koczura, 55 Lack Jur 178

Descriptions held sufficient

Del.—Wilmington Trust Co v Branmar, Inc, Super, 353 A 2d 212

Pa.—Farm Systems, Inc v Vogt, 56 Berks 170

Descriptions held insufficient

Ala.—Tanner v Foley Bldg & Mfg Co, supra, n 36

page 689

49. Pa.—Bosser v Nocella, 16 D & C 2d 158

55. Ind.—Cato v David Excavating Co, Inc, App, 435 N E 2d 597

§ 162. Ownership of Property

Library References

Mechanics' Liens ¶187.

page 690

59. Ariz.—Lawn v Midway Lumber Inc, App, 561 P 2d 750, 114 Ariz 426

Neb.—May Plumbing Co v Shaver, 153 NW 2d 911, 182 Neb 251

NY.—Application of Schermg, 96 N Y S 2d 64—Marshall Const Co v Brookdale Hospital Center, 324 N Y S 2d 806, 68 Misc 2d 20

60. Cal.—H & L Supply, Inc v Ewing, 61 Cal Rptr 289, 253 C A 2d 283

La.—Authement's Ornamental Iron Works, Inc v Reinfeld, App, 376 So 2d 1061, writ den, Sup, 378 So 2d 1390

NJ.—Apex Roofing Supply Co v Keraner, 146 A 2d 481, 53 N J Super 1

Pa.—Kemp v Majestic Amusement Co, 113 P L J 338

Utah.—Graff v Boise Cascade Corp, 660 P 2d 721

Purpose of requirement

(1) NY.—Application of Lycos Francois De New York, 204 N Y S 2d 490, 26 Misc 2d 374

Contract date

Del.—First Florida Bldg Corp v Robino-Ladd Co, Super, 424 A 2d 32

NY.—Meiniker v Grace, 439 N Y S 2d 409, 82 A D 2d 798

Okla.—Joe Brown Co, Inc v Best, App, 601 P 2d 755

Central que trust

Mo.—Nelle Plumbing Co v Stefanc, App, 453 S W 2d 636, 48 A L R 3d 145

63. Ariz.—Lawn v Midway Lumber, Inc, App, 561 P 2d 750, 114 Ariz 426

Mo.—Nelle Plumbing Co v Stefanc, App, 453 S W 2d 636, 48 A L R 3d 145

64. Ariz.—Lawn v Midway Lumber, Inc, App, 561 P 2d 750, 114 Ariz 426

NJ.—Friedman v Stein, 71 A 2d 346, 4 N J 34

68 D C.—Hartford Acc & Indem Co v A B C Cleaning Contractors, Inc, C A, 350 F 2d 430, 121 U S App D C 300

Person not interested

Ohio.—Capital City Lumber Co v Ellerbrock, 203 N E 2d 244, 177 Ohio St 159

Husband and wife

Ind.—Beneficial Finance Co v Wegmiller Bender Lumber Co, Inc, App, 402 N E 2d 41, reh den 403 N E 2d 1150

70. NY.—Admiral Transit Mix Corp v Sagg-Bridgeman Corp, 287 N Y S 2d 751, 56 Misc 2d 47

71. Colo.—Campbell v Graham, 357 P 2d 366, 144 Colo 532, 94 A L R 2d 1165

page 691

73 NY.—Application of Lycos Francois De New York, 204 N Y S 2d 490, 26 Misc 2d 374

80. Kan.—C J S cited in Construction Materials, Inc v Becker, 659 P 2d 243, 248, 8 Kan App 2d 394

NH.—C J S cited in P J Currier Lumber Co, Inc v Stonemill Const Corp, 415 A 2d 869, 871, 120 N H 399

82. Colo.—McIntire & Queros of Colorado, Inc v Westinghouse Credit Corp, 576 P 2d 1026, 40 Colo App 398

83 Pa.—Curdo v Breuninger, 10 Chest 350

page 692

96. Failure to name precludes lien

Okla.—Gaddis-Walker Elec Co, Inc v Phillips Petroleum Co, App, 526 P 2d 964

98. Ga.—Fowler v Roxboro Homes, Inc, 107 S E 2d 285, 98 Ga App 829

6. Pa.—Resnick v Epstein, 63 Pa Dist & Co 669—Rudpath & Potter Co v Edwards, 4 Chest Co 146

7. Ga.—Fowler v Roxboro Homes, Inc, 107 S E 2d 285, 98 Ga App 829

13. Pa.—Glennon v Shonak, 1 Bucks Co L R 251

page 693

17. Ind.—Suburban Elec Co, Inc v Lake County Trust Co, App, 412 N E 2d 295

Mo.—Summit Lumber Co, Inc v Higginbotham, App, 586 S W 2d 799

Pa.—Toll-Barkan Co v Toll, 164 A 2d 36, 193 Pa Super 221

19. Mo.—Boyer Lumber, Inc v Blair, App, 510 S W 2d 738

NY.—Libresco v Irvine, 140 N Y S 2d 252—Application of Long Beach Terrace, Inc, 247 N Y S 2d 76, 41 Misc 2d 915

22. Or.—C J S cited in H D Fowler Co, Inc v Medical Research Foundation, 393 P 2d 657, 659, 238 Or 316

25 Husband and trustee of actual owner

Cal.—Frank Frazano and Associates v Taggart, 105 Cal Rptr 414, 29 C A 3d 1

28. Pa.—Glennon v Shonak, 1 Bucks Co L R 251

32. Omission of middle initial

Pa.—Stott v Irwin, 2 Chest Co 137

page 694

37. Va.—Blanton v Owen, 122 S E 2d 650, 203 Va 73

44. NY.—Application of Reford Realty Corp, 216 N Y S 2d 564—M F Hickey Co v Imperial Realty Co, 319 N Y S 2d 972, 65 Misc 2d 1088, mod on oth grds 342 N Y S 2d 186, 73 Misc 2d 498

45. NY.—Murtha v Murphy, 173 N Y S 2d 451, 12 Misc 2d 199

51. Idaho.—C J S quoted at length in Layrite Products Co v Lux, 388 P 2d 105, 108, 86 Idaho 477

Lien not invalid

Ind.—Beneficial Finance Co v Wegmiller Bender Lumber Co, Inc, App, 402 N E 2d 41, reh den 403 N E 2d 1150

53 Idaho.—Manley v MacFarland, 327 P 2d 758, 80 Idaho 312—Layrite Products Co v Lux, 388 P 2d 105, 86 Idaho 477

§ 163 Contract or Consent of Owner

page 695

66 US.—Cutting v Bullerchick, C A Alaska, 188 F 2d 837, 13 Alaska 269

Pa.—Riley v Caltagrone, 68 York Leg Rec 141—Crispo v Horster Bldg Corp, 76 Montg 435

67 NY.—Meiniker v Grace, 439 N Y S 2d 409, 82 A D 2d 798

69. US.—Matter of Argonne Const Co, Inc, Bkrtcy Ill, 10 B R 570

SC.—Wood v Hardy, 110 S E 2d 157, 235 S C 131

page 696

77. Pa.—Merritt Lumber Yards, Inc v Gavva, 7 Chest 262—Mandos v Baptist Church of Phoenixville, 8 Chest 108

78. Pa.—Mongelli v Schwartz, 44 Del 36

79. Pa.—Wells v Paull, 32 Erie Co 181—Yelen v Gutstern, 70 Pa Dist & Co 383, 41 Luz Leg Reg 7—Coppa v Norris, 1 Bucks Co L R 130—Locket Lumber Co v Koczura, 55 Lack Jur 178—Luddick v Sowers, 1 Camb 54

80. Since the publication of Corpus Juris Secundum, the case of Porteous Decorative Co v Fee, cited in support of the text was held overruled by the case of Milner v Shney, 60 P 2d 604, 57 Nev 159, mod on oth grds 69 P 2d 771, 57 Nev 159—Ray Heating Products Inc v Miller, 324 P 2d 237, 74 Nev 124

81. Nev.—Ray Heating Products, Inc v Miller, 324 P 2d 237, 74 Nev 124

88. Tex.—Gevinson v Stephen-Leedom Carpet Co, Civ App, 368 S W 2d 700

89. Claims held sufficient

Nev.—Ray Heating Products Inc v Miller, 324 P 2d 237, 74 Nev 124

N M.—Allsop Lumber Co v Continental Gas Co, 385 P 2d 625, 73 N M 64—Crego Block Co v D H Overmyer Co, 458 P 2d 793, 80 N M 541

Pa.—Stockard v Graham, 6 Chest Co 165

Claims held insufficient

Mass.—Belmore Contractors, Inc v Dupree, 223 N E 2d 702, 352 Mass 83

Neb.—Omaha Nat Bank v Continental Western Corp, 274 N W 2d 867, 202 Neb 238, app after remand 278 N W 2d 339, 203 Neb 264

page 697

96. Ariz.—Peterson-Donnelly Engineers & Contractors Corp v First Nat Bank of Ariz, Phoenix, 408 P 2d 841, 2 Ariz App 321

97. Neb.—Central Const Co v Blanchard, 141 N W 2d 416, 180 Neb 62

Pa.—St Clair v Drumm, 22 Northumb Leg J 226—Stockard v Graham, 6 Chest Co 165—Murray v Zenon, 107 P L J 307

page 697

96. Ariz.—Peterson-Donnelly Engineers & Contractors Corp v First Nat Bank of Ariz, Phoenix, 408 P 2d 841, 2 Ariz App 321

97. Neb.—Central Const Co v Blanchard, 141 N W 2d 416, 180 Neb 62

Pa.—St Clair v Drumm, 22 Northumb Leg J 226—Stockard v Graham, 6 Chest Co 165—Murray v Zenon, 107 P L J 307

§ 164. Name, Residence, and Status of Employer or Contractor

page 698

6. Ariz.—Westinghouse Elec Supply Co v Western Seed Production Corp, App, 580 P 2d 1231, 119 Ariz 377

Pa.—St Clair v Drumm, 22 Northumb Leg J 226

8. Mo.—Nelle Plumbing Co v Stefanc, App, 453 S W 2d 636, 48 A L R 3d 145

NY.—Houseknecht v Reeve, 108 N Y S 2d 917

Purpose of requirement

Cal—Wand Corp v San Gabriel Valley Lumber Co, 46 Cal Rptr 486, 236 C A 2d 855

9. Pa—William A Geppert, Inc, v Gier, 66 Montg Co 327—Toll-Barkan Co v Toll, 164 A 2d 36, 193 Pa Super 221

11. Absence of prejudice

Cal—Wand Corp v San Gabriel Valley Lumber Co, 46 Cal Rptr 486, 236 C A 2d 855

13. Pa—Toll-Barkan Co v Toll, 164 A 2d 36, 193 Pa Super 221

15. NJ—Apex Roofing Supply Co v Kerner, 146 A 2d 481, 53 NJ Super 1

Statement held sufficient

NY—Arbet v Jillar, Realty Corp, 216 NYS 2d 729, 29 Misc 2d 94

16. Cal—Lannin v Sergeant, 232 P 2d 878, 105 C A 2d 76

17. Idaho—Chief Industries, Inc v Schwendman, 587 P 2d 823, 99 Idaho 682

Nev—C.J.S. cited in Pecole v Luce & Goodfellow, 212 P 2d 718, 724, 66 Nev 360

page 699

24. NJ—Apex Roofing Supply Co v Miller, 190 A 2d 553, 79 NJ Super 68

26. Pa—William A Geppert, Inc, v Gier, supra, n 9

Tex—C.J.S. quoted in Houston Fire & Casualty Ins Co v Cal-Tex Refin Co, 231 S W 2d 468, 470

§ 165. Services or Materials and Charge Therefor

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35. US—Wolters Village Management Co v Merchants and Planters Nat Bank of Sherman, CA Tex, 223 F 2d 793

Colo—Ridge Erection Co v Mountain States Tel & Tel Co, 549 P 2d 408, 37 Colo App 477

Del—Wilmington Trust Co v Brannan, Inc, Super, 353 A 2d 212

Md—Mashkes v Jakeno, Inc, 154 A 2d 439, 220 Md 457

Mo—Oliver L Tetz, Inc v Groff, 253 S W 2d 824, 363 Mo 825

Mont—Cole v Hunt, 211 P 2d 417, 123 Mont 256

NY—Eagle Contractors of Utica, Inc v Black, 179 NYS 2d 316, 7 A D 2d 622, affd 201 NYS 2d 106, 8 NY 2d 732, 167 NE 2d 647—Application of Jorden Realty Corp, 231 NYS 2d 825, 36 Misc 2d 198

NC—Equitable Life Assur Soc of US v Basnight, 67 S E 2d 390, 234 NC 347—Neal v Whisman, 143 S E 2d 379, 266 NC 89

ND—Ask, Inc v Wegerle, 286 N W 2d 290

Pa—Remick v Epstein, 63 Pa Dst & Co 669—Schmader v Braun, 43 Berks Co 95—Root v Olive, 52 Lack Jur 75—St Clair v Drumm, supra, n 6—Harvard v McMullen, 74 Pa Dst & Co 222—P Di Marco & Co v Greenfield, 9 Chest 368

R.I.—Graybar Elec Co v Providence Journal Co, 166 A 2d 885, 92 R I 120

page 700

36. Pa—Heat & Power Corp v Foust Distilling Co, 62 York Leg Rec 49—Guse v Bloom, 60 Dauph Co 106—Schmader v Braun, supra, n 35—Sharp v Blew, 52 Lanc L Rev 243—Rauch v Garrett, 62 Dauph Co 243—Hetz Constructors, Inc v Thatcher Glass Mfg Co, 38 West 49—Crupo v Horter Bldg Corp, 76 Montg 435

37. Statements held insufficient

Md—Continental Steel Corp v Sugarman, 295 A 2d 493, 266 Md 541

Mont—Cascade Elec Co v Associated Creditors, 224 P 2d 146, 124 Mont 370

NY—San Marco Const Corp v Gallert, 178 NYS 2d 137, 15 Misc 2d 208—Empire Pile Driving Corp v Hyland Sanitary Service, 300 NYS 2d 434, 32 A D 2d 563

Pa—Root v Olive, supra, n 35

Wash—Bosse Cascade Corp v Pence, 394 P 2d 359, 64 Wash 2d 798

39. Md—Palmer Park Limited Partnership v Marvella, Inc, 257 A 2d 169, 255 Md 121

Nev—Ray Heating Products, Inc v Miller, 324 P 2d 237, 74 Nev 124

Pa—Cioppa v Norris, 1 Bucks Co L R 130—Mandos v Baptist Church of Phoenixville, 8 Chest 108

Tex—Skunny's, Inc v Hicks Bros Const Co of Abilene, Inc, Civ App, 602 S W 2d 85

Statements held sufficient

Mo—Oliver L Tetz, Inc v Groff, supra, n 35

Ohio—D'Antonio Plumbing & Heating Co v Strollo, App, 172 NE 2d 484

Okla—O'Dell v Kunkel's, Inc, 581 P 2d 878

R.I.—Graybar Elec Co v Providence Journal Co, 166 A 2d 885, 92 R I 120

S.D.—McLaughlin Elec Supply v American Empire Ins Co, 269 N W 2d 766

Not necessary to itemize

Pa—Gera v Nicodem, 32 West Co 252

48. Ala—Wade v Glencoe Lumber Co, 103 So 2d 730, 267 Ala 530

Pa—Hyde v Doyle, 102 Pittsb Leg J 365

49. ND—Ask, Inc v Wegerle, 286 N W 2d 290

page 701

57. Ala—Nelson Weaver Mortg Co v Dover Elevator Co, 216 So 2d 716, 283 Ala 324

63. Or—Ward v Town Tavern, 228 P 2d 216, 191 Or 1, 42 A L R 2d 662

64. Tex—Hill v The Practorians, Civ App, 219 S W 2d 564, err ref no rev err

65. Md—Mashkes v Jakeno, Inc, 154 A 2d 439, 220 Md 457

66. NC—Beach & Adams Builders, Inc v North-western Bank, 220 S E 2d 414, 28 N C App 80

67. Del—Poole v Oak Lane Manor, Super, 118 A 2d 925, 10 Terry 447, affd 124 A 2d 725, 11 Terry 123

Ga—J H Morris Bldg Supplies v Brown, 264 S E 2d 9, 245 Ga 178, on remand 270 S E 2d 92, 154 Ga App 481

Ill—Dougherty-Janssen Co v Damage Enterprises, Inc, 400 N E 2d 1023, 36 Ill Dec 443, 80 Ill App 3d 1112

NC—Neal v Whisman, 145 S E 2d 379, 266 NC 89—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 S E 2d 665, 270 NC 337—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 S E 2d 669, 270 NC 343—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 S E 2d 671, 270 NC 345

Pa—Ernst v Ferguson, 40 Wash Co 45

page 702

68. Del—Di Mondt v S & S Builders, Inc, 124 A 2d 725, 11 Terry 123

72. Pa—Marchak v McClure, 108 A 2d 77, 176 Pa Super 381

81. Neb—Central Const Co v Highsmith 50 N W 2d 817, 155 Neb 113

85. Pa—Scoppitti v Scarborough, 41 Del Co Leg J 116—Pennsylvania Stone, Cement & Supply Co v Zankl, 54 Lanc Rev 345

Itemization required where lien based on quantum meruit

Mo—K-V Builders, Inc v Thomas, App, 353 S W 2d 130

NY—Application of Borysko, 149 NYS 2d 53, 2 Misc 2d 621

87. Tex—Mathews Const Co, Inc v Jasper Housing Const co, Civ App, 328 S W 2d 323, err ref no rev err

Itemization not required

NY—Application of Borysko, 149 NYS 2d 53, 2 Misc 2d 621—819 Sixth Ave Corp v T & A Associates, Inc, 260 NYS 2d 984, 24 A D 2d 446

89. Pa—Wilke v Chambers, 4 Chest Co 336

Statements held sufficient

NY—Atlantic Cement Co v St Lawrence Cement Co, 254 NYS 2d 676, 22 A D 2d 228

page 703

91. Pa—Dahlhausen v Dechelmanna, 69 Pa Dst & Co 459, 66 Montg Co 69

93. NY—Application of Puckney, 216 NYS 2d 19, 13 A D 2d 806—Application of Lawrence Arms, Inc, 234 NYS 2d 783, 37 Misc 2d 396

NC—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 S E 2d 665, 270 NC 337

Pa—Heller v Milia, 59 Pa Dst & Co 491, 650 Lanc Rev 415, 61 York Leg Rec 41—Rauch v Garrett, supra, n 36—Hartshaw v Ellis, 6 Chest Co 263—Stiles v Bangor Republican Club, 34 North 348

S.D.—Builders Supply Co, Inc v Carr, 276 N W 2d 252

Object

(2) NC—Lowery v Hathcock, 79 S E 2d 204, 239 NC 67

Tex—Hill v The Practorians, supra, n 64—Wneman Hardware Co v R L King Const Co, Civ App, 387 S W 2d 79

Claim not fatally defective

Tex—Marchison v Caruth Bldg Service, Civ App, 369 S W 2d 380, err ref no rev err

Account insufficient

Mo—Bernard v Merrick, App, 549 S W 2d 561

94. Mo—Mississippi Woodworking Co v Maher, App, 273 S W 2d 753—Bremer v Mohr, App, 478 S W 2d 14

Okla—Liberty Plan Co, v Francis T Smith Lumber Co, 360 P 2d 500

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95. Ala—Nelson Weaver Mortg Co v Dover Elevator Co, 216 So 2d 716, 283 Ala 324

Mont—Cole v Hunt, supra, n 35

Neb—Central Const Co v Blanchard, 141 N W 2d 416, 180 Neb 62

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Tenn—Southern Blow Pipe & Roofing Co v Grubb, 260 S W 2d 191, 36 Tenn App 641

Tex—Mathews Const Co, Inc v Jasper Housing Const Co, Civ App, 328 S W 2d 323, err ref no rev err

Wash—Bosse Cascade Corp v Pence, 394 P 2d 359, 64 Wash 2d 798

W Va—Gray Lumber Co v Devore, 112 S E 2d 457, 145 W Va 91

98. Md—Continental Steel Corp v Sugarman, 295 A 2d 493, 266 Md 541

Pa—Manessotis, Inc v Holsinger, 16 Beaver Co Leg J 48

99. Del—Mayor and Council of Wilmington v Recony Sales & Engineering Corp, 185 A 2d 68, 5 Storey 129

page 704

2. Assignee of numerous claims

Colo—Ridge Erection Co v Mountain States Tel & Tel Co, 549 P 2d 408, 37 Colo App 477

3. Mo—Mutual Lumber Co v Gero, 244 A 2d 564

4. US—In re Groff, C A Wyo, 624 F 2d 133

5. Accounts held sufficiently itemized

Kan—Kopp's Rug Co, Inc v Talbot, 620 P 2d 1167, 5 Kan App 2d 565

Md—Mervin L Blades & Son, Inc v Lighthouse Sound Manna and Country Club, 377 A 2d 523, 37 Md App 265

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Page 704

NY—Mec v Skellyway Const Co, 290 NYS 2d 516, 30 A D 2d 606

ND—Pudwill v Bismarck Lumber Co, 89 NW 2d 424

Pa—Cohen v Hinkes, 96 Pittsb Leg J 105
SD—Ringenberg v Wilmsmeyer, 253 NW 2d 197
Accounts held not sufficiently itemized

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NY—Application of Sed, 219 NYS 2d 962, 31 Misc 316

Pa—Ranch v Garrett, 62 Dauph Co 243
SD—Crescent Elec Supply Co v Nerson, 232 NW 2d 76, 89 SD 203

Tex—Capitol Steel & Iron Co v Standard Acc Ins Co, Civ App, 299 S W 2d 738—Weisman Hardware Co v R L King Const Co, Civ App, 387 S W 2d 79

8. NY—819 Sixth Ave Corp v T & A Associates, Inc, 260 NYS 2d 984, 24 A D 2d 446

Tex—Hill v The Practoriana, Civ App, 219 S W 2d 564, err ref no rev err

10. Kan—Holtzen v Dunn, 269 P 2d 1042, 176 Kan 206

Tex—Pacific Indem Co v Bowles & Edens Supply Co, Civ App, 290 S W 2d 353, err ref no rev err

12. NC—Lowery v Hathcock, 79 SE 2d 204, 239 NC 67

13. NC—Lowery v Hathcock, 79 SE 2d 204, 239 NC 67—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 SE 2d 665, 270 NC 337—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 SE 2d 669, 270 NC 343—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 SE 2d 671, 270 NC 345

Tex—Pacific Indem Co v Bowles & Edens Supply Co, Civ App, 290 S W 2d 353, err ref no rev err

16. NY—Application of Puckney, 216 NYS 2d 19, 13 A D 2d 806

page 705

21. US—In re Groff, CA Wyo, 624 F 2d 133, applying Missouri law

Minn—C.J.S. cited in Minnesota Home Rebuilding & Repair Co v Knaak, 67 NW 2d 673, 675, 243 Minn. 312

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NC—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 SE 2d 665, 270 NC 337

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Lump sum rule

Mo—Malott Elec Co, Inc v Bryan Enterprises, Inc, App, 549 S W 2d 558

22. Mo—Wadsworth Homes, Inc v Woodridge Corp, App, 358 S W 2d 288

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24. Tex—Capitol Steel & Iron Co v Standard Acc Ins Co, Civ App, 299 S W 2d 738—Lebo v Dochen, Civ App, 310 S W 2d 715, err ref no rev err

In Pennsylvania

(5) Other statements Jno D Bogar Lumber Co v Seldomridge, 56 Lanc Rev 442—Peoples First Nat Bank & Trust Co v Lankford, 107 P L J 123—Murray v Zemon, 107 P L J 307

26. NY—819 Sixth Ave Corp v T & A Associates, Inc, 260 NYS 2d 984, 24 A D 2d 446

27. Pa—Rufe v Neff, 69 Mont Co 352—Michael Roofing Co v Macredes, 54 Lane L Rev 79

29. Pa—Mongel v Schwartz, 45 Del Co 189

31. Pa—Shollenberger v Rickman, 78 Pa Dist, & Co, 459, 2 Lyscoming Rep 10—Shollenberger v Rickman, 78 Pa Dist & Co 459, 2 Lyscoming Co L R 10

page 706

38. Pa—Hegele v Solomon, 37 Wash 136

Where contract is between claimant and owner
Pa—Yanko v Donaldson, 31 North Co, 169—Guse v Bloom, 60 Dauph Co 106

Labor hour by hour not required
NC—Mebane Lumber Co v Avery & Bullock Builders, Inc, 154 SE 2d 665, 270 NC 337

47. Pa—Riley v Caltagrone, 68 York Leg Rev 141

page 707

56 Pa—Jno D Bogar Lumber Co v Seldomridge, 56 Lanc Rev 442

58 Tex—Maryland Gas Co v Barron-Britton, Inc, Civ App, 327 S W 2d 769, affd, 336 S W 2d 622, 161 Tex 83

61. Pa—Heat & Power Corp v Foust Distilling Co, 62 York Leg Rec 49

66 Pa—Marchak v McClure, 108 A 2d 77, 176 Pa Super 381

69 Alaska—Moore v Alaska Metal Buildings, Inc, 448 P 2d 581

Mo—Putnam v Heathman, App, 367 S W 2d 823

Wyo—United Pac Ins Co v Martin & Luther General Contractors, Inc, 455 P 2d 664

Items untimely filed
Mont—Tindall v Negard, 507 P 2d 845, 161 Mont 476

70. Minn—Aaby v Better Builders, 37 NW 2d 234, 228 Minn 222

72 Alaska—Clay v Sandal, 369 P 2d 890

Minn—Aaby v Better Builders, 37 NW 2d 234, 228 Minn 222—Engler Bros Const Co v L'Allier, 159 NW 2d 183, 280 Minn 208

Mo—Putnam v Heathman, App, 367 S W 2d 823

Or—Brown v Farrell, 483 P 2d 453, 258 Or 348

Rule of de minimis applicable
Or—Hays v Pigg, 515 P 2d 924, 267 Or 143

page 708

74 Alaska—Clay v Sandal, 369 P 2d 890

Me—Fischbach & Moore, Inc v Presteel Corp, 398 A 2d 397

Or—Smith v De Knaay, 342 P 2d 784, 217 Or 436

77. US—Walters Village Management Co v Merchants and Planters Nat Bank of Sherman, CA Tex, 223 F 2d 793

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Or—Barber v Henry, 252 P 2d 802, 197 Or 172—Wiggins v Southwood Park Corp, 350 P 2d 436, 221 Or 61

Under some statutes, etc.
(2) Statute applies only where there is actual intent to defraud

Cal—B & J Const Co v Spacious Homes, Inc, 22 Cal Rptr 41, 204 CA 2d 216

(3) Statute strictly construed
Cal—Callahan v Chatsworth Park, Inc, 22 Cal Rptr 606, 204 CA 2d 597

Statement not "just and true"
Mo—Putnam v Heathman, App, 367 S W 2d 823

Test
Alaska—Moore v Alaska Metal Buildings, Inc, 448 P 2d 581

Mo—Putnam v Heathman, App, 367 S W 2d 823

79. Alaska—Moore v Alaska Metal Buildings, Inc, 448 P 2d 581

Or—Brown v Farrell, 483 P 2d 453, 258 Or 348

80 Idaho—Boone v P & B Logging Co, 397 P 2d 31, 88 Idaho 111

III—Verplank Concrete & Supply, Inc v Marsh, 353 NE 2d 27, 40 Ill App 3d 742

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81 Mont—Tindall v Negard, 507 P 2d 845, 161 Mont 476

83 Or—Anderson v Chambliss, 262 P 2d 298, 199 Or 400—Hays v Pigg, 515 P 2d 924, 267 Or 143

§ 166. Signature

84. Fla—Protection House, Inc v Daverman and Associates, App, 167 So 2d 65

Ga—Southwire Co v Metal Equipment Co, 198 SE 2d 687, 129 Ga App 49, cert den 94 S Ct 723, 414 US 1092, 38 L Ed 2d 550—New London Square, Ltd v Diamond Elec & Supply Corp, App, 208 SE 2d 348, 132 Ga App 433

85. NM—First Nat Bank of Lea County v Julian, 627 P 2d 880, 96 NM 38

87 Tex—Trane Co v Wortham, Civ App, 428 S W 2d 417

page 709

89. Wyo—CJS cited in Stricker v Frauendienst, 669 P 2d 520, 522

93. Signed by individual
Ga—Latham Plumbing & Heating Co v Ledbetter Trucks, Inc, 99 SE 2d 345, 96 Ga App 219

Signature by individual for corporation held insufficient
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§ 167. Verification

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Ind—Aetna Glass Corp v Mercury Builders, Inc, 250 NE 2d 598, 145 Ind App 286

Kan—DJ Fair Lumber Co v Karin, 430 P 2d 222, 199 Kan 366

Me—Pinelead Lumber Co v Robinson, 382 A 2d 33

Tenn—Chattanooga Lumber & Coal Corp v Phillips, 304 S W 2d 82, 202 Tenn 266

Specific statute governs
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Purpose
Mont—Saunders Cash-Way Lumber & Hardware Co v Herrick, 587 P 2d 947, 179 Mont 233

SD—Crescent Elec Supply Co v Nerson, 232 NW 2d 76, 89 SD 203

98. Ark—Rasmussen v C J Horner Co, Inc, 505 S W 2d 225, 255 Ark 1030

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Compliance with statute not shown

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4. Alaska—HAMS Co v Electrical Contractors of Alaska, Inc., 563 P 2d 258, supp 566 P 2d 1012

5. Ga—Tallman v Southern Motor Exchange, Inc., 103 S E 2d 640, 97 Ga App 565

6. NM—Marsh v Coleman, 600 P 2d 271, 93 NM 325

page 710

18. Compliance not shown

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page 711

31. Me—Freland Lumber Co v Robinson, 382 A 2d 33

NM—Home Plumbing & Contracting Co v Pruitt, 372 P 2d 378, 70 NM 182

32. Me—Freland Lumber Co v Robinson, 382 A 2d 33

33. Ala—Bolton v Barnett Lumber & Supply Co, 100 So 2d 9, 267 Ala 74

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39. Alaska—Stephenson v Ketchikan Spruce Mills, Inc., 412 P 2d 496

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42. Tex—Perkins Const Co v Ten-Fifteen Corp., Civ App., 543 S W 2d 494

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43. ND—Schaffter v Smith, 113 N W 2d 668

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44. Ind—Aetna Glass Corp v Mercury Builders, Inc., 250 N E 2d 598, 145 Ind App 286

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page 712

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69. Alaska—Anchorage Sand and Gravel Co, Inc v Woodridge, 619 P 2d 1014

70. NY—Fries v Bray, 107 N Y S 2d 425, 279 App Div 8

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71. Amendment

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72. Alaska—Anchorage Sand and Gravel Co, Inc v Woodridge, 619 P 2d 1014

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74. Tex—Crockett v Sampson, Civ App., 439 S W 2d 355

Statement sufficient

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page 713

88. Okl—Curry v Morgan, 321 P 2d 973

§ 168. Proof of Execution

92. Tenn—Chattanooga Lumber & Coal Corp v Phillips, 304 S W 2d 82, 202 Tenn 266

§ 169. Errors or Defects**Library References****Mechanics' Liens §=157**

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page 714

94. Ga—Sears Roebuck & Co v Superior Riggings & Erecting Co., 170 S E 2d 721, 120 Ga App 412

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"Willful" construed

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Page 714

Unintentional errors not fatal

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Value of work held recoverable

N.Y.—Grumpel v Hochman, 343 N.Y.S.2d 507, 74 Misc.2d 39

Owner held entitled to damages for wilful exag-
geration

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Bad faith dependent on circumstances

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Lien improperly discharged

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Penal provision interpretation

N.Y.—Soundwell Const. Corp v Moncarol Const. Corp., 290 N.Y.S.2d 363, 56 Misc.2d 892

Statute held inapplicable

Fla.—Bailey v Jennings Const. Corp., App., 212 So.2d 809

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Ala.—Security Transactions, Inc. v Nelson Excavating & Paving Co., Inc., Civ., 314 So.2d 297, 55 Ala. App. 223, cert. den. 314 So.2d 304, 294 Ala. 768

Del.—Cantano Brickwork, Inc. v Kirkwood Industries, Inc., 276 A.2d 267

Ga.—A & A Heating & Air Conditioning Co v Burgess, 253 S.E.2d 246, 148 Ga. App. 859

Idaho—Chief Industries, Inc. v Schwendman, 587 P.2d 823, 99 Idaho 682

Ill.—Fudco Elec. Co., Inc. v Stunkel, 395 N.E.2d 1116, 32 Ill. Dec. 735, 77 Ill. App.3d 48

Minn.—Banco Mortg. Co. v E. G. Miller Enterprises, Inc., 264 N.W.2d 399

N.M.—Branch v Mays, App., 554 P.2d 1297, 89 N.M. 536

N.Y.—Sbarro Holding Corp v Lamparter Acoustical Products, Ltd., 386 N.Y.S.2d 920, 87 Misc.2d 556

Or.—Wiggins v Southwood Park Corp., 350 P.2d 436, 221 Or. 61

S.D.—Crescent Elec. Supply Co v Nenson, 232 N.W.2d 76, 89 S.D. 203

Tex.—Parsons Const. Co v Ten-Fifteen Corp., Civ. App., 545 S.W.2d 494

Erroneous description of real property

Idaho—Rom v Olson, 523 P.2d 518, 95 Idaho 915

Foreclosure proceeding not allowed

Idaho—Chief Industries, Inc. v Schwendman, 587 P.2d 823, 99 Idaho 682

2. Discretion of court

Fla.—Adobe Brick & Supply Co v Centex-Winston Corp., App., 270 So.2d 755

Wash.—Fitch v Hendrix, 591 P.2d 824, 22 Wash. App. 531

3. Inclusion of unused items

Okla.—Smith v Findley, 298 P.2d 440

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Neb.—Central Const. Co v Highamith 50 N.W.2d 817, 155 Neb. 113

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Or.—Brown v Farrell, 483 P.2d 453, 258 Or. 348

8. N.C.—Canady v Creech, 218 S.E.2d 383, 288 N.C. 354

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Wash.—Spokane Merchants' Ass'n v Tacoma Plumbing Supply Co., 317 P.2d 917, 51 Wash.2d 289

Owner not estopped

Cal.—H & I Supply, Inc. v Ewing, 61 Cal. Rptr. 289, 253 C.A.2d 283

Waiver not shown

N.H.—Bader Co., v Concord Elec. Co., 256 A.2d 145, 109 N.H. 487

N.Y.—Wolff & Munier, Inc. v South Ferry Bldg. Co., 383 N.Y.S.2d 24, 52 A.D.2d 786

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Untimeliness

Md.—Marvin L. Blades & Son, Inc. v Lighthouse Sound Marina and Country Club, 377 A.2d 523, 37 Md. App. 265

11. Defect raised in a special plea

Pa.—Better Bilt Supply, Inc. v Liberty Hotels, Inc., 103 P.2d 445

page 715

13. N.Y.—Goodman v Del-Sa-Co Foods, Inc., 257 N.Y.S.2d 142, 15 N.Y.2d 191, 205 N.E.2d 288

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§ 170. Amendment of Claim or
Statement

Library References

Mechanics' Liens ⇐182(15), 158

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24. Amendment permission held to be erroneous

N.Y.—Fries v Bray, 107 N.Y.S.2d 425, 279 App. Div. 8

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N.J.—Friedman v Stein, 71 A.2d 346, 4 N.J. 34

N.M.—Daughtrey v Carpenter, 477 P.2d 807, 82 N.M. 173

Pa.—Schmauder v Braun, 43 Berks Co. 95—Hustand v Hallemann, 4 Bucks 243

Tenn.—Sequatchie Concrete Service, Inc. v Cutter Laboratories, App., 616 S.W.2d 162

26. U.S.—In re Rhine, D.C. Colo., 213 F.Supp. 527, stating Oklahoma law

Kan.—Thomason v Kirkpatrick, 254 P.2d 329, 174 Kan. 52

Md.—Scott & Wimbrow, Inc. v Waterco Investments, Inc., 373 A.2d 965, 36 Md. App. 274

Nev.—Pecole v Luce & Goodfellow, 212 P.2d 718, 66 Nev. 360—Close v Isbell Const. Co., 471 P.2d 257, 86 Nev. 524

N.J.—Stavola Contracting Co v Dano Const. Co., 237 A.2d 300, 98 N.J. Super. 328, aff'd 246 A.2d 477, 102 N.J. 581

Pa.—Mam Line Const. Co v Mandes, Inc., 8 Chest. 42—Mongelli v Schwartz, 44 Del. 36—Hoffman Lumber Co v Geesey, 35 D. & C.2d 200, 12 Chest. 375—Grannin & Co v Scavotto, 53 Del. Co. 88

Discretion of court

(2) Other matters

Kan.—D.J. Fair Lumber Co v Karlin, 430 P.2d 222, 199 Kan. 366

In New York

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Not permissible where third party adversely
affected

Ill.—Federal Sav. & Loan Ins. Corp v American Nat. Bank & Trust Co. of Chicago, 450 N.E.2d 820, 71 Ill. Dec. 132, 115 Ill. App.3d 426

Wash.—Lumber Mart Co v Buchanan, 419 P.2d 1002, 69 Wash.2d 658

Relation back provision inapplicable

Ga.—Shirah Contracting Co, Inc. v Waite, 238 S.E.2d 728, 143 Ga. App. 355

page 716

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Ala.—Guaranty Pest Control, Inc. v Commercial Inv. & Development Corp., 264 So.2d 163, 288 Ala. 604—Tucker v Trussville Convalescent Home, Inc., 267 So.2d 438, 289 Ala. 366

Del.—Deluca v Martelli, Super., 200 A.2d 825, 7 Storey 399

Fla.—O'Brian Associates of Orlando, Inc. v Tully, App., 184 So.2d 202

Idaho—Rom v Olson, 523 P.2d 518, 95 Idaho 915

Kan.—Logan-Moore Lumber Co v Foley, 317 P.2d 467, 181 Kan. 984, 81 A.L.R.2d 671—Logan-Moore Lumber Co v Black, 347 P.2d 438, 185 Kan. 644—D.J. Fair Lumber Co v Karlin, 430 P.2d 222, 199 Kan. 366

Md.—Baltimore Contractors, Inc. v Valley Mall Associates, 341 A.2d 845, 27 Md. App. 695

Mo.—Mississippi Woodworking Co v Maher, App., 273 S.W.2d 753

N.C.—Neal v Whinnant, 145 S.E.2d 379, 266 N.C. 89—Mebane Lumber Co v Avery & Bullock Builders, Inc., 154 S.E.2d 665, 270 N.C. 337

Ohio—C.J.S. cited in State ex rel. Alban v Kauer, 188 N.E.2d 434, 437, 116 Ohio App. 412—Love Lumber Co v Reaser, 212 N.E.2d 655, 4 Ohio App.2d 354

Pa.—Schmauder v Braun, supra, n. 25—Miller v Chango, 74 Dauph. 77—Jan-Lee Corp v Kay, 21 D. & C.2d 222—Nicklas Plumbing Supply Co v Carlson, 109 P.2d 458—Hoffman Lumber Co v Geesey, 35 D. & C.2d 200, 12 Chest. 375

Utah—Roberts Inv. Co v Gishbous & Reed Concrete Products Co., 449 P.2d 116, 22 Utah 2d 105

32. Pa.—Stunkard v Stull, 7 Lebanon 35

38. N.J.—Friedman v Stein, supra, n. 25

41. N.Y.—Application of Heidi Const. Corp., 188 N.Y.S.2d 596, 20 Misc.2d 58, motion den. 205 N.Y.S.2d 814, 10 A.D.2d 1000, motion den. 207 N.Y.S.2d 431, 11 A.D.2d 951

Pa.—Shollenberger v Rickman, 79 Pa. Dist. & Co. 44, 2 Locomp. Rep. 103

page 717

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N.Y.—Libresco v Irvine, 140 N.Y.S.2d 252—Hilzenrath v Brandel, 139 N.Y.S.2d 688

44. Pa.—Ernst v Ferguson, 40 Wash. Co. 45

45. Liberal construction

N.J.—J. D. Lozeaux Lumber Co v Davis, 124 A.2d 593, 41 N.J. Super. 231

Pa.—Ziegler Lumber & Supply Co v Golden Triangle Development Co., Inc., 326 A.2d 524, 229 Pa. Super. 548

46. Del.—Cantano Brickwork, Inc. v Kirkwood Industries, Inc., 276 A.2d 267

Md—Kitchen v Himelfarb, 254 A 2d 694, 254 Md 372
NY—Hilzenrath v Brendel, 139 NYS 2d 688—Application of Mars Associates, Inc., 184 NYS 2d 253, 17 Misc 2d 188

Pa—Day & Zimmermann, Inc v Blocked Iron Corp of America, 147 A 2d 332, 394 Pa 386

47. **Md**—Scott & Wimbrow, Inc v Wisterco Investments, Inc., 373 A 2d 965, 36 Md App 274

NY—Amal Const Corp v A B G Bldg Corp, 231 NYS 2d 138

48. **Md**—Atlantic Mill & Lumber Realty Co v Keefe, 20 A 2d 178, 179 Md 496

50. **NY**—Hilzenrath v Brendel, supra, n 46

56. **Pa**—Tague v Cambruzzi, 35 West Co 55—Murray v Zemon, 107 P L J 307

Itemization

Okla—Liberty Plan Co v Francis T Smith Lumber Co., 360 P 2d 500

58. **Pa**—Larson Const Co v Donaldson's Crossroads, Inc., 44 Wash Co 196

60. **Pa**—Ziegler Lumber & Supply Co v Golden Triangle Development Co, Inc., 326 A 2d 524, 229 Pa Super 548

Amendment disallowed

Pa—Hiland v Hallenman, 4 Bucks 243

62. **NY**—Application of Hecht Const Corp, 188 NYS 2d 596, 20 Misc 2d 58, motion den 205 NYS 2d 814, 10 A D 2d 1000, motion den 207 NYS 2d 431, 11 A D 2d 951

Pa—Murray v Zemon, 107 P L J 307

Amendment disallowed

Kan—Sutherland Lumber Co v Due, 512 P 2d 525, 212 Kan 658

63. **NY**—Application of Clemens, 104 NYS 2d 720, 200 Misc 772—Application of Hecht Const Corp, 188 NYS 2d 596, 20 Misc 2d 58, motion den 205 NYS 2d 814, 10 A D 2d 1000, motion den 207 NYS 2d 431, 11 A D 2d 951

Pa—Michael Roofing Co v Macrone, 54 Lanc L Rev 79—Kelly-Ashby Elec Co v Claypool, 156 A 2d 587, 191 Pa Super 406—Kelly-Ashby Elec Co v Claypool, 19 D & C 2d 51

page 718

65. **Del**—Greenhouse v Duncan Village Corp, Super, 184 A 2d 479, 5 Storey 102

Kan—Logan-Moore Lumber Co v Black, 347 P 2d 438, 185 Kan 644, 81 A L R 2d 671

Pa—William A Geppert, Inc v Gier, 66 Montg Co 327—Gunder v Beard, 66 Dauph Co 300

66. **NJ**—J D Louzeaux Lumber Co v Davis, 124 A 2d 593, 41 N J Super 231

67. **Md**—Bruncz v DiLeo, 283 A 2d 606, 263 Md 481

NY—Application of Schuring, 96 NYS 2d 64—In re Rosetta, 113 NYS 2d 788—Acme Store Fronts, Inc v McGratty, 155 NYS 2d 135—Application of Boulder Apartments, Inc, 155 NYS 2d 520, 14 Misc 2d 287—Application of Hecht Const Corp, 188 NYS 2d 596, 20 Misc 2d 58, motion den 205 NYS 2d 814, 10 A D 2d 1000, motion den 207 NYS 2d 431, 11 A D 2d 951

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NY—Corinn Associates, Inc v McManis, Longe, Brockwell, Inc, 330 NYS 2d 847, 39 A D 2d 613

69. **NY**—Application of Adams, 324 NYS 2d 450, 67 Misc 2d 632

70. **NJ**—Apex Roofing Supply Co v Miller, 190 A 2d 553, 68 N J Super 68

Pa—Green v Heilbron, 72 Pa Dist & Co 422, 37 Del Co 290

Amendment disallowed

Pa—Hiland v Hallenman, 4 Bucks 243

73. **Tex**—Conn, Sherrod & Co, Inc v Tri-Electric Supply Co, Inc, Civ App, 335 S W 2d 31, err ref no rev err

74. **NY**—Perrin v Stempinski Realty Corp, 222 NYS 2d 148, 15 A D 2d 48, app dismissed 183 NE 2d 85, 11 NY 2d 931, 228 NYS 2d 683—Application of Upstate Builders Supply Corp, 310 NYS 2d 862, 63 Misc 2d 35

Reduction in amount

NY—Application of Upstate Builders Supply Corp, 325 NYS 2d 509, 37 A D 2d 901, app dismissed 280 NE 2d 889, 30 NY 2d 575, 330 NYS 2d 62

75. **NY**—Scriven v Maple Knoll Apartments, Inc, 361 NYS 2d 730, 46 A D 2d 210

Petition or application

(2) Other matters

Conn—City Iron Works, Inc v Frank Badstuebner Post No 2090, 167 A 2d 462, 22 Conn Sup 230

Pa—Berman v Greenfield, 9 Chest 389

Jurisdiction

NY—Brickmasons, Inc v Bermark Const Corp, 278 NYS 2d 464, 53 Misc 2d 158

page 719

86. **NY**—Application of Hecht Const Corp, 188 NYS 2d 596, 20 Misc 2d 58, motion den 205 NYS 2d 814, 10 A D 2d 1000, motion den 207 NYS 2d 431, 11 A D 2d 951—Application of Upstate Builders Supply Corp, 310 NYS 2d 862, 63 Misc 2d 35

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§ 171. Striking Off Claim or Statement

Library References

Mechanics' Liens ¶160

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Ind—Stanray Corp v Horizon Const, Inc, 342 NE 2d 645, 168 Ind App 164

Iowa—A and R Concrete & Const Co v Braklow, 103 NW 2d 89, 251 Iowa 1067

La—State ex rel Algiers Homestead Ass'n v Justice, App, 130 So 2d 818

Mont—Caley v Kohlstadt, 292 P 2d 995, 130 Mont 7
Nev—S and S Carpets v Valley Bank of Nevada, 576 P 2d 750, 94 Nev 165

NY—Singer v Regal Shoulder Pad Co, 81 NYS 2d 734—Application of Edmund J Rappoli Co, 169 NYS 2d 376, 5 A D 2d 758—Application of Lycee Francaise De New York, 204 NYS 2d 490, 26 Misc 2d 374—Kayfield Const Corp v Glazed Block Corp, 261 NYS 2d 202, 46 Misc 2d 880

Pa—Wilke v Chambers, 4 Chest Co 336—Hedden v Major, 41 Luz Leg Reg 26—Carter v Clippinger, 32 West Co 99—Kober v Stellato, 77 Pa Dist & Co 314—Scott v Larkin, 79 Pa Dist & Co 140, 100 Pittsb Leg J 66—Hyde v Doyle, 102 Pittsb Leg J 365—Day & Zimmermann, Inc v Blocked Iron Corp of America, 147 A 2d 332, 394 Pa 386—Jao D Boger Lumber Co v Seldomridge, 56 Lanc Rev 442—Murray v Zemon, 167 A 2d 253, 402 Pa 354

SC—Sea Pines Co v Kiawah Island Co, Inc, 232 SE 2d 501, 268 S C 153

Tex—Capitol Steel & Iron Co v Henderson, Civ App, 239 S W 2d 851

Issues, proof and variance

La—Davis-Wood Lumber Co v Wood, 71 So 2d 125, 224 La 825

Tex—Tucker v Northcutt, Civ App, 248 S W 2d 750

Petition held insufficient

DC—Clarke v Huff, 165 F 2d 247, 83 US App DC 38

Weight and sufficiency of evidence

La—Trouard v Calcasieu Bldg Materials, Inc, 62 So 2d 81, 222 La 1—Harding v Wattgney, App, 62 So 2d 190

NY—John H Reetz, Inc v Stackler, 201 NYS 2d 54, 24 Misc 2d 291

Motion presupposes existence of lien

NY—Application of Pennington, 129 NYS 2d 360

Notice

NY—Drake Construct Corp v Kean Equipment Co, 79 NYS 2d 747, 274 App Div 809—Application of Euclid Concrete Corp, 107 NYS 2d 237, 279 App Div 594—Application of J D H Builders, Inc, 155 NYS 2d 121—Application of Boulder Apartments, Inc, 155 NYS 2d 520, 14 Misc 2d 287

Posting security to cancel notice

NY—Amal Const Corp v A B G Bldg Corp, 231 NYS 2d 138

Questions to be determined at trial not considered

NY—T A Maloney Contracting Corp v Lien and Duburment Unit of Dept of Finance of City of New York, 380 NYS 2d 585, 85 Misc 2d 838

Pa—Farm Systems, Inc v Vogt, 56 Berks 170

Jurisdiction

NY—Gager Roofing Co v Thompson, 283 NYS 2d 296, 54 Misc 2d 718

Attorney's fees

La—Lunray Downs, Inc v R E Hecht Const Co, Inc, App, 397 So 2d 5

92. **Fla**—Alex v Randy, Inc, App, 305 So 2d 13

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NY—Simonetta Concrete Const Corp v Dean Const Co, 192 NYS 2d 96—Application of Joseph P Blitz, Inc, 234 NYS 2d 671, 36 Misc 2d 1028

Pa—Grable v Dombroski, 34 West Co 307

Inadequate description

NY—Country Village Heights Condominium (Group I) v Mario Bonito, Inc, 363 NYS 2d 501, 79 Misc 2d 1088

93. **NY**—Triple Cities Const Co v Dan-Bar Contracting Co, 136 NYS 2d 459, 285 App Div 299, aff'd 128 NE 2d 318, 309 NY 665

Pa—Harris v Joseph, 30 Wash Co 188—Marchak v McClure, 6 Chest Co 90

Motion for cancellation denied

(2) Other cases

NY—Application of Amato, 143 NYS 2d 388—Application of Harbour Green Estates, Inc, 162 NY S 2d 788, 7 Misc 2d 541—Application of Magowan, 203 NYS 2d 35—Application of Lasa Corp, 203 NYS 2d 731, 27 Misc 2d 495—Application of Empress Apartments, Inc, 203 NYS 2d 972, 26 Misc 2d 852—Application of Reford Realty Corp, 216 NYS 2d 564—Application of Oster, 219 NY S 2d 988, 31 Misc 2d 253—Atlantic Cement Co v St Lawrence Cement Co, 254 NYS 2d 676, 22 A D 2d 228

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Fla—Wesley Const Co v Yarnell, App, 268 So 2d 454

Md—Tyson v Masten Lumber & Supply, Inc, 408 A 2d 1051, 44 Md App 293

NY—Application of Mulvey, 189 NYS 2d 814, 21 Misc 2d 855—Simonetta Concrete Const Corp v Dean Const Co, 192 NYS 2d 96—Application of R G R Const Corp, 192 NYS 2d 1010, 19 Misc 2d 920

Pa—Hedden v Major, 41 Luz Leg Reg 26—Mullcooly-Winter Co v Short, 98 Pittsb Leg J 78, aff'd 74 A 2d 136, 365 Pa 141—Stockard v Graham, 6 Chest Co 165—Hetz Constructors, Inc v Thatcher Glass Mfg Co, 38 West 49—Stunkard v Skull, 7 Lebanon 35—Dickson v Neas, 8 Chest 422

Page 719

95 N.J.—*Sharav v Scott*, 117 A 2d 175, 37 N.J. Super 224

Pa.—*Tilo Roofing Co v Abelloff*, 75 Pa. Dist. & Co 534, 12 Monroe L.R. 111

page 720

96. **Methods for discharge of lien and notice of intention**

N.J.—*Sharav v Scott*, 117 A 2d 175, 37 N.J. Super 224

97 Fla.—*Resnick Developers South, Inc v Clerici, Inc*, App., 340 So 2d 1194

N.Y.—*Bradley v Kostanaka*, 101 N.Y.S.2d 767—Application of *Oster*, 219 N.Y.S.2d 988, 31 Misc.2d 253

Order to show cause

N.Y.—Application of *Jencho Jewish Center*, 210 N.Y.S.2d 77, 28 Misc.2d 458

98. N.Y.—Application of *Saddle Rock Homes Corp*, 107 N.Y.S.2d 900—Application of *Jory Const. Corp.*, 158 N.Y.S.2d 632, 6 Misc.2d 701—*Di-Com Corp v Active Fire Sprinkler Corp*, 318 N.Y.S.2d 249, 36 A.D.2d 20

Pa.—*Tilo Roofing Co v Abelloff*, supra, n 95—*Smiegel v Seman*, 53 Lack. Jur 170—*Morris Black & Sons, Inc v Drexel Insulation & Roofing Co*, 35 North 399

Issues of fact for trial

N.Y.—*In re Miller*, 133 N.Y.S.2d 421

(2) Other matters

N.Y.—*Walsh v Boulder Apartments, Inc*, 158 N.Y.S.2d 614, 6 Misc.2d 653—Application of *Yeshiva Rabbi Dov Revel of Forest Hills, Inc*, 170 N.Y.S.2d 124, 9 Misc.2d 252

No summary determination where question of fact involved

N.Y.—Application of *Retford Realty Corp*, 216 N.Y.S.2d 564—Application of *Oster*, 219 N.Y.S.2d 988, 31 Misc.2d 253

99. La.—*Adams v Darby, App.*, 54 So 2d 887

2. Pa.—*Semango v Hobbs*, 75 A 2d 17, 167 Pa. Super 399

Held premature

N.Y.—Application of *Lawrence Arms, Inc*, 234 N.Y.S.2d 783, 37 Misc.2d 396

3. N.Y.—Application of *Ahneman-Christiansen, Inc*, 176 N.Y.S.2d 200, 14 Misc.2d 530

Pa.—*Scott v Larkin*, 79 Pa. Dist. & Co 140, 100 Pittab Leg J 66

Lien is res inter alios acta, etc.

Pa.—*Alan Porter, Inc v Du-Rite Products Co*, 41 Berks Co 184, revid on oth grds 79 A 2d 218, 366 Pa 548

4. Pa.—*Carones v Piccone*, 63 A 2d 65, 361 Pa 93—*Onda v Cecchino*, 101 Pittab Leg J 352—*Stunkard v Stull*, 7 Lebanon 35—*Fotheringham v McPherson*, 17 D & C 2d 199—*Merritt Lumber Yards, Inc*, G E B Enterprises, Inc, 22 D & C 2d 39, 76 Montg 293—*Perkowski v Kasenchak*, 52 Luz L Reg 267—*S L Shaneman, Inc v Churgas*, 84 Montg 24—*Cotter v McArdle*, 223 A 2d 718, 423 Pa 632—*Winegar v Bente*, 39 D & C 2d 558, 48 West 89—*Grimes v Barnes*, 85 Montg 305

Rule to strike denied

Pa.—*Yanko v Donaldson*, 31 North Co 169—*Wells v Paull*, 32 Erie Co 181—*Yelen v Gutstam*, 70 Pa. Dist. & Co 383, 41 Luz Leg Reg 7—*Frater v Neff*, 69 Montg Co 158—*Jones, Inc v 57 Corp*, 1 Pa. Dist. & Co 2d 493—*Hoffman Lumber Co v McCormick*, 7 Chest 48—*Laddick v Sowers*, 1 Cumb 54—*Mattoli v Luciw*, 4 D & C 2d 387—*Mandos v Baptist Church of Phoenixville*, 8 Chest 108—*Littler v Bennett*, 39 West 285—*Johnson v Walker*, 28 D & C 2d 625, 21 Law L J 177—*W-B Bldg Supply Co v Crenko*, 54 Luz L Reg 275—*Grove v Falk*, 84 Dauph 370

7. N.Y.—Application of *Joseph P. Blitz, Inc*, 234 N.Y.S.2d 671, 36 Misc.2d 1028—*Paton v Lincoln Supply Co*, 239 N.Y.S.2d 20, 37 Misc.2d 1003—*Hayes v Carpeting Sales & Service Corp*, 260 N.Y.S.2d 62, 46 Misc.2d 468

Pa.—*Yanko v Donaldson*, supra, n 4—*Heat & Power Corp v Foust Distilling Co*, 62 York Leg Rec 49—*Queen City Heating Co v Kienschuster*, 67 Pa. Dist. & Co 389, 23 Lehigh Co L J 138—*Giose v Coleman*, 23 Lehigh Co Leg J 187—*Phillips v Phillips*, 98 Pittab Leg J 411—*Garvin v Wortman*, 36 Erie Co 269—*Ruggles Lumber Co v Seiling*, 7 D & C 2d 113, 46 Luz L Reg 173—*Vaughn v Rouhn*, 52 Sch L.R. 153—*Z and L Lumber Co v Booth*, 40 West 33—*Peoples First Nat. Bank & Trust Co v Lankford*, 107 P.L.J. 123—*Glenn Lumber & Supply, Inc v Kogler*, 41 West 205—*Dunham-Bush, Inc v Murray*, 51 Lanes, Inc, 194 A 2d 887, 412 Pa 424

Notice of intention to file a lien

Pa.—*Miller v Chango*, 74 Dauph 77

Questions of fact generally

Pa.—*Young Supply Co v Burke & Burke*, 37 Del. Co 282—*Carl Gaintino, Inc v Long*, 30 Del. Co 278

(2) Other cases

Pa.—*Keber v Stellato*, 77 Pa. Dist. & Co 314
Tex.—*Associated Sawmills, Inc v Peterson*, Civ App., 366 S.W.2d 844

Burden of proof

La.—*Adams v Darby, App.*, 54 So 2d 887

Evidence held insufficient

La.—*Adams v Darby*, supra
Motion denied where basis is facts outside record
Pa.—*Main Line Const. Co v Mandes, Inc*, 8 Chest 95—*Green Hills Lumber Co v Essaman*, 105 P.L.J. 327—*Miller v Chango*, 74 Dauph 77

page 721

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§ 172. In General

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Colo.—*Brannan Sand & Gravel Co. v Santa Fe Land & Imp Co*, 332 P 2d 892, 138 Colo 314

Ga.—*Tumlin v Wilson*, 132 S.E.2d 815, 108 Ga App 273

Ill.—*Roth v Lehman*, 116 N.E.2d 413, 1 Ill App 2d 94
Ind.—*Prewitt v Londerree*, 216 N.E.2d 724, 141 Ind App 291

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§ 173. Value of Labor and Materials

page 722

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Counterclaim

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§ 174. Amount Fixed or Due under Contract or Subcontract

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page 723

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page 724

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No lien on extra work
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page 725

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page 726

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§ 175. Abandonment or Part Performance of Contract

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page 727

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Page 727

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87. Percentage based on value of work before abandonment
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§ 176. Interest

page 728

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page 729

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§ 177. Accrual or Commencement

page 730

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- Provision inapplicable
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§ 178. — On Making or Recording of Contract

page 731

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Rule inapplicable to contract by prospective owner

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§ 179. — On Commencement of Building or Improvement

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- Visible commencement of operations
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- Fla—Broderick v Overhead Door Co of Fort Lauderdale, App, 117 So 2d 240
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Change of ownership

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"First spade rule"

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page 732

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Laem for architect's fees, etc.

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Mo—CJS cited in H B Deal Const Co v Labor Discount Center, Inc, 418 S W 2d 940, 951

Ohio—Fryman v McGhee, 163 N E 2d 63, 108 Ohio App 501—Wayne Bldg & Loan Co of Wooster v Yarrowborough, 228 N E 2d 841, 11 Ohio St 2d 195

64. Mo—CJS, cited in H B Deal Const Co v Labor Discount Center, Inc, 418 S W 2d 940, 951

65. Ark—Clark v General Electric Co, 420 S W 2d 830, 243 Ark 399

Mo—CJS quoted at length in H B Deal Const Co v Labor Discount Center, Inc, 418 S W 2d 940, 951

66. Mo—United Lumber Co v Minmar Inv Co, App, 472 S W 2d 630

Nev—Aladdin Heating Corp v Trustees of Central States, 563 P 2d 82, 93 Nev 257

72. Mo—H B Deal Const Co v Labor Discount Center, Inc, 418 S W 2d 940

73. Minn—Reuben E Johnson Co v Phelps, 156 N W 2d 247, 279 Minn 107

76. Utah—Western Mortg Loan Corp v Cottonwood Const Co, 424 P 2d 437, 18 Utah 2d 409

§ 180. — Interruption of Work or Change of Plans

78. Colo—3190 Corp v Gould, 431 P 2d 466, 163 Colo 356

Md—Frank J Klein & Sons, Inc v Laudeman, 311 A 2d 780, 270 Md 152

page 733

80. Pa—Norristown Fed Savings & Loan Ass'n v Gressler, 70 Montg Co 275, 68 York Leg Rec 98

81. Md—Frank J Klein & Sons, Inc v Laudeman, 311 A 2d 780, 270 Md 152

83. Md—Frank J Klein & Sons, Inc v Laudeman, 311 A 2d 780, 270 Md 152

§ 181. — On Performance of Labor or Furnishing of Material

84. U.S.—Diversified Mortg Investors v Gepada, Inc, D C Iowa, 401 F Supp 682

Fla—Roberts v First Federal Sav & Loan Ass'n of Manatee County, App, 222 So 2d 32

Iowa—Northwestern Nat Bank of Sioux City v Metro Center, Inc, 303 N W 2d 395

Tex—Crutcher, Rolfs, Cummings, Inc, v Big Three Welding Equipment Co, Civ App, 224 S W 2d 884, rev'd on oth grds 229 S W 2d 600, 149 Tex 204—Pierce v Mays, Civ App, 277 S W 2d 155, aff'd 281 S W 2d 79, 154 Tex 487

85. U.S.—Diversified Mortg Investors v Gepada, Inc, D C Iowa, 401 F Supp 682

Colo—Bankers Trust Co v El Paso Pre-Cast Co, 560 P 2d 457, 192 Colo 468

Ga—Old Stone Mortg and Realty Trust v New Georgia Plumbing, Inc, 231 S E 2d 785, 140 Ga App 686, aff'd 236 S E 2d 592, 239 Ga 345

Iowa—Society Lunas v Wibos, 113 N W 2d 603, 253 Iowa 953

Kan—Lexena State Bank & Trust Co v Drvon, 559 P 2d 776, 221 Kan 238

Mo—Vasquez v Village Center, Inc, 362 S W 2d 588

Neb—Krotter & Sailors v Pease, 74 N W 2d 538, 161 Neb 774

Ohio—Lake Lumber Co v Watson, 133 N E 2d 925

86. U.S.—Jackson v Flohr, C.A. Wash., 227 F 2d 607, cert den 76 S Ct 322, 350 U.S. 947, 100 L Ed 826

Ala—Gamble's Inc v Kansas City Title Ins Co, 217 So 2d 923, 283 Ala 409

Ark—Streuli v Wallin-Dickey & Rich Lumber Co, 302 S W 2d 522, 227 Ark 885—Mark's Sheet Metal, Inc v Republic Mortg Co, 414 S W 2d 106, 242 Ark 475

Del—J I Kialak Mortg Corp of Del v William Matthews Builder, Inc, Super, 287 A 2d 686, aff'd 303 A 2d 648—Gaster v Wilmington Plumbing Supply Co, Inc, 321 A 2d 504

D.C.—Sloane v Malcolm Price, Inc, App, 339 A 2d 43

Fla—U.S. v Griffin-Moore Lumber Co, 62 So 2d 589

Ga—Old Stone Mortg and Realty Trust v New Georgia Plumbing, Inc, 231 S E 2d 785, 140 Ga App 686, aff'd 236 S E 2d 592, 239 Ga 345

Idaho—Metropolitan Life Ins Co v First Sec Bank of Idaho, 491 P 2d 1261, 94 Idaho 489, reh den 492 P 2d 1400, 94 Idaho 527

Iowa—Northwestern Nat Bank of Sioux City v Metro Center, Inc, 303 N W 2d 395

La—Capital Bank & Trust Co v Broussard Paint & Wallpaper Co, App, 198 So 2d 204

Me—Pineland Lumber Co v Robinson, 382 A 2d 33

Minn—Dunham Associates, Inc v Group Inv., Inc, 223 N W 2d 376

Mo—United Lumber Co v Minmar Inv Co, App, 472 S W 2d 630

Neb—Krotter & Sailors v Pease, 74 N W 2d 538, 161 Neb 774—Gierst v Wright, 94 N W 2d 476, 167 Neb 767

N.C.—Pegram-West, Inc v Hiatt Homes, Inc, 184 S E 2d 65, 12 N C App 519

Tex—Pierce v Mays, supra, n 84—Regold Mfg Co v Maccabeas, Civ App, 348 S W 2d 864, err ref no rev err

Va—Hadrup v Sale, 111 S E 2d 405, 201 Va 421, 76 A L R 2d 1159

87. U.S.—In re Triple A Sugar Corp, Bkrtcy Me., 13 B.R. 969

Cal—Vollstedt Kerr Lumber Co v Production Homes, 279 P 2d 615, 130 C A 2d 507—Walker v Lytton Sav & Loan Ass'n of Northern Cal., 84 Cal Rptr 521, 465 P 2d 497, 2 C 3d 152

Definition of materials

Tex—Blaylock v Dollar Inns of America, Inc, Civ App, 548 S W 2d 924, err ref no rev err, mod on oth grds, Sup, 576 S W 2d 794

90. Ark—U.S. v McGhee, 375 S W 2d 365, 237 Ark 698

91. Ark—Lyman Lamb Co v Union Bank of Benton, 374 S W 2d 820, 237 Ark 629—U.S. v McGhee, 375 S W 2d 365, 237 Ark 698

Md—Hill v Parkway Indus Center, 435 A 2d 472, 49 Md App 676

Neb—Denver Wood Products Co v Frye, 275 N W 2d 67, 202 Neb 286

N.C.—Raleigh Paint & Wallpaper Co v Peacock & Associates, Inc, 247 S E 2d 728, 38 N C App 144

S.C.—Lowndes Hill Realty Co v Greenville Concrete Co, 93 S E 2d 855, 229 S C 619

Test

Tex—Blaylock v Dollar Inns of America, Inc, Civ App, 548 S W 2d 924, err ref no rev err, mod on oth grds, Sup, 576 S W 2d 794

page 734

92. Fla—Miller Elec Co of Miami, Inc v Sweeney, App, 199 So 2d 734

N.C.—Raleigh Paint & Wallpaper Co v Peacock & Associates, Inc, 247 S E 2d 728, 38 N C App 144

Tex—Hubert Lumber Co v King, Civ App, 468 S W 2d 503, err ref no rev err

95. Kan—CJS cited in Benner-Williams, Inc v Romine, 437 P 2d 312, 315, 200 Kan 483

Ohio—Clyborn v Reeves, 234 N E 2d 613, 13 Ohio App 2d 156

97. Tex—University Sav & Loan Ass'n v Security Lumber Co, 423 S W 2d 287

§ 182. — On Date of Notice to Owner

2. Fla—Crane Co v Fine, 221 So 2d 145, mand conf to 222 So 2d 36—Warren v Bill Ray Const Co, Inc, App, 269 So 2d 25

N.D.—Hessinger v Sorenson, 180 N W 2d 910

Ohio—Durrett v Blanc, App, 129 N E 2d 76

Or—Steel Products Co of Oregon v Portland General Elec Co, 628 P 2d 1180, 291 Or 41

Pa—Grayum v McAnley, 37 Del Co 34

Tex—Yeager Elec & Plumbing, Inc v Ingleside Cove Lumber & Builders, Inc, Civ App, 526 S W 2d 738

Ala—Crane Co v Sheraton Apartments, 58 So 2d 614, 257 Ala 332—Teague Hardware Co v Bankhead Development Co, 151 So 2d 611, 274 Ala 697

Amendment

N.J.—Apex Roofing Supply Co v Miller, 190 A 2d 553, 79 N J Super 68

Both tenants by entirety must be notified

N.J.—Apex Roofing Supply Co v Miller, 190 A 2d 553, 79 N J Super 68

Notice not required

N.H.—James Drywall, Inc v Europa Development Corp, 365 A 2d 1047, 116 N H 619

3. Pa—Hoffman Lumber Co v McCormick, 7 Chest 48

Wash—Stricker v Powers, 210 P 2d 814, 34 Wash 2d 897—Whitney v McKay, 344 P 2d 497, 54 Wash 2d 672

§ 183. Continuance and Expiration

4. U.S.—In re Warren, D.C.Wash., 192 F Supp 801—Continental Cas Co v Associated Pipe & Supply Co, D.C.La., 310 F Supp 1207, aff'd in part, mod

Page 744

Neb—May Plumbing Co v Shaver, 153 NW 2d 911, 182 Neb 251
Utah—Buehner Block Co v Glezes, 310 P 2d 517, 6 Utah 2d 226
Wis—Westfair Corp v Kuelz, App, 280 NW 2d 364, 90 Wis 2d 631

Improvement and leasehold

(3) Other matters
US—Continental Cas Co v Associated Pipe & Supply Co, D C La, 310 F Supp 1207, affd in part, mod in part on oth grds and vac in part, on oth grds, CA, 447 F 2d 1041—In re California Steel Co, Bkrtcy Ill, 21 BR 383

Ariz—Hayward Lumber & Inv Co v Graham, 449 P 2d 31, 104 Ariz 103

Del—McHugh Elec Co v Hesler Realty & Development Co, 129 A 2d 654, 11 Terry 296

Fla—North Dade Plumbing, Inc v La Salle Bldg Corp, App, 114 So 2d 707

Iowa—Casaday v De Jarnette, 101 NW 2d 21, 251 Iowa 391

Tex—Diversified Mortg Investors v Lloyd D Blaylock General Contractor, Inc, 576 SW 2d 794

Utah—Interiors Contracting, Inc v Navalco, 648 P 2d 1382

Wash—McCombs Const, Inc v Barnes, 645 P 2d 1131, 32 Wash App 70

Limitation on rights of lienholder

Tex—Schneider v Delwood Center, Inc, Civ App, 394 SW 2d 671, err ref no rev err

page 743

71. Fla—Brenner v Smullian, 84 So 2d 44, foll 84 So 2d 49

Okl—Blalock v Hoshall's A & A Plumbing Co, 318 P 2d 878

Pa—Fiorella v Barrett, 71 Montg 184

72. Tex—Tomlinson v Higginbotham Bros & Co, Civ App, 229 SW 2d 920

§ 192. — Of Person Named in Claim or Statement as Owner

73. Ill—Swords v Riser, 371 NE 2d 182, 13 Ill Dec 487, 55 Ill App 3d 676

Kan—Norms v Ntisch, 325 P 2d 326, 183 Kan 86
SD—Stoneberger v Davis, 51 NW 2d 873, 74 SD 300

W Va—Lilly v Mumsey, 63 SE 2d 519, 135 W Va 247

74. ND—United Accounts, Inc v Larson, 121 NW 2d 628

Ohio—Capital City Lumber Co v Ellerbrock, 203 NE 2d 244, 177 Ohio St 159

Equitable owner

Ark—Snodgrass v Huff, 234 SW 2d 505, 218 Ark 113

75. Pa—A D Ross, Inc v Drew, 4 D & C 2d 589, 102 Pittsb Leg J 293

§ 193. — At Particular Time

76. US—US v Albert Holman Lumber Co, C A Ala, 206 F 2d 685, reh den 208 F 2d 113

Pa—Rudolph & Potter Co v Edwards, 4 Chest Co 146

77. Tex—Diversified Mortg Investors v Lloyd D Blaylock General Contractor, Inc, 576 SW 2d 794

79. Ala—Stewart v Lloyd, 48 So 2d 788, 254 Ala 465

Ga—West Lumber Co v Gignuliat, 48 SE 2d 688, 77 Ga App 336

Tex—Diversified Mortg Investors v Lloyd D Blaylock General Contractor, Inc, 576 SW 2d 794

page 746

83. Court determines the equities of the case
Wn—Else v Cannon, 62 NW 2d 3, 265 Wis 510

90. Fla—Nathman v Chrycy, App, 107 So 2d 782

§ 194. — Interest of Vendor for Improvements of Purchaser

93. Ark—Massey v Tyra, 234 SW 2d 759, 217 Ark 970

Ind—Miles Homes of Indiana, Inc v Harrah Plumbing and Heating Service Co Inc, App, 408 NE 2d 597

Iowa—Skemp v Olansky, 85 NW 2d 580, 249 Iowa 1

NJ—American Lumber & Bldg Supply v D & M, Inc, 210 A 2d 119, 87 NJ Super 562

Ohio—Wayne Bldg & Loan Co of Wooster v Yarbrough, 228 NE 2d 841, 11 Ohio St 2d 195

Tenn—Rowland v Lowe, 326 SW 2d 681, 46 Tenn App 60

Cooperation of parties subjecting property to lien

Ga—Builders Supply Co v Pilgrim, 153 SE 2d 657, 115 Ga App 85

94. Fla—E & E Elec Co v Gold Coast 72nd St Diner, Inc, App, 116 So 2d 660

§ 195. — Reversion of landlord for Improvements by Tenant

95. La—Roman v Zuppardo, App, 407 So 2d 65

Mo—Mid-West Engineering & Const Co v Campaigna, 397 SW 2d 616, app after remand 421 SW 2d 229

Ohio—Kazmier v Thom, 408 NE 2d 694, 63 Ohio App 2d 29, 17 OO 3d 237

Okl—Benton v Hill, 389 P 2d 501

Wash—McCombs Const, Inc v Barnes, 645 P 2d 1131, 32 Wash App 70

§ 197. In General

Library References

Mechanics' Liens ¶198

page 747

4 US—US v Albert Holman Lumber Co, C A Ala, 206 F 2d 685, reh den 208 F 2d 113

Conditions for lien to become "choate"

US—J S Purcell Lumber Corp v Henson, D C Va, 405 F Supp 1130

5 Ark—Clark v General Elec Co, 420 SW 2d 830, 243 Ark 399

Tex—Libo v Doehen, Civ App, 310 SW 2d 715, err ref no rev err

6 US—Sandusky Foundry & Machine Co v City of Wickliffe, C A Ky, 483 F 2d 695

Ark—Franks v Wood, 228 SW 2d 480, 217 Ark 10

Mo—Herbert & Brooner Const Co v Golden, App, 499 SW 2d 541

Notice to lender

Tex—Coke Lumber & Mfg Co v First Nat Bank in Dallas, Civ App, 529 SW 2d 612, err ref no rev err

7 Md—Clark Certified Concrete Co v Lindberg, 141 A 2d 685, 216 Md 576

§ 198. Between Different Mechanics' Liens

page 748

9. US—Matter of Jamail, D C Tex, 471 F Supp 441, affd, C A, 609 F 2d 1387

Cal—Reliable Steel Supply Co v Croom, 5 Cal Rptr 310, 181 C A 2d Supp 831

Ky—Charles White Co, Inc v Percy Galbreath & Sons, Inc, App, 563 SW 2d 478

Neb—Gierst v Wright, 94 NW 2d 476, 167 Neb 767

NY—Marcus Substructure Corp v Goldhaber, 422 NY S 2d 858, 102 Misc 2d 66

Tex—Newman v Coker, Civ App, 310 SW 2d 354—Lubbock Nat Bank v Hinkle, Civ App, 397 SW 2d 285, err ref no rev err

"Same job" held not involved

Ohio—Lake Lumber Co v Watson, 133 NE 2d 925

Liens filed subsequent to commencement of work

W Va—Carolina Lumber Co v Cunningham, 192 SE 2d 722, 156 W Va 272

10. Wash—CJS eted in Homann v Huber, 228 P 2d 466, 470, 38 Wash 2d 190

12 NY—Drachman Structural, Inc v Anthony Rivera Contracting Co, Inc, 356 NY S 2d 974, 78 Misc 2d 486

14 Colo—Bankers Trust Co v El Paso Pre-Cast Co, 560 P 2d 457, 192 Colo 468

Pa—Collegeville Nat Bank v Frehafer, 7 D & C 2d 14, 72 Montg 1, 17 Som 393

18 Mich—Yerrington v Miller, 38 NW 2d 84, 325 Mich 193

NH—Westinghouse Elec Supply Co, Inc v Electromech, Inc, 409 A 2d 1141, 119 NH 833

A materialman who has a lien and is entitled to repossess the material to sell it elsewhere is not obligated to other lien creditors to so repossess the material in order that the other lien creditors may obtain priority¹⁹⁵

195. Ill—Hinkle v Creek, 251 NE 2d 111, 113 Ill App 2d 454

page 749

26 Utah—Utah Sav and Loan Ass'n v Mecham, 366 P 2d 598, 12 Utah 2d 335, 15 ALR 3d 63

28 US—In re Elmwood Farms, Inc, Bkrtcy NY, 30 BR 282

Fla—Baumgartner Const Co, Inc v Harrell, App, 364 So 2d 802

29 US—Elzinga-Volkers, Inc v Federated Elec Co-op, Inc, D C Mo, 449 F Supp 341

SC—Lowndes Hill Realty Co v Greenville Concrete Co, 93 SE 2d 855, 229 SC 619

31 US—US v Westmoreland Manganese Corp, D C Ark, 134 F Supp 898, affd, C A, 246 F 2d 351, revd on oth grds 246 F 2d 357, cert den 78 SCt 262, 355 US 890, 2 LE 2d 189—In re Mayer Central Bldg Corp, D C Ariz, 275 F Supp 873

Mich—Strom Const Co v Raymond, 95 NW 2d 879, 356 Mich 79

Wash—Homann v Huber, 228 P 2d 466, 38 Wash 2d 190

W Va—Carolina Lumber Co v Cunningham, 192 SE 2d 722, 156 W Va 272

32. Wash—Nelson v Bailey, 338 P 2d 757, 54 Wash 2d 161, 73 ALR 2d 1400

36 La—National Bank of Commerce in New Orleans v Southern Land Title Corp, App, 244 So 2d 685, writ ref 247 So 2d 392, 258 La 569

Tex—North Texas Loan & Trust Co v City of Demson, Civ App, 58 SW 2d 858—Marks v Calcasieu Lumber Co, Civ App, 245 SW 2d 749, err ref no rev err

37. US—Marv Lazer Associates, Inc v Moredall Realty Corp, D C NY, 533 F Supp 8

La—Pringle Associated Mortg Corp v Eanes, App, 208 So 2d 346, writ issued 210 So 2d 508, 252 La 267, writ issued 210 So 2d 508, 252 La 268, and, 210 So 2d 509, 252 La 270, affd in part, revd in part on oth grds, am in part on oth grds 226 So 2d 502, 254 La 705

Ohio—Lake Lumber Co v Watson, 133 NE 2d 925

38 Tex—Marek v Goven, Civ App, 346 SW 2d 926

41. US—US v Durham Lumber Co, C A NC, 257 F 2d 570, affd 80 SCt 1282, 363 US 522, 4 L Ed 2d 1371

Tex—First Nat Bank in Graham v Sledge, 653 S W 2d 283

page 750

42. Tex—Marek v Goven, Civ App, 346 S W 2d 926

45. N.J.—Solondz Bros Lumber Co v Piperato, 101 A 2d 33, 28 N.J. Super 414

page 751

57. N.H.—Westinghouse Elec Supply Co, Inc v Electromech, Inc, 409 A 2d 1141, 119 N.H. 833

§ 199. Between Mechanic's Lien and Mortgages or Like Encumbrances

61. U.S.—Bank of Wrentham v Alaska Asiatic Lumber Mills, D.C. Alaska, 84 F Supp 1, 12 Alaska 338—W T Jones & Co v Foodco Realty, Inc, D.C. Va., 206 F Supp 878, mod on oth grds, C.A., 318 F 2d 881—G F Wertme, Inc v Turckich, C.A.N.Y., 358 F 2d 802—In re Viking Co, Inc, D.C. Tenn., 389 F Supp 1230, affd C.A., 510 F 2d 973, 974

Ala.—Empire Home Loans, Inc v W C Bradley Co, 241 So 2d 317, 286 Ala 449, app after remand 283 So 2d 431, 291 Ala 541

Ark.—Jim Walter Homes, Inc v Bowling, 521 S W 2d 828, 258 Ark 28

Cal.—Walker v Lytton Sav & Loan Ass'n of Northern Cal, 84 Cal Rptr 521, 465 P 2d 497, 2 C 3d 152

Ill.—First Federal Sav & Loan Ass'n of Chicago v Connelly, 454 N.E.2d 314, 73 Ill Dec 454, 97 Ill 2d 242

Iowa.—Denniston & Partridge Co v Romp, 56 N.W.2d 601, 244 Iowa 204

Ky.—Merchants Nat Bank & Trust Co v Professional Constructors, Inc, 379 S W 2d 100

La.—National Bank of Commerce in New Orleans v Southern Land Title Corp, App, 244 So 2d 685, writ ref 247 So 2d 392, 258 La 569

Minn.—Henschke v Christian, 36 N.W.2d 547, 228 Minn 142

Miss.—Ziller v Atkms Motel Co, 244 So 2d 409

Neb.—Westland Homes Corp v Hall, 226 N.W.2d 622, 193 Neb 237

N.H.—L. M. Sullivan Co, Inc v Broadway Sav Bank, 380 A 2d 1087, 117 N.H. 985

N.Y.—Cobleskill Sav and Loan Ass'n v Rickard, 223 N.Y.S.2d 246, 15 A.D.2d 286—Robert-Allen Associates, Inc v Carver Federal Sav & Loan Ass'n, 319 N.Y.S.2d 1009, 66 Misc 2d 202

Ohio.—Hilldale Loan & Bldg Co v Creager, Com Pl, 214 N.E.2d 703, 5 Ohio Misc 147

Pa.—Heggie v Solomon, 37 Wash 136

Tenn.—Southern Blow Pipe & Roofing Co v Grubb, 260 S.W.2d 191, 36 Tenn App 641—Kemp v Thurmond, 521 S.W.2d 806

Tex.—Providence Institution for Sav v Sims, 441 S.W.2d 516—Hook Air Conditioning, Inc v Mortgage & Trust, Inc, Civ App, 517 S.W.2d 593

Priority of lien for "original construction"

U.S.—Ault v Harris, D.C. Alaska, 317 F Supp 373, affd, C.A., 432 F 2d 441

Alaska.—Lynch v McCann, 478 P 2d 835

Statute construed

N.H.—North Am Mfg, Inc v Crown Intern, Inc, 335 A 2d 660, 115 N.H. 114

62. D.C.—Guardian Federal Sav & Loan Ass'n v Suskind, App, 265 A 2d 295

La.—Courson v Mauroner-Craddock, Inc, App, 219 So 2d 258, writ ref 219 So 2d 778, 253 La 760, and 219 So 2d 778, 253 La 761, and 219 So 2d 778, 253 La 762

63. N.Y.—Robert-Allen Associates, Inc v Carver Federal Sav & Loan Ass'n, 319 N.Y.S.2d 1009, 66 Misc 2d 202

64. Obligatory or permissive

Okla.—Liberty Nat Bank & Trust Co of Oklahoma City v Kasab Industries, Inc, 591 P 2d 692

66. Wash.—John M. Ketch, Inc v Don Hoyt, Inc, 483 P 2d 135, 4 Wash App 580

§ 200. — Priority in Time

page 752

67. Cal.—Tracy Price Associates v Hebard, 72 Cal Rptr 600, 266 C.A.2d 778

Conn.—Melrose v Industrial Associates, 72 A 2d 469, 136 Conn 518

Fla.—United of Florida, Inc v Illini Federal Sav and Loan Ass'n, App, 341 So 2d 793

Ill.—Detroit Steel Products Co v Hudes, 151 N.E.2d 136, 17 Ill App 2d 514

Ky.—Collier v Dillon, 230 S.W.2d 617, 313 Ky 244

La.—Tri-South Mortg Investors v Forest & Waterway Corp, App, 354 So 2d 588

Miss.—Lee Wholesale Co v McCoy, 100 So 2d 121, 232 Miss 685

N.H.—Coulard v O'Connor, 81 A 2d 205, 97 N.H. 89

N.C.—Frank H. Conner Co v Spanah Inns Charlotte, Ltd, 238 S.E.2d 525, 34 N.C. App 341, affd 242 S.E.2d 785, 294 N.C. 661

Tex.—Reserve Petroleum Co v Hutcheson, Civ App, 254 S.W.2d 802, err ref no rev err

68. U.S.—Grapette Co v Bowden, C.C.A. Tex., 165 F 2d 487

Ala.—Overhead Door Co of Birmingham v First Nat Bank of Tuscaloosa, Civ App, 365 So 2d 70, writ den, Sup, 365 So 2d 72

Cal.—Schrader Iron Works, Inc v Lee, 103 Cal Rptr 106, 26 C.A.3d 621

Colo.—Bankers Trust Co v El Paso Pre-Cast Co, 560 P 2d 457, 192 Colo 468

Fla.—Reading v Blakeman, 66 So 2d 682

Ky.—Cardinal Kitchens, Inc v Home Supply Co, 467 S.W.2d 775

La.—Capital Bank & Trust Co v Broussard Paint & Wallpaper Co, App, 198 So 2d 204

N.Y.—Rich v McCarthy, 98 N.Y.S.2d 638, 198 Misc 347—W.L. Development Corp v Trifort Realty, Inc, 377 N.E.2d 969, 44 N.Y.2d 489, 406 N.Y.S.2d 437

N.C.—Rural Plumbing & Heating, Inc v Hope Dale Realty, Inc, 140 S.E.2d 330, 263 N.C. 641

Ohio.—Connecticut Gen Life Ins Co v Birzer Bldg Co, 101 N.E.2d 408

Okla.—Jack Bell Lumber Co v Will, 383 P 2d 691—American-First Title & Trust Co v Ewing, 403 P 2d 488

Tex.—Pierce v Mays, Civ App, 277 S.W.2d 155, affd 281 S.W.2d 79, 154 Tex 487

69. U.S.—H. B. Agsten & Sons, Inc v Huntington Trust and Sav Bank, C.A.W.Va., 388 F 2d 156, cert den 88 S.Ct. 1413, 390 U.S. 1025, 20 L.Ed.2d 282

La.—Capital Bank & Trust Co v Broussard Paint & Wallpaper Co, App, 198 So 2d 204

Miss.—North American Mortg Investors v Mississippi Hardware Co, Inc, 360 So 2d 1203

71. U.S.—U.S. v Latrobe Const Co, C.A. Ark., 246 F 2d 357, cert den 78 S.Ct. 262, 355 U.S. 890, 2 L.Ed.2d 189—Bellegarde Custom Kitchens v Select-A-Home, Inc, D.C. Me., 385 F Supp 318

Ala.—R. L. Bains Builders, Inc v Bice, 151 So 2d 747, 275 Ala 23—Gamble's, Inc v Kansas City Title Ins Co, 217 So 2d 923, 283 Ala 409

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Cal.—Barr Lumber Co v Shaffer, 238 P 2d 99, 108 C.A.2d 14

Colo.—Colorado Nat Bank of Denver v F. E. Buegert Co, Inc, of Denver, 438 P 2d 306, 165 Colo 78

Ga.—White v Rome Bank & Trust Co, 231 S.E.2d 448, 140 Ga App 431

Ky.—Boggess v Bivins, 231 S.W.2d 32, 313 Ky 451

La.—R. J. Jones & Sons v Meyer, 55 So 2d 898, 220 La 153

Md.—Wilson Bros v Cooney, 247 A 2d 395, 251 Md 350

Mont.—Legland v McGaffick, 338 P 2d 1037, 135 Mont 188

N.Y.—Stefco Realty Corp v Larkfield Country Club, 240 N.Y.S.2d 621, 39 Misc 2d 340—Bodner v Bruckner, 288 N.Y.S.2d 342, 29 A.D.2d 441

Ohio.—Connecticut Gen Life Ins Co v Birzer Bldg Co, supra, n. 68

Okla.—Antrim Lumber Co v Claremore Federal Sav & Loan Ass'n, 230 P 2d 274, 204 Okl 387—Apex Siding & Roofing Co v First Federal Sav & Loan Ass'n of Shawnee, 301 P 2d 352—Sesmore v Voelkle, 312 P 2d 922—American-First Title & Trust Co v Ewing, 403 P 2d 488

Tex.—Continental Inv Co v Bodenheimer, Civ App, 102 S.W.2d 304—Regold Mfg Co v Macabees, Civ App, 348 S.W.2d 864, err ref no rev err—Irving Lumber Co v Alltex Mortg Co, 468 S.W.2d 341—Hubert Lumber Co v King, Civ App, 468 S.W.2d 503, err ref no rev err

page 753

72. Tex.—Majestic Bldg Corp v McClelland, Civ App, 539 S.W.2d 883

74. Ark.—Clark v General Elec Co, 420 S.W.2d 830, 243 Ark 399

Colo.—Beaver Lakes Corp v Ponzie, App, 484 P 2d 1255

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Mo.—H. B. Deal Const Co v Labor Discount Center, Inc, 418 S.W.2d 940

75. Ga.—Old Stone Mortg and Realty Trust v New Georgia Plumbing, Inc, 231 S.E.2d 785, 140 Ga App 686, affd 236 S.E.2d 592, 239 Ga 345

Miss.—Enterprise Plumbing Co v Bailey Mortg Co, 209 So 2d 825

Tex.—Hook Air Conditioning, Inc v Mortgage & Trust, Inc, Civ App, 517 S.W.2d 593

Reetroactive effect

(2) Other cases—Horne-Wilson, Inc v Wiggins Bros, 164 S.E. 365, 203 N.C. 85

77. Security Lumber Co v Weighard Const Co, Civ App, 413 S.W.2d 745, affd, Sup, 423 S.W.2d 287

79. Ill.—Detroit Steel Products Co v Hudes, 151 N.E.2d 136, 17 Ill App 2d 514

81. Tex.—National Western Life Ins Co v Acreman, Civ App, 415 S.W.2d 265, mod on oth grds, Sup, 425 S.W.2d 815

83. Tex.—Irving Lumber Co v Alltex Mortg Co, Civ App, 446 S.W.2d 64, affd, Sup, 468 S.W.2d 341

page 754

84. La.—DeFrances Marble & Tile Co v Cox, App, 148 So 2d 83, writ den Sup, 150 So 2d 583, 244 La 114

89. Tex.—University Sav & Loan Ass'n v Security Lumber Co, 423 S.W.2d 287

90. U.S.—Matter of Jamail, D.C. Tex., 471 F Supp 441, affd, C.A., 609 F 2d 1387

Ariz.—Peterman-Donnelly Engineers & Contractors Corp v First Nat Bank of Ariz., Phoenix, 408 P 2d 841, 2 Ariz App 321

Ark.—Page v John E. Bryant & Sons Lumber Co, 335 S.W.2d 809, 232 Ark 313

Cal.—McBain v Santa Clara Sav & Loan Ass'n, 51 Cal Rptr 78, 241 C.A.2d 829—Ideco Lumber Co v Northwestern Sav & Loan Ass'n, 71 Cal Rptr 422, 265 C.A.2d 490—Walker v Lytton Sav & Loan Ass'n of Northern Cal, 84 Cal Rptr 521, 465 P 2d 497, 2 C 3d 152

Colo.—Stinnett v Modern Homes, Inc, 350 P 2d 197, 142 Colo 176

Fla.—Security Life Ins Co of Georgia v Travis, App, 340 So 2d 529

Iowa.—General Mortg Corp of Iowa v Campbell, 138 N.W.2d 416, 258 Iowa 143

La.—Courson v Mauroner-Craddock, Inc, App, 219 So 2d 258, writ ref 219 So 2d 778, 253 La 760, and

Page 754

219 So 2d 778 253 La 761 and 219 So 2d 778, 253 La 762

Okl—Antrim Lumber Co v Claremore Federal Sav & Loan Ass'n, 230 P 2d 274, 204 Okl 387—Thompson v Smith, 420 P 2d 526

Tex—McConnell v Mortgage Inv Co of El Paso, 305 S W 2d 280, 157 Tex 572—Chamberlain v Dollar Sav Bank of New York, Civ App, 451 S W 2d 518

Test

Ark—Ashdown Hardware Co v Hughes, 267 S W 2d 294, 223 Ark 541

Mortgage not subordinated by mortgagee's consent to improvement

Minn—Gussinger v Robins, 143 N W 2d 50, 274 Minn 215

Funds advanced after construction

La—Pringle-Associated Mortg Corp v Eanes, App, 197 So 2d 160, rev'd on oth grds 206 So 2d 81, 251 La 711, on remand 211 So 2d 399, application den 214 So 2d 715, 252 La 887

91 Fla—Gancedo Lumber Co, Inc v Flagship First Nat Bank of Miami Beach, App, 340 So 2d 486

Not chargeable with notice unless visible improvements

Minn—Reuben E Johnson Co v Phelps, 156 N W 2d 247, 279 Minn 107

92. U S—First Nat Bank of Anchorage v Vasey, D C Alaska, 114 F Supp 913, 14 Alaska 414

La—Capital Bank & Trust Co v Broussard Paint & Wallpaper Co, App, 198 So 2d 204—Pringle-Associated Mortg Corp v Evans-Benck Const Co, App, 209 So 2d 606

Mich—River Rouge Sav Bank v S & M Bldg Co, 101 N W 2d 260, 359 Mich 189, 91 A L R 2d 409
Mo—Schwartz v Shelby Const Co, 338 S W 2d 781
N C—Equitable Life Assur Soc of U S v Basnight, 67 S E 2d 390, 234 N C 347

Ohio—Wayne Bldg & Loan Co of Wooster v Yarbrough, 228 N E 2d 841, 11 Ohio St 2d 195

Okl—Hughes v Cadenhead, 389 P 2d 973

Tex—University Sav & Loan Ass'n v Security Lumber Co, 423 S W 2d 287—Yeager Elec & Plumbing Co, Inc v Gaines Bldg, Inc, Civ App, 492 S W 2d 921

W Va—Carolina Lumber Co v Cunningham, 192 S E 2d 722, 156 W Va 272

40 C J p 292 note 45[a]

Notice

(4) Other instances

Ga—Builders Supply Co v Pilgrim, 153 S E 2d 657, 115 Ga App 85

Ohio—Fryman v McGhee, 163 N E 2d 63, 108 Ohio App 501

Effect of other statutes

U S—In re Taylor, D C Ohio, 16 F 2d 303, mod on oth grds, C C A, 20 F 2d 8

Ohio—A G Sharp Lumber Co v Manus Homes, Inc, App, 189 N E 2d 447

Purpose

Ark—Mark's Sheet Metal, Inc v Republic Mortg Co, 414 S W 2d 106, 242 Ark 475

Survey not commencement of building

Mo—H B Deal Const Co v Labor Discount Center, Inc, 418 S W 2d 940

page 755

93. Fla—Blanchard v Continental Mortg Investors, App, 217 So 2d 586, cert discharged, Sup, 227 So 2d 666

Tenn—Southern Blow Pipe & Roofing Co v Grubb, supra, n 61

Subcontractor's right of priority derived through general contractor

Okl—American-First Title & Trust Co v Ewing, 403 P 2d 488

95. Ark—Mark's Sheet Metal, Inc v Republic Mortg Co, 414 S W 2d 106, 242 Ark 475—Clark v General Elec Co, 420 S W 2d 830, 243 Ark 399

La—C J S quoted in Bank of Morehouse v Williamson Builders, Inc, App, 169 So 2d 619

Minn—Reuben E Johnson Co v Phelps, 156 N W 2d 247, 279 Minn 107

Wis—Mortgage Associates, Inc v Monona Shores, Inc, 177 N W 2d 340, 47 Wis 2d 171

Work held not "commencement of a building"
Md—Rupp v Earl H Cline & Sons, Inc, 188 A 2d 146, 230 Md 573, 1 A L R 3d 815

Work held not visible commencement of operations

Fla—Maule Industries, Inc v Gaines Const Co, App, 157 So 2d 835

Conspicuous character of work held unnecessary in absence of inspection by mortgagee

La—Bank of Morehouse v Williamson Builders, Inc, App, 169 So 2d 619

Work held not to include searching for corners of lot

La—Pringle-Associated Mortg Corp v Eanes, App, 197 So 2d 160, rev'd on oth grds 206 So 2d 81, 251 La 711, on remand 211 So 2d 399, application den 214 So 2d 715, 252 La 887

97 N Y—City and County Sav Bank v Oakwood Holding Corp, 387 N Y S 2d 512, 88 Misc 2d 198

1 Cal—Connolly Development, Inc v Superior Court of Merced County, 132 Cal Rptr 477, 553 P 2d 637, 17 C 3d 803, app dism 97 S Ct 778, 429 U S 1056, 50 L Ed 2d 773

2. Fla—C J S cited in Gesser v Permacrete, Inc, 90 So 2d 610, 612

Iowa—Sitzler v Peck, 162 N W 2d 449

La—Capital Bank & Trust Co v Broussard Paint & Wallpaper Co, App, 198 So 2d 204

Okl—American-First Title & Trust Co v Ewing, 403 P 2d 488

Wyo—C J S cited in Sawyer v Sawyer, 335 P 2d 794, 797, 79 Wyo 489

Notice insufficient

Fla—Mack Industries, Inc v Donald W Nelson, Inc, App, 134 So 2d 821

page 756

3 Tenn—Southern Blow Pipe & Roofing Co v Grubb, 260 S W 2d 191, 36 Tenn App 641

5 Fla—Gesser v Permacrete, Inc, 90 So 2d 610

Okl—Hanna Lumber Co v Wilkins, 444 P 2d 213

7 Ohio—Fryman v McGhee, 163 N E 2d 63, 108 Ohio App 501

9. U S—In re Mayer Central Bldg Corp, D C Ariz, 275 F Supp 873

Ala—Empire Home Loans, Inc v W C Bradley Co, 241 So 2d 317, 286 Ala 449, app after remand 283 So 2d 431, 291 Ala 541

Mo—St Louis Flexcore, Inc v Lintzenich, App, 414 S W 2d 787

Delivery of materials to building site

Ariz—Wahl v Southwest Sav & Loan Ass'n, 476 P 2d 836, 106 Ariz 381

Identification of goods supplied

U S—In Matter of Jamail, C A Tex, 609 F 2d 1387

11. Ala—O Grady v Bird, 411 So 2d 97

Ariz—Woodridge Const Co v First Nat Bank of Arizona, App, 634 P 2d 13, 130 Ariz 86

Iowa—Northern Nat Bank of Sioux City v Metro Center, Inc, 303 N W 2d 395

Kan—Davis-Wellcome Mortg Co v Long-Bell Lumber Co, 336 P 2d 463, 184 Kan 202

La—Brown Brokerage Co v Greely Plumbing Co, App, 135 So 2d 551

Minn—Bretschneider v Wellman, 41 N W 2d 255, 230 Minn 225

Neb—Gierst v Wright, 94 N W 2d 476, 167 Neb 767

Ohio—Lake Lumber Co v Watson, 133 N E 2d 925

Okl—Jack Bell Lumber Co v Will, 383 P 2d 691

Tenn—Southern Blow Pipe & Roofing Co v Grubb supra, n 3

Tex—Tomlinson v Higginbotham Bros & Co, Civ App, 229 S W 2d 920

page 757

14 U S—In re Mayer Central Bldg Corp, D C Ariz, 275 F Supp 873

Kan—Davis-Wellcome Mortg Co v Long-Bell Lumber Co, 336 P 2d 463, 184 Kan 202

Ky—Johnson Lumber Co v Stovall, 394 S W 2d 930

La—Pringle-Associated Mortg Corp v Eanes, App, 197 So 2d 160, rev'd on oth grds 206 So 2d 81, 251 La 711, on remand 211 So 2d 399, application den 214 So 2d 715, 252 La 887—Capital Bank & Trust Co v Broussard Paint & Wallpaper Co, App, 198 So 2d 204—Courshon v Mauroner-Craddock, Inc, App, 219 So 2d 258, writ ref 219 So 2d 778, 253 La 760, and 219 So 2d 778, 253 La 761, and 219 So 2d 778, 253 La 762

Ohio—Holgate State Bank v Gauggel, 217 N E 2d 867, 6 Ohio St 2d 256

Okl—Sisemore v Voelkle, 312 P 2d 922—American-First Title & Trust Co v Ewing, 403 P 2d 488

Tex—Pierce v Mays, Civ App, 277 S W 2d 155, aff'd 281 S W 2d 79, 154 Tex 487—Irving Lumber Co v Alltex Mortg Co, Civ App, 446 S W 2d 64, aff'd, Sup, 468 S W 2d 341

Utah—Western Mortg Loan Corp v Cottonwood Const Co, 424 P 2d 437, 18 Utah 2d 409

Mortgagee's knowledge of nature and extent of work

Me—Carey v Boulette, 182 A 2d 473, 158 Me 204

Time of recording

U S—Fred W Beal, Inc v Allen, D C Me, 287 F Supp 126

15. Overruled case

The case of Industrial Tile Co v Home Federal Savings & Loan Ass'n of Tulsa, Okl, 331 P 2d 918, has been overruled prospectively only, the court holding that when erection of building is one continuous project and no general contract is involved and mortgage lien attaches after construction is commenced, mortgage lien is superior to liens of mechanics and materialmen who thereafter enter into separate contracts with owner and furnish labor and material for separate segments of construction

Okl—American-First Title & Trust Co v Ewing, 403 P 2d 488

16. U S—In re Plainview Realty, Inc, Bkrtcy N Y, 1 B R 759

Ga—Burgess v Sammons, 61 S E 2d 410, 207 Ga 291

Iowa—Society Linnea v Wilbois, 113 N W 2d 603, 253 Iowa 953

La—Pringle-Associated Mortg Corp v Eanes, App, 197 So 2d 160, rev'd on oth grds 206 So 2d 81, 251 La 711, on remand 211 So 2d 399, application den 214 So 2d 715, 252 La 887—Capital Bank & Trust Co v Broussard Paint & Wallpaper Co, App, 198 So 2d 204

Miss—Frerison Bldg Supply Co v Homestead Sav & Loan Ass'n, 193 So 2d 421

Loan under voluntary advancement after actual notice of mechanics' lien rights held junior to mechanics' lien

Cal—Dockrey v Gray, 341 P 2d 746, 172 C A 2d 388

Disbursements of loan mandatory

Ohio—Wayne Bldg & Loan Co of Wooster v Yarbrough, 228 N E 2d 860, 11 Ohio St 2d 224—Kingsberry Mortg Co v Maddox, Com Pl, 233 N E 2d 887, 13 Ohio Misc 98

Okl—Thompson v Smith, 420 P 2d 526

17. La—Capital Bank & Trust Co v Broussard Paint & Wallpaper Co, App, 198 So 2d 204

Disbursements of loan discretionary

Ohio—Kingsberry Mortg Co v Maddox, Com Pl, 233 N E 2d 887, 13 Ohio Misc 98

Okl—Thompson v Smith, 420 P 2d 526

page 758

21. Ohio—Connecticut Gen Life Ins Co v Burzer Bldg Co, 101 N E 2d 408

27. Or—Paget v Peters, 286 P 983, 133 Or 608, reh den 289 P 1119, 133 Or 608

§ 201. — Nature, Validity, Subject Matter, and Provisions of Mortgage

34. La—Courshon v Mauroner-Craddock, Inc., App, 219 So 2d 258, writ ref 219 So 2d 778, 253 La 760, and 219 So 2d 778, 253 La 761, and 219 So 2d 778, 253 La 762

page 759

36. Ga—Builders Supply Co v Pilgrim, 153 S E 2d 657, 115 Ga App 85

- La—Courshon v Mauroner-Craddock, Inc., App, 219 So 2d 258, writ ref 219 So 2d 778, 253 La 760, and 219 So 2d 778, 253 La 761, and 219 So 2d 778, 253 La 762

47. US—CJS cited in US v Westmoreland Manganese Corp, D C Ark, 134 F Supp 898, 941, affd, CA, 246 F 2d 351, rev'd on oth grds 246 F 2d 357, cert den 78 S Ct 262, 355 US 890, 2 L Ed 2d 189

51. Absence of proof as to merger of estates
Minn—Gessinger v Robins, 143 NW 2d 50, 274 Minn 215

page 760

52. Kan—Potwin State Bank v J B Houston & Son Lumber Co, 327 P 2d 1091, 183 Kan 475, 80 A L R 2d 166

- Minn—National Lumber Co v Farmer & Son, Inc, 87 NW 2d 32, 251 Minn 100

- Miss—Deposit Guaranty Nat Bank v E Q Smith Plumbing & Heating, Inc, 392 So 2d 208, clarified 396 So 2d 6

- Ohio—First Federal Savings & Loan Ass'n of Cincinnati v Robbins, App, 36 NE 2d 991

- Or—Cal-Roof Wholesale, Inc v Contractors West, Inc, 497 P 2d 1181, 262 Or 343

- Tex—McConnell v Mortgage Ins Co of El Paso, 305 S W 2d 280, 157 Tex 572

Purpose

- Ohio—Connecticut Gen Life Ins Co v Barzer Bldg Co, supra, n 21

53. US—US v Westmoreland Manganese Corp, D C Ark, 134 F Supp 898, affd, CA, 246 F 2d 351, rev'd on oth grds 246 F 2d 357, cert den 78 S Ct 262, 355 US 890, 2 L Ed 2d 189

54. Mo—CJS quoted in H B Deal Const Co v Labor Discount Center, Inc, 418 S W 2d 940, 952

- Or—CJS quoted at length in Drake Lumber Company v Paget Mortgage Company, 274 P 2d 804, 814, 203 Or 66

55. Mo—CJS quoted in H B Deal Const Co v Labor Discount Center, Inc, 418 S W 2d 940, 952

59. Ohio—Falls Lumber Co v Heman, 183 NE 2d 265, affd 181 NE 2d 713, 114 Ohio App 262

page 761

68. Ark—Jack Collier East Co v E C Barton & Co, 307 S W 2d 863, 228 Ark 300

- Ohio—Fishman v Helwig, 183 NE 883, 43 Ohio App 530—Connecticut Gen Life Ins Co v Barzer Bldg Co, supra, n 21

Sufficient compliance

- Ohio—First Federal Savings & Loan Ass'n of Cincinnati v Robbins, App, 36 NE 2d 991

Better practice requires reference to obligation to advance so as to give notice

- Ohio—Wayne Bldg & Loan Co of Wooster v Yarbrough, 228 NE 2d 841, 11 Ohio St 2d 195—Akron Sav & Loan Co v Ronson Homes, Inc, 238 NE 2d 760, 15 Ohio St 2d 6

Manner of disbursement

- Ohio—Akron Sav & Loan Co v Ronson Homes, Inc, 238 NE 2d 760, 15 Ohio St 2d 6

78. Receipt of proceeds as trust fund

- (2) Mortgage accorded priority where covenant inserted

- NY—Home Federal Sav & Loan Ass'n v Four Star Heights, Inc, 333 N Y S 2d 334, 70 Mac 2d 118

72. NY—W L Development Corp v Trifort Realty, Inc, 377 N E 2d 969, 44 N Y 2d 489, 406 N Y S 2d 437

74. Ohio—Kingsberry Mortg Co v Maddox, 233 N E 2d 887, 13 Ohio Misc 98

- Vt—T A Haugh Lumber Co v Drinkwine, 287 A 2d 560, 130 Vt 120

75. Ark—House v Scott, 429 S W 2d 108, 244 Ark 1075

page 762

77. Ark—Morrilton Lumber Co v Groom, 3 S W 2d 293, 176 Ark 520

- Cal—Hayward Lumber & Investment Co v Starley, 12 P 2d 66, 124 Cal App 283

- Conn—Serpold v Gibboud, 148 A 328, 110 Conn 392

- NJ—Bard Const Co v Wandner Co, 79 A 2d 54, 12 N J Super 118

- N C—Smith Builders Supply v Rivenbark, 56 S E 2d 431, 231 NC 213

- S D—Walrath & Sherwood Lumber Co v Ferris, 247 N W 405, 61 S D 190

- 41 C J p 529 note 41[e]

Recorded deed of trust

- Cal—Rheem Mfg Co v U S, 21 Cal Rptr 802, 371 P 2d 578, 57 C 2d 621

80. Kan—Noll v Graham, 27 P 2d 277, 138 Kan 676

82. Conn—Serpold v Gibboud, supra, n 77

page 763

99. NY—Shulowitz v Wadler, 261 N Y S 351, 237 App Div 330, rearg den 261 N Y S 1029, 238 App Div 757

page 764

5. 41 C J p 528 note 39[a]

§ 202. — Provisions of Building Contract

8. Tex—CJS cited in McConnell v Mortgage Investment Co of El Paso, 305 S W 2d 280, 287, 157 Tex 572

§ 203. — Independent Agreements

10. Colo—Drobick v Western Federal Sav & Loan Ass'n of Denver, App, 479 P 2d 393

- Fla—North Shore Realty Corp v Gallaher, App, 114 So 2d 634

- Tex—McConnell v Mortgage Inv Co of El Paso, Civ App, 292 S W 2d 636, mod on oth grds 305 S W 2d 280, 157 Tex 572

- Va—Globe Iron Const Co v First Nat Bank of Boston, 140 S E 2d 629, 205 Va 841

Diversion of money for construction to other uses

- NJ—Cambridge Acceptance Corp v Hockstern, 246 A 2d 138, 102 N J Super 435

§ 204. — Loss of Priority; Waiver or Estoppel

Library References

Mechanics' Liens §-216

page 765

18. Fla—Reading v Blakeman, 66 So 2d 682

- Md—Riggs Nat Bank v Welsh, 254 A 2d 172, 254 Md 207

- Mont—McGaffick v Leigland, 303 P 2d 247, 130 Mont 332

- NJ—Cambridge Acceptance Corp v Hockstern, 246 A 2d 138, 102 N J Super 435

Circumstances giving rise to waiver or estoppel

- (4) La—Mumson v Rumsger, App, 114 So 2d 56

21. Particular waivers construed

(4) Other waivers

- Mont—McGaffick v Leigland, 303 P 2d 247, 130 Mont 332

23. Mich—G O Lewis Co v Erving, 145 N W 2d 368, 4 Mich App 589

- NY—Gebhardt v Charleston Chemicals, 133 N Y S 2d 764

24. Fla—Reading v Blakeman, supra, n 18

- Me—Mutual Lumber Co v Gero, 244 A 2d 564

page 766

30. Md—Lamar v Nylen, 215 A 2d 806, 240 Md 740

31. Miss—Jones Supply Co v Ishee, 163 So 2d 470, 249 Miss 515—Wortman & Mann, Inc v Frerison Bldg Supply Co, 184 So 2d 857

- NY—Anderman v 1395 E 52nd St Realty Corp, 303 N Y S 2d 474, 60 Misc 2d 437

- Or—Benj Franklin Federal Sav & Loan Ass'n v Hallmark, Inc, 479 P 2d 740, 257 Or 436

33. Fla—Hartstone Concrete Products Co v Verkauf, App, 147 So 2d 194

page 767

34. La—Tharpe and Brooks, Inc v Amott Corp, App, 406 So 2d 1, rem'd, Sup, 410 So 2d 1145, on remand, App 1 Cr, 411 So 2d 1136

- NY—Kiernan Equipment Corp v Centre Lighting Fixture Mfg Co, 248 N Y S 2d 961, 20 A D 2d 895

42. Cal—Rheem Mfg Co v U S, 21 Cal Rptr 802, 371 P 2d 578, 57 C 2d 621

- Fla—Miller Elec Co of Miami, Inc v Sweeney, App, 199 So 2d 734

- NY—Bedford Lake Park Corp v Twelve Linden Corp, 190 N Y S 2d 143, 8 A D 2d 818

- Idaho—Palmer v Bradford, 388 P 2d 96, 86 Idaho 395

46. La—Davis-Wood Lumber Co v DeBroeys, App, 200 So 2d 916

- La—Tharpe and Brooks, Inc v Amott Corp, App, 406 So 2d 1, rem'd, Sup, 410 So 2d 1145, on remand, App 1 Cr, 411 So 2d 1136

page 768

58. Ind—Miles Homes of Indiana, Inc v Harrah Plumbing and Heating Service Co, Inc, App, 408 N E 2d 597

- NY—Nanuet Nat Bank v Eckerson Terrace, Inc, 391 N E 2d 983, 47 N Y 2d 243, 417 N Y S 2d 901

- Okla—Apex Siding & Roofing Co v First Federal Sav & Loan Ass'n of Shawnee, 301 P 2d 332

- Tex—Tomlinson v Higginbotham Bros & Co, Civ App, 229 S W 2d 920

- Utah—CJS cited in Utah Sav and Loan Ass'n v Mecham, 366 P 2d 598, 602, 12 Utah 2d 335, 15 A L R 3d 63

- Va—Globe Iron Const Co v First Nat Bank of Boston, 140 S E 2d 629, 205 Va 841

- Circumstances establishing estoppel

- (1) 41 C J p 530 note 49[a]

60. Mo—CJS cited in H B Deal Const Co v Labor Discount Center, Inc, 418 S W 2d 940, 952—CJS quoted in Trout's Investments, Inc v Davis, App, 482 S W 2d 510, 517

- NY—Bedford Lake Park Corp v Twelve Linden Corp, 190 N Y S 2d 834, 8 A D 2d 962

- Promise to furnish money

(2) Other matters

- Okla—Apex Siding & Roofing Co v First Federal Sav & Loan Ass'n of Shawnee, 301 P 2d 332

63. Cal—Rheem Mfg Co v U S, 21 Cal Rptr 802, 371 P 2d 578, 57 C 2d 621

- Fla—Daring v Kagan, App, 133 So 2d 599

- Kan—Potwin State Bank v J B Houston & Son Lumber Co, 327 P 2d 1091, 183 Kan 475, 80 A L R 2d 166

- Md—Blenard v Blenard, 45 A 2d 335—Rupp v M S Johnston Co, 172 A 2d 875, 226 Md 181

Page 768

NJ—First Nat State Bank of NJ v Carlyle v House, Inc, 246 A 2d 22, 102 NJ Super 300, aff'd 258 A 2d 543, 107 NJ Super 389

Utah—Utah Sav and Loan Ass'n v Mecham, 366 P 2d 598, 12 Utah 2d 335, 15 A L R 3d 63—Federal Bldg & Loan Ass'n v Tidwell, 446 P 2d 311, 21 Utah 2d 411

Va—Globe Iron Const Co v First Nat Bank of Boston, 140 S E 2d 629, 205 Va 841

Violation of federal statutes as not subordinating mortgage lien

US—US v Lawrence Towers, Inc, D C N Y, 236 F Supp 208

page 769

64. Ariz—Pioneer Plumbing Supply Co v Southwest Sav & Loan Ass'n, 428 P 2d 115, 102 Ariz 258

74. Kan—Davis-Wellcome Mortg Co v Long-Bell Lumber Co, 336 P 2d 463, 184 Kan 202—Davis-Wellcome Mortg Co v Long-Bell Lumber Co, 336 P 2d 469, 184 Kan 209

page 770

80. Purpose of statute

NY—New York Sav Bank v Wendell Apartments, Inc, 245 N Y S 2d 827, 41 Misc 2d 527

83. NY—New York Sav Bank v Wendell Apartments, Inc, 245 N Y S 2d 827, 41 Misc 2d 527

86. Neb—Larson Cement Stone Co v Redlum Realty Co, 137 N W 2d 241, 179 Neb 134

87. US—Marine Mart, Inc v O/S Miss Daria Dawn, D C Tex, 273 F Supp 333

§ 205. — Extent of Priority

page 771

3. Ala.—Wade v Glencoe Lumber Co, 103 So 2d 730, 267 Ala 530—Gamble's, Inc v Kansas City Title Ins Co, 217 So 2d 923, 283 Ala 409

Ark—Clark v General Elec Co, 420 S W 2d 830, 243 Ark 399

Kan—Potwin State Bank v J B Houston & Son Lumber Co, 327 P 2d 1091, 183 Kan 475, 80 A L R 2d 166

La—Capital Bank & Trust Co v Broussard Paint & Wallpaper Co, App, 198 So 2d 204

NJ—Jackson Trust Co v Gilkinson, 147 A 113, 105 NJ Eq 116

Reasonable value of labor or materials

Or—Benj Franklin Federal Sav & Loan Ass'n v Hallmark, Inc, 479 P 2d 740, 257 Or 436

Limitation of materialmen's liens to original contract price

Okla—American-First Title & Trust Co v Ewing, 403 P 2d 488

4. Ark—Planters Lumber Co v Jack Collier East Co, 356 S W 2d 631, 234 Ark 1091

page 772

8. Ill—Commercial Mortg & Finance Co v Woodcock Const Co, 200 N E 2d 923, 51 Ill App 2d 61

page 773

20. Minn—C.J.S. cited in Model Home Bldg, Inc v Turnquist, 102 N W 2d 717, 258 Minn 53

21. Miss—Southern Life Ins Co v Pollard Appliances Co, 150 So 2d 416, 247 Miss 211

22. Ohio—Wayne Bldg & Loan Co of Wooster v Yarrowbrough, 228 N E 2d 841, 11 Ohio St 2d 195—Wayne Bldg & Loan Co of Wooster v Yarrowbrough, 228 N E 2d 860, 11 Ohio St 2d 224

26. Ark—House v Long, 426 S W 2d 814, 244 Ark 718

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Minn.—Reuben E. Johnson Co v Phelps, 156 N W 2d 247, 279 Minn 107

Okla—C.J.S. quoted at length in Local Federal Sav & Loan Ass'n v Davidson & Case Lumber Co, 255

P 2d 248, 254 208 Okl 155—Tulsa Ready-Mix Concrete Co v Dale Carter Lbr Co, Okl, 381 P 2d 849

27. Ark—Ashdown Hardware Co v Hughes, 267 S W 2d 294, 223 Ark 541

Okla—Antrim Lumber Co v Claremore Federal Sav & Loan Ass'n, 230 P 2d 274, 204 Okl 387—Tulsa Ready-Mix Concrete Co v Dale Carter Lumber Co, 381 P 2d 849

28. Ark—Ashdown Hardware Co v Hughes, supra, n 27

Del—J I Kislak Mortg Corp of Del v William Matthews Builder, Inc, Super, 287 A 2d 686, aff'd 303 A 2d 648

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29. Minn—Model Home Bldg, Inc v Turnquist, 102 N W 2d 717, 258 Minn 53

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page 774

30. Ark—Ashdown Hardware Co v Hughes, supra, n 27

32. Del—J I Kislak Mortg Corp of Del v William Matthews Builder, Inc, Super, 287 A 2d 686, aff'd 303 A 2d 648

34. Where mortgagee controlled disbursements under construction loan

S C—Fulmer Bldg Supplies, Inc v Martin, 162 S E 2d 541, 251 S C 353

38. Priority for taxes allowed

Ark—Clark v General Elec Co, 420 S W 2d 830, 243 Ark 399

39. Priority for title insurance allowed

Ark—Clark v General Elec Co, 420 S W 2d 830, 243 Ark 399

page 775

44. La—Huhn v Wise, App, 154 So 2d 446

47. Or—Drake Lumber Co v Paget Mortg Co, 274 P 2d 804, 203 Or 66

49. Vendee or mortgagee required to make improvements

US—US v Westmoreland Manganese Corp, D C Ark, 134 F Supp 898, aff'd, C A, 246 F 2d 351, rev'd on oth grds 246 F 2d 357, cert den 78 S Ct 262, 355 U S 890, 2 L Ed 2d 189

page 776

53. US—Matter of Jamaal, D C Tex, 471 F Supp 441, aff'd, C A, 609 F 2d 1387

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57. Mo—Trout's Investments, Inc v Davis, App, 482 S W 2d 510

63. Or—Drake Lumber Co v Paget Mortg Co, 274 P 2d 804, 203 Or 66

64. Nev—Fitch v La Tourrette, 346 P 2d 704, 75 Nev 484

page 777

71. Limitation to repairs or alteration to "original construction"

Alaska—Brand v First Federal Sav & Loan Ass'n of Fairbanks, 478 P 2d 829—Lynch v McCann, 478 P 2d 835

§ 206. — Effect of Priority; Remedies

74. Tex—Teachworth v Terry, Civ App, 440 S W 2d 881

page 778

91. Findings necessary

Colo—Beaver Lakes Corp v Ponzie, App, 484 P 2d 1255

page 779

93. Idaho—Cooper v Wesco Builders, Inc, 253 P 2d 226, 73 Idaho 383

Allegations held sufficient

Fla—Fred S Conrad Const Co v Continental Assur Co, App, 215 So 2d 45

Idaho—Manley v MacFarland, 327 P 2d 758, 80 Idaho 312

94. Mont—McGaffick v Legland, 303 P 2d 247, 130 Mont 332

Evidence held insufficient

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Evidence held sufficient

Ark—Page v John E Bryant & Sons Lumber Co, 335 S W 2d 809, 232 Ark 313—Planters Lumber Co v Wilson Co, 413 S W 2d 55, 241 Ark 1005, 1100

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Presumptions and burden of proof

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Admissibility of evidence

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§ 207. Between Mechanics' Lien and Other Lien or Encumbrance

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NJ—Burke v Hoffman, 147 A 2d 44, 28 NJ 467
Pa—Adams v Kokimakis, 22 Beaver 1

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Lien on personal property

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page 780

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What constitutes "commencement of the building"

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Performance of work or furnishing of materials as notice

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page 781

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§ 208. — Lien for Purchase Price

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page 782

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page 783

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§ 210. Between Mechanic's Lien and Other Claims, Interests or Rights

page 784

50. Ky—Collier v Dillon, 230 S W 2d 617, 313 Ky 244

51. Tenn—First State Bank v Stacey, 261 S W 2d 245, 37 Tenn App 223, cert den 259 S W 2d 863, 195 Tenn 386

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§ 211. — Assignment or Transfer

page 785

63. Ill—Board of Ed of School Dist No 108, Tazewell County, for Use of A. Y. McDonald Mfg Co v Collom, 222 N E 2d 804, 77 Ill App 2d 479

74. US—Randall v Colby, D C Iowa, 190 F Supp 319—US v Crest Finance Co, C A Ill, 305 F 2d 332

Liens or "claims"

(2) Amount which contractor may assign to third party is limited to that part of contract price due him after payment of all valid materialmen's liens recorded against job

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§ 214. — Rights or Claims Asserted in Receivership

page 787

96. US—US v Kensington Shipyard & Drydock Corp, C A Pa, 187 F 2d 709, 27 A L R 2d 708

98. Statutory priority of receiver's certificate La—In re Receivership of Baldwin Lumber Co, 147 So 31, 176 La 909

§ 215. — Rights of Sureties Completing Contract

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§ 216. Of Inchoate Lien

4 Colo—Medical Arts Bldg v Ervin, 257 P 2d 969, 127 Colo 458

Fla—Westinghouse Elec Corp v Carol Fla Corp, App, 122 So 2d 795

In Texas

(4) Other cases

Tex—Wortham v Trane Co, 432 S W 2d 520

page 788

6 Or—Brice Mortg Co v Wodtke, 332 P 2d 1044, 215 Or 192

7. Or—Brice Mortg Co v Wodtke, 332 P 2d 1044, 215 Or 192

§ 217. — Nature, Subject Matter, and Purpose of Assignment or Transfer

8 Fla—Westinghouse Elec Corp v Carol Fla Corp, App, 122 So 2d 795

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13. NY—Hall v Carl G Ek & Son Construction Co, 236 N Y S 2d 555, 17 A D 2d 558, affd 192 NE 2d 227, 13 N Y 2d 825, 242 N Y S 2d 352

page 789

22. Ohio—Talco Capital Corp v State Underground Parking Commission, 324 NE 2d 762, 41 Ohio App 2d 171

§ 219. Of Perfected Lien

page 790

40. Fla—Westinghouse Elec Corp v Carol Fla Corp, App, 122 So 2d 795

Or—Brice Mortg Co v Wodtke, 332 P 2d 1044, 215 Or 192

Tex—Continental Nat Bank of Fort Worth v Conner, Civ App, 209 S W 2d 639, affd in part, revd in part on oth grds 214 S W 2d 928, 147 Tex 218—William J Burns Intern Detective Agency, Inc v General Elec Supply Co, Civ App, 413 S W 2d 775

Liens perfected on public improvements assignable

Ohio—Talco Capital Corp v State Underground Parking Commission, 324 NE 2d 762, 41 Ohio App 2d 171

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Page 790

§ 220. — In Whose Name Lien Enforced

page 791

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§ 221. Rights of Assignee

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Tex—Von Hutchins v Pope, Civ App, 351 S W 2d 642, err ref no rev err—Stone v Pitts, Civ App, 389 S W 2d 601

Reassignment not required

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Priority

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Payment to sub-subcontractor by assignor's surety held bar to assignee's claim

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page 792

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§ 222. In General

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page 793

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82 Acknowledgment

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Recording

(2) Other matter

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Subcontractors

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Different function from that of release

Ill—Capitol Plumbing & Heating Supply Co v Snyder, App, 244 N E 2d 856, 104 Ill App 2d 431

Right to lien on entire tract limited by waiver as to part

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Lien for work or material subsequently furnished

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(3) Other statements

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Subsequently recorded no lien agreement

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page 794

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Grounds for avoidance held not shown

Ill—Capitol Plumbing & Heating Supply Co v Snyder, 244 N E 2d 856, 104 Ill App 2d 431

§ 223. What Constitutes In General

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Ga—Artistic Ornamental Iron Co v Long, 148 S E 2d 478, 113 Ga App 464—Golsen v Maghee Lumber Co, 190 S E 2d 104, 126 Ga App 119

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Va—VNB Mortg Corp v Lone Star Industries, Inc, 209 S E 2d 909, 215 Va 366, 75 A L R 3d 497

page 795

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Md—Gerard C Wallace Co, Inc v Simpson Land Co, 298 A 2d 881, 267 Md 702

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Failure or want of consideration

(3) Other statements

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Ind—Ramsey v Peoples Trust and Sav Bank, 264 N E 2d 111, 148 Ind App 167

Consideration and promise need not be equivalent in actual value

Ind—Ramsey v Peoples Trust and Sav Bank, 264 N E 2d 111, 148 Ind App 167

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Arbitration agreement held not waiver of lien
Fla—Mills v Robert W Gottfried, Inc, App, 272 So 2d 837

§ 224. Agreements

18. U S—Charles Simkin & Sons, Inc v Massiah, C A N J, 289 F 2d 26—Bushman Const Co v Air Force Academy Housing, Inc, C A Colo, 327 F 2d 481

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Cal—A A Baxter Corp v Home Owners and Lenders, 86 Cal Rptr 854, 7 C A 3d 725

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Ill—Ellman v Ianni, 157 N E 2d 807, 21 Ill App 2d 353

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Requirement of consideration

Del—G R Sponaugle & Sons, Inc v McKnight Const Co, Super, 304 A 2d 339

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Consideration shown

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Repudiation rule as to cancellation not applicable
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Public policy

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Failure to record

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page 796

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28. U S—Formigli Corp v Fox, D C Pa, 348 F Supp 629

N Y—Northampton Const Corp v Bastrian, 143 N Y S 2d 461

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30 Under statute

N Y—C H Heist Ohio Corp v Bethlehem Steel Co, 246 N Y S 2d 15, 20 A D 2d 201

31. Cal—R D Reeder Lathing Co v Allen, 57 Cal Rptr 841, 425 P 2d 785, 66 C 2d 373

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N Y—Hutchinson Roofing & Sheet Metal Co v International Business Machines Corp, 237 N Y S 2d 582

Clear and unambiguous implication

Fla—Mills v Robert W Gottfried, Inc, App, 272 So 2d 837

32 N Y—Hauser Indus Sheet Metal Works, Inc v Ellar Estates Corp, 281 N Y S 2d 578, 28 A D 2d 847

34 Ill—Timber Structures, Inc v Chateau Royale Corp, 199 N E 2d 623, 49 Ill App 2d 343

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35. Del—G R Sponaugle & Sons, Inc v McKnight Const Co, Super, 304 A 2d 339

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36. Colo—Bishop v Moore, 323 P 2d 897, 137 Colo 263

N Y—C H Heist Ohio Corp v Bethlehem Steel Co, 246 N Y S 2d 15, 20 A D 2d 201

Pa—Mahn v Nuss, 338 A 2d 676, 234 Pa Super 259

Provision as not binding subcontractor

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page 797

40. Tenn—Fussell v Vowell & Sons, Inc, 447 S W 2d 113, 60 Tenn App 397

41. N Y—Tager v Healy Ave Realty Corp, 218 N Y S 2d 679, 14 A D 2d 584

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§ 225. Action on Claim

page 798

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§ 226. Taking or Transfer of Note, Draft, or Order

66 U S—Scott Paper Co v Adair Truck & Equipment Co, Inc, C A Ala, 542 F 2d 1257

Fla—Ideal Roofing & Sheet Metal Works, Inc v Katzenhne, App, 127 So 2d 116

Iowa—Central Ready Mix Co v John Ruhlin Const Co, 139 N W 2d 444, 258 Iowa 500

La—Wilson v Clerk of Court of 24th Judicial Court In and For Parish of Jefferson, App, 148 So 2d 775, writ ref, Sup, 150 So 2d 590, 244 La 134

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67. N C—Miller v Lemon Tree Inn of Wilmington, Inc, 249 S E 2d 836, 39 N C App 133

68. Crediting of note not payment

U S—Scott Paper Co v Adair Truck & Equipment Co, Inc, C A Ala, 542 F 2d 1257

page 799

70. Md—Gerard C Wallace Co, Inc v Simpson Land Co, 298 A 2d 881, 267 Md 702

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77. U S—Beacon Const Co, Inc v Matco Elec Co, Inc, C A N Y, 521 F 2d 392

81. Cal—E K Wood Lumber Co v Higgins, 4 Cal Rptr 523, 351 P 2d 795, 54 C 2d 91

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§ 227. Taking Security

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20. Ga—J M Wells Supply Co v Shieks, 121 S E 2d 36, 103 Ga App 822—Southwire Co v Metal Equipment Co, 198 S E 2d 687, 129 Ga App 49, cert den 94 S Ct 723, 414 U S 1092, 38 L Ed 2d 550
- La—Bank of Jena v Rowlen, App, 370 So 2d 146
- N C—Miller v Lemon Tree Inn of Wilmington, Inc., 249 S E 2d 836, 39 N C App 133
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- Kan—Benner-Williams, Inc v Romine, 437 P 2d 312, 200 Kan 483
44. Cal—C.J.S. quoted in Cornell v Sennes, 95 Cal Rptr 728, 733, 18 C A 3d 126
45. N C—C.J.S. cited in Miller v Lemon Tree Inn of Wilmington, Inc., 249 S E 2d 836, 839, 39 N C App 133

§ 228. Persons Entitled to Set Up Waiver

55. Mo—Mid-West Engineering & Const Co v Campagna, 397 S W 2d 616, app after remand 421 S W 2d 229
- Purchaser at foreclosure sale
- Ga—Home Mart Bldg Centers, Inc v Wallace, 240 S E 2d 582, 144 Ga App 19
56. Owner held not entitled to benefit of waiver
- Del—G R Sponaugle & Sons, Inc v McKnight Const Co, Super, 304 A 2d 339
59. Ill—Timber Structures, Inc v Chateau Royale Corp., 199 N E 2d 623, 49 Ill App 2d 343
60. Ill—Timber Structures, Inc v Chateau Royale Corp., 199 N E 2d 623, 49 Ill App 3d 343
61. U S—Formugh Corp v Fox, D C Pa., 348 F Supp 629
- Ga—AAA Plastering Co, Inc v TPM Constructors, Inc., 277 S E 2d 910, 247 Ga. 601

§ 229. In General

63. Ala—Floyd v Rambo, supra, n 18
- Ark—Degen v Acme Brick Co, 312 S W 2d 194, 228 Ark 1054—C.J.S. quoted in Starkey Const, Inc v Elcon, Inc, 457 S W 2d 509, 518, 248 Ark 958
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- Hawaii—Reliable Collection Agency, Ltd v Aquarius Industries, Inc, 535 P 2d 129, 56 Haw 251
- Mo—C.J.S. cited in A C Parada Co v H W Maxim Co, 91 A 2d 485, 488, 148 Me 218
- Minn—Sumel Co v First Federal Savings and Loan Ass'n of St Paul, 232 N W 2d 18, 304 Minn 433, app after remand 238 N W 2d 623, 307 Minn 199

- Mo—Mid-West Engineering & Const Co v Campagna, 397 S W 2d 616, app after remand 421 S W 2d 229
- N M—Franklin's Earthmoving, Inc v Loma Linda Park, Inc, 393 P 2d 454, 74 N M 530
- N Y—Arr-Em Plastering Corp v 515 East 85th St Corp, 250 N Y S 2d 995, 21 A D 2d 415
- Tex—Baker v Marable, Civ App, 396 S W 2d 222, err ref no rev err
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- Ark—C.J.S. quoted in Starkey Const, Inc v Elcon, Inc, 457 S W 2d 509, 518, 248 Ark 958
- Cal—C.J.S. cited in Ware Supply Co v Sacramento Savings & Loan Ass'n, 54 Cal Rptr 674, 679, 246 C A 2d 398
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Materialman's bonded stop-notice claim

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Silence

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Particular facts

- (3) Other matters
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- Neb—Wicks Corp v Frye, 273 N W 2d 663, 202 Neb 23
- Wis—Callaway v Evanston, 75 N W 2d 456, 272 Wis 251
66. Mo—Herbert & Brooner Const Co v Golden, App, 499 S W 2d 541
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73. Okla—Mager Mortg Co v Ferguson, 255 P 2d 938, 208 Okl 304

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- La—C.J.S. quoted in Baton Rouge Lumber Co v Gurney, App, 173 So 2d 251, 255

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Payment of checks

(2) Other instances

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Estoppel not shown

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81. Del—Charles G Taylor & Sons, Inc v Brentwood Const Co, Super, 189 A 2d 414

- Ga—West Lumber Co v White, 107 S E 2d 906, 99 Ga App 169

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89. Cal—E D McGillicuddy Const Co, Inc v Knoll Recreation Ass'n, Inc, 107 Cal Rptr 899, 31 C A 3d 891

§ 232. Bond or Undertaking in General

7. D C—Hartford Acc & Indem Co v ABC Cleaning Contractors, Inc, C A, 350 F 2d 430, 121 U S App D C 300

- Fla—Gesco, Inc v Edward L Nezelek, Inc, App 4 Dist, 414 So 2d 535

- Ga—M Shapiro & Son, Inc v Yates Const Co of Southeast, 231 S E 2d 497, 140 Ga App 675

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Purpose of bonding recorded claims

(3) Other statements

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- La—Popch v Fidelity & Deposit Co of Md, App, 231 So 2d 604, am on oth grds 245 So 2d 394, 258 La 163

Not compelled by statute

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9. N Y—Milbank-Frawley Housing Development Fund Co v Marshall Const Co, 335 N Y S 2d 598, 71 Misc 2d 42

§ 233. Deposit in Court in General

10. Fla.—Willis v Hillsborough Homes, Inc., App., 384 So 2d 718
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 Okl.—Brown v Magers, 359 P 2d 321
Discretion of court
 Conn.—Six Carpenters, Inc v Beach Carpenters Corp., 372 A 2d 123, 172 Conn 1
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page 807

23. Provisions self-executing

- NY—Bretzfelder v Froman, 352 NYS 2d 549, 76 Misc 2d 1063

24. Court order not required

- NY—Bretzfelder v Froman, 352 NYS 2d 549, 76 Misc 2d 1063

25. Interest on deposit

- Okl.—Sendenbach v Patterson Steel Co., 218 P 2d 371, 202 Okl 617

29. DC—Hartford Acc & Indem Co v ABC Cleaning Contractors, Inc., C.A., 350 F 2d 430, 121 US App DC 300

§ 234. Who May Give Security

29. Subcontractor's bond held not to qualify
 US—State of Fla for Use and Benefit of Westinghouse Elec Supply Co v Westley Const Co, D C Fla., 316 F Supp 490, affd, C.A., 453 F 2d 1366

31. Conn—Henry F Raab Connecticut, Inc v J W Fisher Co., 438 A 2d 834, 183 Conn 108

§ 235. Time for Giving Security

34. Fla.—Deltona Corp v Indian Palms, Inc., App., 323 So 2d 282

§ 236. Form, Requisites, and Validity of Bond

Library References

Modern Legal Forms Ch 16, Bonds

page 808

37. Cal—Frank Curran Lumber Co v Eleven Co., 76 Cal Rptr 753, 271 C A 2d 175

- Fla.—Schleifer v All-Shores Const & Supply Co., App., 260 So 2d 270

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Subcontractor's bond held not to qualify

- US—State of Fla for Use and Benefit of Westinghouse Elec Supply Co v Westley Const Co, D C Fla., 316 F Supp 490, affd, C.A., 453 F 2d 1366

Statutory bond

- US—Continental Cas Co v Associated Pipe & Supply Co., C.A.La., 447 F 2d 1041

44. US—Continental Cas Co v Associated Pipe & Supply Co., C.A.La., 447 F 2d 1041

46. NY—Application of Tumac Realty Corp., 123 NYS 2d 642, 203 Misc 649

47. Fla.—Schonfeld v Hughes Supply, Inc., App., 392 So 2d 324

- NY—Pacemaker Const Corp v Hedi Const Corp., 208 NYS 2d 1000, 12 A D 2d 643

53. NY—Trustees of Hanover Square Realty Investors v Wemtraub, 382 NYS 2d 110, 52 A D 2d 600

54. Held not necessary

- US—Continental Cas Co v Associated Pipe & Supply Co., C.A.La., 447 F 2d 1041

§ 237. Effect of Bond or Deposit

page 809

63. NY—Application of Tumac Realty Corp., supra, n 46

- Okl.—Oklahoma City Humane Society v Ford, 247 P 2d 530, 207 Okl 65—Magers v Brown—McClure Lumber Co., 383 P 2d 18

Deposit of money

- Hawaii—Shelton v Engineering Contractors, Limited v Hawaiian Pac Industries, Inc., 456 P 2d 222, 51 Haw 242

64. Fla.—Diana Stores Corp v M & M Elec Co., App., 108 So 2d 496—Schleifer v All-Shores Const & Supply Co., App., 260 So 2d 270

Failure to object to solvency of surety

- La—Magnon Elec, Inc v J P Van Way Engineering Contractors, Inc., App., 256 So 2d 851

Liens filed subsequent to statutory deposit not protected

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65. Cal—Frank Curran Lumber Co v Eleven Co., 76 Cal Rptr 753, 271 C A 2d 175

- Conn—Henry F Raab Connecticut, Inc v J W Fisher Co., 438 A 2d 834, 103 Conn 108

- Fla.—Schleifer v All-Shores Const & Supply Co., App., 260 So 2d 270

- Ga—Vector Co, Inc v Star Enterprises, Inc., 206 SE 2d 636, 131 Ga App 569

- Hawaii—Shelton Engineering Contractors, Limited v Hawaiian Pac Industries, Inc., 456 P 2d 222, 51 Haw 242

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Liens not extinguished

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Deposit of money

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66. US—US v Certified Industries, Inc., C.A.N.Y., 361 F 2d 857

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Furnishing labor or materials to different original contractor

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Discretion of court

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70. NY—Axmin & Sons Lumber Co, Inc v Northwood Projects, Inc., 385 NYS 2d 487, 86 Misc 2d 890

72. La—Brown v Dounson, App., 181 So 2d 874

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74. Conn—Hartlin v Cody, 134 A 2d 245, 144 Conn 499

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75. Conn—Bell & Japock, Inc v Heyward—Robinson Co, Super., 182 A 2d 339, 23 Conn Sup 296

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§ 238. Liability on Bond

Library References

Mechanics' Liens ⇨ 227 et seq.

page 810

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Waiver

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80. US—Matter of Little/Shreeves Corp., Bkrtcy Fla., 20 B R 421

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81. Conn—Biller v Harris, 161 A 2d 187, 147 Conn 351

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Page 810

83. NY—Leve v Cottage Homes, Inc., 124 NY S 2d 118
87. Fla—Gesco, Inc v Edward L. Nezelek, Inc., App 4 Dist., 414 So 2d 535
94. Time for bringing action
(2) Other statements
Fla—American Fire & Cas Co v Davis Water & Waste Industries, Inc., App., 358 So 2d 225, approved Sup., 377 So 2d 164
NY—Chessid v Cirila, 225 NYS 2d 223, 15 A D 2d 817

§ 239. Action on Bond

95. Fla—Triangle Distributors, Inc v Travelers' Indem Co of Hartford, Conn., App., 195 So 2d 237
Okla—McClumphy v Jetero Const Co, Inc., 593 P 2d 76
- Time for bringing suit
Fla—General Guaranty Ins Co v Sunrise Nursing Homes, Inc., App., 326 So 2d 446
NY—In re Paradise Realty Corp., 173 NYS 2d 122, 11 Misc 2d 771
Tex.—Kelley v. Bluff Creek Oil Co., 309 SW 2d 208, 158 Tex 180

General limitations statute applicable

Ohio—Ohio Plate Glass Co v Paskin, 209 NE 2d 640

Conditions precedent

Fla.—Morganti South, Inc v Hardy Contractors, Inc., App., 397 So 2d 378

page 811

1. Fla.—Alfred General Contractors v Superior Asphalt Co., App., 397 So 2d 727
2. Tex.—Kelley v Bluff Creek Oil Co., 309 SW 2d 208, 158 Tex 180
3. Ohio—Ohio Plate Glass Co v Paskin, 209 NE 2d 640
4. Joinder not required
Fla.—Alpha Elec Supply, Inc v F Fenster, Inc., App., 358 So 2d 892
9. Ohio—Ohio Plate Glass Co v Paskin, 209 NE 2d 640
11. US—US v Certified Industries, Inc, CANY, 361 F 2d 857
14. D.C.—Hartford Acc & Indem Co v ABC Cleaning Contractors, Inc, CA, 350 F 2d 430, 121 US App D C 300
- Ga.—M Shapiro & Son, Inc v Yates Const Co of Southeast, 231 SE 2d 497, 140 Ga App 675
19. Proof required to recover
Kan.—Bob Eldridge Const Co, Inc v Pioneer Materials, Inc., 684 P 2d 355, 235 Kan 599

page 812

25. Ga.—United Bonding Ins Co v Good-Wynn Elec Supply Co., 184 SE 2d 508, 124 Ga App 545
- Kan.—Murphree v Trinity Universal Ins Co., 269 P 2d 1025, 176 Kan 290
- Tex.—D. H. Overmyer Co v Harrison, Civ App., 453 SW 2d 368

Validity of lien must be established

Ohio—Ohio Plate Glass Co v Paskin, 209 NE 2d 640

Failure to prove claim

La.—Wilson v Centennial Homes, Inc., App., 329 So 2d 893

26. Conn.—Cianelli v Levy, Cir A D., 276 A 2d 912, 6 Conn Cir 507

Fla.—Gesco, Inc. v Edward L. Nezelek, Inc., App 4 Dist., 414 So 2d 535

Judgment of foreclosure

Ga.—Pickett v Chamblee Const Co., 186 SE 2d 123, 124 Ga App 769

Judgment improper

Fla.—McGuire v Consolidated Elec Supply, Inc., App., 329 So 2d 411

§ 240. Discharge in General

32. La.—Welch v Daigrepoint App., 378 So 2d 607
33. Fla.—Goldberger v United Plumbing & Heating, Inc., App., 358 So 2d 860
- Nev.—Ruppert v Edwards, 216 P 2d 616, 67 Nev 200
- SC.—Black v Haile, 240 SE 2d 646, 270 SC 93
- Tex.—Volkman v Bakman, Civ App., 496 SW 2d 752, err ref no rev err

Sufficiency of evidence

(4) Other evidence

Mont.—Harsh Montana Corp v Locke, 328 P 2d 926, 134 Mont 150

Effect of discharge under circumstances involving counterclaim

NY—Joe Smith, Inc v Ots-Charles Corp., 107 NY S 2d 233, 279 App Div 1, motion den 108 NY S 2d 1008, 279 App Div 708, affd 107 NE 2d 598, 304 NY 684

Counterclaim

Fla.—Bridger v Carter, App., 281 So 2d 229

35. NJ.—Heljon Management Corp v Di Leo, 150 A 2d 684, 55 NJ Super 306

page 813

37. Conn.—Justin Development Corp v Donald J Colasano Associates, P C., 326 A 2d 836, 31 Conn Sup 209

NY—Brusca v Maschino, 402 NYS 2d 452, 61 A D 2d 973

Pa.—McCarthy v Reese, 215 A 2d 257, 419 Pa 489

Lack of inherent power

NY—Application of Zimmerman Bros Plumbing & Heating Co., 120 NY S 2d 145—In re Miller, 133 NYS 2d 421—Milbank-Frawley Housing Development Fund Co v Marshall Const Co., 335 NYS 2d 598, 71 Misc 2d 42

Discharge on motion not proper

NY—J B Cien Const Co v Gramercy Const Corp., 215 NYS 2d 994, 13 A D 2d 901

38. Vacating order discharging lien erroneous
Fla.—Goldberger v United Plumbing & Heating, Inc., App., 358 So 2d 860

39. Wyo.—Engle v First Nat Bank of Chugwater, 590 P 2d 826

42. La.—Welch v Daigrepoint, App., 378 So 2d 607
Nev.—Ruppert v Edwards, 216 P 2d 616, 67 Nev 200
Utah—Emerson v Central Lumber & Hardware Co., 382 P 2d 655, 14 Utah 2d 278

Offense

Ark.—State v Jacks, 418 SW 2d 622, 243 Ark 77

Conditional tender

Utah—Zemp v van Frank & Associates, Inc., 546 P 2d 909

Matters of procedure in actions against a lienor for damages for improperly placing a lien have been adjudicated⁴⁵¹

45.1. Evidence held admissible

Ohio—Brate v McDonald, 120 NE 2d 748, 95 Ohio App 448

Charge held proper

Ohio—Brate v McDonald, supra

Verdict held not excessive

Ohio—Brate v McDonald, supra

Damages

Ohio—Brate v McDonald, supra

Utah—K & P Plumbing & Heating, Inc v Winterton, 543 P 2d 1352

§ 241. Extinguishment or Loss in General

46. US—In re Warren, D C Wash., 192 F Supp 801
Ariz.—Brechenen v Parris, 436 P 2d 610, 103 Ariz 61

Fla.—Halifax Const Co v Chastain Groves, Inc., App., 192 So 2d 15

48. Ala.—Marshall Memory Gardens, Inc v Long, 90 So 2d 260, 265 Ala 164

NY—Kim Kevin Corp v A & A Gibel Co., 248 NYS 2d 741, 20 A D 2d 807

page 814

50. US—US v Durham Lumber Co, C A N C., 257 F 2d 570, affd 80 S Ct 1282, 363 US 522, 4 L Ed 2d 1371

Conn.—Town Radio & Television, Inc v Kilpatrick, Cir A D., 275 A 2d 627, 6 Conn Cir 455

Ga.—Melton v Lowe, 161 SE 2d 912, 117 Ga App 783—Johnson v Spencer-Adams Paint Co., 182 SE 2d 324, 123 Ga App 750

NY—Mathies Well & Pump Co v Plainview Jewish Center, 248 NYS 2d 441, 42 Misc 2d 569

Tex.—Security Lumber Co v Weighard Const Co., Civ App., 413 SW 2d 745, affd, Sup., 423 SW 2d 287

Utah—Davis v Barrett, 467 P 2d 603, 24 Utah 2d 162

§ 242. Destruction or Removal of Building or Improvement

page 815

71. Pa.—Fisher v Groff, 3 D & C 2d 49, 54 Lanc Rev 281

77. Del.—McHugh Elec Co v Hemler Realty & Development Co., 129 A 2d 654, 11 Terry 296

§ 243. Transfer of Title in General

88. Ala.—Lily Flagg Bldg Supply Co v J M Medlin & Co., 232 So 2d 643, 285 Ala 402

Ala.—Security Homestead Ass'n v Schnell, App., 232 So 2d 898, writ ref 236 So 2d 35, 256 La 263

Md.—Clark Certified Concrete Co v Linberg, 141 A 2d 685, 216 Md 576

Mo.—J R Meade Co v Forward Const Co., App., 526 SW 2d 21

ND.—United Accounts, Inc v Larson, 121 NW 2d 628

Tex.—Stone v Pitts, Civ App., 389 SW 2d 601

page 816

92. Fla.—Gray v L M Penzi Tile Co., App., 107 So 2d 621

NY—Niagara County Sav Bank v Reese, 179 NY S 2d 453, 12 Misc 2d 489, app dismissed 180 NY S 2d 263, 6 A D 2d 991

95. Cal.—McBain v Santa Clara Sav & Loan Ass'n, 51 Cal Rptr 78, 241 CA 2d 829

Md.—Hummhoughoefer v Medalion Industries, Inc., 487 A 2d 282, 302 Md 270

96. Fla.—Gray v L M Penzi Tile Co., App., 107 So 2d 621—Nathman v Chrycy, App., 107 So 2d 782

Iowa—Robbin Const Co, Inc v Lakes, Inc., 252 NW 2d 403

1. Okla.—Metropolitan Water Co v Hild, 415 P 2d 970

6. Ala.—Staley v Woodruff, 60 So 2d 384, 257 Ala 571

page 817

11. Ga.—Bryant v Ellenburg, 127 SE 2d 468, 106 Ga App 510

La.—Clarke v Shaffett, App., 37 So 2d 56

Miss.—Southern Life Ins Co v Pollard Appliance Co., 150 So 2d 416, 247 Miss 211

Mo.—J R Meade Co v Forward Const Co., App., 526 SW 2d 21

12. Tenn.—Moore-Handley, Inc v Associates Capital Corp., App., 576 SW 2d 354

Tex.—Wood v Barnes, Civ App., 420 SW 2d 425, err ref no rev err

13. Tex.—Wood v Barnes, Civ App., 420 SW 2d 425, err ref no rev err

Recording

(2) Other instances

Tenn—Moore-Handley, Inc v Associates Capital Corp, App, 376 S W 2d 354

16. Miss—Southern Life Ins Co v Pollard Applance Co, 130 So 2d 416, 247 Miss 211

20. U S—Matter of Manetta Baptist Tabernacle, Inc, C A Ga, 576 F 2d 1237

Mo—Rape v Mid-Continent Bldg Co, App, 318 S W 2d 519

21. N Y—Comfort-Craft Heating & Air Conditioning, Inc v Salamone, 241 N Y S 2d 581, 19 A D 2d 760

23. Kan—Lenexa State Bank & Trust Co v Dixon, 559 P 2d 776, 221 Kan 238

24. Recently improved property

(3) Other cases

Tex—Marka v Calcasieu Lumber Co, Civ App, 245 S W 2d 749, err ref no rev err

Statute construed

Del—Warner Co v Leedom Const Co, 97 A 2d 884, 9 Terry 58

page 818

27. Tex—Stone v Pitts, Civ App, 389 S W 2d 601

§ 244. — Judicial Proceedings or Sale

30. La—Motel of Terrebonne, Inc v Baton Rouge Engineering Co, App, 173 So 2d 216

Pa—Bender v Mancino, 5 D & C 2d 532, 14 Law L J 4, 103 P L J 73

32. La—Motel of Terrebonne, Inc v Baton Rouge Engineering Co, App, 173 So 2d 216

Tex—Irving Lumber Co v Alltex Mortg Co, Civ App, 446 S W 2d 64, affd, Sup, 468 S W 2d 341

§ 245. Extinguishment or Merger of Interest or Estate to Which Lien Attached

page 819

45. ND—United Accounts, Inc v Larson, 121 N W 2d 628

49. N Y—Ingram & Greene, Inc v Wynne, 262 N Y S 2d 663, 47 Misc 2d 200

Damages not recoverable in absence of malice
La—Loeb v Johnson, App, 142 So 2d 518**§ 246. Release****Library References****Mechanics' Liens** ¶180(3), 286, 248.**Modern Legal Forms Ch 57, Releases.**

page 820

55. NM—C.J.S. quoted in Petrakis v Krasnow, 213 P 2d 220, 230, 54 NM 39

67. Ala—Floyd v Rambo, 33 So 2d 360, 250 Ala 101

Colo—Mountain Stone Co v H W Hammond Co, 564 P 2d 958, 39 Colo App 58

Ill—Rochelle Vault Co v First Nat Bank of De Kalb, 283 N E 2d 336, 5 Ill App 3d 354

SD—Bruns v Light, 54 N W 2d 99, 74 S D 418

Estoppel to deny validity of release
Md—Winkles & Edwards, Inc v Bock, 289 A 2d 297, 265 Md 274

69. Conn—Town Radio & Television, Inc v Kilpatrick, Cir A D, 275 A 2d 627, 6 Conn Cir 455

Fla—Chemtrol Corp v Kent, App, 370 So 2d 394

Pa—McNerny v French Dye Works, 16 Monroe L R 21, 35 West Co 195

70. Colo—Trustee Co v Bresnahan, 203 P 2d 499, 119 Colo 311

Minn—Colvin Lumber & Coal Co v J A G Corp, 109 N W 2d 425, 260 Minn 46

Neb—Westland Homes Corp v Hall, 226 N W 2d 622, 193 Neb 237

Wash—Haugen v Raupach, 260 P 2d 340, 43 Wash 2d 147

Failure of consideration

Ohio—Connecticut Gen Life Ins Co v Buzer Bldg Co, 101 N E 2d 408

page 821

71. Cal—Western Specialty Co v Claremont Const Co, 22 Cal Rptr 536, 204 C A 2d 532

72. Minn—Colvin Lumber & Coal Co v J A G Corp, 109 N W 2d 425, 260 Minn 46

Neb—Westland Homes Corp v Hall, 226 N W 2d 622, 193 Neb 237

74. Pa—Trunck v Bedio, 22 Beaver 29

79. Mo—C.J.S. quoted in Mid-West Engineering & Const Co v Campagna, 397 S W 2d 616, 629, app after remand 421 S W 2d 229

80. Mo—C.J.S. quoted in Mid-West Engineering & Const Co v Campagna, 397 S W 2d 616, 629, app after remand 421 S W 2d 229

Pa—Blose v Martens, 95 A 2d 340, 173 Pa Super 122

83 Basis of recovery

Utah—Wagstaff v Remco, Inc, 540 P 2d 931

85. Pa—Fisher v Groff, 3 D & C 2d 49, 54 Lanc Rev 281

86. Or—Harder Mechanical Contractors, Inc v Fairfield Erectors, Inc, 564 P 2d 1356, 278 Or 613

Pa—Scott v Larkin, 96 Pittsb Leg J 207, 62 York Leg Rec 90—Fisher v Groff, 3 D & C 2d 49, 54 Lanc Rev 281

Utah—Pierce v Pepper, 405 P 2d 345, 17 Utah 2d 123

Does not run in favor of non parties

Or—Portland Elec & Plumbing Co v Simpson, 656 P 2d 394, 61 Or App 266, review den 662 P 2d 726, 294 Or 682

87. Scope

Or—Harder Mechanical Contractors, Inc v Fairfield Erectors, Inc, 564 P 2d 1356, 278 Or 613

88. Fla—Miami Highland Park, Inc v Leslie, App, 142 So 2d 754

90. Pa—Certano v Cambridge Estates, Inc, 47 Del Co 281

Utah—Brinwood Homes, Inc v Knudsen Builders Supply Co, 385 P 2d 982, 14 Utah 2d 419

Release given effect as to condominium units sold

Colo—Plateau Supply Co v Bison Meadows Corp, 500 P 2d 162, 31 Colo App 205

page 822

91. D C—Hutchison Bros Excavating Co, Inc v Dworman, App, 307 A 2d 760

Fla—Miami Highland Park, Inc v Leslie, App, 142 So 2d 754

N Y—Corhill Corp v S D Plants, Inc, 217 N Y S 2d 1, 9 N Y 2d 595, 176 N E 2d 37

Va—United Virginia Mortg Corp v Hanes Paving Co, Inc, 277 S E 2d 187, 221 Va 1047

92. Pa—Zerbe v Fulton, 9 Cumb 158

Subcontractor

U S—Continental Gas Co v Westinghouse Elec Supply Co, C A Fla, 403 F 2d 761

94. Va—PIC Const Co, Inc v First Union Nat Bank of North Carolina, 241 S E 2d 804, 218 Va 915

95. Colo—Mountain Stone Co v H W Hammond Co, 564 P 2d 958, 39 Colo App 58

Kan—S J Safford & Son Lumber Co v Kerley, 334 P 2d 334, 184 Kan 59

Pa—Scott v Larkin, supra, n 86

96. U S—Carey Lumber Co v Hetherington, D C Okl, 107 F Supp 995

1 N Y—Eminon Acoustical Contractors Corp v Richkill Associates, Inc, 392 N Y S 2d 1007, 89 Misc 2d 992

Release by subcontractor

Colo—Mountain Stone Co v H W Hammond Co, 564 P 2d 958, 39 Colo App 58

§ 247. Payment in General

2. Colo—Trustee Co v Bresnahan, 203 P 2d 499, 119 Colo 311—American Irr Co v Fadenrecht, 489 P 2d 1060, 30 Colo App 28—Star Sprinkler Corp of Florida v Mead & Mount Const Co, App, 508 P 2d 801

Ga—Gignilist v West Lumber Co, 56 S E 2d 841, 80 Ga App 652—Scott v Williams, 143 S E 2d 16, 111 Ga App 735

Ind—Southwest Forest Industries, Dunlap Division v Firth, App, 435 N E 2d 295

Minn—Colvin Lumber & Coal Co v J A G Corp, 109 N W 2d 425, 260 Minn 46

Mo—Sentinel Woodtreating, Inc v Cascade Development Corp, App, 599 S W 2d 268

Mont—Monarch Lumber Co v Wallace, 314 P 2d 884, 132 Mont 163—C.J.S. cited in Jordan v Elizabeth Manor, 593 P 2d 1049, 1054, 181 Mont 424

N Y—Consolidated Blasting Corp v Colabella Bros, Inc, 168 N Y S 2d 275, 10 Misc 2d 913

Old—Smith v Robinson, 594 P 2d 364

Tex—Ruberond Co v Scott, Civ App, 249 S W 2d 256

Payment to lienholder not shown
NC—Rural Plumbing & Heating, Inc v Hope Dale Realty, Inc, 140 S E 2d 330, 263 N C 641**Advance payments**

Miss—Engle Acoustic & Tile, Inc v Grenfell, 223 So 2d 613

3. Fla—Bryan v Owsley Lumber Co, App, 201 So 2d 246

Okl—Knapp v Arko Interstate Elec Co, 448 P 2d 996

4. Nev—Opaco Lumber & Realty Co v Phipps, 340 P 2d 95, 75 Nev 312

10. Iowa—Central Ready Mix Co v John G Ruhlin Const Co, 139 N W 2d 444, 258 Iowa 500

NM—Blueher Lumber Co v Springer, 423 P 2d 878, 77 N M 449

Acceptance of checks or notes

(1) Cal—B & J Const Co v Spacious Homes, Inc, 22 Cal Rptr 41, 204 C A 2d 216—Rodeffer Industries, Inc v Chambers Estates, Inc, 69 Cal Rptr 551, 263 C A 2d 116

La—Smith v General Contractors, Inc, App, 125 So 2d 637

W Va—Hobbs Lumber Co v Robinson, 157 S E 2d 897, 151 W Va 954

(4) Other matters

Md—T Dan Kolker, Inc v Shure, 121 A 2d 223, 209 Md 290

Payments held sufficient

U S—General Fire-Proof Door Corp v Citibank, N A, D C N Y, 544 F Supp 191

Fla—Landrum v Marion Builders, 53 So 2d 769

Detrimental reliance constitutes consideration

Minn—Colvin Lumber & Coal Co v J A G Corp, 109 N W 2d 425, 260 Minn 46

Placing in escrow not payment

N Y—Kneenatics, Limited v Sprayview Const Corp, 209 N Y S 2d 352, 27 Misc 2d 332

§ 248. — Application of Payments in General**Library References****Mechanics' Liens** ¶239

page 823

12. Cal—Westwood Bldg Materials Co v Valdez, 322 P 2d 79, 158 C A 2d 107

Va—Northern Virginia Sav & Loan Ass'n v J B Kendall Co, 135 S E 2d 178, 205 Va 136

Page 823

Appropriation of payments

Pa.—Berman v Greenfield, 9 Chest 389

13. Cal.—Edwards v Curry, 313 P2d 613, 152 C A 2d 726—Rodeffer Industries, Inc v Chambers Estates, Inc, 69 Cal Rptr 551, 263 C A 2d 116

Payment to assignor of contract

Colo.—American Irr Co v Fadenrecht, 489 P 2d 1060, 30 Colo App 28

Joint payees

Cal.—Post Bros Const Co v Yoder, 141 Cal Rptr 28, 569 P 2d 133, 20 C 3d 1

14. Cal.—J S Schirm Co of Orange County v Rollingwood Homes Co, 17 Cal Rptr 1, 366 P 2d 444, 56 C 2d 789

Idaho.—Mountain Home Redi-Mix v Corner Homes, Inc, 428 P 2d 744, 91 Idaho 612

Mass.—Valentine Lumber & Supply Co v Thibault, 146 N E 2d 347, 336 Mass 407

Va.—Northern Virginia Sav & Loan Ass'n v J B Kendall Co, 135 S E 2d 178, 205 Va 136

Check payable to materialman and subcontractor

Cal.—Westwood Bldg Materials Co v Valdez, 322 P 2d 79, 158 Cal App 2d 107—Rodeffer Industries, Inc v Chambers Estates, Inc, 69 Cal Rptr 551, 263 C A 2d 116

15. Ga.—Grigsby v Fleming, 101 S E 2d 217, 96 Ga App 664

Mo.—Rager Roofing & Siding Co v R & H Roofing and Supply Co, App, 582 S W 2d 716

NJ.—General Elec. Co v E. Fred Sulzer & Co, 222 A 2d 655, 92 NJ Super 210

N C.—Rural Plumbing & Heating, Inc v Hope Dale Realty, Inc, 140 S E 2d 330, 263 N C 641

Okla.—Melton v Quality Homes, Inc, 312 P 2d 476

Or.—Empire Bldg Supply, Inc v EKO Investments, Inc, 396 P 2d 593, 40 Or App 739

Pa.—Toll-Barkan Co v Toll, 164 A 2d 36, 193 Pa Super 221

No recovery by joint payee

Cal.—Post Bros. Const Co v Yoder, 141 Cal Rptr 28, 569 P 2d 133, 20 C 3d 1

16. Ga.—Grigsby v Fleming, 101 S E 2d 217, 96 Ga App 664

Iowa.—Lumber Supply Inc v Hull, 158 N W 2d 667

page 824

17. Colo.—Bulow v Ward Terry & Co, 396 P 2d 232, 155 Colo 560

Tex.—First Nat Bank in Dallas v Whirlpool Corp, 517 S W 2d 262

19. La.—Romero & Sons Lumber Co v Babineaux, App, 151 So 2d 714

Minn.—Weyerhaeuser Co (Raike Laminated Products Division) v Hvidsten, 129 N W 2d 772, 268 Minn 448

20. Mass.—Valentine Lumber & Supply Co v Thibault, 146 N E 2d 347, 336 Mass 407

21. La.—Wilson v Clerk of Court of 24th Judicial Court in and For Parish of Jefferson, App, 148 So 2d 775, writ ref, Sup, 150 So 2d 590, 244 La 134

Neb.—Gatchell v Henderson, 54 N W 2d 227, 156 Neb 1

22. Minn.—Weyerhaeuser Co (Raike Laminated Products Division) v Hvidsten, 129 N W 2d 772, 268 Minn. 448

Okla.—United Benefit Life Ins Co v Norman Lumber Co, 484 P 2d 527

23. Tex.—First Nat Bank in Dallas v Whirlpool Corp, 517 S W 2d 262

Va.—C.J.S. cited in Northern Virginia Sav & Loan Ass'n v J B Kendall Co, 135 S E 2d 178, 185, 205 Va 136

28. La.—Duffy v Roman, App, 209 So 2d 502

page 825

34. D.C.—National Brick & Supply Co v Baylor, C A, 299 F 2d 454, 112 U S App D C 73

38. U.S.—Gramatan-Sullivan, Inc v Koslow, C A N.Y., 240 F 2d 523, cert den 77 S Ct 864, 353 U S 958, 1 L Ed 2d 909—Carnier Corp v J E Schechter Corp, C A N.Y., 347 F 2d 153, applying New Jersey law Cert den 86 S Ct 239, 382 U S 904, 15 L Ed 2d 157

N.Y.—Wade v Nassau Suffolk Lumber & Supply Corp, 89 N Y S 2d 294, 275 App Div 864—Allied Thermal Corp v James Talcott, Inc, 159 N Y S 2d 115, 3 A D 2d 198, affd 165 N Y S 2d 91, 3 N Y 2d 302, 144 N E 2d 66—Ciavarella v People, 225 N Y S 2d 168, 32 Misc 2d 680, affd 227 N Y S 2d 530, 16 A D 2d 291—Augman & Candarelli, Inc v Bernard Associates No 3, Inc, 234 N Y S 2d 156—Utica Sheet Metal Corp v J E Schechter Corp, 262 N Y S 2d 583, 47 Misc 2d 290, mod on oth grds 270 N Y S 2d 259, 25 A D 2d 928—Allerton Const Corp v Fairway Apartments Corp, 267 N Y S 2d 860, 49 Misc 2d 525, affd 272 N Y S 2d 867, 26 A D 2d 636—Forest Elec Corp v Century Nat Bank & Trust Co, 333 N Y S 2d 644, 70 Misc 2d 190

Okla.—Swan Air Conditioning Co v Crest Const Corp, App, 568 P 2d 1330

Claims for labor and materials

(1) Del.—State v Pierson, Super, 86 A 2d 559, 7 Terry 538

(4) Other cases

U.S.—Ingalls Iron Works Co v Fehlhaber Corp, D C N.Y., 327 F Supp 272

Del.—State v Pierson, supra

N.Y.—American Blower Corp v James Talcott, Inc, 194 N Y S 2d 630, 18 Misc 2d 1031, affd 203 N Y S 2d 1018, 11 A D 2d 654, rearg and app den 206 N Y S 2d 533, 11 A D 2d 928, affd 219 N Y S 2d 263, 10 N Y 2d 282, 176 N E 2d 833—Fontaine Bleu Swimming Pool Corp v Aquarama Swimming Pool Corp, 210 N Y S 2d 634, 27 Misc 2d 315—Travelers Indem Co v Central Trust Co of Rochester, N.Y., 263 N Y S 2d 261, 47 Misc 2d 849—Caristo Const Corp v Diners Financial Corp, 236 N E 2d 461, 21 N Y 2d 507, 289 N Y S 2d 175—Tri-Boro Enterprises, Inc v Roger & McCoy, Inc, 281 N Y S 2d 588, 28 A D 2d 860

Liberal construction

U.S.—Owens v Drywall & Acoustical Supply Corp, D C Tex., 325 F Supp 397

N.Y.—In re Enach's Estate, 146 N Y S 2d 240, 1 Misc 2d 537—Application of M Leiken & Son, Inc, 240 N Y S 2d 73, 39 Misc 2d 156

Trust fund as source of jurisdiction

N.Y.—Ridgfield Supply Co v Rosen, 147 N Y S 2d 337, 1 Misc 2d 675

Representative action

N.Y.—In re Enach's Estate, 146 N Y S 2d 240, 1 Misc 2d 537

Nature and disposition of funds paid by owner to contractor

N.Y.—Davis & Warshaw, Inc v S Iser, Inc, 220 N Y S 2d 818, 30 Misc 2d 528—Kaufman v Lap Const Corp, 222 N Y S 2d 624, 32 Misc 2d 439—Gotham Sand & Stone Corp v Nuns of order of St Dominic, 224 N Y S 2d 317, 33 Misc 2d 951—Louis Gensberg, Inc v Instant Heat & Power Corp, 227 N Y S 2d 76, 33 Misc 2d 1081—Gibraltar Corp of America v Adson Industries, Inc, 239 N Y S 2d 817, 39 Misc 2d 21—Utica Sheet Metal Corp v J E Schechter Corp, 278 N Y S 2d 345, 53 Misc 2d 284

Second degree subcontractor not protected

Wis.—Hinter Trucking, Inc v State, 126 N W 2d 52, 22 Wis 2d 431

Purpose to protect owner of property

Wash.—Broder Co v Nouse Contract of Seattle, Inc, 401 P 2d 860, 66 Wash 2d 204

Particular sum held not part of trust fund

U.S.—In re Matthews Associates, Inc, C A N.J., 394 F 2d 101

N.Y.—Caristo Const Corp v Diners Financial Corp, 257 N Y S 2d 423, 45 Misc 2d 549

Wis.—Paulsen Lumber, Inc v Meyer, 177 N W 2d 884, 47 Wis 2d 621

Persons who are trustees

Ga.—Short & Paulk Supply Co v Dykes, 171 S E 2d 782, 120 Ga App 639

N.Y.—Utica Sheet Metal Corp v J E Schechter Corp, 262 N Y S 2d 583, 47 Misc 2d 290, mod on oth grds 270 N Y S 2d 259, 25 A D 2d 928—Glens Falls Ins Co v Schwab Bros Trucking, Inc, 277 N Y S 2d 1004, 53 Misc 2d 230—Frontier Excavating, Inc v Sovereign Const Co, 294 N Y S 2d 994, 30 A D 2d 487, motion den 250 N E 2d 228, 24 N Y 2d 991, 302 N Y S 2d 820

Subcontractor as beneficiary of trust

N.Y.—Onondaga Commercial Dry Wall Corp v Sylvan Glen Co, 271 N Y S 2d 523, 26 A D 2d 130, motion den 231 N E 2d 131, 20 N Y 2d 799, 284 N Y S 2d 455, affd 234 N E 2d 840, 21 N Y 2d 739, 287 N Y S 2d 886

Purpose to provide for payment of obligations

U.S.—Flintkote Co v U.S., D C N.Y., 47 FRD 322, affd, C A, 435 F 2d 556, cert den 91 S Ct 1619, 402 U S 944, 29 L Ed 2d 112

Purpose to protect materialmen and laborers

Mich.—National Bank of Detroit v Eames and Brown, 242 N W 2d 412, 396 Mich 611

N.Y.—Scriven v Maple Knoll Apartments, Inc, 361 N Y S 2d 730, 46 A D 2d 210

Liability imposed on non-fiduciary

Okla.—Sandpiper North Apartments, Ltd v American Nat Bank and Trust Co, of Shawnee, 680 P 2d 983

page 826

39 U.S.—U.S. v Kings County Iron Works, C A N.Y., 224 F 2d 232—Ingalls Iron Works Co v Fehlhaber Corp, D C N.Y., 327 F Supp 272

N.Y.—Fontaine Bleu Swimming Pool Corp v Aquarama Swimming Pool Corp, 210 N Y S 2d 634, 27 Misc 2d 315—Frontier Excavating, Inc v Sovereign Const Co, 294 N Y S 2d 994, 30 A D 2d 487, motion den 250 N E 2d 228, 24 N Y 2d 991, 302 N Y S 2d 820

40. N.Y.—Caristo Const Corp v Diners Financial Corp, 276 N Y S 2d 831, 27 A D 2d 661, affd 236 N E 2d 461, 21 N Y 2d 507, 289 N Y S 2d 175

Officers of subcontractor held as trustees

U.S.—Nuclear Corp of America v Hale, D C Tex., 355 F Supp 193, affd, C A, 479 F 2d 1045

Funds collected by subcontractor's administrator

Mich.—Reiter v Kuhlman, 228 N W 2d 830, 59 Mich App 54

41 N.Y.—Wade v Nassau Suffolk Lumber & Supply Corp, supra, n 38—American Blower Corp v James Talcott, Inc, 219 N Y S 2d 263, 10 N Y 2d 282, 176 N E 2d 833—Harman v Fairview Associates, 250 N E 2d 209, 25 N Y 2d 101, 302 N Y S 2d 791

Tex.—Panhandle Bank & Trust Co v Graybar Elec Co, Inc, Civ App, 492 S W 2d 76, err ref no rev err

Both matured and unmatured claims protected

N.Y.—Aquino v U.S., 219 N Y S 2d 254, 10 N Y 2d 271, 176 N E 2d 826

Commencement and duration of trust

N.Y.—Davis & Warshaw, Inc v S Iser, Inc, 220 N Y S 2d 818, 30 Misc 2d 528

43. N.J.—Plevy v Schaedel, 130 A 2d 910, 44 N J Super 430

N.Y.—In re Enach's Estate, 146 N Y S 2d 240, 1 Misc 2d 537

Funds in hand of mortgagee as security deposit held trust funds

N.Y.—United Lakeland Air Conditioning Co v Ahneman-Christiansen, Inc, 226 N Y S 2d 532, 33 Misc 2d 606, affd 239 N Y S 2d 38, 18 A D 2d 1022

Benefit of materialman

Wis—Weather-Tite Co of Milwaukee v Lepper, 130 N W 2d 198, 25 Wis 2d 70

Funds held not subject to statute

NY—McManus, Longe, Brockwehl, Inc v Palmer 261 NYS 2d 639, 47 Misc 2d 35, aff'd 265 NY S 2d 341, 24 A D 2d 1055

Funds held in trust and not as property of contractor

Mich—B F Farnell Co v Monahan, 141 N W 2d 58, 377 Mich 552, overruling Club Holding Co v Loan & Inv Co, 272 Mich 66, 261 N W 133

45. NY—In re Enach's Estate, 146 NYS 2d 240, 1 Misc 2d 537

46. NY—American Blower Corp v James Talcott, Inc, 194 NYS 2d 630, 18 Misc 2d 1031, aff'd 203 NYS 2d 1018, 11 A D 2d 654, rearg and app den 206 NYS 2d 533, 11 A D 2d 928, aff'd 219 NYS 2d 263, 10 NY 2d 282, 176 NE 2d 833

47. U.S.—Gramatan-Sullivan, Inc v Koslow, CA NY, 240 F 2d 523, cert den 77 S Ct 864, 353 U S 958, 1 L Ed 2d 909

NY—Fontaine Bleu Swimming Pool Corp v Aquarama Swimming Pool Corp, 210 NYS 2d 634, 27 Misc 2d 315

Under statute the trust may be enforced by civil action⁴⁷⁵

47.5. U.S.—Gramatan-Sullivan, Inc v Koslow, CA NY, 240 F 2d 523, cert den 77 S Ct 864, 353 U S 958, 1 L Ed 2d 909

Mich—National Bank of Detroit v Eames and Brown, 242 N W 2d 412, 396 Mich 611

Okla—Swan Air Conditioning Co v Crest Const Corp, App, 568 P 2d 1330

Who held entitled to enforce trust

NY—Cavarella v People, 227 NYS 2d 530, 16 A D 2d 291—Gibraltar Corp of America v Adson Industries, Inc, 239 NYS 2d 817, 39 Misc 2d 21—Onondaga Commercial Dry Wall Corp v Sylvan Glen Co, 261 NYS 2d 336, 46 Misc 2d 938, rev'd on oth grds 271 NYS 2d 523, 26 A D 130, motion den 231 NE 2d 131, 20 NY 2d 799, 284 NYS 2d 455, motion gr 232 NE 2d 652, 20 NY 2d 878, 285 NYS 2d 621, aff'd 234 NE 2d 840, 21 NY 2d 739, 287 NYS 2d 886—Caristo Const Corp v Diners Financial Corp, 276 NY S 2d 831, 27 A D 2d 661, aff'd 236 NE 2d 461, 21 NY 2d 507, 289 NYS 2d 175—Herman v Fairview Associates, 250 NE 2d 209, 25 NY 2d 101, 302 NYS 2d 791

Liability for diversion of funds

NY—Mert Plumbing and Heating v Eastern Nat Bank, 221 NYS 2d 143—Caristo Const Corp v Diners Financial Corp, 257 NYS 2d 423, 45 Misc 2d 549—Caristo Const Corp v Diners Financial Corp, 236 NE 2d 461, 21 NY 2d 507, 289 NYS 2d 175

Wis—Weather-Tite Co of Milwaukee v Lepper, 130 N W 2d 198, 25 Wis 2d 70

Parties

NY—Onondaga Commercial Dry Wall Corp v Sylvan Glen Co, 261 NYS 2d 336, 46 Misc 2d 938, rev'd on oth grds 271 NYS 2d 523, 26 A D 2d 130, motion den 231 NE 2d 131, 20 NY 2d 799, 284 NYS 2d 455, motion gr 232 NE 2d 652, 20 NY 2d 878, 285 NYS 2d 621, aff'd 234 NE 2d 840, 21 NY 2d 739, 287 NYS 2d 886

Remedy not exclusive

NY—Onondaga Commercial Dry Wall Corp v Sylvan Glen Co, 261 NYS 2d 336, 46 Misc 2d 938, rev'd on oth grds 271 NYS 2d 523, 26 A D 2d 130, motion den 231 NE 2d 131, 20 NY 2d 799, 284 NYS 2d 455, motion gr 232 NE 2d 652, 20 NY 2d 878, 285 NYS 2d 621, aff'd 234 NE 2d 840, 21 NY 2d 739, 287 NYS 2d 886

Limitations

U.S.—Flintkote Co v U.S., DCNY, 47 FRD 322, aff'd, CA, 435 F 2d 556, cert den 91 S Ct 1619, 402 U S 944, 29 L Ed 2d 112

NY—Forest Elec Corp v Century Nat Bank & Trust Co, 333 NYS 2d 644, 70 Misc 2d 190

Statutory provisions entitling subcontractors and materialmen to examine books and records of the contractor with respect to trust funds received by the contractor from the owner of the improvement or other interested person, or to a verified statement with respect thereto, have been considered and construed⁴⁷¹⁰

47.10 NY—Frontier Excavating, Inc v Sovereign Const Co, 294 NYS 2d 994, 30 A D 2d 487, motion den 250 NE 2d 228, 24 NY 2d 991, 302 NYS 2d 820

Records open to examination

NY—Augman & Candarelli, Inc v Bernard Associates No 3, Inc, 234 NYS 2d 156—Poly Const Corp v Oxford Hall Co, 252 NYS 2d 971, 44 Misc 2d 82

Institution of proceeding to enforce trust not required

NY—Cavarella v People, 234 NYS 2d 15, 36 Misc 2d 1083

Request for statement condition precedent to order therefor

NY—Cavarella v People, 234 NYS 2d 15, 36 Misc 2d 1083

Size or magnitude of contract immaterial

NY—Cavarella v People, 234 NYS 2d 15, 36 Misc 2d 1083

Possible cost of statements not ground for refusal

NY—Cavarella v People, 234 NYS 2d 15, 36 Misc 2d 1083

Right of beneficiary to verified statement of information

NY—In re Silverstein, 219 NYS 2d 389, 30 Misc 2d 510—Harry J Kangas, Inc v Palm Beach Realty Co, 223 NYS 2d 38—Seville Iron Works, Inc v Devine Const Co, 224 NYS 2d 321, 32 Misc 2d 797—Application of King, 238 NYS 2d 83, 38 Misc 2d 113—Gibraltar Corp of America v Adson Industries, Inc, 239 NYS 2d 817, 39 Misc 2d 21

Statement furnished beneficiary held insufficient

NY—Application of M Leiken & Son, Inc, 240 NY S 2d 73, 39 Misc 2d 156

Request held insufficient

NY—Warebak Realty Corp v Ennos Const Corp, 240 NYS 2d 193, 39 Misc 2d 298

Persons entitled

NY—Radory Const Corp v Arronbee Const Corp, 262 NYS 2d 389, 24 A D 2d 573

Agreement as to forbearance of right to examine held void

NY—Allerton Const Corp v Fairway Apartments Corp, 267 NYS 2d 860, 49 Misc 2d 525, aff'd 272 NYS 2d 867, 26 A D 2d 636

Remedy of objecting trustee

NY—G & B Laboratory Installation, Inc v Beekman Downtown Hospital, 321 NYS 2d 175, 66 Misc 2d 441

Pretrial proceedings not condition precedent

NY—G & B Laboratory Installation, Inc v Beekman Downtown Hospital, 321 NYS 2d 175, 66 Misc 2d 441

Condominiums

NY—Marco Bonito, Inc v Country Village Heights Condominium (Group I), 363 NYS 2d 508, 79 Misc 2d 1094

Under some statutes it is a criminal offense for contractors to pay out money received where subcontractors have

not been paid and no civil remedy is afforded⁴⁷¹⁵

47.15 Ga—Short & Paulk Supply Co v Dykes, 171 S E 2d 782, 120 Ga App 639

NJ—Plevy v Schaedel, 130 A 2d 910, 44 NJ Super 450

§ 249. — Payments by Contractor with Money Received from Owner or Other Interested Person

48 Alaska—Stephenson v Ketchikan Spruce Mills, Inc, 412 P 2d 496

Ga—Artistic Ornamental Iron Co v Long, 148 S E 2d 478, 113 Ga App 464

49 Cal—Ewing Irr Products v Rohnert Park Golf Course Corp, 105 Cal Rptr 812, 29 C A 3d 862

page 827

50 U.S.—U S Cas Co v Noland Co, DCNC, 286 F Supp 333

Ark—Wells v Planters Lumber Co, 327 S W 2d 1, 230 Ark 570

Cal—Savage v Nee, 28 Cal Rptr 106, 212 C A 2d 417—Ewing Irr Products v Rohnert Park Golf Course Corp, 105 Cal Rptr 812, 29 C A 3d 862

Colo—Jackson v A B Z Lumber Co, 392 P 2d 288, 155 Colo 33

Fla—Johnson Lumber & Supply Co v Byron, App, 113 So 2d 577

Idaho—C J S est'd in Mountain Home Red-Mix v Conner Homes, Inc, 428 P 2d 744, 746, 91 Idaho 612

La—Baudon v Gallier, App, 153 So 2d 169—Grifford Hill & Co, Inc v Harper, App, 262 So 2d 842—Grifford Hill & Co, Inc v Harper, App, 262 So 2d 846

Me—Mutual Lumber Co v Gero, 244 A 2d 564

NC—Rural Plumbing & Heating, Inc v Hope Dale Realty, Inc, 140 S E 2d 330, 263 N C 641

Tenn—Bann-Nicodemus, Inc v Bethay, 292 S W 2d 234, 40 Tenn App 487

Rights of surety**(3) Other matters**

Fla—Barnett v Concrete Placing Co, App, 120 So 2d 628

51. Mo—Herrman v Daffin, App, 302 S W 2d 313

52. Ark—Lyman Lamb Co v Arkansas Shell Homes, Inc, 406 S W 2d 708, 241 Ark 83

Question of intent

NC—Rural Plumbing & Heating, Inc v Hope Dale Realty, Inc, 140 S E 2d 330, 263 N C 641

54. Nev—Dearth v Robinson, 392 P 2d 512, 80 Nev 272

56. Cal—Ewing Irr Products v Rohnert Park Golf Course Corp, 105 Cal Rptr 812, 29 C A 3d 862

59. La—Pate v Guclair, App, 162 So 2d 729

Tenn—Hammer-Johnson Supply, Inc v Curtis, 364 S W 2d 496, 51 Tenn App 72

page 828

Under some statutes failure of a contractor to discharge the liens of laborers or materialmen may constitute an offense⁴⁷⁵

Elements of offense

Ark—Reno v State, 406 S W 2d 372, 241 Ark 127

§ 250. — Payments by Subcontractor with Money Received from Contractor

66. Cal—Edwards v Curry, 313 P 2d 613, 152 C A 2d 726

Colo—Jackson v A B Z Lumber Co, 392 P 2d 288, 155 Colo 33.

Page 828

Nev—Sherman Gardens Co v Longley, 491 P 2d 48, 87 Nev 558
Okla—McGumply v Jetero Const Co, Inc, 593 P 2d 76

§ 251. Payments to Contractor as Affecting Liens of Other Persons

Library References

Mechanics' Liens §=115

68 US—Jackson v Flohr, CA Wash, 227 F 2d 607, cert den 76 S Ct 322, 350 US 947, 100 L Ed 826—Stone v Mondie, D C Okl, 157 F Supp 929
—First Commercial Corp v First Nat Bancorporation, Inc, D C Colo, 572 F Supp 1430
Cal—Romak Iron Works v Prudential Ins Co of America, 163 Cal Rptr 869, 104 CA 3d 767
Ind—Bennett v Pearson, 218 NE 2d 168, 139 Ind App 224
Iowa—Des Moines Furnace & Stove Repair Co v Lemon, 56 NW 2d 923, 244 Iowa 316
Mo—Herrman v Daffin, App, 302 S W 2d 313
Mont—Monarch Lumber Co v Haggard, 360 P 2d 794, 139 Mont 105
Ohio—Whitesides v Mason, 352 NE 2d 648, 47 Ohio App 2d 173, 1 O O 3d 260—Reliance Universal, Inc v Deluth Const Co, 425 NE 2d 404, 67 Ohio St 2d 56, 21 O O 3d 36
Okla—Cahway Lumber Co v Langston, 479 P 2d 582
Tex—Hayek v Western Steel Co, 478 SW 2d 786

Theory and purpose of law

(3) Other statements
Cal—Romak Iron Works v Prudential Ins Co of America, 163 Cal Rptr 869, 104 CA 3d 767
NY—Eminon Acoustical Contractors Corp v Richhill Associates, Inc, 392 NYS 2d 1007, 89 Misc 2d 992

In Louisiana

(3) Other cases—Polluzzi v Thibodeaux, La App, 35 So 2d 660, reh den 37 So 2d 62—Baton Rouge Lumber Co v Gurney, App, 173 So 2d 251—Maxwell Hardware & Lumber Co v Mercer, App, 201 So 2d 660
Sham contractor statute
Tex—Da-Col Paint Mfg Co v American Indem Co, 517 SW 2d 270

Not set aside as preference in bankruptcy
NY—Beckerman v Tummolo, 406 NYS 2d 398, 63 AD 2d 818

page 829

69. Ark—Denemark v Ed B Mooney, Inc, 237 SW 2d 41, 218 Ark 944—Denemark v Ed B Mooney, Inc, 241 SW 2d 717—Wells v Planters Lumber Co, 327 SW 2d 1, 230 Ark 570
Cal—Romak Iron Works v Prudential Ins Co of America, 163 Cal Rptr 869, 104 CA 3d 767
Conn—Rene Dry Wall Co, Inc v Strawberry Hill Associates, 438 A 2d 774, 182 Conn 568
D C—Washington Concrete Sales Corp v Morrisette, CA, 377 F 2d 137, 126 US App D C 252—Union Wesley A M E Zion Church v Rader Enterprises, Inc, App, 369 A 2d 608
Fla—Foley Lumber Co v Koester, 61 So 2d 634—Richard Store Co v Florida Bridge & Iron, Inc, Fla, 77 So 2d 632—Bryan v Owsley Lumber Co, App, 201 So 2d 246—Crane Co v Fine, 221 So 2d 145, mand conf to 222 So 2d 36—W W Gay Mechanical Contractors, Inc v Case, App, 275 So 2d 570
Ga—Ingram v Barfield, 55 SE 2d 725, 80 Ga App 276—Langford v Edmondson, 61 SE 2d 558, 82 Ga App 494—Saye v Athens Lumber Co, 93 SE 2d 806, 94 Ga App 118—Davenport Bros v Pepper, 133 SE 2d 54, 108 Ga App 372
Ind—Clow Corp v Ross Tp School Corp, 384 NE 2d 1077, 179 Ind App 125
La—Maxwell Hardware & Lumber Co v Mercer, App, 201 So 2d 660
Md—Hill v Parkway Indus Center, 435 A 2d 472, 49 Md App 676

Mich—Knapp Transir Mix Co v Highland Greens, Inc, 216 NW 2d 84, 51 Mich App 719
Minn—Duluth Lumber and Plywood Co v Delta Development, Inc, 281 NW 2d 377
Miss—C.J.S cited in Chancellor v Melvin, 52 So 2d 360, 261, 211 Miss 590
NJ—Houdaille Const Materials, Inc v American Tel & Tel Co, 399 A 2d 324, 166 NJ Super 172
NY—Louis Greenberg, Inc v Pioneer Syndicate, 130 NYS 2d 622, 283 App Div 1053, 284 App Div 294—American Blower Corp v James Talcott, Inc, 194 NYS 2d 630, 18 Misc 2d 1031, affd 203 NYS 2d 1018, 11 AD 2d 654, rearg and app den 206 NYS 2d 533, 11 AD 2d 928, affd 219 NYS 2d 263, 10 NY 2d 282, 176 NE 2d 833—Finnk v Bierau, 212 NYS 2d 869, 27 Misc 2d 701—Drane Lumber Co v T G K Const Co, 331 NYS 2d 678, 39 AD 2d 567
NC—Roberts & Johnson Lumber Co v Horton, 61 SE 2d 100, 232 NC 419—Oldham & Worth, Inc v Bratton, 139 SE 2d 653, 263 NC 307
Tex—Coleman v Newton, Civ App, 458 SW 2d 688
Utah—Home Elec Corp v Russell, 409 P 2d 388, 17 Utah 2d 276
Va—Monk v Walters, 78 SE 2d 202, 195 Va 246
Wis—State v Wolter, App, 270 NW 2d 230, 85 Wis 2d 353
Statute making contractor trustee not limited to monies
NY—Waldman v D & V Plumbing & Heating Contractors, 102 NYS 2d 787
Tex—McCutcheon v Union Mercantile Co, Civ App, 267 SW 2d 916, err ref
Duties of owner
NY—Onondaga Commercial Dry Wall Corp v Sylvan Glen Co, 271 NYS 2d 523, 26 AD 2d 130, motion den 231 NE 2d 131, 20 NY 2d 799, 284 NYS 2d 455, affd 234 NE 2d 840, 21 NY 2d 739, 287 NY 2d 886
Burden of proving absence of good faith
Conn—Canelli v Levy, Cir AD, 276 A 2d 912, 6 Conn Cir 507
Statute remedial not penal
Okla—Bohn v Divine, App, 544 P 2d 916
70. Wis—State v Wolter, App, 270 NW 2d 230, 85 Wis 2d 353
75. US—US v Joe Murray's Point Lookout, Inc, D C NY, 359 F Supp 335
Del—Bedford v Sussex Elec Const Co, 382 A 2d 246
Ga—Roberts v Georgia Southern Supply Co, 88 SE 2d 534, 92 Ga App 303, transf 86 SE 2d 241, 211 Ga 402
Acceptance by contractor of note and deed of trust
Miss—Fortenberry v Wilson, 158 So 2d 704, 248 Miss 153
76. Miss—C.J.S cited in Corrugated Industries Inc v Chattanooga Glass Co, 317 So 2d 43, 47
79. US—Mullins v Noland Co, D C Ga, 406 F Supp 206
Ga—Scott v Williams, 143 SE 2d 16, 111 Ga App 735
Where a contractor is under a statutory duty to give the owner a statement of sums due materialmen before receiving payment from the owner, the failure of the contractor to give such notice does not give unpaid materialmen a right of action against the owner
79.5. NC—Parnell-Martin Supply Co v High Point Motor Lodge, Inc, 173 SE 2d 623, 7 NC App 701, decman affd 177 SE 2d 392, 277 NC 312
Purpose of statute
US—Koppers Co, Inc v Garing & Langlois, CA Mich, 594 F 2d 1094

Mich—J Altman Companies, Inc v Saginaw Plumbing & Heating Supply Co, 202 NW 2d 707, 42 Mich App 747
NY—Puttnms Contracting Corp v Winston Woods At Dix Hills, Inc, 340 NYS 2d 317, 72 Misc 2d 987, affd 349 NYS 2d 652, 43 AD 2d 667, affd 325 NE 2d 169, 36 NY 2d 679, 365 NYS 2d 853
Right of subcontractor
NY—Imadore Rosen & Sons, Inc v Conforti & Ensele, Inc, 338 NYS 2d 39, 40 AD 2d 794
80. Ga—Whately v Alto Corp, 88 SE 2d 398, 211 Ga 718—Solomon v Robert Spector Lumber Co, 137 SE 2d 473, 109 Ga App 801
Money paid into court
(2) Other cases
Tex—Henderson v Couch, Civ App, 274 SW 2d 944
Cost of improvements permitted
NY—Northern Structures, Inc v Union Bank, 394 NYS 2d 964, 57 AD 2d 360, am on oth grds 396 NYS 2d 1021, 58 AD 2d 1042
81. Conn—Ficken v Edward's Inc, 183 A 2d 924, 23 Conn Sup 378, 1 Conn Cir 251—Canelli v Levy, Cir AD, 276 A 2d 912, 6 Conn Cir 507
D C—National Brick & Supply Co v Baylor, CA, 299 F 2d 454, 112 US App D C 73
Fla—Gray v L M Penza Tile Co, App, 107 So 2d 621—Nathman v Chrycey, App, 107 So 2d 782—Bahop v James A. Knowles, Inc, App, 292 So 2d 415
Ga—Whately v Alto Corp, 88 SE 2d 398, 211 Ga 718
NY—Frank v Bierau, 212 NYS 2d 869, 27 Misc 2d 701
Ohio—Durrel Paint & Varnish Co v Arnold, 152 NE 2d 9, 105 Ohio App 172
Tex—J R Dunaway Rug & Lumber Co v Blessing, Civ App, 274 SW 2d 90, err ref—Henderson v Couch, Civ App, 274 SW 2d 844—Marek v Goyen, Civ App, 346 SW 2d 926—First Nat Bank of Lubbock v Jenkins, Civ App, 350 SW 2d 52—W & W Floor Covering Co v Project Acceptance Co, Civ App, 412 SW 2d 379
Va—Waterval v William Doolan Elevator Service, Inc, 181 SE 2d 637, 212 Va 114
page 830
86. NY—Northern Structures, Inc v Union Bank, 394 NYS 2d 964, 57 AD 2d 360, am on oth grds 396 NYS 2d 1021, 58 AD 2d 1042
Tex—Stone Ft Nat Bank v Elliott Elec Supply Co, Inc, Civ App, 548 SW 2d 441, err ref no rev err
87. Ill—McCann Const Specialties Co v Alan Const Co, 298 NE 2d 222, 12 Ill App 3d 206
NJ—James Falcone Plumbing & Heating Co v Pasquale, 97 A 2d 720, 26 NJ Super 285
90. Cal—Central Indus Engineering Co, Inc v Strauss Const Co, Inc, App, 159 Cal Rptr 564, 98 CA 3d 460
Tex—Borden v Tapp, Civ App, 333 SW 2d 417
Legal obligation of contractor
Ky—Blanton v Com, App, 562 SW 2d 90
91. NY—Abe Schild Stone Corp v Apostle, 246 NYS 2d 446, 41 Misc 2d 732
92. NY—Walsh v Boulder Apartments, Inc, 191 NYS 2d 503
94. NY—Maycumber v Wolfe, 171 NYS 2d 44, 10 Misc 2d 464—Walsh v Boulder Apartments, Inc, 191 NYS 2d 503—Abe Schild Stone Corp v Apostle, 246 NYS 2d 446, 41 Misc 2d 732
page 831
96. NC—Parnell-Martin Supply Co v High Point Motor Lodge, Inc, 177 SE 2d 392, 277 NC 312
2. Conn—Canelli v Levy, Cir AD, 276 A 2d 912, 6 Conn Cir 507
NJ—James Falcone Plumbing & Heating Co v Pasquale, 97 A 2d 720, 26 NJ Super 285
9 NY—Waldman v D & V Plumbing & Heating Contractors, 102 NYS 2d 787

page 832

- 11 U.S.—Thermo Tech, Inc v Goodyear Tire and Rubber Co, Inc, CA Tex, 643 F.2d 1173
- Ga—Short & Paulk Supply Co v Dykes, 171 S.E.2d 782, 120 Ga App 639
13. U.S.—U.S. v Durham Lumber Co, C.A.N.C., 257 F.2d 570, aff'd 80 S.Ct. 1282, 363 U.S. 522, 4 L.Ed.2d 1371
- Ala.—Friday Lumber Co v Johnston, 180 So.2d 259, 278 Ala 661
- Cal.—Systems Inv Corp v National Auto & Cas Ins Co, 102 Cal Rptr 378, 25 CA.3d 1057
- Del.—S. G. Williams of Dover, Inc v Diamond State Vinyl, Inc, Super, 430 A.2d 794
- Fla.—Carter Sand Co, Inc v Baymeadows, Inc, App, 320 So.2d 14—Konsler Steel Co v Partin, 356 So.2d 264
- Ill.—Capital Plumbing & Heating Supply Co v Snyder, 275 N.E.2d 663, 2 Ill App.3d 660
- Ind.—Indianapolis Power & Light Co v Southeastern Supply Co, 257 N.E.2d 722, 146 Ind App 554
- Iowa—Moffitt Bldg Material Co v U.S. Lumber & Supply Co, 124 N.W.2d 134, 255 Iowa 765
- Mass.—Corrugated Industries, Inc v Chattanooga Glass Co, 317 So.2d 43
- N.Y.—Drachman Structural, Inc v Anthony Rivara Contracting Co, Inc, 356 N.Y.S.2d 974, 78 Misc.2d 486
- Tex.—Donahue v Rattikum Title Co, Civ App, 534 S.W.2d 156
- Notice after issuance of check but prior to payment
- N.C.—Farnell-Martin Supply Co v High Point Motor Lodge, Inc, 173 S.E.2d 623, 7 N.C. App 701, decision aff'd 177 S.E.2d 392, 277 N.C. 312

Notice not shown

- Va.—Fidelity & Cas Co of New York v First Nat Exchange Bank of Virginia, 193 S.E.2d 678, 213 Va 531

"Damages" for improper notice

- Cal.—Pintokote Co v Presley of Northern California, 1 Dist, 201 Cal Rptr 262, 154 CA.3d 458
15. D.C.—Rutzenberg v Noland Co, C.A., 364 F.2d 667, 124 U.S.App. DC 274
- N.Y.—Drane Lumber Co v T.G.K. Const Co, 331 N.Y.S.2d 678, 39 A.D.2d 567

Sham contractor

- Tex.—De-Col Paint Mfg Co v American Indem Co, 517 S.W.2d 270

Notice to prime contractor

- Tex.—De-Col Paint Mfg Co v American Indem Co, 517 S.W.2d 270

16. Fla.—Royal v Clemons, App, 394 So.2d 155
17. N.Y.—Drachman Structural, Inc v Anthony Rivara Contracting Co, Inc, 356 N.Y.S.2d 974, 78 Misc.2d 486
19. No notice or contract precludes recovery
- Cal.—Boyd & Lovess Lumber Co v Modular Marketing Corp, 118 Cal Rptr 699, 44 CA.3d 460
20. Cal.—Gordon Bldg Corp v Gibraltar Sav & Loan Ass'n, 55 Cal Rptr 884, 247 CA.2d 1
- Del.—Masten Lumber and Supply Co, Inc v Brown, 405 A.2d 101

- Mass.—Superior Glass Co, Inc v First Bristol County Nat Bank, 394 N.E.2d 972, 8 Mass App 356, aff'd, Sup, 406 N.E.2d 672

23. Ga.—Hill v Dealers Supply Co, 120 S.E.2d 879, 103 Ga App 846—Bowen v Kiecklighter, 183 S.E.2d 10, 124 Ga App 82

- Ill.—Deerfield Elec Co, Inc v Herbert W. Jaeger & Associates, Inc, 392 N.E.2d 914, 30 Ill Dec 149, 74 Ill App.3d 380

- Tex.—Berger Engineering Co v Village Casuals, Inc, Civ App, 576 S.W.2d 649

Necessity for records showing receipts and disbursements

- N.Y.—Application of Rafuse, 83 N.Y.S.2d 654, 274 App Div 944

24. Neb.—Wickes Corp v Frye, 273 N.W.2d 663, 202 Neb 23

page 833

25. Fla.—Pope v Carter, App, 102 So.2d 658—Brodbeck v Overhead Door Co of Fort Lauderdale, App, 117 So.2d 240—Mermell v McKinley, App, 126 So.2d 902—Daly Aluminum Products, Inc v Stocklager, App, 244 So.2d 528, cert den 246 So.2d 97

- Ill.—Sanaghan v Lawndale Nat Bank, 232 N.E.2d 546, 90 Ill App.2d 254

- N.Y.—Merv Blank, Inc v Dwyer 374 N.Y.S.2d 676, 50 A.D.2d 563

- Ohio—Ed A. McCarthy & Sons, Inc v Fleming, App, 170 N.E.2d 269—J. G. Laird Lumber Co v Tettelbaum, 236 N.E.2d 531, 14 Ohio St.2d 115

- Statute places burden on owner and contractor
- Ohio—UNECO, Inc v Metropolitan Dev Corp, 296 N.E.2d 702, 34 Ohio Misc 58

- Protection of materialmen and subcontractors
- Ohio—UNECO, Inc v Metropolitan Dev Corp, 296 N.E.2d 702, 34 Ohio Misc 58

- Tex.—Texas Crushed Stone Co v National Housing Industries, Inc, Civ App, 562 S.W.2d 917

Verified statement insufficient

- N.Y.—East Coast Wholesalers, Inc v John J. Moran Co, Inc, 345 N.Y.S.2d 115, 42 A.D.2d 605

26. Fla.—Hardee v Richardson, 47 So.2d 520—Curtis v McCordel, 63 So.2d 60—Shaw v Del-Mar Cabinet Co, 63 So.2d 264—Southern Supply Distributors v Landell, Fla, 76 So.2d 266—Brodbeck v Overhead Door Co of Fort Lauderdale, App, 117 So.2d 240—Adams v McDonald, App, 356 So.2d 864

- Ill.—Barr & Collins v Seden, 120 N.E.2d 380, 3 Ill App.2d 115

- Mich.—Knapp Transit Mix Co v Highland Grems, Inc, 216 N.W.2d 84, 51 Mich App 719

- Ohio—Quality Heating Supply Co v Buckeye Loan & Bldg Co, 148 N.E.2d 88, 105 Ohio App 369—Ed A. McCarthy & Sons, Inc v Fleming, app, 170 N.E.2d 269—Berea Block & Supply Co v Bridges, App, 178 N.E.2d 844—J. G. Laird Lumber Co v Tettelbaum, 236 N.E.2d 531, 14 Ohio St.2d 115

Sub-subcontractor

- U.S.—U.S. Fidelity & Guar Co v Sidwell, C.A. Okl, 525 F.2d 472

- Fla.—Richard Stone Co v Florida Bridge & Iron, Inc, 77 So.2d 632

Payment at peril

- (1) Fla.—All State Pipe Supply Co v McNair, 89 So.2d 774—Southern Gulf Utilities, Inc v United Ben Fire Ins Co, App, 179 So.2d 618

- Ill.—Fred C. Kramer Co v La Salle Nat Bank, 184 N.E.2d 739, 36 Ill App.2d 406

27. Ill.—Fred C. Kramer Co v La Salle Nat Bank, 184 N.E.2d 739, 36 Ill App.2d 406

28. Fla.—Orange Plumbing & Heating Co v Wolfe, 89 So.2d 671—All State Pipe Supply Co v McNair, 89 So.2d 774—Stone Arts, Inc v Dwyer, App, 99 So.2d 880

30. Ohio—B.A.M. Inc v McDonald, 214 N.E.2d 267, 5 Ohio App.2d 166

- Okl.—Cashway Lumber Co v Langston, 479 P.2d 582

Statutory provision requiring the principal contractor to notify the owner of his intention to dispute claims requires strict compliance in order to preserve his defense.^{30.5}

- 30.5. Notice held not within prescribed period
- Ohio—Inter-City Equipment Corp v Mardigan, 182 N.E.2d 873, 114 Ohio App 401

Strictly construed

- N.J.—Houdaille Const Materials, Inc v American Tel & Tel Co, 399 A.2d 324, 166 N.J. Super 172

- Ohio—Inter-City Equipment Corp v Mardigan, 182 N.E.2d 873, 114 Ohio App 401

31. Fla.—Pope v Carter, App, 102 So.2d 658—Townsend v Giles, App, 133 So.2d 451—Stenholm v Calbeck, App, 265 So.2d 531

- Ohio—J. G. Laird Lumber Co v Tettelbaum, 236 N.E.2d 531, 14 Ohio St.2d 115

- S.C.—Lowndes Hill Realty Co v Greenville Concrete Co, 93 S.E.2d 855, 229 S.C. 619

32. Ill.—Sanaghan v Lawndale Nat Bank, 232 N.E.2d 546, 90 Ill App.2d 254

- Ohio—J. G. Laird Lumber Co v Tettelbaum, 236 N.E.2d 531, 14 Ohio St.2d 115

35. Fla.—Southern Supply Distributors v Lansdell, 76 So.2d 266

- Ill.—Sanaghan v Lawndale Nat Bank, 232 N.E.2d 546, 90 Ill App.2d 254

- Ohio—J. G. Laird Lumber Co v Tettelbaum, 236 N.E.2d 531, 14 Ohio St.2d 115

Failure of claimant to notify owner of dishonored check

- Fla.—Lehman v Snyder, 84 So.2d 312

39. Fla.—Renuart Lumber Yards, Inc v Stearn, 95 So.2d 517

- Ga.—Ingalls Iron Works Co v Standard Acc Ins Co, 130 S.E.2d 606, 107 Ga App 454

Sufficiency of affidavit

- Ga.—Short & Paulk Supply Co v Dykes, 171 S.E.2d 782, 120 Ga App 639

Contractor not relieved from filing affidavit

- Colo.—N. R. Nielsen & Son, Contractors, Inc v Myrick, Craswell, Bramley, App, 527 P.2d 935

40. Ga.—Fitts v Adda, 64 S.E.2d 466, 83 Ga App 696

- Ohio—Walker v Ball, 171 N.E.2d 541, 113 Ohio App 313—B.A.M. Inc v McDonald, 214 N.E.2d 267, 5 Ohio App.2d 166

page 834

45. Cal.—A.J. Setting Co, Inc v Trustees of California State University and Colleges, 174 Cal Rptr 43, 119 CA.3d 374

Right not found

- N.C.—Coker v Stevens, 258 S.E.2d 794, 43 N.C. App 352

46. U.S.—Mullins v Noland Co, D.C.Ga., 406 F.Supp 206

- Ill.—Krack Corp v Sky Val Foods, Inc, 273 N.E.2d 202, 133 Ill App.2d 469

48. D.C.—Spencer v Old Stem Grill, D.C., 194 F.Supp 274

- N.Y.—American Blower Corp v James Talcott, Inc, 194 N.Y.S.2d 630, 18 Misc.2d 1031, aff'd 203 N.Y.S.2d 1018, 11 A.D.2d 654, rearg and app den 206 N.Y.S.2d 533, 1 A.D.2d 928, aff'd 219 N.Y.S.2d 263, 10 N.Y.2d 282, 176 N.E.2d 833—Tri-County Plumbing & Heating Nassau, Inc v Brooklyn Women's Hospital Inc, 332 N.Y.S.2d 467, 70 Misc.2d 65

- Wis.—Paulsen Lumber, Inc v Meyer, 177 N.W.2d 884, 47 Wis.2d 621

Particular funds held not subject to trust

- N.Y.—Glantz Contracting Corp v 1955 Associates, Inc, 245 N.Y.S.2d 129, 20 A.D.2d 535, aff'd 200 N.E.2d 867, 14 N.Y.2d 931, 252 N.Y.S.2d 328—York Corp v 1955 Associates Inc, 245 N.Y.S.2d 131, 20 A.D.2d 538—McManna, Longe, Brockwehl, Inc v Palmer, 265 N.Y.S.2d 341, 24 A.D.2d 1055—Hall v Blumberg, 270 N.Y.S.2d 539, 26 A.D.2d 64—Gruenberg v U.S., 285 N.Y.S.2d 962, 29 A.D.2d 527

- Tex.—American Automobile Life Ins Co v Jay's Air Conditioning & Heating, Inc, Civ App, 535 S.W.2d 23, err ref no rev err

No trust created

- N.Y.—ALB Contracting Co, Inc v York-Jersey Mortg Co, 401 N.Y.S.2d 934, 60 A.D.2d 989

49. Fla.—Martins v Baur Hardware Co, App, 147 So.2d 142—Miller v Duke, App, 153 So.2d 627

- Tex.—W & W Floor Covering Co v Project Acceptance Co, Civ App, 412 S.W.2d 379

Filing lien affidavits not required unless fund retained

Tex—General Air Conditioning Co v Third Ward Church of Christ, 426 S W 2d 341—Hayek v West ern Steel Co, Civ App, 469 S W 2d 206, err gr— Hayek v Western Steel Co, 478 S W 2d 786— Dowdy v Hale Supply Co, Civ App, 498 S W 2d 716

Duty arises when claim became available

Tex—Langford v Reeves, Civ App, 478 S W 2d 259, err ref no rev err

Percent of amount paid to contractor

Tex—Dowdy v Hale Supply Co, Civ App, 498 S W 2d 716

Claimant's notice requirements satisfied

Tex—Zack Burkett Co v Industrial Indem Co, 662 S W 2d 161, err ref no rev err 667 S W 2d 493

50. Tex—Gage v Hollywood Overhead Door Co of Fort Worth, Civ App, 482 S W 2d 406, err ref no rev err

52. Fla—Ludwig & Kibbey Enterprises, Inc v Cox Steel & Supply, Inc, App, 119 So 2d 58

Under some statutes the owner is constituted a trustee of funds received for financing an improvement of his realty 335

53.5. N.Y.—Hartford Acc & Indem Co v Ritter, 331 N Y S 2d 471, 69 Misc 2d 981

Purpose of statute

N.Y.—Allerton Const Corp v Fairway Apartments Corp, 272 N Y S 2d 867, 26 A D 2d 636—Schwadron v Freund, 329 N Y S 2d 945, 69 Misc 2d 342—Tri-County Plumbing & Heating Nassau, Inc v Brooklyn Women's Hospital Inc, 332 N Y S 2d 467, 70 Misc 2d 65

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Wash—Maynard Inv Co v McCann, 465 P 2d 657, 77 Wash 2d 616

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Examination of owner's books and records

N.Y.—Allerton Const Corp v Fairway Apartments Corp, 272 N Y S 2d 867, 26 A D 2d 636

Charges against fund

N.Y.—Naustat Iron Works, Inc v Tri-Neck Const Corp, 308 N Y S 2d 427, 62 Misc 2d 228

Conversion of trust funds

N.Y.—Schwadron v Freund, 329 N Y S 2d 945, 69 Misc 2d 342

Wash—Maynard Inv Co v McCann, 465 P 2d 657, 77 Wash 2d 616

Wis—Burmeister Woodwork Co, Inc v Friedel, 222 N W 2d 647, 65 Wis 2d 293

Absolute liability of trustee

N.Y.—Schwadron v Freund, 329 N Y S 2d 945, 69 Misc 2d 342

Fund available only to protected beneficiaries
N.Y.—Schwadron v Freund, 329 N Y S 2d 945, 69 Misc 2d 342

Sufficiency of demand

N.Y.—Tri-County Plumbing & Heating Nassau, Inc v Brooklyn Women's Hospital Inc, 332 N Y S 2d 467, 70 Misc 2d 65

Good faith no excuse

Wis—Burmeister Woodwork Co, Inc v Friedel, 222 N W 2d 647, 65 Wis 2d 293

Particular use of funds

N.Y.—B G Equipment Co, Inc v American Ins Co, 402 N Y S 2d 479, 61 A D 2d 247, affd, 386 N E 2d 833, 46 N Y 2d 811, 413 N Y S 2d 922

Wis—Burmeister Woodwork Co, Inc v Friedel, 222 N W 2d 647, 65 Wis 2d 293

§ 252. Payment to Subcontractors, Laborers, or Materialmen as Affecting Lien of Other Persons

54. U.S.—Jordan Co v Bethlehem Steel Corp, D C Ga, 309 F Supp 148, affd, C.A., 445 F 2d 655

La—R F Mestayer Lumber Co v Tessner, App, 101 So 2d 238

Minn—Weyerhaeuser Co (Rulco Laminated Products Division) v Hvidsten, 129 N W 2d 772, 268 Minn 448

N.Y.—Rutche Const Co v Hoffman, 185 N Y S 2d 289, 8 A D 2d 633, affd, 198 N Y S 2d 613, 7 N Y 2d 962, 166 N E 2d 191

Okla—McGlumphy v Jetero Const Co, Inc, 593 P 2d 76

Tex—Friedman Steel Sales, Inc v Texas Utilities Co, Civ App, 574 S W 2d 849, err ref no rev err

Wash—Thrifty Supply Co of Seattle v Deveran Builders, Inc, 475 P 2d 905, 3 Wash App 425

Payment by surety not deductible from contractors

Kan—Dick v LaVilla Inns, Inc, 510 P 2d 188, 212 Kan 101

Statute inapplicable

Fla—Ronal Builders, Inc v Powell Brothers, Inc, App, 328 So 2d 869

page 835

60. Ga—Scott v Williams, 143 S E 2d 16, 111 Ga App 735

Satisfaction of judgment required

U.S.—Jos L Muscarelle, Inc v Central Iron Mfg Co, C.A.N.J., 379 F 2d 715

§ 253. — Liens of Other Subcontractors, Laborers, or Materialmen

72. Ark—Kelley Bros Lumber Co v Lemmg, 248 S W 2d 358, 220 Ark 418—Long-Bell Lumber Co v Auxer, 255 S W 2d 163, 221 Ark 672

Cal—Rodeffer Industries, Inc v Chambers Estates, Inc, 69 Cal Rptr 551, 263 C A 2d 116

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Wyo—Lasch v Wumpenney, 278 P 2d 807, 73 Wyo 345

"Payment" construed

U.S.—Jos L Muscarelle, Inc v Central Iron Mfg Co, C.A.N.J., 379 F 2d 715

Distribution on pro rata basis proper

N.C.—Interior Distributors, Inc v Promac, Inc 219 S E 2d 281, 27 N C App 418

Liberal construction of statute

Tex—Texas Const Associates, Inc v Balli, Civ App, 558 S W 2d 513

73. Cal—Re-Bar Contractors, Inc v City of Los Angeles, 32 Cal Rptr 607, 219 C A 2d 134

Payment within period for filing

Okla—Richardson v H E Leonhardt Lumber Co, 389 P 2d 965

page 836

76. Ohio—Durrell Paint & Varnish Co v Arnold, 152 N E 2d 9, 105 Ohio App 172

77. Cal—Re-Bar Contractors, Inc v City of Los Angeles, 32 Cal Rptr 607, 219 C A 2d 134

Ill—McCann Const Specialties Co v Alan Const Co, 298 N E 2d 222, 12 Ill App 3d 206

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78. Iowa—C.J.S. cited in C E Sparrow Co v W H Hartman Co, 121 N W 2d 98, 103, 254 Iowa 1370

§ 254 Tender

80. Cal—Richter v Walker, 226 P 2d 593, 36 Cal 2d 634

§ 255. Contracts and Stipulations in General

86. N.H.—River College v St Paul Fire & Marine Ins Co, 187 A 2d 799, 104 N H 398

N.M.—Skidmore v Eby, 262 P 2d 370, 57 N M 669

Okla—Flour Mills of America, Inc v American Steel Bldg Co, 449 P 2d 861

Wis—H & M Heating Co v Andrae, 150 N W 2d 379, 35 Wis 2d 1

page 837

91. Tex—C.J.S. cited in Henderson v Couch, Civ App, 274 S W 2d 844, 853

Title to retained fund remains in owner for benefit of lienors

U.S.—Youngstown Sheet & Tube Co v Patterson-Emerson-Constock of Ind, D C Ind, 227 F Supp 208

Creation of trust fund by construction loan agreement

Cal—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644

93. Tex—C.J.S. cited in Henderson v Couch, supra, n 91

95. Rights under construction loan agreement

Cal—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 C A 2d 644

§ 256. Bonds or Undertakings in General

Library References

Mechanics' Liens ⇨229, 818

page 838

13. U.S.—Thermo Tech, Inc v Goodyear Tire and Rubber Co, Inc, C A Tex, 643 F 2d 1173

Fla—Gunn & Hunt, Inc v Hughes Supply, Inc, App, 335 So 2d 842

14. U.S.—Thermo Tech, Inc v Goodyear Tire and Rubber Co, Inc, C A Tex, 643 F 2d 1173

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N.H.—River College v St Paul Fire & Marine Ins Co, 187 A 2d 799, 104 N H 398

N.Y.—Schmidt v Duggan, 198 N Y S 2d 98, 10 A D 2d 797

Utah—Crane Co v Utah Motor Park, Inc, 335 P 2d 837, 8 Utah 2d 413

Application of particular statute

(2) Other cases

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Purpose of bond

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Ky—Western Cas & Sur Co v Sales, 185 S W 2d 665, 299 Ky 637

Neb—Cagle, Inc v Simmons, 254 N W 2d 398, 198 Neb 595

Okla—Porter v Mid-America Paving Co, 301 P 2d 1005

Bond not required

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No distinction between resident and nonresident
Utah—King Bros, Inc v Utah Dry Kiln Co, 374 P 2d 254, 13 Utah 2d 339

Separate bonds for performance and liens

La—Jimco, Inc v Gentry Terrace Apartments, Inc, App, 230 So 2d 281

15 Statute applying to owner of interest in land

(1) License on land of another not within statute
Utah—King Bros, Inc v Utah Dry Kiln Co, 440 P 2d 17, 21 Utah 2d 43

(2) Ownership of building sufficient

Utah—King Bros, Inc v Utah Dry Kiln Co, 440 P 2d 17, 21 Utah 2d 43

page 839

17. U.S.—Continental Cas Co v Associated Pipe & Supply Co, C A La, 447 F 2d 1041

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18. Utah—Bennett v Downard, 533 P 2d 1348

21. U.S.—Houdaille Industries, Inc v United Bonding Ins Co, C A Fla, 453 F 2d 1048

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Equitable estoppel not precluded

Cal—R D Reader Lathing Co v Allen, 57 Cal Rptr 841, 425 P 2d 785, 66 C 2d 373

23. Utah—J P Koch, Inc v J C Penney Co, Inc, 534 P 2d 903

24. Mass—Superior Glass Co, Inc v First Bristol County Nat Bank, 406 N E 2d 672

Utah—Roberts Inv Co v Gibbons & Reed Concrete Products Co, 449 P 2d 116, 22 Utah 2d 105

30. Effect of failure to require bond

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§ 257. Requisites and Validity of Bond

Library References

Modern Legal Forms Ch 16,
Bonds, Ch 17, Building
Agreements

page 842

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§ 258. Construction and Effect of Bond in General

page 843

89. Fla—Gun & Hunt, Inc v Hughes Supply, Inc, App, 335 So 2d 842

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Ky—Standard Ace Ins Co of Detroit v Rose, 234 S W 2d 728, 314 Ky 233

Subcontractor's bond

(1) Cooley v Cash, Tex Civ App, 207 S W 2d 436

(3) Other cases—James Miles & Son Co v Aetna Casualty & Surety Co, D C Mass, 1 F Supp 925

90. Cal—Thode v McAmis, supra, n 21

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Obligations of contract as those of bond

(4) Other matters

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92. Cal—Southern Heaters Corp v New York Cas Co, 260 P 2d 1048, 120 C A 2d 377

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NY—HNC Realty Co v Bay View Towers Apartments, 409 N Y S 2d 774, 64 A D 2d 417

93. Miss—Great Am Ins Co v Busby, 150 So 2d 131, 247 Miss 39

94. Iowa—Bourrett v W M Brde Const Co, 84 N W 2d 4, 248 Iowa 1080

NY—W A Case & Son Mfg Co v H K Ferguson & Co, 155 N Y S 2d 652, 14 Misc 2d 441

NH—Rivier College v St Paul Fire & Marine Ins Co, 187 A 2d 799, 104 N H 398

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Obligation to pay for materials

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Construction of terms

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95. Md—Levy to Use of Walbrook Mill & Lumber Co v Glens Falls Indem Co, 123 A 2d 348, 210 Md 265

98. U.S.—Ware County v National Surety Co, D C Ga, 17 F 2d 444

page 844

6. La—Magnon Elec, Inc v J P Van Way Engineer-Contractors, Inc, App, 256 So 2d 851

page 845

16. Cal—Myers v Alta Const Co, 235 P 2d 1, 37 C 2d 739

21. Fla—Resnick Developers South, Inc v Clerici, Inc, App, 340 So 2d 1194

La—Magnon Elec, Inc v J P Van Way Engineer-Contractors, Inc, App, 256 So 2d 851—A F Blair Co, Inc v Mason, App, 406 So 2d 6, writ den, Sup, 410 So 2d 1132

22. Miss—Redd v L A Contracting Co, 151 So 2d 205, 246 Miss 548

29. Md—Levy to Use of Walbrook Mill & Lumber Co v Glens Falls Indem Co, 123 A 2d 348, 210 Md 265

§ 259. Liabilities on Bond

page 846

31. Ariz—Prescott Nat Bank v Head, 90 P 328, 11 Ariz 213, 21 Ann Cas 990

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Matters held not within undertaking

(4) Other matters

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Mo—Cones v U S Fidelity & Guar Co, App, 525 S W 2d 654

Whether materials used were delivered directly to site immaterial

La—Mayronne Lumber & Supply Co v Houston Fire & Cas Ins Co, 74 So 2d 198, 225 La 1017

Whether materials were ordered by or furnished to contractor directly

La—Moore Steel, Inc v Snow, App, 85 So 2d 648

33. Fla—Bankers & Shippers Ins Co of New York v AIA Insulation Industries, Inc, App, 390 So 2d 734

34. Ala—Pacific Ins Co v Wilbanks, 214 So 2d 279, 283 Ala 1

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35. Cal—Ferry v Ohio Farmers Ins Co, 27 Cal Rptr 471, 211 C A 2d 651

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Subcontractor's surety liable to prime contractor

U.S.—Glens Falls Indem Co v U S ex rel and to Use of Westinghouse Elec Supply Co, C A Cal, 229 F 2d 370

Profits

(1) U.S.—St Paul-Mercury Indem Co v U S for Use of Jones, C A Kan, 238 F 2d 917

Primary not secondary liability

Cal—Culbertson v Czek, 37 Cal Rptr 548, 225 C A 2d 451

Supplier not limited to sum in affidavit or statutory notice

Fla—Winchester v Florida Elec Supply, Inc, App, 162 So 2d 668

page 847

47. U.S.—American Sur Co of NY v Bruzmel, C A Kan, 184 F 2d 935

page 848

70. S C—Dominion Culvert & Metal Corp v U S Fidelity & Guaranty Co, 120 S E 2d 518, 238 S C 452, 92 A L R 2d 1244

71. Cal—Ferry v Ohio Farmers Ins Co, 27 Cal Rptr 471, 211 C A 2d 651

72. Right held not waived

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78. Time for giving notice

N D—Ireland's Lumber Yard v Progressive Contractors, Inc, 122 N W 2d 554

94. U S—Kansas City Hydraulic Press Brick Co v National Surety Co, C C Mo, 149 F 507

98. Failure to collect-past-due account

S C—City Lumber Co v National Sur Corp, 92 S E 2d 128, 229 S C 115

2. U S—Gimre v Royal Indem Co, C A Ga, 240 F 2d 101

§ 260. — Liability of Surety Completing Work

25. U S—Glens Falls Indem Co v U S ex rel and to Use of Westinghouse Elec Supply Co, C A Cal, 229 F 2d 370

N Y—Daniel-Morris Co v Glens Falls Indem Co, 101 N Y S 2d 535, mod on oth grds 128 N Y S 2d 760, 283 App Div 504, affd 126 N E 2d 750, 308 N Y 464

28. N Y—Daniel-Morris Co v Glens Falls Indem Co, supra, n 25

32. Ark—Johnson v Maryland Cas Co, 280 S W 2d 398, 225 Ark 224

Or—State v Cornwall, 201 P 1072, 102 Or 220

§ 261. — Measure and Limit of Recovery

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33. Ky—Standard Acc Ins Co of Detroit v Rose, 234 S W 2d 728, 314 Ky 233

N Y—Daniel-Morris Co v Glens Falls Indem Co, supra, n 25

38. N J—J Jacob Shannon & Co v Continental Casualty Co, 148 A 738, 106 N J Law 200

40. Minn—Allen v Eseroth, 137 N W 16, 118 Minn 476

41. Ariz—Kroeger v Union Indemnity Co, 14 P 2d 258, 40 Ariz. 467

Cal—Cohn v Smith, 174 P 682, 37 Cal App 764

La—Moore Steel, Inc v Snow, App, 85 So 2d 648—Grather v Snow, App, 85 So 2d 657—Jahncke Service, Inc v Snow, App, 85 So 2d 653, Stone Lumber Co v Snow, 85 So 2d 654—Tulane Hardwood Lumber Co v Snow, App, 85 So 2d 655—Schwartz Supply Co v Snow, App, 85 So 2d 656—Southern States Iron Roofing Co v Snow, App, 85 So 2d 658

Nev—Basic Refractories, Inc v Bright, 298 P 2d 810, 72 Nev 183

Tex—W Horace Williams Co v Vandaveer, Brown & Stoy, Civ App, 84 S W 2d 333, error dismissed

42. Cal—Cohn v Smith, supra, n 41

Recovery has been allowed for additional work done as a result of the general contractor's wrongful act⁴²¹

42.1. N Y—J I Hass Co v D M W Contracting Co, 143 N Y S 2d 917, affd 149 N Y S 2d 213, 1 A D 2d 770

43. Cal—Growall v Pacific Surety Co, 131 P 73, 21 Cal App 185

44. Cal—Growall v Pacific Surety Co, supra, n 43—Aletraz Mascon Hall Ass'n v United States Fidelity & Guaranty Co, 85 P 156, 3 Cal App 338

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§ 262 Action on Bond

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57. Cal—Pierce v Wright, 256 P 2d 1049, 117 C A 2d 718

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Right of attorney to recover for "labor"

Ky—Western Cas & Sur Co v Sales, 185 S W 2d 665, 299 Ky 637

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Right of bank to sue

U S—Third Nat Bank of Miami v Detroit Fidelity & Surety Co, C C A Fla, 63 F 2d 548, cert den 54 S Ct 88, 290 U S 667, 78 L Ed 577

R I—U S Fidelity & Guaranty Co v Rhode Island Covering Co, 167 A 143, 53 R I 397

58. N Y—Adams Engineering Co v Menowitz, 278 N Y S 2d 498, 53 Misc 2d 364

69 Subcontractors' bonds

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72. Ariz—Porter v Eyer, 294 P 2d 661, 80 Ariz 169

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Railroad construction bond

Or—Pankey v National Surety Co, 239 P 808, 115 Or 648

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74. Ariz—Porter v Eyer, 294 P 2d 661, 80 Ariz 169

77. N H—River College v St Paul Fire & Marine Ins Co, 187 A 2d 799, 104 N H 398

N Y—Daniel-Morris Co v Glens Falls Indem Co, supra, n 73—Schmidt v Duggan, 180 N Y S 2d 679, 15 Misc 2d 108, app dismissed conditionally 193 N Y S 2d 630, 9 A D 2d 633, affd 198 N Y S 2d 98, 10 A D 2d 797

81. Ga—Glens Falls Indem Co v Southeastern Const Co for Use of Gill Equipment Co, 62 S E 2d 149, 207 Ga 488, conf to 62 S E 2d 396, 82 Ga App 752 and 62 S E 2d 397, two cases, 82 Ga App 752

85. U S—Houdaille Industries, Inc v United Bonding Ins Co, C A Fla, 453 F 2d 1048

Md—Levy to Use of Walbrook Mill & Lumber Co v Glens Falls Indem Co, 123 A 2d 348, 210 Md 265

87. U S—Frigidaire Sales Corp v Maguire Homes, Inc, 186 F Supp 767, affd, D C Mass, 282 F 2d 427

Fla—Di Camillo v Westinghouse Elec Corp, App, 122 So 2d 499

Ga—U S Cas Co v Durrence, 94 S E 2d 101, 94 Ga App 222

Ind—National Surety Co v Rochester Bridge Co, 146 N E 415, 83 Ind App 195

Iowa—Westinghouse Elec Corp v Mill & Elevator Co, 118 N W 2d 528, 254 Iowa 874

Mo—Board of Education of City of St Louis ex rel Johnson Heat Regulating Co v U S Fidelity & Guaranty Co, 149 S W 46, 166 Mo App 410

Neb—Forbarger Stone Co v Lion Bonding & Surety Co, 170 N W 897, 103 Neb 202, concurring opinion 171 N W 288, 103 Neb 203

N H—River College v St Paul Fire & Marine Ins Co, 187 A 2d 799, 104 N H 398

N Y—Daniel-Morris Co v Glens Falls Indem Co, 126 N E 2d 750, 308 N Y 464—W A Case & Son Mfg Co v H K Ferguson & Co, 155 N Y S 2d 652, 14 Misc 2d 441—Certified Industries Inc v Royal Indem Co, 252 N Y S 2d 345, 43 Misc 2d 761

N C—Crane Co v Shaw, 99 S E 8, 177 N C 346

88. Or—James A C Tait & Co v D Diamond Corp, 365 P 2d 883, 228 Or 602

94. Mo—Board of Education of City of St Louis ex rel Johnson Heat Regulating Co v U S Fidelity & Guaranty Co, supra, n 87

97. U S—Climatrol Industries, Inc v Home Indem Co, D C Ga, 316 F Supp 314

98. Fla—American Fire & Cas Co v Martin Marietta Corp, App, 171 So 2d 435

Iowa—Bourrett v W M Bride Const Co, 84 N W 2d 4, 248 Iowa 1080

Or—Pankey v National Surety Co, supra, n 72

99. Iowa—Bourrett v W M Bride Const Co, 84 N W 2d 4, 248 Iowa 1080

N Y—American Hard Wall Plaster Co v Board of Ed, Central School Dist No 1 of Towns of German Flatts, Frankfort, Herkimer and Schuyler, Herkimer County, 210 N Y S 2d 546, 26 Misc 2d 1022, affd 214 N Y S 2d 670, 13 A D 2d 613

Or—Pankey v National Surety Co, supra, n 72

Tex—Cooley v Cash, Civ App, 207 S W 2d 436

1. Ga—Sentry Indem Co v Central Elec Co, Inc, 222 S E 2d 40, 136 Ga App 557

Iowa—Bourrett v W M Bride Const Co, 84 N W 2d 4, 248 Iowa 1080

3. U S—Frommeyer v L & R Const Co, D C N J, 139 F Supp 579—Corn Const Co v Aetna Cas & Sur Co of Hartford, Conn, C A Colo, 295 F 2d 685

Iowa—Bourrett v W M Bride Const Co, 84 N W 2d 4, 248 Iowa 1080

Or—Pankey v National Surety Co, 239 P 808, 115 Or 648

4. D C—Bevard v New Amsterdam Cas Co, Mun App, 132 A 2d 157

Iowa—Bourrett v W M Bride Const Co, 84 N W 2d 4, 248 Iowa 1080

Or—Pankey v National Surety Co, supra, n 3

9. Tex—Cooley v Cash, Civ App, 207 S W 2d 436

10. Ga—D H Overmyer Warehouse Co v W C Caye & Co, 157 S E 2d 68, 116 Ga App 128

11. Mere showing of delivery to job site held sufficient

La—Jahncke Service, Inc v Foret, App, 139 So 2d 554

A contractor and surety sued by a materialman who supplied materials to a subcontractor have been held to have no right to set off claims against the subcontractor¹⁴⁵

14.5. N Y—Certified Industries, Inc v Royal Indem Co, 252 N Y S 2d 345, 43 Misc 2d 761

19. U S—Houdaille Industries, Inc v United Bonding Ins Co, C A Fla, 453 F 2d 1048

20. Tex—Capitol Steel & Iron Co v Standard Acc Ins Co, Civ App, 299 S W 2d 738

Requirement of notice in bond as condition precedent

Md—Levy to Use of Walbrook Mill & Lumber Co v Glens Falls Indem Co, 123 A 2d 348, 210 Md 265

page 861

27 Tex—F & C Engineering Co v Moore, Civ App, 300 S W 2d 323, err ref no rev err

page 862

30 Cal—Powers Regulator Co v Seaboard Sur Co of New York, 22 Cal Rptr 373, 204 C A 2d 338—Lewis & Queen v S Edmondson & Sons, 248 P 2d 973, 113 C A 2d 705

31 NY—A L Plumbing & Heating Co v Keskent Realty Corp, 223 N Y S 2d 6, 15 A D 2d 546

33 Cal—Leeds & Northrup Co v Interkin-Salco Engineering Co, 341 P 2d 21, 170 C A 2d Supp 836

Utah—Oscar E Chytraus Co, Inc v Wasatch Furnace & Elec, Inc, 502 P 2d 554, 28 Utah 2d 339

34 Cal—Lewis v Hopper, 295 P 2d 93, 140 C A 2d 365

page 863

42 Subcontractor as third party beneficiary NY—Neill Supply Co v Fidelity & Deposit Co of Md, 152 N Y S 2d 157

45 DC—US Plywood Corp v Continental Cas Co, Mun App, 157 A 2d 286

54 Iowa—Streator Clay Mfg Co v Henning-Vineyard Co, 155 N W 1001, 176 Iowa 297

Application of payments**(3) Other payments**

NY—Daniel-Morris Co v Glens Falls Indem Co, 128 N Y S 2d 760, 283 App Div 504, affd 126 N E 2d 750, 308 N Y 464

page 864

64 La—Dixon Terrazzo & Tile Co v Tom Williams Const Co, App, 148 So 2d 329

65. Where claimant estopped to assert claim La—Dixie Lumber Co v Trinity Universal Ins Co, App, 148 So 2d 924

page 865

69. Pa—Horner v Standard Acc Ins Co, 83 Dauph 25

Complaints and petitions held not to state cause of action

N C—Carolina Builders Corp v New Amsterdam Cas Co, 73 S E 2d 155, 236 N C 513

page 866

93. Neb—Waste Lumber Co v Masud Bros, Inc, 200 N W 2d 119, 189 Neb 10, 74 A L R 3d 320

Evidence held sufficient

(2) Cal—Southern Heaters Corp v New York Cas Co, 260 P 2d 1048, 120 C A 2d 377

(7) Ala—Adams Supply Co v US Fidelity & Guaranty Co, 111 So 2d 906, 269 Ala 171

page 867

N C—Carolina Builders Corp v New Amsterdam Cas Co, supra, n 69

Tex—Mundy v Knutson Const Co, 294 S W 2d 371, 156 Tex 211

Prejudice or damage not required

Mich—People for Use and Benefit of Michigan Elec Supply Co v Vandenberg Elec Co, 72 N W 2d 216, 343 Mich 87

98. Or—State v Cornwall, 201 P 1072, 102 Or 220

Instructions held proper

Minn—Seaboard Sur Co v Bonarage, 84 So 2d 517, 226 Minn 482

§ 263. In General**Library References**

Mechanics' Liens ⇨245(1) et seq

page 868

12. Ala—Locke v Kay, 59 So 2d 70, 257 Ala 376
Anz—US Fidelity & Guaranty Co v Hirsch, 385 P 2d 211, 94 Anz 331

Ga—Cowart v Reeves, 55 S E 2d 911, 80 Ga App 161—Allied Asphalt Co v Cumbie, 216 S E 2d 659, 134 Ga App 960

Md—Mervin L Blades & Son, Inc v Lighthouse Sound Marina and Country Club, 377 A 2d 523, 37 Md App 265

N J—General Elec Co v E Fred Sulzer & Co, 207 A 2d 346, 86 N J Super 520, affd 222 A 2d 653, 92 N J Super 210

NY—Imperial Plumbing & Heating Corp v Startford Development Corp, 208 N Y S 2d 174, 26 Misc 2d 815

Pa—Metz v Krupski, 109 P L J 481

page 869

13. US—Ben O'Callaghan Co v Schmincke, D C Ga, 376 F Supp 1361

NY—Concrete Corp v Sansouci Realty Corp, 168 N Y S 2d 973, 7 Misc 2d 717—Imperial Plumbing & Heating Corp v Startford Development Corp, 208 N Y S 2d 174, 26 Misc 2d 815

Tenn—W T Harrison & Co v Harding Court Co, 251 S W 2d 829, 36 Tenn App 98

Wash—Harbor Millwork, Inc v Achtnen, 496 P 2d 978, 6 Wash App 808

Not higher than debt

Pa—Halowich v Amminity, 154 A 2d 406, 190 Pa Super 314

Suit on claim

Vt—Woodbury Lumber Co v McIntosh, 211 A 2d 240, 125 Vt 154

14 Iowa—Harper v Ford, 179 N W 2d 772

Pa—Metz v Krupski, Com Pl, 109 P L J 481

19. Cal—Laubach v Roberdo, 277 P 2d 9, 43 C 2d 702

page 870

Where the lien law provides for the establishment of a trust, a trust claimant can enforce his claim only in a representative action brought for the benefit of all beneficiaries of the trust, and any relief granted is deemed to be for the benefit of the entire class of trust beneficiaries²⁰⁵

20.5 NY—Glazer v Alison Homes Corp, 309 N Y S 2d 381, 62 Misc 2d 1017, affd 320 N Y S 2d 715, 36 A D 2d 720

22. Cause of action properly joined

Pa—Stringert & Bowers, Inc v On-Line Systems, Inc, 345 A 2d 194, 236 Pa Super 196

23. Fla—Bybee v Stearns, 95 So 2d 529

Summary decree precluded

Fla—Allied Florida Corp v Round, App, 147 So 2d 586

25. Mo—K-V Builders, Inc v Thomas, App, 353 S W 2d 130

N M—Terry v Pipkin, 340 P 2d 840, 66 N M 4

In at least one jurisdiction, it has been held that a counterclaim to enforce a lien is grounded upon the contract itself, and not quantum meruit²⁵¹

25.1. Fla—Poranski v Millings, 82 So 2d 675

28. US—In re Etherton, D C Cal, 88 F Supp 874

Del—Miller v Master Home Builders, Inc, Super, 239 A 2d 696

NY—Fedoryk v Fort Salonga Management Co, 288 N Y S 2d 809, 56 Misc 2d 513

page 871

40 Minn—CJS cited in Johnson & Peterson, Inc v Toohy, 172 N W 2d 326, 285 Minn 181, app after remand 184 N W 2d 586, 289 Minn 362

Personal action created by statute

La—Abry Bros, Inc v Tillman, 162 So 2d 346, 245 La 1017

44 Minn—CJS cited in Johnson & Peterson, Inc v Toohy, 172 N W 2d 326, 285 Minn 181, app after remand 184 N W 2d 586, 289 Minn 362

45. Minn—CJS cited in Johnson & Peterson, Inc v Toohy, 172 N W 2d 326, 285 Minn 181, app after remand, 289 Minn 362

47 NY—Soundwall Const Corp v Moncarol Const Corp, 290 N Y S 2d 363, 56 Misc 2d 892

§ 264 Legal or Equitable Proceedings

page 872

54. Ala—Taylor v Shaw, 55 So 2d 502, 256 Ala 467
Cal—Norman v Barney, 45 Cal Rptr 467, 235 C A 2d 424—A J Rauch Paving Co v Mountain View Sav and Loan Ass'n, 103 Cal Rptr 96, 28 C A 3d 832

Colo—Jackson v A B Z Lumber Co, 392 P 2d 288, 155 Colo 33—American Irr Co v Fadenrecht, 489 P 2d 1060, 30 Colo App 28

Fla—Val-Rich Corp v Tole Elec Co, App, 196 So 2d 486

Ind—Indianapolis Power & Light Co v Southeastern Supply Co, 257 N E 2d 722, 146 Ind App 554

Iowa—Landas Fertilizer Co v Hargreaves, 206 N W 2d 675

Mont—Cole v Hunt, 211 P 2d 417, 123 Mont 256

NY—La May & Foudner, Inc v Smith, 150 N Y S 2d 71, 3 Misc 2d 843

Okla—Spartan Petroleum Corp v Curt Brown Drilling Co, 446 P 2d 808—Flour Mills of America, Inc v American Steel Bldg Co, 449 P 2d 861

Or—Ward v Town Tavern, 228 P 2d 216, 191 Or 1, 42 A L R 2d 662

Utah—Frehner v Morton, 424 P 2d 446, 18 Utah 2d 422

Wash—Alpine Industries, Inc v Gohl, 637 P 2d 998, 30 Wash App 750, op changed 645 P 2d 737

Wyo—True v Hi-Plains Elevator Machinery, Inc, 577 P 2d 991

In Missouri

(1) Mo—Dierks & Sons Lumber Co v McSorley, App, 289 S W 2d 164

(3) Fitzgerald v Schaefer, App, 216 S W 2d 939

(6) Other matters

Mo—Peerless Supply Co v Industrial Plumbing & Heating Co, 460 S W 2d 651

In Wisconsin

(1) Wis—Sid Grinker Co v Craighead, 146 N W 2d 478, 33 Wis 2d 42—H & M Heating Co v Andras, 150 N W 2d 379, 35 Wis 2d 1—Martinson v Brooks Equipment Leasing, Inc, 152 N W 2d 849, 36 Wis 2d 209, reh den 154 N W 2d 353, 36 Wis 2d 209

In federal courts

(1) US—In re Etherton, supra, n 28—Schulbach v Caldwell, W Va, 196 F 16, 115 C C A 650

Jurisdiction to enforce lien and to adjust priorities

Ala—Sylvester v Strickland, 177 So 2d 905, 278 Ala 278

55. Cal—A A Baxter Corp v Home Owners and Lenders, 86 Cal Rptr 854, 7 C A 3d 725

Fla—Maule Industries v Trugman, 59 So 2d 27—Martin v Baird Hardware Co, App, 147 So 2d 142

Ill—Park Ave Lumber & Supply Co v Nils A Hofverberg, Inc, 222 N E 2d 49, 76 Ill App 2d 334

- Tex—Continental Radio Co v Continental Bank & Trust Co Civ App, 369 S W 2d 359, err ref no rev err
- Va—Finkel Outdoor Products, Inc v Bell, 140 S E 2d 695, 205 Va 927
56. N Y—Application of Crispino, 170 N Y S 2d 19 9 Misc 2d 409
57. Ind—Fleisch v Circle City Excavating & Rental Corp, App, 210 N E 2d 865
58. Colo—Barlow v Staples, 470 P 2d 909, 28 Colo App 93
61. Ill—Anderson v Gousset, 208 N E 2d 37, 60 Ill App 2d 309
62. Kan—Boyce v Knudson, 548 P 2d 712, 219 Kan 357
- N Y—Harlem Plumbing Supply Co, Inc v Handelsman, 337 N Y S 2d 329, 40 A D 2d 768
63. Ala—Floyd v Rambo, 33 So 2d 360, 250 Ala 101—Marshall Memory Gardens, Inc v Long, 90 So 2d 260, 265 Ala 164
66. Interest available at law but not in ordinary contract action
- Vt—Woodbury Lumber Co v McIntosh, 211 A 2d 240, 125 Vt 154
68. S C—C.J.S. cited in Stone & Ciamp, General Contractors v Holmes, 60 S E 2d 231, 233, 217 S C 203
69. Or—Ward v Town Tavern, supra, n 54
70. N Y—Security Nat Bank v Village Mall at Hillcrest, Inc, 382 N Y S 2d 882, 85 Misc 2d 771

page 873

§ 265. Personal Actions or Proceedings in Rem

71. U S—Southland Corp v Shulman, D C Md, 331 F Supp 1024—In re Scherer Hardware and Supply, Inc, Bkrtcy Ill, 9 B R 125
- Cal—Central Bank, Nat Ass'n v Superior & Co, 189, 68 Montg Co 111—Associated Cal Rptr 696, 30 CA 3d 913
- Del—Stockman v McKee, 71 A 2d 875, 6 Terry 274—McHugh Elec Co v Hessler Realty & Development Co, 129 A 2d 654, 11 Terry 296—Miller v Master Home Builders, Inc, Super, 239 A 2d 696
- Idaho—Pierson v Sewell, 539 P 2d 590, 97 Idaho 38
- Md—Gayles v Palm, 93 A 2d 269, 201 Md 78—Clark Certified Concrete Co v Lundberg, 141 A 2d 685, 216 Md 576—Grinnell Co v City of Cranfield, 287 A 2d 466, 264 Md 552
- Miss—C.J.S. quoted at length in Hannan Motor Co v Durr, 56 So 2d 64, 67, 212 Miss 870—Taylor v Murphy, 203 So 2d 82
- Pa—Bechtel v McCormack, 80 Pa Dist & Co, 189, 68 Montg Co 111—Associated Lumber & Mfg Co v Mastrosanti, 98 A 2d 52, 173 Pa Super 310—Dennison v Dietrich, 3 D & C 2d 43, 50 Sch L R 209—Kreedy v Cankota, 54 Lanc Rev 449—Kulp & Co v Kazmar, 73 Montg 315—Halowich v Amminich, 154 A 2d 406, 190 Pa Super 314
- Tex—Perera v Gulf Elec Co, Civ App, 343 S W 2d 334, err ref no rev err
- Wyo—C.J.S. quoted in Lauch v Wumpenny, 278 P 2d 807, 815, 73 Wyo 345—C.J.S. cited in True v Hi-Plains Elevator Machinery, Inc, 577 P 2d 991, 1004
73. Ind—Fleisch v Circle City Excavating & Rental Corp, App, 210 N E 2d 865
74. Ind—Mann v Schnarr, 95 N E 2d 138, 228 Ind 654
75. Suit will not lie against debtor who is not owner
- Vt—Woodbury Lumber Co v McIntosh, 211 A 2d 240, 125 Vt 154
76. Asserting fraud in obtaining lien waiver
- Pa—Strangert & Bowers, Inc v On-Line Systems, Inc, 345 A 2d 194, 236 Pa Super 196
79. Iowa—Society Linnex v Wilbous, 113 N W 2d 603, 253 Iowa 953

§ 266 Exclusive, Cumulative, and Concurrent Remedies

page 874

84. U S—General Const Co v Hering Realty Co, D C S C, 201 F Supp 487 App dism, C A, 312 F 2d 538—In re Scherer Hardware and Supply, Inc, Bkrtcy Ill, 9 B R 125
- Cal—Reuroth & Reuroth, Inc v General Cas Co of America, 51 Cal Rptr 505, 242 C A 2d 363
- Del—McHugh Elec Co v Hessler Realty & Development Co, 129 A 2d 654, 11 Terry 296
- Fla—Green v Putnam, 93 So 2d 378—Dewing v Davis, App, 117 So 2d 747—Halifax Const Co v Chastain Groves, Inc, App, 192 So 2d 15
- Ill—Eastabrooks v Ravlin, 248 N E 2d 529, 109 Ill App 2d 277—Consolidated Builders & Supply Co, Inc v Ebena, 322 N E 2d 248, 24 Ill App 3d 988
- Iowa—Capitol City Drywall Corp v C G Smith Const Co, Inc, 270 N W 2d 608
- La—Olympic Elec Service, Inc v Craig, App, 286 So 2d 182
- Mich—C.J.S. cited in Canvasser Custom Builders, Inc v Seaton, 196 N W 2d 859, 861, 38 Mich App 643
- Nev—Lane-Tahoe, Inc v Kindred Const Co, Inc, 536 P 2d 491, 91 Nev 385, 73 A L R 3d 1035
- N J—Mitchell v Wrightstown Community Apartments, 67 A 2d 203, 4 N J Super 321
- N Y—A D Walker & Co, Inc v Shelter Programs Co, 443 N Y S 2d 96, 84 A D 2d 536
- N D—C.J.S. cited in Meagher v Quale, 77 N W 2d 878, 880
- Pa—Yanko v Donaldson, 62 Pa Dist & Co 417, 31 North Co 173—Hoffman Lumber Co v Mitchell, 85 A 2d 664, 170 Pa Super 326
- Tex—Bernhardt v McGuire & Pritchard, Civ App, 607 S W 2d 8, err ref no rev err
- W Va—West Virginia Sanitary Engineering Corp v Kurah, 74 S E 2d 596, 137 W Va 836
- Garmentment
- (2) Other matters
- Cal—Calhoun v Huntington Park First Sav and Loan Ass'n, 9 Cal Rptr 479, 186 C A 2d 451
- Personal judgment
- (2) Other cases
- N D—Meagher v Quale, 77 N W 2d 878—Moser v Novak, 338 N W 2d 631
- Action admits debtor creditor relationship and vests title in purchaser
- Fla—Coronet Kitchens, Inc v Mortgage Mart, Inc, of St Petersburg, App, 146 So 2d 768
- Alternative remedy
- Hawai—Shelton Engineering Contractors, Limited v Hawaiian Pac Industries, Inc, 456 P 2d 222, 51 Haw 242
- Sole remedy
- Ill—Hill Behan Lumber Co v Marchese, 275 N E 2d 451, 1 Ill App 3d 789
85. Cal—Culbertson v Czek, 37 Cal Rptr 548, 225 C A 2d 451—Norman v Berney, 45 Cal Rptr 467, 235 C A 2d 424
- Fla—C.J.S. cited in Remington Const Co v Hamilton Elec, Inc, App, 181 So 2d 183, 184
- Ga—Gellis v B L I Const Co, Inc, 251 S E 2d 800, 148 Ga App 527
- Utah—C.J.S. cited in Harra-Dudley Plumbing Co v Professional United World Travel Ass'n, 592 P 2d 586, 588
- Wash—Cordell v Regan, 598 P 2d 416, 25 Wash App 739
- W Va—West Virginia Sanitary Engineering Corp v Kurah, supra, n 84
- Enforcement of lien barred
- N Y—In re Euclid Concrete Corp, 106 N Y S 2d 645, rev'd on oth grds 107 N Y S 2d 237, 279 App Div 594
86. Cal—Reuroth & Reuroth, Inc v General Cas Co of America, 51 Cal Rptr 505, 242 C A 2d 363

Colo—N R Nielsen & Son, Contractors, Inc v Myrick, Craswell, Branney, App, 527 P 2d 935

Likewise an owner is not restricted as to other relief which may be afforded him, at law or in equity^{89 1}

89 1. Ohio—Durrett v Blanc, App, 129 N E 2d 76

A statute may provide for two causes of action, namely, one in personam against the owner, and the other in rem against the property^{89 3}

89.5. La—Broadmoor Lumber Co v Liberto, App, 162 So 2d 800

page 875

- 90 Conn—Roundhouse Const Corp v Telasco Masons Supplies Co, Inc, 362 A 2d 778, 168 Conn 371, vac on oth grds 96 S Ct 20, 423 U S 809, 46 L Ed 2d 29, on remand 265 A 2d 393, 170 Conn 155, 97 S Ct 246, 429 U S 889, 50 L Ed 2d 172
- Ga—King v Rutledge, 65 S E 2d 801, 208 Ga 172
- Ind—Demma v Forbes Lumber Co, 181 N E 2d 253, 133 Ind App 204
- Pa—Hoffman Lumber Co v Mitchell, supra, n 84
- S C—Turbinville v Gordon, 113 S E 2d 68, 236 S C 57
- Las pendens
- (2) Other matters
- N Y—Bilson Housing Corp v Harrison, 205 N Y S 2d 387, 26 Misc 2d 675
- S D—Holzworth v Lampert Lumber Co, 100 N W 2d 405, 78 S D 238

§ 267. Removal of Improvements from Premises

91 Tex—Freed v Bozman, Civ App, 304 S W 2d 235, err ref no rev err

Property not owned by lessee

(3) Other matters

Fla—Dargel Const Co v DeSoto Lakes Corp, App, 172 So 2d 849

§ 268. Conditions Precedent

94. Or—Cloyd v McPherson, 582 P 2d 423, 283 Or 137
95. Fla—Climatrol Corp v Kent, App, 370 So 2d 394
- Ga—Tri-State Culvert Mfg, Inc v Crum, 228 S E 2d 403, 139 Ga App 448
- Ill—Hill Behan Lumber Co v Marchese, 275 N E 2d 451, 1 Ill App 3d 789
- La—Johnson v Banner Corp, App, 308 So 2d 534
- Mo—Putnam v Heathman, App, 367 S W 2d 823
- Okla—H E Leonhardt Lumber Co v Ed Wamble Distributing Co, 378 P 2d 771
- Utah—Millard v Parry, 271 P 2d 852, 2 Utah 2d 217
- Wash—Curtis Lumber Co v Sotter, 522 P 2d 822, 83 Wash 2d 764
96. U S—In re Stanfield, Bkrtcy Nev, 9 B R 790
- N Y—San Marco Const Corp v Gilbert, 178 N Y S 2d 137, 15 Misc 2d 208
- Wash—Cordell v Regan, 598 P 2d 416, 23 Wash App 739
- Failure to show payment of intangible tax
- Okla—Frank Wheatley Industries, Inc v Owens-Corning Fiberglass Supply Division, 470 P 2d 986
98. U S—Ramada Development Co v Rauch, C A Fla, 644 F 2d 1097
- Ga—Ayers v Baker, 114 S E 2d 847, 216 Ga. 132—Chambers Lumber Co v Martin, 146 S E 2d 529, 112 Ga App 826
- Ill—Robertson v Huntley & Blazer Co, 115 N E 2d 533, 351 Ill App 378
- Tex—Finger Furniture Co v Chase Manhattan Bank, Civ App, 413 S W 2d 131, err ref no rev err.

Timely affidavits

Fla—Mardan Kitchen Cabinets, Inc v Bruna, App, 312 So 2d 769

Filing affidavit of payment

Fla—Atlantic Gardens Landscaping, Inc v Boca Raton Land Development, Inc, App, 360 So 2d 1278

Persons not subject to local qualification requirements

Wyo—True v Hi-Plains Elevator Machinery, Inc, 577 P 2d 991

99. Ga—Brackett Road Apartments v Georgia Pacific Corp, 225 S E 2d 771, 138 Ga App 198

Ohio—Whitendes v Mason, 352 N E 2d 648, 47 Ohio App 2d 173, 1 O O 3d 260

2. Fla—Moore v Crum, 68 So 2d 379—Townsend v Giles, App, 133 So 2d 451—Oper v Russell, Inc, App, 197 So 2d 13—Davis Engineering, Inc v Purcell, App, 202 So 2d 827

Excuses for, or waiver of, noncompliance

Fla—Brown v First Federal Sav & Loan Ass'n of New Smyrna, App, 160 So 2d 556

page 876

3. Mo—Davidson v Fisher, App, 258 S W 2d 297

5. Ga—Chandler v Pennington, 80 S E 2d 843, 89 Ga App 676—Hill v Dealers Supply Co, 120 S E 2d 879, 103 Ga App 846

12. Pa—Pancost v Minter, 20 D & C 2d 706, 76 Montg 433

17. Fla—Oppenheim v Newport Systems Development Corp, App, 348 So 2d 328

Ga—Gellis v B L I Const Co, Inc, 251 S E 2d 800, 148 Ga App 527

§ 269. — Suit by Subcontractor

page 877

21. Cal—Michel and Pfeffer v Oceanwide Properties, Inc, 132 Cal Rptr 179, 61 CA 3d 433

Okla—Hall v North Plains Concrete Service, Inc, 425 P 2d 941

22. Ga—Cheshire v Engelhart, 61 S E 2d 434, 82 Ga App 458—West Lumber Co v Aderhold, 82 S E 2d 670, 90 Ga App 255—Spector v Model Const Co, 96 S E 2d 900, 95 Ga App 14—Victory Lumber Co v Ellison, 97 S E 2d 334, 95 Ga App 105—Levin v O'Neill Mfg Co, 99 S E 2d 343, 96 Ga App 43—Eubank v Barber-Colman Co, 154 S E 2d 638, 115 Ga App 217—Bowen v Kicklighter, 183 S E 2d 10, 124 Ga App 82

Mo—Fitzgerald v Schaefer, App, 216 S W 2d 939

Bankruptcy of contractor

Ga—Bennett Iron Works, Inc v Underground Atlanta, Inc, 204 S E 2d 331, 130 Ga App 653

23. Ga—Athens Elec Supply Co v Delta Oil, Inc, 114 S E 2d 289, 101 Ga App 515

24. Ga—Taylor v Mater & Co, 161 S E 2d 394, 117 Ga App 365

27. Ohio—M J Kelly Co v Haendiges, 391 N E 2d 723, 58 Ohio St 2d 505, 12 O O 3d 409

page 878

28. Fla—Art Berman Concrete, Inc v Sey Const Corp, App, 247 So 2d 791

§ 270. Compelling Enforcement

29. Fla—McChuskey v Klock, 35 So 2d 646, 160 Fla 537

Ill—M L Easninger Co, Inc v Chicago Title and Trust Co, 393 N E 2d 663, 30 Ill Dec 627, 74 Ill App 3d 677

Iowa—Keith Young & Sons Const Co v Victor Senior Citizens Housing, Inc, 262 N W 2d 554

N Y—Application of Jory Const Corp, 158 N Y S 2d 632, 6 Misc 2d 701

Statute construed

(1) In general

Iowa—Woodruff & Son v Rhoton, 101 N W 2d 720, 251 Iowa 550

(2) Agent

Iowa—Woodruff & Son v Rhoton, 101 N W 2d 720, 251 Iowa 550

Notice held sufficient

Iowa—Woodruff & Son v Rhoton, 101 N W 2d 720, 251 Iowa 550

Notice insufficient

Ind—Lafayette Tennis Club, Inc v C W Ellison Builders, Inc, App, 406 N E 2d 1211

31. Iowa—Woodruff & Son v Rhoton, 101 N W 2d 720, 251 Iowa 550

N Y—Mincher v Levine, 136 N Y S 2d 585—Application of Lasa Corp, 203 N Y S 2d 731, 27 Misc 2d 495

32. N Y—Mincher v Levine, 136 N Y S 2d 585—Application of Lasa Corp, 203 N Y S 2d 731, 27 Misc 2d 495

§ 271. Restraining or Staying Enforcement

41. U S—Charles Simkin & Sons, Inc v Masnah, CAN J, 289 F 2d 26

N C—Ridge Community Investors, Inc v Berry, 239 S E 2d 566, 293 NC 688

Sufficiency of complaint

Cal—Hilton v Reed, 116 P 2d 98, 46 Cal App 2d 449

44. Ala—Sylvester v Strickland, 177 So 2d 905, 278 Ala 278

page 879

54. No showing of irreparable injury

La—Dixie Air Conditioning Co v Harper, App, 239 So 2d 373

55. Tex—Freed v Bozman, Civ App, 304 S W 2d 235, err ref no rev err

§ 272. Joinder and Splitting of Liens

60. Ill—Moser Lumber, Inc v Morgan, 245 N E 2d 310, 106 Ill App 2d 339

Ind—Saint Joseph's College v Morrison, Inc, 302 N E 2d 865, 158 Ind App 272

Mo—State ex rel Clayton Greens Nursing Center, Inc v Marsh, 634 S W 2d 462

N Y—Ellis Chongos Const Corp v Carlton Properties, Inc, 177 N Y S 2d 358, 13 Misc 2d 577, affd 185 N Y S 2d 238, 7 A D 2d 1020—Mellen v Athens Hotel Co, 133 N Y S 1079, 149 App Div 534—Gee Dee Painting Co v Boston Realty Corp, 217 N Y S 2d 407

Equity proceeding as bar to separate suit

(1) Mo—State ex rel Great Lakes Steel Corp v Sartorius, 249 S W 2d 853

page 880

65. Iowa—Capitol City Drywall Corp v C G Smith Const Co, Inc, 270 N W 2d 608

66. Ala—Drinkard v Hall, 47 So 2d 213, 254 Ala 105

68. Iowa—Capitol City Drywall Corp v C G Smith Const Co, Inc, 270 N W 2d 608

71. Ala—United Supply Co v Hinton Const & Development, Inc, 396 So 2d 1047

page 881

78. Not invalid

Or—Consolidated Elec Distributors, Inc v Jenson Elec Contracting, Inc, 537 P 2d 80, 272 Or 376

82. Ala—Stoughton v Cole Supply Co, 141 So 2d 173, 273 Ala 383

Fla—Morris & Zaher, Inc v Olympia Enterprises, Inc, App, 200 So 2d 579

N Y—Mellen v Athens Hotel Co, 133 N Y S 1079, 149 App Div 534—Gee Dee Painting Co v Boston Realty Corp, 217 N Y S 2d 407

Discretion abused

Ill—Malkoy Lumber Co v Serafine Builders, Inc, 273 N E 2d 654, 1 Ill App 3d 543

§ 273. Defenses in General**Library References**

Mechanics' Liens ¶253.

92. Md—United Elec Supply Co v Greencastle Gardens Section III Ltd Partnership, 373 A 2d 42, 36 Md App 70

Neb—C.J.S. black letter summary quoted in Reeves v Watkins, Neb, 305 N W 2d 815, 819

Pa—Fryer v McLeod, 31 North Co, 271

Failure to obtain approval

Wis—Pfugrader v Neth, 69 N W 2d 477, 269 Wis 528

License

(2) Whether or not a person has a license as a contractor is immaterial in determining whether he is a subcontractor whose supplier is entitled to a lien or a materialman whose supplier is not so entitled

Cal—Piping Specialties Co v Kentile, Inc, 40 Cal Rptr 537, 229 CA 2d 586

(3) A person who is an employee of the owner of property may enforce a mechanic's lien for labor and materials even though he is not licensed as a contractor

Cal—Dorak v Spravack, 236 P 2d 840, 107 CA 2d 206

(4) Where statute prohibits action for compensation by contractor unless licensed when cause of action arose and filing or claim of mechanic's lien by contractor operating without license, in order to foreclose mechanic's lien contractor must be licensed when contract was entered into or work performed

N M—Martinez v Research Park, Inc, 410 P 2d 200, 75 NM 672

(5) Other matters

Cal—Dorak v Spravack, 236 P 2d 840, 107 CA 2d 206—Piping Specialties Co v Kentile, Inc, 40 Cal Rptr 537, 229 CA 2d 586

Ill—Pascall P Paddock, Inc v Glenon, 203 N E 2d 421, 32 Ill 2d 51

Dures

Fla—Val-Rich Corp v Tole Elec Co, App, 196 So 2d 486

Failure to obtain building permits not defense

Ind—Drost v Professional Bldg Service Corp, 286 N E 2d 846, 153 Ind App 273

Matters not constituting defenses

U S—Mullins v Noland Co, D C Ga, 406 F Supp 206

Neb—Wickes Corp v Frye, 273 N W 2d 663, 202 Neb 23

Payment

Fla—Torres v MacIntyre, App, 334 So 2d 59, app after remand 358 So 2d 101

page 882

93 Contract not substantially performed

Pa—Fisher v Crott, 69 Pa.Dist & Co 532

1. La—Harding v Wattigney, App, 62 So 2d 190

Minn—Standard Const Co v National Tea Co, 62 N W 2d 201, 240 Minn 422

Mo—Drew's Hardware & Appliance Co v Willis Housing Projects, App, 268 S W 2d 596

Okla—Thomas v Owens, 241 P 2d 1114, 206 Okl 50

Pa—Kencoky v Yesu, 13 D & C 2d 573, 59 Lack Jur 127

Mortgage having priority over mechanic's lien

Ill—Laddell v Smith, 213 N E 2d 599, 65 Ill App 2d 295—Ripperden v Henry Absher Chevrolet, Inc, 274 N E 2d 113, 1 Ill App 3d 712

Interest and attorney's fees

U S—Ben O'Callaghan Co v Schmincke, D C Ga, 376 F Supp 1361

Tax levy

Del—Funnegan Const Co v Robino-Ladd Co, Super, 354 A 2d 142

Page 882

3. NC—Michael Flynn Mfg Co v J L Coe Const Co, 131 S E 2d 487, 259 N C 649
Pa—Sweet Brner Homes, Inc v Snyder, 27 Lehl J 201
Wis—H & M Heating Co v Andrae, 150 NW 2d 379, 35 Wis 2d 1

In an action by a subcontractor, the owner may not assert defenses that he may have only against the principal contractor³⁵

- 3.5. Wis—H & M Heating Co v Andrae, 150 NW 2d 379, 35 Wis 2d 1
7. Ga—Ingram v Barfield, 35 S E 2d 725, 80 Ga App 276

page 883

8. Ga—Roberts v Georgia Southern Supply Co, 88 S E 2d 554, 92 Ga App 303, transf 86 S E 2d 241, 211 Ga 402—Scott v Williams, 143 S E 2d 16, 111 Ga App 735—Melton v Lowe, 161 S E 2d 912, 117 Ga App 783—Builders Supply Co v Thomas, 166 S E 2d 33, 118 Ga App 830
Minn—Lundstrom Const Co v Dygert, 94 NW 2d 527, 254 Minn 224
9. Ga—Solomon v Robert Spector Lumber Co, 137 S E 2d 473, 109 Ga App 801
10. Ga—Melton v Lowe, 161 S E 2d 912, 117 Ga App 783

§ 275. — Waiver and Estoppel to Assert Defenses

22. Mo—H B Deal Const Co v Labor Discount Center, Inc, 418 S W 2d 940
NY—Certified Industries, Inc v International Business Machines Corp, 415 NY S 2d 65, 69 A D 2d 806

page 884

23. Fla—Johnson v Xaley, 47 So 2d 302
Pa—Wells v Paul, 33 Eric Co 194

§ 276. Recoupment, Set-off, and Counterclaim

Library References

Mechanics' Liens c=254.

27. Ariz—Advanced Living Center v T J Bettes Co of Cal, 464 P 2d 656, 11 Ariz App 336
Fla—Goldberger v United Plumbing & Heating, Inc, App, 358 So 2d 860
Iowa—Kaloft v Nielsen, 106 NW 2d 597, 252 Iowa 249—North Iowa Steel Co v Staley, 112 NW 2d 364, 253 Iowa 355
NY—Vogel Bros Contracting Corp v Town of Oyster Bay, 270 NY S 2d 431, 50 Misc 2d 401
Pa—Eichenlaub v Cascaur Israel, of Harrisburg, Pa, 63 Dauph Co 139—Malin v Nuss, 338 A 2d 676, 234 Pa Super 259
Wis—Stickl v De Both, 44 NW 2d 542, 258 Wis 17
Statute not requiring dismissal of counterclaim
Ill—Rozema v Quinn, 201 N E 2d 649, 51 Ill App 2d 479
28. Del—Stockman v McKee, 71 A 2d 875, 6 Terry 274
Ill—Booher v Williams, 95 N E 2d 518, 341 Ill App 504
Kan—Compley—Neff Lumber Co v Ross, 378 P 2d 178, 190 Kan 734
Pa—Fisher v Croft, 69 Pa Dist & Co 532—Fysher v McLeod, 31 North Co 271—Dennison v Dietrich, 3 D & C 2d 43, 30 Sch L R 209—Dennison v Dietrich, 3 D & C 2d 43, 30 Sch L R 209—Sweet Brner Homes, Inc v Snyder, 27 Lehl J 201—Malin v Nuss, 338 A 2d 676, 234 Pa Super 259

Claims not allowed

(3) Other claims

- Del—E K Geyer Co v Blue Rock Shopping Center, Inc, Super, 229 A 2d 499

- Md—Eastover Stores, Inc v Minnix, 150 A 2d 884, 219 Md 658

- NY—Tuxedo Park Ass'n v Jackson, 127 NYS 2d 364, 283 App Div 675, affd 122 NE 2d 750, 307 NY 865, rearg den 123 NE 2d 578, 307 NY 937—Consolidated Blasting Corp v Colabella Bros, Inc, 168 NYS 2d 275 10 Misc 2d 913
Okl—Knapp v Arko Interstate Elec Co, 448 P 2d 996
Tex—Fidelity Sav & Loan Ass'n of Port Arthur v Baldwin, Civ App, 416 S W 2d 482, err ref no rev err

- Utah—Wagstaff v Remco, Inc, 540 P 2d 931

Vague and indefinite "counterclaim" treated as defense

- NC—Michael Flynn Mfg Co v J L Coe Const Co, 131 S E 2d 437, 259 N C 649

29. Wash—Davis v Altone, 215 P 2d 705, 35 Wash 2d 807

- Ill—Booher v Williams, 95 NE 2d 518, Okl v W R Johnston & Co, 228 P 2d 169, 204 Okl 160

33. Md—Eastover Stores, Inc v Minnix, 150 A 2d 884, 219 Md 658

page 885

34. Del—Stockman v McKee, 71 A 2d 875, 6 Terry 274

- Fla—Peter March & Associates, Inc v Powell, App, 363 So 2d 754

- Iowa—Beane Plumbing & Heating Co v D-X Sunray Oil Co, 92 N W 2d 638, 249 Iowa 1364

- La—Peanington v Campanella, App, 180 So 2d 882, writ gr 181 So 2d 782, 248 La 783

- NY—Drachman Structural, Inc v Anthony Rivara Contracting Co, Inc, 356 NYS 2d 974, 78 Misc 2d 486

36. Iowa—Beane Plumbing & Heating Co v D-X Sunray Oil Co, 92 N W 2d 638, 249 Iowa 1364

37. Iowa—Des Moines Furnace & Stove Repair Co v Lemon, 56 N W 2d 923, 244 Iowa 316

38. Ill—J-M Builders & Supplies Corp v McIntyre, 372 N E 2d 420, 14 Ill Dec 409, 56 Ill App 3d 714

§ 277. — Default in Performance

42. Ala—CJS cited in Saliba v Lunsford, 106 So 2d 176, 177, 268 Ala 307

- Colo—Barlow v Staples, 470 P 2d 909, 28 Colo App 93

- Del—Masten Lumber and Supply Co, Inc v Brown, 405 A 2d 101

- Fla—Berkowitz v Anderson & Wallace Const Co, App, 260 So 2d 551—Schleifer v All-Shores Const & Supply Co, App, 260 So 2d 270

- Ga—Roberts v Georgia Southern Supply Co, 88 S E 2d 554, 92 Ga App 303, transf 86 S E 2d 241, 211 Ga 402

- Idaho—Dawson v Eldredge, 405 P 2d 754, 89 Idaho 402

- Ill—Rozema v Quinn, 201 N E 2d 649, 51 Ill App 2d 479—Moser Lumber, Inc v Morgan, 245 N E 2d 310, 106 Ill App 2d 339

- Iowa—North Iowa Steel Co v Staley, 112 NW 2d 364, 253 Iowa 355

- Kan—Thompson Const Co v Schroyer, 298 P 2d 239, 179 Kan 720

- Md—Johnson v Metcalfe, 121 A 2d 825, 209 Md 537

- Mo—K-V Builders, Inc v Thomas, App, 353 S W 2d 130

- Mont—Miller v Melaney, 560 P 2d 902, 172 Mont 74

- Neb—CJS cited in Reeves v Watkins, 305 N W 2d 815, 819, 208 Neb 804

- Okl—Knapp v Arko Interstate Elec Co, 448 P 2d 996

- Tex—Robinson v Leach, Civ App, 237 S W 2d 366, err ref no rev err

- Utah—Bartlett Elec, Inc v Ballard, 449 P 2d 991, 22 Utah 2d 147

- Vt—Nadeau Lumber, Inc v Benoit, 437 A 2d 1108, 140 Vt 298

43. NY—Shanus v Fulash Corp, 238 NYS 2d 397, 38 Misc 2d 374, affd 248 NYS 2d 1016, 20 A D 2d 910

Acceptance of work

(3) Other statements

- Ky—D H Overmyer Warehouse Co v Smith, 451 SW 2d 668

page 886

44. Wis—H & M Heating Co v Andrae, 150 NW 2d 379, 35 Wis 2d 1

48. Measure of damages

- (1) Alaska—Wallace Const Co v Rude, 535 P 2d 1218

- Iowa—Capitol City Drywall Corp v C G Smith Const Co, Inc, 270 NW 2d 608

- Kan—Thompson Const Co v Schroyer, 298 P 2d 239, 179 Kan 720

50. Ind—Blade Corp v American Drywall, Inc, App, 400 N E 2d 1183

51. Fla—Alton Towers, Inc v Coplan Pipe & Supply Co, 262 So 2d 671

- Ga—E Smith Heating & Air Conditioning, Inc v Buggers, 228 S E 2d 203, 139 Ga App 216

- Va—Henderson & Russell Associates, Inc v Warwick Shopping Center, Inc, 229 S E 2d 878, 217 Va 486

52. Or—Wiggins v Hendrickson, 229 P 2d 652, 191 Or 285

- Wis—H & M Heating Co v Andrae, 150 NW 2d 379, 35 Wis 2d 1

§ 278 Persons Entitled to Enforce

page 887

62. US—US v Durham Lumber Co, C A NC, 257 F 2d 570, affd 80 S Ct 1282, 363 US 522, 4 L Ed 2d 1371

Lack of license

- NY—George Perna, Inc v Rosenthal, 421 NYS 2d 91, 72 A D 2d 593

63. La—Broadmoor Lumber Co v Libertto, App, 162 So 2d 800

- NY—San Marco Const Corp v Gilbert, 178 NYS 2d 137, 15 Misc 2d 208

- Tex—Zarsky Lumber Co v Guiberteau, Civ App, 270 S W 2d 630, err ref no rev err

§ 279. Persons Entitled to Contest

65. NC—CJS quoted at length in Michael Flynn Mfg Co v J L Coe Const Co, 131 S E 2d 487, 489, 259 N C 649

page 888

75. Del—McHugh Elec Co v Hessler Realty & Development Co, 129 A 2d 654, 11 Terry 296

- Minn—Tri County Lumber, Inc v Spartz, 212 NW 2d 540, 298 Minn 13

§ 281. Jurisdiction and Venue

79. Ark—Drum v McDaniel, 222 S W 2d 59, 215 Ark 690

- Cal—States Shingle Co v Kaufman, 39 Cal Rptr 196, 227 C A 2d 830

- Conn—Howell v DiStasio, Cir A D, 252 A 2d 308, 5 Conn Cir 346

- Ind—Demma v Forbes Lumber Co, 178 N E 2d 455, 133 Ind App 204, reh den 181 N E 2d 253

- Minn—Dunnick Bros. and Gilchrist v Brandondale Chaska Corp, 248 NW 2d 743, 311 Minn 291

- Mo—Rape v Mid-Continent Bldg Co, App, 318 S W 2d 519

- NH—James Drywall, Inc v Europa Development Corp, 365 A 2d 1047, 116 NH 619

- NY—Contractors Const Co v Grossman, 186 NY S 2d 419, 17 Misc 2d 710

- NC—Ridge Community Investors, Inc v Berry, 234 S E 2d 6, 32 NC App 642, revd on oth grds 239 S E 2d 566, 293 N C 688

Equity jurisdiction

(2) Other cases

Ala.—Booker v Williams, 87 So 2d 426, 264 Ala 307

Federally-owned property

NY—I Burnack, Inc v Simpson Factors Corp., 250 NYS 2d 989, 21 AD 2d 481, affd 209 NE 2d 105, 16 NY 2d 604, 261 NYS 2d 58

Jurisdiction lacking

Me—Choate v Adams, 387 A 2d 227

80. Cal—States Shingle Co v Kaufman, 39 Cal Rptr 196, 227 CA 2d 830—Division of Labor Law Enforcement v Egnaw Inv., Inc., Super., 55 Cal Rptr 767, 247 CA 2d 863

Mo—Rape v Mid-Continent Bldg Co., App., 318 S W 2d 519

NY—Warner Smith Uni., Inc v Intercoast Ellenville Associates, 380 NYS 2d 947, 85 Misc 2d 495

Tex—Morgan Farms v Brown, Civ App., 231 S W 2d 790

81. Ky—Poulos v Stewart, 233 S W 2d 994, 313 Ky 812

Tex—Harris County Inv Corp v Wiggins, Civ App., 255 S W 2d 304, err dismissed

85. Showing of valid lien necessary

Fla.—Brown v First Federal Sav & Loan Ass'n of New Smyrna, App., 160 So 2d 556

page 889

88. Inherent power to transfer action

Ill—Holland Asphalt Paving Co v Bank Bldg & Equipment Corp. of America, 373 NE 2d 501, 15 Ill Dec 155, 57 Ill App 3d 751

Under other statutes the action must be brought in the parish in which the land is situated⁸⁴

88.5. La—Gurtler, Hebert & Co v Marquette Cas Co., App., 145 So 2d 145

Statute held non-jurisdictional

La.—George Kellett & Sons, Inc v Consumers Lumber & Supply Co., Inc., App., 274 So 2d 453

§ 282. Time to Sue, Limitations, and Laches

98. Cal—States Shingle Co v Kaufman, 39 Cal Rptr 196, 227 CA 2d 830

Ga.—Cowan v Reeves, 55 SE 2d 911, 80 Ga App 161—Montgomery v Richards Bldg Materials, Inc., 177 SE 2d 507, 122 Ga App 472—Allied Asphalt Co v Cumbie, 216 SE 2d 659, 134 Ga App 960

91. NY—Application of Delaware Towers, Inc., 245 NYS 2d 26, 40 Misc 2d 401

96. Cal—Bohannon Bros., Inc v Lo Jean Development Co., 82 Cal Rptr 922, 3 CA 3d 200

Miss.—Sterling Elec Co v Kent, 45 NW 2d 709, 233 Minn. 31

page 890

2. Cal—States Shingle Co v Kaufman, 39 Cal Rptr 196, 227 CA 2d 830

Conn.—Stanley Srea Coal & Oil Co v Willmantic Sav & Loan Ass'n, 183 A 2d 285, 23 Conn Supp 329—Jones Destruction, Inc v Uppoh, 286 A 2d 308, 161 Conn 191.

Ga.—Lee v Stokes, 218 SE 2d 654, 135 Ga App 642

Kan—C.J.S. cited in Boyce v Knudson, 548 P 2d 712, 717, 219 Kan 357

La.—Lumber Products, Inc v Crochet, App., 146 So 2d 44, rev'd on oth grds 156 So 2d 438, 244 La 1060—Abry Bros., Inc v Tillman, 162 So 2d 346, 245 La 1017—Lafayette Woodworks v Boudreaux, App., 255 So 2d 176

NY—In re Enchid Concrete Corp., 106 NYS 2d 645, rev'd on oth grds 107 NYS 2d 237, 279 App Div 594

Pa.—Wetzel v McClarran, 46 West 85—Neamen v Playwack Park Corp., 39 D & C 2d 197, 15 Bucks 456

As to personality

Miss.—Hamilton Bros Co v Baxter, 195 So 335, 188 Miss 610—Jay Industries v Powell, 71 So 2d 193, 220 Miss 372

Applicable to homestead of single women

Fla.—Wood v Wilson, 84 So 2d 32

Laches

Or—Smith v De Krazy, 342 P 2d 784, 217 Or 436

Statutory provision held inapplicable

Ill—Malicki v Holiday Hills, Inc., 174 NE 2d 915, 30 Ill App 2d 459

NY—Gelles-Berger Co v Boynton Properties, Inc., 234 NYS 2d 234, 37 Misc 2d 126

Applicable to subcontractors and contractors

Ill—Rochelle Bldg Co v Oak Park Trust and Sav Bank, 257 NE 2d 542, 121 Ill App 2d 274

Intent

Conn.—Diamond Nat Corp v Dwell, 325 A 2d 259, 164 Conn 540

Fla.—Harris Paint Co v Multicon Properties, Inc., App., 326 So 2d 43

3 Ala.—Home Federal Sav & Loan Ass'n v Williams, 158 So 2d 678, 276 Ala 37—Howell v Hallett Mfg Co., 178 So 2d 94, 278 Ala 316—Lily Flagg Bldg Supply Co v J M Medlin & Co., 232 So 2d 643, 285 Ala 402—Tucker v Trusville Convalescent Home, Inc., 267 So 2d 438, 289 Ala 366

Cal—Hayward's v Nelson, 299 P 2d 1013, 143 CA 2d 807—States Shingle Co v Kaufman, 39 Cal Rptr 196, 227 CA 2d 830—Smith v Union Bank & Trust Ass'n, 93 Cal Rptr 282, 15 CA 3d 413—Loret v Seyfarth, 101 Cal Rptr 143, 22 CA 3d 841

Conn.—C.J.S. cited in Connecticut Steel Co v National Amusements, Inc., 348 A 2d 658, 662, 166 Conn 255

Fla.—Trushin v Brown, App., 132 So 2d 357

Idaho—Wiles v Palmer, 298 P 2d 972, 78 Idaho 104

Ill—Anderson v Goussert, 208 NE 2d 37, 60 Ill App 2d 309—Muehleit v Vieck, 250 NE 2d 14, 112 Ill App 2d 190—Rochelle Bldg Co v Oak Park Trust and Sav Bank, 257 NE 2d 542, 121 Ill App 2d 274

Ind.—Grimm v Rhoades, 149 NE 2d 847, 129 Ind App 1

Kan—Clark Lumber Co v Passig, 339 P 2d 280, 184 Kan 667

La.—Lumber Products, Inc v Crochet, 156 So 2d 438, 244 La 1060

Me—Marshall v Mathieu, 57 A 2d 400, 143 Me 167

Miss.—King v Hankins, 209 So 2d 190

Mo—Continental Elec Co v Ebco, Inc., 375 S W 2d 134

N.M.—Daughtrey v Carpenter, 477 P 2d 807, 82 N.M. 173

NY—Application of Crispino, 170 NYS 2d 19, 9 Misc 2d 409—Contractors Const Co v Grossman, 186 NYS 2d 419, 17 Misc 2d 710—Guevremont v Tracy, 190 NYS 2d 808, 20 Misc 2d 406—A. Toffolo, Inc v Schwartz, 193 NYS 2d 917, 21 Misc 2d 253—Gelles-Berger Co v Boynton Properties, Inc., 234 NYS 2d 234, 37 Misc 2d 126

Or—Otens v Oregon Livestock Co-op., 307 P 2d 320, 209 Or 513

Pa.—Burrell Const and Supply Co v Hareda, 38 West 145—Vaughan v Roulin, 20 Monroe L.R. 60, 54 Sch L.R. 13—Brann & Stuart Co v Consolidated Sun Ray, Inc., 253 A 2d 105, 433 Pa 574, cert den 90 SCt 102, 396 US 840, 24 L Ed 2d 91

S.C.—Lowndes Hill Realty Co v Greenville Concrete Co., 93 SE 2d 855, 229 SC 619

Tex.—Perez v Gulf Elec Co., Civ App., 343 S W 2d 334, err ref no rev err—Hibert Lumber Co v Baumgart, Civ App., 464 S W 2d 728

Utah—Roberts v Hansen, 479 P 2d 345, 25 Utah 2d 190

Suit held timely

Ga.—Vulcan Materials Co v D H Overmyer Warehouse Co., 156 SE 2d 213, 115 Ga App 792

Mo—Maas v Dreckshage, App., 244 S W 2d 397—Drew's Hardware & Appliance Co v Willis Housing Projects, App., 268 S W 2d 596

NY—Application of Burger Queen Corp., 204 NYS 2d 701, 26 Misc 2d 951

Wash—Curtis Lumber Co v Sortor, 522 P 2d 822, 83 Wash 2d 764

Suit held not timely

Cal—Ziganto v Taylor, 18 Cal Rptr 229, 198 CA 2d 603—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 CA 2d 644

Fla.—Wealey Const Co v Lane, App., 323 So 2d 649—Harris Paint Co v Multicon Properties, Inc., App., 326 So 2d 43

N.M.—Brito v Carpenter, 472 P 2d 979, 81 N.M. 716

Purpose of short limitation period

Mo—Continental Elec Co v Ebco, Inc., 375 S W 2d 134—Hennis v Tucker, App., 447 S W 2d 580

Purpose of statute

Fla.—Boston v Ames Appliance Center, Inc., App., 312 So 2d 548

NY—Putnam Contracting Corp v Winston Woods At Dix Hills, Inc., 340 NYS 2d 317, 72 Misc 2d 987, affd 349 NYS 2d 652, 43 AD 2d 667, affd, 325 NE 2d 169, 36 NY 2d 679, 365 NYS 2d 853

5. U.S.—U.S. v Durham Lumber Co, C.A.N.C., 257 F 2d 570, affd 80 SCt 1282, 363 US 522, 4 L Ed 2d 1371

6. Conn.—Diamond Nat Corp v Dwell, 325 A 2d 259, 164 Conn 540

Ill—Niles Const Co v LaSalle Nat Bank, 254 NE 2d 535, 119 Ill App 2d 1

8. Cal—Peterson v W T Grant Co., 115 Cal Rptr 874, 41 CA 3d 217

9. U.S.—In re Etherton, D.C. Cal., 88 F Supp 874

Cal—C.J.S. cited in States Shingle Co v Kaufman, 39 Cal Rptr 196, 227 CA 2d 830—Robinson v S & S Development, 63 Cal Rptr 663, 256 CA 2d 13

10. Cal—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 CA 2d 644

Del—Harrogate Const Co v Joseph Haas Co., Super., 250 A 2d 376

page 891

11. Statute held to expire on Sunday

Me—Bellegarde Custom Kitchens v Leavitt, 295 A 2d 909

12. Kan—C.J.S. cited in Boyce v Knudson, 548 P 2d 712, 717, 219 Kan 357

16. Fla—Hughes v Stevmer, Inc., App., 190 So 2d 410

Mo—Dierks & Sons Lumber Co v McSorley, App., 289 S W 2d 164

Or—Brown v Farrell, 483 P 2d 453, 258 Or 348

Particular statutes have been held not to extend the time within which suit must be brought¹⁶⁵

16.5. Statute specifying time for bringing suit against dissolved corporation

Mo—Frank Duescher Basement Builders, Inc v Gwaco Builders, Inc., App., 449 S W 2d 865

18. La—Lumber Products, Inc v Crochet, App., 146 So 2d 44, rev'd on oth grds 156 So 2d 438, 244 La 1060

19. Limitation held inapplicable to abandonment

NY—Putnam Contracting Corp v Winston Woods At Dix Hills, Inc., 340 NYS 2d 317, 72 Misc 2d 987, affd 349 NYS 2d 652, 43 AD 2d 667, affd 325 NE 2d 169, 36 NY 2d 679, 365 NYS 2d 853

20. La—State Lumber & Supply Co v Gill, App., 259 So 2d 639

page 892

26. Idaho—Wiles v Palmer, 298 P 2d 972, 78 Idaho 104

Page 892

32. Cal—Richards v Hillside Development Co, 2 Cal Rptr 693, 177 CA 2d 776
- Ill—Niles Const Co v LaSalle Nat Bank, 254 NE 2d 535, 119 Ill App 2d 1
- Mo—Continental Elec Co v Ebo, Inc., 375 SW 2d 134
35. Ill—Muehlfeit v Vleck, 250 NE 2d 14, 112 Ill App 2d 190
- La—Motel of Terrebonne, Inc v Baton Rouge Engineering Co, App, 173 So 2d 216

page 893

39. U.S.—U.S. v Durham Lumber Co, CANC., 257 F 2d 570, aff'd 80 SCt 1282, 363 US 522, 4 L Ed 2d 1371
- Ga—Chandler v Pennington, 80 SE 2d 843, 89 Ga App 676
- NC—Equitable Life Assur Soc of US v Beamight, 67 SE 2d 390, 234 NC 347

Statute construed

- Conn—Connecticut Steel Co v National Amusements, Inc, 348 A 2d 658, 166 Conn 255
- Wash—Curtis Lumber Co v Sortor, 515 P 2d 554, 9 Wash App 762, rev'd on oth grds 522 P 2d 822, 83 Wash 2d 764
40. Fla—Nathan v Chryce, App, 107 So 2d 782
- Ga—Home Mart Bldg Centers, Inc v Jones, 212 SE 2d 476, 133 Ga App 822
41. Cal—Miller v Mountain View Sav & Loan Ass'n, 48 Cal Rptr 278, 238 CA 2d 644
- Conn—Connecticut Steel Co v National Amusements, Inc, 348 A 2d 658, 166 Conn 255
- Fla—Jack Stulson & Co v Caloosa Bayview Corp, App, 265 So 2d 85, cert ques ans, writ discharged, Sup, 278 So 2d 282
- N.M.—Mutual Bldg & Loan Ass'n of Santa Fe v Fidel, 437 P 2d 134, 78 NM 673
- N.Y.—Contractors Const Co v Grossman, 186 NY S 2d 419, 17 Misc 2d 710—Guevremont v Tracy, 190 NY S 2d 808, 20 Misc 2d 406
- NC—Lowery v Halthcock, 79 SE 2d 204, 239 NC 67
- Ohio—Ohio Plate Glass Co v Paskin, 209 NE 2d 640

page 894

44. Ky—Helmman Lumber Co, Inc v Landrum, App, 639 SW 2d 379
- Mo—H B Deal Const Co v Labor Discount Center, Inc, 418 SW 2d 940
46. Ala—Home Federal Sav & Loan Ass'n v Williams, 158 So 2d 678, 276 Ala. 37—Howell v Hallatt Mfg Co, 178 So 2d 94, 278 Ala 316
- Ga—Jordan Co v Adkins, 123 SE 2d 731, 105 Ga App 157

Agreements under contract

- Miss—Burwell v Planters Lumber Co, 70 So 2d 71, 220 Miss 79

"Payable" defined

- Va—Southern Materials Co v Marks, 83 SE 2d 353, 196 Va 293

47. Cal—Dorer v McKinney, 10 Cal Rptr 287, 188 CA 2d 199

- N.M.—Mutual Bldg & Loan Ass'n of Santa Fe v Fidel, 437 P 2d 134, 78 NM 673

Revival of right to foreclose

- Cal—Richards v Hillside Development Co, 2 Cal Rptr 693, 177 CA 2d 776

Credit held not expired

- Wash—A.A.C. Corp v Reed, 440 P 2d 465, 73 Wash 2d 612, app after remand 483 P 2d 1293, 4 Wash App 777

48. Mistake

- Cal—Richards v Hillside Development Co, 2 Cal Rptr 693, 177 CA 2d 776

More than one extension

- Cal—Richards v Hillside Development Co, 2 Cal Rptr 693, 177 CA 2d 776

51. Extension by agreement

- Ga—Bryant v Jones, 83 SE 2d 46, 90 Ga App 314

55. Ark—Wiggins v Searcy Federal Sav and Loan Ass'n, 486 SW 2d 900, 253 Ark 407

- Me—Marshall v Mathieu, supra, n 3

- NY—American Blower Corp v James Talcott, Inc, 194 NY S 2d 630, 18 Misc 2d 1031, aff'd 203 NY S 2d 1018, 11 AD 2d 654, rearg and app den 206 NY S 2d 533, 11 AD 2d 928, aff'd 219 NY S 2d 263, 10 NY 2d 282, 176 NE 2d 833
- SC—Lowndes Hill Realty Co v Greenville Concrete Co, 93 SE 2d 855, 229 SC 619

- Utah—Totonica v Thomas, 397 P 2d 984, 16 Utah 2d 175

Suit held premature

- Okla—Smith v Findley, 298 P 2d 440

Agreement cannot extend time

- Ga—Home Mart Bldg Centers, Inc v Jones, 212 SE 2d 476, 133 Ga App 822

page 895

56. Miss—Billups v Becker's Welding & Machine Co, 189 So 526, 186 Miss 41

57. Ala—Marshall Memory Gardens, Inc v Long, 90 So 2d 260, 265 Ala 164

- Colo—Colorado Real Estate & Development, Inc v Sternberg, 433 P 2d 341, 164 Colo 184

- Utah—Totonica v Thomas, 397 P 2d 984, 16 Utah 2d 175

58. Cal—Kane v Hozz, 40 Cal Rptr 701, 230 CA 2d 75

- Ill—Anderson v Gousset, 208 NE 2d 37, 60 Ill App 2d 309

"Completed" construed

- Cal—Richards v Hillside Development Co, 2 Cal Rptr 693, 177 CA 2d 776

63. U.S.—Ingalls Iron Works Co v Fehlhaber Corp, D C N.Y., 327 F Supp 272

69. U.S.—Continental Cas Co v Associated Pipe & Supply Co, D C La, 310 F Supp 1207, aff'd in part, mod in part on oth grds and vac in part on oth grds, CA, 447 F 2d 1041

- Ga—Allied Asphalt Co v Cumbe, 216 SE 2d 659, 134 Ga App 960

Institution of arbitration proceeding insufficient

- NY—Application of Ozer, 233 NY S 2d 697, 36 Misc 2d 314

Amendment of claim held not to toll period

- Fla—Jack Stulson & Co v Caloosa Bayview Corp, 278 So 2d 282

page 896

76. Lien claimants made parties either plaintiff or defendant

- Colo—Bulow v Ward Terry & Co, 396 P 2d 232, 155 Colo 560

79. Ill—Rochelle Bldg Co v Oak Park Trust and Sav Bank, 257 NE 2d 542, 121 Ill App 2d 274

page 897

91. Mich—Hamill v Jenks, 136 NW 2d 699, 1 Mich App 381

Lat pendens

(3) Other statements

- NY—Guevremont v Tracy, 190 NY S 2d 808, 20 Misc 2d 406

95. NY—Application of Miron Bldg Products, Co, 197 NY S 2d 973, 10 AD 2d 756

96. Mo—Continental Elec Co v Ebo, Inc, App, 365 SW 2d 746, transf to, sup, 375 SW 2d 134

97. NY—Mincher v Levine, 136 NY S 2d 585

98. Hawaii—Tropic Builders, Limited v U.S., 475 P 2d 362, 52 Haw 298

- Ill—Rochelle Bldg Co v Oak Park Trust and Sav Bank, 257 NE 2d 542, 121 Ill App 2d 274

- Mo—Dierks & Sons Lumber Co v McSorley, App, 289 SW 2d 164—Peerless Supply Co v Industrial Plumbing & Heating Co, 460 SW 2d 651

Proceeding commenced by other pleadings

- Mo—Truog v Elbel Const Co, App, 374 SW 2d 612

Cross-claimants

- Mo—Drilling Service Co v Baebler, 484 SW 2d 1

1. Mo—Frank Dusselner Basement Builders, Inc v Gwico Builders, Inc, App, 449 SW 2d 865—Kinnear Mfg Co v Myers, App, 452 SW 2d 599

4. Ind—Valley View Development Corp v Chough & Schlegel of Dayton, Inc, 280 NE 2d 319, 151 Ind App 450

5. Summons must be issued at time action filed

- Ind—Valley View Development Corp v Chough & Schlegel of Dayton, Inc, 280 NE 2d 319, 151 Ind App 450

- Other particular matters have been held not to constitute the institution of the proceedings⁵⁵

55. Application to be made party defendant

- Mo—Truog v Elbel Const Co, App, 374 SW 2d 612

page 898

8. Mo—Dierks & Sons Lumber Co v McSorley, App, 289 SW 2d 164

9. Neb—Muenchan v Swartz, 102 NW 2d 129

10. Kan—Clark Lumber Co v Passig, 339 P 2d 280, 184 Kan 667

11. Ill—Anderson v Gousset, 208 NE 2d 37, 60 Ill App 2d 309

12. Fla—Jack Stulson & Co v Caloosa Bayview Corp, 278 So 2d 282

15. Ill—Pipe Trades, Inc v Lemon, 104 NE 2d 562, 346 Ill App 216

16. Minn—O B Thompson Elec Co v Millman & Larson, Inc, 128 NW 2d 751, 268 Minn 299

17. Tenn—Knoxville Structural Steel Co v Jones, 330 SW 2d 559, 46 Tenn App 518

page 899

23. NJ—Misely Masons, Inc v D H Overmyer Co, 274 A 2d 584, 113 NJ Super 524, aff'd 274 A 2d 584, 58 NH 39

- Pa—Hall v Steninger, 44 West 87

- Discretionary with court

- NY—Mincher v Levine, 136 NY S 2d 585

- Attachment and levy

- Tenn—Knoxville Structural Steel Co v Jones, 330 SW 2d 559, 46 Tenn App 518

24. NY—T A Maloney Contracting Corp, v Lien and Disbursement Unit of Dept of Finance of City of New York, 380 NY S 2d 585, 85 Misc 2d 838

25. Ark—Wiggins v Searcy Federal Sav and Loan Ass'n, 486 SW 2d 900, 253 Ark 407

- Conn—Connecticut Steel Co v National Amusements Inc, 348 A 2d 658, 166 Conn 255

- Case of action expires

- Conn—Diamond Nat Corp v Dwelle, 325 A 2d 259, 164 Conn 540

- § 283. Parties Plaintiff

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26. U.S.—In re Grosse, Ekrty NY, 9 BR 815

- Ga—Nix v Luke, 99 SE 2d 446, 96 Ga App 123

- Ind—Martin v Martin, 103 NE 2d 905, 122 Ind App 241

- La—George Kellett & Sons, Inc v Dobbs, App, 380 So 2d 758

- Or—Oak Grove Parr, Inc v McCutcheon Const Co, 550 P 2d 1382, 275 Or 381

- Va—Garrett v Ancarrow Marine, Inc, 180 SE 2d 668, 211 Va 755

- Action at law or in equity

- Mo—Truog v Elbel Const Co, App, 374 SW 2d 612

29. NC—Con Co, Inc v Wilson Acres Apartments, Ltd, 289 SE 2d 633, 56 NC App 661, cert den 294 SE 2d 206, 306 NC 382

page 900

34. Ark—Speights v Arkansas Sav & Loan Ass'n, 393 S W 2d 228, 239 Ark 587
- Fla—Morris & Esher, Inc v Olympia Enterprises, Inc, App, 200 So 2d 579
- Ill—Rochelle Bldg Co v Oak Park Trust and Sav Bank, 257 N E 2d 542, 121 Ill App 2d 274
35. Tex—Tomlinson v Higginbotham Bros & Co, Civ App, 229 S W 2d 920
39. N C—Wolfe v Hewes, 254 S E 2d 204, 41 N C App 88

§ 284. Parties Defendant

Library References

Mechanics' Liens ¶263

42. Ariz—Eng v Stein, 599 P 2d 796, 123 Ariz 343
- Ill—Mutschler Kitchens of Chicago, Inc v Wineman, 420 N E 2d 672, 51 Ill Dec 258, 95 Ill App 3d 728
- Ind—Demma v Forbes Lumber Co, 181 N E 2d 253, 133 Ind 204
- La—Highland Lumber & Supply Co v Young, App, 38 So 2d 638

Possession

- Ind—Fleisch v Circle City Excavating & Rental Corp, App, 210 N E 2d 865

Not limited to those in privity

- Ill—Capital Plumbing & Heating Supply, Inc v Van's Plumbing and Heating, 373 N E 2d 1089, 15 Ill Dec 617, 58 Ill App 3d 173

43. Ga—Athens Elec Supply Co v Delta Oil Inc, 114 S E 2d 289, 101 Ga App 515

- NY—Hornor Associates, Inc v Washington Square Professional Bldg, Inc, 402 N Y S 2d 582, 63 A D 2d 573

44. U S—Ben O'Callaghan Co v Schmincke, D C Ga, 376 F Supp 1361

- Ill—Rochelle Bldg Co v Oak Park Trust and Sav Bank, 257 N E 2d 542, 121 Ill App 2d 274

- Mo—State ex rel Erbe v Oliver, 237 S W 2d 128, 361 Mo 836

The statute contemplates but one suit, etc.

- Ill—Anderson v Goumet, 208 N E 2d 37, 60 Ill App 2d 309—Park Ave Lumber & Supply Co v Nils A Hofverberg, Inc, 222 N E 2d 49, 76 Ill App 2d 334

Broker

- NY—Smith Bros Plumbing Co v Engine Air Service, 123 N E 2d 254, 307 N Y 903

page 901

46. Ariz—Eng v Stein, 599 P 2d 796, 123 Ariz 343
- Cal—Tarter, Webster & Johnson, Inc v Windsor Developers, Inc, 31 Cal Rptr 452, 217 C A 2d Supp 873

47. U S—In re McConaghy, Bktrcy Va, 15 B R 480

- Cal—Rosenman Mill & Lumber Co v Fullerton Sav & Loan Ass'n, 34 Cal Rptr 644, 221 C A 2d 705

- Colo—King v W R Hall Transp and Storage Co, 641 P 2d 916

- Del—Finnegan Const Co v Robino-Ladd Co, Super, 354 A 2d 142

- Fla—McGuire v Consolidated Elec Supply, Inc, App, 329 So 2d 411

- Mich—Glanz & Kilham Co v Garland Mfg Co, 218 N W 2d 791, 53 Mich App 210

- Minn—Anderson v Harrison, 160 N W 2d 560, 281 Minn 95

- NY—Middletown Supply, Inc v S M K Development Corp, 349 N Y S 2d 962, 75 Misc 2d 1087

52. Ala—Benn v Maxwell, 156 So 2d 624, 275 Ala 531—Lowe's of Muscle Shoals, Inc v Dillard, Civ, 304 So 2d 12, 53 Ala App 669

- Ariz—Ballard v Lawyers Title of Arizona, 552 P 2d 455, 27 Ariz App 168

- Cal—A-I Door & Materials Co v Fresno Guarantees Sav & Loan Ass'n, 40 Cal Rptr 85, 394 P 2d 829, 61 C 2d 728

- Fla—Diversified Mortg Investors v Benjamin, App, 345 So 2d 392

- Ga—Reynolds v Magbee Bros Lumber & Supply Co, 162 S E 2d 327, 224 Ga 379, conf to 162 S E 2d 737, 118 Ga App 163

- Ill—Booher v Williams, 95 N E 2d 518, 341 Ill App 504

- Ind—Demma v Forbes Lumber Co, 181 N E 2d 253, 133 Ind App 204

- Mo—Simon Devine Welding Co v Kuhn, App, 329 S W 2d 249

- Mont—Cascade Elec Co v Associated Creditors, 224 P 2d 146, 124 Mont 370

- NY—R E Crut, Inc v Leaker-Goldman Corp, 203 N Y S 2d 493, 27 Misc 2d 552

- N C—C J S cited in Equitable Life Assur Soc of U S v Beaught, 67 S E 2d 390, 395, 234 N C 347

- S D—Holzworth v Lampert Lumber Co, 100 N W 2d 405, 78 S D 238

- Tenn—Fischer Lime & Cement Co v Kaucher, 51 S W 2d 492, 164 Tenn 657

Holder of record title

(2) Former owner

- NY—Kinematics, Limited v Sprayview Const Corp, 209 N Y S 2d 352, 27 Misc 2d 332

(3) Other statements

- Cal—Flintkote Co v Lisa Const Co, 74 Cal Rptr 136, 268 C A 2d 606

- N D—United Accounts, Inc v Larson, 121 N W 2d 628

Former owner a proper party

- Tex—Perrera v Gulf Elec Co, Civ App, 343 S W 2d 334, err ref no rev err

54. Del—First Florida Bldg Corp v Robino-Ladd Co, Super, 424 A 2d 32

57. Fla—Marson v Comsky, App, 341 So 2d 1040

58. Tenn—Cooper v Hunter, App, 569 S W 2d 852

page 902

61. Ala—Chapman v Rivers Const Co, 227 So 2d 403, 284 Ala 633

63. Minn—Jay Industries v Powell, 71 So 2d 193, 220 Minn 372

64. Hawaii—Tropic Builders, Limited v Naval Ammunition Depot Lualaba Quarters, Inc, 402 P 2d 440, 48 Haw 306

- Minn—Jay Industries v Powell, supra, n 63

- Not necessary party where leasehold terminated

- Neb—Watts Lumber Co v Masid Bros, Inc, 200 N W 2d 119, 189 Neb 10, 74 A L R 3d 320

65. N D—United Accounts, Inc v Larson, 121 N W 2d 628

- Pa—C H Herzhock, Inc, v Gregory, 70 Dauph 174

- Transfer during pendency of action

- Cal—Packard Bell Electronics Corp v Theasens, Inc, 53 Cal Rptr 300, 244 C A 2d 355

- Joining owners of units sold in condominium project not required

- Colo—Platoon Supply Co v Bacon Meadows Corp, 900 P 2d 162, 31 Colo App 205

66. Cal—Packard Bell Electronics Corp v Theasens, Inc, 53 Cal Rptr 300, 244 C A 2d 355

- NY—Harlem Plumbing Supply Co, Inc v Handelsman, 337 N Y S 2d 329, 40 A D 2d 768

67. Cal—Packard Bell Electronics Corp v Theasens, Inc, 53 Cal Rptr 300, 244 C A 2d 355

- NH—P J Currier Lumber Co, Inc v Stonemill Const Corp, 415 A 2d 869, 120 N H 399

70. NY—Ellis Chugos Const Corp v Carlton Properties Inc, 177 N Y S 2d 358, 13 Misc 2d 577—Admiral Transit Mix Corp v Sagg-Bridgehampton Corp, 287 N Y S 2d 751, 56 Misc 2d 47—Harlem Plumbing Supply Co, Inc v Handelsman, 337 N Y S 2d 329, 40 A D 2d 768

- Liens transferred from property to surety deposit bond

- Fla—Deltona Corp v Indian Palms, Inc, App, 323 So 2d 282

72. Cal—Frank Pasano and Associates v Taggart, 105 Cal Rptr 414, 29 C A 3d 1

- NJ—Rushanne Homes v Guest, 303 A 2d 623, 123 N Y Super 505

- NY—Admiral Transit Mix Corp v Sagg-Bridgehampton Corp, 287 N Y S 2d 751, 56 Misc 2d 47

73. U S—Cutting v Bullerick, C A Alaska, 184 F 2d 837, 13 Alaska 269

- Cal—Flintkote Co v Lisa Const Co, 74 Cal Rptr 136, 268 C A 2d 606

- Ga—Gamble v Pilcher, 250 S E 2d 416, 242 Ga 556

- Taking subject to not assumption of personal contractual liability

- NY—La May & Poudrier, Inc v Smith, 150 N Y S 2d 71, 3 Misc 2d 843

74. Va—PIC Const Co, Inc v First Union Nat Bank of North Carolina, 241 S E 2d 804, 218 Va 915

page 903

Estate by entirety

- Fla—Moore v Leisure Pool Service, Inc, App 5 Dist, 412 So 2d 392

87. Ill—Contract Builders Service Corp v Eland, 428 N E 2d 178, 56 Ill Dec 859, 101 Ill App 3d 366

89. Mo—Advance Concrete & Asphalt Co v Ingels, App, 556 S W 2d 955

- Pa—Gingrich v Dunsinger, 6 Lebanon 119, aff'd 134 A 2d 362, 184 Pa Super 307—W-B Bldg Supply Co v Creako, 54 Luz L Reg 275

90. Ga—Nix v Luka, 99 S E 2d 446, 96 Ga App 123

- La—National Collection Service, Inc v Woodward, App, 111 So 2d 189

- Pa—Mohr v Derr, 25 Lehigh Co L J 252

95. Ill—Pedi v Jagencarz, 167 N E 2d 447, 25 Ill App 2d 467

Wife a necessary party

- Ill—Fence Co of America v Scott-Ballantyne Co, 111 N E 2d 190, 349 Ill App 467—Henry DeCocco & Co v Drucker, 243 N E 2d 456, 101 Ill App 2d 340

page 904

99. Ill—Anderson v Goumet, 208 N E 2d 37, 60 Ill App 2d 309

5. Cal—Pacific Coast Refrigeration, Inc v Badger, 124 Cal Rptr 786, 52 C A 3d 233

6. Idaho—Wilkes v Palmer, 298 P 2d 972, 78 Idaho 104

10. Cal—Brodenck v Torresan, 198 P 2d 75, 88 Cal App 2d 18

- Colo—Trustees of Mortg Trust of America v District Court In and For Routt County, 621 P 2d 310

- Ill—Anderson v Goumet, 208 N E 2d 37, 60 Ill App 2d 309

- Mo—Vonder Haar Concrete Co v Edwards-Parker, Inc, App, 561 S W 2d 134

- S D—Holzworth v Lampert Lumber Co, 100 N W 2d 405, 78 S D 238

12. Fla—E & E Elec Co v Gold Const 72nd St Diner, Inc, App, 116 So 2d 660

- NY—Baldwin Kitchen Cabinet Corp v Artz, 209 N Y S 2d 39, 27 Misc 2d 265, mod on oth grds. 222 N Y S 2d 930, 15 A D 2d 560

- N C—Miller v Lemon Tree Inn of Rossmore Rapids, Inc, 233 S E 2d 69, 32 N C App 574

- Or—Ernie v Goshen Veneer, Inc, 437 P 2d 479, 249 Or 357

- Tex—American Lumber & Wrecking Co v Dickey, Civ App, 344 S W 2d 913, err diam

Equitable action

- NY—La May & Poudrier, Inc v Smith, 150 N Y S 2d 71, 3 Misc 2d 843

- N C—Equitable Life Assur Soc of U S v Beaught, 67 S E 2d 390, 234 N C 347

13. Ala—Lily Flag Bldg Supply Co v J M Modlin & Co, 232 So 2d 643, 285 Ala 402

14. Ill—Zackur v Irrmger, 304 N E 2d 635, 15 Ill App 3d 805

Page 904

NC—Equitable Life Assur Soc of US v Basnight, supra, n 12
Or—Erue v Goshen Veneer, Inc., 437 P 2d 479, 249 Or 357

15. NY—DMI Painting Inc v Eastern Long Island Hospital, 425 N Y S 2d 633, 74 A D 2d 838
17. Neb—LaPuzza v From Town House Motor Inn, Inc., 217 N W 2d 472, 191 Neb 687

page 905

20. NC—Equitable Life Assur Soc of US v Basnight, supra, n 12

22. Neb—LaPuzza v From Town House Motor Inn, Inc., 217 N W 2d 472, 191 Neb 687

25. Or—Molalla Pump and Heating Co v Chaney, App., 601 P 2d 874, 42 Or App 789

26. Ala—Starek v TKW, Inc., 410 So 2d 35, 33 A L R 4th 1009

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NY—W J Plumber Block, Inc v Musler, 212 N Y S 2d 558, 27 Misc 2d 591

NC—Equitable Life Assur Soc of US v Basnight, supra, n 12

ND—United Accounts, Inc v Larson, 121 N W 2d 628

Wash—CJS cited in Washington Asphalt Co v Boyd, 388 P 2d 965, 969, 63 Wash 2d 690

27. Ala—Bain v Mazel, 156 So 2d 624, 275 Ala 531
Cal—Riley v Peters, 15 Cal Rptr 41, 194 C A 2d 296

Ind—Mitchels Plumbing & Heating Co v Whitcomb & Kellar Mortg Co, Inc., 289 N E 2d 138, 154 Ind App 63

ND—United Accounts, Inc v Larson, 121 N W 2d 628

SD—Holzworth v Lampert Lumber Co, 100 N W 2d 405, 78 S D 238

Where no bond is posted

NY—Bryant Equipment Corp v A-I Moore Contracting Corp., 380 N Y S 2d 705, 51 A D 2d 792

30. NY—Ella Chingos Const Corp v Carlton Properties, Inc., 177 N Y S 2d 358, 13 Misc 2d 577, aff'd 185 N Y S 2d 238, 7 A D 2d 1020

Wash—CJS cited in Washington Asphalt Co v Boyd, 388 P 2d 965, 969, 63 Wash 2d 690

page 906

48. Minn—Bullock v Hans, 43 So 2d 670, 208 Miss 41

49. Ill—Jennet Bridge & Iron Works v Churchill, 182 Ill App 548

page 908

75. Ala—Bain v Mazel, 156 So 2d 624, 275 Ala 531

79. Mo—Vasquez v Village Center, Inc., 362 S W 2d 588—Continental Elec Co v Ebco, Inc., 375 S W 2d 134—Hennis v Tucker, App., 447 S W 2d 580

81. Fla—Klemman v Bel Harbour Towers, Inc., 198 So 2d 830, conf. to, Fla App., 200 So 2d 211—Triangle Distributors, Inc v Travelers' Indemn Co of Hartford, Conn., App., 195 So 2d 237—Val-Rich Corp v Tole Elec Co, App., 196 So 2d 486

83. Colo—Monks v Searle, 197 P 2d 158, 118 Colo 493

Ga—Cheshire v Engelhart, 61 S E 2d 434, 82 Ga App 458

Ill—Chicago Cut Stone Co v Nicosia, 167 N E 2d 577, 26 Ill App 2d 23

Pa—Hossack v Landy Towel and Service, Inc., 7 D & C 2d 39, 55 Lanc Rev 87—Hossack v Landy Towel & Service, Inc., 7 D & C 2d 39, 55 Lanc Rev 87

Tenn—Cooper v Hunter, App., 569 S W 2d 852

Purpose

Del—Finnegan Const Co v Robino-Ladd Co., Super., 354 A 2d 142

84. Colo—Bulov v Ward Terry & Co., 396 P 2d 232, 155 Colo 560

Pa—Hossack v Landy Towel and Service, Inc., 7 D & C 2d 39, 55 Lanc Rev 87

page 909

86. Ark—Gipson v Tyson Foods, Inc., 615 S W 2d 363, 272 Ark 485

Fla—Bybee v Stearn, 95 So 2d 529

Ga—Cheshire v Engelhart, supra, n 83

Ill—Atlee Elec Co, Inc v Johnson Const Co., 303 N E 2d 192, 14 Ill App 3d 716

Mo—Spitcaufsky v Guignon, 321 S W 2d 481

N M—Crego Block Co v D H Overmyer Co., 458 P 2d 793, 80 N M 541

Ohio—Summit-Portage Concrete & Supply Co v Hunter, 206 N E 2d 10, 1 Ohio App 2d 545

Pa—Hossack v Landy Towel & Service, Inc., 7 D & C 2d 39, 55 Lanc Rev 87—Yukon Lumber Co v Findle, 40 West 87

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Agent

Mo—Williams v Cass, App., 372 S W 2d 156

Where amount due contractor not in issue
Conn—Jones Destruction, Inc v Upjohn, 286 A 2d 308, 161 Conn 191

87. Ala—Williams v Pyramid Development Co, Inc., 268 So 2d 752, 289 Ala 473

Ark—Burks v Sims, 321 S W 2d 767, 230 Ark 170

Ill—Capital Plumbing & Heating Supply, Inc v Van's Plumbing and Heating, 373 N E 2d 1089, 15 Ill Dec 617, 58 Ill App 3d 173

Mo—Simon Devine Welding Co v Kuhn, App., 329 S W 2d 249—Kinnear Mfg Co v Myers, App., 452 S W 2d 599—Nelle Plumbing Co v Stefanie, App., 453 S W 2d 636, 48 A L R 3d 145—Pearless Supply Co v Industrial Plumbing & Heating Co., 460 S W 2d 651

Mont—Monarch Lumber Co v Wallace, 314 P 2d 884, 132 Mont 163—Greene Plumbing & Heating Co v Morris, 395 P 2d 252, 144 Mont 234

N J—Sikkema v Packard, 192 A 2d 334, 79 N J Super 599

NC—W E Linticum & Sons, Inc v Kelly Const Co., 97 S E 2d 863, 246 N C 203

Tenn—Jordan v Dettz, 296 S W 2d 866, 201 Tenn 77

Tex—Murchison v Caruth Bldg Service, Civ App., 369 S W 2d 380, err ref no rev err

page 910

96. N J—Brodsky v Cohen, 219 N Y S 2d 644

99. SD—Keeley Lumber & Coal Co v Dunker, 77 N W 2d 689, 76 S D 281

11. Ill—Henry DeCocco & Co v Drucker, 243 N E 2d 456, 101 Ill App 2d 340

Nonappearance

Ariz—Michael Weller, Inc v Aetna Cas & Sur Co., App., 614 P 2d 865, 126 Ariz. 323

page 911

12. Ariz—Eng v Stem, 599 P 2d 796, 123 Ariz. 343

Fla—Canam Systems, Inc v Lake Buchanan Development Corp., App., 375 So 2d 582

Ill—Henry DeCocco & Co v Drucker, 243 N E 2d 456, 101 Ill App 2d 340

13. Ariz—Ballard v Lawyers Title of Arizona, 552 P 2d 455, 27 Ariz App 168

14. Ala—Adams Supply Co v U S Fidelity & Guaranty Co., 111 So 2d 906, 269 Ala 171

Mich—General Elec Corp v R & S Homes, Inc., 254 N W 2d 609, 74 Mich App 673

15. Cal—Dockrey v Gray, 341 P 2d 746, 172 C A 2d 388

§ 285. Intervention, Addition, or Substitution of Parties

17. Colo—McClung v Griffith, 255 P 2d 973, 127 Colo 315

Ga—Montgomery v Richards Bldg Materials, Inc., 177 S E 2d 507, 122 Ga App 472

Hawaii—Tropic Builders, Limited v U S, 475 P 2d 362, 52 Haw 298

Ill—Moser Lumber, Inc v Morgan, 245 N E 2d 310, 106 Ill App 2d 339

Mo—State ex rel Erbe v Oliver, 237 S W 2d 128, 361 Mo 836—Vasquez v Village Center, Inc., 362 S W 2d 588

NY—Admiral Transit Mix Corp v Sags-Bridgchampton Corp., 287 N Y S 2d 751, 56 Misc 2d 47

Order requiring amendment held sufficient leave

Colo—Bulov v Ward Terry & Co., 396 P 2d 232, 155 Colo 560

Jurisdiction held divested

Cal—Mason & Associates, Inc v Guarantee Sav & Loan Ass'n of Livermore Valley, 74 Cal Rptr 669, 269 C A 2d 132

25. Ga—D H Overmyer Warehouse Co v W C Cave & Co., 157 S E 2d 68, 116 Ga App 128

Ohio—Summit-Portage Concrete & Supply Co v Hunter, 206 N E 2d 10, 1 Ohio App 2d 545

page 912

After discharge of the lien by the substitution of a bond, plaintiff may elect to join the surety as defendant or proceed without doing so,²⁹³ but if he elects not to make the surety a party the judgment will not be conclusive on the surety²⁹¹⁰

29.5 US—US v Certified Industries, Inc., C A NY, 361 F 2d 857

29.10. US—US v Certified Industries, Inc., C A NY, 361 F 2d 857

30. Minn—O B Thompson Elec Co v Millman & Larson, Inc., 128 N W 2d 751, 268 Minn 299

NH—Diamond Match Co v Hobbs' Trust, 95 A 2d 142, 98 NH 97

NY—Roscato v Manera, 81 N Y S 2d 353, 192 Misc 607

Pa—Latka v Hambersky, 74 A 2d 698, 167 Pa Super 304—Scott v Larkin, 79 Pa Dist & Co 140, 100 Pittsb Leg J 66

Application not subject to motions testing sufficiency as pleading

Mo—Truog v Elbel Const Co, App., 374 S W 2d 612

Timeliness of application

Colo—National Union Fire Ins Co of Pittsburgh, Pa v Denver Brick & Pipe Co., 427 P 2d 861, 162 Colo 519

Mo—Home Bldg Corp v Ventura Corp., 568 S W 2d 769

31. NY—Slutzky v Hinderstein, 97 N Y S 2d 255

38. Mortgagees not necessary parties

NC—Childers v Powell, 92 S E 2d 65, 243 N C 711

Equitable intervention not available remedy

Ga—Ayers v Baker, 114 S E 2d 847, 216 Ga 132

§ 286. Process in General

page 913

50. Notice requirements satisfied

Del—First Florida Bldg Corp v Robino-Ladd Co., Super., 424 A 2d 32

52. Ark—Burks v Sims, 321 S W 2d 767, 230 Ark 170

Mass—Valentine Lumber & Supply Co v Thibault, 146 N E 2d 349, 336 Mass 411

Minn—Miles Const Co v Krumrey, 133 N W 2d 361, 270 Minn 287

Mo—Hennis v Tucker, App., 447 S W 2d 580

Pa—A D Roms, Inc v Drew, 4 D & C 2d 589, 102 Pittsb Leg J 293

Issuance of alias summons

Mo—Continental Elec Co v Ebco, Inc., 375 S W 2d 134

Delay in obtaining substitute process held not excusable

Mo—Continental Elec Co v Ebco, Inc 375 S.W.2d 134

61 Formal motion unnecessary

Minn—O B Thompson Elec Co v Millman & Larson, Inc, 128 N.W.2d 751, 268 Minn 299

page 914

68. Minn—Miles Const Co v Krumrey, 133 N.W.2d 361, 270 Minn 287

NJ—Columbia Lumber & Millwork Co v De Stefano, 95 A.2d 914, 12 N.J. 117

page 915

78. 50 C.J. p 504 note 93[a](2)

80. Failure to file affidavit

Vt—Reynolds v Clapper, 318 A.2d 173, 132 Vt 188

§ 287. Attachment

87. NH—Mathers v Connelly, 58 A.2d 510, 95 N.H. 107—Tolles-Buckford Lumber Co v Tilton School, 94 A.2d 374, 98 N.H. 55

Personality out of possession of honor

Miss—Hamilton Bros Co v Baxter, 195 So. 335, 188-Miss 610

Requisites of writ

NH—Rodd v Titus Const Co, 220 A.2d 768, 107 N.H. 264

Sheriff's return

NH—Rodd v Titus Const Co, 220 A.2d 768, 107 N.H. 264

page 916

90. Commencement of action

(2) Vt—Reynolds v Clapper, 318 A.2d 173, 132 Vt 188

97. Operation and effect

NH—Warm v John J. Reilly, Inc, 163 A.2d 13, 102 N.H. 558, 86 A.L.R.2d 286

Validity of order dependent on statutory compliance

NH—Manchester Federal Sav and Loan Ass'n v Letendre, 164 A.2d 568, 103 N.H. 64

Writ in proper form

NH—Manchester Federal Sav and Loan Ass'n v Letendre, 164 A.2d 568, 103 N.H. 64

§ 288. Scire Facias

98. Pa—St Clair v Drumm, 22 Northumb Leg.J. 226—St Clair v Drumm, 80 Pa Dist & Co 70, 23 Northumb Leg.J. 181—Hilco Homes Co v Armbruster, 64 Lack Jur 51—Perkowski v Kasenach, 52 Luz L Reg 267

99. Pa—Wintermyer v Benner, 64 Pa Dist & Co 224, 62 York Leg Rec 33—Ash v Krzywicki, 80 Pa Dist & Co, 225, 42 Luz Leg Rec 31—C H Henshock, Inc v Gregory, 70 Dauph 174

Where mechanic's lien has been stricken from record, etc.

Pa—Vaughn v Rouhn, 52 Sch L.R. 153

1. Pa—Wintermyer v Benner, 64 Pa Dist & Co 224, 62 York Leg Rec 33—Wagner v Williamsport Shopping Center, Inc, 6 Locomot 211—Horner & Sons v Harvey, 19 D & C 2d 488, 50 Mun 309, 73 York 56

2. Del—McHugh Elec Co v Hessler Realty & Development Co, 129 A.2d 654, 11 Terry 296

Pa—Samango v Hobbs, 75 A.2d 17, 167 Pa Super 399—Associated Lumber & Mfg Co v Calderaro, 103 P.L.J. 265—Horner & Sons v Harvey, 19 D & C 2d 488, 50 Mun 309, 73 York 56

3. Pa—Fisher v Groff, 3 D & C 2d 49, 54 Lanc Rev 281—Dannan v Dietrich, 3 D & C 2d 43, 50 Sch L.R. 209—Ruggies Lumber Co v Serling, 7 D & C 2d 113, 46 Luz L Reg 173

11. Pa—Jno D Bogar Lumber Co v Seldomridge, 57 Lanc Rev 23—Green Hills Lumber Co v Williams, 198 A.2d 635, 203 Pa Super 3

12. Pa—Samango v Hobbs, supra, n 2—Horner & Sons v Harvey, 19 D & C 2d 488, 50 Mun 309, 73 York 56—Jno D Bogar Lumber Co v Seldomridge, 57 Lanc Rev 23

§ 289. Notice of Pendency of Action

page 917

18. Purpose

Or—Oregon Broadcasting Co v Grecian Health Spa of Medford, Inc, 530 P.2d 80, 271 Or 31

19. Cal—Flintkote Co v Lusa Const Co, 74 Cal Rptr 136, 268 C.A.2d 606

21. Colo—Kalamath Inv Co v Asphalt Paving Co, 384 P.2d 938, 153 Colo 109—Williams v Foster Frosty Foods, Inc, App, 497 P.2d 339

Fla—Stulley v Post, App, 148 So.2d 569—Gay v Mujica, App, 170 So.2d 83, cert discharged, Sup, 178 So.2d 702—Maule Industries, Inc v Von Decken-Luers, App, 186 So.2d 301

NJ—Cox v Hruza, 148 A.2d 193, 54 N.J. Super 54

22. Cal—R M Hacker Co v Hollymount Bowl, 303 P.2d 387, 146 C.A.2d Supp 875—Fisher v Wandell, 320 P.2d 242, 157 C.A.2d Supp 861

Fla—Cowherd & Sanderlin, Inc v Modern Imp Co, App, 142 So.2d 786—Stulley v Post, App, 148 So.2d 569—Modern Painting Co v Schenberg, App, 155 So.2d 561—Phelps v T O Mahaffey, Inc, App, 156 So.2d 900—Arnold Owens, Inc v Balido, App, 175 So.2d 96

La—Robins v Pavone, App, 234 So.2d 541—Lafayette Woodworks v Boudreaux, App, 255 So.2d 176

Mo—Frank Dusecher Basement Builders, Inc v Gwaco Builders, Inc, App, 449 S.W.2d 863

NJ—Cox v Hruza, 148 A.2d 193, 54 N.J. Super 54

Actual notice by defendant held immaterial

Fla—Trushin v Brown, App, 132 So.2d 357—Adams v Kenson Supply Co, App, 137 So.2d 27

Period not shortened by proceeding for discharge

Fla—Gay v Mujica, App, 170 So.2d 83, cert discharged, Sup, 178 So.2d 702

24. La—Webb v Sonnier, App, 272 So.2d 778

25. Cal—Packard Bell Electronics Corp v Theseus, Inc, 53 Cal Rptr 300, 244 C.A.2d 355

26. Cal—Packard Bell Electronics Corp v Theseus, Inc, 53 Cal Rptr 300, 244 C.A.2d 355

Mich—Wallich Lumber Co v Golds, 134 N.W.2d 722, 375 Mich 323

Miss—Hamilton Bros Co v Baxter, 195 So. 335, 188-Miss 610

27. Cal—Patten-Bunn Lumber Co v Francis, 333 P.2d 255, 166 C.A.2d 196

Notice required although action to enforce lien is against property owner

Colo—Kalamath Inv Co v Asphalt Paving Co, 384 P.2d 938, 153 Colo 109

page 918

31. Colo—Bulow v Ward Terry & Co, 396 P.2d 232, 155 Colo 560

Fla—Johnson v Rosell, App, 156 So.2d 190

§ 290. Dismissal before Hearing

Library References

Mechanics' Liens ⇐284.

37. Fla—Brown v First Federal Sav & Loan Ass'n of New Smyrna, App, 160 So.2d 556—Michel v Bayshore Marina, Inc, App, 183 So.2d 294

NY—W J Plander Block, Inc v Mussler, 212 N.Y. 52d 558, 27 Misc 2d 591

Pa—Hiland v Hallemann, 4 Bucks 243—Halowich v Ammutt, 18 D & C 2d 306, 22 Fay L.J. 24, affd 154 A.2d 406, 190 Pa Super 314

Invalid lien not warranting dismissal

Or—Ward v Town Tavern, 228 P.2d 216, 191 Or 1, 42 A.L.R.2d 662

Necessary allegations omitted from complaint

NY—Lehmann v Kingston Plaza, Inc, 252 N.Y.S.2d 964, 44 Misc 2d 63

Waiver and release of lien

Ill—G Chiccone Contractors, Inc v John Marshall Bldg Corp, 222 N.E.2d 712, 77 Ill App 2d 437

Dismissal not warranted

Kan—Abbott Const, Inc v Ahlens Motors, Inc, 461 P.2d 795, 204 Kan 335

Mo—Drilling Service Co v Baebler, 484 S.W.2d 1

38. Cal—Fontana Paving, Inc v Knecht, Garrison & Tait Associates, Inc, 48 Cal Rptr 199, 238 C.A.2d 724

Colo—McClung v Griffith, 255 P.2d 973, 127 Colo 315

Reopening case

Or—Smith v De Kraay, 342 P.2d 784, 217 Or 436

page 919

39. NY—Contractors Const Co v Grossman, 186 N.Y.S.2d 419, 17 Misc 2d 710

40. Mo—Hennus v Tucker, App, 447 S.W.2d 580

41. NY—W J Plander Block, Inc v Mussler, 212 N.Y.S.2d 558, 27 Misc 2d 591

Tenn—Jordan v Deitz, 296 S.W.2d 866, 201 Tenn 77

42. Fla—Cowherd & Sanderlin, Inc v Modern Imp Co, App, 142 So.2d 786

43. Right to some relief as precluding dismissal

NY—Lehmann v Kingston Plaza, Inc, 252 N.Y.S.2d 964, 44 Misc 2d 63

47. Pa—A & C Const Co v Maloof, 17 Monroe L.R. 28

56. NY—Contractors Const Co v Grossman, 186 N.Y.S.2d 419, 17 Misc 2d 710

Dismissal not bar to intervention

Okla—Brown v Magers, 359 P.2d 321

page 920

60. Idaho—Woodard v Huggins, 347 P.2d 993, 81 Idaho 588

§ 291. Receiver

64. Ill—Laddell v Smith, 191 N.E.2d 260, 41 Ill App 2d 408, app after remand 213 N.E.2d 599, 63 Ill App 2d 295

Discretion not abused

Colo—Rugel v Kaveny, 298 P.2d 396, 133 Colo 556

page 921

74. Intervention in rent reduction proceeding

Ill—Rockwell Lime Co v Schlegel, 270 Ill App 598

Pa—Montgomery v Pasco, 11 Chest 50

76. Md—Grinnell Co v City of Crisfield, 287 A.2d 486, 264 Md 552

79. Tex—Yenger Elec & Plumbing, Inc v Ingleside Cove Lumber & Builders, Inc, Civ App, 526 S.W.2d 738

80. Compelling election

Minn—Salblad v Burman, 29 N.W.2d 673, 225 Minn 104

81. Library References

Mechanics' Liens ⇐271(1) et seq

82. Tex—Yenger Elec & Plumbing, Inc v Ingleside Cove Lumber & Builders, Inc, Civ App, 526 S.W.2d 738

83. Compelling election

Minn—Salblad v Burman, 29 N.W.2d 673, 225 Minn 104

Page 921

Alternative allegations

Cal—Norman v Berney, 45 Cal Rptr 467, 235 C A 2d 424

Pleading performance of condition precedent

NY—Allis-Chalmers Mfg Co v Malan Const Corp, 282 N E 2d 600, 30 N Y 2d 225, 331 N Y S 2d 636

80 Cal—Clement v T R Bechtel Co, 273 P 2d 5, 43 C 2d 227

Fla—Mermell v McKinley, App, 126 So 2d 902

Ind—Indianapolis Power & Light Co v Southeastern Supply Co, 257 N E 2d 722, 146 Ind App 554

Kan—Clark Lumber Co v Passig, 339 P 2d 280, 184 Kan 667—Jones v Lustig, 341 P 2d 1018, 185 Kan 208

Or—Anderson v Chambliss, 262 P 2d 298, 199 Or 400

Pleadings held insufficient

Ala—Drunkard v Hall, 47 So 2d 213, 254 Ala 105

Fla—Florida Steel Supply Corp v Carpenter, 66 So 2d 476—Brown v First Federal Sav & Loan Ass'n of New Smyrna, App, 160 So 2d 556—Loving v Vicedi, App, 164 So 2d 360

Ga—J M Wells Supply Co v Shuels, 121 S E 2d 36, 103 Ga App 822—Jordan Co v Adkins, 123 S E 2d 731, 105 Ga App 157—Clause v Roswell Bank, 137 S E 2d 86, 109 Ga App 647

Ind—Kolan v Culveyhouse, 245 N E 2d 683, 144 Ind App 249

La—Holahan v Phillips, App, 145 So 2d 35

NY—237 Const Corp v St Stanislaus Roman Catholic Church in Borough of Queens, 219 N Y S 2d 312, 30 Misc 2d 567

N C—Suffolk Lumber Co v White, 182 S E 2d 215, 12 N C App 27

Pa—Fogaras v Auto Acceptance, Inc, 30 Lehigh 298

Conditions precedent

(2) Other statements

Ga—Jordan Co v Adkins, 123 S E 2d 731, 105 Ga App 157

81. Ala—Floyd v Rambo, 33 So 2d 360, 250 Ala 101

Fla—Temple v Florida Indus Const Co, Inc, App, 310 So 2d 326

Ga—Mullinax v Gilbreath, 86 S E 2d 347, 91 Ga App 311—Levin v O'Neill Mfg Co, 99 S E 2d 343, 96 Ga App 43—Wilson v Harris, 130 S E 2d 612, 107 Ga App 509—Scott v Williams, 143 S E 2d 16, 111 Ga App 735—Dye v Turner Concrete, Inc, 166 S E 2d 773, 119 Ga App 78—Centennial Equities Corp v Hollis, 207 S E 2d 573, 132 Ga App 44

Mo—Wilson v Berning, App, 293 S W 2d 151

NY—Lundell Co v Morrison, 89 N Y S 2d 870

Tenn—Provance v Mitchell, 312 S W 2d 861, 44 Tenn App 115

Particular pleadings held sufficient

(1) Mo—Ladue Contracting Co v Land Development Co, App, 337 S W 2d 578

(4) Ala—Silverman v Mazer Lumber & Supply Co, 42 So 2d 452, 252 Ala 657—Bonner v Barber, 97 So 2d 793, 266 Ala 624—Bice v R L Bams Builders, Inc, 115 So 2d 468, 269 Ala 662—Val Monte Shores, Inc v Mayben, 137 So 2d 774, 273 Ala 202—Stoughton v Cole Supply Co, 141 So 2d 173, 273 Ala 383—Anderson v Tompkins, 228 So 2d 460, 284 Ala 709

Cal—Clements v T R Bechtel Co, 273 P 2d 5, 43 C 2d 227

Del—Charles G Taylor & Sons, Inc v Brenwood Const Co, Super, 189 A 2d 414

Fla—Vitru-Spray of Fla, Inc v Gumenick, App, 144 So 2d 533—Bowen v G H C Properties, Limited, App, 251 So 2d 359

Ill—Stevens v David, 100 N E 2d 526, 344 Ill App 251—Laddell v Smith, 191 N E 2d 260, 41 Ill App 2d 408, app after remand 213 N E 2d 599, 63 Ill App 2d 295—Fitzgerald v Van Buskirk, 239 N E 2d 330, 96 Ill App 2d 432, app after remand 306 N E 2d 76, 16 Ill App 3d 348

Minn—G C Kohlmer, Inc v Albin, 101 N W 2d 909, 257 Minn 436

Mo—Otte v McAuliffe, App, 441 S W 2d 733

NY—Bartlett v Mt Zion Baptist Church of Port Chester, 113 N Y S 2d 221, 280 App Div 798, app den 113 N Y S 2d 776, 280 App Div 828—Seneca Steel Service, Inc v Northern Financial Corp, 314 N Y S 2d 304, 63 Misc 2d 1086

Ohio—Alasco, Inc v Munde, 169 N E 2d 556, 110 Ohio App 446

Pa—Maitland v Bolen, 67 York Leg Rec 174

SC—Wood v Hardy, 110 S E 2d 157, 235 S C 131

Tex—Tomlinson v Higginbotham Bros & Co, Civ App, 229 S W 2d 920

Amended petition held sufficient

Kan—Forster v Newby, 298 P 2d 258, 179 Kan 709—T M Deal Lumber Co v Vieux, 298 P 2d 339, 179 Kan 760

page 922

84 Tex—Rhodes v Miller, Civ App, 414 S W 2d 942

85. Ga—Latham Plumbing & Heating Co v Ledbetter Trucks, Inc, 99 S E 2d 545, 96 Ga App 219

Petition held sufficient

Va—Blanton v Owen, 122 S E 2d 650, 203 Va 73

89 Ill—Fitzgerald v Van Buskirk, 239 N E 2d 330, 96 Ill App 2d 432, app after remand 306 N E 2d 76, 16 Ill App 3d 348

90. Nev—Peccole v Luce & Goodfellow, 212 P 2d 718, 66 Nev 360

As against a general demurrer, the court assumes all relevant facts to be true, and construes the allegations most favorably to the claimant.^{91, 92}

91.5. Mo—Ladue Contracting Co v Land Development Co, App, 337 S W 2d 578

§ 294. — Particular Averments in General

page 923

4. Ala—Ross v Top Catfish, Inc, 262 So 2d 760, 288 Ala 514

Del—Certano Brickwork, Inc v Kirkwood Industries, Inc, 276 A 2d 267

Fla—Lehigh Structural Steel Co v Joseph Langer Inc, 43 So 2d 335

page 924

6. Particular descriptions held sufficient

(2) Ala—Stoughton v Cole Supply Co, 141 So 2d 173, 273 Ala 383

7. Particular description held sufficient

(2) Va—Knight v Ferrante, 117 S E 2d 283, 202 Va 243

19. NY—Ellis Chingos Const Corp v Carlton Properties, Inc, 177 N Y S 2d 358, 13 Misc 2d 577, aff'd 185 N Y S 2d 238, 7 A D 2d 1020

Allegations held sufficient

(4) Neb—May Plumbing Co v Shaver, 153 N W 2d 911, 182 Neb 251

Allegations held insufficient

(4) Ga—Fowler v Roxboro Homes, Inc, 107 S E 2d 285, 98 Ga App 829

page 925

20. Va—Blanton v Owen, 122 S E 2d 650, 203 Va 73

21. Colo—Trustees of Carpenters and Millwrights Health Ben Trust Fund v Angel-Haus Condominium, Ltd, 535 P 2d 259, 36 Colo App 133

Complaint held insufficient

Fla—Peterson v Peterson, 67 So 2d 682

Complaint sufficient

Ala—Lowe's of Muscle Shoals, Inc v Dillard, Civ, 304 So 2d 12, 53 Ala App 669

Ga—Centennial Equities Corp v Hollis, 207 S E 2d 573, 132 Ga App 44

22. NY—Herbert G Martin, Inc v Alperstein, 99 N Y S 2d 940, 277 App Div 990

Or—Culver v Rendahl, 318 P 2d 275, 211 Or 682

Va—Knight v Ferrante, 117 S E 2d 283, 202 Va 243

Complaint held sufficient

NY—Gulligan Const Corp v 104 Mac Realty, Inc, 231 N Y S 2d 140, 34 Misc 2d 1070

25 Ala—Wade v Glenoe Lumber Co, 103 So 2d 730, 267 Ala 530

page 926

27. Ala—Tucker v Trussville Convalescent Home, Inc, 267 So 2d 438, 289 Ala 366

Complaint held sufficient

Ala—Nelson Weaver Mortg Co v Dover Elevator Co, 216 So 2d 716, 283 Ala 324

28. Ala—Guaranty Pest Control, Inc v Commercial Inv & Development Corp, 264 So 2d 163, 288 Ala 604

31 Ga—Lumber Fabricators, Inc v Gregory, 99 S E 2d 145, 213 Ga 356 Wold v Northcutt, 130 S E 2d 257, 107 Ga App 365

Ill—Shaffer v Callerton Corp, 141 N E 2d 77, 13 Ill App 2d 72

32 Del—Erect-Rite Const Co v DeChellis, Super, 193 A 2d 545, 6 Storey 423

Ga—Marshall v Peacock, 55 S E 2d 354, 205 Ga 891—Athens Elec Supply Co v Delta Oil, Inc, 114 S E 2d 289, 101 Ga App 515

34 Ga—Athens Elec Supply Co v Delta Oil, Inc, 114 S E 2d 289, 101 Ga App 515

36. Fla—Barton v Horwick, Fla, 78 So 2d 569

38. Pleading held sufficient

Mo—E C Robinson Lumber Co v Lowrey, App, 276 S W 2d 636

39. Ala—Burge v Morgan, 59 So 2d 795, 257 Ala 558—Nelson Weaver Mortg Co v Dover Elevator Co, 216 So 2d 716, 283 Ala 324—Ross v Top Catfish, Inc, 262 So 2d 760, 288 Ala 514

Ark—Myers v Majors, 413 S W 2d 661, 242 Ark 326

Iowa—Teig and Johnson v Speelman, 153 N W 2d 818, 261 Iowa 210

NY—American Cement Corp v Dunetz Bros, Inc, 263 N Y S 2d 119, 47 Misc 2d 747

Va—Knight v Ferrante, 117 S E 2d 283, 202 Va 243

Allegations held insufficient

(2) Other allegations

Ala—Brown v Oldham, 81 So 2d 331, 263 Ala 76

Ga—Wold v Northcutt, 130 S E 2d 257, 107 Ga App 365—Drawdy v McVagh, 138 S E 2d 477, 110 Ga App 329—Reynolds v Magbee Bros Lumber & Supply Co, 162 S E 2d 327, 224 Ga 379, conf to 162 S E 2d 737, 118 Ga App 163

Ky—Tri-State Plumbing & Heating Corp v Jomelson, 272 S W 2d 458

NY—Jesse T Davis & Son, Inc v Twelve Linden Corp, 183 N Y S 2d 108, 17 Misc 2d 199

Oral modification for extras

Fla—Vitru-Spray of Fla, Inc v Gumenick, App, 144 So 2d 533

page 927

46. Held unnecessary

Ala—Brown v Oldham, 81 So 2d 331, 263 Ala 76—Ross v Top Catfish, Inc, 262 So 2d 760, 288 Ala 514

47. Kan—Bailey v Norton, 283 P 2d 400, 178 Kan 104

page 928

57. Or—Anderson v Chambliss, 262 P 2d 298, 199 Or 400

page 929

73. Averment of contract not required

Ga—Hall v Dealers Supply Co, 120 S E 2d 879, 103 Ga App 846

76. Ala—Stoughton v Cole Supply Co, 141 So 2d 173, 273 Ala 383

78. Fla—Roberts v Lesser, 96 So 2d 222

page 930

85. Del—Harrogate Const Co v Joseph Haas Co, Super, 250 A 2d 376

Ga—Pickard v Gregory, 76 S E 2d 860, 88 Ga App 475

Me—Pendleton v Sard, 297 A 2d 889, 62 A L R 3d 277

86. Ark—Phelps-Powell Bldg Supply Co v Silver Dollar Homes, Inc, 407 S W 2d 925, 241 Ark 425

Ga—Pickard v Gregory, supra, n 85

89. Or—Anderson v Chambliss, 262 P 2d 298, 199 Or 400

Allegations held sufficient

(3) N Y—Gilligan Const Corp v 104 Mac Realty, Inc, 231 N Y S 2d 140, 34 Misc 2d 1070

Or—Hall v G & W Development Corp, 363 P 2d 763, 228 Or 93—Mathus v Thunderbird Village, Inc, 389 P 2d 343, 236 Or 425

90. Or—Anderson v Chambliss, supra, n 89

92. Allegation held insufficient

Or—Anderson v Chambliss, supra, n 89

page 931

2. Del—McHugh Elec Co v Heasler Realty & Development Co, 129 A 2d 654, 11 Terry 296—Harrogate Const Co v Joseph Haas Co, Super, 250 A 2d 376

Fla—Morris & Esher, Inc v Olympia Enterprises, Inc, App, 200 So 2d 579

page 932

12. N H—Solmica of New England, Inc v Verreault, 332 A 2d 179, 115 N H 4

A subcontractor is bound by the allegations in its bill, including the allegations as to the form of the statement of the account.¹³¹

13.1. Mass—Valentine Lumber & Supply Co v Thibault, 130 N E 2d 868, 333 Mass 352

14. N Y—R E Crest, Inc v Laaker-Goldman Corp, 203 N Y S 2d 493, 27 Misc 2d 552

19. Allegation of amount of contract price not required

Ga—Hill v Dealers Supply Co, 120 S E 2d 879, 103 Ga App 846

21. Va—Blanton v Owen, 122 S E 2d 650, 203 Va 73

page 933

30. Minn—Minnesota Home Rebuilding & Repair Co v Kraulik, 67 N W 2d 673, 243 Minn 312

31. N Y—Redderborg v Ballard, 86 N Y S 2d 413

36. N Y—Redderborg v Ballard, supra, n 31

37. Minn—Minnesota Home Rebuilding & Repair Co v Kraulik, supra, n 30

38. Del—Ramsey v D'Sabatino, Super, 347 A 2d 659

39. Del—Deinca v Martelli, Super, 200 A 2d 825, 7 Storey 399

Cross claims

Mass—Continental Casualty Co v Crook, 128 So 574, 157 Mass 518, 72 A L R 186

page 934

41. Amendment of bill of particulars

Del—Deinca v Martelli, Super, 200 A 2d 825, 7 Storey 399

55. Ala—Gray v McKinley, 43 So 2d 421, 34 Ala App 630, cert den 43 So 2d 424, 253 Ala 199—McCleskey v Finney, 130 So 2d 183, 272 Ala 194

Del—Harrogate Const Co v Joseph Haas Co, Super, 250 A 2d 376

Fla—Moore v Crum, 68 So 2d 379—Approved Dry Wall Const, Inc v Morgan Properties, Inc, App, 263 So 2d 243

Ind—Indianapolis Power & Light Co v Southeastern Supply Co, 257 N E 2d 722, 146 Ind App 554

Kan—Clark Lumber Co v Passag, 339 P 2d 280, 184 Kan 667

Mich—Beck v Delta Recreation Corp, 140 N W 2d 764, 2 Mich App 518

Statements as to subcontractors and employees

Fla—Davis Engineering, Inc v Purcel, App, 202 So 2d 827

(2) Other cases

Fla—Barton v Horwick, 78 So 2d 569—Stern v Perma-Stress, Inc, App, 134 So 2d 509—Brown v First Federal Sav & Loan Ass'n of New Smyrna, App, 160 So 2d 556

page 935

56 Allegations held sufficient

Md—Parkway Estates, Inc v Burnham, 122 A 2d 326, 210 Md 64

Tex—Yeager Elec & Plumbing, Inc v Ingleside Cove Lumber & Builders, Inc, Civ App, 526 S W 2d 738

58. Ga—Latham Plumbing & Heating Co v Ledbetter Trucks, Inc, 99 S E 2d 545, 96 Ga App 219

59. Ala—Skelton v Seale Lumber Co, 69 So 2d 288, 260 Ala 179

60. Ala—Skelton v Seale Lumber Co, supra, n 60

Averments held insufficient

Ga—King v Rutledge, 65 S E 2d 801, 208 Ga 172

61. Where noncompliance is shown, etc

Ga—Clause v Roswell Bank, 137 S E 2d 86, 109 Ga App 647

62. Cal—Wand Corp v San Gabriel Valley Lumber Co, 46 Cal Rptr 486, 236 C A 2d 855

page 936

69. Ga—Mullinax v Gilbreath, 86 S E 2d 347, 91 Ga App 511

71. Notice as part of pleading

Ill—Bugs v Plebanek, 99 N E 2d 363, 343 Ill App 466, transf 95 N E 2d 870, 407 Ill 562, cert den 72 S Ct 647, 343 U S 912, 96 L Ed 1328

76. Ala—Wade v Glencoe Lumber Co, 103 So 2d 730, 267 Ala 530

§ 295. — Purpose of Suit

page 937

85. Ga—Maxwell v Summerville Lumber Co, 74 S E 2d 111, 87 Ga App 405

Ind—Indianapolis Power & Light Co v Southeastern Supply Co, 257 N E 2d 722, 146 Ind App 554

N Y—Grandview Const Co v Lepore, 163 N Y S 2d 263, 4 Misc 2d 818, rev'd on oth grds 168 N Y S 2d 209, 4 A D 2d 960, app dism 173 N Y S 2d 15, 4 N Y 2d 775, 149 N E 2d 519, aff'd 183 N Y S 2d 79, 5 N Y 2d 897, 156 N E 2d 710

Pa—Glose v Coleman, 23 Lehigh Co Leg J 187

§ 296. — Status of Claimant

91. Failure to plead license at time cause of action arose held failure to state cause of action

N M—Martinez v Research Park, Inc, 410 P 2d 200, 75 N M 672

§ 297. — Anticipating Defense

92. Tex—Valley Ready-Mix Concrete Co of McAllen v Valley State Bank, Civ App, 227 S W 2d 231

§ 298. — Joinder of Counts and Causes

page 938

3. Miss—Evans v Central Service & Supply Co, 226 So 2d 616 overruling Hursey v Hassam and Pooley, 45 Miss 133, and Federal Land Bank of New Orleans v Thames Lumber & Supply Company, 160 Miss 335, 134 So 154

§ 299. — Verification

Library References

Modern Legal Forms Ch 4, Affidavits

page 939

10. Pa—Larson Const Co v Donaldson's Crossroads, Inc, 44 Wash Co 196

11. Minn—G C Kohlmer, Inc v Albin, 101 N W 2d 909, 257 Minn 436

S C—Wood v Hardy, 110 S E 2d 157, 235 S C 131

Extension of credit

Cal—Richards v Hillside Development Co, 2 Cal Rptr 693, 177 C A 2d 776

Compliance shown

Fla—Walter Harvey Corp v Cohen-Ager, Inc, App, 317 So 2d 775

§ 300. Plea, Answer, or Affidavit of Defense

13. Mass—Enterprise Plumbing Co v Bailey Mortg Co, 209 So 2d 825

Nev—Fisher Bros, Inc v Harrah Realty Co, 545 P 2d 203, 92 Nev 65

Pa—Grable v Dombroski, 34 West Co 307

14. Del—W D Haddock Const Co v D H Overmyer Co, Super, 256 A 2d 760—Pattinaro Const Co v Rago, Super, 269 A 2d 250

A counteraffidavit by the owner may be filed at any time before sale of the property.¹⁴⁵

14.5. Ga—Bowman v Quick, 126 S E 2d 536, 106 Ga App 213

17. Pa—Ash v Krzywicki, 80 Pa Dist & Co 225, 42 Luz Leg Reg 31—McCarthy v Reese, 215 A 2d 257, 419 Pa 489

18. Pa—W-B Bldg Supply Co v Cresko, 54 Luz L Reg 275

19. Time for filing

(3) Other instances

Mo—Boyer Lumber Inc v Blair, App, 510 S W 2d 738

20. Pa—Radpath and Potter Co v Edwards, 4 Chest Co 146—Main Line Const Co v Mandes, Inc, 8 Chest 42—Vaughn v Roulin, 52 Sch L R 153—Hoffman Lumber Co v Gessey, 35 D & C 2d 200, 12 Chest 375

20. Motion improper to raise matters of avoidance, discharge, or waiver

Colo—Markoff v Barenberg, 368 P 2d 964, 149 Colo 311

§ 301. — Form and Sufficiency

page 940

21. Colo—Kalamath Inv Co v Asphalt Paving Co, 384 P 2d 938, 153 Colo 109

Nev—Glose v Isbell Const Co, 471 P 2d 257, 86 Nev 524

N C—C J S, cited in Michael Flynn Mfg Co v J L Coe Const Co, 131 S E 2d 487, 489, 259 N C 649

Ga—Bowman v Quick, 126 S E 2d 536, 106 Ga App 213

Pa—St Clair v Drumm, 80 Pa Dist & Co 70, 23 Northumb Leg J 181—Eichenlaub v Casseur Isra-

Page 960

Kan—Sutherland Lumber Co v Due, 512 P 2d 525, 212 Kan 658
Ky—Haynie v Benton, 258 S W 2d 488
Me—Marshall v Mathieu, 57 A 2d 400, 143 Me 167
Mo—Hertel Elec Co v Gabriel, App, 292 S W 2d 95—Bremer v Mohr, App, 478 S W 2d 14
Neb—Lofholm v Stoltenberg, 133 N W 2d 387, 178 Neb 318

46. Ark—Burks v Sims, 321 S W 2d 767, 230 Ark 170
Ind—Bennett v Pearson, 218 N E 2d 168, 139 Ind App 224
Miss—Hamilton Bros Co v Baxter, 195 So 335, 188 Miss 610—Bilups v Becker's Welding & Machine Co, 189 So 526, 186 Miss 41
Mont—Legland v McGaffick, 338 P 2d 1037, 135 Mont 188
Tex—Hill v The Praetorians, Civ App, 219 S W 2d 564, err ref no rev err—Stone v Pitts, Civ App, 389 S W 2d 601

Nonjoinder of necessary parties

Ill—Hosna v White, 278 N E 2d 197, 3 Ill App 3d 559
47. Ala—Huffman-East Development Corp v Summers Elec Supply Co, 263 So 2d 677, 288 Ala 579
Va—Knight v Ferrante, 117 S E 2d 283, 202 Va 243

page 961

53. Cal—Blakemore Equipment Co v Braddock, Logan and Valley, 74 Cal Rptr 484, 269 C A 2d 12
60. Ark—C.J.S. cited in Gillison Discount Building Materials, Inc v Talbot, 488 S W 2d 317, 321, 253 Ark 696

page 962

70. U.S.—York Corp v Brock, C A Fla, 405 F 2d 759
Fla—Nashman v Chrycy, App, 107 So 2d 782—Leedy v First Federal Sav & Loan Ass'n of Cocos, App, 142 So 2d 99
Ill—Moser Lumber, Inc v Morgan, 245 N E 2d 310, 106 Ill App 2d 339
La—Bernard Lumber Co v Sayre, 87 So 2d 713, 230 La 17—Hattiesburg Mfg Co v Pepe, App, 140 So 2d 449—Long Leaf Lumber, Inc v Svolos, App, 258 So 2d 121
Neb—Stoltenberg v Caffrey, 141 N W 2d 458, 180 Neb 113
71. Ind—Kidd Bros Lumber Co v Tonnis, 149 N E 2d 828, 128 Ind App 459
Me—Andrew v Dubeau, 146 A 2d 761, 154 Me 254
Mich—Skyhook Lift-Slab Corp v Huron Towers, Inc, 118 N W 2d 961, 369 Mich 36
NM—Blucher Lumber Co v Springer, 423 P 2d 878, 77 N M 449

72. U.S.—In re Rhine, D C Colo, 213 F Supp 527
Colo—American Factors Associates, Ltd v Triangle Heating & Sheet Metal Co, 303 P 2d 163, 31 Colo App 240

La—Jim Walter Corp v Emanuel, App, 274 So 2d 867

NM—Blucher Lumber Co v Springer, 423 P 2d 878, 77 N M 449

NC—Wilson Elec Co v Robinson, 189 S E 2d 758, 15 N C App 201

Ohio—Seibold v Fitz, 136 N E 2d 666, 101 Ohio App 316

73. U.S.—In re Rhine, D C Colo, 213 F Supp 527
Ala—Howell v. Hallett Mfg Co, 178 So 2d 97, 278 Ala 316—Madison Highlands Development Co v Hall, 216 So 2d 724, 283 Ala 333

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La—Moore Steel, Inc v Succession of Wright, App, 79 So 2d 118

Me—E. A. Thompson Lumber Co v Heald, 170 A 2d 156, 157 Me 78

Neb—Lofholm v Stoltenberg, 133 N W 2d 387, 178 Neb 318

Wash—Hvak Lumber & Millwork v Cusell, 244 P 2d 253, 40 Wash 2d 484

74. Ga—Athens Elec Supply Co v Delta Oil, Inc, 114 S E 2d 289, 101 Ga App 513

75. Ala—Southern Sawh of Huntsville, Inc v Jean, 235 So 2d 842, 285 Ala 705

Ga—Horne-Wilson, Inc v Smith, 137 S E 2d 356, 109 Ga App 676—Butler v Garrison, 182 S E 2d 185, 123 Ga App 645—C.J.S. cited in Bankston v Smith, 222 S E 2d 375, 376, 236 Ga 92, on remand 225 S E 2d 709, 138 Ga App 39

Kan—Seyb-Tucker Lumber & Implement Co v Hartley, 415 P 2d 217, 197 Kan 58

La—R. F. Mastayer Lumber Co v Tessner, App, 101 So 2d 238—Sundbery's, Inc v Price, App, 117 So 2d 328—Long Leaf Lumber, Inc v Svolos, App, 258 So 2d 121

Md—District Heights Apartments, Section D—E v Noland Co, supra, n 42

N M—Panhandle Pipe & Steel, Inc v Jesko, 457 P 2d 705, 80 N M 457—Fitzgerald v Blueher Lumber Co, 481 P 2d 100, 82 N M 312

Pa—Green Hills Lumber Co v Williams, 198 A 2d 635, 203 Pa Super 3

Va—C.J.S. cited in Thomas Somerville Co v Broynhill, 105 S E 2d 824, 828, 200 Va 358

76. U.S.—Continental Cas Co v Associated Pipe & Supply Co, D C La, 310 F Supp 1207, affd in part, mod in part on oth grds, and vac in part on oth grds, C A, 447 F 2d 1041

Kan—Seyb-Tucker Lumber & Implement Co v Hartley, 415 P 2d 217, 197 Kan 58

La—Romero & Sons Lumber Co v Babineux, App, 151 So 2d 714

Pa—Green Hills Lumber Co v Williams 32 D & C 2d 759, 111 P L J 442, affd 198 A 2d 635, 203 Pa Super 3

77. Ga—C.J.S. cited in Bankston v Smith, 222 S E 2d 375, 376, 236 Ga 92, on remand 225 S E 2d 709, 138 Ga App 39

Ill—Moser Lumber, Inc v Morgan, 245 N E 2d 310, 106 Ill App 2d 339

La—Louisiana Lumber Supply Co v Reeves, App, 55 So 2d 64—Laney Co v Airline Apartments, Inc, 67 So 2d 570, 223 La 1000—Bernard Lumber Co v Sayre, 87 So 2d 713, 230 La 17—Broadmoor Lumber Co v Libertio, App, 162 So 2d 800—Long Leaf Lumber, Inc v Svolos, App, 258 So 2d 121—Apex Sales Co v U S Fidelity & Guaranty Co, App, 261 So 2d 247

Pa—Green Hills Lumber Co v Williams, 198 A 2d 635, 203 Pa Super 3

Wash—Willett v Davis, 193 P 2d 321, 30 Wash 2d 622

80. Pa—Zimmerman v Kaczmarek, 33 West Co 1 W Va—South Side Lumber Co v Stone Const Co, 152 S E 2d 721, 151 W Va 439

Other matters dealing with presumptions have been adjudicated by the courts 80.5

80.5. Colo—First Nat Bank in Fort Collins v Sam McClure & Son, Inc, 431 P 2d 460, 163 Colo 473

Minn—Rochester's Suburban Lumber Co v Slocumb, 163 N W 2d 303, 282 Minn 124

Presumption that delivered timber would be used for building

Ga—Jackson's Mill & Lumber Co v Holliday, 134 S E 2d 563, 108 Ga App 663

83. Iowa—A and R Concrete & Const Co v Braklow, 103 N W 2d 89, 251 Iowa 1067—Carlson v Maughmer, 168 N W 2d 802—Denniston & Partridge Co v Mings, 179 N W 2d 748

Minn—Anderson v Harrison, 160 N W 2d 560, 281 Minn 95—Hughes v Monahan, 165 N W 2d 231, 282 Minn 407

Neb—Rodgers v Jorgensen, 67 N W 2d 770, 159 Neb 485

Okla—Acme Glass Co v Owens, 232 P 2d 624, 204 Okl 601

Pa—McNelly v Silvia, 31 West Co 105

Wis—Fullerton Lumber Co v Korth, 127 N W 2d 1, 23 Wis 2d 253

86. Wis—Fullerton Lumber Co v Korth, 127 N W 2d 1, 23 Wis 2d 253

page 963

96. Minn—Anderson v Harrison, 160 N W 2d 560, 281 Minn 95

98. Actual knowledge required

Minn—Anderson v Harrison, 160 N W 2d 560, 281 Minn 95 overruling contrary inference of Stravs v Steckbauer, 136 Minn 69, 161 N W 259

3. N M—Petrakis v Krasnow, 213 P 2d 220, 54 N M 39

5. Iowa—C.J.S. cited in Huffman v Hill, 65 N W 2d 205, 206, 245 Iowa 935—C.J.S. cited in Peterman v Hardenbergh, 97 N W 2d 152, 153, 250 Iowa 931—C.J.S. cited in Farrington v Freeman, 99 N W 2d 388, 391, 251 Iowa 18—C.J.S. cited in A and R Concrete and Const Co v Braklow, 103 N W 2d 89, 91, 251 Iowa 1067—Kaltoft v Nielsen, 106 N W 2d 597, 252 Iowa 249

Mo—Hong Cons Co v Szombathy, 345 S W 2d 111

N Y—John H Reetz, Inc v Stackler, 201 N Y S 2d 54, 24 Misc 2d 291

Tex—Tucker v Northcutt, Civ App, 248 S W 2d 750

Vt—Vermont Structural Steel Corp v Brckman, 300 A 2d 629, 131 Vt 144

Actual improvement of value of property by work and labor need not be proved

Wyo—United Pac Ins Co v Martin & Luther General Contractors, Inc, 455 P 2d 664

page 964

9. Ariz—Wahl v Southwest Sav & Loan Ass'n, 467 P 2d 930, 12 Ariz App 90, 52 A L R 3d 779, decision vac in part on oth grds 476 P 2d 836, 106 Ariz 381

12. La—Jeffer's Trust v Justice, App, 253 So 2d 234

13. Ariz—Wahl v Southwest Sav & Loan Ass'n, 467 P 2d 930, 12 Ariz App 90, 52 A L R 3d 779, decision vac in part on oth grds, 476 P 2d 836, 106 Ariz 381

Ark—Streuh v Wallin-Dickey & Rich Lumber Co, 302 S W 2d 522, 227 Ark 885

Ind—Ellis v Auch, 118 N E 2d 809, 124 Ind App 454

La—Electric Contracting Co v Brown, App, 39 So 2d 100

Neb—Occidental Sav & Loan Ass'n v Cannon, 171 N W 2d 166, 184 Neb 659

14. Ky—Drummy v Stern, 269 S W 2d 198

Presumption of refusal of notice held not to arise

Md—Bukowitz v Maryland Lumber Co, 122 A 2d 486, 210 Md 148

Presumption of no notice to grantee in deed

Ga—Bryant v Ellenburg, 127 S E 2d 468, 106 Ga App 510

The burden of proof with respect to other matters pertaining to a lien notice has been adjudicated 15.5

15.5 Invalidity of notice of lien

N Y—Admiral Transat Mix Corp v Sage-Bridgehampton Corp, 287 N Y S 2d 751, 56 Misc 2d 47

Ownership of record at time notice filed

N Y—Admiral Transat Mix Corp v Sage-Bridgehampton Corp, 287 N Y S 2d 751, 56 Misc 2d 47

Good faith in including nonlienable items

Alaska—Moore v Alaska Metal Buildings, Inc, 448 P 2d 581

Circumstances extending time for filing lien

La—Le Rouge v Crescent Aircraft Corp, App, 224 So 2d 49

17. Neb—Lofholm v Stoltenberg, 133 N W 2d 387, 178 Neb 318

Ohio—Seibold v Fitz, 136 N E 2d 666, 101 Ohio App 316

page 963

30. Ga—Athens Elec Supply Co v Delta Oil, Inc, 114 S E 2d 289, 101 Ga App 515
- Mont—Monarch Lumber Co v Wallace, 314 P 2d 884, 387, 132 Mont 163—Harsh Montana Corp v Locke, 328 P 2d 926, 134 Mont 150
- Wash—Associated Sand & Gravel Co, Inc v Di Pietro, 509 P 2d 1020, 8 Wash App 938, 68 A L R 3d 1293

Extras

- Ill—Blohm v Kagy, 94 N E 2d 516, 341 Ill App 468
- Wash—Kellogg v Wilcox, 283 P 2d 677, 46 Wash 2d 558, reh den 286 P 2d 114, 46 Wash 2d 558
- 31 Ga—D H Overmyer Warehouse Co v W C Caye & Co, 157 S E 2d 68, 116 Ga App 128
- Wyo—United Pac Ins Co v Martin & Luther General Contractors, Inc, 455 P 2d 664
- 32 Cal—Frank Fissano and Associates v Taggart, 105 Cal Rptr 414, 29 CA 3d 1
- 34 Ind—CJS cited in Kendall Lumber & Coal Co v Roman, 91 N E 2d 187, 191, 120 Ind App 368
- Md—Diener v Cabbage, 270 A 2d 471, 259 Md 555

page 966

38. N.Y.—Maycumber v Wolfe, 171 N.Y.S.2d 44, 10 Misc 2d 464—Lorber v Enkof Real Estate, Inc, 194 N.Y.S.2d 766, 21 Misc 2d 308
- Burden on claimant to prove creditor-debtor relationship**
- Ohio—Price Bros Co v Walters, App, 115 N.E.2d 12
- Indebtedness of contractor to subcontractor**
- N.Y.—Phelan Dept of Borden Co v Foster-Lupins Corp, 331 N.Y.S.2d 138, 39 A.D.2d 633, aff'd 304 N.E.2d 372, 33 N.Y.2d 709, 349 N.Y.S.2d 676
39. Ga—Lumber Fabricators, Inc v Gregory, 99 S.E.2d 145, 213 Ga. 356
48. N.Y.—Maycumber v Wolfe, 171 N.Y.S.2d 44, 10 Misc 2d 464

page 967

52. Ga—Ingram v Barfield, 55 S.E.2d 725, 80 Ga App 276
- Owner's burden to show proper application by contractor of advance payment**
- Ga—Hall v Dealers Supply Co, 120 S.E.2d 879, 103 Ga.App 846—Goss v Davenport, 124 S.E.2d 485, 105 Ga.App 386—Short & Paulk Supply Co v Dykes, 171 S.E.2d 782, 120 Ga App 639
54. N.C.—CJS cited in Priddy v Kernersville Lumber Co, 129 S.E.2d 256, 261, 238 N.C. 653
56. Ind—Kendall Lumber & Coal Co v Roman, 91 N.E.2d 187, 120 Ind App 368
57. Nev—Robert A. Pierce Co v Sherman Gardens Co, 419 P.2d 781, 82 Nev 395, app after remand 491 P.2d 48, 87 Nev 558

Recovery of penalty

- N.Y.—Goodman v Del-Sa-Co Foods, Inc, 257 N.Y.S.2d 142, 15 N.Y.2d 191, 205 N.E.2d 288
58. Ala—Drunkard v Hall, 47 So 2d 213, 254 Ala 105
60. S.D.—E S Gaynor Lumber Co v Morrison, 60 N.W.2d 83, 75 S.D. 132
61. Mo—Bremer v Mohr, App, 478 S.W.2d 14
- N.J.—James Falcone Plumbing & Heating Co v Pasquale, 97 A.2d 720, 26 N.J. Super 285
62. Ark—Orrell v E. C. Barton & Co, 398 S.W.2d 685, 240 Ark 211
- Ind—Kendall Lumber & Coal Co v Roman, supra, n 56
- Pa—Green Hills Lumber Co v Williams, 32 D & C 2d 759, 111 P.L.J. 442, aff'd 198 A.2d 635, 203 Pa Super 3

Estoppel

- Ark—Kensmore v Robbins, 266 S.W.2d 64, 223 Ark 384
- Ind—Midland Bldg Industries v Oldenkamp, 103 N.E.2d 451, 122 Ind App 347

57 CJS 1988 P P—7

page 968

63. Wash—Ernrich v Gardner & Hitchings, Inc, 320 P.2d 288, 51 Wash 2d 528
70. Miss—CJS cited in Enterprise Plumbing Co v Bailey Mortg Co, 209 So 2d 825, 829

Other cases involving the burden of proof have been adjudicated 761

- 76.1 Colo—First Nat Bank in Fort Collins v Sam McClure & Son, Inc, 431 P.2d 460, 163 Colo 473
- Fla—Waldo v U S Ramme Corp, 74 So 2d 106
- Ga—Chambers Lumber Co v Hagan, 163 S.E.2d 847, 118 Ga App 392
- Tex—Stone v Pitts, Civ App, 389 S.W.2d 601

§ 309. Admissibility

Library References
Mechanics' Liens §=280

page 969

78. Idaho—Williams v Idaho Potato Starch Co, 245 P.2d 1045, 73 Idaho 13
79. Colo—Campbell v Graham, 357 P.2d 366, 144 Colo 532, 94 A.L.R.2d 1165
- Ga—Weathers v Modern Masonry Materials, Inc, 129 S.E.2d 65, 107 Ga App 34
- La—Albert K. Newlin, Inc v Weingarten's Markets Realty Co, App, 253 So 2d 594
- Pa—Drummond v Marmo, 107 P.L.J. 12
80. Idaho—Mackey v Eva, 328 P.2d 66, 80 Idaho 260
81. Ga—Ogletree v West Lumber Co, 64 S.E.2d 894, 208 Ga 43—Wilson v Harris, 130 S.E.2d 612, 107 Ga.App 509
- Iowa—Central Ready Mix Co v John G. Ruhlin Const Co, 139 N.W.2d 444, 258 Iowa 500
- Mich—Droulard v Czerwinski, 116 N.W.2d 776, 367 Mich 557
- Neb—W. L. Phillips Sons v Northwest Realty Co, 43 N.W.2d 6, 152 Neb 808

Evidence held admissible

- Nev—Longley v Heers Bros, Inc, 472 P.2d 350, 86 Nev 599
88. Ill—Tison & Hall Concrete Products Co v A. E. Asher, Inc, 229 N.E.2d 137, 86 Ill App 2d 34

page 970

95. Ga—Horne-Wilson, Inc v Smith, 137 S.E.2d 356, 109 Ga App 676
99. Ga—Murphy v Fuller, 100 S.E.2d 137, 96 Ga App 403
2. Iowa—Moffitt Bldg Material Co v U.S. Lumber & Supply Co, 124 N.W.2d 134, 255 Iowa 765
3. La—Sundbery's, Inc v Price, App, 117 So 2d 328
6. Mo—Otte v McAuliffe, App, 441 S.W.2d 733
- Lien contract admissible although unrecorded**
- Tex—Hillard v Home Builders Supply Co, Civ App, 399 S.W.2d 198, err ref no rev err
7. Ga—Roberts v Georgia Southern Supply Co, 88 S.E.2d 554, 92 Ga.App 303, transf 86 S.E.2d 241, 211 Ga 402

page 971

23. Mo—E. C. Robinson Lumber Co v Lowrey, App, 276 S.W.2d 636
25. Neb—S. A. Sorensen Const Co v Broyhill, 85 N.W.2d 898, 165 Neb 397, reh den and op mod on oth grds 87 N.W.2d 439, 165 Neb 744
- Wis—Scheid v Forbes, 41 N.W.2d 297, 256 Wis 366
- Number of hours of work on job**
- Pa—Giansante v Pascuzzo, 206 A.2d 340, 205 Pa Super 28
26. **Speculative evidence inadmissible**
- Wis—Sad Grunke Co v Craighhead, 146 N.W.2d 478, 33 Wis 2d 42

page 972

31. Ga—Murphy v Fuller, 100 S.E.2d 137, 96 Ga App 403
- Okla—Cashway Lumber Co v Langston, 479 P.2d 582
32. **For purpose of proving date of its filing, etc.**
- Neb—Timmons v Neisen, 66 N.W.2d 406, 159 Neb 193
39. Ga—Hall v Dealers Supply Co, 120 S.E.2d 879, 103 Ga App 846
40. Tenn—Chattanooga Lumber & Coal Corp v Phillips, 304 S.W.2d 82, 202 Tenn 266

page 973

56. Ariz—Lenalite Co v Zocher, 388 P.2d 421, 95 Ariz 208
- Cal—Nuttman v Chas, 225 P.2d 660, 101 Cal App 2d 476
- Colo—Bulow v Ward Terry & Co, 396 P.2d 232, 135 Colo 560
- Ind—Kendall Lumber & Coal Co v Roman, 91 N.E.2d 187, 120 Ind App 368
- Minn—G. C. Kohlmer, Inc v Albin, 101 N.W.2d 909, 257 Minn 436
- Nev—Robert A. Pierce Co v Sherman Gardens Co, 419 P.2d 781, 82 Nev 395, app after remand 491 P.2d 48, 87 Nev 558
- Pa—Lanzino v Kessler, 100 Pittsb Leg J 115—Giansante v Pascuzzo, 34 D & C 2d 554, aff'd 206 A.2d 340, 205 Pa.Super 28

Evidence not admissible

- Okla—Snyder v Tulsa Engineering & Const Co, 312 P.2d 488
66. Mo—E. C. Robinson Lumber Co v Ladman, App, 235 S.W.2d 72
- Lien account filed with circuit clerk admissible to show necessary steps taken**
- Mo—Beckemeyer v Baesler, 270 S.W.2d 782, transf, App, 261 S.W.2d 511

page 974

69. N.C.—Lowery v Harthcock, 79 S.E.2d 204, 239 N.C. 67
70. Tex—Texas State Bank of Alice v Baker, Civ App, 275 S.W.2d 168

page 975

83. Ark—Degen v Acme Brick Co, 312 S.W.2d 194, 228 Ark 1054
- Mo—Herrman v Duffin, App, 302 S.W.2d 313
- N.Y.—Soll v Camardella, 100 N.Y.S.2d 187, 277 App Div 1004
84. Ill—Ellman v Iannu, 157 N.E.2d 807, 21 Ill App 2d 353
- Pa—Dunham-Bush, Inc v Murray's 51 Lanes, Inc, 45 West 181

§ 310. Weight and Sufficiency

Library References
Mechanics' Liens §=281

page 976

93. Ind—Bennett v Pearson, 218 N.E.2d 168, 139 Ind App 224
- Iowa—Cassaday v De Jarnette, 101 N.W.2d 21, 251 Iowa 391—Central Ready Mix Co v John G. Ruhlin Const Co, 139 N.W.2d 444, 258 Iowa 500
- Or—Wiggins v Hendrickson, 229 P.2d 652, 191 Or 285
- R.I.—F. D. McKendall Lumber Co v DiDonato, 82 A.2d 403, 78 R.I. 401
95. U.S.—Mittford v Prior, C.A. Alaska, 353 F.2d 550
- Alaska—Vaara v Ketchikan Spruce Mills, 432 P.2d 618
- Ark—Boris v Sims, 321 S.W.2d 767, 230 Ark 170—Lyman Lamb Co v Arkansas Shell Homes, Inc, 406 S.W.2d 708, 241 Ark 83

Page 978

Cal—Frugoli v Conway, 213 P 2d 76, 95 Cal App 2d 518—Arthur B. Sur, Inc v Bridges, 11 Cal Rptr 322, 189 C A 2d 599—Rodoni v Harbor Engineers, 12 Cal Rptr 924, 191 C A 2d 560—Jay Bailey Const Co v Berry Hotel Corp., 34 Cal Rptr 272, 221 C A 2d 135

Colo—National Union Fire Ins Co of Pittsburgh, Pa v Denver Brick & Pipe Co., 427 P 2d 861, 162 Colo 519

Del—Charles G Taylor & Sons, Inc v Brentwood Const Co, Super., 189 A 2d 414

Fla—Foley Lumber Co v Koester, 61 So 2d 634—Bensan Corp v Felton, 63 So 2d 278—Watson v Gallagher, App., 96 So 2d 472—Larrel Builders, Inc v Nicholas, App., 123 So 2d 284—Phelps v T O Mahaffey, Inc., App., 156 So 2d 900—Ray v Dock & Marine Const, Inc., App., 183 So 2d 237—Testinari v Chaney, App., 187 So 2d 376—Kleinman v Bal Harbour Towers, Inc., App., 188 So 2d 398, aff'd in part, rev'd in part on oth grds Sup., 198 So 2d 830, conf to, Fla App., 200 So 2d 211

Idaho—Mackey v Eva, 328 P 2d 66, 80 Idaho 260

Ill—Olson v Zanco Industries, Inc., 108 N E 2d 32, 348 Ill App 124

Ind—Harris v Mt Vernon Lumber Co., 173 N E 2d 672, 131 Ind App 593—General Elec Co v Fueling, 232 N E 2d 622, 142 Ind App 74

Iowa—Casler Elec Co v Carlsen, 86 N W 2d 682—Pay-N-Taket, Inc v Crooka, 145 N W 2d 621, 259 Iowa 719

La—Leslie v Kruppers, App., 154 So 2d 794, writ ref 156 So 2d 604, 245 La 65—Security Homestead Ass'n v Schnell, App., 232 So 2d 898, writ ref 236 So 2d 35, 256 La 263

Md—Wohlmuter v Mt Aury Plumbing & Heating, Inc., 223 A 2d 562, 244 Md 321

Mich—Sadler v Winshall, 129 N W 2d 384, 373 Mich 378

Minn—Berlien v Gagnon, 96 N W 2d 573, 235 Minn 143—Hughes v Monahan, 165 N W 2d 231, 282 Minn 407

Miss—Depont Guaranty Bank & Trust Co v J F Weaver Lumber Co., 60 So 2d 598, 215 Miss 183

Mo—Bryant v Bryant Const Co., App., 425 S W 2d 236—Burgdorfer Elec Co v Voyles Const Co., App., 432 S W 2d 387

Mont—Layland v McGaffick, 338 P 2d 1037, 135 Mont 188

Neb—S A Sorensen Const Co v Broyhill, 85 N W 2d 898, 165 Neb 397, reh den and op mod on oth grds 87 N W 2d 439, 165 Neb 744—Campbell v Lutz, 152 N W 2d 101, 182 Neb 27

Nev—Southern Nevada Plumbing & Heating Corp v Adelson, 381 P 2d 232, 79 Nev 233

NJ—General Elec Co v E Fred Sulzer & Co., 222 A 2d 655, 92 N J Super 210

NY—Rung v Kendzior, 211 N Y S 2d 588, 12 A D 2d 988—American Cement Corp v Dunetz Bros Inc., 263 N Y S 2d 119, 47 Misc 2d 747

Ohio—Ed A McCarthy & Sons, Inc v Fleming, App., 170 N E 2d 269

Okla—Mager Mortg Co v Ferguson, 255 P 2d 938, 208 Okl 304—Kusapp v Arko Interstate Elec Co., 448 P 2d 996

Tex—Newman v Coker, Civ App., 310 S W 2d 354—National Western Life Ins Co v Acreman, 425 S W 2d 815

Wash—Lumber Mart Co v Buchanan, 419 P 2d 1002, 69 Wash 2d 658

Wis—Zanzow Const Co v Giovannoni, 56 N W 2d 782, 263 Wis 185

Assignment

(2) Other matters

Conn—Lewin & Sons, Inc v Herman, 120 A 2d 423, 143 Conn 146

Status of claimant

(2) Other instances

Ga—Murphy v Fuller, 100 S E 2d 137, 96 Ga App 403

Prima facie case held established

Ga—Chambers v Williams Bros Lumber Co., App., 55 S E 2d 244, 205 Ga 735

Supervision

Va—Surf Realty Corp v Standing, 78 S E 2d 901, 195 Va 431

Evidence held insufficient

Fla—Ballard v Krause, App., 248 So 2d 233

NY—American Cement Corp v Underhill Const Corp., 321 N Y S 2d 402, 36 A D 2d 849

Or—Farris v McCracken, 453 P 2d 932, 253 Or 273

96 Ohio—Skinner v Coler, App., 101 N E 2d 171

Prima facie case held established

Neb—Rosebud Lumber & Coal Co v Holms, 52 N W 2d 313, 155 Neb 459, reh den 53 N W 2d 82, 155 Neb 688

(1) Evidence held sufficient

Ala—Crane v Wilson Lumber Co., 261 So 2d 877, 288 Ala 439

Ariz—Ranch House Supply Corp v Van Slyke, 370 P 2d 661, 91 Ariz 177

Ark—West v Page, 305 S W 2d 336, 228 Ark 13

Cal—Kurman v Borzage, 202 P 2d 303, 89 Cal App 2d 898—Cargill v Achziger, 331 P 2d 774, 165 C A 2d 220—Piping Specialties Co v Kentile, Inc., 40 Cal Rptr 537, 229 C A 2d 586

Colo—Samett v Whelan, 362 P 2d 559, 147 Colo 41

Fla—Johnson v Yaxley, 47 So 2d 302—Foley Lumber Co v Koester, 61 So 2d 634—Wallace Bros v Yates, App., 117 So 2d 202

Ga—Langford v Edmondson, 61 S E 2d 558, 82 Ga App 494—Fitts v Addis, 64 S E 2d 466, 83 Ga App 696—Murphy v Fuller, 100 S E 2d 137, 96 Ga App 403—Grigsby v Fleming, 101 S E 2d 217, 96 Ga App 664—Vulcan Materials Co v D H Overmyer Warehouse Co., 156 S E 2d 213, 115 Ga App 792

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Ind—Martin v Martin, 103 N E 2d 905, 122 Ind App 241—Terrel v Irelan & Baum, Inc., 240 N E 2d 95, 143 Ind App 302

Iowa—Casler Elec Co v Carlsen, 86 N W 2d 682

Kan—Thomasson v Kirkpatrick, 254 P 2d 329, 174 Kan 52

La—Russell v Vance, App., 90 So 2d 553

Miss—Handshoe v Daly, 51 So 2d 230, 211 Miss 189—Washington v Spencer, 51 So 2d 742

Mo—Vasquez v Village Center, Inc., 362 S W 2d 588

Mont—Frank J Trunk & Son, Inc v DeHaan, 391 P 2d 353, 143 Mont 442—McCusker v Roberts, 452 P 2d 408, 152 Mont 513

NJ—General Elec Co v E Fred Sulzer & Co., 207 A 2d 346, 86 N J Super 520, aff'd 222 A 2d 655, 92 N J Super 210

NY—Paretta v White Acres Realty Corp., 116 N Y S 2d 885, 280 App Div 998, 281 App Div 691, 697, rearg den 118 N Y S 2d 303, 281 App Div 753, motion den 113 N E 2d 564, 305 N Y 827, aff'd 117 N E 2d 803, 306 N Y 702—Krepelin v Natow, 116 N Y S 2d 913—M F Hickey Co v Imperial Realty Co., 319 N Y S 2d 972, 65 Misc 2d 1088, mod on oth grds 342 N Y S 2d 186, 73 Misc 2d 498

Ohio—Falls Lumber Co v Heman, 183 N E 2d 265, aff'd 181 N E 2d 713, 114 Ohio App 262

Or—Johnston v Abbey, Inc., 445 P 2d 596, 251 Or 330

Pa—Veno v Veno, 106 A 2d 632, 175 Pa Super 421

Tex—Fred v Bozman, Civ App., 304 S W 2d 235, err ref no rev err—Enlow v Brown, Civ App., 357 S W 2d 608

Va—Knight v Ferrante, 117 S E 2d 283, 202 Va 243

Wash—Strucker v Powers, 210 P 2d 814, 34 Wash 2d 897—Boise Cascade Corp v Pence, 394 P 2d 359, 64 Wash 2d 798

(2) Cal—Phillips & Edwards Elec Corp v Shintaffer, 299 P 2d 912, 143 C A 2d 561

Fla—Commercial Engineering & Contracting Co v Beals, App., 99 So 2d 882—Interstate Engineering Co v Adler-Built Industries, Inc., App., 164 So 2d 830

Ga—D H Overmyer Warehouse Co v W C Caye & Co., App., 157 S E 2d 68, 116 Ga App 128—Almand Const Co v Guye, 181 S E 2d 907, 123 Ga App 630

Ill—Schroeder v Brennan, 102 N E 2d 164, 345 Ill App 85, transf 94 N E 2d 355, 406 Ill 416.

La—R J Jones v Sons v Meyer, 55 So 2d 898, 220 La 153

Neb—Lotholm v Stoltenberg, 133 N W 2d 387, 178 Neb 318

Or—Barber v Henry, 252 P 2d 802, 197 Or 172

(3) Other findings

Cal—Rodoni v Harbor Engineers, 12 Cal Rptr 924, 191 C A 2d 560

D C—Washington Concrete Sales Corp v Morrisette, C A., 377 F 2d 137, 126 U S App D C 252

Idaho—Mountain Home Redi-Mix v Conner Homes, Inc., 428 P 2d 744, 91 Idaho 612

Iowa—Welter v Heer, 181 N W 2d 134

Kan—Brohan v Nafziger, 476 P 2d 649, 206 Kan 58

La—Ballard's, Inc v Evans, App., 241 So 2d 557

N H—Bader Co v Concord Elec Co., 256 A 2d 145, 109 N H 487

N M—Groff v Stringer, 477 P 2d 814, 82 N M 180

Tex—Regold Mfg Co v Maccabees, Civ App., 348 S W 2d 864, err ref no rev err

Evidence held insufficient

U S—Humphrey v Harrison Bros, C A Md., 196 F 2d 630—In re Mayer Central Bldg Corp, D C Ariz., 275 F Supp 873

Cal—Callahan v Chatsworth Park, Inc., 22 Cal Rptr 606, 204 C A 2d 597

Fla—Richard Store Co v Florida Bridge & Iron, Inc., 77 So 2d 632—Sterling Apartments, Inc v Arch Creek Lumber Co., App., 113 So 2d 711—Ivne v Atlas Subsidiaries of Fla Inc., App., 128 So 2d 172—Beautyware Plumbing Supply Co v Columbiad Apartments, Inc., App., 215 So 2d 42

Ind—Alliance Lumber & Coal Co v Hill, 235 N E 2d 717, 142 Ind App 497

Kan—Star Lumber & Supply Co v Mills, 349 P 2d 892, 186 Kan 204—Fouts v Armstrong Commercial Laundry Distributing Co., 495 P 2d 1390, 209 Kan 59

La—Smith v General Contractors, Inc., App., 125 So 2d 637

Mo—Henges Co v Doctors' North-Roads Bldg, Inc., App., 409 S W 2d 489

Neb—Central Const Co v Highamuth, 90 N W 2d 817, 155 Neb 113—Muenschau v Swarts, 102 N W 2d 129

NJ—General Elec Co v E Fred Sulzer & Co., 207 A 2d 346, 86 N J Super 520, aff'd 222 A 2d 655, 92 N J Super 210

NY—DiRaffaele v Copagus Laundries, 133 N Y S 2d 358

NC—Farnell-Martin Supply Co v High Point Motor Lodge, Inc., 177 S E 2d 392, 277 N C 312

Okla—Cashway Lumber Co v Langston, 479 P 2d 582

SC—Andrews v Home Reform Soc., 64 S E 2d 17, 219 S C 62

Validity of mechanic's lien

Colo—Marshall v Thurmon Const Co., App., 472 P 2d 195

Or—State ex rel Nilsen v Hoff, 474 P 2d 11, 3 Or App 398

page 977

97. Timely institution shown

Ala—Howell v Hallett Mfg Co., 178 So 2d 94, 278 Ala 316

Colo—Bulow v Ward Terry & Co., 396 P 2d 232, 155 Colo 560

Ill—Hanna v Yeoman, 82 N E 2d 703, 336 Ill App 43

Miss—Billups v Becker's Welding & Machine Co., 189 So 526, 186 Miss 41

Timely institution not shown

Ala—Home Federal Sav & Loan Ass'n v Williams, 158 So 2d 678, 276 Ala 37

98 Fla—Leedy v First Federal Sav & Loan Ass'n of Cocoa, App., 142 So 2d 99

3. Evidence held sufficient

(3) Other instances

Cal—Western Specialty Co v Claremont Const Co, 22 Cal Rptr 536, 204 C A 2d 532

5. Wash—Elmore v Graystone of Centralia, Inc, 387 P 2d 75, 63 Wash 2d 250

7. Evidence held sufficient

(1) La—National Collection Service Inc v Woodard, App, 111 So 2d 189

Evidence held insufficient

(1) Miss—Evans v Central Service & Supply Co, 226 So 2d 616

(3) Other matters

Idaho—Bunt v Roberts, 279 P 2d 629, 76 Idaho 158

page 978

14. Ark—McCool v Jones, 252 S W 2d 80, 221 Ark 123

16. U.S.—Continental Cas Co v Associated Pipe & Supply Co, D C La, 310 F Supp 1207, *affid* in part, *mod* in part on oth grds, and *vac* in part on oth grds, C A, 447 F 2d 1041

Evidence held sufficient

(1) Conn—Stone v Rosenfield, 104 A 2d 545, 141 Conn 188

Ga—Hill v Dealers Supply Co, 120 S E 2d 879, 103 Ga App 846

Idaho—Layrite Products Co v Lux, 416 P 2d 501, 91 Idaho 110

Ind—Kidd Bros Lumber Co v Tonna, 149 N E 2d 828, 128 Ind App 459—Barrick v Morgan Const Supply Corp, 196 N E 2d 762, 135 Ind App 672

Iowa—Cassler Elec Co v Carlson, 86 N W 2d 682—Moffitt Bldg Material Co v U S Lumber & Supply Co, 124 N W 2d 134, 255 Iowa 765

La—R F Mastayer Lumber Co v Tessner, App, 101 So 2d 238—Pate v Gasclair, App, 162 So 2d 729

Me—E A Thompson Lumber Co v Heald, 170 A 2d 156, 157 Me 78

Miss—Enterprise Plumbing Co v Bailey Mortg Co, 209 So 2d 825

Mo—George F Robertson Plastering Co v Magidson, 271 S W 2d 538—Continental Elec Co v Ebon, Inc, App, 365 S W 2d 746, *app trans* to, Sup, 375 S W 2d 134

N M—Blucher Lumber Co v Springer, 423 P 2d 878, 77 N M 449—Boone v Smith, 447 P 2d 23, 79 N M 614

(2) Fla—Sterling Apartments, Inc v Arch Creek Lumber Co, App, 113 So 2d 711

Ind—Wymer v Harrison Sheet Steel Co, 123 N E 2d 241, 125 Ind App 169—Harris v Mt Vernon Lumber Co, 173 N E 2d 672, 131 Ind App 593

La—Romero & Sons Lumber Co v Babineaux, App, 151 So 2d 714—Hattiesburg Hardware Stores, Inc v Robertson, App, 152 So 2d 315—Broadmoor Lumber Co v Liberto, App, 162 So 2d 800

Ohio—Richland Builders v Thome, 100 N E 2d 433, 88 Ohio App 520

(3) Cal—Coronet Const Co v Palmer, 15 Cal Rptr 601, 194 C A 2d 603

La—Holcomb v Jet, App, 260 So 2d 24

Neb—Joyce Lumber Co v Dyrrean, 125 N W 2d 109, 176 Neb 86

(4) Lehigh v Cash Lumber Co, 217 S W 2d 357, 214 Ark 586

Ky—McCorkle v Lawson & Co, 259 S W 2d 27

La—Laney Co v Airline Apartments, Inc, 67 So 2d 570, 223 La 1000—Sandbery's, Inc v Price, App, 117 So 2d 328

Md—District Heights Apartments, Section D-E v Noland Co, 95 A 2d 90, 202 Md 43, 39 A L R 2d 387

N M—Fitzgerald v Blucher Lumber Co, 481 P 2d 100, 82 N M 312

Ohio—Quality Heating Supply Co v Buckeye Loan & Bldg Co, 148 N E 2d 88, 105 Ohio App 369

Tenn—Dealers Supply Co v First Christian Church, 276 S W 2d 769, 38 Tenn App 568

(5) U.S.—Anderson v W L Oakes Mfg Co, C A Okl, 197 F 2d 725

Colo—Bulow v Ward Terry & Co, 396 P 2d 232, 155 Colo 560

La—Laney Co v Airline Apartments, Inc, *supra*
Md—District Heights Apartments, Section D-E v Noland Co, *supra*—Holcomb v Fender, 101 A 2d 814, 203 Md 480—Eastover Co v All Metal Fabricators, Inc, 158 A 2d 89, 221 Md 428

Mo—Schwartz v Shelby Const Co, 338 S W 2d 781—Stewart Concrete & Material Co v James H Stanton Const Co, App, 433 S W 2d 76

Okl—Curry v Morgan, 321 P 2d 973

Or—Timber Structures v CWS Grinding & Mach Works, 229 P 2d 623, 191 Or 231, 25 A L R 2d 1358

(6) Ill—Moser Lumber, Inc v Morgan, 245 N E 2d 310, 106 Ill App 2d 339

Evidence held insufficient

(1) Fla—Surf Properties v Markowitz Bros, 75 So 2d 298

Iowa—Des Moines Furnace & Stove Repair Co v Lemon, 56 N W 2d 923, 244 Iowa 316

Neb—Timmons v Nelsen, 66 N W 2d 406, 159 Neb 193

Ohio—Seybold v Pitz, 136 N E 2d 666, 101 Ohio App 316

(2) Colo—Pacific States Cast Iron Pipe Co v Roberts, App, 489 P 2d 336

La—Bernard Lumber Co v Sayre, 87 So 2d 713, 230 La 17

N M—Panhandle Pipe & Steel, Inc v Jesko, 457 P 2d 705, 80 N M 457

Wash—Hyak Lumber & Millwork v Cassell, 244 P 2d 253, 40 Wash 2d 484

(3) Ala—Madison Highlands Development Co v Hall, 216 So 2d 724, 283 Ala 333

Ark—Southern Lumber Co v Riley, 273 S W 2d 848, 224 Ark 298

Colo—Graham v Brenden, 349 P 2d 702, 142 Colo 88

Ill—Hill Behan Lumber Co v Marchese, 275 N E 2d 451, 1 Ill App 3d 789

Mo—Davidson v Fisher, App, 258 S W 2d 297

Wash—Hyak Lumber & Millwork v Cassell, *supra*

(4) La—Hattiesburg Mfg Co v Pepe, App, 140 So 2d 449

Or—Smith v De Kraay, 342 P 2d 784, 217 Or 436

page 979

18. U.S.—Continental Cas Co v Associated Pipe & Supply Co, D C La, 310 F Supp 1207, *affid* in part, *mod* in part on oth grds, and *vac* in part on oth grds, C A, 447 F 2d 1041

N J—Bard Const Co v Wandner Co, 79 A 2d 54, 12 N J Super 118

Okl—Cashway Lumber Co v Langston, 479 P 2d 582

19. U.S.—Anderson v W L Oakes Mfg Co, C A Okl, 197 F 2d 725

La—Plywoods, Inc v Duet, App, 162 So 2d 732

24. Evidence held sufficient

La—Louisiana Lumber Supply Co v Reeves, App, 55 So 2d 64

25. Evidence held sufficient

(1) Ala—Kyser v Doan, 122 So 2d 764, 271 Ala 229

Cal—Suverkrup v Suhl, 238 P 2d 674, 108 C A 2d 284

Ind—De Armond v Carter, 134 N E 2d 239, 127 Ind App 34

Iowa—Welter v Heer, 181 N W 2d 134

Mich—Moss v Toroman, 104 N W 2d 777, 361 Mich 50

Mo—Simon Devine Welding Co v Kuhn, App, 329 S W 2d 249

Mont—Shaffer v Buxbaum, 352 P 2d 83, 137 Mont 397

N H—Chagnon Lumber Co v Aams, 102 A 2d 916, 98 N H 467

N Y—Sawyer v Robinson, 286 N Y S 2d 137, 29 A D 2d 722

Ohio—Seybold v Pitz, 136 N E 2d 666, 101 Ohio App 316—Gebhart v U S, 174 N E 2d 615, 172 Ohio St 200

Or—R & H Const Co v Landmark Enterprises, Inc, 472 P 2d 796, 256 Or 217

Pa—Toll-Barkan Co v Toll, 164 A 2d 36, 193 Pa Super 221

Wis—Charles v Umentum, 53 N W 2d 706, 261 Wis 647

(2) Ind—Kendall Lumber & Coal Co v Roman, 91 N E 2d 187, 120 Ind App 368

Mo—Wilson v Berning, App, 293 S W 2d 151

Nev—Young Elec Sign Co v Erwin Elec Co, 477 P 2d 864, 86 Nev 822

N H—Diamond Match Co v Hobbs' Trust, 95 A 2d 142, 98 N H 97

N M—Farnell v Brece, 208 P 2d 473, 53 N M 351

Tex—Gomez v Ruddle, Civ App, 334 S W 2d 197

(3) Jost v Cornelius, 79 N E 2d 310, 334 Ill App 279

Neb—W L Phillips Sons v Northwest Realty Co, 43 N W 2d 6, 152 Neb 808

Okl—Costs v Duncan, 211 P 2d 269, 202 Okl 188

(4) Ala—Brantley v Hall, 240 So 2d 364, 286 Ala 400

Cal—Lannin v Sargeant, 232 P 2d 878, 105 C A 2d 76

Iowa—Kaltoft v Nielsen, 106 N W 2d 597, 252 Iowa 249—Harper v Ford, 179 N W 2d 772

Neb—Timmons v Nelsen, 66 N W 2d 406, 159 Neb 193—Peters v Halligan, 152 N W 2d 103, 182 Neb 51

Okl—Woods v Levine, 311 P 2d 204

Or—Lemire v McCollum, 425 P 2d 755, 246 Or 418

Pa—Toll-Barkan Co v Toll, 164 A 2d 36, 193 Pa Super 221

(5) Ala—Howell v Hallett Mfg Co, 178 So 2d 94, 278 Ala 316

Evidence held insufficient

Ala—Brown v Oldham, 81 So 2d 331, 263 Ala 76—Brewton v Semons, 84 So 2d 763, 264 Ala 123—Finney v Story, 123 So 2d 129, 271 Ala 284

Fla—Pheps v T O Mahaffey, Inc, App, 156 So 2d 900

Idaho—Ive v Peck, 495 P 2d 1110, 94 Idaho 625

Minn—Berleau v Gagnon, 96 N W 2d 573, 255 Minn 143

Mo—Nelle Plumbing Co v Stefanc, App, 433 S W 2d 636, 48 A L R 3d 145

N C—Ranlo Supply Co v Clark, 102 S E 2d 257, 247 N C 762—Leflew v Orrell, 172 S E 2d 243, 7 N C App 333

page 980

26. Ill—A A Erickson Bros, Inc v Jenkins, 190 N E 2d 383, 41 Ill App 2d 180

Evidence held sufficient

Ala—Lloyd v Stewart, 60 So 2d 911, 258 Ala 627, *reh den* 64 So 2d 884, 258 Ala 627

Ind—De Armond v Carter, 134 N E 2d 239, 127 Ind App 34

Iowa—Denniston & Partidge Co v Romp, 56 N W 2d 601, 244 Iowa 204

N H—Tilton v Davis, 155 A 2d 179, 102 N H 278

N Y—Consolidated Blasting Corp v Colabella Bros, Inc, 168 N Y S 2d 275, 10 Misc 2d 913

Evidence held insufficient

Ill—Erlach v O'Mahony, 111 N E 2d 189, 349 Ill App 537

N Y—Jenkin Contracting Co v Sixth Ave & 57th St Corp, 122 N Y S 2d 126, 282 App Div 662, *rearg* and *app den* 122 N Y S 2d 891, 282 App Div 760—Fort v Roc Hill Associates, Inc, 256 N Y S 2d 879, 45 Misc 2d 278

27. Evidence held sufficient

Ark—Orr v Bergemann, 284 S W 2d 105, 225 Ark 616

Mich—G O Lewis Co v Erving, 145 N W 2d 368, 4 Mich App 589

Evidence held insufficient

D C—Bernter v Stiggers, C A, 362 F 2d 971, 124 U S App D C 141

Md—Wohlmuter v Mt Aury Plumbing & Heating, Inc, 223 A 2d 562, 244 Md 321

28. Fla—Bybee v Stearns, 95 So 2d 529

Page 980

Mo—Nelle Plumbing Co v Stefanc, App, 453 S W 2d 636, 48 A L R 3d 145

Contract direct with owner

(1) Or—Lemire v McCollum, 425 P 2d 755, 246 Or 418

Va—Surf Realty Corp v Standing, 78 S E2d 901, 195 Va 431

Privity held established

Ga—Weathers v Modern Masonry Materials, Inc, 125 S E2d 532, 105 Ga App 736

Evidence held insufficient

Mass—Phillips v F G & H Millwork Mfg Co, 190 So 2d 843

NJ—American Lumber & Bldg Supply v D & M, Inc, 210 A.2d 119, 87 N J Super 562

Wash—Hopkins v Ulvestad, 282 P 2d 806, 46 Wash 2d 514

30. Evidence held insufficient

(3) Idaho—Bunt v Roberts, 279 P 2d 629, 76 Idaho 158

Ind—Woods v Deckelbaum, 191 N E2d 101, 244 Ind 260

Iowa—Cassaday v De Jarnette, 101 N W2d 21, 251 Iowa 391

Evidence held sufficient

(4) Fla—Phelps v T O Mahaffey, Inc, App, 156 So 2d 900.

(5) Fla—Brenner v Scullian, 84 So 2d 44, foll 84 So 2d 49

Ind—American Lumber Soc v Bob Ulrich Decorating, Inc, 132 N E2d 620, 126 Ind App 266

31. Evidence held sufficient

(4) Other evidence

Cal—Benson Elec Co v Hale Bros Associates, Inc, 55 Cal Rptr 73, 246 C A 2d 686

Fla—Carolina Lumber Co v Daniel, App, 97 So 2d 156

La—National Collection Service, Inc v Woodard, App, 111 So 2d 189

Okla—McLaurin v Eichson, 276 P 2d 751

Evidence held insufficient

(3) Other evidence

NY—Kull v AAC Employment Corp, 304 N Y S 2d 500, 61 Mac 2d 104

page 981

32. Evidence held sufficient

(1) Utah—Fehner v Morton, 424 P.2d 446, 18 Utah 2d 422.

35. Ga.—Nix v Lake, 99 S E.2d 446, 96 Ga.App 123

Evidence held sufficient

Pa.—Gmgnch v Dwyer, 134 A 2d 362, 114 Pa.Super 307.

37. Evidence held sufficient

(2) Other evidence

Mo.—E. C Robinson Lumber Co v Lowrey, App, 276 S W 2d 636

Evidence held insufficient

Ala.—Elder v Stewart, 114 So 2d 263, 269 Ala. 482

Md.—William Penn Supply Corp v Watterson, 146 A 2d 420, 218 Md 291

Mo.—Roper v Clanton, App., 258 S W 2d 283

38. Colo.—H T C Corp v Oida, App, 486 P 2d 463

Idaho—Koser v Bohemian Breweries, 202 P.2d 398, 69 Idaho 33

Minn.—Rochester's Suburban Lumber Co v Socumb, 163 N W 2d 303, 282 Minn 124

NH—Diamond Match Co v Hobbs' Trust, 95 A 2d 142, 91 N H 97

Value of contract

Wa.—Northern State Bank v Beechler, 191 N W 2d 921, 53 Wis 2d 243

39. Iowa—Lautenbach v Meredith 35 N W 2d 870, 240 Iowa 166

Evidence held sufficient

Fla—Restano v Peninsular Bldg Supply Co, App, 262 So 2d 710

Idaho—McClure v Briggs, 379 P 2d 432, 85 Idaho 327

Iowa—Hansen v Kaperonis, 55 N W 2d 284, 243 Iowa 1257

Neb—Timmons v Nelson, 66 N W 2d 406, 159 Neb 193—Jensen v Manthe, 95 N W 2d 699, 168 Neb 361

Nev—Southern Nevada Plumbing & Heating Corp v Adelson, 381 P 2d 232, 79 Nev 233

NY—Consolidated Blasting Corp v Colabella Bros, Inc, 168 N Y S 2d 275, 10 Misc 2d 913

Or—Gabriel v Corkum, 196 P 2d 437, 183 Or 679—Culver v Rendahl, 318 P 2d 275, 211 Or 682

Pa—Welsh v Kulp, 68 Montg Co 44

Wash—Kellogg v Wilcox, 283 P 2d 677, 46 Wash 2d 558, reh den 286 P 2d 114, 46 Wash 2d 558

Wis—McClone v Mulvaney, 53 N W 2d 622, 262 Wis 84—Charles v Umentum, supra, n 25

40 Ala—Southern Sash of Huntsville, Inc v Jones, 245 So 2d 185, 286 Ala 672

Evidence held sufficient

(2) Other evidence

Ind—Means v Everitt, 167 N E 2d 885, 131 Ind App 370

page 982

41 Evidence held sufficient

Neb—May Plumbing Co v Shaver, 153 N W 2d 911, 182 Neb 251

NM—Boone v Smith, 447 P 2d 23, 79 NM 614

NC—Lowery v Hawthcock, 79 S E 2d 204, 239 NC 67

42. Evidence held sufficient

Fla—Broderick v Overhead Door Co of Fort Lauderdale, App, 117 So 2d 240

Miss—Chancellor v Melvin, 52 So 2d 360, 211 Miss 590

Or—Wiggins v Hendrickson, 229 P 2d 652, 191 Or 285

43. Ga.—Allen v Moore, 49 S E 2d 121, 77 Ga App 426

Okla—Hanna Lumber Co v Wilkins, 444 P 2d 213

44. S D—Kasley Lumber & Coal Co v Dunker, 77 N W 2d 689, 76 S D 281

Evidence held sufficient

(1) La—Farris Lumber & Supply Co v Gardette, App, 65 So 2d 424

(3) Ala—Lloyd v Stewart, 60 So 2d 911, 258 Ala 627, reh den 64 So 2d 884, 258 Ala 627

Cal—Scott, Blake and Wynne v Summit Ridge Estates, Inc, 59 Cal Rptr 587, 251 C A 2d 347

Ill—Babak v Strum, 155 N E 2d 332, 20 Ill App 2d 191

Me—Andrew v Dubeau, 146 A 2d 761, 154 Me 254

Evidence held insufficient

Minn—Anderson v Harrison, 160 N W 2d 560, 281 Minn 95

48. Colo—Medical Arts Bldg v Ervm, 257 P 2d 969, 127 Colo 458

Fla—Poranah v Millings, 82 So 2d 675

Ill—Homa v White, 278 N E 2d 197, 3 Ill App 3d 559

Iowa—Caster Elec Co v Carlsen, 86 N W 2d 682—Kaltoft v Nielsen, 106 N W 2d 597, 252 Iowa 249

Mo—K-V Builders, Inc v Thomas, App, 353 S W 2d 130

Neb—Stoitenberg v Caffrey, 141 N W 2d 458, 180 Neb 113

NY—A J Abbott & Son, Inc v Hamel, 231 N Y S 2d 930, 35 Misc 2d 1076

Pa—Meade v Farmer Plywood Service, 59 A 2d 78, 359 Pa 392

Evidence held sufficient

Cal—Miller v Anson-Smith Const Co, 8 Cal Rptr 131, 185 C A 2d 161

Ill—Bauer v Smith, 119 N E 2d 486, 2 Ill App 2d 523

49. Minn—Heyn v Brunt, 99 N W.2d 324, 239 Minn 496

Pa—Toll-Barkari Co v Toll, 161 A.2d 36, 193 Pa Super 221

Evidence held insufficient to show agreement to perform other than as contractor had performed

Neb—Timmons v Nelson, 66 N W.2d 404, 159 Neb 193

49. Idaho—Williams v Idaho Photo Stand Co, 245 P 2d 1045, 73 Idaho 13

Substantial performance shown

Ala—Wilcox v Williams, 59 So 2d 614, 257 Ala 445

Cal—Nutman v Chais, 225 P 2d 660, 101 Cal App 2d 476—Martin v Kamb, 28 P 2d 635, 142 CA 2d 468—Vowels v Witt, 301 P 2d 415, 149 CA 2d 257

Ill—Barr & Collins v. Isador, 120 N E 2d 380, 3 Ill App 2d 115—Hiller v Casey, 168 N E 2d 4, 26 Ill App 2d 261

Iowa—S D & D L Cota Plastering Co v Moore, 77 N W 2d 475, 247 Iowa 972—Partridge v Freeman, 99 N W 2d 388, 251 Iowa 18

Ky—D H Overmyer Warehouse Co v Smith, 451 S W 2d 668

Md—Gamble v Woodla Cost Co., 228 A 2d 243, 246 Md 260

Minn—G C Kohlmer, Inc. v A.Ra, 101 N W 2d 909, 257 Minn 436—Scott-Daniel Properties, Inc v Dresser, 160 N W 2d 675, 281 Minn 179

NY—Marx v Rigg, 153 N Y S.2d 440—Hartman v Devos Gardens, Inc, 195 N. Y S 2d 229, 9 AD 2d 915, affd. 203 N Y S 2d 4, 1 N Y 2d 839, 168 NE 2d 534

Or—Culver v Rendahl, 318 P 2d 275, 211 Or 682

Tex—Stricklin v Southwest Reserve Lumber Co, Civ App, 234 S W 2d 433, err ref—Thurman v Lam-ue Glass Co., Civ.App., 316 S W 2d 180

Wyo—Fronter Plumbing & Heating Co v. Patch, 480 P 2d 398

Substantial performance not shown

Ala—Welch v Lee, 93 So 2d 47, 28 Ala 594—Sabba v Lumsford, 106 So 2d 176, 261 Ala 307

Cal—Richter v Walker, 226 P 2d 93, 36 Cal 2d 634

Fla—Golub v De Luardy Flooring Co, 44 So 2d 75

Idaho—Knoblock v Avergara, 180 P 2d 198, 15 Idaho 503

NY—Klinck v 66 East 10 Realty Corp., 185 N Y S 2d 1009, 15 Misc 2d 911, affd. 193 N Y S 2d 1006, 9 A.D.2d 871.

Tex—Bradley v Hams, Civ App, 300 S.W.2d 135

51. Evidence held sufficient

Ill—Kopald v O'Grady, 128 N E.2d 621, 7 Ill App 2d 19—Homa v White, 278 N E.2d 197, 3 Ill App 3d 559

52 NY—Island Dock Lumber, Inc v Rogen & Haggerty, Inc, 32 N Y S 2d 894, 37 A.D.2d 669

Evidence held sufficient

Colo—Campbell v Kom, 91 P 2d 365, 14 Colo. 425

NY—Fox v National Constructors, Inc., 166 N Y S 2d 148, 8 Misc 2d 393

Or—Morrison-Kunden Co v Porter-Peninger, Inc., 497 P 2d 370, 262 Or 116

Va—Surf Realty Corp v. Standing, supra, n. 28

Wash—Wash Service v Fed, 24 P 2d 117, 45 Wash 2d 289—Lundberg v Corporation of Catho-lic Archbishop of Seattle, 346 P 2d 164, 55 Wash 2d 77

Evidence held insufficient

Kan—Ottawa Plumbing, Heating & Air Conditioning, Inc v Moore, 372 P 2d 1011, 190 Kan 201.

Or—Jasoe & Bushnell Const, Inc v Jordan, 310 P 2d 310, 210 Or 243

Wis—H & M Heating Co v Anden, 150 N W 2d 379, 35 Wis 2d 1

page 983

53. Ala—Miles v Moore, 79 So 2d 42, 282 Ala 441

Or—Smith v De Kray, 32 P 2d 74, 217 Or 436

54. Colo—Johnson v Ned, 229 P 2d 931, 121 Colo 377

Va—Surf Realty Corp v Standing, supra, n 28

Performance held shown

Ariz.—Lendale Co v Zocher, 388 P 2d 421, 95 Ariz 208

Ark—Wood v Hummel, 232 S W 2d 454, 217 Ark 617

Ill—Eastbrook v Ravin, 248 N E 2d 529, 109 Ill App 2d 277

N Y—Mathes Well & Pump Co v Plainview Jewish Center, 248 N Y S 2d 441, 42 Misc 2d 569—Shanus v Fulash Corp, 248 N Y S 2d 1016, 20 A D 2d 910

Nonperformance held shown

La—Sampognaro v Letterman, App, 107 So 2d 548

N Y—Klinek v 66 East 80 Realty Corp, 185 N Y S 2d 1009, 15 Misc 2d 911, affd 193 N Y S 2d 1006, 9 A D 2d 871

Wash—Davis v Altose, 215 P 2d 705, 35 Wash 2d 807—Ludral v Sixth & Battery Corp, 290 P 2d 459, 47 Wash 2d 831

55. Mo—Wilson v Berning, 293 S W 2d 151

Or—Janoe & Bushnell Const, Inc v Jordan, 310 P 2d 310, 210 Or 243

Wis—Schuelz v Forbes, 41 N W 2d 297, 256 Wis 366

Justification in preventing completion of work
Colo—Grumbine v Reynolds, 395 P 2d 10, 155 Colo 403

56. Tenn—Dealers Supply Co v First Christian Church, 276 S W 2d 769, 38 Tenn App 568

Evidence held sufficient

Mo—George F Robertson Plastering Co v Magdson, 271 S W 2d 538

57. Iowa—Banks v Carrell, 43 N W 2d 142, 241 Iowa 786

Wash—Kellogg v Wilcox, 283 P 2d 677, 46 Wash 2d 558, reh den 286 P 2d 114, 46 Wash 2d 558

Wis—Stein v Klewaha, 33 N W 2d 173, 253 Wis 15

Evidence held insufficient

Neb—Timmons v Nelson, 66 N W 2d 406, 159 Neb 193

Evidence held sufficient

Wis—Sad Grunker Co v Craighead, 146 N W 2d 478, 33 Wis 2d 42

59. D C—Washington Concrete Sales Corp v Morasette, C.A., 377 F.2d 137, 126 U S App D C 252

61. Ariz—Wahl v Southwest Sav & Loan Ass'n, 467 P 2d 930, 12 Ariz App 90, 52 A L R 3d 779, decision vac in part on oth grds 476 P 2d 836, 106 Ariz 381

Cal—Tucker v Schumacher, 202 P 2d 327, 90 Cal App 2d 71

Minn—G C Kohlmer, Inc v Albin, 101 N W 2d 909, 257 Minn 436

Mo—George F Robertson Plastering Co v Magdson, 271 S W 2d 538—Maplewood Plating Mill & Starr Co v Pennant Const Co, App, 344 S W 2d 629

N Y—Froehlich v Feldberg, 112 N Y S 2d 691, 279 App Div 1095

Va—Northern Virginia Sav & Loan Ass'n v J B Kendall Co, 135 S E 2d 178, 205 Va 136

Evidence held sufficient

Fla.—Pitts v Ahlswede, App, 139 So 2d 159

62. Ill—Erickson v Holden, 103 N E 2d 668, 345 Ill App 477

Mo—Hartel Elec Co v Gabriel, App, 316 S W 2d 139

Ohio—A I A Plumbing, Heating & Maintenance, Inc v Yeakem, 199 N E 2d 599, 119 Ohio App 266

Evidence held sufficient

(1) Cal—Credit Bureau of San Diego, Inc v Williams, 315 P 2d 355, 153 C A 2d 834—Flintkote Co v Lam Const Co, 74 Cal Rptr 136, 268 C A 2d 606—Howard A Deason & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 C A 3d 742

Ga—Rogers v Johnson, 157 S E 2d 48, 116 Ga App 295

Ind—Wynner v Harrison Sheet Steel Co, 123 N E 2d 241, 125 Ind App 169

Md—Diener v Cabbage, 270 A 2d 471, 259 Md 555—Prima Paint Corp v Ammerman, 287 A 2d 27, 264 Md 392

N J—J D Louzeaux Lumber Co v Davis, 124 A 2d 593, 41 N J Super 231

Okla—Curry v Morgan, 321 P 2d 973—Cashway Lumber Co v Langston, 479 P 2d 582

Or—Robison v Thatcher, 451 P 2d 863, 252 Or 603

S D—Stoneberger v Davis, 51 N W 2d 873, 74 S D 300

(2) La—Rathborne Lumber & Supply Co v Falgout, 62 So 2d 507, 222 La 345

Evidence held insufficient

Ariz—Williams v A J Bayless Markets, Inc, 476 P 2d 869, 13 Ariz App 348

Cal—Howard A Deason & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 C A 3d 742

Ky—Maloney v Waller, 261 S W 2d 418

Neb—Lofholm v Stoltenberg, 133 N W 2d 387, 178 Neb 318

63. Service held established

Ill—Moser Lumber, Inc v Morgan, 245 N E 2d 310, 106 Ill App 2d 339

64. Evidence held sufficient

(1) Ala—Kyser v Doan, 122 So 2d 764, 271 Ala 229

Okla—Liberty Plan Co v Francis T Smith Lumber Co, 360 P 2d 500

Tex—Royal Palma Corp v A Minella Plumbing Supplies, Inc, Civ App, 355 S W 2d 585

(2) N D—McKechine v Bamarck Lumber Co, 114 N W 2d 709

Evidence held insufficient

(3) Other evidence

Okla—Cashway Lumber Co v Langston, 479 P 2d 582

page 984

68. Evidence held sufficient

(1) Ariz—Hayward Lumber & Inv Co v Graham, 449 P 2d 31, 104 Ariz 103

Fla—Haney Chevrolet, Inc v Poh Bros, Inc, App, 262 So 2d 230

Ill—Hanna v Yeoman, 82 N E 2d 703, 336 Ill App 43

Iowa—Petersman v Hardenbergh, 97 N W 2d 152, 250 Iowa 931

La—Singer Lumber Co v King, App, 45 So 2d 567—Hattiesburg Mfg Co v Pope, App, 140 So 2d 449

Ohio—Price Bros Co v P B Harris Realty Co, 129 N E 2d 204

Okla—Knapp v Arko Interstate Elec Co, 448 P 2d 996

S D—Thomson v Pfeiffer, 145 N W 2d 438, 82 S D 313

Utah—Totorena v Thomas, 397 P 2d 984, 16 Utah 2d 175

(2) U S—York Corp v Brock, C A Fla, 405 F 2d 759

Ill—Miller Bros Indus Sheet Metal Corp v LaSalle Nat Bank, 255 N E 2d 755, 119 Ill App 2d 23

Mont—Thompson v Cure, 322 P 2d 323, 133 Mont 273

Neb—Gatchell v Henderson, 54 N W 2d 227, 156 Neb 1

S D—F H Peavey & Co v Whitman, 146 N W 2d 365, 82 S D 367

Wash—Detroit v Gunderson, 252 P 2d 580, 41 Wash 2d 886—Haynes v Columbus Producers, Inc, 344 P 2d 1032, 54 Wash 2d 899

Evidence held insufficient

La—Jeffers Trust v Justice, App, 253 So 2d 234

N Y—A L Plumbing & Heating Co v Kestel Realty Corp, 223 N Y S 2d 6, 15 A D 2d 546

Wyo—Arch Sillery, Inc v Simpson, 346 P 2d 1068

(2) Other evidence

La—Le Rouge v Crescent Aircraft Corp, App, 224 So 2d 49

Timely filing or notice established

Del—E K Geyer Co v Blue Rock Shopping Center, Inc, Super, 229 A 2d 499

Fla—Sharpe v Herman A Thomas, Inc, App, 250 So 2d 330

La—Groves v Dehan, App, 113 So 2d 328—Windham Woodwork & Supply Co v Hopkins, App, 122 So 2d 106

Md—Parkway Estates, Inc v Burnham, 122 A 2d 326, 210 Md 64

Minn—Ternes v Westberg, 75 N W 2d 415, 246 Minn 485

Neb—Rosebud Lumber & Coal Co v Holmes, 52 N W 2d 313, 155 Neb 459, reh den 53 N W 2d 82, 155 Neb 688

Okla—Cushing Country Club v Boardman Co, 381 P 2d 856

Timely filing or notice not established

Ark—Strush v Wallin-Dickey & Rich Lumber Co, 302 S W 2d 522, 227 Ark 885

Fla—Russell v Danford, App, 139 So 2d 743

Kan—Mack-Welling Lumber & Supply Co v Bedore, 379 P 2d 545, 191 Kan 88

La—Taylor Seidenbach, Inc v Healy, App, 90 So 2d 158—Twinn City Lumber & Supply Co v Jackson, App, 115 So 2d 402

Or—Dallas Lumber & Supply Co v Phillips, 436 P 2d 739, 249 Or 58

Tex—Finger Furniture Co v Chase Manhattan Bank, Civ App, 413 S W 2d 131, err ref no rev err

Utah—Bartlett Elec, Inc v Ballard, 449 P 2d 991, 22 Utah 2d 147

Lien, etc.

(2) Other cases

Mo—Wilson v Berning, App, 293 S W 2d 151

Evidence held insufficient

Kan—Don Conroy Contractor, Inc v Jensen, 387 P 2d 187, 192 Kan 300

72. Evidence held sufficient

Ark—Arkansas Louisiana Gas Co v Moffitt, 436 S W 2d 91, 245 Ark 992, 51 A L R 3d 1078

Ill—De Anguera v Arreguin, 234 N E 2d 808, 92 Ill App 2d 381

Mont—Walsh-Anderson Co v Keller, 362 P 2d 533, 139 Mont 210

Mo—Hunt v Riggins, App, 341 S W 2d 136

N C—Priddy v Kernersville Lumber Co, 129 S E 2d 256, 258 N C 653

Okla—Brown v Magera, 359 P 2d 321—Liberty Plan Co v Francis T Smith Lumber Co, 360 P 2d 500

Wyo—Sawyer v Sawyer, 335 P 2d 794, 79 Wyo 489—Arch Sillery, Inc v Simpson, 360 P 2d 911

Occupation as conclusive evidence

Colo—Bulow v Ward Terry & Co, 396 P 2d 232, 155 Colo 560

page 985

73. Evidence held sufficient

(1) Mo—Davidson v Fisher, App, 258 S W 2d 297

(2) Minn—Kahle v McClary, 96 N W 2d 243, 255 Minn 239

74. D C—Curtis v Chambers, C.A., 310 F 2d 857, 114 U S App D C 52

Neb—Timmons v Nelson, 66 N W 2d 406, 159 Neb 193

Nev—Southern Nevada Plumbing & Heating Corp v Adelson, 381 P 2d 232, 79 Nev 233

N Y—Joe Smith, Inc v Otto-Charles Corp, 107 N Y S 2d 233, 279 App Div 1, motion den 108 N Y S 2d 1008, 279 App Div 708, affd 107 N E 2d 598, 304 N Y 684

Evidence held sufficient

Ga—Davenport Bros v Pepper, 133 S E 2d 54, 108 Ga App 372

Ill—Capital Plumbing & Heating Supply Co v Snyder, 275 N E 2d 663, 2 Ill App 3d 660

Ind—Kendall Lumber & Coal Co v Roman, 91 N E 2d 187, 20 Ind App 368

La—Groves v Dehan, App, 113 So 2d 328—Deutsch v Castano, App, 189 So 2d 286

Md—Dente v Bulha, 76 A 2d 158, 196 Md 238—East-over Stores, Inc v Minnux, 150 A 2d 884, 219 Md 658

N M—Home Plumbing & Contracting Co v Pruitt, 372 P 2d 378, 70 N M 182

Page 985

Okl—Berry v Barbour, 279 P 2d 335
 Tex—Diaz v Trevino, Civ App, 430 S W 2d 742
 Utah—Millard v Parry, 271 P 2d 852, 2 Utah 2d 217
Evidence held insufficient
 Ill—Blohm v Kagy, 94 NE 2d 516, 341 Ill App 468
 NY—Joseph Roscato, Inc v Northern Boulevard at 62nd St Realty Corp, 147 N Y S 2d 231, 1 A D 2d 701, motion den 157 N Y S 2d 347, 2 N Y 2d 716, 138 NE 2d 718, and 157 N Y S 2d 390, 2 N Y 2d 754, 138 NE 2d 747, affd 161 N Y S 2d 132, 2 N Y 2d 874, 141 NE 2d 620—Roberg v Evyan, Inc, 163 N Y S 2d 729, 7 Misc 2d 851
 RI—F D McKendall Lumber Co v DiDonato, 82 A 2d 403, 78 RI 401
 78. Cal—Fadel v Slayman, 202 P 2d 775, 90 Cal App 2d 413
 Ill—Cannon Const Corp v Park Transp Co, 252 NE 2d 365, 116 Ill App 2d 61
 Miss—Carson v Moore, 227 So 2d 452
Evidence held sufficient
 Ala—Bonner v Barber, 114 So 2d 400, 269 Ala 591
 Cal—Cunningham v Weaver, 279 P 2d 830, 130 C A 2d 787
 Idaho—Willes v Palmer, 298 P 2d 972, 78 Idaho 104
 Ill—Eastabrooks v Ravlin, 248 NE 2d 529, 109 Ill App 2d 277
 Ind—Wymier v Harrison Sheet Steel Co, 123 NE 2d 241, 125 Ind App 169
 La—Hughes v Will, App, 35 So 2d 241
 Md—Eastover Co v All Metal Fabricators, Inc, 158 A 2d 89, 221 Md 428—Hepding v Debra Corp, 255 A 2d 352, 254 Md 641
 Minn—Ternes v Westberg, 75 NW 2d 415, 246 Minn 485—Scott—Daniels Properties, Inc v Dresser, 160 NW 2d 675, 281 Minn 179
 Mo—Hertel Elec Co v Gabriel, App, 292 S W 2d 95
 NJ—Solondz Bros Lumber Co v Piperato, 101 A 2d 33, 28 NJ Super 414
 NY—Walsh v Boulder Apartments, Inc, 191 N Y S 2d 503—La Rose v Backer, 203 N Y S 2d 740, 11 A D 2d 314, am on oth grds 207 N Y S 2d 258, 11 A D 2d 969, motion den 224 N Y S 2d 684, 10 N Y 2d 1006, 180 NE 2d 264, affd 226 N Y S 2d 695, 11 N Y 2d 760, 181 NE 2d 632
 Pa—Albert v Gurelnick, 63 A 2d 376, 164 Pa Super 204
 SD—Keeley Lumber & Coal Co v Dunker, 77 NW 2d 689, 76 SD 281
Evidence held insufficient
 Iowa—McDonald v Welch, 176 NW 2d 846
 Neb—Grothe v Erickson, 59 NW 2d 368, 157 Neb 248
 NY—Rappi v Smith, 112 N Y S 2d 881, 279 App Div 1140
Amount held inadequate
 Iowa—A and R Concrete & Const Co v Braklow, Iowa, 103 NW 2d 89, 251 Iowa 1067
 76. **Evidence held sufficient**
 Ill—Booher v Williams, 95 NE 2d 518, 341 Ill App 504
 Iowa—A and R Concrete & Const Co v Braklow, Iowa, 103 NW 2d 89, 251 Iowa 1067
 Md—Holcomb v Fender, 101 A 2d 814, 203 Md 480—Goodman v Winkowski, 241 A 2d 407, 249 Md 546
 Minn—Engler Bros Const. Co v L'Alber, 159 NW 2d 183, 280 Minn 208
 Mont—Svert v McGinnis, 349 P 2d 580, 136 Mont 537
 Neb—Rodgers v Jorgensen, 67 NW 2d 770, 159 Neb 485
 NY—Froehlich v Feldberg, supra, n 61—Rakanskas v Konecny, 138 N Y S 2d 156, 285 App Div 984—Fox v National Constructors, Inc, 166 N Y S 2d 148, 8 Misc 2d 393
 Or—Johnson v Develco, Inc, 488 P 2d 794, 260 Or 106
 Tex—Stricklin v Southwest Reserve Life Ins Co, supra, n 49
 Wash—Larson v Duclos, 281 P 2d 458, 46 Wash 2d 334

Wis—Sniki v De Both, 44 NW 2d 542, 258 Wis 17
Evidence held insufficient
 Idaho—Ivie v Peck, 495 P 2d 1110, 94 Idaho 625
 Wash—Hopkins v Ulvestad, 282 P 2d 806, 46 Wash 2d 514
 77 Ind—Kendall Lumber & Coal Co v Roman, 91 NE 2d 187, 120 Ind App 368
 Md—Bronus Homes Corp v Bennett, 96 A 2d 612, 202 Md 433
 Wis—Grether v Derzon, 95 NW 2d 226, 6 Wis 2d 443
Evidence held sufficient
 Ariz—Parker v Holmes, 284 P 2d 455, 79 Ariz 82, 51 A L R 2d 1005—Lentsite Co v Zocher, 388 P 2d 421, 95 Ariz 208
 Cal—Brooks v Duskim, 324 P 2d 351, 159 C A 2d 629—B & J Const Co v Spacious Homes, Inc, 22 Cal Rptr 41, 204 C A 2d 216
 Fla—Haney Chevrolet, Inc v Poli Bros, Inc, App, 262 So 2d 230
 Idaho—Ivie v Peck, 495 P 2d 1110, 94 Idaho 625
 Ky—Boggess v Brvins, 231 S W 2d 32, 313 Ky 451
 Minn—Barrett v Hampe, 53 NW 2d 803, 237 Minn 80—Bierlein v Gagnon, 96 NW 2d 573, 255 Minn 143
 Nev—Stardust, Inc v Desert York Co, 369 P 2d 444, 78 Nev 91
 NM—Edwards v Erwin, 197 P 2d 435, 52 NM 280
 NY—Mathus Well & Pump Co v Plainview Jewish Center, 248 N Y S 2d 441, 42 Misc 2d 569
 Or—Thelin v Taylor, 432 P 2d 791, 248 Or 149
 Wash—Bunn v Bates, 216 P 2d 741, 36 Wash 2d 100
 Wis—Central Refrigeration v Monroe, 47 NW 2d 438, 259 Wis 23—Garaska v Russo, 154 NW 2d 286, 37 Wis 2d 146
 Wyo—United Pac Ins Co v Martin & Luther General Contractors, Inc, 455 P 2d 664
Evidence held insufficient
 Fla—Poranski v Mullings, 82 So 2d 675
 Iowa—Carlson v Maughmer, 168 NW 2d 802
 page 986
 78. **Evidence held sufficient**
 (1) Iowa—A and R Concrete & Const Co v Braklow, Iowa, 103 NW 2d 89, 251 Iowa 1067
 (2) Cal—Benson Elec Co v Hale Bros Associates, Inc, 55 Cal Rptr 73, 246 C A 2d 686
 Ill—Pedi v Jagencarz, 167 NE 2d 447, 25 Ill App 2d 467—Ed Kern Builders, Inc v Hartley, 268 NE 2d 49, 132 Ill App 2d 119
 Minn—Standard Const Co v National Tea Co, 62 NW 2d 201, 240 Minn 422
 (3) Fla—Broderick v Overhead Door Co of Fort Lauderdale, App, 117 So 2d 240
Evidence held insufficient
 Mich—Canvasser Custom Builders, Inc v Seskin, 171 NW 2d 654, 18 Mich App 606
 NY—John H Restz, Inc v Stackler, 201 N Y S 2d 54, 24 Misc 2d 291
 Wash—Hopkins v Ulvestad, 282 P 2d 806, 46 Wash 2d 514
 79. Or—Culver v Rendahl, 318 P 2d 275, 211 Or 682
 80. Neb—Tummos v Nelsen, 66 NW 2d 406, 159 Neb 193
 Wash—Whitney v McKay, 344 P 2d 497, 54 Wash 2d 672
 81. **Evidence held sufficient**
 (1) Ill—Ed Kern Builders, Inc v Hartley, 268 NE 2d 49, 132 Ill App 2d 119
 Mich—Moss v Torosian, 104 NW 2d 777, 361 Mich 50
 NM—Parnell v Breece, supra, n 25
 NY—Lacata v Marra, 215 N Y S 2d 515, 13 A D 2d 903
 Or—Gabriel v Corkum, supra, n 39
 SC—Austin-Griffith v Goldberg, 79 S E 2d 447, 224 S C 372, 42 A L R 2d 1123
 (2) Vaughn v Carlton, 217 S W 2d 201, 309 Ky 180

Wash—Swenson v Lowe, 486 P 2d 1120, 5 Wash App 186
Evidence held insufficient
 Cal—Brand v Riener, 199 P 2d 736, 88 Cal App 2d 875
 Md—Pasarew Const Co v Tower Apartments, 109 A 2d 744, 205 Md 566
 (2) Counterclaim
 NY—Joe Smith, Inc v Otis-Charles Corp, supra, n 74—Tuxedo Park Ass'n v Jackson, 127 N Y S 2d 364, 283 App Div 675, affd 122 NE 2d 750, 307 NY 865, rearg den 123 NE 2d 578, 307 NY 937
 82. Ala—Kyser v Doan, 122 So 2d 764, 271 Ala 229
 Fla—Trowbridge, Inc v Hathaway, 233 So 2d 129
 83 Iowa—Central Ready Mix Co v John G Ruhlin Const Co, 139 NW 2d 444, 258 Iowa 500
Evidence held sufficient
 Alaska—Moore v Alaska Metal Buildings, Inc, 448 P 2d 581
 Fla—Tassinari v Chaney, App, 187 So 2d 376
 Ill—Hosna v White, 278 NE 2d 197, 3 Ill App 3d 559
 Iowa—Denniston & Partridge Co v Mingus, 179 NW 2d 748
 Md—Diener v Cabbage, 270 A 2d 471, 259 Md 555
 Minn—Breiken v Holten, 182 NW 2d 717, 289 Minn 95
 Mo—Romme v Rex Darnall, Inc, App, 541 S W 2d 50
 Or—Robson v Thatcher, 451 P 2d 863, 252 Or 603
 Tex—Perera v Gulf Elec Co, Civ App, 343 S W 2d 334, err ref no rev err
 Wash—Thrifty Supply Co of Seattle v Deveran Builders, Inc, 475 P 2d 905, 3 Wash App 425
Evidence held insufficient
 Iowa—Pay-N-Taket, Inc v Crooks, 145 NW 2d 621, 259 Iowa 719
 Mo—Beckemeier v Baessler, 270 S W 2d 782, transf, App, 261 S W 2d 511
 NJ—Tolland v Lata, 134 A 2d 601, 46 NJ Super 272
 NY—Lorber v Eskof Real Estate, Inc, 194 N Y S 2d 766, 21 Misc 2d 308
 Wash—Fris v Brown, 224 P 2d 330, 37 Wash 2d 457
 85. Ark—Long-Bell Lumber Co v Auxer, 255 S W 2d 163, 221 Ark 672
 89. Tex—Harris v Interstate Lumber Co, Civ App, 303 S W 2d 950
 page 987
 94 Ala—Farmer v Johns-McBride Engineering Service, 54 So 2d 708, 256 Ala 335
 NJ—Solondz Bros Lumber Co v Piperato, 101 A 2d 33, 28 NJ Super 414
 96. **Evidence held insufficient**
 Cal—Consumers Holding Co v Los Angeles County, 22 Cal Rptr 106, 204 C A 2d 234, motion den 25 Cal Rptr 215, 208 C A 2d 419
 97. Fla—Sharpe v Ceco Corp, App, 242 So 2d 464—Adobe Brick & Supply Co v Port Royale Apartments, Inc, App, 267 So 2d 336
 Neb—W L Phillips Sons v Northwest Realty Co, supra, n 25
Evidence held sufficient
 (1) Ala—Teague Hardware Co v Bankhead Development Co, 151 So 2d 611, 274 Ala 697
 Miss—Williams v Taylor, 62 So 2d 883, 216 Miss 563
 NJ—James Falcone Plumbing & Heating Co v Pasquale, 97 A 2d 720, 26 NJ Super 285—Solondz Bros Lumber Co v Piperato, supra, n 95
 Tenn—Bun-Nicodemus, Inc v Bethay, 292 S W 2d 234, 40 Tenn App 487
 (2) Minn—Weyerhaeuser Co (Rico Laminated Products Division) v Hvidsten, 129 NW 2d 772, 268 Minn 448
Evidence held insufficient
 Ala—Lundsey v Rogers, 69 So 2d 445, 260 Ala 231

(2) Mont—Frank J Trunk & Son, Inc v DeHaan, 391 P 2d 353, 143 Mont 442

98. Evidence held sufficient

Fla—Goldberg Ceco Corp, App, 252 So 2d 849

Evidence held insufficient

Mass—Valentine Lumber & Supply Co v Thibault, 130 NE 2d 873, 333 Mass 361

1 Evidence held sufficient

Tenn—Bain-Nicodemus, Inc v Bethay, 292 SW 2d 234, 40 Tenn App 487

Evidence held insufficient

Ga—Saye v Athens Lumber Co, 93 SE 2d 806, 94 Ga App 118

2. Evidence held sufficient

Ark—Wells v Planters Lumber Co, 327 SW 2d 1, 230 Ark 570

4. Clear and convincing evidence, etc

(2) Other cases—Radley v Raymond, 209 P 2d 305, 34 Wash 2d 475

Evidence held sufficient

Ark—Lyman Lamb Co v Arkansas Shell Homes, Inc, 406 SW 2d 708, 241 Ark 83

Cal—Vowels v Witt, 308 P 2d 415, 149 CA 2d 257

Ill—Pedi v Jagencarz, 167 NE 2d 447, 25 Ill App 2d 467

Mass—Valentine Lumber & Supply Co v Thibault, 130 NE 2d 868, 333 Mass 352

Mo—Mid-West Engineering & Const Co v Campagna, 397 SW 2d 616, app after remand 421 SW 2d 229

Ohio—Price Bros Co v P B Harris Realty Co, 129 NE 2d 204

SD—E S Gaynor Lumber Co v Morrison, 60 NW 2d 83, 75 SD 132

Tenn—Hammer-Johnson Supply, Inc v Curtus, 364 SW 2d 496, 51 Tenn App 72

Va—Garrett v Ancarrow Marine, Inc, 180 SE 2d 668, 211 Va 755

Fraud between owner and contractor

(5) Other evidence

Cal—California Viking Sprinkler Co v Cheney, 6 Cal Rptr 197, 182 CA 2d 564

Md—Gamble v Woodless Const Co, 228 A 2d 243, 246 Md 260

Evidence held insufficient generally

Cal—B & J Const Co v Spacious Homes, Inc, 22 Cal Rptr 41, 204 CA 2d 216

Ill—Boober v Williams, 95 NE 2d 518, 341 Ill App 504

Fraud in enforcement

Me—Morin v H W Maxum Co, 82 A 2d 789, 146 Me 421

page 998

6. Nev—Robert A Pierce Co v Sherman Gardens Co, 419 P 2d 781, 82 Nev 395, app after remand 491 P 2d 48, 87 Nev 558

Evidence held sufficient

(2) Mont—Duval v Fucha, 375 P 2d 541, 141 Mont 123

(3) Colo—Pope Heating & Air Conditioning Co v Garrett-Bromfield Mortg Co, 480 P 2d 602, 29 Colo App 169

(4) To show other matters

Or—Drake Lumber Co v Paget Mortg Co, 274 P 2d 804, 203 Or 66

Evidence held insufficient

Conn—Morris v Jarvie, 75 A 2d 47, 137 Conn 97

Mich—G O Lewis Co v Erving, 145 NW 2d 368, 4 Mich App 589

Nev—Sherman Gardens Co v Longley, 491 P 2d 48, 87 Nev 558

NY—American Cement Corp v Underhill Const Co, 321 NY S 2d 402, 36 AD 2d 849

Pa—Albert v Gurelsack, 63 A 2d 376, 164 Pa Super 204

7. Mo—Putnam v Heathman, App, 367 SW 2d 823

Wash—Willett v Davis, 193 P 2d 321, 30 Wash 2d 622

8 US—Dizard & Getty, Inc v Wiley, CA Wash, 324 F 2d 77

10. NJ—Apex Roofing Supply Co v Miller, 190 A 2d 553, 79 NJ Super 68

13. NY—Arr-Em Plastering Corp v 515 East 85th St Corp, 266 NY S 2d 944, 25 AD 2d 59

Evidence held sufficient

(2) Cal—E K Wood Lumber Co v Higgins, 4 Cal Rptr 523, 351 P 2d 795, 54 C 2d 91

(3) Minn—Colvin Lumber & Coal Co v JAG Corp, 109 NW 2d 425, 260 Minn 46

Mo—E C Robinson Lumber Co v Ladman, App, 255 SW 2d 72

Evidence held insufficient

Cal—Consumers Holding Co v Los Angeles County, 22 Cal Rptr 106, 204 CA 2d 234, motion den 25 Cal Rptr 215, 208 CA 2d 419

Colo—Bishop v Moore, 323 P 2d 897, 137 Colo 263

Okla—United Benefit Life Ins Co v Norman Lumber Co, 484 P 2d 527

Wash—Boise Cascade Corp v Distinctive Homes, Inc, 407 P 2d 452, 67 Wash 2d 289

Inequitableness of granting lien not shown

Mo—St Louis Flexscore, Inc v Lintzenich, App, 414 SW 2d 787

15 Evidence held sufficient

Ark—Kennemore v Robbins, 266 SW 2d 64, 223 Ark 384

Cal—Campbell v Jung, 261 P 2d 549, 120 CA 2d 588

Ga—Wilson v Harris, 130 SE 2d 612, 107 Ga App 509

Ind—Voorhees-Jontz Lumber Co v Bezak, 209 NE 2d 380, 137 Ind App 382

Evidence held insufficient

Ark—Orrell v E C Barton & Co, 398 SW 2d 685, 240 Ark 211

NJ—General Elec Co v E Fred Sulzer & Co, 222 A 2d 655, 92 NJ Super 210

Ohio—Price Bros Co v P B Harris Realty Co, 129 NE 2d 204

page 999

16 Colo—3190 Corp v Gould, 431 P 2d 466, 163 Colo 356

17. Kan—Norris v Nitsch, 325 P 2d 326, 183 Kan 86

18 Clear evidence as to time of commencement of improvement required

Mo—Henges Co v Doctors' North-Roads Bldg, Inc, App, 409 SW 2d 489

19. Evidence held sufficient

Fla—Gesser v Permacrete, Inc, 90 So 2d 610

Minn—Barrett v Hampe, 53 NW 2d 803, 237 Minn 80

Okla—Hanna Lumber Co v Wilkins, 444 P 2d 213

Evidence held insufficient

Mass—Vinson v Cooley, 54 So 2d 750

21. Evidence held sufficient

Tex—Parkdale State Bank v McCord, Civ App, 428 SW 2d 121, err ref no rev err

§ 311. In General

Library References

Mechanics' Liens ¶286 et seq.

24. Ill—Hinkle v Creek, 251 NE 2d 111, 113 Ill App 2d 454

28. Pa—W-B Bldg Supply Co v Creso, 54 Luz.L Reg 275

page 990

32. Ill—Fence Co of America v Scott-Ballantyne Co, 111 NE 2d 190, 349 Ill App 467

Va—Mann v Clowser, 59 SE 2d 78, 190 Va 887

33. Ruling reserved on issue of priorities

Ill—Ripperden v Henry Absher Chevrolet, Inc, 274 NE 2d 113, 1 Ill App 3d 712

37. SC—Stone & Clamp, General Contractors v Holmes, 60 SE 2d 231, 217 SC 203

38 Waiver of jury

Pa—Koch v Thompson, 32 Wash Co 71

40. Ws—Sid Grinker Co v Craighead, 146 NW 2d 478, 33 Ws 2d 42

§ 312. References

49. NY—Redderborg v Ballard, 86 NY S 2d 414—Davidson v Sterns, 110 NY S 2d 346, 279 App Div 875

page 991

52. Idaho—Mackey v Eva, 328 P 2d 66, 80 Idaho 260

III—Rozerma v Quinn, 201 NE 2d 649, 51 Ill App 2d 479

56 Dismissal of complaint

III—Howard T Fisher & Associates, Inc v Shimmer Realty Co, 164 NE 2d 266, 24 Ill App 2d 216

65. Idaho—Mackey v Eva, 328 P 2d 66, 80 Idaho 260

Ky—Whitehead v Watts, 254 SW 2d 719

NY—Hammel v Hutner, 95 NY S 2d 66, 276 App Div 976, aff'd 99 NE 2d 560, 302 NY 806

page 992

69. DC—Hart v Williams, CA, 202 F 2d 190, 91 US App DC 340

Who may except

Md—Martin v Golden Key Homes, Inc, 223 A 2d 589, 244 Md 367

70. Evidence held to sustain exceptions

Ill—Kopald v O'Grady, 128 NE 2d 623, 7 Ill App 2d 19

79. NM—Purdy v Tucker, 214 P 2d 766, 54 NM 86

80 NY—Pioneer Const Co of Schenectady v Niskayuna Const Co, 186 NY S 2d 902, 8 AD 2d 879

§ 314. Questions of Law and Fact

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84 Cal—Dustefano v Hall, 32 Cal Rptr 770, 218 CA 2d 637

87 Fla—Green v Putnam, 93 So 2d 378

Mo—Stewart Concrete & Material Co v James H Stanton Const Co, App, 433 SW 2d 76

NJ—Columbia Lumber & Millwork Co v De Stefano, 95 A 2d 914, 12 NJ 117

page 993

89. Mo—Bremer v Mohr, App, 478 SW 2d 14

Pa—Anastasi v Brunet, 90 A 2d 636, 171 Pa Super 464

Evidence held insufficient for jury

Tex—Judson v Scanlan, Civ App, 341 SW 2d 702

4. Evidence held insufficient for jury

Pa—Green Hills Lumber Co v Williams, 198 A 2d 635, 203 Pa Super 3

91. Fla—Westinghouse Elec Corp v Carol Fla. Corp, App, 122 So 2d 795

SD—Brodeky v Maloney, 105 NW 2d 911, 78 SD 605

Summary dismissal should be denied

NY—Bratius Corp v Berger, 120 NE 2d 829, 307 NY 626

92. Ga—Spector v Model Const Co, 96 SE 2d 900, 95 Ga App 14

Ratification

NC—General Air Conditioning Co v Douglass, 84 SE 2d 828, 241 NC 170

93. Ark—Huffman Wholesale Supply Co v Terry, 399 SW 2d 658, 240 Ark 399

Colo—Samett v Whelan, 362 P 2d 559, 147 Colo 41.

Page 993

- Fla.—Westinghouse Elec Corp v Carol Fla Corp, App, 122 So 2d 795
- Idaho—Williams v Idaho Potato Starch Co, 245 P 2d 1045, 73 Idaho 13
- Mo.—Vasquez v Village Center, Inc, 362 S W 2d 588
- N Y.—Dittmar Explosives, Inc v A E Ottaviano, Inc, 231 N E 2d 756, 20 N Y 2d 498, 285 N Y S 2d 55
- Ohio—Love Lumber Co v Reaser, 212 N E 2d 655, 4 Ohio App 2d 354
95. Ark.—Huffman Wholesale Supply Co v Terry, 399 S W 2d 658, 240 Ark 399
97. Mo.—Otte v McAnuliffe, App, 441 S W 2d 733

page 994

9. Mo.—Continental Elec Co v Ebcoc, Inc, App, 365 S W 2d 746, app transf to, Sup, 375 S W 2d 134
- Okl.—U S Fidelity & Guaranty Co v Belew, 325 P 2d 429
- Pa.—Rufe v Neff, 69 Montg Co 352
11. Tex.—Trinity Universal Ins Co v Palmer, Civ App, 412 S W 2d 691, err ref no rev err
15. Wash.—Reed Sand & Gravel, Inc v Bellevue Properties, 502 P 2d 480, 7 Wash App 701
16. N C.—General Air Conditioning Co v Douglass, 84 S E 2d 828, 241 N C 170
18. Miss.—Bullock v Hans, 43 So 2d 670, 208 Miss 41
21. Wyo.—Frontier Plumbing & Heating Co v Fitch, 480 P 2d 398
24. Cal.—Shelley v Kofka, 237 P 2d 984, 107 C A 2d 827
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26. Ill.—Blohm v Kagy, 106 N E 2d 141, 347 Ill App 78
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page 995

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Non suit

- N C.—General Air Conditioning Co v Douglass, 84 S E 2d 828, 241 N C 170—Clark v Morris, 162 S E 2d 873, 2 N C App 388
28. Ill.—Erich v O'Mahony, 111 N E 2d 189, 349 Ill App 537
31. Okl.—Acme Glass Co v Owens, 232 P 2d 624, 204 Okl 601
36. Pa.—Meade v Parmenter Plywood Service, 59 A 2d 78, 359 Pa. 392
37. Cal.—Brodenick v Torresan, 198 P 2d 75, 88 Cal App 2d 18
- Ind.—Byerly v Lusardi, 182 N E 2d 4, 133 Ind App 315
- N Y.—Osborne v McGowan, 149 N Y S 2d 781, 1 A D 2d 924
- Tex.—Bradley v Harris, Civ App, 300 S W 2d 335
41. Ga.—Weathers v Modern Masonry Materials, Inc, 125 S E 2d 532, 105 Ga App 736
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46. Okl.—H E Leonhardt Lumber Co v Ed Wamble Distributing Co, 378 P 2d 771—Cushing Country Club v Boardman Co, 381 P 2d 856
47. N C.—Goldston v Randolph Mach Tool Co, 95 S E 2d 455, 245 N C 226
- Okl.—Liberty Plan Co v Francis T Smith Lumber Co, 360 P 2d 500—Knapp v Arko Interstate Elec Co, 448 P 2d 996

page 996

49. Ariz.—Wahl v Southwest Sav & Loan Ass'n, 467 P 2d 930, 12 Ariz App 90, 52 A L R 3d 779, decision vac in part on oth grds 476 P 2d 836, 106 Ariz 381
- Cal.—Scott, Blake and Wynne v Summit Ridge Estates, Inc, 59 Cal Rptr 587, 251 C A 2d 347—E D

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- Colo.—American Factors Associates, Ltd v Triangle Heating & Sheet Metal Co, 503 P 2d 163, 31 Colo App 240
- La.—Windham Woodwork & Supply Co v Hopkins, App, 122 So 2d 106
50. Me.—Andrew v Dubeau, 146 A 2d 761, 154 Me 254
- Mont.—Walsh-Anderson Co v Keller, 362 P 2d 533, 139 Mont 210
52. Cal.—Howard A Deason & Co v Costa Tierra Limited, 83 Cal Rptr 105, 2 C A 2d 742
- Pa.—Stiles v Bangor Republican Club, 34 North 348
62. Cal.—Borello v Eichler Homes, Inc, 34 Cal Rptr 648, 221 C A 2d 487
63. Ga.—Builders Supply Co v Thomas, 166 S E 2d 33, 118 Ga App 830
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Matters considered by jury

- Wyo.—United Pac Ins Co v Martin & Luther General Contractors, Inc, 435 P 2d 664
64. Mo.—Burgdorfer Elec Co v Voyles Const Co, App, 432 S W 2d 387
- Okl.—Tollett v Clay, 249 P 2d 412, 207 Okl 283
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page 997

69. Okl.—Tollett v Clay, supra, n 64
71. Cal.—Rodeffer Industries, Inc v Chambers Estates, Inc, 69 Cal Rptr 551, 263 C A 2d 116
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§ 315. Instructions

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Mechanics' Liens ¶289

77. Idaho—Dawson v Eldredge, 372 P 2d 414, 84 Idaho 331

Instructions held not improper as argumentative

Ga.—Murphy v Fuller, 100 S E 2d 137, 96 Ga App 403

80. Ga.—Murphy v Fuller, 100 S E 2d 137, 96 Ga App 403

Mo.—Vasquez v Village Center, Inc, 362 S W 2d 588

Instructions held sufficient or not erroneous

Ga.—Fitts v Addis, 64 S E 2d 466, 83 Ga App 696—Wilson v Harris, 130 S E 2d 612, 107 Ga App 509

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N J.—Bard Const Co v Wandner Co, 79 A 2d 54, 12 N J Super 118

82. Mo.—Hong Const Co v Szombathy, 345 S W 2d 111

83. Cal.—Datselino v Hall, 32 Cal Rptr 770, 218 C A 2d 657

§ 316. Verdict and Findings

Library References

Mechanics' Liens ¶290.

page 998

92. Me.—E A Thompson Lumber Co v Heald, 170 A 2d 156, 157 Me 78
- S D.—Scott v Rapid Valley Race Track, 66 N W 2d 713, 75 S D 424
95. Ill.—Hosna v White, 278 N E 2d 197, 3 Ill App 3d 559

2. Findings held insufficient to support forfeiture of lien

Cal.—B & J Const Co v Spacious Homes, Inc, 22 Cal Rptr 41, 204 C A 2d 216

page 999

- 4 Findings held sufficient

(1) Cal.—Richter v Walker, 226 P 2d 593, 36 Cal 2d 634—Jay Bailey Const Co v Berry Hotel Corp, 34 Cal Rptr 272, 221 C A 2d 135

Colo.—Bulow v Ward Terry & Co, 396 P 2d 232, 155 Colo 560

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13. Cal.—Brand v Ruemer, 199 P 2d 736, 88 Cal App 2d 875

15. Ala.—Huffman-East Development Corp v Summers Elec Supply Co, 263 So 2d 677, 288 Ala 579

23. Cal.—Richter v Walker, supra, n 4—Vila v Ruolo, 6 Cal Rptr 592, 183 C A 2d 178

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page 1000

24. Cal.—Nuttman v Chau, 225 P 2d 660, 101 Cal App 2d 476

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33. Okl.—Thomas v Owens, supra, n 4

39. Cal.—Zweig v Fireman's Fund Indem Co, 293 P 2d 812, 139 C A 2d 461

Mont.—Siert v McGinnis, 349 P 2d 580, 136 Mont 537

Findings held not conflicting, contradictory, or inconsistent

(1) Cal.—Marshall v La Bos, 270 P 2d 99, 125 C A 2d 253

Tex.—Hilliard v Home Builders Supply Co, Civ App, 399 S W 2d 198, err ref no rev err

page 1001

43. Cal.—Scott, Blake and Wynne v Summit Ridge Estates, Inc, 59 Cal Rptr 587, 251 C A 2d 347—Robinson v Diller, 79 Cal Rptr 508, 274 C A 2d 813

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45. Wash.—Whitney v McKay, 344 P 2d 497, 54 Wash 2d 672

§ 317. Nature as in Rem or in Personam

page 1002

58. Colo.—Bulow v Ward Terry & Co, 396 P 2d 232, 155 Colo 560

Ill.—Moser Lumber, Inc v Morgan, 245 N E 2d 310, 106 Ill App 2d 339

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59. Ill.—Moser Lumber, Inc v Morgan, 245 N E 2d 310, 106 Ill App 2d 339

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Consent judgment

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61. Under statute entry of interlocutory judgment held permissive
Ark—Lofis v Edwards, 356 S W 2d 742, 235 Ark 30

§ 318. Judgment by Default

69. La—Picon's Builders Supply Co v Schultz, App., 263 So 2d 495, writ den 266 So 2d 429, 262 La 1117
Nev—Opaco Lumber & Realty Co v Pappa, 340 P 2d 95, 75 Nev 312
NJ—New Jersey Cabinet & Mill Co v Creedon, 95 A 2d 29, 24 N J Super 533
Pa—St Clair v Drum, 80 Pa Dist & Co 70, 23 Northumb Leg J 181

Purpose of affidavit by defendant

- Del—Miller v Master Home Builders, Inc., Super., 239 A 2d 696

Setting aside abuse of discretion

- NY—August Bohl Contracting Co, Inc v IUE, AFL-CIO Dist No. 3, 424 N Y S 2d 752, 73 A D 2d 1023

page 1003

74. Pa—Pysker v McLeod, 31 North Co 271—St Clair v Drum, supra, n 69
81. Pa—Shultz v Zoretski, 28 Northumb LJ 110

§ 319. Requisites and Essentials in General

Library References

Mechanics' Liens ⇐291

page 1004

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Tenn—General Elec Supply Co v Arien Realty & Development Corp., 546 S W 2d 210
91. NY—Hampton Bays Supply Co v Adler, 147 N Y S 2d 775, 3 Misc 2d 224
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page 1005

4. Cal—Frank Fusano and Associates v Taggart, 105 Cal Rptr 414, 29 CA 3d 1
Ga—Q S King Co v Munter, 184 S E 2d 594, 124 Ga App 517
6. Kan—Fouts v Armstrong Commercial Laundry Distributing Co., 495 P 2d 1390, 209 Kan 59

page 1006

11. Ala—McMinn v Derrick, 109 So 2d 710, 268 Ala 604
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12. Fla—Trumont Co. v Pasche, 81 So 2d 489
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13. NY—Coppola Bros Excavation Corp v M. Melnick & Co, Inc, 389 N Y S 2d 7, 55 A D 2d 522, an on oth grds 391 N Y S 2d 121, 56 A D 2d 524, aff'd 372 N E 2d 797, 43 N Y 2d 752, 401 N Y S 2d 1009
16. Fla—Brown v Park, 198 So 462, 144 Fla 696
26. Del—Gaster v Colkron, 297 A 2d 384, 73 A L R 3d 510
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27. Credits allowed
Tex—Bogel v Home Lumber Co., 283 S W 2d 794, err rd no rev err

Judgment held erroneous

- Me—E A Thompson Lumber Co v Heald, 170 A 2d 156, 157 Me 78

page 1007

29. Mich—Childers Mfg Co v Altman, 298 N W 2d 725, 100 Mich App 289

Securing discharge of lien

- NY—Durand Realty Co v Stolman, 94 N Y S 2d 358, 197 Misc 208, aff'd 113 N Y S 2d 644, 280 App Div 644

31. Idaho—Guyman v Anderson, 271 P 2d 1020, 75 Idaho 294

- Mo—Mid-West Engineering & Const Co v Campagna, 421 S W 2d 229

Liquidated demands

- Fla—Flood v Clark, App., 111 So 2d 465

Time from which interest is computed

- Ill—Hiller v Casey, 168 NE 2d 44, 26 Ill App 2d 261
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§ 320. Description of Property

40. Mo—Hertel Elec Co v Gabriel, App., 292 S W 2d 95—Williams v Casa, App., 372 S W 2d 156

- NC—Miller v Lemon Tree Inn of Roanoke Rapids, Inc., 233 S E 2d 69, 32 N C App 524

No description required

- Tex—Efficient Energy Systems, Inc v J Hoyt Kneveton, Inc., App. 8 Dist., 631 S W 2d 538

page 1008

47. Ill—Robb v Lundquist, 318 NE 2d 301, 23 Ill App 3d 186

§ 321. Conformity to Lien Statement

48. Ga—Love v Hockenbush, 87 S E 2d 352, 91 Ga App 877

51. Idaho—Guyman v Anderson, 271 P 2d 1020, 75 Idaho 294

§ 322. Conformity to Pleadings, Issues, and Proof

54. Conn—Morris v Jarvis, 75 A 2d 47, 137 Conn 97

- Ga—Maxwell v Summerville Lumber Co., 74 S E 2d 111, 87 Ga App 405

- Mo—Cotton v 71 Highway Mm-Warehouse, App., 614 S W 2d 304

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56. Colo—Lewis v Martin, 492 P 2d 877, 30 Colo App 342

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page 1009

60. Relief warranted

- (1) Hawaii—Honolulu Roofing Co v Felix, 426 P 2d 298, 49 Haw 578

- Or—Bratzel v Stafford, 14 P 2d 454, 140 Or 661, reh den 16 P 2d 991, 140 Or 661

Relief not warranted

- (1) Wash—Seva Steel Buildings, Inc v Weitz, 401 P 2d 980, 66 Wash 2d 260

62. Ga—Peters v Thompson, 190 S E 2d 842, 114 Ga App 228

66. Md—Landover Associates, Ltd Partnership v Fabricated Steel Products, Inc., 371 A 2d 1140, 35 Md App 673

§ 323. Conformity to Findings or Verdict

68. Ill—Honna v White, 278 NE 2d 197, 3 Ill App 3d 559

- Iowa—McDonald v Welch, 176 N W 2d 146

- W Va—South Side Lumber Co v Stone Const Co., 152 S E 2d 721, 151 W Va 439

- Wis—Northern State Bank v Bechler, 191 N W 2d 921, 53 Wis 2d 243

69. Mo—State ex rel Erb v Oliver, 237 S W 2d 128, 361 Mo 836—CJS cited in Hertel Elec Co v Gabriel, App., 292 S W 2d 95, 98

- Pa—Martin v Waldebush, 46 Del Co 162

71. Idaho—Koser v Boheman Breweries, 202 P 2d 398, 69 Idaho 33

§ 324. Direction for Sale and Distribution of Proceeds

page 1010

74. Fla—Hawanan Inn of Daytona Beach, Inc v Robert Myers Painting, Inc., App., 363 So 2d 125

75. Colo—Belmont Elec Service, Inc v Dohra, App., 516 P 2d 130

76. Ill—Babak v Strum, 155 NE 2d 332, 20 Ill App 2d 191

Particular judgment held incomplete

- Ark—Lofis v Edwards, 356 S W 2d 742, 235 Ark 30

79. Mo—Mass v Dreckhage, App., 244 S W 2d 397

81. Fla—Morris & Esher, Inc v Olympia Enterprises, Inc., App., 200 So 2d 579

page 1011

91. Va—Finkel Outdoor Products, Inc v Bell, 140 S E 2d 695, 205 Va 927

94. Cal—Vowels v Witt, 308 P 2d 415, 149 C A 2d 257

§ 328. Personal Judgment

page 1013

24. Ariz—Costanzo v Stewart, 453 P 2d 526, 9 Ariz App 430

- Colo—Hayntun v Gibbons, 338 P 2d 1032, 139 Colo 262—Lewis v Martin, 492 P 2d 877, 30 Colo App 342

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- Ga—Allen v Arrow Contracting Co., 138 S E 2d 600, 110 Ga App 369—Rogers v Johnson, 157 S E 2d 48, 116 Ga App 295

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- La—Highland Lumber & Supply Co v Young, App., 38 So 2d 638—Rathborne Lumber & Supply Co v Falgout, 62 So 2d 507, 222 La 345—Gus Elfer Co v Gundry, App., 92 So 2d 82—Lafayette Woodworks v Boudreaux, App., 255 So 2d 176

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- Neb—Gilenst v Wright, 94 N W 2d 476, 167 Neb 767

- N M—Groff v Stringer, 477 P 2d 814, 82 N M 180

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Owner not liable where contractor furnished material

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Relief to defendant

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Recovery under unjust enrichment statute denied

La—*Holsomback v Jett*, App, 260 So 2d 24

Compliance with statutory procedure

Ind—*Lawshe v Glen Park Lumber Co, Inc*, 375 N E 2d 275, 176 Ind App 344

24.1. Personal liability see supra § 263

25. Fla—*Leader Mortg Co v Richards Elec Service, Inc*, App, 348 So 2d 1202

Ga—*Montgomery v Richards Bldg Materials, Inc*, 177 S E 2d 507, 122 Ga App 472

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Burden of proof

Iowa—*Guldberg v Greenfield*, 146 N W 2d 298, 259 Iowa 873

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What constitutes personal judgment

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Decree properly modified by eliminating personal judgment

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page 1014

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Idaho—*Pierson v Sewell*, 539 P 2d 590, 97 Idaho 38

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Personal judgment on counterclaim not permissible

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33. Wash—*Ketner Bros Inc v Nichols*, P 2d 272, 214 Kan 373, 69 A L R 3d 1334

34. U S—*Lockridge v Brockman*, D C Ind, 137 F Supp 383

La—*Smith v Scott*, App, 345 So 2d 981

37. Ala—*Nelson Weaver Mortg Co v Dover Elevator Co*, 216 So 2d 716, 283 Ala 324

38. Mo—*Dill v Pomdexter Tile Co*, App, 451 S W 2d 365

39. Iowa—*Capitol City Drywall Corp v C G Smith Const Co, Inc*, 270 N W 2d 608

§ 329. — Failure to Establish Lien

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Okla—*Abel v Bachmann*, 400 P 2d 151

Or—*Ward v Town Tavern*, 228 P 2d 216, 191 Or 1, 42 A L R 2d 662—*Koch v Rice*, 237 P 2d 494, 193 Or 102—*Wiggins v Southwood Park Corp*, 350 P 2d 436, 221 Or 61—*Shepherd v Gam*, 488 P 2d 1180, 260 Or 84

Utah—*Pierce v Pepper*, 405 P 2d 345, 17 Utah 2d 123
W Va—*West Virginia Sanitary Engineering Corp v Kurash*, 74 S E 2d 596, 137 W Va 856

41. La—*Acenson Builders, Inc v Jumonville*, App, 251 So 2d 639, affd 263 So 2d 875, 262 La 519

Miss—*King v Hankins*, 209 So 2d 190

Tex—*Langford v Reeves*, Civ App, 478 S W 2d 259, err ref no rev err

Since the publication of *Corpus Juris Secundum* the case of *Hursey v Hassam and Pooley*, and the case of *Federal Land Bank of New Orleans v Thames Lumber & Supply Company*, cited in support of the text have been overruled on this point

Miss—*Evans v Central Service & Supply Co*, 226 So 2d 616

42. Ill—*Wise v Jerome*, 125 N E 2d 292, 5 Ill App 2d 214

Duty of court to hold action for trial as law action

Neb—*Gillespie v Hynes*, 95 N W 2d 457, 168 Neb 49

43. Fla—*Lehigh Structural Steel Co v Joseph Langner, Inc*, 43 So 2d 335—*Surf Properties v Markowitz Bros*, 75 So 2d 298—*Sterling Apartments, Inc v Arch Creek Lumber Co*, App, 113 So 2d 711—*Westinghouse Elec Supply Co v Levin*, App, 115 So 2d 423—*Miami Highland Park, Inc v Leslie*, App, 142 So 2d 754—*Halifax Const Co v Chastain Groves, Inc*, App, 192 So 2d 15—*Emery v International Glass & Mfg, Inc*, App, 249 So 2d 496—*M & M Investments, Inc v Bethlehem Steel Corp*, App, 250 So 2d 324

Mo—*Maran-Cooke, Inc v Furler Excavating, Inc*, 585 S W 2d 38

Conflicting holdings of *Parsons Construction Co v Grifford*, 262 N W 508, 129 Neb 617, *Robinson v Dawson County Irr Co*, 8 N W 2d 179, 142 Neb 811, *Gibson v Koutsky-Brennan-Vana Co*, 9 N W 2d 298, 143 Neb 326, and *Patterson v Spelts Lumber Co*, 90 N W 2d 283, 166 Neb 692 have been overruled, the court stating that where it is determined that no lien in fact existed, equity has no jurisdiction to enter personal judgment against defendant—*Gillespie v Hynes*, 95 N W 2d 457, 168 Neb 49

44. Ala—Lockhart v O'Neal, supra, n 40
 Cal—States Shingle Co v Kaufman, 39 Cal Rptr 196, 227 C 2d 830
 Ill—Eastabrooks v Ravin, 248 NE 2d 529, 109 Ill App 2d 277
 45. Iowa—Guldberg v Greenfield, 146 NW 2d 298, 259 Iowa 873

page 1015

46. NY—Bowerman v Stahl, 92 NYS 2d 842
 47. Colo—Brannan Sand & Gravel Co v Santa Fe Land & Imp Co, 332 P 2d 892, 138 Colo 314
 Mont—Frank J Trunk & Son, Inc v DeHaan, 391 P 2d 353, 143 Mont 442
 NY—Nose v Kaufman, 161 NYS 2d 1, 2 NY 2d 347, 141 NE 2d 529—Tager v Healy Ave Realty Corp, 218 NYS 2d 679, 14 AD 2d 584
 SC—Hodge v First Federal Sav and L Ass'n of Spartanburg, 227 SE 2d 310, 267 SC 270

Unjust enrichment

- SD—Ruggenberg v Wilmeyer, 253 NW 2d 197
 50. NY—Nelson v Schrank, supra, n 40
 51. NY—San Marco Const Corp v Gilert, 178 NYS 2d 137, 15 Misc 2d 208
 52. La—Harris Paint Co v Quinn Const Co, Inc, App, 282 So 2d 543

§ 330. — Deficiency Judgment

53. Fla—Meadows Southern Const Co v Pezzaniti, App, 108 So 2d 499
 Okl—Local Federal Sav & Loan Ass'n v Davidson & Case Lumber Co, supra, n 27

Compliance with statutory requirements held essential

- Pa—Hoffman Lumber Co v Mitchell, supra, n 24
 Mortgage foreclosure statute held applicable
 NY—Sulpan Plumbing Corp v A Builders Corp, 75 NYS 2d 681, 190 Misc 598

54. US—Cutting v Bullerick, C A Alaska, 188 F 2d 837, 13 Alaska 269

- Cal—Rosenman Mill & Lumber Co v Fullerton Sav & Loan Ass'n, 34 Cal Rptr 644, 221 CA 2d 705
 Del—Silverade Home Mart, Inc v Hall, Super, 345 A 2d 427

- Ill—Wm Anperle & Sons, Inc v American Nat Bank & Trust Co of Chicago, 379 NE 2d 400, 19 Ill Dec 736, 62 Ill App 3d 842

- Me—E. A. Thompson Lumber Co v Heald, 170 A 2d 156, 157 Me 78

- Minn—Karl Krali Excavating Co v Goldman, 208 NW 2d 719, 296 Minn 324

- NY—Soll v Camarrella, 100 NYS 2d 187, 277 App Div 1004—Tager v Healy Ave Realty Corp, 218 NYS 2d 679, 14 AD 2d 584

- Wash—Loak v Foster, 222 P 2d 824, 37 Wash 2d 220

Evidence insufficient

- NY—Moore Golf, Inc v Lakeover Golf & Country Club, Inc, 370 NYS 2d 156, 49 AD 2d 583

Sale required

- Ill—Swords v Raiser, 371 NE 2d 182, 13 Ill Dec 487, 55 Ill App 3d 676

55. Minn—Nichols v L & O, Inc, 196 NW 2d 465, 293 Minn 17

- Pa—Hoffman Lumber Co v Mitchell, 98 Pittsb Leg J 407, aff'd 85 A 2d 664, 170 Pa Super 326

§ 331. — Against Whom Judgment Rendered

58. US—Perrin & Martin, Inc v US, D C Va, 233 F Supp 1016

- Ariz—Koefer v Lavender, 243 P 2d 457, 74 Ariz. 24
 Cal—Rogers v Watson, 39 Cal Rptr 849, 228 C A 2d 662—Neptune Gunite Co v Monroes Enterprises, Inc, 40 Cal Rptr 367, 229 C A 2d 439—Frank Curran Lumber Co v Eleven Co, 76 Cal Rptr 753, 271 C A 2d 175
 Colo—HTC Corp v Olds, App, 486 P 2d 463
 Idaho—Person v Sewell, 539 P 2d 590, 97 Idaho 38

- La—Delta Paving Co v Woolridge, App, 209 So 2d 581, application den 210 So 2d 56, 252 La 176
 NY—Clother v Kracko, 211 NYS 2d 516, 27 Misc 2d 917
 Ohio—Blewett v Sullivan, 145 NE 2d 839, 104 Ohio App 486
 SD—McLaughlin Elec Supply v American Empire Ins Co, 269 NW 2d 766

Lessor

- (1) NM—Martinez v Research Park, Inc, 410 P 2d 200, 75 NM 672
 Wash—Markley v General Fire Equipment Co, 563 P 2d 1316, 17 Wash App 480

Privity of contract held necessary

- Del—Silverade Home Mart, Inc v Hall, Super, 345 A 2d 427
 Idaho—Mitchell v Flandro, 506 P 2d 455, 95 Idaho 228, app after remand 526 P 2d 841, 96 Idaho 236

page 1016

59. Ala—Crosby v Hale, 173 So 2d 85, 277 Ala 542
 Ariz—Palmer v Apperson, supra, n 40
 Ark—Lagon v Mitholland, 224 S W 2d 825, 216 Ark 231

- La—Windham Woodwork & Supply Co v Hopkins, App, 122 So 2d 106—Sauth v General Contractors, Inc, App, 125 So 2d 637—Baton Rouge Lumber Co v Gurney, App, 173 So 2d 251
 Me—E. A. Thompson Lumber Co v Heald, 170 A 2d 156, 157 Me 78

Property not primarily liable where cumulative remedies pursued

- Cal—Culbertson v Czek, 37 Cal Rptr 548, 225 C A 2d 451

60. Cal—Pierce Engineering Co v Chohon, 16 Cal Rptr 601, 196 C A 2d 516—Schrader Iron Works, Inc v Lee, 103 Cal Rptr 106, 26 C A 3d 621

- Colo—Lewis v Martin, 492 P 2d 877, 30 Colo App 342

- D C—Jones v Guice, Mun App, 57 A 2d 190

- Ga—Oak Creek Development Corp v Hartline-Thomson, Inc, 225 S E 2d 515, 138 Ga App 83

- La—Adams v Darby, App, 34 So 2d 887—Sundberg's Inc v Price, App, 117 So 2d 328—Windham Woodwork & Supply Co v Hopkins, App, 122 So 2d 106—Smith v General Contractors, Inc, App, 125 So 2d 637—Abry Bros, Inc v Tillman, 162 So 2d 346, 245 La 1017—Long Leaf Lumber, Inc v Svokos, App, 258 So 2d 121

- NY—Clother v Kracko, 211 NYS 2d 516, 27 Misc 2d 917—Soundwall Const Corp v Moncarol Const Corp, 290 NYS 2d 363, 56 Misc 2d 892

- Pa—Wink v Perry, 83 Mont 172

Former owner

- Cal—Packard Bell Electronics Corp v Theasus, Inc, 53 Cal Rptr 300, 244 C A 2d 355

Failure to perfect lien

- Ill—Swansen Concrete Products, Inc v Dauter, 5 Dist, 467 NE 2d 388, 81 Ill Dec 688, 126 Ill App 3d 927

62. Tex—Lopez v Bonded Const and Supply Co, Civ App, 594 S W 2d 809

63. US—Youngstown Sheet & Tube Co v Patterson—Emerson—Corstock of Ind, D C Ind, 227 F Supp 208

- Ala—Crosby v Hale, 173 So 2d 85, 277 Ala 542

- Ariz—Koefer v Lavender, supra, n 58

- Cal—Powers Regulator Co v Seaboard Sur Co of New York, 22 Cal Rptr 373, 204 C A 2d 338—Destefano v Hall, 32 Cal Rptr 770, 218 C A 2d 657—R D Reeder Lathing Co v Allen, 57 Cal Rptr 841, 425 P 2d 785, 66 C 2d 373—Frank Curran Lumber Co v Eleven Co, 76 Cal Rptr 753, 271 C A 2d 175

- Colo—Brannan Sand & Gravel Co v Santa Fe Land & Imp Co, 332 P 2d 892, 138 Colo 314—HTC Corp v Olds, App, 486 P 2d 463

- Fla—Fine v Crane Co, App, 211 So 2d 219, quashed, Sup, 221 So 2d 145, mand conf to 222 So 2d 36

- Ga—Gignillat v West Lumber Co, 56 S E 2d 841, 80 Ga App 652—Drawdy v McVeigh, 138 S E 2d

- 477, 110 Ga App 329—Q S King Co v Minter, 184 S E 2d 594, 124 Ga App 517

- Ky—McCorkle v Lawton & Co, 259 S W 2d 27

- La—Orleans Plumbing Shop, Inc v George, App, 244 So 2d 360

- Me—Pendleton v Sard, 297 A 2d 889, 62 A L R 3d 277

- Neb—Gatchell v Henderson, 54 NW 2d 227, 156 Neb 1

- NM—Home Plumbing & Contracting Co v Pruitt, 372 P 2d 378, 70 NM 182

- NY—Ella Chingos Const Corp v Carlton Properties, Inc, 177 NYS 2d 358, 13 Misc 2d 577, aff'd 185 NYS 2d 238, 7 AD 2d 1020

- Ohio—Walker v Ball, 171 NE 2d 541, 113 Ohio App 313

- Okl—Britton v Groom, 373 P 2d 1012

- SD—Keeley Lumber & Coal Co v Dunker, 71 NW 2d 689, 76 SD 281—Sherman v Meyer, 312 NW 2d 373

- Tenn—Jordan v Dertz, 296 S W 2d 866, 201 Tenn 77

- Tex—Crockett v Sampson, Civ App, 439 S W 2d 355

- Wyo—C J S cited as True v Hi-Plans Elevator Machinery, Inc, 577 P 2d 991, 1004

64. Cal—Borello v Eichler Homes, Inc, 34 Cal Rptr 648, 221 C A 2d 487

- Fla—Logan Const Co v Warren Bros Const Co, 268 So 2d 369

- Express or implied agreement to pay required
 NY—Messaros v Indiven, 232 NYS 2d 926, 36 Misc 2d 632

Liability upheld

- Fla—Canada Dry Bottling Co v Meekins, Inc, of Dade County, App, 219 So 2d 439—Logan Const Co v Warren Bros Const Co, App, 257 So 2d 52, quashed, Sup, 268 So 2d 369

page 1017

65. Cal—Destefano v Hall, 32 Cal Rptr 770, 218 C A 2d 657

68. US—J W Terteling & Sons v Central Neb Public Power & Irr Dist, D C Neb, 8 FR D 210

72. La—Melde Tile Roofing Co v Compact Homes Inc, App, 92 So 2d 735, foll 92 So 2d 738—Gurtler, Hebert & Co v Marquette Cas Co, App, 145 So 2d 145

- Mo—Rape v Mid-Continent Bldg Co, App, 318 S W 2d 519—W H Powell Lumber Co, Inc v Federal Land Bank Ass'n of Mountain Grove-Rolla, App, 561 S W 2d 700

- Mont—Brown v Thornton, 432 P 2d 386, 150 Mont 150

- NY—Nose v Kaufman, 161 NYS 2d 1, 2 NY 2d 347, 141 NE 2d 529

- ND—Hessinger v Sorenson, 180 NW 2d 910

77. Cal—Pierce Engineering Co v Chohon, 16 Cal Rptr 601, 196 C A 2d 516

Personal liability not established

- ND—Quality Builders, Inc v Hahn, 134 NW 2d 577

78. Fla—Meadows Southern Const Co v Pezzaniti, App, 108 So 2d 499

- Ill—Pod v Jagencarz, 167 NE 2d 447, 25 Ill App 2d 467

§ 333. Amendment or Vacation

page 1018

89. Mo—Hertel Elec Co v Gabriel, App, 292 S W 2d 95

90. Fla—Meadows Southern Const Co v Pezzaniti, App, 108 So 2d 499

- Va—Mann v Clover, 59 S E 2d 78, 190 Va 887

Motion to strike

- Mont—M & R Const Co v Shea, 589 P 2d 138, 180 Mont 77

Default judgment or decree

- Conn—Pantlin and Chaname Development Corp v Hartford Cement and Bldg Supply Co, 449 A 2d 162, 188 Conn 253, app after remand 492 A 2d 159, 196 Conn 233

page 1018

11—Park Ave Lumber & Supply Co v Nils A Hof-verberg, Inc, 222 N E 2d 49, 76 Ill App 2d 334

11. Ill—Chapman, Mazza, Aiello, Inc v Ace Lum-ber & Const Co, 227 N E 2d 562, 83 Ill App 2d 320

nd—De Armond v Carter, 134 N E 2d 239, 127 Ind App 34

owa—Kerth Young & Sons Const Co v Victor Senior Citizens Housing, Inc, 262 N W 2d 554

Tex—Close v Isbell Const Co, 471 P 2d 257, 86 Nev 524

VJ—New Jersey Cabinet & Mill Co v Creedon, 95 A 2d 29, 24 N J Super 553

VD—Adams Const Co v Altendorf, 152 N W 2d 576

Amendment denied

JS—Sulens & Hoss, Inc v Favour, D C Alaska, 117 F Supp 535, 14 Alaska 492

4d—Brunecz v DiLeo, 283 A 2d 606, 263 Md 481

Default judgment or decree

11—Park Ave Lumber & Supply Co v Nils A Hof-verberg, Inc, 222 N E 2d 49, 76 Ill App 2d 334

CS—Conn—Morris v Jarve, 75 A 2d 47, 137 Conn 97

§ 334. Operation and Effect

Library References

Mechanics' Liens ⇐291(7).

page 1019

4. Colo—Phillips v McBride, App, 474 P 2d 180
4o—Structo Corp v Leverage Inv Enterprises, Ltd, App, 613 S W 2d 197

1. Cal—Packard Bell Electronics Corp v Theseus, Inc, 53 Cal Rptr 300, 244 C A 2d 355

1. Ala—McMinn v Derrick, 109 So 2d 710, 268 Ala 604

1an—Lenexa State Bank & Trust Co v Duxon, 559 P 2d 776, 221 Kan 238

Construction and effect of decree generally

(4) Pa—Berman v Greenfield, 9 Chest, 82

(5) Other cases

4d—Wernberg v Fanning, 119 A 2d 383, 208 Md 567

Utah—Dugger v Cox, 564 P 2d 300

page 1020

1. NC—Ridge Community Investors, Inc v Berry, 239 S E 2d 566, 293 NC 688

0. NC—Priddy v Kernersville Lumber Co, 129 S E 2d 256, 258 NC 653

1. Md—Wernberg v Fanning, 119 A 2d 383, 208 Md 567

2. NC—Priddy v Kernersville Lumber Co, 129 S E 2d 256, 258 NC 653

page 1021

3. DC—Redding & Co, Inc v Rasmussen Const Corp, C A, 463 F 2d 929, 150 U S App D C 93

Proceedings held not collateral attack

1D—Kuntz v Partridge, 65 N W 2d 681, 52 A L R 2d 1

335. — Lien

9. Ill—Win Aupperle & Sons, Inc v American Nat. Bank & Trust Co of Chicago, 379 N E 2d 400, 19 Ill Dec 736, 62 Ill App 3d 842

y—Central Contractors Service v Ohio County Stone Co, 255 S W 2d 17

Lien does not take effect until after judgment

ex—William J Burns Intern Detective Agency, Inc v General Elec Supply Co, Civ App, 413 S W 2d 775

L. Judgment held void

S—Clarke v Boyesen, C C A Wyo, 39 F 2d 800, cert den 51 S Ct 75, 282 U S 869, 75 L Ed 768

36. NC—National Sur Corp v Sharpe, 72 S E 2d 109, 236 NC 35

page 1022

39. Priority of general judgment liens

NC—National Sur Corp v Sharpe, supra, n 36

§ 336. In General

42 Conn—Howell v DiStasio, Cir A D, 252 A 2d 308, 5 Conn Cir 346

Ga—Maxwell v Summerville Lumber Co, 74 S E 2d 111, 87 Ga App 405

NY—Fedoryk v Fort Salonga Management Co, 288 N Y S 2d 809, 56 Misc 2d 513

Pa—Gahro v Uzelsac, 79 Pa Dist & Co 130

Tex—Skinnys, Inc v Hicks Bros Const Co of Abilene, Inc, Civ App, 602 S W 2d 85

Writ of enforcement, or order of sale

Cal—Laubach v Roberto, 277 P 2d 9, 43 C 2d 702

Third-party beneficiary claims

Hawaii—Honolulu Roofing Co v Felix, 426 P 2d 298, 49 Haw 578

Counterclaim

Fla—Davar Corp v Tropic Land Imp Corp, App, 330 So 2d 482

Special execution properly quashed

Mo—W H Powell Lumber Co, Inc v Federal Land Bank Ass'n of Mountain Grove-Rolla, App, 561 S W 2d 700

44. Pa—Hagen Lumber Co v Seman, 55 Lack Jur 68—Newman v Naumann, 3 D & C 2d 590, 71 Montg 298

Judgment and execution held illegally entered

Ga—Peters v Thompson, 150 S E 2d 842, 114 Ga App 228

45. Pa—Hoffman Lumber Co v Mitchell, 98 Pittsb Leg J 407, aff'd 85 A 2d 664, 170 Pa Super 326

48. Mo—Cork Plumbing Co, Inc v Martin Bloom Associates, Inc, App, 573 S W 2d 947

page 1023

60. Mo—W H Powell Lumber Co, Inc v Federal Land Bank Ass'n of Mountain Grove-Rolla, App, 561 S W 2d 700

62. Mo—Hertel Elec Co v Gabriel, App, 292 S W 2d 95

Precept of writ of execution held not defective

NH—Wurm v John J Reilly, Inc, 163 A 2d 13, 102 N H 558, 86 A L R 2d 286

§ 337. Sale in General

67. Conn—Banking Center v Goodrich, 360 A 2d 137, 33 Conn Sup 553

La—Duxenne Air Conditioning Co v Harper, App, 239 So 2d 373

Pa—Lutka v Hambersky, 74 A 2d 698, 167 Pa Super 304

Evidence

Cal—Ecker Bros v Jones, 9 Cal Rptr 335, 186 C A 2d 775

Writ of enforcement

Cal—Ecker Bros v Jones, 9 Cal Rptr 335, 186 C A 2d 775

73. Ga—Parker v Cherokee Bldg Supply Co, 64 S E 2d 51, 207 Ga 710

Wis—H & M Heating Co v Andrae, 150 N W 2d 379, 35 Wis 2d 1

74. Sale before satisfaction of prior lien denied

Ga—Bowen v Kicklighter, 183 S E 2d 10, 124 Ga App 82

75. US—J S Purcell Lumber Corp v Henson, D C Va, 405 F Supp 1130

78. Pa—Trettel & Varesco v Chesaro, 107 P L J 41

page 1024

81. Va—Funkel Outdoor Products, Inc v Bell, 140 S E 2d 695, 205 Va 927

§ 338. Property or Interest to Be Sold in General

85. Ind—Potter v Cline, 316 N E 2d 422, 161 Ind App 349

NC—Equitable Life Assur Soc of US v Beamight, 67 S E 2d 390, 234 NC 347

87. NC—National Sur Corp v Sharpe, 72 S E 2d 109, 236 NC 35

88. Cal—Ecker Bros v Jones, 9 Cal Rptr 335, 186 C A 2d 775

89. Ind—York v Miller, 339 N E 2d 93, 167 Ind App 444

Tex—Irving Lumber Co v Altex Mortg Co, Civ App, 446 S W 2d 64, Aff'd, Sup, 468 S W 2d 341

§ 341. Notice and Terms of Sale

page 1026

Particular matters with respect to the manner and conduct of a sale have been adjudicated by the courts ²³

23.5. Doctrine of sale in inverse order of abandonment not applied

Wash—Washington Asphalt Co v Boyd, 388 P 2d 965, 63 Wash 2d 690

§ 342. Confirming or Setting Aside Sale

25. Wis—Anthony Grignano Co v Gooch, 47 N W 2d 895, 259 Wis 138

Burden of proof

Okla—Cosgrove v Stewart, 386 P 2d 998

Scope of inquiry

Okla—Cosgrove v Stewart, 386 P 2d 998

page 1027

27. Setting aside not erroneous

Ariz—Homcraft Corp v Fimbres, App, 580 P 2d 760, 119 Ariz 299

Until a judicial sale in a mechanic's lien foreclosure action is confirmed, neither the judgment debtor nor those claiming under him acquire any rights by virtue of the auction ^{27.5}

27.5. Refund of deposit discharges high bidder

NC—Pittsburgh Plate Glass Co v Forbes, 128 S E 2d 875, 258 NC 426

28. Estoppel

Md—Martin v Golden Key Homes, Inc, 223 A 2d 589, 244 Md 367

Order setting aside sale as not affecting persons not parties

Fla—Bakst v Adobe Brck & Supply Co, App, 294 So 2d 683

Failure to establish inadequacy of price

Ind—York v Miller, 339 N E 2d 93, 167 Ind App 444

Sale set aside

Colo—Teku Corp v Transamerica Title Ins. Co, 571 P 2d 321, 39 Colo App 528

29. NY—McCoy v Bailey, 209 N Y S 2d 550, 24 Misc 2d 875

Wis—Anthony Grignano Co v Gooch, supra, n 25

30. Fla—Surratt v Fleming, App, 309 So 2d 614, decman after remand 322 So 2d 39

Pa—Houghton v Kerr, 30 Wash Co 156

§ 343. Conveyance to Purchaser and Recovery of Purchase Money

32. Fla—Deltona Corp v Indian Palms, Inc., App., 323 So 2d 282
Tex—Inman v Orndorff, Civ App., 596 S W 2d 236

§ 344. Title and Rights of Purchaser

36. Cal—Laubach v Roberdo, 277 P 2d 9, 43 C 2d 702
Fla—Bakst v Adobe Brick & Supply Co., App., 294 So 2d 683
Tex—York Division, Borg-Warner Corp v Security Sav & Loan Ass'n, Dickinson, Civ App., 485 S W 2d 327, err ref no rev err

page 1028

39. Cal—Call v Thunderbird Mortg Co., 25 Cal Rptr 265, 375 P 2d 169, 58 C 2d 542
45. Colo—Haddock v Glenn, 403 P 2d 873, 157 Colo 512
ND—United Accounts, Inc v Larson, 121 NW 2d 628
46. NC—Equitable Life Assur Soc of US v Basnight, 67 S E 2d 390, 234 NC 347
Va—Finkel Outdoor Products, Inc v Bell, 140 S E 2d 695, 205 Va 927
51. Fla—Marks Bros Paving Co v Ouellet, App., 124 So 2d 514

§ 345. —Purchaser of Building Alone

page 1029

59. Fla—Lake v Irrgang, App., 391 So 2d 735
Incorrect description of property
ND—Kuntz v Partridge, 65 NW 2d 681, 52 A L R 2d 1

§ 347. Redemption

page 1031

91. Ill—Chapman, Mazza, Aulio, Inc v Ace Lumber & Const Co., 227 NE 2d 562, 83 Ill App 2d 320
Vt—Woodbury Lumber Co v McIntosh, 211 A 2d 240, 125 Vt 154
Wis—C.J.S. quoted in City Lumber & Supply Co v Fisher, 41 NW 2d 285, 287, 256 Wis 402
"Agricultural real estate" exception
Colo—Kuntz Corp v Westland Manor Nursing Home North, Inc., 568 P 2d 105, 39 Colo App 542
94. Ill—Chapman, Mazza, Aulio, Inc v Ace Lumber & Const Co., App., 227 NE 2d 562, 83 Ill App 2d 320
Wis—City Lumber & Supply Co v Fisher, 41 NW 2d 285, 256 Wis 402
Power of court to fix time
(1) Colo—AA Const Co v Gould, 470 P 2d 916, 28 Colo App 161

page 1032

5. Cal—Call v Thunderbird Mortg Co., 25 Cal Rptr 265, 375 P 2d 169, 58 C 2d 542
12. Fla—Marks Bros Paving Co v Ouellet, App., 124 So 2d 514

§ 348. Distribution of Proceeds

page 1033

25. US—Marv Laxer Associates, Inc v Morecell Realty Corp., D C N Y., 533 F Supp 8
Ga—Bankston v Smith, 216 S E 2d 634, 134 Ga App 882, rev'd on oth grds 222 S E 2d 375, 236 Ga 92, on remand 225 S E 2d 709, 138 Ga App 39
Iowa—General Mortg Corp of Iowa v Campbell, 138 NW 2d 416, 258 Iowa 143

Neb—Central Const Co v Highamuth, 50 NW 2d 817, 155 Neb 113—Gilest v Wright, 94 NW 2d 476, 167 Neb 767

NY—Lakeville Mfg Co v Herman Homes, Inc., 215 NY S 2d 553, 28 Misc 2d 798, aff'd 218 NY S 2d 1016, 14 A D 2d 551

NC—F D Cine Paving Co v Southland Speedways, Inc., 108 S E 2d 641, 250 NC 358

27 US—Kizzar v Dollar, C A Okl., 268 F 2d 914, cert den 80 S Ct 258, 361 US 914, 4 L Ed 2d 184

Md—Martin v Golden Key Homes, Inc., 223 A 2d 589, 244 Md 367

NY—Baldwin Kitchen Cabinet Corp v Artz, 209 NY S 2d 39, 27 Misc 2d 265, mod on oth grds 222 NY S 2d 950, 15 A D 2d 560

NC—Miller v Lemon Tree Inn of Roanoke Rapids, Inc., 233 S E 2d 69, 32 NC App 524

Pa—Juhano v Clayton Homes, Inc., 46 Del Co 145

Proportion

(3) Other cases

US—Marv Laxer Associates, Inc v Morecell Realty Corp., D C N Y., 533 F Supp 8

Okl—Local Federal Sav & Loan Ass'n v Davidson & Case Lumber Co., 255 P 2d 248, 208 Okl 155

Tex—Marek v Goyen, Civ App., 346 S W 2d 926

Pa—Collegeville Nat Bank v Frehafer, 7 D & C 2d 14, 72 Montg. 1, 17 Som 393

Preference denied

Or—Drake Lumber Co v Paget Mortg Co., 274 P 2d 804, 203 Or 66

Not entitled to priority

Conn—Banking Center v Goodrich, 360 A 2d 137, 33 Conn Sup 553

28 Ark—Orr v Bergemann, 284 S W 2d 105, 225 Ark 616

Fla—Tarlow v Helmholtz, App., 198 So 2d 109

§ 350. In General

Library References

Mechanics' Liens ⇐310

page 1034

31. Fla—Lopez Terrazzo & Title, Inc v Cooper, App., 302 So 2d 784

Md—Martin v Golden Key Homes, Inc., 223 A 2d 589, 244 Md 367

38. US—Carey Lumber Co v Hetherington, D C Okl., 107 F Supp 995

Wash—Irwin v Sanders, 304 P 2d 697, 49 Wash 2d 600—Washington Asphalt Co v Boyd, 388 P 2d 965, 63 Wash 2d 690

Statement of claim

(3) Other matters

Okl—Brown v Magers, 359 P 2d 321

39. Alaska—Stephenson v Ketchikan Spruce Mills, Inc., 412 P 2d 496

Ill—Wise v Jerome, 125 NE 2d 292, 5 Ill App 2d 214

Wash—Pugot Sound Plywood, Inc v Meister, 542 P 2d 756, 86 Wash 2d 135

Cost of reference to master

Ill—Ahmer v Peters, 149 NE 2d 503, 17 Ill App 2d 113

Costs disallowed

Ill—Ailee Elec Co, Inc v Johnson Const Co., 303 NE 2d 192, 14 Ill App 3d 716

Attorney's fees included

Ind—Inter-City Contractors Services, Inc v Consumer Bldg Industries, Inc., 373 NE 2d 903, 175 Ind App 665

Or—Oregon Broadcasting Co v Grecian Health Spa of Medford, Inc., 530 P 2d 80, 271 Or 31

page 1035

42. Fla—Warren Bros Co v Oakwood Manor, Inc., App., 291 So 2d 635

Okl—Cashway Lumber Co v Langston, 479 P 2d 582

Utah—Mallard v Parry, 271 P 2d 852, 2 Utah 2d 217

Wash—Irwin v Sanders, 304 P 2d 697, 49 Wash 2d 600

Wis—Miles Homes, Inc of Wis v Starrett, 127 NW 2d 243, 23 Wis 2d 356

Who is prevailing party

(3) Other definitions

Fla—Sharpe v Cocco Corp., App., 242 So 2d 464—Flagala Corp v Hamm, App., 302 So 2d 195

Costs disallowed where party fails to prevail

Alaska—Brand v First Federal Sav & Loan Ass'n of Fairbanks, 478 P 2d 829

Wash—Ludral v Sixth & Battery Corp., 290 P 2d 459, 47 Wash 2d 831

44. Mo—Hunt v Riggins, App., 341 S W 2d 136

Tenn—Bann-Nicodemus, Inc v Bethay, 292 S W 2d 234, 40 Tenn App 487

Wis—H & M Heating Co v Andrae, 150 NW 2d 379, 35 Wis 2d 1

Set-off and counterclaim

Fla—Sharpe v Herman A Thomas, Inc., App., 294 So 2d 14

Discretion not abused

Fla—Flagala Corp v Hamm, App., 302 So 2d 195

46. Iowa—McDonald v Welch, 176 NW 2d 846

49. La—Doug Ashy Lumber, Inc v Ducharme, App., 177 So 2d 182

Minn—R & L Lumber Co v Summit Fidelity & Sur Co., 170 NW 2d 594, 284 Minn 489

50. La—Highland Lumber & Supply Co v Young, App., 38 So 2d 638

page 1036

60. La—George Kallett & Sons, Inc v Schwartz Industries, Inc., App., 107 So 2d 815

Where defendant's tender is insufficient and invalid, plaintiff may be allowed costs and attorney's fees ^{as}

62.5. Idaho—Harrington v McCarthy, 420 P 2d 790, 91 Idaho 307

63. Wash—Willett v Davis, 193 P 2d 321, 30 Wash 2d 622

§ 352. Filing and Recording Fees; Abstract

page 1037

77. La—Edward Chassanol, Jr, Roofing & Siding, Inc v Ramsey, App., 144 So 2d 618—Jim Walter Corp v Laperouse, App., 196 So 2d 539

78. La—George Kallett & Sons, Inc v Schwartz Industries, Inc., App., 107 So 2d 815—Jim Walter Corp v Laperouse, App., 196 So 2d 539

82. La—Levingston Supply Co v Basco, App., 164 So 2d 141

§ 353. Attorney's Fees

83. Cal—Arthur B Sni, Inc v Bridges, 11 Cal Rptr 322, 189 C A 2d 599

Tex—Hillard v Home Builders Supply Co., Civ App., 399 S W 2d 198, err ref no rev err—Wood v Barnes, Civ App., 420 S W 2d 425, err ref no rev err

Utah—C.J.S. quoted at length in Park v Jameson, 364 P 2d 1, 4, 12 Utah 2d 141

Wash—Davis v Ahose, 215 P 2d 705, 35 Wash 2d 807

84. US—Citizens Co-op Gm v US, C A Tex., 427 F 2d 692

Fla—Goldberg v Banner Supply Co., App., 230 So 2d 714

Ga—Builders Supply Co v Pilgrim, 153 S E 2d 657, 115 Ga App 85

Hawai—Tropic Builders, Limited v Naval Ammunition Depot Lualualei Quarters, Inc., 402 P 2d 440, 48 Haw 306

Page 1037

Ind—Mann v Schnarr, 95 NE 2d 138, 228 Ind 654—
Saint Joseph's College v Morrison, Inc., 302
NE 2d 865, 158 Ind App 272

Kan—C.J.S. cited in Vonachen v Independent Lumber
Co., 241 P 2d 775, 778, 172 Kan 545

Mich—River Rouge Sav Bank v S & M Bldg Co.,
101 NW 2d 260, 359 Mich 189, 91 ALR 2d 409

Nev—Howard v Waale-Campbell & Tiberti, 217 P 2d
872, 67 Nev 304—Sherman Gardens Co v Long-
ley, 491 P 2d 48, 87 Nev 558

NY—Caristo Const Corp v Diners Financial Corp.,
236 NE 2d 461, 21 NY 2d 507, 289 NYS 2d 175

Tex—Hennemuth v Weatherford, Civ App, 278
SW 2d 271, err ref no rev err—King Const Co
v Flores, Civ App, 359 SW 2d 919, err ref no
rev err—Zorola v Bishop and Son, Civ App, 401
SW 2d 713, err ref no rev err—Ritter v Ken-
drick, Civ App, 482 SW 2d 369

Wash—Cornelius v Stenberg, 215 P 2d 439, 35
Wash 2d 822—Whitney v McKay, 344 P 2d 497,
54 Wash 2d 672—Johnson v Thompson Const,
App, 460 P 2d 291, 1 Wash App 194

Against homestead

(1) Tex—Wood v Barnes, Civ App, 420 SW 2d
425, err ref no rev err

Fees disallowed

Idaho—Willes v Palmer, 298 P 2d 972, 78 Idaho 104

Attorney's fees not included in constitutional
lien

Tex—Rhodes v Miller, Civ App, 414 SW 2d 942

Fees allowed in absence of statute

Tenn—Tennessee United Paint Store, Inc v D H
Overmyer Warehouse Co., 467 SW 2d 806, 62
Tenn App 721

85. Cal—California Viking Sprinkler Co v Cheney,
6 Cal Rptr 197, 182 CA 2d 564—Robinson v
Diller, 79 Cal Rptr 508, 274 CA 2d 813

Ill—Kiefer v Reas, 162 NE 157, 331 Ill 38

Ind—Potter v Cline, 316 NE 2d 422, 161 Ind App
349

Utah—Park v Jameson, 364 P 2d 1, 12 Utah 2d 141—
Hafer v Horn, 515 P 2d 1013, 95 Idaho 621

Provision in note

Tex—Ingham v Harrison, 224 SW 2d 1019, 148 Tex
380—Klemer v Eubank, Civ App, 358 SW 2d
902, err ref no rev err

page 1038

87. U.S.—Kizzar v Dollar, CA Okl, 268 F 2d 914,
cert den 80 SCt 258, 361 US 914, 4 L Ed 2d 184—
Youngstown Sheet & Tube Co v Patterson-
Emerson-Comstock of Ind, D C Ind, 227 F Supp
208

Fla.—Leon Oil Co v Tamara Lakes, Inc, App, 232
So 2d 20—Sharpe v Coco Corp, App, 242 So 2d
464—Midway Shopping Mall, Inc v Corky Corp,
App, 257 So 2d 905—Kinard Enterprises, Inc v
Johnson, App, 308 So 2d 593

Idaho—Guyman v Anderson, 271 P 2d 1020, 75 Idaho
294

Minn—C.J.S. cited in Berlien v Gagnon, 96 NW 2d
573, 578, 255 Minn 143

Okla—Richardson v H E Leonhardt Lumber Co, 389
P 2d 965—McGowan v Harris, 440 P 2d 680—
Flour Mills of America, Inc v American Steel
Bldg Co, 449 P 2d 861

Tex—Nixon Const Co v Rosales, Civ App, 437
SW 2d 52, err ref no rev err

Utah—Brimwood Homes, Inc v Knudsen Builders
Supply Co, 385 P 2d 982, 14 Utah 2d 419

Wash—Bunn v Bates, 216 P 2d 741, 36 Wash 2d 100—
West v Jarvi, 266 P 2d 1040, 44 Wash 2d 241—
Berger Engineering Co v Hopkins, 340 P 2d 777,
54 Wash 2d 300—Whitney v McKay, 344 P 2d
497, 54 Wash 2d 672

As against contractor's surety

Cal—Lewis & Queen v S Edmondson & Sons, 248
P 2d 973, 113 CA 2d 705—Systems Inv Corp v
National Auto & Cas Ins Co., 102 Cal Rptr 378,
25 CA 3d 1057

Tex—University State Bank v Gifford-Hill Concrete
Corp, Civ App, 431 SW 2d 561, err ref no rev
err

Fee held reasonable

NY—Grumpel v Hochman, 343 NYS 2d 507, 74
Misc 2d 39

Okla—Woods v Levine, 311 P 2d 204

Wash—Hos Bros Bulldozing, Inc v Hugh S Ferguson
Co, 508 P 2d 1377, 8 Wash App 769

Award of fees held mandatory

Ind—Byerly v Lusardi, 182 NE 2d 4, 133 Ind App
315

Construction of statute

Hawaii—Honolulu Roofing Co v Felix, 426 P 2d 298,
49 Haw 578

88 Ala—Security Transactions, Inc v Nelson Exca-
vating & Paving Co, Inc, Civ, 314 So 2d 297, 55
Ala App 223, cert den 314 So 2d 304, 294 Ala
768

89 Fla—Sharpe v Herman A Thomas, Inc, App,
250 So 2d 330

Idaho—Harrington v McCarthy, 420 P 2d 790, 91 Idaho
307

90 Idaho—Acoustic Specialties, Inc v Wright, 651
P 2d 529, 103 Idaho 593

Mont—C.J.S. cited in Monarch Lumber v Wallace,
314 P 2d 884, 890, 132 Mont 163

Utah—Millard v Parry, 271 P 2d 852, 2 Utah 2d 217

Successful party

(3) Fees incurred on appeal not included

Fla—John T Wood Homes, Inc v Air Control Prod-
ucts, Inc, App, 177 So 2d 709—Sunbeam Enter-
prises, Inc v Upthegrove, 316 So 2d 34

Idaho—Ivie v Peck, 495 P 2d 1110, 94 Idaho 625

(4) Other statements

Fla—Foxbult Elec, Inc v Belefant, App, 280 So 2d 28

Nev—Close v Isbell Const Co, 471 P 2d 257

"Prevailing party" construed

Fla—H D McPherson, Inc v Metro Elec of Orlando,
Inc, App, 253 So 2d 878—Midway Shopping
Mall, Inc v Airtach Air Conditioning, Inc, App,
253 So 2d 900—CU Associates, Inc v R B
Grove, Inc, 472 So 2d 1177

91. Hawaii—Honolulu Roofing Co v Felix, 426 P 2d
298, 49 Haw 578

Or—Clark v Girard, 512 P 2d 993, 266 Or 270

Tex—Rosen v Peck, Civ App, 445 SW 2d 241

Fees disallowed

Minn—Standard Const Co v National Tea Co, 62
NW 2d 201, 240 Minn 422

95. Fla—R F Driggers Const Co v Bagli, App,
313 So 2d 450—Green Tree Communities, Inc v
Ramos Group, Inc, App, 327 So 2d 233

Minn—Larson-Roberts Elec Co v Burdick, 127
NW 2d 163, 267 Minn 486

NM—Dunson Contractors, Inc v Koury, 418 P 2d
66, 76 NM 723

NY—Caristo Const Corp v Diners Financial Corp.,
236 NE 2d 461, 21 NY 2d 507, 289 NYS 2d 175

Wash—Forrester v Craddock, 317 P 2d 1077, 5
Wash 2d 315—Swenson v Lowe, 486 P 2d 1120, 5
Wash App 186

Discretion not abused

Cal—Lewis & Queen v S Edmondson & Sons, supra,
n 87

Minn—Klingelhut v Grover, 236 NW 2d 610, 306
Minn 271

Tenn—Knox-Tenn Rental Co v Sarbec Corp, 442
SW 2d 652, 59 Tenn App 564

Tex—Schlumberger Well Surveying Corp v James,
Civ App, 401 SW 2d 328, err ref no rev err

Wash—Walsh Services v Peck, 274 P 2d 117, 45
Wash 2d 289—Brower Co v Nouse Control of
Seattle, Inc, 401 P 2d 860, 66 Wash 2d 204

Right not lost by stay of proceedings

Minn—Hilltop Const, Inc v Lou Park Apartments,
324 NW 2d 236

96. Cal—Datefano v Hall, 69 Cal Rptr 691, 263
CA 2d 380

Fla—Oper v Russell, Inc, App, 197 So 2d 13—Houd-
aille-Duval-Wright Co v Charidon Const Co,
App, 266 So 2d 106—Kinard Enterprises, Inc v
Johnson, App, 308 So 2d 593

Idaho—Boone v P & B Logging Co, 397 P 2d 31, 88
Idaho 111—Dawson v Eldredge, 405 P 2d 754, 89
Idaho 402—Layrite Products Co v Lav, 416 P 2d
501, 91 Idaho 110

Ind—Saint Joseph's College v Morrison, Inc., 302
NE 2d 865, 158 Ind App 272

Okla—Keener v Tully, 263 P 2d 513

Or—Maddox v Balboa Raceways, Inc., 516 P 2d 1293,
267 Or 321

Wash—Ludral v Sixth & Battery Corp, 290 P 2d 459,
47 Wash 2d 831—Dean v McFarland, 500 P 2d
1244, 81 Wash 2d 215, 74 ALR 3d 378

Lien exceeding contract price

Okla—Shugart v L F Platt Lumber Co, 379 P 2d 698

Mode and substance of recovery pursuant to
statute

Fla—Emery v International Glass & Mfg Inc, App,
249 So 2d 496

page 1039

97. Cal—Systems Inv Corp v National Auto &
Cas Ins Co, 102 Cal Rptr 378, 25 CA 3d 1057

Fla—R F Driggers Const Co v Bagli, App, 313
So 2d 450

Okla—Snyder v Tulsa Engineering & Const Co, 312
P 2d 488

Utah—Palombi v D & C Builders, 452 P 2d 325, 22
Utah 2d 297

Held not prevailing party on voluntary dismissal
by plaintiff

Okla—Swan-Sugler, Inc v Black, 414 P 2d 300

Owner held not entitled to fee

Fla—Emery v International Glass & Mfg, Inc, App,
249 So 2d 496

98. Fla—C A Davis, Inc v Yell-For-Pennell, Inc,
App, 274 So 2d 267

99. NM—Home Plumbing & Contracting Co v
Fruitt, 372 P 2d 378, 70 NM 182

Utah—Frehner v Morton, 424 P 2d 446, 18 Utah 2d
422

1. Cal—Lewis & Queen v S Edmondson & Sons, 248
P 2d 973, 113 CA 2d 705

Ind—Oxford Development Corp v Ransauer Builders,
Inc, 304 NE 2d 211, 158 Ind App 622

Wash—Hos Bros Bulldozing, Inc v Hugh S Ferguson
Co, 508 P 2d 1377, 8 Wash App 769

2. Okla—Briggs v McAdams Pipe & Supply Co, 359
P 2d 572

Or—Thehn v Taylor, 432 P 2d 791, 248 Or 149

4. Del—Coldiron v Gester, Super, 278 A 2d 328,
mod on oth grds, Sup, 297 A 2d 384, 73 ALR
3d 510

Nev—C.J.S. cited in Peccole v Luce & Goodfellow,
212 P 2d 718, 728, 66 Nev 360

NM—Skidmore v Eby, 262 P 2d 370, 57 NM 669

Utah—Lawson Supply Co v General Plumbing &
Heating, Inc, 493 P 2d 607, 27 Utah 2d 84

Allowances sustained

U.S.—Kizzar v Dollar, CA Okl, 268 F 2d 914, cert.
den 80 SCt 258, 361 US 914, 4 L Ed 2d 184

Alaska—Kenai Power Corp v Strandberg, 415 P 2d
659

Cal—Scott, Blake and Wayne v Summit Ridge Es-
tates, Inc, 59 Cal Rptr 587, 251 CA 2d 347

Fla—Rentano v Peninsular Bldg Supply Co, App, 262
So 2d 710

Minn—Barrett v Hampe, 53 NW 2d 803, 237 Minn
80

NM—Daughtrey v Carpenter, 477 P 2d 807, 82 NM
173—Fitzgerald v Bluecher Lumber Co, 481 P 2d
100, 82 NM 312

Okla—Consolidated Builders, Inc v McDaneels, 376
P 2d 613—Flour Mills of America, Inc v Ameri-
can Steel Bldg Co, 449 P 2d 861

Tenn—Tennessee United Paint Store, Inc v D H Overmyer Warehouse Co, 467 S W 2d 806, 62 Tenn App 721

Utah—Park v Jameson, 364 P 2d 1, 12 Utah 2d 141
Wash—Brower Co v Garrison, 468 P 2d 469, 2 Wash App 424

Excessive fees

Wash—West v Jarvi, 266 P 2d 1040, 44 Wash 2d 241

Allowances held inadequate

Wash—Willett v Davis, 193 P 2d 321, 30 Wash 2d 622—Hopkins v Ulvestad, 282 P 2d 806, 46 Wash 2d 514

Discretion held abused

Alaska—American Service, Inc v Tundra Inv Co, 473 P 2d 614

Fla—Flagala Corp v Hamm, App, 302 So 2d 195
Minn—New Ulm Bldg Center, Inc v Studtmann, 225 N W 2d 4, 302 Minn 14

5. Minn—Obraske v Woody, 199 N W 2d 429, 294 Minn 105

6. Ind—Oxford Development Corp v Rausauer Builders, Inc, 304 N E 2d 211, 158 Ind App 622

Minn—Larson—Roberts Elec Co v Burdick, 127 N W 2d 163, 267 Minn 486

Tex—Tomplins v Vickers, Civ App, 243 S W 2d 257, err ref no rev err

7. N M—Meanday v Sweeney, App, 438 P 2d 525, 78 N M 781

8. Minn—Bierlein v Gagnon, 96 N W 2d 573, 255 Minn 143

Okla—Tollett v Clay, 249 P 2d 412, 207 Okl 283—Bush v Pyatt, 445 P 2d 793

Statute used as guide

Minn—Larson—Roberts Elec Co v Burdick, 127 N W 2d 163, 267 Minn 486—Obraske v Woody, 199 N W 2d 429, 294 Minn 105 overruling Bierlein v Gagnon, 96 N W 2d 573, 255 Minn 143, to the extent inconsistent

12. Cal—Lewis & Queen v S Edmondson & Sons, supra, n 1

Minn—Barrett v Hampe, supra, n 4

page 1040

18. Tex—Stricklin v Southwest Reserve Life Ins Co, Civ App, 234 S W 2d 439, err ref

A personal judgment may be rendered for attorney's fees ¹⁸³

18.5. Non-contractual mechanic's lien

Tex—Diaz v Trevino, Civ App, 430 S W 2d 742

20. Idaho—Willis v Palmer, 298 P 2d 972, 78 Idaho 104—Dawson v Eldredge, 372 P 2d 414, 84 Idaho 331—Boone v P & B Logging Co, 397 P 2d 31, 88 Idaho 111

21. Limitation of amount of lien

Utah—Park v Jameson, 364 P 2d 1, 12 Utah 2d 141

§ 354. Costs on Appeal

22. Fla—In re Carol Florida Corp, App, 118 So 2d 837—Babe's Plumbing Inc v Maser, App, 194 So 2d 666

Iowa—Cusler Elec Co v Carlson, 86 N W 2d 682
Mich—River Rouge Sav Bank v S & M Bldg Co, 101 N W 2d 260, 359 Mich 189, 91 A L R 2d 409

Tex—Hennemuth v Weatherford, Civ App, 278 S W 2d 271, err ref no rev err

Wash—Larson v Duclos, 281 P 2d 458, 46 Wash 2d 334—Hopkins v Ulvestad, 282 P 2d 806, 46 Wash 2d 514—Elmore v Graystone of Centralia, Inc, 387 P 2d 75, 63 Wash 2d 250

Wis—Miles Homes, Inc, of Wis v Starrett, 127 N W 2d 243, 23 Wis 2d 356

page 1041

MEDIC. A physician or a medical student. ¹⁷⁵⁰

17.50. D C—Radiator Specialty Co v Ladd, D C 218 F Supp 827, 828

MEDICAL.

18 Similarly defined

(1) Pertaining or relating to the science of medicine or to the practice or study of medicine—Lowman v Kuecker, 71 N W 2d 586, 246 Iowa 1227, 52 A L R 2d 1380

(2) The word "medical" is defined as relating to or concerned with physicians or with the practice of medicine

Mo—Mashak v Foelker, App, 356 S W 2d 713, 720

"Medical" and "psychiatric" do not denote subjects greatly different from each other, but do in fact refer to those that are connected with each other ¹⁸³ Each do not embrace all the objects of the class, one being a specialty, branch, or division of the other ^{18 10}

18.5. Mo—Mashak v Foelker, App, 356 S W 2d 713, 720

18 10 Mo—Mashak v Foelker, App, 356 S W 2d 713, 720

Phrases

19. Phrases

(1) "Medical aid" see Physicians & Surgeons, § 1

(9) "Medical center" see the CJS definition Center

(10) "Medical treatment" means any medicine or application which puts an end to disease and restores health or one that relieves but does not necessarily end a marked condition—Mangeri v Spring Tool Co, 161 A 2d 765, 767, 769, 62 N J Super 32

MEDICINE.

page 1042

28. Mo—CJS quoted in State ex rel and to Use of Gibson v Missouri Bd of Chiropractic Examiners, Mo App, 365 S W 2d 773, 778

29. Mo—CJS quoted in State ex rel and to Use of Gibson v Missouri Bd of Chiropractic Examiners, App, 365 S W 2d 773, 778

30. Minn—CJS quoted in Harris v State, 92 So 2d 217, 222, 229 Minn 755

Mo—CJS quoted in State ex rel and to Use of Gibson v Missouri Bd of Chiropractic Examiners, App, 365 S W 2d 773, 778

31. Minn—CJS quoted in Harris v State, 92 So 2d 217, 222, 229 Minn 755

32. Minn—CJS quoted in Harris v State, 92 So 2d 217, 222, 229 Minn 755

34. Mo—State ex rel and to Use of Gibson v Missouri Bd of Chiropractic Examiners, App, 365 S W 2d 773, 778

35. Minn—CJS quoted in Harris v State, 92 So 2d 217, 222, 229 Minn 755

Mo—State ex rel and to Use of Gibson v Missouri Bd of Chiropractic Examiners, App, 365 S W 2d 773, 778

36. Minn—CJS quoted in Harris v State, 92 So 2d 217, 222, 229 Minn 755

39. Mo—CJS quoted in State ex rel and to Use of Gibson v Missouri Bd of Chiropractic Examiners, App, 365 S W 2d 773, 778

41. Minn—CJS quoted in Harris v State, 92 So 2d 217, 222, 229 Minn 755

Mo—CJS quoted in State ex rel and to Use of Gibson v Missouri Bd of Chiropractic Examiners, Mo App, 365 S W 2d 773, 778

MEDITATE.

page 1043

53. Tex—Ohlrich v State, 287 S W 2d 478, 479, 162 Tex Cr R 502

MEDIUM FORMAT CAMERA.

A "medium format camera" is used principally by professional photographers and sophisticated amateurs, and utilizes ^{120/220} film ^{56 30}

56.50 U S—Bell & Howell Manuya Co v Masel Supply Co Corp, C A N Y, 719 F 2d 42, 43

MEET.

As a verb

59. Similarly defined

(1) "Meet" means to come, by accident or design, into contact or proximity with, or into the presence or company of, by approach from opposite or different directions—Blanchi v Barli, CCA Cal, 168 F 2d 793, 800

page 1044

61 Similarly defined

(1) "Meet" means to come together, to approach each other so as to arrive at the same place, as where roads meet, to come together as by approach from opposite or different directions—People v Berghauer, 166 N Y 2d 161, 162, 7 Misc 2d 178

(2) "To meet" a person indicates a joining together in some social or other activity temporarily or otherwise—U S ex rel Miller v Fata, C A Ill, 342 F 2d 646, 649

63. Met means agreed to—In re Lifter's Estate, 103 A 2d 670, 674, 377 Pa 227

Meeting

66. Similarly defined

(1) A "meeting" is an assembling of a number of persons for purpose of discussing and acting upon some matter or matters in which they have a common interest—American Brass Co v Ansonia Brass Workers' Union Local 445, Intern Union of Mine, Mill and Smelter Workers, 101 A 2d 291, 293, 140 Conn 457

(2) Term "meetings" includes deliberative gatherings however confined to investigation and discussion—Sacramento Newspaper Guild v Sacramento County Bd of Sup'rs, 69 Cal Rptr 480, 485, 487, 263 C A 2d 41

(3) A "meeting" is a coming together of persons, an assembly—Buchholz v Board of Adjustment of Bremer County, Iowa, 199 N W 2d 73, 77

The word "meeting" is also defined to mean a junction, intersection, or confluence. ^{66 1}

66.1. N Y—People v Berghauer, 166 N Y 2d 161, 162, 7 Misc 2d 178

Phrases.

72. Other phrases

(1) "Public meeting" presupposes the right of the public freely to attend such meetings with concurrent right freely to express any approval or disapproval of any action or course about to be taken—City of Lexington v Davis, 221 S W 2d 659, 661, 310 Ky 751

Adjourned meeting of city board of commissioners held at home of mayor who was seriously ill was not a "public meeting" within statute requiring all meetings of board of commissioners to be public—City of Lexington v Davis, supra.

page 1045

MELANIN. A dark bodily pigment found in hair, choroid of the eye, other dark tissues, and in melanotic tumors. ^{76 50}

76.50. La.—Foster v St Paul Fire & Marine Ins Co, La App, 212 So 2d 729, 731

MELT.

Melting.

MELT**Page 1045****82 In glass industry**

"Melting" as used in the glass industry has reference to the application of heat to the solid glass-making materials whereby they are fused and brought to a molten condition—Application of Arbet, 201 F 2d 923, 924, 40 CC Pa A., Patents, 831

Phrases

(1) The "melting temperature" is that temperature at which stretched polyethylene film loses its dimensional stability

US—Sealed Air Corp v US Intern Trade Commission, 645 F 2d 976, 984, 68 CCPA 93

MEMBER.**84. Similarly defined**

(1) The word "member" means one of the persons composing a society, community, or party, an individual who belongs to an association—Fisher v US, C A Wash, 231 F 2d 99, 106

Ky—Louisville Bd of Ins Agents v Jefferson County Bd of Bd, 309 S W 2d 40, 41

(2) A member is a person belonging to some association, society, community party, etc—In re Freshour's Estate, 345 P 2d 689, 696, 185 Kan 434, 81 A L R 2d 806

page 1046

In anatomy

85. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

86. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

87. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

88. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

89. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

90. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

91. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

92. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

93. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

94. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

95. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

96. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

97. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

98. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

99. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

100. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

101. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

102. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

103. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

104. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

105. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

106. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

107. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

108. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

109. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

110. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

111. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

112. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

113. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

114. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

115. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

116. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

117. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

118. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

119. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

120. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

121. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

122. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

123. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

124. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

125. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

126. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

127. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

128. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

129. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

130. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

131. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

132. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

133. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

134. Wis—C.J.S. quoted in Fuchs v Old Line Life Ins Co, 174 N W 2d 273, 276, 46 Wis 2d 67

Kan—State v Cruitt, 436 P 2d 870, 874, 200 Kan 372

31. Kan—State v Cruitt, 436 P 2d 870, 874, 200 Kan 372

Ohio—State v Brunswick, supra, n 25

32 Similarly defined

(1) "Menace" is technically a threat of duress or a threat of injury to the person, property or character of another—Odorizzi v Bloomfield School Dist, 54 Cal Rptr 533, 538, 246 C A 2d 123

As a verb

37. Ohio—State v Brunswick, supra, n 25

page 1049

MENIERE'S SYNDROME. See the CJS definition Disease

MENINGES.**49 Three membranes**

The meninges are the three membranes enveloping the brain and spinal cord, including the "Dura", "Pia" and "Arachnoid"—York v Daniels, 259 S W 2d 109, 111, 241 Mo App 809

MENINGITIS.**50. Cerebrospinal meningitis**

(1) Inflammation of the meninges of the brain and spinal cord—Steadman Med D

(2) It is said to be a communicable disease—Sherwood v Babcock, 175 N W 470, 471, 208 Mich 536

MENTAL. The term is defined as meaning of or pertaining to the mind⁵⁵¹

55.1. Ill—Schoenbein v Board of Trustees of Police Pension Fund of Village of Morton, 212 N E 2d 380, 382, 65 Ill App 2d 379

MENTION.

page 1050

65. Similarly expressed

(1) As a noun the word "mention" is employed to indicate a speaking or notice, especially in a brief or cursory manner, a specification, usually by name, casual introduction into speech or writing, naming, especially incidentally—Hunt v Mayor and Council of City of Riverside, Cal, 191 P 2d 426, 430, 31 Cal 2d 619

68. Similarly defined

(1) "Mention" means to make mention of, to refer to casually, to specify by name, or to name—Hunt v Mayor and Council of City of Riverside, Cal, supra, n 65

page 1051

MERCANTILE.**86. Similarly expressed**

(3) "Mercantile" is buying and selling of goods or merchandise, or dealing in the purchase or sale of commodities, and that, too, not occasionally or incidentally, but habitually as a business—Insurance Co of North America v Lapidus, 123 A 2d 597, 601, 210 Md 389

MERCANTILE AGENCIES**Library References**

Modern Legal Forms Ch 25, Corporations.

§ 1. Definition and Nature

page 1052

2. Similar definitions

Miss—Retail Credit Co v Garraway, 126 So 2d 271, 240 Miss. 230

§ 2. Regulation and Control**Library References****Credit Reporting Agencies ¶1****State regulation of credit reporting agencies**

Kan—Peasley v Telecheck of Kansas, Inc, 637 P 2d 437, 6 Kan App 2d 990

The Federal Fair Credit Reporting Act, was enacted to protect consumers against inaccurate or arbitrary information in a consumer report that is being used to evaluate his eligibility for credit insurance or employment⁷⁵ The Act applies to consumer reporting agencies which furnish such reports, either for monetary fees or for dues paid on a cooperative non-profit basis and which use facilities of interstate commerce to prepare and distribute such reports,⁷¹⁰ and imposes certain procedural requirements and liabilities upon agencies found to be within its scope⁷¹³

7.5 US—Wrigley v Dun & Bradstreet, Inc, D C Ga, 375 F Supp 969, aff'd, C A, 500 F 2d 1183—Ackerley v Credit Bureau of Sheridan, Inc, D C Wyo, 385 F Supp 658

Act not retroactive

US—Porter v Talbot Perkins Children's Services, D C N Y, 355 F Supp 174

Business or commercial credit report not protected "consumer report"

US—Suzmore v Bamba Leasing Corp, D C Ga, 360 F Supp 252

Report for terminating insurance benefits not protected "consumer report"

US—Bersah v Retail Credit Co, Inc, D C Cal, 358 F Supp 260

Reports necessary in business transaction involving consumer may qualify as other authorized purpose

US—Bersah v Retail Credit Co, Inc, D C Cal, 358 F Supp 260

Violation not shown

US—Behlaw v Credit Bureau of Prescott, D C Ariz, 392 F Supp 1356—Todd v Associated Credit Bureau Services, Inc, D C Pa, 451 F Supp 447, aff'd, C A, 578 F 2d 1376, cert den 99 S Ct 834, 439 US 1068, 59 L Ed 2d 33

Ky—Equifax Services, Inc v Lamb, App, 621 S W 2d 28, cert den 102 S Ct 1973, 456 US 927, 72 L Ed 2d 442

N Y—Graney Development Corp v Taksen, 411 N Y S 2d 756, 66 A D 2d 1008

Act not applicable to "consumer report"

US—Behlaw v Credit Bureau of Prescott, D C Ariz, 392 F Supp 1356

Cal—Emerson v J F Shea Co, Inc, 143 Cal Rptr 170, 76 CA 3d 579

Purpose

US—Conley v TRW Credit Data, D C Ill, 381 F Supp 473—Boothe v TRW Credit Data, D C N Y, 523 F Supp 631

Ariz—Antwerp Diamond Exchange of America, Inc v Better Business Bureau of Maricopa County, Inc, 637 P 2d 733, 130 Ariz. 523

Ky—Equifax Services, Inc v Lamb, App, 621 S W 2d 28, cert den 102 S Ct 1973, 456 US 927, 72 L Ed 2d 442

Okla—Derryberry v Retail Credit Co, 550 P 2d 942

Wash—Razor v Retail Credit Co, 554 P 2d 1041, 87 Wash 2d 516

MENACE.

page 1048

As a noun.

25. US—C.J.S. quoted in Bogard v Cook, C A Miss, 586 F 2d 399, 410

"Threat" synonymous

Ohio—State v Brunswick, App, 91 NE 2d 553, 559

27. Ohio—State v Brunswick, supra, n 25

30. Cal—People v Stoddard, 38 Cal Rptr 407, 408, 227 CA 2d 40

Violation of Act shown

US—Millstone v O'Hanlon Reports, Inc., 528 F 2d 829

Deletion of information

SC—Herring v Retail Credit Co., 224 S E 2d 663, 266 SC 435

State Fair Credit Reporting Act

Me—Equifax Services, Inc v Cohen, 420 A 2d 189, 12 A L R 4th 251, cert den 101 S Ct 1360, 450 US 916, 67 L Ed 2d 342

Held not consumers

Ariz—Antwerp Diamond Exchange of America, Inc v Better Business Bureau of Maricopa County, Inc., 637 P 2d 733, 130 Ariz 523

7.10. US—US v Puntorian, D C N Y, 379 F Supp 332—D'Angelo v Wilmington Medical Center, Inc., D C Del., 515 F Supp 1250

Kan—Peasley v Telecheck of Kansas, Inc., 637 P 2d 437, 6 Kan App 2d 990

Reports which affect commercial eligibility

US—Porter v Talbot Perkins Children's Services, D C N Y, 355 F Supp 174

Credit card company revoking own credit card not "consumer reporting agency"

US—Wood v Holiday Inns, Inc, D C Ala., 369 F Supp 82, affd in part, revd in part on oth grds CA, 508 F 2d 167

Persons administering lie-detector examination for employment not "consumer reporting agency"

US—Peller v Retail Credit Co, D C Ga., 359 F Supp 1235, affd, CA, 505 F 2d 733

Unreasonable burden on agencies not shown

US—Retail Credit Co v Dade County, Florida, D C Fla., 393 F Supp 577

No inconsistency

US—Retail Credit Co v Dade County, Florida, D C Fla., 393 F Supp 577

Reports subject to act

US—Belshaw v Credit Bureau of Prescott, D C Ariz., 392 F Supp 1356

Wash—Razor v Retail Credit Co., 554 P 2d 1041, 87 Wash 2d 516

Transfer of files to other consumer reporting agencies

NH—State v Credit Bureau of Nashua, Inc., 342 A 2d 640, 115 NH 435

Reports not subject to act

US—Ollstad v Kelley, C A Cal., 573 F 2d 1109—Freeman v Southern Nat Bank, D C Tex., 531 F Supp 94

NJ—Krumholz v TRW, Inc., 360 A 2d 413, 142 NJ Super 80

Retailer not consumer reporting agency

US—Rice v Montgomery Ward & Co, Inc., D C NC., 450 F Supp 668

7.15. US—Porter v Talbot Perkins Children's Services, D C N Y, 355 F Supp 174—Dynes v TRW Credit Data, C A Cal., 652 F 2d 35—Lawhorn v Trans Union Credit Information Corp., D C Mo., 515 F Supp 19

Action not improper

US—Middlebrooks v Retail Credit Co, D C Ga., 416 F Supp 1013

NY—Goodnough v Alexander's Inc., 370 NYS 2d 388, 82 Misc 2d 662

Violation of Act shown

US—Greenway v Information Dynamics, Ltd., D C Ariz., 399 F Supp 1092

Total nonperformance not shown

US—Hong Kong Export Credit Ins Corp v Dun and Bradstreet, D C N Y, 414 F Supp 153

Copy to person seeking credit

Okla—Derryberry v Retail Credit Co., 550 P 2d 942

"Opinions in writing"

Okla—Derryberry v Retail Credit Co., 550 P 2d 942

Disclosing findings to consumer

US—Millstone v O'Hanlon Reports, Inc., C A Mo., 528 F 2d 829

Procurer

US—Middlebrooks v Retail Credit Co, D C Ga., 416 F Supp 1013

Confusion of computer credit reports

US—Lowry v Credit Bureau, Inc of Georgia, D C Ga., 444 F Supp 541—Thompson v San Antonio Retail Merchants Ass'n, C A Tex., 682 F 2d 509

Liability only for failure to follow reasonable procedures

US—Hauser v Equifax, Inc, C A Neb., 602 F 2d 811

Not required to disclose possession of records

US—In re Green, C A Cal., 633 F 2d 825

Civil and criminal penalties

US—Matter of Application to Quash Grand Jury Subpoena, D C Md., 526 F Supp 1253

Court order

US—Matter of Application to Quash Grand Jury Subpoena, D C Md., 526 F Supp 1253

Provisions of the Act which require an agency to obtain an order of a court or the written consent of the person affected before issuing a consumer report to a party requesting it apply to a request therefor by government agencies.^{7.20}

7.20. US—Belshaw v Credit Bureau of Prescott, D C Ariz., 392 F Supp 1356

Grand jury subpoena duces tecum as court order

US—In re Grand Jury Proceedings, D C N J., 503 F Supp 9

Grand jury subpoena duces tecum as not court order

US—In re Grand Jury Subpoena to Credit Bureau of Greater Harrisburg, D C Pa., 594 F Supp 229

Federal Trade Commission

DC—FTC v Manager, Retail Credit Co, Miami Branch Office, D C., 357 F Supp 347, revd, C A., 515 F 2d 988, 169 US App D C 271—FTC v Manager, Retail Credit Co, Miami Branch Office, C A., 515 F 2d 988, 169 US App D C 271

Subpoena duces tecum not order

NY—Application of TRW Credit Data, 415 NYS 2d 196, 98 Misc 2d 940

Ex parte order

SC—Herring v Credit Bureau of Columbia, 252 SE 2d 123, 272 SC 368

Form of order

US—In re Grand Jury Proceedings, D C N J., 503 F Supp 9

Grand jury subpoena is order

US—US v Retail Credit Men's Ass'n of Jacksonville, D C Fla., 501 F Supp 21

Confidential financial information and reports of social service institutions, such as child adoption agencies, are not subject to disclosure under the Federal Fair Credit Reporting Act which is keyed to deal with the commercial uses of consumer reports.^{7.25}

7.25. US—Porter v Talbot Perkins Children's Services, D C N Y, 355 F Supp 174—Belshaw v Credit Bureau of Prescott, D C Ariz., 392 F Supp 1356

Except as to juveniles, there is no general policy preventing the full reporting of court records under the Act.^{7.30} Accordingly, a credit reporting

agency may lawfully report the record of an arrest or indictment and a judgment of acquittal.^{7.35}

7.30. US—Fite v Retail Credit Co, D C Mont., 386 F Supp 1045, affd, C A., 537 F 2d 384

Internal Revenue Service

US—US v Puntorian, D C N Y, 379 F Supp 332

7.35. US—Fite v Retail Credit Co, D C Mont., 386 F Supp 1045, affd, C A., 537 F 2d 384

The Act imposes a requirement that the user of credit information not obtain the information under false pretenses.^{7.36} Where information is so obtained, there is a civil right of action against such user.^{7.37}

7.36. US—Kennedy v Border City Sav & Loan Ass'n, C A Ohio, 747 F 2d 367

7.37. US—Kennedy v Border City Sav & Loan Ass'n, C A Ohio, 747 F 2d 367

Under a state consumer credit reporting act, credit information concerning business entities or individuals engaged in business in their business capacities and not as consumers, is not a "consumer credit report" within the meaning of the act, as would subject one to liability for disseminating false or obsolete information about consumer.^{7.50}

7.50. US—Mende v Dun & Bradstreet, Inc, C A Cal., 670 F 2d 129

§ 3. Creation and Effect of Relation as between Agency and Its Subscribers

Library References

Credit Reporting Agencies ⇐2.

§ 4. — Duty to Exercise Care and Diligence

Library References

Credit Reporting Agencies ⇐3.

page 1053

11. US—Corrigan v Dun & Bradstreet, D C R I., 91 F Supp 424

Colo—Strong v. Retail Credit Co., 552 P 2d 1025, 38 Colo App 125

Disclosure to consumer

US—Roseman v Retail Credit Co, Inc, D C Pa., 428 F Supp 643

12. US—Serno v Dun & Bradstreet, Inc., D C S C., 267 F Supp 396—Thompson v San Antonio Retail Merchants Ass'n, C A Tex., 682 F 2d 509

13. Ga—Howard v Dun & Bradstreet, Inc., 220 SE 2d 702, 136 Ga App 221

14. US—Serno v Dun & Bradstreet, Inc., D C S C., 267 F Supp 396

Fla—Pan American Bank of Miami v Osgood, App., 383 So 2d 1095

Negligence will not subject defendant to liability

US—Koral Sales, Inc v Dun & Bradstreet, Inc., D C Wis., 389 F Supp 985

§ 5. — Scope of Use of Information

Library References

Credit Reporting Agencies ⇐3.

28. Civil liability of person obtaining report under false pretenses

US—Rice v Montgomery Ward & Co, Inc, D C N C, 450 F Supp 668

§ 7. Effect of Relation as between Agency and Third Persons

A report by a mercantile agency must be complied with regard to the effect it will have on the rights of the person who is the subject of the report³⁶⁵

36.5. Neb—Bartels v Retail Credit Co, 175 NW 2d 292, 185 Neb 304, 40 A L R 3d 1039

§ 8. Actions by or against Agencies

Library References

Credit Reporting Agencies ¶4

38. US—Mallinckrodt Chemical Works v Goldman, Sachs & Co, D C N Y, 420 F Supp 231

NY—Baldacci v Zenner, 113 N Y S 2d 178, 203 Misc 40

Fraud not shown

Ga—Howard v Dun & Bradstreet, Inc, 220 SE 2d 702, 136 Ga App 221

Various matters have been adjudicated in actions by third persons against mercantile agencies³⁸⁵

38.5. S C—Herring v Credit Bureau of Columbia, 237 SE 2d 381, 269 S C 335

Defense of qualified privilege

US—Sermo v Dun & Bradstreet, Inc, D C S C, 267 F Supp 396

Cal—Tendler v Dun & Bradstreet, Inc, 118 Cal Rptr 274, 43 C A 3d 788

Pleadings

US—Sermo v Dun & Bradstreet, Inc, D C S C, 267 F Supp 396—Koral Sales, Inc v Dun & Bradstreet, Inc, D C Wis, 389 F Supp 985—Ackerley v Credit Bureau of Sheridan, Inc, D C Wyo, 385 F Supp 658—Rice v Montgomery Ward & Co, Inc, D C N C, 450 F Supp 668

Cal—Tendler v Dun & Bradstreet, Inc, 118 Cal Rptr 274, 43 C A 3d 788

Ga—Thomas v Equifax, Inc, 236 SE 2d 154, 142 Ga App 422

Or—Reliable Credit Ass'n v Creditworth of America, Inc, 570 P 2d 379, 280 Or 233

Submission of matters to jury

US—Sermo v Dun & Bradstreet, Inc, D C S C, 267 F Supp 396—Collins v Retail Credit Co, D C Mich, 410 F Supp 924

Wash—Razor v Retail Credit Co, 554 P 2d 1041, 87 Wash 2d 516

No cause of action under Fair Credit Reporting Act

US—Wood v Holiday Inns, Inc, C A Ala, 508 F 2d 167

NY—Graney Development Corp v Takson, 411 N Y S 2d 756, 66 A D 2d 1008

Plaintiff not entitled to injunction

US—Fite v Retail Credit Co, D C Mont, 386 F Supp 1045, aff'd, C A, 537 F 2d 384

Proof of actual damages unnecessary

US—Ackerley v Credit Bureau of Sheridan, Inc, D C Wyo, 385 F Supp 658—Thompson v San Antonio Retail Merchants Ass'n, C A Tex, 682 F 2d 509

Persons who have standing to sue

US—Conley v TRW Credit Data, D C Ill, 381 F Supp 473

NY—Randaccio v Retail Credit Co, 372 N Y S 2d 4, 48 A D 2d 1007

No liability where report issued on order of court

Kan—Kansas Commission on Civil Rights v Sears, Roebuck & Co, 532 P 2d 1263, 216 Kan 306

Injunctive relief

US—Greenway v Information Dynamics, Ltd, D C Ariz, 399 F Supp 1092

Burden of proof

US—Hong Kong Export Credit Ins Corp v Dun and Bradstreet, D C N Y, 414 F Supp 153

Evidence

US—Collins v Retail Credit Co, D C Mich, 410 F Supp 924—Equifax Inc v FTC, C A, 678 F 2d 1047

Colo—Strong v Retail Credit Co, 552 P 2d 1025, 38 Colo App 125

Damages for violation of Fair Credit Reporting Act

US—Millstone v O'Hanlon Reports, Inc, C A Mo, 528 F 2d 829

NY—Nitti v Credit Bureau of Rochester, Inc, 375 N Y S 2d 817, 84 Misc 2d 277

Punitive damages not assessable

US—Collins v Retail Credit Co, D C Mich, 410 F Supp 924

Cal—Emerson v J F Shea Co, Inc, 143 Cal Rptr 170, 76 C A 3d 579

Law of defamation applicable

Ariz—Ross v Gallant, Farrow & Co, P C, 551 P 2d 79, 27 Ariz App 89

Action dismissed

NJ—Krumholz v TRW, Inc, 360 A 2d 413, 142 NJ Super 80

Actual damages

US—Bryant v TRW, Inc, D C Mich, 487 F Supp 1234, aff'd, C A, 689 F 2d 72

Wash—Razor v Retail Credit Co, 554 P 2d 1041, 87 Wash 2d 516

Instructions

US—Thornton v Equifax, Inc, C A Ark, 619 F 2d 700, cert den 101 S Ct 108, 449 U S 835, 66 L Ed 2d 41

Wash—Razor v Retail Credit Co, 554 P 2d 1041, 87 Wash 2d 516

Award of expenses

US—Lowry v Credit Bureau, Inc of Georgia, D C Ga, 444 F Supp 341

Punitive damages recoverable

US—Pendleton v Trans Union Systems Corp, D C Pa, 76 F R D 192

Fla—Pan American Bank of Miami v Osgood, App, 383 So 2d 1095

Defense

US—Kiblen v Retail Credit Co, D C Wash, 76 F R D 402

Theory of action

NY—Graney Development Corp v Takson, 400 N Y S 2d 717, 92 Misc 2d 764, aff'd 411 N Y S 2d 756, 66 A D 2d 1008

Law applicable

Ky—Credit Bureau of Pulaski County, Inc v LaVoe, App, 627 S W 2d 49

Review

Wis—Stern v Credit Bureau of Milwaukee, App, 315 N W 2d 511, 105 Wis 2d 647

Damages not shown

Ky—Equifax Services, Inc v Lamb, App, 621 S W 2d 28, cert den 102 S Ct 1973, 456 U S 927, 72 L Ed 2d 442

Attorney fees

US—Lawhorn v Trans Union Credit Information Corp, D C Mo, 519 F Supp 455

MERCAPTANS.

1 Similarly described

(1) "Mercaptan" is any of a series of compounds of the general formula RSH, analogous to alcohols and phenols, but containing sulfur in place of oxygen—Shell Development Co v Pure Oil Co, D C D C, 111 F Supp 197, 200, C A, aff'd 212 F 2d 454, 94 U S App D C 86

MERCHANDISE.

In General

6 Mo—C J S cited in State v Laswell, App, 311 S W 2d 356, 358, 359—State v Laswell, App, 311 S W 2d 356, 358, 359

7. Mo—C J S cited in State v Laswell, App, 311 S W 2d 356, 358, 359—State v Laswell, App, 311 S W 2d 356, 358, 359

As a Noun

19 NY—Knapp v Realty Hotels, 95 N Y S 2d 227, 229, 197 Misc 606, rev'd on oth grds 100 N Y S 2d 176, 277 App Div 977, rearg den 100 N Y S 2d 1019, 277 App Div 1037—Utica Carting Storage & Contracting Co v World Fire & Marine Ins Co, 100 N Y S 2d 941, 944, 277 App Div 483, 36 A L R 2d 500, rearg and app den 102 N Y S 2d 637, 278 App Div 629

20. Similarly defined

(1) "Merchandise" is something to be bought or sold, the subject of trade—Strauss v Schlamm, 144 N Y S 2d 229, 231

21. Similarly defined

(1) Mo—State v Laswell, App, 311 S W 2d 356, 358, 359
NY—Knapp v Realty Hotels, supra, n 19

23. Similarly defined

(1) "Merchandise" is wares of commerce or goods which are bought and sold in commerce—City of Nokomis v Smith, 219 N E 2d 776, 777, 74 Ill App 2d 211

27. Similarly defined

(1) Commercial commodities usually bought or sold—Utica Carting Storage & Contracting Co v World Fire & Marine Ins Co, supra, n 19

31. NY—Utica Carting Storage & Contracting Co v World Fire & Marine Ins Co, supra, n 19

32. Mo—C J S cited in State v Laswell, App, 311 S W 2d 356, 358, 359

38. NY—Utica Carting Storage & Contracting Co v World Fire & Marine Ins Co, supra, n 19

39. NY—Utica Carting Storage & Contracting Co v World Fire & Marine Ins Co, supra, n 19

40. NY—Utica Carting Storage & Contracting Co v World Fire & Marine Ins Co, supra, n 19

44. Tangible articles

Mo—State v Laswell, App, 311 S W 2d 356, 358, 359

62. Ohio—Grinnell Corp v Bowers, 147 N E 2d 657, 660, 167 Ohio St 267

64. Mo—State v Laswell, App, 311 S W 2d 356, 358, 359

69. Mo—C J S cited in State v Laswell, App, 311 S W 2d 356, 358, 359

The term may encompass agricultural or horticultural products.⁶⁷¹

87.1. Mo—State v Laswell, App, 311 S W 2d 356, 358, 359

88. Held merchandise

(5) *Pittsacine birds*—*Stener v U.S., CA Cal*, 229 F.2d 745, 747—*Duke v U.S., CA Cal*, 235 F.2d 721, 724

(6) *US—US v Stromberg, DCNY*, 22 FRD 513, 520

(7) *Foreign postage stamps—US v Wehaupt, DCNY*, 167 F Supp 211, 213

89. Held not merchandise

(6) *Manuscript of historical work, notes and memoranda—Knapp v Realty Hotels, supra*, n 19

(7) *Office records—Strauss v Schlumm*, 144 NY S.2d 229, 231

(8) *Sanders v U.S.*, 389 P.2d 799, 802, 192 Kan 501

90. *SD—City of Gregory v Clausen*, 99 NW.2d 883, 885, 77 A.L.R.2d 1212

page 1060

Cross References and Phrases**Phrases****94. Phrases**

(4a) "Retailer of merchandise" is a merchant who buys articles in gross or merchandise in large quantities and sells the same by single article or in small quantities—*City of Syracuse v Bronner*, 133 N.Y.S.2d 153, 161

(6) "Shifting stock of merchandise" means a stock of merchandise subject to change from time to time, in the course of trade by purchases, sales, or other transactions—*Laderburg v Miller*, 210 F.614, 616, 127 CCA 250

57 C.J. p. 1144, note 51

MERCHANT.**As a Noun**

7. *Mo—Food Center of St. Louis v Village of Warson Woods*, 277 S.W.2d 573, 577

8. *Mo—Food Center of St. Louis v Village of Warson Woods*, 277 S.W.2d 573, 577

page 1061

15. Similarly defined

(1) *Mo—Food Center of St. Louis v Village of Warson Woods*, 277 S.W.2d 573, 577

17. *Defined by statute dealing with risk of loss*—*Com—Mercant v Pearson*, 280 A.2d 137, 140, 160 Conn 468

24. Similarly defined

(1) One who buys and sells goods or commodities in a store, stand, shop, or other fixed place as a usual and customary business and for profit—*C.J.S. cited in City of Florid Hills v Hardekopf*, Mo App., 271 S.W.2d 256, 257

28. Similarly defined

(2) *Va—Com v Wytheville Knitting Mills Emp Welfare Ass'n*, 79 S.E.2d 621, 624, 195 Va 663

page 1063

59. So defined

A "merchant" is one who engages in economic enterprise on a systematic basis, not merely an isolated transaction—*Newton-Waltham Bank & Trust Co v Bergen Motors, Inc.*, 327 N.Y.S.2d 77, 80, 68 Misc.2d 228, aff'd 347 N.Y.S.2d 568, 75 Misc.2d 103

page 1064

—Kinds of Merchants.**73. Wholesale and retail merchants**

(3) *Retail merchant* is one who sells at retail only, and not for resale—*Com v Wytheville Knitting Mills Emp Welfare Ass'n*, 79 S.E.2d 621, 624, 195 Va 663

As an Adjective

page 1065

Phrases:**76. Phrases**

(6) *US v The Reefer King, DC Wash*, 90 F Supp 236, 237

MERCHANTABLE.

83. *Kan—McAfee v City of Garnett*, 469 P.2d 295, 299, 205 Kan 269

85. *Kan—McAfee v City of Garnett*, 469 P.2d 295, 299, 205 Kan 269

95. *Anz—Peters v Macchiaroli*, 243 P.2d 777, 779, 74 Anz 62

"Salable" equivalent

Kan—Foote v Wilson, 178 P.430, 431, 104 Kan 191—*McAfee v City of Garnett*, 469 P.2d 295, 299, 205 Kan 269

96. *Anz—Peters v Macchiaroli, supra*, n 95

97. *Anz—Peters v Macchiaroli, supra*, n 95

page 1066

99. *Anz—Peters v Macchiaroli, supra*, n 95

2. *Anz—Peters v Macchiaroli*, 243 P.2d 777, 779, 74 Anz 62

4. Phrases

(6a) A "merchantable title" is one free from a reasonable probability of litigation—*May v Nyman*, 278 N.E.2d 97, 102, 3 Ill App.3d 580

MERE.

16. *Mich—City of Detroit v General Foods Corp.*, 197 N.W.2d 315, 322, 39 Mich App 180

Mo—Conser v Atchison, T & SF Ry Co., 266 S.W.2d 587, 593

17. *Conser v Atchison, T & SF Ry Co.*, 226 S.W.2d 587, 593—*City of Detroit v General Foods Corp.*, 197 N.W.2d 315, 322, 39 Mich App 180

MERELY.

page 1067

34. "Simply" synonymous

Nev—Pearson v Pearson, 201 P.2d 309, 328, 65 Nev 717

MERETRIOUS.

36. *Ga—Hathcock v Hathcock*, 287 S.E.2d 19, 22, 249 Ga 74

Adjective form of noun "meretrix"

NJ—Churelstein v Churelstein, 79 A.2d 884, 891, 12 N.J. Super 468

Comes from Latin "meretrix" meaning prostitute

Wash—In re Relationship of Eggers, 638 P.2d 1267, 1270, 30 Wash App 867

MERETRIX. A prostitute

36.50. *NJ—Churelstein v Churelstein, supra*, n 36

MERGE; MERGER.

38. *US—National Latex Products Co v Sun Rubber Co., CA Ohio*, 274 F.2d 242, 249

page 1068

Merger

50. *US—C.J.S. quoted in Shock v Gilpin, DC Ill.*, 150 F Supp 471, 476, aff'd, CA, 255 F.2d 912

51. *US—C.J.S. quoted in Shock v Gilpin, DC Ill.*, 150 F Supp 471, 476, aff'd, CA, 255 F.2d 912

Mergers are variously classified in the business world, and such a merger may be horizontal,⁵¹ or it may be vertical,⁵² or it may be a products extension merger,⁵³ or it may be a geographic market extension merger.⁵⁴ It may be a conglomerate merger,⁵⁵

but the term "conglomerate merger" encompasses a variety of combinations.⁵⁶

58.1. Defined or described

(1) "Horizontal merger" is acquisition of one company by another company producing same product or similar product and selling it in same geographic market

US—US v International Tel & Tel Corp., DC Conn, 306 F Supp 766, 774—*US v First Nat. Bank of Jackson, DC Miss*, 301 F Supp 1161, 1190

58.2. Defined or described

(1) "Vertical merger" is acquisition of one company which buys product sold by acquiring company or which sells product bought by acquiring company—*US v International Tel & Tel Corp., DC Conn*, 306 F Supp 766, 774—*US v International Tel & Tel Corp., DC Conn*, 324 F Supp 19, 39

(2) "Vertical merger" is a merger between two firms that have a buyer-seller relationship, that is, one produces a product that is then sold to the other—*US v First Nat. Bank of Jackson, DC Miss*, 301 F Supp 1161, 1190

58.3. Defined or described

(1) "Product extension merger" is a merger between two firms which are not direct rivals but each of which produces a product that is functionally related either in marketing or in production to the other—*US v First Nat. Bank of Jackson, DC Miss*, 301 F Supp 1161, 1190

(2) A "product extension merger" is a merger that may enable significant integration in the production, distribution or marketing activities of the merging firms—*Allis-Chalmers Mfg. Co v White Consol. Industries, Inc., CA Del*, 414 F.2d 506, 518

58.4. Defined or described

(1) "Geographic market extension merger" is a merger between two firms that produce same product line but do so in separate geographic markets and are not direct rivals—*US v First Nat. Bank of Jackson, DC Miss*, 301 F Supp 1161, 1190

58.5. Defined or described

(1) A merger other than horizontal or vertical—*US v International Tel & Tel Corp., DC Conn*, 306 F Supp 766, 774

(2) A merger is considered conglomerate when the relationship of the merging companies before the merger was not one of buyer and seller or direct competitor—*General Foods Corp v FTC, CA*, 386 F.2d 936, 944, cert den 88 S.Ct. 1805, 391 U.S. 919, 20 L.Ed.2d 657

Pure conglomerate merger

A residual category of mergers in which all mergers are placed that do not fit anywhere else and in which there seems to be no functional or meaningful relationship between firms involved—*US v First Nat. Bank of Jackson, DC Miss*, 301 F Supp 1161, 1190

58.6. *US—General Foods Corp v FTC, CA*, 386 F.2d 936, 944, cert den 88 S.Ct. 1805, 391 U.S. 919, 20 L.Ed.2d 657

Classified as pure and mixed

US—US v International Tel & Tel Co., DC Conn, 306 F Supp 766, 774

MERIT.

page 1070

73. *Mont—State ex rel Bonner v District Court of First Judicial Dist in and for Lewis and Clark County*, 206 P.2d 166, 172, 122 Mont 464

75. *Mont—State ex rel Bonner v District Court of First Judicial Dist in and for Lewis and Clark County, supra*, n 73

Similarly defined

(1) Usually, reward deserved—*State ex rel Bonner v District Court of First Judicial Dist in and for Lewis and Clark County, supra*, n 73

(2) A mark or token of excellence or approbation—*State ex rel Bonner v District Court of First Judicial Dist in and for Lewis and Clark County, supra*, n 73

page 1091

§ 12. Enlistment or Enrollment of Members, and Qualifications Therefor

81. Ineligibility for enlistment or reenlistment

US—Gallo v Brown, D C R I, 446 F Supp 45—Lundena v Alexander, C A N M, 663 F 2d 68

82. Actions not reviewable by civil court

US—Dunlap v Akin, D C Tenn, 376 F Supp 138

Single custodial parents

US—Henson v Alexander, D C Ark, 478 F Supp 1055

88. Pa—Joyce v Guenther, 351 A 2d 331, 23 Pa Cmwh 256

§ 13. Term of Service and Discharge

page 1093

20. NY—Natal v Hausman, 115 NYS 2d 75, 203 Misc 89, mod on oth grds 121 NYS 2d 712, 282 App Div 7, rearg den and app gr 122 NYS 2d 817, 282 App Div 684, revd on oth grds 124 NE 2d 94, 308 NY 146, cert den 75 S Ct 894, 349 US 962, 99 L Ed 1284

Refusal of reenlistment

US—Nesmith v Fulton, D C Ga, 443 F Supp 411, affd, C A, 615 F 2d 196

25. To reduce pilot strength to level authorized by Defense Department

US—Covington v Anderson, C A Or, 487 F 2d 660

Various other matters relating to the discharge of members of the militia have been adjudicated²⁵

25.5. US—Johnson v Laird, C A Wash, 435 F 2d 493—Davis v Vandiver, C A Ga, 494 F 2d 830

Rules and regulations

NY—Boing v Rockefeller, 277 NYS 2d 168, 52 Mac 2d 745

Discharge by governor

NY—Boing v Rockefeller, 277 NYS 2d 168, 52 Mac 2d 745

Review by courts

NY—Boing v Rockefeller, 277 NYS 2d 168, 52 Mac 2d 745

Conscientious objector

US—Holmes v Hoffman, C A Minn, 429 F 2d 34

Medical grounds

NJ—Gross v New Jersey Army Nat Guard, 286 A 2d 736, 118 NJ Super 150

US—Dunlap v State of Tenn, C A Tenn, 514 F 2d 130, revd on oth grds 96 S Ct 2099, 426 US 312, 48 L Ed 2d 660

Governor may exercise discretion

US—Kurian v Callaway, C A N Y, 510 F 2d 274

Termination upon separation

US—Tennessee v Dunlap, Tenn, 96 S Ct 2099, 426 US 312, 48 L Ed 2d 660

Single custodial parents

US—Lundena v Alexander, C A N M, 663 F 2d 68

§ 14. — Pay and Allowances

31. US—Alexander v Fioto, NY, 97 S Ct 1345, 430 US 634, 51 L Ed 2d 694—Gnagy v US, 634 F 2d 574, 225 Ct Cl 242

Retirement pay

Cal—Santin v Cranston, 59 Cal Rptr 1, 250 C A 2d 438

Mich—Lewis v State, 90 NW 2d 856, 352 Mich 422—Moore v Department of Military Affairs, 247 N W 2d 801, 396 Mich 324, app after remand 278 N W 2d 711, 88 Mich App 657

Pension rights are vested

Cal—Santin v Cranston, 59 Cal Rptr 1, 250 C A 2d 438

Liberal approach

NJ—Doerr v State, 322 A 2d 491, 129 NJ Super 150

Pay from private employers

US—Hilliard v New Jersey Army Nat Guard, D C N J, 527 F Supp 405

Ala—White v Associated Industries of Alabama, Inc, 373 So 2d 616, 8 A L R 4th 696

Qualifying for disability annuity

US—Polos v US, 621 F 2d 385, 223 Ct Cl 547, overruling Allen v United States, 571 F 2d 14, 215 Ct Cl 524

32. US—Pattillo v Schlesinger, C A Cal, 625 F 2d 262

page 1094

33. US—Alexander v Fioto, NY, 97 S Ct 1345, 430 US 634, 51 L Ed 2d 694

Right of state employees to differential pay

NJ—Amanita v Cantwell, 213 A 2d 251, 89 NJ Super 7

36. US—Polos v US, 621 F 2d 385, 223 Ct Cl 547

Mich—Brown v State, Dept of Military Affairs, 191 NW 2d 347, 386 Mich 194, cert den 92 S Ct 1256, 405 US 990, 31 L Ed 2d 457

§ 16. Unauthorized Military Organizations

49. US—Vietnamese Fishermen's Ass'n v Knights of the Ku Klux Klan, D C Tex, 543 F Supp 198

Statute construed

US—Vietnamese Fishermen's Ass'n v Knights of Ku Klux Klan, D C Tex, 518 F Supp 993

51. NY—Application of Cassidy, 51 NYS 2d 202, 268 App Div 282, rearg den 63 NYS 2d 840, 270 App Div 1046, affd 73 NE 2d 41, 296 NY 926

§ 18. Armories, Drill or Camp Grounds, and Rifle Ranges

Library References

Militia ⇨17

page 1095

Liability on the bond of a National Guard officer in charge of expenditures may be imposed where the officer expends public funds without receiving proper vouchers or receipts^{62.5}

62.5 Or—Secretary of State v Hanover Ins Co, 411 P 2d 89, 242 Or 541

US—Athas v US, 597 F 2d 722, 220 Ct Cl 96

65. Ill—Loomis v Kechn, 80 NE 2d 368, 400 Ill 337

Armory held by state in governmental capacity

Mass—Com v Massachusetts Turnpike Authority, 206 NE 2d 74, 349 Mass 1

67. Statute creating state armory board held valid

Ill—Loomis v Kechn, supra, n 65

Status of board and its property

Mont—State ex rel Olsen v Montana Armory Bd, 275 P 2d 652, 128 Mont 344

Actions for injuries

(1) Pleading

Wis—Mayerus v Milwaukee County, 159 NW 2d 86, 39 Wis 2d 311

(2) Burden of proof

NY—Zayceck v State, 382 NYS 2d 867, 86 Misc 2d 701

Wis—Mayerus v Milwaukee County, 159 NW 2d 86, 39 Wis 2d 311

68. US—Morris v McCaddin, C A Va, 553 F 2d 866

Purpose of act

(3) Other statements

US—Allen v US, 571 F 2d 14, 215 Ct Cl 524—Storey v Office of Personnel Management, C A Ga, 654 F 2d 361

Discharge proper

US—Davis v Vandiver, C A Ga, 494 F 2d 830—Gnagy v US, 634 F 2d 574, 225 Ct Cl 242

Termination illegal and improper

US—Bollen v National Guard Bureau, D C Pa, 449 F Supp 343

page 1096

Under a federal statute giving federal employee status to national guard technicians, pay scales are governed by the statute rather than by federal personnel regulations^{71.5}

71.5 US—Wright v US Civil Service Commission, D C Ind, 442 F Supp 1274

Hazardous duty pay

US—Guarnello v US, 475 F 2d 640, 201 Ct Cl 129

Statement of National Guard Chief

US—Morris v McCaddin, C A Va, 553 F 2d 866

Retirement

US—Storey v Office of Personnel Management, D C Ga, 519 F Supp 54, affd, C A, 654 F 2d 361

A civilian technician may be dismissed when he ceases to hold the requisite "military grade" because he is reassigned to a military unit from which the civilian duties cannot be performed^{71.10}

71.10 US—Martelon v Temple, C A Colo, 747 F 2d 1348, cert den 105 S Ct 2675, 86 L Ed 2d 694

75. NY—Strassman v State, 176 NYS 2d 702, 6 AD 2d 962

Rules governing injuries in places of public assembly held applicable

NY—Butler v State, 264 NYS 2d 579, 24 AD 2d 925, app after remand 277 NYS 2d 853, 27 AD 2d 897

Refusal to rent armory held reasonable

D C—Jones v District of Columbia Armory Bd, C A, 438 F 2d 138, 141 US App DC 297

82. Discharge from civilian employment

US—Chaudon v Atkinson, C A Del, 494 F 2d 1323

§ 19. Discipline and Training

86. US—Nesmith v Fulton, C A Ga, 615 F 2d 196

Order to active duty held not abuse of discretion by commander of army national guard unit

US—Shadle v US, D C Pa, 315 F Supp 102

88. US—Miller v Rockefeller, D C N Y, 327 F Supp 542

page 1097

93. Court review of unit commander's determination

US—Johncœur v Laird, D C Minn, 344 F Supp 1125, affd, C A, 462 F 2d 1234

Other matters respecting regulations have been adjudicated^{96.5}

96.5. Hair length

US—Gianatasio v Whyte, C A Conn, 426 F 2d 908, cert den 91 S Ct 234, 400 US 941, 27 L Ed 2d 244—Hennig v US, D C Ill, 385 F Supp 1138

Hair, dress, and appearance

US—Bruton v Schnupke, D C Mich, 370 F Supp 1157
—Syrek v Pennsylvania Air Nat Guard, D C Pa, 371 F Supp 1349—Hennig v U S, D C Ill, 383 F Supp 1138

Uniforms

US—Bruton v Schnupke, D C Mich, 404 F Supp 1032

§ 20. — Military Offenses**9. Judicial review**

US—NeSmith v Fulton, C A Ga, 615 F 2d 196

§ 21. Service

page 1098

18. US—Rivera-Rodriguez v Commanding Officer, First US Army, C A Puerto Rico, 596 F 2d 508
Ind—State ex rel Brannan v Morgan Superior Court, 231 NE 2d 516, 249 Ind 220
Miss—Brady v State, 91 So 2d 751, 229 Miss 677
20. NJ—Adams v Atlantic County, 53 A 2d 168, 25 NJ Misc 291, rev'd on oth grds 62 A 2d 162, 137 NJ Law 648
21. NJ—Adams v Atlantic County, supra, n 20

Unsatisfactory participation in his training duties may subject a member of the national guard to involuntary active duty²¹⁵

21.5. US—Sullivan v Mann, D C Pa, 431 F Supp 695, aff'd C A, 571 F 2d 572

Not entitled to active duty training period credit
US—Fox v Brown, C A NY, 402 F 2d 837, cert den 89 S Ct 1219, 394 US 938, 22 L Ed 2d 471

Advance notification of orders to report

US—Fox v Brown, C A NY, 402 F 2d 837, cert den 89 S Ct 1219, 394 US 938, 22 L Ed 2d 471

Violation of neat appearance rule

US—Granatano v Whyte, C A Conn, 426 F 2d 908, cert den 91 S Ct 234, 400 US 941, 27 L Ed 2d 244

Baugh v Bennett, 350 F Supp 1248

Absence from training sessions

US—Papadopoulos v Commanding Officer, 1st US Army, C A RI, 509 F 2d 692—Hall v Fry, C A Kan, 509 F 2d 1105

22. US—Crotty v Kelly, C A NH, 443 F 2d 214

25. US—Schesser v Rhodes, Ohio, 94 S Ct 1683, 416 US 232, 40 L Ed 2d 90, app after remand C A, 570 F 2d 563, application for stay den 98 S Ct 29, 434 US 1335, 54 L Ed 2d 47, cert den 98 S Ct 1488, three cases, 435 US 924, 55 L Ed 2d 517

Miss—McBride v State, 73 So 2d 154, 221 Miss 508

Right not unlimited

US—Aaron v Cooper, D C Ark, 156 F Supp 220

Right not delegable

Cal—Seaman v City of Los Angeles, 75 Cal Rptr 240, 269 CA 2d 803

page 1099

31. Cal—Seaman v City of Los Angeles, 75 Cal Rptr 240, 269 CA 2d 803

page 1100

§ 22. — Liability of State or Political Divisions for Injuries

58. NY—Newadony v State, 93 NYS 2d 24, 276 App Div 59—Duncan v State, 111 NYS 2d 590, 279 App Div 970—Long v State, 145 NYS 2d 433, 208 Misc 703

Or—Johnson v State, By and Through Nat Guard, 564 P 2d 714, 29 Or App 477

Wash—Wark v Washington Nat Guard, 557 P 2d 844, 87 Wash 2d 864

60. NY—Fanna v State, 94 NYS 2d 614, 197 Misc 319—Barash v State, 96 NYS 2d 342, 197 Misc 909

61. NY—Goldstein v State, 24 NE 2d 97, 281 NY 396, 129 A L R 905

§ 23. Expense of Maintenance

63. Fla—State v Florida State Imp Commission, 47 So 2d 627

Authority to accept donations for military purposes

Ga—State v Hiers, 80 S E 2d 308, 210 Ga. 348

page 1101

80. Ill—Loomis v Kechn, 80 NE 2d 368, 400 Ill 337

page 1102

91. Writing not necessary

NY—Zayciek v State, 382 NYS 2d 867, 86 Misc 2d 701

page 1103

18. US—Division of Military and Naval Affairs, State of NY v Federal Labor Relations Authority, C A, 683 F 2d 45, cert den 104 S Ct 523, 464 US 1007, 78 L Ed 2d 708

§ 25. — Courts-martial

page 1104

30. Habeas corpus, certiorari and injunction held unavailable to prevent court-martial
Wyo—State ex rel Pearson v Hansen, 409 P 2d 769

Removal of adjutant general

Mich—McDonald v Schnupke, 155 NW 2d 169, 380 Mich 14

38. Excuse for failure to convene not shown

Wyo—State ex rel Pearson v Hansen, 401 P 2d 954

39. That Governor is accuser held immaterial

Wyo—State ex rel Pearson v Hansen, 401 P 2d 954

page 1105

45. Qualifications

Wyo—State ex rel Pearson v Hansen, 401 P 2d 954

47. Accused may waive right

Wyo—State ex rel Pearson v Hansen, 401 P 2d 954

52. NY—State ex rel Sage v Montoya, 338 P 2d 1051, 65 N M 416

58. Held not applicable to Air National Guard not in federal service

US—Rasmussen v Seaman, C A Colo, 432 F 2d 346

page 1106

73. Right to object to trial before summary court-martial

Cal—Application of Palacio, 48 Cal Rptr 50, 238 CA 2d 545

page 1107

81. Charge held proper or sufficient

Wyo—State ex rel Pearson v Hansen, 409 P 2d 769

page 1108

2. NY—People ex rel Pantano v Sheriff of City of New York, 238 NYS 2d 886, 38 Misc 2d 879

3. NY—People ex rel Pantano v Sheriff of City of New York, 238 NYS 2d 886, 38 Misc 2d 879

§ 27. Civil Status and Liability of Members of Militia**Library References**

Militia ⇐19

page 1109

25. Or—Johnson v State, By and Through Nat Guard, 564 P 2d 714, 29 Or App 477

Immunity under compact between two states
US—Boyer v Chaloux, D C NY, 288 F Supp 366
NY—Dorr v Gibson, 145 NYS 2d 48, 208 Misc 262

Sovereign immunity

US—Krause v Rhodes, C A Ohio, 471 F 2d 430, rev'd 94 S Ct 1683, 416 US 232, 40 L Ed 2d 90, app after remand C A, 570 F 2d 563, application for stay den 98 S Ct 29, 434 US 1335, 54 L Ed 2d 47, cert den 98 S Ct 1488, three cases, 435 US 924, 55 L Ed 2d 517

Statute held inapplicable to governor

US—Krause v Rhodes, C A Ohio, 471 F 2d 430, rev'd 94 S Ct 1683, 416 US 232, 40 L Ed 2d 90, app after remand C A, 570 F 2d 563, application for stay den 98 S Ct 29, 434 US 1335, 54 L Ed 2d 47, cert den 98 S Ct 1488, three cases, 435 US 924, 55 L Ed 2d 517

26. Mo—Cotton v Iowa Mut Liability Ins Co, App, 260 S W 2d 43, transf 251 S W 2d 246, 363 Mo 400

Or—Johnson v State, By and Through Nat Guard, 564 P 2d 714, 29 Or App 477

28. No immunity unless act performed under lawful military order

Wis—Mazurek v Skaar, 210 NW 2d 691, 60 Wis 2d 420

page 1110

45. US—Boyer v Chaloux, D C NY, 288 F Supp 366

46. Standard applied

US—Chandon v Atkinson, D C Del, 406 F Supp 32

The doctrine of "official immunity" will not bar an action for negligence against national guardsmen acting in their official capacities where a civilian's complaint is for inaction or inattention rather than the negligent exercise of discretion³³⁵

53.5. NH—Tilton v Dougherty, 493 A 2d 442, 126 NH 294

55. Wilful wanton conduct of subordinates

US—Krause v Rhodes, C A Ohio, 471 F 2d 430, rev'd 94 S Ct 1683, 416 US 232, 40 L Ed 2d 90, app after remand C A, 570 F 2d 563, application for stay den 98 S Ct 29, 434 US 1335, 54 L Ed 2d 47, cert den 98 S Ct 1488, three cases, 435 US 924, 55 L Ed 2d 517

page 1111

72. Personal service alone exempted

S C—Hunter v Hunter, 1 Bailey 646

77. NY—Shea v Rotenour, 135 NYS 2d 694

page 1112

81. Ga—Sanders v City of Columbus, 231 SE 2d 473, 140 Ga App 441

Criminal charges; providing counsel

Ohio—Hoobler v Ohio Army Nat Guard, C C, 330 NE 2d 731, 73 O O 2d 152

84. NM—State ex rel Sage v Montoya, 338 P 2d 1051, 65 N M 416

§ 28. Aid to Militiamen and Their Dependents**Library References**

Militia ⇐11

88. Recovery under workmen's compensation laws

NY—Sadowski v State, 274 NYS 2d 368, 51 Misc 2d 832

90. NY—Cunningham v State, 186 NYS 2d 146, 18 Misc 2d 367, app conditionally dismissed 191 NY S 2d 923, 9 AD 2d 703, mod on oth grds 194 NYS 2d 452, 9 AD 2d 855, revd on oth grds 197 NYS 2d 542, 10 AD 2d 751, affd 181 NE 2d 852, 227 NYS 2d 253, 11 NY 2d 808

Amount of compensation determined in accordance with Workmen's Compensation Act

US—Com, Pennsylvania Nat Guard v Workmen's Compensation Appeal Bd, 437 A 2d 494, 63 Pa Cwlvth 1

92. Payment held mandatory

Minn—Stoecker v Moeglein, 129 NW 2d 793, 269 Minn 19

Right to death benefits

Kan—Smyth v Adjutant General, 522 P 2d 372, 214 Kan 715

Minn—Stoecker v Moeglein, 129 NW 2d 793, 269 Minn 19

Administrative proceeding

Minn—Stoecker v Moeglein, 129 NW 2d 793, 269 Minn 19

Statute authorizing penalty against employer delaying payment held inapplicable

Minn—Stoecker v Moeglein, 129 NW 2d 793, 269 Minn 19

Reduction of benefits to extent of federal benefits

Minn—Halverson v Rolvaag, 143 NW 2d 239, 274 Minn 273—Halverson v Rolvaag, 165 NW 2d 534, 282 Minn 464

Extent of liability limited by Workmen's Compensation Law

Minn—Halverson v Rolvaag, 165 NW 2d 534, 282 Minn 464

97. NJ—Adams v Atlantic County, 53 A 2d 168, 25 NJ Misc 291, revd on oth grds 62 A 2d 162, 137 NJ Law 648

98. NJ—Adams v Atlantic County, supra, n 97

Since the publication of *Corpus Juris Secundum* the case cited in support of the text has been reversed in a decision holding that the facts did not entitle the plaintiff to the benefits of the statute—Adams v Atlantic County, 62 A 2d 162, 137 NJ Law 648

MILLER INDICES. A set of numbers used to define a particular set of atomic planes in a crystalline material § 30

8,50. US—Sarkis Tarzan, Inc v Audio Devices, Inc, D C Cal, 166 F Supp 250, 280, affd, CA, 283 F 2d 695, cert den 81 S Ct 903, 365 US 869, 5 L Ed 2d 859

